

Managing Risks:

First Steps in Identifying Congregational Liability

Richard B. Couser

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CONTENTS

INTRODUCTION 3

Chapter 1

THE CONGREGATION AS EMPLOYER 4

Chapter 2

COUNSELING AND CONFIDENTIALITY 13

Chapter 3

SOCIAL EVENTS, CHILD CARE, AND TRIPS 18

Chapter 4

REPORTING ABUSE AND NEGLECT 21

Chapter 5

PROPERTY OWNERSHIP 23

Chapter 6

FEDERAL INCOME TAX RESPONSIBILITIES 27

Chapter 7

FUNDS AND TRUSTS 31

Chapter 8

COPYRIGHT 35

Chapter 9

LIABILITY INSURANCE 39

Chapter 10

DISPUTE RESOLUTION 42

APPENDIX 47

MANAGING RISKS

FIRST STEPS IN IDENTIFYING CONGREGATIONAL LIABILITY

This resource has been developed by Augsburg Fortress and the Division for Congregational Ministries of the Evangelical Lutheran Church in America. DCM Project Coordinator: Michael R. Rothaar.

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INTRODUCTION

Purpose

Your congregation has a responsibility to carry out its ministry in compliance with many laws and legal standards. Sometimes that compliance is mandated by laws that apply both to secular and religious institutions. At other times your congregation will want to comply in order to carry out effective “witness to God’s creative, redeeming, and sanctifying activity in the world” (C4.01., *Model Constitution for Congregations of the Evangelical Lutheran Church in America*, hereafter referred to as the *Model Constitution for Congregations*). Those who lead ELCA congregations—pastors, associates in ministry, Congregation Council members, officers, boards, and committees—are responsible for compliance matters.

Increasing demands are placed on congregations to comply with laws and to protect against risks not previously experienced. The need to meet these demands arises from at least the following concerns:

- Compliance with statutory and regulatory requirements binding on the congregation and enforceable by public authorities;
- Prevention of harm to members, employees, and others your congregation serves and deals with;
- Witness to both members and nonmembers who look to your congregation to model Christian living;
- Responsibility for proper management of resources; and
- Exposure to financial liability to people injured by your congregation’s clergy, staff, or volunteers.

The church—in its manifestation as a local congregation—should be a place of safety, a place where people are treated with due care and respect. That care and respect should extend to members, employees, visitors, and any others who participate in and benefit from your congregation’s ministry. Those who deal with the congregation in its secular affairs also should be treated with care and respect. Too often, congregations and their leaders, while giving much attention to ministry, are dangerously unprepared for their legal vulnerability. Accidents occur, funds are embezzled, wrongful advantage is taken of children, counselees, or subordinates. Risk management policies are needed to protect those who are served, as well as the congregation. This resource will help your congregation comply with law and manage risk in ways that are Christ-honoring.

Using this resource should help your congregation manage risk by identifying areas of exposure and suggesting measures that can reduce or eliminate the exposure.

Your success in making your congregation a place where people and property are respected and treated with care will contribute immeasurably to its internal strength and health and to the effectiveness of its witness to the world.

Overview

As noted in the table of contents, *Managing Risks* reviews 10 areas of concern that congregations are likely to encounter. Each chapter addresses one issue that can result in liability if mismanaged. Chapters are introduced by a general, brief discussion of the applicable law. Federal stat-

utes are reviewed where applicable. Issues arising under diverse state laws and court decisions that may differ from state to state are noted. References are made, where appropriate, to governance documents of the ELCA. Topics adequately addressed in these documents, such as congregation organization and governance and church discipline, are not included in this resource. While this resource is designed primarily for the ELCA, most of it will apply to any denomination.

The summary discussion of the law in each chapter is followed by an inventory to help your congregation review its own practices and policies. References are provided to further resources for those who wish—or need—to explore topics in greater depth.

No resource of this size can provide definitive legal advice, even for the limited number of issues it addresses. It is intended only as a general guide for congregations, to identify issues and suggest approaches to solutions. The writer and publisher make no warranty, express or implied, that the information contained herein is correct, complete, or current. Congregations should always obtain specific advice from a qualified local attorney when dealing with specific legal problems.

This resource is a companion to *Ministry and the American Legal System* (Minneapolis: Fortress Press, 1993) by Richard B. Couser. Readers interested in a more expansive treatment of the topics covered here, other legal issues pertinent to congregational life, or further background on the American legal system as it pertains to congregations may consult the Fortress Press publication.

Process

Congregation leaders—probably Congregation Council members—will make most effective use of this resource by following a procedure such as the one outlined here.

1. Review the contents with a local attorney, who might add to the inventory items pertaining to state or local law.
2. Delegate responsibility for review of specific topics to appropriate committees. Existing committees may handle some topics. Other topics might be reviewed by ad hoc committees established for that purpose. Each committee should meet with staff or volunteers whose jobs relate to the topic, review pertinent records or documents, respond to the items covered by the inventory, and prepare a report outlining problems and recommending remedial action.
3. Review the reports prepared by the committees.
4. Develop and implement plans to address deficiencies.
5. Review additional questions or policy issues that go beyond the specific inventories provided here.
6. Use outside consultants—attorneys, accountants, insurance advisers, and others—if in doubt about how to proceed with a matter.
7. Consult synodical or denominational offices as needed.
8. Schedule reviews periodically, perhaps every two years, to be sure policies and practices are current.

THE CONGREGATION AS EMPLOYER

The employment relationship exposes the employer to a number of legal requirements and potential liabilities. Laws differ between local, state, and federal governments and from state to state. Administrative agencies at every level of government make regulations that govern employment and have the force of law. Government regulates employers through antidiscrimination laws, wage and hour requirements, workers' compensation, unemployment compensation, and the requirements of the tax system. The rules of private contract law, some of them unique to the employment contract, surround the relationship between employer and employee. The employer may be liable to people injured by the conduct of its employees. Many, but not all, of these legal requirements apply to congregations in the same way they apply to secular employers.

Employment of clergy presents a special case. For the most part, clergy employment, job discipline, and termination is provided for in the governing documents of the Evangelical Lutheran Church in America, its synods, and its congregations. These documents consist of the Restated Articles of Incorporation, *Evangelical Lutheran Church in America Constitution, Bylaws, and Continuing Resolutions*, and comparable synodical and congregational documents. (See the resources at the end of this chapter, page 7, for documents that describe ELCA policies related to *Managing Risks*.) Secular courts will rarely interfere with congregational, synodical, or denominational handling of employment matters relating to clergy. Exceptions may exist if the matter is one courts can examine without having to interpret religious doctrine or polity, such as failure to meet agreements to pay wages or benefits or to give notice of termination. But generally internal dispute resolution procedures provided by governing documents will be honored by courts. Therefore, this chapter does not address the provisions for employment, discipline, and termination of clergy within the ELCA.

The congregation's responsibility for payroll—income taxes and social security or self-employment contributions—is treated under Chapter 6, "Federal Income Tax Responsibilities," page 27.

Antidiscrimination Laws

Title VII of the Civil Rights Act of 1964, a federal statute that has been broadened by amendments in later years, prohibits employers from discriminating in employment because of race, color, religion, sex, or national origin. Religious organizations are exempted from the ban on religious discrimination. To be subject to the law, the employer must have 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year.

Discrimination is prohibited not just in hiring but in all aspects of employment—compensation, terms, conditions, privileges, discharge; and limiting, segregating, or classifying employees or applicants in any way that would deprive them of opportunity or adversely affect their employment status.

Most states and many municipalities also have antidiscrimination laws. These laws may address types of discrimination not prohibited by federal law, such as discrimination based on marital status or sexual orientation. State and municipal laws may reach a broader group of employers than federal law and may contain exemptions not included in federal law. Congregations should be aware of the requirements of their states and municipalities.

Congregations that are not subject to antidiscrimination laws may, nevertheless, choose to adhere to them as a matter of policy. The Model Constitution for Congregations provides that the congregation "agrees to the Purposes of the Evangelical Lutheran Church in America and shall act in accordance with them" (C6.02.). Those purposes include providing "fair personnel practices and adequate compensation, benefits, and pensions for those employed by this church" (ELCA, 4.03.q.).

Establishing policies for employment practices that are not required by law may create expectations in employees that become interpreted as an agreement. Hence, they can become enforceable as a matter of contract law, as discussed below. Voluntary compliance with antidiscrimination laws, however, may protect the congregation against other kinds of claims such as wrongful discharge.

Some exceptions to the antidiscrimination laws are of interest to congregations.

- The religious exemption applies to all employees, not just those who have specifically religious functions such as leading worship, celebrating the sacraments, or teaching. Religious employers may discriminate among, as well as in favor of, their own members for religious reasons.
- Courts have generally been unwilling to examine claims of discrimination when made by clergy. In many states, however, cases of sexual harassment are an exception, as discussed below. This unwillingness stems from concern for the religious freedom provisions of the federal and state constitutions and the uniquely religious nature of the pastor-congregation relationship.
- Sex discrimination does not include discrimination based on sexual preference. Congregations subject to state or municipal laws banning discrimination based on sexual preference have nevertheless been allowed to discriminate based on their religiously founded moral views and constitutional religious freedom considerations.
- The principle that congregations may discriminate based on religiously founded moral views has been extended to conduct other than sexual preference, although it is important to apply such discipline evenhandedly between sexes. One cannot fire an unmarried pregnant female, for example, if the same underlying conduct by a male employee would not lead to the same discipline.
- There is also in federal antidiscrimination law an exception (separate from the narrower, religious exemption discussed in the first bulleted item above) for bona fide occupational qualification reasonably necessary to

the normal operation of that particular business or enterprise. In the context of congregation employment, this exception will substantially overlap with the exemption for religious discrimination by religious employers.

Sexual Harassment

Sexual harassment is a particular form of sex discrimination against employees. Federal regulations define sexual harassment as consisting of unwelcome sexual advances, requests for favors, and other verbal, nonverbal, and/or physical conduct of a sexual nature when:

- Submission to such conduct is made, either explicitly or implicitly, a term or condition of an individual's employment;
- Submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting the individual; or
- Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive work environment.

Thus sexual harassment may be either of two kinds:

- *quid pro quo harassment*, in which a supervisor or others require sexual favors for employment benefits;
- *hostile environment harassment*, in which unwelcome conduct of a sexual nature interferes with an employee's job performance or creates an intimidating or offensive work environment.

Sexually explicit or derogatory remarks, display of sexually oriented materials, lewd jokes, inappropriate comments on an employee's physical attributes, and persistent requests for a dating or sexual relationship can create a hostile environment for an employee. The question in a sexual harassment case is whether the conduct complained of was unwelcome, not whether or not the complaining employee's response was voluntary. What is unwelcome is judged by the complaining employee's conduct. Employees may go along with very unwelcome conduct when they believe their job is at stake.

Other Sex Discrimination Issues

There are two other sex discrimination issues under federal law that should be noted.

The Equal Pay Act requires, separately from the antidiscrimination laws discussed above, that men and women be paid equally for performing work requiring equal skill, effort, and responsibility. It applies regardless of the number of employees an organization has. The act does not apply to congregations but does apply to church-related organizations engaged in commercial activities such as running private schools.

The Pregnancy Discrimination Act, which is part of the antidiscrimination laws discussed above, extends the ban on sex discrimination to pregnancy, childbirth, or related medical conditions. Women who are pregnant or have given birth must be treated as any other temporarily disabled workers. As a corollary, leave allowed beyond the period of actual disability must be made available to fathers on the same terms. Health insurance must cover pregnancy-related conditions in the same manner as other medical conditions.

Other Antidiscrimination Laws

Racial discrimination is also prohibited by federal law, regardless of the number of employees in an organization. Employers need to be sure that their hiring and other employment practices are free of racial discrimination. This includes avoiding requirements that may have a "disparate impact"—that are not essential to job performance but may result in disqualifying a disproportionate number of minority applicants.

Discrimination on the basis of intended citizenship or national origin is also banned by federal law for employers of four or more workers, although an employer may select a citizen or intending citizen over an alien if both are equally qualified.

Age discrimination is prohibited against individuals over the age of 40 for employers with 20 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year. Mandatory retirement for people over the age of 70 is not permitted except for individuals in bona fide executive or high policy-making positions who have certain minimum retirement benefits.

The Americans with Disabilities Act applies to employers with 25 or more employees, and as of July 26, 1994, to employers with 15 or more. It prohibits employment discrimination against a qualified individual with a disability. A disability is a physical or mental impairment that substantially limits the person in some major life activity. Disabled people are considered qualified if they can perform essential job functions with reasonable accommodation. Reasonable accommodations need not be made if they would cause undue hardship to the employer. Employers need not hire or retain people who pose a direct threat to the health or safety of others that cannot be eliminated by reasonable accommodation.

Nondisabling physical characteristics, cultural or economic disadvantages, prison records, age, and homosexuality are not disabilities. Alcoholism, drug addiction, psychological problems, and AIDS are disabilities. Employers are not required to provide drug or alcohol rehabilitation programs, nor are they to tolerate drug or alcohol influence on the job, but they cannot discriminate against people in rehabilitation programs. There is no general religious exemption, but religious organizations may discriminate based on the applicant's adherence to the religious tenets of the organization.

Congregations receiving federal funds may be subject to additional nondiscrimination requirements that are conditions of the funding. Child-care facilities, for example, may not engage in religious discrimination if they receive 80 percent or more of their revenue from grants or certificates under the Child Care and Development Block Grant of 1990.

Affirmative Action

Affirmative action consists of programs designed to correct the effects of past discrimination and differences between the percent of minority people employed by the employer and the percent in the local labor pool. Affirmative action plans can be imposed by a court as a part of the remedial orders for violators of civil rights laws.

Some employers adopt voluntary affirmative action plans. If the employer is subject to the civil rights laws, voluntary plans must be carefully crafted to avoid being unlawful as

reverse discrimination. The civil rights laws protect, for example, white males from discrimination just as they protect blacks and women. Court decisions and guidelines from the Equal Employment Opportunities Commission provide an understanding of what constitutes an acceptable affirmative action plan.

Voluntary affirmative action plans are appropriate when

- actual or potential adverse impacts are likely to result from existing or contemplated employment practices;
- it is necessary to correct effects of past discriminatory employment practices; or
- there is a limited pool of qualified women or minorities for jobs historically limited by employers or others.

To determine if a plan is appropriate, an employer should undertake a reasonable self-analysis, which usually means investigating whether there are disproportionate numbers of employees of a particular sex, race, or national origin in its work force, in a particular job category, or compared to the local labor pool. Affirmative action plans should be temporary. They should be designed to terminate when their goals are met and should not be designed to maintain racial or other balances. They should also consider the interests of innocent third parties, especially with respect to maintaining existing jobs. There should be no absolute bars to the hiring or advancement of nonminorities.

Affirmative action plans by congregations subject to the civil rights laws should only be undertaken with qualified legal advice in order to avoid causing reverse discrimination. Congregations not subject to these laws may, of course, develop their own voluntary affirmative action plans without regard to legal requirements. And, as always, congregations must determine whether state or local laws impose their own requirements.

The Employment Contract

Employment is a contractual relationship, whether or not the contract is in writing. Contract law is almost entirely state law. Many specifics of employment law differ from state to state. Hence, consultation with a local attorney is important in employment matters.

Although states vary widely in their understanding of employment, the traditional law in most states has been that, unless there is some express agreement to the contrary, employment is "at will." This means either party may terminate the employment at any time, with or without reason. Employers sued for wrongful termination or discipline of employees may find that the employee—and the court—construe statements or documents other than a written employment contract as part of the agreement. This may include job advertisements, application forms, statements in interviews, job offer letters, or job-related correspondence, employee handbooks, personnel manuals, and memos or notices of personnel policies or job-related matters.

In addition, many states now permit exceptions to the "at will" doctrine, allowing fired employees to sue when discharge is for some improper reason. A discharge related to sexual harassment, for example, would be grounds for such a wrongful discharge suit, even if the employer was not subject to statutes barring sex discrimination. Whistle-blowers—those who report wrongful conduct by the employer or supervisors—would also have such a suit. Some states go beyond these limited exceptions to "at will" standards

and require that all discharges be for good cause, whether or not any specific contractual or statutory rights are involved.

Injury by an Employee

Congregation employment practices must also take into account the congregation's responsibility to those who may be injured by an employee's conduct. In some circumstances the congregation may be liable to injured people. To protect those people, as well as to protect the congregation from legal liability, it is important that the congregation manage this aspect of the employment relationship with due care and respect.

Congregation liability for an employee's conduct arises from two distinct legal theories. The first, *respondeat superior* (let the master—or employer—answer), holds an employer liable for damage caused by its employees acting within the scope of employment. It is important in such cases to determine if the act that caused the damage was truly committed in the scope of employment, or with the intent of being of service to the employer. Sexual misconduct, especially by clergy or other congregation employees, has often been found by courts to be so clearly outside the scope of employment as to preclude congregational liability on this ground, but court decisions are not consistent. Even courts trying to follow a consistent rule within a state often reach results that might appear to be inconsistent based on specific facts in a case, such as the degree of control the congregation or church-related institution had over the victim, and the relationship of the wrongful conduct to the employee's job duties.

The second legal basis for congregation liability for acts of its employees is negligence—that the congregation did not act in a reasonable and prudent fashion. Negligence may be claimed in hiring, supervision, or retention of the employee. The claim is that the congregation knew, or should have known, of the inclination of the employee to cause the harm that occurred and failed to prevent it. To avoid negligence claims, it is important that the congregation do a prehire check appropriate to the position in question, exercise reasonable supervision over its employees, and investigate to a point of closure and act on complaints of employee misconduct.

The people most likely to be injured by employee misconduct are the most vulnerable—minors and counselees. Claims of misconduct by congregation employees toward minors or counselees are often claims of sexual misconduct—that minors were molested or seduced by people who were trusted authority figures or that counselees were taken advantage of at a time of vulnerability by the person to whom they turned for help. This kind of misconduct in the congregation setting is particularly grievous, often causing significant damage to the victim and setting the stage for a major damage award against the offender's employer. Public attention to cases of this nature in recent years has heightened awareness of the problem. As awareness increases, offenses are more likely to be reported. The congregation's responsibility to protect its children and counselees from such sexual misconduct—and to protect the congregation from the liability risk that accompanies it—is also increased by the growing awareness of this behavior.

Other employee conduct that might be discovered by a

proper prehire check or supervision on the job can also bring congregation liability to injured parties. Poor drivers (if the employee's job duties would include driving) or people with a tendency to engage in physical or sexual assaults are examples of people who should be screened out of employment or removed from responsibility.

Congregations are generally liable for the conduct of their volunteers in the same manner as employees. Often volunteers work in the most liability-sensitive areas of congregation life—in the nursery, with the Sunday school, or with the youth group. While it may not always be practical to do the same level of prehire check for volunteers as for paid employees, congregations should not ignore liability considerations when choosing and giving responsibility to volunteers. Pedophiles often seek out volunteer opportunities with youth-serving organizations, which includes virtually all congregations. Some level of screening, and the same kind of supervision and complaint investigation as is applied for employees, is necessary for responsible risk management of volunteer-led activities.

Getting the right references and checking them for both employees and some volunteers is a critical part of risk management for the congregation. Some of the references suggested in the inventory at the end of this chapter (see IV.B.6. on page 10) will not be useful, and the extent of references that need to be required and checked depends on the nature of the job and the degree of prior knowledge the congregation has of the applicant. Hiring a previously unknown person for a youth leader or nursery caretaker requires more prehire checking than hiring as a part-time secretary a person who has been a life-long member of the congregation. Congregations should use good judgment but err on the side of caution. The important point is that your congregation, not the applicant, should determine what people will be asked for references. A pedophile is not likely to give the congregation the name of someone who knows about the problem. The prehire check needs to sweep broadly enough to have a reasonable likelihood of identifying previous problems with the applicant.

Many states have statutes that protect volunteers from personal liability for service to nonprofit organizations, including congregations, under certain circumstances. Volunteers are still liable for intentional harm, as from sexual misconduct, and usually for conduct that may be described as gross negligence or wanton or reckless conduct. The statutes can give volunteers important protection against lawsuits for ordinary negligence, however. In some states, volunteers are only protected if specific requirements are met, such as providing written recognition of the individual's status as a volunteer, carrying some specified amount of insurance coverage, or having certain training or certification for particular tasks such as coaching. Your congregation should know what is needed to protect its volunteers and implement the requirements.

If a crisis arises because of an employee's or volunteer's misconduct, your congregation must act promptly to deal with the problem. An investigation is mandatory. Public relations and confidentiality issues may be present. Several interested parties should be considered—the victim and the victim's family, the accused offender, the congregation's insurer, the congregation and its members, and the public. Liability insurance issues are discussed in Chapter 9, "Li-

ability Insurance." Crisis management is discussed further in Chapter 10, "Dispute Resolution."

Wage and Hour Laws

The Fair Labor Standards Act protects workers from substandard wages and excessive hours and regulates child labor. Most congregations will not be subject to this act's terms but may be subject to similar state laws. Church-related organizations, such as schools, may be covered by the federal law. The act sets a maximum 40-hour work week unless the employee is paid time and a half for hours over 40, and it sets a minimum wage, which has been increased from time to time. Employees employed in a bona fide executive, administrative, or professional capacity are exempted if certain minimum income standards are met. Congregations not subject to the act may wish to comply voluntarily as a matter of implementing a policy of fairness to employees.

Immigration Law

The Immigration Reform and Control Act of 1986 requires all employers to verify within three days of hire that an applicant is not an illegal alien and is eligible for employment. Verification is accomplished when the applicant presents such documents as passport, driver's license, Social Security card, birth certificate, or resident alien card. It is prudent to photocopy the document or documents presented and keep the photocopy on file.

Employer and employee are also required to sign form I-9, Employment Eligibility Verification, under penalty of perjury. (You can obtain the form and instructions for completing it through the nearest Immigration and Naturalization Service office. Call 1-800-755-0777 for assistance.) The employer must retain it until the later of three years from the date of hire or one year from the date of termination. There are no religious exemptions from the act.

Resources

Bloss, Julie L. *The Church Guide to Employment Law—1993*. Matthews, N.C.: Christian Ministry Resources, 1993. Available from Church Management, Inc., P.O. Box 1098, Matthews, NC 28106.

Couser, Richard B. *Ministry and the American Legal System*. Minneapolis: Fortress Press, 1993.

Equal Employment Opportunity Commission. *Affirmative Action and Employment: A Guide for Employers*. Available from Superintendent of Documents, Government Printing Office, Washington, DC 20402.

Hammar, Richard R. *Pastor, Church & Law*. 2nd ed. Matthews, N.C.: Christian Ministry Resources, 1991.

The ELCA Church Council has adopted several policies that officially interpret certain aspects of the constitution. Copies are available from synod offices and from the ELCA Office of the Secretary. These policies include:

Definition and Guidelines for Discipline (of Ordained Ministers, of Commissioned Teachers, Deacons, or Deaconesses, of Congregations), Evangelical Lutheran Church in America (November 19, 1989).

Rules Governing Disciplinary Proceedings against an Ordained Minister or a Congregation of the Evangelical Lutheran Church in America (November 10, 1991).

Visions and Expectations, Ordained Ministers in the Evangelical Lutheran Church in America (November 23, 1990).

THE CONGREGATION AS EMPLOYER

I. Antidiscrimination Laws

A. Our congregation is subject to federal laws against employment discrimination on the basis of race, color, sex, or national origin, by virtue of our having 15 or more employees.

Yes No

B. Our congregation is subject to state or municipal antidiscrimination law because of state laws regarding the number of employees or other factors.

Yes No

C. If the answer to A or B is yes, our congregation has determined what discrimination is prohibited and what exceptions apply to the congregation.

Yes No

D. If the answer to A and B is no, our congregation has adopted antidiscrimination practices in employment as a matter of policy, realizing that such policies could be interpreted as part of a binding contractual commitment to employees.

Yes No

E. If our congregation is implementing an antidiscrimination policy as a matter of either compliance with law or policy, we have reviewed our job advertising, application forms, and interview forms or practices, and have done the following:

1. Eliminated information on applicant's race, color, or national origin;

Yes No

2. Eliminated preemployment photographs;

Yes No

3. Eliminated information on or relating to applicant's gender, including marital status, pregnancy, number and age of children, and childbearing intentions;

Yes No

4. Eliminated other information that would permit discrimination on grounds not allowed by state or local law or church policy.

Yes No

5. Ensured that all job qualification requirements, for example, educational background and test performance, are significant to job performance and unlikely to have a disparate impact;

Yes No

6. Eliminated height and weight questions;

Yes No

7. Eliminated any inquiries on physical characteristics such as color of skin, eyes, or hair;

Yes No

8. Eliminated inquiries about cultural affiliations, such as membership in clubs or organizations, that would identify an applicant with a particular racial or national group;

Yes No

9. Eliminated inquiries about languages spoken that would identify the applicant as a member of a particular national group, except as language may be a bona fide job requirement for the work to be performed;

Yes No

10. Eliminated inquiries into the applicant's birthplace or that of her or his relatives, except as necessary to comply with the Immigration Act of 1986;

Yes No

11. Eliminated inquiries into arrest, as opposed to conviction, records.

Yes No

Comment: Information on convictions can be construed as having a disparate impact. Some information on conviction records should be mandatory for employees who will work with minors or counselees, or whose responsibility will include driving.

F. We comply with the Equal Pay Act, which applies regardless of the number of employees.

Yes No

G. Our congregation has implemented the following with regard to sex discrimination:

1. We have a written policy prohibiting sexual harassment that includes the following:

a) A clear definition of what conduct constitutes sexual harassment, along with examples that illustrate the definition;

Yes No

b) A clear statement that such conduct is unacceptable; that the congregation encourages employees to report such conduct; that complaints will be thoroughly, discreetly, and promptly investigated; and that justified complaints will result in job discipline or termination;

Yes No

c) Instruction on how to report sexual harassment, including identifying at least two people, identified by name and preferably of different genders, to whom sexual harassment may be reported;

Yes No

- d) A clear statement that good faith reports of sexual harassment will not result in adverse job action toward the reporter.
Yes No
2. The sexual harassment policy has been specifically communicated to all employees.
Yes No
3. Supervisors have been trained to understand the sexual harassment policy and the procedures to be followed in the event of a complaint.
Yes No
4. Pregnancy and childbearing is treated like any other temporary disability for purposes of health insurance coverage and other job benefits or conditions.
Yes No
5. Benefits made available with respect to parenthood are made available equally to mothers and fathers.
Yes No
6. We make no gender-based distinctions in salary and other benefits of employment.
Yes No
- H. Our congregation is subject to the federal Age Discrimination in Employment Act by virtue of our having 20 or more employees.
Yes No
- I. Our congregation is subject to state or local law banning age discrimination in employment.
Yes No
- J. Our congregation voluntarily complies with age discrimination laws, realizing such a policy could be construed as a binding contractual commitment.
Yes No
- K. If our congregation is subject to laws banning age discrimination in employment, or chooses to voluntarily comply with such laws, we have
1. Eliminated birthdate and age information from employment forms, advertising, and interview questions;
Yes No
 2. Eliminated mandatory retirement except for people in bona fide executive or high policy-making positions who have the requisite retirement benefits.
Yes No
- L. Our congregation is subject to the Americans with Disabilities Act or similar state or local law.
Yes No
- M. If not subject to a legal requirement that our congregation not discriminate in employment against the handicapped, we have a policy of voluntary compliance, realizing that such a policy could be

construed as having contractual force for employees and hence be binding.

Yes No

- N. If our congregation is subject to laws banning discrimination against the handicapped, or if we have a policy of voluntary compliance, we have
1. Eliminated prehire physicals;
Yes No
 2. Eliminated from advertising, job application forms, and interviews any reference to medical background, physical qualities, or characteristics unless they are necessary to perform essential job functions and cannot be overcome with reasonable accommodation;
Yes No
 3. Made those reasonable accommodations that can be implemented without undue hardship for disabled applicants and employees.
Yes No

II. The Employment Contract

- A. Our congregation has reviewed its advertisements, application forms, interview forms and procedures, and offer letters to eliminate language that may communicate any commitment to longevity of employment beyond an "at will" commitment.
Yes No
- B. Employee or personnel manuals or handbooks have been reviewed to be sure that our congregation is willing to be bound by all of the contents. Statements that might create misunderstanding and false expectations have been eliminated.
Yes No
- C. All employment contracts, employee or personnel manuals or handbooks, or other documents setting forth the terms of employment contain language affirming that the employment is "at will" and can be terminated by either party at any time, unless our congregation intends a different commitment. Documents not intended to be binding contain language clearly so stating.
Yes No
- D. Our congregation's expectations of employee conduct on or off the job that is relevant to employment, such as adherence to religiously based moral standards, are specifically stated and agreed to by the employee.
Yes No

III. Maintaining the Employment Relationship

- A. Our congregation's employees have regular written evaluations that are objective, candid, reviewed by the next level of supervision, shared with the employee, and maintained in a permanent file.
Yes No
- B. We maintain complete, consistent personnel files

in one place for each employee. All employment actions are documented.

Yes No

IV. Protecting the Congregation

- A. Our congregation has a written policy, communicated to all employees and volunteers, setting forth our opposition to any form of sexual conduct toward minors or counselees, encouraging the reporting of any such conduct, and assuring that any complaints will be promptly, thoroughly, and discreetly investigated.

Yes No

Comment: Having such a written policy may serve the dual purpose of deterring sexual misconduct by alerting potential abusers of the congregation's watchfulness for such conduct, and helping to avoid a negligence claim if a problem arises.

- B. When hiring, we follow these procedures:

1. Application forms contain representations of the truthfulness of their contents and a disclosure that untruthfulness will result in immediate discharge.

Yes No

Comment: This protects the congregation's right to terminate employment if misrepresentations have been made to obtain the job.

2. Application forms require disclosure of all criminal convictions, including expunged convictions, except for minor traffic offenses.

Yes No

3. Employment applications require a complete job history with dates.

Yes No

Comment: Be alert to significant employment gaps with vague explanations.

4. Applications contain a signed release to allow prior employers or organizations the applicant has served as a volunteer to disclose records and speak freely about the applicant.

Yes No

Comment: Beware when prior congregations or employers are reluctant to discuss the applicant. The release form, if properly drafted, will allow honest communication without fear of liability. Ask for a copy of the complete personnel file on the individual if you have suspicions as to whether you are getting a straight story, but do not rely on it. Problems are not always documented in personnel files, but if they are, you have valuable information.

5. Applications contain a release to enable our congregation to obtain criminal conviction records from law enforcement agencies.

Yes No

Comment: A criminal records check is not necessary for every employee. It is most valuable for hiring people not well known to the congregation who will be in liability-sensitive positions such as working with minors.

6. Applications require references from

- a) The applicant's immediate supervisor in any job held within the last 10 years;

Yes No

- b) The pastor or senior staff person and the board chair or senior lay leader at the time the applicant left employment in any congregation or youth-serving organization (for example, public or private schools);

Yes No

- c) The immediate supervisor, senior staff person, and board chair at the time the applicant quit serving as a volunteer of any youth-serving organization;

Yes No

- d) The immediate supervisor, senior staff person, and board chair at the time the applicant quit performing counseling services for any organization;

Yes No

- e) The pastor of any congregation the applicant has attended for the past 10 years.

Yes No

7. References are checked and a written record made and included in a permanent file.

Yes No

Comment: If records of reference checks are not preserved, the fact that references were checked and the information obtained may be difficult to prove later if problems occur.

8. Reference checks include a specific inquiry as to whether the reference knows of any history of or propensity toward sexual misconduct on the part of the applicant, any other reason why we should not hire the applicant, or anything we should know about the applicant.

Yes No

Comment: Such specific inquiry need not suggest undue suspicion. Explain to the reference that the congregation is a youth-serving institution and has a responsibility to protect itself and its youth from problems it might have no other way to be aware of.

9. For applicants who will be responsible for minors, the applicant's name is submitted to the state agency that records reports of child abuse, for each state in which the applicant has lived during the last 10 years, to determine if there is any record on the applicant.

Yes No

Comment: Some states may require checks for certain employees responsible for minors.

10. In a personal interview, the applicant is asked directly if he or she has any history of, or propensity toward, sexual misconduct with minors or counselees.

Yes No

Comment: Again, direct inquiry need not suggest undue suspicion. Explain to the applicant that you have a responsibility to the congregation and the minors it serves to make such inquiries of any applicants who will be dealing with minors. Making the inquiry may have a deterrent effect, even if you do not get an honest answer.

11. Our congregation has incorporated into our procedures synodical and denominational materials and advice on employment practices and prevention of sexual abuse.

Yes No

- C. Our congregation screens volunteers who will be working with minors as follows:

1. A simple form is reviewed with the volunteer by the pastor, Sunday school superintendent, or other supervisor. At least the following information is obtained:

a) A statement indicating whether the volunteer has any criminal convictions other than minor traffic violations;

Yes No

b) A statement indicating whether the volunteer has any history of or propensity toward sexual misconduct with minors;

Yes No

c) A list of organizations in which the volunteer has worked with minors, either as an employee or volunteer, with references from each person who would be familiar with the applicant's work there.

Yes No

Comment: As with employment applicants, such inquiries need not suggest undue suspicion or be offensive if the volunteer understands the reason for the inquiry, and that the inquiry is made of all volunteers.

Making the inquiry may not result in an honest answer from a pedophile or child abuser, but it will serve the dual purpose of alerting the person that you are aware of such problems and watchful for them, and protecting the congregation in a negligence suit if a problem occurs.

2. References are checked and a written record of the check kept in a permanent file.

Yes No

Comment: As with employee reference checks, it is important to maintain records. If there is no written record of a check, it may be difficult to prove it was done or what the result was if a problem develops later.

3. A check is made with state agencies in states in which the volunteer has resided for the past 10 years for reports of child abuse.

Yes No

4. Volunteers for youth work are not used until they have been part of our congregation for a period of time, perhaps six months, to become known to members.

Yes No

Comment: Pedophiles may move from place to place seeking a location where they can operate freely. A waiting period is a further deterrent to such people as well as an opportunity for congregation leaders to get to know volunteers before giving them responsibility for liability-sensitive programs.

- D. Our congregation controls and supervises youth work by at least the following:

1. We require at least two adults to be present to supervise or lead minors.

Yes No

Comment: Requiring two adults to supervise activity or care of minors minimizes the opportunity for the child abuser to operate with the secrecy required. Often a married couple are the ideal two adults for youth leadership.

2. We insist that both male and female adult leaders work together with mixed-gender groups.

Yes No

3. We establish regular supervision by another adult who is alert to suspicious or unusual circumstances, freely communicates with the children and parents, and visits unannounced during activities on a regular basis.

Yes No

Comment: No undue suspicion need be implied from the natural presence of the pastor, Sunday school superintendent, parents, or others in youth activities or caretaking. Supervisors should be alert to unusual or suspicious circumstances such as overnight trips or time spent alone by one leader with one child, one leader always picking up and driving home one child, sudden changes in personality or attitude by children, fear or hostility by a child toward a particular leader or caretaker, and the like. Professional counselors may be able to suggest other signs of problems for which supervisors should be alert.

4. We provide regular training of paid and volunteer staff on child abuse issues.
Yes No
 5. Adult leaders, paid or volunteer, do not meet alone or behind closed doors with minors unless there are unusual circumstances approved in advance by the supervisor.
Yes No
 6. We have a written policy, provided to all paid and volunteer staff working with minors, that, at a minimum
 - a) Clearly states our congregation's policy of protecting minors from sexual abuse;
Yes No
 - b) Sets forth policies for appropriate conduct of adults with minors;
Yes No
 - c) Informs leaders of their responsibility under state law to report child abuse and neglect (see Chapter 4);
Yes No
 - d) Provides specific names of people to whom inappropriate sexual behavior is to be reported;
Yes No
 - e) Provides for people to sign an acknowledgment of receipt and review of the policy.
Yes No
 7. Regular meetings of paid and volunteer staff working with minors are held to discuss policy, problems, and potential problems.
Yes No
 8. We have a plan and procedure to investigate complaints of sexual abuse (see Chapter 10).
Yes No
 9. Outside groups using our congregation's facilities for youth activities are required to implement policies and procedures as stringent as our congregation uses.
Yes No
 10. Drivers for congregation programs are checked to be sure they
 - a) Are properly licensed;
Yes No
 - b) Are properly insured;
Yes No
 - c) Have a safe driving record.
Yes No
- E. Other employees and volunteers who regularly engage in activity that is particularly prone to gen-

erate liability, such as transporting, coaching, lifeguarding during water activities, or leading mountain climbing, canoeing, or other wilderness or adventure activities, have verified qualifications and no history of problems in the activity.

Yes No

Comment: Some of these activities, such as bus driving, may have specific requirements under state law. Training and certification programs may be available for other activities, such as lifeguarding or, in some instances, coaching. Review all of the congregation's activities for compliance with mandatory or desirable training and safety standards.

- F. Our congregation is familiar with the volunteer immunity statutes in this state and has taken any steps required to maximize immunity for its volunteers.

Yes No

V. Miscellaneous Employment Compliance Activities

- A. If our congregation is subject to the Fair Labor Standards Act, or similar state law, or chooses to comply voluntarily, it
1. Pays at least minimum wage for every job;
Yes No
 2. Pays time and a half for work time over 40 hours per week, except for bona fide executive, administrative, or professional employees who receive the minimum required compensation;
Yes No
 3. Employs minors only in compliance with law;
Yes No
 4. Keeps records to document wages, hours, and other conditions and practices of employment.
Yes No
- B. Our congregation complies with the Immigration Reform and Control Act of 1986 by
1. Verifying within three days of hire that the employee is not an illegal alien and is eligible for employment by requiring that the person present satisfactory documents, such as passport, driver's license, birth certificate, Social Security card, or resident alien card;
Yes No
 2. Signing and having the employee sign form I-9, Employment Eligibility Verification, under penalty of perjury, and retaining the form for three years after hire or one year after termination, whichever is later.
Yes No

COUNSELING AND CONFIDENTIALITY

Counseling is part of the life of almost all congregations and clergy. Concern for the protection of those for whom the congregation assumes the responsibility of counseling, as well as for the protection of the congregation from liability, should motivate good risk management of counseling. The congregation should be a safe place, especially for the vulnerable who need and seek its help. A counseling relationship is liability prone. Only taking responsibility for minors is more likely to lead to harm and, when mishandled, lawsuits seeking significant amounts of money. Every congregation whose pastor or other staff members counsel parishioners or others should be aware of the potential for damage that accompanies counseling, and should take the necessary steps to minimize that risk.

The church wants to provide support and comfort to people in need. This may occur through counseling, which may include offering any spiritual or therapeutic advice, hearing confessions, or helping counselees deal with emotional issues. It may occur in a variety of settings, including informal or nontraditional ones such as home visits, small-group meetings, telephone conversations, and various discussions. Counseling may be provided by an ordained pastor, who may or may not have a license from the state to engage in such activity; by staff members, who may be neither ordained nor licensed by the state; and by volunteers, such as members of a care calling or support network. Do not restrict your thinking about counseling to the formal situation in which a parishioner makes an appointment with the pastor to come to the church office to get advice on a personal, emotional, or spiritual problem.

This chapter considers liability issues in counseling in four areas: sexual misconduct in counseling, malpractice and licensing, confidentiality in counseling, and supervision of counselors.

Sexual Misconduct in Counseling

Sexual conduct with a counselee is always sexual *misconduct*. In some states, it is a crime for which violators may be jailed. Even if the sexual relationship does not begin until after the counseling relationship has ended, it may be considered misconduct. There is no "religious freedom" defense as may apply to other claims of improper pastoral counseling. No church condones sexual conduct by its pastors or counselors toward counselees on any ground, let alone on spiritual grounds.

If sexual conduct occurs with a minor counselee, it is wrong for all of the above reasons, and it carries all of the potential negative consequences that have been discussed in Chapter 1. And if sexual contact is uninvited and unwelcome, the counselor is subject to serious liability and possible criminal charges, even if the counselee is an adult. But sexual conduct with a counselee who is a consenting adult and who may even invite and initiate the relationship is also serious misconduct for a counselor. It can lead to civil liability for the counselor and possibly the employing congregation or other organization, and in some states criminal charges can be made. In addition, clergy sexual mis-

conduct may make the pastor subject to discipline and possible removal from the clergy roster. Finally, congregations themselves experience emotional and spiritual turmoil, pain, and conflict when an accusation of clergy sexual misconduct is made.

The protection that counselees have in the law is based on the recognition that most counselees are, by definition, vulnerable. The counselor is an authority figure whose advice is sought because of the counselor's greater knowledge and expertise. Sometimes the counselee will idealize the counselor as an ideal parent or love partner. This phenomenon, known in psychological terms as transference, places the counselor in a position of great influence and power over the counselee, whether or not the counselor sought that position or is even aware of his or her influence or power.

In addition, because of the psychological phenomena of transference and projection (in which one person attributes to another feelings that are present in the first person), misunderstandings can arise in the counseling relationship. Touching, for example, might be perceived very differently by counselor and counselee. What the counselor intends as a hug of comfort or reassurance may be perceived as a sexual or emotional expression by the counselee. Touching, beyond the formality of a handshake, should not be part of the counseling relationship. Dating relationships between counselors and counselees are always out of place. Other common sense rules and standards, some of which are suggested in the inventory following this chapter, will help prevent misunderstandings as well as actual misconduct.

When the counselor succumbs to his or her own emotions or sexual feelings toward the counselee, or permits the counselee to act out sexual feelings toward the counselor, a liability suit may be in the offing. When the counselee sees the relationship more realistically, he or she is likely to feel damaged and betrayed by the counselor. If the counselee is married, the spouse may have the same feelings and may also have a potential lawsuit.

In legal terms, the suit is likely to be based on a "breach of fiduciary duty," in which the trust created by the special relationship between the parties has been broken. A breach of fiduciary duty occurs when the counselor acts for his or her own interest and not in the interest of the counselee toward whom the counselor is obligated to act with the utmost good faith. A second type of legal claim sometimes brought in these situations is for intentional or negligent infliction of emotional distress. This claim is based on the outrageous conduct of the counselor in negligently, recklessly, or intentionally disregarding the great emotional distress a sexual relationship with the trusted counselor is likely to cause in a counselee.

It has been estimated that in 80 percent of church counseling, male counselors work with female counselees. Most of the reported liability claims arise from these relationships. The principles are no less applicable, however, to female counselors who work with male counselees or to same-sex counseling.

Malpractice and Licensing

In recent years, there has been a protracted legal debate as to whether there is such a claim as "clergy malpractice." Malpractice is professional negligence, that is, a claim of legal liability for damages caused by the failure of a professional person to perform services in keeping with the standards of reasonable conduct in the profession. Malpractice claims against doctors, dentists, lawyers, accountants, and engineers are commonplace. In the case of *Nally v. Grace Community Church*, a claim of negligent failure to refer a counselee who committed suicide, the California Supreme Court decided that there was no legal liability for clergy malpractice. Several other state supreme courts have since agreed. The reason is that there is no generally accepted standard for spiritual or religious counseling, and that constitutional religious freedom considerations prevent courts from determining what is proper church doctrine and practice in this area. However, even though courts have generally declined to define professional standards for clergy counselors, many claims against clergy counselors are claims of sexual misconduct—behavior that is clearly wrong apart from professional standards—and these can be brought under other theories, as discussed above.

Many state courts have not had an opportunity to consider the issue of whether clergy malpractice is a recognized basis for a lawsuit in their state. However, even if all agree with the *Nally v. Grace Community Church* decision, the potential for liability for nonsexual misconduct in counseling is not necessarily ended. Some states license "pastoral counselors," at least on an optional basis, who meet certain standards of education and training. Clergy who wish to improve their counseling skills may receive training in secular counseling theories and techniques, which they use in their spiritual counseling.

All counseling is inherently a mental health-care activity. Secular counselors may be permitted or required to be licensed under the regulatory programs of the various states. Clergy who in their counseling are simply interpreting Scripture or the doctrines of the church or providing other spiritual guidance will not be subject to state licensing or regulation. But clergy or other church counselors who are licensed under state regulatory laws for therapists, pastoral counselors, psychologists, or other mental health professionals will be subject to regulation and must be aware of the standards that apply to them. Clergy and other church personnel who receive secular training and apply secular theories and techniques in their counseling are vulnerable to claims that they are not acting as spiritual counselors and should be held to the secular standards of their training and conduct. The further a congregation's staff members move from the spiritual to the commercial or secular in their counseling practice, the greater the congregation's legal duty to select, train, and supervise counselors properly, and the greater the counselors' duty to meet secular standards in therapy and recognize and refer appropriately cases beyond their ability to handle.

Your Congregation Council and staff members who do counseling should discuss conduct in counseling, perhaps reviewing hypothetical situations and establishing guidelines for appropriate behavior. This might even be a matter for discussion in adult forums, newsletter articles, and other settings.

Confidentiality

Counselees are always entitled to confidentiality in counseling. Often they seek counseling for problems that are inherently personal and private—confession of wrongdoing, marital or sexual problems, family difficulties, grieving, coping with loss of job, or financial distress. Whatever the subject matter, when people seek counseling from their pastor or spiritual counselor, they have an expectation that the discussion will be treated with the strictest confidence. The law, with certain specific exceptions, protects that expectation.

The expectation of confidentiality is also protected by church ordinance. The *Evangelical Lutheran Church of America Constitution, Bylaws, and Continuing Resolutions* provides:

In keeping with the historic discipline and practice of the Lutheran church and to be true to a sacred trust inherent in the nature of the pastoral office, no ordained minister of this church shall divulge any confidential disclosure received in the course of the care of souls or otherwise in a professional capacity, nor testify concerning conduct observed by the ordained minister while working in a pastoral capacity, except with the express permission of the person who has given confidential information to the ordained minister or who was observed by the ordained minister, or if the person intends great harm to self or others (7.45.).

The ELCA constitutional provision for confidentiality does not have the force of secular law. In certain respects it goes beyond what is required, and perhaps permitted, by law. For example, it provides for confidentiality with respect to "conduct observed by the ordained minister while working in a pastoral capacity." It does, however, provide a foundation for arguing that the obligation of confidentiality is a matter of religious belief and practice, and thus should be protected by state and federal constitutional provisions for religious freedom.

There are three principal legal issues that arise with respect to confidentiality of communications to pastors or spiritual advisers. First, what are the consequences of a breach of confidentiality? Second, what are the exceptions to the obligation of confidentiality? Third, under what circumstances may a pastor or spiritual adviser be compelled to disclose what would otherwise be a protected confidence?

A breach of confidentiality may permit a lawsuit against the counselor by the counselee on any of several grounds. Breach of fiduciary duty or negligent or intentional infliction of emotional distress, as discussed above, are likely grounds. If the information disclosed is derogatory, suit may be brought for defamation. If it intrudes into personal affairs, breach of privacy is another ground for suit. Pastors should take care not to use information disclosed in confidence for sermon illustrations, teaching examples, or in loose talk around the home or office that can get repeated. The counselee is entitled to confidentiality with respect to the pastor's spouse and secretary, as well as the rest of the world.

The ELCA constitution contains two exceptions to the requirement of confidentiality: waiver and intent to harm. *Waiver* means the counselee consents to the disclosure or knowingly gives up the right to have the information kept in confidence. Waiver may occur when the counselee is not

really intending to grant it, as when a third person is brought into a counseling session. In such situations, courts usually find that the expectation of confidence no longer exists. It may not justify the counselor's voluntary disclosure of confidential information, but it will be hard to protect it against disclosure in court. Counselees who want to bring a friend or relative into a counseling session for support should be warned that the presence of the other may destroy their legal right to confidentiality if information disclosed is sought in court.

The "intent to harm" exception is well recognized. Indeed, the counselor is subject to liability to a person harmed by the counselee if specific information of an intent to harm was disclosed in counseling by the counselee and the counselor took no steps to warn the intended victim and otherwise prevent the injury (as by informing the police). And a counselor is always justified in taking steps to prevent a counselee from committing suicide or otherwise harming himself or herself.

Other exceptions to the obligation of confidentiality include

- state law requirements for reporting the abuse or neglect of children, elders, and other dependent people, which apply to clergy in some states, as discussed in Chapter 4;
- in some states, statutory obligations to report certain other information pertaining to minors.

Every state has a statute, rule of evidence, or both that protect clergy to some extent from compelled disclosure of confidential communications. Compelled disclosure occurs when the cleric is subpoenaed to testify in court. The protective laws are not uniform. Some of the questions that arise under them include:

- *Whose privilege is it*—that is, who has the right to reveal or refuse to reveal what has been given in confidence? Usually it will be the communicant, but in some states the cleric or both may, allowing the cleric to refuse disclosure even if the communicant agrees to it.
- *What people are within the privilege?* It may be limited to ordained ministers or may reach more broadly to people serving as spiritual advisers or counselors.
- *What communications are within the privilege?* Normally the communication must be confessional or intended to solicit spiritual advice, comfort, or care. Communications are not necessarily protected just because the recipient is a cleric.

Clergy and others providing spiritual counseling should be aware of the extent of and limits on the legal protection

of the confidentiality of communications from counsees in their state.

Supervision of Counselors

Proper supervision will help counselors recognize and deal with problems in counseling, improving the quality of the service and protecting the counselee and congregation. Individual congregations might not be equipped to provide qualified supervision internally. Possible sources of supervision would be synodical personnel, pastors or counselors in other nearby ELCA congregations, or pastoral counselors working in other settings. If there is no other available supervision, the Congregation Council or designated members of it could meet with the pastor or counselors periodically to review this aspect of their performance of pastoral duties, just as other aspects of pastoral work may be reviewed. Supervision need not and should not involve breaches of confidentiality. Practices and problems or potential problems can be discussed in a manner that does not identify counsees or their specific problems.

Supervision, as used here, does not mean the formal type of supervision that may be conducted in the health-care professions—including secular therapy—in which the supervisor assumes responsibility for the case and instructs the subordinate in delivering care. Rather, it refers to the degree of oversight appropriate to protect the congregation and those it serves when the counselor is usually the pastor and the person in the congregation who is most knowledgeable about counseling. Supervision provides the counselor with a checkup and regular opportunity to inquire about difficulties. It does not establish a reporting relationship or higher authority for the counselor.

Other suggestions for providing safety in counseling are contained in the inventory.

Resources

- Bush, John C., and William Harold Tiemann. *The Right to Silence: Privileged Clergy Communication and the Law*. Nashville: Abingdon Press, 1989.
- Buzzard, Lynn R., and Dan Hall. *Clergy Confidentiality: A Time to Speak and a Time to Be Silent*. Diamond Bar, Calif.: Christian Ministries Management Association, 1988.
- Couser, Richard B. *Ministry and the American Legal System*. Minneapolis: Fortress Press, 1993.
- Hammar, Richard R. *Pastor, Church & Law*. 2nd ed. Matthews, N.C.: Christian Ministries Resources, 1991.
- Lieberman, Aaron, and Michael J. Woodruff. *Risk Management*. Minneapolis: Fortress Press, 1993.

COUNSELING AND CONFIDENTIALITY

I. Sexual Misconduct in Counseling

A. Our congregation has reviewed the inventory items in Chapter 1, section IV, "Protecting the Congregation" (page 10), to be sure that all requirements applicable to counseling, as well as dealing with minors, are met.

Yes No

B. Our congregation has a written policy, communicated to all people providing counseling, setting forth its opposition to any form of sexual conduct toward counsees, encouraging the reporting of such conduct, and assuring that any complaints will be promptly, thoroughly, and discreetly investigated.

Yes No

C. When considering an applicant for a counseling position, our congregation requires references from people knowledgeable about the applicant's work as a counselor with any former employers.

Yes No

D. Applicants for positions that may involve counseling are interviewed with the specific objective of inquiring into any history of sexual conduct toward counsees.

Yes No

E. Our congregation has incorporated into its procedures denominational and synodical materials on sexual misconduct in counseling.

Yes No

F. Our pastor and others involved in spiritual counseling receive regular training in counseling.

Yes No

G. Our congregation has a plan and procedure to investigate complaints of sexual misconduct in counseling.

Yes No

H. Our congregation has written guidelines for conduct in counseling, such as the following:

1. Counselors and counsees shall not touch.

Yes No

2. Counseling is to be conducted only in church offices except under extraordinary circumstances.

Yes No

3. Counseling must be conducted with a desk between counselor and counselee.

Yes No

4. Counseling of opposite-sex counselee may occur only when other people are on the premises.

Yes No

5. No gifts may be exchanged between counselor and counselee.

Yes No

I. Our congregation maintains a permanent personnel file on pastors and counselors in which any untoward behavior is recorded.

Yes No

J. There is written communication to all counsees describing the inappropriateness of sexual conduct between counselor and counselee.

Yes No

K. Pastors and others conducting counseling in the congregation are trained to recognize early warning signs of inappropriate emotional involvement on their own part or that of the counselee.

Yes No

II. Malpractice and Licensing

A. The counseling conducted by the pastor or counselors in the congregation is entirely confessional or spiritual in nature.

Yes No

B. The pastor or others who conduct counseling in the congregation are licensed by the state as pastoral counselors or other licensed practitioners.

Yes No

C. If the pastor or others conducting counseling in the congregation are licensed by the state, they are fully informed about obligations imposed on them by the licensing statute and regulations, including standards of ethics and competence.

Yes No

D. If the pastor or others conducting counseling in the congregation are not licensed by the state, they are not conducting any counseling that would subject them to licensing requirements.

Yes No

E. The pastor and others conducting counseling in the congregation are trained to recognize the need to refer counsees to other specialists, including physicians, psychiatrists, or psychologists, for treatment of physical or mental health problems, and to attorneys for legal problems.

Yes No

F. Counseling occurs only in appropriate settings (normally the counselor's office).

Yes No

G. The congregation charges a fee for counseling.

Yes No

Comment: When fees are charged, the relationship has moved to the commercial realm, even if the

counseling is entirely spiritual and the institution is nonprofit. Counseling for a fee carries a much increased prospect of a court finding that the counselor and congregation can be found liable for breach of standards of reasonable and prudent conduct in the relationship.

- H. If the pastor or others conducting counseling in the congregation are conducting counseling that goes beyond nontherapeutic religious support, the congregation has taken steps to be sure the counselor's training is adequate and that he or she is maintaining proficiency through a program of ongoing inservice training.

Yes No

- I. The pastor and others conducting counseling in the congregation are trained in their responsibilities under the state law to report abuse and neglect of children, elders, or dependent people.

Yes No

Comment: See Chapter 4 for further discussion of this subject.

- J. There is a written or public representation or disclaimer about the nature of and limits on the congregation's counseling program.

Yes No

Comment: An honest, well-drafted statement setting forth the nature of the congregation's counseling program and its limits will be most helpful in preventing unreasonable expectations on the part of counselees, avoiding misunderstandings, and keeping the congregation's ministry within the realm of religious counseling rather than secular therapy. (See the appendix, page 47.) Such a statement could also include other information sug-

gested in this chapter, such as the inappropriateness of sexual conduct between counselor and counselee and limits on confidentiality.

III. Confidentiality

- A. The pastor and other people conducting counseling in the congregation are fully informed on the obligation of confidentiality under the ELCA constitution and state law.

Yes No

- B. The pastor and others conducting counseling in the congregation are fully informed about the circumstances in which they may, or must, breach confidentiality: to prevent great harm to intended victims or themselves; to comply with statutory duties of reporting abuse or neglect of children, elders, or dependent people; or in cases of waiver.

Yes No

- C. Pastors and others conducting counseling in the congregation are fully informed of their rights and duties in the event they are subpoenaed to give testimony about communications they may consider confidential.

Yes No

- D. There is a written disclosure to counselees of any limits on their expectation of confidentiality, for example, in cases of waiver or child abuse reporting.

Yes No

- E. Our congregation provides supervision for its counseling activities. Supervision consists of at least a regular meeting by the pastor or other spiritual counselors with a supervisor to discuss policy, problems, and potential problems.

Yes No

SOCIAL EVENTS, CHILD CARE, AND TRIPS

Congregations are, by their nature, places where children are cared for. Nursery care during worship services, Sunday school, youth groups, and other activities for children of various ages, which may involve social events and trips, are provided. Sometimes trips and activities present risks that exceed the normal and routine. Even normal and routine activities, however, should be conducted with constant attention to the safety of the participating young people. The concern in this chapter is for the physical safety of program participants in both routine and unusual events or activities.

Negligence

The responsibility of the congregation and its employees and volunteers for the safety of children entrusted to its care can lead to legal liability to the children or their parents when that responsibility is not met. Liability for injuries to children in the care of the congregation will usually be based on negligence. Negligence is doing something that a reasonable and prudent person in similar circumstances would not do, or omitting to do what such a person would do. When negligent conduct causes injury to someone the negligent person had a duty to protect from harm (such as other vehicle occupants or pedestrians on the road), the negligent person is liable to the injured person for the damages. When the negligent person is an employee or volunteer for a congregation, and the negligent conduct occurs when he or she is acting within the scope of the employment or volunteer activity, the congregation is also likely to be liable for the damages.

Some of the situations in which concern for safety should receive particular attention include

- any occasion when people are transported by motor vehicle;
- water activities generally;
- adventure trips, such as wilderness hiking or canoeing;
- overnight trips;
- gatherings of teenagers where alcohol, controlled drugs, and sexual activity can be present, however surreptitiously;
- any activity with a higher than normal exposure to physical injury, such as horseback riding, skiing, tree or rock climbing, using snowmobiles or other off-road recreational vehicles, athletic activities, using firearms or bows and arrows.

Attention to safety should not be limited to activities with unusual or apparent hazards. In one recently reported case, a student at a religious school suffered a severe eye injury from a pin that flew through the air during removal of balloons that had been pinned to the wall as decoration for a dance. The case was settled for \$900,000. This case illustrates the safety hazards and liability risk that can be present in even the most common situations.

Permission Slips and Release Forms

In many situations, even those that seem quite safe, congregations may choose to use permission slips and releases. There are three types of documents of this nature to be considered.

- The *permission slip* is simply a signed permission from a parent or guardian for the child's participation in the activity in question. It is not a release from liability. Its utility is limited to assuring that the parent is aware of the child's participation and consents to it. The permission slip should be used routinely for any overnight or other activity that presents unusual hazards. When risks or dangers beyond the routine might be encountered, the permission slip should identify them, request consent for the child's participation notwithstanding the hazard, indicate that the signer accepts the risk of injury, and provide that the congregation and its employees and volunteers are not responsible for injuries that occur.
- The *medical release form* should be used for longer trips or activities during which the child will be away from home for a period of time and the caretaker may need to deal with medical problems in the parent's absence. The form should include at least a description of any significant medical history and allergies; current medical problems or limitations; medications currently being used; permission for the caretaker to authorize medical care in an emergency or when the parent or guardian is unavailable; the name, address, and phone number of the child's physician; and the address and phone number where the parents or guardians can be reached during the period the child is away from home.
- The *liability release form*, which could be combined with the permission slip, would go beyond permission for the child's participation and acceptance of the inherent risk of an activity, to release the congregation, its employees, and its volunteers from liability for negligence. In many jurisdictions, such a release would not be enforceable, and it would not protect against liability for intentional conduct such as physical assault or sexual misconduct. Consult an attorney as to the enforceability of a release from negligence liability in your jurisdiction, and have the attorney draft a release if you are going to use one.

Congregations reviewing this chapter should also review the portions of Chapter 1 (pages 5–7) pertaining to liability for conduct of employees and volunteers.

Resources

Couser, Richard B. *Ministry and the American Legal System*. Minneapolis: Fortress Press, 1993.

SOCIAL EVENTS, CHILD CARE, AND TRIPS

I. Transportation Policies

A. Operators of vehicles used to transport people for congregation activities

1. Have current driver's licenses;

Yes No

2. Carry an amount of liability insurance we have determined to be adequate for the risks involved, or are covered by the congregation's liability insurance;

Yes No

Comment: Do not confuse liability insurance that covers the congregation with liability insurance that covers the individual driver. One policy may or may not cover both. See Chapter 9.

3. Have safe driving records.

Yes No

B. Vehicles our congregation owns are regularly checked for safety, including lights, tires, brakes, horn, windshield wipers, fluid levels, and emergency warning systems.

Yes No

C. Drivers of nonstandard vehicles our congregation owns, such as buses or passenger vans, or vehicles that are used to transport people for congregation activities, have any licenses required to operate the vehicle and are trained in its operation—backing, loading and unloading passengers, refueling, conducting safety checks, and so forth.

Yes No

D. Our congregation requires all people traveling in congregation-owned vehicles or on congregation-sponsored activities to use seat belts at all times while vehicles are in motion.

Yes No

E. Our congregation does not permit people to be transported in nonpassenger vehicles (such as the back of pickup trucks).

Yes No

F. Private vehicles are used for congregational business only if driven by the owner or with the owner's express written consent.

Yes No

II. Adventure Trips and Overnights

A. Our congregation gets signed permission forms from parents for all adventure trips, activities involving out-of-the-ordinary risk of injury, and overnight activities.

Yes No

B. Permission forms identify the place and nature of the activity and any unusual hazards that may be involved, and require that the signer accept the risk of injury from the activity.

Yes No

C. Adventure or hazardous activities are supervised by people who are qualified by training and experience to supervise.

Yes No

D. Water activities are undertaken only with appropriate safety precautions, such as establishing life-guards and buddy systems for swimming, requiring boaters or canoeists to wear flotation devices, and providing instructions in case of accidents.

Yes No

E. Leaders of wilderness trips have cellular phones so leaders can communicate in emergencies.

Yes No

F. Children participating in wilderness or adventure trips receive training on safe conduct and handling emergencies.

Yes No

G. First-aid materials are available for all activities that take place where first-aid supplies would not be readily accessible.

Yes No

H. Leaders of all overnight trips have addresses and telephone numbers where parents and guardians can be located during the trip.

Yes No

I. An adequate number of leaders and supervisors to ensure safety is provided for each activity, considering the age and mental and physical abilities of the participants.

Yes No

J. Medical release forms are completed and signed by parents or guardians of each child when activities will be of a duration or in a location such that authorization for medical care might be needed. Forms include important medical history and allergies; current medical conditions or drugs being taken; limitations on activity; name, address, and telephone number of the child's physician; and authorization for medical treatment.

Yes No

III. Nursery Care

A. Cribs for infants have locking side panels and are only used when panels are locked in place.

Yes No

B. The congregation does not make available toys intended to be mouthed. Any such objects are brought by parents and used only by their own child.

Yes No

C. Bedding for congregation cribs and cots is regularly washed.

Yes No

D. At least two caretakers are in the nursery at all times, and more if the number of children to be watched requires it.

Yes No

E. All toys or play objects used in the nursery are safe. Toys for small children are large enough to prevent swallowing or choking. Other toys are in good repair; have no sharp edges, splinters, or protruding nails; and do not shoot objects through the air.

Yes No

F. Provision is made for cleanliness, hand washing, and disposal of soiled material if infants who may need diapering are cared for.

Yes No

G. Premises are examined for such safety features as adequate light and ventilation, secure handrails, screens in good repair, covered electric outlets, nonslip or attached floor coverings, and absence of toxic building materials (such as asbestos or lead paint).

Yes No

H. Smoke detectors are provided and batteries changed on a regular schedule.

Yes No

I. Fire extinguishers are provided and staff trained on their location and use.

Yes No

J. Staff are trained to deal with fire or storm emergencies. Primary and secondary evacuation routes are known and posted in writing. Evacuation procedures are practiced periodically.

Yes No

K. First-aid supplies are available.

Yes No

L. Staff are trained only to release children to parents or others whom they know to be authorized to take them.

Yes No

M. There is a policy prohibiting parents from leaving children who are sick.

Yes No

IV. Miscellaneous

A. Our employees and volunteers who work with children and young people communicate regularly

with the parents or guardians, keeping them informed of the nature of the activities, their child's participation, and any problems the child is experiencing.

Yes No

B. Parents and other adults in positions of responsibility are welcome to attend our congregation's activities for children and young people at any time.

Yes No

C. Our congregation's activities with children and young people are covered by our liability insurance.

Yes No

Comment: See Chapter 9 for information on liability insurance.

D. All leaders of activities with children and youth are supervised by a person who communicates regularly with the leaders and remains in close touch with the activities.

Yes No

E. Leaders of activities with children and youth are suited by temperament and personality for their responsibilities.

Yes No

F. Playground areas where falls can occur are examined regularly for safety features such as cushioning material under swings or climb sets.

Yes No

G. Our congregation's child and youth workers are trained in their responsibility to report child abuse and neglect (see Chapter 4).

Yes No

H. Our congregation has investigated the use of releases from liability for negligence for certain activities and obtains such releases if desired and enforceable in our jurisdiction.

Yes No

I. Any sports teams or activities our congregation sponsors are coached and supervised by people with the training and experience to do so, and teams use all appropriate safety gear, such as batting helmets.

Yes No

J. Leaders of youth groups are alert to the possible presence of alcohol, drugs, or sexual activity at gatherings. Events are adequately chaperoned.

Yes No

K. Our congregation requires any outside groups using our premises for youth activities to follow as stringent safety rules as we follow for our own activities.

Yes No

REPORTING ABUSE AND NEGLECT

Beginning in the 1960s when awareness of the “battered child syndrome” came to public attention, all 50 states enacted legislation requiring the reporting of child abuse. There is no federal law in this area, and state laws are not uniform from state to state.

The essence of abuse-reporting laws is to require certain categories of people to report to public authorities any actual or suspected abuse within a fixed, and usually brief, period of time after learning of the abuse. Public authorities then carry out whatever investigation or intervention is appropriate. The person giving the report is generally exempted from civil or criminal liability for making the report, as long as it is made in good faith. “Good faith” generally is understood to mean an honest belief that the report is true. Before making the report, people who suspect reportable abuse should take care that their suspicion is based not on any ulterior motivation but on objective observations. Failure to report when required to do so may carry criminal penalties. Whether it can also result in civil liability to a person whose injuries might have been prevented by timely reporting by someone obliged to report is not well settled.

Because the reporting laws vary greatly from state to state, your congregation should know the answers in your state to the following questions. (The material in this chapter should be considered in conjunction with pertinent material in Chapters 1 and 2.)

Who is required to report? Reporting statutes will include lists of categories of people required to report. Terms such as social worker, child-care worker or custodian, health-care worker, teacher, or counselor may include both paid and volunteer church workers. Some terms may be construed broadly to include workers not immediately obvious.

Clergy may be specifically required to report, exempted from reporting, or not mentioned, in which case the question would be whether they fall within some other category of people required to report. In some states, the obligation to report applies to everyone. And in some states, people not required to report may do so and be exempt from civil liability if the report is made in good faith.

A congregation would be well advised to schedule periodic training sessions with people required to report abuse. Such sessions could include training on both legal responsibilities and symptoms of a child’s need for protection. Training should be conducted by qualified people.

For whom must abuse be reported? Children, whose abuse or neglect must be reported, will be defined in most states as people under the age of 18. In some states, statutes will also require reporting the abuse or neglect of elders, dependent, or physically or mentally disabled people.

What conditions must be reported? Reporting statutes will define what must be reported. Often it will include physical, sexual, and emotional or mental abuse. Neglect may also be reportable, such as when a child’s basic needs of food, clothing, health care, and shelter are not being adequately provided. The statute will further define these terms, but definitions will often and necessarily be somewhat vague. State agencies that administer the law, law enforce-

ment agencies, and public and private counselors who deal with minors and others who may be subject to abuse and neglect may have materials that will help you understand and recognize what may be reportable abuse. In the case of elder or dependent abuse, exploitation—that is, taking economic advantage of the person—may also be reportable.

It is important to understand that the obligation to report is an obligation triggered by suspicion of or reason to suspect abuse, neglect, or exploitation. The reporter is not required to be judge and jury. That is, the reporter need not have determined that the wrongful conduct really has occurred. Once reason to suspect the reportable conduct is presented, a person subject to the reporting obligation must make the report and let the responsible authorities investigate and determine if intervention is warranted.

Normal corporal punishment of children (spanking and the like) as part of traditional parental discipline will not be considered child abuse in most states, even though some contemporary child-raising theories disparage it. For parents who believe such child-raising practices are biblically mandated, a serious religious freedom issue would be presented by prohibiting the practices.

Who must be reported as an abuser? In some states, only parents, guardians, or other custodians must be reported. In other states, the reporting obligation is much broader. A question often exists as to whether one must report children under 18 as abusers, when, for example, one minor has perpetrated sexual acts on a younger minor. These questions must be addressed with the assistance of local counsel based on statutory definitions and guidelines. Sometimes agencies that administer the statutes have developed regulations, policies, or guidelines to deal with the gray areas.

How and when are reports made? Statutes will give relatively specific direction on this. Typically, the state agency in charge of child welfare, or law enforcement agencies, will receive the reports. For elder or dependent abuse, other agencies may be designated. Reports must usually be made promptly, typically within 36 or 48 hours after the reason to suspect abuse arises. Often an initial telephone report is required, followed by a written report.

What is the liability for reporting or failing to report? Reporters acting in good faith are immune from liability for so doing, although there is no way to prevent a reported abuser from claiming a lack of good faith. Failure to report when required is usually a criminal offense, punishable by fines and possibly even imprisonment.

How does the clergy-penitent privilege or obligation of confidentiality in counseling relate to the obligation to report abuse? Abuse and neglect reporting statutes will almost always supersede the confidentiality obligation or privilege that normally applies to health-care providers, counselors, or therapists. While religious freedom claims for exemption from the reporting obligation for nonclergy have not been widely litigated, it appears unlikely that courts will be receptive to such claims.

If clergy are specifically exempted or are not included in any category of people required to report, they have no

reporting obligation. If they do have a reporting obligation, and the information about possible abuse or neglect comes to their attention in the kind of communications that would normally be classified as privileged, a dilemma is presented. The *Evangelical Lutheran Church in America Constitution, Bylaws, and Continuing Resolutions*, discussed in Chapter 2, has great breadth, preventing a pastor from divulging any "confidential disclosure received in the course of the care of souls or otherwise in a professional capacity" and from testifying concerning "conduct observed by the ordained minister while working in a pastoral capacity" (7.45.). Keep several points in mind in applying these requirements to state abuse and neglect reporting laws.

- Reporting abuse is not the same as testifying, although it is arguable that one who reports abuse can no longer claim the right to refuse to testify since, by the reporter's act, the information is no longer confidential.
- The limitation on divulging information refers only to "confidential disclosure." Not all communications are confidential.
- The limitation on testifying applies only to "conduct observed" by the pastor while working in a pastoral capacity. It does not prohibit testifying about observations of circumstances other than conduct or about nonconfidential communications.
- Both the ELCA constitution and the law contain an exception when the individual "intends great harm to . . . others" (7.45.). The application of this exception to abuse and neglect cases will depend on the circumstances but should be considered when apparent conflict arises.

Assistance in understanding state law and its application to particular circumstances can often be obtained from

- the state agency that administers the law;
- the state attorney general's office (or department of justice);
- police and other law enforcement agencies;
- private or public counselors who work with children or people likely to be abused;
- your local attorney;
- synodical resources.

Assistance in understanding the confidentiality obligations of ordained ministers of the ELCA may be available from synodical or denominational resources.

Resources

- Bush, John C., and William Harold Tiemann. *The Right to Silence: Privileged Clergy Communication and the Law*. 3rd ed. Nashville: Abingdon Press, 1989.
- Buzzard, Lynn R., and Dan Hall. *Clergy Confidentiality: A Time to Speak and a Time to Be Silent*. Diamond Bar, Calif.: Christian Ministries Management Association, 1988.
- Couser, Richard B. *Ministry and the American Legal System*. Minneapolis: Fortress Press, 1993.
- Hammar, Richard R. *Pastor, Church & Law*. 2nd ed. Matthews, N.C.: Christian Ministries Resources, 1991.
- Hammar, Richard R., Steven W. Klipoweog, and James F. Cobble Jr. *Reducing the Risk of Child Sexual Abuse in Your Church*. Matthews, N.C.: Christian Ministries Resources, 1993.

Inventory

REPORTING ABUSE AND NEGLECT

- I. Appropriate people in our congregation understand the scope, meaning, and application of any abuse and neglect reporting laws in our state, and understand the answers to the questions discussed on page 21.
- Yes No
- II. Our congregation has a written policy describing how we will comply with our obligations under any abuse and neglect reporting laws in our state.
- Yes No
- III. Our congregation's policy for complying with abuse and neglect reporting laws in our state is provided to all people who work with minors or with other people whose abuse or neglect may be subject to required reporting.
- Yes No
- IV. Our congregation conducts regular training about abuse and neglect laws for both employees and volunteers who work with children or with others whose

abuse and neglect may be subject to required reporting.

Yes No

- V. We have developed a policy that is consistent with the ELCA constitution to address any potential conflicts between abuse and neglect reporting requirements and confidentiality requirements for our ordained minister(s).

Yes No

- VI. Couselees are informed, in writing and in advance, of our counselors' obligations to report abuse and neglect.

Yes No

- VII. We have established a relationship with an attorney and counselor who can assist us in making judgments on short notice as to whether reporting is required in particular circumstances.

Yes No

PROPERTY OWNERSHIP

Congregations normally own the real estate consisting of the church building and the land on which it is located. Many also own a parsonage. Small or start-up congregations may meet in leased space. Larger or older congregations may own other property—adjacent lots or buildings used for parking, Sunday school or other congregation programs, or future expansion; more distant sites used for recreational purposes or retreats; or property gifted to the congregation with no designated use. Ownership or tenancy in any real estate requires your congregation to manage it properly. If your congregation is a tenant, most of your obligations will be set by the terms of the lease. If your congregation owns property, congregation leaders need to understand what is required of owners.

It is often desirable to form a separate corporation to own property that is used for purposes other than the congregation's worship, such as for a cemetery, camp, school, or day-care center. Such uses can generate liability, regulation, or taxes that are best kept apart from the congregation itself. Consult counsel concerning the wisdom of establishing separate corporations to conduct separate functions or to own property used for separate purposes.

Acquiring land and building a church are major events in the life of any congregation. They should always be undertaken with the advice of counsel and other appropriate consultants. The congregation will need to be sure it is acquiring good title to property, that there are no environmental problems with the ground or buildings, that construction contracts are designed and administered to accomplish the congregation's purpose, that the project will be delivered within the congregation's financial means and expectations, and that all decisions are authorized in the proper manner. Consult Richard B. Couser's *Ministry and the American Legal System* (Minneapolis: Fortress Press, 1993) for more information on legal considerations. Consult synodical or denominational resources for other practical information.

Deeds and Form of Ownership

A congregation is usually organized as a nonprofit religious corporation. Corporations, like people, have specific names that should be used in their full, correct form on deeds and other instruments in which interests in real property are conveyed (mortgages, leases, easements, and so forth). An unincorporated association will also normally have a specific correct name that should be used in the same way. Audit your deeds and other instruments of title to be sure they all convey title to the congregation by its correct name.

Much litigation involving congregations is about who owns the real estate of the congregation when it leaves a denomination or there is a split within the congregation. The *Evangelical Lutheran Church in America Constitution, Bylaws, and Continuing Resolutions* (9.71.) and the Model Constitution for Congregations, Chapter 7, address these questions. Deeds to property of the congregation should be consistent with these documents.

Property that is gifted to your congregation may contain conditions limiting the use. These conditions may become burdensome at later dates, but they may have to be followed at the peril of losing the property to the donor or the donor's heirs. Be aware of the conditions and limitations on any property you own, comply with them, and consider steps that can be taken to eliminate them if they become burdensome or no longer serve their original purpose. The discussion of this issue in Chapter 7, page 32, applies to real estate as well as other types of assets.

Compliance with Codes

Laws or codes governing real property are typically municipal ordinances. The most common are zoning, planning, and building codes. Building codes may incorporate fire or other safety codes. Often these codes are based on or incorporate codes developed by national organizations or adopted by state law.

If your congregation is subject to a periodic licensing requirement because it operates licensed activities such as a day-care center or school, it may have to meet changing requirements of codes from year to year, or at least from inspection to inspection. Without such a periodic licensing requirement, congregations are likely to need to consider code compliance only when they move, build, expand, or add uses. Almost any building project, even an improvement to the existing facilities, is likely to require a building permit. Congregations making any changes in their facilities or uses should review all applicable code requirements. Municipalities will have a department (or perhaps several departments) that will handle compliance and enforcement activities for zoning, planning, and building codes. Other sources of information and assistance in determining requirements for compliance are attorneys, architects, surveyors, design professionals, experienced local contractors, and consultants who specialize in advising on code compliance.

Zoning and Planning

Zoning laws establish lawful uses for property, guidelines for special use permits, and exceptions to or variances from the ordinance for designated zones in the community. Zoning laws may also regulate such things as building height, setback, parking requirements, and signage. Existing uses may not necessarily need to conform to changes in zoning. Under some state laws and local ordinances, they might become "grandfathered" as nonconforming uses. If the nonconforming use ceases for a period of time, however, or is lost to such causes as fire or other disaster, the right to maintain it may be lost. And any change in use (such as turning the church basement into a homeless shelter or day-care center), added use (such as building a parking lot next door), or building addition must be checked for conformity to zoning ordinances. Consult counsel as well as public authorities. Many congregations have successfully established the right to maintain uses initially opposed by regulators.

Planning boards generally have jurisdiction over subdi-

vision of land and the right to review and approve site plans for certain types of developments. As with zoning, uses that predate the applicable regulation may not be subject to it, but changes or additions to uses, as well as new property acquisitions, may be. Again, check with counsel, not just the public authorities.

Building Codes

Most building codes do not grandfather existing uses, but enforcement consists almost entirely of granting permits for new construction or improvements, or of property inspections for licensing. Be aware of the following:

- There are no religious exemptions to code compliance requirements. The government has as much right to protect the safety of occupants of churches as any other building.
- If your church building has multiple uses, the most stringent code requirements will apply. The requirements for a school or child-care center, for example, are likely to be higher than for church use.
- Congregations rely on building inspectors' approval at their peril. If the building inspector approves something that should not be approved, the congregation can often be held to the correct, and more rigorous, standard later on.
- Code standards are not always precise. The manner of compliance is often negotiable, as long as a reasonable result is achieved.
- The purpose of the codes—to protect people from fire and other safety hazards—is an objective shared by the congregation. When code compliance issues arise, keep this mutual objective in mind before despairing of the cost of compliance. Then seek solutions that are within the congregation's budget for the project.

Americans with Disabilities Act

The Americans with Disabilities Act, discussed in Chapter 1 with respect to employment, also applies to public accommodations. Churches are specifically exempt from the public accommodations requirements only when the building is used for the congregation's own functions. Your congregation may wish to comply voluntarily or institute its own accessibility measures as a matter of outreach or evangelism or simply to accommodate the needs of elderly or other disabled members of the congregation. Keep in mind that over the next decade, as more facilities are made accessible, people will come to see accessibility as the norm. Some obvious measures are ensuring wheelchair accessibility to all parts of the building, including rest rooms and basements, and providing for the hearing impaired in public gatherings and worship services. Consultants can suggest other steps.

Minor Building Projects

Even minor building projects call for businesslike management. Contractors should be bonded for job completion and to ensure that they will pay their subcontractors and material suppliers for all but the smallest projects. Contractors should also provide their own liability insurance and evidence of workers' compensation insurance for their employees. Your congregation should carry workers' compensation coverage that would provide for workers on the

property who might not be employed by a contractor that provides its own coverage. Contracts should be complete, written, and specify exactly what is to be done, by when, for how much, and when payment is due.

Premises Liability

Your congregation has a responsibility for the safety of people on its property. The congregation is not a guarantor against injury—that is, the congregation is not automatically responsible just because an incident occurred on its property—and the rules by which liability is judged differ somewhat from state to state. Some states hold to a simple negligence standard, as described in Chapter 3 (page 18), requiring that congregations act in a reasonable and prudent manner under all the circumstances to prevent injury. Other states differentiate between categories of people, applying a higher standard to those invited onto the premises, for example, than to trespassers.

Keep your premises as safe as you can. Be sure walks and drives are cleared and sanded or salted after snow or ice storms. Protect entries from snow or ice accumulations on roofs. Have handrails and good lighting on stairs and steps. Make sure glass doors are marked in some way so people will notice them. Keep floors free of obstacles or conditions that might make people trip or slip. Low ceilings and changes in floor level should have warnings. Eliminate dangerous conditions on the premises, such as abandoned buildings or well shafts, and especially those that may attract children. Conditions that cannot be eliminated should be secured from access. If security is not feasible, warning signs should be posted. Carefully monitor for safety special occasions such as work projects where people are on ladders or roofs, or fund-raising events or special programs that bring in devices or activities that pose unusual hazards. Candlelight services and other occasions when open flame might be used deserve particular safety attention. In fact, certain uses of open flames might be prohibited by local ordinances.

Another area not to be overlooked is the church kitchen. Measures should be taken to ensure that dishes, silverware, glassware, and serving dishes are well cleaned, that spoiled food is not allowed to accumulate with the risk of being served, and that in general, high standards for sanitation practices are maintained. Be aware that some church food-service activity can be subject to regulation by municipal or state health laws. If, for example, the congregation serves meals for a price or sells homemade foodstuffs, it may fall under such laws in some states.

Use of Property by Others

Church facilities, often little used by a congregation during the week, are often made available to outside groups. Scouts and other nonprofit youth groups, Alcoholics Anonymous and other Twelve Step groups, cultural events, and other community gatherings may fill the unused space. Often these groups will have purposes highly compatible with the congregation's understanding of its own mission and ministry. In other instances, space may be made available as a community service for groups or purposes unrelated to the congregation's ministry. Some considerations in allowing such outside usages are the following:

- *Property tax exemptions.* Occasional use by other religious or nonprofit groups will probably not (in most

states) affect the property tax exemption of the congregation. This is an important exemption, however, and other uses should be consistent with the requirements for it.

- *Unrelated business income tax.* Even though the church is exempt from federal income tax, it may be subject to federal taxation of unrelated business income. The rules for what constitutes unrelated business income are complex and beyond the scope of this resource. If your congregation is receiving income from activities outside its direct ministry and mission, however, these rules should be checked out.
- *Liability considerations.* The organization using the congregation's facilities should provide evidence that it carries its own liability insurance in an amount acceptable to the congregation, and should obtain an endorsement naming the congregation as an additional insured for the organization's activities on the congregation's premises. The organization should agree to assume any liability for claims arising from its activities on the premises or for injuries to people using the premises as part of its activities, and to hold the congregation harmless and indemnify it (that is, reimburse it) for any such claims made against the congregation.
- *A written lease or agreement* describing the terms and conditions of the use is desirable, even if an organization is not paying to use the facility. The details of the document will differ with the circumstances, but it should at least identify the premises, or portion, being used; the purpose for which the tenant may use them; the compensation, if any, being paid; the liability provisions; the term of the lease; the right of the congregation to terminate the lease and under what conditions if the lease is for more than a onetime use; any additional agreements the congregation is making; the obligation of the tenant to keep the premises in good repair and use them lawfully and only for the designated purposes; insurance provisions; and any other understandings the parties have reached.
- Organizations that are using the premises for *youth activities* should be subject to the same standards the congregation imposes on its own youth-serving employees and volunteers, as discussed in Chapter 1.

Property Taxes

Church buildings used for worship and usual congregation functions will be exempt from property taxes in most, if not all, jurisdictions.

Parsonages and property used for other purposes may or may not be, depending on local law and the particulars of use. Property tax exemption is not necessarily automatic. It may require an initial application and periodic, sometimes annual, filings. A new application may be required for ac-

quired property, even if the prior owner was exempt. Time limits for filing are often short and mandatory. Know your local requirements and mark them on a calendar.

Miscellaneous

Two particular premises hazards merit final mention: asbestos and lead paint. Many older buildings contain these. Consultants can tell you if there is any lead or asbestos in your building, and you should never buy property without checking for these and receiving written assurances of their absence from the seller.

Asbestos may be present in floor or roofing tiles, insulation, fire proofing, or wall or ceiling materials. Asbestos is known to cause often fatal lung diseases. It is generally a problem if it is in a school or if construction projects will remove or disturb it. Federal legislation addresses asbestos in schools, and religious schools may be required to remove it. The federal Clean Air Act imposes stringent requirements on conditions of asbestos removal in construction, renovation, or demolition projects. The owner can be responsible for the improper disposal of the asbestos by an incompetent or unscrupulous contractor, as well as for violations of standards on the job. Qualified environmental consultants should be brought in to deal with these specialized problems.

Lead-based substances can cause serious damage to a person's brain or central nervous system. Young children and the unborn are especially susceptible. Inspection and abatement requirements for lead-based paint are imposed by federal law on public but not private housing. State laws may reach more broadly, for example, to private residential sales or rentals, or to child-care facilities. Congregations can be exposed to liability to people who buy, rent, or use their facilities and who are damaged by ingesting or inhaling lead-based paint chips or dust.

Other potentially harmful substances that may be subject to state regulation are radon gas, a natural product of the breakdown of radioactive materials in the soil and bedrock, that can cause lung cancer in sufficient concentrations; and urea-formaldehyde foam insulation, which has been implicated in various health complaints. Neither substance is subject to federal bans or standards.

Prudent real property management will include an inspection for any of these substances before purchasing buildings and representations from the seller as to their absence. Property currently owned should be inspected and corrective measures taken if any conditions violating state or federal law or posing a threat to human health are identified.

Resources

- Couser, Richard B. *Ministry and the American Legal System.* Minneapolis: Fortress Press, 1993.
- Hammar, Richard R. *Pastor, Church & Law.* 2nd ed. Matthews, N.C.: Christian Ministries Resources, 1991.

PROPERTY OWNERSHIP

I. Deeds and Form of Ownership

- A. All deeds and other instruments use the congregation's full and correct name.
Yes No
- B. Deeds to our property are consistent with constitutions of the ELCA and the congregation.
Yes No
- C. We are aware of any conditions or limitations on use of our property imposed by language in deeds and have taken any necessary action to comply with them or eliminate them.
Yes No

II. Compliance with Codes

- A. We are aware of the zoning and planning requirements of the district in which our congregation is located and comply with them.
Yes No
- B. We meet all building code requirements applicable to the nature and uses of our property.
Yes No
- C. Although not legally required to do so, we have reviewed our facilities and activities for access by the handicapped or disabled and have taken reasonable steps to provide access.
Yes No
- D. We carry workers' compensation insurance for employees or other workers on our premises.
Yes No
- E. In all but the smallest jobs, we require contractors working for the congregation to provide evidence of liability and workers' compensation insurance in satisfactory amounts, and to obtain bonds for job completion and payment of their subcontractors and material suppliers.
Yes No

III. Premises Liability

We inspect our premises regularly, and have programs in place to ensure the following:

- A. Snow removal and sanding or salting drives, walks, and steps is completed in a timely manner.
Yes No
- B. Entries or other locations where people may be present are protected from falling snow and ice.
Yes No
- C. Stairwells are well lighted and have handrails.
Yes No
- D. Glass doors are marked so people will notice them.
Yes No

- E. Floors are kept free of obstacles or conditions that might make people slip or trip.
Yes No

- F. Other dangerous conditions are identified and eliminated, secured, or made subject to warnings.
Yes No

- G. The kitchen is kept clean, old food is thrown out, and good sanitation is maintained.
Yes No

- H. Our congregation is aware of and complies with any state or local regulations that apply to food service or sale of foodstuffs at the church.
Yes No

- I. We are aware if there is any asbestos or lead paint on the church premises and have taken any steps that are required by law or prudence to remove it.
Yes No

IV. Use of Property by Others

- A. We make sure any use of church property is consistent with our property tax exemption.
Yes No
- B. We comply with applicable federal income tax regulations on unrelated business income.
Yes No
- C. We require organizations using the church premises to provide evidence of liability insurance in amounts satisfactory to the congregation and to name the congregation as an additional insured.
Yes No
- D. We require organizations using the church premises to agree to be liable for any injury claims based on their use, and to indemnify the church for any such claims made against it.
Yes No
- E. We have a written lease or agreement with any organization that uses the church's premises.
Yes No
- F. We require groups using the church premises for youth activities to adhere to the standards we impose to protect minors from sexual abuse.
Yes No

V. Property Taxes

- A. We have established exemption from property taxes for all congregation property that qualifies for it.
Yes No
- B. We meet all application and filing requirements to obtain and maintain property tax exemption.
Yes No

FEDERAL INCOME TAX RESPONSIBILITIES

Congregations receive contributions and other income and pay those who render services to them. This chapter addresses the congregation's responsibility for the federal income tax consequences of its conduct. In many localities there will be state and local income tax consequences to be considered as well. They will differ from state to state and are not treated here. Obtain local advice on how to deal with them. Chapter 7 (pages 31–32) addresses other aspects of the congregation's responsibility in acquisition and management of funds and trusts.

The Congregation as Wagepayer

Congregations have the same obligation as any other employer to withhold federal income taxes from the wages of their employees, report the wages and withheld taxes, and pay the withheld taxes to the Internal Revenue Service in accordance with the applicable rules. The treasurer or person responsible for handling the congregation's payroll should be familiar with federal income tax requirements, forms, and procedures for handling payroll, as well as any requirements of state or local law as well. Tax law changes frequently, and the information provided here might be dated by the time you read this. Hence the responsible person should update himself or herself annually through some of the resources listed at the end of this chapter or by other means. Responsible people in the congregation who willfully fail to collect, report, and pay over taxes may be personally liable for them.

An important exception applies to those the IRS defines as ministers. The withholding obligation does not apply to wages paid for services performed by a duly ordained, commissioned, or licensed minister of a church in the exercise of his or her ministry. The definitions of who qualifies as a duly ordained, commissioned, or licensed minister and what services are performed in the exercise of ministry are technical, and specialized resources should be consulted in doubtful cases. Pastors who want voluntary withholding to avoid the discipline and paperwork of filing estimates and quarterly reports can have income taxes withheld with the congregation's consent by filing a completed Form W-4 (Employee's Withholding Allowance Certificate) with the congregation.

Tax withholding is required by the IRS only for employees. Self-employed people who perform services for the congregation must do their own tax reporting. The congregation's obligation to a self-employed person is to obtain his or her Social Security number (which should be done at the start of the job) and, if the person is paid \$600 or more during the year, to issue the worker a Form 1099-MISC before February 1 of the following year, with a copy to the IRS by March 1 accompanied by a transmittal form (Form 1096). The information needed to complete the Form 1099-MISC for the individual can be obtained by using Form W-9.

The IRS uses a 20-factor test to determine if workers are employed or self-employed. The central determinant is whether the congregation has the right to control the worker in the performance of the work, not just as to the end

product, but also as to the details of how and in what sequence work is performed. The *right* to control is sufficient—the congregation need not actually exercise the right. Some of the more significant factors are whether the worker has invested in his or her business or facility, the opportunity for profit or loss, the right to discharge, whether the work is part of the congregation's regular business, the permanency of the relationship, whether the worker receives a lump sum payment or is paid based on a time period, and whether the worker can hire others to perform the service or must do it personally. People engaged personally to perform services on the premises subject to the direction of the pastor or other supervisor will be employees. A common example is the congregation secretary. Some part-time custodians who can have others do the job for them, as well as providers of such services as plumbing, snowplowing, yard care, and the like, may be self-employed.

The wagepaying congregation must have a federal Employer Identification Number. It must obtain a Form W-4 or W-4A for each employee and consult withholding tables to determine how much to withhold. It must pay withheld taxes to a qualifying depository institution or federal reserve bank in a timely fashion. Finally, the congregation must provide each employee a completed Form W-2 by February 1 of the following year and submit an additional copy to the Social Security Administration before March 1.

Congregations must also withhold the employee's share of Social Security taxes (referred to as "FICA," for the Federal Insurance Contributions Act) and pay over both the employer's and employee's share. Clergy who meet the definitions of terms referred to above—duly ordained, commissioned, or licensed ministers with respect to services performed in the exercise of ministry—are treated as self-employed even though they are employees for all other purposes. They may avoid self-reporting, however, by designating a sufficient amount of withholding on Form W-4 to cover their SECA (Self Employment Contribution Act—the Social Security law covering the self-employed) obligations, in addition to their income tax withholding. Church employment is exempt from federal unemployment taxes and from state unemployment taxes in many states.

Clergy who meet the definitions discussed above qualify for an important tax benefit—the housing allowance. This allows the pastor to exclude from his or her income

- the fair rental value of a church-owned parsonage occupied by the pastor, and the portion of compensation predesignated as a housing allowance, to the extent it is actually used to maintain the housing, including paying utilities and maintaining furnishings;
- a portion of compensation predesignated as a rental allowance, to the extent of actual rental expenses incurred;
- for housing owned by the pastor, the portion of compensation predesignated as a housing allowance to the extent actually used to own and maintain a home, not to exceed its fair rental value furnished and with utilities.

Other rules apply, set forth in more specialized works. This important benefit to clergy should be maximized by all congregations.

There is one more federal income tax-related obligation congregations have toward employees. Congregations should also have an accountable plan for all employees who are reimbursed for business expenses. The plan must be adopted by the employer and must require employees who submit an expense account to show the date, place, business nature, and amount of the employee's expenses (including credit card or other charges) and must require excess reimbursements to be returned within a reasonable time. The plan must be prospective, that is, applicable only to expenses incurred after its adoption. Other requirements apply. Consult a more specialized reference for details.

The Congregation as Taxpayer

The congregation has two significant concerns in its role as a potential taxpayer (as distinguished from its responsibility for payroll tax administration and payment of the employer's share of social security, discussed on pages 27–28). The first is to conduct itself so as to maintain its tax exempt status. The second is to report and pay taxes on any unrelated business income it may have.

Congregations are exempt from federal income taxation. This means that they do not have to pay taxes on their income and that they can be the recipient of gifts that are tax deductions for the donor. Unlike most other nonprofit organizations, churches are not required to apply to the IRS for recognition of their tax exempt status, although some do. The principal advantage of IRS recognition is for proof to donors of exempt status. ELCA congregations can be included under an ELCA group exemption by applying to the Office of the Secretary of the ELCA. Inclusion in the group exemption avoids the laborious process of individual application. Congregations are not required to file Form 990, the annual return most nonprofits must file with the IRS. They are, however, in common with other tax exempt groups, required to adhere to certain standards to maintain their nonprofit status. These include the following:

- *Absence of racial discrimination.* If the congregation operates, supervises, or controls a private school, it must file Form 5578 (Certificate of Racial Nondiscrimination) annually.
- *Lack of private inurement.* This means the congregation must be run for exempt purposes, not for the personal benefit of people associated with it. This is rarely a problem in congregations. It does not preclude paying normal or even reasonably generous staff salaries and benefits. If individual compensation, including all financial benefits as well as direct salary, are excessive to the point of unreasonableness, a private inurement issue may be raised. Salaries of people in comparable positions is a good guide to reasonableness. ELCA congregations can consult *Compensation Planning: A Guidebook for Lay Leaders of the Evangelical Lutheran Church in America* by Manfred Holck, listed at the end of this chapter (page 29).
- *Absence of prohibited political activities.* Two types of activities are of concern—campaign activities supporting or opposing any candidate for public office, which are absolutely prohibited, and lobbying activities, which

are allowed as long as no substantial part of the activities of the congregation constitutes attempts to influence legislation. The political activity restrictions are the limitations on tax exempt status most likely to affect congregations, since many public issues are of interest to congregations. The IRS frequently issues reminders to churches during national political campaigns to refrain from campaign activities.

The ban on campaign activities does not prevent a congregation from permitting political candidates to address groups using the congregation's facilities or as part of the congregation's programs as long as the invitation is neutral, access is nonexclusive, and the congregation does nothing to indicate its support for or opposition to any particular candidate. Hosting a candidates' forum, for example, where all candidates are invited and none are favored, is not a violation of the ban. Nor is it a violation to provide neutral objective information about the candidates for public office. Focusing on a single issue or a narrow range of issues, however, is likely to suggest partisanship. The ban on campaign activities applies to all public offices—national, state, and local. It is as much a violation for a congregation to take a partisan position in a local school board or city council election as in a presidential election. There is, of course, nothing wrong with pastors and congregation leaders participating as actively as they wish in political campaigns, as long as they are not using the pulpit or the facilities, assets, or organization of the congregation to participate in the campaign, but are acting entirely on a personal basis.

The ban on lobbying, or attempts to influence legislation, is not absolute. The issue is how much activity is "substantial." No clear definition exists, but many tax advisers think that expenditures for lobbying that do not exceed 5 percent of the organization's total expenditures will not be considered substantial. The ban on lobbying also extends to legislation at every governmental level, including local. It does not prohibit educational efforts on issues of general public concern that are not directed at specific legislation.

Congregations, like other nonprofit organizations, must report and pay taxes on unrelated business income. This is to prevent abuse of tax exempt status by nonprofits that are substantially involved in business enterprises, and unfair competition with the taxpaying private sector. Unrelated business income is income (1) from a trade or business, (2) regularly carried on, and (3) not substantially related to the exempt purposes of the organization. Income used for the organization's exempt purpose is still unrelated business income if it meets the above definition and the activity that generates the income is not substantially related to the exempt purpose of the organization. Unrelated business income does not include income derived from volunteer work where the volunteers receive no compensation in any form for their services; sales of donated merchandise, as in rummage sales, bake sales, and Christmas fairs; and sale of religious items by a congregation. Passive income such as interest, dividends, royalties, or rents may or may not be unrelated business income, depending on the circumstances. This is a complex area of taxation to which technical rules may apply. Consult a qualified tax adviser if your congregation might have unrelated business income.

Receipt of unrelated business income, so long as it is not so substantial as to raise a question about the real purpose

of the exempt organization, does not threaten a congregation's tax exempt status and there is nothing wrong with receiving it. It is just income that must be reported and on which taxes must be paid. The IRS reporting Form 990-T must be filed if the congregation has gross unrelated business income over \$1000, even if there is no tax due.

Most states have sales and use taxes that apply to sales of goods in the state or to use in the state of goods purchased out of state. Congregations that sell goods, such as at a congregation bookstore or at fund-raising events, should determine whether or not they are subject to sales tax. In some states, they will be exempt either as purchaser, as seller, or as both. It is not unconstitutional to tax the congregation on such sales. State and local law will govern. Consult a local tax adviser.

Deductibility of Gifts

For the most part, deductibility of gifts to the congregation is a matter for individual donors, not the congregation, to determine. The congregation should never put itself in the position of being a donor's tax adviser, and it has few obligations under the tax code other than using its revenue properly for its exempt purposes as discussed above. There are, however, several areas in which congregations should be informed about their responsibility for, or the tax consequences of, gifts. They are the following:

- *Accounting for cash or donations.* While the tax code imposes no obligation on the congregation to account for the donations of its supporters, it is good practice to do so. The envelope system will enable donors who wish such an accounting to have cash gifts recorded. With such records, the congregation can assist its members and supporters whose own records may be inadequate by informing them annually of their contributions. Should they undergo an IRS audit and lack sufficient records themselves, the congregation's records will be invaluable to them. Special gifts should be acknowledged in writing, noting the amount of the gift, for the same reason.
- *Noncash donations.* Noncash donations of a value of \$5000 or less must be substantiated by a receipt from the congregation showing the name of the donee, the date and location of the contribution, and a detailed description of the property. The congregation should not, however, specify the value of the property. The congregation gives the receipt to the donor. It is not obligated to file anything with the IRS.

If the noncash donation is valued at \$5000 or more, and the donation's value includes groups of similar property donated within the same calendar or fiscal year, the congregation must sign the Form 8283, which is submitted with the donor's tax return verifying the date of the contribution. If the congregation disposes of the property within two years, it must file a Donee Information Return, Form 8282.
- *Contributions to or for the benefit of individuals.* Contributions are only deductible if made to the exempt organization—the congregation—and not directly to the congregation's pastors or other staff, missionaries it supports, or needy people it is assisting. This limitation should guide fund-raising efforts to help indi-

viduals in the congregation or community who have experienced adversity, and occasional gifts for pastor or staff.

To be deductible, the contribution must be made to the congregation, which must have full discretion as to the use of it, although the donor may express wishes about the use of the contribution. An expression of desire for the use of the funds by the donor does not make it nondeductible as long as the gift is unconditional. Congregations should maintain benevolence funds that give the congregation full discretion and control of the use of funds, and they should communicate this policy to the donors to maintain the deductibility of such gifts.

- *Contributions for which goods or services are expected or given.* Contributions are not deductible if they are actually in exchange for some expected goods or services. There are exceptions for minor items with insubstantial value. Otherwise, congregations conducting fund-raising projects such as dinners or rummage sales should inform the donor of the nondeductible amount, that is, the amount of the price attributable to the value of the goods or services received. Other examples of contributions that would be nondeductible due to a personal benefit are contributions in lieu of or to lower tuition—or that are expected for admission—at a religious school, and contributions to have a marriage ceremony on the premises.

Resources

- Buzzard, Lynn R., and Sherra Robinson. *IRS Political Activity Restrictions on Churches and Charitable Ministries*. Diamond Bar, Calif.: Christian Ministries Management Association, 1990.
- Buzzard, Robert A., and Lynn R. Buzzard. *"Render unto Caesar": Unrelated Business Income Tax Liability of Churches and Ministries*. Buies Creek, N.C.: Church-State Resource Center, Norman Adrian Wiggins School of Law, Campbell University, 1990.
- Couser, Richard B. *Ministry and the American Legal System*. Minneapolis: Fortress Press, 1993.
- Hammar, Richard R. *Church and Clergy Tax Guide*. (Matthews, N.C.: Christian Ministry Resources. Published annually for current returns.
- Hammar, Richard R. *Pastor, Church & Law*. 2nd ed. Matthews, N.C.: Christian Ministry Resources, 1991.
- Holck, Manfred, Jr. *Compensation Planning: A Guidebook for Lay Leaders of the Evangelical Lutheran Church in America for Planning Compensation for Pastors and Associates in Ministry*. Chicago: Evangelical Lutheran Church in America, 1990.
- Holck, Manfred, Jr. *Payroll Tax Procedures for Churches and Clergy*. Austin, Tex.: Church Management, Inc., 1989. A series of monographs or reprints by Holck are available from Church Management, Inc. for tax planning for churches and clergy.
- Internal Revenue Service. *Publication 557: Tax Exempt Status for Your Organization*. Revised October 1988.
- Worth, B. J. *Income Tax Guide for Ministers and Religious Workers*. Winona Lake, Ind.: Worth Tax and Financial Service, 1990.

FEDERAL INCOME TAX RESPONSIBILITIES

I. The Congregation as Wagepayer

- A. The person responsible for our payroll administration is familiar with current federal income tax requirements, forms, and payroll procedures.
Yes No
- B. Our pastors have determined if they want voluntary withholding, and we have implemented it if they so desire.
Yes No
- C. We have determined whether each person who performs services for the congregation is employed or self-employed.
Yes No
- D. We comply with all federal income tax filing requirements for self-employed people who provide services for our congregation.
Yes No
- E. We have a federal employer identification number.
Yes No
- F. We obtain a Form W-4 or 4A for each employee and determine the proper amount of withholding.
Yes No
- G. We make timely deposits of withheld taxes to a qualifying depository institution using Form 8109.
Yes No
- H. We provide Form W-2 to employees by February 1 and send a copy to the Social Security Administration with transmittal Form W-3.
Yes No
- I. We withhold the employee's share of FICA contributions and pay the employer's and employee's share as required.
Yes No
- J. We have determined whether we are exempt from unemployment tax in our state.
Yes No
- K. We have taken the fullest advantage available of the housing allowance for the benefit of all of our clergy who qualify for it.
Yes No
- L. We have an accountable plan, adopted before the beginning of the year, for reimbursement of business expenses for appropriate employees.
Yes No

II. The Congregation as Taxpayer

- A. We maintain a policy and practice of racial non-discrimination and, if we operate, supervise, or control a school, we file IRS Form 5578 annually.
Yes No
- B. We use ELCA compensation planning materials for

clergy and do not pay excessive or unreasonable compensation to anyone.

Yes No

- C. We do not support or oppose candidates for public office or permit our facilities, assets, or organization to be used for a partisan purpose.

Yes No

- D. We do not engage in any lobbying or activities to influence legislation unless it is an insubstantial part of our activities and expenditures.

Yes No

- E. We have reviewed any income we receive other than donations to determine if it is unrelated business income and have properly reported it and paid taxes on the income as needed.

Yes No

- F. We have determined whether there is sales tax liability for goods the church sells, and we meet our obligations to report and pay sales taxes.

Yes No

III. Deductibility of Gifts

- A. We do not give our donors or supporters tax advice on the deductibility of their contributions.
Yes No
- B. We account for donations through an envelope system and by acknowledging special gifts.
Yes No
- C. We substantiate receipt of noncash donations of less than \$5000 value with appropriate procedures.
Yes No
- D. For noncash donations valued at \$5000 or more, we sign or file appropriate IRS forms.
Yes No
- E. We distinguish between gifts to individuals and gifts to the congregation that the congregation may, at its discretion, use for individuals. We make it clear to donors which is involved. We have a benevolence fund to which donors can contribute to enable tax deductible contributions to be made.
Yes No
- F. We do not lead people to believe that contributions are tax deductible if any goods or services are given in return, unless the goods or services are of insubstantial value and we have determined that they do not affect deductibility.
Yes No
- G. If contributions have both deductible and non-deductible components we advise donors of the nondeductible component.
Yes No

FUNDS AND TRUSTS

The Congregation Council of congregations of the Evangelical Lutheran Church in America fills the function of the board of directors or trustees of other nonprofit or secular organizations. The council's responsibilities, as described in the Model Constitution for Congregations, include "maintaining and protecting its property and the management of its business and fiscal affairs" (C12.05.a.) and "this congregation's investments" (C12.05.f.). Officers of the congregation have the duties specified in the bylaws (C11.01.a.) and also are members of the Congregation Council (C11.01.).

Role of Council Members

Members of the council, like directors of other organizations, have three duties recognized by law, beyond the specifics of their jobs as described in the congregation's governing documents. They are as follows:

- *The duty of care* requires council members to act with the care that a normally prudent person would exercise in the same position and like circumstances. Such care can be exercised by taking steps such as faithfully attending meetings; being sure the congregation acts in accordance with its governing documents (constitution, bylaws, and so forth); insisting on advance notice and provision of meaningful written materials when major items are to be acted on; reading financial statements, budget proposals, investment reviews, and like material with care; questioning financial and other reports when inconsistencies or problems appear or reports are not understood; investigating and rectifying problems; calling on outside experts when matters are presented that are beyond the council's knowledge and ability to understand and decide without such consultation; insuring that accurate records are kept of meetings and decisions; and in general exercising a good faith independent judgment after reasonable inquiry into a matter.
- *The duty of loyalty* requires council members faithfully to pursue the interest of the congregation alone and not the financial or other interests of the member or others. Financial opportunities for the congregation should never be diverted to other people or organizations. Business relationships with members of the congregation, other council members, or people with relationships to members should be undertaken, if at all, only on an objective arm's-length basis (that is, on an informed but disinterested basis), and only after considering other options. Members with an interest in the transaction or relationship should abstain from any presence or participation in the discussion or decision. Adoption of a written conflict of interest policy will assist members in understanding and adhering to the duty of loyalty.
- *The duty of obedience* requires that the council member act faithfully to the congregation's mission, as expressed in its constitution and bylaws. The council should not lead the congregation into activities outside the scope

of its mission but should pursue only matters directly related to the congregation's mission.

Handling Money

The trust inherent in most relationships within the congregation should not replace prudent practices in money handling. Protecting the responsible people from suspicion and temptation, as well as the congregation from negligence or theft, requires businesslike practices.

Weekly offerings should be counted immediately after the service by two unrelated people, neither of whom handles the cash alone at any time. These people should not be the same ones who handle the books and write checks for the congregation. They should record and sign or initial a record of the money counted, prepare a deposit slip, and together deposit the money in the night depository of the bank. The deposit record and summary report should be given to the treasurer or financial secretary. The money handlers should be rotated from time to time so that no one has the position for an extended period. Cash should not be stored in the church.

Bills and obligations should be approved in writing for payment by an authorized person. Checks should be signed by two authorized people. The pastor should not be among them. Check numbers should be recorded on the invoice or support document. At least three people should be involved in this process.

The congregation should have an Audit Committee (C13.03.) whose members do not include the treasurer or financial secretary. Audits should be conducted annually according to established procedures, such as those recommended by the ELCA Office of the Treasurer in "Suggestions for the Audit Committee." Outside assistance from an independent accountant may be obtained when finances and the size of the congregation permit or suggest it. In any event, the Audit Committee should include people with training in accounting procedures, if possible, and should use specific procedures recommended by accountants or a qualified outside source.

Congregations should purchase fidelity bonds to cover any fraud or dishonesty by employees or volunteers handling congregation funds. A fidelity bond is an insurance policy to protect the congregation against loss of its funds through embezzlement or dishonesty. An Employee Dishonesty Blanket Bond is available through the ELCA.

Acquiring Funds

Both state and municipal regulation may apply to the acquisition and management of funds. Most states, through the attorney general, department of justice, or another state agency, require some annual or other periodic financial reporting by charitable or nonprofit agencies or trusts. Churches are usually exempt from these requirements but should be aware of them. Congregations might need to complete an application in order to be exempt, and there might be reporting requirements that might apply to auxiliary activities or separate corporations affiliated with them.

Municipalities may require licenses or permits for certain types of fund-raising activities, especially if they occur on public property. Some fund-raising activities, such as games of chance, lotteries, and the like, may require specific permits or be prohibited altogether.

Any fund-raising activities that involve promises or commitments to contributors that they will receive some financial or material return for their contribution or investment must be carefully reviewed with counsel. Such plans may come within state or federal laws regulating the issuance of securities (selling bonds), which require certain disclosures and filing information with regulatory agencies. Never undertake such activities without qualified legal advice.

Fund-raising, whether it is conducted on a congregation-wide basis or with individual members or contributors, should always be conducted with scrupulous honesty. Funds raised must be used only for the purposes for which donors are told they are being raised, and offered back if the purposes change or are impossible to fulfill. If a building fund campaign, for example, falls short of its goal, the funds should not be diverted to another use without the consent of the donors. People who are solicited for major contributions should be encouraged to seek independent advice from family and financial or legal advisers before making the contribution. Contributors should never be pushed into contributing, especially by spiritual advisers who might exercise significant influence over the individual. Be particularly attentive to propriety when accepting large donations from people who may be, or thought by their family or others to be, vulnerable to undue influence. Such people might include the elderly, infirm, terminally ill, mentally handicapped, or people of means who are impetuous or imprudent.

Donors of significant funds or assets to the congregation often wish to attach conditions or restrictions to their gifts. Sometimes the congregation will have no foreknowledge of the gift or opportunity to discuss it with the donor in advance, as is common with bequests in wills. Such gifts must usually be accepted on the terms rendered or not at all. When the opportunity exists to discuss major gifts in advance, however, the congregation is well advised to discourage donors from surrounding gifts with conditions and restrictions. What might seem innocuous or sensible at the time the gift is made might make no sense in later years when conditions change. If, for example, a house next to the church is given to the congregation on the condition that it be used solely for a parsonage, the time might come when the congregation moves or the neighborhood changes, so the house is no longer suitable for a parsonage. Or the house might be taken by eminent domain to enlarge or change a road. Or sound management practice might make it prudent to cease maintaining a parsonage and to provide a housing allowance for the pastor. Innumerable other circumstances might change. If the donor considers such possibilities, he or she would probably want the congregation to be free to do what makes sense and to maximize the benefit of the gift to the congregation, not to have the property revert to heirs generations into the future. Minimize conditions and restrictions on gifts wherever possible.

Dealing with Conditions and Restrictions

Suppose property has been given with conditions or restrictions, or in trust for limited purposes, and the condi-

tions, restrictions, or limitations no longer make sense but have become a burden to the rational management of the asset for the congregation's benefit. What then?

First, the conditions, restrictions, and limitations, whatever form they take and whatever the nature of the property they attach to, must be honored. The congregation should never unilaterally disregard them. To do so may result in forfeiting the property, which may revert to the donor, the donor's heirs, or some other contingent taker. It may also trigger regulatory action by the state. The attorney general or other officer in charge of charitable trusts in the state has the authority to enforce conditions and restrictions in charitable gifts.

Second, conditions that no longer make sense can be removed by the donor if he or she is still alive and competent, or by the heirs or alternative takers of the gift if not. Obtaining such consents can be tedious or impossible, but it should be considered in appropriate cases.

Third, if the condition or restriction is subject to an interpretation that would permit the congregation to use the asset as it wishes but the congregation is uncertain whether the interpretation is correct, the congregation can apply to the appropriate court and ask the court to provide an interpretation. If a gift, for example, is intended to be used to build a new church and the congregation wants instead to add on to its existing facility, a court interpretation will enable the congregation to determine if it is permitted to use the funds for this purpose rather than risk losing them. Any parties in interest, that is, the donor or those who would take the asset if the church lost its right to it, should be made a party to the proceeding. Just as the congregation can seek an interpretation by the court as to how it should act, so can it seek court assistance if it is the beneficiary of assets being handled by others and believes those assets are not being properly administered for the congregation's benefit.

If the purpose of the donor as expressed in the terms of the gift is impossible, impractical, or illegal (such as building a church in an area where the zoning law does not permit), the congregation can apply to the court to change or remove the limiting conditions under a legal principle known as *cy pres* (as near as possible). The gift must express a general intent or desire to benefit a particular purpose or object, and not one limited to the specific. The absence of an alternative gift in the instrument is one indication that there is such a general charitable purpose. Funds that are given for a purpose but are inadequate to accomplish it are often subject to *cy pres* applications.

Separation of Funds

Funds that are given for particular purposes, that are to be used in particular ways, or that are subject to conditions or restrictions of any sort should be kept in separate accounts from the congregation's operating funds. Do not commingle restricted and unrestricted funds. Restricted funds include funds intended to be held as a memorial gift with income only to be used, as well as funds intended for limited purposes. Maintain separate accounting of all such funds.

Separate Incorporation

Council members should consider whether the congregation conducts activities that should be separately incor-

porated. Separate incorporation should be considered for activities that are outside the normal activities of congregational life, and especially those that carry a high risk of liability. This would include, for example, schools, child-care centers, homeless shelter programs, camps, or health-care programs. Activities that are subject to state licensing or regulation, that take place in a different state than the one in which the congregation is located and incorporated, that may involve prohibited lobbying or campaign activities, or that generate unrelated business income may also be appropriate for separate incorporation. There may be disadvantages to separate incorporation that offset or outweigh the advantages. Separate corporations will not be included in the ELCA group federal tax exemption, and the corporation will have to apply separately for exempt status. And congregations may be able to avoid regulation or taxation, or may be able within zoning laws to conduct activities that would be regulated, taxed, or prohibited if carried out by a separate corporation. Consult counsel in all instances.

The major advantage of separate incorporation is that it insulates the parent or affiliated corporation, the congregation, from liability for the activity in question. There may be other tax, regulatory, or management reasons to do so. For the separation to be effective, however, the two corporations must actually function separately. They should have separate, and not identical, boards of directors. Separate meetings and records should be kept. Funds should not be commingled. If assets (such as space) or employees

are shared, there should be some objective way of separating and documenting in writing agreements about the distinct functions and financial responsibilities. If corporations are run as separate organizations and are not merely separate on paper, the law will usually respect the separation.

With separation goes some degree of loss of control. The parent corporation can maintain some control over the offspring corporation by in turn retaining control of such devices as amendments to the corporate governance documents, the right to elect the necessary majority of board members, the right to select or veto key officers, and the right to approve or veto certain significant decisions such as operating budgets or disposition of assets.

Resources

- Couser, Richard B. *Ministry and the American Legal System*. Minneapolis: Fortress Press, 1993.
- Edie, John A. *Directors and Officers Liability Insurance and Indemnification: An Explanation for Foundations*. Washington, D.C.: Council on Foundations, 1991.
- ELCA Office of the Treasurer. *Risk Management: Suggestions for the Audit Committee and Suggestions for Handling Cash Funds*, undated information sheets from the Evangelical Lutheran Church in America.
- Hammar, Richard R. *Pastor, Church & Law*. 2nd ed. Matthews, N.C.: Christian Ministry Resources, 1991.
- Kurtz, Daniel L. *Board Liability: Guide for Nonprofit Directors*. Mt. Kisco, N.Y.: Moyer Bell Limited, 1988.

FUNDS AND TRUSTS

I. The Role of the Congregation Council and Officers

A. The Congregation Council and officers understand the duty of care and act in accordance with it.

Yes No

B. Council members faithfully attend meetings.

Yes No

C. The congregation acts and is governed in accordance with its constitution and bylaws.

Yes No

D. Council members receive in advance of meetings major items for action and review.

Yes No

E. Council members review and understand financial statements, budgets, and other such documents.

Yes No

F. Council members and officers understand the duty of loyalty and act in accordance with it.

Yes No

G. Business relationships with council members or their families are avoided, or, if undertaken, done only after an arm's-length review, and consideration of other options and the best interest of the congregation. Members who have an interest in the transaction do not participate in the decision.

Yes No

H. The congregation has a written conflict of interest policy for council members and officers.

Yes No

I. Council members and officers understand the duty of obedience and act in accordance with it.

Yes No

II. Handling Money

A. Weekly offerings are counted immediately after the service by two unrelated people together, neither of whom handles the books or writes checks. A written record of the counting is made. Funds are deposited immediately.

Yes No

B. Bills and obligations are approved before payment, and checks are signed by two people.

Yes No

C. An Audit Committee conducts an annual audit in accordance with established procedures.

Yes No

D. People with accounting training are on the Audit Committee or establish its procedures.

Yes No

E. The congregation has a fidelity bond for employees and volunteers who handle our funds.

Yes No

F. Significant sums of cash are not left in the church.

Yes No

G. All expenditures are accounted for by receipts or written records.

Yes No

III. Acquiring Funds

A. Our congregation is aware of the reporting obligations we have to the state for ourselves or auxiliary or affiliated organizations or programs.

Yes No

B. Our congregation is aware of and obtains necessary licenses or permits for fund-raising activities.

Yes No

C. Our congregation conducts no fund-raising activities in which contributors expect some financial or material return, except with the advice of qualified counsel.

Yes No

D. Funds raised by the congregation are used only for the purpose for which they are raised.

Yes No

E. People who may be subject to undue influence are encouraged to seek independent qualified advice before making major gifts to the congregation.

Yes No

F. Donors are discouraged from attaching conditions or restrictions on gifts wherever possible.

Yes No

IV. Dealing with Conditions and Restrictions

A. Our Congregation Council is aware of, respects, and deals with as necessary conditions, restrictions, and limitations placed by the donor on assets given to the congregation.

Yes No

B. Our Congregation Council keeps and accounts for restricted funds and operating funds separately.

Yes No

V. Separate Incorporation

A. Our Congregation Council has considered whether the congregation has any activities that should be separately incorporated.

Yes No

B. If the congregation has any separately incorporated activities, they function with the degree of separateness required to achieve the purposes of the separate incorporation.

Yes No

COPYRIGHT

Copyright laws encourage the development of the arts and sciences by protecting the work of creative individuals. The copyright holder has five exclusive rights:

- to reproduce a work;
- to prepare derivative works, for example, abridgements, translations, or other adaptations;
- to distribute a work;
- to perform a work in public;
- to display a work in public.

As with other property, only the owner has authority to allow another person to exercise any of these rights. Sometimes that copyright owner is the creator, and in other instances the creator assigns the copyright to a publisher or an organization. To find who holds the copyright, look for the word *copyright* or the symbol ©, followed by a year and a name, the copyright holder.

Works published on or after March 1, 1989, are not required to carry the copyright notice, although most do; hence, its absence on such works does not necessarily indicate that they are in the public domain.

The length of copyright protection depends on when the work was created. Works created prior to 1978 may be protected for up to 75 years. Works created in 1978 or later generally are protected for the author's lifetime plus 50 years. Works not protected by copyright are in the public domain.

Copyright laws apply to records, audiotape recordings, compact discs, videotapes, movies, and computer software. According to Copyright Law of the United States of America, copyright protection is available for any original work "fixed in any tangible medium of expression" from which it can be "perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device" (102.a.).

The copyright law applies to churches. Violations are not limited to direct reproduction of the copyrighted material. Such variations as handcopying, copying into a different medium, making a transparency, adapting a work, or performing or displaying a work at a place open to the public or at any place where a substantial number of people outside of a normal circle of a family and its social acquaintances is gathered are violations.

Fair Use

Under very limited circumstances, someone other than the copyright holder may exercise a right that belongs to the copyright holder. This is called "fair use." Fair use is reproducing a copyrighted work "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research" (107.). This is not an infringement. The copyright law does not clearly define the limits of fair use, but it does list the following points that should be considered:

- *The purpose and character of the use.* Nonprofit or educational use generally is granted more latitude.
- *The nature of the copyrighted work.* A script, anthem, or student worksheet probably cannot be reproduced, since the owner intends the users to buy copies.
- *The amount and substantiality of the portion used in*

relation to the work as a whole. One stanza of a four-stanza poem represents one-quarter of the work.

- *The effect of the use upon the value of the existing work.* Copying must not compete with or replace the purchase of the copyrighted resource.

Those guidelines have been interpreted to allow classroom teachers to make a single copy of a work for their own use and a copy for each student in class if (1) the copies do not replace a consumable resource or something that is already available; (2) the use is spontaneous and will not be repeated; (3) the students are not charged more than it costs to make a copy; and (4) the copies carry a copyright notice. Permission must still be obtained if a significant portion of a copyrighted work is copied, the use is planned in advance, or the copying would replace a purchase. Many other situations that frequently occur in churches and schools are also outside the fair use limits. All copying is subject to the limits of fair use.

Other Defenses

Certain other defenses are relevant to church practice. They are as follows:

- *Display of a lawful copy.* The owner of a lawfully acquired copy is authorized "to display that copy publicly, either directly or by the projection of no more than one image at a time, to viewers present at the place where the copy is located" (109.c.).
- *Face-to-face teaching activities.* Performance or display of a work by instructors or pupils in the course of face-to-face teaching activities of a nonprofit educational institution is permissible as long as copies of any motion pictures or audiovisual works used are lawful. It is not clear if this exception would apply to a Sunday school, but it would cover schools run by churches.
- *Performance of religious works in religious services.* A "nondramatic literary or musical work or a dramatico-musical work of a religious nature, or display of a work, in the course of services at a place of worship or other religious assembly" (110.3.) is permitted. This is the exception that allows the performance of copyrighted music by a choir or soloists in a worship service.
- *Nonprofit performances.* The "performance of a nondramatic literary or musical work otherwise than in a transmission to the public, without any purpose of direct or indirect commercial advantage and without payment of any fee or other compensation for the performance to any of its performers, promoters, or organizers" (110.4.) is permitted. There must be no admission charge, or the proceeds must be used exclusively for the nonprofit purposes of the institution.

Permission Requests

Every copyright holder determines the policies concerning the way that particular copyright is administered. Most owners require permission requests to be made in writing. If the copyright holder is a publisher, direct your letter to "Rights and Permissions." Since requests are evaluated in

light of the information provided, make the description of your proposed use complete. State the following:

- *What is used:* title, author or composer, pages or hymn numbers, copyright year, code number, a description of the specific material you wish to use (exact sentences, paragraphs, verses).
- *How it will be used:* name, address, and phone number of your congregation or organization, your name and relationship to the group (pastor, director, teacher, and so forth), a description of the use (parish publication, local event), the right requested (onetime, permanent), your intended audience, the number of copies to be made, and format of the publication (bulletin, handout).

After your request is received and evaluated, you will usually receive either written permission and a credit line that should appear on all copies, or an explanation stating why your request cannot be approved. Because of their financial investment in the material, many copyright holders charge a fee. If your request is for a onetime or local use, the owner may reduce or waive the fee; however, permission is still required. Many publishers will not grant blanket permission to use copyrighted material and will ask that you contact them before each use.

Augsburg Fortress and ELCA Copyright

Most congregations using this publication will be Evangelical Lutheran Church in America congregations, and copyright questions are likely most frequently to involve ELCA publications. Augsburg Fortress, Publishers, the publishing house of the ELCA, administers copyright for both the ELCA and Augsburg Fortress materials. Augsburg Fortress enters into an agreement with an author, writer, or composer when it creates a new publication. As a part of that contract, it resolves the copyright ownership of the work. It is bound to be faithful to those terms and must encourage those who use its publications to respect that agreement as well.

While every request is evaluated individually, Augsburg Fortress generally follows these patterns when granting permission to use copyrighted materials:

- *Periodicals.* Magazines like *The Lutheran*, *Lutheran Woman Today*, *Parish Teacher*, and *Lutheran Partners* often purchase only onetime rights to an article, and Augsburg Fortress cannot grant permission for reprints. Contact the publishing house for information on the copyright.
- *Plays and skits.* Since the only compensation the author receives is a royalty based on total sales, Augsburg Fortress cannot grant permission to reproduce scripts. You must purchase enough copies to meet your cast's needs. Credit should be given to the author and publisher in any advertising or program notes.
- *Out-of-print publications.* The copyright remains in effect even after the work is no longer available. Contact Augsburg Fortress for information on the current copyright status.
- *Songbooks and hymnals.* Unless it is in the public domain, the text, tune, or setting (arrangement) of a song may be protected by a copyright. No portion may be reproduced without the copyright holder's permission. Collections of music often contain materials protected

by many different copyrights. Contact Augsburg Fortress to determine who holds the copyright to a specific song in one of its collections.

- *Illustrations, photographs, charts, diagrams, and logos.* Artwork, like the text of a publication, is protected by copyright. While printed uses must be authorized, you may create a single banner or parament without securing permission. The source, as well as the publisher and copyright holder, should be acknowledged as your project is first introduced to your congregation or organization.

Lutheran Book of Worship (LBW)

Lutheran Book of Worship, like most collections of hymns and worship materials, contains materials gathered from many different sources. Because *LBW* contains materials protected by many different copyrights, each category must be examined separately.

- *Prayers and worship services.* Materials found on pages 6–214 were developed for the worship book and are protected by *LBW* copyright. You must secure permission before they are reproduced.
- *Creeds, Lord's Prayer.* Texts of the creeds and the Lord's Prayer were prepared by the International Consultation on English Texts (ICET). Congregations are welcome to reproduce those texts without prior permission.
- *Psalms.* The psalms found in *LBW* (pages 215–289) originated in *Book of Common Prayer* (proposed edition). These psalms are now in the public domain. While no written permission is required for their use, you are encouraged to give the following credit:

Psalm XX reprinted from

Book of Common Prayer (1979)

- *Canticles and hymns.* Each canticle or hymn has three components: the text (words), the tune (melody line), and the setting (the harmonization or arrangement of the tune). Each of those components may be protected by copyright.

When *LBW* was prepared, the publishers contacted the copyright owner of each component to secure permission to include it in the worship book. To subsequently reproduce copyrighted material published in *LBW*, new permission must be obtained. A few copyright holders have asked the *LBW* publishers to give permission on their behalf. Most, however, have asked that requests be referred to them.

To determine the copyright status of a hymn and its components, turn to the canticle and hymn copyright acknowledgments beginning on page 923 in *LBW*. Any hymn or hymn component protected by copyright will be on that list. Any hymn or hymn component omitted from that list is in the public domain. Consider three examples:

1. *Public domain.* If you wish to reprint the text, tune, or setting of "Abide with Me" (*LBW* 272), you could do so without securing permission because the entire hymn is in the public domain and thus it does not appear on the list:

271 Text: Copyright 1978 *Lutheran Book of Worship*.

273 Setting: Copyright 1970 *Neues Choralbuch*, Bärenreiter-Verlag, Kassel and Basel. Used by permission.

Likewise, if you wanted to reproduce the text and/or the tune of "On Our Way Rejoicing" (*LBW* 260), you would not need permission. However, the setting is protected:

260 Setting: Copyright 1978 *Lutheran Book of Worship*.

2. *LBW copyright*. The hymnal contains materials protected by *LBW* copyright, such as "Amid the World's Bleak Wilderness" (*LBW* 378):

378 Text, tune, and setting: Copyright 1978 *Lutheran Book of Worship*.

The hymnal also contains materials protected by Contemporary Worship Series copyrights, such as "Listen! You Nations" (*LBW* 14):

14 Text, tune, and setting: Copyright 1972 Contemporary Worship 5: *Services of the Word*.

Requests to use these materials should be directed to Augsburg Fortress, as should all *Service Book and Hymnal* requests, such as for "Built on a Rock" (*LBW* 365):

365 Text: Copyright 1958 *Service Book and Hymnal*.

3. *Other copyright holders*. To reprint portions of a hymn protected by a copyright owned by another publisher or individual, you must secure permission from the copyright owner(s). Contact the owners for permission to copy the text and tune of "Praise God. Praise Him" (*LBW* 529):

529 Text: Copyright Daniel T. Niles. Used by permission of the Christian Conference of Asia. Tune: Copyright John Milton Kelly. Used by permission of the Christian Conference of Asia.

If the text, tune, and setting of a hymn are owned by different copyright holders, you must secure permission from the owner of each portion you wish to reproduce.

When *LBW* was completed, each of the participating Lutheran church bodies was authorized to respond to permission requests from their respective denominations. Each denomination may grant permission to reproduce materials protected by joint copyright (such as *LBW*), as well as materials under their own copyright. When materials are owned by other copyright holders, addresses are available for you to secure reprint permission yourself. When in doubt, ask questions about copyrighted material. See "Resources" for Augsburg Fortress's address and phone number.

Common Church Copyright Issues

Some of the ways congregations commonly encounter and sometimes violate the copyright law are the following:

1. *Reproducing copyrighted music*, whether for choir or other solo or group performers, use off-premises, inclusion in bulletins, or projections for use in worship services. It is a violation to reproduce separately or together, by any means, if it is not in the public domain or subject to a specific exception.
2. *Computer software*. Reproduction of computer software for multiple machines, even if all are owned by the owner of the software, is almost always a violation. Photocopying software instruction manuals would also be a violation.
3. *Reproduction of poems* in the church bulletin or other publications. While reproducing a few lines or a brief excerpt from a lengthy work may be permissible, reproduction of an entire work will seldom be.
4. *Scripture*. The King James Bible is in the public domain. Modern translations and renditions are not. Most will include on the copyright page a limited authori-

zation for reproduction without obtaining specific permission. More extensive reproduction requires permission.

5. *Videotapes*. Copying protected videotapes is rarely permissible. Display is considered performance and, if done in a place open to the public or where a substantial number of people outside of a normal circle of a family and its social acquaintances is gathered, is a violation unless within one of the exceptions discussed on page 35.
6. *Video- or audiotapes of worship services*. Making or distributing audio or video recordings of copyrighted works, even if use of the works was authorized in the original performance, such as a hymn-sing or a choir performance in a worship service, is a violation. Recording devices should be turned off or the sound eliminated for recordings, unless permission is obtained.

Solutions to Copyright Problems

- *Know the law and stay within it*. The Copyright Office makes available many free circulars on specific aspects of copyright law. Write to Copyright Office, Library of Congress, Washington, DC 20559.
- *Secure permission* by contacting the copyright owner directly for permission on a case-by-case basis.
- *Consider obtaining a blanket license to photocopy materials*. If your congregation regularly copies music owned by a particular copyright holder, it might be cost-effective to purchase a license to do so. Look closely to see that the license you are considering actually includes the material you wish to copy and covers the type of use you have in mind. Even a blanket license does not cover all songs and uses. Some organizations, acting as middlemen, have obtained the right from certain copyright holders to grant for a fixed fee blanket licenses to users of musical works in the copyright holders' repertory for a specific period of time.

Resources

- Augsburg Fortress, Publishers, Attn: Publication Rights and Records Department, 426 S. 5th St., Box 1209, Minneapolis, MN 55440-1209. (612) 330-3300 or 1-800-328-4648. Augsburg Fortress will answer questions and supply information with respect to its publications.
- Church Music Publishers Association, P.O. Box 158992, Nashville, TN 37215. This organization has information available concerning copyright issues for music.
- Copyright Office, Library of Congress, Washington, DC 20559. The Copyright Office has many publications available on aspects of copyright law.
- Couser, Richard B. *Ministry and the American Legal System*. Minneapolis: Fortress Press, 1993.
- Hammar, Richard R. *The Church Guide to Copyright Law*. Matthews, N.C.: Christian Ministry Resources, 1990.
- Hammar, Richard R. *Pastor, Church & Law*. 2nd ed. Matthews, N.C.: Christian Ministry Resources, 1991.

COPYRIGHT

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|--|--|
| <p>I. Our congregation is conscious of and endeavors to comply with the copyright laws at all times.
Yes No</p> <p>II. We do not reproduce copyrighted music, either in its entirety or any of its protected parts (text, tune, setting), without permission, by any of the following means:</p> <p>A. Photocopies;
Yes No</p> <p>B. Transparencies;
Yes No</p> <p>C. Use in the bulletin;
Yes No</p> <p>D. Handwritten or typed copies for display or projection;
Yes No</p> <p>E. Audio- or videotapes, including tapes of worship services for distribution.
Yes No</p> <p>III. We do not reproduce computer software, except for input into the machine or to make archival copies, or copy software instruction manuals.
Yes No</p> <p>IV. We do not reproduce copyrighted poems or other textual materials in our congregation's bulletin or newsletter without permission.
Yes No</p> <p>V. We abide by publisher's guidelines in reproducing portions of modern translations of the Bible.
Yes No</p> <p>VI. We do not copy videotapes, and we obtain permission for performance or display of them unless within allowable exceptions.
Yes No</p> | <p>VII. We follow the guidelines of Augsburg Fortress, Publishers for reproduction of materials from Augsburg Fortress and ELCA publications, including <i>Lutheran Book of Worship</i>, ask questions when in doubt, and obtain permission when required.
Yes No</p> <p>VIII. We have designated a person to be responsible for copyright compliance in the congregation's activities.
Yes No</p> <p>IX. The person responsible for copyright compliance in the congregation's activities has obtained information from the resources listed on page 37 and remains informed on copyright issues pertaining to the congregation's practices.
Yes No</p> <p>X. People with responsibility for matters that might raise copyright issues are informed on copyright compliance and work with the person responsible for such compliance. Such people include the following:</p> <p>A. Pastor(s);
Yes No</p> <p>B. Music director;
Yes No</p> <p>C. Choir director;
Yes No</p> <p>D. Sunday school superintendent;
Yes No</p> <p>E. Person responsible for preparation of the church bulletin and newsletter;
Yes No</p> <p>F. Person responsible for photocopying.
Yes No</p> |
|--|--|

DISPUTE RESOLUTION

Disputes are inherent in the nature of humanity. They will occur both within the congregation and between the congregation and others. Resolution of disputes is a necessary part of the life of a congregation, whether those disputes are worked out within or outside the secular legal system.

Internal disputes will usually be subject to the dispute resolution procedures set forth in several documents. The Model Constitution for Congregations (Chapters 9 and 15) addresses local conditions that imperil effective ministry, member discipline, and factional disagreement within the congregation. The *Synod Constitution* (S11.02., S11.03., S14.13., and Chapter 17) designates processes to address disputes arising within the synod, matters of concern or discipline, and factional disputes within congregations. And the *Evangelical Lutheran Church in America Constitution, Bylaws, and Continuing Resolutions* (Chapter 20) makes comprehensive provision for consultation, discipline, appeals, and adjudication governing ordained ministers, associates in ministry, congregations, members of congregations, and certain others.

Most disputes within congregations, synods, or the ELCA should be resolvable within the provisions and procedures of these documents without the assistance of the secular legal process. You should be sure that all disputes that are subject to this process are resolved within it. The civil courts will rarely interfere with or alter the result reached by the internal church adjudicatory process of a church body with established procedures, such as the ELCA. In addition to these formal dispute resolution mechanisms, informal assistance is available from the synod and other Lutheran resources.

When disputes occur with outsiders or cannot be resolved within the ELCA adjudicatory processes, and litigation is commenced or appears likely, the congregation must prepare to enter the arena of secular litigation and dispute resolution. This chapter examines four issues related to the congregation's approach to litigation and dispute resolution: managing the crisis, hiring a lawyer, settlement or alternative dispute resolution, and litigation.

Managing the Crisis

Let us assume that a crisis has occurred and that it is of the worst kind—a charge that a church staff member or volunteer has sexually molested or abused one or more minors. Often a Congregation Council member or pastor will hear about an allegation of abuse because a complaint has been received by a synod staff member or bishop, or possibly by a child protection worker or police officer. How do you respond?

When managing the crisis after it has occurred, you have a number of constituencies or interest groups to consider: the victim and his or her family, the accused molester, the members of the congregation, your insurer, and the general public. (Many of the issues we have discussed in this resource will present less acute crises than accusations of child molestation, and all of the suggestions that follow will not be

equally applicable to each of them.) Following are some suggestions for crisis management:

1. Immediately notify your synod's bishop, not only informing him or her of the problem, but keeping him or her fully informed as matters develop, and until the situation is entirely resolved. Consult resources available through synodical or churchwide organizations. Many synods have response teams that can assist. (See the appendix, "ELCA Strategy for Responding to Sexual Abuse in the Church," page 47.)
2. Follow your obligations under the child abuse reporting law.
3. Take all allegations seriously. Even if you do not think they are true, or if they turn out not to be true, you cannot assume in advance that they are false.
4. Support the victim and the victim's family. Too often the church or its leader—motivated either by disbelief of the allegations and support for the alleged offender or by concern for liability—will close ranks against the accuser. The victim then becomes victimized a second time by being made to feel like an outcast. This aggravates the problem and increases the likelihood of litigation. The victim's parents are often more interested in truthfulness and honest investigation, assurance of steps taken to prevent future offenses, healing, and reconciliation than in monetary damages.

A lawsuit may reflect the failure of the church to respond to the victim's distress. Once the matter is in the hands of a plaintiff's attorney, however, it is unlikely to be resolved without the payment of a significant amount of money. You can help the victim and the victim's family by providing free medical care and counseling (your insurer might be willing to support this); assuring the family of a full, fair, and honest investigation by qualified people; and instituting measures to prevent a recurrence.

5. Notify your insurer immediately. If the events in question have occurred over a period of time, notify every insurer that has provided coverage within the time period in question, as well as the insurer providing coverage at the time of reporting.

Provide your notice to the insurer immediately by telephone, followed by written notice sent by certified or registered mail with a return receipt requested. Read your policy for an address to which to provide notice. Provide notice to the local insurance agency issuing the policy as well.

6. With respect to liability issues, cooperate fully with the insurer and allow it to manage liability aspects of the matter. Often an insurer will agree to defend a lawsuit under a reservation of rights, usually expressed in a letter to the congregation. This means the insurer will finance the defense but does not agree that it is responsible for a judgment, if there is one. Reservations of rights are usually done by insurers when it is not clear whether the claims are insured

or not. In such cases, seek guidance from your own attorney as to how to proceed.

7. If the insurer denies coverage, do not accept the denial, but have your attorney review the facts and the policy if a claim is asserted by the victim or the victim's family. Insurers will read the policy in terms most favorable to them, but your attorney may be able to find, or establish through litigation, coverage that is not initially acknowledged by the company.
8. With or without the participation of the insurer, conduct appropriate investigation into the allegations. This aspect of the matter should be handled by counsel or with the advice of counsel with the potential liability implications in mind. Pursue the matter to a point of closure; that is, reach an internal judgment as to whether the allegations are well founded, then take appropriate action. In no circumstances should you ignore the allegations. In some cases, however, a situation might be clearly serious and urgent, and local authorities will quickly become involved, so you will not need to conduct the investigation.
9. Protect the rights of the alleged perpetrator. Obtain written or tape-recorded statements where possible. Do not audio- or videotape statements without the express consent of the interviewee. The consent should be recorded on the tape. First, be sure that (1) your investigation does not presume the truth of the allegations but provides the alleged perpetrator a full and fair opportunity to present information on his or her own behalf, and (2) the investigation is approached in an unbiased manner. For example, interviews with witnesses should solicit information in a neutral fashion, not with leading questions asking them to assent to information provided by the interrogator. Questioning should be in the nature of "What happened?" "What did you see?" "Who was there?" "What was said?" "What happened next?" rather than "Did Mr. X touch Bobby or Sally in a wrong place?" Interviews with minor witnesses, especially young children, are particularly susceptible to being colored by the interviewee's perception of what the interviewer wants to hear. Having interviews conducted by counsel or, in the case of minors, by a trained specialist is particularly useful, given the problem of bias in the investigation.

Second, if the alleged perpetrator is an employee of the congregation, review the employment contract (if any exists), any personnel policy manual or procedures established by the organization, the employee's personnel file and job history, and any other documentation that may be relevant. Do this at an early stage of the investigation and before deciding on the appropriate disciplinary sanction, if any.

Third, maintain the correct balance regarding who is made privy to the information and investigation. This requires you to be sure that those who should be involved in the investigation or decision-making process are given pertinent information. A pastor should not, for example, conduct a sensitive investigation without first consulting his or her governing board or ecclesiastical superior. Decisions to discipline or terminate an employee are most defensible

if the facts are reviewed and the decision shared by a larger body or higher level of authority. Peremptory decisions made on the spot by an immediate superior are more vulnerable to attack. On the other hand, information should be limited to those who have a legitimate reason to know and to be involved in the decision making. These people should be cautioned not to spread the information.

10. Release information to congregation members prudently and with advice of counsel. Certain circumstances will call for some explanation; for instance, when the occurrence has become more public or when something happens that calls for explanation, such as when a significant staff person suddenly leaves his or her post. In some circumstances, the announcement that is made or the information that is released may be negotiated with the individual or individuals concerned. This is desirable, as long as the information is truthful and not misleading. Often that negotiation will not be possible and you must formulate your own statement, which must be carefully worded so as to be truthful and not misleading without defaming the individual. Congregation leaders should advise members not to speculate about allegations and should take measures to avoid polarization within the congregation or blaming the victim.
11. If the matter has become the subject of media attention or you anticipate receiving a number of questions about it from members or other interested people, consider one of the following:
 - Identify a single person to act as the spokesperson and have everyone else in authority refer inquiries to that individual. This avoids the possibility of members of governing boards or involved individuals making statements that are inconsistent, poorly informed, defamatory, or otherwise inappropriate. The fewer people discussing the issue publicly, the less likely something will be said that will cause a problem.
 - Formulate a written statement and respond to all questions by reference to it.
 - Make, in appropriate cases, a statement that an investigation is being undertaken, and give assurance that the church will take appropriate action based on the results.
12. Where serious allegations have been made but you are unsure of their truth, suspending the alleged perpetrator (with pay, if employed) will often be in order to alleviate people's concerns and any fear of further incidents until the matter is resolved.
13. In addition to investigating the immediate allegation and taking appropriate action, review all of your congregation policies and procedures to determine what changes need to be made to prevent a recurrence (or occurrence, if you conclude that the allegations are not well founded) of the events complained of.
14. If the accused individual chooses to resign rather than face an investigation, you cannot prevent the resignation. There may be several good reasons, however, to proceed with your investigation anyway. Should a legal claim be brought, you might be in the best

position to identify information that would tend to clear the congregation from organizational liability if an investigation is conducted while memories of the event are fresh, and personnel are available to answer questions. You may learn information that is useful in preventing recurrences. And the victim and victim's family might be less likely to pursue a legal claim if they believe the church took the allegation seriously and took appropriate measures to prevent a recurrence. If the investigation is conducted properly, it should not provide a foundation for liability that does not already exist.

15. Be wary of negotiating to induce an alleged perpetrator to resign. Avoid entering into deals that have any hint of a cover-up, such as providing references or letters of recommendation that would enable the perpetrator to obtain future employment in a similar situation.
16. No matter how serious the allegations and how obvious it is or how persuaded you are that they are truthful, treat the perpetrator with dignity. If employment termination is necessary, be firm, candid, and unapologetic, but also be fair and humane. Do not be angry, insulting, or embarrassing. Be fair in the final paycheck.
17. If the investigation is inconclusive and you decide, after consulting counsel, that you are unable to terminate the employee, carefully monitor and supervise him or her thereafter.
18. Cooperate with law enforcement officials.

Hiring a Lawyer

Should you determine that you need to hire a lawyer, here are some suggestions to help you find the right one.

1. Remember that lawyers, like doctors and other professionals, often specialize. The lawyer who helped you with a real estate problem or tax question might not be the right person to try your lawsuit. Assess what specific needs you have, and look for an attorney who can help you with your situation.
2. If the attorney is a member of your congregation or another ELCA congregation, so much the better. The nature of the client and its concerns might be better understood from the outset. Prefer competence to a shared faith, however. While congregations might often prefer to deal with like-minded vendors of services, you will be better served by a qualified attorney who is not a Lutheran than an unqualified one who is.
3. If you do not know how to find the right lawyer, ask, in order,
 - other attorneys, for although they may not be specialists in your situation, they are the most likely to know how to find the person you want.
 - satisfied clients, especially if they are congregations that have dealt with problems similar to yours.Under ELCA polity, congregations are expected to manage their own affairs. Do not expect to rely on the synod's or ELCA's attorney; plan to hire your own.
4. Count the cost. You should determine the attorney's hourly rate or other basis for compensation, what other expenses can be anticipated for the services, and a

general estimate of cost. That estimate may cover a wide range, since situations requiring counsel are often not entirely controlled by either side and can outgrow anyone's original estimate of the scope of the battle. The cost of litigation may be sufficient reason to seriously consider an early settlement or alternative dispute resolution, discussed below.

5. Provide your attorney with all information pertinent to the case, the bad news along with the good. You will not receive the most effective advice or representation if your attorney is not fully informed and is constantly surprised by negative information you have withheld.
6. Do not accept lack of communication or inattentiveness to your case from your attorney. The attorney-client relationship is one of trust and confidence. If it is not maintained, retrieve the file and place it with an attorney in whom you do have confidence.
7. Pay your bills. Do not expect an attorney to give you free or reduced-fee services because you are a religious or nonprofit organization. That might sometimes occur, but attorneys' time and advice are all they have to sell, and they should not be presumed upon. If you are dissatisfied with the amount of the bills, discuss your concerns candidly with the attorney, and if you are unsatisfied with the explanation, seek other counsel.
8. If your attorney is not experienced in counseling churches, be sure to raise any concerns you have for religious freedom issues or inherently religious matters involved in the situation. There is a considerable body of law that has developed around such issues and that is not familiar to most attorneys who do not regularly serve churches or religious organizations.

Settlement

Litigation is often the worst approach to dispute resolution. It can be expensive, prolonged, embittering, and can also tie up personnel and resources, upset morale and spiritual growth within the congregation, and engender adverse publicity. Settlement or alternative dispute resolution mechanisms are often preferable to going through a lawsuit.

A legal claim can be settled at any time before or during the litigation process. Your attorney can advise you on the best strategy and timing. You should be aware, however, that settlement means compromise, with each side giving up something to which it thinks it is entitled. The ideal settlement, it is sometimes said, is one in which both parties are a little bit unhappy. Most cases will not be settled on terms that you choose, or with the other side simply becoming convinced of the rightness of your position and giving up its cause. A realistic appraisal of the cost of litigation, the possibility of an adverse result, the possible cost of that result, and other attendant burdens associated with the litigation may make settlement prudent.

On the other hand, if you are thinking about beginning litigation as a plaintiff, do not assume the other side will rush to settle as soon as you appear on the legal horizon. Before you start down the road, be sure you are prepared to go to the end if necessary. You do not want to be forced into an awkward compromise or to surrender in midstream because of an unrealistic expectation of the other side's weakness at the outset.

Alternative Dispute Resolution

There are a number of alternative dispute resolution (ADR) mechanisms available to help parties avoid some of the time, cost, and burden of litigation. These include conciliation or mediation, in which a neutral third person works to bring the parties to agreement. Parties might also pursue neutral evaluation, nonbinding arbitration, and summary jury trial. (In a summary jury trial, a neutral party, or sometimes an actual jury, hears with varying but limited degrees of length and formality the parties' positions or evidence and gives a nonbinding conclusion as to the correct or probable result.) And finally, binding arbitration involves an arbitrator, who makes a binding decision that decides the controversy.

Arbitration, summary jury trial, or other forms of ADR may be mandated or available on an optional basis in some courts. In addition, arbitration clauses in contracts may compel dispute resolution by arbitration, and courts will honor such clauses. Even if not required by contract, parties are also free to choose ADR by agreement among the litigants. ADR services are available through such long-established groups as the American Arbitration Association, which has offices in many cities nationwide. The association has an established set of rules for conducting arbitration proceedings. A number of private ADR firms are also proliferating, often with contract lawyers or retired judges as arbitrators, to meet what is sometimes perceived as a litigation crisis.

ADR is not always quicker and cheaper than litigation. For example, federal and most state laws permit parties to engage in some prehearing discovery in arbitration, as in court. "Discovery" is the legal process used by lawyers to obtain information, sometimes with the aid or force of a court order. Arbitration involves up-front costs that would not be required in court. Arbitration that cannot be completed in one or two days often requires the parties to return to the hearing on repeated and widely separated occasions, since arbitrators, unlike judges, usually have other jobs and responsibilities and are not free to sit indefinitely on a case until it is finished. All of these factors can drive up costs of ADR.

Other factors also sometimes suggest careful consideration before choosing ADR. Arbitrators are not required to follow the rules of evidence that apply in court. They do not have authority to issue collateral orders that are binding, such as attachments or injunctions, although their findings can become the basis for a court order. And there are very few grounds for appeal from an arbitrator's findings.

ADR methods short of binding arbitration often result in realistic evaluations of the parties' positions and encourage settlement. Binding arbitration is most effective for cases in which the evidence can be presented in one day, no complex legal issues are presented or expected to need resolution by a higher court, and it is more important to get the issue resolved promptly and inexpensively than correctly.

Disputes between Christians may lend themselves to resolution by the Christian Conciliation Service. This organization provides ADR services in a specific framework of biblical dispute resolution. Its objective is to reconcile the parties, as well as resolve disputes. See information in the resources section of this chapter.

Litigation

If your congregation is made a defendant in a lawsuit, you should do two things immediately.

First, notify your insurer and send it a copy of the process served on the congregation. If the insurer does not agree to defend the suit, check with your attorney before accepting the denial of coverage. If it agrees to defend under a reservation of rights, ask your own attorney if any other action on your part is advisable. Be sure to notify any insurers that have provided any possibly applicable coverage from the time of the first event that could lead to liability up to the present. Some claims are based on acts that occurred over an extended period of time and coverage may be provided by different policies and even different insurers.

Second, be sure the attorney representing you, whether hired by you or your insurer, files the necessary papers in a timely fashion at the outset of the suit. The court papers served on the congregation will include a summons or notice of some sort that will inform you as to when you must appear or respond to the claims. Failure to do so on time may result in the congregation being defaulted, that is, losing the lawsuit before it begins because the defendant did not defend it on time. Never ignore court process served on you, no matter how unfounded the claims seem to be.

It is your responsibility to be sure the insurer or your attorney is properly informed that the suit has begun and that they respond to it. Thereafter, your job is to cooperate fully with them, provide all information and records that are relevant, and be guided by them as the ongoing managers of the litigation. They are the experts who represent your interest in the matter most effectively. Do not try to manage the case yourself by communicating directly with the other side, talking to the press or others, making your own decision as to what information to give or withhold, or otherwise interfering with the professional management of the defense you have a right to expect from your insurer and your attorney.

If you are the injured party and might want to initiate a lawsuit, remember that the right to do so does not last forever. All claims are subject to various statutes of limitations that cause them to expire if not acted on within a given period of time. Some types of claims may require written notice to the prospective defendant before filing suit, and sometimes the period within which notice must be given is short. If you think you have a claim, consult counsel promptly.

Resources

Association of Christian Conciliation Services, 1537 Avenue D, Suite 352, Billings, MT 59102, has a variety of publications available on Christian conciliation.

Buzzard, Lynn R., and Laurence Eck. *Tell It to the Church: Reconciling Out of Court*. Elgin, Ill.: David C. Cook Publishing Co., 1982.

Couser, Richard B. *Ministry and the American Legal System*. Minneapolis: Fortress Press, 1993.

Qualben, James. *Peace in the Parish: How to Use Conflict Redemption Principles and Process*. San Antonio: LangMarc Publishing, 1991.

Sande, Ken C. *The Peacemaker: A Biblical Guide to Resolving Personal Conflict*. Grand Rapids: Baker Book House, 1990.

DISPUTE RESOLUTION

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|---|---|
| <p>I. Our congregation is familiar with and utilizes when applicable the conflict resolution and adjudicatory procedures of the ELCA.
Yes No</p> <p>II. Our congregation is in communication with the synod and uses synodical resources and assistance to resolve conflict within the congregation.
Yes No</p> <p>III. Our congregation is aware of and will utilize when applicable other resources for resolving conflict and dispute within the congregation.
Yes No</p> <p>IV. We have a crisis response team and a crisis response plan, or we understand how to get help through a synod response team, to address promptly serious allegations that could lead to litigation, such as sexual abuse on the congregation's property or in its programs by an employee or volunteer.
Yes No</p> <p>V. We notify our insurer immediately of any occurrences that could lead to litigation or raise a claim of liability.
Yes No</p> <p>VI. If suit is brought against us, we notify our insurer promptly and provide it with the papers served on us.
Yes No</p> <p>VII. If an allegation of wrongdoing or a suit is brought against us, we promptly notify our synod's officials.
Yes No</p> <p>VIII. If our insurer denies coverage for a claim or suit, or reserves the issue of coverage, we have our attorney review all insurance policies that may be applicable before accepting the denial.
Yes No</p> <p>IX. We investigate all allegations of misconduct on the congregation's premises or in its programs to a point of closure.
Yes No</p> <p>X. Our investigation protects the right of any person accused of wrongdoing by maintaining an appropriate level of confidentiality, giving the accused a full and fair opportunity to present information, not presuming the facts, and interviewing witnesses in a neutral and nonsuggestive manner.
Yes No</p> | <p>XI. We support the victim and family of the victim of any alleged wrongdoing without presuming wrongdoing before an investigation is completed, admitting congregation liability for the alleged wrongdoing, or taking over management of the liability issue from our insurer and attorney.
Yes No</p> <p>XII. We release information about allegations of wrongdoing and investigations only on a need-to-know basis to protect the confidentiality of the parties involved and to avoid defaming the accused wrongdoer.
Yes No</p> <p>XIII. We handle any employment discipline or termination necessitated by wrongdoing in accordance with our established employment practices and applicable state laws.
Yes No</p> <p>XIV. We are advised and represented by experienced counsel in matters that are in or may lead to litigation.
Yes No</p> <p>XV. We provide our attorney with all information pertinent to any matters that are in or may lead to litigation.
Yes No</p> <p>XVI. We make sure our attorney is aware of any religious freedom or religion-related concerns that we have about any matter in or that may lead to litigation.
Yes No</p> <p>XVII. We consider alternative dispute resolution, including, where appropriate, Christian conciliation through available services, to resolve disputes without litigation.
Yes No</p> <p>XVIII. We consult our attorney promptly if we are sued and make sure a timely response is filed in court.
Yes No</p> <p>XIX. We consult our attorney promptly and make sure action is taken in a timely manner if we think the congregation may have a basis for initiating a lawsuit.
Yes No</p> |
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Appendix

ELCA STRATEGY FOR RESPONDING TO SEXUAL ABUSE IN THE CHURCH

Elements of Policy and Procedure Recommended for Synod Responses to Complaints of Clergy Sexual Abuse (Adopted by the ELCA Church Council, November 6–9, 1992)

In keeping with ELCA polity, the 1989 Churchwide Assembly called upon each synod to create policies and procedures to empower victims to report incidents of sexual abuse, provide healing for victims, and safeguard the rights of those accused. Since that time, several synods have developed such policies.

The material subsequently enumerated is offered to synods for guidance regarding essential elements of policy as each synod works to develop policies that reflect its specific circumstances and particular contexts for ministry. These essential elements can be viewed as a sequence of steps that would normally be followed in responding to a specific complaint, while recognizing that in applying any policy to a specific situation, some deviation in sequence may be appropriate.

As part of a larger strategy for this church in all its expressions to deal with the problem of sexual abuse, and especially sexual abuse committed by clergy, the Church Council of the Evangelical Lutheran Church in America now calls upon each of the synods to review existing policies and procedures and to develop policies that include each of the following elements:

1. Adequate Preparation

A synod is in the best position to receive and process a complaint if it is ready to do that. Being prepared to receive a complaint implies that the synod has policy and procedures in place and that a synod has established an inviting and hospitable atmosphere for hearing complaints of sexual abuse by clergy. In addition to an ongoing educational effort about sexual abuse, a synod needs to provide clear and well-publicized information to congregations and related agencies, and institutions on how the synod will respond—and who, within the synod structure, should be contacted. Adequate preparation also implies an effort of theological reflection about sexual abuse in the church.

2. Initial Contact—First Response

Each bishop designates a qualified person (who may be the bishop) to hear fully and promptly the complainant's story, to assure the complainant that this church takes sexual abuse by clergy seriously, to provide information about the synodical procedure, and to respond with pastoral concern to the complainant.

3. Initial Investigation of the Complaint

The bishop (together with such persons as the bishop designates) engages in an initial review of the complaint to determine what additional investigation is necessary, whether there may be additional complainants, how the com-

plaining witness's story can be best documented, whether state law may have implications for the process, whether other synods need to be involved, how the complainant's story may be corroborated, whether immediate intervention with the pastor in question is necessary, and like matters. At the same time, the bishop should determine how to provide for the pastoral care and the needs of the complainant. A complainant has a right to be accompanied to any meetings by an advocate of her/his choosing at all meetings.

4. Conversation with the Pastor

The bishop provides the pastor with information on the complaints made against her/him, provides her/him with the opportunity for an initial response to those complaints, describes the synod's policy and procedure, informs the pastor of the action the synod will be taking in this case, discusses options, and if appropriate, makes recommendations to the pastor and provides for her/his pastoral care. In appropriate cases the bishop should also clarify that the pastor in question is to have no contact with possible complainants and is not to engage in or cause reprisal or retaliation of any kind against the complainant(s).

During this part of the process, it is important to provide continuing care of the complainant. Inform complainant(s) of the results of the meeting with the pastor in question and of the next steps in the process.

5. Assess the Information

The bishop determines a fair and equitable response to the complaint, which may include no further action, further investigation; convening a consultation or advisory panel; proceeding directly to written charges and hearing before a discipline hearing committee. The bishop may also need to decide whether temporary suspension pursuant to ELCA 20.21.23. and 20.21.24. is in order.

6. Consultation or Advisory Panel

The bishop has the discretion to convene a consultation or advisory panel to assist her/him in bringing a just and appropriate resolution to the complaint. When appointed at the request of the synodical bishop, a consultation or advisory panel advises the bishop as to whether or not the bishop should bring charges. The consultation or advisory panel may recommend that the ordained minister resign from the current call from the clergy roster. Whenever possible, a consultation panel or an advisory panel shall endeavor to resolve the controversy through recommendations that are pastoral and therapeutic and that, if accepted by the parties and others concerned, will eliminate the necessity for proceedings before a discipline hearing committee.

7. Formal Hearing

Formal proceedings before a discipline hearing committee are commenced when written charges are filed, usually by the bishop. The charges set forth the offense of which the

accused is alleged to be guilty with specifications stating what the accused is alleged to have done, which, if true, constitute an instance of the offense. The discipline hearing committee composed of a nonvoting chair or hearing officer and 12 voting members, six from the synod discipline committee and six from the churchwide discipline committee, then holds a formal hearing on the charges at which the testimony of witnesses and other evidence is presented by the accuser and the accused. The witness(es) for the accuser will normally include the complainant(s). This proceeding is to be conducted to assure due process, as defined, and due protection for the accused, other parties including the complainant(s), and this church.

8. Disclosure

The synod supports and enhances the process of healing for individuals, the congregation, and the community through the appropriate disclosure of information. Except in the most unusual of circumstances, disclosure is always necessary. Disclosure needs to be made to those who need to know, including the congregation. Experience has demonstrated that where disclosure is made to the congregation served by the pastor in question, the healing within that congregation is better realized, even though the initial trauma may be greater. Disclosure should never involve revealing the identity of the complainant(s), or of facts that would make the complainant(s) readily identifiable.

What needs to be decided is how much is to be disclosed and when. This decision needs to be tailored to the needs of the persons and organizations most affected. Any time there is admission of guilt, resignation from the congregation or the clergy roster, temporary suspension, or a finding of guilty in a discipline proceeding, then disclosure is essential to the healing process of all parties—the complainant(s), congregation, and accused pastor.

9. Follow-up

The synod should plan and implement long-range follow-up efforts with respect to each case, so that all those affected—individuals, their families, congregations, and the broader community—may experience grace, peace, and healing following this time of crisis.

Resolution Adopted by the 1989 ELCA Churchwide Assembly

WHEREAS, all persons were created by God in the divine image, and human sexuality is a gracious gift of God;

WHEREAS, our Baptism into the family of God calls us to stand firmly and pastorally against all forms of abuse and to respect and empower our brothers and sisters in Christ;

WHEREAS, sexual violence of many kinds is widespread in our society (including sexual harassment on the job, rape and sexual assault, incest, and child sexual abuse), and ex-

perts estimate that two-fifths of working women experience sexual harassment, two-fifths of all American women experience one or more incidents of sexual assault, and one-third of American children experience sexual abuse before the age of 18; and

WHEREAS, sexual harassment and sexual abuse betray God's creation, inflict grievous suffering on the victims, and rend the fabric of the whole community of the people of God; therefore be it

RESOLVED, that the Evangelical Lutheran Church in America commit itself to work to make our church a safe place for all persons by working to eliminate these abuses; and be it further

RESOLVED, that the Evangelical Lutheran Church in America will not tolerate any forms of sexual abuse or harassment by any of its personnel; and be it further

RESOLVED, that each congregation commit itself to become a safe place by working to

- a. provide an atmosphere where sexual abuse can be discussed with the freedom and compassion of the gospel, and where specific acts of ministry are encouraged;
- b. engage in education and prevention of all forms of sexual abuse and harassment;
- c. provide pastoral care for survivors and referrals for treatment of offenders;
- d. create policies and procedures that assist and support the members of the congregation and its leadership to cope in healing and redemptive ways with these abuses; and
- e. manifest its concern for problems of this kind in its community, e.g., families, schools, and workplaces;

and, be it further

RESOLVED, that each synod shall commit itself to

- a. examine the issues of sexual harassment and abuse as manifested in its synod, in cooperation with appropriate ELCA churchwide units, and with local or regional specialists in its area;
- b. create policies and procedures that empower victims to report incidents of sexual harassment and abuse, provide healing for victims, and safeguard the rights of those accused;
- c. assist congregations in creating their policies and procedures; and urge congregations to inform personnel of these policies and procedures; and
- d. sponsor and encourage theological reflection and insight on these issues;

and, be it further

RESOLVED, that this assembly call upon the Commission for Church in Society to include sexual harassment and abuse in its forthcoming Social Statement on Sexuality.