

THE ROLE OF THE DIOCESAN OUTSIDE COUNSEL

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In reviewing how diocesan outside legal counsel can best play a role in achieving a wholistic approach to the sexual abuse question, we must first understand that, normally, outside legal counsel for a diocese is an attorney who may handle pre-litigation aspects of diocesan sexual abuse matters; who may handle litigation directly or oversee and coordinate the work of other litigation counsel; or who may be retained specifically to handle litigation of such matters. Such understanding can best be found by reviewing some examples.

In some instances the diocesan outside counsel's role is to advise the diocese regarding matters resulting from review of diocesan policies, procedures or activities in this area. Thus, for example, in responding to sexual misconduct in the Church, a diocese may seek to implement various policies. As to the diocese promulgating such policies, one role diocesan outside counsel may play is in drafting and/or reviewing such policies.

In another instance, the diocesan outside counsel's role is to advise the diocese regarding litigation matters. Thus, for example, a diocese may be sued for the misconduct of one of its priests, and the diocesan outside counsel will advise the diocese as to legal issues which arise in that litigation. In some such instances the diocesan outside counsel may also be serving as litigation defense counsel in the particular lawsuit. In other instances another attorney may be retained by the diocese and/or its insurer and the role of the diocesan outside counsel is to coordinate and manage the litigation for the diocese.

Finally, in some instances, the diocesan outside counsel may be a specialist who is retained by a diocese as its separate counsel with respect to certain matters. Thus, for example, a diocese sued in a misconduct case instead of relying upon its usual diocesan counsel, may choose to retain diocesan outside counsel who are quite familiar and experienced in misconduct litigation defense work.

BACKGROUND

The role that diocesan outside counsel fulfills in sexual abuse cases has evolved from the early 1980's. At that time, dioceses began to experience litigation over sexual misconduct cases with increasing frequency. Initially, the cases were rare, isolated instances, often settled or resolved with little or no publicity and the financial impact of such settlements, usually in low five figure dollar amounts, was negligible. Diocesan outside counsel, although usually experienced in defending personal injury cases, were rarely

experienced in handling the defense of sexual abuse cases. This was not unusual, as such cases were rare and attorneys likely had not been involved in such litigation.

In the mid to late 1980's, sexual abuse litigation began to achieve greater importance, both from the standpoint of liability issues and from the standpoint of the financial impact because such cases were soon seen to result in significant settlements and jury verdicts. Throughout this period, diocesan outside counsel frequently were compelled to educate themselves in the unique aspects of such litigation in order to assist the diocese in responding to them. During this time period, the role of the diocesan outside counsel often expanded to include public relations, policy making, evaluating and other aspects.

The 1990's have seen a continued evolution in the role of diocesan outside counsel in sexual misconduct matters. While litigation defense and litigation management continues to be one role filled by diocesan outside counsel, other roles have often been overtaken by others as dioceses have become more adept, experienced and sophisticated in their response to sexual abuse cases, and more importantly, in their response to sexual abuse victims. During this time period, diocesan outside counsel have worked to seek ways to legally protect the diocese from legal liability and have sought to organize the assets of dioceses to shield them from litigation exposure. This time period also has seen diocesan outside counsel engage in litigation with diocesan insurers over coverage and insurance policy exclusion issues.

INSURANCE

Understanding the role of diocesan outside counsel would be incomplete without an understanding of the part insurance coverage plays in sexual misconduct cases. In such cases, the diocese and its bishop have two responses. The first is primarily pastoral; concern for the victims and seeking ways to help such victims, concern for the person who committed the abuse and seeking ways to evaluate and rehabilitate such persons and concern for members of the faith community who are distressed by the occurrence of such abuse in their community.

The second response of the diocese and its bishop is largely legal; assessing the liability for such misconduct, determining the financial exposure created by such instances and creating procedures to prevent reoccurrence. This second response has been driven in great measure by insurance factors. This, in turn, has had some impact on the diocesan pastoral response.

If a diocese was fully insured for a sexual misconduct case, diocesan outside counsel could either defend the case or coordinate that defense with less concern for these other matters. Liability determination and financial exposure would be the concern of the insurers and the diocese and diocesan outside counsel could concentrate on risk management to prevent reoccurrence.

If, however, insurance was minimal, non-existent or contested, the diocese and diocesan outside counsel needed to focus narrowly on liability and financial exposure. This resulted in liability and financial exposure achieving a more prominent place on the list of concerns held by the diocese, and consequently, in the legal response undertaken or coordinated by the diocesan outside counsel.

LITIGATION UNDERTAKING

Whether by a report from a victim or someone acting on a victim's behalf, or by service of a summons and complaint by an attorney, the role of diocesan outside counsel usually begins as reactive where possible legal liability might be found. An initial assessment is usually done to determine what legal issues are present.

The diocesan outside counsel must determine what response is being made to the victim and the faith community, or what investigation is being conducted in order to determine whether such undertaking may have an effect on litigation matters. For example, if the bishop or the bishop's delegate meets with the victim are statements or promises being made which may be used against the diocese in litigation? Are efforts to soothe the faith community, seek evaluation and treatment for the alleged abuser or other responses going to also impact on the litigation? Diocesan outside counsel usually works closely with the diocesan response team to monitor or evaluate such response.

As to the litigation itself, diocesan outside counsel begins by determining what parties are defendants, usually the diocese and a parish or other institution. What follows is an attempt to determine whether insurance coverage exists which might insure these defendants. If such insurance exists, the diocesan outside counsel will tender or present the defense of the case to the insurer. Typically, the insurance policy obligates the insurer to defend the diocese by selecting, retaining and financing litigation defense counsel. Additionally, the policy will require the insurer to indemnify or warrant payment of financial obligations imposed by law.

In some instances the diocesan outside counsel may be the attorney retained by the insurer to defend the litigation. If so, the role the diocesan outside counsel plays is not only to advise the diocese of all aspects related to the litigation, but also to actually undertake the defense by conducting litigation discovery, usually by means of depositions, interrogatories and the like. In addition, diocesan outside counsel in such instances would be the attorney to make or resist motions, to attend hearings on various issues, to represent the diocese and the insurer in any alternative dispute resolution proceedings, and if necessary, to actually try the case.

In other instances the diocesan outside counsel is not the attorney retained by the insurer to defend the litigation. In these instances the attorney retained by the insurer will undertake the litigation activities and typically diocesan outside counsel will monitor,

oversee and coordinate such activities and typically report the progress of the litigation to the diocese and advise the diocese as to such aspects related to the litigation.

Regardless of whether the diocesan outside counsel is the attorney retained to defend the litigation or not, early on the diocesan outside counsel must review documents, files and other materials which may be relevant to the litigation so as to assess and determine whether any problem issues are present related to litigation discovery. Thus, diocesan outside counsel may review chancery priest or personnel files, priest placement files, complaint files, archives (whether secret or not) and any other written materials which may be sought in litigation. Many of the early litigation battles were fought over the discoverability of church documents. Diocesan outside counsel have frequently been occupied in matters relating to state statutory privileges, constitutional protection, privacy issues and other matters which have had an impact on whether the opposing party might get access to Church records.

As these cases and litigation in this area have evolved, diocesan outside counsel have been able to refine and define definitional and other standards in this area to assist the diocese in responding to discovery requests. This has also resulted in diocesan outside counsel becoming closely involved in the formation and drafting of diocesan policies relating to the creation and retention of records.

This matter of discoverability of Church records has assumed great importance in cases where such records might identify other possible claimants and therefore, increase the potential for litigation exposure of the diocese. In many instances diocesan outside counsel have found themselves moving through a legal minefield, caught between the litigation party's obligation to disclose facts and documents relevant to the case and the recognition that such disclosure may well create further and greater litigation and liability exposure for the diocese.

At the same time, diocesan outside counsel must review and evaluate the various legal theories being pled against the diocese in such litigation. In such cases, claims of negligence or claims of vicarious liability are frequently made. The diocesan outside counsel must review the known facts to determine whether proof of negligence might be found. Diocesan outside counsel must also review the facts and law to determine whether the diocese can be found to be vicariously liable for the misconduct of its representatives, even though it may not have known of any propensities to engage in such conduct on the part of that representative.

As these legal liability theories evolve over time, diocesan outside counsel have had to keep abreast of changing laws and doctrine around this concept of ascending liability. While the law has always addressed liability questions relating to master-servant, employer-employee or principal-agent relationships, application of the resulting liability theories to the organization of the Catholic Church has presented unique questions for diocesan outside

counsel to struggle with and understand in an attempt to position the Church to avoid this ascending liability.

LITIGATION SUPPORT

The diocesan outside counsel in such cases have been fortunate in that there have been resources which they could tap to assist them in representing the diocesan client. The Office of General Counsel (OGC) of the USCC, under Mr. Mark Chopko, has made special efforts to advise and assist diocesan counsel in litigating these cases. In addition, organization of the diocesan attorneys from around the country in the National Diocesan Attorneys Association (NDAA) has enhanced the ability of diocesan outside counsel to confer with colleagues involved in similar litigation to share ideas, legal theories, discovery approaches and litigation strategy.

This network of diocesan attorneys has allowed the diocesan outside counsel to evaluate litigation approaches to determine the best course of action for the diocesan client. In addition, the sharing of information about expert witnesses, opposing attorneys, court decisions and jury verdicts has been invaluable to the diocesan outside counsel.

LITIGATION EVALUATION

The most difficult and troublesome aspect of the role of diocesan outside counsel has been in evaluating cases against the diocese. Especially in the early cases, there simply was not a history of litigation and jury verdicts to rely upon to assess and evaluate cases from the standpoint of settlement and potential jury verdict ranges. While information about traditional negligence and tort litigation abounds, little if any information was directly reflective of what diocesan outside counsel might expect in cases against the Catholic Church. Cases of negligence in sexual abuse or misconduct cases simply were not analogous to slip and fall or other negligence cases typically litigated.

As time went on, such information was developed on a case-by-case basis and that information was frequently shared through the OGC and NDAA networks of diocesan attorneys. Before such information was available however, diocesan outside counsel needed to be creative in assessing such litigation.

One tool utilized by diocesan outside counsel which was valuable early on, before litigation information was available, but which has remained valuable to the present, is the use of focus groups or mock juries. In such instances, diocesan outside counsel would arrange to present a condensed version of the facts and law to a select group of individuals and have them "deliberate" to a conclusion. Reviewing the results of such deliberations, together with interviews with the focus group/mock jury participants, allowed the diocesan outside counsel to assess trial strategy, to evaluate strengths and weaknesses in the case and to attempt to quantify the dollar value of such cases.

Another tool utilized by diocesan outside counsel has been the use of jury selection consultants at trial to assist litigation counsel in jury selection. Increasingly today attorneys need to use such experts to select a jury that will not only be fair and impartial, but be receptive to the Church's posture in these cases.

The future will see greater use of consultants in the area of witness preparation. While Church officials are often dynamic and effective public speakers, no one is ever quite comfortable testifying from the witness stand. In the appropriate case, diocesan outside counsel may recommend use of witness preparation consultants to enhance the delivery of testimony of the witnesses.

SETTLEMENT

Like litigation generally, most sexual abuse litigation undertaken by diocesan outside counsel is settled. In many instances, the negotiation expertise of diocesan outside counsel has been an important component in getting such cases settled. Sexual abuse litigation presents challenges where a victim's anger or desire to use litigation to change the Church may present impediments to litigation settlement. The diocesan outside counsel has, in many instances, sought to use alternative dispute resolution (ADR) in order to overcome such barriers. Often the use of a mediator has been effective in getting the parties beyond such emotional barriers to settlement. The diocesan outside counsel has needed to be ready to not only use ADR effectively, but to position the case so that the opposing party and counsel are agreeable to such alternatives as well.

Settlement often results in the need to be creative in formulating settlement agreement provisions acceptable to both sides. Diocesan outside counsel have prepared and drafted settlement agreements covering confidentiality issues, agreements regarding assignment, apologies, counseling assistance, educational assistance and pastoral matters. In many instances, diocesan outside counsel have been able to guide the settlement and draft settlement agreements which have permitted both sides to conclude the litigation.

TRIAL

In a very few instances settlement simply has not been possible and diocesan outside counsel has been required to try the case, often to a jury. The trial itself presents the unusual challenges one might expect in such instances. In addition, unique challenges are often present in examination and cross examination of expert witnesses regarding the psychological impact of sexual misconduct by clergy. Other testimony may relate to church organization and structure, or relate to church finances. Diocesan outside counsel must be able to present this testimony to the judge or jury who are often not familiar with such matters.

POST TRIAL

Following trial, the diocesan outside counsel must be responsive to post trial motions and appeals. While these matters may be typical of most litigation, one different aspect may be the constitutional application in a particular case. Decisions which impact on the Church, whether they involve the assignment and supervision of clergy or whether they involve the imposition of punitive damages, may raise constitutional issues. One role to be assumed by diocesan outside counsel, therefore, is to evaluate and assert, if necessary, such constitutional challenges.

INSURANCE REVISITED

As has been stated, insurance coverage plays an important part in sexual misconduct cases. The role of diocesan outside counsel has often included representation of the diocese in litigation with its own insurance carriers.

With increasing frequency insurers are denying coverage for sexual misconduct cases. Often they rely upon policy exclusions or injury definitions to support their denial of coverage. In some instances, disputes may arise between insurers over how a claim is to be allocated between or among a number of insurers.

In this area, diocesan outside counsel has had to play a prominent role in advocating for the diocese to force the insurers to respect and accept their obligations under insurance policies, or to bring resolutions to coverage disputes between or among various insurers.

In other cases, proof of insurance coverage may be incomplete or lacking. If so, diocesan outside counsel may need to undertake investigation to locate and establish insurance policies or secondary evidence of such coverage in so-called "lost policies" cases. This may also result in the need to litigate coverage issues between the diocese and its insurer. This has required that diocesan outside counsel gain the required expertise to pursue these matters.

FUTURE ROLES

As stated, there has been a continual evolution in the role of diocesan outside counsel in sexual misconduct matters. In earlier cases diocesan counsel might have been called upon to handle not only litigation matters, but also non-litigation matters such as responding to news media, responding to victims, dealing with psychological evaluation and treatment of victims and the accused and many other aspects of sexual abuse cases.

Today, diocesan outside counsel have returned to handling largely litigation related issues and responding to diocesan clients by advising them as to policies and procedures. Some of the earlier tasks performed by diocesan outside counsel have now been undertaken

by public relations staff, by diocesan sexual misconduct response teams and by evaluation and treatment professionals.

The future should see a further refinement of the role of the diocesan outside counsel as one being more purely legal in nature. At the same time, the diocesan outside counsel will need to continue to develop expertise in handling sexual misconduct cases. The future approach will call upon the diocesan outside counsel to be more effective in the management and coordination effort among the various personnel involved in misconduct cases.

The diocesan outside counsel will also be expected to play a larger role in prevention and risk management areas. This has already been seen in diocesan outside counsel advising the diocesan client regarding misconduct policies, formulating background investigations and questionnaires and other preventative measures. It is expected that diocesan outside counsel will also be called upon to assess and evaluate legal issues as they relate to the reassignment of personnel involved in misconduct cases.

Certainly diocesan outside counsel have a role to play in addressing the legal element in educational efforts undertaken by the diocesan client in the sexual misconduct area. Efforts must continually be made to educate diocesan personnel about these matters. Just as diocesan outside counsel played a part in educational efforts in other areas, there is a part for them to play in the area of sexual issues in ministry.

Diocesan outside counsel must also continue their efforts to review diocesan organization, financial affairs and related liability and insurance elements to maximize the legal protection of Church assets. These efforts will require the assistance of diocesan outside counsel experienced not only in litigation but also diocesan counsel experienced in corporate law, trusts, endowments, and various other disciplines.

Finally, diocesan outside counsel must continue to respect the limitations of the role they can play in these cases. At times diocesan counsel are tempted to substitute their judgment for that of diocesan leadership. Decisions by diocesan leadership cannot be driven solely by legal considerations, however. Legal considerations are only one element, albeit an important one, in that decision making process. Other elements, especially pastoral considerations, must be considered as well. In that regard, the role of diocesan outside counsel is supportive and advisory, and diocesan counsel cannot forget that ultimately it is the client who, after considering all these elements, must make the decisions in these cases.