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THE SELECTION, TRAINING, AND REMOVAL OF DIOCESAN CLERGY

MOST REV. ADAM J. MAIDA, BISHOP OF GREEN BAY

Let me begin by reflecting on a bit of personal history. How does one receive the complex vocation of being a Bishop, a Canon Lawyer, and a Civil Lawyer? When I was ordained for the Diocese of Pittsburgh, I wanted to be a parish priest. Bishop (later Cardinal) Deardon called me in and said, "I want you to go to Rome and study Canon Law." I objected, "Bishop, I really want to study theology. That is my vision of priesthood. I want to learn more about God and how I can explain God to society and to the people."

"And," the Bishop said, "you'll study canon law. My secretary will give you your boat ticket." So, off I went to Rome. There was no dialogue and no opportunity to demur. When I returned from Rome, we had another bishop, Bishop (later Cardinal) Wright. Bishop Wright said, "You'll have a job in the Chancery and at night, just to keep you out of trouble, you'll go to law school." I replied, "No opportunity for dialogue?" To which he replied, "No. On the weekends you can help out in one of the local parishes." So I proceeded on a four-year course. As I look back on that dialogue, on what has happened over twenty-five years of my life as a priest, as a lawyer, and now as a Bishop, I can say that somehow or other my early education has served me well personally, and I hope, has also served the Church.

One of the things of which I am very proud is that I am a charter member of this organization. When I came together twenty-five years ago with many of you, we wondered what we were going to do. As you look at those early agendas, they were concerned basically with two areas. One was education—we were fighting for our rights regarding our schools in the late 1960s. The other area was taxes—we were concerned about tax benefits, exemptions, church pension plans, and legislation. Then, as we moved on, we became involved in life issues. Abortion came on the scene

in 1973 and we were able to add a dimension to that discussion. Then, later in the 1970s, there was another famous canon/civil lawyer who came forward with a theory—the McGrath thesis—which, if it were to be followed, would have pretty much wiped out our institutions. I wrote a volume which rebuts that thesis. Since that time, this has been a matter of much debate. Most of you as diocesan attorneys have had to grapple with how best to keep our nonprofit corporations, health care institutions, and local diocesan corporations “Catholic” and yet be mindful of our responsibilities to the civil law. Then came the host of liability issues as evidenced by the agenda we are discussing today. I can tell you that there is no one in the world who would have dreamed twenty-five years ago that I would be addressing you on the question of priest’s vocation and removal and the priest’s relationship with the bishop. As I indicated earlier, when the Bishop spoke, the people responded. That was the way it was. But today, the bishop gives an order and his priest may take him to court. These personnel issues are really my primary concern and in the forefront of the kind of legal advice you need to give the bishop. In the course of this presentation, I would like to focus on certain issues and also to have the opportunity for some dialogue with you.

A bishop’s relationship with his priest begins with a call from God, a vocation. Vocation is something given to an individual. It is the Church that recognizes the vocation in an individual. It is the obligation of the whole Christian community to foster and to pray for vocations, and yet it is the specific responsibility of the bishop, in the name of the Church, to call forward a candidate for priesthood. In our law and theology, no one has the *right* to ordination. And anyone who is preparing for priesthood, until ordained, has no rights as such within the Church. Having said that, I must also note that there are those who suggest otherwise. For example, some would ask whether there is an implied contract if one should “string along” a young man for eight years and, in the final days, decide there is no true priestly vocation. It does become problematic. So often, in making these decisions in a late stage of training, there surfaces the results from observation, information, conduct, or just a gut reaction about the candidate. Often enough, much of this information is confidential and sometimes not even provable in a court of civil law or even in Canon Law. As we deal with formation, bishops rely heavily upon their seminary faculty and formation personnel. On the other hand, there is constant dialogue between the Bishop’s vocation director and the bishop himself to assess the suitability of candidates for the priesthood. When bishops make the ultimate decision to ordain or to dismiss, I pray that none of us is arbitrary and that we try to be as fair as we can. However, I am waiting for the first lawsuit to come in which, on the pretext of implied contract, we might need to give serious attention to this when we ask someone to leave in the later years of formation.

One of the problems, when we make these decisions later in the formation process, is that we do so on the basis of information which is confidential and we face the confidential privilege area. What are privileged communications? To what extent can we act on them? To what extent are we liable if we act on them or receive our information in a way that is not civilly legal? Consider *Alberts v. Devine*,¹ a Massachusetts case in which a Methodist minister was fired from his job. He was already ministering and the local judicatory received information from his psychiatrist that indicated the minister was not suitable to function in a parish. Wherever he had been assigned, he had been divisive. So he was fired. A suit was brought against the judicatory. In *Alberts*, the plaintiff prevailed against the doctor and the local Methodist bishop because the bishop received confidential information from the doctor without the consent of the particular minister.

One of the first things we need to be conscious of whenever we work with priests and we make decisions that seriously affect their lives, is to be sure we obtain those releases from the client—the priest or the seminarian—so that when we act, we act with their consent. Otherwise there is the possibility for tort action.

The outline you received indicates the canons relevant to our topic. With this outline and as you read the canons, you will have a good sense of what the Church demands of bishops and expects of you as you give advice to the bishops. There are some requirements about the suitability of a candidate—he must be of a certain age, have certain qualities, have no impediments, and be unmarried.

From *Gonzalez v. Archbishop*,² we know that it is proper for the Church alone to judge the satisfaction of these requirements. As long as we live according to those requirements, the civil courts cannot force us to do things against what is our own policy. It is the bishop who admits a person to a seminary, and he requires certain documentation and evidence. No one has the right to go to a particular seminary. The bishop has full authority, responsibility, and accountability in this area.

There are a number of problems encountered in making a judgment about the suitability of a candidate. One of the areas today is the question of homosexuality. We distinguish between those who are “acting out” and those who have a homosexual orientation. For those who are acting out, we have directions from the Holy See that they should not be ordained. On the other hand, an orientation is a “red flag.” In discovering somewhere along the line that someone has an orientation, the bishop must take very serious precautions and make sure that this man can live

¹ 395 Mass. 59, 479 N.E.2d 113, *cert. denied*, 474 U.S. 1013 (1985).

² 280 U.S. 1 (1980).

out a life of priesthood and be faithful to his vows and his calling.

How do we glean this information about whether a man is homosexually acting out, or merely has a homosexual orientation? Most dioceses require some kind of psychological testing. Again, the courts have upheld our right to discover this kind of information as a qualification for suitability for ordination. It becomes a pastoral problem for the bishop once he has the information properly disclosed with the consent of the seminarian or the priest.

The other issue in which we are involved is the area of pedophilia. How do we discover the sexual anomalies that exist sometimes in a person because of his basic character? Tests might provide guidance, but in the end, it is the bishop who makes the decision. I do not make that decision, except when my legal counsel is at my right hand. Although Church law gives the bishop full discretion and authority to deal with these matters, the civil law implications can be very serious.

Another area is that of confidentiality. When there is a release and it is given to the bishop, how far does that release extend? I have a Vicar for Priests, and under Canon Law he is my alter ego. I share everything, or just about everything with him because he is like my mirror. We discuss issues and he needs information. I think the civil law would also allow that kind of exchange of information concerning a person, whether he be in a seminary or as a priest. Beyond that, do I share this information with the Personnel Board? There are times when I personally have had to decline, saying "for reasons I can't give you, we cannot give this man an assignment." Under Canon Law, when a bishop sees that a priest may be disruptive in a parish or disruptive in his personal life, the bishop has the right to demand that the man be tested and even take therapy for his own good.

I have indicated some of the concerns that bishops have regarding training and prospective ordination. Now let us look at the canonical process for dismissal. By virtue of ordination the priest automatically becomes, in some way, the serious responsibility of the bishop. A priest is ordained for the diocese and, as such, the bishop has the responsibility for his welfare. It is a "contract" that is assumed in Canon Law. He also has retirement rights by reason of incardination and we also need to respect these. Incardination in Canon Law, then, sets up certain rights and responsibilities between Bishop and priest. In civil law, I think, the questions you must ask concern the extent to which this relationship raises agency questions and the extent to which the bishop is liable for a priest's actions under the doctrine of *respondeat superior*. These become problematic areas in given situations as a result of the incardination and the resulting relationship of the priest to his bishop. The bishop has rather good control of the priest in Canon Law, assuming good faith compliance. However, in practice, it is another question.

I love the law. It is so easy to quote the Canons, but when you work with human beings together in pastoral ministry in the service of the people, the law must be modified, interpreted, and pastorally applied. In the Church, through incardination you “get married” to the diocese. How does one sever that bond? By excardination. It sometimes happens that a priest cannot survive in the cold climate of Green Bay and wants to move to Arizona or Florida (he feels called to a warmer climate). What does a bishop do? He can’t just have the priest move there and send him a check each month. He must find a bishop from that area who needs someone. When that happens, we have a “divorce proceeding” called excardination. The bishops involved agree that one bishop will receive the priest upon the other bishop’s recommendation. In that process, the Bishop of Green Bay would excardinate the priest, and the receiving bishop would incardinate him. It is vital that the bishops (or superiors of religious communities if they are involved) be told the whole story about the character of the priest. This can be a difficult area for the bishop who excardicates, as well as for the bishop who incardicates since civil liability might be involved.

I have not specifically referred to permanent deacons, but we also have the process of incardination and excardination of deacons. Since most permanent deacons are married men with other jobs, they tend to move all over the country. It is important for the bishop to know this and to give attention to the changing locations of the deacon so that the deacon who moves to another diocese does not remain the responsibility of the diocese in which he was originally incardinated. Once a man is ordained, the bishop must do something with him. A priest has the right to expect a job and the bishop has the responsibility to give him one. Once the bishop appoints someone as a pastor (as opposed to an associate or one involved in teaching) he gives him a Church office with specific rights attached to it. After giving him an office, the bishop is not as free to deal unilaterally with him. Some offices in the Church have a term. For example, Canon Law states that one can be a finance officer for five years and then the term expires. Or, one is appointed a judge for three years, and then the term expires. The person has no rights beyond the specified term. However, when someone is appointed pastor, the mind of the law is that this is a stable appointment, and it remains in effect until the day he dies or is legitimately retired. It is the mind of the Church that once a pastor is appointed, he is appointed for life.

While that sounds good, it is ineffective. The Bishops of the United States asked the Holy See for an exception because the idea of stability in office for life was unrealistic. In the United States, we are very mobile. Very little is stable for a lifetime. Because of this, the Bishops asked for a term of office for pastors. Since the Holy Father is the lawmaker, he can also change and modify the law. The Bishops of the United States re-

ceived an indult from the Holy Father to allow them to establish a term of office for pastors. For this country, that term is six years. A local bishop with his presbyterial council can adopt a policy that every pastor would be appointed, but that the term would be reviewed after six years. At that time he would either be reassigned or moved to another parish. If the local bishop, after hearing the presbyterial council, promulgates this policy, it becomes the law for that diocese.

Retirement is another issue. As you know, the Pope is elected for life. A bishop must submit his resignation when he reaches seventy-five. A pastor also is asked to submit his resignation letter at the age of seventy-five. Some dioceses have given the priest the option to do this at age seventy or even at sixty-five. However, a priest or pastor does not have to resign. Those who submitted a case to the Holy See discovered that if a pastor is seventy-five, healthy, and doing the job, he need not submit his resignation. He may be asked to do so, but he is not compelled. Resignation occurs at the end of life. The real world tells us that we do need to move people along. Ordinarily, we begin with a young priest in a small parish. We test his talents to see how he relates to the people, and then move him to another parish. A priest understands the system. There is a kind of voluntary relationship that exists between the bishop and priest with respect to transfer. We must be sensitive to the needs of our people, the talents of our priests and the good of the diocese as we move priests from place to place. We know over the years the system has proven to work well. But there is always the priest who will at some point refuse to move.

What can a bishop do? If everything is all right, the bishop cannot force the pastor to move, because he needs a reason to do this. Let me make a distinction here between transferring a pastor from one parish to another and removing a pastor. In the transfer of a pastor from one parish to another, if this is involuntary, *i.e.*, if the pastor does not want to move and the bishop insists, the bishop must have good reasons. This cannot be done arbitrarily. The bishop would have to identify a reason such as the lack of liturgical growth in the parish, weakness in administration, or divisions within the parish. There is a process in Canon Law which allows a bishop to transfer a pastor, giving him the same kind or better parish according to the procedure outlined in the law. If, however, the bishop removes a pastor against his will, the bishop must be very, very careful, and he must follow the very detailed procedure in the canons I've cited in the outline.

There is a case in process in which a Bishop removed a priest several years ago. The parish was divided, and, after consultation and for the good of the parish, the Bishop removed the pastor. The priest appealed the case to Rome before the Congregation for Clergy. The Congregation agreed with the Bishop and upheld the removal. The priest then appealed

the decision to the Apostolic Signatura, complaining that proper procedure was not followed. The case was remanded back to the Bishop for some changes in procedure. You'll note earlier that I stated that a bishop could send a priest for therapy, education, or whatever else would help him in his ministry. The Bishop in this case was using all the information he had gathered in the course of trying to work with the priest. He used that as evidence in his case, but the Signatura stated that he had not followed the law. This would be comparable to our law with the *Miranda*³ decision. There may be no question that a crime had been committed. But if the authorities did not follow the rules, the accused goes free. In this particular case, this is the concern for the local Bishop.

I use this instance because in advising the bishop in these matters, be sure that the Canon Law is followed. There may even be some civil law "fallout" in this particular case because of what has happened.⁴ In the case described above, there has been newspaper coverage with allegations of incompetence. To what extent is the priest's good name being ruined? To what extent is there defamation of character? As the allegations come, you would be called to give guidance to the bishop. What could you do at that point to control the damage? When the bishop removes a priest, the law is meticulous regarding causes and the process. Both must be followed meticulously. To remove a priest from an office is characterized as a penal process. The distinction is similar to criminal law, as opposed to civil or administrative law. When one is in the criminal area (and in penal process), one must be very careful that the law is followed. Almost any time a bishop is involved in imposing a penalty in Canon Law, his civil lawyer should be involved because there are potential civil law implications if the priest or the injured party decides to bring an action against the bishop.

Another case may serve our purpose here. I will state what was reported in the local newspapers. There was a case of a parishioner who took the pastor to the district attorney and accused the pastor of stealing money. Under Canon Law, stealing parish funds is a serious offense for which a bishop could remove the pastor. In Canon Law, maladministration itself is also a cause for removal. The civil law is now involved in investigating alleged criminal activity. The case is being filed as an action against John Doe with everything in secret. The Bishop involved knew about the situation, but faces a dilemma in the public forum of the courtroom. A bishop is a priest's best friend. He cannot accuse, but how much can he reveal? Beyond these serious questions, there are pastoral implications: An individual parishioner brings an action against a pastor by initi-

³ *Miranda v. Arizona*, 384 U.S. 436 (1966).

⁴ *Cf. Higgins v. Maher*, 210 Cal. App. 3d 1168, 258 Cal. Repr. 757 (1989).

ating a criminal investigation. Since a nonprofit corporation was involved, the Attorney General is also involved. One never knows from where the next lawsuit will come.

Let us move to the area of pedophilia and the process a bishop can invoke when he deals with a question of this seriousness. In these areas there is high profile conduct on the part of the priest. It is usually notorious and always extremely serious. How does a bishop deal with this on a practical level? In the canonical penal process, there must be three judges involved, the evidence from witnesses, and the opportunity for counsel for the accused. Also under our penal process, when a priest expresses sorrow, it derails the process. If he seeks reconciliation, in Canon Law we may give him absolution and say, "sin no more." But every civil lawyer knows that what is between God and his conscience does not satisfy either the victims (or the potential victims) or the civil law. In Canon Law we are limited because a diocese cannot proceed to a final determination of laicizing a priest, which is the ultimate way of bringing about that ex-communication and severing the legal bond between bishop and priest.

I am worried about legal issues, and I am worried about money, but in these cases where we receive massive newspaper coverage, I am more worried about the image of the priesthood. What does this publicity do to our priests who move to the pulpit every Sunday and preach? What difference does it make in our relationship with people? While one wants to be very human in his ministry, one is also cautious in his natural expression of affection. Priests who work with our youth on a daily basis can be hurt in their ministry. At this time we struggle to undo the damage that has been done probably for a whole generation of people.

For the integrity of the priesthood, we need a process where, in these cases, we can act quickly by administrative decree without going to the judicial process because the judicial process is slow and often not helpful. The priest could be protected with counsel and other protections since we must protect his rights. We know that the integrity of any society depends on the rights of individuals and how we preserve them. It is the same in the Church. We keep struggling to find a better way.