

# THE CHRISTIAN LAWYER®

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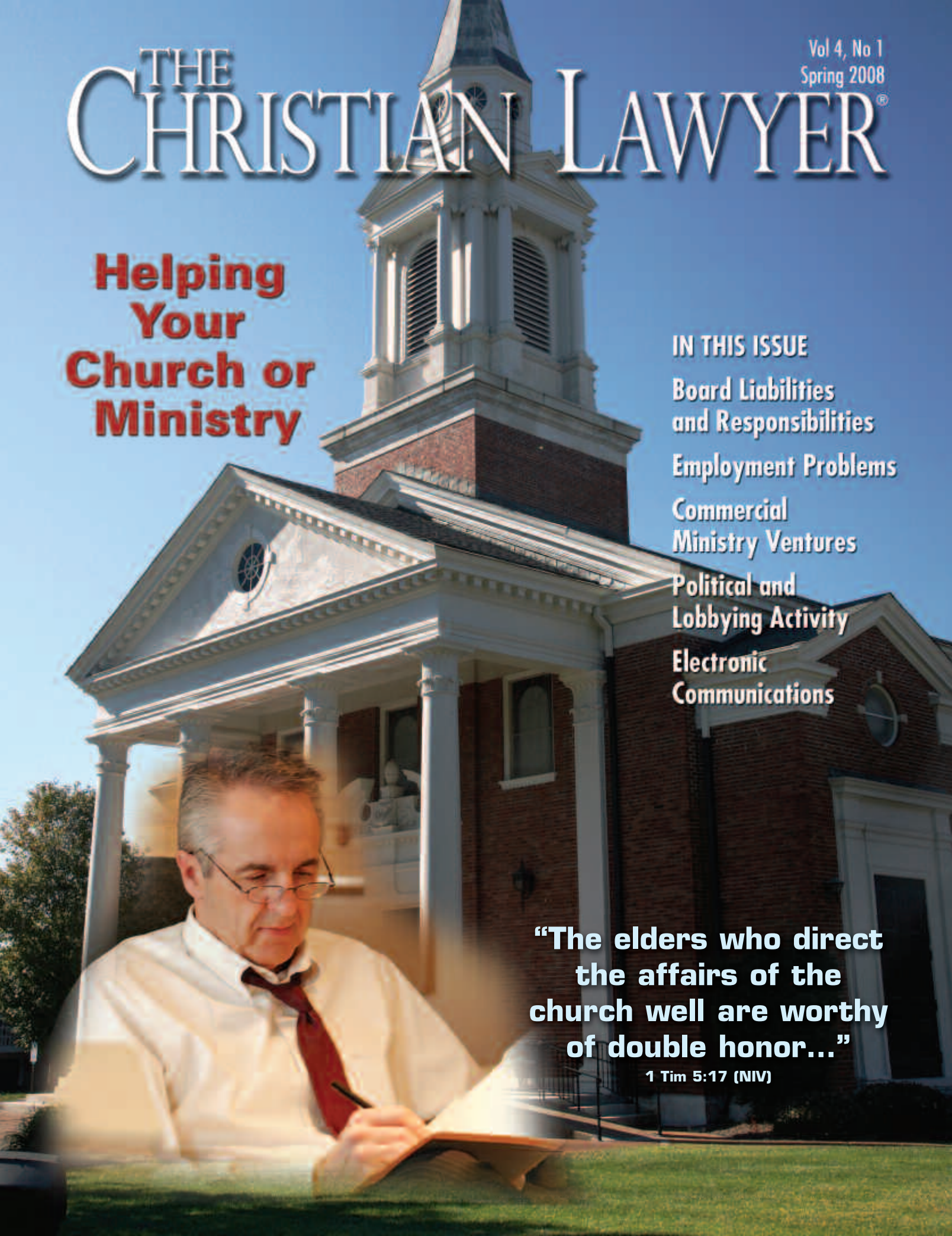
**Helping  
Your  
Church or  
Ministry**

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Board Liabilities  
and Responsibilities  
Employment Problems  
Commercial  
Ministry Ventures  
Political and  
Lobbying Activity  
Electronic  
Communications

**“The elders who direct  
the affairs of the  
church well are worthy  
of double honor...”**

1 Tim 5:17 (NIV)



DO NOT LAY UP FOR YOURSELVES  
TREASURES ON EARTH... BUT LAY  
UP FOR YOURSELVES TREASURES IN  
HEAVEN... FOR WHERE YOUR  
TREASURE IS, THERE YOUR HEART  
WILL BE ALSO. — MATTHEW 6:19-21 (ESV)

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— II Corinthians 9:11 (NIV)

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Samuel B. Casey  
EXECUTIVE DIRECTOR  
AND CEO



## WE NEED EACH OTHER'S HELP

Often when I meet with pastors and talk to them about “Christian lawyers” – they almost always remind me about “oxymorons” and other such improbabilities. Suspecting that most often the best pastoral care for lawyers may be a good helping of humble pie, pastors love to serve up their latest lawyer jokes. A current favorite is **Q: What's wrong with lawyer jokes? A: Lawyers don't think they're funny and other people don't think they're jokes!**

But the laughing stops when pastors and leaders of other charitable organizations express their gratitude for the various ways that Christian lawyers advise, assist, support and advance their ministries, by offering their time, treasure and talent, most often voluntarily or at a reduced fee. After all, lawyers serve on their boards, incorporate them, help them with their building projects, suggest ways to reduce their potential liabilities, speak to members of their congregations about the real and imagined problems their pastors refer to them, help them raise the funds needed to accomplish their mission, provide more conciliatory means of resolving their conflicts than going to court, and go to court for them as the need arises.

Since our founding in 1961, one of CLS' stated reasons for existing has been “to encourage lawyers to furnish legal services to the poor and needy and grant special considerations to the legal needs of churches and other charitable organizations.” Who knew in 1961 how those “legal needs” would grow and complicate in the intervening 46 years, but they have. Who knew how large and complex many Christian organizations would become? Who knew how interested the government would become in regulating religious organizations? Who knew that Christians in the U.S. would file 4 to 8 million lawsuits every year, often against other Christians, costing 20 to 40 billion dollars? Or that there would be approximately 19,000 major, scarring church conflicts in the U.S. each year (an average of 50 per day)? Or that the same percentage of Christians who have been married have gone through a divorce at the same rate as the general population? Or that 1,500 pastors would leave their assignments every month because of conflict, burnout, or moral failure that costs the church at least \$684 million each year? No wonder life in the law lane involves the church.

On the other hand, every Christian lawyer knows that he or she is a danger to himself and others without the salvation, redemption, spiritual care, community and accountability that can only come from Jesus Christ through His Church. And so, in the midst of the jokes and all the very real challenges our local churches and other charitable organizations face in this country, we realize that the church and lawyers need each other. My picture of this truth are the two CLS members who each week walk in prayer for a city block around their congregation's church building as they ask for God's guidance even as they represent this church in a court proceeding that the church did everything it could to otherwise avoid.

So we trust you will enjoy this issue of the Christian Lawyer magazine. It's for all of us who love the church and the other charitable organizations who help the church accomplish the mission for which Jesus has appointed us.

Whether we are currently sitting on a church or nonprofit board, advising such an organization, or aspire to do so, this issue hopes to fill the bill. We are most grateful to some of our best and brightest nonprofit lawyers who so readily offered to write articles to help us with some of the basic issues that churches and nonprofits face or will face: Church and Board Liability; Employment Issues, Electronic Communications, Political Activity and Commercial Ventures. Hopefully, it's enough to keep us all smiling as we help each other.

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*Editor-in-Chief & Publisher*  
**David Nammo**

*Assistant Editors*  
**Laura Nammo  
Helen Hogye**

*Design & Production*  
**Custom Designers, Inc.**

*Editorial Office*  
**The Christian Lawyer  
Christian Legal Society  
8001 Braddock Rd, Suite 300  
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**Ad Guidance, Inc.  
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(703) 365-7411**

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[info@adguidance.com](mailto:info@adguidance.com)

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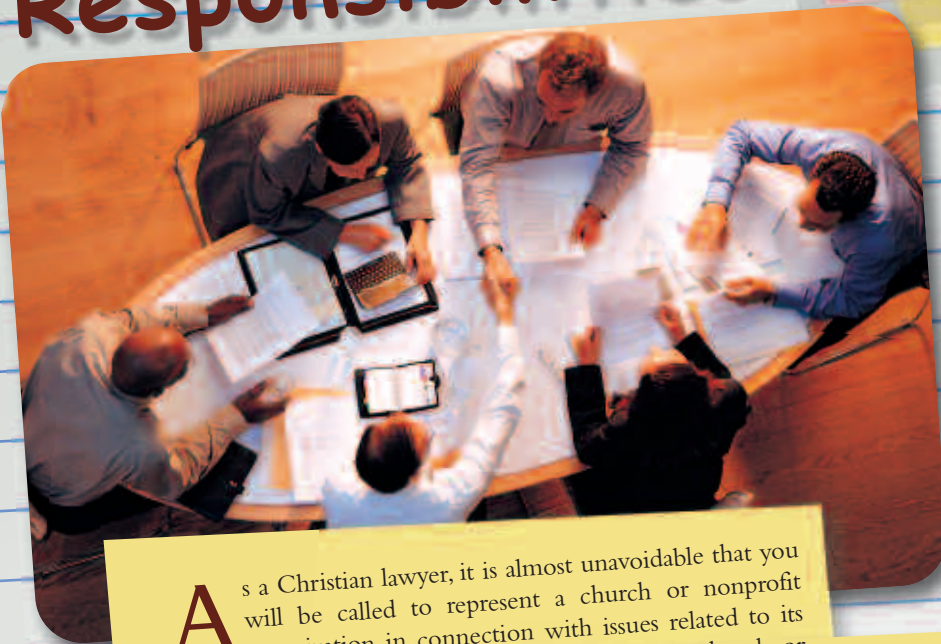
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# Nonprofit and Church Board Liabilities and Responsibilities

- Review Contracts
- Sign Mortgage
- Amend Bylaws
- Hire Church Secretary



By Whitman H. Brisky  
and Jeffrey M. Schwab  
Mauk & Baker, LLC

**A**s a Christian lawyer, it is almost unavoidable that you will be called to represent a church or nonprofit organization in connection with issues related to its board or that you will be asked to serve on a church or nonprofit board yourself. Particularly for the lawyer who does not regularly practice nonprofit law, it could be easy to get into trouble if the lawyer does not understand the responsibilities and potential liabilities church and nonprofit board members face.

Scripture instructs us that board members (sometimes called Elders, Trustees, Deacons, or Vestrymen) must “be above reproach . . . temperate, self-controlled, respectable, hospitable, able to teach, not given to drunkenness, not violent but gentle, not quarrelsome, not a lover of money.” (1 Timothy 3:2-3). They should understand the commitments and requirements of board membership and be diligent and prudent in everything. (Proverbs 14:15).

## BOARD MANAGEMENT

It is typically the responsibility of the board to manage the business affairs of the church or nonprofit. This generally means that the board has authority to authorize the execution of contracts, to elect officers, to hire employees, to authorize borrowing, deeds, and mortgages, and to institute and settle lawsuits. These powers may be limited by and/or further explained in the board or organization’s charter, bylaws, or resolutions. The board may

continued on page 4

## NONPROFIT AND CHURCH BOARD LIABILITIES AND RESPONSIBILITIES

*continued from page 3*

not exceed the powers given to it in the bylaws, must exercise its powers in accordance with the bylaws, and may not abdicate its powers and duties to others.

Generally, the authority to manage church or nonprofit affairs vested in the board may only be exercised when the board acts as a group at a meeting or, in some cases, by unanimous written consent. The bylaws will ordinarily specify that regular meetings of the board occur at specified times and at a specified location. The bylaws should also provide for the procedure required to call a special meeting of the board. Additionally, any decision made at a meeting of the board will not be binding on the church or nonprofit unless a quorum is present. The bylaws typically state the quorum requirements, but if not, state nonprofit law will determine what constitutes a quorum. Attendance by members at board meetings is, therefore, important. Additionally, it is imperative for the board to meet as frequently as the bylaws or state nonprofit law require.

It is essential to remember that the financial resources of church or Christian nonprofit are the Lord's and that board members are stewards of those finances (See the parable of the talents in Matthew 25:14-30). The board of a church or nonprofit has the responsibility to avoid theft or waste, to pay bills on time, to invest wisely, to take care of the land and building, and to avoid situations that will cause the church or nonprofit to be sued. Finances are a crucial element of any church



or nonprofit, and the inadequate or improper management of funds by the board can lead to the hasty downfall of a church or nonprofit. Although money is necessary, money also gives rise to problems ranging from temptation of theft to poor investment. Prudent management will usually thwart these problems, allowing the ministry to stretch to serve a wide number of people, perhaps even beyond that initially anticipated.

Although, in general, members of the board of church and nonprofit organizations are not personally responsible for actions taken in good faith by the board, there are exceptions. Some exceptions include possible liability for torts committed by board members directly, contracts entered into personally, and breach of fiduciary duty.

### PERSONAL LIABILITY

A common basis of personal legal liability for board

members is the commission of a tort by an individual board member. Board members and officers of a church or nonprofit corporation do not incur personal liability for torts of the church or nonprofit merely by reason of their official position. Rather, they will be liable only for those torts that they commit directly or participate in, even though the church or nonprofit itself may also be liable. Some examples of torts for which board members might be individually liable include: (a) causing injury as a result of the negligent operation of a vehicle in the course of church or nonprofit business; (b) uttering a defamatory remark about another individual; (c) authorizing an act that infringes upon the exclusive rights of a copyright owner (for example, reproducing the text of sheet music of copyrighted worship songs without permission); (d) engaging in fraudulent acts; (e) knowingly drawing checks against insuffi-

cient funds; or (f) knowingly making false representations as to the financial condition of the church or nonprofit to third parties, who, in reliance of such representations, extend credit to the church or nonprofit and suffer a loss. Members of the board will ordinarily not be liable for the torts committed by other board members without his or her knowledge or consent.

Board members also can be held personally responsible for contracts that are entered into without proper authorization, or that are entered into by the board member in his or her individual capacity. The latter might happen, for example, if the board member signs without stating he or she is signing on behalf of the church or nonprofit. To prevent the latter inadvertent assumption of liability, board members who are authorized to sign contracts (or any other legal document) should always indicate the name of the church or nonprofit on the document and clearly indicate their own representational capacity (e.g., agent, director, trustee, officer, etc.).

Board members also might become personally liable for breach of contract by personally guaranteeing the contract. Board members with authority to sign contracts should always read what they are signing to ensure they are not inadvertently guaranteeing the contract.

A board member may also be liable for breach of contract if the church or nonprofit operates as another "pocket" for that board member. In this case, the board member will be personally liable because he or she is using the nonprofit or church for his or her own personal gain. This method of

*continued on page 6*



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continued from page 4

operation also exposes the church or nonprofit to loss of its tax exempt status and must be avoided.

**FIDUCIARY DUTY**

Church and nonprofit board members have a fiduciary duty to use reasonable care in the discharge of their duties, and they may be personally liable for damages resulting

statements and reports and seeking clarification of any irregularities or inconsistencies; (c) affirmatively investigating and rectifying any other problems or improprieties; (d) thoroughly reviewing the corporate charter, constitution, and bylaws; (e) dissenting from any board action about which they have any misgivings and insisting that their objection be

member holds a secret or undisclosed interest in a transaction with the nonprofit or church of which he or she is a board member. For this reason, a church or nonprofit should have in place a written policy regarding self-dealing and conflicts of interest.

**MINIMIZING RISK**

To minimize risk to church or nonprofit board members, the church or nonprofit should: (a) provide all new board members with a proper orientation including information about what the board does, and the rights and responsibilities of board members; (b) keep the membership rolls up to date; (c) develop professionally written bylaws and policies and provide board members with copies of the charter, bylaws, written policies and other similar documents; (d) act in accordance with those documents; (e) follow corporate formalities by keeping minutes, filing reports, holding elections, etc.; (f) hire qualified professionals such as lawyers and accountants to perform professional tasks; (g) ensure that all board members are aware of their right to dissent from decisions with which they disagree; (h) follow prudent business practices which include, in addition to those already mentioned, financial controls (beware of the person who never takes a vacation) and written job descriptions for employees; (i) avoid self-dealing; (j) pay no compensation to board members [Illinois law (805 ILCS 108.70) provides protection for board members who serve without compensation for their discretionary acts as board members unless they are “willful and wanton”]; (k) make sure there

is an indemnification provision in the bylaws for board members acting within the scope of their responsibilities in the bylaws; and (l) purchase adequate insurance for the organization and Directors’ and Officers’ (D&O) insurance for the board.

Most significantly, the board of a church has spiritual responsibilities. Church leaders must, above all, listen for God’s guidance. This includes daily prayer, reading of the Word, and listening to others for the wisdom of God to come through their words and actions. Board members should act wisely, not only to avoid legal liability, but because the Word commands us to do so. As members of the board, you are entrusted with caring for God’s people. Listen to the concerns of the congregation, keep board matters that are not personal in the “sunshine,” know your people so you can see when they are hurting, bring more people into leadership, lovingly exercise church discipline, and educate your flock on your church’s polity.

Becoming a board member is an important legal and spiritual responsibility and should not be taken lightly.

**THE BOARD OF A CHURCH OR NONPROFIT HAS THE RESPONSIBILITY TO AVOID THEFT OR WASTE, TO PAY BILLS ON TIME, TO INVEST WISELY, TO TAKE CARE OF THE LAND AND BUILDING, AND TO AVOID SITUATIONS THAT WILL CAUSE THE CHURCH OR NONPROFIT TO BE SUED.**

from their failure to do so. While there is no comprehensive definition of what constitutes a breach of the fiduciary duty of care, generally this means that board members are required to perform their duties in good faith, in a manner they reasonably believe to be in the best interests of the church or nonprofit and not for personal gain, and with such care as an ordinarily prudent person in a like position would use under similar circumstances. Board members can reduce the risk of liability in several ways, including: (a) attending all of the meetings of the board and of any committees on which they serve; (b) thoroughly reviewing all interim and annual financial

recorded in the minutes of the meeting; and (f) resigning from the board if and when the board member is unable to fulfill any of these duties.

Board members also have a fiduciary duty of loyalty to the nonprofit or church and may not place their own or other board members’ interests ahead of those of the nonprofit or church itself. This duty generally requires that any transaction between the board and one of its members be (a) fully disclosed, (b) approved by the board without the vote of the interested board member, and (c) objectively fair and reasonable to the nonprofit or church. The most common case of breach of fiduciary duty of loyalty is where a board



Left: Brisky  
Right: Schwab

Whitman H. Brisky and Jeffrey M. Schwab practice with the Chicago law firm of Mauck & Baker. www.mauckbaker.com. Mr. Brisky has been practicing law since 1975 and has focused primarily on business and commercial law with his clients being mainly businesses and professionals. Mr. Schwab graduated from the University of Michigan Law School in 2006 where he was the Executive Editor of the University of Michigan Journal of Law Reform.



# Quick Issue Spotting for Church/Nonprofit *Employment Problems*

by Nathaniel Taylor  
Ellis, Li & McKinstry PLLC

**T**he Christian community is not spared the employment law conflicts that pervade the secular workplace, nor the majority of the laws that govern employment relationships. If anything, the problems are worse because the biblical/spiritual overlay on the secular law adds another level of complexity to the relationships and issues.

At the very minimum, practitioners helping a church or nonprofit should know and be able to spot some of the high-level issues that churches and other nonprofits face in the employment context especially before they become problems.

## HAVE SOUND POLICIES

**Sexual harassment.** Churches are subject to the same obligation as secular employers to maintain a workplace free of harassment. Employers should adopt—and follow—a harassment policy that provides alternatives for reporting harassment in the event that the harasser is the first person to whom complaints should be directed.

**Computer, internet, and telephone use.** The law can be murky regarding an employee's rights to privacy when using employer resources (telephone, email, internet) for personal use. Policies that outline standards of conduct and clearly state that all such facilities belong to the employer and may be monitored can reduce employer exposure.

**Child abuse prevention and reporting.** In addition to conducting appropriate background checks (discussed below), churches should adopt and implement policies to reduce risks, including policies such as: always requiring two adults with children (including driving children home from church functions), not permitting brand new members to serve in children's ministry, training employees and volunteers on recognizing signs of predators and symptoms of child abuse, and understanding reporting requirements (internal and external) for suspected abuse.

**Other policies.** Other policies that should be considered include nondiscrimination (with appropriate carve-outs for doctrinal reasons where permitted by law, e.g., faith qualifications); medical, family, sick, vacation, personal, bereavement, jury and witness leave (check legal requirements—local law may be more expansive than federal law for certain types of leave); expectations for non-work conduct (drug and alcohol use, etc.); and outside employment.

**Employee handbooks.** Employee handbooks are a good place to set expectations and detail a number of different policies. However, employers should be careful NOT to adopt someone else's handbook without a thorough review by legal counsel. Handbooks should leave the employer with flexibility: no mandatory language ("must," "will," etc.) and no exhaustive lists. Employers should not engage in conduct inconsistent with the policies in the handbook. Get employees to sign an acknowledgement that they have received and read the handbook, and get them to re-sign every time the handbook is amended.

*continued on page 8*

**QUICK ISSUE SPOTTING  
FOR CHURCH/NONPROFIT  
EMPLOYMENT PROBLEMS**

*continued from page 7*

**HANDLING  
TERMINATIONS**

Legal exposure and bad publicity can be reduced by taking a deliberate, unemotional approach toward a potential termination. Consistent, honest performance reviews and being forthright in the reasons for termination are important.

***Minimizing legal exposure.***

The employer should follow its policies. Conduct that presents a legal risk to the employer (e.g., harassment, theft, violence) should be dealt with quickly, but the employer should still conduct an appropriate investigation into the facts (suspend the employee pending investigation if necessary). Longer term performance problems should generally result in termination only after a good paper trail has been established (the employer doesn't look good when a termination follows a series of good performance reviews). When an employee is terminated, there should generally be two people present for the meeting, and the employee should be given the true reason for the termination (without limiting the employer's ability to give additional justification later).

***Reducing negative publicity.***

Employers frequently wish to terminate an employee who is not an immediate threat, but who is "divisive," a "bad apple," or a "thorn in the side of the senior pastor." Be careful. The employer should pro-



ceed with caution, build a record before termination, and consider how an objective observer might perceive the employer's conduct. With very few exceptions, the employee becomes far more of a problem once terminated. The issue is usually not legal; for example, the "ministerial exemption" gives a church a fair degree of latitude in terminating pastors and other high-level people in ministry. But the problem employee will frequently enjoy a loyal following amongst the congregation, which can cause far more damage after termination than before.

**EXCESS BENEFIT  
TRANSACTIONS**

The IRS is authorized by section 4958 of the Internal Revenue Code to levy "inter-

mediate sanctions" on transactions that provide an excess benefit to certain leaders within a church or other nonprofit. An excess benefit can take the form of an above-market salary, a real estate transaction or loan at other than fair market value, or any other transaction at other than fair market value between the insider and the nonprofit. The IRS can levy penalty taxes of up to 200% on the recipient and 10% (up to \$20,000) on any "organization manager" (board member, treasurer, etc.) who participates in the transaction. Real estate transactions, loans, or any other business agreement with a pastor or board member should immediately invoke scrutiny.

"Automatic" excess benefit transactions are a particular trap for the unwary. Even if

overall economic benefits are reasonable, the church or nonprofit must provide written contemporaneous substantiation if it intends to deem a benefit as compensation for services. This is generally accomplished by reporting the benefit on the W-2 or 1099, but can also be handled via an employment contract or appropriate documentation in the minutes of the board. Failure to do so results in an "automatic" excess benefit. For example, a car allowance that is not excludable from gross income is provided to a minister but not reported on his W-2 or otherwise substantiated. The church board and the minister are subject to intermediate sanctions on the car allowance even if the total value of his compensation package is reasonable. Other examples include church-provided cell phones, expense accounts that do not properly follow "accountable reimbursement plan" rules, and paying for spousal travel expenses.

**CORPORATE  
DOCUMENTS THAT  
CHANGE AT-WILL STATUS**

Many practitioners are familiar with the concept of "at-will" employment and the appropriate steps that should be taken to preserve it (don't discriminate; don't have mandatory progressive discipline policies in employee handbooks; don't make promises of termination only "for cause," etc.). But another means of altering the at-will employment relationship is peculiar to churches: the bylaws and other corporate documents. These will frequently have procedures for hiring and firing employees. In addition to the significant steps that must usu-

## THE CHRISTIAN COMMUNITY IS NOT SPARED THE EMPLOYMENT LAW CONFLICTS THAT PERVADE THE SECULAR WORKPLACE ...

ally be taken to terminate a senior pastor, there may be language that provides that other employees may only be terminated by the board, not the employee's supervisor. In addition to employment contracts and employee handbooks, churches should review all corporate documents to ensure that the at-will relationship is not altered.

### LOANS TO OFFICERS OR DIRECTORS

A significant number of states explicitly prohibit a nonprofit from making loans to officers or directors (even if the interest rate is at fair market value). Yet churches frequently will loan money to a new pastor to help in buying a house. Most likely that pastor is either a director or officer, and in some states, each board member who approved the loan has unwittingly personally guaranteed the loan. It is a good idea to restate the law in the nonprofit's governing documents to increase the board's awareness of the prohibition. Even if loans are permitted in your state, if the loan is below market interest, it is likely an intermediate sanctions violation.

### BACKGROUND CHECKS

Churches and other nonprofits should conduct a background check on all employees and all volunteers who will have access to children. Know what you are legally permitted to ask as part of the interview process. Have the application contain an appropriate detachable release to be signed by the applicant that can be given to

former employers to increase the likelihood that they will be candid when you check references. Criminal history checks should generally be done by a third-party provider that looks at other states of residence, as the governmental checks are usually limited to convictions within your state. Check with your insurance company—it may have a contract with a third party provider that gets the church a substantial discount.

### WAGE AND HOUR COMPLIANCE

The Fair Labor Standards Act and similar state laws apply to churches and nonprofits. Yet many fail to make the distinction between exempt employees (who can be paid a salary) and non-exempt employees (who must be paid hourly).

The problem is made worse by the fact that many non-exempt employees (e.g., a bookkeeper or receptionist) "volunteer" to do the same work beyond what they are paid to do, which is generally not permitted.

### WORK MADE FOR HIRE

The work made for hire doctrine provides that the copyright to creative work done by an employee in the scope of employment belongs to the employer. Accordingly, the pastor's sermons, the worship director's compositions, and the children's ministry coordinator's curriculum generally belong to the church, not the employee. The church may wish to allow the employee to profit from these creations, but to give the employee these intellectual property rights

may give rise to a taxable benefit, which employers rarely attempt to value or report.

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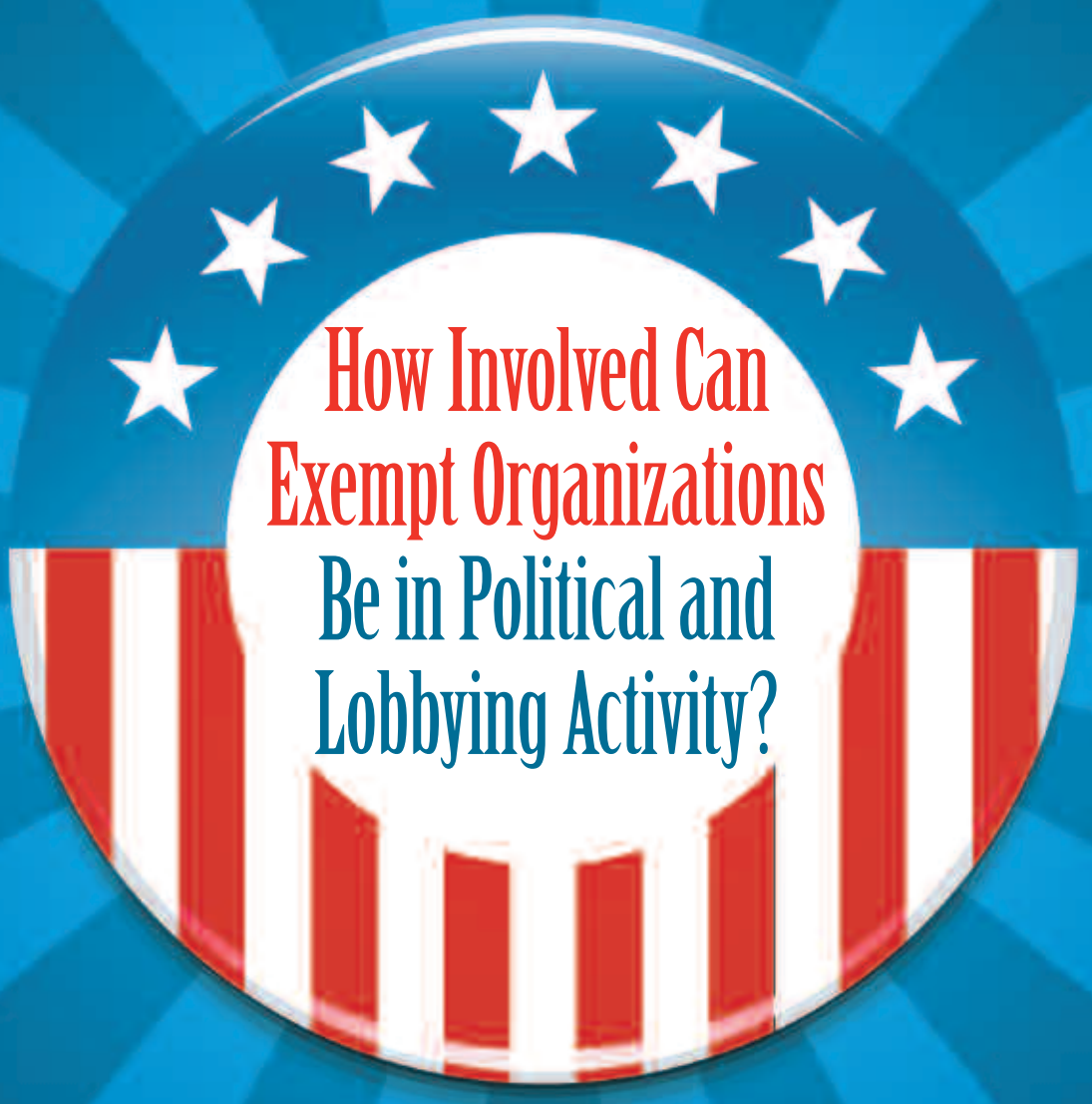
The previous list should help many general practitioners when it comes to issue spotting or general advice for a church or nonprofit. However, keep in mind that if the issues either become murky or get out of hand, you should retain experienced and qualified counsel in the area of nonprofit law on behalf of the church or nonprofit.



Nathaniel Taylor is a partner in the Seattle law firm of Ellis, Li & McKinstry PLLC. He represents dozens of churches and other nonprofits on employment, corporate, and other matters. [www.elmlaw.com](http://www.elmlaw.com)



# THE PIOUS AND THE POLITICALLY SAVVY:



How Involved Can  
Exempt Organizations  
Be in Political and  
Lobbying Activity?

By Stephen H. King and Holly D. Kuebler  
Gammon & Grange, P.C.

**PURSUANT TO THE CODE, UNDER NO CIRCUMSTANCE MAY A FEDERALLY TAX-EXEMPT 501(c)(3) ORGANIZATION PARTICIPATE OR INTERVENE IN ANY CAMPAIGN ON BEHALF OF, OR IN OPPOSITION TO, ANY CANDIDATE FOR PUBLIC OFFICE.**

Days before the Democratic primary in South Carolina, simultaneous visits to Bible Way Church of Atlas Road in Columbia by both Michelle Obama and Chelsea Clinton placed this congregation into the mix of a highly contentious political battle over the Democratic presidential nomination. Having been recently recognized as one of America's most influential churches, this 9,000+ member congregation represented a sweet spot of potential political advantage worthy of personal visits by one candidate's daughter and another's wife. Media coverage of the event created the intended political spectacle, and although neither woman addressed the congregation, the service became more focused on political postures than the posture of prayer.

The use of churches and other tax-exempt organizations as forums for political discourse is not new to the recent Presidential election, but the spotlight on such activity has been intensifying based on a per-

ceived increase in violations of the Internal Revenue Code's prohibition on political campaign activity. Pursuant to the Code, under no circumstance may a federally tax-exempt 501(c)(3) organization participate or intervene in any campaign on behalf of, or in opposition to, any candidate for public office. Violations can lead to the revocation of the organization's tax-exempt status and the assessment of excise taxes on the organization and its leaders.

In contrast to political campaign activity, tax-exempt 501(c)(3) organizations may engage in a limited amount of lobbying activity, so long as such activity is not "substantial." This article provides an introduction to both the political activity and lobbying restrictions placed on 501(c)(3) organizations, restrictions that are not as clearly defined as many would wish.

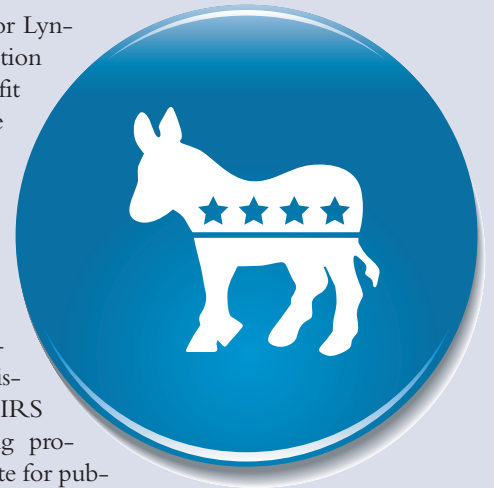
### **PROHIBITED POLITICAL CAMPAIGN INTERVENTION**

Tax exemption under section 501(c)(3) of the Code is premised upon an organization operating exclusively for charitable, religious, or educational purposes. In 1954, Congress enacted an additional condition for maintaining 501(c)(3) status: a prohibition from engaging in "any political campaign on behalf of (or in opposition to) any candidate for public office." This politicking prohibition was put for-

ward by then-Senator Lyndon Johnson in reaction to a Texas nonprofit that dared to oppose his candidacy.

The political campaign prohibition has recently been teased out more explicitly in IRS Revenue Ruling 2007-41. Consistent with prior IRS guidance, this ruling provides that a "candidate for public office" is not limited to a Presidential contender, but includes any individual who offers himself as a contestant for an elective public office, whether such office is at the national, state or local level. Participation or intervention in a campaign includes, but is not limited to, endorsements, contributions to candidates, permitting the facilities, name, reputation, or resources of the organization to be used by a candidate, and publication or distribution of written statements or the making of oral statements on behalf of or in opposition to such a candidate. Revenue Ruling 2007-41 provides a number of factual scenarios of activities that do and do not constitute prohibited political campaign intervention.

In keeping with its exempt purposes, however, a 501(c)(3) organization may participate in nonpartisan educational activities even if they relate to a political campaign. For instance, the monitoring of Congressional voting records on a particular issue or compiling voter guides on candidates'



positions is permissible, provided that the guides are nonpartisan in nature. In determining whether a particular voter guide is nonpartisan, the IRS will consider such factors as whether the guide provides fair and impartial treatment of candidates, addresses a wide variety of issues, and has a neutral format and context.

The IRS also recognizes the presentation of public forums or debates as a permissible educational activity. As long as a forum is held for the purpose of educating and informing voters, permits participation of all major candidates, provides fair and impartial treatment of the candidates, and does not promote one of the candidates over any other, it generally would not constitute impermissible political activity.

The political campaign prohibition does not prevent organizational leaders from becoming involved in *their individual capacities* in political campaigns, so long as they do so without using the organization's financial resources, facilities, or per-

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sonnel. Also, leaders must clearly and unambiguously indicate that their actions and statements are on their own behalf and not on behalf of the organization. In contrast, a leader's endorsement of a candidate at an official organizational function or in an official organizational publication, even with a disclaimer, would violate the prohibition.

### RECENT IRS ENFORCEMENT INITIATIVES

In June 2007, the IRS released a report on its Political Activity Compliance Initiative (PACI) for the 2006 election cycle. The initiative, begun in 2004 in response to the anticipated increase in referrals for impermissible political action, is part of the IRS Exempt Organizations Division's multi-pronged strategy of guidance, publicity, accelerated

of exemption; however, 26 examinations did result in the issuance of a written advisory by the IRS. In 35% of the referrals, the IRS found that allegations of political intervention were not substantiated. Thus, the relatively soft action taken by the IRS highlights the inherent difficulty of enforcing this prohibition and perhaps points to the fact that violations of the prohibition are not as widespread as some may believe.

### PERMISSIBLE LEGISLATIVE ACTIVITIES

Unlike the absolute prohibition on political campaign activity, 501(c)(3) organizations are permitted to engage in a limited amount of lobbying activity. According to section 501(c)(3) of the Code, an organization does not qualify for tax-exempt status if a *substantial part* of its activities involves attempts to influence legislation. Determining what activities are considered lobbying, and whether these constitute a substantial part of an organization's activities, requires looking to the less than precise parameters established by the IRS.

**THERE IS AN ESTABLISHED AND PROTECTED PLACE FOR 501(C)(3) ORGANIZATIONS WITHIN THE POLITICAL AND LEGISLATIVE PROCESS. BUT CHARITIES MUST AVOID POLITICAL CAMPAIGN ACTIVITIES THAT FAVOR OR DISFAVOR ONE CANDIDATE OVER ANOTHER, ...**

case initiation, and outreach.

The 2006 project included 237 cases of alleged political campaign intervention. This represented a 70% increase in referrals from the PACI of 2004. 100 of the 237 were selected for examination. The IRS found that the following types of political intervention warranted examination:

- ★ Exempt organizations distributed printed materials supporting candidates, including newsletters, church bulletins, inserts in church bulletins, and letters to members;
- ★ Church officials made statements during normal services endorsing candidates;
- ★ Candidates spoke at official functions of exempt organizations;
- ★ Organizations distributed improper voter guides or candidate ratings;
- ★ Organizations posted signs on their property endorsing candidates;
- ★ Organizations endorsed candidates on their Web sites or through links on their Web sites;
- ★ Officials verbally endorsed a candidate in their organizational capacity;
- ★ Organizations made political contributions to candidates; and
- ★ Non-candidates endorsed candidates at organization functions.

The PACI 2006 examinations did not result in any revocations

Lobbying (or "influencing legislation" in IRS terms) is broadly defined. According to the IRS, "legislation" includes any action by Congress, any state legislature, any local council, or similar government body with respect to acts, bills, resolutions, or similar items (including legislative confirmation of a political appointment), or any public referendum, ballot initiative, constitutional amendment, or similar procedure. "Influencing legislation" involves contacting, or urging the public to contact, members or employees of a legislative body in support or opposition to legislation.

The IRS does not consider general involvement in public policy issues to be lobbying. Activities like educational meetings, distribution of educational materials, and any other involvement by an organization in matters of public policy in an educational manner will not be factored into the substantial part test. An organization can freely educate the public on an issue of public policy without risking the loss of its tax exemption. In fact, for some tax-exempt organizations, such activity is their primary exempt function.

Additionally, using the substantial part test to determine a tax-exempt organization has overstepped the permissible lobbying bounds is an imprecise determination based on all facts and circumstances of each individual case. The IRS will primarily look at the amount expended in financial resources and time for the lobbying activity relative to total expenditures on other educational and charitable activities. Cases in this area provide scant guidance. Because the IRS traditionally disfavors a percentage test to determine substantial lobbying, it is difficult to pin down a permissible range for lobbying expenditure. Previous cases suggest that lobby-

ing efforts that constitute 5% of an exempt organization's total activities (including volunteer hours) would not be considered a substantial amount of lobbying activity. Beyond that limit, however, it is difficult to determine how much lobbying activity is permitted.

Organizations other than churches and private foundations that desire more certainty of their lobbying limits than is provided under the "no substantial part" test may elect to be governed by an expenditure test under section 501(h) of the Code. The expenditure limits are based upon the size of the organization, but are capped at \$1 million for the largest category of organizations. Special limitations apply to grassroots lobbying, which is generally defined as an appeal to the general public to influence opinions or to encourage action

regarding specific legislation. Five specific activities are exempted from the definition of legislative activities under section 501(h), including non-partisan research, providing technical assistance to governmental bodies, appearances before a legislative body with respect to legislation that affects its existence, communication to the organization's members regarding legislation of direct interest to the organization, and communication with governmental officials that only incidentally attempts to influence legislation so long as there is some other substantial purpose to the communication.

### CONCLUSION

It is important for charities to understand clearly the boundaries of the political campaign prohibition and limitation on lobbying activities so

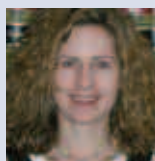
as not to jeopardize their tax-exempt status. There is an established and protected place for 501(c)(3) organizations within the political and legislative process. But charities must avoid political campaign activi-

ties that favor or disfavor one candidate over another, and must limit legislative activities pursuant to the requirements of the Code. Staying within these boundaries permits a 501(c)(3) organization to engage fully in its beneficial charitable work without fear of jeopardizing its tax exemption.



**STEPHEN H. KING**

Steve co-directs the exempt organizations practice at Gammon & Grange, P.C., in McLean, Virginia. [www.gg-law.org](http://www.gg-law.org). He concentrates on the representation of tax-exempt organizations involved in both domestic and international activities, including such matters as structuring and establishing organizations, compliance with federal and state tax and regulatory requirements, risk management issues, and human resources.



**HOLLY D. KUEBLER**

Holly has been an attorney with Gammon & Grange, P.C. since 2006. Her areas of practice include nonprofit and exempt organizations, civil litigation, intellectual property, and communications.



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# Commercial Ministry Ventures Should Be Structured And Managed Carefully

by *Stuart J. Lark, Holme Roberts & Owen LLP*

Ministry organizations often consider conducting their ministry through new commercial ventures, ranging from micro-enterprises manufacturing goods in developing countries to coffeehouses in college communities. Although such ventures can expand the reach and impact of the ministry, they also can result in adverse tax and other legal consequences if they are not properly structured and managed. While structuring a commercial ministry venture, ministries should consider some of the following primary issues.

## TYPICAL MINISTRY VENTURES

A ministry organization may conduct commercial ventures either directly or through a separate legal entity (usually corporations) to carry on activities in support of certain strategic objectives. These activities often support outreach in urban, ethnic and/or overseas environments. The driving force for creating a separate corporation may vary somewhat based on the ministry focus.

Urban ministries often conduct certain social services through a commercial venture and sometimes micro-enterprises, explained below. Government or private foundation funding is available to the commercial venture because some funding agencies consider ministry organizations to be too religious (or not sufficiently “local”) to be eligible. In addition, funding agencies may impose religious restrictions unacceptable to the ministry.

With respect to ethnic ministries, the driving force may be the use of micro-enterprises as a source of funds. These business ventures are often owned by ministry staff members (perhaps along with other investors). As a tax-exempt non-profit corporation, a ministry is generally not a suitable vehicle for such activities, in part because investors cannot acquire an ownership interest in activities of the organization and in part because such activities may not directly accomplish the mission of the organization under Internal Revenue Code (“Code”) § 501(c)(3).

Finally, with respect to overseas ministries, the driving force is often the need of staff members to gain country access or greater authenticity in terms of their activities. In such situations, association with the ministry (either in part or entirely) precludes access or effective outreach in a country.

## LIABILITY RISKS

Implementing any new ministry venture, either within the legal corporation of a ministry or within a separate legal entity, may create unintended adverse consequences. These consequences could undermine the anticipated benefits to be derived from the new venture and/or drain resources from other activities of the ministry. Such consequences might include:

- Tax liability for the ministry, the new venture and/or ministry staff and directors individually;
- Liability to employees of the venture, based on alleged adverse employment action;
- Third-party liability resulting from the venture’s activities



(third parties in this context could include customers or other members of the general public, creditors, investors and others);

- Liability to government agencies due to noncompliance with various regulations and/or contract provisions;
- Costs related to inadequate insurance coverage for liabilities arising from the venture; and
- Costs related to inefficient use of ministry resources in the venture due to duplication of administrative overhead, maintaining excessive legal structure not justified by the probable benefit of such structure and/or use of ministry resources for activities that do not sufficiently accomplish the primary mission of the ministry.

### PRIMARY CODE §501(c)(3) REQUIREMENTS

The liability risks unique to ministries derive primarily from their status under Code § 501(c)(3), as well as from various legal accommodations related to their Christian character (including the right to make faith-based employment decisions). To qualify for exemption from federal income tax under Code §501(c)(3), an organization must be organized and operated exclusively for exempt purposes. Consistent with this requirement, the IRS has ruled that generally the activities of a joint venture attributable to exempt organizations must also further exempt purposes. Further, exempt organizations must avoid private inurement and private benefit. In the context of joint ventures with non-exempt (i.e., for-profit) entities, this requirement generally translates into a requirement that

the exempt organization control the policies and activities of the venture, at least with respect to assets and activities attributable to the exempt organization.

Net revenues from activities of a ministry which do not contribute importantly to accomplishing the Christian purposes of the ministry are subject to an unrelated business income tax (“UBIT”) under Code §511. In addition, as a general rule, the provision of services provided for a fee by one exempt organization to another exempt organization is considered to be an unrelated business activity, subject to UBIT.<sup>1</sup> To avoid the general rule that imposes UBIT on a range of services provided by one or more exempt organizations to a ministry venture, it is important to establish either that the provision of services directly accomplishes the exempt purposes of the provider (which may be difficult given the historical perspective of the IRS), or that the provider is an integral part of the venture.

Finally, to provide a means of penalizing activity prohibited under Code §501(c)(3) without revoking the exempt status of an organization, Congress has enacted the so-called “Intermediate Sanctions” provisions, Code § 4958. Pursuant to these provisions, the IRS may impose a tax on individuals who receive an “excess benefit” from an exempt organization over which they exercise “substantial influence.” The individuals also are required to return the excess benefit to the exempt organization, and directors of the organization can be taxed if they knowingly approve of the transaction. In the context of ministry ventures, particularly those involving both exempt



**MINISTRY ORGANIZATIONS OFTEN CONSIDER CONDUCTING THEIR MINISTRY THROUGH NEW COMMERCIAL VENTURES, RANGING FROM MICRO-ENTERPRISES MANUFACTURING GOODS IN DEVELOPING COUNTRIES TO COFFEEHOUSES IN COLLEGE COMMUNITIES.**

and for-profit entities, intermediate sanctions could apply to ministry staff who receive compensation from, or have an equity interest in, the commercial venture.

### RELATIONSHIP FACTORS CREATING LIABILITY RISKS FOR THE MINISTRY

Although a ministry is generally not liable for activities of separate legal entities, in principle, this liability protection may not apply to the corporations (or other legal entities) discussed above if one or more of the following factors apply:

#### 1. Use of Ministry Staff.

Employees of the ministry, in the course of their employment, provide the primary services and leadership for the other corporation.

**2. Funding from the Ministry.** Funds for the other corporation are provided by the ministry, perhaps based on designated contributions from donors.

#### 3. Coordination and/or Control of Activities.

The activities of the other corporation are coordinated with activities of the ministry, or the ministry exercises informal control over day-to-day activities and/or the strategic management of the corporation.

#### 4. Description of Activities.

The ministry describes the activities of the other corporation as ministry activities of the ministry.

**5. Corporate Control.** The ministry possesses authority (either as sole shareholder or as sole corporate member) to elect directors

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## COMMERCIAL MINISTRY VENTURES

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and/or officers of the corporation.

In addition to these legal liabilities, the ministry may also face significant adverse publicity with the public or with donors arising from activities conducted in a separate legal entity.

### MANAGING LIABILITY RISKS

With respect to some ministry ventures, a ministry may be exposed to substantial liability risk without having (or exercising) any meaningful control over the activities of the venture. Ministries with ventures currently in place should conduct an audit to identify all the corporations (or other legal entities) that ministry staff are currently operating in connection with their activities. For each such corporation, the audit should identify ownership or control, sources of financing, scope of activities (including coordination with ministry activities or oversight by ministry staff), overlap of employees, key contract terms, any statements describing the activities, and how ministry staff allocates their time between their duties for the ministry and their duties for the separate corporation.

Any current or proposed ministry venture should identify a legal and management structure that will facilitate the anticipated benefits offered by the venture while managing the potential consequences through a “due diligence” set of questions. The following list consists of nine primary questions that can be used as a starting point for this analysis.

1. Will the activities of the ministry venture directly advance the mission of the ministry?
2. Will the ministry provide resources to and/or publicly associate with the ministry venture?
3. From what sources will the venture obtain capital and operational funding?
4. Will the activities of the new venture contribute importantly to accomplishing a religious, charitable, educational or other exempt purpose under Code § 501(c)(3)?
5. How will the activities of the ministry venture be managed and conducted?
6. If the venture is conducted under a separate legal entity, what *governance* control should the ministry exercise over the ministry venture?
7. If the venture is conducted under a separate legal entity, what *contractual* arrangements should exist between the ministry and the entity?
8. What steps will be taken to manage liability risks?
9. Has a business plan addressing all of the foregoing issues been reviewed and approved by appropriate management?

The first two questions are intended to elicit the importance of the venture to the mission of the ministry, both in terms of how the activities will further that mission and in terms of resources (both staff and finances) the ministry intends to devote to the venture. Answers to these questions will guide consideration of subsequent questions regarding the legal structure of the venture.

The third question addresses the tax impact of the anticipated funding sources

(capital and operational) for the venture. If the venture will rely at least in part on tax-deductible contributions, then it generally must be conducted within a Code § 501(c)(3) organization. On the other hand, if the venture is to be capitalized at least in part by private investors holding equity interests in the venture, then it will be necessary to conduct the venture within a commercial entity (e.g., an LLC).

It is important to note that the Code imposes substantial constraints on the use of ministry resources in a commercial entity, particularly if ministry staff or directors have any type of financial interest in the entity. Therefore, in all cases involving separate for-profit corporations employing ministry staff or in which staff hold an equity interest, it is important to ensure that the corporation is not using funds or other resources of the ministry to increase its profits. This principle may be difficult to apply in certain situations, particularly where the other corporation is conducting activities that directly complement the activities of the ministry. Nevertheless, if ministry staff realize a windfall through a separate corporation based in part on the use of ministry resources, there could be severe adverse tax implications for the ministry. This is one reason it is important to understand and monitor the operational and financial arrangements of each separate corporation.

The fourth question considers the tax impact of the venture’s activities. If the primary activities of the venture do not, in and of themselves, contribute importantly to an exempt purpose, then any net revenues derived by the min-

istry (or any other Code § 501(c)(3) organization) from such activities will be taxable. In this case, it may be preferable to conduct the activities in a separate taxable entity. However, if the activities do satisfy the Code § 501(c)(3) requirements, then it is preferable from a tax perspective to conduct them within an exempt organization.

Questions 5, 6, and 7 address the governance and operations of the venture, particularly as they relate to other activities of the ministry. These questions will help ensure that appropriate lines are drawn between the activities of the venture and other activities of the ministry, and that the ministry maintains adequate management over activities using its resources.

In general, if a ministry is likely to be closely associated with the venture, then the ministry should consider exercising, to the extent possible, control over the governance and operations of the entity through which venture activities are conducted.<sup>2</sup> Such control will enable the ministry to minimize the probability that any liabilities will actually arise. The ministry should also include such corporations under its applicable insurance policies where possible.

By way of contrast, if the ministry does not want to be publicly associated with the venture, or does not want to incur liability risks, the ministry should establish clear lines of separation between its activities and the activities of the separate corporation. This separation would include (among other things) compensation and job descriptions that account for the time ministry staff is spending conducting activities specifically for the ministry. It would also seek

to ensure that no funding for the separate corporation flows through the ministry (either in staff accounts or general funds), that the ministry does not include the activities of the corporation in materials describing its own activities, and that activities of the separate corporation are not directly coordinated with ministry activities. Indeed, the ministry may even consider a formal agreement with the other corporation requiring adequate insurance coverage and an indemnification obligation.

Question 8 specifically addresses liability risks, both for the venture and for the ministry. If the venture is conducting activities which are inherently risky and may not even be insurable, then the ministry may wish to take specific steps to preserve its pro-

tection from the liabilities arising in the venture (e.g., by putting it in a separate legal entity). One risk associated with conducting activities in a separate commercial entity is that such an entity may be subject to religious nondiscrimination laws with respect to its employees. A ministry may need to consider carefully how it will manage this potential risk.

Finally, question 9 raises the suggestion that each significant new venture should have a “business plan” that addresses the previously identified issues (and others) with input from legal counsel and auditors.

The foregoing questions provide an initial framework for information gathering and analysis. However, as the subsequent discussion of the questions indicates, there may be many additional and signif-

icant details to work through and address in the final legal structure. Ministry organizations would be well advised to address these issues adequately during the initial planning process so as to avoid potentially significant adverse consequences in the future.

1 *BSW Group, Inc. v. Commissioner*, 70 T.C. 352 (1978)

2 There may be some situations, such as access vehicles to closed countries, where a ministry may choose not to be involved with another corporation in a way that would allow third parties to connect the organizations readily. This separation may reflect a strategic decision made in recognition of the attendant risks.



Stuart Lark is a partner with Holme Roberts & Owen LLP, [www.hro.com](http://www.hro.com) and his practice concentrates on corporate, tax, constitutional and transactional matters for ministry organizations. He regularly advises clients on a wide range of matters including federal income tax exemption issues, faith-based employment practices, joint ventures, tax-exempt financing, government funding, property tax exemptions and corporate governance and structure.

In 2002, Mr. Lark took a one-year leave of absence during which he served as Legal Counsel for Christian Legal Society's Center for Law and Religious Freedom. Recently, Mr. Lark filed a brief on behalf of the Council for Christian Colleges & Universities in support of the Center's challenge of a discriminatory student aid program in Colorado.

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# Electronic Communications for Churches and Religious Nonprofits

## The New Frontier or a New Major Source of Liability?

by H. Robert Showers,  
Simms & Showers LLP

Computers and the Internet have revolutionized the work environment by making it possible for employees to perform their work more effectively, efficiently, and accurately. Most churches and nonprofits provide computers with Internet access to their employees as well as to their volunteers, but Internet access and electronic communications through various devices have sometimes created unexpected and serious legal risks.

One increasingly familiar scenario is when a church or religious nonprofit inquires as to whether they can access an employee's computer: 1) to determine whether an employee is using an Internet connection on his church computer to "surf" the Internet; 2) to ascertain whether an employee is using the Internet connection to view and download pornographic images or have sexually explicit online chats; 3) to discover whether the employee is sharing confidential information such as donor lists with another entity; or 4) to get to critical files on a vacationing employee's computer that must be accessed by other staff members. In all these and other scenarios, what is the proper action, and what landmines are you uncovering or stepping on in the process?

## EMAIL AND INTERNET

A couple of real life email and Internet access examples which ended up in court are instructive:

1. The senior pastor, secretary, and business administrator are sued by a former youth pastor who was fired as a result of pornographic materials and sexually explicit emails that were discovered on his office computer after he was overheard having a sexually explicit phone conversation with what was suspected to be with someone in his youth group. The federal court in Wisconsin concluded that the church violated federal electronic privacy laws by accessing his church computer without consent and also invaded his privacy. The employee won a large award against the church. Fischer v. Mt. Olive Lutheran Church, Inc., 2002 WL 1306900 (W.D.Wis. 2002)
2. A California court ruled that an employee who was fired for using his office computer to access pornographic websites on the Internet was barred from suing his employer for wrongful termination or invasion of privacy. TBG Insurance Services Corporation v. Superior Court, 117 Cal.Rptr.2d 155 (Cal. App. 2002).

*What was the major difference in these two cases with apparently similar facts yet very different outcomes?* In the second case, employees at that company were required to sign a computer/Internet use agreement under an electronic communications policy that authorized the employer to monitor employees' office computers and terminate an

employee for misuse of the office computer. The computer use agreement specified that the employer's computers would be used "for business purposes only and not for personal benefit or non-company purposes, unless such use is expressly approved. Under no circumstances can the equipment or systems be used for improper, derogatory, defamatory, obscene or other inappropriate purposes." The agreement also expressed that improper use of the computers could result in disciplinary action, including discharge.

In the first case, the church had no such electronic communication policy, and the youth pastor had not signed such a computer/Internet use agreement upon his hiring. The youth pastor, therefore, had never given his employer consent to monitor the church's computer and Internet system (server), setting down the proper and improper use of both and agreeing that he could be fired for violating the policy.

As these cases illustrate, any unauthorized access to an employee's church-provided computer or emails may violate federal and state electronic privacy laws and also may constitute an invasion of privacy, no matter how compelling the justification for access may be. Having some basic risk management procedures make all the difference.

A good electronic communications policy and computer/Internet use agreement incorporating that policy, which is signed by an employee at his/her hire or promotion, either as part of the Employment Handbook or contained in the Employment Agreement, where adequate consideration is given to the employee to sign away his rights will allow access to an

employee's computer. In short, the signed agreement incorporating the electronic communications policy will make all the difference in such situations, as it did in these cases.

*What should be in such an Electronic Communications Policy and Agreement?* Here is a brief checklist of some key components of an effective electronic communications policy:

- Ownership by organization of all equipment and all electronic messages;
- Applicability of all "users" on all of the organization's "computer systems" to all "electronic communications and systems;"
- Limitations on users' expectations of privacy and restrictions on use of email to business/ministry purposes only—not for personal use;
- Organization's right to monitor and review email (actual monitoring should be conducted only in limited situations where there is a clear business need);
- Prohibited Communications:
  - Harassing, defamatory or disparaging communications
  - Sexually explicit communications
  - Disclosure of church's/school's confidential or proprietary information
  - Transmission, uploading or downloading, or storage of any fraudulent, harassing, threatening, discriminatory, copyrighted, sexually explicit, obscene messages or materials;
- Prohibition on the use of encryption devices on a church computer without express written authorization and a requirement for employees to provide a designated staff member with all passwords needed to access all

programs and files;

- Email Retention and Deletion Policy
    - Employees should be educated as to the sensitive nature of the email system and the fact that email messages are still retrievable after they have been "deleted."
    - In order to avoid the expense of burdensome discovery of an inordinate amount of email files, your policy should be to retain emails for a set period of time, then erase them on a systematic and timely basis.
    - Employers should consider a pre-logon screen/banner reminding employees the emails are the property of the company, shall only be used for business purposes, and will be subject to periodic monitoring and deletion by the company.
    - Disciplinary options for all violations, including discharge;
    - Written acknowledgment of policy and agreement to be binding to employees.
- An idea to be used in addition to the signed policy is to place on the church/ non-profit's computer equipment an electronic communications policy where the user must click the OK button on the computer screen when they turn on the computer for the day:
- Church/Nonprofit provides technological equipment for job-related purposes only and specifically reserves the right to monitor employee work performance and use of any electronic, mechanical or other work-related device, such as telephone, voice mail, computer,*

*continued on page 20*

**ELECTRONIC COMMUNICATIONS**  
*continued from page 19*

*Internet and email. Misuse of this equipment according to our policy may lead to disciplinary action including dismissal.*

The computer/Internet use agreements, computer pop-ups, and electronic communications policies effectively reduce the employee's reasonable expectation of privacy with regard to their use of the employer's computers, servers and any other electronic communication devices and puts them on notice that misuse will have serious consequences.

**WEBSITES**

- Is there any potential liability for the quickly expanding church website, where most churches are making a wide range of information available to their members, visitors and potential parishoners? A few examples can illustrate the dangers:
- A church's website that has numerous pictures of adults, children and youth, some who do not belong to the church, its faith tradition and/or appear in unflattering and embarrassing poses. Of course, none of the people pictured have given their written consent to use their pictures, stories or names, but most do not mind. However, it only takes one to be offended and sue.
- A church's website with innocent links to sites which have significant pornographic and violent material unbeknownst to church leaders.
- Discussion boards, chat rooms or postings that have false, defamatory and harmful statements about certain individuals.
- Nonprofit websites that include articles promoting a



**THE BEST TIME TO CREATE AN ELECTRONIC POLICY IS BEFORE THE FIRST COMPLAINT IS FILED...**

certain political candidate running for office.

- Websites that download and use copyrighted and/or material without permission.
- Websites where all membership information is accessed by others to be used by for-profit companies or political candidates for solicitation purposes.
- Websites that have no disclaimers about material on the website or disclosures whereby users agree to certain use criteria.

Obviously, websites are being utilized more and more by churches and nonprofits. Unfortunately, it is opening them up to liabilities that they never contemplated. One of the best ways to minimize the risks is to create and implement a **strict and clear website policy** with the following guidelines:

- Avoid libel and slander – always check sources of information before you post (chat room or discussion forum statements).
- Linked site content—choose wisely and obtain permission for links.
- Insure that your organization has permission to use material that has privacy, trademarked and copyright concerns attached, and its use fits within your charitable exemption!

**• Beware of photos!**

- Obtain written permission for all photos and 3rd party materials reproduced on website.
- Include disclaimers, disclosures and exculpatory clauses that users accept by clicking before exploring site.
- Security issues must be professionally addressed to prevent spamming, spoofing and hacking.
- Always provide passwords for members, donors or board information to avoid unwanted and unauthorized disclosure or use and ensure that members/donors agree to only use the information for ministry-related purposes.

It is important for churches and nonprofits to become legally compliant and minimize risks encountered in the new electronic world of technology that can make or break a ministry.

**THE NEW FEDERAL AND STATE RULES AND E-POLICIES**

In December 2006, the Federal Rules of Civil Procedure (FRCP) were amended to require that any entity involved in litigation must be able to produce electronically stored information during the discovery process. Most states have either adopted or base their state rules on the FRCP, which

also requires litigants to retain email and electronic documents and produce them when required in discovery. Of course, if a litigant destroys such information or fails to affirmatively retain it when it should have known of a pending claim or lawsuit, there could be serious ramifications for violating the FRCP, including dismissal, sanctions or jury instructions such that the jury can assume that the missing electronic evidence corroborated the other party's allegations.

In response, every church and nonprofit employer should be proactive in addressing the issues raised by electronic communications systems and establish policies governing the operation of email, voice mail, etc. The new rules and warnings above also apply not only to litigation but to any disputes about which there might be evidence.

Employment plaintiffs' attorneys use workplace emails to establish their employment discrimination claims, including claims for hostile work environments, Title VII violations, ADA discrimination, and sexual harassment. Employers are then put in the position of defending why their employees were distributing sexually explicit, racist, and sexist emails.

Church and nonprofit leaders and their employees also often fail to realize that "deleted" messages can be recovered and are discoverable. Deleted emails often live on and are readily available in deleted or trash folders until these folders are emptied manually, and even then they remain on the hard disk until overwritten by other files. And even after you delete a message from one computer, there is a strong chance that a copy still exists in the recipient's computer or that employers have

additional backup systems containing these email messages. Plaintiff attorneys also can and will use deleted emails as evidence of the “smoking gun,” proof of wrongdoing when employees send and receive inappropriate emails.

The best time to create an electronic policy is before the first complaint is filed and before the first discovery letter or request is served. Any electronic policy should primarily include a “litigation hold” provision so that whenever the church or nonprofit receives a letter, phone call or verbal message threatening a lawsuit or legal claim, all electronic messages and documents potentially relevant to the claim must be saved, even if the normal routine email retention would delete such information. In short, have a policy that: 1) preserves all electronic records from the time of threatened lit-

igation until it is over or resolved and 2) creates a mechanism to sort through electronic information to produce the e-documents that will be needed in the possible litigation/arbitration.

The goal for employers is to address the delicate balance between employee privacy and legitimate ministry interest in monitoring electronic devices used by employees and volunteers. Churches and nonprofits should address this balance by enacting policies regarding workplace usage so as to eliminate an employee’s expectation of privacy and protect the church/nonprofit from liability resulting from the misuse of the e-systems.

### CONCLUSION

In the 21st century, every church and nonprofit should establish a clear policy for its website and the use of email

and the Internet, which every employee and volunteer must read and sign.

In sum, websites must be viewed like any publication, taking usual care to not publish or allow defamatory statements or pictures to be posted without the person’s consent. Always include disclaimers, disclosures and exculpatory clauses that website users accept before exploring the site and use adequate security and protection for your site’s users. As to emails and Internet usage, employers must reduce or eliminate an individual employee’s expectation of privacy by clearly stating in the policy that electronic communications are to be used solely for church/nonprofit business, and that the church/nonprofit reserves the right to monitor or access all employees’ Internet or email usage. For sexual harassment and employee

morale reasons, any electronic communications policy should include a statement prohibiting the transmission of any discriminatory, offensive or unprofessional messages. Finally, any such e-policy must be agreed to in writing by all employees and volunteers.



H. Robert Showers heads up his firm’s, Simms Showers, LLP [www.simmsshowers.com](http://www.simmsshowers.com).

Northern Virginia/Metro DC office where he focuses on all aspects of Nonprofit and Church law as well as civil and commercial litigation. Prior to starting Simms Showers in 2002, Mr. Showers was a managing owner and head of litigation for a well known Washington, DC firm for over 13 years where he served hundred of churches and nonprofits regionally, nationally and internationally.

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# ATTORNEY MINISTRIES

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## IN PRAISE OF AN INTERACTIVE PIONEER

### In Memoriam

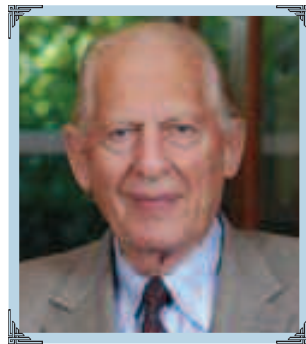
### Harold Joseph Berman (1918-2007)

by Edward McGlynn Gaffney, Jr.<sup>1</sup>

Like John Henry Cardinal Newman, Harold J. Berman knew that “to live is to change and to be perfect is to have changed often.”<sup>2</sup> Yet neither Newman nor Berman was a theological chameleon changing colors to match a momentary fad. Both were willing to change their views, and both challenged their readers to consider important changes in our views because both were deeply committed to the unfolding of what the Canadian philosopher Bernard Lonergan called the “unrestricted, detached, disinterested desire to know.”<sup>3</sup>

Berman’s reassessment of the interaction of law and religion represented a seismic shift in thinking about disciplines that previously had been viewed as isolated and even as antagonistic to one another. He first stated his thesis on this theme in the seminal lectures that he delivered at Boston University in 1973.<sup>4</sup> In these lectures, Berman demonstrated persuasively that – broadly understood – law and religion have in fact had a continuous and powerful influence upon the other. Two later volumes that formed his *magnum opus* richly illustrated his pivotal thesis, but added a powerful historical claim that law and religion have been interactive from the ancient world to the present.<sup>5</sup> Neither volume allows us to miss the forest for the trees. And both volumes are truly revolutionary in reshaping the ways in which law and religion must now be viewed as an interaction.

It is, of course, possible in the post-Berman universe that lawyers might continue to ignore theology, and theologians might continue to ignore law. But such lawyers and theologians now go along their



separate paths at their peril, or at least at the loss of a richer understanding of much within their chief focus of concern that would be disclosed to them if they began to appreciate the importance of interacting with the other discipline.

Anyone who encountered Berman’s scholarship is bound to state a sense of awe for the breadth of his interests and the utter integrity of his lifelong research agenda. One must admire his greatness if only for the scope of what he sought to understand. And I would be deficient if I failed to acknowledge that his humility constantly drove his research as a project to search and to search again for some fact or some important connection he might have missed. This rigorous honesty enabled him to reject false dichotomizations of things that many lesser minds view not simply as distinct, but as radically disjointed.

Having grasped that religion and law are not inherently contradictory but are interactive, Berman readily applied this insight to specific aspects of both law and religion. For example, when he focused sharply on the Religion Clause of the First Amendment, he quickly concluded: “The interrelationship of church and state is not

solely a political-legal matter. It is also a religious matter. Analysis of it should begin ... with a consideration of the interaction between our religious belief ... and the legal process.” Berman understood both terms of the relationship broadly: religion for him meant “our concern for the ultimate meaning and purpose of life and our faith in and commitment to transcendent values.” And for Berman, law meant “the process of allocating rights and duties, and thereby resolving conflicts and creating channels of cooperation.”<sup>6</sup>

Whenever Berman entered the space of our halls and homes, one-dimensionality did not stand a chance. Even his virtues came in complementary sets: courage and understatement, clarity and charity, seriousness and humor, and eminence and graciousness.

His deep dedication to scholarship made him a pioneer restlessly blazing new paths to discover new connections and relationships. Yet it was always with a deep respect for ancient traditions with which he became intimately familiar, so that he could unravel them so masterfully to his readers.

History was the matrix of his principal discoveries. Yet he never made the mistake of revering a mythical Golden Era in which all was glorious, and he never treated the past as only the future deserves to be treated.<sup>7</sup>

At different times of his life Berman was a Jew and a Christian. To Jews troubled by his acceptance of Jesus, he could offer the reassurance that he was never a supercessionist. He did not imagine that the newness of the covenant into which he entered



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by becoming a Christian was defined by nullifying the older alliance between the divine and the human called the people of Israel. That covenant is “old” in the sense of being venerable, and it retains its own significance and vitality in the world. The very fact that Berman took Jewish faith seriously enabled many of his new Christian brothers and sisters to accept the sense in which “spiritually we are Semites.”<sup>8</sup> No bigot could safely utter a word of contempt or scorn for Jews in presence of this great Christian.

Neither would this devout Episcopalian let Roman Catholics monopolize the term “catholicity.” Nor would he allow his Christian identity to lead him down the path of viewing the current encounter with Islam as merely a “clash of civilizations.” On the contrary, as any Jew or Muslim who ever met Berman could testify, he repudiated all stereotypes that continue the teaching of contempt.

It is not simply his scholarship that focused on interaction. He also lived his life interactively – with attention and respect for others. No one knows this better than his wife Ruth and his children, grandchildren, and great-grandchildren. He was not one to boast of his own formidable achievements. The only occasions on which I recall him being boastful or proud was to express his joy in his family.

Not only will his family cherish memories of this jolly soul, so will thousands of friends of different backgrounds and interests. The interaction of Hal Berman and Emory University was especially rich. His status as a world-class scholar added luster to Emory when he made the great move to Atlanta from another prestigious institution in the north. Emory gave to him the gift of collegiality he had begun to lack in the other place. Frequently in my conversations with him, he would use the word “delight” to describe the deep joy he felt in Atlanta. Emory, you were very good for Hal Berman, and he was a great blessing to you. So it is most appropriate for the Emory community to celebrate with gratitude the special relationship that they and Berman

sustained for decades with one another. His important work is now sustained by superb scholars like Frank Alexander, John Witte, Johan D. Van der Vyver, Michael Perry, Steve Tipton, Martin Marty and countless others associated with the Center for the Study of Law and Religion.

But even his special relationship with Emory invites the happy memory of other sets of interactions between Berman and other scholars and friends around the world – up in Cambridge (he never burnt a bridge in his life) and over in Moscow and Beijing (he was busy building bridges throughout the Cold War). Like John Wesley, Hal Berman viewed the “wide world” as his “parish.”

Specifically, the larger circle of scholars on law and religion now happily numbers thousands outside the Emory community. For example, the *Journal of Law and Religion*, a project he helped to found decades ago, has become the premier journal on these matters. Hal Berman is now surrounded by a thick “cloud of witnesses” to the interactive mode of thinking about law and religion. The conversation among those whom Berman influenced to think differently about law and religion has been rewarding not only for us, but also for our world.

A distinguished professor, Hal Berman was always accessible to his students. I count myself richly blessed that I was one of his pupils, and I never ceased to be amazed at his expectation that I could teach him anything, much less that I should do so. When I objected once to what I thought was an unfair reversal of roles, he corrected me gently: “All teachers learn from their students,” he said. And in that moment I decided to become a teacher. I also decided that I had to be a much more diligent student if I were going to match up to his extraordinary expectation that our relationship would be – like the great themes he linked in his writing – an interaction.

In the end, the single word “interaction” sums up much of Hal Berman’s contribution to this world. He embodied the interaction about which he frequently wrote. Hence he leaves not just a legacy of pro-

found scholarship that connects things, but also an ethical obligation to interact with one another with the same generous respect that he showed us in daily interactions throughout his long and fruitful life. For Berman, the duty of interaction commenced with the habit of careful, attentive listening to the other. Since this is so, it is equally true that his legacy imposes upon all of us who were influenced by him to behave with similar respect for one another. By carrying on the enterprise that Hal Berman began so well, all of us may continue to rejoice in his vibrant presence to and in us.

- 1 Professor of Law, Valparaiso University School of Law.
- 2 John Henry Newman, *An Essay on the Development of Christian Doctrine* 41 (London and New York: Longmans, Green & Co., 1909); <http://www.newmanreader.org/works/development/chapter1.htm> 1 (visited January 31, 2008).
- 3 Bernard J.F. Lonergan, *Insight: A Study in Human Understanding* 380 (New York: Philosophical Library, 1957).
- 4 Harold J. Berman, *The Interaction of Law and Religion* (Nashville: Abingdon, 1974).
- 5 Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge: Harvard University Press, 1983) (focusing principally on the synthesis of religion and law achieved by medieval canonists and theologians); Harold J. Berman, *Law and Revolution II: The Impact of the Protestant Reformations on the Western Legal Tradition* (Cambridge: Harvard University Press, 2003) (focusing principally on the central figures of the Protestant Reformation).
- 6 Harold J. Berman, “Religion and Law: The First Amendment in Historical Perspective,” 35 *Emory L.J.* 779 (1986).
- 7 One might expect a paleontologist to be concerned exclusively with the past, indeed with the very remote past. Yet the Jesuit paleontologist Pierre Teilhard de Chardin wrote to Max and Simone Begouen: “I am not sure whether what I say will shock my friends in prehistory. In the end I come to the conclusion that there is only one real method of discovery (as we learn from historical research); it is to build the future. It’s perfectly simple, but there are still so many people who behave as though the past was interesting in itself, and treat it as only the future deserves to be treated.” *Letters of a Traveler* 205 (New York: Harper & Row, 1962).
- 8 Speaking to a group of Belgian Pilgrims a year before the outbreak of World War II, Pope Pius XI stated: “Anti-semitism is unacceptable; spiritually we are Semites.” *La Documentation Catholique*, 29 (1938) col. 1460; see “We Remember: A Reflection on the Shoah,” (Vatican Commission for Religious Relations with the Jews) [http://www.vatican.va/roman\\_curia/pontifical\\_councils/chrstuni/documents/rc\\_pc\\_chrstuni\\_doc\\_16031998\\_shoah\\_en.html](http://www.vatican.va/roman_curia/pontifical_councils/chrstuni/documents/rc_pc_chrstuni_doc_16031998_shoah_en.html) (visited Jan. 31, 2008).



## Leading the Charge to Defend Life and Religious Liberty

The Center for Law & Religious Freedom pursues litigation primarily on behalf of religious student groups at public universities; faith-based social service providers; religious educational institutions; and pro-life health care providers. The following is an update on the Center's current litigation.

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### Religious Student Groups at Public Schools and Universities

*Christian Legal Society v. Newton* (U.S. Court of Appeals for the Ninth Circuit) The Center represents the CLS chapter at

Hastings College of Law, which the University de-recognized because CLS chapters require their members and leaders to profess faith in Christ and to sign a code of conduct. A federal district court ruled against the chapter, which appealed to the Ninth Circuit. Briefing is completed but the court has yet to schedule oral argument.

*Beta Upsilon Chi v. Machen* (U.S. District Court for the Northern District of Florida) The Center represents Christian fraternity Beta Upsilon Chi (BYX) in its suit against University of Florida officials for refusing to recognize the fraternity as a registered student organization, because it requires its members to profess faith in Christ. The Center's motion for preliminary injunction is pending, and discovery is ongoing.

*Christian Legal Society v. Eck* (U.S. District Court for the District of Montana) The Center filed suit on behalf of the Christian Legal Society Chapter at the University of Montana School of Law against law school officials for derecognizing the chapter. The suit is proceeding toward discovery.

*Christian Legal Society v. Sorenson* (U.S. District Court for the District of South Carolina) The Center filed suit against the University of South Carolina for its unconstitutional policy that does not allow religious student groups to apply for the funding for which all other student groups may apply. Center attorneys are awaiting the University's response.

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### Faith-based Social Service Providers

*Pedreira v. Kentucky Baptist Homes for Children* (U.S. District Court for the Western District of Kentucky) The Center represents Kentucky Baptist Homes for Children in a suit initiated by homosexual and secular activists challenging the Home's partial government funding, because of its religious affiliation. A motion to dismiss has been filed, and discovery is proceeding.

*Association of Faith-Based Organizations v. Granholm* (U.S. District Court for the Western District of Michigan) The Center represents the Association of Faith-Based Organizations in challenging the State of Michigan's action in excluding those chari-



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**THE CENTER FOR LAW & RELIGIOUS FREEDOM PURSUES LITIGATION PRIMARILY ON BEHALF OF RELIGIOUS STUDENT GROUPS AT PUBLIC UNIVERSITIES; FAITH-BASED SOCIAL SERVICE PROVIDERS; RELIGIOUS EDUCATIONAL INSTITUTIONS; AND PRO-LIFE HEALTH CARE PROVIDERS.**

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ties that take religion into account in their personnel decisions from its state employee charitable campaign. The suit is proceeding toward discovery.

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### **Religious Educational Institutions**

***Colorado Christian University v. Baker*** (U.S. Court of Appeals for the Tenth Circuit) The Center represents Colorado Christian University in challenging Colorado statutes that exclude CCU students from state aid programs because the state deems the school to be “pervasively sectarian.” A federal district court ruled against CCU, who appealed. Briefing is complete but oral argument has not yet been scheduled.

***Doe v. California Lutheran High School*** (California Court of Appeal) The Center filed a motion on behalf of the Association of Faith Based Organizations seeking to intervene in support of California Lutheran High School. The parents of two students sued the school alleging “sexual orientation” discrimination when the school suspended the students for violating the school’s code of conduct by engaging in homosexual behavior. The judge dismissed the case declaring that the school was not a business, thus was not subject to the anti-discrimination law under which the parents sued. Center attorneys are preparing an opening brief on behalf of the school if the parents appeal this decision.

***Pennybacker v. Beshear*** (Kentucky Circuit Court) The Center intervened in a lawsuit supporting University of the Cumberlands, a Christ-centered college in Kentucky, which had been awarded state funding to build a pharmacy school to alleviate a severe pharmacist shortage in the region. A homosexual rights activist group challenged the grant because of the college’s religious



affiliation and because the school recently enforced its policy prohibiting homosexual conduct. Briefing and hearings have been concluding and Center attorneys are awaiting the judge’s ruling.

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### **Health Care Rights of Conscience**

***California v. United States*** (U.S. District Court for the Northern District of California) The Center represents pro-life health care providers in the State of California’s challenge to the Weldon Amendment. After the federal district court denied the Center’s motion to intervene on behalf of the Christian Medical Association, the American Association of Pro-Life Obstetricians and Gynecologists, and the Fellowship of Christian Physician Assistants, Center attorneys filed an emergency appeal to the U.S. Court of Appeals for the Ninth Circuit. The Ninth Circuit reversed the district court’s ruling and ordered the lower court to allow the Center and its clients to defend the statute. A decision is pending.

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### **Amicus Briefs**

***Morr-Fitz v. Blagojevich*** (Illinois Supreme Court) The Illinois State Board of

Pharmacy adopted an administrative rule requiring pharmacies to dispense contraceptives, including “Plan B,” which is believed to act as an abortifacient in some cases. Some pharmacists had exercised their consciences and chosen not to fill prescriptions for Plan B. The Center filed *amicus* briefs on behalf of CLS and the Christian Pharmacists Fellowship International at both the petition stage and the merits stage. The Center’s briefs focused on the state Religious Freedom Restoration Act. A decision is pending.

***North Coast Women’s Care Medical Group v. Superior Court*** (California Supreme Court) Center attorneys filed an *amicus* brief supporting a Christian doctor’s decision (based on her religious beliefs) to refuse to perform an infertility treatment to assist an unmarried woman in conceiving a child. A decision is pending.

***DeJohn v. Temple University*** (U.S. Court of Appeals for the Third Circuit) The Center joined a brief urging the Court of Appeals to refrain from licensing public university officials to censor student speech that could not reasonably be characterized as disruptive to the educational environment. A decision is expected in 2008.

For more information about these cases and information about all the Center for Law and Religious Freedom’s work, please visit us online at [www.clsnet.org](http://www.clsnet.org).



## From Generation to Generation

By Brent Amato

**“Abraham was the father of Isaac. Isaac was the father of Jacob.” Matthew 1:2**



*The first National Law Student Leadership Conference in 1974 at Mt. Herman, California. Skeeter Ellis is in front row, far left, in black glasses. Author Brent Amato is front row, second from right, with moustache.*

Scripture describes God as “the God of Abraham, Isaac, and Jacob”—the God of generations of His people. As a CLS member, I think a lot about the CLS Family, especially the relationships that span from generation to generation.

We all have our favorite Old Testament Hebrew names, whether it be “El Shaddai” (“The Almighty, All-Sufficient God”), “Adonai” (“Lord”), “Jehovah” (“The Eternal, Ever-Loving One”) or any of a number of others. Recently, however, the name of God that has captured my heart is this generational one – about family, His family. Additionally, I was amazed to discover that this name appears in both the Old and New Testament: in the Books of the Law, in the Historical Books, in two of the four Gospels and in Acts, the story of His Church. (Exodus 3:6, 15, 16; 4:5; 6:3; 32:13; Deuteronomy 9:27; I Kings 18:36; I

Chronicles 19:18; Matthew 22:32; Mark 12:26; Acts 3:13, 7:32). The Gospel writer to the Jews was even inspired to start his Gospel with the genealogy of Jesus Christ, from generation to generation to generation, from Abraham forward. This generational concept must be important, for it appears in God’s Word no less than 213 times!

As I recently attended the CLS Northeast Student Retreat and was confronted with a bunch of law students, certainly not from my generation, I realized that my “CLS story” was consistent with “God’s story” here on His earth. Abraham...Isaac...Jacob – same story, just different names (and a few less generations).

It all began in the 1960s, arguably three generations removed from those law students at this year’s retreat. We would see Skeeter Ellis and Burt Ericson, CLS found-

ing fathers and board members who participated in creating the Christian Legal Society in February 1962. Skeeter was always in the forefront of the ministry, from CLS board member, to CLS president to CLS Center director. Burt, however, was always quietly serving. Skeeter was conspicuous in so many pictures throughout CLS periodicals and other materials, even on the cover of the CLS magazine in 1971, while Burt, on the other hand, was just as inconspicuous, never appearing in any pictures in any of the CLS periodicals or other materials. One always in the spotlight, the other always on the sidelines—both used mightily by God, reminiscent of the disciples Peter and Andrew. Moreover, I was watching both, and they were watching me.

I have a picture on my study’s wall of the first National Law Student Leadership Conference in 1974 at Mt. Hermon,

**AS I RECENTLY ATTENDED THE CLS NORTHEAST STUDENT RETREAT AND WAS CONFRONTED WITH A BUNCH OF LAW STUDENTS, I REALIZED THAT MY “CLS STORY” WAS CONSISTENT WITH “GOD’S STORY” HERE ON HIS EARTH. ABRAHAM... ISAAC... JACOB—SAME STORY, JUST DIFFERENT NAMES (AND A FEW LESS GENERATIONS).**

California, which I attended and which forever shaped my ministry in the practice of law. There in that picture is Skeeter, prominently positioned in the front row and, if you look close enough, you see other lawyers and law students: future CLS Presidents like Bob Toms, Directors like Mike Woodruff and other CLS “movers and shakers.” A bunch of other Christian law students, including me, fill in the picture. You won’t find Burt in the picture, but he sponsored me for that event, paying all my expenses. Both Burt and Skeeter invested in me much more than their time and money. They invested their very lives in me, like Paul did to His beloved Thessalonian believers (1 Thessalonians 2:8) – from one generation to another.

The cover of the CLS magazine from Winter 1980 pictures a group of nine men nominated for the CLS Board – eight seasoned Christian attorneys including Skeeter, and one young attorney, me – from one generation to another. I will never forget how Lynn Buzzard, CLS’ first executive director, described me to the entire Board. He told them, “Brent will be an experiment!” which I guess, after all these years, is still in process. Flip through the pages of that edition and you will find an article announcing the establishment of the Ellis-Toms Student Intern Scholarship Fund – from one generation to another. Flip through some more pages and you find a Chapter Highlight on Valparaiso University Law School, in which you read, “The faith [of this Chapter] is nurtured through speakers and Bible Studies...Chicago Attorney and CLS Board member, Brent Amato, has spoken a number of times...” – from one generation to another.

Skeeter has passed on to his eternal reward, but the Ellis ministry to me did not stop. Bev, Skeeter’s bride, who called herself “The Grandmother of CLS” (who else would go to a convention of lawyers on her honeymoon?) continued to walk with me through life. After Skeeter’s death in 1996, she sent me a book from Skeeter’s library, a

book written in 1879, entitled The Struggle For Law. The most meaningful words in the book were her handwritten note to me: “Dear Brent, I don’t know the history of how this book found its way to Skeeter’s library, but I send it on to you....It seems appropriate—dedicated to a member of ‘the bar of Chicago’....Whatever its merits (good or bad) I give it to you for memory’s sake.” – from one generation to another.

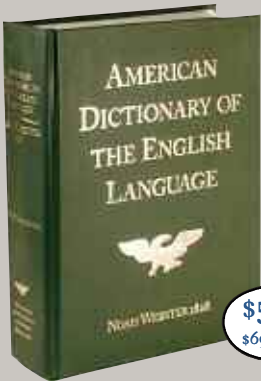
Burt also has passed on to his eternal reward, but the Ericson ministry to me did not stop. Before he retired from the practice of law, he gave me a beautiful briefcase. Until recently, I have used it each day of my law practice. Over time, many would ask about the dilapidated, old briefcase that was literally decomposing, and to each inquirer I would tell the same story – the story about

the lawyer who invested his life over the years in a young law student, who later became a young attorney working with him, and who eventually became his partner. I would tell them that the reason I continued to use the briefcase was that each day when my hand gripped the worn handles it reminded me of Burt and his loving legal legacy to me – what it meant to be a Christian lawyer. All three, Skeeter, Burt and Bev, have left my path, but the fact that our paths crossed has not been lost on me.

My philosophy when visiting CLS student chapters has been very simple and very Italian: “Food, fun and fellowship!” If you feed them, they will come!” Along the way, I have met many wonderful Christian law students called to serve God in the practice

*continued on page 28*

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## FROM GENERATION TO GENERATION

*continued from page 27*



*CLS Board picture. Brent is front row, third from the left, holding Bev Ellis' hand. Sylvia Chen is front row, fourth from the right.*

of law. One such student was Sylvia Chen at University of Michigan Law School. In addition to being smart and Spirit-filled, she was also entrepreneurial, persuading me to buy a CLS sweatshirt from her chapter (I thought it was a great deal!) – from one generation to another. Sylvia later served on the CLS Board for many years and still continues to serve law students on the CLS Law Student Ministries Committee. I recently asked her why, and she said it was because she loves law students and because of how she was blessed while in law school. Who knows how many law students have crossed Sylvia's path and been indelibly influenced for Jesus Christ in the practice of law? – from one generation to another.

In my law office, there is a picture of the CLS Board from a few years ago. There in the front row are Bev Ellis, me and Sylvia – Bev and I holding hands and Sylvia in close proximity – from one generation to another to another.

So, where do we go from here? For me, another Regional Student/Attorney Conference just occurred in Pennsylvania, where nearly 100 law students from 20 schools attended accompanied by 25 lawyers (by my reckoning, three generations!). The CLS staff let me come and hang out with the lawyers and students, and I even got to talk to them about investing their lives in others. Who, but God, knows how many blessings and how much min-

istry will flow through the years from those who attended?

The beat goes on in CLS – from generation to generation to generation. The other day, I received an e-mail from one of the leaders of the Valparaiso CLS Law School Chapter wondering about my next visit this semester (I think we'll have food, fun and fellowship!) and whether I might have any leads about a law firm position in the Chicagoland area—from one generation to another.

Scripture teaches that God is a God of generations, moving alongside His people from one to another, helping them run in life's marathon and continuing to pass the torch, the torch of the Word of God, the torch of God's love. The torch will always be lit because there will always be runners in the race and there will always be "fans in the stands" cheering you on. "Therefore, since we have so great a cloud of witnesses surrounding us [including without limitation Skeeter, Bev and Burt], let us also lay aside every encumbrance and the sin which so easily entangles us, and let us run with endurance the race that is set before us." (Hebrews 12:1). From Abraham to Isaac to Jacob – amazing! From Skeeter, Bev and Burt (I hear the cheers!) to me to Sylvia to current law students – amazing!

I'm mindful that this "generational thing" can play out on a spectrum from very good to very sad. I am mindful that for

every Moses, there is a Joshua (Joshua 1:1-2); for every Paul, there is a Timothy (I Timothy 1:1-2, II Timothy 1:1-2) and Titus (Titus 1:1-4). I am also mindful that after Joshua's death and the death of his generation, it is written, "And all that generation also were gathered to their fathers; and there arose another generation after them who did not know the Lord nor yet the work which He had done for Israel. Then the sons of Israel did evil in the sight of the Lord..." (Judges 2:10-11).

However, Paul captures my heart: "And the things which you have heard from me in the presence of many witnesses, these entrust to faithful men, who will be able to teach others also." (II Timothy 2:2). So, I will continue telling and living my "story" and keep hanging with law students. How about your story? – from generation to generation.



With over 30 years of law practice experience, Brent joined Pluymert, Piercey, MacDonald & Amato, Ltd. in May 1999 as a partner, where he heads the Business/Corporate Department. Brent

is married to Sherrie and has two adult children, Jason and Kristin. He also is active in various ministries, including at his church, Medinah Baptist Church, the Christian Legal Society, and Peacemakers Ministries, as a Christian Conciliator in Biblical conflict resolution.

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## For the Public Good

by William F. Burton



### A Rough Introduction

I knew something was very wrong the moment I stepped outside. When I arrived at the public housing complex in southeast Washington, D.C., only an hour before, the courtyard shared by the residents of those apartment buildings was teeming with people. There had been music and conversations and arguments and children playing and most of all people – people everywhere. It was a warm summer evening, now so many years ago. I was there to interview and, if possible, get a written statement from a witness in a murder investigation. Walking down the stairway from the witness' second floor apartment, written statement in hand, I pushed open the battered steel door and was greeted by silence. The courtyard was empty. It was just after 8:00 p.m.—much too early to explain the exodus.

As a young investigator for one of the city's leading criminal defense attorneys I was learning on the fly how to handle challenging situations. "Keep a sharp lookout

and walk straight to the car" I told myself. A surge of adrenaline seemed to sharpen all of my senses. I walked quickly across the now-empty courtyard and turned right when I reached the sidewalk. My big red Ford with the white vinyl half-roof and Ohio tags was parked on the street just ahead. As Marisa Tomei's character observed in *My Cousin Vinny*, "Oh yeah, you blend."

I had taken only a few more steps when suddenly I found myself sitting on the sidewalk with a sharp pain near my right temple. What a bee sting! Wait . . . no, it's bleeding too much for a sting. Someone must have hit me in the side of the head with a rock! And a piece of it must have broken off, because I can feel it . . . no, it was not a rock. I held between my fingers a .177 caliber lead pellet from an air rifle, maybe just like the one I once used to shoot at targets and tin cans (yes, the cans were made of tin back then) back in Ohio. I looked up at the apartment building on my right and quickly took note of the many open, darkened windows. I imagined someone standing behind one of those windows, pumping up that air rifle again. A moment later I was behind the wheel of that big red Ford. I decided to call the police from my apartment.

**"We are caught in an inescapable network of mutuality, tied in a single garment of destiny. Whatever affects one directly, affects all indirectly."**

– Martin Luther King, Jr.

### Answer The Call

Last Fall I received an e-mail message from another attorney in our church, asking if I would talk with the pastor of a church serving that very same public housing proj-

ect. The pastor wanted to form a nonprofit corporation to be a resource to help increase the effectiveness of ministries, school programs, businesses, and other organizations in fulfilling their missions in D.C.'s urban community. One of his ideas was to establish an exchange program involving inner-city high school seniors and college students who would spend time during a summer vacation as interns at churches located in urban areas in other cities, essentially becoming full-time laborers in the vineyards of those churches. The program would address the urgent need for eager, energetic manpower in urban churches while providing the students with hands-on ministry experience. The pastor needed legal assistance to incorporate this faith-based business and obtain tax-exempt status for the business.

Although the bulk of my practice is that of a trial lawyer, I jumped at the opportunity. The representation involved preparing and filing the necessary papers to incorporate the business, then gathering and submitting to the Internal Revenue Service the information required to have the corporation recognized as a nonprofit entity for income tax purposes. Although confident in my ability to advise the client as to corporate form and to see that the necessary forms were completed and filed, I was comforted by the knowledge that I would be able to call upon colleagues who routinely handle such matters for assistance as necessary.

Why volunteer to represent clients for no pay? Especially if, like me, you recently opened your own law practice? I suggest two short answers. First, it is our moral obligation as human beings to assist those in need without asking for anything in return. Second, it is our ethical obligation as lawyers to provide legal services to those



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**I KNOW THAT THIS MINISTRY I WAS WILLING TO ASSIST WILL CONTINUE TO HAVE AN ETERNAL IMPACT UPON THE LIVES OF THOSE IN THAT PUBLIC HOUSING COMPLEX, MAYBE EVEN THE TRIGGER MAN WHO PUT THAT .177 CALIBER AIR PELLET IN MY HEAD ALL THOSE YEARS AGO.**

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who cannot afford to pay. Admittedly, it is easier to provide *pro bono* legal services when one can rely upon the resources of a law firm or other organization. But I suggest that “easy” is not a qualifier for our service to the community. We are called upon, by our God and our profession, to seek out people in need and provide them our assistance.

God’s Word commands us to “defend the rights of the poor and needy,” (Proverbs 31:9), and to “vindicate the weak and fatherless, do justice to the destitute and afflicted.” (Psalm 82:3). We should heed His Word. In addition, ABA Model Rule 6.1 states, in pertinent part, “Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render at least (50) hours of *pro bono publico* legal services per year.” The Rule is quite helpful, actually, by suggesting ways we might fulfill that responsibility, such as providing legal services not only directly to the disadvantaged, but to “charitable, religious, civic, community, governmental and educational organizations in matters which are designed primarily to address the needs of persons of limited means,” or, for example, “to individuals, groups or organizations seeking to secure or protect civil rights.” I commend to your reading, or re-reading, the Model Rule and your state bar’s counterpart, and I challenge you to take action.

**“The paramount interest in oneself, for money, for material goods, for security, must be replaced by an interest in one another – an actual, not just a vocal, interest in our country . . . a desire to serve our community, our schools, our nation.”**

**– Robert F. Kennedy**

### The Reward

Comment 1 to the Model Rule states that “personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer.” I have found this to be true each

time I have provided service without pay. It is a rare occasion for many of us to actually *see* the results of our labor, beyond a file being closed and sent to storage, beyond the receipt of a check to be deposited. Among its other benefits, *pro bono* legal service provides us with the opportunity to make a difference.

More importantly, however, is the spiritual impact of our service. Proverbs tells us that “He who gives to the poor will never want.” (Proverbs 28:27) Jesus told us, in Luke 14:13-14, “when you give a reception, invite the poor, the crippled, the lame and the blind and **you will be blessed** since they do not have the means to repay you; **for you will be repaid** at the resurrection of the righteous.”

I am glad I answered the call. It would have been easy to have ignored it. In addition to the fact that the legal work required was outside my area of expertise, I could

have relied upon the excuse available to most attorneys, the familiar “I’d like to, but I’m much too busy.” I am blessed to be busy, but now even more so to have given my time to further such a worthwhile community project, one that will bring positive change to the lives of those with whom I share that community. I know that this ministry I was willing to assist will continue to have an eternal impact upon the lives of those in that public housing complex, maybe even the trigger man who put that .177 caliber air pellet in my head all those years ago.

“[I]f we love one another, God abides in us, and His love is perfected in us. By this we know that we abide in Him and He in us, because He has given us of His Spirit.” (1 John 4:12-13)

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William F. Burton practices law in Washington, D.C., Maryland, and Virginia.

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**It's time to reap.** Launched in 1991, in response to the fall of Communism in Eastern Europe and the subsequent collapse of the Soviet Union, Advocates International is a work in progress. It puts in practice the strategy of Jesus whose chosen method was the formation of small bands of committed friends. He inspired

them with a sense of his spirit and vision to build their lives into an intensive fellowship of affection, worship and work.

Advocates International encourages followers of Christ within the legal profession to be proactive locally, nationally, regionally and globally in a broad range of justice issues impacting freedom, faith and family. In 1991 there were just two nations with national Christian lawyer groups proactive in the public square. Now, in 2008, there are 100 active or emerging Christian lawyer groups among the 158 nations linked through eight regional networks. Four Global Convocations and 32 Regional Conferences since 1998 have been instrumental in broadening and strengthening a unique global movement

committed to doing justice with compassion. As our 5th Global Convocation approaches, designed to encourage and enable advocates to meet locally, organize nationally, cooperate regionally and link globally to promote justice, rule of law, religious freedom, reconciliation and integrity, we invite you to join us.

**We invite you to be part of a historic event.** The invitation is extended to you, your family, your church, Bible study, law firm, CLS chapter, business or ministry. The 5th Global Convocation in Washington, DC, during October 6 to 12, 2008, will be co-hosted by Advocates International, Advocates North America and the Christian Legal Society. The inter-

**IN 1991, THERE WERE JUST TWO NATIONS WITH NATIONAL CHRISTIAN LAWYER GROUPS PROACTIVE IN THE PUBLIC SQUARE. NOW, IN 2008, THERE ARE 100 ACTIVE OR EMERGING CHRISTIAN LAWYER GROUPS AMONG THE 158 NATIONS LINKED THROUGH EIGHT REGIONAL NETWORKS.**

national program, which involves country representatives meeting by region, begins on October 6. The North America (CLS) component begins on October 9.

The theme is *Redeeming Law: Christian Calling and the Legal Profession*. The program promises to be superb. The speakers will be first-class! We hope to see 1,500 delegates from 150 nations at the largest-ever gathering of Christian lawyers and law students. The relationships you build may last a lifetime. It could be life changing for you and Advocates International's global delegates, with the potential to have a long-term impact on nations around the world. Join us either for the entire week (Oct. 6-12) or the long weekend (Oct 9-12). Additionally, please pray about helping sponsor a delegate from any one of dozens of countries. Contact Advocates' headquarters in



Washington, DC, via phone (703-894-1084) or e-mail (info@advocatesinternational.org) for more information.

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*...we know that the law is good if one uses it lawfully. -1 Timothy 1:8*

*Something old.*

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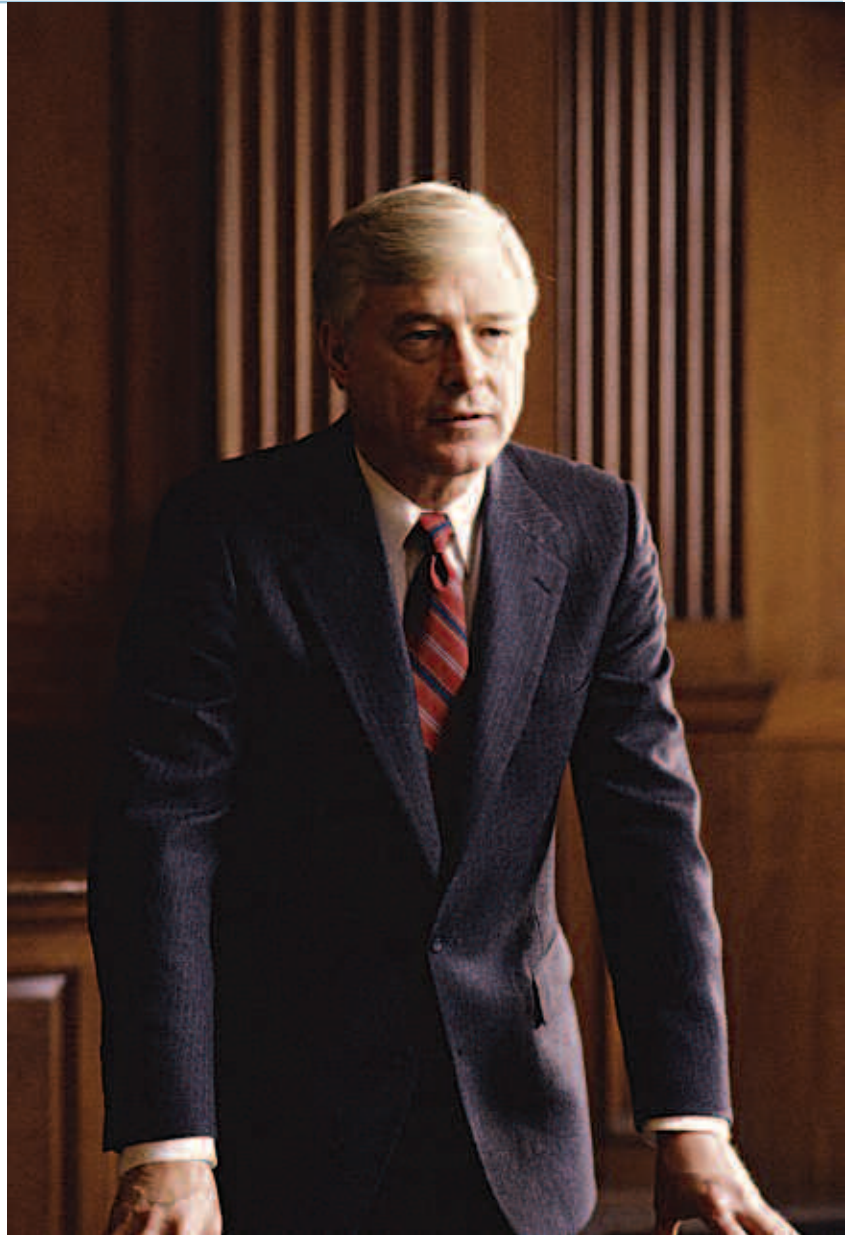
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blah, blah, blah.



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bob@elglaw.com

### Mobile

CLS Mobile Chapter  
William Watts  
williamwatts@hotmail.com

## ARIZONA

### Phoenix

CLS Phoenix Chapter  
Timothy J. Watson, Esq.  
twatson15@cox.net

### Tucson

CLS Tucson Chapter  
Scott Rash  
scottrash@gabroylaw.com

## CALIFORNIA

### Los Angeles

CLS Los Angeles Chapter  
Terran Steinhart  
terran@steinhartlaw.com

### Orange County

CLS Orange County Chapter  
Gerald Unis  
lori@unislaw.com

### Sacramento

CLS Sacramento Chapter  
Steven Burlingham  
steveb@gtblaw.com

### San Diego

CLS San Diego Chapter  
John Yphantides  
johnyphantides@usa.net

## COLORADO

### Colorado Springs

CLS Colorado Springs Chapter  
Tyler Makepeace  
jmakepeace@integrity.com

### Metro Denver

CLS Metro Denver Chapter  
Rachel Stokowski  
rstokowski03@law.du.edu

## DISTRICT OF COLUMBIA

CLS DC Metropolitan Area  
David Nammo  
memmin@clsnet.org

## FLORIDA

### Daytona Beach

CLS Daytona Beach Chapter  
Annette Pitts  
gator465@aol.com

### Jacksonville

CLS Jacksonville Chapter  
Roger Gannam  
rgannam@lflaw.com

### West Palm Beach

CLS Palm Beach County Chapter  
Sherri L. Renner  
slrenner@bellsouth.net

## HAWAII

### Honolulu Area

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Sandra Young  
Youngsandyg@cs.com

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CLS Northern Illinois Chapter  
Michael Avramovich  
businessfirm@aol.com

## INDIANA

### Indianapolis

CLS Indianapolis Chapter  
Herb Jensen  
Jensen@iquest.net

## KANSAS

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CLS of Wichita  
J. Craig Shultz  
shultzlaw@veracom.net

## LOUISIANA

### New Orleans

CLS of New Orleans  
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rmb@boweslew.com

## MARYLAND

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CLS Baltimore Chapter  
Matt Paavola  
matt@myworkerscomplawfirm.com

## MASSACHUSETTS

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Jlewis1515@aol.com

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JCAMACHO@shb.com

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CLS Metro New York Chapter  
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jruta@rutasoulios.com

### Syracuse

CLS Syracuse Chapter  
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## NORTH CAROLINA

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CLS of Charlotte  
Robert Bryan III  
Rbryan@wcsr.com

## OHIO

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CLS of Central Ohio  
Charles Oellermann  
coellermann@jonesday.com

## OKLAHOMA

### Oklahoma City

CLS Oklahoma City Chapter  
Michael L. Tinney  
OKkidsdad@cox.net

## PENNSYLVANIA

### Pittsburgh

CLS Western Pennsylvania Chapter  
Delia Bianchin  
delia\_bianchin@pennunited.com

## TEXAS

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CLS Austin Chapter  
Col Donald W. Neal Jr.  
donteresaneal@hotmail.com

### Dallas

CLS Dallas Chapter  
Jon D. Campbell  
jcampbell@chambleeryan.com

### Houston

CLS Houston Chapter  
Rebecca Renfro  
rrenfro1@houston.rr.com

### San Antonio

CLS San Antonio Chapter  
Paul Russo Stone  
paulr.stone@grandecom.com

## VIRGINIA

### Charlottesville

CLS Charlottesville Chapter  
James Garrett  
jwgarrett@snookandhaughey.com

### Hampton Roads/Tidewater

CLS Hampton Roads Chapter  
Michelle Hawkins  
hawkinsjd@gmail.com

## WASHINGTON

### Seattle

CLS Seattle Chapter  
Tom Rodda  
trodda@elmlaw.com

# The Heart of the Matter

David Nammo  
EDITOR-IN-CHIEF

My oldest daughter's tooth fell out the other day. She was excited and anticipating a visit from the Tooth Fairy (*i.e.* mom and dad's wallet; she knows the truth but enjoys pretending), especially because it was a molar and you allegedly get "extra cash" for the bigger teeth. She then went through all the proper procedures – cleaning the tooth, wrapping it up, and placing it under her pillow.

As is usual for a family with five children going in several different directions, the day got away from us. That night, mom and dad forgot all about the lonely tooth underneath our daughter's pillow. Meanwhile, she went to bed confident that a quarter or two or maybe even a dollar would appear sometime that night.

The next morning, she came to me in amazement. The tooth fairy had left five dollars under her pillow. I immediately went to my wife to ask why she put so much money under there for the tooth. She had forgotten all about it. I was confused and my first reaction was really one of absolute amazement – if my wife didn't do it, and I didn't do it, maybe there is a Tooth Fairy – we have been wrong all this time.

Unfortunately, my cynicism didn't allow me to believe that there might actually be a Tooth Fairy for more than a few seconds. I realized that there was only one other person who would do such a thing, and have access to that kind of cash, my oldest son Joshua, her little brother.

I cornered poor Joshua, who probably thought he was going to be in trouble, and asked him to tell me the truth about it. He said he figured we would forget about it and wanted to take care of his big sister. So he cracked open his little piggy bank and pulled out five one-dollar bills and put them under her pillow.

It was all we could do to not gush with pride over our little guy's heart for taking care of his sister. Most of the time he is annoying her, bothering her, attacking her, and essentially filling the role of the little brother. But it is unique moments like this that allow me to see through to his heart or to witness a gesture that is completely selfless. It reminds me of similar moments that I often witness around the country

through CLS members.

Recently, the New York Metro CLS attorney chapter decided to buy dinner for the children and families staying at the Ronald McDonald House in New York City. The Ronald McDonald House allows children with cancer and their families to stay there while the child with cancer is receiving treatment. Some families are there for days, some for weeks, some for months, and some a few for years. Because of the world famous cancer facility nearby, the home is filled with children that have rare or unusual cancers.

Into this scenario, the local CLS group decided to gather donations and do something nice for those families. They bought an entire buffet dinner and set it up in the



TV room. They hired a local worship leader to play songs. They also had a puppet/skit for the children and families. There were no TV cameras, no press releases, no self-congratulations – just the reward of doing something selfless for others. As I walked around the room, filled with bald children of all ages and their families, I heard the appreciation for such a simple, generous gift, both from veteran families and those who just arrived that day. It was one less thing they had to worry about that day.

As I travel and speak and meet with CLS members, I hear the same thing over and over. The moments that they cherish are the ones where they know they are following the Lord's calling in their life. Recently, I had lunch with a federal judge who had no idea why he was on the bench other than the fact that the Lord called him there. He neither desired nor sought the position, yet the Lord brought it to

him. Over fried chicken and fried okra, he shared how he just wanted to glorify the Lord and was submitting daily to Him to do so.

Christian law student groups also are continually trying to reach out to their often hostile campus in the name of Christ. Many of them offer "free chocolate" for finals. Why? So people feel loved and cared about during a stressful time. No strings attached, just giving. And it is often that a law school leader tells me about how their groups spend their time counseling and working with other students who are scared, have lost faith, or have given up because of the stress.

And of course, Christian legal aid clinics around the country are manned by Christian lawyers and law students quietly and faithfully serving the "least of these" on a daily basis.

A few years back, CLS received a letter from a prison inmate who was concerned about his lawyer. A CLS member had decided to help him out with his criminal appeals after receiving a referral. It was an uphill battle that eventually resulted in no change, but the relationship between the attorney and his client had an eternal impact. The man in prison saw and felt the love of Christ through the lawyer's taking such an impossible case. They had gotten to know each other along the way, and the inmate wrote because he knew the lawyer was having trouble with his heart. The appeals were over, but he wanted us to know what the lawyer had tried to do for him and to find and pray for the lawyer, as he was worried about his friend.

There are hundreds of similar stories going on around the country that could take pages and pages to fill. There is no fanfare for any of these acts, no big recognition, no medals. There is only the reward of serving the Lord where He has called us – to the firm, to the law school, to the business, to the home (even as a little brother), to the ministry, to Him. Are you working on your story?

---

David Nammo is the director of Attorney Ministries and Law Student Ministries for the Christian Legal Society.

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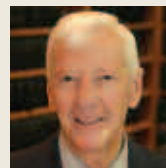
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