

Churches need a policy to deal with subpoenas

By David Middlebrook and Robert W. Rucker

You are sitting in your office at the church trying to deal with the church's broken copy machine or finding more volunteers for Sunday school classes, and the receptionist tells you that there is a deputy constable in the front office who wants to serve the custodian of records of the church or the senior pastor with a subpoena. In this increasingly common occurrence, what do you do?

When the church itself has been sued for an allegation of wrongful conduct, it is a party to a lawsuit and therefore it's predictable that certain employees of the church will be called to court or asked to produce certain documents.

What about situations where the church is not a party to the lawsuit and its employees are being subpoenaed as potential witnesses? The most common situations where this occurs are in family law disputes, such as a divorce or child-custody, and criminal trials.

Ultimately when and how to give character testimony is not a legal issue, it is a matter of personal conscience.

As a preliminary matter, until and unless the church employee has been served with a subpoena, that employee is not required to come to court. In most jurisdictions a subpoena is not the same as a search or arrest warrant. The process server cannot enter restricted or locked areas without permission of the property owner. The church witness can choose to simply not come out of his office to accept the subpoena.

Depending upon how determined the process server is, there could be a "cat-and-mouse" situation where the server tries to catch the witness in the parking lot or while he is at lunch. We have also had church clients who were served with papers while they are in a public setting in an attempt to embarrass them.

Public perception issue

Many of our church clients are worried about the possible public perception if it appears they are trying to avoid

being served. As the client's attorneys we have often been able to work out an arrangement to accept service on behalf of the client to avoid any potential misconception by them being served with papers in public. It is also possible to make an appointment with the process server in order to have control over the circumstances under which the papers are served.

If a church wishes to prevent its employee from being called to court, a typical court filing is a "motion to quash." This motion asks the judge to make a ruling that the witness is not required to testify at the trial or to produce requested documents. The usual reason given for filing such a motion is because the information is confidential or privileged. It is also possible to argue that the subpoena is an inconvenience to the church. In such cases the church would usually need to show something more, such as that the information sought from the church is available from other sources or is not really relevant to the case.

Many judges will conduct in camera hearings in their chambers and not in open court to decide if the information sought is privileged. Many churches are worried about negative public perception if they resist coming to a particular trial. The church may need to issue statements to educate its members or the public about its responsibility to protect privileged and confidential information. We have found that most people are very receptive and understanding when a church seeks to protect its privileged materials.

Most common instances

The most common instances in which a church employee is called as a witness are:

1. In family law cases, church employees are often called as witnesses to produce donor records to establish if monies that were claimed by one spouse or the other to have been donated were really given or what the pattern of giving has been. This issue is usually related to helping the court set child-support payments.

Some spouses are accused of hiding income by claiming they made donations to the church when they did not. Some spouses begin to give larger than normal donations on the eve of a divorce or child-support hearing in order to try and claim such monies should not be considered as part of their discretionary income. >>

2. In criminal and family law cases a list of the church members is sometimes sought. This is usually to create a list of names for a party's investigators to try and contact as potential witnesses to a party's habits, lifestyle, or as eye-witnesses to certain events.

Unlike a regular business a church is protected by the First Amendment to the United States Constitution and depending upon the context, asking for the member list is an infringement upon the church's and those members' freedom to worship and freedom of association.

3. In criminal and family cases church employees are sometimes called as fact witnesses such as in child abuse and neglect cases to substantiate that the employee saw evidence of the abuse or neglect or that a certain person confessed to the abuse. Every jurisdiction recognizes some form of clergy privilege where information learned in a pastoral counseling session cannot be disclosed without the permission of the person who was being counseled.

However, many jurisdictions have exceptions to that privilege, which include cases of child abuse or neglect. Another common exception is if the conversation relates to an ongoing crime or fraud such as when a person confesses he is about to do harm to another person.

4. In all types of cases a church employee might be called as a character witness. You would think that someone who wanted that kind of assistance from the church would be kind enough to alert the staff that a subpoena is coming, but more often than not, the subpoena arrives without any prior warning. This situation often presents an ethical or moral dilemma for the church employee.

While they may not have ever seen the party seeking their testimony abuse a child or steal money or do whatever they are accused of doing, common sense tells us that the church staff may only see the person in question once or twice a week at church when they are presumably on their best behavior and have no idea what that

person is like at home or work.

Ultimately when and how to give character testimony is not a legal issue, it is a matter of personal conscience. In many jurisdictions when clergy act as character witnesses, the pastor-penitent privilege is considered waived and anything that was discussed with that person will now be available as testimony.

Seek written waiver

One way to protect church employees from potential criticism or liability for producing records that relate to a particular member or to provide testimony is to seek a written waiver from that party or their attorney. If the person does not want the church employee to provide the records or testimony, then they or their attorney should file appropriate pleadings to get a ruling on the issue.

As a matter of general principal, no church employee should produce church records or divulge confidential information without a written waiver from the party who is affected by the disclosure, or a ruling from the court requiring such production or testimony. Depending upon what is at stake some churches have even refused to provide testimony or records after being directed to do so by a trial court and sought protection from a higher appellate court.

In any event, it is a good idea to have a policy regarding subpoenas which includes having a designated church custodian of records and making sure anyone served with a subpoena immediately informs a designated staff person.



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