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Churches, Ministries, and the Law

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Handling an Allegation of Leadership Misconduct

BY THERESA SIDEBOTHAM

Although allegations of leadership misconduct are one of the hardest things for ministries to handle, they offer a great opportunity to seek truth and justice and to minister to people. Given the partially legal nature of the process, Christian attorneys can play key roles in these circumstances. Consider the following scenario:

Someone has alleged misconduct by a religious leader. But Rev. Dr. Important assures the board that he did nothing wrong. Will he be investigated? Will the standards for moral and spiritual behavior be equally applied to a leader? Will the organization be serious about protecting its weaker members and living out its spiritual values?

If this church or nonprofit takes allegations of misconduct seriously, it will take steps to investigate and provide spiritual care.

Responding to the Accusation and Initial Review

First, if an organization desires to remove barriers to reporting misconduct regardless of the identity of the accused, it should offer more than one way to report.

Second, in most cases, the accused leader should immediately be placed on administrative leave. He or she should lose the ability to influence decision-making. Independent board members or other unbiased leadership should take over. Potential exoneration will be much more compelling, and corrective actions will be much less messy, with the possibilities for undue influence removed.

Finally, a small committee of people who are not dependent on the accused leader personally or professionally should review the allegations. The initial reviewers should evaluate for “reasonable suspicion,” which is a lower standard than “probably true.” If the accusation is credible, then further action will be needed.

Reporting to Authorities

The standard for reports to law enforcement for child abuse or other criminal behavior is usually “reasonable suspicion.” Reporting to law enforcement can be important. Failure to report

child abuse is often a criminal offense. Furthermore, internal investigations can jeopardize a law enforcement investigation, and should be avoided or postponed until law enforcement is done.

Starting the Investigation

A determination of “reasonable suspicion” should eventually precipitate an internal investigation. The investigation assumes that misconduct could have happened, but not that it did happen. An investigation must be impartial and open-minded. An allegation of misconduct can be true, can be mistaken, can be false, or can be some mixture of these things.

Depending on the gravity and legal ramifications of the allegation, the investigation can be as simple as hiring a CPA for an audit or as complex as hiring a professional team to investigate sexual misconduct. The initial review should recommend a path forward. The organization may need some level of external help, both for expertise and for objectivity.

Who Needs an Attorney, Anyway?

For serious allegations, a ministry will need good legal advice. Relevant laws apply differently to religious and secular organizations. Ministries should use attorneys who understand both secular and religious law issues, as well as spiritual, emotional, and practical ministry concerns. Their approach should be legally sound as well as spiritually mature.

If an attorney is supervising the investigation, the investigation can be either attorney-client privileged or work product. The attorney’s presence at Board meetings, as an attorney, can privilege discussions.

As always, whether an attorney should take on that role depends on her in-depth knowledge of applicable law and the ministry of the organization. It also depends on her current relationship to the organization. If she is a board member, giving legal advice is tricky indeed, and the attorney will have to carefully separate and protect her roles (in a way that does not jeopardize professional liability coverage).

Generally, for a serious investigation, an attorney should be involved at every step to monitor the investigation, receive inves-

tigative 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 prepare any legal defense that may be needed.

Protecting People During the Investigation

Allegations may be true or false in whole or in part. The accused may be exonerated. The process for learning the truth should protect reputations until the ministry has determined a course of action. Maintaining appropriate confidentiality is critical throughout the investigative process. In addition, an attorney should ensure that measures are in place to preserve religious privileges.

Practical Steps During the Investigation

The Investigative Team

A fact-finding team must address several different goals at once: following facts objectively; not creating more harm to those already hurt; protecting possible victims; providing justice (including due process); and avoiding legal liability. A fact-finding team must discern the truth and follow the facts objectively. Different types of investigation require specialized knowledge, like forensic analysis of accounts, understanding psychological disorders, or forensically interviewing children. If criminal charges could someday be filed, evidence must be handled properly and preserved adequately, which requires specialized training.

Handling the Documents

Documents to gather might include:

- Ministry codes of conduct or doctrinal statements;
- Personnel records, including employment timelines and disciplinary actions;
- Employment handbook;
- Releases of cell phone, electronic device, and computer records, including relevant passwords;
- Relevant computer and electronic device records; and
- Records of the initial review.

A forensic data recovery specialist can image the hard drives of all computers or mobile devices and search them for current or deleted data.

Cooperation or Not

A reasonable investigation goes as far as the data available. Efforts to locate evidence and testimony should be carefully documented. Part of the supporting data for an investigation's factual findings will be any refusals to cooperate. Uncooperative people who are organizational employees are likely violating policies for which they may be disciplined.

Making Factual Findings—to What Standard?

The last step for the investigative team is preparing factual findings for leadership decisions, but defining the standard of proof in advance is important. The team will consider one of two possible standards. One is “preponderance of the evidence,” which means that the allegation more likely than not happened. The other is the higher standard of “clear and convincing evidence.” If the investigation cannot reach one of these standards, a “finding” will not be made.

Leadership Responsibilities

The board (or comparable organizational leadership) has important fiduciary, as well as spiritual responsibilities. It takes the factual findings of the investigative team and develops a plan. The plan will include: disciplining wrong-doers; ministering to victims and people close to them; protecting others who could be at risk; vindicating anyone exonerated; extending compassion to reporters who are not victims; protecting confidentiality; and avoiding liability.

Can There Be Restoration?

Ministries often believe that forgiveness means putting the leader back in place. It is true that our sins are forgiven. That does not eliminate the need to do the hard work of facing up to the damage that sin has done, taking care of victims, and putting in place safety plans, addressing personality disorders, and doing the work of restoration. Christ's blood was costly, and so is restoration on the human level.

Restoration can be defined in at least four ways.

Relational

Restoring relationships is impossible if one party will not repent or another party will not or cannot forgive. In one situation, a now-adult victim went back and confronted the man who had sexually abused and seduced him as a teenager. The

man acknowledged his actions, but refused to admit to wrongdoing. Although the victim was willing to forgive, relationship was not possible without repentance. In many cases, the process of forgiving is just too difficult for victims.

Sometimes even after repentance and forgiveness, restoring relationship may be undesirable. If the original relationship was not healthy, restoring it would be unwise. Allowing an abusive person access to a victim may even create legal liability.

Positional

Restoration can involve position. Some kinds of wrongdoing may make it inappropriate for someone to keep his or her position in the organization, either for a period of time under an action plan, or forever. This outcome does not limit God's forgiveness.

On the legal side, an organization can be responsible for negligent supervision if it gives someone who is guilty of destructive behaviors the opportunity to offend again. For instance, religious organizations need to remove permanently those who commit child sexual abuse.

Locational

Restoring a person to a particular location may or may not be wise. If stressors in the environment triggered bad behavior, the person should probably not return to that environment. Inconclusive findings of severe allegations may still require precautions. For instance, with a 30% chance that the person abused a child (less than a preponderance), the ministry might not terminate the person, but would remove the person from locations where he or she had access to children. Such action is not disciplinary but is prudent for the safety and protection of both parties.

Reputational

What if the person is innocent or at least the allegation is unsubstantiated? Ruining someone's life because of an allegation that is not substantiated is wrong. (In some circumstances, it could also be illegal.) Here, restoration involves the delicate task of preserving the person's career and reputation. This is certainly much more difficult if the ministry is not completely sure that the allegation is untrue. A safety plan may still be needed.

Caring for Victims and Those Who May Not Be

After the investigation, the ministry will want to consider the impact on the person making the allegation. If the allegation has been substantiated, the ministry will consider ways to provide healing. If the allegation has not been substantiated, the person bringing the accusation is usually also still hurting. Findings that an allegation is not substantiated should be revealed to the accuser with great sensitivity. The person will need compassion and may need help, therapy, or pastoral support.

Whether the accuser is a victim or not, healing and reconciliation is likely needed. If misconduct has been confirmed, it can be healing to get an apology from the organization, given by someone high in leadership.

Spiritual Discipline and Release of Information

Religious organizations have a First Amendment privilege to determine how to discipline and otherwise address their leaders and membership. As needed, ministries can say more to their members about misconduct of employees and members than a secular organization could say. They should still be cautious.

Once information is set loose, it cannot be called back. This has implications for personal reputations and privacy and for the organization's legal defenses.

Privacy issues

Privacy is a key value in an investigation. Alleged victims will not likely wish their personal information to be broadcast. In addition, those accused should generally not be publicly identified. Publishing unproven allegations opens the organization to a defamation claim, and may be unjust.

Privilege issues

Ministry investigations have several privileges. Communications between clergy and people under their pastoral care are often privileged. Ministries have a number of First Amendment protections that may cover communications as well. Having an attorney usually provides attorney-client privilege. Care must be taken not to waive any applicable privileges.

After the investigation concludes, legal advice will help leadership consider carefully privacy and privilege concerns, and what aspects of the report should be released to claimants, to constituents of the organization, and to the public.

Need to Know

Generally, release of information should be because of a “need to know” and should fit the religious privileges. For instance, when a ministry leader is dismissed for misconduct, a short statement will likely be given to the congregation. Certain people, such as a children’s ministry leader, may need more information. A designated point person should be prepared with appropriate responses to discuss legitimate concerns without sharing unnecessary gossip.

Dealing with Media

A ministry should establish good relationships with reporters when times are good. When a bad situation is developing, leadership must prepare suitable sound bites and anticipate hostile questions. “No comment” is not a good answer because it makes the ministry look guilty. Engage a media expert for advice on communicating the ministry’s truthful message. Media skills take time and specialized knowledge to master. The middle of a crisis is not a good time to practice. Neither social media nor regular media should dictate the organization’s strategy, even if they claim to speak for the victims.

Organizational Culture and Policies

An allegation of misconduct may trigger an internal review of the ministry’s culture. In addition to having reporting policies and procedures in place, the ministry should evaluate its inte-

rior culture to see if members will likely carry out policies in a meaningful way. The report on sexual abuse at Penn State, for instance, disclosed a culture that was unfavorable to reporting because of problems with power and control in the hierarchy.¹ Catholic Church culture of the past that fostered “isolation, separation, and obedience” and a “code of silence” created an opportunity for child abuse in the Church and required intentional change.² Similar problems infect all kinds of organizations. Change takes great effort and focus.

Conclusion

Although allegations of leadership misconduct are one of the hardest things for ministries to handle, they offer a great opportunity to seek truth and justice and to minister to people. Given the partially legal nature of the process, Christian attorneys can play key roles in these circumstances.



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ENDNOTES

- 1 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.
- 2 Tom Barth, “Crisis Management in the Catholic Church: Lessons for Public Administrators,” *Public Administration Review*, Sept./Oct. 2010, p. 785.



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