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THE ROLE OF THE ADVOCATE

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THE ADVOCATE IN CHURCH COURTS, working toward the settlement of matrimonial cases, performs his function in a unique way: while representing an important element of the judicial machinery, operating in concomitance with the judges and the Defender of the Bond, he does not ordinarily take an active part in the probative stage of the process. He is essentially a counselor, the client's legal advisor. Unlike the other court officers assigned to the case, the Advocate is not strictly required, for the validity of the proceedings, to be present or even consulted. The party may, in fact, plead and respond for himself in court, although this practice would generally result in an obscure examination of the points at issue, in view of the fact that the legal system of the Church, like any other complex of laws, is too profound for the ordinary person who has not devoted special time and study to it.

The activities of the Advocate in a matrimonial case primarily concern two separate aspects of the process and are characterized by two distinct phases of it. The first is the period that precedes the presentation of a formal petition to the tribunal. This is the time during which a legal relationship is established and developed between the Advocate and the client. It is also the stage during which all available elements relevant to the claim are gathered and readied for subsequent evaluation by the court. The second substantial intervention of the Advocate takes place at the very end of the process, when, the case being duly considered by the Presiding Judge as sufficiently elaborated, a legal defense in favor of nullity of the marriage in question is drawn up. Again, two parties are directly involved: the Advocate on one side, and the Defender of the Bond on the other; two conflicting theses, two distinct claims are laid before the judges for the final decision.

The legal steps preliminary to the introduction of the cause assume utmost importance in terms of a prompt consideration by the court and the ultimate success of the case. It is at this stage that its framework is formed; here it takes life. Much of the fortune which the case will enjoy rests upon the evidence, testimonial as well as documentary, collected and prepared by the Advocate. His first responsibility

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is to recognize the validity and sound basis of his client's demand, by means of an extensive and detailed consultation with the petitioner. The Advocate must then conduct an investigation of every particular aspect or angle of the case, examining at length all points of substantive and procedural law. Such an inquiry is prompted mainly by the necessity of individualizing precisely the motive or *caput* to be adduced for the nullity; by the need of determining more accurately whether there exists sufficient evidence to warrant the introduction of the case, with a subsequent reasonable hope of success; and by the urgency to determine whether to petition for a judicial or administrative process. The Advocate contacts and interviews every witness in an effort to ascertain the full extent and kind of information. He checks on all possible types of proof, verifies the documents to be produced, and, in cases dealing with insanity or impotence, familiarizes himself with the most recent advances in psychiatry, urology and medical science in general.

Subsequently, the Advocate assists his client, or more frequently, may himself prepare a draft of the *libellus*, also called the bill of complaint, wherein the precise nature of the party's claim is set forth and the services of the court are requested generally for a declaration of nullity of the marriage in question. Specifically, the bill of complaint must indicate: the name of the tribunal before which the case is introduced; the ground whereupon a declaration of nullity is sought; a general outline of the law which constitutes the basis of the plaintiff's demand; and an indication of the spouses' domicile or quasi-domicile so that the court may de-

termine its proper competency. If the proofs of a case are offered in the form of records or documents, these should also be submitted to the court simultaneously with the bill of complaint. If witnesses are to supply the proofs of the assertions, then their complete addresses should be indicated. In addition, the formal petition must include the party's mandate of advocate, as well as authentic copies of baptismal records, marriage certificates, decrees of divorce and similar pertinent documents.

With the juridical acceptance of the bill of complaint by the competent tribunal, the issuance of a citation to the parties, and with the precise formulation, before the Presiding Judge, of the specific grounds upon which the plea of nullity is based, the first phase of activities for the Advocate is complete. From this moment up to the publication of the acts of the process, he will sidestep and almost disappear from the court scene and only by way of exception, granted for grave motives, will he be allowed to assist at the examination of the parties and witnesses.

After all testimonial and documentary proofs have been carefully scrutinized and appraised, and all presumptions properly evaluated, the Presiding Judge proceeds to the publication of the process. In virtue of this decree, the parties and the Advocate are authorized to examine the testimony and to inspect all the other proofs contained in the acts which have hitherto remained secret during the course of the process. If he deems it necessary, the Advocate will have an opportunity, within an equitable period of time, to submit documents and adduce arguments by which the proofs and objections previously ad-

vanced may be corroborated, implemented, explained and completed. In fact, he may introduce new witnesses, provided the danger of fraud and subornation is carefully averted.

The decree of conclusion of the case, which follows immediately, opens the way to the discussion of the case. Here the Advocate presents his brief, a written summary of observations, wherein he analyzes, discusses and emphasizes, in a logical form, all the arguments in favor of his client's petition, and proposes answers to adverse testimony. Indeed, he should also anticipate possible remarks, and should examine and, insofar as possible, resolve all dubious points. To the animadversions of the Defender of the Bond, the Advocate will have a right to submit a written rebuttal and, in intricate and extraordinary cases, to make a request to the Presiding Judge for an oral discussion aimed at clarifying certain obscure but important questions.

Following the pronouncement of the definitive sentence, if he believes his client aggrieved by the reaffirmation of the validity of the marriage under consideration, the Advocate has the right to lodge an appeal to a higher court asking for a new and complete re-examination of the case.

How valuable is the work of the Advocate in ecclesiastical courts? Experience indicates that he plays an exceedingly important role. Not only does he satisfy a basic requirement of justice, since he opposes the assertions of the Defender of the Bond with ample, though not always equal juridical means, but he also guarantees that the interests of the petitioner will be adequately safeguarded. Only when the case is accurately constructed, duly developed, and properly concluded can we

truthfully say that the petitioner has been accorded a fair hearing.

The need for the Advocate is felt particularly in the period that precedes the formal introduction of the case as well as in the draft of the bill of complaint. There can be no doubt that if the parties wrote the bill themselves, there would be more spontaneity and an absence of legal terminology. But, at the same time, one would frequently notice vagueness, inaccuracy, confusion and tedious sequences of irrelevant details. The skilled Advocate, on the other hand, puts the salient points and arguments into good order and correct perspective so as to set up a *prima facie* case (*fumus boni iuris*) which is indispensable for the acceptance of the petition.

Furthermore, the Advocate is the first one to approach and interview possible witnesses, with the consequent advantage of obtaining a genuine, personal appraisal of their knowledge. He is, therefore, in a position of suggesting to the Defender of the Bond a series of questions regarding which the witnesses may be interrogated. At this stage of the process, the Advocate certainly knows more about the case than the Defender of the Bond, who has only the bill of complaint on which to depend. Such an action may save supplementary interrogations, and it commonly bears forth advantageous results with regard to time, expenses, and the establishment of truth.

Indeed, the Advocate must marshal and emphasize everything that can be alleged in favor of his client's petition. For this reason his role is a noble one, since it is directed to the triumph of justice. The work of the Advocate is burdened with great moral responsibility: in all his mani-

fold activity, he must never withdraw himself from the sole and common final purpose of matrimonial processes—the discovery, ascertainment, and legal affirmation of the truth of the objective fact. In matrimonial cases, the validity of a sacrament and the welfare of souls are generally involved. Hence, the Advocate becomes a valuable instrument for the achievement of truth, and not a weapon for a blind vindication of the petitioner's claim. Pius XII once remarked:

In matrimonial processes, the juridical controversy cannot be compared to a contest or a tournament in which the two contenders do not have a common final purpose, but in which each one pursues his own particular, absolute aim without respect to, and in fact, in opposition to that of his rival.

In brief, all officers of the court, together with the Advocate, must, as it were, plead a common cause and collaborate, without merging their particular offices, in conscious union and subordination to the same end.

In the United States, the role of the Advocate in ecclesiastical courts has traditionally been fulfilled exclusively by clerics. The help of capable laymen, especially lawyers, has been often considered and recommended, but never officially accepted or introduced in tribunals. One reason for such a practice can be found in the present exacting requirements of the Church law: a Doctorate of Canon Law plus a three-year forensic apprenticeship, preferably at the Tribunal of the Sacred Roman Rota—a goal which is not readily obtainable by laymen, especially in view of the time and expenses involved. Another cause could be found in a suspicion on the part of Bishops or those in charge of

ecclesiastical courts that there could be great danger of collusion, particularly in marriage cases. Consequently, priests have been preferred in consideration of the fact that they fully know what is at stake. In addition, the usual charges about having enough money to buy a decree of nullity (charges frequently alleged in this country) have discouraged many from resorting to lay help, in order to keep the fees at a minimum.

The work that has been done by clerics acting as Advocates deserves consideration and praise, but whether the true function of a legal counsellor has been adequately fulfilled to the best interest of the petitioner is perhaps a matter of discussion. We are all aware of the shortage of priests in the United States. Those, therefore, who are assigned to tribunals are oftentimes entrusted with posts of great responsibility in the ministry, to which they dedicate, of necessity, the majority of their attention and energy. This, of course, subtracts from the quantity and quality of legal assistance a priest is able to give. Furthermore, clerics are sometimes appointed as Advocates immediately after their Licentiate degree in canon law, that is, after only two years of purely theoretical studies—and not infrequently do we find clerical Advocates without any specific canonical preparation.

In addition, the number of petitions for a declaration of nullity or dissolution of the bond remains excessive in relation to the way in which an ordinary ecclesiastical court is staffed. Moreover, certain types of cases, dealing for example with insanity, impotence, or the intention of the parties, become constantly more complex, and demand a profound technical study.

In insanity cases, where various forms and degrees of psychoses are found, it is mandatory that the Advocate, even before the presentation of the bill of complaint, have an overall picture of the mental condition of the afflicted spouse at the time of the contracted marriage. This implies a diligent search into the history of the pathological process in question, as well as into its pre-psychotic and psychotic manifestations.

In his brief the Advocate will attempt to prove, beyond reasonable doubt, the lack of a minimum discretion indispensable for an effective exchange of matrimonial consent at the time of the contract. This is ordinarily an extremely arduous task. He must endeavor to establish that a true condition of insanity was present before and after the marriage ceremony in order to invoke the presumption of law in favor of the existence of a form of insanity present at the precise moment of the contract. It is often necessary that clear distinctions be made between the different stages of mental derangement so as to indicate the progress of the mental disorder, whether manifest or latent. However, in his analysis, the Advocate must resort only to sound doctrines and accepted principles of psychiatry and psychology, and never make recourse to novel hypotheses, unproved theories, or pseudo-scientific theses.

In cases involving impotence, especially if it is of functional rather than organic origin and character, the Advocate must be skillful and tactful in the selection of the witnesses. Owing to the delicate nature of this pathological condition, an excessive number of witnesses, who possess only scanty information, would tend to cloud

the issue rather than enlighten it. The essential requirements of the impediment of impotence, namely certainty, antecedence, and perpetuity are often extremely difficult to establish beyond doubt. The means available are represented by the physical examination of the parties by medical experts, the testimony of the spouses, and the judicial deposition of the so-called character witnesses (*testes septimae manus*), who attest not to the condition of impotence but to the trustworthiness and credibility of the spouses. Hence, the paramount task assigned to the Advocate is to provide and adroitly select the evidence. Especially with regard to the concept of perpetuity, he must fully recognize that impotence, as a matrimonial impediment, is not regulated by purely physiological concepts, but rather by juridical principles. Consequently, the test to determine the temporary or perpetual character of a condition of impotence will not be, as it is in medicine, whether such an abnormal condition may or may not be cured, but, instead, whether the defect may be cured without causing serious threat to the patient's life and health, and without employing extraordinary means or adopting treatments which do not guarantee a morally certain success.

Finally, in intention cases, *i.e.*, in those instances wherein a positive act of the will or a condition against the substance of marriage are claimed to be the motive for the nullity of the matrimonial contract in question, it is absolutely necessary that the Advocate, besides gathering evidence of general character, concentrate his best efforts toward ascertaining the exact motivating cause that prompted the spouses to

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simulate their consent. The more plausible and grave, even subjectively, the reason, the more incontestable will the arguments be in favor of nullity. The Advocate will find corroborating proofs in the moral standard of the person simulating consent; in his admission of simulation, particularly if made under oath and immediately or shortly after the marriage ceremony; in circumstances surrounding the case and pointing to simulation; and in the testimony of witnesses or documentary evidence confirming the claim of the parties. It is obvious that the entire process of investigation can be accomplished only by a prepared and totally dedicated mind.

Indeed, there is a great need for the entry of the lay civil lawyer into the field of ecclesiastical case law, either as an able assistant to priest-Advocates, or as the sole advisor to the parties. It may be objected that the introduction of civil lawyers into the tribunals will bring about an increase in the cost of the processes.

This is undeniably true, for, when a client can afford it, an Advocate has the right not simply to token fees, but to a just remuneration in proportion to the importance, difficulty and length of the case. Even though the policy of gratuitous legal assistance is well grounded in this country, I am inclined to believe that the question of fees would be an obstacle only for a small segment of the people who approach the tribunal. The great majority of the petitioners will realize the importance, with respect to time and success, of having a qualified Advocate to assist them in a very personal and effective manner. For those who lack adequate means of support, the court itself could supply the Advocate with a reasonable subsidy taken from a special fund provided for by the diocese.

Whatever the type, range, and purpose of the activities of lay civil lawyers, I am convinced that their introduction into ecclesiastical courts would serve to upgrade, sharpen, and develop Church law and adapt it to modern day requirements. In his role as Advocate, the civil lawyer could find a challenging task, and could fulfill an apostolate for which the Church today has so much need.