IV. Forming the Nonprofit Corporation

Suppose that you're inclined to proceed and incorporate.

How do you do it?
Is it complicated?
Expensive?
Do you have to go to law school first?

A. SOME GENERAL QUESTIONS

1. Are the basic requirements complicated?

No. While incorporation is a serious process, it is not especially obscure. It does require the preparation and filing of Articles of Incorporation, the preparation and adoption of Bylaws, and the holding of an organizational meeting which launches the structure and installs the leadership of the new corporation. The procedural requirements in North Carolina are not complex.

2. Does it require changes in a church's structure or leadership?

No. In most cases, incorporation may be accomplished with no significant change in the church's charter or bylaws required by the law. As we shall note, there are very few corporate requirements regarding the internal management of a nonprofit corporation.

Traditional Baptist polity, though quite distinct from most nonprofit corporation structures, is compatible with the flexible structure permitted under the Nonprofit Corporation Act.
The Act does have provisions regarding the corporate structure such as the role and powers of directors, officers, member's rights, quorum requirements, etc. These provisions are of two types:

1) Mandatory Provisions

A few of these provisions are mandatory -- that is, any nonprofit corporation must comply with them. But these are generally few, are reasonable and do not appear to conflict with any Baptist practice or religious principles. (They are discussed below).

2) Non-mandatory Provisions

Most of the provisions regarding the structure and management of the corporation are non-mandatory and take effect only if the corporation does not provide otherwise in its own bylaws. For example, the Act indicates that directors serve a term of one year, unless the bylaws or charter provide otherwise. Most church bylaws would provide for longer terms. The church is free to establish different procedures, but if the church does not provide for rules and regulations in a certain area, such as quorum requirements for member meetings, then the Nonprofit Corporation Act provisions will apply.48

3. Can we just send in our current Charter and Bylaws?

Probably not. Though no fundamental changes are likely to be necessary, some changes or additions to these documents may be necessary. What must be filed are "Articles of Incorporation" which are usually brief. (See discussion below.) In most cases it is possible to adapt present provisions in the church's Charter or Bylaws, and add a few additional clauses confirming the nonprofit character of the church in order to complete and then file this document.

We would expect, however, that in addition to making these minor changes, that the very process of incorporation will stimulate a more thorough review and updating of the church bylaws, even if not required under the Nonprofit Corporation Act.

4. Will it affect our tax exempt status?

There is no reason for the tax-exempt status of a church to be affected by incorporation. Generally a nonprofit corporation or nonprofit unincorporated association must apply to the I.R.S. for recognition as an exempt organization.49

Churches, however, have been exempted by IRS regulations from the requirement that they make application, and, in effect, are granted automatic tax exempt, 501(c)(3) status, whether they incorporate or not, and without any filing requirement.50 The effect is a presumption of tax exemption for churches.51
5. Are there different kinds of church corporations?

Yes. In fact, because of the flexibility of the law in providing for nonprofit corporations, a church is free to structure its affairs with very few limits. To some extent, every church corporation is unique because it creates its own articles of incorporation and bylaws to meet its particular needs.

As you would expect, the internal rules which Baptist churches develop will be quite different from those of a Methodist or Presbyterian church. The particular roles of deacons, trustees and members would vary significantly in these churches and the bylaws would reflect these differences. Baptist churches with their strong independent and congregational traditions may well vary widely even among themselves.52

6. Do you need a lawyer to assist you in incorporating?

Like a lot of answers, especially about law, Yes and No.

Legally, there is no requirement to use a lawyer, and the formal processes themselves are straightforward enough that a lawyer is not required to perform the basic incorporation requirements.

BUT, it is advisable to seek legal counsel. Not only will legal counsel be current on the law, but since a church may have special needs or characteristics which warrant special structures and provisions provided for in the Articles or Bylaws, the attorney may be of great assistance in insuring that these principles are properly embodied in the basic corporate documents. The very flexibility of the law encourages churches to carefully manage their own internal structures, and legal assistance in that process may be very appropriate. The more complex a church’s operations, and the more diverse its program, the more important it may be to carefully review these matters with competent counsel. In some circumstances, legal counsel may wish to review with a church the possibilities of separate incorporation for some major ministry divisions of the church, such as Day Care ministries or a school.

It is critical, however, to be sure that a lawyer retained to assist in these matters be familiar both with nonprofit corporation law in North Carolina and with the special interests and concerns of churches. It is especially important that the attorney understand the special congregational commitments of Baptists and how that impacts the legal aspects of the structure of the church. You are concerned, after all, not just to incorporate, but to do so in a fashion which most protects and enables the church in the performance of its ministry and the internal healthiness of the community. While there is little formal specialization in the practice of law, there are clearly areas of expertise which lawyers develop and other fields where lawyers would not have sufficient familiarity or expertise.
B. STEPS IN FORMING A CHURCH CORPORATION

1. Select Incorporators

What do incorporators do?

Remember the theory: we are going to create a new person - the corporation. Somebody must be the one who asks that the new corporation be formed. The person or persons who formally file the papers and ask that the new corporation be approved are called the "incorporators."

In the case of most corporations, they are the persons most interested in the new corporation. In businesses or where there is not a pre-existing body, the incorporators are those who obtain the funds, property and persons who will be involved in the corporation. In non-profit corporations, the incorporators will usually, though not necessarily, be the organizers and they will also usually be the initial directors.

Who may serve as incorporators?

Legally, the incorporators are the persons who sign the Articles of Incorporation. They need not be any particular persons, so long as they are age 18 years or more. They need not even be residents of North Carolina.53

In North Carolina, only one incorporator is required, but there is no limit on the number. Thus, the Board of Trustees or Deacons of a church could be the incorporators.

Since their role is very limited and of short duration, the Model Articles noted later suggest that three current deacons or trustees act, on behalf of the whole church, as incorporators. In order to involve the whole church in the incorporation decision and clarify the relationship of the incorporators to the church, it might be helpful for the church to adopt a resolution authorizing the incorporators to organize, on behalf of the church, the new corporation. Such a resolution might read as follows:

Resolved that the First Baptist Church of Centerville hereby authorizes (names of incorporators) to form, on behalf of the current members of this church, a nonprofit corporation, First Baptist Church of Centerville, Inc., as a successor corporation to this church, and to file the Articles of Incorporation attached hereto.

2. Prepare the Articles of Incorporation

The Articles of Incorporation [Charter]54 is like the application for corporate status. But it is more than that. It is the basic fundamental document of the corporation, stating its purposes and other fundamental items about its structure or government.
What do the Articles contain?

The legal requirements for what must be included in the Articles are rather minimal, including such items as the name, purposes, and initial directors [discussed in detail in next section]. Some nonprofit corporations and churches, however, may wish to go beyond the minimum requirements and include some provisions about the structure of the church and the rights and duties of various groups such as trustees, deacons or members. Others put only the minimum in the Articles and leave the details to the By-laws.

The specific content of the Articles is discussed in the next section.

3. File the Articles

The statute requires that the Articles of Incorporation in duplicate, be signed and notarized by the incorporators, and delivered to the Secretary of State along with the required fees.

The fees are currently $10 filing fee and $30 taxes.

The Secretary of State will then endorse both copies with the word "filed" and the time and date of the filing. The copy is then returned to the corporation or its representative.

4. Record the Articles

The statute provides that the endorsed copy provided by the Secretary of State to the corporation "shall be promptly delivered to the register of deeds of the county wherein the corporation has its registered office."

There is a small recording fee. After recording and being indexed in the Record of Incorporations, the register of deeds is to note the recordation on the copy and return it to the corporation.

Failure to comply with the local recording requirement shall "only subject the corporation to a penalty of $100. . ." Note: it does not affect the corporate status.

5. Hold the Organizational Meeting

Now we have a corporation, but at this stage it is like an empty shell. It has no officers, no bylaws and no activities which work toward achieving its purposes. To flesh out and activate the corporation, the initial directors must call an organizational meeting of the Directors.

The purpose of that meeting is to elect officers, approve bylaws, receive members and begin the regular operations of the corporation. The conduct of this meeting is discussed more fully below.
NOTES

48 This is different from an associational context where there is no source to which one would turn to find the rules and regulations if they were not provided for in the associational bylaws. Even in such cases, however, some courts in other states have read into the bylaws general principles of justice and fairness, and in one case looked to general Baptist practice as reflected in The Hiscox Guide for Baptist Churches, (Valley Forge, Pa: Judson Press, 1964).

49 For charitable organizations including churches, this application would be under section 501(c)(3) of the Internal Revenue Code. Except for organizations like churches which are exempt from filing requirements, only those organizations which receive a formal notice ("determination letter") from the IRS that they are exempt are tax exempt. But not all nonprofit organizations can qualify for tax exemption. Thus, one could have a nonprofit corporation and NOT be exempt.

50 See I.R.C. § 508(c).

51 An I.R.S. inquiry or investigation might, however, conclude that a given "church" did not qualify as tax exempt either because it was not in fact a church or because it had lost its exempt status by activities inconsistent with exempt status such as impermissible political activities or distributing its "profit" to members, officers or directors. [Tax exemption and 501(c)(3) requirements are noted below.]

52 Not all nonprofit corporations have members. Some exist solely in the Board of Directors. However, almost all church nonprofit corporations would be membership organizations, though the powers of the members might vary widely. One special type of religious corporation is the "corporation sole" which is a corporation with only one member. This specialized corporate form is employed in religious groups where all the assets of the religious body are under the exclusive direction and control of a single person such as a bishop. The corporation sole form is most commonly associated with Catholic church corporate structures. While North Carolina does not specifically provide for a corporation sole, it does provide in § 61-5 that ecclesiastical authorities operating under the ecclesiastical polity of any church do have "power to acquire ... hold, improve, mortgage, sell and convey the property ... of any church," and provides that the title to any property and rights in regard to it pass to his successor.

53 § 55A-6.

54 The term Articles of Incorporation and Charter refer to essentially the same document. Technically, the Articles of Incorporation are the papers initially filed at the time of the incorporation. The Charter includes the original Articles and all amendments thereto. See § 55A-2(3).

55 § 55A-7.

56 § 55A-78.

57 § 55-A-4(a)(6).

58 § 55-A-4(a)(6).

59 § 55-A-4(b).

60 § 55A-9.