

Church Discipline and the Courts

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Concern abounds in the Christian community today in ways that would have been unheard of several decades ago in America. Until recent years churches had little to fear from the civil authorities, church members, or their local communities in regards to legal matters. The church was viewed as sacrosanct in American culture. The local church building was a place of refuge that provided safety for persons pursued by civil authorities. Other than a few instances regarding property disputes, parishioners, for the most part, would not consider taking their pastor, church board, or local church body to court. Clergy were highly respected members of the community and charges against them were viewed as highly suspect. If churches were careless in caring for the physical premises, they did not need to worry about being sued by members or visitors who happened to be injured. Churches that exacted discipline against its members had no reason to believe that the member would, in turn, sue them for such things as defamation, infliction of emotional distress, or invasion of privacy. None of these matters is the case any longer in America. Lawsuits against churches are on the rise and there appears to be no end in sight to their proliferation.¹

Church Discipline in the History of the Church

Jesus' Teaching on Discipline in the New Testament

The subject of church discipline first appears in the gospel according to St. Matthew in a conversation between Jesus and

His disciples. Jesus, having spoken earlier (Matt 16:17-19) of building a church,² then proceeds in 18:15-20 to explain what kind of discipline the church is to use when disruption occurs in the community of believers. Certainly the Jewish community from the time of Moses had judged issues and persons by the law,³ so this was not unfamiliar to the disciples of Jesus. The question for them would be whether Jesus had instituted a new order in this area.

Practice of Church Discipline in the New Testament

One may find only a few examples of church discipline in the New Testament.⁴ Paul and John both speak of the need to discipline members and leaders who seek by their teachings and actions to lead the faithful of God astray (3 John 9-10). Paul, in 1 Corinthians, sets forth several sins for which believers should be shunned by the Christian community, namely, immorality, covetousness, idolatry, reviling, drunkenness, and swindling.⁵ The contemporary church rarely practices discipline for such matters, and sexual immorality tends to be the cardinal, if not sole, spiritual offense sufficiently serious to incur this severe action. Such a position is out of harmony with the church in the New Testament, where disciplinary action might occur for violations in four different categories: private and personal offenses that violate Christian love, divisiveness and factions that destroy Christian unity, moral and ethical deviations that break Christian standards, and teaching false doctrine.⁶

The Relation Between Biblical Teaching and the Legality of Church Discipline Today

A local church that seeks to implement the biblical obligation of discipline should not do so haphazardly or ignorantly. It should know the necessity, purpose, causes, and methods employed in Holy Scripture, so that it may be in harmony with the commands of Christ and in concert with the historic perspectives of the church. Moreover, endeavoring to anchor one's practices in the biblical text at each juncture of the disciplinary action provides further protection when seeking to make a first amendment defense.

Necessity of Church Discipline

The practice of church discipline flows from the commands of the Lord and should not come from a personal or corporate desire for vengeance. Jay Quine pointedly says,

Many passages in Scripture call for discipline of erring church members. These passages lead to the inevitable conclusion that church discipline is as much the function of a local church as the preaching of the "pure doctrine of the gospel," and "the administration of the sacraments as instituted by Christ." Discipline in the church is not optional but mandatory—it is an absolute necessity if we are . . . to be obedient to the Scriptures.

Matthew 18:15-20 and 1 Corinthians 5:1-5 clearly proclaim this necessity. In view of the procedure in Matthew 18:15-20 with the present imperative ("go"), church discipline is not merely suggested; it is required.⁷

Only with a sense of biblical justification and mandate may a church both properly and boldly maintain the loving discipline that will promote the purity of the body of Christ and bring honor to her

Lord. In the face of possible legal ramifications in our current litigious society, only a strongly held biblical conviction will spark and sustain courage to press on in this mark of a biblical church.

Purpose of Church Discipline

Contrary to what might be perceived by an ill-informed public, church discipline is not, by intent, a destructive act; grace is part and parcel of discipline. As Luis Palau indicates, church discipline "is not carried out in cruelty to destroy, but rather in love to produce conviction, sorrow, repentance, and restoration."⁸ Consequently, church discipline has as its goal the restoration of sinning church members to a spiritually healthy condition and back to the fellowship of the believing community, whose purity standards had been violated and whose good reputation had been stained by their sin. Moreover, church discipline serves as a deterrent to other church members from falling into grievous sins.⁹

Causes of Church Discipline

The New Testament does not possess a comprehensive list of sins for which church discipline is to be performed. Both Jesus and Paul speak in general terms of sins warranting church discipline. At times, however, Paul does give certain specific sins that must be addressed by the church.¹⁰ Quine elucidates,

. . . it appears that to a great extent the application of the requirement for church discipline is up to the local church. Jesus mentioned only general causes, and the specific causes referred to by Paul are not specific as to quality, quantity, or seriousness. The local assembly is apparently given latitude to decide when discipline is necessary. This seems right, since it is they who will

know the seriousness, frequency, and potential hazard of the offense. However, the lack of specific parameters can make it difficult for a local church to demonstrate legally that there was no caprice or illegitimate motive involved. Since disciplined members have become more litigious, the fact that Scripture gives local churches broad power must be explained to all members.¹¹

Methods of Church Discipline

The Scripture provides some specific information concerning the method of church discipline. Following the biblical method is both faithful to Scripture and also provides better protection for the church practicing discipline. The church demonstrates sincerity of belief when it reveres and practices the teachings of Scripture.¹² Moreover, this *ordered* and *cautious* procedure demonstrates fairness by providing due process in which the accused is given adequate notice and hearing within the church body, similar to what is practiced in the courts of the land today. A court listening to a complaint from a litigating member should respond positively to such use of due process by a local church. The Bible outlines such a due process in Matthew 18 where it gives four separate steps for disciplining a member: (i) private correction; (ii) group correction; (iii) public correction; and (iv) public exclusion.¹³

Historical Perspectives of Church Discipline

Church discipline in the early days of the Christian church is especially observed in the Donatists, who required that church members be pure and unwavering in their commitment to Christ.¹⁴ Augustine responded to these perspectives with a doctrine of two churches, one in which the church was pure and invis-

ible and another that was visible and not entirely pure. By means of this view he brought some balance to discipline:

With this view of two churches, Augustine sought to provide some balance in discipline. The church would strive for purity, by excluding obvious and gross sinners, but would recognize that not all sins are known and that even known sins must be dealt with in a redemptive manner. This was considered possible through formulas for repentance, especially acts of penance.¹⁵

During the medieval period, it was common for membership in a church to be based on geographical considerations, rather than personal commitment to Jesus.¹⁶ This practice changed during the Reformation. Evangelical churches, following the Reformation's lead, made one's personal confession in Christ the basis for church membership.

After joining a church, members are generally held to certain doctrinal and moral standards to remain in "good standing." This standard may provide help to a local church exercising discipline on a "erring" member:

If it is understood from the beginning of membership that the discipline of a member may include public expulsion, the church is ethically and probably legally secure in the practice of discipline against anyone who complains or who brings litigation against the church.¹⁷

This general rule may be compromised through certain actions of the church, as discussed below.

Contemporary Legal Perspectives on Church Discipline *Governmental Non-Interference with Religion*

The intent of the structure of American government, and the first amendment in particular, is that neither the state nor the church should dominate the other. Though individuals who belong to religious entities have the right to influence the government, as an institution, a church is not to exercise any authority over the state. On the other hand, the government may exercise its authority over individuals in regards to taxes and the use of police power but the church is immune from governmental action.¹⁸ There are times, however, in which the institutions of government and church intersect; they were never intended to be absolutely non-communicative with each other, nor was there to be a high and impregnable wall dividing them, as defined by some earlier court decisions.¹⁹ The government may perform acts that benefit the church, if done in a non-preferential manner.²⁰ The church may encourage involvement in the political process by individual members as long as it does not seek to influence them toward particular candidates.²¹

General Manifestations of Prohibitions in Adjudication of Religious Matters

Until recently, these principles of church and state were relatively stable in American constitutional law. The courts tended to stay out of intra-church disputes due to the protection for religion found in the First Amendment, which provides for the free exercise of religion and prohibits the government from becoming entangled with the institutional church.²² In certain instances state courts have been willing to enter into disputes regarding church schisms, particularly in property disputes, but unwilling to intervene in matters concerning ecclesiastical ques-

tions.²³ The United States Supreme Court has consistently and assiduously avoided this collateral jurisdiction.²⁴ Such caution on the part of the Supreme Court protected the church from intrusion into its internal affairs, including discipline, by secular powers.

At least three lines of analysis have been offered in judicial cases relating to churches and the doctrine of ecclesiastical abstention. First, it has generally been recognized that the government, in any form, is prohibited from inquiring into the validity of a religious assertion or belief.²⁵ This is true regardless of how that inquiry is couched. It may not inquire into the matters of truth or falsity,²⁶ reasonableness,²⁷ verity,²⁸ correctness,²⁹ or worthiness³⁰ of religious claims. The court has been especially insistent that it has no jurisdiction in doctrinal disputes. This insistence is well-enshrined in the famous statement in *Watson v. Jones* that “[t]he law knows no heresy, and is committed to the support of no dogma, the establishment of no sect.”³¹

Second, a governmental entity may not pursue an independent interpretation of religious texts or tenets. At the very least, the government may not form an authoritative declaration or determination of their meaning.³² Courts have said that they are “not arbiters of scriptural interpretation,”³³ and that it is not the “province of government officials or courts to determine religious orthodoxy.”³⁴

The third prohibition has been called the ecclesiastical abstention doctrine.³⁵ Under this doctrine “the government may not inquire into or review the internal decision making or governance of religious entities, especially those of a hierarchical nature.”³⁶ As Carl Esbeck stated it: “The rule of judicial deference is that

civil courts are to do no more than determine the highest ecclesiastical tribunal with jurisdiction over the dispute, ascertain the decision of the tribunal, and defer to its resolution of the dispute."³⁷

In an important decision at the end of the nineteenth century, in *Order of St. Benedict v. Steinhauser*, the U.S. Supreme Court awarded a monk's assets to the Order over against the claims of the executor of the monk's estates because of the voluntary association of the monk within the Order and because such actions by the Order were not contrary to public policy.³⁸ Dean Kelley speaks of the court's analysis,

Rather than leaving the matter here, the court went on to link this holding with [previous like decisions], cementing a firm recognition by the courts over a century of the rights of religious bodies to choose for themselves unconventional forms of organization and operation that—so long as voluntary—would not be disturbed by civil law.³⁹

In property disagreements the court tends to defer to the particular form of government generally exercised in American religious polity, namely, congregational or hierarchical government. It tends to let the respective ecclesiastical authorities settle the question, or the court may rule that the issue be sent back to these parties.⁴⁰

Consequently, as the above case law demonstrates, the issue of church discipline will receive a better hearing in a court of law if the discipline is firmly based on theological and biblical reasoning. This deference to the church, however, is dependent on whether the claimants can demonstrate invasion of privacy, defamation, or outrageous conduct, which are questions of considerable

importance in current law.

Theories of Law that May Imply Liability and Responses to Them

Recently, three different legal theories, namely, invasion of privacy, defamation of character, and infliction of emotional distress, have been used to strip the church of First Amendment and case law protections. Other causes of action, such as interference with contract or alienation of affection, could also be used when the circumstances warrant. Churches should be aware of these causes of action in order to exercise discipline in a wise manner that precludes successful litigation against them.

Invasion of Privacy

Richard Hammer provides a useful statement of the nature of invasion of privacy at law, when he says,

One who gives publicity to the private life of another is subject to liability for invasion of his privacy if the matter publicized is not of legitimate concern to the public. The key elements of this form of invasion of privacy are (1) publicity (2) of a highly objectionable kind (3) given to private facts about another. Publicity is defined as a communication to the public at large, or to so many persons that the matter is substantially certain to become one of public knowledge. Thus, it is not an invasion of privacy to communicate a fact concerning another's private life to a single person or even to a small group of persons. But a statement made to a large audience, such as a church congregation, does constitute "publicity."

The facts that are publicly disclosed must be private. There is no liability if one merely repeats something that is a matter of public record or has already been publicly disclosed. Thus, a minister who makes reference in a sermon to the prior marriage or prior criminal acts of a

particular church member has not invaded the member's privacy; such facts are matters of public record. Many other facts—such as, dates of birth, military service, divorce, licenses of various kinds, pleadings in a lawsuit, ownership of property, and various debts—are matters of public record. References to such facts will not invade another's privacy.⁴¹

Jay Quine gives a slightly different presentation of the nature of invasion of privacy: "To prove a legally culpable invasion of privacy the plaintiff must establish that (a) there was a public disclosure, (b) of private facts, (c) that were highly offensive to a reasonable person, and (d) that were of no legitimate concern to the public."⁴² Since the biblical text moves discipline beyond personal and small group confrontation to "tell it to the church," what occurs would qualify as an invasion of privacy under either Hammer's or Quine's definitions. But what about the elements of "offense" and "public disclosure"? Quine elucidates on this:

A plaintiff must also show that the public disclosure of private facts was "highly offensive to a reasonable person"—a culturally sensitive determination made by evaluating the content and environment in which the disclosure was made. It must further be shown that the disclosure was not of legitimate concern to those who heard. These determinations are made on a case-by-case basis, which gives rise to the possibility of defense against this claim.⁴³

Furthermore, the church may defend its actions by appealing to privileged communication against invasion of privacy:

The common interest of members of religious . . . associations, whether incorporated or unincorporated, is recognized as sufficient to support a privilege for communications

among themselves concerning the qualifications of the officers and members and their participation in the activities of the society. This is true whether the defamatory matter relates to alleged misconduct of some other member that makes him undesirable for continued membership, or the conduct of a prospective member.⁴⁴

Caution must be exercised in setting forth this privilege, as Quine says,

Though a church may utilize this privilege, it is limited to actions that are not a result of fraud (motivated by a secular purpose), or malice (motivated by personal vengeance). Only action resulting from religious conviction is within the scope of this defense.⁴⁵

One important defense to a disciplined member's lawsuit against a church is the contract theory of consent. The individual may waive the right of privacy explicitly or implicitly.⁴⁶ Under contract law, consent to discipline is either explicit (especially if a document expressing consent to submit to discipline is signed in joining) or implicit (by the very fact of knowingly entering into the relationship with the church) when a person joins a church. "By becoming a member an individual approves the rules provided by the government of the society and agrees to be governed by its usages and customs."⁴⁷ The reader must be aware, however, that the association with the church is voluntary, and the consent remains only as long as the member is willing to continue membership in the church. As I have explained elsewhere:

In the United States, no one is compelled to ally himself, or to remain identified, with any religious organization, but when he does join a church and becomes a member of that ecclesiastical body, he voluntar-

ily surrenders his individual freedom to that extent.⁴⁸ As a general rule, the rights and obligations of members of a religious society are governed by the laws of that society. Every person entering into a religious society impliedly, if not expressly, covenants to conform to its rule and to submit to its authority and discipline. Who are members of a religious society must be determined by reference to the rules, constitution, or by-laws of the society, and by reference to the statutes governing such bodies. The agreement of the parties determines the requirements of membership in a religious society. This includes financial support in some form where the religious society requires it, generally a profession of faith, adherence to the doctrines of the church, and a submission to its government.⁴⁹

In conclusion, whether a case qualifies as an invasion of privacy of a “highly objectionable kind” or is “highly offensive to a reasonable person” depends on how the leadership deals with the offending party under discipline and how it is presented to the church.⁵⁰ Whether infringement of privacy is involved also depends on how the information is given to the church body (how specific and how private are the facts) and whether the church membership (the public) has a legitimate right to know. When a person is excluded from church membership, it may not be possible to avoid appearing offensive. If the exclusion is carried out with due process and the right “spirit,” it may prevent a reasonable person from taking offense. Moreover, the biblical requirements to speak to the church (the public in the law since it is before more than a small group) puts one at risk of violating the element relating to “no legitimate concern to the public.” The risk will be lessened if the church is able to trust the leadership to know the specific details. The church need

only be given general information to decide whether to exclude a member. In addition, the vulnerability of the church may be limited, depending on what degree of consent was expressed or implied by the member in joining the church.

Defamation

Defamation is a legal term which covers either verbal (slander) or written (libel) unprivileged communication if “it tends to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.”⁵¹

Defamation cannot be successfully claimed if the communication is, in fact, true. No matter how horrible a statement is made against a person, if the statement is true, then there is no defamation. Truth is an absolute defense: “Truth of a defamatory statement of fact is a complete bar to recovery not only in an action for harm caused to another’s reputation, but also in an action for nominal damages only, for the purpose of vindicating the plaintiff’s reputation by a verdict that brands the defamatory matter as untrue.”⁵² As Quine explains,

Horrible statements made public cannot be held to be defamatory if true. Even false statements do not automatically result in a successful lawsuit, for a church and its leadership still have the privileged communication defense. Yet this defense is limited. . . . If malice is found, the defendant has gone beyond the privilege.⁵³

Infliction of Emotional Distress

“Infliction of emotional distress” or “outrage” is the newest of the three legal causes of action. Outrage is defined as “[o]ne who by extreme and outrageous conduct intentionally or recklessly causes

severe emotional distress to another is subject to liability for such emotional distress. . . .”⁵⁴ “Extreme and outrageous conduct” occurs

where conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. . . .

The liability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions or other trivialities.⁵⁵

Not only must the conduct be outrageous but the plaintiff must also have suffered “emotional distress.” This has been defined in a number of ways, including “all highly unpleasant mental reactions such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry, and nausea. It is only when it is extreme where liability arises.”⁵⁶

When a church is involved in the practice of discipline, care should be taken to avoid falling within the parameters of “outrage” as defined above. This may be accomplished by avoiding even the appearance of vindictiveness or unreasonableness. The unruly member must be treated gently and patiently (Gal 6:1).

The Constitutional Foundation for Ecclesiastical Immunity from Collateral Civil Jurisdiction in Inter-Church Disputes.

The most explicit constitutional basis that prohibits the intrusion of the civil courts into juridical acts of the church is the First Amendment to the United States Constitution. The pertinent part reads, “Congress shall make no law respecting the establishment of religion or prohibit-

ing the free exercise thereof. . . .”⁵⁷ It is not within the scope of this article to discuss the meaning and implications of that important amendment in any depth.⁵⁸

The two clauses of the First Amendment are both intended to protect religious liberty. The first prevents the establishment of a state religion, similar to the Church of England, while the second protects an individual’s right to believe and practice his religion free from state interference. The establishment clause has been interpreted by one court to be an absolute bar to prosecution for church discipline unless the church’s activity is clearly a “threat to public safety, peace, and order,” or some “grav[e] abuse, endangering paramount interests, [which] give[s] occasion for permissible limitation.”⁵⁹ Another court applied that standard to a church discipline case involving shunning:

Harms caused by shunning (are) clearly not the type that would (require) the imposition of tort liability. Without society’s tolerance of offenses to sensibility, the protection of religious differences mandated by the First Amendment would be meaningless.⁶⁰

The free exercise clause allows the religious person the freedom to make statements that reflect religious values without intervention from the state. For example, one court said of this right of religious speech, “In the present case, this court would be violating defendant’s right to free exercise of religion if we were to find defendant’s statements actionable under state defamation law.”⁶¹

Moves Towards Lowering the Bar in Tort Cases Against Religious Entities

The generally serene situation enjoyed

by the church since its rooting in American soil has been considerably shaken. The church is now vulnerable in ways it has never been before. Due to increasing litigation against churches for a variety of alleged tort and contract violations, the mystique of the church has been lost. Judges, juries, and possible litigants have come to accept the notion that churches are as ripe for lawsuit liability as any other entity in society. The lack of reluctance to sue churches, pastors, leaders, and church members arose because churches have lost their revered status in today's culture. Idleman gives several reasons why this is so. He first comments,

Regardless of its origins, this new willingness to bring suit is important in at least two respects. First and most obvious, it increasingly places the relevant issues—such as reasonableness of conduct, potential liability, and deterrence—before the legal system, and specifically before judges and possibly juries. Second, it is self-generating: the perceived willingness of some victims to bring suit may prompt still others themselves to bring suit, especially if plaintiffs do periodically prevail.⁶²

The second reason mentioned by Idleman is that the media have been particularly interested in covering clergy and church failings. Instead of relegating them to the usual religion section of the papers, the media has placed them on the front page.⁶³

Third, the public has increasingly developed sympathy for victims of clergy exploitation. This bleeds over into perceived victimization of an individual whose morals or ideologies are called into question by a group of Christians. The relativistic culture does not concur with the church's moral and doctrinal standards. Instead, it views the church as

intolerant.⁶⁴

Last of all, there is the undervaluation of the significant First Amendment issues that attach to a tort action:

Few media reports address, with any sensitivity or sophistication at least, the many potential constitutional or theological aspects of such tort actions, focusing instead upon the grave, sometimes lurid nature of the allegedly inflicted or, where liability is imposed, upon the size or impact of the verdict. Concomitantly, organizations such as the American Civil Liberties Union that normally might alert the media to the constitutional dimensions of legal controversies seem, for whatever reason, to be largely if not entirely absent from the picture. The result is that the public appears to remain unaware of, and in turn unconcerned about, the significant First Amendment principles implicated by the adjudication of certain tort actions against religious defendants.⁶⁵

Earlier Attempts

An early case for defamation was filed against a pastor in the mid-19th century because during a worship service he announced that a woman had violated the seventh commandment:

The church does now as always bear its solemn testimony against the sin of fornication and uncleanness, as an unfruitful work of darkness, eminently dishonorable to the God of purity and love; polluting to the souls of men and fearfully prejudicial to the welfare of society and the world.⁶⁶

The Massachusetts Supreme Court ruled that the pastor's public reading of his statement was privileged and dismissed the claim with these words: "Maintenance of church order and discipline are amongst the church's long recognized powers, including hearing

complaints of misconduct and administering punishment if found to be true.”⁶⁷ Chief Justice Shaw, continues in *Farnsworth*,

[E]stablished by long immemorial usage, churches have authority to deal with their members for immoral and scandalous conduct; and for that purpose to hear complaints, to take evidence and to decide; and, upon conviction, to administer proper punishment by way of rebuke, censure, suspension, and excommunication. To this jurisdiction, every member, by entering into this church covenant, submits, and is bound by his consent. . . . The proceedings of the church are quasi-judicial, and therefore those who complain, or give testimony, or act and vote, or pronounce the result, orally or in writing, . . . are protected by the law.⁶⁸

Recent Cases

Several cases have dealt with the limits of tort action against a church,⁶⁹ but only two recent cases that have reached different conclusions will be considered. First, we will examine the case of *Guinn v. Church of Christ of Collinsville*,⁷⁰ where the Oklahoma Supreme Court recognized some legitimacy to the charge that the church had violated privacy in a disciplinary action. Next we will look at *Paul v. Watchtower Bible and Tract Society of New York*, where the federal district court and appeals court both sided with a local church.

Guinn v. Church of Christ of Collinsville

The case of *Guinn v. Church of Christ of Collinsville*, in the late 1970s in Oklahoma, was a sensational trial balloon for the question of constitutional privilege. Ms. Guinn was discovered to be involved in immoral activity in contravention of the

moral standards of the Collinsville church. The plaintiff was aware of the church’s disciplinary practices, which it followed meticulously according to biblical standards as it understood them and according to guidelines it had established. Moreover, she had actually seen the disciplinary procedure used before. Nevertheless, at first she lied about the affair. Then, when approached by the elders of the church, she agreed to stop the sinful activity, but failed to do so. The church was left with no choice but to begin disciplinary action against her. She was then counseled by her attorney to send a letter to the church withdrawing her membership. The church responded by excommunicating her in a public meeting.

At trial, the elders and the church were charged with invasion of privacy and outrage. The church was found guilty. On appeal the Oklahoma Supreme Court dismissed the church’s claims of privilege and consent, denying judicial abstention: “Because the controversy in the instant case is concerned with the allegedly tortious nature of religiously-motivated acts and not with their orthodoxy vis-à-vis established church doctrine, the justification for judicial abstention is nonexistent and the theory does not apply.”⁷¹ It appears that the court was especially concerned that discipline occurred after she had terminated her membership:

When parishioner withdrew her membership from the Church of Christ and thereby withdrew her consent to participate in a spiritual relationship in which she had implicitly agreed to submit to ecclesiastical supervision, those disciplinary actions thereafter taken by the Elders against parishioner, which actively involved her in the church’s will and command, were outside the purview of the First Amendment

protection and were proper subject of state regulation.⁷²

Jehovah's Witnesses' religious faith.⁷⁷

Quine properly sees the potential ramifications from such legal reasoning:

If church discipline following biblical mandates, without malice on behalf of the church leadership, consistent with church policy, following prior incidents and policy, and with implied if not explicit prior consent by the disciplined member is not considered a doctrinal or ecclesiastical matter warranting constitutional privilege, then what action in church discipline matters will courts allow? If all a member about to be disciplined need do to sustain a lawsuit is state that he or she withdraws his or her membership, then the courts have essentially prohibited discipline by church and have effectively decided the ecclesiastical merits of discipline. The Oklahoma Supreme Court effectively decided that Matthew 18 and the other discipline passage cannot be practiced by church in its state.⁷³

Paul v. Watchtower Bible and Tract Society of New York

The important case of *Paul v. Watchtower Bible and Tract Society of New York*⁷⁴ in the state of Washington, which followed *Guinn*, provides some hope for better decisions on the matter of church discipline.⁷⁵ On appeal the Ninth Circuit Federal Court of Appeals agreed with the lower court in saying, "When the imposition of liability would result in the abridgement of the right to free exercise of religious beliefs, recovery in tort is barred."⁷⁶ The court then added,

Imposing tort liability for shunning on the church or its members would in the long run have the same effect as prohibiting the practice, and would compel the church to abandon part of its religious teachings. In sum, a state tort law directly restricts the free exercise of the

Quine observes, in reference to the reasoning of the court, "It is significant that this court also determined that this action of discipline by a church did 'not constitute a sufficient threat to the peace, safety, or morality of the community to warrant state intervention.'"⁷⁸

The Ninth Circuit court seemed to be in concert with the opinion of Justice Thorton, in *Chase v. Cheney*, where he said, "A church without discipline must become, if not already, a church without religion."⁷⁹

Conclusions from the Case Law

There are several other cases in which the courts have agreed or disagreed with *Guinn* and *Paul*.⁸⁰ The case law at present is not determinative of how the law is developing in regard to church discipline. Due to this, it is important that churches use care in exercising discipline. What follows are some suggestions on how a church might avoid litigation.

Suggestions to a Church Desiring to Practice Biblically Mandated Discipline *Use a Biblical Approach*

As discussed above, the way in which a member should be disciplined by a church is presented in the New Testament and should be followed carefully and with gentleness. A sin by a Christian should be kept as quiet as possible for the sake of the person's, as well as the church's, reputation. There is no so-called public's right to know in the Christian church. Only when there is no repentance, and thus no forsaking of sin, should it be pursued to the next level. Rashness and harshness do not further the cause of repentance or res-

toration. Long suffering due process may succeed where a judgmental spirit may fail. When all means to bring the offending party to repentance have failed, however, the matter should go to the church for the maintenance of church purity. If discipline is pursued biblically, the ultimate purpose is restoration.

Prepare Church Documents to Maintain Biblical Fidelity

A church covenants together under biblical standards and the lordship of Christ; it is not merely a social club or society or weekly get-together. The moral and doctrinal purity of the church should be carefully, seriously, and prayerfully thought through and put into a clear, comprehensive form in church documents so that the views expressed are not mere preferences, but are, in fact, an attempt to be faithful to the Lord Jesus Christ. A sincerely held religious belief is the first test not only in a defense of free exercise of religion but is also the first test in one's fidelity to God.

Prepare Church Documents to Defend a Legal Challenge

The documents that govern a church, including procedures for disciplining a sinning member should be clear and understandable. Moreover, all members should be required to read and sign these documents. If this is so, the disciplined member cannot later plead ignorance. The documents should include, at minimum, the basic beliefs and doctrinal tenets of the church, and the basic lifestyle expected of the member.

Prepare Church Members for Church Discipline

All current members, and any new members added to the church, should

receive the documents. Moreover, all members, especially new members, should sign a statement indicating their understanding of the moral, governmental, and doctrinal positions of the church, that they agree with these positions, and that they will submit to the spiritual authority of the church and its leadership. This should be signed by the member and placed in the church files.

Minimize the Knowledge and Repercussions

Although the elders of the Collinsville church apparently desired to insure that Ms. Guinn would not attempt to join other Church of Christ congregations upon leaving their church under discipline, this pro-active approach is not the best course of action. The discipline should be restricted to the local church in which the offense occurs and the airing of the reasons for discipline should be as gentle and circumspect as possible. If possible, any specific details should occur in a small group of leadership and only general charges brought before the church. In this case, the church body will have to trust the maturity and discretion of the leadership, even if church members do not know all of the details of the facts.

Should the disciplined member attempt to move to another Christian church and the church is contacted about the member, the response must be cautious but truthful. Simply indicating that the member was under discipline or did not leave in good standing is sufficient; embellishment or negativism will backfire on the church. Too much detail may lead to successful litigation against the church.

Be Consistent

It is absolutely necessary that the

church be consistent in its application of discipline. If member A has committed the same sin as member B, then the discipline for A and B must be administered in the same way. Obviously there can be extenuating circumstances, but there must be consistency. If a church does not follow a consistent procedure, one can expect member A “to complain of inconsistency, arbitrariness, and unfairness and these are the types of allegations which will usually support a lawsuit.”⁸¹

Follow the Church's Standards Consistently

The church should practice what it preaches. If the members do not do so, an argument can be proffered that the church's lack of enforcement of a particular tenet or lifestyle is some form of an implied waiver. The church's consistent practice would avoid any type of acquiescence argument that a member under discipline might make.

Use Mediation and Binding Arbitration if Possible

As I have said elsewhere,

If consistent with the doctrines of the religion, adopt a procedure that allows for disputes to be settled only in the church through binding mediation or arbitration. Explain to new members why it is important that the church handle the disputes of members within the church, and not before a secular tribunal. As part of the membership process have the new members sign a written document agreeing that in any disputes, they agree to binding arbitration in lieu of a lawsuit. Be sure there is a process outlined in the written documents signed by the new member explaining how mediators and arbitrators will be picked, how many, and from what type of organization.⁸²

Be Up-Front and Honest

People can overlook a mistake but have little sympathy with cover-ups or lies. Never weaken or compromise your position by attempting to cover up an error. If a mistake is made, admit it, and then correct it. Be candid with church members who may be potential plaintiffs against the church; if a mistake occurred, explain what happened. However, do not expose yourself or the church to a lawsuit by admitting to a mistake that you personally did not make.⁸³ Remember, “A soft answer turns away wrath.”

Consult an Attorney

Although this is mentioned last in the list, it should be high in priority. As leaders in a local church, you should never presume to know the course of action in a matter in which you or the church may be culpable. Too often lawyers are consulted only after considerable, and often irreparable, damage is done to the case. If possible, the church should have an attorney on retainer who may be consulted about questionable issues and events. Be sure to provide the attorney all relevant documents of the church, such as by-laws, doctrinal statements, and particularly any documents giving disciplinary procedures. Before any oral or written communication is given to the member under discipline, the attorney should thoroughly review it.⁸⁴

ENDNOTES

¹ See my *Christian Ministries and the Law* (Grand Rapids: Kregel, 1999) for chapters regarding such issues as the clergy and political activity, tort actions against churches, taxation questions, estate planning for the church, and whether Christians should sue other Christians.

²Matthew 16:19 may imply the kind of empowerment for church discipline that is later discussed explicitly in Matthew 18:15-20, when Jesus gives to Peter (and later to the remaining apostles) the keys of the kingdom. However, these keys may only refer to opening the kingdom to all peoples through the proclamation of the gospel (Jews in Acts 2; 3; Samaritans in Acts 8:14-17; Gentiles in Acts 10).

³Examples of community discipline within Israel includes Yahweh's discipline of Israel concerning the golden calf (Exod 32:19-29); the breaking of vows (Lev 26:14-46; Deut 17:2-7; 29:25-28; 31:16-17; Judg 2:20-23). This discipline related to the underlying principle of Yahweh's holiness enunciated in Leviticus 19:2. See Lynn R. Buzzard and Thomas S. Brandon, Jr., *Church Discipline and the Courts* (Wheaton, IL: Tyndale House., 1986) 37-38. Buzzard and Brandon's book is an excellent resource for the spectrum of questions on the issue of church discipline.

⁴The most notable and early example of discipline in the early Christian church is that of Ananias and Sapphira. God directly intervened and the believing community took no action, except that Peter, as the leader of that community at that period, unambiguously pronounced God's judgment on this husband and wife (Acts 5:1-11).

⁵See Ted G. Kitchens, "Perimeters of Corrective Church Discipline," *Bibliotheca Sacra* 148 (April 1991) 203-204, where he seeks to establish a more expansive and regular exer-

cise of discipline within the church to maintain the spiritual mission and reputation of the church.

⁶Kitchens, 211-212.

⁷Jay A. Quine, "Court Involvement in Church Discipline," Part 1 *Bibliotheca Sacra* 149 (Jan 1992) 60. The author would especially like to state appreciation to Jay Quine, a former student of mine at Dallas Seminary, for his two-part article on church discipline, which was most helpful in the preparation of this article.

⁸J. Carl Laney, "The Biblical Practice of Church Discipline," *Bibliotheca Sacra* 143 (Oct. 1986) 360-361, quoting Luis Palau, "Discipline in the Church," *Discipleship Journal* 3 (1983) 18.

⁹See Quine, 61-62 for fuller development of these purposes and Laney, 356-357 for an exegetical treatment of some biblical texts relating to the purposes of church discipline.

¹⁰See *ibid.*, 63-65 for a discussion of the general and specific reasons for which discipline is to be undertaken.

¹¹*Ibid.*, 65. "In the Reformation, Luther threatened to excommunicate a person who intended to sell a house for 400 guilders that he had purchased for 30. Luther suggested 150 guilders and labeled the offender as one in need of discipline because of unbridled greed." H. Newton Malony, Thomas L. Needham, and Samuel Southard, *Clergy Malpractice* (Philadelphia: Westminster Press, 1986) 201, quoting Ruth Gote, *Wie Luther Kirchengzucht Ubte* (Göttingen: Vandenhoeck & Ruprecht, 1958) 110.

¹²A sincerely held religious belief is an important ingredient for free exercise claims on the part of a defendant and the first test used by a court in determining whether a free exercise defense is triggered. The other two tests relate to whether the state has a compelling interest in burdening this sincerely held belief, and whether the state has burdened that belief in the least drastic or restrictive manner. *Wisconsin v. Yoder*, 406 U.S. 205 (1972), *Sherbert v. Verner*, 374 U.S. 398 (1963). See John Eidsmoe, *The Christian Legal Advisor* (Milford, MI: Mott Media, 1984) 152-160.

¹³Laney labels these as private reproof, private conference, public announcement, and public exclusion. Laney, 358. See Laney, 358-362, and Quine, 65-67, for a fuller discussion of these steps of discipline.

¹⁴Malony, *et al* 80. See also for a discussion of early Donatism by Bengt Häggglund, *History of Theology*, trans. Gene J. Lund (Saint Louis: Concordia, 1968) 124-128, and Geoffrey W. Bromiley, *Historical Theology: An Introduction* (Grand Rapids: Eerdmans, 1978) 63-64.

¹⁵Malony, *et al* 81.

¹⁶*Ibid.*

¹⁷*Ibid.*, 82.

¹⁸See H. Wayne House, ed., *The Christian and American Law* (Grand Rapids: Kregel, 1998) 109-174.

¹⁹H. Wayne House, "A Tale of Two Kingdoms: Can There be Peaceful Coexistence of Religion with the Secular State?" *Brigham Young University Journal of Public Law* 13 (1999) 264-271.

²⁰Robert L. Cord, "Church-State Sepa-

- ration: Restoring the 'No Preference' Doctrine of the First Amendment,' *Harvard Journal of Law & Public Policy* 9 (Winter 1986) 129-172; and, in general, *ibid.*, *Separation of Church and State: Historical Fact and Current Fiction* (New York: Lambeth Press, 1982).
- ²¹See House, *Christian Ministries and the Law*, 165-172.
- ²²House, "A Tale of Two Kingdoms," 251-264.
- ²³Robert T. Miller and Ronald B. Flowers, *Toward Benevolent Neutrality: Church, State, and the Supreme Court*, 5th ed. (Waco, TX: Baylor University Press, 1996) 1:531.
- ²⁴*Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1871).
- ²⁵Scott C. Idleman, "Tort Liability, Religious Entities, and the Decline of Constitutional Protection," *Indiana Law Journal* 75 (Winter, 2000) 219, 223.
- ²⁶*Sherbert v. Verner*, 374 U.S. 398, 407 (1963).
- ²⁷*Callahan v. Woods*, 658 F.2d 679, 685 (9th Cir. 1981).
- ²⁸*United States v. Ballard*, 322 U.S. 78, 86 (1944).
- ²⁹*Smith by Smith v. Board of Educ.*, 844 F.2d 90, 93 (2d Cir. 1988).
- ³⁰*Kaplan v. Hess*, 694 F.2d 847, 851 (D.C. Cir. 1988).
- ³¹*Watson v. Jones*, at 728.
- ³²Idleman, 223.
- ³³*Thomas v. Review Bd.*, 450 U.S. 707, 716 (1981).
- ³⁴*Teterud v. Burns*, 522 F.2d 357, 360 (8th Cir. 1975).
- ³⁵See Paul J. Morken, "Church Discipline and Civil Tort Claims: Should Ecclesiastical Tribunals Be Immune?" *Idaho Law Review* 28 (1991/1992) 93-165; also see *Jones v. Wolf*, 443 U.S. 595, 602 (1979).
- ³⁶Scott Idelman, 224.
- ³⁷Carl H. Esbeck, "A Restatement of the Supreme Court's Law of Religious Freedom: Coherence, Conflict, or Chaos?" *Notre Dame Law Review* 70 (1995) 581, 601, n. 75.
- ³⁸*Ibid.*, 533.
- ³⁹Dean M. Kelley, *The Law of Church and State in America: Historical Survey and Analysis* (Westport, CT: Greenwood Press, unpublished), quoted by Miller and Flowers, 1:534.
- ⁴⁰Another legal theory militating against government intrusion on inter-church judicial actions is judicial immunity, discussed at length at Morken, 137-153.
- ⁴¹Richard R. Hammar, *Pastor, Church & Law* (Springfield, MO: Gospel Publishing House, 1983) 71.
- ⁴²Quine, Part 1, 68.
- ⁴³Quine, Part 1, 68.
- ⁴⁴Restatement (Second) of Torts, Common Interest, §596, comment e (1977).
- ⁴⁵Quine, Part 1, 69.
- ⁴⁶*Continental Optical Co. v. Reed*, 86 N.E. 2d 506, 119 Ind.App. 643 (1948), reh'g den, 88 N.E. 2d 55.
- ⁴⁷W. Torpey, *Judicial Doctrines of Religious Rights in America* (1948) at 126, cited in Quine, 70.
- ⁴⁸*Trustees Pencader Presbyterian Church in Pencader Hundred v. Gibson*, 22 A.2d 782 (1941).
- ⁴⁹House, *Christian Ministries and the Law* 72-73. For substantiation of these statements, see *Trustees Pencader Presbyterian Church in Pencader Hundred v. Gibson*, 22 A.2d 782 (1941); *Canovaro v. Brothers of Order of Hermits of St. Augustine*, 191 A. 140 (1937); *Linke v. Church of Christ of Latter Day Saints*, 71 Cal.App.2d 667 (1967); and *Kubilius v. Hawes Unitarian Congregational Church*, 79 N.E.2d 5 (1948).
- ⁵⁰See Quine, 70-73 for further discussion of privilege by consent.
- ⁵¹Restatement (Second) of Torts, Defamatory Communications, §559 (1977).
- ⁵²Restatement (Second) of Torts, §581A, comment d (1977).
- ⁵³Quine, Part 1, 70.
- ⁵⁴Restatement (Second) of Torts, §46 (1977).
- ⁵⁵Restatement (Second) of Torts, §46, comment d (1977).
- ⁵⁶Restatement (Second) of Torts, §46j (1977), quoted in Quine, Part 1, 70.
- ⁵⁷U.S. Const. amend. I
- ⁵⁸For a more detailed explanation of these religion clauses, see Eidsmoe, 130-164.
- ⁵⁹*Sherbert v. Verner*, U.S. 398, 403, 406 (1963), cited in Quine, Part 1:73.
- ⁶⁰*Paul v. Watchtower Bible Society*, 819 F.2d 875, 883 (1987).
- ⁶¹*Rasmussen v. Bennett*, 741 P.2d 755 (Mont. 1987).
- ⁶²Idleman, 231-232.
- ⁶³*Ibid.*, 232-233.
- ⁶⁴*Ibid.*, 233.
- ⁶⁵*Ibid.*, 233-234.
- ⁶⁶*Farnsworth v. Storrs*, 59 Mass. (5 Cush.) 412, 413 (1850).
- ⁶⁷*Ibid.*, 413.
- ⁶⁸*Ibid.*, 415-16.
- ⁶⁹For a discussion of these cases, see Jay Quine, "Part 2: Court Involvement in Church Discipline," *Bibliotheca Sacra* 149 (Apr 1992) 228-229.
- ⁷⁰See further House, *Christian Ministries and the Law*, 69-76, 253-254.
- ⁷¹*Guinn v. Church of Christ of Collins-*

ville, 775 P.2d, 766, 773 (Okla. 1989).

⁷²*Ibid.*, 776-777. Since *Guinn*, the courts have followed the Oklahoma Supreme Court and held that “a church can discipline individuals without fear of judicial intervention” only while “the complaining individual was a member at the time of the disciplinary action.” *Smith v. Calvary Christian Church*, — N.W.2d —, 1998 WL 842259 (Mich. Ct. App. 1998). As the Michigan Court of Appeals framed the rule: “Where the plaintiff is a member of the church at the time of the defendant church’s alleged tortious activity . . . ‘the church has authority to prescribe and follow disciplinary ordinances without fear of interference by the state.’” *Smith*, supra (quoting *Guinn*, 775 P.2d at 773-774; and citing *Hadnot v. Shaw*, 826 P.2d 978, 987-88 (Okla. 1992); see also *Hester v. Barnett*, 723 S.W.2d 544, 559-560 (Mo. 1987) (if plaintiffs were members of the church, “they presumptively consented to religiously motivated discipline practiced in good faith”). But this absolute privilege from judicial intervention applies only if the discipline “does not pose a substantial threat to public safety, peace or order.” *Guinn*, 775 P.2d at 779.

⁷³Quine, Part 2:228. See also David K. Ratcliff, “Constitutional Law: *Guinn v. Collinsville Church of Christ*: Balancing an Individual’s Right to Tort Compensation and the First Amendment’s Religion Clauses,” *Oklahoma Law Review* 42 (Winter 1989) 627-645.

⁷⁴*Paul v. Watchtower Bible Society*, 819 F.2d 875 (1987).

⁷⁵Idleman is concerned about the direction of cases that have eroded the historic position on church and state in the question of judicial abstention. See Idleman, 248-251.

⁷⁶*Paul v. Watchtower Bible Society*, 880.

⁷⁷*Ibid.*, 881.

⁷⁸Quine, Part 2:229.

⁷⁹*Chase v. Cheney*, 58 Ill. 509, 533 (1871) (Thorton, J.).

⁸⁰See Quine, Part 2:228-229, and House, *Christian Ministries and the Law* 253-254 for discussion of these various cases.

⁸¹House, *Christian Ministries and the Law* 76.

⁸²*Ibid.*, 77. Small stylistic adjustments have been made to the original statement written by the author.

⁸³*Ibid.*

⁸⁴*Ibid.*, 76.