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Expert Analysis

Establishment Clause Extended To Non-Ordained Clergy Member

By **Dennis J. Dozis**

Religious freedom is a fundamental tenet of our jurisprudence.[1] The Establishment Clause of the First Amendment to the U.S. Constitution, which is binding on the states through the Fourteenth Amendment, provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[2] The Establishment Clause "is a prohibition of government sponsorship of religion which requires that government neither aid nor formally establish a religion."[3] Said prohibition exists because there is a substantial danger that the government will become entangled in essentially religious controversies or intervene on behalf of groups espousing particular doctrines or beliefs.[4]

Although civil disputes involving religious parties may be adjudicated if neutral principles of secular law are exclusively involved, the Establishment Clause absolutely prohibits civil courts from deciding actions in which the nature of the issues raised are in any way religious.[5] As the New York Court of Appeals has explained:

> The United States Constitution protects the right of individuals to believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs… If these doctrines are subject to trial before a jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect. When the triers of fact undertake that task, they enter a forbidden domain…[C]ivil courts are forbidden from interfering in or determining religious disputes. Such rulings violate the First Amendment because they simultaneously establish one religious belief as correct … while interfering with the free exercise of the opposing faction's beliefs.[6]

As a result of the prohibition against secular entanglement in religious beliefs, the courts of this state have undertaken the arduous task of defining the Establishment Clause's scope in sexual affair and abuse cases and identifying which individuals are protected thereunder. In so doing, the courts have published tense decisions and engendered precedent contracting and expanding the constitutional proscription.

For example, in *Langford v. Roman Catholic Diocese of Brooklyn*, a parishioner of a Queens church brought, inter alia, negligence and breach of fiduciary duty claims against a priest and a diocese in connection with an alleged sexual affair which developed during the course of spiritual counseling.[7] The Supreme Court, Kings County, dismissed the claims upon motion practice, and plaintiff appealed. By a 3-1 decision, the Appellate Division, Second Department, affirmed and held that:

> The cause of action alleging that [the priest] negligently handled the counseling relationship in fact stated a claim for malpractice. As such, it was properly dismissed because any attempt to define the duty of care owed by a member of the clergy to a parishioner fosters excessive entanglement with religion.[8]

In a partially dissenting opinion, Justice Sondra M. Miller sharply disagreed with the majority and opined that the plaintiff's allegations fully supported recovery against the priest under a theory of breach of fiduciary duty. In her dissent, she stated:

> I disagree most significantly with the majority's holding that any attempt to define the duty of care owed by a member of the clergy to a parishioner fosters excessive entanglement with religion. That holding will establish appellate precedent shielding from civil judicial examination even the most flagrant clerical misconduct perpetrated upon vulnerable parishioners, children as well as adults. The injured will be deprived of any recourse short of criminal prosecution. The miscreant clergy, unsanctioned, will remain free to continue undeterred.…Moreover, the First Amendment to the United States Constitution was not intended to protect the misconduct of clergy where examination of their conduct does not require any inquiry into church doctrine. Clearly no examination of church doctrine is required in order for the plaintiff's claims against her priest to be heard.[9]

In *Wende C. v. United Methodist Church*, the Appellate Division, Fourth Department, similarly dismissed an action against an ordained clergy member based on an alleged sexual affair as constitutionally barred.[10] In *Wende*, a minister provided marital counseling to a couple who belonged to his church.[11] A consensual sexual relationship ensued between the minister and the wife, who later, with her husband, sued the minister, the church and a supervising bishop. The complaint alleged, inter alia, that the minister's actions constituted a breach of "the sacred trust between a counselor and care-seeker in the course of a ministerial relationship."[12]

The Monroe County Supreme Court dismissed the action on grounds that the plaintiffs effectively alleged "clergy malpractice," which implicated constitutional concerns. The plaintiffs appealed, contending that the "sacred trust" allegation was, in fact, a claim for breach of fiduciary duty, not clergy malpractice.

By a 3-2 decision, the Fourth Department affirmed and held that the plaintiffs' argument was nothing more than an "elliptical" way of alleging clergy malpractice.[13] The court reasoned that to determine whether the minister violated his "trust obligations" to the plaintiffs would require the court to "venture into forbidden ecclesiastical terrain" and inquire into "religious precepts."[14]

Then Presiding Justice Eugene F. Pigott Jr. and Justice Henry J. Scudder dissented in part, stating:

> [W]e conclude that the court erred in dismiss-

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ing the complaint against defendant [minister] insofar as it asserts a breach of fiduciary duty cause of action.…

The majority fears excessive entanglement in religion and uses that fear as a basis to deny recognition of such a breach of fiduciary duty claim in New York state. In this vein, the majority asserts that a court's task would be the impermissible one of determining whether the defendant grossly abused his pastoral role. In our view, the majority's all or nothing approach—a cleric is at all times, and for all purposes, acting on behalf of his or her religion, and therefore there can be no inquiry into his or her actions without entangling oneself in religion—is unwarranted.[15]

By yet another split decision, the Court of Appeals affirmed the Fourth Department's order and held that the complaint sounded "in clergy malpractice, which would improperly require courts to examine ecclesiastical doctrine in an effort to determine the standard of due care owed to parishioners undergoing ministerial counseling."[16] Judge George Bundy Smith dissented and stated that the plaintiffs should have been permitted to prove a claim for breach of fiduciary duty.[17] The U.S. Supreme Court denied the plaintiffs' petition for writ of certiorari.[18]

Ordained and Non-Ordained

Over the ensuing years, the courts of this state began chipping away at the foregoing precedent. Notwithstanding the fact that the Court of Appeals dismissed clergy malpractice claims in *Marmelstein v. Kehillat New Hempstead: Rav Aron Jofen Community Synagogue*,[19] and *Doe v. Roman Catholic Diocese of Rochester*,[20] the court resoundingly adopted the approach set forth in the dissenting opinions in *Langford* and *Wende*, and observed that ordained clergy members could be held liable in tort for breaching their fiduciary duties to their parishioners.[21] However, until recently, none of the published New York state clergy malpractice cases addressed whether the Establishment Clause applies equally to ordained and non-ordained members of the clergy.

In *Young v. Brown*, the Second Department addressed this question and unanimously answered it in the affirmative.[22] In *Young*, the plaintiff underwent counseling sessions with a non-ordained biblical counselor for approximately 19 months on church premises. The plaintiff alleged that the sessions eventually took on a sexual overtone. In turn, the plaintiff voluntarily ended the relationship.

The plaintiff commenced an action sounding in negligence and professional malpractice against the biblical counselor, the counselor's professional corporations, and the church. The biblical counselor and the professional corporations moved to dismiss the causes of action against them on the grounds, inter alia, that the plaintiff's claims raised entanglement concerns. The Westchester County Supreme Court granted the motion and held that the plaintiff's claims involved a nonjusticiable religious dispute because the plaintiff did not identify the nature of the counseling allegedly involved and the standards applicable thereto. The plaintiff appealed.

Although the plaintiff argued that entanglement barriers were not germane because the biblical counselor was not an ordained clergy member, the Second Department disagreed. Instead, the court unanimously affirmed the order appealed from and held that "the Supreme Court properly determined that the plaintiff failed to state a cause of action against the [biblical counselor and his professional corporations]."[23]

> The courts have undertaken the arduous task of defining the Establishment Clause's scope in sexual affair and abuse cases.

Thus, while the courts of this state have been steadfast in carving out an exception to the First Amendment prohibition against clergy malpractice cases based upon breach of fiduciary duty, which, as Justice Miller observed, "is gaining recognition throughout the country as a result of the disturbingly frequent incidence of sexual predation by clergymen against vulnerable members of their flocks," *Young* reminds us that the Establishment Clause still prohibits civil courts from hearing actions where the nature of the issues involved in any way require the interpretation of religious precepts.[24] For the very first time, *Young* further instructs us that this prohibition extends to ordained and non-ordained clergy members alike.

By effectively expanding the constitutional proscription against secular entanglement in religious beliefs, *Young* implicitly underscored the tension that the courts of this state have faced in defining the Establishment Clause's scope and application. Whether the Second Department's expansion of the anti-entanglement doctrine to non-ordained clergy members will discourage trial courts from resolving clergy malpractice disputes even where plaintiffs allege viable claims sounding in breach of fiduciary duty remains to be determined.

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1. See US Const. amend. 1; NY Const art. I, §3.
2. See US Const. amend. 1; US Const. amend. 14.
3. 4 Rotunda & Nowak, Treatise on Constitutional Law §21.3 (2nd ed. 1992).
4. *Matter of Congregation Yetev Lev D'Satmar, Inc. v Kahana*, 9 N.Y.3d 282 at 286, 849 N.Y.S.2d 463 at 466 (2007); see *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Memorial Presbyterian Church,* 393 U.S. 440, 89 S.Ct. 601 (1969); *First Presbyt. Church of Schenectady v United Presbyt. Church in U.S. of Am.*, 62 N.Y.2d 110, 476 N.Y.S.2d 86 (1984).
5. See *Marmelstein v. Kehillat New Hempstead: Rav Aron Jofen Community Synagogue*, 11 N.Y.3d 15, 862 N.Y.S.2d 311 (2008).
6. *Lightman v. Flaum*, 97 N.Y.2d 128 at 137, 736 N.Y.S.2d 300 at 306 (2001), cert. denied, 535 U.S. 1096, 122 S.Ct. 2292 (2002) (internal citations and quotations omitted).
7. *Langford v. Roman Catholic Diocese of Brooklyn*, 271 A.D.2d 494, 705 N.Y.S.2d 661 (2d Dept. 2000).
8. *Langford*, 271 A.D.2d at 494, 705 N.Y.S.2d at 662 (2d Dept. 2000) (internal citations omitted).
9. *Langford*, 271 A.D.2d at 496-497, 705 N.Y.S.2d at 663 (2d Dept. 2000) (internal citations and quotations omitted).
10. *Wende C. v. United Methodist Church*, 6 A.D.3d 1047, 776 N.Y.S.2d 390 (4th Dept. 2004), aff'd 4 N.Y.3d 293, 794 N.Y.S.2d 282 (2005), cert. denied 546 U.S. 818, 126 S.Ct. 346 (2005).
11. Although the plaintiff called the propriety of the minister's ordination into question, the trial court and the Fourth Department held that ordination is a "quintessentially religious" activity, such that imposing liability for negligent ordination would excessively entangle the court in religious affairs, in violation of the First Amendment. *Wende C. v. United Methodist Church*, 6 A.D.3d at 1053, 776 N.Y.S.2d at 395 (4th Dept. 2004).
12. *Wende C.*, 6 A.D.3d at 1050, 776 N.Y.S.2d at 393 (4th Dept. 2004).
13. Id.
14. *Wende C.*, 6 A.D.3d at 1051, 776 N.Y.S.2d at 394 (4th Dept. 2004).
15. Id. (internal citations and quotations omitted).
16. *Wende C. v. United Methodist Church,* 4 N.Y.3d 293 at 299, 794 N.Y.S.2d 282 at 285 (2005) .
17. *Wende C.*, 4 N.Y.3d at 301, 794 N.Y.S.2d at 286 (2005).
18. *Wende C. v. United Methodist Church*, 546 U.S. 818, 126 S.Ct. 346 (2005); see also *Doe v. Holy See* (*State of Vatican City*), 17 A.D.3d 793, 793 N.Y.S.2d 565 (3d Dept.. 2005); *Doe v. Holy See* (*State of Vatican City*), 17 A.D.3d 799; 793 N.Y.S.2d 571 (3d Dept. 2005), lv. denied 6 N.Y.3d 707, 812 N.Y.S.2d 443 (2006); and *Doe v. Holy See* (State of Vatican City), 6 A.D.3d 1228, 775 N.Y.S.2d 729 (3d Dept. 2004) (refusing to recognize a doctrine of "religious duress" based solely on church teachings and tenets to toll the applicable statute of limitations periods in sexual abuse cases because doing so would require the court "to venture into forbidden ecclesiastical terrain").
19. *Marmelstein v. Kehillat New Hempstead: Rav Aron Jofen Community Synagogue*, 11 N.Y.3d 15, 862 N.Y.S.2d 311 (2008) (affirming the dismissal of a congregant's breach of fiduciary duty and intentional infliction of emotional distress claims against a rabbi based upon an alleged sexual affair where the complaint failed to state a claim upon which relief could be granted).
20. *Doe v. Roman Catholic Diocese of Rochester*, 12 N.Y.3d 764, 879 N.Y.S.2d 805 (2009), rearg. denied 12 N.Y.3d 879; 883 N.Y.S.2d 173 (2009) (holding that the plaintiffs' breach of fiduciary duty claim against a priest and negligent supervision claim against diocese based upon alleged sexual relationship should have been dismissed where the plaintiffs' bare allegation that the plaintiff-wife was "a vulnerable congregant" was deemed insufficient to establish that the plaintiff-wife was particularly susceptible to priest's influence).
21. See *accord Spielman v. Carrino*, 77 A.D.3d 816, 910 N.Y.S.2d 105 (2d Dept. 2010), lv. denied 17 N.Y.3d 703, 929 N.Y.S.2d 94 (2011) (reversing the denial of the defendants' motion to dismiss the plaintiffs' vicarious liability claims against a church and another individual based upon breach of fiduciary duty, intentional infliction of emotional distress, and negligent supervision based upon alleged secret, sexual affairs).
22. *Young v. Brown,* 113 A.D.3d 761, 978 N.Y.S.2d 867 (2d Dept. 2014).
23. *Young*, 113 A.D.3d at 761-762, 978 N.Y.S.2d at 868 (2d Dept. 2014).
24. *Langford*, 271 A.D.2d at 496, 705 N.Y.S.2d at 663 (2d Dept. 2000) (internal citations omitted).

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