

ACBC Annual Conference 2017
Avoiding Legal Conflicts With Your Counselees

Purpose of Workshop

- To honor God through faithful biblical counseling, without government interference
- To avoid dishonoring Christ by going before the secular courts to solve disputes inside the church (1 Corinthians 6:1-8)
- To facilitate biblical reconciliation and peacemaking
- To avoid loss of time and resources in civil litigation
- ***NOT*** to escape responsibility for sinful conduct
- To ***PREVENT***, not merely ***PREVAIL***

Local Attorneys

- This workshop covers general legal principles.
- Unlike the Bible, state law varies widely!
- Your church and/or counseling center should have an ongoing relationship with a local attorney.

Good News and Bad News

- **Good News:** The First Amendment to the U.S. Constitution provides important protection to biblical counselors.
- **The Best News!!:** God is on His throne!!
- **Bad News:** We live in a sinful world and in a culture where lawsuits are legion and lawyers are hungry.

Structure of Counseling Center

- Church (strongly recommended for maximum protection)
- Separate non-profit, religious, tax-exempt corporation with a strong connection to one or more local churches

Consent Form Issues
(sample form available)

INFORMED + CONSENT

INFORM your counselees about who you are and what you are doing, and give them an opportunity to **VOLUNTARILY CONSENT** after they understand your counseling approach and policies.

1. Religious/Biblical Nature of Counseling (INFORM!!)

- **WHO YOU ARE:** Your counseling is based on the Bible.
- **WHO YOU ARE NOT:** You reject the methods/theories of psychotherapy. Your counselors are NOT psychotherapists, psychologists, or such. Review your state's law as to licensing requirements and religious exemptions.
- Your policy is NOT to refer to "mental health professionals" because of your RELIGIOUS convictions.
- You may wish to have a clearly written statement about the biblical basis for your approach to counseling.
- When you make representations to counselees about your counseling, base these on God's promises in the Bible. Any promises you make should be based on and qualified by Scripture.

2. Confidentiality

- You do not guarantee *absolute* confidentiality.
- The Bible may require you to make disclosures.
- The civil law may require you to make disclosures.
- Consent should cover your ability to contact the counselee's pastor and/or elders, if you counsel people outside your church.

3. Other Professionals

Stay within your territory and be willing to refer to other professionals, such as medical doctors, attorneys, financial advisors.

4. Christian Dispute Resolution – Biblical Peacemaking

- Courts generally uphold arbitration clauses, even in a secular context. Courts are clogged!
- Courts have upheld church policies.
- **Peacemakers Ministry!**

5. Minor Children Counselees

- Be aware of custody issues if parents are separated or divorced.
- Obtain written consent of custodial parent.
- Parents have constitutional rights concerning religious training.
- Establish a policy about the release of records.
- **BEWARE: Same-sex couples raising children!??**

Litigation Potential – Where Are You Vulnerable?

1. Conduct of the Counselor

Courts generally WILL NOT hold pastoral counselors liable for content of *religious* counseling. "Clergy malpractice" (*Nally* case) is a type of negligence action, which requires all of the following:

- 1 - Duty (LAWSUITS BREAK DOWN HERE!)
- 2 - Breach
- 3 - Causation
- 4 - Damages

Courts sometimes WILL hold the counselor and/or church (or center) liable if a sexual relationship develops between counselor/counselee:

- Beware of "holding yourself out" as psychological counselor
- **USE BIBLICAL TERMS!!**
- Intentional infliction of emotional distress
- Breach of fiduciary duty . . . or consenting adults?
- Alienation of affections (abolished in most states)
- Battery (harmful or offensive touching to another person)
- **CRIMINAL LIABILITY** in some states!!

Courts sometimes find liability because sexual misconduct is not rooted in religious belief – sometimes dismiss on "consenting adults" theory.

2. Conduct of the Church or Counseling Center

AREAS OF VULNERABILITY

- Negligent hiring, supervision, retention of counselors
- Disclosure of confidential communications
- Church discipline

PROTECTION FROM LIABILITY

- Church (or Center) governing documents and policies (FOLLOW THEM)
- Selection of counselors (background checks, references)
- Legal Defenses to Liability
 - Informed consent (preferably written)
 - "Implied consent" (from church participation)
 - Privilege - "common interest" in church matters
- "Tell it to the church" (Matthew 18:17)
 - ***To*** church members ***about*** church members
 - Written (marked "privileged and confidential")
 - Warn against further disclosure
 - Communicate factually verifiable info only
 - Avoid announcements where visitors present
 - Closed membership meetings
 - Binding biblical arbitration policy (written)
 - **CAUTION!** Prayer bulletins (name only)
- Church Membership – Definitions and Issues
 - Member counselee v. non-member counselee
 - Avoid ambiguous definitions of "member"
 - Is membership a "property right" under civil law??
 - Membership withdrawal

ORGANIZATIONAL POLICIES

- BYLAWS – identify governing body responsible to interpret Scripture
- BYLAWS – define MARRIAGE and MALE-FEMALE ("gender")
- POLICY – premarital counseling, who may be married
- POLICY – who may counsel (employment law)
- *Job descriptions related to religious mission*
- POLICY – who may be counseled
- POLICY – use of facilities
- Remove yourself from "PUBLIC ACCOMMODATION" definition

3. Conduct of the Counselee

Counselee's threat to harm specific others *may* trigger a legal duty to warn.

Counselee's threat to commit suicide (*Nally* case)

Child abuse

- Duty to report (know your state's law!)
- Cooperate with authorities

FINALLY . . . who you gonna call? (also see separate list – "Legal Resources")

- Alliance Defending Freedom
- Christian Legal Society
- Pacific Justice Institute
- Advocates for Faith and Freedom (California)
- Christian Law Association
- Similar local groups across the country