

Legal Resource Manual
for
Presbyterian Church (U.S.A.)
Councils and Churches



Fourth edition (2020)

Important Disclaimer

While this Manual is provided in the hope it will assist you generally in answering questions, the Office of Legal Services is not engaged in rendering legal, accounting, or other professional services to you. If legal advice or other expert assistance is required, the services of a competent professional advisor should be sought. Indeed, before relying on information contained in this Manual or any resource, including Web sites, please consult with an attorney or other professional advisor licensed in your state.

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Introduction

The Office of Legal Services performs work for the Presbyterian Mission Agency, the Office of the General Assembly, the Administrative Services Group, the ministry divisions, and other corporations and work areas at the General Assembly level. These are our clients.

Over the years we have also provided general guidance to councils and churches of the Presbyterian Church (U.S.A.). This fourth edition Manual is a compilation of some of the advice and resources we have shared over the years. Our first three editions were well received and well used. We trust the same will be true for this Manual.

The law is far-ranging in modern American society. This Manual does not cover every topic. Let us know if there are additional resources or changes you would like to see in future publications. Moreover, let us know if you have resources or articles to share. Some of our very best materials have been provided to us by churches, presbyteries, and synods.

The Office of Legal Services sincerely appreciates the contributions and work of many outside authors. Contributors to this Manual include colleagues from churches, councils, and other General Assembly-level offices and corporations. Legal counsel from other denominations also contributed to this Manual. We especially thank the Legal Department of the General Council of Finance and Administration of The United Methodist Church. This Manual is, in part, based on the very successful legal manual published by that office.

Finally, be certain to consult your local attorney for legal advice and expert assistance. While the information in this Legal Resource Manual should be a helpful guide, it cannot substitute for your local counsel familiar with the law and facts of your particular state and situation. The laws, of course, continue to change. Your local counsel will ensure the current law is applied to your needs.

Sincere regards,

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Section I – Basic Organization of the Presbyterian Church (U.S.A.)

The Presbyterian Church (U.S.A.) is a body of Reformed Christians who have agreed to conduct their worship and other religious activities in conformity with the then current version of the Presbyterian Church (U.S.A.) Constitution. The Constitution consists of the *Book of Confessions* (Part I) and the *Book of Order* (Part II). The *Book of Confessions* contains twelve theological statements developed over the church's history. The *Book of Order* includes The Foundations of Presbyterian Polity, the Form of Government, the Directory for Worship, and the Rules of Discipline.

The Form of Government sets forth the relationships among the various elements that comprise the church. Central to the organizational structure of the Presbyterian Church (U.S.A.) is the concept of councils of which there are four types:

- sessions of particular churches
- presbyteries
- synods
- General Assembly

The Presbyterian Church (U.S.A.) is governed by these representative bodies composed of presbyters, both ruling elders and teaching elders. G-3.0101. The session of a particular church consists of the pastor, associate pastors, and ruling elders in active service. G-3.0201. The presbytery consists of all the churches (represented by ruling elders) and teaching elders within a certain district. G-3.0301. A synod consists of at least three presbyteries within a specific geographic region and is composed of commissioners elected by the presbyteries. G-3.0401. The General Assembly is a council of the whole church and consists of equal numbers of ruling elder and teaching elder commissioners elected from each presbytery. G-3.0501.

Each council has particular responsibilities and powers. These are set out in the Form of Government: Sessions G-3.0201, Presbyteries G-3.0301, Synods G-3.0401, and the General Assembly G-3.0501. Our polity is presbyterial — as distinguished from hierarchal, episcopal, or congregational. As we explain our structure, we must not oversimplify the essential detail of our presbyterian polity.

A very important concept for this Legal Resource Manual and within the life of the Presbyterian Church (U.S.A.) is found at G-3.0102: “Councils of this church have only ecclesiastical jurisdiction for the purpose of serving Jesus Christ and declaring and obeying his will in relation to truth and service, order and discipline.” The corollary to this principle is that civil governments and courts must not assert ecclesiastical jurisdiction. This principle is embodied in the First Amendment to the United States Constitution and the religion clauses found in the various state constitutions.

Thus, neither the Presbyterian Church (U.S.A.) nor its councils should be thought of as civil jural entities with legal capacities and attributes. Their fundamental ecclesiastical nature, relationships, duties, and responsibilities are established by the Presbyterian Church (U.S.A.) Constitution — not the civil law. The *Book of Order* does direct the particular churches (G-4.0101) and the higher councils (G-4.0101) to cause a corporation to be formed whenever permitted by civil law. This provision is not understood to incorporate the ecclesiastical council but, instead, to create a corporation to perform the limited civil law functions necessary within the life of the church (e.g., holding title to real estate, entering into contracts). Of course, all of these corporations operate within the applicable civil law and the strictures of the Presbyterian Church (U.S.A.) Constitution. These corporations are civil jural entities.

Section 2 – Property

This Section covers a wide variety of property matters in a general manner. It begins with a discussion of Presbyterian Church (U.S.A.) property provisions. These are found in Chapter **Four** of the *Book of Order*, The Church Civil Authority.

Remember: Almost all property matters are governed by state law. An attorney familiar with your state’s property law should be consulted on property issues and matters.

A. The Presbyterian Church (U.S.A.) and Its Property

The *Book of Order* Chapter Four is relatively brief, but it sets out very important provisions in the life of the Presbyterian Church (U.S.A.). These property provisions include:

- Property as a Tool for Mission G-4.0201
- Decisions Concerning Property G.4.0202
- Church Property Held in Trust G-4.0203
- Property Used Contrary to Constitution G-4.0204
- Property of a Dissolved or Extinct Congregation G-4.0205
- Selling, Encumbering or Leasing Church Property G-4.0206
- Property of a Congregation in Schism G-4.0207

Chapter Four sets forth the terms by which the church will act and be bound at some of the most challenging and demanding times. In addition to the discussion set out immediately below, there is an Advisory Opinion “The Trust Clause and Gracious Separation: Implemented the Trust Clause for the Unity of the Church,” which councils may want to review for further information (*See* Appendix A).

1. Presbyterian Church (U.S.A.) Property Trust Clause (G-4.0203)

All property held by or for a congregation, a presbytery, a synod, the General Assembly, or the Presbyterian Church (U.S.A.), whether title is lodged in a corporation, a trustee or trustees, or an unincorporated association, and whether the property is used in programs of a congregation or of a higher council or retained for the production of income, is held in trust nevertheless for the use and benefit of the Presbyterian Church (U.S.A.).

This clause is central to Chapter **Four** and, in many respects, the life of the Presbyterian Church (U.S.A.). It establishes, as all Presbyterians know, that our church is not congregational in its structure. It is connectional. The governing bodies of the church interrelate with and depend on one another in many ways — defined and established by the Presbyterian Church (U.S.A.) Constitution. While the church does not describe itself as hierarchal, this is the term most civil courts use when ruling on Presbyterian Church property cases. In this context, the civil courts use hierarchal to distinguish our structure from the congregational form. As they view our structure in church property disputes, the civil courts correctly focus on the core principles of Presbyterian government, including F-3.0206: “A higher council shall have the right of review and control over a lower one and shall have power to determine matters of controversy upon reference, complaint, or appeal.” This and other *Book of Order* provisions cause the typical civil court to view the Presbyterian Church as hierarchal concerning church property.

It is strongly advised that all written instruments of conveyance involving property acquired for use as a place of worship or other church activities should contain the following clause or language very similar:

The premises herein conveyed shall be used, kept, and maintained by the grantee for Divine Worship and other purposes of its ministry as a particular church belonging to the Presbytery of _____ (or its legal successors), subject to the provisions of the Constitution of the Presbyterian Church (U.S.A.). The grantee holds the property in trust pursuant to the provisions of the Constitution of the Presbyterian Church (U.S.A.).

2. Absence of Trust Clause

The absence of a trust clause in a conveyance instrument in no way mitigates or compromises the obligation of the particular church or other church agency to the presbytery, other governing body of jurisdiction, or denomination as a whole. Evidence that church property, which has no express trust in the deed, is intended to be used for denominational purposes includes the following:

- The property Trust Clause set out in the Constitution
- Prior conveyances in the chain of title to predecessor local churches or agencies within the Presbyterian Church (U.S.A.) or its predecessor denominations
- Use of the name, customs, or polity of the Presbyterian Church (U.S.A.) or its predecessor denominations in such a way that it becomes known by the community as part of the denomination
- Service by a minister member of presbytery of the Presbyterian Church (U.S.A.) or its predecessors
- Activity within the presbytery, including participation in presbytery meetings, committees, and functions by ministers and elders of the church
- Funding and development assistance from a presbytery or any other PC(USA) or predecessor governing bodies

Where such evidence is present, civil courts have upheld the right of denominational units to succeed to the title on the express or implied trust theories. It is extremely important to understand that, although title to the property may be held by a particular church subject to the provisions of the Constitution, the title is merely held in trust for the denomination by that entity. The title may be taken in the name of the corporation or certain trustees, but the Constitution clearly states that **all such properties are held in trust for the denomination, whether or not a trust clause is included in the instrument of conveyance.**

3. Property Used Contrary to the Constitution, Church in Schism, Church Dissolved

As is evident from this discussion, most church property cases appear in civil court because of difficult and often wrenching disputes. When such disputes arise in a Presbyterian congregation, it is the presbytery that holds central responsibility and power to resolve the matter. If it cannot be successfully resolved, again the presbytery determines how the property will be handled.

G-4.0204 establishes the central principle that when the property of a particular church is not being used in accord with the Constitution, the presbytery shall determine how the property shall be held, used, applied, transferred, or sold. In a similar vein but more specifically, when a particular church is dissolved by the presbytery, the presbytery has all the same powers in regard to the property. G-4.0205. Finally, in a schism at a particular church, the presbytery again holds the central authority. As established by G-4.0207:

- Only the presbytery can sever the relationship with a particular church (G-3.0301 and G-3.0303).
- The presbytery is to effect a reconciliation of the membership or divide the church into two separate PC(USA) churches.
- If this is not possible, the presbytery determines which faction is entitled to the property because the presbytery identifies it as the true church within the PC(USA). This determination does not depend on the majority vote within that church.

These mandates, in conjunction with the property trust and other provisions of the Constitution (G-4.0202), establish a systematic process whereby the Presbyterian Church (U.S.A.) makes decisions about its property.

As noted above, most civil courts ruling on Presbyterian Church property disputes will recognize and enforce the property trust set forth in the Constitution. Others will look to the trust along with a combination of

- the core polity that a higher governing body has the right of review and control over a lower governing body;
- other constitutional provisions setting forth the authority of presbytery;
- the historic interrelationship, support, customs, and functions between a church and other governing bodies.

Courts that consider these factors rule in favor of the presbytery pursuant to the free exercise of religion found in the First Amendment. They respect the polity and structure the Presbyterian Church (U.S.A.) has determined for itself via its Constitution and polity. They do not transform the Presbyterian Church (U.S.A.) into a congregational polity it does not and never has embraced.

Unfortunately, some church property cases do not reflect the free exercise of religion by respecting the polity and structure a church has chosen for itself. Presbytery officials and their legal counsel must be wary of these rulings.

See the subsection below titled **E. Property of a Dissolved or Extinct Church** near the end of this Section. That discussion sets out helpful suggestions about the typical church dissolution, where members have moved away, died, or the like. A sample form is also provided there.

4. Selling, Encumbering, and Leasing Church Property

The *Book of Order* Chapter Four also vests the presbytery with certain powers when the property of a particular church is being sold, mortgaged, encumbered, or leased:

- A particular church shall not sell, mortgage, or encumber its real estate without the written permission of its presbytery. G-4.0206.
- A particular church shall not lease its real estate used for worship or enter into a lease for more than five years on its other real estate without the permission of presbytery. G-4.0206.

Generally, these provisions ensure the presbytery will be involved when a congregation begins a significant real estate project. These may include land acquisition, building expansion, rehabs, sales, and relocations. Because of these provisions in Chapter Four, as well as other provisions vesting the presbytery with authority, most lenders require the presbytery to guarantee loans to the particular churches.

With the inclusion of Section G-4.0206 Selling, Encumbering, or Leasing Church Property, and Section G-4.0208 Exceptions, all of the churches in both former denominations entered the

Presbyterian Church (U.S.A.) in 1983 with the same constitutional provisions for holding, using, and disposing of church property.

The purpose of the requirement that presbytery approve selling, mortgaging, or leasing church property is to enable the presbytery to participate in planning an affordable project for the use of its property and to avoid legal pitfalls. The rules were adopted in 1935, 1941, and 1946 at a time when many churches were facing financial difficulties and have enabled presbyteries to assist congregations that were unaware of what a presbytery could offer.

5. Exceptions

Section G-8.0700, the predecessor to Section G-4.0208, Exceptions, provided a window of opportunity for eight years after June 1983 during which congregations of the former Presbyterian Church in the United States might vote to excuse themselves from that provision of the chapter by which they had not been bound before reunion. Once this exception has been properly adopted and the presbytery notified it is legally binding and runs as long as the congregation or its legal successors exist, or until the congregation votes to accept section G-8.0500 (now G-4.0206). For this reason, to avoid future disputes, it is important that the session of an exempt congregation hold the record of this action with the deeds and other property records, and that presbyteries that have received notice of such actions also hold the record where it will be available when needed.

B. Information about Property Generally and Church Property

1. Special Issues with the Leasing of Church Property

From time to time, local churches and other church organizations will have the opportunity to rent church real property to another organization. There are legal, tax, zoning, and practical issues that should be considered before any leasing decisions are made.

The leasing of church property generally should not result in loss of the church's 501(c)(3) (federal tax-exempt) status. Unless rental activities unrelated to the congregation's exempt purpose (religion) become more than insubstantial, the federal tax exemption should not be affected. Although rentals of church property do potentially give rise to unrelated business income (UBI), Internal Revenue Code Section 513 specifically exempts most rental income from being taxable UBI. A tax professional should be consulted in advance of the lease to determine what income tax liability may be present at the federal and state level.

A more likely area of complication arises at the state and local tax exemption level. One area of concern relates to local real estate property tax exemptions for charitable and religious use property. Check state and local laws and regulations to determine whether there will be a loss of part, or all, of the property tax exemption enjoyed by the church based on its religious use of the property. Many states, counties, or municipalities have statutes that mandate "exclusive religious use" to maintain tax-exempt status for property. Governmental bodies also require periodic reporting and reaffirmation of the tax-exempt use of the property. Failure to report in time can lead to loss of the exemption. Churches are strongly advised to confer with legal counsel familiar with local property tax law regarding these pitfalls. Be sure to open and respond to mail from the county assessor's office as exemptions have been lost for failure to respond in a timely fashion.

Some churches may be in areas where there are zoning restrictions that prohibit rental of the property. For example, a church in a residential area may not be properly zoned to be used as a school or child-care facility. Before lease negotiations, check your property's zoning restrictions and, where desired, consider variances or zoning modifications. Some churches have successfully challenged zoning restrictions under the free exercise of religion. These challenges, however, involve lawsuits, are uncertain, and may take many years for a final decision.

In addition to the above concerns, there are other points that churches should consider when renting property. They are as follows:

- a. Obtaining presbytery’s approval to enter into a lease. See G-4.0206.
- b. The renting/leasing group (tenant) should, if possible, be a not-for-profit organization.
- c. The tenant should further the cultural, civic, spiritual, or educational goals of the church and/or community.
- d. The tenant’s activities should not supersede or interfere with the programs of the church.
- e. The tenant should submit a properly completed application form including an explanation of the structure of the tenant’s organization and of the general uses that it intends for the rental including hours, access desired, and any special needs.
- f. The tenant should sign a lease spelling out the rights and liabilities of the parties.
 - i As part of that lease, there should be an indemnification and a hold harmless agreement in favor of the church. The church should carefully draft the lease in conjunction with its legal counsel so that the church requirements and needs become lease obligations of the tenant.
 - ii It would be wise to state in the lease that the tenant must also follow and comply with all policies of the congregation, including sexual misconduct and child and youth protection policies.
 - iii The term of an Agreement should be short enough (ex. 1 year) to allow periodic evaluation of the rental amount, conduct of the User, and other conditions of the relationship. There should also be provision for cancellation/termination of the Agreement, a list of grounds for cancellation/termination (ex. failure to comply with church policy, failure to timely pay rent), and notifications of intent to terminate the lease (ex. 30-day notice of termination). The Agreement should also describe the procedures Users must follow when vacating the property, including cleaning the premises, removing all of User’s property, and restoring the premises to their original condition.
 - iv The Agreement should obligate the tenant to pay for any damage or disrepair its uses cause to your property and/or its contents. The Agreement should be as simple and clear as possible. The church should make best efforts to determine the appropriate security deposit and rent for the uses of the property if there is a lease. Issues such as increased utility bills, maintenance costs, and other new expenses such as possible property taxes, should be considered when setting the rent or terms of a lease. Language stating that the User accepts the rented property “as is” (except as otherwise expressed in the Agreement) is also recommended.
- g. The tenant should be required, prior to occupancy, to submit a current certificate of insurance from its liability insurer naming the church as an additional insured under that policy. A copy of this certificate should be sent to the church’s insurance agent. If there is a multi-year lease, a new certificate should be submitted each year. The certificate of insurance should show General Liability and Property coverage for use of church space. If the tenant works with minors (ex. Boy Scouts, Girl Scouts, Indian Guides), the tenant’s insurance coverage should include coverage for intentional acts and sexual misconduct. If the tenant is conducting a business such as a day care, the certificate should show Worker’s Compensation Insurance for the employees. It should also show property insurance for the tenant’s contents.

- If the tenant refuses to provide a certificate of insurance or if its coverages do not cover risks related to its use of your property (ex. no coverage for intentional acts or sexual misconduct), your session and your corporate board has a duty to consider whether this is a tenant who should use your property or buildings and the significant risk the tenant may create for your congregation. Having a tenant without insurance or whose insurance will not provide coverage for risks related to its use of your property and buildings potentially puts all your assets at risk. And do not take the tenant's word for it that its insurance is adequate. Send the tenant's certificate of insurance to your insurance agent and ask if it is adequate for coverage for the User's activities and your congregation's risk in hosting the tenant.
- h. Make a written inquiry to your liability insurer to make sure that company provides coverage for any liability resulting from the proposed use or rental and that there will be no premium increase or any exclusion due to the proposed use or rental. You may wish to review the adequacy of your own insurance policy limits considering the new activity. If supplemental or specialized coverages are needed, they should be obtained prior to signing a lease or covenant and occupancy. Ask the agent to send you a binder or endorsement showing coverage is in effect for the new User. The lease or covenant should not be signed until you receive written confirmation. If any insurance claim or lawsuit should arise due to conduct or activities of the User, give immediate written notice to your agent and the insurance company.
 - i. All legal documents should be reviewed and approved by a local attorney.
 - j. The church should review the state and local laws relating to zoning and property tax exemptions prior to executing a lease.
 - k. There should be an inquiry made in writing to the current church's liability insurer to make sure the insurance company provides coverage for any liability resulting from the proposed rental and that there will be no premium increase or any exclusion due to the proposed rental. Any increase that may be incurred can be offset by adjusting the terms of the lease or requiring the tenant to pay for the increase. The church also may wish to review the adequacy of its own insurance policy limits in light of the new activity. If supplemental or specialized coverages are needed, they should be obtained prior to lease execution and property occupancy. Ask the agent to send you a binder or endorsement showing coverage is in effect for the new occupancy. The lease should not be signed until you receive written confirmation. If any insurance claim or lawsuit should arise, give immediate written notice to your agent and the insurance company.
 - l. You may wish to consider adding a lease provision to protect the church in the event of a dispute and litigation. Such a provision may provide that in the event of a lawsuit, the prevailing party shall be entitled to attorney fees and costs.
 - m. The lease should obligate the tenant to pay for any damage or disrepair to the property and/or its contents.
 - n. Beware of any new obligations to comply with state or federal disability statutes because of this rental.
 - o. The lease should be as simple and clear as possible. The church should make best efforts to determine the appropriate rent for the uses of the property involved. Issues such as increased utility bills, maintenance costs, and other new expenses such as possible property taxes, should be considered when setting the rent or terms of the lease. The lease should spell out specifically the space covered by the lease and the uses that are permitted and the time the occupancy is allowed. The tenant should not be allowed to make changes in the building or improvements without the prior written consent of the church. Special zoning, safety, and

- licensing requirements may involve additional costs. The lease should cover the duty of the tenant to comply with zoning, make safety inspections, and obtain licenses and permits. The party required to pay for any improvements to the building should be spelled out in the lease. There should be a clear statement that such improvements become property of the church.
- p. When evaluating a potential tenant, the church should make sure that it is a legitimate organization that can fulfill its obligations under the lease. Special consideration should be given to security when outside individuals are to be given keys and access to the building. The responsibility for locking the building should be fully understood. Alternatively, the church may designate trustees or other persons to open and close the building.
 - q. Typically, the lease terms should be short enough to allow periodic evaluation of the rental amount and other terms. There should also be provision for cancellation of the lease and for prior notifications of intent to terminate the lease.
 - r. All leases and tenant records should be maintained in a separate file and kept locked so they can be quickly and easily accessed when needed.

After the lease is executed, the church must monitor and enforce it. It must be prepared to act appropriately if the tenant is violating the lease. It is unpleasant to evict a tenant but that is one of the negatives landlords should consider. Should problems arise with improper use, breaches of security, nonpayment of rent or other conflicts, it is always best to address them promptly. Written notice on the points of dispute and on the needed resolution of those points should be forwarded to the tenant so that all parties understand the relevant concerns and are aware of the consequences for failure to rectify them.

Through rental of church property, churches can generate additional income and increase their outreach into their communities. Persons involved with the renting organization may become interested enough in the church to become members. If all ramifications, legal and practical, are carefully considered and dealt with in advance, leases can be mutually beneficial.

2. Conveyances of Property

In the simplest terms, a conveyance is the process by which title to real or personal property is transferred from one party (grantor) to another party (grantee). Most conveyances are sales, but other instruments related to the creation of interest in real estate, or which affect the title to property, such as deeds, mortgages, assignments, trusts, and wills, could function as a conveyancing instrument.

Conveyancing is basically a two-step process. **First**, a **contract** for the conveyance is prepared and executed by the parties. This contract should include any particular provisions that either party desires to be part of the agreement. The contract will guide the parties through the conveyancing process. Preprinted form contracts are often used by buyers or sellers of real property. **Remember, the terms in such contracts are negotiable.** Local counsel should be consulted **before** executing a contract of purchase or sale rather than afterward because it is easier to negotiate for particular terms prior to execution of the contract. Indeed, some matters may prove to be nonnegotiable after the contract is executed.

The **second step** of the conveyancing process is the actual delivery of the conveyancing instrument (usually a **deed**) by the grantor and delivery by the grantee to the grantor of the consideration stated in the contract for the conveyance. The buyer must determine the capability and competence of the seller to transfer the property involved prior to paying over the consideration. A complete and thorough examination of the seller's title must be made. A title summary (abstract) may be prepared and examined either by the counsel for the buyer or by an abstract company specializing in title searches and title insurance. Local law may determine

whether an attorney or title company must be used. Title insurance should be considered and used in most cases. Title insurance protects the buyer against losses due to defects in the seller's title.

a. Items of Concern When Property Is Being Conveyed

Where real property is being conveyed to a local church, presbytery efforts should be made to take the property free of any encumbrances such as possibilities of reverter to the donor's heirs if the property is no longer used for church purposes. These steps should be taken because local churches may find it necessary in the future to relocate or to use the property for other purposes. Reverter or other restrictive use clauses could lead to the property reverting to the heirs of the donor with no compensation to the local church. Current deeds should be reviewed for potential restrictive clauses. An attorney familiar with real estate should be consulted about the best course of action if such clauses are included in the deeds to any church property. Some states have laws that extinguish reverter clauses after a certain number of years has passed. Other states enforce such clauses regardless of the elapsed time. Your attorney should check your state's law.

The name for the entity involved in a conveyance should be the legal name of the entity. For example, First Presbyterian Church is incorporated as First Presbyterian Church, Inc. The corporate legal name, First Presbyterian Church, Inc., should be used in the conveyance. See Section 3-Incorporation and Boards of Trustees, A. Requirements of the Presbyterian Church (U.S.A.) Constitution, footnote 1, if it is unclear as to the corporate name or if it is unclear as to whether a corporation has been formed.

b. Contracts for Sale

Contracts for the sale of land must be written and properly executed in order to ensure their enforceability. In the land sale contract, the buyer usually agrees to accept the deed of the grantor (seller) who will warrant the validity of the title. In their simplest form, such purchase agreements must contain the following provisions:

- i Names and addresses of the parties.
- ii An address and complete legal description of the property to be conveyed.
- iii Delivery by the grantor of title documentation. The documentation may take the form of abstracts and title insurance binders containing the agreement of a title insurance company to insure the buyer's interest against seller's defective title, or an attorney's title opinion letter prepared after her research into the state of the title.
- iv The time allowed the buyer to examine the seller's title and the date for the "closing," that is, final conveyance of the deed, and the date of possession.
- v The type of deed to be delivered.
- vi Apportionment of charges—specific clauses relating to the liability of the vendor and buyer to pay the costs incurred for title insurance, surveys, deed preparation, taxes, recording and filing of deed, surtaxes, mortgage costs, and attorney fees. These are often referred to as closing costs.

Implicit in all contracts for the sale of property is the grantor's obligation to convey a marketable title. A marketable title has been defined as one that is:

- i Free of encumbrances — mortgages, liens, easements, and so on.
- ii Free of defects in the chain of conveyances by which the grantor took title, for example, grants of all or part of the property to two different grantees by a previous owner,

creating more than one claim of title, which the buyer might have to litigate in order to establish as the rightful claim. All title should be in fee simple.

Exceptions to the marketability rule are found in cases of zoning restrictions and public rights-of-way or easements. The grantor's obligation to convey a marketable title does not require him or her to convey title free from these restrictions. Any exceptions to the grantor's duty to convey free of encumbrances must be *specifically* noted in the contract even if they are customary exceptions, such as special assessments related to incomplete improvements, installments of assessments not yet due, general taxes for the stated and subsequent years, or zoning and public easement restrictions. Leases and outstanding mortgages also may be included as exceptions. **Generally, a presbytery or church in the role of buyer should include a provision that, "The seller represents that there are no restrictions which would prevent the property from being used as a sanctuary for worship and house for residence."** The contract serves as a navigation chart for the conveyance procedure by stating the operative guidelines of the transaction and setting the stage for closing.

(a) **Purchase of Real Property**

Several practical concerns also will arise in purchases of real property. In the case of buildings, warranties should be obtained in the purchase contract as about soundness of structure, compliance with local building codes, and pest and termite infestations. A professional building inspector should be used to check for structural problems. Environmental issues such as the presence of underground storage tanks, asbestos, mold, and radon accumulations need to be addressed. An environmental audit of the property to be purchased should be obtained. At times, appropriate relief from the burdens of any potential cleanup can be placed in the purchase contract. The seller may be asked to warrant there are no environmental problems, and title insurance may be purchased to insure against any future discovery of problems. Specific provisions also should be made in the real estate contract for the disposition of any fixtures such as refrigerators, ranges, and other equipment. Insurance responsibilities of the seller prior to the closing should be spelled out. Many jurisdictions affix documentary stamps to title documents, and the seller generally assumes the cost of the stamps affixed to the deed. The buyer assumes those costs from the filing of mortgages requiring documentary stamps. Where construction is contemplated, the contract should permit testing to determine whether the prospective site is suitable for the planned building. Zoning requirements should be checked and time to obtain necessary zoning approvals may be provided in the contract as well.

The corporation of the particular church will adopt resolutions that direct and authorize the corporation's board of directors to execute the necessary papers, that is, contracts of sale, deeds, leases, bills of sale, mortgages, and so on. The corporation's board of directors also must adopt any resolutions as necessary or required by local law and the corporation's bylaws. Any written instruments, that is, contracts, deeds, bills of sale, mortgages, and so on, necessary to carry out the action as authorized are to be executed in the name of the corporation by its authorized officers. Upon execution, these instruments are binding and effective as the action of the corporation.

Remember: The congregation must approve the purchase of real estate. G-1.0503. Also, the presbytery must approve if the property is subject to an encumbrance or condition. G-4.0206.

(b) **Zoning**

Some churches may be in areas where there are **zoning restrictions** that would disallow the use of property for a church, school, or child-care facility. **Thus, prior to any purchase being made, zoning restrictions should be checked** and, where desired, variances or zoning modifications may be considered.

(c) **Option Agreements**

Option agreements, while not conveyance instruments, serve to reserve the rights of parties as to future purchases of property. An option is a continuing offer to buy property at a fixed price during a specified period. Other than the initial consideration paid for the option by the option buyer, neither buyer nor seller need make any additional payments over the term of the agreement.

c. **Deeds**

The second stage of the conveyance process requires the delivery of a properly prepared and executed deed from grantor to grantee and payment of any agreed upon consideration for the conveyance of the deed. A written instrument signed by the grantor or his or her duly authorized agent is required for the conveyance of any interest in real property. There are three types of deeds, and they vary as to the degree of protection given to the buyer by the seller:

- i. A "**General Warranty Deed**" contains a covenant of warranty under which the grantor is obligated to protect the property interest granted against lawful claims of ownership from any person whatsoever. This is the deed presbyteries and churches should obtain.
- ii. A "**Special Warranty Deed**" is more limited in that the grantor warrants against defects of the title arising subsequent to his ownership but does not warrant the grantee against claims of persons who acquired their title prior to the grantor's ownership.
- iii. A "**Quitclaim Deed**" is a deed in which the grantor warrants nothing. This deed passes any title, interest, or claim that the grantor may have in the premises but does not profess that the title is valid and does not warrant the grantee against claims of others to the same property.

All deeds conform to a certain pattern that includes the following component parts:

- i. **Names of Parties** — The grantee must be identified with reasonable certainty, or the deed is void. Where bona fide buyers or mortgagees are involved, the person to whom the deed is delivered may have express or implied authority to fill in the name of the grantee. Omission of grantor's name will not void the deed where grantor has signed and delivered the deed.
- ii. **Consideration** — The law does not require consideration for a valid deed and thus a grantor may be bound by a gift of land once a deed has been properly executed and delivered. However, it is the custom to specify at least nominal consideration (ten dollars and other good and valuable considerations) to protect the grantee from claims he or she is under a trust obligation to the grantor and to protect the grantee from adverse actions that allege that the grantee is not a bona fide buyer for value. No matter what consideration is recited, documentary stamps required by taxing authorities on the face of the deed are based on the actual consideration paid.
- iii. **Words of Conveyance** — Certain operative words of conveyance are often used in deeds. Phrases such as "convey and warrant," "grant, bargain, and sell," and "warrant and

defend the title" are common phrases in warranty deeds. "Conveys and quitclaims" and "quitclaims all interest" are normally used in quitclaim deeds. Any words that substantially indicate the intent of the grantor to transfer his or her estate to the grantee are usually deemed sufficient.

iv. Description of Land Conveyed — The primary requirement of such a description is that it be legally sufficient to permit identification of the property to be conveyed. A current survey (within six months) should be required of the seller by the buyer.

v. Exceptions or Reservations — In essence, a description of the property conveyed describes the grant: exceptions or reservations to grants immediately follow this description. Reservations imply retention of such rights as mineral rights in the grantor, or their assignment to the grantor's heirs and assigns.

vi. Quantity of Estate Conveyed — This clause defines the nature of the estate conveyed and the extent of the grantee's ownership of the estate, for example, "To have and to hold Blackacre (grantor's property) in fee simple absolute." By obtaining title in fee simple absolute, buyers gain total control over the property for an unlimited period with unconditional powers to dispose of the property during buyer's lifetime. Although zoning requirements and easements may restrict use of the property in some ways, obtaining title in fee simple gives the buyer maximum latitude in use of the property.
Churches should obtain title in fee simple absolute wherever possible.

vii. Covenants of Title — These are the promises of the grantor about or her title in the land that guarantee the grantee undisturbed possession and the subsequent transferability of the property without adverse claims of right by third parties. These covenants indemnify the grantee in the event that the covenants are breached.

viii. Execution — The signature of the grantor and a seal of acknowledgment before a notary public generally conclude the execution of a deed. The significance of the seal has been diluted in some jurisdictions and has been replaced by the word "seal" or the initials "L.S." However, an acknowledgment is usually a prerequisite to recording a deed; in its absence a deed may not be effective against third parties. Local statutes cover the specific form of acknowledgment or notarization necessary.

The final act of conveyancing is the delivery of the deed. Physical delivery is the best evidence of intent of the grantor to divest herself of dominion and grant control to the grantee. A presumption that an effective delivery has occurred will arise from the grantee's possession of the deed. Also, if the grantor records the deed to the grantee, it is presumed that she or he made effective delivery of the deed to the grantee. The grantor's words and conduct are evidence of her intent to make a valid delivery. Escrow arrangements are often used whereby the grantor makes delivery to an "escrow grantee" who is bound to deliver the deed to the grantee upon the happening of a named event or upon the performance of stated conditions within a stated period. If the grantee does not perform or the event does not occur within the time stated, the deed is returned to the grantor.

d. Adverse Possession

Aside from the two-step conveyance process described above, title occasionally will pass because of adverse possession. At common law, if a person openly and continuously occupies or exerts dominion over the property of another for a period of twenty-years, the law provides that the occupying person shall gain title to the property that she has been occupying. Some states have statutes that shorten the period of continuous and open occupation. The possession must be continuous. Any act of dominion by the true owner during the twenty-year period will toll the period of adverse possession, that is, break the continuity of the

possession. If one purchases the property from an adverse possessor who has been in possession for seven years, the buyer may tack on those seven years to her or his own period of adverse possession in order to establish the required twenty-year period. Adverse possession is not valid against either federal or state government lands. For example, one who openly and notoriously lives on a corner of a U.S. military base for twenty-years cannot take the land he has lived on from the federal government by adverse possession. **Because adverse possession typically results in litigation about unclear ownership and title, presbyteries and churches should not purchase property acquired by adverse possession.**

e. **Recording**

Deeds and transfers should be promptly recorded. Unrecorded instruments are only valid between the immediate parties and those who know about the transfers. The bona fide buyer for value without notice is one who takes the property in good faith, for value, without notice, actual or constructive, of previous grants of the property. The burden of proof about the status of the bona fide buyer is on the buyer. Failure to record a deed properly opens the possibility of losing one's interest in real property to a subsequent bona fide buyer without notice. Legal counsel should be consulted for the recording of conveyancing instruments to avoid the consequences that can result from failure to record deeds, mortgages, and other instruments properly.

All conveyancing instruments should be recorded immediately upon delivery to the grantee. Recording will avoid the potential problems described above. It is the buyer's responsibility to make sure that the instrument is properly recorded in the recorder's office. The cost of recording is generally the obligation of the grantee (buyer). Recording systems vary from state to state. Recording statutes enable the owner to give **constructive notice** of her ownership to all other potential buyers of the estates or interest disclosed in the instrument recorded. Recording prevents a subsequent buyer or mortgagee of the same piece of real property from qualifying as a bona fide buyer without notice. Some state recording statutes protect the bona fide buyer and cut off the interest of another grantee with an unrecorded instrument whether the bona fide buyer recorded first or not. These are known as Notice Statutes. In other states, the first grantee to record the instrument in the recorder's office is protected, whether she had notice of the other grantee's existence or not. These statutes are known as Race Statutes because the person who wins the race to the courthouse to record her deed gets the property. A third type of recording statute is the Race-Notice Statute. In this system, a bona fide buyer is protected if she records before a prior grantee. As with the Race system, there is a premium on the race to the recorder's office between bona fide buyers of the property without notice. However, if the first to record in a Race-Notice state has actual notice of a prior grantee, she is not considered a bona fide buyer without notice and the first grantee will take the property. A fourth type of state statute is the Period of Grace Statute, which gives the prior grantee a period of grace in which to record and protect her interest against subsequent grantees. In these states, the bona fide buyer is protected if the prior grantee does not record in the time allowed to her or him by the statute.

f. **Ensuring Good Title**

Although most deeds contain covenants of warranty about the title, it is generally of little consolation to a buyer that she has a cause of action against the grantor for damages arising out of defects in the title. The buyer's title will remain clouded until an action to quiet title is brought to clear the cloud on the title, thereby subjecting the buyer to a period of uncertainty about the nature and marketability of her title. Several methods can be employed to ensure the title is clear prior to the sale of property. One is a written opinion from the buyer's attorney about the marketability of title based on an individual title search in the recorder's office. The more prevalent procedure is an abstract or insurance in which the preliminary

report of title is furnished by the title insurance company to the buyer's attorney to determine any title defects. The abstract or commitment for title insurance is then used to determine whether the title policy guarantee from the title insurance company is sufficient to protect the grantee from all defects and encumbrances on the title. Where available, the buyer should secure title insurance. The costs of the abstract or title insurance should be specifically assigned in the contract of sale and the method employed also should be indicated. Typically, the seller is obligated to pay for title insurance to guarantee good title.

g. Mortgages and Deeds of Trust

A mortgage takes the form of a lien on real property that secures the payment of money owed. The borrower is called the mortgagor, and the lender is the mortgagee. The mortgage represents security to the lender for the borrower's promise to pay. It is accompanied by a promissory note that is expressly secured by the mortgage from the buyer or borrower (mortgagor) to the seller or lender (mortgagee). In the event of a borrower's failure to pay on the note, the mortgagee can secure return of the loaned funds by foreclosing on the property, selling it, and taking its share of the sale proceeds. A first mortgage gives the lender (mortgagee) first priority on the proceeds of a foreclosure. A second mortgagee recovers proceeds only after satisfaction of the first mortgage. Some states require the use of a deed of trust. A deed of trust is the same as a mortgage except the legal title to the real property is placed in one or more trustees, to secure the sum of money or the performance of the conditions. Although it differs in format from a mortgage, it is still a security instrument. Both mortgages and deeds of trust are recorded in the county where the property is located and become public documents.

h. Releases

As indicated above, both mortgages and deeds of trust are recorded in the county where the property is located and upon recording become public documents. When a mortgage/deed of trust is paid in full, a release and/or satisfaction document will need to be prepared and recorded in the appropriate county to remove the document from the public records. Normally, when the debt that secures the mortgage/deed of trust is paid the holder of the mortgage/deed of trust sends the original document marked "paid" to the borrower to record in the appropriate county office. In most states, a separate Deed of Release or Release of Mortgage is also required to be filed. It is important to note the requirement concerning the release document varies from state to state. The appropriate release documents verify the original mortgage/deed of trust has been paid and authorizes the recording officer at the local county office to release the mortgage/deed of trust from the public records. A mortgage/deed of trust will remain on the public records until it is officially released. Therefore, it is important to have a release document prepared and filed whenever a mortgage/deed of trust is paid in full.

i. Mechanic's Liens

In most states, the law gives laborers or subcontractors who provide services connected with the construction, repair, or remodeling of a building a lien on the property, buildings, and improvements in order to secure their claims for payment for the materials and labor provided. Note that subcontractors who have not been paid by a general contractor may establish a mechanic's lien on the property although the general contractor has been paid in full. Lien waivers or releases must be obtained from contractors and subcontractors prior to payment for the work ordered. Once a mechanic's lien has been perfected, suit may be brought to collect the amount of the lien against property owner.

Upon completion of a church building or remodeling project, releases or lien waivers should be obtained from the contractor and subcontractors on the job. Title would be

clouded by the possibility of an outstanding mechanic's lien unless the releases are obtained. It may be advisable to use the services of a third party (such as a title company) to ensure that all the necessary waivers and releases have been obtained.

j. Surveys

A description of the land conveyed is contained in all deeds. Customary formal descriptions fall into three categories:

- (a) **Description by reference to monuments and courses** — Monuments may be either man-made reference points specifically placed for purposes of boundary identification, such as iron rods or concrete emplacements, or natural objects such as rocks or trees. Courses, on the other hand, are boundary lines sighted by direction in terms of the compass: such lines may be described as running a certain distance or between boundaries. In the case of a conflict between monuments and courses about the determination of a boundary line, monuments prevail in view of their permanency, as opposed to the personal judgment used to determine courses.
- (b) **The Rectangular Survey System** — Most states in the continental United States west of the Allegheny Mountains employ this system. The beginning points of this survey are lines that run parallel to longitudinal and latitudinal bases. Lines conforming to a parallel of latitude are called base lines. A series of lines running due north and south at right angles to the base lines are Principal Meridians. Township lines are those lines running at six-mile intervals on either side of the base line. Range lines are drawn at six-mile intervals parallel to the Principal Meridians. The six-mile strips in each case are numbered consecutively. Six-mile squares formed by the intersection of these lines are called townships, which are further divided into one-mile squares, called sections. Sections may be subdivided successively into 160-acre quarters and 40-acre tracts.
- (c) **Reference to a recorded plat** — This method involves the description of property in a deed by referencing a survey of a larger tract that includes the conveyed parcel. Great care needs to be exercised in the deed language to designate accurately property identified by this method of survey. **In all property transactions, a registered land surveyor should be employed to establish the physical location of buildings, to place appropriate markers, and to determine any encroachments.** The survey is needed to ensure the buyer's awareness of the extent and location of the property.

Descriptions of the property in question also will appear on the deed, mortgage, and title policy or abstract. **It is critical that these descriptions, including the description on the deed, be identical.** A new survey should always be compared with any previous surveys on hand in order to detect any discrepancies.

3. Property Used by Two Denominations

With the rise of agreements for sharing church buildings between separate congregations of differing denominations, it is advisable to enter into a written agreement to ensure fairness and orderly procedures in the evolution of such arrangements. The mutually agreed-upon written relationship should include a statement of purpose and a reference to the length of time the arrangement is expected to run. The development of such a document is to enable coordination of schedules and building use, to provide for cooperative building maintenance and to coordinate cooperative programs.

4. Historic Landmarking of Church Property

Church property often is a prime target for local community efforts to preserve historic sites. The preservation effort begins with the designation of a particular property — or an area of town — as

historic landmark. Landmark status sounds prestigious, but it can have serious drawbacks. Landmark status can give governmental entities the “right” to impose significant controls and financial burdens on the owners of landmarked property. For example, if a church decides it can no longer afford the upkeep of its old, expensive, stained-glass windows and wants to replace them with contemporary glass, the governmental unit may say no. If a church decides to build an addition onto an historic sanctuary, the governmental unit in charge of approving such an addition may say no — or may impose significant financial and other burdens on the church before approving the changes. If a church decides to tear down a deteriorated secondary building on its property, which is in a designated historic district of a community, the governmental unit in charge of approving such changes may say no. The designation also can affect changes to the heating or cooling of a large sanctuary. Likewise, attempts to make the church accessible to handicapped persons may be more complicated because of restrictions on changes to the structure.

In exchange for such limitations on the use of property, governmental bodies may compensate the property owner for such reduction in property value and limitations on development and use by allowing federal and state income tax credits against actual expenditures made for future rehabilitation work done to the property. Such income tax credits are, however, worthless to a church because a church does not pay such taxes.

In its seminal 1988 policy statement *God Alone Is Lord of the Conscience*, the General Assembly adopted the following statement about landmarking of church property:

The government may not require a congregation to maintain a church structure because of its historical significance or subject it to proceedings in eminent domain in order to preserve a church structure. The church should make every effort to cooperate with efforts to preserve esthetic and architectural character but must finally itself be the judge of what religious life and mission require concerning property and its use.

As this section reflects, landmarking can impose substantial limitations on church property. If it is decided to oppose landmarking status, the church should do so at every administrative and judicial level so that the church does not accidentally waive any of its rights.

C. Loan Programs Offered by General Assembly Offices

The General Assembly of the Presbyterian Church (U.S.A.) has a loan program with two sources of funding. The purpose of the programs is to facilitate the mission of the Presbyterian Church by helping churches and governing bodies meet their needs to fund capital improvements. The Presbyterian Church (U.S.A.) Investment and Loan Program, Inc. (PILP) provides a coordinated loan program. PILP administers this coordinated loan program through two funding sources: endowed funds and the PILP Loan Program (investment funds).

1. Endowment Funds

The sources of funds for these loans are endowments that have been left to the General Assembly for this purpose and mission funds that have been accumulated and set aside for this program. These funds make it possible to provide loans for a variety of purposes, at affordable rates for churches. **Contact Clare Lewis at (800) 903-7457 ((800) 903-PILP).**

2. Presbyterian Church (U.S.A.) Investment and Loan Program, Inc.

The Presbyterian Church (U.S.A.) Investment and Loan Program, Inc. (<https://pilp.pcusa.org/>) sources funds for these loans from investments by individuals, congregations, governing bodies, and other related entities of the Presbyterian Church (U.S.A.). Individuals and congregations

purchase term notes paying competitive rates. All loans are made at affordable rates. **Contact Clare Lewis at (800) 903-7457 ((800) 903-PILP).**

D. Property of a Dissolved or Extinct Church

From time to time it becomes necessary for the presbytery to take formal action to dissolve a congregation, at the request of the members or on the initiative of the presbytery. Rarely, but sometimes, the presbytery learns that all of the members have moved away, died, or become unable to act. When one of these events happens, the remaining property, real estate, financial assets, and furnishings become the responsibility of the presbytery to use in the mission of the Presbyterian Church (U.S.A.). The committee on ministry and the presbytery trustees or strategic planning committee both have significant responsibilities and will need to work together. There are a number of legal requirements and procedures for the transfer and disposition of property in consultation with the session and trustees of the congregation. This includes considering their requests for the disposition of family memorials, furnishings, and the uses of financial assets.

When it is proposed to dissolve a congregation, representatives of the presbytery and the session should compile an inventory of all real and personal property. Parcels of real estate and the buildings on each should be separately identified, along with all bank accounts, investments, and the documentation of all endowments or other funds held for specific purposes. An attorney should be consulted to advise how to transfer ownership where legal requirements must be followed. Normally it is much simpler to complete this process before dissolution becomes final, so that appropriate documents can be executed by the congregation's corporate officers. Care should be taken to assure that any prospective gifts, known or unknown, will flow to the presbytery or, in the case of a merger, the successor Presbyterian Church (U.S.A.) church.

A title search of all real estate should be conducted to determine whether there are reversionary interests that may cause the property to pass out of the control of the church if the property ceases to be used for specified purposes. Also, if it is decided to transfer the property, this must be done properly to ensure good title. Consult legal counsel.

The presbytery's insurance agent should also be notified when ownership is transferred or the location is to be vacated. An unused or abandoned building may become an expensive risk. Special care should be taken to secure the building from trespassers and to inspect the building regularly. The owner of an unused building continues to be liable for any accident that may occur on the premises. Consult your agent to determine the particular provisions of your insurance policy regarding vacant property. Often a vacant building endorsement must be added.

When property is of minimum value and/or a buyer is difficult to find, it may be better to transfer the property for nominal consideration rather than having the responsibility to maintain and insure the property. One solution for a cemetery is to transfer the property to a local cemetery association composed of individuals with family buried there.

The “Sample Form for the Property of a Dissolved Church” (see Appendix B), can serve as a guideline when the presbytery and a congregation are considering dissolution of a church. As a sample, the form is simplified as though the property all moves in one piece. Actually, a task force representing the presbytery and representatives of the church often list and consider a large number of separate items.

Updated October 2021

APPENDIX A

ADVISORY OPINION

THE TRUST CLAUSE AND GRACIOUS SEPARATION: IMPLEMENTING THE TRUST CLAUSE FOR THE UNITY OF THE CHURCH

WHAT IS THE TRUST CLAUSE?

G-4.0203 of the *Book of Order* states:

All property held by or for a particular church, a presbytery, a synod, the General Assembly, or the Presbyterian Church (U.S.A.), whether legal title is lodged in a corporation, a trustee or trustees, or an unincorporated association, and whether the property is used in programs of a particular church or of a more inclusive governing body or retained for the production of income, is held in trust nevertheless for the use and benefit of the Presbyterian Church (U.S.A.)¹

Presbyterian congregations emerge from the collective gifts of God's people and often include direct gifts from individuals, other congregations, presbyteries, synods, and the General Assembly. These gifts are not regarded as given for a single generation but are held in trust for this generation and for future generations to come. Indeed, "the Trust Clause reflects our understanding of the church as a communion of saints across time, with responsibilities both to those who came before and those who will follow. When a congregation seeks to leave the Presbyterian Church (U.S.A.), it is breaking what is often a significant historic relationship; it is also departing from a fellowship in which its officers have participated, by whose polity they have pledged to be governed, and with which many members may feel bonds of affection."² Accordingly, the idea of holding property in trust has long been a part of the Presbyterian theology as well as a practice recognized by the U.S. Supreme Court (*Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1872)).³

HOW DOES CHURCH UNITY RELATE TO THE TRUST CLAUSE?

"There is one Church, for there is one Spirit, one hope, 'one Lord, one faith, one baptism, one God and Father of all, who is above all and through all and in all' (Eph. 4:5-6) (F-1.0302(a))

Our polity reflects this theology of unity and oneness and the *Book of Order* reminds us that "unity is God's gift to the Church in Jesus Christ" and "in Christ the Church is one, it strives to be one."⁴ Along these lines, the 217th General Assembly (2006) called upon "every member of the Presbyterian Church (U.S.A.) to witness to the church's visible oneness, to avoid division into separate denominations that obscure our community in Christ, and to live in harmony with other members of this denomination, so that we may with one voice together glorify God in Jesus Christ, by the power of the Holy Spirit; and all sessions, congregations, presbyteries, and synods to renew and strengthen their covenanted partnership with one another and with the General Assembly."⁵

Further, G-3.0101 reminds us, "the mutual interconnection of the church through its councils is a sign of the unity of the church. Congregations of the Presbyterian Church (U.S.A.), while possessing all the gifts necessary to be the church, are nonetheless not sufficient in themselves to be the church. Rather, they are called to share with others both within and beyond the congregation the task of bearing witness to the Lordship of Jesus Christ in the world. This call to bear witness is the work of all believers. The particular responsibility of the councils of the church is to nurture, guide, and govern those who witness as part of the Presbyterian Church (U.S.A.) to the end that such witness strengthens the whole church and gives glory to God."⁶ Furthermore, "the congregation is the basic form of the church, but it is not of itself a sufficient form of the church. Thus congregations are bound together in communion with one another, united in relationships of accountability and responsibility, contributing their strengths to the benefit of the whole, and are called, collectively, the church."⁷ Accordingly, the church is not a voluntary association of those who share the same opinions and experiences, but is an organic body reflecting unity in diversity and called into existence by God that celebrates and transmits through the ages the name and knowledge of Jesus Christ.⁸ The constitutional provisions under which congregations hold property for

the benefit of the Presbyterian Church (U.S.A.) arise out of and reflect our theological conviction that this denomination constitutes one indivisible body, which itself is part of the body of Christ, and which encompasses not only the visible Church today but also the one, holy, catholic, and apostolic Church of our heirs and forbearers (F- 1.0302).

HOW DOES MISSION RELATE TO THE TRUST CLAUSE AND CHURCH PROPERTY?

The *Book of Order* in G-4.0201 affirms, “the property of the Presbyterian Church (U.S.A.), of its councils and entities, and of its congregations, is a tool for the accomplishment of the mission of Jesus Christ in the world.”⁹ Each local congregation “is the church engaged in the mission of God in its particular context” with a particular history.¹⁰ For its members, the congregation is the site of baptisms, confirmations, marriages, and celebrations of the resurrection to join the communion of saints. Such significant personal experiences make the local congregation an indelible part of the lives of their members. These shared experiences are what most of us picture when we think of our home congregation.

Yet, we also affirm that the “congregation is the basic form of the church, but it is not of itself a sufficient form of the church” and our polity recognizes that purpose of the Trust Clause is not only to support the witness and mission of a particular congregation, but also to support the mission and witness of the whole Presbyterian Church (U.S.A.). Indeed, “the particular responsibility of the councils of the church is to nurture, guide, and govern those who witness as part of the Presbyterian Church (U.S.A.) to the end that such witness strengthens the whole church and gives glory to God.”¹¹ Along these lines, as a council of the church, the presbytery is responsible for developing “the strategy for the mission of the church in its district”¹² and has the responsibility and power to organize, receive, merge, dismiss and dissolve congregations in consultation with their members.¹³ Further, the presbytery has the responsibility to assist congregations in developing mission and participating in the mission of the whole church.¹⁴ Accordingly, it is important for the presbytery to prayerfully discern and consider the mission of the church in its district and of the whole church as it decides whether to dismiss or dissolve a congregation.

WHO HAS THE AUTHORITY TO DISMISS A CONGREGATION?

Presbyteries are responsible for upholding the Trust Clause and congregations may only be dismissed upon the approval of their presbytery. In accordance with G-4.0207, “the relationship to the Presbyterian Church (U.S.A.) of a particular church can be severed only by constitutional action on the part of the presbytery.”¹⁵ As noted above, the presbytery is responsible for the mission and government of the church throughout its geographical district and has the power to organize, receive merge, dismiss and dissolve congregations in consultation with their members.¹⁶

CAN A CONGREGATION VOTE TO SEEK DISMISSAL? DOES A CONGREGATION HAVE A UNILATERAL RIGHT TO DEPART FROM THE PC(USA)?

No. There is not a unilateral right of a Presbyterian Church (U.S.A.) congregation to depart from the denomination or its presbytery of membership. Withdrawal from the Presbyterian Church (U.S.A.) is not a matter that can be considered at a congregational meeting.¹⁷ No authority is given to a congregation or to session to vote to leave the denomination.¹⁸ While a presbytery may consult with a congregation about dismissal in the form of listening sessions, hearings, or other consultations, these consultations are merely for the benefit of informing the presbytery as it considers a request for dismissal.¹⁹ Along these lines, our church has long recognized that “by giving to presbytery rather than to session or congregation the power to dismiss a church, the constitution of this denomination guarantees a formal meeting of presbytery as the forum in which loyalist minorities of whatever size might press their claims that they were sufficient in numbers and dedication to continue a church in its connectional relationship within this denomination.”²⁰ Further, in seeking to negotiate with a congregation seeking dismissal, presbyteries have an obligation to see that secular litigation is used as a last resort.²¹

Here, it is also important to note that freedom of conscience is limited for teaching elders, ruling elders and deacons under G-2.0105 and does not encompass the calling of congregational meetings to seek dismissal, moving churches to seek dismissal from the denomination or obstructing constitutional

governance of the church.²² There may not be any secret acts by the pastors and sessions diminishing a church's connection to the Presbyterian Church (U.S.A.).

Further, congregations that fail to abide by the principles of Gracious Separation "have breached important responsibilities and duties."²³

DOES A CONGREGATION HAVE TO BE DISMISSED TO ANOTHER REFORMED BODY?

Yes. Dismissal to another reformed body is a requirement through authoritative interpretations of PC(USA) constitutional provisions.²⁴ Through authoritative interpretation the General Assembly held:

Presbyteries may dismiss congregations to other ecclesiastical bodies of this denomination, and to denominations whose organization is conformed to the doctrines and order of the Presbyterian Church (U.S.A.). No congregation may be dismissed to independent status, or to the status of a nondenominational congregation.²⁵

The requirement of dismissal to another reformed body goes back to historical reformed understandings of the importance and need to continue the reformed family as well as our reformed theology. Further, dismissal to "another Reformed body" was also the language used during reunion and is found in the *Book of Order* under the "Articles of Agreement."²⁶ Accordingly, if the presbytery discerns it should dismiss the congregation to another reformed body, then the Presbytery should dismiss "pending reception into another reformed denomination" so that the congregation does not end up in independent status if another reformed denomination refused to admit the congregation into the denomination.

WHO DETERMINES WHETHER THE RECEIVING BODY IS ANOTHER REFORMED BODY?

"It is the responsibility of the dismissing presbytery to determine whether the receiving body meets these standards, and this responsibility cannot be delegated to any other entity within the presbytery (such as an administrative commission). Thus, the General Assembly may not determine in advance whether a particular denomination or its constituent bodies qualify under these standards."²⁷ In exploring this matter, presbyteries should consider such questions as whether the receiving body is:

- "1) doctrinally consistent with the essentials of Reformed theology as understood by the presbytery;
- 2) governed by a polity that is consistent in form and structure with that of the Presbyterian Church (U.S.A.); and
- 3) of sufficient permanence to offer reasonable assurance that the congregation is not being dismissed to de facto independence."²⁸

Further, "failure on the part of the presbytery thoroughly to explore and adequately to document its satisfaction in these matters may thus violate, however unintentionally, the spirit of the polity of the Presbyterian Church (U.S.A.)"²⁹

MAY A PRESBYTERY DELEGATE ITS FINAL DECISION TO DISMISS A CONGREGATION TO AN ADMINISTRATIVE COMMISSION?

While a presbytery could delegate dismissal of a congregation to an Administrative Commission, such a decision is of such missional importance to a presbytery that the entire presbytery would likely wish to discern such a matter together.³⁰

CAN A PRESBYTERY DISMISS ITSELF OR ALL OF ITS CONGREGATIONS?

No. A presbytery cannot release itself, or all of its congregations, for only the General Assembly and the synod working together can organize, divide, unite, or combine presbyteries or portions of a presbytery.³¹

WHAT ARE GRACIOUS DISMISSAL POLICIES?

At the direction of the 219th General Assembly (2008), the Stated Clerk of the Presbyterian Church (U.S.A.) sent a resolution to the presbyteries, synods and sessions, “indicating the will of the assembly that presbyteries and synods develop and make available to lower governing bodies and local congregations a process that exercises the responsibility and power ‘to divide, dismiss, or dissolve churches in consultation with their members’ with consistency, pastoral responsibility, accountability, gracious witness, openness, and transparency.”³² Accordingly, Gracious Dismissal Policies may be used by councils to offer clarity and guide their process when discerning whether and how a particular congregation could be dismissed from the PC(USA).

HOW DO GRACIOUS DISMISSAL POLICIES RELATE TO THE TRUST CLAUSE (G-4.0203)?

In the recent General Assembly Permanent Judicial Commission (GAPJC) case, [Tom v. Pby of San Francisco](#), the GAPJC authoritatively interpreted how the Trust Clause found in the *Book of Order* at G-4.0203 interacts with Gracious Dismissal Policies.³³ The GAPJC held that while a presbytery has broad discretionary authority under the *Book of Order* to determine property rights [within the context of determining the mission of Jesus Christ in the world (G-4.0201) and in its district (G-3.0303a) to dismiss a particular congregation within its geographic region (G-3.0301a)], the presbytery must fulfill its fiduciary duty under the Trust Clause (G-4.0203) to consider the interest of the Presbyterian Church (U.S.A.) as a beneficiary of the property.

WHAT MUST BE IN A GRACIOUS DISMISSAL POLICY?

A presbytery has broad discretionary authority to determine the mission of Jesus Christ in its district and may take into account many issues such as the spiritual needs of the congregation and community as well as the Marks, Notes and Great Ends of the Church.³⁴ The presbytery must also consider a congregation’s financial position and valuation of property and take into consideration the Presbyterian Church (U.S.A.)’s use and benefit of the property in every decision concerning disposition of property. Accordingly, the Gracious Dismissal Policy should include this duty among the procedures listed within the Policy.

MUST A GRACIOUS DISMISSAL POLICY OR IMPLEMENTATION OF A GRACIOUS DISMISSAL POLICY INCLUDE CONSULTATION WITH ANY OF THE GENERAL ASSEMBLY ENTITIES?

No, a presbytery has discretionary authority to determine the mission of Jesus Christ in its district when deciding whether to organize, merge, dismiss or dissolve a congregation.³⁵ This discretionary authority includes the presbytery’s consideration of a congregation’s financial position and valuation of the property.

MAY A GRACIOUS DISMISSAL POLICY (OR ANY BYLAW OR POLICY OF THE PRESBYTERY) DELINEATE THE CIRCUMSTANCES IN WHICH A PRESBYTERY WILL DISSOLVE, DISMISS OR MERGE A CONGREGATION?

No. Since the presbytery must determine its mission when discerning whether to dissolve, dismiss or merge a congregation, dismissal of a congregation requires that the presbytery make the decision about dismissal in each separate case after careful consideration of all the circumstances.³⁶ A presbytery may not discern ahead of time the circumstances in which a presbytery will dismiss a congregation. “Dismissal of a congregation now requires, as it always has with the single exception of Article 13, that the presbytery make the decision about dismissal in each separate case after careful consideration of all the circumstances.”³⁷

MAY A GRACIOUS DISMISSAL POLICY DESCRIBE HOW AND WHEN PROPERTY WILL BE USED AND/OR DISTRIBUTED AMONG CONGREGATIONAL ENTITIES?

No. A presbytery is required to determine its mission, including the use and distribution of real and personal property, after careful consideration of all the circumstances on a case-by-case basis.³⁸

HOW MUST A GRACIOUS DISMISSAL POLICY BE IMPLEMENTED?

Even if the presbytery's Gracious Dismissal Policy does not include the fiduciary duty under the Trust Clause, the presbytery should ultimately exercise this fiduciary duty before making its decision about dismissal. In [Tom v. Pby of San Francisco](#), the GAPJC stated that this would include exercising due diligence regarding the value of the property of the congregation seeking dismissal which would include doing a financial analysis of the value of the property.³⁹ The presbytery must be informed of this financial analysis before it votes on a dismissal. Providing this information gives the presbytery and congregation the information needed to make an informed decision regarding dismissal of the congregation.

WHAT TYPES OF GRACIOUS DISMISSAL POLICIES WOULD NOT BE CONSTITUTIONAL?

Any Gracious Dismissal Policy that precludes a presbytery from taking into account the Trust Clause fiduciary duty before deciding whether to dismiss a congregation on a case-by-case basis would be unconstitutional. Possible examples of policies that would preclude this analysis on a case-by-case basis are:

1. Policies that only require a percentage vote from the congregation for the presbytery's approval of terms of dismissal including only taking into account the spiritual needs or desires of current membership and not the breaking of the historic relationship of the members who came before.
2. Policies that only require the consideration of per capita and/or mission financial obligations are not sufficient to meet the fiduciary duty under the Trust Clause to consider the interest of the Presbyterian Church (U.S.A.) as a beneficiary of property.
3. Policies that require the payment by the congregation of a set percentage of assets prior to approval for dismissal. This would serve to preclude a case-by-case analysis.

WHAT IS THE PRESBYTERY'S ROLE REGARDING RECORDS OF A CONGREGATION SEEKING DISMISSAL?

Presbyteries have a constitutional responsibility to safeguard the historic records of congregations that choose to leave the denomination. According to the *Book of Order*, G-3.0107, ownership of the records of dismissed or dissolved congregations passes to the presbytery, and clerks are charged with the safekeeping of records that must be maintained in perpetuity.⁴⁰ Depositing records with the Presbyterian Historical Society, the official archives of the Presbyterian Church (U.S.A.), is a recommended means of preservation. The Presbyterian Historical Society (PHS) offers stated clerks and administrative commissions several options that may help ease the conflict over records while ensuring that vital materials are preserved by the denomination. The desire of departing congregations to have continued access to records may be a point of contention. By choosing to microfilm the original records and digitize the microfilm, presbyteries, congregations and PHS will all have access to the materials.⁴¹ In sum, PHS provides presbyteries with the capacity to: 1) Place original materials on deposit; 2) Place materials on deposit and microfilm them; 3) Deposit, microfilm and digitize records; or 4) microfilm, digitize and return the original records to the congregation.⁴²

IS A PRESBYTERY'S DECISION TO DISMISS A CONGREGATION SUBJECT TO REVIEW?

Yes, a presbytery's decision to dismiss a congregation is subject to review and if a presbytery fails to carry out its constitutional responsibilities, the synod may be required to intervene by undertaking review of the presbytery's processes and decisions.⁴³ If the synod finds that the presbytery has not been faithful to its mission, the synod may direct the presbytery to appropriate action.⁴⁴ If a presbytery is unable or unwilling to carry out these constitutional responsibilities, the synod may assume jurisdiction over the presbytery's powers to divide, dismiss or dissolve congregations, identify true church, and hold property in trust for the use and benefit of the Presbyterian Church (U.S.A.).⁴⁵

WHAT ROLE DOES THE TRUST CLAUSE PLAY WITH REGARD TO CONGREGATIONAL LOANS?

The Trust Clause provides important support and safeguards for the low-cost loan programs for Presbyterian Church (U.S.A.) congregations provided by the Presbyterian Investment and Loan Program, Inc. (PILP) and the General Assembly Mission Council (GAMC). The PILP makes low-cost loans to Presbyterian Church (U.S.A.) congregations for new buildings and renovations and without the Trust Clause, presbyteries would be unlikely to guarantee loans and without guarantees PILP's ability to assist congregations would be significantly impaired.⁴⁶ Most church building projects cannot be financed by congregations from their current receipts and many congregations depend on loans from PILP, the GAMC's Church Loan Program, or commercial lenders to complete these projects. Generally, these loans are secured by first lien mortgages on the property of the borrowing congregation. The property of the congregation provides the collateral for these loans and is a potential source of repayment should the borrowing congregation not be able to repay the loan. In addition to being secured, these loans are guaranteed by the presbytery of jurisdiction of the borrowing congregation. This means the presbytery is responsible to pay back the loan should the borrowing congregation fail to pay. The presbyteries have confidence in guaranteeing these secured loans due in part to the fact that church property is held in trust under G-4.0203. Further, G-4.0204 states:

Whenever property of, or held for, a congregation of the Presbyterian Church (U.S.A.) ceases to be used by that congregation as a congregation of the Presbyterian Church (U.S.A.) in accordance with this Constitution, such property shall be held, used, applied, transferred, or sold as provided by the presbytery.

Under G-4.0204, when a congregation ceases to exist or leaves the denomination, the congregation's property (which includes, but is not limited to, its real property, building, and other assets such as investments) is subject to the control of the presbytery of jurisdiction. The presbytery continues to be responsible for mission of the Presbyterian Church (U.S.A.) in the area of the departing congregation, and the presbytery can use the property to implement that mission. If the departing congregation has a secured loan with PILP, guaranteed by the presbytery, the presbytery will have the ability to retain the property or the presbytery could use the property to raise funds to satisfy the presbytery's responsibility under the guaranty. As noted above, a presbytery may discern and give some or all of this property to a departing congregation, but this choice will not result in a release of the obligation to repay the secured loan and/or in the release of the guaranty.

If a congregation has a secured loan with PILP and/or the GAMC and chooses to leave the denomination or is dissolved by a presbytery, the terms of the loan provide that the loan is accelerated and becomes immediately due and payable. The guarantee of the presbytery is not satisfied until the loan is paid in full. Our connectional system and the fact that property owned and used by congregations is held in trust for the Presbyterian Church (U.S.A.) allows the denomination to assist local congregations by providing low interest mortgages through national entities such as PILP and the Church Loan Program. The assurances and protections given under the Trust Clause help enable these programs to make loans secured by mortgages of the underlying property which are more financially beneficial for the congregations than traditional loan sources.

In the current economy and in the aftermath of the banking crisis, it has become increasingly difficult for small and mid-size congregations to obtain financing for capital projects from banks.

It is often new, young, or struggling congregations that need the resources of the denomination the most and the PILP is able to meet these needs of these and other Presbyterian Church (U.S.A.) congregations. Without the current Trust Clause of the *Book of Order*, it is important to recognize that presbyteries would be unlikely to guarantee loans and without guarantees PILP's ability to assist congregations would be significantly impaired.

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¹ G-4.0203

² PJC ([2012, 221-03 Tom et. al. vs. Pby of San Francisco](#))

³ This necessity for adoption of G-4.0203 arose from court decisions that changed the permissible role of courts in determining disputes as to church property. Until a few years before the adoption of G-4.0203, courts determining property disputes sought to determine from the doctrinal documents of a denomination whether the property of local congregations was held in trust for the larger church (this was referred to as the “implied trust” analysis). However, in 1979, the United States Supreme Court found that this type of inquiry into the doctrine of a denomination was an improper intrusion into the First Amendment right to freedom of religion. Accordingly, the courts were required to determine property disputes without seeking to interpret a denomination’s doctrine (the so-called neutral principles of law analysis). For Presbyterians, this change in the legal framework the civil courts applied suggested specific reference in property matters in a denomination’s constitutional documents was prudent. Section G-4.0203 provides that explicit understanding of the long held Presbyterian understanding. As such, it was not a change in our Presbyterian polity, but rather an attempt to protect the denomination’s polity against changes in the permissible framework of legal analysis applied by the civil courts.

⁴ In John 17:20-21, Jesus prayerfully desires unity in the Church saying: ²⁰ “My prayer is not for them alone. I pray also for those who will believe in me through their message, ²¹ that all of them may be one, Father, just as you are in me, and I am in you. May they also be in us so that the world may believe that you have sent me. Paul picks up on this theme in Galatians and Ephesians: Galatians 3:28 says “There is neither Jew nor Gentile, neither slave nor free, nor is there male and female, for you are all one in Christ Jesus.” Ephesians 4:3, “Make every effort to keep the unity of the Spirit through the bond of peace.” Along these same lines, F-1.0301 reminds us that our “church is called to be a community of love, where sin is forgiven, reconciliation is accomplished, and the dividing walls of hostility are torn down.”

⁵ GA (2006), Report of the Task Force on Peace, Unity, and Purity, 06-01, Rec. 1, a-b.

⁶ G-3.0101

⁷ G-1.0101

⁸ See F-1.02 “Jesus Christ is the Head of the Church;” see also F-1.0403

⁹ G-4.0201

¹⁰ G-1.0101

¹¹ G-3.0101

¹² G-3.0301; G-3.0303(a)

¹³ G-3.0301(a)

¹⁴ G-3.0301(c)

¹⁵ G-4.0207

¹⁶ See G-3.0301; G-3.0303(a)

¹⁷ GA (218th, Item 4-20); see also PJC (*Sundquist v. Heartland*, [Remedial Case 219-03](#), 2008)

¹⁸ See G-1.0503 and G-3.02

¹⁹ *Sundquist v. Heartland*, [Remedial Case 219-03](#)

²⁰ See PCUS 1976, 92, *Strong v. Synod of Mid-South*.

²¹ *Sundquist v. Heartland*, [Remedial Case 219-03](#)

²² *Sundquist v. Heartland*, [Remedial Case 219-03](#)

²³ *Sundquist v. Heartland*, [Remedial Case 219-03](#)

²⁴ GA (2008, 14, 15 Item 07-13). For more information on authoritative interpretations see G-3.0501c and G-6.02

²⁵ GA (2008, 14, 15 Item 07-13). Along these lines, The General Assembly Permanent Judicial Commission has found that “[a]n ‘independent’ or ‘congregational’ Presbyterian church is an anomaly which runs counter to the notion that we are a ‘family’ of churches and dismissal must therefore be made to another church within the family group ...

... The ... presbytery had no constitutional right to dismiss ... the churches to independent status. ... The policy of not allowing members and ministers to be cut loose with no ties indicates the historic Presbyterian policy of ecclesiastical connectionalism. This policy likewise forbids ... dismissal to independency” (PCUS 1973, pp. 119- 121, *Anderson v. Synod of Florida*).

²⁶ See the *Book of Order* Appendix B, Article 13 (page B. 13). The “Articles of Agreement” are cited here for historical purposes and do not carry constitutional authority.

²⁷ GA (2008, 14, 15 Item 07-13).

²⁸ GA (2008, 14, 15 Item 07-13).

²⁹ GA (2008, 14, 15 Item 07-13).

³⁰ *Sundquist v. Heartland*, [Remedial Case 219-03](#); see also (PCUS 1976, 92, *Strong v. Synod of Mid-South*)

³¹ G-3.0502(e)

³² GA (2008, 49, 51, 284, Item 04-28) The 218th General Assembly (2008) of the Presbyterian Church (U.S.A.)

1. Directs the Stated Clerk to send this resolution to the presbyteries, synods, and sessions, indicating the will of the assembly that presbyteries and synods develop and make available to lower governing bodies and local congregations a process that exercises the responsibility and power "to divide, dismiss, or dissolve churches in consultation with their members" (Book of Order, G-11.0103i) with consistency, pastoral responsibility, accountability, gracious witness, openness, and transparency.

2. Believing that trying to exercise this responsibility and power through litigation is deadly to the cause of Christ, impacting the local church, other parts of the Body of Christ and ecumenical relationships, and our witness to Christ in the world around us, [the General Assembly] urges [congregations considering leaving the denomination,] presbyteries [,] and synods to implement a process using the following principles:

- **Consistency:** The local authority delegated to presbyteries is guided and shaped by our shared faith, service, and witness to Jesus Christ.
- **Pastoral Responsibility:** The requirement in G-11.0103i to consult with the members of a church seeking dismissal highlights the presbytery's pastoral responsibility, which must not be submerged beneath other responsibilities.
- **Accountability:** For a governing body, accountability rightly dictates fiduciary and connectional concerns, raising general issues of property (G-8.0000) and specific issues of schism within a congregation (G-8.0600). But full accountability also requires preeminent concern with "caring for the flock."
- **Gracious Witness:** It is our belief that Scripture and the Holy Spirit require a gracious witness from us rather than a harsh legalism.
- **Openness and Transparency:** Early, open communication and transparency about principles and process of dismissal necessarily serve truth, order, and goodness, and work against seeking civil litigation as a solution.

³³ PJC (2014, 221-03, [Tom et al v. Pby of San Francisco](#))

³⁴ See F-1.0302; F-1.0303; F-1.0304.

³⁵ However, in considering each congregation on a case-by-case basis, it is important to recognize that one of the entities of the General Assembly or a synod may have created with the congregation and the presbytery a direct financial interest in the property or assets and thus must be consulted by the presbytery. For example, The Presbyterian Church (U.S.A.) Investment and Loan Program (PILP) regularly extends loans to congregations which are secured by the property and/or guarantee of payment from a presbytery. A presbytery that is considering the dismissal or dissolution of a congregation with a secured or unsecured loan from PILP must, as a part of the presbytery's fiduciary interest under the Trust Clause, consult with the Presbytery Investment and Loan Program.

³⁶ GA (Minutes, 1991, Req. 91-24, Part I, p 396).

³⁷ GA (Minutes, 1991, Req. 91-24, Part I, p 396).

³⁸ GA (Minutes, 1991, Req. 91-24, Part I, p 396).

³⁹ PJC (2014, 221-03, [Tom et al v. Pby of San Francisco](#))

⁴⁰ G-3.0107 states, "each council shall keep a full and accurate record of its proceedings. Minutes and all other official records of councils are the property in perpetuity of said councils or their legal successors. When a council ceases to exist, its records shall become the property of the next higher council within whose bounds the lower council was prior to its cessation. The clerk of each council shall make recommendation to that body for the permanent safekeeping of the body's records with the Presbyterian Historical Society or in a temperature and humidity-controlled environment of a seminary of the Presbyterian Church (U.S.A.)."

⁴¹ The PHS microfilming program creates archival-quality film at a reduced cost for PC(USA) entities, and if requested, PHS will arrange for the production of a digital edition of the microfilm in PDF or JPEG format at cost. Presbyteries may opt to pay for microfilming (and digitization) or ask the departing congregations to cover the costs. After the records are microfilmed, stated clerks may decide to place the original records on deposit at PHS or return them to the departing congregation as part of a gracious dismissal agreement.

⁴² For more information about these processes, please contact: Presbyterian Historical Society, 425 Lombard Street, Philadelphia, PA 19147. Phone (215)-627-1852. Email: refdesk@history.pcusa.org or via the web at: www.history.pcusa.org

⁴³ G-3.0108(a)&(b); *see also* F-3.0206

⁴⁴ G-3.0108(a)(b)&(c)

⁴⁵ *See* G-3.0401(c); G-3.0301(a); G-3.0303(b); G-4.0203 & G-4.0207.

⁴⁶ The funds for PILP loans are generated through the sale of Term Notes, which are debt securities to PC(USA) members and congregations and the sale of Denominational Account receipts (DARs) accounts to mid councils and PC(USA) agencies. The interest paid on these Term Notes and DARs and any redemptions are funded by the interest and principal repayment of the loans to congregations. The PILP relies on the congregation's repayment of principal and interest to be able to pay interest to investors and to repay principal to investors at maturity. The PILP administers the Church Loan Program for the GAMC. The Church Loan Program is a mission program under the responsibility of the GAMC and the principal corporation of the General Assembly, Presbyterian Church (U.S.A.), A Corporation, where endowment funds are also used to make low-cost loans to congregations.

Section 3 – Incorporation and Boards of Trustees

This Section covers two major issues. The first section focuses on the *Book of Order* requirements related to incorporation for congregations as well as presbyteries, synods, and the General Assembly. The second section focuses on the duties of trustees in a more general way.

Remember: Almost all corporate and trustee matters are governed by state law. An attorney familiar with your state's laws in these areas should be engaged to help you in this work. They should also review all sample forms to ensure that the forms comply with controlling state law.

I. Requirements of the Presbyterian Church (U.S.A.) Constitution

The *Book of Order* directs that whenever permitted by civil law, each congregation shall cause a corporation to be formed. G-4.0101. This is also true for the mid councils and the General Assembly. G-4.0101.

The church itself does not incorporate; instead, it causes a corporation to be formed.¹ This is a recognition of the difference between ecclesiastical jurisdiction (reserved to church courts) and civil jurisdiction (in civil courts). See **Section 1: Basic Organization of the Presbyterian Church (U.S.A.)**, for a discussion of this topic.

Corporate statutes generally refer to a board of directors. The *Book of Order* uses the term trustees instead of directors. This discussion will use trustees.

Chapter Four: The Church and Civil Authority sets out various directives regarding incorporation at the particular church level. These provisions are set out at G-4.0101 and G-1.0503:

1. Only congregation members shall be members of the corporation and eligible for election as trustees. G-4.0102.
2. Trustees shall be elected in the same manner as ruling elders and deacons. G-4.0101.
3. Where permitted by civil law, both ecclesiastical (church council) and corporate matters (as the corporate board of trustees) may be conducted at the same congregational meeting. It is the preferred model. G-1.0503. [NOTE: the minutes of such a meeting should reflect which body is taking certain actions recorded in the minutes: the council, or the corporate board.]
4. Some states, however, prohibit this dual capacity. Also, some churches choose to have a board of trustees different from the session. If either of these is the case, another method of electing trustees may be established. Any such alternate method shall provide for a nominating committee

¹ Before forming a new church corporation, church leaders should determine if a church corporation already exists for that congregation. Church leaders should consult the website for their state's Secretary of State under corporation, corporation names, to determine if a corporation exists for their congregation. In addition, if a church has been in existence for some time, it may have been incorporated at the county level, so it is important to also check with the County Recorder's Office to determine if such a corporation exists at that level (this is particularly so in New York State). Whether at the state or county level, it is possible that the congregation incorporated under a different name than that by which the church is currently known.

elected by the corporation and for trustee terms the same as those provided for ruling elders. G-4.0101. Other important elements arise when the session is different from the board of trustees:

- a. The session should designate the specific functions of the board of trustees (consistent with the *Book of Order*) so it understands its duties and authority. Such planning will help avoid disputes. G-4.0101
 - b. Always remember the session, not the board of trustees, has responsibility for the budget, mission giving, and property. G-3.0205
5. The corporation and its trustees perform their work subject to the authority of the session. G-4.0101. The power and duties of trustees shall not infringe upon the powers and duties of the session or of the board of deacons. G-4.0101.
6. Pursuant to G-4.0101, the corporation and its trustees shall have the powers to
- a. receive, hold, encumber, manage, and transfer real or personal property for the church,
 - b. accept and execute deeds of title to such property,
 - c. hold and defend title to such property,
 - d. manage any permanent special funds for the furtherance of the church's purpose

Note: The above functions are performed subject to the authority of the session and the Presbyterian Church (U.S.A.) Constitution. Moreover, when the board of trustees moves to buy, sell, or mortgage real property, it shall act only after the approval of the congregation in a duly constituted meeting. See also G-4.0206 for the circumstances where presbytery approval is also required.

Recall that the members of the corporation are the members on the church's active roll. G-4.0101. When corporate membership meetings are required, the following applies:

1. Where permitted by civil law, corporate and ecclesiastical business can be conducted at the same meeting. G-1.053.
 - a. For annual and special meetings of the congregation G-1.0501 shall apply.

Two additional points bear mention:

1. Because teaching elders are not members of the congregation (they are members of presbytery), they are not members of the corporation. G-4.0101. Generally, this means teaching elders do not serve as officers of the corporation either. Some states' civil corporation laws allow nonmembers to serve as officers of the corporation. While such a provision would allow the teaching elder to serve as an officer, the preferred method is that the teaching elder not serve in such a capacity. The corporation president, not the teaching elder, should preside at corporation meetings.
2. The *Book of Order* does not limit councils to one corporation, but this is the most common and preferred structure. Generally, a single corporation should be able to perform all the civil law functions a typical church or mid council needs. When a council chooses to establish second or third corporations, it must ensure:
 - a. all the Constitutional requirements noted above are in place;
 - b. every power of the subsequent corporation is very carefully defined, and such powers are integrated securely in the session (202nd General Assembly (1990), p. 243);
 - c. clarity between the duties and authority of the first corporation versus those of subsequent corporations.

Note: see Section 8 – Taxation. Having a second or third corporation may have tax implications.] An example of a second or third corporation includes separately incorporated camps, daycares, and

foundation/endowment boards. Once again, there is no legal necessity to separately incorporate such boards. If, however, your council chooses to do so, be certain the above requirements are met. Attention to such detail in the initial incorporation process will best prevent future disputes and drifts away from the council.

A. Forming a Local Church Corporation

The *Book of Order* directs that all councils shall cause a corporation to be formed unless incorporation is prohibited by civil law. The first step in the incorporation process should be the retention of qualified legal counsel.

Under the law, a corporation is a separate legal entity from its officers, directors, and its incorporators. Corporate powers are conferred by the articles of incorporation (sometimes called the corporate charter) and by the state corporation statute. As noted above, corporate requirements are also set out in the *Book of Order*. The corporate form provides a continuous entity for the ownership and management of property and for carrying out the business and programs of the corporation. Assertions of liability for acts undertaken by the corporation may be satisfied, if proved, from corporate assets only, rather than from personal assets of the corporate directors/trustees. Note, however, that in cases of fraud against the corporation by a director/trustee, or where corporate formalities are not followed, a case can be made that the corporation is acting as an alter ego of its directors and personal liability can be imposed.

A corporation derives its powers and existence from the state. The sources of its powers are its articles of incorporation and the state statute under which the corporation was organized. The statutes grant numerous specific powers relating to organization, the use and conveyance of property, the election of officers, the amendment of articles of incorporation and bylaws, the right of dissolution, and the like. **Care should be taken to ensure all corporate documents conform to the *Book of Order*. See the sample corporate articles (see Appendix A) and bylaws (see Appendix B).**

The express powers of a corporation are those related to the activities in which the corporation is engaged that are enumerated in its articles of incorporation. Implied powers arise out of reasonable inferences about the scope and intent of the language of the corporate articles as they relate to certain facts and circumstances. Great care should be taken by the church corporation to ensure that its acts and transactions do not extend beyond its limits of authority. Such acts are termed *ultra vires* and should be expressly barred by the corporation's articles of incorporation.

Procedures for forming and organizing corporations vary from state to state. However, general incorporation statutes in most jurisdictions allow for the issuance of articles of incorporation to certain persons by a designated state official (usually the Secretary of State) in compliance with the provisions of the corporation statute. The typical state incorporation statute requires:

1. The preparation and execution of the articles of incorporation by the incorporators, and the acknowledgment of their signatures before a notary public.
2. The delivery of the articles of incorporation to the Secretary of State, including any other required incorporation papers and payment of required organizational fees.
3. Filing of the articles by the Secretary of State, and subsequent issuance by her of the certificate of incorporation.
4. The recording of the Certificate and Articles of Incorporation with the Recorder of Deeds, or any other county officials as required in the county or parish where the corporation is located.
5. The convening of the first corporation organization meeting at the call of the directors to adopt bylaws, elect officers, and transact other business.

6. The procurement of a corporate seal and the commencement of business.

The articles of incorporation generally include the following provisions:

1. The name and address of the corporation.
2. The address of its registered agent for the service of process, notice, or demand upon the corporation. Usually, the agent will be the board of trustees, inasmuch as it manages the business of the church about property and other legal affairs.
3. The duration or tenure of the corporation, which may be perpetual or limited. Church corporations are typically perpetual in duration.
4. The names and addresses of the incorporators.
5. A statement of purpose for which the corporation is formed.
6. The names and number of trustees constituting the initial board of trustees, and the names and addresses of those who are to serve as the initial trustees.
7. Membership of the corporation.
8. The powers of the corporation.
9. Procedures for the adoption of bylaws by the board of trustees.
10. Definition of the quorum of directors needed to transact corporate business.
11. Procedures for amending the articles of incorporation.
12. Provisions for the distribution of assets upon dissolution of the corporation.

See the beginning of this Section for the specific requirements for corporations formed by Presbyterian Church (U.S.A.) councils. Also see the sample corporate articles (Appendix A) and sample corporate bylaws (Appendix B), which are set out below in the Section D.

After completion of the incorporation, care should be taken to deed all property into the new corporation. Real property can be deeded by use of quit claim deed. This transfer process presents an excellent opportunity to review the title to property, to determine if there are any limitations or reversionary interests and to make sure that the property trust clauses are put into the new deeds. See **Section 2: Property** for suggested trust language to be used in deeds.

State incorporation statutes vary. **Many states now have special not-for-profit corporation statutes or religious corporation statutes that significantly decrease the reporting requirements and filing costs for such corporations. Local counsel should be instructed to incorporate under such statutes if possible.** Some states (principally in the northeast) have incorporation statutes for the particular mainline denominations: Presbyterian, Congregational, Methodist, Lutheran, and so on.

Note: Sample corporate articles and bylaws are included in Section D. Each state has different incorporation requirements. These forms should be a useful starting point for local legal counsel.

B. Fiduciary Duty of Trustees

Church trustees have fiduciary obligation to hold property interests for the benefit of another — the local church and, per G-4.0203 of the Constitution, the denomination. A fiduciary relation is one in which the law demands of one party an unusually high standard of ethical or moral conduct with reference to another. The settlor of a trust is the person who intentionally causes the trust to come into existence. The trustee is the individual or entity which holds the trust property for the benefit of another. The trust property is the interest in property which the trustee holds, subject to the rights of another. The beneficiary is the person for whose benefit the trust property

is to be held by the trustee. The trust instrument is the document, whether a deed, agreement or will, in which the settlor expresses an intent to have a trust and sets forth the trust terms, that is the details as to beneficiaries and their rights and the duties and power of the trustee. In some cases, trusts are created without a writing and hence there is no trust instrument as such. In such a case the terms of the trust are determined by evidence of the settlor's intent.

The law imposes two basic duties on all trustees: the duty of loyalty and the duty of care. The duty of loyalty requires that the trustee take no part in an action regarding trust property in which she would have an actual or potential conflict of interest without having previously disclosed that conflict to the board. **Decisions must be made by the trustee looking only toward the interest of the beneficiaries and not to the trustee's own interest.** Any form of self-dealing is prohibited, and any profit or advantage gained by the trustee due to self-dealing transactions must be returned to the beneficiaries. When a conflict or potential conflict does arise, the trustee must disclose the conflict or potential conflict prior to any discussion of the decision to be made. Preferably, this disclosure should be in writing and given to the secretary and chair of the board. This procedure will provide protection to a trustee who might later be challenged on whether or not she actually did make the proper disclosure. **Any trustee with an actual or potential conflict of interest should abstain from any discussion or action on the issue in question.** Care should be taken to document the abstention in the minutes in order to provide a record of it in the event of a challenge on this point. Trustees who breach their fiduciary duty of loyalty may be required to reimburse the trust for any loss suffered by the trust due to that breach.

Courts often deal harshly with those who deal for their own benefit in a trust situation. Justice Cardozo, in the case of *Meinhard v. Salmon*, 249 N.Y. 458, 464 (1928), made a famous statement concerning the high standards the trustees must uphold:

“Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden by those bound by fiduciary ties. A trustee is held to something stricter than the morals of the marketplace. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty ...”

This statement indicates the seriousness with which courts look at potential breaches of loyalty on the part of trustees.

In local church settings, disclosure of the actual or apparent conflict should be followed by the individual's abstention from participation in the decision. These situations can arise, for example, in building situations (where members are contractors), in financial management areas (where members are bankers or investment advisors), or in insurance (where members are insurance agents). So long as the potential conflict is properly disclosed, and the party in conflict abstains from participation in the decision or selection process, the trustees can still elect to do business with the disclosing party. However, the board of trustees collectively has a legal duty to ensure that its decisions are made in the best interests of the trust beneficiaries. This standard requires extra care when the trustees are considering doing business with an organization in which one of the trustees has a personal or professional interest.

The second primary duty of all trustees is fulfillment of the duty of care. Trustees are required to act in good faith and in a manner they believe to be in the best interests of the beneficiaries and of the trust. They should act with such care as an ordinarily prudent person would use under similar circumstances in the management of her own affairs. Thus, trustees are required to be diligent in attending meetings and in making sure they are properly informed as to that various aspects of the decisions to be made. **Trustees who do not have time to attend meetings should resign from the board.** Attendance at meetings and reading and understanding relevant materials concerning

the issues at hand are vital. To the extent that any board of trustees is making decisions, it needs a reasonable basis for making those decisions.

Given the facts available at the time of the decision, trustees are required to use their best judgment in making their decision. Trustees are not held responsible for facts that they could not have known at the time the decision was made. Decisions made in good faith and with reasonable care should be upheld if challenged even if they prove not to be the best decision in the light of later unfavorable developments. However, boards of trustees must keep track of the information available to and considered by the board in making the decision in order to answer such charges. Regular and accurate minutes, including exhibits of information considered, should be kept by boards of trustees.

Trustees are not absolved from the requirements of the duty of care by delegating their responsibility to others. For example, should a board of trustees entrusted with a large sum of money engage an investment adviser? The board still has the ultimate responsibility for the funds, even if the adviser is given broad powers to make trust investments. The trustees need to be able to demonstrate that proper procedures were used in choosing advisers. Persons engaged to handle funds or to do legal work should be trustworthy and competent in the areas for which they are engaged. Trustees may rely on delegates so long as the initial decision in choosing the delegates is well-founded and so long as the trustees have no basis for concern about relying on the delegates. Any trustee who has knowledge, from whatever source, that would cause the reliance of the board of trustees on a particular person to be unwarranted must disclose that knowledge to the board. If the trustee does not make the disclosure and allows the board to rely on a delegate she knows to be unreliable, the trustee is not considered to be acting in good faith any may be personally liable for breaching her fiduciary duty of care.

C. Investment of Funds

The local church board of trustees has broad powers in regard to investment of local church funds, including funds received from wills and bequests and funds received from operations. In regard to bequests made under a will or written gifts in trust made by living donors, the board of trustees is bound to receive and administer such bequests subject to session direction, in accordance with local law, and the terms of the bequest or trust. Where the gift or bequest is unrestricted, the trustees may make a recommendation regarding the use of the funds to the session, but it is the session that is the final decision-maker on policy to be followed. It is an excellent idea for the session to develop guidelines and to give prospective direction to the trustees in regard to receipt and administration of funds. Trustees should be cautious and consult with legal counsel about the benefits versus the burdens of accepting restricted gifts or bequests.

The essential elements of most trusts are (1) designation of a beneficiary and a trustee, (2) sufficient identification of the funds or other assets to enable the passing of good title to the trustee, and (3) actual delivery of the property to the trustee with the specific intention of passing title of the property to the trustee. In the particular church, the trustees must be sure that the terms of the trust agreement as spelled out by the donor are carried out. For example, should the trust provide funds exclusively for loans to students, only loans to students may be made. The funds could not be diverted and used for scholarships because that would be a breach of the trust agreement. Any such action taken in violation of the trust agreement by the board will subject the individual trustees and the board as a whole to liability for a breach of fiduciary duty in not following the instructions of the trust. Trustees should be extremely careful to make sure that restrictions on the use of trust monies are carefully reviewed and followed where legally permissible. Courts and juries often deal harshly with boards of trustees when trust funds are perceived to have been misappropriated or misused in contravention of express restrictions and conditions placed upon such funds.

If bequests, legacies, and trusts are encumbered with restrictive covenants which may guarantee the obsolescence of the purpose of the gift or otherwise impossible to administer, the session may wish to instruct the trustees to reject it. The session, pursuant to G-4.0101, has authority to direct the board of trustees regarding acceptance or rejection of any gift or bequest for the use and benefit of the particular church. In turn, trustees should make the council aware of the necessity for responsibility in the construction and administration of all trust bequests.

Local trustees should carefully examine any actions taken in regard to an investment or distribution of funds held in trust. If a trustee becomes aware of a situation where the funds are being improperly invested, distributed to the wrong parties, or where proper reports by investment advisers or the trustees are not being made, she should ask why proper actions are not being taken. Failure to take action in such a case could expose a trustee with such knowledge to a charge that the duty of care was breached. When necessary, reporting procedures are not followed, it is difficult to argue later that the proper standard of care was upheld in the handling of the trust or church funds.

The trustees are responsible to carry out the donor's intent, if it is expressed, for the investment of principal and distribution of income. In most jurisdictions, trustees making decisions about trust investments must assume the posture of the prudent person investing her own funds for her own purposes. The prudence required involves sufficient diversification of investments to minimize risk in order to preserve capital as well as consideration of the income potential of any investment. Funds also must be invested in conformity with the laws of the state in which the church is located.

Whenever the board of trustees is dealing with gifts and trust property, it is acting **subject to the direction of the session**. The board of trustees may make recommendations and interim decisions on management of property. However, all significant decisions and permanent actions should be approved by the session.

Routine receipts of gifts, sale of securities, and administration of the gifts is handled by the board of trustees. In the event there is some unusual question regarding a gift of securities, the session should be consulted. **Receipt of unrestricted gifts of securities in the normal course of events presents no problem. However, when considering accepting securities or other property subject to restrictions as to use or sale of the property, it is wise to obtain approval of the session or to act in accordance with previously enacted session policies regarding restricted gifts.** For example, if a donor wished to give \$500 in a restricted fund, only the income from which was to be used for scholarships for needy church members to attend a specific Presbyterian Church (U.S.A.) related college, the administrative responsibility of the choice to award this income is likely greater than the benefit it provided. Therefore, the decision might be made to encourage the donor strongly to take the restriction off the gift (explaining why administering such a bequest would be unduly cumbersome) or suggest an alternate trustee. Likewise, if a donor gave property with a restriction on sale or use, such restrictions could present a problem. The church or the board should consider developing a policy (approved by the session) to be used in accepting or rejecting gifts, bequests, and the obligations of trust administration.

When receiving a specific gift, it is important that the trustees consider the appropriateness of retaining the security or selling it and investing the proceeds. Typically, if the church portfolio contains a large percentage of investment in a single stock or security, there are problems with lack of diversification. A prudent person standard would suggest selling of the security to have a more varied portfolio mix. Also, concerns for investment return and long-term growth could dictate a more diverse portfolio. When a decision has been made to sell or purchase securities, a board resolution should be adopted.

Particular concern should be given to the handling of original stock certificates and related original evidence of ownership. It is advisable to use a stockbroker to handle stock transactions. If the broker is reputable and properly bonded, it may be easiest to keep the church's securities in street name accounts at the broker's office, i.e., the original certificates are not held by the church trustees but rather by the stock brokerage house itself. Be aware that lost or misplaced certificates are expensive and cumbersome to replace. Certificates should be mailed by certified mail or return receipt requested or, if possible, personal delivery with a receipt from the brokerage house.

Because the session has the ultimate authority over bequests, gifts, and trusts, it should consider drafting a policy for the acceptance or rejection of such property. When receiving bequests and gifts that have a restricted purpose, it is important to memorialize the terms of the bequests, keep them properly organized in the church records, and keep proper financial accounting. The board of trustees, in consultation with the session, should consider adopting investment guidelines and standards.

There are often legal and tax issues involved in dealing with property and the administration of trusts. Consult with an attorney or tax advisor to obtain an expert opinion on legal or tax questions. There are significant tax advantages to the donor who contributes appreciated securities. Donors of security or other non-cash gifts worth more than \$500 must file Internal Revenue Service Form 8283, Non-cash Charitable Contributions. This form acknowledges that a proper evaluation has been made of the property, which in the case of regularly traded securities would be straightforward. The church is required to sign Part Four of Form 8283. Under that form, the church must acknowledge receipt giving its name, Employer Identification Number, and a signature by the appropriate board representative, typically the chairperson, who is empowered to receive gifts.

Should the board decide that the church will sell the securities within two years of the date of receipt, it is necessary to file Internal Revenue Service Form 8282, Donee Information Return, with the Internal Revenue Service and send a copy to the donor. An exception applies to certain publicly traded securities and items having a value of \$500 or less if the donor identified the items and signed the statement in Part 2 of Form 8283.

The board of trustees should prepare an annual written report to the session and include in that report the amount of income received from income-producing property, a detailed list of expenditures in relation thereto, a list of all trusts in which the local church is a beneficiary, how those funds are invested, and an explanation of the use and goals for which those funds are expended or applied.

D. Church Property

G-4.0203 of the Constitution states that all property held for a particular church, presbytery, synod, the General Assembly, or the Presbyterian Church (U.S.A.) is held in trust for the use and benefit of the Presbyterian Church (U.S.A.). The legal titles to property may be held by corporations, trustees, or unincorporated associations. When the trust is created, the rights of ownership to the property are separated into legal and equitable rights. The benefits of the property go to the holders of the equitable rights, known as the beneficiaries. Title to real property as listed on a deed is held in the name of the church corporation (unless a particular state does not allow for a church to incorporate) and the trustees, in their fiduciary capacity, manage the church's real property subject to the direction of the session and the congregation. The trustees hold the legal title to the property and are considered to be in fiduciary relationship with the beneficiaries. The fiduciary duty to the beneficiaries is very strong. It requires the trustees to administer the trust solely for the benefit of the beneficiaries. In denominational terms, a local church board of trustees must administer the property solely for the benefit of the members of the

denomination and, in particular, the members of the denomination who are members of the local church. See G-4.0203.

See Section 2: Property, for a detailed discussion of the trust clause, property transfers, and other aspects of church real property. Regarding church property, the board of trustees has certain responsibilities to the whole church as established in the Constitution. The trust clause set out at G-4.0203 has been upheld by both state and federal courts as valid expressions of the rights of the denomination, **through its presbyteries**, to retain church property where local congregations are in schism, have disbanded, or have been discontinued and the property has been abandoned. Great care must be taken to ensure that these clauses are protected in the event of legal attack. Written authorization of the presbytery is necessary for the trust clause to be released in conveyances of mortgages by the local church board of trustees. A limited exception is set out at G-4.0208. See Section 2: Property, for a full discussion. All involved must be especially aware of the risks and responsibilities inherent in the handling of real estate transactions. Competent counsel in the area of real estate law should be engaged and great care taken in any real property transaction. If such transactions are not carefully handled, questions regarding title validity and restrictions on the use of the property that could have been resolved at the outset may lie dormant for years. These questions can become major problems when future efforts are made to convey the property or to use it for other purposes. It should be noted that prior to a recommendation to discontinue the use of church property as a particular church (or before any action is taken to consider local church property abandoned), the presbytery should obtain and consider an opinion of legal counsel. This legal work will be much simpler if the groundwork has been properly laid years earlier as a part of the original real estate transaction.

Where real property is being conveyed to a local church, every effort should be made to take the property free of any encumbrances such as possibilities of reverter to the donor's heirs if the property is no longer used for church purposes. These steps should be taken because local churches may find it necessary in the future to relocate or to use the property for other purposes. Reverter or other restrictive use clauses could lead to the property reverting to the heirs of the donor with no compensation to the local church. Current deeds should be reviewed for potential restrictive clauses. An attorney familiar with real estate should be consulted about the best course of action if such clauses are included in the property deeds. Be sure the attorney is also aware of the relevant trust provisions in the Constitution. **It is strongly advised to use the following clause or similar language in deeds:**

The premises herein conveyed shall be used, kept, and maintained by the grantee for Divine Worship and other purposes of its ministry as a particular church belonging to the Presbytery of _____ (or its legal successors), subject to the provisions of the Constitution of the Presbyterian Church (U.S.A.). The grantee holds the property in trust pursuant to the provisions of the Constitution of the Presbyterian Church (U.S.A.).

Although the local church board of trustees does not have program responsibilities in the local church structure, it is responsible for maintaining and repairing the local church property so that the programs of an individual church can be carried out. The church trustees should inspect the property annually to determine upcoming maintenance needs. Record keeping of prior maintenance expenditures can be useful in planning when future expenditures can be expected, such as when a new roof might be needed, when the furnace might need to be replaced, and so on. By systematizing the repair and maintenance function through careful record keeping and annual inspections, the trustees will be able to submit budgets adequate to provide for the financing of needed repairs and maintenance. In addition, ideas for property use policies are often generated within the board of trustees. Such policies should keep program considerations in mind and be developed in conjunction with the teaching elder and the session. In preparing policies on the use

of the church buildings and property by church groups and community groups, flexibility should be a primary consideration. Factors to be considered include the purpose and nature of the groups, the possibility of additional maintenance expenses, the cleaning and locking of the property after the use is completed, the supervision of the groups using the church, and so on. It is important to remember, however, that final decisions regarding the programmatic nature of church property use are not vested in the board of trustees but in the session. See Section 2: Property, for a detailed discussion of leasing the church's property.

E. Annual Report and Record Keeping

It is advisable for the board of trustees to make an annual report to the session. Elements of an annual report might include the following and should be recorded in the minutes:

- a. The legal description and the reasonable valuation of each parcel of real estate owned by the church.
- b. The specific name of the titleholder in each deed of conveyance of real estate to the local church.
- c. An inventory and the reasonable valuation of all personal property owned by the local church.
- d. The amount of income received from any income-producing property and a detailed list of expenditures in connection therewith.
- e. The amount received during the year for building, rebuilding, remodeling, and improving real estate, and an itemized statement of expenditures.
- f. Outstanding capital debts and how contracted.
- g. A detailed statement of the insurance carried on each parcel of real estate, indicating whether restricted by co-insurance or other limiting conditions and whether adequate insurance is carried.
- h. The name of the custodian of all legal papers of the local church, and where they are kept.
- i. A detailed list of all trusts in which the local church is the beneficiary, specifying where and how the funds are invested, and in what manner the income is expended or applied.

An annual report with these elements will keep the trustees and session well informed about the church's assets and liabilities. Each church board of trustees should have a system of record maintenance to establish the chain of ownership of all church-owned properties. A title company can perform a title search on all church real estate. This report will inform the trustees what the property status is — whether the title is clear or if flaws or restrictions exist. In the event that conveyances, mortgages, or other actions concerning the local church property are contemplated, these records will be vital in preventing delays in the transactions. When real estate transactions are undertaken, this information will be required by potential buyers and/or financial institutions. An up-to-date inventory of local church and manse contents is also advisable. Retain records of purchases; consider supplementing the list with a videotape of contents and keep inventory materials off-site in a fireproof place such as a bank safe-deposit box where other vital church papers are kept.

F. Building Committees and Programs

Care should be taken to select individuals qualified to assess building needs, plans, and financial arrangements. The committee should make diligent efforts to ascertain from within the local community assessments of the reliability and competence of architects and general contractors under consideration for the project. Price, reputation, and quality of work as well as experience in working on church projects are all factors to be considered. **Careful selection of the architect**

and contractor can do much to make the project run smoothly and be completed on schedule. Make sure the contractor is bonded and has insurance coverage for worker's compensation and general liability. Request the contractor provide a certificate of insurance before the work is to begin. A payout schedule contingent on the percentage of work completed can provide protection for the church.

II. Sample Articles of Incorporation and Corporate Bylaws

These are samples. Each state has different nonprofit incorporation laws. Use a local attorney familiar with your state's incorporation requirements to draft the corporate articles and the corporate bylaws. The samples at Appendix A and Appendix B should be a useful starting point for your legal counsel.

APPENDIX A**Articles of Incorporation**

of

_____, **Inc.**

(name of congregation's corporation)

[**Note:** The Secretary of State's Office generally has a list of names that have already been used or reserved. Check that list. It may be necessary and advisable to include the city's name in the name of the church corporation.]

Article I***Name***The name of the corporation is _____, **Inc.**

(name of congregation's corporation)

Article II***Type***

The Corporation is a nonprofit religious corporation.

Article III***Duration***

The period of duration of the Corporation is perpetual.

Article IV***Purposes***

The purposes for which the Corporation is formed are as more fully set forth in the Constitution of the Presbyterian Church (U.S.A.) (citations to the *Book of Order*), including:

The Great Ends of the Church (Book of Order F-1.0304):

- the proclamation of the gospel for the salvation of humankind;
- the shelter, nurture, and spiritual fellowship of the children of God;
- the maintenance of divine worship;
- the preservation of the truth;
- the promotion of social righteousness; and
- the exhibition of the kingdom of heaven to the world.

In furtherance of the Constitution of the Presbyterian Church (U.S.A.) and the purposes stated above, the Corporation shall exercise powers as set out herein.

Article V

Support and Conform to the Constitution of the Presbyterian Church (U.S.A.)

The Corporation shall support, at all times and in all respects, the Constitution of the Presbyterian Church (U.S.A.). The Corporation and all of its property, both real and personal, shall be subject to the Constitution of the Presbyterian Church (U.S.A.), as it is now or shall be, from time to time, amended, established, made, and declared by the authority of the Presbyterian Church (U.S.A.). The business of the Corporation shall be conducted in conformity with the Constitution of the Presbyterian Church (U.S.A.), as it is now or shall be, from time to time, amended, established, made, and declared by the authority of the Presbyterian Church (U.S.A.).

Article VI

All Property Held in Trust for the Presbyterian Church (U.S.A.)

All property, both real or personal, held by or for a congregation, whether legal title is lodged in the Corporation, the Board of Trustees or a trustee, or an unincorporated association, and whether the property is used in programs of the congregation or of a higher council or retained for the production of income, is held in trust nevertheless for the use and benefit of the Presbyterian Church (U.S.A.). (*Book of Order* G-4.0203).

Article VII

Powers and Duties

The Corporation shall have the powers and duties granted by the Constitution of the Presbyterian Church (U.S.A.). (*Book of Order* G-4.0101):

To receive, hold, encumber, manage, and transfer property, real or personal, for the congregation provided that in buying, selling, and mortgaging real property, the trustees shall act only after the approval of the congregation, granted in a duly constituted meeting and subject to the congregation obtaining written permission of the presbytery transmitted through the session of the congregation; To accept and execute deeds of title to such property; To hold and defend title to such property; To manage any permanent special funds for the furtherance of the purposes of the congregation.

All of above are subject to *Book of Order* G-4.0101 and *Book of Order* G.4.0206 (a.)

In addition, to the extent not included in the above and not inconsistent with the Constitution of the Presbyterian Church (U.S.A.), the Corporation shall have all of the general powers of a nonprofit religious corporation organized under

(state religious nonprofit incorporation statute)

The powers and duties of the trustees shall not infringe upon the powers and duties of the Session and the Board of Deacons of the congregation and such powers and duties shall be exercised in conformity with the Constitution of the Presbyterian Church (U.S.A.) (*Book of Order* G-4.0101, G-3.0201).). In addition, the Corporation shall not engage in ultra vires acts.

Article VIII
Members

Only members on the active role of the _____ (name of congregation) shall be members of the Corporation and eligible for election as Trustees. (*Book of Order* G-4.0102).

Article IX
Trustees

The directors of the Corporation are designated Trustees. The Trustees shall be those persons who are elected, installed, and serving as ruling elders of the Session of _____ (name of congregation). They must also be eligible under civil law. (*Book of Order* G-4.0102).

[Note: The preferred and most efficient model is this one: The session of the congregation and the board of trustees is identical. Some states may prohibit this dual capacity; your local attorney should check state law in this regard. Also, some congregations may simply choose to have a separate board of trustees. If the congregation designates a trustee board other than the elders of session, then different language should be used for this article as determined by the congregation. See G-4.0102 for particular requirements when another board is designated.]

Article X
Officers

The bylaws identify and provide for the method of election or appointment of the officers of the Corporation.

Article XI
Bylaws

The bylaws of the Corporation shall be in conformity with the Constitution of the Presbyterian Church (U.S.A.), as it is now or shall be, from time to time, amended, established, made, and declared by the authority of the Presbyterian Church (U.S.A.). The bylaws will be adopted by the members of the Corporation and may be amended or repealed by the members of the Corporation and may be amended or repealed by the members of the Corporation but must at all times and in all respects remain in conformity with the Constitution of the Presbyterian Church (U.S.A.).

Article XII
Initial Board of Trustees

The number of Trustees constituting the initial Board of Trustees shall be _____ [not less than three] and the names and addresses of the persons who are to serve as the initial Trustees and until their successors are elected and installed are:

(name)

(address)

(name)

(address)

(name)

(address)

(name)

(address)

(name)

(address)

Article XIII
Incorporators

The names and addresses of the incorporators are:

(name)

(address)

(name)

(address)

(name)

(address)

(name)

(address)

(name)

(address)

Article XIV
Initial Registered Office and Agent

The address of the Corporation's initial Registered Office and the name of its initial Registered Agent at this address is:

(Clerk of Session)

(Street Address of Particular Church)

(City, State, Zip Code)

Article XV
Amendments

The articles of incorporation of the Corporation may be amended or added to, or new articles of incorporation may be adopted, by the affirmative vote of two-thirds of the members of the Corporation; provided that the articles of incorporation must at all times and in all respects remain in conformity with the Constitution of the Presbyterian Church (U.S.A.). (*Book of Order* G-4.0101, G-4.0203).

[**Note:** Your attorney should determine if state law requires a different articles of incorporation amendment process.]

Article XVI
Restrictions on Corporations Exempt from Federal Taxation

No part of the assets of the Corporation shall inure to the benefit of, or be distributable to its members, trustees, officers, or other private persons, except that the Corporation shall be authorized and empowered to pay reasonable compensation for services rendered and to make payments and distributions in furtherance of the purposes of the Corporation. No substantial part of the activities of the Corporation shall be the carrying on of propaganda, or otherwise attempting to influence legislation, and the Corporation shall not participate in, or intervene in (including the publishing or distribution of statements) any political campaign on behalf of or in opposition to any candidate for public office. Notwithstanding any other provision of these articles, the Corporation shall not carry on any other activities not permitted to be carried on (a) by a corporation exempt from federal income tax under Section 501(c)(3) of the Internal Revenue Code, or corresponding section of any future federal tax code, or (b) by a corporation, contributions to which are deductible under Section 170(c)(2) of the Internal Revenue Code, or corresponding section of any future federal tax code.

Article XVII
Dissolution

If the congregation is formally dissolved by the Presbytery of which it is a member, or has become extinct by reason of the dispersal of its members, the abandonment of its work, or any other cause, such property, both real and personal, as the Corporation may have shall be vested in and be the property of the Presbytery of _____ (name of Presbytery of membership) of the Presbyterian Church (U.S.A.), pursuant to the Constitution of the Presbyterian Church (U.S.A.), said Presbytery being an organization qualified under section 501(c)(3) of the Internal Revenue Code of the United States. In the alternative, said property of the Corporation shall be held, used and applied for such

uses, purposes and trust as the Presbytery may direct, limit and appoint, or such property may be sold or disposed of as the Presbytery may direct in conformity with the Constitution of the Presbyterian Church (U.S.A.). (*Book of Order* G-4.0204, G-4.0205, G-3.0301).

APPENDIX B

Corporate Bylaws

of

_____, Inc.
(name of congregation)

Article I

Objectives, Purposes, Formation, Limitations, Powers and Duties, Property

Section 1. **Purpose.** The purposes for which the Corporation is formed are as more fully set forth in the Constitution of the Presbyterian Church (U.S.A.) (*Book of Order* G-4.0101), including the Great Ends of the Church (*Book of Order* F.10304), and in the Articles of Incorporation (Article IV).

Section 2. **Formation.** The Corporation is formed by _____ (name of congregation) pursuant to the Constitution of the Presbyterian Church (U.S.A.). (*Book of Order* G-4.0101) The _____ (name of congregation) is a member congregation of the Presbytery of _____ (name of presbytery) in the Synod of _____ (name of synod).

Section 3. **Authority.** In carrying out such purposes, the Trustees and the Corporation shall be under the authority of the Session and the congregation and shall, at all times and in all respects, conform to and support the Constitution of the Presbyterian Church (U.S.A.) as it is now or shall be, from time to time amended, established, made, and declared by the authority of the Presbyterian Church (U.S.A.). (*Book of Order* G-4.0101; Articles of Incorporation V, VI, VII).

Section 4. **Limitation of Powers and Duties.** The powers and duties of the Corporation and its Trustees shall not infringe upon the powers and duties of the Session or of the Board of Deacons of the congregation. (*Book of Order* G-4.0101., G-3.0201; Article of Incorporation VII).

Section 5. **Powers and Duties.** The Corporation shall have the powers and duties granted by the Constitution of the Presbyterian Church (U.S.A.). (*Book of Order* G-4.0101):

- To receive, hold, encumber, manage, and transfer property, real or personal, for the congregation provided that in buying, selling, and mortgaging real property, the Trustees shall act only after the approval of the congregation, granted in a duly constituted meeting and subject to the congregation obtaining written permission of the presbytery transmitted through the Session of the congregation;
- To accept and execute deeds of title to such property;
- To hold and defend title to such property;
- To manage any permanent special funds for the furtherance of the purposes of the congregation.

All of above are subject to *Book of Order* G-4.0101 and *Book of Order* G-4.0206(a.)

In addition, to the extent not included in the above and not inconsistent with the Constitution of the Presbyterian Church (U.S.A.), the Corporation shall have all of the general powers of a nonprofit religious corporation organized under

(state religious nonprofit incorporation statute)

Section 6. **All Property Held in Trust.** All property held by or for a congregation, a presbytery, a synod, the General Assembly, or the Presbyterian Church (U.S.A.), whether legal title is lodged in a corporation, a trustee or trustees, or an unincorporated association, and whether the property is used in programs of a congregation or of a higher council or retained for the production of income, is held in trust nevertheless for the use and benefit of the Presbyterian Church (U.S.A.). (*Book of Order* G-4.0203; Article of Incorporation VI).

Section 7. **Particular Property Requirements.** When buying, selling, and mortgaging real property, the Board of Trustees shall act only after the approval of the congregation granted in a duly constituted meeting. (*Book of Order* G-4.0101). The Board of Trustees shall not sell, mortgage, or otherwise encumber any of its real property and it shall not acquire real property subject to an encumbrance or condition without the written permission of the presbytery transmitted through the Session of the congregation. (*Book of Order* G-4.0206). The Corporation shall not lease its real property used for purposes of worship, or lease for more than five years any of its other real property, without the written permission of the presbytery transmitted through the Session of the congregation. (*Book of Order* G-8.0502).

Section 8. **Property Conveyances.** As set forth in Section 6 above all of the congregation and this corporation property, both real and personal, is held in trust for the use and benefit of the Presbyterian Church (U.S.A.). To that end any and all deeds or instruments of conveyance shall include the following language in the deed:

The premises herein conveyed shall be used, kept, and maintained by the grantee for Divine Worship and other purposes of its ministry as a congregation belonging to the Presbytery of _____, subject to the provisions of the Constitution of the Presbyterian Church (U.S.A.).

Article II Members

Section 1. **Eligibility for Membership.** Only members on the active roll of the congregation shall be members of the Corporation and eligible for election as Trustees. (*Book of Order* G-4.0102; Article of Incorporation VIII).

Section 2. **Active Members.** The roll of active members established and maintained by the Session as prescribed by the *Book of Order* (G-3.0204) shall determine those individuals who are active members from time to time.

Article III Trustees

Qualification; Election; Removal. The directors of the Corporation are designated Trustees. The initial Board of Trustees shall be those persons named in the Articles of Incorporation. Thereafter, the membership of the Board of Trustees shall be identical to the membership of the ruling elders on the Session of the congregation in active service. Election by the congregation and installation as Ruling Elder of the congregation shall constitute a person a Trustee of the Corporation. They must also be eligible under civil law.

[**Note:** Have your local attorney determine the minimum age under state law; insert that requirement, if any, here.] Termination for any cause of the active service of a person on Session shall automatically

terminate such person as a Trustee of the Corporation. (*Book of Order* G- 2.0405; Article of Incorporation IX).

[**Note:** The preferred and most efficient model is this one: The session of the congregation and board of trustees is identical. Some states may prohibit this dual capacity; your local attorney should check state law in this regard. Also, some congregations may simply choose to have a separate board of trustees. If the congregation designates a trustee board other than the ruling elders of session, then different language should be used for this article.]

Article IV Meetings of the Board of Trustees

Section 1. **Annual Meeting.** The annual meeting of the Board of Trustees shall be held in conjunction with or immediately following the first meeting of the Session of the congregation held after the annual meeting of the congregation of the congregation.

Section 2. **Procedures.** The meeting requirements and provisions of the Constitution of the Presbyterian Church (U.S.A.) shall govern. In addition to those requirements and provisions, these bylaws provide specific guidance for the Corporation.

Section 3. **Notices.** Notice of the time and place and, in case of special meeting, the purpose of every meeting of the Board of Trustees shall be in writing and shall be duly sent, mailed or otherwise delivered to each Trustee not less than ten (10) days before the meeting; provided, that no notice of any regularly scheduled or adjourned meeting need be given.

Meetings may be held at any time without notice if all of the Trustees are present or if those not present waive notice of the time, place, and purpose of the meeting, either before or after the holding thereof.

Section 4. **Quorum.** A majority of the Trustees shall constitute a quorum for the transaction of business, and the action of the Board of Trustees present at any meeting at which a quorum is present shall be the action of the Board of Trustees; provided, that, if the Trustees shall unanimously consent in writing to any action to be taken by the Corporation, such action shall be valid as corporate action as though it had been authorized at a meeting of the Trustees. If at any meeting of the Board of Trustees there shall be less than a quorum present, a majority of those present may adjourn the meeting from time to time until a quorum shall have been obtained.

Section 5. **Special Meetings.** Special meetings of the Board of Trustees may be held simultaneously with meetings of the congregation or immediately thereafter. Special meetings may be held at any time upon the call of Session, the President or Vice-President, or of not less than one-third of the Trustees then in office.

Section 6. **Power and Authority.** The board of trustees shall have power and authority to carry out the affairs of the Corporation and in so doing may elect or appoint all necessary officers or committees; may employ all such employees as shall be requisite for the conduct of the affairs of the Corporation; may fix the compensation of such persons; may prescribe the duties of such persons; may dismiss any appointive officer or agent of the Corporation without previous notice. The Board of Trustees may, in the absence of an officer, delegate that officer's powers and duties to any other officer or a Trustee for the time being.

Section 7. **Executive Committee.** The officers of the Board of Trustees shall constitute the Executive Committee. The Executive Committee shall have and exercise the authority of the Board of Trustees in the management of the business of the Corporation between the meetings of the Board. The Board of Trustees may appoint such other committees, including therein persons who are not members of the

Board of Trustees, as in the judgment of the Trustees will be helpful in carrying on the work of the Corporation.

Article V Meeting of Members

Section 1. **Annual Meeting.** There shall be an annual meeting of the members of the Corporation.

Section 2. **Place and Time.** Such meeting shall be held at the same place and time as the annual meeting of the congregation or immediately thereafter. Whenever permitted by civil law, both ecclesiastical and corporate business may be conducted at the same meeting. (*Book of Order* G-1.0503). Any stated or called meeting of the congregation shall be a meeting of the Corporation, and any business may be conducted that is appropriate to the Corporation.

[**Note:** This section sets out the preferred form: The corporate meeting is contemporaneous with the congregational meeting. Some states may prohibit this dual capacity. Your local attorney should check state law. If your state prohibits this dual capacity, different language should be used in this section.]

Section 3. **Notices.** Notice of all meetings of members of the Corporation shall conform in all respects to the notice requirement of meetings of the congregation. (See *Book of Order* G--1.05 and G-1.0502).

Section 4. **Procedural Requirements.** The meetings of the members shall be conducted to conform to the procedural requirements of meetings of the congregation and the provisions of the Constitution of the Presbyterian Church (U.S.A.). (See *Book of Order* G-1.0503). In addition to those requirements and provisions, these bylaws provide specific guidance for the Corporation.

Article VI Officers

Section 1. **Officers.** The Board of Trustees, as soon as may be practicable after the election of Trustees in each year, shall elect from their number a President of the Corporation, and may from time to time select one or more Vice-Presidents, Assistant Secretaries, and Assistant Treasurers. The Clerk of Session shall serve as Secretary of the Corporation. The Treasurer elected by the session shall serve as Treasurer of the Corporation (See *Book of Order* G-3.0205). The same person may hold any two offices except those of President and Secretary. The board may also appoint such other officers and agents as may be deemed necessary for the transaction of the affairs of the Corporation. (Article of Incorporation X).

[**Note:** This is a recommended configuration and process to elect the corporate officers. Your congregation may choose a different configuration and process. See G-3.0205 regarding the requirements for the treasurer of the congregation and G-3.0104 regarding the duties of the clerk of session.]

Section 2. **Term.** The term of office for all officers shall be one (1) year or until their respective successors are chosen. Any officer elected by the Board of Trustees may be removed from the office at any meeting of the Board of Trustees by the affirmative vote of a majority of the Trustees then in office, whenever in their judgment the interest of the Corporation will be served thereby. The Board of Trustees shall have full power to fill any vacancies in any offices it is authorized to elect occurring for any reason whatsoever.

Section 3. **Powers and Duties.** The officers of the Corporation shall respectively have such powers and perform such duties in the management of property and affairs of the Corporation, subject to the control of the Trustees, as generally pertain to their respective offices, as well as such additional powers and

duties as may from time to time be conferred by the Board of Trustees. No action taken by the officers shall infringe upon the authority of the Session of the congregation or of the Board of Deacons and all actions shall be in conformity with the Constitution of the Presbyterian Church (U.S.A.). Subject to this Section, these bylaws and the articles of incorporation of the Corporation, the officers shall have the following powers and duties in regards to the Corporation:

A. The President shall: (1) preside at meetings of the Corporation and the Board of Trustees; (2) make such appointments as directed, authorized, or required, including appointing Trustees to serve on committees who shall be responsible for reporting to the Board of Trustees of the activities of their respective committees; (3) execute any and all documents of whatsoever kind and nature necessary to carry out the purpose and functions of the Corporation; (4) be responsible for carrying out the directives and requirements of applicable law, these bylaws, and the articles of incorporation; (5) in general, perform all duties incident to the office of president; and (6) perform such other duties as may from time to time be assigned by the Board of Trustees.

B. The Vice President(s) shall: (1) assist the President in the exercise of his or her duties; (2) in the absence or inability of the President, execute the duties of the President; (3) in general, perform all duties incident to the office of Vice President; and (4) perform such other duties as may from time to time be assigned by the Board of Trustees.

C. The Secretary (Clerk of Session) shall: (1) perform for the Corporation those duties set out in the Constitution of the Presbyterian Church (U.S.A.) (see *Book of Order* G-3.0104); (2) record all votes by the Board of Trustees; (3) be the custodian of the corporate seal, if any, and affix it to all documents to be executed on behalf of the Corporation under its seal; (4) in general, perform all duties incident to the office of secretary; and (5) perform such other duties as may from time to time be assigned by the Board of Trustees.

D. The Treasurer (elected by the Session) shall: (1) perform for the Corporation those duties set out in the Constitution of the Presbyterian Church (U.S.A.) (see *Book of Order* G-3.0205); (2) be responsible for the safekeeping of all funds and assets, except for those funds expressly assigned to the trusteeship of another; (3) be responsible for the filing of any and all tax and other financial reports as required by applicable law; (4) deposit all monies, drafts, and checks in the name of or to the credit of the congregation or Corporation at such banks or depositories as the Board of Trustees shall designate; (5) in general, perform all duties incident to the office of treasurer; and (6) perform such other duties as may from time to time be assigned by the Board of Trustees.

E. Assistant Secretaries shall perform those duties of the Secretary as directed by the Board of Trustees.

F. Assistant Treasurers shall perform those duties of the Treasurer as directed by the Board of Trustees.

[**Note:** This is a recommended configuration and listing of corporate officers' powers and duties. Your congregation may choose a different configuration and different powers and duties. Or, you may choose to list none of these powers and duties and accomplish them by corporate resolution. Always keep in mind the requirements for the Treasurer of the congregation (*Book of Order* G-3.0205) and the clerk of session (*Book of Order* G-3.0104).]

Section 4. **Checks, Notes, Drafts, Etc.** The Board of Trustees may, from time to time, prescribe the manner of making signature or endorsement of bills of exchange, notes, drafts, checks, acceptances, obligations, and other negotiable paper or other instruments for the payment of money and designate the officer or officers, agent or agents, who shall from time to time be authorized to make, sign, or endorse the same on behalf of the Corporation.

Article VII
Fiscal Year; Seal; Office

Section 1. **Fiscal Year.** The fiscal year of the Corporation shall be _____ [Choose a twelve-month period. Many congregation corporations choose the calendar year: January 1–December 31. Some choose July 1–June 30. You should choose the twelve-month period that best serves your accounting needs.]

Section 2. **Seal.** The Board of Trustees shall provide a suitable corporate seal for use by the Corporation if deemed appropriate.

Section 3. **Office.** The principal office and mailing address of the Corporation is _____
_____ (address of congregation).

Article VIII
Amendments

The bylaws of the Corporation may be amended or added to, or new bylaws may be adopted, by the affirmative vote of two-thirds of the members of the Corporation; provided, that the bylaws must at all times and in all respects remain in conformity with the Constitution of the Presbyterian Church (U.S.A.). (*Book of Order* G-4.0101, G-4.0102, G-4.0203; Articles of Incorporation IV, V, VI, XI).

[**Note:** Your attorney should determine if state law requires a different bylaws amendment process]

Article IX
Indemnification of Trustees and Officers

Each Trustee and officer of the Corporation shall be indemnified by the Corporation against expenses reasonably incurred in connection with any action, suit, or proceeding to which the Trustee or officer may be made a party by reason of being or having been a Trustee or officer of the Corporation (whether or not he or she continues to be a Trustee or officer at the time of incurring such expenses), except in relation to matters as to which he or she shall finally be adjudged in such action, suit, or proceeding to be personally liable. The foregoing right of indemnification shall not be exclusive of other rights to which any Trustee or officer may be entitled as a matter of law.

Article X
Dissolution

If the congregation is formally dissolved by the Presbytery of which it is a member, or has become extinct by reason of the dispersal of its members, the abandonment of its work, or any other cause, such property, both real and personal, as the Corporation may have shall be vested in and be the property of the Presbytery of _____ (name of presbytery of membership) of the Presbyterian Church (U.S.A.), pursuant to the Constitution of the Presbyterian Church (U.S.A.), said Presbytery being an organization qualified under section 501(c)(3) of the Internal Revenue Code of the United States. In the alternative, said property of the Corporation shall be held, used, and applied for such uses, purposes, and trust as the Presbytery may direct, limit, and appoint, or such property may be sold or disposed of as the Presbytery may direct in conformity with the Constitution of the Presbyterian Church (U.S.A.). (*Book of Order* G-4.0205, G-3.0301; Article of Incorporation XVII).

Section 4 – Copyright and Trademarks

I. Copyright

A. What is a Copyright?

A copyright is a property right under federal law protecting original works of authorship fixed in tangible medium of expression sufficiently permanent or stable to permit it to be perceived, reproduced or otherwise communicated. Works of authorship include: literary works; musical works, including any accompanying words; dramatic works, including any accompanying music; pantomimes and choreographic works; pictorial, graphic and sculptural works; motion pictures and other audiovisual works; sound recordings; and architectural works. Computer programs, lyrics, music, and videos are also included.

Federal copyright law does not protect an idea, procedure, process, system, method of operation, concept, principle or discovery, regardless of the form in which it is described, explained, illustrated or embodied in such work.

B. Who is the Owner of a Copyright?

The owner of a copyright is the author who created a work in fixed form, unless the work is prepared by an employee or by an independent contractor as a work made for hire. Where a work is created by an employee, the employer is the copyright owner. Where the work is created by an independent contractor as a work made for hire, the person or company that hired the independent contractor is typically the copyright owner.

The owner of a copyright has the exclusive right to do the following:

- reproduce the work in copies or phonorecords;
- prepare derivative works based on the copyrighted work (a derivative work is one based upon one or more pre-existing works; for example, the update to an existing book would be a derivative work);
- distribute copies or phonorecords of the work to the public by sale or other transfer of ownership, or by rental lease or lending;
- in the case of literary, musical, dramatic, choreographic, pantomime, motion picture, and other audiovisual works, to perform the copyrighted work publicly;
- in the case of literary, musical, dramatic, choreographic, pantomime, pictorial, graphic, or sculptural works (including images of a motion picture or other audiovisual work), to display the copyrighted work publicly; and
- in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

C. Religious Services Exemption

The religious services exemption contained in the U.S. copyright law (17 U.S. Code § 110(3)) exempts from copyright infringement “performance of non-dramatic literary or musical work or of a dramatico-musical work of a religious nature, or display of a work, in the course of services at a place of worship or other religious assembly.” This exemption allows, for example, congregants to sing hymns during service and ministers to recite poems in their sermons without first getting permission from the copyright holder.

Churches often ask if they can copy music pages from hymnals, copy sheet music, or audiotape/videotape church services for members who cannot attend worship services. **The religious services exemption does not extend to the copying of music or to the audio or video recording of portions of church services that include copyrighted works.** Moreover, the exemption does not allow for portions of services that include copyrighted works to be transmitted (also known as “streaming”) over the internet in any manner. Churches will need to obtain permission from the copyright holder to record and transmit any performance of a copyrighted work during a service.

D. Copying Music

Under the Copyright Act of 1976 the copyright owner has the exclusive right to copy or reproduce a musical work. If a church purchases sheet music or hymnals, that purchase alone does not authorize the church to make copies or transparencies of the sheet music or songs from the hymnals. This applies to the lyrics as well as the music. The only exceptions are (1) music that is in public domain (no longer copyrighted) may be copied; and (2) music may be copied in an emergency situation to replace purchased copies that are not available for an imminent performance provided the church replaces the copies with purchased copies. *See The Essential Guide to Copyright Law for Churches.* This excellent resource is available for \$49.95 from Christianity Today (800-222-1840), or on the internet. Public domain music is that which has either lost its copyright protection or was never protected by copyright. Generally, music published in the United States before January 1, 1923, is in the public domain. This applies to both music notation and lyrics.

It is important to note that the absence of a copyright notice © does not mean a work is in the public domain.

In the *Presbyterian Hymnal*, copyright ownership can be determined by looking at the bottom of the first page of each hymn. If the bottom of the page contains no copyright/ownership information, one can assume this version of the hymn is in the public domain and can be freely used. If copyright ownership does appear at the bottom of the page, the work is not in the public domain and permission to copy or tape is necessary. **For further information about the copyright ownership of various hymns in the *Presbyterian Hymnal*, please contact the Robin Howell, Manager of Rights & Permissions for the Presbyterian Publishing Corporation at rhowell@presbypub.com.**

Furthermore, uploading or downloading music from the Internet without authorization from the copyright owner or authorized distributor is a violation of copyright because it results in an unauthorized copy. Consider posting notices to this effect near computers and include it in the Internet policy section of the employee handbook.

E. Audio and Videotapes of Religious Services

As noted above, under federal copyright law, a copyright owner has the exclusive right to: reproduce, prepare derivative works (make changes), distribute copies, publicly perform, and publicly display the copyrighted work.

The religious services exemption permits the **performance** by the congregation and choir of copyrighted hymns in the course of the worship services; however, the exemption **does not extend to the taping** of the performance. Taping or transmitting (including internet “streaming”) a live performance of copyrighted material without permission or a license is copyright infringement.

If the church wants to tape copyrighted music, the options set out in Richard R. Hammar's *The Essential Guide to Copyright Law for Churches* include: obtain permission from copyright owners; avoid the use of copyrighted music; turn off the recording device when copyrighted

music is being performed; "splice in" prerecorded public domain musical works that were previously sung by the church choir; obtain a compulsory license; or enter into a "blanket license agreement."

The compulsory license process is cumbersome and not recommended. For information about blanket licenses, you may contact:

- Christian Copyright Licensing International, of Portland, Oregon; (503) 257-2230; (800) 234-2446; website: <https://us.ccli.com/>.
- EMI Christian Music Publishing (formerly Sparrow Corporation) of Brentwood, Tennessee; (615) 371-4300.
- Christian Copyright Solutions; (855) 576-5837; website: <https://christiancopyrightsolutions.com>.
- Christian Video Licensing International; website: <https://us.cvli.com>.
- And others.

These companies can provide information about blanket licenses, fees and the list of songs in their repertoires. Please make sure to clearly communicate to the companies the purpose for which the license(s) would be obtained (for example: taping copyrighted music and making copies of these tapes, streaming performances of copyrighted material over the internet, etc.). Please make certain to carefully consider all the uses of the music you want to make and communicate that to the licensing corporation so that the license will cover all your intended uses.

If these licenses prove too expensive for the church, the only options, as noted above, are not to tape the copyrighted music performed, use only public domain music in the service to be taped, or stop or mute the recorder during the performance of copyrighted music and splice in public domain music. Again, the church does not have to obtain permission to tape or copy public domain music.

In some cases, churches may wish to project or broadcast hymns onto screens in the course of a service; the right to make copies for the purpose of preparing overhead transparencies is **not** given to the church when it buys the hymnals. The copyright owner retains the right to make these types of copies. If the church wants to make these kinds of copies, it must obtain written permission from the copyright owner or obtain a license that permits such use.

Copyright infringement is serious. It can result in significant civil damages, injunction, and/or criminal penalties. As an example, willful infringement can result in statutory damages of up to \$100,000. The infringer may also be liable for attorneys' fees and costs. There are companies that act as agents for the copyright owners. These companies have employees that spend their time traveling the country to discover unauthorized use and collect license fees, so proceeding without permission or license is both unwise and illegal.

F. Video Viewing

As noted earlier, a copyright owner is given the right by federal copyright law to regulate public performances or showings of copyrighted DVDs and videotapes.

Pre-recorded DVDs or videotapes are intended for personal, home use only. **Buying or renting a video for in-home viewing (from a store or online) generally does not grant the user a license for public showings (such as viewing the videos in Sunday worship services, youth groups, or small church group meetings or retreats).** Certain distributors of religious videos may include a license for public viewing. If the video is labeled "For In-Home Viewing," public viewing is not permitted.

Generally, churches and other ministry organizations can show videos and be in accordance with the U.S. Copyright Act by obtaining written permission from the copyright owner prior to using the video, showing videos which have "Public Performance Rights," or showing works that are in the public domain. In very limited circumstances, the Classroom Use Exemption (17 U.S.C. §110(1)) may apply to your situation; for more information please visit <https://www.lib.umn.edu/copyright/limitations#classroomuse>.

G. Displaying Photos or Graphics

Whether or not a copyright is indicated on a piece of visual art, it may be protected. Even photos on "public" social sites like Facebook, Twitter, and Flickr belong to the person who created the art. In order to utilize a copyrighted photo or graphic, a church must get permission from the copyright holder, or opt for images that are in the public domain. If a church purchases stock photos for use on websites or newsletters, it may only use the images that are within the terms of the license. It may be advisable to use original photos that church personnel take themselves that are sufficiently distinct from copyrighted photos.

Regarding taking pictures of individuals. Taking pictures of individuals in places where they do not have a "reasonable expectation of privacy" (parks, street, concert, fair, public church gathering, or any public gathering) is legally permissible. On the other hand, taking photographs of people in private locations (a private room, hospital, potentially inside a private business) is not allowed. Likewise, it is not allowable, without permission, to use someone's likeness for commercial purposes, to publish a photo that defames someone or injures one's reputation, or to publish a photo that gives away private information about someone. Be mindful that some people may not want to appear in photos that will be shared. Consider asking for written permission or crafting a Photo Use Agreement to document when people grant permission to appear in photos.

H. Using Written Works

Printing or otherwise utilizing copyrighted written works (poems, book passages, etc.) without permission from the copyright holder is impermissible and may result in lawsuits and monetary fines. Before using such materials in church newspapers, newsletters, bulletins, etc., churches should conduct an internet search to learn more about the material and (if necessary) obtain written permission for use.

I. What is "Fair Use"?

Small parts of copyright works may be copied "for the purposes of research or private study." Educational institutions, archives, libraries, and museums also hold specific exemptions. Ordinary congregational worship activities, however, do not provide a context for "fair use" of copyright material.

J. Other Copyright Resources

In addition to *The Church Guide to Copyright Law*, other resources are available on the World Wide Web:

Church Music Publishers Association (<http://www.cmpamusic.org/html/main.isx>) (answers to common copyright questions)

United States Copyright Office (<http://www.copyright.gov/>)

Augsburg Fortress Copyrights & Permissions (<http://www.augsburgfortress.org/copyrights/>) (Guide to copyright law by the publishing house of the Evangelical Lutheran Church in America)

The Motion Picture Licensing Corporation (<http://www.mplc.com/>) (information about the use of videos. See, in particular, the very helpful questions and answers in the FAQ section.)

K. Internet and Other Electronic Media Copyright Issues

The Internet presents the unique opportunity to make materials almost immediately accessible to anyone in the world with Internet access. This communication medium continues to evolve as does the law related to it. In general, communication on the Internet is subject to the same rules as communication in print or broadcast.

1. Web Pages

Web page owners should place copyright notices on their copyrighted information posted on their Web page. If a Web page owner places copyrighted material on her Web page without prior permission or allows a third party to do so, the Web page owner will be liable to the copyright owner for copyright infringement. A Web page owner who permits third parties to upload information to the Web page should place a notice on the Web page stating the owner is not responsible for content or information uploaded by third parties and that third parties shall not upload copyrighted information to the Web site. Such a disclaimer may limit or eliminate liability by the Web page owner.

2. Computer Software

Computer software is generally copyrighted. A copyrighted software program cannot be copied without a license or permission from the copyright owner. Installation of software results in "copying." **Generally, purchase of software from a retailer gives permission to install on one computer only.** It may not give the purchaser the right to install the software on multiple computers. The license must be read carefully to ascertain whether the software can be installed on more than one computer and, if so, under what conditions. Unless the license permits, copyrighted computer software should not be loaned for two reasons: (1) lending is a form of distribution reserved to the copyright owner, and (2) installation by an unlicensed borrower will result in an infringing copy.

Generally, revising computer software will not result in a copyrightable program. Revision results in the creation of a derivative work and may constitute infringement if done without the copyright owner's permission. The copyright owner enjoys the exclusive right to create derivative works.

Transferring a copyrighted work from some other medium to CD-ROM without the copyright owner's consent is also prohibited. Any reproductions of such a CD-ROM would violate the copyright laws as well.

3. Uploading and Downloading from the Internet

Churches and other organizations need to be aware that software developers and publishers fund an organization known as the Business Software Alliance ("BSA"), located in Washington, D.C. The sole purpose of this organization is to locate and delete unlicensed software and capture pirates. According to an article in the National Law Journal, BSA had 35 hotlines around the world, sometimes working in cooperation with the Federal Bureau of Investigation and the U.S. Department of Justice, to receive reports of unlicensed software. BSA has been successful in obtaining many monetary settlements from unauthorized users. The settlements have also included agreements to delete the unauthorized software, purchase replacement copies, and develop a software policy. Many BSA investigations are the result of calls from disgruntled employees and calls from computer consultants. If contacted by BSA,

provide them an opportunity to voice their claim, but contact an attorney that specializes in computer law before responding.

It is recommended that churches and mid councils conduct periodic software audits to ensure they have a valid software license for every program on every computer. In addition, they should adopt a software policy that only specified personnel are permitted to load software into the employer's computers and then the program must be licensed unless it is public domain software.

Downloading copyrighted materials (including photographs) from or uploading to the Internet without permission of the copyright owner results in unauthorized copying. The same is true with regard to transferring copyrighted material to a third party via email. Do not assume drawings and games are not copyrighted and can be freely downloaded and used. Check the respective site's terms of use agreement and copyright policy.

L. Domain Names

One essential step in establishing a Web site is the selection and registration of a domain name that will function as the Internet address, for example, "First Presbyterian of Anytown.org." See InterNIC (<http://www.internic.net/>) and Internet Corporation For Assigned Names and Numbers (<http://www.icann.org/>) for more information. Churches and presbyteries should be aware that entrepreneurs, sometimes referred to as domain name "squatters," can easily register the church or presbytery's name as an Internet domain name for as little as \$100. Once they have done so, it is not unusual for these squatters to then contact you for business based on their ownership of a domain name attractive to you or for them to try to sell the domain name to you. While some businesses may see the domain name as important enough to justify paying a premium to receive ownership of it, others have challenged these squatters' registrations based on trademark and trade name infringement.

If the domain name registered by the squatter is a registered trademark, it is possible to successfully challenge the domain name registration through the dispute resolution process of a registrar or through a court action. For a list of approved dispute resolution service providers, see this website (<http://www.icann.org/en/dndr/udrp/approved-providers.htm>). Because an infringement action is costly, the recommended approach is to select a domain name and be the first to register it. The Anti-Cybersquatting Consumer Protection Act creates a cause of action for bad faith registration and profiteering in the registration of domain names that are identical to or confusingly similar to a distinctive or famous trademark. The remedies under the act include injunction and damages. The law in this area continues to evolve as do the domain name registrars and the dispute policies. For more information on these topics, see Internet Corporation For Assigned Names and Numbers (<http://www.icann.org/>).

II. Trademarks

A. What are trademarks?

Trademarks are distinctive words, symbols, or a combination of both that identify the source of goods to the public. These symbols are distinctive words (or phrases), designs or a combination of both, and may be registered on the state and/or federal levels or used, unregistered under the common law. An example of a famous federally registered trademark is "Coca-Cola®" for soft drinks.

To develop a trademark, the more arbitrary and fanciful the selected mark is the better. The idea is to select a distinctive mark, such as "Xerox®" for a photocopier, rather than one that is generic or descriptive. The purpose is to distinguish one company's goods or services from another's. Once the mark is selected, a trademark search should be designed with an attorney and conducted

by the attorney or a trademark search firm. The attorney will also work with you to determine whether the mark should be registered and, if so, whether it should be registered at the state level or with the U.S. Patent and Trademark Office at the federal level. After registration, the mark must be consistently used as a trademark or service mark, meaning that whenever possible the mark should be used with a generic term or with the word "brand," for example, "Coca Cola" soft drinks or "Coca Cola" brand soft drinks. This is an important precaution to avoid losing the mark by its becoming a generic term as was the case with the term "aspirin." A notice that the mark is registered should be included when the mark is used. One of the following notices should appear with a federally registered trademark:

- The letter R enclosed in a circle: ®
- Reg. U.S. Pat. & Tm. Off.
- Registered in the U.S. Patent and Trademark Office

To maintain a federal registration, an affidavit of use must be filed during the fifth year of registration or the mark will be canceled. In addition, an affidavit of incontestability should also be filed. The filing of this affidavit makes the mark incontestable, meaning the registration becomes conclusive evidence of the registrant's ownership and renders the mark immune from attack in certain instances. Federal registrations must be renewed every ten years after registration.

While maintenance of the registration is important, it is equally important to protect the mark from infringement and dilution. Failure to act to stop unauthorized use of a trademark may result in abandonment of the mark and loss of the exclusive right to use it.

From time to time, one may desire to use a trademark owned by someone else. Always obtain written permission to make any commercial use of another's mark. If you receive a cease-and-desist letter from a trademark owner for unauthorized use of their mark, contact your attorney before responding.

B. Application and Use of the Presbyterian Church (U.S.A.) Name

The words *Presbyterian Church (U.S.A.)* should not be used as, or as a part of, a trade name or trademark or as a part of the name of any business, firm, or organization, except by the particular churches, mid councils, corporations they control or other entities created for the administration of work undertaken directly by the Presbyterian Church (U.S.A.).

The term "property" includes many elements or ideas in addition to land and the rights incident to land. The law of unfair competition prohibits the misleading use of a name, even while unintentional, and is based on the idea that the right to use a name is a valuable property right entitled to protection from misappropriation and misuse. The right to exclusive use of a name may be established by a history of prior usage of the name, by compliance with statutory provisions about registration and notice, or by a combination of both.

The use of the name "Presbyterian Church (U.S.A.)" by unauthorized persons or organizations comes within the area of the law known as unfair competition. The use of the name of the church in such a manner that deception or confusion may result is considered unfair competition. The remedy at law is generally an injunction prohibiting the offending party or parties from continuing the unauthorized use of the name and/or monetary damages. The complaining party must show that the effect of the offending use is the likelihood of confusion or deception of third parties.

Sometimes other churches with confusingly similar names to a Presbyterian Church (U.S.A.) church are established in the same community. This situation could lead to confusion not only

among potential members but also with wills and bequests that are ambiguous in their reference to the recipient church. The term "Presbyterian Church" has been in use for hundreds of years and is one to which several denominations lay claim. Each of these denominations should incorporate some wording into their name to distinguish them from one another in order to avoid confusion. For example, the term "Presbyterian Church in America" is distinguishable from "Presbyterian Church (U.S.A.)." Such distinguishing denominational names on local church signs, letterhead, and the like often remedy any potential confusion.

The ultimate concern is that the term "Presbyterian Church (U.S.A.)" is used by parties that are not official organizations of the church. If you become aware of such misuse, contact Mike Kirk, Legal Services, (502) 569-5390. Legal Services can help determine the next steps. Generally, the first step will be a friendly call on the infringer by the local teaching elder or presbytery executive. If that contact is not productive, the next step will most likely be a letter to the infringer demanding they immediately cease and desist use. If an infringement legal action becomes necessary, the relief requested would most likely be a permanent injunction against the continued use of a misleading name by an unauthorized organization. Any actions necessary to enjoin misuse of the term "Presbyterian Church (U.S.A.)" would be brought by Presbyterian Church (U.S.A.), A Corporation. If the unauthorized user is allowed to continue the use with the knowledge of the denomination, the denomination's exclusive rights to the term "Presbyterian Church (U.S.A.)" could be compromised.

C. The Seal of the Presbyterian Church (U.S.A.)



The seal of the Presbyterian Church (U.S.A.) is a registered trademark, registered in the United States Patent and Trademark Office on the principal register. In addition, the seal is registered with the United States Copyright Office. The seal is comprised of the symbol, the basic components of which are cross, scripture, a descending dove at the upper part of the cross, and flames on either side of the lower part of the cross; and the name of the denomination, Presbyterian Church (U.S.A.), encircles the symbol.

The seal was approved by the 197th General Assembly (1985). **Each congregation and council may use the seal without receiving prior permission. Congregations and councils may not, however, license use of the seal to anyone else. All other organizations, groups, and members must receive prior written permission to use the seal from Legal Services (Administrative Services Group) (see contact information below).**

A congregation or council may, of course, authorize the seal to be used for core functions of the council. For example:

- Printing on church stationery and publications
- Church signs
- Shirts for church athletic teams

The church must, however, be sure the vendor that produces these items does not then use the seal for its own purposes. For example, if Acme Printing produces fifty T-shirts for First Presbyterian Church using the seal, that use is authorized by the 1985 General Assembly action.

If Acme Printing then uses the seal on other shirts and markets them, that is a copyright violation without a prior license from Legal Services (Administrative Services Group).

Any authorized use of the Presbyterian Church (U.S.A.) symbol must comply with the following guidelines, as may be amended from time to time by the Office of the General Assembly:

1. The design and proportions of the symbol must not be altered in any way, except the size may be changed for use on stationery, signs, banners, and so forth. The colors may be changed in the manner set forth below.
2. The symbol may be used with or without the words "Presbyterian Church (U.S.A.)" encircling the symbol.
3. The use of color in the symbol is permitted as follows:
 - Traditional colors using royal blue or gold for the cross, scripture and dove portion, and gold for the words "Presbyterian Church (U.S.A.)" encircling the symbol.
 - Liturgical colors using one color for the entire symbol as follows: violet for Advent and Lent, red for Good Friday and Pentecost and green for the Sundays after Pentecost.
 - Other colors and color combinations with prior approval of OGA.
4. The symbol must never be depicted with any type of motion. For example, the symbol must not be depicted in a video or on an Internet web page as spinning.
5. While every use of the seal may not provide an opportunity to display the statutory notice (the circle "R", ®) and use of the statutory notice is not mandatory, it is good practice, when practicable, to give public notice of the trademark registration by using one of the following:
 - The letter R enclosed in a circle: ®
 - Reg. U.S. Pat. & Tm. Off.
 - Registered in U.S. Patent and Trademark Office

So, while it is not practical to display the statutory notice on a stained-glass window or church sign, it is possible to note it on the reverse of a piece of jewelry or in another inconspicuous place.

Trademark protection may be lost through improper use, abandonment, and dilution. To minimize this risk, the symbol must always be used in its entire and original form.

As is the case with the notice of trademark registration, copyright notice is not mandatory but, whenever possible, it is desirable to include some notice of the copyright on the inside cover of publications displaying the seal. The following language is suggested: **"The seal is the exclusive property of the Presbyterian Church (U.S.A.) and is registered in the U.S. Copyright Office. This seal may not be used or reproduced without the prior written permission of Legal Services (Administrative Services Group) of the Presbyterian Church (U.S.A.), A Corporation, 100 Witherspoon Street, Louisville, Kentucky 40202."**

In addition, any suspected unauthorized use should be promptly brought to the attention of Legal Services (Mike Kirk 502-569-5390) or by forwarding the name and address of the user to Legal Services (Administrative Services Group) as well as a sample of their use of the seal.

Anyone other than a congregation or council who plans to use the seal must receive the prior permission of Legal Services (Administrative Services Group) of the Presbyterian Church (U.S.A.), A Corporation. Any products marketed in wholesale or retail settings must be specifically licensed by Legal Services (Administrative Services Group). An application for use must be submitted and a fee must be paid for each design. A sample of the proposed product

should be sent to Legal Services (Administrative Services Group) so approval may be based on the finished product.

For more information or a license to use the seal, contact:

Legal Services
Administrative Services Group
Presbyterian Church (U.S.A.), A Corporation
100 Witherspoon Street
Louisville, KY 40202
Andrej Ajanovic
502-569-5043

D. Request for License to Use the Seal of the Presbyterian Church (U.S.A.)



1. Commercial Use

The Presbyterian Church (U.S.A.) Seal is a registered trademark of the Presbyterian Church (U.S.A.), A Corporation. Anyone making a commercial use of the seal must first have a license issued through Legal Services (Administrative Services Group).

2. Accuracy

Every usage of the trademark must maintain the accuracy of the seal in its design, proportion, and style and comply with our guidelines.

This completed request-for-permission form (see Appendix E), should be sent to Legal Services (Administrative Services Group). A sample of the product should be sent with this request. Send to:

Legal Services
Administrative Services Group
Presbyterian Church (U.S.A.), A Corporation
100 Witherspoon Street
Louisville, KY 40202
Attention: Andrej Ajanovic
502-569-5043

3. Instructions for Request for Permission to use Presbyterian Church (U.S.A.) Seal

The following are instructions for completing the request for permission. As stated, the completed request should be mailed to Legal Services (Administrative Services Group) of the Presbyterian Church (U.S.A.), A Corporation, 100 Witherspoon Street, Louisville, KY 40202, Attn: Andrej Ajanovic. If this is a request for a renewal, please send a copy of the original request form that you completed or, if it is not available, complete another request and tell us in Question #7 when permission was first granted.

4. Explanation of the Questions:

- a. Provide your name, the company name, if any, and address.
- b. Please set forth in detail the proposed use of the seal. (For example, for a jewelry pin, on clothing, etc.) Please supply us with as much information as possible. Also, please explain how the product is to be marketed or sold. (For example, to a local Presbyterian church, produced for a conference, etc.)
- c. If you have a sample of the product, please enclose it and indicate in #3 that you have enclosed it. In order to maintain the integrity and proportions of the seal, you should obtain design proofs from the Legal Services (Administrative Services Group) if you do not have any available.

If you do not have the actual product, describe how it will appear. For example, if it is used for a jewelry pin, give the materials and dimensions (if no sample is available, enclose a sketch). For clothing, describe the specific article of clothing and explain how the design will appear (if no sample is available, enclose a sketch).

- d. State the number of products you intend to produce.
- e. State the sale price per individual item.
- f. Provide the name of the council or entity in the Presbyterian Church (U.S.A.) that requested that you produce this product. For example, a local church, presbytery, agency, etc. Please supply us with the name of the individual from which you obtained this request. If such authorization is not direct, please explain how you plan to market this product.
- g. For renewals, you may enclose the original application and a note that you are requesting a renewal. If you do not have the original request, please complete this form again and include the date the original license was granted. If you have changed your name from the time of the original request, please let us know.

As part of the license, it is understood that if you have not included a sample product, you will supply us with the actual product within a reasonable time after production. If a license is granted it will be with the understanding that the product you produce conforms substantially with the information set forth on the request. If the actual product you produce differs substantially from the sample or description you have given in the request, you need to supply us with a new request or sample. If you have any questions, please call Andrej Ajanovic at 502-569-5043.

5. Guidelines for use of the Seal of the Presbyterian Church (U.S.A.)

Any authorized use of the Presbyterian Church (U.S.A.) symbol must comply with the following guidelines, as may be amended from time to time by the Office of the General Assembly:

- a. The design and proportions of the symbol must not be altered in any way, except the size may be changed for use on stationery, signs, banners, and so forth. The colors may be changed in the manner set forth below.
- b. The symbol may be used with or without the words "Presbyterian Church (U.S.A.)" encircling the symbol.
- c. The use of color in the symbol is permitted as follows:
 - Traditional colors using royal blue or gold for the cross, scripture and dove portion, and gold for the words "Presbyterian Church (U.S.A.)" encircling the symbol.

- Liturgical colors using one color for the entire symbol as follows: violet for Advent and Lent, red for Good Friday and Pentecost and green for the Sundays after Pentecost.
 - Other colors and color combinations with prior approval of OGA.
- d. The symbol must never be depicted with any type of motion. For example, the symbol must not be depicted in a video or on an Internet Web page as spinning.
 - e. While every use of the seal may not provide an opportunity to display the statutory notice (the circle "R", ®) and use of the statutory notice is not mandatory, it is good practice, when practicable, to give public notice of the trademark registration by using one of the following:

The letter R enclosed in a circle: ®

Reg. U.S. Pat. & Tm. Off.

Registered in U.S. Patent and Trademark Office

So, while it is not practical to display the statutory notice on a stained-glass window or church sign, it is possible to note it on the reverse of a piece of jewelry or in another inconspicuous place.

Trademark protection may be lost through improper use, abandonment, and dilution. To minimize this risk, the symbol must always be used in its entire and original form.

APPENDIX E

**Request for License to Use the Seal of the Presbyterian Church (U.S.A.)
Commercial Use**

1. Name of Applicant and Company/Organization

Address: _____

2. How will the seal be used and to whom will the product or service be marketed? (Please describe in detail):

3. Description of product to be manufactured or developed

4. How many will be manufactured?

5. What is the anticipated selling price?

6. Will the seal be used under the authorization and direction of some governing body or related entity of the Presbyterian Church (U.S.A.)?

If so, name of the governing body or related entity and the chief executive

8. If this is a renewal request, give the date that permission was first given

Signed _____

Title _____

Date _____

Section 5 – Contracts

The material in this Contracts section deals with general contract issues such as what is a contract, why is a contract needed, what types of contracts exist, what items should be included in contracts, what can be done to amend an existing contract, and what can be done when a dispute arises. Typical instances when you would use a contract include:

- Purchasing equipment (computers, organs, furniture)
- Services (painting, roofing, architects, remodeling)
- Using hotels or conference centers

I. Definition of a Contract

A contract is a promise or set of promises constituting an agreement between the parties that gives each a legal duty to the other and also gives each the right to seek a remedy for the breach of those duties. It is the total legal obligation that results from the parties' agreement and a promise or set of promises for the breach of which the law in some way recognizes a duty. In order to be legally binding, a contract must contain competent parties, subject matter, legal consideration (something of value given), mutual assent, and mutual obligation to perform.

One common misconception some have is that a contract must be written to be valid. Generally, oral agreements that have competent parties, subject matter, legal consideration, mutual assent, and mutual obligation to perform constitute legally binding contracts. There are, however, certain types of contracts that must be in writing in order to be legally binding, and, if you have any questions regarding whether a particular contract must be written, it is always best to consult an attorney in your jurisdiction. A written contract is generally preferable because the terms exist in "black and white" instead of merely in the parties' minds.

II. Function of a Contract

A clear written agreement between the parties lets each party know what to expect and avoids future disputes. Without such a written agreement, excess funds may be expended and future working relationships may be hindered.

III. Types of Contracts

As discussed above, a contract can be either oral or written. In addition, a contract can be express, promises communicated by language (i.e., A promises to paint B's garage in return for B's promise to pay A \$250), or implied, parties' conduct indicates that they assented to be bound (i.e., A fills his car with gas at B's gas station. There is an implied contract for the purchase and sale of gas.).

The following are examples of types of contracts churches may encounter:

1. **Purchase Orders** are generally used for items such as office supplies, printing, and computer equipment. Terms and conditions (which typically favor the seller) are preprinted on the form. Remember: You can negotiate these terms if you desire.
2. **Honorarium Letters** are used for services of limited duration rendered by an individual for which no set standard of quality is to be dictated and which does not include the creation of a copyrightable work. Examples of such services are one-time speeches, lectures, teaching engagements, and musical or other performances. (A sample form of honorarium letter is attached as Appendix A).
3. **Independent Contractor Agreements** are used for services rendered by an individual. For such an agreement to be entered into, the services performed by the individual must meet the common law rules which determine whether one has been properly classified as an independent contractor

as opposed to an employee. As stated by the Internal Revenue Service (IRS), “It is critical that business owners correctly determine whether the individuals providing services are employees or independent contractors. Generally, you must withhold income taxes, withhold and pay Social Security and Medicare taxes, and pay unemployment tax on wages paid to an employee. You do not generally have to withhold or pay any taxes on payments to independent contractors.” Misclassification of an individual as an independent contractor can give rise to a variety of liabilities.

No legal test applies in every situation when deciding on how to classify a potential worker. The IRS, Department of Labor (DOL) and certain States all utilize similar, yet different, analytical frameworks for such analysis.

In making the determination whether one is an independent contractor or an employee for the purposes of the IRS, all information which provides evidence of the degree of control and the degree of independence should be considered. Three categories of consideration will provide evidence regarding the degree of control and independence; the categories are: behavioral control, financial control, and the type of relationship of the parties. The IRS publication titled "Independent Contractor (Self-Employed) or Employee?" (<https://www.irs.gov/businesses/small-businesses-self-employed/independent-contractor-self-employed-or-employee>) provides excellent guidance on the topic and the employee/independent contractor test. Similarly, the Department of Labor’s fact sheet titled “Fact Sheet 13: Employment Relationship Under the Fair Labor Standards Act (FLSA)” provides detailed information on the test (<https://www.dol.gov/agencies/whd/fact-sheets/13-flsa-employment-relationship>). Lastly, a few states contain slightly different and occasionally more stringent employee/independent contractor classification rules (for example, California’s "ABC" test) and workers’ compensation rules.

Common situations where the independent contractor classification may be appropriate include:

- A specific, complex project where specialized knowledge or experience is necessary.
- A project of specific or short duration.
- Exigent circumstances such as meeting needs when an employee is on a prolonged leave of absence.

Some examples of services provided pursuant to such independent contractor agreements are: video production, manuscript acquisition and production or consulting services.

It is highly advisable to not treat the independent contractors as a regular employee and to utilize an independent contractor agreement that clearly establishes the workers as independent contractors. (*See* Sample Independent Contractor Contract Form attached at Appendix B).

4. **Specialized Contracts** are used for services rendered by individuals or companies. Specialized contracts may be drafted when no other form of agreement (i.e., purchase order, independent contractor agreement) fits the situation at hand. The types of services that may be provided under such an agreement are similar to the types of services that may be provided pursuant to an independent contractor agreement. (*See* Sample Company Contract Form attached as Appendix C).
5. **Hotel and Conference Contracts** are used for providing accommodations for meetings and conferences. These agreements are types of specialized agreements. Generally, the hotel or conference center will have a form contract that it will provide. However, you should review this form and negotiate any revisions you deem necessary for your event as well as the financial well-being of your council. For example, look for oppressive, one-sided cancellation, indemnity, and attrition clauses as well as clauses regarding overflow of rooms at off-site locations, clauses concerning the hotel or conference center's responsibilities pursuant to the Americans with Disabilities Act, and clauses requiring large advance deposits. Also be aware you may need separate transportation, catering, audiovisual, or parking contracts. Finally, given the current political and security situation review the contract's "Acts of God" clause, paying special attention to whether it may be canceled due to terrorist acts or government imposed state of emergencies.

IV. Terms to Include in Contracts

Certain items should generally be included in contracts. Examples of these items are:

1. the legal names of the parties and their addresses,
2. start and end dates,
3. whether the contract is renewable,
4. a clear statement of the services or product to be provided,
5. a clear indication of the cost of the service or product including any installment payment schedules,
6. a clear statement of the ownership of any copyrightable material,
7. a clear statement regarding whether any expenses shall be reimbursed and, if so, to what level,
8. the parties' taxpayer identification numbers (for a corporation this is its employer identification number),
9. a clear statement regarding termination,
10. a clear statement regarding warranties provided; and
11. a clear statement of how any potential disputes will be resolved (i.e., arbitration, mediation).

V. Amending an Existing Contract

If you have an existing contract and need to change some of its terms, an addendum to the existing contract is needed. It should clearly identify the original agreement it is amending (usually by title and date), identify the specific terms being amended, set forth the amendments in detail, specify that all items not amended remain in full force and effect, and be signed and dated by the parties. (*See* Sample Independent Contractor Contract Addendum attached as Appendix D and Request For Services of a Company Addendum attached as Appendix E).

VI. Dispute Issues

Sometimes, despite your best efforts, contract relationships go sour, and there is a dispute. It is at this point that a well-drafted, detailed contract can be your ally because you can look to it to see what each party's obligations are as well as what is to happen in the event of a dispute (i.e., Can you terminate? Can you require the other party to provide the partially completed product? Do you have an obligation to arbitrate the dispute? If you decide to resort to litigation, must it take place in a particular jurisdiction?). Generally, litigation should be a last resort option because it is costly both in terms of financial resources and human resources.

VII. Important Tax Information

Beginning with tax year 2020, the IRS requires that the payer (here, the church or mid council) issue a Form 1099-NEC to any nonemployee worker paid \$600 or more during the year. This would typically arise under an independent contractor agreement or an honorarium. The payer must provide a copy of the Form 1099-NEC to the independent contractor by January 31 of the year following payment. The payer must also send a copy of this form to the IRS by January 31. Form 1099 and the related instructions can be found on the IRS website (<https://www.irs.gov/forms-pubs/about-form-1099-nec>). Note: The 1099-NEC is not used for payments to corporations or to employees. The individual receiving the money should fill out a Form W-9 (U.S. citizen or resident alien) or a Form W-8 BEN (foreign person subject to withholding) and submit it to you so you have the correct information on file to issue the required 1099-NEC. Richard Hammar's *Church & Clergy Tax Guide* has additional information on this topic. IRS forms and instructions are available by telephone at 800-919-9835 and on the IRS's Forms, Instructions and Publications page (<https://www.irs.gov/forms-instructions>).

*Sample form of Honorarium Letter
(on letterhead of Church or Mid Council)*

(Current Date)

(Address of Recipient)

RE: Honorarium

Dear _____:

In order that we may provide you with an honorarium in the amount of _____ Dollars (\$ _____), **(total amount to be paid for services rendered by Recipient)** for your participation as _____ **(description of services provided, i.e., speaker, teacher)** in the _____ Presbyterian Church **(name of church)** (hereinafter “Church Corporation”) “_____” **(name of event Recipient will participate in)** on _____, 21 **(dates Recipient will perform the services)** please complete the certification appearing below. For your convenience attached is a pre-paid envelope for your handling **(optional)**.

(If applicable) Also as agreed, the Church Corporation will reimburse your expenses related to this event up to _____ Dollars (\$ _____) **(total amount to be paid for expenses related to the services being performed)**. All reimbursable expenses must be documented with receipts for amounts in excess of Ten Dollars (\$10).

I thank you in advance for your attention to this matter. Should you have any questions please call _____ at _____ **(name and telephone number of person in Office that can assist Recipient)**.

Sincerely,

Signature and Title of Church Corporation Officer

Attachment

By my signature I, _____ **(name of Recipient)**, hereby certify that this Honorarium is fully understood by me and is entirely satisfactory and that I am not on the payroll of the Church Corporation.

Signature

Date

Sample of Contract for an Independent Contractor

(Name of Church Corporation)

(Address)

This form is to be used for services to be performed by an *individual*. It is not to be used to contract services by a *corporation or other business association*. No work shall be performed until this contract is fully *completed and approved by all parties*. Any work performed prior to such date is at contractor's sole risk that payment will not be approved.

1. Name and Social Security # of Contractor: _____

2. Address & Phone No: _____

3. Trade, Business or Profession: _____

4. Other major clients (Do not include service as an employee): _____

5. Is the Contractor *in any way related* to any employee of Church Corporation (i.e., related by blood or marriage, business associate, partner, or employment relationship)? _____ If so, to whom and what relationship? _____
6. Church Corporation hereby contracts with Contractor, and Contractor agrees to perform the following services in accordance with the terms and conditions outlined in this Contract. If appropriate, attach a copy of any additional terms. This copy must be dated and initialed by both parties hereto and shall be incorporated herein by reference: _____
7. Will Church Corporation set Contractor's working hours; determine work site; or control the day-to-day details of the services? _____
8. Contractor shall begin work on _____, 21_____ and complete work by _____, 21_____.
9. Contractor will perform services in accordance with this contract at _____
10. Will Church Corporation provide Contractor's working space, materials, or equipment? _____
If yes, specify which: _____

11. Are expenses to be reimbursed by Church Corporation? _____ If yes, list type and maximum dollar amount for each expense: _____

12. Church Corporation shall pay Contractor a firm and fixed fee of \$ _____ for the satisfactory completion of all work. The total fee paid shall not exceed this amount and excludes any expenses. The fee shall be paid (check one only):

_____ (A) In a lump-sum payment on _____ or

_____ (B) In installment payments on the following schedule: _____

Signatures:

Contractor (Also Sign Page 2) Date

Church Corporate Officer Date

Title

*Sample of Contract for an Independent Contractor
Terms and Conditions*

Contractor and Church Corporation agree that Contractor shall perform the services described on PAGE 1 according to the following terms and conditions:

- A. **Termination.** This Contract may be terminated by either party upon ten (10) days' written notice. Upon termination, a written report of work completed and the status of the project, including all materials completed or in progress, research findings or other products previously produced by the Contractor, shall become the property of Church Corporation and shall immediately be delivered by Contractor to Church Corporation. In the event of cancellation of this Contract, any amounts previously advanced to Contractor for which satisfactory work has not been completed shall be refunded to Church Corporation, and Contractor shall release to Church Corporation all copies and all rights to all of the written materials produced under this Contract. Immediately upon any cancellation notice, Contractor shall not perform any further work, and Church Corporation shall not make any further payment.
- B. **Time Devoted by Contractor.** It is understood and agreed that Contractor will spend a sufficient number of hours in fulfilling the duties and obligations under this Contract. The particular amount of time may vary from day-to-day and week-to-week.
- C. **Payment.** The fee for the work is stipulated on PAGE 1 and is payable according to the terms specified therein.
- D. **Independent Contractor.** Both Church Corporation and Contractor understand and agree that Contractor is at all times and shall remain an independent contractor in the performance of the duties under this Contract and shall not be considered an agent, employee, partner of, or joint venturer or joint employer with Church Corporation. Contractor hereby acknowledges that she/he is an independent contractor and has no authority to represent, obligate, or bind Church Corporation in any manner or to any extent. Contractor is to do work according to Contractor's best judgment and methods, without being subject to the control of Church Corporation except as to the quality of the final product. Because Church Corporation will not control the manner of performing services, it will not be liable for the negligence of Contractor or Contractor's employees or agents, and Contractor will indemnify Church Corporation for any claims resulting therefrom, including attorney's fees. Contractor will determine the time and place for doing the work consistent with the responsibilities described. Except as otherwise provided on PAGE 1, Contractor will provide the required working space, equipment, materials, and assistance at Contractor's own expense. Under this Contract, there will be no deductions for withholding income or Social Security taxes, and Contractor shall file all applicable tax returns and pay all taxes due thereon. Church Corporation will not obtain Worker's Compensation Insurance or State Unemployment Insurance for Contractor or Contractor's employees. Contractor will not be eligible for, or entitled to, any benefits normally provided for employees of Church Corporation.
- E. **Confidential Information.** Contractor agrees that any information received by Contractor during any activities under this Contract, which concerns the personal, financial, or other affairs of Church Corporation, will be treated by Contractor in full confidence and will not be revealed to any other persons, firms, or organizations.
- F. **Indemnity.** Contractor hereby agrees that all work and services performed and all personnel provided and/or hired under this Contract (with exception of employees of Church Corporation) shall be covered by Contractor's worker's compensation insurance and general liability insurance, and that

Contractor shall be solely responsible for and shall indemnify, hold harmless, and defend Church Corporation with respect to any and all actions, suits, causes of action, or damages based upon or arising out of any work performed hereunder by Contractor or any person hired by Contractor.

- G. **Approvals and Changes.** Church Corporation shall have the right of review, and approval, or disapproval at all stages of the services to be delivered under this Contract.
- H. **Title/Ownership.** Contractor understands and agrees that title to all items prepared and produced by Contractor for Church Corporation under this Contract shall be solely the property of Church Corporation, and Contractor shall have no right or interest therein. Further, all materials of whatever kind are works made for hire under federal law; all rights for publication will be held by Church Corporation; and the copyright will be owned by Church Corporation. Without limiting the generality of the foregoing, Church Corporation shall own all rights in and to all items prepared and any programs, products, and files that result or are derived therefrom. As applicable, Contractor understands and authorizes his or her voice and/or image to be projected on the audio/video recordings produced for Church Corporation under this Contract.
- I. **Entire Agreement.** This Contract represents the entire understanding and agreement between the parties with respect to the subject matter hereof and supersedes all previous negotiations, representations, and writings between the parties relating hereto. No modification, alteration, waiver, or change in any of the terms of this Contract shall be valid or binding upon the parties hereto unless expressed in writing signed by both parties. This Contract shall be deemed to be fully understood, satisfactory, and in effect when signed by all parties indicated below but shall not be binding on Church Corporation until approved by its appropriate officials.
- J. **Governing Law and Venue.** It is understood and agreed by the parties that this Contract shall be construed in accordance with the laws of _____ (state where Church Corporation is located) and that any litigation in connection with this Agreement shall be determined by a court proceeding in _____ (city and state where Church Corporation is located).

These Terms Have Been Read and Agreed to By:

Contractor Date

Church Corporate Officer Date

Title

*Sample of Contract for an Independent Contractor
Request for Services of a Company*

(Name of Church Corporation)

(Address)

This form is to be used for services to be performed by a company. It is not to be used to contract services by an individual. No work shall be performed until this contract is fully completed and signed by all parties. Any work performed prior to such date is at company's sole risk that payment will not be approved.

1. Company Name _____ (“Company”)

2. EIN # _____

3. Full Address & Phone No _____

4. Trade, Business or Profession: _____

5. Other major clients: _____

6. Church Corporation hereby contracts with Company, and Company agrees to perform the following services in accordance with the terms and conditions outlined in this Contract. If appropriate, attach a copy of any additional terms which must be dated and initialed by both parties hereto and shall be incorporated herein by reference: _____

7. Company shall begin work on _____, 21_____ and complete work by _____, 20_____

8. Company will perform services in accordance with this Agreement at _____

9. Will Church Corporation provide Company's working space, materials or equipment? _____ If so, specify which: _____

10. Are expenses to be reimbursed by Church Corporation? _____ If yes, list type, maximum dollar amount for each expense: _____

11. Church Corporation shall pay Company a firm and fixed fee of \$_____ for all work satisfactorily completed. The total fee paid shall not exceed this amount and excludes any expenses. The fee shall be paid (check one only):

_____ (A) In a lump-sum payment on _____; **or**

_____ (B) In installment payments on the following schedule: _____

SIGNATURES (also print name):

Church Corporation

Date

Company (Also Sign Part 2)

Date

TERMS AND CONDITIONS - Part 2 of 2

Company and Church Corporation agree that Company shall perform the services described in PART 1 according to the following terms and conditions:

- A. **Termination.** This Contract may be terminated by either party upon ten (10) days' written notice. Upon termination, a written report of work completed and the current status of the project, including all materials completed or in progress, research findings or other products previously produced by the Company, shall become the property of Church Corporation and shall immediately be delivered by Company. In the event of termination of this Contract, any amounts previously advanced to Company for which satisfactory work has not been completed shall be refunded to Church Corporation, and Company in turn shall release to Church Corporation all copies and all rights to all of the written materials produced under this Contract. Immediately upon any termination, Company shall not perform any further work, and Church Corporation shall not make any further payment.
- B. **Time Devoted by Company.** It is understood and agreed that Company will spend a sufficient number of hours in fulfilling the duties and obligations under this Contract. The particular amount of time may vary from day-to-day and week-to-week.
- C. **Payment.** The fee for the work is stipulated in PART 1 and is payable according to the terms specified therein. The fee is fixed and firm.
- D. **Independent Contractor.** Both Church Corporation and Company understand and agree that Company is, at all times and shall remain, an independent contractor in the performance of the duties under this Contract and shall not be considered an agent, employee, partner of, or joint venturer or joint employer with Church Corporation. Company hereby acknowledges that it is an independent contractor and has no authority to represent, obligate, or bind Church Corporation in any manner or to any extent. Company is to do work according to Company's best judgment and methods without being subject to the control of Church Corporation, except as to the quality of the final product. Because Church Corporation will not control the manner of performing services, it will not be liable for the negligence of Company or Company's employees or agents, and Company will indemnify Church Corporation for any claims resulting therefrom, including attorneys' fees. Company will determine the time and place for doing the work consistent with the responsibilities described. Except as otherwise provided in PART 1, Company will provide the required working space, equipment, materials, and assistance at Company's own expense. Under this Contract, there will be no deductions or withholding of income or Social Security taxes, and Company shall file all applicable tax returns and pay all taxes due thereon. Church Corporation will not obtain Worker's Compensation Insurance or State Unemployment Insurance for Company or Company's employees. Company will not be eligible for, or entitled to, any benefits normally provided for employees of Church Corporation.
- E. **Confidential Information.** Company agrees that any information received by Company during any activities under this Contract, which concerns the personal, financial, or other affairs of Church Corporation, will be treated by Company in full confidence and will not be revealed to any other persons, firms, or organizations.
- F. **Indemnity.** Company hereby agrees that all work and services performed and all personnel provided and/or hired under this Contract (with exception of employees of Church Corporation) shall be covered by Company's worker's compensation insurance and general liability insurance and that Company shall be solely responsible for and shall indemnify, hold harmless, and defend Church Corporation with respect to any and all actions, suits, causes of action, or damages based upon or arising out of any work performed hereunder by Company or any person hired by Company.
- G. **Approvals and Changes.** Church Corporation shall have the right of review and approval or disapproval at all stages of the services to be delivered under this Contract.
- H. **Title/Ownership.** Company understands and agrees that title to all items prepared and produced by Company for Church Corporation under this Contract shall be solely the property of Church Corporation, and Company shall have no right or interest therein. Further, all materials of whatever kind are works made for hire under federal law; all rights for publication will be held by Church Corporation; and the copyright will be owned by

Church Corporation. Without limiting the generality of the foregoing, Church Corporation shall own all rights in and to all items prepared and any programs, products, and files that result or are derived therefrom.

- I. **Entire Agreement.** This Contract represents the entire understanding and agreement between the parties with respect to the subject matter hereof and supersedes all previous negotiations, representations, and writings between the parties relating hereto. No modification, alteration, waiver, or change in any of the terms of this Contract shall be valid or binding upon the parties hereto unless expressed in writing signed by both parties. This Contract shall be deemed to be fully understood, satisfactory, and in effect when signed by all parties indicated below but shall not be binding on Church Corporation until approved by its appropriate officials.
- J. **Governing Law and Venue.** It is understood and agreed by the parties that this Contract shall be construed in accordance with the laws of _____ (insert state of incorporation of Church Corporation) and that any litigation in connection with this Agreement shall be determined by a court proceeding in _____, _____ (insert city and state of Church Corporation).
- K. **Expenses.** If applicable, a copy of Church Corporation’s travel and reimbursement policies and guidelines shall be provided upon request and such policies and guidelines are hereby fully incorporated. Church Corporation shall not reimburse Company for charges for movie rentals or alcoholic beverages.

THESE TERMS HAVE BEEN READ AND ARE AGREED TO BY:

Company

Date

Sample of Contract Addendum for an Independent Contractor

ADDENDUM

THIS FIRST ADDENDUM is entered into this *(insert Day)* day of *(insert Month)*, 20__ in accordance with that certain Independent Contractor Contract (hereinafter "Contract") dated *(insert Date)*, 20__ by and between *(insert name of Church Corporation)* of *(insert address)* (hereinafter "Church Corporation") and *(insert individual's name)* of *(insert individual's address)* (hereinafter referred to as "Contractor").

1. Both Church Corporation and Contractor agree that paragraph number *(insert number (or letter) of Contract's paragraph that is to be amended)* of the Contract is hereby amended, whereby *(insert the change to be made)*

- Examples of Changes:

- Contractor will provide the following additional services to the Church Corporation: _____
- Contractor shall complete the work by *(insert new date)*.
- Church Corporation shall pay Contractor up to an additional *(insert amount of additional payment)* for the additional services. The total fee paid under the Contract shall not exceed *(insert the new total amount to be paid under this contract)*.

2. Etc. Both Church Corporation and Contractor agree that paragraph number *(insert number and/or title of Contract's paragraph that is to be amended)* of the Contract is hereby amended, whereby *(insert the change to be made)*

3. Etc.

All other provisions of the Contract shall remain in full force and effect.

IN WITNESS WHEREOF, the parties hereto have caused this First Addendum to be duly executed the date above-stated.

 Insert Name of Contractor
 ("Contractor")

 Insert Name of Church Corporation
 ("Church Corporation ")

 Date

 Date

Request for Services of a Company - Addendum

ADDENDUM

THIS FIRST ADDENDUM is entered into this *(insert Day)* day of *(insert Month)*, 20__ in accordance with that certain Request for Services of a Company contract (hereinafter "Contract") dated *(insert Date)*, 20__ by and between *(insert name of Church Corporation)* of *(insert address)* (hereinafter "Church Corporation") and *(insert Company's name)* of *(insert Company's address)* (hereinafter referred to as "Company").

1. Both Church Corporation and Company agree that paragraph number *(insert number (or letter) of Contract's paragraph that is to be amended)* of the Contract is hereby amended, whereby _____ *(insert the change to be made)*.

- Examples of Changes:

- *Company will provide the following additional services to the Church Corporation:*

- *Company shall complete the work by (insert new date).*
 - *Church Corporation shall pay Company up to an additional (insert amount of additional payment) for the additional services. The total fee paid under the Contract shall not exceed (insert the new total fee amount to be paid under this contract).*

2. Etc. Both Church Corporation and Company agree that paragraph number *(insert number and/or title of Contract's paragraph that is to be amended)* of the Contract is hereby amended, whereby _____ *(insert the change to be made)*.

3. Etc.

All other provisions of the Contract shall remain in full force and effect.

IN WITNESS WHEREOF, the parties hereto have caused this First Addendum to be duly executed the date above-stated.

 Insert Name of Contractor
 ("Contractor")

 Insert Name of Church Corporation
 ("Church Corporation ")

 Date

 Date

Section 6 – Personnel and Employment Matters

I. Introduction

The area of employment law has become increasingly important in recent years. New laws governing the employment relationship have increased and existing laws have expanded while charges of discrimination filed with the Equal Employment Opportunity Commission and filings of employment-related lawsuits remain at a high level. Employers need to exercise caution when making decisions about hiring, compensation, benefits, supervision, discipline and termination. Churches are not totally immune from this flurry of activity in the employment arena. While some laws and regulations exempt religious organizations or particular types of claims against religious organizations, there are other laws that do not exempt religious organizations. For example, many state worker's compensation laws do not exempt churches; some state disabilities and discrimination laws do not exempt churches.

Increasingly, disgruntled employees and former employees of religious organizations — as well as disgruntled clergy — are filing lawsuits in an effort to have the courts address their bitter feelings toward their employer, church or denomination. As a general rule, many courts find they have no jurisdiction over discrimination and other employment claims filed by clergy. Courts try to avoid dealing with disputes between clergy and churches because it is often impossible to address these lawsuits without becoming entangled in the church or denomination's polity and ecclesiastical jurisdiction, which the Supreme Court has repeatedly held is not permissible. Part of the protection of the First Amendment of the Constitution of the United States and many state constitutions is to prevent courts from meddling in a church's internal polity and the selection of its ministers. The courts are generally very respectful of that important protection.

Many churches, councils, and other church entities have become increasingly interested in developing personnel policies that describe the employment relationship with staff and give guidance on how to handle particular types of common personnel issues. The Presbyterian Church (U.S.A.) *Book of Order* contains some information on employment and its provisions are, of course, mandatory. The Human Resources Department of the Presbyterian Church (U.S.A.), A Corporation also has information available at (800) 728-7228 ext. 5237. In addition, churches and councils have developed and continue to refine their own policies for addressing employment and personnel matters, including sexual misconduct, sexual abuse, and sexual harassment. To address sexual misconduct, abuse, and sexual harassment, the 207th General Assembly (1993) adopted the Presbyterian Church (U.S.A.) Sexual Misconduct Policy and Its Procedures, which was updated by the Assembly in 2010. The General Assembly has included a provision in the *Book of Order* that requires each council to implement a sexual misconduct policy. The Policy and Its Procedures sets out useful guidelines and samples, although it is only mandatory for the national agencies of the church. It is available through the Office of the General Assembly and can be found on the Creating Safe Ministries webpage <https://www.presbyterianmission.org/legal-resources/creating-safe-ministries/>.

Finally, employment law varies from state-to-state, which is why it is important to consult with a local attorney in your state regarding employment-related matters. Resources may often also be found on the internet, typically through state departments of labor websites.

II. The Laws

A. Federal Laws Coverage

A variety of federal laws regulate an employer's relationship with its employees. The theory of federal government ability to legislate over that relationship is typically under the U.S. Constitution's Interstate Commerce Clause in which the federal government may assert jurisdiction into states and over organizations involved in interstate commerce. Typically, most

organizations, having a certain number of employees, can be assumed to be in interstate commerce, and therefore many federal laws set a certain number of employees as the threshold on which coverage by the federal law applies. Of course, whether or not your church or council is subject to a local, state or federal employment law should not be construed as permission to engage in discriminatory employment practices. Talk to your local attorney about whether the business of your church or council may be considered involved in interstate commerce.

The following is a short summary of federal and some state laws affecting employers who have the required number of employees:

1. **Civil Rights Act of 1964 (Title VII) as amended:** Applies to employers with 15 or more employees. It bans discrimination based upon race, color, religion, sex, or national origin in employment. Note that sexual harassment is a form of sex discrimination. Discrimination based upon sex also includes discrimination based upon pregnancy. This law is enforced by the Equal Employment Opportunity Commission (EEOC) and the Department of Labor. There is a limited exception for religious organizations to enable them to restrict job positions to those of their own religious faith. In the leading case on the matter, the Supreme Court gave religious organizations very broad powers to require religious qualifications for their employees. However, that does not give license to discriminate as to other protected categories (ex. race, age) if it is subject to local, state or federal discrimination laws. So, for example, while a church may be permitted to not select applicants because their religious beliefs are not those of that church, the church cannot discriminate against applicants because of their race or age. Most states and cities have similar civil rights laws that govern employers with fewer than 15 employees. In addition, some states and cities have included other protected categories in their laws, such as sexual orientation and veteran status. See <http://www.eeoc.gov/facts/qanda.html>.
2. **Pregnancy Discrimination Act:** This Act amended Title VII and prohibits discrimination against pregnant employees. If a woman is able to work, she must be permitted to work under the same conditions as other employees. If she becomes unable to work for medical reasons, she is entitled to the same rights to benefits and leave as other workers who become unable to work for medical reasons not related to pregnancy.
3. **Age Discrimination in Employment Act of 1967 (ADEA):** Applies to employers with 20 or more employees. The ADEA generally prohibits discrimination against employees age 40 or older. It prohibits employers from failing or refusing to hire someone age 40 or older or from discriminating in terms or conditions of employment or firing employees on the basis of age. This law is enforced by the EEOC. Most states and some cities have parallel laws prohibiting age discrimination and those laws govern employers with fewer than 20 employees. See <http://www.eeoc.gov/laws/types/age.cfm>.
4. **Older Workers Benefit Protection Act of 1990:** amended the Age Discrimination in Employment Act to prohibit age discrimination with regard to employee benefits. This law is also enforced by the EEOC. See <https://www.eeoc.gov/laws/types/age.cfm>.
5. **Genetic Information Non-Discrimination Act of 2008:** Applies to employers with 15 or more employees. This law prohibits discrimination by employers on the basis of genetic information. Genetic information is broad and includes not just results of genetic tests, but also tests of family members and information from a medical history of an employee. Remedies for violation of this Act are the same as those provided under Title VII. This law is enforced by the EEOC. See <https://www.eeoc.gov/laws/types/genetic.cfm>.
6. **Occupational Safety and Health Act of 1970 (OSHA):** A regulatory system designed to protect worker safety; the current threshold for required reporting is one or morw employees engaged in secular activities. Employees performing or participating in religious services are not covered by OSHA. This law is enforced by Occupational Safety and Health

Administration. The Act covers organizations to the extent they are engaged in commerce (see discussion of Fair Labor Standards Act). See <http://www.osha.gov/>.

7. **Immigration Reform and Control Act of 1986:** Bans hiring non-U.S. citizens who do not possess the authorization to work in this country and provides fines up to \$10,000 for each illegal immigrant hired and in some cases imprisonment; all employers (even of one person) must fulfill the document verification provisions of the Act. Failure to do so can result in penalties. The discrimination provisions apply to four or more employees. This Act makes it an offense to refuse employment to anyone whom the employer believes may be an illegal immigrant but turns out not to be; the Act applies to companies with four employees or more. Employers are required to verify employment eligibility within three days of hire of a new employee by completing the I-9 form. It is important to keep copies of the evidence of employability: green card, passport, driver's license, Social Security card, birth certificate, or citizenship papers as set forth on the I-9 form. I-9 forms must be kept by the employer for the longer of the following: three (3) years after the date of hire or one (1) year after termination of employment. In the 1980s this law was unsuccessfully challenged on religious grounds. Churches must comply with the law. This law is enforced by the U.S. Citizenship and Immigration Service (USCIS). See additional immigration information in Section 7: Immigration.
8. **Worker Adjustment and Retraining Notification Act of 1988 (WARN):** this notice of plant-closing legislation requires 60 days written notice of large-scale layoffs and plant closings; the law applies to companies with 100 or more employees. WARN is enforced through a civil lawsuit which can be filed in U.S. district court. Some states, such as New York, have their own WARN Acts which apply to employers with less than 100 employees. See <https://www.dol.gov/agencies/eta/layoffs/warn>.
9. **Americans with Disabilities Act of 1990 (ADA),** as amended in 2009: Applies to employers with 15 or more employees. The Act covers both treatment of employees with disabilities and architectural requirements for buildings. The law requires employers to make reasonable accommodation for qualified employees with disabilities that substantially limit one or more major life activities (examples - caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working) absent a showing of "undue hardship" and expense on the employer. If significant risks to health and safety of others cannot be eliminated by providing reasonable accommodations to an employee with disabilities, the ADA does not require hiring of that individual. Qualified individuals with a disability are those who can perform the essential job functions with or without accommodations. This law is enforced by the EEOC. The ADA contains provisions permitting churches to discriminate in hiring based on religion. There is also an exemption for churches relieving them of the requirement to comply with provisions related to building accessibility to public accommodations by the disabled, but this does not relieve a church of the responsibility to make a reasonable accommodation for a disabled employee. Congress amended this law in 2009 to restore much of its original intent. Consult with your attorney to ensure compliance. Many states and cities have parallel laws that may cover employers with fewer employees. For information on the amendments implemented in 2009, see <https://www.eeoc.gov/disability-discrimination>.
10. **Fair Labor Standards Act of 1938 (as amended by the Equal Pay Act of 1963):** contains standards for minimum wage (\$7.25 effective 7/24/09), and overtime pay of time and one-half to non-exempt (non-managerial) employees working over 40 hours a week; also regulates child labor providing that anyone age 18 or older may work, but employees who are younger are subject to restrictions related to hazardous work and work hours, and provides for a minimum wage. There is a limited exception for religious camps operating no more than seven months a year. While churches that are not engaged in "interstate commerce" are not subject to the act, many activities fall into this gray area. Consult with your local employment attorney. The Department of Labor may view any entity with

employees as covered by the Act, including churches. The operation of a day care facility, preschool, or school will subject a church to coverage by the Act. Further, the requirements of the Act cannot be avoided by classifying a worker as an independent contractor to avoid paying the employee overtime. Ministers are professional employees and are exempt from the overtime pay requirement. This law is enforced by the Department of Labor's Wage and Hour Division. New overtime rules were enacted in September 2019

<https://www.dol.gov/agencies/whd/overtime/2019/index>. Consult the U.S. Department of Labor web site (<http://www.dol.gov/>), for further information and training. Many states also have wage and hour laws and their minimum wage laws set a higher amount than \$7.25. See <https://www.dol.gov/general/topic/wages>

11. **Equal Pay Act of 1963:** The Fair Labor Standards Act was amended by the Equal Pay Act to require equal pay for equal work, regardless of the employee's sex. This law applies to all employers. See <https://www.eeoc.gov/laws/statutes/epa.cfm>.
12. **Family and Medical Leave Act of 1993, as amended in 2009:** Applies to private sector employers who employ 50 or more employees in 20 or more workweeks in the year leave is sought. Eligible employees may take up to twelve weeks of unpaid, job-protected leave with continued benefits during a twelve-month period for the birth of a child, care of a newborn, placement for adoption, or foster care, to care for a spouse, son, daughter, or parent with a serious health condition, or the employee's own serious health condition or due to a qualifying exigency when a spouse, son, daughter or parent is on active duty or is called to active duty in the military. In addition, an employee who is a spouse, son, daughter, parent or next of kin of a service member can take up to 26 weeks of job-protected leave to care for member of the armed forces who suffers a serious injury or illness. To be eligible the employee must have worked for the employer at least twelve months and at least 1,250 hours during the immediately preceding twelve months, at a work site where 50 or more employees are employed within 75 miles of the work site. There is no specific exception for churches, but if a church employs fewer than 50 employees it is not covered by the federal law (some states have their own family and medical leave laws that govern employers with fewer than 50 employees). The employer's obligation is triggered by the employee's notice to employer of need to take leave under the Act or upon employer's learning that an eligible employee needs leave for purposes covered by the Act. The employer must provide eligibility notice within 5 business days and then should require medical certification from the affected person's physician. "Serious health condition" covers inpatient care and continuing treatment by a health care provider. This law is enforced by the U.S. Department of Labor's Employment Standards Administration, Wage and Hour Division <https://www.dol.gov/agencies/whd/fmla> . Due to the complexity of this law, it is a good idea to work with an attorney who specializes in employment law to ensure compliance. For information on the amendments in 2009 see <http://www.dol.gov/whd/fmla/finalrule/factsheet.pdf>.
13. **Personal Responsibility and Work Opportunity Reconciliation Act of 1996:** generally referred to as federal welfare reform, contains a requirement that all employers report new hires to the employer's respective state agency. The appropriate state agency varies from state to state. One purpose of this law is to locate parents who avoid child support payment obligations by moving and changing jobs. There is no exclusion for small employers or religious organizations. The designated state agency may be a child support enforcement agency or state labor department.
14. **Unemployment:** by virtue of inclusion in the Presbyterian Church (U.S.A.)'s Federal Group Tax Exemption Ruling, churches and councils are exempt from federal unemployment tax. However, individual states (ex. New York) may impose an unemployment tax on certain nonprofit organizations even though they are exempt from the federal tax. Organizations should consult their tax advisers concerning liability for the state unemployment tax.

15. **Worker's Compensation:** This is a matter of state, not federal, law. There is no per se exemption for churches, and coverage depends upon the specific state law. It is important to determine who is considered a covered employee for state law purposes. This is also a very important area for insurance coverage. Consult your insurance agent about worker's compensation coverage for your church's employees.
16. **National Child Care Protection Act of 1993:** This Act allows (does not require) states to require that certain childcare providers make mandatory background checks on child-care workers (both employees and volunteers). States will have the right to designate certain organizations, such as day care centers, nurseries, schools, and possibly Sunday schools, as child-care providers. Churches and presbyteries should become aware of their state's requirements regarding the designation of child-care providers. The National Child Care Protection Act was amended in 1999 by the Volunteers for Children Act to enable (not require) child care providers designated by state law as qualified entities to contact an authorized agency of the state to request nationwide criminal fingerprint background checks. To find out if churches are designated as qualified entities in your state, contact a local attorney. There are advantages and disadvantages to any screening process; select a screening process that best suits the needs of your church.

NOTE: in 2016 the General Assembly approved the Child/Youth/Vulnerable Adult Protection Policy and its Procedures. In addition, the *Book of Order* now requires all councils of the church to implement a child/youth protection policy. While the Assembly's policy only applies to its national agencies, it can be used as a model for other councils. The Policy can be found on the Creating Safe Ministries webpage. See <https://www.presbyterianmission.org/legal-resources/creating-safe-ministries/> under Resources.
17. **Employee Polygraph Protection Act:** This Act may apply to churches engaged in interstate commerce and prohibits requiring or suggesting employees or job applicants submit to polygraph tests. Consult with your attorney to determine whether your church is engaged in interstate commerce and covered by the Act.
18. **Bankruptcy Discrimination: Section 525 of the Bankruptcy Code** prohibits private employers from discriminating against a person who is or has been a debtor in bankruptcy, with some exceptions. This is a complicated area of the law and employers should consult with their local attorney when they plan to take an employment-related action against an employee known to the employer to be involved in a bankruptcy, past or present.
19. **Uniformed Services Employment and Re-employment Rights Act of 1994:** In 1994, Congress enacted the Uniformed Services Employment and Reemployment Rights Act (USERRA). This federal law secures a variety of rights to employees called to military service. This law provides that an employee who leaves to train or serve in the uniformed services must be re-employed upon return and has a right to certain benefits during absence and upon return, provided the employee's service does not exceed five years and the employee did not receive a dishonorable discharge. There is no exemption for churches or small employers. The employer is not required to re-employ under specified limited circumstances set forth in the Act. This law is enforced by the U.S. Secretary of Labor and may be referred to the U.S. Attorney General for further action. See <https://www.dol.gov/vets/programs/userra/>

In cooperation with other General Assembly offices, the Board of Pensions wrote USERRA Questions and Answers: (https://www.pensions.org/file/what-we-offer/benefits-guidance/forms-documents/Documents/userra_qa.pdf/).

B. Posting Requirements

The following is a list of the federal laws that require covered employers to post notices for employees. First, determine whether you are a covered employer. Many of these laws may be inapplicable because the church or council does not meet the minimum number of employees or does not engage in interstate commerce. Second, the Free Exercise clause of the First Amendment exempts ministers and, in some cases, other core religious employees from some of these laws. These notices need not be posted if you are not a covered employer:

- The Fair Labor Standards Act (minimum wage and overtime)
(<https://www.dol.gov/general/topics/posters>)
- Equal Employment Opportunity (<https://www1.eeoc.gov/employers/poster.cfm>)
- Occupational Safety and Health Act (OSHA)
(<https://www.osha.gov/Publications/poster.html>)
- Employee Polygraph Protection Act
(<https://www.dol.gov/whd/regs/compliance/posters/eppac.pdf>)
- Family and Medical Leave Act (FMLA)
(<https://www.dol.gov/whd/regs/compliance/posters/fmla.htm>)

Posters for all of the above, except Equal Employment Opportunity, may be obtained from your local office of the U.S. Department of Labor. For a poster covering Equal Employment Opportunity, contact your local office of the Equal Employment Opportunity Commission.

NOTE: Many states have posting requirements in addition to those required by federal laws. Consult with your attorney on posting requirements.

C. HIPAA: Health Insurance Portability and Accountability Act Privacy Rules

The Health Insurance Portability and Accountability Act (HIPAA) privacy rules prohibit unauthorized disclosure by covered entities of individually identifiable health information (protected health information). **In general**, local churches and councils are **not** "covered entities" under the HIPAA privacy rules. Covered entities are health plans, health care providers and health care clearinghouses. If, for example, a local church or council directly operates a health clinic, then it would be a health care provider and, consequently, a covered entity.

There are two categories of disclosures where local churches, as non-covered entities, may be affected by the HIPAA privacy rules. One instance is disclosure of protected health information of a church member and the second is disclosure of protected health information of an employee.

1. **Church Member's Protected Health Information.** Again, a church with respect to its members is not a covered entity. The HIPAA privacy rules permit a hospital to provide the name, general condition, room number and religious affiliation in a directory accessible by clergy and permits this information to be given to those who ask for the patient by name, unless the patient has objected. It is not a violation of the HIPAA privacy rules for a minister to access the information in the hospital directory and then subsequently disclose the information to the congregation. If a member has notified the church that the member does not consent to such disclosure, any subsequent disclosure may amount to an invasion of the member's privacy. The best approach is to obtain a written consent from the member to make disclosures. However, if this is not practicable, then notice of the church's practice should be posted or placed in the church bulletin from time to time with an opportunity for members to notify the church if they object to disclosure of their information. A notice in the church bulletin might include the following:

When a congregation member is ill or injured, we inform fellow members and pray for you by name—seeking the comfort and healing of the Risen Christ. If you do not want members informed of your name and illness stated in these congregation prayers, please notify the pastor in a brief written note.

A related issue is how much to disclose. This is a good discussion to have with your session. For example, you may decide it is enough to say, our member John Smith is hospitalized, and he has asked for your prayers **as opposed to** our member John Smith is hospitalized with X disease or condition which is serious and may be fatal, etc., etc. Tact and sensitivity may be called for rather than oversharing details and embarrassing someone.

2. **Church Employee's Protected Health Information.** The church, as an employer, may need to request disclosure of an employee's protected health information from a health care provider, for example, in connection with an employee's return to work after a medical leave. The church employer requesting the protected health information will be required to submit to the health care provider an authorization signed by the employee that in the provider's opinion complies with HIPAA. If the church employer does receive an employee's health information, this information should be used solely for the narrow purposes it was gathered. Otherwise, it should be held in a secured confidential file separate from the employee's personnel file.

For further information see "Are Prayer Lists Illegal?" Church Law & Tax Report, Vol. XVIII, No. 2, March/April, 2003. Church Law & Tax Report is a publication of Christian Ministries Resources. You can subscribe by calling (800)222-1840.

III. Hiring Issues

A. Interviewing

1. Lay Persons

In formulating questions for interviewing lay persons, the two most important guidelines are to ensure that each question be related to the job for which the applicant is applying and that the questions be asked of all applicants for the position. Questions should not be posed to applicants in order to determine their race, marital status, age, sex (including pregnancy), national origin, citizenship, genetic information or disability. Because a religious organization may discriminate based on religion, the church or presbytery may require the employee be Presbyterian or may indicate applicants who are Presbyterian will be given preference but should be prepared to explain why.

a. Examples of Prohibited Questions

- What year did you graduate from high school? (Can learn of age)
- Could you enclose a photograph with your resume? (Can learn of race, national origin, sex, or age)
- Are you married? (Illegal inquiry about marital status)
- Have you ever been arrested? (Some racial-ethnic groups are arrested at a higher rate than others and this question could lead to race discrimination.)
- What is your native language? (National origin discrimination)
- Are you handicapped? (Disability discrimination)
- What medications do you currently take? (Disability discrimination)
- How old are you? (Age discrimination)
- Do you plan to have children? (Sex discrimination)

- Are you pregnant? (Pregnancy discrimination)
- Do you have a drug or alcohol problem? (Disability discrimination)

b. Examples of Permitted Inquiries (Job Related)

- Have you ever been fired or otherwise had your employment involuntarily terminated?
- There is a gap in the time frames shown on your resume. Tell me about that.
- If hired, can you prove you are at least 18 years of age?
- Can you show proof of eligibility to work in the United States?
- Are you able to perform essential functions of this job with or without accommodation?
- Would you be willing to travel?

If you need to compile applicant tracking information for affirmative action purposes, for example, do not ask for this information on the employment application unless it is on a perforated portion at the bottom that will be separated from the application and not available to the decision maker.

2. Ministers

In the civil law arena, the protections of the First Amendment to the Constitution of the United States give the nominating committee and the committee on ministry much greater flexibility in posing questions to a minister. The *Book of Order* indicates that a nominating committee take care to consider candidates without regard to race, ethnicity, sex, marital status, age, or disabilities (F-1.0403). Any interview questions must comply with the Presbyterian Church (U.S.A.)'s Constitution. If a search committee has questions related to this topic, the committee should contact its committee on ministry, the presbytery office, or OGA Constitutional Services.

Of course, the *Book of Order* sets out many provisions applying to the employment and call of a minister. See, for example G-2.08.

B. Background Checks

Employers can find themselves sued over hiring and firing practices. Failing to properly investigate a prospective employee's background could result in legal liability for negligent hiring or negligent retention if that employee later injures someone. Conducting background checks before hiring and before allowing employees to start work is always a good idea, as is having applicants sign a release to obtain such background checks. A background check is especially important for employees who will be working with children (ex. child abuse convictions should bar the candidate), counseling members, handling funds (ex. embezzlement can be a bar for the candidate), or operating church vehicles (ex. DUIs may be disqualifying as would be a high number of traffic infractions). Investigation of the applicant's background should involve contacting personal and employment references as well as conducting a criminal records investigation. Some background checks may amount to consumer investigative reports under the federal Fair Credit Reporting Act. A few guidelines to follow in conducting these types of background checks are: (a) Keep the investigation work-related; (b) obtain written authorization from the potential employee; (c) disclose negative information to the potential employee before adverse action is taken; (d) give the potential employee an opportunity to dispute the accuracy of the information; (e) do not ask references legally impermissible question (see examples above in section C(1)(a)); and, (f) consult with a local attorney to create a consistent process for conducting background checks. Employers should create a simple release form for reference checks. Sample language:

"I hereby authorize any investigator of [Name of Church Employer] bearing this release to verify and obtain any information from schools, residential management agents, former and current employers, religious bodies, criminal justice agencies and individuals relating to my activities. This information may include, but it is not limited to, academic, residential, achievement, performance, attendance, personal history, disciplinary, criminal conviction records, and any judicial or ecclesiastical proceedings involving me as a defendant. I hereby direct and authorize you to release such information upon request to the bearer. I hereby release [Name of Church Employer], and any individual or group, including record custodians, from any and all liability for damages of whatever kind or nature which may at any time result to me on account of compliance or any attempts to comply, with this authorization. A copy of this signed form is to be considered as valid as the actual signed form."

If the information obtained in a reference check is inappropriately used or disclosed, the employer could later be found to be liable to the employee or prospective employee for defamation or violation of privacy. Local churches and presbyteries should develop reference checking procedures in conjunction with their local employment attorney. All information obtained from background checks should be locked in a secure location.

See the discussion of the National Child Care Protection Act of 1993 set out earlier in this Section.

C. Background Checks for Ministers

Pursuant to *Book of Order* G-2.0504 a: **the installed pastoral relationships are pastor, co-pastor, and associate pastor. A minister of the Word and Sacrament may be installed in a pastoral relationship for an indefinite period or for a designated term determined by the presbytery in consultation with the congregation and specified in the call.**

Under the *Book of Order*, the congregation elects a nominating committee that works with the committee on ministry of the presbytery (G-2.0802). Once the nominating committee identifies a candidate, that candidate is presented to the presbytery to receive and consider the presbytery's counsel on the merits, suitability, and availability of those considered for the call through the committee on ministry (G-2.0803). The nominating committee should take care to consider a candidate without regard to race, ethnic origin, sex, marital status, age, or disabilities (F-1.0403).

The nominating committee of the church and/or the committee on ministry of the presbytery should exercise reasonable care in checking the minister's background. **Reference checkers should consult with the committee on ministry and/or the presbytery executive.** If the reference and background checks reveal previous incidents of misconduct, including sexual misconduct, Richard Hammar's *Pastor, Church and Law* recommends the following factors be considered before hiring the minister:

"(a) the nature and severity of the previous misconduct; (b) the frequency of the previous misconduct; (c) how long ago the misconduct occurred; (d) whether the minister received counseling; (e) the competency and effectiveness of any counseling received; (f) the likelihood that the minister will repeat the same type of misconduct now; (g) the possibility of legal liability if a jury concludes, on the basis of all evidence, that the church or denomination was negligent in hiring the minister."

In situations where a candidate has a history of sexual misconduct, employer councils would be wise to be very cautious about hiring such a candidate. Knowingly hiring someone with a background of sexual misconduct could create significant liability if that candidate engages in sexual misconduct after hire. Always consult with local counsel before making such a decision for two reasons. First and most importantly, you may be putting employees, members, children, and guests at risk by hiring someone with a history of sexual misconduct. Second, if a minister

with a history of sexual misconduct engages in misconduct after hire, your insurer may be unwilling to defend you in litigation and may refuse to pay any judgment as a result of litigation. The same logic applies to hiring non-ministerial staff with a background that includes a past history of sexual misconduct.

IV. Job Descriptions and Performance Management

Job descriptions define the essential and nonessential functions of a position. Job descriptions can be shown to interviewees who may be asked if they can perform the essential functions of the position. If the applicant says no, this provides a basis not to extend an offer of employment. If the applicant says yes, but later plainly demonstrates he cannot perform the essential functions, this may provide a basis to sever employment. Job descriptions are useful in providing job information to the employee and supervisor, information for performance appraisals, information in situations calling for review under the Americans with Disabilities Act (can the employee perform the essential duties, with or without reasonable accommodations), and information for the employee discipline process.

Having detailed and accurate job descriptions are also essential for religious employers to use if they are sued by those who provide ministerial services, including ministers of Word and Sacrament, lay pastors, and music directors. The job description should accurately describe their leadership of worship, planning of worship, providing pastoral aid and counseling to parishioners, leading marriage ceremonies and presiding at funerals, and other ministerial functions. In that way, if a ministerial employee makes claims against their religious employer, the employer can assert: (1) the ecclesiastical abstention doctrine or church autonomy doctrine by which the employer argues a court should not intervene in disputes with church employers and employees because it may require the court to interpret church doctrine and decide religious questions; or (2) the ministerial exception which provides that religious organizations have an the right to select their own ministers free from government, and court, interference

A performance appraisal should be conducted at least annually. Supervisors should manage employee performance throughout the year, documenting conversations with the employee regarding good work and unacceptable performance. Any documentation should contain only facts, not generalizations or assumptions. For example, if a church staff person is tardy in arriving to work 3 out of 5 days each week, week after week, and the church has warned the staff person several times that repeated tardiness will not be tolerated, the tardiness — and the warnings to the staff person — should be documented in the personnel file. If the situation becomes intolerable and the church decides to terminate the person's employment, then the documentation in the file will serve as an important record of **what** transpired, **when** it transpired, and **how** it was handled. If the discharged staff person tries to challenge the decision, the detailed records will provide an important defense for the church in support of its decision. Having the employee sign disciplinary write-ups and evaluations will make it difficult for the employee to claim surprise in further discipline or termination. When performance management is an ongoing process, comments in the annual performance review will not surprise the employee. Performance appraisals should be truthful appraisals. It is unhelpful to both the employee and the church employer to gloss over or fail to document performance problems. Truthful appraisals are important as a tool to inform employees of deficiencies in an effort to improve their work performance and in the defense of adverse personnel actions.

Employees should be given an opportunity to review and comment on their performance evaluations. The evaluation should be signed by the reviewing manager and the employee to indicate that the review occurred, not that the employee necessarily agrees with the review. If the employee refuses to sign indicating that the review has occurred, the manager may note that fact on the appraisal form.

V. Compensation

As a federal tax-exempt organization, all Presbyterian Church governing bodies are prohibited from paying unreasonable compensation to their staff. Unreasonable compensation is compensation above what would ordinarily be paid for like services by like organizations under like circumstances.

Regular employees must be paid at least the Federal minimum wage of \$7.25 per hour. State or localities often have minimum wage laws that require a higher rate of hourly pay. If those regular employees work over 40 hours per workweek they must be paid overtime at time and one-half his/her regular rate of pay.

There has been some confusion with churches and councils about whether they can make persons who would normally be classified as employees in the category of independent contractors, paid under a contract. If a person is performing regular work for your church or council, as opposed to discrete projects, it is most likely that they will be considered employees. For example, a presbytery executive or stated clerk is an employee; they perform regular work duties for their council. A computer consultant or website webmaster may well be an independent contractor, especially if they have multiple clients, including your church or council. You can find more information in these resources:

Department of Labor Fact Sheet 13: Employment Relationship Under the Fair Labor Standards Act (FLSA): <https://www.dol.gov/agencies/whd/fact-sheets/13-flsa-employment-relationship>

Misclassification: <https://www.dol.gov/agencies/whd/flsa/misclassification>

VI. Termination

Most states recognize the doctrine of employment at-will, meaning the employment relationship between the employer and the employee may be terminated by either the employer or employee at any time with or without cause. If employment is at-will and if the church or council has an employee handbook, this at-will relationship should be stated in the handbook, along with disclaimers that the handbook is not a contract of employment nor a guarantee of future employment, and so forth. If a contract of employment with the employee exists, that eliminates the "at-will" relationship and the employee's rights upon termination will be governed by the employment contract. Some states recognize oral and implied employment contracts. In those states, the employment contract may not have to be in writing to be enforceable. A termination in violation of a state or federal law will be subject to legal challenge. For example, a typical employee cannot be discharged on the basis of age, sex, race, or for any other unlawful reason.

While an employee can be terminated at-will, if there is a legitimate reason for termination and if it is well-documented (ex. theft, violence, poor performance), the employer may be wise to tell the employee the reason for termination. It is equally wise to make sure there is plenty of documentation to back up the reason for termination.

In addition, an employer that discharges an employee in retaliation for exercising the employee's rights or obligations under state or federal law may be found liable for wrongful discharge. For example, if an employee files an EEOC complaint for race discrimination, the employee cannot lawfully be terminated for filing the complaint.

Termination of a minister's employment must be consistent with the written call and any applicable provisions of the *Book of Order*. As noted above, because of constitutional protections, most civil courts will not hear a lawsuit filed by a minister against the church or presbytery. Such relationships are not ordinary civil employment. They are ecclesiastical relationships defined by Presbyterian Church (U.S.A.) polity and governing bodies. Churches should communicate with their presbytery leaders when they have issues or concerns with ministers whom they employ.

VII. Personnel Policies

A. Pros and Cons

There are several important advantages to personnel policies on certain key issues:

1. **Uniform statement of information:** Creating policies and handbooks or manuals is a uniform method to inform employees about the terms and conditions of their employment. It informs employees of compensation policy and benefits policies. It provides information on what is expected of employees and their duties with regard to certain aspects of their employment. Having such written, formal policies helps avoid confusion and misinformation about how matters will be handled at work, such as the employer’s intolerance for harassment and discrimination and how such matters should be reported and what holidays are recognized by the employer.
2. **Consistency:** Policies can help ensure that certain situations are handled in a consistent manner (Examples: holidays; work schedule; reimbursement of business expenses) — and that all staff are treated equally.
3. **Strong statement of acceptable and unacceptable conduct:** Policies inform staff and others about conduct that is acceptable and unacceptable in a work setting and the consequences of engaging in unacceptable conduct. The existence of a policy makes it more difficult for a staff person to say s/he did not understand this type of behavior would not be condoned (Examples: policy on the use of alcohol during work hours or while traveling on church business; policy on sexual abuse and harassment). U.S. Supreme Court cases (See G. Anti-Harassment Policy for a discussion of these cases.) make the existence and communication of a sexual harassment policy and complaint procedure very important. Without such a policy and complaint procedure, the employer may be open to vicarious liability for sexual harassment unknown to the employer. .
4. **Protection from liability exposure:** Policies can help protect a church from liability exposure. For example, if an employer has a policy prohibiting employees from using the employer’s computer system to illegally engage in file-sharing, that may provide a defense if someone in the music industry sues and claims that the employer aided and abetted an employee’s illegal conduct by not having a policy that notifies employees that they are prohibited from using the employer’s computer system to engage in illegal file-sharing.

There is one major disadvantage to personnel policies:

If an organization adopts a policy and then does not follow it — or follows it only with respect to certain staff — there is an increased risk of liability exposure to the organization for claims of discrimination. Some states will apply personnel policies as legally binding; some states will not. Having clear disclaimers in a handbook is important (“this handbook is not a contract of employment or an agreement for continued employment or for specific compensation or benefits”). Of equal importance is training of supervisors and executives who must be trained on the employer’s handbook and policies and informed how they should be implemented. Encouraging supervisors and executives to consult with the human resources official of the organization also helps to foster consistent application of policies across the organization. Consult with an employment attorney in your state as you consider personnel policies. Also, check with other churches and governing bodies in your area to determine if they have personnel policies. These policies may be a helpful model.

B. Common Personnel Policies

Each church and governing body needs to decide for itself whether to adopt personnel policies, who should be covered by each policy (lay/clergy; full/part-time staff); and which types of policies should be included in a set of policies.

Personnel policies and handbooks should be updated annually, if possible. Laws are amended, new laws are passed, technology develops, and you discover new issues in employee relations each year that are not addressed in your policies or handbook. It is recommended that employers maintain a file in which they keep notes about new laws that should be included in their

handbook, situations not covered by handbook policies, and ideas for human resources and personnel committees to discuss which might be included in a handbook.

Subjects that are commonly included in personnel policies are the following:

- **Hiring policies** (recruitment; job posting; immigration; references; hiring of relatives; promotions; statement of "at-will" employment; etc.)
- **Salary administration** (pay periods; overtime; time card procedures; wage assignments; performance reviews; etc.)
- **Operations** (work schedule; etc.)
- **Benefits** (health insurance; disability; life insurance; pension; bereavement leave; worker's compensation; social security; unemployment compensation, if applicable; vacation; holidays; maternity and paternity leave; sick leave; jury duty; personal days; policy on HIV/AIDS; attendance records; leave of absence; family and medical leave; continuing education; etc.)
- Policy on reimbursement of work-related expenses
- **Annual performance review and corrective action** (evaluations; work rules; disciplinary action)
- Retirement issues
- Termination and resignation issues
- **Conduct issues and compliance with employment laws** (race and gender issues; sexual abuse and harassment; violence; code of ethics; conflicts of interest; confidentiality; etc.)
- Complaint process
- **Neutral reference policy for lay employees** giving only title and length of service (written release from employee allows for full disclosure)
- **Personal use of employer's equipment and software** (computers, cell phones, social networking, Internet, and email)

C. Anti-Harassment Policy

Sexual harassment is a form of sex discrimination under Title VII of the Civil Rights Act and is illegal under federal and state law. The EEOC defines sexual harassment as unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature if rejecting the conduct results in an adverse employment action, or submitting to the conduct is explicitly or implicitly made a condition of the target's employment, or the conduct unreasonably interferes with the target's work performance or creates an intimidating or hostile work environment. While sexual harassment is traditionally thought to occur between male supervisors and female subordinates, it may occur between a female supervisor and a male subordinate, between supervisor and subordinate of the same gender, between co-workers of different genders or between co-workers of the same gender.

There are two types of sexual harassment: *quid pro quo* and hostile environment. In a *quid pro quo* (if you do this for me I will do that for you) case, if the employee suffers a tangible job action (termination, demotion, loss of pay), the employer will be strictly liable to the harassed employee as will the individual harasser, regardless of whether the employer had notice of the harassment.

In a hostile environment case where there is no tangible job action, but the employee proves she was subjected to unwelcome, severe, and pervasive conduct of sexual nature, the employer will

be vicariously liable unless the employer can prove an affirmative defense establishing the exercise of reasonable care to prevent or promptly correct a sexual harassment and that the plaintiff failed to use these preventive or corrective measures.

Two U.S. Supreme Court decisions, *Burlington Industries, Inc. v. Ellerth* and *Faragher v. City of Boca Raton*, make it clear that to have a chance to defend themselves on claims of sexual misconduct by victims, employees must:

- have a strong anti-harassment policy;
- make all employees aware of the policy, preferably by including it in an employee handbook and by discussing it in annual training; and
- make all employees aware of how to file a complaint with the employer and the employer's complaint process, again, preferably in a detailed policy in a handbook; the reporting policy should have multiple avenues (ex. Head of Staff, personnel committee) so a victim is not forced to report harassment to the person who harassed her/him;
- not ignore reports of sexual harassment from victims, supervisors or anyone in their organization; such reports should be promptly investigated in a reasonable and dispassionate manner and victims should be protected in the process.

Churches should check their state laws on harassment. Some states, such as New York, have detailed legal requirements for employees that require policies and annual training.

In 1999, the EEOC issued enforcement guidance on employer vicarious liability for unlawful harassment by supervisors, extending liability to harassment based on an individual's race, color, sex (whether or not the harassment is of a sexual nature), religion, and national origin. For more information on this issue and on sexual harassment prevention, please see the Equal Employment Opportunity Commission's Enforcement Guidance: (<http://www.eeoc.gov/policy/docs/harassment.html>).

In addition, some state and federal courts have broadened the scope of *Ellerth* and *Faragher* to include harassment based on an individual's race, age, national origin, veteran status, and disability. It would be advisable to implement similar policies and preventive measures for these forms of harassment.

VIII. Personnel Records

Churches and councils should work with their attorneys to have a clear understanding about the importance of keeping good personnel records — what to keep in those records and what not to keep in those records. It is advisable to put any and all records related to employment in a personnel file with a separate, locked file for medical records.

A. Access to Personnel Records and Confidentiality

There are state and federal laws that provide access to or protect confidentiality of certain personnel records. Councils and churches should review these legal requirements with their attorney. Medical information is particularly sensitive. It should be gathered only when there is a legitimate business reason to do so and then retained in a locked cabinet. Medical information should only be disclosed in strict compliance with applicable state and federal laws. A written consent to release medical information, signed and dated by the employee specifying the information to be released, should be obtained by the employer before any release of medical information. To comply with the Americans with Disabilities Act, any medical information should be kept in a separate, locked file, **not** in the employee's personnel file and access should be strictly limited only to those with a clear need to know.

The following is the policy used by the Presbyterian Church (U.S.A.), A Corporation (which includes the Presbyterian Mission Agency and the Office of the General Assembly); it is provided as a sample policy:

1. Personnel Records

The Employer maintains a personnel file on each employee, which is the property of the Employer. The personnel file includes such information as the employee's job application, resume, records of training, documentation of performance reviews and salary increases, and other employment records. Any medical or health information shall be maintained separately. Employees may review their personnel file by contacting HR. Employees may review their personnel file only in the presence of a member of HR, but employees cannot remove documents from personnel files. Former employees are not allowed access to their personnel file. Information in personnel files is confidential. Generally, only those with supervisory responsibility for the employee have access to the employee's personnel file. Supervisors with open positions may review the personnel files of employees who are candidates for those open positions.

B. Record Retention

The types of personnel records that must be retained by federal law include but are not limited to:

Record	Retention Period
Payroll records	3 years
Personnel records used in hiring, termination, and promotion	1 year from action
Records relevant to legal action or discrimination complaint	until matter is concluded
Time sheets	2 years
FMLA records	3 years
Immigration records	3 years from date of hire or 1 year after termination whichever is later
OSHA records	5 years log and summary of Injuries duration of employment + 30 years for medical exams

The safest course is to retain any and **all** records on employees for the length of their employment + the number of years within which an employee can file an action for discrimination or other employment related actions, in the employer's state. Employers should check with their attorneys for that information.

An employer should consider maintaining three types of files on an employee in its Human Resources office: (1) personnel file; (2) confidential file (hiring and interview records, reference checks, EEO/affirmative action data, credit checks, and information regarding legal actions or complaints); and (3) medical information.

C. Subpoena of Personnel Records

An employer can no longer simply produce documents in response to a subpoena, especially if the subpoena is issued by a court in another state. Upon receipt of a subpoena, the employer should consult with an employment attorney to determine how to respond to a subpoena. If there is no law on point, the employee should still be notified. If the employee objects, the employee may instruct the employee's own attorney to act to quash or modify the subpoena. At the same time, the employer should let the attorney who issued the subpoena know of the employee's objection. In any event, the employer should contact the issuing attorney to determine the issues

in the matter that require the subpoenaed documents and obtain a release from the employee that mirrors the request contained in the subpoena.

IX. Employee Privacy

The Fourth Amendment to the Constitution of the United States does not protect the privacy of employees of nongovernmental entities unless their respective state law indicates otherwise. Some states have laws addressing confidentiality of certain personnel records. Confidentiality of records is discussed under the **VIII. Personnel Records** subsection of this Manual.

Employees have privacy rights in what they bring to work inside their clothing, inside bags and purses, in their offices and desks, and other work-related areas. The reasonableness of the expectation of privacy varies and the ability of the employer to search also varies and may depend upon state law. Consult with your local attorney before engaging in a search of any employee or his/her work area.

A. Privacy Issues Concerning HIV/AIDS

The Americans with Disabilities Act and state medical confidentiality laws protect the confidential nature of an employee's medical information, particularly whether he/she has AIDS or is HIV-positive. HIV is not transmitted by casual contact and, therefore, the employee's need for confidentiality typically outweighs any concern the employer may have about transmission.

X. Benefits Plan of the Presbyterian Church (U.S.A.)

By administering the Benefits Plan and the Assistance Program, The Board of Pensions of the Presbyterian Church (U.S.A.) serves ministers of the Word and Sacrament and lay workers of the Presbyterian Church (U.S.A.) throughout the United States and abroad.

A. Community Nature

The Benefits Plan has several unique features that collectively are referred to as “the community nature of the Plan.” These features relate primarily to the Plan’s funding, pension benefits, and family medical coverage. The Benefits Plan is a self-insured church plan that is funded by dues from Presbyterian churches and church-affiliated employing organizations, as well as the income and capital appreciation on the Plan assets. The dues contributed by the local church or an employing organization are based on a percentage of its employees’ effective salaries and represent that employing organization’s share of the cost of protecting the entire community.

B. The Benefits Plan

The Benefits Plan serves as a cornerstone for the ministry of the Presbyterian Church (U.S.A.). The pension, death, disability, and medical benefits, as well as the optional benefits, provide a comprehensive package of protection and financial assistance for participating church workers and their families.

The Benefits Plan provides two programs: the Traditional Program and the Affiliated Benefits Program. The Book of Order requires all churches to provide participation in the benefits plan of the Board of Pensions, including both pension and medical coverage. Dues are based on a percentage of each employee’s compensation.

C. The Assistance Program

The Assistance Program of the Board of Pensions helps church workers whose personal financial needs exceed the bounds of the Benefits Plan, personal resources, and other means. It also provides grant opportunities and programs to build the practical skills needed to minister in today’s world. The Assistance Program comprises a range of discretionary grant programs that

complement the Benefits Plan. These grants are funded by gifts, legacies, endowment income, and half of the Christmas Joy Offering, not dues.

D. For More Information

For more information about the Benefits Plan and the Assistance Program, please reference the Benefits Plan document and other publications and forms available on Pensions.org.

The Board of Pensions of the Presbyterian Church (U.S.A.)
2000 Market Street
Philadelphia, PA 19103-3298
Phone: 800-773-7752 (800-PRESPLAN)

E. Board of Pensions Publications

These excellent resources are available by calling the Board of Pensions at (800) 773-7752 (800) PRESPLAN or on the Board of Pensions Web site: <http://www.pensions.org/portal/server.pt>

- Benefits Plan Overview
- Benefits Plan of the Presbyterian Church (U.S.A.)
- Community Nature of the Benefits Plan
- Product Sheets
- Healthcare Summary Plan Description
- Retirement Pension, Death and Disability
- Medicare Supplement
- Retirement Savings Plan Summary Plan Description
- Benefits Administrative Handbook (For Churches & Employing Organizations)
- Benefits Administrative Handbook (For Presbyteries, Synods, & General Assembly Entities)
- Understanding Effective Salary
- Benefits Plan and Divorce
- A Shopper's Guide to Long-Term Care Insurance
- Tax Guide for Ministers & Churches
- Federal Reporting Requirements for Churches
- Information for Members Planning to Retire
- Benefits for Lay Employees
- Social Security Basics for Ministers and Churches
- Major Medical Continuation Program
- Stewardship of Life: Preparing an Advance Directive
- The Living Needs Benefit

F. Flexible Spending Accounts and Other Benefits

Federal tax laws now provide for Section 125 Flexible Spending Accounts which enable an employee to set aside portions of their salary on a pre-tax basis to pay for medical, dental, and vision expenses not covered under group insurance plans, as well as certain child care expenses.

Section 132 of the *Internal Revenue Code* also provides certain tax benefits related to commuting and parking for employees.

XI. Resources

There are a number of websites on which employers can find information concerning employment issues:

- U.S. Department of Labor (<http://www.dol.gov/>)
- U.S. Equal Employment Opportunity Commission (<http://www.eeoc.gov/>)
- U.S. Citizenship and Immigration Services (<http://www.uscis.gov>)
- U.S. Occupational Safety and Health Administration (<http://www.osha.gov/>)

Section 7 - Immigration

I. Overview

The following information is intended to provide Presbyterian Church (U.S.A.) mid-councils, congregations, and entities with general information about immigration law. This is not intended to be legal advice, nor is it an exhaustive source of information on U.S. immigration options. For more information, please contact the Office of Immigrations Issues which is housed in the Office of the General Assembly: Teresa Waggener at Teresa.Waggener@pcusa.org (web site:

<http://oga.pcusa.org/section/departments/immigration>)

Mid-councils, congregations and offices of PC(U.S.A.) often engage persons from other countries in the work of the church. In order to enter the U.S. to work or attend a conference as a lecturer, observer or participant, nonresidents must have proper authorization from United States Citizenship and Immigration Services (USCIS). In addition to reviewing the information below, it is important to consult with a lawyer to see which option best fits the needs of the church, mid-council or entity and of the nonresident.

II. Non-Immigrants

Non-immigrants enter the U.S. temporarily for a specific purpose and intend to leave the U.S. after completion of their approved visit. The State Department issues non-immigrant visas specific to the purpose of the nonresident's visit. Students, tourists, some athletes, exchange visitors, temporary workers, and many others enter the U.S. every day on non-immigrant visas. Each visa has its own limitations and rules about how long a person can stay or whether, and under what conditions, they can work. Non-immigrants must not violate the conditions of their stay. If a non-immigrant violates their stay they can lose their current non-immigrant status in the U.S. and cause the State Department to look at any future applications with more scrutiny. Such a violation of stay can also make the process for permanent resident status more difficult or impossible for a non-immigrant should they decide to apply adjust status to immigrant. For a full list of non-immigrant visa types and their descriptions please visit the State Department at <https://travel.state.gov/content/travel/en/us-visas/visa-information-resources/frequently-asked-questions/what-is-us-visa.html>.

Some non-immigrant visas are more commonly used in the church setting. The following is a general overview of those types of visas. The process for applying for a visa depends upon the type of visa required. For some visas a nonresident approaches the Embassy and applies on their own; other visas require a U.S. entity, such as a church, to petition the USCIS for a visa.

1. Religious Workers (R visa)

A religious worker visa is a non-immigrant visa that allows mid-councils and churches to call religious workers, who are not residents of the U.S., to work for the church. To qualify the religious worker must: 1) have been a member of a religious denomination having a bona-fide non-profit religious organization in the U.S. for the two (2) years preceding the petition; 2) be coming to the U.S. to work as a religious worker for at least twenty (20) hours a week; 3) be coming solely to work as a minister or in a religious vocation; 4) be coming solely to work as a religious worker for the petitioner; and 5) may not work in the U.S. in any other capacity. A religious worker visa status may be extended once for a total of up to five (5) years. The spouse and dependent children (unmarried and under the age of 21) of a religious worker can enter the U.S. in R-2 status, but in that status they may not work. For more information about religious worker visas and the religious worker visa application process, please contact Teresa Waggener at Teresa.Waggener@pcusa.org and visit the State Department website at:

<https://travel.state.gov/content/travel/en/us-visas/other-visa-categories/temporary-religious-worker.html>.

2. Other Non-Immigrant Visas Commonly Used in the Work of the Church

An H-1B Visa can be used to bring a professional to the U.S. to work for up to six (6) years. A mid-council or congregation can use an H-1B when hiring a nonresident employee who does not have a religious vocation or for a religious worker who is ineligible for a religious worker visa. This process can be lengthy and more expensive than obtaining a religious worker visa, in addition the government has capped the number of H1-B visas issued each year and typically, those caps are reached early in the annual H1-B period. However, some employers like educational institutions (i.e. seminaries and colleges) are exempt from the cap. Under the H1-B program the spouse and dependent children of an H1-B worker can come to the U.S. in H-4 status, but they cannot work. For more information about the H1-B temporary worker visa program please visit the State Department website at <https://travel.state.gov/content/travel/en/us-visas/employment/temporary-worker-visas.html>.

The F-1 Student visa program is available to persons who wish to study in the U.S. at a Student Exchange Visitor Program (SEVP) certified college, university or seminary. To qualify for a student visa, an applicant must be accepted at a SEVP school, possess sufficient funds to pursue the course of study, have the proper preparation for the course of study and intend to leave the U.S. upon completion of the course of study. For more information about the F-1 student visa program please visit the State Department website at <https://travel.state.gov/content/travel/en/us-visas/study/student-visa.html>. Typically students do not have permission to work off-campus, even in a congregational setting, but there are some exceptions for required and approved internships. For details, the student should speak to the Designated School Official at their institution.

The B-1 Business Visitor visa program permits visitors to come to the U.S. for business purposes, such as for attending a conference or workshop. It is important to note that the B-1 Visitor program does not allow for the visitor to receive a salary or income from a U.S. based entity. However, certain expenses may be reimbursed and, in **some limited** cases, a business visitor may receive an honorarium for some lecturing engagements.

To learn more about the B-1 Business Visitor visa program please visit <https://travel.state.gov/content/travel/en/us-visas/tourism-visit/visitor.html>.

III. Immigrants

Immigrants to the U.S. are commonly referred to as green card holders or permanent residents. They have been legally admitted to the U.S. to permanently live and work. Immigrants can, after they have met certain requirements, become citizens of the U.S. The following is an overview of the four ways to become a resident in the U.S.

A. Diversity Lottery

The Diversity Visa Program makes available 55,000 visas annually to persons coming from countries with historically low rates of U.S. immigration. It is an opportunity for legally admissible persons who cannot qualify for immigrant visas under other available programs to apply and qualify for residency in the U.S. Each year the State Department opens the program for applications around October and closes the program around November of that same year. Names are randomly drawn from the pool of applicants and reviewed for admissibility in the U.S. When applying for the diversity visa program, applicants should only access the program from the State Department website and never respond to phone calls or emails from unknown entities since lottery scams and fraud are common. To learn more about the next diversity program,

please visit the State Department website at <https://travel.state.gov/content/travel/en/us-visas/immigrate/diversity-visa-program-entry/entry/diversity-visa-submit-entry.html>.

3. Family Based Immigration

A person wishing to immigrate to the U.S. under family based category must have a qualifying relationship with either a U.S. Citizen or Legal Permanent Resident (LPR) and that relative must file the proper petition. LPRs in the U.S. can apply for: 1) their spouse, 2) dependent children, and 3) unmarried sons and daughters. U.S. citizens can apply for an even greater list of family members: 1) spouse, 2) dependent children, 3) unmarried sons and daughters, 4) married sons and daughters, 5) parents, if the petitioning citizen is over 21, and 6) siblings. The spouses, dependent children and parents of U.S. Citizens are considered immediate relatives under the law and are not subject to a visa waiting list. All other family members, for LPRs and Citizens however, are subject to visa availability and must often wait to enter the U.S.

The State Department issues a monthly visa bulletin to notify the public and would-be immigrants of visa availability. To view the current visa bulletin and backlogs in family-based immigration please visit the State Department website at <https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin.html>. To learn more about the application process please visit the State Department website at <https://travel.state.gov/content/travel/en/us-visas/immigrate/family-immigration.html>.

4. Employment Based Immigration

1. Special Immigrant Status for Religious Workers

Religious Workers who are in the U.S. under non-immigrant status may qualify for Special Immigrant Status if they: 1) have been a member of a religious denomination having a bona fide, non-profit religious organization in the U.S. for the two (2) years preceding the application; 2) are coming to the U.S. to work **full time** as a minister or in a religious vocation for that religious denomination; 3) are coming to work for a bona fide non-profit religious organization in the U.S.; and 4) were working as a religious worker continuously for the two (2) years preceding the petition.

The mid-council or congregation offering the full-time religious work, must petition for a religious worker to gain this status. Upon approval, a religious worker may then apply for permanent resident status in the U.S. A religious worker's spouse and minor unmarried children also qualify for permanent resident status through this process. For more information about this process, please contact Teresa Waggener in the Office of Immigration Issues at Teresa.Waggener@pcusa.org. You may also visit the State Department website at http://travel.state.gov/visa/immigrants/types/types_1324.html

2. Other Workers

An employer may petition for an employee to immigrate to the U.S. to work. There are different categories based on the credentials of the employee and requirements of the position. An employer must comply with strict guidelines regarding the advertising of the position and the inability fill the position with a U.S. Citizen or legal permanent resident worker. As with family-based immigration, the beneficiary employees of employment-based petitions may be subject to a visa waiting list. Please see the most recent State Department visa bulletin at <https://travel.state.gov/content/travel/en/legal/visa-law0/visa-bulletin.html>

5. Humanitarian Based Immigration

The U.S. government allows for special categories of persons to immigrate to the U.S. for humanitarian reasons. Refugees, asylees, victims of domestic violence, victims of human

trafficking and other crimes and Iraqi and Afghan translators all have special programs that can lead to permanent resident status in the U.S. Each of these special categories carries with it different criteria. To learn more about gaining a green card through humanitarian based immigration, please visit the USCIS website at

<http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=194b901bf9873210VgnVCM100000082ca60aRCRD&vgnnextchannel=194b901bf9873210VgnVCM100000082ca60aRCRD>

IV. The Church as a Responsible Employer

Protecting Prospective Employee's Immigration Status

For a person born outside of the U.S., who may have, or develop, plans to make the U.S. their permanent home, unauthorized work can hinder those plans, making their immigration process longer, more expensive or impossible. By asking for documentation early in the process, an employer may prevent future immigration problems for prospective employees.

Moreover, we are a church who believes that “[t]he unity of believers in Christ is reflected in the rich diversity of the Church’s membership.”¹ Central to a search for any candidate for employment should be a desire to be faithful to the guidance of the Holy Spirit, who has a history of sending people on the move. How does one ask for immigration documentation without singling out a candidate, treating them differently than the others and, possibly, engaging in the offense of employment discrimination?

One way to do this is to ask early, at the application phase and, most importantly, *ask everyone*. Here is an example from the application form used to hire employees at the Presbyterian Center:

As a condition of employment, I understand that I will be required to furnish proof of my identity and authority to work in the U.S. as required by law. Do you have the legal right to work in the United States?	YES	NO
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1. I-9 Requirements

All employers must ask every employee, regardless of the employee’s nationality or immigration status, for proof of their authorization to work in the U.S., thereby complying with federal I-9 requirements. There are no exceptions for religious employers, no matter how small the congregation. Mid-councils and churches must complete, and keep on file, the I-9 form and supporting documentation for every member of staff. Employers who do not comply with I-9 requirements are subject to sanctions.

For the I-9 form and instructions please visit the USCIS website at: <https://www.uscis.gov/i-9-central/about-form-i-9/about-form-i-9>

2. Document Discrimination

The law sets forth documents acceptable as evidence of authorization to work. Page five of the I-9 form lists acceptable documents and/or combinations of documents. An employee may present any one or combination of those listed. An employer requiring specific documents and refusing other satisfactory documents has committed document discrimination and is at risk of sanctions from the Department of Justice or the Equal Employment Opportunity Commission.

¹ F-1.0403, Book of Order: The Constitution of the Presbyterian Church (U.S.A.), Part II

For more information, please visit the Department of Justice webpage at: <https://www.justice.gov/crt/immigrant-and-employee-rights-section> or the Equal Employment Opportunity Commission webpage at: <https://www.eeoc.gov/laws/types/nationalorigin.cfm>

3. Taxes

In addition to the requirement that employers verify each employee's eligibility to work in the U.S., employers must withhold certain taxes from employee's paychecks and employees must file the appropriate tax forms at the end of the year. Please visit the [IRS](#) webpage and consult with a tax attorney to make sure you comply with the law.

Section 9 – Risk Management and Insurance

This Section includes a discussion of the types of insurance churches and middle governing bodies should secure; leading companies that offer insurance; and, recommended minimum standards. Various helpful checklists appear at the end of the Section.

I. Insurance

The *Book of Order* directs all churches, synods, and presbyteries to obtain adequate property and liability insurance coverage to protect the facilities, programs, and officers:

G-3.0112 Insurance

Each council shall obtain property and liability insurance coverage to protect its facilities, programs, staff, and elected and appointed officers.

While there are many risks that must be considered and a wide array of insurance types, securing insurance is not an impossible task. Working with agents and other resources, a board of trustees, session, or middle governing body can ensure it has adequate coverage in place.

Insurance policies should be reviewed annually for adequacy and completeness. Coverages should be adjusted upward as property values increase. As costs increase, churches often find themselves underinsured because coverages have been held steady while inflation has increased property values. Periodic appraisals of the property can help to update the coverage to reflect current values. Coverage that increases automatically by a set inflation factor is also available. Casualty (liability) coverage should be reviewed periodically as well. Should a change in use be implemented, such as opening a day care center, school, or other new program, be sure to review potential liability insurance needs with the church's insurance agent and to adjust coverages accordingly. **Give the agent at least 30 days notice before an event or starting a new program.** This will give the insurance company time to review the new risk, give a response, and provide a quote on any additional charges. It is important that a binder or endorsement be obtained before the event or program begins. You may wish to contact your agent within ten days of the original notification to ask for an update.

The reasons why insurance coverage should receive high priority and review include the following:

- the recognition of the varied risks faced by the church, with special attention to fund-raising events, acquisition of new property, leased property, counseling services, and fiduciary responsibilities
- increase in building costs and the purchase of new property
- the need for specialized coverage for day care and counseling
- fluctuating annual premium costs
- expanding ministry of many churches

The following should be used as a guideline for establishing insurance practices:

- an annual review of the church's insurance program
- an annual safety inspection of the buildings with fire officials to identify hazards that may cause personal injury, fire, or other loss of property. Check with your local fire department. Typically, they are happy to assist you with a voluntary inspection and ideas to prevent fires

- a detailed inventory of all furniture and equipment, kept current with additions and deletions of items. A photographic inventory of all furniture, equipment, and rooms of the church is an excellent inventory record. Videotapes have been used effectively by some churches. All inventory reports should be kept off the church property in a bank safe-deposit box or similar secure location
- a periodic building appraisal to update the value of all property, at least every three years
- at least two quotations when purchasing or renewing insurance coverage. Contact your agent at least ninety days prior to the expiration of your policy to provide quotes.
- a determination of actual annual premium costs for budget development.

A. Types of Insurance

1. Property Insurance

Property insurance is designed to cover buildings and personal property for loss or damage. The property policy may be amended to include the following coverages: newly acquired property, property in transit, stained glass windows, valuable papers, loss of business income, extra expense, computer equipment and boiler and machinery. This is just a partial list of coverages that may be available, check with your insurance agent for a complete list of coverages.

Property insurance limits on your policy should be adjusted upward as property values increase. Churches often find themselves underinsured because coverages have been held steady while inflation has increased property values. To prevent underinsured losses, periodic appraisals of the property can enable the church to update the coverage to reflect current values. Property insurance limits can also be automatically set by an inflation factor. Check with your insurance agent about this option.

2. General Liability

Casualty (general liability) coverage is designed to protect the insured from losses in which they are legally liable arising out of the ownership of property or activities from your premises. General liability policies should be reviewed periodically and should include coverage for slips and falls and other bodily injuries, property damage of others, products liability, completed operations, libel and slander, false arrest, employee benefits liability, contractual liability, and other types of claims usually covered by this policy. It is important to verify that employees, directors, trustees, officers, and volunteers are covered under this insurance policy. Most general liability policies restrict coverage to the United States, its territories, and Canada. For any travel outside of these areas, contact your insurance agent prior to the start of the trip.

The general liability policy is usually provided on an occurrence basis as opposed to a claims made basis. This is preferred because the occurrence is covered under the policy in force at the time of the accident, regardless of when the claim is reported or the suit is filed. Some coverages, however, are traditionally provided on a claims made basis, such as directors and officers coverage and employee benefit liability. Under claims made coverage, the claim must be reported during that policy period or any extended reporting period specified by the policy. The extended reporting period, commonly referred to as a "tail," frequently is for one year following the policy term. When claims made and coverage is provided, it is important to have a "retroactive date" that covers previous time periods in addition to the current policy term. Review the claims made coverage option with your insurance agent.

As changes occur in use of church property, such as opening a day care center, school, or other new program, the church's insurance agent should be notified of the changes in exposure. The new uses of property may result in new liability risks that will need to be addressed. Contact the insurance agent at least thirty days in advance of the event or new program. This will give the insurance company time to review the new risk, give a response, and provide a quote on any additional charges. **It is important that a binder or endorsement be obtained before the event or program begins.**

3. Sexual Misconduct Liability

Most general liability policies exclude sexual abuse or molestation and pastoral professional liability. Both coverages can be purchased by endorsement or on a separate policy. Check with your insurance agent for availability of these coverages. It is wise to secure these coverages. It is a good practice to review your general liability policy's exclusions and limitations with your insurance agent to avoid uninsured claims.

4. Pastoral Professional Liability

Pastoral Professional Liability is designed to cover liability for pastoral counseling services. The church should be included in the definition of the named insured as well as the pastoral professional and any other professional staff. There are many definitions of coverage under this form. Review with your insurance agent definitions as well as the exclusions in the contract carefully.

5. Workers' Compensation

The purpose of workers' compensation insurance is to give greater protection and security to the worker in case of injury, illness, or death occurring in the course of employment. Worker's compensation provides, as a matter of right, for the payment of benefits to employees injured on the job. The amounts paid are set by state law for covered occupational injuries or disease. The compensation award is, in nearly all situations, the covered employee's exclusive remedy against the employer. The laws in most states provide for fixed awards to employees or their dependents upon a showing of employment-related injury. Payment for injuries or illness is not based on determination of fault or negligence, with a few exceptions, on the part of the employer. Some states go beyond simple establishment of the right to worker's compensation and provide insurance systems, either under state supervision or otherwise. Under these laws, methods are usually prescribed that allow employers and workers to accept or reject the compensation system. Several states have provided workers' compensation funds that coincide with the coverage required by law. In most states, employers who refuse to come within the provisions of the workers' compensation law are denied the customary defenses to actions for injury by the injured employee.

It is not the purpose of this Manual to compare the workers' compensation laws of the various states, other than to point out that these laws differ not only in detail but in major features as well. In evaluating considering workers' compensation coverage, the following considerations are particularly important:

- Persons covered and type of employment
- Injuries and diseases covered
- Benefits provided
- Civil law and administrative requirements and options — including limitations on the ability of injured parties to sue the employer for damages

- Method of securing benefits

The workers' compensation laws of every state require the employer to secure payment of compensation benefits. Jurisdictions may require either the purchase of insurance with a state fund, a private insurance company, or a qualified self-insurance program. Workers' compensation insurance is provided through a Workers' Compensation and Employer's Liability Policy. Two types of basic coverages are afforded by this type of policy: one provides actual worker's compensation benefits, and the other insures the employer for liability when employees or dependents are able to sue for such problems as employer negligence and unsafe working conditions. The combination of these two coverages is intended to provide the employer with protection against liability that may arise out of the employee-employer relationship due to occupational injury and disease. Supplementary coverages are available to cover the needs of employers that are not satisfied by the basic coverage. Ask your insurance agent about the supplemental coverages available and to identify the supplemental coverages required by your state.

6. Umbrella Liability

Consider purchasing an umbrella (excess) liability policy, which provides excess limits over the primary general liability, auto liability, and the employer's liability section of workers' compensation policies. An umbrella policy will be activated when the underlying primary limits are exhausted or exceeded by a single loss. Umbrella policies are issued with an aggregate limit, which is the most the policy will pay during a one-year policy term, regardless of the number of claims. Umbrella policies are purchased in coverage multiples of \$1 million increments. All churches are encouraged to purchase umbrella policies especially those with owned vehicles, day nurseries, or schools.

7. Minister's Personal Liability

Many ministers live in manses furnished by and insured by the local church. If a homeowner's policy is provided with the church named as additional insured, the policy should be written to protect the minister and her or his family for both personal liability and damage to their personal property. Even when the manse and personal property is insured under the church policy, there is still a need for a tenant's homeowner policy for the minister and her or his family. For example, family events/activities would not be covered under the church policy unless the activity was considered part of the minister's responsibilities. Ministers who own or rent homes should consult an insurance agent regarding the coverages needed.

8. Employee or Volunteer Dishonesty

Employee dishonesty coverage provides protection against employee theft. Employee dishonesty coverage provides for losses of money, securities, and other property caused by theft or forgery of an employee of the insured, acting alone or in collusion with others. Make sure to check with your insurance agent to ensure that volunteers are covered under your employee dishonesty policy. It is recommended to include volunteers.

The *Book of Order* provides a minimum standard of financial procedures (G-3.0205) for local sessions that can help to prevent employee dishonesty claims.

G-3.0205 Finances

In addition to those responsibilities described in G-3.0113, the session shall prepare and adopt a budget and determine the distribution of the congregation's benevolences. It shall authorize offerings for Christian purposes and shall account for the proceeds of such

offerings and their disbursement. It shall provide full information to the congregation concerning its decisions in such matters.

The session shall elect a treasurer for such term as the session shall decide and shall supervise his or her work or delegate that supervision to a board of deacons or trustees. Those in charge of various congregational funds shall report at least annually to the session and more often as requested. Sessions may provide by rule for standard financial practices of the congregation, but shall in no case fail to observe the following procedures:

- a. All offerings shall be counted and recorded by at least two duly appointed persons, or by one fidelity bonded person;
- b. Financial books and records adequate to reflect all financial transactions shall be kept and shall be open to inspection by authorized church officers at reasonable times;
- c. Periodic, and in no case less than annual, reports of all financial activities shall be made to the session or entity vested with financial oversight.

Other ways to minimize your exposure include:

- a. At least 2 individuals should be responsible for taking up the collection. The collected monies should be held in a secure area until counted and deposited.
- b. Counting should be done by at least 3 unrelated individuals in a secure area.
- c. Individuals responsible for collecting, counting and depositing monies should be rotated on a weekly basis.
- d. Responsibilities and function of monies should be divided so that no one person has control over all functions of money transactions. For example, the individual who makes the bank deposit or pays invoices should not be responsible for reconciling the bank statement.
- e. Check books should be stored in a secure place.
- f. Bank statements should be reviewed on a regular basis.
- g. Authorized signer of checks should not be the same person who reconciles the accounts.
- h. Reporting of financial records to congregations should be done at least quarterly. Congregations should be informed on how their money is being spent.

Terminology in this section is meant to provide general guidance and is not intended to require or not require specific audit procedures or practices as understood within the professional accounting community. Also see the section titled “Suggestions for Accounting Procedures to Reduce Susceptibility to Loss,” later in this Section.

9. Suggestions for Handling Employee Theft

- a. Report loss to church’s insurance carrier and legal counsel immediately. Follow procedures as set forth by both. Your insurance carrier may have specific protocol in this type of loss.
- b. Report the loss to local authorities for investigation, so that appropriate charges can be brought.
- c. Inform session in a closed meeting of the outcome of the investigation.
- d. Once investigation has been concluded, inform the congregation of the outcome of the investigation. This should be in a closed meeting as well. By keeping the session and

congregation informed of the process will help to keep the trust within the church community.

10. Automobile Liability

Automobile liability provides coverage to the insured for bodily injury and property damage claims arising out of the ownership, maintenance, use, loading or unloading of church-owned vehicles. Physical damage coverage for owned vehicles is insured separately. In many cases, the pastor and/or volunteer uses his or her own vehicle for church activities. In the event of an accident, the policy covering the vehicle provides the primary coverage, but it is very important for the church to have non-owned automobile liability coverage. The church's non-owned auto liability policy may also provide excess coverage for the church if the automobile owner's coverage is not adequate. Hiring car coverage is for the same coverage if a rental vehicle is used. Non-owned and hired car coverages are separate coverages that must be requested at issuance of the automobile liability policy. Issues involving rental vehicles can be very complex; consult your insurance agent prior to renting the vehicle.

11. Directors and Officers

This coverage protects the officers, directors, and trustees of the organization against damages from claims resulting from negligent or wrongful acts in the course of their duties subject to the terms and conditions of the policy and the circumstances involved. However, directors and officers coverage does not provide coverage for third party bodily injury or property damage claims because these would be covered by other policies. The insuring agreement, named insured, and exclusions should all be reviewed thoroughly when purchasing a policy. The directors and officers policy may be extended to cover the organization itself (entity coverage) and to cover employment practices liability. Both of these additions are recommended. Directors and officers coverage is almost always written on a claims made form with defense costs inside the limits of protection.

12. Business Travel Accident Insurance

Churches who have individuals that travel at the church's request both domestically and internationally should consider purchasing business travel accident insurance. This coverage provides accidental death and dismemberment insurance for individuals traveling on church business. The policy should also address the needs for travel outside the United States such as repatriation of remains and medical evacuation. This insurance can be purchased in various amounts of coverage and options. Check with your insurance professional to determine your business travel accident needs.

13. Insurance for Travel Abroad

As more and more churches sponsor trips abroad, insurance needs to be factored into the trip. While the trips have educational and spiritual value, they are not done without risks. One way to offset some this risk is through travel accident insurance. The insurance is an accidental death and dismemberment policy that should also include repatriation of remains and medical evacuation while traveling outside the United States. Depending on your trip other coverage may be necessary for travel abroad. Some additional insurance coverage to consider are: foreign commercial liability, commercial foreign automobile liability and foreign workers compensation and sickness insurance. Always check with your personal health care provider before traveling outside your policy area. Please contact your insurance professional to discuss your travel plans and to determine your insurance needs.

14. Employment Practices Liability

Employment practices liability provides coverage for employment related issues arising out of employee hiring, termination, or employment. Contact your insurance agent to discuss if these coverages are available under your directors and officers policy or whether they can be purchased under a separate employment practices liability policy. Employment litigation is one of the fastest growing areas of the law and this coverage is recommended.

B. Guidelines for Minimum Standards of Property and Liability Insurance for Churches, Presbyteries, and Synods

These minimum standards should be used as a general guideline only! As always, an insurance professional must be used to evaluate the insurance needs of each church and middle governing body. Insurance needs as well as alternate ways to reach their insurance goals should be discussed with an insurance professional. One possible alternative is the use of higher deductibles, which could lower insurance premiums. Ask your insurance professional about this and other cost-saving options.

1. Property

- a. Buildings and Contents at Appraised Replacement Cost as an agreed value endorsement.
 - Eighty percent Coinsurance: an alternative to agreed value, offered by some companies as a percentage of appraised value, providing coverage up to fixed limits.
 - Special Form: the broadest coverage available, normally including fire, vandalism, sewer back-up, theft of property, and so on, unless specifically excluded, or deemed not necessary by an insurance professional.
- b. Supplemental Coverage: off-premise coverage, newly acquired property, debris removal, rebuilding to code requirements, necessary demolition of building, personal property of ministers and others, stained glass, organ, other musical instruments, art work, valuable papers, loss of business income, and related extra expenses.
- c. Boiler and Machinery: as boiler and machinery types require, including all related expenses, spoilage, and similar costs.
- d. Earthquake, where appropriate for geographical area, is written separately unless specifically stated in policy.
- e. Flood, where appropriate, is also written separately, and may be offered with state or federal assistance.
- f. Also consider extra expense or loss of income coverage.

Note: Churches should be inspected periodically because of policy exclusions, such as mold, virus, lead paint, and asbestos for which many insurance companies may not provide coverage.

2. Liability

- a. **General Liability:** \$1,000,000 per claim/occurrence, \$2,000,000 aggregate; covers most risks, including products; bodily injury; property of others; \$10,000 no fault medical payments including volunteers, and athletic activities; contractual liability; fire legal liability at \$100,000 limit; day nursery/child care; pastoral professional liability and sexual misconduct coverage at \$1,000,000 limit.
- b. **Umbrella Coverage:** \$10,000,000 per occurrence or aggregate, in excess over primary limits of general and automobile liability; review of coverage by insurance professional for additional excess limits.

- c. **Automobile:** \$1,000,000 per occurrence or aggregate, including uninsured and underinsured motorist protection; \$10,000 medical coverage; personal injury protection in states where applicable; hired and non-owned coverage to policy limits.
- d. **Workers' Compensation:** As required in each state, including pastors and all employees.
- e. **Directors and Officers:** \$1,000,000 per claim/occurrence, or aggregate, for corporate protection of session, deacons, trustees, officers in performance of regular duties.
- f. **Employment Practices Liability:** \$250,000 per claim, or aggregate for claims related to employment, benefits, termination, and sexual harassment.
- g. **Crime Coverages:** \$50,000 per claim or occurrence for protection from employee dishonesty, theft or loss of money or securities, depositor's forgery; volunteers with access to church funds in any way should be covered.
- h. **International liability:** This coverage provides protection for incidents that occur outside the United States in which the church or individual would be legally obligated to pay. If your church sponsors mission trips outside the United States, consider purchasing this coverage. Analysis of your exposure should be done by your insurance professional.
- i. **Repatriation of Remains:** In case of death, this coverage will cover the expense of returning remains to the United States. Consider this coverage if your church is sponsoring mission trips outside the United States.

C. Suggestions for Property Lease Procedures to Reduce Loss

1. The tenant should sign a lease spelling out the rights and liabilities of the parties. As part of that lease, there should be an indemnification and a hold harmless agreement in favor of the church. The church should carefully draft the lease in conjunction with its legal counsel so that the church's requirements and needs become lease obligations of the tenant. For example, if your congregation has sexual misconduct and child and youth protection policies (as required by the *Book of Order* G-3.0106), these should be referenced in the lease and the tenant should be required to comply with them and copies of the policies provided to the tenant. To confirm receipt of those policies, draft a simple receipt form to have an authorized agent of the tenant sign, date, and acknowledge receipt.
2. As part of its duties under the lease, the tenant should be required, prior to occupancy, to submit a current certificate of insurance from the tenant's liability insurer naming the church as an additional insured under that policy. If the lease is a multi-year agreement, a new certificate should be submitted each year. The certificate of insurance should show general liability and property coverage. It should also show property insurance for the tenant's contents. If the tenant is conducting a business such as a day care, the certificate should show workers' compensation insurance for their employees. A copy of all insurance certificates should be sent to the church's insurance agent for review.
3. There should be an inquiry made in writing to the church's current insurance company to make sure coverage is provided for any liability resulting from the proposed rental. Also check with your insurance agent for possible increases in premium or for possible exclusions that may apply. Any increase that is incurred may be offset by adjusting the terms of the lease or requiring the tenant to pay for the increase. The church also may wish to review the adequacy of its own insurance policy limits in light of any new activity. If supplemental or specialized coverages are needed, they should be obtained prior to lease execution and property occupancy. Ask the insurance agent to send you a binder or endorsement showing coverage is in effect for the new occupancy. The lease should not be signed until you receive written confirmation from your agent. If any insurance claim or lawsuit should arise, give immediate written notice to your agent and the insurance company.

D. Federal Bus Regulations

If your church has vans or buses you may be required to comply with federal regulations which are summarized at this link:

<https://www.fmcsa.dot.gov/regulations/faith-based-organization-related-transportation>

You should speak to your insurance company about those regulations when you discuss your insurance needs for the vehicles.

For more information about the regulations, contact the Federal Motor Carrier Safety Administration at (855) 368-4200 or find a field office near you at www.fmcsa.dot.gov/mission/field-offices .

E. Arson and Bombing Attacks on Churches

After the mid-1990s, there were arson and bombing incidents against local churches. While the problem seems to be decreasing, there is cause for concern, and incidents are still being reported. Churches are easy targets for the arsonist. Most of the time they are unoccupied, and schedules of activities are predictable. Arson is often an afterthought to cover up another crime or a crime of emotion. Whatever the reason for the increases, the federal government has taken an aggressive stance against these acts. For more information on arson and bombing attacks on churches you can contact the Bureau of Alcohol, Tobacco, and Firearms:

Bureau of Alcohol, Tobacco, and Firearms: <https://www.atf.gov/contact> (<https://www.atf.gov/>)

ATF National Arson Hotline: 1-888-283-3473

ATF National Bomb Hotline: 1-888-283-2662

- a. For Your Records (*see* Appendix N)
- b. Safe Conditions and Practice Survey: A Self-Inspection Guide (*see* Appendix O)

Section 11 – Do’s and Don’ts When a Lawsuit is Filled – And Until It is Over

I. When the papers arrive

Lawsuits usually are initiated by the filing by a plaintiff of a summons and complaint with the court clerk’s office. It is the plaintiff’s responsibility to serve those papers on other parties. Depending upon the rules of that particular court, those papers may be served on you (if your council or congregation is a party to the lawsuit) by a process server, such as a sheriff’s deputy, or by mail. Here are things to consider when you are served:

1. Do not sign anything other than a simple messenger's receipt that acknowledges your receipt of papers from a process server or mailed to you from a party. Admit nothing, say nothing. If you are asked to sign for the papers read what the receipt says and sign to acknowledge receipt with your job title and date.
2. Keep the envelope or wrappers that the papers arrived in.
3. Date stamp the first page or write the date and time the documents were received and the method by which they were received (hand-delivery by a sheriff’s deputy or process server, mail, other — be specific).
4. Note the instructions on the summons or other papers that tell you how many days you have to respond and immediately put that date in your calendar with a reminder a week in advance so you do not default in responding.
5. Immediately call your insurance broker or agent. Forward a copy of the papers to your broker/agent, with a dated cover letter (save a copy of the cover letter too), and if you already have an attorney, inform the broker you plan to contact your attorney to provide the attorney a copy of the documents. Your insurer will decide if the claims in the complaint are covered by insurance and if the company will provide you with a defense, meaning that it will pay your attorney. It is possible you have a deductible to pay first, which means you pay the deductible by paying your attorney first and when the deductible is exhausted the insurance company pays the attorney. If your insurance company acknowledges that your council or church is covered, it has a list of attorneys it has approved to handle such cases. If the insurer denies coverage, you will need to hire an attorney to defend your organization.
6. Immediately call your attorney for instructions, note the date and time of the call.
7. Determine whether your organization has a policy already in place for what to do when a lawsuit is filed, make sure you follow the requirements outlined in such a policy, if it exists.
8. Deliver a copy of the papers to other leaders in your organization, as appropriate (check your bylaws for such instructions; if none, for example, , deliver the documents to the teaching elder/head of staff, the treasurer, the clerk of the session).
9. Notify your IT department or the employee in charge of your computer system or the vendor who handles your electronic systems and instruct them to protect e-mail and electronic documents which may have any relevance to the lawsuit. Bring your attorney into that conversation.
10. If the complaint names the Presbyterian Church (U.S.A.) or the General Assembly as a defendant, please contact the Legal Services Office immediately. (Michael Kirk (888)-728-7228 ext. 5390).

II. The Next Steps . . .

1. Sit down immediately with your attorney and a small group of leaders (the group will vary depending on the nature of the lawsuit) and decide key strategy issues. Let your attorney be your guide on these issues:
 - a. Prepare for possible media interest and press statements, if necessary. Your attorney may want to be the point of contact.
 - b. Decide who is going to be the up-front person on the lawsuit to handle inquiries, to assist counsel, to follow what's happening, and so on. (Note: This person should be someone who has excellent follow-through skills, knows how to keep information in strict confidence, and who consistently uses good judgment about delicate matters.). Ensure that this person gets the training that they need on what is appropriate to say, when and to whom.
 - c. Discuss contacting all employees and members who might have documents and records relevant to the litigation and ask them to deliver their documents to the employee who is the principal contact with your attorney.
 - d. Ensure that a file of all documents (hard copy and electronic) is maintained. Decide who is going to maintain that file and be responsible for it.
 - e. Decide whether the congregation needs to be informed of the lawsuit, as applicable (again, be careful — seek legal advice).
 - f. Decide whether any local church pastoral care will be needed and develop a plan to address these needs.
 - g. Decide whether pastoral care will be important for anyone else — including yourself!
 - h. If the lawsuit is based on some type of misconduct of a teaching elder, determine whether there has been an internal disciplinary action filed and, if so, what is its status. If no action has been filed, decide whether it would be appropriate to pursue such an action at this time (again, be careful — seek legal advice). Consult with the pastor's presbytery of membership.
 - i. If you are a teaching elder, ruling elder, deacon or Certified Christian Education and the allegations involve sexual abuse of a minor or an adult who lacks capacity to consent, review the mandatory reporting requirements in the *Book of Order* (G-4.0302), and determine your mandatory reporting duties.
2. Preserve notes, correspondence, and files that relate to the matter.
3. Do not talk with anyone about the lawsuit, except your attorney and the small group of leaders who work together to develop a strategy for what to do next. Determine if the Session as a whole should be informed as the lawsuit progresses.
4. Do not call the plaintiff, his or her attorney, or anyone else who might be on the other side in this matter **and do not accept calls from them**. If they call refer them to your attorney. Once you have an attorney, the attorneys should contact each other, not the parties.
5. Do not call, write, or visit with the judge, at any time, for any reason.
6. Ask your attorney before you act.

III. When You Meet with Your Attorney . . .

1. Be completely open, truthful, and forthright. Your attorney cannot help you if you hide information. Do not try to decide what information is important or unimportant — let your attorney be the judge of that — tell everything you know.
2. Bring a copy of all documents, writings, and things that may have anything to do with the lawsuit. Keep the originals, unless your attorney asks for them.
3. Talk with your attorney about your insurance coverage.
4. Educate your attorney about the Presbyterian Church (U.S.A.) as a denomination. Make sure that the attorney understand the importance of the structure of the Church.
5. If you receive a "reservation of rights" letter — or a "denial of coverage" letter from your insurance carrier, you should obtain an opinion from a special insurance coverage attorney about whether there are steps you should take to protect your legal rights under the insurance policy(s).

IV. As the Case Progresses . . .

1. Remember the do's and don'ts from above!
2. Call your attorney immediately if you receive any additional official papers related to the lawsuit.
3. Make sure your up-front person is continually updated about the status of the case and has access to independent legal counsel to help answer questions about legal strategies and maneuverings and address concerns regarding insurance coverage or actions being taken in the lawsuit by your attorney or others.
4. Try to be patient: the court system is often very slow and cumbersome. It may seem like it's taking forever for your case to progress to resolution.