serve the ultimate purpose of the trial, the discovery of the truth and the fair dispensation of justice.

CHAPTER III

PROCURATORS AND ADVOCATES

CAPUT III

DE PROCURATORIBUS ET ADVOCATIS

Article 101

Legal Assistance

Art. 101 – § 1. Without prejudice to the right of the parties to defend themselves personally, the tribunal is bound by the obligation to provide that each spouse is able to defend his rights with the help of a competent person, most especially when it concerns causes of a special difficulty.

§ 2. If in the judgement of the *praeses* the ministry of a procurator or advocate is necessary and the party has not so provided within a prescribed time limit, the *praeses* is to name them, as the case requires, but they remain in function only as long as the party has not named others.

§ 3. If gratuitous legal assistance has been granted, it pertains to the tribunal *praeses* himself to name the procurator or advocate.

§ 4. In any case, the appointment of a procurator or advocate by decree is to be communicated to the parties and the defender of the bond.

Art. 101 – § 1. Salvo partium iure sese personaliter defendendi, tribunali obligatio incumbit providendi ut uterque coniux sua iura auxilio personae competentis tueri valeat, potissimum si agatur de causis peculiaris difficultatis.

§ 2. Si procuratoris vel advocati ministerium, iudicio praesidis, necessarium fuerit et pars intra terminum statutum non providerit, idem praeses eos, prouti casus ferat, nominet, tamdiu in munere mansuros quamdiu pars alios non constituerit.

§ 3. Si gratuitum patrocinium concedatur, constitutio procuratoris vel advocati ad ipsum tribunalis praesidem pertinet.

§ 4. Quovis in casu constitutio procuratoris vel advocati per decretum cum partibus necnon vinculi defensore communicanda est.

1. The current article goes beyond the provisions of the code inasmuch as it offers practical recommendations for those who provide legal assistance to parties in marriage nullity trials. In doing so, the Instruction emphasizes a critical element of the marriage nullity trial, one that has been lacking in practice in many

tribunals since the promulgation of the code.

2. The parties to an ecclesiastical trial are not presumed to have expert knowledge regarding either the procedural or substantive law at play in the process. The same situation pertains in civil legal systems where legal representation for parties before a court is either presumed or required. In the canonical system, the function of advocate (legal advisor) and procurator (procedural representative) are theoretically, although not practically, distinguished. Most often the same person will fulfill both roles for the same person standing before the court.

3. The procurator (*procurator*) acts on behalf of the party before the court in a way similar to the function of a *curator* for those who are deprived of the use of reason (see Art. 97). The actions of the procurator are taken as if they had been placed personally by the one represented. The person represented need not act in person, although here, as opposed to when a guardian is appointed, the person remains free to do so. However, the party cannot recall or challenge an act once it is placed by a legitimately appointed procurator. The procurator assists the party with regard to the formal, procedural aspect of the trial. In doing so, the procurator carries out those matters the party is obliged to perform during the course of the trial (see Art. 104 §2). The procurator does not, however, act on behalf of the party with regard to the substance of the trial. That is, the procurator neither offers evidence to the court as if a party nor presents observations to the court regarding the merits of the cause. The former function can be carried out only by the party personally, and the latter task is reserved to the advocate.

4. The advocate (*advocatus*) is the person admitted by the court to offer legal advice to the party. As such, the advocate cannot place any procedural acts on behalf of the party, a function reserved to the party himself or the procurator who stands in for the party. Rather, the advocate argues before the court on behalf of the party with regard to the substantive issues; that is, the merits of the cause.

5. The procedural law regarding marriage nullity trials expressly grants to the advocate the right to be present when the declarations of parties and testimony of witnesses is taken (Art. 159 §1, 1°). According to Art. 159 §1, 2°, advocates have the right to inspect the acts throughout the course of the trial, and not simply at the stage when the mandated, formal publication of the acts takes place (see Art. 229).

6. Parties are free to name an advocate and/or a procurator to assist them (see Art. 103) so long as the person named meets the requirements of Art. 105. The only exception to this rule regards parties who require a guardian (those lacking the

capability to place procedural acts; see Art. 97). They are not free to name advocates or procurators since the very fact that they require a guardian entails that they are precluded by their mental condition from making such a procedural decision.

7. As a rule, parties are not obliged to name an advocate and/or a procurator to assist them at diocesan tribunals. However, there is an obligation to do so for causes that come before the Roman Rota. Nevertheless, Art. 101 §2 stipulates that a judge (the *praeses* or the sole judge) may determine that access to an advocate and the services of a procurator are necessary. This is meant to assure that the parties are duly represented. The article offers no criteria for a judge to use when making a determination as to who should be given representation. The first paragraph (§1) mentions simply that "causes of a special difficulty" constitute a reason for doing so.

8. If, as is provided for in Art. 305, a party requests and is granted gratuitous legal assistance, then an advocate and/or procurator is to be appointed by the *praeses* or single judge. The Instruction does not indicate whether such an appointment still requires that the procurator receive a mandate to act from the party whom he or she represents. Presumably, this provision of the Instruction is analogous to the situation at the Roman Rota whereby a party who receives gratuitous assistance is given a representative *ex officio*. If the party wishes freely to choose a procurator/advocate from the list of officials authorized to function before the Rota then the party must personally pay the fee required for the services of the official. Otherwise, the *ex officio* procurator/advocate may act on the person's behalf.

   Abuses may arise with regard to this provision in regions where gratuitous assistance is the norm rather than the exception. For instance, in many tribunals in the United States (as well as other countries) at least part of the cost of a marriage nullity trial is subsidized by the diocese itself. The "fee" for a trial is set with this in mind. Technically, then, the party is still receiving assistance, albeit not a total waiving of the true cost of the trial. This does not entail that the tribunal may then appoint a procurator/advocate for the party simply because the diocese is subsidizing part of the cost of the trial. The party should still be free to choose another procurator and/or advocate, who must be suitably qualified and, in the case of the advocate, admitted to practice before the tribunal. Indeed, this holds as well in those dioceses that have done away entirely with fees for marriage nullity trials. Here the party may accept the court appointed procurator/ advocate, or, if the party so wishes, appoint (and pay for) another qualified person to carry out the function. In other words, the fact that a diocese covers some of the burden of the cost of a trial does not of itself remove the right of the party to name representatives (the *ius postulandi* remains intact).

9. In any event, the appointment of an advocate and/or procurator takes place by a decree communicated to the parties and the defender of the bond. By use of the phrase *in any case*, §4 is referring to appointment in light of the provisions of Art. 101 rather than appointment by the parties themselves.

10. The first paragraph (§1) retains the right of the parties to defend themselves in trial. As noted above, the limited discretion given to a judge in Art. 101 stands in a certain tension with the right of the parties to represent themselves; that is, to act on their own behalf rather than through a representative. The problem arises when the judge determines that the services of an advocate are necessary and so appoints one to function in the trial. The party can reject this advocate only indirectly, by use of another appointed by the party himself, and not through direct opposition to the appointment made by the judge.

    Yet more serious misgivings arise in light of the possibility a judge has of appointing a procurator to represent a party without the party's prior consent. In light of the task that a procurator is to fulfill (see comm., par. 3 above) it is difficult to see, first of all, how a person who is capable of acting procedurally will require the assistance of a procurator. Secondly, the objection can be raised that the procurator can incur judicial expenses by raising exceptions or other incidental questions that the party would not have wanted to raise. This means that the party would have to bear the court costs associated with the actions of the procurator which the party would not have otherwise placed.

Article 102 — Common Legal Assistance

Art. 102 – If both parties are seeking a declaration of the nullity of the marriage, they can name for themselves a common procurator or advocate.

Art. 102 – Si ambo coniuges nullitatis matrimonii declarationem petant, communem procuratorem vel advocatum sibi constituere possunt.

1. It is not uncommon for both spouses to support a possible declaration of the nullity of the marriage. In such cases, Art. 102 allows the same person to provide legal assistance and representation to both spouses. This counts not only for the role of advocate, but also if the spouses wish to nominate a procurator to place procedural acts for them before the court.

2. This reasonable norm recognizes that the spouses as parties to the process (as the title of Chapter II indicates) play a different role than they would in an ordinary contentious trial. The procedural means for the realization of their request (the declaration of the nullity of their marriage) serves to secure their legal rights, rights which are best safeguarded through the formalized process

of the trial and the investigation of the truth that occurs there.

Article 103 **Nomination of Advocate and Procurator**

Art. 103 – § 1. The parties can name a procurator separate from the advocate.

§ 2. Each person can name only one procurator for himself, who cannot appoint another in his place unless the express faculty has been given to him to do so (can. 1482, §1).

§ 3. If, however, for a just cause several have been appointed by the same person, they are to be so designated that prevention is operative among them (can. 1482, §2).

§ 4. Several advocates can still be named at the same time (can. 1482, §3).

Art. 103 – § 1. Partes constituere possunt procuratorem ab advocato distinctum.

§ 2. Unicum sibi quisque potest constituere procuratorem, qui nequit alium sibimet substituere, nisi expressa facultas eidem facta fuerit (can. 1482, § 1).

§ 3. Quod si tamen, iusta suadente causa, plures ab eodem constituantur, hi ita designentur, ut detur inter ipsos locus praeventioni (can. 1482, § 2).

§ 4. Advocati autem plures simul constitui queunt (can. 1482, § 3).

1. Although it is generally advisable that the same person be appointed to represent a party for procedural acts (procurator) and to advise the party and argue on his or her behalf regarding the merits of the cause (advocate), the law permits separate persons to be named to carry out the role of advocate and procurator. A person appointed to fulfill both responsibilities is commonly referred to as a either a procurator-advocate or, less frequently in English speaking tribunals, as a *patronus* or patron.

2. The appointment of more than one procurator brings with it the risk that the mandates for representation will be ambiguous, resulting in contradictory actions being placed by the procurators. Accordingly, §2 restates the general norm of c. 1482 §1 that each party may name only one procurator. All the same, when more than one procurator is named, prevention must apply among them: see comm., par. 4 below.

3. The procurator stands in for the party represented with regard to the procedural course of the trial (see Art. 104; comm., par. 3). In doing so, the procurator is expected to have the best interests of the party in mind. Thus, when naming a procurator to represent them, parties should be able to have confidence that the procurator will, in fact, act so to further their legal interest. An incompetent or

negligent procurator can damage the party's interest in ways that cannot be remedied since the law does not admit challenges against legitimately placed acts of a procurator. Without an express faculty (or permission), the procurator cannot appoint others to function for him. The requirement that the faculty be expressly given excludes the possibility that merely implied or tacit permission might suffice.

4. Just cause would be required to deviate from the general norm of §2, that a party name only one procurator. If this is done, prevention takes hold among procurators with regard to who may act before the court. The procurators named must be ranked according to who was first named, or, if they were all named at the same time, by who acted first. The law does not state who is to verify that there is a just cause for naming more than one procurator. According to Art. 109, the judge is authorized to reject procurators and advocates for grave cause. However, a grave cause is not required for the judge to intervene in the question of whether or not there is a just cause for the naming of multiple procurators.

5. There is no objection to the naming of multiple advocates since they are not authorized to represent the procedural interest of the parties in the process. This precludes the possibility of confusion arising should more than one advocate act. Several persons can carry out in common the task of offering legal advice to the parties and arguing the merits of the cause on their behalf. This does not mean that the court will necessarily receive observations from all advocates appointed. Rather, the party himself will benefit from access to multiple sources of legal counsel.

Article 104 **Duties of the Advocate and Procurator**

Art. 104 – § 1. The advocate and procurator are bound according to their function to protect the rights of the party and to keep the secret of office.

§ 2. It pertains to the procurator to represent the party, to present the libellus or recourses to the tribunal, to receive its notifications, and to inform the party of the state of the cause; but those things pertaining to defense are always reserved to the advocate.

Art. 104 – § 1. Advocatus et procurator pro munere suo tenentur tueri iura partis atque secretum officii servare.

§ 2. Procuratoris est partem repraesentare, libellos aut recursus tribunali exhibere, eius notificationes recipere, atque partem de statu causae certiorem facere; quae vero spectant ad defensionem semper advocato reservantur.

1. The disciplinary provisions of Art. 111 can be applied against advocates and procurators who violate the duty of their office to protect the rights of the persons whom they assist and represent.

2. The various duties assigned to the advocate and procurator are treated separately in this article. This is because parties may name a legal representative to fulfill only one of the functions mentioned here, that of offering legal advice, with the party himself fulfilling the other, the placing of procedural acts. Alternately, a party might name one person to carry out both functions or name two persons, with one assigned to each of the roles.

3. The function of the procurator (see Art. 101; comm., par. 3) is to stand in for the party with regard to the placing of procedural acts during the course of the trial. Among the tasks assigned to the procurator, §2 mentions the presentation of the *libellus* and lodging of complaints and other types of recourse. The lodging of an appeal also belongs to the duties of a procurator. The procurator also functions as a representative of the party for the purpose of the communication of decrees and other dispositions of the court. Those things communicated to the procurator are considered to have been communicated to the party as well. From this it follows that the procurator has an obligation to inform the party he represents of such communications.

4. Paragraph two (§2) describes the duty of the advocate (see Art. 101; comm., par. 4) succinctly as one of *defense*. This makes it clear that the Instruction does not intend the advocate to function solely in defense of the principle claim of the party before the court (the question of the nullity of the marriage) but also with regard to any other assertion proffered in favor of the interests of the party. Naturally, the advocate of the petitioner has the duty to convince the court of the justification for the introductory petition. However, this duty demonstrates as well that the function of the advocate is limited to the sphere of argumentation. For instance, the advocate can evaluate witness testimony in his brief to the court, but he cannot submit requests for witnesses to be deposed. That task belongs to the procurator.

Article 105 — Qualifications for Advocates and Procurators

Art. 105 – § 1. The procurator and advocate must be of good reputation; in addition the advocate must be a Catholic, unless the Bishop Moderator allows otherwise, and a doctor in canon law, or otherwise truly expert, and approved by the same Bishop (cf. can. 1483).

Art. 105 – § 1. Procurator et advocatus esse debent bonae famae; advocatus debet praeterea esse catholicus, nisi Episcopus Moderator aliter permittat, et doctor in iure canonico, vel alioquin vere peritus, et ab eodem Episcopo approbatus (cf. can. 1483).

§ 2. Those who have the diploma of Rotal Advocate do not need this approval; however, the Bishop Moderator for a grave cause can prohibit them from practicing in his tribunal; in such case, recourse can be had to the Apostolic Signatura.

§ 3. The *praeses* because of special circumstances can approve as procurator *ad casum* someone who does not reside in the territory of the tribunal.

§ 2. Qui diplomate Advocati Rotalis sunt ornati hac approbatione non indigent; Episcopus Moderator autem gravi de causa eos a patrocinio exercendo in suo tribunali prohibere potest; quo in casu datur recursus ad Signaturam Apostolicam.

§ 3. Praeses ob peculiaria adiuncta ad casum uti procuratorem probare potest, qui in ipso territorio tribunalis non resideat.

1. The sole and indispensable qualification for a person serving as procurator is that he actually be capable of fulfilling the functions required of him during the trial. This means he must be truly capable of acting procedurally before the court, possibly on behalf of a person who would not otherwise be suitably qualified to place procedural acts.

   The requirement that the person enjoy a good reputation is certainly reasonable, but it is also rather impractical. Despite the provision of §3, there is no licensing procedure for the admission of a procurator, and so no concrete means is in place for the determination of whether or not this particular qualification has been met. Mere doubt as to a person's good reputation should not constitute the grave cause mentioned in Art. 109 that could lead to the rejection of the procurator by the sole judge or *praeses*.

   Moreover, the code does not exclude either baptized non Catholics or the non baptized from functioning as procurators. However, the party who appoints a procurator would do well to note that the person who carries out this task should have sufficient understanding of and appreciation for the process being conducted before the ecclesiastical tribunal. Otherwise, the procurator will not serve properly the interests of the party he or she represents.

2. There are more qualifications necessary for a person to serve as an advocate than there are to function as a procurator. Depending on the nature of the particular cause being tried, the advocate can exercise a greater influence on the substantive outcome of the process than would the procurator. This is because the advocate is charged with persuading the court of what the advocate considers to be the just, substantive outcome to the process. This, in turn, requires that the advocate be well versed in the substantive or material law of the code regarding the matter before the court. Specifically, the advocate must be familiar with the law and jurisprudence regarding the various grounds of nullity. In light of this serious responsibility, the law adds additional

qualifications to those necessary to function as procurator.

The advocate must also:

- as a rule, *be a Catholic*; that is, a baptized Catholic or one received into full communion into the Catholic Church after baptism. It is reasonable to require as well that the advocate not have left the Church by a formal act following baptism or full reception (see c. 1117). The bishop moderator (see Art. 34) can also allow non-Catholics to function as advocates provided the moderator discerns that the person is capable of fulfilling the role of legal adviser according to and in the spirit of the canonical legal system;

- *possess a good reputation.* Since the advocate – as opposed to the procurator (see comm., par. 1 above) – requires approval before he or she can function, the qualification of possessing a good reputation can be more easily considered during the approval process. The Apostolic Signatura stated in a declaration of July 12, 1993, that persons who are living in an irregular union, concubinage, or other type of unacceptable intimate relationship are not to be approved for functioning as advocates (Prot. Nr. 24339/95 V.T.; published in *Periodica* 82 [1993] 699-700). Further, if such persons are already on the list of approved advocates, their names can be removed from it once the irregular situation comes to light.

- *possess a doctorate in canon law* or at least be truly expert in it. It remains unclear why the Instruction, like the code itself, does not indicate that a licentiate in canon law suffices for fulfilling the function of advocate. As the law stands, a higher academic degree is required for a person to function as advocate than is necessary for someone to function as a judge (see Arts. 42 §1 and 43 §2). However, the norm does not insist that the doctorate be solely in canon law. A person can also be truly otherwise expert in the sphere of canon law necessary to function as a legal advisor in a canonical trial. This allows, for instance, persons with degrees in secular law to function as advocates in the ecclesiastical system provided they do, in fact, have some expertise in the applicable canon law. It is always the case that the suitability of an advocate to serve the client's interest depends largely on the advocate's knowledge of the canon law. So, too, in broader terms, does the ability of the advocate to contribute to the trial process so it achieves its proper end, the discovery of the truth regarding the matter before the court.

Caution must be taken with regard to the use of so called "lay advocates" to function as advisors to parties in ecclesiastical nullity trials. The practice has arisen in some tribunals where persons without any knowledge of canon law, or very little foundation in it, are trained in the marriage law of the Church through a series of workshops or seminars. The persons are then assigned to

assist parties as advocates, even if the actual term advocate is not applied to their position. The practice attempts to provide at least a modicum of legal advice to parties before tribunals that do not have a sufficient number of qualified advocates. Although it can be argued that the practice is better than not having anyone assist parties, concerns still surround its use. It is first of all difficult to presume that the persons will, in fact, have been trained to the degree that they are "truly otherwise expert" in the substantive law of the Church. Secondly, the parties have a right to access to an advocate qualified according to the expectations of the law. This assures that the party will enjoy a fundamentally sound defense throughout the course of the trial, but most especially when it comes to arguing the interests of the party before the court. Finally, the danger arises that if the "lay advocates" are not, in fact, sufficiently trained to function as legal advisors, the judge himself will feel compelled to intervene, assuming the role of advisor to a party who is otherwise unable to find proper legal advice.

3. The diocesan bishop must approve the advocate to function either generally for all causes or specifically for determined ones. If the approval is given generally, the name of the advocate should be included in a register of advocates (*album advocatorum*), something discussed in Art. 112. Without the approval of the diocesan bishop, the advocate should not be admitted to function at the tribunal. This is so even if the party has appointed the advocate.

4. Whoever possesses the diploma of a Rotal advocate is authorized without need of further qualification (including approval) to function as an advocate on all diocesan and interdiocesan tribunals (§2). The grave cause required for a bishop moderator to forbid the advocate from functioning as a legal advisor – the text speaks here of *patrocinium* – should correspond with the notion of grave cause applicable in terms of Art. 109.

5. The wording of §3 implies that the procurator should have a residence in the territory of the jurisdiction of the tribunal. This is a practical provision of the Instruction. A procurator is expected to have a residence in the jurisdiction of the court since he will be functioning on a regular basis at the court. This will include the reception of notifications from the court regarding procedural acts placed before it. Thus, it is helpful if the procurator has a residence in the jurisdiction to which notifications can be sent (see Art. 116 §1, 4°). This expectation arises partly from the experience of the Roman Rota (see Art. 48 §3 of the norms of the Roman Rota; citation at Art. 1, comm., par. 4) whose own work is encumbered by the need to send judicial notifications to addresses throughout the world. All the same, with regard to diocesan and interdiocesan tribunals the requirement of the Instruction is not commensurate with the stipulations of the code according to which the procurator requires no approval in order to function. The procurator's place of residence is irrelevant as far as

appointment by the parties is concerned. Nor does the presiding judge have to approve or otherwise give permission for a particular procurator to function. Thus, the code would not permit a judge to exclude a person from functioning as procurator based solely on the fact that he or she does not have a residence within the territory of the tribunal.

Article 106 **Mandate**

Art. 106 – § 1. Before a procurator and advocate can take up their function, they must deposit an authentic mandate at the tribunal (can. 1484, § 1).

§ 2. Nonetheless, in order to prevent the extinction of a right, the *praeses* can admit a procurator even before the mandate has been exhibited, with a suitable guarantee having been offered, if the matter so warrants; any act lacks force, however, if the procurator does not properly present an authentic mandate within the peremptory time limit to be set by the same *praeses* (cf. can. 1484, § 2).

Art. 106 – § 1. Procurator et advocatus antequam munus suscipiant, mandatum authenticum apud tribunal deponere debent (can. 1484, § 1).

§ 2. Ad iuris tamen extinctionem impediendam praeses potest procuratorem admittere etiam non exhibito mandato, praestita, si res ferat, idonea cautione; actus autem qualibet vi caret, si intra terminum peremptorium ab eodem praeside statuendum, procurator mandatum rite non exhibeat (cf. can. 1484, § 2).

1. As a rule, a procurator can function on behalf of a party only after first having received a mandate to do so from the party to be represented (for advocates, see comm., par. 5 below). The procurator can act without a mandate only in the cases mentioned in Art. 101 §§2 and 3; that is, if the *praeses* determines one is necessary and the party has failed to name one, or if gratuitous legal assistance has been granted to the party. This same norm applies to advocates only in a limited way. In order for an advocate to function before the tribunal on behalf of a party the advocate must present a mandate from that party. Otherwise, the judge does not admit the advocate. However, one cannot characterize the mandate as a condition for the validity of the actions of the advocate.

   The tribunal can admit the person appointed only if the mandate is presented in a reliable form. The wording of §1 presumes that this mandate will be in written form. The date and place where the mandate was issued should be indicated in order for the judge to be able to verify the authenticity of the mandate. The signature of the one granting the mandate should also be clearly identifiable. Canon 1105 §3 applies by analogy in cases where the mandator cannot write.

   The mandate can be signed by another person who attests to the fact that the mandator cannot write and that the mandate does convey the true sentiments of the party with regard to the appointment of the advocate or procurator.

2. The mandating of a procurator by a party constitutes an indispensable condition for the effective procedural activity of the mandatary. A procurator who has not been authorized to act on another's behalf cannot bring about the intended effects. However, the presentation of the mandate itself is merely a procedural requirement meant to assure that the procurator has, in fact, received a mandate to act from the one he has been asked to represent. This is why the presentation of the written mandate can be delayed if waiting for it would cost too much time. This is especially true if the delay would extend beyond the expiration of a procedural deadline, resulting perhaps in the extinguishing of rights enjoyed by the party to be represented by the procurator. In such cases, the judge can recognize the actions of the procurator who cannot yet establish his or her authority to act on the party's behalf. However, the judge should set a deadline for the presentation of the mandate as stipulated in §1. If the mandate is not presented by then, the representation undertaken by the procurator would be invalid and his or her actions would be without effect.

3. Before the judge approves the participation of a procurator without a prior written mandate having been presented, he can demand a security deposit to cover possible court costs that might result from the acts placed by the procurator. However, this would rarely become an issue in marriage nullity trials where the opposing party rarely suffers harm from the procedural activity of a person acting without proper authorization. When it comes to responsibility for the cost of individual procedural acts, however, it can happen that the petitioner is burdened by the costs of a procedural act placed by the procurator of the respondent; for instance, by the request to have a certain witness deposed.

4. Art. 270, 6°, threatens nullity of sentence if someone acts on behalf of another in trial without a legitimate mandate to do so. This sanction applies only to the function of procurator, not that of advocate.

5. Like the procurator, the advocate also requires a mandate so that the judge can hear the advocate in accord with any specific provisions of that mandate. Again, the mandate of an advocate does not carry the same significance as that of a procurator since the advocate as such is not authorized to place procedural acts on behalf of a party to the cause.

Article 107 **Special Mandate**

Art. 107 – § 1. Unless he has a special mandate, a procurator cannot

Art. 107 – § 1. Nisi speciale mandatum habuerit, procurator non

validly renounce an action, an instance, or judicial acts, nor in general do those things for which the law requires a special mandate (cf. can. 1485).

§ 2. Once a definitive sentence has been issued, the procurator retains the right and duty to appeal, unless the mandating party declines (can. 1486, § 2).

potest valide renuntiare actioni, instantiae vel actis iudicialibus, nec generatim ea agere pro quibus ius requirit mandatum speciale (cf. can. 1485).

§ 2. Lata definitiva sententia, ius et officium appellandi, si mandans non renuat, procuratori manet (can. 1486, § 2).

1. The procurator exercises a significant function on behalf of the party he represents. Under certain circumstances, acts placed by the procurator can carry special risk to the interests of the party represented. The first paragraph (§1) protects the party from imprudent acts placed by the procurator that might result in a termination of the trial. The Instruction does so by requiring that the procurator receive a special mandate in order to place such acts. The party must consider carefully whether or not to hand over to the procurator such extensive authority since once the mandate is given, the acts placed by the procurator will stand as legitimate.

2. A special mandate is required for:

   - the renunciation of the action; this can be done freely up to the point of the citation of the respondent; after that it may take place only in accord with the provisions of Art. 150 §2;

   - the renunciation of the instance as provided for in Art. 150.

3. §2 stipulates that the mandate of the procurator does not cease with the definitive sentence. Rather, unless the mandate indicates otherwise the procurator retains the right and duty to lodge an appeal against the decision. It is not evident from the text of the Instruction:

   - whether opposition of the party to the lodging of an appeal should be an exception to the rule that the activity of the procurator is valid for the party;

   - whether the procurator must ask the party beforehand if an appeal is desired; or

   - whether a party's refusal (*renuere)* before the court to appeal should be treated as a renunciation of the legal remedy.

In light of the time limits that have been established for lodging an appeal (see Art. 281 §1), and in light of the duty of the procurator to lodge one, the only reasonable interpretation seems to be that the party can forbid the procurator from lodging an appeal. Still, the procurator does not have to inquire as to the party's desires regarding an appeal. If the party should fail to indicate that no appeal is to be lodged, and the procurator proceeds with one, the party may subsequently renounce the appeal (see Art. 287). The party would then bear any costs associated with the processing of the appeal (see Art. 151).

Article 108

Removal of Legal Representatives

Art. 108 – Advocates and procurators can be removed at any stage in the cause by the person who named them, without prejudice to the obligation of paying the remuneration due them for the work they have done; in order for the removal to take effect, however, it is necessary that it be communicated to them and, if the doubt has already been established, that the judge and the other party be informed of the removal (cf. can. 1486, § 1).

Art. 108 – Advocati et procuratores possunt ab eo a quo constituti sunt in quovis causae statu removeri, salva obligatione solvendi honoraria pro labore impenso ipsis debita; ut autem remotio effectum sortiatur, necesse est ipsis intimetur, et, si dubium iam concordatum fuerit, iudex et altera pars certiores fiant de remotione (cf. can. 1486, § 1).

1. Unlike the provisions of c. 1486 §1, which correspond with those of this article, the Instruction speaks directly of the possibility of retracting a mandate given to a procurator or advocate. Neither the code nor the Instruction requires that any legitimate or even justifiable reason be given for the withdrawal of the mandate.

2. The removal carries different significance, depending on whether it is effected against the procurator or the advocate. The removal of the authorization for a procurator to act results in the invalidity of any procedural acts placed by the procurator on behalf of the party after the mandate was withdrawn. The removal of the authorization for the advocate results in the judge no longer accepting briefs submitted by the (now former) advocate on behalf of the party.

3. In order for the removal to take effect it is sufficient – so long as the formulation of the doubt has not yet been set – for the party to inform the mandatary of the removal. At least with regard to the removal of the procurator, it would have been desirable had the Instruction required, even at this early stage of the trial, that the court be informed of the withdrawal of the mandate.

This would assure all the more that no further procedural acts would be placed by the procurator after the removal. The notification of the removal must occur in a reliable, authentic way. It is in the interest of the party to be able to prove that the mandate was, in fact, withdrawn.

4. Following the determination of the formulation of the doubt, removal of the procurator or advocate will have effect only after the court and opposing party are notified of the withdrawal of the mandate. Were this not the case, there would arise a risk of confusion regarding who actually maintains a mandate to represent another in the process. The notification of the withdrawal of the mandate to the court does not replace the party's obligation to notify the procurator or the advocate directly of the retraction of the mandate.

5. As is the case with the code, the Instruction lacks clear provisions regarding the duration of a mandate of a legal representative. Still, the law does seem to foresee that:

   - the mandate expires with the termination of the legal action;

   - the procurator and the advocate can renounce the mandate and cease functioning on behalf of the party; Art. 110 provides limitations on this right;

   - the mandate expires if the procurator or advocate is forbidden from functioning within the tribunal before which the cause is pending (an argument based on Art. 111 §2).

   For more on the question as to whether the rejection of a procurator or advocate in accord with Art. 109 also results in the cessation of the service for which the person was mandated, see Art. 109; comm., par. 1.

Article 109 — **Rejection of a Legal Representative**

Art. 109 – Both the procurator and the advocate can be rejected by the *praeses*, by a decree containing motives, either *ex officio* or at the instance of a party, but only for a grave cause (cf. can. 1487).

Art. 109 – Tum procurator tum advocatus possunt a praeside, dato decreto motivis suffulto, repelli sive ex officio sive ad instantiam partis, gravi tamen de causa (cf. can. 1487).

1. The judge before whom a cause is pending, and in which a procurator or advocate participates by mandate of a party, can reject the legal representative for grave cause. The cause for doing so can lie in the behavior of the person, lack of qualifications for the task, a special relationship to the party represented

that precludes suitable participation in the process, or a personal interest of the procurator or advocate in the matter before the court. With regard to the procurator in particular, a cause for rejection can be doubt concerning his or her ability to carry out the function responsibly.

2. The court should normally exert no unwelcome or illegitimate influence over the free choice of a procurator or advocate by the party (see Art. 103). The approval of an advocate belongs to the bishop moderator (see Art. 105 §1). The judge cannot approve of one, even on an individual basis. Rather, the judge exercises merely a negative right of intervention. The decision for rejection of one or both of the legal representatives belongs to the judge. The judge's ability to reject an advocate or procurator serves to safeguard the proper course of the trial. A decision to reject a legal representative must be made by decree. The act of rejection mentioned in this article of the Instruction relates only to procurators or advocates who are about to exercise their function in the trial, but have not yet begun to do so. For removal of those who are already functioning in a pending cause, see Arts. 110 and 111.

3. An opposing party can also request that a procurator or advocate be rejected. By use of the term *party*, the Instruction does not intend to include the promoter of justice or defender of the bond. The promoter and defender have the right to intervene when a request by a party is necessary in order for the judge to be able to deliberate on a matter (see Art. 59, 2°). Such a request is not necessary with regard to the removal of the legal representatives. However, both the defender and the promoter of justice are free to notify the judge of issues that the judge might consider important to address *ex officio*.

   Causes that might justify the request of the opposing party for removal of a procurator or advocate might include the fact that the party has a relationship with the proposed advocate or procurator that could impair the objective character of the cause (e.g., personal animosity between the two).

4. Rejection does not constitute a disciplinary measure so long as the cause for it does not lie in the misconduct or fault of the one rejected. Rejection is much more an act of judicial administration meant to promote the proper course and outcome of the legal process.

Article 110 — **Prohibitions on Legal Counsel**

Art. 110 – Advocates and procurators are forbidden:

1° to renounce their mandate without a just reason while the cause is pending;

Art. 110 – Advocati et procuratores vetantur:

1° renuntiare mandato, causa pendente, sine iusta ratione;

2° sibi de immodico emolumento

2° to contract for an excessive fee themselves: if they should do so, agreement is null;

3° to betray their duty because of ts, promises or another reason;

4° to withdraw causes from mpetent tribunals or to act *in udem legis* in any way whatsoever . cann. 1488-1489).

pacisci: quod si fecerint, pactio nulla est;

3° ob dona, pollicitationes aliamve causam prodere officium;

4° causas a competentibus tribunalibus subtrahere vel quomodocumque in fraudem legis agere (cf. cann. 1488-1489).

This article enumerates a list of behaviors that procurators and advocates are forbidden from engaging in; specifically:

- renouncing their mandate without a just reason;
- contracting with the party for an excessive fee;
- abusing their official position because of gifts, promises or other reasons;
- withdrawing causes illegitimately from competent tribunals;
- acting in other unlawful ways.

. A party who has appointed either a procurator or an advocate must have confidence that the person appointed will serve the party's legal interests and so attend to the protection of the party's rights (see Art. 104 §1). Since the procurator and advocate play an integral role in the course of the trial, and, depending on the circumstances, may have already earned a fee, a party generally has a just expectation that the investment in the services of the representatives will not be in vain. Therefore, procurators and advocates can renounce their mandate only when they have a credible or justifiable cause for doing so. Article 110 offers no concrete causes. However, grounds for renouncing a mandate can certainly relate to circumstances surrounding the legal representative, such as illness, work load, as well as frustrated attempts at communicating with the party and engaging him in the process when necessary.

3. Section two (2°) forbids procurators and advocates from charging excessive fees. Violation of this provision may result in the voiding of any agreement regarding fees entered into by the party and the legal representative. Such agreements would have no effect, would not have to be observed, and could not be enforced by use of legal remedies.

4. Betrayal or abuse of office arises when the office held by a procurator or advocate is used in a way that is contrary to the obligations constitutive of the function. The misuse of office betrays that trust most especially when the interests of the one who mandated the legal representative are harmed by illegitimate or inappropriate acts. Advocates can commit the offense if they plead before the court in a manner that is disadvantageous or harmful to the

mandator, while procurators do so if they place procedural acts that have detrimental consequences for the party. 3° relates the notion of betrayal of office to the acceptance of promises and gifts as well as to other actions or situations resulting in the corruption of the procurator or advocate.

5. According to 4°, actions intended to manipulate the norms governing competence are also forbidden. This entails, on the one hand, that causes cannot be introduced intentionally before incompetent tribunals. It also means that provisions regarding competence cannot be manipulated in order to establish competence before a desired tribunal (e.g., through the acquiring of a purely formal domicile).

6. It is obvious that any other type of unlawful or fraudulent action is also proscribed. The stipulation in 4° to this effect intends unlawful acts that are intentionally placed by the procurator or advocate.

Article 111

Discipline of Legal Representatives

Art. 111 – § 1. Advocates and procurators who commit an offense against the responsibility entrusted to them are to be punished in accordance with the law (cf. cann. 1386; 1389; 1391, n. 2; 1470, § 2; 1488-1489).

§ 2. If however they were found to be unequal to their duty because of incompetence, a loss of good reputation, negligence or abuses, the Bishop Moderator or *coetus* of Bishops is to provide for the matter using appropriate means, not excluding, if need be, a prohibition from practicing in their tribunal.

§ 3. Whoever has harmed another by any act illegitimately placed, either maliciously or through negligence, is bound by the obligation to repair the harm (cf. can. 128).

Art. 111 – § 1. Advocati et procuratores, qui contra sibi commissum munus deliquerint, puniantur ad normam iuris (cf. cann. 1386; 1389; 1391, n. 2; 1470, § 2; 1488-1489).

§ 2. Si autem iidem impares officio ob imperitiam, amissam bonam famam, neglegentiam vel abusus reperti fuerint, Episcopus Moderator vel coetus Episcoporum, mediis aptis adhibitis, provideat, non exclusa, si casus ferat, prohibitione a patrocinio exercendo in suo tribunali.

§ 3. Qui alteri quovis actu dolo vel culpa illegitime posito damnum intulerint, obligatione tenentur damnum reparandi (cf. can. 128).

1. For a discussion of the offenses that §1 names as a basis for actions that constitute an offense against the responsibility entrusted to procurators and

advocates, see the commentary under Art. 75.

2. The situations mentioned in §2, which the bishop moderator or – according to the statutes of the interdiocesan tribunal – the *coetus* of bishops is called on to correct are not offenses that call for disciplinary measures. Rather, they are circumstances that indicate the lack of suitability for office of the advocate or procurator independently of the person's personal guilt or fault. Specifically:

- persons are unequal to their duty (*imperitia*) if they lack sufficient knowledge of canon law (here the substantive law on marriage and the procedural law of marriage nullity trials) in order to advance effectively the rights of the parties (see Art. 104 §1);

- loss of a good reputation (*amissa bona fama*) results if advocates or procurators through their own fault, or even without their cooperation, are no longer seen to possess the credibility necessary for the administration of justice in ecclesiastical tribunals;

- negligence (*neglegentia*) is an irresponsible handling of the commission given to the advocate or procurator through the mandate, resulting in detriment to the expectation of the parties for a successful defense of their rights (see Art. 104, comm., par. 4) or at least detriment to the expeditious course of the trial itself;

- abuse of office (*abusus*, see Art. 110; comm., par. 4) also arises due to actions that occur unintentionally; if the actions are unintentional, they cannot be punished by imposition of a penalty.

3. §2 does not indicate what might constitute suitable means for the bishop moderator or the *coetus* of bishops to remedy the unacceptable situations that might arise. The Instruction mentions only the harshest response, prohibiting the advocate or procurator from practicing in the tribunal in which the actions took place. It is not possible to impose a general prohibition on practicing in all tribunals since the jurisdiction of the bishop moderator or *coetus* is limited to the tribunal over which they exercise authority.

4. For observations on the reparation of damages, see Art. 75; comm., par. 13.

Article 112 **List of Advocates**

Art. 112 – § 1. It pertains to the Bishop Moderator to publish an index or directory in which there are listed the advocates admitted before his tribunal and the procurators who usually represent parties there.

Art. 112 – § 1. Episcopi Moderatoris est publici iuris facere indicem seu album, in quo adnotentur advocati apud suum tribunal admissi necnon procuratores qui ibidem partes repraesentare solent.

§ 2. The advocates inscribed in the directory are bound, by a mandate of the Judicial Vicar, to provide gratuitous legal assistance to those to whom the tribunal has granted this benefit (cf. art. 307).

§ 2. Advocati in albo inscripti tenentur, de mandato Vicarii iudicialis, gratuitum patrocinium praebere iis quibus hoc beneficium tribunal concesserit (cf. art. 307).

1. In order to avoid the situation where parties to marriage nullity trials have to rely on random information or unreliable advertising to find legal assistance, Art. 112 requires that a directory be drawn up and published containing:

   - a list of advocates approved to function in the tribunal; and
   - a list of persons who usually function as procurators on behalf of parties.

   There is a clear basis for the first list, the approval required by Art. 105 §1. However, the compilation of the second list would require asking those persons who have actually functioned as procurators in the tribunal whether they wish to be included in the list.

2. Inclusion in the register of advocates is not simply a means by which those listed there might receive mandates. It also brings with it an obligation. Those advocates included in the register must be prepared to provide legal care to parties who, according to Art. 307, receive gratuitous legal assistance. An advocate can be relieved of this obligation only if the presiding judge approves of the reasons for it in an individual cause (see Art. 307 §2).

Article 113 **Access to Legal Advice**

Art. 113 – § 1. At every tribunal there is to be an office or a person available so that anyone can freely and quickly obtain advice about the possibility of, and procedure for, the introduction of their cause of nullity of marriage, if such should be the case.

Art. 113 – § 1. Apud unumquodque tribunal sit officium seu persona, adeo ut quilibet libere expediteque consilium obtinere valeat de possibilitate et procedendi ratione ad suam nullitatis matrimonii causam, si et quatenus, introducendam.

§ 2. If this office should happen to be carried out by the ministers of the tribunal, they cannot have the part of judge or defender of the bond in the cause.

§ 2. Si eiusmodi officium a tribunalis ministris expleri contingat, in causa sive iudicis sive vinculi defensoris ipsi partem habere nequeunt.

§ 3. In each tribunal, to the extent possible, there are to be stable

§ 3. In unoquoque tribunali, quatenus fieri potest, stabiles

advocates designated, receiving their salary from the tribunal itself, who can carry out the function described in § 1, and who are to exercise the function of advocate or procurator for the parties who prefer to choose them (cf. can. 1490).

§ 4. If the function described in §1 is entrusted to a stable advocate, he cannot take on the defense of the cause except as a stable advocate.

advocati constituantur, ab ipso tribunali stipendium recipientes, qui munus de quo in § 1 explere possunt, quique munus advocati vel procuratoris pro partibus quae eos seligere malint, exerceant (cf. can. 1490).

§ 4. Si munus de quo in § 1 advocato stabili demandatum sit, iste causae defensionem assumere nequit, nisi tamquam advocatus stabilis.

1. In §1 of the present article, the Instruction requires that every diocesan and interdiocesan marriage tribunal establish a means for offering legal advice, either by appointing a person to fulfill the task or establishing an office to accomplish it. The duty of the person or office will be to offer information to those who seek advice regarding the ecclesiastical marriage law and nullity process. In particular, persons seeking advice should be able to receive sufficient information regarding the nullity process so that they can, based on that information, decide whether or not to pursue the possibility of initiating a trial.

2. Personnel employed by the tribunal may be used to fulfill the obligation to provide access to legal advice. For instance, persons who already function as judges or defenders of the bond may also serve to offer legal advice. However, if the official assists a person with legal advice, that official may not later exercise his or her office in a cause in which the person is involved. For other grounds for the exclusion of tribunal officers, see Art. 66.

3. Canon 1490, from which §3 of the current article is taken, seeks to assure that *ex officio* those with no or little knowledge of ecclesiastical law will have access to an advocate to advise parties of the initiation of the process and assist them with lodging a petition should they desire to do so.

4. Members of such a permanently appointed staff of legal representatives are to be paid by the tribunal and must possess the qualifications mentioned in Art. 105. However, they require no special approval in order to function. The approval is implicit by admission to the position they already hold at the tribunal. If they wish to exercise this function at other tribunals, then they must receive the required approval to do so.

5. Paragraph three (§3) is silent concerning who names the legal advisor to assist the parties. Although it can be otherwise provided for in particular cases, the bishop moderator is always competent to do so.

6. The parties for whom an advocate is named *ex officio* remain free to decide whether or not to make use of this means of obtaining legal advice. If necessary, the party must mandate the advisor as provided for in Art. 106. Without the mandate, the court cannot recognize the legal advisor. Although the stable advocates stand in service to the tribunal, they are not assigned to parties or to function in the process by the tribunal. The third paragraph (§3) indicates that the parties are free to choose who will represent them (a right provided for in Art. 103) inasmuch as it states that the parties may choose an advocate from the list if they prefer to do so (*malint*); it does not require that they make such a choice.

7. To the extent that stable advocates exist, a party would have no further need to request gratuitous legal assistance based on lack of financial resources. A party can choose one of the stable advocates and authorize that person to act by grant of a mandate. Beyond this, the party can also request remission of other court costs as provided for in Art. 305.

8. The judge who assigns a stable advocate to a party in accord with Arts. 112 and 307 §1 can usually rely on the advocate more easily than he can on a freely designated advocate. The same is the case with the appointment of a legal guardian according to Art. 97.

9. Paragraph four (§4) serves to prevent situations where a stable advocate assigned to a party by the tribunal enters into an agreement with the party to assume the position of a privately appointed advocate. Where this is done the advocate might then illegitimately receive a fee from the party in addition to the usual salary received by the tribunal.

10. The norm does not stipulate whether the stable advocate is to be appointed for a definite or indefinite term. The requirement that they be *stabiles patroni* does preclude appointing them until such time as the appointment is revoked.