

A Legal Perspective on Building a Culture that is Sensitive, Aware and Anticipates

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Convocation
The Spirit of Collaboration



Wellness Activity

Litigation Settlements

Understanding the Context, Litigation Response

- California 2003 “window” with global settlement in 2007
- 558 cases settled for a total of \$660 million drawn from Archdiocese, religious orders, schools, and insurers.
- Included commercial insurance buyout of future claims for Archdiocese and posting clergy files of priests.
- Now in second window of 3 years for public and private CA institutions (AB 218)
- Petition for certiorari to Supreme Court filed in April to challenge constitutionality of AB 218.

Understanding the Context, Pastoral Response

- Continued settlements since 2007
- Ongoing, even to now, and involves a team from Vicar for Clergy, Moderator of Curia, Victims Assistance Ministry, and General Counsel.
- Great reliance on Victims Assistance insights, knowledge, investigation results.
- Settlement includes full release and provides reimbursement for counsel review for victim; includes on-going counseling and creative solutions on a victim-by-victim basis
- Parallel pastoral process: Feinberg Independent Compensation Program

Lessons Learned

- Journey with victims is essential
- Money matters for some; it is not sole element.
- Open communication and confirmation of hurt.
- Appreciate challenges faced by victims; critical for respectful investigation to be part of healing (not just questioning).
- Similarly important to support those wrongly accused.
- Finding solutions and resolving matters is more than a financial, social, and ministerial resolution, it is being Church – reconciling errors, mishaps, and misdeeds.

Employment & Mission

Who Carries Out Your Mission?

Ministerial Exception and Employment

Key cases have focused on schools as clearly religiously affiliated charitable organizations. Further extension is a question of facts and circumstances.

What's challenging is defining (then supporting) the qualities necessary for an employee to be a "minister".

Even if the employee squares completely with the exception, it's a defense, not protection from being sued. Also, no preclusion of claims unrelated to the terms and conditions of ministry.



Constitution & Cases (the CliffsNotes version)

- First Amendment: Free Exercise protection to select religious leaders and Establishment Clause barrier to government deciding.
- Hosanna-Tabor Evangelical Lutheran Church v. E.E.O.C. (2012): finds unanimously that Lutheran grade-school teacher is qualified as a minister in a non-discrimination suit over disability.
- Subsequent cases tacked between broad and narrow applications of the 4-factors identified in Hosanna-Tabor.
- Our Lady of Guadalupe School v. Morrissey-Berru (2020): goes beyond the “checklist” to what an employee does and how those actions convey Church mission and message.
- Current cases parsing how this functions in practice: where is the line?

Practicalities

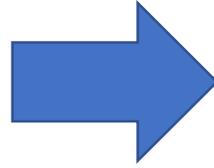
- Give deliberate attention to which positions are integral to mission; reflect that in job descriptions.
- Not unlike an employee handbook review, consider an audit of employee roles (qualities, function, connection).
- Consent is a baseline for employees (enthusiastic endorsement is aspirational).
- Connect the dots between employee's position and religion's ministry; make it easy for a Court to decide this point.
- Make it routine, you never know which case will need to rely on the record you've created.

Pastoral Practices

- Talk about religious mission throughout employment: Who we are.
- Invite applicants to join that mission (and acknowledge by signing application).
- Integrate mission into on-boarding, orientation, and periodic continuing education.
- Extend the conversation – employees, yes, but also other stakeholders.
- Plan ahead: high-performing but non-compliant employees, tenure or union issues, etc.

Public Accommodations

Public Accommodations Law



Everyone has facilities that are rented to the community. Often, they are engaged only by parishioners, but just as often, not.

Whether a Church Hall is a place of public accommodation is a question of fact – not law: “Any place ... which is open to and accepts or solicits the patronage of the general public....”

Similarity to “public uses”: meeting hall that advertises and rents to neighborhood or pre-school that advertises space to the community (schools are included in many lists)

The Sleeping Dog



If you rent to anyone, must you rent to everyone?

- Growth in protected categories and expectations generally.
- Tension over “marriage” issues in Community puts pressure on owners.
- Arbitrary, inconsistent and undocumented uses.
- Desperately seeking revenue / advertising to the public
- Unintended consequences of “uses” and “users” on premises
- Who’s in your facilities? Why? What are they charged? Who knows?

Religious Exemptions – Check the Rules

- Often excludes religious schools – but what about non-school uses in the cafeteria, gym or grounds?
- Sometimes mirrors “religious employment” exemption (thus - only for religious discrimination).
- Sometimes “Religious Society” is allowed preference in admission, housing, real property, use of facilities – but only on the basis of religion.
- Always includes “for profit” entities.
- Focus is on making money from the community

Connecting the Dots

- Why do we have facilities? How are they connected to Mission?
- Where is that articulated? Publicized?
- Are any uses or users excluded? If so, how and why? How would anyone know?
- Note – Labels are not determinative. Articulation between facility and mission.
- What are the facts? (rents, advertise, etc.)
- Getting “buy-in”



Discussion



Thank you.

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