

Charitable immunity no longer exists, so prepare for litigation

Legal planning process can improve management skills and protect churches against runaway juries.

The doctrine of charitable immunity is dead. Strangers, church members and church employees alike feel no reluctance to sue a church. The number and types of claims against churches have exploded.

The tsunami of sexual abuse claims which forced four Catholic Dioceses into bankruptcy fundamentally altered the way juries react to lawsuits against all churches, Catholic and Protestant alike. In light of this litigation-prone environment, good stewardship requires a comprehensive review of the risks

If your church has substantial assets, particularly equity in its real estate holdings, in most cases it is not protected from hostile claims.

facing churches. If your church has substantial assets, particularly equity in its real estate holdings, in most cases it is not protected from hostile claims.

All churches face the possibility of a runaway jury verdict. The \$37 million verdict against the Salvation Army for the crash of a 15-passenger van or \$35 million verdict against the Evangelical Lutheran Church in Mitchell, TX arising from a sexual abuse claim are notable examples. Surprisingly, the insurance carriers for churches report that a high percentage of claims against churches (well over 50 percent in most years) are filed by the churches' own employees.

Pastors are exposed to new lawsuits

Pastors are also exposed to new types of lawsuits which were unheard of a generation ago. Even church board members can, under certain circumstances, be sued personally for claims arising from church matters. Your church's general liability insurance

policy may not provide adequate insurance to cover the value of its holdings. Moreover, the insurance market is volatile. Liability insurance coverage has become increasingly expensive, harder to obtain, contains shrinking limits and may have unexpected exclusions from coverage.

Many insurance carriers have narrowed the scope and the dollar amount of available insurance coverage for sexual abuse claims and for certain types of employee claims. Typical church liability insurance with a \$1 million general limit may restrict coverage for sexual abuse claims to \$300,000. These factors expose your church assets to the risk of being diverted from its intended charitable purpose to be used instead as forced payment of uninsured or underinsured claims.

We developed "The Campus Preservation Planning" process about five years ago. Scottsdale Christian Academy, a well-known Christian School in Scottsdale, AZ, pioneered this concept. The proactive planning goes beyond traditional loss prevention programs. Though originally developed in the context of protecting the resources of a Christian school, this process

can also be used to aid a well-managed church (or para-church organization) in fulfilling its mission in this increasingly hostile legal environment.

This process imports the liability shields commonly used by commercial enterprises into the nonprofit arena. Using an analytic process based on our "Twin Pillars of Stewardship" — churches should be prepared to respond fairly to a just claim, and also be equipped to resist an unjust claim — concepts grounded in real property law are combined with well-accepted corporate asset holding patterns and trust doctrines. Special care must be taken to comply with detailed IRS regulations and to avoid inadvertently incurring sales, rent and/or real property taxes.

We recommend this four part planning process:

>>

By Robert Erven Brown and John R. Politan

PHASE 1

Phase one is "The Snapshot": Risk assessment, resource inventory, ministry overview and outline/diagrams of legal entities.

This "due diligence" review contains questions which would be raised by attorneys for a creditor with a large judgment against the church (i.e., in excess of applicable insurance limits) and questions which would be raised by a lender's attorneys in the process of preparing documents for a large loan to the church.

The reviewing attorneys determine if the corporation is being operated in compliance with Federal and state statutory requirements. The checklist is also useful in analyzing the strengths and weaknesses of the church legal structure, asset holding pattern, cash management, vulnerability to unjust claims, ability to respond to just claims and general loss prevention strategies. By taking proactive steps before a claim occurs, the church strengthens the existence of its corporate shield, as well as its compliance with the fundamentals of good stewardship.

PHASE 2

Phase two is the "Concept Memo": Analyze weaknesses, propose alternative proactive resource plans and begin interactive discussions.

The phase two analysis contains a basic plan with carefully chosen possible alternatives to correct the weaknesses identified in the phase one study. A typical phase two analysis includes recommendations for specific volunteer, pastoral, and employee legal training, changes to the type and amount of insurance coverage, alternative plans for implementing a multiple company ownership structure, use of leases, joint occupancy agreements, deed restrictions, and the like.

Only after approval by tax, legal, insurance and risk management reviewers is the proposal submitted for formal approval. For example, the presence of potential exposure resulting from a day-care program, an elementary or high school, gymnasium, skate park, youth camp, college, seminary, overseas mission travel, 15-passenger vans, airplanes, assisted living center, health clinic, or donated "for profit" operations such as a ranch, oil field, marina, timeshare project, cemetery, etc., can add time and complexity to the analysis.

PHASE 3

Phase three is "Implementation Assistance": The approved concept is implemented in a staged, cost effective manner after formal approval by the church board in compliance with church bylaws and/or other governing documents. The church's legal structure, asset holding pattern, insurance policies and operations are honed to be in full compliance with the approach, i.e., (1) to increase the church's ability to respond fairly to just claims and (2) to reduce vulnerability to unjust claims.

PHASE 4

Phase four is "Compliance Review": Ongoing periodic review of operating and legal compliance is especially critical during the first two years of operations under the reorganized legal structure. A periodic review is important to ensure that proper accounting protocols, corporate minutes, etc., are being maintained.

Professional review of operating results and audit findings in a year or so after implementation is highly recommended to see if the new leadership and new staff members are still "in sync" with the previous plans. Checklists, continuing education, and an "open line" to the professional planners are all helpful to ensure that the church's effort is not undermined by failing to follow the "corporate formalities" which are critical if the church's new legal structure is to withstand the test of time.

Like most churches in the U.S., your church is most likely not using the full complement of legal structures to protect its critical resources from unjust claims. Our process was created using input from litigators, pastors and commercial transaction specialists to aid churches in the effort to preserve its campus for generations to come. To create an effective shield for church assets, however, you must act before a claim occurs.

By implementing this approach, church leaders can retain the discretion to decide how and when to settle major claims. Rather than being forced to settle unjust claims at the point of a sword, this process equips your leadership with the legal tools to retain discretion in choosing which claims to resist as well as being equipped to respond appropriately to just claims. Most importantly, by conducting a thorough management, insurance and risk management review, the probability of a devastating claim is greatly reduced.

HOW "CAMPUS PRESERVATION PLANNING" WORKS:

- Phase 1: Snapshot planning assumptions
- Phase 2: Concept memo
- Phase 3: Budget approval and implementation
- Phase 4: Monitoring and compliance

Robert Erven Brown [Bob@REBpa.com] and John R. Politan [jrp@johnpolitan.com] work with church and parachurch organizations throughout the U.S. using the "Campus Preservation Planning" concept.