

Summary Contents

Foreword	xix
Glossary of Selected Terms	xxi
Chapter 1	
Constitutional Rights of Religious Organizations	1
Chapter 2	
Formation and Governance Structures of Religious Organizations	15
Chapter 3	
Tax Exemption and Taxation of Religious Organizations	51
Chapter 4	
Fundraising by Religious Organizations	81
Chapter 5	
General Employment Law for Religious Organizations	111
Appendix 5-A: Religious Preference Exceptions to State Civil Rights Statutes	150
Chapter 6	
Special Tax and Other Considerations for Ministers and Other Employees of Religious Organizations	155
Appendix 6-A: Employee vs. Independent Contractor Status	175
Chapter 7	
Tort Liability of Religious Organizations	181
Appendix 7-A: Treatment of Charitable Immunity by State	216
Chapter 8	
General Copyright Issues for Religious Organizations	227
Appendix 8-A: Agreement on Guidelines for Classroom Copying in Not-for-Profit Educational Institutions with Respect to Books and Periodicals	251
Appendix 8-B: Sample Work Made for Hire Agreement	254
Appendix 8-C: Sample Copyright Assignment Clauses	256
Appendix 8-D: Additional Resources	257

Chapter 9

**Performing Rights Licensing: Rights and Obligations of Religious
Organizations 259**

Chapter 10

**Development and Renovation of Real Properties by Religious
Organizations 271**

Chapter 11

The Religious Land Use and Institutionalized Persons Act of 2000 299

Index 311

Contents

Foreword	xix
Glossary of Selected Terms	xxi
About the Editors	xxiii
About the Authors	xxv
Chapter 1	
Constitutional Rights of Religious Organizations	1
I. Overview of Constitutional Principles	3
A. Law in the United States: Roles of State and Federal Law	3
B. The Bill of Rights	3
1. The First Amendment	4
2. Applicability of Bill of Rights to States	4
C. Finding the Right Governmental Balance Between Non-Establishment of Religion and Free Exercise	5
D. Establishment Clause	6
E. Free Exercise	6
F. The Church Autonomy Principle	7
G. Other Constitutional Protections for Churches and Other Religious Organizations	7
1. Federal Constitutional Protections	7
2. State Constitutional Protections	8
II. Definitions Relating to Churches and Other Religious Organizations ...	9
A. What Is Religion?	9
B. What Is a Church?	9
C. How the IRS Defines Church	10
D. Convention or Association of Churches; Integrated Auxiliary of the Church	11
E. Religious Orders	11
F. Religious Organizations Other Than Traditional Churches	12
1. General	12
2. Religious Schools and Seminaries	13
3. Parachurch Organizations	13
4. Religious Social Welfare Organizations	13
5. Supporting Organizations	14
6. International Operations	14
III. Conclusion	14

Chapter 2

Formation and Governance Structures of Religious Organizations	15
I. Organizational Structure	19
A. Trusts	19
B. Unincorporated Associations	20
C. Additional Issue with Non-Filing Entity	21
D. Limited Liability Companies	22
E. Nonprofit Corporations	22
F. Corporation Sole	23
G. Summary	24
II. Internal Church Structure	24
A. Hierarchical Structure	24
B. Congregational Structure	25
III. Basic Elements of Corporate Organization and Governance	25
A. Key Incorporation Steps	25
B. Corporate Name	26
C. Articles of Incorporation	26
1. Provisions Required Under State Law	26
2. Provisions Required for 501(c)(3) Tax Exemption	27
3. Optional Provisions	27
4. Filing the Articles	28
D. Constitution	29
E. Bylaws	29
1. Identification of Members, Directors, Officers, and Others	29
2. Membership	30
a. Generally	30
b. Rights of Members	31
c. Member Selection and Qualifications	32
3. Directors	32
a. Generally	32
b. Selection of Directors	32
c. How Many Boards?	33
d. The Director as a Fiduciary	33
e. Term Limits	33
f. Removal of Directors	34
4. Officers	34
a. Generally	34
b. Director-Officer Distinctions	34
c. Bylaw Provisions Regarding Officers	35
5. Committees	35
a. Board Committees	35
b. Designation of Committees	36
c. Committee Reports to the Board	36
d. Common Committees	37
e. Advisory Committees	37

6.	Taking Action: Members and Directors	37
a.	Annual, Regular and Special Meetings of Members and of the Board	38
b.	Action by Written Consent	39
c.	Meeting Notice Requirements	39
d.	Quorum	39
e.	Voting	40
7.	Resolution of Disputes	40
8.	Member Discipline and Dismissal	41
9.	Ordinations	42
10.	Indemnification	42
F.	Amendments of Articles and Bylaws	42
G.	Fiduciary Duty of Directors/Conflicts of Interest	43
1.	What Is Meant by “Fiduciary Duty”?	43
a.	General Definition	43
b.	The Strict Trustee Standard of Duty	43
c.	Fiduciary Standards Applied to Directors of Nonprofit Corporations	43
2.	Statutory Definition of the Directors’ Standard of Conduct (Duty of Care)	44
3.	The Directors’ Duty of Loyalty	44
a.	Generally	44
b.	The Corporate Opportunity Doctrine	45
c.	Statutory Regulation of Self-Dealing Transactions and Conflicts of Interest	45
d.	IRS’s Position on Conflicts of Interest	46
H.	Operating Sponsored Functions Under Same or Different Entity— Case Study: Church-Sponsored School	46
1.	Reasons to Incorporate	46
2.	Reasons Not to Separately Incorporate	47
a.	Loss of Direct Control	47
b.	Protections from Audit	47
c.	Form 990 Filing Exemption	47
d.	Unemployment Insurance Exemption	48
e.	Religious-Based Hiring Decisions	48
f.	NLRB Jurisdiction Exemption	48
3.	Compliance with Governmental Licensing	48
I.	Control of Organization/Operation for Exempt Purposes/Joint Ventures	49
IV.	Conclusion	49

Chapter 3

Tax Exemption and Taxation of Religious Organizations	51
I. Introduction	53
II. The Tax Exempt Status of Nonprofit Corporations	54
A. The Structure of Tax Exemption For Nonprofits, Generally	54
1. Numerous Categories of Exemption Exist	54
2. Determination of Exempt Status—Generally	54
3. Exemption of Churches and Related Organizations from 501(c)(3) Application Filing Process	55
B. Requirements for Tax Exempt Status Under Section 501(c)(3)	56
1. Basic Requirements for Exemption	56
2. Religious Organizations Must Carefully Observe Technical Requirements to Maintain Their Exemption	56
3. Exempt Organizations' Activities Cannot Be Illegal or Violate Public Policy	62
C. Public Charity Status	62
1. Qualification as a Public Charity	62
2. Private Foundations	63
D. Applying for Exempt Status	64
E. Disclosure of Application	64
F. Obtaining 501(c)(3) Status Under a Group Exemption	65
III. Disclosure/Reporting Requirements	65
A. Disclosure/Reporting Requirements to Donors	65
B. Form 990 Filings with the IRS and Certain States	66
1. Church and Related Organization Filing Exemption	66
2. Versions of Form 990	66
3. Form 990 Overhaul	66
C. Disclosure Obligations to the General Public	67
1. In General	67
2. Applicability to Churches and Other Non-Filers of Form 990	67
3. Turning a Requirement Into an Opportunity	68
4. Access to Form 990s on the Internet	68
IV. Unrelated Business Income	68
A. Summary of Unrelated Business Income Rules	68
B. Exemptions	69
C. Exclusions	70
1. Passive Investment Income	70
2. Royalties	70
3. Rent	70
4. Research	71
D. Debt-Financed Income	71
E. Advertising v. Corporate Sponsorship	71
1. General Rules Regarding Advertising	71
2. Advertising or Sponsorship?	72
3. Congress Steps In: Qualified Sponsorship Payments	72
F. Sale of Merchandise	73
G. UBI Cost Allocations	73

V.	IRS Audits of Exempt Organizations	74
	A. IRS Review of Church Records: Restrictions on IRS Audit Review . . .	74
	B. IRS Summons Related to Exempt Status	75
	C. Advice to Directors and Officers Regarding IRS Audits	76
	D. General Organization Responses to IRS Audits	77
VI.	Obtaining State Income Tax Exemption	77
VII.	Property Tax and Other State Tax Exemptions	77
	A. Property Tax Exemption	78
	B. Sales and Use Taxes, Constitutional Issues	79
	C. Business License Taxes	80
VIII.	Conclusion	80

Chapter 4

	Fundraising by Religious Organizations	81
I.	The Need to Raise Funds	83
II.	Types of Fundraising	83
	A. Outright Gifts: Weekly Offerings and Other Gifts	83
	B. Special Campaigns and Restricted Gifts	84
	C. Event Fundraising	84
	D. Gifts in Kind	85
	E. Planned Giving	85
	F. Operation of a Business to Generate Funds	86
	G. Gaming Activity	87
III.	Regulation of Fundraising Activities of Religious Organizations	87
	A. Charitable Solicitation	87
	B. Registration Requirements and Exemptions	88
	1. General	88
	2. Solicitation Exemption for Religious Organizations	88
	3. Constitutional Issues	88
	C. Representations to Donors	89
IV.	Regulations of Donor Contributions	89
	A. What is a Contribution?	89
	B. IRS Disclosure and Reporting Requirements	90
	C. Donor Substantiation	90
	D. Disclosure When the Donor Receives a Benefit from the Contribution . .	91
	1. Quid Pro Quo Contributions	91
	2. No Disclosure Required for Insubstantial Benefits	91
	3. No Disclosure Required for Certain Benefits to Members	92
	4. Estimating the Value of Goods and Services	92
	E. Intangible Religious Benefits	93
	F. Contribution Through Payroll Deduction	93
	G. Disclosure Obligations for Non-Cash Gifts	94
V.	Deductibility of Contributions	94
	A. Don't Give Donors Tax Advice	94
	B. What Gifts of Property Can Be Deducted?	95
	C. Donations of Services	95
	D. Is Tuition Deductible?	95

VI. Restrictions on and Use of Donated Funds	96
A. UMIFA/UPMIFA	96
B. Accounting for Donations	97
C. Revocation of a Gift	97
D. Releasing Restrictions on Gifts	97
E. Pledges	98
F. Donor-Directed Giving	99
G. Automobile Donations	100
H. Donor Advised Funds	101
VII. Planned or Deferred Giving	102
A. Bequests	102
B. Charitable Gift Annuities	103
C. Charitable Remainder Trusts	103
1. Charitable Remainder Annuity Trust	103
2. Charitable Remainder Unitrust	104
D. Charitable Lead Trusts	104
E. Pooled Income Funds	104
VIII. Borrowing Money and Issuing Securities	105
A. Registration Requirements	105
B. Information Disclosure to Potential Investors	106
IX. Gift Acceptance Policy	106
X. Online Fundraising	107
A. Sales of Goods or Services/Auctions	107
B. Sales and Use Taxes	107
1. State and Local Standards	107
2. Sales Taxes on Internet Activities	107
3. Unrelated Business Income	108
XI. Online Advertising v. Sponsorship	108
A. Is it Advertising?	108
B. Contingent Payments	109
C. Online Periodicals	109
XII. Use of Fundraising Professionals	109
XIII. Conclusion	110

Chapter 5

General Employment Law for Religious Organizations	111
I. Introduction	115
II. The Employment Relationship	115
A. Employee Versus Volunteer	116
B. Employee Versus Independent Contractor	117
1. Right to Control	117
2. Economic Realities Test	118
3. Common Law Test	119
C. Employment at Will	120
D. Exceptions to Employment at Will	120

1.	Exception One: Contract	120
a.	Written Contract	120
b.	Implied Contract	120
2.	Exception Two: Public Policy	121
3.	Exception Three: Arbitrary and Capricious Discharge	121
4.	Exception Four: Discharge in Violation of a Statute	121
III.	Unlawful Employment Discrimination	122
A.	Title VII of the Civil Rights Act of 1964	122
1.	What it Prohibits—In General	122
a.	Disparate Treatment and Disparate Impact	122
2.	Does it Apply?	123
3.	Specific Prohibitions	124
a.	Sex Discrimination	124
b.	Retaliation	125
c.	Harassment	125
i.	Harassment by a Supervisor	126
ii.	Anti-Harassment Policy	127
iii.	Harassment by a Non-Supervisor	127
4.	Exceptions to Title VII	127
a.	Exception for Any Type of Employer	127
b.	Specific Exceptions for Religious Organizations	128
5.	State Civil Rights Statutes	131
B.	Age Discrimination in Employment Act	131
1.	What it Prohibits—In General	131
2.	Does it Apply?	131
3.	Specific Prohibitions	132
4.	Exceptions	132
a.	Exception for Any Type of Employer	132
b.	Specific Exception for Religious Organizations	132
C.	Americans with Disabilities Act	133
1.	What it Prohibits—In General	133
2.	Does it Apply?	133
3.	Specific Prohibitions	134
4.	Exceptions	135
a.	Exception for Any Type of Employer	135
b.	Specific Exceptions for Religious Organizations	136
D.	Equal Pay Act	137
1.	What it Prohibits	137
2.	Does it Apply?	137
E.	Genetic Information Nondiscrimination Act	137
1.	What it Prohibits—In General	137
2.	Does it Apply?	138
3.	Specific Prohibitions	138
4.	Exception for Any Type of Employer	139

IV. Other Federal Employment Laws	139
A. Family and Medical Leave Act	139
1. What it Protects—In General	139
2. Does it Apply?	140
3. Specific Protections	141
a. Right to Reinstatement	141
b. Benefits	142
c. Intermittent or Reduced Leave	142
4. Specific Obligations	142
a. Notice by the Employee	142
b. Notice by the Employer	142
c. Employee Certification	143
5. Special Rules for Teachers and Instructors	143
B. Fair Labor Standards Act	144
1. What it Protects—In General	144
2. Does it Apply?	144
3. Exceptions	145
a. General Exception for Any Type of Employer	145
i. Executives	145
ii. Administrators	145
iii. Professionals	146
b. Specific Exception for Religious Workers	147
C. Worker Adjustment and Retraining Notification Act	147
D. Sarbanes-Oxley: Application to Nonprofit Organizations	147
E. Uniformed Services Employment and Reemployment Rights Act ...	148
V. Conclusion	149
Appendix 5-A: Religious Preference Exceptions to State Civil Rights	
Statutes	150

Chapter 6

Special Tax and Other Considerations for Ministers and Other Employees of Religious Organizations

I. Is a Minister an Employee or Self Employed for Income Tax Purposes?	157
II. Employment Taxes and Reporting	160
A. Withholding—Non-Minister Employees	160
B. Withholding—Ministers	160
C. Social Security—Employees	161
D. Social Security—Ministers	161
E. Social Security Exemption—Pastors	162
F. Revocation of Election	163
G. Unemployment Tax	163
III. Parsonage	164
A. Church or Other Qualifying Organization	165
B. Official Designation	165
C. Eligible Ministers	165
D. Computing Parsonage Allowance	166

IV. Additional Compensation Issues	166
A. Unreasonable Compensation Generally	166
B. Intermediate Sanctions	167
1. Who Is Affected?	168
2. Who is a Disqualified Person?	168
3. Organization Manager	168
4. What Organizations Are Covered?	169
5. Application to Churches	169
6. What is an Excess Benefit Transaction?	170
7. What Happens if an Excess Benefit Is Paid to a Disqualified Person?	170
8. Rebuttable Presumption of Reasonableness	171
9. Revocation May Still Occur	172
V. Payment of Royalties	172
VI. Employee Retirement Income Security Act/Church Plans	173
Appendix 6-A: Employee vs. Independent Contractor Status	175

Chapter 7

Tort Liability of Religious Organizations	181
I. Introduction	183
A. Torts and Common Law; Application to Religious Organizations ...	183
B. The Demise of Charitable Immunity	184
C. Religious Organizations and Vicarious Liability	185
1. Overview	185
2. Requirements of Vicarious Liability Under Respondeat Superior Doctrine	186
3. Application of Vicarious Liability Principles in the Religious Organization Setting	187
II. Premises Liability	188
A. Liability Based on Category of Visitor	188
B. Movement to Concepts of General Landowner Duty of Care	190
1. General Principles	190
2. As Applied to Churches?	191
C. Related Issues Concerning Premises Liability	192
1. Children on the Land	192
2. Comparative or Contributory Negligence	193
3. Potential Off-Premises Liability	193
III. Liability for and to Volunteers	194
A. Religious Organizations' Liability for the Actions of Volunteers ...	194
B. Federal Protection for the Volunteer	195
C. A Religious Organization's Liability for Injury to Volunteers Compared to Employees	196
D. Pointers for the Religious Organization in its Handling of Volunteers	196

IV.	Liability for Child Sexual Abuse	197
A.	Overview	197
B.	Negligent Employment Claims	198
1.	Background: General Standards for Negligent Employment Claims Against Religious Organizations	198
2.	Application of General Standards to Child Sexual Abuse Context	199
3.	Liability Predicated on Organization’s Knowledge of Offending Conduct	200
4.	Application in Religious Sexual Abuse Cases	200
C.	Fiduciary Duty	201
D.	Vicarious Liability	203
V.	Counselor Liability	204
A.	Negligent Counseling Claims	204
B.	Counselor-Counselee Relationship Has Been Characterized as Fiduciary	205
VI.	Liability for Defamation	206
A.	Overview of Defamation	206
1.	The Basic Elements of Defamation	206
2.	The Requirement of Pleading Malice	207
B.	Liability of Religious Institutions for Speech of Their Employees or Volunteers	208
C.	Common Defenses and/or Affirmative Defenses to Defamation	210
1.	Truth of the Statement and Opinion	210
2.	Absolute Privilege and Conditional Privilege to Publish	210
3.	The First Amendment Immunity Enjoyed by Religious Institutions	211
VII.	Conclusion	214
	Appendix 7-A: Treatment of Charitable Immunity by State	216

Chapter 8

	General Copyright Issues for Religious Organizations	227
I.	Introduction	229
II.	Nature and Scope of Copyright Protection	230
A.	Principles of Copyright Protection	230
B.	Description of Protectible Works	231
C.	Enumerated Rights Granted by the Copyright Act	231
D.	Effect of Notice and Registration	233
E.	Process of Copyright Registration	233
F.	Effect of Expiration of Copyright Protection	233
G.	Length of Copyright Protection	234
H.	Copyrights in Modified Works	234
III.	Infringement of Copyrights	234
A.	Assume Works Are Protected	234
B.	No General Religious Organization Exemption	235

IV. Penalties for Copyright Violations	236
A. Damages	236
B. Criminal Penalties	236
C. Collateral Costs	236
V. Copyright Licenses Are Required Unless a Specific Exemption Applies	237
A. Definition and Significance of “Commercial Purpose” When Religious Exemptions Apply	237
B. Obtaining Permission	238
C. Copyright License Subscriptions	238
D. Licenses for Older Works	239
E. Non-Subscription License Fees	239
VI. Fair Use and Other Exceptions	239
A. Definition of Fair Use	239
B. Fair Use in Public Educational Settings	240
C. Other Published Guidelines	241
D. Burden of Proof of Non-Commercial Use	242
E. Commercial Use Is Generally Not Exempted under the Fair Use Doctrine	242
F. Parody	243
G. Other Statutory Exceptions	245
VII. Ownership of Created Works	245
A. Definition of Work Made for Hire	246
B. Application of the Work Made for Hire Doctrine with Employees	246
C. When Author Is Not a Paid Employee	247
D. Work Made for Hire Agreement	248
E. Copyright Assignment Agreements	248
VIII. Conclusion	250
Appendix 8-A: Agreement on Guidelines for Classroom Copying in Not-for-Profit Educational Institutions with Respect to Books and Periodicals	251
Appendix 8-B: Sample Work Made for Hire Agreement	254
Appendix 8-C: Sample Copyright Assignment Clauses	256
Appendix 8-D: Additional Resources	257
 Chapter 9	
Performing Rights Licensing: Rights and Obligations of Religious Organizations	
	259
I. Introduction	261
II. Performing Rights Under the Copyright Act of 1909	262
A. Copyright Act of 1909	262
B. History of Nonprofit Broadcast Licensing	263
C. Treatment of Nonprofit Theatrical Performances	264
D. Copyright Misuse and Antitrust Defenses Against Licensing	265
III. Performing Rights Under the Copyright Act of 1976	266
A. Rights Granted to Copyright Holders Under the 1976 Act	266
B. Exceptions Under the Copyright Act of 1976	267

C.	The Religious Service Exception	267
D.	Compulsory Broadcast Licenses	268
E.	Digital Performance Rights in Sound Recordings	269
IV.	Enforcing Performing Rights	269
A.	Remedies	269
B.	Ineffective Defenses	270
V.	Conclusion	270

Chapter 10

Building a House of Worship: Development and Renovation of Real

	Properties by Religious Organizations	271
I.	Introduction	273
II.	Identifying and Hiring the Necessary Experts	274
A.	Hiring Experienced Real Estate or Other Project Counsel	274
1.	General Issues	274
2.	Areas Requiring Legal Expertise	275
3.	Transactional Real Estate Attorney	275
4.	Land Use Attorney	276
5.	Environmental Attorney	276
6.	Lending Attorney	277
7.	Construction Attorney	277
8.	Real Estate Tax Attorney	277
9.	Attorney Engagement Letter	277
B.	Hiring the Architect	278
1.	General	278
2.	Scope of Engagement	278
3.	Role in Construction Process	278
4.	Lender's Architect	279
5.	"Design-Build" Agreements	279
C.	Engaging the Broker/Identifying the Real Estate	279
D.	Engaging a Civil Engineer	280
E.	Choosing a Lender	281
1.	General	281
2.	Lender's Role	281
3.	Lender Financing Stages	282
F.	Hiring a Contractor	282
1.	Competitive Bid Approach and Alternatives	282
2.	Construction Agreement	283
3.	Landscape Architect	283
III.	The Real Estate Purchase Agreement	284
A.	Letter of Intent	284
B.	Elements of Purchase Agreement Price Terms	284
1.	Price Terms	284
2.	Contingency	284
3.	Documents to be Provided by Seller	285

4. Representations and Warranties	286
5. Transfer and Other Taxes	286
IV. Real Estate Due Diligence	287
A. General	287
B. Environmental/Environmental Consultant	288
1. Environmental Assessments	288
2. Phase I—Site Assessment	288
3. Phase II—Site Assessment	289
4. Phase III—Remediation Plan	289
5. Clean-Up Standards	289
6. Payment Terms for Environmental Assessments	290
7. Environmental Sampling Issues	290
8. Responsibility for Environmental Assessment Costs	290
9. Soil Testing by Geotechnical Engineer	291
C. Title Insurance, Survey, and Construction Escrow	291
1. Title Insurance and Commitment	291
2. Survey	293
V. Closing	293
A. General	293
B. Owner’s and Lender’s Title Policies	294
1. Extended Coverage and Other Endorsements	294
2. Construction-Related Title Provisions	294
VI. Elements of Construction Agreement	295
A. General Terms and Conditions	295
1. Construction Time Frame and Related Issues	295
2. Responsibility for Subcontractors and Suppliers	296
3. Property Owner Responsibilities	296
4. Performance and Payment Bonds	296
5. Responsibility for Additions and Change Orders	296
6. Warranties	297
7. Other Provisions	297
VII. Conclusion	297

Chapter 11

The Religious Land Use and Institutionalized Persons Act of 2000 299

I. Introduction	301
A. The Need for RLUIPA	301
B. RLUIPA’s Five Basic Limits	302
II. Substantive Protections of RLUIPA in Detail	302
A. Substantial Burdens—RLUIPA Section 2(a)	302
1. What qualifies as a substantial burden?	303
2. If government imposes a substantial burden, can it satisfy strict scrutiny?	305
3. Using RLUIPA’s substantial burden safe harbor to avoid litigation	307
B. Equal Terms—Section 2(b)(1)	307

C. Discrimination—Section 2(b)(2)	308
D. Total Exclusion—Section 2(b)(3)(a)	308
E. Unreasonableness—Section 2(b)(3)(b)	309
F. Statute of Limitations	309
G. Remedies	310
III. Conclusion	310
Index	311