



2018 “XPastor” Conference

“Legal Threats to Take Seriously”

Dallas, Texas

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Issue #1:
Litigation Review

The Top 5 Reasons Religious Organizations Were in Court in 2016

2016
property disputes 8.7%
sex w/child 8.3%
personal injuries 8.3%
insurance disputes 6.6%
zoning, clergy termination 4.5%

Issue #2:
Criminal Background
Checks

1. a case of immense importance
2. background
3. a youth soccer league's liability
4. failure to conduct a criminal background check on volunteer coaches
5. ordinarily no duty to protect others from criminal acts
6. exception:
 - "special relationships" including minor participants in sports leagues "based on the vulnerability of children and the insidious methods of sexual offenders," AND
 - foreseeable harm

7. “defendants had a duty to require and conduct criminal background checks of defendants’ employees and volunteers who had contact with children in their programs”
8. the risk of pedophilia in youth sports and activities
9. risk management
 - 1) An interview.
 - 2) A written application.
 - 3) Obtain “institutional references” from other institutions (i.e., churches, schools, youth sports teams) with which an applicant has worked with minors.

- 4) A six-month rule
 - 5) "Benchmark" church policies by comparing them with the policies of other charities and the public schools.
 - 6) Adopt a two-adult policy prohibiting a child from being alone with an unrelated adult.
 - 7) A criminal background check consisting of a nationwide search of sex offender registries, and a national criminal file search. Many denominations and insurance companies offer special pricing for such checks.
10. NOTE: criminal records checks not sufficient (Florida case)

Issue #3:
Child Abuse Reporting
Update

Failure to Report Child Abuse

1. all states require reporting of child abuse
2. actual knowledge or reasonable suspicion
3. what is reportable child abuse
 - any physical, sexual, emotional abuse of a child
 - by a parent or guardian?
4. definition of “child”
5. Mandatory and permissive reporters
6. significance to clergy

Child Abuse Reporting by Clergy -- 2017

"clergy" are mandatory reporters except for privileged information		"clergy" are mandatory reporters; NO privilege exception	everyone is a mandatory reporter; clergy privilege exception	everyone is a mandatory reporter; NO clergy privilege exception	"clergy" not mandatory reporters, but may be if a teacher, counselor, etc. (clergy privilege exception)	"clergy" not mandatory reporters, but may be if a teacher, counselor, etc. (NO clergy privilege exception)
AL	MO	CT	DE	IN	VA	AK
AZ	MT	MS	FL	NE	WA	DC
AR	NV	NH	ID	NJ		GA
CA	NM	WV	KY	NC		HI
CO	ND		MD	OK		IA
IL	OH*		TN*	RI		KS
LA	OR		UT	TX		NY
ME	PA		WY			SD
MA	SC					
MI	VT					
MN	WI					

* Limited "clergy privilege" exception

the clergy privilege

- defined
- 32 states – clergy who are mandatory reporters not required to report
- BUT:
- are you sure the privilege applies (often difficult to know)
 - ✓ for example, what if a third person present?
 - ✓ were you acting as a spiritual counselor at the time?
 - ✓ some states – the privilege only applies to courtroom testimony, not child abuse reporting
 - ✓ sleep test

Why Ministers Often Fail to Report

1. ignorance of the law
2. fear of being sued by the alleged perpetrator if the report is not substantiated [cf. limited immunity]
3. they report to someone else (senior pastor)
4. fear of their identity being revealed
5. alleged perpetrator is a friend of the pastor, or prominent church member
6. deal with it “internally” as a matter of church discipline
7. the report seems fanciful

3 Risks of Not Reporting

1. criminal (misdemeanor) liability for mandatory reporter
2. civil liability for mandatory reporter
3. civil liability for employing church
 - contingent liability for decades
 - expanded S/L, discovery rule

Civil Liability for Failure to Report: State Statutes

- ✓ Arkansas
- ✓ Colorado
- ✓ Iowa
- ✓ Michigan
- ✓ Montana
- ✓ New York
- ✓ Ohio
- ✓ Rhode Island

Civil Liability for Failure to Report: Court Rulings

Judicial Recognition of Liability for Failure to Report (No Statutory Basis)

Liability Recognized	Liability Rejected	
<ul style="list-style-type: none">• California• Indiana• Pennsylvania (federal court, negligence per se)	<ul style="list-style-type: none">• Georgia• Illinois• Iowa• Kansas• Maine• Minnesota• Mississippi• Missouri• New Hampshire	<ul style="list-style-type: none">• Pennsylvania• South Carolina• Texas• Utah• Washington• West Virginia• Wisconsin

- Liability based on mandatory reporter status.
- Most of these cases are decisions by intermediate level appellate courts, meaning that the highest state court has not addressed the issue. Further, other intermediate level appellate courts in the same state may reach a different conclusion.

statutes of limitation

- 44 states recognize the discovery rule in cases of child molestation
- policy considerations
- persistent risk
- insurance policies
 - ✓ retention
 - ✓ insurance archaeologists

- Former Penn State president Graham Spanier sentenced to 60 days in prison (plus a year of house arrest) for failing to report allegations of child abuse by Jerry Sandusky
- endangering the welfare of a child by not reporting reasonable suspicion of child abuse
- prosecutor: Spanier is “a failure as a leader who chose to protect the school’s reputation over the well-being of innocent children”
- “I deeply regret that I did not intervene far more carefully” (Spanier)

- “this is a fall from grace that is both unfortunate and well deserved” (sentencing judge)
- 2 other University officials sentenced to prison terms; one told the court during sentencing: “It sickens me to think I might have played a part in children being hurt. I am sorry that I did not do more, and I apologize to the victims.”
- relevance to church leaders

Issue #4:
Sexual Harassment
Update

- Form of sex discrimination under “Title VII” of CRA of 1964
- Covered employers:
 - ✓ 15+ employees
 - ✓ interstate commerce
 - ✓ Employees of affiliates?
- State laws

two types of conduct:

1. "Quid pro quo" harassment, which refers to conditioning employment opportunities on submission to a sexual or social relationship; and
2. "Hostile environment" harassment, which refers to the creation of an intimidating, hostile, or offensive working environment through unwelcome verbal or physical conduct of a sexual nature.

The Supreme Court has cautioned that Title VII's ban on sexual harassment is not "a general civility code." Title VII does not prohibit teasing, offhand comments, or isolated incidents that are not "extremely serious." Rather, the conduct must be "so objectively offensive as to alter the conditions of the victim's employment." *Faragher v, City of Boca Raton*, 118 S.Ct. 2275 (1998).

Employer Liability: A Summary

	scenario	employer liability
1	harassment committed by a NONSUPERVISORY employees	employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action
2	quid pro quo harassment by a SUPERVISORY employee	employer liable if terms or conditions of employment adversely affected, whether or not it was aware of the harassment
3	hostile environment harassment by SUPERVISORY employee with an adverse employment decision	employer is liable
4	hostile environment harassment by a SUPERVISORY employee with no adverse employment action	employer is liable
5	employer's affirmative defense to liability for a SUPERVISOR's hostile environment harassment not accompanied by an adverse employment decision	<ol style="list-style-type: none"> (1) employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior (2) the victim unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer

- Survey data
- The importance of a sexual harassment policy

- Define sexual harassment (both quid pro quo and hostile environment) and state unequivocally that it will not be tolerated and that it will be the basis for immediate discipline (up to and including dismissal).
- Contain a procedure for filing complaints of harassment with the employer.
- Encourage victims to report incidents of harassment.
- Assure employees that complaints will be investigated promptly.
- Assure employees that they will not suffer retaliation for filing a complaint
- Discuss the discipline applicable to persons who violate the policy.
- Assure the confidentiality of all complaints.

Case studies addressing sexual harassment in churches

Case	Church Liable?	Facts
Sanders, 134 F.3d (331 (5th Cir. 1998)	No	Church not guilty of hostile environment sexual harassment because it “took <u>prompt remedial action</u> upon learning of the minister’s misconduct.”
Jonasson, 115 F.3d 436 (7th Cir. 1997)	Yes	Church school liable for harassment based on principal’s longstanding and pervasive misconduct, and <u>church’s waiting years to act.</u>
Elvig, 375 F.3d 951 (9 th Cir. 2004)	Yes	Female associate pastor claimed that male senior pastor repeatedly engaged in sexually offensive <u>behavior that created a hostile environment, and that the church failed to respond when she reported it.</u>
Dolquist, 2004 WL 74318 (D. Kan. 2004)	Yes	Female pastor claimed that director of music subjected her to sexually inappropriate behavior which was rude, offensive, oppressive, humiliating, degrading, embarrassing, annoying and emotionally upsetting. Such conduct included (1) embracing her in an extremely hard, suggestive and sexual manner; (2) making comments about the drug Viagra; (3) making explicit gestures and comments; and (4) inappropriate touching. The church dismissed the pastor. The court ruled that the church could be liable for the music director’s acts since it took no action when she complained

Case	Church Liable?	Facts
Father Belle, 642 NYS2d 739 (A.D. 1996)	Yes	<p>A male employee of a religious charity engaged in repeated acts of sexual harassment against female employees. The director was the charity's highest ranking employee. The harassment included inappropriate and demeaning communications, unwelcome sexual overtures, unwanted physical contact, and <u>threats to fire the women (or make their jobs more unpleasant) if they did not submit to his advances</u>. The director repeatedly begged each woman to be his "girlfriend" or "mistress," and to marry him or sleep with him. <u>He frequently demanded that the women attend nonwork-related lunches with him</u>. A personnel committee was apprised of these actions, and it conducted an investigation which came to the attention of the governing board. The court concluded that the charity was liable for the director's acts of harassment, which it concluded were both quid pro quo and hostile environment sexual harassment. The court noted that under federal law an <u>employer is "strictly liable" for quid pro quo harassment</u>, since the harasser has the authority to alter the terms or conditions of the victims' employment based on their response to his advances. And, since the director was the highest ranking supervisory employee, the charity was strictly liable for hostile environment harassment caused by his actions.</p>
Black, 471 N,W,2d 715 (Minn. App. 1991)	Yes	<p>A female associate pastor claimed that the senior pastor repeatedly made <u>unwelcome sexual advances toward her and insisted on her companionship outside of church over her objections</u>. The court rejected the supervising pastor's claim that the woman was prevented from suing because she had "consented" to the supervising pastor's conduct.</p>

Case	Church Liable?	Facts
Smith, 63 F.Supp.2d 694 (E.D.N.C. 1999)	Yes	<p>A federal court in North Carolina ruled that the <u>First Amendment did not prevent it from resolving a sexual harassment claim brought by two nonminister church employees against their church</u>. A church's receptionist and the pastor's secretary (both of whom were female) claimed that the pastor had sexually harassed them, and they sued the church and a denominational agency for damages. They claimed that the church defendants were responsible for the pastor's repeated acts of hostile environment sexual harassment since he was a supervisory employee. In particular, the women alleged that the defendants failed to take timely and appropriate action to correct the problem. The <u>court noted that an employer is responsible for sexual harassment if it "knew or should have known about the conduct but failed to stop it."</u></p>
Smith, 495 SE.2d 395 (N.C. App. 1998)	Yes	<p><u>Three female church employees (the "plaintiffs") sued their Methodist church and various Methodist agencies as a result of the sexual misconduct of a pastor</u>. The lawsuit alleged that the pastor "committed inappropriate, unwelcome, offensive and nonconsensual acts of a sexual nature against the plaintiffs, variously hugging, kissing and touching them, and made inappropriate, unwelcome, offensive and nonconsensual statements of a sexually suggestive nature to them." The plaintiffs further alleged that the pastor's actions amounted to sexual harassment. <u>The lawsuit alleged that the local church and Methodist agencies "knew or should have known" of the pastor's propensity for sexual harassment as well as assault and battery upon female employees and that they failed to take any actions to warn or protect the plaintiffs from his wrongful activity."</u></p>

Case	Church Liable?	Facts
Davis, N.E.2d, 70 Ohio App. 3d 359 (Ohio App. 1991).	Yes	An Ohio court ruled that an Episcopalian minister and his employing church could be sued for the minister's alleged acts of sexual harassment. A woman served some ten years as parish secretary of an Episcopal church prior to the arrival of a new minister. Soon after the arrival of the new minister, the secretary began alleging that the minister was engaging in acts of sexual harassment against her. The court noted that "it is quite clear that the alleged sexual harassment did occur within the scope of [the minister's] employment with [the church]. He was the supervisor of [the secretary], and most of the alleged sexual harassment took place during working hours at the work place."
Bolin v. Oklahoma Conference, 397 F.Supp.2d 1293 (D. Okla. 2005).	No	A federal court in Oklahoma ruled that a church was not liable on the basis of sexual harassment for the conduct of a minister. A woman was employed by a denominational office as an administrative assistant. Her supervisor was one of the regional church's officers. She sued the denomination for sexual harassment based on the following alleged acts of her supervisor: (1) The supervisor offered to boost her husband's compensation if she would "cooperate" with him, which she interpreted to mean a sexual relationship. Her husband was a pastor of a local church affiliated with the regional church. (2) She alleged that the supervisor blocked her path by standing in a doorway, and began rubbing her shoulders while saying that "I'm sorry it has to be this way." (3) The supervisor continued to sexually harass her for the next few months by brushing against her as he took things from her or handed them to her. The supervisor terminated her, and she sued the supervisor and denomination

Case	Church Liable?	Facts
		for sexual harassment. The court noted that for the denomination to be liable for the supervisor's hostile environment sexual harassment the plaintiff had to show that "the workplace was permeated with discriminatory intimidation, ridicule and insult, that was sufficiently severe or pervasive to alter the conditions of her employment and create an abusive working environment." The court concluded that the plaintiff failed to show that the conduct of her supervisor was "so extreme as to change the terms and conditions of her employment."

insurance coverage?

Issue #5:
Workers Compensation
for Volunteers

- A New York court ruled that workers compensation insurance is an exclusive benefit for job-related injuries, and therefore a worship leader who was injured when she tripped over a bass guitar cable could not bring a civil lawsuit against her church.
- Several state workers compensation laws cover some volunteers
- Church leaders should check with insurance agent to determine need for coverage
- a \$25 million case

Issue #6:

15-Passenger Van Update:

Are Newer Vans Safe?

- recent safety measures
 - ✓ electronic stability control (ESC, 2011)
 - ✓ rearview cameras (2018)
 - ✓ forward collision alerts (2022)
- are they safe enough to use?
- safety improvements do NOT address:
 - ✓ high center of gravity
 - ✓ flat sides contribute to instability in crosswinds
 - ✓ seating configurations place excess weight on left rear tire (due to walkway to the rear seats being on right side) and contribute to instability

- ✓ designed for the less rigorous standards of transporting cargo
- ✓ "width of stance"
- ✓ inexperienced drivers
- ✓ lack of maintenance, tire exams, etc.
- ✓ continue to be banned by public schools
- BEST PRACTICE . . .

NHTSA Current Recommendations

- tire pressure (inspect before each use; check B pillar recommendations)
- spares (they weaken with age even if unused)
- driver (CDL preferred; regular experience)
- attention (driver rested, attentive at all times, no cell phone use, limit conversation with passengers, 8 hrs/24hrs)
- speed (safe speed, slow down in rain)
- occupancy (fewer than 10)

- cargo (forward of rear axle; nothing on roof; no trailer)
- seat belts (80% of fatalities not wearing seat belt)

Issue #7: Insurance

1. the “intentional misconduct” exclusion
2. the “employment practices” exclusion
3. the “notify promptly” condition
4. misrepresentation on the application
5. adequate coverages
6. policy retention
7. insurance committee
8. extraterritorial exclusion

Insurance Checklist

1. check with insurer about sexual abuse coverage
2. employment practices exclusion?
3. review applications for inadvertent errors
4. coverage limits adequate?
5. workers compensation
6. retention policy
7. importance of prompt notification

8. D & O coverage
9. unique items such as stained glass windows, pipe organs, handbells, artwork, and sound equipment may require special "endorsements"
10. conduct periodic inventories of property to prove claims in the event of loss or destruction.

11. Check to see if coverage is limited to the market value of damaged or destroyed property. If so, consider obtaining replacement cost coverage.
12. Check exclusions under your policy. Some risks, such as earthquakes, mold, and sewer or drain backup, may be excluded and require special endorsements.
13. be aware of coinsurance implications

insurance committees

Issue #8:
Noted Briefly

Risk Multipliers

1. joint and several liability

AL NC

DE PA

MD RI

MA VA

2. blue states

3. judicial "hell holes"

- St. Louis
- California
- NYC
- FL supreme court and south FL
- New Jersey

- Cook, Madison, St. Clair counties in IL
- Louisiana
- Newport News, VA
- Hidalgo county, TX

“watch list”

- GA supreme court
- McLean county, IL
- Montana supreme court
- northern district of TX federal court
- PA supreme court
- Pittsburgh, PA
- West Virginia

RONR 11th edition (2011)

Is there a difference between receiving,
accepting, or adopting a report?

- “receive” a report = having it read
Example. Each monthly board meeting the treasurer reads his report, and the chair (senior pastor) asks for a motion to “receive” the report. MSP that the treasurer’s monthly report be received. Is this a correct parliamentary practice?
- effect of a motion to “receive”
key point: informational reports containing no motions – no motion to adopt is necessary; chair instructs secretary to file with minutes
- adopt = accept
- entire report becomes the act of the assembly (~ endorsement of every word, fact, and conclusion)
- best practice – accept CPA report (minimizes risk to treasurer and board that “adopts” or “accepts” each treasurer’s report)

Other Developments

1. Several donors lost charitable contribution deductions in 2016-17 due to the church's failure to provide a receipt complying with the code and regulations.
2. An Indiana appeals court ruled that a husband and wife could sue the state for the emotional suffering they experienced as a result of the disclosure of the husband's identity as the person who reported five neighbors on his church bus route to the child abuse hotline.

3. An Ohio court awarded \$4.5 million in damages to parents whose 2 daughters were sexually molested by an associate pastor AND ruled that the damages were not covered by the church's liability insurance.
4. A New York court authorized a church to ignore the investment restrictions in a decedent's will and invest estate funds under the Prudent Investor Act.

5. A Pennsylvania court rejected a church's request for permission to invade the principal of a \$1 million charitable trust whose terms provided only for distribution of income. The court concluded:

The plain language of Article IV does not permit discretionary distributions from the corpus of the trust when needed or requested by the church

in order to sustain its financial viability. To the contrary, the language indicates unequivocally that the trust is to be held perpetually and only the income is to be distributed to the respective beneficiaries. Invasions of principal would deplete the trust so that it would not be perpetual, in violation of the settlor's clearly-articulated intent.

6. A federal district court in Colorado ruled that sex offender registries violate the Constitution's ban on cruel and excessive punishments.

- an appeal is likely
- former Supreme Court precedent (Alaska; 2003; 5-4)
 - ✓ Registries based on "grave concerns over the high rate of recidivism among convicted sex offenders and their dangerousness as a class."
 - ✓ The Court quoted from a U.S. Department of Justice study: "When convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault."

- ✓ In a 2003 ruling upholding the constitutionality of the Connecticut sex offender registry, the United States Supreme Court observed: "Sex offenders are a serious threat in this Nation. In 1995, an estimated 355,000 rapes and sexual assaults occurred nationwide. Between 1980 and 1994, the population of imprisoned sex offenders increased at a faster rate than for any other category of violent crime. As in the present case, the victims of sexual assault are most often juveniles. In 1995, for instance, a majority of reported forcible sexual offenses were committed against persons under 18 years of age. Nearly 4 in 10 imprisoned violent sex offenders said their victims were 12 or younger. When convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault."

7. A Florida appeals court ruled that a trial court erred in dismissing a lawsuit against the church by a member of a church's worship team who was severely injured when he tripped over the bass player's unsecured electric cord and fell off the stage.
8. A federal appeals court (11th cir.) dismissed an appeal by a dismissed SDA minister who claimed that the termination of his retirement benefits under a denominational plan for not "remaining as a member in good standing of the denomination" following his dismissal constituted a breach of contract, interference with contract, unlawful conversion, and violation of SDA governing documents. The court concluded:

“A dispute involving the application of church doctrine and procedure to discipline one of its members is not appropriate for secular adjudication. [The plaintiff’s] claims, which were predicated on his defrocking, his excommunication, and the termination of his retirement benefits due . . . would have required encroachment into matters of church dogma and governance.”

Impact on screening church
volunteers and employees

Bonus Material: Computer Privacy

- recent incident
- the *Quon* case (2007)
 - ✓ employees have a legitimate expectation of privacy in their workplace AND employer-provided computer
 - ✓ negated by:
 1. consent
 - express--importance of a computer policy
 - implied--IT access
 2. employer's limited authority to search if:
 - the employer has a legitimate work-related reason for the search, and
 - the search was not excessively intrusive in light of that justification.
 - ✓ the "ministerial exception"?

Resources

Churchlawandtax.com

CT REALSTORIES



Richard Hammar Answers Your Tax Questions

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Church Law & Tax Report

Church Finance Today

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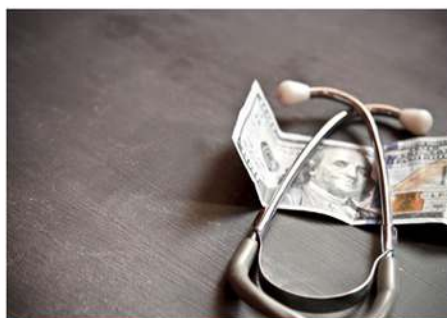
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The Return of Tax-Free Medical Premium Payments

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Alerts

- Church Law & Tax Update (Weekly) ?
- Church Finance Update (Twice Monthly) ?
- Church Management Update (Twice Monthly) ?
- Richard Hammar's Essential Reminders (Weekly) ?
- Managing Church Risk (Twice Monthly) ?

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This Week

Richard R. Hammar
Senior Editor | Bio



FEATURED

The Pastor's Sabbatical and Tax Implications

How duration, expenses, and compensation need to be handled.
Elaine Sommerville



High Risk Youth Activities

What churches should know about swimming events and trampolines.
Tony Gill

Are your small groups changing lives?

REBOOT Your Small-Group Ministry

LEARN MORE

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Current Issues