Rights And Responsibilities Between Dioceses And Religious Communities

Nicholas P. Cafardi, Esq.
Rev. Jordan Hite, T.O.R.

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A question that has occupied the practice of diocesan attorneys has been the nature of relationships, and the allocation of risk and responsibility, between Bishops and major Superiors. It is a mixed canon law and civil law question. The presenters are well known to religious communities and the dioceses. Dean Nicholas Cafardi of the Duquesne Law School and Fr. Jordan Hite, a Past President of the Canon Law Society of America. Both have civil law and canon law degrees. Both have written and advised dioceses and religious institutes on these and other questions. Both have addressed the issues with great sensitivity and understanding of the complexities of the topic.

Rev. Jordan Hite: The way Nick and I have divided this discussion is that I will do the introduction and the personnel issues, Nick the contractual and property issues; and I will conclude.

INTRODUCTION

There are areas of church ministry in which both the Bishop and the major Superior of a religious institute have authority over the apostolate and the personnel in ministry, and the fixed assets used in ministry. This overlap of authority requires cooperation between the Bishop and the major Superior, and may also lead to conflict at times. The rights and responsibilities between a diocese and an institute or a Bishop and a major Superior are related to the available resources for ministry. The
United States has 47,563 priests—31,657 diocesan and 15,925 religious. Religious communities represent a substantial resource for ministry in this country. In addition, since we are dealing with all major Superiors and not just clerical major Superiors, there are 6,115 brothers and 85,412 sisters. Thus, the religious far outnumber the diocesan priests available for ministry.

I. PERSONNEL ISSUES

A. Assignment

The assignment of a religious entails various administrative protocols and legal considerations. Attorneys confronting assignment issues should have a sense of how a particular person got to where he or she is. There are three areas of Church law that need to be considered. First is the law of the Church, especially the Canons, which are the universal law of the Church. Second is the law of the institute. This includes its constitution, statutes, and any other governing documents approved by the Church. The third body of law, and possibly the most extensive, is the internal policies or guidelines of a religious institute. Many of the guidelines that apply to personnel are found in the policy books of religious institutes. Although certain processes are outlined in the Canons, the most extensive information is contained in the personnel booklets available for each institute.

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2 See id.
3 See Codex Iuris Canonici (1983). This was promulgated on Jan. 28, 1983 under the authority of Pope John-Paul II.
4 See 1983 CODE c.631, §§ 1–2. (indicating that canon law applies in accordance with local constitutions and the constitutions define the limits of the institute's power); see also id. c.587, § 1 (noting that an institute's code or constitution should contain provisions concerning governance, discipline, and administration).
5 See id. c.631, § 2 (indicating that the institute's own law determines the details for administering the institute); see also id. c.632 (stating that the institute's own law will determine local issues).
1. How is a Parish Entrusted to a Religious Institute?

It takes two approvals for a parish to be entrusted to a religious institute. First, the Bishop must offer or consent to the parish being entrusted to a religious institute. The consent of the major Superior of the religious institute is also required. The process of accepting a parish is usually found in its own constitution. Religious institutes commonly use two different processes. In the first process, the major Superior needs consent of the council to accept a parish. In the second, the council is presented with the proposal, discusses it, and consults with the major Superior.

2. How is a Religious Priest Assigned to a Parish Entrusted to a Religious Institute?

The answer to the above heading is found in the Canons. A priest, whether diocesan or religious, must follow a particular process to be assigned to a parish. Pastors and parochial vicars are nominated or proposed by the major Superior, and appointed by the Bishop. There are two different processes occurring, each with accompanying documentation. First, the major Superior sends a letter to the Bishop proposing a person for assignment to the parish in question. The Bishop makes the actual assignment. There are, therefore, two letters in the file of every assignment of a religious priest.

There is a pre-proposal process that is probably outlined in

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6 See id. c.520, § 1 (stating that the Bishop, with consent of the Superior, may entrust a parish to a clerical religious institute provided that one priest serves as parish priest or moderator); see also id. c.631, § 2 (indicating that the institute’s own law determines the details for administering the institute).

7 See id. c.520, § 2 (stating that entrustment may be in perpetuity or for a specified time); see also id. c.609, § 1 (requiring prior written consent of the Bishop, under the local constitution, to establish a religious institute).

8 See id. c.638, § 3 (requiring the written consent of the Superior given with the consent of the council).

9 See id. c.587, § 1 (requiring that the code or constitution of the institute contain rules for the governance of the institute).

10 See id. cc.521–25 (describing the qualities, term, and method of appointment of a parish priest).

11 See id. c.1748 (“[The Bishop is to propose the transfer to [the priest] in writing and persuade him to consent.”); see also id. c.519 (stating that entrustment is under the authority of the Bishop).
the personnel policies of the religious institute.\textsuperscript{12} There is often a process beyond the Canons that leads up to an assignment, or a letter of proposal by a major Superior, such as the personal referral process. As an example, consider a religious priest who attended the same seminary as a diocesan priest, who became a leader in his diocese. If the religious priest seeks an assignment within that particular diocese, he may contact that diocesan priest directly. Diocesan personnel may have more to do with the assignment of a religious priest than any internal personnel procedure. Diocesan attorneys must be aware that someone in the diocese may initiate the process or be very influential in bringing a religious to a diocese.

3. How is a Lay Religious (Sister or Brother) Assigned to a Parish?

Priests must be considered separately from lay religious sisters or brothers. This is because the Canons do not deal directly with the assignment of lay religious.\textsuperscript{13} Usually, this happens in one of two ways, and depends on whether an institute has a contract with a diocese and whether other personnel, besides clerical personnel, are included in the contract. There may be a provision that describes hiring personnel in addition to the pastors and parochial vicars. Such a provision may or may not be covered in the Canons.\textsuperscript{14}

In some situations, a member of the institute may undergo a separate hiring process even if the parish is entrusted to the institute. Certain positions, such as parish nurse, director of religious education, youth minister, or a music minister, may not be included in the contract. Moreover, a parish may hire religious personnel, that is, a member of any institute. A diocesan parish, for instance, may hire a brother, sister, or priest for the above offices. Such brother or sister would be covered by the specific contract that the parish uses for the hiring of those

\textsuperscript{12} See id. cc.515–44 (describing the establishment of parishes and the assignment of priests to the parish without describing the pre-proposal process).

\textsuperscript{13} See id. cc.224–27 (describing lay participation in the Church, but limiting such discussion to their responsibility to give witness to Christ); see also id. cc.228–31 (authorizing appointment to some roles within the Church, but failing to describe the process by which it is accomplished).

\textsuperscript{14} See id. c.1290 (observing local civil law rules in the formation and content of contracts).
The major Superior occasionally signs those contracts for the institute.

In the letters of assignment that go to religious, beyond the proposal letter and the letter of the Bishop, there will also be forms, customs, or traditions. For instance, some communities do not assign a religious to a ministry, college, high school, or even to a parish. Instead a letter goes out that states the religious is assigned to the local fraternity or the area under the jurisdiction of the particular local minister or Superior. The hiring process actually goes on outside the letter of assignment. In each and every case, the personnel process that the institute uses must be examined. Institutes have different ways of assigning people. Many religious are asked to survey the employment market, find a place, and present it to one of their personnel directors. Sometimes, instead of a letter of assignment, a letter of confirmation is issued granting permission to accept the particular position. The documents can vary greatly beyond the particular canonical process for the proposal and the assignment of a member of a religious institute to a parish.

4. How Have the Guidelines Affected the Process?

When misconduct cases first arose, there were many questions as to who would be responsible for the misconduct of a religious. There were a few dioceses that talked to religious institutes and asked them, as a condition of ministry, to consent to be liable for the misconduct of a member. Major Superiors did not agree with that position, and the leadership conference of men and women formed a committee to deal with the question. They took the position that they would not enter into agreements to be solely liable for the misconduct of members in diocesan positions. The Superiors began to dialogue with the Conference of Bishops, and out of that came the Guidelines.¹⁵ The Guidelines take the approach that everyone has responsibility

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¹⁵ See PROPOSED GUIDELINES ON THE ASSESSMENT OF CLERGY AND RELIGIOUS FOR ASSIGNMENT (1993) [hereinafter GUIDELINES]. The Guidelines were developed in collaboration with the Leadership Conference of Women Religious, Conference of Major Superiors of Men, Conference of Major Superiors of Women, and the National Conference of Catholic Bishops.
for the good of the Church. The last page of the Guidelines contains a model letter. The Guidelines are really used just as guidelines, especially the model letter, because it is what a major Superior sends to a Bishop proposing a candidate for assignment.

The third paragraph of the model letter includes the following sentence: “I have carefully reviewed our personnel and other records . . . and I have consulted with some who served with [him or her] . . . [and based on these inquiries] he or she should be given the assignment.” Consideration should be given to diocesan policies. When a priest is transferred, is there an inquiry about his performance? Some dioceses may have policies regarding such practice. There are probably many dioceses that do not have a policy to inquire about a priest’s performance following completion of an assignment. After six years, when the transfer of a parochial vicar or a change of a pastorate is required, diocesan personnel administrators and Bishops may know their people, but inquiries regarding his past performance in that ministry are infrequent. The same is basically true in religious institutes. Major Superiors are probably not going back and making inquiries. That does not necessarily mean that they do not know anything. A diocese may operate differently, but in religious institutes there are two dynamics occurring that provide a major Superior with information.

First of all, every major Superior is required to do a “visitation” of the members of the religious institute. Anywhere from once a year to once every four years, the major Superior or the Provincial talks with all the people in ministry, getting feedback from them and the religious with whom they serve. The second dynamic is that religious institutes, like dioceses, have personnel directors who tend to visit even more often, so that there is a constant inquiry occurring. The information developed does not always make it back to the file.

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16 See id. at 1, 3; see also 1983 CODE c.223, § 1 (“In exercising their rights, Christ’s faithful, both individually and in associations, must take account of the common good of the Church.”).
17 See GUIDELINES, supra note 15, app.
18 Id. app. at 1.
19 See 1983 CODE c.628, § 1 (requiring visits to the houses and members entrusted in accordance with the institute’s own laws).
20 See id. c.628, § 3 (requiring that the members reply truthfully and with clarity to these interrogatories).
Most major Superiors do not file written reports evaluating a
member's performance in his or her particular ministry. Many
major Superiors omit the part of the letter referring to the
inquiry because it is not a formal part of their process, and they
do not substitute language that refers to the visitation or
personnel visits. Major Superiors treat the Guidelines and the
letter purely as a guide, and they alter it to reflect their
procedures.

B. Supervisory Personnel

Once the religious is assigned, what is the process of
supervision? Canons 678 and 394 are written broadly with
regard to the Bishop. Canon 678, in the section on religious,
provides: “In matters concerning the care of souls, the public
exercise of divine worship and other works of the apostolate,
religious are subject to the authority of the Bishops . . . .” In
the section on Bishops, Canon 394 provides: “The Bishop is to
foster various forms of the apostolate in his diocese and is to
ensure . . . all works of the apostolate are coordinated under his
direction.” That is a major grant of authority resting with the
Bishop. The Canons are subject to interpretation by those who
sue the diocese when something goes wrong. There is a grant of
power given to religious. They are subject to their own proper
law and Superiors in their apostolic work. This excludes the
care of souls and the public exercise of worship. Religious
institutes do not provide directions or guidelines for the
celebration of liturgy to their own members that differ from
those guidelines of the diocese. That is in the care of the Bishop
of the diocese.

The canonical authority of religions refers primarily to the
internal governance and the exercise of the charism of the
religious institute. If the charism of the institute is proclaiming

21 See id. c.628, § 1 (requiring visits, but apparently not requiring
documentation of the content of the conversations).
22 See id. c.632 (indicating that the institutes own law will determine local
issues).
23 See id. c.394, §§ 1–2 (requiring the Bishop to ensure that the works of the
apostolate are coordinated and to insist on the faithful's participation); id. c.678, § 1
stating that religious are subject the authority of the Bishops).
24 Id. c.678, § 1.
25 Id. c.394, § 1.
the word of God, members may emphasize preaching in parish missions. If the charism is that of reconciliation or peace, members may emphasize those particular works. The institute’s proper law refers to all the laws that govern the institute. A third directive, which is even more interesting, is that a Bishop can also require members of an institute to live up to their own proper law. A Bishop becomes a kind of a guardian under Church law for the faithful living of the charism of the institute. The final provision states: “In directing the apostolic works . . . . Bishops and religious Superiors must proceed by way of mutual consultation.” Mutual consultation is the guideline. Often, the Bishop consults with the leaders of religious institutes to ensure that their activities do not overlap.

C. Removal from Ministry

Religious are subject to reassignment by the major Superior at any time based on the needs of the institute. Such a broad statement includes many nuances. Normally, Bishops inquire and major Superiors tell them how long a particular person is going to be available. Religious in the diocese may be reassigned if there is an election in the middle of someone’s assignment to a parish or a particular work, or if very important personnel die. If they are elected to office, there is not much choice. If the novice director dies or is too sick to carry on, a Superior may reach into a parish for a replacement. This authority of a major Superior over a member is not meant to be used so that regularly assigned people can suddenly be pulled out at the whim of the major Superior. Major Superiors understand thus there should be good reason in order for a religious to be reassigned.

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26 See id. cc.631–32 (indicating that the institute’s own laws govern most aspects of the institute).
27 See id. c.678, § 2 (requiring Bishops to insist on fulfillment of the obligation when the need arises).
28 Id. c.678, § 3.
29 See id. c.596, § 1 (granting Superiors authority over the members of the institute).
30 See id. c.523 (conferring discretionary authority to assign parish priests to the diocesan Bishop); see also id. c.538, § 1 (outlining conditions for removal or transfer of a parish priest by the diocesan Bishop).
31 But see id. c.682, § 2 (stating that removal is discretionary by the authority that appointed the religious).
A Bishop can remove a religious priest from a parish because the Bishop appointed him. Most removals originate with a call to the major Superior requesting that a priest be transferred. This request is predicated on the best interests of all concerned. The law allows the Bishop to remove the person notwithstanding the refusal of the major Superior. It is extremely doubtful that a major Superior would defy a Bishop's removal request. The removal of a religious hired by the parish may raise certain contractual concerns.

II. CONTRACTUAL ISSUES

Nicholas P. Cafardi: Before I get directly into the contract issues, let me start by pointing out a critical difference between the civil law and canonical systems that we need to be aware of. The civil lawyer, bound to act in "the best interest of the client," often takes this to mean full speed ahead, running over anyone that gets in the way. In canon law, however, the lawyer is required to mediate disputes first, before taking an adversarial position. This requirement is even in the Code of Professional Ethics for canon lawyers.

A good example of this difference is found in the canonical trial. The canonical trial is a judge-driven search for truth. In a canonical trial, the lawyers just sit there. The three tribunal judges ask all the questions. The most that a lawyer can do is to scribble a question and give it to the judges. If they deem it appropriate, they will ask the question. They are not required, however, to do so. It is very difficult, as a civil lawyer, to sit there listening to witnesses not telling the truth, without being able to ask them the two or three questions that would pin them into a corner. Very often, the judges ignore the lawyer's proffered questions. Their search for truth does not need to be adversarial to be effective.

This really is a different way of practicing law for civil lawyers, but the problem area that we are considering is one that involves both types of law—canon and civil—and we need to

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32 See id. c.1740 (granting the Bishop the authority to remove a parish priest); see also id. c.1741 (listing the reasons for which a priest may be removed).
33 See id. c.1446, §§ 1–3 (encouraging parties in all instances to reach an amicable settlement and requiring the tribunals to promote such agreements).
34 See id. c.1561.
be cognizant of the different values that each legal system pursues. Very often, there will be a civil lawyer representing both sides, and a canon lawyer representing both sides. But for the Church, the most important process must be the canonical process. So in these mixed civil and canonical disputes involving religious institutes and dioceses who disagree or have problems, an attempt to mediate issues must be made before charging full speed ahead at the other side, as civil lawyers are wont to do. While the canon lawyers are trying to do this, the civil lawyer must sit on his or her hands, allowing the canonical mediation process to work.

With that as a preface, there are certain canonical rules involving contract issues between dioceses and religious institutes that I should highlight. A diocesan Bishop must not entrust a parish in his diocese to a religious institute without a written agreement between the diocese and the religious institute. This agreement must indicate “the work to be done, the persons to be assigned to it and the financial arrangements.”

What is the work to be done? The scope of the work is comparable to civil law contracts. Obviously, the agreement will allow the public juridic person (the religious institute) to run the parish. But what does that mean? Certainly, to maintain a regular schedule of masses and devotions. The agreement may even want to state what the parish’s schedule of masses historically has been. It may identify the persons to be assigned to the work, not by name but by title. For example, there might be, obviously, a pastor, one or two assistant pastors, a team of co-pastors, and a number of other people—in other words, the resources that the religious institute is committing to this particular parish.

There are financial considerations as well. The disposition of the collections, gifts to the parish, and other parish income must be determined. In the case of an endowed parish (very few of them are), the disposition of the investment income of the parish must also be determined. Additionally, the manner in which the priests assigned to the parish will be paid and the amount of that remuneration will have to be decided. Very

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35 See 1983 CODE c.520, § 2 (requiring a detailed writing).
36 Id.
often, this can be handled by simply referring to diocesan pay scales in the contract.

The Code mentions the scope of the work, the personnel involved, and how the finances are supposed to be managed.\textsuperscript{37} It does not talk about what happens when the parties split. What will happen when the religious institute decides it can no longer supply the personnel that it takes to run this parish, when they walk away and are no longer there? The agreement should provide for such contingencies as well.

As an example, suppose that the diocese has entrusted the parish of St. Agnes to the Franciscan Fathers. After thirty or forty years, they have to leave the parish because they do not have enough personnel to keep the parish staffed. Within a few years of their departure from the parish, a will is probated in which somebody leaves $1 million to the Franciscans at St. Agnes Parish. Issues over where that money should end up will soon arise. The diocese is going to claim that St. Agnes Parish was named co-beneficiary at least (or maybe even the sole beneficiary). The Franciscans are going to assert that it is their gift. Therefore, it would be pragmatic to address these "termination" or "after termination" issues in the agreement.

"Works which the diocesan Bishop entrusts to religious are under the authority and direction of the Bishop ... ."\textsuperscript{38} Examples of works include retreat houses, hospitals, and schools. Entrustment of such programs to a religious institute is very similar to the entrustment of a parish. Both entrustments, of parishes and works, require that the diocese and the institute enter into a written agreement covering the scope of work, personnel, and the financial arrangements.\textsuperscript{39} The signed writing should include a termination clause covering the interests and objectives of the parties. It is unfortunate, however, that many entrustments are carried out without adherence to the above writing requirements.

The dioceses and religious institutes must begin following the canon law in this regard. Addressing these concerns at the contract formation stage would surely minimize the potential for

\textsuperscript{37} See id. (requiring a writing to specifically outline these details).

\textsuperscript{38} Id. c.681, § 1.

\textsuperscript{39} See id. c.520, § 2 (listing requirements for agreements governing the entrustment of a parish); see also id. c.681, § 2 (listing requirements for agreements governing entrustment of works).
future problems. And while the Code of Canon Law does not itself require that the specifics of termination be included in such entrustment agreements, that might well be the most important clause of all.

III. PROPERTY ISSUES

The property issues that I want to address will arise when a religious institute leaves a particular work in a diocese or drastically alters its presence in that work. These types of property issues can involve Catholic institutions and a diocese regarding questions involving assets worth many millions of dollars. But, it is not so much the money, as it is the work being done, that actually causes concern for the diocese. After all, the property owned by a religious institute in a diocese is the property of the institute. It does not become the property of a diocese. It is subject to the rules of the institute and to the canon law.

In canon law, there are two types of religious institutes. There is a religious institute of diocesan right and a religious institute of pontifical right. An institute of diocesan right is one founded by the diocesan Bishop who remains as the competent Superior of that diocesan institute. An institute of pontifical right, though active in a diocese, is one established by the Apostolic See. Its competent Superior is the Apostolic See, not the local Bishop. The property of religious institutes of pontifical right is under the oversight of the Holy See, and in some limited ways, of the local Bishop. The primary responsibility, however, belongs to the religious institute. Conflicts can occur between dioceses and religious institutes with regard to property whose status is changing.

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40 See id. c.1254, § 1 (stating that the “Church has the inherent right, independently of any secular power, to acquire, retain, administer and alienate temporal goods, in pursuit of its proper objectives”).

41 See id. c.1256 (indicating that ownership of goods rests with the juridical person who acquired them).

42 See id. c.1257, § 1 (stating that all ecclesiastical goods are regulated by the canons as well as an institute’s individual statutes).

43 See id. c.589 (distinguishing between the establishment of the pontifical and diocesan rights).

44 See id.

45 See id.
Alienation is the canonical term for the sale of property.\textsuperscript{46} The rules of alienation apply to actual sales, transfers, and any procedure in which the rights or interests of the religious institute in property are diluted. As a result, the alienation process has been extended to the granting of mortgages that are more typically part of a bond issue. An alienation proposal for an asset with a value exceeding $3 million requires the permission of the Holy See.\textsuperscript{47} As part of this process, which is not in the Code, the \textit{votum}\textsuperscript{48} of the local Bishop is requested as a standard practice of the Holy See. The local Bishop means the Bishop in the diocese where the property is located. The alienation of a Catholic hospital, college, or university in a diocese sponsored by a religious institute of pontifical right requires the permission of the Holy See. The Holy See will request the local Bishop to give his \textit{votum}. The \textit{votum} that the Bishop is issuing is not a veto. Some Bishops, however, misinterpret the \textit{votum} request as an opportunity to veto what the religious institute of pontifical right intends to do with its property. That appears to be more authority than the canon law grants. A Bishop attempting to veto a property transaction by a religious institute of pontifical right is probably overreaching. But if the asset is one belonging to an institute of diocesan right, then the local Bishop has a veto through the use of the \textit{votum} because he is the competent Superior.

There are other transactions that can be handled entirely within the religious institute without involving either the Holy See or the local Bishop.\textsuperscript{49} The institute may purchase property regardless of its price provided it follows its own internal process and has the free capital, as opposed to stable capital, to make the expenditure. It can also alienate stable assets worth $3 million or less. In other words, the involvement of the Holy See is

\begin{thebibliography}{99}
\item \textit{See id.} cc.1291–98 (providing the procedures for the alienation of property); \textit{see also} A.J. MAIDA \& N.P. CAFARDI, \textsc{Church Property, Church Finances and Church-Related Corporations}, 85–91 (1985); N.P. Cafardi, \textit{Alienation, in Church Finance Handbook}, 247–63 (1999).
\item \textit{See id.} c.1291, § 2 (requiring permission for alienation of goods that exceed the cap, were given to the church by reason of a vow, or are precious because of their artistic or historical significance).
\item \textit{Latin for a vow or promise. See} BLACK'S \textsc{Law Dictionary} 1577 (6th ed. 1990).
\item \textit{See} 1983 \textsc{Code} c.1274, §§ 1–5 (establishing a fund in order to support "the clergy who serve the diocese").
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triggered only when the asset is worth over $3 million.50

The acquisition of debt is basically what is involved in a bond issue. Catholic hospitals always seem to be going through bond issues. If the hospital opts for a bond issue, simply borrowing money using the property as security, as opposed to transferring away the property, the Holy See as of recent days is no longer requiring the votum of the local Bishop if the institute is of pontifical right. It would be unreasonable to expect the local Bishop to provide a votum regarding such complex financial transactions. The master trust indentures and various documents may reach a foot in thickness. The Canons require the local Bishop to participate in the property transactions involving a religious institute of pontifical right present in his diocese.51 The Bishop has the right to supervise the apostolate in his diocese.52 That is his job. The apostolate may be carried on by others, as opposed to just diocesan personnel.53 Catholic hospitals, universities, and nursing homes inside a diocese, even though they may be owned and operated by religious institutes, are still part of the apostolate of that diocese. The Bishop does have a say in how apostolates are carried on in his diocese. For this reason, if an apostolate is undergoing a substantial change, which is usually what alienation involves, the Bishop has to be a part of that process. His opinion should certainly be solicited by the religious institute very early in the process, because this will have a major impact on his diocese.

This is also an area where some very difficult disputes between dioceses and religious institutes have erupted. Very typically, the diocese does not want a Catholic institution of health care, nursing home, or university to undergo the corporate transformation that is being proposed, which in many situations involves board control passing into non-Catholic or secular hands.54 It will hurt the Catholic presence, as well as

50 See id. c.1292, §§ 1–2 (requiring permission of the Holy See when the value exceeds a certain maximum amount, but the sum is determined by the Episcopal Conference).
51 See id. c.616, § 1 (requiring consultation with the diocesan Bishop prior to suppressing an institute).
52 See id. c.394, § 1 (requiring the Bishop to ensure that all works of the apostolate are coordinated under his direction).
53 See id. c.394, § 2 (requiring the Bishop to urge the faithful to participate in the apostolate).
54 See, e.g., Patty Gerstenblith, Civil Court Resolution of Property Disputes
perhaps diminish the kinds of services that people need. A religious institute, however, may seek a corporate transformation in order to alleviate serious personnel and financial difficulties, including under-funded retirement accounts. Corporate transformations and other property issues can create substantial conflicts between dioceses and religious institutes.

Rev. Hite: The votum of the Bishop is one of the most important letters in the dossier that is sent to the Holy See. They look at it to see if a Bishop is in accord with the transaction that is being requested. Even in a situation where a votum is not required, it is considered courteous for the institute to communicate with the local Bishop about the proposed transaction.

Bishops do not want to learn from the newspapers that an institute or a sponsored apostolate have just borrowed $500 million. They want to know about it beforehand—and they should. It is courteous and polite, and it enhances the relationship between Bishops and religious institutes to have that kind of communication regardless of what the law of the Church or the practice of the Holy See is at any particular moment.

SUMMARY

In order to effectively deal with the myriad of personnel, contractual, and property issues facing the Church, it is essential that Bishops and major Superiors communicate and cooperate because they share power and responsibility. Bishops and major Superiors each have authority within their own realm. A major Superior's authority reaches to the members of the institution. A Bishop's authority reaches diocesan institutions

Among Religious Organizations, 39 AM. U. L. REV. 513 (1990) (discussing conflicts involving the disposition of church-held property and the difficulty of applying civil law judgments under the implied trust doctrine without transgressing upon ecclesiastical issues).

55 See 1983 CODE c.620 (defining the position of a major Superior); id. c.595, § 1 (defining the role of a Bishop); id. c.586 § 1 (granting true autonomy to the governance of each institute); id. c.594 (indicating that an institute of diocesan right remains under the diocesan Bishop); id. c.596, §§ 1–2 (granting the Superiors authority over their members and ecclesiastical power over internal and external governance of institutes of pontifical right).
and the members working in the diocese. The authority of the Bishops and major Superiors routinely overlap. For example, the characterization of the letter of nomination by a major Superior and a letter of assignment by a Bishop can be problematic. It is a purely canonical practice. But the characterization by an attorney in a particular case and the interpretation applied by a judge could lead to different results. The nature of the relationship between a Bishop and a major Superior is capable of being characterized in different ways—equal partnership, unequal partnership, or joint venture?

Bishops and major Superiors must exercise understanding, good will, and cooperation. A Bishop will have the opportunity to interact with many major Superiors. In a large diocese, there may be thirty or forty religious institutes. Similarly, the major Superior of a large institution which extends beyond a single diocese may interact with several Bishops. The frequency of their interaction requires good will and understanding in order to foster a greater sense of communication and cooperation.

The relationship between a major Superior and a Bishop often begins when a major Superior visits the members of a religious institution and the Bishop who shares authority over the members. The Bishop and major Superior then discuss the progress of the religious institution in the diocese. The ideal atmosphere of cooperation is illustrated by the practices of Bishop Wuerl in Pittsburgh. Bishop Wuerl would meet twice a year with the major Superiors of religious institutes. He would spend all day discussing the concerns of the major Superiors. It is in this type of atmosphere where cooperation begins.

Bishops and major Superiors must talk to each other when facing issues involving insurance carriers and their attorneys. Ideally, the Bishop and major Superior would meet concerning this problem and decide on a settlement. There is, however, no freedom to deal that way since their ability to direct a settlement is probably limited by the provisions of their insurance coverage. If they are not in agreement with the carrier, the carrier may not provide coverage.

56 See, e.g., Roman Catholic Diocese of Brooklyn, Welcome (visited Mar. 13, 2000) <http://www.dioceseofbrooklyn.org> (providing information and links to a variety of institutions such as schools and parishes governed by the diocese).
RIGHTS AND RESPONSIBILITIES

CONSIDERATION OF CASE STUDY NUMBER 1

Rev. Jordan Hite: In this case study, a religious priest is accused of misconduct. Although the priest has no prior history of misconduct, he is assigned to the provincial house during the investigation concerning his alleged misconduct. The party making the allegations decides to sue both the diocese and the religious institution that has authority over the priest. The insurer for the diocese wants to settle the lawsuit, and offers to pay half of the settlement amount. The insurer for the religious institution, however, does not want to contribute to a settlement. The Bishop for the diocese then personally contacts the major Superior of the religious institution and requests that the institution contribute its share to the settlement amount. The major Superior, however, indicates that the institution could not contribute without taking funds from its retirement account. This case study provides an illustration of some of the difficulties and potential conflicts faced by Bishops and major Superiors. How would you advise the diocese or the institute in this situation?

Sr. Judy Murphy (L.A.): It would be best to settle the case as fast as possible in order to assure that the insurer for the diocese pays. The insurer for the diocese can then bring an action against the insurer for the religious institute for contribution.

Luis G. Stelzner (Gallup): If I were the lawyer for the diocese, I would try to get my client settled one way or the other. I doubt that the insurance company would settle on behalf of both parties. In this type of situation, it may be necessary to settle on behalf of the diocese and let the religious institute handle its own affairs. It is important to work together, but if you cannot, you have to represent your client, and if the case has merit, I would try to settle it. Insurance companies can be common to both entities, as we often have the same insurance packages. Sometimes the insurance companies seek to settle together.

George Restovich (Winona): This is a difficult question to answer because there are so many nuances to be considered when deciding whether or not to go to trial. In a case like this, I see two things happening. The diocese says we have insurance money here, and it will not cost us a penny. The religious
institute, however, may go bankrupt if they agree to settle. If the Bishop and major Superior have a good relationship and they go to eat once a week, they simply agree to go to trial. This would be a good case to try.

James Geoly (Chicago): There are two other considerations that can affect this situation. Contribution laws allow a defendant to settle out separately. If you disagree with the course of action taken by the other party, you can opt out of the case. The plaintiff's bar is sophisticated and they believe in building war chests. If they have the opportunity to collect even a discounted settlement from the first defendant, they will take it and go headlong against the other one.

The second consideration is the reality of negotiating a settlement when separate insurers are involved. Insurers know full well that one of the primary reasons for settling these cases is to avoid public disclosure. Because the threat to go after the insurer later may not be credible, insurers can gain leverage. It is also important to consider the religious institute's relationship with the diocese. This is especially true if the religious institute has a good working relationship with the diocese, and does not want to jeopardize it. Problems can arise if a religious institute wants to settle the case and the diocese or its insurer does not want to settle. You want to avoid a situation where there is going to be a suit in the name of the religious institute against the Bishop. I suppose Bishops might feel the same way.

Bob Pleus (Orlando): I think the first order of the day is to try to get the case settled. Florida has a system of mediation, as I am sure a lot of the other states do. Mediation generally takes place in the context of trial or close to trial. It can, however, be used very effectively pre-trial.

CONSIDERATION OF CASE STUDY NUMBER 2

Mr. Cafardi: In this case study, a religious institute of pontifical right came to a diocese in the last century. It was actually invited there to start a separately incorporated Catholic college. The members of the religious institute held all of the college's board seats. In 1911, the college became a university, and a few years later added a medical school and a training hospital. The Catholic university did very well and received financial support from Catholics as well as non-Catholics. In
1967, two years after the conclusion of the Vatican Council, a majority of the seats on the university's board were given to lay people. Most of the new directors were Catholic. This change was made without the permission of any other ecclesiastical authority. Under the university by-laws, however, the President of the university would remain a member of the religious institute. For the most part, everything went along well, and the university and its medical center continued to thrive.

Earlier this year, however, the hospital started losing money and draining the resources of the university. In response to the changing nature of health care, the university decided that it must sell the hospital complex and retain only the medical school. Although the list of bidders included some Catholic organizations, the university board chose a huge, for-profit, national health care chain. The local Bishop read about this in the newspapers and protested over the fact that he has not been consulted, or at the very least, informed about the transaction. The Bishop understands that the hospital has to be sold, but he would prefer that it remain under the control of a Catholic organization. The President of the university maintains that the Bishop has no rights to assert in this situation. The President underscores that the university is not a Church entity and has not been since its incorporation in 1877, which made it a purely civil law entity. The President of the university further argues that the university could not be considered a Church entity after its corporate board passed into lay control in 1967. Under these circumstances, what are the rights of the parties, including the board, the religious institute, and the Bishop?

**Bernie Huger (St. Louis):** The Bishop's role is more than a *votum.* He has a responsibility to ensure that canon law is going to be followed in his diocese. The canon law requires permission for alienation of something of this magnitude. Should the Bishop find that canon law requirements are being ignored, he has an affirmative obligation to rectify any non-compliance.

**Mr. Cafardi:** The Bishop has an obligation under canon law to maintain a certain order of discipline in the management of the apostolate, the teachings of the Church, and also in carrying on acts of charity in this diocese. Moreover, he has to maintain a certain order in all his duties under the Code. The Bishop should inform the religious institute that, in his opinion, their action transgresses canon law. The Bishop cannot, however,
order the religious institute to sell the hospital to a Catholic organization because it is an institute of pontifical right. The Bishop’s sole remedy is to avail himself of the Holy See for assistance. Once this is done, it is up to the Holy See to get involved.

Rev. Hite: In this particular scenario, it is important to determine whether the founding of the university in 1887 or the change in corporate structure in 1967 qualify as alienations. The basic questions presented by this case have pragmatic utility, for they arise in a number of cases in a variety of forms.

Mr. Cafardi: The American Commentary on the Code of Canon Law, published by the Canon Law Society of America, opines that whenever a religious institute separately incorporates under civil law, it in fact becomes a non-Church entity. This viewpoint is commonly referred to as the “McGrath Thesis,” and is a rather common, but I think wrong-headed, opinion that you may run into with some canonists.

Rev. Hite: And other people would say that it was an invalid alienation.

Mark Chopko (U.S.C.C.): I would make one observation on the Commentary. I do not know a Bishop who in his heart believes that these institutions are not Catholic, however they may be structured. If they have a Catholic nameplate—such as St. Thomas, Notre Dame or Georgetown—then there must be a connection to the Catholic Church. Is there a twilight zone between the Church and its secular civil education? I know of no Bishop that holds this view.

Rev. Hite: Do they want the benefit of sharing in the Group Ruling?

Mr. Chopko: There were a number of universities who left the Group Ruling at the same time. This trend started during the celebrated Abortion Rights Mobilization case. A number of hospitals and universities, believing there was a risk associated

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57 United States Catholic Conference v. Abortion Rights Mobilization, Inc., 487 U.S. 72 (1988) (holding that in an action to rescind the tax exempt status of the Catholic Church and its institutions, a non-party witness can challenge a district court’s subject matter jurisdiction when defending against a civil contempt adjudication). On remand, the Second Circuit held that the plaintiffs, who were seeking the revocation of the Church’s tax-exempt status because of alleged participation in political activity, lacked standing and therefore the district court lacked subject matter jurisdiction. See United States Catholic Conference v. Abortion Rights Mobilization, Inc., 885 F.2d 1020 (2d Cir. 1989).
with staying in the Group Ruling, started to seek their own letter rulings. For ten years, there was uncertainty about what the district court was going to do.

**Bill Filice (San Jose):** What happens to the lay board, which has a fiduciary duty to sell an asset for the highest price? For example, in California, transactions involving health care entities must be approved by the Attorney General.

**Mr. Cafardi:** In civil law, the lay board's corporate fiduciary obligations are controlling. The only way the Church interest can prevail is if you can convince the lay board that there is another interest to be considered. A board, in exercising its fiduciary obligations, can say there is more than money at issue here; there are certain intangible values in keeping this institution Catholic.

**Rev. Hite:** In addition to that, all of these institutions have in their corporate mission statement a statement about the purpose of their existence that invariably has to do with ministry. Therefore, although I recognize the financial concerns, there are also corporate obligations that have to do with ministry and philanthropy.

**Fr. Sammie Maletta (Gary, Ind.):** I am both a canonist and civil attorney. As a canonist, the primary issue for me was when they transferred the power over to a lay board in 1967. That would be the alienation that would somehow dictate this deal.

**Rev. Hite:** One could argue that the restructuring of those boards was an alienation without permission.

**Mr. Cafardi:** The question, therefore, becomes: "What is the effect of an invalid alienation?" But, since this is a civil law gathering, we will stick with civil law.

**John Jarboe (Tulsa):** Whether there was an invalid alienation back when control was passed to the civil board is a valid question. If it was indeed an invalid alienation, who would have standing? What would be the appropriate forum? Conversely, does the fact that this transaction was never constituted as a canon law entity by the Bishop make the question moot? Was he just along for the ride as a member of a civil board if he never constituted it as a canon law entity?
Rev. Hite: The Bishop does not need to constitute it as a canon law entity. A pontifical institute can determine their own canonical structure. An institution like a hospital or university may or may not be a canonical entity. Most of these institutions are not considered canonical entities. They are not separately constituted as a juridic person. They are considered one of the sponsored apostolates.

Christopher Dodson (N.D. Catholic Conference): I have a question as to what constitutes a votum. We had a situation where a religious institute decided to sell two hospitals located in the same state. The institute decided that the best buyer would be a for-profit corporation. They asked the Bishop to give his permission for them to enter negotiations with that corporation. The Bishop granted his permission in writing and did not hear anything from the religious institute for approximately six months. After that period, he received a rescript from Rome approving the sale. The Bishop argued that he did not give his votum. Is it possible that the Bishop gave his votum without even realizing it?

Mr. Cafardi: Sounds like it. I would guess the letter got sent in the package to the Holy See, and they probably figured that he approved of the transaction.

Mr. Dodson: What could he do if a similar situation occurs in the future? I did not think that the letter, as submitted, was a votum. Also, can he do anything to alter what has already occurred?

Rev. Hite: You need to describe what you are sending. A votum letter does not always say "votum," so you need to be careful if you are advising the Bishop or his canonical advisor. You must characterize what you are sending, as there is little doubt that a religious institute would interpret a permission to negotiate as an approval to proceed with the transaction.

Mr. Cafardi: If there is no letter from the Bishop in the package, the Holy See will ask for one. In this instance, they probably considered the letter as meeting this requirement.

Mr. Chopko: Whenever I get asked to speak before groups that have numerous religious institutes, I have applied what I call the "one bite rule." You ignore a Bishop at your peril. To stress the separations within canon law and civil law is to do so at your own peril. If you are going to go to the mat with it and tell the Bishop that he has no power or authority here, it had
better be something that is really worth it. It is, after all, the last time you are going to get to do it. The St. Louis Hospital letters, for example, show that Rome had addressed the Jesuits, not the board, and said: “Fix it.” So Rome assumes it was dealing with appropriate religious Superiors. Remember, the Jesuits and the Archbishop of St. Louis were not dealing with civil structures. My guess is that Bishops will never let that happen again. You only have “one bite” with Bishops in those situations.

Mr. Cafardi: One of the things I liked about the St. Louis matter was the Vatican’s response. The Vatican essentially told the Society of Jesus, which was asserting the rights of the lay board, that because they did not ask for permission to transform this corporation in the first place, the transmutation was deemed not to have occurred at all.

Mr. Huger: The Vatican insisted that when the Jesuits put the lay majority on the board in 1967, all they were really doing was conforming to a wish to increase the involvement of the laity more in the works of the Church. It was not an alienation, and therefore, the property still remained the property of the religious institute. The religious institute still needed permission before it could sell the property. The Vatican simply articulated that this particular circumstance did not involve an invalid alienation.

Rev. Hite: In reality, this presents a problem for decisions made at the board level, as the board is comprised of a lay majority.

Mr. Cafardi: Civilly, that lay board has a lot of cards to play, and they must be involved in the solution for it to be an effective one. The fact that the Holy See is talking to the Jesuits in this case may resolve all the issues.

Bill Murphy (Providence): As a follow up, let us suppose that I represent the for-profit hospital chain that wants to buy this hospital. I have read in the Washington Post about the Bishop’s concerns, and I call you as counsel for the hospital and ask: “What written assurance can you give me upon which my client can rely, so that I know that you have the authority to sell this hospital?”
Mr. Cafardi: It is all in the practice of due diligence. When bonds are issued for Catholic hospitals, the underwriter will ask for a canonical opinion that the required ecclesiastical permissions for this transaction have been received. Likewise, counsel representing a prospective purchaser should ask for similar assurances that all ecclesiastical permissions necessary for the transaction have been received. If they cannot be given, a red flag goes up warning that you probably should not proceed.

Mr. Murphy: My response is to read the Serbian Eastern Orthodox case. This is entirely an internal matter for the Church. It has nothing to do with a legal right enforceable in court. It will never see the light of day as evidence.

Mr. Cafardi: I am not sure I agree with that, Bill. There is a Pennsylvania statute that says very clearly that whenever property owned by Church organizations or entities is transferred, it must be transferred in accordance with the internal discipline of that Church. It is likely that some states will take the Serbian case and make it part of their civil law.

Mr. Murphy: There are half a dozen ways to approach this situation. Behind this issue is the much larger issue of government defining the model of Church governance. That is the basic problem facing attorneys for the Church.

Mr. Chopko: I would just like to make one concluding observation on the Guidelines. We need to remind ourselves that they are guidelines, and the official title is Proposed Guidelines. They are guidelines that have been proposed to Bishops and major Superiors by their appropriate conferences. The conferences lack civil and canonical authority to promulgate binding rules, and so the only thing we can do is propose to Bishops and Superiors. The goal was to bring up the floor and bring down the ceiling by establishing at least some dependable


[T]he First and Fourteenth Amendments permit hierarchical religious organizations to establish their own rules and regulations for internal discipline and government, and... when this choice is exercised and ecclesiastical tribunals are created to decide disputes over the government and direction of subordinate bodies, the Constitution requires that civil courts accept their decisions as binding upon them.

59 See GUIDELINES, supra note 15.

60 See id.

61 See id.
guidelines around the country. It is up to Bishops and major Superiors through the processes that both Nick and Jordan illustrate in discussions, cooperation, and personal contact to build the mutual trust that would make these things work.