Legal Counsel *for* Churches

July | 2022

Corporate Governance for Churches & Their Leaders

M SMITH | LAW PLLC

Private Emails May Become Public Evidence

It can be a nightmare scenario when an embarrassing internal email among church officials become public. This situation is made worst when the threat of a lawsuit is underway.

Emails can be an effective way to communicate. Emails often improve efficiency among parties. Used the wrong way, emails can become a liability.

Emails often do not give the receiver the insight of any off-line facts surrounding the message. The nuances of emotions and body language are hard to convey with an email. As a result, the messages often lacks context.

Some email messages could have legal implications for the parties. Contract negotiations can be splintered if the terms are provided in disjointed messages. Depending on the situation, emails can obligate the church to future performance. For these reasons, we often advise clients to emphasize to their staffs the importance of good email habits.

Here are some common situations involving emails that could present liability.

Humor: Sometimes, colleagues like to lighten the day with humor. Emails that are meant to be humorous could be misunderstood by the message recipient.

An email does not always stop with the first recipient. The receiver may forward the message to others. The person to whom the message was shared may not fully consider the inside gag. The intended joke could be taken wrongly by someone else.

The sender should consider all potential audiences when writing email messages. This may help avoid the unintended consequences of creating a legal claim. This is especially important to avoid claims such as a hostile work environment, gender bias, or other workplace allegations.

Disputes: Churches risk facing disagreements like any other organizations. If the controversy is serious enough, a lawsuit may ensue. In a legal action, the parties may request evidence from each other in the Discovery process. The evidence may include all emails, memos, minutes, and documents related to the dispute.

When it becomes obvious that a legal claim is likely, church leaders should be careful to guard what is transmitted via email. There are two reasons for this caution.

First, including unnecessary recipients on an email could harm the church's legal case. Conversations between a church and its attorney are often cloaked with the privilege of confidentiality. This privilege can be inadvertently waived with an errant email.

The second reason for caution is the content of some emails may be discovered and used as evidence in court. The church leaders should put themselves in the shoes of an opposing party and wonder how the message might be misconstrued.

Privacy: Churches provide private services to individuals during sensitive moments in their lives. Some of the information that may be transmitted among church officials could be confidential. Extra care should be taken with emails that contain sensitive data.

Church leaders should address the confidentiality of emails from at least two angles. First, the church's information technology provider should be tasked to ensure emails are not vulnerable to intrusions. Failure here could lead a legal claim for negligence.

The second issue church leaders should consider is ensuring staff and volunteers are trained. The training could include the kinds of information prohibited for email.

Wrongly used, emails can be a liability to the church. Leaders should ensure everyone who represents the church understand the importance of good email hygiene to prevent liability and embarrassing situations. ■

FEATURE ARTICLE

M&A Strategy for Churches

It is not uncommon to see for-profit companies use a merger and acquisition (M&A) strategy to grow. These corporations believe combining their organizations with another can lead to greater profits and market share.

It might seem unusual to think about churches in the manner of M&A activity. While not typical, church leaders have a responsibility to consider all possible strategies to improve their corporate performance.

In the October 2019 edition of *Legal Counsel for Churches*, we explored the idea of church mergers. In this edition, we add acquisition to the church strategy toolkit.

Churches, like all institutions, have limited capabilities. The limitations can be with its resources, regulatory restrictions, management capabilities, or market pressures. The leaders of churches have a fundamental decision to make. On one hand they can ignore market needs and opportunities. The other choice is to seek ways to expand their church's powers.

Some companies try to build internal systems to fill in the missing pieces. Other firms make up for these deficiencies by acquiring companies that fill important gaps.

Here's a couple of examples to help make this point. These are hypothetical situations to stir your imagination.

Church A Buys a Construction Company

Church A has a corporate strategy to help its members ease the burden of high utility bills. The church leaders recognize that members who have strained budgets are more subject to stress-related illnesses and less capable to be good financial stewards towards the church.

Church A decided to purchase a local construction company that would perform home improvement work for members of the community. The profits from the business are used for expansion and scaling the business. Some church members work part-time for the company for employment and skills development.

Church B Acquires a Grocery Store

Church B sees a need to help the community with affordable, healthy foods. Many of the church's members reside in a food desert. Most of what's available are fast foods restaurants. There has been a spike in high blood pressure, diabetes, and other health problems that exceed state averages. The Church sought a way to address these conditions and provide local employment.

Church B acquired a controlling interest in a grocery store that was in a saturated market and had declining market share. The good price the church negotiated led to sufficient resources to relocate the store to the community. The store sponsors healthy eating workshops and cooking classes for residents. The profits are reinvested in the store's operations for further expansions.

These are examples of how a church may expand its influence in the community through an acquisition strategy. The first step is to think critically about the risk appetite of church leaders to explore a new model for revenue and community service. This conversation can lead to a tactical plan on how to benefit the church and community.

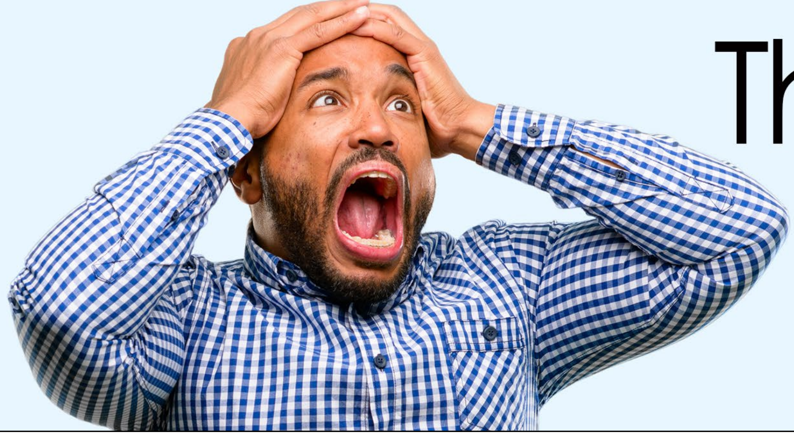
The next task is to be clear about what church leaders hope to accomplish. A goal to increase revenue for ministry can feel different from a focus on community service only. This exercise requires an explorative dialog to ensure all members of the leadership consent to the direction and purpose of a possible acquisition.

After church leaders agree on the strategy, the church governing board should conduct a search of possible acquisition targets. A potential source for identifying available businesses is the services of a business broker. The broker will often have a list of business owners who are interested in selling a portion or 100% their companies.

Negotiating an acquisition can be a complicated transaction. There are many factors to consider. It would be advisable for church leaders to retain experienced consultants, attorneys, tax advisors, and accountants to help guide the conversation. Church leaders should be cautious with the monetary aspect, legal terms, and risks of buying a business.

Some acquisitions include all cash deals. Others involve bank lending or owner-financing. Church leaders should determine the deal size they are willing to entertain before considering a potential transaction.

A business acquisition can be a productive way for a church to increase its revenue and serve the community. Church leaders should approach this strategy carefully to ensure it achieves its expected results. ■



The Moment

You realized you had not thought of all the risks.

M SMITH | LAW PLLC

The Right Level of Church Capital

Most leaders face the question of capital adequacy for their institutions. Having insufficient capital can empower or handicap an organization's plans.

This is a conversation around the amount of reserves a church should have on hand. In this article, we share a governance perspective on the dialog around capital.

Capital is the church's savings account for a rainy day. Capital is important because it provides a financial cushion for future perils. Officials who focus on building capital recognize the need to be prepared for what may come.

Capital is defined as the net assets of a church. Capital is calculated by subtracting the total liabilities from total assets. The difference is the church's net financial value.

Knowing the capital of a church is important for strategic reasons. Churches face some of the same uncertainties as other organizations. Church leaders who are involved in strategic planning should have a firm grasp on the organization's capital standings. To make prudent decisions, leaders must put a financial valuation on each risk and set aside reserves should the threat happen.

Capital cushions the church against foreseeable risks. This stash of reserves prepares the ministry for disruptions in its revenues from economic, weather, or public health events. Today's inflation, supply-chain disruptions, and market uncertainties present risks church leaders should consider. Risks threaten to eat away at the church's capital.

Church leaders also are faced with opportunities as well. Opportunities offer the prospects for the church to prosper in some way. Endeavors to expand the ministry, create new programs, and improve infrastructure often require financial commitments.

The key to mitigate risks and exploit opportunities, is knowing how much capital to have on hand. Sufficient capital improves the church's resilience to disruptions. Excess capital provides room to invest in new ways to advance the ministry.

Church leaders should determine how much capital is enough. To make this decision, officials must calculate three values. First, determine how much capital is required to meet current legal obligations. This may come about if the church has a bank loan with a minimum liquidity covenant. This restriction obligates the church to keep a certain amount of capital set aside as collateral for the loan.

Second, the monetary value of the likely risks should be factored into the equation. This analysis involved looking at the community and the church membership to find where weaknesses exist. For instance, a community that is heavily employed by a single company presents a concentration risk to the church. If that employer is operating in a declining industry exposed to market disruptions, the blow back on the church could be significant. The church leaders may put aside reserves for the possibility many of their members could face financial difficulties.

Finally, setting aside a budget for prospective opportunities becomes the last consideration. This factor materializes after leaders have a strategic conversation in a planning process. Here, the leaders identify ways to expand the ministry, assign a dollar value to each venture, and plan financial allocations towards the goals.

The capital adequacy calculation should be reviewed periodically. Doing so helps church leaders stay abreast of emerging risks and opportunities.

Church leaders have a fiduciary duty to plan. Knowing how much capital should be set aside for the future is an important responsibility. As officials think ahead for the traditional fall planning sessions, capital adequacy should be on the agenda. ■

Legal Counsel for Churches is a service provided by M Smith Law, PLLC for members of the religious community. This periodical is intended to help churches and their officials become better prepared to address important legal and governance issues. We hope you find *Legal Counsel for Churches* a valuable resource. For each issue, we try to raise relevant issues and offer some practical alternatives. We welcome your comments and input.

Post Office Box 27461, Raleigh, North Carolina 27611 919.362.0744 (*voice*) 888-321.9047 (*fax*) maurice.smith@msmithlaw.us