

The pastor and civil law

This paper was delivered November 8, 2006 at the New Pastors' Workshop, hosted by St Mary's Seminary and University, Baltimore.

This talk was much harder for me, a non-lawyer, to construct than was my first talk on canon law.

I am extremely grateful to James Coriden, who is both a civil and a canon lawyer, for the concepts and the structure—even for the words--of what I will say to you. I recommend to you Father Coriden's monograph *The Parish in Catholic Tradition* (Paulist Press), which has served as the basis for much of this talk.

At our first meeting, we considered the parish as a household and the pastor as a householder. We also considered the parish as an office and the pastor as an officeholder who, by virtue of his sacred ordination and his office, participates in the *munera sacra* and the *potestas sacra* of his bishop, of the Episcopal College, and of the Church of Christ.

Our civil governments don't get concerned with these niceties of theology and polity. Whereas the constitutional guarantee of free exercise of religion allows us to construct our churches and to pursue our religious goals, the interpretative principle of separation of church and state does even more. This not only forbids an established church; it also requires government to remain largely agnostic to the truth-claims of religions, and to stay largely uninvolved in the practices of religions.

I say "largely" because there are times when governments must not remain agnostic to truth-claims, and when governments cannot be idle in the face of certain religious practices.

For example:

- If a religious prophet were to claim that God is so angry with gay black Muslims that God regards them as having no claims upon life or liberty, perhaps the government could get involved.
- If a church were to establish a practice of dancing with rattlesnakes in order to prove the faith of its members, the government could prohibit this.
- Some cases get to be a bit dicier—such as the *Oregon vs. Smith* case, where the court stated that anti-hallucinogenic laws are laws of general applicability, and apply to sacramental use of peyote just as much as to recreational use of the drug.

The issue at the heart of all cases of government involvement in church doctrine and practice is the intersection of the common good and of public order.

- The common good is the human good lived in common. It looks to the well-being of a community. GS26 defines it as:

The sum of those conditions of social life which allow social groups and their individual members relatively thorough and ready access to their own fulfillment. . .

- Whereas the common good looks to the well-being of a community, public order looks to its basic being: without this order, community chaos or destruction will result.

While the balance is never easy, the one thing that must always be avoided is what Alan Donegan has called the Caiaphas Principle: hanging out someone to dry for the sake of institutional advantage, and calling it “the common good.”

While the civil authority usually keeps a distance from the internal affairs of churches, public order requires that, (a) for the safety of its members *ad intra*, and (b) for the financial and juridical relationship of church structures with people and with corporations and with the government *ad extra*, churches and church associations have to be able to give an account of themselves in the public square, in public terms, offering public reasons for their being and action.

Of the entire range of relationships of parishes with the civil law, I would like to consider the following, in which the pastor’s role is pivotal:

1. The parish and ownership of goods, including real estate
2. The parish and tax obligations
3. The parish and legal liabilities
4. The parish and labor law

I. The parish and ownership of goods, including real estate

State laws govern the way churches organize themselves to become subjects of rights and obligations under civil law. The way that this is done varies from state to state, and is also the result of choices made when a diocese or parish was established.

A. Forms for holding property

With regard to the *holding* of property, there are two basic forms of civil organization:

1. The parish property is part of a unified diocesan property-holding arrangement.

2. the parish holds its own property.

The form in which *the diocese* holds the parish property has the following sub-forms:

- A. “corporation sole” whereby the diocesan bishop is himself an incorporated office, and holds title to all the property of all the parishes in the diocese
- B. “nonprofit religious corporation” that holds all the parish property in the diocese, with the bishop as the only member of the corporation. This differs from the corporation sole in that the “nonprofit corporation” is a corporate entity with one member, whereas the corporation sole is identified with the bishop himself.
- C. “charitable trust,” that holds all the parish properties, with the bishop as the sole trustee, holding the parish property in trust for the beneficiaries of these goods, namely, the parishioners of a particular parish
- D. “fee simple,” where the bishop holds all the property in his own name.

The form in which *the parish holds its own property* has the following sub-forms:

- A. “separate membership corporation” This is the so-called New York model and the one most prevalent in the eastern US. In this form, the bishop, vicar general, pastor and two laypersons are members of the corporation. Typically no significant action can take place without the agreement of bishop and/or vicar general
- B. separately incorporated not-for-profit religious corporation
- C. A charitable trust—where the pastor –not the bishop -- is the sole trustee, administering the trust for the benefit of the parishioners
- D. An unincorporated religious corporation which, according to the statutes of a particular state, can hold and control property.

Dioceses need to get serious about re-thinking their civil organizational structure, particularly in these litigious days of sex-abuse settlements.

Recently the form of organization of property became a pivotal point in a bankruptcy hearing in the appellate court of a northwestern state. The lower court, arguing from an organizational model of the corporation sole, held that all parish properties of an entire diocese should be considered as available to settle sexual abuse cases that happened within the diocese. On appeal, the court determined that, although it appeared to be a corporation sole, the diocese was in actuality a charitable trust, in which the bishop administered goods of a particular parish for the benefit of the members of that particular parish.

B. Issues connected with owning real estate

The control of land-use is one of the important executive powers of the state. Such control – and issues to which the pastor needs to be attentive—are the following:

1. **Zoning ordinances.** Parishes need to comply with local zoning ordinances, or request variances from appropriate municipal, state or federal agencies
2. **Land use regulations** Municipalities, in the interest of orderly development, water availability and hygiene often have an array of rules, to which all land-developers, including pastors, need to submit
3. **Building codes.** These require pastors to get permits, to maintain construction standards, to have inspections upon the completion of work.
4. **A constellation of other requirements, such as:**
 - a. compliance with barrier-free construction, in accord with the Americans with Disabilities Act
 - b. Adhering to special designations of property and property management as a result of landmark designations for cultural or historical reasons
 - c. Following the EPA regulations for new property inspection, for old-property remediation. One of the worst nightmares for a pastor is an underground oil tank that develops a pinhole leak. The EPA and their cousins will be visiting you for years!
 - d. Eminent domain claims of the government, to take private property for public use

→In addition, there are some other concerns connected with property management. I wish to consider but one of these: the leasing of parish property.

Suppose you have a school that is not being used, and you decide to lease it to, say, a day care center.

After you have managed the canonical hurdles (canonically, the bishop needs to give permission for this sort of arrangement, since you are “jeopardizing” parish patrimony) there is a number of civil-law issues that you need to consider:

- The parish will probably be subject to state and federal tax on the lease income, under the rubric of “unrelated business income”
- Repairs to the building, even though different arrangements appear in the lease, may fall to the pastor to get done. This is particularly true of the lessee is slow in doing his or her duty, and repairs are essential to prevent further major damage.
- And, of course, liability and liability insurance remain a major concern....

II. The parish and Tax Obligations

A. Property Taxes

The exemption of churches and church-related properties from property taxes is a nationwide practice which is both historically ancient and constitutionally valid. It reflects the benevolent neutrality on the part of the state toward religions and religious practices.

What about the situation, though, where a church or a religious community is running an assisted living facility—and when this church-run facility is in competition with a privately owned facility on the other side of town? This is the very issue that is being dragged through the courts presently. The Holy Cross community in South Bend is being required by the city to pay taxes. They claim that they should not, since the facility is an extension of their ministry. The city claims that they should. And, in words of Linda Ellerbee, so it goes. . . .

B. Federal Income Taxes

As with property taxes, religious organizations have historically enjoyed exemption from federal income taxes. Such an exemption, however, is not a constitutional right: parishes need to secure and maintain an exemption via Section 501-(c)-(3) of the Internal Revenue Code.

Typically if a parish has secured a federal exemption and has a federal taxpayer id number reflecting this exemption, states will consider the parish exempt from payment of state income taxes as well.

The good news is that the exemption is historical, constitutional and available. The bad news is that there are a series of restrictions required to maintain this tax-exempt status, to which pastors must adhere most strictly. There are two political activities which pastors need to avoid in order to maintain federal tax-exempt status:

1. Lobbying

No “substantial part” of an organization’s activity may involve carrying on propaganda, or attempting to influence legislators.

2. Political Campaigns

--An exempt organization may not participate or intervene on behalf of or in opposition to any candidate for public office.

--While parishes may engage in political activities, they may not endorse one candidate over another.

--They may not make financial contributions, solicit funds, supply mailing lists

--they may not make available facilities for one candidate and not others.

What they can do is as follows:

- they can make facilities available to all candidates
- they can develop voter education sessions
- they can sponsor public forums and debates to which all candidates are invited
- while they are free to criticize public officials, they must remain neutral when it comes to individual candidates.

III The Parish and Legal Liability

Liability is responsibility of a person, a corporation or a group which is legally enforceable.

The legal liability of a parish, and the legal obligation to address this liability, may be found in three chief areas:

- Payment for goods and services received
- Breaches of contract
- Torts and tortuous activity

- Payment of debts is a no-brainer
- Contract breach is more serious business. When employees are terminated in mid-course, when jobs have been contracted and the contract is not honored, when a pastor enters into a “quasi contract” to perform a wedding and then doesn’t, or when a pastor signs a contract which, by diocesan statute, he cannot do, there can be major problems.

As messy as contracts can get, it is in the area of tort claims where things can get really ugly.

A tort is harm committed upon a person or property which may be intentional or unintentional.

-It is in the area of unintentional tort claims where most of the problems are to be found.

Unintentional harm may be the result of a negligent party – e.g., someone did not clean ice from the church steps.

--Or it may simply be the result of accident, with no one responsible for the harm –e.g., a distracted parishioner trips or falls on the church steps.

If a tort claim is made against a parish, there are three questions that need to be investigated:

1. Is the pastor responsible for the harm, either through an action or an omission on his part?

2. Is the parish as a parish as a corporation or the pastor as a chief operating officer to be held liable for the actions or omissions of the parish employee whose action or inaction resulted in the harm done?
 - This is the so-called *respondeat superior* principle –which holds the pastor or parish liable **when the employee is acting or not acting within the scope of his employment**.
 - Thus: when the snow is not shoveled, the superior may be held answerable.
 - But:** if the action is beyond the scope of employment, the pastor very possibly may not be held liable –**unless** it can be shown that he was **negligent** in his basic obligation of supervision. *It is here—in the area of negligence to supervise—that the nasty tort claims against a pastor or bishop or both for an employee’s sexual misconduct are located.*

3. There is a third question that needs to be addressed in tort claim cases: *Does the state hold parishes and other charitable organizations immune from tort claims when the harm to a person occurs while that person is receiving charitable or religious benefit from that organization?*
 - This is called the principle of charitable immunity.
 - An example: A slip and fall on the way out of Mass in New Jersey is covered by the charitable immunity statute. A slip and fall on the way into or out of a church-sponsored bingo game is not.

There is yet another area of tort claim procedures which needs careful scrutiny:
is the parish, at law, an independent juridical entity from the diocese, or – as one examines the civil legal structure and interrelation of parish and diocese, is the parish but a diocesan branch office?

→ Courts have gone both ways on this issue. In our present atmosphere of uncontrolled litigation, it might be just as important to have a wall of separation between diocese and parish in civil law as it is to have a wall of separation between church and state.

When we consider tort claims and the way, in four years’ time, they have cost the Church in America close to two billion dollars, we think that sexual abuse of minors is the only area that needs careful scrutiny. I would like to suggest one other area, in which harm is more regularly done and for which parishes and dioceses are legally liable. This is the area of **copyright infringement**.

Copyrights protect intellectual and artistic property; violation of copyrights carries severe legal penalties.

I have handouts for you on copyright law, as well as on Catholic music publishers' permissions to reproduce lyrics and music.

In all cases:

1. Don't mess with copyright laws! The Archdiocese of Chicago did, and it cost them millions of dollars.
2. Be ready and willing to pay whatever fee necessary for the permissions to reproduce music. Sometimes there is no fee; sometimes it is only twenty dollars per booklet. The time and trouble to abide by copyright rules are less inconvenient than legal battles over copyright infringement.

IV Finally: let's consider the pastor and employment law

I wish to consider eight of the more relevant regulations involving employment in parishes.

1. The **IRS Code** requires employers—including churches—to withhold income taxes and social security taxes. Make certain to do this; check with local tax experts on the regulations in your own states.
2. **The Federal Civil Rights Act of 1964** –forbids discrimination in employment that is based on *race, color, religion, gender, or national origin*.
BUT:
 1. **it exempts religious employers from discrimination based on religion**
 2. **It will allow religious employers to hire or fire not only because of a professed religious affiliation, but also because of actual religious practice.**
3. **The Age Discrimination Employment Act of 1975 and the Americans with Disabilities Act of 1990** also bind parishes as employers, and prohibit discrimination in hiring or maintaining employees based *solely* on the fact of their age or of their disability.
4. **The Equal Pay Act** requires employers to offer equal pay for equal work, regardless of the employee's gender.
5. **The National Labor Relations Act of 1935** assures employees the right to form or join a union and to participate in collective bargaining.

Please note that, in terms of the *Federal* Labor Relations Act, it is not all that clear that teachers in parish schools can claim the right to form unions.

In 1979 the Supreme Court held that teachers in church-run schools are not covered by the Act—since this might compromise a church’s First Amendment rights by requiring the government to inquire into the delicate relationship between the schools and their sponsoring churches. *State* regulations, however, are very often not so generous to parishes.

6. **The Fair Labor Standards Act of 1935** protects workers from excessive hours and sub-standard wages
7. **The Immigration Reform and Control Act of 1986** requires employers to verify employment eligibility. But it also bans discrimination against documented non-citizens by employers of four or more workers. *And there is no religious exemption for this regulatory act.*
8. **The Occupational Safety and Health Act of 1970** requires employers to maintain safe, health-protected workplaces. Chances are, however, that this act does not affect a parish, in that the regulation, on its face, is directed at employers engaged in interstate commerce.

The civil law can be a friend, and sometimes a good friend.

- Civil law extends a high level of autonomy to Catholic parishes
- It generally allows canonical rules and structures to play a major role in settling disputes
- It often exempts parishes from specific, onerous regulatory demands.

Even so: civil law can be a tough friend, holding a parish’s – and a pastor’s – feet to the fire for the sake of community justice and the public good.

As pastors, as *parochi* – householders in an extended household which is a parish, a *par-oikia*—you and I need to know well the Canon Law. As participants within a larger pluralistic community, you and I need to be knowledgeable and attentive to the civil law as well.

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