III. What if you're not a corporation?

Churches have existed and thrived for two thousand years, and for 200 years in our own nation, without incorporation. They have organized, built buildings, paid salaries, developed mission programs, schools and hospitals and carried on the work of the gospel.

The churches were not corporations, but they were something. What are churches that are not corporations? Answer: unincorporated associations. Note: Readers should not confuse the term "association" as a legal description of the way many organizations including churches are legally constituted, with the particular use of the term "association" to describe the relationship and common work of a group of Baptist churches in a particular geographic region. Those regional "associations" may themselves with be an "association" or a "corporation" in terms of their legal status.

A. UNINCORPORATED ASSOCIATIONS

Early in American history, Alexis deTocqueville observed that Americans are joiners. Americans love to associate. We do it in clubs, fraternal organizations, charitable causes, youth groups, garden clubs, unions, political societies, social fraternities, and countless other civic, social, religious and political affiliations.

Most of these groups are not corporations at all. They have constitutions and bylaws. They elect officers. They have budgets. They own property. But they have not incorporated. They are associations.
1. What is an "unincorporated association"?

One source defined an unincorporated association as "A group of individuals who have joined together for a certain purpose or object, who do not have the common purpose of gain, and who have not taken advantage of the available procedures for incorporation."?

2. Associations and the Law

American law has been congenial toward associations, recognizing a Constitutional right to associate and to form associations which choose their own members, generally govern their own affairs without intrusion by the government or nonmembers, and develop their unique purposes and programs.

But their precise legal status has been somewhat ambiguous. For while America has thrived on associations, and the law has not hindered their existence, neither has the law traditionally recognized their independent status.

Historically, and to a significant extent today, an association is not a separate legal entity from its members. The association does not have its own independent rights. Rather the association's rights and obligations are simply the cumulative rights and obligations of members.

Because associations do not have a separate legal status, the traditional law was that associations could not, for example,
1) own property,
2) enter into contracts, or
3) sue or be sued.

Most states, including North Carolina, now recognize some legal aspects of an association - that is, in at least some respects, an independent entity from the members.8

Since 1966 in North Carolina, property may be owned directly by an association in its own common name,9 though much property owned by churches is still held through trustees who hold it in their personal name,10 but in trust for the association.11

At one time in North Carolina you could not sue an association itself, but had to sue every individual member of the association, or bring a class action. Now one may sue the association in its own name, and the association may sue using its own name.12

The older concept that an association has no legal identity of its own still applies, however, to bar a member of an association from suing the association itself. The rationale for this concept is that since everyone in the association was legally perceived as acting together whenever the association did anything, a member could never sue the association for any
injuries caused by it, because the member was a part of the very group he was suing -- sort of
like suing yourself.

This remains the law regarding most associations today, including churches. One North
Carolina court stated it this way:

The members of an unincorporated association are engaged in a
joint enterprise, and the negligence of each member in the
prosecution of that enterprise is imputed to each and every other
member, so that the member who has suffered damages to his
person, property or reputation through the tortious conduct of another
member of the association may not recover from the association for
such damage although he may recover individually from the
member actually guilty of the tort.

Historically, associations could not enter into contracts in the association's name. And, quite
unlike the limited liability of a corporation, wherever the association was in some way liable,
then all the members might become personally liable on the contract and their own assets
reached if the association had insufficient assets to cover its liabilities. Even if the members
were not found liable, certainly any officers who were a party to the contract could be
personally liable.

Another potential area of problems for associations is associational liability for injuries
caused by negligence attributable to the association. Suppose an employee of the association
(janitor, secretary) or an officer is negligent in some manner, e.g. fails to correct a known
hazardous condition, and a guest is injured due to the carelessness. Or imagine a child
injured on the playground due to defective or poorly maintained playground conditions, or
inadequate supervision during a child care program. [The possibilities are endless.] The
association may well be liable. Any association or other organization is liable for the acts of
its employees if they were within the course and scope of their employment. Suppose the injured
person sues and recovers damages that exceed the insurance coverage, and the assets of the
association. Who pays?

If there were a corporation, liability would likely be limited to the legal person responsible --
that is, the fictional legal person, the corporation. But in the case of the association, there is no
necessary limit to that liability and it might well extend to directors (trustees), officers and
members.

Now, in fact, there are no reported North Carolina cases in which individual church members
have been held personally liable for injuries caused by the church's negligence. However,
with increased willingness of injured persons to bring suits, and perhaps more willingness to
include churches in those suits, the possibilities exist.
3. What about associational criminal liability?

Criminal liability on the part of associations or their directors or officers acting for the association is rare. There are some specialized situations where individuals could be liable for acts or failures to act in regard to associational activities. One recent article noted:

"when an association has been granted association status ... only the assets of the association are available to satisfy any fine imposed. When an affirmative duty is placed upon an association officer by statute, he is liable in his personal capacity for any penalty. An officer or a member may, however, be personally liable when found to be responsible for improper association activities. The criterion seems to be knowledge and opportunity to control."16

4. Churches as associations

Churches which are not incorporated are simply one type of association, and incorporation is neither required nor encouraged by the state. An Alabama court noted that

A church or religious society may exist for all the purposes for which it was organized independently of any incorporation of that body ... For the promotion of religion and charity, they may subserve all the purposes of their organization, and, generally, need no incorporation except incidentally to further these objects.17

Church associations have always occupied a special, and sometimes, ambiguous, legal position. Some North Carolina courts have even referred to churches as "quasi-corporations"18 suggesting that although they have not legally incorporated, they will be viewed in some circumstances by the law as if they were.

The Internal Revenue Service (IRS) in its regulations regarding nonprofit corporations, has indicated that it construes the term "corporations" in the Internal Revenue Code dealing with tax exemption, to include unincorporated associations, such as churches.19

B. ASSOCIATIONAL PLUSES AND MINUSES

The most substantial associational disadvantages are two: a lack of a clear legal identity, and exposure to unlimited liability for leadership and even members. These are both serious handicaps in an associational identity.
Despite these ambiguities of identity and liability problems, there are clearly some advantages to the associational form which many churches employ.

1. Flexibility

   The associational form, by its very lack of any structured legal identity, is the most flexible as to structure and form of any way in which a group might choose to exist. There are few, if any, presumptions about how a group might organize, conduct its affairs, choose its members or whatever.

2. No filings or reports

   Since the association does not seek any formal legal recognition, there are no requirements to file any papers with the state or make any reports on activities, members or purposes.20

3. No need to seek government approval

   While as we shall note, governmental supervision of nonprofit corporations is usually minimal, there is a requirement that the government review the corporate purposes and that certain requirements be met such as a minimum number of directors, records being open to members, etc. In associations, there are no such required government approvals or minimum conditions which must be met by the association.

4. No Presumptions

   In general, the Nonprofit Corporation Act provides certain basic internal corporate rules which will govern unless the corporation's bylaws provide differently. For example, a corporation that fails to state the quorum required for a members' meeting will be governed by the statutory provision of 20% of the membership. In an association, no such presumptions apply, and thus government regulations are less applicable.21
C. STRUCTURE AND GOVERNANCE IN ASSOCIATIONS

The structure and governance of an association is established by the members. The rules set forth by the association are like a contract between the members, and one's membership in the body is a conclusive presumption of an agreement to be bound by those internal rules. One may resign at will from an association, but the rules which govern its internal life, including qualifications for members, voting rights, discipline and expulsion of members, are controlled by the "contract" between the members.22

Normally this "contract" or agreement which provides the structure, government and rules of the association is contained in one or two documents. The first is called by one of three names: Charter, Constitution or Articles. Whatever the name, the purpose is the same -- to set forth the basic purposes and fundamental rules of the association. The second is usually called the bylaws. The bylaws are the day to day rules and regulations which govern the operation and structure of the organization.23

Both of these documents are agreed upon by the members, and may be modified by them according to the rules set forth within them for amendments. When disputes arise about the meaning of the bylaws, in most cases the association itself will determine the meaning of its own rules. Only in exceptional cases will courts interfere with the internal affairs of an association, and where churches are involved, a near "hands off" policy is observed by courts.24

Typical Provisions in Associational Charters and Bylaws are essentially the same as those in Charters and Bylaws of nonprofit incorporations which are discussed in chapters V and VI.25
NOTES

8 Courts have tended to treat different types of associations differently. For example, unions have been given much more legal independent status from their members than have most other associations.
10 Some states limit the amount of property an association can own or otherwise limit the right to hold land, e.g. Indiana limits associational ownership to 160 acres.
11 Similarly with church conventions, synods, denominations. Gen. Stat. §61-1,3: such bodies may appoint trustees "for the purpose of acquiring and holding church property." 156 N.C. 524, 72 S.E. 617 (1911).
13 See Employers Mutual Casualty Co. v. Griffin, 266 S.E.2d 18 (N.C. 1980) holding that neither the church nor its insurer could sue a member whose negligence had caused fire damage to the church building; Goard v. Branscom, 189 S.E. 2d 667 (N.C. 1972) cert. denied, 191 S.E. 2d 354 (1972) where a member injured because of negligence of the church could not recover from the church because it is a joint enterprise and she may not recover for the wrongful conduct of a fellow member.
15 There is a general trend not to find mere membership alone enough to find members liable for association debts, at least in large membership organizations where members have little control, and at least where a member was not involved in the decisions which created the liabilities. But the law in this area is still somewhat unclear, and no North Carolina cases dealing with this matter have been found, much less cases relating to church membership liabilities.
19 Treas Reg. § 1.501(c)(3)-1(b)(2); IRS Publication 557.
20 There are some arenas, however, where associations would have to file other kinds of reports. For example, any employer may have duties to file reports, withhold taxes, etc.
21 Courts have occasionally read into church bylaws provisions that are presumed to apply or which are held to be required of all associations, such as the right to notice and hearing before dismissal from membership.
22 See "Associations and Clubs," 6 Am. Jur. 2d §§5, 18, 19 for discussion and illustrative cases.
23 Not uncommonly, churches and other associations ignore their own bylaws, often through ignorance. Ignoring specific provisions can often lead to challenges by disgruntled members who claim irregularities. While courts will rarely interfere with internal associational actions, it will usually enforce the provisions of the rules of the association and insist that procedures set forth in those rules be observed. For example, if the by laws require 30 days notice before a meeting to elect trustees, and the association fails to provide such notice, a complaining member might succeed in having a court set aside the election and order a new one conforming to the bylaws.
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24 See footnote 6 above.

25 See the discussion below regarding each of these items since the nature of these provisions is the same whether the association incorporates or not.