

# Legal Issues in the Church: Top Concerns for Keeping Your Church Out of Court



**PRESENTED BY: DARREN B. MOORE**

**PEOPLE'S LAW SCHOOL  
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# What is a Church?



- Term is found but not defined in IRC
- Duck test
- May have different meanings depending on context
- Broad and includes temples, mosques, covens, etc.





# Organizing to Avoid Liability



**ORGANIZING AND INSURING TO  
PROTECT AGAINST LIABILITY**



# Incorporation



- Incorporated vs. Unincorporated
- Governance of the Church
- Decision-Making Authority
- Benefits of Well-Drafted Governing Documents





# Immunities in Personal Injury and Property Damage Claims



- No common law charitable immunity
- Ch. 84 TX CPRC provides limited statutory immunity
  - ✦ Must meet definition in Ch. 84 of “charitable organization”
  - ✦ If definition met, volunteers are immune from civil liability except to extent of their personal motor vehicle insurance
  - ✦ Churches and their employees must carry the requisite insurance to have immunity
  - ✦ Exceptions to immunity: conduct that is intentional, committed with willful neglect, conscious indifference, or reckless disregard; duties owed to members of the church
- Federal Volunteer Protection Act: protects qualifying volunteers (subject to conduct exceptions)



# Insuring to Minimize Exposure



- Objectives: Adequate coverage and appropriate coverage
- Charitable Liability & Immunity Act
  - ✦ \$500,000/person
  - ✦ \$1MM/occurrences of death/bodily injury
  - ✦ \$100,000/occurrences of property damage
- Types of coverage—look at your operations
- Coverage for affiliated ministries (insurance vs. separate incorporation)



# Operating to Avoid Liability



**CLAIMS ARISING FROM  
CHURCH CONFLICT**



# Claims Arising from Church Conflict



- **Ecclesiastical Abstention vs. Civil Court Jurisdiction**

*Congress is prohibited from passing laws that establish any religion or restrict the free exercise thereof*

- **First Amendment Concerns**
  - ✦ Constitutional implications of religious freedom restrict intervention even more severely than other voluntary associations
  - ✦ Civil courts lack jurisdiction to resolve any dispute where resolution would necessitate inquiry into ecclesiastical doctrine or polity
  - ✦ Civil courts have jurisdiction where the dispute can be resolved solely by neutral principles of law



# Ecclesiastical Abstention



- Membership disputes (admission and dismissal)
- Clergy dismissal
- Claims of defamation
- Claims of invasion of privacy
- Claims of clergy breach of fiduciary duty
- Disputes over ownership of property?
- Violation of bylaws?



## **Enforcing Governing Documents**



- **Enforcement by the courts**  
(neutral principles of civil, contract, or property rights)
- **Christian conciliation**  
(enforceable mediation and arbitration provisions)



# Avoiding Claims Arising from Church Conflict



- Well drafted governing documents, policies and policy manuals
- Clearly defined membership guidelines
- Conflict resolution procedures in your governing documents
  - ✦ Between members
  - ✦ Between a member and the church
  - ✦ Church discipline
- Express trust language in real property records



# Operating to Avoid Liability



## **CLAIMS ARISING FROM PERSONAL INJURY**



# Claims Arising from Personal Injury



- **Intentional Torts:** Actor intends the injury complained of
- **Negligence:** Failure to exercise care of a reasonably prudent person
  - ✦ **Vicarious Liability:** liability for acts of agent acting within course and scope of agent's responsibilities
  - ✦ **Direct Liability:** liability from actor's own conduct
    - Negligent Hiring
    - Negligent Retention
    - Negligent Supervision

} Examples



# Operating to Avoid Liability



## **CLAIMS ARISING FROM CHILD ABUSE**





## **Importance of a Child Abuse Prevention Policy**

Creates consistency  
in practices and  
reasonableness of  
procedures

Once adopted, the  
policy must be  
followed

### **Considerations for this policy:**

- Encompass all trained and volunteer workers
- Provide regular child abuse prevention/reporting training and feedback to all workers
- **Supervise Workers**
  - ✦ Two adult rule
  - ✦ Worker to children ratio
  - ✦ Identification/monitoring system
- **Visibility/security considerations of facilities**



# Reporting Child Abuse/Neglect



- Ch. 261 of Family Code provides definition
- Duty to report—made to CPS/law enforcement; non-accusatory; “immediately”
- Immunity for good faith reporting
- Overrides all privileges including the clergy privilege (Rule 505 of TRE)
- Class B misdemeanor for failure to report (no private cause of action in Texas)
- No duty to report once child reaches 18
- Immediately contact insurance company and church’s attorney



# Steps to Take in the Event of Child Abuse



- Investigate thoroughly—DON'T treat as frivolous!
- Maintain confidentiality of victims and accused
- Appoint someone to oversee matter
  - ✦ Cooperate with law enforcement
  - ✦ Keep victim's families advised of investigation status
  - ✦ Keep congregation informed as to matters that are not confidential
  - ✦ Prepare a media response
- Immediately suspend the accused
  - ✦ If evidence is inconclusive, consider reassigning accused
  - ✦ If abuse is confirmed, immediately dismiss accused



# Operating to Avoid Liability



## **CLAIMS ARISING FROM COUNSELING**



# Negligent Counseling



- Texas does not recognize a claim for clergy malpractice or breach of fiduciary duty against clergy
- Courts will not attempt to differentiate between clergy conduct/professional conduct when clergy is licensed (abstention applies)
- Other than religious practitioners, Texas requires people providing counseling to be licensed
- Regardless of licensing, communications and records are to be treated as confidential if not intended for further disclosure unless exception applies (e.g. child abuse)



# Sexual Exploitation Cause of Action



- Includes sexual contact, sexual exploitation, or therapeutic deception
- Ch. 81 TX CPRC provides statutory cause of action against “mental health service providers” (this includes clergy who provide counseling UNLESS purely religious, moral, or spiritual)
- Employer (i.e. church) can be liable for failing to conduct background check, failing to report/stop, failing to provide information to future prospective employer
- Defense: victim not emotionally dependent on provider and counseling stopped more than two years prior to conduct





# **Importance of a Ministerial Counseling Policy**

Clergy staff ministers  
on a spiritual level  
only

Clergy staff may refer  
individuals to  
licensed counselors,  
but it is the  
individual's  
responsibility to seek  
such counseling

## **Considerations for this policy:**

- Sessions are confidential unless:
  - ✦ Occurrence/intention to commit child abuse
  - ✦ Intention to commit a felony/suicide
  - ✦ Written permission
- May record sessions (audio/video/steno)
- Special procedure when ministering to children or a person of the opposite sex
- Prior consent of parent/custodian when ministering to a child
- Counseling only by designated clergy staff
- Signed memorandum acknowledging receipt and understanding of policy prior to sessions



# Operating to Avoid Liability



**CLAIMS ARISING FROM  
EMPLOYMENT PRACTICES**





## **Avoiding Liability Related to Hiring and Retention of Employees**

Negligence claims in this area are related to hiring, supervision, and retention of employees

These causes of action can exist even where the individual is a volunteer

- **Avoidance begins with reasonably prudent hiring practices**
  - ✦ Job descriptions
  - ✦ Written applications
  - ✦ Background and reference checks
  - ✦ Interviews
- **Avoid discrimination in selection process**
- **Maintain personnel files on all workers**
- **After hiring, continue to train/supervise/provide feedback on a regular basis**




# Avoiding Liability Related to Disciplinary/Termination Issues



- Explanation of the Employment At Will Doctrine
- Progressive Disciplinary Procedure
  - ✦ Step One: Oral Warning
  - ✦ Step Two: Written Warning
  - ✦ Step Three: Termination
- Suspension and Immediate Termination Procedure
- Announcing the Decision







## **Avoiding Liability when Providing References**

- No reference policy
- Neutral reference policy
- Policy of providing factual references
  - ✦ Moral obligation
  - ✦ Avoid slander
  - ✦ Facts which are subject to proof
  - ✦ Must provide reference to prospective employers upon request for clergy who provided counseling while employed by church



# Operating to Avoid Liability



## **PREMISES LIABILITY CLAIMS**



# General Premises Liability



- Legal duty of church depends on status of third party (invitee/licensee/trespasser)
- Invitees: ON the premises with the express or implied invitation of owner for mutual benefit
  - ✦ Duty to warn of concealed dangerous conditions
  - ✦ Duty to make safe attractive nuisances
  - ✦ Duty to conduct inspections to discover and remedy dangerous conditions
- Liable for criminal acts of third parties if general danger was foreseeable





## **Use of Facilities by Outside Groups**

- Church can still be held liable for injuries that occur on its premises
- Dependent on degree of control church maintains over its premises
- Must also consider potential issues with tax exemption



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