

FIVE KEY LIABILITY RISKS FOR RELIGIOUS ORGANIZATIONS



Presented by:

Richard R. Hammar



Listening. | Learning. | Leading®

Introduction:

**Annual Church Litigation
Review**

Risk #1:

Sexual Molestation of Minors

Church Liability

- negligent selection
- negligent retention
- negligent supervision
- fiduciary duty

Preventing Child and Youth Sexual Abuse

the 5-step "basic plan"

1. application
2. interview
3. reference checks
(institutional)
4. 6-month rule
5. 2-adult rule



additional precautions

6. criminal records checks
7. confirm identity
8. social security trace
9. limit "second chances"
10. staff training
11. be alert to current legal developments

www.nsopw.gov

Which Crimes Are Disqualifying?

- Our church youth group is planning a short-term missions trip later this summer. We are conducting background checks, including criminal records checks, for the adults who will be going on the trip. We discovered that one of the adult workers has a 2002 conviction for resisting arrest, which is a Class A misdemeanor in our state. Can we use him?

Which Crimes Are Disqualifying? (cont'd)

1. sexual assault of a child
2. physical abuse of a child
3. causing mental harm to a child
4. sexual exploitation of a child
5. incest
6. use of a computer to facilitate a child sex crime
7. soliciting a child for prostitution
8. sexual intercourse with a child age 16 or older
9. exposure
10. possession of child pornography
11. child sex offender working with children
12. registered sex offender photographing children

Which Crimes Are Disqualifying? (cont'd)

- 13. child neglect; abduction
- 14. contributing to truancy
- 15. strip searches by school employees
- 16. hazing
- 17. child unattended in a child care vehicle
- 18. leaving loaded firearm accessible to a minor
- 19. receiving stolen property from a child
- 20. tattooing a child
- 21. battery
- 22. battery or threat to a witness
- 23. battery or threat to a judge
- 24. battery to an unborn child

Which Crimes Are Disqualifying? (cont'd)

26. mayhem

27. sexual exploitation by a therapist

28. sexual assault

29. reckless injury

30. injury by negligent handling of a firearm

31. injury by intoxicated use of a vehicle

32. abuse of persons at risk

33. false imprisonment

34. kidnapping

35. stalking

The greatest risk – sex offenders who are pedophiles

The American Psychiatric Association's current Diagnostic and Statistical Manual of Mental Disorders (DSM-IV-TR) identifies the following "diagnostic criteria" for pedophilia:

- A. Over a period of at least 6 months, recurrent, intense sexually arousing fantasies, sexual urges, or behaviors involving sexual activity with a prepubescent child or children (generally age 13 years or younger).
 - B. The person has acted on these urges, or the sexual urges or fantasies cause marked distress or interpersonal difficulty.
 - C. The person is at least age 16 years and at least 5 years older than the child or children in Criterion A.
- Note: Do not include an individual in late adolescence involved in an ongoing sexual relationship with a 12- or 13-year-old.

4 Unique Characteristics of Pedophiles

1. incurability
2. promiscuity
3. predatory behavior
4. high recidivism rate

The Association for the Treatment of Sexual Abusers website states that "predatory pedophiles, especially those who molest boys, are the sex offenders who have the highest recidivism rates. Over long follow-up periods, more than half of convicted pedophiles are rearrested for a new offense."



Freeh Report Recommendations (119)

1. “It is critical for institutions that provide programs and facilities for children to institute and adhere to practices that have been found to be effective in reducing the risk of abuse.”
2. “benchmark University practices and policies with other similarly situated institutions”
3. “evaluate control of the President . . . to ensure duties are realistic and capable of the President’s oversight and control”
4. “update, standardize, centralize, and monitor background check procedures”

Freeh Report Recommendations (cont'd)

5. “require updated background checks for employees and volunteers at least every 5 years”
6. “audit periodically the effectiveness of background check procedures”
7. “develop a procedure to ensure that the University immediately retrieves keys and access cards from unauthorized persons”
8. “select and hire a permanent general counsel”
9. “review periodically all University policies for relevance, utility, and necessity, and modify as appropriate”
10. “term limits for the board”
11. “require regular risk management reports to the board on assessment of risks, pending investigations, compliance with federal and state regulations, and measures in place to mitigate these risks”

Freeh Report Recommendations (cont'd)

12. “develop a critical incident management plan”
13. “conduct periodic internal and external self-assessments of board performance”
14. “send a communication to all students, faculty and staff each year encouraging the reporting of misconduct and describes the channels for direct or anonymous reporting”
15. “increase the physical security and access procedures in areas frequented by children or used in camps and programs for children”
16. “require and provide abuse awareness and mandatory reporter training to all University leaders, including faculty, coaches, volunteers, and interns”
17. amend policy manual to state that University personnel who to fail to report allegations of suspected abuse are subject to discipline of dismissal

4 recent cases . . .



CASE #1: Criminal liability for failing to report clergy child abuse

- Philadelphia jury convicted the “secretary for clergy” of the Archdiocese of Philadelphia of one count of child endangerment for allowing a priest to take a new position involving contact with minors after learning that he had had sexual contact with at least one other minor.
- 3-7 year sentence
- may prompt prosecutions in other jurisdictions

CASE #2: \$28 million verdict in a child molestation case in CA

- \$7 million compensatory and \$21 million punitive
- national entity pays all of the the punitive and 40% of compensatory
- policy required elders in local congregations to keep reports of child sex abusers within the congregation, and not follow civil reporting obligations
- enabled a sex offender to remain in a congregation and molest a 7-year-old girl

CASE #3. \$6.5 million settlement in failure to screen case

- An Area Agency on Aging paid \$6.5 million to four young girls who were molested by an 81-year-old volunteer at a Head Start preschool. The plaintiffs claimed that
- the background check on the offender only went back one year;
- the offender had been in the US only one year, but the defendant failed to investigate his prior life

CASE #4: Importance of References!

Denominational State Office App. 2012

- “Church planting” pastor, funded by state office.
- Molested child in FL church.
- State office performed extensive criminal records check, which disclosed nothing.
- Failed to contact two prior churches (in AL and MD) where the pastor was employed – in both he molested a young boy, though criminal charges never filed.
- Failure to contact prior churches was negligent.
- Implications.
- Liability of MD and AL churches for not reporting?

Risk #2: Counseling Ministries



Counseling Ministries— the Legal Risks

1. key risks:

- negligent counseling (malpractice)
- child abuse reporting
- sexual misconduct
- confidentiality
- negligent supervision

2. risk management:

- counseling policy (spiritual counseling, privilege, child abuse, what may be disclosed)

Counseling Ministries—the Legal Risks (cont'd)

- avoid controversial therapies (e.g., age regression)
- referrals
- insurance
- third person rule—general application
- third person rule—selective application
- limit frequency and duration
- architectural considerations
- telephone
- video technology

Counseling Ministries—the Legal Risks (cont'd)

- women counsel women (Titus 2)
- the importance of policies
- written application
- reference checks (denomination, prior churches)
- criminal records checks
- other background checks

Risk #3: Bodily Injury



Eight Common Nonsexual Injuries

1. recent survey data on frequency of injuries
2. slips and falls
 - examples
 - premises liability
 - unique cases
3. skate ramps
 - high risk activity
 - city ordinances, state statutes
 - unsupervised ramps
 - supervised ramps
 - other not-for-profits

Eight Common Nonsexual Injuries

4. vehicle accidents

- common
- nonowned vehicle coverage?
- negligent entrustment
- cell phone policy
- 15 passenger vans

5. water events

6. rope repelling

7. trampolines

Risk Management for Youth Activities

- adequate number of qualified adults
- what do other not-for-profits do (“benchmarking”)
- release forms?
- swimming events
 - parental consent form (consent, certification, designation of who will make medical decisions)
 - adult workers with CPR training
 - only go where certified lifeguards are on duty
- avoid hazardous activities

Eight Common Nonsexual Injuries

8. assaults

church liability

1. premises liability:

- landowner's duty to protect patrons
- general rule: no duty to protect against criminal acts
- exception: foreseeable, unreasonable risks
- foreseeability (legal duty) based on the following four factors:
 - whether any criminal conduct previously occurred on or near the property
 - how recently and how often
 - how similar the conduct was to the conduct on the property
 - what publicity was given the occurrences to indicate that the landowner knew or should have known about them.

Examples

- Three years ago a larceny occurred four blocks from the church.
- An assault occurred two blocks from the church earlier this year, but church leaders were not aware of it.
- An assault occurred in the church parking lot following an evening service ten years ago.
- An assault occurred in the church parking lot earlier this year.
- A shooting occurred on church premises last year.

Church Liability

1. Premises liability
2. failure to hire security guards
3. negligent selection of security guards
4. liability for negligent acts of security guards



Risk Management: Security Guards

- Legal duty based on (1) whether any criminal conduct previously occurred on or near the property (2) how recently and how often similar crimes occurred; (3) how similar the conduct was to the conduct on the property; (4) what publicity was given the occurrences to indicate that the landowner knew or should have known about them.
- Moral/theological duty

uniformed, armed police officers	uniformed private security guards	plain clothed, armed church members with CCW permit
<ul style="list-style-type: none"> • thoroughly screened • extensive training in responding to crises • extensive firearms training • continuing training • uniform a deterrent • become “on duty” when responding to crime 	<ul style="list-style-type: none"> • references • licensed • criminal records check • application (listing experience and training in crisis management and the use of firearms) 	<ul style="list-style-type: none"> • often pose the greatest risk to the church

Risk Management: Technology

United States Department of Justice recommends that risk management technologies be evaluated on the basis of three factors:

- effectiveness
- affordability
- acceptability

Risk Management: Technology (cont'd)

1. video cameras
2. metal detectors
 - expensive (multiple entrances)
 - trained operators
 - difficulty in interpreting results
 - secondary screening
 - lines of people waiting outside
 - would not stop a dedicated assailant
 - handheld scanners require secondary screening
 - one NYC school:
 - 2,000 students
 - 9 trained security officers
 - complete restructuring of start-times

Risk Management: Technology (cont'd)

1. video cameras
2. metal detectors
3. entry control technologies
 - security guards check ID cards
 - card readers
 - PIN numbers + keypad
 - many problems:
 - exclude visitors
 - members who forget their ID or PIN
 - demagnetized cards
 - tailgating
 - stolen cards
 - cards not turned in by dismissed staff
 - prone to malfunction
 - use of such technologies during the week

Risk #4: Workplace Privacy



Workplace Privacy (cont'd)

- federal Electronic Communications Privacy Act
- federal Electronic Communications Storage Act
- federal Computer Fraud and Abuse Act
- state electronic privacy laws
- invasion of privacy – the Quon case

Workplace Privacy (cont'd)

- The Court concluded that a police officer had a reasonable expectation of privacy in the text messages on his employer-provided pager despite the city's Computer Policy.
- However, the Court concluded that even if the plaintiff had a reasonable expectation of privacy in his text messages, the police department did not necessarily violate his rights by obtaining and reviewing the transcripts

Workplace Privacy (cont'd)

- "Because the search was motivated by a legitimate work-related purpose, and because it was not excessive in scope, the search was reasonable For these same reasons--that the employer had a legitimate reason for the search, and that the search was not excessively intrusive in light of that justification--the Court also concludes that the search would be regarded as reasonable and normal in the private-employer context"

Workplace Privacy (cont'd)

- KEY POINT: 2 factors to apply in evaluating employer inspections of workplace computers and cell phones:
 - "Because the search was motivated by a legitimate work-related purpose, and
 - because it was not excessive in scope, the search was reasonable"
- [a computer policy helps demonstrate the reasonableness of a search.]

#5: Employment Issues



Federal Employment Law: Miscellaneous Issues

- religious discrimination
- discrimination based on morals
 - treating similar cases similarly

“Ministerial Exception” Update

E.E.O.C. v. Hosanna-Tabor
Evangelical Lutheran Church and
School (2012)

-
- What is it?
 - “This case involves the fundamental question of who will preach from the pulpit of a church, and who will occupy the church parsonage. The bare statement of the question should make obvious the lack of jurisdiction of a civil court. The answer to that question must come from the church.” *Simpson v. Wells Lamont Corporation*, 494 F.2d 490 (5th Cir. 1974).
 - “The right to choose ministers without government restriction underlies the well-being of religious community . . . for perpetuation of a church's existence may depend upon those whom it selects to preach its values, teach its message, and interpret its doctrine both to its own membership and to the world at large.” *Rayburn v. General Conference of Seventh Day Adventists*, 772 F.2d 1164 (4th Cir. 1985).
 - Recognized by many state and federal courts.

-
- Expansion of the exception in recent years: (1) broad application (discrimination, employment, compensation); (2) lay employees as “ministers” (teachers, music directors, etc.)
 - Hosanna-Tabor Evangelical Lutheran Church and School case
 - Supreme Court:
 - recognizes ministerial exception in employment discrimination disputes between churches and “ministers”
 - declines to define “minister”
 - concludes that a “called” teacher at a Lutheran school was a minister

-
- her role was distinct from that of most of the church's members;
 - when her congregation called her as a teacher, it provided her with a certificate according her the title of "commissioned minister";
 - she was tasked with performing her teaching duties "according to the Word of God";
 - the congregation prayed that God would bless her ministry to the glory of God;
 - to become a licensed minister, the teacher had to complete eight college-level courses, receive endorsement from her Synod district, and pass an oral examination;
 - she was commissioned as a minister only upon election by her congregation upon its recognition of God's call to her to teach;
 - she held herself out as a minister by accepting the formal call to teach, and by claiming a housing allowance exclusion on her tax return;
 - her job duties demonstrated her role in conveying the church's religious message and carrying out its mission;
 - she performed several religious duties at the school as a called teacher

Questions and comments:

- compensation and other non-discrimination disputes
- who is a “minister”
- leading definition: PRIMARY DUTIES consist of “teaching, spreading the faith, church governance, or supervision or participation in religious ritual and worship.”
- outstanding questions—teachers, business administrators, music directors
- credentialed status not determinative (application to tax law?)
- “stopwatch” test rejected (application to tax law, and property tax exemptions)

Resources

- ChurchMutual.com
- [Pastor, Church & Law, 4th Edition](#)
by Richard R. Hammar
- [Essential Guide to Managing Risk for Church Boards eBook](#)
by Richard R. Hammar
- [Risk Management Handbook for Churches and Schools](#)
by James F. Cobble and Richard R. Hammar
- [Risk Management Checklists for Churches](#)
by James F. Cobble and Richard R. Hammar

This webinar is designed to provide accurate and authoritative information in regard to the subject matter covered. It is provided with the understanding that neither the presenters nor the publisher is engaged in rendering legal, accounting or professional service. If legal advice or other expert assistance is required, the services of a competent professional person should be sought.