

GUIDELINES: DRAFTING CHURCH BYLAWS AND CONSTITUTION

I. RELIGIOUS AUTHORITY

Societal consensus is evaporating on elemental questions of theology, philosophy, and jurisprudence. In response, [Church] should identify the final human authority — person, board, committee — who will promulgate, interpret, and enforce religious policies for [Church]. Religious entities should incorporate language on qualifications, quorum rules, officers, executive committees, disqualification, removal and other procedural rules. Further, the church’s bylaws and/or constitution should include binding *religious* rules relevant to “internal church governance” and discipline.¹

Because there are myriad constitutional and statutory protections for “religious organizations” arising under the First Amendment, Religious Freedom Restoration Act (“RFRA”), Religious Land Use and Institutionalized Persons Act (“RLUIPA”),² and various state statutes,³ the final authority must be essentially *religious* and charged with promulgating and enforcing *religious* rules on at least the following:

- Scripture and Canonicity
- Statements of Faith and Doctrine
- Standards of Morals and Conduct
- Resolution of Theological Controversies
- Internal Dispute Resolution
- Interpretation and enforcement of conformity of belief/practice
- Discipline of Members
- Discipline of Ministers
- Discipline of Executives
- Property and Facility Usage⁴

¹ *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 706 (2012).

² U.S. CONST., amend I; 42 U.S.C. §§ 2000e, *et seq.*; 42 U.S.C. § 2000bb, *et seq.*; 42 U.S.C. §§ 2000cc, *et seq.*; 42 U.S.C. §§ 9858, *et seq.*, Executive Order 13279, 67 F.R. 77141.

³ *See, e.g.*, Cal. Gov’t Code § 12926(d); Col. Rev. St. § 24-34-401; Conn. Gen. Stat. § 46a-81p; D.C. Code § 2-1401.03; Hi. Rev. Stat. § 378-3(5); 775 Ill. Comp. Stat. 5/2-101(B)(2); Iowa Code § 216.6(6)(d); 5 Me Rev. Stat. §§ 4553(4) & 4573-A; 49-B Md. Code § 18; 151B Mass. Gen. Laws § 4; Minn. Stat. § 363A.20; Nev. Rev. Stat. § 613.320 & 613.350; N.J. Stat. § 10:5-12; N.H. Rev. Stat. § 354A:7; N.M. Stat. § 28-1-9(B); N.Y. Exec. Law 296(11); Or. Rev. Stat. § 659A.006; R.I. Gen. Laws § 28-5-6(7)(ii); 21 Vt. Stat. § 495; Wash. Code § 49.60.040(3); Wis. Stat. § 111.337.

⁴ *See, e.g.*, *Gunn v. Mariners Church*, 2005 WL 1253953, at *2 (Cal.App. 4 Dist. 2005); *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 709-10 (1976); *Maryland & Va. Churches of God v. Church at Sharpsburg*, 396 U.S. 367, 368 (1970); *Gonzales v. Roman Catholic Archbishop*, 280 U.S. 1, 16 (1929); *Holy Trinity Church v. United States*, 143 U.S. 457, 472 (1892); *Bryce v. Episcopal Church in the Diocese of Colorado*, 121 F.Supp. 1327, 1328 (D.Col. 2000).

If [Church] is denominationally affiliated, its best line of defense will be to incorporate by reference pre-existing denominational doctrinal, dogmatic or theological documents.⁵ Typically, denominational doctrine will enhance and thoroughly explain the sincerely held religious beliefs of [Church].

It is important that [Church] explicitly charge its religious authority with oversight of all areas of [Church] governance, particularly issues of faith, practice, theology, moral and scriptural interpretation. If [Church] seeks to adopt any policy or doctrinal statement, submit it openly to the congregation for corporate notice or consideration while the designated authority considers the ecclesiastical matter.⁶

In addition, [Church] should clearly define the person/board/committee's scope of authority over the above referenced matters. Express that the designated authority is the final authority on (1) scripture, faith, morals, and employee/member discipline; (2) formal employment or membership requirements vis-à-vis eligibility, morals, discipline, removal, and rescission; (3) Statements of Faith and Doctrine; (4) Standards of Morals and Conduct; (5) internal dispute resolution; and, (6) enforcement of conformity of belief and practice relating to religious teaching and practice. State that ecclesiastical government of all members, congregations, and officers within the general association is unquestioned.⁷ Create authority for the decision of controverted questions of faith within the [Church].⁸ Conclusively state that decisions of the established authority are "binding in all cases of ecclesiastical cognizance, subject only to appeals" as [Church] itself provides for.⁹

⁵ *Spencer v. World Vision, Inc.*, 633 F.3d 723, 727 (9th Cir. Wash. 2011) (citing *LeBoon v. Lancaster Jewish Cmty. Ctr. Ass'n*, 503 F.3d 217, 226 (3d Cir. Pa. 2007) (citing *Samford v. Killinger*, 113 F.3d 196 (11th Cir. 1997); *EEOC v. Kamehameha Schools/Bishop Estate*, 990 F.2d 458 (9th Cir. 1993); *Townley*, 859 F.2d at 618-19; *EEOC v. Mississippi College*, 626 F.2d 477 (5th Cir. 1980)).

⁶ *See Fiedler v. Marumscos Christian Sch.*, 631 F.2d 1144, 1152 (4th Cir. Va. 1980).

⁷ *Connor v. Archdiocese of Phila.*, 601 Pa. 577, 588-591 (Pa. 2009) (quoting *Watson v. Jones*, 80 U.S. 679, 728-29 (1871)).

⁸ *See id.*

⁹ *Id.*

Lastly, beyond defining the scope of authority over the above-referenced matters, it is important that [Church] delineate its religious purpose and motivation in exercising authority over each category, with scriptural references. Emphasize that the “religious authority necessarily pervades” all aspects of [Church] governance and operations.¹⁰ Explain how everything that occurs in the [Church] affects its ministry and mission and is therefore under its religious authority. Further, express that the religious purpose in exercising said authority is for the [Church] to practice its religion, foster, repeat, advertise, and disseminate [Church’s] view, message, and statements.¹¹

A. Leadership

[Church] has an interest, as a religious institution, in “autonomy in ordering its internal affairs, so that it may be free to: select [its] own leaders, define [its] own doctrines, resolve [its] own disputes, and run [its] own institutions.”¹² Therefore, [Church] should revise and amend its [list any and all written organizational policies, governing documents, handbooks, or procedures, including things like employment policies, Standards of Morals and Conduct, discipline, Statements of Faith, religious beliefs, Purpose Statement, Mission Statement, polity, and internal dispute resolution policy] (the “Written Statements of Faith”), to expressly state this autonomy.

¹⁰ See *Lemon v. Kurtzman*, 403 U.S. 602, 617 (1971).

¹¹ *HEB Ministries, Inc. v. Tex. Higher Educ. Coordinating Bd.*, 235 S.W.3d 627, 644, 800 (Tex. 2007); see *Hurley v. Irish-American Gay*, 515 U.S. 557 (1995)

¹² See also *Serbian Eastern Orthodox Diocese*, 426 U.S. at 696 (church has interest in effecting binding resolution of internal governance disputes); *Kedroff v. Saint Nicholas Cathedral*, 344 U.S. 94 (1952) (state statute purporting to transfer administrative control from one church authority to another violates Free Exercise Clause); *Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 341-342 (1987).

B. Employment and Volunteers

Second, clearly and explicitly define the formal requirements for employment and volunteering. Specify the authority that the designated person, board, or committee will have over establishing these requirements, which should be stated as “instituted for the purpose of ecclesiastical government.”¹³

C. Discipline

As Christian consensus evaporates on controversial issues like marriage, sexuality, and gender identity, [Church] will likely encounter more and more scenarios where it must discipline or remove counter-witnessing persons. Such actions are legally defensible only if [Church] clearly delineates its employment requirements and secures signed written consent from all volunteers, employees, administrators, ministers, officers, and board members. The employment policies should cover at least the following:

- Standards of Morals and Conduct
- Eligibility Requirements
- Procedures for Discipline, Mediation, Termination (more than Matt. 18)
- Agreement binding all volunteers, employees, administrators, ministers, officers, and board members to all [Church] policies
- Procedures for Rescission and Voluntary Withdrawal

[Church] Bylaws should incorporate binding Standards of Morals and Conduct for all board members, employees, ministers, and volunteers. [Church] Bylaws must state that assent and adherence to its Statements of Faith and Standards for Morals and Conduct is a qualification to serve the [Church] in any employment or volunteer capacity. [Church] should clearly establish that its Standards of Morals and Conduct as well as adherence to its Statements of Faith is expected at all times, publically and privately. Further, all employees and volunteers should sign these statements.

¹³ *Watson*, 13 U.S. at 679.

For more information regarding suggested Statements of Faith policies, see our “Statement of Faith” Templates.

For more information regarding suggested policy requirements for Employment and Administration, see our “Guidelines: Drafting Church Employment and Administrative Policies.”

II. MEMBERSHIP

Many non-denominational and non-hierarchical churches lack written policies and procedures for the admission, discipline and removal of members. If leaders intend to exercise church discipline, they should promulgate written policies and procedures that are binding and enforceable against members.

A. Formal Membership Requirements and Disqualifications

As a religious entity, it is important for [Church] to clearly communicate that it is charged with the instillation of dogma and discipline of its members as an integral part of its religious mission. For this reason, [Church] should have well defined Membership Requirements and Disqualifications.

[Church] may directly set forth that it will “select those individuals with whom [Church] wishes to join in a common endeavor or mission because membership will play a critical role in the culture and traditions of [Church] by cultivating and transmitting shared ideals and beliefs.”¹⁴ Further, if applicable, the [Church] should state its belief that “individuals draw much of their emotional [and spiritual] enrichment from close ties with others.”¹⁵

¹⁴ See, e.g., *Zablocki v. Redhail*, 434 U.S. 374, 383-386 (1978); *Moore v. East Cleveland*, 431 U.S. 494, 503-504 (1977) (plurality opinion); see also *Gilmore v. City of Montgomery*, 417 U.S. 556, 575 (1974); *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972); *Griswold v. Connecticut*, 381 U.S. 479, 482-485 (1965); *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 535 (U.S. 1925); *Poe v. Ullman*, 367 U.S. 497, 542-545 (1961) (Harlan, J., dissenting); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460-462 (1958).

¹⁵ *Roberts v. United States Jaycees*, 468 U.S. 609, 621 (1984).

While [Church] does not have to employ stringent inquiry into members' backgrounds, it is important that criteria for eligibility, morals, discipline, removal and rescission are clearly designated and communicated, grounded in scriptural references. Further, express that membership is made up of "coreligionists,"¹⁶ as commitment to [Church's] mission, goals or vision is required.

Potential qualifications for membership may include: written profession or statement of faith in the Holy Bible and Jesus Christ; a written statement of faith in Jesus Christ and member's intent to pursue a life that will glorify God, with His help; assent and adherence to [Church's] Written Statements of Faith.

Disqualifications may state that membership is contingent on whether or not the member is actively pursuing his/her relationship with Christ, as well as abiding by convictions and commitments of [Church] regarding Standards of Morals and Conduct. As discussed in more detail below, members should be advised of potential consequences of or discipline for not abiding by their commitments as members.

Similar to Employment and Volunteer standards, apply [Church's] Standards of Morals and Conduct to membership procedures. It is in [Church's] discretion to adopt specific Standards of Morals and Conduct to apply to members.

¹⁶ *World Vision, Inc.*, 633 F.3d at 727; *Kamehameha Schools/Bishop Estate*, 990 F.2d at 458; *Townley*, 859 F.2d at 618-19; *Mississippi College*, 626 F.2d at 477.

Request that members review [Church] policies and Written Statements of Faith and proceed with membership only if they are in agreement with, and willing to abide by, said policies. In order to do so, have potential members sign an agreement that they have received, read and understand the [Church] policies. For example, “_____, is a member of and adheres to established and traditional tenets or teachings of [Church/religion/body/or sect] which has historically held to the beliefs set forth herein.”¹⁷ Additionally, all members should sign a written consent to all written policies, preferably on an annual basis.

It is imperative for the [Church] to thoroughly explain the connection between its membership requirements and [Church’s] religious mission, integrity, and purpose. State how its membership requirements or disqualifications will “assist in the expression and dissemination of religious doctrine” or instill religious values in existing members.

B. Discipline, Mediation, and Removal

It is the responsibility of the designated authority, as described in Acts 20:28, to “be on guard for themselves and all the flock among which the Holy Spirit has made them overseers to shepherd the church of God which He purchased with His own blood.” As is consistent with church tradition, shepherding includes both the care and correction of the sheep.

¹⁷ *NLRB*, 440 U.S. at 506.

Because members in good standing have consented to abide by and adhere to [Church] authority, church discipline may occur when necessary. [Church] should establish clear disciplinary and removal procedures for members, grounded in scripture, and apply these procedures consistently. Timing, means, and congregational involvement should be established. Further, it is the [Church's] prerogative to include policies relating to grace and reconciliation.

[Church] should identify any controversial issues deemed terminable for members. Simply put, [Church] must define what it intends to defend. If [Church] intends to discipline, terminate, or refuse membership based on an issue, its written policies must expressly state a sincerely held religious belief on that issue. Explain further why a member is not allowed to counter-witness on said issue, particularly because it will damage the testimony and mission of the church. [Church] should define behavior that it will deem to qualify as counter-witnessing, heresy, or apostasy.

Delineate clear standards of conduct regarding sexual morality, identity and orientation, and other non-sexual behaviors (e.g. Cheating, stealing, lying, etc.). In addition, incorporate [Church's] Statements of Faith by reference.

As outlined in more detail below, disciplinary procedures are best applied to individuals who are actual members. Therefore, [Church] may include a provision that prevents members from resigning in an effort to avoid church discipline.

C. Membership Rescission

Federal and state courts are highly deferential to church discipline when the matter is “internal” and “ecclesiastical,” but may require an express waiver when the underlying legal issues are arguably “external” and resolvable under “neutral principles of law.”

“[T]he First and Fourteenth Amendments permit hierarchical religious organizations to establish their own rules and regulations for internal discipline and government, and to create tribunals for adjudicating disputes over these matters. When this choice is exercised and ecclesiastical tribunals are created to decide disputes over the government and direction of subordinate bodies, the Constitution requires that civil courts accept their decisions as binding upon them.”¹⁸ Conversely, the First Amendment right to freely exercise one’s religion also includes the right to *cease* exercising one’s religion.¹⁹ Reconciling these two principles, federal and state courts have affirmed post-rescission church discipline where the member has expressly waived his or her rights to “walk away.” Importantly, waiver is commonly defined as “the voluntary or intentional relinquishment of a known right.”

As a general rule, courts will not intervene to resolve theological controversies, but will intervene if the church dispute may be resolved by applying “neutral principles of law” without inquiry into religious dogma or doctrine. Applying federal precedent, state courts will not interfere with church discipline matters if the relevant documents clearly reflect that the wayward member intentionally and knowingly waived his legal rights to “walk away.”

¹⁸ *Serbian E. Orthodox Diocese*, 426 U.S. at 724-25.

¹⁹ See, e.g., *Guinn*, 775 P.2d at 776.

Consequently, should [Church] determine that post-rescission church discipline is necessary and biblically mandated, its written policies should be expressly based on scriptural religious teaching — thereby rendering the issue a matter of “internal church governance.”²⁰ Include the circumstances and timing of when church members may rescind their membership, acknowledging when [Church] will continue to be the legal authority to discipline the individual. This will serve to insulate [Church] from liability, should the former member choose to sue.

Should [Church] include membership rescission paragraphs to its written documents, it must include: (1) doctrinal or scriptural language explaining the “ecclesiastical” and “theological” basis for post-rescission discipline; (2) waiver language stating that the member has been notified of his legal rights under constitutional, federal, and state law, but has voluntarily and intentionally relinquished the right to unilaterally withdraw from [Church]; (3) statement prohibiting voluntary rescission of membership after the initiation of the disciplinary process; and (4) a signature block acknowledging receipt, review, and assent to [Church’s] post-rescission discipline process. This notice and waiver language should appear in the written membership documents that are executed prior to full admission into [Church].

In regards to voluntary termination of membership, specify that it is available to any member in good standing upon written request of that member. [Church] should outline any other policies or procedures it deems necessary for transfer, termination, or reinstatement of church membership.

²⁰ *Hosanna-Tabor*, 132 S. Ct. at 706.

II. BIBLICAL COUNSELING SERVICES

The American Psychiatric Association (“APA”), American Psychological Association (“A-Psych”), and the American Medical Association (“AMA”) – and many of their state affiliates – have adopted public policy statements affirming same-sex attraction, same-sex sexual acts, same-sex marriage, and additional legal protections for LGBT persons.²¹ To varying degrees, all three organizations have condemned as harmful “conversion” or “reparative” therapy for same-sex attracted persons. In response, the states of New Jersey and California have banned “conversion” or “reparative” therapy for minors. The Third and Ninth Circuit Courts of Appeal recently affirmed the New Jersey and California bans, respectively.²² Similar legislation is pending in Florida.²³

Because leading psychiatric, psychological, and medical organizations are enlisted in legal and legislative campaigns to ban treatment regimens that fail to affirm same-sex conduct, [Church] counselors should: (1) expressly state that all counseling services are based on the written and sincerely held religious beliefs of [Church]; (2) expressly disclaim any affiliation with APA, A-Psych, AMA, or similar organizations or compliance with their standards; and (3) recommend that patients seeking psychiatric, psychological, or medical care refer to a medical professional. In short, the church must clearly distinguish religious counseling from psychiatric, psychological, or medical care.

²¹ See, e.g., “LGBT-Sexual Orientation,” psychiatry.org, available at www.psychiatry.org/lgbt-sexual-orientation/ (“All major professional mental health organizations have gone on record to affirm that homosexuality is not a mental disorder. In 1973 the American Psychiatric Association’s Board of Trustees removed homosexuality from its official diagnostic manual, The Diagnostic and Statistical Manual of Mental Disorders, Second Edition (DSM II).”); “American Psychological Association Reiterates Support for Same-Sex Marriage,” apa.org, available at <http://apa.org/news/press/releases/2010/08/support-same-sex-marriage.aspx>; “AMA Policies on LGBT Issues,” ama-assn.org, available at <http://www.ama-assn.org/ama/pub/about-ama/our-people/member-groups-sections/glb-advocacy-committee/ama-policy-regarding-sexual-orientation/> (“Our American Medical Association: (1) recognizes that denying civil marriage based on sexual orientation is discriminatory and imposes harmful stigma on gay and lesbian individuals and couples and their families.”).

²² National Center for Lesbian Rights, “48 States Allow Gay Conversion ‘Therapy’ For Minors,” available at <http://big.assets.huffingtonpost.com/ReparativeTherapy.png>.

²³ National Center for Lesbian rights, “Protecting LGBT Youth From Conversion Therapy,” available at <http://www.nclrights.org/bornperfect-laws-legislation-by-state/>.

If possible, this notice and disclaimer language should appear on the written materials provided prospective clients, followed by a signature block acknowledging receipt, review, and assent to [Church's] counseling standards. The objective is two-fold: (1) provide advance notice that [Church] counseling is rooted in religious teachings, and (2) document the client's assent to religious counseling. An equivalent disclaimer should be included in each published work of [Church].