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Austin, TX**Religion and Religious Organizations:
Keeping Your Church Out of Court****Frank Sommerville**Weycer, Kaplan, Pulaski & Zuber, P.C.
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Religion and Religious Organizations: Keeping Your Church Out of Court

Qualified religious organizations are recognized as exempt under Section 501(c)(3) of the Internal Revenue Code alongside charitable organizations, educational, scientific, and literary purpose organizations, organizations organized to further the prevention of cruelty to children, organizations for the prevention of cruelty to animals, organizations that foster national and international amateur sports competition (but only if no part of the activities involve the provision of athletic facilities or equipment), and organizations organized to conduct testing for public safety. However, while being subject to the general rules regarding 501(c)(3) entities, religious organizations are unique in their treatment. This paper examines certain aspects of this unique treatment. Part One of the paper will provide a definitional structure for churches and associated, religious organizations, describe the Constitutional and statutory framework affecting churches, and consider unique aspects of churches in various contexts. Part Two of the paper will consider basic planning and operating considerations to avoid some of the most common claims arising in the church context.

Part One:

I. Defining Religious Organizations. The religious world uses a variety of terms to define organizations that have very specific meanings in the legal context.

A. **Church:** This term is never defined by specific terms. The duck test is commonly employed; i.e. if it has feathers, a beak, webbed feet and goes quack it must be a duck. If it looks like a church, if the organization fulfills the same role in adherents' lives as a church, if it is associated with a church, it must be a church. The term church, as used in statutes, includes temples, mosques and covens. This term may have different meanings in different statutes and legal contexts.

B. **Association or Convention of Churches:** An organization where its members include churches (though they may also include individual members). The churches need not be of the same faith. Very little other authority exists further defining this term. Some believe that the membership must be composed exclusively of churches while others believe that it must be controlled by churches.

C. **Integrated Auxiliary (of a church):** This term is a tax term defined in Treasury Regulation section 1.6033-2(g)(5). It is an organization that is described in Internal Revenue Code Section 501(c)(3), affiliated with a church, an association of churches or convention of churches and is internally supported by the church(es).

D. **Integral Agencies:** Organizations that are integrally connected with churches and associations or conventions of churches. For example, the foreign missions arm of a denomination would be an integral agency.

E. **Qualified Church-Controlled Organization:** This term is used in the pension area and means a tax exempt organization (recognized under IRC Section 501(c)(3)) that does not offer its goods, services or sale of its facilities to the general public (other than nominal amounts) and receives less than 25% of its support from sales of goods, services or facilities, unrelated business incomes, and government funding.

F. **Religious organization:** Generally, this term means all organizations other than those described above that have a religious purpose. As with the term “church,” the term “religious” is not defined in the Internal Revenue Code.

II. First Amendment Issues. The First Amendment of the U.S. Constitution does not allow Congress to pass laws that establish any religion or restrict the free exercise of religion. In representing any organization related to religion, one must test the government’s positions against the Constitution.

A. The First Amendment has been interpreted numerous times by the U.S. Supreme Court, but most statutes specifically addressing churches have not been challenged. The Lemon Test and the Smith Standard provide key guidelines in First Amendment considerations.

1. **The Lemon Test:** A law or government practice that confers some benefit on religion is constitutional if: (1) it has a clearly secular purpose, (2) it has a primary effect that neither advances or inhibits religion, and (3) it does not foster excessive entanglement between church and state. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

2. **The Smith Standard:** A law does not inhibit the free exercise of one’s religion if it is a law of general application even if it interferes with an individual’s free exercise of religion. *Employment Division v. Smith*, 494 U.S. 872 (1990).

B. As explained below, the courts lack jurisdiction over most internal disputes because asserting jurisdiction over an internal church dispute would violate the Establishment Clause of the First Amendment.

III. Church Governance

A. Some churches are organized as charitable trusts, but most churches are organized as nonprofit corporations. However, the type of legal entity is less relevant than the actual way a church is governed. NOTE: The Roman Catholic Church and the Church of the Later Day Saints are typically organized as “corporate sole.” Eight states formally recognize corporate sole by statute. The remainder of the states treats corporate sole as a form of charitable trust.

B. Most courts divide all churches (synagogues, mosques, etc.) into one of two categories: Hierarchical churches and Congregational churches. *Watson v. Jones*, 80 U.S. 679, 722 (1871). In reality, most churches are really hybrids of these two categories.

1. **Hierarchical Churches.** The Supreme Court finds a hierarchical church is present where: the local religious congregation or ecclesiastical body is but a subordinate member of some general church organization in which there are superior ecclesiastical tribunals with a general and ultimate power of control more or less complete, in some supreme judicatory over the whole membership of that general organization.

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