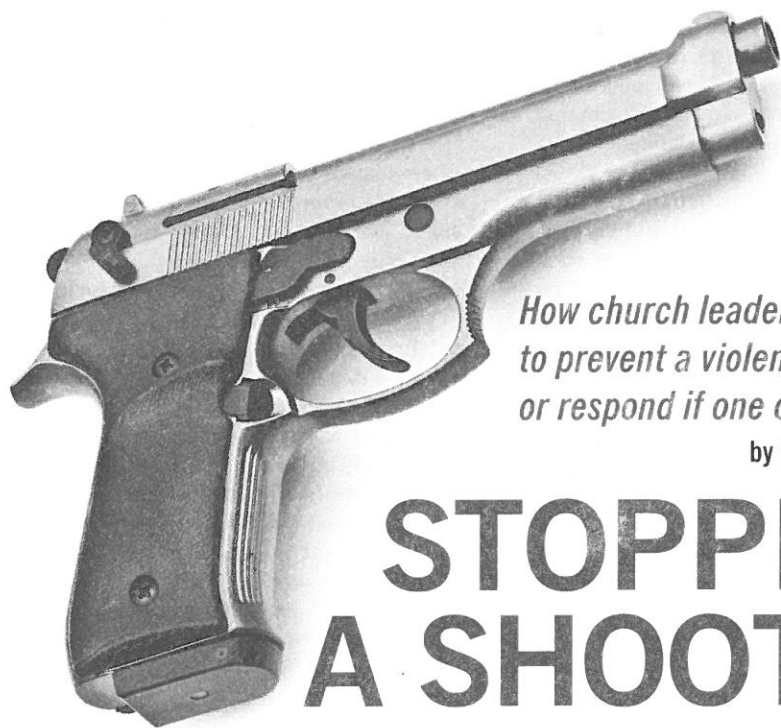


Church Law & Tax Report

A REVIEW OF LEGAL AND TAX DEVELOPMENTS AFFECTING MINISTERS AND CHURCHES SINCE 1987

ALSO INSIDE:	NOVEMBER/DECEMBER 2013
DEVELOPING EMERGENCY OPERATIONS PLANS	PAGE 22
RECENT DEVELOPMENTS	PAGE 26
TAX CALENDAR	PAGE 30
ONE-MINUTE SUMMARY	PAGE 32



How church leaders can work to prevent a violent incident—or respond if one occurs.

by Richard R. Hammar

STOPPING A SHOOTER

Background

In the summer of 2013, the Federal Emergency Management Agency (“FEMA”) released *Developing High Quality Emergency Operation Plans for Houses of Worship* (the “Guide”), a 38-page resource assisting churches with planning for, and responding to, emergencies. The Guide notes that many kinds of emergencies may affect churches, including:

- fires
- tornadoes
- floods
- hurricanes
- earthquakes
- arson
- lightning
- extreme temperatures
- landslides
- tsunamis
- volcanoes
- winter precipitation
- violent acts

The Guide provides houses of worship with information regarding emergency operations planning for the spectrum of threats and hazards they may face. It discusses actions that may be taken before, during, and after an incident in order to reduce the impact on property and any loss of life and it encourages every house of worship to develop an “emergency operations plan” (EOP).

Key point. *The Guide clarifies that it “does not create any requirements beyond those included in applicable law and regulations, or create any additional rights for any person, entity, or organization.”*

The Guide acknowledges that “congregations may approach some of these issues differently than government and other community organizations,” but it stresses that FEMA “would like to assist congregations that are interested in emergency operations planning, and

continued on page 2

WELCOME!

Acts of deadly violence at churches continue to make headlines. With more than 135 deadly-force incidents occurring on ministry premises in 2012, church leaders face complex questions about how best to protect the people who come through their doors each week.





Questions frequently arise about guns in churches. In August, I presented a webinar on this topic. Registration and attendance for this free event was among our highest ever, which demonstrates the levels of complexity and concern involved. Church leaders are concerned about creating security teams and whether those teams should be armed. Leaders also are concerned about how they address their state’s concealed carry weapons (CCW) laws.

In a guide released earlier this year, the Federal Emergency Management Agency attempted to help churches plan and prepare for a variety of crises, including an active-shooter scenario. Though rare, these incidents create understandable worry. In this edition, I thoroughly review FEMA’s guidance, and then I delve deeper into the unique angles so frequently on the minds of church leaders: the roles of security teams, CCW laws, and guns. On page 22, we also summarize the Guide’s directions to houses of worship for emergency operations plans.

May the Lord bless you and keep you, and those you lead. And should the unthinkable ever unfold at your church, may he use his work through you to be ready to respond.

Blessings—
Richard R. Hammar

-  [facebook.com/ChurchLawandTaxReport](https://www.facebook.com/ChurchLawandTaxReport)
-  [@RichardHammar](https://twitter.com/RichardHammar)
-  [linkd.in/187SPcY](https://www.linkedin.com/in/187SPcY)
-  CLTReditor@ChristianityToday.com

continued from page 1

this guidance is offered in that spirit.” The Guide recommends that the church teams responsible for developing and revising EOPs use the Guide to assist their efforts.

“Active shooter situations”

Much of the Guide is devoted to the implementation and maintenance of an emergency operations plan (see “Developing an Emergency Operations Plan” on page 22). But the Guide ends with a look at the risk of “active shooters,” and it is this section of the Guide that will be addressed in this article.

Key point. *The “active shooter” section of the Guide is based almost entirely on a 2008 booklet titled Active Shooter: How to Respond, which was prepared by the Department of Homeland Security (DHS).*

The Guide defines active-shooter situations “as those where an individual is actively engaged in killing or attempting to kill people in a confined and populated area.” The Guide, in noting that churches are not immune from such assaults, refers to two examples—a 2012 shooting in a Sikh temple in Oak Creek, Wisconsin, that left six people dead and four injured, and a 2008 shooting at a Unitarian Church in Knoxville, Tennessee, that left two dead and seven injured.

The Guide makes the following statements:

- “Working with emergency management officials and community partners, houses of worship can develop a plan to better prepare their staff and congregants in prevention, reaction, and response to an active shooter incident.”
- “The better first responders and those working and visiting a house of worship are able to discern these threats and react swiftly, the more lives can be saved. . . . Working with emergency management officials and community partners, houses of worship can develop a plan to better prepare their staff and congregants in prevention, reaction, and response to an active shooter incident.”
- “Active shooter situations

are unpredictable and evolve quickly. Because of this, individuals must be prepared to deal with an active shooter situation before law enforcement arrives on the scene.”

Preparing for an Active-Shooter Incident

planning

The Guide recommends that churches form an “emergency planning team” to develop “goals, objectives, and courses of action” for an active-shooter situation. And, as courses of action are developed, the planning team should consider a number of issues, including, but not limited to:

- How to evacuate or lock down personnel and visitors. Personnel involved in such planning should pay attention to disability-related accessibility concerns when advising on shelter sites and evacuation routes;
- How to evacuate when the primary evacuation routes are unusable;
- How to select effective shelter-in-place locations (optimal locations have thick walls, solid doors with locks, minimal interior windows, first aid-emergency kits, communication devices and duress alarms);
- How those present in buildings and on the ground will be notified that there is an active-shooter incident underway. This could be done using familiar terms, sounds, lights, and electronic communications, such as text messages or e-mails. In the courses of action, include how to communicate with those who have language barriers or need other accommodations, such as visual signals to communicate with hearing-impaired individuals. Planners should make sure this protocol is readily available and understood by those who may be responsible for sending out or broadcasting an announcement. Rapid notification of a threat can save lives by keeping people out of harm’s way;

- How everyone will know when buildings and grounds are safe.

The planning team may want to include functions in the active-shooter annex that are also addressed in other functional annexes. For example, evacuation will be different during an active-shooter situation than during a fire.

Additional considerations are included in the “Responding to an Active Shooter Incident” and “After an Active Shooter Incident” sections below.

sharing information with first responders

The Guide stresses that “the planning process is not complete until the house of worship’s emergency operations plan is shared with first responders.” It continues:

The planning process should include preparing and making available to first responders an up-to-date and well-documented site assessment as well as any other information that would assist them. These materials should include building schematics and photos of the buildings, both inside and out, and include information about door and window locations, as well as locks and access controls. Emergency responders should also have advance information on where individuals with disabilities are likely to be sheltering or escaping, generally in physically accessible locations or along accessible routes. Building strong partnerships with law enforcement, fire, and EMS includes ensuring they also know the location of available public address systems, two-way communications systems, security cameras, and alarm controls. Equally important is information on access to utility controls, medical supplies, and fire extinguishers.

The Guide notes that providing detailed information to first responders allows them to rapidly move through buildings and grounds during an emergency; to ensure areas are safe; and to tend to those in need. It is “critically important to share this information with law enforcement and other first responders before an emergency occurs so that they have immediate access to the information.”

continued on page 4

Representative



With Church Mutual, you get more than just insurance. You get access to a team of experts who will be there when you need us most.

Maria Allen is a Church Mutual Account Manager with more than 10 years of experience. She leads a team of customer service professionals ready to serve your most immediate needs. Whether that means helping you file a claim or answering a question quickly and accurately, being present when you need us most is important to each and every one of our employees. Because with more than 115 years of experience, we understand how important it is to you.

Church Mutual has received consistently high ratings from industry analyst A.M. Best every year since 1952.

To learn more, call us at
(800) 554-2642
or visit
www.churchmutual.com.



Listening. Learning. Leading.®

continued from page 2

Key point. *The Guide recommends that “every house of worship should have more than one individual charged with meeting first responders to provide them with the site assessment, the emergency operations plan, and any other details about facility safety or concerns.”*

exercises

The Guide notes that evacuation drills for fires and protective measures for tornadoes may be part of routine activities for a house of worship, “but far fewer facilities practice for active shooter situations.” To be prepared for an active-shooter incident, churches “should train their staff and congregation, as appropriate, in what to expect and how to react.” And, “good planning includes conducting drills that involve first responders.” Exercises with these individuals “are one of the most effective and efficient ways to ensure that everyone knows not only their role, but also the role of others at the scene.”

Exercises should include “walks through buildings to allow law enforcement to provide input on shelter sites as well as familiarize first responders with the location.”

Preventing an Active-Shooter Incident

The Guide provides two suggestions for preventing active-shooting incidents: look for warning signs, and utilize “threat assessment teams.”

warning signs

The Guide acknowledges that no profile exists for an active shooter, but it notes that “research indicates there may be signs or indicators.” It explains:

Specialized units in the federal government (such as the FBI’s Behavioral Analysis Unit) continue to support behaviorally-based operational assessments of persons of concern in a variety of settings (e.g. schools, workplaces, houses of worship) who appear to be on a trajectory toward a catastrophic violent act. A review of current research, threat assessment literature, and active shooting incidents, combined with the extensive case experience of the Behavioral Analysis Unit, suggest that there

are observable pre-attack behaviors which, if recognized, could lead to the disruption of a planned attack.

The Guide concedes that “checklists of warning signs are often of limited use in isolation,” but it asserts that “there are some behavioral indicators that should prompt further exploration and attention from law enforcement or house of worship officials.” These behaviors often include:

- Development of a personal grievance;
- Contextually inappropriate and recent acquisitions of multiple weapons;
- Contextually inappropriate and recent escalation in target practice and weapons training;
- Contextually inappropriate and recent interest in explosives;
- Contextually inappropriate and intense interest or fascination with previous shootings or mass attacks;
- Significant real or perceived personal loss in the weeks and months leading up to the attack, such as a death, breakup, divorce, or loss of a job.

Few offenders had previous arrests for violent crimes, the Guide notes.

The Guide also notes that “no research has been conducted on individuals solely engaged in active shooting incidents at houses of worship; however, the behaviors listed above may be useful in identifying some of the behaviors of individuals of potential concern.”

threat assessment teams

The Guide noted that research shows that perpetrators of targeted acts of violence “engage in both covert and overt behaviors preceding their attacks.” They “consider, plan, prepare, share, and, in some cases, move on to action.” A useful tool to “identify, evaluate, and address these troubling signs is the creation of a multidisciplinary threat assessment team for the house of worship.” The Guide explains:

The threat assessment team serves as a central convening body, so that warning signs observed by multiple people are not considered isolated

incidents, slipping through the cracks, when they actually may represent escalating behavior that is a serious concern. . . . Although not as common in private industry or in religious establishments, threat assessment teams are increasingly common in college and university settings, pushed to the forefront of concern following the 2007 shooting at Virginia Polytechnic Institute and State University, Blacksburg, Virginia, where 32 individuals were killed. In some cases, state funding mandates that institutions of higher learning create threat assessment teams.

Churches also may want to create threat assessment teams. FEMA offers the following recommendations for the creation and operation of threat assessment teams, although it recognizes that houses of worship may differ in their approaches to certain issues:

- For the purposes of consistency and efficiency, a threat assessment team should be developed and implemented in coordination with other policy and practices for the organization;
- A threat assessment team with diverse representation often will operate more efficiently and effectively. Team members may include the leaders or administrators of the house of worship, counselors, staff, congregants, and medical and mental health professionals, who may be drawn from the congregation;
- Threat assessment teams review troubling or threatening behavior of persons brought to the attention of the team;
- Threat assessment teams contemplate a holistic assessment and management strategy that considers the many aspects of the person’s life. More than focusing on warning signs or threats alone, a threat assessment team’s assessment involves a unique overall analysis of changing and relevant behaviors. The threat assessment team takes into consideration, as appropriate, information about behaviors; communications; any threats made; security concerns; family issues; or relationship problems that might involve a troubled

**COVER
STORY**

individual. The threat assessment team may also identify any potential victims with whom the individual may interact. Once the team identifies an individual that may pose a threat, the team will identify a course of action for addressing the situation. The appropriate course of action, whether law enforcement intervention, counseling, or other actions, will depend on the specifics of the situation;

- The threat assessment team may wish to seek assistance from law enforcement that can help assess reported threats or troubling behavior and tap available federal resources.

Key point. The FBI's behavioral experts in its National Center for the Analysis of Violent Crimes (NCAVC) at Quantico, Virginia, are available 24 hours per day,

seven days per week to join in any threat assessment analysis and develop threat mitigation strategies for persons of concern. Law enforcement working with a threat assessment team from a house of worship should contact the local FBI office for this behavioral analysis assistance. Each FBI field office has a NCAVC representative available to work with the house of worship and coordinate access to the FBI's Behavioral Analysis Unit, if the congregation wishes. The unit focuses on prevention, not response. Early intervention can prevent a situation from escalating by identifying, assessing, and managing the threat.

Key point. The Guide notes that "generally, active shooter situations are not motivated by other criminal-related concerns such as monetary gain or gang affiliation.

Often, violence may be prevented by identifying, assessing, and managing potential threats. Recognizing these pre-attack warning signs and indicators might help disrupt a potentially tragic event."

Responding to an Active-Shooter Incident

How should church members and staff respond to an active-shooter incident prior to the time that law enforcement officers arrive? The Guide states:

No single response fits all active shooter situations; however, making sure each individual knows his or her options for response . . . [can help them] react decisively [and] save valuable time. Depicting scenarios and considering response options in advance will assist individuals and groups in quickly selecting their best course of action.

continued on page 8

Table 1. **Summary of 27 Selected Church Shooting Incidents from 1998-2013**

Table 1 summarizes 27 shootings on church property during a 15-year period.

DATE	PLACE	SHOOTER	VICTIMS	WEAPON	HOW RESOLVED	POSSIBLE MOTIVE	GUNMAN A CHURCH MEMBER?	GUNMAN MADE PRIOR THREATS?	SHOOTING OCCURRED DURING CHURCH SERVICES?
August 2013	Uptown Baptist Church, Chicago, Illinois	unknown	5 wounded	handgun	shooter fled (a suspect is being investigated)	gang violence	no	no	no
July 2013	Norwood Baptist Church, Norwood, Missouri	Earnest Smith, 48	none	handgun	restrained by church members	"get the pastor to admit that he had lied about him"	no	no	yes
July 2013	Belgrade Baptist Church, Kirbyville, Texas	Pastor Luther Jones, 64	1 dead	handgun	gunman surrendered to police	family dispute (victim was shooter's nephew)	yes	no	no
December 2012	First United Presbyterian Church, Coudersport, Pennsylvania	Greg Eldred (victim's ex-husband), 52	1 dead	.40 caliber handgun	gunman arrested while fleeing	domestic dispute	no	no	yes, while the victim played the organ
August 2012	Sikh Temple in Oak Creek, Wisconsin	White supremacist Wade Michael Page, 40	7 dead (including the gunman), 4 wounded	9mm semi-automatic handgun	gunman committed suicide	hate crime	no	no	yes
June 2012	Asia Missionary Baptist Church, Lexington, Mississippi	Cacedrick White (son of a church deacon), 26	none	shotgun	gunman killed by police in parking lot	church dispute	yes	no	no
April 2012	New Destiny Church, Aurora, Colorado	Kiarron Parker, 29	1 dead (mother of one of the church's pastors)	handgun	gunman shot and killed by his cousin, an off-duty police officer who was attending a church service	unknown	no	no	yes (shooting occurred in church parking lot)

DATE	PLACE	SHOOTER	VICTIMS	WEAPON	HOW RESOLVED	POSSIBLE MOTIVE	GUNMAN A CHURCH MEMBER?	GUNMAN MADE PRIOR THREATS?	SHOOTING OCCURRED DURING CHURCH SERVICES?
February 2012	Grace Connection Church, St. Petersburg, Florida	a church member	1 dead (the pastor's 20-year-old daughter)	handgun	accidental discharge while gun examined by 3 church members	none	yes	no	following a church service
February 2010	Gethsemane Church of God in Christ, Richmond, California	3 minor shooters	2 wounded	handgun	gunmen fled	unknown	no	no	yes
March 2009	First Baptist Church, Maryville, Illinois	Terry Sedlacek, 27	1 dead (the pastor, who deflected the first of 4 shots with his Bible), 1 wounded	.45 caliber Glock handgun	restrained by church members	unknown	no	no	yes
July 2008	Unitarian-Universalist church, Knoxville, Tennessee	Jim Adkisson, 58	2 dead, 7 wounded	shotgun concealed in a guitar case	gunman restrained by church members	hate crime	no	no	yes
December 2007	New Life Church, Colorado Springs, Colorado	Matthew Murray, 24	2 dead, 3 wounded	high-powered rifle	gunman committed suicide when confronted by armed church member	revenge (expelled from Arvada missions agency)	no	no	yes
August 2007	First Congregational Church of Neosho, Missouri	Eiken Elam Saimon, 52	3 dead, 4 wounded	9mm semi-automatic pistol, and a small caliber handgun	gunman surrendered to police	family argument	no	no	yes
May 2007	First Presbyterian Church, Moscow, Idaho	Jason Hamilton, 36	1 dead	AK-47 and M1A assault rifles	gunman committed suicide when cornered by police	unknown	no	no	no
July 2006	Jewish Federation of Greater Seattle, Seattle, Washington	Naveed Afzal Haq, 30	1 dead, 5 wounded	2 handguns	gunman surrendered to police	hate crime	no	no	yes
May 2006	The Ministry of Jesus Christ Church, Baton Rouge, Louisiana	Anthony Bell, 25	5 dead, 2 wounded	handgun	arrested in an apartment building away from the church	family dispute (all victims were relatives of the gunman's estranged wife)	no	no	no
February 2006	Zion Hope Missionary Baptist Church, Detroit, Michigan	Kevin Collins, 22	2 dead	shotgun	gunman died of self-inflicted wound while fleeing police	family dispute	no	no	yes
October 2005	Chabad Weltman Synagogue, Boca Raton, Florida	Marc Benayer, 79	1 dead	handgun	gunman arrested	revenge (victim helped gunman's ex-girlfriend obtain a restraining order against him)	no	no	no

DATE	PLACE	SHOOTER	VICTIMS	WEAPON	HOW RESOLVED	POSSIBLE MOTIVE	GUNMAN A CHURCH MEMBER?	GUNMAN MADE PRIOR THREATS?	SHOOTING OCCURRED DURING CHURCH SERVICES?
August 2005	Sash Assembly of God church, Sash, Texas	Frederick Leroy Cranshaw, 54	2 dead	9mm semi-automatic pistol and a .38-caliber revolver	gunman committed suicide when cornered by police several miles from the church	unknown	no	no	yes
July 2005	World Changers Church International, College Park, Georgia	John Givens, 27	none	handgun	gunman killed by police officer	unknown	no	no	no
March 2005	Living Church of God, Brookfield, Wisconsin	Terry Ratzmann, 44	7 dead, 4 wounded	9mm semi-automatic pistol	gunman died of self-inflicted wound	depression, alcohol use, upset over a sermon, frustration over inability to find a spouse	yes	no	yes
October 2003	Turner Monumental AME Church, Atlanta, Georgia	Shelia Chaney Wilson, 43	2 dead	handgun	gunman died of self-inflicted wound	loss of job; some church members considered the shooter "mentally unstable"	yes	no	yes
June 2002	Benedictine monastery, Conception, Missouri	Lloyd Jeffress, 71	2 dead, 2 wounded	AK-47 assault rifle, .22 caliber rifle	gunman died of self-inflicted wound	unknown	no	no	no
March 2002	Our Lady of Peace Catholic Church, Lynbrook, New York	Peter Troy, 34	2 dead	.22 caliber semi-automatic rifle	gunman arrested at his home by police	unknown	no	no	yes
May 2001	Greater Oak Missionary Baptist Church, Hopkinsville, Kentucky	Fredrick Radford, 35	2 dead	handgun	gunman arrested at church	domestic dispute (one victim was his estranged wife)	unknown	yes	yes
September 1999	Wedgewood Baptist Church, Fort Worth, Texas	Larry Ashbrook, 47	7 dead, 7 wounded	9mm semi-automatic pistol	gunman died of self-inflicted wound	hate crime (gunman shouted anti-religious curses); friends described gunman as a paranoid loner and "very troubled"	no	no	yes
April 1999	LDS Family History Library, Salt Lake City, Utah	Sergei Babarin, 70	2 dead (including a church security officer), 4 wounded	handgun	shot and killed by police 2 hours after shooting began	unknown (possible mental illness)	unknown	no	no (occurred in church-affiliated genealogical library)

continued from page 5

The Guide offers these suggestions for responding to an active shooter:

congregational meetings

The Guide states that “it may be valuable to schedule a time for an open conversation regarding this topic. Though some congregants or staff may find the conversation uncomfortable, they may also find it reassuring to know that as a whole their house of worship is thinking about how best to deal with this situation.”

respond immediately

It is common for people confronted with a threat to deny the danger rather than respond. The Guide notes that “an investigation by the National Institute of Standards and Technology into the collapse of the World Trade Center towers on September 11, 2001, found that people close to the affected floors waited longer to start evacuating than those on unaffected floors.” Similarly, during the Virginia Tech shooting, “individuals on campus responded to the shooting with varying degrees of urgency.”

The Guide recommends that churches “train congregants and staff to skip denial and to respond immediately.” For example, “train congregants to recognize the sounds of danger, act, and forcefully communicate the danger and necessary action.”

run

If it is safe to do so, the first course of action that should be taken is to run out of the building and far away until in a safe location. Congregants and staff should be trained to:

- Leave personal belongings behind;
- Visualize possible escape routes, including physically accessible routes for individuals with disabilities;
- Avoid escalators and elevators;
- Take others with them, but do not stay behind because others will not go;
- Call 911 when safe to do so;
- Let a responsible adult know where they are.

hide

If running is not a safe option, the Guide recommends that church members “hide in as safe a place as possible.” In addition:

Table 2. **Key Findings from Table 1**

Table 2 presents some of the key findings from Table 1 and demonstrates the difficulty of profiling and anticipating active shooters.

weapon used	rifle or shotgun in 7 incidents handgun in 20 incidents
how resolved	shooter committed suicide in 10 cases shooter arrested by police in 13 cases shooter killed by police in 4 cases shooter restrained by church members in 3 cases
possible motive	unknown in 10 cases domestic dispute in 7 cases hate crime in 4 cases
shooter a church member	no in 22 cases yes in 5 cases
shooter made prior threats	no in 26 cases yes in 1 case
shooting occurred during services	yes in 17 cases no in 10 cases

- Lock the doors;
- Barricade the doors with heavy furniture;
- Close and lock windows and close blinds or cover windows;
- Turn off lights;
- Silence all electronic devices;
- Remain silent;
- If possible, use strategies to silently communicate with first responders; for example, in rooms with exterior windows, make signs to silently signal law enforcement and emergency responders to indicate the status of the room’s occupants;
- Hide along the wall closest to the exit but out of the view from the hallway (allowing for an ambush of the shooter and for possible escape if the shooter enters the room)
- Remain in place until given an all clear by identifiable law enforcement.

fight

The Guide concludes its review of options when responding to an active-shooter incident with this advice:

If neither running nor hiding is a safe option, as a last resort, when confronted by the shooter, adults in immediate danger should consider trying to disrupt or incapacitate the shooter by using aggressive force and items in their environment, such as fire extinguishers or chairs. In

a study of 41 active shooter events that ended before law enforcement arrived, the potential victims stopped the attacker themselves in 16 instances. In 13 of those cases, they physically subdued the attacker.

While talking to the congregation and staff about confronting a shooter may be daunting and upsetting for some, they should know that they might be able to successfully take action to save lives. How each individual chooses to respond if directly confronted by an active shooter is up to him or her. Each house of worship should determine, as part of its planning process, policies on the control and presence of weapons, as permitted by law.

“How each individual chooses to respond if directly confronted by an active shooter is up to him or her. Each house of worship should determine, as part of its planning process, policies on the control and presence of weapons, as permitted by law.” *FEMA Guide*

Evaluating FEMA’s Guide for Churches

FEMA’s Guide provides some useful information for churches, but it fails to address a number of important topics pertaining to guns in churches, including the following:

1. A church’s potential liability for deaths and injuries caused



- by an active shooter on church property.
2. Using armed police officers or security guards on church property as a deterrent to violent assaults and as first responders in the event of a shooting incident.
 3. Using technology to manage the risk of active shooters.
 4. Allowing members with a concealed weapons permit to bring their weapon onto church property as a means of responding to active-shooter incidents.

These are questions that many church leaders are asking, and the FEMA Guide failed to respond to any of them. Each of these questions is addressed below.

Importance of the FEMA Guide

The fact that the FEMA Guide fails to address some of the most common questions asked by church leaders in no way diminishes the importance of the Guide. The fact is that the Guide represents an intentional effort by FEMA to assist houses of worship in planning for and reducing the risk of active-shooter incidents.

Also, note that the Guide likely will be used by attorneys representing victims of gun violence on church property in establishing a "standard of care" by which a church's acts and omissions can be judged. For this reason, it is important for church leaders to implement the FEMA Guide's recommendations if possible.

1. A church's potential liability for deaths and injuries caused by an active shooter on church property.

The FEMA Guide fails to address the critical question of a church's potential liability for deaths and injuries occurring on its premises as a result of an active-shooter incident. And yet, this is a question of considerable relevance to church leaders.

Few churches have been sued as a result of acts of violence, but many other places of public accommodation have been, and here are some of the leading theories of liability:

1. premises liability
2. failure to hire security guards
3. negligent selection of a security guard or security service
4. liability for negligent acts of security guards

Each of these theories of liability is addressed below.

(1) premises liability

Generally, property owners have no duty to protect others from the criminal acts of third parties who are not subject to their control. But, there are exceptions. For example, property owners have a duty to use ordinary care to protect "invitees" from criminal acts of third parties if the owner knows or has reason to know of an *unreasonable and foreseeable risk of harm* to invitees. Persons who are on church property to attend religious services or other scheduled activities generally are considered to be invitees, whether members or visitors, since they are on the premises by reason of an actual or implicit invitation.

The *Restatement (Second) of Torts*, a respected legal treatise, states the general rule as follows:

[A property owner] is not liable where he neither knows nor should know of the unreasonable risk. . . . He is not required to take precautions against a sudden attack from a third person which he has no reason to anticipate. *Section 314A, comment e.*

Similarly, *Restatement (Second) of Torts* § 344 (*comment f*), provides:

Since the possessor is not an insurer of the visitor's safety, he is ordinarily under no duty to exercise any care until he knows or has reason to know that the acts of the third person are occurring, or are about to occur. He may, however, know or have reason to know, from past experience, that there is a likelihood of conduct on the part of third persons in general which is likely to endanger the safety of the visitor, even though he has no reason to expect it on the part of any particular individual.

The foreseeability of an unreasonable risk of criminal conduct is a precondition to imposing a duty on a property owner

to protect others from that risk. It is important to note that:

criminal conduct of a specific nature at a particular location is never foreseeable merely because crime is increasingly random and violent and may possibly occur almost anywhere, especially in a large city. If a [property owner] had a duty to protect people on his property from criminal conduct whenever crime *might* occur, the duty would be universal. This is not the law. A duty exists only when the risk of criminal conduct is so great that it is both unreasonable and foreseeable. Whether such risk was foreseeable must not be determined in hindsight but rather in light of what the premises owner knew or should have known before the criminal act occurred. *Lefmark Management Company v. Old*, 946 S.W.2d 52 (*Tex.* 1997).

In deciding if criminal conduct on a landowner's premises was foreseeable, most courts consider several factors, including the following:

- whether any criminal conduct previously occurred on or near the property;
- how recently and how often similar crimes occurred;
- how similar the conduct was to the conduct on the property;
- what publicity was given to the occurrences to indicate that the landowner knew or should have known about them.

Each of these factors is summarized below.

(a) proximity in place and time

A relevant factor in assessing the foreseeability of criminal assaults is whether similar crimes occurred on or near a landowner's property in the recent past. Criminal activity occurring far from a landowner's property bears less relevance because crime rates often vary significantly within a large geographic area. This is not to say that evidence of remote criminal activity can never indicate that crime is approaching a landowner's property. But such evidence must show that the risk of criminal conduct on the landowner's property is not merely increasing but has reached a level as to make crime likely. One court explained

foreseeability as follows: "It does not necessarily follow that the prior similar criminal activity must have taken place at the premises; it is required only that the criminal act or acts occurring near the premises in question give notice of the risk that crime may travel to the premises of the business owner."

(b) how recently and often similar crimes occurred on or near the property

Foreseeability also depends on how recently and how often criminal conduct has occurred in the past. The occurrence of a significant number of crimes within a short time period strengthens the claim that a particular crime was foreseeable. On the other hand, the complete absence of previous crimes, or the occurrence of a few crimes over an extended time period, negates the foreseeability element.

To illustrate, the courts have found a criminal act to be foreseeable when similar crimes occurred on or near the property in question:

- 10 times within 3 years;
- 394 times within 2 1/2 years;
- 40 times within 1 year;
- 85 times within 3 or 4 years;
- 7 times within 1 year; and
- 75 to 100 times within 3 years.

On the other hand, the courts have concluded that a criminal act was not foreseeable in several cases, including the following:

- apartment owner not liable for a criminal assault on a tenant because no violent crimes had occurred at the premises;
- sexual assault on a female customer of a parking lot as unforeseeable in light of only 17 previous crimes over a 10-year period;
- bank could not foresee an assault at one of its ATMs based on 2 previous crimes within the 8 preceding years;
- an assault in a grocery store was not foreseeable because no robberies or assaults had ever occurred in the store;

- "because there are no reports of prior similar crimes occurring on the Wal-Mart Supercenter parking lot, the crime was unforeseeable";
- a cab company could not foresee an employee's criminal act based upon one prior incident in a 20-year period.

(c) similarity of previous crimes

The previous crimes on or near a landowner's property must be sufficiently similar to the crime in question to place the owner on notice of the specific danger. To illustrate, one court found that the stabbing of a guest at an apartment complex was not foreseeable from four prior incidents of vandalism and the theft of a refrigerator.

The prior crimes need not be identical. A string of assaults and robberies in an apartment complex make the risk of other violent crimes, like murder and rape, foreseeable. On the other hand, a spate of domestic violence in the complex does not portend third-party sexual assaults or robberies.

This factor is often difficult to apply because, as one court observed, "criminal activity is not easily compartmentalized." In addition, property crimes may facilitate personal crimes. For example, a burglar who breaks into a home to steal property may decide to assault a person who is discovered inside. On the other hand, vandalism to automobiles in an apartment complex's parking lot generally does not suggest the likelihood of sexual assault.

(d) publicity given to prior crimes

The publicity given to previous crimes helps determine whether a property owner knew or should have known of a foreseeable danger. Actual notice of past incidents strengthens the claim that future, similar crimes were foreseeable. However, unreported criminal activity on or near the premises is no evidence of foreseeability. Previous similar incidents cannot make future crime foreseeable if nobody knows or should have known that those incidents occurred. One court noted that "property owners bear no duty to regularly inspect criminal records to determine the risk of crime in the area. On the other hand, when the occurrence of criminal activity is widely publicized, a

property owner can be expected to have knowledge of such crimes."

In summary, these factors (proximity in place and time, frequency, similarity, and publicity) must be considered together in determining whether criminal conduct is foreseeable. The frequency of previous crimes necessary to show foreseeability lessens as the similarity of the previous crimes to the incident at issue increases. The frequent occurrence of property crimes in the vicinity is not as indicative of foreseeability as the less frequent occurrence of criminal assaults on the landowner's property itself. The courts must weigh the evidence using all of these factors.

If a church receives a threat of an attack by an armed assailant, this will immediately elevate foreseeability toward certainty, triggering a corresponding duty on the part of the church to implement the most stringent safeguards. Depending on the circumstances, this may require the cancellation of church services. It is imperative that church leaders coordinate the church's response with local enforcement agencies.

In only 1 of the 27 cases of church shootings summarized above did the gunman warn the church in advance.

church cases

No court has addressed the liability of a church for a shooting incident on church premises. However, a few courts have addressed the liability of churches for other violent assaults. The main cases are summarized below.

Case study #1. A Georgia court ruled that a church was not liable for an assault on a woman who was passing by an abandoned property owned by the church. A woman (the "victim") was assaulted and seriously injured on her way home late one evening from a neighborhood convenience store. Her assailant crept up behind her as she walked along the sidewalk near a church. The church building was owned by the church, but no longer used since the church moved to another location a few years before. During the attack, the victim's back was injured and her legs paralyzed. While she lay immobile, a second

**COVER
STORY**

assailant emerged from a door on the church property. This person raped the victim and left her. The victim sued the church, claiming that it was responsible for her injuries because it should have foreseen that a criminal might use an abandoned building as a hideout when preying on the general public. In rejecting the victim's claims, the court concluded: "[The victim's] unsupported speculation that her assailant may have concealed himself in the bushes near the church building before attacking her on the public sidewalk does not establish a causal relation between the condition of the property and the attack or a duty on the part of the church to protect her from such a criminal assault by a third party. . . . A contrary ruling would, in effect, impose a duty upon all property owners, especially those in high crime areas, to protect the general public from criminal activity committed on the property by third persons. This would include most unimproved lots and well-maintained buildings wherever the criminal could perform his misdeeds out of the public's watchful eye. Public policy, we believe, would not favor such a holding. Although defendants may have owed a duty to plaintiff against harm caused by the dilapidated condition of the building (e.g., injury caused by a falling brick or broken glass), that duty does not extend to the unforeseeable criminal activity of third persons." *Barnes v. St. Stephen's Missionary Baptist Church*, 580 S.E.2d 587 (Ga. App. 2003).

Case study #2. A New York court ruled that a church was not responsible on the basis of negligent supervision or negligent retention for a sexual assault committed by a church employee. The court concluded that the church had received no complaints of inappropriate behavior concerning the employee for the five years of his employment, and therefore his assault was not foreseeable. The court acknowledged that the employee "may have used drugs in the past," was an HIV-positive homosexual, and may have made "inappropriate expenditures" or hired "ex-convicts" to perform community

The court concluded that the church had received no complaints of inappropriate behavior concerning the employee for the five years of his employment, and therefore his assault was not foreseeable.

service at the church, but it found all of these factors "irrelevant to any propensity to commit an act of sexual aggression." *Osvaldo D. v. Rector Church Wardens and Vestrymen*, 834 N.Y.S.2d 94 (N.Y.A.D. 2007).

Case study #3. A South Carolina court ruled that a church was not liable for injuries sustained by a person when he was attacked on church property. A church owned an apartment complex used as low-income housing. Despite the fact that the apartment building was in a high-crime area, and church leaders were aware of numerous incidents of criminal behavior occurring within the building, the church did not provide a security guard. A man (the "victim") was injured when he was attacked while visiting a friend in the apartment building. The victim sued the church, claiming that it was responsible for his injuries on the basis of negligence. A state appeals court disagreed. The court observed: "A [property] owner has a duty to take reasonable care to protect invitees. However, this duty does not extend to protection from criminal attacks from third persons unless the owner knew or had reason to know the criminal attack would occur. . . . In this case [the victim and his mother] stated they knew of criminal activity that had occurred at [the apartment building] in the past, including an alleged shooting. In addition [the victim] asserted he knew [his attacker] was a violent person and that he had seen [him] involved in other fights at the complex. However, there is no evidence in the record that [the church] was aware of [the attacker's] previous fights or of any incident that day that would put management on notice the attack [on the victim] might occur. Therefore [the church] had no duty to protect [the victim] from an intentional

attack." *Goode v. St. Stephens United Methodist Church*, 494 S.E.2d 827 (S.C. 1998).

"Foresight, not retrospect, is the standard of diligence. It is nearly always easy, after an accident has happened, to see how it could have been avoided. But negligence is not a matter to be judged after the occurrence. It is always a question of what reasonably prudent men under the same circumstances would or should, in the exercise of reasonable care, have anticipated. Reasonable anticipation is that expectation created in the mind of the ordinarily prudent and competent person as the consequence of his reaction to any given set of circumstances. If such expectation carries recognition that the given set of circumstances is suggestive of danger, then failure to take appropriate safety measures constitutes negligence. On the contrary, there is no duty to guard when there is no danger reasonably to be apprehended. Negligence is gauged by the ability to anticipate. Precaution is a duty only so far as there is reason for apprehension. Reasonable apprehension does not include anticipation of every conceivable injury. There is no duty to guard against remote and doubtful dangers." (Quoting *Shearman and Redfield on Negligence*).

non-church cases

Several courts have addressed the liability of commercial property owners for armed assaults occurring on their premises. Most courts have applied the principles summarized above, and have found commercial property owners liable for armed assaults on patrons only if the assaults were foreseeable. A few illustrative cases are set forth below.

COVER STORY

Case study #4. On a clear and sunny day in 1984, a man entered a McDonald's restaurant dressed in camouflage pants and armed with a 9mm semi-automatic rifle, a semi-automatic 9mm pistol and a 12-gauge shotgun. He immediately began indiscriminately slaughtering patrons and employees within the glass-enclosed structure. During the hour of terror before he was killed by a police sharpshooter, the assailant showed no intent to rob the restaurant; made no demands for money; made no effort to take hostages; loaded his weapons several times; and killed 21 people in the restaurant and wounded 19 others. His single apparent purpose was to kill as many people as possible before he was slain. Several victims and their families sued for damages for wrongful death and personal injuries, claiming that McDonald's failed to provide adequate security personnel to protect customers from dangerous and known risks. In support of their theory of liability, the plaintiffs alleged that McDonald's knew of the area's high-crime rate, increasing gang activity, and nearby incidents of violent crimes. Claiming economic reasons, McDonald's declined to provide a uniformed security officer.

The plaintiffs presented evidence showing that within the three years preceding the shootings, the crimes committed at the restaurant included two robberies, two petty thefts, one unlawful use of a vehicle, vandalism, grand theft and theft by fraud. During the same period, crime statistics revealed that within a one-tenth of a mile radius of the restaurant, six burglaries, five batteries, one assault with a deadly weapon, two drawings of a deadly weapon, numerous grand thefts, and various other crimes occurred.

A California appeals court noted that property owners may be responsible for the criminal acts of third parties only if those acts are reasonably foreseeable under the "totality of circumstances." The court concluded that the shooting rampage in this case was not foreseeable:

The risk of a maniacal, mass murderous assault is not a hazard the likelihood of which makes McDonald's conduct unreasonably dangerous. Rather, the likelihood of this unprecedented murderous assault was so remote and unexpected that, as a matter of law, the general character of McDonald's nonfeasance did not facilitate its happening. [The assailant's] deranged and motiveless attack, apparently the worst mass killing by a single assailant in recent American history, is so unlikely to occur within the setting of modern life that a reasonably prudent business enterprise would not consider its occurrence in attempting to satisfy its general obligation to protect business invitees from reasonably foreseeable criminal conduct. . . .

Plaintiffs' reliance on the evidence of mostly theft-related crimes on and nearby the [restaurant] and the crime rate in the surrounding area, to show the event here was reasonably foreseeable, is misplaced. We recognize foreseeability of third-party criminal conduct does not require prior identical or even similar incidents. However, here the evidence does not portend disasters of this type. As McDonald's argues: "To the extent it can be foreseen at all, such an attack, like a meteor falling from the sky, can occur in any neighborhood regardless of the crime rate." Rather, the predominantly theft-related character of the crimes is simply probative of the foreseeability of such crimes, more precisely defining its duty to provide protective measures designed to deter theft-related and ordinary criminal conduct (i.e., vandalism). In comparison, not only was [the assailant's] crime not theft-related, but the narrow focus on slaughter and [his] obvious suicidal motive are unrelated to the area's general crime rate as a matter of law. . . . A review of the surrounding circumstances

emphasized by plaintiffs does not render the occurrence of a mass murderous assault any more foreseeable. . . .

Further, although the policy of preventing future harm is great, the extent of the burden to the defendant and the consequences to the community of imposing a duty to protect against heavily-armed, suicidal murderers is onerous. As already explained, where the burden of preventing future harm is great, a high degree of foreseeability is required. Absent such a high degree of foreseeability, the courts have declined to declare a duty where its imposition "would place an extremely onerous burden on both the defendant and the community, and where the defendant is not morally culpable, and where the proposed duty and the measures to be applied in discharge of the duty defy exact delineation and suffer from inherent vagueness. . . ."

[W]hat protective measures should be pursued to protect against a mass murderous assault truly defy exact delineation, because how can one know which measures will be effective against a degenerate, a psychopath or a psychotic? The type of unforeseeable criminal conduct involved here would require expensive protective measures of questionable deterrent value when confronted by an assailant bent on committing a mass murder. In other words, the kind of harm involved here cannot be deterred by such measures as security cameras and alarms which help deter ordinary criminal conduct because of the potential of identification and capture. Lopez v. McDonald's Corporation, 238 Cal.Rptr. 436 (Cal. App. 1987).

Case study #5. A husband and wife attended a night baseball game at Dodger Stadium. As they returned to their car at the end of the game, the husband was injured when he came to the aid of another man who

had been attacked by two drunks. The couple sued the owner of the stadium for damages and won. A California appeals court reversed the decision and dismissed the couple's claims. The California Supreme Court described the appeals court ruling as follows in a later case:

Starting from the premise that it would be grossly unfair to permit a lay jury, after the fact, to determine in any case that security measures were "inadequate," particularly in light of the fact that the decision would always be rendered in a case where the security had, in fact, proved inadequate, the court observed: "It appears that a growth industry is developing consisting of experts who will advise and testify as to what, in their opinion, constitutes 'adequate security.' The \$64 question, of course, is 'adequate for what?'

The question then to be determined by the jury is what reasonable steps could have been taken to prevent plaintiff's injury? The purpose of a trial in this type of case is not simply to critique defendant's security measures and to compare them to some abstract standards espoused by a so-called "security expert." The objective is to determine whether a particular defendant should, under the circumstances, be held liable for a plaintiff's injury because of a failure to prevent the criminal actions of a third party. . . .

Further it is one thing for an expert to testify concerning the mechanical devices such as locks, safes, fences, etc. which are designed to protect property by "hardening the target," it is quite another for such expert to discuss deterring conduct such as rape, robbery or physical assaults. As one court has stated: "It is an easy matter to know whether a stairway is defective and what repairs will put it in order. . . . but how can one know what measures will protect against the thug, the

Property owners have no duty to employ security guards unless the foreseeability of violent crime is high as a result of the four factors summarized above (proximity in place and time, frequency, similarity, and publicity).

narcotic addict, the degenerate, the psychopath and the psychotic?" The present case is a classic example of a plaintiff establishing what could be described as abstract negligence, in the context that the Dodgers' security didn't comport with plaintiffs' expert's or the jury's notion of "adequacy," but failing to prove any causal connection between that negligence and the injury. Noble v. Los Angeles Dodgers, 214 Cal. Rptr. 395 (Cal. App. 1985).

"It is an easy matter to know whether a stairway is defective and what repairs will put it in order. . . . But how can one know what measures will protect against the thug, the narcotic addict, the degenerate, the psychopath and the psychotic?" Noble v. Los Angeles Dodgers, Inc., 214 Cal. Rptr. 395 (1985).

(2) failure to hire security guards

Can a church be liable for deaths or injuries caused by an armed assailant as a result of a failure to employ security guards or police officers? Most churches do not employ such persons. Does this make them liable for shooting rampages that occur on their premises? No court has addressed this question in a published decision. But, a few courts have addressed this question in cases involving commercial property owners, and these courts generally have concluded that property owners have no duty to employ security guards unless the foreseeability of violent crime is high as a result of the four factors summarized above (proximity in place and time, frequency, similarity, and publicity). Consider a few examples.

Case study #6. *The California Supreme Court ruled that a shopping*

mall owner's failure to employ security guards did not make it liable for the rape of a mall employee who worked for a photo processing service located in a secluded area of the mall. The court concluded that a property owner's duty to provide protection from foreseeable third-party crime "is determined in part by balancing the foreseeability of the harm against the burden of the duty to be imposed. In cases where the burden of preventing future harm is great, a high degree of foreseeability may be required. On the other hand, in cases where there are strong policy reasons for preventing the harm, or the harm can be prevented by simple means, a lesser degree of foreseeability may be required. . . . Or, as one court has accurately explained, duty in such circumstances is determined by a balancing of foreseeability of the criminal acts against the burdensomeness, vagueness, and efficacy of the proposed security measures."

The court then addressed the need to hire security guards:

While there may be circumstances where the hiring of security guards will be required to satisfy a landowner's duty of care, such action will rarely, if ever, be found to be a "minimal burden." The monetary costs of security guards is not insignificant. Moreover, the obligation to provide patrols adequate to deter criminal conduct is not well defined. No one really knows why people commit crime, hence no one really knows what is "adequate" deterrence in any given situation. Finally, the social costs of imposing a duty on landowners to hire private police forces are also not insignificant. For these reasons,

we conclude that a high degree of foreseeability is required in order to find that the scope of a landlord's duty of care includes the hiring of security guards. We further conclude that the requisite degree of foreseeability rarely, if ever, can be proven in the absence of prior similar incidents of violent crime on the landowner's premises. To hold otherwise would be to impose an unfair burden upon landlords and, in effect, would force landlords to become the insurers of public safety, contrary to well established policy in this state.

The court suggested that "it is possible that some other circumstances such as immediate proximity to a substantially similar business establishment that has experienced violent crime on its premises could provide the requisite degree of foreseeability." But the court concluded that this possible exception was not met in this case: "Violent criminal assaults were not sufficiently foreseeable to impose a duty upon [the mall owner] to provide security guards. [It] did not have notice of prior similar incidents occurring on the premises."

The court acknowledged that previous assaults and robberies had occurred at the mall, but it concluded that these offenses "were not similar in nature to the violent assault that [the victim in this case] suffered," and were not "sufficiently compelling to establish the high degree of foreseeability necessary to impose a duty to provide security guards."

The court noted that some properties, such as a parking garage or all-night convenience stores, may be so "inherently dangerous" that the owner may have a duty to employ security guards even without evidence of prior serious crimes on or near the property. But, such a rule would not apply to the typical retail store. *Ann M. v. Pacific Plaza Shopping Center*, 25 Cal. Rptr.2d 137 (Cal. 1993).

Case study #7. The California Supreme Court ruled that "only when heightened foreseeability of

'It is highly unlikely that a crime risk will be sufficiently foreseeable for the imposition of a duty to provide security guards if there have not been previous instances of crime on the business' premises.'

third party criminal activity on the premises exists—shown by prior similar incidents or other indications of a reasonably foreseeable risk of violent criminal assaults in that location—does the scope of a business proprietor's duty include an obligation to provide guards to protect the safety of patrons. *Delgado v. Trax Bar & Grill*, 36 Cal.4th 224 (Cal. 2005).

Case study #8. The Louisiana Supreme Court ruled that a Wal-Mart store was not liable for an armed robbery of a customer in its parking lot. The customer claimed that Wal-Mart was liable for the robbery since it failed to post a security guard in the parking lot. The court disagreed. It applied a balancing test to determine whether a business owes a duty to protect its customers from the criminal acts of third persons. This test weighs the foreseeability of the crime risk on defendant's property and the gravity of the risk to determine the existence and the extent of defendant's duty. More specifically, the court held: "The greater the foreseeability and gravity of the harm, the greater the duty of care that will be imposed on the business. A very high degree of foreseeability is required to give rise to a duty to post security guards, but a lower degree of foreseeability may support a duty to implement lesser security measures such as using surveillance cameras."

The court noted that the foreseeability and gravity of the harm are to be determined by the facts and circumstances of the case. The most important factor to be considered "is the existence, frequency and similarity of prior incidents of crime on the premises, but the location, nature and condition of the property should also be taken into account. It is highly unlikely that a crime risk will be sufficiently foreseeable for the imposition of a duty to provide security guards if there have not been previous instances of crime on the business' premises."

The court found that during the prior six and one-half years the parking lot had been the scene of three predatory offenses and that the area surrounding the store was considered "a high crime area." This, however, was not enough for the court to find that Wal-Mart had a duty to post security guards in the parking lot. *Posecai v. Wal-Mart Stores, Inc.*, 752 So.2d 762 (La. 1999).

These cases, and many others, suggest that a church has no legal duty to hire security guards except in cases of "heightened foreseeability of third party criminal activity on the premises" due to "prior similar incidents or other indications of a reasonably foreseeable risk of violent criminal assaults on church property." Hiring one or more security guards is an expensive practice that will be justified only by a high degree of foreseeability that a shooting or other violent criminal act will occur on church property.

(3) negligent selection of security guard or security service

If a church decides to hire security guards, can it be liable for deaths and injuries that they cause, or fail to prevent, on the ground that the church was negligent in selecting the guards? To illustrate, assume that a woman is shot by an armed assailant on church property despite the fact that the church employs a security guard. The woman sues the church, claiming that the church was negligent in selecting its security guard. She points out that the guard was not a police officer, had no law enforcement training, was not licensed, and had only minimal training in handling

continued on page 16

WE BELIEVE
TRANQUILITY
CAN COME IN
MANY FORMS.

GO WEST



BANK OF THE WEST
COMMERCIAL BANKING

BNP PARIBAS GROUP

**Our Religious Institution
Banking business has been
serving the community of
faith for over twenty years.**

- We're a national leader in religious institution lending and an affiliate of BNP Paribas,* one of the strongest banks in the world.
- We have banking solutions that can provide religious institutions with opportunities for growth.
- Our years of industry expertise help us in recommending great solutions to manage your finances.

Speak to a Relationship Manager 1-800-405-2327

©2013 Bank of the West. Member FDIC. Equal Housing Lender. Loans subject to credit approval.
*Rated A+ by Standard and Poor's.

continued from page 14

a firearm. Is it possible for the church to be responsible for her injuries under these circumstances? While no court has addressed this question in a published decision involving a church, a few have addressed the issue in other contexts. The principal cases are summarized below.

Case study #9. A California court observed: "A security guard is liable to an injured customer when the guard fails to act reasonably and that failure causes injury. The business, in turn, may be liable for failing to hire a competent security guard. Having assumed the duty to protect one's patrons while on the premises of a business establishment, the proprietor will be liable if the guard acts unreasonably. Moreover, the proprietor will be directly liable when he or she negligently hires or retains an incompetent employee or negligently trains or supervises the employee. Under these circumstances, the injured patron need not prove the proprietor had notice of prior similar acts." *Mata v. Mata*, 130 Cal.Rptr.2d 141 (Cal. App. 2003).

Case study #10. A Texas court ruled that an off-duty police officer acting as a security guard for a department store was acting "within the scope of his employment as a police officer" rather than as a security guard for the store when he allegedly used excessive force in apprehending a customer who was suspected of engaging in credit card fraud in a transaction. The victim sued the store on several grounds, including the negligent hiring of the security guard. The court observed:

The basis of responsibility for negligent hiring and retention is the employer's negligence in hiring or retaining an incompetent employee who the employer knew or, in the exercise of ordinary care, should have known was incompetent or unfit, and thereby creating an unreasonable risk of harm to others. Negligence in hiring requires that the employer's failure to investigate, screen, or supervise its [employees]

Such cases demonstrate that a church may be liable on the basis of negligent hiring for injuries caused by, or not prevented by, a security guard if the church failed to exercise reasonable care in investigating the competency of the guard before hiring him or her.

caused the injuries the plaintiffs allege. An employer is not negligent when there is nothing in the employee's background that would cause a reasonable employer not to hire or retain the employee.

The court noted that when an off-duty police officer acting as a department store's security guard attempts to apprehend a criminal, he or she is acting as an on-duty police officer. Since the officer is no longer acting as a store employee, the store cannot be liable for negligent hiring or retention based on the officer's alleged acts performed as an on-duty police officer.

*Further, even if the police officer was acting as a store employee at the time of the arrest, "there is no evidence which supports a claim of negligent hiring or retention. [The police officer] was hired by the store as a security officer in 1998. The record reflects, at that time, he had no complaints on his record. In order to demonstrate a claim for negligent hiring, there must be evidence in an employee's record that would cause a reasonable employer not to hire the employee." *Ogg v. Dillard's, Inc.* 2007 WL 3317480 (Tex. App. 2007).*

Such cases demonstrate that a church may be liable on the basis of negligent hiring for injuries caused by, or not prevented by, a security guard if the church failed to exercise reasonable care in investigating the competency of the guard before hiring him or her. However, this risk can be reduced by exercising reasonable care in selecting a security guard. As noted later in this article, hiring only uniformed, off-duty police officers as security guards best demonstrates the exercise of reasonable care.

(4) liability for acts of security guards

Churches that hire security guards may

be liable for deaths and injuries caused by the negligence of their guards. This is so, even if a church did not have a legal duty to hire security guards because criminal acts on church property were not foreseeable. As one court has observed, "We do not hold that business owners owe any duty to the public to provide security services generally. We simply find that where a business owner undertakes to provide security services, he remains liable as though he directly employed the security personnel, regardless of whether they are technically employed by an independent entity." The court noted that "the majority of jurisdictions that have considered this issue have reached the same conclusion [and] have recognized the existence of this specific nondelegable duty, either explicitly or by imposing vicarious liability on a store for the intentional torts of independently contracted security guards regardless of the nature of the employment relationship between the store and the security agency." *Simon v. Safeway, Inc.*, 2007 WL 4441194 (Ariz. App. 2007).

Case study #11. A Pizza Hut restaurant employed an off-duty uniformed and armed police officer as a security guard. The restaurant was in a high-crime area and had been robbed or burglarized more than 20 times. Three armed robbers entered the restaurant while the security guard was sitting at a table obscured from view behind a partition, reading a book and visiting with an acquaintance. One of the robbers pointed a shotgun at the officer's face and ordered him not to move. The officer allegedly made a slight movement to his right, which caused the robber to fire his shotgun. The blast missed the officer, but killed one patron and wounded another. The family of the deceased victim sued Pizza Hut, claiming that the shooting was caused by the security guard's negligence. The

Louisiana Supreme Court agreed that the shooting was due to the security guard's negligence, and that this negligence could be imputed to Pizza Hut. The court found the following acts to have been negligent: (1) the security guard failed to position himself where he was clearly visible to potential armed robbers; (2) the security guard was eating a salad at a table inside the restaurant while on duty; (3) the security guard made a slight movement when ordered by one of the robbers not to move. The court concluded: "A business which undertakes to hire a security guard to protect itself and its patrons is liable for physical harm which occurs because of negligence on the part of that guard." *Harris v. Pizza Hut*, 455 So.2d 1364 (La. 1984).

2. the use of armed police officers or security guards on church property as a deterrent to violent assaults and as first responders in the event of a shooting incident.

The FEMA Guide also fails to address the use of police officers or security guards as a means of responding to the risk of

armed assailants on church property.

Churches should consider using security guards in some situations, including the following:

(1) A legal duty to employ security guards may exist because the risk of shootings or other violent crimes on church property is highly foreseeable based on the following factors described above:

- whether any criminal conduct previously occurred on or near the property;
- how recently and how often similar crimes occurred;
- how similar the previous crimes were to the conduct in question; and
- what publicity was given the previous crimes to indicate that the church knew or should have known about them.

(2) The use of one or more security guards is deemed necessary to further a church's theological values, whether or not legally required.

As noted above, a church that uses security guards may be liable for deaths and injuries caused by the negligence of their guards based on at least two potential grounds: (1) negligent hiring, and (2) a nondelegable duty to exercise reasonable care in the protection of the public when a security guard is employed, whether or not the church had a legal duty to employ a guard. These risks make it imperative for churches that elect to use security guards to select persons of demonstrable competence. Consider the following options:

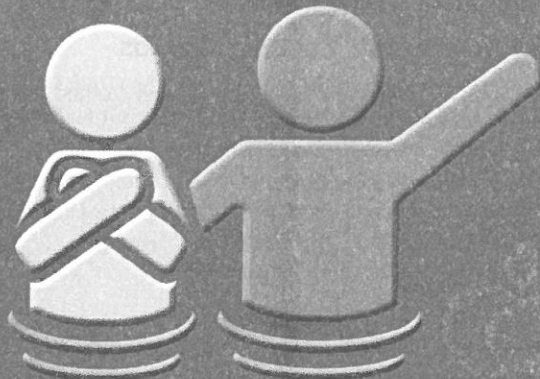
(a) uniformed police officers

A church's risk of liability for injuries caused by, or not prevented by, a security guard can be reduced by exercising reasonable care in selecting a security guard. The exercise of reasonable care can best be demonstrated by hiring only uniformed police officers as security guards since such persons:

- are thoroughly screened before being hired as police officers;

continued on page 18

Your passion is ministry. So is ours.



All 12,000 of us.



- Church Loans
- Banking Services for Ministries and Missionaries

EVANGELICAL CHRISTIAN CREDIT UNION

We are the people and organizations who bank with ECCU. Our mission is to fuel Christ-centered ministry worldwide.

How can we fuel your ministry? To get started, check out these resources:

- *Truths about Tithers* (webinar)
- *Purchasing and Financing Existing Facilities Today* (white paper)
- *Funding Your Vision* (webinar series)

Visit www.eccu.org/resources for these resources and more.



ECCU

Investing in ministry.®

continued from page 17

- receive extensive training in dealing with volatile situations;
- receive extensive training in the use of firearms;
- receive continuing training in the use of firearms, and other job-related skills;
- according to some courts, become “on-duty” police officers even while otherwise acting as private security guards when responding to criminal activity, which has the effect of insulating their employer from liability based on negligent hiring or retention for their actions; and
- serve as a deterrent to crime because of their police uniform.

Churches considering the use of uniformed off-duty police officers should check with the local police department regarding the use of such persons as security guards, and the number they should hire.

(b) private security guards

Some churches that decide to employ security guards may opt for uniformed, private security guards who are hired directly by the church, or who work for a security firm that provides guards to the church pursuant to a contractual agreement. Sometimes, these persons are members of the church with nothing more than a permit to carry a concealed weapon. Churches will find it more difficult to defend against a negligent hiring claim when hiring security guards who are not police officers. But the risk can be reduced to some degree through various means, including the following:

- conduct a thorough criminal records check on the individual;
- obtain several references, ideally from other institutions where the person has served as a security guard;
- make sure that the guard is licensed under state law (if possible); and
- have the individual complete a detailed application documenting all prior experience as a security guard or police

officer, along with a full description of all prior law enforcement and firearms training, and any licenses or certifications the person currently has as a security guard, police officer, or firearms trainer, under state or federal law.

According to the United States Department of Labor:

Most States require that guards be licensed. To be licensed as a guard, individuals must usually be at least 18 years old, pass a background check, and complete classroom training in such subjects as property rights, emergency procedures, and detention of suspected criminals. Drug testing often is required and may be random and ongoing.

Guards who carry weapons must be licensed by the appropriate government authority, and some receive further certification as special police officers, allowing them to make limited types of arrests while on duty. Armed guard positions have more stringent background checks and entry requirements than those of unarmed guards.

An increasing number of states are making ongoing training a legal requirement for retention of licen-

sure. Guards may receive training in protection, public relations, report writing, crisis deterrence, first aid, and specialized training relevant to their particular assignment.

The American Society for Industrial Security International has written voluntary training guidelines that are intended to provide regulating bodies consistent minimum standards for the quality of security services. These guidelines recommend that security guards receive at least 48 hours of training within the first 100 days of employment. The guidelines also suggest that security guards be required to pass a written or performance examination covering topics such as sharing information with law enforcement, crime prevention, handling evidence, the use of force, court testimony, report writing, interpersonal and communication skills, and emergency response procedures. In addition, they recommend annual retraining and additional firearms training for armed officers. . . .

Obviously, security guards with little or no training, and who are not licensed under state law, present the greatest risk of liability to a church or other employer as a result of injuries they inflict while responding to a crime or otherwise performing their duties, or injuries they fail to prevent.

Table 3. Risk Management: Security Guards

uniformed, armed police officers	uniformed, private security guards	plain clothed, armed church members with CCW permit
<ul style="list-style-type: none"> • thoroughly screened • extensive training in responding to crises • extensive firearms training • continuing training • a uniform may act as a deterrent • police officers become “on duty” when responding to criminal acts • best choice for security guards 	<ul style="list-style-type: none"> • a less desirable choice than police officers due to less training, and lack of “on duty” public officer status when responding to criminal acts • risk of using them can be reduced, but not eliminated by: <ul style="list-style-type: none"> • references • active state-issued license • criminal records check • application (listing experience and training in crisis management and the use of firearms) 	<ul style="list-style-type: none"> • often pose the greatest risk to the church

All 50 states have enacted legislation allowing specified persons to carry a concealed weapon in public. In most states, carrying a concealed weapon requires a state-issued permit or license, while a few states allow anyone to carry a concealed weapon in public even without a permit or license.

3. technology

A third issue not addressed by the FEMA Guide is the use of technology as a means of preventing or reducing the impact of active-shooter incidents. Like security guards, crime-fighting technologies should be implemented as a result of either or both of the following grounds:

(1) A legal duty to install technological devices may exist because the risk of shootings or other violent crimes on church property is highly foreseeable based on the following factors described above:

- whether any criminal conduct previously occurred on or near the property;
- how recently and how often similar crimes occurred;
- how similar the previous crimes were to the conduct in question; and
- what publicity was given the previous crimes to indicate that the church knew or should have known about them.

(2) The use of one or more technological devices is deemed necessary to further a church's theological and biblical principles, whether or not legally required.

In evaluating the feasibility of various technologies to prevent or reduce the risk of shootings in public schools, the United States Department of Justice noted that the effectiveness, affordability, and acceptability of each technology must be considered. To illustrate, many church leaders would regard metal detectors at church entrances to be unacceptable, even if affordable and effective, because they are incompatible with the concept of "sanctuary" and are at odds with biblical assurances of providence and divine protection. For many smaller churches, such devices would be unaffordable.

Devices that often are employed by churches and commercial businesses to prevent or reduce the risk of criminal acts include surveillance cameras, metal detectors, and entry control devices. In each case, church leaders should consider the device's effectiveness, affordability, and acceptability in evaluating its usefulness.

4. using church members legally authorized to carry a concealed weapon as non-uniformed security guards

A fourth issue that the FEMA Guide fails to address is the use of lay members who possess a state-issued concealed weapons permit as a means of responding to the risk of armed assailants on church property. The Guide simply states, "How each individual chooses to respond if directly confronted by an active shooter is up to him or her. Each house of worship should determine, as part of its planning process, policies on the control and presence of weapons, as permitted by law."

 ON CHURCHLAWANDTAX.COM: Watch attorney Frank Somerville, an Editorial Advisor for CHURCH LAW & TAX REPORT, further explain what concealed carry weapons laws mean for churches.

There are several points to keep in mind when considering the use of church members who possess a concealed weapons permit as a means of responding to active shooters, including the following:

- All 50 states have enacted legislation allowing specified persons to carry a concealed weapon in public. In most states, carrying a concealed weapon requires a state-issued permit or license, while a few states allow anyone to carry a concealed weapon in public even

without a permit or license.

- Most states condition the issuance of a concealed weapons permit on successful completion of a prescribed course of study and active firearms training.
- States that allow persons to carry a concealed weapon in public are either "shall-issue" or "may-issue" jurisdictions. Most states are "shall-issue," meaning that the state shall issue a concealed weapons permit upon a person's successful completion of the prescribed coursework and weapons training. A few states are "may-issue," meaning the persons have no absolute right to obtain a concealed weapons permit. Rather, the issuance of a permit is at the discretion of a local or state official on the basis of "good cause." In some "may-issue" states, permits are rarely granted.
- The District of Columbia is a "no-issue" jurisdiction since concealed weapons permits are not issued. In 2008, the United States Supreme Court ruled that several statutes in the District of Columbia which, taken together, amounted to a total ban on possessing a handgun in the home, violated the Second Amendment. But the only conduct that the Supreme Court clearly located within the Second Amendment right was the possession and carrying of a handgun by an otherwise qualified person within his or her home for self-defense. It carefully noted that "the right secured by the Second Amendment is not unlimited," and that "historically, the right had never been viewed as a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *District of Columbia v. Heller*, 554 U.S. 570 (2008). The *Heller* decision did not address directly the constitutional right of citizens to carry concealed weapons in public, and so the District of Columbia "no-issue" position, and the de facto no-issue position of some "may issue" states, are presumably constitutional until further guidance from the Supreme Court.
- In most shall-issue and may-issue states, persons must complete

a prescribed course of study, including active firearms training, in order to qualify for a permit.

- Concealed weapons permit holders exhibit a wide range of competency in handling firearms, with some permit holders having a very minimal ability in the use of firearms, and others having extensive training and ability. As a result, church leaders should not treat all permit holders equally.
- Most state concealed weapons statutes specify a concealed weapons permit does not apply to certain properties. Exempt properties often include government buildings, airports, schools, hospitals, and churches. However, in many states, a church can allow persons with concealed weapons to access church property.
- In most cases, uniformed, on-site police officers are a better way for churches to respond to the risk of active shooters for several reasons, including the following: (1) extensive training in responding to crises; (2) extensive firearms training; (3) continuing training; (4) a uniform may act as a deterrent; (5) police officers become "on duty" when responding to criminal acts, which reduces a church's legal liability for a police officer's negligence or exercise of excessive force when responding to an active shooter. To be sure, some holders of concealed weapons permits have extensive experience in handling weapons, due to military or law enforcement training, or personal experience. But, as noted above, the range of ability among concealed weapons permit holders is vast. While some are highly skilled and competent, many are not. To some extent, churches can reduce their legal risks when using concealed weapons permit holders as part of their response to armed shooters by taking the following steps: (1) place a reasonable limit on the number of concealed weapons permit holders that the church will use as part of its response to armed shooters; (2) do a thorough background check on each person, including references; (3) use a

written application that includes a description of the applicant's weapons training; (4) periodic confirmation that the individual's permit is active. Note that the use of uniformed police officers remains the best response to the risk of active shooters for the reasons mentioned above, but it is possible for carefully screened concealed weapons permit holders to serve in a supporting role. But any such role should be coordinated with the law enforcement personnel already being used.

- Church leaders should periodically "benchmark" their security policies by comparing them with other similar organizations in the community.
- A church's security policy, including the use of concealed weapons permit holders, should be reviewed by your police or sheriff's department, your insurance agent, and an attorney.
- An additional risk in using concealed weapons permit holders as a means of responding to active shooters is the use of excessive force. Few permit holders have received training on the importance of limiting any response to "reasonable force." The use of excessive force, which is always a possibility when concealed weapons permit holders respond to an active shooter, can result in liability for the church. Permit holders must receive competent training on this essential point.

Unfortunately, recent tragedies in the United States have demonstrated the need for churches to be prepared to respond to shootings and other violent crimes. The United States Department of Justice has prepared the following recommendations for schools to help reduce the risk of violent crime (the word "church" is substituted below for "school"). *Department of Justice, Research Report: The Appropriate and Effective Use of Security Technologies in U.S. Schools.*

- Every church needs a well-thought-out, annually updated crisis plan, with regular training for all those who might be involved.
- The crisis plan needs to make

assignments of who is in charge during different types of emergencies; who is the alternate in charge; who is called first, by whom, from where, and using what; whether persons are relocated and how; what type of statement is made to the press and by whom; and who is in charge when emergency teams (fire, police, and so forth) arrive on the scene. These are only a few of the specifications called for.

- In the best of all possible situations, a predetermined team will immediately mobilize upon the occurrence of a serious situation. Team members will know who to look to for decisions and then proceed automatically in their roles for the particular plan chosen to be implemented.
- Crisis team members should wear distinctive clothing, and be located in places of high visibility, so they can be contacted in the event of a crisis.
- Crisis team members should immediately contact local law enforcement when a crisis is reported, either on a cell phone or two-way radio. All crisis team members should have one or both of these devices with them at all times while on church premises.
- Consider the use of "duress alarms" that anyone can activate to report a crisis. These can activate an audible alarm, or an inaudible alarm that is detected only by crisis team members.
- Be sure to have your crisis plan reviewed by local law enforcement professionals, your insurance agent, and an attorney.

Conclusions

Listed below are several conclusions, based on the material presented in this article:

- Church shootings, and other violent crimes on church premises, are rare.
- The law imposes upon any place of public accommodation, including a church, a duty to protect occupants against foreseeable criminal acts. The level of protection is directly proportional to the degree of foreseeability.

Many courts assess foreseeability on the basis of the following factors: (1) whether any criminal conduct previously occurred on or near the property; (2) how recently and how often similar crimes occurred; (3) how similar the previous crimes were to the conduct in question; and (4) what publicity was given the previous crimes to indicate that the church knew or should have known about them. If shootings or other violent crimes on church property are highly foreseeable based on these factors, then a church has a heightened duty to implement measures to protect occupants from such acts.

- Many church leaders and congregations, guided and informed by their theological values, feel compelled to take steps to protect human life from acts of violence whether or not they have a legal duty to do so.
- In evaluating which measures to implement in order to discharge a legal or moral duty to protect occupants, church leaders should consider the affordability, effectiveness, and acceptability of a measure before implementing it.
- Church leaders should consult with local law enforcement professionals, the church insurance agent, and legal counsel, in making decisions regarding which protective measures to implement. These same persons should also review the church's emergency response plan.
- Contact other churches and other places of public accommodation in your community to see what measures they have enacted to protect occupants against shootings and other violent crimes. Examples include schools, malls, libraries, restaurants, stores, sports facilities, theaters, and concert halls. This research will help church leaders ascertain the "community standard," which is an important consideration in deciding if a property owner was negligent.
- Note that even the most stringent protective measures would have prevented few, if any, of the 27 shooting incidents on church property summarized in Table 1 of this

While it is not possible for churches to prevent acts of violence on their premises, it is possible to deter such acts in some cases, and to contain the damage and destruction when an incident erupts.

article. In fact, in some of these cases, the church implemented what seemed to be reasonable precautionary measures. However, no measures will foil an armed and dedicated assailant, especially if that person plans on taking his or her own life.

- While it is not possible for churches to prevent acts of violence on their premises, it is possible to deter such acts in some cases, and to contain the damage and destruction when an incident erupts.

.....
 President Bill Clinton, following a 1999 shooting rampage in a Texas church that left seven dead and seven more wounded, noted that "there is nothing we can do to assure that this will never happen, but there is a lot more we can do to assure that it will happen more rarely."

Courts, public figures, and law enforcement officials have all acknowledged that no level of risk management can thwart a dedicated killer from shooting people on church premises. President Bill Clinton, following a 1999 shooting rampage in a Texas church that left seven dead and seven more wounded, noted that "there is nothing we can do to assure that this will never happen, but there is a lot more we can do to assure that it will happen more rarely." Even the most stringent precautions will not prevent such incidents. To illustrate, consider a church that uses metal detectors at each entrance and armed guards. Will these measures prevent shooting incidents from happening? Not at all. They would not stop a dedicated assailant who is sufficiently armed.

If no level of risk management can prevent such incidents from happening, what should churches do? Church

leaders should view risk management as achieving four attainable objectives:

- Reduce the risk that shootings and other criminal assaults will happen on church property. In the words of President Clinton, "there is nothing we can do to assure that this will never happen, but there is a lot more we can do to assure that it will happen more rarely."
- If an incident should occur, contain the damage through an appropriate response.
- Ensure that the church's precautionary measures satisfy the applicable legal duty of care. As noted previously, most courts have ruled that the level of precaution a property owner should take is proportional to the foreseeability that a shooting or other violent criminal act will occur on the property. The very highest level of care will be required when multiple crimes involving shootings or other assaultive acts have occurred in recent years on or near church property, or when a church receives a direct threat that a shooting or assault will occur.
- Ensure that the church's precautionary measures are consistent with its moral values. Most churches place a high value on human life as a result of theological and biblical principles, and may wish to adopt precautionary measures that transcend those of local businesses unconstrained by those principles. ■

For more suggestions, church leaders should contact local law enforcement officials and the church's insurance agent. More articles about church security and risk management planning are available to *ChurchLawAndTax.com* subscribers in the site's "Risk" section.

Developing an Emergency Operations Plan

Steps FEMA says churches should take now—before a crisis unfolds.

By Sarah E. Merkle

In addition to specifically addressing active-shooter incidents, the FEMA Guide suggests a process that houses of worship should follow when developing an emergency operations plan (EOP). This article provides an overview of the Guide's suggestions.

At the outset, churches should note that the Guide's suggestions apply to all types of emergencies, not just active-shooter incidents. Like any entity, churches are susceptible to harm from natural disasters, power failures, explosions, and other similar events. Although harm due to human violence is always a concern, churches should not ignore other types of threats. Additionally, the Guide's suggestions are adaptable to any size and type of congregation. Some of the details provided may seem applicable only to large groups, but groups of all sizes should consider the Guide's suggestions and apply them as much as possible. Furthermore, churches with educational institutions on their property should consult FEMA's *Guide for Developing High-quality School Emergency Operations Plans* for additional information.

Foundational Considerations

Three federal initiatives are helpful for drafting an effective EOP. Although churches are not required to use the terminology and approaches suggested by these initiatives, doing so will aid communication and collaboration with emergency management officials and emergency responders. Individuals working in these capacities at local, state, and national levels are familiar with, and trained to follow, the procedures outlined in federal initiatives.

In 2011, President Obama signed Presidential Policy Directive 8 (PPD-8), which delineates the United States' approach to preparing for national emergencies in terms of five focus areas—prevention, protection, mitigation, response, and recovery. The Guide defines these terms, which are outlined in Table 1:

Table 1. **Key Preparedness Terms**

Prevention	Actions to "prevent a threatened or actual incident from occurring"
Protection	Actions to "protect people, networks, and priority from a threat or hazard"
Mitigation	Actions to "eliminate or reduce the loss of life and property damage . . . [and] the likelihood that threats and hazards will happen"
Response	Actions to "stabilize an incident once it has already happened or is certain to happen in an unpreventable way; establish a safe and secure environment; save lives and property; and facilitate the transition to recovery"
Recovery	Actions to "assist houses of worship affected by an incident in restoring their environment."

Incorporating the terminology of PPD-8 into an EOP will help ensure that efforts undertaken by a church are aligned with those of first responders and others. Additionally, the National Incident Management System (NIMS) and Incident Command System (ICS) standardize the approaches with defining responsibilities and roles and managing specific types of incidents. Churches should become familiar with these systems and incorporate their procedures as appropriate. They are available at fema.gov/national-incident-management-system.

Planning Principles

The Guide encourages an EOP that is leadership-supported, comprehensive, and inclusive, as further explained in Table 2:

Table 2. **Traits of a Plan**

Leadership-Supported	"The leadership of the house of worship should initiate and support planning efforts to ensure engagement from the congregation and outreach to the entire community."
Comprehensive	Planning should account for a "wide-range" of threats and hazards, various gathering times (both standard and non-standard), and various gathering locations (both on-site and off-site).
Inclusive	Planning should accommodate "regular attendees, guests, and staff, including those with disabilities and others with access and functional needs; those from racially and ethnically diverse backgrounds; and people with limited English proficiency."

Additionally, the Guide encourages churches to foster a collaborative approach. Doing so will ensure that the final product is one in which key stakeholders and organizational members are invested.

The Planning Process

Six steps for planning are outlined in the Guide: (1) Form a Collaborative Planning Team, (2) Understand the Situation, (3) Determine Goals and Objectives, (4) Plan Development, (5) Plan Preparation, Review, and Approval, and (6) Plan Implementation and Maintenance.

Step 1: Form a Collaborative Planning Team

The Guide aptly notes that successful emergency operations occur when a team of individuals and organizations are involved both in planning and execution. Accordingly, it recommends that churches first identify a core planning team that is "small enough to permit close collaboration, yet large enough to be representative of the house of worship, its congregation, and its community partners." Ideally, the team will include first responders or others who have emergency response expertise, some of whom may be members of the organization. Once the team is identified, team members should determine and clearly

define their roles and responsibilities, and should set a regular schedule of meetings.

Step 2: Understand the Situation

Step 2 requires a church to identify the threats and hazards to which it is susceptible, evaluate the risk of those threats and hazards, and then prioritize those risks. To identify threats and hazards, the planning team should draw on the knowledge and expertise of its members as well as community assessments that local and state agencies have conducted.

Once threats and hazards are identified, the team should evaluate the risk that each one poses. "Evaluating risk involves understanding the probability that the specific threat or hazard will occur; the effects the threat or hazard will likely have, including [each one's] severity; the time the house of worship will have to warn occupants about the threat or hazard; and how long the threat or hazard may last." The Guide suggests organizing this information in a table so that risks can easily be compared and prioritized. Using a table similar to Table 4 on page 24, churches can consider various aspects of each risk and then determine their priority.

'Evaluating risk involves understanding the probability that the specific threat or hazard will occur; the effects the threat or hazard will likely have, including [each one's] severity; the time ... to warn occupants about the threat or hazard; and how long the threat or hazard may last.'

Step 3: Determine Goals and Objectives

In Step 3, the team should decide which of the identified threats and hazards it will address in its EOP. It need not address all of them, but should address more than simply those identified as high risk. Once the team has made this determination, it should "develop goals and objectives for each threat or hazard."

Per the Guide, goals are "broad, general statements that indicate the desired outcome in response to a threat or hazard. Goals are what personnel and other resources are supposed to achieve. Goals also help identify when major activities are complete and what defines a successful outcome." In contrast, "objectives are specific, measurable actions that are necessary to achieve the goals."

Goals can be organized according to the focus areas outlined in PPD-8. For example, a prevention goal related to fires might read, "Prevent a fire from occurring in the church." Objectives associated with this goal could read, (1) "Provide fire prevention training to all persons that use combustible materials or equipment in or around the church" and (2) "Store combustible materials in fireproof containers or rooms."

Step 4: Plan Development (Identifying Courses of Action)

Step 4 involves developing a course of action for each of the objectives noted in Step 3. The Guide recommends the following steps for this process, as noted in Table 3:

Table 3. **Planning Courses of Action**

Depict the scenario	"Create a potential scenario based on the threats and hazards identified earlier in the planning process."
Determine the amount of time available to respond	The amount of time to respond will vary based on the type of hazard.
Identify decision points	"Decision points indicate the place in time, as threats or hazards unfold, when leaders anticipate making decisions about a course of action."
Develop courses of action	Ask and answer questions regarding who is responsible for the action, where and when will it take place, how long will it last, "what has to happen before and after the action," and "what resources and skills are needed to perform the action."
Select courses of action	Several courses of action may be possible for a specific hazard. Evaluating the costs and benefits of each course will help planners identify the appropriate course(s) for each hazard. Developing more than one course of action for a hazard is advisable since the precise manner in which a hazard will unfold is unpredictable.

Step 4 also involves identifying the resources necessary for each chosen course of action. Doing so will help churches identify "resource gaps or shortfalls" that they should address.

Step 5: Plan Preparation, Review, and Approval

In Step 5, planners should draft an EOP based on the research and decisions made in Steps 1 through 4. The Guide recommends that an EOP have three sections: the basic plan, functional annexes, and threat- and hazard-specific annexes.

Basic Plan

The basic plan is general and serves to communicate "an overview of the house of worship's approach to emergency operations." The primary audiences for the basic plan are the members of the church, local emergency management officials, and, where appropriate, the community. Shown in Table 5 on page 24 are the main sections of a basic plan and the components that each section should include.

Functional Annexes

Functions are key operations that occur during the course of an emergency. Examples include evacuation and lockdown. Obviously, "[f]unctions may occur consecutively or concurrently, depending

continued on page 25

Table 4. **Assessing Threats**

Hazard	Probability	Magnitude	Warning Time	Duration	Risk Priority
Earthquake	4. Highly Likely 3. Likely 2. Possible 1. Unlikely	4. Catastrophic 3. Critical 2. Limited 1. Negligible	4. Minimal 3. 6-12 Hours 2. 12-24 Hours 1. > 24 Hours	4. 12+ Hours 3. 6-12 Hours 2. 3-6 Hours 1. < 3 Hours	High Medium Low
Fire	4. Highly Likely 3. Likely 2. Possible 1. Unlikely	4. Catastrophic 3. Critical 2. Limited 1. Negligible	4. Minimal 3. 6-12 Hours 2. 12-24 Hours 1. > 24 Hours	4. 12+ Hours 3. 6-12 Hours 2. 3-6 Hours 1. < 3 Hours	High Medium Low

Table 5. **Contents of a Basic Plan**

Introductory Material	<ul style="list-style-type: none"> Cover page noting the plan title, church name, and effective date Signature page formally adopting the plan Approval and Implementation page indicating who can modify the plan Record of all updates and changes to the plan Record of when, and to whom, the plan was distributed Table of Contents
Purpose and Situation Overview	<ul style="list-style-type: none"> General statement of the plan's purpose Overview of the threats and hazards posing risks to the church that would necessitate use of the plan
Concept of Operations	<ul style="list-style-type: none"> General discussion of the manner in which the church intends to execute the plan (e.g., who has authority to activate the plan, what aspects of the church building and members the plan has accounted for, what community agencies are involved in implementing the plan, what the purposes are for key portions of the plan)
Organization and Assignment of Responsibilities	<ul style="list-style-type: none"> Descriptions of the roles and responsibilities of each individual and organization who are (or could be) involved in an incident, including individuals, such as congregants, who have no responsibility for plan implementation
Direction, Control, and Coordination	<ul style="list-style-type: none"> Description of the chain of command, the relationship between the church and local emergency operation agencies, and the individuals who control key resources necessary to implement the plan
Information Collection, Analysis, and Dissemination	<ul style="list-style-type: none"> Description of which information sources (e.g., weather reports, law enforcement alerts) should be consulted before, during, and after incidents Identification of who is responsible for consulting information sources and reporting data gathered Description of procedures used for disseminating relevant information
Training and Exercises	<ul style="list-style-type: none"> Outline of the types of training and exercises that will be employed and the frequency with which they will be conducted
Administration, Finance, and Logistics	<ul style="list-style-type: none"> Outline of procedures for financing the plan, accounting for expenditures, maintaining logs of activities, preserving records, and replacing assets
Plan Development and Maintenance	<ul style="list-style-type: none"> Description of the planning and revision process, identification of individuals responsible for revisions, and outline of the cycle of training and updates
Authorities and References	<ul style="list-style-type: none"> List of relevant laws and statutes related to executing the EOP

Table 6. **Example Annexes**

Evacuation Annex	Relevant to evacuation of buildings and grounds
Lockdown Annex	Relevant to securing buildings and grounds during "incidents that pose an immediate threat of violence"
Shelter-in-Place Annex	Relevant to incidents that require individuals to remain indoors
Recovery Annex	Relevant to "how the house of worship will recover from an emergency." "The four fundamental kinds of recovery are services recovery; physical recovery; fiscal recovery; and psychological and emotional recovery."
Security Annex	Relevant to "the courses of action that the house of worship will implement on a routine, ongoing basis to secure the house of worship from criminal threats"

continued from page 23

on the incident” and how an incident unfolds. Functional annexes are aspects of an EOP that focus on these “critical operational functions and the courses of action developed to carry them out.” When the EOP references a specific function, users of the plan can refer to the annex for information on specific courses of action. Table 6 on page 24 provides a list of annexes that the Guide recommends.

Threat- and Hazard-Specific Annexes

According to the Guide, “threat- and hazard-specific annexes describe the courses of action unique to particular threats and hazards (e.g., fires, hurricanes, active-shooter situations). Courses of action already outlined in a functional annex need not be repeated in a threat- or hazard-specific annex.”

Step 6: Plan Implementation & Maintenance

Implementing the EOP requires training both individuals with specific roles and congregants. Training can take place through meetings, visits to evacuation sites, distribution of plan details, posting plan details throughout the site, and exercises. Exercises allow participants to practice their roles and may reveal gaps in a developed course of action. Churches can conduct exercises verbally, where participants simply discuss what they would do during certain emergencies; they can also conduct drills, where participants can physically walk through the steps that they would take.

Maintaining the EOP requires consistent and measured review by all key stakeholders. Under the best circumstances, a house of

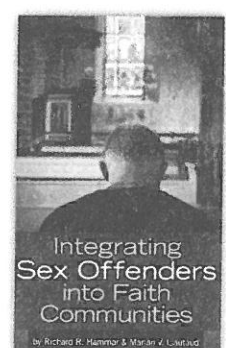
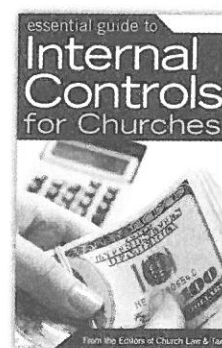
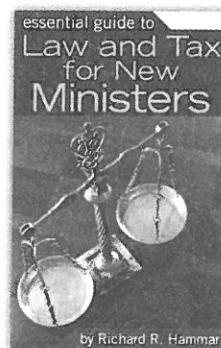
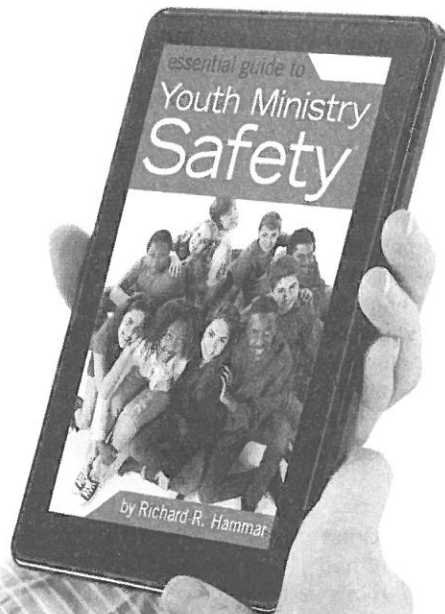
worship would review its plan annually. But the Guide advises that “[i]n no case should any part of the plan go for more than two years without being reviewed and revised. Houses of worship may find it easier to review and revise sections of the EOP on a systematic basis rather than the entire plan at one time.”

Conclusion

In sum, developing an EOP is essential for churches. Although the process is tedious and, no doubt, time consuming, an adequate and efficient plan can be developed systematically if churches are willing to regularly dedicate some portion of time to evaluating risks and crafting appropriate responses. If you are a church leader, don't wait until an emergency occurs before you spearhead the EOP development process. Begin today.

Sarah E. Merkle, J.D., graduated with honors from the University of South Carolina School of Law, where she served as Editor-in-Chief of the South Carolina Law Review. Following graduation, Sarah served as law clerk for the Honorable Henry F. Floyd, United States Court of Appeals for the Fourth Circuit. She is currently a litigation associate with Bradley Arant Boult Cummings, LLC, in Birmingham, Alabama. Merkle achieved the highest levels of certification from both the American Institution of Parliamentarians and the National Association of Parliamentarians. ■

NEW! eBooks FOR CHURCH MANAGEMENT



Available now for your eReader

YourChurchResources.com





Recent Developments

Issues that Affect
Ministers and Churches

This section of the newsletter contains a summary of recent court decisions, administrative rulings, and legislative developments that directly affect churches and clergy. Court decisions reflect decisions of all state appellate courts and supreme courts, and all federal courts. State trial court decisions are not reviewed since they are unpublished and have no value as legal precedent. The fact that a case is reported as a "Recent Development" rather than as a Feature Article does not imply that it is less important. All of these developments are important, but some are of vital significance. Therefore, each development should be reviewed carefully. Note that there are a number of "key points" associated with Recent Developments. These are intended to help you more quickly comprehend the importance of each development.

DENOMINATIONS--LEGAL LIABILITY

* See "Sexual misconduct by clergy, lay employees, and volunteers," *Doe v. Presiding Bishop*, 2012 WL 3782454 (D. Idaho 2012), in the Recent Developments section of this newsletter.

EMPLOYMENT PRACTICES

* See "Sexual harassment," 2012 WL 2912516 (W.D. Okla. 2012), in the Recent Developments section of this newsletter.

INCOME TAXES

Key point. *The Tax Court uses a seven-part test in deciding if a minister is an employee or an independent contractor for payroll reporting purposes.*

FED

The United States Tax Court ruled that a rabbi was not an employee of a synagogue, and therefore the synagogue was not liable for tens of thousands of dollars in penalties for failing to withhold Social Security and income taxes. A religious organization was incorporated to operate a synagogue. It paid a rabbi annual amounts ranging from \$30,000 to \$100,000 from 2004 to 2007. None of these amounts were reported as employee compensation, and so no FICA taxes or income taxes were withheld. The IRS audited the rabbi, determined that he was an employee, and assessed penalties (under section 6651 of the tax code) of more than \$100,000 against the synagogue for failing to withhold and pay \$95,000 in FICA taxes and \$162,145 in federal income taxes. The synagogue appealed to the Tax Court, claiming that the rabbi was an independent contractor, rather than an employee, and so no taxes had to be withheld from his compensation.

The Tax Court began its opinion by noting: "Employers and employees are subject to employment taxes, including FICA. FICA provides a Social Security tax payable by both employers and employees. Employers are required to withhold FICA tax and federal income tax on wage payments that they make to their employees. These employment taxes do not apply to payments made to independent contractors."

In resolving the rabbi's status, the Court relied on a seven-step analysis it had adopted in a previous ruling involv-

ing the tax status of a minister. *Weber v. Commissioner*, 103 T.C. 378 (1994), *aff'd* 60 F.3d 1104 (4th Cir. 1995). The Court noted:

Whether an individual performing services for a principal is an employee (rather than an independent contractor) is a factual question to which common law principles apply. . . . In determining whether a worker is an employee, the court considers (1) the degree of control exercised by the principal over the details of the work; (2) which party invests in the facilities used by the worker; (3) the opportunity of the worker for profit or loss; (4) whether the principal can discharge the worker; (5) whether the work is part of the principal's regular business; (6) the permanency of the relationship; and (7) the relationship the parties believed they were creating. . . . We consider all facts and circumstances; no one factor dictates the outcome. Although the determination of employee status is to be made by common law concepts, a realistic interpretation of the term "employee" should be adopted, and doubtful questions should be resolved in favor of employment in order to accomplish the remedial purposes of the legislation involved.

The Tax Court concluded, on the basis of its examination of each of these seven factors, that the rabbi was an independent contractor rather than an employee, and so the synagogue was not required to withhold FICA taxes of income taxes from his compensation.

What This Means For Churches:

This case illustrates the continuing relevance of the seven-factor test adopted by the Tax Court in the *Weber* case (1994) for determining the correct reporting status of ministers. Unfortunately, however, the Court failed to explain that clergy are not subject to FICA taxes with respect to their ministerial compensation (they are regarded as self-employed for Social Security and pay self-employment taxes), and their ministerial wages are exempt from income tax withholding unless they elect voluntary withholding. *Ungvar v. Commissioner, T.C. Memo. 2013-161*.

SEXUAL HARASSMENT

Key point 8-12.5. *Sexual harassment is a form of sex discrimination prohibited by Title VII of the Civil Rights Act of 1964. It consists of both "quid pro quo" harassment and "hostile environment" harassment. Religious organizations that are subject to Title VII are covered by this prohibition. An employer is automatically liable for supervisory employees' acts of harassment, but a defense is available to claims of hostile environment harassment if they have adopted a written harassment policy and an alleged victim fails to pursue remedies available under the policy. In some cases, an employer may be liable for acts of sexual harassment committed by nonsupervisory employees, and even nonemployees.*

Key point 8-16. *State and federal civil rights laws generally prohibit employers from retaliating against an employee for filing a discrimination claim or otherwise exercising rights provided by the law.*

FED **A federal district court in Oklahoma ruled that a church could be sued on the basis of sexual harassment for the conduct of a supervisory employee even though it was not aware of it at the time it occurred.** A female church employee (the "plaintiff") claimed that over the course of a year she was sexually harassed by her supervisor. The harassment included both language and physical conduct. The plaintiff resisted her

supervisor's advances, and this led directly to a reduction in her hours.

Plaintiff reported the sexual harassment to the church. After doing so, her hours continued to be reduced until she was terminated. The church insisted that the plaintiff quit her job.

The plaintiff sued the church, alleging sexual harassment, retaliation, wrongful termination, and negligence.

The plaintiff claimed that she was subjected to a sexually hostile work environment due to the actions of her supervisor.

sexual harassment

Title VII of the Civil Rights Act of 1964 prohibits employers with 15 or more employees from discriminating in employment decisions on the basis of race, color, national origin, sex, or religion. Sexual harassment is a form of sex discrimination prohibited by Title VII. The courts have identified two types of sexual harassment—"quid pro quo" and hostile environment. "Quid pro quo" harassment refers to conditioning employment opportunities on submission to a sexual or social relationship, while "hostile environment" harassment refers to the creation of an intimidating, hostile, or offensive working environment through unwelcome verbal or physical conduct of a sexual nature. In general, an employer is liable for a supervisory employee's hostile environment sexual harassment.

The plaintiff claimed that she was subjected to a sexually hostile work environment due to the actions of her supervisor. The court noted that "a plaintiff may prove the existence of hostile work environment sexual harassment in violation of Title VII where sexual conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment . . . For sexual harassment to be actionable, it must be sufficiently severe or pervasive to alter the conditions of [the victim's] employment and create an abusive working environment."

The church claimed that the plaintiff had not shown that any alleged harassment was sufficiently severe or pervasive to alter the conditions of her employment. The court disagreed, and rejected the church's request that the lawsuit be dismissed:

The court finds plaintiff has set forth sufficient evidence to create a genuine issue of material fact as to whether she suffered sexual harassment that was sufficiently severe or pervasive to alter the conditions of her employment and create an abusive working environment. Specifically, plaintiff has submitted evidence that for a year . . . she was verbally and physically sexually harassed by her supervisor, in that on a weekly, and near daily basis, he referred to her by sexually offensive names and on some 15 occasions, on a weekly and near bi-weekly basis, he either grabbed, groped, pinched, slapped, and squeezed her breasts or buttocks . . . or he forcibly pinned her against a wall with his body and kissed or tried to kiss her, or he directly requested she engage in sexual intercourse.

The court rejected the church's argument that it could not be liable for the supervisor's conduct since it had no knowledge it was occurring. It observed, "An employer is subject to liability to a victimized employee for a hostile environment created by a supervisor with immediate (or successively higher) authority over the employee." Since the supervisor was the plaintiff's immediate supervisor having immediate authority over her, "whether the church had knowledge of any alleged sexual harassment is not dispositive of the church's liability."

retaliation

The court rejected the church's request to dismiss the plaintiff's retaliation claim that she had been wrongfully retaliated against her pursuing her harassment claim. Many federal and state civil rights laws that ban discrimination in employment prohibit employers from "retaliating" against employees who oppose discriminatory practices or pursue claims of discrimination. To illustrate, Title VII of the Civil Rights Act of 1964, the federal Age Discrimination in Employment Act, and the Americans with Disabilities Act all prohibit employer retaliation.

The court noted that for the plaintiff to establish a claim of discrimination she had to show that “(1) she engaged in opposition to discrimination; (2) she was subject to adverse employment action; and (3) a connection existed between the protected activity and the adverse action.”

The church claimed that there was no retaliation since the plaintiff suffered no adverse employment action. The court disagreed:

The Court finds plaintiff has set forth sufficient evidence to create a genuine issue of material fact as to whether she was subject to an adverse employment action. Having reviewed the parties’ submissions, it is clear there is a genuine dispute as to whether plaintiff quit her employment with the church or whether she was terminated. The court would also note that plaintiff has submitted evidence showing that her hours were greatly reduced both after she rejected her supervisor’s alleged sexual advances and after she reported the sexual harassment to the church.

Accordingly, the Court finds that summary judgment should not be granted as to plaintiff’s retaliation claim.

constructive discharge

The court refused to dismiss the plaintiff’s claim of “constructive discharge,” noting that “when an employer controls the working hours and reduces the number of working hours, a constructive discharge can occur if the employee quits.”

negligence

The plaintiff claimed that the church was responsible for its supervisor’s acts of sexual harassment on the basis of negligence due to its failure to “investigate, respond, or discipline” the supervisor. In rejecting the church’s request to dismiss this claim the court observed:

Employers may be held liable for negligence in hiring, supervising or retaining an employee. In such instances, recovery is sought for the employer’s negligence. The claim is based on an employee’s harm to a third party through employment. An employer is found liable, if—at the critical time of the tortious inci-

dent—the employer had reason to believe that the person would create an undue risk of harm to others. Employers are held liable for their prior knowledge of the employee’s propensity to commit the very harm for which damages are sought. . . . The critical element for recovery is the employer’s prior knowledge of the employee’s propensities to create the specific danger resulting in damage.

The court concluded that there was sufficient evidence that the church was aware of prior acts of sexual harassment by the supervisor to allow this claim to proceed.

What This Means For Churches:

This case is important because it demonstrates that a church may be liable for a supervisory employee’s acts of sexual harassment even though it had no actual knowledge that they occurred.

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

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

This definition confirms the conclusion reached by numerous state and federal courts that sexual harassment includes *at least two separate types of conduct*:

1. “*quid pro quo*” harassment, which refers to conditioning employment opportunities on submission to a sexual or social relationship, and
2. “*hostile environment*” harassment, which refers to the creation of an

intimidating, hostile, or offensive working environment through unwelcome verbal or physical conduct of a sexual nature.

An employer may be liable for a supervisor’s acts of “hostile environment” sexual harassment even if it was not aware the acts were happening when they occurred. The basic rule may be stated as follows: If a supervisor creates an intimidating, hostile, or offensive working environment through unwelcome verbal or physical conduct of a sexual nature, this is “hostile environment” sexual harassment for which the employer will be legally responsible if the supervisor takes any “tangible employment action” against the employee. A tangible employment action includes “a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.” The employer is liable under such circumstances whether or not it was aware of the harassment.

An employer may be liable for a supervisor’s acts of hostile environment sexual harassment even if it takes no tangible employment action against the victim. But, in such cases, the employer may assert an “affirmative defense” to liability. This defense consists of two elements:

- i. The employer “exercised reasonable care to prevent and correct promptly any sexually harassing behavior.” This generally means that the employer adopted a written sexual harassment policy that was communicated to employees, and that contains a complaint procedure.
- ii. The victim “unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.” This generally means that the victim failed to follow the complaint procedure described in the employer’s sexual harassment policy.

As a result, it is a “best practice” for a church with employees to adopt a sexual harassment policy, since this will serve as a defense to liability for a supervisor’s acts of “hostile environment” sexual harassment to the extent that a victim of such harassment does not follow the policy. 2012 WL 2912516 (W.D. Okla. 2012).

SEXUAL MISCONDUCT BY CLERGY, LAY EMPLOYEES, AND VOLUNTEERS

Key point 10-13.1. A few courts have found churches and denominational agencies liable on the basis of a breach of a fiduciary duty for the sexual misconduct of a minister. In some cases, the church or agency is found to be vicariously liable for the minister's breach of a fiduciary duty, but in other cases, the church or agency is found to have breached a fiduciary duty that it had with the victim.

FED A federal district court in Idaho ruled that the Boy Scouts of America had a legal duty to disclose to the public the risk of child molestation in scouting programs, and that its failure to do so could expose it to liability for individual acts of molestation. An adult male (the "plaintiff") was a member of a church-based Boy Scouts troop when he was a minor during the years 1965 through 1971. He claimed that he was repeatedly sexually abused by his scoutmaster on various overnight trips and day trips. Only the plaintiff and scoutmaster participated on some of these trips, which typically involved fishing and searching for campsites for the troop.

In 2008, when he was 55 years old, the plaintiff sued national and regional organizations of the Boy Scouts of America (BSA), and the church that hosted his former scout troop. He claimed that the BSA organizations and church knew about the danger of abuse. But instead of disclosing this danger to him, they promoted scouting as a safe, trustworthy, and fun activity for boys. According to the plaintiff, the BSA organizations and church also represented that the perpetrator was a trusted youth leader worthy of his scoutmaster role, despite knowing that he had previously molested another boy.

The plaintiff's lawsuit claimed that the BSA "has always had a known problem with adult volunteers abusing scouts." In the early 1900s, the BSA began keeping "Ineligible Volunteer Files" on individuals banned from volunteering in scouting. The "Perversion" category contains the most files and comprises any type

In short, the plaintiff asserted that the BSA organizations, and host church, had a relationship of trust and confidence that imposed upon them a "duty to disclose" the general danger of child molestation inherent in scouting.

of sexual misconduct, including child abuse. Before the plaintiff became a Scout, the BSA had compiled "thousands of incidents of child abuse" within scouting involving its adult volunteers. And by the time the plaintiff joined scouting, BSA was creating approximately 40 to 60 Perversion files each year.

The plaintiff further claimed that the BSA and church had specific notice that the perpetrator was a child molester and danger to children. In 1964, a church member told a church official that his son, a scout in the same troop, had also been molested by him. The church official allegedly responded that he would "take care of it." And a week later, he told the father that he "had taken care of it."

The plaintiff's lawsuit asserted that the BSA organizations, and host church, were liable for the scoutmaster's acts on the basis of "constructive fraud." The court explained this basis of liability as follows: "An action in constructive fraud exists when there has been a breach of a duty arising from a relationship of trust and confidence, as in a fiduciary duty. . . . To prove constructive fraud, a party must prove the existence of a confidential relationship. When a confidential relationship is found to exist, the one in whom confidence was reposed may be held to a higher standard of disclosure and fairness than in an arm's-length relationship."

In short, the plaintiff asserted that the BSA organizations, and host church, had a relationship of trust and confidence that imposed upon them a "duty to disclose" the general danger of child molestation inherent in scouting. Their failure to do so amounted to constructive fraud.

The court concluded that a confidential relationship existed between the plaintiff and the BSA organizations and host church, based on four factors:

(1) he was a minor child when he was allegedly abused; (2) he was an active and regular participant in camping trips and other activities provided through a church-sponsored organization; (3) he was strongly encouraged by the church to participate in those camping trips and activities; and (4) the church allegedly knew of the specific danger that the scoutmaster posed. Also, the church taught the plaintiff to respect and trust his church and scout youth leaders. And presumably, his parents trusted the scoutmaster enough, in his role as a church and scout leader, to allow him to take the plaintiff on overnight camping trips and individual day trips. On these scouting trips, the parents entrusted the perpetrator to ensure their son's safety and act as his caretaker.

What This Means For Churches:

This case is important for two reasons. First, the court insinuated that the church and BSA organizations could be liable for a 50-year-old case of child molestation because at, or prior to, the time the victim became involved in scouting they failed to "disclose" to him, and more generally to the public, that child molestation by scoutmasters was a risk that parents should consider before allowing their children to participate in scouting. This extraordinary conclusion will expose youth-serving charities to liability for their actions decades ago based on modern-day standards of proper care.

Second, the court concluded that the pastor could be viewed as an "agent" of the national and regional BSA organizations, and as a result, the father's disclosure to a church official that his son had been molested by the same scoutmaster who molested the plaintiff could be imputed to the BSA organizations, even though they lacked any direct knowledge of the incident. *Doe v. Presiding Bishop*, 2012 WL 3782454 (D. Idaho 2012). ■



Tax Calendar

Churches and Ministers Should Be Aware of the Following
Deadlines in November and December of 2013

Note: If a date listed below for filing a return or making a tax payment falls on a Saturday, Sunday, or legal holiday (either national or statewide in a state where the return is required to be filed), the return or tax payment is due on the following business day.

Semiweekly requirements

- If your church or organization reported withheld taxes of **more than \$50,000** during the most recent lookback period (for 2013 the lookback period is July 1, 2011, through June 30, 2012), then the withheld payroll taxes are deposited semiweekly. This means that for paydays falling on Wednesday, Thursday, or Friday, the payroll taxes must be deposited on or by the following Wednesday. For all other paydays, the payroll taxes must be deposited on the Friday following the payday. Note further that large employers having withheld taxes of \$100,000 or more at the end of any day must deposit the taxes by the next banking day. The deposit days are based on the timing of the employer's payroll. Withheld taxes include federal income taxes withheld from employee wages, the employee's share of Social Security and Medicare taxes, and the employer's share of Social Security and Medicare taxes.

Monthly requirements

- If your church or organization reported withheld taxes of **\$50,000 or less** during the most recent lookback period (for 2013 the lookback period is July 1, 2011, through June 30, 2012), then withheld payroll taxes are deposited monthly. Monthly deposits are due by the 15th day of the following month. Note, however, that if withheld taxes are less than \$2,500 at the end of any calendar quarter (March 31, June 30, September 30, or December 31), the church need not deposit the taxes. Instead, it can pay

the total withheld taxes directly to the IRS with its quarterly Form 941. Withheld taxes include federal income taxes withheld from employee wages, the employee's share of Social Security and Medicare taxes, and the employer's share of Social Security and Medicare taxes.

Note: You must use electronic funds transfer to make all federal employment tax deposits. Generally, electronic fund transfers are made using the Electronic Federal Tax Payment System (EFTPS). If you do not want to use EFTPS, you can arrange for your tax professional, financial institution, or payroll service to make deposits on your behalf. If you fail to make a timely deposit, you may be subject to a 10-percent failure-to-deposit penalty. EFTPS is a free service provided by the Department of the Treasury. For more information about EFTPS, visit the EFTPS website, eftps.gov.

November 10

- Churches having nonminister employees (or one or more ministers who report their federal income taxes as employees and who have elected voluntary withholding) may file their employer's quarterly federal tax return (Form 941) by this date instead of October 31 if all taxes for the third calendar quarter have been deposited in full and on time.

December 15

- Complete all year-end transactions to be sure that they are reportable on your income tax return.
- A church must make quarterly estimated tax payments if it expects an unrelated business income tax liability for the year to be \$500 or more. Use IRS Form 990-W to figure your estimated taxes. Quarterly estimated tax payments of one-fourth of the total tax liability are due by April 15, June 15, September 15, and December 15, 2013, for churches on

a calendar-year basis. Deposit quarterly tax payments electronically using the EFTPS system.

December 31

- Churches must designate a portion of each minister's compensation as a housing allowance by this date in order for ministers who own or rent their homes to receive the full benefit of a housing allowance exclusion for calendar year 2014. The designation should be adopted during a regular or special meeting of the church board, and should be contained in the written minutes of the meeting.

- Churches should designate a parsonage allowance for any minister who lives in a parsonage and who is expected to pay some of the expenses of maintaining the parsonage (e.g., utilities, furnishings, repairs, improvements, yard care). For sample housing and parsonage allowance resolutions, see chapter 6 in Richard Hammar's annual *Church and Clergy Tax Guide* (YourChurchResources.com).

- Donors must *deliver* checks on or by this date in order to claim a charitable contribution deduction for 2013. Checks that are placed in the church offering during the first worship service in 2014 *will not qualify for a charitable contribution deduction in 2013*, even if the check is predated to 2013 or was actually written in 2013. However, checks that are written, mailed, and postmarked in 2013 will be deductible in 2013 though they are not received by a church until 2014.

- Your marital status on this date determines your filing status for the year.

- If you have a minister or lay worker who is treated as self-employed for federal income tax reporting purposes, but who you would like to reclassify as an employee, the ideal time to make the change is on January 1 of the new year. ■