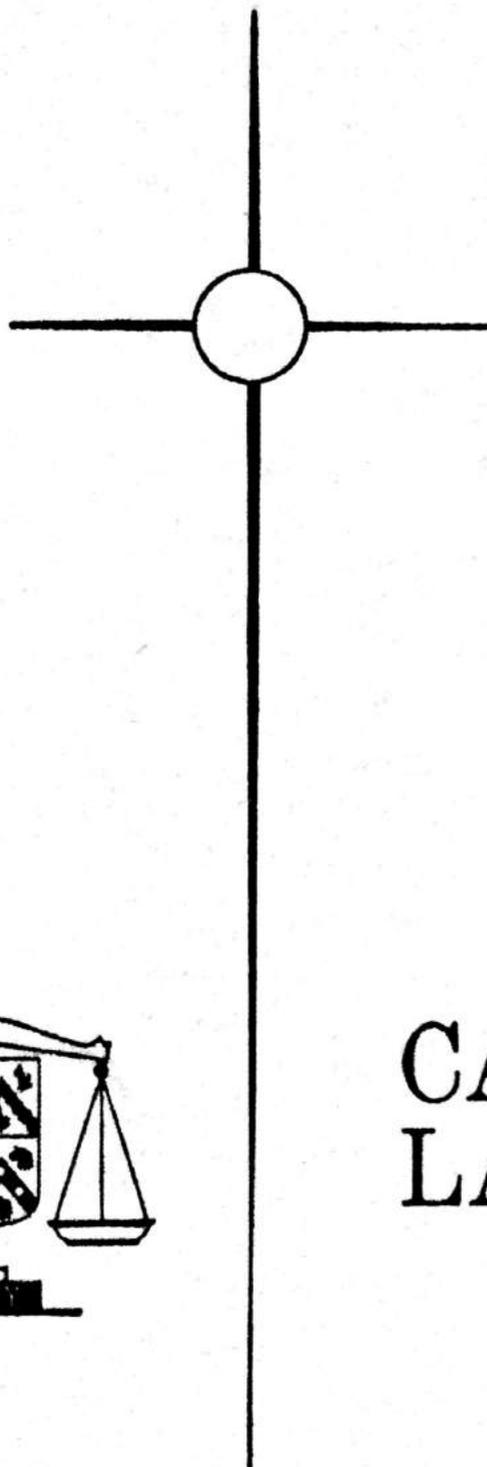


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CATHOLIC LAWYERS GUIDE

Malloy, Charles J.

Catholic
Lawyers
Guide

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Through the Cooperation of the
CATHOLIC LAWYERS SOCIETY
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Archbishop of Detroit
March 21, 1963

On the cover is the official Coat of Arms of the Catholic Lawyers Society of the Archdiocese of Detroit. Using a scale denoting justice as the central theme, an emblem is attached which has, as one views it, part of the Coat of Arms of the Archdiocese of Detroit on the left and part of the Coat of Arms of St. Thomas More on the right. The scale rests on a pedestal bearing the word "Equity."

The artist and designer of this Coat of Arms is the Reverend Victor M. Kolasa, a priest of the Archdiocese of Detroit.

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VIII

Civil Divorce and Separation

Much has been written in recent years on the whole question of the obligations of the Catholic lawyer and the Catholic judge in cases of civil divorce and civil separation. Two excellent articles covering this problem are Father Schlitzer's article in the *Notre Dame Lawyer* entitled "The Catholic Lawyer and Divorce Cases" and Father Dailey's article in the *University of Detroit Law Journal* entitled "The Catholic Attorney and the Moral Lawfulness of the Civil Divorce Case." ¹

DECREES OF THE COUNCIL OF BALTIMORE

The Second Plenary Council of Baltimore which met in 1866 enacted two decrees on the question of divorce and separation—Decree No. 325 and Decree No. 326. The Third Plenary Council of Baltimore which convened in 1884 and whose decrees are, for the most part, still in effect in the United States, issued three decrees on the subject.

DECREE No. 123 indicates that marriage is one of the seven sacraments and the care of it belongs solely to the Church, a care which Christ Himself gave into Her hands. The Council

quotes the Council of Trent which stated: "If anyone says that matrimonial causes are not to be decided by ecclesiastical judges that person is to be condemned."

DECREE NO. 124 of the Third Plenary Council of Baltimore indicates that a sacramental marriage cannot be annulled by anyone since divine law forbids it. The Council goes on to say that an individual who seeks to have such a marriage dissolved by a civil magistrate is guilty of a most grave fault and sins even more seriously if he attempts a new union while the former one still exists. A penalty of excommunication is attached to the attempting of a second union after a civil divorce while the valid union still exists.

DECREE NO. 126 makes it clear that if, for serious reasons, an individual desires to obtain from civil authorities separation from bed and board, permission is first to be secured from the competent ecclesiastical authorities. If such is not done and the action is deliberate, the Bishop is informed that the erring Catholic is to receive ecclesiastical penalties according to the good judgment of the Bishop.²

RULES OF CANON LAW ON SEPARATION

The questions involved in separation cases are taken up in canon law in Canons 1128-1132 which read as follows:

CANON 1128. Married persons are bound to live together unless they have a just cause for separation.

CANON 1129, §1. Adultery on the part of one of the spouses, without breaking the bond, gives to the other spouse cause for separation, even forever, unless he himself consented to the crime, or has been responsible for it, or has condoned it expressly or tacitly, or committed the same crime.

§2. There is tacit condonation when the innocent spouse, knowing the adultery, has freely continued to treat the guilty one with marital affection; condonation is presumed when

the adulterous party has not, within six months, been sent away, or left, or been duly denounced.

CANON 1130. After a legitimate separation, whether effected by private authority or by a sentence of the ecclesiastical judge, the innocent spouse is never obliged to admit again to married life the party guilty of adultery; he may, however, admit or recall her, unless, with the consent of the innocent spouse, the guilty one has embraced a state incompatible with matrimony.

CANON 1131, §1. If one of the married parties becomes affiliated with a non-Catholic sect; if he gives to the children an education which is not Catholic; if he leads a criminal and disgraceful life; if he is a grave danger to the other party's soul or body; if his cruelty renders common life too hard; such and similar causes will give the other spouse the right to withdraw by appealing to the Ordinary of the place; or even of his own authority if they are proved with certainty and there is danger in delay.

§2. In all these cases, when the cause for separation ceases, the married life ought to be resumed; but if the separation has been pronounced by the Ordinary for a definite or indefinite period of time, that obligation is not binding on the innocent party until it has been so declared by the judge or the time expires.

CANON 1132. After the separation, the education of the children belongs to the innocent spouse; if one of the parties is a non-Catholic, it belongs to the Catholic; unless, in either case, for the good of the children and their Catholic education being duly provided for, the Ordinary decides otherwise.³

OBTAINING ECCLESIASTICAL PERMISSION TO SEPARATE

Some dioceses have had, or do have, an excommunication attached to anyone who seeks civil divorce or civil separation without permission from the Church. But even if such a penalty is not attached, the Catholic who goes ahead without such a

permission, except in extreme cases, puts himself in a most difficult position. He is not fulfilling his duties and he has set himself up as his own judge in a matter in which he is forbidden to judge. In the Sacrament of Penance he must confess serious infractions which involve the duties of his state of life. He will find the priest sore-put to render absolution if he is separated from someone to whom he is validly married without having secured the required permission.

Different dioceses process requests for such permission in different ways, but it is safe to say that the active party in such a contemplated action should consult his parish priest who will know the particular diocesan rules and no doubt will, in turn, consult the Chancery.

A lawyer who takes the case of a Catholic desiring a civil separation or a civil divorce from a valid marriage, when the Catholic does not have ecclesiastical permission for such an action, is putting himself in a state of sin. It would seem that any good Catholic lawyer would be happy to let the Church make such a difficult decision and not assume to himself something which he is definitely forbidden in conscience to do.

In dealing with a non-Catholic, the Catholic lawyer should proceed cautiously. He must bear in mind that the morality of a civil divorce action always involves the basic question of whether or not the action taken by the plaintiff in a given instance involves sin. If it does, the lawyer must remember that he is not to participate in the sin of another; neither may he give scandal.

While representing the plaintiff in a forbidden divorce action may not in a given case be formal cooperation, it is almost certainly proximate material cooperation. This demands a very serious reason indeed for the plaintiff is doing something seriously sinful. If scandal cannot be avoided, no reason is serious enough to allow the lawyer to act.

In a very exceptional case Father Connell allows a lawyer to proceed, when a non-Catholic seeks a civil divorce from a valid marriage in order to remarry. He describes the situation as one where the lawyer would be in dire need of funds or would be dis-

charged from his law firm if he did not take the case and where there would be no scandal. He makes it clear that scandal easily occurs in such cases and then the lawyer cannot accept such a suit.⁴

Father Connell also takes up a situation where the non-Catholic involved in a valid marriage seeks a civil divorce but neither party to the marriage intends to marry again. Father Connell allows the lawyer to proceed when convincing proof is offered that neither party intends to enter a second union. Once again, it is evident that such a situation is rare.⁵

In each of these cases envisioned by Father Connell we have unusual situations which cannot be used as norms of action.

LAWYERS AND CIVIL DIVORCE OR SEPARATION CASES

A civil divorce or separation case obviously involves either a Catholic plaintiff or a non-Catholic plaintiff.

A Catholic Plaintiff

If a Catholic plaintiff is involved in a valid marriage, that is, one performed in the presence of a priest and one which has not been dissolved by the Holy Father or declared null by an ecclesiastical court, the lawyer is bound under pain of mortal sin not to plead such a case in civil court unless ecclesiastical permission is secured.

Father Dailey states that, in valid marriages involving a Catholic the civil lawyer “. . . can defend the respondent who is illegitimately sued.” Also, he says, “. . . he can defend the respondent who is legitimately sued in order to safeguard his merely civil rights.”

Ecclesiastical permission might more likely be given to separate without civil action than to seek a civil separation or a civil divorce. One need merely refer to the words of the Council of Baltimore to understand why this is so.

Canon law, as mentioned, allows a permanent separation, not necessarily a civil divorce or separation, if the other party has

certainly committed adultery. This adultery must not be condoned or brought about by the first party and the first party must not also be guilty of adultery. An individual in such a situation should not separate, of his own authority, unless the crime of adultery is public and there is danger of scandal. Secondly he still needs ecclesiastical permission to take up civil court action for civil separation or divorce. If, because of unusual circumstances, a court action must be begun immediately, the permission to continue it should be secured as soon as possible.

As we saw, canon law allows temporary separation for a variety of reasons. Once again, even to separate, the innocent party needs the required ecclesiastical permission unless the grievances are certain and there is danger in delay. Even then, as soon as time allows, the judgment of the Bishop or his representative should be secured and his decision followed.

A different approach entirely confronts the Catholic judge or the Catholic lawyer when a Catholic plaintiff, or a non-Catholic plaintiff for that matter, is involved in a marriage which has been dissolved or declared to be ecclesiastically invalid. In other words, the Church Court has already granted a decree of nullity or, in the case of a non-consummated marriage, the Holy Father has dissolved it. Here the judge or the lawyer need have no worry in processing such a civil divorce case except to be sure that perjury or collusion is not being used to bring this about.

A difficult situation sometimes occurs when a Catholic finds himself in a marriage which is ecclesiastically null, but civilly valid. An example is found in a case where one person cannot live with the other person according to God's law and he cannot get a civil divorce according to the State law, because there are no civil grounds for such action.

The Plaintiff who is not a Catholic

As was indicated earlier, all baptized people are bound by divine positive, natural and ecclesiastical law unless in this latter case they are specifically exempt or dispensed. Those who find this hard to believe might read Canon 87 of the Latin Code of

Canon Law. This canon indicates very clearly that the door to the Church of Christ is the Sacrament of Baptism. Once a man is baptized, he belongs to the Church Christ founded, whether he likes it or not or knows it or not.

It is well to indicate once again that the marriage of two baptized non-Catholics, if each is free to marry, is a sacramental marriage and belongs, as Canon 1960 indicates, to the jurisdiction of the Catholic Church. This jurisdiction is there even if only one of the parties is baptized.

A Catholic lawyer should realize also that a valid marriage between two unbaptized persons is a sacred contract.

If a non-Catholic, married to a non-Catholic, is seeking a civil divorce from a valid marriage in order to remarry, the Catholic lawyer should refuse to have anything to do with the case.

Father Dailey says "the lawyer may defend the respondent" in such cases.

If a non-Catholic has a right to a permanent separation from his partner because of adultery which is proved, not condoned, and as long as the plaintiff is not the cause of or also guilty of adultery, the Catholic lawyer can take civil action which will guarantee that the civil law will recognize the right of the innocent party to a permanent separation.

If the non-Catholic is seeking merely the protection of civil law from serious molestation, it appears that the Catholic lawyer can proceed, having sought to reconcile the couple first and having tried to secure merely a civil separation or some other civil protection, rather than an absolute divorce.

If the marriage appears to be ecclesiastically invalid, and both parties are non-Catholic, the Catholic lawyer can proceed if, after consulting competent authority, there is solid reason to believe the marriage is invalid.

If a case involves a non-Catholic plaintiff with a Catholic defendant, and the marriage was witnessed by a Catholic priest, the matter should be brought to the attention of the pastor of the Catholic party.

It should be emphasized again that the lawyer can do what is right for the client to do but the lawyer may not do for the client what the client may not do for himself, as a general rule.

Therefore in all cases involving a Catholic in a valid marriage, a lawyer should not accept a case unless ecclesiastical permission for civil action has been secured. Further, he should not exceed the limits of the permission given, that is, he should not seek absolute divorce when permission has been given for civil separation only.

In cases involving non-Catholics bound by a valid marriage, if the plaintiff has no grounds for separation recognized by canon law or intends to secure a divorce for the purpose of remarriage, the Catholic lawyer should not accept such a case nor should he refer it to another lawyer.

The Catholic lawyer should be alerted to the fact that Catholic Chanceries are well aware of the many problems the Catholic attorney faces in regard to civil separation and divorce. Also, the Chancery knows of the reluctant attitude of many lawmakers, judges and attorneys to the whole idea of civil separations. These men often press for absolute divorce. The civil law is so intent on preventing civil illegitimacy and civil bigamy that it often encourages both real illegitimacy and real bigamy.

THE CATHOLIC JUDGE IN DIVORCE CASES

Catholic judges would do well to heed the words of Pope Pius XII as he concluded his talk in 1949 to the Catholic jurists:

“In particular the Catholic judge may not, except for reasons of great weight, pronounce a judgment of civil divorce (in countries where that is recognized by law) in the case of a marriage which is valid before God and the Church. He must not forget that in practice such a judgment has not only a bearing on the civil effects, but in reality rather leads to the false belief that the actual bond is dissolved and that the new one is consequently valid and binding.”

We have indicated that in the same talk the Holy Father said that a judge cannot wash his hands of the whole affair and let the responsibility rest on the law and the lawmakers since the judge becomes a “contributing cause” and, as such, is “concurrently responsible.”

Though the Catholic lawyer is closer to the action than the Catholic judge when a divorce or civil separation is sought or obtained, the judge cannot, as Pope Pius XII said, refuse all responsibility. At the same time, one would not want to eliminate the Catholic judge from society. If a Catholic lawyer runs for the office of judge, he must be aware of the fact that, if he is seeking a court which handles domestic problems such as divorce and separation problems, he must be well grounded in moral theology and ethics. As a judge he must do everything reasonably possible to keep divorce cases involving valid marriages from coming before the court. He cannot in any way give his aid to the one who is sinfully seeking a civil separation or divorce. He should make his own beliefs evident, if it is necessary for him to decide that the civil law allows a civil divorce where the moral law forbids it.

A Catholic judge should seek to do his part to make civil divorce more difficult for those who have valid marriages. He is, after all, a leader in the field of law and he one day will have to face the Supreme Judge. Certainly what he does to bear his heavy cross will not go unrewarded, but what he does to lighten it unjustly will not go unforgotten, either.

References are listed at the end of this chapter which will be helpful for those Catholic lawyers and Catholic judges who would like to read more about this intricate problem.⁶

In closing it should be mentioned that the Church looks to the Catholic layman, especially the Catholic judge, Catholic lawyer and Catholic legislator, to help Her in strengthening the holy bond of marriage against the onslaught of those who ignore the words of Christ: “What therefore God has joined together let no man put asunder.”⁷

REFERENCES TO CHAPTER VIII

- ¹ Schlitzer, Albert L., "The Catholic Lawyer and Divorce Cases" reprinted from *Notre Dame Lawyer*, vol. 29, no. 1, (Fall, 1953) University of Notre Dame, Notre Dame, Indiana (\$4.00 per year; \$1.00 per copy).
Dailey, Robert H., "The Catholic Attorney and the Moral Lawfulness of the Civil Divorce Case," *University of Detroit Law Journal*, February, 1961, University of Detroit Law School, 651 East Jefferson Avenue, Detroit 26, Michigan (\$1.50).
- ² *Concilii Plenarii Baltimorensis II*, Acta et Decreta, "De Matrimonio," pp. 170-177.
Concilii Plenarii Baltimorensis III, Acta de Decreta, "De Matrimonio Sacramento," pp. 63-68.
- ³ The translation of these Canons is taken from Ayrinhac, H.A., *Marriage Legislation in the New Code of Canon Law*, pp. 328-335, Benziger Brothers, Inc., 7 East 51st Street, New York 22, New York, 1953 (\$4.00).
- ⁴ Connell, Francis J., "The Ethics of the Legal Profession," *National Catholic Almanac*, 1955, pp. 263-264, Doubleday & Company, 575 Madison Avenue, New York 22, New York (\$2.95).
- ⁵ Connell, Francis J., "The Ethics of the Legal Profession," p. 263, cf. reference (4).
- ⁶ Brown, Brendan F., "The Natural Law, The Marriage Bond and Divorce," paper presented at New York City, December 4, 1954, *The Jurist*, vol. 15, no. 1, January, 1955, Catholic University of America Press, 620 Michigan, N.E., Washington 17, D.C. (\$1.00 per copy).
Burke, Edward M., "The Legal Profession in Regard to Separation and Divorce Cases," address delivered at the 17th Annual National Meeting of The Canon Law Society of America, October, 1955, *The Jurist*, vol. 15, no. 4, Catholic University of America Press, 620 Michigan, N.E., Washington 17, D.C. (\$1.00 per copy).
O'Keefe, Gerald, "The Catholic Lawyer and Divorce," paper read at the Annual Regional Meeting of The Canon Law Society of America on May 27, 1958, *The Jurist*, vol. 18, no. 3, Catholic University of America Press, 620 Michigan, N.E., Washington 17, D.C. (\$1.00 per copy).
Quinn, Hugh G., "Permission for Separation and Divorce," paper read at the Southwestern Regional Conference Meeting of The Canon Law Society of America, September 29, 30, 1953, *The Jurist*, vol. 14, no. 3, Catholic University of America Press, 620 Michigan, N.E., Washington 17, D.C. (\$1.00 per copy).
- ⁷ Matthew 19:7.