CHURCH DISCIPLINE AND CIVIL LIABILITY IN ARIZONA

By Ashby L. Camp

Christians are required by God to discipline wayward members of their churches (Mat. 18:15-17; Rom. 16:17-18; 1 Cor. 5:1-11; Gal. 6:1; 2 Thess. 3:6-15; 1 Tim. 1:19b-20, 5:19-20; Tit. 3:9-11). This is not done in spite or for revenge but for the good of the person disciplined, for the good of other Christians, for the health of the church as a whole, for the corporate witness of the church, and for the glory of God.[1]

Despite this obligation, many congregations fail to discipline their members. I suspect part of the reason is that the leaders who ultimately execute the discipline fear being sued for doing so. Fear of men is never an excuse for disobeying God (Acts 4:18-20, 5:29), but if fear of lawsuits is in fact hindering obedience, it is incumbent upon the leaders to do what is within their power to reduce that fear. In other words, they must strengthen their hands by taking whatever steps are consonant with Scripture to reduce the risk of liability attendant to disfellowshipping someone. That requires some understanding of the law in this area.

I focus on the law of Arizona because that is where I live and because casting the net nationwide would greatly expand the time and effort necessary to complete the project. Decisions from other jurisdictions are discussed only as they relate to issues that may arise in Arizona. Those interested in a broader analysis may wish to consult the following: Ira Mark Ellman, "Driven from the Tribunal: Judicial Resolution of Internal Church Disputes," 69 *Cal. L. Rev.* 1378 (1981); Scott C. Idleman, "Tort Liability, Religious Entities, and the Decline of Constitutional Protection," 75 *Ind. L.J.* 219 (Winter 2000);[2] H. Wayne House, "Church Discipline and the Courts," 4 *Southern Baptist Journal of Theology* (No. 4, Winter 2000) 60;[3] Nicholas Merkin, "Getting Rid of Sinners May Be Expensive: A Suggested Approach to Torts Related to Religious Shunning Under the Free Exercise Clause," 34 *Colum. J.L. & Soc. Probs.* 369 (Summer 2001).

The Church Autonomy Doctrine

The right of religious groups to operate free of state intrusion derives from the First Amendment to the U. S. Constitution, as applied to the states through the Fourteenth Amendment. The "church autonomy doctrine" (also called the "ecclesiastical abstention doctrine"), which requires courts to abstain from deciding issues touching on the religious

[1] These purposes are identified and discussed briefly in Mark Dever, "Biblical Church Discipline," *Southern Baptist Journal of Theology* 4:4 (Winter 2000) 38-42. This article is available online at http://www.sbts.edu/pdf/sbjt/SBJT_2000Winter4.pdf.

[2] This article can be downloaded from http://papers.ssrn.com/sol3/papers.cfm?abstract_id=889843.

[3] This article is available online at http://www.sbts.edu/pdf/sbjt/SBJT_2000Winter6.pdf

domain, has been recognized since 1871 and is well established in decisions of the U. S. Supreme Court.[4]

The doctrine clearly applies to matters of church discipline. For example, in *Watson v. Jones*, 80 U.S. 679, 733, 20 L. Ed. 666 (1871) the court stated that civil courts may not exercise jurisdiction over "a matter which concerns theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them." In *Serbian Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 717, 96 S. Ct. 2372, 2384, 49 L. Ed. 2d 151 (1976), the court recognized that "questions of church discipline . . . are at the core of ecclesiastical concern." In the concluding paragraph of the opinion of the Court, Justice Brennan wrote:

> The First and Fourteenth Amendments permit hierarchical religious organizations to establish their own rules and regulations for internal discipline and government, and to create tribunals for adjudicating disputes over these matters. When this choice is exercised and ecclesiastical tribunals are created to decide disputes over the government and direction of subordinate bodies, the Constitution requires that civil courts accept their decisions as binding upon them.

As explained in *Celnik v. Congregation B'Nai Israel*, 131 P.3d 102, 106 (N.M. App. 2006):

> The church autonomy doctrine is based on the First Amendment, which provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." . . .
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> The doctrine protects both interests: First, it prevents civil legal entanglement between government and religious establishments by prohibiting courts from trying to resolve disputes related to ecclesiastical operations. Second, by limiting the possibility of civil interference in the workings of religious institutions, the free exercise of religion also is protected.

The question is how this general doctrine is (or will be) applied by Arizona courts in the specific case of a disfellowshipped church member who sues for damages because of his exclusion or conduct associated with it.

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[4] See Kelly J. Shackelford, "Church Autonomy: Does the Right of Religious Institutions to Operate Free of State Intrusion Still Exist?" *Texas Lyceum Journal* (July 2007) 38-40. This article is available online at http://texaslyceum.org/media/staticContent/journals/Journal_-_2007_Pubcon.pdf.

Arizona Case Law Regarding Church Autonomy

1. In *Konkel v. Metropolitan Baptist Church*, 117 Ariz. 271, 572 P.2d 99 (App. 1977), church members who allegedly had been "dismissed" as active members in violation of the church's constitution and bylaws sued to prevent the reverend/president of the church from denying them the right to be present and to vote at the church's business meetings. The trial court dismissed the claim on the basis that the relief sought was "an ecclesiastical matter beyond the court's subject matter jurisdiction." In reversing that dismissal, the court of appeals stated:

> It is the general rule that courts have no jurisdiction to intervene in cases involving expulsion from church membership where there is no question as to the invasion of civil or property rights. *Brown v. Mt. Olive Baptist Church*, 255 Iowa 857, 124 N.W.2d 445 (1963). Some cases stress the separation of church and state, while others rely on the fact that a member by joining the church expressly or impliedly consents to the exercise of its expulsory jurisdiction. Many decisions rest on both grounds. *See* Annot., 20 A.L.R.2d 421.
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> There is a recognized exception, however, where the issue is whether the expelling organization acted in accordance with its own regulations. Cf. *Owen v. Board of Directors of Rosicrucian Fellowship*, 173 Cal.App.2d 112, 342 P.2d 424 (1959). The trial court apparently found this issue foreclosed by appellants' allegation that their dismissal occurred at a "regular business meeting." We disagree, in view of the specific allegation of violation of the church constitution and bylaws.
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> We hold, therefore, that the superior court has jurisdiction to determine whether appellants were expelled from membership in accordance with the constitution and bylaws of the church. If so, however, the court has no jurisdiction to proceed. *Owen v. Board of Directors of Rosicrucian Fellowship*, supra.

2. In *Barnes v. Outlaw*, 188 Ariz. 401, 937 P.2d 323 (App. 1996) (vacated in part on other grounds, 192 Ariz. 283, 964 P.2d 484 [1998]), a pastor (Outlaw) who served as a therapist or psychological counselor for three adult siblings (Naomi, Rose, and Isaac) divulged to various people personal matters the siblings had revealed to him in confidence during their private counseling sessions. He also relayed false information about them and threatened to publicize embarrassing information one had revealed to him unless she and her sister stopped making accusations of infidelity against his son (the husband of one of the sisters). Afterward, the pastor described to the congregation the sisters' conduct (presumably in making accusations against his son), "marked" them as causing division in the church, and stated that their family was incestuous and dysfunctional. The siblings sued the pastor and the church for invasion of privacy, defamation, therapist malpractice, and breach of fiduciary duty and obtained a jury verdict in their favor.

The defendants argued on appeal that the trial court lacked jurisdiction to consider the claims under the doctrine of ecclesiastical abstention. In rejecting that argument, the court stated:

> The doctrine of ecclesiastical abstention prohibits courts from determining issues of canon law. *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 96 S. Ct. 2372, 49 L. Ed. 2d 151 (1976). It is not applicable here because this dispute can be resolved without inquiry into religious law and polity. We need not consider the "marking" ritual nor its origins in resolving these issues. Outlaw revealed confidences from his counseling sessions with Naomi to Rose and threatened to publicize Rose's involvement with Kirkland. He divulged confidences of Naomi, Rose, and Isaac to his wife, mother, sister, and the Church administrator and also relayed false information to them. There was no evidence that this conduct was part of the observance of the Church's religious practices or beliefs; thus, the doctrine of ecclesiastical abstention has no bearing here. See *Paul v. Watchtower Bible and Tract Society of New York*, 819 F.2d 875, 878 n.1 (9th Cir.), cert. denied, 484 U.S. 926, 98 L. Ed. 2d 249, 108 S. Ct. 289 (1987).
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> Moreover, appellants misstate appellees' injury claims. In their complaint, appellees alleged intentional infliction of emotional distress, loss of consortium, damage to their reputations, and exposure to public ridicule and disgrace. That the injuries occurred in a religious setting does not render them noncompensable, nor does it deprive the court of jurisdiction. See *McNair v. Worldwide Church of God*, 197 Cal. App. 3d 363, 242 Cal. Rptr. 823 (1987) (free exercise clause did not bar defamation claim against minister for remarks made during meeting explaining church doctrine); *Hester v. Barnett*, 723 S.W.2d 544 (Mo. App. 1987) (defamation claim against minister for statements made in sermons compensable); *Guinn v. Church of Christ of Collinsville*, 775 P.2d 766 (Okla. 1989) (intentional infliction of emotional distress and invasion of privacy claims based on continued denunciation of former member during church services actionable).

As for the claim for counseling malpractice, the court rejected the argument that it was a prohibited claim for *clergy* or *pastoral* malpractice concluding instead that it was a permissible claim for *therapist* malpractice. The court stated:

> Appellants maintain that appellees' malpractice claim was essentially a claim for clergy or pastoral malpractice and that the therapist malpractice instruction submitted to the jury ignored the reality of the parties' relations and thus was improperly given. In support of this argument, appellants cite several cases rejecting clergy malpractice claims because of First Amendment concerns about determining a standard of

> care. Those cases are not applicable here because the claim submitted to the jury was for therapist malpractice, not clergy malpractice, and was based on a psychological therapist's duty not to disclose confidential information revealed in counseling sessions. *Dausch v. Rykse*, 52 F.3d 1425 (7th Cir. 1994). Appellees' claim arose, not out of any duty Outlaw owed them in his capacity as their pastor, but rather out of his duty as a therapist or counselor to refrain from acting in a manner that carried a foreseeable and unreasonable risk of harm to the person being counseled. See *Dausch* (psychological malpractice claim upheld against minister acting as counselor); *Sanders v. Casa View Baptist Church*, 898 F. Supp. 1169 (N.D. Tex. 1995) (professional malpractice claim upheld against pastor acting as marriage counselor).

Having held himself out and undertaken to render services as a mental health therapist or counselor, the pastor was required to exercise the skill and knowledge normally possessed by members of that profession. That included a duty not to disclose confidential information.

3. *Dobrota v. Free Serbian Orthodox Church*, 191 Ariz. 120, 952 P.2d 1190 (App. 1998) involved an employment dispute between a priest and his church and diocese. In May 1994 the president of the local church (St. Nicholas Church) terminated Dobrota's employment and instructed him to vacate the parish rectory by June 15. When Dobrota refused to leave, the president disabled the air conditioner, disconnected the water and telephone services, and eventually had the police remove him from the property as a trespasser. When Dobrota's personal belongings were returned to him three months later, some of the items were missing.

The Diocesan Ecclesiastical Court determined that the Church had dismissed Dobrota contrary to its rules and ordered the Church to pay him his salary to October 1, 1994, the date on which the proper church authority relieved him of his duty. The Ecclesiastical Court also ordered the Church to return to Dobrota the articles that had disappeared from his belongings. The Ecclesiastical Court did not set the amount due Dobrota nor did it determine the value of the missing belongings.

When the Church did not pay Dobrota as ordered and did not return his belongings, he sued for breach of contract and for torts relating to the taking of his possessions and cutting off his utilities. The trial court dismissed all of Dobrota's claims ruling that (a) it had no jurisdiction to entertain the breach of contract claim, (b) it had no jurisdiction to entertain the related tort claims, and (c) it could not enforce the order of the Ecclesiastical Court because Dobrota had not exhausted his remedies within the church system. Both sides appealed.

The court of appeals ruled that the trial court was correct in abstaining from deciding Dobrota's breach of contract and tort claims. Regarding the breach of contract claim, the court stated:

The First Amendment guarantees that both individuals and churches have the "power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine." *Kedroff v. St. Nicholas Cathedral of the Russian Orthodox Church*, 344 U.S. 94, 116, 97 L. Ed. 120, 73 S. Ct. 143 (1952). Ecclesiastical decisions are generally protected from government interference; "civil courts are bound to accept the decisions of the highest judicatories of a religious organization of hierarchical polity on matters of discipline, faith, internal organization, or ecclesiastical rule, custom, or law." *Milivojevich*, 426 U.S. at 713. "Where religious organizations establish rules for their internal discipline and governance, and tribunals for adjudicating disputes over these matters, 'the Constitution requires that civil courts accept their decisions as binding upon them.'" *Crowder v. Southern Baptist Convention*, 828 F.2d 718, 724 (11th Cir. 1987), *quoting Milivojevich*, 426 U.S. at 725.

The interaction between a church and its pastor is an essential part of church government. *Simpson v. Wells Lamont Corp.*, 494 F.2d 490, 493 (5th Cir. 1974). In particular, "a minister's employment relationship with his church implicates 'internal church discipline, faith, and organization, all of which are governed by ecclesiastical rule, custom, and law.'" *Lewis v. Seventh Day Adventists Lake Region Conf.*, 978 F.2d 940, 942 (6th Cir. 1992) (quoting *Hutchison v. Thomas*, 789 F.2d 392, 396 (6th Cir. 1986)). Thus, civil courts must abstain from deciding ministerial employment disputes or reviewing decisions of religious judicatory bodies concerning the employment of clergy, "because such state intervention would excessively inhibit religious liberty." *Id.*; *see generally Milivojevich*, 426 U.S. at 709 (setting forth the abstention doctrine). Accordingly, "secular courts will not attempt to right wrongs related to the hiring, firing, discipline or administration of clergy." *Higgins v. Maher*, 210 Cal. App. 3d 1168, 1175, 258 Cal. Rptr. 757 (1989), *cert. denied*, 493 U.S. 1080, 107 L. Ed. 2d 1040, 110 S. Ct. 1135 (1990).

The First Amendment prohibits civil adjudication of Father Dobrota's breach of contract claim because his claim challenges Church decisions involving the hiring and firing of its clergy. Review of Father Dobrota's contract claims would have involved the trial court in matters of "internal church discipline, faith, and organization." *Lewis*, 978 F.2d at 942. Thus, the trial court correctly dismissed these contract claims.

The court of appeals relied on *Higgins v. Maher*, 210 Cal. App. 3d 1168, 1175, 258 Cal. Rptr. 757 (Cal. App. 1989) in affirming the trial court's ruling that the tort claims also could not be heard. The court stated:

Under similar factual circumstances, the California Court of Appeals abstained from resolving a priest's tort claims because his claims

were too intimately connected with matters of Church discipline to allow civil review. *Higgins*, 210 Cal. App. 3d at 1176. In *Higgins*, the priest alleged that the bishop, and other officials in the church hierarchy, improperly suspended him from his position and published confidential details of his psychiatric treatment and false accusations against him. *Id.* at 1172-73. He pleaded the torts of invasion of privacy, defamation, and intentional and negligent infliction of emotional distress. *Id.* at 1175.

In concluding it could not hear the priest's claims, the *Higgins* court determined that the acts complained of were "part and parcel" of the bishop's administration of his ecclesiastical functions. *Id.* at 1175-76. Although the court agreed that torts such as battery, false imprisonment or conversion could not be perpetrated by a church upon its members with impunity, it held that the torts alleged by the priest were "too close to the peculiarly religious aspects of the transaction to be segregated and treated separately--as simple civil wrongs." *Id*. at 1176. The *Higgins* court explained that because the torts occurred as "inseparable parts of a process of divestiture of priestly authority," it would not subject the church to civil court proceedings on the tort claims. *Id.*

In comparing this case with *Higgins*, we conclude that the alleged actions of cutting off the Dobrotas' utilities and taking their belongings were inseparable parts of the process of divesting Father Dobrota of his priestly authority. While the alleged acts may have been improper, they occurred as Klipa attempted to remove the Dobrotas and their belongings from the Church premises after the Church terminated Father Dobrota. Furthermore, the Ecclesiastical Court has dealt with the issue of the missing property and ordered its return to Father Dobrota. Therefore, we conclude that the rule of ecclesiastical abstention precludes the trial court from hearing Father Dobrota's tort claims.

The court of appeals also agreed with the trial court's decision that it could enforce the ruling of the Ecclesiastical Court. Setting the amount of lost wages and benefits and the value of the missing property that the Ecclesiastical Court had determined was owed was a purely secular computation and thus would not intrude on the First Amendment protection. The court's only disagreement with the trial court was with its ruling that Dobrota had not exhausted his church remedies. The conclusion of the opinion was:

The trial court correctly concluded that it must abstain from deciding Father Dobrota's breach of contract and tort claims against the Church and the Diocese. The court also correctly ruled that it could enforce the judgment entered by the Ecclesiastical Court. The court erred, however, in concluding that Father Dobrota had not exhausted his remedies with the Diocese. Accordingly, we affirm the trial court's judgment dismissing Father Dobrota's breach of contract and tort claims,

but reverse that part of the judgment that refuses Father Dobrota's request to determine the amount of his damages and enter judgment. The case is remanded for further proceedings consistent with this opinion.

4. In *Rashedi v. General Board of the Church of the Nazarene*, 203 Ariz. 320, 54 P.3d 349 (App. 2002), a church pastor (Yousfi) allegedly swindled a woman (Rashedi) out of large sums of money and used his position as spiritual advisor to seduce her sexually in furtherance of his scheme to defraud her. The woman sued, among others, the General Board of the Church of the Nazarene (Board) and the Arizona/Southern Nevada District Church of the Nazarene (District) claiming that they negligently hired and retained the pastor when they knew or should have known that he had a history of stealing money from, improperly soliciting investments from, and engaging in sexual misconduct with church members in other states. The trial court dismissed the claim against the Board and the District on the basis that any review of their role in the case "would necessarily require a review of the ecclesiastical doctrine, law and polity of the Church of the Nazarene as it relates to granting licenses to ministers," which would run afoul of the First Amendment and the doctrine of ecclesiastical abstention. Rashedi appealed.

The court of appeals reversed the trial court's ruling. After acknowledging the general principle that civil courts are precluded from inquiring into ecclesiastical matters,[5] the court stated:

> However, when a church-related dispute can be resolved by applying neutral principles of law without inquiry into religious doctrine and without resolving a religious controversy, the civil courts may adjudicate

[5] The court stated:

> The First Amendment and the ecclesiastical abstention doctrine preclude civil courts from inquiring into ecclesiastical matters. For example, courts may not consider employment disputes between a religious organization and its clergy because such matters necessarily involve questions of internal church discipline, faith, and organization that are governed by ecclesiastical rule, custom, and law. *Gonzalez v. Roman Catholic Archbishop of Manila*, 280 U.S. 1, 16, 74 L. Ed. 131, 50 S. Ct. 5 (1929); *Dobrota v. Free Serbian Orthodox Church St. Nicholas*, 191 Ariz. 120, 124, 952 P.2d 1190, P14, 952 P.2d 1190, 1194 (App. 1998) (citing *Lewis v. Seventh Day Adventists Lake Region Conf.*, 978 F.2d 940, 942 (6th Cir. 1992)); *Higgins v. Maher*, 210 Cal. App. 3d 1168, 258 Cal.Rptr. 757, 759-60 (App. 1989). Whether an individual is qualified to be a clergy member of a particular faith is a matter to be determined by the procedures and dictates of that particular faith. *Gonzalez*, 280 U.S. at 16; *Rayburn v. Gen. Conf. of Seventh-Day Adventists*, 772 F.2d 1164, 1169 (4th Cir. 1985). Nor can civil courts inquire into internal organizational disputes between different factions of a religious organization or into property disputes that would require interpreting religious doctrine or practice. *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 709, 49 L. Ed. 2d 151, 96 S. Ct. 2372 (1976); *Crowder v. S. Baptist Convention*, 828 F.2d 718, 726 (11th Cir. 1987).
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> Civil courts must accept "the decisions of the highest judicatories of a religious organization of hierarchical polity on matters of discipline, faith, internal organization, or ecclesiastical rule, custom, or law." *Milivojevich*, 426 U.S. at 713.

> the dispute. *Jones v. Wolf*, 443 U.S. 595, 602-04, 61 L. Ed. 2d 775, 99 S. Ct. 3020 (1979); *Barnes v. Outlaw*, 188 Ariz. 401, 404, 937 P.2d 323, 326 (App. 1996), *vacated in part on other grounds*, 192 Ariz. 283, 964 P.2d 484 (1998).
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> Because religious organizations are part of the civil community, they are subject to societal rules governing property rights, torts, and criminal conduct. *Dobrota*, 191 Ariz. at 125, P22, 952 P.2d at 1195. The First Amendment does not excuse individuals or religious groups from complying with valid neutral laws. *Employment Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 878-79, 108 L. Ed. 2d 876, 110 S. Ct. 1595 (1990).

The court then cited conflicting judicial opinions from other jurisdictions on the question of whether a civil court can adjudicate claims against certain officials of a religious organization based on their alleged licensing and hiring of a pastor whom they knew or had reason to know was likely to victimize members of that organization. It concluded:

> In the present case, Rashedi claims that she was injured by the tortious conduct of individuals whom church officials placed in a position to injure her when they knew or should have known of the risk of harm presented by those individuals. In our opinion, resolution of these claims does not require the interpretation of religious doctrine or ecclesiastical law; it requires application of tort law principles that are neutral and generally applicable.

What Does It Mean?

Under the holding of *Konkel*, an act of disfellowshipping is not subject to judicial review if it was done in accordance with the congregation's established procedures. So if a church's procedures for disfellowshipping members are those set forth in Scripture, adherence to those mandates will, absent any overriding circumstances (see below), preclude a court from entertaining a claim for damages because of the exclusion.

It is questionable, however, whether the First Amendment permits even *Konkel's* limited inquiry into whether an expulsion from membership was in accordance with the church's procedures. The case relied upon by the *Konkel* court, *Owen v. Board of Directors of Rosicrucian Fellowship*, 173 Cal.App.2d 112, 342 P.2d 424 (Cal. App. 1959), was decided before the U. S. Supreme Court's decision in *Serbian Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 96 S. Ct. 2372, 49 L. Ed. 2d 151 (1976). In *Milivojevich* the court stated:

> whether or not there is room for "marginal civil court review" under the narrow rubrics of "fraud" or "collusion" when church tribunals act in bad faith for secular purposes no "arbitrariness" exception -- in the sense of an

> inquiry whether the decisions of the highest ecclesiastical tribunal of a hierarchical church complied with church laws and regulations -- is consistent with the constitutional mandate that civil courts are bound to accept the decisions of the highest judicatories of a religious organization of hierarchical polity on matters of discipline, faith, internal organization, or ecclesiastical rule, custom, or law.

The question is whether this constitutional ban on inquiring into whether the disciplinary decision was in accordance with the church's laws and regulations applies to churches that do not have a hierarchical form of government. A number of courts have held that it does. See, e.g., *Callahan v. First Congregational Church of Haverhill,* 808 N.E.2d 301, 308-309 (Mass. 2004); *Tubiolo v. Abundant Life Church, Inc.*, 605 S.E.2d 161 (N.C. App. 2004); *Heard v. Johnson,* 810 A.2d 871, 879 n.4 (D.C. 2002); *Howard v. Covenant Apostolic Church, Inc.*, 705 N.E.2d 385 (Ohio App. 1997); *Burgess v. Rock Creek Baptist Church,* 734 F. Supp. 30, 31 n. 2 (D.C. D.C. 1990); *Guinn v. The Church of Christ of Collinsville,* 775 P.2d 766, 771 n.18 (Okla. 1989); *First Baptist Church of Glen Este v. Ohio*, 591 F. Supp. 676, 682 (S.D. Ohio 1983); and *Nunn v. Black*, 506 F. Supp. 444 (W.D. Va. 1981), affirmed 661 F.2d 925 (4th Cir. 1981).[6] Other courts have held that the ban does not apply to "congregational churches" defined as churches in which the congregation makes all decisions by a majority vote. See *Kennedy v. Gray*, 807 P.2d 670, 676-677 (Kan. 1991) and the cases cited therein. Autonomous congregations that are governed by elders rather than by majority vote arguably do not fit that definition of congregational churches, but whether that would change the result in those jurisdictions is unclear.

Whether an expulsion was done in the correct way, meaning in accordance with church's procedural requirements, may be distinct from whether the expulsion was done by the correct entity, meaning the person or group having the clear authority to do so. So even if Arizona courts accept that the constitutional ban on inquiring into whether the disciplinary decision was in accordance with the church's procedures applies to churches that do not have a hierarchical form of government, they still might review whether the expulsion was carried out by the clearly authorized person or group.[7] See, e.g., *First Baptist Church of Glen Este v. Ohio,* 591 F. Supp. 676, 682 (S.D. Ohio 1983). They also

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[6] The church in question apparently was a part of a larger religious society but had "no structured decision-making process." 506 F. Supp. at 448.

[7] I say "clearly authorized" because at least one court has held that civil courts are precluded from determining who was authorized to administer discipline where the relevant church documents or rules are ambiguous. *Chavis v. Rowe*, 459 A.2d. 674 (N. J. 1983). This statement in *Rashedi v. General Board of the Church of the Nazarene* seems to point in the same direction (emphasis supplied): "Any inquiry into the structure of the religious organization **would not be** undertaken to resolve any internal organizational dispute or the appropriateness of the conduct of the parties in relation to their religious beliefs or obligations. Inquiry into the organizational structure would be to factually determine the roles the parties played in the licensing and hiring of an employee." Inquiring into ambiguous church documents or rules to resolve a dispute over what person or group has the power to disfellowship a member would be resolving an internal organizational dispute.

might review whether the expulsion was the result of fraud or collusion. *Id.*; *Burgess v. Rock Creek Baptist Church,* 734 F. Supp. 30 (D.C. D.C. 1990).

Though *Barnes v. Outlaw* allowed the plaintiffs' claims to proceed, the case actually reinforces the principle that disfellowshipping of a member is exempt from judicial scrutiny (except to the possible extent noted above). The court specifically distinguished the pastor's wrongful breach of confidences by stating, "There was no evidence that this conduct was part of the observance of the Church's religious practices or beliefs; thus, the doctrine of ecclesiastical abstention has no bearing here."[8] Disfellowshipping someone is quintessentially the observance of the church's religious practices or beliefs.

Barnes v. Outlaw allowed the plaintiffs' claims to proceed because they could be "resolved without inquiry into religious law and polity." Likewise, *Rashedi v. General Board of the Church of the Nazarene* allowed the plaintiff's claims to proceed because they could be "resolved by applying neutral principles of law without inquiry into religious doctrine and without resolving a religious controversy." Might an Arizona court conclude that claims for defamation[9] or invasion of privacy[10] or intentional infliction of

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[8] Though not related to disfellowshipping, *Barnes v. Outlaw* shows that religious counselors need to make clear that they are offering biblical or spiritual counseling rather than mental health therapy or psychological counseling and that biblical duties govern the relationship.

[9] To be defamatory in Arizona, a publication must be false and must bring the defamed person into disrepute, contempt, or ridicule, or must impeach his honesty, integrity, virtue, or reputation. *Turner v. Devlin*, 174 Ariz. 201, 848 P.2d 286 (1993); *Chilton v. Center for Biological Diversity, Inc.*, 214 Ariz. 47, 148 P.3d 91 (App. 2006). In addition to any constitutional privilege that may be available, a church also may have a common-law qualified privilege for statements to congregants relating to a member being disfellowshipped. See, e.g., *East v. Bullock's, Inc.*, 34 F.Supp.2d 1176 (D. Ariz. 1998), holding that the human relations vice president of a department store had a privilege to inform other managers in a meeting that an employee had been terminated for falsifying company documents. This qualified privilege can be overcome by a showing of actual malice or excessive publication. *Olive v. City of Scottsdale*, 969 F.Supp. 564 (D. Ariz. 1996). *Kliebenstein v. Iowa Conference of United Methodist Church*, 663 N.W.2d 404, 407 (Iowa 2003) specifically recognized that "communications between members of a religious organization concerning the conduct of other members or officers in their capacity as such are qualifiedly privileged." See also, *Cargill v. Greater Salem Baptist Church*, 215 S.W.3d 63 (Ky. App. 2006); *McAdoo v. Diaz*, 884 P.2d 1385, 1391 (Alaska 1994); *Rasmussen v. Bennett*, 228 Mont. 106, 741 P.2d 755 (Mont. 1987); *Murphy v. Harty*, 393 P.2d 206, 214 (Ore. 1964). Though the court in *McNair v. Worldwide Church of God*, 197 Cal. App. 3d 363, 242 Cal. Rptr. 823 (App. 1987) eschewed a common-law analysis of a defamation claim against a minister for remarks made during a doctrinal explanation at a conference, the end result was similar to the finding of a qualified privilege. The court held that the plaintiff could recover only upon a showing, by clear and convincing evidence, that the defamatory statement was made with knowledge that it was false or with a reckless disregard for whether it was false.

[10] Arizona has recognized the four-part classification of the tort of invasion of privacy laid out in the *Restatement (Second) of Torts* §§ 652A, et seq. *Rutledge v. Phoenix Newspapers, Inc.*, 148 Ariz. 555, 556 n.2, 715 P.2d 1243 (App. 1986), overruled on other grounds, *Godbehere v. Phoenix Newspapers, Inc.*, 162 Ariz. 335, 783 P.2d 781. These are (1) intrusion upon seclusion, (2) commercial appropriation, (3) publication of private facts, and (4) false light. The last two are the relevant claims in this context. Regarding publication of private facts, one who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of privacy if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person and (b) is not of legitimate concern to the public.

emotional distress[11] that arise in connection with disfellowshipping also can be resolved by neutral and generally applicable principles of tort law that do not require interpretation of religious doctrine or ecclesiastical law? Even if the answer to that question is "yes," it is the wrong question in the context of disfellowshipping. The prohibition against government intrusion in that case is not based on the need for courts to abstain from interpreting matters of church doctrine. Rather, it is based on the First Amendment's guarantee of the free exercise of one's religion.

This distinction was explained in *Paul v. Watchtower Bible & Trust Society*, 819 F.2d 875 (9th Cir. 1987) and *Guinn v. Church of Christ of Collinsville*, 775 P.2d 766 (Okla. 1989), both of which were cited by the court in *Barnes v. Outlaw*. As the court in *Guinn* explained:

> The specific governmental interference with First Amendment rights challenged here is civil court enforcement of tort law against the Church of Christ Elders and not a judicial adjudication of the doctrinal propriety of the disciplinary measures carried out by the Elders against Parishioner. Parishioner did not attack the Elders' disciplinary actions on the basis that they contravened established Church of Christ polity. Rather, she claimed that the Elders' actions -- whether or not in conformity to established church doctrine -- amounted to a tortious invasion of her rights for which she was entitled to recover. While this dispute involved a religiously-founded disciplinary matter, it was not the sort of private ecclesiastical controversy which the Court has deemed immune from judicial scrutiny. According to a federal circuit court case, *Paul v. Watchtower Bible & Tract Soc. of New York*, "ecclesiastical abstention . . . . provides that civil courts may not redetermine the correctness of an interpretation of canonical text or some decision relating to government of the religious polity." Unlike the instant controversy, the class of religious dispute which the Court has traditionally held to be outside the purview of civil judicature involves arguments among members over interpretation of church doctrine, or over actions taken pursuant to an allegedly incorrect construction of church rules. Because

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Restatement (Second) of Torts § 652D. Regarding false light, one who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if (a) the false light in which the other was placed would be highly offensive to a reasonable person, and (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed. *Restatement (Second) of Torts* § 652E; *Godbehere v. Phoenix Newspapers, Inc.*, 162 Ariz. 335, 783 P.2d 781 (1989).

[11] The tort of intentional infliction of emotional distress requires proof of three elements: (1) the conduct by the defendant must be "extreme" and "outrageous"; (2) the defendant must either intend to cause emotional distress or recklessly disregard the near certainty that such distress will result from his conduct; and (3) severe emotional distress must indeed occur as a result of defendant's conduct. *Citizen Publishing Co. v. Miller*, 210 Ariz. 513, 115 P.3d 107 (2005). The plaintiff must show that the defendant's acts were 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 society. *Mintz v. Bell Atlantic Systems Leasing International, Inc.*, 183 Ariz. 550, 905 P.2d 559 (App. 1995).

> the controversy in the instant case is concerned with the allegedly tortious nature of religiously-motivated acts and not with their orthodoxy *vis-a-vis* established church doctrine, the justification for judicial abstention is nonexistent and the theory does not apply.

Both *Paul* and *Guinn* explain that allowing tort claims for disfellowshipping places a direct burden on that religious practice and thus can be justified only if disfellowshipping constitutes a sufficient threat to the peace, safety, or morality of the community. As put by the court in *Guinn*:

> In testing the constitutionality of the court's action against the Elders and the jury's verdict in Parishioner's favor, the proper inquiry is whether, on the record, the Elders' decision to discipline Parishioner constituted such a threat to the public safety, peace or order that it justified the state trial court's decision to pursue the compelling interest of providing its citizens with a means of vindicating their rights conferred by tort law.

On this issue, the court in *Paul* stated, "We find the practice of shunning not to constitute a sufficient threat to the peace, safety, or morality of the community as to warrant state intervention." The court in *Guinn* stated (with regard to actions prior to the member's withdrawal of membership), "The Elders' protected conduct clearly did not justify governmental regulation on the ground that it posed a serious threat to public safety, health or welfare."[12]

Courts recognizing that tort claims based on disfellowshipping are barred because that would place a constitutionally impermissible burden on the free exercise of religion include *Westbrook v. Penley*, 231 S.W.3d 389 (Tex. 2007); *Sands v. Living Word Fellowship*, 34 P.3d 955 (Alaska 2001); *Korean Presbyterian Church of Seattle Normalization Committee v. Lee*, 880 P.2d 565 (Wash. App. 1994); and *Rasmussen v. Bennett*, 741 P.2d 755 (Mont. 1987). Other courts, however, describe the bar simply in terms of avoiding entanglement in religious affairs. E.g., *Anderson v. Watchtower Bible and Tract Society of New York, Inc.*, 2007 Tenn. App. LEXIS 29 (Jan. 19, 2007); *Brady v. Pace*, 108 S.W.3d 54 (Mo. App. 2003); *Kond v. Mudryk*, 769 So.2d 1073 (Fla. App. 2000); *Abrams v. Watchtower Bible and Tract Society of New York, Inc.*, 715 N.E.2d 798 (Ill. App. 1999); *Howard v. Covenant Apostolic Church, Inc.*, 705 N.E.2d 385 (Ohio App. 1997); *O'Connor v. The Diocese of Honolulu*, 885 P.2d 361 (Haw. 1994); *Schoenhals v. Mains*, 504 N.W.2d 233, 236 (Minn. App. 1993); *Burgess v. Rock Creek Baptist Church*, 734 F. Supp. 30 (D.C. D.C. 1990).[13]

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[12] In *Bear v. Reformed Mennonite Church*, 341 A.2d 105 (Pa. 1975) the court left open the possibility that disfellowshipping could constitute "an excessive interference within issues of paramount state concern that courts might have the authority to regulate." The court did not find that the Free Exercise Clause is an invalid defense to torts resulting from shunning. It held only that there is at least a chance that there might be liability and that the trial court should not have dismissed the complaint without hearing the case.

[13] In *Hester v. Barnett*, 723 S.W.2d 544 (Mo. App. 1987), which was cited in *Barnes v. Outlaw* for the proposition that injuries occurring in a religious setting can be compensable, the court noted that declarations in a sermon that the plaintiffs stole, committed arson, and abused their children would not

The crucial element in the ruling against the elders in *Guinn* was the court's distinction between disciplinary conduct (in the form of publicizing the member's sin to the congregation and several nearby) taken before and after the woman voluntarily withdrew her membership from the congregation. As the Supreme Court of Oklahoma explained in its later case of *Hadnot v. Shaw*, 826 P.2d 978, 987 (Okla. 1992):

> In *Guinn* this court recognized a jurisdictional boundary limiting the powers of the ecclesiastical judicature. The church's jurisdiction exists as a result of the mutual agreement between that body and its member.
>
> That relationship may be severed freely by a member's positive act at any time. Until it is so terminated, the church has authority to prescribe and follow disciplinary ordinances without fear of interference by the state. The First Amendment will protect and shield the religious body from liability for the activities carried on pursuant to the exercise of church discipline. Within the context of ecclesiastical discipline, churches enjoy an absolute privilege from scrutiny by the secular authority.

Note that even under *Guinn* activities or communications *after* disfellowshipping are privileged to the extent they are part of implementing that decision. The court stated in *Hadnot* (at 987):

> The church privilege extends in this case to activities or communications which occurred *after excommunication* if these may be termed as mere implementation of previously pronounced ecclesiastical sanction which was valid when exercised – i.e., that it was declared when Church jurisdiction subsisted. Within the concept of protected implementation are not only the religious disciplinary proceeding's merits and procedure but also its end product – the expulsion sanction. While excommunication would put an end to jurisdiction over any further offense, it does not abrogate the consequences flowing from the previously announced Church judicature.

And note also the requirement in *Hadnot* (at 988 n. 46) that withdrawal of membership requires a positive and affirmative act:

> We specifically reject parishioners' notion that they have "constructively withdrawn" their church membership by inactivity. The parishioners' continued affiliation with the Church was not tendered as a

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support a defamation claim against the minister if the plaintiffs were members of the congregation and if such statements were "a form of chastening usual as to wayward members and conformable to the liturgy, discipline and ecclesiastical policy of the church and congregation." In that event, the statements would be the kind of good-faith discipline to which a member presumably consented. The court's decision on the defamation claim "rests on the assumption that the [plaintiffs] were not members of the church served by Pastor Barnett." So the case provides no support for a tort claim by a church member who has been disfellowshipped in good faith.

> disputed fact issue by any evidentiary material. Their appellate argument to the contrary lacks support in any evidentiary material. To terminate an ecclesiastical court's jurisdiction a positive and affirmative action is required. The action must impart due notice to the ecclesiastical body that its spiritual cognizance has come to an end as a result of the parishioners' act of withdrawal. Silence and inactivity alone are not indicia of cessation. Serbian Eastern Orthodox Diocese, Etc. v. Milivojevich, *supra* note 35, 426 U.S. at 713, 96 S.Ct. at 2382.

It is unknown whether Arizona courts will adopt *Guinn's* prewithdrawal – postwithdrawal distinction. That distinction has been criticized by at least two commentators[14] and questioned by at least one court.[15] But until an Arizona court decides the matter, prudence dictates preparing for the worst. The question is whether and how a church that believes it is obligated to inform the congregation of the impenitent sin of a member (the injunction in Mat. 18:17 to "tell it to the church")

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[14] Nicholas Merkin writes in "Getting Rid of Sinners May Be Expensive: A Suggested Approach to Torts Related to Religious Shunning Under the Free Exercise Clause," 34 *Colum. J.L. & Soc. Probs.* 369, 390 (Summer 2001):

> *Guinn*'s approach, however, too heavily favors the plaintiff in a religious shunning case. According to *Guinn*'s reasoning, a religious group would be subject to tort liability for shunning as soon as the plaintiff announced that she did not consider herself a member of the group. This would effectively deprive religious groups from using shunning as a deterrent to religious misbehavior in many if not most instances, potentially contributing to the destruction of a significant number of minority religious communities.

Jay A. Quine writes in "Part 2: Court Involvement in Church Discipline," 149 *Bibliotheca Sacra* (Jan. 1992) 228:

> 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.

[15] In *Smith v. Calvary Christian Church*, 614 N.W.2d 590, 594 n. 11 (Mich. 2000), the Supreme Court of Michigan stated:

> We recognize, but need not decide, another issue in this case. That issue is whether religious discipline imposed on a person who is not a member of the disciplining religious body, or who is not consenting to the body's authority when the discipline is imposed, nevertheless arose out of events that occurred during the person's period of membership or consent. Allowing a person who was a member of a religious body or consented to such a body's practices to escape discipline for actions that occurred during the period of membership or consent by severing ties to that body could undermine the efficacy of the body's disciplinary practices toward its remaining members.

regardless of whether that member withdraws prior to completion of the discipline process can, under the court's analysis in *Guinn*, protect itself from potential liability for doing so. The answer is suggested by the following statement of the court (at 777) (emphasis supplied):

> The Elders testified that, while the Church of Christ practices "withdrawal of fellowship" as a disciplinary punishment, its biblically grounded beliefs prohibit members from unilaterally withdrawing their allegiance to the church. **The Elders never controverted Parishioner's claim that she was not taught the Church's prohibition against withdrawal of membership**. Parishioner's testimony must hence be taken as true.
>
> By voluntarily uniting with the church, she impliedly consented to submitting to its form of religious government, but did not thereby consent to relinquishing a right which the civil law guarantees her as its constitutionally protected value. **The intentional and voluntary relinquishment of a known right required for a finding of an effective waiver was never established**. On the record before us Parishioner – a *sui juris* person – removed herself from the Church of Christ congregation rolls the moment she communicated to the Elders that she was withdrawing from membership.

If every member is informed that membership in the congregation carries with it relinquishment of any right to avoid church discipline by withdrawing one's membership before the process is completed, the agreement to become or remain a member under those terms should constitute a waiver of that right should one be found to exist in Arizona. As I stated at the beginning, if fear of lawsuits is in fact hindering leaders from obeying the obligation to practice church discipline, it is incumbent upon them to do what is within their power to reduce that fear.

Dobrota v. Free Serbian Orthodox Church provides another angle of analysis by which tort claims based on disfellowshipping may be barred under Arizona law. The tort claims in that case for taking Dobrota's belongings and shutting off his utilities were disallowed because they were so closely connected to the privileged act of divesting him of his priestly authority. In most cases, claims for defamation, invasion of privacy, and intentional infliction of emotional distress are intimately connected to the privileged act of disfellowshipping a member. The fact Dobrota involved dismissal of a priest rather than a regular member of the congregation might be argued to justify a different result in his case, but at least one court has rejected such a distinction. The court in *Howard v. Covenant Apostolic Church*, 705 N.E.2d 385, 388 (Ohio App. 1997) stated:

> We reject, also, appellant's argument that secular courts retain jurisdiction over internal disputes between a member of the Church and the Church in circumstances where such courts would indisputably lack jurisdiction over the same disputes between a clergyman and the church.

> Appellant claims that the special relationship between the church and its pastor or spiritual leader militates against secular court intervention, but no such problem exists when the membership of a church brings a complaint to the courts. While we agree that matters regarding "who should preach from the pulpit" are fundamentally and unquestionably beyond the jurisdiction of secular courts, see, *e.g., Niemann v. Cooley* (1994), 93 Ohio App. 3d 81, 637 N.E.2d 943, jurisdictional motion overruled (1994), 69 Ohio St. 3d 1478, 634 N.E.2d 1025; *Salzgaber v. First Christian Church* (1989), 65 Ohio App. 3d 368, 583 N.E.2d 1361, the cases demonstrate that **all** matters of the propriety of internal church discipline (except, in the case of a congregational church, whether the proper authority determined the discipline), whether taken against a clergyman or a church member, are beyond the jurisdiction of secular courts. See *Salzgaber*, 65 Ohio App. 3d at 372, 583 N.E.2d at 1364, quoting *Hutchinson v. Thomas* (C.A.6, 1986), 789 F.2d 392, certiorari denied (1986), 479 U.S. 885, 107 S. Ct. 277 (even though a court may inquire into purely secular matters, that doctrine "'has never been extended to religious controversies in the areas of church government, order and discipline, nor should it be'").

Kliebenstein v. Iowa Conference of United Methodist Church, 663 N.W.2d 404 (Iowa 2003) is noteworthy because the court there permitted a claim for defamation in the context of a church disciplinary proceeding on the basis that the allegedly defamatory statements had been made to persons outside the congregation.[16] The court stated (at 406-407):

> Plainly Iowa's courts could not entertain this case if it involved solely the discipline or excommunication of Jane Kliebenstein. *Marks*, 528 N.W.2d at 545. "Civil courts are bound to accept the decisions of the highest judicatories of a religious organization of hierarchical polity on matters of discipline, faith, internal organization, or ecclesiastical rule, custom, or law." *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 713, 96 S. Ct. 2372, 2382, 49 L. Ed. 2d 151, 165 (1976); *accord Drevlow v. Lutheran Church, Missouri Synod*, 991 F.2d 468, 471 (8th Cir. 1993). Nor would her claim enjoy viability had the matter been divulged solely to the members of Shell Rock UMC. It is the general rule that the common interest of members of religious associations is such as to afford the protection of qualified privilege to communications between them in furtherance of their common purpose or interest. Thus, communications between members of a religious organization concerning the conduct of

[16] See also, *Hiles v. Episcopal Diocese of Massachusetts*, 773 N.E.2d 929, 937 n. 12 (Mass. 2002) ("The absolute First Amendment protection for statements made by a Church member in an internal church disciplinary proceeding would not apply to statements made or repeated outside that context") and *Hayden v. Schulte*, 701 So. 2d 1354, 1357 (La. App. 1997) ("The internal nature of the church proceedings in *Joiner* is very different from the allegations in Father Hayden's petition, unrefuted at this time, of dissemination through the media of defamatory information about him").

other members or officers in their capacity as such are qualifiedly privileged.

Since it is unknown whether Arizona courts would adopt a similar approach, information related to a disfellowshipping should be communicated only to members of the congregation or to leaders of other congregations with which that person is seeking to associate.

Concluding Suggestions[17]

1. The leaders need to make clear to all members of the congregation that they will follow the biblical mandates concerning disfellowshipping. The purposes and grounds for disfellowshipping should be taught, and it should be made known what person or group makes the determination regarding the biblical grounds for expulsion and the application of those grounds to particular situations.

2. Whoever has the responsibility of disfellowshipping needs to think through the kinds of sins for which disfellowshipping is required and the manner in which different situations are to be handled.

3. If those having the responsibility of disfellowshipping have heretofore failed to fulfill their duty in that regard, they should publicly repent and inform the congregation of their renewed commitment to obedience in this area.

4. Every member should be informed that disfellowship proceedings against an impenitent member will continue regardless of whether he or she voluntarily withdraws from the congregation prior to their completion and that continuing as a member constitutes submission to that policy.

5. The church's procedures for disfellowshipping someone should be followed carefully and consistently.

6. Disfellowshipping must be done out of love and concern for the sinner and the church and to the glory of God. It must never be done fraudulently, out of malice, or as a way to grind some personal axe.

7. Disfellowshipping should be handled as discreetly as possible. Only those who need to know at any particular stage of the process should be told about the situation and then should be given as little detail as necessary.

8. The church should purchase insurance to protect itself and its leaders from liability for claims that may arise in connection with disfellowshipping.

9. The leaders should gain a basic familiarity with the law in this area and consult an attorney specializing in such claims whenever they feel the need.

[17] Some of these are adapted from House, 70-72.

10. Churches that spell out practices in extrabiblical documents like constitutions and bylaws should make sure that those documents adequately express the church's policies.