The Shifting Relationship of
Law and Ministry

Robert H. Wheeler

The role of the minister today is more clearly subject to legal as well as ecclesiastical scrutiny. Likewise, legal thinking has been evolving rapidly during the last two decades and promises to continue to evolve. This changing terrain demands a healthy awareness of the legal environment within which one ministers.

The United States of America is a country of laws. The often-heard refrain “No person is above the law” has a corollary, “Every person is under the law.” That both apply fully to ministers in the United States has never been truer than today. The relationship of law and ministry is undergoing profound change in the United States largely as the consequence of the institutional church’s failures in the priests’ sexual abuse scandals.

The First Amendment’s freedom of religion clause had long been interpreted to allow the church and its ministers broad freedom from governmental interference and regulation. In an often-cited nineteenth-century decision, Justice Miller wrote:

The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine, and to create tribunal for the decision of controverted questions of faith within the association and for the ecclesiastical

Robert H. Wheeler, J.D., M.A.P.S., has been associate director of the Emmaus Formation for Ministry Program at Catholic Theological Union for ten years and previously enjoyed a thirty-year career in law and business. He was chair of the Diocese of Joliet, Illinois, Board of Conciliation from 1992 until 2009.
government of all the individual members, congregations and officers within the
general association, is unquestioned. . . . [It is the essence of these religious
unions, and of their right to establish tribunals for the decision of questions arising
among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for. (Walton v. Jones)

With few exceptions, the First Amendment permitted churches, their ministers, and congregations to be free from government interference. Illustrative of these exceptions are cases in which the exercise of the religion was deemed to be inimical to the public and created a compelling state interest in addressing behavior—not belief. The polygamy litigation of the nineteenth century is an early example (see Reynolds v. United States and Davis v. Beason).

A classic example of the continued protective vigor of the First Amendment is the “ministerial exception” in Title VII antidiscrimination cases brought by employees against churches. Courts have been reluctant to entertain employment discrimination claims (e.g., race, age, gender, national origin) made by anyone serving in a “ministerial” capacity. In defining ministry for this purpose, courts have proven themselves far more broad-minded than some church officials, who for other purposes would narrow the meaning of ministry. For example, an archdiocesan Hispanic communication manager claimed wrongful discharge on the basis of gender and national origin. Her claims were summarily dismissed under First Amendment freedom of religion protection. The court styled her job as that of a press secretary serving as a communications link to the Hispanic community. The court held that the claimant “served a ministerial function for the Church and her Title VII claims are therefore barred by the First Amendment.” Civil law will not interfere with internal church matters concerning ministers.

**Fallout of the Abuse Scandal**

The unhappy development and mishandling of the priests’ sexual abuse scandal is shifting gradually the First Amendment balance between church/ministerial freedom and government intervention in the direction of more government intervention on many fronts. Most obvious is the vigorous use of criminal proceedings to address abusers and their church facilitators. Six major grand jury and state attorneys general report evidence of the grave enormity of the crimes and consequent skepticism of the church as a credible institution to protect children and other victims (see the collection of reports at http://www.bishop-accountability.org/AtAGlance/reports.htm). Unprecedented civil litigation both preceded and complemented the criminal redress of the abuse evils. This civil litigation caused six dioceses and one religious province to date to seek federal bankruptcy
The current judicial oversight of these bankrupt dioceses is at a level unimaginable forty years ago when the Catholic Church in the United States was fresh with the renewal of Vatican II. Published reports from past grand juries and media reports of present grand jury proceedings suggest that laws intended to combat organized crime or corrupt public officials should be applied to church officials as well (e.g., Cardinal Mahoney and the Los Angeles archdiocese; see Slater).

Recent commentators have identified many of these and other various shifts occurring in ministry/law relations. For example, in a recent article Formicola identified several direct results of the scandal in both criminal and civil law (445, 449). First, Formicola noted an increased successful use of subpoena power to gain access to previously confidential and protected personnel records (445–50). For some in ministry, it can be surprising to learn that even one’s own personal notes and records, kept apart from “official” church records, are subject to the subpoena process. Second, several state legislatures have extended the statute of limitations to allow litigation of sexual abuse claims long after the otherwise applicable limitations period expired (450–52). Third, in some states new legislation or court rulings have banned the use of confidentiality agreements as part of settlements in abuse cases (452). While frequently favored by defendants (especially large institutions) in settling litigation for fear that settlement details might encourage new litigation, the use of confidentiality agreements in sexual abuse litigation has been perceived as one more effort by church officials to conceal the scope and seriousness of the scandal. Finally, Formicola noted generally increased state oversight of church-run programs intended to protect children (452–54). In the context of civil liability, Formicola referenced the sheer number and cost of individual and class action litigation, verdicts, and settlements that has approached $2 billion (456–62). Formicola concluded that “only further litigation and legislation will be able to clarify and reconcile the loss of church autonomy to increased state powers increasingly dictated by U.S. civil authorities” (465). In the meantime Formicola predicts the “Catholic Church will continue to be distracted by its legal and civic responsibilities versus its primary spiritual mission. . .” (465).
Schaefer and Van Bogaert share Formicola’s view that the legal relationship between the church and the U.S. state and federal governments has changed at the expense of church autonomy. Schaefer and Van Bogaert focus more specifically on the consequences for clergy. Their sense is that individual clerics (and presumably all in church ministry) must become more aware of legal risks attendant upon ministry in today’s society. From their beginning observation that “the sexual scandals rocking the Catholic church and the resulting liability issues should be a wakeup call for all clergy” (117), to their concluding admonition that “today, more than ever, clergy and employees of religious institutions need to be informed about their obligations to protect against potential legal controversies” (138), their work is a summary of potential pitfalls for the unwary minister.

Other developments unthinkable in earlier generations are now serious legal issues. For example, litigants have sought to include the Vatican as a defendant in sexual abuse cases. Until March 2009, the Vatican had successfully avoided litigation over sexual abuse by relying on the Foreign Sovereign Immunities Act (FSIA) (see Bryan v. Holy See and Doe v. Holy See [2006]). However, the Ninth Circuit Court of Appeals expanded a limited exception to this immunity that is triggered by the “tortious act or omission of . . . any official or employee of that foreign state while acting within the scope of his or her employment.” The Court’s ruling in Doe v. Holy See permits litigation of alleged Vatican liability under a respondeat superior theory for alleged abuse perpetrated by a religious community priest because the priest was deemed “an employee” of the Vatican and the abusive conduct fell “within the scope of employment” under statutory and case law standards (2009).

The fallout is seen in other areas of ministry unconnected with abuse claims. Over the last two decades, the malleable tort of malpractice has been raised in cases involving ministers—cases of so-called clergy malpractice. A generation ago the notion of tort liability for “clergy malpractice” would have seemed both extreme and unlikely. No court had accepted a clergy malpractice cause of action because to do so would require establishing a legal standard of reasonable professionalism dependent on religious understandings (see Dausch v. Ryske; Schmidt v. Bishop; Hester v. Barnett). Decisions uniformly determined that the First Amendment precluded such judicial entanglement in matters of religious competency (see Wende v. United Methodist Church; for a thorough general discussion, see Idleman, 219, 232–39). But in recent years, conduct that was the basis of clerical malpractice claims has been found actionable under other theories (see Doe v.
This changing legal landscape does not mean that ministry must become a defensive profession.

The foregoing is only an indication of how legal thinking has been evolving rapidly during the last two decades and promises to continue to evolve. This shift in perception and law challenges the preexisting relative comfort a minister could take that official ministerial activity would by and large never be subject to civil, let alone criminal, law oversight. In short, the role of the minister today is more clearly subject to legal as well as ecclesiastical scrutiny.

But this changing legal landscape does not mean that ministry must become a defensive profession where concerns about litigation or legal consequences predominate. Indeed, if ever ministry were to reach that unhappy state, ministry in any Christian sense would have been long lost.

What this changing terrain does demand is a healthy awareness of the legal environment within which one ministers. This healthy awareness does not require the minister to obtain a law degree or even take law classes. But this does require the same professional respect for and awareness of the law that ministers have
displayed over the years, for example, at the intersection of ministry and medicine, counseling, and other service professions. The following sections offer some practical methods for viewing the law and using lawyers (for further reading in area of the intersection of law and ministry, see Shaughnessy; for a more extensive treatment, see Hammar).

**Increasing Awareness of Risk Areas**

Avoiding legal problems is always the path of greatest reward. Discerning and following this path is not that difficult. In fact, a committed and competent minister—regardless of ministry—is actually unlikely to discover legal problems too late. Rather, the very professionalism of ministry—authentically serving others for the sake of Christ—rarely runs askew of the law. Most legal problems in ministry arise from a failure, intentional or not, to behave as a professional minister committed to serving the people of God.

Over the years, sensitive legal areas in ministry—other than the obvious sexual abuse—have included the full range of ministerial relationships: employment matters, confidentiality, counseling, contracting, and general financial administration. Ministerial failures in these matters that once were exclusively a matter of internal ecclesial oversight are now also legitimately the subject of civil remedies. In today’s legal environment the minister needs to be aware that personal carelessness, incompetency, or unprofessionalism in any of these areas generates a risk of legal redress if any are harmed by inexcusable shortcomings. For example, a minister who fails to maintain confidentiality of pastorally sensitive conversations risks litigation for common law negligence (see *Alexander v. Culp*). Carelessly shared confidential communication is no longer simply a matter for internal reprimand by church authorities. In similar fashion, carelessness in counseling, either failing to recognize obvious medical and psychological needs beyond mere spiritual counseling, or carelessness in making referral to other professionals, can occasion clergy malpractice and negligence claims (see *Dausche v. Ryske*).

Failure to use prudent and reasonable care in attending to ministerial funds also creates a great legal risk. Today no excuse exists for any minister not to implement basic financial management techniques to protect ministry funds. Canon law as well as civil law imposes clear obligations to be a good and accountable steward of ministry funds. Yet local practices often are rife with a carelessness derived from equal measures of laziness and unprofessionalism.

In the emerging legal considerations in ministry, there is one very practical ministerial tool that should be employed to assist in understanding what the law requires. It is not, as one pastor once complained to the author, “I guess I have to go to law school and become a CPA to do my job.” Rather, it is an openness of heart and mind that recognizes ministry occurs within the laws of the nation and
state. Coupled with that openness is a need for theological reflection on the intersection of law and Gospel. Aside from certain obvious and very public issues such as abortion, most of what the U.S. legal system seeks in society is very consistent with Gospel values. Whether it is fairness in dealing with employees, honesty in dealing in finances, professionalism in counseling, or appropriate boundaries in dealing with youth, these are all values that the Christian minister should already have learned in preparation for ministry. In the United States today, laws and civil remedies will enforce actively these professional ministerial responsibilities.

**Seeking Competent Legal Advice**

Times and events arise that require legal advice from a lawyer with appropriate special skills. Long past is the time of the generalist lawyer. The sheer breadth and complexity of today’s legal system precludes the generalist and requires the specialist. The American Bar Association references dozens of areas of specialty certifications and itself sponsors thirty-five specialty sections for members. (However, law and ministry do not appear at this point to be a certifiable specialty or to fit within any of the sponsored sections.) The minister, as a consumer of legal services, needs to seek a lawyer competent to provide the precise legal service required.

Realistically, other than a diocese or significant institutions (hospitals, universities, major foundations, and religious communities), no one in ministry will have on staff an attorney, let alone access to the array of legal expertise. So how does one locate counsel?

Two basic paths to finding counsel are usually available. First, the general counsel for the diocese or other significant institution may serve as a starting point. Many dioceses employ a general counsel and others retain a general counsel who is in private practice, usually a member of a larger law firm. General counsel for the diocese can assist in one of two ways. Where the legal issues are simple and within counsel’s competence, assistance can be directly provided. Where the questions are complex or go beyond the counsel’s area, the counsel most likely will be able to provide the appropriate referral. The second basic path is to seek referrals from personal acquaintances—lawyer acquaintances, responsible business people, or others in ministry. Today no business person with any significant level of responsibility is unfamiliar with lawyers and more likely has used the services of several lawyers. Peers in ministry today are also very likely to have used legal counsel.

When seeking legal advice, especially from an attorney employed or retained by a diocese or other large institution, one preliminary caution should be observed. Before disclosing sensitive or confidential matters, the minister must ascertain whether the communication is in the context of a lawyer/client relationship. Sen-
ative information should not be shared outside the protection of the attorney/client privilege. The diocesan or other institutional general counsel owes his or her professional loyalty and legal responsibility to his or her client—the diocese or institution. Those legal interests may not coincide with the discrete interests of the minister that led to legal consultation in the first instance. If not, then anything shared may not be protected under a lawyer/client privilege. Indeed, the general counsel might be obliged by his or her professional relationship to report that information to appropriate diocesan institutional officials. Usually a good lawyer will early on recognize any possible conflict in this area and immediately initiate a cautionary conversation concerning unprotected disclosures.

The minister is legally entitled to a lawyer who is professionally committed to his or her specific interests and who is competent in the area of concern. Implicit in this statement is that the minister is free to and at times must reject the assistance of some attorneys—even ones who are good people and eager to help. The minister’s obligation to self and the people served is to choose a competent counsel who will serve those interests well.

Frequently a minister’s first choice is a member of the minister’s own congregation who volunteers to provide free legal services. On important legal matters, the minister should be wary of these circumstances. No matter how willing a lawyer may be to provide free advice, a commercial, professional arrangement has advantages. It can be far easier to demand attention when the arrangement is other than pro bono. Additionally, if a difference of opinion develops or if dissatisfaction arises with respect to the lawyer’s work, dismissing a lawyer retained under normal commercial arrangements can be far easier than dismissing a parishioner acting pro bono.

The first instinct may also be to seek a lawyer who is familiar with the church and a Catholic or at least Christian. While a shared faith belief system offers a certain advantage of familiarity, solid legal advice sometimes is best received from a totally disinterested person. On occasion, a competent agnostic may be less likely swayed by the aura of minister and church and may provide the most unbiased legal advice.

A concern in retaining a lawyer is invariably the cost. The minister should approach this issue no differently than other commercial relationships. Candid discussions should be held about hourly rates, estimated overall costs, and detailed billing for accounting purposes. The minister should seek discounting of rates in view of the not-for-profit nature of the church. Lawyers will negotiate fees and rates.

If legal advice is sought in the context of a developing dispute, it is good to be wary of counsel who is overly fond of seeing court litigation as the first and
normal route of dispute resolution. Around 1850, Abraham Lincoln wrote, “Dis-encourage litigation. Persuade your neighbors to compromise whenever you can. As a peacemaker the lawyer has superior opportunity of being a good man. There will still be business enough” (82). Any dispute that reaches the court means that those closest to the matter have been unable to resolve their own dispute. In essence, court litigation is recourse to strangers to solve problems. Litigation should be the last resort. Competent counsel will always seek resolution short of litigation. Many Catholic dioceses offer dispute resolution forums that provide mediation or conciliation assistance in lieu of civil litigation. Such agencies take seriously Paul’s challenge to the Corinthians who used courts of the day against fellow believers, “Can it be that there is no one among you wise enough to decide between one believer and another, but a believer goes to court against a believer—and before unbelievers at that?” (1 Cor 6:5-6 NRSV).

Such diocesan dispute resolution agencies make good legal and church sense. Typically, resolutions are sought that provide a measure of satisfaction to all disputants. Often pastoral reconciliation is sought in connection with the dispute resolution. By contrast, taken to conclusion, civil litigation results in winning and losing, the victor and the vanquished—hardly a model for Christian resolution of differences.

Today’s legal system—the imperfect but necessary forum of sex abuse litigation and its progeny—now holds the minister to greater accountability and professionalism in ministry. This shift in law should be no burden to any competent and conscientious minister, even if it may be surprising to some.

References


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