

GUIDELINES REGARDING SEXUAL MISCONDUCT

WHOM TO CALL

Someone who wishes to present credible allegations that a pastor or deacon may have been involved in sexual misconduct should notify the synod. The following persons have been designated to receive those calls:

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Metropolitan New York Synod of the Evangelical Lutheran Church in America

GUIDELINES REGARDING SEXUAL MISCONDUCT BY ROSTERED PERSONS Approved by the Synod Council July 18, 1995

The Metropolitan New York Synod of the Evangelical Lutheran Church in America ("ELCA") is committed to preventing sexual misconduct within the church and to responding with justice and compassion when such misconduct occurs. These guidelines describe how the Synod will act upon these commitments.

I. INTRODUCTION

A. Definitions

1. "Sexual Misconduct." Federal and state law make distinctions among various types of sexual misconduct, such as "sexual harassment," "sexual abuse," and "sexual assault." Similarly, the governing documents of the ELCA define what types of sexual misconduct can result in a rostered person being disciplined. Some types of sexual misconduct may provide grounds for discipline but may not be unlawful, while other types may be unlawful but may not provide grounds for discipline.

These distinctions need not concern a person who is troubled about the sexual conduct of a rostered person. The Synod is concerned about all types of sexual misconduct by these professionals, regardless of whether or how the misconduct is characterized by the law or by the governing documents of the ELCA. Any sexual misconduct committed by one of these professionals should be reported to the Synod, including, but not limited to, any sexual contact between the professional and a congregant, counselee, employee, or volunteer.

It should be noted that the Synod may not be able to assume primary responsibility for addressing all allegations of sexual misconduct. For example, if a rostered person who is under call to a congregation is accused of sexually harassing another of the congregation's employees, civil law may require that the congregation take timely and appropriate action and may prevent the Synod from interfering in the situation.

2. "Complainant." As used in these guidelines, "complainant" means a person who reports sexual misconduct to the Synod. These guidelines will assume that the complainant is also the victim of the alleged sexual misconduct.

3. "Rostered Person." As used in these guidelines "rostered person" refers to pastors, associates in ministry, members of the deaconess community, and diaconal

ministers rostered in the Metropolitan New York Synod.

4. "Bishop's Designees." As used in these guidelines "bishop's designees" refers to an executive staff person and another person trained in the counseling field. At least one designee will be a different gender than the bishop.

B. The Role of Congregations

The Synod and its member congregations have different responsibilities and thus different roles to play in preventing and responding to reports of sexual misconduct by rostered persons.

Each ELCA congregation calls its own rostered person, determines its rostered person's duties and responsibilities, supervises its rostered person's day-to-day ministry, and decides whether to terminate its rostered person's call as provided by the governing documents of the church. The Synod has neither the authority nor the ability to make those decisions. Obviously, then, the Synod cannot be a safe place unless every one of its member congregations shares its commitment to ending sexual misconduct by rostered persons.

The Synod's role is essentially twofold. First, the bishop is responsible for providing pastoral care and leadership to the Synod's congregations and rostered persons. Reports of sexual misconduct by rostered persons invariably creates an acute need for such care and leadership. Second, rostered persons who commit sexual misconduct may be disciplined- that is, they may be suspended or removed from the roster of the ELCA. The bishop is primarily responsible for overseeing the preliminary or consultation stage of the disciplinary process and for initiating the formal stage of the disciplinary process.

These guidelines are the Synod's, and therefore they say little about the role played by congregations in preventing and responding to reports of sexual misconduct by rostered persons. This should not obscure the fact that congregations also have a vital role to play. The Synod strongly urges its member congregations to develop their own sexual misconduct guidelines.

C. Disclaimers

1. Every report of sexual misconduct by a rostered person involves unique people and unique circumstances. Therefore, the Synod reserves the right to depart from these guidelines at any time and for any reason. These guidelines merely describe the general approach that the Synod will follow in responding to reports of sexual misconduct by rostered persons. It will not be appropriate or even possible for the Synod to follow this approach in every case.

2. When the Synod provides pastoral care and leadership in the wake of alleged sexual misconduct by rostered persons, it is performing acts of ministry.

The freedom of the Synod to decide for itself how God has called it to minister to those harmed by sexual misconduct is a precious one that is constitutionally protected from governmental interference. The same is true of the Synod's freedom to decide who will be on its roster, and of the freedom of each congregation to decide who will preach and teach from its pulpit. Nothing in these guidelines is intended to diminish these freedoms in any respect or to create any legal rights or responsibilities.

3. In every sexual misconduct case, the bishop and his or her staff will attempt to provide pastoral care to the victim of the misconduct, the victim's family, the rostered person who committed the misconduct, the rostered persons family, the members of the rostered person's congregation, the rostered person's colleagues, and others. However, the bishop and the bishop's staff cannot themselves function as a pastor, counselor, advocate, attorney, or other "fiduciary" to any of these people. If a conflict arises between what is in the Synod's interests and what is in the interests of someone else, the bishop and the bishop's staff are obligated to act on the Synod's behalf. The ultimate responsibility of the bishop and his or her staff is to the Synod, and not to any individual within the Synod.

II. SYNOD POLICY

An ELCA Strategy for Responding to Sexual Abuse in the Church (Nov. 1992) recommended that nine elements be included in any synodical policy regarding sexual misconduct of rostered persons. This Synod has decided to incorporate those nine elements as follows:

A. Adequate Preparation

The Synod is committed to preventing sexual misconduct by rostered persons in the following ways:

First, the Synod will not tolerate sexual misconduct by rostered persons. The Synod will make this clear in educational opportunities that it provides, in the manner in which it responds to reports of sexual misconduct by rostered persons, in discussions that it has with seminarians and others who seek to join its roster, and in its public and private statements regarding this issue.

Second, the Synod will provide ongoing educational opportunities regarding sexual misconduct for rostered persons, congregations, and others. Those efforts will focus on such subjects as the dynamics of sexual misconduct and the impact of such misconduct on its victims. The Synod strongly urges its rostered persons and congregations to take advantage of these educational opportunities.

Finally, the bishop and the bishop's staff will continue to take advantage of educational opportunities that are available to them. The Synod recognizes that

society generally and churches particularly have much to learn about sexual misconduct by rostered persons. As the Synod's understanding of this problem changes, its guidelines and educational efforts will change as well.

These preventative efforts are intended to complement similar efforts that have been or will be made by the Synod's member congregations, by the church wide organization, by ELCA seminaries, and by other entities affiliated with the ELCA.

B. Initial Contact - First Response

This section hopes to answer the following questions: What can the complainant expect to happen? What can the complainant expect the Synod to do or not do? What will be asked of the complainant?

Even the best preventative measures cannot completely eliminate sexual misconduct by rostered persons. The Synod must always be prepared to respond to reports of misconduct. As the Synod becomes more open to receiving such reports, sexual misconduct by rostered persons will be more often reported.

Someone who wishes to present credible allegations that a rostered person may have been involved in sexual misconduct should notify the Synod. The names, addresses, and telephone numbers of the bishop's assistant and other specified persons are attached to these guidelines. It must be stressed that these people are acting on behalf of the Synod, and any information that they are given will be shared with the bishop (unless it is the bishop who is being accused of sexual misconduct, in which case the bishop of the ELCA will be contacted).

A contact may be made with the bishop or other authorized person by mail, by telephone, or in person. The complainant need not identify herself or himself when she or he first contacts the Synod. The complainant may anonymously ask questions about how the Synod would respond to a particular complaint of misconduct. However, the Synod can do little about a report of sexual misconduct until the complainant identifies herself or himself and the rostered person involved in the misconduct.

The bishop or other person contacted by the complainant will 1) assure the complainant that the Synod does not tolerate sexual misconduct and takes seriously all reports of such misconduct; 2) explain the Synod's process for responding to reports of sexual misconduct and offer to provide a copy of these guidelines; 3) answer the complainant's questions about the guidelines and procedures of the Synod; 4) express care and concern for the complainant; 5) when the complainant is anonymous, encourage the complainant to identify herself or himself and the rostered person involved in the misconduct.

The bishop or other person contacted by the complainant will also offer to provide the complainant with names of advocates who are available to provide support and to help interpret the Synod's guidelines and procedures. The complainant will be invited to contact an advocate and to be accompanied by that advocate through the reporting, investigative, and, if necessary, disciplinary processes. If the complainant requests, the Synod will contact an advocate for her or him. The complainant is welcome to use an advocate who does not appear on the list—such as a friend or family member—or to decline to use an advocate.

Promptly after a report of sexual misconduct by a rostered person has been received from an identified complainant, the bishop and bishop's designees will interview the complainant in person or, if that is not possible, by telephone. In this and all meetings with Synod personnel, the complainant may be accompanied by a friend, family member, support person, or advocate of her or his choice. The bishop will ask the complainant to provide as much information about the sexual misconduct as the complainant is comfortable sharing. The complainant will be asked to reduce the information to writing. The complainant providing a written statement does not constitute the filing of formal charges. The bishop will also ask the complainant what she or he is seeking in coming forward. The complainant will be given a copy of these guidelines if she or he has not already received them.

The bishop will discuss with the complainant how she or he feels about the possibility that her or his identity may become known to the accused or others. Insofar as possible, the Synod will respect the wishes of the complainant regarding confidentiality. However, at some point, the Synod may be required by civil law or by the governing documents of the SLCA to disclose the identity of the complainant. Also, in unusual circumstances, the fact that the bishop is responsible to the Synod may require that he or she act contrary to the wishes of the complainant. Finally, the identity of the complainant may become known despite the best efforts of the Synod to protect it. The Synod cannot guarantee confidentiality to a complainant.

If the bishop or bishop's designee learns that a child or vulnerable adult may have been neglected or physically or sexually abused, the bishop may be legally required to report that information to law enforcement authorities. If possible, the complainant will be notified before such a report is made.

The bishop will discuss with the complainant her or his needs for pastoral care or professional counseling. If the complainant requests, the bishop will help to put the complainant in touch with persons who can provide such care or counseling. Under no circumstances will any employee of the Synod function as the complainant's advocate, pastor, or counselor.

The bishop or one of the bishop's designees will keep in regular contact with the complainant, will inform the complainant of significant developments, and respond to the complainant's questions and concerns about the process.

C. Initial Investigation of the Complaint

After interviewing the complainant, the bishop and/or bishop's designee will carefully review the information provided by the complainant. If the report appears credible and involves sexual misconduct for which the rostered person might be disciplined, the bishop may authorize a preliminary investigation to determine whether information either supporting or contradicting the report exists. When and how extensive the investigation will be is a careful and critical decision. This decision is made by the bishop.

This preliminary investigation will be conducted as quickly and as discreetly as is possible under the circumstances. All of those contacted will be asked to keep the contact in strictest confidence. If the Synod or a discipline hearing committee later determines that the rostered person did not commit sexual misconduct, that conclusion will be communicated to those who were contacted by the Synod in the course of its preliminary investigation.

This preliminary investigation may include 1) further discussions with the complainant; 2) a review of the records of the Synod, another ELCA synod, the SLCA or an entity affiliated with the ELCA; or 3) interviews of former bishops of the rostered person, those who served as assistants to former bishops of the rostered person, rostered persons who succeeded the rostered person at congregations that he or she served, rostered persons who served on the same staff with the rostered person, respected members of congregations that the rostered person served, respected members of the congregation that the rostered person now serves, friends of the rostered person, or friends, family members, rostered persons, or counselors of the complainant.

D. Conversation with the Rostered Person

The bishop and the bishop's designees will usually meet with the rostered person after the preliminary investigation is concluded. In some cases—such as when the rostered person is aware of the complainant's report or when the rostered person may pose an immediate danger to members of his or her congregation—they may meet with the rostered person immediately after or perhaps even before meeting with the complainant. The bishop will clarify that the meeting is not confidential, and that the bishop may disclose anything that he or she is told.

At their meeting, the bishop will provide the rostered person with information regarding the complaint. The bishop will ask the rostered person to respond and may also ask the rostered person to reduce his or her response to writing. The rostered person may choose to respond at a later agreed upon time. The bishop will also 1) assure the rostered person that, while the Synod does not tolerate sexual misconduct, the Synod will give any rostered person who denies an allegation of sexual misconduct a full and fair opportunity to contest it; 2) explain

the Synod's process for responding to reports of sexual misconduct and provide a copy of these Guidelines; 3) answer the rostered person's questions about the policies and procedures of the Synod; 4) express care and concern for the rostered person; 5) strongly discourage the rostered person from having any contact with the complainant; and 6) invite the rostered person to contact an advocate and to be accompanied by that advocate through the investigative, and, if necessary, disciplinary processes. If the rostered person requests, the Synod will assist the rostered person in finding an advocate. The rostered person may decline to use an advocate.

Depending upon the circumstances, the bishop may ask the rostered person to voluntarily agree to certain restrictions upon his or her ministry- such as agreeing not to have contact with children- until the investigation and/or disciplinary proceedings are concluded. If the rostered person refuses, the bishop may ask the congregation to impose the restrictions upon the rostered person. The bishop may also ask the rostered person to take a leave of absence—either with or without pay—until the investigation and/or disciplinary proceedings are concluded. If the rostered person refuses, the bishop may ask the congregation to place the rostered person on involuntary leave of absence, or, in extreme circumstances, the bishop may temporarily suspend the rostered person without prejudice. Finally, the bishop may ask the rostered person to resign his or her call or from the roster of the ELCA. The bishop cannot force the rostered person to resign. Only a discipline hearing committee can remove the rostered person from the roster.

The bishop and the bishop's designees will discuss with the rostered person his or her needs for pastoral care or professional counseling. If the rostered person requests, the bishop will help to put the rostered person in touch with persons who can provide such care or counseling. Under no circumstances will any employee of the Synod function as the rostered person's advocate, pastor, or counselor.

The bishop or bishop's designees will appoint a contact person within the Synod. That contact person (who may be the bishop or bishop's designee) will keep regular contact with the rostered person and will inform the rostered person of significant developments. That contact person will also be available to respond to the rostered person's questions and concerns about the process.

E. Assess the Information

After meeting with the rostered person, the bishop will carefully review the information provided by the complainant, discovered during the preliminary investigation, and provided by the rostered person. The bishop will then decide upon a course of action. Possible options available to the bishop are the following: no further action; further investigation; requesting the rostered person to undergo a psychodiagnostic evaluation; requesting the rostered person's congregation to take some action; convening a consultation or advisory panel; or initiating the formal disciplinary process.

F. Consultation or Advisory Panel

Reports of sexual misconduct often present a bishop with a difficult decision. For example, a bishop may be confronted with "one person's word against another's"- that is, a situation in which both the complainant's report and the rostered person's denial of the report appear credible, and no one but the complainant and the rostered person can know for certain who is being truthful.

To assist him or her in making these difficult decisions, a bishop may, at his or her sole discretion, appoint a consultation or advisory panel. The function of a consultation or advisory panel is described at length in Sections 20.21.04 to 20.21.06 of the Constitution and Bylaws of the ELCA (Sept. 1993 edition) and Section D of *Rules Governing Disciplinary Proceedings Against an Ordained Minister, a Rostered Layperson, or a Congregation of the Evangelical Lutheran Church in America* (Dec. 5, 1993). Both of these documents are available from the Synod.

Essentially, a consultation or advisory panel is a small group of rostered persons and laypersons who are asked to recommend a course of action to the bishop. Before making that recommendation, the panel may interview the complainant, the rostered person, the bishop, the bishop's designee, and/or others. If possible, the panel will seek to resolve the controversy through recommendations that are pastoral and therapeutic and that will eliminate the need for disciplinary proceedings if they are accepted by all concerned. If such a resolution does not appear possible, the panel will advise the bishop whether or not it believes that the disciplinary process should be initiated.

G. Formal Hearing – Disciplinary Action

The disciplinary process is the process by which the ELCA, not the Synod or the congregation, determines if a rostered person should be suspended or removed from its roster. The process is governed by Chapter 20 of the Constitution and Bylaws of the ELCA and by the Rules Governing Disciplinary Proceedings. (see Appendix A).

A rostered person may be disciplined for committing "conduct incompatible with the character of the ministerial office, "which is defined in *Definitions and Guidelines for Discipline Ordained Ministers* (Dec. 5, 1993) to include "adultery, promiscuity, the sexual abuse of another, or the misuse of counseling relationships for sexual favors." *Definitions and Guidelines* is available from the Synod.

A committee of twelve persons is appointed to hold a hearing on the charges. The hearing resembles a court trial. The bishop presents testimony and other evidence in support of the charges, and then the rostered person presents testimony and other evidence in opposition to the charges. The governing documents of the ELCA provide for certain rights for the bishop, the rostered person, and the complaining witnesses. A bishop generally will not initiate formal disciplinary

proceedings unless the complainant agrees to testify against the rostered person.

Following the hearing, the discipline hearing committee decides whether the charges are true, and, if so, what discipline should be imposed. The options available are private censure and admonition, suspension from the roster of the ELCA for a designated period of time or until the rostered person complies with specified conditions, or removal from the roster. The discipline hearing committee's decision is generally made about three months after charges are filed.

H. Disclosure

Except in unusual circumstances, the Synod will disclose all serious allegations of sexual misconduct by rostered persons. Although disclosure can increase the short term pain caused by sexual misconduct, experience has demonstrated that disclosure speeds the healing of the primary and secondary victims of the misconduct, empowers unknown victims to come forward and seek help, protects others from being victimized by the same rostered person, and demonstrates the commitment of the Church to deal openly and honestly with the problem.

Decisions regarding who will make what disclosure to whom and when will vary from case to case. In general, though, the Synod will abide by the following guidelines:

I. To protect the privacy of those harmed by the rostered person, only the following will be disclosed: 1) the fact that the rostered person has been accused of, admitted to, or been found guilty of committing sexual misconduct; 2) the gender of the complainant; 3) whether the complainant was an adult or a minor at the time of the misconduct; and 4) whether the complainant was a member of the rostered person's congregation or a person to whom the rostered person was providing pastoral care. Disclosure will almost never include the name of the complainant or facts from which she or he could readily be identified. If the rostered person has denied the allegations, that fact will also be disclosed.

2. Disclosure will be made if 1) the rostered person admits to committing sexual misconduct; 2) the rostered person resigns his or her call or from the roster of the ELCA after being accused of sexual misconduct; 3) the rostered person is placed on leave of absence or temporarily suspended in response to an allegation of sexual misconduct; 4) the rostered person is suspended or removed from the clergy roster as a result of formal disciplinary proceedings; or 5) secular legal proceedings (civil or criminal) are initiated against the rostered person.

3. The Synod will first disclose to the leaders of the rostered person's congregation at a meeting of the officers and/or the congregation council. The Synod will then work closely with the leaders regarding appropriate disclosure to the members of the congregation. Disclosure to the members will usually be made

to the members of the rostered person's family and all rostered persons within the Synod.

4. Other persons who believe that they have been harmed (directly or indirectly) by the rostered person will be invited to contact the Synod. Copies of these guidelines will be made available.

I. Follow-up

The Synod will work with congregations and thhers to help ensure that care and support are available to those harmed by sexual misconduct by rostered persons. As noted above, the Synod cannot provide this care itself, but it will assist the primary and secondary victims of sexual misconduct to find human and material resources that might help them on their journey to healing.

Appendix A

An Overview of the ELCA Disciplinary Process

The Evangelical Lutheran Church in America (ELCA) has a process for the discipline of clergy and associates in ministry (AIMs) that is set forth in Chapter 20 of the ELCA constitution and Bylaws, and in *Rules Governing Disciplinary Proceedings Against an Ordained Minister, a Rostered Layperson, or a Congregation of the Evangelical Lutheran Church in America*. Following is a very brief summary of the process.

The process can be thought of as a time line that begins at one end when there are indications that a cause for discipline may exist. This time line is terminated at any point if the rostered individual chooses to resign from the roster of clergy or AIMs. Absent a resignation, the time line may continue until there is a decision of a discipline hearing committee or, if appealed, a decision of the Committee on Appeals. At approximately the midpoint of this time line, an important event occurs—the filing of written charges, usually by the synodical bishop, although four other groups also have authority to file written charges.

Prior to the filing of written charges, the process is very informal. There are few rules. How the process works at this stage is largely within the discretion of the synodical bishop. The emphasis at this stage is pastoral, and efforts are usually made to find a resolution of the controversy that would not involve a hearing before a discipline hearing committee. At this stage, the synodical bishop has the option of convening a five member panel to assist the bishop by evaluating the evidence or by making recommendations to resolve the controversy.

With the filing of written charges, the process becomes very formal. There are many rules that must be faithfully followed. Many of these rules are designed to protect the accused individual, who has the following rights:

- the right to specific written notice of the charges
- the right to a hearing before a discipline hearing committee
- the right to select two members of the committee
- the right to disqualify any member of the committee whose participation in the case would appear unfair
- the right to testify before the committee
- the right to decline to testify before the committee

- the right to hear all testimony and evidence against him or her before deciding whether to testify
- the right to call witnesses and introduce documentary evidence on his or her behalf
- the right to personally hear all testimony and evidence against him or her
- the right to cross-examine all adverse witnesses
- the right to be represented by counsel
- the right to be present at any time that the accuser communicates with the committee
- the right to a closed hearing
- the right to a verbatim record of the hearing in the event of an appeal
- the right to a written decision of the committee
- the right to a decision of the committee within 60 days after the committee is constituted
- the right to appeal
- the right not to be tried twice for the same offense.
- the right to be presumed innocent until found guilty by a discipline hearing committee

A discipline hearing committee consists of a hearing officer who serves as the nonvoting chair, six members of the synod's committee on Discipline (previously elected at the Synod Assembly), and six members chosen from the 28 member church wide Committee on Discipline (previously elected at the church wide assembly). Four of the six members from the church wide Committee on Discipline are chosen by the Executive Committee of the ELCA Church Council; the other two are chosen by the accused individual. A hearing is held before this discipline hearing committee at which time the accuser, who signed and filed the written charges, presents witnesses and other evidence in support of the charges. The accused may cross-examine the accuser's witnesses, as well as present additional witnesses and evidence. Both accuser and accused may be represented by attorneys.

After the hearing is concluded, the discipline hearing committee deliberates to decide what it has found to be the relevant facts-that is, what it believes to be the truth of the matter, and based upon the facts it has found, what discipline should be imposed. If discipline is imposed, it can range from private censure and admonition, to suspension for a designated

period or until there is satisfactory evidence of repentance and amendment, or to removal from the roster of ordained ministers or of AIMs.

Either party can appeal a decision of a discipline hearing committee to the 12 member Committee on Appeals that has been previously elected by the Church wide Assembly.

The following resources are the key documents for a more detailed study of the ELCA disciplinary process:

- Chapter 20 of the church wide constitution, as contained in the September 1993 edition. The document entitled *Constitutions, Bylaws, and Continuing Resolutions of the Evangelical Lutheran Church in America* is distributed every two years to each ELCA congregation by the ELCA Secretary. Additional copies may be ordered from Augsburg Fortress, Code #23-62003.
- *Definitions and Guidelines for Discipline*, is a document which has been distributed to all clergy and AIMs. Additional copies can be obtained from the Office of the ELCA Secretary.
- An earlier version of the *Rules Governing Disciplinary Proceedings against an Ordained Minister, a Rostered Layperson, or a congregation of the Evangelical Lutheran Church in America*, approved by the Church Council on November 10, 1991, is found at pages 351-368 of 1993 Church wide Assembly Reports and Actions. Volume 1, Part 1. This volume was distributed to each ELCA congregation by the ELCA Secretary in the spring of 1993. Persons interested in obtaining the current version of the rules adopted by the Church council on December 5, 1993, can obtain a copy from the Office of the ELCA Secretary.
- A report of the only decision rendered by the Committee on Appeals (the equivalent of the Supreme Court for the ELCA) is found at pages 100-101 of the Church wide Assembly Reports and Records, Volume 1, Part 2. This volume was distributed to each ELCA congregation by the ELCA Secretary in the summer of 1993.
- A very careful analysis of the burden of proof standard in disciplinary cases was initiated at the 1993 Church wide Assembly and completed by the Church Council in April 1994. A copy of materials relating to this analysis can be obtained from the Office of the ELCA Secretary.