

Challenges to Religious Liberty: Practical Tips to Articulate Your Ministry's Identity and Purpose and to Strengthen Your Legal Rights

Gammon & Grange, P.C.

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Goals of Today's Webinar

- Inform religious organizations about some of the recent challenges to religious liberty.
- Share practical tips on how to communicate about and preserve religious organization's religious freedom rights.
- Topics:
 - Recent Challenges to Religious Liberty
 - Communicating About Religious Liberty
 - Practical Tips to Preserve Religious Liberty
 - Question & Answer.

Questions? Email religiousfreedom@gg-law.com.

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Obergefell v. Hodges: Overview of the Decision

- Holding: The Fourteenth Amendment requires a State to license same-sex marriage and to recognize a same-sex marriage performed in a state where the marriage was lawful.
- Reasoning:
 - Fourteenth Amendment:
 - Fundamental Right under the Due Process Clause
 - Also “informed by” Equal Protection Clause
 - Concerns:
 - No Equal Protection analysis.
 - No clear standard or test for lower courts to apply.

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Obergefell v. Hodges: The Lack of a Clear Standard

It's a little hard to identify the precise legal holding in the case. Justice Kennedy opted for soaring and vague and uplifting language instead of rigorous legal analysis, so it's hard to think of it as the kind of precedent you can mechanically apply to the next case.

Adam Liptak, *New York Times* Supreme Court Reporter

*But Kennedy's moving language was more than just aspirational thoughts on dignity. He found a right to marriage based not on the status of the couples as homosexuals but rather on the right of everyone to the "dignity" of marriage. **The uncertain implications of that right should be a concern not just for conservatives but also for civil libertarians.** While Obergefell clearly increases the liberty of a historically oppressed people, **the reasoning behind it, if not carefully defined, could prove parasitic or invasive to other rights. Beware the law of unintended constitutional consequences.***

Jonathan Turley, Shapiro Chair of Public Interest Law, George Washington University

Sometimes the appropriate response to a judicial decision is: "Right ruling, but wrong - or, at least, problematic - reasoning."

Michael J. Perry, Robert W. Woodruff Professor of Law, Emory University School of Law

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Obergefell v. Hodges: Two Perspectives on Religious Liberty



“The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths...”



“The First Amendment guarantees, however, the freedom to “exercise” religion. Ominously, that is not a word the majority uses... [P]eople of faith can take no comfort in the treatment they receive from the majority today.”

Image Source: www.supremecourt.gov

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Two Competing Views of Religious Liberty

Two Views of Religious Liberty
Scott J. Ewert, Esq., Gammon & Grange, PLLC

	The Emerging “First Amendment” View	The Traditional “Free Exercise” View
PRO:	<ul style="list-style-type: none"> The absence of religious doctrine that is not subject to legal scrutiny. Individualist approach. Other religious beliefs – all are considered. Forfeiture – loss of constitutional protections. Restraints – when the religious doctrine is not being exercised. 	<ul style="list-style-type: none"> The “exercise” of religion “occurs in a formal and structured religious tradition of persons who regard that tradition as central to their religious beliefs.”
PRO: Religious activities Religious beliefs	<ul style="list-style-type: none"> Religion is not merely a personal activity, similar to a hobby. It is a way of life, not just a set of beliefs. Religious activities are not subject to legal scrutiny. Religious beliefs are not subject to legal scrutiny. Religious activities are not subject to legal scrutiny. 	<ul style="list-style-type: none"> Religion is an essential element of human existence. It is not a hobby, but a way of life. Religious activities are not subject to legal scrutiny. Religious beliefs are not subject to legal scrutiny.
PRO: Freedom of speech Freedom of religion	<ul style="list-style-type: none"> Religious activities are not subject to legal scrutiny. Religious beliefs are not subject to legal scrutiny. Religious activities are not subject to legal scrutiny. Religious beliefs are not subject to legal scrutiny. 	<ul style="list-style-type: none"> Religious activities are not subject to legal scrutiny. Religious beliefs are not subject to legal scrutiny. Religious activities are not subject to legal scrutiny. Religious beliefs are not subject to legal scrutiny.
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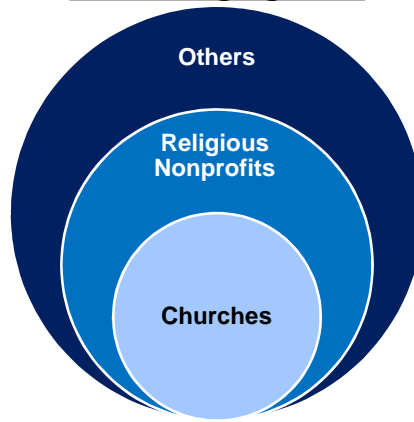


Two Competing Views of Religious Liberty: WHO is protected?

The Traditional View



The Emerging View



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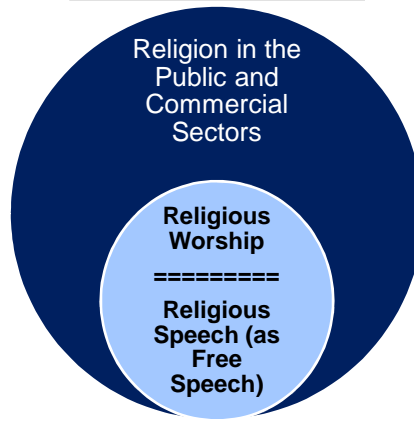


Two Competing Views of Religious Liberty: WHAT is protected?

The Traditional View



The Emerging View

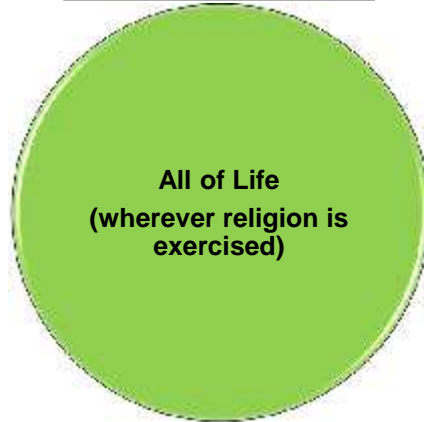


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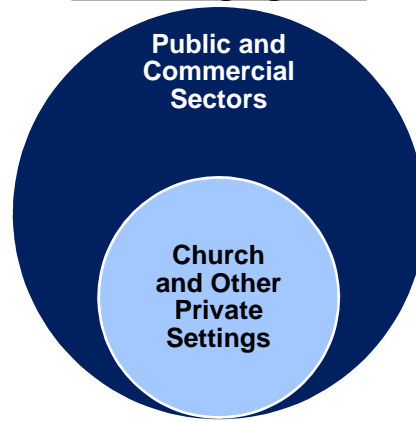


Two Competing Views of Religious Liberty: Where & when is religious activity protected?

The Traditional View



The Emerging View



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Two Competing Views of Religious Liberty

	<u>The Traditional View</u>	<u>The Emerging View</u>
Who?	Free exercise protected for all	Type of claimant limits scope
What?	1 st Am & RFRA protect the "free exercise of religion"; other rights also implicated	1 st Am & RFRA protect religious "worship"
Where?	May pervade all of life	Private sphere
When?	Extends beyond religious activities to all of life	Religious services and other expressly religious activities
How?	Claims: coercion of religious beliefs, speech, expression Injury: coercion of religious exercise	Claims: "complicity" claims Injury: "dignitary" injury

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Communicating About Challenges to Religious Liberty

- Religious liberty is viewed as a special privilege rather than a fundamental right
- To the contrary, religious liberty is about **equal rights** and **minority rights**
 - Statistics show talking about religious liberty rights as equal rights or minority rights is very well-received
- Comment in winsome, calm manner – what contending for is religious liberty for **all**

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Employment / Benefits

Housing

Marriage

Adoption

Tax Exemption

Services / Facilities

School Clubs

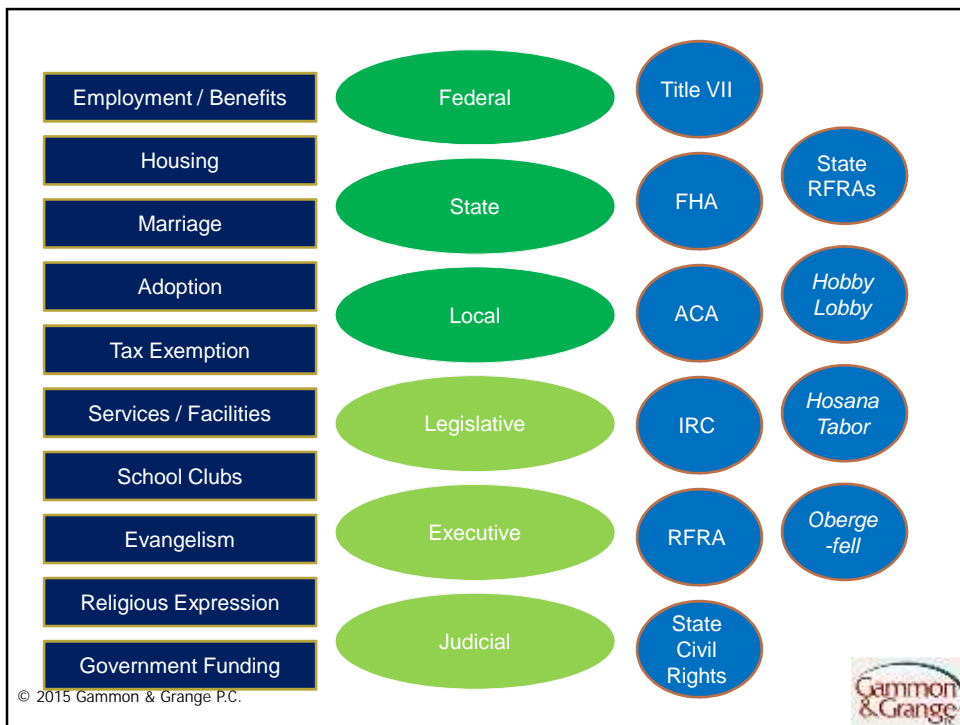
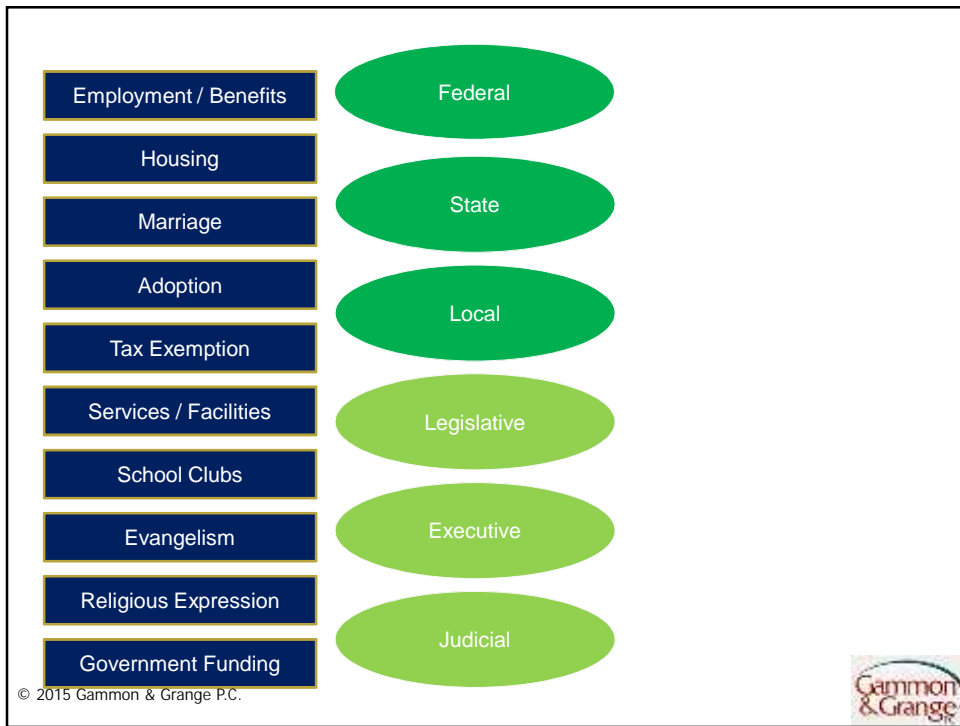
Evangelism

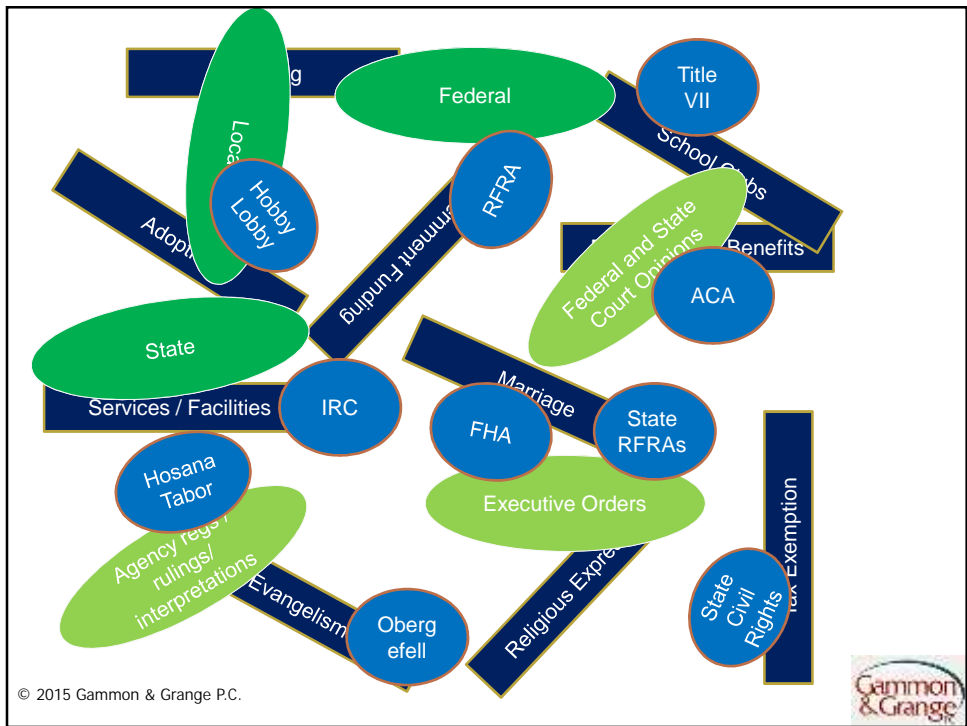
Religious Expression

Government Funding

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Recent Challenges to Religious Liberty: What has changed?

Immediate

- **Initial impact will be more focused**
 - *Obergefell* applies to state laws, not private actions.
 - A majority of states licensed same-sex marriage prior to *Obergefell*.
 - *Likely efforts to extend all marital benefits to all same-sex marriages.*

Longer Term

- **Most implications will play out over time**
 - So there is time to prepare and adjust.
 - "Keep calm and carry on" / "Don't panic"
- Increased litigation over implications and application of decision
- Increased legislative activity to apply decision in other areas of law
- Increased potential for clashes between new fundamental right of same-sex marriage and other fundamental rights
- **Much of the activity will shift to the states**
 - State RFRAs

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Questions?

Email

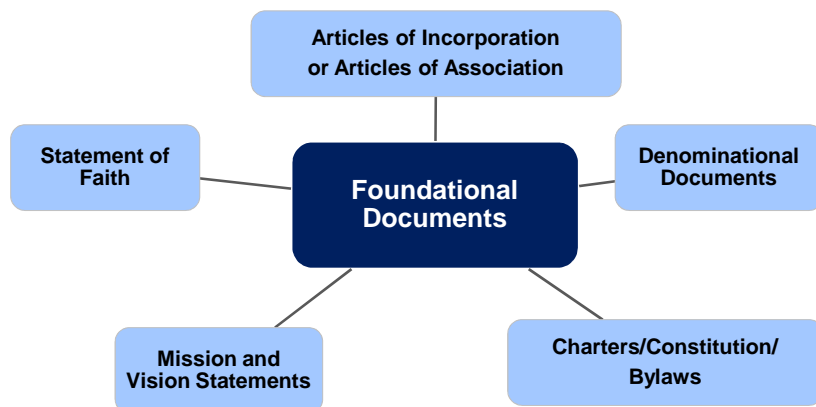
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Tip #1:

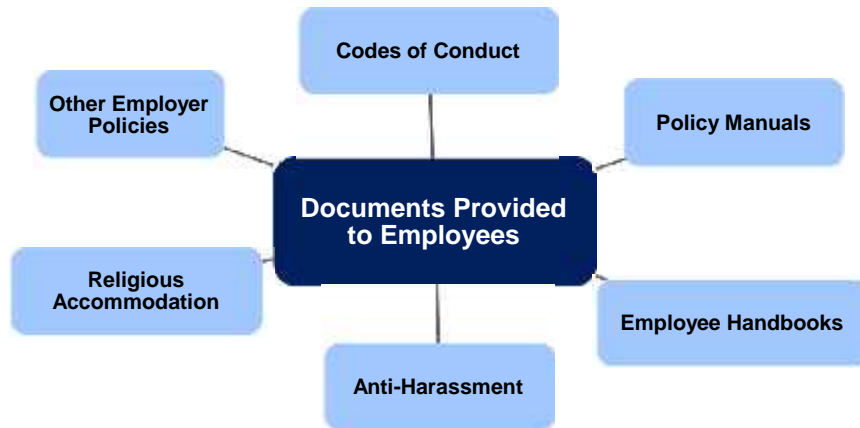
Clearly articulate your religious identity in organizational documents.



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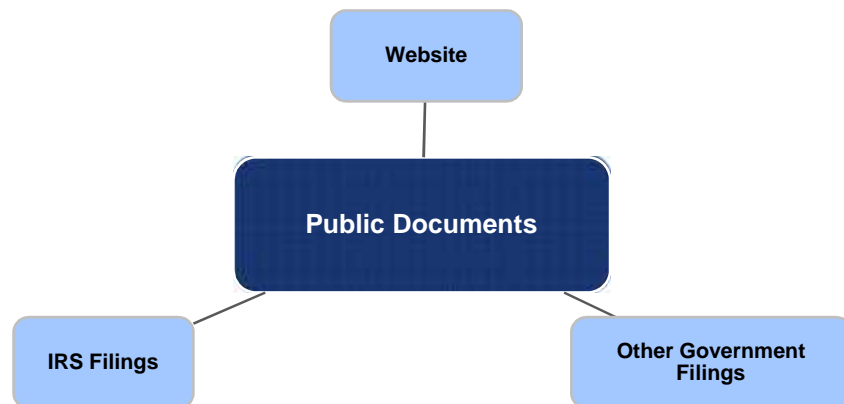
Tip #1:
*Clearly articulate your religious identity
in organizational documents.*



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*Clearly articulate your religious identity
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Tip #1:
*Clearly articulate your religious identity
in organizational documents.*

Purpose of Revising Documents:

- Defenses under Religion Clause of First Amendment, state constitutions, and federal and state RFRAs (if available)
- Section 702 religious entity exemption from prohibition on discrimination in employment (Title VII of Civil Rights Act of 1964)
 - Broad entity-wide exemption for religious employment decisions by religious organizations
 - Exemption for religious and secular activities
 - “Religion” broadly defined

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Tip #2:
*Recognize advantages and disadvantages
of how your ministry is organized.*

- Tip #2: Recognize the advantages and disadvantages of how your organization is organized as a legal entity under state law and recognized as tax-exempt under federal law
- Issue of state law
 - VA: One nonprofit, nonstock corporation
 - CA: Religious, charitable, and public benefit corporations
- Carefully weigh options available and know risks

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Tip #2:

Recognize advantages and disadvantages of how your ministry is organized.

- Basis for federal tax-exempt status
 - Church
 - Convention or association of churches
 - Integrated auxiliary of a convention or association of churches
- Advantages
 - Automatic tax-exempt status
 - Exempt from filing IRS Form 1023 and IRS Form 990
 - More likely to recognize religious liberty rights

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Tip #3:

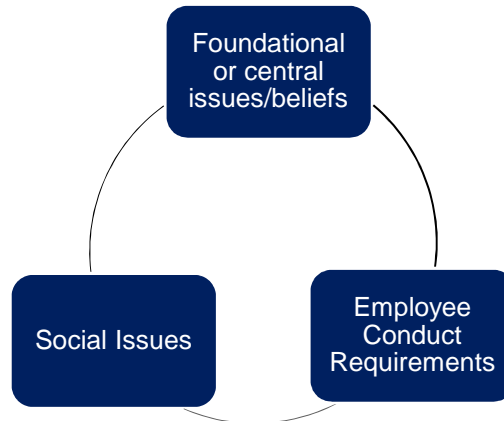
Articulate religious character of and basis for positions on foundational issues.

- Tip #3: Clearly articulate specific religious character of organization's positions on foundational and other important issues
- Explicitly base these positions on Scripture and other expressly religious norms
- Make direct connection between
 - Commitment to beliefs AND
 - Accomplishment of ministry's specific tax-exempt purposes

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Tip #3:
Articulate Religious Positions



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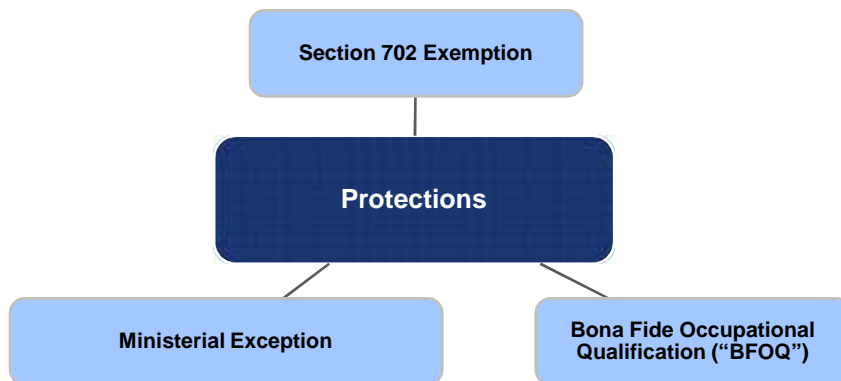
Tip #4:
Articulate religious character of all activities.

- Secular activities, such as rescue missions, soup kitchens, and other aid related ministries, can be seen as non-religious and not entitled to protection

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Tip #5:
Articulate specific religious character and requirements of employment positions.



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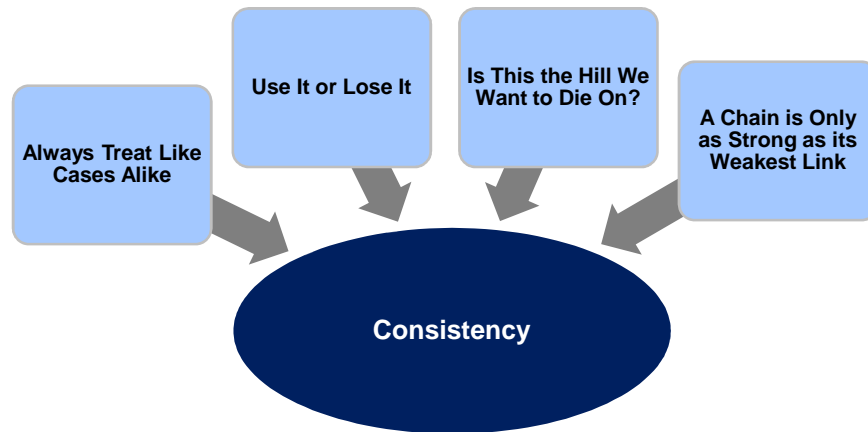
Tip #5:
Articulate specific religious character and requirements of employment positions.

- How?
 - Job descriptions and other relevant documents
 - Don't overreach
 - Be consistent

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Tip #6:
Apply standards with ruthless consistency.



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Tip #7:
Adopt a GOOD Anti-Harassment Policy.

BAD Anti-Harassment Policy

- × Treats religion just like everything else
- × One size fits all
- × Waiver or relinquishment of legal rights

GOOD Anti-Harassment Policy

- ✓ Articulates basis for full respect of ALL religious rights, including those of organization and employees

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Tip #7:
Adopt a GOOD Anti-Harassment Policy.

Bases for Treating Religion Differently

- Religion Clause of First Amendment to US Constitution
- Free Speech Clause of First Amendment to US Constitution
- Federal Religious Freedom Restoration Act
- Section 702 Exemption Under Title VII

Claim Legal Rights

Articulate How Religion is Different from Other Suspect Classes

Define Harassment Carefully

- Ensure evangelism is not considered harassment by expressly stating it constitutes free exercise of religion and does not create hostile working environment

Respond quickly and wisely to all claims of harassment

Encourage employees to be polite and respectful

Golden rule

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Questions?

Email

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Tip #8:

Be careful with gracious use of facilities.

- Problem: providing unlimited or ad hoc availability of organization's facilities
 - Public accommodation
 - Reduce right to deny use
- Solution: Facilities Use Policy
 - Religious nature and purposes of facility
 - Invokes religious rights
 - Imposes religious requirements for use
 - Clear and reasonable approval process



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Tip #9:

Beware of governments bearing gifts.

- Before accepting funds from a governmental entity, have legal counsel carefully review for:
 - Statutes under which funds are being provided
 - Regulations regarding receipt/provision of funds
 - Relevant Executive Orders
 - Government contracts regarding grant/activity including attachments to contract
 - Other applicable laws
 - Origin of funds and any related laws and regulations

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Tip #9:

Beware of governments bearing gifts.

- After receive funds, comply with all requirements
 - Separately track and account for all such funds and their use
 - Segregate public funds for use only for program's recognized secular good
 - Consider establishing separate legal entity to receive, hold, administer, and account for funds

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Tips #10:

Recognize how rights are impacted.

- Tip #10: Recognize how not only your religious liberty rights but also your other constitutional and legal rights are impacted
- Hybrid constitutional claims
 - Free Speech
 - Free Press
 - Free Association
 - Equal Protection
- In articulating religious freedom rights, include others that may apply

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Tip #11:
Identify burdens on free exercise.

- Tip #11: Carefully identify, articulate, and document all of the “burdens” on your free religious exercise that result from the government’s actions.
- “Complicity” claims and “dignitary” claims
- Identify full and true nature of specific harms

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Tip #12:
Use RFRA but be aware of its limitations.

- *Hobby Lobby* was a RFRA Decision
- RFRA applies only to governmental burdens and actions, not private actions
- May be amended by legislature at any time



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Tip #13:
Be vigilant and guard your flanks.

- Watch for efforts to pass or amend federal laws and regulations
- Watch for attempts to promulgate new agency regulations or guidance
- Guard supply lines
 - Tax reform; tax exemption
- Watch efforts at state level
- Preserve attorney-client privilege
- Support work of “watchmen on the walls”

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