

MOM GUIDELINES FOR CANON LAWYERS AND CANONICAL ADVOCATES

I. PARTICIPATING IN AN INTERVIEW WITH AN INVESTIGATOR.

In representing a priest at an interview with a diocesan-appointed investigator, keep in mind two general considerations: (A) What to do *in advance* of the interview; and (B) What to do *at* the interview.

A. Pre-Interview Considerations.

As a threshold matter, consider whether and to what extent you will cooperate with the preliminary investigation, including submitting to the interview. Participation is *voluntary*.

Remind the priest (repeatedly) that you are his canonical advocate and that all communications should go through you. He should *never* answer questions unless you are present.

If the priest is too upset or too angry to present himself well, consider declining the interview, even though this may be used against him.

If, however, he is composed and well prepared, the interview may give him the opportunity to provide his side of the story as an initial step in his own defense.

Consider the following matters in advance of the interview, or if that is not possible, at the start of the interview.

1. Recorded Interview.

Consider whether it will be in the priest's best interest to record the interview. A recording will allow you to correct any inaccuracies that may appear in the investigator's report. Ensure that you will give a copy of that recording.

A recording may or may not be privileged under the secular law in your jurisdiction if a criminal or civil proceeding is pending or may result. Consider whether you (and the priest) are willing to waive privilege in submitting to the interview. State at the outset that you are reserving all rights to claim privilege, but be prepared to lose that claim.

Consider how confident you are in your knowledge of the facts and the priest's ability to answer questions in an unrehearsed and sincere manner. A recording of a priest who sounds confident and kind, who categorically denies the accusations, and who does not come across as evasive, may prove to be helpful. A recording that does not reflect well on the priest should be avoided.

Obtain the investigator's consent to record the interview. Consider whether you would decline the interview if consent is withheld.

2. Advance Letter.

Send a letter to the investigator in which you:

- a. Notify the investigator that you are the priest's canonical advocate and to direct all communications on this matter through you;
- b. Request a copy of the Ordinary's decree appointing the investigator;
- c. Summarize the ground rules for the interview;
- d. Ask the investigator to review the relevant sections of the *Code of Canon Law* and the June 2022 CDF *Vademecum* before the interview;
- e. Inform the interviewer of your intent to record the interview, if you intend to do so.

(A model letter is attached.)

Determine the investigator's experience in conducting preliminary investigations under canon law, even if the investigator has law enforcement experience. Remember that the aims and functions of investigators under civil law are different than preliminary investigations under canon law. You may need to help the investigator appreciate those distinctions.

If the only way to obtain this information is to ask the investigator, do it as conversationally as possible; don't make the mistake of "cross-examining" the interviewer, as that will be confrontational and will not help the priest.

B. The Interview.

The interview, of course, is a highly important event and great care must be taken in setting the tone and ground rules in a polite and non-threatening manner.

1. Make Introductions.

Make clear you are a canonist, that you are a lawyer under church law, and that you are representing the priest as his canonical advisor/advocate.

If you are also a civil lawyer, make clear whether you are serving in that capacity as well, as it may have implications for future assertions of the attorney client privilege and attorney work product doctrine, depending on your jurisdiction. (Also keep in mind potential issues regarding the unauthorized practice of law in a given jurisdiction.)

Ask the interviewer for identification, and be prepared to show yours.

2. Obtain Consent To Record.

Obtain consent to record the interview if you have decided on this approach as discussed above. Consider whether you will terminate the interview if the interviewer declines to give consent.

3. Open With A Prayer.

Ask the priest to open the interview with a prayer. Discuss this with him in advance so he can prepare a short, suitable prayer. The interview will already be stressful enough without putting him on the spot.

4. Set Ground Rules.

Set the ground rules. Even though you may have already done so in the pre-interview letter to the investigation, repeat the rules, especially if it will be recorded. Here is a sample approach:

“Father has agreed to participate in this interview on the understanding that this investigation will be conducted consistent with canon law and the procedure for investigations under the CDF’s *Vademecum* issued in June

2022. There are a few things we would like to confirm with you before we begin to make sure there are no misunderstandings.

First, Father is here freely, he is under no obligation to answer any of your questions, and he can end this interview at any time.

Second, Father cannot be forced to confess to anything, and, as provided in canon 1728 § 2, under no circumstances may he be required to take an oath.

Third, Father is entitled to a presumption of innocence as provided in canon 1321 § 1, and he is entitled to the protection of his good name, as provided in canon 220 and canon 1717 § 2.

Fourth, you will be conducting the preliminary investigation, of which this interview is part, consistent with the purpose of a preliminary investigation as described in canon, 1718 § 1, and the *only* purpose of this investigation is to collect enough information so as to help the Ordinary decide [1] whether a process to inflict or declare a penalty can be initiated, and [2] whether this is expedient given the goals of canonical penal law, as provided in canon 1341.

5. Obtain Concurrence.

After you have read the ground rules, obtain the investigator's concurrence in these rules or identify issues of disagreement. Make sure this discussion is on the record or is otherwise noted in writing. You may ask the question something like this:

"Can you please confirm that you agree with each of the above points?"

"Can you please confirm you have reviewed the cited provisions of the Code, and that you have read the *Vademecum* in preparation for today's interview?"

If the investigator declines to confirm any point, ask the investigator why and to identify and explain any points of disagreement.

If the investigator has not reviewed the citation provisions or the *Vademecum*, have copies available and provide them. Consider terminating the interview and rescheduling it until after the investigator has read them.

6. Object To Irrelevant Questions.

Do not allow questions about the priest's education and formation. Many interviewers, especially former law enforcement officers, will begin with biographical information. This is a way to ease into the interview, build rapport, and get interviewees to let their guard down. Consider interjecting with the following:

"Your questions are about Father's education and formation. All of that information is contained in his personnel files and you know this information. We do not wish to go over that information now, as it is not relevant to this inquiry and is not a good use of our time. Do you have any specific questions about Father's background that is not in the file?"

Do not allow questions about the priest's health or privacy unless they are directly relevant to the investigation. Consider interjecting with the following:

"Can you please tell us how this information is relevant to the issues raised by this investigation? Unless you can explain how it is so relevant, then I'm instructing Father not to answer that question, because of his right to privacy."

Do not trust assurances of confidentiality. There are no guarantees of confidentiality. Respond as follows:

"I understand that you may wish to maintain confidentiality, but we have no confidence you can guarantee it. We must assume that your interview, and any documents you compile or reports you prepare, including your notes of this interview, may be discoverable or released in the future without Father's permission or over his objection. We cannot allow some innocent response to be taken out of context and then used against him and/or released to the press, or both."

Do not allow questions unrelated to the alleged delict. While you should be concerned about how such information may be used in the canonical process, you must also be concerned with the potential disclosure and use of "other acts" evidence under Federal Rule of Evidence 404(b) or its state-law equivalent. Consider interjecting with the following:

"I'm instructing Father not to answer that question. As we noted at the outset, this interview is for the limited purpose of helping the Ordinary

decide whether a *canonical penal process* should be initiated, which can only occur if there is evidence of a canonical delict. This question goes beyond that. Father has already categorically denied the alleged delict. He is here only to answer questions that are relevant to determining the truth or falsity of the specific delict alleged in the Ordinary's decree."

II. PARTICIPATING IN A HEARING BEFORE A REVIEW BOARD.

In representing a priest before a review board, consider the following suggestions and approach.

1. Express Gratitude.

Thank the board for the opportunity to address it and/or to submit a memorandum on the priest's behalf. Thank the members for their careful consideration of this matter and their commitment to justice.

2. Remind Members of Their Duty.

Emphasize the importance of the board's work. Remind members that:

- a. The Ordinary is bound under canon law to decide how to proceed considering the accusation that has been made;
- b. He has entrusted them with the important work of evaluating the information that has been gathered and giving him a recommendation, of which he must give due consideration under canon law;
- c. The fate of the priest's vocation—his service to God and to his people—is at stake;
- d. Everyone in this process—the Ordinary, the investigator, you, and each of them—is performing a supremely important act; one day we will be called to give an account before God, the Supreme Judge of us all, as to how we discharged our respective duties;
- e. As they evaluate what has been brought before them in that light, they must be focused squarely and solely on justice—not what others may say, not what the media may say, not what lawyers may say—only what God will say.

3. Remind Members of Priest's Rights.

Remind member of the priest's rights, especially the presumption of innocence.

4. Remind Members of Existing Limitations.

Remind members of the limitations of the preliminary investigation. Emphasize the following:

- a. The limited time frame within which the investigation was performed;
- b. That the priest has no right at this stage to subpoena records, compel depositions, or otherwise undertake a robust investigation to defend his good name;
- c. The burden of proof and the limitations of the use of the word "credible;" the standard is "semblance of truth," but what would you want that to mean if you were in the defendant's position?

Consider analogizing to the grand jury process: The investigator, like a prosecutor, is empowered to go out and collect information, including from those who have a duty of obedience to the Ordinary. But the priest, like a defendant, has no such power. The review board, like a grand jury, safeguards against unfounded and malicious accusations of wrongdoing. Grand juries generally operate within a clearly defined legal framework; review boards generally do not.

Remind members not to put special stock in the investigator simply because of past credentials or even expertise. An investigator does not perform the same task as an impartial review board. Otherwise, why bother having them?

5. Consider the Complainant.

Challenging the complaint's allegations requires great tact and diplomacy. But members will be considering those allegations with this presumption in mind: "Why would the accuser come forward if there were no basis in fact?"

In response, point out the many reasons why an accusation might be false or even mistaken:

- (a) Mistaken identity or memory;
- (b) Jealousy;
- (c) Fear;
- (d) Revenge;
- (e) Mental instability;
- (f) Ulterior motives (such as protecting immigration status);
- (g) Financial incentive.

Consider drawing from good Biblical stories, such as Joseph and Potiphar's wife in of *Genesis*, or Susanna in *Daniel*, and other classic literary references, such Mayella Ewell in *To Kill A Mockingbird* or Rebecca Nurse in *The Crucible* (to name just a few).

SAMPLE LETTER TO THE INVESTIGATOR

Dear Mr. X:

Thank you for scheduling the interview with my client, Fr. A. In preparation for you interview, we wish to confirm a few preliminary matters:

1. I am Father's canonical [advisor/advocate/civil lawyer]. [A copy of the requisite canonical mandate is enclosed.] In turn, I would appreciate receiving ahead of time a copy of the decree by which the Ordinary appointed you as investigator.

2. Since this will be the first time we will be meeting in person, Father and I will be prepared to show identification at the start of the interview. We would appreciate seeing yours as well at that time.

3. We intend to record the interview. Please let us know if you intend to record it as well.

4. Father has agreed to participate in this interview on the understanding that this investigation will be conducted consistent with canon law and the procedure for investigations under the *Vademecum* issued by the Congregation for the Doctrine of the Faith in June 2022. Accordingly, we wish to confirm certain details to make sure no misunderstandings exist.

- a. Father is participating freely in this interview, he is under no obligation to answer any of your questions, and he can end the interview at any time;
- b. Father cannot be forced to confess to anything, and under no circumstances may he be required to take an oath (cf. c. 1728 § 2);
- c. Father is entitled to a presumption of innocence (cf. c. 1321 § 1), and to the protection of his good name (cf. cc. 220, 1717 § 2).
- d. You will be conducting the preliminary investigation, of which this interview is part, consistent with the purpose of a preliminary investigation as described in c. 1718 § 1—specifically, that

the *only* purpose of the investigation is to collect enough information that will help the Ordinary decide [i] whether a process to inflict or declare a penalty can be initiated, and [ii] whether this is expedient given the goals of canonical penal law (c. 1341);

We will need you to confirm these points in advance of, or at, the interview. We enclose for your information the cited provisions of the Code and the *Vademecum*.

As always, please contact me if you have any questions or concerns regarding the content of this letter or on any other matter during this preliminary canonical investigation. We look forward to meeting you at the interview.

Sincerely yours in Christ,

Atticus Finch, JD, JCL, etc. etc.

Enclosures