

PVS Sexual Misconduct Leadership Workshop
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Dickstein Shapiro LLP Law Offices
Potomac Conference Center on 12th floor
International Square
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Presented by Deborah Kelly

John Ertter introduced Deborah Kelly

The purpose of today's presentation: Ms Kelly's goal is to help us know just enough about this subject so that we can protect ourselves, our staff, our business and our swimmers without giving us the minute details of the law. She will give us the "land mines" so we know what not to step on. This will be prevention work, helping us keep out of trouble.

Why are we here?

- To protect our swimmers, our coaches and our teams
- The perception in the media is that the coaches and clubs care more about their clubs and businesses than they do about the kids, and the media feeds off of this perception.
- Allegations of improper relationships between coaches and swimmers
 - As of now 38 coaches have been banned, primarily for inappropriate sexual behaviors.
 - Where has this happened:
 - Southern Cal
 - Florida
 - Indiana
 - Plaintiffs have filed at least 6 suits in the past year against coaches, clubs and /or USA Swimming. They are saying that the families trusted these clubs, coaches, USA S trusted these entities to take care of their swimmer, but feel that they have been let down because the teams/ USA S didn't care enough to watch their coaches. These are highly emotional cases...the parents want to pin this on someone, they want to blame someone, anyone.
 - Note that because you are the head coach, owner, etc. you are going to be the one to blame.
 - The world has changed.
 - The media has put this analogous to the Catholic Church. Coaches are being compared to priests.
 - It is going to be difficult to see how much has changed and will change in how we conduct ourselves with the swimmers.
 - Coaches deal with bodies and bodies in swim suits (often tiny suits). Automatically coaches "have to" look at these bodies in suits. As coaches we are supposed to do look at an athletic person in little clothing. We will go over how to do this without looking like a pervert.
 - The days of driving swimmers, eating with swimmers, etc has to stop and stop now!

- What is Criminal Sexual Misconduct?
 - It varies by state, no federal law
 - Inappropriate touching in the areas set forth, or the forcing of minors to touch someone else. The younger the person is the more serious it is (breast of a 10 year old, worse than a 16 year old).
 - Every act of sexual misconduct will get you in criminal law, but there is also a civil counterpart as well. Meaning that the parent or child (swimmer) can decide to sue the swim club/coach civil suit (harassment, assault, emotional distress)
 - Harassment, could included touching , but not necessarily, it is an act that you do is so persuasive that it changes how the athlete feels (sexual comments – if you hear or see or comes to the attention, you have to do something about it. It can be female to male, male to female, female to female or male to male (coach to athlete, coach to coach or athlete to athlete) Coaches have to set the environment by not allowing this. Words, comments, touching, suggestions that is inappropriate should be stopped. If you as a coach laugh it off, you can get in trouble.
 - Question – If, as a coach you witness any harassment and stop it, should you document it as well? Answer - Yes, I would. Everyone makes a stupid comment once in a while. It is when it happens over and over that trouble starts. Make a coach file, send your self an email about the incident and what you said to the swimmer, keep accurate records.
 - Question- This also extends past the pool deck to computers, FB, etc. They might think no one else sees it, correct? Answer- Yes, this is not just at the meets or at practice. It's also when you go out to eat, have a club activity, etc. The law has not caught up with social media. Not a good idea to friend a student, athletes, etc. on any social network.
 - We shouldn't have to monitor FB, but if we become aware of inappropriate behavior with your swimmers, you have to do something about it. If you chose to communicate via FB, or other social sites, you then must monitor it. State that it is for communication purposes only. It is still a land mine. Unless you have the time to monitor it.
 - What comes with any of these sexual misconduct issues is the emotional distress on the victim. The parents will say "this is what this has done to my child, he/she can't sleep, drop in grades, can't get into a good college, etc. There is no standard, it is all about who does the judge believe more.
 - Emotional distress, you should be aware of this, and in many cases it has been noted that the athletes were fearful of the coach and/or the situation.
- Plaintiffs argue that the clubs are liable for negligent hiring/retention if they knew an employee (coach) may cause harm to the swimmers.
 - You need to make sure you are not putting a bad person, who is a good actor in a position of trust/ authority with athletes (people in suits, etc). You are hiring a coach to work with, teach and positively influence young children.
 - Bad coaches tend to move from team to team, state to state, etc. You have to be aware of where this coach has been and why they have left their previous team. USA S will have to create a nationwide system. Don't high 5 yourself if you get rid of a person who you think may be trouble (you suspect could possibly be a pedophile). If you cannot say good thing about a person because you suspect

he/she does bad things to others (athletes) then you are responsible for telling the next person how you feel. Don't hide this information just because you don't have any proof.

- Q –What about if you don't know for sure, but you just suspect that the coach has done bad things, will you get in trouble for defaming them? A- if you know or have some details you have a responsibility to say something. If you suspect, but don't have any details, just say you don't give a reference.
- If you as a club knows something, but don't say anything, this is what the media will pick up on
- No employers give references good or bad.
 - For example you can/should say; Yes, they worked here from x to x. Yes they have been let go. But you don't have to say why. This may be the red flags to the new employer.
 - IF you are giving an opinion that is ok, but you can't state a fact that may or may not be true.
- If you have a swim club and are getting complaints/comments about your coaches you should be doing performance evaluations and keep track of these complaints so you have documentation.
- If someone in bad faith, gives a statement that is untrue (allegation), you should look into it.
- Negligent Hiring –
 - For an employer to be liable for negligent hiring an unfit employee, the plaintiff must prove that you knew or should have known the employee was unfit and hired anyway.
 - The idea is you are hiring someone that represents you and works with the kids. Other examples: nanny, teachers, daycare, coaches, etc.
- What to do about this?
 - You personally and your club the guardians, you have to keep your eyes and ears open. To keep an eye on the athlete to athlete relationships, athlete to coach relationships.
 - USA S has sexual misconduct policies. If you don't know what to do when you see a problem, then you have blown the whole thing. If you simply abide by the policies you will go a long way in protecting yourself.
- Hiring Practices
 - Interviewing and screening
 - Criminal background check should be done on all applicants
 - Travel rules now say team managers and chaperones must be members of USA S and have passed background check.
 - But you don't want to get in trouble in doing this. As most people don't like to have their privacy looked at. The rules are different from state to state.
 - You have to have written permission to do the background checks. You have to let them know that their employment is subject to the information on this background check. Some information may take a while. Put this in writing on the application/contract.
 - The words USA S uses "directly and frequently have access to the swimmers" must have to have background screening. Q – If you hire a

coach from another club, do you have to redo the background screening right away. A - Once they go through the background screening it doesn't mean they are good for life. The background screening that USA-S has been using will be changing. The new one will be a moving target; it will be updated if/when something happens. It should be in your contract with your employees that you can terminate their jobs at anytime due to what may come up on the back ground screening.

- Background screenings are not allowed to ask questions about arrests, can only ask questions about convictions. (can only consider convictions. The conviction then has to be related to the job and the proximity to the time period). If it is a conviction for assault then you may want to disqualify because you don't want to put a "Hot Head" in charge. But if it is shoplifting 20 years ago (when they were a teenager) it might not matter.
 - Q – What about volunteers at swim meets. How is this looked at by USA S? A – Volunteers are not subject to screening. Officials will have to be screened. (Timers and others who do not have a lot of interaction with the swimmers won't have to be.)
 - A- Riley Easton commented that he talked to Peter Clark regarding the chaperone part of the questions, what they said position was if this person at a swim meet (serving food) is basically a onetime thing, but then either won't do it again or at least not for a while then they don't have to be screened. But if you have someone on your club who is in charge of that part of club (always serves the food, always sets up the banquets) then they should be screened to be safe. If the parents work out with another parent to take their kids on a travel trip (and neither the coach nor the club was involved in setting up the plans), then no background screening is necessary. But if the team sets up the Chaperones for the club trip then those chaperones must be screened.
 - The key is that you KNEW OR SHOULD HAVE KNOWN! You cannot shut your ears and eyes to what is going on your team or on your pool deck. You want to have people in leadership positions who help keep an eye on things, even if they come across as too intense, they need to be alert.
- Defending against a sexual misconduct charge (make sure it doesn't happen):
 - Coach Can NOT: kiss an athlete, play provocative games with an athlete, allow an athlete to sit on their laps, engage in any other inappropriate touching with an athlete.
 - No coach is allowed to give an athletes rub down or massage even if it is just a quick shoulder/neck rub.
 - May have athletes in their home without parent's permission
 - No cameras in locker rooms, behind the blocks. Videotaping for training purposes is allowable.
 - If you abide by a standard you are going to be in a good place. IF you abide by the best practices you will be in a better place. (Industry standard) To adopt best practices is to show you are doing the best you can to be in the best and safest place for you and your business.
 - Travel rules

- Coaches may not share room with any athlete other than their own children.
 - When only one athlete is going to a competition, coach must receive written permission from the parents to travel alone with the coach.
 - USA S will be providing additional travel policies.
 - Encouraging parents to be involved. Parents should be encouraged/welcome to watch practice (just not on deck).
 - Always have at least 2 coaches (or one coach and one adult) on deck
 - If you must travel alone with an athlete or stay alone with an athlete then buddy up with another team with an athlete of the same sex, close in age.
 - One on one interaction between coach/athlete should not be allowed. Always have another adult present.
- Swim Teams are unique in that they are co-ed, where boys and girls are often put together.
- Inappropriate conversation – some coaches are not that much older than swimmers. Talk to all coaches and remind them that they have to be in a supervisory role. “You might be 22 and she might be 18, but you cannot have this type of relationship, you cannot talk to her/him like this”. Your burden to lead your young coaches to understand that the world has changed and the consequences are too great.
 - Peer to peer relationships; don’t discuss personal problems with athletes. Don’t share too much personal information particularly sexual in nature.
 - Touching during instruction – Tell your athlete what you are going to do, only touch as necessary and only in direct view of others. Give them verbal reasoning before you touch them and why you are touching them.
 - OK – high fives, fist bumps, side to side hugs and handshakes. NOT OK – horseplay
 - Changing clothes – Adults should respect the athletes privacy while changing clothes, showers, etc. Adults should protect their own privacy in similar situation. While deck changing is not banned or against the policy, but should NOT BE allowed (it has since been banned at all PVS sanctioned events). It should be discouraged and not allowed. Putting you in the best situation, as a club you should not allow anyone on your club to deck change ever.
 - As the club owner, you should set the standards for how your coaches and athletes conduct themselves. If your coach doesn’t follow these standards then you should fire them. You can have higher standards or stricter rules than PVS or USA S, but then you have to be consistent and make sure all of your staff follows these rules/standards.
- Romantic relationships with former athletes are a bad idea (at any time).
- As they are frequently harmful to the athlete.
 - Undermine public confidence in coaching profession.
 - Coaches should not engage in such relationships with former athlete.
 - Additional information is available from USA S.
- Other new protections
- Enhanced background checks
 - Must be members of USA S
 - Continual bases (county court search as well as general search)
 - Athlete protections education

- Non athlete members must complete athlete protection education as a condition of membership, all current members must complete training before 11-12 season, take refresher as required.
- Reporting
 - Every member must report any incident regarding sexual misconduct to USA S's athletes protection Officers when member has firsthand knowledge of misconduct; or member receives specific and credible information from victim or knowledgeable third party (As a matter of policy, USA S reports any incident involving a minor to law enforcement)
 - If you have credible info with specific information that is not a rumor, you are better off reporting it to law enforcement without waiting for USA S. However you should not be doing the investigating.
 - Promptly report – what is this? IF I get credible information that one of my 20 year old coaches has inappropriate relationship with a swimmer, do I get in trouble for reporting it to USA S before going to the proper authority? A- if you sit on the information, you can be in trouble. Because if in the time it is “sitting around” the bad person can do it to someone else you will be in trouble. Suggestion to tell USA Swimming, but also tell local authority.
 - USA-S, has a policy that you turn it straight over to USA S and the LSC doesn't touch it, this goes for any type of abuse.
 - Q – where do we put the parents in this...If we see something and we tell the parents and the parents say no don't go to the police...A – You do the right thing and you take it to the authorities, the parents can then decide not talk to the police or press charges, but you will have then done the right thing.
 - Q – How do we protect the children (rented facility) that are in the locker room and something bad happens, how do we handle that? A – Tell the managers right away and let the facilities take care of it.
 - Q – I alert USA S, but I don't go to the local authorities and USA S doesn't do something right away, can the parents come back on me? A – Yes, you will still be responsible. You must do the right thing and go to the local authorities!
 - What is specific and credible – keeping the rumors out.
 - Credible – The source of the information must inside information.
 - There cannot be retaliation for reporting in “good faith”. This is strictly prohibited. GOOD FAITH means that the individual believes it to be true.
 - IF you are doing your job to the best of your ability and some one accuses you of doing something inappropriate. You must continue to deal with this swimmer you cannot take it out on the swimmer.

- Bad Faith reporting is prohibited. You as a coach, owner cannot say right up front that it is not true...unless you know absolutely. IF a families does this...off the team
- The good news is that the steps USA-S is taking to (requiring background check) a good start in the right direction. They are giving clubs a “Standard of Care”, if you follow these standards then you should be safe and well protected. If you decide not to follow any of these steps then you are on your own. Follow these steps and you will be in good shape. The steps USA Swimming has put into effect will assist in keeping your and your club protected. But you have to take all of this to you staff and train them to follow these standards.