ALM | LAW.COM

New York Law Journal

RELIGION LAW

The Unique Role of Counsel for Religious Organizations

March 1, 2024

By **Barry Black**

And **Christopher Byrnes**

All corporations need experienced counsel to serve their needs. Smaller organizations typically hire lawyers from time to time as necessary, while larger ones tend to be advised on a regular basis by in house or external counsel. The basic legal principles governing traditional organizations are familiar to most judges, lawyers and even non-legal professionals.

Religious organizations, on the other hand, are grounded in ecclesiastical doctrine and traditions, and therefore treated differently by the law. It is not unusual for even the most experienced jurists and sophisticated lawyers to be perplexed by the unique treatment of certain well-established corporate principles and policies in the context of religious organizations. *See, e.g.,* Barry Black and John Madden, "Exceptions and Exclusions Benefit Religious Institutions and Clergy," New York Law Journal (Sept. 13, 2017); Barry Black and Christopher Byrnes, "Religious Organizations Differ From Other Nonprofits—Here's Why That Matters," New York Law Journal (Aug. 30, 2023).

Lawyers advising churches, whether in house or as outside counsel, should be substantially familiar with the legal concepts and principles that underlie much of the lawyer's work for religious organizational clients.

Coexisting Dual Entities

All religious organizations, including houses of worship and religious schools, seminaries and charities, exist as part of a religious mission, and are designed to achieve a religious objective. They are guided by religious doctrine and subject to tenets of faith. When an unincorporated religious "society" or "association" chooses to incorporate under the secular laws of a state, it subjects itself to certain statutory rules and conditions. But the First Amendment requires that the underlying religious doctrine and rules remain intact.

In short, "the society itself is incorporated" and "the previous voluntary association is merged in the corporation, so far as its secular affairs merely are concerned." *Robertson v. Bullions*,

BARRY BLACK *is a partner in the religion law firm Nelson Madden Black, which serves the legal needs of religious institutions and individuals.* CHRISTOPHER BYRNES*, a partner at the firm, formerly served as General Counsel of The Heritage Foundation. The authors may be reached at bblack@nelsonmaddenblack.com and cbyrnes@nelsonmaddenblack.com, respectively.*

11 N.Y. 243, 247 (1854). The religious association continues as before, unimpeded by the corporation's statutory obligations.

Any statute governing a religious organization, such as New York's Religious Corporations Law (RCL) is constitutional only to the extent it does not supplant the religious association's underlying doctrine. The U.S. Supreme Court invalidated an entire section of the RCL for just this reason, holding that Section 5-C "directly prohibits the free exercise of an ecclesiastical right." The court declared that "[o]urs is a government which by the 'law of its being' allows no statute, state or national, that prohibits the free exercise of religion." *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church*, 344 U.S. 94, 119-20 (1952).

Lawyers advising churches, whether in house or as outside counsel, should be substantially familiar with the legal concepts and principles that underlie much of the lawyer's work for religious organizational clients.

The dual-entity structure gives rise to peculiar, complex and often highly nuanced legal treatment of religious institutions. Like secular organizations, religious corporations sign contracts to receive goods and services from commercial entities. They buy, rent or use real estate for worship and ministry, and hire clergy and staff. Because the law treats religious organizations differently from secular organizations, counsel should be prepared to confront legal challenges competently and effectively.

Litigation

Litigation is almost unavoidable for institutional clients, both religious and secular. If an institution signs contracts; buys, sells, rents or occupies real estate; or hires and fires employees, then sooner or later it will find itself in a legal dispute.

Counsel for religious organizations walk into a courtroom armed with significant legal advantages when compared to secular clients.

Foremost among these advantages is the "ecclesiastical abstention doctrine," which restricts courts from interfering with or determining religious disputes. Under this age-old doctrine as developed by the U.S. Supreme Court, courts are prohibited not only from deciding doctrinal questions but also from interfering in a church's internal governance.

Courts are also bound to "defer to" the decisions of a religious body's highest ruling authority, which protects its right to govern itself and its members. Religious institutions are well served when their counsel is practiced in these doctrines and prepared to invoke them in a wide variety of situations, including governance challenges, real estate transactions, employment decisions, and contract disputes.

In a related doctrine, religious institutions enjoy substantial advantage in the employment context with the "ministerial exception" to federal antidiscrimination laws. The Supreme Court has recognized that the Free Exercise and Establishment Clauses of the First Amendment protect the freedom of religious employers to fire and hire their ministers, serving as affirmative defenses to complaints filed by ministers under antidiscrimination laws, such as Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act. *See Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171 (2012).

Because the law treats religious organizations differently from secular organizations, counsel should be prepared to confront legal challenges competently and effectively.

The heart of this exception is that the church retains sole authority to select and control who will minister to the faithful—a matter strictly ecclesiastical. The court has declined to adopt a rigid formula in defining "minister" for this purpose, considering instead a variety of circumstances and conditions—even a religious organization's job description, as part of the analysis. *See Our Lady of Guadalupe School v. Morrissey-Berru*, 591 U.S. ___, 140 S. Ct. 2049 (2020).

Wise governance and corporate practices can help prevent painful, expensive, and costly litigation, such as uniquely drafted articles of incorporation, bylaws, employee handbooks and internal policies.

Of course, an ounce of prevention is worth a pound of cure. Wise governance and corporate practices can help prevent painful, expensive, and costly litigation, such as uniquely drafted articles of incorporation, bylaws, employee handbooks and internal policies.

Corporate

The dual-entity nature of a religious organization means that its system of governance is fundamentally different from that of traditional for-profit and not-for-profit corporations. To begin with, a certificate of incorporation under the RCL is not filed with the Department of State, but with the county clerk in the county where the members of the religious association worship.

Section 5 of the RCL provides that the "trustees of every religious corporation shall have the custody and control of all the temporalities and property, real and personal, belonging to the corporation," but the trustees are compelled to "administer the same in accordance with the discipline, rules and usages" of the "ecclesiastical governing body, if any, to which the corporation is subject."

The role of the trustees as set forth in corporate bylaws must fully comply with the letter and spirit of the RCL and the well-established jurisprudential prohibition against trustees in any way interfering with or usurping the role of the spiritual entity. Nor can members of the spiritual body engage in unauthorized activity delegated exclusively to the organization's corporate representatives.

Lawyers who provide corporate advice to religious organizational clients should incorporate the unique legal principles pertaining to religious organizations as reflected in related judicial decisions. Conversely, transactional counsel's attention to meaningful detail in good religious corporate governance should enhance the client's litigation posture. Getting a client's corporate governance house in order can often help head off litigation altogether, or at least reduce the cost and time spent in litigation.

Getting a client's corporate governance house in order can often help head off litigation altogether, or at least reduce the cost and time spent in litigation.

But counsel should be up to the challenge of getting corporate governance "right" for a religious institutional client irrespective of litigation needs. Religious institutions and associations are bound by the highest moral and ethical standards, and their internal governance deserves no less principled attention and scrutiny. They should take great care in considering whether to accept the generous offers by well-intentioned, oftentimes highly skilled, attorneys, accountants, and other professionals, to provide pro bono services, unless those professionals are independently studied and

experienced in working with the principles of religion law.

Counsel, particularly in house counsel and general counsel, should be equally circumspect in referring to the organization outside professionals. For example, not all accountants are well-suited for working with religious organizations. Consider that the 2023 Church & Clergy Tax Guide by Richard R. Hammar, J.D., LL.M., CPA, a leading, annually updated treatise on the issue of taxes alone, contains 667 pages and covers a seemingly endless list of issues unique to religious corporations. Accounting firms experienced and learned in the many unique applications of tax law to religious organizations are hard to find, but crucial for organizations that want to "get it right."

Because federal and state authorities take a keen interest in ensuring that religious organizations, like other nonprofits, are well governed and truly operating for religious purposes to benefit the communities they serve, counsel should be on top of all the laws, regulations and sub-regulatory guidance that govern every stage of a nonprofit organization's life: campaign intervention, lobbying, federal and state campaign finance law, state charitable solicitation law and corporate and board governance, to name just a few.

It is all too common for religious clients to have poorly drafted governing documents and to be plagued with substandard governance. In New York, the RCL provides great detail for how different churches and church organizations are to conduct their corporate activities, carefully and painstakingly reflecting the relevant religious traditions. Counsel should be intimately familiar with these requirements, including related current judicial rulings, to keep the organization running smoothly and properly, and prevent the time, pain and costs that would result from future disputes or litigation.

Counsel should regularly revise and update governing documents and organizational policies to assure the corporation functions in accordance with the law and religious doctrine while providing maximal protection against legal challenges.

In doing so, counsel should be focused on the relative roles of, and interplay between, the organization's spiritual and corporate bodies; assuring that a religious corporation "controls" an educational institution and is therefore entitled to an exemption from Title IX of the Education Amendments Act of 1972; shoring up and protecting the organization's claim for tax-exempt status under Section 501c3 of the Internal Revenue Code; supporting the organization's claim for property tax exemption under state laws like the New York Real Property Tax Law; and firmly setting forth the ecclesiastical nature of church governance, discipline and other proceedings to protect the organization against legal challenge.

Conclusion

Serving as effective counsel for a religious organization is unlike the attorney's role in representing traditional corporations. To be sure, counsel should be generally familiar with tax, contracts, commercial real estate, and employment law. But the attorney also should be versed in First Amendment jurisprudence. This well-developed and highly nuanced body of law affects virtually every aspect of a religious organization's day-to-day operations and provides counsel with a variety of constitutionally unique swords and shields. Counsel for a religious organization should have keen appreciation and enthusiasm for how these bedrock legal principles protect the client's ability to live its faith and fulfill its mission while fully complying with the law.