A LEGAL AUDIT PLAN FOR RELIGIOUS INSTITUTES

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Introduction

The initial version of this article – *Conducting a Legal Audit of a Non-Profit Religious Organization* – was completed in 1988. Since then, updated and revised versions have been published by the Resource Center for Religious Institutes ("RCRI") and its predecessor organization at intervals of approximately ten years.

The audit plan was originally intended to provide a guide for the non-lawyer administrator or treasurer to conduct a limited review of the civil posture of a religious institute to ensure that its legal house was generally in order. The idea of a "legal audit" was not – and should not – serve as a substitute for good legal advice from a practicing lawyer with extensive experience in non-profit corporate and tax law.

Over time and several iterations, however, the legal audit plan grew in complexity and detail. The most recent version, published by RCRI in 2008 (and, we readily admit, prepared by our own lawyers), was more than 70 pages long and included nearly 100 footnotes, numerous statutory and regulatory citations, four appendices as well as an extensive bibliography. While this was an impressive and thorough piece of work, it was no longer a simple guide for the non-lawyer to ensure that the legal basics are in order.

In reviewing the 2008 edition of this memorandum, we concluded that another revision of the document – with the addition of a new round of citations, regulatory explanations and invitations to further discuss – ran the risk of leading to one of two outcomes. Either the non-lawyer(s) responsible for assuring legal compliance by a religious institute would (a) attempt the unauthorized practice of law in the often arcane specialties of non-profit corporate, trust and tax regulation *or* they would (quite understandably) put-off, defer or abandon the project entirely.

Neither of these outcomes would be good. So we decided to return to the original objective – and try to provide a

straightforward guide for the religious institute administrator to ensure basic legal compliance and identify matters for the attention of competent legal counsel. While we could not avoid a few footnotes, this article is intended to outline a clear and simple set of steps for a non-lawyer to take in an effort to answer the basic question of whether a religious institute's legal house is generally in order.

WHILE WE COULD NOT AVOID A FEW FOOTNOTES, THIS ARTICLE IS INTENDED TO OUTLINE A CLEAR AND SIMPLE SET OF STEPS FOR A NON-LAWYER TO TAKE IN AN EFFORT TO ANSWER THE BASIC QUESTION OF WHETHER A RELIGIOUS INSTITUTE'S LEGAL HOUSE IS GENERALLY IN ORDER.

The following pages have been arranged to answer eight distinct questions that go to the ultimate inquiry of whether a religious institute has met its basic legal obligations:

- What is the civil structure of the Institute?
- Where is the Institute?
- What are the "special powers" of the Institute?
- What does the Institute own?
- What does the Institute owe?
- What about the tax collector?
- What legal risks does the Institute face?
- What do we keep – and what can we throw out?

In reading onward, please note that we understand that religious communities have different identities under Canon Law. These canonical forms could include religious institute, society of apostolic life, monastery, or congregation. In terms of the civil law in the United States, each of these canonical constructs is an "association". While a properly formed non-profit corporation extends "limited liability" to members and directors for debts incurred by the corporation, an association provides no such protections. So, whenever the terms "the Institute" or "your Institute" are used herein, the aim is to characterize the broadly defined religious institute that is seeking to review its civil legal structures.

Finally, we must note that this memorandum is not intended to offer or provide legal advice to a client or to establish an attorney-client relationship in any form. Every legal question is unique and there is no substitute for the work of a lawyer who has spent the time necessary to understand all the facts and circumstances and to provide sound and informed legal counsel.

What is the Civil Structure of the Religious Institute?

As a general proposition, the courts of the United States will not interpret or otherwise involve themselves in any functions of Canon Law or, for that matter, any aspect of

any religious law or code.[1] So the first step in any legal audit is understanding the legal form(s) through which the Institute conducts its civil affairs. Most Institutes operate in the civil environment through one or more non-profit corporations, although some Institutes may also hold assets through charitable trusts. These are the only two legal forms of organization through which an Institute may do its civil business and both are organized under state (not local or federal) law.

Non-Profit Corporation. All corporations are organized under state law with articles of incorporation (sometimes called a certificate of incorporation) filed with the Secretary of State or similar agency. To assess the sufficiency of an Institute's non-profit corporations, the following questions should be answered:

- Are the articles of incorporation for each non-profit corporation that serves the civil needs of the Institute properly on file with the Secretary of State of the state of incorporation?

- Do each of the non-profit corporations have a set of by-laws that have been approved by the board of directors?[2]

- To the extent that the by-laws provide for a minimum and/or maximum number of directors, is the incumbent elected board comprised of the appropriate number of directors?

- If the by-laws indicate that a defined member or class of members (a "membership corporation") have the power to elect the board of directors, have those members met at least once within the past year for the purpose of voting for directors?[3]

- If the by-laws provide that the board of directors is self-perpetuating – meaning that remaining directors elect replacement directors when a vacancy occurs – has the board of directors met at least once during the past year (or more often if required under the by-laws)?[4]

Trusts. The second form of civil organization commonly employed by a religious institute is a charitable "trust." Charitable trusts differ from non-profit corporations in many important ways. For example, charitable trusts do not require the involvement of any state agency or department in order to come into lawful existence. The basic configuration of a charitable trust involves a contribution of assets by one party (the "grantor" or "donor") into the care of a second party (the "trustee" or "trustees") for the benefit of some third party or a specified purpose (the "beneficiary" or "charitable purpose"). Trusts are usually established by religious institutes to hold and manage assets –

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[1] *Serbian Eastern Orthodox Dioceses for the United States of America and Canada, et al. v. Dionisije Milivojevich, et al.*, 426 U.S. 696 (1976).

[2] The terms "trustees" and "board of trustees" are generally interchangeable with the terms "directors" and "board of directors."

[3] Most state corporation laws permit unanimous written consents – signed by all of the members – as a substitute for an actual in-person meeting of members.

[4] Likewise, most state corporation laws permit the use of unanimous written consents – signed by all of the incumbent directors – as a substitute for an in-person board meeting.

typically real estate or investment assets – for the benefit of its members or ministry.

If the Institute has formed one or more charitable trusts, those trusts will be governed by the terms of a trust instrument or trust agreement – signed by the grantor or donor and the trustees– that sets out the rules by which the trust assets are to be managed by the trustees for the benefit of the charitable purpose. Basic questions, to ensure that trusts established by or for the benefit of the Institute have been properly maintained, would include the following:

- Have copies of the trust agreements or instruments – and all amendments to those agreements or instruments – been maintained in the records of the Institute?

- Are the individuals who are named as trustees in the trust agreements or instruments currently available and in regular contact with the Institute? A common problem arises when a trust is established but then not properly maintained and trustees are not regularly replaced. If the trustees named in a trust agreement are deceased, have left the Institute, or are living abroad, the capacity of the trust to act may be substantially impaired.

- Have the trustees met (in person or by telephone) with the frequency required in the trust agreement or, alternatively, have they met or conferred during the past year?

- Are all formal actions of the trustees recorded and maintained with the books and records of the trust – in much the same way as board minutes and resolutions are maintained in a corporation?

- If the value of the trust assets is substantial, or if the trust accepts donations from third parties outside the Institute, does the trust prepare annual financial statements that are subject to audit (or in some cases, review) by an independent public accounting firm?

It is important to remember that reliance on canonical forms of organizational structure – which would be treated as unincorporated associations in civil law – provide none of the limits on liability and other protections that flow from lawful incorporation or from the formation of a trust. To the extent that the Institute owns assets, enters into contracts, employs laypersons or incurs debt – those activities and any others that touch upon civil commerce should be conducted through non-profit corporations or, in limited circumstances, through a properly formulated trust.

Where is the Religious Institute?

To the extent that the Institute conducts it ministry outside the state of its incorporation, registration with government agencies in those other states is almost always required. Compliance with these state registration laws for "foreign corporations" are simple and involve little expense. They are important, however, in relation to the rights and ability of the Institute to defend itself in litigation in another state. This is because the primary rationale for requiring registration by "foreign corporations" is to ensure that if a legal claim arises, the "foreign corporation" has an identified agent within the state on whom (or which) a summons, subpoena or other legal notice can be conveniently

served. These formally identified persons or firms are commonly known as "a registered agent for service of process."

The place to begin this review is with a list of locations in which the Institute is engaged in Ministry within the United States. That is to say, a list of states in which the Institute (a) owns or leases real estate, (b) has members or sponsored lay associates working in ministry, or (c) otherwise maintains an active civil presence, should be readily available for review. For each state in which the Institute's non-profit corporations are active – other than the original state of incorporation – the following questions should be answered:

- Is there a current registration for each of the Institute's non-profit corporations as a "foreign corporation" – in states in which such corporations have a presence?

- Does the Secretary of State, State Corporation Commission or similar state agency of each such state list each affected corporation as a "foreign corporation" (this information is almost always universally available on a public web site)?

- If the "agent for service of process" in each state where the corporation is registered as a foreign corporation is a person (as opposed to a firm), is there confirmation that such individual registered agent is (a) still living or doing business at the stated address and (b) in regular contact with the corporation and the Institute?

If the Institute must register as a foreign agent in multiple states, there is considerable value in contracting with a corporate services firm to perform that function. Corporate services firms are in the business of (a) ensuring that foreign corporate registration is in order and (b) serving as registered agent for service of process. Most of the major corporate service firms do an excellent job, at comparatively modest course, and will ensure that any court processes or legal notices that are served on the corporation are brought to the attention of the Institute as soon as they are received.

Maintaining Corporate "Status"

The primary source for learning whether an Institute has maintained its lawful corporate status – and is in compliance with the requirements of state law in the state of incorporation – is (a) the Office of the Secretary of State, State Corporation Commission or similar state agency in the state of incorporation and (b) the minute book or equivalent electronic record maintained by the corporation. The principal annual filing requirement in most states is called an "annual report" and may be accompanied by a "franchise tax" return. The "annual report" bears no resemblance to the extensive financial and operating reports of the same name that are issued each year to stockholders of publicly-owned corporations. Rather, the annual report for state corporation law compliance purposes is typically not more than a single page of basic information, accompanied by a modest annual fee.

Whether a corporation is currently in good standing in its state of incorporation – generally meaning that a current annual report is on file and the franchise tax has been paid – can be confirmed on the publicly available website of the Secretary of State or State Corporation Commission.

For purposes of confirmation, the records of each non-profit corporation established for the benefit of the Institute should include:

- The current and three most recent annual reports filed with the Secretary of State or State Corporation Commission in the state of incorporation;

- Evidence that the current franchise tax has been paid in the state of incorporation; and

- Contact information for the firm, office or individual listed as maintaining the non-profit corporation's registered office in the state of incorporation.

When annual reports are not timely filed or the annual franchise tax is not paid, the universal consequence is administrative liquidation – meaning that the corporation may lose its corporate status. Like the failure to properly register as a foreign corporation in states outside the original jurisdiction of incorporation, a principal consequence of administrative liquidation is that the corporation may be denied the right to bring a lawsuit or defend itself in civil litigation brought in the courts of that state.

What are the "Special Powers" of the Institute?

Most religious institutes that historically have been engaged in some form of public ministry hold reserved powers with regard to the function of civil corporations established to manage those ministries. The most common example of this phenomenon occurs when operational control of schools, colleges, universities or healthcare facilities – by the Institute – is transferred to a civil corporation controlled by a lay, or combined religious and lay, board of directors (a "Ministry Corporation"). Ensuring that those reserved powers are documented and understanding how and under what circumstances such powers may be exercised is an important step in any legal audit of a religious community. In almost every instance, the authorities reserved to the Institute are memorialized in the articles of incorporation and/or by-laws of the Ministry Corporations. A simple check to understand the scope and enforceability of the Institute's reserved powers would involve the following steps:

- Assemble a list of all Ministry Corporations that are separately incorporated with a board of directors that is not under the full control of the Institute.

- Establish that the articles (or certificate) of incorporation and current by-laws for each Ministry Corporation are on file.

- Maintain a list of the names and contact information for the chair and members of the board of directors or trustees, as well as the corporate secretary, for each Ministry Corporation.

- On an annual basis, confirm that no amendments to the articles of incorporation of the Ministry Corporations have been filed with the Secretary of State and that no amendments to the corporate by-laws have been approved by the members (holding reserve powers for the benefit of the Institute) and board of directors.

- Prepare a summary of the reserved powers held by the members under

the articles of incorporation and/or by-laws of each Ministry Corporation as an easy reference guide when issues arise that may involve the exercise of the reserved powers.

- Assure that any waiver, amendment or other modification to the reserved powers is recorded in writing, approved by the members and acknowledged by the board of the Ministry Corporation (also in writing), and maintained with the records of the Institute.

Religious institutes and their separately incorporated ministries often share a deep history and sense of common purpose or mission. At the same time, it is important to remember that powers were reserved at the time that the Institute relinquished full control of the sponsored work for a reason. Reserved powers should be afforded the same treatment as any other important asset of the Institute. Ensuring that leadership of the Institute, as well as the board of directors of the Ministry Corporation, are aware of the scope and authority of reserved powers is an important function in any audit of legal matters on behalf of a religious community.

What Does the Institute Own?

For purposes of a limited annual audit, much of what is owned by the Institute has no material legal consequences. Automobiles (although they must, of course, be registered and inspected), furniture, equipment, books, records and other categories of "personal property" do not call for any careful legal scrutiny. The two classes of assets that are well within the scope of a basic legal audit, however, are real estate and financial assets (including bank accounts used for operations). Each of these two broad classes of assets requires some brief, but careful, attention.

Real Property

Most important rights relating to real property (the general legal term for real estate – land, buildings and fixtures) are matters of public record. Deeds reflecting "fee simple" ownership in real property, as well as mortgages, deeds of trust, liens and other encumbrances, are recorded in a government office for that purpose in the county or city where the property is located. Many municipalities make their real property records available for inspection on Internet websites or other electronic platforms.

The principal objectives of an informal audit of legal records relating to real estate owned by the Institute are to: (a) ensure that title to the property is in the correct name of the civil corporation or trust that is intended to be the record owner, (b) be certain that no unknown or unauthorized liens, mortgages or other encumbrances have been recorded against the property, and (c) confirm that no other obvious impairments on legal title have appeared. These objectives can be met, in the context of an informal legal audit, by answering the following straightforward questions:

- Do the records of Institute include a deed, in the name of the Institute, for each parcel of real property owned?

- Does each deed list, as the fee simple owner of each parcel, the civil corporation or trust that is intended to hold legal title to the land?

- Does the address on the deed of each parcel match the address believed by

the Institute to be the actual legal address?

- Have any legal notices (of any kind) or other correspondence, relating to any real property owned by the Institute, been received during the past twelve months?

- What is the most recent title search report available for each parcel of real property owned? If title search reports are more than three years old – a new and updated title report (particularly for significant parcels of real property) may be appropriate.

- If the Institute is the lessor (the landlord) under any lease for real property, the following questions should be addressed: (a) Is a copy of the lease with all amendments and extensions in the possession of the Institute? (b) What are the renewal provisions of such lease?

- If the Institute is the lessee (the tenant) under any long-term leasehold the following questions should be addressed: (a) Is a copy of that lease with all amendments and extensions in the possession of the Institute? (b) What are the specified dates for notice of extension or termination under the lease?

- Are current policies of liability, property, casualty, and (where appropriate) flood insurance in place, at appropriate levels of coverage, for each parcel of real estate owned or leased and is the appropriate Institute corporation or trust named as the insured party under such policies?

- Are any other persons, groups or organizations occupying any portion of any parcel of real property owned by the Institute – either without permission or through any kind of informal arrangement? This step may, of course, require an on-site inspection of the relevant parcels.

- Do the publicly available real property tax and assessment records for each parcel of real estate indicate an unpaid or outstanding property tax balance owed to the local county or state?

Issues of ownership and utilization rights with regard to real property can present unusual problems for religious institutes that should be addressed promptly. At the same time, legal rights and obligations relating to real estate can be complex matters. These steps are intended only to identify circumstances in which a problem *may* be present in a portfolio of real estate and may call for the involvement of an experienced real estate lawyer.

Financial Assets

Most financial assets owned or held for the benefit of an Institute – other than basic bank depository and operating accounts – will be managed by a professional advisor or advisory firm. For that reason, the key step in conducting the legal audit – as it relates to financial assets – is to ensure that the financial manager and custodian (particularly if they are different entities) hold the Institute's investment assets in the appropriate trust or corporate name(s).

A second important consideration – which should also be addressed by the Institute's independent auditors – is the concept of "dual controls." That is to say, the

Institute's financial manager or custodian should require that any transactions with a dollar amount above a specified level must be approved by two officers of the corporation (or trustees of the trust) who have independent reporting authority. That is to say, the two approving officers who exercise dual controls should not be in the positions of supervisor and direct-report – or any other relationship that would suggest a lack of independence.

Finally, all bank deposit and operating accounts should be briefly examined to ensure that (a) each account is styled in the appropriate corporate name and (b) the current signers on each account are the appropriate corporate officers or employees.

What Does the Institute Owe?

Like any commercial entity in the civil world, the Institute will incur debt obligations to third parties in the ordinary course of business. Commercial accounts payable and other debts that are current (due within one year) are generally the business of the independent public accounting firm and not appropriate to a limited legal audit. Long-term debt obligations (those with a maturity date greater than a year), however, are characterized by structures that should be given some scrutiny in a legal audit. Specifically, with regard to each long-term debt obligation, the following questions should be asked:

- Is the corporation or trust that is listed as the borrower on the promissory note or other documentation of the long-term debt actually the correct entity?

- Was the debt approved by the board of directors, and the members if within the scope of the reserved powers (if the obligation of a corporation), or trustees (if the obligation of a trust formed by the Institute)?

- Is approval of the debt properly reflected in a formal resolution or minutes of the board of directors, and the members if within the scope of the reserved powers (in the case of a corporation) or the written books and records of the trustees (in the case of a trust)?

- Is any property that provides collateral security for long-term debt obligations, as reflected in the loan documents, owned by the corporation or trust that incurred the debt?

- Has the lender issued any notice of default or is there any evidence of default under the governing loan documentation?

In performing this limited legal audit function relating to long-term loans, the notes to the financial statements issued by the independent accounting firm engaged to audit the corporate or trust borrower will provide important information regarding the status and structure of long-term debt obligations.

What about the Tax Collector?

In a 1946 letter ruling, the Treasury Department affirmed the exemption from federal income tax of all Catholic institutions listed in the *Official Catholic Directory*, published by P.J. Kenedy & Sons (the "OCD"). This IRS Group Exemption letter has been renewed annually since that time and is formally issued to the U.S. Conference of Catholic Bishops (the

"USCCB") which effectively controls the exemption. So any organization listed in the *OCD – with a very few exceptions* – is presumed by the IRS to be generally exempt from federal income tax. A copy of the Group Ruling, along with an extensive collection of information relating to the Group Exemption and federal tax issues for organizations in the Group Ruling is posted annually on the USCCB website.[5]

Diocesan bishops are responsible for ensuring that organizations listed in the *OCD* are qualified to be included in the Group Exemption. To qualify for inclusion in the *OCD*, and hence the USCCB Group Ruling recognizing tax exemption, each applicant must pass both an organizational and an operational test.[6] To meet the organizational test, a corporation's articles of incorporation and bylaws must (a) limit the organization's stated mission and activities to one or more charitable purposes and (b) not expressly empower the organization to engage in activities that are not in furtherance of one or more exempt purposes – unless such activity is an insubstantial part of the organization's overall activities. When the exempt entity is a trust, the same or similar language must be included in the trust agreement or instrument.

With regard to the operational test, the applicant must provide information about its governing body, charitable works, and finances in order for its eligibility to be assessed. This information is delivered to the diocese in which the religious institute resides in the form of a detailed questionnaire. If a religious institute undergoes reorganization, it must reapply to the diocese for inclusion in the USCCB Group Ruling and cannot rely on its former *OCD* listings.

So the first – and very important – step with regard to federal tax compliance is to go to the OCD and confirm that each corporation and trust established by or for the benefit of the Institute appears under its proper legal name in the listing for the diocese where the Institute resides. If one or more of Institute's civil entities is not listed in the OCD, immediate inquiries should be made with the diocesan office responsible for the annual submission to the OCD.

When the civil corporations and charitable trusts established by the Institute are properly listed in the OCD, those entities are included in the IRS Group Ruling and so are properly exempt from federal income taxation. But that does not mean that the Institute is entirely free from the need to think about the IRS. While the Institute's tax advisor should be consulted about what additional tax reporting is still required, the legal audit should address two common reporting obligations of religious institutes.

IRS Form 990. Most organizations exempt from income tax under Internal Revenue Code ("IRC") section 501 are required to file Form 990, an annual information return stating gross income, receipts, contributions, disbursements and the like. Organizations included in the OCD are required to file a Form 990 with the IRS, unless they are covered by one of several specific exceptions:

- Churches,
- Integrated auxiliaries of churches,

[5] http://www.usccb.org/about/general-counsel/tax-and-group-ruling.cfm

[6] Treas. Reg. § 1.501(c)(3)-1(a) provides that an organization must be both organized and operated exclusively for one or more exempt purposes to be exempt as an organization described under I.R.C. § 501(c)(3).

- Exclusively religious activities of religious orders,
- Schools below college level affiliated with a church or operated by a religious order, and
- Organizations whose annual gross receipts in each taxable year are not normally more than $5,000.[7]

Because of the exemption for "exclusively religious activities" of any religious order, religious institutes operating as a non-profit corporation may *not* have to file Form 990. But before making a final decision, particularly with regard to sponsored ministries – the Institute should consult its tax advisors to determine what entities are exempt from the requirement to file Form 990.

IRS Form 1099. An Institute, through its operating corporation(s) must file information returns on some of the compensation it pays to non-employees as well as on income earned on patrimony administered by the Institute for its individual members. This requires the filing of some form of Form 1099. These filings must be made timely and should be prepared, in the first instance, by the Institute's professional tax advisor.

What Are the Legal Risks Facing the Institute?

The legal audit is intended to identify many of the most common risks that may affect an Institute. This list includes, in broad terms, the risk that key documentation is not in place, that corporate and trust formalities have not been maintained, or that the Institute has otherwise failed to take some other necessary legal or administrative action.

Civil lawsuits or administrative proceedings that have been initiated against the Institute – or its constituent corporations or trusts – should be under the control of the Institute's outside lawyers. In the case of insured claims, each case should be in the hands of counsel engaged by the liability insurance carrier. For purposes of a limited legal audit, a basic list of pending and threatened civil and administrative litigation should be assembled and regularly updated. With regard to lawsuits or other forms of legal action that have been filed, that list should include:

- The full name of the case as reflected on the court docket;
- The identity (corporation, trust or other) of the Institute defendant(s) in the case;
- The court in which the case is pending;
- If the claim is insured, the name and contact details for the insurance carrier;
- The lawyer or law firm representing the Institute in the litigation; and
- The identity of the officer or employee of the Institute responsible for the matter.

"Threatened" claims – those that have not yet resulted in a complaint filed with a court – require additional scrutiny but should also be assembled on a working list that includes the following information:

- The name and contact information of the prospective claimant;
- A brief description of the nature of the threatened claim;

[7] *See* I.R.C. § 6033(a)(3).

- The location in which the alleged conduct that led to the claim took place;
- If the threat was conveyed by a lawyer, contact information for that lawyer;
- Whether insurance may cover the claim and if the liability carrier has been notified;
- Contact information for any lawyer to whom the matter has been referred by the Institute;
- Identity of the officer or employee of the Institute who is responsible for the matter; and
- The location of all relevant correspondence and records relating to the threatened claim.

Finally, with regard to all pending and threatened legal actions, a clearly worded "legal hold" memorandum should be issued (and should be on file). Such memoranda should (a) be directed to all personnel – lay or religious – who may have possession or access to any correspondence, files, reports or other documentation that could relate to the pending or threatened claim, and (b) instruct such personnel to suspend all document destruction protocols (*See infra,* "What Should We Keep and What May We Throw Out?") and take all steps necessary to preserve all relevant documentation.

What Should We Keep – and What May We Throw Out?

In the past twenty years, a small industry has grown up around the design of document retention policies – organizational protocols that determine what records and files should be retained and for what period of time. There is no shortage of publicly available document retention standards and policies for consideration by religious institutes in deciding what record-keeping rules should be implemented. With the evolution of digital recordkeeping during the past twenty years, however, the need to "free-up space" in file cabinets and storage rooms is no longer really an important consideration.

Providing comprehensive recommendations with regard to an appropriate document retention policy is well outside the scope of this article. But for purposes of conducting a legal audit, the first question to be asked is whether the organization has a well-defined (meaning written and distributed) set of document retention policies. If the answer is in the negative, then a search of the Internet will provide a very large collection of forms that can be adapted to the needs of the Institute.

If a document retention policy is in place, the second question is whether that policy is being followed. A few random inquiries should provide the answer. For example, if the document retention policy calls for retention of tax records for five (5) years, the legal audit should include a perfunctory check to ensure that tax files from four years past are still in hand but that records from eight years ago are no longer retained.

For every religious institute, there are a few categories of records that should be retained and preserved without time limitation. Digitalization of records – simply scanning to a disc or a managed off-site storage provider – should overcome any concern about the need for physical office storage space. At the same time, electronic files that are to be retained indefinitely – pursuant to a formal document retention policy – should be preserved in at least two formats and maintained in at least two locations to insure against loss due to fire or other catastrophe.

A record retention policy for the Institute should provide for indefinite preservation of the following categories of files:

- Personnel records of all members of the Institute without limitation and should preclude deletion of any personnel documentation of any kind – even after the death of the member;

- Records of all policies of liability insurance, including policies for individual communities or provinces that have been canonically suppressed, merged or otherwise gone out of existence;

- All correspondence received by the Institute (including any predecessor religious communities) regarding allegations of misconduct by members of the Institute or by any laypersons who may have been employed, directly or indirectly, by the Institute or by any predecessor community; and

- All correspondence, of any kind, with lawyers, advocacy groups, school administrators, diocesan officials or law enforcement agencies relating to allegations of misconduct by any member of the Institute – whether living or dead – or any layperson employed by the Institute.

In reviewing any existing document retention policy, steps should be taken to ensure that there are no informal protocols or practices among the leadership of the Institute to purge or otherwise remove documentation relating to sexual or other forms of misconduct. Whether a specific record will be harmful to reputation – or may be perceived as supporting an adverse factual finding in some unknown future proceeding – is not a consideration.

Liability insurance records, including for all predecessor communities, should be permanently retained and preserved. Historically, most liability insurance contracts involved "occurrence policies" that cover claims made many years after the event – so long as the conduct that prompted the claim took place during the coverage period. For this obvious reason, preservation of all insurance files may be critical to establishing liability insurance coverage for conduct alleged to have taken place years or even decades after the lapse of the policy.

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In using the information provided in this article to conduct a legal audit of your Institute, please bear in mind the inherent limitations in this kind of exercise. While the questions, answers and proposed steps that we have outlined should be of considerable use in identifying lapses in an Institute's legal profile, please remember that there is no substitute for the legal advice and counsel of a skilled lawyer or law firm with established expertise in the practice of non-profit corporate law, tax law and other related legal disciplines.