Litigation against Disaffiliating Dioceses:
Is it Authorized and What does Fiduciary Duty Require?

by Mike Watson

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This paper examines whether the Presiding Bishop is authorized to initiate and conduct recent property litigation and finds no source for such authority in the Constitution and Canons of the Episcopal Church. Arguments based on a presumed equivalence of the roles of the Presiding Bishop and Executive Council to those of a corporate CEO and board of directors are found not to be valid. The paper also examines claims that pursuit of litigation is necessitated by fiduciary duty. It concludes that no convincing case has been made that this is so. First, no person is under a fiduciary duty to undertake something that has not been authorized. Putting aside the issue of authorization, several factors relevant to a proper fiduciary duty analysis suggest refraining from litigation such as has been commenced against disaffiliating dioceses. In this connection, relevant fiduciary duties are not limited to those that may be owed to TEC as an organization, but also include duties owed to its member dioceses. Claims that a member diocese cannot disaffiliate and retain ownership of its property implicate the latter set of duties. The paper presents a case that the duties to dioceses include duties to those that have withdrawn because the claims against them are based on alleged consequences of their having been dioceses of TEC rather than the actions of an unaffiliated third party.

Presiding Bishop Katharine Jefferts Schori and others have maintained that pursuit by The Episcopal Church of property litigation is required by fiduciary duty. For example, in October 2007 the Presiding Bishop gave deposition testimony in the Virginia litigation against several congregations, saying, "I have a responsibility both in a fiduciary sense and an ecclesiastical sense to protect the assets of the Episcopal Church and to protect the integrity of the Episcopal Church"[1] and also that "I believe I have a fiduciary responsibility to protect the assets of the Episcopal Church for the mission of the Episcopal Church."[2] In the same testimony, asked about her refusal to suspend litigation in response to the requests of the Anglican Communion Primates in the Dar es Salaam communiqué, she responded, "I cannot suspend what I have a fiduciary duty to

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[1] Videotape Deposition Designations of Bishop Katharine Jefferts Schori at 61:7-10, *In re Multi-Circuit Episcopal Church Litigation*, No. CL 2007-248724 (Va. Cir. Ct. (Fairfax County) Oct. 30, 2007), available at http://www.cflaac.com/documents/103007%20Deposition%20of%20Bishop%20Schori.pdf.

[2] *Id*. at 66:4-10.

protect."[3] In connection with the San Joaquin litigation, Bishop Jerry Lamb said the litigation was required by "a canonical, fiduciary and moral duty to protect the assets and property of the church for the church's mission." [4]

A recurring element in statements attempting to justify litigation against dioceses and parishes is the assertion that TEC needs the assets for "mission." Apparently it is assumed that the Church's mission cannot be conducted unlinked from a national organizational structure. The linkage of litigation to mission has even worked its way into the Episcopal Church's financial reporting and budget categories. The litigation line item in the financial statements and budgets bore the caption "Property protection for mission" beginning in March 2007 and continuing until September 2007 when the words "legal costs" were appended after concern was expressed by audit committee members that the caption did not clearly indicate the nature of the expense.[5] A more recent association of property lawsuits with the Episcopal Church's mission was made in a post-General Convention 2009 letter from the Presiding Bishop to the House of Bishops, attributing her position on property disputes to the requirements of "our participation in God's mission as leaders and stewards of The Episcopal Church . . . ."[6]

In the same letter to the House of Bishops, the Presiding Bishop elaborated on conditions for property settlements that possibly indicate she is facing pressure from at least some quarters for a less rigid stance. It is not at all clear at this point, however, that the fine tuning expressed in the letter points to any new flexibility that will make a practical difference.

It is at least a starting point that the Presiding Bishop acknowledges that she has duties that are of a fiduciary character. Nonetheless, the basis for the conclusion that those duties require the pursuit by TEC of the legal battles currently being waged is less than clear. A purpose of this paper is to explore some of the considerations relevant to determining whether the Presiding Bishop's conclusion is correct. In doing this, it is necessary first to consider whether the Presiding Bishop is even the appropriate person to

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[3] *Id.* at 65:18-66:3.

[4] Pat McCaughan, *San Joaquin diocese, Episcopal Church file suit to regain property*, Episcopal Life Online, April 25, 2008, http://www.episcopalchurch.org/79901_96679_ENG_HTM.htm.

[5] "Question arose about the title, 'Property protection for mission,' and comment made that it may wiser to re-title the line to show that it is a legal expense. . . . Consensus was that the line should be called what it is." Minutes of September 17, 2007 meeting of Audit Committee of the Domestic and Foreign Missionary Society, http://www.episcopalchurch.org/gc/ccab/EC_Ctme_Audit_2007_Sept.pdf. Later the line item caption was changed to refer to "legal assistance to dioceses," dropping reference to mission. *See* DFMS Budget—New Structure at **Error! Hyperlink reference not valid.** and Budgetary Summary as of the end of March 2008 at http://www.episcopalchurch.org/documents/2008MarchBudgetarySummary.pdf.

[6] *New York: A Message from the Presiding Bishop on Property Issues*, Anglican Mainstream, August 1, 2009, http://www.anglican-mainstream.net/?p=13638.

exercise the responsibility claimed. These objectives will be undertaken primarily in the context of the pending litigation against four withdrawn dioceses[7] and related individuals and affiliated diocesan organizations.

Because ultimately the laws of many different states are (or may in the future be) at issue, because the objective is to discuss principles rather than attempt to express definitive conclusions applicable to particular pending cases, and for reasons of economy, reference will frequently be made (primarily in the notes) to legal sources of broad applicability, such as Restatements of the Law published by the American Law Institute and to statutory provisions and related commentary promulgated by the National Conference of Commissioners on Uniform State Laws and the Committees on Corporate Laws and Nonprofit Organizations of the Section of Business Law, American Bar Association, rather than to state-specific authorities.

The Question of Authority

One thing to note at the outset is that fiduciary duties do not require an individual within an organization to do something that the individual is not authorized to do. To the contrary, one of the duties of a person in the Presiding Bishop's position is to take action only within the scope of her actual authority.[8] Thus it is not enough for the Presiding Bishop to think that TEC has a meritorious claim, that it would be advantageous to TEC's mission strategy to prevail in the litigation and that the benefits of the effort outweigh the costs and possible liability. If those are her views, she should advocate them as appropriate, but to instruct attorneys to file lawsuits on behalf of TEC should have required more.

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[7] TEC does not acknowledge that the dioceses have in fact withdrawn. This paper will generally speak of them as having withdrawn and deal specifically with TEC's contention that they have not where appropriate.

[8] Restatement (Third) of Agency § 8.09(1) (American Law Institute 2006). For purposes relevant to this inquiry, the Presiding Bishop's position is that of an agent, *see infra* note 40 and accompanying text. "Actual authority" is a term used to describe authority that, as between the principal and the agent, the agent in fact possesses, in contrast to "apparent authority," a broader category on the basis of which the agent's actions may bind the principal even if outside the scope of actual authority. Restatement (Third) of Agency §§ 2.01, 2.03. If an agent takes action beyond the scope of the agent's actual authority, the agent is subject to liability to the principal. Restatement (Third) of Agency § 8.09, comment *b*. The possibility of such liability extends to agency in the organizational context. For example, in the case of limited liability companies,

> The members can recover from a member or a manager who brings, carries on, or settles a suit the damages to the firm resulting from a suit that was unauthorized or breached the member's or manager's fiduciary duty of care.

Larry E. Ribstein and Robert R. Keatinge, *Ribstein and Keatinge on Limited Liability Companies* §10:2, text accompanying n. 20 (2nd ed. 2008).

Apparently, the Executive Council of The Episcopal Church acquiesced in the position that the Presiding Bishop is the person with authority to initiate and conduct litigation against dioceses. The draft budget for the 2010-2012 triennium adopted by the Executive Council in January 2009 [9] stated:

> The [Office of the Presiding Bishop] has responsibility for . . . the preservation of the legacy of The Episcopal Church in instances where bishops have sought to remove dioceses from the church.

The activity of "preservation of the legacy" is meant to embrace litigation, because the quoted language relates to a portion of a budget presentation for the "Presiding Bishop's Office" that includes a category now called "Title IV & Legal Assistance to Dioceses" (changed from the caption "Property Protection for Mission" noted earlier and subsequent variants). This budget category is further described as follows:

> These expenses are related to property litigation and disciplinary situations, as well as legal assistance to dioceses. Fundamentally, this activity concerns the preservation and ongoing stewardship of our heritage and resources, both financial and structural.[10]

Some of Bishop Jefferts Schori's statements indicate she believes not only does she have a fiduciary duty to bring the property litigation on behalf of TEC, but also that the duty is hers and hers alone. Her deposition testimony in the Virginia litigation referred to above was to the effect that the duty to bring litigation is that of the Presiding Bishop and not that of General Convention or the Executive Council.[11] Although the

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[9] *Draft Budget and Mission Statement of the Executive Council to the 76th General Convention* 14, http://www.episcopalchurch.org/documents/Budget_DRAFT_0313092.pdf.

[10] *Id.* at 16.

[11] The following extract is from the deposition testimony.

13 Q. [By Mr. Coffee] Did the General Convention authorize the
14 Episcopal Church to intervene in the 57-9
15 proceedings?
16 A. [The Witness] That is not a duty of the general
17 Episcopal Church.
18 Q. So the answer is no?
19 A. Correct.
20 Q. Did the General Convention authorize the
21 Episcopal Church to file suit against the CANA
22 congregation?

1 A. That is not a duty of the General
2 Convention.
3 Q. Is it a duty of the Executive Council?
4 A. No.
5 Q. That is your duty?
6 A. It is.
7 Q. So it is your view that you are the
8 authority to initiate litigation, without the

deposition testimony related specifically to litigation against congregations rather than dioceses, no reason seems evident why the Presiding Bishop would consider that she has authority to act on her own in one case but not the other.

But what is the source of the Presiding Bishop's claimed authority to bring this litigation? TEC's Constitution, which is the location of "the basic Articles for the government of this Church,"[12] provides in Article I, Section 3 for the office of the Presiding Bishop but does not specify any role of the Presiding Bishop in governance other than that implicit in the title (*i.e.,* to preside at meetings of the House of Bishops).[13] Article I, Section 3 says that other *duties* shall be prescribed by canon,[14] but does not provide for the canons to confer upon the Presiding Bishop other *authority*. Apart from Article I, Section 3, there are only three references to the Presiding Bishop in the Constitution. One says that the Presiding Bishop, if authorized by the House of Bishops, may request a bishop to act temporarily in an unorganized territory.[15] Another places the Suffragan Bishop for the Armed Forces under the direction of the Presiding Bishop.[16] The last provides for the Presiding Bishop to receive certifications from the bishops authorized to vote in the House of Bishops when they approve the consecration of a bishop to act in foreign lands.[17]

Since there is nothing in the "basic articles for the government of this Church" that gives the Presiding Bishop the authority to bring litigation against dioceses, what then of the responsibilities of the Presiding Bishop assigned by the canons? If the canons had language broad enough to cover litigation authority against dioceses, it would be necessary to consider whether it would impact governance too fundamentally to be effective without constitutional warrant. As it is, no canonical provision comes close to anything that could be construed as authorizing the Presiding Bishop to issue warnings to

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9 formal approval of the General Convention?
10 A. Yes.
11 Q. And it is your view that you have the
12 authority to incur substantial legal expenses in
13 litigation without the approval of the General
14 Convention?
15 A. Yes. The General Convention has
16 provided some funds in its budget to be used as
17 necessary.

Videotape Deposition Designations of Bishop Katharine Jefferts Schori, *supra* note 1, at 85-86.

[12] *Constitution and Canons: The Episcopal Church*, Preamble to the Constitution (Church Publishing 2006).

[13] A reference to the Presiding Bishop was first added to the Constitution in 1901. The function of presiding over the House of Bishops and the title descriptive of that function predated the constitutional reference. *See* I Edwin A. White and Jackson A. Dykman, *Annotated Constitution and Canons* 23-25 (Church Publishing 1981).

[14] *Constitution and Canons*, *supra* note 12, Constitution, Article I, Section 3.

[15] *Id.,* Constitution, Article II, Section 3.

[16] *Id.,* Constitution, Article II, Section 7.

[17] *Id.,* Constitution, Article III.

dioceses against disaffiliation and then to initiate litigation when that eventuality ensues. To see this, consider the two potentially relevant canons in Title I, Section 2 pertaining to the Presiding Bishop and Section 4 pertaining to the Executive Council and the Presiding Bishop's assigned duties relating to that body.

The introductory language of Canon I.2.4(a) provides that the Presiding Bishop "shall be the Chief Pastor and Primate of the Church." There isn't a serious argument that designating a bishop as chief pastor (an action taken in 1967) is sufficient to confer authority to pursue legal claims against dioceses led by other bishops. The language "and Primate" was added in 1982, with the legislative history indicating that this change was titular in nature with no intention to expand authority or confer archiepiscopal jurisdiction.[18] Canon I.2.4(a) then continues with a series of numbered clauses, only one of which need be discussed. Clause (1) provides that the Presiding Bishop shall

> [b]e charged with responsibility for leadership in initiating and developing the policy and strategy in the Church and speaking for the Church as to the policies, strategies and programs authorized by the General Convention.

The language relating to leadership in initiating and developing policy and strategy was added in 1967 at the same time as "chief pastor." At the time, the language was explicit that the policy and strategy function was something to be done *in the capacity of chief pastor*.[19] At some time between 1991 and 1997 the words providing this explicit connection were changed but there is no indication that the change was intended to be substantive.[20] Moreover, examining the two parts of this clause makes clear that the Presiding Bishop's role is *leadership in initiating and developing* policy and strategy, in contrast to the responsibility that resides in the General Convention for *authorizing* policy

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[18] *See* Edwin A. White and Jackson A. Dykman, *1991 Supplement to Annotated Constitution and Canons* 21-22 (Domestic and Foreign Missionary Society 1991). The original proposal before the 1982 General Convention was to substitute "Archbishop" for Presiding Bishop. According to recent commentary prepared by Robert C. Royce, Esq., the rejection of the original proposal demonstrated that there was "no inclination to even bestow the image of metropolitical authority on a Presiding Bishop." Robert C. Royce, Esq., *The Roles, Duties and Responsibilities of the Executive Council, Domestic and Foreign Missionary Society, Presiding Bishop and President of the House of Deputies in the Governance of the Episcopal Church* 10 (May 31, 2008). http://www.episcopalarchives.org/AR2009-011-4_Roles_by_Royce.pdf

[19] The language read, "The Presiding Bishop of the Church shall be the chief pastor thereof. As such he shall

> (1) Be charged with the responsibility for giving leadership in initiating and developing the policy and strategy of the Church . . . ."

See I White & Dykman, *supra* note 13, at 197-202.

[20] See *id.* and *compare* Resolution 1997-A183 (concurred), http://www.episcopalarchives.org/cgi-bin/acts/acts_resolution-complete.pl?resolution=1997-A183. The words "as such" were removed and the two sentence joined with "and."

and strategy. In recent commentary prepared by Robert C. Royce, Esq. at the request of the Presiding Bishop and the President of the House of Deputies on various roles and responsibilities, the duties of the Presiding Bishop under clause (1) of Canon I.2.4(a) are said to be of a prophetic nature, with a contrast drawn to the duties of Executive Council, which are said to be programmatic in nature.[21] In making this distinction, Mr. Royce draws on a 1997 report of the Standing Commission on Structure emphasizing the communicative aspects of the role of the Presiding Bishop versus the implementation and management role assigned to the Executive Council.[22] No suggestion emerges as to responsibility that would include authorizing litigation.

Bishop Stacy F. Sauls attempts to locate authority for the Presiding Bishop to conduct litigation by identifying the Presiding Bishop as the chief executive officer of TEC,[23] but that identification is incorrect.[24] Presumably he bases his assertion on the canon that provides that the Presiding Bishop is chief executive officer of TEC's *Executive Council*. This leads to examination of the second potentially relevant canon referred to above. Canon I.4.3(a) provides that the Presiding Bishop shall be *ex officio* the Chair and President of the Executive Council and that the Chair and President shall be the chief executive officer of the Executive Council. Further, "as such the Chair and President shall have ultimate responsibility for the oversight of the work of the Executive Council in the implementation of the ministry and mission of the Church as may be committed to the Executive Council by the General Convention." Does the conclusion that the Presiding Bishop does not have authority to initiate or conduct litigation against dioceses change when her role on the Executive Council is taken into account? Since the Presiding Bishop's duties and responsibilities under Canon I.4.3(a) cannot extend to

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[21] Royce, *supra* note 18, at 9.

[22] Passage from *Report of Standing Committee on Structure to General Convention*, 1997 Blue Book 486, *quoted in* Royce, *supra* note 18, at 10.

[23] Stacy F. Sauls, *Our Constitutional Heritage: Why Polity and Canon Law Matter*, text accompanying nn. 28-29, http://www.episcopalcafe.com/daily/chicago_consultation/the_fifth_horseman_of_the_apoc.php (Dec. 5, 2007). ("In TEC, that fiduciary duty [to guard property] rests in particular on the Presiding Bishop as the organization's chief executive officer . . . .").

[24] Even if the Presiding Bishop were the chief executive officer of TEC, that would not be dispositive as to authority to bring litigation. Cases finding litigation-related authority to be inherent in the office of a chief executive officer or president most frequently arise in the context of assessing apparent authority rather that the actual authority relevant for the purposes being considered here. *See, e.g.,* Restatement (Third) of Agency § 3.03, comment *e(3)*. Even in the apparent authority context, the Restatement observes that "many courts limit the president's litigation-related authority when the context is an intra-corporate dispute among groups of investors or individuals in a closely held corporation. It is in this context that most litigated disputes over the president's litigation authority surface." *Id. See also* Principles of Corporate Governance: Analysis and Recommendations § 3.01, Reporter's Note on Authority of Senior Executives (American Law Institute 1992).

matters outside the scope of those assigned to the Executive Council, it is necessary to consider further the duties of the Executive Council.

The Executive Council is not a constitutionally established body. There is only one reference to the Executive Council in the Constitution, namely, providing for the Council to approve the text of the constitution of any new diocese.[25] The first sentence of Canon I.4.1(a) establishes the Executive Council and assigns its single duty: "There shall be an Executive Council of the General Convention . . . whose duty it shall be to carry out the program and policies adopted by the General Convention." The second sentence of Canon I.4.1(a) elaborates by providing that the Executive Council "shall have charge of the coordination, development, and implementation of the ministry and mission of the Church." Canon I.4.2(e) provides that the "powers" of the Executive Council are the ones conferred on it by Canon and such further powers as may be designated by the General Convention, and adds that the Executive Council "between sessions of the General Convention may initiate and develop such new work as it may deem necessary."

Since TEC's litigation strategy is argued to be in furtherance of "mission,"[26] could the cited language in Canon I.4.1(a) be viewed as conferring on the Executive Council the authority to initiate and conduct litigation? That "mission" cannot reasonably be so construed is reinforced by reference to what was considered to be included in "the Church's Mission" by Bishop Lloyd, the primary architect of the 1919 canonical changes that established the Executive Council (then called the National Council), namely, missions, religious education and social service.[27] As reflected in Section 1 of the original Canon 60 adopted in 1919, the responsibility assigned to the "Presiding Bishop and Council" was the administration and carrying on of "Missionary, Educational, and Social work."[28] From the outset, the responsibilities of the Executive Council were related to missionary, educational and social work and budgetary and financial matters ancillary to the carrying on of that work, not legal relationships with dioceses or other governance matters.[29]

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[25] *Constitution and Canons*, *supra* note 12, Constitution, Article V, Section 1.

[26] See the quotations from the deposition testimony appearing in the introductory paragraphs.

[27] I White & Dykman, *supra* note 13, at 252-53.

[28] Canon 60, Section 1 (1919), *quoted in* I White & Dykman, *supra* note 13, at 249.

[29] That the litigation is not something that is authorized by canon is supported by observations reflected in minutes of the September 2008 meeting of the Joint Standing Committee on Program, Budget and Finance. In response to a question about why property litigation expenses had been included in the "canonical section of the budget," Treasurer Kurt Barnes responded not by maintaining that the property litigation expenses were canonically authorized, but instead by explaining (in the words of the minutes) that "until 2003, Title IV represented the bulk of our legal expenses and it was positioned in the canonical section and, by default, the other expenses were included as well." September 2008 minutes of the Joint Standing Committee on Program, Budget and Finance, at http://www.episcopalchurch.org/gc/ccab/JSC_PB&F_2008_Sep.pdf, at p.6. In effect, Mr. Barnes characterized the new litigation expense category as piggybacking on

What of the ability of the Executive Council to initiate and develop "new work" between sessions of the General Convention as provided in Canon I.4.2(e)? The implicit antecedent for "new work" in Canon 60 as adopted in 1919 was the "Missionary, Educational, and Social work of the Church" for which the Executive Council was assigned responsibility in the sentence immediately preceding the reference to new work. Although the language "Missionary, Educational, and Social work" has changed in the current canonical expression of the Executive Council's duty, it remains the case the "new work" language does not appear as an independent statement of an additional duty. It is a part of a paragraph granting "powers" to be used in aid of already prescribed duties. "New work" therefore can cover additional tasks encompassed by assigned areas of responsibility, but not new responsibilities. Further, a test of necessity must be met for new work to be initiated and developed. It follows that the new work clause is not a grant of authority for the Executive Council to undertake whatever it deems appropriate between meetings of the General Convention. Indeed, a reading that would encompass so broad a grant of authority has been rejected by General Convention, in the form of proposed canonical language that would have incorporated the concept that the Executive Council could "act for" the General Convention.[30] An analysis similar to that applicable to the new work clause would apply to "other work" referred to in Canon I.4.6(f) relating to the budget.

Moreover, an argument that the canonical language is broad enough to give the Executive Council the authority to initiate litigation against dioceses would face a constitutional impediment. As noted above, the Executive Council is not a constitutionally established body. Since the Constitution is the locus of principles for basic governance, canons or interpretations of canons conferring on Executive Council comprehensive authority to act for General Convention would represent such a fundamental change in governance so as to belong, if anywhere, in the Constitution.

Inquiry into the Executive Council's authority such as that briefly just undertaken is interesting but not really necessary for evaluation of the asserted source of authority, because both the Presiding Bishop and the Executive Council have taken the position that the responsibility for authorizing litigation lies with the Presiding Bishop and not with the Executive Council.[31] The Presiding Bishop goes further by claiming authority not even

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the canonical status of the Title IV expenses (relating to clergy discipline). The property litigation expenses were shifted from a separate subcaption under the "canonical" budget category to "Presiding Bishop's Office" in February 2008. However, it remains the case that according to Canon I.4.6(b), all expenses of the office of the Presiding Bishop are required to be in the canonical category. It is understandable that Mr. Barnes, when asked, was not able to identify any requirement of the canons with which to associate property litigation expenses.

[30] I White & Dykman, *supra* note 13, at 273.

[31] See the excerpts from the Presiding Bishop's deposition testimony and from the Executive Council's budget draft quoted above.

deriving from that of the General Convention.[32] Before leaving the subject of the Executive Council, however, it is worth mentioning a diversionary argument sometimes made: that the Executive Council functions as a corporate board of directors. Those making this association include Bishop Sauls, who in the same discussion mentioned above about the Presiding Bishop being the CEO of TEC, stated that the Executive Council "is by canon the Church's board of directors."[33] The correct response to Bishop Sauls and others is that TEC is not a corporation and there no canon stating that the Executive Council is the Church's board of directors or conferring on it authority equivalent to that of a corporate board. This is important because the analogy to a corporate board seems to be deployed in an effort to avoid the need to locate sources of more extensive authority for the Executive Council in the Constitution and canons, an exercise bound not to encounter much success.[34]

In a corporation, the structure of governance is based on a statutory framework that typically confers on the board the authority to manage or direct the management of the business and affairs of the corporation[35] (or authority expressed in words to similar effect). In exercising this general authority conferred by statute, the directors of a corporation do not act as the agents of shareholders or members or anyone else.[36]

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[32] See the deposition testimony quoted in note 11, *supra*.

[33] Sauls, *supra* note 23, text accompanying n. 29. Bishop Sauls apparently differs from the Presiding Bishop in that he has maintained that the fiduciary duty to litigate in order to protect property is one shared by the Presiding Bishop and the Executive Council, and that in the event of a conflict in their respective positions, the vote of the Executive Council would prevail. *Id*., at text accompanying nn. 29-30. Regarding possible confusion with the board of directors of the Domestic and Foreign Missionary Society, see *infra*, text accompanying note 45.

[34] Some descriptions of Executive Council authority broader than can be supported by the Constitution and Canons may be found in the study paper on governance by Robert C. Royce referred to *supra* at note 18 and accompanying text. Statements about the Executive Council's authority made or cited by Mr. Royce include:

- "The Executive Council acts for General Convention, when the General Convention is not in session." (p. 2)
- A quotation from a report of the Standing Committee on the Structure of the Church included in the 1997 Blue Book: "The Executive Council is the executive board of the church and such a directing board exercises full corporate and fiduciary responsibilities for the policies, strategies and budgets adopted by the General Convention and will function as a true directing board." (p. 3)
- "Executive Council [is] the central corporate authority in the governance of the Church, when General Convention is not in session." (p. 6)

[35] *See, e.g.*, Delaware General Corporation Law, § 141(a).

[36] "Although a corporation's shareholders elect its directors and may have the right to remove directors once elected, the directors are neither the shareholders' nor the corporation's agents as defined in the section, given the treatment of directors within contemporary corporation law in the United States. Directors' powers originate as the

Instead, the board has direct responsibility for management and gives direction to the organization's agents. If the Executive Council were the board of directors of a corporation, it would not be necessary to locate specific sources of authority for its management activities, but only to check for limitations on that authority. But since TEC is not a corporation, management authority does not flow directly to a board simply as a result of the way the corporate law operates, but must instead be specified in the governing instruments.

TEC is not a corporation but an unincorporated voluntary association.[37] (The identity of TEC as a voluntary unincorporated association and how that characteristic fits into a broader analysis of TEC's polity is discussed in more detail in Mark McCall's paper "Is the Episcopal Church Hierarchical?"[38]) For an unincorporated association, there is no statutory framework conferring on a board of directors or other body the power and authority to manage the association's affairs.[39] Instead, when the managerial roles are not performed by the associating parties themselves (in TEC's case the member dioceses), the primary relationship defining those managerial rules is that between principal and agent. The scope of duties and authority of those acting on behalf of the association is determined by the law of agency, as supplemented by the association's internal rules.[40] Agency is the relationship that arises when one person (a "principal")

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legal consequence of their election and are not conferred or delegated by shareholders." Restatement (Third) of Agency § 1.01, comment *f(2)*.

[37] The characterization of The Episcopal Church as an unincorporated association is not something that is disputed by TEC. It so characterizes itself, including in the audited financial statements of the DFMS and in numerous legal papers such as complaints filed in the suits brought against the disaffiliating dioceses.

[38] Mark McCall, Esq., *Is the Episcopal Church Hierarchical*, Anglican Communion Institute, 41-43 (Sept. 2008), http://anglicancommunioninstitute.com/wp-content/uploads/2008/09/is_the_episcopal_church_hierdoc.pdf.

[39] An exception may be found in the new Revised Uniform Unincorporated Nonprofit Association Act (2008) (RUUNAA), which contains a basic governance framework (most of which may be varied by agreement). See RUUNAA, sections 16-27. Concerning the authority of persons acting in a managerial capacity, the RUUNAA's default provision (i.e., that applicable when no contrary provision is included in the governing documents) is that all matters relating to the association's activities are to be decided by managers except for matters reserved for approval by members. RUUNAA, section 22. However, the default provisions reserve broad classes of activities for approval by members including, among others, any act undertaken outside the ordinary course of the association's activities. RUUNAA, section 16. If RUUNAA were to become the law governing the internal affairs of TEC, the result that the Presiding Bishop does not have authority to initiate litigation of the type being discussed would not appear to change. (Generally, the subject of the extent to which a statute like RUUNAA governs the internal affairs of an unincorporated association versus other matters such as relations with third parties is not dealt with in this paper. See RUUNAA, section 4.)

[40] Persons acting in a managerial capacity in an unincorporated association do so in the role of agents. See Comment 1 to Section 15 of RUUNAA to the effect that members

authorizes another person (an "agent") to act on the principal's behalf and subject to the principal's control.[41] In the case of TEC, the persons who act in a managerial capacity and therefore act as agents include members of the Executive Council,[42] the Presiding Bishop, TEC's various other officers and the members of its other committees and boards.[43] From a legal perspective, they function as agents of the members of the unincorporated association (the dioceses), or to the extent the unincorporated association is recognized as an entity itself, agents of the association.[44] Although it would be possible for TEC to restructure itself so that the role of the Executive Council approximates that of a corporate board, to do so would require changes to TEC's Constitution and Canons or conversion to another form of entity, neither of which has been done. As TEC is now structured, the board of directors analogy does not provide a way around the necessity to identify specific sources for the authority of the Executive Council.

It might be argued that there does exist one corporate entity, the Domestic and Foreign Missionary Society, the board of directors of which consists of the same persons as constitute the Executive Council, and therefore that the DFMS could exercise broad corporate powers not available to the Executive Council as such. However, the litigation is said to be brought on behalf of TEC. The DFMS, which like the Executive Council is not a body that was organized pursuant to a requirement of the TEC's constitution, is not at all the same as TEC. Although the DFMS may have the authority to hold and manage assets that would otherwise be held by TEC, there is no constitutional or canonical provision giving the DFMS the authority to seek to establish ownership claims to diocesan assets.[45] (Moreover, as noted above, the Presiding Bishop claims to exercise

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who are also managers are considered agents because of their managerial roles, but that members who are not managers are not so considered. The subject of organizations as principals in a principal – agent relationship is also discussed, for example, in Restatement (Third) of Agency § 1.03, comment *c*, § 2.01, comment *e*, and § 3.03, comment *c*.

[41] Stated more completely, "Agency is the fiduciary relationship that arises when one person (a "principal") manifests assent to another person (an "agent") that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act." Restatement (Third) of Agency § 1.01.

[42] White and Dykman characterize the Executive Council as "an agency and servant of the General Convention." I White & Dykman, *supra* note 13, at 273.

[43] In speaking of the Presiding Bishop's role as being that of an agent, the intention is not to refer to doctrinal matters or liturgical, ceremonial, theological or pastoral duties, but to managerial responsibilities relevant to the subject of this paper, which include those affecting the rights of other parties under civil law.

[44] Compare sections 4, 6 and 7 of the Uniform Unincorporated Nonprofit Association Act (1996) (UUNAA) providing for entity treatment for limited purposes, thereby reversing the common law rule, with section 5 of RUUNAA, providing for comprehensive entity treatment.

[45] Disposition of funds of the DFMS is dealt with in Canon I.4.2(f). Even a corresponding provision on the receipt side (which without more would not embrace

litigation authority in her own right, not by way of authority derived from that of the Executive Council or the DFMS.) The board of directors of DFMS should be concerned to see that monies being spent on any litigation activities are properly authorized on behalf of TEC, but that DFMS is itself a corporation does not change the analysis for TEC.

A question related to authorization concerns the "capacity" of an unincorporated association to sue on behalf of its members. The common law rule is that an unincorporated association does not have the capacity to sue or be sued, so that the parties to any litigation would have to include all the individual members of the association.[46] In many jurisdictions, the common law rule has been varied by statute. For example the Uniform Unincorporated Nonprofit Association Act, adopted in about a dozen states, provides that a nonprofit unincorporated association may initiate, defend and otherwise participate in litigation and other proceedings in its own name.[47] Other states specify particular procedures necessary for an unincorporated association to bring suit in its own name. For example, in Pennsylvania, there is a rule of procedure requiring suits by an association to be prosecuted in the name of one or more members appointed as trustees *ad litem*.[48] Thus in the current Pittsburgh litigation, TEC's pleadings have been filed on behalf of the Right Reverend John C. Buchanan, said to be acting as Trustee *ad litem*. Bishop Buchanan does not, however, appear to fulfill the requirement of the rule that a trustee *ad litem* be a member of the association. The term "member" in the legal sense often differs from common usage, and simply because an association calls a person a member does not make the person a member for relevant legal purposes.[49]

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authority to conduct litigation) seems to be assumed to exist rather than being spelled out canonically.

[46] UUNAA, Prefatory Note, seventh paragraph.

[47] UUNAA, Section 7; adopted in Texas, for example, as Tex. Rev. Civ. Stat. Ann. Art. 1396-70.01, sec. 8.

[48] 231 Pa. Code Rule 2152. Another example of such a statute is New York General Associations Law § 12, providing that certain suits may be maintained by the president or treasurer of an unincorporated association. All this does, however, is to remove the incapacity of the association to sue at all. It does not go to the question of whether in any particular case the lawsuit has been properly authorized by the association's members.

[49] A member of a local parish is not a "member" (in the sense used here) of TEC the unincorporated association, just as membership in a civic or other nonprofit association resulting from being a contributor does not typically give rise to membership in the legal sense with accompanying rights to select management. *See* RUUNAA, comment 4 to section 2 (explaining that in most cases contributors are not members for purposes of the Act and that an association's calling a person a member does not make the person one). Since TEC is not organized under a state statute governing its internal affairs, under common law principles its members are those who associate themselves to form the association. In the case of TEC, it was the dioceses that associated themselves in 1789 (except that initially the dioceses were identified simply as States or Churches in the several States). That the dioceses are the members can be seen from the original 1789 Constitution, which refers to the Churches in the States as the bodies that adopt (or, in the

If there has somehow occurred a proper authorization on behalf of TEC for the filing of the lawsuits against dioceses, there seems to be, at a minimum, the lack of an adequate disclosure or explanation as to how this has occurred. It might be objected that the absence of authority in either the Presiding Bishop or the Executive Council would leave TEC without practical means to vindicate the rights it claims. In addition to raising the question whether it would really be so difficult to take action on such a significant action at General Convention, perhaps even at a special meeting,[50] such an objection begs the question of whether TEC has rights to vindicate. If it doesn't have the right to stop a diocese from disaffiliating, then it doesn't need someone authorized to make that effort. The prior Presiding Bishop took that position that the interpretation and application of the national church's property canons was a matter primarily for the dioceses.[51] Under that position, there would be no need for a source of the authority now claimed by the present incumbent. (There is no impediment to TEC's ability to constitute new dioceses to replace the disaffiliated ones in the territories involved; it is the property claims that occasion the litigation.)

A final question relates to whether any action taken at the 2009 General Convention somehow serves to correct the lack of earlier authorization. The applicable legal concept is that of "ratification," which is an affirmation of a prior action so that it is treated as having been taken with actual authority.[52] But it appears that General Convention took no action to ratify the litigation decisions and it seems unlikely that the action taken by General Convention to approve a budget containing one $3 million line item for future litigation expenses out of a $121 million triennium budget (approximately 2.5% of the total) could plausibly be regarded as tantamount to ratification, especially since, as appears to be the case, the two houses in approving the budget did not have before them substantive information about the background of and rationale for the litigation. In fact, a resolution calling for disclosure of information on litigation expenses was rejected by the House of Deputies.[53] The case for an implicit ratification would be especially difficult to make in light of the state of the public record that includes the Presiding Bishop's statement that the responsibility for litigation decisions was hers and not that of General Convention. The Presiding Bishop's August 1, 2009 letter to the

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case of subsequently admitted dioceses, accede to) the Constitution and that are entitled to representation in General Convention.

[50] By way of analogy, it has been observed that obtaining majority approval by members for initiating litigation is feasible and may make good sense in the limited liability company context, among other reasons because it gives members as a whole the ability to weigh the costs and benefits of suit. Larry E. Ribstein, *Litigating in LLCs*, 64 Bus. Law. 739, 749 (May 2009).

[51] *See, e.g.*, George Conger, *Presiding Bishop steps in to prevent church sales*, Religious Intelligence, August 11, 2009, http://www.religiousintelligence.co.uk/news/?NewsID=4861.

[52] Restatement (Third) of Agency, § 4.01.

[53] The text of Resolution C067, Litigation Expense Disclosure, is accessible at http://gc2009.org/ViewLegislation/view_leg_detail.aspx?id=964&type=Last and the disposition is shown at http://www.episcopalchurch.org/documents/ResStatusReport.pdf.

House of Bishops reveals that there was some (apparently inconclusive) discussion about property issues in one of the two Houses of General Convention "over two-plus afternoons."[54] Although the failure of General Convention to act on its own initiative to require a proper account to be given of the litigation decisions can hardly be excused, it is difficult to argue that General Convention's inaction should be regarded as a ratification affording cover to anyone acting without authority.

Fiduciary Duties

Without attempting to catalogue the variations in facts and applicable legal rules in the several disputes, it nonetheless seems possible to make some general observations about how fiduciary duties might apply to a decision to authorize litigation against the dioceses.

What are the fiduciary duties being spoken of? They constitute, at a minimum, the duty of loyalty and the duty of care.[55] There are variations among states and organizational contexts in the specifics of how these duties are formulated, but generally, the duty of loyalty is a duty to act loyally for the benefit of the person to whom the duty is owed and with the reasonable belief that the action is in the best interests of that person. Similarly, a common formulation of the duty of care is the duty to act with the care, competence and diligence that a person in a like position would reasonably believe appropriate under similar circumstances. These duties arise by virtue of assuming or occupying certain positions of trust and confidence.

More will be said about the substance of these duties later, but it is worth making brief note here of some terminological difference in how terms are used in different legal contexts. In the Restatement of Agency and many agency cases, "fiduciary" duties are considered limited to the duty of loyalty. The duty of care and related duties such as the duty to act only within the scope of actual authority as discussed previously and the duty to provide information are still duties that are owed, just characterized differently. Other agency cases and most cases arising in the context of corporations and other organizations classify both the duty of loyalty and the duty of care as fiduciary in nature. There may also sometimes be ambiguity as to whether particular facts implicate the duty of loyalty or the duty of care. For example, if a person fails to act loyally in the best interests of another person but the failure does not seem to be attributable to the first person's self interest, some authorities may classify the breach of duty as a breach of the duty of care. Generally, these differences in classification are not significant for this discussion and will not be dwelt upon.

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[54] *New York: A Message from the Presiding Bishop on Property Issues*, *supra* note 6.

[55] Other duties sometimes identified as fiduciary in nature include the duty of candor or disclosure and the duty of good faith. Disclosure duties are often considered to be embraced in the duties of loyalty and care. With respect to unincorporated entities, good faith is usually regarded as a contract-based obligation. *See, e.g.*, RUUNAA § 23, comment 2; Restatement (Second) of Contracts § 205 (1981).

As a preliminary to further discussion of fiduciary duties in the context of the litigation, it is useful to identify the primary claim being asserted on behalf of TEC in opposition to the dioceses and to say some things about the merits of the claim. Essentially, the claim is that a diocese is a "subordinate unit" that may not unilaterally separate or disaffiliate from TEC. The inability to separate is presented as an incapacity, not simply a failure to follow the right procedure. TEC does not at this point in the litigation against dioceses appear to be invoking directly Canon I.7.4 (the Dennis canon). Presumably this is because the Dennis canon purports to apply to property held by or for the benefit of parishes and missions but not to property owned by the diocese or other diocesan instrumentalities in their own right. TEC wishes at this stage, by asserting control over the dioceses as "subordinates," to establish indirect control over diocesan property and congregations within the dioceses. Separate claims based on the Dennis canon with respect to property of parishes and missions can be asserted later if TEC decides.

How sound does this claim appear to be? It is relevant to ask because it may make a difference in the outcome of a decision properly informed by an awareness of fiduciary duties whether Presiding Bishop Schori is right when she wrote recently to the members of the House of Bishops that "Clarity continues to emerge in the legal realm." and that "in every case which has concluded, The Episcopal Church has prevailed."[56] Or could it be the case instead that while the Episcopal Church has prevailed in a number of cases in a small number of states it has not done so in all cases,[57] that the current status of the two pending high profile cases favors TEC's position in one but favors its opposition in the other (with most at stake monetarily and in numbers of parishes in the latter),[58] that no case that TEC has initiated against a diocese has ever been concluded, and that law review commentary does not in general support TEC's positions.

The argument that dioceses cannot disaffiliate. There is no provision in TEC's Constitution or Canons that states that a diocese may not withdraw from the Episcopal Church.[59] Moreover, it is well established as a general proposition that a member of an

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[56] *Id.*

[57] *See Bjorkman v. Protestant Episcopal Church in U. S. of Am. of Diocese of Lexington,* 759 S.W.2d 583 (Ky. 1988) and *Protestant Episcopal Church v. Barker,* 115 Cal. App. 3d 599 (Cal. Ct. App. 1981). There are also concluded cases involving trust clauses analogous to the Dennis canon in the governing instruments of other denominations that have outcomes inconsistent with TEC's positions on relevant issues.

[58] It is sometimes argued that the Virginia cases are *sui generis* because of the state statute involved. Although it is true that Va. Code § 57-9 is unique, it is also true that a number of the federal constitution arguments made by TEC in an effort to overcome the effect of the statute were not accepted by the trial court, including arguments that TEC has so far made with success in the California case.

[59] *See, e.g.,* McCall, *supra* note 38, at 20; Philip W. Turner, *Subversion of the Constitution and Canons of The Episcopal Church: On Doing What it Takes to Get What You Want*, Anglican Communion Institute, Inc. 5 (November 2008),

unincorporated association may resign or withdraw from membership.[60] A recent affirmation of this principle with particular clarity appears in the Revised Uniform Unincorporated Nonprofit Association Act (RUUNAA), published by the National Conference of Commissioners on Uniform State Laws.[61] RUUNAA, although of recent vintage (2008) and presently in effect in only one state (Nevada), has been approved by the American Bar Association.[62] Section 20 of RUUNAA provides that a member of an unincorporated non-profit association may resign in accordance with the organization's "governing principles" and that in the absence of applicable governing principles, a member may resign at any time. A comment to Section 20 states that "[p]reventing a member from voluntarily withdrawing from a UNA [unincorporated nonprofit association] would be unconstitutional and void on public policy grounds." So not only do the RUUNAA drafters incorporate into their statute a section permitting withdrawal, they say it would be unconstitutional and against public policy to provide otherwise. By way of further illustration, section 18310(a)(1) of the California Corporations Code states that unless otherwise provided by an unincorporated association's governing principles, membership in the unincorporated association may be terminated by resignation of the member.

A similar principle applies to nonprofit membership corporations. Section 6.20(a) of the Model Nonprofit Corporation Act provides that "[a] member of a membership corporation may resign at any time." The accompanying official comment states:

> A nonprofit organization generally cannot force a person to belong to it, except in limited instances where membership is required by law, such as certain homeowners associations or bar associations in states that have an integrated bar.

Note that the comment covers not only nonprofit corporations, but also nonprofit organizations generally.

That members of an unincorporated nonprofit association may withdraw is consistent with the common law of contracts applicable to associations[63] as well as

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http://anglicancommunioninstitute.com/wp-content/uploads/2008/11/subversion_of_the_constitution_and_canons_of_the_episcopal_church.pdf.

[60] *See, e.g.,* McCall, *supra* note 38, at 20-23, 43.

[61] The NCCUSL is an organization consisting of lawyers, judges, legislators, legislative staff and law professors appointed by various state governments that has as its purpose drafting legislation for consideration by legislatures to promote uniformity among states where desirable and practical.

[62] Resolution of American Bar Association House of Delegates, February 16, 2009, at http://www.abanet.org/leadership/2009/midyear/daily_journal/Adopted102B.doc, approving RUUNAA as appropriate for adoption by states wishing to do so.

[63] *See* McCall, *supra* note 38, at 20-22 and 42-43.

statutory law applicable to other organizations such as partnerships.[64] Withdrawal does not, of course, relieve a member from any unpaid dues, assessments or other binding obligations incurred before resignation.[65]

The apparent intent of those in charge of the legal efforts set in motion by the Presiding Bishop is to overcome the normally applicable principles of freedom of contract and association by maintaining that dioceses are not normal associating parties but are "subordinate units" (or, sometimes, "subordinate entities" or "creatures"[66]). Interestingly, neither "subordinate unit," "subordinate entity," "creature" nor even "subordinate" ever appears in TEC's Constitution or Canons.[67] The assumption behind the "subordinate unit" label and related terminology seems to be that the dioceses do not have separate legal personalities apart from TEC, and are thus merely local chapters or districts of a unitary organization. But that argument is inconsistent not only with the

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[64] Uniform Partnership Act (1914) §§ 29, 31; Alan R. Bromberg and Larry E. Ribstein, *Bromberg and Ribstein on Partnership* §7.02(d) ("[I]t is implicit in §29 of the Uniform Partnership Act that a partner can withdraw at any time."); Uniform Partnership Act (1996) (RUPA) §§601(1), 602; Uniform Limited Partnership Act (1976, with 1985 amendments) (RULPA) §§ 402, 602 (recognizing that a general partner may withdraw at any time, although a withdrawal in violation of the partnership agreement may give rise to an action for damages for breach of the agreement), and Uniform Limited Partnership Act (2001) §604(a) ("A person has the power to dissociate as a general partner at any time, rightfully or wrongfully . . . .") The ability of limited partners and members of limited liability companies to withdraw may be more restricted under some state statutes, in recognition that their interests are of an economic nature without the associational characteristics of a partnership or nonprofit organization, with the result that limitations on dissociation often amount essentially to restrictions on withdrawal of capital.

[65] For example, both Section 20 of RUUNAA and Section 6.20 of the Model Nonprofit Association Act and the accompanying commentary to each recognize that withdrawal does not relieve a member from any unpaid dues, assessments or other obligations incurred or commitments made before resignation. In addition, the comment to Section 6.20 of the Model Nonprofit Corporation Act as well as law pertaining to partnerships and some other organizations recognize the possibility of liability for damages resulting from wrongful withdrawal in violation of contractual or other obligations. For example, where one partner has induced others to invest funds in reliance on the capital employed in the partnership's business by the first partner or managerial expertise to be provided, it may be wrongful for that partner to withdraw thereby putting the success of the enterprise at risk.

[66] David Booth Beers, Chancellor to the Presiding Bishop, is quoted in a November 2006 article in *The Living Church* as saying that according to Episcopal Church polity, the diocese "is a creature of General Convention." Steve Waring, *Chancellor: Episcopal Church Will Prevail in Communion and Courts*, The Living Church, November 28, 2006, http://www.livingchurch.org/news/news-updates/2006/11/28/chancellor-episcopal-church-will-prevail-in-communion-and-courts.

[67] *See* McCall, *supra* note 38, at 11 for a more comprehensive list of terms denoting hierarchical relationships that are not found in the Constitution.

history demonstrating that General Convention was created by dioceses and not *vice versa*,[68] but also with the language of the Constitution and Canons and with TEC's own acknowledgment that it is an unincorporated association. The very act of associating implies separate legal personalities and the mutuality that accompanies agreement on the terms of association.

Nor does subordinate unit status follow from "accession clauses" that provide that a diocese accedes to the Constitution and canons of TEC. Mark McCall discusses the effect of accession in "Is the Episcopal Church Hierarchical?", demonstrating that there is no support for the idea that the presence of an accession clause implies a prohibition on withdrawal.[69] McCall's conclusion is reinforced by the principles articulated in RUUNAA as discussed above—a default rule that withdrawal is permitted and commentary to the effect that a prohibition on withdrawal would be unconstitutional and contravene public policy. To argue that an exception to these principles must be made based on accession to the association's rules makes no sense, because the very existence of the association is premised on agreement to be bound by its rules. The very same unincorporated nonprofit associations the members of which must be allowed to withdraw on constitutional and public policy grounds typically have governing documents containing an express agreement to be bound. McCall shows, based on historical usage contemporaneous with the adoption of TEC's constitution, that "the term 'accession' signifies the independence and autonomy that the dioceses retain with respect to the General Convention."[70] But even without according to the term that particular historical significance, the residual content of "acceding" to a document equates to agreement to its terms, an agreement which the rule mandating a right of withdrawal already presumes.

In short, TEC's "accession clause" argument against the ability to withdraw consists of a category mistake in contract fundamentals—treating the question of whether an agreement to associate is binding as the same as whether a party may withdraw.

The automatic vacancy argument. Faced with the difficulties in arguing against complete incapacity to withdraw, the complaints filed on behalf of TEC in the Pittsburgh and Fort Worth litigation make an even stranger assertion. They maintain that individuals in leadership positions who supported or took action in furtherance of the withdrawal "violated their obligations under the Church's Declaration of Conformity and/or Canon I.17(8)." As a result, it is alleged, they ceased to be "eligible" to hold any office in The Episcopal Church, the Diocese, or any of their other "subordinate units," and as a consequence "their offices became vacant."[71] Concerned that withdrawal could

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[68] *See* McCall, *supra* note 38, at 17-18.

[69] *See* McCall, *supra* note 38, at 20-22.

[70] McCall, *supra* note 38, at 21.

[71] Complaint-in-Intervention filed on behalf of The Episcopal Church at § 45, *Calvary Episcopal Church v. Rt. Rev. Robert W. Duncan,* No. GD-03-020941 (Ct. of C.P. Allegheny County, May 12, 2009); Plaintiff's First Amended Original Petition at § 51,

not be blocked directly, TEC's lawyers postulate a mechanism to create automatic vacancies in the offices whose incumbents would need to take action to move forward with withdrawal.

The first problem with this approach is that it purports to apply to offices not only within TEC as such, but also within dioceses, other diocesan entities and even congregations. At least as to positions other than clerical positions to which TEC's disciplinary canons apply, it would create conflicts with provisions covering removal from office under the other entities' governing instruments and applicable state law. Second, the automatic vacancy approach attempts to turn standards of conduct into mere qualification requirements (implying an objective standard such as qualification requirements typically entail) and then substitute an automatic removal mechanism for the normal procedures for adjudication of whether standards of conduct have been violated.[72] The automatic vacancy mechanism asserted is, as to violations of the Declaration of Conformity, inconsistent with TEC's own canons which would require presentment and trial under Title IV. The alleged mechanism for creating automatic vacancies based on violation of Canon I.17.8 not only has no basis in existing canons, but would go even further than a once-proposed canonical amendment withdrawn by its proposers in the face of opposition. Specifically, a January 2008 proposal for discipline of laity for noncompliance with canon I.17.8, put forward by the Title IV Task Force II on Disciplinary Policies and Procedures, was later withdrawn by the Task Force in view of "extensive objections as being overreaching and unnecessary."[73] Not even the

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The Episcopal Diocese of Fort Worth v. Salazar, No. 141 237105 09 (Dist. Ct. Tarrant County Sept. 3, 2009).

[72] It would perhaps be possible for a completely objective qualification requirement such as a citizenship or age limitation to be coupled with a mechanism for automatic removal, but even in such a case, removal is often not automatic. To illustrate that qualifications to serve on a governing body are defined and treated differently than standards of conduct, see Model Nonprofit Corporation Act, Third Edition (American Bar Association 2008) § 8.02 (qualifications for directors may be established); § 8.30(c) (setting forth standards of conduct for directors); and §§ 8.08-8.09 (removal of directors in various circumstances by vote of members, directors or other appointing parties or by court order, with removal for failure to satisfy qualifications treated differently than breach of standard of conduct and with removal in no case automatic.)

[73] The reasons for deletion of the proposal were described in the Blue Book Report of Title IV Task Force II to the 76th General Convention:

> The laity was included as a subject of discipline in the 2006 draft—a concept that was roundly criticized. Task Force II proposed that this be addressed by inserting an express right of removal of lay persons from ecclesiastical offices in Title I, rather than inserting full disciplinary procedures in Title IV, but this too caused extensive objections as being overreaching and unnecessary. It is the judgment of Task Force II that the time is not yet propitious for the inclusion of disciplinary provisions for the laity other than as already provided in the Book of Common Prayer, and no inclusion of laity is contemplated at this time.

http://ecusa.anglican.org/documents/BlueBook-TitleIV.pdf

withdrawn Task Force proposal would have operated automatically as the Presiding Bishop's litigators would have it, but would have required action by the Ecclesiastical Authority, with the advice and consent of the Standing Committee, following an opportunity for the accused to be heard by the Ecclesiastical Authority on the grounds for removal.[74]

There are ample methods available for a non-profit organization to place control in the hands of some other organization on a locked-in basis. A typical method would be to provide in the organization's governing instruments for discretionary appointment and removal of all or some of the governing body by the superior organization.[75] Dioceses in TEC could, but do not, have such provisions.

The Dennis canon. Although the litigation against dioceses to date appears not to invoke directly the Dennis canon, potential claims based on the Dennis canon lie in the background. It may therefore be useful to remark briefly on TEC's arguments that are based on the Dennis canon.

No grounds appear evident under which TEC, under a neutral state law analysis, could prevail on a claim to be the beneficiary of a trust created by the Dennis canon. The Restatement of Trusts lists five methods of creating a trust.[76] None of the methods described resembles what the Dennis canon purports to do. In order to prevail, therefore, TEC needs to be successful in invoking special exceptions from the normal rules.

The conclusion that the TEC position cannot prevail under normal state law rules is not changed by the fact that accession clauses were in place prior to enactment of the Dennis canon. The argument is made that the prior existence of an accession clause means that parties are bound by the Dennis canon once it becomes part of the canons. But state law requisites for creation of a trust are not satisfied by prior agreement to an accession clause, because creation of a trust requires a proper manifestation by the settlor of an intent to do a specific thing -- *create a trust relationship.*[77] An open-ended accession clause doesn't do that. The same result follows from the contract law principles that govern the legal effect of TEC's Constitution and canons. Construing an accession clause to mean that the Constitution and canons may be amended so as to change not only the rules governing the organization's internal affairs, but also to affect materially the property rights of congregations in the member dioceses without their

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[74] The proposal for lay discipline under Canon I.17.8 was set forth in an Exposure Draft dated 1/1/08, accessible at http://www.episcopalchurch.org/gc/ccab/TitleI_Exposure_Draft2008_01_01.pdf

[75] *See. e.g.,* Model Nonprofit Corporation Act, Third Edition § 8.04 (permitting some or all of the directors to be "appointed by some other person or designated in some other manner") and §8.08(e) (corresponding provision concerning removal).

[76] Restatement (Third) of Trusts § 10 (American Law Institute 2003).

[77] See Restatement (Third) of Trusts, Intro. Note to Ch. 3, § 10, comment *e* and § 13, comment *b.*

agreement, would contravene basic contract law requirements including among others the requirement for definiteness of the promises made.[78]

In addition, as noted in the Restatement of Trusts, if the property said to be subject to a trust is an interest in land, "statutes of frauds in nearly all states require that the creation of an enforceable trust be manifested and proved by written instrument."[79] The written instrument would, at a minimum, need to (a) be signed by someone authorized to act on behalf of the congregation owning the property, (b) manifest the intention to create a trust and (c) reasonably identify the trust property.[80] In some states, statutes of frauds also apply to trusts covering only personal property. New York, for example, requires significant formalities for the creation of all "lifetime trusts" (a term that excludes trusts created by will and some other categories not relevant here).[81]

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[78] The requirement of definiteness follows from the premise that contract law protects the parties' expectation interest. E. Allan Farnsworth, *Farnsworth on Contracts* §§ 3.1, 3.27 (3rd ed. 2004); *See also* 1 *Corbin on Contracts* § 4.1, at 536-37 (rev. ed. 1993):

> The fact that the parties have left some matters to be determined in the future should not prevent enforcement, if some method of determination independent of a party's mere "wish, will, and desire" exists, either by virtue of the agreements itself or by commercial practice or custom. This may be the case, even though the determination is left to one of the contracting parties, if this party is required to make it "in good faith" in accordance with some existing standard or with facts capable of objective proof.

(internal footnote references omitted). Use of the accession clause mechanism to impose a trust clause that results in a material diminution in the property rights of member dioceses does not seem to meet the requirement that changes without a party's consent be limited to those made "'in good faith' in accordance with some existing standard." Even if the resulting degree of indefiniteness did not render the contract unenforceable, an attempt to impose a trust on the property of a member diocese might violate the implied covenant of good faith and fair dealing that applies under the contract law of most U.S. jurisdictions. It is recognized that a breach of the implied covenant can take the form of an abuse of a power to supply terms. Restatement (Second) of Contracts § 205, comment *d.* Under this analysis, use of the open-ended accession clause to impose obligations on a member would be required to be exercised in good faith and in a manner consistent with the reasonable expectations of the parties. It is difficult to see how a canonical amendment purporting to give others a beneficial interest in property held by a nonconsenting party could be said to be consistent with reasonable prior expectations, particularly when coupled with the asserted inability to avoid the trust clause's applicability through withdrawal.

[79] Restatement (Third) of Trusts, Intro. Note to Ch. 3.

[80] Restatement (Third) of Trusts §§ 22-23.

[81] New York Estates, Powers and Trusts Law § 7-1.17(a), *cited in* Restatement (Third) of Trusts §20, Reporter's Note to comment *a*. ("Every lifetime trust shall be in writing and shall be executed and acknowledged by the initial creator and, unless such creator is the sole trustee, by at least one trustee thereof, in the manner required by the laws of this state for the recording of a conveyance of real property or, in lieu thereof, executed in

Although noncompliance with the statute of frauds should stand as an impediment to enforceability of a trust created by the Dennis canon in most jurisdictions, it is important to recognize that the problem is more fundamental than lack of a written instrument. It is the absence of a proper manifestation by the congregation of the intent to create a trust.

Can the Dennis canon form the basis for creation of a trust *after* the Dennis canon became part of TEC's canons? Clearly the possibility of something along these lines is what was in view in the passage in *Jones v. Wolf*, 443 U.S. 595, 606 (1979), referring to various actions that could be taken by the parties before a dispute erupts to provide for retention of ownership by the faction loyal to a hierarchically superior body. Included among the possible actions listed was an amendment to the constitution of the general church to recite an express trust. However, the creation of such a trust would, under the Supreme Court's language and consistent with the neutral principles of law approach the Court was in the process of enunciating, require that the creation of a trust be undertaken by agreement of both parties and that that the incorporation of the new provision of the church constitution into the agreement of the parties be done in a way that meets the formal requisites for creation of a trust under state law (*i.e.,* in the words of the *dicta* in *Jones,* be "embodied in some legally cognizable form").

TEC's reading of the *Jones* language would turn a holding intended to endorse neutral principles into one requiring an exception, so sweeping that it would apply whenever it really mattered, which is itself inconsistent with neutral principles. Notwithstanding that the Jones court speaks of the advantages of relying "exclusively on objective, well-established concepts of trust and property law familiar to lawyers and judges,"[82] TEC's reading requires coming to a conclusion opposite to that required by well-established legal concepts.

Hierarchical deference. Since the positions advanced in the name of TEC in the litigation set in motion by the Presiding Bishop do not fare well under normal state law rules, what about the degree of success in obtaining special treatment?

The broadest, most all encompassing form of special treatment is the hierarchical deference approach having its origins in the 1871 U.S. Supreme Court case *Watson v. Jones.*[83] It is important to appreciate that *Watson v. Jones* was not decided based on First Amendment principles, having arisen before the First Amendment became applicable to the states, but under a federal common law approach no longer applicable. The hierarchical deference approach is in decline as measured by the number of states in which courts adhere to it. Its most notable recent rejection was in the California Supreme

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the presence of two witnesses who shall affix their signatures to the trust instrument.") Note, however, that a provision of the New York Religious Corporations Law appears to give recognition to a trust relationship as described in the Dennis canon. New York Religious Corporations Law § 42-a. The question is whether such a provision granting special treatment for a particular religious denomination violates the First Amendment.

[82] *Jones,* 443 U.S. at 603.

[83] 80 U.S. (13 Wall.) 679 (1871).

Court case involving St. James, Newport Beach,[84] which, although decided favorably to TEC and the Los Angeles diocese (pending possible review by the U.S. Supreme Court), rejected the hierarchical deference approach adopted by the intermediate appellate court below and advanced by TEC.

The other forms of special treatment involve courts purporting to apply neutral principles instead of hierarchical deference, but winding up creating, in practical effect, special exceptions for hierarchical religious denominations. This phenomenon has been observed in the literature for some time, one example being a 1990 article in the American University Law Review by Professor Patty Gerstenblith which contains this summary:[85]

> These courts, while employing the language of neutral principles and examining church documents and state statutes, are nonetheless applying a concept that is entirely unique to church-related cases. This usage does not accord with legal principles from any other recognized branch of the law. Instead, the courts base their opinions on presumptions of implied intent and implied consent without any inquiry into the actual intent of the presumed settlor. As indicated earlier, this doctrine of implied trust does not fit within the definitions found in other areas of trust law.

Notable examples of this phenomenon in cases involving the Episcopal Church include *Bishop and Diocese of Colorado v. Mote*, 716 P.2d 85, 90 (Colo. 1986) *cert. denied*, 479 U.S. 826 (1986) and *Rector, Wardens and Vestrymen of Trinity-St. Michael's Parish, Inc. v. The Episcopal Church in the Diocese of Connecticut*, 620 A.2d 1280 (Conn. 1993). This approach was recently dubbed "neutral principles in name only" in an *amicus curiae* brief of the Presbyterian Lay Committee in support of the petition to the United States Supreme Court filed by St. James, Newport Beach for a writ of certiorari in the recent California case.[86]

If the Supreme Court grants certiorari in the California case,[87] it seems that there should be a reasonably good prospect that hierarchical deference will be disallowed and that neutral principles will emerge as the only permitted approach to these cases. As observed by Professor Kent Greenawalt, hierarchical deference "contains an anomaly that

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[84] *Episcopal Church Cases,* 198 P.3d 66 (Cal. 2009).

[85] Patty Gerstenblith, *Civil Court Resolution of Property Disputes among Religious Organizations*, 39 Am .U. L. Rev 513, 558 (1990). See also the survey and analysis in Jeffrey B. Hassler, *A Multitude of Sins?*, 35 Pepperdine L. Rev. 399 (Jan. 2008).

[86] The amicus brief in Rector, Wardens and Vestrymen of St. James Parish in Newport Beach v. Protestant Episcopal Church in the Diocese of Los Angeles is accessible at http://www.layman.org/Files/St%20James%20Pet%20for%20Granting%20Cert_FINAL_07-27-09.PDF.

[87] The petition for a writ of certiorari may be accessed at http://steadfastinfaith.org/sites/default/files/St-James-Petition-for-Certiorari.pdf.

is so evidently impossible to justify, it will almost certainly not survive."[88] Even absent Supreme Court action, it seems likely that the trend in the case law against overt hierarchical deference will continue. The question then is what happens with neutral principles in name only.

If the Supreme Court grants certiorari in the California case, there would seem to be a high likelihood that the Court will not let stand uncorrected the misreading of the language in *Jones v. Wolf* that was used to provide the legal underpinnings for the Dennis canon and other denominational trust clauses. The misreading is simply too patent and has contributed to too much confusion to be allowed to stand. Apart from that, it seems reasonable to hope, if not expect, that with increased scrutiny in higher profile cases with more developed briefing and argument, neutral principles in name only will come to be seen for what it is in the cases against congregations, and not be extended to TEC's cases against dioceses.

The point of the foregoing discussion of the litigation claims asserted in the name of TEC is not to provide a definitive or comprehensive evaluation, but to attempt to demonstrate that the arguments are not without serious infirmities. With that observation in the forefront, how fiduciary duties might apply can be considered with greater clarity.

A duty for TEC to litigate? The question originally posed is whether the Presiding Bishop has a fiduciary responsibility to initiate litigation against the departing dioceses. As suggested earlier, that can't be the case if she doesn't have proper authorization within TEC to take that action.[89] Instead of satisfying a fiduciary responsibility, initiating and conducting litigation without proper authorization amounts to an independent breach of duty.[90] Moreover, the absence of authorization likely eliminates any ability the person taking the action might otherwise have to rely on the protection afforded by the business judgment rule referred to below.[91]

Putting aside the absence of proper authorization, it can still be asked, assuming a properly authorized body considered the issue, whether fiduciary duty would compel a decision in favor of bringing litigation. To an extent this question is academic even on that assumption, because not only does it appear the Presiding Bishop is not authorized to take action, there is apparently no other body within TEC, other than General Convention itself, that could provide the authorization.

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[88] K. Greenawalt, *Hands Off! Civil Court Involvement in Conflicts over Religious Property,* 98 Colum. L. Rev. 1843, 1866 (1998).

[89] *See* note 8 *supra* and accompanying text.

[90] Restatement (Third) of Agency § 8.09(1). The duty to act only within the scope of actual authority is enumerated as a "duty of performance" in the table of contents to the Restatement (Third) of Agency.

[91] A. Gilchrist Sparks, III and Lawrence A. Hamermesh, *Common Law Duties of Non-Director Corporate Officers*, 48 Bus. Law. 215, 234-35.

Nonetheless, since the decision to litigate has already been claimed to have been measured against the standard of fiduciary duty and the results announced, it seems in order to take another measurement, and it is here that the vulnerabilities in TEC's case and various other negatives appear especially relevant. The decision not to pursue a claim is a prototypical example of a case in which the "business judgment rule" ordinarily applies.[92] Under one common formulation of the business judgment rule, if the responsible governing body making the decision is informed and acts with due care and makes a decision in good faith in the honest belief that the decision is in the best interests of the organization, the substantive decision will be sustained if it can be attributed to a rational purpose.[93] Absent self-dealing or some other breach of the duty of loyalty, the decision makers are presumed to satisfy the applicable legal requirements and the burden of overcoming that presumption is ordinarily borne by the person challenging the decision.[94] The business judgment rule was developed primarily in the context of business corporations. (Although analogies to corporations were found above to be defective in determining sources of authority within an unincorporated association,[95] corporate analogies are often more useful in considering duties.) The business judgment rule also applies in the case of other business organizations[96] and, notwithstanding what might be suggested by its name, to nonprofit organizations as well as for-profit entities.[97]

Under the business judgment rule, it would be reasonable for a decision making body to consider factors which weigh against bringing litigation as well as factors weighing in favor. Some of the factors might include the following:

- The relative strength and weakness of the claim and of the defenses that can be expected to be asserted.

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[92] A large body of precedent applying the business judgment rule exists in the context of the authority of a board of directors not to pursue, or to terminate, shareholder derivative litigation. *See, e.g.,* Dennis J. Block *et al., The Business Judgment Rule: Fiduciary Duties of Corporate Directors* Ch. IV, at 1379-1819 (5th ed. 1998).

[93] *See, e.g.,* R. Franklin Balotti and Jesse A. Finkelstein, *The Delaware Law of Corporations and Business Organizations* §4.19[A] (3rd ed. 1998).

[94] Model Business Corporation Act, Fourth Edition § 8.31, Official Comment, Note on Directors' Liability ¶4 and Note on the Business Judgment Rule; Model Nonprofit Corporation Act, Third Edition § 8.31, Official Comment, Note on Directors' Liability ¶3 and Note on the Business Judgment Rule.

[95] *See* text accompanying notes 33-36, *supra*.

[96] *See* Elizabeth S. Miller and Thomas E. Rutledge, *The Duty of Finest Loyalty and Reasonable Decisions: The Business Judgment Rule in Unincorporated Business Organizations,* 30 Del. J. Corp. L. 343 (2005).

[97] *See* Principles of the Law of Nonprofit Organizations, Tentative Draft No. 1, § 365, general comment *a* (American Law Institute , March 19, 2007 and March 14, 2008 (partial reprint)); Model Nonprofit Corporation Act, Third Edition § 8.31 and Official Comment, Note on the Business Judgment Rule and §8.42 and Official Comment (discussing duties of officers to deal fairly with the corporation and its members and applicability of business judgment rule to officers).

- That property TEC seeks to "retain" has not been paid for, financed or maintained by the DFMS or other TEC instrumentalities.
- That the Anglican Primates and others within the Anglican Communion have requested that the litigation cease.
- That TEC is completely free to constitute replacement dioceses.
- That some positions now being asserted by those responsible for bringing the litigation are materially different from those taken previously, including by the Presiding Bishop's immediate predecessor.
- That the claims against departing dioceses may be viewed by some as adverse to the interests of, and could be disputed by, not only those dioceses but by others not seeking to disaffiliate.
- That there has been no determination by a properly authorized body that the claims against departing dioceses have merit and should be pursued through litigation.
- Whether authorized funding is available to carry on the litigation, and the budgetary impact on other activities.
- Whether improper motives may be at work (*e.g.,* using national church deep pockets to intimidate others considering or that might consider disaffiliation).

Or a duty not to litigate? Applying traditional governance standards, it is difficult to see a persuasive case that fiduciary duty leaves no choice but for TEC to litigate aggressively against withdrawing dioceses. A more interesting question is whether the consideration that has been given within TEC to the relevant factors would be sufficient (assuming that the problem regarding the Presiding Bishop's apparent lack of authority could be surmounted) even to justify the decision to litigate if not require it.

Fiduciary duties owing to dioceses. In addition to the other factors that properly should be considered in a decision whether to pursue litigation, a set of considerations arises having to do with the nature of the relationship between TEC and those against whom it is asserting the claims. Those being sued are not persons in arm's length relationships with TEC or other unrelated parties, but dioceses of the Church. They may have become former TEC dioceses by the time the litigation was initiated, but the claims asserted are predicated directly on their status as dioceses within TEC.

The question to which examination of the nature of the relationship leads, of course, is whether fiduciary duties are implicated – duties of the kind that in the oft-quoted words of Judge Cardozo make "forms of conduct permissible in a workaday world for those acting at arm's length . . . forbidden to those bound by fiduciary ties."[98] And if the conclusion is reached that those having managerial roles within TEC are bound to act under a higher standard than would be appropriate with third parties, has that higher standard been met?

Because the Presiding Bishop maintains that it is not possible for dioceses to disaffiliate from TEC, the complaints filed on TEC's behalf purport to be not against

[98] *Meinhard v. Salmon*, 249 N.Y. 458, 164 N.E. 545, 546 (1928).

present or former TEC dioceses, but against former bishops (alleged to have been deposed), diocesan entities said to be different from the continuing "TEC" diocese, and other affiliated entities and officials. Under TEC's theory, therefore, it is not suing its own present or former dioceses. But TEC's characterizations and the alignment of parties it puts forward are dependent on the success of the very theories that underlie its substantive claims. The claims asserted are to the effect that a diocese is prohibited, by virtue of having been part of TEC, from disaffiliating, even if the action taken is in compliance with the diocese's own governing instruments. The nature of the claims is such that the fiduciary duty issue should not be avoidable by timing of the lawsuit filings.[99]

Those acting in a managerial capacity within TEC have duties of loyalty and care. From whence do these duties arise and to whom are they owed? Under the traditional common law approach, in which an unincorporated association such as TEC is not considered a separate entity but merely the aggregate of its members, the source of such duties is the common law of agency.[100] Under that approach each member of the association would be a coprincipal to whom fiduciary duties are owed.[101]

In jurisdictions where the association is regarded as a separate entity for this purpose, the duties of loyalty and care are owed to the association itself, but in the typical case are also owed to the association's members. A comment to the Restatement of Agency deals with the situation in which the principal is an organization recognized as a separate entity:

> . . . When a principal is an organizational entity, an agent has a fiduciary duty to the entity. Law distinctive to that form of entity may also subject the agent to fiduciary duties to constituents of the entity, such as shareholders in a corporation.[102]

In the case of RUUNAA, the law distinctive to the form of entity provides exactly that. Section 23(a) states that "[a] manager owes to the unincorporated nonprofit

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[99] A recognized example of a circumstance in which an agent's duties may continue after the end of the agency relationship is a situation involving the use of property of the principal. Restatement (Third) of Agency § 8.01 comment *c.*

[100] *See* Restatement (Third) of Agency § 8.01 (agent owes duty of loyalty to act for principal's benefit) and § 8.08 (agent owes duties to the principal to act with care, competence and diligence).

[101] Regarding coprincipals, s*ee* Restatement (Third) of Agency § 3.16. As described in comments *b* and *c* to § 3.16, it is partnership *legislation* that changes the coprincipal situation to one in which the partnership entity becomes the principal. By analogy, for unincorporated associations in jurisdictions in which the common law rule has not been modified to provide for entity treatment in the relevant context, individual members may continue to be characterized as coprincipals.

[102] Restatement (Third) of Agency § 8.01 comment *c.*

association and to its members the fiduciary duties of loyalty and care."[103] RUUNAA is by no means unique in providing that fiduciary duties are owed to members or other constituents of an organization, but follows a recurring pattern among common organizational types. Section 409 of the Revised Uniform Limited Liability Company Act (2006) provides that fiduciary duties of managers of limited liability companies are owed to members as well as the company and Section 404 of the Uniform Partnership Act (1997) and Section 408 of the Uniform Limited Partnership Act (2001) provides that fiduciary duties of a general partner are owed to the other partners as well as to the partnership.[104] Various corporate laws provide that fiduciary duties of directors and officers are owed to shareholders as well as to the corporation.[105] A significant body of case law deals with distinguishing derivative actions, which are properly brought by shareholders or other constituents on behalf of the organization itself, and direct, non-derivative claims brought by a shareholder or other constituent for an injury separate and distinct from any suffered by constituents generally, or for wrongs involving breach of a constituent's individual contractual rights.[106] The Model Nonprofit Corporation Act contemplates that the duty to act in a manner reasonably believed to be "in the best interests of the corporation" requires that the corporation be viewed not only as a surrogate for the enterprise but as a frame of reference encompassing the body of members, speaks of the duty to deal fairly with the corporation and its members and

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[103] *See also* comments 1 and 2 to RUUNAA § 23.

[104] See also Section 901(b) of the Revised Uniform Limited Liability Company Act (2006) and Section 1001(b) of the for the Uniform Limited Partnership Act (2001) and the accompanying commentary regarding the requirement that to maintain a direct action as an individual member or partner (in contrast to a derivative action on behalf of the entity) a partner or member must plead and prove an actual or threatened injury not solely the result of an injury to the limited liability company or limited partnership itself. These provisions make clear that assertion of a breach of fiduciary duty owed to members or other individual constituents is not limited to claims that apply equally to all members. See also *Bromberg and Ribstein on Partnership*, *supra* note 64 at §6.07(a)(6) for a brief discussion of duties to a partnership versus duties to individual partners. In general, the action by particular dioceses to disaffiliate does not put them in the position of asserting rights not applying equally to all member dioceses, because resolution of the issue of whether dioceses are free to disaffiliate does not turn on which ones may wish to do so.

[105] As to corporations, for one of many cases holding Delaware corporate law is to this effect, see *Mills Acquisition Co. v. Macmillan, Inc.,* 559 A.2d 1261, 1280 (Del. 1989). See also Model Business Corporation Act, Fourth Edition §8.31, contemplating that a director may be liable "to the corporation or its shareholders." As one commentator noted in the corporate context, "While some early courts treated duties of officers and directors as running only to the corporation, many modern cases and some statutes acknowledge that this fiduciary duty is owed to minority shareholders as well as the corporation . . . ." F. Hodge O'Neal and Robert B. Thompson, *O'Neal and Thompson's Oppression of Minority Shareholders and LLC Members* § 7:3 (rev. 2nd ed.).

[106] *See* Block, *supra* note 92, Ch. IV.A.8, at 1411-15.

contemplates that a director or officer may be liable to the corporation or its members.[107] Given the RUUNAA precedent and the analogous treatment in the case of other types of entity, it seems unlikely that courts in jurisdictions where no statutory provision directly addresses the issue will establish rules holding that managers of an unincorporated association have no fiduciary duty to members.

Nature of the fiduciary duties owed. What are the implications of the foregoing analysis for the scope of fiduciary duties owed to member dioceses? If the coprincipal analysis is applicable, then first, an agent for the coprincipals should refrain from acting to further the interests of any member where the interests of all members are not aligned.[108] If interests of the coprincipals diverge the agent's position will become compromised if the agent acts to serve the interests of one coprincipal to the detriment of another.[109]

Second, under the fiduciary duty of loyalty as articulated in the Restatement of Agency, the following duties of an agent to a principal should, among others, apply to each coprincipal: An agent is required to act loyally for the principal's benefit in all matters connected with the agency relationship and may not deal with the principal as an

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[107] Model Nonprofit Corporation Act, Third Edition § 8.30, 8.31 and 8.42 and accompanying Official Comments. Sometimes when charities are considered, fiduciary duties are said to run to the charitable purpose. *See* Principles of the Law of Nonprofit Associations, Tentative Draft No. 1 § 310 and accompanying General Comment (American Law Institute March 19, 2007). This concept may apply to TEC as to charitable activities it conducts directly. But as to TEC as an association of dioceses with independent existence and their own charitable purposes, the duties should also run in favor of the member dioceses for the reasons indicated. The treatment in Principles of the Law of Nonprofit Associations, Tentative Draft No. 1 appears to be the result of a proposed chapter on "noncharitable nonprofit organizations" not yet having been written with the result that the current draft's focus is on what might be called pure charities without associational aspects.

[108] *See* Restatement (Third) of Agency § 3.16 comment *b* ("Unless otherwise agreed, authority given by two or more principals jointly includes only authority to act for their joint account.")

[109] *See* Restatement (Third) of Agency § 1.01 comment *e* ("Without the principal's consent, an agent may not . . . act on behalf of one with interests adverse to those of the principal in matters in which the agent is employed."); § 8.03 ("An agent has a duty not to deal with the principal as or on behalf of an adverse party in a transaction connected with the agency relationship.") *See also* comment *b* to § 8.03 ("Likewise, an agent who acts on behalf of more than one principal in a transaction between or among the principals has breached the agent's duty of loyalty to each principal through undertaking service to multiple principals that divides the agent's loyalty.") On the possibility of consent by multiple principals in such a situation, see Restatement (Third) of Agency § 8.06(2).

adverse party in a transaction connected with the agency relationship.[110] The agency relationship imposes a particular duty on an agent not to use property of the principal for anyone else's purposes.[111] The fiduciary principle supplements instructions that a principal gives expressly, making it unnecessary for the principal to graft explicit qualifications and prohibitions onto instructions given to the agent. An agent is not free to exploit gaps in the instructions given by taking action that fails to serve the interests of each principal.[112]

It may be objected that requiring someone with managerial responsibility in an organization with 100+ members to observe a duty to treat each member as a coprincipal creates standards difficult or impossible to meet. One answer might be that it is easy enough for an unincorporated association to convert to another form in which the "aggregate theory" would not apply and that for just such reasons it has become relatively less common for large nonprofit organizations to remain structured as unincorporated associations. As was observed in the commentary to the Uniform Unincorporated Association Act (1996),[113]

> . . . it may be surprising that some large nonprofit organizations are or until recently were unincorporated; for example, National Conference of Commissioners on Uniform State Laws, Association of American Law Schools (1900-1972), and American Bar Association (1878-1992). That these three are lawyer organizations may provide further evidence of the vitality of the rule of the shoemaker's children.

But it doesn't seem necessary to rely for an answer to the objection on the rule of the shoemaker's children or differently articulated regrets about TEC not having converted to a more modern organizational form. For example, a reasonable approach would suggest the ability of coprincipals to give instructions to or to terminate the organization's agents would be circumscribed by the terms of association, just as agency relationships are affected in this way when legislation makes the organization itself a principal.[114] Another example, in the context of member withdrawal, might be that no criticism would be directed toward an agent whose duties included collecting member dues if the agent made efforts to collect past due amounts from the withdrawn member,

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[110] Section 8.01 of the Restatement (Third) of Agency provides, "An agent has a fiduciary duty to act loyally for the principal's benefit in all matters connected with the agency relationship." Section 8.03 provides, "An agent has a duty not to deal with the principal as or on behalf of an adverse party in a transaction connected with the agency relationship."

[111] Section 8.05 of the Restatement (Third) of Agency provides, "An agent has a duty . . . not to use property of the principal for the agent's own purposes or those of a third party . . . ." See also § 8.12.

[112] Restatement (Third) of Agency § 8.01 comment *b*.

[113] UUNAA, prefatory note.

[114] *See* Restatement (Third) of Agency § 3.16, comments *b* and *c* and illustration 4 (discussing this in the partnership context).

even if the withdrawn member didn't want to pay them. The core duties of loyalty and care remain, however, and at some point issues may arise that are nonroutine and subject to dispute by a member on non-frivolous grounds, and that may also diverge from what is clearly within the scope of the organization's internal affairs. In such a case the agent is not free simply to take the organization's side and needs instead to view duties owed to members with the seriousness they deserve.

What should be the result in a jurisdiction in which a statute such as RUUNAA or a judicial adaptation of the common law rule provides for entity rather than aggregate treatment of the unincorporated association? RUUNAA and other statutes provide that the agent still owes fiduciary duties to the members,[115] but it may not be clear that the scope of the duties owed to members would necessarily be the same as the duties owed to coprincipals under an agency analysis. One can certainly surmise that they might be the same. But a court might instead decide that because of large number of coprincipals to whom duties would be owed under a coprincipal analysis, the substance of fiduciary duties owed to members can be given adequate scope by drawing on precedent from organizational law without necessarily adhering in every detail to what a strict agency analysis would require.

The difference in possible approaches naturally leads to speculation about what might be the minimum content of fiduciary duties agents owe to members of an unincorporated association in the situation now being considered. It seems reasonable to suggest that, although the duty might be found to be higher, it should involve at least the following:

- Because those acting in a managerial capacity within TEC owe fiduciary duties to its member dioceses, it follows that decisions to litigate against the dioceses should *not* be made on the same basis as litigation against a party to which no such duties are owed.
- Claims made against former dioceses, in fact or in substance, are not exempt from this standard if the nature of the claims asserted are not extraneous to the relationship but derive directly from the status of having been a diocese within TEC.
- Claims against dioceses asserted in order to attempt to gain control of property, directly or indirectly, or that have the effect of restricting freedom of contract or rights of association, should not be made on the basis of lawyers' theories as to what might be a viable claim. The claims should be indisputable, or close to it. If some dioceses want to pursue claims against other dioceses nonetheless, they should decide for themselves to do so, not have it decided for them by agents who owe fiduciary duties to all dioceses.
- Such claims should not be made based on assertions of what a diocese is "deemed" to have agreed to. If a diocese is alleged to have agreed or consented to something, the agreement or consent needs to be explicit and informed.

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[115] RUUNAA § 23(a), *supra* note 103 and accompanying text.

- Before asserting claims against dioceses, a careful and disinterested evaluation of the merits of the claims should be obtained, with the benefit of independent advice, including state-specific advice where appropriate.

Of course we do not know for sure that there have not been efforts to make evaluations along the lines just suggested. It would seem, however, that if more persuasive reasoning were available, it would be advantageous for the Presiding Bishop to put that reasoning forward, instead of just conclusory pronouncements. In addition, there is reason to believe that there is at least some high level concern within TEC about the process of decision making about litigation. In draft minutes of the September 15, 2008 of the audit committee of the Domestic and Foreign Missionary Society available on TEC's website, one member of the audit committee, a bishop, expressed concern about the appearance of a potential conflict of interest in the process (although adding that he was not questioning the integrity of the individuals involved). Another member of the audit committee drew a connection between the issue raised by the bishop and the ability to satisfy fiduciary responsibilities. These concerns are now on the record, but the question appears to remain how if at all they have been addressed. And in any event, a more transparent process whereby persons with managerial responsibility within TEC would expose their reasoning behind the litigation against dioceses would be welcome.

Mike Watson is a lawyer retired from law firm practice in Houston, Texas. He is a member and former parish chancellor of St. Martin's Episcopal Church in Houston. The views expressed here are his own and to the extent views on legal matters may be expressed or implied, they are not to be taken as legal advice or otherwise relied upon.