

FACING THE RISK OF COUNSELLING LIABILITY

by Kenneth A. Hall

BACKGROUND:

The current malpractice crisis in North America is fuelled by the assumption that "someone else" must be responsible for all of the problems in one's life. If patients don't get well, they sue their doctor. If church members or adherents experience continuing problems in their emotional health and interpersonal relationships, they sue their minister. Some cases are based on financial motives while others are based on revenge or dislike toward the church or its leaders. In any event, counselling services present a significant potential legal liability exposure to churches and other Christian charities.

Counselling liability issues include such interrelated grounds for negligence as professional malpractice, abuse of authority, physical and sexual abuse, emotional abuse, harassment, exceeding qualifications, failing to refer cases requiring specialized psychological or medical care to qualified professionals, as well as issues of confidentiality and the legal responsibility to report criminal acts.

The types of counselling offered by churches and Christian charitable organizations can be divided into two broad categories. The first category is "professional" counselling which can generally be defined as instruction, advice or guidance provided by individuals by virtue of their specialized training, education or membership in an accredited professional association. Professional liability is based on the legal principles which require that professionals, relative to others, be subject to a higher duty of care consistent with their specialized skill or knowledge. Examples of professional religious counsellors include ordained ministers, therapists, psychologists, guidance counsellors, etc., whether or not fees are charged.

The second category is "non-professional" counselling which can roughly be defined as general instruction, advice or guidance of a religious nature provided by individuals who have certain recognized responsibilities, but who have no specialized training or qualifications. The only legal liability posed by this counselling is based on general legal principles that infer the existence of a standard duty of care required of any person in a position of responsibility, to act as any reasonable and prudent person would act in order to avoid harm or injury to another. Examples of non-professional religious counselling include elders, lay persons, youth leaders, teachers, volunteer counsellors, peer counsellors, cell group leaders and certain employees, etc.

ISSUES:

Most General Liability policies contain an exclusion for "professional" services. This standard exclusion has the effect of withdrawing any coverage for counselling services deemed to be professional in nature. With respect to non-professional counselling activities there may exist a degree of coverage in a General Liability wording, as long as there are no other applicable exclusions (however it is preferable to maintain a policy that spells out the degree of coverage for such activities).

In order to address the potential gap in coverage created by this exclusion, it is important for churches and Christian charities to

obtain appropriate coverage for the type, or types, of counselling conducted by employees and volunteers. Coverage for professional counselling can be integrated into a primary General Liability policy by modifying the wording to specifically include the counselling activities. The advantage of this option is that the premium is relatively cost efficient and the coverage is maintained on an "occurrence" form consistent with the rest of the organization's General Liability protection.

Another option is to obtain a separate Professional Liability Policy to specifically cover "professional" counselling services. The advantage of this option is that the policy wording provides broad coverage for "damages because of any claim arising out of any negligent act, error or omission". However this type of policy is costly and may not specifically address the issue of non-professional counselling activities. Also this type of policy is often written with a "claims-made" trigger. If the organization changes their insurance coverage to an "occurrence" form in the future and a claim subsequently arises which occurred during the time on risk under a claims-made policy, there may not be any coverage under either policy.

INSURANCE TIPS:

- (1) Organizations which provide any type of professional or non-professional counselling as part of their ministries or activities should arrange appropriate coverage under their General Liability policy or under a separate Professional Liability policy.
- (2) If coverage is arranged under a General Liability policy, make sure that the policy wording is broad enough to include the type, or types, of counselling conducted by the organization's employees and volunteers, and that the definition of bodily injury contained in the policy includes "mental anguish".
- (3) If coverage is arranged under a separate Professional Liability policy, try to obtain a policy with an "occurrence" rather than a "claims-made" basis, in order to prevent potential future gaps in your coverage. Also, make sure that "non-professional" counselling activities are specifically covered, either under your General Liability policy or under your Professional Liability policy.
- (4) Regardless of which type of policy form is chosen, try to avoid policies which contain exclusions or limitations which may restrict your coverage in the event of a counselling claim, such as:

(i) Exclusions for "vicarious" liability against the organization arising out of criminal or intentional acts (such as physical or sexual abuse and harassment).

(ii) Policy wordings that limit the scope of "whose" counselling is covered (e.g. only by ordained ministers or only by specified individuals), especially if your counselling responsibilities are shared by other employees or volunteers.

(iii) Policy wordings that limit the scope or definition of the type of counselling activities covered (e.g. policies covering only certain types of "professional" or "religious" counselling)

For more information or a no obligation review of your insurance program please contact our office directly.