

LAWSUITS AGAINST THE AGENCY

As a result of an alleged child abuse, a lawsuit may sometimes be filed by the parent and the child against both the agency and the alleged abuser. This lawsuit is usually filed in the form of a complaint or a petition, and generally filed in a state circuit court of general jurisdiction. The petition will normally allege that the accused was an agent and representative of the agency and that the agency owed a duty to the child and the mother to provide responsible, adult care and supervision while the said minor child was under the care, control and supervision of its agent. The lawsuit alleges professional negligence in that the agency failed to properly screen its applicants for suitability to undertake the care and guidance of the child, by negligently accepting the accused into the program after it knew, or should have known, that he/she was not a suitable person to offer care and guidance to said minor child. It is generally asserted that the injuries and damages are continuing and it cannot be said with any certainty that the injuries and damages will not be permanent. The negligence which is alleged is said to constitute wilfull and wanton disregard for the rights and safety of the minor children enrolled in the program and, therefore, the plaintiffs will additionally seek punitive damages in addition to actual damages. These lawsuits are generally for very large sums of money and, therefore, agencies should be adequately covered by the proper insurance program which will be discussed later

in this paper.

The accused is prosecuted for criminal charges or sued for the civil action of assault and battery; however, the agency is sued on the grounds of negligence in the selection of the accused and his/her placement into the program. Generally, the plaintiffs are seeking monetary damages which could only be awarded through an adequate insurance program, for most often the accused is unable to satisfy any substantial monetary judgment.

For many years agencies performing a charitable service were not subject to lawsuits of this nature because the courts and the law protected them under the doctrine of "charitable immunity". This doctrine, in short, merely protected all agencies performing a charitable service from being sued, but that doctrine has now been abolished in most, if not all, jurisdictions and, therefore, our agencies are potentially liable for all such litigation.

It is important to emphasize here that not every abuse situation will result in a lawsuit against either the accused or the agency and in most cases the attitude, actions and support of the agency can be very important in the determination as to whether or not there will be a lawsuit filed against the agency. When the lawsuit is filed, legal advice must be sought immediately. In this connection, it is important to state that

the local board of directors should have a local legal counsel as well as some lawyers on the board itself. I do not recommend that the legal counsel to the board be a member of the local board itself. Further, I recommend that legal counsel be responsible for providing or acquiring legal advice to the agency concerning this area of litigation. When the agency is insured, the insurer must be notified of the abuse complaint in the first instance and of the lawsuit when it was filed and, as a part of the policy, the insurance company may provide legal counsel since it may also be financially responsible in the outcome of the litigation.

To date, no case has yet litigated to conclusion the issue of negligence of the agency. This is so because most cases have resulted in a compromised settlement prior to the completion of the case. The issue as to whether or not the lawsuit should be settled is a very difficult issue for the agency itself, but the final determination as to whether or not it will be settled will generally be determined by the insurance company and not the agency. The important factors which are taken into consideration in such a decision are:

- 1) the severe adverse publicity which results from such litigation and
- 2) the potentiality of larger monetary awards in the event the decision were to be rendered in favor of the plaintiffs.

It does not necessarily follow that just because an abuse situation has occurred that therefore there must have been negligence on the part of the agency in the acceptance of the accused into the program. It must be proven by a preponderance of the evidence that the agency was negligent in its selection procedures and that the negligence resulted in the acceptance of the accused. Therefore, the agency's entire selection and supervision process will be a matter of severe scrutiny by the lawyers involved in the litigation. In this connection, the minimum standards of service as established by the national agency will be closely examined as will any evaluations of agency service which may have been performed.

In a recent case, one of our stronger agencies experienced an abuse situation and a lawsuit against the agency and the accused did result. Initially, the staff, board and insurance carrier were strongly of the opinion that no professional negligence had been exhibited on behalf of the agency and therefore the decision was made to litigate the case. There was extensive discovery procedures including depositions, interrogatories, and other investigations. I personally reviewed the facts and circumstances in this individual case and concluded that in my professional judgment the agency was not professionally negligent in the selection of this volunteer. I, therefore, recommended that the agency go to trial and resolve this matter before a jury.

During the trial, which took several days, there was continuous pressure on the agency to settle the lawsuit before its conclusion. Although the agency steadfastly refused to settle and concede the allegation of negligence, nonetheless the insurance company on its own decided it would settle the lawsuit for a lesser sum of money and avoid the possibility of an adverse verdict and judgment. The agency director in that situation participated on behalf of the agency on a daily basis and in addition to her own experiences, she noted matters of interest and concern, and as a result of her cooperation, the following are some general areas of interest to all agencies which were addressed in this case and are likely to be addressed in any similar lawsuit.

A. Employee Qualifications

Employee turnover, educational requirements, prior experience, salary and fringe benefits, written personnel practices, written evaluations on employees, prior work experience and length of employment prior to the making of approving of this particular match.

B. Standard and Agency Policies

Written policies regarding screening, selection and supervision of staff and volunteers, case files and comparison to national standards.

C. National organization

National organization offered training on a regional or national level and your attendance at these programs; national standards; training on questioned sexual abuse and profile of sexual offenders; evaluation of local agency by national personnel; average length of match; and number of contacts of local with national agency.

D. Public Relations

All public relations materials for the period in which the accused was a participant in the program were reviewed: news letters, news releases, brochures, films, pamphlets, number and places of public speaking for recruitment purposes, including TV ads, radio, newspaper, all stressing desperate need for volunteers and the fact that more children are available than volunteers to serve them, and statistical data such as number: of inquiries, attending orientation, screening process, number accepted and matched, as well as those rejected.

E. Application and Case Notes

The application of the volunteer and the casework notes on the selection and match process as well as the supervision process are closely examined and experts called to give conclusions concerning these procedures.

The above areas of questions and the experience here are not unique and are expected to be encountered in most litigation.

Not to be discounted in this entire process is the terrific effect that adverse publicity could have on the agency survival and the continuation of the program. In this connection it is again emphasized how valuable good PR people in the community can be to a local board of directors.

INSURANCE

Until recently, no insurance was designed to specifically protect the agency for coverage concerning professional negligence in alleged child abuse situations. However, on October 24, 1981, the Board of Directors of BB/BSA approved an insurance program specifically designed to cover this situation. The approved program has been designed especially for Big Brother/Big Sister agencies and we in fact participated in the development of the insurance program. The program is now being offered through Jack L. Kirby Insurance, Inc. of Jacksonville, Florida and the St. Paul Fire & Marine Insurance Co. There are three policies offered as a part of this program, including general liability and professional liability, directors and officers liability and accidental and medical for Little Brothers/Little Sisters.

Professional liability insurance with general liability insurance coverage is the proper and suggested method to protect our agencies in the area of alleged negligence from child molestation and abuse situations. This policy, of course, does not cover the volunteer for any intentional act, but it does cover the agency for any battery, physical injury, sickness, disease

or death, including damages for care and loss of services and any mental anguish including emotional or psychological distress. The above is the definition of bodily injury and it is the language which is utilized by plaintiffs in this type of lawsuit.

The policy does protect the agency for acts of the professional staff and the non-professional, such as the volunteers. In fact, the policy specifically states that the acts of volunteers are covered. This policy covers the agency, officers and directors, employees of the agencies, and the volunteers for other than the illegal or intentional act.

At this time we have over 180 member agencies who are enrolled in the program, which is available only to member agencies of BB/BSA. All agencies who have been eligible for renewal have renewed their insurance coverage. We have just been advised that beginning immediately all prior acts that occurred prior to the purchase of the insurance coverage can now be insured. There is no limit to the number of years of retroactive coverage under this new offering. However, there are two conditions: there must be no knowledge of wrongful act and there must have been no other prior insurance that was in effect at the time that the wrongful act is alleged to have occurred. This is an excellent addition to an insurance program which I feel sufficiently meets the need of our agencies.

If interested, please contact Jack L. Kirby Insurance Co., Inc., 4196 Herschel Street, Jacksonville, Florida 32210, or call collect (904) 389-4571.

When an allegation of molestation of abuse occurs, the insurance company should be notified concerning the allegation immediately. This notification should be in writing with a copy retained by the agency. If any legal action occurs as a result of this complaint, then the insurance company should be renotified immediately.

Some agencies have the mistaken impression that if they don't have insurance they won't/can't be sued. This is a foolish notion if the agency intends to continue operation in the community. Like all insurance we pay for the protection with the hope that we will never need it, but we do need the protection. Our staff and our boards are not immune from personal liability and this insurance will protect them as well as our clients who certainly deserve to be financially protected. In the days ahead I will be taking the position that every affiliated agency be required to carry this insurance as a condition precedent to affiliation with BB/BSA.

CONCLUSION AND SUMMARY

I realize that this paper is lengthy, yet by no means is it exhaustive of the subject matter. This is a very sensitive area, yet I recognize there are many more questions than there are answers and I only hope we have provided some useful information for your consideration. Please realize that the Board of Directors of BB/BSA, the Program Committee and professional staff are doing what they can in recognition and study of this serious problem. I strongly recommend that you attend our Annual Meeting in San Diego this year where detailed workshops will be given addressing this particular subject. Furthermore, you should contact your field staff personnel on the District level as soon as you encounter one of these allegations. National staff has developed a format of reporting every such incident and referring the source to the proper personnel for advice and recommendation. I continue to be a resource person for all agency personnel seeking advice in this area and the program committee will continue to address your needs in this regard. Only through the sharing of information and experiences can we learn from each other's lessons in this regard. We will also continue to upgrade our standards as we are doing at this very time. If you have any questions or comments concerning the above, please feel free to contact me; my thanks to the many of you who have called and written and shared your comments and information.

CHILD SEXUAL ABUSE

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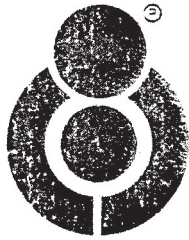
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EXHIBIT 6

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MAR 18 1983

BIG BROTHERS/BIG SISTERS OF AMERICA

FULL MEMBERSHIP

AFFILIATION AGREEMENT

WITH

VALLEY BIG BROTHERS

PHOENIX, AZ

117 S. 17TH STREET, SUITE 1200, PHILADELPHIA, PENNSYLVANIA 19103

This Agreement, dated September 16, 19 81, is made by and between Big Brothers/Big Sisters of America, a corporation of the District of Columbia incorporated by Act of Congress of the United States of America, having its principal place of business at 117 S. 17th St, Ste. 1200 Philadelphia, Pennsylvania 19103 (BB/BSA) and VALLEY BIG BROTHERS (Member).

The Member, being cognizant of the distinctive and valuable significance to the public of BB/BSA and its professional service, desires, and is qualified, to become a Full Member, having completed its requirements as a Provisional Member under an Agreement dated , 19 , or under other arrangements previously in force.

In recognition of all the above, the parties, intending to be legally bound hereby, agree as follows:

✓ 1. Grant of Full Membership.

BB/BSA hereby grants to the Member and the Member accepts a Full Membership to operate an organization utilizing the BB/BSA name in Service Community # AZ 08 . The Service Community, for the purposes of this Agreement, is the geographical area outlined in an unbroken line on the map attached hereto as Exhibit A. BB/BSA agrees not to enter into any agreements, after the date hereof and for the duration of this Agreement, with any other person or agency for the purpose of granting rights to such person or agency to service the Service Community granted hereby.

2. Term.

Except as provided in Section 7. hereof, the term of this Agreement shall be indefinite; however, it may be terminated, subject to the other provisions of this Agreement, (a) by the Member upon thirty days' notice in writing (which shall include a certified copy of a resolution to such effect by the Member's Board of Directors) for any reason, or (b) by BB/BSA as provided in Section 7. hereof.

3. Membership Fees.

The Member agrees to pay Membership Fees to BB/BSA as initially set forth in Exhibit B, attached hereto, and as thereafter determined under the provisions of Section 6.b. of this Agreement.

✓ All Membership Fees shall be paid no later than the 31st day of December in each year.

4. Full Membership.

As a Full Member, the Member shall be entitled to utilize the BB/BSA name, and logotype, and other terms peculiar to the Big Brothers/Big Sisters Movement during the term set forth in Section 2. above. At all times during and after termination of this Agreement, BB/BSA shall retain all rights, title, and interest in and to the name Big Brothers and/or Big Sisters, Big Brothers/Big Sisters of America, or any similar name or names, and any labels, logotypes, symbols, badges, materials and documents containing such name or names. So long as the Agency is in good standing, the Member shall be able to vote at meetings of BB/BSA in accordance with the provisions of the BB/BSA Constitution and By-Laws, so long as the Member is in compliance with the provisions of section 6 of this Agreement (unless such non-compliance has been waived in writing, by BB/BSA.)