

**Getting it Right, Healing the Wrong:  
Legal Issues in Protecting Children and Organizations from Child Sexual Abuse**

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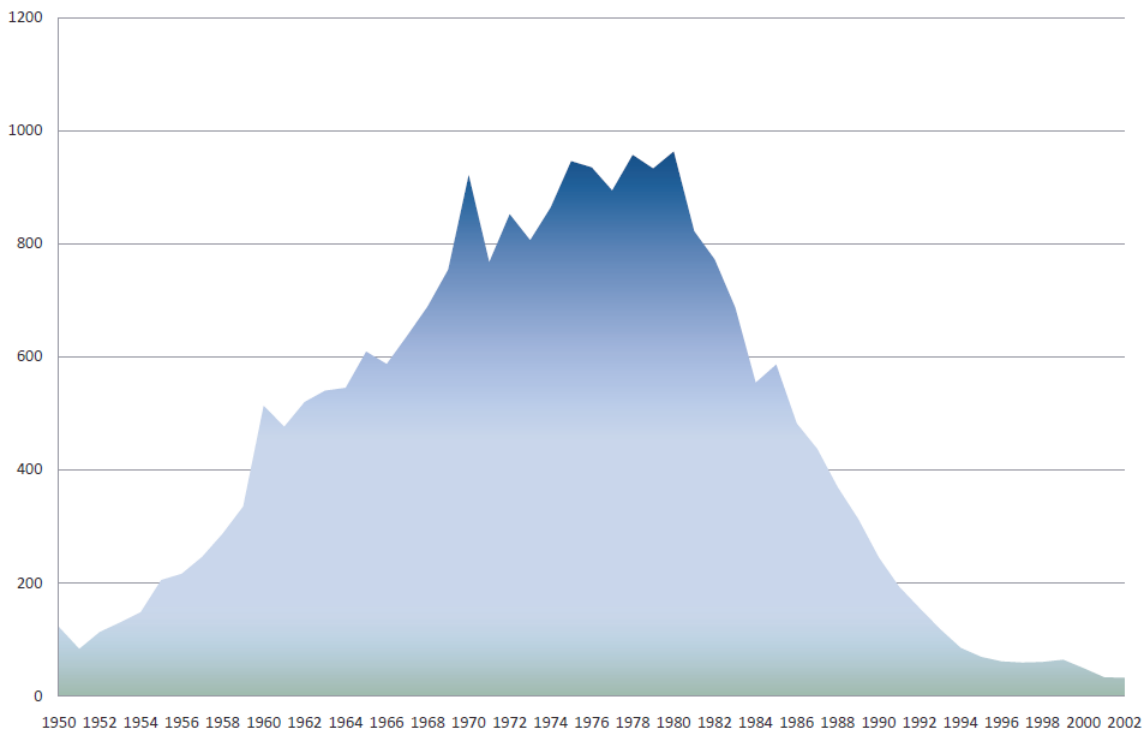
Child sexual abuse is endemic in human society. This paper examines the current landscape of child sexual abuse, addresses prevention of abuse, offers wise approaches to investigations, and discusses sex abuse litigation.<sup>1</sup>

**I. Current Landscape of Child Sexual Abuse**

Child sexual abuse reports fall into two categories, present and historic. Many reports of abuse in religious organizations, including missions, are from the distant past. Present and historic claims must be addressed in slightly different ways. While there is no sharp dividing line between the two, these different approaches will be referenced.

Data for abuse in the Catholic Church is instructive. The incidence of abuse rose in the sixties, peaked in the seventies, fell sharply in the eighties, and continued to fall.<sup>2</sup>

*Nature and Scope: Incidents of Sexual Abuse by Year of Occurrence, 1950-2002*<sup>3</sup>



Although “new” cases are reported each year, they follow the same pattern, so the “peak of the curve is not moving forward or broadening as time goes on.”<sup>4</sup> For instance, current minors

lodged 7-10 credible reports in 2011 across the entire Catholic Church.<sup>5</sup> The Church's many steps to prevent child abuse and reach out to victims are also instructive.

Patterns of past and present abuse appear to be similar in other organizations, though none have done in-depth audits like the Catholic Church. Mission organizations have faced abuse allegations from the distant past.<sup>6</sup> Organizations tracking sexual abuse allegations against missions, like the Child Safety and Protection Network, see both current and historic sexual misconduct claims.

In a new development, law enforcement has pursued religious leaders with criminal charges because of failure to protect children. In Philadelphia, Monsignor William Lynn was convicted of endangering children and sentenced to prison. In Missouri, Bishop Robert Finn was convicted of a misdemeanor for failing to report suspected abuse. Victim's advocacy groups wanted him sent to jail.<sup>7</sup> In the Protestant world, five employees of Victory Christian Church in Oklahoma were arrested and charged because they delayed two weeks in reporting sexual abuse in August 2012.<sup>8</sup> The court refused to dismiss the charges and scheduled the cases for a jury trial.<sup>9</sup> By March 2013, all five had pleaded to charges, and three faced some jail time.<sup>10</sup>

In sum, any organization that has worked with children over time should assume that historic cases exist, even though unknown. Any organization currently working with children should assume that abuse is an ongoing risk.

## **II. Prevention of Abuse: Policies, Screening, and Training**

Adequate child safety policies are gradually becoming the standard of care. Strong evidence shows that good policies protect children and protect the organization.

Prevention should be based on "situational factors" or "routine activities theory," which teaches that abuse requires three factors: first, a motivated abuser; second, a potential victim; and third, lack of a "capable guardian,"<sup>11</sup> or put another way, an environment that gives access. Studies show that addressing these three factors reduces child sexual abuse by limiting chances to commit it.<sup>12</sup> Methods can include policies, screening, training adults and children, and audits.

### *A. Policies*

Codes of conduct for all staff and volunteers establish clear standards of behavior. These should include behaviors that are boundary violations or lack integrity or Christian purity, such as dirty jokes, inappropriate touching that is not sexual abuse, sexual harassment, and adult pornography. Religious organizations have the advantage of legal protection to enforce religious moral standards.

Conduct policies should be widely available to all staff and be incorporated into training.

### *B. Screening*

Criminal background checks are considered key. The Catholic Church has run well over two million checks on employees and volunteers,<sup>13</sup> but has uncovered few, if any, sexual offenders. Possibly, background checks scare offenders away from applying. At a minimum, background checks show that the organization takes child protection seriously.

Be aware of government regulations on background checks. In the United States, the Fair Credit Reporting Act (FCRA) applies to both credit reports and criminal records.<sup>14</sup> Adverse employment actions based on these reports must comply with FCRA standards. Additionally, the U.S. Equal Employment Opportunity Commission (EEOC) has issued guidance on when and how arrest and conviction records may be used,<sup>15</sup> because it is worried that screening for criminal backgrounds disproportionately affects minorities.

Checking references is a useful screening tool. When former employers are reluctant to discuss reasons an employee left,<sup>16</sup> a written permission and waiver of liability allows former employers to be candid without fear of retribution.<sup>17</sup>

Background questionnaires are useful. They can ask about the history of working with children. Religious organizations can ask about religious morals. Screening sample documents are available through organizations like Child Safety and Protection Network, MinistrySafe, or the organization's insurer. The organization's attorney should also review application and screening documents.

It is not necessarily true that any prospective employee with a history of inappropriate behavior would simply lie on a questionnaire. Indicators such as questions not answered, or dubious answers, often appear.

### *C. Training*

Training is critical to a good child protection program. If children know what behavior is not acceptable and what steps to take if they are threatened, they are less likely to be victims.

Training also addresses the "capable guardian," or environmental access. If all other adults understand red flags and danger signals, and see the first signs of boundary violations, they are more likely to take action to protect children. Clear understanding of a safe environment also empowers adults to take appropriate action rather than being afraid to cause trouble.

All personnel and volunteers should be trained initially and at stated intervals. With groups such as Child Safety and Protection Network, organizations can share resources.

### *D. Audits*

Some large organizations conduct audits to evaluate compliance with hiring, training, and conduct policies. The Catholic Church conducts a massive annual audit, which is one reason it may now be the safest organization for children. An audit can also demonstrate to observers that the organization has not been negligent.<sup>18</sup>

## **III. Wise Approaches to Investigations**

Allegations of child abuse are almost inevitable. Leaders must be ready to face them. They must resist any impulse to denial, but not jump to conclusions. Not responding well can: further hurt victims; disrupt ministry; mistreat alleged offenders; lower morale; destroy public image; and result in legal action. Good policies equip administrators to handle these crisis situations. Important steps in response are reporting, investigating, making findings, healing victims, disciplining offenders, and managing public relations.

*A. Reporting—Both Internal and External.*

Organizations should have procedures to report reasonable suspicions of sexual misconduct. The definition of the legal term “reasonable suspicion” may vary according to the regional statute. Generally it means “sufficient knowledge to believe that criminal activity is at hand,” based on specific facts. The standard is lower than probable cause or “probably true.”<sup>19</sup> Reports of misconduct need to be made within the organization, and should trigger an investigation. Depending on the nature of the allegations, reports must also be made to authorities. An internal report alone is appropriate for immoral adult activity that is not child abuse but violates the Christian principles of the organization (such as adultery or other illicit sexual behavior).

Reasonable suspicion of child abuse must (usually) be reported promptly to law enforcement. A prompt but brief preliminary investigation may or may not be appropriate to determine if specific facts support reasonable suspicion. All U.S. states and many countries now have mandatory child abuse reporting. External reports to law enforcement should be made in accordance with the law, and all alleged abuse involving minors should be reported, including historic claims.<sup>20</sup> Such a report does not mean that a finding of abuse has been made. Failure to report may have serious consequences.

Alleged sexual abuse that takes place overseas should be reported to local authorities, in accordance with local law and culture. For a U.S. citizen, allegations of abuse at home or overseas should also be reported in the home states of the victim and the perpetrator. Reporting is similar for citizens of many other countries. Finally, for U.S. citizens, alleged child sexual abuse that occurs overseas can be reported to federal authorities for possible prosecution under the Federal Protect Act, which criminalizes “illicit sexual conduct” abroad by United States citizens and permanent residents.<sup>21</sup> Reporting to local embassies or consulates may also be wise. Organizations can take into account the victim’s wishes for reporting when not required by law, but required reports must be made.

If the law enforcement agency plans to investigate, usually the organization will defer investigating until after the criminal investigation so that evidence is handled correctly.

*B. Organizational Culture*

The culture of an organization and how members experience that have an impact on reporting and investigations, and may have an impact on the likelihood of abuse. Inappropriate culture can lead to failure to deal with abuse. In addition to having reporting policies and procedures in place, the organization should evaluate its interior culture to see if members will likely carry out policies in a meaningful, helpful way. The report on Penn State, for instance, disclosed a culture that was not favorable to reporting because of problems with power and control in the hierarchy.<sup>22</sup> The culture of the Catholic Church that fostered “isolation, separation, and obedience” and a “code of silence” helped to make child abuse possible in the Church.<sup>23</sup> Culture changes are possible, but take great intentionality.

*C. Characteristics of a Good Investigation*

If a single lesson has been learned from past mistakes, it is that allegations must be investigated quickly and thoroughly. Anyone posing a current risk should be suspended from ministry or placed on leave while an investigation is conducted. Making the investigation public calls for discretion. A baseless allegation could ruin a person's career and ministry.

An investigation of current abuse allegations must first protect the alleged victim and other children. Provide an investigator with in-depth training on interviewing children. A historic investigation may encounter problems in locating witnesses, and the investigation may be more documentary. Historic allegations also may involve more difficult decisions on how broadly to investigate. Investigating too widely may re-injure people who have moved on, or even trigger false claims, but investigating too narrowly may foreclose healing for victims.

When abuse is reported, the investigation should begin promptly, especially in a current case, where victims may be at risk. An immediate investigation honors the claimant's report, prevents further harm, and protects the organization from claims of negligence. It also provides a fair process and quick resolution for the alleged offender, who may be innocent. The first step is for the organization's leadership to put together a fact-finding team.

*D. The Responsibilities and Competencies of a Fact-Finding Team.*

A fact-finding team must address competing goals. First, it must discern the truth—the accurate, unvarnished truth without any presuppositions either way. It must probe deeply, ask follow-up questions, and view all statements and evidence with an open mind.

Second, the team must avoid further wounding the alleged victim and close family or friends. Third, the team must be aware of and collect information about others who could be harmed. Fourth, the team must objectively administer justice concerning the alleged offender.

Fifth, the team must avoid creating unnecessary liability for the organization. This should include reporting confidentially to the organization's attorney, and ultimately to leadership.

The fact-finding team should be assembled carefully. Two or three is a good number, depending on how extensive the investigation will be. The gender of the team should be mixed unless everyone interviewed will be of a single gender.

The team must have experience. Competencies should include: psychological training in sexual abuse; legal knowledge of the unique sexual abuse issues; and knowledge of the organization and its ministry. A trained team will know how to get evidence and how to evaluate it. Specialized knowledge required may include: how to interview children without contaminating evidence; how to interview offenders; and cross-cultural understanding. If criminal charges may be filed, evidence must be handled properly, with attention to issues like chain of custody, so that evidence can be proven to be valid and uncontaminated.

*E. Advantages and Disadvantages of an Outside Investigative Team*

Some debate whether or not the investigative team should be an independent, outside team. The Child Safety and Protection Network recommends that at least one person on the team be from outside the mission, to preserve objectivity. Some victim advocacy groups insist that the entire team should be independent of the organization.

Investigating purely **within the organization** creates a higher risk that the investigation will stop too soon. Anecdotes from the Catholic Church to Penn State demonstrate the tendency to take a minimal approach. Additionally, organizations may lack adequately skilled personnel. Also, media and victims' groups may accuse the organization of bias.

An **outside team** may have a higher level of professional expertise, but will have less knowledge of the organizational history and structure. An outside team is not automatically free from bias. If a group positions itself, or historically acts, as either advocating for victims or advocating for organizations, it should not be used. In addition, using an outside team could undermine privacy and confidentiality of information for both the organization and individuals, as discussed below.

A **mixed team** has at least one member from within the organization and at least one from outside. This facilitates understanding the organization's culture and objectivity, but also brings objectivity. This may be the best option.

Probably the main reason organizations resist using outside investigative team members is the much higher cost. In the world of child sexual abuse, this misses the bigger picture. First, the damage to children's lives must be properly addressed, even if it is costly. Secondly, defending even one lawsuit resulting from an inadequate investigation will likely dwarf the costs of an external investigation.

#### *F. The Role of Attorneys*

An attorney may bring useful training and legal knowledge, and helps to preserve privacy and confidentiality rights. Of course, attorney time is costly, and few attorneys focus on this area of law.

Attorneys can take various roles. An attorney on the investigative team seeks impartial truth. An attorney advising the organization has a different role, an obligation of loyalty to the client. Keeping these two roles separate prevents possible conflict of interest.

In some cases, the investigation itself should be kept confidential or privileged, with only limited information prepared for general consumption. If litigation could occur, the investigation should be very carefully structured with the assistance of an attorney, especially with respect to outside investigators.

Even if an attorney is not on the investigative team, the organization needs to be advised by an attorney with deep experience in child protection and sexual abuse litigation. The attorney should be involved at every step to monitor the investigation, receive the reports, help determine whether the investigation is being done effectively and adequately, help determine whether justice is being done to the accused, recommend healing responses to care for victims, and help the organization position for any legal defense that may be needed.

#### *G. Considering Issues of Privacy and Privilege*

An investigation is about information. Once information is set free, it cannot be recaptured. This affects personal reputations, and the organization's legal defenses.

Privacy is a key value in an investigation. Victims will not likely wish their personal information to be broadcast. They may not even want leadership to have it. The fact-finding team can report to leadership using numbers rather than names, and keep a separate key. In

addition, those accused should generally not be publicly identified until after some kind of due process has occurred, such as a law enforcement proceeding or a disciplinary action by the organization. Publishing unsupported accusations violates our canons of justice and opens the organization to a defamation claim.

In a lawsuit, some evidence must be turned over to the other side, but some is protected. Society labels some information confidential, or in a legal term, “privileged.” Communications between clergy and people under their pastoral care are privileged. Other confidential or privileged communications are between attorneys and clients, doctors and patients, or husbands and wives.

Communications that are privileged in these various ways may be kept private, and usually need not be revealed in a lawsuit. But these privileges can be waived or lost by giving the documents or information to anyone outside the tight circle of privilege. Once privileges are waived, they cannot be restored. Indiscriminately managing information may waive privilege, and make the organization more vulnerable to a lawsuit.

Before the investigation begins, the organization needs to consider carefully how it will manage the resulting information. How will information be discussed and reviewed to keep it within the circle or privilege? What information will be reviewed and by whom, how that should be done in light of these privileges, and how publicly will the information will be revealed? Attorney advice is helpful here.

After the investigation concludes, leadership will need to consider carefully what aspects of the report should be released to claimants, to constituents of the organization, and to the public.

#### *H. Outreach to Victims and Healing Responses*

If someone reports abuse, the report should be received promptly and sensitively, and taken seriously. Many victims feel they have had to fight to get any recognition of what has happened to them. Rather than being embraced, they have been rebuffed and wounded further.

Organizations must give attention to healing and reconciliation for victims of child sexual abuse. Responding to victims in a strictly legal fashion is inadequate and does even more damage to them.

Many victims express a primary need for someone to hear their story and affirm that what happened to them was evil. When abuse has been substantiated, an apology from the organization, given by someone high in leadership, can be healing. Other approaches to healing include offering therapy, support groups, retreats, and giving victims input on improving child safety going forward. When possible, victims need compassionate care and a pastoral response.<sup>24</sup>

#### *I. The Complex Truth About Claimants.*

Many claimants are telling the tragic truth about their lives. In many cases, they have suffered horrific abuse that is sickening to consider. These findings should be presented to the organization’s Board or leadership in a complete form.

Others are exaggerating, perhaps unconsciously. Over time, incidents can become perceived as more grave, frequent, or brutal, and injuries can grow from a mildly disturbing

episode to life-threatening trauma.<sup>25</sup> Sharing of stories can cause others to unintentionally appropriate true accounts and make them part of their own experience. Occasionally, claims are flat-out fraudulent.

At times, claimants' memories of abuse are "recovered," meaning that the alleged abuse was not continuously remembered, but was retrieved (or created) later. For some time, psychologists have doubted the reliability and accuracy of recovered memories.<sup>26</sup> Best practice calls for independent corroboration of the accuracy of recovered memories.

Even for genuinely injured claimants, the level of wounding varies. Astonishingly, some studies show that at the time it happens, child sexual abuse may not be particularly traumatic, if it is non-violent touching perpetrated by a "friend." The child does not understand sexuality, and may be confused or uncomfortable, but not initially traumatized. Later, trauma sets in after the child realizes the depth of the betrayal and the evil that occurred.<sup>27</sup> For other children, abuse produces more immediate symptoms.

Trauma levels may vary in time and may depend on other factors, such as the emotional health of the person at the time of cognitive processing of the abuse and the level of support available.<sup>28</sup>

Treating abused children shortly after the injury helps prevent later complications.<sup>29</sup> (Sometimes leadership and family members both need help to understand this, as the child's initial symptoms may be very subtle.) The benefit of timely intervention underscores the importance of prompt investigations.

#### *J. Balancing Conflicting Interests of Parties*

The mission seeks to serve justice in several ways. First, and most important, it must protect children. Preventing harm to present-day children by moving to correct unsafe situations is critical. Next, it does justice to the alleged victim (who may or may not presently be a child) by hearing the story promptly and attentively, and thoroughly investigating the claims. If the mission finds child abuse has occurred, it seeks to provide healing to the victim by offering counseling and other action steps. It provides justice to the alleged offender by an impartial investigation that protects privacy interests until allegations have been established, and having an investigate structure that provides due process. Some kind of appeal process is also desirable. If the organization finds abuse, it disciplines the offender, and may need to provide some carefully thought-out notification to others who need to know. If the accused is exonerated, it moves to restore the person's reputation and discredit false charges. (Inconclusive findings require careful consideration of what is just to all parties.) Finally, it carries out the investigation in a way that protects the legal interests of the mission.

#### *K. Zero Tolerance*

Historically, religious organizations have handled offenders ineptly. Early efforts sought to rehabilitate offenders, consistent with the idea of forgiveness and reconciliation. Ministries today still struggle with whether a repentant sexual sinner should be allowed to return to ministry, with varying answers. The decision is tough when removing a gifted person will destroy a successful ministry.



The lesson of history is clear, at least with respect to child sexual abuse. Others have repeatedly tried the experiment, and the dangers of keeping an offender in ministry are too great. If an allegation of child sexual abuse is determined to be true, the person should be removed immediately and permanently from ministry—no matter how charismatic, vibrant and successful that person is otherwise.

#### **IV. Facing Litigation Against the Organization**

At times, healing responses to allegations of abuse are inadequate or not accepted. Factors outside the organization's control usually drive lawsuits. Victims have a moral right to healing responses. But litigation is combative and destructive, and the organization may need a strong defense.

##### *A. What Drives Sex Abuse Litigation?*

Plaintiffs' attorneys drove the Catholic sexual abuse scandal. Seldom has a righteous cause been so profitable. Filing claims of child sexual abuse is enormously lucrative for attorneys, because they receive 35 to 50 percent of the result, over and above their expenses.<sup>30</sup> Given that the total payout on the claims was around \$1.5 billion in just 5 years, their earnings have been substantial.<sup>31</sup> Total Catholic defense expenditures since the claims began exceed \$2.5 billion and are still growing.<sup>32</sup>

Claims may be filed against both alleged offenders and institutions. Fiscal reality dictates that claims should be filed against institutions, whether or not the evidence shows the institution ever knew of the abuse problem. True offenders deserve to be punished, but they rarely have money, and they may be dead, in which case the claims are filed against the institution alone.

Claims include negligent supervision, vicarious liability (employers being liable for acts or omissions of employees), breach of fiduciary duty (a type of breach of trust), fraudulent concealment, and others. Courts have found some of the claims legally viable and others not. Plaintiffs file them anyway. Whether or not they are legally sound, they put pressure on the defending organization. Cases rarely go to trial; the vast majority of them settle.

Because even ancient Catholic sexual abuse claims are gradually drying up, the plaintiffs' bar seems to be seeking new markets. Missionary boarding schools are a good target, because they provide a large pool of former children. So are other religious organizations that have worked with children in the last fifty years. Cases are much more profitable when developed in groups and waves. A proactive approach to investigations and healing, both for current and historic abuse, is the best preparation for the gathering storm.

##### *B. Why Keep Statutes of Limitations?*

Victims' groups applaud removing the statutes of limitations. These statues, they argue, hinder justice by permitting old crimes to go unpunished. They claim victims may not yet remember what happened, or they lack the psychological strength to come forward, sometimes for decades.

In some regions, plaintiffs' attorneys have helped to change laws to revive old, time-barred claims. In Connecticut, for instance, the statute of limitations is now thirty years. In

California, the statute of limitations was suspended for a one-year window to file old claims, triggering around a thousand new lawsuits.<sup>33</sup> A current “window” bill that would revive old claims is being debated in Pennsylvania.<sup>34</sup>

But statutes of limitations have always been a vital component of our legal system. Leaders need to understand how they work. First, the clock starts when a child reaches majority, commonly at age 18. Then the clock runs for the length of time provided by state statutes, often three to six years, and much longer in some states. So someone abused at age 12 may have until they are 18, plus the length of the statute of limitations, to file a claim.

Filing cases against institutions for decades-old allegations is problematic. Early notice to an institution helps to correct dangerous conditions so that others are not injured. This notice principle is one way the government justifies such short time frames for itself. (In Colorado, for instance, to sue the government, a person must give notice within 180 days of the wrongful act.)

Limitations help good adjudication of claims. Hazards of old claims, often made after the offenders are dead, include fading memories, lost documents, and missing witnesses. Recent studies show that even current eyewitness testimony may be unreliable because of memory inaccuracies. Of the 297 cases that have been overturned by DNA evidence, more than 70 percent were based on (presumably well-meant) eyewitness testimony.<sup>35</sup> Thus, old claims create a greater possibility of injustice to the accused.

And testimony is not always well-meant. Fraud is much more difficult to detect and prove for old claims, especially if the only other person supposedly involved in the incident has dementia or is dead. Many old claims may be exaggerated or completely fabricated.

Justice issues are different in current and historic abuse. In a lawsuit on current abuse (which takes place at the latest within a few years after the person becomes an adult), recollections and evidence are relatively fresh, and it is easier to evaluate the actual injury. In historic abuse, the injury, while it may be very real, is hard to evaluate because it has gotten tangled up with all the other griefs and difficulties of life.

In historic cases, the financial burden for wrongdoing gets shifted by decades. After forty or fifty years, not only is litigation difficult, but it resembles reparations. The current organization is being asked to pay for something done long ago by someone else. That does not feel like justice to the present members of the organization.

Insurance purchased forty or fifty years ago, with a certain set of assumptions about risk, is seldom adequate. Often the insured institution cannot even locate such old policies. If insurance is not available, today's members and donors must pay for mistakes made generations ago. Current church or missions programs suffer. It is not those responsible for any wrongdoing who pay, but their institutional descendants.

In addition, reasonable statutes of limitations make sure that defendants are judged by contemporaneous standards of care.<sup>36</sup> For example, medical standards have changed enormously since 1970. No medical decision made then would be judged by the standards of 2013. Yet this litigation routinely evaluates decisions made in 1970 by the standards of today's research and knowledge. In those days, instead of prison, offenders were sentenced to treatment until they were "cured."<sup>37</sup> At the time, leaders did not realize this was ineffective. Another difference in the standard of care for historic cases is that most child protective services and child abuse

reporting laws were not yet in place even in the U.S., let alone for international offenses. Organizations are within their rights to insist on applying the statutes of limitations.

*C. Shouldn't Repressed/Recovered Memory Delay the Statutory Period From Running?*

An argument often made for extending or ignoring statutes of limitations is that sexual abuse is so traumatic that victims either repress their memories, or remember them but take time to gain strength to confront the institution. Some experts, such as Dr. Elizabeth Loftus, consider the repressed-memory theory to be largely junk science.<sup>38</sup> Memories retrieved after a long period of time are suspect, even when the claimant remembers them in good faith. Research has established that false memories can be created and that memory is plastic.

Dealing with a recovered memory is an important therapy goal, because a negative memory carries trauma and emotion, whether it is entirely, partially, or not at all true. In therapy, it may not matter much if the memory is true, because it truly affects the person.

Legal settings are different. If allegations of abuse mean that someone is to lose their career or be convicted of a crime, or if an organization is to pay out large sums of money, then corroborating evidence that the abuse really happened is needed. The same recovered memory that is taken seriously as the basis for therapy may not have sufficient evidentiary support to warrant legal consequences or to destroy an alleged offender's personal and professional life.

While normal statutory limitation periods do not start running until a child victim becomes an adult, allowing repressed memory or "psychological strength" claims to change the statutory period makes the claims period effectively lifelong. While mission organizations should reach out compassionately to former MKs with recovered memories, they can require recovered memory to pass certain tests before it is accepted as evidence.

*D. Litigation Will Attempt to Circumvent the Statute of Limitations*

Because the historic cases cannot otherwise be litigated, plaintiffs' attorneys plead theories like repressed memory, psychological inability to come forward, or lack of knowledge of the organization's culpability, to circumvent the statute of limitations. Some courts have recently accepted these arguments, and some have not.<sup>39</sup>

Given that these arguments are common, the organization should prepare to face them from the beginning of the investigation and should not lightly waive them or permit others to do so on its behalf.<sup>40</sup>

*E. Litigation Strategy*

Counsel and insurers are key players in litigation strategy. A very early step is to put the insurer on notice and get the insurance defense in place. Child sexual abuse cases in religious organizations are highly specialized and usually the plaintiffs' attorneys are repeat players, so the defense team must understand these specific patterns. Consider whether your organization's attorneys are litigators with this kind of experience, and if not, work with them to hire a defense attorney with this practice area.

Litigation defense counsel will help address issues about document privileges (confidentiality), as well as litigation holds (making sure that relevant documents are preserved).

Defense counsel will also work with the organization's general counsel to assess the costs and goals of the case and devise a strategic approach. The defense team has available certain constitutional and religious law principles as well as more ordinary defenses. Organizations should be aware that litigation is expensive, and they need to plan and prepare financially. Early stages of the litigation may involve motions to dismiss or for summary judgment because of the statute of limitations. Litigation around discovery may include disputes over privileged documents, or resisting extraordinarily broad requests for documents that plaintiffs' attorneys use to uncover more claims.

Throughout the case, litigation counsel will be aware of and strategize towards the possibility of settling the case, as most civil litigation ends in settlement. But achieving this settlement often means preparing well to go to trial.

#### *F. Alleged Offender Lawsuits*

If an accusation is false and is acted on, a person's life will be essentially destroyed. Other types of lawsuit arising from sexual abuse investigations are those filed by the alleged offenders for defamation, negligent supervision of the investigation team, or wrongful termination. These lawsuits are a very real risk. Both justice and litigation risk are reasons to conduct investigations carefully and in accordance with best practices, including due process for the accused. Legal counsel can help balance competing risks, and also help formulate findings and statements that reduce legal liability.

### **V. Conclusion**

Child sexual abuse may be the most noxious plant that can root and grow in a religious organization. Preventing child sexual abuse or rooting it out is a difficult and expensive challenge—but critical for both children and the organization. One major mission's Chief Financial Officer has said, "The continued work of the mission is just one bad child abuse case away from being ended." Organizations must get it right to protect children and the organization, and when abuse has happened, do what they can to heal the wrong.

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<sup>1</sup> The white paper "Protecting Children and Organizations from Child Sexual Abuse: An Overview of Legal and Practical Issues" is a more extended version of this paper, and is available from the author at [www.telioslaw.com](http://www.telioslaw.com).

<sup>1</sup> John Jay College of Criminal Justice of the City University of New York, *Nature and Scope of Sexual Abuse of Minors by Catholic Priests and Deacons in the United States 1950-2002* (Washington, D.C.: US Conference of Catholic Bishops, 2004), 24-35, [www.usccb.org/issues-and-action/child-and-youth-protection/upload/The-Nature-and-Scope-of-Sexual-Abuse-of-Minors-by-Catholic-Priests-and-Deacons-in-the-United-States-1950-2002.pdf](http://www.usccb.org/issues-and-action/child-and-youth-protection/upload/The-Nature-and-Scope-of-Sexual-Abuse-of-Minors-by-Catholic-Priests-and-Deacons-in-the-United-States-1950-2002.pdf).

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<sup>3</sup> Research Team of the John Jay College of Criminal Justice of the City University of New York, *The Causes and Context of Sexual Abuse of Minors by Catholic Priests in the United States, 1950-2010* (Washington, D.C.: US Conference of Catholic Bishops, 2012), 8, [www.usccb.org/issues-and-action/child-and-youth-protection/upload/The-Causes-and-Context-of-Sexual-Abuse-of-Minors-by-Catholic-Priests-in-the-United-States-1950-2010.pdf](http://www.usccb.org/issues-and-action/child-and-youth-protection/upload/The-Causes-and-Context-of-Sexual-Abuse-of-Minors-by-Catholic-Priests-in-the-United-States-1950-2010.pdf).

<sup>4</sup> National Review Board, *A Ten Year Progress Report* (Washington, D.C.: United States Conference of Catholic Bishops, 2012), 1, [www.usccb.org/issues-and-action/child-and-youth-protection/upload/10-year-report-2012.pdf](http://www.usccb.org/issues-and-action/child-and-youth-protection/upload/10-year-report-2012.pdf).

<sup>5</sup> Secretariat of Child and Youth Protection for the National Review Board, *2011 Annual Report Findings and Recommendations Report on the Implementation of the Charter for the Protection of Children and Young People* (Washington, D.C.: United States Conference of Catholic Bishops, 2012), 3-4, [www.usccb.org/issues-and-action/child-and-youth-protection/upload/2011-annual-report.pdf](http://www.usccb.org/issues-and-action/child-and-youth-protection/upload/2011-annual-report.pdf).

<sup>6</sup> For examples see Melissa Steffan, "Missionary Group Fires Sex Abuse Investigator," *Christianity Today*, February 12, 2013, [www.christianitytoday.com/gleanings/2013/february/missionary-group-fires-sex-abuse-investigator.html](http://www.christianitytoday.com/gleanings/2013/february/missionary-group-fires-sex-abuse-investigator.html); Leslie Scanlon, "Six persons named by Abuse Review Panel in physical, sexual abuse investigation," *The Presbyterian Outlook*, August 11, 2010, [www.pres-outlook.org/component/content/article/44-breaking-news/10520-six-persons-named-by-abuse-review-panel-in-physical-sexual-abuse-investigation-.html](http://www.pres-outlook.org/component/content/article/44-breaking-news/10520-six-persons-named-by-abuse-review-panel-in-physical-sexual-abuse-investigation-.html); *GRACE Amended Final Report for the Investigatory Review of Child Abuse at New Tribes Fanda Missionary School*, August 28, 2010, [www.bishop-accountability.org/reports/2010\\_08\\_28\\_GRACE\\_Fanda\\_Report.pdf](http://www.bishop-accountability.org/reports/2010_08_28_GRACE_Fanda_Report.pdf); "Final Report of Independent Panel," *Global Ministries in the United Methodist Church*, <http://new.gbgm-umc.org/about/globalministries/childprotection/finalpanelreport/>; and John W. Kennedy, "Missions: From Trauma to Truth," *Christianity Today*, April 27, 1998, [www.christianitytoday.com/ct/1998/april27/8t5016.html](http://www.christianitytoday.com/ct/1998/april27/8t5016.html).

<sup>7</sup> John Eligon and Laurie Goodstein, "Kansas City Bishop Convicted of Shielding Pedophile Priest," *The New York Times*, September 6, 2012, [www.nytimes.com/2012/09/07/us/kansas-city-bishop-convicted-of-shielding-pedophile-priest.html?\\_r=0](http://www.nytimes.com/2012/09/07/us/kansas-city-bishop-convicted-of-shielding-pedophile-priest.html?_r=0).

<sup>8</sup> Gregory S. Love and Kimberlee D. Norris, "Church Employees Arrested/Charged for Failure to Report Sexual Abuse," *Ministry Safe Blog*, 2012, <http://blog.ministrysafe.com/blog/post/church-employees-arrestedcharged-for-failure-to-report-sexual-abuse.aspx>

<sup>9</sup> Jarrel Wade, "Judge rules against Victory Christian ministers," *Tulsa World*, November 20, 2012, [http://www.tulsaworld.com/news/crimewatch/judge-rules-against-victory-christian-ministers/article\\_88497413-9a6a-59d7-9521-22d975701e8c.html](http://www.tulsaworld.com/news/crimewatch/judge-rules-against-victory-christian-ministers/article_88497413-9a6a-59d7-9521-22d975701e8c.html).

<sup>10</sup> Lori Fullbright, "Victory Christian Staff Members Plead No Contest to Failing to Report Teen Rape," *WNOW News on 6*, March 22, 2013, <http://wnow.worldnow.com/global/story.asp?s=21767011>.

<sup>11</sup> Research Team, *The Causes*, 5, 16.

<sup>12</sup> Research Team, *The Causes*, 99.

<sup>13</sup> National Review Board, *A Ten Year*, 8.

<sup>14</sup> 15 U.S.C. § 1681 *et seq.*

<sup>15</sup> U.S. Equal Opportunity Commission, *EEOC Enforcement Guidance*, Number 915.002, April 25, 2012, [www.eeoc.gov/laws/guidance/arrest\\_conviction.cfm](http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm).

<sup>16</sup> Jeffrey L. Seglin, "Too Much Ado About Giving References," *The New York Times*, February 21, 1999, [www.nytimes.com/1999/02/21/business/the-right-thing-too-much-ado-about-giving-references.html](http://www.nytimes.com/1999/02/21/business/the-right-thing-too-much-ado-about-giving-references.html).

<sup>17</sup> This approach will depend on the law in different jurisdictions, and some states protect former employers acting in good faith by statute.

<sup>18</sup> Diane Heldt, "Regents: All University of Iowa employees should have sexual harassment training," *The Gazette*, February 6, 2013, <http://thegazette.com/2013/02/06/regents-all-university-of-iowa-employees-should-have-sexual-harassment-training/>.

<sup>19</sup> Farlex Inc., *The Free Dictionary*, <http://legal-dictionary.thefreedictionary.com/Probable+Cause+and+Reasonable+Suspicion>.

<sup>20</sup> Most of the privileges, such as the counselor-client privilege, do not shelter persons from reporting child abuse, though clergy confidentiality is more often absolute.

<sup>21</sup> 18 U.S.C.A. § 2423(c).

<sup>22</sup> Freeh Sporkin & Sullivan, LLP, "Report of the Special Investigative Counsel Regarding the Actions of the Pennsylvania State University Related to the Child Sexual Abuse Committed by Gerald A. Sandusky," July 12, 2012.

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- <sup>23</sup> Tom Barth, "Crisis Management in the Catholic Church: Lessons for Public Administrators," *Public Administration Review*, Sept./Oct. 2010, p. 6.
- <sup>24</sup> National Review Board, *A Ten Year*, 2.
- <sup>25</sup> The sort of intense focus created by involvement with a victims' group or a lawsuit may lead to unconscious exaggeration, as the person becomes obsessed with the injuries.
- <sup>26</sup> Robert J. Priest and Esther E. Cordill, "Christian Communities and 'Recovered Memories' of Abuse," *Christian Scholar's Review*, 2012.
- <sup>27</sup> Susan A. Clancy, *The Trauma Myth* (New York: Basic Books, 2009).
- <sup>28</sup> Sometimes it may be not so much that memory is repressed or lost, as that the abuse had relatively little significance or effect until the person realized—rather than remembered—what actually happened.
- <sup>29</sup> For a more detailed overview see B. E. Saunders, L. Berliner, and R. D. Hanson editors, *Child Physical and Sexual Abuse: Guidelines for Treatment (Revised Report: April 26, 2004)* (Charleston, S.C.: National Crime Victims Research and Treatment Center, 2004), 25-26.
- <sup>30</sup> One sample fee agreement for this type of case gave the attorneys 40% of gross recovery if the case settled or went to trial, and 50% if there was an appeal. In addition, attorneys received all their costs. Fees would be divided between local counsel and one of the national plaintiffs' firms. Costs are high. For instance, one national plaintiffs' consultant and expert witness charges \$700 an hour. In the end, the amount of money available for the actual plaintiff might be rather small.
- <sup>31</sup> \$1,499,088,412 was paid out in settlements from 2004 to 2009. Center for Applied Research in the Apostolate, *2009 Survey of Allegations and Costs A Summary Report for the Secretariat of Child and Youth Protection United States Conference of Catholic Bishops* (Washington D.C.: Georgetown University, February 2010), 41, [www.bishop-accountability.org/usccb/implementation/report\\_on\\_2009/9\\_CH4.pdf](http://www.bishop-accountability.org/usccb/implementation/report_on_2009/9_CH4.pdf).
- <sup>32</sup> Laurie Goodstein and Erik Eckholm, "Church Battles Efforts to Ease Sex Abuse Suit," *New York Times*, June 14, 2012, [www.nytimes.com/2012/06/14/us/sex-abuse-statutes-of-limitation-stir-battle.html](http://www.nytimes.com/2012/06/14/us/sex-abuse-statutes-of-limitation-stir-battle.html).
- <sup>33</sup> *Id.* Estimates vary on the California window, but it seems to have been around 800 persons who alleged abuse by priests and around 1,000 total.
- <sup>34</sup> Jan Murphy, "Pa. lawmakers push for extending statute of limitations for child sex abuse victims," *Penn Live*, Sept. 25, 2013, at [http://www.pennlive.com/midstate/index.ssf/2013/09/pa\\_lawmakers\\_push\\_for\\_extendin.html](http://www.pennlive.com/midstate/index.ssf/2013/09/pa_lawmakers_push_for_extendin.html).
- <sup>35</sup> Douglas Starr, "False Eyewitness," *Discover Magazine*, September 2012, 40, <http://discovermagazine.com/2012/nov/04-eyewitness#.UTztRRlifNA>.
- <sup>36</sup> Changing standards of care for children may be illustrated simply. When I lived in Indonesia, everyone commented on what nice, round heads my children had. I explained that it was because American doctors had determined it was safer for children to sleep on their stomachs (and much easier for them to roll over and crawl). Indonesian babies had flat heads from lying on their backs. About the time my last round-headed baby had graduated to a regular bed, the American doctors changed their minds and the standard of care and decided that, after all, it was much safer for babies to sleep on their backs. It turned out the mothers of the flat-headed babies were right after all.
- <sup>37</sup> Dr. Monica Applewhite gave an excellent summary of historic standards of care and the Catholic sexual abuse scandal in an address to the Irish Bishops on March 10, 2009. Its full text can be downloaded at [www.safeguarding.ie/dr-monica-applewhite-irish-bishops/](http://www.safeguarding.ie/dr-monica-applewhite-irish-bishops/).
- <sup>38</sup> Elizabeth Loftus and Katherine Ketcham, *The Myth of Repressed Memory: False Memories and Allegations of Sexual Abuse* (New York: St. Martin's Press, 1994).
- <sup>39</sup> See *Colomb v. Roman Catholic Diocese of Burlington*, No. 2:10-cv-254 (D. Vt. Sept. 28, 2012) (denying summary judgment for abuse in 1974); but see *Quarry v. Doe 1*, 272 P.3d 977 (Cal. 2012) (dismissing case as barred by statute of limitations).
- <sup>40</sup> In the *GRACE Final Report*, August 23, 2010, on page 51, GRACE recommended that New Tribes Mission submit to binding arbitration for all MK claims, and that it agree to waive all statutes of limitations defenses.