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#YouTo: Lifecycle of a Sexual Misconduct Claim

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Widespread risk of sexual abuse

General male population: *Approximately **3 to 5** percent of men meet the diagnostic criteria for pedophilia.*

"These numbers increase significantly if you include men who sexually violate postpubescent teenagers." (e.g. ephebophilia)

Source: Thomas G. Plante Ph.D., Psychology Today (Aug. 1, 2019), Top 10 Myths About Clergy Abuse in the Catholic Church (citing *Diagnostic and Statistical Manual (DSM-5; American Psychiatric Association, 2013).*

Catholic Church

About **4%** of Catholic clerics had credible or substantiated accusations of child sexual abuse of minors.

Source: Thomas G. Plante Ph.D., Psychology Today (Aug. 1, 2019), Top 10 Myths About Clergy Abuse in the Catholic Church (citing *John Jay College of Criminal Justice, 2004, 2011).*

Other Religious Groups

Abuse rates are similar among ***all*** religious groups. There is “no difference between Catholic and non-Catholic groups”

Source: *Plante, T., Psychology Today* (citing Zech, C. (2011). *Church governance in light of the sex abuse scandal: The need for financial accountability, transparency, and sound internal financial controls*.)

Boy Scouts

April 2019 court testimony showed the Boy Scouts believed more than 7,800 of its former leaders were involved in sexually abusing children over the course over a 72-year period.

Source: CNN.com “Boy Scouts of America files for bankruptcy. Hundreds of sexual abuse lawsuits are now on hold” (Feb. 18, 2020).

California Court of Appeals:

The Boy Scouts: "acknowledge, as they must, the possibility exists that pedophiles will be attracted to scouting to gain legitimate access to young boys in order to seduce the more susceptible ones into sexual activity. The Scouts can hardly claim otherwise. … [S]ex abuse in scouting 'is more common than accidental deaths and serious injuries combined,' with the Scouts reporting, on average, more than one incident of sexual abuse per week for the past two decades, and with many more cases going unreported."

Source: *Juarez v. Boy Scouts of Am., Inc.*, 97 Cal. Rptr. 2d 12, 30 (Cal. Ct. App. 2000).

Public schools

290,000 students experienced some sort of *physical sexual abuse* by a public school employee from 1991 to 2000.

Source: Thomas G. Plante Ph.D., Psychology Today (Aug. 1, 2019) (Discussing an analysis by Dr. Charol Shakeshaft of survey data obtained by the University Women Educational Foundation in 2000).

"The physical sexual abuse of students in schools is likely more than 100 times the abuse by priests."

Source: CBS News, Has Media Ignored Sex Abuse In School? (August 24, 2006) (quoting Charol Shakeshaft, Ph.D.).

Public schools

4.5 million: Estimated number of public schools students between kindergarten and 12th grade (in early 2000s) subjected to sexual misconduct by a school employee.

Source: U.S. Dept. of Health & Human Service, Child Maltreatment 2016.

Youth Sports

United States Youth Soccer Association, Inc.

"[A]ware of incidents of physical and sexual abuse of [its] members by its coaches at a steady yearly rate of between 2 and 5 per year."

Provided a pamphlet stating: "One out of every 4 girls and one out of every 6 boys will be sexually abused before the age of 18."

"Pedophiles are drawn to places where there are children. All youth sports, including youth soccer, are such places."

Acknowledged "that children playing soccer were at risk for sexual abuse."

Source: *Doe v. United States Youth Soccer Assn., Inc.*, 214 Cal. Rptr. 3d 552, 567 (Cal. Ct.App. 2017).

Municipal and County Governments

Bureau of Justice Statistics

SPECIAL REPORT

January 2010, NCJ 228416

Sexual Victimization in Juvenile Facilities Reported by Youth, 2008-09

- An estimated 12% of youth in state juvenile facilities and large non-state facilities (representing 3,220 youth nationwide) reported experiencing one or more incidents of sexual victimization by another youth or facility staff in the past 12 months or since admission, if less than 12 months.

Sexual misconduct occurs at all levels of employment

Table 7. Percent of Student Targets by Job Title of Offender	
Job Title	**Percent**
Teacher	18
Coach	15
Substitute Teachers	13
Bus Driver	12
Teacher's Aide	11
Other School Employee	10
Security Guard	10
Principal	6
Counselor	5
Total	100

Source: Shakeshaft, 2003; AAUW, 2001

Bias and media reporting create misperception of risks and causes:

In 2002, the 61 largest newspapers in California ran nearly 2,000 stories about sexual abuse in Catholic institutions, mostly concerning past allegations.

During the same period, those newspapers ran four stories about the federal government's discovery of the much larger — and ongoing — abuse scandal in public schools.

Source: CBS News, Has Media Ignored Sex Abuse In School? (August 24, 2006).

Legislative response:

Legislative action via expansion of statutes of limitations or so-called “window” or “look back” legislation that suspends or removes the statutes of limitations for certain claims.

Legislative changes to sovereign immunity that permits lawsuits against government entities and public schools.

The majority of states apply a special statutes of limitations to both perpetrators and the non-perpetrators (e.g., employers, organizations, religious groups, etc.) that were affiliated with the perpetrator.

Example Legislation – California (eff. Jan 1, 2020)

Amended the government claims acts (exceptions to sovereign/tort immunity).

Old – schools and government entities could be sued for misconduct occurring from 2009 to present.

New – 2009 time limit removed. Can be sued for any/all claims, regardless of date.

Revived: for three years, the statute of statute of limitations for previously time-barred claims.

Active/new claims – Plaintiff now has until age 40 (but there are exceptions that could mean no statute of limitations).

Legislation – Risks and Costs

Actuarial report indicates that new legislation will cost California public schools at least $560 million.

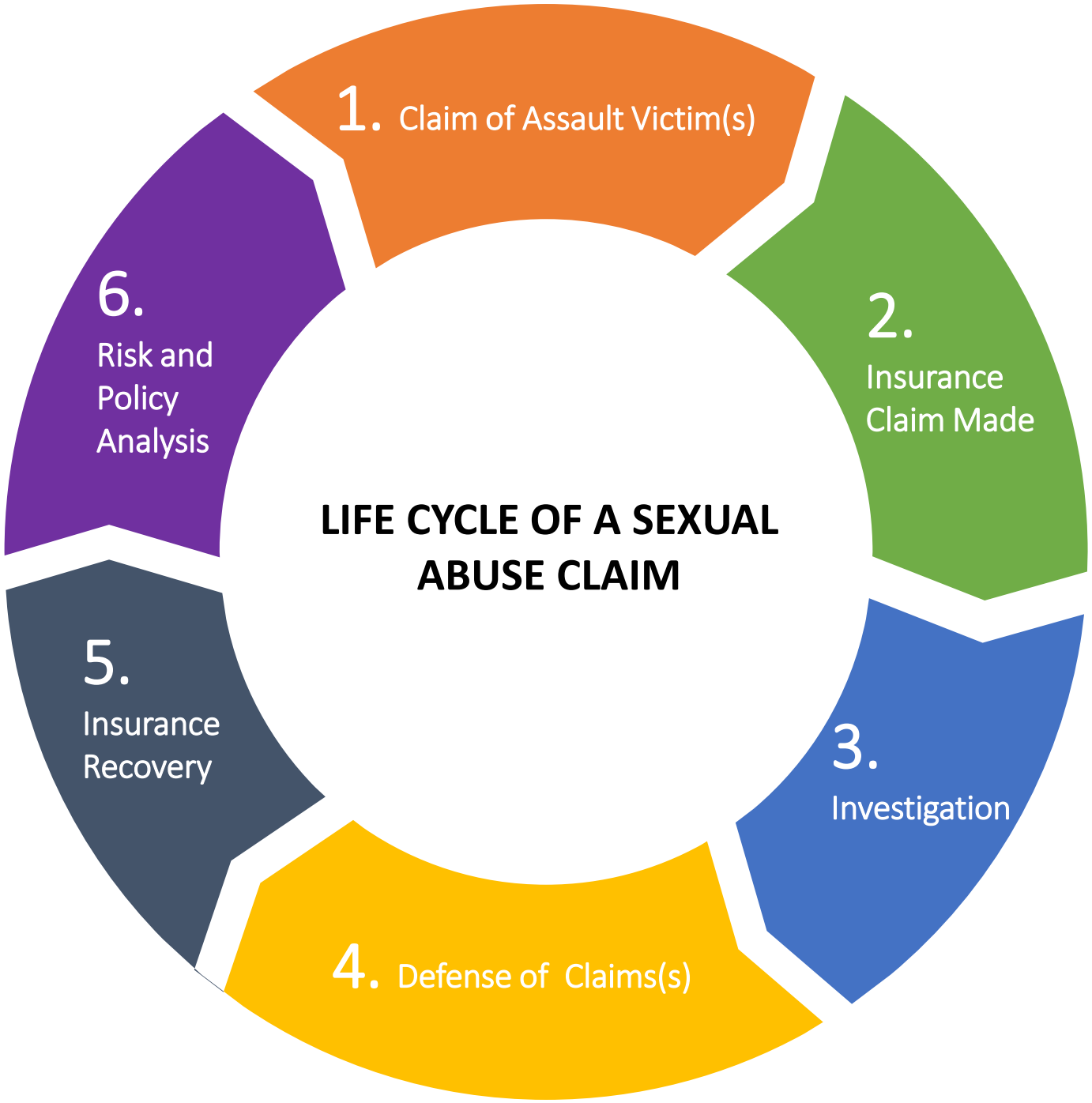
But…

Studies indicate there are 2.2 million potential claimants against California public schools.

Settling each claim for $100,000 means **$220 billion** in liability costs.

Note: the total annual budget for California public schools is $84 billion.

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1. Claim of Assault Victim(s)

Claims reported – Media involved

Media coverage and coordination with Plaintiff's lawyers

- You or your organization may be made aware of a sexual misconduct report for the first time through news coverage.
- Plaintiffs' lawyers will share court filings with the press.
- Media reports will portray the allegations as entirely accurate and will often assume a "cover-up."
- Complaint/Petition will includes salacious details of the abuse, and are frequently written with media interest in mind.
- Expect a press conference and survivors groups in front of (or on) your property.

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You should expect <u>only</u> NEGATIVE and CRITICAL media coverage.

Courthouse News Service

DAILY BRIEF

Raped Student Told It 'Happens All the Time'

THE SACRAMENTO BEE

He 'would be honored' to be her first kiss. How coach 'groomed' his player for sex

BY YOUR ARCHIVIST — JANUARY 22, 2018

KCTV 5 NEWS

Lawsuit: Ex-Lone Jack superintendent was a sexual predator

| Posted Mar 11, 2020 | 0

Youth softball coach took teen to Hooters, got drunk and raped her, police say

NEWS4SA

Develop a Crisis Communication Plan

Coordinate with legal counsel and your public relations teams, and have a response plan in place for any potential claim.

- How will you communicate with?
  - Parents
  - Teachers, Coaches, Volunteers
  - Other students
  - Social media
  - Other potential victims
  - Warning: what you say/how you respond may be used against you to claim there was a “cover up”
- Have you complied with mandatory reporter statutes
  - Reported the incident to authorities?
  - Contacted authorities?
- What will you tell the media
  - Privacy laws (e.g., FRPA)
  - Discuss your policies and procedures
  - Prior background checks of the accused perpetrator
- Employment decisions
  - Suspension, discipline, termination

Responding to reports of assault

Topics to avoid:

- The victim's use of alcohol or drugs
- Clothing or make up
- Flirting or previous consensual encounters
- Familiarity with the alleged perpetrator

Remember:

- Reporting misconduct is extremely difficult for the victim (*i.e.,* conflicting emotions, shame, embarrassment, confusion, anger).
- Your expectations about how a victim should act may be wrong.
- Believe the victim and express support.
- You may have reporting obligations that prevent you from keeping the report secret.

Consider:

- Training supervisors about appropriate responses to sexual misconduct.
- Retaining independent counsel to objectively evaluate the claim *and* any potential legal or moral responsibility.
- Offering to pay for counseling or medical services



Be careful of victim blaming/victim shaming

- Criticisms…
- Challenging media narratives…
- Successful defense of claims…

…can (will?) result in claims of victim shaming.

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FOX 5 WASHINGTON DC

2 Montgomery County high school students accused of sexually assaulting 11-year-old girls

SILVER SPRING, Md. (FOX 5 DC) - The principal of Montgomery Blair High School's sent out a letter to parents and students Tuesday scrutinizing another television station for focusing on MCPS in the reporting on two young adults charged in separate, off-campus rape cases.

"First, these alleged incidents did not occur on MCPS property. It remains unclear to us why the reporter chose to place so much focus on the schools they attended in this story," Montgomery Blair HS Principal Renay Johnson wrote in her letter. Johnson's letter was also signed by Bethesda-Chevy Chase High School's Acting Principal Shelton Mooney.

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Woman abused by coach says lawyers trying to make her pay Sacramento Diocese's court fees



The sexual abuse victim of a former St. Francis High School softball coach who sued the Catholic Diocese of Sacramento for failing to protect her said the church is unfairly making her pay its court fees after she withdrew her lawsuit this year.

BY ALEXANDRA YOON-HENDRICKS | AKIRA OLIVIA KUMAMOTO

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LIFE CYCLE OF A SEXUAL ABUSE CLAIM

2.
Insurance
Claim Made

Find all potentially relevant policies

CGL, E&O, D&O, Auto, Public Officials Liability, EPL,
Law Enforcement Liability, Professional Liability,
Sexual Abuse and Misconduct Liability, Crisis Management
Reputation Risk Insurance, etc.

- Determine coverage years

  When was the first alleged abuse or other alleged wrongful acts?

  When was the claim first made?

  For older claims, the victim may be unable to remember dates, resulting in uncertainty about applicable polices.

Give notice

Give notice to all potentially triggered insurers

- Tender of Defense vs. Provision Notice

- “All Potentially Applicable Policies”



(sooner rather than later)

Duty to report “claims” probably includes pre-suit correspondence and maybe even orally reported incidents.

If you wait to report:

(1) May risk losing coverage

(2) Pre-tender defense costs may not be covered.

Don’t assume no coverage or no duty to defend

Look for factual nuances in the underlying allegations that could support a theory of liability that would be covered even if sexual misconduct, itself, is not

- Premises/supervisory/negligence liability
- Defamation allegations (i.e., any statements made about the claimant after abuse is reported)

You may be able to get, at a minimum, a defense of the entity even if the underlying alleged sexual abuse (intentional conduct) is not covered

Example legal authorities:

Insurer must defend transportation company and public school because general negligence allegations raised potential for coverage despite negligent supervision, abuse and molestation exclusions.

Source: *National Liability & Fire Ins. Co. v. Brimar Transit, Inc.*, -- F. Supp. 3d --, 2020 WL 209315 (W.D. Penn. Jan. 14, 2020).

Insurer must defend hotel in action alleging sex-trafficking claims. Despite alleging criminal conduct, lawsuit was reasonably susceptible of alleging negligence.

Source: *Ricchio v. Bijal, Inc.*, -- F. Supp. 3d. --, 2019 WL 6253275 (D. Mass. Nov. 22, 2019).

Insurer owed defense for claims alleging negligent failure to protect the victim from sexual abuse, despite sexual molestation exclusion.

Source: *Homesite Ins. Co. of the Midwest v. Walker*, 2019 WL 4034690 (W.D. Wash. Aug. 27, 2019).

Example Legal Authorities (cont.)

Insurers owed duty to defend because it was not clear that the sexual misconduct exclusion would apply to sexual misconduct by another student as opposed to a school leader or employee.

Source: *Netherlands Ins. Co. v. Macomb Comm. Unit School. Dist. No. 185*, 2019 WL 5417144 (C.D. Ill. Aug. 6, 2019).

Insurer had to defend insured in defamation actions based on his denial of sexual assault allegations.

Source: *AIG Property Cas. Co. v. Cosby*, 892 F.3d 25 (1st Cir. 2018).

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LIFE CYCLE OF A SEXUAL ABUSE CLAIM



After a claim is made (or a suit is filed), investigate the claim.

- Use experienced legal counsel to interview witnesses
  - Statements, notes and impressions of counsel may be privileged or work product protected.
- Gather and review all policies and procedures
  - Confirm compliance with all applicable policies and reporting obligations
- Collect and preserve key data
  - Use litigation holds
  - Preserve and prevent deletion of e-mail accounts and server/storage spaces
  - Locate and secure any video/surveillance footage
- Consider coordinating with criminal defense counsel
  - E.g., for managerial or organizational criminal liability

After a claim is made (or a suit is filed), investigate the claim. – cont'd

- Smartphones and social media are critical
  - Ask for and copy smartphones for key witnesses
  - Many items on a mobile phone may be completely deleted and cannot be recovered even with latest/best software

- Software (e.g. Cellebrite) allows for in-depth analysis of smartphone data

  Examples:
    - Photos (including deleted photos)
    - Calendar entries
    - Phone call logs
    - Automatic deletion settings
    - WiFi location history
    - Some deleted texts may be recoverable
    - Website history

After a claim is made (or a suit is filed), investigate the claim. – cont'd

- Social media
  - Comments
  - Private messages
  - Photos
  - "Likes"
  - BEWARE ethical issues of "friending" represented parties

- Other communications resources
  - Organization provided computers, iPads
  - Document management/file-sharing systems
  - Organization provided "cloud" accounts, which may contain copies of communications or messages sent

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LIFE CYCLE OF A SEXUAL ABUSE CLAIM

4. Defense of Claim(s)

No vicarious liability/respondeat superior

Virtually every (if not all) states have concluded that an employer/organization is not *indirectly* (vicariously) liable for sexual misconduct by employee.

Sexual misconduct is considered personal, and thus outside the course and scope of employment.

> "As solely a question of common sense, it is difficult to comprehend how any sexual assault could be committed for a purpose other than that of the individual. Sexual assault is, by its nature, a crime committed for personal reasons."

Guzel v. State of Kuwait, 818 F. Supp. 6, 10 (D.D.C. 1993).

Direct liability: Failure to warn, protect, or supervise

Common defense: lack of notice

- Most negligence claims against an organization or entity turn on whether the defendant had notice or knowledge of the perpetrators "proclivities" for sexual abuse.

- E.g.,

  (1) the employer knew or should have known of the employee's **dangerous proclivities**, and
  (2) the employer's negligence was the proximate cause of the plaintiff's injuries.

“Grooming” behavior (alone) is generally not sufficient notice

- Generally, conduct must be more than ambiguous, friendly behavior between alleged perpetrator and victim. *Doe v. Roman Catholic Archdiocese of St. Louis*, 347 S.W.3d 588, 593 (Mo. Ct. App. 2011) (“[w]e can find no authority that conflates so-called “grooming” with sexual abuse”)

- Gifts and excessive attention may not be *legal* notice of sexual misconduct. *Chaney v. Superior Court* (1995) 39 Cal. App. 4th 152, 158.
  - But such behavior may violate internal policies.

- No liability for sexual assault based on an individual conduct that is ambiguous and not explicitly sexual. *See Federico v. Superior Court* (1997) 59 Cal.App.4th 1207, 1216.

- Interactions described as “grooming” were not notice of abuse because interactions were typical of a youth sports coach and a youth athlete. *Doe v. United States Youth Soccer,* 8 Cal.App.5th 1118, 1140-1141 (2017).

- **Negligent hiring**
  - Failure to properly screen employees and volunteers
    - Proper background checks are an excellent defense.
    - Relatively cheap to perform.
    - Should be conducted for EVERY person who may have contact with a minor.

- **But be careful**
  - Use a reputable, third-party background check company
  - Self-directed research (e.g., checking case files, searching criminal records) may not be sufficient.
  - Do not search too narrowly (geographic area/time period).
  - Follow up. Ask about background data and any errors or omissions in the applicant-submitted materials.
  - Check references.
  - Do not rely on an applicant's self-reported misconduct (e.g., "check the box" for prior crimes/felonies).

Generally no liability for off-premises misconduct.

- E.g, sexual acts that take place on property that is neither owned nor controlled by the organization.

- But… liability can arise if:
  - The perpetrator used the employer's chattel (e.g., company car) to commit or facilitate the assault.
  - Used special privileges provided by the employer (e.g., access to off-premises swimming pool, recreational property).
  - Employer had notice of and an opportunity to prevent sexual assault (e.g., observing an adult leave property with a child under suspicious circumstances).

Restatement (Second) of Torts § 317

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LIFE CYCLE OF A SEXUAL ABUSE CLAIM



Defending Under Reservation of Rights

- Are the reservations/exclusions supported by the policy language?

- Are they supported by the allegations of the underlying claim?

- Are they legally adequate?

- Beware: Reservation of Right to Recoup Defense Costs

Reservation of Rights (cont'd)

Do I have the right to independent counsel?

Common Scenario: Insurer is defending under reservation of rights because covered and non-covered claims are alleged. If the insurer is controlling the defense, and there is a question as to whether the defense may be clouded by the insurer's conflict of interest, the insured may have a right to independent counsel.

- May be a common law right or by statute

- May depend on whether it is a "serious" conflict (e.g., a reservation of rights on a punitive damages claim may not suffice)

- Some states do not recognize independent counsel rights because insurers are supposed to be loyal to the defense of the insured notwithstanding any potential conflict.

Maximizing Recovery

Number of Occurrences

Fire & Cas. Co. v. Archdiocese of Portland, 35 F.3d 1325, 1329-30 (9th Cir. 1994) (“the [claimant’s] exposure to the negligently supervised priest in each of the four different policy periods constituted a separate occurrence”)

Roman Catholic Diocese of Brooklyn v. National Union Fire Insurance Co. of Pittsburgh, Pa., 991 N.E.2d 808 (N.Y. 2013) (each instance of abuse is a separate occurrence where perpetrated in unique locations interspersed over extended period of time)

In re Diocese of Duluth, 565 B.R. 914 (Bankr. D. Minn. 2017) (“[t]here are separate occurrences for each separate sexual abuse for each victim and each priest.”)

Sorg v. Safeco Ins. Co., No. DV 12-342 (Mont. Dist. Ct. July 5, 2012) (seven sexual assaults by two assailants of the same victim on the same day constituted seven separate injuries).

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METRO-EAST NEWS

Freeburg school fights insurers for coverage in sex abuse suit

Boy Scouts of America battle insurers over coverage for sex abuse scandal

As LAUSD battles insurers, taxpayers left with bill for teacher sex abuse settlements



Insurance Recovery Strategy Considerations

1. Consider standstill and tolling agreements
2. Consider global mediations and settlements

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6. Risk and Policy Analysis

LIFE CYCLE OF A SEXUAL ABUSE CLAIM

Continually evaluate and improve

- Consult with policy experts to improve sexual misconduct prevention.
- Prevention policies WORK
- Review your polices.
- Conduct “lessons learned” after an incident.
  - What worked?
  - What failed?
- Employ the “internal self-critical analysis” privilege to protect your internal evaluations from future discovery.

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Example: Archdiocese of St. Louis after adopting the Dallas Charter in 2002

- **“**No archdiocesan clergy member against whom there has been a substantiated allegation of sexual abuse of a minor is currently in ministry.”

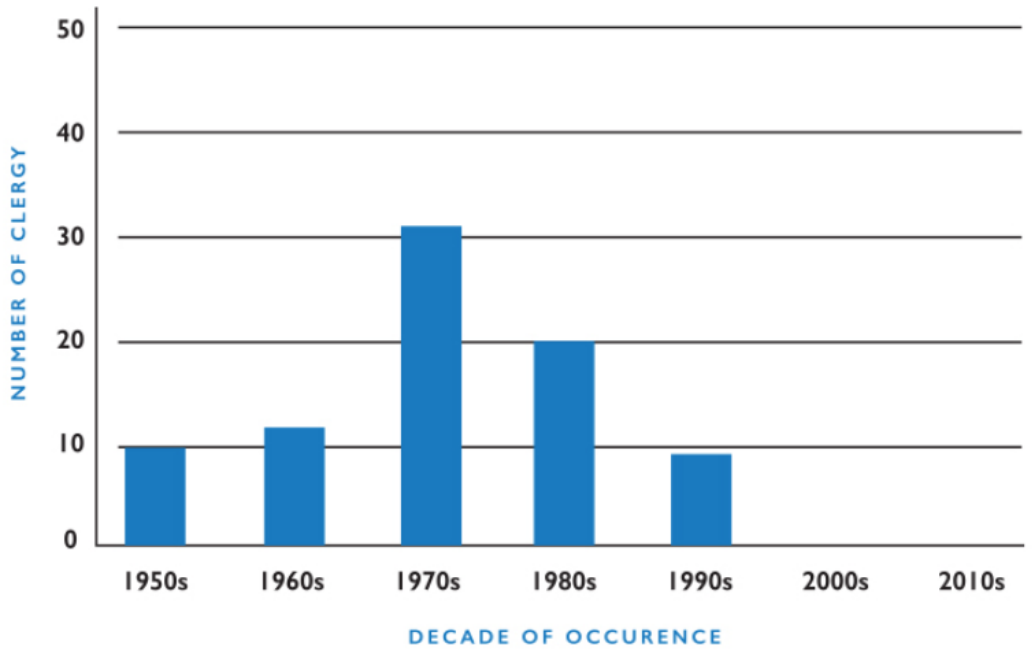
- “There have been no substantiated allegations of sexual abuse of a minor alleged to have occurred after 2002.”



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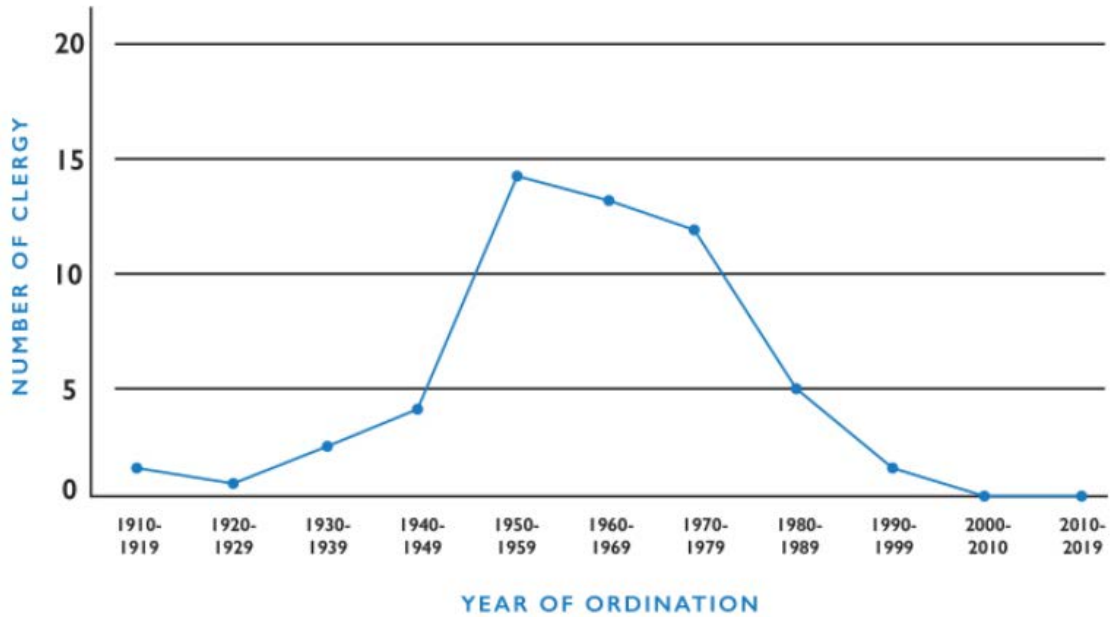
ARCHDIOCESE OF ST. LOUIS

Archdiocesan Clergy with Substantiated Claims of Sexual Abuse of a Minor by Decade of Occurrence



The data in this chart is provided by the Archdiocese of St. Louis

Archdiocesan Clergy with Substantiated Claims of Sexual Abuse of a Minor by Year of Ordination



The data in this chart is provided by the Archdiocese of St. Louis

Consistent policy enforcement, training, and active compliance monitoring are crucial

Example school policy:

Except in an emergency or urgent circumstance involving the youth's safety, school personnel shall never be alone with a youth during any school related activity or setting. All adults should avoid situations that put them in a position of being alone with a minor in a school building, classroom, office, or other closed room. The doors to a room should remain open while occupied by personnel and any minor.

Facts:

- School employee and students regularly work together as part of a program where students receive class credit for performing vocational/technical work.
- Students often enter a storage area to access supplies and use a work bench and tools to perform tasks. Thus, they are occasionally in a room together alone with the teacher.
- The door to the storage area will automatically close if not propped open. The room has no windows.
- A teacher notices that students are working in the room with the door closed, and confronts the school employee about the violation.
- After a second violation, the teacher reports the violation to the principal, who then formally reprimands the teacher.
- One of the students later alleges he was sexually abused inside the storage room.
- School employee had no prior instances of misconduct, a clear background check, and no student, teacher, parents, etc. had ever complained of any misconduct (sexual, inappropriate, or otherwise).

Abuse victims demand “safe” environments and will question every possible oversight by your organization.

Liability? Numerous theories.

- School policies state you provide a “safe” environment, but school violated its own safety policy, and thus failed to provide a promised “safe” environment.
- The purpose of the policy was to prevent abuse, and yet abuse occurred when that policy was violated.
- The school employee should have been fired after the violation (strict liability).
- The teacher and principal both failed to comply with mandatory reporter statutes, which require reporting of *suspected* abuse. Claim: A violation of a safety policy designed to prevent sexual abuse *is sufficient* for *suspected* abuse.
- The school knew students were using/had access to a closed room, but did not install security cameras.
- The school should have relocated the students’ work area to an open room or a room with a window.

More liability theories

- The school's policies and training were inadequate because they lack guidance on how to respond to a violation of the policy.
- The school conducted its own investigation, but it is not a safety/investigation expert and should have relied on experts, the police, or state agencies (following a mandatory report).
- The school failed to interview the student, and thus failed to properly investigate the accident.
- The school failed to assign a safety monitor for the offending personnel or adopt a two-adult policy.
- The school failed to contact the students' parents and investigate potential abuse.
- The school engaged in a cover-up by failing to alert students, other personnel, and parents of the safety violation.
- The school failed to remove the door or modify it so that room was permanently open.
- The school failed to monitor e-mail and other communications (including personal text and social media accounts) to determine possible improper contact between staff and students..

Questions?

Please feel free to contact us:



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