DFMC Herald

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Boston 2013

The words of the theme song for the 1980's television sitcom *Cheers* seem fitting as we prepare to journey to Boston for our 2013 DFMC Conference:

Making your way in the world today takes everything you've got
Taking a break from all your worries sure would help a lot
Wouldn't you like to get away!

Sometimes you want to go where everybody knows your name,
And they're always glad you came.
You wanna be where you can see
Our troubles are all the same.
You wanna be where everybody knows your name.

We are indeed looking forward to seeing friends and sharing stories with one another. The Program Committee is made up of board members Mary Beth Koenig of Austin, Tony Rabago of Phoenix, and Deacon Jim Hoy of Gallop together with assistance from our President, Brad Watson of Patterson; Treasurer, Rich Kelly of Cincinnati; Brad Wilson of Atlanta; and our Executive Director, Les Maiman. Together, the Committee has put together a strong slate of speakers.

Jeff Trumps
Program Chair
Diocese of Lafayette in Louisiana

We are blessed to have Cardinal Sean O'Malley, OFM, Cap., Archbishop of Boston as our keynote speaker on Sunday evening. Monday's menu offers up General Sessions by Coach Dale Brown as our motivational speaker (*How Do We Find Success and Happiness*) and Dr. Loren Scott as our expert economist (*The Outlook for the Economy*) while Tuesday's General Sessions will be presented by Kenneth Gronbach, noted demographer (*Shifting*

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Go online to learn more

www.dfmconf.org

DIOCESAN FISCAL MANAGEMENT CONFERENCE

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From the Desk of the Executive Director

Dear Colleagues,

Leslie T. Maiman, Jr., D.Min.
Executive Director

For the next part of the DFMC journey, our conference will be seeking a new Executive Director. We are reminded in Ecclesiastes that for everything there is a time and season. For our part, my wife, Brenda, and I have discerned that for the next season in our journey, we are being offered the calling and distinct privilege of serving within the church of Alaska. Thus subsequent to the completion of Boston 2013, I will begin my ministry as the Chief Operating Officer of the Archdiocese of Anchorage as my successor takes the DFMC's reins to lead as our new Executive Director.

It has been an honor and privilege to serve as your Executive Director for these past seven conferences. Together, we have seen our conference attendance set new highs, experienced a 50% expansion of exhibiting partners, and established a very healthy increase in our financial reserves for funding future member service initiatives.

Returning to Ecclesiastes, I would like to invite those experienced DFMC members who sense that their "next season" might be calling them to consider serving our membership as Executive Director, to seriously explore that possibility with our search committee. (Please see the position advertisement on page 4 of this issue). The expanding possibilities for the DFMC's future ministry to the national church are both most critical and timely, and the deeper friendships which you will develop as Executive Director with our colleagues a rich blessing.

I thank you for the kindness and considerations which you have graciously extended to me over these years, and look most forward to seeing you this year at our Boston Conference!

Blessings,

// Les

Leslie T. Maiman, Jr., D.Min.

Executive Director

From the President

Brad Watson
President

As you may know, the DFMC will be undergoing some organizational changes over the next few months. For the past seven years, it has be a distinct privilege for all of us on the DFMC to work beside Les Maiman. This coming September, Les will be stepping down from his role as Executive Director of the DFMC, but continuing as a member of our organization in his new role as COO for the Archdiocese of Anchorage.

With change comes both challenges and opportunities. With all that has been accomplished over the past seven years under the guidance of Les, the bar has been set high to fill some rather large shoes.

Opportunity is in our future; our next Executive Director will serve as our organization's guide, paving the road to where the DFMC is headed. We hope to find somebody who will continue the common excitement that our Board of Directors and Les share for the positive change and evolution of our organization. Our future is bright and promising with many exciting events, starting with the 2013 conference this September in Boston.

The countdown has begun. Registration materials were distributed to the membership over the past few weeks and can now be completed online on the DFMC website at www.dfmconf.org.

Thank you in advance to Cardinal Sean O'Malley for agreeing to serve as our keynote speaker, to John Straub, our site chair, the many conference presenters, our vendors for their support, and the Program Committee and Board of Directors for their dedication and service to our organization.

Last but certainly not least, our most sincere thanks to Les Maiman for his outstanding service as our Executive Director the past seven years. We wish you all the best!✝

Catholic Extension Assistance for Mission Dioceses

Pre-Conference Luncheon Sunday, 8 September:
Catholic Extension would like to invite all DFMC attendees from a Mission Diocese to attend a pre-conference luncheon, scheduled for Sunday, 8 September, from 11:30am-1:30pm. The luncheon will include a presentation from Catholic Extension regarding funding strategies and opportunities and the year ahead. Please arrange your conference arrival accordingly to plan to attend this important meeting and discussion.

Conference Assistance and Sponsorship:
The DFMC is a tremendous resource for those who are charged with most effectively managing the church's finances. Therefore, Catholic Extension is willing to offer conference sponsorship opportunities to ensure that potential attendees from mission dioceses are not prohibited from being able to attend due to cost. For more information about 2013 DFMC sponsorship guidelines and opportunities, please keep an eye out in the June issue of the Catholic Extension Bulletin or for questions contact mission@catholicextension.org

CATHOLIC EXTENSION
Building Faith | Inspiring Hope | Igniting Change

DIOCESAN FISCAL MANAGEMENT CONFERENCE (DFMC) EXECUTIVE DIRECTOR

The Diocesan Fiscal Management Conference is seeking an Executive Director. The DFMC is a national membership organization representing financial managers of Catholic dioceses throughout North America. Its mission includes promoting the spiritual growth of its members, encouraging the development of professional relationships, facilitating the free exchange of ideas and information, and providing professional financial services to the local and national church. Specific responsibilities include the following:

1. Coordinating the DFMC annual conference;
2. Publishing the organization's quarterly newsletter;
3. Managing the organization's budget and financial records;
4. Serving as the resource person for technical issues and clearinghouse of information exchange;
5. Providing organizational support to the Board of Directors, third party vendors, and Conference vendors; and
6. Providing services to the organization's membership including welcoming new members, national office services, job postings, etc.

Candidates must have demonstrated success in non-profit organizations and/or membership organizations. The Executive Director should be proficient in website management and data management including list-serve delivery systems. The Executive Director must be a self-starter while working in a small office environment, and **must have a strong commitment and knowledge of the teaching of the Roman Catholic Church**. Candidates must have a Bachelor's in finance, accounting, public affairs or communications; advanced degrees are desired but not required.

Location of National Office determined based upon selection of candidate.

Qualified candidates are invited to email a cover letter outlining major accomplishments with an attached resume to DFMC search committee c/o Deacon Jeff Trumps at jtrumps@diolaf.org.

Conference Early Bird Registration

Members whose paid registration is received by 26 July will automatically be entered for a chance to **WIN a free iPad (32GB with Wi-Fi)!!**

You can both register and pay on-line for ALL of your Conference and Tours; and Hotel and Travel Reservations... just go to the DFMC website at:

www.dfmconf.org

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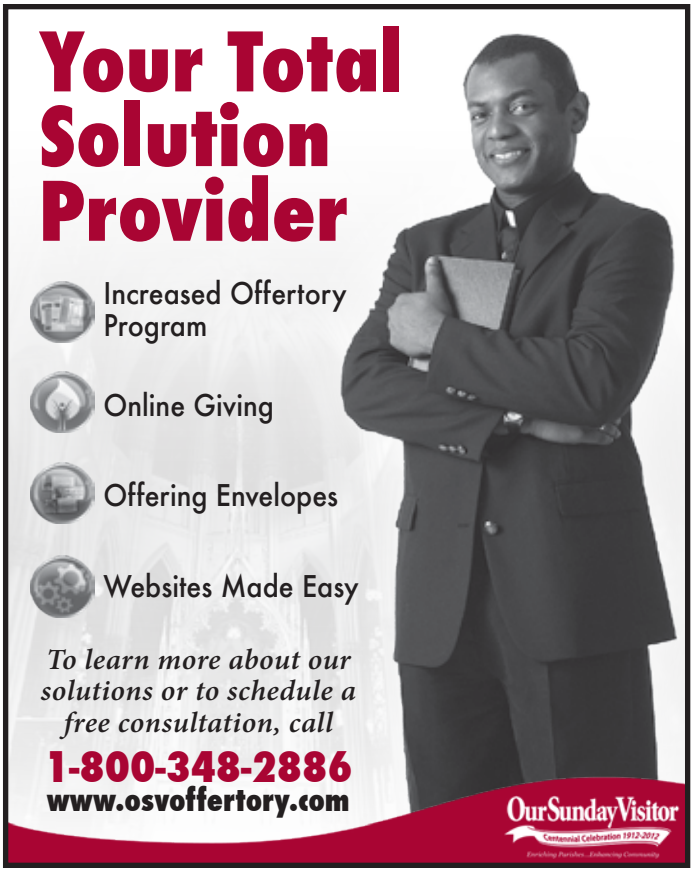
Demography and the Catholic Church) and Rev. Msgr. Stephen Rossetti, Clinical Associate Professor at The Catholic University of America (*Why Priests are Happy ...we should be, too!*). On Wednesday our General Sessions will be given by Matthew Giuliano, Assistant General Counsel at USCCB (*Health Care Legal Considerations*) and Dr. Thomas Buckhoff, Associate Professor of Accounting at Georgia Southern University (*Cleaning Up After Fraudsters*).

Our Concurrent Sessions on Monday bring familiar and popular presenters, Octavio Verdeja, Jr. (*Internal Controls over Expenses*) and Frank Kurre (*Restructuring Diocesan Operations*) with the addition of a session on *National Standards and Benchmarks for Effective Schools* given by Dr. Patricia Weitzel-O'Neill. And our Concurrent Sessions on Wednesday have a distinctive diocesan flair with presentations on internal controls by Mac Bryant of Denver; Property and Liability by Barbara Walsh and Rich Kelly of Cincinnati; and Cemeteries and Perpetual Care Funds by Debra Crane of Cincinnati and Thomas Duffy of Washington, D.C.

As you can tell, our plate is full but we still made time to enjoy the host city of Boston. Maybe for those days in September we, too, can be Boston Strong! Together let us Energize, Learn, Pray, Share, Relax, Prepare and Collaborate. I'm sure you'll be glad you came.

In the words of the Boston City Seal motto: "God be with us as he was with our fathers." Peace.✝



APC Update: Investment Disclosures

By Henry T. Chamberlain, SJ, USCCB Accounting Practices Committee

The Accounting Practices Committee (APC) operates under the auspices of the USCCB Committee on Budget and Finance. The primary purpose of the APC is to represent the U.S. Catholic Church before regulatory bodies in the formulation of accounting principles and reporting standards that would affect the Catholic Church. The Committee consists of 15 voting members: 11 diocesan CFOs (all of whom are CPAs) and 2 representatives each from CWR and CMSM. In addition, there are four CPA advisors from public accounting firms.

Early in February, 2013, the Financial Accounting Standards Board (FASB) issued a clarifying Accounting Standards Update, no. 2013-03 (the "Update") regarding certain disclosures about investments. The Update added a new paragraph to the *Accounting Standards Codification*, no. 825-10-50-3A and states that certain investment disclosures are optional for non-public entities.

At the end of 2012, there was some confusion regarding how much had to be disclosed regarding the investments held by certain entities, including many not-for-profit (NFP) entities. This would include the vast majority of Church organizations. The FASB recognized the fact of confusion and saw that some resolution was necessary in the immediate future because many entities choose the calendar year as their fiscal year. For those entities it was imperative that FASB resolve the confusion before the audit season for those entities ended. For those entities with fiscal years ending on December 31, this Update resolved the confusion.

For most Church organizations with a different fiscal year end, the Update has yet to take effect. Consequently, it is important to understand what the Update said and the choices that may be available under it.

The Update raises three questions:

1) What disclosures are involved?

2) Are Church organizations non-public entities?

3) What choices are available for non-public entities?

Disclosures. The general rule for disclosures about investment portfolios (and any other financial instruments elsewhere in the statement of financial position) is that the portfolio be divided according to the level of the fair value hierarchy into which each holding in the portfolio fits. The fair value hierarchy has three levels: I - holdings measured by reference to quoted market prices as of the date of a financial statement, II - holdings for which there is no quoted market price but for which approximately equivalent securities have quoted market prices, and III - holdings that do not fit in either of the first two categories. The disclosures regarding category III of the fair value hierarchy are the only ones addressed by the Update.

Non-Public Entity. FASB defines a non-public entity as one which has no shares, equity instruments, or any other ownership interests that are traded on any exchange or in an

over-the-counter market; nor has it issued any debt securities, e.g., bonds, including conduit debt, traded on any market. (A conduit debt is a debt that is issued by one party for the benefit of a different party, with the beneficiary contractually liable to pay to the issuing party on a timely basis all funds needed to cover all interest due plus the repayment of the principal amount of the debt.) Further, to be a non-public entity, an entity does not file with a regulatory agency prior to the issuance of debt securities. This definition of a non-public entity is admittedly complex. It is also broader than just NFP entities since it would include for-profit commercial—and taxable—entities that do not issue securities traded on any market. At the same time, the definition does not include all NFP entities because some NFP entities are obligated by conduit debt agreements. Among Church entities that are also NFP entities exempt from federal income taxes and eligible to receive deductible donations, most—but not necessarily all—instances of conduit debt obligations are likely to be among organizations engaged in the fields of health care, welfare, and post-secondary education. As a result, a listing in the *Official Catholic Directory* does not suffice to make an entity a non-public entity for the purposes of this FASB Update. The facts at each Church entity will determine whether such entities are non-public entities.

A Choice. Sometimes a non-public entity may hold in its investment portfolio a financial instrument in the third category of the fair value hierarchy which, for whatever reason, it carries in its statement of financial position at a value different from its fair value. The new FASB Update would allow a non-public entity either to include in, or to omit from, its summary of fair value categories that particular asset as long as its fair value is disclosed elsewhere in the notes to the statements.

This situation does not seem likely to arise very often in Church organizations. When it does, it may well be the result of a donation instead of a purchase of such a security. However, the scope of the Update is not limited to an investment portfolio (even though that may easily be the most evident application). The scope includes financial instruments reported in the statement of financial position. For example, if an entity were to reacquire its own debt instruments without cancelling them and were then to carry them at face value instead of fair value, the Update would apply to these holdings as well.

Perhaps the most significant aspect of this new Update for most Church entities is the distinction between non-public entities and NFP entities.

More information about the agenda projects will be available in the coming months and will be shared by the FASB as it develops.

USCCB Files Comments on Federal Regulatory Proposal Pertaining to Coverage of Contraceptives and Sterilization Procedures in Health Plans

On March 20, the USCCB filed comments on a Notice of Proposed Rulemaking concerning a regulatory requirement that virtually all health plans cover contraceptives, sterilization procedures for women, and related education and counseling. 78 Fed. Reg. 8456 (Feb. 6, 2013).

Here is an excerpt from the opening pages of the comments, the full text of which is available at http://www.usccb.org/about/general-counsel/rulemaking/upload/2013-NPRM-Comments-3-20-final.pdf.

- Like earlier iterations, the latest proposed regulation requires coverage of sterilization, contraception, and drugs and devices that can cause abortions. These are items and procedures that, unlike other mandated "preventive services," do not prevent disease. Instead, they are associated with an increased risk of adverse health outcomes, including conditions that other "preventive services" are designed to prevent. The proposed regulation is therefore at odds with the purpose of the preventive services provision of the Affordable Care Act ("ACA" or "the Act") upon which that regulation purports to be based. In addition, insofar as the regulation requires coverage of drugs that can operate to cause an abortion, the mandate violates the following: (a) provisions of ACA on abortion and non-preemption, (b) a distinct federal law forbidding government discrimination against health plans that do not cover abortion, and (c) the Administration's own public assurances, both before and after enactment of ACA, that the Act does not require, and would not be construed to require, coverage of abortion. We have raised all these issues previously.
- Under the current proposal, no exemption or accommodation is available at all for the vast majority of individual or institutional stakeholders with religious or moral objections to contraceptive coverage. Virtually all Americans who enroll in a health plan will ultimately be required to have contraceptive coverage for themselves and their dependents, whether they want it or not. Likewise, unless it qualifies as a "religious employer," every organization that offers a health plan to its employees (including many religious organizations) will be required to fund or facilitate contraceptive coverage, whether or not the employer or its employees object to such coverage. This requirement to fund or facilitate produces a serious moral problem for these stakeholders. We have raised all these issues previously.
- Although the definition of an exempt "religious employer" has been revised to eliminate some of the intrusive and constitutionally improper government inquiries into religious teaching and beliefs that were inherent in an earlier definition, the current proposal continues to define "religious employer" in a way that—by the government's own admission—excludes a wide array of employers that are undeniably religious. Those employers therefore remain subject to the mandate. Generally the nonprofit religious organizations that fall on the "non-exempt" side of this religious gerrymander include those organizations that contribute most visibly to the common good through the provision of health, educational, and social services. We have previously raised problems associated with dividing the religious community into those "religious enough" to qualify for the exemption from the mandate, and those not—especially when that division falsely assumes that preaching one's faith is "religious," while living it out is not. We have likewise previously raised objections to linking the exemption to provisions of the tax code that have nothing to do with health care or conscience.
- The Administration has offered what it calls an "accommodation" for nonprofit religious organizations that fall outside its narrow definition of "religious employer." The "accommodation" is based on a number of questionable factual assumptions. Even if all of those assumptions were sound, the "accommodation" still requires the objecting religious organization to fund or otherwise facilitate the morally objectionable coverage. Such organizations and their employees remain deprived of their right to live and work under a health plan consonant with their explicit religious beliefs and commitments. We have raised these problems previously, and we raise them again here.
- The mandate continues to represent an unprecedented (and now sustained) violation of religious liberty by the federal government. As applied to individuals and organizations with a

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religious objection to contraceptive coverage, the mandate violates the First Amendment, the Religious Freedom Restoration Act, and the Administrative Procedure Act. We are willing, now as always, to work with the Administration to reach a just and lawful resolution of these issues. In the meantime, along with others, we will continue to look for resolution of these issues in Congress and in the courts.

Any comments on the NPRM must be filed on or before April 8, 2013.

See: **Notice of Proposed Rulemaking on Preventive Services, 78 Fed. Reg. 8456 (Feb. 6, 2013).**

Roundup of Litigation by Nonprofits Challenging Federal Contraceptive Mandate

So far, at least 52 plaintiffs and over 150 lawsuits have been filed to challenge the federal government's regulatory mandate that most health plans cover contraceptives, sterilization procedures for women, and related education and counseling.

A number of cases brought by dioceses and other religious organizations have been dismissed on grounds of ripeness or standing (or both); others have been allowed to proceed.

Here is a snapshot of some recent decisions:

A federal district court in Missouri has dismissed suit by the Archdiocese of St. Louis and its Catholic Charities. The court concluded that the case was not ripe for resolution. The challenged regulations are in the process of being amended, and therefore "represent a tentative as opposed to final agency position," the court wrote. "Moreover, the forthcoming amendments are intended to address the exact issue Plaintiffs raise here by establishing alternative means of providing contraceptive coverage … while accommodating religious organizations' religious objections to covering contraceptive services…. In the meantime, Plaintiffs are protected from enforcement by the safe harbor." For similar reasons, the court found that plaintiffs lacked standing.

See: Archdiocese of St. Louis v. Sebelius, **No. 4:12-CV-00924-JAR, 2013 WL 328926 (E.D. Mo. Jan. 29, 2013).**

USCIS Publishes Revised Employment Eligibility Verification Form I-9

On March 8, the U.S. Citizenship and Immigration Services ("USCIS") published a revised Employment Eligibility Verification Form I-9. All employers must complete a Form I-9 for each employee hired in the United States. According to USCIS, the revised Form I-9 features new fields, reformatting to reduce errors, and clearer instructions. The Form I-9 consists of (1) instructions for completion, (2) three sections for recording employee and employer information, and (3) lists of acceptable employee verification documents.

Employer Transitional Concerns

USCIS has directed employers to begin using the newly revised Form I-9 as of March 8, 2013, although employers may also use previously accepted revisions N (February 2, 2009) and Y (August 7, 2009) until May 7, 2013, after which only the newest Form I-9 may be used. The revision date is found on the lower left-hand corner of the Form I-9.

Employers need not complete a new Form I-9 for current employees whose Form I-9 is already on file. When rehiring an employee within three years of original completion of a Form I-9, or re-verifying that an employee

is authorized to work within three years of the first Form I-9, employers may use either (1) Section 3 of the employee's Form I-9 already on file or (2) the newly revised Form I-9.

Employers may order the new Form by calling USCIS toll-free at 1-800-870-3676 or by downloading the Form at www.uscis.gov. When copying a blank Form I-9, employers must ensure all sides are copied.

Section 1 – Employee Information and Attestation

Newly hired employees must complete and sign Section 1 no later than the first day of employment, but not before the employee has accepted a job offer. The Form I-9 asks for an employee's name, address, date of birth, and Social Security number; provision of email address and telephone number is optional. Provision of Social Security number is only mandatory if the employer is participating in E-Verify.[1]

Section 1 also requires an employee to attest, under the penalty of perjury, that he or she falls into one of four citizenship/immigration statuses: (1) U.S. citizen, (2) noncitizen U.S. national, (3) lawful permanent resident, or (4) alien authorized to work. Employees in the latter two categories must provide an Alien Registration or USCIS number; in specified circumstances, an Admission Number is also acceptable. If the employee requires assistance to complete the Form I-9 – e.g., translation of instructions or physical assistance in filling out the fields – the person providing assistance must complete the "Preparer and/or Translator Certification" field, although the employee must still personally sign Section 1.

Section 2 – Employer Review and Verification

Employers or their authorized representatives must complete Section 2 by examining the employee's evidence of identity and employment authorization within 3 business days of the first day of employment, or where the employer is hiring a person for less than 3 business days, on the first day of employment. Employees must present either (1) one of the documents in List A, showing both identity and employment authorization, or (2) a combination of one selection from List B, showing identity, *and* one from List C, showing employment authorization.

Employers cannot dictate which particular acceptable document an employee offers. Specified types of receipts are acceptable in lieu of a listed document. The List B document must contain a photograph if the employer is participating in E-Verify. Employers are not required to photocopy the documents, and doing so does not alleviate the need to fill out Form I-9; if the documents are photocopied, they must be retained by the employer along with the Form. With the sole exception of a certified copy of a birth certificate, only unexpired, original documentation is acceptable.

Employers must physically examine each document to determine if it reasonably appears to be genuine and to relate to the person presenting it. In Section 2, the examiner of the documents enters:

- the employee's name;
- the document's title, issuing authority, document number, expiration date (if any), and, where the employee is a student or exchange visitor presenting a foreign passport with a Form I-94 (Arrival/Departure Record), the employee's Form I-20 or DS-2019 number and program end date (for foreign students or exchange visitors);
- under "Certification," the employee's first day of employment;
- the name and title of the person completing Section 2 on behalf of the employer; and
- the employer's business name and address.

The person filling out Section 2 also must sign and date the attestation, and return the employee's documents.

Section 3 – Re-verification and Rehires

Employers must re-verify in this section that an employee is authorized to work if either (1) the employee is rehired or (2) the employee is not a U.S. citizen, national, or lawful permanent resident who presented a Permanent Resident Card and his or her evidence of employment authorization is expiring.

When rehiring within three years of a Form I-9's original completion, employers may use either Section 3 of the original Form I-9 or complete a new Form I-9. Re-verifying employers may choose between using Section 3 of the original or of a new Form I-9, but any new pages must be attached to and retained with the original Form I-9. With re-verification, this Section should be completed prior to the expiration date of the employment authorization or employment authorization document.

In Section 3, employers need only complete Block A if an employee's named has changed. With all rehires, employers must complete Block B with the date of rehire. With rehires whose employment authorization or authorization documentation has since expired, as well as with current employees with expiring employment authorization or authorization documentation, an employer must also fill out Block C. There, an employer must examine an employee's List A or C document and record its title, document number, and expiration date, if any.

If any block of Section 3 is completed, the person examining the documentation and filling out the Form I-9 on the employer's behalf must provide his or her name and sign and date the attestation.

Final Considerations

Employers do not file completed forms with USCIS, but rather are responsible for retaining completed forms and making them available for inspection by federal authorities. Once an employee's employment ends, the employer must retain the

employee's Form I-9 for either three years after the date of hire or one year after the date of separation, whichever is later. The Form I-9 may be signed and retained electronically.

Further Form I-9 details are described in the *Handbook for Employers: Instructions for Completing Form I-9* (M-274), available at www.uscis.gov/I-9Central.

[1] E-Verify is an electronic internet-based employment eligibility verification system sustained by the Department of Homeland Security and supported by the Social Security Administration. While the system is generally voluntary, certain states may require its use under certain circumstances and it is mandatory for federal contractors subject to the Federal Acquisition Regulation, employers of certain F-1 foreign student visa holders, and the federal government itself.

***See:* U.S. Citizenship and Immigration Services, *USCIS Revises Employment Eligibility Verification Form I-9* (March 8, 2013); AILA Infonet Doc. No. 13030845 (posted 3/8/13).**

IRS Clarifies Procedures for Organizations to Request a Change in Foundation Classification

In January, the Internal Revenue Service issued its annual update of the revenue procedure regarding determination letters and rulings on private foundation status under section 509(a) of the Code. Rev. Proc. 2013-10, 2013-2 I.R.B. 267. The revenue procedure now states that "subordinate organizations included in a group exemption letter seeking a change in public charity status, must submit Form 8940, *Request* [for] *Miscellaneous Determination Under Section 507, 509(a), 4940, 4942, 4945, and 6033 of the Internal Revenue Code*, along with all information, documentation, and other materials required by Form 8940 and the instructions thereto, as well as the appropriate user fee pursuant to Rev. Proc. 2013-8 or its successor revenue procedures." This applies to organizations included in the USCCB's group ruling.

In related news, the IRS and Treasury issued final and temporary regulations concerning classification of "Type III" supporting organizations on December 28, 2012. 77 Fed. Reg. 76382. Prior to the issuance of these final and temporary regulations, private foundations and donor advised funds making grants to supporting organizations (including those in the USCCB group ruling) could rely on certain written representations of the supporting organization or reasoned written opinions of counsel that an organization was a Type I or Type II supporting organization. See Notice 2006-109, 2006-51 I.R.B. 1121. Now that final and temporary regulations have been issued, and the IRS announced in a February 4, 2013 memorandum from the Director, Exempt Organizations Rulings and Agreements, that it will begin "typing" supporting organizations, the reliance standards are (arguably) no longer effective.

What does all this mean? An organization in the USCCB group ruling described in section 509(a)(3) of the Internal Revenue Code, that wishes to receive grants from private foundations or donor advised funds, should either (i) ensure that it is listed in the most current update of the BMF extract available to the public on www.irs.gov, as a Type I or Type II supporting organization (i.e., has a Foundation Code of 21 or 22), in order take advantage of the donor reliance rules in Rev. Proc. 2011-33, 2011-25 I.R.B. 887, or (ii) file Form 8940 (described above) and request from the IRS an initial or change in type of section 509(a)(3) organization. Organizations described in section 509(a)(3) and classified as Type III supporting organizations (whether or not functionally integrated) are not eligible for inclusion in the USCCB group ruling.

Mark Your Calendar Now For DFMC 2013 In Boston!

September 2013

S	M	T	W	T	F	S
1	2	3	4	5	6	7
8	9	10	11	12	13	14
15	16	17	18	19	20	21
22	23	24	25	26	27	28
29	30					

Lastly, another reason to use Form 8940 is if an organization that is not otherwise required by law to file an annual return (Form 990 or 990-EZ) or notice (Form 990-N) with the IRS, such as churches, integrated auxiliaries, religious orders, and certain elementary and secondary schools, is getting "Where is your return?" notices. Such an organization should consider filing Form 8940 to request an exemption from Form 990 filing requirements. If an organization is getting "Where is your return?" notices, it probably means the IRS does not know the organization is entitled to a filing exemption, and failure to respond or update your records with the IRS could result in loss of exemption, or recognition of exemption.

The Form 8940 user fee in 2013 for the requests described above is $400.

***See:* Rev. Proc. 2013-10, 2013-2 I.R.B. 267 (published Jan. 7, 2013).**

Minnesota Supreme Court Holds Memory Repression Evidence Is Unreliable and Therefore Inadmissible

The Minnesota Supreme Court has decided, finally resolving the issue in that state, that expert opinion testimony supporting a claim of repressed memory may not be admitted into evidence because it is unreliable. The court upheld summary judgment in favor of a defendant diocese because plaintiff's claim was time-barred.

The underlying suit arose out of alleged incidents of sex abuse that occurred in 1980 or 1981, when the plaintiff was a teenager. He sued in 2006, claiming negligent supervision and fraudulent concealment. Because the State of Minnesota has a six-year statute of limitations in such cases, the plaintiff's claims would generally be time-barred since they did not accrue after 2000, but he argued that accrual of his claims was delayed because of his repressed and then recovered (allegedly in 2002) memory. The trial court disagreed, holding the proffered supporting expert testimony inadmissible.

The trial court had conducted a hearing pursuant to *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), and *State v. Mack*, 292 N.W.2d 764 (Minn. 1980), a so-called "*Frye-Mack* hearing," to decide on the admissibility of the plaintiff's expert testimony on repressed/recovered memory. For expert testimony based on "novel scientific theory" to be accepted as evidence, the proponent must show it is generally accepted in the relevant scientific community and that the particular scientific evidence offered in the case has foundational reliability.

The plaintiff put on evidence from well-qualified experts, as did the defendant, but the Minnesota Supreme Court emphasized some specific factors that undercut the admissibility of plaintiff's expert testimony.

- The experts' lack of differentiation between "repression" and other types of simple "forgetting."
- Lack of evidence about the error rate of supposedly recovered memory.
- The heated and unresolved debate in the scientific community on whether repressed memory exists.
- The current DSM suggests there is at present no method for establishing the accuracy of recovered or repressed memories.
- The demonstrated potential that false memories may occur, and may be "implanted" or created in another.

A state appeals court had overturned the trial court decision based primarily on its conclusion that the trial court had erred in applying the *Frye-Mack* test to such

evidence in the first place. The appeals court said the admissibility of plaintiff's expert testimony was governed by Minn. R. Evid. 702, which focuses on "helpfulness" to a trier of fact. However, the state Supreme Court observed that the *Frye-Mack* standard is, in fact, actually just one prong of the four-part test set out in Rule 702. So, if the Minnesota Supreme Court decided that the trial court had correctly excluded the expert testimony under one of the first three prongs of the Rule 702 test, then it would be unnecessary to decide whether the theory of repressed memory is subject to the *Frye-Mack* test.

The Minnesota Supreme Court noted that the current version of Rule 702 requires not just "helpfulness" to a trier of fact, but also foundational reliability and proof of general acceptance in the relevant scientific community. The trial court had specifically found that the proffered expert testimony about repressed memory was foundationally unreliable. The studies claimed to support plaintiff's experts' views were themselves unreliable. The studies did not provide sufficient information about the scope of the subjects' purported memory loss. And the accuracy of the supposedly recovered memories themselves was not established.

Plaintiffs argued that the trial court should have tested their expert testimony only by the other three prongs of the Rule 702 test – not by *Frye-Mack*. But ultimately, the Minnesota Supreme Court decided that the trial court had cut to the heart of the foundational reliability issue, had analyzed the reliability, consistency and accuracy of the proffered expert testimony, and had found them wanting. Thus, the trial court had effectively considered the relevant reliability considerations of Rule 702, even though it may have described its efforts as part of the application of the *Frye-Mack* test. It only remained to review the trial court's evidentiary rulings for an abuse of discretion. Based on the conduct of the three-day evidentiary hearing, the trial court's consideration of the testimony of all five proffered experts, and assessment of the relevant studies, the Minnesota Supreme Court concluded that the theory of repressed and recovered memory lacked foundational reliability when offered to prove a disability that justified the delay in bringing plaintiff's suit, and so decided that the trial court did not abuse its discretion in excluding plaintiff's expert testimony.

While it recognized that some other states' courts have come to contrary conclusions, the Minnesota Supreme Court decided that the trial court had properly granted summary judgment for the diocese because the plaintiff's suit was untimely filed.

***See: John Doe 76C v. Archdiocese of Saint Paul & Minneapolis*, 817 N.W.2d 150 (Minn. 2012).**

District Court Grants Archdiocese's Motion for Summary Judgment on Teacher's Contract Claim, But Allows Her Pregnancy Discrimination Claim to Proceed

Christa Dias sued the Archdiocese of Cincinnati, claiming breach of contract and violation of Title VII's ban on employment discrimination on the basis of pregnancy. Dias had been employed by two Archdiocesan schools as a computer technology coordinator. She became pregnant through artificial insemination. She was unmarried. When Dias informed the schools that she was pregnant, one of the school principals allegedly told her that she would probably

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lose her job because she was "pregnant and unmarried." Dias further alleges that after she told the schools that she had become pregnant through artificial insemination, she was informed that her termination was based on the fact that she was "pregnant by means of artificial insemination."

The Archdiocese moved for summary judgment. The district court granted the Archdiocese's motion on the contract claim, but denied its motion on the Title VII claim.

The court first considered whether Dias's suit was foreclosed under the ministerial exception. The court rejected the proposition that *all* teachers, simply by virtue of being role models to students, can properly be viewed as "ministers" for purposes of the exception. The court concluded that Dias, in particular, was not a minister because, as a non-Catholic, she was not permitted to teach Catholic doctrine. She therefore retained her Title VII protection against pregnancy discrimination, the court held.

The court next considered whether the Archdiocese was a proper defendant. The Archdiocese argued that it was not a proper defendant because Archdiocesan schools enjoy a unique level of independence from centralized Archdiocesan operations, and each parish hires and fires its own employees, owns its own land, and generally manages its own affairs. The court rejected the argument. "Facts show the Archdiocese is involved in setting uniform employment contracts, performing background checks on new employees, and evaluating job performance of school employees," the court wrote. "The Archdiocese sets policies for the schools—and its overall relationship with the schools shows an interrelation of operations, common management, centralized control of labor relations, and that it can exercise a meaningful degree of financial control over its parishes."

The court next turned to the merits of Dias's Title VII claim. In the Sixth Circuit, an employment policy against premarital sex is not a violation of Title VII as long as it is enforced in a gender-neutral manner. *Cline v. Catholic Diocese*, 206 F.3d 651 (6th Cir. 1999); *Boyd v. Harding Academy of Memphis*, 88 F.3d 410 (6th Cir. 1996). In light of *Cline* and *Boyd*, the district court held that terminating an employee for being pregnant out of wedlock, or pregnant by artificial insemination, is not a *per se* violation of Title VII. Such employment policies can be upheld, the court concluded, as long as they are enforced in a gender-neutral manner. Because, in the court's view, genuine issues of fact remained as to whether the defendant's policies were enforced in a gender-neutral manner, disposition of Dias's Title VII claim on summary judgment was inappropriate.

Lastly, the court held that the Archdiocese was entitled to summary judgment on Dias's contract claim. Dias's contract included a "morals clause" stating that Dias would "comply with and act consistently in accordance with the stated philosophy and teaching of the Roman Catholic Church." Initially, the court questioned whether the parties had ever arrived at a "meeting of the minds" as to the meaning of the "morals clause," which did not specifically prohibit artificial insemination. In subsequent discovery, however, Dias admitted that during her employment she was in a long-term homosexual relationship that she kept secret from the schools because she knew they would view it as a violation of the morals clause. "Under such circumstances," the court wrote, Dias, "with 'unclean hands,' cannot invoke a cause of action based on a contract she knew she was breaching."

***See: Dias v. Archdiocese of Cincinnati,* No. 1:11-CV-00251, 2013 WL 360355 (S.D. Ohio Jan. 30, 2013).**

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