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No Sanctuary from the Law: Legal Issues Facing Clergy

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I. INTRODUCTION

"I don't want to know" can be five of the most dangerous words in our litigious society. Ignorance is a poor excuse for liability issues, and can be extremely hazardous to the life of clergy and their institutions. Staggering legal costs, whether an enterprise is vindicated or not, can significantly devastate both the individual and the organization's financial and emotional resources. Still, some religious associations and their clergy continue to think they are insulated from this legal reality by divine immunity. Perhaps they believe that they will not be sued because they have altruistic intentions; or maybe there is a belief that laypeople do not sue clergy and their churches or synagogues out of an inherent respect for religious leaders.[1] In light of these naive views, there are few vehicles for clergy to become informed about their legal exposure.

While well publicized cases like *Nally v. Grace Community Church*[2] and *Tarasoff v. Regents of the University of California*[3]

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1. Ben Zion Bergman, *Is the Cloth Unraveling? A First Look at Clergy Malpractice*, 9 SAN. FERN. V. L. REV. 47, 66 (1981). The author concludes that "[m]ost people have an inherent respect for the clergy and share the feeling that to sue a clergyman partakes of irreverence for him and the religion he serves, which sentiment would act as a deterrent to bringing suit." *Id.*

2. 47 Cal. 3d 278, 763 P.2d 948, 253 Cal. Rptr. 97 (1988) (raising the issue of whether or not clergy have a duty to prevent suicide).

3. 17 Cal. 3d 425, 551 P.2d 344, 131 Cal. Rptr. 14 (1976) (holding that a psychiatrist had a duty to warn a third party threatened by a client during a counseling session). The duty articulated in this opinion has become a required duty for psychiatrists, psychotherapists, and social workers. *See* Peter F. Lake, *Revisiting* Tarasoff, 58

spawn articles and discussion of a particular legal topic, courses at seminaries or conventions for clergy on legal liability issues are few and far between. Unlike college business programs that require exposure to the legal environment, religious educators perceive no such need. This Article contends that courses in seminaries and at clergy conventions should become the rule rather than the exception. Clergy need to become more aware of the legal minefields so that they can better protect themselves and their religious communities.

When one thinks of our ministers, rabbis, and priests, one often envisions them from the congregant's viewpoint. Clergy may incorrectly conclude that their functions are limited to providing ritualistic services and religious counseling. A closer look reveals that the minister is often a manager who supervises employees and volunteers. Moreover, the synagogue or church is a work environment where concerns of sexual harassment and discrimination might be present.[4] Lastly, the clergyperson may have a fiduciary duty to act in certain ways when conducting business on behalf of a nonprofit organization.[5] Add to this mix all the legal issues that potentially arise in pastoral counseling and the job description quickly supersedes that of spiritual leader.[6]

This Article addresses several legal topics facing the clergy community: the realities of clergy-congregant privilege, child molestation and mandatory reporting requirements, employment law, wrongful termination of an employee, and sexual harassment. This Article has two goals. First, it seeks to introduce clergy to some common legal snares in the hope that religious leaders will

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ALB. L. REV. 97, 100 (1994) ("Most jurisdictions consider *Tarasoff* favorably and only one court has openly rejected its holding to date") (citations omitted); *see also* Michael R. Geske, Note, *Statutes Limiting Mental Health Professionals' Liability for the Violent Acts of Their Patients*, 64 IND. L.J. 391, 400 n.55 (1989) (citing expansions and limitations of the *Tarasoff* doctrine).

4. *Cf.* Eduardo Cruz, Comment, *When the Shepherd Preys on the Flock: Clergy Sexual Exploitation and the Search for Solutions*, 19 FLA. ST. U. L. REV. 499, 505 (1991) (discussing the exploitation of parishioners by clergy).

5. *See infra* Part IV.A.

6. *See generally* James T. O'Reilly and JoAnn M. Strasser, *Clergy Sexual Misconduct: Confronting the Difficult Constitutional and Institutional Liability Issues*, 7 ST. THOMAS L. REV. 31 (1994) (discussing a religious institution's potential liability for the sexual misconduct of clergy members under negligence and respondeat superior theories); Raymond C. O'Brien & Michael T. Flannery, *The Pending Gauntlet to Free Exercise: Mandating that Clergy Report Child Abuse*, 25 LOY. L.A. L. REV. 1 (1991) (analyzing whether the Free Exercise Clause protects discussions about child abuse in a confidential religious setting from state-mandated reporting requirements).

become aware of the serious potential of liability issues that face them. Second, it is targeted at the legal professional, who should be encouraged to help individual religious leaders become better informed in order to guard against the growing number of potential liability "sinkholes."

II. COUNSELING RELATED ISSUES

A. Confidential Communication

To better understand clergy-congregant privileges one must start with a review of protected communications generally. To encourage frankness and the free flow of information between professionals and their clients, certain professions have been accorded the legal and ethical right to keep communications with their clients confidential.[7] Traditionally, attorney-client communications have been kept confidential by the canon of ethics adopted by each state or its bar association.[8] The attorney-client privilege has now been codified by both state and federal statutes.[9] Although some privileges may be sought in the codes of ethics of other professions such as accountants, physicians, therapists, etc., there has not been a unified recognition of their right to protect "communications" with their clients.[10] Each state has adopted statutes that may or may not allow client communication to be held free from the eyes of courts and other government agencies.[11]

In many states clergy and congregants are given the right to hold their penitential communications privileged.[12] Against the backdrop of privileged communication for various professionals, clergy have often asserted a clergy-congregant privilege.[13] The Su-

7. Roger L. Miller & Gaylord A. Jentz, BUSINESS LAW TODAY 965 (3d ed. 1994).

8. *See, e.g.*, CAL. BUS. & PROF. CODE § 6068(e) (West Supp. 1996).

9. *See* FED. R. EVID. 501; *see, e.g.*, CAL. EVID. CODE §§ 950-952 (West 1995).

10. Miller & Jentz, *supra* note 7, at 965; *see, e.g.*, CAL. EVID. CODE §§ 990-992, 1010-1012 (West 1995).

11. Mary Harter Mitchell, *Must Clergy Tell? Child Abuse Reporting Requirements Versus the Clergy Privilege and Free Exercise of Religion*, 71 MINN. L. REV. 723, 740 (1987); *see, e.g.*, CAL. EVID. CODE §§ 917, 992, 1010.5, 1012 (West 1995); WIS. STAT. ANN. § 905.04 (West 1993).

12. *See, e.g.*, CAL. EVID. CODE §§ 1028, 1032 (West 1995); COLO. REV. STAT. ANN. § 13-90-107 (West 1996); WIS. STAT. ANN. § 905.06 (West 1993).

13. *See, e.g.*, *In re* Grand Jury Investigation, 918 F.2d 374 (3d. Cir. 1990); Ellis v. United States, 922 F. Supp. 539 (D. Utah 1996); Niemunn v. Cooley, 637 N.E.2d 943 (Ohio Ct. App. 1994).

preme Court has stated that "[t]he priest-penitent privilege recognizes the human need to disclose to a spiritual counselor, in total and absolute confidence, what are believed to be flawed acts or thoughts and to receive priestly consolation and guidance in return."[14] However, with the exception of communication made to a Catholic priest in the confessional, most religions do not require their clergy to keep communication with congregants confidential.[15]

These privileges are not absolute. In many cases such professionals may be compelled to disclose confidential information regarding their client to state or federal authorities.[16] In addition, most states require psychiatrists, psychologists, and social workers to report to the authorities when their clients have threatened acts of physical harm to themselves or to a third person.[17] For example, the well-known *Tarasoff* precedent requires all California professional counselors to report any client who has threatened to inflict bodily harm on another.[18] Arguably, this duty to disclose information should apply to a clergyperson who learns in a confidential communication that a congregant threatens to harm a third party.[19] This may mean that the clergyperson has the responsibility to warn not only to a government authority but also to the potential victim[20] if the clergy person reasonably believes that the congregant may commit the crime.

14. Trammel v. United States, 445 U.S. 40, 51 (1980).

15. *See* Mark Henry, *Admission of Crime by Penitent Creates Hard Choice for Clerics*, L.A. TIMES, May 31, 1986, Part II at 3. For example, California only affords this privilege when "under the discipline or tenets of [the clergyperson's] church, denomination, or organization, [the clergyperson] has a duty to keep such communications secret." CAL. EVID. CODE § 1032 (West 1995).

16. For example, there is an exception to the psychotherapist-patient privilege when the patient is dangerous. Stanley Mosk, *Psychotherapist and Patient in the California Supreme Court: Ground Lost and Ground Regained*, 20 PEPP. L. REV. 415 (1993).

17. Arthur Gross Schaefer, *Divine Immunity: Should Clergy be Subject to a Standard of Care?*, 40 CPCU J. 217, 221 (1987).

18. Tarasoff v. Regents of the University of California, 17 Cal. 3d 425, 431, 551 P.2d 344, 340, 131 Cal. Rptr. 14, 20 (1976).

19. *See generally* Mary Harter Mitchell, *Must Clergy Tell? Child Abuse Reporting Requirements Versus the Clergy Privilege and Free Exercise of Religion*, 71 MINN. L. REV. 723 (1987) (discussing the clergy privilege and its conflict with child abuse reporting requirements).

20. *See Tarasoff*, 17 Cal. 3d at 431, 551 P.2d at 340, 131 Cal. Rptr. at 20.

B. Legal Theories of Mandatory Reporting

The clergyperson is faced with a legal and ethical dilemma when made aware of physical abuse. The source of such knowledge might be the victim or perpetrator coming to seek help, or a concerned third party informant. The clergyperson must take action when they have "reasonable" belief that crime is being committed.[21] The moment that a hunch becomes a reasonable belief, the clergyperson should initiate the reporting procedure devised by their legal counselors.

Many states believe that there is a compelling government interest in protecting children that outweighs free speech and free exercise of religion.[22] For this reason alone, most states require that professionals report on behalf of the victimized child when made aware of child molestation;[23] some states require all persons to report an incident of molestation.[24] Additionally, all professional counselors are required to report any possible child abuse that their client confesses—or risk the revocation of their license.[25]

New Hampshire has the strictest law. It requires "any person," including clergy, "having reason to suspect that a child has been abused or neglected" to report his or her findings.[26] Conversely, Washington does not include clergy amongst the parties that must report.[27]

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21. *See* Danny R. Veilleux, Annotation, *Validity, Construction, and Application of State Statute Requiring Doctor or Other Person to Report Child Abuse*, 73 A.L.R.4TH 782, 806 (1989).

22. *See, e.g.*, CAL. PENAL CODE § 11166 (West 1992 & Supp. 1996). The area of mandatory reporting may well become a battleground between church and state, especially for those religious traditions whose canons do not allow for the disclosure of privileged information.

23. *See id.*; Mitchell, *supra* note 19, at 727 & n.20 (discussing most states' requirement that physicians and various professionals report abuse).

24. *See, e.g.*, DEL. CODE ANN. tit. 16, § 903 (1995).

25. CAL. PENAL CODE § 11166(a) (West 1992 & Supp. 1996). California law requires that:

> any child care custodian, health practitioner, [or non-medical practitioner] . . . who has knowledge of or observes a child in his or her professional capacity or within the scope of his or her employment . . . or reasonably suspects has been the victim of child abuse shall report the known or suspected instance of child abuse to a child protective agency immediately or as soon as practically possible by telephone and shall prepare and send a written report thereof within 36 hours of receiving the information . . . .

Id.

26. N.H. REV. STAT. ANN. § 169-C:29 (1995); *see* ARK. CODE ANN. § 12-12-518 (1992); W. VA. CODE § 49-6A-2 (1993).

27. State v. Motherwell, 788 P.2d 1066 (Wash. 1990).

In Utah clergy must report child abuse when they learn of the abuse from any source other than the offender's confession.[28] The act of confessing shows that the offender has taken the responsibility to seek help and is looking to correct the behavior. However, when the clergyperson learns of child abuse through privileged information from a third party, it is obvious that the offender is not looking to change the behavior, and the clergyperson is required to report this information to the proper authorities.

The reporting requirement poses an interesting question for clergy. By the nature of their profession, clergy may wish to deal with the sensitive matter within the church through prayer and in a confidential manner. If they choose not to report the incident, clergy may unknowingly be violating specific statutory regulations or general tort duties.

Many believe that clergy should report all child abuse matters to the appropriate state agency whether or not church staff are mandatory reporters.[29] On the other hand, some groups argue that requiring clergy to report child abuse would ruin the confidentiality of the congregant-clergy relationship and make clergy reluctant to engage in counseling.[30] The concern is that without confidentiality the abuse would continue because the confider would have nobody to turn to and would not know how to self-correct the behavior.[31] A majority of states have resolved the conflict in favor of specifically requiring clergy, including Catholic priests, to report even the suspicion of child abuse or neglect regardless of the ramifications.[32]

It is now well established that child abuse must be reported to a state agency.[33] But what about reporting spousal or elder abuse? These are serious crimes as well. Each clergyperson must answer this moral question and decide in the face of potentially serious legal ramifications. This Article contends that regardless of pro-

28. UTAH CODE ANN. § 62A-4-503(3) (1993).

29. *See* Gross Schaefer, *supra* note 17, at 221.

30. *Id.* at 222.

31. *Id.*

32. Mitchell, *supra* note 19, at 730; Jeffrey Warren Scott, *Confidentiality and Child Abuse: Church and State Collide*, 103 THE CHRISTIAN CENTURY 174, 174 (1986); *see, e.g.*, CAL. PENAL CODE §§ 11165-11174 (West 1992); MONT. CODE ANN. § 41-3-201 (1995).

33. Douglas J. Besharov, *The Legal Aspects of Reporting Known and Suspected Child Abuse and Neglect*, 23 VILL. L. REV. 458, 465 & n.36 (1978); *see also* O'Brien & Flannery, *supra* note 6, at 18 n.106 (explaining in detail the reporting requirements of all states).

tected communication, the clergyperson has a moral obligation to report such specific acts of violence to the proper authorities in order to protect the victims. Only after this has been done can the clergyperson enter into counseling with the involved individuals.

C. Advice When an Incident of Child Molestation Occurs

Dealing with an incident or allegation of child molestation is an unfortunate but very real situation. It is natural to want to address the situation quickly and quietly because reputations are at stake; however, such haste often creates further problems. Most importantly, the clergyperson should treat every complaint as serious until proven otherwise.

When made aware of a potential child molestation case,[34] a clergyperson should immediately contact an attorney who is knowledgeable about the reporting requirements. Next, the clergyperson should contact the appropriate state agency that receives reports of child abuse.[35] Clergy should cover these grounds first before raising the issue with the alleged perpetrator.[36] The clergyperson must maintain the confidentiality of the parties by limiting the number of people who are informed of the situation.

1. The perpetrator confesses

When a perpetrator confesses to child molestation, the clergyperson should contact an attorney for advice on the most appropriate way to conduct an investigation, preserve confidentiality so as to avoid defamation suits, and handle the possible employment termination so as to have a strong case in the event of a lawsuit. The clergyperson should immediately remove the perpetrator from any position involving contact with minors. The alleged victims and their parents should be interviewed to determine the possibility of other victims. With utmost care and with the advice of counsel, the clergyperson should consider making public the fact that a child has been molested at the site. This should be done without revealing the identity of the perpetrator in order to en-

34. The government considers a person "aware" when they have a reasonable belief of past, present, or future child abuse. *See* Besharov, *supra* note 33, at 471; *see also* CAL. PENAL CODE § 11166 (West 1992) (creating a duty to report if one "knows or reasonably suspects" abuse).

35. Mandatory reporters face possible criminal liability for failure to report. *See* Stecks v. Young, 38 Cal. App. 4th 365, 45 Cal. Rptr. 2d 475 (1995); People v. Hodges, 10 Cal. App. 4th Supp. 20, 13 Cal. Rptr. 2d 412 (1992).

36. *See Hodges*, 10 Cal. App. 4th Supp. at 30, 13 Cal. Rptr. 2d at 418.

courage other victims to come forward.

2. The alleged perpetrator does not confess

The most common situation is when an alleged perpetrator of child abuse does not confess. It is a mistake to assume innocence based solely on the alleged perpetrator's denial of any wrongdoing. First, the clergyperson should contact an attorney to determine the appropriate course of action. It may be appropriate to meet with the alleged victim's parents to assure them that the institution does not tolerate sexual molestation and is actively pursuing the allegation. Also, the clergyperson may wish to share the investigation procedure with the family. The clergyperson may discuss with the family what they would like the religious institution to do if the accused is found guilty. Lastly, the clergyperson may want to find out if the alleged victim or the victim's family has mentioned the allegations to anyone else in order to better appreciate the number of individuals aware of the situation.

After these consultations the clergyperson will need to investigate the matter immediately; issue a warning to the alleged perpetrator; interview the accused and the accused person's supervisor, potential witnesses, or other alleged victims; and consider running a criminal records check on the accused. The clergyperson must conduct the investigation judiciously to avoid having a child abuse allegation lead to a future "wrongful termination" suit. The clergyperson should keep the family of the victim informed of progress at all times. Lastly, the clergyperson must be certain to document everything from the initial accusation to the last piece of the investigation.

In most cases the accused will not confess. Guilt or innocence will depend upon witness testimony and physical evidence such as notes and letters. While the investigation is underway, the alleged perpetrator should be treated with care because people are innocent until proven guilty. Handling the case negligently or treating the employee outrageously may violate the individual's rights and create grounds for future wrongful termination litigation.[37] However, it would be wise and appropriate to immediately remove the accused from any isolated contact with minors.[38]

37. Kenneth A. Sprang, *Beware the Toothless Tiger: A Critique of the Model Employment Termination Act*, 43 AM. U. L. REV. 849, 868 (1994).

38. It is critical to understand that there are many delicate issues that could arise beyond the legal considerations, including feelings of pain, hurt, and hostility. For

III. EMPLOYEE SUPERVISION

A. Related Employment Laws

Title VII of the Civil Rights Act of 1964[39] applies to institutions with fifteen or more employees[40] and outlaws discrimination in employment on the basis of race, color, religion, sex, or national origin.[41] Employers are prohibited from making employment decisions based on these distinctions. The Act provides for compensatory and punitive damages in cases of intentional discrimination.[42] Similarly, most states have constitutional provisions or code sections that prohibit discrimination in hiring or employment.[43] For instance, the California Constitution provides that "[a] person may not be disqualified from entering or pursuing a business, profession, vocation, or employment because of sex, race, creed, color, or national or ethnic origin."[44] In addition to this constitutional provision, California has made it unlawful for religion to be a factor in employment decisions such as promotion, demotion, and termination.[45]

Nonprofit religious organizations are granted a limited exemption from the provisions of Title VII in that they may legally discriminate on the basis of religion.[46] They may legally consider religious practice and belief when making employment decisions regarding employees performing ritual and spiritual functions such as priests, pastors, and rabbis.[47] The courts have consistently con-

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example, the congregation may become polarized with some members contending that the person is guilty while others support the person's innocence. A pastor could easily get caught in the middle of a split community with the congregants turning on the pastor.

39. 42 U.S.C. §§ 1981-2001 (1994).

40. *Id.* § 2000(e).

41. *Id.* § 2000e-2(a).

42. *Id.* § 1981(b).

43. HENRY H. PERRITT, JR., EMPLOYEE DISMISSAL LAW AND PRACTICE 126 (3d ed. 1992).

44. CAL. CONST. art. 1, § 8.

45. CAL. GOV'T CODE § 12940 (West 1992).

46. 42 U.S.C. § 2000e-1.

47. Corporation of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987) (citing Amos v. Corporation of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints, 594 F. Supp. 791, 799 (D. Utah 1984)); *see* King's Garden, Inc. v. FCC, 498 F.2d 51, 56 (D.C. Cir. 1974) ("The Free Exercise Clause precludes governmental interference with ecclesiastical hierarchies, church administration, and appointment of clergy"); *see also* Scott D. McClure, Note, *Religious Preferences in Employment Decisions: How Far May Religious Organizations Go?*, 1990 DUKE L.J. 587, 591 (1990) (discussing the Free Exercise right of re-

cluded that where clergy employment is involved, religious groups are free from government scrutiny.[48] Additionally, religious schools may discriminate in the hiring of teachers based on religious preference.[49] Here, the law protects the religious institution from the religion element of employment discrimination.[50]

Except under certain circumstances,[51] protection from Title VII exemption does not exist in the hiring of non-clergy to perform secular work at religious institutions.[52] Religious groups remain subject to legal scrutiny if the issue involves employee discrimination based on race, gender, national origin, or other protected classifications against employees other than clergy.[53] However, because no legal definition of 'clergy' exists, some groups avoid employment laws by claiming that every staff member is clergy.[54]

The Age Discrimination in Employment Act (ADEA)[55] prohibits both profit and nonprofit employers from discriminating against persons based on their age.[56] However, this only applies to employees other than clergy who are at least forty years of age.[57] The Americans with Disabilities Act (ADA)[58] prohibits discrimination against qualified persons with mental or physical disabili-

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ligious institutions to select employees most capable of carrying out their missions).

48. Ira C. Lupu, *Free Exercise Exemption and Religious Institutions: The Case of Employment Discrimination*, 67 B.U. L. REV. 391, 395-99 (1987).

49. *See* Pime v. Loyola Univ. of Chicago, 803 F.2d 351 (7th Cir. 1986) (holding that reservation of seven out of thirty one teaching positions for Jesuits by a Jesuit Catholic university was not discrimination).

50. 42 U.S.C. § 2000e-1.

51. *Amos*, 483 U.S. at 336, 339; *see also* McClure, *supra* note 48, at 594-600 (analyzing the potential scope of the religious organization exemption).

52. *Id.* at 397.

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

54. *See* Equal Employment Opportunity Comm'n v. Southwestern Baptist Theological Seminary, 651 F.2d 277, 283-85 (1981); Welter v. Seton Hall Univ., 608 A.2d 206 (N.J. 1992).

55. 29 U.S.C. §§ 621-34 (1994).

56. The ADEA prohibits companies with 20 or more employees from refusing to hire, compensate, discharge, or in some other manner discriminate against individuals because of their age. 29 U.S.C. §§ 623(a), 630(b). The ADEA is enforced by the federal Equal Employment Opportunity Commission (EEOC). 42 U.S.C. § 2000(e)(4). ADEA also provides for jury trials and compensatory damages. 29 U.S.C. § 626.

57. 29 U.S.C. § 631(a); *see also* Minker v. Baltimore Annual Conference of the United Methodist Church, 699 F. Supp. 954 (D.D.C. 1988), *aff'd*, 894 F.2d 1354 (D.C. Cir. 1990) (holding that the application of the ADEA to clergy would violate the Free Exercise Clause).

58. 42 U.S.C. §§ 12101-12213 (1994).

ties, including AIDS and other "grave" diseases, and the nonprofit religious institution must uphold these employee protections.[59]

B. Wages and Compensation

Federal law requires profit and nonprofit employers to pay their employees a minimum hourly wage as well as time-and-a-half for hours worked in excess of forty in one week.[60] Certain employees, such as religious professionals who are highly compensated, may be exempt.[61] The determination of excludable categories is quite complex and may allow for the exemption of an employee who is an executive, administrator, or professional if that person both manages the business and is involved in the hiring and firing of employees.[62]

In some situations employers may be liable for pay even when a regularly paid employee works voluntarily.[63] Employees must receive credit for short rest periods when they cannot use the time effectively for their own purposes.[64] Lastly, the employer must pay a penalty for any amount wrongfully withheld from the employee.[65] Additionally, each state has its own regulations and requirements that govern this area.[66]

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59. *Id.* § 12112(a)(b). *But see* Doe v. Attorney General, 814 F. Supp. 844, 849 (1992) (citing Carter v. Casa Cent. 849 F.2d 1048, 1056 (7th Cir. 1988) (holding that an employer may inquire into an individual's disability if it is relevant to the job and can consider risks posed by a contagious disease in determining the individual's qualifications)).

60. 29 U.S.C. §§ 201, 207(a)(1) (1994); *see* A. JAMES BARNES ET AL., LAW FOR BUSINESS 377 (1994).

61. 29 U.S.C. § 213(a) (1996).

62. BARNES ET AL., *supra* note 60, at 337.

63. 29 C.F.R. § 785.11 (1995). Also, it has been suggested that an employee cannot be treated as an unpaid volunteer when performing regular work for the employer in the same work week in which he is also an employee. *See, e.g.*, Rodriguez v. Township of Holiday Lakes, 866 F. Supp. 1012 (S.D. Tex. 1994) (holding that a volunteer patrol officer is not a volunteer to be exempt from the minimum wage provisions of the FLSA); *cf.* 29 C.F.R. § 553.102 (1995) (dealing with public agencies).

64. 29 C.F.R. § 785.15 (1995).

65. 29 U.S.C. § 216(b) (1995); *see* Susan Palmer Adams, *The Standard of Willfulness for Liquidated Damages Under the Age Discrimination and Employment Act*, 32 EMORY L.J. 583, 585 n.9 (1983).

66. For example, California law calls for overtime compensation after eight hours per day or forty hours per week. *See* Cal. Code Regs. tit. 8, § 11070(3)(A).

1. Equal Pay Act[67]

Employers must compensate their employees equally without regard to gender for jobs that require identical skill, effort, and responsibility when those jobs are performed in the same establishment and under similar working conditions.[68] Different rates of pay are permitted under seniority and merit systems but must not be gender-based.[69]

2. Workers' compensation

Established in the early 1920s, workers' compensation laws place liability for injuries occurring within the scope of employment on the employer without regard to fault.[70] This means that regardless of negligence, the employer is liable for an employee's injury. Employers typically contribute to either a state fund or they self-insure, but all claims are administered by a combination of federal guidelines and state supervision.[71]

Volunteers who receive "no remuneration for services other than meals, transportation, lodging, or reimbursement for incidental expenses" are excluded from workers' compensation laws[72] but may sue the organization if a work-related injury arises out of their work.[73] For instance, a volunteer teacher whose spouse arrives uninvited and shoots the teacher while at school cannot recover damages because the injury was not related to the work of teaching. However, if a student shoots the volunteer teacher, the teacher's employer would be liable for compensation because this may be considered an injury arising out of employment.

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67. Equal Pay Act of 1963, 29 U.S.C. § 206 (1994). The Equal Pay Act is an amendment to the Fair Labor Standards Act of 1938. *Id.* § 201 (1994).

68. Employers are only subject to the Equal Pay Act if covered by the Fair Labor Standards Act. 29 U.S.C. § 206(b) (1995).

69. BARNES ET AL., *supra* note 60, at 383.

70. These laws grew out of the situation in the 1800s when it was nearly impossible for an employee who was injured on the job to recover damages from the employer. *Id.* at 374. The difficulty was in proving the employer negligent rather than another worker. *Id.*

71. *See* Robert A. Kagan, Book Review, 84 COLUM. L. REV. 816 (1984) (reviewing JERRY L. MASHAW, BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS (1983)).

72. CAL. LAB. CODE § 3352(i) (West Supp. 1996).

73. *See* Martinez v. Workers' Compensation App. Bd., 15 Cal. 3d 982, 544 P.2d 1350, 127 Cal. Rptr. 150 (1976) (awarding workers' compensation to a volunteer for injuries suffered while acting in good faith to prevent a theft).

C. *Avoiding Wrongful Termination Suits*[74]

Terminating a worker's employment is never a pleasant experience, and unfortunately, clergy often find themselves as part of the dismissal procedure. Moreover, terminating employees can create a "legal minefield." Religious professionals, lay leadership, and religious institutions are not immune from wrongful discharge or negligent hiring claims and the associated financial and emotional burdens.[75] Religious institutions and their leadership should carefully create an employment process that reduces exposure to wrongful termination lawsuits.

1. Publicizing the job opening

Job openings should be well publicized so that individuals interested in the position have a fair opportunity to apply.[76] Accordingly, positions should be reasonably advertised and allow a reasonable amount of time for applicants to submit applications.[77] Due to the many limitations on what types of questions can and cannot be asked, it is critical that the employment application be reviewed by an attorney who specializes in the employment field. It is also helpful to have an attorney or human resources professional review public job announcements before they are placed to ensure that the advertisement is accurate, complete, and not in violation of any current statutory requirements.[78]

When pre-employment substance abuse tests or other physical or mental qualifications are required, the applicant must be notified in the job announcement.[79]

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74. Adapted from Stuart W. Rudnick, Examining Legal Issues Facing Individuals with Pastoral Responsibilities, Avoiding Wrongful Termination Claims, (Nov. 18, 1993) (unpublished manuscript on file with the *Loyola of Los Angeles Law Review*).

75. *E.g.*, Evan F. v. Hughson United Methodist Church, 8 Cal. App. 4th 828, 834-36, 10 Cal. Rptr. 2d 748, 752-53 (1992) (holding that a church may be held liable under a negligent hiring theory for acts of employee).

76. KENNETH L. SOVEREIGN, PERSONNEL LAW 40 (3d ed. 1994).

77. *Id.*

78. Not all attorneys have adequate knowledge. Religious institutions are notoriously short on cash and like to use congregants for free legal advice whenever possible. However, due to the extraordinary number of complex issues involved in personnel matters, it is important to use an attorney who is competent in employment issues.

79. Wilkinson v. Times Mirror Corp., 215 Cal. App. 3d 1034, 264 Cal. Rptr. 194 (1989) (holding that an employer does not violate job applicants' rights to privacy under the California Constitution because applicants had notice of the employer's drug testing policy).

2. The interview

To avoid asking a job candidate illegal questions such as marital status, dependents, maiden name, spouse's occupation, and pregnancy-related issues,[80] selection committees should meet with a human resources professional or attorney prior to interviewing applicants to learn which inquiries are permissible. There are a wide variety of laws that impose limitations upon the type of inquiries that can be made and the methods that can be used to acquire such information. For instance, California law prohibits companies from using arrests not resulting in convictions as criteria for employment.[81] There is an exception for applicants or volunteers who may have advising or disciplinary power over minors or persons under their direction.[82] In this case employers may request any information from the California Department of Justice and use such information in their hiring decisions.[83]

Employers should use the interview as a time to evaluate the candidate's social interaction skills and interest in the position. Employers should not use the interview to obtain basic data. Instead, employers should prepare for interviews using information from the applicant's recent employment history, education, skills, abilities, and interest in the position based on the candidate's application, recommendations, and resumé. Since the nature of the interview is interactive, the selection committee must take care not to make oral representations that the institution may disagree with or be unable to fulfill since promises made during an interview may become legally binding obligations.[84]

3. Prescreening candidates

Exercising care at the prescreening stage is critical since employers are usually found liable for the torts of their employees under the doctrine of respondeat superior—"let the master answer."[85] This theory can place responsibility for employee actions within the hands of the employer[86]—in some cases a church or

80. *See generally* 29 C.F.R. § 1604 (1996) (offering a detailed explanation of sex discrimination).

81. CAL. LAB. CODE § 432.7 (West Supp. 1996).

82. CAL. PENAL CODE § 11105.3 (West 1992).

83. *Id.*

84. Rudnick, *supra* note 74, at 9.

85. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS, § 69, at 499-500 (5th ed. 1984 & Supp. 1988).

86. MICHAEL B. METZGER ET AL., BUSINESS LAW AND THE REGULATORY

synagogue. If an employee commits a crime, injures a person, or damages property while acting within the scope of employment,[87] the victim may be able to sue the religious institution for damages.[88] Victims may also sue religious organizations for negligence in the hiring or supervision of the employee.[89]

As in the area of interviews, there are certain actions that are legally permitted to protect the institution and others that are not. For instance, employers may not require that a potential employee take a lie detector or similar test.[90] Pre-employment substance abuse testing is permissible, provided the applicant is advised of the testing requirements when the application is first made, the testing procedures are not impermissibly intrusive, access to the results are restricted, and testing is done for applicants for the same job or class of jobs.[91] Pre-employment physical examinations are permissible, provided all employees entering similar positions are subject to the same exam and the results are used only as permitted by the ADA.[92] Employers may not use the results of an HIV antibody test as a basis to evaluate an individual's competence for employment because AIDS is considered a disability and religious institutions are not allowed to discriminate on the basis of

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ENVIRONMENT 743 (9th ed. 1995).

87. The issue of whether an employee's conduct is within the scope of employment is subject to a careful review of the particular facts. RESTATEMENT (SECOND) OF AGENCY § 228(1) cmt. a, d (1958). The *Restatement (Second) of Agency* uses a test that the actions must have been "not unexpectable" by the employer to be within the scope of employment. *Id.* § 228(1). Additional factors include: (1) whether this was the kind of act that the employee was employed to perform, (2) whether the action occurred substantially within the authorized time period, (3) whether the action occurred substantially within the location authorized by the employer, (4) whether the employee's motivation was, at least in part, to serve the employer. *Id.*

88. However, some courts have held that a church may not be held liable for child molestation by clergy or volunteers, such as school teachers, on the grounds that such conduct is, as a matter of law, outside the scope of their employment. *See, e.g.*, Jeffrey E. v. Central Bishop Church, 197 Cal. App. 3d 718, 722, 243 Cal. Rptr. 128, 130 (1988); Rita M. v. Roman Catholic Archbishop, 187 Cal. App. 3d 1453, 1461, 232 Cal. Rptr. 685, 690 (1986).

89. *See Evan F.*, 8 Cal. App. 4th at 843-44, 10 Cal. Rptr. 2d at 758-59 (holding that a church can be sued for negligent hiring practices); *cf.* RESTATEMENT (SECOND) OF TORTS § 411(b) (1965) (dealing with the negligent hiring of contractors).

90. *See* CAL. LAB. CODE § 432.2 (West 1989). For federal statutes, see 29 U.S.C. § 2002 (1994).

91. *Wilkinson*, 215 Cal. App. 3d at 1051, 264 Cal. Rptr. at 205-06.

92. Americans with Disabilities Act, 42 U.S.C. § 12112(d) (1995); *see* CAL. CIV. CODE § 56 (West 1982).

disability.[93] Lastly, all employers must establish candidates' true identities and be certain they are legally permitted to work in the United States, for it is unlawful to hire undocumented immigrants.[94]

4. Hiring the candidate

What is said and done during the time when the employment relationship is established will greatly affect the circumstances under which the employer will be able to terminate the employee.[95] Therefore, it is critical to clearly develop the grounds and procedures for employee evaluation and dismissal at the beginning of the employment relationship. Such procedures must be carefully followed to avoid inconsistent applications or violations of company procedures that can later be used by the plaintiff in a wrongful termination lawsuit.[96] It is therefore a good idea to have all employment contracts written and reviewed by an attorney familiar with employment issues.[97] The contract should describe alternative grounds for dismissal. Otherwise, termination may occur only in the case of neglect of duty, a willful breach of duty during the course of employment, or continued incompetence of the employee.[98] Open-ended employment agreements without a specified term may be terminated at the will of the employee or the employer.[99] However, difficulties in terminating "at will" employees arise if promises are made at the hiring stage concerning job security and probationary periods.[100]

5. Preventive measures during the relationship

Steps can be taken during the employment relationship to maintain a healthy and well-defined working environment. Personnel manuals, employee evaluations, progressive discipline, and a careful monitoring of supervisors can be invaluable for protect-

93. 42 U.S.C. § 12112(a) prohibits discrimination against disabled persons who could otherwise do the job. The Ninth Circuit has held that HIV infection is a disability. Gates v. Rowland, 39 F.3d 1439, 1446 (9th Cir. 1994).

94. Immigration Reform and Control Act of 1986, 8 U.S.C. § 1324 (1995).

95. Susan L. Paulus, *Measures to Reduce Litigation Risks and Control Litigation Costs, in* UNJUST DISMISSAL UPDATE 1985, at 725, 727 (PLI Litig. & Admin. Practice Course Handbook Series No. 297, 1985).

96. *Id.* at 726.

97. *See supra*, note 78.

98. CAL. LAB. CODE § 2924 (West 1989).

99. *Id.* § 2922.

100. *See* Paulus, *supra* note 95, at 727.

ing the employer from wrongful termination lawsuits. Personnel manuals and employee handbooks can be a very effective medium to communicate employment procedures, policies, rules, expectations, probationary periods, job security, grounds for discipline, and grievance procedures. However, these handbooks can be contractually binding and therefore must be scrupulously crafted and carefully followed.[101]

Employee evaluations serve two very important purposes with regard to job performance. If done properly, they can monitor the effectiveness of the employee and serve as notices for praise or constructive criticism. Further, in the case of a trial, they can act as evidence that an employer's decision to terminate was based solely upon performance-related issues.[102]

Progressive discipline is different from standard employee evaluations as it focuses on correcting personnel problems rather then punishing employees for misconduct. Accordingly, the approach is developmental with a process of oral warnings, followed by written warnings, suspension, and finally, release if performance does not improve. This procedure can also serve as protection against wrongful termination claims.[103] An employee that has been warned of the need to improve may find it very difficult to prove that he or she has been treated unfairly. An effective warning should have the following parts: (1) a written description of the employee's transgression,[104] (2) a statement of what is expected of the employee,[105] (3) a statement of how much time the employee has to rectify the situation,[106] and (4) a statement of what will occur if the expectations are not met.[107] The employer should maintain dated copies of all written warnings.

Wrongful discharge claims are often the result of poor relations between supervisors and employees.[108] Harassment, dis-

101. *Id.* at 748-51. Lawsuits are often based in part on employers' failure to follow their own procedures as set forth in their manual or in their policies. *Id.* at 769. *See, e.g.*, Pine River State Bank v. Mettille, 333 N.W.2d 622, 625-27 (Minn. 1983).

102. Paulus, *supra* note 95, at 753; *see* Lawrence v. Northrop, 980 F.2d 66, 71 (1st Cir. 1992).

103. Paulus, *supra* note 95, at 758.

104. *Id.* at 760.

105. *Id.* at 761.

106. Susan G. Tannenbaum, *Employee Relations Guide, in* ADVANCED STRATEGIES IN EMPLOYMENT LAW, at 506-07 (PLI Litig. & Admin. Practice Course Handbook Series No. 342, 1986).

107. *Id.* at 506.

108. *See* Jerome B. Kauff & David E. Block, *Recent Developments in the Law of*

crimination, wage violations, and occupational safety violations on behalf of supervisors may put the employers in jeopardy of being sued for wrongful termination.[109] Communication between the employer and supervisors should be carefully maintained and fostered. Additional preventive measures include: developing and using a probationary period; developing a severance policy to help with out-placement assistance; developing a grievance procedure; using "at-will" language in employment forms, documents, handouts, policies, manuals and agreements; and using annual individual employment contracts.[110]

6. Terminating the employee

Nobody enjoys the discomfort of ending relationships on negative terms. Nonetheless, clergy are often involved in the termination process. When this situation arises there are measures that can be taken to reduce the potential for wrongful termination claims. One must be certain that the decision to terminate conforms with applicable law, is consistent with the organization's policies, and is fundamentally fair. The following are some of the questions to be considered.

a. is the employee in a protected classification or status?

It is illegal to discharge employees on the basis of their race or ethnicity,[111] age,[112] disability,[113] or pregnancy.[114] Employees who are on a leave of absence due to pregnancy, family reasons, work-related reasons, military service, or jury duty are afforded special protection.[115] Further, a decision to terminate an employee who

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Unjust Dismissal, in ADVANCED STRATEGIES IN: LITIGATING, SETTLING, AND AVOIDING UNJUST DISMISSAL AND AGE DISCRIMINATION CLAIMS 1987, at 121-23 (PLI Litig. & Admin. Practice Course Handbook Series No. 321, 1987).

109. Kathleen A. Smith, *Employer Liability for Sexual Harassment: Inconsistency Under Title VII*, 37 CATH. U. L. REV. 245, 247 (1987); *see* Kauff & Block, *supra* note 108, at 93; Donald G. Kempf, Jr. & Roger L. Taylor, *Wrongful Discharge: Historical Evolution, Current Developments and a Proposed Legislative Solution*, 28 SAN DIEGO L. REV. 117, 123 (1991).

110. Joseph Grodin, *Toward a Wrongful Termination Statute for California*, 42 HASTINGS L.J. 135, 149 (1990).

111. 42 U.S.C. § 2000e-2(m) (1995).

112. *Id.* § 6102.

113. *See generally* Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 (1995) (prohibiting discrimination based on disability).

114. *See* Pregnancy Discrimination Act, 42 U.S.C. § 2000(e)(k) (1995).

115. Wendy Strimling, *The Constitutionality of State Laws Providing Employment Leave for Pregnancy: Rethinking* Geduldig *After* Cal Fed, 77 CAL. L. REV. 171, 175

has recently complained of discrimination, sexual harassment, or unsafe working conditions may be risky because the termination may be seen as retaliation for the previous complaints.[116]

b. has the employee been with the institution for several years?

The longer the term of employment, the more difficult it is to prove rightful termination.[117] The standard question is as follows: "If the employee was so terrible, why did the employer wait so long to terminate employment?"

c. has the employer conducted an investigation into the terms of the employee's discharge?

The supervisor must substantiate the discharge through witnesses or written documentation such as employee evaluations and progressive discipline records. The employer should properly notify the employee of poor performance and allow opportunity to improve. Prior to any final decision, the employer should give the employee an adequate opportunity to tell his or her side of the story.

d. can the employer effectively articulate the reason if a dispute or litigation arises?

How strong is the evidence of the event that triggered the discharge? How strong is the documentation of progressive discipline? What do the employee's performance evaluations reflect? Has the employer looked at the employee's personnel records? Are there compelling explanations or sympathies that favor retaining the employee? How have similar situations been handled in the past? Has the employee's version of the "triggering event" been documented? Should there be a final warning instead of

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(1989).

116. Title VII provides a cause of action to redress discharges in retaliation for complaints about discrimination or harassment. Tunis v. Corning Glass Works, 747 F. Supp. 951 (S.D.N.Y. 1990), *aff'd* 930 F.2d 910 (2d Cir. 1991). For a discussion of liability for retaliation against complaints of sexual harassment, discrimination, and unsafe working conditions, see Jana Howard Carey, *Sexual Harassment: Avoiding Lawsuits and Litigation Strategies, in* AVOIDING AND LITIGATING SEXUAL HARASSMENT CLAIMS 1996 7, 11, 61-67 (PLI Litig. & Admin. Practice Course Handbook Series 1996).

117. Samuel Issacharoff, *Contracting for Employment: The Limited Return of the Common Law*, 74 TEX. L. REV. 1783, 1812 (1996); *see* Paulus, *supra* note 95, at 756; Stewart J. Schwab, *Life-Cycle Justice: Accomodating Just Cause and Employment At Will*, 92 MICH. L. REV. 8, 44-47 (1993).

termination? And, have the decision-makers been fully informed? These questions need to be asked.

e. has the termination procedure followed the institution's normal discharge practices as described in the employer's handbook?

Information found in an employee handbook can be legally binding.[118] Be certain to remain consistent with such printed information.

f. have other similarly situated employees been treated the same?

It is important to be consistent with termination procedures to limit the potential for wrongful termination. While it is not easy to terminate an employee, it may be legally dangerous to continue using the services of an employee for which there are valid grounds for dismissal.[119] Should the employee act in such a manner to cause injury to a third party or other employees, the religious institution and the supervisor could be liable for negligent supervision.[120] Thus, the choice between keeping or firing an employee is not always an easy decision, especially when both options may be fraught with problematic legal and ethical consequences.[121]

Finally, employers must conduct a fair and thorough exit interview for all employees. It is important to learn employees' perceptions of why they are being terminated. It is a good rule of thumb to have a third party present at the exit interview to serve as a witness and to document the date, time, place, and what is said by whom. Be certain to document the proceedings and identify and deal with any claims of unfairness.

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118. Kurt S. Decker, *Reinstatement: A Remedy for an Employer's Violation of a Handbook or Written Employement Policy*, 3 HOFSTRA LAB. L.J. 1, 4 (1985).

119. *See* Paulus, *supra* note 95, at 777; Jay Rand, *Employment Protection for the Substance Abuser*, 9 COMP. LAB. L.J. 450, 452 (1988).

120. *See, e.g.*, Erickson v. Christenson, 781 P.2d 383, 387 (Or. Ct. App. 1989) (holding that there is a cause of action against a church for negligent supervision of a pastor who allegedly abused a confidential relationship with a parishioner and manipulated the parishioner into a sexual relationship).

121. Beyond the legal considerations, there are many ethical issues relating to employment decisions. While there are many good sources, the use of an ethics decision model may help to clarify the ethical considerations and provide alternative responses to an employer's decision. Arthur Gross Schaefer, Ethics Model (Nov. 25, 1995) (unpublished manuscript on file with the *Loyola of Los Angeles Law Review*).

D. Proper Use of Volunteer Labor

Utilizing the help of volunteer workers can be very rewarding for both the religious institution and the volunteer. Religious organizations need the help of volunteer workers, and cultivating the satisfaction one receives from helping at a synagogue or church can be priceless. However, there are legalities that supervisors and employers must be aware of before enlisting the use of volunteer labor.

Volunteers are not protected under workers' compensation insurance while performing services for nonprofit organizations because they are not considered employees,[122] although some carriers will provide coverage for volunteers at a premium.[123] Therefore, one should only use volunteer workers in activities that provide a low risk of injury. Insurance carriers may define the limitations placed on volunteer activities. Since accidents do happen, it is best to develop guidelines that will limit the potential for accidents and in turn limit the number of liability claims or lawsuits against the organization. Additionally, contractors who donate services should carry their own insurance[124] as most insurance carriers do not cover donated services. It is wise to treat this situation like any other business dealing in the sense that a contract should be drawn and approved by both parties.

In addition to concerns regarding physical harm to volunteers, there is also a need to properly train, supervise, and screen volunteers, especially if their work involves children.[125] A religious institution may be liable if one of its volunteers molests a child or harasses a worker. It is a sure breach of the institution's legal and

122. *See generally*, Charles R. Tremper, *Compensation for Harm from Charitable Activity*, 76 CORNELL L. REV. 401, 434 (1991) (discussing whether a volunteer's recovery should be equivalent to what the volunteer would have received if eligible to receive workers' compensation or whether the volunteer should be entitled to damages under tort theories).

123. *See, e.g.*, Martinez v. Workers' Compensation Appeals Bd., 15 Cal. 3d 982, 985, 544 P.2d 1350, 1351, 127 Cal. Rptr. 150, 151 (1976) (involving a Roman Catholic Bishop who obtained a workers' compensation insurance policy that covered volunteer workers).

124. It would be wise to make sure that contractors show evidence of carrying workers' compensation insurance and having proper licenses. It would also be important to make sure that "hard hat" areas are enforced and that access to construction sites is limited.

125. *See, e.g.*, Nancy A. Lauten, *Who's Minding the Cradle? Regulatory Reform in the Child Care Industry*, 13 FLA. ST. U. L. REV. 633, 643-44 (1985) (discussing Florida's recently passed child abuse prevention legislation).

ethical duties to give a volunteer who has a record of sexual offenses access to children or to allow the volunteers to move freely within the institution. Unfortunately, religious organizations must realize that actions done by volunteers, just as the actions of paid workers, may result in legal liability for the institution.

E. Sexual Harassment

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature can violate Title VII of the Civil Rights Act.[126] Victims can be awarded front pay, the value of lost fringe benefits, emotional distress relief, and the reinstatement of seniority.[127] Additionally, federal law provides up to $300,000 in damages to victims plus punitive damages against the employer.[128] While sexual discrimination in the religious organization may be legal in certain circumstances related to employment responsibilities,[129] sexual harassment is not—and religious institutions will be liable for the actions of its clergy, staff, and lay leadership if they engage in sexual harassment.[130] The problem facing all organizations and employees is a changing social climate in which previously acceptable actions may now be legally actionable. For instance, continually asking a coworker for a date could be considered sexual harassment.[131]

1. Sexual harassment policies in the workplace

With the growing social and media attention given to sexual harassment, there has been a resulting increase in the number of lawsuits alleging such harassment.[132] In many states there exist re-

126. Title VII of the Civil Rights Act of 1964 as amended in 1972 prohibits sex discrimination by all employers with 15 or more employees. 42 U.S.C. §§ 2000(e)(b), 2000e-2(a) (1994). In 1986 the United States Supreme Court ruled that sexual harassment based on a "hostile work environment" constitutes sex discrimination in violation of Title VII. Meritor Savings Bank v. Vinson, 477 U.S. 57, 66 (1986). Most states have their own statutes that also provide relief for claims of sexual harassment, such as the California Fair Employment and Housing Act which specifically makes sexual harassment an unlawful employment practice. *See, e.g.*, CAL. GOV'T CODE § 12940(h) (West 1992 & Supp. 1996).

127. 42 U.S.C. § 1981(b)(1).

128. *Id.* § 1981(b)(3); *see* Tammy W. Moore, *War on Sexual Harassment Enters New Phase*, BUS. REC., Nov. 22, 1993, at 5.

129. 42 U.S.C. § 2000e-1(a).

130. O'Reilly & Strosser, *supra* note 6, at 58.

131. *See* Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991).

132. *See* Carol Kleinman, *New Tactics Against Sexual Harassment*, CHI. TRIB., Sept. 14, 1992, at C2.

quirements that all institutions have sexual harassment policies in which "sexual harassment" is defined and that reporting and investigation procedures of complaints are clearly established.[133] A general legal definition of harassment should include quid pro quo harassment—that is, employment decisions affecting any individual that results from submission to or rejection of unwelcome sexual behavior, as well as harassment that creates a hostile environment for members of one gender.[134]

The antisexual harassment policy should contain specific examples of verbal, physical, and visual harassment. Verbal harassment includes jokes or teasing of a sexual nature and continuing to express personal interest after being informed that such interest is unwelcome. Visual harassment includes leering, whistling, or sexually suggestive objects. Physical harassment includes unwanted touching, brushing against the body, or impeding or blocking another's movement.[135]

The complaint procedure should be written in understandable language, not legalese. The policy should encourage employees to report all incidents of sexual harassment and should spell out the procedure for doing so. To make it "friendlier" and "safer" for a complaint to be filed, the procedure should allow for reporting to be made to a variety of individuals, not just to one office or person. To demonstrate that every complaint will be taken seriously, the procedure should clearly delineate the steps that the institution will take when a complaint is lodged, including a fair and prompt investigation which respects confidentiality to the maximum extent possible.

Guidelines for appropriate disciplinary measures and monitoring of subsequent behavior of offenders will convey the seriousness with which such offenses will be regarded. The religious organization's written policy should also provide an important opportunity to spell out the conviction that sexual harassment will not be tolerated at any level of the organization, from the clergy and staff to lay leaders and members.

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133. Clyde Summers, *Effective Remedies for Employment Rights: Preliminary Guidelines and Proposals*, 141 U. PA. L. REV. 457 (1992).

134. Benjamin E. Goldman et al., *Recent Developments in Labor and Employment Law: Sexual Harassment Update for California Employers* (Graham & James, LLP, San Francisco, Cal.), Oct. 1993, at Part IV.A.

135. *Id.* at Part III.

2. Liability in sexual harassment claims

Employers will be liable for a hostile work environment created by another employee if the employer "should have known" about the improper conduct.[136] Employers can learn of sexual harassment via first-hand knowledge, through observation, or through formal complaints. Even without first-hand knowledge, the employer may be held to have "constructive" knowledge.[137] Under constructive knowledge, it is assumed that harassment is recognized by the employer if harassment is well known amongst employees.[138] Thus the employer may be held liable even in the absence of first-hand knowledge.

In some states an employer may have "imputed" liability in a hostile environment case.[139] This rare situation is characterized by a supervisor's harassment that falls within the "scope of employment" or "apparent authority."[140] If an employer knew of sexual misconduct and did nothing to prevent it, the courts would consider the employer as authorizing the supervisor to continue such behavior.[141] This would technically bring the supervisor's actions within the scope of employment.

The employer may also be held liable by failing to establish an effective policy against sexual harassment, including a formal complaint procedure.[142] Without such a policy the employees might believe that harassment might be tolerated or even condoned by the management.[143] Again, the supervisor's actions may be within the supervisor's "apparent authority"[144] and will be imputed to the employer.[145]

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136. *Id.* at Part IV.B.2; METZGER ET AL., *supra* note 86, at 1092.

137. *See* Goldman et al., *supra* note 134, at Part IV.B.2.

138. *Id.*

139. *See id* at Part IV.B.3; Murren Roy, *Employer Liability for Sexual Harassment*, 48 SMU L. REV. 289 (1994); Ronald Turner, *Employer Liability under Title VII for Hostile Environment Sexual Harassment by Supervisory Personnel: The Impact and Aftermath of* Meritor Savings Bank, 33 HOW. L.J. 1, 18 (1990).

140. Goldman et al., *supra* note 134, at Part IV.B.3.

141. *Id.*

142. *Id.*

143. *Id.*

144. Apparent authority arises when a third party forms a reasonable belief that the action taken was authorized conduct. *See* METZGER ET AL., *supra* note 86, at 741.

145. *See id.* at 741-42; *see, e.g.*, Horn v. Duke Homes, 755 F.2d 599, 605 (7th Cir. 1985).

3. Preventing sexual harassment and reducing liability

The creation of a sexual harassment policy, whether mandated or not, creates procedures that will help to properly investigate complaints and promote a harassment-free work environment. The policy needs to be distributed, posted, and discussed so that its existence and importance will be apparent.

When a complaint is filed, it is important to take the report seriously and consult legal counsel throughout the process. Many sexual harassment lawsuits can be avoided if accusations are dealt with professionally and promptly.[146] Procedures set out in the institution's policy should be carefully followed. Acting quickly and in a confidential manner are critical to ensure that both the complainant and the accused are treated fairly. Remember that a charge of harassment shall not, in and of itself, create the presumption of wrongdoing. Be certain to document the individual interviews with the complaining employee, the accused, and appropriate witnesses.

If the employer concludes that harassment has occurred, the employer should take immediate action to solve the problem. Disciplinary action may include reprimands, demotion, suspension, or termination. Moreover, it is important to console the victim and learn how the institution can become a safer environment.

Lastly, it is critical to educate the staff about sexual harassment by holding meetings, seminars, and discussions with videos and oral presentations. This also demonstrates that management takes the issue seriously.

F. Recommending Former Employees[147]

Before recommending a previous employee to a third party, consider whether permission to make the recommendation was given. If not, the employer may be liable to previous employees for comments made about their work.[148] Also, permission from an employee only offers limited protection.[149] An employer must still

146. Arthur Gross Schaefer & Muriel A. Finegold, *Creating A Harassment-Free Workplace*, RISK MGMT., Feb. 1995, at 53, 55.

147. Adapted from Ralph Quinones & Arthur Gross Schaefer, *The Legal, Ethical and Managerial Implications of the Neutral Employment Reference Policy*, (forthcoming Winter 1996) EMPLOYEE RESP. & RTS. J.

148. *Id.* at 4; Paul W. Barada, *Check References With Care*, NATION'S BUS., May 1993, at 54.

149. Barada, *supra* note 147, at 54, 56.

be very careful about what is said.

When interviewing prospective employees it is unreasonable to expect them to provide perfect information about their qualifications and experience. Therefore, employers attempt to obtain information from former employers. Past performance is often the best indicator of future job performance. Obviously, the sources of a prospective employee's work history and other relevant information are former employers. However, due to the potential for suit, the information available from former employers may be limited.[150]

In recent years, the neutral employer or "no comment" reference policy has been adopted by numerous employers.[151] Under this policy, only neutral employment information is provided when responding to a reference request.[152] The information includes dates of employment, positions held, job responsibilities, and the supervisor's name at time of termination.[153] The neutral employee policy has gained recent popularity in response to the growing number of reference defamation suits filed against former employers.[154] However, maintaining the neutral policy may have adverse effects on a company and may be a disservice to the business community.

If former employers share information with a prospective employer, they run the risk of being sued by the dismissed employee for reference defamation.[155] Also, the prospective employer may be liable to a third party for negligent hiring.[156]

Obviously, this presents the former employer with a litigation dilemma. In fact, this entire topic can be confusing and frustrating. First, ascertain that the party requesting the information has a "legitimate business reason"[157] for requesting the information. The

150. Even when a company has not been found negligent, the cost in terms of legal fees and time have been tremendous. Lewin, *Boss Can Be Sued for Saying Too Much*, N.Y. TIMES, Nov. 27, 1987, at B26.

151. *See* Barada, *supra* note 147, at 54.

152. *Id.*

153. Bradley Saxton, *Flaws in the Laws Governing Employment References: Problems of "Overdeterrence" and a Proposal for Reform*, 13 YALE L. & POL'Y REV. 45, 46 (1995).

154. *See id.*; Stuart R. Deuring & John E. Murray, *Three Steps to Take to Avoid Employee Defamation Suits*, CORP. LEGAL TIMES, Apr. 1996, at 27.

155. *See* Barada, *supra* note 147, at 54.

156. *See id*; Michael Cox, *Negligent Hiring and Retention: Availability of Action Limited by Foreseeability Requirements*, 10 N.M. L. REV. 491, 493 (1980).

157. *See* Barada, *supra* note 147, at 54.

former employer should limit the offerings to factual and verifiable information.[158] The information provided should be limited by the scope of the inquiry and should not give any additional and unrelated information.[159]

A professional approach to protect all interests is to establish an institutional policy that allows each party to agree upon potentially shared information.[160] This eliminates the surprise factor and protects the previous employer from reference defamation litigation.[161]

At the beginning of the employment relationship, consider providing employees with a reference consent form that will allow the employer to release reference information during or after the employment relationship.

Indicate to the employee that the policy is to not provide full disclosure unless the employee agrees to such terms prior to a voluntary or involuntary termination. Emphasize that the employee is not required to agree to the terms of the policy. This eliminates any argument that the consent was obtained through coercion, adhesion, oppression, or any other improper way.

At the conclusion of the employment relationship, have the employee review the policy and consent to sharing reference information with prospective employers. This gives employees a chance to rescind approval of the policy if they are unhappy with their work experience or the termination was unpleasant. Be sure that the policy regarding references is carefully and consistently followed.

IV. INDIVIDUAL CLERGY TORT LIABILITY

"Tort" is a legal term synonymous with the concept of injury to a person or property that society has determined should be compensated.[162] There are both intentional and unintentional torts.[163] An intentional tort could be battery, assault, infliction of mental distress, defamation, an invasion of privacy, or trespassing.[164] Unintentional torts are often defined as negligence and

158. *See id.*; Buchanan Ingersoll, *Unchecked Rumors Result in $10 Million Defamation Award to Ex-schoolteacher*, 6 PA. EMPLOYMENT L. LETTER 5 (1996).

159. Barada, *supra* note 147, at 56; Deuring & Murray, *supra* note 153, at 27.

160. Barada, *supra* note 147, at 54.

161. *Id.*

162. LAWRENCE S. CLARK ET AL., LAW AND BUSINESS 77 (4th ed. 1994).

163. *Id.*; KEETON ET AL., *supra* note 85, § 8, at 33.

164. CLARK ET AL., *supra* note 161, at 79-80; KEETON ET AL., *supra* note 85, §§ 9-

strict liability.[165] Negligence is an unintentional breach of duty that results in harm to another.[166] Strict liability means that a person who participates in certain kinds of activities is held responsible for any resulting harm to others, despite the use of utmost care and caution.[167] The importance here is that with recent changes in the law, clergy have become increasingly personally susceptible for such claims.[168]

In past decades charitable immunity coupled with clergy privilege often protected clergy and religious institutions from tort liabilities.[169] Clergy were made to feel that they would be immune from civil liability as long as they carefully followed the rules within their own religious tradition.[170] If that ever was the case, it certainly is not today. Clergy are finding themselves increasingly liable under a number of tort theories.[171]

Clergy can be held personally responsible for their defamatory comments that injure a person's reputation.[172] True comments are not slanderous and truth is an absolute defense to a defamation suit, unless the comments are also invasions of privacy.[173] This arises when a clergyperson publicly reveals a confidential disclosure made by a member.[174] Since clergy have a fiduciary responsibility to the source of their privileged information, invading the privacy of the speaker may make the church and pastor liable.[175]

13, 111, 117, at 39-84, 771-85, 849-68.

165. WILLIAM L. PROSSER ET AL., CASES AND MATERIALS ON TORTS 135, 669 (8th ed. 1988).

166. RESTATEMENT (SECOND) OF TORTS § 281 (1965); KEETON ET AL., *supra* note 85, § 30, at 164-65.

167. RESTATEMENT (SECOND) OF TORTS § 519 (1977); KEETON ET AL., *supra* note 85, § 75, at 534-36.

168. *See* Ivy B. Dodes, *"Suffer the Little Children . . .": Toward a Judicial Recognition of a Duty of Reasonable Care Owed Children by Religious Faith Healers*, 16 HOFSTRA L. REV. 165, 166 n.8, 173 (1987).

169. KEETON ET AL., *supra* note 85, § 133, at 1069-70; *see* O'Reilly & Strasser, *supra* note 6, at 59-63.

170. Gross Schaefer, *supra* note 17, at 218.

171. Kelly Beers Rouse, *Clergy Malpractice Claims: A New Problem for Religious Organizations*, 16 N. KY. L. REV. 383, 385-86 (1989).

172. Clergy enjoy no special protection from defamation suits. Marshall v. Munro, 845 P.2d 424, 428 (Alaska 1993).

173. RESTATEMENT (SECOND) OF TORTS § 652(D) (1977); KEETON ET AL., *supra* note 85, § 117, at 856.

174. *See* Snyder v. Evangelical Orthodox Church, 216 Cal. App. 3d 297, 264 Cal. Rptr. 640 (1989).

175. *See* RESTATEMENT (SECOND) OF TORTS § 874 (1979). "A fiduciary relation exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation." *Id.*

Generally, if the person talking with the clergyperson expects confidentiality, then the pastor has a fiduciary responsibility to protect the details of the conversation.[176] Making public any comment made in the confessional or other confidential situation may violate the rights and expectations of the congregant and expose the clergyperson to potential liability.[177]

There is a growing awareness of the problem of clergy sexual boundary violations.[178] For example, "in the past decade the Episcopal Church has seen the incidence of clergy sexual misconduct almost double."[179] With regards to clergy sexual misconduct, clergy may be held liable for having sexual relations with congregants.[180] The legal theories include interference with a marital relationship if the congregant is married[181] and intentional infliction of emotional harm.[182] A clergyperson may be liable for inflicting emotional distress if it can be proven that the clergyperson intentionally or recklessly caused severe distress and anguish.[183] In one highly publicized case, three women won a $3 million verdict against a priest but lost their suit to collect against the diocese's insurance company.[184]

The particular clergyperson may also be liable for the negli-

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at cmt. a.

176. *See* Destefano v. Grabrian, 763 P.2d 275 (Colo. 1988) (stating that a fiduciary duty may arise from the confidential relationship between clergy and a person confiding in clergy in a counseling setting).

177. *See* KEETON ET AL., *supra* note 85, § 117, at 856-59 & Supp. 121 n.6.5.

178. According to a survey in a Christian magazine, "one in 10 pastors (12 percent) admitted to having full sexual affairs outside their marriages. One in five (18 percent) admitted to some form of sexual contact with someone other than their spouse." Kim Luman, *Adults Suffering Bulk of Sexual Abuse*, CALGARY HERALD, Sept. 24, 1994, at A8.

179. Celia Sibley, *Churches Forging Policies on Clergy Sexual Misconduct*, ATLANTA CONST., Nov. 13, 1993, at J4.

180. A jury recently awarded $135,000 in damages to a plaintiff—herself an ordained Methodist minister—when her pastor "turned pastoral counseling sessions stemming from the death of her mother into an improper sexual relationship that lasted from 1987-1991." Lee Moriwaki, *Jury Awards $135,000 in Clergy Sexual-Abuse Case*, SEATTLE TIMES, Feb. 12, 1995, at B3.

181. Courts have recognized an actionable claim for interference with a marital relationship. *See* WILLIAM L. PROSSER ET AL., THE LAW OF TORTS, § 124, 873 (4th ed. 1971).

182. CLARK ET AL., *supra* note 161, at 80.

183. Jane Doe v. Dermody, No. 514187 (Sacramento Super. Ct. Feb. 1992). "Priests' sexual misconduct cost the Archdiocese of Chicago $4.3 million in the fiscal year ending June 1994—up 54% from $2.8 million in 1993." Kevin Kelly, *Black Cassocks and Red Ink*, BUS. WK., Feb. 13, 1995, at 6.

184. Ramon Coronado, *Priest-Abused Victims Lose Bid for Money*, SACRAMENTO BEE, Apr. 21, 1995, at B3.

gent hiring, supervising, and training of those who commit sexual transgressions.[185] In addition, religious institutions may well find themselves defendants under the doctrine of respondeat superior.[186] Employers may be responsible for the torts of their employees if the tort was committed within the time, space, and scope of employment and the act is the kind of which the employee is hired to perform.[187] If any of the following questions can be answered in the affirmative, the institution may be responsible for their employee's actions.

A. Was the Tort Committed Within the Time and Space Limits of the Employment?

If the act was done during off-hours, it may not be considered within the scope of employment.[188]

B. Was the Employee Attempting to Serve the Employer with Such an Act?

If the act was self-serving and in no way facilitated the employer's business objective, the employer may not be liable.[189]

C. Was the Act of a Similar Nature as Other Authorized Conduct?

It is generally accepted that employees' actions during their free time will not result in liability for the hiring institution.[190] However, when is a clergyperson at work? This can be a very problematic issue. Arguably, a clergyperson is constantly at work.[191] The twenty-four hour nature of the clergy profession certainly may provide ample opportunity to claim that a particular action was within the scope of the clergy's employment, thus making the religious institution liable for any of the clergy's actions. It is therefore incumbent on the religious institution and the lay leadership to quickly respond and effectively deal with clergy behavior that may result in legal liability to the institution.

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185. CLARK ET AL., *supra* note 161, at 317; *see, e.g.*, *Destefano*, 763 P.2d at 275.
186. METZGER ET AL., *supra* note 86, at 742.
187. RESTATEMENT (SECOND) OF AGENCY § 228 cmt. a (1958).
188. *Id.*
189. *Id.*
190. *Id.*
191. This is a debatable issue. Priests, who take the vow of obedience, are under the strict control of their Ordinary. Arguably, a priest is a priest twenty-four hours a day because the priest's job requires his attention twenty-four hours a day, and the priest's vows do not allow him to take any "time off" from being a religious leader.

V. BOARD OF DIRECTORS: DUTIES, LIABILITIES, INSURANCE[192]

The nature of the nonprofit charitable organization is unique when compared to all other forms of business ventures. The activities of the nonprofit institution are dedicated to the pursuit of the corporation's charitable purposes and not to enrich the shareholders' purses.[193] Although all officers and directors have fiduciary duties to their business organizations, the directors and officers of nonprofit organizations are expected to adhere to a very high standard of conduct due to public trust and certain benefits such as the tax-exempt status, reduced postage rates, and the right to solicit funds.[194] Directors are expected to put the organization before any of their own personal benefits.[195] As can be expected due to the nature of their jobs, clergy often act as directors or officers for a variety of community organizations including their own religious institutions.

A. Responsibilities of Directors and Officers

Clergy may act as directors or officers to their religious institution or to other nonprofit organizations. The most important aspect of directors' and officers' responsibilities is to guide the organization in ways to ensure that it continually pursues its charitable purpose.[196] Directors and officers of nonprofit corporations have fiduciary duties to the corporation and must act within their authority and within the powers of the corporation; they must also make their decisions with care, loyalty, and good faith.[197] Arguably, such decisions must also be made to serve third-party members to ensure that the organization's actions do not harm them.

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192. The author recognizes that there are different views on the issue of whether directors of nonprofit corporations owe the same duty to their corporation as directors of for-profit corporations owe to their corporations. *See* DANIEL L. KURTZ, BOARD LIABILITY: GUIDE FOR NONPROFIT DIRECTORS 30 (1988). However, the author feels that the better, more cautious approach is for nonprofit directors to adhere to the same standards as directors of for-profit corporations. *See id.* Therefore, some of the sources cited herein relate specifically to nonprofit corporations while others relate to for-profit corporations.

193. Deborah A. DeMott, *Self-Dealing Transactions in Non Profit Corporations*, 59 BROOK. L. REV. 131, 132 (1993).

194. *See Developments in the Law*, 105 HARV. L. REV. 1578, 1593 (1992).

195. *See id.* at 1590-92; METZGER ET AL., *supra* note 86, at 867.

196. *See* Thomas H. Boyd, *A Call to Reform the Duties of Directors Under State Not-for-Profit Corporation Statutes*, 72 IOWA L. REV. 725, 727-29 (1987).

197. METZGER ET AL., *supra* note 86, at 867.

1. Duty of care

Directors and officers are required to assume their duties "with the care an ordinarily prudent person in a like position would exercise under like circumstances."[198] They have a responsibility to act with common sense, practical wisdom, and informed judgment. Since directors and officers typically rely on information supplied by employees, staff, and professional consultants—attorneys, lawyers, and other clergy—they should make a reasonable investigation prior to making a corporate decision. Therefore, prudent directors and officers should inform themselves of the risks and potential harm associated with their decisions and continually seek to make reasonable, informed decisions that are in the best interest of the corporation. This duty of care is often expressed as the business judgment rule,[199] discussed below.

2. Duty of loyalty and good faith

Remaining loyal to the corporation means acting solely in the best interests of the organization.[200] Directors and officers breach their duty of loyalty if they attempt to profit personally at the expense of the nonprofit organization.[201] Serious penalties face leaders who mix their personal interests with the interests of the corporation.[202] Directors and managers owe the duty of utmost loyalty and fidelity and are generally not allowed to self-deal, make secret profits, be in a position of a conflict of interest, or usurp corporate opportunities.[203] Such violations may occur when a director or officer in an official status becomes aware of a business opportunity that would benefit the corporation.[204] Under a fiduciary duty to the organization, the director or officer may not take personal advantage of any situation unless there is full disclosure and the noninvolved directors approve the intended action.[205] With only

198. MODEL BUS. CORP. ACT § 8.30(a)(2) (1993).

199. METZGER ET AL., *supra* note 86, at 868.

200. Guth v. Loft, Inc., 5 A.2d 503, 510 (Del. 1939); *see* Marcia M. McMurray, Note, *An Historical Perspective on the Duty of Care, the Duty of Loyalty, and the Business Judgment Rule*, 40 VAND. L. REV. 605, 623 (1987).

201. *See* Professional Hockey Corp. v. World Hockey Ass'n, 143 Cal. App. 3d 410, 414, 191 Cal. Rptr. 773, 776 (1983).

202. *E.g.*, CAL. CORP. CODE §§ 5233(h), 9243(h) (West 1990).

203. METZGER ET AL., *supra* note 86, at 876-77.

204. *Id.*; *see* Industrial Indem. Co. v. Golden State Co., 117 Cal. App. 2d 519, 533, 256 P.2d 677, 686 (1953).

205. METZGER ET AL., *supra* note 86, at 876-77.

one minor exception, directors and officers must refrain from participating in transactions in which they have a financial interest.[206] However, if it can be proven that a corporate move is in the best interest of the institution and would also benefit a director, it may be allowed if there has been full disclosure.[207] Prior to this mutually beneficial transaction, the benefit to the corporation must be confirmed through full disclosure of the director's and officer's private interests versus that of the organization's.[208] In addition, all disinterested board members must approve the transaction, indicating that the corporation could not have found a better deal with reasonable effort.[209]

Often within the religious community, clergy serve on boards of several nonprofit corporations. In the business world, serving on boards of competing companies can cause several legal problems.[210] However, in the nonprofit world, there is less concern of running afoul of both one's legal and ethical duties. There are legal issues that arise if there are dealings between two nonprofit institutions that share the same board member.[211] Accordingly, the director should announce the possible conflict of interest and consider not participating in the deliberations or the vote.

The lesson here is that it is wise to avoid engagements that might even suggest a conflict of interest between a director's or officer's personal interests and the interests of the corporation. Also, if there is any doubt as to whether an action may cause a breach of duty, then the director or officer should fully disclose the possible conflict.

B. Directors' and Officers' Liability

Directors and officers are bound to act within the authority given to them by their corporation's bylaws.[212] As long as they act within the scope of the company's business and their own authority, they may be protected from individual liability claims.[213] How-

206. *Id.*
207. *Id.*
208. *Id.* at 876.
209. *Id.* at 868; *see* CAL. CORP. CODE § 5233(d)(2) (West 1990).
210. For example, the Clayton Act of 1914 prohibits interlocking directorates. 15 U.S.C. § 19 (1994).
211. *See* KURTZ, *supra* note 191, at 59 (noting that the duty of loyalty may be violated by pursuing the interests of another nonprofit organization).
212. METZGER ET AL., *supra* note 86, at 867.
213. *Id.* at 868.

ever, if they fail to uphold a duty of care by acting negligently or fraudulently or if they attempt to usurp a corporate opportunity they may be personally liable.[214]

Directors and officers who make intentionally fraudulent statements about the corporation may be liable to the organization or to those who are harmed by such reports.[215] Directors and officers whose negligent actions inflict harm on another person may be personally liable to that person.[216] Although nonprofit organizations may not be subject to income or other types of taxes, they are always liable for various payroll taxes.[217] Failure to pay state and federal withholding taxes or workers' compensation contributions may also put liability onto the directors and officers.[218] In addition, directors and officers may be held liable for the torts of their corporation's employees if they authorize or participate in committing the tort.[219]

When a third party is injured on a corporation's property or at an event sponsored by the corporation, its directors and officers may be liable for the injuries suffered if the directors authorized the corporation's action that resulted in injury; the directors or officers were aware or should have been privy to the potential for danger but failed to take action to remove the danger; and a prudent person in the directors' or officers' position would have taken a different course of action.[220]

The business judgment rule protects directors and officers from personal liability for honest errors in judgment.[221] The purpose of this rule acknowledges human error and relieves directors of the fear of being second-guessed by the court system.[222] Here, if directors and officers act with care and good faith and can prove they made an informed decision on a rational basis and without

214. McMurray, *supra* note 199, at 626-28.

215. Under the Securities Act of 1933, an officer or director may be liable if acting with scienter—the knowledge of untruth or the reckless disregard for the truth. 15 U.S.C. § 77l (1994).

216. CLARK ET AL., *supra* note 161, at 312-19.

217. *See* KURTZ, *supra* note 191, at 98-99; MARILYN E. PHELAN, REPRESENTING NONPROFIT ORGANIZATIONS § 1-10.70 (1996).

218. John D. Jackson & Alan W. Tompkins, *Corporations and Limited Liability Companies*, 47 SMU L. REV. 901, 912 (1994).

219. See the discussion of respondeat superior, *supra* note 87.

220. Willburt D. Ham, *Kentucky Law Survey*, 74 KY. L.J. 281, 307 n.157 (1985).

221. METZGER ET AL., *supra* note 86, at 868; *see* Casey v. Woodruff, 49 N.Y.S.2d 625, 642 (1944).

222. METZGER ET AL., *supra* note 86, at 868.

conflict of interest, they will generally be legally protected.[223] However, if it is found that the director or officer acted negligently, did not make an informed decision, or acted in bad faith, then that officer or director can be held personally liable.[224]

With regard to third-party liability, a few statutes exist that protect volunteer directors of nonprofit organizations. If the nonprofit organization maintains a fixed amount of insurance coverage, then "no cause of action for monetary damages shall arise against any person serving without compensation as a director," if the director's conduct meets the duty of care standard.[225] The same protection is afforded to volunteer directors even without insurance, as long as the board has made "all reasonable efforts" to obtain such insurance.[226]

C. Directors' and Officers' Insurance

1. Indemnification

The cost of defending a lawsuit or criminal charge brought against a director can be enormous.[227] To induce or persuade people to become directors, corporations often indemnify them for such costs.[228] The key issue when dealing with directors' insurance is whether or not the nonprofit institution can and will advance funds to the director or officer to pay for a legal defense. In some situations the organization will front the necessary money for pretrial expenses, and in others, directors or officers will need to spend their own money on legal fees and hope that the corporation will reimburse or indemnify them.[229] The nonprofit organization's

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223. *Id.*

224. CAL. CORP. CODE §§ 5231, 9242 (West 1990).

225. *Id.* § 5047.5(b).

226. *Id.* §§ 5239(a)(4), 9247(a)(4).

227. Bennett L. Ross, *Protecting Corporate Directors and Officers: Insurance and Other Alternatives*, 40 VAND. L. REV. 775, 805-06 (1987); *see* Robert H. Rosh, Note, *New York's Response to the Director and Officer Liability Crisis: A Need to Re-examine the Importance of D & O Liability Insurance*, 54 BROOK. L. REV. 1305, 1308 (1989).

228. *See* Kimberly C. Harris, *Recent Development: The Impact of Bankruptcy on Liability of Corporate Directors*, 5 BANK. DEV. J. 289 (1987); Ross, *supra* note 226, at 787.

229. *See generally* Joseph P. Monteleone & Nicholas J. Conca, *Directors and Officers Indemnification and Liability Insurance: An Overview of Legal and Practical Issues*, 51 BUS. LAW. 573 (1996) (discussing various consequences of indemnification and liability insurance).

bylaws or minutes may specify to what extent indemnification exists.[230] Alternatively, the board of directors can vote to reimburse or indemnify a particular director or officer for a particular situation.[231]

There are three possible outcomes of litigation: victory, loss, or settlement. Generally, a director who successfully defends against a suit will be reimbursed by the nonprofit organization.[232] When there is a third party settlement, the reimbursement picture is a little less clear. The nonprofit organization may indemnify the director or officer against all losses including legal expenses, judgments, fines, penalties, and settlement payments if a majority of the board decides that the director acted in good faith, in the best interests of the company, and without criminal intent.[233] However, if a director or officer is found liable for breach of duty, the nonprofit organization may indemnify the director for defense expenses only, not for the cost of judgment, unless the court decides the director is entitled to such reimbursement.[234]

Nonprofit institutions are legally required to indemnify a director who has successfully defended a lawsuit.[235] However, the clergyperson involved must first put up personal funds to fight the prospective lawsuit. It would be wise for religious professionals to become knowledgeable of what coverage, if any, the religious institution carries and what is covered in case of a lawsuit.

2. Coverage

In light of the potential liability, it is wise to consider acquiring directors' and officers' insurance when possible. When an organization purchases directors' and officers' liability insurance, it is actually buying an indemnification policy which will reimburse the organization for the costs of indemnifying a director or will reimburse the director for costs incurred when the nonprofit organiza-

230. *See, e.g.*, CAL. CORP. CODE §§ 5238, 9246 (West 1996).
231. *Id.*
232. *Id.*
233. Peter B. Manzo, Obligations and Possible Liabilities of Directors of Nonprofit Public Benefit Religious Corporations (Nov. 18, 1993) (on file with the *Loyola of Los Angeles Law Review*) (citing CAL. CORP. CODE §§ 5238, 9246 (West 1996)).
234. CAL. CORP. CODE §§ 5238(c), 9246(c) (West 1996).
235. Manzo, *supra* note 232, at 12; *see also* CAL. CORP. CODE §§ 5238(d), 9246(d) (West 1996) (allowing a corporation to indemnify a director unless the director was adjudged liable to the corporation in performance of the director's duties).

tion cannot pay.[236]

Directors' and officers' coverage typically pays for defense costs and loss at the time of judgment or settlement. It is possible that the defense costs could consume all of the coverage and leave the director or corporation with a large balance owed if the case is lost. Further, since insurance companies generally do not have a duty to defend in breach of duty of loyalty cases,[237] the director or officer is often forced to use personal funds until the action is decided by a court or is settled. This places some pressure on the director to settle cases before trial.

Not all directors' and officers' insurance policies are the same. Many policies exclude coverage for bodily injury, property damage, libel, and slander since these issues are typically covered under general liability policies.[238] While shopping for a directors' and officers' policy, one should be certain that a lawyer explains what the policy does and does not cover. Consider the following questions: Will the policy automatically cover directors who begin service after the policy has taken effect? Will the insurer advance funds to pay defense costs as they become due? What coverage will it give for claims arising from events occurring before the policy's period? Does the insurer have a right to approve the insured's legal counsel? Does the policy impose a fixed duty on the director? Does the insurer have a duty to defend? What are the policy's limits and deductibles?

VI. CREATING EFFECTIVE RELATIONSHIPS BETWEEN CLERGY AND LEGAL ADVISERS

Conscious of all the information covered in this Article, a priest, pastor, or rabbi may feel overwhelmed. Certainly there are many real issues as well as reasonable solutions facing clergy. Therefore, it is critical that clergy seek out level-headed and competent legal advisers. Undoubtedly, this may cost some time and money. Often a well-intentioned member of the congregation who is an attorney will offer legal services free of charge.

Remember the best legal advice is always preventive. It

236. Manzo, *supra* note 232, at 14.

237. Director and officer policies typically exclude self-dealing and other breaches of the duty of loyalty. KURTZ, *supra* note 191, at 113.

238. *Id.*; Fred J. Lower, Jr., Potential Legal Liabilities of Members of Non-profit Boards of Directors, Loyola Marymount University, Los Angeles, California, at 6 (Nov. 18, 1993) (on file with the *Loyola of Los Angeles Law Review*).

would be wise for a pastor or rabbi to spend time with a legal advisor reviewing this Article and developing good preventive strategies. The best time to call a lawyer is before there is a problem.

Moreover, no attorney is an expert in all legal areas and therefore clergy cannot rely on a single legal advisor to deal with all the issues that arise. Since bad advice can be costly, unless the attorney is very familiar with the particular legal problem under decision, the advice may be worth even less than what is being paid. One final note is that while clergy often deal with religious doctrines that seem timeless, legal rules change almost daily. Accordingly, the clergyperson and the legal advisor should meet annually to discuss pertinent changes in the law.

VII. CONCLUSION

Cicero wrote, "No power should be above the law."[239] While he may not have been talking about clergy or religious institutions, this sentiment is more true today regarding our religious leaders than it was in the past. All things considered, clergy must establish good relations with a legal counsel and become more aware of the legal environment. Once pastors, priests, and rabbis are better informed, they will be better able to protect themselves and their institutions from potential legal controversies. As many clergy have learned, an ounce of preventive law is often worth a whole bushel of defense lawyers.[240]

239. *See* BURTON STEVENSON, THE HOME BOOK OF QUOTATIONS 1088(1967).

240. Loosely based on the old English proverb, "An ounce of discretion is worth a pound of wit." *Id.* at 456.