

8 Legal Concerns for a Constitution and Bylaws

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Today, as we look at the **8 Legal Concerns for Constitutions and Bylaws**, we will see

3 Articles Essential to Include

5 Articles Often Left Incomplete

PLUS, A BONUS: 3 Articles Usually Neglected

Why should a church even care if their Constitution & Bylaws is up to date?

1. If sued, courts are likely to **impose liability** if the church is not following the proper procedures as stated in the church's Constitution and Bylaws.
2. In the event of a lawsuit, where a church's Constitution and Bylaws are inadequate, the court will **impose state statutory provisions** on the church. The church will then be held to state standards rather than the church's own standards which the church has the legal authority to set but has failed to do so.
3. Because churches **are** being sued, or threatened by lawsuits in increasing numbers.

Proper and careful drafting of the church's Constitution and Bylaws is imperative to protect the church from legal liability.

While it is impossible to prevent someone from suing a church, the **Christian Law Association** recommends effective language that will protect the church as much as possible from potential legal liability.

DISCLAIMER: This workshop has been prepared in consultation with the **Christian Law Association** (or CLA). This informational workshop should not be misconstrued as legal counsel. Workshop participants are encouraged to consult directly with CLA or another attorney with specific legal questions. This brief workshop is only addressing a limited number of issues in an overview format.

Understanding that you need more than a good insurance policy, what are the **8 Legal Concerns for Constitutions and Bylaws?**

1. Structure
2. Statement of Faith
3. Membership
4. Leadership
5. Meetings
6. Personal Liability for Organizational Activities
7. Disputes
8. Procedures

Every church needs an updated Constitution and bylaws. This governing document sets forth what the church has agreed on so it can run effectively.

If your Constitution and Bylaws has not been reviewed and updated within the past two or three years, it's time to give it a good look.

In most instances, when a church is taken to court, the court will look to the organization's bylaws to determine whether that church and its leaders acted within the scope of their duties.

For legal purposes, the set of bylaws is the organization's most important document because it sets out in detail the internal workings of the church.

It is vital that this document be prepared properly and that it include all the protections available for the church to safeguard it against many of the lawsuits that are being filed against religious organizations today.

Courts generally hold that a member who joins a church with knowledge of the bylaws has agreed to be bound by the bylaws—even to those with which they may disagree.

So why do people sue churches?

The 11 Most Common Reasons People Sue Churches

1. Negligence by general public¹
2. Negligence by congregation members and visitors²
3. Negligence (“Attractive Nuisances to Children”)³
4. Negligent supervision of Employees⁴
5. Sexual Harassment⁵
6. Defamation⁶
7. Apparent Authority⁷
8. Disputes over election of the Pastor⁸
9. Disclosure of Confidential information⁹
10. Unfair acts¹⁰
11. Failure to Report Child Abuse or neglect¹¹

You may say: *“But, we have insurance. That will be enough.”* TRUE or FALSE?

FALSE

GENERAL PRINCIPLES

The church bylaws (and all of their amendments) must be kept in a church office file that is readily accessible.

Readily accessible means that the church bylaws is not stored in an attic, a basement, or away from the premises of the church. If the bylaws cannot be placed on the pastor's desk within five minutes of the request, the document is not readily accessible.

The members that are to be subject to the bylaws should either be given their own copy or should be given notice as to where they may review the bylaws.

A court will not hold a member to bylaws of which he had no notice.

Each state has enacted laws establishing rules by which ministries incorporated as nonprofit corporations will be governed if it has no bylaws or if the bylaws do not speak to a specific issue.

It is important that your church at least consider all the issues I am presenting in this workshop.

While a church may omit provisions that do not apply to it, the organization will need to include the majority of provisions we are discussing to avoid having a court subject the church to the state's nonprofit corporation rules.

For instance, if the church bylaws fail to provide for the amount and method of notice to call an organization meeting, and the amount and method of notice becomes an issue for the organization, a court will use the state's provisions to establish the amount and method of a meeting notice.

The organization 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 in court proceedings.

Now let's look at these **8 Areas of Concern**.

3 Articles Essential to Include

1. Structure

Be sure that your structure is clearly detailed in your document.

Committees should be flexible in the bylaws.

The church should not list all committees in the bylaws, but should retain the authority to create and dissolve committees as it chooses.

Most committees are temporary and should be treated in the bylaws as such.

2. Statement of Faith

Be sure to carefully draft your church's Constitution and bylaws to clearly reflect your church's position on matters of faith, practice and procedure.

CLA strongly recommends that your church Constitution and Bylaws include your church's position on important Biblical and doctrinal issues that are under attack by the culture at large. By doing this, you will put your members and prospective members on notice of the church's official position on these issues.

Is listing that your church adheres to the **Baptist Faith and Message** or some other doctrinal statement enough? Yes and No.

Yes, in the areas that the BF&M addresses, it is probably sufficient.

But, NO in the areas it does not cover. Either list each doctrinal position in your document or reference the BF&M then, detail additional doctrinal positions of the church.

Your statement of faith should address current issues in our culture that are ripe for dispute such as homosexuality, gender modification, divorce

and remarriage, abortion, euthanasia, embryonic stem cell research, the position of women in the church and our attitude toward non-Christians with whom we disagree, and lawsuits between believers.

The church bylaws should state what version of the Bible is acceptable for the church, it that is an important issue.

These are “hot-button” issues that have a higher potential of putting the church in legal jeopardy.

The 3rd Article to Include

3. Membership

The church bylaws should carefully specify the qualifications for membership.

Most churches will want the members to be believers who agree with their Statement of Faith and the Church Covenant and who have been baptized after conversion.

The church bylaws should specifically set forth the procedures for admission to church membership.

For example, may members be admitted at any service of the church? Does the church vote on the admission of members? Is it merely a voice vote? Is the membership subject to the prospective member completing a membership class or signing a statement of agreement to the Statement of Faith and the Church Covenant?

Do the church bylaws specifically set forth the basis for the termination of church membership?

Privileges of membership should include that only members at least eighteen years of age, or of legal voting age, may vote.

Only those who are physically present at a properly called meeting of the church are entitled to vote.

There should be no proxy or absentee voting.

The church bylaws should set forth any limitations on a member's right to inspect church records.

CLA recommends that you minimize the access a member can have to church records.

Imagine the impact and cost if an angry member demands that the church provide records from three to five years in the past.

In some states, members have this right unless the bylaws restrict members' access to records.

The church bylaws need to state the discipline process that a church will follow in dealing with an erring member.

It is not sufficient merely to provide the Scripture references. The steps should be stated specifically.

In any church discipline situation this outline should be followed to the letter.

CLA strongly recommends that an automatic termination of membership for nonattendance be included in the bylaws. This provision will automatically, and without any further action from anyone, remove from the church membership rolls any person who has not attended a regular church service in the amount of time established by the church. Ideally, that period of time should be less than a year.

CLA recommends against placing members in an "inactive" or "non-resident" membership status. This is a problem because it is a vague status. For instance, may those "inactive" or "non-resident" members vote?

If not, may they attend members only meetings?

If so, may they have a say on the issue at hand?

When they are present in a meeting in which a vote is taken, are they counted for purposes of determining whether a quorum is present?

It has been our 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 in the matter.

We should know that someone who has not attended any service in several months is upset at something.

Providing for an 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 a member's meeting.

You may 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.

The automatic termination of members who flaunt their sexual immorality spares the church the shame of having to **"speak of those things which are done of them in secret"** for discipline purposes. The automatic termination for "going to law against a brother" provides the church with protection against having to retain as a member an individual who is willing to harm the church by taking it to court. Because this provision is automatic, it avoids the charge of retaliation.

5 Articles Often Left Incomplete

1. Disputes

Make sure that your 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, if such a dispute does arise, that the matter would be arbitrated in a Biblically based Christian manner.

We recommend that you **not** use just any secular arbitration procedure.

Instead, be sure that the dispute is handled in a Scriptural manner.

2. Procedures

Specify the procedures for selecting and removing the pastor and deacons.

At a minimum, the church corporation needs to have a president, a secretary, and a treasurer.

If the church prefers to use other titles, such as pastor or deacon, the bylaws need to identify the corporate function of the ministry name.

For example, the pastor is generally stated to be the president of the corporation.

Most states require a nonprofit corporation to have at least three directors (or trustees).

The bylaws should also address the procedures for nominating and electing officers, the duties and terms of service for each officer, the procedure for removing an officer before the end of his elected term, and the procedure for filling a vacancy in an office.

3. Leadership

Articles should be included on church officers, their eligibility for office, terms of office, and their election.

Detail what the powers and duties are given to each of the officers.

What do you see as the Biblical offices of the church.

The bylaws should set forth the qualifications for a candidate for licensing or ordination and should direct who will determine whether the candidate should be presented to the church for licensing or ordination.

Ordination is not a legal matter, but rather a ecclesiastical matter.

4. Meetings

Include how often and where meetings will be held, how special meetings may be called, and the procedures for notifying members of annual, regular, and special meetings.

This section should also define the ministry's fiscal year.

It is important that church documents carefully spell out the rules and procedures for all church business meetings, including who is to preside at the meeting and the number of eligible voters required for a quorum.

CLA strongly discourages the use of Robert's Rules of Order to govern meetings because they are too specific and inflexible. Entire college courses are taught on the procedures contained in Robert's Rules of Order. They are familiar with court cases in which the issue is whether the organization complied with correct procedure as outlined in Robert's Rules of Order. It is much preferable to create your own workable rules based upon the Bible and common sense. Most organizations do not properly comply with the Rules of Order anyway.

5. Personal Liability for Organizational Activities

3 Articles Usually Neglected

1. Article on Indemnification

Indemnification is an important protection for those in authority in the church.

It assures the officers that the church is willing to back their good-faith decisions on behalf of the church.

Indemnification simply means that the church is able to pay for the defense or any damage that occurs when an officer makes a decision for which he is later sued.

We suggest that indemnification be subject to the approval of the deacons or other authority so that the church has the option of indemnification.

The church may decide to purchase an insurance policy to pay for the defense of church staff members or volunteers and for the payment of any judgment against him for his actions on behalf of the church.

2. Second Article Usually Neglected is an Article on Designated Contributions

Contributions that are designated by the contributor for a specific purpose impose a “trust” obligation upon the recipient church to use the designated funds for that purpose only.

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.

If the church receives a designated contribution, there are only three things the church may legally do with the money:

use it for the purpose designated,

return the gift to the donor,

or have the donor change or remove the designation.

To avoid being required to ask the donor for permission to use the funds for a purpose other than the designated purpose, the bylaws should contain a specific provision making gift designation advisory only.

3.... Second Article Usually Neglected is an Article on Binding Arbitration

CLA recommends that the pastor and deacons (or other group) adopt procedures for arbitration.

They recommend that those arbitration procedures be adopted as soon as possible.

Since these procedures are not a part of the bylaws, they are not required to be voted upon by the church members and should not be included in the church bylaws.

These procedures should be attached to the minutes of the board of deacons meeting in which they are adopted, and should be kept in a safe place with the other important church documents.

Closing Tips

Regularly review your Constitution and Bylaws

Evaluate your activities

Keep accurate records of all incidents that occur

Scan and maintain records on removable media such as writable CD's

Finally, **The Ecclesiastical Abstention Doctrine**¹² prevents civil courts from determining the correctness of an interpretation of a Biblical text or some decision relating to government of the religious group. Whenever a dispute involves questions of religious doctrine or organization or government of the church, the court loses jurisdiction. Because of this doctrine, courts will not entangle themselves or unduly interfere with the affairs of churches except to determine whether the church has adhered to its own provisions in its Constitution and Bylaws. Churches therefore have extensive legal leeway and must use this autonomy wisely by drafting a clear and unambiguous Constitution and Bylaws provisions that will adequately protect the church's Ecclesiastical interests and its "sincerely held" religious beliefs as protected under the U.S. Constitution's provisions regarding First Amendment Freedom of Religion rights and privileges.

The Christian Law Association is ready and prepared to assist you with legal issues related to your Constitution and bylaws. I want to also recommend their Sample Constitution and bylaws resource that is annotated by their lawyers. You can find it on their website at www.ChristianLaw.org.

¹ People may slip and fall in front of the church and the church may be held liable for known dangers that the church was aware of but that the general public was not aware of. A warning sign prominently posted gives adequate notice of danger and will usually be adequate to avoid needless injury while absolving the church from liability.

² The church owes a greater duty of care to church members and visitors than to the general public. You must warn them of dangers you know of but also exercise reasonable care and take necessary precautions to ensure their safety at all times that they are on the premises. If the church finds a hazardous condition [such as a puddle of water or rotten wooden stairs], it must be fixed or members must be adequately warned by posting prominently displayed signs.

³ Property owners have a special duty to protect children who may be enticed to play in dangerous areas such as construction areas and playground equipment on church property. The age and maturity of the child and his ability to appreciate the danger with the obvious and inherently dangerous nature of the condition will be considered by the courts. Tree swings, other swings, slides, stairs, hard-surfaced play areas and soft-surfaced play areas can all be a source of harm to children. Keep gates locked and restrict access to piles of debris and construction materials which can attract children's attention and always provide adequate adult supervision for children on church grounds.

⁴ After hiring employees, you have an on-going duty to adequately supervise them. If you receive a complaint about disturbing conduct of an employee, you have a duty to immediately and thoroughly investigate the charges. Always carefully document all actions and investigations and maintain records indefinitely making them accessible for future reference. Failure to take action or turning a blind eye to misconduct places the church and the employee in a situation where liability will exist if a later investigation reveals the misconduct. A church's duty extends only to conduct that is Foreseeable by a reasonable person and only to employee actions that are within the scope of his official church duties.

⁵ Church staff members are vulnerable to such charges given the close working relationships that develop especially when clergy counsel members of the opposite sex. It is wise for Church staff and other leaders to receive instruction on harassment issues. Anyone in a church position of authority can be accused of intemperate remarks or patterns of inappropriate conduct while supervising employees. Church staff should act with due caution and utmost integrity in all situations.

⁶ Defamation is the publication to a third party of false or misleading information that you know will cause a person the loss of reputation or other injury. It may be written [libel] or verbal [slander]. Avoid all disparaging including jesting and other such comments especially when terminating the employment of church employees, when disciplining church members or when church members resign under unpleasant terms.

⁷ When church lacks clear division of authority between clergy and laity or within these two groups, projects can be commenced and work begun without proper approval obtained. Sometimes a dispute can arise about what approval is necessary. This situation can be avoided by the church outlining, in writing, the scope of authority of each church official stating specifically who has budget and hiring authority in what matters.

⁸ At least twice in the year 2000, churches were involved in suits over claims that a new minister was improperly hired and should not be permitted to lead. No important decision, such as the calling of a new minister, should be made until internal issues of control and authority are completely resolved.

⁹ A church can expose itself to charges of invasion of privacy and infliction of emotional distress by making public, information that should be kept private. Always err on the side of maintaining confidentiality unless it is legally necessary to disclose the information [ie: duty to report child abuse or neglect].

¹⁰ A church was sued over injuries a security guard it hired, inflicted on attendees at a church fair. The claim was brought under an unfair trade practices act. Such are common in most states and provide that businesses may not act unfairly or unscrupulously. To avoid most of these cases all that is required is for a church to be honest and caring toward both its members and the public. A church that is faithful to its mission and diligent in pursuing the safety and well-being of its members is also likely to satisfy its legal obligations.

¹¹ All fifty states have enacted child abuse reporting statutes in an effort to protect abused children and prevent future abuse. *Child abuse* is defined by most statutes to include physical abuse, emotional abuse, neglect, and sexual molestation.

A child ordinarily is defined as any person under the age of 18 years. A typical statute defines *child abuse* as any physical injury, sexual abuse, or emotional abuse inflicted upon a child other than by accidental means by those responsible for his care, custody, and control, except that discipline, including spanking, administered in a reasonable manner shall not be construed to be abuse. All fifty states enumerate categories of persons who are under a legal duty to report abuse to designated civil authorities.

Ministers are listed among those professionals having a mandatory duty to report known or reasonably suspected cases of child abuse in only a few states. Nearly half the states impose a mandatory duty to report on anyone having knowledge or a reasonable belief that abuse has occurred, and clergy obviously would be under a legal duty to report in these states as well. In the remaining states, clergy may be under a duty to report if they fall within another classification of mandatory reporters, such as school or child care workers and administrators. In summary, many clergy have a mandatory duty to report child abuse. Clergy should not assume that they have no duty to report.

Even if the clergy--penitent privilege is not abolished by state law in the context of child abuse reporting, it is by no means clear that the privilege will be a defense to a failure to report in a criminal or civil proceeding against the minister, since (1) the information causing a minister to suspect that abuse has occurred may not have been privileged (i.e., it was not obtained in confidence, or it was not obtained during spiritual counseling); and (2) a privilege ordinarily applies only to courtroom testimony (or depositions), and not to a statutory requirement to report to a state agency.

¹² *U.S. Const. amend. I.* - “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”