

195

**Re: Church of Scientology**

When we last met on 20 April you noted that you had seen press releases about two recent court cases in Germany involving Churches of Scientology located there. Apparently, these press reports indicated that the two court decisions ruled that Scientology is not a religion. You asked for our comments on the two decisions.

One such court decision involves the applicability of trade registration laws to the Church of Scientology of Hamburg. This decision simply holds that the Church, because of its activities, was required to comply with the relevant trade registration laws whether or not the organisation in question happens to be a church or another religious organisation. Thus, this decision does not rule on Scientology's religiosity; to the contrary, it proceeds from the assumption that Scientology is a religion. A copy of this decision, in both original German and English translation, is attached as Exhibit 1.

It is impossible to analyze the other court decision at this time, however, since as yet we have only the press release and no written decision has been issued. The general context of this case involved the applicability of certain labour laws to the Church of Scientology of Hamburg. It may well be that the written decision, once released, will be the same as the first Hamburg case -- a determination that the relevant laws apply

irrespective of the religious nature of the organisation in question.

On the other hand, the language of the press release suggests the appellate court in fact may have evaluated the religious character of Scientology based on independent readings of Scientology Scripture that the judges may have undertaken on their own initiative and reached a negative conclusion. If this was so, such a "holding" would be plainly erroneous under German law, for several reasons, and easily reversed on appeal.

First, a decision on the question of religiosity would be totally irrelevant to resolution of the issue at hand, since, as the two lower courts held, the law in question applies regardless of the employer's religious standing. Thus, the appellate court failed to address the issue raised on appeal, but on its own went on to address another issue not properly before it. This action directly violated German judicial procedural requirements that the appellate court limit its review to determine only whether the lower court failed to apply or incorrectly applied the applicable rule of law.

Second, the Scientology books that the judges apparently read were not part of the record but rather appear to have been procured by the judges on their own initiative from some unknown sources. This action alone violated two other important German rules of judicial procedure. One rule is that an appellate court cannot make its own findings of fact -- as discussed above, it must limit its review to narrow issues of law. The other rule is that "evidence" such as books be submitted in accordance with detailed rules of evidence, which allow both parties to comment on the particular items under consideration. The Church of Scientology of Hamburg did not present any evidence on the issue of religiosity because the courts below specifically found that the issue of whether Scientology is a religion was not relevant to the case before them. The action of the court has denied the parties this right, and thereby violated fundamental principles of "fair trial" under German procedural laws.

Such a decision also would be directly contrary to numerous decisions of German courts and administrative agencies recognizing Scientology as a religion under Article 4 of the German Constitution,<sup>1/</sup> but it would not be surprising, given the present hostile political climate in Germany towards Scientology.

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<sup>1/</sup> Representative decisions are summarized in Exhibit 2.

Over the past several years, the German media, with the active participation of significant elements of the German governmental and political leadership, have undertaken a relentless campaign of disinformation to poison the public perception of Scientology in Germany. Unfortunately, this has not been merely a war of words but has resulted in concrete, discriminatory action against the Church and its German adherents. Instances of this outrageous action include the state of Baden-Württemberg refusing to permit the jazz pianist Chick Corea to perform at a concert simply because he is a Scientologist, and the Christian Democratic Union political party barring Scientologists from party membership. A summary of these and numerous other discriminatory actions against the Church and its adherents by German political parties, federal, state and local governments, and businesses and individual acts of harassment is attached as Exhibit 3. The Church provided this briefing to the United States Commission on Security and Cooperation in Europe.

Commendably, these repeated violations of fundamental human rights have not gone unnoticed. To the contrary, accounts of the efforts to suppress Scientology in Germany have been featured prominently in recent human rights reports, including the 1993 and 1994 Country Reports on Human Rights Practices, issued by the United States Department of State, and the 1993 Human Rights and Democratization in Unified Germany Report issued by the Commission on Security and Cooperation in Europe concerning the implementation of the Helsinki Accords. Copies of the relevant pages of these reports are attached as Exhibits 4 and 5, respectively.

In addition, in December 1994, a Special Rapporteur of the United Nations Commission on Human Rights issued his report entitled "Application of the Declaration on Eliminating all Forms of Intolerance and Discrimination Based on Religion or Conviction." A very significant portion of his report dealt with discriminatory action against Scientology churches and individual Scientologists that had been taken by German State governments, German political parties, German media and others. The report included a four-page summary of these discriminatory acts, a copy of which is attached in Exhibit 6.

Thus, we believe the Charity Commission should not consider the later decision concerning the Church of Scientology of Hamburg (under the labour laws). The first decision concerning the Church of Scientology of Hamburg (under the trade registration laws), on the other hand, does not raise any question concerning the religiosity of Scientology but in fact is

consistent with the numerous other court decisions in Germany that recognize Scientology as a religion.

In any event, we would be happy to respond to any further specific allegations from German sources, although, for the foregoing reasons, we urge the Commission to be extremely skeptical in reviewing any negative information about Scientology emanating from Germany.

Yours sincerely,

Enclosures

re: Church of Scientology

This letter responds to your letter of 19 June 1995, in which you requested the Church of Scientology Religious Education College, Inc. ("the Church") to provide you with a brief written confirmation of verbal observations made at our 6 June meeting concerning three recent decisions in Spain, Denmark and France. In your letter you also requested information regarding all criminal and civil proceedings in the United Kingdom involving the Church or its officials in the last ten years. You noted that you are requesting this information in order to determine whether the Church is established for the benefit of the public or whether its activities raise issues of public policy.

In addition to the foregoing request, in an earlier letter dated 6 June 1995, you requested a plan of the Church's facilities at Saint Hill along with a description of the use to which each area is put, including the roles of people who may occupy the premises, whether permanently or temporarily.

All of the information you have requested is provided with this letter.

As a preliminary matter, I would like to place the proceedings that you have inquired about in proper context in light of the extraordinary successes the Church of Scientology has accomplished throughout the world in recent years.

As you know, Scientology is a relatively new religion, and like all new religions, it has met its share of religious intolerance and persecution in several countries. The Church has found that much of this intolerance has been governmentally sanctioned, especially in countries that have one national religion or a close nexus between the government and a particular religion. In many cases this persecution has been less overt but more subtle, such as requiring the Church to abide by rules not generally enforced against churches of other religions:

Without exception, these actions against the Scientology religion have been fuelled either by misconceptions of the religion, false accusations, or a desire to protect the status quo of the

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existing "state religion." Nonetheless, whenever officials have taken an objective look at Scientology, these objective inquiries have uniformly resulted in religious recognition.

The attached narratives demonstrate that the recent matters in Spain, Denmark and France about which you have inquired all fit within the former categories. As discussed at Exhibit B, the Danish matter involves a change in administrative policy that simply requires that Scientology, as a new religion, now establish that it has the basic characteristics of a religion through an administrative process. Exhibit C shows that the proceedings in Spain are the result of a local judge's witchhunt fuelled by a desire for fame and fortune -- on appeal the reviewing court dismissed all of the significant charges. And Exhibit D shows that the proceedings in France resulted from the corporate structure the French church adopted when it was established, which it now is in the process of changing to comport with structures used by churches of other religions.

These actions stand in stark contrast to the action taken by the United States Internal Revenue Service in October 1993, when it reversed its long-standing position and recognised the tax exempt status of the Church of Scientology and its affiliated churches and religious and charitable organisations. Of course, this result would not have occurred had not a group of fair minded senior officials in the Internal Revenue Service decided to put Scientology to the most rigorous -- but objective -- examination in the history of United States tax law.

Official recognition of Scientology as an established religion certainly is not limited to the United States alone. The memorandum we previously provided you, "Tax Exemption Issues -- Church and Religious Status" (Exhibit I-I to the submission of 20 April 1995), set out a listing of numerous court decisions and governmental acknowledgements from around the world confirming the religious status of Scientology. And such favourable decisions continue to be rendered.

For example, on August 1, 1995 the Independent Administration Senate in Vienna, Austria, rendered the final decision in a case concerning whether activities of the Church of Scientology of Vienna should be classified as a trade or business subject to trade registration and other laws. In this decision the Court concluded unequivocally that Scientology is a religion and not a trade or business, that Scientology auditing is a religious activity, and that the religious services in question were solely conducted for religious purposes and not for profit. The Court specifically recognised that Scientology's fixed donation system simply is the Church's method of raising funds and that this "financial sacrifice" by Scientologists was less stringent than the sacrifices exacted by some other religions from their members. (A certified translation of the decision of the Austrian Court is attached as Exhibit A.) For the reasons discussed below, we fully expect similar results in proceedings involving churches of Scientology that currently are pending in Germany.

As you know, the Lutheran and Catholic Churches are, for all intents and purposes, the national churches of the German Republic and are supported by tax assessments against German citizens. Lutheran priests are members of the German Parliament and often occupy positions in political parties and government agencies. The nexus between the government and these Churches has been very close and the government historically has acted to protect their interests, particularly with respect to new religions -- such as Scientology -- which were believed to draw their members from the ranks of the Lutheran and Catholic Churches.

This self-protectionist policy came to a head in 1989 in a decision involving Transcendental Meditation, which allowed the government to issue official "warnings" to the public about new religions. This decision significantly weakened what had been a fundamental principle of the German Constitution -- governmental neutrality toward religious beliefs. It also served as legal support for ever increasing attacks and acts of intolerance against new religions, including Scientology.

However, just last month the German Federal Constitutional Court established a major precedent for the protection of religion under the German Constitution that should change all this. The case, Selers v. Government of Bavaria, ruled that the State of Bavaria could not hang crucifixes on the walls of public schools as such governmental identification with a particular religion (in this instance Catholicism) violates the German Constitution. The Court expressly used this case as a forum to re-establish the constitutional principle of governmental neutrality toward religion, which had markedly deteriorated since the Transcendental Meditation decision.

The decision in Selers supersedes the Transcendental Meditation ruling and gives new force to the constitution's inherent protections. It is expected that this decision will have a very positive effect on pending court proceedings involving Scientology in Germany, as well as in all governmental proceedings there.

In your 19 June letter, you also asked the Church to provide you with details of civil and criminal proceedings in the United Kingdom involving the Church and its officials over the last ten years. This request is similar to a request made by the IRS during the IRS settlement proceedings. In the U.S., however, there was a higher volume of litigation to address because lawyers there can work on a contingency fee basis, so it is in their self-interest to encourage the bringing of many lawsuits. Nonetheless, the IRS investigated each of these cases and found that they were without merit.

Comparatively, in the United Kingdom there has been much less litigation involving the Church, particularly when you consider the large presence of the Church. The list and background information of the Church's litigation in the UK is attached as Exhibit E. You should note that this background information does not encompass individual suits that fall into two narrow categories of cases -- claims by creditors whose bills were either disputed or not timely paid, and requests for the return of contributions previously given to the Church.

The reason background information is not given for these suits is that in each case the dispute involved a nonsubstantive issue not relevant to questions of "public benefit" or "public policy" and was resolved out of court for either the amount requested or some other agreed-upon amount. However, for your information a list of these cases is included as part of Exhibit E.

At our 6 June meeting you also asked for a plan of the Church's Saint Hill premises that indicates the use to which each area is put. The plan of the Saint Hill premises is attached as Exhibit F, with specific areas of the Church's premises identified by letter along with a narrative description of the use of each area. Also attached as Exhibit G are photographs of the premises so that you may better visualise the different parts of the property. The

photographs show the grounds where Saint Hill is situated, the external features of the various buildings and many of the rooms in use for the ministry of religious services, Church meetings and gatherings and the other activities of the religion which are described in the plan at Exhibit F.

The photographs also show Saint Hill Manor, where L. Ron Hubbard lived and worked from 1959 to 1966. It was here that Mr. Hubbard conducted much of his research and made many discoveries that are part of the doctrine and practice of the Scientology religion. The Manor has been restored and maintained as it was when Mr. Hubbard lived there.

As these exhibits demonstrate, all of the Church's premises at Saint Hill are used exclusively for religious purposes either through direct ministry to the Church's parishioners or through the necessary administrative support of this ministry -- or in the case of the Manor, as a museum for the religion.

On several occasions my clients have invited you to take a personal tour of the Church facilities at Saint Hill. I would like to take this opportunity to again extend this invitation. A personal tour of the facilities would enable you see first hand a Scientology environment and Scientologists practising their religion. It would also enable you to fully understand how the property is used and provide a much better understanding of the Church's specific activities and the Scientology religion in general. You may be interested in knowing that Internal Revenue Service officials toured a United States Church of Scientology as part of their examination process and found it extremely useful and informative.

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With this letter the Church has provided all information requested by the Commission to date. Our original application, our submission of April 1995 and the information included with this letter provide a comprehensive picture of the Scientology religion in general and, more specifically, the organisation and activities of the Church in England. This information clearly establishes beyond question the Church of Scientology's entitlement to recognition as a qualified religious charity.

Yours sincerely,



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**Appellate Ruling**

The Independent Administrative Division of Vienna, via its member, Dr. Obransky, has ruled in the appeal from Ms. Elfriede Fasching (represented by Dr. Egon Engin-Deniz, Attorney, Ebendorferstraße 3, 1010 Vienna) against the sentence from the Municipal Council of the City of Vienna, Municipal District Office for the 6th and 7th Districts, on 5/16/94, MDO 6/7 - S 12040/93, due to a breach of § 366, Par. 1, Line 1, Business Ordinance 1994:

According to § 66, Par. 4, AVG, the appeal is as follows, that the disputed sentence is lifted and the case according to §, Par. 1, Line 1, Property Tax Law is dismissed.

The appellant shall not be charged for any fees for the appeal in accordance with § 65 Property Tax Law.

**REASON**

According to the disputed sentence, the appellant has charged the following breach of § 366, Par. 1, Line 1, Business Ordinance.

She called in, as a representative, the spokesperson (§ 9, Par. 1, Property Tax Law) of the Church of Scientology, Austria to answer that this organization advised and consulted with people on 11/9/93 at Schottenfeldgass 13-15, Vienna 7, by offering and conducting courses, for example on marriage, relations with children, simplifying work for Sch 700.00, an introductory auditing course for Sch 3,000.00, an auditing course for Sch 7,000.00, a package 'purification rundown' for Sch 22,000.00, as well as a Dianetics and Scientology Processings course for Sch 55,000.00 and other courses up to Sch 88,000.00 and thus practiced the profession: life and social advisor, § 128, Line 16, Business Ordinance 1973, in accordance with § 127, Line 29, Business Ordinance 1994, without having attained the necessary professional authorization.

The substance of the appellant's argumentation was that "Scientology," according to her understanding, is a religious organization (not recognized in Austria) and not a business

operation. The organization's activity was not practiced with the intention of obtaining a profit or other economic advantage and was not designed to achieve proprietary advantages for the organization's members.

"Based on the agency's argument, one could also, for example, hold the opinion that a pertinent business exists within the Catholic church if for baptisms, marriages or burials, where a service is provided, a payment is requested. A comparison must be made here within the contribution system. The Catholic church, for example, collects church taxes from all its members whether a "service" is received or not. Based on the fact that now all Catholics make their contributions, it is of course easier to request a relatively small payment for baptisms or weddings since the entire apparatus of the church is supported by all of the others making payments. This naturally creates an impression, one which we do not allow at first to come to mind, that this is a business operation. For us, it is the same, i.e., that not all member always make their contributions, rather only if they are currently active and are pursuing their religious studies. Thus, the all expenses for our church are always only supported by those who are currently using our services."

Further, the appellant made a particular reference to "our religion in the United States of America."

"Years ago, the United States IRS conducted an identical investigation of our organization. All imaginable aspects were checked -- costing thousands of work hours and filling meters of files.

"This means we are already accustomed to being inspected. Nevertheless, we expect that we will be regarded without prejudice.

"As always, the investigation by the federal tax authorities in America showed that we 1) are a bona fide religion and 2) work exclusively for organizational, caritative purposes and, what is also important to mention in this particular case, no single member of our organization obtains financial advantages from our activities.

"This decision by the federal tax authorities became effective on October 1, 1993 through an official letter."

A copy of the cited decision from the United States IRS was presented in the appeal both in its original form as well as a translation in German.

Within the scope of the appeal, the disclosure of the applicable statutes for the "Church of Scientology, Austria" was requested from the organization's authorities.

The important parts of these statutes have the following contents (§ 2, 4 and 5):

§ 2

The Church:

The church is and shall be one of the many worldwide churches that were organized for the goals of the Scientology religion and are all connected as elements of an international and hierarchical church, under the voluntary and self-determined agreement with and adherence to the following points:

1. The goals, teachings, guidelines, practices and profession of faith as presented in the writings and other designated materials by L. Ron Hubbard; and
2. Acknowledgement of the church's authority, the hierarchy of the mother church; and
3. Control in church matters through said hierarchy.

The board and the members must adhere to the above and shall ensure that the actions and activities of the organization, as a Church of Scientology, are conducive to the view of the mother church and thus are maintained.

Of overriding significance is always and in every regard the observance and adherence to all applicable laws and the conditions of this charter.

This hierarchy is only applied to the extent that the inner-Austrian purposes, at least for the most part, are required.

By "mother church" and "hierarchy of the mother church," the internal church hierarchy is meant, as well as how it is currently organized and operated.

Further, it is a nonprofit, religious organization under the protection of the CHURCH OF SCIENTOLOGY INTERNATIONAL.

Purpose of the organization:

- (1) The organization serves religious purposes and is not designed for the private attainment of profits for any person.

It is the purpose of the organization to support the purity and integrity of the Scientology religion, to protect, propagate and practice it, to properly receive it as it was developed and can be further developed by L. Ron Hubbard so

that every person who would like to participate or has already participated in Scientology can obtain the greatest possible use from one's own spiritual consciousness, existence and knowledge.

For this purpose, the organization creates an organization with whose assistance the church's work and activities can be implemented. In particular, the organization stands for the unlimited attainment of the following specific purposes:

- a) to serve to expand and practice the religious beliefs of Scientology,
  - b) religious services, which include organizing and conducting divine services for its (the organization's) believers,
  - c) to perform religious activities that correspond with the organization's purpose,
  - d) to promote and increase the spiritual welfare of its members and society.
- (2) The organization is to support the community through the activities described above; the organization's activities are not directed toward obtaining profits; it exclusively promotes church, nonprofit and charitable causes and focuses its management on these purposes.
- a) The organization promotes church and religious causes by promoting the goals and purposes described in 1 a - d.
  - b) The organization promotes charitable causes in that as it pursues goals through whose attainment the general good is furthered in the sense that it promotes public interest in spiritual, cultural, moral and material areas; thus it achieves through training, which is available to the public, through education levels and the possibility for each person to attain education within the framework of the organization's purpose through caring treatment by being there in emergencies and in particular, by promoting piety.
  - c) The organization promotes charitable causes by providing and ensuring material assistance within the framework of its possibilities and its organizational purposes, as well as spiritual assistance.
  - d) The organization does not strive toward profits;

the members are permitted basic allowances for organization measures, however, they do not receive any unreasonable payments.

- e) In regard to the organization's purpose, the organization also operates training and information centers that are accessible to all and are nonprofit and that are operated within the full framework of the organization's work. These training and information centers represent an essential assistance operation for the Church of Scientology, Austria; any profits or excesses from this operation are devoted to the organization's causes.
- f) The organization cause is determined in large part by the demands of the domestic causes.
- g) The organization, in the sense of the above conditions, also establishes an actual managing board, exclusively and directly for fulfilling the church, nonprofit and charitable purposes. The organization's leadership will comply with the goals of the organization's bylaws.
- h) Any member may leave the organization at any time, whereby the board has the right, according to the statutes, to determine the conditions of a binding type and method of readmittance into the organization.

#### § 4

#### The Profession of Faith:

We of the church believe:

That all people, of whatever race, color or beliefs they may be, shall be treated with the same rights;  
That all people have inalienable rights to their own life;  
That all people have inalienable rights to their own religious practices and their application;  
That all people have inalienable rights to their own defense;  
That all people have inalienable rights to devise, select and support their own organizations, churches and governments;  
That all people have inalienable rights to the freedom of thought, speech, to write their own opinion and to counter the opinions of others or to comment or write thereon;  
That all people have inalienable rights to create their own way;  
That the souls of people have the rights of people;

That the study of understanding and healing of illness with emotional causes is not alienated from religion or should not be assigned to non-religious areas.

And that no instance has power aside from God to revoke these rights or to disregard them, either publicly or in secret.

And, we of the church believe:

That man is fundamentally good;

That man endeavors to survive;

That man's survival is dependent on himself and his fellow man.

And, we of the church believe that the laws of God prohibit man:

From destroying his own way;

From destroying or enslaving the soul of another;

From destroying or reducing the survival of his comrades or his community.

And, we of the church believe that the soul can be saved and that, above all, the soul saves and heals the body.

## § 5

Means for achieving the organization's purposes:

- (1) The organization's purposes shall be achieved through use of idealistic and material means.
- (2) Idealistic means are:
  - a) Conducting seminars to promote communication, creativity, acknowledgement of dependencies, for example on drugs, alcohol, etc., one's own conception of man as a spiritual being in the sense of the education methods developed by L. Ron Hubbard, which are applied in their original form without changes or deviations;
  - b) Organizing functions, such as presentations, meetings, social gatherings, discussion evenings and the like through which the public can and shall come into contact with Scientology;
  - c) Preparing and making available their own religious literature;
  - d) Arranging spiritual advise and spiritual training;
  - e) Conducting personality tests;

- f) Advising in ethical situations;
  - g) Informing the public through the church's activities and its members;
  - h) Advising members of the congregation that are experiencing or have experienced difficulties and providing church services for them;
  - i) Officiating marriages, christenings and burial services without infringement of existing laws;
  - j) Providing help and advise by the chaplain;
  - k) Handling legal situations as well as management and supervisory functions to ensure the continuation of the church, its expansion and its welfare; and
    - 1) Preparing and implementing social programs in the community for drug abuse, study problems, crime, etc., in the public interest to gain control;
- 3) Material means are:
- a) Participation fees;
  - b) Membership contributions;
  - c) Donations;
  - d) Profits from the sale of books and printed materials (religious literature); and
  - e) Profits from functions and other statutory activities."

Further, on 8/3/94, an inquiry of the following contents was directed to the Finance Office for Legal Entities:

"The Independent Administrative Division of Vienna, in connection with an appeal from the board of the Church of Scientology, Austria against the sentence from the Municipal District Office for the 6th and 7th District on 5/16/94, Line Municipal District Office 6/7-S/12040/93, requests a disclosure on whether the "Church of Scientology, Austria" holds the status of a nonprofit organization or whether the "Church" is liable to pay taxes on profits. The cited sentence held the reproach of the unauthorized practice of the profession of life advisor."

For the time being, this inquiry was not answered (in writing). Therefore, on 10/18/94, the Independent Administrative Division of Vienna urged the Finance Office to make a written statement.

On 11/15/94, a telephone call confirmed that the Church of Scientology, Austria did enjoy, in part, the status of a (nonprofit) organization; in part its status was acknowledged as a

business operation. An appeal has been in progress for two years against this status. The file is with the federal ministry responsible for this. Therefore, concrete information could not be provided.

Further, the appellant applied for an oral hearing in a letter dated 12/19/94. In a letter dated 3/16/95, the authorization was granted to an attorney.

The oral hearings could only be scheduled for 7/5/95 after the person for the legal representative was changed.

During the preparations for this hearing, the appellant's representative reported an additional submission, which was comprehensive and supported by the presentation of corresponding evidence, to extensively represent the appellant's position.

The following statement of 6/22/95 explains in detail:

1. On the question of business activity

It is correct that the Church of Scientology, Austria, of which I am a representative, is set up as an organization as defined by the law on organizations. The authority involved did not, however, correctly decide the question of business activity.

The authority involved refers to § 1 Par. 6 Commercial Ordinance 1973, now Commercial Ordinance 1994 for the judicial decision, according to which organizations conforming to the Organizations Law of 1951 exhibit the intention to make a profit or receive some other economic advantage. This intention is also exhibited when the organization's activities have the appearance of a for profit enterprise and these activities -- directly or indirectly -- are oriented toward obtaining proprietary advantages for the organization's members. The authority involved further refers in its legal judgment to the opinion of the trade committee which took the position in its report (1988) on the business law amendment that if an organization -- even in the fulfillment of idealistic goals -- offers and provides its members payment or sells goods to its members, and conducts itself in a manner that is comparable to the behavior and the management of a for profit enterprise, then it may be said to have the appearance of a for profit enterprise.

Next, it must be established that the opinion of the trade committee cannot be referred to primarily as interpretation for a legal brief corresponding to the government bill in any meaningful way. As the decision being challenged rightly states, this is only a matter of one opinion, which is not supported by other sources on the interpretation, the supplements to the stenographic minutes or the report of the committee.

Even if the opinion of the trade committee -- which is not



supported in any way by the judiciary -- were to be correct, the challenged decision lacks any preliminary inquiry into and any answer to the question of whether and to what extent the Church of Scientology, Austria exhibits the appearance of a for profit enterprise. There has also been no determination by the authority involved on the extent to which the Church of Scientology, Austria is supposed to have acted that is comparable to the behavior and the management of a for profit enterprise. The authority involved has also failed to determine in greater detail what operations were for profit for which I have been accused and how the Church of Scientology corresponds to any type of for profit enterprise.

Likewise, there is no reference to the "opinion" of the trade committee in which the trade committee speaks only of goods and services that are distributed to members. In the concrete discussion about the sentence, I have never been accused of selling goods. The authority involved made no determination of which groups of people were performing spiritual services such as auditing, marriage courses and other ceremonial events. I hold that these services were provided not only to members, but to nonmembers as well. The actual facts then do not correspond to the position of the trade committee, which states that proprietary advantages are given to the members of the organization.

Thus Purification Rundowns, Auditing, and the other events are religious in nature and not financial advantages.

The authority did not carry out an orderly preliminary investigation. In the reasons for the decision, page 2, it says simply that the knowledgeable authority has come to the conclusion, based on the report, that this happened in such a way, that it is comparable with the behavior and the management of a for profit enterprise. But the verba legalia and the statement of the trade committee are simply repeated here without applying the legal standard to a concrete factual account recorded by the authority. Legal grounds of this type, that do not refer to concrete facts established and recorded by the authority, are only grounds in appearance, making the disputed decision unconstitutional. Grounds in appearance only are not valid legal grounds. This is thus a case of tyranny as defined by the Judicature of the constitutional court. An action of this type by the authority involved violates the principle of equality manifested in Article 2 of the constitution of 1867 (Constitutional Congress 8854; 9206; 10057; Constitutional Court 9/27/86, B 265/86).

To the extent that the authority involved assumes that the Church of Scientology, Austria is a for profit enterprise in the sense of "counselors and social workers" according to § 128 Line 16 Commercial Ordinance 1973, as well as § 127 Line 29 Commercial Ordinance 1994, it still has not been established how an enterprise of this type must conduct itself in the view of the authority and to what extent the Church of Scientology, Austria meets the criteria of such a commercial enterprise. Obviously, the Church of

Scientology, Austria has not violated the named conditions, because it is, as will be demonstrated below, a religious organization.

Because the authority involved has neglected to present any evidence on the question of whether we are set up like a typical commercial enterprise, the authority involved could also not examine the interesting legal question of whether -- apart from any consideration of whether we are, as we claim, a religious organization -- the activities performed are, as is alleged, life counseling or rather relaxation training and philosophical analysis. These latter activities are exempted from the business ordinance because of the decree by the Federal Ministry of Economic Affairs of 12/9/92, line 30.599/70-III/1/92 of the laws governing trade and industry. The determination, I would have to answer, that the Church of Scientology, Austria is in the business of counselling and social work is anyway incorrect because the prerequisites for it do not exist.

2. The presence of a religious organization precludes business activities:

2.1 The basis for the concept of a business is § 1 Par. 2 Commercial Code. According to this, an activity is commercial if it is pursued independently, regularly and with the intention to make a profit or obtain some other economic advantage no matter what purpose is specified. This concept of a business is modified for organizations in that the activity of the organization is oriented directly or indirectly toward the economic advantage of its members. The authority involved has in no way established whether or not organization members have obtained economic advantages through the activities of the organization nor identified which members were supposed to have done so. This is clearly refuted. Neither members nor nonmembers obtain financial advantages, directly or indirectly, from the organization's activities. Thus, the authority involved can in no way have established this.

Next, the appellant testified on the previously cited organizational statutes as well as on the implementation of numerous charitable organizational goals such as anti-drug measures, but also mediation and help in private disputes, such as marital problems by a chaplain of the Church of Scientology, Austria, or members doing voluntary street cleaning or working on New Year's Day in a soup kitchen for drug addicts and the homeless.

"Anyone can take part in religious acts such as church services, weddings, christenings, burials and funeral services whether a member or a nonmember by inquiring with the Church of Scientology, Austria. These services are completely free of charge and are performed by a clergy member (chaplain) of the Church of Scientology, Austria. For example, a wedding was performed on 6/10/95 by the chaplain of the Church of Scientology, Austria.

Further, a christening ceremony took place on 6/25/95 and another wedding was held on 7/1/95, which were also performed by the chaplain of the Church of Scientology, Austria.

All these activities are doubtless included and supported as organizational purposes. Indisputably, these acts cost a good deal of money. They are financed by revenues from, for example, those courses that are seen by the authority involved as unauthorized commercial practices. There is no concrete flow of money back to members of the organization. There is no monetary profit for members or nonmembers from the Church of Scientology, Austria, even only for business-like practices. Revenues from courses, auditing and other events serve to finance all charitable activities of the Church of Scientology, Austria. It is a principle of organizational law that organizations have the right to finance their existence and the activities of the organization through activities that they set up. Organizational activities that alongside the dissemination of the religious teachings of Scientology are oriented merely toward ensuring the continuation of the organization and by which there is no direct or indirect assignment of monetary payments to the members of the organization, are without doubt exempted from the commercial ordinance. This is shown in a decision reversing § 1 Par. 6 Commercial Ordinance, in which the authority involved cited in the report by the trade committee.

We would also gladly publicize how a Church of Scientology uses its money. The attachment shows that expenditures for missionary work and dissemination (received from new members) make up 22%, personnel costs 27%. The purchase of books is budgeted at 14%. Rent and maintenance make up 9%. Office and administrative costs come to 4%, legal and consultant fees 9%, postage and telephone 10%, member education 3%, travel costs and miscellaneous 1%.

According to the annual accounts from the last five years (1988 to 1992), the Church of Scientology, Austria has sustained losses. This points away from business activity. The losses were:

1988:	- Sch	816,459.15
1989:	- Sch	107,518.05
1990:	- Sch	2,516,391.11
1991:	- Sch	1,107,843.43
1992:	- Sch	9,120.82

It is apparent that the Church of Scientology, Austria can only reach its goals through powerful financial planning, whereby the type and method of financing a religious group belongs to a protected area of self-administration. Small religious groups, which unlike the large established churches, who do not have large tax incomes at their disposal, must seek other means of financing. Whether they obtain their income through donations, member contributions, or fees for particular services within the framework

of the religious activities must remain with the self-conception of the individual church. Otherwise, the result is unlawful discrimination between recognized and powerful religious groups and unrecognized, small religious groups.

The question of whether the Church of Scientology, Austria pursues commercial aims is also posed in the tax laws. In the tax laws, the term charitable according to the profit regulations of the BAO should be referred to for evaluation. In this connection, we refer to the legal testimonies of Dr. Walter Barfuß, University Professor of 7/23/79 and 9/18/79. These show that the organization of the Church of Scientology, Austria is charitable as defined by §§ 34 ff BAO.

Dr. Siegbert Morscher, professor at the Institute for Public Law and Political Science at the University of Innsbruck comes to the same conclusion in his writings of 8/10/79. Professor Morscher concludes that the charitable status is fulfilled, because it is undisputed that the Organization of Scientology in Austria in no way has a closed membership. The organization is open in principle to everyone. Even with regard to the dissolution regulations of the Scientology Organization of Austria, the characteristics of a charitable organization according to §§ 34 ff BAO are ensured. This organization is thus charitable as defined by the BAO, which contradicts business practice as defined by the commercial code.

The opinion of counsel that was referenced was presented in its entirety (a copy) by the appellant. This furthers the Administrative Court's judgement on 5/26/82, Lines 13/0039/79, 82/13/0100-0102, in which the legal viewpoint of the "Church of Scientology, Austria," as the complainant, was supported when the Regional Financial Director of Vienna, Lower Austria and Burgenland, reversed an appellate decision on October 25, 1978, Line File 9 - 119/14/78 (regarding the sales tax 1971, 1972 and 1973, the assessed value of business capital, the capital taxes and the estate tax equivalent from January 1, 1974, to the extent that it effects the sales tax 1973, the assessed value of business capital from January 1, 1974 and the estate tax equivalent from January 1, 1974) due to the illegality of its contents in large part. In particular, the Administrative Court based their decision on the nonprofit character of the complainant, as is shown in the case.

To corroborate this allegation, "Scientology" is a religion, the appellant proceeded:

"The Church of Scientology, Austria applied to the Federal Ministry for Instruction and Art for legal recognition as a religious organization, based on the law from 5/20/1874, Government Statement No. 68. The hearing is still pending. The question whether Scientology is a religious organization deals with a precedential

legal relationship in regard to § 38. Since neither a positive nor a negative decision has been made about the nature of the Church of Scientology, Austria as a religious organization, the professional authorities must also independently judge this question as a previous question in the trial. Since the activity of the Church of Scientology, Austria is the practice of religious beliefs, it is not possible to subsume the incriminated facts under the trade law. Testimony from Dr. Heinz Mayer, University Professor, was obtained on this question. The abbreviated testimony is available.

All of the dealings that have suggested that we are commercially active are part of the religious practice. Through Auditing, the goal, that the person achieve a new status, namely Clear, is pursued through auditing. A Clear is a person that no longer has his/her own reactive understanding. The spiritual consequences of this breakthrough are profound. The Clear has no engrams that, when restimulated, affect the accuracy of his calculations and introduce hidden and false data.

By relinquishing the reactive thoughts, according to our beliefs, the person is guided to complete freedom (reactive understanding, according to our teachings is defined as the entirety of the experiences -- even those that are subconscious -- that are instilled in the person. The person who has not yet achieved "Clear" will always be guided by their reactive understanding, i.e. their positive and negative memories).

Likewise, the so called "Purification Rundown" represents a religious process that serves to purify the person to strengthen the Thetan, the spiritualization of the person.

To the extent that I proceeded, the so called E-Meter, which is also sold within the framework of the religious practice, is viewed as a part of the religious practice. The clergy of the Church of Scientology, Austria, who is called the Auditor, conducts the spiritual ceremonies and uses this device. It serves to detect spiritual areas of the aberrations (sins).

All of the acts presented to me are part of practicing the beliefs of the Scientology religion. In all of the spiritual actions and ceremonies cited, it is common that they do not serve as any profit-making purposes. Since a profit-making purpose is missing in the religious practice, per se, the commercial law also cannot apply. Otherwise, holy services conducted upon request, read quietly or with musical accompaniment, for which one usually pays, would also fall under the commercial law. This is, of course, not the case. Payment for religious functions in other acknowledged belief systems are not for commercial purposes and therefore are not subject to commercial law.

The inclusion of other religious organizations that earn money through by conducting religious activities, serve exclusively for

maintaining and covering the respective church institution.

If one would subject these actions, purification rundown and auditing, exactly as they are practiced in our belief system, whose earnings in turn finance public causes that are conducted by the Church of Scientology, this would be a breach against constitutionally guaranteed right to the freedom of religious practice.

This would mean that, since the beginning, belief systems that are different from the traditional form of religious practice, would be subject to commercial law. The Church of Scientology, Austria -- as would all others religious organizations that are not recognized according to the Religious Acknowledgement Law -- would be denied the right to finance the church's nonprofit activities from income received in religious ceremonies. It is obvious that this is contrary to the principle of equality.

That Scientology teachings deal with a religion is clear from the fundamental principles distributed by the Church of Scientology, Austria as well as the Scientology Church International. The fundamental beliefs of Scientology are:

- Man is a spiritual being;
- Scientology affirms the existences of God, whereby there is no dogma on a specific picture of God;
- The belief in God help for man;
- The belief in another life;
- The belief that man is by nature good, however is aberrated (sinful);
- The possibility of an former life. Man is a spiritual being, he is a Thetan;
- Scientology is for all and would like to provide charitable and welfare services -- without charge to all in need.

That Auditing, Purification Rundown and Drug Rundown are religious activities was also confirmed by the legal opinion of Dr. Jörg Müller-Volbehr, Professor, jur. habil. On page 25 of this evidence, it was determined that Purification Rundown, Drug Rundown and Auditing each represent procedures to support and simplify the spiritual advice in the Church of Scientology and that they are a part of the religious teaching of the Church of Scientology. Auditing is of central importance according to the teachings of the Church of Scientology.

Auditing should be qualified as an action that falls under the protective area of Article 4, Par. 1 and Par. 2d of the German Basic Law. Purification Rundown and Drug Rundown, as a part of Auditing, also have the legal characteristics of a protected religious activity according to Article 5d of the Basic Law.

Evidence: Testimony of Dr. Jörg Müller-Volbehr, University Professor (Attachment . /7)

The characteristic of Scientology as a religion and thus the claim for recognition as a religion is substantiated by the numerous scientific testimonies of known theologians and jurists.

a) Testimony of Wilhelm Koopmann, Eng., Theol.

According to the testimony by Wilhelm Koopmann, Theologian, in September 1985, the teachings of Scientology are a humanistic religion as described by Erich Fromm. Scientology, as a humanistic religion, has the goal that man achieve his greatest strength and not his outer helplessness. The aspired virtue is self-actualization and obedience. It does not effect the humble submission under an almightiness, rather of a belief experience that corresponds with personal convictions and builds on this. One may view early Buddhism, the teachings of Isaiah, Jesu, Socrates, Moses, certain threads within Judaic and Christian Religions (particularly mystic), the religion of reason in the French Revolution as examples of humanistic religions. In Christianity, there are recurring tendencies of this type of religion and, above all, a direction that has developed as theocentric, dogmatic and scholastic. Scientology and its numerous practical exercises can only be properly understood as a progression and development of a humanistic religion that is analytical and practical-oriented, that should lead to religious-spiritual redemption. Koopmann correctly indicates that Scientology contains a transcendental element, namely the belief in a higher being, wherein a typical characteristic of religion and its practice is found.

b) Testimony of Dr. Oosthuizen, University Professor:

Dr. G. C. Oosthuizen, University professor and Dr. of Theology also made a similar judgement:

"The Churches of Scientology assumes a highest existence and is not merely secular or ideological (Testimony on 9/20/74, page 2)."

c) Testimony of Dr. G. Wießner, University Professor:

In scientific discussions, the idea is often presented that Scientology is comparable to the Buddhist religious understanding. On this point, Dr. G. Wießner, University professor (Full professor of religious history), discussed the characteristics of Scientology as a religion on page 26 of his testimony of 8/10/80:

"With regard to the teachings in the materials presented here on the foundation of the origin and authority of the knowledge proclaimed in them, Scientology is comparable to the major Asian religions. In these religions, there is a heteronomous foundation... Scientology, based on the prophecy, draws on an

awareness and knowledge that has the characteristic of religious awareness in the Asian religions. Its content cannot be recognized and held as truth by man or by every man himself, rather he must be informed. Characteristic of this emphasis on the heteronomous foundation of educated awareness is the reference to Rgveda, Samhita -- as the oldest source of Scientology."

d) Testimony of Dr. Michael Schmaus, University Professor:

Likewise, a brief statement from Dr. Michael Schmaus, University Professor (full professor of religious studies at the University of Munich): "Similar to Buddhism and Hinduism, the "Church of Scientology" is an applied, philosophical religion. It is related in many ways in its content and methods to the eastern religions cited. Their purpose is to help people in the completion of life through their religious and philosophical statements and through their rituals.

These theological foundations for the religious characteristic of the teachings of Scientology draw on the following legal conclusions:

According to the law of 5/20/1874 regarding the legal recognition of religious organizations, the right to recognition is subject to the following requirements:

- a) That the religious teachings, the religious service, the constitution as well as the name chosen for the religious organization cannot be unlawful in any way or morally offensive.
- b) That the establishment and existence is protected by at least one of the requirements of this law on establishing religious communities.

The Church of Scientology, Austria, in its application on 8/22/75 to the Federal Ministry of Instruction and Art, showed that the requirements for establishing at least a religious community did exist. In this regard, we refer to our application, which has remained unsettled thus far. Proof of membership numbers can be easily provided.

Further, the logical conclusion can be made that the religious teachings, the services, the constitution and the selected name of Scientology are not unlawful based on the fact the Church of Scientology, Austria has existed for many years in Austria and are organizational statutes are known. In regard to this procedure of waiving an injunction, the legality of the organization is being checked by the organization's authorities so that legality of the teaching of Scientology are secure.

The claim results from the following legal considerations:



According to the judgement from the Constitutional Court on 12/12/88, which affected the Church of Scientology, Austria itself, the Constitutional Court indicated that the decision on recognized and unrecognized religious organizations did not provoke any thoughts of constitutionality because this differentiation was already made constitutional in Article 15 of the State's Basic Law. Basic legal regulations that are related to this differentiation, are unthinkable in regard to the constitution if this differentiation is based on fact and further, if the acknowledgement was made on factual viewpoints and is also accepted. From this, the Constitutional Court deduced that the Recognition Law granted an acceptable legal claim to recognition. The recognition is to be pronounced in the by decree. In the event of non-recognition, a corresponding decision must be made (see also Herbert Kalb, the Court of Public Rights and the legal implementation of recognition of churches and religious organizations - a discussion of the Administrative Court's decisions from 3/22/93, ÖAKR 1993).

The decision by the Constitutional Court on 6/25/92 is along the same line in that the Constitutional Court remarked against the Administrative Court's decision on the completion of the dilatory problem that the subjective public legal claim to be acknowledged as a state recognized religious organization in the case of the non-decision by the Federal Ministry of Instruction and Art is implementable through the default complaint.

Ermacora had a similar argument which said:

"The right to recognition of a church and a religious organization in the sense of Article 15 of the State's Basic Law directly concerns the validity of the constitutional standard that was cited. If the recognition and open judgement of the state authorities is given then they would have to treat philosophical organizations, despite substantial similarity, unequally and further differentiate the status of the privileges (Ermacora, Handbook of Basic Freedoms and Human Rights. A commentary on the Austrian Basic Law Conditions, 390).

The same legal view was represented by Gampl, Austrian State Church Law, § 34 (Herbert Kalb, et al, The Court of Public Rights and the Legal Implementation of Recognizing Churches and Religious Organizations).

There are numerous other testimonies that are based on the juristic view of the religious characteristic of the Scientology religion. As an example, following is a testimony to support our viewpoint:

- Legal testimony by Dr. Ferdinand Kopp, University Professor [Professorship of Public Law and Administration at the University of Passau:

According to this testimony, it can be assumed that per Article 15 of the State's Basic Law, a lower position of a legal, non-recognized religious organization is only permissible as provided in the general constitutional equality ban due to sufficient important differences in the activities. The circumstance alone, in which a religious organization is not legally recognized, does not justify a lower position -- aside from the cited Article 15 of the State Basic Law and thus the necessary, relevant questions -- in comparison to other legally recognized religious organizations because the acknowledgement is neither a constitutional criterion for differentiation nor the expression of sufficient differences in reality. The assumption that Scientology is a religion are clearly met according to Prof. Kopp. In the Austrian State Church Law, religion means belief in God and a direction in life that is guided by this belief. Religion in this sense means this is the single guiding principle for the entire life. There is no doubt that this is the case with Scientology.

If there is any doubt, it is proposed that the current Administrative Penal Proceedings be suspended until a legally enforceable decision on religious recognition is made.

The previous question whether the Church of Scientology, Austria is a religious organization is clearly confirmed.

Even if one were to adopt the inaccurate view that the Church of Scientology, Austria has no claim to recognition as a religious organization because the formal requirements in the sense of § 1 of the Religious Recognition Law 1874 are missing, a differentiation between recognized religious organizations and Scientology as a non-recognized religious organization is impermissible. If one assumes that Scientology is however a religious organization since it attempts to include and influence the entire life of its members and establishes a relationship with God and representative religious teachings, the lack of recognition thus far means that the Church of Scientology, Austria has not yet participated in all the rights that legally recognized churches and religious organizations receive according to state laws (§ 2, Paragraph 2, Recognition Law; Gampl, State Church Law 150).

If one follows the individual legal regulations in the Austrian legal system that are relevant to churches, religious organizations and clergy (spiritual bodies), then one determines that increasingly, the focus is no longer on whether the a church or religious organization is recognized. A typical example of this is the Austrian Penal Code. There are numerous regulations that grant specific rights only to recognized churches and religious organizations and their clergy. A typical example of this are the conditions of the penal code, conscription law and military service law.

In any case, the penal protective clauses cited in §§ 117, 126, Par. 1, Line 1, 128, Par. 1, Line 2, 188, 283 and 286 of the Penal Code in relation to religious organizations and their clergy are not only applicable to people that belong to legally recognized churches and religious organization, rather apply to all domestic churches and religious organizations (Leukauf-Steiniger, Commentary on the penal code, Margin Number 1 on § 117 Penal Code).

The appellant provided the Independent Administrative Division of Vienna with the complete contents of the aforementioned testimonies.

On 1/10/78, Dr. Walter Barfuß, University Professor, answered the question, whether, according to Austrian Law, the Church of Scientology is a religious organization and if it, e.g. its clergy are entitled to special legal rights as follows:

#### I.

Based on the Austrian Organization Law, the Church of Scientology constitutes an organization ("Church of Scientology, Vienna"). However, that does not mean that it is not -- as set forth by other federal laws -- a religious organization.

Each organized organization of religious followers of a (non-christian) religion which organized for the purpose of exercising and maintaining a certain, modified form of belief in God as compared to other religious organizations, is a religious organization under the [(Austrian Federal Religious Act of 1971, Page 25 ff) Gampl]. Organizations of followers of a christian religion thus organized are commonly called "Churches"; however, this dealt mostly with a question of terminology.

The term "religion" is thus presupposed. In the Austrian Federal Church Law it usually means: "any belief in God" (Gampl, Federal Church Law, page 24). The modification of this expression what was suggested by Gampl does not bear any significance for the case in question.

According to the documents before me, there can be no doubt that the followers of the Church of Scientology maintain a positive belief in God, thus there is a religion present.

It is also significant that, a religious organization represent a certain religious teaching, conduct church services or exercises cult rituals and that it have a constitution (Gampl, Federal Church Law, page 26).

According to the documents before me, all the above is present in the Church of Scientology, Austria as well as the desire typical

for a religious organization, which is to encompass and influence the entire life of the members and to set it in relation to God, e.g. the representative religious teachings.

Thus the Church of Scientology, Austria is a religious organization. It does not matter that it is not a recognized religious organization in the sense of the Recognition Law of 1874. Today, the question regarding recognition according to the law mentioned simply means that the recognized church concerned "has all the rights available to it which, according to the Federal Laws are available to legally recognized churches and religious organizations" (compare § 2, Par. 2 Recognition Law; compare Gampl. Federal Church Law, page 150).

## II.

If one researches the individual legal rulings in the Austrian Law that deal with churches, religious organizations, clergy (spiritual bodies), then one will find that in increasing measure it does not matter if it is a recognized church or a religious organization. The new Austrian Penal Code (StGB; BGBl 1974/60) is typical of that. On the other hand, however, there are numerous provisions which grant certain rights only to recognized churches and religious organizations, e.g. to their clergy. The provisions of the Code of Criminal Procedures, the Defense Law and the Military Services Law are typical examples of this.

This raises the question if these differentiations are compatible with the Equality Statute guaranteed by the Constitution.

I want to mention this question here only briefly, even though in truth the problem goes far deeper. Also, sometimes the question arises -- such as when dealing with the exceptions to the common and equal military service rules -- if those, who are not clergy members of a recognized church or religious organization, are not being disadvantaged in some intangible way. Publications generally deny this (compare Pernthaler, the Constitutional State and its Army, 1964, pg. 211). Even so, the question remains, especially regarding the increasingly equal treatment of recognized and not recognized churches and religious organizations, e.g. their clergy and members -- in those cases, where the principle of different treatment of recognized versus not recognized religious organizations still persists -- if there is not a violation of the Equality Statute and therefore a violation of the Federal Constitution.

## III.

According to the Austrian Military Law (§ 23, Par. 2 Military Law

GBG1 1955/181), clergy are only then exempted from enlisting and thus from serving in the Federal Army (compare also Pernthaler, Constitutional State, pg. 211) if they represent a recognized church or religious organization.

Thus, the clergy of the Church of Scientology, Austria are not covered by these provisions.

#### IV.

As an example I would like to point to the new Austrian Penal Code (StGB; BGbL 1974/60) which, (as well as the previous Penal Code) contains some provisions pertaining to religious organizations and their clergy. (The term "clergy" is no longer being used in the new Penal Code).

In connection with religious organizations and their clergy, §§ 117, 126 Par. 1 Line 1, 128 Par. 1 Line 2, 188, 283 and 286 of the Penal Code show special criminal rights. All these special provisions refer not only to the legally recognized churches and religious organizations, e.g. their clergy, but they concern all domestic churches and religious organizations (Leukauf-Steiniger, commentary on the Penal Code, 1974, pgs. 580, 628, 653). All these special criminal rights (for instance, against defamation of honor of clergy, damage to or theft of items intended for church services, slander, libel, etc.) also serve the Church of Scientology, Austria, e.g. its clergy (spiritual bodies).

#### V.

I would like to summarize my findings: that the Church of Scientology, Austria is a religious organization and that it thus - - just like its clergy -- enjoys all the special privileges which are provided for religious organizations and clergy (spiritual bodies) in the Austrian Laws, as long as the privileges concerned are not reserved for the legally recognized churches and religious organizations, e.g. their clergy (spiritual bodies) as is the case with the Military Service Law.

In conclusion, the appellant referred to the opinion and legal status in Germany.

"The question whether certain actions of the Church of Scientology constitute business as defined in the relevant laws, is also the subject of some decisions in Germany.

a) Bavarian Administrative Court (decision from 12/10/85, 8 CS 85 A 2549):

The Bavarian Administrative Court found in this decision regarding the business activities of Scientology that it is understood, that, as the applicant (Church of Scientology in Germany, Munich) understands it, "auditing" is an essential part of the teachings of Scientology and that on this basis, the alleged conditions of a business enterprise, as defined, cannot be adopted terminologically (decision of the 5th Division of the Bavarian Administrative Court, dated 6/25/85, page 7).

b) Judgement of the Administrative Court of Berlin dated 10/12/88. VG 1 A 73.86:

This decision also dealt with the question whether the Church of Scientology in Germany must register as a business. To this, the Administrative Court of Berlin decided that there is no doubt that the Church of Scientology, Berlin is active, at last spiritually, and that the advertisement for this activity enjoys the protection of Article 4d of the Basic Law. That certain governmental units and institutions want to view the convictions of the Church of Scientology in Germany and its religious technologies and acts, such as the auditing as sectarian, nonsensical and dumb, is irrelevant, in view of the statute of governmental neutrality regarding questions of religious and spiritual convictions.

c) Testimony of Dr. Ferdinand Kopp, University professor, dated 6/2/84 regarding the question whether the Church of Scientology is a religious organization as defined by the Constitution of the Federal Republic of Germany:

Indirect conclusions regarding the question if auditing sessions and purification rundown are subject to the trade rules can be drawn from this expert testimony (see testimony page 6):

"Even if Scientology denies a closer characterization of God, it still understands him as a supernatural being or principle, as far as I can understand it, to which man is called to be in immediate contact by means of various Scientology supported methods, through teachings, through auditing, cult actions, etc., whereby it grants the required or rather appropriate support. The transcendence of the teachings is especially apparent in the teachings of reincarnation."

"Therefore, according to the expert legal testimony of Prof. Kopp, auditing and purification rundown do constitute cult-like actions which preclude the utilization of the trade provisions."

Then the applicant summarized as follows:

"In summary, it must be concluded, that the Church of Scientology, Austria is a religious organization. Due to recognition as defined by the Religious Recognition Law not yet granted, it has been organized in the form of a mutual support organization. Due to the desired equalization of recognized and not recognized religious organizations pursued by the law -- also coming from reflections regarding constitutionality -- one can speak of a privilegization of the Church of Scientology. In principle, the Church of Scientology, Austria cannot be regarded as anything different than the, for instance, Catholic Church or other recognized religious organizations, when it conducts religious ceremonies. Conducting religious activities is never a business, even if compensation is requested, since there is no business purpose.

The purification rundown and auditing rituals conducted by the Church of Scientology, Austria are religious activities and ceremonies which serve transcendental meditation. Thus, they constitute religious activities and not business dealings.

For this reason we recognize, for instance, that the sale of books constitutes business conduct and will let stand a previously imposed administrative fine. Therefore, the Church of Scientology, Austria will organize according to Austrian laws -- where it pertains to the sale of books.

However, conducting religious activities and ceremonies, which are like church services of other religions and have nothing to do with business, must be viewed in another light.

During the deliberations before the Independent Administrative Division of Vienna, the appellant elaborated on her testimony to date and justified herself as follows:

"I would initially like to refer to the entire testimony delivered to date, particularly to the document submitted by my attorney on 6/22/95 and the testimonies appended thereto. The courses conducted by the Church of Scientology, and in particular what is known as "auditing," serve the purpose of leading to a "clear" state, in accordance with the religious teachings of the Church of Scientology. Simply stated, this state can be described as follows: a person's "clearing" process serves the purpose of enlightening him about himself and his relationship to God and the Universe. A "clear" is certainly no "superman," but he is able to deal with personal problems and those of his environment much more efficiently than average people once this "clear" state is reached, and also becomes closer to God. He especially becomes more forgiving towards others and is able to admit to his own mistakes. This state of mind is very similar to the Buddhist concept of "Bodhi." In religious and philosophical terms, there are certain similarities with Buddhism in the religious sphere. The duration of

auditing depends on various factors, which is why it is not possible to determine an average duration, but the audited person decides the pace of his progress himself and can suspend auditing at any time. The so-called "purification rundown" is intended to cleanse the body of environmental toxins, including alcohol, drugs and medications, in an effort to enhance spiritual growth and to reduce negative effects by eliminating physical problems. This process lasts approximately two to four weeks and does not include any special dietary guidelines, except for the prohibition of alcohol. However, participants are encouraged to eat primarily vegetables during this period.

As for the price of Sch 55,000 for auditing listed in the sentence, I would like to point out that it is possible to pay considerably lower contributions in order to take part in such auditing, and sometimes this religious act is even offered free of charge. These contributions may seem fairly high for religious acts, but they are due to the fact that auditing in the Church of Scientology only involves one clergy, who dedicates his time to the follower, or audited person, and it requires a relatively large amount of time (in contrast to Christian churches in which the member of the clergy conducts a service for several hundred people). The Church of Scientology, Austria has only very few clergy members. The auditing process requires so much time and effort, that we consequently encourage interested parties and followers to learn the auditing themselves. The Church of Scientology by no means regards itself as a sort of "therapeutic institution," which charges people with personal problems high contributions for some lengthy therapy. Besides, auditing constitutes neither therapy nor counseling. People primarily become involved in Scientology, because they are seriously interested in the spiritual path of the Church of Scientology. In addition, it is possible to take advantage of auditing outside these courses, in the "Free Scientology Center." The majority of courses is offered at a price that also allows people with lower income to take part without facing financial problems. Church of Scientology services are also offered to non-members, and the latter are not charged any mandatory fee, such as a church contribution or a fee-for-service type of contribution, unless a fixed fee existed beforehand. Religious acts, including marriages, funerals and baptisms, are offered at no charge at all."

Based on the existing results of the investigation, the Independent Administrative Division of Vienna summed up the evidence as follows:

Pursuant to Article 1, Paragraph 2 of the 1994 Commercial Ordinance, an activity is carried out for commercial purposes if it is pursued independently, regularly and with the intention of achieving a profit or any other economic advantage, irrespective of the purpose for which it is designed. In this context, it is irrelevant whether the profit or any other economic advantage



intended by the activity is achieved in connection with an activity within the scope of this federal code or with respect to an activity not covered by this law.

The typical characteristics of a profit organization exist, if an organization offers and renders services to its members even if these services serve idealistic goals or distributes merchandise to its members, and does so in a manner comparable to the characteristics and manners of a typical profit organization. In this respect, it is of particular significance how the organization presents itself towards its addressees with respect to activities usually carried out by profit organizations (HB 1988).

The sustained nature of a fee-for service activity offered by an organization is cited as a reason for the refutable assumption that profit intentions exist. This legal assumption cannot be applied to organizations of which it is officially known that they do not act with the intention of gaining a profit, because they serve charitable, social or other related purposes.

Despite the high contributions, such as paid for participation in so-called "purification rundowns" or "Scientology processing," it cannot be determined that the Church of Scientology, Austria constitutes a profit organization, i.e., "intends to achieve a profit or any other economic advantage," for the following reasons:

In addition to the fact that after decades of detailed investigation, "Scientology" was granted the status of a charitable, "bona fide religion" less than two years ago by the IRS in the United States, the country with the highest number of Scientology churches, the appellant was also able to give enough evidence to convince us that the Church of Scientology, Austria represents a religion that is attributed the status of an unrecognized religious organization in Austria, due to the organization's statutes on record as well as the numerous theological and legal reports cited by the appellant.

"Purification rundown" or "Scientology Processing" are carried out pursuant to the religious teachings of Scientology, which are based on the writings of its founder Ron Hubbard and represent religious acts in accordance with the religious identity of the Church of Scientology itself, which also becomes evident in the organization's statutes.

The high price, in absolute terms, allocated for rendering such services to both members and non-members, was explained by the appellant in a fairly logical manner by saying that the "Scientology" does not collect regular membership fees from its members, but finances the organization's comprehensive activities through contributions earned from these religious acts due to a lack of other income sources. The funds earned from those courses cannot be used by individual members and are solely and exclusively

utilized for the organization's purposes.

In addition, the appellant has convincingly presented in her argument how the organization's funds have been utilized and distributed and that in recent years, the organization has realized losses to varying degrees.

Furthermore, the following remarks must be made:

The Church of Scientology is undoubtedly characterized by high contributions collected for the rendering of certain services, the "success" of which cannot be guaranteed. Reports published in books and magazines almost exclusively criticize or reject Scientology. According to these reports, interested parties or individuals seeking help are charged an increasingly higher amount of money for different courses following the path offered by Scientology, i.e., from beginning to more advanced levels. It is therefore easily understandable that individuals whose expectations are not met feel cheated of their money and are therefore eager to present their frustrations as part of various media reports.

On the other hand, virtually any serious form of religion has to do with sacrifice, i.e., the mandatory wearing of veils or the prohibition of alcohol, the fasting or prayer commandments of Islam, the numerous commandments that Mosaic religion followers have to abide by, such as, for instance, kosher cooking, which causes a large amount of additional work in meal preparation, but also restrictions that followers voluntarily subject themselves to, those, for instance, who intend to become priests in the Catholic Church or who intend to join a convent or monastery. Asian religions, such as Hinduism or Buddhism, equally require their followers to pursue a lifestyle that involves restraint in "worldly delights." In this respect, payment of higher fees, such as for a "Dianetics Processing" course at the Church of Scientology, undoubtedly constitutes a financial sacrifice, but cannot be regarded as a greater sacrifice than the frequently serious restrictions that followers of other churches or religious communities must subject themselves to.

In addition, even the large religious communities are often subject to vehement criticism:

In recent months, the Catholic Church in Austria, for instance, has been faced with heavy criticism and appeals to reform, which despite the persistence and frequency of such criticism has definitely given the wrong impression with regard to the actual acceptance within the Catholic Church, because it is almost exclusively the critics that make headlines, whereas church-affiliated circles either cannot articulate themselves or are ignored, or, if they do make headlines, are particularly criticized and disparaged for their remarks.

There is no doubt, that in many respects, few parallels can be drawn between the Catholic Church and the Church of Scientology, but the followers of Scientology are among those who enjoy the guarantees of freedom of religion granted by the civil rights enshrined in the constitution.

As previously mentioned, reports on Scientology have almost exclusively been negative.

However, according to the additional remarks made by the appellant, the world-wide number of Scientology followers has increased from 5 to 8 million over a ten year period from 1985 to 1995.

This development alone forces us to conclude that there must be a high and ever increasing number of people that find satisfactory answers to the questions of "where they come from" and "where they are heading," or find guidance in their lives in the teachings of Scientology and would certainly be willing to share their experiences with others. However, "satisfied" followers are virtually non-existent in the reports on Scientology, at least in Austria.

Yet, if pros and cons are not equally considered, any sentence becomes prejudiced.

As we all know, "Scientology" has been overly demonized everywhere and has been denounced as a particularly dangerous sect, which is why several official agencies feel called upon to restrict this danger as much as possible by legal means.

However, if mature citizens believe that salvation is like a product that they can buy and they are willing to spend high sums to that end, the Independent Administrative Division of Vienna is of the opinion that state intervention is not absolutely necessary in order to keep them from doing so.

Contrary to the reports by authorities in the first trial, the current proceedings could not support claims that the organization "Church of Scientology, Austria" only offers its services to members, and thus the sale of merchandise was not sanctioned in the sentence. Neither could the trial support claims that the organization acts as a "typical profit organization" in other ways when rendering the services listed above. Instead, the appellant was able to give enough evidence to finally convince us that the incriminatory acts serve religious purposes in accordance with the teachings of Scientology and not commercial purposes. In addition, it was shown that the funds gained from those acts are used to finance the organization's (religious) goals and are not used by individual members.

At least there was not enough overall evidence for claims that the courses offered by the "Church of Scientology, Austria" have to be

regarded as exercising a commercial activity pursuant to Article 1, Paragraph 2 of the 1994 Commercial Code), also because the appellant was able to present impressive arguments to defend herself against the accusations, whereas the accusations themselves were only insufficiently supported. Since requested testimonies had not been given, it also had to be assumed that the "Church of Scientology, Austria" can be recognized for the time being as a charitable organization by corporate tax authorities with respect to those activities that are part of these proceedings, particularly because at present no sales tax, etc. must be paid for these courses, according to the appellant, and because the notions of charity and profit are mutually exclusive.

For that reason, the sentence calls for the suspension of the trial in favor of the appellant.

EXPLANATION ON THE RIGHTS OF APPEAL

Ordinary legal action is not permitted against this verdict.

Delivered to:

1. Ms. Elfriede Fasching, attn: Dr. Egon Engin-Deniz, attorney, Ebendorferstr. 3, 1010 Vienna, Austria, in person
2. Municipality of Vienna, Municipal District Authorities for the 6th and 7th District, Hermannsgasse 24-26, 1070 Vienna, for further consideration (BB + File, ZNW)

for the Independent  
Administrative Division of Vienna

[OFFICIAL STAMP]

Dr. Obransky

A10

**JUDICIAL AND ADMINISTRATIVE DECISIONS  
RECOGNIZING SCIENTOLOGY AS A RELIGION**

Courts and various governmental agencies in the United States, Europe and other countries have repeatedly determined that Scientology is a bona fide religion. The following are examples of some of the court rulings and agency determinations concerning Scientology's religiosity:

After reviewing the judicial precedents concerning the religiosity of Scientology, the United States Eleventh Circuit Court of Appeals in Church of Scientology Flag Services Organization v. City of Clearwater, September 30, 1993, stated:

The history, organization, doctrine and practices of Scientology have been thoroughly recounted in numerous judicial decisions. We need not reiterate this background because the district court found that no genuine factual issues existed to dispute Scientology's claim of being a bona fide religion.

In another decision by the Oregon Court of Appeals on May 3, 1982 on Christofferson v. Church of Scientology of Portland, the court stated:

We have found that it is established in this case that the mission is a religious organization and that Scientology is a religion.... These facts may be highly persuasive evidence of the contention that the courses and auditing plaintiff received were religious in nature and that the statements made regarding their nature and efficacy were religious statements.

On January 19, 1983, in Founding Church of Scientology of DC v. Director, Federal Bureau of Investigation, the United States District Court, District of Columbia, ruled:

The Church of Scientology must be treated the same as any established religion or denominational sect within the United States, Catholic, Protestant or other.

On October 27, 1983, the High Court of Australia, in Church of the New Faith v. the Commissioner for Payroll Tax, found:

The conclusion that it [the Church of Scientology] is a religious institution entitled to the tax exemption is irresistible.

On February 27, 1984 the United States District Court Central District of California, in Peterson v. Church of California, ruled:

This court finds that the Church of Scientology is a religion within the meaning of the First Amendment. The beliefs and ideas of Scientology address ultimate concerns--the nature of the person and the individual's relationship to the universe. The theories of Scientology involve a comprehensive belief system. Additional indicia of the religious status of Scientology include the following: a) Scientology has ordained ministers and ceremonial functions; b) it is incorporated as a tax-exempt religious organization; and c) it characterizes itself as a church.

On January 30, 1985, in In Re Karl-Friedrich Munz, the Stuttgart District Court ruled:

[The Church of Scientology's] purpose in this world is considered to help man in his striving for spiritual freedom and to completely free him from problems and burdens to reach total freedom in order to recognize himself as a spiritual being and experience the existence of a Supreme Being. . . .

In Hernandez v. Commissioner of Internal Revenue, on June 5, 1989, the United States Supreme Court, found as follows:

Scientology was founded in the 1950's by L. Ron Hubbard. It is propagated today by a mother church in California and by numerous branch churches around the world. The mother church instructs laity, trains and ordains ministers, and creates new congregations... Scientologists believe that an immortal spiritual being exists in every person. A person becomes aware of this spiritual dimension through a process known as auditing.... The Church also offers members doctrinal courses known as training. Participants in these sessions study the tenets of Scientology and seek to attain the qualifications necessary to serve as auditors.... Scientologists are taught that spiritual gains result from participation in such courses.

In Italy, in the case of State v. Eight Defendants, Trento C., the court made the following finding:

Scientology ... has the target to achieve an inner and outer freedom, one that transcends the human, one that belongs to the field of spiritual things, and that moves up to infinity; indeed, the progress toward realization of the eighth dynamic force - concerning Infinity and God -

actually is the characteristic that describes Scientology as a religion and as a church.

MO In the Supreme Court of the State of New York, on January 31, 1994, in the case of Jo Ann Scrivano v. The Hubbard Dianetics Research Foundation Inc., et al., the court ruled: NO

Assuming the church to be a religion, the adjudication of the tortious conduct alleged in the complaint necessarily involves an adjudication regarding the merits of the practice of auditing, a spiritual precept of the religion. Accordingly, the Court finds that the complaint must be dismissed as defendant enjoys a First Amendment immunity.

Scientology is treated as a religion with respect to all facets of its activities by courts and agencies at all levels of government. A number of court decisions in Germany dealing with taxes, solicitation, dissemination practices and other issues have all found that Scientology is a religion. In Canada, the United States, Australia and in other countries, Scientology ministers are officially recognized as ministers of religion allowing them to perform marriages. Churches of Scientology are registered in countries throughout the world as religious organizations, including former communist countries such as Hungary and Russia. Churches of Scientology are recognized as exempt from value added tax in several European countries, including Holland, Belgium and Denmark.

In the United States alone, each of the following decisions has recognized Scientology as a religion:

Hernandez v. C.I.R., 490 U.S. 680, 109 S.Ct. 2136, 2141-2142 (1989) (Stipulation with Internal Revenue Service); Religious Technology Center v. Scott, 660 F.Supp. 515, 517-518 (C.D. Cal. 1987); Religious Technology Center v. Wollersheim, 796 F.2d 1076, 1077 (9th Cir. 1986) cert denied (1987) 479 U.S. 1103; Founding Church of Scientology v. United States, 409 F.2d 1146, 1160, (D.C. Cir. 1969); Christofferson v. Church of Scientology of Portland, 57 Or.App. 203, 244; 644 P.2d 577, 601 (1982); cert denied (1982) 459 U.S. 1206, 1227; Siegleman v. Church of Scientology of New York, 475 F.Supp. 950, 953; Barr v. Weise (2d Cir. 1969) 412 F.2d 338, 340 (S.D.N.Y. 1979); Founding Church of Scientology v. United States, 412 F.2d 1197 (D.C. Cir. 1969); Church of Scientology of Hawaii v. United States, 485 F.2d 313, 314 (9th. Cir. 1973); Brown v. Commissioner of Internal Revenue 62 T.C. 62 (1974); Church of Scientology of California v. Laurel Sullivan, et al., United States District Court Central District of California, Case No. CV 85-3075-R; Church of Scientology of California v. Gerald Armstrong, et al., Superior Court of the State of California, County of Los Angeles, Case No. C 420153; Donald Bear v. Church of Scientology of New York, Church of Scientology, Mission of East Manhattan, Celebrity Center, Inc.; NO



*Cite*  
Church of Scientology, Mission of Fifth Avenue, Church of  
Scientology of California, United States District Court Southern  
District of New York, Case No. 81 Civ. 6864 (MJL); Peggy Bear v. NO  
Church of Scientology of New York, Church of Scientology, Mission  
of East Manhattan, Celebrity Center Inc.; Church of Scientology  
of California, United States District Court Southern District of  
New York, Case No. 81 Civ. 4688 (MJL); Carol A. Garrity and Paul X NO  
Garrity v. Church of Scientology of California, et al., United  
States District Court Central District of California, No. CV  
81-3260 CBM (Kx); Howard D. Schomer v. L. Ron Hubbard, Author X  
Services, Inc., David Miscavige and Pat Broeker, United States  
District Court Central District of California, Case No. CV  
84-8335-JSL (Kx); Thomas Jefferson v. Church of Scientology of X  
California, et al., United States District Court Central District  
of California, No. CV 81-3261 CBM (Kx); Dana Lockwood v. Church NO  
of Scientology of California, et al., United States District  
Court Central District of California, No. CV 81-4109-CBM (Kx);  
Jane Lee Peterson and Richard J. Peterson v. Church of X NO  
Scientology of California, et al., United States District Court  
Central District of California, No. CV 81-3259-CBM (Kx); Tonja C.  
Burden v. Church of Scientology of California, et al., United  
States District Court Middle District of Florida, Case No.  
80-501-Civ-T-17; Gabriel Cazares and Margaret Cazares v. Church  
of Scientology of California, Merrell Vannier, Francine Vannier,  
Mary Sue Hubbard, L. Ron Hubbard and Joe Lisa, a/k/a Peter Joseph  
Lisa, United States District Court Middle District of Florida,  
Case No. 82-886-Civ-T-15; John G. Clark, Jr. MD. v. Norman F. NO  
Starkey, as Executor for the Estate of L. Ron Hubbard, United  
States District Court for the District of Massachusetts, Civil  
Action No. 85-356-MC; Church of Scientology of Boston, Inc. v. CITE  
Michael J. Flynn, Commonwealth of Massachusetts, Suffolk, ss.  
Superior Court, Civil Action No. 79231; Earle Cooley v. Michael NO  
J. Flynn, Commonwealth of Massachusetts, Suffolk, ss. Superior  
Court, Civil Action No. 81420; Paulette Cooper v. Church of ✓  
Scientology of Boston, et al., United States District Court for  
the District of Massachusetts, Civil Action No. 81-681-MC; Church  
of Scientology of California, v. Paulette Cooper, Superior Court  
of the State of California for the County of Los Angeles, Case  
No. 78-2053-RMT; Bent Corydon v. Church of Scientology ✓  
International, et al., Superior Court of the State of California  
for the County of Los Angeles, Case No. C 694401; Heber Jentzsch 7  
v. Bent Corydon, Superior Court of the State California for the  
County of Los Angeles, Case No. NVC 14274; John Carmichael v. NO  
Bent Corydon, Superior Court of the State of California for the  
County of Riverside, Case No. NVC 189 414; Roxanne Friend v. NO  
Church of Scientology International, et al., Superior Court of  
the State of California for the County of Los Angeles, Case No.  
BC 018003; Mary Sue Hubbard v. Ronald E. DeWolf, Michael J. NO  
Flynn, et al., Superior Court of the State of California for the  
County of Los Angeles, Case No. C 474 789; Michael J. Flynn v.  
Church of Scientology International, et al., United States  
District Court, Central District of California, Case No. CV CITE

85-4853; Nancy McLean and John McLean v. The Church of Scientology of California, et al., United States District Court Middle District of Florida, Case No. 81-174-Civ-T-08; Church of Scientology of Nevada, et al. v. Eddie Walters, Ernest Hartwell, Mary Adell Hartwell, et al. and Ernest Hartwell, and Mary Adell Hartwell v. Church of Scientology of Nevada, et al., Eighth Judicial District Court of the State of Nevada in and for the County of Clark, Case No. A196800; Church of Scientology of California v. Michael J. Flynn, United States District Court, Central District of California, Case No. 83-5052, United States Court of Appeals in the Ninth Circuit V.A. No. 85-6305; LaVenda Van Schaick v. Church of Scientology of California, et al., United States District Court for the District of Massachusetts, Civil Action No. 79-2491-G; Julie Christofferson-Titchbourne v. Church of Scientology Mission of Davis, et al., Circuit Court of the State of Oregon for the County of Multnomah, Case No. A7704-05184; Martin Samuels v. Lafayette Ronald Hubbard, Circuit Court of the State of Oregon for the County of Multnomah, Case No. A8311-07227; Margery Wakefield v. The Church of Scientology of California, United States District Court Middle District of Florida, Case No. 82-1313-Civ-T-10. Hutchinson v. Church of Scientology of Georgia, Civ. Action No. D90315 (Superior Ct. of Fulton County, Georgia (April 5, 1993)).

These are cases from the United States. Numerous courts and other bodies outside the United States have made similar findings concerning the religiosity of Scientology. Some are described below.

#### CANADA:

In Board Decision dated May 1, 1990, relating to property taxes, the Church of Scientology of Vancouver, B.C. was ruled to be a religious organization. (Province of British Columbia, Assessment Appeal Board in the Matter of the Appeal of Church of Scientology of British Columbia v. Assessor of Area #09.)

Church of Scientology of Alberta has been recognized as religious by the Province and has been accepted under the Marriage Act which allows Church members in Alberta to perform marriages. (Letter from Acting Director of Alberta Division of Vital Statistics, Edmonton, Alberta, Canada, October 17, 1990.)

The Provincial government of Quebec granted the Church of Scientology of Quebec the status of being a church. (Letter from Inspector General of Financial Institutions, Quebec, December 21, 1993.)

DENMARK:

In a letter dated June 18, 1986 the Danish Value Added Tax Board ruled that Scientology is a religion and exempt from VAT.

GERMANY:

The Stuttgart District Court issued a decision finding that the Church is a religious community which offers teachings based on religious tenets. (Decision of the Stuttgart District Court, No. 13 C 3687/76, December 8, 1976, Hans Peter Fuger v. Stuttgart Church.)

On January 7, 1993, the Regional Court in Munich found that Scientology is a religious belief that cannot be scientifically assessed and the services are of a religious nature. (Regional Court of Munich I, 6th Chamber for Civil Matters. No. 6 O 5709/82, 6 O 6 6895/82, January 7, 1993, Kager v. SKD, Ertl v. SKD.)

On May 20, 1985, the District Court of Stuttgart ruled that the Church's dissemination activities are part of the pursuit of its religion. (District Court of Stuttgart, No. 33 OWi 13691/84, May 20, 1985.)

On February 17, 1988, the Superior Court of Hamburg ruled that Scientology is a bona fide religion and an association that is not only united for ideological purposes but also pursues a transcendental purpose. (Superior Court of Hamburg, No. 71 T 79/85, February 17, 1988 Administrative Court of Berlin, No. VG 1 A 73.86, October 12, 1988, Scientology-Kirche Berlin v. the State of Berlin.)

A similar ruling was made on October 12, 1988 by the Administrative Court of Berlin, ruling that the Church is philosophically active and the promotion of its tenets is protected under Article 4 of the Constitution. (Administrative Court of Berlin, No. VG 1 A 73.86, October 12 1988, Scientology-Kirche Berlin v. the State of Berlin.)

On September 4, 1990, the Administrative Court of Frankfurt determined that the Church of Scientology is a religious and ideological association. The Court's reasoning included findings that three characteristics of a religion could be established: 1) it must be a voluntary association of not less than two persons with a minimum of organizational structure that does not depend on legal or civil status as per public or civil law and does not depend on its numerical strength or social relevance. 2) There must be some consensus of the purpose of human existence (origin, purpose, goal, transcendence) as well as basic principles of individual conduct. It is not required that this consensus can be inferred from a dogmatically fixated, systematically

conclusive creed or ideological denomination. 3) A religious or ideological community strives for and practices its purposes and dogma (consensus) and this is visible to the outside world. The Church of Scientology fulfills these requirements. (Administrative Court of Frankfurt/Main, No. IV/2 E 2234/86, September 4, 1990, Scientology Mission of Frankfurt v. City of Frankfurt.)

On May 27, 1992, the 4th Civil Court of Regional Court of Frankfurt, found that there is no evidence of profiteering by the Church and the value of the services cannot be measured by market value as they are spiritual services aimed by the plaintiffs to fulfill their own personal spiritual needs. 4th Civil Court of Regional Court of Frankfurt, No. 2/4076/92, May 27, 1992, Gebauer v. Church of Scientology of Frankfurt.)

The Stuttgart District Court ruled on December 9, 1992, that auditing is a religious activity, and it is the focus of the religious practice of the Church. (Stuttgart District Court, No. 27 O 417/92, December 9, 1992, Graf v. Dianetics Center Stuttgart.)

On February 24, 1993, the Regional Court of Frankfurt ruled that the delivery of the services are part of a religious and life-philosophical character and based on the principle of free religious practice. (Regional Court of Frankfurt/Main, No. 2/4 O 235/92, February 24, 1993, Koch v. Church of Scientology of Frankfurt.)

#### HUNGARY:

The Registration document from the Court of the City Capital, in Hungary, dated July 17, 1991, states that the Church of Scientology of Hungary is a recognized and registered religious organization.

#### ITALY:

The Magistrate of the Lower Court of Novara ruled on March 15, 1985 that Church staff perform voluntary services for religious and community purposes which fall outside the purview of employer/employee relationships.

On March 27, 1990, the Tax Court of First Instance of Monza ruled that the nature of activities carried out by the Church are aimed at the dissemination of doctrinal and also religious principles. (Appeal of Luciano De Marchi.)

On March 27, 1990, the Trento Court of Appeals Criminal Division, ruled that Scientology has the purpose to achieve an inner and outer freedom, that transcends the human and belongs to the field of spiritual things moving up to infinity; the progress

towards realization of the force concerning infinity and God is the characteristic that describes Scientology as a religion and as a Church.

The Tax Court of First Instance of Torino, ruled on September 20, 1990 that the various practices of Dianetics and Scientology when applied to Church parishioners are the Church's road to salvation. (Tax Court of First Instance of Torino, No. 0734.)

On February 21, 1991, the Tax Court of First Instance of Como - Sixth Section, ruled that the Association "Dianetics & Scientology Institute" is of a religious nature. (Tax Court of First Instance of Como.)

On April 15, 1991, the Tax Court of First Instance of Milano, ruled that the National Association of the Church of Scientology of Italy is a religious association. (Tax Court of First Instance of Milano, No. 12580 12581/1988.)

On April 19, 1991, the Tax Court of First Instance of Lecco, determined that the activity of the Scientology association essentially consists of the propagation of its religious philosophy by means of courses and books sold and their pursuit of a philosophical and religious purpose. (Tax Court of First Instance of Lecco, No. 948/91.)

On December 11, 1991, the Tax Court of First Instance of Novara, ruled that when applied to followers of the creed, the practices of Scientology are its chosen way to salvation. (Tax Court of First Instance of Novara, in Decision No. 1510/91.)

On May 14, 1992, the Tax Court of First Instance of Verona, ruled that it was undisputed that the books and courses of Scientology concern the in-depth development of the Scientology religion as founded by L. Ron Hubbard. The books present a philosophical theory and religious background that has expanded into many countries with millions of followers. (Tax Court of First Instance of Verona, No. 165/4/92.)

On February 25, 1992, the Tax Court of First Instance of Monza, ruled that the Church of Scientology Monza is a religious establishment which has the purpose to spread the principles contained in the works of Lafayette Ronald Hubbard. (Tax Court of First Instance of Monza, No. 597.)

#### SOUTH AFRICA:

In a letter from the Department of Finance Controller of Customs and Excise, Johannesburg, dated April 28, 1993, it was acknowledged that the Church of Scientology of South Africa is a religious body and exempt from importation tax.

CHURCH OF SCIENTOLOGY FLAG SERVICE, ORG., INC.,  
Plaintiff-Appellant, v. CITY OF CLEARWATER, Thomas Bustin,  
City Attorney of the City of Clearwater, Lucille Williams,  
City Clerk of the City of Clearwater, Defendants-Appellees.

No. 91-3760.

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

2 F.3d 1509; 1993 U.S. App. LEXIS 24940; 7 Fla. Law W. Fed.  
C 866

September 30, 1993, Decided

SUBSEQUENT HISTORY: As Amended.

PRIOR HISTORY: **[\*\*1]** Appeal from the United States District Court for the Middle District of Florida. (No. 84-96-CIV-T-17). Elizabeth A. Kovachevich, District Judge.

DISPOSITION: VACATED and REMANDED.

CORE TERMS: ordinance, prevailing party, prevailed, repealed, legal relationship, exemption, religious, vacated, vague, judicial review, solicitation, investigate, membership, clarified, threshold, fee award, vindicated, prevailing, alteration, succeeded, vagueness, religion, entirety, lawsuit, repeal, enjoin, charitable organization, prior restraint, discriminatory, record-keeping

COUNSEL: For Plaintiff-Appellant: Paul B. Johnson, JOHNSON & JOHNSON, Tampa, FL. Eric M. Lieberman, RABINOWITZ, BOUDIN, STANDARD, ET AL., Edward Copeland, New York, NY.

For Defendants-Appellees: Frank Kowalski, Chief, Asst. City Attorney, M. A. Galbraith, Jr., Clearwater, FL. Alan S. Zimmet, COVERT & ZIMMET, Clearwater, FL. Lawrence R. Velvel, Windham, NH.

JUDGES: Before ANDERSON and DUBINA, Circuit Judges, and CLARK, Senior Circuit Judge.

OPINIONBY: DUBINA

OPINION: **[\*1511]** DUBINA, Circuit Judge:

Appellant Church of Scientology Flag Service Organization, Inc. ("Scientology") challenges the district court's order denying its petition for attorneys' fees in its civil rights action brought against the appellee, City of Clearwater, Florida (the "City"). The district court's ruling was based on its determination that Scientology was not a "prevailing party" under 42 U.S.C. § 1988. n1 Because we hold that Scientology has met the threshold

test for prevailing party status, we vacate the district court's order.

n1 As amended, 42 U.S.C. § 1988, provides in pertinent part:

In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

**[\*\*2]**

I. BACKGROUND

In January, 1984, Scientology filed an action under 42 U.S.C. § 1983 to enjoin the enforcement of Clearwater Ordinance No. 3091-83 (the "1983 Ordinance"). The 1983 Ordinance sought to regulate the solicitation of charitable contributions by imposing, inter alia, reporting and record-keeping requirements and prohibiting fraudulent representations. The district court conducted a hearing on a motion for permanent injunction and directed counsel to file post-hearing memoranda by March 16, 1984.

On March 15, 1984, the City enacted Emergency Ordinance No. 3479-84 (the "1984 Ordinance"), which repealed the 1983 Ordinance in part, but retained many of its provisions. Thereafter, the district court ruled on Scientology's pending motion to enjoin the repealed 1983 Ordinance. The district court found the 1983 Ordinance facially unconstitutional in its entirety and enjoined its enforcement permanently. On appeal, we vacated that order as moot, reasoning that only the 1984 Ordinance remained in effect. *Church of Scientology Flag Serv. Org. v. City of Clearwater*, 777 F.2d 598 (11th Cir.1985), cert. denied, **[\*\*3]** 476 U.S. 1116, 106 S. Ct. 1973, 90 L. Ed. 2d 656 (1986).

On remand, the district court found the 1984 Ordinance to be constitutional in its [\*1512] entirety. n2 Thereupon, Scientology petitioned for attorneys' fees pursuant to 42 U.S.C. § 1988 on the ground that its earlier litigation triggered the City's decision to repeal portions of the offending 1983 Ordinance.

n2 That order is the subject of a separate appeal, *Church of Scientology Flag Serv. Org. v. Clearwater*, slip opinion page 3445, 2 F.3d 1509 (11th Cir.1993).

Scientology claims to have "prevailed" on allegations that the 1983 Ordinance discriminated against religious organizations, such as itself, that do not conduct regular prayer meetings. The 1983 Ordinance exempted organizations that solicit funds from "members," defined as "any person regularly attending or participating in a charitable organization." 1983 Ord. § 100.01(5). To be eligible for the exemption, [\*\*4] the 1983 Ordinance required organizations to record and disclose the names of members. Scientology alleged that the exemption had been included at the request of mainline denominations in Clearwater and that the principal purpose of the ordinance was to drive Scientology out of Clearwater. Scientology alleged discrimination in violation of the Free Exercise Clause, unwarranted governmental entanglement with religion in violation of the Establishment Clause, both in violation of the First Amendment to the United States Constitution, and a denial of Equal Protection as guaranteed by the Fourteenth Amendment to the United States Constitution. As a result of these challenges to the limited membership exemption and its disclosure requirement, the provision was repealed by the 1984 Ordinance.

Scientology also challenged a provision granting discretion to the City Attorney, upon receipt of ten citizen complaints, to investigate a charitable organization. Reasoning that only "controversial organizations" such as itself would likely be subject to complaints, Scientology argued that the investigative authority was merely a ruse by which to justify city harassment, unbridled by limits on official [\*\*5] discretion. The 1984 Ordinance amended the provision by requiring the City Attorney to investigate upon receipt of ten complaints. n3

n3 Although the language of this provision of the 1984 Ordinance appears somewhat ambiguous, the City concedes that it mandates an investigation upon the receipt of ten complaints, whereas the 1983 Ordinance merely conferred discretion to investigate upon receipt of ten complaints.

The 1983 Ordinance, like the 1984 version, required charitable groups to obtain a city permit to solicit funds, imposed a penalty for solicitation without a permit, and authorized judicial review of a decision denying a permit application. Scientology charged that the 1984 Ordinance was overly vague because it did not state whether the penalty could be invoked against an organization that solicited without a permit pending judicial review; if the penalty would have applied in such circumstances, Scientology argued, it would have constituted an improper prior restraint of religious speech. The 1984 Ordinance [\*\*6] attempted to pretermitt the prior restraint claim by allowing solicitation to continue pending judicial review.

The 1984 Ordinance also eliminated a provision requiring disclosure concerning the tax deductibility of contributions, which Scientology had challenged as discriminatory on its face and as applied. The new ordinance repealed an exemption for organizations soliciting from fewer than twenty members, which Scientology challenged on vagueness grounds, and also clarified other allegedly vague provisions. However, the bulk of the record-keeping and regulatory provisions remained intact.

The district court denied Scientology's fee request, ruling that it had not "prevailed" because, inter alia, its rights were not vindicated as a result of its lawsuit. *Church of Scientology Flag Servs. Org. v. City of Clearwater*, 773 F Supp. 321 (M.D.Fla.1991).

## II. STANDARD OF REVIEW

A plaintiff must be a "prevailing party" to recover an attorney's fee under 42 U.S.C. § 1988. *Hensley v. Eckerhart*, 461 U.S. 424, 433, 103 S. Ct. 1933, 1939, 76 L. Ed. 2d 40 (1983). We review [\*\*7] the factual findings underlying a district court's determination regarding "prevailing party" status for clear error. Fed.R.Civ.P. 52(a); *Fields v. [\*\*1513] City of Tarpon Springs*, 721 F.2d 318, 321 n. 7 (11th Cir.1983); *Romberg v. Nichols*, 970 F.2d 512, 517 (9th Cir.1992); see also *Perket v. Secretary of Health and Human Services*, 905 F.2d 129, 132 (6th Cir.1990) ("insofar as the district court based its prevailing party determination on a finding that Perket's lawsuit was the catalyst for the reinstatement of his disability benefits, such a finding is a factual conclusion subject to review for clear error"). Whether the facts as found suffice to render the plaintiff a "prevailing party" is a legal question reviewed *de novo*. Cf. *Nadeau v. Helgemoe*, 581 F.2d 275, 281 (1st Cir.1978) (analysis has legal as well as factual component). Once a district court has determined that a party has "prevailed," its award of attorneys' fees is reviewed for abuse of discretion. *Markham v.*

*International Association of Bridge, etc.*, 901 F.2d 1022, n. 5 at 1026 (11th Cir.1990); [\*\*8] *Taylor v. City of Ft. Lauderdale*, 810 F.2d 1551 (11th Cir.1987); *Solomon v. City of Gainesville*, 796 F.2d 1464 (11th Cir.1986). The scope of the district court's discretion to deny fees to a prevailing party, however, is "exceedingly narrow." *Maloney v. Marietta*, 822 F.2d 1023, 1025 (11th Cir.1987).

### III. ANALYSIS

It is well-settled that a plaintiff is a prevailing party and thus ordinarily entitled to a fee award of "some kind" if the plaintiff has succeeded on "any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." *Hensley*, 461 U.S. at 433, 103 S. Ct. at 1939 (footnotes omitted), followed, *Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 791-92, 109 S. Ct. 1486, 1493-94, 103 L. Ed. 2d 866 (1989).

At a minimum, to be considered a prevailing party within the meaning of § 1988 the plaintiff must be able to point to a resolution of the dispute which changes the legal relationship between itself and [\*\*9] the defendant ... The touchstone of the prevailing party inquiry [therefore] must be the material alteration of the legal relationship of the parties in a manner which Congress sought to promote in the fee statute. Where such a change has occurred, the degree of the plaintiff's overall success goes to the reasonableness of the award under *Hensley*, not to the availability of a fee award vel non....

*Texas State Teachers*, 489 U.S. at 792-93, 109 S. Ct. at 1494.

Scientology has met the threshold requirement of "prevailing party" status. It is undisputed that the suit brought by Scientology caused the City to amend the 1983 Ordinance and it is clear that the amendment significantly affected the parties' legal relationship. The 1984 Ordinance abandoned several challenged provisions, including the limited membership exclusion and the provision providing for unfettered City Attorney investigative and prosecutorial discretion. These successes, while partial only, are neither technical nor de minimis. *Id.* (citations omitted).

Scientology prevailed on its asserted right not to be treated differently from other religious [\*\*10] organizations. The gravamen of its challenge was not that the government may not regulate religious organizations, but that it may not do so in a discriminatory manner that favors one religion over another. See *Larson v. Valente*, 456 U.S. 228, 244, 102 S.

Ct. 1673, 1683, 72 L. Ed. 2d 33 (1982). That right was plainly vindicated by the repeal of the challenged limited membership exemption, an action which Clearwater conceded at the time was caused by Scientology's articulation of alleged constitutional infirmities. See *Nadeau*, 581 F.2d at 279 (critical inquiry is whether the suit "prompted defendants to take action to meet plaintiff's claim....").

The same conclusion applies with similar force to a challenge based upon alleged vagueness. Even if a challenged provision is clarified against the plaintiff's interests, he has succeeded in materially altering the legal relationship in a manner that confers some benefit, namely, the certainty of clearly stated legal norms that bind him. In this case, some of the provisions were clarified in Scientology's favor, while others were repealed entirely. [\*\*11] Cf. *Texas State Teachers*, 489 U.S. at 792, 109 S. Ct. at 1494 (dictum) (successful challenge of provision as vague might not alone be sufficient to constitute [\*\*1514] plaintiff as prevailing, especially if provision had never been enforced).

Moreover, it is inappropriate to deny "prevailing party" status merely because Scientology's pleadings in challenging the amended 1984 Ordinance alleged the same or similar constitutional defects as its earlier action. Scientology's challenges were addressed to new features of the amended ordinance, as well as old features carried over from the 1983 Ordinance. The fact that Scientology may (or may not) ultimately prevail in those challenges has little to do with the question of whether it prevailed in challenging the repealed provisions of the 1983 Ordinance. Scientology did not fail when Clearwater ceased some of its challenged discriminatory conduct merely because the city persisted in other challenged conduct. For this reason, the fact that Scientology challenges the 1984 Ordinance as invalid is irrelevant. As discussed above, there was a material change in the legal relationship between the parties [\*\*12] which benefitted Scientology, and the fact that Scientology continues to challenge that relationship as modified does not mean that it did not "prevail" as a threshold matter.

### IV. CONCLUSION

Scientology's challenge to the 1983 Ordinance resulted in a material alteration of its legal relationship with the City. It has therefore prevailed for purposes of 42 U.S.C. § 1988. The district court's order denying the fee award is vacated and the case remanded for a determination of the amount of attorneys' fees to which Scientology as prevailing party is entitled.

VACATED and REMANDED.



CHRISTOFFERSON, Respondent, v. CHURCH OF SCIENTOLOGY OF  
PORTLAND et al, Appellants

CA No. 15952

COURT OF APPEALS OF OREGON

57 Ore. App. 203; 644 P.2d 577; 1982 Ore. App. LEXIS 2838;  
40 A.L.R.4th 1017

May 3, 1982

SUBSEQUENT HISTORY: [\*\*\*1]

Appellants' and Respondent's Reconsiderations Denied June 10, 1982. Both *Petitions for Review Denied August 3, 1982 (293 Or 456)*.

PRIOR HISTORY:

Appeal from Circuit Court, Multnomah County. Robert P. Jones, Judge. No. A7704-05184.

DISPOSITION: Reversed as to defendants Church of Scientology of Portland and Delphian Foundation; reversed and remanded for a new trial as to defendants Samuels and Church of Scientology, Mission of Davis.

COUNSEL: Charles J. Merten, Portland, and Emily M. Bass, New York, New York, argued the cause for appellants. On the briefs was Charles J. Merten, Portland.

Garry P. McMurry, Portland, argued the cause for respondent. With him on the brief were Patric J. Doherty, Ronald L. Wade, Rankin, McMurry, VavRosky & Doherty, William T. Powers and Powers & Powers, Portland.

Elden M. Rosenthal and Leslie M. Roberts, Portland, filed a brief amicus curiae for Cooperating Counsel for the American Civil Liberties Union of Oregon.

James K. Hoops, Lee Boothby, and Robert W. Nixon, Portland, filed a brief amicus curiae for Americans United for Separation of Church and State.

JUDGES: Gillette, Presiding Judge, Young, Judge, and Roberts, Judge Pro Tempore.

OPINIONBY: GILLETTE

OPINION: [\*205] [\*\*\*2] [\*\*580] Defendants appeal from the judgment entered on a jury verdict in favor of plaintiff in her action for fraud and intentional infliction of emotional distress ("outrageous conduct").

n1 Plaintiff's fraud cause of action alleged 14 misrepresentations which induced her to pay some \$3,000 to defendants. Her cause of action for outrageous conduct alleged in two counts a scheme to gain control of her mind and to force her into a life of service to defendants and a course of retaliatory conduct after plaintiff disassociated herself from defendants. Defendants interposed various defenses, including a defense based upon the Free Exercise Clause of the First Amendment. The jury awarded compensatory and punitive damages. We reverse and remand.

n1 Plaintiff's complaint also contained a cause of action for Unlawful Trade Practices against all defendants. The jury found that the action was barred by the statute of limitations as to all defendants except the Church of Scientology of Portland. As to the Church, it awarded no damages on that claim, and we are not asked to review that verdict.

[\*\*\*3]

THE PARTIES AND THE FACTUAL  
BACKGROUND

Plaintiff is a young woman who moved to Portland from Eureka, Montana, in July, 1975, shortly after she graduated from high school, intending to obtain some work experience before going to college in the fall to study civil engineering. When she first arrived, she stayed for a few days with a friend from Montana, Pat Osler, and then moved into an apartment with a young woman she met through Osler. She soon found a job with an engineering firm and worked there full-time.

Defendants are the Church of Scientology of Portland (COSOP), a religious corporation; the Church of Scientology, Mission of Davis (the Mission), also a religious corporation; the Delphian Foundation (Delphian), a nonprofit educational institution not expressly organized as a church-related school; and Martin Samuels, an ordained minister of the Church of

Scientology and the president of the Mission and Delphian.

The beliefs of Scientology were summarized in *Founding Church of Scientology v. United States*, 409 F2d 1146, 1151-52, (DC Cir 1969), in a manner which appears to be accurate according to the record before us in this case:

[\*206] "The movement [\*\*\*4] apparently rests almost entirely upon the writings of one man, L. Ron Hubbard, an American who maintained the headquarters of the [\*\*581] movement in England at the time this action was brought. In the early 1950's, Hubbard wrote tracts elucidating what he called 'Dianetics.' Dianetics is a theory of the mind which sets out many of the therapeutic techniques now used by Scientologists, \* \* \*.

"The basic theory of Dianetics is that man possesses both a reactive mind and an analytic mind. The analytic mind is a superior computer, incapable of error, to which can be attributed none of the human misjudgments which create social problems and much individual suffering. These are traceable rather to the reactive mind, which is made up of 'engrams,' or patterns imprinted on the nervous system in moments of pain, stress or unconsciousness. These imprinted patterns may be triggered by stimuli associated with the original imprinting, and may then produce unconscious or conditioned behavior which is harmful or irrational.

"Dianetics is not presented as a simple description of the mind, but as a practical science which can cure many of the ills of man. It terms the ordinary person, [\*\*\*5] encumbered by the 'engrams' of his reactive mind, as a 'preclear,' by analogy to a computer from which previously programmed instructions have not been erased. The goal of Dianetics is to make persons 'clear,' thus freeing the rational and infallible analytical mind. The benefits this will bring are set out in considerable and alluring detail. All mental disorders are said to be caused by 'engrams,' as are all psychosomatic disorders, and that concept is broadly defined.

"A process of working toward 'clear' is described as 'auditing.' This process was explicitly characterized as 'therapy' in Hubbard's best-selling book DIANETICS: THE MODERN SCIENCE OF MENTAL HEALTH (1950). The process involves conversation with an 'auditor' who would lead the subject or 'preclear' along his 'time track,' discovering and exposing 'engrams' along the way. Though auditing is represented primarily as a method of improving the spiritual condition of man, rather explicit benefits to bodily health are promised as well. Hubbard has asserted that arthritis, dermatitis, asthma, some coronary difficulties, eye trouble, bursitis,

ulcers and sinusitis are psychosomatic and can be cured, and further [\*\*\*6] that tuberculosis is 'perpetuated by engrams.'

"\* \* \*

[\*207] "The Hubbard Electrometer, or E-meter, plays an essential, or at least important, part in the process of auditing. The E-meter is a skin galvanometer, similar to those used in giving lie detector tests. The subject or 'preclear' holds in his hands two tin soup cans, which are linked to the electrical apparatus. A needle on the apparatus registers changes in the electrical resistance of the subject's skin. The auditor asks questions of the subject, and the movement of the needle is apparently used as a check of the emotional reaction to the questions. According to complex rules and procedures set out in Scientology publications, the auditor can interpret the movements of the needle after certain prescribed questions are asked, and use them in diagnosing the mental and spiritual condition of the subject." (Footnotes omitted).

From Dianetics developed Scientology, which incorporates Dianetics, but includes broader concepts. As characterized in *Founding Church, supra*:

"With Scientology came much of the overlay which lends color to the characterization of the movement as a religious one. Hubbard [\*\*\*7] has claimed kinship between his theories and those espoused by Eastern religions, especially Hinduism and Buddhism. He argues that man is essentially a free and immortal spirit (a 'thetan' in Scientological terminology) which merely inhabits the 'mest body' ('mest' is an acronym of the words matter, energy, space, time). Man is said to be characterized by the qualities of 'beingness,' 'havingness,' and 'doingness.' The philosophical theory was developed that the world is constructed on the relationships of 'Affinity,' 'Reality' and 'Communication,' which taken together are denominated the [\*\*582] ARC Triangle." 409 F2d at 1152. (Footnotes omitted).

The thetan is said by Hubbard to be immortal; it is the spirit controlling the body, through the mind. After the death of the body, the thetan "exteriorizes" and returns in another body. The thetan does not care to remember the life just lived when separated from the body and mind, but because each individual comes back, he is responsible for what goes on today because he will experience it tomorrow.

Plaintiff became involved with Scientology n2 almost immediately upon arriving in Portland. Her friend Osler [\*208] [\*\*\*8] was taking courses from the Mission and, on his advice, she enrolled in a communications course offered by the Mission. As part of the enrollment process, she also applied for membership in the Church

of Scientology. Because she was not yet 18 years old, she was told that she must obtain her mother's consent to receive the services offered by the Mission. She telephoned her mother and dictated a consent form which her mother typed, signed and returned.

n2 References to "Scientology" refer to plaintiff's involvement with the movement in general and do not refer to plaintiff's relationship with any particular defendant.

Plaintiff paid \$50 for the communications course and began attending classes at the Mission every evening after work and at least one day on the weekends. Before completing the communications course, she signed up for another course and continued to participate in courses and services offered at the Mission until the beginning of October, 1975.

In early September, plaintiff applied to become [\*\*\*9] a provisional staff member at Delphian, located at Sheridan, Oregon. She informed her parents that she had decided not to attend college that fall. Moving to Delphian in early October, she worked as a provisional staff member until the beginning of December. At that time, she was asked to leave Delphian until she could convince her mother to stop opposing her involvement in Scientology. Plaintiff moved from Sheridan back to Portland and worked as a waitress. While there, she worked with a staff member of the Mission, attempting to convince her parents not to interfere with Scientology.

Plaintiff went home for Christmas and then returned to Portland in the early part of January, 1976. She lived with several people, mainly Scientologists, and continued to work as a waitress. She did not participate in courses or programs at the Mission, but continued to work on "handling" her parents. In April, 1976, plaintiff went to her parents' home in Montana to "handle" them, that is, to convince them to accept her involvement in Scientology, or else to "disconnect" from them. When she reached home, she was locked in the house and "deprogrammed." She did not return to her involvement [\*\*\*10] with Scientology and, in fact, became active in anti-Scientology activities and participated in "deprogramming" others. She filed this action in 1977.

[\*209] Defendants raise 52 assignments of error, covering nearly every phase of the proceedings from pretrial to post-verdict. Organization of the issues is somewhat complicated by the various causes of action and the various defendants. Several assignments involve the First Amendment defense raised by defendants. However, before reaching the constitutional issues which must be decided in this case, we first consider non-

constitutional challenges to the outrageous conduct cause of action.

## OUTRAGEOUS CONDUCT

Plaintiff alleged two counts of outrageous conduct. The first alleged a scheme to gain control of her mind and to force her into a life of service to defendants. The allegations in this count involve actions committed by defendants during the time that plaintiff was involved with Scientology. At the close of the case, defendants moved for directed verdicts on this cause of action, arguing that, as a matter of law, plaintiff had not proved acts that exceeded the limits of social toleration. n3

n3 The motion below was directed to both counts of the outrageous conduct claim. On appeal, defendants argue that there was no outrageous conduct as a matter of law as to Count II. As to Count I, defendants do not make that precise argument, but make several other arguments, including the argument that the actions are protected by the First Amendment. We decide the issue as to both counts on the non-constitutional basis rather than reach the constitutional issue as to Count I.

[\*\*\*11]

[\*\*583] The tort of intentional infliction of emotional distress, or outrageous conduct, is still in the process of developing in this state. For example, there remain some questions as to what state of mind is required in particular situations to subject a defendant to liability. See *Brewer v. Erwin*, 287 Or 435, 454-58, 600 P2d 398 (1979); compare *Turman v. Central Billing Bureau*, 279 Or 443, 568 P2d 1382 (1977), with *Rockhill v. Pollard*, 259 Or 54, 485 P2d 28 (1971).

A "special relationship" between the parties has played a role in every case in this state involving this tort. n4 [\*210] The tort was characterized in *Turman v. Central Billing Bureau*, *supra*, as "an abuse by the actor of a position, or a relation with the other, which gives him actual or apparent authority over the other, or power to affect his interests. \* \* \*." 279 Or at 446. See also *Brewer v. Erwin*, *supra* (landlord and tenant); *Rockhill v. Pollard*, *supra* (doctor and patient); *Fitzpatrick v. Robbins*, 51 Or App 597, 626 P2d 910, rev den 291 Or 151 (1981) (landlord and tenant); *Bodewig v. K-Mart*, 54 Or App 480, 635 P2d 657 (1981), rev den 292 Or 450 (1982) [\*\*\*12] (employer-employee). n5 The role of that relationship has recently been explored in *Hall v. May Department Stores Co.*, 292 Or 131, 637 P2d 126 (1981), a case involving an employer-employee relationship, in which the court stated:

"The character of the relationship bears on the mental element required to impose liability, compare *Rockhill* with *Turman* and *Brewer*, and also on the next issue, the offensiveness of conduct that crosses the threshold of potential liability, see *Pakos v. Clark*, [253 Or 113, 453 P2d 682 (1969)]." 292 Or at 137.

n4 Brewer specifically did not decide whether there could be recovery in a situation in which there was no special relationship and where only recklessness was shown. One of defendants' assignments of error concerns an instruction which informed the jury that plaintiff could recover if defendants acted recklessly. Plaintiff had previously withdrawn portions of her complaint which alleged a special relationship between her and defendants. We do not reach the issue of the instruction because we dispose of the outrageous conduct claims on other grounds.

[\*\*13]

n5 Bodewig involved one party defendant who had no special relationship to the plaintiff. However, even in that case, some of the acts necessary to establish the tort were committed only by the employer-defendant, albeit with the other party defendant's encouragement.

A plaintiff's particular susceptibility to distress has also played a part in certain of the cases. See *Rockhill v. Pollard*, *supra* (plaintiff already distraught because of automobile accident and injury to child); *Turman v. Central Billing Bureau*, *supra* (plaintiff blind and suffering from glaucoma, requiring treatment by clinic for which bill was being collected); *Fitzpatrick v. Robbins*, *supra* (plaintiffs aged and visually disabled).

Part of the uniqueness of this case lies in the absence of both of the considerations just discussed. At the close of the evidence, plaintiff withdrew the portion of her complaint which alleged a special relationship between her and defendants. Neither does she argue on appeal that she was in any way particularly susceptible to the infliction of emotional distress. n6

n6 Plaintiff was 17 years old when she first enrolled in the communications course but turned 18 soon after. She does not contend that her age or the fact that she was living on her own for the first time made her particularly susceptible to the infliction of emotional distress.

[\*\*14]

[\*211] The type of conduct for which liability may be imposed for infliction of emotional distress, absent physical injury, is not well defined. *Rockhill v. Pollard*, *supra*, rejected [\*\*584] the description in Restatement (Second) of Torts, § 46 (1965) n7 and decided:

"We need a simpler test and think it best for this case to merely hold that the conduct must be outrageous in the extreme. It is our impression that the test for liability in these cases can only be worked out on a case by case basis. Here we must determine whether defendant's conduct was so extreme as to warrant the imposition of liability for any severe emotional distress caused thereby." 259 Or at 59-60.

In later cases, the type of conduct which would subject a defendant to liability has been characterized as "beyond the limits of social toleration." *Brewer v. Erwin*, *supra*, 287 Or at 458; see also, *Hall v. May Department Stores Co.*, *supra*, 292 Or at 137.

n7 The Restatement describes the conduct which gives rise to liability as follows:

"\* \* \* It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by 'malice,' or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the 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. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous!'" Restatement (Second) of Torts, § 46, comment d (1965), quoted in *Rockhill v. Pollard*, *supra*, 259 Or at 59-60.

[\*\*15]

Although it is ordinarily for the trier of fact to determine not only the historical facts, but also "whether the offensiveness of the defendant's conduct exceeds any reasonable limit of social toleration," *Hall v. May Department Stores Co.*, *supra*, 292 Or at 137,

"[i]t [is] for the trial court to determine, in the first instance, whether the defendants' conduct may reasonably be regarded as so extreme and outrageous as to permit recovery. If the minds of reasonable men would not differ on the subject the court [is] obliged to

grant an order of involuntary nonsuit \* \* \*." *Pakos v. Clark, supra*, 253 Or at 132.

[\*212] The trial court here erred in denying defendants' motions for a directed verdict as to Count I of the outrageous conduct cause of action. We find no conduct both alleged and proved under that count that could subject defendants to liability for the tort. Plaintiff's first count alleges:

"That the above misrepresentations and other unlawful practices were part of a scheme to gain control of Plaintiff's mind and force her into a life of service to the Defendants. She was intentionally alienated from her family and friends. Plaintiff's [\*\*\*16] ability to direct her life and form reasonable judgments was intentionally impaired by Defendants through the use of a crude polygraph, intense peer pressure and other covert means. She was coerced into performing labor for which she was not paid. She was held up to ridicule, humiliated, and forced under threat of retribution and physical harm to follow the dictates of the Defendants, and caused to give Defendants all the monies she had or could beg or borrow from others.

"As part of the above scheme, Defendants caused Plaintiff to believe and fear that she would be subject to severe punishment should she ever bring suit against Defendants, voice her disapproval of Defendants' practices, testify against Defendants, demand a return of money from Defendants or commit any other act Defendants determined to be against their interests."

In this pleading, defendants' intent, their conduct and the effect on plaintiff are interwoven. However, this interweaving should not be permitted to obscure the fact that each of the three elements -- intent, conduct which is outrageous or beyond the limits of social toleration, and resultant severe emotional distress -- must be proved. In [\*\*\*17] the present case, defendants made no [\*\*585] argument concerning intent, but they maintain that there is not sufficient evidence of either of the last two elements -- the outrageous conduct and the resultant distress -- to permit the case to go to a jury. We agree that there is no sufficient evidence of the resultant severe emotional distress. However, that specific basis for taking the case from the jury was not argued to the trial court and we therefore decline to reverse the court on that basis. This brings us to a consideration of the evidence concerning defendants' conduct. It is only by proof of conduct that is "beyond the limits of social toleration" that plaintiff may recover in an action for outrageous [\*213] conduct, no matter what defendants may have intended and no matter what the effect on plaintiff may have been. n8

n8 It may well be that much of the effect on plaintiff that is alleged is not "emotional distress"

either, but we need not consider here whether recovery for such effects may be had in an action for outrageous conduct. We note that the misrepresentations which are re-alleged are the same misrepresentations which form the basis for the fraud action. These representations are not separately sufficient to be actionable as outrageous conduct.

[\*\*\*18]

With respect to the well-pleaded allegations, the evidence, viewed in the light most favorable to plaintiff, is as follows. Plaintiff enrolled in the communications course on the advice of her friend Pat Osler. She paid \$50 and began the course almost immediately. In signing up for the course, plaintiff filled out forms which stated that she was applying for membership in the Church of Scientology and which explained that Scientology was a religion. Because she was 17 years old at the time, she was required to get permission from her mother to take the course and did so. Plaintiff did not pay any attention to the explanations of the religious nature of the courses because she was told that she had to fill out the forms in order to be allowed to take the communications course, and that was all she was interested in.

Plaintiff found a job working full-time in an engineering office in Portland and was living with a non-Scientologist roommate. She testified that she would go to work until 5 p.m. or 6 p.m. and then attend class every evening from about 7 p.m. until between 10 p.m. and midnight. She also attended class at least one full day, and often both days, on weekends. This [\*\*\*19] schedule continued from July 13, when she began the communications course, until the beginning of October, when she moved to Delphian. At the same time, plaintiff maintained contact with family members and friends in the Portland area, visiting them a number of times and corresponding regularly with her mother.

The communications course in which plaintiff first enrolled consisted of a set of "drills" which were practiced on an individual basis with a supervisor. As part of each drill plaintiff would read bulletins which described the theory of the particular drill to be undertaken. She was [\*214] then "checked out" on that information to be certain that she understood what she had read. Then she would practice the drill "to a win," that is, until she could complete the drill as prescribed. After completing each of eight drills, plaintiff repeated each on a more difficult level until a final pass was achieved.

The drills were described by plaintiff at trial. The first drill involved reading a bulletin entitled "How to Study"

and being checked out on it. The second drill involved reading the prescribed bulletin and then sitting across from another person with eyes closed [\*\*\*20] and attempting to clear her mind of all thoughts and to eliminate all outside influences or distractions. She testified that she practiced this drill for "a couple of hours" before her supervisor indicated that she had completed it to a win. The third drill involved the same procedure, except that she sat across from her supervisor with her eyes open.

The fourth drill is called "bullbaiting." Plaintiff described it as follows:

"\* \* \* You're sitting with your eyes open facing another person. The other person, while you're sitting there staring at them, tries to distract you by telling you jokes, making fun of you, pointing at [\*\*586] you, touching you, making faces at you, trying anything that they can to make you laugh or twitch or cry or frown - make any sort of acknowledgement that you heard what he said or saw what he did.

"And the objective is to be able to sit there while that person says anything to you and does anything around you without thinking about what they're doing, and without getting mad - making any gestures.

"Q: How was it practiced on you?

"A: Well, first of all they started by just telling me jokes and I like a good joke and I would laugh. And [\*\*\*21] they would say: Flunk, you laughed. And they would start you all over again on the same drill and they would tell the same jokes until they reached a point that you no longer laughed at it.

"They would make fun of me. \* \* \* Well, they teased me about my religion; they teased me about sex; they teased me about my looks. Some of them made gestures toward me like coming up close to me as if they were going to kiss me or touch me. \* \* \* As soon as they found an area that caused me to laugh more or to frown or to cry, they would [\*215] go into that area in depth and \* \* \* try and get me embarrassed or to cry or make some sort of reaction.

"Q: Did they use obscene words or any foul language?

"A: Yes, they did. I was embarrassed by obscene words and they used obscene words a lot. Every obscene word that I ever heard was used.

"Q: Were you reduced to tears?

"A: Yes, I was, at times.

"Q: How long did the bullbaiting thing go on?

"A: I was bullbaited several different times during the communications course, through three weeks."

After plaintiff was able to complete the bullbaiting drill, she participated in teaching it to other people. n9

n9 There was other testimony regarding the experiences of others in bullbaiting on other occasions when plaintiff was not present. However, in considering defendants' conduct toward this plaintiff, we consider as relevant only what plaintiff experienced.

[\*\*\*22]

The next drill required that plaintiff read sentences from Lewis Carroll's Alice in Wonderland and Through the Looking Glass until she was able to read without any inflection. After that drill plaintiff participated in a drill which was described as "learning to acknowledge someone."

"And in that drill the person that's acting as coach would \* \* \* ask you a question and all you were supposed to do is acknowledge them by saying: 'Good,' or 'Yes.' And you weren't supposed to put again any inflection in your voice. You were supposed to just say it. \* \* \* There was no specific meaning to it or anything; just to get the person to know that you heard what they said.

"Q: What type of questions were asked?

"A: There were two questions; one was \* \* \* I don't think they were all questions. I think the person just read phrases out of the books 'Through the Looking Glass' and 'Alice in Wonderland.'"

The next drill was learning how to receive an acknowledgment from a person.

"And what that was there were two questions. The first one was 'do fish swim' and the second one was 'do birds fly.' \* \* \* [Y]ou sat across from the coach and you say to him: Do fish swim. [\*\*\*23] And the coach tries to ignore you and you try to say it in as much of a forceful manner that you get an acknowledgement from him. And he will sit there [\*216] and laugh at what you're doing, or totally ignore you. And you're supposed to just sit there and stare right at him and clear your head of all thoughts and ask him this question with such force that he feels he has to answer you.

"And then, as another step up from that same drill, the coach, instead of just ignoring you or laughing, will begin to make remarks just like in the bullbaiting drill. You will say: Do birds fly. He [\*\*587] will say: I don't know, what do you think. And then you're supposed to just repeat the question 'Do birds fly' until you get him to answer. And he will - sometimes the person will say that they have a headache or that they want a drink of water and you're supposed to say - you're supposed to get them to forget that they have a headache or that they need something and to answer your question for you."

Plaintiff's memory was not clear on four further drills, called "upper indoctrination" drills. One involved reading a bulletin entitled "What is Control," which plaintiff remembered [\*\*\*24] as "telling you how to control people and how to achieve the response and the actions that you want to achieve from the other person." Another involved learning commands, such as "Look at the wall, walk over to that wall, touch that wall, turn around." In another drill,

"\* \* \* you give a command to [an] ashtray as you hold it in front of you. I can't remember what the commands were, but they were something like \* \* \* 'Rise up,' or something. And you raise the ashtray up and you do this drill over and over until you are convinced that you have told the ashtray to move and it has moved." n10

n10 There was some other testimony concerning the type of activities involved in the "upper indoctrination" drills. Although somewhat more detailed, it is substantially the same as plaintiff's descriptions.

Plaintiff completed the communications course in about one month. However, on July 25, 1975, less than two weeks after she started that course, she signed up for another, known as the Student HAT course, [\*\*\*25] for which she paid \$250 to the Mission. While she was taking the communications course she was also approached by the Mission staff about receiving "auditing," for which certain claims were made that are included among the misrepresentations alleged in the fraud action. When she was approached about "auditing" by a staff member, he told her everyone has "hangups" that inhibit communication and asked if she [\*217] would like to get rid of all of her hangups and improve herself. Plaintiff signed up for auditing because the staff member told her it was the best thing she could do for herself, she was convinced that it was, and she wanted to develop herself to her fullest potential. On July 26, plaintiff paid \$780 and on July 31, she paid an additional \$1100 for a number of hours of auditing.

Because she did not have the money to pay for the hours of auditing she was told she would need, plaintiff was coached by Mission staff members to borrow money from friends and family. The staff members helped her to call people and ask to borrow money. A staff member would tell her the type of conversation to use and sit there while she called, giving her ideas and suggestions. In [\*\*\*26] the evenings when she went to the Mission she would take courses for a while and then be asked to come to a staff member's office to make phone calls. She borrowed \$700-800 from friends and family and another \$500 from Freedom Federal Credit Union, which is operated by Scientologists.

Plaintiff began the Student HAT course and the auditing right after completing the communications course, approximately in mid-August. She took the course on weekends and participated in auditing in the evenings during the week. As explained above, the purpose of auditing is claimed to be to relieve the negative effects of past experiences. This is accomplished by the use of an "E-meter," which is a crude galvanometer. The individual receiving the auditing holds what are described as two tin cans, one in each hand. The cans are connected to a device which has a needle which reacts in some manner to the responses made. n11

n11 The E-meter was described in *United States v. Article or Device, etc.*, 333 F Supp 357 (DDC 1971):

"The E-meter is essentially a simple galvanometer using two tin cans as electrodes. It is crude, battery-powered, and designed to measure electrical skin resistance. It is completely harmless and ineffective in itself. A person using the meter for treatment holds the tin cans in his hands during an interview with the operator who is known as an auditor and who purports to read indicators from the galvanometer needle as it notes reactions to questions. \* \* \*"

[\*\*\*27]

[\*\*588] Plaintiff testified that the auditor would ask a question, such as "Do you have any problems with your [\*218] parents?" She would describe a particular argument, and he would ask if there were earlier, similar times she had had arguments with her parents. She testified that he would take her back earlier and earlier until he decided she had related the earliest incident and her "needle was floating." The auditor would then go on to another question.

The time spent on auditing varied. Plaintiff testified:

"I spent at least two hours, and often as many as five or six hours in auditing. If a point was reached, after a couple of hours, where I was pretty happy, then the auditor would end the session. But if during the course of the questions he asked me, I became very upset and cried or wouldn't answer his questions, he would keep asking me questions over and over again until I reached a point where he felt it was safe to end the session.

"There was a rule that in auditing that the auditor could never let the person leave when they were upset. And so I remember a number of times that I became real upset and just wanted to leave and go home and get out of [\*\*\*28] the place, but he said: No, just sit down. The way out is the way through, was the phrase he used. What upsets you the most by talking about it more with me will help you overcome it."

The Student HAT course involved listening to tapes of lectures by L. Ron Hubbard, the founder of Scientology, and reading various bulletins, after which plaintiff would be examined to determine whether she knew the material contained in each one. These materials concerned proper study habits and methods and the values of auditing.

In conjunction with the Student HAT course, plaintiff attended Friday evening "musters," which all students in the communication course and the Student HAT course were required to attend. According to plaintiff, the purpose of these meetings was "to discuss our progress on the course and reinforce one another, telling each other how many points we had made." n12 She described the musters as follows:

[\*219] "Well, I would go into the graduation room and be seated and then someone would come in that was officiating that night. And it varied, like the person would come in and usually do something to get everybody to relax. One of the most common things [\*\*\*29] they did was to say: I want everybody in here to introduce themselves to two people in the room that they have never met before. And then the people would do that and they would be relaxed and then he would start talking about Scientology and Dianetics and communications course and all of these things and how we were all going to become part of clearing the planet or making sure that everyone on the planet got Dianetic auditing.

"Sometimes they did little drills like: Once a person asked us to locate a space around us that we would call ours and then everyone would sit there and do that. And he would say: Now increase that space - increase that space to include you and two people beside you, and you do that. And then he would say: Increase the space to include this room, and we did that.

"He would say: Increase the space to include the whole world, and you just bodily increased it to that spot. And he said: See what it is going to be like. We are going to increase ourselves until we get everyone on this planet clear."

[\*\*589] The graduates of the courses would stand up and tell the group what they had gained from the course. They would

"\* \* \* say how it [\*\*\*30] had changed their lives and how they were - they had finally found meaning and finally found a way to improve themselves and rid themselves of their harmful past, emotions and attitudes."

n12 The students received points for what they learned in the courses, and a charting system was maintained in which each student's points were recorded to show his or her progress in Scientology.

Around the end of August or the beginning of September, staff members at the Mission began to talk to plaintiff about becoming a staff member. They told her how rewarding it was, and they began to talk about Delphian. Certain of the claims made for Delphian are included as misrepresentations alleged in the fraud count. According to plaintiff's testimony, she was told that she could take courses at Delphian which could be applied toward a college degree, that she would learn about architecture and engineering "from the ground up" and that Delphian was partially funded by government grants for doing research in solar and wind [\*\*\*31] energy and recycling. Plaintiff decided that going to Delphian would be the best way to combine her [\*220] interests in architecture and engineering with her interest in Scientology and Dianetics. She informed her parents that she would not be going to college that fall as she had planned; instead, she applied to Delphian as a provisional staff member. After visiting her parents' home in Montana in September, she moved to Delphian at the beginning of October.

Plaintiff was assigned to live in a room with two other women and two children. She had a small space for her belongings. She worked harvesting crops for a couple of weeks after she arrived and then helped to move an old garbage dump on the property. In the evenings, she worked indoors cleaning floors, washing dishes and other such tasks. Her work day extended from 8:30 a.m. to 11 p.m. or later. After three or four weeks, she was assigned to care for small children of other staff members. She was given instructions on using



Scientology methods in caring for the children. She worked as a "nanny" until she left Delphian. She received wages of a few dollars a week.

Visitors were not encouraged at Delphian, and [\*\*\*32] plaintiff was instructed that two-weeks notice was necessary if visitors were coming. She described one incident that occurred around Halloween when she was reprimanded because her mother and one of her friends from Montana came to visit unannounced. Plaintiff's mail was sometimes opened before she received it at Delphian.

Beginning in October and continuing into November, plaintiff reported to Delphian staff members that her mother was very concerned about her involvement with Scientology. She had been told that she must report that kind of activity, because if it was upsetting to her it would inhibit her progress in Scientology. Plaintiff eventually became aware that her mother had hired a lawyer to find a way to get her away from Delphian. She informed the staff of this action and that her mother had also gone to the media.

Plaintiff was told that this kind of activity was bad for Scientology and that it would give Delphian and Scientology a bad reputation. She was told that she would have to leave Delphian until she could "handle" her parents, [\*221] which meant that she must convince them to sign a statement that they would not sue, attack or embarrass Scientology [\*\*\*33] or Delphian.

Plaintiff left Delphian in late November or early December and returned to Portland. She began working as a waitress in an hotel and lived in a house with several other people, including her friend Osler, who had also been at Delphian during the time plaintiff was there and had left when she did. Plaintiff went to the Mission and saw staff member Jim Brooks, who was to help her handle her parents. She was told that she could not take any classes or auditing until she could handle them. She was informed that in order to continue in Scientology she had to handle her parents or "disconnect," i.e., cut off all relations with them.

[\*\*590] Brooks coached her on what to say in letters to her parents to convince them to allow her to continue in Scientology without interference. Plaintiff obtained permission from Brooks to go home for Christmas to attempt to handle her parents. She rode home with her brother, who lived near Portland. Her parents would not agree to plaintiff's requests, and plaintiff returned to Portland with Osler.

Under the direction of Brooks, plaintiff wrote her parents a letter on January 5, 1976, informing them that

she was no longer [\*\*\*34] involved with Scientology. Although that was not true, Brooks told her it would help her family "destimulate." She continued to report her parents' activities to Brooks, including an unsuccessful attempt to hold plaintiff in an hotel for "deprogramming." Brooks coached plaintiff in writing letters to her parents, either asking that they not interfere with her involvement in Scientology or "good road, fair weather" letters avoiding the subject of Scientology.

Plaintiff also met with Kay Wilson from COSOP, who told her that if she wanted to continue in Scientology she would have to disconnect from her parents. Regarding that conversation, plaintiff testified:

"We were discussing my mother and I told Kay Wilson that my mother had hired an attorney and that she had told me all these things about Scientology I had never heard about. My mother mentioned something about a [\*222] Fair Game Law and I said that to Kay Wilson. And she said: Oh, that policy letter has been cancelled. However, the treatment of suppressive persons is still the same."

A "suppressive person" is one who attempts to damage or interfere with Scientology. The Fair Game policy was proclaimed by [\*\*\*35] L. Ron Hubbard in a policy letter of October 18, 1967. It stated that suppressive persons "[m]ay be deprived of property or injured by any means by any Scientologist without any discipline of the Scientologist. May be tricked, sued, lied to or destroyed." n13 Plaintiff testified that she had been shown several policy letters regarding treatment of "suppressive persons." Plaintiff had been told that her mother was suppressive.

n13 Defendants maintain that this policy had been cancelled. There was conflicting evidence as to the status of the policy and its meaning. We need not resolve those conflicts because the mere existence of the policy does not constitute outrageous conduct as to this plaintiff.

Plaintiff did not want to disconnect from her parents, but she did want to continue in Scientology. She asked for permission from Brooks to go back to Montana to persuade her parents to agree not to sue, attack or embarrass Scientology and not to interfere with her involvement in it. She made the trip in April, [\*\*\*36] 1976. When she arrived at her parents' home, she was locked in the house and "deprogrammed." As a result, plaintiff decided that she did not want to return to her involvement in Scientology, and she did not.

Whether viewed as individual acts or taken together as a "scheme," we find nothing in this record which constitutes conduct which is "beyond the limits of social

toleration." There is no evidence that plaintiff was threatened or forced to remain involved in Scientology. To the contrary, she maintained many contacts with non-Scientologists. She had a full-time job both before and after her stay at Delphian. The record shows that she visited with relatives living in the Portland area periodically while she was there. She maintained correspondence with her parents and went back to Montana twice before her visit in April when she was "deprogrammed." Her parents or her mother visited her several times in Portland or at Delphian. Plaintiff became involved and maintained her involvement [\*223] because she desired to do so. If misrepresentations were made regarding the benefits or the nature of Scientology which gave rise to that desire, her remedy would be for fraud, not [\*\*\*37] outrageous conduct.

Plaintiff was recruited and indoctrinated into the Church of Scientology. That recruitment and indoctrination, as far as this record discloses, were not so very different than might be used by any number of organizations. She joined the group voluntarily, [\*\*591] albeit, as she claims, on the basis of misrepresentations made to her. However, she continued to participate and maintained her involvement for whatever reason without actionable threats or coercion by defendants.

The drills plaintiff was subjected to as part of the communications course she initially signed up for were not in themselves outrageous. Plaintiff studied the theory behind each drill before participating in it. She returned day after day to participate in the course, although she had daily contact with non-Scientologists in her job and at her apartment with her non-Scientologist roommate. The most that can be said is that plaintiff was convinced by defendants to accept what they were teaching; unless the means involved more than persuasion, that is not outrageous. Whether or not we find any merit to defendants' teachings, plaintiff apparently did find merit in them during the [\*\*\*38] time she was associated with Scientology. The fact that she was later convinced of their invalidity does not make defendants' conduct outrageous post hoc.

The only evidence which supports the allegation that plaintiff was caused "to believe and fear that she would be subject to severe punishment should she ever bring suit against Defendants, voice her disapproval of Defendants' practices, testify against Defendants, demand a return of money from Defendants or commit any other act Defendants determined to be against their interests" is the testimony regarding the Fair Game policy. Plaintiff testified that after she was "deprogrammed" she was fearful of retaliation by

defendants. There is no evidence that during her association with Scientology plaintiff was afraid to terminate her involvement or feared defendants in any way. The fact that she was informed of a policy known as Fair Game is not outrageous conduct.

[\*224] We hold that the evidence presented under Count I of the outrageous conduct cause of action does not, as a matter of law, establish conduct that is outrageous in the extreme or beyond the limits of social toleration.

Count II of the outrageous [\*\*\*39] conduct action n14 alleges that:

"Subsequent to Plaintiff's deprogramming, Defendants have pursued a course of conduct against Plaintiff that is designed to threaten, humiliate, and intimidate Plaintiff and cause her fear, anguish and mental distress. Defendants on June 7, 1977, filed suit against Plaintiff without cause and for the purpose of intimidating Plaintiff; Defendants have, in June of 1976 and April of 1977, declared Plaintiff to be a suppressive person subject to Defendants continuing 'fair game' policy of retribution which directs Defendants' organizations and other Scientology organizations and their members to trick, lie to or destroy Plaintiff. Defendants have, beginning in June of 1976 and continuing to the present, forbid, through threats of mental and physical harm, any friends of Plaintiff connected with Defendants from communicating with Plaintiff; Defendants have caused and continue to cause the mailing of materials to Plaintiff and Plaintiff's family subsequent to Plaintiff's request that such mailings cease."

Defendants moved for a directed verdict on this count as well, on the basis that the conduct proved was not such that it could subject [\*\*\*40] them to liability.

n14 This count was withdrawn as to defendant Delphian at the close of the evidence. COSOP and defendant Samuels contend that no involvement by them was shown. Because of our disposition of this count on other grounds, we need not reach that issue. We use the term "defendants" here without delineating whose involvement was shown.

The evidence established, first, that a libel action was filed by certain of the defendants against plaintiff after a press conference in which plaintiff participated. That matter was still pending at the time of the trial of this action. We said in *Erlandson v. Pullen*, 45 Or App 467, 472, 608 P2d 1169 (1980):

"Without necessarily suggesting that it could never be so, we note that it would be a rare case in which the bringing of a [\*\*592] lawsuit would fit the definition of outrageous conduct. This tort has been reserved for 'intentional acts of [\*225] a flagrant character under most unusual facts and circumstances \* \* \*' *Melton v. Selen* [\*\*\*41] , 282 Or 731, 736, 580 P2d 1019 (1978)."

Here the record reveals nothing about the other case except that it was an action for libel. We do not know, nor can we infer from this record, that it was without foundation. Such proof would not even support an action for abuse of process without evidence that plaintiff had prevailed. *Erlandson v. Pullen, supra*. Filing such a suit is not outrageous conduct.

There is evidence that plaintiff was declared a suppressive person by certain individuals connected with the Mission. Plaintiff testified at trial that she knew she had been declared suppressive because that is what is done. At her deposition, she testified that someone had told her that she had been declared suppressive. However, there is no evidence that defendants informed plaintiff that she was declared suppressive and subject to the Fair Game policy, or knew or intended that she be so informed. n15

n15 At her deposition, plaintiff testified that she did not know whether she had been declared suppressive. Later, however, she said she had been told by someone that she had been declared suppressive. She stated that she could not remember who had told her, but thought it was someone who left Scientology after she did.

[\*\*\*42]

The only evidence that defendants forbade, "through threats of mental and physical harm, any friends of Plaintiff connected with Defendants from communicating with Plaintiff" is a document issued June 7, 1976:

"All staff are hereby notified not to attempt to contact or interfere with JULIE CHRISTOFFERSON or PATRICK OSLER in any manner. These two persons have attacked the Church of Scientology so I repeat, they are not to be communicated to for any reason.

"If either of these two contact any one in the Church, or if any associates of theirs try to contact any one of the Church, report this action \* \* \* immediately."

This directive followed a letter sent on June 6, 1976, by an attorney on behalf of plaintiff and Osler. That letter said:

"This office represents Julie Christofferson and Patrick Osler, formerly members of your group. Enclosed are photocopies of affidavits to the effect that they have both been deprogrammed, and that they request legal assistance should you make any effort to induce them back into the [\*226] cult. Naturally, a large civil action would be an expected element of any such legal assistance. Therefore you are hereby on notice [\*\*\*43] that any attempt to contact them, or to interfere with them in any manner, will result in most grave consequences to you."

In addition, a former staff member of the Mission testified that they were told at a staff meeting not to communicate or associate with plaintiff or Osler under any conditions, or if they did so, to write it up immediately.

Following, as the directive had, the letter from plaintiff's attorney demanding that defendants not contact plaintiff in any way, the orders that plaintiff's demand be met can in no way be considered outrageous conduct. There is no evidence that any threats of mental or physical harm were made to enforce the prohibition on contact with plaintiff.

The mailings of which plaintiff complains were, with one exception, from the American Saint Hill Foundation (known as ASHO) in California, a Scientology organization. Several personal letters to plaintiff, signed by individuals she did not know, asked about her progress in Scientology. Some of those letters contained brochures on Scientology. In addition, two editions of a newsletter entitled Cause, also published by ASHO, were received by plaintiff. Finally, plaintiff received one [\*\*\*44] form letter with brochures from COSOP. Plaintiff does not seem to contend that the contents of the letters were offensive, but she testified that she was made fearful by the fact that she received mail from Scientology organizations [\*\*593] at all. Certain of the mailings were addressed to plaintiff's last Portland address and were forwarded to her in Montana. Others were addressed to the post office box which was her Eureka, Montana, address.

Mailing letters, brochures on Scientology and a newsletter which were in themselves innocuous cannot constitute outrageous conduct. There was nothing sinister in any of the material plaintiff received. Neither was there anything mysterious about the fact that plaintiff's forwarding address was obtained, for it is clear that certain of the items were forwarded by the post

office and that the envelopes contained an "address correction requested" imprint.

[\*227] In addition to what was alleged in her complaint, plaintiff also presented evidence at trial, without an objection that it was outside the scope of the pleadings, of three incidents which made her fearful. Once, a couple of months after she left Scientology, she was in [\*\*\*45] Portland and was walking down the street with Osler near the house in which she was staying. They noticed a car parked about a block from the house, and Osler recognized the person in the car as a Scientologist. They walked up to the car and asked the person what he was doing. He did not answer but started the car and drove away. Later that afternoon plaintiff noticed a van parked about a block from the house and, as they approached the van, it drove away. Osler recognized the person driving as a Scientologist.

Finally, in June, 1976, plaintiff and Osler were out walking and noticed two Scientologists behind them. They walked into the library and were followed into one of the library rooms. There the two Scientologists sat down at a table and stared at them while they looked at books. When they started to leave, the Scientologists got up, but plaintiff and Osler left quickly and did not see them after that. These three incidents, either singly or taken as a group, cannot conceivably be called outrageous conduct.

We have reviewed the record as it relates to the conduct which plaintiff claims to be outrageous. We recognize that plaintiff does not claim that any particular [\*\*\*46] action, by itself, would constitute outrageous conduct, but rather contends that the actions together rise to the level of actionable conduct. We find as a matter of law that the conduct shown is not actionable as outrageous conduct, whether viewed as individual acts or as a course of conduct. Defendants' motions for directed verdicts on the cause of action for outrageous conduct should have been granted.

#### FRAUD

We turn to plaintiff's cause of action for fraud. Plaintiff's complaint contained the following allegations:

#### "VII

"Between July, 1975 and April, 1976, in Oregon Defendants Church of Scientology, Mission of Davis, Church of Scientology, Portland, and the Delphian Foundation made the following misrepresentations regarding the standard, [\*228] quality, grade, sponsorship, status, characteristics, ingredients, uses, benefits, character or qualities of the courses or goods

offered by Defendants when they knew or should have known that such representations were false:

#### "STUDENT HAT AND COMMUNICATIONS COURSE

"(1) \* \* \* the Church of Scientology Communication Course would provide more knowledge of the mind than is possessed by any psychologist or psychiatrist. [\*\*\*47]

"(2) \* \* \* the communication course was completed and endorsed by Father Pat Flanagan of Boys' Town, Omaha, Nebraska. \* \* \*

"(3) \* \* \* the communication course would help the Plaintiff in college work and that the course was offered on a money back guaranteed basis. \* \* \*

"(4) \* \* \* [the] student HAT course enabled a student to understand any subject better and more accurately. \* \* \* the Student HAT Course was offered on a money back guaranteed basis.

[\*\*594] "PLAINTIFF WAS FURTHER INDUCED TO ENGAGE IN A PROGRAM KNOWN AS AUDITING BY THE FOLLOWING REPRESENTATIONS:

"(5) \* \* \* auditing relieves the effects of past experiences. \* \* \* through auditing she would have more knowledge of the mind than any psychiatrist or psychologist and more knowledge of the bodily processes than any doctor.

"\* \* \*.

"(a) Auditing develops creativity;

"(b) Auditing increases I.Q. scores;

"(c) Auditing cures neuroses, criminality, insanity, psychosomatic ills, homosexuality and drug dependence;

"(d) Auditing allows one to control his own emotions and the physical universe; and

"(e) Auditing was offered on a money back guaranteed basis.

"\* \* \*.

"PLAINTIFF WAS INDUCED TO ENGAGE [\*\*\*48] IN THE STUDY OF 'DIANETICS' BY THE FOLLOWING REPRESENTATIONS:

"(8) \* \* \* Dianetics is scientifically provable and that it cures asthma, arthritis, rheumatism, ulcers, toothaches, pneumonia, colds, and color blindness. \* \* \*

"(9) \* \* \* L. Ron Hubbard, the creator of auditing, is an engineer and nuclear physicist and has a degree from [\*229] Princeton University and an honorary degree from Sequoia University and is a graduate of George Washington University who revealed Dianetics to mankind as a service to humanity, with no intent to profit therefrom. \* \* \*

"(10) \* \* \* L. Ron Hubbard had a civil engineering degree; a 'B.S.' degree and was a nuclear physicist, a graduate of George Washington University; and had received an honorary degree from Sequoia University and Princeton University;

"DEFENDANTS FURTHER INDUCED PLAINTIFF TO QUIT HER JOB AND LIVE AND WORK AT THE DELPHIAN FOUNDATION BY MAKING THE FOLLOWING REPRESENTATIONS:

"(11) \* \* \* Delphian Foundation was funded by government grants for developing education and alternative energy sources; further that Plaintiff could take courses at the Delphian Foundation that could be applied by an accredited college toward a college [\*49] degree.

"(12) \* \* \* L. Ron Hubbard was a graduate of George Washington University, was an engineer and nuclear physicist and had an honorary degree from Sequoia University and that the Delphian Foundation was nearing accreditation and had almost been accredited in September of 1975; further that in the Spring of 1976 Plaintiff could take courses at the Delphian Foundation that could be applied by an accredited college toward a college degree.

"(13) \* \* \* [Plaintiff] could attend school at the Delphian Foundation and, after such study, be able to obtain college credit hours in architecture or engineering at any college in the country merely by taking a test.

"(14) \* \* \* [Plaintiff] would obtain at the Delphian Foundation an education superior to any University in the world.

"\* \* \*." n16

n16 Defendants do not argue that these alleged statements may not be fraudulent, at least under some circumstances.

We first consider the motions for directed verdict made by each of the parties on other than [\*\*\*50] constitutional grounds. COSOP moved for a directed verdict on the ground that plaintiff had not shown that any of its agents or employees had made any of the misrepresentations alleged. COSOP argues on appeal that that motion should have been granted.

[\*230] Plaintiff's complaint alleged that the misrepresentations were made by specific individuals who were agents or employees of the Mission or Delphian. None of the individuals named is claimed to have been an agent or employee of COSOP. The complaint did [\*\*\*595] allege that the misrepresentations were repeated by various employees of defendants and that they were contained in literature provided to plaintiff by COSOP. However, at trial, plaintiff did not introduce any evidence that the statements were made by employees of COSOP or that she was provided with any literature by COSOP.

There is evidence that plaintiff paid \$75 to COSOP for a "Lifetime HASI" on July 30, 1975. HASI is an acronym for Hubbard Association of Scientology International. HASI membership entitles one to a 10 percent discount on purchases from all Scientology organizations. Plaintiff contends that COSOP may be held liable for the misrepresentations [\*\*\*51] made by employees of the Mission, because it received money from plaintiff while knowing about the fraudulent practices employed by the Mission. She does not contend that actual knowledge was shown, but only that COSOP had constructive knowledge of the marketing practices of the Mission and of the claims that were made for the courses offered.

Assuming without deciding that COSOP could be held liable on such a basis, we find no evidence, nor has plaintiff pointed to any, to indicate that COSOP was aware on July 30, 1975, when plaintiff paid \$75 for the HASI membership, that plaintiff had had any contact with the Mission at all. The only evidence regarding the \$75 payment to COSOP is a receipt. Plaintiff did not testify to the circumstances surrounding that payment and, in fact, testified mistakenly that she had not paid any money to COSOP. The fact that both COSOP and the Mission are Scientology organizations does not by itself provide a sufficient link to hold COSOP liable for what may have been done by the Mission. Neither does the fact that policy letters and bulletins written by L. Ron Hubbard are espoused by both COSOP and the Mission make COSOP liable to this plaintiff. [\*\*\*52]

Plaintiff has not shown that the Mission acted as an agent for COSOP, nor does she claim that such a [\*231] relationship existed. She has shown no basis upon which

COSOP may be held vicariously liable for the actions of the Mission. We conclude that the motion of COSOP for a directed verdict on plaintiff's action for fraud should have been granted.

Delphian's motion for directed verdict was on the ground that none of the statements alleged by plaintiff were made by any of its agents or employees and that plaintiff had already paid the \$3,000 she claims was procured by fraud long before she went to Delphian. Although the complaint alleges that certain of the misrepresentations were made or repeated by employees of Delphian, plaintiff appears to concede in her brief that there is no evidence to support that allegation. Plaintiff argues, however, that Delphian should be held liable because 1) the relationship between the Mission and Delphian was such that Delphian should be held liable; 2) Delphian confirmed certain of the misrepresentations regarding its funding, structure and courses in a data sheet given to plaintiff to read to acquaint her with Delphian when she arrived; [\*\*\*53] and 3) Delphian did receive some money from plaintiff, apparently for books, and also received free labor from plaintiff while she was there.

Plaintiff does not state the theory behind her contention that the relationship between Delphian and the Mission is such that Delphian should be held liable for misrepresentations made by the Mission. The evidence she points to in support of her contention is as follows:

"\* \* \* Mission of Davis has a branch at Sheridan on the Foundation premises \* \* \*, the management of Mission of Davis is centered at Sheridan \* \* \*, and that Mission of Davis, Delphian Foundation and the Sheridan Mission all co-exist on the same property to such an intertwined extent that a memorandum was necessary to prevent confusion in writing out purchase receipts \* \* \*. The two organizations have a common president, Martin Samuels \* \* \*, who lives at Sheridan \* \* \*."

"Additionally, [the Mission's] representations were not made coincidentally, but as part of a policy calculated to induce [\*\*596] members who had spent all their available funds for courses in auditing at the Mission, to work at the Delphian Foundation in return for further courses and auditing [\*\*\*54] \* \* \*."

[\*232] It is not clear whether plaintiff is suggesting that the Mission acted as the agent for Delphian in making the representations or that the two corporations are in reality one entity, i.e., an alter ego theory. n17 The evidence adduced at trial does not support "piercing the corporate veil" so as to permit treating the two corporations as one or as the alter ego of defendant Samuels. The memorandum to which plaintiff refers shows only that the affairs of the corporations were

maintained separately. One shared corporate officer and shared facilities are not enough to permit such an approach. See *Howco Leasing Corp. v. Oregon Lumber Export Co.*, 283 Or 225, 228, 582 P2d 4 (1978); *Schlecht v. Equitable Builders*, 272 Or 92, 535 P3d 86 (1975); *Wakeman v. Paulson*, 257 Or 542, 480 P2d 434 (1971); *A. J. Rose & Son, Inc. v. Bd. of Funeral Dir.*, 31 Or App 537, 570 P2d 1008 (1977). n18

n17 Plaintiff's brief responds to Delphian's argument as follows:

"Defendants' argument presumes, erroneously, that since these misrepresentations were made by someone from 'Mission of Davis' rather than from 'Delphian Foundation,' Delphian is insulated from liability no matter how blatant the misstatements."

Plaintiff then recites the facts quoted above and concludes: "Any claim of no relationship between Mission and Delphian is absurd and contrary to all the evidence." This misses the point -- the issue is not whether there was a relationship; the issue is whether that relationship was so close as to give rise to joint or vicarious liability.

[\*\*\*55]

n18 Because of our disposition of this issue we need not consider whether the doctrine of "piercing the corporate veil" should be applied differently, or if it may be applied at all, to religious corporations.

We also find no evidence to support a finding that the Mission was acting as the agent of Delphian in making the alleged misrepresentations. n19 Our responsibility at this stage of the proceedings is to decide whether there is any evidence which would support a reasonable inference of agency between the Mission and Delphian. *Briggs v. Morgan*, 262 Or 17, 496 P2d 17 (1972). One essential feature of agency is the right of the principal to control over the agent. "A business organization which operates in its sole and unlimited discretion is not an agent but a principal." *Kuhns et ux v. State Tax Com.*, 223 Or 547, 555, 355 P2d 249 (1960); and see Restatement (Second) of Agency, §§ 1, 14 (1958). There is nothing in the record before us to [\*233] support an inference that Delphian had any right to control the actions of the Mission or had actual control over those actions; [\*\*\*56] therefore, there could be no finding of agency.

n19 Plaintiff does not specifically claim that there was an agency relationship.

Plaintiff contends that Delphian may be held liable on the basis of the following statements contained in the data sheet which was given to plaintiff to read when she arrived at Delphian, because these statements "confirmed" the misrepresentations made by the Mission:

"That some 'external' students be accepted for tuition in accordance with our school and university structure.

"\* \* \*

"That funding shall be by donations and endowments and by grants for specific projects, and that the full definition of allowable income routes be obtained and used.

"\* \* \*

"That apprenticeships be a standard part of any educational program.

"\* \* \*

"That there be a designated faculty, both for primary/secondary school and for the University.

"\* \* \*

"That the formal structure of a university be created and maintained, and a program leading to accreditation be developed.

"\* \* \* [\*\*\*57]

"That special attention be given to the maintenance of ethical relationships and [\*\*597] exchanges among the dynamics of TDF; this shall be the guiding principle behind decisions as to techniques and orientations in architecture, agriculture, forestry, utilities, etc. \* \* \*"

The statements quoted above are contained under a heading "Policies." Plaintiff does not seem to claim that these are misrepresentations in themselves, and they could not fairly be construed as such. There is no evidence to suggest that they were not the policies of Delphian; neither do the statements show a connection between Delphian and the Mission sufficient to permit a finding of agency or an alter ego situation. They do not aid plaintiff.

Finally, plaintiff argues from the fact that Delphian received some money from plaintiff and also received the benefit of her free labor that Delphian can be held liable for misrepresentations made by the Mission. As [\*234] with the COSOP motion, we need not decide if that is a viable theory of recovery because, at the close of all the evidence, the trial court struck plaintiff's claim

that Delphian had received free labor and was paid money by plaintiff. [\*\*\*58] Plaintiff has not contended here that that was error.

We conclude that there is no basis in this record for holding Delphian liable for any misrepresentations made to plaintiff and that its motion for directed verdict should have been granted. n20

n20 Delphian argues that plaintiff had already paid all the money she claims to have paid before she had any contact with Delphian and that, therefore, there is no causative link between plaintiff's damages and anything Delphian may have done. Plaintiff did buy some books while at Delphian, but it is not clear whether the amount she spent for those books is included in the amount of damages she claims. Plaintiff's complaint claimed that she was induced to pay the defendants \$3,000.20. The receipts that plaintiff introduced at trial add up to something more than that figure.

Defendant Samuels' motion for directed verdict was based on the ground that he had not participated in the alleged fraud and could not be held liable to plaintiff merely because he is the [\*\*\*59] president of the Mission. The Oregon Supreme Court held in *Osborne v. Hay*, 284 Or 133, 145-46, 585 P2d 674 (1978), that

"\* \* \* in order to hold the officer of a corporation personally liable for fraud by an agent or employee of the corporation it is necessary to show that the officer had knowledge of the fraud, either actual or imputed, or that he personally participated in the fraud. See *McFarland v. Carlsbad Sanitorium Co.*, 68 Or 530, 536-537, 137 P 209 (1914), and *Hoff v. Peninsula Drainage Dist.*, 172 Or 630, 643, 143 P2d 471 (1943)." And see *McDonough v. Jones*, 48 Or App 785, 617 P2d 948 (1980), rev den 290 Or 519 (1981).

There is evidence in the record from which a jury could have found that Samuels had knowledge of at least some of the alleged misrepresentations. It was not error to deny his motion for directed verdict on that basis. n21

n21 Samuels is alleged to be liable only because he is resident of the Mission and Delphian. His liability, therefore, is limited by the liability of the Mission. In the remainder of this opinion the term defendants refers to the Mission and Samuels.

[\*\*\*60]

The Mission asserted only constitutional grounds for its motion. Not all of the alleged representations are

[\*235] claimed to be religious and therefore the motion was properly denied. n22

n22 Defendants claim that the statements regarding the communications course, the Student HAT course, Dianetics and auditing are protected. They do not claim that the statements concerning Delphian or the statements regarding Hubbard's educational background are religious.

#### FREE EXERCISE CLAUSE DEFENSE

We now consider the appropriate procedures for dealing with a defense to an action for fraud based on the Free Exercise Clause of the First Amendment. n23 Defendants [\*598] made a pretrial motion to exclude from the trial "any evidence regarding the validity or sincerity of defendants' religious beliefs and practices." In the alternative, they asked for a hearing

"\* \* \* to determine whether the courses, training, studies, and counseling constitute a part of the religious beliefs and practices of defendants' [\*\*\*61] religious organizations and are thus protected from inquiry as to their validity or sincerity by the Oregon and United States constitutions and applicable law interpretive thereof."

That motion was denied. At the close of the evidence, defendants moved to strike on various grounds certain of the specifications of fraudulent statements. As part of that motion, defendants moved to strike and withdraw from the jury all allegations regarding the communications course, the Student HAT course, auditing and Dianetics on the ground that they constitute religious practices of the defendants. That motion was also denied. Defendants assign error to the denial of both motions. As we will explain hereafter, the pretrial motion was premature, but the motion at the close of all the evidence properly presented the question for the trial court's consideration.

n23 Defendants rely on both the United States and the Oregon constitutions for their defense. They do not, however, argue that the scope of the Oregon constitution differs materially from that of the federal constitution and, therefore, we refer only to the First Amendment of the federal constitution in discussing this defense.

[\*\*\*62]

A defense based on the Free Exercise Clause presents particular difficulties in an action for fraud. To establish fraud, a plaintiff must ordinarily prove that the

representations made were false. See *Meader v. Francis Ford, Inc.*, 286 Or 451, 595 P2d 480 (1979). However, when [\*236] religious beliefs and doctrines are involved, the truth or falsity of such religious beliefs or doctrines may not be submitted for determination by a jury. See *United States v. Ballard*, 322 U.S. 78, 64 S Ct 882, 88 L Ed 1148 (1944). The Supreme Court there stated:

"\* \* \* Freedom of thought, which includes freedom of religious belief, is basic in a society of free men. *Board of Education v. Barnette*, 319 U.S. 624. It embraces the right to maintain theories of life and of death and of the hereafter which are rank heresy to followers of the orthodox faiths. Heresy trials are foreign to our Constitution. Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others. Yet the fact that they may be beyond the ken of mortals does not mean that [\*\*\*63] they can be made suspect before the law. Many take their gospel from the New Testament. But it would hardly be supposed that they could be tried before a jury charged with the duty of determining whether those teachings contained false representations. The miracles of the New Testament, the Divinity of Christ, life after death, the power of prayer are deep in the religious convictions of many. If one could be sent to jail because a jury in a hostile environment found those teachings false, little indeed would be left of religious freedom. The Fathers of the Constitution were not unaware of the varied and extreme views of religious sects, of the violence of disagreement among them, and of the lack of any one religious creed on which all men would agree. They fashioned a charter of government which envisaged the widest possible toleration of conflicting views. Man's relation to his God was made no concern of the state. He was granted the right to worship as he pleased and to answer to no man for the verity of his religious views. The religious views espoused by respondents might seem incredible, if not preposterous, to most people. But if those doctrines are subject to trial [\*\*\*64] before a jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect. When the triers of fact undertake the task, they enter a forbidden domain. The First Amendment does not select any one group or any one type of religion for preferred treatment. It puts them all in that position. *Murdock v. Pennsylvania*, 319 U.S. 105. [\*\*599] As stated in *Davis v. Beason*, 133 U.S. 333, 342, 'With man's relations to his Maker and the obligations he may think they impose, and the manner in which an expression shall [\*237] be made by him of his belief on those subjects, no interference can be permitted, provided always the laws of society, designed



to secure its peace and prosperity, and the morals of its people, are not interfered with." 322 U.S. at 86-87.

Defendants here were asking by both motions that the trial court determine which of the alleged misrepresentations were religious and withdraw from the jury the issue of the truth or falsity of those statements. Rather than make that determination, the trial court submitted to the jury the question of whether the statements were religious, with instructions that [\*\*\*65] it was not to determine the truth or falsity of any statements it found to be religious. n24

n24 Defendants also assign error to the instruction given on the Free Exercise defense and to the failure of the trial court to give certain requested instructions. We consider those assignments infra.

Defendants and amici argue that it is the responsibility of the trial court to determine in the first instance the religious character of statements alleged to be fraudulent and that, if it is determined that the statements relate to religious beliefs or practices, further inquiry is forbidden. They argue that submission of the question to a jury makes the determination one that is not reviewable after a general verdict, leaving the possibility that a defendant's adherence to unpopular or unorthodox religious beliefs could be made the basis for liability. Plaintiff argues, on the other hand, that it is appropriate for the trial court to determine which statements are religious only if it can do so as a matter of [\*\*\*66] law. She contends that, if the determination requires resolution of questions of fact, that resolution is for the jury. Plaintiff further contends that the courses and practices in which she participated were held out to her as secular and that she therefore is entitled to have a jury consider the allegedly fraudulent statements, because they were not religious in the context in which they were made.

Courts have had little occasion to consider the application of a Free Exercise Clause defense in an action for fraud in a jury trial. By far the majority of the cases in this area have been non-jury cases. We have found no cases which have considered this specific issue, and none have been cited to us. In fact, there has been little discussion in [\*238] even a general way of whether an action or statement is religious is a question of law or of fact. In practice, the issue has been treated as one of fact by many courts, without discussion. See, e.g., *Fiedler v. Marumsco Christian Sch.*, 631 F2d 1144 (4th Cir 1980); *Brown v. Dade Christian Schools, Inc.*, 556 F2d 310 (5th Cir 1977); *United States v. Carroll*, 567 F2d 955 (10th Cir 1977), but see *United States v. [\*\*\*67] Silberman*, 464 F Supp 866 (MD Fla 1979); *People v. Mullins*, 50 Cal App 3d 61, 123 Cal Rptr 201 (1975).

In *Founding Church of Scientology v. United States*, 409 F2d 1146 (DC Cir 1969), a false labeling case, the court directed that, if a new trial were to follow its remand of the case to district court,

"\* \* \* it is incumbent on the trial judge to rule in the first instance whether each item of alleged false labeling makes religious claims and hence cannot be submitted to the jury for the factual determination of whether it is a label for the device in question and whether it is false." (Footnote omitted.) 409 F2d at 1165.

On remand, the district court interpreted this admonition to mean that the trial court should remove from the jury's consideration only those items which made "purely religious" appeals,

"\* \* \* reserving a presentation of the other literature for determination under instructions differentiating the secular from the religious." *United States v. Article [\*\*\*600] or Device, Etc.*, 333 F Supp 357, 361 (DDC 1971).

We agree with and adopt this approach. n25

n25 Although in *Wisconsin v. Yoder*, 406 U.S. 205, 92 S Ct 1526, 32 L Ed 2d 15 (1972), the Supreme Court seemed to undertake to determine on its own, from the record in the case, whether the Amish parents who refused to send their children to secondary school were acting on the basis of religious conviction, 406 U.S. at 215-16, the good faith religious belief of the parents was not questioned by the state. There was no fact dispute to be resolved.

[\*\*\*68]

The jury is the usual trier of fact in tort cases such as the one before us. Disputes in the evidence should be resolved by the trier of fact. We conclude that the trial court was required to determine the religious character of the alleged misrepresentations only if it could do so as a matter of law, that is, if there was only one conclusion to be drawn from the evidence. We now turn to that question.

[\*239] The fundamental qualification for protection based on the Free Exercise Clause of the First Amendment is that that which is sought to be protected must be "religious." *Wisconsin v. Yoder*, 406 U.S. 205, 215-16, 92 S Ct 1526, 32 L Ed 2d 15 (1972). The Mission claims that Scientology is a religion and that

statements regarding its beliefs and practices are protected. n26 Plaintiff does not contend that Scientology is not a religion, but instead concentrates on the particular representations at issue. She contends that those representations are not religious statements, no matter what the status of Scientology, and that the statements are therefore not protected by the First Amendment.

n26 Because defendant Samuels is only sought to be held liable only as president of the Mission, we look to the protection afforded the Mission. Samuels may be held only to the extent the Mission is liable.

[\*\*\*69]

Plaintiff's approach to this case has been to treat the alleged statements by defendants in vacuo, but we do not believe that it is constitutionally permissible to approach them that way. In this case, the issue of whether the allegedly fraudulent statements are entitled to the protection of the First Amendment involves several questions. Statements made by religious bodies must be viewed in the light of the doctrines of that religion. Courts may not sift through the teachings of a religion and pick out individual statements for scrutiny, deciding whether each standing alone is religious. While plaintiff has skipped past the issue of whether Scientology is a religion, we do not believe we can do so, because the answer to that question is pertinent to, although not dispositive of, the determination of whether the statements made by the agents of the Mission are religious.

The Supreme Court stated in *Wisconsin v. Yoder*, *supra*,

"\* \* \* Although a determination of what is a 'religious' belief or practice entitled to constitutional protection may present a most delicate question, the very concept of ordered liberty precludes allowing every person to make his own standards [\*\*\*70] on matters of conduct in which society as a whole has important interests." 406 U.S. at 215-16. (Footnote omitted.)

And, as noted by the court in *Founding Church of Scientology v. United States*, *supra*:

[\*240] "\* \* \* Though litigation of the question whether a given group or set of beliefs is or is not religious is a delicate business, our legal system sometimes requires it so that secular enterprises may not unjustly enjoy the immunities granted to the sacred. When tax exemptions are granted to churches, litigation concerning what is or is not a church will follow. When

exemption from military service is granted to those who object on religious grounds, there is similar litigation. When otherwise proscribed substances are permitted to be used for purposes of worship, worship must be defined. The law has provided doctrines and definitions, unsatisfactory as they may be, to deal with such disputes. \* \* \*" 409 F2d 1160.

[\*\*601] Without attempting an "unprecedented definition of religion," *Malnak v. Yogi*, 440 F Supp 1284, 1320 (DNJ 1977), *aff'd*, 592 F2d 197 (3d Cir 1979), we draw guidance from the case law. We find that, while beliefs relating [\*\*\*71] to the existence of, and man's relationship to, a God are certainly religious, belief in a traditional, or any, "god" is not a prerequisite to a finding that a belief is religious. *Torcaso v. Watkins*, 367 U.S. 488, 81 S Ct 1680, 6 L Ed 2d 982 (1961); *Everson v. Board of Education*, 330 U.S. 1, 67 S Ct 504, 91 L Ed 711, 168 ALR 1392 (1947); *Washington Ethical Soc. v. District of Columbia*, 249 F2d 127 (DC Cir 1957); *Malnak v. Yogi*, *supra*; *Fellowship of Humanity v. County of Alameda*, *supra*. Neither does the fact that Scientology is of relatively recent origin mean that it is not entitled to the protection of the First Amendment. See *Loney v. Scurr*, 474 F Supp 1186 (SD Iowa 1979); *Malnak v. Yogi*, *supra*; *Remmers v. Brewer*, 361 F Supp 537 (SD Iowa 1973); see also *United States v. Ballard*, *supra*; *Founding Church of Scientology v. United States*, *supra*. On the other hand,

"[a] way of life, however, virtuous and admirable, [is not entitled to First Amendment protection] if based on purely secular considerations.

"\* \* \*

"Thus, if the Amish asserted their claims because of their subjective evaluation and rejection of contemporary secular values accepted [\*\*\*72] by the majority, much as Thoreau rejected the social values of his time and isolated himself at Walden Pond, their claims would not rest on a religious basis. Thoreau's choice was philosophical and personal rather than religious, and such belief does not rise to the [\*241] demands of the Religion Clauses." *Wisconsin v. Yoder*, *supra*, 406 U.S. at 215-16; see also, *United States v. Seeger*, 380 U.S. 163, 176, 85 S Ct 850, 13 L Ed 2d 733 (1965); and see *Welsh v. United States*, 398 U.S. 333, 90 S Ct 1792, 26 L Ed 2d 308 (1970).

Courts may not, of course, judge the "truth" or "falsity" of the beliefs espoused by a group in determining its status as a religion; the inquiry here is simply whether the teachings of Scientology are of the type that qualify for the protection of the Free Exercise Clause. The record in this case demonstrates indisputably that they are. Although certain of the theories espoused by Scientology appear to be more

psychological than religious, we cannot dissect the body of beliefs into individual components. It seems clear that if defendants sought to teach Scientology in the public schools in this country, they would be prohibited from [\*\*\*73] doing so by reason of the Establishment Clause of the First Amendment. See *Malnak v. Yogi, supra*; *Epperson v. Arkansas*, 393 U.S. 97, 89 S Ct 266, 21 L Ed 2d 228 (1968). The theories of Hubbard are interrelated and involve a theory of the nature of the person and of the individual's relationship with the universe. See *Founding Church of Scientology v. United States*, 409 F2d at 1160.

The Mission is incorporated as a tax-exempt religious organization; it has ordained ministers and characterizes itself as a church. It has a system of beliefs, or creed, which encompasses beliefs which are religious in character. We conclude that Scientology is a religion and that the Mission is a religious organization entitled to invoke the protection of the Free Exercise Clause.

The second inquiry to be made in determining whether the statements at issue are protected is whether those statements relate to the religious beliefs and practices of the Mission. It is clear that a religious organization, merely because it is such, is not shielded by the First Amendment from all liability for fraud. See *Founding Church of Scientology v. United States, supra*; see also *Cantwell v. Connecticut* [\*\*\*74] , 310 U.S. 296, 60 S Ct 900, 84 L Ed 1213 (1940). If the statements involved here do not concern the religious beliefs and practices of the Mission, the Free Exercise Clause provides no defense to plaintiff's action. [\*242] Defendant presented evidence that [\*\*602] the courses and auditing in which plaintiff participated, and about which the alleged misrepresentations were made, were part of the religious beliefs and practices of Scientology. Plaintiff did not, and does not, contest that fact.

The final inquiry involved in determining whether the alleged misrepresentations are protected by the First Amendment is whether the statements, although made on behalf of a religious organization and having a religious character, were nonetheless made for a wholly secular purpose. Although we find that it has been established in this record that Scientology is a religion, that the Mission is a religious organization and that the statements which are claimed to be religious relate to religious beliefs and practices of Scientology, plaintiff did present evidence that the courses and auditing she received were offered to her on an entirely secular basis for self-improvement, thereby [\*\*\*75] creating a jury issue as to that matter. Plaintiff testified that she was told that the term "religion" and "church" were used only for public relations purposes. She also presented testimony from a former Mission staff member that the staff was instructed

to avoid the issue of religion when attempting to interest someone in Scientology and that, if pressed, they were to say that it is not a religion. n27

n27 It is suggested in Weiss, Privilege, Posture and Protection: "Religion" in the Law, 73 *Yale LJ* 593, 604 (1964), that

"Because religion can be in conflict with other disciplines, because it cuts across everyday life, we can only know that a claim is based on religion when we are told that it is. The legal basis for stating that a claim is in the religious domain can be that it is held out as being religious in nature.

"\* \* \*

"Since the Constitution prohibits defining an area of belief as 'religious,' a man must make it clear that the beliefs he represents are 'religious' if he wants to be free to express them under the constitutional warrant of freedom of religious belief. He has the burden of communicating that he speaks only from the authority of religion. But, once such a burden has been met, then we cannot attack the particular aspects of his faith as fraudulent.

"\* \* \*

"What a man presents as a religious claim, then, cannot be attacked. It is only when he makes a representation beyond religious authority that we can apply laws of fraud."

As attractive as this analysis may be, we do not believe that it has been the approach taken by the courts in considering claims for protection under the First Amendment. As in *Welsh v. United States, supra*, and *Malnak v. Yogi, supra*, the proponents of a particular doctrine may unwittingly fail to define as "religious" what is, in fact, constitutionally protected as such.

[\*\*\*76]

[\*243] There is, on the other hand, evidence that plaintiff joined the Church of Scientology and that she was told that the courses and practices were religious in nature. Many of the materials which she read contained a statement inside the front cover which indicated that Scientology is a religion, that auditing is a religious practice and that the E-meter is a religious artifact. n28

n28 It is clear that in the context of the Establishment Clause the characterization of the

activity as non-religious is not a determinative factor. See *Malnak v. Yogi*, *supra*; see also *Engel v. Vitale*, 370 U.S. 421, 82 S Ct 1262, 8 L Ed 2d 601, 86 ALR2d 1285 (1962); *Torcaso v. Watkins*, 367 U.S. 488, 81 S Ct 1680, 6 L Ed 2d 982 (1961); *Welsh v. United States*, *supra*. On the other hand, the characterization of beliefs as religious by one seeking the protection of the Free Exercise Clause is not determinative either. See *Wisconsin v. Yoder*, *supra*, 406 U.S. at 215-16; *Founding Church of Scientology v. United States*, *supra*; *People v. Woody*, *supra*; *United States v. Kuch*, 288 F Supp 439 (DDC 1968).

[\*\*\*77]

In *United States v. Article or Device, Etc.*, *supra*, 333 F Supp at 363-365, the district court, sitting without a jury, found that Scientology services were offered on both a religious and a secular basis and that the E-meter was misbranded because much of the literature explaining its use and expounding on its value was presented in an entirely non-religious context. The court recognized that complete condemnation of the E-meter would encroach upon the religious freedom of those who used the device as a religious artifact. It therefore ordered the device condemned with the provision that it could be distributed only for use in bona fide religious counseling. This case [\*\*\*603] differs from *United States v. Article or Device, Etc.*, *supra*, in that the court there pointed out that there were organizations other than the Founding Church of Scientology that were using the E-meter and offering auditing services. It was the use of the E-meter by the secular organizations which the court forbade. The court did not consider whether use by the Church could be on a secular as well as on a religious basis. We believe that such a possibility exists.

There are certainly [\*\*\*78] ideas which may only be classified as religious. Statements regarding the nature of a supreme being, the value of prayer and worship are such statements. There are also, however, statements which are [\*244] religious only because those espousing them make them for a religious purpose. The statements which are alleged by plaintiff to be misrepresentations in this case are not of the type which must always and in every context be considered religious as a matter of law.

We have found that it is established in this case that the Mission is a religious organization and that Scientology is a religion. Plaintiff does not dispute the claim that the courses and auditing she received are part of the religious beliefs and practices of Scientology. It is also uncontroverted that plaintiff applied to join the Church of Scientology, Mission of Davis, before taking any of the courses offered. These facts may be highly

persuasive evidence of the contention that the courses and auditing plaintiff received were religious in nature and that the statements made regarding their nature and efficacy were religious statements. There is, however, conflicting evidence which the jury was entitled [\*\*\*79] to consider. Plaintiff presented evidence from which it could be concluded that the courses and auditing were also offered on a wholly secular basis. Because the statements were not necessarily religious, plaintiff was entitled to have a jury consider, under proper instructions, the question of whether the statements were made for a wholly non-religious purpose. The trial court was correct, therefore, in refusing to rule before trial as to whether these alleged statements were religious. It was likewise correct in refusing to withdraw the statements from the jury's consideration.

We turn now to the question of the proper instructions to be given the jury in considering the allegations of fraud in this context.

#### FIRST AMENDMENT INSTRUCTION

Defendants objected to the giving of the following instruction regarding the First Amendment defense:

"The defendants have asserted as an affirmative defense that the Constitutions of the United States and the State of Oregon provide that religious beliefs and doctrines may not be questioned for truth or falsity. To establish this defense, defendants must prove that each of the acts or representations complained of were religious [\*\*\*80] in nature and were held out as such to plaintiff.

[\*245] "They must further prove that if the acts and representations complained of were held out as religious in nature, that they were held out by defendants as good faith religious beliefs and doctrine. Therefore, if you find that the acts or representations complained of were acts or representations religious in nature and held out as such, and held in good faith belief, then you may not inquire into the truth or falsity of such acts or representations. Your inquiry must end and your verdict shall be for the defendants. However, should you determine that any of the acts or representations complained of were not religious in nature or were not held out as such to the plaintiff, or were not held to be such in good faith, then you may determine the truth or falsity of such acts or representations."

We find the instruction to be an inaccurate statement of the law as it applies to this case and conclude that reversal of the judgment on the fraud cause of action is required.

Defendants first object to the submission to the jury of the question of the religious [\*\*604] nature of the statements. That submission [\*\*\*81] was not error. However, the directions for determination of that issue were erroneous. This record establishes that Scientology is a religion and that the Mission is a religious organization. It also establishes that the courses and auditing which plaintiff was induced to participate in are part of the religious beliefs and practices of the Scientology. The Mission is, therefore, entitled to the protection of the First Amendment for statements regarding its religious beliefs and practices unless it is shown that the statements made were part of an offer of those services to the public on a wholly secular basis. The reasonable inference to be drawn from the instruction as given is that a determination should be made for each of the alleged misrepresentations as to whether it was religious and whether it was held out to plaintiff as religious in nature. This fragments the inquiry inappropriately. The question which the jury was required to decide in this case was whether, even though the Mission is a religious organization, it offered the services in question here on a wholly non-religious basis. See *Founding Church of Scientology v. United States*, *supra*. It is only upon [\*\*\*82] an affirmative finding on that issue that liability can attach for the statements made in this case. The jury was not correctly instructed in that regard.

[\*246] In addition, the instruction that the statements must be held out as religious in good faith is not accurate. The question of "good faith" belief is quite complicated in this case, for the defendants charged with fraud are not the individuals who made the representations, but the religious organizations themselves. It is true that in many cases in which free exercise protection has been sought, courts have looked to whether the one seeking the protection is "sincere" in his or her belief in the doctrine at issue. See, e.g., *People v. Woody*, *supra*; *Teterud v. Burns*, 522 F2d 357 (8th Cir 1975). Those cases, however, involve the sincerity of the individual claiming the protection.

*United States v. Ballard*, *supra*, has been cited to us for the proposition that the sincerity of the proponents of religious belief is a proper subject for inquiry in an action for fraud. We do not read *Ballard* so to hold. In *Ballard*, a criminal action for mail fraud, the parties agreed in the trial court that the issue [\*\*\*83] of the truth or falsity of the statements at issue would not be submitted to the jury, but only the question of whether the defendants honestly and sincerely believed the statements they made. After a jury verdict finding them guilty, the defendants contended that it was improper to withdraw from the jury the question of whether the statements made were true or false. The Circuit Court of

Appeals agreed and reversed the conviction. On appeal, the Supreme Court held that " \* \* \* the District Court ruled properly when it withheld from the jury all questions concerning the truth or falsity of the religious beliefs or doctrines of [the defendants]." The Court then noted that the defendants urged other grounds for supporting the reversal of the convictions, but it refused to consider those contentions before giving the circuit court an opportunity to consider the issues first. 322 U.S. at 88. *Ballard* did not address the question of the propriety of submitting the issue of the defendants' sincerity to the jury. In addition, the defendants in *Ballard* were the very individuals accused of actually making the statements at issue. The liability of a religious organization for the [\*\*\*84] statements of its agents was not discussed.

In the situation presented here, it is difficult to determine whose sincerity or good faith the jury could be asked to determine. Is the religious organization to be held [\*247] liable if one of its ministers is less than a true believer? Or is it to be saved from liability if the individual who makes the statement truly believes, but others in the church do not?

In *Founding Church of Scientology v. United States*, *supra*, the court suggested that liability might attach if it were shown

" \* \* \* that an item (book, pamphlet, advertising flier) makes out a self-sufficient non-religious claim for Scientology services, to which a religious appeal has [\*\*605] been merely tacked on." 409 F2d at 1165. (Emphasis supplied.)

As we have indicated, defendants could be held liable if the jury found that the courses and services offered by the Mission to plaintiff were offered for a wholly secular purpose. A wholly secular purpose means that, at the time they were made to this plaintiff, the statements were made for a purpose other than inducing plaintiff to join or participate in defendants' religion. A wholly [\*\*\*85] secular purpose, in this regard, would include, but not be limited to, the intention solely to obtain money from plaintiff. On this record it would have been proper to instruct the jury that it is possible to find that the services were offered on a wholly secular basis, notwithstanding the fact that plaintiff was required to join the Church of Scientology in order to participate and that the materials she was given to read stated that Scientology is a religion. A jury could find that the courses and services were offered on a secular basis and that a religious designation had been merely "tacked on." Phrasing the issue as one of good faith was therefore misleading and erroneous.

Defendants also contend that the instruction improperly placed on them the burden of proof on the question of the religious nature of the representations. They contend that it was improper to require that they prove the statements were religious when it was plaintiff's burden to prove knowledge of falsity to recover for fraud. Defendants confuse the burden of proving fraud with the burden of proving the affirmative defense of freedom of religion. As this instruction indicates, it is appropriate for [\*\*\*86] the jury to consider the matter of the defense first, before reaching the issue of the truth or falsity of the statements for deciding [\*248] the issue of fraud. That approach makes good sense in this context.

In summary, we conclude that the motions of all defendants for directed verdicts on the claims for outrageous conduct should have been granted. The motions of COSOP and Delphian for directed verdicts on plaintiff's action for fraud should have also been granted. The instruction which was given regarding the Free Exercise defense asserted by the remaining defendants was erroneous and requires reversal.

Because of the disposition we have made of the causes of action and counts, this case will have to be retried. We now turn to the assignments of error which raise issues which are likely to arise on re-trial.

#### EXHIBITS

Defendants assign error to the exclusion of three exhibits offered to show the good faith of the individual who informed plaintiff that L. Ron Hubbard had an honorary degree from Sequoia University and a degree from Princeton University. Those exhibits were photocopies of a telegram and two certificates. Plaintiff objected to the exhibits on [\*\*\*87] the grounds of lack of authentication and hearsay. The objections were sustained. Those objections were not well taken. The exhibits were offered to show the state of mind of the individual who made the representations regarding Hubbard's background to plaintiff. That individual testified that he had seen the exhibits before talking with plaintiff and believed them to be true. Neither the truth of the matter contained in the exhibits nor their authenticity was asserted by defendants. The state of mind of the one accused of making fraudulent representations is clearly at issue where one of the elements to be shown is the speaker's knowledge of the falsity of the representation being made. See *Linebaugh v. Portland Mortgage Co.*, 116 Or 1, 239 P 196 (1925); *Seaside, City of v. Randles*, 92 Or 650, 180 P 319 (1919). The exhibits were relevant to that state of mind, and their exclusion was error.

#### INSTRUCTIONS

Defendants assign error to the giving of certain instructions and the failure to give other instructions. The [\*249] first assignment we consider is the failure of the trial court to give defendants' requested instruction defining "justifiable reliance" [\*\*\*88] as follows:

[\*\*606] "A party claiming to have been defrauded by a false representation must not only have acted in reliance thereon, but must have been justified in such reliance, that is, the situation must have been such as to make it reasonable for him, in the light of the circumstances and his intelligence, experience and knowledge, to accept the representation without making an independent inquiry or investigation."

The court instructed the jury that to find for plaintiff it must find that " \* \* \* the plaintiff having a right to do so, reasonably relied upon the representation and did not know it was false." We believe the instruction given by the trial court "adequately and accurately state the applicable law." *Bowlds v. Taggesell Pontiac*, 245 Or 86, 95, 419 P2d 414 (1966); see also *Yardley v. Rucker Brothers Trucking, Inc.*, 42 Or App 239, 600 P2d 485 (1979), rev den 288 Or 335 (1980). It was not error for the trial court to refuse to give the instruction requested by defendants.

Defendants also assign error to the failure to give their requested instruction defining "material fact." The court instructed the jury that there must have been "a false [\*\*\*89] representation of material fact" in order to find for the plaintiff on her fraud claim. Defendants requested the following instruction defining "material fact":

"A fact is material if a reasonably prudent person under the circumstances would attach importance to it in determining his course of action."

Plaintiff does not contend that this instruction is an incorrect statement of the law, but only that it was unnecessary to instruct the jury on the meaning of the term material because that term was used in its usual and conventional sense. We disagree that the instruction was unnecessary. The term "material fact," as it is used as an element of an action for fraud, involves the kind of objective standard included in the requested instruction. See *Milliken v. Green*, 283 Or 283, 583 P2d 548 (1978). The dictionary definition of "material," "being of real importance or great consequence," Webster's Third International Dictionary, does not contain that objective element. [\*250] Defendants were entitled to have the jury instructed on the definition of the term which constitutes an element of the action against which they were defending.

Defendants also contend that [\*\*\*90] the trial court erred in failing to instruct the jury that "fraud is never presumed." Within the context of the instructions as a whole, see *Yardley v. Rucker Brothers Trucking, Inc.*, *supra*, we believe the jury was adequately instructed in that regard, and the failure to give the instruction was not error.

Defendants assign error to the failure to give their requested instructions containing the specific language of the First and Fourteenth Amendments to the United States Constitution and Article I, Sections 2 and 3 of the Oregon Constitution. n29 The refusal to give such instructions was not error. The language of the constitutional provisions is not by itself a statement of the law which was necessary or even particularly helpful to the jury in resolving the issues [\*\*607] in this case. Although it might not have been error to give such an instruction, neither was it error to refuse to do so.

n29 Defendants' requested instructions were as follows:

"The First Amendment to the United States Constitution provides that: 'Congress shall make no law respecting the establishment of religion or prohibiting the free exercise thereof.'

"The Fourteenth Amendment to the United States Constitution provides that: '\* \* \* No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny any person within its jurisdiction equal protection of the laws.'

"Article I, Section 2 of the Oregon Constitution provides under Freedom of Worship: 'All men shall be secure in the natural right, to worship Almighty God according to the dictates of their own consciences.'

"Article I, Section 3 of the Oregon Constitution under Freedom of Religious Opinion provides: 'No law shall in any case whatever, control the free exercise, and enjoyment of religious opinions, or interfere with the rights of conscience.'"

[\*\*\*91]

Finally, defendants assign error to the refusal to give the following instruction:

"The parties have stipulated that Scientology is a religion. I instruct you that for all purposes in this case

Scientology is a religion and the Church of Scientology, Mission of Davis, and Church of Scientology of Portland are religious institutions."

[\*251] The first portion of their requested instruction is not correct. Plaintiff did not stipulate that Scientology is a religion. She chose to approach the problems presented in this litigation on the basis that it did not matter whether Scientology is a religion, because the defendants could be liable in any event. That does not amount to a stipulation that Scientology is a religion. However, we have determined that the record in this case establishes, as a matter of law, that Scientology is a religion. The jury should have been so informed.

#### PUNITIVE DAMAGES

The final assignment of error we consider n30 is the failure of the trial court, on motion by defendants, to withdraw from the jury the claim for punitive damages. In the trial court and in this court defendants rely on *Wheeler v. Green*, 286 Or 99, 593 P2d [\*\*\*92] 777 (1979), for the proposition that imposition of punitive damages is constitutionally impermissible in the context of free speech. n31 Defendants contend that that proposition also applies to the area of free exercise of religion and that statements arguably religious should not subject one to liability for punitive damages because of the "chilling effect" such awards could have on the practice of religion. They make only constitutional arguments and do not argue that the case is otherwise inappropriate for an award of punitive damages.

n30 Defendants' other assignments of error are either mooted by our disposition of the issues we have discussed, were not preserved in the trial court, or are, in our estimation, unlikely to arise again on re-trial.

n31 *Wheeler v. Green*, *supra*, is based on the Oregon Constitution. Defendants also rely on *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S Ct 2997, 41 L Ed 2d 789 (1974), for the proposition that punitive damages are constitutionally impermissible for defamation. *Gertz*, however, does not hold that punitive damages may never be awarded for defamation. The Court was concerned with the self-censorship of media defendants which might result from the possibility of punitive damage awards under state laws requiring less than a showing of actual malice. The Court stated:

"We also find no justification for allowing awards of punitive damages against publishers and broadcasters held liable under state-defined standards

of liability for defamation. \* \* \* In short, the private defamation plaintiff who establishes liability under a less demanding standard than that stated by New York Times [*Co. v. Sullivan*, 376 U.S. 254, 84 S Ct 710, 11 L Ed 2d 686, 95 ALR2d 1412 (1964), that is 'actual malice'] may recover only such damages as are sufficient to compensate him for actual injury." 418 U.S. at 350.

[\*\*\*93]

[\*252] After the briefs in this case were submitted, the Oregon Supreme Court decided *Hall v. May Department Stores Co.*, *supra*, in which it held that punitive damages are not available in an action for outrageous conduct in which the only conduct which subjects the defendant to liability is "speech." The court stated:

"When the cause of defendant's liability is his 'abuse' of speech and expression, as in the case of defamation, *Wheeler v. Green* holds that the 'responsibility for the abuse' is confined to civil liability for compensation only. Here the injury was to plaintiff's person rather than her reputation, but as long as it resulted from an 'abuse' of speech only, the principle is the same." 292 Or at 146.

It might well be argued on the basis of the above language that any fraud which involves an abuse of speech or expression is similarly exempt from the imposition of punitive damages. The Supreme Court has, however, recognized the possibility of an award of punitive damages in cases involving fraud in several recent opinions. See, e.g., *Schmidt v. Pine Tree Land Dev.*, 291 Or 462, 631 P2d 1373 (1981); *Milliken v. [\*\*608] Green*, *supra*; [\*\*\*94] *Green v. Uncle Don's Mobile City*, 279 Or 425, 568 P2d 1375 (1977). Although we are not certain just what the analytical distinction is, given the broad language in *Hall*, we do not believe that the Supreme Court intended to prohibit the award of punitive damages in all cases of fraud, and we decline to do so here.

Defendants, arguing without "benefit" of *Hall*, do not claim that all fraud is exempt from the imposition of punitive damages, but that " \* \* \* in the sensitive area of First Amendment freedoms, a plaintiff can recover only compensatory damages." They contend that the imposition of punitive damages would have a chilling effect, not only on the exercise of free speech and association, but on the free exercise of religion as well.

As we have stated, we do not agree that punitive damages are unavailable for fraud merely because the fraudulent representations are "speech." Defendants suggest that because the actions giving rise to this cause of action occurred in the context of a religious organization of which plaintiff was a member, the free exercise of religion would be chilled by the possibility of a punitive damage award. We do not believe that such a chilling [\*\*\*95] effect is a threat [\*253] to the free exercise of religion. In order to be actionable at all, the statements alleged must be found to have been nonreligious as made. Defendants' argument seems to lead to is the conclusion that religious organizations should not be made liable for punitive damages because they are religious organizations, even if the content of the statements which they are alleged to have made is not religious. We find no constitutional requirement for such an exemption. The free exercise of religion is sufficiently protected by the the broad scope of what is protected as religious belief and practice and the fact that the truth or falsity of such religious beliefs may not be determined in an action for fraud. The trial court properly denied defendants' motion to strike the claim for punitive damages.

Reversed as to defendants Church of Scientology of Portland and Delphian Foundation; reversed and remanded for a new trial as to defendants Samuels and Church of Scientology, Mission of Davis.



HERNANDEZ v. COMMISSIONER OF INTERNAL REVENUE

No. 87-963

SUPREME COURT OF THE UNITED STATES

490 U.S. 680; 109 S. Ct. 2136; 1989 U.S. LEXIS 2773; 104 L.  
Ed. 2d 766; 57 U.S.L.W. 4593; 89-1 U.S. Tax Cas. (CCH)  
P9347; 63 A.F.T.R.2d (RIA) 1395

June 5, 1989, Decided \*

\* Together with No. 87-1616, *Graham et al. v. Commissioner  
of Internal Revenue*, on certiorari to the United States

Court of Appeals for the Ninth Circuit.

PRIOR HISTORY: [\*\*\*1]

CERTIORARI TO THE UNITED STATES COURT  
OF APPEALS FOR THE FIRST CIRCUIT.

DISPOSITION: 819 F. 2d 1212 and 822 F. 2d 844,  
affirmed.

CORE TERMS: religious, church

<=3> View References <=4> Turn Off Lawyers'  
Edition Display

DECISION: Payments to branch churches of Church of  
Scientology for certain religious services held not  
deductible as charitable contributions under 170 of  
Internal Revenue Code (26 USCS 170).

SUMMARY: The Church of Scientology offers its  
members services known as (1) "auditing," consisting of  
one-to-one encounter sessions between a participant and  
a Church official, or "auditor," during which the  
participant's areas of spiritual difficulty are identified,  
and (2) "training," consisting of doctrinal courses in  
which participants seek to attain the qualifications  
necessary to serve as auditors. Pursuant to the Church's  
doctrine of exchange, according to which any time one  
receives something one must pay something back, the  
Church charges fixed donations for auditing and training  
sessions. Fixed price schedules are established in each  
branch church, with prices calibrated according to the  
length and level of sophistication of the sessions. The  
Church returns a refund if auditing and training services  
go unperformed, and it distributes account cards on  
which persons who have paid money to the Church can  
monitor what prepaid services they have not yet claimed.

The provision of auditing or training sessions for free is  
categorically barred. Some taxpayers who paid for  
auditing or training sessions sought to deduct such  
payments on their federal income tax returns as  
charitable contributions under 170 of the Internal  
Revenue Code (26 USCS 170). The Commissioner of  
Internal Revenue disallowed the deductions. The Tax  
Court of the United States, upholding the  
Commissioner's decision, (1) held that the payments  
were not contributions or gifts, so as to be deductible  
under 170, because the taxpayers had received a benefit  
for their payments, and (2) rejected challenges to the  
Commissioner's decision that were based on the  
establishment of religion and free exercise of religion  
clauses of the Federal Constitution's First Amendment  
(83 TC 575). The United States Court of Appeals for the  
First Circuit affirmed in the case of one taxpayer (819  
F2d 1212), and the United States Court of Appeals for  
the Ninth Circuit affirmed in the case of other taxpayers  
(822 F2d 844).

On certiorari, the United States Supreme Court  
affirmed the judgments of both Courts of Appeals. In an  
opinion by Marshall, J., joined by Rehnquist, Ch. J., and  
White, Blackmun, and Stevens, JJ., it was held that (1)  
the relevant inquiry in determining whether a payment  
made for the right to participate in a religious service is a  
"contribution or gift," so as to be deductible under 26  
USCS 170, is not whether the payment secures religious  
benefits or access to religious services, but whether the  
transaction in which the payment is involved is  
structured as a quid pro quo exchange for an identifiable  
benefit; (2) under this test, the payments for auditing and  
training sessions were not deductible under 170; (3) 170  
did not create an unconstitutional denominational  
preference, so as to violate the establishment of religion

clause, by according disproportionately harsh tax status to those religions that raise funds by imposing fixed costs for participation in certain religious practices, because (a) the line that 170 draws between deductible and nondeductible payments does not differentiate among sects but applies to all religious entities, (b) there was no allegation that 170 was born of animus to religion in general or Scientology in particular, (c) the primary effect of 170 is neither to advance nor to inhibit religion, and (d) 170 threatens no excessive government entanglement between church and state; and (4) the denial of the requested deduction did not violate the free exercise of religion clause by placing a heavy burden on the central practice of Scientology, because (a) it was doubtful whether the alleged burden was a substantial one, and (b) even a substantial burden would be justified by the broad public interest in maintaining a sound tax system that is free of myriad exceptions flowing from a wide variety of religious beliefs.

O'Connor, J., joined by Scalia, J., dissented, expressing the view that the Internal Revenue Service, by disallowing the deduction, misapplied its longstanding practice of allowing such deductions for fixed payments to other religions for religious services, and thus discriminated against the Church of Scientology in violation of the establishment of religion clause.

Brennan and Kennedy, JJ., did not participate.

LEXIS HEADNOTES - Classified to U.S. Digest Lawyers' Edition:

<=5> INCOME TAXES §102

deductions -- charitable contributions -- payments to Church of Scientology --

Headnote: <=6> [1A] <=7> [1B] <=8> [1C]

Payments made by taxpayers to branch churches of the Church of Scientology in order to receive services known as "auditing"--that is, one-to-one encounter sessions between a participant and a Church official during which the participant's areas of spiritual difficulty are identified--and "training"--that is, doctrinal courses in which participants seek to attain the qualifications necessary to serve as auditors--do not qualify as contributions or gifts under 170 of the Internal Revenue Code (26 USCS 170), and thus are not deductible under 170 as charitable contributions, because such payments are part of a quid pro quo exchange of money for an identifiable benefit; the inherently reciprocal nature of the exchange is revealed by the Church's practices of (1) establishing fixed price schedules for auditing and training sessions in each branch church, (2) calibrating particular prices to auditing or training sessions of particular lengths and levels of sophistication, (3)

returning a refund if auditing and training services go unperformed, (4) distributing account cards on which persons who have paid money to the Church can monitor what prepaid services they have not yet claimed, and (5) categorically barring provision of auditing or training sessions for free. (O'Connor and Scalia, JJ., dissented from this holding.)

<=9> INCOME TAXES §102

<=10> STATUTES §145.4

charitable deduction -- contributions or gifts -- legislative history --

Headnote: <=11> [2]

The legislative history of the Internal Revenue Code provision under which the applicability of the charitable deduction is limited to a "contribution or gift" (26 USCS 170) reveals that the limitation is intended to differentiate between unrequited payments to qualified recipients and payments made to such recipients in return for goods or services; only the former are deemed deductible.

<=12> INCOME TAXES §102

deductions -- charitable contributions -- religious benefits or services --

Headnote: <=13> [3A] <=14> [3B] <=15> [3C] <=16> [3D]

The relevant inquiry in determining whether a payment made for the right to participate in a religious service is a "contribution or gift," so as to be deductible under 170 of the Internal Revenue Code (26 USCS 170), is not whether the payment secures religious benefits or access to religious services, but whether the transaction in which the payment is involved is structured as a quid pro quo exchange; such a payment is not automatically deductible under 170, because (1) the Code makes no special preference for payments made in the expectation of gaining religious benefits or access to a religious service, (2) such a deductibility proposal would expand the charitable contribution deduction far beyond what Congress has provided, since numerous forms of payments to eligible donees plausibly could be categorized as providing a religious benefit or as securing access to a religious service, and (3) such a proposal might raise problems of entanglement between church and state, in that (a) the proposal, if framed as a deduction for those payments generating benefits of a religious nature for the payor, would inexorably force the Internal Revenue Service (IRS) and reviewing courts to differentiate religious benefits from secular ones, and (b) if framed as a deduction for those payments made in

connection with a religious service, the proposal would force the IRS and the judiciary into differentiating religious services from secular ones. (O'Connor and Scalia, JJ., dissented from this holding.)

<=17> CONSTITUTIONAL LAW §972  
religious freedom -- taxation -- charitable deduction --  
claim of religious benefit --

Headnote: <=18> [4]  
Under the Federal Constitution's First Amendment, the Internal Revenue Service, in determining the validity of a taxpayer's charitable contribution deduction of a payment that generated a religious benefit to the taxpayer, may properly reject otherwise valid claims of religious benefit only on the ground that the taxpayer's alleged beliefs are not sincerely held, but not on the ground that such beliefs are inherently irreligious.

<=19> COURTS §127

<=20> STATUTES §91  
income taxes -- Congress' intent --

Headnote: <=21> [5]  
The United States Supreme Court is loath to expand the charitable contribution provision of the Internal Revenue Code (26 USCS 170) far beyond the provision's present size in the absence of supportive congressional intent.

<=22> CONSTITUTIONAL LAW §961  
establishment of religion -- government entanglement --  
regulatory interaction --

Headnote: <=23> [6A] <=24> [6B]  
Routine regulatory interaction between the government and a religious institution that involves no inquiries into religious doctrine, no delegation of state power to a religious body, and no detailed monitoring or close administrative contact between secular and religious bodies does not of itself violate the nonentanglement command of the establishment of religion clause of the Federal Constitution's First Amendment; however, pervasive monitoring by public authorities for the subtle or overt presence of religious matter is a central danger against which the establishment clause guards.

<=25> APPEAL §1092  
failure to argue issue --

Headnote: <=26> [7A] <=27> [7B]

On certiorari to review United States Court of Appeals decisions as to whether certain payments made by taxpayers to churches in order to receive certain religious services are deductible under 170 of the Internal Revenue Code (26 USCS 170) as charitable contributions, the United States Supreme Court has no occasion to decide whether the taxpayers are entitled to a partial deduction to the extent that their payments exceeded the value of the benefit received, where the taxpayers have not argued before the Supreme Court that their payments qualify as "dual payments" under Internal Revenue Service regulations.

<=28> CONSTITUTIONAL LAW §972  
establishment of religion -- income taxes -- denial of  
charitable deduction -- payments for religious services --

Headnote: <=29> [8A] <=30> [8B] <=31> [8C]  
<=32> [8D] <=33> [8E]

The denial of a requested charitable deduction, under 170 of the Internal Revenue Code (26 USCS 170), for payments made by taxpayers to branch churches of the Church of Scientology in order to receive certain religious services does not violate the establishment of religion clause of the Federal Constitution's First Amendment; 170 does not create an unconstitutional denominational preference by according disproportionately harsh tax status to those religions that raise funds by imposing fixed costs for participation in certain religious practices, because (1) the line that 170 draws between deductible and nondeductible payments to statutorily qualified organizations does not differentiate among sects but applies to all religious entities, (2) 170 is neutral both in design and purpose, there being no allegation that it was born of animus to religion in general or to Scientology in particular, (3) the primary effect of 170 is neither to advance nor to inhibit religion, and (4) 170 threatens no excessive government entanglement between church and state, since the application of 170 to religious practices does not require the government to place a monetary value on particular religious benefits. (O'Connor and Scalia, JJ., dissented from this holding.)

<=34> CONSTITUTIONAL LAW §961  
establishment of religion -- denominational preference --  
court's inquiry --

Headnote: <=35> [9A] <=36> [9B]  
A court's initial inquiry, when it is claimed that a statute creates a denominational preference in violation of the establishment of religion clause of the Federal Constitution's First Amendment, is whether the statute facially discriminates among religions; if no such facial