

CLINICAL/MEDICAL QUESTIONS

1. Are psychiatrists, psychologists, and social workers equally qualified, both professionally and legally, to examine Clerics who have a suspected problem of sexual molestation of children?
2. If you ask a social worker, psychologist, or psychiatrist to examine and evaluate your Cleric, is he obliged under your state law to report this to the District Attorney or the Child Abuse Agency?
3. What is the difference between pedophilia, homosexuality and the sexual abuse of adolescent males or females?
4. Does the age of the offending Priest (older or younger) create a significant difference in his diagnosis and treatment?
5. Are there mitigating psychiatric disorders of which it would be important to be aware before proceeding with a decision on a treatment facility or a treatment program?
6. If there is a problem of alcohol or drug abuse complicating the problem of sexual abuse of children or adolescents, would any alcohol treatment center be capable of treating both the alcohol or drug abuse and the sexual abuse issues?

7. Are the treatment centers presently used for Catholic Clergy and Religious, i.e. the Houses of Affirmation, Guest House, St. Luke Institute, the institutions of the Servants of the Paraclete and Southdown (near Toronto) equally qualified to treat both the alcohol/drug abuse and dependence as well as cases of sexual abuse of children or adolescents? Do they all have follow-up programs for two or more years that would monitor the Cleric's activity and report to the Ordinary?

8. If the case involves a repeat offender and prior psychiatric or psychological intervention has been useless, what drug therapy would be considered in the treatment of the sex offender, whether or not alcohol or other mitigating psychiatric disorders were present?

9. What constitutes sexual abuse? Does touching the buttocks of a fully clothed nine year old child constitute sexual abuse either in the law or from a psychiatrist's viewpoint? Does touching the covered genitalia of a fully clothed youngster constitute sexual abuse? Does masturbation of the child by the Priest or of the Priest by the child constitute sexual abuse?

10. Does the age of the child at the time of the abuse and the extent of the abuse have any effect on long term function or dysfunction of this child with adults?

11. At what age would an abused child be expected to fully comprehend and be cognizant of the long term effects of prolonged and severe sexual abuse by a lay-person or by a Cleric?
12. If the juvenile were a sixteen year old boy, would this imply that the abuse would have a lesser impact in the adult life of this victim?
13. If the teenager appeared to initiate the sexual contact and seemed to continue to enjoy it over a period of time, would this change the offense in the eyes of the law or in the eyes of a psychiatrist?
14. If the sexual contact is mainly with juvenile boys or adolescent boys., does this imply, that the boys are more likely to be homosexually oriented in their future adult life as compared to abuse of pre-pubertal children?
15. Clinically, in cases involving Cleric-sexual offenders, is there a difference if the offender regularly abused children as opposed to adolescents? Is there a difference if the victims are pre-pubertal girls as opposed to adolescent girls?
16. Would there be more likelihood that the adolescent boy or girl would "not tell the truth" as compared to a pre-pubertal child?

17. If there is a "mitigating" psychiatric disorder or psychological disorder, would it make any difference in where you would send this priest for treatment?

18. Of the facilities listed in number 7 above, which offers a complete neurological and neuropsychological as well as complete physical and medical evaluations as well as psychological testing? Would the facility and the variety of evaluations be important in determining the presence of mitigating medical or psychiatric disorders?

19. What kind of pre-intervention strategy should the Ordinary consider?

20. How soon should a complete evaluation be done?

21. Should the alleged Priest-offender see anyone else before the evaluation?

22. What are the causes of sexual abuse by Roman Catholic clergy?

23. What should an Ordinary look for and expect in an adequate evaluation of a cleric?

24. How can an Ordinary know which treatment center is best for the needs of the alleged offender?

25. Can a Priest/cleric ever return and function in the Diocese?

26. What should the Ordinary do with regard to the families of the victims?

SIGNIFICANT CRIMINAL AND CIVIL LAW CONSIDERATIONS

The following criminal and civil law considerations follow upon the pertinent question in the same area, posed elsewhere. These are not to be construed as answers to these questions. Rather, they expand upon the questions and suggest the importance in dealing effectively with the various aspects of these two dimensions of this problem.

SUMMARY OF CONSIDERATIONS

Insurance Considerations:

1. Loss of Liability Insurance Coverage to Each and Every Diocese. It is highly probable that specific, exclusionary language shall begin to appear following a few years experience in all Diocesan liability policies which shall exclude coverage to the Diocese, the Bishop, Vicars, Clergy and other personnel for "coverage of claims arising as a result of sexual contact between a Priest and parishioner, an employee and any member of the public . . . "

Such an exclusion was adopted as an insurance industry standard on January 1, 1985 for the psychiatric and psychological profession. Coverage for those professions and the entities, partnerships, corporations, and associations which employ them is no longer available for "claims arising as a result of sexual contact between patient and therapist or other employee."

The exclusion was a reaction to payment of large claims by insurance companies over several years and an inability

actuarially to predict the risk that a physician might have sexual contact with a patient.

The estimated cost of the loss of coverage correlates to the remarks contained in the introduction. The cost could be hundreds of millions.

This threatens the very economic viability of the Church's mission in many areas.

2. Interim Increased Cost of Liability Insurance Coverage.

Following the experience by insurance companies of a number of claims resulting in large monetary court awards or cash settlements involving insurance funds and prior to the cancellation of coverage referred to above, a significantly higher actuarial value would be assigned to the risk, resulting in a significantly increased premium cost.

One Diocese which experienced insurance losses as a result of a Priest sexually molesting children has been notified that the insurance premium shall increase more than 25 percent.

According to Time Magazine (June 3, 1985) a day care center which suffered a child molestation experience was

forced to pay a liability premium which increased nearly 750 percent, from \$600 dollars per year to \$8,000 dollars per year.

This individual increase to each Diocese, weighted in aggregate will cost many millions.

CIVIL CONSIDERATIONS:

1. Liability of Bishops.

Some debate exists in the civil law's understanding of the relationship between a Bishop and his Priests and major religious superiors and their subjects.

The extent of responsibility a Bishop or religious superior has in regard to tortious or felonious conduct of his Priests/subjects has not been defined in the original sense by the higher courts of the civil law system, and thus, the exceptions to such original definition do not exist. There are absolutely no reported civil court decisions on the issues. This body of law is just beginning to develop with the filing of these cases.

The Bishop's responsibility beyond incardinated Priests, for the actions of non-incardinated Priests assigned for study, special work, visiting (or having been suspended by another) as well as a Bishop's responsibility for one whom he has suspended who is residing elsewhere, including a treatment center without appropriate supervision . . . the questions await definition.

2. Impact of Code of Canon Law on Civil Courts.

The Canon Law shall play an important part of the Civil damage cases. The interpretation of Canon Law by plaintiff lawyers in litigation has already been experienced. No court has yet made rulings in this regard.

It is well founded in civil cases that operation manuals, policy and procedure memoranda, and other documents generated as guidelines by the civil defendant may be utilized in evidence.

That the Code of Canon Law actually has the effect of Law over our personnel shall make it more relevant than some civil document which constitutes no more than a guideline.

The impact may be negative or positive depending on the preparation of the civil lawyer and the participation of a canon lawyer in cases where the issue presents itself.

3. Liability of Larger Ecclesiastical Entities

Presently there are efforts to sue, successfully, not only a diocese but also a bishop, diocesan vicars, the metropolitan archdiocese, the Holy See's representative in the United States and the Holy Father himself. These cases are being partially settled by the insurance companies without first attempting to settle the question for the civil jurisdiction in question.

The trend to expand the circle of responsibility beyond the diocese of the priests in question but to the National Conference of Catholic Bishops, the Apostolic Pro-Nuncio and the Holy Father himself shall continue.

In great measure the courts shall look to both the civil law and the canon law to comprehend the relationship of these other ecclesiastical entities with the diocese in question, the bishop and the priest-offender himself.

It is highly probable, nearly certain, that each and every Ordinary in the United States shall be made a party - defendant in a federal class action suit, the threat of which has been documented in correspondence to the General

counsel's office of the USCC-NCCB. In a class action every Ordinary in the country would have to testify about every instance of aberrant sexual conduct in their diocese, produce all records relating to aberrant sexual practices, and defend their actions or inaction in each instance.

The Papal representative in the United States, the Holy Father, and the NCCB will be the primary target of lawsuits seeking to establish their direct responsibility for the grave injury suffered by the child-victims. In these efforts plaintiff lawyers will utilize, possibly to their advantage, the structures set forth in the Code of Canon Law describing the inter-relationship and inter-dependence of these various ecclesiastical entities. The project proposed herein shall address these extremely serious issues and attempt to provide acceptable solutions.

4. Responsibility for Seminarians

The responsibility for seminarians is two-edged in that there is a responsibility on the part of the Ordinary for things done by the seminarian and things done to the seminarian.

Depending on the geographic location of the seminary as well as the canonical and corporate structure, more than

one bishop may be involved in answering the questions of responsibility. It is also possible that the wider ecclesiastical entities may be involved if the seminary has some direct connections to the Holy See. (i.e., a Pontifical seminary, inter-diocesan seminary etc.)

5. Responsibility of Bishops for Visiting Clergy

A bishop may extend hospitality to a priest who is not incardinated to his diocese and allow said priest to live and work as a priest in his own diocese. If the priest has a history of problems involving sexual misconduct and the bishop is aware of this and allows the priest to live and work in his diocese anyway, there are serious questions regarding his responsibility to act in the event of a subsequent incident.

A legal agreement between the host bishop and the priest's own Ordinary may provide a partial remedy to problems pursuant to an incident.

6. Maintenance of Diocesan Records

A paramount concern is the security of diocesan records and the limits of confidentiality that may be successfully claimed by church authorities. This issue is governed by complex discovery decisions in the state and Federal law.

In civil law the courts allow lawyers who bring suits to

use the process called "discovery" to make the defendant (in these cases, bishops and/or dioceses) produce records and personnel who may be compelled to give sworn testimony.

In the event of a class action suit such as the one that is threatened, the lawyers bringing the suit shall try to obtain records from each and every diocese in the country. They shall also try to obtain testimony from each and every bishop. All this shall be an attempt to document each and every known instance of sexual misconduct by a priest.

It is important to know what matter should be contained in a priest's personnel file, considering the very probable discoverability of these files.

The idea of sanitizing or purging files of potentially damaging material has been brought up. This would be in contempt of court and an obstruction of justice if the files had already been subpoenaed by the courts. Even if there has been no such subpoena, such actions could be construed as a violation of the law in the event of a class action suit. On a canonical level, to sanitize the personnel files could pose a problem of continuity from one diocesan administration to another.

One other suggestion regarding files has been to move them to the Apostolic Nunciature where it is believed they would remain secure, in immune territory. In all

likelihood such action would ensure that the immunity of the Nunciature would be damaged or destroyed by the civil courts.

The canon law law speaks of secret archives. Are these safe from civil discovery whereas ordinary files might not be? Thus far it appears that the secret archives afford no more security from discovery than regular diocesan archives.

7. Uniformity of Case Management

At this time there is no uniformity of case management. It is desirable that such uniformity be developed in order to provide optimum assistance to bishops and diocesan lawyers. The same issues are present in similar cases in the different diocese such as:

- *The confidentiality of diocesan records
- *Legal arguments against liability
- *The criminal defense posture to be developed for a priest-offender
- *The responsibility of insurance companies to act in a manner that is not detrimental to Church interests
- *Legal pleadings to be filed on behalf of all defendants and their contents
- *Potential conflicts between defendants and with insurers
- *The public posture of all parties in relationship to the general public and the wider church community as presented

in press announcements and stories, statements of the bishop and other authorities related to the case as well as pulpit announcement.

All of the above legal efforts and the many others that arise should be coordinated so that a single, carefully choreographed theme is presented. This theme or posture should be consistent in character and design and produce a result that is advantageious for the Church, victims and the public.

8. The Discovery of Information that is Circulated About

This Problem If all of the possible questions related to this problem are posed and a suitable and complete set of answers drawn up and set forth in the form of a policy manual or procedural guideline, it would not be advisable to release such a manual/document to the Bishops of the country or to the diocesan lawyers.

Such information could fall into the hands of either the plaintiffs or the press and the document itself could be deemed discoverable and used as evidence.

Nevertheless it is virtually impossible at this time to compose a document or manual which a) adequately addresses the problem with all of its vitally important aspects and b) would not cause damage if it fell into the hands of the press or plaintiffs.

Only two major insurance considerations and eight civil law considerations have been noted for the sake of brevity. This is because the purpose of this entire document is to provide a basis for understanding both the enormity and the gravity of the total situation. To continue to list the hundreds of civil law considerations and the many insurance issues would expand this document beyond its intended format. Accordingly a limited listing of the criminal law considerations, clinical and medical considerations and canon law issues follows.

CRIMINAL LAW CONSIDERATIONS

Every civil jurisdiction (usually by states) has statutes which impose civil and criminal penalties on persons who engage in illicit sexual activities with children and/or adolescents. If a cleric is charged with sexual misconduct civil law suits can be lodged against him and his Ordinary for monetary damages to the victim and families resulting from felonious conduct. The offender could also be charged with criminal activity. If a sworn complaint is received by a police agency or a prosecutor (DA) it is inevitable that criminal charges will be filed causing the press to publish reports of the charges. This would lead investigative reporters to delve into the details of the case.

What follows the pressing of criminal charges is this: upon completion of the criminal investigation by the police authorities and the D.A., an indictment is obtained, the priest or cleric will be apprehended and arrested, placed in custody i.e., jail pending

a bond hearing where it will be required that some individual or entity (Ordinary or Diocese) assume substantial financial obligations which will allow the priest offender to remain free (in treatment) pending trial. A very expensive criminal defense will be required prior to and through the course of the trial. At the conclusion of the trial the priest will either be acquitted or convicted. Upon conviction the priest will be sentenced to imprisonment at a state penitentiary. A judge usually has no choice (depending on the jurisdiction and what the priest is found guilty of) but to sentence a convicted offender to prison.

1. *In most or all jurisdictions there are statutes which require that instances of child abuse be reported to the civil authorities. The failure to do so can result in civil and/or criminal penalties.*

2. Providing a Criminal Defense

Every instance of sexual molestation of a child is a criminal offense. A judge must sentence a convicted offender to prison. Though this is more properly the domain of the canon law, an Ordinary has some degree of obligation to provide an offender with a competent trial lawyer in order that he be adequately defended as is his right.

3. Conflict Presented by Civil Cases

The fifth amendment of the U.S. Constitution provides the right to all who are accused of committing crimes to remain silent and say nothing to anyone which might

later be used against the subject in a court of law. Therefore, should or must the Ordinary provide a criminal lawyer to the priest prior or in advance of having the initial conversation with the priest about the complaint. Can the priest refuse to answer the questions posed by the Ordinary based on his civil constitutional rights in anticipation of criminal charges being filed against him? Can the Ordinary be forced to reveal or convey any communication he receives from the priest to police or prosecution authorities which information would either be utilized to provide corroborating evidence of the priest's guilt or provide the very basis for the prosecution. The basic conflict that exists here is whether or not the priest should honestly communicate with his Ordinary or not.

Though the accused priest is obviously the one in the best position to provide all of the basic information about the alleged incidents. This essential information is needed in order to determine how best to proceed with such matters as treatment plans for the offender; identifying all of the victims and their families so that adequate intervention can be planned etc. Nevertheless if the priest, in all good faith provides this information to his Ordinary it may derogate from his fifth amendment privilege. This could, in some jurisdictions, literally finish him in terms of a defense in criminal prosecution.

The choice of a criminal attorney at the earliest stage and the creation of the mutually cooperative relationship between the criminal attorney and counsel in the civil cases as well as insurance counsel is very important.

4. Unavailability of Plea Bargaining Process

Plea bargaining is process whereby a district attorney and a criminal defense lawyer reach a binding agreement providing that there shall be no trial. The defendant, as a result of the plea bargain, admits guilt to a crime, and receives a minimal sentence, much lighter than the maximum which might well have been imposed following a trial.

Plea bargains are unavailable in criminal cases where there is the commission of a heinous and odious crime against a young and defenseless victim. These cases are very high profile, attracting wide-spread media attention and these cases enrage communities, all of which creates obvious and subtle political pressure bearing down on the prosecutor or D.A. This forces him to bring the cases to trial. District attorneys in these cases want to make certain that there is no perception in the public or opinion in the community that because the Church was involved that the D.A. has treated the priest in a deferential or preferential manner. To prove his political independence the tendency of most D.A.'s would be to prosecute fully.

5. Extreme Criminal Law Possibilities for Superiors

There have been situations wherein District Attorneys almost pressed criminal charges against the priest's Ordinary which criminal charges would have resulted in the indictment, arrest, incarceration, bonding, trial or the Ordinary. Had this process occurred, upon conviction, the Ordinary would have been faced with the possibility of serving a severe sentence in the penitentiary.

There are a lot of criminal laws which pertain to an Ordinary in instances of sexual molestation of children by their subjects. Primarily there are two broad areas under which this criminal responsibility falls. First, the area of reporting. Failure to report information regarding sexual molestation of a child by a priest when such information is available or in the possession of the Ordinary, is considered a criminal offense in some states. Secondly, to allow a priest to continue to function, endangering the health of children, following the receipt of private, confidential knowledge that this priest victimized a child is considered to be "criminal neglect" (a crime in many states).

The proposal contained herein seeks to deal with this very serious question.