

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

**Theresa Lynn Sidebotham, Esq.
Telios Law PLLC**

Yet it is not our part to master all the tides of the world, but to do what is in us for the succour of those years wherein we are set, uprooting the evil in the fields that we know, so that those who live after may have clean earth to till. What weather they shall have is not ours to rule.

J.R.R. Tolkien, “The Last Debate,” *The Return of the King*

Child sexual abuse is an evil and poisonous plant, that strikes roots deep into the soil, and destroys the lives of those it touches. Because child sexual abuse is endemic in human society, religious organizations must devote time, energy, and money to prevent the seeds from sprouting, uproot abuse where it is found, heal those suffering from its poisonous effects, and keep the organization healthy and whole.

This paper will first examine the current landscape of child sexual abuse. Then it will address prevention of abuse and wise approaches to investigations. Finally, it will discuss sex abuse litigation.

I. Current Landscape of Child Sexual Abuse

Child sexual abuse is frighteningly more prevalent than most people understand. Experts disagree on the percentage of sexual abusers among the American male population, but a conservative estimate is 1 in 10, and some researchers believe it is closer to 1 in 5. Even these figures may be low due to under-reporting.¹ (By way of comparison, data shows that the number of accused priests from 1950 to around 2000 was 4 percent of priests in ministry, or 1 out of 20.²) Child sexual abuse in public institutions is a serious problem. For instance, including both verbal sexual abuse and touching, nearly ten percent of public school students experience sexual

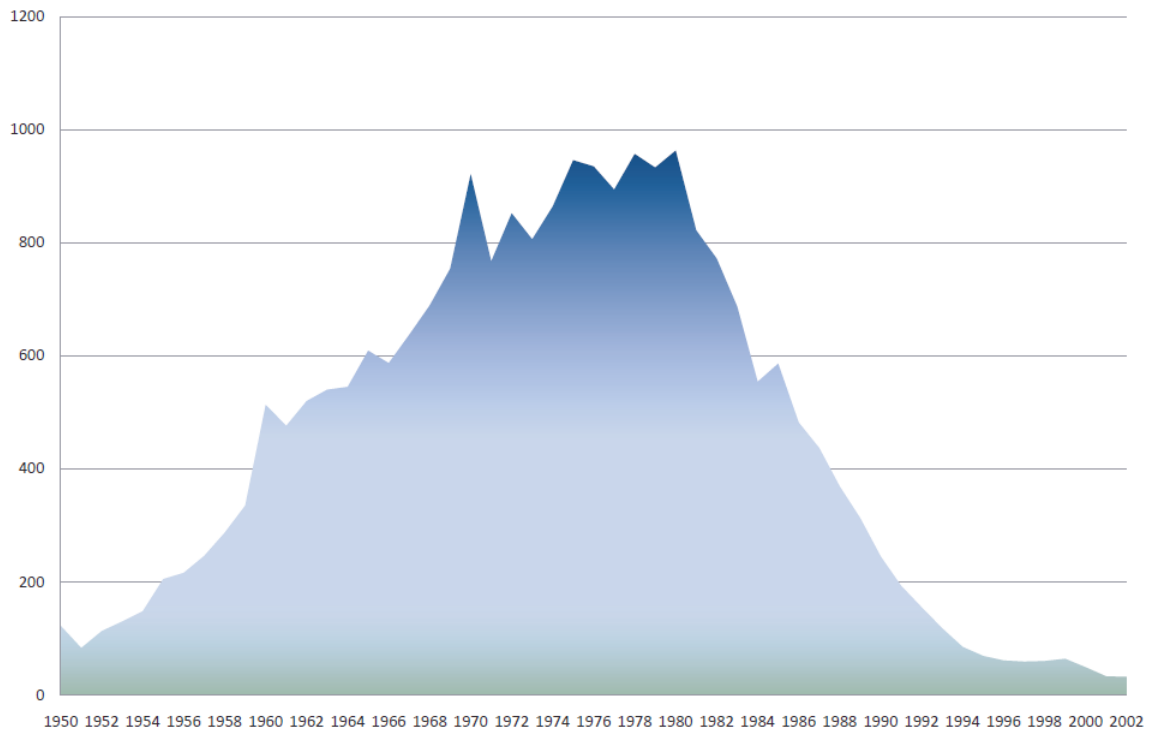
abuse from school employees.³ These numbers indicate child abuse will always be a problem both in society and the Church.

This paper will focus on child sexual abuse in religious organizations, particularly mission organizations. Claims of child sexual abuse in religious organizations are hard to analyze objectively, because of institutional and spiritual shame. Also, media coverage of claims employs a rhetoric, volume, and fervor that belies the facts. While it is natural to suppose, based on media coverage, that children are at greater risk for sexual abuse in religious institutions, no hard data supports that supposition. The highest risk factors for child abuse are unrelated to faith community. Risk factors depend on the relationship between the offender and the victims. Federal studies show that three-quarters of child abuse takes place in the "circle of trust." Child sexual abuse is committed by family members, friends, teachers, coaches, doctors—and, of course, clergy members.⁴

Reports of child sexual abuse fall into two categories, present and historic. Although it is not widely acknowledged, many reports of abuse in religious organizations, including missions, are of incidents that took place in the distant past. Both present and historic claims must be addressed, but the approach is necessarily different.

The incidence of abuse in the Catholic Church rose in the sixties, peaked in the seventies, fell sharply in the eighties, and continued to fall.⁵

*Nature and Scope: Incidents of Sexual Abuse by Year of Occurrence, 1950-2002*⁶



Although many “new” cases are reported each year in the Catholic Church, they fall into the same pattern, so that the “peak of the curve is not moving forward or broadening as time goes on.”⁷ For instance, there were 7-10 credible reports from current minors in 2011 across the entire Catholic Church.⁸ The Catholic Church has taken many positive steps to prevent child abuse and to reach out to victims, some of which will be discussed later in this paper.

Patterns of abuse appear to be similar in other organizations, though no organization has done indepth audits and reports like the Catholic Church. For instance, the Episcopal Church, the Hare Krishnas, and Lutherans have all experienced large jury verdicts or settlements, mostly over past abuse.⁹ Mission organizations have dealt with abuse allegations from the distant past, including the Association of Baptist for World Evangelism (ABWE), New Tribes Mission (NTM), the Christian and Missionary Alliance (C&MA) and the Presbyterian Church U.S.A.

(PCUSA).¹⁰ Organizations that track sexual abuse allegations against missions, like the Child Safety and Protection Network, see claims of both current and historic sexual misconduct.

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 insisted his sentence was too lenient because it did not include jail time.¹¹ 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 2012.¹² The court refused to dismiss the charges as of late 2012, and scheduled the cases for a jury trial.¹³

In sum, any organization that has worked with children historically should assume there are historical incidents of abuse, even if they are not known. Any organization that works with children currently 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 for organizations. Strong evidence shows that good policies protect children. They also protect the organization. While at least one recent court refused to decide as a matter of law that a church's duty to children means it must have a policy in place to protect children,¹⁴ this argument might fail under different facts or in a different jurisdiction.

Prevention should be based on "situational factors" or "routine activities theory," a concept that teaches that, for child sexual abuse to occur, three factors must be in place: first, a person motivated to abuse; second, a potential victim; and third, lack of a "capable guardian,"¹⁵ or put another way, an environment that gives access. Studies show that interventions that limit

chances to commit child sexual abuse by addressing these three factors are effective in reducing commission of the crime.¹⁶ Such interventions can include policies, screening, training adults and children, and audits.

A. Sexual Misconduct and Behavior Policies

Codes of conduct should be in place for all staff and volunteers. These establish clear standards of behavior, not just for child sexual abuse, but for other behaviors that may be boundary violations or lack integrity or Christian purity, such as dirty jokes, inappropriate touching that is not sexual abuse, sexual harassment, adult pornography, and so forth. Policies can address the alcohol, use of pornography, and drug consumption that often accompany child sexual abuse. A religious organization has the advantage of being legally protected in enforcing its religious moral standards.

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

B. Criminal Background Checks

Criminal background checks are a key component of a child abuse prevention program. The Catholic Church has run well over two million checks on employees and volunteers.¹⁷ Very few sexual offenders, if any, have been uncovered through those background checks. One possibility is that such a background check scares offenders away so that they do not apply. Another possibility is that the background checks are a waste of time and money. Even if this were true, background checks do show that the organization takes child abuse prevention seriously, plans to deal with it effectively, and is not negligent.

Be aware of government requirements for background checks. In the United States, the Fair Credit Reporting Act (FCRA) applies to both credit reports and criminal records.¹⁸ Recently it has changed. New forms apply, and a reputable service provider will use the updated forms.

Also, adverse employment actions based on these reports must comply with the FCRA. In addition, the U.S. Equal Employment Opportunity Commission (EEOC) has recently issued extensive guidance on when and how arrest and conviction records may be used, and how to avoid discriminatory action under Title VII.¹⁹ The EEOC is concerned that screening people for criminal backgrounds disproportionately screens out minorities. Organizations will likely need legal advice on these complicated issues.

C. Applications and References

Checking references is one of the most useful tools in screening someone, yet is likely to be skimmed or overlooked. Former employers can be very reluctant to talk about reasons an employee left or the employee's work habits.²⁰ One approach is to include in the employee application packet a written permission and waiver of liability allowing former employers to give their opinions without fear of retribution. Many former employers are much more willing to discuss a former employee with a written reference release and waiver of liability in hand.²¹

Background questionnaires in the employment application can also be surprisingly useful. In addition to information that any employer can ask for, such as history of working with children, religious organizations can include questions in line with their religious morals and hiring practices. Screening sample documents are available through organizations like MinistrySafe, Child Safety and Protection Network, or the organization's insurer. The organization's attorney should also review application and screening documents.

Although it seems intuitively obvious that any prospective employee with a history of inappropriate behavior would simply lie in response to such questions, this is not necessarily true. Later review of such questionnaires after there has been trouble often reveals that there

were red flags on the form, such as questions not answered, or answered in doubtful ways, that should have triggered further exploration.

D. Training of Staff, Volunteers, Adults, and Children

Training is a critical component of a good child protection program. Policies and screening attempt to weed out potential offenders. The way a mission can best protect children is to train them. 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. Sadly, other adults often comment in retrospect that they thought certain behavior was peculiar, but did not know it was a problem. Clear understanding of a safe environment also empowers adults to take appropriate action steps rather than being afraid to cause trouble.

Because the “capable guardian” theory needs full participation to work well, all personnel and volunteers should be trained initially and at stated intervals. This can be expensive and time-consuming. Organizations can share resources in groups such as Child Safety and Protection Network. Especially for mission organizations, online and video training may be a good format, with programs such as MinistrySafe, that have developed a cost-effective way to provide and monitor training. One mission that has been training its staff for five years can demonstrate that, as a result of the training, it receives more early reports, leading to early intervention.²²

E. Organizational Audits

Some large organizations now conduct regular audits that evaluate whether the organization is complying with its hiring, training, and conduct policies. The Catholic Church

conducts a massive annual audit, which is one of the reasons it may now be the safest organization for children. An audit can also demonstrate that the organization has not been negligent when an employee violates a policy such as a harassment policy, a defense recently used at the University of Iowa.²³

III. Wise Approaches to Investigations

Allegations of child abuse are not quite as inevitable as death and taxes, but close. Leaders must be ready to move forward despite their sense of shock and distaste. They must resist any impulse to move into denial, but keep an open mind and not make assumptions either way. Not responding well can have disastrous consequences: further hurt to victims; disruption to ministry; gossip and loss of morale; negative publicity; and legal action. Good policies equip administrators to handle these crisis situations. Important steps in response are reporting of abuse, a good investigation, healing of victims, discipline of offenders, and public relations. Good responses cost time and money—but nothing like the downstream costs of damage to lives and legal action.

A. Reporting—Both Internal and External.

Organizations should have procedures to report reasonable suspicions of sexual misconduct. “Reasonable suspicion” is a legal term, so the definition may vary according to the statute, but generally it means “sufficient knowledge to believe that criminal activity is at hand,” based on specific facts, but less than probable cause or “probably true.”²⁴ Reports need to be made within the organization. Depending on the nature of the allegations, reports must also be made to authorities. Internal reporting and subsequent discipline are appropriate for immoral adult activity such as sexual harassment, behavior that violates the Christian principles of the organization (such as adultery or other illicit sexual behavior), and boundary violations with a

child that are not child abuse. An internal report should trigger a complete investigation, as discussed below.

If there is a reasonable suspicion of child sexual abuse, laws across the United States (and many other countries) require that it be reported promptly to law enforcement. It may (or may not) be appropriate to have a prompt but brief preliminary investigation to determine if specific facts support reasonable suspicion. All states now have mandatory child abuse reporting. External reports to law enforcement should be made in accordance with the law, and all abuse involving minors should be reported, including historic claims.²⁵ This is true even if law enforcement is unlikely to take action, because it shows good faith. Failure to report may have serious consequences for individuals and the organization.

Misconduct that takes place overseas should be reported to local authorities, in accordance with local law and cultural sensitivities. When and how to do this can be a knotty problem. Clear mission policy and legal advice can both help.

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. There is analogous reporting for citizens of many other countries. Finally, for U.S. offenders, child sexual abuse that takes place overseas can be reported to the federal authorities for possible prosecution under the Federal Protect Act, which criminalizes “illicit sexual conduct” abroad by United States citizens and permanent residents.²⁶ While it is fairly rare for the federal government to prosecute these crimes, it sometimes happens, and federal reporting is recommended even though it is not mandatory. Reporting to local embassies or consulates may also be wise. Organizations can take into account the victim’s wishes for reporting when it is 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. 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. If someone poses a current risk, he or she should be suspended from ministry or placed on leave while an investigation is conducted. Discretion should be exercised as to whether the investigation or the reason for administrative leave is made public. A baseless allegation could ruin a person's career and ministry.

An investigation may be of either current or historic abuse. A current investigation must first consider protecting the victim and the safety of other children. Providing an investigator with in-depth training on interviewing children is important. A historic investigation may present problems in locating witnesses, who may have moved on or died, and the investigation may be based more on documentary review. Historic allegations also may involve more difficult decisions on how broadly to investigate. Casting the net too widely may re-injure people who have moved on, or even trigger false claims, but ending the investigation too soon may foreclose healing for victims.

When abuse is reported, investigation should begin immediately, 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.

C. The Responsibilities and Competencies of a Fact-Finding Team.

A fact-finding team must address a number of different goals at once. These goals can easily come into conflict in the hands of a less-than-expert or biased team. First, a fact-finding team must find out the truth—the accurate, unvarnished truth without any presuppositions either way. The investigative team should follow the facts objectively and hunt down both evidence that incriminates and that exonerates. It must probe deeply and ask follow-up questions. It should view all statements and evidence with an open mind.

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

Fifth, the team must conduct its investigation in such a way that it does not create unnecessary liability for the religious organization. This should include reporting confidentially to the organization's attorney, and ultimately to leadership.

The fact-finding team should be assembled carefully. A team of 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 be experienced with such investigations. Competencies on the team should include: someone with psychological training in sexual abuse; someone with legal knowledge of the issues surrounding sexual abuse, including privilege issues; and someone with an in-depth knowledge of the setting and personnel. 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

knowledge for the particular situation. If criminal charges may be filed, and criminal authorities have not done and do not plan to do an investigation, evidence must be handled properly and adequately preserved, with attention to issues like chain of custody. This requires specialized professional training.

D. 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. MK and other victim advocacy groups insist that the entire team should be independent of the organization. Pros and cons require balancing in each situation.

Investigating purely **within the organization** creates a higher risk that the investigation will stop too soon. This concern is real, as repeated history, from the Catholic Church to Penn State, shows that organizations are tempted to take a minimal approach to these problems. In addition, organizations may not have personnel with the deep level of skills described above. Also, media and victims' groups may accuse the organization of "whitewashing" or ignoring problems. For these reasons, it reduces risk to the organization to have at least one external, independent person on the team.

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, serious concerns exist about whether using an outside team destroys the right to privacy and the legal privileges for both the organization and individuals, as discussed below. This must be handled carefully.

One option is to have a **mixed team**, with at least one member from within the organization and at least one from outside. This allows for both sensitivity to the organization's culture and for transparency. The external person can bring objectivity, help the organization carry out its policies, and help the team write a Statement of Findings.

Probably the main reason organizations don't want to use an outside investigative team is the much higher cost. In the world of child sexual abuse, this is foolish in light of the bigger picture. First, the damage to children's lives must be properly addressed, even if it is costly. Secondly, defending even one lawsuit where the investigation was inadequate will likely dwarf the costs of an external investigation by professionals.

E. The Role of Attorneys

Should lawyers be involved in an investigation? An attorney participating in the investigation brings useful training and legal knowledge, and may help to preserve privacy and privilege rights. Of course, attorney time is costly, and few attorneys focus on this area.

Attorneys potentially can take different roles. An attorney who is on the investigative team has a mandate to seek impartial truth. An attorney who advises the organization on how to proceed has a different role, an obligation of loyalty to the client. It may be wise to keep these two roles separate because of possible conflict of interest.

In some cases, the investigation itself should be kept confidential or privileged, with only final reports prepared for general consumption, depending on privacy concerns, privileges involved, and possible litigation. If this is true, it must 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, recommend healing responses to care for victims, and help the organization position for any legal defense that may be needed.

F. Considering Issues of Privacy and Privilege

An investigation is about information. Once this information is set loose, it cannot be called back. This affects two areas—personal reputation and privacy, 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. In fact, they may not even wish for leadership to have it. If this is true, the fact-finding team can prepare a report for leadership using numbers rather than names, and keep a separate key. (If litigation occurs, it may be necessary to identify what a claimant said during the investigation, but at that point the claimant will have waived the rights to privacy by filing the lawsuit.) In addition, those accused should not be publicly identified until some kind of due process has occurred, such as a law enforcement proceeding or a disciplinary action by the organization. Publishing unsupported accusations not only violates our canons of justice, but also opens the organization to a defamation claim.

In a lawsuit, some evidence must be turned over, but some is protected. Our society has decided that some information is confidential, or in a legal term, “privileged.” Communications between clergy and people in their pastoral care are confidential. Churches and ministries have a number of First Amendment protections that may cover communications as well. Other forms of confidential communication occur between attorneys and clients, doctors and patients, or

husbands and wives. The law protecting these communications is based on the Constitution, statutes, regulations, and common law.

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 those outside the privilege. Once the privileges are waived, they cannot be put back in place for that information. Some of this information betrays privacy and confidentiality issues for the organization, and some of it may make the organization more vulnerable in a lawsuit.

Before the investigation begins, the organization needs to consider carefully what information will be reviewed, how that should be done in light of these privileges, and how publicly the information will be revealed. Attorney advice is helpful here.

After the investigation, privacy concerns mean 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. Practical experience has shown that claimants are likely to leak information to websites or victims' groups, whether or not they have agreed to keep it confidential.

G. Outreach to Victims and Healing Responses

Organizations must give attention to healing and reconciliation for victims of child sexual abuse. Contrary to media reports, the Catholic Church has developed a good model in this area. It has observed that responding to victims in a strictly legal manner is inadequate and does more damage. When possible, victims need compassionate care and a pastoral response.²⁷

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

are offering therapy, support groups, retreats, and giving victims input on improving child safety going forward.

H. The Complex Truth About Claimants.

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

In other cases, claimants were abused, but they are exaggerating the abuse, perhaps unconsciously. Particularly with the distorting effect of decades of time, incidents can become more grave or frequent, physical abuse can become more brutal, and injuries can grow from a mildly disturbing episode to life-threatening trauma.²⁸ Cross-pollination of stories can cause others to unintentionally appropriate true accounts and make them part of their own stories. Occasionally, claims are flat-out fraudulent.

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 traumatized. Later, when the child realizes the depth of the betrayal and the evil that occurred, trauma sets in.²⁹ For other children, abuse produces more immediate symptoms.

This means that the level of trauma experienced may vary in time and may depend on the emotional health of the person at the time he or she processes the abuse, the level of support available, and the approach taken to the episode.³⁰ Some people are very resilient and others are much more fragile. Many factors play into it: family dysfunction, substance abuse, poor work

record, poor relationships, mental problems, and physical problems. Any of these can exacerbate trauma from the abuse.

Treating abused children shortly after the injury helps prevent later and deeper onset of trauma.³¹ (Sometimes leadership and family members both need help to understand this, as the child's symptoms may be very subtle.) This benefit of timely intervention is another reason investigations should be prompt and adequate.

I. Third Culture Kid Issues

In mission organizations and boarding schools, child abuse issues are complicated by difficult life issues. Most MKs have to process issues such as rejection, abandonment, and alienation. In addition, overly strict discipline and religious shame were fairly common in the evangelical subculture several decades ago. TCK issues and child abuse may be difficult to distinguish, and one can exacerbate the other. Although some TCKs are very resilient, others may be fragile and more at-risk for serious consequences from sexual abuse. In a mission organization, the investigative team should be aware of cross-cultural and subculture factors and have some idea of their impact.

J. Zero Tolerance

Historically, religious organizations have handled offenders ineptly. While early efforts to rehabilitate offenders were consistent with current thinking in the culture, other factors came into play. One was the Christian idea of forgiveness and reconciliation. Ministries today still struggle with whether a person repentant of sexual sin 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 credible, the person should be removed immediately and permanently from ministry—no matter how charismatic, vibrant and successful that person is otherwise.

K. Coping With Media and Public Relations

A scandal in a religious institution is juicy news and an easy media target, even without victims' groups and plaintiffs' attorneys in the mix. In addition, the social media, with a potential storm of negative blog posts, frightens ministry leaders. How should leaders react?

First, leaders can prepare messages before they are needed, preferably even before a scandal arises. A ministry should establish good relationships with reporters when times are good. When a bad situation is developing, leadership must prepare suitable soundbites and anticipate hostile questions. "No comment" is never a good answer, because it makes the ministry look guilty.³² The best approach is to prepare with a media expert who will help get the ministry's truthful message across. Media skills take time and specialized knowledge to master, and the middle of a crisis is not a good time to practice.

Next, neither social media nor regular media should dictate the organization's strategy, even if they claim to speak for the victims. A ministry must consider many things in responding to allegations, including the needs of all victims (not just the vocal ones), safety of children, other personnel, the mission of the organization, the trust placed in it by donors, and due process for alleged offenders. Reacting to the desires of an interest group on any side of the question is likely to lead the ministry in a bad direction.

L. Responsibilities of Leadership.

The Board (or comparable organizational leadership) has important fiduciary as well as spiritual responsibilities. It must be open to hearing the truth as found by the fact-finding team, no matter what level of past failure it must acknowledge. Next, it is responsible to develop a plan to minister spiritually and emotionally to any victims and those close to them. It should respond compassionately to those claimants who may not be victims. Leadership must discipline any wrong-doers internally, as well as cooperate with law enforcement. It should make plans to keep anyone else from being harmed. Leadership protects confidentiality and does not unnecessarily create liability for the organization. Lastly, it should take responsibility for any media contact or press releases.

IV. Facing Litigation Against the Organization

At times, healing responses to allegations of abuse are inadequate or are not accepted, and the organization faces a lawsuit. Often, litigation is driven by factors outside the organization's control. The organization will have to consider its position on a strong litigation defense. Victims have a moral right to healing responses. But caving to litigation is like eradicating noxious weeds with a bulldozer or flamethrower. The field itself may be destroyed in the process.

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.³³ Given that the total payout on the claims was around \$1.5 billion in just 5 years, their earnings

have been substantial.³⁴ Total defense expenditures since the claims began exceed \$2.5 billion and are still growing.³⁵

The plaintiffs' bar worked hard to develop the market, approaching the task with passion, marketing savvy and flair. Certain boutique law firms specialized in these cases and developed a national reputation. Some plaintiffs' attorneys are adept at attracting media coverage, channeling information to reporters and posting colossal amounts of confidential information (including lists of priests alleged to be abusers, whether they are proven to be so or not) on their websites. For instance, when the Archdiocese of Milwaukee filed for bankruptcy protection, plaintiffs' attorneys launched a month-long advertising campaign through television, radio, print, and social media, to encourage others who may have been abused to come forward.³⁶

Plaintiffs' attorneys support and work closely with organizations such as Survivors Network of Those Abused by Priests (SNAP) and Voice of the Faithful (VOTF). MK Safety Net is affiliated with SNAP, and David Clohessy, the leader of SNAP, is scheduled to speak at the MK Safety Net Conference and Advocacy Summit in April 2013.³⁷ Victims' groups are organized around two themes: one, that justice demands reparations from the religious institutions; and two, that the institutional problems have never been solved.

Claims may be filed against both alleged offenders and institutions. Financial strategy dictates that claims should be filed against the institution. True offenders deserve to be punished, but they rarely have large sums of money. When the alleged offenders are dead, as frequently happens, the claims are filed against the institution alone, whether or not the evidence shows the institution ever knew of the abuse problem.

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, as well as other religious organizations that has 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 preventive.

B. Why Keep Statutes of Limitations?

Victims' groups applaud removing the statutes of limitations. These statutes, 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 parts of the country, plaintiffs' attorneys have helped to lobby successfully to change laws on statutes of limitations in order 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.³⁸ A current “window” bill that would revive old claims is being debated in Pennsylvania.³⁹

But statutes of limitations have always been a vital part 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 the offenses decades old—what might be called "graveyard litigation" because so many alleged offenders are dead—is problematic. Early notice to an institution helps to correct dangerous conditions so that others are not injured. This notice principle is one reason the government imposes such short statutes of limitations. (In Colorado, for instance, to sue a government agency, a person must give notice within 182 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.⁴⁰

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 is dead. Many old claims may be exaggerated or completely fabricated. In mass tort settlements, claims suddenly come into question as plaintiffs' attorneys fight out whose claims are fraudulent.⁴¹

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. When forty or fifty years have passed, not only is litigation difficult, but it is more like 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.⁴² For example, medical standards have changed enormously since 1970. No medical decision made then would be judged by the standards of 2013. Yet litigation evaluates decisions made in 1970 by Catholic bishops or Protestant missions leaders, consistent with the advice of mental health professionals of that day, by the standards of today's research and knowledge. In those days, instead of prison, offenders were sentenced to treatment until they were "cured."⁴³ Neither the Church nor anyone else at the time realized 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 right 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.⁴⁴ 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.

It is different in a legal setting. 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, there should be strong evidence that the abuse really happened (such as independent corroborating evidence). The same recovered memory that is taken seriously as the basis for therapy may not have sufficient evidentiary support to warrant legal consequences.

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.⁴⁵

Given that these arguments are common, the organization should prepare to face these arguments from the beginning of the investigation and should not lightly waive them or permit others to do so on its behalf.⁴⁶

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 area of practice.

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 requests for documents that are extraordinarily broad because they are intended 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 goal often means preparing well to go to trial.

F. Should Settlements be Confidential?

Confidentiality of settlements is hotly disputed in the child sexual abuse context. Unlike its earlier practice, the Catholic Church no longer uses confidential settlements, except at the request of the victim.⁴⁷ Some argue that carefully drafted confidentiality clauses advance the interest of all parties.⁴⁸ While preventing victims of abuse from talking about the abuse can re-victimize them, confidentiality about the terms of the settlement may help bring closure and prevent publicity they do not want. And generally, the organization would prefer to have the settlement be confidential. Thus, pros and cons of confidentiality should be considered carefully.

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.

Theresa Lynn Dixon Sidebotham, Esq., who owns Telios Law PLLC, is a former MK and TCK. She and her husband Bruce, both Wheaton College graduates, also served on the field for 7 years, and are parents to four MKs. Theresa serves ministries and missions by advising on a variety of issues. For child sexual abuse issues, she has been involved in creating policies, monitoring investigations, or providing litigation defense for a variety of churches and missions.

¹ Pat Wingert, "Mean Men," *Newsweek*, April 7, 2010, at <http://www.thedailybeast.com/newsweek/2010/04/07/mean-men.html>.

² John Jay College Research Team, *The Causes and Context of Sexual Abuse of Minors by Catholic Priests in the United States, 1950-2010*, p. 8, May 2011, at <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>.

³ Charol Shakeshaft, *Educator Sexual Misconduct: A Synthesis of Existing Literature*, U.S. Department of Education (2004), at <http://www2.ed.gov/rschstat/research/pubs/misconductreview/report.pdf>.

⁴ Pat Wingert, "Mean Men."

⁵ John Jay College of Criminal Justice, *Nature and Scope of Sexual Abuse of Minors by Catholic Priests and Deacons in the United States 1950-2002*, Feb. 2004, <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>.

⁶ *Causes and Context*, p. 8, Figure 1.1, used by permission of the USCCB.

⁷ *A Ten Year Progress Report*, June 2012, National Review Board, p. 1, at <http://www.usccb.org/issues-and-action/child-and-youth-protection/upload/10-year-report-2012.pdf>; *Causes and Contexts*, p. 3.

⁸ *2011 Annual Report: Findings and Recommendations*, United States Conference of Catholic Bishops, April 2012, pp. 3-4, at <http://www.usccb.org/issues-and-action/child-and-youth-protection/upload/2011-annual-report.pdf>.

⁹ Rose French, "Three insurers shed light on Protestant church sex abuse," *Houston Chronicle*, June 14, 2007, at <http://www.freerepublic.com/focus/f-religion/1850676/posts>; Stephen Manning, "Hare Krishnas to Declare Bankruptcy," *Associated Press*, Feb. 6, 2002, at <http://www.gotapex.com/threads/38880-hare-krishnas-to-file-bankruptcy>; Tony Bartelme, "Deal May Put Abuse Scandal to Rest," *The Post and Courier*, July 15, 2004, at http://oldsite.d2l.org/news/archives/news_07_15_04.asp.

¹⁰ Melissa Steffan, "Missionary Group Fires Sex Abuse Investigator," *Christianity Today*, Feb. 12, 2013, at <http://blog.christianitytoday.com/ctliveblog/archives/2013/02/missionary-group-fires-sex-abuse-investigator-abwe-grace.html>; Leslie Scanlon, "Six persons named by Abuse Review Panel in physical, sexual abuse investigation," *The Presbyterian Outlook*, August 11, 2010, at <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, at http://www.bishop-accountability.org/reports/2010_08_28_GRACE_Fanda_Report.pdf; John W. Kennedy, "Missions: From Trauma to Truth," *Christianity Today*, April 27, 1998, at <http://www.christianitytoday.com/ct/1998/april27/8t5016.html>.

¹¹ John Eligon and Laurie Goodstein, "Kansas City Bishop Convicted of Shielding Pedophile Priest," *The New York Times*, Sept. 6, 2012, at http://www.nytimes.com/2012/09/07/us/kansas-city-bishop-convicted-of-shielding-pedophile-priest.html?_r=0.

¹² Gregory S. Love, Kimberlee D. Norris, "Church Employees Arrested/Charged for Failure to Report Sexual Abuse," *MinistrySafe*, 2012, at <http://www.ministrysafe.com/blog/post/CHURCH-EMPLOYEES-ARRESTEDCHARGED-FOR-FAILURE-TO-REPORT-SEXUAL-ABUSE.aspx>.

¹³ Jarrel Wade, "Judge rules against Victory Christian ministers," *Tulsa World*, Nov. 20, 2012, at http://www.tulsaworld.com/news/article.aspx?subjectid=11&articleid=20121120_11_A1_CUTLIN143933.

¹⁴ *Clifford v. Licking Baptist Church*, 930 N.E.2d 333 (Ohio 2010).

¹⁵ *Causes and Contexts*, pp. 5, 16.

¹⁶ *Causes and Contexts*, p. 99.

¹⁷ *Ten Year Progress Report*, p. 8.

¹⁸ 15 U.S.C. § 1681 *et seq.*

¹⁹ *EEOC Enforcement Guidance*, Number 915.002, April 25, 2012, at http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm.

²⁰ Jeffrey L. Seglin, "Too Much Ado About Giving References," *The New York Times*, § 3 at 4 (February 21, 1999), at <http://www.nytimes.com/1999/02/21/business/the-right-thing-too-much-ado-about-giving-references.html>.

²¹ This approach will depend on the law in different jurisdictions, and some states protect former employers acting in good faith by statute.

²² Director of Child Safety, SIL, 2013.

²³ Diane Heldt, "Regents: All University of Iowa employees should have sexual harassment training," *The Gazette*, Feb. 6, 2013, at <http://thegazette.com/2013/02/06/regents-all-university-of-iowa-employees-should-have-sexual-harassment-training/>.

²⁴ *The Free Dictionary*, at <http://legal-dictionary.thefreedictionary.com/Probable+Cause+and+Reasonable+Suspicion>.

²⁵ 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.

²⁶ 18 U.S.C.A. § 2423(c).

²⁷ Ten Year Progress Report, p. 2.

²⁸ 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.

²⁹ Susan A. Clancy, *The Trauma Myth*, Basic Books, 2009.

³⁰ 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.

³¹ For a more detailed overview, see Saunders, B.E., Berliner, L., & Hanson, R.D. (Eds.), *Child Physical and Sexual Abuse: Guidelines for Treatment (Revised Report: April 26, 2004)*, Charleston, S.C.: National Crime Victims Research and Treatment Center, pp. 25-26.

³² Neal Browne, "Don't be Ambushed: Get Your Media Act Together," Neal Browne & Associates, www.expertmediacoach.com.

³³ 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.

³⁴ 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," Georgetown University, Washington, D.C. February 2010, p. 41 (\$1,499,088,412 paid out in settlements from 2004 to 2009), at http://www.bishop-accountability.org/usccb/implementation/report_on_2009/9_CH4.pdf.

³⁵ Laurie Goodstein, Erik Eckholm, "Church Battles Efforts to Ease Sex Abuse Suit," *New York Times*, June 14, 2012, at <http://www.nytimes.com/2012/06/14/us/sex-abuse-statutes-of-limitation-stir-battle.html?pagewanted=all>.

³⁶ Georgia Pabst, "Sex Abuse Lawyers Plan Ad Campaign," *Milwaukee Journal Sentinel*, March 3, 2011, at <http://www.jsonline.com/features/religion/117336278.html>.

³⁷ <http://www.mksafetynet.net/conference/>

³⁸ Laurie Goodstein, Erik Eckholm, "Church Battles Efforts to Ease Sex Abuse Suit," *New York Times*, June 14, 2012. Note: 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.

³⁹ Tara Murtha, "Pa. Lawmakers Fight to Reform Statute of Limitations on Sexual Abuse," *PhillyNow*, Jan. 29, 2013, at <http://blogs.philadelphiaweekly.com/phillynow/2013/01/29/pa-lawmakers-fight-to-reform-statute-of-limitations-on-sexual-abuse/>; Shayndi Raice Sigall, "Religious Battle Heats Up Over Sex Abuse Bill," *The BrooklynInk*, April 13, 2009, at <http://archives.jrn.columbia.edu/2009/thebrooklynink/brooklyn/413-story-of-the-day-religious-battle-heats-up-over-sex-abuse-bill.html>.

⁴⁰ Douglas Starr, "False Eyewitness," p. 40, *Discover Magazine*, Sept. 2012, at <http://discovermagazine.com/2012/nov/04-eyewitness#.UTztRRlifNA>.

⁴¹ Daniel Lyons, "Clergy Sex Scammers" *Forbes*, Sept. 24, 2003, at http://www.forbes.com/2003/09/24/cz_dl_0923church.html. In a "wicked twist," with \$85 million offered to settle 552 complaints, leading plaintiffs' attorneys suggested that some of the claims were bogus. One attorney making the suggestion had fought the idea of having his clients psychologically evaluated. One such client alleged he had been brutally assaulted 80 times at a period twenty years in the past, and had blocked the memories even as the assaults occurred.

⁴² 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 Americans 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.

⁴³ Address of Dr. Monica Applewhite to the Irish Bishops,” March 10, 2009, p. 1, The National Board for Safeguarding Children in the Catholic Church (<http://www.safeguarding.ie/dr-monica-applewhite-irish-bishops/>). Excellent summary of historic standards of care and the Catholic sexual abuse scandal.

⁴⁴ Elizabeth Loftus and Katherine Ketcham, *The Myth of Repressed Memory; False Memories and Allegations of Sexual Abuse* (St. Martin's Griffin 1996).

⁴⁵ 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)

⁴⁶ In the *GRACE Final Report*, August 23, 2010, p. 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.

⁴⁷ *Ten Year Progress Report*, p. 3.

⁴⁸ Elizabeth K. Grace, “Confidentiality of Settlements in Sexual Abuse Cases: Necessary Evil or Positive?” Lerner's Personal Injury Lawyers, at <http://lernerpersonalinjury.ca/articles/218/>.