

Presented:
29th Annual Nonprofit Organizations

January 18, 19-20, 2012
Austin, TX

Religion and Religious Organizations: Keeping Your Church Out of Court

Frank Sommerville
Weycer, Kaplan, Pulaski & Zuber, P.C.
Arlington, Texas

Darren B. Moore
Bourland, Wall & Wenzel, P.C.
Fort Worth, Texas

Religion and Religious Organizations: Keeping Your Church Out of Court

Qualified religious organizations are recognized as exempt under Section 501(c)(3) of the Internal Revenue Code alongside charitable organizations, educational, scientific, and literary purpose organizations, organizations organized to further the prevention of cruelty to children, organizations for the prevention of cruelty to animals, organizations that foster national and international amateur sports competition (but only if no part of the activities involve the provision of athletic facilities or equipment), and organizations organized to conduct testing for public safety. However, while being subject to the general rules regarding 501(c)(3) entities, religious organizations are unique in their treatment. This paper examines certain aspects of this unique treatment. Part One of the paper will provide a definitional structure for churches and associated, religious organizations, describe the Constitutional and statutory framework affecting churches, and consider unique aspects of churches in various contexts. Part Two of the paper will consider basic planning and operating considerations to avoid some of the most common claims arising in the church context.

Part One:

I. Defining Religious Organizations. The religious world uses a variety of terms to define organizations that have very specific meanings in the legal context.

A. **Church:** This term is never defined by specific terms. The duck test is commonly employed; i.e. if it has feathers, a beak, webbed feet and goes quack it must be a duck. If it looks like a church, if the organization fulfills the same role in adherents' lives as a church, if it is associated with a church, it must be a church. The term church, as used in statutes, includes temples, mosques and covens. This term may have different meanings in different statutes and legal contexts.

B. **Association or Convention of Churches:** An organization where its members include churches (though they may also include individual members). The churches need not be of the same faith. Very little other authority exists further defining this term. Some believe that the membership must be composed exclusively of churches while others believe that it must be controlled by churches.

C. **Integrated Auxiliary (of a church):** This term is a tax term defined in Treasury Regulation section 1.6033-2(g)(5). It is an organization that is described in Internal Revenue Code Section 501(c)(3), affiliated with a church, an association of churches or convention of churches and is internally supported by the church(es).

D. **Integral Agencies:** Organizations that are integrally connected with churches and associations or conventions of churches. For example, the foreign missions arm of a denomination would be an integral agency.

E. **Qualified Church-Controlled Organization:** This term is used in the pension area and means a tax exempt organization (recognized under IRC Section 501(c)(3)) that does not offer its goods, services or sale of its facilities to the general public (other than nominal amounts) and receives less than 25% of its support from sales of goods, services or facilities, unrelated business incomes, and government funding.

F. **Religious organization:** Generally, this term means all organizations other than those described above that have a religious purpose. As with the term “church,” the term “religious” is not defined in the Internal Revenue Code.

II. First Amendment Issues. The First Amendment of the U.S. Constitution does not allow Congress to pass laws that establish any religion or restrict the free exercise of religion. In representing any organization related to religion, one must test the government’s positions against the Constitution.

A. The First Amendment has been interpreted numerous times by the U.S. Supreme Court, but most statutes specifically addressing churches have not been challenged. The Lemon Test and the Smith Standard provide key guidelines in First Amendment considerations.

1. **The Lemon Test:** A law or government practice that confers some benefit on religion is constitutional if: (1) it has a clearly secular purpose, (2) it has a primary effect that neither advances or inhibits religion, and (3) it does not foster excessive entanglement between church and state. *Leman v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

2. **The Smith Standard:** A law does not inhibit the free exercise of one’s religion if it is a law of general application even if it interferes with an individual’s free exercise of religion. *Employment Division v. Smith*, 494 U.S. 872 (1990).

B. As explained below, the courts lack jurisdiction over most internal disputes because asserting jurisdiction over an internal church dispute would violate the Establishment Clause of the First Amendment.

III. Church Governance

A. Some churches are organized as charitable trusts, but most churches are organized as nonprofit corporations. However, the type of legal entity is less relevant than the actual way a church is governed. NOTE: The Roman Catholic Church and the Church of the Later Day Saints are typically organized as “corporate sole.” Eight states formally recognize corporate sole by statute. The remainder of the states treats corporate sole as a form of charitable trust.

B. Most courts divide all churches (synagogues, mosques, etc.) into one of two categories: Hierarchical churches and Congregational churches. *Watson v. Jones*, 80 U.S. 679, 722 (1871). In reality, most churches are really hybrids of these two categories.

1. **Hierarchical Churches.** The Supreme Court finds a hierarchical church is present where: the local religious congregation or ecclesiastical body is but a subordinate member of some general church organization in which there are superior ecclesiastical tribunals with a general and ultimate power of control more or less complete, in some supreme judicatory over the whole membership of that general organization.

Hierarchical churches are sometimes further divided into two types: Episcopal and Presbyterian. Episcopal churches rely on the hierarchy to appoint clergy under the authority of bishop. The Roman Catholic Church, Episcopal Church in America and the United Methodist Church represent episcopal type churches. Presbyterian churches, also known as connectional churches, elect regional and national bodies but are still classified as hierarchical churches for jurisdictional purposes. *Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 450–51(1969).

The Supreme Court has ruled that only three ways exist to resolve disputes in hierarchical churches: (1) deference to the hierarchical authorities, (2) use neutral principles of law, or (3) democratic vote. *Watson v. Jones*, 80 U.S. 679, 722 (1871). Whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them. In essence, the court is recognizing that the local congregation has voluntarily agreed to be subject to the hierarchical authorities. Some courts recognize one exception to the deference rule: fraud or collusion by the hierarchical authorities who act in bad faith for secular purposes.

The neutral principle of law approach applies when the dispute can be resolved by using neutral law principles and does not involve a rule of discipline, faith, doctrine, ecclesiastical rule, custom or church law. Generally, questions involving governing documents cannot be resolved by neutral principles of law because they fall under the deference rule above.

In three northeastern states, state statutes mandate a democratic vote if the local church has a dispute with the hierarchical authorities.

2. Congregational Churches. Example: Southern Baptist Churches. A congregational polity is one in which each local congregation is self-governing and the autonomy of the local congregation is the central principle. Remember, a church may have a local congregational polity and still belong to regional or national organizations and associations of a particular denomination. Such cooperation with other like-minded congregations on issues of mutual concern, such as theological education or world missions, does not cede any final authority from the congregation to the association. The associations serve the local church but have no authority over the local church affairs.

The Supreme Court has ruled that only two ways exist to resolve disputes in a congregational church: (1) congregational vote according to the church's governing documents or (2) vote by the duly elected authorities of the local church. *Watson v. Jones*, 80 U.S. 679, 725 (1871). A court's review of the resolution of the dispute is limited to determining whether the vote complied with the congregation's governance requirements. This type of limited review must employ neutral principles of law.

IV. The Church as Employer

- A. Tax laws
 1. Churches are exempt from Federal Unemployment Taxes. 26 U.S.C. §3306(c)(8).
 2. New churches may elect to be exempt from FICA and Medicare taxes by filing an election timely with the IRS. 29 U.S.C. §3121(w).
 3. Churches are not exempt from withholding income taxes from their secular employees, but ministers are exempt from income tax withholding unless the minister elects otherwise. 26 U.C.S. §3401(a)(9).
- B. Title VII. 42 U.S.C. §2000e.
 1. Religious organizations that otherwise meet the qualifications for coverage under Title VII are exempt from religious discrimination claims for employees that are engaged in the faith and practice of the church. 42 U.S.C. §2000e-1(a).
 2. Clergy are always exempt from all parts of Title VII. *Starkman v. Evan*, 198 F.3d 173 (5th Cir. 2000), *Rubin v. General Conference of Seventh Day Adventists*, 772 F.2d 1164 (11th Cir. 1985)
- C. Americans with Disabilities Act
 1. The ADA's building accommodation requirements do not apply to religious organizations, including "houses of worship." But, frequently state and local laws (including building codes) will require accommodation of disabilities by churches.
 2. The ADA's employment provisions contain no special exemptions for churches and religious organizations.
- D. Age Discrimination Act, Civil Rights Restoration Act, Fair Labor Standards Act, National Labor Relations Act, Employee Polygraph Protection Act, Occupational Health and Safety Act and Family Medical Leave Act have no special provisions related to religion.
- E. Immigration laws have no exemption for churches that hire undocumented workers. The immigration laws allow religious workers a special visa to work in the United States.
- F. State employment laws
 1. Generally, churches are exempt from state unemployment taxes.
 2. Generally, churches are not exempt from mandatory workers' compensation laws. Note: Texas has a voluntary workers' compensation law.
 3. Churches are not exempt from state and local income tax withholding requirements.
- G. COBRA benefits – Churches are exempt from COBRA for church welfare benefit plans. 26 U.S.C. Section 4980B (IRC) and 29 U.S.C. Section 1162 (ERISA)
- F. Pension and employee benefit plans
 1. Church plans are exempt from ERISA. 29 U.S.C. Sections 4(b) and 3(33) (ERISA).
 2. Church plans are defined in 26 U.S.C. Section 414(e) (IRC).
 3. Church plans have 5 years to correct errors after the government discovers them.

4. Church plans have other advantages too numerous to list here.

V. The Church as Property Owner

- A. Religious Land Use and Institutionalized Persons Act of 2000 restricts the government's ability to limit religious land use.
- B. Many property disputes arise because the local church decides to leave its historical affiliation. These disputes (typically occurring within hierarchical churches) are generally decided by secular courts employing neutral principles of law.

VI. The Church as Taxpayer

- A. While churches are exempt from federal income taxes, they have not been exempt from the Unrelated Business Income Tax since 1969.
- B. State and local taxes
 1. Sales taxes. Texas exempts all Section 501(c)(3) organizations from paying sales taxes on purchases, but do not exempt them from the collection of sales taxes on taxable transactions. Each state is different. Tex. Tax Code §151.310.
 2. Property taxes. While Texas exempts "places of worship" owned by qualifying organizations and individuals from property taxes, religious organizations must find a specific exemption in the Texas Property Code in order to have their property exempt from property taxes. Tex. Prop. Code §11.20.
 3. A survey of the miscellaneous taxes imposed in Texas did not reveal any particular pattern of exemption. In every instance, the tax professional must examine the particular tax enabling statute to determine whether any exemptions may apply.
 4. Every state is slightly different, requiring the prudent tax advisor to check with local authorities.

VII. The Church as a Lawsuit Target

- A. Immunity laws for the organization
 1. About 38 states have some form of charitable immunity for religious organizations. Each state is different.
 2. The Texas Charitable Liabilities and Immunities Act exempts qualifying Section 501(c)(3) organizations from certain types of liabilities. Tex. Prac. & Rem. Code Chapter 84. The liability protection is conditioned upon the organization maintaining at least \$1 million in general liability insurance coverage. The liability protection does not apply when the organization's conduct is willful or grossly negligent.
- B. The Volunteer Protection Act of 1997 (11 Stat. 218)
 1. This federal statute protects qualifying volunteers from liability unless the volunteer's actions were willful or grossly negligent.
 2. This statute also limits a volunteer liability for non-economic damages.

3. This statute allows states to impose additional rules; i.e. it is non preemptive.
- C. Good Samaritan statutes. Tex. Civ. Prac. & Rem. Chapter 86.
1. About 30 states have some form of immunity for volunteers.
 2. Texas protects volunteers if the qualifying organization has adequate insurance and the cause of action is not willful or gross negligence.
- D. Sexual misconduct
1. Religious organizations have the same duty to screen and supervise employees and volunteers as any other organization.
 2. Clergy frequently have conflicting duties when a member confesses harming a child. The clergy has duty to report the abuse to the authorities, but also has a duty to keep the revelation confidential.
- E. Counseling problems – *Sanders v. Casa View Baptist Church*, 134 F.3d 331 (5th Cir. 1998).
1. Civil courts do not have jurisdiction over spiritual counseling by a minister.
 2. Civil courts have jurisdiction over ministers who conduct secular counseling but fail to meet the applicable standard of care.
- F. Discovery problems in litigation
1. The church has a duty to maintain certain records confidential, such as donor records, member lists, counseling notes and financial data.
 2. The church should be aware that many records involve third parties who have an expectation of privacy.
 3. The courts generally hold that member donor records and member lists are privileged under the free association constitutional rights. *NAACP v. Alabama*, 357 U.S. 449 (1958); *Buckley v. Valeo*, 424 U.S. 1, 66 (1976); *St. German of Alaska Eastern Orthodox Catholic Church, et al., v. United States*, 840 F.2d 1087 (2nd Cir. 1988)
 4. Counseling notes are not confidential in a proceeding concerning the welfare of a child or where the counselee is a party to the suit. See Tex. R. Evid. 510.
 5. General financial data is generally discoverable, but only to the extent relevant to the lawsuit.
- G. Member lawsuits
1. Members are granted special rights in every state. If these rights are violated, then the member may sue to recover those rights.
 2. In Texas, members have the right to see financial data. Tex. Bus. Org. Code, Section 22.351.

Part Two:**I. Organizing to Avoid Liability**

As addressed above, with certain exceptions churches may be incorporated or act as unincorporated associations. In Texas, both incorporated and unincorporated churches are governed the Texas Business Organizations Code; however, the law governing corporations is more developed and complete. The laws regarding unincorporated associations serve as gap-fillers. As a result, incorporation provides an additional level of certainty with respect to the legal effect of certain church decisions.

Whether incorporated or not, clarity and thoroughness in the church's own internal governing documents is critical to avoiding disputes. This is particularly true with respect to internal church conflict – a frequent source of litigation. While Texas law provides that certain provisions must be included in a nonprofit corporation's certificate of formation, the majority of the governance provisions will be located in a set of well-crafted bylaws or other policy decisions.

The bylaws may contain any provision for the regulation and management of the affairs of the corporation not inconsistent with law or the certificate of formation. Bylaws typically cover such matters as the following:

A. Decision-making authority.

A member led church should establish in its governing documents those persons who have the right to vote on church matters. The church's bylaws should define the membership for purposes of voting, the method by which an individual may become a member, and the method by which a member may be removed or excluded from membership. Not all church members must be given the right to vote. In fact, the church may choose to divide its membership into classes by so providing in its governing documents, with one or more classes having voting rights and the other class not having voting rights. Dividing the membership into classes of voting and non-voting members could prove to be beneficial to the church, if the church has non-active members who are not sufficiently involved in church activities to vote on significant church matters or if the church wishes to restrict voting rights to members who have reached a certain age.

The church's governing documents should also clearly set forth the method by which the membership will make decisions, including provisions for times of meetings, notice of meetings, notice of agenda, the percentage or number of members necessary to constitute a quorum (which is the number of members required to be present in order to constitute a valid meeting for the purpose of transacting business), and the number of votes required to pass decisions.

A church may be governed by a board of directors rather than by its members. The board of directors may be called by any name appropriate to the customs of the church, such as the board of deacons, board of trustees, or board of elders.

In a board of director led church, the board of directors makes all of the decisions on behalf of the church, except the following: decisions involving the dissolution of the church, merger or consolidation with another church or organization, sale of substantially all of the church's assets, most amendments to the church's certificate of formation, and amendments to the bylaws provided that such right is expressly reserved to the members in the bylaws. Those decisions are made by the approval of two-thirds of the members voting at a legally constituted meeting, after recommendation from the board. While all other decisions may be made by the directors without the necessity of member approval, it is common and advisable that the members be informed about the issues and given the opportunity to offer input and opinion. It is also important to have governing documents that establish the method by which the board will meet and make decisions.

Finally, a church may choose to be a board of director-led non-member church, making a distinction between the concept of “member” for ecclesiastical purposes and “member” for corporate purposes. In this scenario, the church is governed by a board of directors (who may be self-perpetuating or elected by the ecclesiastical members). Because there are no corporate members, the board of directors makes all decisions for the church including decisions on extraordinary transactions (though safeguards can be implemented to ensure the ecclesiastical members’ desires are heard and understood). In this type of governance, because there are no corporate members, the rights of members of nonprofit corporations (such as the right to inspect books and records) are not applicable.

B. Admission of members.

Whether members are corporate members, ecclesiastical members, or both, because the status of membership grants certain rights and privileges, the rules of governance of a church (through certificate of formation and/or bylaws) should clearly set forth how membership is determined and what types of membership rights and privileges are granted. In churches that have corporate members, because most significant decisions are made by the members of a church, having a procedure to keep church membership roles current and accurate is very important. This procedure should be set out in the church’s governing documents.

C. Termination of membership and discipline of members.

Unfortunately, times will arise when a church must implement a procedure for the discipline or dismissal of a church member. If this procedure is not in writing and set out in the bylaws of the church, a great deal of dispute can arise as to the correct procedure to follow. This can invite complaints that may result in litigation filed by the member who is subject to the discipline or dismissal action. Texas law allows a nonprofit entity, whether incorporated or not, to govern its own affairs, including decisions involving membership. However, the rules adopted by the church in this regard must be followed strictly when taking away rights or privileges of a member. If these rules are not clear, unambiguous, and in writing, the church could subject itself to a risk of liability. While it is unlikely a court would entertain such a dispute and ultimately rule in favor of a disgruntled member, the church may still be forced to incur significant costs in defending the suit.

D. Church officers, including pastor, church staff, deacons, moderator, church clerk, treasurer, and trustees (duties, election, and termination).

E. Designation of committees, duties of each committee, and election of committees.

F. Church meetings, including method of notice of meetings, required quorum for meetings, whether advance notice is required for particular business at meetings, percentages of votes necessary to pass general and special items of business, and rules of procedure for the conduct of meetings.

G. Conflict resolution procedures.

Courts are reluctant to involve themselves in the internal disputes of private membership associations. As noted above, this reluctance is even stronger in the area of internal church disputes as a result of 1st Amendment concerns and the ecclesiastical abstention doctrine. In the context of hierarchical churches, the governance nature of the church provides a forum or resolution of disputes. However, in the context of congregational churches where there is no higher judicatory within the church, no such forum exists. As a result, absent a court being able to resolve a dispute using neutral principles of law (which is rare in such internal disputes), such conflicts are difficult to resolve. Quite often these conflicts end up in court with one side (typically the one in power or possession of the property) arguing a plea to the jurisdiction. Alternatively, churches may choose to include conflict resolution procedures in their governing documents to cover such disputes. Courts will enforce such procedures (i.e. send a matter to arbitration) as doing so can be done without delving into internal church principles. A church choosing to include such provisions should consider whether the provisions should apply to conflicts between members, between a member and the church, employment matters, or some combination of the foregoing. Churches may include a provision requiring mediation with a mediator specializing in religious disputes with mediation being followed by arbitration with one or a panel of arbitrators chosen by the parties or selected from an organization such as the Institute for Christian Conciliation or a like organization. Churches must understand there is a cost to employing such alternative dispute procedures both in dollars as well as in giving up the plea to the jurisdiction argument. The church must weigh these costs against the cost of unresolved conflict and its ability to tear at the fabric of the church.

H. Amendment of bylaws (note: in an incorporated church with a board of directors, to reserve the power to amend the bylaws exclusively to the members, such a provision must be included in the certificate of formation).

II. Insuring to Avoid Liability

While incorporation and wise operation can serve to minimize liability exposure, as operating charities, churches will, at some time in their lives, be faced with claims of liability. Churches should consider appropriate insurance coverage (both in terms of amounts and types) to protect themselves.

A. Property

Property insurance provides insurance protection for losses related to the real property and contents owned by the church. For example, property coverage on the church building and contents would protect against fire, hail storm, tornado, and other loss. It could even insure against vandalism and theft. It is very important for a church to review its policies to determine the types of risks for which the church is insured.

The normal property insurance policy provides coverage, limited to the total amount of coverage purchased, to pay the fair market value of the property at the time of the loss, or in the case of partial destruction, the reasonable cost to repair, less depreciation. It is important to review the amount of coverage from time to time to ensure that the coverage will be sufficient to replace the insured property, due to increasing construction costs.

It is recommended that the church pay for an endorsement to its property coverage to provide for "replacement value" coverage. This endorsement provides that the insurance carrier will pay for the replacement value of the property, up to the total amount of coverage purchased, which is damaged or lost (i.e., the cost to repair the property, excluding depreciation).

B. Liability

Liability coverage is available to protect the church against claims made by third parties, including members or employees, for personal injury or property damage. Because claims generally relate to different activities and different conduct, a church should review the different types of liability coverage it has to ensure that there are no gaps that leave the church unprotected for particular activities. The amount of insurance coverage (or policy limits) for liability policies should be determined for each church based upon its needs, but should be at least in the amounts prescribed by Chapter 84 of the Texas Civil Practice and Remedies Code (The Texas Charitable Liability and Immunity Act).

1. General Liability

General liability coverage insures the church against the majority of claims that can be made against the church resulting from personal injuries or property damage. General liability policies specifically exclude liability for certain activities, such as those that would be covered by the insurance discussed below. General liability coverage also excludes coverage for personal injury or property damage that is expected or intended by the acts of the insured.

2. Automobile

Automobile liability coverage provides liability protection to the church for vehicles owned by the church. Texas law requires minimum levels of coverage, but it is recommended that the church maintain higher levels of coverage than the minimum required by Texas law.

3. Hired and Non-Owned Automobile Coverage

This insurance provides liability coverage for vehicles that are not owned by the church but are being used in a church activity. Members of churches commonly use their own vehicles on church business, which makes this coverage important.

4. Directors, Officers, and Trustees

This liability coverage provides protection to the church and the individuals involved if the persons who serve in leadership roles make decisions that cause harm to a third party.

5. Counseling

Liability coverage for counseling helps to protect the church in the event that a third party makes a claim for "negligent counseling" by a member of the church staff.

6. Sexual Misconduct

This coverage provides protection to the church in the event that a claim is brought by a third party for the sexual misconduct of an employee or agent of the church.

7. Special Events

Special insurance can be purchased for those activities that involve higher than normal risk. This additional insurance covers only the duration of the event and is less expensive than a per annum rate.

C. Workers' Compensation Insurance

A church's general liability insurance policy will not cover personal injury claims of employees of the church suffered during the scope of their employment. In other words, if a paid employee of the church is injured while engaged in a church activity, the church is not protected under its general liability policy and is therefore not covered on the claim. Protection for this type of claim is provided by a workers' compensation policy with respect to the paid employees of a church. It should be noted that Texas does not require an employer to carry workers' compensation insurance, but the church should give serious consideration as to whether such coverage would be prudent.

D. Employee Dishonesty Insurance

This policy provides coverage for the dishonest acts of persons defined in the policy, such as the treasurer or other money handlers.

E. Employment Practices Liability Insurance

This policy provides coverage for claims against the church that arise out of the employment relationship including claims such as discrimination, harassment, and wrongful discharge.

F. Coverage for Affiliated Ministries

Churches sponsor a variety of ministries. In some instances the ministries grow to a significant enough size that the ministry has the ability to be self-sustaining. An example might be a school sponsored by the church. Other times the ministry may be of such complexity or pose such significant liability that the church determines the ministry should be legally separate from the church. An example might be a counseling ministry of the church.

In making a determination to separately incorporate a ministry of the church, the decision makers of the church should consider three broad categories: (1) liability concerns; (2) tax law; and (3) management. Each of these three categories should be given due consideration with the positives and negatives of each being balanced. In addition, the cost to separately incorporate (and where necessary, apply for exemption from the federal income tax) must be taken into consideration. It is often more cost-efficient for the church to simply add additional insurance. This is particularly true when the church desires to maintain control over the affiliated ministry.

III. Operating to Avoid Liability -- Common Claims

A. Child Abuse/Neglect

1. Defined - Chapter 261 of the Texas Family Code

Chapter 261 of the Texas Family Code provides a list of acts or omissions by a parent or other person towards a child including child abuse and neglect. Child abuse is defined to include acts or omissions which cause or permit: (a) mental or emotional injury to a child; (b) physical injury or a threat of physical injury to a child; (c) the failure to make reasonable efforts to prevent action by another person that results in physical injury to a child; (d) sexual contact or the failure to make reasonable efforts to prevent sexual conduct with or in the presence of a child; or (e) causing, expressly permitting, or encouraging a child to use a controlled substance.

Neglect is defined to include: (a) leaving a child in a situation where the child would be exposed to a substantial risk of harm; (b) requiring a child to use judgment to take actions beyond the child's level of maturity, physical condition, or mental abilities; (c) the failure to obtain medical care for a child; or (d) the failure to provide a child with food, clothing, or shelter necessary to sustain the life or the health of a child.

2. Duty to Report

Section 261.101 of the Texas Family Code requires that any person who learns of or has cause to believe that a child's physical or mental health or welfare has been or may be adversely affected by abuse or neglect by any person is required to report that belief to a local or state law

enforcement agency or the Texas Department of Family and Protective Services (state hotline: 1-800-252-5400 or online at <https://www.txabusehotline.org/PublicMain.asp>). An oral report must be made immediately upon learning of the abuse or neglect or the likelihood of abuse or neglect, and a written report shall be made within five days to the same agency or department on the form available at that agency for making such a report. The statute does not provide a definition of “immediately.” The reports must be nonaccusatory, meaning that the identity of the victim of the abuse or neglect must be identified, but that the reporter is not required to speculate as to the person who committed the abuse or neglect. It should be emphasized that the duty to report is very broad. Any time that a person has knowledge of or cause to believe that abuse or neglect has been or is likely to be committed, that person has a duty to report. The duty to report terminates once the child reaches age eighteen (although the statute of limitations for child abuse extends to two years beyond a child’s eighteenth birthday).

Under the Texas Family Code, a professional who has cause to believe that a child has been abused or neglected must make a report within 48 hours that the professional first suspects such abuse or neglect. Tex. Fam. Code. Ann. § 261.001. A professional is defined rather broadly and specifically includes day-care employees. Importantly, § 261.110 of the Texas Family Code prohibits retaliation by an employer against a professional who in good faith makes a report.

3. Immunity

Any person who reports or assists in the investigation of a report of child abuse or neglect is immune from liability, civil or criminal, that might otherwise be incurred or imposed. Tex. Fam. Code. Ann. § 126.106. Immunity extends to participation in any judicial proceeding resulting from the report. This means that a person who reports child abuse and is later sued by any of the parties, including the parents of the child or the accused perpetrator of the crime, can defend himself or herself on the basis that his or her actions are absolutely protected by this immunity statute and that the reporter should not be liable for damages related to the reporting. This does not mean, however, that the reporter cannot be sued and be required to defend himself against the suit even though the defense is ultimately successful.

4. Clergy Privilege: Rule 505 of the Texas Rules of Evidence

Rule 505 of the Texas Rules of Evidence provides that communications between clergy and any individual consulting with him or her for the purpose of seeking spiritual advice in the clergy’s professional capacity is considered privileged, and the person making the communication has a privilege to refuse to disclose and prevent the clergy member from disclosing the confidential communication. Because the privilege belongs to the communicant, the minister violates the communicant’s rights if he discloses an otherwise privileged communication.

However, under an express exception to this rule, the clergy member’s privilege disappears in the event that he or she learns of child abuse or neglect. The clergy is required to report the information to authorities under the child abuse reporting statute. Tex. Fam. Code Ann. § 261.101(c). Because of this exception to the clergy privilege, it is recommended that when any clergy member is engaged in communications with an individual seeking spiritual advice, the clergy member should advise the individual (preferably in writing) that suspicion of child abuse

and/or neglect are non-privileged matters that must be reported to the authorities by law. Any time an individual during a counseling session discloses an instance of abuse, the clergy's warning should be renewed verbally, so that the communicant has no expectation of privacy with respect to the matter, and will be less likely to sue the church or the clergy member for allowing the communicant to make statements to the clergy member that the clergy member is then required by law to report to authorities.

5. Criminal/Civil Liability for Failure to Report

A person failing to report child abuse or neglect commits a Class B misdemeanor. Tex. Fam. Code Ann. § 261.109. In addition, the person who is the victim of child abuse or neglect and his or her family may bring a civil claim against the church and its agent if the agent of the church learns about an instance of child abuse or neglect and fails to report this as required by law. The potential civil liability in this instance is so great that it could easily bankrupt a church if a matter that should have been reported by law goes unreported.

6. Child Abuse Prevention Policy

Churches, as with any organization caring for children, should have a child abuse prevention policy. Such a policy provides for consistency in practice and reasonableness or procedures. However, it is critical that a church actually follow its policy. Having a policy that the church has deemed the reasonable way to prevent child abuse, not following that policy and child abuse occurring is a significant liability concern.

A Child Abuse Prevention Policy should address the following areas:

- Worker enlistment (both paid and volunteer workers)
- Worker training (providing a definition for abuse, a plan for reporting, and ongoing education)
- Worker supervision (e.g. a two adult rule, a ratio of workers to children, an identification system of workers)
- Worker performance reviews/unannounced checks/floater
- Physical facilities (secure check in, visibility into rooms)
- Insurance (ensure liability insurance covers)
- Reporting (a description of the reporting process)
- Steps to take in the event of abuse (investigation, confidentiality, cooperation with law enforcement, etc.)

B. Negligent Counseling

Negligent counseling refers to claims brought by individuals who have received counseling that falls below the defined standard of care. In the context of religious organizations, such claims have been made as a result of counseling or ministering, often in private sessions, with the ministerial staff of the church. Claims usually involve assertions that the ministerial staff improperly advised or counseled such individuals. Claims could also involve the assertion of

lack of training or expertise of the staff member in handling a particular problem of someone being counseled.

Importantly, Texas law does not recognize a claim for “clergy malpractice” or for negligent counseling by a member of the clergy. Staff members serving as licensed counselors may still be subject to liability. However, the Texas Supreme Court has held that where an individual serves as both clergy and licensed counselor, courts cannot attempt to separate the roles to impose liability with respect to the licensed counselor role while avoiding entanglement in the religious role. *See Penley v. Westbrook*, 231 S.W.3d 389, 402 (Tex. 2007) (“Even if [the pastor’s] dual roles as [plaintiff’s] secular counselor and her pastor could be distinguished, which is doubtful, [the pastor] could not adhere to the standards of one without violating the requirements of the other.”).

1. State Regulation - Licensing

Texas requires professional counselors to be licensed, unless the counseling activity involves a religious practitioner performing counseling consistent with the law of the state, their training, and any code of ethics of their profession, so long as they do not hold themselves out as being “licensed.” As such, churches should use care in recognizing the limitations of their unlicensed staff with regard to expertise in particular areas of counseling, and not attempt to deal with issues beyond the scope of the training or expertise of their staff. From a liability standpoint, the church should encourage “ministering” and should refer individuals to licensed experts for “counseling.”

2. Confidentiality of Communications and Records

Communications made to the church’s ministerial staff as well as to licensed counselors who perform counseling on behalf of the church are confidential if they were not intended to further disclosure except to other persons present in furtherance of the purpose of the communication. The person making the communication has the privilege to refuse to disclose, and to prevent the ministerial staff member or licensed counselor from disclosing, the confidential information. In addition, the records of the identity, diagnosis, evaluation, or treatment of a person who receives counseling are also confidential. The disclosure to third parties of information or records related to counseling without the consent of the person who received the counseling can result in liability for the church and the ministerial staff member or counselor, unless disclosure was otherwise permitted by law. Note, however, where such matters serve as the basis for church discipline, courts will not intervene to prohibit disclosure in the context of church discipline. *See Penley*, 231 S.W.3d at 400.

C. Sexual Misconduct

Sexual misconduct claims include all crimes involving sexual conduct under the Texas Penal Code, such as indecent exposure, indecency with a child, and sexual assault, including rape. Such claims also include conduct that may not violate a penal statute but is still sexually oriented, such as sexual harassment and sexual suggestion. If this conduct is committed by agents of the church, then claims are often made against both the actor and the church.

Churches are generally not vicariously liable for the intentional torts (including intentional sexual misconduct) of their employees and agents, even if those torts are committed within the scope of the authority given to those employees and agents. It could be argued that it would never be in the scope of authority of an agent of the church to commit sexual misconduct. However, if the claim can be characterized as negligent conduct instead of intentional conduct on the part of the church's agent, then a victim could argue that the church's agent acted within the scope of the agent's authority, and vicarious liability could attach to the church. Second, the theory involving negligent hiring or appointment could apply to cause liability to the church. Third, the theory involving negligent retention of an employee or agent could apply to cause liability to the church. Fourth, the church may be liable pursuant to a state statute (Chapter 81 of the Texas Civil Practice and Remedies Code, entitled "Sexual Exploitation By Mental Health Services Provider"), as described below.

1. Sexual Exploitation Cause of Action

Chapter 81 of the Texas Civil Practice and Remedies Code establishes a statutory cause of action that can apply to members of the clergy, their employers, and possibly even religious denominations. The statute creates a statutory cause of action against mental health services providers. The term "mental health services providers" is defined broadly and includes members of the clergy. "Mental health services" is defined clinically and includes the following: counseling in a professional relationship to assist an individual or group in alleviating mental or emotional symptoms or conditions; understanding conscious or subconscious motivations; resolving emotional, attitudinal, or relationship conflicts; or modifying feelings, attitudes, or behaviors that interfere with effective emotional, social, or intellectual functioning. Religious, moral, and spiritual counseling, teaching, and instruction provided by a member of the clergy do not come within the definition of "mental health services." However, whether this exclusion applies will be a fact question to be determined by the trier-of-fact based on the evidence.

A member of the clergy who provides "mental health services" can be liable to a patient (an individual who seeks or obtains mental health services from a clergy member) or former patient for damages for sexual exploitation (a pattern, practice, or scheme of conduct which may include sexual contact, that can reasonably be construed as being for the purposes of sexual arousal or gratification or sexual abuse of any person) if the patient or former patient suffers, directly or indirectly, a physical, mental, or emotional injury. *See, e.g., Hawkins v. Trinity Baptist Church*, 30 S.W.3d 446 (Tex. App.—Tyler 2007, no petition) (in claim regarding sexual exploitation by mental health service provider, pastor failed to produce evidence his conduct constituted protected religious conduct).

Damages can also result from "therapeutic deception," meaning a representation by the clergy member that sexual contact with, or sexual exploitation by, the clergy member is consistent with, or part of, a patient's or former patient's treatment. It is not a defense to this cause of action that the consent of the patient or former patient was given, that the conduct was outside the therapy or treatment sessions of the patient or former patient, or that the conduct occurred off the premises regularly used by the clergy member for the therapy or treatment sessions of the patient or former patient (i.e., the church premises).

Further, the statute requires that mental health service providers (including clergy members) must report to the prosecuting attorney in the county in which the alleged sexual exploitation occurred, and any state licensing board having responsibility for another mental health services provider's licensing, any conduct that the reporting mental health service provider has reasonable cause to suspect has occurred involving the sexual exploitation of a patient by another mental health services provider. This duty to report includes making a report when a patient alleges sexual exploitation by a mental health service provider during the course of treatment. The report is due no later than thirty days after the date in which the clergy member became aware of the conduct. Before mailing the report, the reporter must inform the alleged victim of the duty to report and determine whether the alleged victim wishes to remain anonymous. The alleged victim's identity may not be disclosed unless the alleged victim has consented in writing to the disclosure. A person who makes a report under the statute receives limited immunity against liability resulting from the reporting of another's conduct under the statute. Failure to make a report is a Class C misdemeanor.

2. Employer Liability for Sexual Exploitation

An employer of a mental health service provider (i.e., the church where the mental health service provider is a clergy member) is liable to a patient or former patient if the patient or former patient has a cause of action as described above against the mental health service provider, if the employer:

- (a) Failed to make inquiries of an employer or former employer, whose name and address have been disclosed to the employer and who employed the mental health service provider as a mental health service provider within the last five years of that date, concerning the possible occurrence of sexual exploitation; or
- (b) Knows or has reason to know that the employee engaged in sexual exploitation, and the employer failed to report the suspected sexual exploitation as required by law or take necessary action to prevent or stop the sexual exploitation; or
- (c) If the employer knows of the occurrence of sexual exploitation by an employee or former employee and receives a specific request by a future employer or prospective employer concerning the possible existence or nature of sexual exploitation committed by the employee, and the employer fails to disclose the occurrence of the sexual exploitation, provided that this failure is a proximate and actual cause of damages to a patient.

The employer also has the duty to report an occurrence of sexual exploitation any time that the employer has reasonable cause to suspect an instance of sexual exploitation. The report must be made no later than thirty days after the date the employer became aware of the occurrence.

3. Denomination Liability for Sexual Exploitation

The statute makes reference to an extension of liability beyond the local church if the patient proves that officers and employees of the religious denomination in question at the regional,

state, or national level: (a) knew or should have known of the occurrences of sexual exploitation; (b) received reports of such occurrences and failed to take necessary action to prevent or stop such sexual exploitation, if such failure was a proximate and actual cause of damages; or (c) knew or should have known of the clergy member's propensity to engage in sexual exploitation.

4. Defenses

Pursuant to the terms of the statute, it is not a defense that the sexual exploitation (a) occurred with the consent of the patient or former patient; (b) occurred outside the therapy or treatment sessions of the patient or former patient; or (c) occurred away from the counseling premises.

It is a defense to a sexual exploitation cause of action brought by a former patient that the mental health services provider terminated mental health services with the former patient more than two years before the alleged sexual exploitation began and the person bringing the claim was not emotionally dependent on the mental health service provider when the alleged sexual exploitation began. A person is considered "not emotionally dependent" under the statute if the nature of the person's emotional condition and the nature of the treatment provided are not such that the mental health services provider knows or has reason to believe that the patient or former patient is unable to withhold consent to the sexual exploitation. This of course requires a factual inquiry.

D. Negligent Hiring/Appointment

Because the church's vicarious liability results when an agent or employee, including any volunteer, engages in tortious conduct while acting within the scope of his or her authority, it usually can be stated that when the agent or employee acts outside of the scope of his or her authority, the vicarious liability of the church does not extend to that activity. For example, a church may be vicariously liable when a church volunteer acting within his or her authority carries out his or her duties in a negligent fashion, even if the volunteer acted in good faith. On the other hand, if the church volunteer commits an intentional tort, such as sexual misconduct, the church may argue that the volunteer has not acted in good faith with respect to his or her conduct, and that the conduct has gone outside of the scope of the volunteer's authority given by the church. In the latter case, the church would, most likely, not be vicariously liable for those intentional torts of the employee.

However, a second source of liability to the church exists in this case. This involves the church's potential direct liability in the negligent hiring of an individual that the church knew or reasonably should have known was prone to commit such acts. The church must show it acted as a reasonably prudent person would have acted in the same or similar circumstances (e.g. hiring an employee). Thus, where the church's vicarious or indirect liability ends, its own negligence can give rise to liability if it has not performed due diligence in its hiring and supervising practices of its agents and employees. Negligent hiring can apply not only to employees, but also to any agent of the church, even a volunteer. The church is charged with the duty under law of using volunteers, agents, and employees that will act in a reasonably prudent manner. If the church is aware or if it should be aware of facts that point to the propensity of its volunteer,

agent, or employee to commit such torts, especially involving intentional torts, then the church has been negligent in appointing these actors to carry out the activities of the church.

Because the church cannot predict with certainty which persons in fact will commit acts that cause injury or damage to others, an objective of preventing such occurrences in every case would be unrealistic. Thus, the objective of the church in this area must be to undertake such steps to demonstrate that it has exercised due diligence with respect to the hiring and/or appointment of its employees and volunteers. Ultimately, if the church is sued for an action by an employee or volunteer, which was outside the scope of that individual's scope of authority, then the church must show that it acted in a reasonably prudent manner with respect to the decision-making process of hiring or appointing the individual as an agent.

E. Negligent Retention

Even if a church has acted prudently in the decision-making process of hiring or appointing an individual as its employee or agent, the church still has a continuing responsibility with respect to its agent. If the church gains information that would show that it would not be reasonably prudent for the church to continue to have that individual act as the church's employee or agent, then the church has the responsibility to dismiss that individual or remove him or her from the position for which the individual is unfit. If the church retains an employee or agent after the church learns that the individual is not someone the church should have acting on its behalf, then the church would be negligent for allowing the individual to continue in that position. If the individual commits a tortious act consistent with the negative information the church has learned, then the church could be liable for having retained or left that individual in a position in which the individual could commit the act.

For example, if the church performs a diligent investigation of an individual who has asked to be a volunteer in the nursery of the church, and the church has found no indication that the person would be unfit for that position, then the church has acted properly in appointing that person as its agent for that purpose. However, if the church later learns that the person had a history of child molestation incidents, which were not uncovered during the initial background check, then the church would be negligent for allowing the individual to continue to work in the nursery, and the church would likely be legally responsible to the victims of any child molestation committed by that individual while working in the nursery.

F. Inadequate or Negligent Supervision

Any activity can become more risky without the proper supervision. This can happen in the church nursery, the church baptistery, or on the church volleyball court or softball field. The church can be liable for injuries occurring during activities when it is shown that the injuries could have been avoided with adequate supervision. Adequate supervision includes both the ratio of adults to children as well as the training of those supervising the activity.

G. Hazardous Activities

Church groups often engage in fellowship activities that involve some type of recreation. Because some forms of recreation are extremely dangerous, care should be taken to limit those activities (e.g., a church tackle football game). Other activities that are not considered unreasonably hazardous under ordinary circumstances could become hazardous if there is inadequate supervision or uncommon circumstances (e.g., a church snow skiing trip that involves traveling on icy or extra hazardous roadways due to a storm). Therefore the church should take steps to ensure proper supervision (ratio of those supervising to those being supervised and the training of those supervising) and otherwise limit the risk when such circumstances are anticipated.

Churches, schools, youth associations, and other entities often use written forms containing waivers of liability to discourage claims resulting from injuries. While there may be some benefit to these forms in discouraging claims and in making the participants aware of certain risks involved in the activity, waivers of liability are often not effective to release the sponsor of the activity from being responsible and potentially liable for negligent or other tortious conduct that causes injury.

The age of the participant of the activity is significant in determining the effectiveness of such forms. Forms signed voluntarily by competent adults expressly acknowledging risk in the activity can be useful to limit the organization's liability. For such a form to be effective, the individual's intent that the organization be released for its own future negligence must be expressed in unambiguous terms within the four corners of the release and the releasing language must be conspicuous (e.g. contrasting type or all caps). Such forms do not, however, operate in the same manner with respect to minors for the reason that minors are not legally competent to contract, and parents of minors cannot contract away causes of action their children may have based on the negligence of another. Churches may also choose to have a child's parents or legal guardians sign forms consenting to the child's participation in the activity, certifying that the child is able to participate, and listing emergency contact information as well as health conditions of the child. Ultimately, it should be remembered that adequate supervision is the most important and most effective way to avoid liability arising from potentially hazardous activities.

H. Premises Liability

While the general rule is that one must exercise reasonable care with respect to his or her activities to prevent unreasonable risk to others, different rules apply with respect to the ownership or lease of property. The fact that one owns or leases a piece of property does not fall within the category of an "activity." Therefore, the risk of injury to third parties related to those parties' use of the premises is dealt with under a separate analysis.

1. Concealed Dangerous Conditions

An owner or lessee of property has a duty to warn his invited guests of conditions of property that are concealed or not obvious to the invitees, and that cause the invitees to be exposed to the

dangerous condition. An example would be knowledge of the presence of friable asbestos in a building.

2. Attractive Nuisances

When a landowner/lessee is aware that children will be on the premises who are of such an age that they will not appreciate a danger, even if the danger is open and obvious, the owner/lessee has the duty to protect against that risk. For example, if the church builds a swimming pool, the church should know that the pool attracts children of a young age who may not be able to swim, and therefore should properly safeguard against that risk by building a childproof fence around the pool.

3. Reasonable Care

With regard to activities on the premises, the landowner/lessee must always use reasonable care. Failure to use reasonable care could subject the church to liability for a negligence claim by someone who participates in an activity on or otherwise uses the church's property.

4. Inspections

a. Duty to Inspect

The landowner/lessee has a duty to conduct reasonable inspections to discover dangerous conditions on the property and to render them safe, or, if they cannot be rendered safe, to post appropriate notices.

b. Time Period to Inspect

There is no absolute or arbitrary time frame for a landowner/lessee to inspect its property. The test is one of reasonableness; that is, when would it have been reasonable for the landowner/lessee to have inspected the property and discovered the dangerous condition if the landowner/lessee had acted as a reasonably prudent person under the same or similar circumstances.

For example, if during a storm a tree causes damage to an electrical outlet, thereby rendering electric wires exposed, the landowner/lessee would not normally be liable to someone who is injured prior to the time that the landowner/lessee should have discovered the dangerous condition and rendered the condition safe.

c. Liability for What a Reasonable Inspection Would Discover

A landowner/lessee must anticipate the invitees who will enter the property and perform reasonable inspections to render the property safe for those invitees. If a reasonable inspection would not uncover a dangerous condition, then the landowner/lessee would not be liable under the doctrine of premises liability. On the other hand, if a reasonable inspection would have uncovered a condition, the landowner/lessee has the responsibility to discover and render that

condition safe as soon as reasonably possible after the time that a reasonable inspection should have been performed. For example, if a church is aware that children play on its playground equipment each Sunday morning, then the playground should be inspected each week before children are allowed on the equipment. If a reasonable inspection would have detected any unsafe playground equipment, then the equipment should be rendered safe before children are allowed to play on it further.

IV. Immunities in Personal Injury and Property Damage Claims

1. No Common Law Charitable Immunity

Historically, a doctrine in Texas law held that charities were immune from liability for the negligent acts of their servants, for which those charities would incur vicarious liability without the immunity. For example, if a church's agent acted negligently within the scope of the agent's responsibilities, under the doctrine of charitable immunity the church would not have been vicariously liable for the acts of the agent.

However, in 1971, the Texas Supreme Court abrogated the doctrine of charitable immunity for any action occurring after March 9, 1966. *Howle v. Camp Amon Carter*, 470 S.W.2d 629 (Tex. 1971). Therefore, since that date, charitable organizations have been subject to vicarious liability for negligent acts of their agents taken within the agent's scope of authority.

2. Chapter 84 of the Texas Civil Practice and Remedies Code

a. Definition of a Charitable Organization

In response to the growing increase in liability against entities carrying out charitable purposes, the Texas legislature passed the Charitable Immunity and Liability Act of 1987 (the "Act"), codified in Chapter 84 of the Texas Civil Practice and Remedies Code. A stated purpose of the statute is to remedy the unwillingness of volunteers to serve in organizations due to their perception of the risk of personal liability related to those services.

The Act covers, among other organizations beyond the scope of this book, the following:

(A) any organization exempt from federal income tax by being listed as an exempt organization in Section 501(c)(3) or 501(c)(4) of the Internal Revenue Code, if it is a nonprofit corporation, foundation, community chest, or fund organized and operated exclusively for charitable, religious, prevention of cruelty to children or animals, youth sports and youth recreational, neighborhood crime prevention or patrol, fire protection or prevention, emergency medical or hazardous material response services, or educational purposes, including private primary or secondary schools if accredited by a member association of the Texas Private School Accreditation Commission but excluding fraternities, sororities, and secret societies, or is organized and operated exclusively for the promotion of social welfare by being primarily engaged in promoting the common good and general welfare of the people in a community, and

(B) any bona fide charitable, religious, prevention of cruelty to children or animals, youth sports and youth recreational, neighborhood crime prevention or patrol, or educational organization, excluding fraternities, sororities, and secret societies, or other organization organized and operated exclusively for the promotion of social welfare by being primarily engaged in promoting the common good and general welfare of the people in a community, and that:

- (i) is organized and operated exclusively for one or more of the above purposes;
- (ii) does not engage in activities which in themselves are not in furtherance of the purpose or purposes;
- (iii) does not directly or indirectly participate or intervene in any political campaign on behalf of or in opposition to any candidate for public office;
- (iv) dedicates its assets to achieving the stated purpose or purposes of the organization;
- (v) does not allow any part of its net assets on dissolution of the organization to inure to the benefit of any group, shareholder, or individual; and
- (vi) normally receives more than one-third of its support in any year from private or public gifts, grants, contributions, or membership fees.

Once it has been determined that an entity falls within the definition of a charitable organization under the Act, the volunteers and employees of the organization, as well as the organization itself, enjoy the immunities described below. However, charitable organizations and their employees and volunteers are still well-advised to confirm that adequate liability insurance coverage exists with respect to their activities.

b. Volunteer Immunity

A volunteer is a person who renders services for or on behalf of a charitable organization but who does not receive compensation in excess of reimbursement for expenses incurred. "Volunteer" includes a person serving in the capacity of a director, officer, trustee, or direct service volunteer.

A volunteer of a charitable organization is immune from civil liability for any act or omission resulting in death, damage, or injury if the volunteer was acting in the course and scope of the volunteer's duties or functions, including as an officer, director, or trustee within the organization.

All volunteers, without regard to the type of service they provide to the charitable organization, are liable for death, damage or injury to a person or a person's property that is proximately caused by an act or omission arising from the operation or use of any motor driven equipment, including an airplane, to the extent of insurance coverage required by Texas law, or, if greater, any existing insurance coverage applicable to the act or omission. Thus, a volunteer who acts within the scope and course of his or her duties is not liable other than to the extent of liability insurance that he or she is required to have under Texas law or that he or she actually has in place. This is intended to make available any liability insurance coverage for the injured individual, without subjecting the volunteer to additional out-of-pocket exposure.

c. Employee and Organizational Immunity

An employee is defined as any person, including an officer or director, who is in the paid service of a charitable organization (regardless of the level of compensation), but this definition does not include an independent contractor. A non-hospital charitable organization and employees of such an organization enjoy limited immunity only if the charitable organization has a certain amount of liability insurance coverage in place for the act or omission of the organization, its employees, and its volunteers. The minimum amounts are as follows: (1) \$500,000 for each person; (ii) \$1,000,000 for each single occurrence for death or bodily injury; and (iii) \$100,000 for each single occurrence for injury to or destruction of property. These amounts must be provided under a contract of insurance or other plan of insurance authorized by statute and may be satisfied by the purchase of a \$1,000,000 bodily injury and property damage combined single limit policy. The employee and the non-hospital charitable organization enjoy immunity for any liability in excess of those amounts. For the limited immunity to apply, the employee of a non-hospital charitable organization must act in the course and scope of the person's employment at the time of the act or omission resulting in death, damage, or injury.

The purpose of this limited immunity is to allow liability to remain to the extent of the amount of liability insurance coverage the legislature has decided would be prudent for the charitable organization to have in place to cover itself and its employees and volunteers, without causing the charitable organization or the employee to pay any out-of-pocket amounts with respect to such liability. The Act provides that the insurance coverage must apply to any act or omission to which the Act applies. Accordingly, it is reasonable to assume that for the limitations provided under the Act to apply, the charitable organization must have the requisite amounts of insurance to cover the subject liability. In other words, a church should review its activities and, working with its insurer, seek to have appropriate coverage in terms of both amount and scope.

d. Exceptions

The Act does not apply to any act or omission that is intentional, willfully negligent, or done with conscious indifference or reckless disregard for the safety of others (more extreme than ordinary negligence). The Act also does not limit or modify the duties or liabilities of the leaders of an organization to the organization itself or to its members and shareholders. Other exceptions exist that are generally not applicable to churches.

3. Federal Volunteer Protection Act

Federal law also provides limited immunity for volunteers of charitable organizations. The Volunteer Protection Act of 1997 provides civil liability protection for nonprofit or government volunteers if: (i) the volunteer was acting within the scope of his/her responsibility; (ii) the volunteer was properly licensed, certified or authorized to engage in the activity or practice (if required by the state in which the damage occurred) and those activities were within the scope of the volunteer's responsibility; (iii) the harm was not caused by willful or criminal misconduct, gross negligence, reckless misconduct or a "conscious, flagrant indifference" to the rights or safety of the individual harmed by the volunteer; and (iv) the harm was not caused by the

operation of a motor vehicle, aircraft, or other vehicle for which an operator's license or insurance is required by the state.

V. Keeping Your Church Out of Court

Ultimately, it is not possible to truly keep a church or other religious organization out of court. However, in understanding the role of the ecclesiastical abstention doctrine, the unique exceptions churches enjoy from certain statutory requirements (particularly in the employment context), and common claims churches face, churches can plan and operate to limit liability exposure and limit the amount of expenses faced by the church in defending lawsuits.