

## Lay Attorneys in the Tribunal

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# LAY ATTORNEYS IN THE TRIBUNAL

REV. ADAM J. MAIDA \*

THE ANNOUNCEMENT earlier this year that the Diocese of Pittsburgh would use lay advocates in the ecclesiastical tribunal has prompted extensive inquiry from Diocesan Courts across the country. Since we have received over one-hundred requests for information concerning our experiment, it will be my purpose to share with you the fruits of this experiment, to answer some of the questions which have been asked of our tribunal, and to give you an appraisal of this program and of the hope that it offers for the future.

There were three primary considerations which prompted us to use civil attorneys as advocates in our marriage tribunals: (1) the documents of Vatican II underline and encourage the role of the layman in every phase of the Church's life; (2) the Council underscored the responsibility and the obligation of the layman to become involved in all phases of the Christian Apostolate; and, (3) the layman is anxious for an opportunity to serve his Church and his fellow man, especially in the various professions in which he has been trained.

With these general considerations in the background, the occasion which acted as a catalyst in our decision to bring civil attorneys into the tribunal was a telephone call, in 1964, from the Dean of the Law School at Duquesne University. A prospective client had asked the Dean to recommend the finest civil lawyer in the city to represent him before the tribunal of the Diocese of Pittsburgh. Obviously there was none. When I related the call to our tribunal personnel, we all wondered why we couldn't make such representation available. Why could we not have a corps of attorneys who would be

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available to serve in marriage cases when requested to do so?

Two recent articles dealing with the subject, appearing in a professional periodical, concluded that the use of lay advocates in Church tribunals was an impractical idea in America because:

(1) The civil lawyer had no knowledge of Canon law and could hardly take the time from his profession to acquire a canonical degree or sufficient knowledge.

(2) All of the significant marriage jurisprudence was in Latin and most civil lawyers were incapable of coping with the language factor.

(3) Time and advice are the tools of a lawyer's trade and his fees are measured accordingly. Neither the tribunals nor the petitioners could afford to pay a civil lawyer the going rate for his time.

(4) There would not be sufficient interest among the lawyers for this work and even if they were interested, they would not realistically have the time to do the work.

A careful analysis of these objections led us to the conclusion that none were insurmountable in view of the tremendous advantages lay advocates could bring to Church tribunals. To provide a minimal knowledge of Canon law and to give attorneys a feel for the code, a course was designed in which the lawyers received twenty hours of instruction. Our *Officialis* outlined very generally the contents of the code, its history, and its purpose; one of our theologians gave a lecture on the theology of marriage; our Chancellor discussed the impediments and dispensations; the Secretary of our tribunal lectured on judicial procedure; the director of our family life office in the

Diocese gave an instruction on separation and divorce procedures, and I gave the instructions on rotal jurisprudence. Most important, however, was the first two-hour session in which Bishop Wright informally sat down with the attorneys and discussed the hopes he had for the group, encouraging them to give their best efforts to the pilot project. This first session set the tone for all the subsequent meetings and its spirit still lingers in the generous way in which these attorneys serve in our tribunal. Obviously, none of these lectures was exhaustive; they were merely introductory. In addition to these general instructions, each lawyer was given a copy of *The Catholic Lawyer*, volume 12, no. 1, Winter, 1966, which was dedicated to a study of the ecclesiastical tribunal, its structure and personnel and which in essence consisted of a reproduction of the papers given at a symposium held at Fordham University in the Spring of 1966, under the auspices of Fordham University and the Archdiocese of New York.

The objection that most ecclesiastical jurisprudence was in Latin was not as difficult an objection to overcome as might first appear. The limited number of grounds upon which a nullity can be granted in the Church have each been the subject matter of doctoral theses published by the Canon Law School at Catholic University. We have a complete set of these in our library. Furthermore, the library contains a set of *The Jurist* which has treated most of the grounds for annulments and the particular problems involved in proving them. Last year, the Canon Law Society made available to us a little booklet on tribunal jurispru-

dence. Early this year, the decisions published in 1966 by the Archdiocese of New York in first and second instance were made available to us. Each attorney was given a complete set of these decisions, containing in some two hundred and fifty pages all possible grounds for attacking the validity of a marriage and illustrating each of these grounds in different factual situations. In addition, our own file of cases and decisions is open for study and analysis by the lay advocate. Finally, if any point of law is unclear or needs further clarification, a priest is made available to the lay advocate as a translator of pertinent rotal decisions.

The problem of fees has temporarily been resolved. During the course of instruction for the lawyers, while joking about legal fees, one of the lawyers speaking for the group wanted it understood that none of them expected any fees for their work. As professional men, they wanted to make this project a part of their apostolate in the Church. In order that no one would be overburdened in his generosity, it is contemplated that each lawyer will receive one or perhaps two cases a year. To illustrate the seriousness of this problem, we asked the lawyers to keep a record of the time they devote to a case. In an easy case just completed, the attorney told us that he devoted sixty hours to preparation. Given the ordinary hourly rate for legal services rendered, in this case the cost to the petitioner would have been \$2,100. While the problem has been temporarily overcome, I do not know what the ultimate solution will be.

The interest of the lawyers in the program has been simply fantastic. In

fact we have a waiting list of attorneys who want to be approved for practice before our court. They seem willing to give as much time as is necessary to insure the success of our project and to give proper representation before the court.

The contributions made by the lay advocates in our Pittsburgh Courts are worthy of note. These successful, dedicated, practicing lawyers have introduced a professional spirit into the tribunal. These are men who are masters at discovering evidence and applying its relevancy to the issues before the court. Their search for witnesses is unrelenting and they are expert at preparing a witness to give meaningful testimony. It is a great pleasure to work with men who understand concepts of law and can make subtle legal distinctions and apply them to varying factual situations. They know the value of a good brief and do an excellent job in formulating an argument in behalf of their client.

The lay advocate has infused into our judicial system many of those qualities which have already made him a very successful civil attorney. The preparation of his case is extremely thorough and well organized. A wonderful rapport exists between the attorney and his client, and the petitioner and witnesses seem to have a greater confidence in the attorney than they have in a priest-advocate. The petitioner, who feels he is getting maximum legal advice and protection and knows he is being competently represented in the ecclesiastical tribunal, seems to identify much more realistically with a lay advocate than he did with a priest who served as advocate. In fact, when

given the choice between one of the lay advocates and a priest-advocate, the petitioner will inevitably choose the lay attorney, and with good reason. In our experience, the lay attorney will spend hours with the petitioner and his witnesses prior to any formal proceeding in the court. The lay attorney would not think of permitting any interrogation of his client or his witnesses in his absence. The very presence of the lay attorney in the courtroom with the petitioner, the respondent and the witnesses has produced a very sobering atmosphere and a certain quieting feeling in those who are asked to testify.

Furthermore, the use of the lay attorney has had a good effect on our tribunal. The judges, with one exception, are all pastors in busy parishes who, in the past, looked upon the part of a judge as an ancillary function of their priestly lives. Now, however, the judge, lest he be shamed by an aggressive and intelligent attorney, is forced to study the law and become acquainted with the minutest details of judicial procedure. Any structure which is closed and inbred, whose deliberations are secret and sometimes mysterious, can tend to take itself for granted and can become sluggish in executing the purpose for which it exists. The introduction of lay attorneys keeps the judges sharp and constantly aware of the fundamental and noble reasons why they sit in judgment over their fellow Christians.

The use of lay advocates has made it possible, or should I say forced us, to hear many more cases than we have ever heard before and in record time. The first two cases presented by lay advocates

have been concluded in seven months. In 1965, three formal cases were heard, and in 1966, two cases were heard. In 1967, twelve cases were introduced, half of which were concluded during that year and the others early in 1968. It is interesting to note that the first two decisions in which lay advocates were involved have been affirmative.

Finally, the use of lay advocates in the tribunal constitutes a tremendous saving in priestly manpower and frees many priests from the obligation of representing people before the court. In our Diocese this has a twofold blessing in that it enables the priest to devote his time to other priestly work and it avoids imposing upon the priest a work for which he is totally unqualified and unprepared. This is to say nothing of the matter of justice, wherein the petitioner is now adequately represented by competent counsel.

The use of lay advocates has not been without its difficulties. For example, all the advocates practicing before our court are very successful civil attorneys and it has been frustrating at times to schedule a hearing, with full court, including notaries, witnesses and judges, only to find the busy lay attorney asking for a continuance because of some urgency in his civil practice. In addition, there has been a significant stress placed on the tribunal staff. The three priests who staff the tribunal find themselves busier than ever. A fourth full-time girl was added recently to the secretarial staff. The increased work load has resulted in additional costs and expenses for machines and manpower. Moreover, despite an elaborate screening

procedure, two of the eighteen attorneys chosen for this work have not followed through on their original commitment.

After eight months of experience with our tribunal, I asked the lay attorneys for their observations and their evaluation of our judicial system and they rendered some of the following criticisms:

(1) They feel it is fundamentally unfair and unjust to assert that the plaintiff must prove his case and then deny him the opportunity to come forward with his proof by not allowing the attorney for the plaintiff to examine witnesses and elicit from them the testimony needed. No right to effectively cross-examine is granted. The Defender of the Bond, in preparing his questions, will necessarily prepare them in sympathy with his official position. In any event, except in a very general way, he doesn't even know what the plaintiff intends to prove, how he will prove it, what witnesses he will call and what testimony they are prepared to give. The judge in asking the questions may well be even less prepared and competent to assist the plaintiff in proving his allegations. To the lay attorney this is a gross violation of due process which is rooted in the natural law.

(2) In order to compensate for the deficiencies and injustices which may arise because of this fundamental prejudice against the plaintiff, after the judge has asked all the questions prepared by the Defender of the Bond, we have permitted the advocate to ask any questions which might have some bearing on the case. These questions are accepted by the judge as his *ex officio* questions as long as he or the Defender of the Bond has no serious objection. This has not

been completely satisfactory because many points are not developed within the context of the original interrogation and the testimony of a witness often loses its full force. Consequently, at a recent meeting among the members of the tribunal and the lay advocates, it has been decided that in the future, all questions would be drawn up by the Defender of the Bond in consultation with the lay advocate and the lay advocate will be permitted to ask any questions in the course of interrogation which may be necessary or pertinent. In this way, the testimony elicited from witnesses should flow coherently and logically.

(3) The attorneys were critical of our use of notaries. In civil courts, every word of a witness is recorded and is considered important. In our court, even with the use of electronic devices (stenomasks), much of the testimony is a detailed summary of what the witness said. When our advocates go to other courts where notaries write down in long hand what testimony witnesses give, they are hopelessly dismayed.

(4) With only brief experience in our courts, it was evident to the experienced lawyer that our judges were not trained in the law. If it is justice which the plaintiff seeks, the advocates contend, it ought to be meted out by men who are thoroughly familiar with the law and its procedures.

(5) Our system of appeal, *i.e.*, the need for two affirmative decisions, is to them a classic example of double jeopardy and consequently a violation of fundamental due process. They have suggested that when the court of first instance gives

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in revamping outmoded legal procedures generally and in encouraging more widespread use of group practice for those well above the poverty line but too poor to afford effective and continuing legal representation.<sup>36</sup>

Today, it is generally conceded that though indigents cannot even begin to think about hiring a lawyer, middle-income people in the big cities, especially, will also think twice before doing so.

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<sup>36</sup> Paulsen, *The Expanding Horizons of Legal Services—II*, 67 W. VA. L. REV. 267, 277 (1965).

The cost of an urban lawyer's services, except for real estate closings where cash in hand or a new home tend to give a glow to the transaction, or personal injury litigation, where almost everyone recovers, for most citizens is usually disproportionate to the results achieved, and, therefore, a luxury item.

The fault in most cases is not attributable to the lawyer himself. He has no choice but to charge for the many hours he spends in a lower court, not to speak of the discourtesies he endures, waiting for a calendar call on a single claim worth one or two thousand dollars. The fault, instead, lies with an archaic and rigid system which, in practice, imposes a sacrosanct attorney-client relationship on all except the truly affluent.



## LAY ATTORNEYS

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an affirmative decision that it also be affirmed on appeal except in those cases where the facts in *no way support* the decision of the court of first instance or where there has been a gross violation of procedural law. They argue that the court of first instance is better prepared to grant a just decision because it has had all the parties before it. And ultimately, who is to say that three prudent men in Pittsburgh are more or less wise than three prudent men in Chicago, New York or San Francisco in reaching a

decision on the validity of a marriage. If we are not prepared to change Canon 1014 in favor of the person, and if we cannot change our system of appeals, perhaps this suggestion can be the first step in giving a new and greater hope to those who seek the justice of the ecclesiastical tribunal.

(6) Finally, unlike the common law with which the lay advocate is familiar, they find our law too strict and rigid. There is little room for creativity. Like the common law, they feel that canon law ought to live and breathe and realistically reflect the needs of our people within the context of their existential experience.