

## The Report of The Task Force on Contract Negotiations

This is the report of the Task Force related to the contract negotiations requested by the Executive Committee regarding the engagement of a third-party firm to conduct an independent investigation of the Executive Committee.

### **Waiver of Privilege**

With deep grief we must report that while we are thankful for the tone in which yesterday's discussions were conducted, the Executive Committee officers would not agree to waive attorney-client privilege.

We have retained independent legal counsel with the firm LinkSlater and sought their input as well as the input of several other attorneys. This is a summary of the information as it has been given to us:

We first believe it is important that you understand what the risks are not:

- Waiving privilege does not risk the ability to get future insurance plans. Extensive liability created by bad acting may affect that ability, much the same way a driver who has multiple at-fault accidents may incur difficulty with insurance, but waiving privilege does not prevent the ability to obtain future coverage.
- Waiving privilege does not allow any personal assets to be attached. The corporate veil that protects officers, employees, etc. from having their personal assets attached is a completely separate protection from privilege. The corporate veil can only be pierced to attach personal assets in cases of the existence of fraud, wrongdoing, or injustice to third parties. Unless an individual has engaged in that type of behavior to such an egregious extent that a court may declare the corporate veil pierced, personal assets cannot be attached. Waiving privilege might make it easier to *find* that level of bad acting, but the veil is pierced not because of waiver, but when there has been fraud or illegal behavior. This also means that the veil is only pierced for the person who did the bad acting. If Trustee A engages in behavior sufficient to pierce the corporate veil, Trustee A's assets may be able to be attached. This has no bearing on Trustee B however, unless Trustee B also engaged in said bad-acting.

The concern related to waiver is that if the Convention waives privilege *at any point* it is possible that an insurance company could refuse to fulfill a policy related to the issue where waiver occurred.

While neither the Task Force, nor Guidepost, nor the Trustees we met with yesterday had been provided a copy of the insurance policy (despite multiple requests by Guidepost in particular over a period of a few weeks), it is true that insurance policies generally require the entities they ensure to defend against legal claims – this is an attempt to mitigate damages and it is a requirement of the policy regardless of how much fault the insured entity actually has. Meaning, insurance policies require even entities with massive fault to defend against that fault regardless of whether they themselves believe they have caused damage that morally should be restored.

Part of this requirement to litigate against claims can include or be interpreted to include a provision that waiving privilege is considered a breach of the duty to litigate and mitigate damages, therefore voiding the policy for that event. This is not a guaranteed result – but it is a risk.

What this looks like in practice is that if Survivor A has a valid legal case against the SBC for sexual abuse and wins a court case or settles with the SBC, the insurance company could argue that they do not have to pay Survivor A's claim, if privileged information related to Survivor A's case, had been released. If the insurance company refuses to pay, the SBC would need to pay the claim itself and, if they so choose, challenge the insurance company's refusal in court.

This would apply only to cases where privileged information relevant to that case is waived. Thus, waiving information for say, Survivor A's sex abuse case does not affect Person B's lawsuit over a different legal matter.

In addition, the investigating entity (Guidepost) is only seeking and receiving relevant information – meaning information directly pertinent to the scope of their investigation. And they are only reporting on information relevant to the scope of their investigation. A qualified, licensed firm like Guidepost not only has a vested interest in being true to the scope of the work they are asked to do, but are also bound by professional rules of conduct and ethics to only do what they are commissioned to do.

So, while it is true that waiving privilege may risk the insurance proceeds for that event where waiver happened, it is also true that this is an unquantifiable and unidentifiable threat. Whether liability to give rise to a lawsuit exists, whether an insurance company would make an argument to refuse coverage, and whether they would be successful at that argument, is an unknown.

***This risk must be balanced against other risks, including:***

- The risk that insurance coverage has *already* been forfeited by not acting on available information. Part of the requirement to mitigate damage is also a requirement to act on information that is known or should have been known. Meaning, if the SBC does indeed have liability for sexual abuse, and they knew or should have known of that risk and did not promptly act, the insurance company may have the right to also refuse to pay any damages that were incurred after the time that the SBC/Executive Committee knew or should have known, of the risk.
- The Messengers specifically directed that such an action be taken and to refuse to follow such a clear directive violates the bottom-up structure of leadership in the SBC and severely undercuts the theory of autonomy that has so far successfully prevented ascending liability.
- Insurance coverage is not worth more than the individuals who have been harmed by action or inaction, or individuals who could be spared harm, by engaging in a transparent, accurate diagnosis of breakdowns or failures. Not allowing all information to be accessed and reported limits the ability to pursue transparency and fully identify root causes of breakdowns or failures.
- Whether insurance coverage would be lost, and to what degree, and what impact that would have on the Convention overall, is unknown, while the potential harms of ignoring such a mandate are, we believe, very clear.

- A continued breakdown of loss of trust and goodwill in the SBC.
- Potential loss of cooperative program dollars from churches whose Messengers voted for waiver, only for it to be ignored.
- The responsibilities of a fiduciary encompass much more than the preservation of insurance proceeds and we believe the overall long-term risk to our members, our children, and even our entities, is greater when we do not engage in honest, transparent diagnostics, repentance and assessments.

The Task Force is happy to meet with any EC members to further discuss these concepts. But for all the reasons listed above, we firmly believe that waiver of privilege is the only proper course of action in this case.

### **Alternative Models**

At this time however, we believe it is imperative to at least begin the process with as much depth and breadth as is possible. We have therefore proposed two options which we believe based on our attorney's counsel and review, still preserves privilege. The Task Force has retained our own independent legal counsel – attorneys Adam Lurie and Richard Smith of LinkSlater. Per our request they have examined the structural and governing documents of the Executive Committee and the SBC Convention, as well as relevant laws and court decisions in each entity's jurisdiction and more broadly. LinkSlater has advised us that the contract signed does, in their professional view, meet the concerns expressed by the Messengers regarding the preservation of insurance funds.

Both of these models are also predicated on the firm's belief that the Task Force, as an agent of the SBC, has come under the shared privilege between the Executive Committee and the Convention. Because the Convention is the sole shareholder of the Executive Committee, we have been advised that this creates a parent-subsidiary relationship, and further that court have almost universally held that in these cases, the parent entity (SBC) and the subsidiary (Executive Committee) *both* hold privilege. This would mean that the SBC's agents may operate under privilege as an arm of the SBC (even if temporary). Because of this, the Task Force has the ability to enter into contracts in both of the following models, in a way that maintains privilege.

*Note: We understand that the Executive Committee's attorneys feel it is less certain that the Task Force is under privilege and therefore can bring a firm also under privilege. However, to-date, we have been given no case law, statutes, work product or explanations of the bylaws to explain their position.*

*The only alternative to the Task Force contracting with Guidepost or any firm and maintaining privilege, would be for the Executive Committee to be the entity hiring the firm and forming a fiduciary relationship with them. This is entirely and clearly contrary to the will of the Messengers and we do not believe this is an option.*

*We understand the Executive Committee's attorney's position that there may be a level of risk if a court were, at some point, to decide that the Task Force was not in fact under privilege. We believe this is a risk which is very small, and must be accepted since the alternative of the Executive Committee entering into the contractual relationship, is not a valid option.*

It is our position, based on our legal counsel, that both of the following options meet the Executive Committee's goals of preserving privilege:

### **Bringing Guidepost in under privilege**

This model preserves privileged information by having the Task Force employ an independent law firm to provide the cover of privilege between the firm, the Task Force and Guidepost. This is a model that has been successfully used in numerous investigations and assessments to preserve privilege and we believe that the Task Force, as agents of the SBC, has the legal capacity to contract with this supervising firm and extend privilege to that firm and therefore Guidepost. This model will allow Guidepost investigators to access any and all information, *including* privileged information. **We must stress however, that unless the Executive Committee waives privilege, Guidepost will not be able to report on any privileged information**, which we believe was a critical component of the Messenger's directive and motion. Because this model does preserve privilege, it is thereby still limiting the transparency and accountability to the Messengers and survivors. We believe this is a significant limitation on available information since much of abuse policies related to both prevention and response, take place in the context of the attorney-client relationship.

### **Utilizing a Special Master Process**

This model would create a non-privileged relationship between Guidepost and the Task Force, but the Task Force would then also hire an independent third-party attorney to review any documents that the EC claims privilege over. The Special Master would ensure that documents which are claimed to be privileged in fact are, and also redact out only privileged information, while passing on non-privileged information to Guidepost. Like in the model above, this is still a significant limit on transparency because it still restricts any review of or reporting on, privileged information.

### **Fiduciary Oversight**

Concern was expressed that the Executive Committee needed some level of oversight in order to fulfill their responsibilities to the Convention. We have therefore proposed a model where Guidepost will be contracted with and overseen by the Task Force and produce a fully-public report on their findings. The Executive Committee has a cooperative fiduciary relationship related to financial oversight and will receive periodic updates on finances expended and general updates on work performed, but may not control the scope, processes or product of Guidepost nor have access to work product. All parties have committed to an unedited and unredacted fully public report. (Note – where relevant, members will be asked to verify factual details with corrections to be approved and verified by Guidepost, as is standard practices in independent assessments. Examples of this would be correcting the misidentification of an individual or the date of a document.)

### **Indemnification**

Several concerns were raised asserting that the indemnification clause of the new contract was markedly different than the clause previously approved by the EC. In fact, however, the clauses were identical excepting the insertion of relevant party names to match the contracting parties.

### **Counseling Services**

Concerns were raised that the engagement letter went beyond the scope of the motion by engaging counseling services or similar provisions outside of the mandate. This is inaccurate – the engagement letter does provide for trauma-informed survivor care as is standard in investigations involving a significant number of trauma victims. This may include provisions such as a survivor advocate, focus groups and listening sessions related to reform being sought, and appropriate updates to survivors from individuals who are trauma-trained and informed.

We are confident that both contracts we presented to the Committee yesterday, addresses the concerns of the Executive Committee.

While we are grateful that Guidepost can begin their work, we remain dismayed at some of what took place in this process. While insurance proceeds have been repeatedly raised as the objection to waiving privilege, Guidepost Solutions has repeatedly asked to be sent the relevant insurance policies – yet no policies have been provided.

For the first six days between the annual meeting and the meeting yesterday, the attorneys for the Executive Committee shifted the discussion completely to insist on control of the scope of the work and redact the commitment to a public report, under the auspices of needing such control to fulfill fiduciary obligations. We are deeply grateful for the leadership of Chairman Slade in ensuring that this attempt at regaining control of the process and information was ended, and the agreement of the trustees who met with us in Dallas, so that progress could be made towards this Agreement, but dismayed that it could continue for almost the entire time allotted to negotiate contract terms.

### **Conclusion**

Based on our attorney's analysis of the corporate relationships and bylaws, we are likewise confident that as a Task Force we are endowed with the sole authority to execute this contract. However, we believe it is in the best interest of all involved for the EC to engage collaboratively and sign the contract via Chairman Slade.