

Churches, Ministries, and the Law

*Helping Your Church or
Nonprofit with Legal Matters*

- *“Top Ten Legal Hotspots” for Lawyers Serving on Boards of Churches and Nonprofits*
- *Attorney Service on Church Boards: Do’s and Don’ts*
- *Handling an Allegation of Leadership Misconduct*
- *Who Owns The Pastor’s Writings?*



David Nammo,
Executive Director
and CEO

A Lawyer’s Usefulness

Without fail, every time a pastor sees a copy of this magazine, they always ask if “Christian lawyer” is an oxymoron. As the CEO of the largest Christian lawyers’ association, I often have to bite my tongue in response. Yet the reality is that many pastors not only misunderstand true “vocational calling,” but also they cannot imagine what lawyers can offer in ministry.

It is because of these interactions that I often claim that the church only has two uses for lawyers: first, as a punchline for a joke from the pulpit or second, to put him or her on the church board in case the church needs free legal advice. And when I repeat that statement to groups of lawyers around the country, there are often nods of approval.

Either way, it is the second “use” that is the theme of this magazine. Many of us Christian lawyers are sitting on church or nonprofit boards but know very little about nonprofit law. We are usually general practitioners and, like any good lawyer, know that we can get up to speed on a particular body of law if needed.

The purpose of this issue is to offer those of you sitting on that church or nonprofit board a little primer. Some of the more universal issues that arise in these settings could be easily addressed

in a few good articles, which are included here.

As lawyers, in an advisory context or as a board member for a church or nonprofit, we never want to have a situation where we look back and say “if only we had...” It is cliché, but prevention and preparation are the best ways to avoid complications that can damage not only an organization, but also hurt those who trust that organization the most.

The churches and nonprofits see themselves as representatives of Christ to our communities, our culture, and those they serve. And as such, they want to be above reproach in all they do. And as lawyers, who are risk averse by nature, we are the ones who can help them draw the boundaries, set up the procedures, and help them safely and wisely keep watch over their flock.

So I am thankful for the CLS nonprofit lawyers who have contributed to this issue. They are lending us their expertise and their advice, free of charge. And hopefully, the churches and nonprofits who have appointed us to their boards will benefit as well. So please take the time to read through this issue – if not for you, for those who are relying on you – from the CEO and pastor all the way down to the child in Sunday school.

THE CHRISTIAN LAWYER®

Editor-in-Chief
David Nammo

Design & Production
Perceptions Studio

Editorial Email
clshq@clsnet.org

Advertising Office
Christian Legal Society
8001 Braddock Road, Suite 302
Springfield, Virginia 22151

For advertising inquiries, email
memmin@clsnet.org.

Advertising in The Christian Lawyer does not imply editorial endorsement. Opinions expressed in The Christian Lawyer are solely the responsibility of the authors and are not necessarily those of the editors or members of the Christian Legal Society.

Manuscript Policy
We encourage the submission of article and story ideas by our readers. For a copy of our editorial guidelines, please write or send an e-mail to memmin@clsnet.org. Unsolicited manuscripts and poetry are not accepted. A query letter must be sent first to memmin@clsnet.org describing a proposed manuscript. Any unsolicited manuscripts will not be returned.

The Christian Lawyer is a publication of:



Christian Legal Society
8001 Braddock Road, Suite 302
Springfield, Virginia 22151
Main Office: 703-642-1070

© Copyright 2015, Christian Legal Society. All rights reserved.



IN THIS ISSUE

Churches, Ministries, and the Law: Helping Your Church or Nonprofit with Legal Matters

- “Top Ten Legal Hotspots” for Lawyers Serving on Boards of Churches and Nonprofits, *by Daniel Hebda and H. Robert Showers, Esq.* **3**
- Attorney Service on Church Boards: Do’s and Don’ts, *by James H. Pluymert* **8**
- Handling an Allegation of Leadership Misconduct, *by Theresa Sidebotham* **11**
- Who Owns The Pastor’s Writings? *by Leslie Ruiter* **16**



CHRISTIAN LEGAL AID

Scaling Up Our Dreams. **19**

Ken Liu



CENTER FOR LAW AND RELIGIOUS FREEDOM

A Short Primer for Understanding RFRAs. **21**

Kim Colby



ATTORNEY MINISTRIES

New Season, But Same Calling **24**

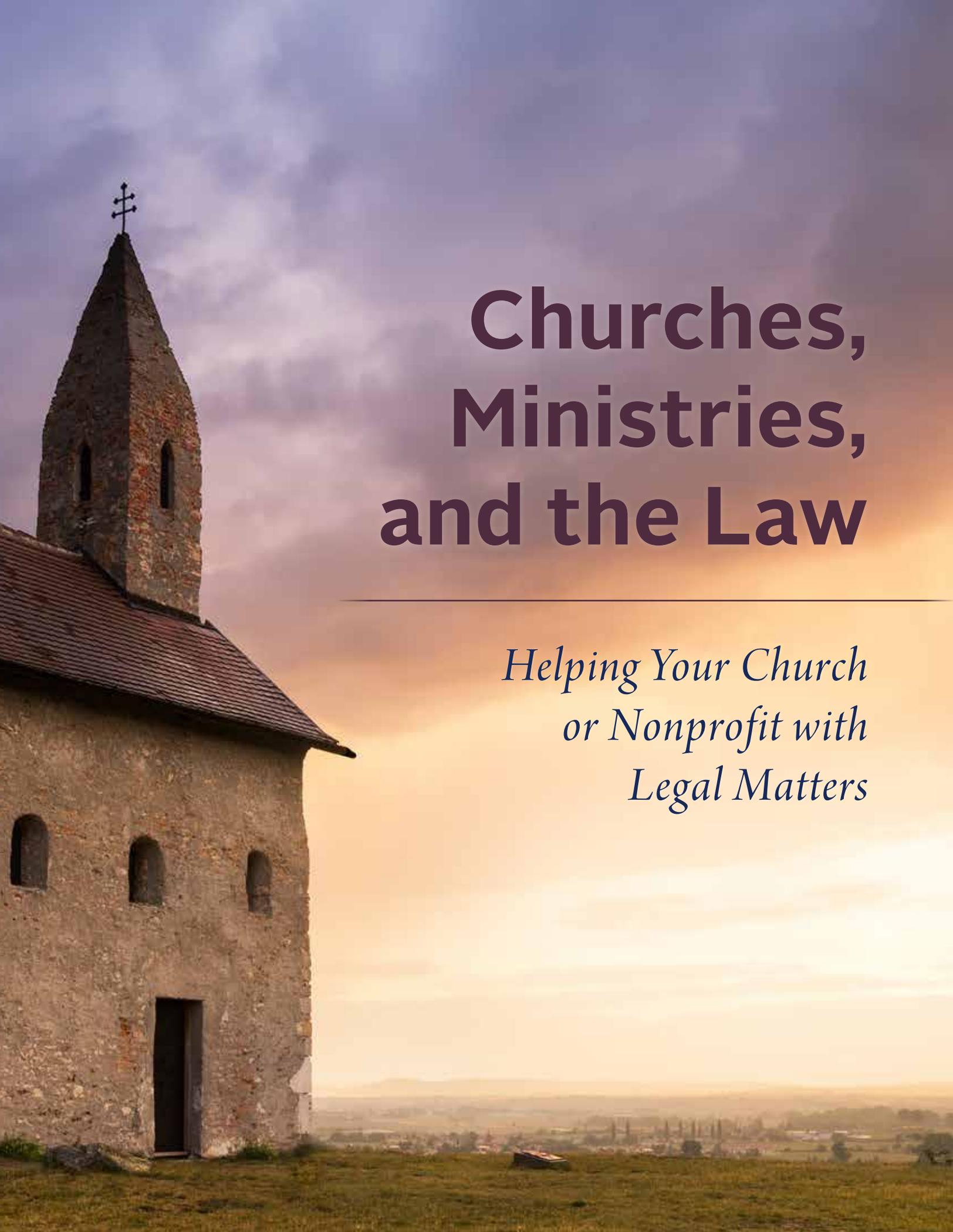
Brent Amato

FROM THE PRESIDENT

Churches and Religious Nonprofits in Trouble, but God is Able. **27**

H. Robert Showers, Jr.

CLS Attorney Chapters List **28**

A photograph of a stone church with a steeple, set against a dramatic sunset sky. The church is on the left side of the frame, and the sky transitions from a deep blue at the top to a warm orange and yellow near the horizon. The church has a dark doorway and several arched windows. The steeple is topped with a cross.

Churches, Ministries, and the Law

*Helping Your Church
or Nonprofit with
Legal Matters*

“Top Ten Legal Hotspots” for Lawyers Serving on Boards of Churches and Nonprofits

BY DANIEL J. HEBDA AND H. ROBERT SHOWERS

If you are “the lawyer” on a church or nonprofit Board of Directors, then you probably know that such a designation often comes with the unwelcome expectation that, despite your actual area of legal expertise, all potential legal liabilities are now covered just by your dignified presence. As a competent lawyer, however, you also know that this is no truer than the expectation that a talented orthopedic surgeon can competently cure a brain tumor.

It is paramount that you are aware of which “hat” you are being asked to wear: board member or legal counsel to the organization. To help educate your board on how these principles apply to the specialist body of law governing churches and nonprofits, we have provided short summaries of the top ten legal issues facing churches and nonprofits.

The steps below should help you begin to see areas of need in your church or nonprofit. And remember, the safest and best advice is to work closely with a knowledgeable nonprofit attorney in many of these areas.

1. Governance: the Devil’s in the details.

While incorporation provides significant protection, especially for leadership, governing documents are often boilerplate and not well-crafted. We have seen very nasty disputes that stem from unclear or poorly-worded governing documents or simply from misunderstood governance structures and principles. As an attorney on the church board, be on the look-out for at least two key elements to minimize any frustrations. First, do the articles and bylaws clearly describe the actual practice and doctrine of the church? When disputes arise among members or leaders, one of the first questions is always “what do the documents say?” Second, do your governing documents take full advantage of the religious “shield” available to churches? The best way to analyze this is to look at whether a neutral IRS agent, by reading your church’s governing documents and observing their practices, could easily conclude that your choices and decisions are made based on your *sincerely-held religious beliefs*. If the answer to this is no, particularly on an issue that is potentially “on the line” legally (like discriminating against an employee or refusing to use donated money for a certain

project), your church will have a much harder time justifying its tax-exempt existence.

2. Membership and leadership: plan for disagreement.

Good governance easily spills over into helping resolve disputes over membership and leadership. Keep in mind four key points. First, make sure your governing documents (articles, bylaws, constitution, etc.) have binding and mandatory Christian mediation or arbitration clauses. A disgruntled member who cannot sue the church in civil court will resolve the dispute in a much healthier and confidential way than a disgruntled member who can make a public spectacle in open court with secular juries, judges and media. Check your state’s laws on the language needed to enforce such clauses in court if they are challenged. Second, ensure that your statement of faith addresses the key doctrinal points that your church practically emphasizes. If, for example, you would never allow a transgender who identifies as a Christian into membership, but your statement of faith or member covenant says nothing about sexuality or gender, you may be stuck. If you know you would discipline and possibly excommunicate a member for some kind of misbehavior, think carefully about whether that behavior is tied to your sincerely-held religious beliefs and how your statement of faith shows that. Third, make sure that contract approval and access to and use of funds are clearly circumscribed in your governing documents and policies. This is a particularly sticky wicket when a new pastor or elder signs unauthorized agreements or tries to make changes and access funds that are part of a church’s long-standing heritage. Fourth, make sure your governing documents state clearly how authority is delegated in leadership so that committees and boards are not colliding on who has the authority to do what.

3. Same-sex marriage: don’t wait on this one.

Homosexuality in the church may well become, if it is not already, the defining issue of faith communities in this century. This is a sweeping issue that will have implications in member-

ship, governance, leadership, and almost every other aspect of church life. Obviously, your church must first decide what its doctrinal position will be. Defining marriage as between one man and one woman will likely open your church up to attack in the not-to-distant future. Make sure that your statement of faith and governing documents include a discussion of the definition of Biblical sexuality, complete with Scripture references. This lays the groundwork for everything. It establishes that your church's position on homosexuality is firmly grounded in its sincerely held religious beliefs and nowhere else. Second, make sure that this statement clearly governs how you admit members, hire employees, and take on volunteers. This is most readily done through the policies, covenants, applicable manuals, and third party use and special event (like weddings) agreements.

4. Para-church and for-profit activities: good ideas with hidden consequences.

Many excellent fundraising ideas involve pursuing some sort of venture that brings the potential for a nonprofit or church to realize income that is unrelated to their tax-exempt purpose. While income is not a bad thing, this type of income generates a tax, otherwise known as the "Unrelated Business Income

Tax" (UBIT). This can happen in a variety of situations, from a nonprofit youth camp that leases its facilities for weekend business conventions, to a church that sells Christmas trees at twice their cost to raise money for a mission trip, to a church that leases its parking lot to a local university during the school year. First, familiarize yourself with the following elements that trigger a UBIT: 1) the income is from a trade or business; 2) the trade or business is regularly carried on; and 3) the income is not substantially related to the exempt purpose of the entity. Second, know the exceptions. For example, while UBIT generally applies to income from land, there are exceptions available when the use is substantially related to your exempt purpose and when the property is not debt-financed.

If your church or nonprofit wants to undertake an unrelated (or even a related) business venture on a larger scale, you should also consider the possibility of conducting that business through a wholly-owned subsidiary entity. This can help avoid negative tax consequences, such as losing your tax exempt status, while balancing the control and separation of assets needed to keep tax-exempt status. The details of setting this up, however, should involve competent counsel, because owning a for-profit can implicate the IRS rule governing what percentage of your activities must be charitable to retain your tax-exemption.

TRUSTED ADVISERS TO NON-PROFITS



WAGENMAKER
OBERLY

The attorneys at Wagenmaker & Oberly focus their practices on the crucial nuances of nonprofit law. Our attorneys' interests in exempt organizations are not merely legal in nature. Each attorney has been personally involved in nonprofit activities through the years. The firm's desire to help and assist nonprofits achieve their goals stems from our attorneys' belief in the fundamental value of the nonprofit organization, and its place in our world.

53 W. Jackson Blvd, Suite 550, Chicago IL 60603 • 312.626.1600 • wagenmakerlaw.com

Sponsored by Wagenmaker & Oberly, thankful supporters of CLS in Illinois and nationwide.

5. Third-party facility use: planning ahead of time helps you serve your community effectively.

If your church or nonprofit chooses to use its facilities to serve the community, there can be a number of potential problems if it does not take proper steps at the outset. Letting someone onto your property is in many ways an intimate act and should only be done with careful planning. One of the first mistakes many churches make is allowing use of their premises without any written agreement as to the terms or the types of uses that are permitted and prohibited. For example, if a church wouldn't allow gay marriages to be performed on its premises, it cannot expect to enforce that restriction unless it has that restriction included in a facilities use policy, or somehow tied to the terms controlling the use of the property. Allowing use of your premises can also impact your tax exemption and may endanger your status if you dedicate too much use to non-exempt purposes if that use is not securely tied to your exempt purpose. Your church may also come under the purview of your state's public accommodation non-discrimination laws. Although these laws often have exceptions for religious organizations, more and more states are prohibiting discrimination by places of public accommodation based on sexual orientation.

6. Child and youth protection: what you don't know does hurt you.

Youth and child-care programs often form a significant part of a nonprofit or church's ministry focus. It is easy to get involved with serving children in the community, but much trickier to develop the proper safeguards to shield your program from liabilities. There are at least four key steps that you should implement. First, you must have a program to screen your workers and volunteers. Getting people to work with youth can be a challenge, so it is tempting to welcome with open arms anyone who is willing to help and to check them out later. After you've conducted proper background and reference checks, make sure to train your workers properly. If volunteers and employees don't know how to report suspected abuse or even spot it, your liability increases significantly. Third, make sure you properly supervise your workers. Training is not enough—supervision ensures the policies and plans you have in place are actually being followed. Finally, have in place protocols that dictate exactly how to report and investigate alleged abuse. When the allegation is made, you need to have a system to address that allegation quickly and clearly, without hesitation.

7. International ministry and fundraising: not all that glitters is gold.

More and more frequently, ministry is being done through partnerships and relationships developed with overseas organizations and individuals. U.S. churches and nonprofits are working to raise funds in the U.S. that can be sent to support those laboring internationally. They can run afoul of laws restricting the transfer of funds to such organizations by a U.S. tax-exempt organization. Because the IRS has no way of knowing whether the recipient of the money sent overseas is a true exempt organization, it is much more skeptical about international transfers. Cases abound of well-meaning U.S. donors who are hoodwinked by scam artists around the globe who seem genuine but ultimately divert funds to their private benefit. Add to that the added scrutiny of the Office of Foreign Asset Control, looking for potential violations of trade embargoes and sanctions, and it can be highly risky for a church or nonprofit to send money—whether large or small sums—to foreign recipients. As a general rule of thumb, however, the IRS is looking for factors that demonstrate the U.S. charitable organization's control over the use and direction of the funds. Any such transfers have to be structured so that it is apparent that the US charity is not just a temporary resting place for funds as they exit the country.

8. Church health insurance: sadly, harder than it has to be.

Thanks to the Affordable Care Act (ACA), it is becoming more and more difficult for churches and small nonprofits to navigate the nuances of providing healthcare for their employees. Some churches can't afford the cost of compliance, and some can't afford the actual insurance premiums. Some practices that used to be perfectly acceptable can now get your church in big trouble. For example, many churches used to provide their employees, in lieu of a full health-care program, tax-free reimbursements of their individual health care premiums. Under the ACA, those reimbursements are no longer tax-free, and employers can be severely penalized for failing to withhold taxes. The ACA now also prevents employers from providing a Health Reimbursement Arrangement or Flexible Spending Arrangement (HRA or FSA) to employees without providing full healthcare coverage through a group plan.

9. Employment issues

Although churches are entitled to many unique exemptions when it comes to employment, they also sadly have a reputation for making ill-advised employment decisions and running their human resources departments without knowledgeable legal counsel. For example, churches expose themselves to significant liability when they grant housing allowances, tax-free, to “pastoral staff” members who are not licensed, ordained, or commissioned as ministers. This practice is especially dangerous given the recent challenges to the housing allowance and the subsequent increased scrutiny. Churches can also be slapped with penalties for classifying as “independent contractors” employees who are subject to the control of the church in performing their jobs. Counsel your church to pay special attention to their employment practices and to invest in legal review of their employee classifications, pay practices, fringe benefit programs, and policies and manuals.

10. Violence in the Church: prevention is the best medicine.

Twenty years ago no business administrator or facilities director for a church or nonprofit would even contemplate, let alone address, the need for creating a comprehensive safety and security team. Times have changed, and the idea that churches are off-limits to violence has disappeared as the number of violent activities on church property increases every year. To address this with your church, start by conducting a review of your security, your neighborhood, and the risks involved. Appoint a security team and consider what steps (such as a security system) will help mitigate your risk. Educate your members and your security team on how to handle requests for help and what information to collect and how to respond when approached by a stranger in need. Taking preventative steps, establishing policies, and conducting due diligence can go a long way to mitigating liability in court should any incident occur, particularly if your church or nonprofit is in an obviously dangerous neighborhood.

Conclusion

The top five lawsuit list includes claims that make it to court: insurance claims, child abuse, property disputes, religious free-

dom, and personal injuries. The top ten claims that we have identified, however, are issues that, in our interaction with churches and nonprofits, cause crises and occur frequently. Handled properly, these claims can be resolved or settled before a lawsuit results and never see the light of a courtroom.

As legal and cultural landscapes continue to shift, risk management for churches and nonprofits is no longer an optional planning tool, used only by those with extra time and resources. It is a necessity. Without it, churches and nonprofits run the risk that their beloved ministry may one day come to a grinding and unexpected halt when the IRS questions their charitable receipts, or when a member announces he is a homosexual, or when a trusted child-care volunteer becomes an abuser. Your position as a lawyer on the board of your church or nonprofit may place unwanted expectations on you, but it gives you a unique opportunity to educate your board and take steps to set their ministry up for long-term success.



Daniel Hebda is an associate at the NOVA/DC branch of Simms Showers LLP. He represents churches and nonprofits on matters involving employment, tax-exemption, real estate, risk management, international missions, and complex corporate structures. He also represents clients on business and civil litigation matters involving personal injury, real estate disputes, breach of contract, and various state agency and administrative claims. Mr. Hebda joined Simms Showers in 2012 after graduating from Regent University School of Law, where he served on the Moot Court Board and the International Law Review.”



Rob Showers originally formed Simms Showers LLP in 2002 with Virginia and Maryland offices and now serves as the managing partner at the thriving VA/DC branch of a 12-lawyer firm. He has a long history of litigation and appellate work but is presenting focusing on serving nonprofits and churches as well as faith-based businesses. Before entering private practice in 1989, Mr. Showers acted as Deputy Assistant Attorney General and served as Executive Director of the U.S. Department of Justice’s Child Exploitation and Obscenity Section (CEOS). Mr. Showers has started and run several nonprofits, including the National Law Center for Children and Families, and NonprofitChurchlaw.org. Mr. Showers graduated *cum laude* from Wake Forest University with honors in History. In 1980, he graduated from Wake Forest University School of Law where he served with distinction on Law Review and the Moot Court Board.”



Learn the Law, Live the Faith

Argue for truth. Advocate for just policies. Defend your beliefs in the marketplace of ideas. Speak for those without a voice. Fight injustice. Help the oppressed.

Whichever type of law you choose to practice, we believe that a legal career is more than a profession. It is a call to make a difference. Take the next step. Gain an education at an affordable, Christian law school that will prepare you to answer that call with excellence.

For more information

Please visit www.tls.edu or call 800-922-4748.



Proud sponsor of the
2015 Christian Legal Society
National Conference

Attorney Service on Church Boards: Do's and Don'ts

BY JAMES H. PLUYMERT

Attorneys are often asked to serve on their church's Board of Directors. This can be a wonderful opportunity to serve in a high-impact role for the Kingdom. There will be challenges and a wide variety of expectations about the attorney's skills, expertise, and ability to contribute meaningfully. There will likely also be an assumption, spoken or unspoken, that the attorney will provide some legal services as a member of the board.

God's standard is for attorneys to serve humbly and with excellence as board members: "Do not think more highly of yourself than you ought, but rather think of yourself with sober judgment, in accordance with the measure of faith God has given you" (Romans 12:3). With this in mind, the attorney must fulfill the fiduciary duties required of a director and the concurrent ethical duties required of a lawyer.

Church board members generally have two main fiduciary duties: the duty of care and the duty of loyalty. The duty of care applies a "reasonable and prudent person" standard and requires the board member to act with the care a person in a like position would reasonably believe to be appropriate under similar circumstances. The duty of loyalty requires the board member to act in good faith and in the best interests of the church. The duty of loyalty also includes conflict of interest situations.

An attorney serving on a church board also has ethical obligations with regard to conflicts of interest, attorney-client privilege, and the duty of loyalty to the client. In particular, the attorney must be able to exercise independent judgment in dealings with the church.

Duty of Care

People expect attorneys to know more than the average board member, particularly about legal aspects of governance and operations. There may be a tendency of the attorney board member to delve into areas of the law that he or she is not familiar with, especially when doing *pro bono* work. An attorney has an ethical duty to provide competent representation, and

An attorney has an ethical duty to provide competent representation, and the attorney providing *pro bono* services has the same duties as attorneys who are paid for their work.

the attorney providing *pro bono* services has the same duties as attorneys who are paid for their work. The key is for the attorney board member to either be competent in the particular area of law being discussed, or get outside legal counsel skilled in that area of the law. An attorney's duty of care may be violated if the church even unknowingly violates the law during the attorney's term of service.

Tip: At a minimum, an attorney/board member should be familiar

with: (1) the church's organizational structure and governing documents such as its Articles of Incorporation and Bylaws; (2) applicable state and federal reporting and registration obligations and the church's compliance; (3) the church's financial health and stability; and (4) the church's contractual obligations.

Most attorneys are usually very diligent in managing legal services for paying clients. Something seems to change, however, when the lawyer's services are free. Keeping track of priorities is very important, and the duty of care requires that the work of both paying clients and *pro bono* clients be done in a timely and diligent manner. Particularly when a church is small, an attorney board member may be expected to volunteer legal services and oversight on a broad range of issues. Ask yourself: Can I handle this board commitment? Do not take on more than you can reasonably and competently do!

Duty of Loyalty

The duty of loyalty prohibits directors and officers of a church board from using their position of trust for personal advantage at the expense of the church. This can involve money transactions, and the issue can arise in the context of confidential information obtained through work with the church. The attorney board member may not use confidential information regarding the church to his or her personal advantage or for the advantage of a client or another nonprofit with which the attorney works.

Conflicts of Interest

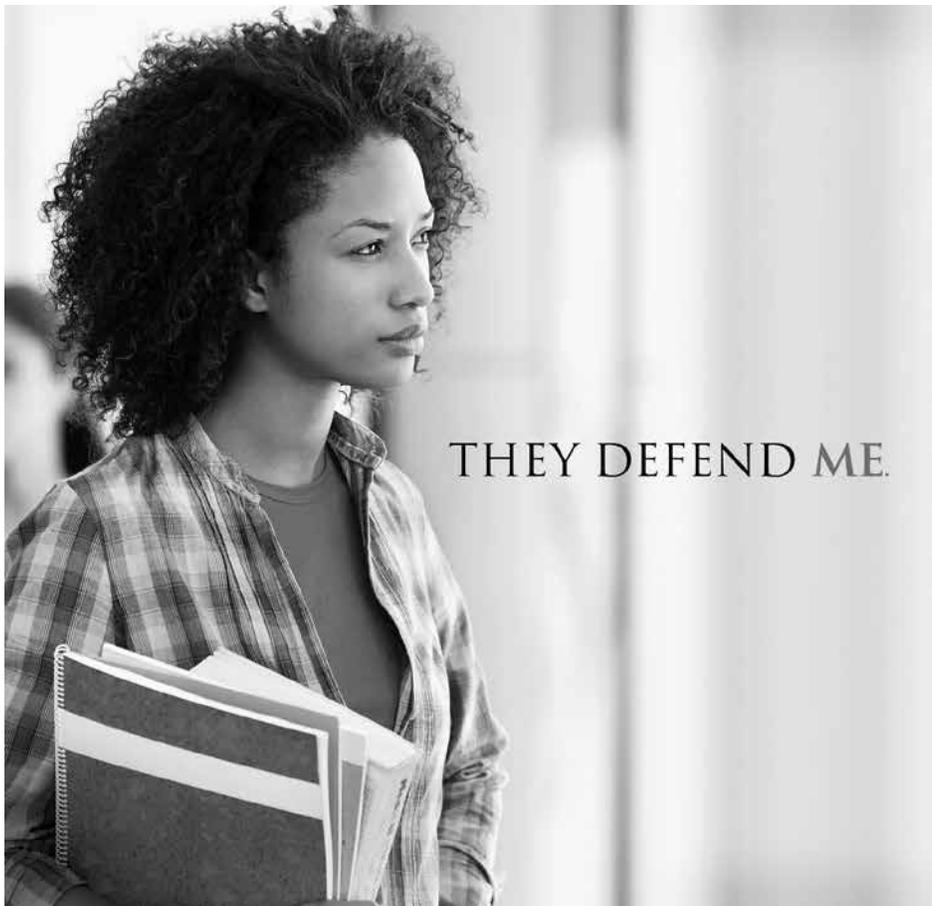
One of the most complex problems that affects attorneys working for charitable organizations is conflict of interest. Usually a conflict of interest arises in situations in which nothing improper appears to be taking place, and everyone's intentions are good. For example, a conflict might arise when the board votes on the employment of the attorney or the attorney's law firm as legal counsel for the church. Likewise, there may be a conflict when the attorney board member is giving advice about charitable giving to a client and recommending that the client make a donation to the church, whether or not the gift is in the client's best interest or best serves the client's stewardship goals. The attorney in this situation should make full disclosure to the client of the attorney's interest in the church's business affairs and disclose that this might affect the attorney's professional judgment on behalf of the client. Additionally, the church should have a board-approved conflict of interest policy which includes annual disclosure statements by each church board member. The consequences of an improper conflict of interest can be severe, including payment back to the church of benefits improperly obtained. Other directors who knowingly permitted the improper transactions may be

compelled to compensate the church if the primary person is not able to make the church whole, and the credibility and reputation of the church in the community will be damaged.

Tip: Attorneys considering board service should take the time to review the rules governing conflicts of interest, including ABA Model Rules of Professional Conduct 1.13 and 1.7 (including comments), as well as state rules and advisory opinions regarding professional conduct.

Concurrent Role as Board Member and Attorney

Many attorneys join a church board thinking they will not be serving as attorney for the church. They can still end up providing legal services, such as when the attorney reviews a contract or assists in the preparation of church bylaws. The problem is that it is often unclear when the attorney board member has crossed the line of being a director and starts providing legal services. Other members of the board may assume that every comment by an attorney board member is legal advice, rather than a business or practical suggestion. The existence of the attorney-client relationship is generally determined by the



THEY DEFEND ME.

In Wisconsin, university officials denied a Christian student group access to school funds and facilities. In fact, as Christians, our rights are threatened every day. That's why Alliance Defending Freedom is dedicated to the unyielding legal defense of religious liberty, the sanctity of life, and marriage and family. Help protect our shared right to freely live out our faith. Learn how at AllianceDefendingFreedom.org



ALLIANCE DEFENDING
FREEDOM
FOR FAITH. FOR JUSTICE.

client's reasonable expectations, and an attorney's statements may inadvertently create an attorney-client relationship with the church. To reduce the risk of this misunderstanding, the attorney/board member needs to tell other board members that he or she is not acting as attorney for the church and, if appropriate, suggest that outside legal advice be sought.

Tip: Before agreeing to serve, the attorney board member should review his or her own malpractice policy to understand the coverage and exclusions relating to concurrent service for the church. The attorney board member should also confirm that the church has Directors and Officers and Errors and Omissions policies that will provide coverage for service on the board.

Another issue that arises relates to the attorney-client privilege. Other board members may assume that every conversation with an attorney is privileged. The only communications that are privileged are statements by the attorney acting as legal counsel and not as business advisor. This distinction may not be clear to a non-attorney director and should be em-

phasized on the record when discussing legal issues so that a false sense of confidentiality is not created when the attorney/board member participates in a discussion.

Conclusion

An attorney serving on a church board can contribute to the Kingdom work of the church in unique and significant ways. By paying close attention to one's ethical duties as an attorney and one's fiduciary duties as a director, the attorney board member will serve with diligence and excellence to the great benefit of the faith community.



CLS member James H. Pluymert is an attorney at Pluymert, MacDonald, Hargrove & Lee, Ltd. in Hoffman Estates, Illinois. He represents churches and nonprofit organizations in corporate, employment, real estate, and other legal issues. Jim leads the conciliation ministry at Willow Creek Community Church.

Our Top-Performing Law School Gives You a Winning Edge

TOP 10
Faculty Nationally
Princeton Review, 2014

83%
of 2013 Graduates Were
Employed Within 9 Months

JD: 2 Yr. Accelerated, 3 Yr., Part-Time/Evening | **M.A. in Law**

APPLY TODAY.
regent.edu/success | **877.267.5072**

Approved by The American Bar Association (ABA). LAW140916

REGENT UNIVERSITY
SCHOOL OF LAW

Handling an Allegation of Leadership Misconduct

BY THERESA SIDEBOTHAM

Although allegations of leadership misconduct are one of the hardest things for ministries to handle, they offer a great opportunity to seek truth and justice and to minister to people. Given the partially legal nature of the process, Christian attorneys can play key roles in these circumstances. Consider the following scenario:

Someone has alleged misconduct by a religious leader. But Rev. Dr. Important assures the board that he did nothing wrong. Will he be investigated? Will the standards for moral and spiritual behavior be equally applied to a leader? Will the organization be serious about protecting its weaker members and living out its spiritual values?

If this church or nonprofit takes allegations of misconduct seriously, it will take steps to investigate and provide spiritual care.

Responding to the Accusation and Initial Review

First, if an organization desires to remove barriers to reporting misconduct regardless of the identity of the accused, it should offer more than one way to report.

Second, in most cases, the accused leader should immediately be placed on administrative leave. He or she should lose the ability to influence decision-making. Independent board members or other unbiased leadership should take over. Potential exoneration will be much more compelling, and corrective actions will be much less messy, with the possibilities for undue influence removed.

Finally, a small committee of people who are not dependent on the accused leader personally or professionally should review the allegations. The initial reviewers should evaluate for “reasonable suspicion,” which is a lower standard than “probably true.” If the accusation is credible, then further action will be needed.

Reporting to Authorities

The standard for reports to law enforcement for child abuse or other criminal behavior is usually “reasonable suspicion.” Reporting to law enforcement can be important. Failure to report child abuse is often a criminal offense. Furthermore, internal

investigations can jeopardize a law enforcement investigation, and should be avoided or postponed until law enforcement is done.

Starting the Investigation

A determination of “reasonable suspicion” should eventually precipitate an internal investigation. The investigation assumes that misconduct could have happened, but not that it did happen. An investigation must be impartial and open-minded. An allegation of misconduct can be true, can be mistaken, can be false, or can be some mixture of these things.

Depending on the gravity and legal ramifications of the allegation, the investigation can be as simple as hiring a CPA for an audit or as complex as hiring a professional team to investigate sexual misconduct. The initial review should recommend a path forward. The organization may need some level of external help, both for expertise and for objectivity.

Who Needs an Attorney, Anyway?

For serious allegations, a ministry will need good legal advice. Relevant laws apply differently to religious and secular organizations. Ministries should use attorneys who understand both secular and religious law issues, as well as spiritual, emotional, and practical ministry concerns. Their approach should be legally sound as well as spiritually mature.

If an attorney is supervising the investigation, the investigation can be either attorney-client privileged or work product. The attorney’s presence at Board meetings, as an attorney, can privilege discussions.

As always, whether an attorney should take on that role depends on her in-depth knowledge of applicable law and the ministry of the organization. It also depends on her current relationship to the organization. If she is a board member, giving legal advice is tricky indeed, and the attorney will have to carefully separate and protect her roles (in a way that does not jeopardize professional liability coverage).

Generally, for a serious investigation, an attorney should be involved at every step to monitor the investigation, receive investigative reports, help determine whether the investiga-

tion is being done effectively and adequately, help determine whether justice is being done to the accused, recommend healing responses to care for victims, and help the organization prepare any legal defense that may be needed.

Protecting People During the Investigation

Allegations may be true or false in whole or in part. The accused may be exonerated. The process for learning the truth should protect reputations until the ministry has determined a course of action. Maintaining appropriate confidentiality is critical throughout the investigative process. In addition, an attorney should ensure that measures are in place to preserve religious privileges.

Practical Steps During the Investigation

The Investigative Team

A fact-finding team must address several different goals at once: following facts objectively; not creating more harm to those already hurt; protecting possible victims; providing justice (including due process); and avoiding legal liability. A fact-finding team must discern the truth and follow the facts objectively. Different types of investigation require specialized knowledge, like forensic analysis of accounts, understanding psychological disorders, or forensically interviewing children. If criminal charges could someday be filed, evidence must be handled properly and preserved adequately, which requires specialized training.

Handling the Documents

Documents to gather might include:

- Ministry codes of conduct or doctrinal statements;
- Personnel records, including employment timelines and disciplinary actions;
- Employment handbook;
- Releases of cell phone, electronic device, and computer records, including relevant passwords;
- Relevant computer and electronic device records; and
- Records of the initial review.

A forensic data recovery specialist can image the hard drives of all computers or mobile devices and search them for current or deleted data.

Cooperation or Not

A reasonable investigation goes as far as the data available. Efforts to locate evidence and testimony should be carefully documented. Part of the supporting data for an investigation's factual findings will be any refusals to cooperate. Uncooperative people who are organizational employees are likely violating policies for which they may be disciplined.

Making Factual Findings—to What Standard?

The last step for the investigative team is preparing factual findings for leadership decisions, but defining the standard of proof in advance is important. The team will consider one of two possible standards. One is “preponderance of the evidence,” which means that the allegation more likely than not happened. The other is the higher standard of “clear and convincing evidence.” If the investigation cannot reach one of these standards, a “finding” will not be made.

Leadership Responsibilities

The board (or comparable organizational leadership) has important fiduciary, as well as spiritual responsibilities. It takes the factual findings of the investigative team and develops a plan. The plan will include: disciplining wrong-doers; ministering to victims and people close to them; protecting others who could be at risk; vindicating anyone exonerated; extending compassion to reporters who are not victims; protecting confidentiality; and avoiding liability.

Can There Be Restoration?

Ministries often believe that forgiveness means putting the leader back in place. It is true that our sins are forgiven. That does not eliminate the need to do the hard work of facing up to the damage that sin has done, taking care of victims, and putting in place safety plans, addressing personality disorders, and doing the work of restoration. Christ's blood was costly, and so is restoration on the human level.

Restoration can be defined in at least four ways.

Relational

Restoring relationships is impossible if one party will not repent or another party will not or cannot forgive. In one situation, a now-adult victim went back and confronted the man who had sexually abused and seduced him as a teenager. The

*Introducing a new book about the US Constitution by father-son authors
Michael Stokes Paulsen and Luke Paulsen*

THE CONSTITUTION: *An Introduction*

-- The definitive modern primer on the US Constitution --



Co-authors Michael Stokes Paulsen and Luke Paulsen

“... a truly spectacular book—perhaps the best, single-volume treatment of the Constitution ever written.”

Guy-Uriel Charles
Professor of Law, Duke University

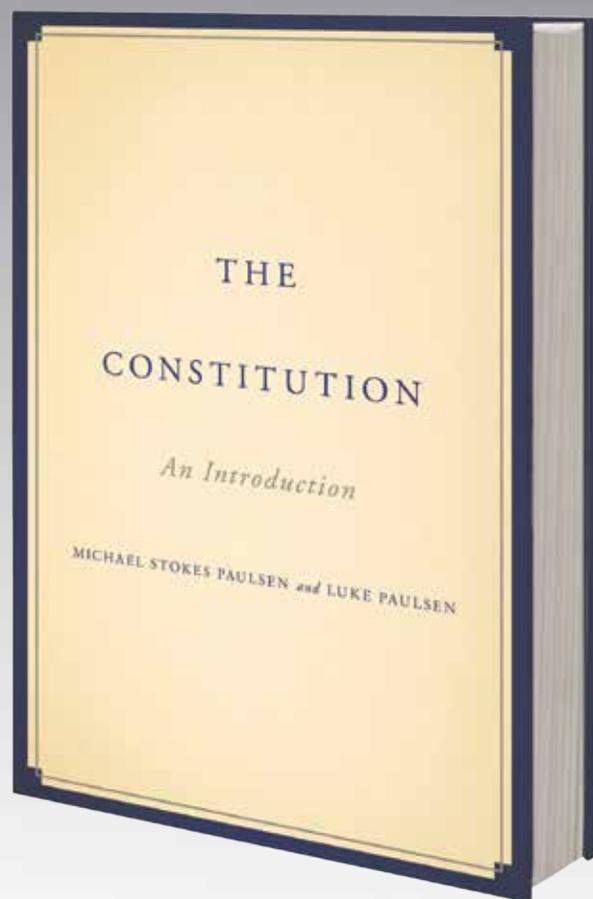
MORE PRAISE:

“A sharp, efficient guide to the creation, content, and construction of the supreme law of the land. A well-conceived, well-executed primer.”
-Kirkus Reviews

“A solid, intelligent, reliable, and interesting look at the origins of the Constitution, its basic structure, and its interpretation over the course of our country’s history. This impressive book ... does not tell Americans what to think, but it provides invaluable help as they think for themselves.”
-Justice Samuel Alito, United States Supreme Court

“This readable history of the Constitution as it has evolved over more than two centuries corrects many false beliefs about that document and its applicability to every corner of American life. ... Written in a style that makes it accessible to readers at several levels, this book tells the human story of the ways in which the world’s oldest written constitution has shaped our experience.”
-James M. McPherson, Professor of History Emeritus, Princeton University, Pulitzer Prize-winning author of Battle Cry of Freedom

“A splendid introduction to the Constitution – *The Constitution: An Introduction* strips away the layers of interpretation that obscure the Constitution’s meaning, enabling readers to encounter the Constitution itself.”
-Robert P. George, McCormick Professor of Jurisprudence, Princeton University



Now available for purchase in bookstores and online. To read more about the book, including authors’ blog, visit the website: www.constitutionintroduction.com.

ISBN: 978-0-465-05372-8

Publisher: Basic Books

man acknowledged his actions, but refused to admit to wrongdoing. Although the victim was willing to forgive, relationship was not possible without repentance. In many cases, the process of forgiving is just too difficult for victims.

Sometimes even after repentance and forgiveness, restoring relationship may be undesirable. If the original relationship was not healthy, restoring it would be unwise. Allowing an abusive person access to a victim may even create legal liability.

Positional

Restoration can involve position. Some kinds of wrongdoing may make it inappropriate for someone to keep his or her position in the organization, either for a period of time under an action plan, or forever. This outcome does not limit God's forgiveness.

On the legal side, an organization can be responsible for negligent supervision if it gives someone who is guilty of destructive behaviors the opportunity to offend again. For instance, religious organizations need to remove permanently those who commit child sexual abuse.

Locational

Restoring a person to a particular location may or may not be wise. If stressors in the environment triggered bad behavior, the person should probably not return to that environment. Inconclusive findings of severe allegations may still require precautions. For instance, with a 30% chance that the person abused a child (less than a preponderance), the ministry might not terminate the person, but would remove the person from locations where he or she had access to children. Such action is not disciplinary but is prudent for the safety and protection of both parties.

Reputational

What if the person is innocent or at least the allegation is unsubstantiated? Ruining someone's life because of an allegation that is not substantiated is wrong. (In some circumstances, it could also be illegal.) Here, restoration involves the delicate task of preserving the person's career and reputation. This is certainly much more difficult if the ministry is not completely sure that the allegation is untrue. A safety plan may still be needed.

Caring for Victims and Those Who May Not Be

After the investigation, the ministry will want to consider the impact on the person making the allegation. If the allegation has been substantiated, the ministry will consider ways to provide healing. If the allegation has not been substantiated, the person bringing the accusation is usually also still hurting. Findings that an allegation is not substantiated should be revealed to the accuser with great sensitivity. The person will need compassion and may need help, therapy, or pastoral support.

Whether the accuser is a victim or not, healing and reconciliation is likely needed. If misconduct has been confirmed, it can be healing to get an apology from the organization, given by someone high in leadership.

Spiritual Discipline and Release of Information

Religious organizations have a First Amendment privilege to determine how to discipline and otherwise address their leaders and membership. As needed, ministries can say more to their members about misconduct of employees and members than a secular organization could say. They should still be cautious.

Once information is set loose, it cannot be called back. This has implications for personal reputations and privacy and for the organization's legal defenses.

Privacy issues

Privacy is a key value in an investigation. Alleged victims will not likely wish their personal information to be broadcast. In addition, those accused should generally not be publicly identified. Publishing unproven allegations opens the organization to a defamation claim, and may be unjust.

Privilege issues

Ministry investigations have several privileges. Communications between clergy and people under their pastoral care are often privileged. Ministries have a number of First Amendment protections that may cover communications as well. Having an attorney usually provides attorney-client privilege. Care must be taken not to waive any applicable privileges.

After the investigation concludes, legal advice will help leadership consider carefully privacy and privilege concerns, and what aspects of the report should be released to claimants, to constituents of the organization, and to the public.

Need to Know

Generally, release of information should be because of a “need to know” and should fit the religious privileges. For instance, when a ministry leader is dismissed for misconduct, a short statement will likely be given to the congregation. Certain people, such as a children’s ministry leader, may need more information. A designated point person should be prepared with appropriate responses to discuss legitimate concerns without sharing unnecessary gossip.

Dealing with Media

A ministry should establish good relationships with reporters when times are good. When a bad situation is developing, leadership must prepare suitable sound bites and anticipate hostile questions. “No comment” is not a good answer because it makes the ministry look guilty. Engage a media expert for advice on communicating the ministry’s truthful message. Media skills take time and specialized knowledge to master. The middle of a crisis is not a good time to practice. Neither social media nor regular media should dictate the organization’s strategy, even if they claim to speak for the victims.

Organizational Culture and Policies

An allegation of misconduct may trigger an internal review of the ministry’s culture. In addition to having reporting policies and procedures in place, the ministry should evaluate its inte-

rior culture to see if members will likely carry out policies in a meaningful way. The report on sexual abuse at Penn State, for instance, disclosed a culture that was unfavorable to reporting because of problems with power and control in the hierarchy.¹ Catholic Church culture of the past that fostered “isolation, separation, and obedience” and a “code of silence” created an opportunity for child abuse in the Church and required intentional change.² Similar problems infect all kinds of organizations. Change takes great effort and focus.

Conclusion

Although allegations of leadership misconduct are one of the hardest things for ministries to handle, they offer a great opportunity to seek truth and justice and to minister to people. Given the partially legal nature of the process, Christian attorneys can play key roles in these circumstances.



Theresa Lynn Sidebotham, Esq. is the founder of Telios Law PLLC, and practices litigation, religious law, appellate work, and civil rights law. She advises churches and nonprofits on legal and policy issues, coordinates legal audits, and represents organizations in litigation defense. She represents religious organizations nationally and internationally on First Amendment issues, employment law, and child abuse cases and investigations, historic and current.

ENDNOTES

- 1 Freeh Sporkin & Sullivan, LLP, “Report of the Special Investigative Counsel Regarding the Actions of the Pennsylvania State University Related to the Child Sexual Abuse Committed by Gerald A. Sandusky,” July 12, 2012.
- 2 Tom Barth, “Crisis Management in the Catholic Church: Lessons for Public Administrators,” *Public Administration Review*, Sept./Oct. 2010, p. 785.

Who Owns The Pastor's Writings?

BY LESLIE RUITER

Church leaders are often surprised to learn how intellectual property laws affect their organizations' tax status and their freedom to use material during and after a pastor's term of service. As a matter of custom, pastors often take their sermon material with them to a new assignment. In a large church, intellectual property ownership may be awarded to a star leader. But if the intellectual property in the material becomes valuable, the relationship sours, the stakeholders perceive a shifting of assets, or the IRS comes calling (on the author or the organization), then the improper handling of intellectual property can have serious consequences. "It can come as a surprise to a departing pastor to learn that his former church can control everything the pastor has written and spoken during his tenure at the church," says Dr. Greg Selmon, church planter in the Christian Reformed Church and the Reformed Church in America. And in the non-traditional church environment, where Internet publication, pay-per-click, and broad distribution of video and sound recordings are the norm, these issues become even more complicated. This article raises questions for legal counsel to consider when advising nonprofit organizations about copyright ownership. To simplify this discussion, I'll often refer to a "pastor," but the same issues apply to business leaders in religious organizations or nonprofits, rabbis, imams, or other clergypersons.

Question: *Who owns content created by a pastor or other employee of a religious institution?*

Answer: The pastor's creative work is a "work-for-hire" under the Copyright Act of 1976. This means that, absent agreement, the copyrights in sermons or blog posts or books are owned by the church that employs the leader. Under the work-for-hire doctrine, organizations own works of authorship if the works were created as a part of the employee's job. Although ministers dating from Jonathan Edwards to the present may consider writing sermons, blogs, articles, and books as integral to their calling, such writings all constitute intellectual property.

Question: *Does the "work for hire" doctrine include sound or video recordings?*

Answer: Yes, a sermon constitutes intellectual property, whether it is written down as notes or recorded in audio or video. In fact, a separate copyright exists in the sound recording of the sermon. And worship leaders who create musical content may also be creating works of authorship in both the composition and the sound recording of the performance.

Question: *What are the nonprofit implications when a church allows leaders to retain private copyright ownership?*

Answer: Within the nonprofit arena of churches, employees' works are considered to be charitable assets because they were created through use of charitable resources (e.g., employees' compensation or church equipment). Such works, therefore, must be used for charitable, tax-exempt purposes consistent with the church's mission. It is not within a church's mission to promote a pastor's own personal opportunity to make money (beyond ordinary and reasonable employee compensation), such as from selling his or her own books or other materials. In tax parlance, that is known generally as inurement and can lead to punitive "excess benefit" sanctions for the pastor and approving board members, as well as even invalidation of an organization's tax-exempt status.

But even where profit is not a motive, copyright protection is still very important, as it ensures that the materials cannot be used in an altered format that dilutes or distorts the organization's message. The last thing most religious organizations want to see is their message distorted and widely distributed as such.

Questions: *Are there benefits to authors when the organization owns the copyrights in the works?*

Answer: Yes. Religious organizations can use their platforms and resources—the pulpit, the website, domain names, Facebook pages, and mailings, for example—to promote the book or blog to a wide group. The organization may hire editors or provide a speaking platform for promotion of the material. The organization may pay the legal costs to file copyright registrations or negotiate for derivative works, translation or publishing agreements. An organization may pay or insure for the legal costs of defend-

ing a claim of infringement, which can arise from as small an act as quoting a poem believed to be old and anonymous or including a photo widely available on the web. Such coverage is prohibitively expensive for an individual pastor. And when a single entity owns the copyrights, licensing and future derivative works are more available.

But when the organization provides these benefits to its pastor or leader, the conflicts can become sensitive. Richard Stearns, president of World Vision U.S., donated the copyrights in his books to the charity. "I realized that it would be impossible to separate the promotion of my books from the promotion of our mission and cause. My marketing teams would be promoting the books to our donors and to a wide group of churches. I felt that it was a conflict of interest for me to use any World Vision venues and vehicles to promote the books if I was profiting in any way," says Stearns. "By transferring copyrights and royalties directly to World Vision, clear ethical lines were drawn."

Question: Are there benefits to the organization in retaining the copyright assets?

Answer: Yes. Retaining copyrights in the organization maintains clear title in the works, ensures that the works are licensable, avoids splintering of ownership, avoids litigation, and provides funds to support the author in his work of spreading the message of the organization. Consider this: would you become a shareholder in a company that hired software developers but did not retain the copyrights in the software created? Would you advise dividing a company asset into several pieces so that management of it was impossibly cumbersome? What would a donor think of a charity using donated funds to promote a book that did not belong to the organization? What would you think of a church that transferred copyrights to its pastor to avoid buying insurance in the event the pastor was sued for inadvertent copyright infringement? These legal and fiduciary principles must be considered in allocating the ownership of copyrights in religious nonprofits.

Question: How can a board steward a charitable organization's copyright assets?

Answer: While a board may initially believe it is best to allow everyone to own the copyrights in materials he



Will You Help Us to Seek Justice with the Love of God?

The Christian Legal Society seeks to inspire, encourage, and equip Christian lawyers and law students to lovingly serve Christ and one another.

In this world that is increasingly cruel and unjust, the Christian Legal Society and its member attorneys act as a light in the darkness by providing needed legal assistance to the poor, proudly defending the inalienable right to life, and standing firm for religious freedom.

Membership dues only cover one-quarter of our ministry costs. Please consider supporting CLS this summer.

SUPPORT CLS!

Please consider a tax-deductible gift today. Give now at www.clsnet.org/donate



**CHRISTIAN
LEGAL SOCIETY**

or she creates, these are assets of the organization that should be managed with good stewardship. Boards of nonprofits and businesses are generally expected to manage organizational assets by retaining proper ownership in the works created by their paid employees. (Colleges and universities are an exception to this rule.) On the other hand, a board should handle these works not only as assets, but as a message to be sent forth. Boards will want to employ and reward leaders who can proclaim the organization's message and should not seek to stifle the proclamation. "If not handled properly in the employment agreement, the leadership has the ability to silence a pastor's speech and writing by controlling all his intellectual property," says Dr. Selmon. In churches especially, the message of the gospel should go forth unhindered by improper controls. Pastors and other leaders should be given every incentive to be creative, produce good content, and proclaim the message, and pastors should also be given freedom to use their own material and ideas for many years into the future.

Question: *Is the answer different if the organization wants to give away its content for free?*

Answer: Religious organizations have a mission to spread their message far and wide. Such organizations often give away free downloads of sermons and songs, free educational materials, free brochures, free videos, free books. But even where profit is not a motive, copyright protection is still very important, as it ensures that the materials cannot be used in an altered format that dilutes or distorts the organization's message. The last thing most religious organizations want to see is their message distorted and widely distributed as such.

Further, when an employee owns copyrights in her works of authorship, she has exclusive rights to alter the works if her ideas or theology changes. The copyright owner (and her heirs) also control the content and royalties of any second editions and have the exclusive right to license the works to anyone. Can you imagine a famous worship song recording created by church employees licensed for use in a ketchup commercial? Or what about a tasteless parody of the famous

"I Have A Dream" speech? Such licenses would certainly not fit the mission. When religious organizations retain copyrights in the intellectual property, however, they can ensure that use is consistent with the mission and purposes for which the material was originally intended.

Question: *If an author wishes to retain the ability to freely use the material she created, what are the legal options?*

Answer: Other than an agreement to transfer ownership entirely, which may have dire tax consequences, there are other options for pastors to have substantial usage rights in their sermons without jeopardizing their church's exempt status. A simple, perpetual copyright license from the church or other religious employer back to the pastor is one solution. Such a licensing agreement keeps the title to the work clear and keeps the IRS at bay, all while allowing the pastor freedom to reuse his own material in the future.

Religious organizations can always transfer the copyrights back to the author at a later date, and they often do. For example, if an employee creates a series of church education materials, and then moves to another organization, the church may want to give the employee a free license to reuse his own materials at the new church. Or the church may decide to transfer any liability associated with those materials to the departing employee rather than retain ownership and management obligations for those assets.

In summary, there are weighty issues around copyright ownership by pastors, churches, and charities that a board must weigh carefully and preferably long before an ownership dispute, infringement claim, or leadership transition occurs.



Leslie Ruiten provides legal counsel on complex copyright and trademark problems to churches around the United States and other nonprofits, businesses, authors, and rock bands. She holds a joint degree in law and theology from Emory University School of Law and Emory's Candler School of Theology. She is a leader in the intellectual property team at Stokes Lawrence P.S. in Seattle, Washington.



Scaling Up Our Dreams

BY KEN LIU

Traditionally, one of the key indicators of nonprofit “success” has been how low an organization’s overhead expenditures are. By this measure, Christian legal aid is a worthy financial investment. But it’s time for us to look beyond just the size of program expenditures, and start seeking a bigger vision of the impact Christian legal aid can make.

Christian legal aid (CLA) has the power to transform broken lives by helping with crucial life issues such as saving children from abuse, preventing eviction, and removing barriers to employment. But the CLA community is tiny compared to the vast number of people who face legal troubles and injustices. Only an estimated 20% of poor people with legal needs can obtain affordable legal help. A majority of that help comes from secular legal programs, which will receive \$375 million this year from the federal government alone (not including foundations and other private funders). By contrast, CLA programs, which typically do not receive any government funds, have an estimated combined revenue of less than 2% of that amount.

The impact of CLA volunteers

Despite the lack of funds, CLA programs generally make a tremendous impact from dollars invested because of the power of

leveraging staff time into volunteer time. In an informal survey of ten clinics that received grants from Christian Legal Society in 2014, each has an average of just 1.4 paid staff, but over 115 volunteers (attorneys and non-attorneys). These ten clinics collectively served over 5,600 clients in one year – an average of about 630 clients per clinic.

CLA clinics are able to leverage their staff powerfully because they are largely served by dedicated volunteers who give of their time freely, motivated by the love of Christ. Most of the clinics also have their office space donated by churches or law firms, or have low-cost rents; therefore, their total overhead is generally quite low.

But volunteers can only do so much. To grow the impact of Christian legal aid, clinics desperately need to invest in building their capacity. More staff attorneys are needed to take on bigger cases. Program coordinators are needed to recruit and manage more volunteers. Both staff and volunteers need more training to improve their services. Clinics cannot make a bigger impact unless they expand their operations. But, unfortunately, many donors are reluctant to support growth in “overhead.” If we, as a Christian community, want to help meet the overwhelming need for legal services to the poor, we need to change our outlook on funding.

The “overhead myth”

In 2013, three of the nation’s largest charity monitoring organizations—GuideStar, Charity Navigator, and BBB Wise Giving Alliance—started a campaign called “The Overhead Myth.” They issued a public letter to the nation’s donors arguing that focusing too heavily on the percentage of a charity’s budget spent on administrative and fundraising expenses “can do more damage than good.” In a widely viewed talk entitled “The Way We Think About Charity Is Dead Wrong,” nonprofit consultant Dan Pallotta famously urged: “*The next time you look at a charity, don’t ask about the rate of their overhead, ask about the scale of their dreams.*”

All charities need to spend money on things like staff, technology, and office space. In order to grow, they need to invest in training, recruitment, planning, and evaluation. In the for-profit world, such things are valued as infrastructure and capacity building. But in the nonprofit world, such things are often demonized as “overhead.” The result? Charities are hamstrung from building and growing.

Growing the CLA movement

The Christian legal aid movement is still small because, although the harvest is plentiful, the workers are few. There are tens of thousands of Christians attorneys in the country, but whether out of busyness, feeling ill-equipped, or just failing to see the need, only a small number of them are involved in CLA. CLA needs more attorneys to heed Christ’s call to serve, and a greater investment to engage, equip, and empower those attorneys. And as crucial as volunteers are, CLA clinics also need more staff attorneys to take on bigger cases and make more long-term impact.

To expand CLA’s impact, CLA clinics and their supporters need to scale up their dreams and “enlarge their territories” (1 Chronicles 4:10). Please get involved, and pray for more supporters who not only recognize the financial soundness of investing in Christian legal aid, but also share the dream of reaping the harvest!



Ken Liu joined the CLS staff as Director of Legal Aid Ministries in September 2014. This essay is based on the Christian Legal Aid update he presented at the October 2014 CLS Conference.

INVITE A FRIEND TO JOIN YOU IN YOUR JOURNEY

We are created for community!

Bring someone with you on your CLS journey in 2015! When you renew your dues this year, invite another Christian lawyer to join CLS. Why not take a minute now to ask the Lord to bring to mind friends and colleagues who would join you as walk out your professional calling in the CLS community? CLS members are changing lives through Christian Legal Aid, Law Student Ministries, and the Center for Law and Religious Freedom.

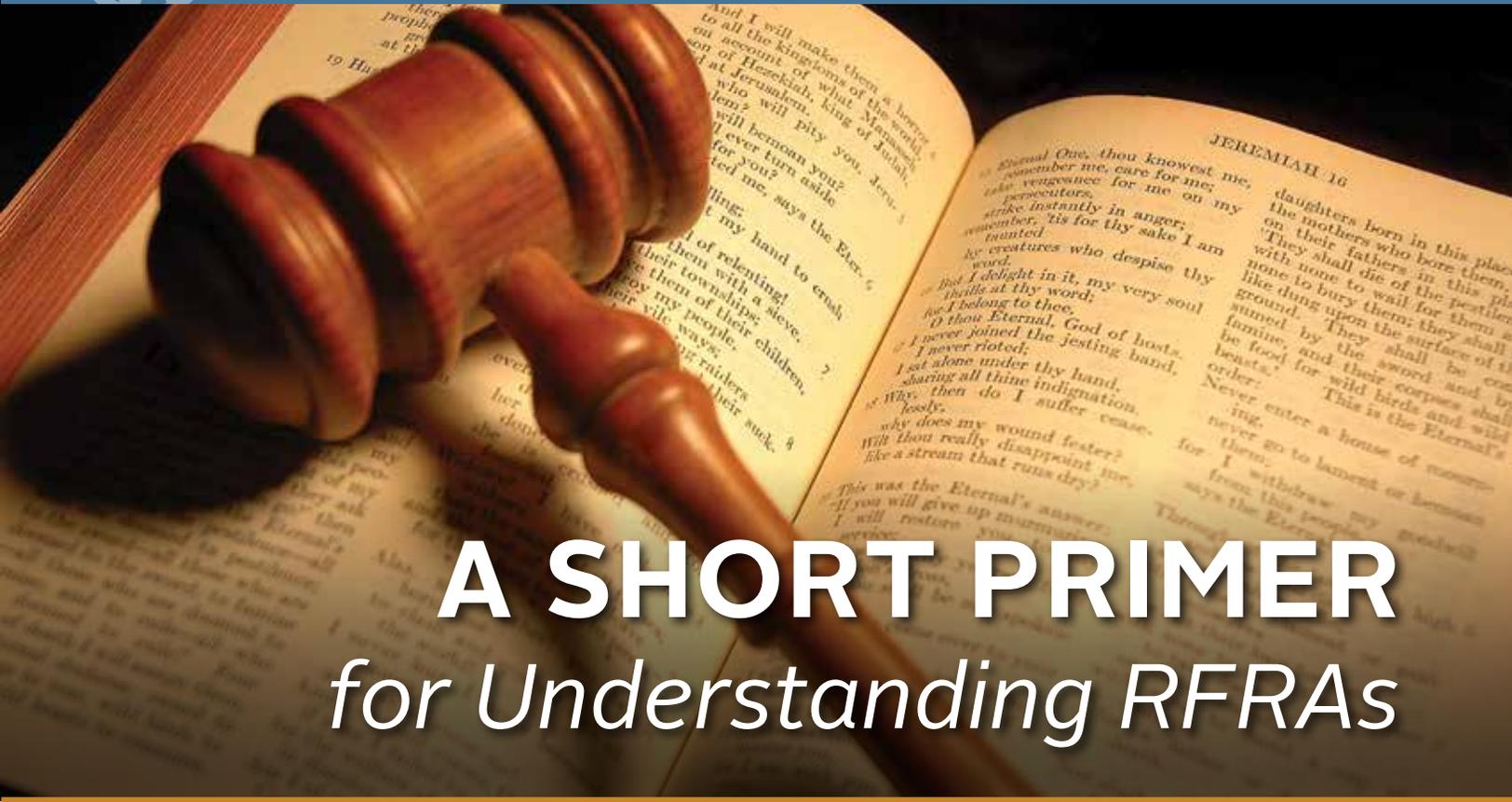
Invite someone to join you in changing lives!

one by one



clsnet.org/onebyone





A SHORT PRIMER for Understanding RFRAs

BY KIM COLBY

In the last week of March, misinformation combined with media malpractice to nearly derail the passage of two pieces of sensible religious liberty protection in Indiana and Arkansas. Supporters of religious liberty need to analyze and take to heart the lessons of the unfortunate “March Madness” in order to be prepared for future attacks on religious liberty, both at the state and national levels.

Since 1990 when the First Amendment’s protection for religious exercise was severely eroded, Religious Freedom Restoration Acts at both the federal and state levels have provided the primary – and often the only — protection for citizens’ religious liberty. We need to understand that attacks on Religious Freedom Restoration Acts are almost always attacks on religious liberty itself.

Religious Freedom Restoration Acts (RFRAs) sound complicated, but they are fairly simple. If we are to sustain religious liberty in this country, it’s important that we all become familiar with the basic workings of RFRAs in order to defend them to co-workers, neighbors, and even fellow believers.

This article serves as a short primer on RFRAs. For a more in-depth exploration of RFRAs, visit the CLS website to read CLS’s written statement submitted in February 2015 to the House Judiciary Subcommittee on the Constitution or a one-pager that summarizes pertinent information about RFRAs.

Why State Religious Freedom Restoration Acts Are Necessary

In 1990, the Supreme Court, in an opinion authored by Justice Scalia, severely weakened the First Amendment’s constitutional protection of religious liberty in the case of *Employment Division v. Smith*. The Court abandoned the “compelling interest” test that required the government to show a compelling interest in order to justify a restriction on religious liberty. Instead, the *Smith* Court said that if a law were neutral and generally applicable, the government could restrict a citizen’s or congregation’s religious exercise — no matter how easily the government could accommodate the religious exercise if it wanted.

To restore the “compelling interest” test, liberals and conservatives in Congress came together to pass the Religious Freedom Restoration Act. Congress spent three years holding hearings on RFRA to determine how best to protect religious liberty after *Smith*. Led by Senator Hatch (R-UT) and Senator Kennedy (D-MA), ninety-seven senators voted for RFRA, including Senator Biden. The House passed RFRA by a unanimous voice vote, and President Clinton signed it into law. CLS played an important role in the enactment of RFRA.

Basically, to bring a RFRA claim, a citizen, congregation, or other religious organization must show two things: 1) a sincerely-held religious belief that has been 2) substantially burdened by a governmental action. If the religious claimant makes those two showings, the government must show two things as to the application of its law to the specific religious claimant: 1) a compelling governmental interest that is 2) unachievable by a less restrictive alternative.

RFRA does not pre-determine whether the government or the religious citizen wins. After hearing both sides, the courts determine who wins under RFRA. Without RFRA, the courthouse door would be closed to many religious citizens who simply want to live according to their religious consciences.

Congress intended the federal RFRA to apply to all levels of government. But in 1997, the Supreme Court ruled that Congress had exceeded its authority under the Fourteenth Amendment when it applied RFRA not just to the federal government, but also to state and local governments.

In response, CLS and other groups helped some state legislatures enact state RFRA to protect religious liberty at the state and local levels. Since 1997, 21 states have enacted some version of RFRA. In an additional 9 states, the state supreme courts have adopted a judicial “compelling interest” test for religious liberty under their state constitutions. But that means that citizens’ religious liberty is inadequately protected in 20 states.

What Happened in Indiana and Arkansas

State RFRA had strong support in Indiana and Arkansas and had passed both legislatures by comfortable margins. Nothing had prepared their political leaders for the tempest that erupted, even though the script closely followed the controversy over amendments to Arizona’s state RFRA a year earlier. Basically, the controversy materialized seemingly out of nowhere over a weekend.

Two factors were particularly important. First, the media largely served as an unthinking conduit for the massive misinformation that RFRA’s opponents were purveying. While the media has never been particularly friendly to religious liberty, in Indiana, it completely abandoned any pretense of balanced reporting.

Second, corporations placed great public pressure on the state political leaders by threatening not to do business with the states. The hypocrisy of corporate CEOs, who claimed to be too pure to do business in Indiana and Arkansas, while their companies daily do business with the repressive Chinese government, was jaw-dropping. But it may be a necessary wake-up call for the Christian community to understand that where they spend their money matters. (Personally, I am a long-time Walmart customer who plans to never darken Walmart’s doors again. A friend who cannot avoid using Apple devices for work nevertheless protested Apple’s disdain for his religious liberty by placing a Christian symbol over the Apple symbol on his iPad.)

The most important lesson from Indiana and Arkansas is that state RFRA need to be clones of the federal RFRA. With a 21-year history of judicial interpretation behind it, the federal RFRA cannot easily be painted as an extreme measure, or a tool for discrimination. Two decades of decisions that sensibly balance religious liberty and government interests belie opponents’ claims to the contrary. Both the Indiana and Arkansas RFRA had minor differences from the federal RFRA, and the opposition drove a truck through those unimportant differences. That can be stopped by adopting the federal RFRA virtually verbatim, changing only what is needed to make it apply at the state rather than federal level.

Another lesson is to compare what happened when Indiana and Arkansas “fixed” their RFRA in the face of protests. While both “fixes” left a state RFRA intact that will protect religious liberty, the Indiana “fix” negated some important religious liberty protection. Arkansas learned from Indiana’s experience and acted quickly to adopt a “fix” that had no substantive effect on the state RFRA’s protections for religious liberty. Window-dressing sometimes is enough.

In many states, the state legislative session is truncated. A lot of important state business has to be done in a few short months by citizen legislators who do not have a lot of time to become conversant on the details of the measures they are considering. A better job of educating them as to the need for religious liberty in advance is imperative, so that they are naturally ca-

pable of defending religious liberty measures in committees, on the floor, or to their constituents, when misinformation campaigns target a religious liberty measure.

Another lesson is that the day of “lone ranger” state efforts is over. The religious liberty community needs to agree together on what legislation will be tried in which states in order to bring to bear the local grassroots and national support that is needed in a timely way when a problem arises.

State RFRAs and other state measures to protect religious liberty are too important to be abandoned in the face of a campaign of intimidation through falsehoods and corporate bullying, but the Christian community is going to have to become better at mastering our “talking points” for state RFRAs and religious liberty.

Ten Reasons Why RFRAs Deserve All Americans’ Support

- **RFRAs create a level playing field for Americans of all faiths:** RFRA places “minority” faiths on an equal footing with every other faith. Without RFRA, every time Congress considered a new law, “minority” faiths would have to lobby for statutory exemptions to protect their religious freedom.
- **RFRAs implement a sensible balancing test:** RFRAs do not mean that religion always wins. The government still wins many cases. But RFRAs provide a sensible balancing test for courts to use to balance religious liberty and other governmental interests.
- **Courts do not interpret RFRAs to discriminate against anyone:** Discrimination claims consistently trump religious liberty claims. They do not “license” anyone to discriminate.
- **RFRAs prevent discrimination against religious people:** Government discrimination against religious people still happens — today — in America. Ask Jews, Amish, Hindus, Mormons, Catholics, Sikhs, Evangelicals, and Muslims. Because religious discrimination often happens at the state and local level, state RFRAs protect religious liberty in situations that the federal RFRA does not reach.
- **RFRAs reduce “religion in politics”:** Without RFRAs, every time a government considers a new law, religious

groups must lobby to protect their religious freedom. With RFRAs, religious freedom is already protected, so less interaction with government is necessary.

- **RFRAs increase governmental transparency and accountability:** RFRA requires government officials to justify any restriction they impose on citizens’ religious liberty. Without RFRAs, government officials may just ignore citizens’ religious liberty concerns. RFRAs increase citizens’ leverage in dealing with government officials and incentivize the government to find ways to achieve its interests while respecting citizens’ religious liberty — a win-win for everyone.
- **RFRAs promote diversity:** RFRAs create space for religions to flourish. Ironically, RFRAs’ opponents talk about the importance of religious diversity while simultaneously repressing the very religious liberty that makes diversity possible.
- **RFRAs actually minimize religious conflict in the long-term:** Such conflict is unnecessary when everyone’s religious liberty is guaranteed.
- **RFRAs’ opponents’ extreme position means religious liberty always loses:** Just like free speech, religious liberty is unpopular with people who want a monopoly for their speech and beliefs. But Americans believe in letting everyone say what they want and believe what they want. When we stop defending religious freedom, we stop being a free society.
- **RFRAs reinforce America’s commitment to pluralism:** With RFRA, Congress re-committed the Nation to its foundational principle that American citizens have the God-given right to live peaceably and undisturbed according to their religious beliefs.

One final thought — Americans are stewards of religious liberty, not just for Americans, but for religious liberty around the globe. But if we fail to maintain religious liberty in America, we cannot credibly criticize other governments for repressing their citizens’ religious freedom. Religious liberty starts — but does not stay — at home.



Kim Colby is the Director of the Center for Law & Religious Freedom. She is a graduate of Harvard Law School.



New Season, *Same Calling*



BY BRENT AMATO

What is your “calling?” Attorneys, trained and skilled at asking and answering questions, all probably have an answer that, in some way, includes their practice of law. The Apostle Paul, “as to the Law, a Pharisee” (Philippians 3:5), raised the issue with the believers in the local church at Ephesus: “I, therefore, . . . entreat you to walk in a manner worthy of the calling with which you have been called” (Ephesians 4:1). A strong exhortation for every Christian. Based on Paul’s self-assessment of his credentials, “things I have counted as loss for the sake of Christ” (Philippians 3:7), Paul was driving at something deeper than the mere practice of law. One commentator suggests Paul rejected these “things” with horror and treated them as liabilities. Jesus was in the same camp: “Woe to you, . . . Pharisees! For you . . . have neglected the weightier provisions of the Law: justice and mercy and faithfulness, but these are the things you should have done . . .” (Matthew 23:23). Both Paul and Jesus saw the

Law as a means to be rightly related to others. In answer to a scribe’s question as to the “greatest commandment,” Jesus pointed to our vertical relationship with God and horizontal relations with others: Love God; love your neighbor (Mark 12:28-31).

What is your calling? As a Christ-follower. As a Christ-follower who is an attorney.

In a recent CLS devotional, Hugh Welchel states, “As Christians, we have a mission that our Lord expects us to accomplish in the here and now.” In his book *The Call: Finding and Fulfilling the Central Purpose of Your Life*, Os Guinness explores this idea: “Do you have a reason for being, a focused sense of purpose in your life? Or is your life the product of shifting resolutions and the myriad pulls of forces outside yourself?” He challenges us to listen to Jesus and answer his call. Whether the call of Jesus be framed in The Great Commission (Mat-

thew 28:19-20), shepherding the “sheep” in our life (John 21:15-17) or his “new commandment” to His disciples (John 13:34), it is embedded in relationships and to be followed by all, including lawyers.

Beginning when I entered the legal profession in 1975, my calling was shaped in large measure by my affiliation with the Christian Legal Society and found in the organization’s purposes and mission: “To encourage Christian lawyers to view law as ministry . . . To clarify and promote the concept of the Christian lawyer and to help Christian lawyers integrate their faith and their professional lives . . . To encourage, disciple and aid Christian students in preparing for the legal profession.” (Christian Legal Society Bylaws, Article I). Similarly, the CLS Attorney Ministries mission is “to inspire, encourage and train attorneys to faithfully proclaim and live out the Word of God in their personal and professional lives.” Part of the Law Student Ministries mission is “to nurture and encourage Christian law students by providing mentors and resources aimed at fostering spiritual growth, compassionate outreach, and the integration of faith and practice.” Paul instructs Titus to “diligently help Zenas the lawyer...on [his] way so that nothing is lacking for [him]” (Titus 3:13). The people in one’s world matter greatly.

My law practice world, like yours, included clients, third parties, partners, associates, paralegals, secretaries, staff, law students, and others. I hope, in some way consistent with Scripture, that this practice has been “to the glory of God” (I Corinthians 10:31). I hope there has been encouragement, nurture and discipleship of lawyers and law students consistent with the CLS purpose and mission statements. But the calling that Paul describes to the Ephesians went beyond this. Paul characterized his ministry this way: “Having thus a fond affection for you, we were well-pleased to impart to you not only the gospel of God but also our own lives, because you had become dear to us” (I Thessalonians 2:8). Part of my calling as a practicing attorney was the investment in the lives of others in the legal community.

My law practice ended December 31, 2014, as I responded to the calling of God to “vocational ministry.” I view this change much as the Preacher does in Ecclesiastes, in terms of a season of “time appointed by God.” Part of that vocational ministry has been my acceptance of a part-time position with CLS as the Chicagoland Staff Member reporting to Mike Schutt, the

CLS Director of Attorney and Law Student Ministries. My job description and duties reference the CLS Attorney and Law Student Ministries missions. It has been an easy transition in one respect. This position and job description have been my “CLS heartbeat” since the beginning of my career. Burt Erickson, one of the CLS “Founding Fathers,” modeled this for me and instilled this in me. The “beat” goes on to this day and will continue! A new season, but the same calling.

I am mindful that some resonate more with the CLS religious liberty or legal aid missions than with this pastoral bent, but isn’t there some capacity in all of us to embrace this purpose and mission for the lawyers and law students in our legal practice spheres?

How about you? In 2009, as a practicing attorney, I wrote an article for *The Christian Lawyer* magazine with a modest proposal for all attorneys to minister to law students. Now as an employee of CLS with an expanded scope of ministry, I advance the same proposal, but expand it to include attorneys:

1. Pray about and then identify one “Zenas” (an attorney) and one “Timothy” (a law student). If you need help identifying a law student in your “neighborhood,” either I or Mike Schutt will be happy to provide you with some names.
2. Intentionally invest yourself in the lives of these two individuals by:
 - praying for them,
 - talking with them,
 - spending time with them on their terms and turf, and
 - encouraging, nurturing and discipling them.

No matter what season of life you find yourself in, the “calling” remains. Figure it out and then work at it “with all your heart and with all your soul and with all your mind and with all your strength” (Mark 12:30) to the glory of God.



Brent Amato practiced business and corporate law in the Chicagoland area for nearly 40 years and recently retired as Vice-President, General Counsel for Heritage-Crystal Clean, a publicly-traded company. He now serves as a member of the CLS Chicagoland Field Staff, working with lawyers and law students, and in part-time roles with the Gospel Justice Initiative and Crossroads Resolution Group.

Join the thousands of church leaders who rely on *Church Law & Tax Report* and *Church Finance Today* for the latest on tax, finance, and legal information affecting churches.



Visit ChurchLawAndTax.com for subscription options.



H. Robert Showers, Jr.
President and
Chairman of the Board

Churches and Religious Nonprofits in Trouble, but God is Able...

The landscape for churches and religious ministries in the 21st century reveals serious legal, tax, and risk management challenges like never before in America with child abuse lawsuits, religious land disputes, violence and security issues, Affordable Care Act healthcare dilemmas, counseling crises, employment disputes, and a variety of other serious concerns. Now, ministers appear subject to losing their housing allowances, and churches and religious ministries are faced with same-sex issues that could jeopardize their tax-exempt status and sincerely-held religious beliefs. Thirty years ago, churches and religious ministries would not have imagined that they would be facing any of these serious legal, tax, and risk issues nor that they would be bombarded with lawsuits and claims. However, *today it is not if, but when*, such a claim or lawsuit will occur against the minister, church, or religious nonprofit.

Twenty-five years ago the leadership of CLS saw these growing challenges and realized that most, if not all, Christian lawyers serve in leadership capacities at such churches, ministries and religious nonprofits but are not equipped to help give legal and tax advice and guidance through these storms. As all lawyers realize, these serious legal church and nonprofit issues require special knowledge and expertise which the vast majority of lawyers are not equipped to render. Thus, CLS created, at each CLS national conference since 1994, a **nonprofit and church law track** to help lawyers and law students be aware of serious legal and tax issues confronting today's churches and religious nonprofits, and where to get answers and assistance. Our goal was not to make tax-exempt or church law experts of these servant leader Christian lawyers

in four one and a half hour sessions at the national conferences, but to sensitize them to the hot legal issues for churches and point them to the resources available to help the churches and religious nonprofits where they serve in leadership.

In 2015, CLS is launching a **series of white papers and webinars** to address the upcoming tsunami of same-sex legal issues brought on by the court, legislative challenges of same-sex marriages, and homosexual rights that are now front and center before every court, state and federal legislature and media outlet. As most now know, the U.S. Supreme Court will render some landmark decisions on these issues in June that may trigger a variety of intended and unintended consequences which will challenge religious liberty at its core. The webinars and white papers with many resources will be featured on the CLS website and promoted by many denominations and associations of churches and nonprofits. They will cover how churches, religious schools, and other religious nonprofits can practically address same-sex issues in a legally protective manner consistent with their sincerely-held faith and convictions and yet be sensitive to loving people with whom they may not agree. Such freedom of speech, association and religion is at the heart of our First Amendment, Bill of Rights and Constitution that are foundational principles for U.S. democracy and way of life.

Please participate in the webinars and the 2015 national conference in New Orleans where the top Legal Hotspots will be discussed at length and you will be well equipped to help your local church and religious ministries navigate the troubled waters ahead.



Connect with other CLS members in your area

ALABAMA

Birmingham
CLS Birmingham
Mark Hogewood
mhogewood@wallacejordan.com

Mobile
CLS Mobile
William Watts
bill@alabamatrial.com

ARIZONA

Phoenix
CLS Phoenix
Chris Charles
chris@providentlawyers.com

Tucson
CLS Tucson
Jim Richardson
james.richardson@azbar.org

CALIFORNIA

Los Angeles
CLS Los Angeles
Bill Reichert
reichert@wellsfargo.com

Orange County
CLS Orange County
Steve Meline
melinelaw2@yahoo.com

Inland Empire
CLS Inland Empire
Maureen Muratore
mmlawyer@peoplepc.com

Sacramento
CLS Sacramento
Steve Burlingham
steveb@gtblaw.com

San Diego
CLS San Diego
Miles Lawrence
MLawrence@LECProfGroup.com

San Fernando Valley
CLS San Fernando Valley
Ben Jesudasson
ben@bjslawfirm.com

San Francisco
CLS San Francisco
Brian Barner
bbarner@asu.edu

West Los Angeles
CLS West L.A.
Sarah Olney
sarah.olney@yahoo.com

COLORADO

Colorado Springs
CLS Colorado Springs
Synthia Morris
synthiamorrisatty@gmail.com

Denver
CLS Metro Denver
Terry O'Malley
tomalley@omalleylawoffice.com

DISTRICT OF COLUMBIA

CLS DC Metro
Paul Daebeler
pfdaeber@verizon.net

FLORIDA

Jacksonville
CLS Jacksonville
Hollyn Foster
hjfooster@sbnjax.com

Orlando
CLS Orlando
Joshua Grosshans
jgrosshans@mateerharbert.com

Tampa
CLS Tampa
Joseph Pippen
joe@attypip.com

West Palm Beach
CLS West Palm Beach
Laura Mall
lmall@cdhanley.com

HAWAII

Honolulu
CLS Hawaii
Tom Rulon
tom@rulonandmatsumoto.com

ILLINOIS

Chicago
CLS Northern Illinois
Steve Denny
sdenny@dennylaw.com

KANSAS

Wichita
CLS of Wichita
Richard Stevens
rcstevens@martinpringle.com

LOUISIANA

New Orleans
CLS New Orleans
Frank Bruno
frank@fabruno.com

MARYLAND

Baltimore
CLS Baltimore
David Smith
dcsmith12@startmail.com

MASSACHUSETTS

Boston
CLS Boston
Brian Tobin
btobin@tobin.pro

MINNESOTA

Minneapolis
CLS of Minnesota
Paul Baertschi
baertschi@integra.net

MISSISSIPPI

Jackson
Stephen Griffin
sgriffin@danielcoker.com

MISSOURI

Kansas City
CLS Kansas City
Jesse Camacho
jcamacho@shb.com

St. Louis
CLS St. Louis
Gary Drag
garydrag@sbcglobal.net

NEBRASKA

Lincoln
Jefferson Downing
jd@keatinglaw.com

NEVADA

Las Vegas
David Ortiz
davidortizlaw@yahoo.com

NEW YORK

New York City
Melissa Salsone
msalsone@yahoo.com

Syracuse
CLS Central New York
Ray Dague
rjdague@daguelaw.com

NORTH CAROLINA

Wake County
Wake County CLS
Rik Lovett
riklovett@mindspring.com

OHIO

Columbus
CLS of Central Ohio
Douglas Hertlein
hertlein@aksnlaw.com

Willoughby Hills
CLS of Ohio Northeast
Robert L. Moore, Esq.
rob@robertlmooreesq.com

OKLAHOMA

Oklahoma City
CLS Oklahoma City
David Van Meter
david@vanmeterlawfirm.com

OREGON

Salem
CLS of Oregon
Warren Foote
warren.foote@comcast.net

PENNSYLVANIA

Philadelphia/Delaware Valley
Ted Hoppe
thoppe@thoppelaw.com

Pittsburgh
CLS Western Pennsylvania
Delia Bianchin
delia_bianchin@pennunited.com

TENNESSEE

Chattanooga
CLS Chattanooga
Todd McCain
tmccain@cumberlandtitleandguaranty.com

TEXAS

Austin
CLS Austin
Steve Campos
scampos@thefowlerlawfirm.com

Dallas
CLS Dallas
Steven Morton
smorton@mortonpllc.com

Houston
CLS Houston
Stephen Moll
smoll@gardere.com

San Antonio
CLS San Antonio
Chad Olsen
chad@braychappell.com

VIRGINIA

Leesburg
CLS Northern Virginia
Mark Crowley
markvincentcrowley@earthlink.net

Richmond
CLS Richmond
Brian Fraser
brian.r.fraser@gmail.com

WASHINGTON

Seattle
CLS Seattle
Tom Rodda
trodda@elmlaw.com

REGISTER BEFORE JULY 31 FOR EARLY DISCOUNT RATE

**CLE
CREDITS
AVAILABLE**

CLS NATIONAL CONFERENCE

HEARING GOD IN THE STORM

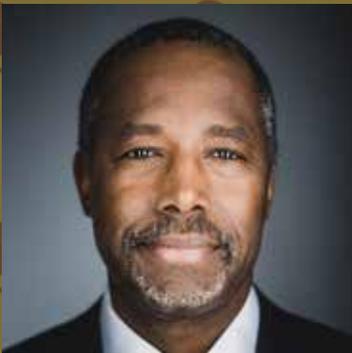
PRACTICING LAW IN TURBULENT TIMES

NEW ORLEANS, LA



OCTOBER 1-4, 2015

FEATURED SPEAKERS



DR. BEN CARSON
Author, Speaker, Philanthropist



STEPHAN BAUMAN
CEO, World Relief



THABITI ANYABWILE
Pastor, Author



RICHARD HAMMAR
Attorney, CPA, Author

Enjoy dynamic speakers, informative seminars, heartfelt worship and warm fellowship with Christian lawyers, judges, academics and law students from across the country.

Don't miss this unforgettable event in one of America's most historic cities. Register today to receive an early discount rate.

christianlawyer.org/2015conference