

Keep Me Out of Trouble, a Legal Primer for Music Teachers

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I could not begin without the legal disclaimer; I am licensed to practice law in the State of Georgia and do not intend for this to be legal advice, but an introduction to legal issues that arise during the teaching day. If you find yourself with a legal problem, I urge you to contact a licensed attorney in your State and seek advice on the proper way to proceed.

Introduction

Teaching today not only requires tremendous subject matter skills, effective interpersonal skills, some proficient psychological abilities, and negotiation techniques, but also more than a casual knowledge of the legal consequences of interaction with children. The reasons are complicated to say the least, but should be explored by a teacher seeking to insulate themselves from either civil or criminal liability or both.

Some reasons include: bad conduct on the part of a few teachers whose actions should merit harsh punishment, a litigious society where the “big payoff” is right around the corner, and finally, a surge in the number of lawyers seeking new and innovative claims to make a living. In Georgia, where I practice, we have over 35,000 lawyers or one lawyer for every two hundred fifty nine people in the state; most states find themselves in similar situations.

Because of the contact with our most precious resource, our children, teachers are subjected to intense scrutiny. Understanding the rules, what conduct can and will get you in trouble, allows one to plot a course to retirement that should be free from an excursion into the legal system. Briefly, we will explore some areas that have potential for problems. Please realize that all state’s laws are different and one should consult an attorney to understand fully the consequences of any given action. The following is not legal advice, but a roadmap to help one navigate the bumps in the road that may come along the way in a teaching career.

Civil v. Criminal Liability

Many not acquainted with the legal system do not understand the dual system we have in this country. Boiled to its lowest denominator, the civil system can order people to do things, enforce agreements, and award money as a consequence of a particular action. The criminal system, on the other hand, can order people to do certain things and put people in jail as a consequence of a particular action. In the civil system, the case must be proven “by a preponderance of the evidence”; while in the criminal system the

case must be proven “beyond a reasonable doubt.” These differences exist because our fore-fathers wanted to make it more difficult to take someone’s liberty away than it was to take away someone’s property (money). Further confusion exists because one can be charged with the same thing, for the same conduct, with different consequences under both systems. For example, let’s say the allegation is a child was hit by a teacher, the child tells, and the teacher is charged under the criminal system with battery. At the same time, the child’s parent hires a private lawyer who files a civil lawsuit charging the teacher with battery. In the criminal suit, the teacher must hire an attorney to defend the case while the State’s lawyer represents the victim. If the case is proven beyond a reasonable doubt, the teacher can be fined and put in jail by the Judge assigned to the case. In the civil suit, the teacher must hire a lawyer to defend the action based on an hourly fee charged by their attorney, while the victim is represented by a lawyer who is only paid by a percentage of the money awarded after the case is over. If the case is proven by a preponderance of the evidence, the Judge can award money damages both actual and punitive against the teacher. By the very same action, two different cases arise with very real results. As we have all seen in very high profile cases, one result is independent of the other. O.J. Simpson was found not guilty in his criminal murder trial, but found liable in his civil wrongful death trial and ordered to pay a large sum of money. In the next section we will explore several areas in the criminal law arena that can and will lead to some very serious consequences.

Criminal Liability

Prosecutors work hard every day to “do the right thing” in every case. We are bound by ethical rules to “seek justice” in all matters before us. Most prosecutors take a hard-line position when it comes to individuals who harm children. Because we place children in the care of our teachers, we even associate Latin phrases with that relationship, *In loco parentis*, or *in the place of the parent*, prosecutors hold a more harsh view of teachers who have harmed children. A teacher must take steps to insure that no allegation can be made about the care they give a child while that child is in their charge.

To understand how easily it is to get into criminal legal trouble, one only needs to examine the system itself. In most states, the criminal process is begun with an act which is, or is perceived, as a violation of a criminal law. Police are called and an investigation begins. If the police believe a crime has been committed and that a particular person has committed this crime, they visit a Judge and request that an arrest warrant be issued for the defendant. It is important to note that at this stage, the evidence needed to have someone arrested is based upon the standard of “probable cause”. Is it more probable than not that a crime has been committed, and is it more probable than not that the defendant charged has committed the crime? This is the least strict standard needed in our legal system. At this stage, only one side, the police or private citizen seeking charges appears before the Judge; the defendant is not represented. In some states, Georgia included, the process can be started by a private citizen. In other words, the police are not required to ask for the warrant, the private citizen seeks the arrest warrant. Under this system, before the warrant is issued, the Judge holds a hearing and hears from both sides before deciding to have the defendant arrested. Many ask, “You can be arrested for that?” My answer is yes and many people are every day. In the following paragraphs we will explore three areas that many teachers have been arrested, charged, and sent to prison. They are: Assault & Battery, Sexual Contact, and Theft.

Assault & Battery

Every state has some form of law prohibiting illegal physical contact of a non-sexual nature, and many carry severe consequences. In Georgia, it is a misdemeanor offense to have “contact of an insulting or provoking nature”. A misdemeanor offense carries a possible jail sentence of one year in prison and a one thousand dollar fine. Think of the possible definitions for “insulting or provoking contact”, it could be almost anything. I’m sure your state has a similar law and would urge you to become familiar with it and the cases decided with teachers as defendants. There are certain defenses to acts involving battery cases and are generally labeled as self-defense or defense of others. To qualify for self-defense or defense of others, it is imperative that the amount of force used in defense is equal to the force or the perceived force being used by the offending party. For example, if you, as a teacher, see a student being struck by another person, you would have the right to use equal force to defend that victim. You would not be allowed to use a gun to shoot that offender to stop the attack. One is justified in using deadly force to defend themselves or others when deadly force is used or one reasonably believes deadly force may be used against them or others. It is important to an adequate defense of any charges when a teacher must use force against a student to defend themselves or others that they take note of all who witness the event, so that independent witnesses who are available can substantiate their version of the events. The best practice is to try not to place hands on a child in your care unless you are defending yourself or others. Many teachers are very “hands on”, especially in demonstrating proper posture or horn placement on the embouchure or simply a pat on the shoulder for a job well done. While the legal answer would be not to engage in this conduct anymore, the practical answer would be to do so only out in the open with plenty of witnesses who will agree with your version of the contact if you are ever presented with the task of defending yourself.

Sexual Contact

Unfortunately, in today’s headlines and on the news we see too many teachers accused of sexual contact with students. Prosecutors take a very dim view of teachers having sexual relations with children in their care. The best advice to follow is don’t become sexually involved with a student. No good results will follow from such conduct. The question then becomes, how do I protect myself from a false claim? There are many rules that I would suggest a teacher follow to prevent such an allegation from ending your career. Never allow yourself to be alone with a student. You do not want to be the defendant in a case we in the business call, “he said, she said”. Generally, if a prosecutor is given a case in this posture, two witnesses, one saying it happened, one saying it didn’t, and if the credibility of the two is equal, the prosecutor will likely go forward with that case to trial and let the jury decide where the truth is to be found. Always conduct meetings with students at the school, and never at a local hangout or private home. Check the laws of your state concerning audio taping and the consent needed to make such recordings. In Georgia, only one party to a conversation must consent to have a recording made and the teacher is always the consenting party. No notice to the other party is required to make such a recording. This would apply to video tapes as well. What better evidence to share at the appropriate time after an allegation of improper conduct has been made than an audio or video tape demonstrating that the alleged conduct did not happen?

Theft

It goes back to the early days of civilization, it is just wrong to take something that doesn't belong to you. Society has no use for a thief; however, the community will want to hang those in a position of trust who steal. The school owned flugelhorn that somehow ends up in the band director's possession several years after he left the position. The fundraiser money that never makes it to the bookkeeper or the band booster treasurer even though orders were taken but never sent to the fundraising company. How about the checks written on the band booster account to pay the personal debts of the director or staff members? The best course of conduct when dealing with money is to turn that responsibility over to someone else and you supervise it very closely. Have booster parents collect the money, after all if you had wanted to be an accountant you would have completed that major in college. My grandfather always said that a good name is worth more than all the gold around, and only you can destroy your good name. Prosecutors prosecute thieves every day; typically, they will throw the book at those teachers who pilfer on the job.

Civil Liability

As discussed earlier, one can be held liable in a civil court for their actions as well as criminal court. The punishment is not a restriction of liberty, but usually involves an award of money or other property. The award of money can be the actual loss suffered by a person or can involve punitive damages defined as an award of money to punish the offending conduct. Typically when a teacher is sued civilly for conduct toward a student, punitive damages are awarded in an effort to punish the teacher for the misdeed, but also to serve as a deterrent for others who might engage in similar behavior. One guiding principle to follow when dealing with students is to not engage in any conduct you wouldn't want the general public to see. Try to look at each student in your care as if they were your own child. Never do anything with a student you wouldn't do in public with your own child. Following the golden rule has always been a good tenant to follow in any situation. In the civil arena, Judges also have the authority to order you to do a particular act or keep you from doing a particular act. Civil actions can deal with negligent acts, contract disputes, slander, and libel actions and just about any creative cause of action a hungry lawyer can devise. Govern yourself with the highest ethical conduct with the student's safety as your number one priority and you may avoid a lawsuit. As I have said earlier, anyone with the required filing fee can sue anyone, for anything. Because the standard of proof in a civil action, a preponderance of the evidence, is less than in a criminal case, beyond a reasonable doubt, many civil disputes turn on the credibility of the person. Make sure that you guard your reputation for truth, justice and the American way. If you become a witness in your own defense, you want the jury to believe every word you say, as my Grandfather said, your name is good as gold.

Vicarious Liability

This is just a fancy way to say that you can be held liable for actions of others if you have some special relationship to the other person or you conspire with others directly to commit an act. In the criminal world we have what is called a conspiracy or in Georgia, party to a Crime. Every State in the Union has some type of Criminal statute dealing with conspiracy. The janitor and the teacher who conspire to steal instruments

and pawn them, eventually splitting the proceeds; the teacher and the booster club treasurer who conspire to steal money from the booster club to pay for personal credit cards, trips and I-Pod Nanos; in each scenario there was a meeting of the minds and acts in furtherance of the criminal enterprise. Each co-conspirator can be held criminally liable if they engaged in the conspiracy at any level, even if they did not personally commit the criminal act alleged. On the Civil side of the house, one can also be held liable for the acts of others they have special relationships with. Examples of this would be boss-employee, teacher-student, and band director-band parent. If you hire a person to assist with the program, you must take steps to ensure the employee has no criminal record, has no history of inappropriate conduct toward students, parents or members of the community, and you must adequately supervise the employee at all times. Many teachers have been held civilly liable and administratively liable for the conduct of staff members in their employ. An example might be the following; you have become aware that the staff member has a quick temper having escalated with either a parent or teacher. You take no steps to address the problem (meeting with the staff member, suspension of duties or pay or other remedial action) and the staff member engages in a physical confrontation with a student, parent or other staff member. You, as the boss, may be held liable for those actions because the event was foreseeable, and you took no action to stop the problem. Another example; you hear that the staff member is providing alcohol to students, you ignore the situation, or worse, confront the staff member and they deny the allegation. You are satisfied with the explanation and conduct no further inquiry, the staff member provides alcohol and a child dies driving drunk on the roadway. You may be held liable for the death of that child because the inquiry was inadequate. Because you are the head of the program, you have supervisory responsibilities over the booster organization. If a booster member steps out of line and a civil action is filed based on the conduct, you may be held liable for those actions as well. When one is faced with having to correct or investigate the actions of a staff member or parent, you must take all allegations seriously. Thoroughly investigate the allegations, put all steps taken in writing, and share those writings with an administrator...immediately.

Hazing

For several years now cases have begun to surface concerning hazing. Hazing has been around forever, so what has caused this issue to rise to the surface? Some cases have come to the forefront because of lawyers seeking the “break-through” case, and others have come to light because they are severe and should be exposed to the light of day. In every state in the Union, physical acts of hazing meet all the requirements for the criminal battery law, or if a weapon (a paddle can be a weapon) is used or injuries severe, the felony of aggravated battery or assault. If students engage in physical acts of hazing, they can be held accountable and punished for those acts. If the director covertly condones the behavior with a wink and a nod or, in some cases out in the open, then the director can and should be held criminally liable for those acts. Students and Directors may also be held civilly liable for psychological acts of hazing under a theory of negligent or intentional infliction of emotional distress. Clearly, the safest path for a director to follow is to have a written no hazing policy that is clear and specific and to follow it up with clear verbal instructions that such acts will not be tolerated. Have your Principal approve these directives so that when an issue arises you have the full backing of your administration.

Libel/Slander

A new trend in the music business has emerged recently dealing with director or music store dealers' comments on certain brand instruments being sold. Libel is a written statement that places someone or something in a bad light. Slander is the verbal equivalent to libel. In each and every libel/slander action, truth is always a defense to the action. Directors are concerned with the quality of the instrument a child brings to the program. If a substandard instrument is obtained by a child, frustration on the part of the director or child may result because of poor quality. The instrument may not play in tune, may not be pitched in the correct key, may not have true spit valves, may have keys that bend on will, and the valves and slides may corrode with the first contact with oxygen. I learned in politics years ago (although political consultants will disagree) don't spend your time "bad-mouthing" the other guy, talk about what your good qualities are and what you bring to the job. Don't get caught up in talking about how bad these instruments are, "that so and so trumpet from _____ store is just terrible, it stinks, and they aren't worth the little bit of metal in them..."; instead concentrate on the minimum quality instrument you want to see in your program. Speak in terms of your experience that instruments in certain price ranges do not last long, that repair shops will work on instruments such as so and so brand. Speak to the reliability of certain proven brand of instruments both in consistency and quality. When a parent asks about a certain instrument you feel less comfortable with, try to direct the conversation to the positive aspects of the brands you trust without making negative comments about other brands. If your district allows you to recommend certain brands, then by all means do so, but do not engage in disparaging comments about other brands. Remember, you can be sued for anything and an owner of a particular product must vigorously prosecute any liable/slander action or they diminish their ability to bring the actions in the future. Focus on the quality instruments you want in the program, not negative comments about any particular brand.

Copyright

Copyright is one area where the old adage should be modified to say "it is better to get permission than it is to ask forgiveness." The reason is simple, you are dealing with the creative property of another individual and each copyright owner must vigorously prosecute any violation or lose the right to object to future violations. The law does allow for an exception for educational purposes under the "fair use" doctrine. One should view this as it was intended, the exception and not the rule as many teachers seem to think. For an article which explains copyright in plain language, I would direct you to ***The Copyright Monster and Music Educators: We CAN All Co-Exist by Ted Piechocinski, J.D.*** The article gives you step by step suggestions on complying with the Copyright law. The penalties are very severe and as noted earlier are enforced very strongly.

Endnotes

You didn't go to school to become a lawyer, but these days and times it is important that you have some working knowledge of the law in your jurisdiction. The consequences of intentional or unintentional acts can be life altering. However, that having been said, please realize the important work you do and take pride in the fact that you may have a future President in your midst; you may have the individual who will

discover the cure for cancer. Think back on the teacher or teachers who most influenced your life and realize you stand in that role for so many young people. Music is so important to the development of the child and your influence will shape the children who will soon be the leaders in our society. That is an awesome responsibility; I commend all of you who work everyday to share your love of music and life with young people, you are true heroes.