



MINISTRY RELATIONSHIPS AND RISKS FOR THE LEGALLY UNWARY RELIGIOUS INSTITUTE AND SOCIETY OF APOSTOLIC LIFE: *EXAMINING PHYSICAL AND PSYCHOLOGICAL EXPLOITATION SCENARIOS THAT CAN GIVE RISE TO INDIVIDUAL AND INSTITUTIONAL LIABILITY*

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Leaders of institutes¹ manage a growing number of duties and responsibilities. These responsibilities range from assigning members to various ministries, to ensuring that the institute's facilities comply with building codes. Today, in addition to these responsibilities, superiors of institutes must also concern themselves with the legal implications of their members' actions. With this relatively new responsibility comes a different set of challenges for religious leaders — knowing what conduct could have legal implications, and understanding the different legal theories used to impose liability on both the individual religious members and their institutes. Armed with this knowledge and understanding, institutes can take steps to prevent and protect against individual and institutional liability for member misconduct. For instance, a religious institute may incur legal liability for its members' intentional acts, such as the much-reputed sexual abuse of minors, and

other types of wrongful conduct committed by members.

This Article focuses primarily on instances of physical and psychological exploitation engaged in by religious members and the legal consequences arising therefrom. Specifically, the Article describes several different exploitation scenarios that might occur within an institute, the civil and criminal liability potentially arising from each set of facts for both individual members and the institute, and, briefly, how leaders of institutes can better protect against liability for misconduct committed by a member.

The first three fact scenarios analyzed in this Article involve situations in which a priest engages in a sexual relationship with a parishioner he is counseling. The fourth hypothetical modifies the first three by using a marriage-counseling situation as opposed to individual counseling following a marital break up. The fifth scenario involves a different situation wherein a brother engages in a sexual relationship with an employee of the church. The sixth vignette describes a situation in which two religious sisters, one holding a more superior position, engage in a sexual relationship. Finally, the last set of facts involves the physical disciplining of a student by a

* Grateful recognition is given to Lindsay Schrieber, a third year law student at Chicago-Kent College of Law, for her assistance in the preparation of this Article.

¹ Throughout this Article, "institute" will be used to refer both to religious institutes and societies of apostolic life.

sister. Following each scenario, the Article provides practical advice for institutes, including an explanation of how to prevent these types of situations from occurring and how a religious institute can attempt to limit its liability in the unfortunate event that a similar situation does occur.

SCENARIO 1:

Father Joe, a member of the Institute of Missionary Fathers, has an undergraduate degree in history and a master's degree in theology. He is a priest at St. Matthew Parish. One Sunday after mass, Judy, a parishioner of the church, approaches Father Joe and asks him if they can meet and talk about some troubling issues in her life. Father Joe agrees to meet with her in the parish office the following day.

At the first meeting, Father Joe sits behind his desk and Judy tells him all about her problems. Father Joe listens, and their discussion focuses primarily on Church teachings and scripture. Father Joe suggests they continue to meet for the next few months so that he can help her overcome this "rough time in her life."

For the next session, Father Joe and Judy again meet on Monday afternoon in the Parish office. Father Joe sits next to Judy on the couch to discuss her problems. They talk about Judy's recent divorce and her trouble coping with her failed marriage. They also discuss the Church's perspective on Catholics who divorce.

At the third meeting, Judy unexpectedly stops by the church on Thursday morning. She is very distressed and Father Joe tries to comfort her by holding her hand and hugging her. Judy explains that she had an upsetting encounter with her ex-husband, George, and that she needs to talk to someone. Father Joe agrees to listen.

At the next Monday meeting, Father Joe suggests they get some fresh air while they talk, and they go for a walk in the nearby park. This meeting goes well, and Judy begins to feel better about her divorce and about her place within the Church. Father Joe suggests that maybe Judy needs to have a little fun, and the two agree they

should meet on Saturday night over dinner at a new restaurant in town.

At dinner, Father Joe and Judy talk less about her divorce and more about each other's hobbies and interests. To a third person, the dinner resembles a romantic date, not a counseling session.

The relationship between Father Joe and Judy eventually becomes sexual. Father Joe and Judy believe that they are in love, and Father Joe promises Judy he will leave the priesthood so that they can be together and eventually marry. A few months pass and Father Joe develops doubts about leaving his vocation. He begins to pull away from Judy and ultimately chooses to end the relationship with her. Judy is hurt and upset by this decision and believes that Father Joe manipulated her. She originally approached Father Joe because she was experiencing a difficult time in her life, and she believes that he took advantage of her obvious vulnerability. Judy decides the only recourse she has is to file a lawsuit against Father Joe and the institute of which he is a member.

Individual Liability:

Under this set of facts, Father Joe may be liable for a number of civil and criminal offenses. First, he may be liable for "civil battery." Battery is defined in many ways but, generally, it is characterized as "the intentional physical contact with another person without that person's consent."² Here, Judy could argue that her mentally and emotionally impaired state prevented her from being able to fully consent to Father Joe's touching her. Father Joe, on the other hand, might argue that, despite her outward vulnerability, Judy fully and freely consented to the relationship. If this argument succeeds, her consent will serve as a defense to a claim of battery.

Father Joe may also be liable for "fraud," which involves an intentional act of deception. A defendant commits fraud if he or she knowingly makes a false statement with the intent that the

² *Coopersmith v. Gold*, 172 A.D.2d 982, 984 (N.Y. App. Div. 1991).

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recipient of that statement act in reliance upon it, and if the recipient does rely on the false statement to his or her detriment.³ Under the instant set of facts, Judy might allege that Father Joe committed fraud by leading her to believe that he was counseling her, when in fact he was using his religious counseling services as a guise to initiate a sexual relationship. Judy might also allege that Father Joe's representations to her that he intended to leave the priesthood and marry her constituted fraud if he did not truly intend to do so at the time he made the promise.

Father Joe may have also committed "intentional infliction of emotional distress." To successfully establish a cause of action for intentional infliction of emotional distress, a plaintiff must demonstrate the following: (1) the defendant's conduct was extreme and outrageous; (2) the defendant either intended to inflict severe emotional distress or knew that there was a high probability that such conduct would do so; and (3) the defendant's conduct actually caused the plaintiff to suffer severe emotional distress.⁴ Court decisions differ as to whether a given situation, such as this hypothetical scenario, rises to the level of "extreme and outrageous" conduct necessary to prevail on a claim of intentional infliction of emotional distress.⁵ A court might find that Father Joe is liable for intentional inflic-

tion of emotional distress if his conduct is "shocking" in the eyes of the average community member, and if he should have known that his conduct would cause Judy to suffer severe distress.

Judy might also claim that Father Joe committed professional malpractice. "Malpractice consists of any professional misconduct, unreasonable lack of skill or fidelity in professional or fiduciary duties, evil practice, or illegal or immoral conduct."⁶ Two different types of malpractice claims have been alleged in similar cases involving misconduct committed by a religious counselor: (1) "clergy malpractice," and (2) "pastoral counseling malpractice."

Thus far, however, courts have been unwilling to recognize misconduct committed by a vowed religious member in the context of a counseling relationship as the legal equivalent of professional malpractice. For example, the California Supreme Court, in *Nally v. Grace Community Church of the Valley*, observed that it would be "impractical, and quite possibly unconstitutional," to impose a legal duty of care on clergy and vowed religious providing pastoral counseling services.⁷ This is because the First Amendment of the United States Constitution precludes the government, *i.e.*, civil judges and juries, from determining the standard of care to which a reasonably prudent and trained religious member should conform his or her conduct. Accordingly, courts have consistently rejected clergy malpractice claims on the basis of "ecclesiastical immunity."⁸ In light of the current

3 *Suburban 1, Inc. v. GHS Mortgage, LLC*, 833 N.E.2d 18, 21 (Ill. App. Ct. 2005).

4 *Welsh v. Commonwealth Edison Co.*, 713 N.E.2d 679, 683 (Ill. App. Ct. 1999).

5 See *F.G. v. MacDonell*, 696 A.2d 697, 705 (N.J. 1997); *Teadt v. Lutheran Church Mo. Synod*, 603 N.W.2d 816, 823-24 (Mich. Ct. App. 2000).

6 *Destefano v. Grabrian*, 763 P.2d 275, 285 (Colo. 1988).

7 47 Cal.3d 278, 299 (Cal. 1988).

8 See *Dausch v. Rykse*, 52 F.3d 1425 (7th Cir. 1994) (Ripple, J., concurring) (asserting that state courts have uniformly rejected claims for clergy malpractice because civil courts and juries should not adjudicate ecclesiastical disputes involving questions of doctrine or practice).

state of the law,⁹ Judy will not likely succeed on a professional malpractice claim against Father Joe.

It should be noted, however, that, if the counseling provided to Judy was of a “secular nature,” and not limited in scope to religious and faith-based guidance, the First Amendment may not shield Father Joe, or his religious institute, from liability for malpractice or negligent counseling. For example, in *Sanders v. Casa View Baptist Church*,¹⁰ the United States Court of Appeals for the Fifth Circuit held that the First Amendment’s prohibition against judicial determination of ecclesiastical disputes did not prevent parishioners’ claims against their minister based on counseling malpractice because, although the minister occasionally quoted scripture during the counseling sessions, he held himself out as a professional marriage counselor and provided counseling of a secular nature. The court explained: “[T]he constitutional guarantee of *religious* freedom cannot be construed to protect *secular* beliefs and behavior, even when they comprise part of an otherwise religious relationship between a minister and a member of his or her congregation.”¹¹ According to the court, “To hold otherwise would impermissibly place a religious leader in a preferred position in our society.”¹²

9 Although the law does not *currently* recognize a professional malpractice cause of action for misconduct committed in the context of a religious counseling relationship, judicial decisions addressing this issue have not foreclosed the possibility that such claims will succeed in the future. Institutes and their leaders should closely evaluate their processes of assignment and supervision of members ministering to the public in this capacity, as courts have become increasingly willing to hold supervisors of institutions liable for injuries inflicted by their members. See Ira C. Lupu & Robert W. Tuttle, *Sexual Misconduct and Ecclesiastical Immunity*, 2004 B.Y.U. L. Rev. 1789, 1797-1800 (observing that the shield ecclesiastical immunity is weakening as courts have become increasingly willing to impose liability on religious institutions for the misconduct of their members).

10 134 F.3d 331 (5th Cir. 1998).

11 *Id.* at 336 (emphasis in original).

12 *Id.*

“[T]he constitutional guarantee of *religious* freedom cannot be construed to protect *secular* beliefs and behavior, even when they comprise part of an otherwise religious relationship between a minister and a member of his or her congregation.”

Additionally, Judy may claim that Father Joe breached a “fiduciary duty.” A fiduciary duty is created when a person chooses to undertake an activity primarily for the benefit of another. Examples of typical fiduciary relationships include attorney-client, doctor-patient, and trustee-beneficiary. A fiduciary duty might exist between a religious counselor and the recipient of the counseling services when the religious member acquires influence and gains trust and confidence during the course of the counseling relationship.¹³ It should be noted, however, that courts are more likely to find the existence of a fiduciary relationship when the religious member holds himself or herself out as a provider of professional services and when the nature of the counseling is primarily secular. For the same reasons discussed above, courts are less likely to recognize a fiduciary duty where the religious member provides primarily religious and faith-based counseling services and does not hold himself or herself out as a profes-

13 *Sanders*, 134 F.3d at 334 (noting that the jury found a fiduciary relationship where the minister acquired influence and gained the trust and confidence of his parishioners during the course of the counseling relationships).

sional therapist. Still, some states, have found the existence of a fiduciary duty even in the latter context. For example, the New Jersey court in *F.G. v. MacDonell* observed: "Ordinarily, consenting adults must bear the consequences of their conduct, including sexual conduct. In the sanctuary of the church, however, troubled parishioners should be able to seek pastoral counseling free from the fear that the counselors will sexually abuse them."¹⁴ Therefore, a finding of liability for breach of a fiduciary duty will depend on the nature of counseling provided and on the applicable state law.

Father Joe may also face criminal liability. The types and elements of sexual offenses vary from state-to-state. Different types of offenses include sexual assault, sexual abuse, sexual battery, sexual misconduct, forcible touching, and sexual imposition. In New York, for example, a person is guilty of sexual misconduct when he or she engages in sexual intercourse with another person without that person's consent; or when he or she engages in oral or anal sexual conduct with another person without consent.¹⁵ The sexual imposition statute in Ohio prohibits a person from having sexual contact with another if that person knows such contact is offensive to the other person, knows the other person's ability to appraise the nature of the contact is substantially impaired, or knows the other person is submitting because he or she is unaware of the sexual contact.¹⁶ Each jurisdiction labels and defines the criminal sexual offenses differently and, therefore, Father Joe may face liability for a number of different offenses depending on the applicable law.

The Institute's Liability:

It is imperative that religious leaders become familiar with the legal theories that expose their communities to liability so they can better prepare to cope with the legal consequences of members'

actions. Most importantly, however, a higher level of institutional awareness in this context will assist an institute in developing methods to prevent situations that expose it to liability.¹⁷

In the instant situation, the institute may well face liability for Father Joe's conduct. First, the religious institute might incur liability pursuant to the doctrine of "*respondeat superior*," which holds that an employer can be held liable for an employee's actions if they are committed in the course and scope of the employee's employment and are in furtherance of the employer's business. Although the relationship between an institute and its members is not typically characterized as an employer-employee relationship, civil law is limited in its constraints and will sometimes treat the relationship as similar to an employment situation when analyzing the liability of institutes for their members' actions. Generally, however, sexual misconduct is not deemed by courts to be in furtherance of the Church's business.¹⁸ Therefore, in this Scenario, most courts would not impose liability on the institute for Father Joe's conduct. A few courts, however, have held that the defendant's "sexual relations with the plaintiff during their pastoral-psychological counseling sessions, were a misguided effort at psychologically and spiritually counseling the plaintiff, rather than an abandonment of the counseling."¹⁹ Although this represents a minority view today, leaders of institutes should become familiar with this theory of liability in light of the tendency of court decisions to seek conformity with the social and political climate of the day.

17 Because Father Joe also serves as a parish priest, in addition to his status as a member of a religious institute, the particular diocese to which that parish belongs may also face liability for Father Joe's misconduct. This Article does not intend to address the potential liability of a diocese or bishop under the hypothetical facts presented.

18 See *Moses v. Diocese of Colo.*, 863 P.2d 310, 330 (Colo. 1993) (explaining that when a priest engages in sexual conduct with a parishioner it is not part of the priest's duties and this type of relationship is not customary within the business of the church or in any way incidental to the tasks assigned to a priest).

19 *Mullen v. Horton*, 700 A.2d 1377, 1381 (Conn. App. Ct. 1997).

14 696 A.2d 697, 705 (N.J. 1997).

15 See N.Y. Penal Law §130.20 (McKinney 2006).

16 See Ohio Rev. Code 2907.06 (West 2006).

Under the hypothetical facts presented, an institute might also be liable for its member's conduct under a "ratification" theory. If an employer confirms, adopts, or fails to disclaim the intentional or negligent acts of its employee, it may be independently liable.²⁰ Thus, in the instant Scenario, if the institute knew about Father Joe's behavior and did nothing to stop it, a court will most likely find that the institute is liable to Judy for its own wrongdoing.

The institute may also be liable under several negligence theories. Judy may claim negligent hiring, assignment, training, retention, and/or supervision of Father Joe.²¹ A cause of action for negligent hiring exists against an employer if the following elements are satisfied: (1) the employer knew or should have known of the employee's unfitness for a particular position giving rise to an increased risk of harm to others, (2) the employee's unfitness for the position was known or should have been known at the time of hiring, and (3) the employee's unfitness for the work being performed caused injury to the plaintiff.²² In order to prevail on a claim of negligent retention, a plaintiff must establish: (1) the existence of an employment relationship, (2) the employee's incompetence, (3) the employer's actual or constructive knowledge of this incompetence, (4) the employee's actions or failure to act resulted in the plaintiff suffering injury, and (5) the employer's negligence in hiring or retaining the employee caused the plaintiff's injuries.²³ A cause of action

for negligent supervision, on the other hand, will exist against an institute if it is alleged and established that (1) the institute had a duty to supervise its members, (2) the institute negligently supervised the offending member, and (3) this negligence caused plaintiff's injuries.²⁴ The liability "linchpin" for these negligence theories is notice — whether the institute knew or should have known that the offending individual was, in some aspect, unfit to serve in his or her assigned position. Therefore, to prevail on these negligence actions under the instant set of facts, Judy must demonstrate that the institute either knew or should have known of Father Joe's unfitness to carry out certain aspects of his "employment," or his proclivity to use his public ministry as a means for engaging in inappropriate relationships, and that the institute unreasonably failed to prevent Father Joe from putting others at risk.

Judy may also claim that Father Joe was "negligently ordained." Most courts, however, will agree that the act of conferring ordination "is a 'quintessential religious' activity, and imposition of liability for conferring that status would excessively entangle the court in religious affairs, in violation of the First Amendment."²⁵ Because the entire concept of ordination is so inextricably linked with religious belief and procedures, ecclesiastic immunity will most likely bar a legal cause of action for negligent ordination.

Last, although not a common theory of liability under these facts, both Father Joe and his institute may also face liability for "civil conspiracy." The existence of a conspiracy would depend on what the institute, through members holding positions of authority within the institute, knew and what role the institute played during Father Joe's relationship with Judy. To establish a claim for civil conspiracy, a plaintiff must demonstrate that two or more persons entered into an agreement to carry out an unlawful act and took some step in furtherance of this plan.²⁶ Here, a

20 See *Prunty v. Ark. Freightways, Inc.*, 16 F.3d 649, 653 (5th Cir. 1994).

21 In some cases, courts have held that the First Amendment prevented the court from determining whether a religious institute acted reasonably in its "supervision and retention" of a religious minister because such an inquiry would necessitate an evaluation of religious precepts and beliefs. See *S.H.C. v. Sheng-Yen Lu*, 54 P.3d 174, 179 (Wash. Ct. App. 2002) (holding that whether a religious temple was negligent in its "supervision and retention of its religious leader would involve the 'excessive entanglement' that First Amendment jurisprudence forbids.").

22 See *Mueller v. Cmty. Consol. Sch. Dist. 54*, 678 N.E.2d 660, 663 (Ill. App. Ct. 1997).

23 See *DiPietro v. Lighthouse Ministries*, 825 N.E.2d 630, 635 (Ohio Ct. App. 2005).

24 See *Mueller*, 678 N.E.2d at 664.

25 *Wende C. v. United Methodist Church*, 6 A.D.3d 1047, 1053 (N.Y. App. Div. 2004).

26 See *Suburban 1, Inc. v. GHS Mortgage, LLC*, 833 N.E.2d 18, 21 (Ill. App. Ct. 2005).



The institute should establish a policy enumerating the standards that a pastoral counselor must follow when counseling a client.

court will not find the existence of a conspiratorial relationship unless Father Joe and a representative of the institute knowingly and voluntarily participated in a scheme to commit the alleged offenses against Judy.

Prevention:

The institute in this Scenario may have incurred a great deal of liability for actions committed by its member in his role as a counselor. A religious institute should attempt to limit its liability in similar situations by creating and adopting standards of conduct. The institute should establish a policy enumerating the standards that a pastoral counselor must follow when counseling a client. For example, pastoral counselors must never engage in sexual intimacies with clients.²⁷ This includes consensual and nonconsensual contact, forced physical contact, and inappropriate sexual comments.²⁸ Physical contact of any kind, including any type of touching, hugging, or holding, between pastoral counselors or spiritual directors and the persons they counsel is easily misconstrued and, therefore, should be avoided. It is also important that counseling sessions take place at appropriate times and places. Sessions should occur during regular business hours and should never be conducted in

private living quarters or in the client's home.²⁹ Counselors should also keep a detailed record of the time and place of each counseling session.³⁰ Additional suggestions can be found in the Model Code of Pastoral Conduct.³¹

As previously touched upon, an institute's liability for a member's actions will oftentimes hinge on whether the institute, or individuals serving the institute in supervisory capacities, acquired knowledge of any past or present misconduct on the part of the offending individual, or whether the institute *should* have acquired such knowledge. In light of this fact, individuals within an institute who serve in supervisory capacities must exercise a high level of institutional awareness and remain on the lookout for members' deviations from the institution's standard of conduct. Deviations from a standard of conduct, or any type of suspected misconduct on the part of a religious member, should be investigated, documented, and handled appropriately in order to avoid future liability. Depending upon the nature and severity of the misconduct, appropriate handling may even entail permanently removing the member from public ministry and/or any supervisory roles within the institute.

To further protect itself from liability, an institute should attempt to prevent the occurrence of scenarios like the one discussed above by implementing "screening procedures" that help determine whether a particular candidate for membership is fit for religious life and/or any type of public ministry. Ideally, these screening procedures would entail the following: (1) a written application; (2) multiple face-to-face interviews; and (3) a thorough personal and professional background check, including a criminal records check. Thorough pre-membership screening procedures such as these can raise "red flags," or warning signs, that an individual may be at high risk for engaging in the type of conduct that might expose the institute to liability.

27 See, e.g., Virtus, "Model Code of Pastoral Conduct, Pastoral Standards 1.4," 2004, <http://www.virtus.org/virtus/PastoralConduct.pdf> (19 September 2006).

28 *Id.*

29 *Id.* at 1.8.

30 *Id.* at 1.9.

31 *Id.*

Institutes should also take steps to ensure that their members, especially those ministering to the public and offering counseling services, demonstrate a thorough understanding of appropriate behavioral and psychological "boundaries" that should not be crossed when interacting with others. Institutes should make training programs and educational materials available to all members so they understand how to avoid sexual and/or psychological mistreatment of the individuals to whom they minister.

SCENARIO 2:

The facts in Scenario 2 are identical to those used in Scenario 1, except that Father Joe holds a Ph.D. in clinical psychology and is a licensed psychotherapist.

Individual Liability:

In this example, Father Joe's individual liability is potentially greater than in the first scenario due to his educational background and, most importantly, his status as a *licensed* psychotherapist. Because he holds a professional license, a court may well determine that Father Joe, instead of offering counseling services of a primarily pastoral and religious nature, is also offering professional, clinical-type counseling services. Thus, he faces not only the liability discussed in Scenario 1, but also becomes subject to additional liability for his conduct as a licensed professional, because the law typically holds licensed professionals to a higher standard of care. For example, in Florida, "[a]ny psychotherapist who commits sexual misconduct with a client . . . commits a felony of the third degree."³² Additionally, "[a]ny psychotherapist who violates subsection (1) by means of therapeutic deception commits a felony of the second degree."³³ In jurisdictions with similar legislation, regardless of the type of counseling provided to Judy, Father Joe's

status as a licensed therapist subjects him to criminal penalties for sexual misconduct committed in the course of his counseling of Judy.³⁴ Conversely, states such as Illinois specifically exclude counseling of a spiritual or religious nature in their psychotherapy statutes.³⁵

In this Scenario, Father Joe might also be liable for common law breach of a fiduciary duty. As discussed above, a fiduciary duty can arise in a therapist-client relationship if the nature of the relationship allows the counselor to acquire a higher degree of dependency and trust. Therefore, if Father Joe's status as a licensed professional caused increased trust and confidence in Judy, it might broaden the scope of his individual liability to include the liability discussed in Scenario 1 along with professional and fiduciary liability. Again, however, despite his status as a licensed therapist, the protections of the First Amendment will likely prevent a finding of liability for breach of fiduciary duty if a court finds that Father Joe limited his counseling services to those of a primarily religious and spiritual nature.

The Institute's Liability:

The religious institute may also have increased liability in this Scenario by reason of Father Joe's status as a licensed psychotherapist. For example, in Illinois, "[a]n employer of a psychotherapist, unlicensed health professional, or unlicensed mental health professional may be liable . . . if the employer fails or refuses to take reasonable action when the employer knows or has reason to know that the psychotherapist, unlicensed health professional, or unlicensed mental health professional engaged in sexual contact with the plaintiff or any other patient or former patient."³⁶ Thus, if any person in the

34 The following 23 states have criminalized the sexual relationship between a therapist and a client: Alaska, Arizona, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Iowa, Kansas, Maine, Michigan, Minnesota, Mississippi, New Hampshire, New Mexico, North Dakota, South Dakota, Texas, Utah, Washington, and Wisconsin.

35 See 740 Ill. Comp. Stat. 140/1(e) (West 2006).

36 740 Ill. Comp. Stat. 140/3 (West 2006).

32 Fla. Stat. Ann. § 491.0112 (1) (West 2006).

33 Fla. Stat. Ann. § 491.0112 (2) (West 2006).

institute knew or should have known about Father Joe's conduct with Judy or any other parishioner that he counseled, the institute may be held accountable.

Prevention:

To avoid the increased liability that accompanies counseling services provided by members holding professional licenses, an institute can adopt a policy specifically limiting its offered services to pastoral and spiritual counseling. Additionally, the religious institute should "develop a referral network of other professionals who provide help beyond the scope of spiritual counseling."³⁷ These steps can minimize both the individual liability of the religious institute's members, and that of the institute itself. As noted above, however, when the counselor holds a professional license, some jurisdictions' regulatory legislation will view the type of the services provided as irrelevant. For example, in jurisdictions such as Florida, where legislation specifically prohibits all licensed therapists from engaging in sexual relations with a client, Father Joe would be liable solely by reason of his status as a licensed therapist and regardless of the nature and scope of the services he provided to Judy. In other words, while the nature of the counseling services is often a critical factor in determining liability, it will never be dispositive if the religious counselor holds a professional license subject to state regulation.

SCENARIO 3:

The facts of this Scenario are the same as those described in Scenario 1, including Father Joe's educational credentials, except that Father Joe represents himself to be a licensed psychotherapist when in fact he is not.

37 Brotherhood Mutual Insurance Company, "Reducing the Risk of Counseling Ministry Misconduct," 2006, <http://www.brotherhoodmutual.com/NAV-pages/navart20.shtml> (15 September 2006).

Individual Liability:

Because Father Joe led Judy to believe he was a licensed professional, he may be subject to greater liability than in Scenario 1. For instance, in Idaho, any person who holds himself or herself out as a psychotherapist and engages in sexual conduct with a patient is guilty of sexual exploitation by a medical care provider, even if he or she is not licensed.³⁸ Thus, under the given facts, Father Joe may be held liable as a professional because he represented himself as a professional.

Additionally, courts have been more willing to find the existence of a fiduciary relationship in this Scenario as opposed to the facts contained in Scenario 1. In the instant situation, if Judy's belief that Father Joe was a licensed professional changed the nature of the relationship by increasing his influence over Judy and her dependency on his advice, some courts might be more willing to find the existence of a fiduciary relationship and will hold Father Joe to a higher standard of legal accountability if he counseled Judy on matters other than those relating to religion and spirituality.

The Institute's Liability:

The religious institute's liability remains the same as in Scenario 1.

SCENARIO 4:

Scenario 4 is similar to Scenario 1. In this instance, Father Joe has an undergraduate degree in history and a master's degree in theology. He is a priest at St. Matthew Parish. One Sunday after mass, Judy and her husband, George, both St. Matthew parishioners, approach Father Joe and ask him if they can meet with him for marriage counseling. Father Joe agrees to meet with them.

At the first meeting, Father Joe sits behind his desk and Judy and George shout at each other for

38 See Idaho Code §18-919 (Michie 2006).

the entire session. Father Joe attempts to listen to their problems, but he determines that it would be best to counsel the couple separately at first to see if he can get at the root of the couple's problems. The counseling sessions for Judy then proceed as they do in Scenario 1.

Individual Liability:

In this Scenario, Father Joe may be liable under the same legal theories discussed in Scenario 1. In addition, Father Joe may be liable to George and Judy for the consequences of his actions with Judy. A group of offenses, called "amatory acts," is recognized to protect the marital relationship from outsiders who attempt to interfere with one married person's affections for the other. The causes of action encompassed in these acts include (1) "alienation of affection," and (2) "criminal conversation." Many states have done away with these causes of action by enacting "heart balm"³⁹ statutes; however, some states still recognize these claims.⁴⁰

To prevail on a cause of action for alienation of affection, George must prove that (1) he and Judy had a genuine marriage involving mutual love and affection, (2) Father Joe's conduct, through his control over or enticement of Judy, interfered with her affection for George, and (3) the loss of Judy's affection caused damage to George.⁴¹ To sustain an action for criminal conversation, on the other hand, George need only establish adultery, which requires (1) the existence of a marriage, and (2) sexual intercourse between the defendant and the spouse (Judy) during the marriage.⁴²

39 These legislative acts are referred to as "heart balm" statutes because they put an end to lawsuits brought by individuals seeking economic damages to soothe their broken hearts.

40 States that still recognize causes of action for alienation of affection and criminal conversation include: Hawaii, Illinois, Mississippi, New Hampshire, New Mexico, North Carolina, South Dakota, and Utah.

41 See *Orbeta v. Gomez*, 733 N.E.2d 1287 (Ill. App. Ct. 2004).

42 See *Russo v. Sutton*, 422 S.E.2d 750, 752 (S.C. 1992).

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George may also attempt to recover monetary damages for "loss of consortium." A loss of consortium claim incorporates two fundamental aspects of the marital relationship: (1) loss of support, and (2) loss of society, which includes companionship and sexual intercourse.⁴³ The law generally holds that, if one spouse is injured by the negligence of another, "the other spouse may recover from the tortfeasor for the loss which the deprived spouse suffered by virtue of the impaired spouse's injury."⁴⁴ Any claim for loss of consortium brought by George, however, will not succeed unless Judy, herself, has a viable claim for damages against Father Joe.

Therefore, in this Scenario, both George and Judy may have actionable claims against Father Joe.

The Institute's Liability:

The institute's liability remains the same as in Scenario 1.

43 See *Johnson v. May*, 585 N.E.2d 224, 232 (Ill. App. Ct. 1992).

44 *Id.*

SCENARIO 5:

Brother Thomas has an undergraduate degree in history and a master's degree in theology. He is associated with the Brothers of the Sacred Cross and serves as the vice-principal at St. Kevin's School for Boys. Patricia is a new administrative assistant in the school office and Brother Thomas is her supervisor. Patricia recently divorced from her husband, and she has decided to start over in a new city. On Patricia's first day, all of the staff eat lunch together in the faculty lounge, and Brother Thomas and Patricia talk about her divorce and her new position at the school.

The next day, most of the staff attend an employee retreat, and Brother Thomas and Patricia are the only people left in the office. They again have lunch together in the faculty kitchen and learn that they have similar interests and hobbies.

That weekend, Brother Thomas offers to take Patricia around the city and show her places that she might find interesting in her new home town. They have a great time and agree to go hiking the next day. Brother Thomas and Patricia have a wonderful time on the hike, and they genuinely seem to enjoy one another's company.

A few weeks into their relationship, Brother Thomas starts to make sexual advances towards Patricia. Patricia soon becomes uncomfortable with the relationship and asks Brother Thomas to stop. Brother Thomas does not take Patricia seriously and believes that she is just frightened that someone will find out about the relationship. Patricia, however, wants the sexual advances to end, but she fears she will lose her job if she continues to reject Brother Thomas. Ultimately, Patricia decides to quit her job at the School because she cannot work in an environment with Brother Thomas. Patricia seeks legal advice and decides to file a lawsuit against Brother Thomas and the Brothers of the Sacred Cross, which controls and operates the School.

Individual Liability:

In this Scenario, Brother Thomas may be

guilty of "sexual harassment," which is a type of employment discrimination consisting of verbal or physical abuse of a sexual nature.⁴⁵ While federal laws prohibiting sexual harassment in the work place do not provide for individual liability, many state sexual harassment laws do provide for individual liability. For example, Ohio has recognized that "a person may be held directly liable, in his individual capacity, for a failure to take appropriate action with respect to sexually harassing conduct."⁴⁶

A cause of action for sexual harassment is more likely to prevail when the harassing conduct occurs in the context of a relationship where one person holds more authoritative power than the other, such as a supervisor over an employee, or more informal power, such as one peer over another. Additionally, courts have "distinguished between cases where sexually harassing conduct was 'directly linked to the grant or denial of an economic *quid pro quo*' and those cases where the conduct created a 'hostile environment.'"⁴⁷ *Quid pro quo* sexual harassment exists when an employment decision is based on the employee's satisfaction or refusal of a sexual demand. For example, this type of harassment might occur if a supervisor fired or demoted an employee who refused to go on a date with the boss. On the other hand, when a plaintiff brings a sexual harassment claim based on hostile environment, they must demonstrate that "the harassment was sufficiently severe or pervasive enough to alter the condition of the victim's employment and to create an abusive working environment."⁴⁸ Under the facts of the instant hypothetical, a court likely would find that Brother Thomas committed

45 Black's Law Dictionary (8th ed. 2004).

46 *Wille v. Hunkar Laboratories, Inc.*, 724 N.E.2d 492, 499 (Ohio App. Ct. 1998)

47 *Lutkewitte v. Gonzales*, 436 F.3d 248, 258 (D.C. Cir. 2006) (quoting *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986)).

48 *Fairbrother v. Morrison*, 412 F.3d 39, 48 (2d. Cir. 2005); See also *Elvig v. Calvin Presbyterian Church*, 375 F.3d 951 (9th Cir. 2004) (holding that the plaintiff stated a claim for hostile work environment sexual harassment against her supervising pastor and the church).

sexual harassment by creating a hostile work environment for Patricia.

The Institute's Liability:

The institute may also be liable for sexual harassment under the theory of "vicarious liability."⁴⁹ Vicarious liability is the liability of an organization for the acts of its employees, agents, or volunteers. The religious institute may be liable for sexual harassment under both federal and state law.⁵⁰ If Patricia successfully alleges sexual harassment, the institute may have a defense if it can prove that (1) it reasonably attempted to prevent and promptly correct any sexual harassing behavior, and (2) Patricia failed to use any preventive or corrective opportunities provided by the institute or to otherwise avoid the harm.⁵¹

Prevention:

In order to prevent sexual harassment in the workplace, the institute should take certain preventative measures. For instance, the institute should adopt and publish a sexual harassment policy. The policy should enumerate the preventive measures that the employer will take in order to avoid harassment; it should also describe the proper procedure for investigating harassment complaints. Additionally, the institute should require sexual misconduct training for all existing and new employees. All employees should be familiar with the sexual harassment policy, in addition to the proper methods for reporting sexual harassment. These preventative steps will

help create for the institute a defense against vicarious liability for sexual harassment.

SCENARIO 6:

Sister Mary is a member of the Sisters of St. Monica. She is the novice director and serves as a teacher and role model for the novices. Sister Mary oversees the novices' educational opportunities and task assignments. Sister Katherine has always wanted to become a nun and has just begun her formation with the Sisters of St. Monica. She chose the Sisters of St. Monica because they agreed to fully fund her college education and ensured her job placement in Virginia.

When Sister Katherine begins her formation she wants to do everything possible to impress the sisters and the provincial. Soon after Sister Katherine becomes a novice, Sister Mary takes a special interest in her. Sister Mary starts singling her out from the other novices and begins giving her special attention. Sister Katherine is also given more opportunities than the other novices. At first she believes that she is getting special opportunities because of her hard work and dedication, but she soon realizes that Sister Mary has developed an interest in her for a different reason. A few months into Sister Katherine's novitiate, Sister Mary expresses her feelings to Sister Katherine. Sister Katherine eventually agrees to engage in sexual conduct because she is afraid that, if she does not consent, Sister Mary will restrict her educational and work opportunities and that she will not be able to carry out her vocation.

The relationship between the sisters continues for sometime, and Sister Katherine becomes increasingly uncomfortable with the situation. At first, Sister Katherine is given incredible educational and work opportunities because of her relationship with Sister Mary. However, Sister Mary starts to become hostile and antagonistic in their conversations and jealously accuses Sister Katherine of having sexual relationships with men. Sister Katherine tries to end the relationship, but Sister Mary will not allow it. She continues to make sexual advances and forces herself on Sister

49 See *Lutkewitte*, 436 F.3d at 251 (stating that "[a]n employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee").

50 See *Elvig v. Calvin Presbyterian Church*, 397 F.3d 790 (9th Cir. 2005); *Bollard v. The California Province of the Society of Jesus*, 196 F.3d 940 (9th Cir. 1999); *McKelvey v. Pierce*, 800 A.2d 840 (N.J. 2002).

51 *Bollard*, 196 F.3d at 949-50.

Katherine. Sister Katherine notifies the provincial, but the provincial “turns a blind eye” and does nothing about the situation. Eventually, Sister Katherine is compelled to withdraw from the institute, and when she does the Sisters of St. Monica cease funding her college tuition. She files suit against Sister Mary and the Sisters of St. Monica.

Individual Liability:

First, Sister Katherine might claim that Sister Mary breached her fiduciary duty. Sister Mary was Sister Katherine’s mentor and spiritual director, and she may have owed a higher duty to the novices under her care and direction. Also, the nature of the mentoring relationship may have encouraged Sister Katherine to place a high degree of confidence and trust in Sister Mary.⁵² While some courts might find that Sister Mary breached a fiduciary duty to Sister Katherine in this situation, others might decline to impose liability based on a finding that determining whether a fiduciary relationship existed would require a court to define the scope of the duty, if any, owed by one religious member to another, a matter necessarily involving issues of church organization and governance.

Sister Mary might face liability for intentional infliction of emotional distress, a legal theory discussed in Scenario 1. Because the nature of the relationship involved a high level of trust and dependence, Sister Mary’s conduct might constitute the type of “extreme and outrageous” behavior required to establish a claim for intentional infliction of emotional distress. Under the present facts, however, it is not clear whether Sister Katherine suffered the requisite “severe” emotional distress required to recover on this theory. Although she became “increasingly uncomfortable,” and chose to withdraw from the institute,

52 See *McKelvey*, 800 A.2d at 859 (finding that the relationship of trust between a religious candidate and spiritual director holding a dominant position in the hierarchical structure of seminary education might give rise to a fiduciary duty).

these facts alone do not establish sufficiently Sister Katherine’s severe distress.

Sister Katherine may also allege that she was sexually harassed. However, she likely will not succeed on this claim because members of institutes who are serving pursuant to their religious obligations are generally not considered “employees” under the federal and state legislation applicable to sexual harassment claims. Sister Mary may also face the same type of criminal liability as Father Joe in Scenario 1.

The Institute’s Liability:

In this Scenario, the institute may be liable for negligent hiring, assignment, training, retention, and supervision.⁵³ The provincial knew of the alleged conduct and did not take any steps to document, investigate, or substantiate the claims. In light of these failures, the Sisters of St. Monica may be liable under these negligence theories.⁵⁴

Sister Katherine may also attempt to bring sexual harassment claims against the institute. However, under these facts, the First Amendment likely will shield the institute from liability under a sexual harassment theory. This is because Sister Mary was not performing duties of a merely custodial or secular nature. Rather, the institute appointed her to carry out the important role of novice director, which involved overseeing the religious vocation of novices. Most courts will decline to impose liability on a religious institute for sexual harassment committed by a member serving in a primarily religious capacity, espe-

53 The elements of these claims are discussed in Scenario 1.

54 See e.g., *Malicki v. Doe*, 814 So.2d 347, 361 (Fla. 2002) (holding that the First Amendment does not protect a religious institute from negligent hiring and supervision claims in connection with alleged sexual assaults by a priest because alleged negligence was “not rooted in religious belief”); *Moses v. Diocese of Colorado*, 863 P.2d 310, 320-21 (Colo. 1993) (holding that the First Amendment did not bar claims of fiduciary duty or negligent hiring and supervision against religious members and their superiors because the claims did not involve disputes within the church and were not based solely on ecclesiastical or disciplinary matters).

cially in situations similar to this hypothetical, where the individual was appointed to conduct religious training within the institute.

Last, the institute may be liable for breach of contract because it agreed to fund Sister Katherine's college education and stopped doing so when she withdrew from the institute to escape Sister Mary. A court might allow Sister Katherine to present evidence of written and oral representations, conduct, and relevant surrounding circumstances to prove the existence of a contract with the institute for her education and training.⁵⁵ Courts have noted that, like similar secular contracts, members' agreements with their institutes also entail a promise to exercise good faith and fair dealing. Therefore, the Sisters of St. Monica breached an implied promise by allowing Sister Katherine to become a victim of Sister Mary's sexual and psychological exploitation.⁵⁶ Because Sister Katherine was prevented from enjoying the benefits of the education offered to her, a court might allow her to recover monetary damages

Prevention:

As addressed in Scenario 5, a religious institute should take preventative measures such as adopting a sexual misconduct policy and requiring ongoing training that addresses relational boundary violations and what constitutes exploitive behavior. Furthermore, all complaints, regardless of how frivolous or outlandish they might seem, must be promptly documented, and the veracity of an allegation should be thoroughly investigated. If an allegation of sexual misconduct is substantiated, the institute must take appropriate steps to prevent the individual from harming others.

55 See *McKelvey*, 800 A.2d at 858 (asserting that a priesthood candidate could present evidence showing the existence of a contract with the diocese for his education and training).

56 See *McKelvey*, 800 A.2d. at 859 (explaining that agreements between religious candidates and sponsoring institutions are similar to secular contracts and necessarily involve a covenant of good faith).

Last, as noted previously, all members, especially those ministering to the public or holding supervisory positions within the institute, should be properly screened to ensure their fitness for serving in that capacity. These steps will help protect the institute from exposure to the liability that arises when an institution either knows or should know about a particular member's propensity for causing harm to others.

SCENARIO 7:

Sister Claire is a member of the Sisters of St. Edith of Wilton. She is a sixth grade teacher at St. Edith's grammar school. Four years ago, Heather, a student in Sister Claire's class, made an accusation to the school authorities that Sister Claire slapped her while she was serving an after school detention. The school took Heather's statement and Sister Claire's statement, and they conducted a cursory investigation of the allegations. The School administration determined that the accusations were unfounded, and Heather never filed a lawsuit or pursued the accusation further.

Johnny, a student in Sister Claire's current sixth grade class, is a troublemaker. He shows up late for class, does not turn in his homework assignments, and talks back to Sister Claire when she asks for an explanation for his actions. A few weeks into the first semester, Johnny enters class late, chewing gum and talking on his cell phone. Sister Claire responds by grabbing the cell phone out of Johnny's hand and squeezing his cheeks to remove the gum from his mouth. Johnny storms out of the room shouting, "You'll be sorry you laid a hand on me." Johnny goes directly to the principal who assures him the incident will be investigated and instructs him to return to class. Johnny goes home that evening and tells his parents about the incident at school. Johnny's parents immediately file a lawsuit against Sister Claire, the school, and the Sisters of St. Edith of Wilton.⁵⁷

57 Although the school may be liable, these theories of liability are not discussed in this Article.



Corporal punishment in schools is permissible via the concept of “in loco parentis.”

Individual Liability:

In this Scenario, Sister Claire may be liable for several offenses previously discussed, such as battery and intentional infliction of emotional distress. Yet, because some states allow educators to use corporal punishment, Sister Claire might not incur individual liability for squeezing Johnny’s cheeks.

“Corporal punishment” is generally defined as “the physical touching or striking of a student by any means for the purpose of punishing or disciplining the student.”⁵⁸ Corporal punishment in schools is permissible via the concept of *in loco parentis*. *In loco parentis* means that school employees stand in the shoes of the parents and, therefore, can use physical force because they have an interest in the child’s discipline. Some states, such as Kentucky, allow teachers to use force in furtherance of a special purpose or to maintain reasonable discipline.⁵⁹ Other states allow the use of corporal punishment, but require additional safeguards for the children. For example, some states require the principal of the school to be informed before punishment is used,

while other states require two adults to be present at the time of disciplining. Thus, Sister Claire’s actions probably would be permissible in states that allow the use of corporal punishment if her use of force was neither excessive nor unjustified, and if it was reasonable under the circumstances.

In states where corporal punishment is not permitted, however, Sister Claire may be liable for civil and criminal assault and battery. Common law defines assault as “intentionally placing another in fear of imminent harmful or offensive contact,” and civil battery as “actually and intentionally making that wrongful physical contact without consent.”⁶⁰ Moreover, the statutes of each jurisdiction codify criminal assault and battery.⁶¹ Sister Claire would most likely be found liable for all of these offenses.

The Institute’s Liability:

The institute may be vicariously liable under the doctrine of *respondeat superior*. Under this doctrine an employer can be held liable for an employee’s actions if they are committed in the course and scope of the employee’s employment and are in furtherance of the employer’s business. In most jurisdictions, Sister Claire’s behavior would be found to be in the furtherance of the religious institute’s business (i.e., operating an educational institution) and the institute would be held liable for Sister Claire’s conduct.

Additionally, the institute also may be liable for negligent hiring, assignment, training, retention, and supervision. This Scenario differs from Scenarios 5 and 6 because, in this instance, the institute knew about the previous allegation, investigated it, and determined the allegation to be unfounded. Liability in this Scenario might hinge on the investigation and documentation of the first allegation of abuse by Heather, because it poten-

58 *Subashi v. Unemployment Comp. Bd.*, 713 A.2d 1177, 1179 (Pa. Commw. Ct. 1998).

59 See Ky. Rev. Stat. Ann. § 503.110 (Banks-Baldwin 2006). Other states that allow corporal punishment include: Alabama, Arkansas, Colorado, Idaho, Indiana, Louisiana, New Mexico, Mississippi, Missouri, South Carolina, Tennessee, and Texas.

60 *Dougherty v. Weinert*, 809 N.Y.S.2d 758, 758-59 (N.Y. Sup. Ct. 2005).

61 See e.g., Ark. Code Ann. § 5-13-201, § 5-13-205 (Michie 2006) (setting forth what constitutes the offenses of battery and assault under Arkansas law).

tially can indicate whether or not the institute was aware of Sister Claire's propensity for physically abusing students.

CONCLUSION:

The simple scenarios discussed in this Article serve merely to illustrate situations that may lead to litigation and, ultimately, liability for institutes. The nature and extent of the institute's liability will vary depending upon the facts of each particular case, including the jurisdiction that will

supply the governing law. To protect their communities, it is imperative that religious leaders become familiar with and understand the types of conduct that can give rise to individual and institutional liability. Knowledge and understanding of the unique legal issues faced by their institutes will allow religious leaders to effectively deal with situations similar to those described in this Article and, more importantly, to prevent these regrettable circumstances from arising in the first place.