

Keeping your CHURCH OUT of court

LEGAL ISSUES IN THE CHURCH: TOP CONCERNS FOR KEEPING YOUR CHURCH OUT OF COURT

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The information set forth in this outline should not be considered legal advice, because every fact pattern is unique. The information set forth herein is solely for purposes of discussion and to guide practitioners in their thinking regarding the issues addressed herein. Nonlawyers are advised to consult an attorney before undertaking issues address herein.

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I. Organizing and Insuring to Protect Against Liability

A. Benefits to Incorporation

1. Clearer rules of governance
2. Members of an incorporated church are not responsible for the debts and obligations of the church, with some limited exceptions (e.g., guaranteed indebtedness or participation in conduct that gave rise to a legal claim).
3. Although the Texas Charitable Immunity and Liability Act of 1987 (see below) provides similar protection for unincorporated churches, these churches may be required to prove additional elements in order to gain protection.
4. Businesses often prefer to do business with incorporated churches. This is particularly true with respect to lenders.

B. Bylaws

1. Subject to state law and the Certificate of Formation (Articles of Incorporation), govern the operations of the church
2. Should cover qualifications, election, and action of directors/trustees/elders, where applicable
3. Should address admission and expulsion (including discipline) of members (including requirements for membership, powers of members)
4. Should address officers, including election, duties, and compensation
5. Typically will address calling and dismissal of at least the senior pastor
6. Should have basic entity issues, such as notice requirements, quorum, authority to contract on behalf of church, authority to create committees, etc.
7. Bylaws may address conflict resolution and include procedures.
8. Bylaws are unique to each church, as they represent how that church operates.

C. Governance Issues

1. Decision-makers (directors/elders/trustees/officers) owe fiduciary duties of care, loyalty, obedience.
 - a. Care: act in good faith; use care that person of ordinary prudence would use in same or similar circumstances; make decisions reasonably believe to be in best interest of church (protected from second-guessing by business judgment rule)
 - b. Loyalty: exercise unselfishness (follow conflict of interest policy); don't usurp opportunities of the church; be fair to the church; maintain appropriate confidentiality
 - c. Obedience: be faithful and pursue goals of church; follow governing documents; follow donor restrictions; ensure charitable assets not diverted to non-charitable uses

D. *Objective of Insurance*

1. Adequate coverage (Texas Charitable Liability & Immunity Act)
2. Appropriate coverage (Type of coverage)

E. *Charitable Immunity - Charitable Immunity and Liability Act of 1987*

1. Volunteer Immunity: The statute protects volunteers of charitable organizations, including the organization's officers, directors, trustees, if the volunteer is acting within the course and scope of his or her duties or functions.
2. Employee and Organizational Liability: Limits the maximum liability of an employee of a non-hospital charitable organization and the organization itself to (a) \$500,000 for each person; (b) \$1,000,000 for each single occurrence for death or bodily injury; and (c) \$100,000 for each single occurrence for injury to or destruction of property

Note: Limited liability applies only to those charitable organizations that have liability insurance coverage in effect. The amount of coverage required under the statute is the same as the limits in liability.

3. Exceptions: The statute does not apply to any act or omission that is intentional, willfully or wantonly negligent, or done with conscious indifference or reckless disregard for the safety of others. The statute also provides that a volunteer is liable for acts or omissions that arise from the operation of a motor vehicle to the extent of a volunteer's insurance coverage.

II. **Claims Arising from Church Conflict**

A. *Overview of First Amendment of the United States Constitution*

1. Establishment and Free Exercise Clauses of the First Amendment –

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .”

2. No civil court jurisdiction - exercise of religious beliefs and activities
 - a. The courts will not intervene in matters or disputes which would require the courts to extensively investigate and evaluate religious tenants and doctrines.
 - b. Freedom to believe is absolute; freedom to act is subject to regulation for the protection of society.
3. Civil court jurisdiction – where the conflict may be resolved solely by application of neutral principles of law, such as civil, contract or property rights, even though they stem from church controversy

B. Enforceability of governing documents is the issue

1. Typical bylaws assume all members, leaders and staff will follow the rules and abide by all votes and decisions. This is not happening and courts are not enforcing those rules.
2. Who wins in these conflicts?

The conflict: Sinners versus Saints

The result: The Saints don't always win

Determining factor: The winner is usually the one who has control of the property.

Goal: To develop governing provisions that, if followed, will be enforced.

C. Two sources of enforcement:

1. Christian conciliation (enforceable mediation and arbitration provisions)
2. Courts - will enforce neutral principles of civil, contract or property rights

Note: Conflict resolution clauses are especially important for non-hierarchical churches because such conflicts would likely otherwise end up in court (or worse yet, remain unresolved forever).

D. How to Address:

1. Adopt well drafted governing documents, policies and policy manuals, including an employee manual; these documents direct a conflict toward resolution by addressing the procedures to follow.
2. Adopt clearly defined membership guidelines; conflict resolution procedures in a church's governing documents generally will not apply to non-members of the church (or those who have not expressly consented).
3. Include conflict resolution procedures in your governing documents for the following types of conflicts:
 - a. Between members - the members are bound by agreement as set forth in the church's governing documents to follow the scriptural procedures set forth therein
 - b. Between a member and the church - The governing documents require the following in the event of unresolved conflict:
 - Christian mediation - nonbinding settlement negotiation facilitated by a third party mediator/facilitator to attempt a voluntary resolution (binding only if the parties reach a mutual agreement)
 - Christian arbitration - formal presentation of claims and defenses through admission of evidence before a third party arbitrator who is empowered to make a binding decision

- c. Church discipline - members agree to follow the church's discipline policy which can include formal hearing and punishment, including procedures for disfellowshipping and restoration
 - For employment matters - church follows its employee policy manual, which can include mediation and arbitration

III. Claims Arising from Personal Injury

A. *Intentional Torts*: Arises when an actor intends the "injury" complained of.

B. *Negligence*: Occurs when the actor fails to exercise a level of care that a reasonably prudent person would exercise under the same or similar circumstances.

1. Direct Liability: An actor incurs direct liability when the actor is personally responsible for his or her conduct.
2. Vicarious Liability: An employer may become liable for the acts of an agent when an agent acts within the scope and course of the agent's responsibilities. A church may be vicariously liable for the negligent acts of a volunteer or employee of the church if the volunteer or employee were acting within the scope and course of his or her responsibilities.
 - a. The agent must act within the scope of his or her general authority and in furtherance of the employer's business and the accomplishment of the object for which the employee was hired.
 - b. Vicarious liability generally arises from negligent conduct by an agent. If an agent commits an intentional tort (e.g., assault, false imprisonment), then this is generally considered to be beyond the scope of the agent's responsibilities. However, the church may still be liable under another theory, such as negligent supervision or negligent hiring.

Examples:

- Negligent Hiring: This may arise if the church hired a person whom the church knew or should have known that was prone to commit a tortious act. Exercise of due diligence in the hiring process is thus important to avoid liability because it may demonstrate that the church acted in a reasonably prudent manner in hiring the employee.
- Negligent Retention: Similarly, if a church gains information that an employee or volunteer has the propensity to commit a wrongful act, then the church has a duty to dismiss the individual.
- Negligent Supervision: A church may be liable if it fails to supervise its employees or volunteers adequately and an employee's or volunteer's conduct causes injuries to another.

IV. Claims Arising from Child Abuse

A. Theories of liability include negligent selection, supervision and retention.

B. Report child abuse or neglect (Tex. Fam. Code Chapter 261)

1. Any person who has cause to believe abuse or neglect has occurred has a duty to report
2. Duty overrides all privileges (attorney, clergy, physician, etc.)
3. Immunity for good faith report
4. Failure to report: Class B misdemeanor
5. Report is made to CPS or a police agency
6. Report is nonaccusatory (i.e. simply identifies child and suspicion)
7. Statute does not create a private cause of action for failure to report
8. No duty to report once child reaches age eighteen

C. Statute of Limitation – 2 years following child’s eighteenth birthday.

D. Child Abuse Prevention Policy

1. Why Churches Need A Child Abuse Prevention Policy
 - a. Consistency in Practices
 - b. Reasonableness of Procedures
2. Importance of Following the Policy
 - a. Once a policy is adopted, it must be followed
 - b. Possible negligence per se (i.e. automatic negligence) if not followed
3. What the policy should consider
 - a. Worker enlistment (all paid and volunteer workers)
 - b. Worker training
 - Provide legal definition of child abuse
 - Provide copy of the church’s policy for reporting child abuse
 - Provide regular additional training and education
 - c. Worker supervision
 - Two adult rule (two adults in classroom)
 - Reasonable ratio of workers to children
 - Church staff should supervise, make unannounced visits into classes, etc.
 - Identification system
 - Enforce Policies

- d. Worker performance reviews
- e. Physical facilitates
 - Visibility into rooms
 - Cameras
 - Secure area
 - Restrooms
 - Outdoor playground area
- f. Insurance
 - Liability insurance coverage available to cover child abuse
 - Charitable Immunity and Liability Act of 1987 (ensure adequate insurance coverage to trigger statute)
- g. Reporting
 - Reporting procedure set forth in the policy
 - All workers familiar with the procedure
 - Reporting required by state law
 - Immediately contact insurance company and report occurrence
 - Contact church's attorney
- h. Steps to take in event of Child Abuse
 - Appoint someone to oversee matter
 - Investigate thoroughly, don't treat as frivolous
 - Maintain confidentiality of victims and accused as much as possible
 - Cooperate with law enforcement
 - Suspend immediately the accused from duties, if a worker
 - Keep victim's families advised of status of investigation
 - If abuse is confirmed, immediately dismiss worker
 - If evidence inconclusive, consider moving worker to position that does not involve children
 - Keep congregation informed as to matters which are not confidential
 - Prepare a media response
- i. Transition Rules for implementation

V. Claims Arising from Counseling

A. Types of Relationships in counseling

1. Fiduciary Duty
2. Professional Relationship
3. Spiritual Advisor

B. State Regulation

1. Licensed Professional Counselor
2. Licensed Marriage And Family Therapist Act
3. Professional Social Worker Act
4. Psychologists' Licensing Act
5. Chemical Dependency Counselors

C. Causes of Action Against Counselor

1. Clergy malpractice – No cause of action recognized in Texas
2. Professional malpractice – Courts will recognize cause of action for secular conduct, but courts will not attempt to differentiate between clergy conduct/professional conduct when clergy is licensed. See *Penley v. Westbrook*:

Penley v. Westbrook (Tex. June 29, 2007)

“While the elements of [Plaintiff’s] professional negligence claim can be defined by neutral principles without regard to religion, the application of those principles to impose civil tort liability on [the pastor] would impinge upon the [church’s] ability to manage its internal affairs and hinder adherence to the church disciplinary process that its constitution requires (emphasis in original).”

“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.”

3. Breach of fiduciary duty – No cause of action recognized in Texas by member of church against clergy
4. Intentional infliction of emotional distress – Courts will recognize cause of action for secular conduct
 - a. Intentional or reckless conduct
 - b. Which was extreme and dangerous
 - c. Which caused emotional distress

- d. The resulting emotional distress was severe
 - e. Not mere insults, threats or indignities
5. No license or exemption (while holding oneself out as providing professional counseling)
6. Sexual Exploitation Cause of Action:
- a. Sexual contact, sexual exploitation (pattern, practice or scheme of conduct for the purpose of sexual arousal or gratification or sexual abuse of any person), or therapeutic deception (representation that sexual contact or sexual exploitation is part of a patient's treatment) by a mental health service provider (includes clergy except where only religious, moral, or spiritual counseling, teaching and instruction)
 - b. Patient suffers damages, directly or indirectly, including physical, mental or emotional injury, caused from above conduct (mental anguish alone is actionable)
 - c. Defense – victim was not emotionally dependent on the provider and counseling stopped more than two years prior to conduct
 - d. No defense
 - Consent
 - Conduct occurred outside counseling sessions
 - Conduct occurred away from counseling premises

Ministerial Counseling Policy – a recommended checklist

- ✓ Clergy staff will minister on a spiritual level only, consistent with the church's beliefs.
- ✓ If an individual needs licensed counseling assistance in addition to ministering from the clergy staff, it is the responsibility of that individual to seek such counseling.
- ✓ Clergy staff may refer individuals to licensed counselors.
- ✓ Communications to clergy staff during ministerial counseling will be confidential and will not be disclosed, except in the following circumstances:
 - Any occurrence of or intention to commit child abuse
 - An intention to commit a felony
 - An intention to commit suicide
 - With written permission
- ✓ Sessions may be audio or video taped and the clergy staff may take notes.
- ✓ Either two clergy staff or another specially designed procedure must be followed when ministering to children or a person of the opposite sex.

- ✓ A parent or custodian must consent to a child's ministerial counseling prior to the sessions. Child acknowledges that if minister feels parents need to know that they will be told.
- ✓ No counseling may be provided by lay persons in the church, and ministerial counseling is limited to those clergy staff designated by the church in the policy.
- ✓ Each person to receive ministerial counseling must execute a memorandum acknowledging the receipt of the policy prior to the sessions and stating that the person has read and understands the policy and agrees to follow it.

VI. Claims Arising from Employment Practices

A. Negligence Claims (Hiring/Retention/Supervision)

B. Hiring Practices

- Create a process by which the church can remove from consideration any applicant against whom there is some evidence of a propensity to commit acts of misconduct.
- Create a personnel file for each employee and volunteer to document the due diligence the church undertook into that individual's background prior to the individual beginning work at the church and thereafter.
- Goal is to be "reasonably prudent"; however, there is no set standard, and to some extent the standard will shift based on what other churches and employers are doing (example: today reasonable prudence demands background checks, unlike 20 years ago).

1. Job Descriptions

- a. Accurately establishes the duties and responsibilities of that position.
- b. Establishes minimum qualifications for each position. The church/ministry should only interview those who meet these minimum qualifications.
- c. List duties and responsibilities
- d. Limit scope of authority

2. Written Applications

- a. Every applicant should complete a written application. This helps demonstrate due diligence in screening potential employees, allows the church/ministry to determine an applicant's qualifications, and ensures that no evidence suggests that the applicant may commit an act of misconduct. The church/ministry should read each application carefully before proceeding.
- b. The church/ministry should develop a standard job application. This should only ask questions related to the position.

- c. The church/ministry should not discriminate on the basis of race, color, sex, age, or national origin, so the application should not contain questions that would obtain such information.
 - d. The church/ministry should only accept applications for positions that the church is trying to fill.
 - e. The church/ministry should not accept a resume in lieu of an application.
 - f. The screening process should begin with the completion of the job application.
3. Criminal Background Checks: There are a number of different methods for conducting criminal background checks on prospective employees. Check with your insurer, denominational or associational offices, or local school districts for options.
4. Checking References
- a. Although personal and professional references may not provide significantly helpful information, failure to check references may be used as proof of negligent hiring.
 - b. The church/ministry should (but is not required to) obtain the applicant's written consent prior to checking the references.
 - c. The church/ministry should develop standard reference questions (e.g., why the applicant left prior employment, whether the employer would rehire the applicant, the type of job performance that can be expected from the applicant, and so forth).
 - d. Reference checks should be documented showing person contacted, date, method of contact, and substance of questions and answers
5. Interviews
- a. The church/ministry should conduct an interview after the application is reviewed and after the background check has been performed.
 - Participants: understanding of role, purpose and function
 - Obtain Christian testimony
 - Discussion of church policies: protect children against child abuse, identify competent and safe workers and/or drivers, etc.
 - Advise of expectations of job performance
 - Obtain commitment to follow policies and meet performance expectations
 - b. The church/ministry should develop standard questions that are asked during the interview.
 - c. The interviewer(s) should take notes of the interview and should retain these in the applicant's personnel file.
6. Maintain personnel files on all workers for period of statute of limitations
7. Avoid discrimination in selection

- a. Race, color, sex, or national origin (Title VII: 15+ employees)
- b. Age (15+ employees in Texas; protected class is over 40 years old)
- c. Disabilities
 - May only look at whether the applicant can perform the essential functions of the job with or without reasonable accommodation
 - May not inquire about an applicant's disability, health status, or medical history, or require an applicant to submit to a medical examination before an offer of employment has been made [note: an employer may require a post-offer medical examination so long as it is consistently given, job-related, and consistent with a business necessity]

C. Disciplinary/Termination Policies

1. After selection provide:
 - a. Training
 - b. Education
 - c. Regular reviews of assigned scope, job duties and responsibilities contained in job descriptions - reallocate and adjust between workers to find efficiencies in performance
 - d. Regular worker performance reviews - measure and communicate to worker his or her level of performance and progress when compared to expectations and requirements
2. Employment At Will Doctrine
 - a. Right to terminate with or without cause
 - b. Exceptions
 - Employment contract
 - Discrimination
3. Progressive Disciplinary Procedure (Performance Issues)
 - a. Step One: Oral Warning
 - State the task or level of performance expected
 - Review worker's performance, including the manner in which performance failed to meet expectations
 - Steps expected of worker to correct
 - Deadline for correcting
 - Consequences if not corrected
 - Document in personnel file

- b. Step Two: Written Warning
 - Set forth same information included in oral warning
 - Warn worker his or her job is in jeopardy if deficient performance continues
 - Place copy of letter in personnel file
- c. Step Three: Termination
 - Letter to worker communicating termination
 - Exit interview
 - (i) If termination is for cause pursuant to progressive disciplinary policy, communicate reason for termination
 - (ii) Advise of the effect of termination on insurance and other benefits
 - (iii) Document the interview; place exit interview documentation and termination letter in personnel file
- 4. Suspension and Immediate Termination (Misconduct Issues):
 - a. If worker is accused of serious misconduct:
 - Suspend worker immediately, with pay (if employed) pending investigation
 - Investigate allegation of misconduct thoroughly
 - If misconduct confirmed, immediately terminate worker for cause
 - If probable cause for allegations exists and investigation is lengthy, consider suspension without pay
 - If worker innocent, reinstate
 - If evidence inconclusive, consider change of position and duties or termination without cause
- 5. Announcing the Decision

D. References

1. No reference policy
2. Neutral reference policy
3. Policy of providing factual references
 - a. Moral obligation
 - b. Avoid slander
 - c. Facts which are subject to proof
 - d. Must provide reference to prospective employers upon request for clergy who provided "counseling" while employed by church

- e. If provide references, document:
 - The person who was provided the reference
 - Date
 - Information disclosure
 - Place in personnel file

VII. Premises Liability Claims

A. General Premises Liability

1. Cause of Action
 - a. The owner/lessee had knowledge of some condition on the premises
 - b. The condition posed an unreasonable risk of harm
 - c. The owner/lessee did not exercise reasonable care to reduce or eliminate the risk
 - d. Such failure caused injury to a third party
2. Legal Duty on Owner/Lessee (depends on the category of persons to which the third party belongs)
 - a. "Invitee" on the premises at the express or implied invitation of the owner/lessee
 - b. "Licensees" are persons on the premises of the owner/lessee with the permission of the owner/lessee but without an invitation
 - c. "Trespassers" are persons on the premises without right, lawful authority, invitation, or permission

Note: Because churches and other religious organizations are held open to the public, persons entering onto the premises (during the appropriate times) are typically classified as invitees. The remainder of this section will deal with a landowner/lessee's duty to invitees.

- d. Concealed Dangerous Conditions – church has a duty to warn
- e. Attractive Nuisances (conditions on premises attractive to, but posing unreasonable danger to, children) – duty to make secure
- f. Inspections
 - A landowner only owes a duty to inspect the premises to discover dangerous conditions to its invitees.
 - Time Period to Inspect – test is reasonableness
 - Liability for what reasonable inspection would discover

3. Use of Facilities by Outside Groups

- a. Can be held liable for injuries that occur on its premises, even if the injuries occur during times the premises are being used by outside groups
- b. Determinative factor is degree of control church maintains over its premises during the outside group's use

B. Property owners/occupiers are liable for criminal acts of third parties if the general danger was foreseeable.

1. Foreseeability depends on the following factors:

- a. Similarity
- b. Recency
- c. Frequency
- d. Publicity
- e. Proximity

2. If a duty exists based upon this analysis, the landowner owes a legal duty to use ordinary care to protect invitees from criminal acts of third parties.

3. Consider adoption of Registered Sex Offender Accountability Policy.

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