

CRITICAL *Ministry* DOCUMENTS

6 ESSENTIALS FOR
MINIMIZING YOUR
MINISTRY'S LIABILITY



INTRODUCTION



There is no absolute, foolproof strategy for avoiding a lawsuit against your ministry. The reality is that churches and their associated ministries are targeted for a variety of reasons. Some may be quick to sue a church because they think that churches are a source of “deep pockets” and would be willing to pay out in order to avoid a costly and time-consuming lawsuit. Others are simply attempting to further an anti-biblical agenda because they are hostile toward the Gospel and want to target churches that preach Truth and refuse to conform to a morally declining, wholly relativistic society. Still others are angry or feel unjustly treated because of an employment disagreement or because they were the subject of church discipline. Legal controversies involving churches truly run the gamut: from child sexual abuse allegations, employment-related issues, church discipline, injuries/accidents on church property or at church activities, property disputes, copyright violations, and financial scandals to, more recently, allegations of discrimination—just to name a few.

A church can dramatically reduce its liability by managing one key concept: expectations. Communicating the requirements for affiliating with the ministry, as well as what attendees, members, employees, and volunteers should expect, will reduce the possibility of angry ministry participants—and will subsequently reduce the likelihood of legal action against the ministry. Expectations that have been reduced to writing by way of an agreement, a policy, or a document that reflects what occurred at a meeting or in a conversation will provide much-needed protection for the ministry, because these documents reflect an understanding and agreement of expectations on the part of both the ministry and the other party. The following six ministry documents are ones that the NCLL has found in recent years to be indispensable to reducing a ministry’s liability risk:

- BYLAWS
- MEETING MINUTES
- EMPLOYMENT AGREEMENTS
- CONFLICT RESOLUTION AGREEMENTS & PROCEDURES
- PERMISSION SLIPS & LIABILITY RELEASE FORMS
- COUNSELING POLICY AND AGREEMENTS



BYLAWS

MINISTRY BYLAWS

Every church, whether incorporated or unincorporated, must have an operational document. This is the internal church document that sets forth how the church will operate, e.g., the purposes of the church, the election of officers, when church meetings will be held, if and how members will be admitted, etc. The bylaws should be written to reflect the specific needs and practices of the church.

In most instances, when a legal dispute arises as to the authority or duties of church officers or members, a court will look to the church's bylaws to determine whether or not the officer or voting member acted within the scope of his or her duties. For legal purposes, the bylaws are the church's most important document because they set out in detail its internal workings. It is vital that this document be prepared properly and that it include all the provisions necessary for the church to safeguard against potential lawsuits. Courts generally hold that members who join a church have agreed to be bound by the bylaws—even by those provisions with which they may disagree.

The church bylaws (and all of their amendments) must be kept in a church office file that is readily accessible. The members who are to be subject to the bylaws should either be given their own copy or should be given notice as to where on the church property (or church website) they may review the bylaws. A court will not hold a member to bylaws he had no opportunity to review.

Each state has enacted laws establishing rules by which a church, whether incorporated or not, or a nonprofit corporation will be governed if it has no bylaws or if the bylaws do not address a specific issue. For example, if a church has no bylaws or the bylaws fail to provide for the amount and method of notice to call a church meeting and the amount and method of notice becomes an issue for the church, a court will use the state's provisions governing nonprofit corporations to establish the required amount and method of a meeting notice. The church may set whatever operational rules it wishes, but its failure to do so would force a court to impose the state's rules as a default position in the event of a dispute that ends up in court proceedings.

MINISTRY Bylaws:



NAME AND PURPOSE STATEMENT

The ministry bylaws should start with a designation of the ministry's formal, legal name. A church's purpose statement should include the language required for ministries that are tax exempt under § 501(c)(3) of the IRS Code. The purpose provision should be broad in scope and should include, at a minimum, the words "charitable, religious, and educational" as well as any other "purpose" words that would cover all present and future ministries. In most cases, those three words will broadly cover all potential purposes of the ministry.

MINISTRY Bylaws:



STATEMENT OF FAITH

More so than ever before, it is vital for the ministry's bylaws to state clearly and unequivocally the ministry's beliefs. This part of the bylaws will usually be called a "statement of faith" or a "confession of faith" and should include the ministry's position and supporting scripture references for doctrinal beliefs, as well as issues that are not necessarily "doctrinal" in nature but that have nonetheless become the focus of litigation for churches, such as (1) marriage and sexuality, (2) divorce and remarriage, (3) abortion, (4) euthanasia, (5) lawsuits within the church, and (6) the protection of children.

The following list includes some of the issues that your church may wish to consider for the doctrinal section: (1) the authority of scripture, (2) dispensationalism, (3) the Trinity, (4) the person and work of Christ, (5) the person and work of the Holy Spirit, (6) the depravity of man, (7) salvation, (8) eternal security, (9) the role and work of the church, (10) separation, (11) the second coming of Christ, (12) creation, (13) the role of civil government, (14) the three institutions created by God [home, church, and state], (15) the role of missions, (16) giving/tithing, and (17) ordinances.

MINISTRY Bylaws:

MEMBERSHIP PROVISIONS

Be sure the bylaws clearly state the church's qualifications for membership. This section should not only state the formal ways by which a person may become a member of your church, but it should also state the minimum standards of Christian conduct and agreement with your statement of faith that must be met before your church would accept someone as a member. This section should also describe the procedures and the scriptural support for church discipline.

Members should have no contract, property, or civil legal rights in the property or other ministry affairs of the church, and this should also be stated in the member section. Also included in this section should be those issues on which the church would require a vote by members and what percentage is required to carry the vote. The church should limit voting only to those members who are present when the vote is actually taken. The NCLL recommends against absentee and proxy voting because those types of votes can cause severe damage in a church when a decision is hijacked by a group of disgruntled members who choose to vote as a bloc even though they have not been regularly attending the church.

The membership section of the bylaws should also include a section on the rights and privileges of membership and the events that will trigger an automatic termination of membership, such as when a person has not attended regular services within a specified period of time (we recommend six months). It has been the NCLL's experience that in most cases in which there is internal church dissension, members who have not attended for months appear and expect to have a say and/or vote on the matter. Someone who has not attended any service in several months is likely upset at something or is attending somewhere else. Providing for automatic termination clears up any confusion as to who is eligible to vote, attend members' meetings, count for quorum purposes, or have a say in members' meetings. The church may decide to exclude from this termination provision such persons as college students, military personnel, shut-ins, missionaries, evangelists, or others who are legitimately unable to regularly attend services.

MINISTRY Bylaws:



OFFICERS

The bylaws should specify the different church officers, which should include, at a minimum, a president (usually the pastor or board president), secretary, and treasurer. Many churches will also have elders and/or deacons, a financial secretary, clerk, or other officers the church deems necessary. In the section on officers, include the qualifications for church officers, one of which should be an unequivocal agreement with, and a requirement to periodically affirm, the statement of faith, as well as how and when officers are elected and their terms of service.

The duties of the listed officers should also be included in the bylaws, as well as the procedure for calling and termination of a pastor and/or elders.

MINISTRY Bylaws:



CHURCH BUSINESS MEETINGS

The bylaws need to spell out the rules and procedures for all church business meetings. The NCLL does not recommend Robert's Rules of Order, as they are too specific and inflexible. It is preferable to create your own workable rules based upon the Bible and common sense.

This section should also address when the annual church business meeting will be held, the dates of the ministry's fiscal year, who may call special meetings and who will moderate meetings, notice requirements for meetings, voting procedures, and what constitutes a quorum for any votes taken at meetings. The NCLL recommends that a quorum be the number of members who are present and that any votes pass with a majority of the eligible members present and voting.

MINISTRY Bylaws:



EDUCATIONAL MINISTRIES

A separate article in the bylaws should discuss any additional educational ministries of the church. The primary purpose of this section is to clearly establish that the educational ministry is in furtherance of the ministry's tax-exempt purposes, that all such programs must be taught in full agreement with the statement of faith, and that all employees or volunteers in the educational ministry who fail to adhere to or express disagreement with the statement of faith, either in word or action, will not be retained as volunteers or staff in the educational ministry.

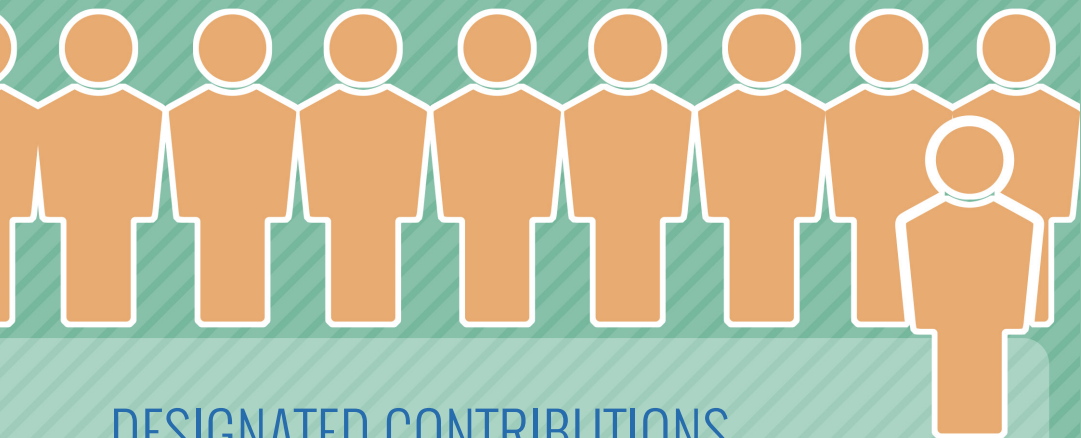
MINISTRY Bylaws:



COMMITTEES

Be flexible in the bylaws with provisions relating to committees. The bylaws should not include a list of all the church's committees but should instead retain the authority to create and dissolve committees at will. Most committees are temporary and should be treated as such in the bylaws. It should also be clearly stated that committees have no authority to act on behalf of the corporation—that their primary function is to research and recommend.

MINISTRY Bylaws:



DESIGNATED CONTRIBUTIONS

Contributions that are designated by the contributor for a specific purpose impose a “trust” obligation upon the recipient to use the designated funds for that purpose only. Including within the ministry’s bylaws a provision akin to the NCLL sample provision below legally permits the church to use the funds for other purposes if deemed necessary by the pastor and the board. For example, if a designation is made for the building fund, the amount designated must be used solely for the purpose of that building fund unless this provision is included. Otherwise, if the church receives a designated contribution, there are only three things the church may legally do with the money: (1) use it for the purpose designated, (2) return it to the donor, or (3) have the donor change or remove the designation. The sample provision eliminates the need for the church to ask the donor for permission to use the funds for a purpose other than the designated one.

NCLL SAMPLE DESIGNATED CONTRIBUTIONS BYLAW PROVISION

FROM TIME TO TIME, THE CHURCH, IN THE EXERCISE OF ITS RELIGIOUS, EDUCATIONAL, AND CHARITABLE PURPOSES, MAY ESTABLISH VARIOUS FUNDS TO ACCOMPLISH SPECIFIC GOALS. IF THE CHURCH RECEIVES A DESIGNATED CONTRIBUTION FOR THESE FUNDS OR FOR ANY OTHER DESIGNATED PURPOSE, THE CHURCH WILL ATTEMPT TO HONOR THE DESIGNATION; HOWEVER, ALL DESIGNATED CONTRIBUTIONS SHALL BE DEEMED ADVISORY RATHER THAN LEGALLY MANDATORY IN NATURE AND SHALL REMAIN SUBJECT TO THE EXCLUSIVE CONTROL AND DISCRETION OF THE PASTOR AND THE BOARD. NO FIDUCIARY OBLIGATION SHALL BE CREATED BY ANY DESIGNATED CONTRIBUTION MADE TO THE CHURCH OTHER THAN TO USE THE CONTRIBUTION FOR THE GENERAL FURTHERANCE OF ANY OF THE PURPOSES STATED IN THE PURPOSE STATEMENT OF THESE BYLAWS.

MINISTRY Bylaws:



BINDING ARBITRATION

It is important to make sure the ministry's bylaws provide that any and all disputes between a church member and the church cannot be litigated in the civil courts, as this is biblically forbidden, but that if such a dispute does arise, the matter would be arbitrated in a biblically based, Christian manner.

MINISTRY Bylaws:



TAX-EXEMPT PROVISIONS

In order to maintain federal tax-exempt status, the ministry's organizing or operational documents must include the following provisions: prohibition on private inurement, political involvement limitations, dissolution clause, racial nondiscrimination, and a limitation of activities statement. If your church is incorporated, the dissolution clause is probably already included in your articles of incorporation (as that is a requirement to be incorporated as a nonprofit), but the rest of these provisions may not be. Either way, since most church members will never read the articles of incorporation, we recommend that all of these provisions be included in the bylaws even if they are in the articles of incorporation. For unincorporated churches, it is absolutely essential that these provisions be included in the bylaws. The NCLL has sample wording of each of these provisions available for our supporting ministry partners.



MEETING MINUTES

Whether it is a private church board meeting or a congregational business meeting, it is imperative to keep an accurate record of the events, votes, and conversations that took place. In the event of a lawsuit that involves actions taken at a meeting, the minutes provide the best evidence for what actually occurred and are more persuasive than eyewitness testimony or someone's past recollection of events. In some cases, meeting minutes have been used as evidence years after they were taken, so accuracy is imperative.

CONTENTS OF MEETING MINUTES:

- Date and time of meeting
- Place of meeting
- Statement that the meeting was duly called:
 - Who called the meeting
 - What notice of the meeting was given
 - Copy of the meeting notice
- Presiding officer of the meeting
- Secretary of the meeting
- Names of those present at the meeting (for board meetings)
- How many were present in person at the meeting
- Statement that the minutes of the previous meeting were read, including a note on any corrections, and adopted
- Summary of what occurred at the meeting:
 - Resolutions proposed and by whom
 - Resolutions adopted
 - Record of votes for and against a proposal
 - Reports of officers and committees
- Who adjourned the meeting and at what time
- Signature of secretary
- Signature of presiding officer (obtained at the next meeting when the minutes are adopted)



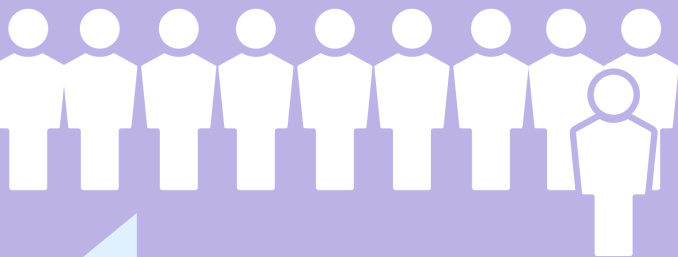
MEETING MINUTES

READING AND CORRECTING MINUTES:

- The secretary should read the minutes to the group (membership or board as applicable) at the next meeting.
- Only those who were present at the meeting being discussed may make corrections to those minutes.
- The secretary and the person presiding over the meeting should initial any corrections to the minutes as read by the secretary.
- The secretary should then certify the minutes by his or her signature when the organization has corrected and/or approved them.
- The presiding officer should also sign the minutes below the secretary's signature as verification of their correctness.
- Changes that need to be made to the minutes after they are accepted must be made by actions taken in subsequent meetings, not by rewriting previous minutes.

FURTHER CONSIDERATIONS:

- Have a designated person take notes and then transcribe the notes into minutes as soon as possible after the meeting.
- Keep minutes in a clear, concise form.
- Properly verify all minutes.
- Keep minutes together in a book.
- Back up minutes in the Cloud or on an external hard drive.
- Make changes or corrections to the minutes of a meeting only with the approval of the members when minutes are read and approved at the next meeting.
- Do not "rewrite history" when considering changes or corrections to the minutes.
- The secretary and presiding officer should initial any changes to the minutes.
- Include the essential information of the meeting each time.
- Be careful what is said in the minutes, since minutes are legally binding.
- Attach all important or referenced documents to the minutes.
- Never discard or delete minutes or minute books.
- Minutes should be objective—not expressing the personal views of the secretary recording the minutes.



EMPLOYMENT AGREEMENTS

In years gone by, many people would and could take a job without ever signing a contract or even having a formal interview. In practice, many churches and ministries still operate this way. While we are biblically commanded to honor our agreements (our “yes” should mean “yes” and our “no” should mean “no”), we are also commanded to be wise as serpents and harmless as doves. Simply put, it is wise for a ministry—and for someone who wishes to work for a ministry—to have a written agreement that details expectations and job requirements on the part of the ministry and the employee.

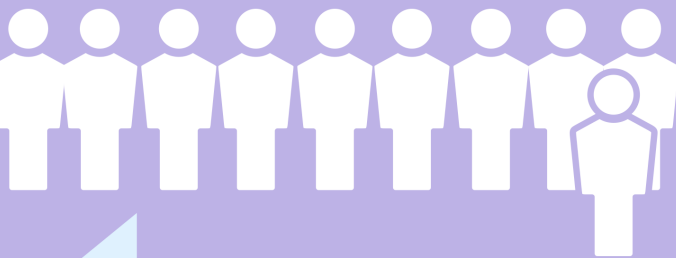
An employment agreement should, at a minimum, include the following major provisions:

TERM OF EMPLOYMENT

Most ministry positions should be considered “at-will” positions, which means that the ministry AND the employee have the right to terminate the employment at any time, with or without cause. If the church intends a position to be “at-will,” that should clearly be stated in the employment agreement. If, however, the position is for a specified term (as is usually the case for Christian school teachers, who usually sign a one-year contract), that should also be clearly stated.

MINISTERIAL JOB REQUIREMENT

It is crucial for churches and ministries to define employment and volunteer positions within the ministry as “ministerial” in nature, because religious organizations may legally discriminate in favor of their religious beliefs when hiring for “ministerial positions.” This means that they can require their volunteers and employees to agree with and be bound to a code of conduct that aligns with the ministry’s statement of faith. The employment agreement (contract) should clearly state that the employee is being hired for a ministerial position and, as such, agrees to abide by particular ministerial duties such as leading staff devotions; prayer with, witnessing to, or counseling visitors who come to the church during the work day; or other types of “ministerial” activities that reflect the integral nature of the employee’s faith to his or her position.



EMPLOYMENT AGREEMENTS

ADDITIONAL DUTIES OF EMPLOYEE

In addition to specifying that the employee will have ministerial duties, the agreement should also state that the employee agrees to subscribe to the ministry's statement of faith, code of conduct, and staff handbook in all aspects of the employee's life, both at and away from ministry functions (if certain provisions do not apply away from ministry functions, such as the ministry dress code, for example, the handbook should state as such).

Additional particulars of the job should also be listed in this section but should be written broadly enough that the ministry is able to adjust the employee's responsibilities without materially changing the nature of the position for which the employee was hired.

COMPENSATION/BENEFITS

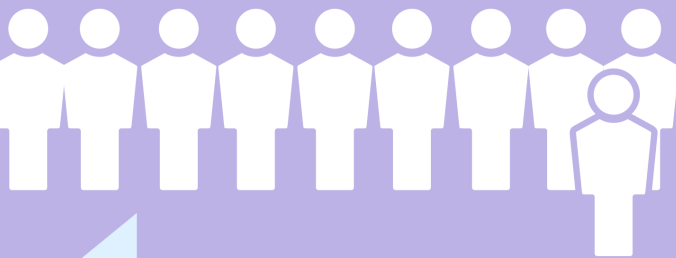
Salary and fringe benefits should be clearly delineated in the employee's contract. It should also include how benefits and compensation will be handled in the event of an employee's termination.

TERMINATION OF EMPLOYMENT

For an at-will employment, this section should reiterate that employment with the ministry is at-will and that the employment may be terminated at any time and for any reason. For a specific term contract, termination by the employer (the ministry) should be for "cause," with "cause" defined in the agreement. The NCLL sample term ministry employment agreement includes this section, defining "cause":

(Ministry Name) shall have cause to terminate employee's employment if, as determined in the sole discretion of (the board of directors or other governing person/body), employee violates the nature or spirit of the ministry's statement of faith, code of conduct, or staff handbook; displays a consistently critical spirit toward the ministry and/or its employees/staff; willfully fails to substantially perform any duties required by this employment agreement; is consistently underperforming or negligent in the performance of required duties; engages in conduct that demonstrably and substantially damages (Ministry Name); or discloses confidential information in violation of applicable ethical and legal duties.

This section should also include notice of termination requirements for both the ministry (employer) and the employee. These requirements should include that the notice must be in writing, stating the reasons for termination and the date termination is effective.



EMPLOYMENT AGREEMENTS

ENTIRE AGREEMENT STATEMENT

Sometimes during the course of employment negotiations or informal job discussions, communications are made that vary from what the employment agreement states. Both the ministry and the employee should thoroughly read and understand the agreement so as to ensure that it includes everything that has been agreed upon by the parties. The agreement should then include an entire agreement statement that articulates that the written agreement is a full and exclusive statement of the agreement of the parties and that it supersedes all prior agreements, oral or written, between the parties.

AMENDMENT OF AGREEMENT STATEMENT

The agreement should also include a statement that no changes or modifications to the agreement will be valid unless they are in writing and signed by both parties. This protects both the ministry and the employee by preventing informal conversations between the parties regarding changes in compensation/benefits, etc., from becoming legally enforceable until they are written and agreed upon by both the ministry and the employee.

RESOLUTION OF DISPUTES

The employment agreement should include a section mandating arbitration in the event of a legal conflict between the ministry and the employee. See “Conflict Resolution Procedures” in the next section for more details about mandatory arbitration and conflict resolution.

ACKNOWLEDGMENT AND CONSIDERATION

Many of us have signed contracts and agreements the terms of which we never fully read. Yet in most cases we will still be bound by the terms of the agreement simply because we acknowledged our acceptance of the terms and conditions in the agreement. In order to prevent or at least minimize employee conflicts with the ministry related to employment expectations, the employment agreement should include a statement that the employee has read through the terms of not just the agreement but also the statement of faith, staff handbook, code of conduct (if separate from the staff handbook), and the ministry’s arbitration procedures—and that the employee agrees to abide by the regulations set forth in each one. This acknowledgment statement should precede the employee and the employer’s signatures at the end of the agreement.



CONFLICT RESOLUTIONS AGREEMENTS/ PROCEDURES

Perhaps nothing has the potential to create disharmony within a ministry more than disputes between employees. And when the dispute is between an employee and the ministry, the result is not merely disharmony but the possibility of a lawsuit. Oftentimes, it is not even the underlying dispute that creates the biggest problem—it is how the dispute was handled.

To minimize this possibility, the ministry should adopt a biblically based dispute-resolution policy for its staff and include the policy procedures in the staff handbook. A dispute-resolution policy is important because even the godliest of Christians has emotions that, when not tempered, can get out of control. When we strongly disagree with another person, we tend not to think clearly and may say or do things that are not only unbiblical but also have the potential to permanently damage our own, others', and the ministry's reputations, as well as the cause of Christ. Even if we intend to practice biblical conflict resolution in accordance with Matthew 18, most church members and staff may not do so without written guidelines to direct them in the process. A dispute-resolution policy provides those guidelines and helps to resolve conflicts in a way that is Christ-honoring, unity-promoting, and relationship-restoring.

Employment agreements and church bylaws should also include a mandatory arbitration clause as the last step in a dispute resolution process. This provision should explain that disputes of a legal nature between employees and the ministry or between church members and the church must be handled through arbitration rather than through the court system due to the ministerial nature of the work involved and the biblical prohibition against bringing lawsuits against believers in the church. Mandatory arbitration procedures should be attached to the handbook and/or the employment agreement and should also be adopted by the ministry board of directors. Note that these procedures do not apply when a staff member or volunteer is suspected of child abuse/molestation. In that case, the legal requirements for child abuse reporting must be followed.

PERMISSION SLIPS/ LIABILITY RELEASE FORMS



Although the church should certainly have a general liability insurance policy that would cover many accidents and/or injuries, requiring permission slips and other liability release forms is important, particularly for events or activities where the risk of abuse, injury, or death is higher than in other events. This is an important part of limiting the ministry's liability in the event of an accident, injury, property damage, or other problem that arises on ministry property or during certain ministry activities. Requiring that these forms be filled out, signed, and returned also keeps parents and church members informed as to ongoing activities and the potential risks involved.

Keep in mind that most states have a strong public policy against enforcing liability waivers, and in recent years, courts have been reticent to uphold liability waivers in a negligence lawsuit against a ministry or other organization without particular, very specific wording that clearly indicates precisely what the person/parent is providing permission for and the liability that is being waived. For example, in several states, if a church or organization is sued for negligence but the person suing signed a liability waiver, the court will not uphold that waiver unless it specifically states, in bold, that the person is releasing the organization/nonprofit/business for the organization's own negligence. Also keep in mind that while a parent can waive the right to sue a ministry for injuries to their minor child that occur during ministry activities, parents cannot waive the minor's right to sue for his or her own injuries after the minor becomes an adult.

PERMISSION SLIPS/ LIABILITY RELEASE FORMS



Examples of events/activities for which permission/liability release forms should be required include:

HIGH-RISK CHURCH/SCHOOL ACTIVITIES

Permission slips specific to each high-risk activity are invaluable in minimizing the risk of lawsuits or in demonstrating to a jury that the parents were aware of and agreed to the risks attendant to the specific activity in which a child was injured. Before children and teens are permitted to attend a high-risk activity, the staff member or volunteer directing the activity should be certain the child/teen has returned this form. This is particularly important for activities such as mission trips, vacation Bible school, overnight events, or activities where water, sports, or other potentially dangerous activities will occur. If there is no signed release form in hand for a minor at the time of the activity, do not permit him or her to take part in the activity. The form should list all specific activities that will take place on an outing, and staff and volunteers should be warned not to substitute activities that have not been specifically listed. Retain the consent and release form permanently. The NCLL has sample activity consent and release forms available for our ministry partners.

PERMISSION SLIPS/ LIABILITY RELEASE FORMS



HEALTH CARE/MEDICAL AUTHORIZATION RELEASE

Every activity consent form should include an authorization for the church or ministry to act on behalf of the parent in the event of an emergency situation and an authorization for the minor to receive both basic and emergency medical care. In addition, Christian schools and preschools should include a health care information form and medical authorization release each year as part of the registration process for each minor in their care and should require that these be updated any time a minor's medical condition or medications change. The NCLL has sample health care and medical authorization release forms for ministries that partner with the NCLL.

BENEVOLENCE RECEIPT RELEASE

The church should require a release/waiver anytime a person receives benevolence from the church. This could include voluntary services performed for members or non-members on behalf of the ministry (such as building a ramp for an elderly neighbor of the church or a church member), food or clothes pantry recipients, or other forms of benevolence. The waiver should state that recipients understand that they are being provided the goods or services at no charge as a benevolent activity of the church in furtherance of the church's charitable, religious, and/or educational purposes and that the recipient waives any liability arising from such benevolence.

PERMISSION SLIPS/ LIABILITY RELEASE FORMS



PHOTOGRAPH/VIDEO-USE RELEASE

A number of churches have been sued recently for the online posting of member photographs or videos in which members are visible, without having first obtained written authorization from the persons in the image. Churches and other ministries need to ensure that pictures of church members and attendees are not posted online (on the ministry website or on social media) or used in church printed materials unless the persons in the photos have given their permission (in the case of a minor, the parent must give written permission). A photograph/video-use authorization and release can simply be included in permission slips for various activities, or a general photograph release form may be used for all members of the church and/or youth group/children's ministries. The NCLL has sample photograph permission and release forms available for our ministry partners.

PERMISSION/LIABILITY RELEASE FORMS SHOULD ALSO BE REQUIRED FOR:

- Use of church-provided transportation
- Baptism of a minor
- Ministry-provided counseling
- Private use of church facilities (which would be incorporated in a ministry facility-use policy)

COUNSELING POLICY & AGREEMENTS



Pastors who engage in counseling to any degree have been particularly vulnerable to lawsuits by the very individuals they try to help. Pastors and churches should recognize the legal risks associated with pastoral counseling so they can be more effective in their counseling ministry while protecting themselves from people dissatisfied with their advice.

Many different claims can be and have been asserted against pastors in their counseling roles. The most frequent claims in recent lawsuits involve:

- Clergy malpractice
- Intentional or negligent infliction of emotional distress
- Breach of fiduciary duty or confidential relationship
- Negligence
- Defamation, libel, or slander
- Invasion of privacy
- Counselor/therapist malpractice
- Failure to refer a counselee to a health care professional when necessary
- Exerting undue influence over the person being counseled
- Violation of clergy privilege

Churches may also be sued for:

- Vicarious liability
- Negligent hiring
- Negligent training and supervision
- Negligent retention

Minimizing the church's liability for counseling involves four primary steps: (1) taking reasonable care when hiring pastors and non-pastoral counselors, (2) adopting a church counseling policy and requiring counselors and counselees to acknowledge their understanding and agreement to abide by the policy, (3) an awareness of and understanding of state counseling laws, and (4) obtaining appropriate and sufficient counseling liability insurance.

COUNSELING POLICY & AGREEMENTS



HIRING COUNSELORS

A church that takes reasonable care in hiring a pastor and/or counselor will drastically reduce the likelihood that it will be found responsible for any harm he might cause individuals that he counsels. There are two reasons for this reduced liability risk: the church will succeed in weeding out unqualified candidates and will have met the legal duty of exercising reasonable care in the hiring process. However, a church that fails to take such care is likely to be found negligent if it hires a counselor knowing he is unfit or fails to use reasonable care to discover his unfitness. A church takes reasonable care in hiring a counselor when it conducts a detailed background check that includes the following steps:

1. Asking churches or other organizations where the candidate has served about his service history
2. Asking employers for whom the candidate worked within the past five years about his work history
Example: Failure to take this step caused one church to negligently hire a youth counselor who had been dishonorably discharged from the US Navy for sexual molestation.
3. Requesting a criminal and civil record check in the state of the candidate's prior employment and in states where the candidate has lived during at least the past five years (a pastoral counselor candidate should be asked to sign a form authorizing this background check)
4. Gathering applications and conducting detailed interviews, reference and education verifications, and follow-up evaluations

WRITTEN COUNSELING POLICY

Requiring a church counselor to abide by a written counseling policy provides the best protection for both the counselor and counselees. A church that pays no attention to how the counselor conducts his counseling ministry could be found negligent for any harm the counselor does to those he counsels. If a church fails to take action after the church has become aware, or should have become aware, of the counselor's unfitness, the church could also be found liable for negligent retention of the counselor.

COUNSELING POLICY & AGREEMENTS



Key elements in a pastoral counseling policy should require the counselor providing counseling services to do the following:

Be selective as to whom he will counsel.

It is much easier to never begin a counseling relationship than it is to terminate one after counseling has begun.

Limit counseling to biblical counseling.

Refuse to provide medical, mental health, or family therapy. Do not use the labels “licensed,” “clinical,” or “professional” counselor unless the pastor has actually received psychological training and is licensed to practice professional counseling in his state.

Emphasize biblical counseling.

Do this by keeping the Bible open and clearly in sight throughout each counseling session; read from at least one scripture reference during each counseling session; assign scriptural homework to the person being counseled; and begin and end each counseling session with prayer.

Use a counseling agreement.

Require each person being counseled to sign, on behalf of himself or his child, a counseling agreement in which he does the following: acknowledges that the counseling provided is biblical and not professional; acknowledges that the counseling pastor is not professionally licensed in psychological counseling, psychiatric therapy, or marriage and family counseling or therapy and is not licensed by the state as a counselor, social worker, or therapist; agrees not to sue the church for any expenses or damages that result from any of the pastor’s counseling services; and agrees that otherwise confidential communications may be disclosed to appropriate state law enforcement authorities where required by law.

Visit ncll.org/sampleforms to see the NCLL’s sample counselor/church counseling policy/agreement as well as a counselor/minor counselee policy and agreement.

COUNSELING POLICY & AGREEMENTS



Refer when necessary.

Refer people with serious problems requiring professional counseling to a professional medical or psychiatric counselor with specialized training.

Set a limit on the number of counseling sessions.

This limitation, which should be included in the counseling agreement/policy, not only ensures that the pastor reserves sufficient time for his other pastoral duties, but it also lowers the risk of the pastor and counselee relationship becoming either intimate or estranged. Studies show that many of those counseled for an extended period actually leave the church because they feel exposed or feel like they have become the object of sermon illustrations.

Schedule all counseling sessions in writing.

Keeping the office staff informed of the counselor's whereabouts will avoid the appearance of inappropriate secret meetings. A master office calendar can serve as both a reminder of upcoming events and a historical business record of past meetings.

Do not counsel members of the opposite sex or minors out of sight and alone.

One study of pastors involved in affairs found that 71% of the affairs began through pastoral counseling sessions. One way to minimize this risk is to make sure the counseling session is visible to others. In the counseling policy, clearly state the church's position that romantic or sexual relations with counseled persons are absolutely prohibited.

Keep detailed records of counseling sessions, including notes of the following:

- The date, time, and location of the session and how many sessions were conducted with the person and counselor
- The names of those present and the reason for their presence
- The confidential nature of the session
- The problem for which counseling was sought

COUNSELING POLICY & AGREEMENTS



- Any unusual incidents or statements occurring during the session, including threats of harm to self or others; allegations or suspicions of child abuse; or evidence that the counselee is under the influence of alcohol or a controlled substance
- The spiritual advice given, including specific scripture references shared
- The specific actions recommended and any actions the counselee was discouraged from taking

Keeping careful records is necessary to protect pastors from a “he said, she said” dispute in a legal claim against the pastor or church. The notes should be retained in a confidential file to which no one but the counselor has access.

STATE COUNSELING LICENSING LAWS

Generally, pastoral counselors do not need state licenses to provide biblical counseling services as part of their ministry, as most states exempt religious counselors from state licensing laws as long as they do not misrepresent their counseling credentials or improperly use professional titles. However, criminal sanctions may be imposed on pastors who represent themselves as being licensed by the state or as being professional marriage, family, or mental health professionals.

Because licensing laws vary in each state, it is critical that a pastor knows the law of the state in which he ministers. In some states, the licensing exemption only applies to an ordained minister or other member of the clergy while acting in a ministerial capacity if the service is free. In other states, the exemption may not apply if the person being counseled is not a church member and the counseling is not a requirement of the pastor’s position. In these states, many pastors choose not to counsel non-church members rather than lose their exemption from the state-licensing requirement.

COUNSELING POLICY & AGREEMENTS



PROFESSIONAL LIABILITY INSURANCE

Professional liability insurance, also known as errors and omissions insurance (E&O), protects against negligent acts performed by those in counseling roles. Check with the church's insurance agent to make sure the church's liability insurance policy covers pastoral counseling. In reviewing your church's professional liability insurance policy, please keep in mind the following points:

What does the policy protect?

- This insurance should protect against negligent acts and errors and omissions performed by those providing professional services at your church.
- The coverage should also protect your church from the cost of legal defense, personal injury, and actions performed on your behalf by subcontractors.

How much professional liability insurance should the ministry purchase?

- How much professional liability insurance your ministry should purchase will depend upon how often and at what level your church provides professional services.
- If your church provides specialized counseling, long-term counseling, or counseling to nonmembers, your church may be required to purchase more liability insurance.

The National Center for Life and Liberty exhorts pastors and churches to equip themselves with effective hiring and pastoral counseling policies to guard against the legal risks associated with pastoral counseling. Such policies are critical to avoid the legal pitfalls found in state licensing laws, clergy malpractice claims, sexual abuse claims, and state confidentiality requirements.

