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TO: Pastors and Clerks of Session
FROM: Carl Wilton, Acting Stated Clerk
DATE: December 2, 2021
SUBJECT: Churches and Boy Scouts of America (BSA) Misconduct Litigation

Questions have been coming up about a recent spate of lawsuits against churches, arising from allegations of sexual misconduct in Boy Scout units related to those churches. Two factors have caused this recent legal activity: (1) the Boy Scouts of America's Chapter 11 bankruptcy filing in February, 2020 — after a flood of sexual-abuse lawsuits — which is currently in the courts in Delaware; and (2) a 2019 act of the New Jersey Legislature which suspended the statute of limitations for certain lawsuits alleging sexual abuse — a window which, as of November 30, 2021, has just closed.

The Delaware court has put a stay on all litigation until the court accepts the BSA's bankruptcy reorganization plan, which is supposed to take place by January 22, 2022. That stay could be extended, at the court's discretion.

Our hearts go out to anyone who has experienced sexual abuse. The scars of such a horrendous experience are lifelong, and it often takes years for victims to muster the courage to come forward. As the church of Jesus Christ, we have a special responsibility to work for the healing and wholeness of all people.

If your congregation has been sued, you likely already know about this because you've been served with a legal summons. Three congregations of Highlands Presbytery have recently been served with summonses for Scouting-related abuse incidents alleged to have taken place decades in the past. In two of these cases, the presbytery, along with higher councils of the church, has also been served with a summons.

But even if you haven't been sued, if your church has a chartered relationship with the Boy Scouts you may be feeling uncomfortable about potential liability going forward, and may even be questioning the wisdom of the historic relationship you have with the BSA.

I intend to address both concerns in this memo: liability (both past and future), as well as best practices for relating to BSA units. Some of this material comes from my colleague, the Rev. Jeremy Campbell, now co-leader of the Presbytery of Northeast New Jersey. Other material is based on conversations I've had with the attorney the presbytery has retained for our legal defense: Ellen O'Connell, Esq., who is defending a number of congregations and presbyteries in New Jersey and New York that have received summonses.

A disclaimer: I am not an attorney. My purpose here is educational, rather than to dispense legal advice. If you are seeking authoritative legal advice for a specific case, your session needs to retain the services of your own attorney.

So, how is it that some Presbyterian churches are being caught up in the Boy Scout litigation?

It has to do with the way the Boy Scouts have always related to what they call their "chartered organizations" (in our case, congregations). Although some congregations may simply lease space to other community organizations who sponsor Boy Scout units, in most cases, the churches providing the meeting space *are* the sponsoring organization. (By "Boy Scout units," I mean Cub Scout packs, Boy Scout troops or Exploring clubs/posts.) You'll know if you are a chartered organization if the local Scout Council approaches you each year with a new charter to be signed by your pastor or your clerk of session. The charter asks you to supply the name of an Institutional Representative: someone — perhaps a session member — who agrees to serve as the church's contact person for the Scout unit. Scoutmasters or cubmasters — who may or may not be members of the congregation — cannot serve as Institutional Representatives. It's up to you, as the chartered organization, to decide whether or not to require that scoutmasters or cubmasters also be church members.

(This is not true, by the way, of Girl Scout units. The Girl Scouts of America are structured differently. Girl Scout units are run directly by the local Girl Scout Council. Churches that lease meeting space to Girl Scout units are simply landlords, and do not have a say in the running of the local unit.)

What do we know about the proposed BSA bankruptcy settlement agreement?

The BSA bankruptcy plan filed in September 2021 will eventually pay claims related to abuse that took place in two periods:

Pre-1976: chartered organizations can be covered by paying into a trust
Post-1976: chartered organizations are covered by BSA insurance

If the court approves the proposed bankruptcy settlement, chartered organizations — including local congregations — are likely to receive at least some release from claims for harm from incidents alleged to have occurred from January 1, 1976 until the date the bankruptcy was filed in 2019.

Why 1976? Because that's the date the BSA began carrying insurance covering incidents of sexual abuse. That insurance policy, underwritten by The Hartford, included coverage for chartered organizations as additional insured beginning on that date. Prior to 1976, few insurance companies offered coverage for liability related to sexual abuse.

As word of the BSA bankruptcy plan has gotten around, it's prompted adults who, as young people, had bad experiences in Scouting programs to consider a legal remedy. It's important to remember that the vast majority of recent lawsuits are responses to incidents that occured decades ago.

For pre-1976 cases, there is a further possibility of becoming what's called a "Contributing Chartered Organization." This would grant a complete release for incidents occurring in all time periods in exchange for a "substantial" contribution to the bankruptcy settlement-fund pool. At the moment this appears to be cost-prohibitive for congregations — so expensive that the buy-in would likely need to occur at the denominational level. So far, only the Church of Jesus Christ of Latter-Day Saints (the Mormons) has agreed to make such a contribution. If the court approves the bankruptcy settlement, there will be an opportunity to negotiate with the trustee as to the cost of contributing to this pool.

There is a slight possibility that, prior to 1976, your local BSA Council, independent of the national organization, had its own liability insurance coverage for sexual misconduct that might cover chartered organizations: although this is not likely.

We've filed "Proof of Claim" documents. What does that mean?

Responding to news of the bankruptcy filing, some congregations sponsoring Scout units filed what's called "Proof of Claim" documents as potential creditors in the bankruptcy. This was a proactive step, providing extra protection just in case a lawsuit were filed alleging harm that took place during the period covered by the settlement. The deadline to file proof of claim was in November of 2020.

If you did so, you've recently received a ballot to vote for the BSA's proposed settlement plan. If you filed a proof of claim before the deadline, we believe it is in your interest to vote *in favor* of the plan. You can vote online through a link in the ballot you received. We DO NOT recommend that you opt out of the releases contained in the plan, because that was the reason you filed the proof of claim in the first place.

We didn't file Proof of Claim documents: how does that impact us?

If you didn't file a Proof of Claim before the deadline, don't worry about it. As a bankruptcy lawyer has explained it to us, the only significant advantage of doing so is that it entitles you to vote as part of the approval process of the BSA bankruptcy proposal.

As we understand it, if approved, the bankruptcy settlement includes — for all congregations being sued, even those that didn't file a Proof of Claim — a channeling injunction which will catch all the Boy Scout cases and channel them into the bankruptcy proceeding. This means that if the settlement is approved, congregations and other chartered organizations should still benefit from the release described above, for harm alleged to have occurred in 1976 or later.

We've been named in a suit, and the alleged harm occurred prior to 1976: what can we do?

The first thing you need to do is contact your presbytery office. We stand ready to assist you and advise you in this process — although we strongly advise you to retain your own legal counsel.

Next, you'll want to search your session and trustee minutes for the time period in question. Look through them for any information (or lack of information) about session approving the names of Boy Scout leaders. Also look for information about any insurance policies the session had at the time. Your attorney will want to know this information.

We've recently learned that, in the 1970s, a number of Presbyterian churches in New Jersey (although not in the former Newton Presbytery, which had other arrangements) had their insurance coverage through a self-insurance pool the Synod had put together at the time, administered by an insurance company that's now defunct. We're currently seeking more information about that plan, with an eye to discovering what financial resources may still exist for paying historic claims from that period. Anything you can discover in your session minutes related to that policy could be helpful to us in that fact-finding process.

What are the chances of a financial judgment being levied against our church, or the presbytery?

The attorney who's advising the presbytery has provided some encouraging news. In 2019, the New Jersey Legislature updated its rules concerning "charitable immunity" — which gives charitable organizations some extra protection against negligence lawsuits, even those reaching far back into the past. In order for a financial judgment to be levied against a charitable organization, the plaintiff must prove "willful, wanton or gross negligence" — which is different from ordinary negligence. That means the plaintiff must prove that congregational or presbytery leaders knew about the specific incident of abuse at the time, but willfully decided to do nothing about it. That's a pretty high bar, legally speaking.

You mentioned that Highlands Presbytery has been named in two of these lawsuits. Could the presbytery be financially harmed by these suits?

It's still too early to say, but we believe our polity offers some degree of protection. Unlike hierarchical churches like the Roman Catholic Church, Presbyterian congregations are self-governing for most practical purposes, when it comes to local ministries. The Book of Order specifies certain areas — such as the calling and continuing service of ministers, and decisions related to buying, selling or encumbering real estate — where the presbytery does exercise a direct role, but the majority of governance decisions sessions make, including decisions related to volunteer or paid personnel, are not approved or reviewed by the presbytery.

That doesn't stop attorneys from naming presbyteries in lawsuits against congregations, but as long as the court has an accurate understanding of the connectional nature of Presbyterian polity, we don't think the court is likely to levy a financial judgment against the presbytery.

Should we renew our BSA unit charter for next year?

You may have heard in the news that the United Methodist Church has advised its congregations not to renew their charters for BSA units in 2022. This is because the proposed bankruptcy settlement does not provide protection for pre-1976 lawsuits filed against chartered organizations, unless those organizations buy into the settlement pool. This is a complex and controversial issue. As we understand it, local Methodist churches have the freedom to decide whether or not to follow this advice from the national church.

The Presbyterian Church (U.S.A.) as a denomination has not offered specific advice on the question of charter renewal going forward. That's entirely up to sessions to decide.

We suggest that you read the charter document carefully and make sure you're willing to be an active partner with the Scout unit: more than simply a landlord. We see no reason not to renew the charter if you're willing to uphold your end.

News of sexual-misconduct lawsuits always attracts a disproportionate amount of media attention. That can give the mistaken impression that today's BSA units are a dangerous place for young people to be. A generation ago, youth organizations of all kinds — including church youth programming — functioned without many safeguards other than reputational good will. Nearly all the lawsuits we're seeing today date back to that era, when formal child-protection procedures were a rarity throughout society. If you're inclined, in light of all this, to reconsider whether you, as a church, should continue to be affiliated with Scouting, we encourage you to look forward, not back, as you assess risks.

Deciding not to renew your charter means you're essentially cutting your Scout unit loose from the BSA. Although you could continue to offer similar children's or youth programs on an independent basis, you could no longer call them BSA units, nor could you use trademarked BSA resources or uniforms. The cost of your congregation's liability insurance could go up, because you would no longer have the coverage the BSA currently offers to chartered organizations. Alternatively, if you did decide against renewing, you could ask the unit leaders to find another local church or organization to sponsor them — in which case you would need to reach some agreement as to the disposition of camping and other equipment (which is likely owned by the church, not the Scout unit).

Does the BSA offer insurance against sexual-abuse lawsuits going forward?

You will need to consult your local Scout Council to find out for sure, but it's very likely that their insurance policy does now cover chartered organizations (including congregations) as additional insured. You should also check with your own insurance company as to your coverage with them, and which coverage is primary: the church's or the Scout Council's. In recent years, Scout Councils have been requiring criminal background checks and abuse-prevention training for all volunteer leaders, but we suggest that you ask your Council leaders about the specifics, making sure such protections are robust and are universally applied. (You may find that the Scout Council's child-protection procedures are more extensive than what your session currently requires for Sunday School teachers and youth-group leaders — which could inspire you to up your game in that regard.)

It would be wise to review your congregation's present insurance policies, asking questions such as these:

1) Does your current insurance include liability coverage (either primary or secondary) for Boy Scout units for which the church is the chartered organization?
2) Are you complying with conditions the insurer places on such coverage (having child-protection policies in place, for example)?
3) Do you have your own protocols in place for congregational youth activities (background checks, "two-deep" leadership, incident reporting procedures, etc.)?

I have other questions. Who can I talk to?

Your Presbytery Leader, the Rev. Jeanne Radak, and I, as Acting Stated Clerk, are glad to be conversation partners. Please feel free to reach out to us!