



Christian Mentoring

JOHN MALLISON MINISTRIES

LEGAL PITFALLS IN MENTORING & HOW TO AVOID THEM

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INTRODUCTION

People normally approach their mentor on three bases that are likely to raise legal issues for the mentor. Firstly a mentoree may be divulging confidential information in the expectation that the mentor will receive this information and be able to keep it confidential. Secondly mentorees will be seeking advice on what they might do in relation to a particular situation. This doing normally involves them communicating information or expressing an opinion about a particular person or group of persons involved in a particular situation. Thirdly they may be involved in a church disciplinary proceeding.

CONFIDENTIALITY

It is a basic part of a mentor's role to be someone who provides a confidential reflection or input into a mentoree's life. This assumption of confidentiality is vital to the necessary freedom and frankness that needs to characterise a relationship between a mentor and a mentoree. It nevertheless has some potential legal complications.

On most occasions confidentiality is going to be respected by courts and other third parties which may become aware of a mentor, mentoree relationship. It is helpful nevertheless to understand the basic principles which underline the obligation and privileges of confidentiality.

Firstly it should be understood that the right and privilege of confidentiality attaches to the mentoree not the mentor. Therefore if the mentoree is not entitled to maintain confidentiality over the content of their discussions with their mentor then the mentor will not be able to assert that confidentiality either. A formal religious confession is an exception to this and a mentor who is a minister of religion may get additional consideration as against a mentor who is a lay person or not seen to act with the formal endorsement of a religious community.

Secondly the privilege of confidentiality may well lie with a third party who is brought into the situation by the mentoree. For example a mentoree's spouse will have privilege in relation to anything that the mentoree raises about their private and intimate marital relationship. Mentors need to be careful that they respect the privilege of third parties even if the mentoree does not do so themselves.

The practical implication of the issues that I have discussed above is that a mentor may be required through a civil or criminal court action to disclose the contents of a discussion with a mentoree. If the mentor feels that this may be a possibility then they should warn the mentoree of that and perhaps suggest that details be kept to generalities or hypotheticals in order to minimise the chance of being drawn into such a legal action.

The other area in which mentors need to be very careful is whenever a mentoree raises issues about the mentoree's own misconduct when that misconduct might attract either criminal or civil sanctions. A mentor would be wise to get legal advice at this point before finding out too much in case the material disclosed to the mentor can be compelled in an appropriate legal action to be disclosed to the court. The most sensitive issue in this regard in recent times has usually been the disclosure by a mentoree that they have been guilty in the past of some degree of sexual misconduct particularly with children. In this particular case a mentor will have difficult legal and moral issues to sort through and there will be a real difference in the position of a minister who is not obliged to report such misconduct and non-ministers who very often are obliged to report the misconduct. If you are in this situation you need to anticipate it as much as possible so you can warn the mentoree that their confidentiality may not be able to be respected and you need to get legal advice as to your own obligations.



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The one exception to what I have outlined above come about is in relation to ministers of religion. Under section 127 of the NSW Evidence Act passed in 1995 there is a complete privilege against the disclosure of the contents of a confession and even the existence of such a confession given to a member of the clergy provided such a confession is in accordance with the rites of their particular church. The privilege only applies where the confession is made in accordance with the ritual of the church or religious denomination concerned. It is therefore a very narrow exemption and could not be used to provide privilege in relation to a general conversation. A minister seeking to rely on this section should once again get clear legal advice about the requirements of meeting it so as to not place in jeopardy the trust and confidence of a mentoree.

ADVISING PEOPLE ON WHAT TO SAY

Very often people approach their mentor in a situation of conflict, seeking advice on how to respond.

Mentorees will normally therefore be seeking advice about what to say in a church meeting which has been convened in another forum for the resolution of a dispute that they are involved in.

In this context an understanding of qualified privilege is quite crucial. Qualified privilege allows person to make a defamatory comment about another provided the comment is made in good faith and it is made to people who have a legal responsibility for the issue or the relationship involved. Good faith means that the person must genuinely believe the comment that they are making and that it must be made without malice or reckless indifference to the truth.

The meeting or group to whom the comment is made must be a group that has responsibility for the issue or the conduct that is being canvassed in the comments that are made. Necessarily therefore that meeting or group will have to meet in private and have to make a private record of the discussion and deliberations.

Therefore an employee who believes that they have been treated unfairly or harshly by their supervisor is entitled to complain to the body that appoints them and to have their views considered provided it is done so in private and provided the material laid before them meets the test of being made in good faith.

In the circumstances outlined above the defence of qualified privilege is available to a person who is sued for defamation and as the stakes can be quite high it may often be necessary to get legal advice as qualified privilege should or would apply before somebody takes action. Normal circumstances in which qualified privilege would be of assistance without seeking legal advice would include an exit interview or a review committee which seeks information from the mentoree in relation to any dispute on behalf of a body which has clear jurisdiction for that matter.

DISCIPLINARY HEARINGS

Mentorees will often seek advice from a mentor on how to respond to a disciplinary action within the church context. This area is fraught with difficulty. The reason for this is usually because church procedures are often woefully inadequate, patronising and invasive to a degree that would not be tolerated in civil society or in the criminal legal system.

There is a particular tendency for church tribunals to assume that they can have access to ones personal feelings and consciousness to determine whether a person was likely to have done or not done the conduct which is in dispute. Often a church will appoint an adviser to assist a person who is subject to a church disciplinary hearing but the quality of these advisers is very uncertain and can on occasion create more difficulties for the person accused than they would have been able to get into by themselves.



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As a general rule if a person's livelihood, ie their housing and income are at stake the civil courts will take an interest in the fairness of the procedures. If a mentoree's professional future is at stake it is most advisable to get formal legal advice at the very beginning of the matter as this may save a great deal of grief and difficulty later on. Many a person would have been best advised to simply contest the facts of an allegation without providing any other information rather than enter into the processes of church mediation tribunals.

Even if a new mentoree is guilty of misconduct they may have significant rights under Superannuation Law or other areas of legal redress which enable them to protect the rights and income of their families while minimising damage to themselves. This is therefore a complex area and the need for professional legal advice whenever a mentoree is this degree of difficulty is paramount. The issue of privilege also arises as only with a legal adviser can a person generally canvass the issues involved and what they may and may not have done without any fear of their frank views being forced into the legal arena.

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