

Developments in Clergy Malpractice: The Case of *Sanders v. Casa View Baptist Church*

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The courts have so far consistently refused to view misconduct by clergy counselors as constituting clergy malpractice. However, they have increasingly come to view it as a breach of fiduciary duty. More recently, they have also begun to differentiate between the secular and religious aspects of clergy counselors' work. The case discussed in this article (*Sanders v. Casa View Baptist Church*) provides an instructive example from the United States Court of Appeals, Fifth Circuit, in 1998. The court upheld a district court finding, based on a review of trial testimony, that the defendant's counseling work as a whole (and not merely his sexual misconduct itself) was essentially secular in nature. Thus the plaintiff recovered punitive damages for both breach of fiduciary duty and marriage counseling malpractice.

A decade ago there was serious concern that clergy counselors were becoming vulnerable to lawsuits alleging malpractice whenever their clients had a bad outcome, regardless of the counselor's degree of culpability. A young man's suicide in California received considerable attention as his parents' clergy malpractice lawsuit made its rather circuitous

way through the courts.¹ The case eventually ended without any recognition of a legal concept of clergy malpractice.²

Over the ensuing years, plaintiffs suing clergy have shifted their emphasis from the absence of counseling skills to the presence of sexual misconduct. However, no matter how outrageous the misconduct alleged, courts have continued to avoid making findings of clergy malpractice. This outcome, as we pointed out in a recent analysis and commentary published in this journal,³ was only to be expected, because any allegation of failure by a member of the clergy to meet a standard of care would have to be judged at least in part using definitions based on

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religious doctrine. In this age of increasing sensitivity to issues of discrimination, the courts have tended to work hard to stay clear of any interference with First Amendment provisions involving freedom of religion.

At the same time, common sense never had trouble understanding why the clergy involved in counseling should be held to a standard that excludes having sex with their clients. As we described in a 1995 report,⁴ the courts have recognized claims of sexually abused clients under a variety of headings other than clergy malpractice. In that article, we urged that the concept of breach of fiduciary duty be considered particularly appropriate for this purpose. The New Jersey Supreme Court has recently provided a worthy example of how to appropriately apply the concept of breach of fiduciary duty to a case of sexual misconduct by a clergy counselor.³

Another approach to making tort claims against clergy counselors who have sex with their clients, which has emerged in recent cases, is that of labeling the counseling as a secular activity and then alleging that professional malpractice, rather than clergy malpractice, has occurred. This distinction may be gaining appeal with the trend of increasing social opprobrium against sexual misconduct by secular therapists (and indeed by professionals outside the therapy field). This development represents a significant change from earlier courts' refusals to countenance any attempts to separate the secular aspects of counseling from those that are protected by the practice clause of the First Amendment. In 1994 a federal circuit court used this dis-

inction in overturning a summary judgment granted in a sexual misconduct case against a clergy counselor.⁵ In the present case another federal circuit court upheld trial awards made to plaintiffs who had accused a minister of professional rather than clergy malpractice because he had sex with them during counseling sessions.

The Case

On February 11, 1998, *Sanders v. Casa View Baptist Church* was decided unanimously by the United States Court of Appeals, Fifth Circuit.⁶ The opinion was by Judge Benavides, joined by Judge Parker and Chief Judge Politz, affirming the decision by Judge Solis following a jury trial in the United States District Court for the Northern District of Texas. The two plaintiffs, Robyn Sanders and Lisa Mullanix, were members of the Casa View Baptist Church and had worked in its offices. Casa View Baptist Church had a large staff, only some of whom were designated to provide spiritual counseling to church members. The defendant, Shelby Baucum, was not part of this counseling staff. Rather, the church hired him in 1988 as Minister of Education and Administration. As for its members who might require nonpastoral counseling, the church had a written policy that they be referred to a "licensed professional counselor" (134 F.3d at 334).

Despite the policy and the nature of his position, Baucum offered marriage counseling to each of the plaintiffs. He told them that he wanted to help, that he had a counseling degree, and that he was also counseling other women church members. The sessions with Sanders began

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around May of 1990 and those with Mullanix in January of 1991. Both ended during September of 1991. The defendant made expressions of love and affection during the sessions and offered encouragements to reciprocate these expressions. Sexual intercourse took place multiple times between Baucum and each plaintiff. When the two plaintiffs discovered that the defendant was having affairs with both of them, they reported it to church authorities who obtained a confession from Baucum and forced his resignation three days later.

At the same time, both women were placed on paid administrative leave while the church investigated whether their sexual involvement with Baucum violated its prohibition against adultery. After two months, the investigation found that they had committed adultery, and the two women were dismissed from their church jobs. They then brought several claims against Baucum and against the church. One of their suits against the church was for employment discrimination, which placed their case in the federal court system. The United States District Court, N.D. Texas, Dallas Division, dismissed all of their claims against the church.⁷

Two of their claims against Baucum were not dismissed: marital counseling malpractice and breach of fiduciary duties. The case went to trial in January 1996 and involved three weeks of testimony. After 10 hours of deliberation, the jury decided in the plaintiffs' favor on both counts. The defendant tried to portray his counseling as being of a religious nature, using the argument that he sometimes discussed passages of sacred scrip-

ture during the sessions. Both Mullanix and Sanders described their sessions in some detail, listing such topics as marital, sexual, financial, emotional, family, and career problems. According to their testimony they never prayed with Baucum nor discussed scripture or other religious topics during the sessions. Having heard this, the jury took the stance that the counseling was "essentially secular" in nature and that Baucum had indeed committed malpractice as a marriage counselor. At the same time, they also found that he had breached a fiduciary relationship with each of the plaintiffs. The jury saw the fiduciary obligation to each plaintiff as based on a secular counseling relationship through which Baucum had "acquired influence and gained their trust and confidence" (134 F.3d at 334). The awards to each plaintiff in punitive damages were \$42,500 for the defendant's malpractice as a marriage counselor and another \$42,500 for his breach of fiduciary duties.

After hearing various posttrial motions from the parties, the district court confirmed the trial outcomes.⁸ On appeal, the circuit court affirmed,⁶ also disagreeing completely with Baucum's attempts to cast his work as inherently ecclesiastical rather than purely secular. The court refused to go along with Baucum's idea that therefore the case was one of clergy malpractice. The judges did not hesitate to exclude secular components of the relationships from the protections of the First Amendment, explaining that "the constitutional guarantee of *religious* freedom cannot be construed to protect *secular* beliefs and behavior, even when they comprise part of an otherwise religious

relationship" (134 F.3d at 336, emphasis in the original). They underscored this statement by pointing out that the lower court had instructed the jury "to consider whether Baucum's counseling, rather than his alleged misconduct, was 'essentially secular' in nature" (*ibid.*).

Even if they had taken place, occasional discussions of scripture were not enough, in the courts' view, to make a religious activity out of what was otherwise secular marriage counseling. Sanders' testimony that he had provided her with pastoral counseling was of no help to Baucum, because her definition of pastoral counseling was "when a pastor counsels" (929 F. Supp. at 1037). She testified that he "did not provide her with spiritual, or religious, counseling" (*ibid.*). For her part, Mullanix testified that before their counseling sessions she had received spiritual guidance from Baucum in regard to her activities with church-related groups, but that during their sessions he did not mention scripture or make religious references.

Further, the district court gave as examples of religious issues that the jury did not touch upon: "whether Baucum referred the Plaintiffs to wrong or misleading Bible passages, or whether he doled out adequate and helpful religious advice. . . whether he provided them with sound spiritual guidance" (929 F. Supp. at 1037). The court thus avoided the trap of finding the counseling to be a secular activity merely because sleeping with a client is obviously secular.

Nor was religion involved in the Fifth Circuit Court's approval of a finding of breach of fiduciary duty. The obligation

arose out of the counselor's gaining influence and developing a relationship of trust. It was undertaken and then breached apart from any considerations of religious teachings or faith. In the view of the appeals court, it would have been brazen of the defendant to contend otherwise, which he did not do.

Commentary

With this case, we see a Federal Court of Appeals willing to support a distinction that courts are only recently beginning to undertake. The court looks at the secular aspects of counseling by a particular clergyman and sees them as essentially defining his activity. Then it is in a position to affirm a finding of malpractice for sexual misconduct by a clergy counselor. Although it may not be a finding of clergy malpractice, this result is important for advancing a new approach. It confirms that in the bright daylight of trial testimony it is reasonable for a jury to identify characteristics that define a clergy counselor's role as essentially a secular one.

The policy of the Casa View Baptist Church was wise and may have set the stage for the outcome here. The church maintained a counseling staff for pastoral work and referred some parishioners for secular counseling outside its boundaries. Making this distinction was crucial. Likewise, the district court judges were in agreement with our understanding of pastoral counseling when they pointed out that the term means more than counseling by a pastor. We have explained that, without forsaking the religious dimension, pastoral counseling involves a spectrum

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of differing conceptual models for defining problems and approaching them.⁹

In addition to affirming a finding of secular malpractice by a counselor who was a clergyman, the circuit court also supported an award for breach of fiduciary duty, again without involving any religious issues. It specified (134 F.3d at 337) that the primary relationship between a minister and a parishioner is not necessarily a fiduciary one. Rather, more is involved in establishing a fiduciary relationship, namely acting in such a way as to acquire influence over an individual and gain his or her trust. This is what the defendant had done in offering and then undertaking the marriage counseling.

It will be interesting to follow how other courts respond to the developments described here, particularly whether they begin to develop specific criteria for defining what makes a clergy counselor's work secular enough to lose the protection of the First Amendment. *Sanders v.*

Casa View Baptist Church may also prove to be of interest for its employment discrimination aspects, which are beyond the scope of this discussion.

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