



# LEGAL HOTSPOTS FOR CHURCHES AND MINISTRIES


























- H. Robert Showers, Esq.
- Justin R. Coleman, Esq.
- William R. Thetford, Jr., Esq.
  - *Simms Showers LLP*
- Christian Legal Society
- 2023 National Conference

# POP QUIZ

- How many serve a church of less than 500 attendees? Over 500 attendees?
- Does your church own real property? Is it mortgaged or free and clear?
- Does your church operate a preschool or daycare? Does it lease to a separate preschool or daycare?
- Does your church directly support foreign missionaries or foreign churches/ministries?

# TOP 5 REASONS CHURCHES ARE IN COURT

## Top 5 Reasons Churches End Up in Court

	2014	2015	2016	2017	2018
Reason #1	 Sexual Abuse of a Minor	 Sexual Abuse of a Minor	 Property Disputes	 Sexual Abuse of a Minor	 Sexual Abuse of a Minor
Reason #2	 Personal Injury	 Property Disputes	 Sexual Abuse of a Minor	 Property Disputes	 Zoning
Reason #3	 Property Disputes	 Personal Injury	 Personal Injury	 Personal Injury	 Personal Injury
Reason #4	 Insurance Coverage Disputes	 Zoning	 Insurance Coverage Disputes	 Zoning	 Property Disputes
Reason #5	 Affordable Care Act	 Insurance Coverage Disputes	 Zoning	 Insurance Coverage Disputes	 Clergy Removal

**ChurchLaw&Tax**  
LEAD YOUR MINISTRY WITH CONFIDENCE

This infographic also includes cases involving religious organizations.

# NOT ALL CLAIMS GO TO COURT!

- The previous chart shows only claims that go to court.
- Many top claims made against churches don't get to court:
  - Employment claims
  - Governance challenges
  - Member disputes and challenges
  - Volunteer complaints
  - Mediation/arbitration clause disputes

**6 LEGAL  
“TRAPDOORS”  
THAT COULD  
END  
MINISTRIES-  
LEGAL  
HOTSPOTS FOR  
2023**

1. Good Governance, M&A for churches and Asset Protection
2. Employee Tax Credits – Good, bad, and ugly
3. Foreign Grants/Donations
4. Child Abuse Considerations - Assimilation of Sex Offenders
5. Security/Safety
6. Third Party Leases

# 1. GOOD GOVERNANCE

Incorporation, Asset Protection, Mergers/Splits

<https://www.simmshowerslaw.com/incorporation-of-churches-a-new-day-2/>

# INCORPORATION AND GOOD GOVERNANCE: WHY BOTHER?

- **Limited Personal Liability-Leadership and Members.**
- **VA: Removes Court involvement from property matters.**
- **Ease of Trademark registration.**
- **Stability and avenue to update governing documents.**
- **Ensure assets are used for tax-exempt purpose.**
- **Ensure board members have fiduciary responsibility to manage assets wisely.**
- **Separate assets from liability.**



## CHURCH GOVERNANCE — COMMON PITFALLS

- Legal/Tax Exempt Inadequacies.
  - Too narrow/silent
- Lack of “Religious”-ness.
  - No Stated Doctrine/SOF
- Procedural Concerns.
  - Membership/Elections/  
Chain of Authority
- Risk Management/Best Practice Policies.
  - COI/Audits/Authority
- Christian Dispute Resolution.

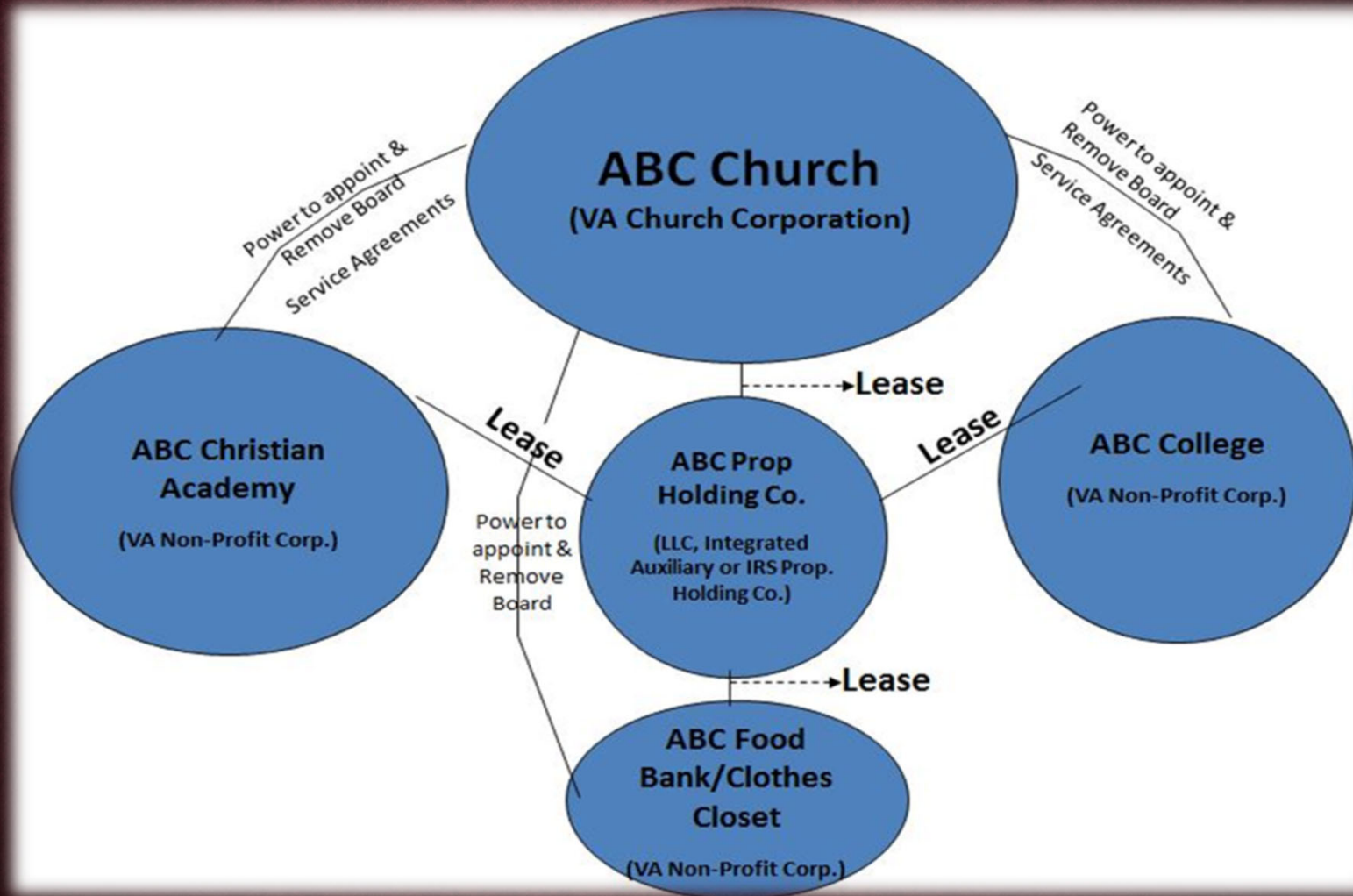
<https://www.simsshowerslaw.com/the-power-of-well-drafted-church-bylaws/>



# ASSET PROTECTION

- Separate your major assets from your major liabilities
- Reasons-lawsuits that outstrip insurance or bankruptcy claims
- Options for subsidiaries and affiliates;
  - 1) Integrated Auxiliaries;
  - 2) Statutory Property Holding Companies;
  - 3) SMNPLLC
  - 4) Separate 5012c3 non-profit corporations; or
  - 5) For profit subsidiaries
- See <https://www.simmshowerslaw.com/asset-protection-for-churches-and-nonprofits/>

# ASSET AND LIABILITY SEPARATION



# CHURCH MERGERS / SPLITS

- What do governing documents say?
- Conduct good due diligence (legal, financial, spiritual).
- Pastor and Board election and removal clearly stated
- Consult knowledgeable legal counsel to determine best options.
- Write down motivations and expectations of both sides, including time frame, before starting legal process.
- See To Merge or Not Merge blog- <https://www.simmsshowerslaw.com/to-merge-or-not-to-merge-that-is-the-question/>

# **2. EMPLOYEE RETENTION CREDIT**

# EMPLOYEE RETENTION CREDIT

## The Basics

- The Employee Retention Credit (ERC) was created by the Coronavirus Aid, Relief, and Economic Security (CARES) Act
- Originally employers were able to choose the Employee Retention Credit OR the more popular Paycheck Protection Program (PPP) forgivable loans.
- Later Congress made PPP recipients eligible to also apply for ERC as a form of additional stimulus or relief through the vehicle of a credit against taxes for eligible entities.

# EMPLOYEE RETENTION CREDIT

## The Eligibility Criteria

- Applicable on a quarter-by-quarter basis within the 2020 and 2021 tax years for entities that:
  - Sustained a full or partial suspension of operations due to orders from an appropriate governmental authority limiting commerce, travel or group meetings because of COVID-19 during 2020 or the first three quarters of 2021,
  - Experienced a significant decline in gross receipts during 2020 or a decline in gross receipts during the first three quarters of 2021, or
  - Qualified as a recovery startup business for the third or fourth quarters of 2021.
- Can amend previously filed tax returns to get a refund.
- Over 3.6 million ERC claims filed.

# EMPLOYEE RETENTION CREDIT

## The Concerns

- The IRS calls it “an incredibly complex credit.”
- Aggressive marketing by third-party filers which will help businesses file for free money – but take a substantial cut.
  - “Nothing to lose”
  - “Easy application process”
  - Often will prepare, but have the entity sign the forms
- Many nonprofits and small business were not understanding the “fine print.”
  - May face fines IRS action for unlawful filings.
  - May be on the hook to pay substantial sum to the filers even if they do not receive the ERC
- The IRS has uncovered what it believes to be over \$8 billion in pandemic relief fraud, including \$2.8 billion under the ERC.

# EMPLOYEE RETENTION CREDIT

## The Reality

- Don't rush into filing or into a third-party agreement without carefully examining your eligibility and obligations.
- The IRS has received a flood of suspected fraudulent filings.
  - Including many for “supply chain” problems which are not an eligible criteria per the IRS.
- In September, the IRS announced an immediate moratorium on the processing of new ERC claims through at least December 31, 2023.
- IRS is encouraging those who have filed and have a pending claim to review and consider withdrawing if suspect.
- The IRS is creating a system to settle with businesses who have erroneously received ERC to avoid penalties.



# **3. IRS/FOREIGN ACTIVITIES**

## CHARITABLE DONATIONS

- **IRC 170:** charitable deduction is allowed when contribution is “to or for the use of” an exempt organization.
  - Earmarked vs. Designated
- Cannot “pass-through” a gift to an individual or organization. – “Resting place” rule.
- IRS Tests: Donor Intent vs. Control
- See our *Foreign Grants White Paper*.



# FOREIGN GIVING

- **Intent**
  - Cannot market an event as a fundraiser for a foreign charity/individual.
  - Cannot market for projects that have not yet been approved.
- **Control**
  - Foreign organization is a *branch* of the church.
  - Stage 1: Due diligence/investigation/written application/reference checks/OFAC
  - Stage 2: Written agreement *with enforcement teeth*.
  - Stage 3: Consistent reporting/follow-up.

# REQUIREMENTS

- **Grants to Individuals (Rev. Rul. 56-304)**
  - Grantee's name and address
  - Grant Amount
  - Purpose
  - Selection Process
  - Relationship between Grantee and Church body
- **Grants to NGO (Rev. Rul. 68-489)**
  - Granted funds used only for tax-exempt projects that further Church purposes.
  - Retain control and discretion of use of funds
  - Maintain records evidence funds used for 501c3 purposes.

# DUE DILIGENCE

## Pre-Grant Investigation:

- Written grant application with detailed project description.
- Site visits.
- Written procedure for grant application review/approval.
- Prior grantees → follow-up to evaluate operational ability to accomplish purpose.
- Office of Foreign Asset Control (OFAC) sanctions list checked.
- Risk Matrix:  
[https://home.treasury.gov/system/files/126/charity\\_risk\\_matrix.pdf](https://home.treasury.gov/system/files/126/charity_risk_matrix.pdf)

# DUE DILIGENCE (CONT.)

## Grant Agreement:

- Grantee certifies monies only used for tax-exempt purposes.
- Granted amount may not be exact amount requested.
- Measurable goals.
- Grantor may recover misspent/unused funds and stop grants if grantee not meeting expectations.
- Grantee submits regular reports and/or financial statements.
- Electronic fund transfer for check.
- Periodic disbursement for long-term projects.

# DUE DILIGENCE (CONT.)

## Post-Grant:

- Site visits/conference calls.
- Investigative procedures and process used when funds not properly accounted for.

# I HAVE A GRANT AGREEMENT, CAN I WIRE \$\$\$?

- **OFAC SDN: WHAT?**
  - Sanctions programs list
  - Individuals and companies list.
- Penalties are high *just for failing to check and even if you self-report and stop!*
  - **2014, ESCO corporation:** \$2m in penalties for violation of sanctions on Cuba, *even though they self-reported and cooperated.*
  - **2012 Yasrebi and the Child Foundation, Oregon:** \$50,000 fine on Yasrebi and 5 years' probation, \$50,000 fine on org and 2 years probation. He pled guilty to sending funds to Iran in violation of the embargo and trying to cover it up. This was **EVEN THOUGH** they couldn't prove actual ties to terrorism. Organized in 1994, it supported poor children and orphans in the Middle East.



**OFAC  
COMPLIANCE**

- Management  
Commitment
- Risk Assessment
- Internal Controls
- Testing and Auditing
- Training

## SPONSORING R-1 VISA APPLICATIONS

- Sponsoring church/ministry must have legally-compliant tax-exempt governing documents.
- Must have a formal 501(c)3 tax-exempt Determination Letter.
- Sponsorship will result in a site visit by Citizenship and Immigration Services to confirm whether actual church/ministry.
- If deemed not an actual church/ministry → potential shut down.

# 4. CHILD PROTECTION

**FOUR STEP  
STRATEGY  
TO PREVENT  
CHILD  
ABUSE**

1. Worker Selection-Screening
2. Worker Training and Supervision
3. Proper Response to Indications of Child Abuse
4. Reporting Child Abuse

# WORKER SELECTION

- Background checks
  - Criminal
  - Child abuse registries
- Reference checks-often more important than background checks if done correctly



# WORKER TRAINING AND SUPERVISION

- Establish and explain child abuse prevention policy.
- Train workers (employees and volunteers) to identify abuse and grooming, prevent abuse, and report abuse.
- Require all workers to receive training before starting work and require “refresher” courses.



## VIRTUAL YOUTH MINISTRY

- What are the hidden dangers of virtual ministry, especially youth ministry?
- Precautions?
- Which platform should we use?
- Privacy concerns? - COPPA
- Online bullying?
- Other basic guidelines?

*Conducting Youth Ministry in a Digital Age*

White Paper Article

See also blog on small groups:

<https://www.simmsshowerslaw.com/protecting-children-in-church-small-group-settings>

## **PROPER RESPONSE TO INDICATIONS OF ABUSE**

- Conduct sufficient investigation to determine whether a reasonable suspicion that child abuse occurred, according to state law.
- Minister to alleged victim and family and alleged perpetrator and their family as Christ would have ministered.
- Work with legal counsel to properly report and proper communication with stakeholders and general public.



# REPORTING CHILD ABUSE

- Under most state law, the following are mandatory reporters (VA Code Ann 63.2-1509):
  - Teachers
  - Childcare workers
  - Athletic coaches
  - “Any person 18 years of age or older associated with or employed by an public or private organization responsible for the care, custody or control of children”
  - Admin and employees over age 18 who work for day camps, youth centers, and youth recreation centers
- If mandatory reporter has “reason to suspect” abuse, they must report it immediately.
- Safe Sport Act of 2017
- Privilege: Many states recognize priest/penitent privilege.
  - Ministers exempt from mandatory reporting of information gained in confidential communication

# RECOMMENDATIONS:

<b>Draft</b>	Draft a written child abuse prevention policy that covers at least the reporting, training, and prevention requirements under the Act.
<b>Provide</b>	Provide copy of policy to all participating adults annually and obtain written acknowledgement of receipt.
<b>Train</b>	Provide online training and train to your church's particular policy and obtain written certification of completion.
<b>Document</b>	Document compliance with above steps.

**EVANGELICAL  
COUNCIL FOR  
ABUSE  
PREVENTION  
(ECAP)**

- Organization developed to support Christian Ministries in child protection and abuse prevention through awareness, accreditation, and resources.
- ECAP provides churches and ministries with resources and practical policies for reducing child abuse in their ministry.
- [www.ecap.net](http://www.ecap.net)

# **SEX OFFENDER INTEGRATION**

# INTEGRATING SEX OFFENDERS IN THE CHURCH

## The Great Need

There are serious difficulties in returning a sex offender into the local community upon release from prison as this impacts the community and the offender.

There is a tremendous need to assist the offender in making the transition to the local church.



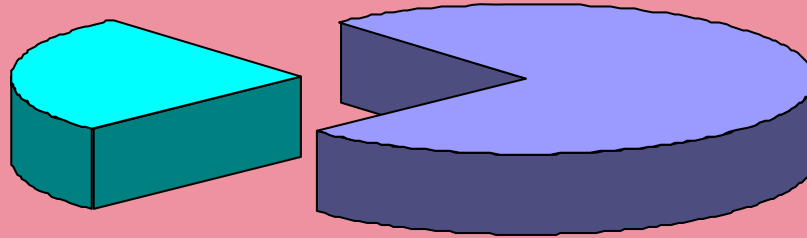
# INTEGRATING SEX OFFENDERS IN THE CHURCH (CONT.)



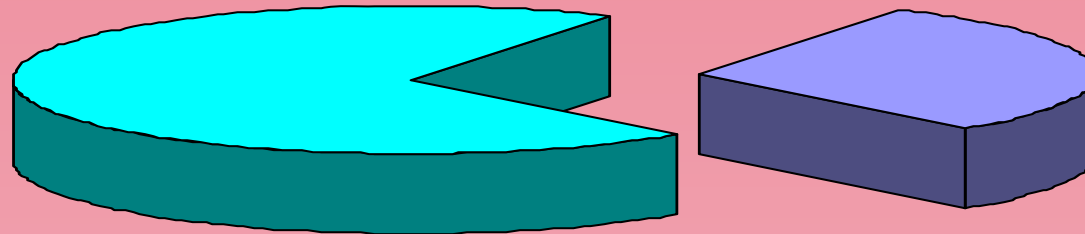
## The Greater Problem

- Serious offenses make it difficult to assimilate some offenders;
- Congregations recoil;
- Threat of relapse;
- Authentic re-integration is a slow process that requires a high level of accountability.

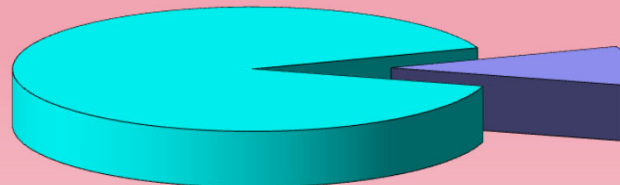
## National Criminal Recidivism Rate



## Impact of Bible Study and Worship on Inmates While Incarcerated



## Impact of Bible Study and Worship While Incarcerated Plus Inclusion in a Church Body of Believers Upon Release





## **BEST TYPE OF MISSION/ CHURCH TO UNDERTAKE INTEGRATION**

- Vibrant, healthy and stable-not in transition or building etc.
- Established leader with organizational trust
- Sufficient resources to disciple and mentor
- Vision for this type of ministry (also engages in Celebrate Recovery or other addiction programs)
- Gift of discernment and calling for this type of high risk but great ministry



# TYPE OF SEX OFFENDER FOR CHURCH TO CONSIDER TO UNDERTAKE INTEGRATION

## 3 types of sex offenders-

1. First time, situational offender with one victim  
known to offender=**low risk**;
2. More than one victim, abuse long term and predatory often violating position of trust and offender in denial or minimization of crime and  
impact=**moderate risk**;
3. More victims and prior offenses, may not know  
victims, personality disorder and sometimes preferential molester=**high risk. To be avoided**

# CONSIDERATIONS FOR INTEGRATION

- Require offender to sign an agreement with the church, agreeing to abide by all rules established by the church.
- Assign a chaperone to accompany individual while on the church premises (offender should never be alone).
- Strict prohibition from any contact with children.
- See blog Successful Assimilation of SA-  
<https://www.simmsshowerslaw.com/successful-church-assimilation-of-sex-offenders/>



# **5. CHURCH SAFETY AND SECURITY**

# VIOLENCE IN THE CHURCH

No longer a place of refuge from violence:

- 2014 – 176 incidents of deadly force (74 deaths);
- 2015 – 248 incidents (77 deaths);
- 2016 – 246 incidents (66 deaths);
- 2017 – 261 incidents (118 deaths).
  - 92 before Southerland Springs
- 2018 (11 months) – 21 (8 deaths)
- Weapons used (1999-2018)
  - Firearm – 58%
  - Knife – 15%

## POTENTIAL LIABILITY FOR A CHURCH

- Generally, premises owner not liable for criminal actions of third parties.
- UNLESS owner failed to use reasonable care to protect invitees if owner knew/reason to know for *reasonably foreseeable* risk.
  - *Lopez v. McDonald's* (1987) / *Axelrod v. Cinemark Holdings* (2014).
- Factors:
  - Previous criminal activity
  - Recency/Repeated Occurrence
  - Similar Conduct
  - Publicity

## SAFETY/SECURITY CONSIDERATIONS

- Initial Considerations
- Contact/Communicate with local PD
- Guns or No Guns and Who Carries – *Check State Law.*
- Options:
  - Hire off-duty LEO/Security Firm;
  - Trained Security Team;
  - Risk-mitigation policies and security items.
- See *Violence in the Church* White Paper.

# More Ministry Control

# Less Ministry Control

NO ONE	OUTSIDE SECURITY	SECURITY TEAM	EMPLOYEES/VOLUNTEERS	APPROVED ATTENDEES	ANYONE
All individuals are prohibited from carrying firearms.	Only an outside security vendor whom you have hired is authorized to carry firearms.	Only individuals on your ministry's internal security team are authorized to carry firearms.	Select ministry staff and/or volunteers are authorized to carry firearms.	Certain attendees are approved to carry firearms.	Any individual with a permit is authorized to carry firearms.
<b>SIGNAGE</b>	<b>OFF-DUTY OFFICERS</b>	<b>SECURITY PLAN</b>	<b>POSITION REVIEW</b>	<b>GUIDELINES</b>	<b>SIGNAGE</b>
Does your state require your ministry to post sign prohibiting firearms or are firearms automatically prohibited?	Can you hire local law enforcement? If so, what does the police dept. require regarding insurance and liability issues?	Have you defined your security team's duties and training?	Have you identified which positions are not conducive to carrying a firearm?	Have will you determine whether to allow an attendee to carry?	Are you required by state law to post signs granting permission to carry, or is permission automatically granted?
<b>AUTHORIZED BY LAW</b>	<b>SECURITY VENDORS</b>	<b>SCREENING</b>	<b>SCREENING</b>	<b>PRIOR APPROVAL</b>	<b>VIOLATIONS</b>
Are policy officers or similar authorities authorized by law to carry firearms regardless of ministry policy?	If you're planning to hire an outside security company, is it qualified, properly licensed, and insured?	How will you screen the security team (interview, background check, permit verification, training, etc.)?	How will you screen staff/volunteers (interview, background check, permit verification, training, etc.)?	Does your state allow prior approval on an individual basis? If 1 person is approved, may other automatically carry?	Have you considered what behavior is not allowed when someone is carrying a firearm?
		<b>LICENSING</b>	<b>AUTHORITY TO ACT</b>	<b>AUTOHRITY TO ACT</b>	
		Does your state require armed members to be licensed security guards?	Are you allowing staff/volunteers to carry, or are you specifically authorizing them to act on your ministry's behalf?	Are you allowing attendees to carry, or are you specifically authorizing them to act on your ministry's behalf?	
		<b>INSURANCE</b>			
		Do you have proper insurance to protect your ministry and the security team?			

Courtesy of Brotherhood Mutual Ins. Company®

# SAFETY/SECURITY POLICY



- Preparation
  - Involve Congregation.
  - Prepare Staff and Volunteers.
- Develop Written Policy.
  - Qualifications for safety/security team
  - Weapons policy
  - Response protocols
- Building your Security Team
  - Identify
  - Recruit
  - Train
  - Deploy
  - Manage
  - See blog on church safety - <https://www.simmsshowerslaw.com/protecting-your-church-in-troubled-times-a-guide-to-establishing-church-security-protocols/>



## 6. THIRD PARTY USE/LEASES

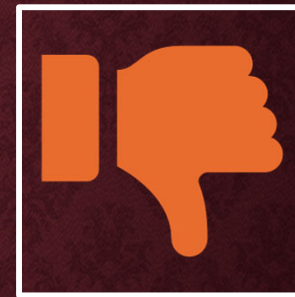
See blog on third party church leases-  
<https://www.simsshowerslaw.com/church-third-party-uses-what-you-dont-know-can-hurt-you/>

# PROS/CONS OF 3<sup>RD</sup> PARTY USE



## Pros:

Outward-facing Ministry  
Community Involvement  
Potential Source of Revenue



## Cons:

Unwanted/Inconsistent Use  
Greater Liability Exposure  
Tax Implications

# INCONSISTENT USE AND PRIVATE ENTITY STATUS

- Churches typically not treated as public accommodation.
- Public accommodations are subjected to much more regulation and non-discrimination laws not applicable to regular private property.
- If you plan appropriately, you can ensure your church or nonprofit continues to be treated as a private entity.
  - Have a clear statement about the church's sincerely held beliefs on marriage and sexuality in your foundational documents.
  - Have a written Facility Use Policy and/or Agreement evidences private owner status.
  - All uses are consistent with church's religious beliefs and use of its property.

# LIABILITY CONCERNS

There is no guaranteed way to eliminate ALL liability risks. But there are things you can do to **reduce and manage** risk:

- Check with insurance carrier that proposed use is covered by your policy.
- Require organizations to identify church as an “additional insured” on their liability insurance policy.
- Indemnification clause in Use Agreement.
- Biblical Dispute Resolution clause.
- Adequate Child Protection Policies by User.

# CHILD PROTECTION

- Landowner may be liable for child abuse that occurs on its property, even by a third party.
- If user is conducting activities with minors (i.e., preschool, homeschool co-op, etc.), user should have adequate screening and training of workers.
- 4 Elements:
  - Screening of potential workers;
  - Child sexual abuse and grooming training;
  - Tailored child protection policy and procedure;
  - Monitoring and oversight for responding to and reporting reasonably suspected child abuse.

## **TAX IMPLICATIONS**

- Will facility use income trigger unrelated business income tax?
- User Fees: Optional but be clear that fees are not for income-producing but to counter operating costs.
- Related Use: Church should be clear that 3/P use is related to its religious use. See our *Unrelated Business Income and Tax Primer*.
- Property Taxes: Church real property is typically exempt from property taxes; however, 3/P may impact it.





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**H. Robert Showers, Esq.**

**Justin R. Coleman, Esq.**

**William R. Thetford, Esq.**

Simms Showers, LLP  
305 Harrison Street, SE, 3<sup>RD</sup> Floor  
Leesburg, Virginia 20175  
(703) 771-4671

[HRS@SimmsShowersLaw.com](mailto:HRS@SimmsShowersLaw.com)

[JRC@SimmsShowersLaw.com](mailto:JRC@SimmsShowersLaw.com)

[WRT@SimmsShowersLaw.com](mailto:WRT@SimmsShowersLaw.com)

**Offices in Washington DC /Virginia Metro, Baltimore Md., Winchester VA, and Williamsburg, VA.**