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LEGAL HOTSPOTS AND RISK MANAGEMENT FOR CHURCHES AND NONPROFITS - SIX “TRAPDOORS” THAT WILL CLOSE YOUR MINISTRY

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Introduction - Chart of most common claims and cases of risk for churches and nonprofits

1. Governance, Entity Structure, and Asset Protection

- a. Sound governance structure- Incorporation and Tax exemption separate concepts.
 - i. Compliance with federal and state requirements
 1. IRS-required policies: whistleblower, conflicts of interest, record retention;
 2. No private inurement or benefit;
 3. No political campaign activity;
 - ii. Majority of board unrelated, unpaid:

If closely controlled by a board of directors comprised of related persons, have to prove clearly that the organization meets requirements to show it is not operated for private interests. *See* Treas. Reg. 1.501(c)(3)-1(d)(1)(ii) and (iii) for examples. *See also Bubbling Well Church of Universal Love, Inc. v. Commissioner*, 74 T.C. 531 (1980) *aff'd*, 670 F.2d 104 (9th Cir. 1980): Tax Court denied tax exemption, since “church” was controlled by three family members.
 - iii. Important risk management provisions for church bylaws: a) member covenants or agreement; b) church disciplinary process defined; c) Christian dispute resolution clauses.
 - iv. Church Governance in Bylaws should cover Members, Board of Directors, officers, teams and committee and financial aspects at high level pointing to policies and procedures manual. *See* <https://www.simsshowerslaw.com/the-power-of-well-drafted-church-bylaws>.
- b. Seeking a §501(c)(3) singular/group formal determination for a church.
 - i. Benefits
 - ii. Negatives
 - iii. Group Exemption for Church Associations/Affiliates
- c. Reclassifying nonprofit as church or association trends-BGA, Samaritan Purse, Focus on Family intervarsity etc.-Pros, Cons and concerns.
- d. Asset Protection Structure options (often used for property, schools or other) -
 1. - As a SMNPLLC, if allowed under state law;
 2. Integrated Auxiliary or

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3. As a separate §501c3, or as a subsidiary/IA of parent nonprofit/church you must adhere to corporate formalities and act as a separate entity with leases service agreements and other legal connections to keep legally separate and sound.

- e. . Key provisions to keep liability shield:
 - 1. Adhere to Corporate formalities-board meetings and minutes;
 - 2. No interlocking boards;
 - 3. No commingling of assets/accounts; and
 - 4. Key agreements for establishing separateness.
- f. **Chart for reference on PowerPoint**

2. IRS/Foreign Grants and Involvement

- a. Charitable Donations –Designated vs. Restricted *IRC §170*.
 - i. [End of Year Donations: The Gift that Keeps on Giving?](#)
 - ii. Benevolence – [Am I Giving Away the Church This Christmas?](#)
 - iii. Deputized Fundraising.
- b. Foreign Giving – Intent and Control.
 - i. *ESCO Corporation* and *Yasrebi and the Child Foundation*.
 - ii. [Granting Money from a US Charity or Church to a Foreign Individual or NGO: Substantial Risks and Best Practices.](#)
- c. Hidden Risk for Sponsoring R-1 Visa Applications.

3. Intellectual Property

- a. Copyright Ownership – 17 U.S.C. § 100 *et. seq.* (Copyright Act of 1976)
 - i. Work for Hire Doctrine. – *Avtec Sys. Inc. v. Peiffer*, 21 F.3d 568 (4th Cir. 1994). Copyrighted work created in scope of employment if 1) work is of the type for which the employee was hired to perform; 2) creation of work occurred “substantially within the authorized time and space limits” of employment; and 3) work is wholly or partially motivated to benefit employer. *Id.*
 - 1. Pastors and their sermons.
 - a. *Weber, et. al. v. Commissioner of the Internal Revenue Service*, 60 F.3d 1104 (1995). Ministers are employees of their church.
 - b. *McKenna v. Lee*, 318 F. Supp. 2d 296 (E.D.N.C. 2002). Off-site/off-hours work not sufficient to demonstrate not “work for hire” if other elements sufficiently demonstrated.
 - 2. Directors or Founders – their books, publishing, speaking engagements
 - ii. Options and warnings for church/entity
- b. Trademark Ownership – 15 U.S.C. § 1051 *et seq.* (The Lanham Act)
 - i. Trademarks are valuable personal property – public goodwill and name recognition.
 - ii. [What’s In a Name?: Non-Profit Branding and Trademarks](#)
- c. Protecting the brand and goodwill of the church/entity
 - i. *Park’N Fly, Inc., v. Dollar Park & Fly, Inc.*, 469 U.S. 189 (1985). Federal trademark registration provides owners with national protection to secure the goodwill of business and protect consumers.

- ii. *Lone Star Steakhouse & Saloon, Inc. v. Alpha of Va, Inc.*, 43 F.3d 922 (4th Cir. 1995). Trademark infringement claim requires 1) a valid trademark and 2) another’s use of a colorful imitation of the trademark that is likely to cause confusion.
- d. Reducing/Avoiding Copyright Infringement Claims.

4. Safety / Security for Churches, Schools, and Ministries

- a. Faith-based shooting deaths: Between 1999 and 2017, there have been 617 faith-based shooter deaths in the US. See [Violence in the Church article](#).
 - i. 2014 – 74 violent deaths in faith-based orgs.
 - ii. 2015 – 77 deaths;
 - iii. 2016 – 66 deaths; and
 - iv. 2017 – 118 deaths (92 not including Sutherland Springs).¹
- b. School shootings: Safety in public (94%) v. private schools (6%).²
- c. **General Rule:** Premises liability: Owner has to protect the patrons EXCEPT: unforeseeable, unreasonable risks (“remote and doubtful dangers”).
- d. Foreseeability of violent crime is based on numerous factors:
 - i. Whether criminal activity previously occurred on or near the property;
 - ii. How recently and how often
 - iii. How similar the conduct was to the conduct on the property
 - iv. What publicity was given to the occurrence so the church/landlord should have known.
 - v. *Richard Hammar has addressed the topics of foreseeability and security in various pieces for Church Law & Tax, including “Failed Shooter Prevention and Fault,” “A Church’s Knowledge and Liability,” and “Can Technology Help Prevent Crime and Violence at Church?”*
- e. Cases
 - i. *Lopez v. McDonald’s Corp.*, 193 Cal. App. 3d 495 (1987). Gunman entered, opened fire immediately, killed 21. Court found store didn’t have a duty to protect, because the likelihood of the assault was SO remote and unexpected that it was not reasonably foreseeable. The Lopez court considered that in the “setting of modern life,” including the crimes committed in the vicinity of McDonalds, did not make a “once-in-a-lifetime” massacre reasonably foreseeable. *Id.* at 509-10. Motion for summary judgment was granted.
 - ii. *Contrast: Axelrod v. Cinemark Holdings, Inc.*, 65 F. Supp. 3d 1093, 1098–1100 (D. Colo. 2014). The Aurora, CO, theater was sued after the shooter James Holmes killed a dozen people in the theater. He had left the movie theater through a side door, which he propped open, and then re-entered through the side door with body armor and weapons and started killing movie-goers. The judge examined the same question as in *Lopez*, but distinguished *Lopez*. However, the judge reasoned that

¹ <https://www.churchlawandtax.com/blog/2018/march/violence-at-churches-in-2017.html>.

² <https://www.cato.org/blog/are-shootings-more-likely-occur-public-schools?fbclid=IwAR3ZDOLbORSuC4HocqKWInIcjbaxt7qMZyJLOhFYkOLgFEP6gCbYD5v2-1g>

what was so unlikely given the setting of modern life in 1984 was not the same as what would be unlikely in 2012. Among other things that the theatre may or should have been aware of, the judge noted that mass shooting and killings had been on the rise recently (noting there were 31 mass shooting incidents between the *Lopez* and *Axelrod* incidents).

- f. Upshot: look at the “setting of modern life,” including information and warnings published by the government (Federal, state, and local), historical incidents of violence (i.e., shootings at a YWAM base and church in 2007, the 2015 Charleston Church shooting, 2017 Sutherland Springs Church shooting), and the trends in the neighborhood. You cannot be willfully ignorant; you must examine the factors that would be reasonably known to you that may impact incidents of violent crime.
- g. Developing a Security Plan
 - i. Guns or No Guns: Check state statutes in regard to carry and conceal carry laws on church/school property.
 - ii. Preparing Congregation, Staff, and Volunteers
 - iii. Drafting a Written Policy
 - iv. Identifying a Safety/Security Team
- h. Practical Steps to reduce potential active shooter situation in Christian schools and ministries.
- i. See articles, “[Protecting your church in Troubled times: Guide to church security protocols](#)” and “[Five Steps to Building an Effective Safety Team](#)” *contact Simms Showers for article.*

5. **Employment**

- a. Consideration of what employment laws apply to churches.
- b. Who is a “minister” for the purposes of the so-called “ministerial exception?”
 - i. Supreme Court precedent: compare: *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020) with *Bostock v. Clayton Cnty., Georgia*, 590 U.S. 644, 140 S. Ct. 1731, 207 L. Ed. 2d 218 (2020)
 - ii. *Chris v. Kang*, 2022 WL 2967455 (D. Ore. 2022).
 - iii. Consider application to state laws: <https://www.simmsshowerslaw.com/new-sexual-orientation-and-gender-identity-law-in-virginia-ramifications-for-religious-employers-and-others-2/>
 - iv. Practical steps in light of increasing employment requirements but also broad protection under ministerial exception.
 - 1. Create your overview and decide in advance who you consider to be a “minister”
 - 2. Draft accordingly with this in mind:
 - a. Job descriptions
 - b. Application documents
 - c. Handbooks
 - v. Additional resources:
 - 1. Oregon Federal Court Affirms Ministerial Exception’s Application to State Law, Richard R. Hammar, <https://www.churchlawandtax.com/legal->

[developments/oregon-federal-court-affirms-ministerial-exceptions-application-to-state-law/](#)

- c. Are the tests for the ministerial exception to employment laws the same as the IRS's test for minister's housing allowance? See 26 U.S.C. 107; Kirk v. Comm'r, 425 F.2d 492 (D.C. Cir. 1970)
 - i. <https://www.simmshowerslaw.com/seventh-circuit-to-hear-constitutional-challenge-to-ministerial-housing-allowance/>
- d. How will the FTA Rulemaking Concerning Non-Competes impact Churches and Nonprofits?
 - i. Many churches have non-compete agreements with their pastors or key leadership. Some nonprofits as well.
 - ii. Final Rule from the Federal Trade Commission regarding Non-Compete Clause. 16 CFR Part 910 www.ftc.gov/system/files/ftc_gov/pdf/noncompete-rule.pdf
 - iii. Be aware of new rules and litigation regarding them.
 - iv. VA rules on non-compete clauses. 40.1-28.7:8. <https://law.lis.virginia.gov/vacode/title40.1/chapter3/section40.1-28.7:8/>
- e. Classification of workers as employees versus contractors and exempt versus non-exempt.
 - i. Consider application of being subject to ministerial exception.
 - ii. Consider legal audits to mitigate legal risk.
 - iii. Virginia Code § 40.1-28.7:7: Misclassification of Workers. Private right of action now available.
 - iv. Additional resource: <https://www.simmshowerslaw.com/new-nondiscrimination-accommodations-other-employment-requirements/>

6. Child Protection and How to Respond to Sex Offenders

- a. **Protecting Young Victims from Sexual Abuse and Safe Sport Authorization Act of 2017.**
 - i. General Purpose of Act.
 - ii. Impact on Religious Schools and Non-profits that engage in youth sports.
- b. **Child Protection Policies and Procedures**
 - i. Sexual abuse of minors is one of the most common civil claims against churches in U.S. courts. Why?
 - 1. Vulnerability of the Church.
 - 2. Litigious environment.
 - ii. Recent Large Verdicts that destroyed the church and ministry
 - 1. *Mirlis v. Greer*, 952 F3d 36 (2nd Cir 2020) affirmed 21.7 million verdict against a private Jewish school;
 - 2. *C.A. v School District*, 2019 WL 1649637 (Cal App. 2019) public school liable for child abuse due to inadequate reference checks and 9 other reasons.
 - 3. *Doe v. Apostolic Assembly* (W.D. Texas 2020) church and board could be sued for punitive damages and personal liability due to gross negligence;
 - 4. *Doe v. BSA Corp.*, 147 A.3d 104 (Conn 2016) \$7 million award for 3 incidents of sexual assault on 10-year-old by Boy Scout leader
 - iii. Impact of Child Sexual Abuse Claim.

- iv. Four Key Steps in Child Protection:
 1. What steps taken to **SCREEN** its child/youth workers?
 2. What steps taken to **TRAIN** child/youth workers to understand the nature of child abuse and grooming, identify, and prevent child abuse and properly respond?
 3. What steps taken to **SUPERVISE AND STRUCTURALLY SAFEGUARD** child/youth workers?
 4. What steps taken to develop clear and effective process of **INVESTIGATING AND REPORTING** child abuse?
- v. Worker Selection/Screening:
 1. Require all workers (both paid and volunteer) to use a written application;
 2. ALWAYS verify ALL information provided (including references);
 3. Require background check (criminal and child abuse) with waiver and release by applicant;
 4. Address and answer irregularities;
 5. Keep applicants and all information confidential.
- vi. Structural Safeguards – Written Policies and Procedures:
 1. Written policies for child/youth worker interactions;
 2. Training/Education for child/youth worker on these policies and how to identify behavior and physical indicators of child abuse.
 3. What to do about Small Groups and Child Abuse Protection, “**Protecting Children in Church Small Group Settings**”
- vii. Investigation and Reporting:
 1. Written policy and procedure to report suspected child abuse both by the worker and by others;
 2. Know your State’s Mandatory/Permissive Reporting Requirements and Exceptions.
- viii. Impact of COVID-19 on Conducting Youth Ministry
 1. Transitioning Structural Safeguards to Virtual World;
 2. Assumption of Risk Waivers-Releases.
 3. See article, “**Conducting Youth/Children Ministry in a Digital Age**” (republished by CT and ECFA)
- ix. Relevant Cases:
 1. *Allen v. Zion Baptist Church*, 328 Ga. App. 208 (2014). Church found to negligently hire a volunteer who molested a minor when it failed to contact the volunteer’s references;
 2. *J. v. Victory Tabernacle Baptist Church*, 236 Va. 206 (1988). Negligent hiring is an exception to the charitable immunity doctrine and employer should conduct reasonable due diligence to avoid an “employment situation involving an unreasonable risk of harm to others.” Id. at 211 (citations omitted).
- x. **Evangelical Council for Abuse Prevention (ECAP)**-huge step forward with gold standards and best practices (like ECFA for financial issues) for prevention of child abuse and certification. <https://abuseprevention.org/>

c. **Integration of Sex offenders into your church or ministry**

- i. Currently, over 800,000 registered sex offenders in the US.³
- ii. Criminal Recidivism Statistics:
 1. National Average – 74% recidivism after 4 years⁴;
 2. Bible Study and Worship during Incarceration – 30% recidivism after 4 years;
 3. Bible Study and Worship + Inclusion in Church upon Release – 10% recidivism after 4 years.⁵
- iii. 3 Types of Sex Offender and Corresponding Risk.
- iv. Correct Type of Church to Undertake Assimilation.
- v. Policy and Process for Potential Assimilation – “Seven Link Chain”
- vi. Legal Implications:
 1. Research your state’s laws on restricted areas/places where registered sex offenders may be present –*See State v. Fryou*, 780 S.E.2d 152 (NC 2015). NC state law prohibits registered sex offenders from being within 300 ft. of any location primarily intended for use, care, or supervision of minors even if location is not primarily intended for it;
 2. Research your state’s laws limiting an offender’s employment/volunteer opportunities and/or notice requirements;
 3. Know offender’s probation/parole limitations - *State v. McCormick*, 213 P3d 32 (Wash. 2009).
 4. See article, “[Successful Church Assimilation of Sex Offenders](#)”

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³ <https://www.parentsformeganslaw.org/public/meganReportCard.html>

⁴ Bureau of Justice Statistics, U.S. Dept. of Justice

⁵ Institute of Prison Ministries