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## News Story

### Preaching for a president? It could be costly

#### Churches face revocation of tax-exempt status if openly 'stumping' for candidates

By Douglas J. Levy

#### Tax Law

#### ADVERTISEMENT

Select churches across the United States have been getting anonymous threatening letters in the mail in recent weeks, and they have had nothing to do with stances on abortion or stem cell research.

Rather, the letters, which had no return addresses, signatures or affiliation, warned houses of worship about getting involved in the 2008 presidential election, and how endorsing a candidate could endanger the churches' tax-exempt status.

The thing is, churches can get involved in politics, they just can't break the rules.

"What the church *can't* do is say, 'This church's position on X is this,' so you'd be able to match the church's position with the candidate's," said Daniel P. Dalton, a Royal Oak attorney who has handled legal matters for metro Detroit churches for 17 years, including general counsel work, employment matters, insurance defense and disputes under the Religious Land Use and Institutionalized Persons Act (RLUIPA).

That means that if Republican presidential candidate Mitt Romney wants to address a church congregation from the pulpit, he can.

However, "When he preaches, it has to be about faith, Christianity, or some religious sect," Dalton explained.

"When he switches gears to 'Vote for me for president,' you can't have that. If you do, you have to invite [all the other candidates] in, like an equal-time provision."

That's not to say that churches have to remain silent on all election-related topics.

For example, a church or religious organization may publish and distribute a voter's guide, which may include questions and answers about candidates' particular platforms on Social Security, health care reform, even abortion and stem cell matters.

And, pastors may endorse.

"The pastor doesn't lose his free-speech rights once he becomes a pastor," Dalton said.

It's only when a pastor endorses a candidate and makes it known that he's doing it on behalf of his church that the law is broken.

#### **Origin of the regulations**

Since the federal income tax became law in 1913, Congress has exempted churches from paying this tax on the grounds that their work is charitable, educational or religious.

But in 1954, Congress placed a limit on churches' tax-exempt status, prohibiting churches from engaging in "any political campaign on behalf of (or in opposition to) any candidate for public office."

If the IRS revokes an organization's tax-exempt status, the organization is subject to federal income tax for the open tax year or years revoked.

The IRS also can subject the organization to a 10 percent excise tax on each political expenditure, and the group's managers may be personally subject to a 2.5 percent excise tax on each expenditure. These taxes may be asserted regardless of whether the organization's 501(c)(3) exemption is revoked.

However, that organization can get its 501(c)(3) status back for the subsequent tax year following revocation if it qualifies under IRS guidelines.

Some pastors have no problem with such regulations.

The Rev. Kevin Hollinger of First Baptist Church in Algona, Iowa, has endorsed Republican Mike Huckabee, a Southern Baptist minister who has support from many evangelicals, but Hollinger hasn't urged his congregation to support a particular candidate.

"I just encourage people to get out and vote and use their biblical principles," Hollinger told the Associated Press before this year's Iowa primary. "I don't tell people who to vote for."

In an October 2006 article in the *Arizona Daily Star*, the Rev. David Wilkinson of Tucson's St. Francis in the Foothills agreed.

He likes using the pulpit as a sounding board, Wilkinson told the paper.

"The responsibility of the church is to awaken people to the full dynamics of certain platforms of certain political parties," Wilkinson said. "I never feel restricted."

#### **When they cross the line**

Should either Hollinger or Wilkinson change their minds, however, their churches might suffer as the Church at Pierce Creek near Binghamton, N.Y., did.

In 1995, the Church at Pierce Creek lost tax-exempt status after the Internal Revenue Service (IRS) determined it had violated federal tax law by publishing a full-page ad in *USA Today* in October 1992 advising people that voting for presidential candidate Bill Clinton was a sin.

The church's federal lawsuit to regain its tax-exempt status failed.

If a complaint is made to the IRS about a group violating the tax exemption, the IRS may simply issue an advisory warning rather than revoke the organization's tax exempt status depending on all the facts and circumstances.

Dalton recalled a church he represented that was vocal about the same-sex marriage amendment (Proposal 2) in the November 2004 election. The IRS sent the church a letter saying a complaint was filed because of it and that a response was sought. The church, however, explained it didn't stand one way or other on the issue, and the IRS closed the investigation.

The Americans United for the Separation of Church and State (AU) recently asked the IRS to investigate Wiley S. Drake, a California pastor and a former national leader of the Southern Baptist Convention.

The group said Drake's endorsement of Huckabee on church letterhead and during a church-affiliated Internet radio show was illegal.

Drake responded by asking his followers to pray for the deaths of three of the AU's leaders, the Associated Press reported.

He said that his "imprecatory prayer ... does call for serious, serious punishment on people. But I didn't call for that; God did."

#### **Not just churches at risk**

Educational, scientific, charitable and literary organizations have the tax designation status, too, and all must abide by the legal requirement barring involvement in elections.

For example, the AU also is seeking IRS investigation after Liberty University Chancellor Jerry Falwell Jr. sent out a Dec. 1, 2007, e-mail message on university letterhead endorsing Huckabee. The AU said this was an improper use of school resources.

Dalton, the Royal Oak attorney, pointed to Operation Rescue West, an anti-abortion group, as an organization the IRS had stripped of its tax-exempt status following a complaint filed by Catholics for a Free Choice.

That came after the group took out an advertisement in a July 2004 edition of *The Wanderer*, a Roman Catholic weekly. The ad copy stated that the group was seeking "tax-deductible donation [s] to help pay the bills and affect the outcome of the election" and help "defeat [John Kerry] in November and enable President Bush to appoint a pro-life Supreme Court Justice to finally overturn *Roe v. Wade*."

Additionally, Operation Rescue West members displayed a large photo of a late-stage aborted fetus and the words "Kerry's Choice" at the Democratic convention.

Dalton said the best thing a politically active church can do to preserve its tax-exempt status is simply to brush up on the law.

"It's a very difficult line," Dalton said, "because you have your First Amendment free-speech rights on the one hand, and then you have the [tax] rules on the other."

*If you would like to comment on this story, please contact Douglas J. Levy at (248) 865-3107 or douglas.levy@mi.lawyersweekly.com.*

#### **Do's and don'ts for pastors' and churches' political activities**

These summarize the requirements of the Federal Election Campaign Act and the Internal Revenue Code as they apply to churches and pastors:

- A pastor may individually and personally endorse candidates for political office.
- A church may not endorse candidates for political office, and a pastor may not endorse candidates on behalf of the church.
- A pastor may allow his name to be used as a supporter of a candidate in the candidate's own political advertisements. In this connection, the pastor may be identified as pastor of a particular church, if it is indicated that this is for identification purposes only and if it is indicated that the endorsement is by the pastor personally and not by the church.
- Churches may engage in nonpartisan voter registration, voter identification, get out the vote, and voter education activities, so long as such activities are not intended at the supporters of any particular candidate or political party.

- A church may distribute a voter guide regarding candidates' positions on various issues or a scorecard reporting on the voting records of incumbents. In such publications, the church or pastor may *not* state whether the candidate's position or vote is consistent with the church's.
- A church or pastor is free to state the position of a candidate on any issue and may comment on that position, including praising or criticizing the candidate for it.\* A church may allow political candidates to speak on church premises; however, all candidates should be invited and given equal opportunity to speak. A candidate should not be allowed to appeal to a church congregation at a church service for funds to be used in his political campaign and no member of the church should endorse a candidate in conjunction with the candidate's visit.
- Church facilities may be used by political candidates on the same basis that civic groups are allowed to. If civic groups are required to pay some rent for using the church property, a political candidate should be charged the same amount.
- Lists of members of the church congregation may be provided to candidates for use in seeking support or raising funds only if rented at fair market value.
- A church may *not* establish a political action committee.
- Pastors and other like-minded individuals may establish a political action committee, but care should be taken that the committee is separate from the church and does not use the assets of the church.

*Source: James Madison Center for Free Speech, Alliance Defense Fund*

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