

Navigating the Sexual Minefield in Today's Culture

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Here are 10 significant risks associated with sexual conduct and ways to reduce the risk of litigation.

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mail@agfinancialinsurance.com

866.662.8210

By: Richard R. Hammar

Of all the legal risks confronting churches, those associated with sexual conduct are of special relevance for two reasons. First, in recent years sexual misconduct claims have been one of the most common forms of litigation involving churches; and second, many of the largest verdicts and settlements in litigation involving churches are associated with sexual misconduct claims.

What is the relevance of this information for pastors and lay church leaders? They must take affirmative steps to inform themselves about these risks, and implement appropriate risk-management strategies. Such steps not only will reduce the risk of litigation, but more important, will help safeguard the congregation, and especially its most vulnerable members. The responsibilities of a pastor demand no less.

This article will review 10 significant risks associated with sexual conduct. I will also, where appropriate, review risk-management strategies.

Risk #1. Negligent Selection of Church Workers

In recent years several churches have been sued as a result of the sexual molestation of minors by church workers on church property or during church activities. Common examples include the molestation of children and adolescents by youth pastors, camp counselors, Sunday School teachers, church custodians, volunteer youth workers, and others. In many cases, the victim alleges either or both of two theories: (1) the church was negligent in hiring the offender without adequate screening or evaluation; or, (2) the church was negligent in its supervision of the offender. I discuss negligent supervision later in this article.

Negligence refers to conduct that creates an unreasonable risk of foreseeable harm to others. It connotes carelessness, heedlessness, inattention, or inadvertence. Negligent selection simply means a church failed to act responsibly and with due care in selecting workers (both volunteer and compensated) for positions involving the supervision or custody of minors. Victims of molestation who have

sued a church often allege that the church was negligent in not adequately screening applicants.

A single incident of abuse or molestation can devastate a church. Parents often become enraged, it jeopardizes the viability of the church's youth and children's programs, and people may blame church leaders for allowing the incident to happen. But far more tragic is the emotional trauma to the victim and the victim's family, and the enormous potential legal liability the church faces.

There is good news, however. Church leaders can take relatively simple yet effective steps to significantly reduce the likelihood of such an incident occurring, including the following:

- Require every applicant for youth work (volunteer or compensated) to complete a screening application. At a minimum, the application should ask for the applicant's name and address, the names of other youth-serving organizations in which the applicant has worked as an employee or volunteer, a full explanation of any prior criminal convictions, and the names of two or more references. Every applicant for any position involving the custody or supervision of minors needs to complete this application. Current employees or volunteers having custody or supervision over minors also need to complete this application.
- Having current or prospective employees and volunteers complete an application form does not significantly reduce a church's risk of negligent selection. Significant risk reduction occurs if the church takes the following additional steps: (1) If an applicant is unknown to you, confirm his identity by requiring photographic identification (such as a state drivers license). Child molesters often use pseudonyms. (2) Contact each person and organization listed as a reference in the application and request a written reference. The best reference is an institutional reference. This is a reference from another institution with which the applicant has worked with minors either as a paid employee or an unpaid volunteer. Obviously, obtaining a positive reference from one or more other institutions that have actually observed the applicant interact with minors is the gold standard in terms of references.

Some applicants have not worked with other youth-serving institutions in the past, and so no institutional reference is available. In such cases, a church's only option is to obtain personal references. Churches can reduce risk, however, by limiting personal references to members of the church.

- Churches can reduce the risk of incidents of sexual molestation by adopting a policy restricting eligibility for any volunteer position involving the custody or supervision of minors to those persons who have been members in good standing of the church for a minimum period of time, such as 6 months. Such a policy gives the church an additional opportunity to evaluate applicants, and will help to repel persons seeking immediate access to potential victims.
- Criminal records checks will further reduce a church's risk of being



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found liable for the negligent selection of youth workers. Churches need to consider these record checks.

- Church leaders often err on the side of mercy when making employment decisions. This attitude can contribute to a negligent selection claim, especially if a church gives an applicant a second chance despite knowledge of prior sexual misconduct, and the conduct is repeated. What the church views as mercy may be viewed as negligence by a jury.



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Risk #2. Negligent Retention of Church Staff

A church may use reasonable care in selecting youth workers and other church staff but still be responsible for their misconduct if it retained them after receiving information indicating they posed a risk of harm to others.

How can churches reduce the risk of liability based on negligent retention of a minister or lay worker who engages in inappropriate conduct with an adult or child? While churches cannot eliminate this risk, they can take steps to reduce it. Consider the following:

(1) Investigate. Whenever a church leader receives credible information that a church employee or volunteer may represent a risk of harm to others, the church needs to initiate an immediate and thorough investigation. Remember: Once the church receives such information, the church is “put on notice” of the risk and may be legally responsible on the basis of negligent retention for future acts of misconduct by the same person if it does nothing to investigate or respond to the information.

(2) Restrictions. If the church’s investigation results in credible evidence to support the victim’s allegations, then the church can reduce its risk of negligent retention by imposing appropriate restrictions on the alleged wrongdoer. The nature and extent of such restrictions will vary depending on a number of circumstances, including the nature and severity of the alleged wrongs and the strength of the evidence. If a church ignores credible evidence of wrongdoing and imposes no restrictions on the alleged wrongdoer, it exposes itself to liability based on negligent retention from the time it learned of the allegations.

Risk #3. Negligent Supervision of Church Staff and Activities

Churches can use reasonable care in selecting workers, but still be liable for injuries sustained during church activities on the basis of negligent supervision. Negligent supervision refers to a failure to exercise reasonable care in the supervision of church workers and church activities. Churches have been sued on the basis of negligent supervision in several contexts, including child molestation, injuries to children participating in church-sponsored events, and injuries to infants in a church nursery.

Churches are not “guarantors” of the safety and well-being of those

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persons who participate in their programs and activities. Generally, they are responsible only for those injuries that result from their negligence.



Churches can take precautions to reduce the risk of liability based on negligent supervision. To illustrate, here are some precautions that churches have used to reduce the risk of a negligent supervision claim involving an injury to a child:

- (1) Adopt a two-adult policy specifying that no minor is ever allowed to be alone with an adult during any church activity. This rule reduces the risk of child molestation, and also reduces the risk of false accusations of molestation.
- (2) Only release minors from church activities to the parent or legal guardian who brought them, or to a third person that the parent or guardian has authorized in writing to receive custody of the child.
- (3) Consider adopting a claim-check policy for children in the church nursery.
- (4) Install video cameras in strategic locations. These can serve as powerful deterrents to child molesters and can reduce a church's risk of negligent supervision. Video cameras are especially helpful in church nurseries, since infants and very young children are present who are incapable of explaining evidence of molestation.
- (5) Any activity involving minors should be staffed with an adequate number of qualified adults. This will help demonstrate that the church exercised reasonable care in the supervision of minors, and reduce the risk of liability based on negligent supervision in the event that a minor is molested. **Tip.** *It is often helpful to contact other institutions for assistance with staffing ratios. For example, some churches base their adult-to-child ratio in the nursery to what the state requires of licensed day care facilities. You may also contact the Red Cross, Salvation Army, or similar organizations. The point is: If you can demonstrate that you based your adult-to-child ratio on the established practices of other similar organizations in your community, this will be a strong defense in the event you are accused of liability (for an injury to a child) on the basis of negligent supervision.*
- (6) Be especially careful of off-site activities such as field trips and camping. These outings can be difficult to control. It is essential that an adequate number of adults are present. While on the trip, precautionary measures must be implemented to ensure adequate supervision of the group. For example, some churches group children in pairs, always keep the entire group together, and have frequent roll calls. Once again, you can call other community-based organizations for guidance.
- (7) Acts of child molestation on church premises often occur in remote, unsupervised rooms or areas. A church can reduce its risk of liability based on incidents of molestation occurring in such

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locations by restricting access to them. If possible, lock vacant rooms that are not being used or exercise supervision over them.

- (8) Install windows in all doors to classrooms and other areas that are frequented by minors. This will reduce isolation and make it easier to supervise activities.
- (9) Adopt an appropriate policy addressing access to church property by registered sex offenders (see Risk #8 below).

It is absolutely essential to familiarize youth workers with the church's policies and make sure all workers follow these policies. At a minimum, this should be part of an orientation process for all new workers (both paid and volunteer). Periodic training sessions are also desirable to reinforce nursery policies.

Have your risk-management procedures reviewed periodically by a local attorney and by your church insurance agent. Such a review will help ensure that your policies are current and effective.

Risk #4. Counseling

Most churches offer some form of counseling services. The most common example would be counseling of church members by a minister. Many churches also offer lay counseling services. Some limit these services to members of the congregation, while others target the general public and promote their counseling ministry in the local media and telephone directory. Some churches use counselors or psychologists who are licensed by the state, while others use unlicensed laypersons with little if any professional training.

Counseling ministries can provide an excellent and needed service, and represent a point of contact with the community. There are a number of important legal concerns, however, that any church that offers such services, or that is considering doing so in the future, should consider, including liability associated with sexual misconduct. Churches that offer counseling services can reduce this risk in various ways, including the following:

- (1) Adopt a policy prohibiting any male minister or counselor on staff from counseling privately with an unaccompanied female (i.e., opposite sex counseling) unless a third person is present. The third person may be the minister's or counselor's spouse, another minister on staff, or a mature and trusted church employee (preferably female). Some churches have limited such a policy to counseling that occurs off of church premises, or on church premises when no other church staff are present and visible.
- (2) Since the vast majority of cases of inappropriate sexual behavior involve male counselors and female counselees, churches can significantly reduce their risk by using women to counsel women.
- (3) Install a window in the pastor's office making all counseling sessions clearly visible to office staff. Of course, such a precaution



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is effective only if other staff are present and visible throughout the counseling session. This means that the church should implement a policy limiting counseling sessions to office hours when other staff are present and visible.



(4) Implement appropriate boundaries. Many courts have recognized the psychological principle of “transference.” To illustrate, one court defined transference as “a process whereby a patient undergoing psychotherapy for a mental or emotional disturbance (particularly a female patient being treated by a male psychotherapist) develops such overwhelming feelings of warmth, trust, and dependency toward the therapist that she is deprived of the will to resist any sexual overtures he might make.” Pastoral and lay counselors are often tempted to engage in inappropriate sexual contact with a counselee because of unfamiliarity with this phenomenon. They misinterpret transference as affection, and fail to engage in anti-transference precautions that reduce the risk of inappropriate physical or emotional bonding. These precautions can include one or more of the following:

- require a third person to be present for any counseling occurring off of church premises;
- allow one-on-one counseling on church premises only during office hours if other staff members are present and visible;
- limit counseling sessions to 45 minutes; and
- permit no more than five counseling sessions with the same person during a calendar year.

Risk #5. Child Abuse Reporting

Child abuse is of epidemic proportion in our country. Ministers often learn of incidents of abuse in the course of counseling, or from reports they receive from nursery or youth workers. It is essential for ministers to understand clearly their responsibilities under state law to report known or reasonably suspected incidents of abuse. In many states, ministers are “mandatory reporters,” meaning they can be criminally liable for failing to report. Several states now permit a minister who is a mandatory child abuse reporter under state law to be sued for money damages by a victim of child abuse who discovers that the minister was aware of the abuse but did not report it.

A number of courts have rejected the defense made by some ministers that they failed to report abuse because they wanted to deal with the problem “within the church” as a matter of discipline. Some states excuse ministers from the reporting obligation if they learn of child abuse in the course of a privileged communication. Check your state law at least a few times each year, since this is an area of law that changes often.

Risk #6. Computer Access

Churches sometimes come across inappropriate material on an employee’s computer and are faced with the decision of whether to discipline or dismiss the employee. It is important to recognize that disciplining or dismissing an employee under these circumstances exposes a church to potential legal liability. The bottom line is: Any

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unauthorized access to an employee's church-provided computer may violate federal and state electronic privacy laws and also may constitute an invasion of privacy.



Employees can consent to the inspection of their church-provided computer so long as their consent is voluntary, they clearly understand what they are consenting to, and they receive something of value (“consideration”) in exchange for their consent. Consent can be express or implied. Express consent means that an employee signs a statement consenting to the inspection of his church-provided computer at any time and for any purpose. Implied consent means the circumstances in the office suggest that consent has occurred. This happens in large corporate offices where computer technicians frequently upgrade and maintain computers. This will not be true in most churches. So, you will need to adopt a policy and have employees sign a statement agreeing to be bound by it.

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With new employees, this is done at the time of hire. With current employees it is a little more difficult since they must receive some form of “consideration” (something of value) for their consent to be enforceable. You could give them a token cash amount or wait until the next cost-of-living pay raise. In either case, it is imperative that the “consent” refer to the consideration that was received by the employee in exchange for his consent to the computer policy.

Risk #7. Liability of Church Board Members

Most states have enacted laws limiting the liability of church officers and directors. In some states, these laws protect all church volunteers. In some cases, the statute may protect only officers and directors of churches that are incorporated under the state's general nonprofit corporation law. The most common type of statute immunizes uncompensated directors and officers from legal liability for their ordinary negligence committed within the scope of their official duties. These statutes generally provide no protection for “willful and wanton” conduct or “gross negligence.”

A court can view indifference by church leaders to information that clearly demonstrates improper behavior by a staff member or volunteer worker as gross negligence. This will make it more likely that church leaders will be sued personally.

Example. *Bob is a registered sex offender who previously was convicted of molesting a child. He served time in prison, but was released a few years ago. He has started attending a church, and the church board learns of his background. Some members of the board are concerned about having Bob attend the church, and they speak with him. Bob assures them that he was “rehabilitated” while in prison, and no longer poses a risk of harm to anyone. Nothing is done to monitor Bob. Several months later, Bob is charged with molesting a child on church property. The board is distressed by this development, but take comfort in the fact they are immunized from personal liability by state law. They should not assume that they are protected against personal liability by a state law conferring limited immunity from liability*

on the acts of uncompensated church board members. Such laws generally do not apply to gross negligence or willful and wanton misconduct. It is possible that a court would conclude that the board was guilty of such behavior by allowing Bob unrestricted and unsupervised access to church property despite its knowledge that he is a registered sex offender.



Risk #8. Dealing With Sex Offenders Who Want To Attend Your Church

When a church allows a registered sex offender to participate, without limitation, in normal activities of the church, this exposes the church and members of the church board to legal liability. If the sex offender should ever have sexual contact with a minor or adult on church premises, or in the course of church activities, the church could face a significant degree of liability at the hands of a jury that would be incredulous that such a person was allowed to have unrestricted access to the church.

When someone informs the senior pastor, or any member of the church board, that a registered sex offender is attending the church, steps can be taken to manage risk. These include the following:

1. Obtain a record of the sex offender's prior criminal convictions by conducting a national criminal records check. The church must be fully informed regarding the sex offender's criminal background.
2. If the sex offender is on probation, identify his probation officer and ascertain the conditions that have been imposed. In some cases, sex offenders are not even allowed to attend church. If the probation officer says that the offender is free to attend church, ask the officer if he would recommend that the offender be allowed to attend church, and if so, under what conditions. Obtain this information in writing; or, if that is not possible, make a detailed written account of the officer's response.
3. Condition the sex offender's right to attend church services and activities on his signing a "conditional attendance agreement" that imposes the following conditions:
 - The sex offender will not work with minors in any capacity in the church.
 - The sex offender will not transport minors to or from church, or any church activity.
 - The sex offender will not attend any youth or children's functions while on church property, except for those involving his own child or children, and only if in the presence of a chaperone (see below).
 - The sex offender will always be in the presence of a designated chaperone while on church property. This includes religious services, educational classes, activities, and restroom breaks. The chaperone will meet the sex offender at the entrance of the church, and accompany the sex offender on church premises until returned to his vehicle.
 - A single violation of these conditions will result in an

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immediate termination of the sex offender's privilege to attend the church.

- The conditional attendance agreement option will not be available unless the church's insurer is informed and confirms that coverage will not be affected.

4. In some cases, exclusion of the offender from church is the only viable option. This option is advisable if (1) for any reason the conditional attendance option is not feasible or enforceable; or, (2) if the offender's crimes are so frequent or heinous that exclusion is the only appropriate option; or, (3) one or more of the offender's victims attends the church. This will be a judgment call made by the pastor and board.

5. It is often desirable to draft a short policy addressing the church's response to registered sex offenders attending the church, and have it adopted by the congregation during an annual or special business meeting. This would allow the membership to discuss this issue in a rational manner.

6. Seek legal counsel in formulating the church's response.

Risk #9. Sexual Harassment

Sexual harassment is a form of "sex discrimination" prohibited by Title VII of the Civil Rights Act of 1964. Equal Employment Opportunity Commission (EEOC) regulations define sexual harassment as follows:

(a) Harassment on the basis of sex is a violation of Sec. 703 of Title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment; (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

This definition illustrates that sexual harassment includes at least two separate types of conduct:

- (1) "*quid pro quo*" harassment, which refers to conditioning employment opportunities on submission to a sexual or social relationship, and
- (2) "*hostile environment*" harassment, which refers to the creation of an intimidating, hostile, or offensive working environment through unwelcome verbal or physical conduct of a sexual nature.

Tip. Title VII applies to any church that has at least 15 employees (full-time or part-time), and is engaged in interstate commerce. The definition of "interstate commerce" is very broad, so a church with at least 15 employees should assume that it is subject to Title VII unless



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it receives an attorney's opinion to the contrary.

Tip. Most states have enacted their own civil rights laws that bar sexual harassment in employment. It is more likely that these laws will apply to churches since there is no "commerce" requirement and often fewer than 15 employees are needed to be covered by the law.

Key point. A woman's "consent" is not a defense to an allegation of sexual harassment. The United States Supreme Court has observed: "The fact that sex-related conduct was voluntary in the sense that the complainant was not forced to participate against her will, is not a defense to a sexual harassment suit. ... The gravamen of any sexual harassment claim is that the alleged sexual advances were unwelcome. ... The correct inquiry is whether [the victim] by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary." In other words, a female employee may engage in voluntary sexual contact with a supervisor because of her belief that her job (or advancement) depends on it. While such contact would be voluntary, it is not necessarily welcome. Sexual harassment addresses unwelcome sexual contact, whether or not that contact is voluntary.

Churches can be liable for their employees' conduct that constitutes sexual harassment.

Risk #10. Same-Sex Marriages

In recent years, a number of state courts and legislatures have recognized the legal validity of same-sex marriages. Such precedent raises a number of important questions for churches and clergy, including the following:

- Can ministers who are opposed to same-sex marriages on the basis of religious convictions be liable for refusing to perform a same-sex marriage for a couple who asks them to do so?
- Can a church be liable if it refuses to allow same-sex couples to use its facilities for a marriage ceremony?

The highest courts in four states have recognized the legal validity of same-sex marriages. In each case, the court expressly ruled that ministers and churches are not required to perform or accommodate a same-sex marriage in violation of their religious convictions.

Massachusetts

In a 2003 ruling, the Massachusetts Supreme Judicial Court recognized the legal validity of same-sex marriages, but made the following statement:

Our decision in no way limits the rights of individuals to refuse to marry persons of the same sex for religious or any other reasons. It in no way limits the personal freedom to disapprove of, or to encourage others to disapprove of, same-sex marriage. Our concern, rather, is whether historical, cultural, religious, or other reasons permit the State



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to impose limits on personal beliefs concerning whom a person should marry. *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003).



California

In a 2008 ruling that was later overturned by Proposition 8, the California Supreme Court recognized the legal validity of same-sex marriages, but made the following statement:

Affording same-sex couples the opportunity to obtain the designation of marriage will not impinge upon the religious freedom of any religious organization, official, or any other person; no religion will be required to change its religious policies or practices with regard to same-sex couples, and no religious officiant will be required to solemnize a marriage in contravention of his or her religious beliefs.

The Court cited Article I, Section 4, of the California Constitution as support for this conclusion. This section, which was added to the California Constitution in 1974, provides, in relevant part: “Free exercise and enjoyment of religion without discrimination or preference are guaranteed.”

The Court’s ruling, then, contains an unequivocal recognition of two fundamental principles: (1) no church would be required to perform a same-sex marriage, or any other marriage, that violates its religious beliefs; and (2) no minister would be required to perform a marriage in violation of his religious beliefs. And, on these points, the court was unanimous. In *re Marriage Cases*, 43 Cal.4th 757 (Cal. 2008).

Connecticut

In a 2008 ruling, the Connecticut Supreme Court recognized the legal validity of same-sex marriages, but made the following statement:

Finally, religious autonomy is not threatened by recognizing the right of same-sex couples to marry civilly. Religious freedom will not be jeopardized by the marriage of same-sex couples because religious organizations that oppose same-sex marriage as irreconcilable with their beliefs will not be required to perform same-sex marriages or otherwise to condone same-sex marriage or relations. Because, however, marriage is a state sanctioned and state regulated institution, religious objections to same-sex marriage cannot play a role in our determination of whether constitutional principles of equal protection mandate same-sex marriage. *Kerrigan v. Commissioner of Public Health*. 957 A.2d 407 (Conn. 2008).

Iowa

In a 2009 ruling, the Iowa Supreme Court recognized the legal validity of same-sex marriages, but made the following statement:

It is quite understandable that religiously motivated opposition to same-sex civil marriage shapes the basis for legal opposition to same-sex marriage, even if only indirectly. Religious objections to same-sex marriage are supported by thousands of years of tradition and biblical interpretation. The belief that the “sanctity of marriage” would be

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undermined by the inclusion of gay and lesbian couples bears a striking conceptual resemblance to the expressed secular rationale for maintaining the tradition of marriage as a union between dual-gender couples, but better identifies the source of the opposition. Whether expressly or impliedly, much of society rejects same-sex marriage due to sincere, deeply ingrained — even fundamental-religious belief. ...



We, of course, have a constitutional mandate to protect the free exercise of religion in Iowa, which includes the freedom of a religious organization to define marriages it solemnizes as unions between a man and a woman. This mission to protect religious freedom is consistent with our task to prevent government from endorsing any religious view. State government can have no religious views, either directly or indirectly, expressed through its legislation. This proposition is the essence of the separation of church and state. ...

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In the final analysis, we give respect to the views of all Iowans on the issue of same-sex marriage — religious or otherwise — by giving respect to our constitutional principles. These principles require that the state recognize both opposite-sex and same-sex civil marriage. Religious doctrine and views contrary to this principle of law are unaffected, and people can continue to associate with the religion that best reflects their views. A religious denomination can still define marriage as a union between a man and a woman, and a marriage ceremony performed by a minister, priest, rabbi, or other person ordained or designated as a leader of the person's religious faith does not lose its meaning as a sacrament or other religious institution. The sanctity of all religious marriages celebrated in the future will have the same meaning as those celebrated in the past. The only difference is civil marriage will now take on a new meaning that reflects a more complete understanding of equal protection of the law. This result is what our constitution requires. *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009).

Like the California Supreme Court, the Iowa Supreme Court unequivocally recognized two fundamental principles: (1) no church will be required to perform a same-sex marriage, or any other marriage, that violates its religious beliefs; and (2) no minister will be required to perform a marriage in violation of his or her religious beliefs. In other words, the very concerns that formed the basis for the above-mentioned recommendations were effectively addressed by the Court.

In summary, every state supreme court that has recognized the validity of same-sex marriage has also recognized the freedom of clergy and churches not to participate in such marriages. Other courts, in future cases, may not reach this same conclusion. But, given the current understanding of the First Amendment religion clauses, such an outcome appears very unlikely for the foreseeable future.

Key point. *Several decisions of the United States Supreme Court strongly suggest that the civil courts are barred by the First Amendment guaranty of religious freedom from compelling ministers to perform marriages in violation of their religious beliefs, or subjecting*

them to civil or criminal liability for refusing to do so. To illustrate, in 1952 the Supreme Court observed that its prior decisions “radiate a spirit of freedom for religious organizations, and independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.” Kedroff v. St. Nicholas Cathedral, 344 U.S. 94 (1952).

Key point. *Several state constitutions define marriage as a union between a man and a woman. State supreme courts are powerless to alter such provisions.*

RICHARD R. HAMMAR, J.D., LL.M., CPA, serves as legal counsel to The General Council of the Assemblies of God, and is editor of the Church Law & Tax Report newsletter. He has written over 50 books on church legal and tax issues, including the newly released third edition to Pastor, Church & Law.

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