



SEVEN THINGS ALL CHURCHES SHOULD HAVE IN THEIR BYLAWS *Proactively Protecting the Church's Right to Be the Church*

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In the wake of battles in several states over the issue of same-sex “marriage,” the institution of federal “hate crimes” legislation and the adoption by states and local governments of special rights for those engaging in homosexual behavior, many churches are unsure of their legal rights. Churches have broad constitutional protections designed to ensure the free exercise of religion and to prevent intrusion by the state into matters of doctrine and church autonomy. While these broad constitutional provisions protect the church’s ability to minister freely according to its own dictates, there are proactive steps that churches can take to further protect and insulate themselves from attacks that threaten the church’s independence.

The following items are suggestions to strengthen the bylaws of a church to ensure the broadest possible protections of church autonomy. There is no “magic language” in any of these areas and churches should incorporate their own language and traditions. The point is not to create specific language to be copied, but merely to ensure that these areas are covered by the church’s bylaws.

#1: FORMAL MEMBERSHIP POLICY

Churches should always have a formal process by which congregants become members. Churches enjoy substantial freedom under the U.S. Constitution to govern themselves as they see fit without fear of legal consequences. Courts “do not exercise jurisdiction over the internal affairs of religious organizations.”¹ The Supreme Court has recognized “a spirit of freedom for religious organizations, an independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine,” and has recognized that this freedom is rooted in the Free Exercise Clause of the U.S. Constitution.² Thus, the Constitution protects church conduct, even where that conduct causes personal injury that would otherwise be actionable in court: “When the imposition of liability would result in the abridgment of the right to free exercise of religious beliefs, recovery in tort is barred.”³

¹ *Tomic v. Catholic Diocese of Peoria*, 442 F.3d 1036, 1037 (7th Cir. 2006).

² *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952).

³ *Paul v. Watchtower Bible and Tract Society of New York, Inc.*, 819 F.2d 875, 880 (9th Cir. 1987).

But this freedom has limitations. “Only those ‘who unite themselves’ in a religious association impliedly consent to its authority over them and are ‘bound to submit to it.’”⁴ So, in order for a church to claim immunity against a possible tortious act,⁵ the alleged victim must be (or have been) a member of the church. This is very difficult to determine if the church does not have a formal membership policy.

#2: PROCEDURE FOR MEMBER DISCIPLINE/MEMBERSHIP REVOCATION

Generally speaking, a church cannot be held liable for disciplining a church member or terminating his or her membership. “Courts generally do not scrutinize closely the relationship among members (or former members) of a church. Churches are afforded great latitude when they impose discipline on members or former members.”⁶ There are exceptions, however. The most common is when a church disciplines a member or terminates a person’s membership because that person refuses to stop engaging in sinful behavior, and the church leaders reveal the sinful behavior to the congregation. This can lead to claims against the church for invasion of privacy, intentional infliction of emotional distress, defamation, etc.⁷

There are some simple steps a church can take to help avoid such claims. First, a church should have each step of its procedure for discipline and membership termination explained in its bylaws. If the church believes that it may be necessary to reveal to the congregation the reason for the discipline/termination, it is essential that this be a part of that procedure. Second, as part of the process for becoming a member, a church should provide all prospective members a copy of the bylaws and have them sign a statement that they have read them. And, of course, the church should *always* follow the procedures in the bylaws.⁸

As part of the church discipline process, the church should also consider including a provision in its bylaws that a member cannot voluntarily withdraw or resign membership once the discipline process has begun. See the explanation in #3 below for more details on this provision.

⁴ *Guinn v. Church of Christ of Collinsville*, 775 P.2d 766, 779 (Okla. 1989); *accord Owen v. Bd. of Directors of Rosicrucian Fellowship*, 342 P.2d 424, 426 (Cal. App. 1959) (“A person who joins a church covenants expressly or impliedly that in consideration of the benefits which result from such a union he will submit to its control and be governed by its laws, usages, and customs”).

⁵ A tort is any wrongful act that results in injury to another’s person, property, or reputation. Examples include breach of contract, assault, defamation, invasion of privacy, intentional infliction of emotional distress, etc.

⁶ *Paul*, 819 F.2d at 883.

⁷ *See, e.g., Snyder v. Evangelical Orthodox Church*, 216 Cal.App.3d 297, 307 (1989) (allowing case against church to go forward because the church’s bylaws were silent about whether confessions could be revealed to the congregation).

⁸ The Supreme Court has repeatedly affirmed that churches have the right to decide purely religious and ecclesiastical matters for themselves, but has recognized that if “fraud, collusion, or arbitrariness” is present, the civil courts may be empowered to intervene to decide such a case. *See Gonzalez v. Roman Catholic Archbishop*, 280 U.S. 1, 16 (1929). Some state courts have reviewed cases brought to challenge membership decisions if the church did not comply with its procedures and bylaws. *See, e.g., Konkel v. Metropolitan Baptist Church, Inc.*, 572 P.2d 99 (Ariz. 1977) (finding that the court had jurisdiction to determine if removal of church members complied with the procedures in the church bylaws); *LeBlanc v. Davis*, 432 So. 2d 239 (La. 1983) (same); *First Baptist Church v. State of Ohio*, 591 F. Supp. 676 (S.D. Ohio 1983) (finding jurisdiction to adjudicate claim that expulsion of members was a result of fraud or collusion); *Hatcher v. South Carolina Dist. Council of the Assemblies of God*, 552 S.W.2d 865 (Tex. 1977) (same).

If these steps are followed, then courts are much less likely to consider a tort claim against a church for its internal discipline process, unless the church's conduct was so "extreme and outrageous" as to justify intruding on the church's religious liberty.⁹

#3: PROCEDURE FOR RESCINDING MEMBERSHIP

Just as the church should have a written policy for terminating membership, it should also have a written policy for how members can disassociate from the church. Courts have held that church members have a First Amendment right to terminate their membership.¹⁰ Once a member has rescinded her membership, she is no longer consenting to the church's doctrine. This could limit a church's legal protection if it is sued for disciplining someone *after* they have revoked their membership. At least one state court has allowed a suit to proceed against the elders of a church who attempted to discipline an individual after she had formally withdrawn her membership.¹¹ But that court also held that an individual can waive their constitutional right to withdraw from church membership in the midst of a discipline process as long as the waiver is "voluntary and intentional."¹² With a formal revocation policy, it is easy for all parties involved, including the court, to identify when the membership was terminated – otherwise a court will decide on its own.

The church should place a provision in its bylaws for formally terminating membership and this provision should prohibit the voluntary resignation or withdrawal of membership of a member once the discipline process has begun. Because the waiver of a church member's right to resign his membership must be voluntary and intentional, it is a good idea to have church members sign an explicit statement that they have read and agree to this provision of the bylaws.

Some churches do not want to limit their members' ability to resign from the church and want to allow their members to resign voluntarily from church membership at any time, even in the midst of a disciplinary policy. However, should churches choose not to place an explicit procedure for rescinding membership in their bylaws, they should be aware that their ability to discipline a member *after* the member has resigned is strictly limited and a court may intervene to halt discipline directed against a member that has already resigned their membership.

#4: JOB DESCRIPTIONS AND RELIGIOUS GROUNDS FOR LIMITING EMPLOYMENT OPPORTUNITIES

Federal law prohibits discrimination in employment on the basis of race, color, religion, sex, national origin, or age.¹³ State non-discrimination laws are similar, but some also ban discrimination on the basis of sexual orientation.¹⁴

⁹ *Snyder*, 216 Cal.App.3d at 309.

¹⁰ *See, e.g., Guinn*, 775 P.2d at 776 ("Just as freedom to worship is protected by the First Amendment, so also is the liberty to *recede* from one's religious allegiance").

¹¹ *See Guinn*, 775 P.2d at 766 (permitting lawsuit against church and elders to proceed when the elders disclosed the details of the conduct of the individual to the church after the individual had explicitly resigned her membership).

¹² *Guinn*, 775 P.2d at 779.

¹³ *See* 42 U.S.C. § 2000e-2; 29 U.S.C. § 621 et seq.

The government is very protective of church autonomy and generally does not interfere with church hiring practices. Federal law exempts religious organizations and allows them to consider an applicant's religious beliefs in hiring for all positions.¹⁵ For hiring clergy, none of the federal non-discrimination regulations apply.¹⁶ And under most state laws, religious non-profit organizations are entirely exempt from these regulations.¹⁷

But, should a dispute arise, churches can best protect themselves from discrimination claims if they provide job descriptions in their bylaws for every position in the church and explain in the job description how the position furthers the religious mission of the church. These position descriptions should include the religious grounds for limiting employment opportunities – especially if the limitations involve any of the categories listed above. Thus, if the church's beliefs require that only certain positions be held by men, for example, this should be stated in the bylaws with support from Scripture. This firmly establishes that there is a religious basis for the church's limitations on employment, and is unlikely to be questioned by a judge.

Additionally, churches should ensure that they are consistently following their employment rules to protect themselves from claims of employment discrimination. Churches must handle similar cases similarly and cannot use religion to treat a protected class of people more favorably than others. For example, churches might be vulnerable if they terminate an unmarried, pregnant female employee on religious grounds, but do not terminate a male pastor guilty of extramarital sexual relations. Consistency in employment decisions will protect the church from employment discrimination claims.

#5: STATEMENT OF RELIGIOUS BELIEF REGARDING MARRIAGE

With the rise of same-sex “marriage,” domestic partnerships, and civil unions, churches are regularly being confronted with these marriage counterfeits and asked to recognize these relationships. This can arise in the area of employment (see previous section) and whenever churches offer classes, retreats, or other events designed for married couples. Churches should include in their bylaws a Biblical definition of marriage and a statement that marriage is the only legitimate and accepted sexual relationship. This will help protect the church if it is forced to

¹⁴ Twenty states currently prohibit discrimination in employment on the basis of sexual orientation: California, Colorado, Connecticut, District of Columbia, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Jersey, New Hampshire, New Mexico, New York, Oregon, Rhode Island, Vermont, Washington, and Wisconsin. Seven states also prohibit employment discrimination on the basis of gender identity or expression: Connecticut, Maryland, Massachusetts, Nevada, New Hampshire, New York, and Wisconsin.

¹⁵ *McClure v. Salvation Army*, 460 F.2d 553, 558 (5th Cir. 1972).

¹⁶ *Id.* at 558-61; *Scharon v. St. Luke's Episcopal Presbyterian Hosp.*, 929 F.2d 360 (8th Cir. 1991).

¹⁷ *See, e.g.*, Cal. Gov't Code § 12926(d); Col. Rev. St. §24-34-401(3); Conn. Gen. Stat. §46a-81p; D.C. Code §2-1401.03; Hi. Rev. Stat. 378-3(5); 775 Ill. Comp. Stat. 5/2-101(B)(2); Iowa Code §216.6(6)(d); 5 Me Rev. Stat. §§ 4553(4) & 4573-A; 49-B Md. Code §18; 151B Mass. Gen. Laws §4; Minn. Stat. §363A.20; Nev. Rev. Stat. §613.320 & 613.350; N.J. Stat §10:5-12; N.H. Rev. Stat. §354A:7; N.M. Stat. §28-1-9(B); N.Y. Exec. Law 296(11); Or. Rev. Stat. §659A.006; R.I. Gen. Laws §28-5-6(7)(ii); 21 Vt. Stat. §495; Wash. Code §49.60.040(3); Wis. Stat. §111.337.

terminate/punish an employee for engaging in unbiblical sexual relationships,¹⁸ or if the church declines to allow an unmarried couple to participate in events designed for married couples.

#6: IDENTIFY GOVERNING BODY THAT IS THE SOLE AUTHORITATIVE INTERPRETER OF SCRIPTURE

It is impossible to anticipate every doctrinal dispute that a church could encounter. Thus, churches should include a statement in the bylaws that its governing body (e.g. elder board, executive committee, etc.) is the church's sole authoritative interpreter of Scripture. This will allow the governing body to issue an interpretation of Scripture whenever a dispute arises that cannot be questioned by courts.¹⁹

#7: DUE DILIGENCE REQUIREMENTS FOR ALL VOLUNTEERS AND STAFF WHO WORK WITH CHILDREN

Churches have a legal obligation to help protect the children in their care: “[C]hurches and the adult church workers who assume responsibility for the spiritual well being of children of the congregation, whether as paid clergy or as volunteers, have a special relationship with those children that gives rise to a duty to protect them from reasonably foreseeable risk of harm from those members of the congregation whom the church places in positions of responsibility and authority over them.”²⁰ Thus, churches need to do due diligence when selecting staff and volunteers to work with children. This could include conducting background checks and requesting references. It is also important to avoid situations where staff members or volunteers are alone with children.

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¹⁸ See, e.g., *Bryce v. Episcopal Church in the Diocese of Colorado*, 121 F. Supp.2d 1327 (D. Col. 2000) (Holding that a lesbian youth minister that was terminated as a result of her “commitment ceremony” could not bring a claim against the church for her termination because such a claim as barred by the First Amendment); see also *Gunn v. Mariners Church*, 2005 WL 1253953 at *2 (Cal.App. 4 Dist. 2005). *Gunn* involved the termination of a worship pastor who was engaging in homosexual conduct. The pastor tried to argue that the church’s doctrine did not prohibit homosexuality. But because the church was able to demonstrate otherwise, the court refused to second-guess the church’s employment decision. *Id.*

¹⁹ *Gunn*, 2005 WL 1253953 at *2. (courts “cannot undertake...a mission” of finding what is and is not “moral” or “sinful” within the beliefs of a particular church).

²⁰ *Funkhouser v. Wilson*, 950 P.2d 501, 509 (Wash.App. Div. 1 1998); accord *Evan F. v. Hughson United Methodist Church*, 8 Cal.App.4th 828, 843 (1992).