

Ministerial Key Legal Issues

(The information contained within this paper is for informational purposes only and is not intended to offer or provide legal advice.)

The Ministerial Exception

The ministerial exception is a legal doctrine in the United States that protects the freedom of religion by exempting religious institutions from anti-discrimination laws in hiring employees.

The U.S. Supreme Court unanimously has recognized the "ministerial exception" under the Establishment and Free Exercise Clauses of the First Amendment and bars employment discrimination suits brought on behalf of ministers against church or religious organizations.

The ministerial exception protects a "church's right to decide matters of governance and internal organization" and the Establishment Clause forbids "excessive government entanglement with religion." For example, the US government cannot force the Catholic Church to hire homosexual or female priests.

A key question often at issue is whether an employee is in fact a "minister." Although not issuing a rigid formula, a recent Supreme Court decision identified four factors for consideration:

1. The employee's formal job title (use caution when calling someone a "minister.")
2. The substance reflected in that title;
3. The employee's use of that title; and
4. The important religious functions performed for the church by the employee.

The Ecclesiastical Abstention Doctrine

The ecclesiastical abstention doctrine arises from the Free Exercise Clause of the First Amendment to the United States Constitution. ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.").

"The Supreme Court has broadly interpreted the command to 'make no law' [respecting an establishment of religion or prohibiting the free exercise thereof] as prohibiting all forms of government action, including both statutory law and court action through civil lawsuits."

The ecclesiastical abstention doctrine prohibits civil courts from exercising jurisdiction over matters concerning "theological controversy, church discipline, ecclesiastical government, or the conformity (or non-conformity) of the members of a church to the standard of morals required of them."

Pastoral Confidentiality

Pastoral confidentiality is both a moral and legal obligation. In recent years, however, people have brought an increased number of lawsuits against pastors for invasion of privacy and other claims arising out of the disclosure of confidential information by a pastor or other church official. The result of these

suits has brought recognition that the obligation to maintain confidentiality is not only a moral obligation, but also often a legal one.

The Clergy Communicant Privilege

The Clergy Communicant Privilege also referred to as the clergy-penitent privilege, clergy privilege, confessional privilege, priest-penitent privilege, clergyman-communicant privilege, or ecclesiastical privilege is an application of the principle of privileged communication that protects the contents of communications between a member of the clergy of **any religious faith** ("clergy" meaning a minister, priest, rabbi, or other similar functionary of a religious organization, or an individual reasonably believed to be so by the person consulting him) and a penitent, who shares information in confidence. It stems from the principle of confessional privilege.

The Clergy Communicant Privilege is a distinct concept from that of confidentiality and is rooted in the imperative need for confidence and trust. This privilege recognizes the human need to disclose to a spiritual counselor, in total and absolute confidence, what are believed to be flawed acts or thoughts and to receive consolations and guidance in return." A pastor has a duty to hold in confidence any information obtained during a counseling session. A pastor who violates this trust might be on the losing end of a suit for an invasion of privacy or defamation.

Note that this privilege belongs to the person who disclosed the information and is designed for his protection, rather than for the protection of the clergy.

In addition, the privilege would not apply when the penitent or someone authorized to act on his behalf signs a written waiver of the right to the privilege or confidentiality. This eliminates the privilege and the information is subject to disclosure. If a parishioner waives this privilege, the pastor has no legal grounds for withholding the information and must disclose it upon proper request.

Mandatory Reporters of Child Abuse

The Clergy Communicant Privilege, however, is not absolute. While clergy penitent privilege is frequently recognized within the reporting laws of many states, it is typically interpreted narrowly in the context of child abuse or neglect.

All 50 states have enacted child-abuse laws that define responsibilities in protecting vulnerable children from abuse and neglect. Most state statutes define child abuse to include physical and emotional abuse, neglect, and sexual molestation. States ordinarily define a child as any person under age 18. Typically, individuals who may be reported for abuse or neglect include individuals who have some legal responsibility for the child, such as a parent, legal guardian, foster parent, or relative.

In the state of Nebraska clergy are considered mandatory reporters of child abuse and must do so immediately to the appropriate state agency and/or law enforcement.

Malpractice

As a basic concept, clergy malpractice is related to a lack of professional skill and failure to exercise reasonable professional care directed against the claimant seeking such services. It is based on what the clergyman did or did not do as compared to what a reasonable and prudent clergyman would have done or not done under the same set of circumstances. While there may be a number of circumstances where the issue may arise, one of the recurring areas is within clergy privilege.

As a general rule, the courts are rejecting the idea that there is a cause of action for clergy malpractice, by that name. Many courts do allow suits to proceed that claim assault, defamation, misappropriation of funds, fraud, or any other crime or tort that might apply.

Clergy malpractice may or may not be covered under church insurance. Many policies make exclusions for intentional misconduct. Pastors know your coverage in this area.

Pastor Selection & Dismissal

The selection of a minister is an ecclesiastical decision that the civil courts ordinarily will not review—even when it is alleged that a church failed to follow its own internal procedures in the selection of a minister, or the selection process was discriminatory.

Likewise, most courts have concluded that they are barred by the First amendment guarantees of religious freedom and non-establishment of religion from resolving challenges by dismissed clergy to the legal validity of their dismissals.

Churches may be classified in terms of polity or organization as either congregational or hierarchical. Understanding the difference between these two basic types of church structure is important, since some aspects of the pastor-church relationship turn on this distinction. The United States Supreme Court has defined a congregational church as "a religious congregation which, by the nature of its organization, is strictly independent of other ecclesiastical associations, and so far as church government is concerned, owes no fealty or obligation to any higher authority."

In congregational churches it is common for ministers to be selected by church members according to the procedures set forth in the church's governing instrument.

Hierarchical churches generally select their ministers according to rules promulgated by a parent denomination. Some denominations give subordinate churches complete freedom in selecting ministers. Others dictate who will be the minister of each affiliated church. Many denominations provide for the selection of ministers by the combined efforts of both the denomination and the subordinate church.

When a hierarchical body or official selects a minister for a local congregation, the local congregation is without authority to affect or overrule that decision.

Pastor as Officer of the Church

A minister has no legal right to serve as president of the church corporation unless authorized to do so in the church's governing documents. The office of president is one that is filled according to the constitution and bylaws of the church. Although the minister is customarily named president of the corporation, this is not a legal requirement.

Property Matters

A minister can engage in property transactions on behalf of a church only if authorized to do so. Authority may be expressly granted in the church's charter or bylaws, but more frequently a church's board of directors or members vote to authorize the minister to represent the church in a specific transaction.

If no authority over the business and property affairs of a church has been delegated to a minister, he or she may not lawfully act for the church in such matters.

Diversion of Church Funds

Church income ordinarily consists of designated and undesignated contributions, interest on bank accounts, gain on investments, and rent from church-owned properties. Some churches have income from the rendition of services, such as the operation of child care facilities, private schools, or counseling services. Church income, from whatever source, is held by the church in trust for the church's religious and charitable purposes. Such a trust may be express, as when a donor contributes funds for a specified purpose, or implied, as when funds are contributed without designation regarding their use.

Clergy who divert church funds to their personal use face possible criminal and civil liability.

Exemption from Military Duty

"Regular or duly ordained ministers of religion are exempt from military training and service if they apply for exemption. This exemption does not apply to selective service registration requirements, and does not apply to ministerial or seminary students.

Designated Funds

It is common for church members to make "designated" charitable contributions to their church specifying that their contributions be used for a specified purpose. What happens if a church board applies such contributions to some other purpose? Are there legal consequences for either the church or the church board? A recent decision by the Mississippi Supreme Court is significant since it represents the most extended discussion of the legal consequences of expending designated contributions for other purposes. The case suggests that donors who make designated contributions to their church may have a legal right to a refund of their contributions if the church fails to use the contributions for the designated purpose.

Same Sex Marriage

In 2015 the U.S. Supreme Court, in a 5–4 decision authored by Justice Anthony Kennedy, held that the Equal Protection Clause requires a state to license a marriage between two persons of the same sex and to recognize a same-sex marriage entered into lawfully in another state. In other words, same-sex marriage was declared legal in all 50 states.

The majority opinion stated the following with respect to religious opposition to same-sex marriage:

“Finally, it must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered.”

The greatest threat for churches lies in the application of the court’s decision to believers who live in jurisdictions covered by so-called “non-discrimination” laws and ordinances that prohibit discrimination in employment, housing, or places of public accommodation on the basis of sexual orientation or gender identity. What should Churches do?

1. **Churches should update their statement of faith on the issues of marriage, human sexuality, and gender.** Putting clarifying language in the statement of faith merely serves to codify a church’s long-standing religious beliefs.
2. **Pastors will not be legally compelled to officiate same-sex wedding ceremonies**—for now. In the near term, no pastor will be forced to officiate any wedding ceremony with which he disagrees. Pastors remain free to make a theological determination about whom they will marry and whom they will not. For example, pastors will often not marry a believer to an unbeliever, and some will not perform ceremonies for someone they know didn’t have biblical grounds for a previous divorce. Nothing in the Supreme Court’s opinion changes the freedom of pastors to continue to make those theologically based decisions about whom they will marry.
3. **Churches should ensure their facilities usage policies are revised to allow only uses consistent with the church’s religious beliefs.** In the wake of the Supreme Court ruling, some churches may be approached by same-sex couples seeking to be married in the church facility. Churches should not feel as if they have to close their doors to the community just to prevent wedding ceremonies with which they disagree. Churches must continue to be a welcoming presence in the community and can do so through updating or revising their facility usage policy. The key point is to tie usage of the church’s facility to the statement of faith and religious beliefs of the church. And then to make clear that uses inconsistent with those religious beliefs will not be allowed.

Where Major Religions Stand on Same-Sex Marriage



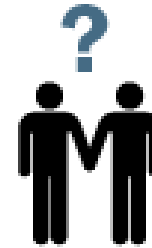
Sanctions Same-Sex Marriage

- Conservative Jewish Movement
- Episcopal Church
- Evangelical Lutheran Church in America
- Presbyterian Church (U.S.A.)
- Reform Jewish Movement
- Society of Friends (Quaker)
- Unitarian Universalist Association of Churches
- United Church of Christ



Prohibits Same-Sex Marriage

- American Baptist Churches
- Assemblies of God
- Church of Jesus Christ of Latter-day Saints (Mormon)
- Islam
- Lutheran Church-Missouri Synod
- National Baptist Convention
- Orthodox Jewish Movement
- Roman Catholic Church
- Southern Baptist Convention
- United Methodist Church



No Clear Position

- Buddhism
- Hinduism

As of July 2015

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