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***Challenges to Religious Liberty:
Practical Tips to Articulate Your Ministry's Identity and Purpose
and to Strengthen Your Legal Rights¹***

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Over the last few days, many religious organizations have been asking questions about how the *Obergefell* decision, holding that the U.S. Constitution requires states to license same sex marriages, will affect their ministries and how they can preserve their religious freedom rights. There are conflicting voices among the opinions released Friday, June 26. Justice Kennedy in the majority opinion wrote, "The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths..." *Obergefell, et al., v. Hodges, et al.*, No. 14-556, 2015 U.S. LEXIS 4250, at *48-49 (U.S. June 26, 2015). Conversely, Chief Justice Roberts in his dissent said, "Unfortunately, people of faith can take no comfort in the treatment they receive from the majority today." *Id.* at *92 (Roberts, C.J., dissenting).

It is important to consider how this decision, and other recent developments, may affect your ministry's religious freedom rights. This article contains some practical tips to help your ministry strengthen and better express its religious identity and mission so that it will remain free to bring hope and healing to future generations of people in need. Many ministries have, over time, proactively implemented many of the tips below to address a broad range of legal, regulatory, liability, and funding issues. Gammon & Grange, P.C. has been advising religious nonprofits about protecting their religious liberty and promoting their ministry purposes for more than 35 years and will provide more extensive guidance, both written and oral, on each of these issues in a webinar on Tuesday, July 7 at 2:00pm EDT. Please click on the following link to either sign up for the webinar or request additional information on the topic: <http://survey.constantcontact.com/survey/a07eb7vqk2vibjfd2b9/start>.

Your ministry's religious identity – the understanding of the purposes for which it was established, what it does, and why it does it – is the foundation for its service to God and to others. An important part of maintaining that religious identity and the freedom to faithfully serve is making certain that the ministry clearly and consistently articulates how faith permeates its work. It should be evident from its documents and practices that religious faith is at the heart of its mission and services. How well your ministry does this may determine its ability to maintain its religious character and core values that motivate it to selflessly serve others.

¹ **DISCLAIMER:** *This material constitutes legal information, and is NOT legal advice. Provision of this information does not establish an attorney/client relationship, nor does it constitute the rendering of legal services. Information contained in this presentation is intended for general informational purposes only and should not be relied upon for legal decision-making without first consulting legal counsel and considering the relevant laws and rulings in your state or jurisdiction and the specific factual circumstances of your organization.*

Tip #1: Clearly articulate your organization’s religious identity and religious purposes in all important organizational documents. This includes foundational and governing documents, documentation provided to employees and volunteers, and documents accessible to the public.² Establishing your organization’s religious identity will allow it to assert defenses found in the First Amendment and federal and state Religious Freedom Restoration Acts against lawsuits and claims. It will also establish a stronger basis for claiming the religious entity exemption from prohibitions on discrimination in employment.³

Tip #2: Recognize the advantages and disadvantages of how your organization is organized as a legal entity under state law and recognized as tax-exempt under federal law. The legal form or structure of an organization is generally an issue of state law. If your organization claims to be religious, but is incorporated as a non-religious nonprofit corporation in a state that offers a religious nonprofit corporation option, that fact may be used to attack the claimed religious identity. At the same time, the legal form must satisfy the federal tax-exempt requirements. It is also important to consider how related/affiliated organizations are established as legal entities and connected to your organization. Further, your organization may consider whether it may obtain IRS recognition as a church, a convention or association of churches, or an integrated auxiliary of a church in connection with its 501(c)(3) tax exemption determination.

Tip #3: Clearly articulate the specific religious character of and basis for your organization’s positions on foundational and other important issues. Your organization should identify what it considers to be foundational issues and explicitly base its position on Scripture and other expressly religious norms. Make a direct connection between the commitment to these beliefs and accomplishment of your tax-exempt purposes.

Tip #4: Clearly articulate the religious character of and basis for all of your organization’s specific ministries and ministry activities. This can be an issue for organizations whose activities may be considered secular such as rescue missions or soup kitchens.

Tip #5: Clearly articulate the specific religious character and requirements (“BFOQs or bona fide occupational qualification”) of specific employment positions. BFOQs must be narrowly tailored to the position as possible. Don’t overreach! The best rule of thumb in shaping BFOQs is to be consistent.⁴

Tip #6: Apply your organization’s standards and invoke these exemptions (Section 702 and BFOQ) with ruthless consistency. If your organization will “look the other way” and not apply a BFOQ requirement to avoid losing a good employee, it is not a true BFOQ. The failure to apply the exemptions consistently may waive the rights of your organization. Be thoughtful and prayerful about when and why your organization decides to invoke its rights and exemptions. The training of management employees on these issues should be a priority.

² Your ministry’s policies and procedures for employees or volunteers may be different than policies and procedures applicable to the individuals or families who benefit from the services provided.

³ Title VII of the Civil Rights act of 1964, as amended (“Title VII”), 42 U.S.C. § 2000e-1.

⁴ Some states have entity exemptions but do not have BFOQ exemptions.

Tip #7: Adopt a GOOD anti-harassment policy that recognizes religion is special. Articulate the basis for full respect of ALL religious rights, including those of the organization and of ALL employees and volunteers. Harassment should be defined in a way that permits religious speech, such as evangelism, and expressly states that the use of religious speech does not create a hostile work environment. Respond to claims of harassment promptly and encourage all employees to treat one another with respect.

Tip #8: Be careful about your organization's gracious sharing of its facilities. Providing unlimited availability of your facilities may convert it to a "public accommodation" or reduce your right to deny use to persons for practices inconsistent with your organization's beliefs. A solution is to adopt a Facilities Use Policy that articulates the religious nature and purposes for your organization's property and imposes religious requirements for its use. This policy should contain a clear approval process for outside use of the property.

Tip #9: Beware of governments bearing gifts. Before accepting any funds from any federal, state, or local government entity (or private organization that may be a recipient of government funds), have legal counsel carefully review the conditions of accepting the funding as well as the statutory and regulatory landscape to determine whether this may affect your organization's religious freedom rights. It is wise to consider whether it is prudent to establish a separate legal entity to receive, hold, administer, and account for such funds.

Tip #10: Recognize how not only your religious liberty rights but also your other constitutional and legal rights are impacted. In *Smith v. Employment Division*, the U.S. Supreme Court said that a claim that involves religious freedom in combination with another constitutional right, or a "hybrid right", will receive strict scrutiny, or the highest level of constitutional review. A stand-alone religious freedom claim receives only rational basis scrutiny, a much lower standard of review. A few possible "hybrid rights" that may apply are Free Speech, Free Press, Free Association, and Equal Protection. When articulating your organization's religious freedom rights, also articulate other potentially applicable rights.

Tip #11: Carefully identify, articulate, and document all of the "burdens" on your free religious exercise that result from the government's actions. Identify all of the specific harms that result from a challenged governmental action. An opposing party in litigation may argue that the government's actions do not substantially burden your free exercise of religion.

Tip #12: Use RFRA to the fullest, but be aware of limits and vulnerabilities. RFRA applies only to governmental burdens and actions, not private actions. Also, it may be amended by the legislature at any time.

Tip #13: Be vigilant and guard your flanks. Watch for efforts to pass or amend federal and state laws and regulations. Watch for attempts to promulgate new agency regulations or guidance, especially during the closing months of an administration.

Gammon & Grange, P.C. will host a webinar on July 7, 2015 at 2:00pm EDT that will address each of these tips in further detail. To sign up or request additional information, please visit <http://survey.constantcontact.com/survey/a07eb7vqk2vibjfd2b9/start>.