

THE ROLE OF THE DIOCESAN IN-HOUSE ATTORNEY

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Introduction

It is understood that the Ad Hoc Committee has commissioned eight or nine articles about the many aspects of the sexual abuse question. It is further understood that the Committee is trying to help the Bishops come as closely as possible to a "wholistic" approach to the problem; primordially pastoral but with the appropriate and necessary legal and financial bases covered.

My task, as I understand it, is to offer my reflections on how the in-house diocesan attorney plays his/her most effective role to achieve this wholistic approach. However, before outlining my thoughts it is, of course, appropriate to clarify what is meant by the terms "Diocesan Attorney" and "In-House Counsel".

The "Diocesan Attorney", in the classical sense, is normally the lawyer(s) who routinely represents a Diocese on a variety of matters [i.e. as either an In-House General Counsel serving as a full-time Diocesan employee, or as an outside General Counsel]. If a lawsuit involving sexual abuse is filed, an In-House Diocesan Attorney, like myself, would not be hired by the insurance company to represent the Diocese. Rather, insurance defense counsel would be retained. Depending on the circumstances, and the desires of the particular Diocese involved, a Diocesan Attorney who serves as outside General Counsel may or may not be retained by the insurance company. Thus, there are four possible "counsel" scenarios:

1. An In-House Diocesan Attorney who handles only the pre-litigation aspects of Diocesan sexual abuse policies and procedures [but does oversee and coordinate the work of litigation counsel on behalf of the insured Diocese].
2. An outside Diocesan Attorney who handles only the pre-litigation aspects

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of Diocesan sexual abuse policies and procedures [but does oversee and coordinate the work of litigation counsel on behalf of the insured Diocese].

3. An outside Diocesan Attorney who handles both the pre-litigation work as well as the direct handling of all litigation aspects pertaining to sexual abuse.
4. An outside counsel assigned by the insurance company who does not serve as the outside General Counsel or "Diocesan Attorney" except with regard to specialized matters [e.g. sexual abuse claims and/or other insurance defense work].

As can be seen, the role of the Diocesan Attorney in scenarios 1 and 2 are quite similar. Thus, while I will confine my paper almost exclusively to "In-House" counsel, the potential overlaps of function; particularly with respect to scenario #2, should be noted. (Andrew Eisenziemmer, who will prepare a paper on the "Role of Outside Counsel", will focus on scenarios #3 and #4.)

The Traditional Role of the Diocesan In-House Counsel versus a Recommended (and, in some cases, already evolving) New Role

The question is increasingly raised, "Why are Diocesan Attorneys involved at all if the Church is secure in its claim that it investigates and responds pastorally to allegations of sexual misconduct by members of the clergy, religious, lay employees and volunteers?" However, anyone who has been directly involved in, or taken the time to carefully study, the complex issues which attend charges of sexual misconduct understands that the Diocesan Attorney should have a role to play in such matters. The real questions relate to the degree of emphasis on, and the visibility of, the Attorney. In this vein the "Catholic Church" in general (e.g. the various Dioceses and Religious Congregations) has perhaps been rightfully criticized for overemphasizing legal concerns and the use of lawyers when addressing the subject. The topic of sexual misconduct by members of the clergy; particularly concerns about "pedophilia" (which often is erroneously cited by the media and others as involving a sexual attraction to any minor regardless of his or her age) has become almost a frenzy. Whether fair or not, the expectations (both within the Catholic community and outside of it) of a thorough, open, and "just" response from the Catholic Church are higher than for any other organization, religious or otherwise. This creates a natural and understandable tension within the Church Hierarchy between wanting to do the "pastorally right" thing and desiring to do the "legally safe" thing; between wanting to assist true victims with obtaining the reasonable restitution which they may be entitled to

from the perpetrator under Church law (or in otherwise receiving charitable assistance from the Church) versus wanting to act responsibly as stewards of the Church's common weal. That is, a desire to be pastoral without laying down the gloves and allowing the Church to be knocked senseless financially and reputation wise.

Sexual misconduct, particularly pedophilia, genuinely turns everyone's stomach. There is a clear understanding that these matters must be dealt with and not "covered up" as is so often falsely alleged even in regard to the current handling of cases (i.e. as opposed to situations from decades past when no one, including the mental health and law enforcement communities, understood the problem). However, who is to be assigned to deal with the problem has oftentimes been handled by possible candidates like a hot potato. The task is a very delicate, stressful and time consuming one. It seems that no matter what the outcome neither the complaining party nor the alleged perpetrator is ever satisfied that the situation was handled properly (which, in some cases, may be a good sign in light of the old adage that a good settlement is where neither party is satisfied nor feels that they "won").

There was a tendency by many Church authorities, particularly in the early years of the "sexual abuse revolution" (circa 1985-1990), to see the issue as having so many "legal" overtones that all aspects of the matter, from responding to the press, to interviewing all contemporary articles on the pathology of sexual misconduct, to formulating sexual misconduct policies, to interviewing witnesses and victims, etc., were considered best left in the hands of the lawyers. Diocesan Lawyers faithfully responded to the call. However, despite their best efforts, they have been able to do little more than keep their fingers in the dike. Thus, in order to prevent the waters of the now broken dam from flooding the fertile grounds of Christ's Church, the problem must be viewed (both in word and in deed) as the entire Church's responsibility, not simply the lawyers'.

It is this author's opinion that a swinging of the pendulum in the direction of an enhanced focus on the pastoral aspects (particularly at the investigatory phase) would help to restore the severely tarnished image and credibility of the Church (especially its clergy). Ironically, I believe it would also, in the long run, result in fewer suits being brought (and smaller settlements and jury awards).

Perhaps the highly publicized approach of the Chicago Archdiocese serves as the best current example of this philosophy. In that Archdiocese there was a substantial involvement of the Catholic faithful in the drafting and implementation of the sexual abuse policy and procedures, including the establishment of an independent commission to investigate claims of abuse. While the representatives of that Archdiocese are likely in the best position to evaluate the affect that the policies and procedures there have had on such things as clergy

morale, it seems that Catholics nationwide, as well as the general public (including the media) view that system as open and credible. The fact that Cardinal Bernardin was treated relatively fairly in terms of the usual prejudgments of the public in cases of alleged sexual misconduct, can be attributed in part to the Cardinal's compassionate and incredibly candid response. But, perhaps more important were the initial findings made by the Archdiocese's independent commission. The Cardinal demonstrated that he was not above his own policies and procedures. Furthermore, under the system in place there, one or several priests are not placed in the highly uncomfortable position of acting as sole jury and judge over the actions of a fellow priest, lifetime spiritual brother, and often-times close friend. (At a minimum then, that Archdiocese allows itself to remain above reproach in terms of the customary assertions that an "old boys protection network" is in place).

More about the Future

In order for a truly wholistic pastoral approach to emerge, Diocesan Bishops must actively and directly use their influence to change, even more, the sexual abuse policies and procedures and the way in which the insurance companies and representatives write and apply insurance policies. Pursuing this latter point, which often influences the former, should become easier in the future since most Dioceses in the country are now covered by such self-insurance networks as The Ordinary Mutual (TOM) in the western United States and the Catholic Mutual, which is nationwide. TOM, for example, currently requires, as a condition of coverage, that there be a "team" approach in responding to sexual abuse allegations. The team generally consists of individuals such as the Bishop or his delegate; the Diocesan Attorney (whether "In-House" or "Out-House"); a canonist; a mental health professional; the Priest Personnel Administrator; the Superintendent of Schools, etc. The team approach is a laudable attempt to be more wholistic. However, in many respects, the emphasis is still on maintaining the Attorney Client/Attorney Work Product privileges relative to the team's investigation. This enhances the perception among the Catholic community of a shroud of mystery, subjectivity and cover up. Thus, even though well intentioned, this approach has a tendency, in many cases, to cause the pastoral aspects and goals to be unappreciated and unfulfilled. That is to say, the "circling of the wagons" around the attorney and the Bishop creates a widespread perception, albeit often unwarranted, that the Church's real motivation is to "cover-up" scandal and protect its legal tail from its "failures".

It may be wise then, to explore further whether the Diocesan policies and procedures on abuse, as well as the policies of the insurance companies

(particularly the self-insured ones) should be coordinated so as to permit the investigations of abuse to be conducted by an independent, highly qualified commission which has a clear understanding of the nature and scope of its mandate. The inclusion of this mandate component is essential if Dioceses are to avoid the risks of lapsing into a form of "McCarthyism" or "guilt by virtue of allegation". For example, when to place a person on leave and what to say publicly during the early phases of the Commission's investigations, are crucial decisions affecting the reputation and future livelihood of individuals. Therefore, there should be a degree of flexibility allowed which would take into account the nature of the charge. By way of illustration, different thresholds concerning the time for placing someone on the leave of absence might apply where an apparent consenting adult situation is involved, or in cases involving allegations of so-called "repressed memory" that do not appear to include independent, corroborative facts.*

If the establishment of the independent commission is considered, it should be done with a full understanding that, in all likelihood, the information gathered by, and the discussions among, the Commission members (as well as their ultimate findings) will not be protected by any legal privileges in the event of the lawsuit (It should be kept in mind, however, that virtually all key facts, impressions, etc. surrounding an incident have a tendency to come out in litigation anyway during the course of interrogatories, depositions and court testimony). On the other hand, the traditional candid and confidential relationship between the Diocesan Lawyer and the Bishop (e.g. in evaluating and acting upon the findings of the Commission) would still be legally preserved. Under this model, the In-House/Out-House Diocesan Attorney should continue to serve as a close secondary (not primary) advisor on such things as establishing preventative procedures; providing continuing education programs for clergy, religious, lay employees and volunteers, parents, children, and parishioners; reviewing proposed press releases, etc.

* In the Spring of 1994, the Board of Trustees of the American Psychiatric Association (APA) issued a statement "in response to the growing concern regarding memories of sexual abuse." In part, the statement says: "It is not known what proportion of adults who report memories of sexual abuse were actually abused. Many individuals who recover memories of abuse have been able to find corroborating information about their memories. However, no such information can be found, or is possible to obtain, in some situations. While aspects of the alleged abuse situation, as well as the context in which the memories emerge, can contribute to the assessment, there is no completely accurate way of determining the validity of reports in the absence of corroborating information" (Statement of the APA Board of Trustees, adopted December 12, 1993).

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If and when all efforts to pastorally investigate and resolve complaints of abuse have failed, Diocesan Attorneys should encourage the use of Alternative Dispute Resolution (ADR). Preferably this should take place in a Church Tribunal or some other acceptable ecclesiastical forum so that claims which almost always exclusively involve Catholics can be resolved by Catholics. Alternatively some form of mutually acceptable binding arbitration could be utilized. These ideas, of course, will not be welcomed by many greedy plaintiffs' lawyers (who with increasing frequency find clients, file suits, hold press conferences and, only after all this is done, they inform the Diocese or Religious Congregation about the allegations). However, if a Bishop/Commission is perceived as having been candid and fair throughout, a prospective plaintiff may prefer to pursue this route despite the protestations of counsel.

The American Medical Association (AMA) also recently formulated the following conclusions and recommendations:

"The AMA has a long history of concern about the extent and effects of child abuse. Child abuse, particularly child sexual abuse, is under recognized and all too often its existence is denied. Its effects can be profound and long-lasting. The Council on Scientific Affairs recommends that the following statements be adopted and that the remainder of this report be filed:

1. That the AMA recognize that few cases in which adults make accusations of childhood sexual abuse based on recovered memories can be proved or disproved and it is not yet known how to distinguish true memories from imagined events in these cases.
2. That the AMA encourage physicians to address the therapeutic needs of patients who report memories of childhood sexual abuse and that these needs exist quite apart from the truth or falsity of any claims.
3. That Policy 515.978 be amended by insertion and deletion to read as follows: The AMA considers recovered memories of childhood sexual abuse to be of uncertain authenticity, which should be subject to external verification. The use of recovered memories is fraught with problems of potential misapplication. (emphasis added)
4. That the AMA encourage physicians treating possible adult victims of childhood abuse to subscribe to the Principles of Medical Ethics when treating their patients and that psychiatrists pay particular attention to the Principles of Medical Ethics with annotations Especially Applicable to Psychiatry.
5. That Policy 80.996, which deals with the refreshing of recollections by hypnosis, be reaffirmed." (Note - this policy, adopted in 1984, places heavy restrictions on the use of hypnosis if it is to be used as a technique to "refresh recollection")

In Sum

Diocesan Lawyers have uniquely been at the forefront "fighting the good fight" in connection with the issues surrounding sexual abuse from approximately 1985 to the present. I believe I speak for many Diocesan Attorneys (certainly many whom I've spoken to in the western United States) when I say that our "starring role" in this great play should now rightfully be relegated to membership in the supporting cast. The legal crutches, often used in the past by the other actors, must be cast aside if the viability and credibility of the Church is to be restored.

The Diocesan Attorneys have, over the past decade or so, summarized and evaluated the criminal and civil laws pertaining to the various types of sexual transgressions within the Church context. We have organized or participated in seminars dealing with the legal components of the problem. Along with the Bishops and/or their delegates we have spearheaded the investigations of abuse complaints. We have drafted or assisted in drafting Diocesan policies dealing with Abuse and Harassment of all kinds. We have vigorously studied, and often served as the central repository for, nationwide press clippings dealing with the subject as well as any information addressing the psychological dimensions of the problem. We have given advice on the relative risks involved in proposed reassignments to ministry and retentions in employment, and in establishing the cautionary steps to be followed if reassignment or retention is chosen.

Now it is time for the torch to be passed. It is time for more widespread and independent involvement in the establishment of sexual abuse policies and procedures; particularly as relates to the investigations of alleged abuse. In this way, the problem will more likely be viewed as it should be -- the problem of the entire Church community.