F. THE JUDICIAL PROCESS TO DISMISS FROM THE CLERICAL STATE

For the remainder of this document, we shall assume:

1. that we are dealing with a serious violation of canon 1395, §2 by a cleric's sexual abuse of a minor;
2. that, considering all the circumstances, there is good reason to dismiss the accused from the clerical state;
3. that the bishop has issued an initiatory decree under canon 1718 to commence the judicial process.

Note that the judicial process may be commenced even though the ordinary has already imposed a temporary expiatory penalty or even a censure through an administrative process, and such penalties are still in effect.

1. General Norms (cc. 1400-1665, 1721-1728)

The judicial process is governed by the canons on **trials in general** and on **ordinary contentious trials**, observing the special norms which refer to cases involving the **public good** and the particular norms found in canons 1721-1728 (c. 1728, §1). While we shall give the general outline of such a process, the individual canons must be consulted in detail to make certain that the process is properly carried out. We shall comment only on canons that may be especially significant for sexual misconduct cases or that raise certain questions about the best way to proceed.

2. Initiatory Decree (c. 1718)

The bishop commences the judicial process pursuant to the preliminary investigation by issuing a decree in accordance with canon 1718, §1. The decree should state that, based on the sufficiency of the evidence collected, the judicial process for imposing the penalty of dismissal from the clerical state can be legally set in motion and is appropriate in the light of the threefold pastoral goal of repairing scandal, restoring justice, and reforming the cleric.

Prior to issuing this decree it would be advisable for the bishop to consult with two or more qualified canon lawyers concerning the presence of the necessary requisites for bringing the accusation (including the timeliness required by the statute of limitations), the prospects for a successful prosecution of the case (including a consideration of the accused's imputability), and the expediency under the circumstances of imposing a

permanent expiatory penalty (§3). As stated *supra* in regard to the administrative penal process (Section E-1-a), it is also advisable for the bishop to discuss the situation with the cleric in question if at all possible. It will enable the bishop to discern more accurately the cleric's particular situation and the appropriateness of the judicial process.

3. Personnel

a. Promoter of Justice (cc. 1430-1436)

A promoter of justice is to be appointed in each diocese to intervene in contentious cases in which the public good could be at stake and to vindicate the public good in penal cases such as those involving dismissal from the clerical state (c. 1430). The promoter of justice functions as the prosecutor of a penal case. Like a plaintiff in a contentious case, he brings the action, educes evidence, argues the case, and appeals if necessary.

If the office of promoter of justice is vacant or the promoter is otherwise unavailable or inappropriate, may the diocesan bishop appoint someone to serve as *ad hoc* promoter of justice? Yes (c. 1436, §2).

May the defender of the bond serve as the promoter of justice in a penal case? Yes. There is no role for a defender in the case and therefore no conflict of interest (c. 1436, §1).

Must the promoter be a priest? Canon 1435 states clearly that a lay person may be appointed a promoter provided that the promoter is of unimpaired reputation, possesses at least a licentiate in canon law, and is noted for prudence and zeal for justice. On the other hand, canon 483, §2 requires that a notary, who is usually a lay person, must be a priest when the case involves the reputation of a priest. The same requirement is not made of the promoter. An argument could be made — *inclusio unius, exclusio alterius* — that the omission of an express requirement about the promoter in the face of the clear canonical requirement for the intervention of the promoter in penal cases supports the conclusion that the promoter need not be a priest. Still, in practice, it is probably more advisable for both the promoter and the notary to be priests unless a particularly knowledgeable and prudent deacon or lay person is available to serve as promoter.

Is it permissible for the promoter of justice to have conducted or participated significantly in the preliminary investigation? The 1917 Code (c. 1945) contemplated consultation by the investigator with the promoter of justice, thus implying that they were distinct individuals. A similar

statement is not found in the 1983 Code. There is no question that a judge would be disqualified if he had participated in investigating the case. Consequently, in order to protect his neutrality in the event of a judicial process in which he may be involved, the judicial vicar should not be involved in the preliminary investigation. But there seems to be no canonical bar to the promoter's fulfilling both roles.

The promoter's principal duty is to *seek justice*. His concern is the *public good*. He is not to prosecute if he decides that there is no basis for the prosecution. (Canon 1724, §1 recognizes that the promoter may renounce the instance even after the trial has commenced if the ordinary consents.) The same disinterested approach should mark the acts of the preliminary investigator. The parallel with most American civil jurisdictions confirms this approach. Police conduct a preliminary investigation to establish probable cause and make an arrest, but, with an arrest, the investigation is quickly brought to the prosecutor's office, which works with the police or with its own investigators to build up the case without violating the rights of the accused.

In canonical practice, it may be more judicious to have another diocesan official conduct the preliminary investigation and only bring matters to the attention of the promoter of justice when it is clear that a judicial process is warranted and desirable. There is nothing, however, to prevent the promoter from then carrying out a fuller investigation, particularly to obtain additional evidence needed to prove the allegations and justify the requested penalty.

b. Collegiate Tribunal (cc. 1419-1464)

How many judges should be appointed to hear the case? A collegiate tribunal of *three judges* is required for penal cases in which dismissal from the clerical state is a possibility (c. 1425, §1, 2°). If the case is considered especially difficult, the bishop may entrust it to a collegiate tribunal of five judges (c. 1426). Normally three should suffice.

Technically, there seems to be nothing to prevent the use of a single judge in such a case since the permission of the episcopal conference according to the provision of canon 1425, §4 has been granted without restriction (November 1983). Since, however, the judicial imposition of a permanent penalty will be a rather rare and extremely significant occurrence, the diocesan bishop should seek, if at all possible, to make certain that the tribunal is collegiate.

May the diocesan bishop serve as *praeses* of the collegiate tribunal? Yes,

but the bishop is strongly advised against it since a charge of bias might be lodged against him insofar as it was his duty to make the original decision to initiate the judicial process (c. 1419). In fact, if the bishop himself is a judge and the accused lodges an objection against him, he is required to recuse himself (c. 1449, §3). From a more practical point of view, the bishop may find himself with a serious conflict of interest since he owes a duty of pastoral care to all concerned: the accused cleric, victims, family members, witnesses. To be a judge in such a case may significantly hamper his pastoral relationship with one or more of these participants.

Must all three judges be priests? Not necessarily. The *praeses* ought to be the judicial vicar or an adjutant judicial vicar (c. 1426, §2); if these are not available, it must be a cleric. The other judges must simply fulfill the requirements of the law (c. 1421). In practice, however, it is probably more advisable for all three judges to be priests.

A judge who is appointed as a member of the collegiate tribunal must recuse himself if he holds any personal bias for or against the accused (c. 1448, §1). (The same holds true for the promoter of justice and any assessor or auditor used in the case [§2].) Awareness of public facts of the case, which are generally known by priests or others in the diocese, does not necessarily warrant recusal.

May judges for the tribunal be selected from outside the diocese *ad hoc*? Yes. This approach might avoid unnecessary questions about bias and may also permit the bishop to obtain the services of judges (or a promoter of justice, for that matter) who have greater expertise and experience in regard to such rare cases. The NCCB and the Canon Law Society of America can provide assistance in identifying canonists who are qualified to serve in such a capacity.

If an objection is lodged against a particular judge and the judge refuses to recuse himself, any appeal of such a determination should be heard most expeditiously by the judicial vicar, unless he himself is recused, in which case by the bishop (cc. 1449, §2 and 1451, §1). The decree resolving objections against a judge does not admit of appeal (c. 1629, 5°).

c. Advocate (cc. 1481-1490, 1723)

When the accused is cited, the judge invites him to appoint an advocate in accordance with canon 1481, §1 and sets a time period for that appointment. The normal period of time for such an appointment is ten days. If the accused fails to act in a timely fashion, the judge has the duty to name

a competent advocate prior to the joinder of issues, and the named advocate will function in this capacity as long as the accused has not yet personally appointed an advocate (cc. 1481, §§1&2; 1507; 1723, §§1&2). The judge should be careful to appoint a truly qualified and neutral advocate, possibly selecting someone who is not a member of the diocesan clergy if this seems appropriate.

Must the advocate be a priest? No. The advocate appointed by the accused or the advocate appointed *ex officio* by the judge must simply fulfill the requisites of canon 1483: eighteen years of age, of good reputation, a Catholic (unless the bishop permits otherwise), and possessing a doctorate in canon law unless approved by the bishop as otherwise expert in the law.

d. Notary (c. 1437)

The notary is to be present during each processual act and must notarize the written acts.

Must the notary be a priest? Yes (c. 483, §2). The chancellor or vice-chancellor, if he is a priest and is not serving in some other capacity in the trial, may serve as the notary, or the bishop may appoint another priest as notary *ad hoc* (§1) provided that he has a good reputation and is above reproach (§2).

Is the preliminary investigator, called for in canon 1717, disqualified from serving as notary? No. There is no express prohibition, but it is probably advisable to keep the two functions separated since the notary, as one who certifies acts and establishes their authenticity, is viewed as a completely disinterested person.

4. Introducing the Case

a. Submission of the *Libellus* (cc. 1501-1505)

Pursuant to the decree initiating the process, the bishop hands over to the promoter of justice *all the information* obtained in the preliminary investigation in order to assist him in drawing up a *libellus* of accusation to be presented in writing to a competent judge (c. 1721). The promoter of justice should normally present this accusatory instrument to a competent judge within five days from his receipt of the acts of the prior investigation unless further investigation is warranted (c. 1721, §1).

In accordance with canon 1504, the *libellus* must:

1. express before which judge the case is being introduced, the fact that the tribunal is being asked to find that the accused committed the canonical delict(s) specified and impose the penalty of dismissal from the clerical state, and the fact that the petition is being made by the promoter of justice at the request of the bishop.

2. indicate the basis for the promoter's right to make the petition and, at least in general, the facts and evidence that will be used to prove the allegations.

3. be signed and dated by the promoter and contain the official address of the promoter for receiving the acts of the case.

4. indicate the domicile or quasi-domicile of the accused.

b. Admission or Rejection of the *Libellus* (cc. 1501-1506)

Upon receipt of the *libellus* by a judge, the tribunal should be constituted and the *libellus* accepted or rejected by the tribunal within ten days (c. 1506). To do so, certain preliminary determinations must be made by the tribunal:

Competence (cc. 1407-1409). The tribunal must determine that it is competent to hear the case. Instead of the specialized bases for competence used in matrimonial cases, a tribunal of first instance with general jurisdiction is competent if it has jurisdiction for cases within the diocese in which the accused is incardinated and thereby possesses a diocesan domicile (c. 1408), or within another diocese where the accused possesses a domicile or quasi-domicile, or within the diocese where the alleged offense was perpetrated (c. 1412). (On domicile, consult canons 102-103.)

The doctrines of **connection** (c. 1414) and **prevention** (c. 1415) apply to penal cases if there are *de facto* several competent tribunals. When the case may involve dismissal from the clerical state, the matter is usually adjudicated by the tribunal of the diocese of incardination.

***Ius standi in iudicio* (c. 1505, §1).** The tribunal must then determine that the promoter of justice has been legitimately appointed for the jurisdiction in question, either generally or *ad hoc*, and therefore has standing to bring the action. At this point, it may also be necessary for the tribunal to determine whether the accused is competent

to participate in a trial and, if not, to appoint a guardian *ad litem* (curator). Appointment of a guardian *ad litem* should be a rare occurrence, appropriate only when the tribunal is morally certain that the accused is incompetent to participate in the trial.

Sufficient basis (c. 1505, §2). Once these determinations have been made and it is clear that the *libellus* fulfills the requirements of canon 1504, the tribunal may reject the *libellus* only if it is obvious that there is no basis whatsoever for the charges and that such a basis could not be established through the judicial process (c. 1505).

Upon rejection of the *libellus*, the promoter of justice has the right to lodge a recourse against the rejection within ten available days (*tempus utile*) before a competent appellate tribunal, or before the entire collegiate tribunal of first instance if the *praeses* rejected the *libellus* individually (c. 1505, §4).

5. Citation of the Accused: Commencement of the Action (cc. 1507-1512)

The judicial decree accepting the promoter's *libellus* can include within it a citation of the accused and the promoter either to respond in writing or to appear at a session for the joinder of issues (c. 1507, §1). The citation of the accused (or the *de facto* appearance of the accused and the promoter before the tribunal [c. 1507, §3]) represents the *commencement* of the first instance action (c. 1517). If the accused refuses to accept the citation or prevents it from being delivered, he is deemed to have been legitimately cited (c. 1510).

Since the action is commenced by the citation of the accused, the statute of limitations during which the action may be interposed continues to run until a valid citation occurs. This is an extremely important point to be observed in order to preclude a defense that the action is time-barred. Neither the initiatory decree of the bishop to start a judicial process nor the submission of a *libellus* by the promoter of justice nor even the decree admitting the *libellus* suffices. If the statute of limitations has expired between any of these preliminary events and the citation of the accused, the action will be time-barred. (cf. discussion *infra* on the statute of limitations, Section G-1).

If the accused cleric's whereabouts are unknown, may a penal process be initiated? Yes. Normally, such circumstances would qualify as the

recalcitrance addressed by canon 1510. If the case is brought in the diocese of incardination, the cleric would undoubtedly be deemed to have prevented citation by his failure to fulfill his duty of remaining within the diocese and in communication with his diocesan bishop (c. 283, §1). In such cases, of course, the court-appointed advocate must zealously and vigorously defend the rights of the accused and make every effort to locate the accused during the trial to elicit his cooperation. As Pope John Paul II stated in his *Address to the Roman Rota* in 1989: "[T]he parties can renounce the exercise of the right of defense in a contentious trial; in a penal case, however, there must always be a *de facto*, indeed a technical defense, because in a penal trial the accused must always have an advocate [cf. cc. 1481, §2 and 1723]."

Whether his whereabouts are known or not, once the accused is deemed to have been legitimately cited and an advocate has been appointed to represent him, the judge may declare the accused absent from the trial upon his failure to appear. The judge may decree that the case should proceed without the accused, in accordance with the provisions of canons 1592-1595 concerning incidental cases, because of the failure of the accused to appear in the action. (The fact that a penal trial may proceed with the accused *in absentia* is confirmed by the reference to it in canon 1724, §2.)

6. Administrative Leave of Absence (c. 1722)

Once the diocesan bishop has completed the preliminary investigation and issued the initiatory decree commencing a judicial (or administrative) penal process, he may, after consulting the promoter of justice and citing the accused, bar the cleric from exercising public ministry during the course of the penal process and may impose or forbid the cleric's residence in a given place or territory or even prohibit the cleric's public participation in the Most Holy Eucharist. Such a prohibition may be issued to preclude scandal, to protect the freedom of witnesses, or to safeguard the course of justice. Once the reason for such measures ceases, they must be revoked. They also cease automatically by operation of law once the penal process ceases. The penal process is deemed to continue until all appeals, by either accused or promoter, have been exhausted and the matter is settled by the execution of the judgment or the renunciation of the action (c. 1722).

As with any administrative act, the accused may have recourse against the imposition of an administrative leave within the judicial process. Such

recourse had been prohibited in the 1917 Code (c. 1958), but the prohibition was deleted from the 1983 Code. Nonetheless, unlike the usual recourse against the administrative imposition of a canonical penalty, recourse against the administrative leave of canon 1722 is not suspensive of the effects of the decree. Nor does such recourse impede the prosecution of the trial, which is expected to continue uninterrupted even though the recourse is still pending.

7. Joinder of Issues (cc. 1513-1516)

The tribunal must settle the terms of the prosecution based on the written and oral complaints by the promoter and responses by the accused (c. 1513, §1). Upon receipt by the tribunal of the nomination of an advocate by the accused or the appointment by the tribunal itself of such an advocate, the tribunal should determine whether the complexity of the case requires that the parties be convened for the joinder of issues (c. 1513, §2). This should normally be done within ten days. After hearing the parties or, if there is no need to convene the parties, after examining their written statements, the tribunal is to issue a decree to the parties specifying the question or questions to be answered in the sentence.

In this type of case, it should be made clear in the decree of joinder that the tribunal is being asked to answer two questions:

> **Guilt.** Whether the accused is **guilty** under canon law of the delict(s) with which he is charged.
>
> **Punishment.** If guilty, whether the accused should be **dismissed** from the clerical state or, in the alternative, whether some other type of penalty should be imposed.

8. Prosecution of the Case (cc. 1517-1597)

Once a case has been legitimately commenced, the tribunal itself can and must proceed, even *ex officio*. Consequently, unlike cases involving only private individuals, penal cases, because they involve the public good, afford the judge a great deal of discretion in calling needed witnesses, consulting with experts, and obtaining whatever evidence is available that will achieve justice (c. 1452). The instruction of the case normally can be done by one of the judges of the collegiate tribunal (c. 1428, §1), and the tribunal can carry out some of its activity outside its own seat to the extent permitted in other contentious cases (c. 1468-1469).

The accused is never required to give testimony or other information in a penal case. He can flatly deny the allegations without saying anything more. It is for the promoter of justice to prove the allegations about violation of the penal law, the imputability of the violation, and the appropriateness of the penalty. If the accused decides to write or speak, he has the right to do so last, either personally or through an advocate or procurator (c. 1725). Even so, the accused is not bound to confess his offense and he cannot be required to take an oath (c. 1728, §2). Thus, if the accused agrees to testify under oath, he cannot be asked under oath to confess. On the other hand, if, in his testimony, he voluntarily confesses, either totally or partially, to the promoter's allegations, such testimony is admissible.

The rule about confession applies only to *judicial* confessions. If the accused admits to someone outside of the judicial proceedings that he has committed some or all of the acts with which he is charged, proof of such statements is admissible in the trial by written instrument, deposition, or witness testimony. As admissible hearsay, the probative force of such evidence must be carefully weighed by the judges (c. 1537).

If the accused has already been subject to civil proceedings either in a criminal trial or in a civil action for damages and/or injunction, a certification of the civil court's judgments is admissible as proof of a criminal conviction or civil judgment (c. 1540, §2). Such certification, however, does not represent conclusive proof of the facts found by the civil tribunal. Nonetheless, the record of the civil proceeding may be introduced by the promoter or the accused to prove particular issues and may be given whatever weight the tribunal finds appropriate. In this regard, it is very important for the tribunal, insofar as it must reach moral certitude, to determine the various standards of proof used by the civil court. In a civil action, the proof is usually only the fair preponderance of the evidence, although at times the court may require more proof, perhaps rising to the level of clear and convincing evidence. In a criminal proceeding, all courts require that the elements of the crime be proven beyond a reasonable doubt, which probably comes closest to the canonical concept of moral certitude. Even in criminal proceedings, however, certain facts which may not be elements of the crime charged may be proved based on a lesser standard.

In these cases, it could very well be that the morally certain determination of guilt may rest solely on the testimony of the victim, testimony which

the accused may categorically deny and completely contradict. While normally the testimony of a single witness cannot constitute full proof, the circumstances may persuade the tribunal otherwise in individual cases. The old *regula iuris*, *"unus testis, nullus testis,"* has been deemed formalistic and legalistic and is considered superseded by canon 1573, which gives greater latitude to judges.

The evidence must be weighed by the judges in the light of all facts and circumstances. While direct testimony is important, oftentimes the coalescence of various pieces of circumstantial evidence is the turning point in the transition from mere probability to moral certitude about what acts were committed and what level of imputability was present.

Circumstantial evidence is truly indispensable in a penal case whenever the proof relies principally on the judicial confession of the accused or declarations made by him outside of the judicial proceedings. Whereas in an ordinary contentious case, not involving the public good, the judicial confession of one party relieves the opponent of the burden of proof (c. 1536, §1); such statements are not dispositive in penal cases. They are admissible but "complete probative force cannot be attributed to them unless other elements are present which thoroughly corroborate them" (§2).

Expert testimony can be helpful to the tribunal and is admissible provided that the qualifications of the experts are clearly established and their testimony is truly necessary for interpreting the facts, particularly regarding the imputability of the accused (cc. 1574-1581).

In these cases, it may be necessary for children to give testimony. If the child is less than fourteen years old, the child cannot appear as a witness unless the judge issues a decree declaring such a hearing expedient (c. 1550, §1). The judge also has broad discretion about who will be present when the child offers testimony (c. 1559). There is a considerable distinction between the judge's broad discretion to prohibit parties and advocates from the judicial examination of a child witness and the judge's narrow right to reserve a piece of evidence from publication of the acts, as noted below.

All priests, whether the accused himself or simply witnesses, are prohibited from testifying about anything made known to them by reason of sacramental confession even if the penitent himself requests that they testify about the matter. Nor is the testimony of anyone who may have overheard statements made on the occasion of confession admissible in any way to prove the truth of such statements (c. 1550, §2).

If the accused did not appear before the tribunal, the case may be prosecuted *in absentia*. If the accused changes his mind about appearing and asks to present proofs at a later stage of the process, the judge should normally require that such evidence be presented within fifteen days from the time the accused proposes to submit it. Such an untimely proffer of evidence by the accused should not be permitted to be used as a dilatory tactic (c. 1593, §1).

9. Publication of the Acts and Conclusion of the Case (cc. 1598-1606)

The parties and advocates have the right to inspect at the tribunal depository all acts not yet known to them. Since a penal case involves the public good, the judge has the power to decree that a particular act not be shown to anyone, provided that the judge takes care that the accused's right of defense is not prejudiced (c. 1598, §1). In a case involving dismissal from the clerical state, a decision to withhold any act from the accused should be extremely rare. While a particular piece of evidence in a case of matrimonial nullity might very well be kept confidential without disturbing the rights of the parties, the same reasoning would hardly apply to someone accused of a canonical delict and facing the imposition of a permanent expiatory penalty for his commission of it.

The judge issues the usual decree concluding the case once the promoter and the accused have had a reasonable opportunity to supplement the acts previously published (c. 1599). The decree of conclusion should normally be issued no more than ten days after the decree of the publication of the acts (c. 1598, §§1&2).

10. Sentence (cc. 1607-1618)

The sentence must answer the questions stated in the joinder of issues as originally decreed or later amended (c. 1611). The judgment must arise from the acts of the case itself and from the evidence submitted. The individual judge cannot base his decision on personal knowledge that he may have about the issues (c. 1608). In fact, if, at any stage of the process, a judge determines that his personal knowledge about a material fact would bias his decision in any way, he has the duty to recuse himself and withdraw.

The collegiate tribunal must meet to discuss the judges' individual opinions and then vote to answer each of the issues joined on the basis of whether the individual judge is morally certain about the answer. If the

majority of judges cannot arrive at moral certainty about an issue, the complaint of the promoter as to that particular issue fails and is to be dismissed. If the promoter of justice is unable to convince the majority of judges on the evidence that not even one delict was committed by and is imputable to the accused, the tribunal must dismiss the accused as absolved of all charges (cc. 1608-1609).

The sentence must address both elements of the joinder of issues: guilt and punishment (cf. *supra*, section F-7). It is not sufficient to determine the accused's guilt in committing one or more delicts. The appropriateness of the penalty of dismissal or an alternative penalty must also be specifically decided by the judges. In this regard, note the discretion in such penal cases afforded to both judges and ordinaries (cc. 1343-1346, 1348-1350).

The sentence is to be published as soon as possible with an indication of the ways in which it can be challenged (c. 1614). A copy of the sentence should be given to the promoter and the accused (c. 1615). The time limit of fifteen days within which to lodge an appeal does not begin to run until the accused is notified of the proper publication of the sentence (c. 1630, §1). The thirty period for prosecuting the appeal does not expire if the accused or the promoter, despite the formal publication of the sentence, has been unable to obtain a copy of the sentence from the tribunal (c. 1634, §2).

11. Renunciation (c. 1724)

The promoter has the right to renounce the action at the order of or at least with the consent of the bishop who decreed that the action should be brought. If the accused has not been declared absent from the trial, the consent of the accused is required for the tribunal to accept the promoter's renunciation of the instance (c. 1724). In other words, if the promoter concludes during the prosecution that the allegations are false or cannot be proven and seeks to extinguish the action, the accused has a right to insist that the action go forward and a sentence be published declaring him not guilty.

Similarly, if it becomes clear to the tribunal, at any point, that the charged offense was not committed by the accused, the tribunal has the duty to declare this fact *ex officio* in a judicial sentence and to absolve the accused, even if the criminal action has, for some reason, already been extinguished (c. 1726).

12. Appeal (cc. 1619-1640)

If the accused has been found guilty and the penalty of dismissal has been imposed, the lodging of an appeal by the accused within the prescribed time limit suspends the effect of the penalty until the appeal is disposed of (c. 1353). (As was mentioned above, the same effect results when recourse is had against an extra-judicial decree imposing a penalty.) Similarly, if the tribunal's sentence absolves the accused of the charges, the effects of such a judgment are also suspended if the promoter appeals the sentence.

The appeal is to be heard by the competent metropolitan or regional tribunal of second instance to which the diocesan tribunal of first instance is subject in such cases or by the Roman Rota sitting in second instance. In the event of a reversal of the first instance tribunal by the appellate tribunal or of an appeal of two conforming sentences because of new and serious proofs and arguments (c. 1644, §1), appeal in third instance in such cases is to the Roman Rota unless a special tribunal for third instance is designated in the particular case by the Apostolic Signatura.

Is appeal to the second instance tribunal mandatory? No. There is neither a mandatory review nor a mandatory appeal. It is an option of the accused and the promoter of justice (c. 1628). The promoter may appeal whenever he determines that reparation of scandal or restitution of justice has not been adequately served (c. 1727, §2). The right of appeal must be exercised within fifteen available days (*tempus utile*) from notification of the publication of the sentence (cc. 1614; 1630, §1). Lodging the appeal suspends the execution of the sentence (c. 1638).

Incidental cases should be decided as expeditiously as possible during the prosecution of the principal case or, if appropriate, left to its conclusion and incorporated into the definitive sentence (c. 1589, §2). There are no separate appeals against interlocutory sentences; all are handled together in the one appeal (c. 1629, 4°; *see also* cc. 1428, §3; 1449, §§1&2; 1459, §§1&2).

If a finding of guilt and the imposition of dismissal from the clerical state is upheld by the appellate tribunal, or there has been no legitimate appeal by the guilty party within the prescribed time limit, the tribunal of first instance orders that the sentence be executed (c. 1651). The guilty party is to be notified of this executory judicial decree in order to avoid prescription of the action to execute the penalty (c. 1363, §1). The bishop of

the diocese in which the first instance sentence was rendered then executes the sentence personally or through a delegate. At that moment, the guilty party is definitively dismissed from the clerical state (c. 1653).

13. Nullity of the Sentence and *Restitutio in Integrum* (cc. 1619-1627, 1645-1648)

Is the remedy of nullity of the sentence available in appropriate cases to the appellant? Yes (cc. 1619-1627). This is why it is extremely important to protect the accused's right of defense and to exercise care about all the factors listed in canon 1620. Cases involving a complaint of nullity can be treated according to the norms for the oral contentious process (c.1627; cf. cc. 1656-1670).

Is the remedy of *restitutio in integrum* available in appropriate cases to the appellant (cc. 1645-1648)? There is some debate about this point. A case affecting the status of a person never results in *res iudicata* and therefore *restitutio in integrum* is viewed by some as inapplicable to a case in which a cleric has been judicially dismissed from the clerical state (c. 1645). Another opinion, however, is that the penal case is not addressing status as such. The purpose of the case is not to arrive at a declaration of a person's status (which, as a statement of fact, is not *res iudicata*), but a declaration of a non-status fact (guilt of delict) and the juridical determination of the appropriateness of a penalty (dismissal). Thus, the determination would admit of *restitutio in integrum* if one of the five bases of injustice in canon 1645, §2 is clearly established. From a practical viewpoint, it is advisable for the tribunal to be aware of the five bases of *restitutio* and, insofar as humanly possible, to protect against their occurrence.

14. Secrecy and Disposition of the Acts (cc. 489, 1455)

The proceedings should be conducted in a confidential manner in order to protect the reputations of all concerned. Unlike a civil trial, the examination of witnesses is conducted by the judge (the entire collegiate tribunal may be, but need not be, present) with the assistance of a notary (c. 1561).

There is no requirement that the accused be present; in fact, he can participate only if admitted by the judge (c. 1559). The advocates may participate unless the judge "believes that the process must be carried on in secret because of the circumstances of things or persons" (c. 1559). In such a case, the advocates may submit questions to the judge in advance of the examination. As an officer of the court, however, the promoter of

justice has a right to be present at all procedural acts, and such acts would be invalid if the promoter was not cited or actually present (despite the lack of a citation), or at least able to inspect the acts before the sentence (c. 1433).

Even where others are present at the examination of a witness, the questioning is done by the judge unless he permits those who are present to pose questions directly to the witness rather than through him (c. 1561). The examination of children may be a circumstance in which others might be excluded from the session or in which specialists may be asked to conduct the questioning.

The judges, the promoter, and the notary are bound *ex officio* to secrecy (c. 1455, §1). Since reputations are always involved in such trials, the tribunal should bind all the witnesses, the experts, the accused, and the advocates and procurators by oath to observe secrecy (c. 1455, §3).

Upon completion of the case, the acts are to be filed in the secret archives. If all appeals have been completed and the sentence executed, the acts are to be retained for ten years after the date of the condemnatory sentence. If the dismissed cleric should die during that period, the acts are to be destroyed within one year after the date of death. In either case, a brief summary of the case and the text of the definitive sentence are to be retained in the secret archives (c. 489).