

RELIGION LAW

Expert Analysis

Balancing Mission, Permanence, and Flexibility in a Church's Governing Documents

By Barry Black and Christopher Byrnes

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Although the law requires certain inclusions in a church's certificate (sometimes called articles) of incorporation (*see, e.g.*, New York Religious Corporations Law (RCL) §193), no specific limits are set for what *may* be included. And there is even less guidance concerning the form and content of bylaws or corporate policies. This column will examine what should or should not be included in the various governing documents—specifically, articles of incorporation, bylaws and policies, and how to best formulate a clear, enduring and effective corporate strategy in doing so.

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Certificate of Incorporation

The certificate of incorporation establishes the religious corporation's identity and legal fundamentals. In the certificate, church congregations should list and describe the most permanent aspects of their religious and corporate identity. Articles of incorporation are intended to be relatively permanent and difficult to amend, thus ensuring the continuity of a congregation's mission and the members' fidelity to its calling.

Aside from what *should* be in a church's certificate of incorporation, both state and federal law impose requirements

about what it *must* contain. For example, if a church decides to incorporate under Article 10 of the RCL in New York, then the certificate must include the name of the religious corporation, its current or intended principal place of worship, the initial trustees,

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and their terms of office. *See* RCL §193.

The IRS typically has additional requirements on what

must be in articles of incorporation for a nonprofit corporation seeking affirmative IRS recognition of tax-exempt status. While churches are automatically exempt from federal income taxation without the need for formal recognition from the IRS, it is important to include this language by transparently stating that the church will not be involved in non-exempt activities. The additional requirements and suggested language can be found in IRS Publication 557 (Pub. 557), *Tax-Exempt Status for Your Organization*, available at <https://www.irs.gov/pub/irs-pdf/p557.pdf> (last visited Nov. 22, 2024).

In addition to the statutorily required inclusions, a certificate of incorporation should contain both a *purpose* clause and a *dissolution* clause. The *purpose* clause states the reason for forming the religious corporation and describes generally the scope of activities that the religious corporation will undertake in furtherance of its purpose. The clause should describe the organization's immutable purposes, such as to worship and operate in accordance with certain faith tenets or a denominational affiliation, thus ensuring that no future members or leaders can divert the church from its intended purpose.

It should also set forth the implied powers necessary and proper to carry out any or all of the religious charitable purposes for which it is formed, such as to (a) buy, receive, lease, acquire, own, and use property; (b) sell, convey, lease, exchange, transfer or otherwise dispose of, or mortgage or pledge, or create a security interest in, its property; (c) establish educational institution(s); and (d) license and ordain ministers or clergy.

The *dissolution* clause establishes how any assets remaining at the end of the corporation's life will be used. Federal law requires that assets of a tax-exempt organization must be permanently dedicated to an exempt purpose. This means that, if the organization dissolves, its assets must be distributed for an exempt purpose described in Section 501(c)(3) of the Internal Revenue Code, or to the federal government or to a state or local government for a public purpose. *See* Pub. 557.

But churches and religious corporations often wish to honor their deep commitments to their faith traditions by restricting disposition of assets post-dissolution to churches that hold the same or similar beliefs. Indeed, in cases where a church belongs to a religious denomination, they may be required by denominational rules and by

law to expressly direct in the dissolution clause that any remaining assets shall revert to the denomination.

Bylaws

A religious corporation's bylaws are a framework that guides the actions and decisions of the corporation's governing board and the congregation's membership. They clearly outline rules regarding authority, rights, and processes to make it clear when actions bind the corporation. Bylaws are more flexible than the articles of incorporation—that is, they are amended more easily to permit changes in the religious corporation as its needs grow and become more complex.

For example, imagine a congregation that included in its article of incorporation a provision limiting the size of the governing board to three members. The congregation grows over time and requires a bigger board to address its more complex operations and finances. Amending the articles of incorporation to increase the board size would be cumbersome, requiring a supermajority vote and additional filings with the county in which the congregation worships. The congregation would therefore be better off relegating board size limits to bylaws, which can be more easily amended with no need for public filings.

What topics therefore should be covered by the bylaws? Bylaws for all types of corporations typically include provisions addressing the composition and structure of the church's governing board, the election of officers and/or members of the gov-

Bylaws for all types of corporations typically include provisions addressing the composition and structure of the church's governing board, the election of officers and/or members of the governing board, their terms of office, conduct of meetings (including quorum and voting requirements), committees of the governing board, the process for amending the bylaws, indemnification for officers and members of the governing body; and membership in the organization.

erning board, their terms of office, conduct of meetings (including quorum and voting requirements), committees of the governing board, the process for amending the bylaws, indemnification for officers and members of the governing body; and membership in the organization.

Aside from these good governance basics, the bylaws for a religious corporation should also be drafted to codify basic procedures for hiring or dismissing clergy and for the governance of a church's religious arms, such as Sunday school or youth groups. Well-drafted bylaws can also enable the corporation to avail itself of all the constitutional and statutory swords and shields available to religious entities. A religious corporation's bylaws should:

- Promulgate a Statement of Faith, firmly establishing its religious underpinnings, mission and objectives;
- Describe the religious nature of its work so as to trigger the ministerial exception to anti-discrimination laws;
- Support the corporation's claim for tax-exempt status by establishing that it is operated exclusively for religious purposes and to support a claim for property tax exemption under New York's Real Property Tax Law;
- Outline the ecclesiastical nature of a church's governance, church discipline, and other church procedures so as to support an ecclesiastical abstention defense to litigation.

See Barry Black and Jonathan Robert Nelson, *The Many*

Benefits of Reviewing and Updating Bylaws, New York Law Journal (Mar. 6, 2023).

Experienced counsel for religious corporations should be able to help draft a comprehensive but still flexible set of bylaws.

Policies

Organizational policies are the most flexible instrument used to govern a religious corporation. The Bylaws could simply delegate authority to certain officers or staff to formulate, promulgate, and amend a policy without board approval. The organization should nevertheless ensure that members of the Board are aware of these policies.

What policies should a religious corporation have in place? The right arsenal of policies depends on federal and state law, as well as principles of good governance. While churches are exempt from having to file annual tax returns (either Form 990 or Form 990EZ) with the IRS, the Form 990 asks secular tax-exempt organizations about five policies that the IRS considers essential. Specifically, Form 990 asks whether the tax-exempt organization filing the return has adopted:

- *A written conflict of interest policy.* New York law requires nonprofits to have a conflict of interest policy to ensure that their

directors, officers, and key employees act in the “best interest of the nonprofit.” See New York Not-for-Profit Corporation Law (N-PCL) § 715-a. New York law also requires nonprofit boards to adopt a process so that board members can annually disclose potential conflicts of interest. See N-PCL §715-a(c).

- *A written whistleblower protection policy.* New York law requires any nonprofit with annual revenue of more than \$1 million and at least 20 employees to have a written policy protecting directors, officers, and employees who “blow the whistle” on their employer’s financial management or accounting practices. See N-PCL 715-b. Smaller religious corporations may still want a whistleblower policy for risk management or to comply with contractual obligations. This policy can help ensure that, if there is a financial management or accounting problem, it will be investigated and fixed. Having a process open to hearing concerns or complaints expressed by employees sends a signal to the organization’s employees and donating public that it values accountability and transparency.

- *A written document retention/destruction policy.* A written document retention policy provides consistent guidance to a nonprofit organization’s leaders and employees about document retention and document destruction/deletion. When hit with a subpoena, the organization could then point to a regularly observed document deletion policy as a defense, provided that the document deletion did not violate any other federal or state law and did not follow receipt of a demand for document preservation.

- *A written gift acceptance policy* to govern the receipt of “non-cash” gifts, such as gifts-in-kind, and unusual gifts (land, vehicles, artwork, etc.). There are some kinds of gifts that a religious corporation may not want to or should not accept. For example, some in-kind contributions cannot be easily used or disposed of. Accepting some types of gifts may run afoul of the religious corporation’s beliefs. Other types of gifts may result in the church assuming legal obligation that it was not ready to assume. A gift acceptance policy can help a religious corporation

steward its resources properly by setting forth what gifts it can accept and who can accept them on behalf of the corporation.

- *If the organization has participated in a joint venture, whether the organization took steps to avoid prohibited private benefit.*

Aside from these essential policies, a religious corporation may also want to have written policies on compensating the pastor and/or trustees, accountable business expense reimbursement for employees, privacy, and/or confidentiality. Counsel versed in religious governance matters could assist with drafting these policies.

Conclusion

Striking the right balance in formulating a religious organization’s governing documents is important for maximizing flexibility while assuring the fundamentals remain intact. As a general rule, certificates of incorporation should be short and to the point, bylaws comprehensive but lean, and policies robust. All of a church’s governing documents should be drafted with an eye toward protecting the church from judicial interference and assuring that its religious goals are forever secure.