

**UNRAVELING THE ESTABLISHMENT CLAUSE: LEGAL AND OTHER
PRACTICAL CONCERNS FOR THE CHURCH “BUSINESS”**

By Elizabeth Gingerich

Abstract

Churches function as employers, offer spiritual and counseling guidance, operate schools at all levels, maintain employment relations, develop intellectual property, and defend and prosecute legal actions. Procedures and policies implemented by various religious organizations regarding the proper retention, disclosure and preservation of church-related records must be carefully scrutinized and, where applicable, applied uniformly. In this way, premature destruction of records potentially leading to the imposition of fines and sanctions can be avoided while the confidences of parishioners and parochial students can be appropriately guarded. More importantly, church workers may better understand the degree of confidentiality and legal importance to be given to those documents necessary to conduct church “business.” The classical constitutional division between church and state affairs is tenuous at best in light of increasing litigation in both the civil and criminal judicial forum,¹ the potential pitfalls of failing to abide by Internal Revenue Service and securities registration rules and regulations² and the threat to maintaining not-for-profit status by engaging in political activities.³ Further, persistent questionable accounting practices, the

¹ According to a *Church Law and Tax Report* survey, 7% of churches having an attendance of 1,000 or more members at weekly worship services have been sued. See Richard R. Hammar, Ten Legal Risks Facing Churches and Church Leaders, *Enrichment Journal*, para. 1 (Winter 2004) http://enrichmentjournal.ag.org/200401/200401_78_legalrisks.cfm.

² In 1975, Internal Revenue Procedure No.75-50 was issued by the Internal Revenue Service requiring private schools to file an annual statement of non-discrimination (Form 5578). Beginning January 1, 2006, this certification statement must now also include a policy of pro-diversity.

³ Political campaigning and endorsing specific candidates are prohibited activities under Internal Revenue Code 501(c)(3) exempt status eligibility criteria.

failure to formally designate church workers as either employees or independent contractors and establishing proper reimbursement and benefit plans for church workers have added to the division. No longer can the cloak of litigation and regulatory exemptions be invoked perfunctorily as a comprehensive subterfuge. Without employing properly educated and experienced business managers, establishing auditing plans of the church's finances, conducting regular legal situation reviews, and generally becoming more aware of an increasingly regulated and litigious environment, the paucity of safeguards and uniformity in documentation may unnecessarily expose the church⁴ to unfavorable public scrutiny, costly litigation and unwarranted governmental intervention.

Regardless of substandard or antiquated business practices, why should the church be in such a perilous position with First Amendment protections and the traditional notion of separation of church and state?

I. Introduction

In the wake of civil settlements, declared bankruptcies, asset liquidations, clashes with federal agencies, financial misdealing, and school closures, the church must reevaluate its standing in American society and review and reform standard business procedures. Proper assessment of legal risk, documentation of church-sponsored activities and preservation of recorded transactions – all key to the normal operation of any other business – is no less important to the effective functioning of the religious institution. A constitutional cloak of immunity is no longer an expectation as the First Amendment only serves to protect the church from “*excessive* government entanglement with religion.”⁵ How “*excessive*” has

⁴ For purposes of this Note, the term “church” is accorded the generic meaning of “place of worship” in conformity with Internal Revenue Code rules. See “Glossary of Terms” for *IRS Publication 1828, Tax Guide for Churches and Religious Organizations (Rev. 9-2006)*. “Church” is further restricted to refer to the nine most prominent Christian denominations in the United States, although the findings and conclusions as expressed herein could certainly apply to other religious organizations and entities whose primary purpose is the advancement or study of religion.

⁵ Jamie Darin Prenkert, *Liberty, Diversity, Academic Freedom, and Survival: Preferential Hiring Among Religiously-Affiliated Institutions of Higher Education*, 22 HOFSTRA LAB. & EMP. L. J., 1, 43 (2004) (citing *Lemon v. Kurtzman*, 403 U.S. 602, 612-613, 615 (1989)). In *Lemon*, “*excessive*

governmental regulation of religious affairs become and in what ways should the church respond for economic and legal survival?

Church as Business. Churches are allowed to incorporate or assume statutory *alter egos* throughout the various jurisdictions of the United States.⁶ As churches arguably no longer occupy positions of honor traditionally held in society nor enjoy blanket legal immunity from litigation,⁷ the need to incorporate has evolved from a tool of convenience into a business necessity. Corporate status provides the institutional church with an independent legal identity, allowing the church to sue and be sued, to hold and dispose of property, and to limit the personal liability of deacons, elders and other religious leaders, excluding those, of course, who commit intentional acts of harm.⁸ An inevitable consequence of the formal creation of a business entity is the need to record the corporate entity's business transactions and to establish or modify policies of record management and retention.

Understanding employment laws, managing intellectual property interests (especially those securing statutory copyright protection over musical works and liturgy), establishing proper financial accounting methods, and monitoring asset acquisition, maintenance and disposition, all pose business decisions, which have

entanglement" is established by three factors: "the character and the purpose of the institution protected, the nature of the aid to or burden upon the religious organization's affairs, and the resulting relationship between the state and the religious organization." *Id.*

⁶ Until recently, only two states, Virginia and West Virginia, did not allow churches to incorporate. There have now been legislative changes, which provide protection to church officers from potential personal fiscal liability for church-related transactions and allow the religious entity to hold title to real estate. *See, e.g.,* VA. CODE ANN. § 57-16.1 (2007) and W. VA. CODE § 29-19-6 (2007).

⁷ In light of recent Catholic Church sex abuse claims and judgments, religious institutions have generally experienced a fall from grace, becoming subject to scrutiny by communicants well as non-member alike. Jeffery L. Sheler and Jeff Glaser, *A Fall from Grace*, U.S. NEWS & WORLD REPORT, Dec. 23, 2002, 24. *See also*, a recent exposé on current public opinion regarding the role of the church in American society in *The Church and the Law*. The Alliance (Jan. 2006) <http://www.cemalliance.org/ncm/churchrisk/law.jsp>.

⁸ The doctrine of *respondeat superior* is not foreign to church workers and volunteers who commit intentional acts of harm; such actions potentially subject their employers to co-liability. Morgan Fife, *Predator in the Primary: Applying the Tort of Negligent Hiring to Volunteers in Religious Organizations*, 2006 BYU L. REV. 569-76 (2006).

thrust churches into the business world, prompting further investigation into government regulations and proper bookkeeping policies and practices. Such records simply do not fall into one category and must be accorded proper degrees of importance. From workmen's compensation documentation to individual student academic progress notes to incorporation documents, which justify the church's tax exempt status, concerns of document preparation and preservation differ. In light of increasing regulation of religious institutions as more traditional business entities, this Note presents the findings of a limited survey conducted of the record production, maintenance, and retention activities of a sampling of the major church bodies in the United States. The study seeks to ascertain the level of sophistication of business practices currently implemented, to determine any significant differences or shortcomings in the policies and procedures of the church bodies surveyed, and finally to postulate a more formalized and uniform policy of record generation and retention to respond to increasing governmental governance of religious affairs.

II. The Erosion of the Establishment Clause

(a) *Legislative Non-Regulation.* Any application of federal and state statutes and administrative regulations to church operations ostensibly triggers the assumption that such interference is violative of the First Amendment of the Constitution:

*Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. . . .*⁹

For example, invocation of the traditional notion of separation of church and state has prevented the display of a crèche on the staircase of a county courthouse during the Christmas season¹⁰ and caused the removal of framed displays of the Ten Commandments from the interior walls of a county courthouse in Kentucky.¹¹ The proscription of state regulation of church affairs, however, has been obfuscated. Akin to yelling "fire" in a crowded movie house, there are definite limitations to constitutional freedoms that all religious institutional

⁹ *Allegheny v. ACLU*, 492 U.S. 573 (1989).

¹⁰ *Id.*

¹¹ *McCreary County v. ACLU of Kentucky*, 545 U.S. 844 (2005).

administrators should expect to impact daily activities. Matters of worker safety, financial accountings, academic performance, and student truancy represent just a sampling of governmental regulation of church and parochial school affairs. The legislative guidelines for records production and retention for both churches and church-operated academic institutions, however, is a nebulous topic. While States clearly define retention requirements for certain categories of records by for-profit businesses, religious organizations do not receive similar treatment. Rather, legal requirements are often merely implied when churches and other religious societies are not specifically excluded from regulatory coverage.

(b) *Legislation through Implication.* Perhaps in an effort to at least facially preserve the notion of separation of church and state affairs, legislatures, administrative agencies, and courts have, perhaps, unintentionally impacted the governance of church operations. The Fair Labor Standards Act implies coverage of all church workers, with the notable exception of clergy members.¹² Thus, the Act ensures wage and work hour controls. Similarly, negligent hiring and retention civil lawsuits have compelled churches to run routine criminal checks on volunteers. Additionally, if the church maintains a workforce of 50 or more employees – typically implausible unless the organization maintains a sizeable operation – it will also be impliedly subject to the obligations imposed by the Family and Medical Leave Act.¹³ Churches would more likely be obligated to adhere to the requirements of the Americans with Disabilities Act,¹⁴ which applies to organizations employing at least 15 or more workers. Additionally, with the

¹² The Fair Labor Standards Act of 1938 is codified at 29 U.S.C. §§ 201-219. 29 C.F.R. § 516.1(a) mandates that employers subject to the Fair Labor Standards Act are “required to maintain records containing the information and data required by the specific sections of this part.” Retention periods for employment records generally range from 6 months to 4 years. State rules regulating document retention generally parallel federal rules. Hammar, *supra* note 1.

¹³ Codified at 29 U.S.C. §§ 2601, *et seq.* and 29 C.F.R. § 825. The Family and Medical Leave Act of 1993, Pub. L. No. 103-3, was enacted on February 5, 1993.

¹⁴ Americans with Disabilities Act of 1990 is codified at 42 U.S.C. § 12101 *et seq.*, Pub. L. No. 101-336, 104 Stat. 327. The ADA formally took effect on July 26, 1992. Title I prohibits private employers, state and local governments, employment agencies and labor unions from discriminating against qualified individuals with disabilities in job application procedures, hiring, firing, advancement, compensation, job training, and other terms, conditions and privileges of employment. Fife, *supra* note 8.

ensuing political debate over illegal immigration, churches, like all other employers, are held to the same verification requirements of employee eligibility.¹⁵ And despite the traditional “ministerial exemption” from claims of discriminatory employment actions under Title VII of the 1964 Civil Rights Act,¹⁶ that exemption does not cover all employees of the church and as such, the proper preparation and preservation of employment manuals, contracts, and handbooks as well as general correspondence and rejected employment applications are critical to defend against claims of inequitable treatment. Recent judicial decisions have clarified that “the scope of the ministerial exception in Title VII is limited to what is necessary to comply with the First Amendment and should be limited to covering only those positions where spiritual functions are involved.”¹⁷

(c) *Direct Legislation.* Even with tax-exempt status, either obtained automatically by reason of simply being a church or through the ordinary application process required of other not-for-profit organizations, the Internal Revenue Service (IRS) possesses wide latitude in regulating certain financial affairs of the church.¹⁸ The church must account for unrelated business income taxes (UBITs), excessive employee benefits, federal insurance contributions (FICA) and/or self-employed contributions (SECA) payments,¹⁹ and other

¹⁵ Since the events of September 11, 2001, no U.S. employers have received absolute immunity from verifying the legal status of immigrant hires. Cristina M. Rodríguez, *The Significance of the Local in Immigration Regulation*, 106 MICH. L. REV. 567, 601 (2008). A worker’s legal status is documented on IRS Form I-9 – prescribed by both the Immigration and Naturalization Service (INS) and the Internal Revenue Service (IRS).

¹⁶ Title VII of the 1964 Civil Rights Act is codified at 42 U.S.C. §§ 2000(e) *et seq.*, Pub. L. No. 88-352.

¹⁷ *E.E.O.C. v. The Roman Catholic Diocese of Raleigh, N.C.*, 213 F.3d 795, 801 (4th Cir. 2000).

¹⁸ *E.g.*, as of August 17, 2006, strict regulations on the deductibility of cash donations to the church were activated and new emphasis was given to the filing of W-2 statements by church and parochial school employees who earn at least \$400.00 per year. Form 1099 payments to ministers have become highly suspect and prone to IRS audit. Also, as many churches routinely involve the sale of security instruments, which include bonds and promissory notes, in their fundraising campaigns, federal and state security registration laws must also be strictly followed. Hammar, *supra* note 1.

¹⁹ Section 4958 of the Internal Revenue Code of 1986, as amended, now requires churches to reduce all financial transactions to writing. A violation of this section could result in the imposition of an excise tax of 25% charged directly against the pastor and/or board of directors. Similarly, the church’s salary compensation package designed for its minister must also be in writing and detail all benefit provisions, including procedures for reimbursement of mission-

activities, which could threaten the continued exempt status of the institution. Under recent changes in IRS regulations, (1) the reimbursement of travel, supply and meeting expenses must be properly and adequately documented or may be otherwise taxed as ordinary wages; (2) cash donations are no longer deductible (the church's bulletins and newsletters could be used to communicate this restriction); (3) donors must receive written acknowledgments from the church for donations of \$250.00 or more to be deductible; and (4) even implied political endorsements could undermine the church's non-profit status (supplying a reason other than archival preservation to maintain written sermons and homilies).²⁰

(d) *Judicial Impact.* Negligent hiring or wrongful retention of employees and volunteers has evolved into an issue of critical concern for the church.²¹ If a church official has been informed that an employee or a volunteer of either the church or its school has harmed or harassed either a parishioner or a pupil, and appropriate action is not undertaken, the church may have to defend litigation for which standard policies of officers' liability insurance will not cover. For adequate protection, a chain of command and accountability within the church and school ranks of reporting and investigating claims should be established and correspondence from the complainant maintained. In the wake of priest sexual abuse cases, several states have introduced legislation enlarging the time for which a complaint can be filed, thereby emphasizing the need for proper documentation of investigatory and remedial actions.²²

related expenses. Additionally, I.R.C. § 7611 imposes potential personal liability on directors and pastors for failing to file 1099 and W-2 forms.

²⁰ To date, the only church stripped of its exempt status for violating tax-exempt regulations was a small New York church which purportedly ran ads in its bulletins in 1992 spurning Bill Clinton only several days before the 1992 presidential election. The I.R.S. stripped this church of its tax exempt status under U.S.C. § 501(c)(3) retroactive to January 1, 1992. *Branch Ministries, Inc. v. Richardson*, 970 F. Supp. 11 (D.D.C. 1997).

²¹ Fife, *supra* note 8.

²² Sheler and Glaser, *supra* note 7.

III. State of Religious Institutional Presence in America

The United States has the largest number of religious affiliations than any other country in the world.²³ In spite of this distinction, more than fifty (50) years have passed since a question of religious preference has been included in a U.S. census questionnaire. The Pew Research Council collected data concerning religious membership through a survey of approximately 2,000 adults in March 2002²⁴ following a more extensive study of 50,000 adults conducted by the American Religious Identity Survey (ARIS) in 2001.²⁵ According to the ARIS study, the top 5 “religious” affiliations in 2000 were categorized as follows: Christianity 76.5%, self-classified nonreligious 13.2%, Judaism 1.3%, Islam 0.5% and Buddhism 0.5%.²⁶ The Pew Research Council’s survey in 2002 revealed that the largest branches of Christianity in the United States were Protestant (collectively) (52%), Catholic (24%), and Church of Jesus Christ of Latter Day Saints (Mormons) (2%).²⁷ The Christian denominational loyalty of adult adherents above 1% of the 2004 estimated total U.S. population indicated the following religious composition: Catholic (24.5%), Baptist (16.3%), Methodist (6.8%), Lutheran (4.6%), Presbyterian (2.7%), Assemblies of God (2.1%), Episcopalian/Anglican (1.7%), Mormon (1.3%), and United Churches of Christ (1.2%).²⁸ With myriad religious affiliations and a commanding presence in American society, a questionnaire was prepared to assess the degree of uniformity and comprehensiveness of institutional business practices. The survey was

²³ Conclusion derived from the results of an extensive study conducted by the Hartford Institute for Religion Research in 2000 entitled “Faith Communities in the United States Today,” cited in Bill Broadway, *Claim of ‘Post-Denominational Era’ Defied; Interfaith Survey Finds that 62% of U.S. Congregations Maintain Strong Ties to Religious Groups*, WASH. POST, Mar. 14, 2001, at A3.

²⁴ Pew Research Council, *U.S. Religious Affiliations*, 2002. Survey results incorporated in *The Largest Religious Groups in the United States of America* (2005), www.adherents.com/rel_USA.html.

²⁵ The ARIS study also revealed significant other statistics respecting religious organizational growth. The 11 years between these studies reflect a 110% increase in secular groups and a 109% rise in Islam adherents. Seymour P. Kosmin, *American Religious Identity Survey* (ARIS) (2001), available at www.gc.cuny.edu/faculty/research_briefs/aris/aris_index.htm.

²⁶ *Id.*

²⁷ Andrew Kohut and Melissa Rogers, *Americans Struggle with Religion’s Role at Home and Abroad*, Pew Research Center for the People and the Press (Mar. 20, 2002), available at <http://people-press.org/report/150/americans-struggle-with-religions-role-at-home-and-abroad>.

²⁸ *Id.*

disseminated in July of 2006 to 370 congregations touting 250 members or more. Churches within the top nine religious denominations as identified in the Pew Research Council study were selected, relatively proportionate to their national percentage of adherents in the United States as listed in the 2006 Church Directory.²⁹

IV. Goal of Study

By analyzing responses from the most predominant religious bodies in the United States, the expectation is to assess the degree of uniformity and sophistication in church recordkeeping procedures and standardizing accounting procedures, especially in the wake of Sarbanes-Oxley,³⁰ and to suggest the implementation of a management system capable of delivering historically accurate records and a logistical audit trail, prudent use of human resources, and credible business practices and policies. A procedural rule – especially critical to the church business in light of recent million dollar judgments and settlements and as an increasing number of state legislatures seek to lengthen limitation periods for the prosecution of sexual abuse claims perpetrated by church officials – states that business records must be made in the ordinary course of business to be considered as credible evidence in courtroom proceedings.³¹ Poor records management can lead to actionable claims of negligence and undermine well-designed accounting

²⁹ Church Directory of the United States (2006 ed.).

³⁰ Known formally as the “Public Company Accounting Reform and Investor Protection Act of 2002,” and passed as Pub. L. No. 107-204. Sarbanes-Oxley Act of 2002, 15 U.S.C.A. §§ 7201, *et seq.*

³¹ California has now eliminated the statute of limitations on child sex abuse cases by church officials and has permitted lawsuits against all dioceses that fail to report and discipline those priests and other high-ranking members of the church who cause such acts. CAL. PENAL CODE § 803(g) (West 2003). Legal preparedness is particularly a concern in light of a \$105 million verdict rendered in 2000 against a school operated by the Episcopal Church in Charleston, South Carolina and a historical \$660 million settlement approved by a Los Angeles Superior Court judge against the Los Angeles Diocese on July 17, 2007. Property liquidations and parochial school closings necessary to satisfy court judgment amounts not covered by insurance have already become commonplace in the Archdiocese of Chicago. *See Religion & Ethics NewsWeekly: Catholic Church Finances* (PBS television broadcast, July 12, 2002). Similar financial consequences have also occurred in Boston with the Archdiocese paying out more than \$40 million at the end of 2002 for litigated and settled claims, including a \$10 million settlement entered into with 86 victims abused by former priest John Geoghan. *See Spotlight Investigation: Abuse in the Catholic Church: The Financial Cost*, THE BOSTON GLOBE, Apr. 30, 2002, available at <http://www.boston.com/globe/spotlight/abuse/cost/> (last visited Oct. 17, 2008).

practices. Ostensibly, any conclusions or suggestions will not obviate the need for synodical, diocesan and congregational approval as well as local legal scrutiny to satisfy special state and denominational requirements. It is also important to recognize that business operational manuals and handbooks are already in existence, which provide a certain amount of guidance to members of that particular religious body.³² Examining this issue in broader scope does, however, (1) offer more universal clarity and comprehension of record preparation, storage, preservation and destruction allowing religious institutions to prepare more adequately for litigation and financial audits and (2) assist in identifying deficiencies in business practices among the different church bodies, offering ways to remediate in a more uniform fashion.

V. Survey Methodology

The questionnaire distributed requests information concerning: (1) whether a formal records retention policy has been established in that parish by the parish itself or as a result of intervention by that religious body's governing diocese or convention; (2) whether the entity employs a business manager and if so, his or her qualifications; (3) whether that religious body operates a private school, and if so, at what level; and (4) in the event a retention policy is maintained, which records are identified and under what conditions are the documents to be prepared and maintained. For purposes of the study, reference to Catholic parishes includes both Roman Catholic entities (more centralized in governance with an established diocese, archdiocese, national diocese and Vatican hierarchical structure) and American Catholic congregations (more independent of papal rule).³³ Likewise, whereas the Lutheran Church of America is represented by two branches, the Lutheran Church-Missouri Synod (more conservative and fewer in number) and the Evangelical Lutheran Church in America (representing the

³² See, e.g., MANUAL OF THE CHRISTIAN AND MISSIONARY ALLIANCE with particular emphasis on sections (A5) Uniform Constitution for Accredited Churches and (H1) Position Statement on Church Government, available at <https://my.cmalliance.org/resources/books/manual/manual.jsp> (last visited Oct. 17 2008).

³³ FRANK S. MEAD, SAMUEL S. HILL, AND CRAIG D. ATWOOD, HANDBOOK OF DENOMINATIONS IN THE UNITED STATES 216-22 (12th ed. 2005).

majority of Lutheran churches in the United States), the study of its formal recordkeeping practices is grouped as a whole.³⁴ Lastly, Baptists, the largest Protestant denomination in the United States, include both members of the independent National Baptist and Southern Baptist Conventions, despite significant ideological differences and governing bodies that regulate administrative procedures.³⁵ Several of the aforementioned denominations have prepared their own business manuals, which offer guidance in establishing records retention schedules and standard business practices.³⁶

VI. Categories of Business Records Identified in Survey

Individual records used in this survey were chosen by identifying the most prevalent documents listed in various church and business manuals,³⁷ cross-referencing same with Congregational Library record management recommendations,³⁸ and finally segregating the documents into seven (7) main categories of business records.

³⁴ *Id.* at 174-85.

³⁵ Historically, the Baptist denomination (currently comprised of several branches) has particularly championed the separation of church and state from its earliest roots, and would appear to be the organized denomination least desirous of centralized management and of establishing a formal records retention schedule as many of the duration times are based solely upon state, federal, and administrative requirements. As early as 1639, Roger Williams proclaimed religious separatism and complete autonomy from state affairs, condemning any form of secular interference. Although the American Baptist Convention (previously known as the Northern Baptist Convention), the American Baptist Association and the Southern Baptist Convention ascribe to various governing entities, the local church still remains the primary autonomous unit. *Id.* at 49-79.

³⁶ Sources reviewed include the MANUAL OF BUSINESS METHODS IN CHURCH AFFAIRS, Chapter IX: Records Management IX and Retention Schedule for Congregations (The Episcopal Church of the U.S.A.), *available at* http://www.episcopalchurch.org/documents/MANUAL_FOR_BUSINESS_METHODS.PDF (last visited Oct. 21, 2008); Community of Christ - Records Retention Schedule, *available at* <http://www.cofchrist.org/CFO/Records/MissionCenters&CongregationsRetSchv060905.pdf> (last visited Oct. 21, 2008); District Area United Methodist Church Records Retention and Disposal Schedule, *available at* <http://www.depauw.edu/library/archives/aboutus/retention/ret-dis.htm> (last visited Oct. 21, 2008); Catholic Parish Records Retention Recommendation, *available at* <http://www.catholicreno.org/record%20retention%20schedule.htm> (last visited Oct. 21, 2008); and the Records Retention Schedule of the ELCA Churchwide Office (Lutheran), *available at* <http://www.elca.org/secretary/records.html> (last visited Oct. 21, 2008).

³⁷ *Id.*

³⁸ *See* Church Records: Retention and Storage Guidelines, *available at* http://www.congregationallibrary.org/pdf/Records_Management_for_Local_Churches.pdf.

(a) *Archival Documents.* Even without formal legal guidelines established to regulate record retention, it is imperative to recognize the importance of preserving, restoring, and retaining documents that chronicle the development, expansion, retraction, and changing nature of the church and parochial school. In addition to providing a written accounting of church affairs, which may prove fruitful in defending legal claims of malfeasance, historical documents evidencing unpleasant events, hostile communiqués, and questionable proceedings may lead to well-reasoned change in administrative structure. The tragedy of premature record destruction is the permanent loss of history: the lack of roots, tradition and understanding why the institution is in financial distress, why younger congregants and older school children are decreasing in numbers and in attendance, why social projects are an intricate part of the church or the parochial curriculum, and how liturgy has evolved over time.

Examining the content of sermons throughout the years provides a barometer of changing social mores, from views on the Vietnam War to the more current issue of gay marriage. In addition to words from the pulpit, written reactions from congregants provide feedback concerning direct application and interpretation of scriptural passages. Photographs and drawings of the congregants, pupils, and parents add to the comprehensive (and sometimes comedic) review of changing personal trends in dress and general personal appearance. Visual documentation of church buildings reflects architectural influence and parishioner appeal. Genealogical studies are often facilitated by the recording of events such as marriages, first communions, confirmations, funerals, and baptisms.

States have also recognized the importance of maintaining records of historical value. Even with the lack of legislation establishing specific record retention periods, several state legislatures, in allowing for the destruction of public records

with no official or historical value, provide for numerous exceptions.³⁹ With respect to records of negligible worth, other states mandate preservation of such records for particular periods of time.⁴⁰

With respect to the instant survey, archival documents are defined as those that relate the historical purpose of the church and school and are identified as:

- Birth, death, confirmation and baptismal registries;
- Sermons, church bulletins and newsletters;
- Architectural drawings and surveys;
- Staff and committee meeting records;
- School awards, certificates of recognition and accomplishments;
- Parishioner correspondence; and
- Membership records.

(b) *Legal Documents.* The church's base organizational documents, which define its existence as a separate business entity, include:

- Proof of tax-exempt status (i.e., I.R.S. and individual state ruling letters);
- Articles and Certificate of Incorporation, Bylaws or Organizational Charter, and other governing documents;
- Deeds and Certificates of Title evidencing property ownership;
- Will and estate papers which include bequests to the church and/or school; and
- Leases and other written contracts.

These records should be treated in the same manner as historical documents and retained on a permanent basis.

³⁹ See, e.g., N.Y. ARTS & CULT. AFFR. § 57.05 (McKinney 2008); TEX. GOV'T CODE ANN. § 441.186 (Vernon 2008); WASH. REV. CODE ANN. § 40.14 (West 2008); IND. CODE ANN. § 5-15-6-3 (West 1998); OHIO REV. CODE ANN. § 149.331 (West 2008).

⁴⁰ See, e.g., IND. CODE ANN. § 5-15-6-3 (2)(b) (West 1998), which states that records "shall not be destroyed until a period of at least three (3) years shall have elapsed from the time when the records were originally filed."

(c) *Confidential Documents*. It is of extreme importance to segregate “personal” records from “church records” in order to safeguard materials containing personal data, intimate details, and to further regulate access and control to them to reduce tort liability.⁴¹ From matters of written individual spiritual guidance notes to academic disciplinary records, additional sensitivity should be ascribed to the release and retention of these types of records. Any disclosure should be made with competent legal guidance and a properly drafted consent to release information to deter defamatory claims of action.⁴²

(i) Spiritual Guidance. The confessional booth has always been a symbol of privacy where a penitent individual can go to expel the mental burdens of self-deprecation or outright transgressing behavior. The euphoric experience of confession and the expectant bestowal of forgiveness would be severely compromised if the receiving party communicated the confessor’s secrets to unauthorized third parties. All inhibitions would be revisited without this protected communication. But does the sanctity of everyday ritual contain guarantees of total privacy? Under well-established law, only the penitent can waive the right to a privileged confession. Confessions are still regarded as privileged communications in the same manner as attorney-client and physician-patient shared confidences. Confidential communications made to a clergyman in the clergyman’s professional character as a spiritual advisor or counselor are generally protected. Confessions are to be differentiated from spiritual advising especially in light of where the dialogue occurred and who initiated the dialogue.⁴³

⁴¹ Bill Summers, *Records Management in the Church*, (2007), available at http://www.sbhla.org/art_rec_mang.htm (last visited Oct. 21, 2008).

⁴² MARK J. DUFFY, *DOMESTIC AND FOREIGN MISSIONARY SOCIETY OF THE PROTESTANT EPISCOPAL CHURCH IN THE U.S.* (1997).

⁴³ See, e.g., *State v. Martin*, 975 P.2d 1020 (Wash. 1999); *State v. Boling*, 806 S.W.2d 202 (Tenn. Ct. App. 1990).

(ii) School Records. A leading state case concerning the maintenance of record confidentiality is *Meury v. Eagle-Union Community School*.⁴⁴ In *Meury*, a public high school student had been written up on several different occasions for various breaches of school rules and policy directives. In an attempt to explain possible physiological and sociological causes for this aberrant behavior, the student's parents submitted a confidential note in response to the citations issued. When the parents requested that the child's grade transcripts be copied and forwarded to selected universities and colleges, the high school's principal copied and attached the submitted note of explanation with each transcript sent. As a result, the child was allegedly denied admittance into his colleges of choice and was unable to secure scholarships or other preferred financial aid.

The child and his parents brought a direct action against the public school system, asserting that their child's expectation of privacy of confidential communications was violated under the Family Educational Rights and Privacy Act (FERPA).⁴⁵ The Indiana appellate court affirmed the trial court's ruling that the enforcement of FERPA is vested exclusively in the Secretary of Education, precluding any private enforcement of these laws. Because of its ruling, the Court was able to bypass adjudicating the factual merits of this case, although in *dicta*, strongly implied that the principal's actions were retaliatory and wrongful.

The applicability of FERPA privacy protections, at least with respect to the disclosure of disciplinary records, exempts parochial schools.⁴⁶ Regardless, the threat of common law tortious actions including invasion of privacy, defamation, and interference with contractual relations represent substantial reasons to safeguard and restrict dissemination of academic disciplinary records, especially in similar circumstances where there appears to be malicious motivation.

⁴⁴ 714 N.E.2d 233 (In. Ct. App. 1999).

⁴⁵ Codified at 20 U.S.C.A. § 1232(g) (West 2008).

⁴⁶ *Id.* at § 7165.

(d) *Financial Records.* Churches are certainly not immune from IRS audits and recordkeeping responsibilities.⁴⁷ While three (3) years is the statutory period within which the Service can perform an audit, that period can be extended to six (6) years for the church's failure to file or its underreporting of unrelated business income and employment taxes.⁴⁸ No limitations period exists for intentional acts of fraud. As with any individual or organization, the IRS is certainly not immune from losing returns, necessitating proof of filing by the church entity. Therefore, simply to offer evidence that a return was filed, it is critical to preserve records for at least ten (10) years.⁴⁹ Longer periods of retention create a necessary historical pattern of clearly separating charitable- related activities from unrelated income sources, lessening the chance of a civil inquiry. In addition to regulatory concerns, financial reports may serve as the best barometer to measure a church's financial status in predicting the church's future wellbeing. Meeting minutes and annual reports from steering committees represent useful resources in designing and implementing fundraising methods by reviewing outcomes from past campaigns.

Key financial documents of church management include:

- Accounts payable and receivable;
- Deposit slips;
- Annual fiscal and administrative reports (indispensable for government audits and to determine future budgets and improvement plans based upon the church and school's past and current financial situation);
- Audit records;
- Cancelled checks, bank deposits and statements;
- Deduction and tax withholding authorization records (W-4s);
- Certificates of deposit;
- Tax returns;

⁴⁷ 26 C.F.R. § 1.600-1(c).

⁴⁸ Governed by 26 U.S.C.A. § 6501(E) (West 2008) (amended October 3, 2008, Pub. L. No. 110-343, 122 Stat 3765) and 26 C.F.R. § 31.6001-1.

⁴⁹ A less conservative approach used in the preservation of financial records for possible tax audits has been current year (CY) + 7 years with the limitations period beginning when the return was filed, not when the specific tax was incurred. DUFFY, *supra* note 42.

- Time sheets; and
- Travel records.

(e) *Employment Records*. In addition to the Internal Revenue Service, both the Equal Employment Commission and the United States Department of Labor require that employers maintain records evidencing compensation levels, number of hours worked, recruitment and hiring practices, retirement plans, and injuries occurring in the workplace. Even with the paucity of legislation on establishing retention periods for different types of employment documents, Title VII of the Civil Rights Act of 1964 provides for retention periods in certain circumstances: e.g., personnel records must be retained for three (3) to six (6) years after termination while payroll records are to be kept for three (3) years after the date of last entry. The longest period of retention time – five (5) years – is required for individual employee medical records.⁵⁰

The documents included in this survey under the category of employment records are:

- Personnel files;
- Payroll records;
- Workers compensation, accident and injury reports;
- Employee medical records;
- Employment benefit policies;
- Employment eligibility forms (I-9s);
- Employment manuals; and
- Rejected employment applications.

⁵⁰ A state parallel is found under Indiana law which requires employers to “[m]ake and preserve records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the agency to protect the legal and financial rights of the government and of persons directly affected by the agency’s activities.” IND. CODE ANN. § 5-15-5.1-10 (West 2008). Further, “no records shall be removed or transferred from any office until a period of at least three (3) years shall have elapsed from the date on which the records were filed.” IND. CODE ANN. § 5-15-6-4 (West 2008).

(f) *Academic Records*. Additional concerns exist with respect to academic record retention and management in light of the growing presence and demands of the “double household” as well as the privacy requirements of FERPA. Confusion is often the consequence of parents and/or guardians asking (and often demanding) individual notices of church choir participation, parent/teacher conferences, weekly bulletins, sports schedules, school calendars, grade reports and homework assignments. Many state laws allow for joint “legal” custody, a term that permits *both* parents – even if only one is the primary physical custodian – to decide upon issues of education, religious upbringing, and medical care for their children.⁵¹ School and church offices should keep a current copy of that family’s most recent dissolution or post-dissolution court order on file. A call to the local clerk’s office in the particular county of residence of the child, supplying either the family surname and/or the case number assigned to the litigation, will suffice to relate the current status of joint custody. Assuming that both parents, or a parent and another legally-appointed guardian, have joint legal custody of the child, the pastor and teacher should make separate meeting and notification arrangements with each parent and guardian, documenting their efforts.

Where specific guidelines for record retention are lacking, emulating state public school practices may be prudent. As with heightened protection of an individual’s right to privacy – especially with respect to health records – state public schools follow several basic tenets of record retention. The term of retention is indefinite but a minimum of five (5) years is generally recommended for maintaining all academic documents. Extending the retention period may serve well to demonstrate a parochial school’s record of achievement historical continuity of excellence and bespeak of the quality of its educational and/or extracurricular programs.

⁵¹ *E.g.*, Illinois Code Title VI, Ch. 61, § 61.13 *et seq.*; Pa. Code Title 23, Part V, Ch. 53; Florida Code, Title VI, Ch. 61, § 61.13 *et seq.*

In an attempt to adequately prepare for challenged grading decisions, suspensions, expulsions, and claims of discrimination in the student selection process, and to accommodate appropriately for students' college preparatory and special health care needs, the most important records to prepare and maintain are:

- Rejected student applications;
- School accreditation records;
- Academic records (i.e., grade reports);
- Academic testing results (e.g., SATs);
- Student health records; and
- Official class lists.

(g) *Administrative Records*. Even basic documentation evidencing supply acquisition methods and providing sufficient risk and property loss coverage command specific retention periods and procedures for the following documents:

- Insurance records;
- Inventories of properties and equipment; and
- Purchase orders.

VII. Survey Results

The results of this church records retention survey of 370 parishes generally reveal (1) a paucity of parental organizational governance; (2) a lack of compensated and experienced business managers occupying formal positions in monitoring church accounting affairs; (3) no formal policy of record generation or preservation; and (4) a trend of prematurely discarding employee records and rejected employee (and student, where applicable) applications. These deficits imperil historical guidance and result in a lack of information needed to properly prepare for an administrative audit.

Specifically, the results indicate the strictest governance of business in the Catholic Church and the consistent application of a thorough records retention manual by the Episcopal Church. The Catholic and Lutheran parishes operate the

greatest number of church-supported schools, but lack consistent application of an academic records retention policy. Acknowledging the lack of response from the Mormon parishes selected, the remaining church bodies emphasize the retention of most archival and legal documents but are lax with respect to the maintenance and preservation of newsletters, general correspondence, church bulletins, sermons, rejected student and employee applications, reimbursement and travel records – documents relevant to preservation of the church’s history and to the preparation of a defense in a civil inquiry and an administrative audit

GINGERICH SURVEY RESULTS

(Business Structure and Archival/Legal Records Retention Policies)

Selected Church Denominations/ No. of Responses YES/NO	Records Retention Policy Maintained	Policy Mandated by Parental Entity	Salaried Business Manager: degreed and/or experienced	Private School	Archival Documents Retention	Legal Documents Retention
Catholic (33/100)	27/6	27/6	14/19	24/9 11 accred.	32/1	28/5
Baptist (6/100)	2/4	1/5		0/2	2/4	2/4
Methodist (13/60)	4/9	4/9	3/10	2/11	5/8	5/8
Lutheran (6/40)	1/5	0/5	3/3 (volunteers)	3/3	5/1	5/1
Presbyterian (9/30)	5/4	4/5	2/7	0/9	5/4	5/4
Assemblies of God (1/10)	0/1	0/1	0/1	1/1 non- accredited	1/0	1/0
Episcopalian	5/5	5/5	2/3	0/5	0/5	0/5

(10/10)	Episcopal - Manual of Business Methods	Episcopal Church of the USA			Covered by Episcopal Manual of Business Methods	Covered by Episcopal Manual of Business Methods
Mormon (0/10)	-	-	-	-	-	-
Church of Christ (3/10)	2/1	2/1	2/1	1/2	2/1	2/1

GINGERICH SURVEY RESULTS

(General Business and Academic Records Retention Policies)

Selected Church Denominations/ No. of Responses NO/YES	Confidential Records Retention	Financial Records Retention	Employment Records Retention	Academic Records Retention	Administrative Records Retention
Catholic	21/12	25/8	21/12	NO/YES 16 of 24 schools	6/27
Baptist	0/6	1/5	1/5	N/A	0/6
Methodist	2/11	3/10	2/11	0/2	1/12
Lutheran	0/6	1/5	1/5	NO/YES 0 of 3 schools	0/5
Presbyterian	2/7	2/7	1/8	1/8	0/8
Assemblies of God	1/0	1/0	1/0	1/0	1/0
Episcopalian	Covered by	Covered by	Covered by	N/A	Covered by

	Episcopal Manual of Business Methods	Episcopal Manual of Business Methods	Episcopal Manual of Business Methods		Episcopal Manual of Business Methods
Mormon	-	-	-	-	-
Church of Christ	2/1	2/1	2/1	NO/YES 0 of 1 school	1/2

VIII. Deficiencies Noted

It is important to note that while certain congregations do not maintain formal record retention policies nor keep a business-degreed and experienced manager on their payroll, such omissions do not necessarily translate into the conclusion that records are not kept. A better understanding of the differences in record-keeping and business management practices might be gleaned from a larger sampling of churches from each Christian branch, segregating those with school operations, regionalizing results and categorizing according to size of congregation.

IX. Recommendations

(a) *Development of Record Retention Guidelines.* For reasons outlined herein, it is imperative that church bodies and individual parishes, if necessary, systematically determine appropriate record retention periods as well as systematically control the destruction of records at the appropriate times. The following recommendations concern the importance that certain categories of business records play in legal proceedings as well as administrative audits, but do not necessarily offer guarantees of successfully defending fiscal audits, civil litigation, or criminal prosecutions. Succinctly presented as general uniform guidelines, the following recommendations of record retention periods are more liberal than traditional tables in order to address adequately the proliferation of litigation and the need to operate the church as any other “business.” In light of the often confusing and conflictive federal and state statutory and administrative

guideline retention periods, if the document does not command permanent retention, the need to create more uniformity and security should persuade the parish to employ the simple, but highly practical suggestion that “when in doubt, go with the ten-year rule of thumb.”⁵² There exists a legal basis to this particular period of time; in many states, the longest limitations statute permitted for initiating litigation with respect to a breach of written contract is ten years.⁵³

GINGERICH CHURCH RECORD RETENTION RECOMMENDATIONS

DOCUMENT CATEGORY	RETENTION RECOMMENDATIONS
1. Archival Documents	Permanent Retention
2. Legal Documents	Permanent Retention
3. Confidential Documents	Retain for at least the state’s prescribed period for tort of invasion of privacy, defamation and misappropriation tort limitations periods
4. Financial Records	CY “Current Year” plus a minimum of ten years
5. Employment Records	CY “Current Year” plus ten years. (Caveat: actions for breaches of employment contracts will follow each state’s prescribed statutory limitations period within which a claimant must commence a civil claim or forever be

⁵² LifeOrganizers.com, Records Retention, <http://www.lifeorganizers.com/office/records-retention.htm> (last visited October 24, 2008). The ten-year default time period is made in contravention to the Paperwork Reduction Act of 1980, which recommends a minimum retention period of three years. Paperwork Reduction Act, 44 U.S.C. § 3501 *et seq.* (2005). The specific reference to a three-year retention period is codified at 44 U.S.C. § 3507(g).

⁵³ States with ten-year written contractual limitations periods include Illinois, Indiana, Iowa, Louisiana, Missouri, Rhode Island, West Virginia, and Wyoming (Ohio and Kentucky extend this claim period to fifteen years). Credit-to-Cash-Advisor.com, State Collection Law, <http://www.credit-to-cash-advisor.com/Home/Resources/StateCollectionLaw> (last visited Oct. 23, 2008).

DOCUMENT CATEGORY	RETENTION RECOMMENDATIONS
	barred. Such documents should be preserved for longer periods of time to show a pattern of consistent fair dealing).
6. Academic Records	As the majority of church-operated schools were pre-K through high school, permanent retention is recommended to disprove discriminatory practices in the student selection process, to preserve accountings of academic performance, and to serve as a guidance post for future generations of students.
7. Administrative Records	While considered the least important of the other categorical documents, maintaining records of supply and asset purchases as well as reimbursement records on a permanent basis offers a beneficial tool to gauge the needs of either a thriving or contracting congregation and to prepare adequately for financial audits.

(b) *Appointment of a Business Manager*. No non-profit organization is immune from financial or other audits which, if unfavorable, could lead to the imposition of fines or in more serious circumstances, suspension or revocation of its tax-exempt status. In the wake of Sarbanes-Oxley, two phenomena have occurred: the non-governmental organization sector has grown exponentially⁵⁴ and in 2005,

⁵⁴ Peter Hall-Jones, *The Rise and Rise of NGOs*, Public Services International: Global Policy Forum, May 2006, available at <http://mail.kein.org/pipermail/incom-l/2006-May/001302.html>.

the undergraduate major of accounting had become the most popular major in U.S. colleges.⁵⁵ With new accounting regulations imposed and a larger pool of qualified individuals from which to choose, the employment of a business manager who has no conflicts of interest with the employer church's transactions, is essential to help ensure the validity of the church's accounting practices.⁵⁶

(c) *Development of a Confidentiality Policy.* As the church is regarded to be the lawful owner of its business records, the organization's bylaws or governing charter should restrict access to them and provide for the appointment of a properly trained records custodian. Since corporate records are made available to church members pursuant to the disclosure provisions of the Revised Model Nonprofit Corporation Act,⁵⁷ efforts should still be taken to segregate those records of particular sensitivity to safeguard the priest-penitent privilege and to discourage the filing of invasion of privacy claims. The need to segregate such confidential documents is further necessitated as many records may be subject to disclosure by reason of a court-issued subpoena or made available to the I.R.S. to substantiate tax-exempt status. All church employees and volunteers should be required to sign a confidentiality agreement that remains in effect post-termination. The original confidential records and any copies made should be stored in a safe place such as a bank safe box or the entity's attorney's office to preclude commingling corporate documents with those of a more sensitive nature.⁵⁸

(d) *Preservation and Storage Concerns.* In defending a lawsuit, the manner in which copies of original documents are used, duplicated, and preserved pose

⁵⁵ Angela Doody, *Labor report: Accounting is top major on campuses*, Central Penn Business Journal, May 2005, available at http://findarticles.com/p/articles/mi_qa5295/is_/ai_n24298778.

⁵⁶ The Church and the Law, *The Alliance*, 2007, available at <http://www.cmalliance.org/resources/church/risk/law.jsp>

⁵⁷ See, e.g., Revised Model Nonprofit Corp. Act § 16.02 (1987).

⁵⁸ The Church and the Law, *The Alliance*, 2007, available at <http://www.cmalliance.org/resources/church/risk/law.jsp>

additional concerns. The following evidentiary rules, patterned almost identically by most states, are of particular significance:⁵⁹

- **Federal Rules of Evidence – Rule 803(6): Records of Regularly Conducted Activity.** In matters where the preparer of the actual document material is unavailable to testify, admittance of the document over a hearsay objection is still feasible as long as the record was made at time of event, by a person having knowledge of the material transcribed, and that document is kept as a regularly conducted business activity, and created by that business in its normal and usual operations.⁶⁰

Therefore, the absence of the declarant in the trial proceeding is immaterial as long as the records custodian or other qualified witness can demonstrate the usual practice of record generation.

- **Federal Rules of Evidence – Rule 1003: Admissibility of Duplicate Documents.** “A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.”⁶¹ *Thus, the best business practice would be to keep both the original and at least one copy to avoid having to confront the two exceptions to this rule.*

- **Federal Rules of Civil Procedure – Rule 26: Duty of Disclosure.** The process of discovery requires each party upon whom a request for tender of relevant information is made relating to the litigation produce copies of, “or a description by category and location of, all documents, electronically stored information, and tangible things that are in the possession, custody,

⁵⁹ DONALD S. SKUPSKY, RECORDKEEPING REQUIREMENTS: THE FIRST PRACTICAL GUIDE TO HELP YOU CONTROL YOUR RECORDS . . . WHAT YOU NEED TO KEEP AND WHAT YOU CAN SAFELY DESTROY! 38-42 (Information Resources Clearinghouse 1988).

⁶⁰ Fed. R. Evid. 803(6).

⁶¹ Fed. R. Evid. 1003.

or control of the party and that the disclosing party may use to support its claims or defenses, unless solely for impeachment.”⁶²

Although storage of documents may pose physical limitations, the alternative of nondisclosure without just reason can generate the imposition of sanctions and fines.

- **Federal Rules of Civil Procedure – Rule 34: Request for Production of Documents.** Under this discovery rule, “[a]ny party may serve on any other party a request (1) to produce and permit the party making the request . . . to inspect and copy, any designated documents (including writings, drawings, graphs, charts, photographs, phonorecords, and other data compilations from which information can be obtained . . .).”⁶³

Again, failure to tender the requested documents without the protection of a recognized exception may result in the incursion of substantial penalties to the non-compliant entity or party.

While there is no doubt as to the importance of record retention, physical storage of a sizable amount of documents may remain problematic. While copies may suffice under evidentiary and procedural rules, reproductions should merely supplement durable records. Microfilm may represent one option of storing especially large quantities of archival documents. For documents stored on a computer’s hard drive, it is necessary to produce a weekly backup and maintain a paper copy (preferably encased in an acid-free folder) of each record kept on the computer. A removable storage or memory device, such as a jump drive, is indispensable for record storage. With regular back-ups, safeguards should be employed sufficiently to aid in the protection against viruses or any other corruption of computer drives. Additionally, it is imperative to use the latest

⁶² Fed. R. Civ. P. 26.

⁶³ Fed. R. Civ. P. 34.

software format technology in the event that the church or school's computer system is replaced.⁶⁴

Document reduction may also be achieved more efficiently by following these steps: (a) categorize each document and specify which are confidential in nature; (b) secure documents, providing sufficient backup and restricting access to records by utilizing passwords; (c) develop and conspicuously display a "Copying and Retention of Confidential Documents" policy in the workplace; and lastly (d), develop a uniform "Document Destruction" policy.⁶⁵

IX. Conclusion

There are several predominant reasons to retain documents even without direct legal guidance: the facilitation of daily operations, protection against future legal proceedings, the establishment and maintenance of financial security and the preservation of an historical accounting. Having established procedures for daily operations is invaluable to the consistent and uniform treatment of issues and preservation of documents. Document retention, preservation and destruction policies must be definite and should leave no room from conflicting interpretations as to operational procedures. And with the guidance of an experienced and knowledgeable business manager and records custodian, daily operations should flow with some degree of relative certainty.

⁶⁴ SKUPSKY, *supra* note 59, at 42.

⁶⁵ *Id.*