

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

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I. 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.
 - 3. Examples:
 - a. 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.
 - b. 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.
 - c. 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.

II. 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
 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
 - Consistency in Practices
 - Reasonableness of Procedures
2. Importance of Following the Policy
 - Once a policy is adopted, it must be followed
 - Possible negligence per se if not followed.
3. What the policy should consider
 - a. Worker enlistment (All paid and volunteer workers)
 - b. Worker training
 - Legal definition of child abuse
 - copy of the church’s policy for reporting child abuse
 - Regular additional training and education
 - c. Worker supervision
 - Two adult rule
 - 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
- 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 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

III. Claims Arising from Counseling

A. Type of Relationship

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.

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.
 - Intentional or reckless conduct
 - which was extreme and dangerous
 - which caused emotional distress
 - the resulting emotional distress was severe
 - Not mere insults, threats or indignities
 - 5. No license or exemption
 - 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
 - A. Clergy staff are not licensed
 - B. Clergy staff will minister on a spiritual level only, consistent with the

- Church's beliefs.
- C. 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.
 - D. Clergy staff may refer individuals to licensed counselors
 - E. Communications to clergy staff during ministerial counseling will be confidential and will not be disclosed, except in the following circumstances:
 1. any occurrence of or intention to commit child abuse
 2. an intention to commit a felony
 3. an intention to commit suicide
 4. with written permission
 - F. Sessions may be audio or video taped and the clergy staff may take notes.
 - G. Either two clergy staff or another specially designed procedure must be followed when ministering to children or a person of the opposite sex.
 - H. 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.
 - I. 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.
 - J. 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.

IV. 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. Protected Conduct - exercise of religious beliefs and activities
 - The courts will not intervene in matters or disputes which would require the courts to extensively investigate and evaluate religious tenants and doctrines.
 - Freedom to believe is absolute; freedom to act is subject to regulation for the protection of society where it involves purely secular activities that are not religious in motivation.
 - Examples:
 - *Green v. United Pentecostal Church International*, 899 S.W.2d 28 (Tex. App. – Austin 1995, writ den.). Church's decision to terminate license of minister was not subject to court intervention. "Questions of church discipline and government are left to the church." See also *Dean v. Alford*, 994 S.W.2d

392 (Tex. App. – Ft. W. 1999).

- *In re Pleasant Glade Assembly of God*, 991 S.W.2d 85 (Tex. App. – Fort Worth 1998). Whether minister and his wife misapplied church doctrine during their attempt to drive demons from a minor girl was not justiciable controversy.
 - *Tilton v. Marshall*, 925 S.W.2d 672 (Tex. 1996). Courts may not inquire into truth or falsity of religious belief. (Claim of fraud based on representation that Bible demanded adherent to tithing).
 - *Smith v. Tilton*, 3 S.W.3d 77 (Tex. App. – Dallas 1999). Promise of a miracle does not give rise to claim.
 - *Turner v. Church of Jesus Christ of Latter Day Saints*, 18 S.W.3d 877 (Tex. App. – Dal. 2000, rev. den.) – Missionary to Guatemala sued Church for breach of fiduciary duty. No claim.
3. Unprotected Conduct – 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
- Examples:
 - *Smith v. Tilton*, 1999 WL 649359 (Tex. App. – Dallas 1999). Representation in two “dun” letters that husband had pledged or vowed a contribution to the church where pledge occurred on a date after his death. Receipt of letters caused widow emotional distress.
 - *Tilton v. Marshall*, 925 S.W.2d 672 (Tex. 1996). Claim recognized based on pastor’s representations that he would personally read, touch, and pray over contributor’s prayer requests (claim stems from pastor’s promise to perform concrete acts). Query: If pastor promised that requests would be answered?
 - *Sanders v. Baucum*, 929 F. Supp. 1028 (USDC – ND Texas 1996). If a clergy person holds himself out as having skill and expertise of secular professional and undertakes to provide secular services, he can be held to the same secular standard of care by which secular professionals are held under similar circumstances.
 - *Guinn v. Church of Christ of Colleyville*, 775 P.2d 766 (Okla. 1989). Where church discipline involved a person not presently a member of the church, First Amendment offers no protection. First Amendment protects right to withdraw from membership. But see *Smith v. Calvary Christian Church*, 614 N.W.2d 590 (Mich 2000), where the court holds that whether a person is a present or former member is not dispositive; the question turns on informed consent.

B. Enforceability of governing documents are the issue

- 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.
- 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 principals 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:
 - 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
 - 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.
- 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

V. Claims Arising from Sexual Misconduct in the Workplace

- A. Prerequisites with Respect to the Employer
 - 1. Employ 15 or more employees for each work day in each of 20 or more calendar weeks in the current or preceding calendar year.
 - 2. Engage in an industry affecting commerce.
- B. Employee must file written claim with EEOC or Texas Commission on Human Rights prior to filing lawsuit.
- C. Quid Pro Quo or Economic Harassment
 - 1. Employer is strictly liable for the quid pro quo or economic harassment conduct of supervisory employees.
 - 2. Elements of cause of action:
 - a. The employee was a member of a protected class.
 - b. The employee was subjected to unwelcome harassment in the form of sexual advances or request for sexual favors.
 - c. The harassment complained of was based on sex.
 - d. A tangible employment action resulted from the employee's refusal to submit to a supervisor's sexual demands, by changing the terms or conditions of the employee's employment.
- D. Hostile Work Environment Harassment.
 - 1. Elements of cause of action:
 - a. Plaintiff belongs to a protected class
 - b. Plaintiff was subjected to unwelcome sexual harassment
 - c. Harassment complained of based upon or because of sex
 - d. Harassment complained of was sufficiently severe or pervasive to create an abusive working environment (it affected a term, condition, or privilege of employment).
 - e. The employer is liable as follows:
 - (i.) If a co-worker commits sexual harassment and the

employer knew or should have known of the harassment and failed to take prompt, effective or remedial action.

(ii.) If a supervisor commits the sexual harassment, the employer is liable unless:

- The employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior; and
- The employee reasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

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.
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. 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.
 - a. District and County Clerks' Offices
 - b. Private Investigative Agency
 - c. Department of Public Safety (Records.txdps.state.tx.us)
 4. Checking References.
 - a. Although personal and professional references may not provide significantly helpful information, failure to check references may be used as proof 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).
 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. Avoid discrimination in selection
 - a. race, color, sex, or national origin (Title VII: 15+ employees)
 - b. Age (15+ employees in TX; protected class is over 40 years old)
 - c. Disabilities

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; and
 - 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 – Duty to warn
- e. Attractive Nuisances
- f. Inspections
 - (i.) a landowner only owes a duty to inspect the premises to discover dangerous conditions to its invitees.
 - (ii.) Time Period to Inspect – test is reasonableness
 - (iii.) Liability for what reasonable inspection would discover
3. Use of Facilities by Outside Groups
 - 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.
 - 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
 - Similarity
 - Recency
 - Frequency
 - Publicity
 - 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.

VIII. Claims Related to the Internal Revenue Code

- A. Private Benefit/Private Inurement/Excess Benefit Transactions
 1. Private Benefit
 - a. Implicit in the requirement that a church be operated for charitable (public) purposes
 - b. Benefits cannot be limited to a defined and unchanging group of persons (i.e. a closed class)
 2. Private Inurement
 - a. Subset of private benefit
 - If an organization allows its assets to inure to an insider, it violates not only the private inurement prohibition but also operates to benefit a private interest
 - b. Private inurement can result in revocation of tax-exempt status
 - Can also result in intermediate sanctions as excess benefit transactions
 3. Intermediate Sanctions/Excess Benefit Transactions
 - a. Transactions between a public charity (e.g. a church) and a disqualified person (term defined in I.R.C. as a person with substantial influence over the affairs of the organization) whereby the public charity gives more than fair market value (and excess benefit) to the disqualified person
 - b. Excess benefit given is subject to an excise tax to be paid by the disqualified person along with the possibility of an excise tax by decision makers assenting to the transaction
 - c. May also result in revocation of tax-exempt status
- B. Attempting to influence legislation (no substantial efforts)

1. Lobbying is an attempt to influence legislation by propaganda or otherwise
2. Legislation is any action by congress, by any state legislature, by any local council or similar governing body, or by the public in referendum, initiative, constitutional amendment, or similar procedure
3. Attempting to influence legislation includes contacting (or urging the public to contact) legislators or their staff for the purpose of proposing, supporting or opposing legislation; advocating the adoption or rejection of legislation (construed broadly by the courts)
4. Attempting to influence legislation does not include nonpartisan analysis, study or research, technical assistance or advice to a governmental body in response to a request for assistance
5. Substantial is not defined but an unpublished IRS General Counsel Memorandum (cannot be relied suggests looking to cost, time or physical effort, importance to the organization, and frequency of legislative activities)

C. Intervening in Political Campaigns

1. Absolute prohibition
 - a. Must be part of a political campaign
 - b. Campaign must be with respect to an individual who is a candidate
 - c. Must be a campaign for public office
2. Penalties
 - a. Revocation of exemption
 - b. Initial tax of 10% of “political expenditures”
 - c. If not corrected, tax of 100%
3. Allowable activities (further exempt purpose):
 - a. Nonpartisan voter registration guides
 - b. Nonpartisan voter drives
 - c. Educational/informational talks with invitations extended on a nonpartisan basis
 - d. Student newspaper endorsing a candidate
 - e. Political Science course requirement to work in campaign

IX. 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 must 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. Objective of Insurance

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

C. 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.

X. Questions & Answers

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