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Agency Liability: What Adoption Service Providers and Adoptive Families Need to Know

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The increased regulation of adoption agencies and more stringent agency licensing requirements at both the state and federal levels have resulted in agencies being mandated to accept progressively more supervision, responsibilities, and liabilities in the adoption process. Specifically, adoption agencies face far greater liability in several key areas, including financial accountability, information disclosure, communications with clients, and the supervision of employees' actions. To ensure the safety and security of children and a transparent, ethical adoption process, adoption service providers as well as prospective adoptive families must be aware of current requirements for approved and accredited agencies.

Financial Liability

The financial liability of an agency is not insignificant. Per guidelines mandated by The Hague Convention on Inter-country Adoption and the Universal Accreditation Act, Hague Accredited and Hague Approved agencies are charged with maintaining good financial health.¹ The current climate in which adoption agencies operate can present difficulties in realizing this goal. Agencies are impacted by requirements and regulations established by licensing entities, the significant cost of maintaining current licensures, the continued reduction in international adoptions, and country closures. Regardless, maintaining financial health is necessary in order to continue to provide adoption services.

¹ For more information, see: Hague Accreditation and Approval. Council on Accreditation. Retrieved from: <http://coanet.org/programs/hague-accreditation-and-approval/>



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Financial health is demonstrated through profit and loss statements, cash reserves, audits, and financial policies and procedures. To ensure that agencies are maintaining the required financial health status, agencies undergo regular financial review. In addition to a financial review for purposes of Hague regulations, individual state licensing entities may require a financial review as well. As such, in many cases, both DOS and state licensing entities will conduct regular financial reviews.

Despite the review processes in place, it is not unheard of for an agency to shutter its doors due to insurmountable financial hardships, particularly when faced with the realities and pressures that accompany the current climate of adoption.² In 2013, a well-known South Carolina adoption service provider closed its doors and declared bankruptcy; this was followed by another well-established agency in Washington in March 2014. Both of these agencies were Hague Accredited entities that should have previously demonstrated a high standard of financial health in accordance with Hague guidelines.

In addition to maintaining financial health, agencies must practice responsible financial risk management. Financial risk management is demonstrated through bonding, insurance, the ability to obtain loans, audits, and financial policies and procedures. Furthermore, all adoption agencies have a fiduciary duty to their clients as follows:

- Keep monies separated from personal funds or escrow funds
- Reimburse unused fees
- Communicate regarding changes in fees
- Implement safeguards – insurance and bonding
- Implement procedural safeguards – proper supervision of accounts and check-writing
- Supervise payments/receipts for proper payment in compliance with communicated fees to clients
- Perform monthly account reconciliation
- Supervise tax payments
- Supervise budgets

A breach of fiduciary or a failure to practice financial risk management can result in loss of licensure. For example, in 2011, the Council on Accreditation (COA) cancelled Hague Accreditation for one agency due in part to a financial complaint. The complaint alleged that the agency took \$7,000.00 in adoption fees with knowledge that the complainant's

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² For more, see: "2 U.S. Adoption Agencies Closing, Citing Woes Abroad." *Associated Press*. February 11, 2013. Retrieved from: <http://bigstory.ap.org/article/2-us-adoption-agencies-closing-citing-woes-abroad-0>

circumstances had changed and then discontinued services based on the complainant's changed circumstances. As this case demonstrates, proper supervision of payments is extremely important; agencies must approach their financial responsibilities and fiduciary duties with seriousness.

Information Disclosure

To avoid liability relating to a lack of information disclosure, adoption agencies need to be aware of their duties of candor and must also take proper precautions. An adoption agency may be found liable for false statements or for not attempting to obtain information that could and/or should have been known, particularly if the information could or would impact an adoptive parent's decision to accept the referral of a child. It is important for an adoption agency to understand that, even if it did not know the information regarding a child's health, age, behavior, etc., the agency could still be found liable if it *could* have known it or should have made attempts to obtain it. The following cases are demonstrative of this point:

Roe v. Jewish Children's Bureau of Chicago, 790 N.E.2d 882 (App. Ct. 1st Dist. 2003), provides guidance regarding the liability of an agency to disclose information. In this case, the Court found that an agency would be found guilty of fraudulent/negligent misrepresentation if an adoptive parent could establish: 1) that they asked a question any rational parent would consider relevant in understanding the future risks of accepting the referral of a child with a serious mental or physical illness; and 2) that the parents would not have proceeded with the placement had they not relied upon the agency's false statement regarding these future risks.³

Mohr v. Com., 653 N.E.2d 1140 (Mass. 1995) provides that while an agency cannot be expected to guarantee or warranty a child's future health, the agency must use due care to ensure that it fully and adequately discloses information about a child's background so that it is not misleading the adoptive parents.⁴

As mentioned, there are precautions an agency can take to reduce its liability regarding information disclosure. Such precautions include:

- Specific language in contracts/service agreements regarding unknown risks;
- Education curriculum for families regarding unknown risks;

³ *Roe v. Jewish Children's Bureau of Chicago*. 790 N.E.2d 882 (App. Ct. 1st Dist. 2003). Retrieved from: www.state.il.us/court/opinions/appellatecourt/2003/1stdistrict/may/html/1000246.htm

⁴ *Mohr v. Com.* 653 N.E.2d 1140 (Mass. 1995). Retrieved from: <http://masscases.com/cases/sjc/421/421mass147.html>

- Implementing procedures that attempt to gain information about child's medical and social history;
- Document efforts made to obtain child specific information, even if such efforts prove unsuccessful;
- Complete and full disclosure of all information obtained regarding child; and
- Internal education for all employees regarding proper communication and full disclosure to family.

Various complaints about Hague Accredited and Hague Approved agencies have revolved around the placement of children with undisclosed medical, behavioral, and age issues.⁵ In one such case, an agency faced complaints that ultimately led to a temporary suspension of the entity's Hague accreditation. Specifically, the complaints alleged that the information contained in the agency's records did not demonstrate that the agency employed reasonable efforts on behalf of the family to obtain medical information, and that the information that was provided did not fully meet the applicable Hague standards. Instances such as these underscore the importance of exercising due diligence as well as making full and complete disclosure of known information to prospective adoptive families.

Communication with Clients

Communication is not only the key to a positive relationship between friends or spouses, it is also the key to a positive relationship between a prospective adoptive family and an adoption agency. Establishing a good relationship with regular and open communication is beneficial throughout the entire adoption process.

During the extremely busy and challenging adoption process, it can be a struggle to return calls, emails, and other communications in a timely manner. Often agencies attempt to prioritize the importance of each communication. Agency staff might not respond immediately to a communication from a client about what to pack for their adoption trip that will not be occurring for ten months or more. However, it is important to make prompt responses a priority, and to make all possible good faith efforts to provide accurate information, resulting in appropriate adoption services and avoidance of potential future liabilities. In particular, all complaints from families should be promptly, thoughtfully, and completely responded to in a timely manner.

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⁵ For more, see: Hague Accreditation and Approval Substantiated Complaint and Adverse Action Report. Council on Accreditation. Retrieved from: <https://coa.my.salesforce.com/sfc/p/300000000aAUSKW3KgJaQWFxUBIC4qyq7a7W9E>

An agency can reduce liabilities from communication issues in the following ways:

- Develop and implement a communication policy
- Communicate to families a return call/email response policy (e.g., two business days for a response; out-of-town notices listing alternative contacts if unavailable)
- Communicate importance of prompt communication with internal employees
- Repeat communication: In interactions with clients (e.g., monthly newsletters, education classes, placement agreements, and other periodic notices), repeatedly discuss risks, expectations, and responsibilities as set forth in initial adoption service agreement
- Develop procedures for review of information
- Provide training to foreign service providers and domestic staff regarding proper communication, including ethical considerations
- Practice proper communication with staff and review communication techniques with staff

Incorrect information and delayed communication have provided the basis for previous COA complaints and subsequent action. Nineteen agencies have been subject to adverse action by COA in the past three years; in eleven of the related complaints, incorrect information or delayed communication comprised part of the complaint, further demonstrating the imperativeness of accurate and prompt communications.

Actions of Agency Staff

Adoption agencies have seen arrests and criminal charges for illegal entry of children into the U.S., illegal departures from foreign countries, adoption fraud, and misuse of monies. *Respondeat Superior* (“let the master answer”), a legal theory with significant precedence in U.S. law, provides that an employer can be liable for the actions of an employee when those actions were taken within the scope of the employment relationship. While adoption agencies have avoided liability for foreign service providers, The Hague Convention on Inter-country Adoption and the Universal Accreditation Act have clearly placed foreign service providers under the supervision and, thus, within the liability of the adoption agency.

International Adoption Guides, Inc. had four current and former employees indicted by a Grand Jury in South Carolina for conspiring to defraud the U.S. in the adoption process.⁶ This case, along with others,

⁶ “Four Employees of Adoption Services Provider Charged with Conspiracy to Defraud the United States in Connection with Ethiopia Operations.” Department of Justice, Office of Public Affairs. February 11, 2014. Retrieved from: www.justice.gov/opa/pr/2014/February/14-crm-149.html

illustrates that criminal charges can be also be a serious consequence of agency liability for the actions of the agency's staff. Even in the event that a CEO/Executive Director may not have specific knowledge, it is important that the agency has procedures in place that demonstrate proper training, monitoring, and supervision of all involved in the adoption process. Liability can sometimes be extended because the executive "should have known" about the actions of agency employees, but due to negligence in training, monitoring, and supervision, he or she was unaware of the actions. A strong focus on ethical standards, training, communication, proper oversight procedures, and supervision is the key to avoiding liabilities associated with employee misconduct.

Conclusion

Stricter licensing requirements have opened adoption agencies up to greater liability. These liabilities touch upon the agency at every level and must always be a consideration in agency operations. Adoption service providers must implement agency-wide precautionary measures and procedures in order to avoid the harmful outcomes and negative repercussions that might result by running afoul of proper practice.

While some agency staff may feel frustrated by increasing regulations and responsibilities, it is also important to consider the resulting benefits. Such requirements are intended to help ensure that agencies follow ethical and legal policies and procedures. Not only will this adherence elevate the level of services the adoption community provides to birth parents and adoptive families, it will—most importantly—better serve children in the U.S. and around the world who are in need of families. As always, it is the best interests of children that should be at the heart of all actions taken by agencies and other related entities providing services to adoptive families. Adoption service providers as well as prospective adoptive families should be aware of all liabilities assumed by agencies, recognizing that they are necessary to protect children, families, and adoption.

ABOUT THE AUTHOR

Michele Jackson has provided education in international adoption for attorneys, law students, and professionals at Indiana University School of Law, National Business Institute, the Indiana State Bar Association, Indiana Continuing Legal Education Foundation, and the Indianapolis Bar Association. She has been a guest speaker at various universities and a presenter at national adoption conferences. Ms. Jackson represents clients throughout the United States who are seeking to adopt or have an issue with an international adoption or orphan visa. She is dedicated to the adoption and care of orphans worldwide, and to helping couples and individuals realize their dream of becoming parents.



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