

Zen and the Art of Corporate Governance:

SPECIAL CONSIDERATIONS IN COUNSELING SPIRITUAL/RELIGIOUS INSTITUTIONS

by Professor Walter A. Effross

STUDENTS ENROLLED IN A BUSINESS Associations course quickly learn that its basic elements - fiduciary duties, governance and decision-making procedures, division of power between owners and managers of a business, and attempts to limit personal liability - appear in a wide variety of contexts in everyday life. Principles of business law govern not only family-owned small businesses, but also megacorporations, condominium developments, and universities. Often overlooked, though, is the degree to which religious or spiritual institutions are organized as business associations, and thus are bound by, or can make use of, the laws governing their business forms.

For example, there was widespread speculation in December 2002 that the Archdiocese of Boston, which faced potential liability from victims of sexual abuse by clergymen, would file for corporate bankruptcy protection. A much different organization, the Church of Scientology, explains on its Web site that "[e]ach [Scientology] church corporation is organized on a nonprofit basis with its own board of directors and executives . . . [and that] [t]hese churches together form the stable building blocks of an international network which spans the globe."¹

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Michael Downing provides another illustration of the corporate organization of a spiritual group in a fascinating book, *Shoes Outside the Door: Desire, Devotion, and Excess at San Francisco Zen Center* (Counterpoint Press 2001). In 1983, in the wake of allegations that the American-born Abbot of the Zen Center (which was organized as an S Corporation) had committed financial and sexual indiscretions, one member consulted a lawyer about the Center's possible liability for its Abbot's actions. In Downing's view, "[t]his might be considered the moment that Zen truly took root in America - when the branches of an ancient lineage were grafted onto the well-established stand of civil law and legal precedents."

The lawyer's unequivocal response - that under agency law, the institution would be liable for damages caused by the actions of its leader - sparked its own transformation of awareness at the Center. One longtime member recalled that before this incident, "[i]f you were to think of the Zen Center as a corporation, and [the Abbot] as CEO, [his networking and lifestyle] would make perfect sense. It's just that some of us were slow to think in those terms." That type of thinking would change quickly.

One person suing the Center informed its Board of Directors that he was willing to settle his action and to indemnify the Center and its members, but not the Abbot himself. The Board's lawyer, as well as California officials, advised the Center that if it did not accept this offer, it not only would expose itself to liability in this action but it could also be vulnerable to members angry that the Board had jeopardized the Center's assets by holding out for a settlement that would protect the Abbot.

After the departure of the Abbot, who had dominated the entire institution, the Board undertook a year-long study of the Center's governance. Ultimately, it established distinct roles for a President, Abbot, and President of the Board of the Zen Center; created positions for other officers; delegated responsibilities to special committees of the board; and established an Outside Financial Advisory Board and an Abbot's Council, as well as a special council for "Ethics and Reconciliation." The Center also set forth a large number of policies for deciding matters such as which senior members of the community could live in the Center, and how to structure the training of its Zen practitioners.² Downing observed, "[t]his was the real work of making Zen American. It was a tireless, often tiresome effort that involved almost every member of the community" in an extensive series of meetings, reviews, and debates, over a period of fifteen years.

In general, counsel for the board of directors of a religious or spiritual institution, or for one or more board members personally, may encounter a variety of special concerns, whether in transactional work or while dealing with actual (or heading off potential) litigation:

- 1 There may be occasions on which the tenets of corporate and commercial law are augmented by the organization's own traditions, teachings, or practices concerning authority, business dealings, ethics, and the airing and resolution of complaints. In some cases, the lawyer may consider it

within her professional duty to advise the group on how to reconcile its (traditional or modern) spiritual tenets and practices with relevant business laws. The circumstances may be complicated by a split of authority within the faith or spiritual institution regarding the question at hand.

- 2 Spiritual concerns (as well as public relations issues) might lead counsel to suggest that the organization and its directors adhere to an even stricter interpretation of corporate responsibilities than legally required (perhaps because, in the words of a memorable, though arguably tasteless, commercial for kosher hot dogs, "We answer to a higher authority.")
- 3 Similarly, a lawyer for a spiritual organization, whether or not she is a member, might feel compelled - or be instructed - to conform to an even higher standard of professional ethics than mandated by the relevant rules of professional responsibility.
- 4 Depending on the situation, a lawyer might suggest that the institution would be better represented by someone who is (or, in some cases, who is not) a member of the faith and/or group in question. In certain circumstances, an "outsider's" perspective might be valuable in the same manner that views of "outside directors" on a corporate board are beneficial. In other areas, it might legitimately be argued that only someone fully familiar with the organization's practices and perspectives could most effectively understand, appreciate, and represent its positions.
- 5 Members of a spiritual organization may challenge its doing business with, or holding the stock of, entities whose actions or goals are not in alignment with those of the institution. On the other hand, the institution might be sued by those who claim that its selectivity in choosing members, employees, or business partners amounts to some form of illegal discrimination.
- 6 In ordinary corporate situations, complex ethical and attorney-client privilege issues can arise when counsel also serves as a director of the corporation. For instance, it may be difficult to determine when the lawyer is speaking in her capacity as a director rather than in her role as counsel. Similar concerns might be raised when the institution's lawyer (or a director, or possibly a lawyer who is also a director) is at the same time a priest, rabbi, or other spiritual authority who might be able to invoke the priest-penitent privilege to shield herself from disclosing communications to and from her.
- 7 Questions may arise concerning the actions of the group's leaders - or even the group's lawyers - in their private lives.

If, for instance, a leader or lawyer behaves in a manner contrary to the teachings of the group (or, perhaps, merely criticizes its doctrine), is this proper grounds for severing her legal relationship with the group? If such a provision were inserted into directors' and lawyers' contracts, would it be enforceable? Or might, in some circumstances, the attempted enforcement of such a provision involve a court in an impermissible adjudication of religious doctrine?

- 8 First Amendment issues could well be asserted to protect various actions of members (for instance, as in one Supreme Court decision, the smoking of peyote) that might be open to legal challenge if they are not seen as spiritual practices.
- 9 The institution might require its members to sign arbitration agreements to have complaints resolved privately (perhaps by arbitrators who are themselves group members). However, these provisions might be challenged by dissident members.
- 10 The organization might be reluctant to disclose, in the course of litigation or otherwise, its closely-held teachings or spiritual techniques. It might also attempt to prevent commentators or "breakaway" groups from providing their own versions of the material.³ In some circumstances, even the identities of the group's members might be considered confidential.

In light of these issues, not only should counsel for spiritual leaders and their organizations become familiar with the elements of their clients' teachings and practices, but they should encourage these clients to become acquainted with the basics of business law. Today as never before, a group's "spiritual director" is also being seen as a form of corporate director.

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¹ See http://www.scientology.org/en_US/religion/management/index.html.

² Some of these policies, including informal recommendations and formal procedures for the resolution of grievances, are discussed on the Center's Web site at www.sfzc.com under links to "Paths and Gates" and "Who We Are/Ethics Statement." In November 2003, the site provided information concerning an upcoming election of Zen Center directors.

³ My article, *Owning Enlightenment: Proprietary Spirituality in the "New Age" Marketplace*, which was published in the Summer 2003 issue of the *Buffalo Law Review*, evaluates legal actions brought by a number of spiritual groups to prevent unauthorized dissemination of their material, and discusses in detail the intellectual property law and spiritual justifications advanced by protecting these works. An abstract appears at www.effross.com.