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Memorandum

To: Chancellors of the Annual Conferences of The United Methodist Church

From: Laurence R. Tucker

Date: June 1, 2006

Subject: Lessons learned from recent litigation

The Missouri Annual Conference has recently experienced the trial of an action charging it with the intentional failure to supervise a fully connected clergy member of the Conference who was accused of sexually assaulting an employee of the church he was serving. I thought it might be appropriate to set down some of my thoughts about lessons that I have learned from examining the trial and post-trial phases of this case. I was engaged to represent the Conference after the trial had been completed and a substantial verdict including both compensatory and punitive damages had been awarded by a jury..

In my review of the record from the trial, including pleadings, motions, depositions and portions of the trial transcript, I reached the following conclusions as to lessons the Conference and its representatives should have learned from this case:

1. The Conference must assign a knowledgeable contact person to work with defense counsel as soon as a case is known to exist. Ideally, this person would work with defense counsel or legal counsel representing the Conference from the moment a claim is filed as opposed to only after the suit is served.

2. If the defense counsel is not knowledgeable about the structure, operation and finances of a United Methodist Conference (or congregation), training must be provided before a responsive pleading is filed. This training should involve someone knowledgeable about the governing structure of the denomination and the distinctions among the responsibilities and rights of Conferences, districts and congregations. It should also include an understanding of how a denomination which is hierarchical and connectional differs from denominations which are congregational in nature. It is imperative that defense counsel know from the beginning how the finances work at each level of the United Methodist denomination.

3. All documents which relate to or refer to the subject of the case should be immediately collected, organized and copied. No documents should be destroyed that relate to

the topic matter. These documents need to be gathered even if there is a small likelihood they will have to be produced because of some claim of privilege or some other basis of protecting the disclosure of the information. It is imperative that documentary evidence be brought in from every level of the church unit involved and from every person who may collect documents so that there are no surprises later in the case. It is imperative that the term "documents" is understood to include electronic records as well as hard copies and that the efforts to preserve those electronic records be as vigorous as for that used for the hard copies.

4. A plan for the defense of the action should be jointly developed by outside counsel and conference personnel. This plan should be put into writing and periodically reviewed and revised. Early determination should be made as to whether the plan is legally viable and whether it is consistent with the mission of the denomination. For instance, it may be a good legal defense to affirmatively attack the credibility of the plaintiff, but it may be that given the mission of the denomination and the way the public views the denomination, such a tactic may be counterproductive.

5. The Conference should determine what insurance is available to pay for a defense or indemnity and what the Conference's rights and exposures may be. This should be done as early as possible in any matter that may be leading to litigation. It is important also to make certain that the insurer is clear as to the Conference's view as to the insurer's role with regard to settling the case. For instance, if a demand is made which appears to be within the policy limits available to the Conference, a decision should be made at that point whether an offer will be made. Any decision to not make an offer should be understood as shifting the responsibility for any excess verdict from the insurer to the Conference, if it should occur later.

6. The defense plan created in paragraph number 4 above should require full involvement of the Conference for all substantive pleadings, discovery and communications. The Conference should not only be copied on matters received by defense counsel, but should be involved in any outgoing substantive pleadings, discovery requests or communications so that there is never a situation where the Conference is surprised by developments in the case.

7. Expert witnesses should be engaged as early as possible in the case. Subjects of such expertise may include: church polity, church finances and church history. The Conference would be wise to begin compiling a list of resources in these areas. The expert should not necessarily be a United Methodist and, in fact, in many cases would be better if they were not, since there will always be the argument that a member of the denomination is biased.

8. No Conference witness should be deposed without joint defense counsel and Conference liaison discussion of the preparation followed by thorough deposition preparation. It is imperative that the Conference know what the witnesses are likely to say and understand how their testimony may fit with the defense plan agreed to by the counsel and the Conference. Thinking that any witness is only a "marginal" witness or deals only with "technical" issues, may be a mistake. Witnesses speaking on behalf of the Conference may have the power to bind the

Conference in a way that would be damaging unless they are thoroughly prepared.

9. No written discovery should be responded to by the Conference without a review by persons with knowledge of the subject of the responses. This will avoid the embarrassing situation confronted in the recent case where Conference personnel signed an answer to interrogatories which was clearly wrong. Neither defense counsel nor Conference personnel were aware of the error in the answer until after the jury trial was completed. The amendment or supplementation of that response could easily have fixed the error at an earlier date if there had been an adequate communication between counsel and the Conference about that interrogatory.

10. In cases with a substantial exposure (equal to in excess of the insurance coverage available), jury trial simulations should be conducted well before trial to develop trial themes and to shape tactics. This tool can be very expensive, it can also be very important to avoiding blunders in front of a jury. There are ways to reduce the cost of trial simulations which can be utilized, but it is important that any trial simulation be conducted by a professional who can help the Conference and the defense counsel in the analysis of the data obtained.

11. It is important to integrate the work of the defense of any claim in a case with the public disclosures of information to the United Methodists within a particular Conference. Unlike corporations which operate for profit, the Conference cannot be seen to be holding important information in secrecy. However, a Conference has to be careful not to disclose information which will undercut its valid legal defenses. Therefore, it is important that any public relations efforts directed toward the members of the denomination or the public promote openness, honesty and clarity. However, it is also important that the Conference personnel (and all persons who may have the ability to speak on its behalf) are aware of the limits of such disclosures. In the recent case, there were instances where well-meaning lay persons and pastors working with Conference committees made statements in the public about financial matters relating to the Conference which caused difficulties for the Conference in the post-trial period. It would be better if everyone understood the limits of what can and should be disclosed to the public.

12. Any discussions about settlement in a case against the Conference must involve the Conference's legal counsel, the Bishop or the Bishop's designated representative and defense counsel. These discussions should be open, direct and well documented. It is important that a consistent position be established as to whether a particular case is one which should be settled. Changes in a case can, of course, change the evaluation of whether a case should be settled. However, a changed case evaluation should be jointly agreed upon among the Conference, its legal counsel and its outside defense counsel.

13. Any case involving the Conference should be certain to involve not only its retained counsel, but also the people associated with the General Council on Finance and Administration.

These are some of the "lessons learned" from the Missouri Annual Conference's recent case which occur to me. I do not, by listing these, mean that these are all of the lessons which the Conference should take away from the experience. The one thing that appears clear from my review of the recent case is that there was a lack of understanding until late in the process of the seriousness of this claim. I do not fully understand why that was so, but the steps that I have suggested above would help prevent a similar situation from occurring in the future.

Finally, once a matter is finally concluded either by the appeal or settlement, I would recommend that there be a meeting of the Bishop's counsel, the Bishop and his designated parties, and such outside counsel as may be willing to come and volunteer some time, to discuss the "lessons learned". Such a discussion could lead to a refinement of these lessons and an improvement in the response of the Conferences of The United Methodist Church to claims against those Conferences, in the future.

LRT/mw