

# BEYOND THE BOY SCOUTS

Third-party use of facilities and sexual abuse risk: can ministries be held financially responsible?

By Gregory S. Love, Esq. and Kimberlee D. Norris, Esq.

On May 18, 2020, the Boy Scouts of America filed for bankruptcy protection, largely in response to mounting sexual abuse allegations and civil lawsuits. This bankruptcy filing further complicates liability concerns for organizations (churches, schools, camps, conference centers) that hosted, co-sponsored, chartered or provided facilities for BSA meetings and activities.

In civil litigation, it is common for all entities related to a sexual abuse allegation to be named as a defendant in a lawsuit. To prevail in litigation, there must first be a theory of liability; examples include negligent hiring, negligent supervision, negligent retention. When it comes to a sponsoring or hosting organization — third parties — the theory is less straight-forward. It relates to control.

## Third-party liability

All programming related to children (for example, scouting) carries with it the *known risk* of child sexual abuse. Any sponsoring ministry has the ability to require certain protocols to ensure child safety: training, screening, effective policies and adequate supervision. For a church or ministry to be responsible or liable for child sexual abuse occurring in the context of third-party use (e.g. a boy scout troop), the plaintiff must allege a *duty* that the ministry failed to reasonably undertake, and this failure resulted in harm to the plaintiff/victim. It relates to control.

When a ministry has the *right to exercise control* regarding a known risk, and it is reasonable that it does so — arguably, a duty is created. Put differently: when a ministry has *the right to exercise control*, it is no defense that it failed to do so. A variation of this theory is asserted in relation to ministries that host or provide facilities: when a ministry has *the right to exercise control* related to use of facilities, it is reasonable that it does so.

This theory is not as direct or inflammable as the negligence (or gross negligence) theories being leveled directly at BSA. Nonetheless, third-party organizations, including *churches and denominations*, are being named in civil lawsuits, requiring the church or denomination to defend itself and negotiate its release — both cost money. >>



## Not just Boy Scouts

This analysis is not limited to Boy Scouts of America and those who sponsored or hosted a troop; it applies to all third-party use of churches, camps, conference centers and Christian colleges. Allowing outside entities to use church facilities comes with risk. How should a church navigate this risk? How should a church evaluate insurance issues related to third-party facility use (coverage and/or indemnification)?

Before evaluating these questions, it's necessary to better understand the underlying risk of child sexual abuse occurring in ministry contexts.

## Sexual abuse risk

Child sexual abuse is a known risk in any child-serving endeavor; when a ministry gathers children, *this risk exists*. Every church must take reasonable steps to reduce this risk. What constitutes *reasonable effort* is largely defined by the legal concept known as *Standard of Care*— what a reasonable ministry should do to reduce a known risk. Reasonable safety protocols for any child-serving ministry includes at least five elements:

1. Sexual Abuse Awareness Training for staff members and volunteers;
2. Skillful Screening Processes;
3. Appropriate Criminal Background Checks;
4. Tailored Policies & Procedures; and
5. Effective Monitoring and Oversight.

For detailed discussion of safety system elements and implementation, see prior article at [www.churchexecutive.com/archives/stop-sexual-abuse-2](http://www.churchexecutive.com/archives/stop-sexual-abuse-2).

Sadly, many churches have inadequate safety systems in place, and therefore run a higher risk of abuse (and corresponding liability). Some ministries DO have an effective safety system in place, but the system is designed to protect *only* children directly served by the ministry — children's ministry, youth ministry, children's music programs etc. Risk is reduced as to those children — as is liability. If an allegation does arise, a well-prepared ministry is insured for that risk and equipped to report appropriately to law enforcement authorities, families, media and the organization's insurance carrier.

*But what about 'outside use' of a ministry's facility?*

This question circulates among organizations with facilities used by outside groups bringing children onto the organization's campus. Specifically:

- What is a church's responsibility for an allegation arising from an *outside* group?
- What is a church's *risk* related to that allegation?
- Should a ministry require safety measures as a *condition* of facility use?
- What should a ministry *reasonably require* of an outside group as a condition of use?
- Can a ministry be held responsible for an allegation arising from *outside* use?

These questions, arising out of recent lawsuits and claims, demand an answer.

## What is 'reasonable'?

'Reasonable' action or behavior is generally defined by licensure and legislation. Given the risk of sexual abuse arising from outside use of a church's facilities, what reasonable steps should a church take to reduce that risk? Historically, ministries have relied on the outside group to supervise its staff members and children. Is this reasonable? Will this protect the ministry from civil liability?

## HOST ORGANIZATIONS IMPACTED BY CLAIMS

When an allegation is made or lawsuit filed, a host organization becomes involved in a myriad of contexts, beginning with initial press reports identifying the *location* of the abuse allegation, which may generate negative public perception. When a lawsuit is filed, a church or ministry may be named as a party and therefore forced to defend itself, often requiring payment in some form or amount, including attorney's fees, if only to get the ministry's name off the pleading and out of the press. Many churches, camps, conference centers and Christian colleges making their facilities available for outside use have faced this unfortunate situation.

## Churches

Churches are often asked by outside programs to use a building or facility. The outside group either cannot afford its own facility or does not own or lease its own facility, using instead what is available in the community (e.g. scouting groups, church plants, para-church ministries, home school groups and mentoring programs).

## Camps

Camps are generally operated to provide summer and seasonal programming designed to gather children for camp programs. In this capacity, camps are responsible for administration and program staff, providing activities, food service, grounds, medical care and counselors (leaders assigned to particular children for a set period of time). When operating as a camp, the organization is responsible for all aspects of child protection and should employ a reasonable safety system to reduce the risk of child sexual abuse. This safety system should be tailored to camp programming.

Camps sometimes operate as a conference center when the camp has facilities available that are not otherwise used in its camp program, offering unused facilities to an outside group.

## Conference centers

Ministries maintaining a campus for outside use — conference centers — are often owned and operated by denominations for use by churches and youth groups. Conference centers occasionally create programs that are internally staffed, operating like a camp, in that children are hosted and supervised directly by conference center staff members. More commonly, a conference center employs administrative staff, medical staff, food service staff and groundskeepers for the purpose of maintaining a facility where various church or outside groups bring their own adult chaperones and program staff. Multiple programs may be occurring at any given time. Ostensibly, each group is responsible for the supervision of staff and protection of children within its own program.

## STATE LAW MANDATES

In some states, child-serving organizations allowing outside use have child protection requirements mandated by state law. In the state of Texas, for example, the legislature created specific requirements for youth camps, day camps and colleges related to child sexual abuse. Whether a ministry provides services in Texas or not, this legislation is instructive, and will become, we believe, *standard of care* for all organizations gathering children, regardless of whether the ministry is acting merely as a host organization or facility provider. After the passing of this legislation, many camps, conference centers and colleges across the country embraced the requirements of the Texas Youth Camp Act as *reasonable measures* designed to reduce the risk of sexual abuse in camp settings.

For more information concerning the Texas Youth Camp Act and TX Senate Bill 1414, see Appendix, on page 22.

## RECOMMENDED ACTIONS FOR HOST ORGANIZATIONS

The following recommendations provide practical child protection options based on systems and tools existing in the marketplace.

## Facility-use agreement form

Every ministry allowing third-party use should utilize a Facility-Use Agreement which includes the costs and requirements associated with facility use. In this Agreement, the ministry should describe safety protocols required for outside group use AND proof of insurance listing the host organization as a *third-party insured*.

## Require safety controls, then verify

The safety measures utilized by an outside group using a ministry's facilities are its Safety Controls. An outside group's safety system should include Awareness Training, effective screening (including an appropriate criminal background check), tailored policies, adequate supervision and a plan for reporting abuse or neglect consistent with state reporting requirements.

Host ministries should consider requiring a list of adult participants, with verification of criminal background checks and completion of Awareness Training within the previous two years.

Verification. Verification may occur through written assurance from the outside group. *Is it reasonable for the ministry to trust the outside group to have met this requirement by simple acknowledgement?* Optimally, verification is provided by paper or electronic copies of completed criminal background checks and certificates of completion for Awareness Training. This option shifts some responsibility to the host ministry to ensure compliance.



Video describing of the Control Panel (online tracking system) offered by MinistrySafe

When outside groups arrive, the host organization should have a system in place to verify completed criminal background checks and certificates of completion for Awareness Training corresponding to all participating adults. [In many cases, this type of process is already in place regarding medical releases related to outside group participants.] In the event either is not completed, the hosting ministry may undertake a criminal background check (at the group's expense) and have the adult complete Awareness Training online upon arrival at a designated computer terminal (at the group's expense). Sexual Abuse Awareness Training is available online at MinistrySafe.com. Request an online Sexual Abuse Awareness Training link at <https://safetysystem.ministrysafe.com/register/digitalpresentation>.

Some hosting ministries provide Sexual Abuse Awareness Training online to all participating adults *prior to arrival*, so the ministry can ensure completion of Awareness Training for all adults with an outside group. The cost of training is then passed to the outside group in the form of facility fees or per-participant costs.

Policies/Supervision. Ensuring an outside group has adequate policies or supervision is more difficult. Programs vary, making a one-size-fits-all policy or plan implausible. Some degree of this risk is addressed by *simply requiring* Awareness Training, because all adults from the outside group will be trained to understand the *grooming process* of the abuser. At a minimum, hosting ministries should require *written* policies addressing the risk of abuse and reporting responsibilities, in conformance with state law.

In addition, consider providing suggested resource links to outside groups, allowing outside groups to obtain sample policies and procedures, sample screening forms and training resources.

## Recommend safety controls

If *requiring and verifying* isn't possible, consider *strongly recommending* that an outside group implement Safety Controls, providing suggested resource links for consideration.

A recommendation is better than *no action at all*, but will a jury consider this *reasonable*? In some sense, a recommendation is an acknowledgement of a risk without any corresponding requirement, and that can be problematic.

## 'Hope for the Best'

Some ministries simply hope for the best, where outside use is concerned. This works until it doesn't, and the subsequent cost in monetary resources and public perception is high. For obvious reasons, *hoping for the best* isn't best practice.

## CONCLUSION

Every child-serving ministry should utilize an effective Safety System aimed at reducing the risk of child sexual abuse at the hands of adults *or other children*. An effective safety system should contain the following elements:

- Sexual Abuse Awareness Training;
- Skillful Screening Processes;
- Appropriate Criminal Background Check;
- Tailored Policies and Procedures; and
- Monitoring and Oversight.

No single element above provides a *stand-alone* safety protocol; rather, each element works within the system to create checks, balances and accountability in an overarching plan of protection.

When a church or ministry provides its facilities (with or without payment) to outside groups, viable questions arise concerning the host's responsibility to safeguard children served by the outside group. In some states, these responsibilities are legislated. In others, civil litigation is changing current *standards of care* and best practices. Inevitably, standards of care and state legislation are trending toward practices more protective of children.

Unprotected, both children and ministries are at risk. Many ministries are in the position of potential third-party risk; the recent BSA bankruptcy filing simply provides a wake-up call to evaluate the risk, potential liability, adequate insurance coverage and strategies to exercise control in a way that balances risk and the ministry's mission. ☞

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**Gregory S. Love, Esq. and Kimberlee D. Norris, Esq.** are partners in the Fort Worth, Texas law firm of **Love & Norris** and founders of **MinistrySafe**, providing child sexual abuse expertise to ministries worldwide. After representing victims of child sexual abuse for more than two decades, Love and Norris saw recurring, predictable patterns in predatory behavior. MinistrySafe grew out of their desire to place proactive tools into the hands of ministry professionals. Love and Norris teach the only graduate-level course on Preventing Sexual Abuse in Ministry Contexts as Visiting Faculty at Dallas Theological Seminary.

# APPENDIX — TEXAS LEGISLATION

## Texas Youth Camp Act (youth camps and day camps)

In 2006, the Texas legislature enacted the Texas Youth Camp Act, which mandated all youth camps and day camps (both defined liberally) to require:

1. Administrators to have a background in child care;
2. Background Checks on all staff members and volunteers; and
3. Sexual Abuse Awareness Training for all staff members and volunteers.

The definition of a “youth camp operator” includes “a person who owns, operates, controls or supervises a youth camp, regardless of profit.” [Health & Safety Code Ch. 141.002 (6)]. This arguably covers all camps and conferences centers.

The Youth Camp Act outlines specific elements required in the state-approved Sexual Abuse Awareness Training and specific obligations for the operating organization in Chapter 141.0095:

141.0095. TRAINING AND EXAMINATION PROGRAM.

(a) A person holding a license issued under this chapter may not employ or accept the volunteer service of an individual for a position involving contact with campers at a youth camp unless:

(1) the individual submits to the person or the youth camp has on file documentation that verifies the individual within the preceding two years successfully completed the training and examination program required by this section; or

(2) the individual successfully completes the youth camp's training and examination program, which must be approved by the department as required by this section, during the individual's first workweek and the youth camp issues and files documentation verifying that fact.

(b) A person holding a license issued under this chapter must retain in the person's records a copy of the documentation required or issued under Subsection (a) for each employee or volunteer until the second anniversary of the examination date.

(c) A person applying for or holding an employee or volunteer position involving contact with campers at a youth camp must successfully complete the training and examination program on sexual abuse and child molestation required by this section during the applicable period described by Subsection (a).

(d) ...

(e) A training and examination program on sexual abuse and child molestation approved by the department must include training and an examination on:

(1) the definitions and effects of sexual abuse and child molestation;

(2) the typical patterns of behavior and methods of operation of child molesters and sex offenders that put children at risk;

(3) the warning signs and symptoms associated with sexual abuse or child molestation, recognition of the signs and symptoms, and the recommended methods of reporting suspected abuse;

*[emphasis added]*

In short, all staff members and volunteers must complete a Sexual Abuse Awareness Training that is state-approved (Texas Department of State Health Services), and the Awareness Training must include information related to abuser characteristics, grooming process, common grooming behaviors, signs and symptoms of abuse and reporting requirements.

The Texas Youth Camp Act was amended in 2010, which made a number of changes related to the requirement of a criminal background check. A few of those requirements include:

1. The criminal background check must be completed before the staff member or volunteer is in a supervisory capacity related to minors;
2. The criminal background check must include searches related to the applicant's primary and temporary residences (i.e. college students attending an educational entity away from home); and
3. A list of 'disqualifying offenses' that preclude an applicant's acceptance.

It is important to note that the hosting organization is responsible for maintaining the verification of completion for all supervisory adults for two years.

### TX Senate Bill 1414 (Texas colleges and universities)

In 2011, the Texas legislature enacted Senate Bill 1414, which mandated that all colleges and universities in Texas that provide or host 'campus programs for minors' require that staff members and volunteers related to 'campus programs for minors' to complete a Sexual Abuse Awareness Training consistent with Chapter 141 of the Health and Safety Code (Texas Youth Camp Act).

In short, the state-approved Sexual Abuse Awareness Training is now required for colleges and universities. **CE**