

Testimony of Mark E. Chopko
Pennsylvania Revival Legislation –Impact Observations
October 2, 2019

Introduction and Background

My name is Mark E. Chopko. I am a partner in the law firm Stradley Ronon Stevens & Young, in its Washington DC office. My practice deals with the wide variety of legal problems, including litigation and risk management, that face religious and nonprofit organizations. I am the chair of the practice group in my firm that deals with the problems of these particular institutions. Prior to my coming to the firm in 2007, for 20 years, I was the general counsel of the United States Conference of Catholic Bishops. I managed a legal staff of seven lawyers that generally advised the bishops of the United States with respect to their legal issues. Because dioceses are separate civil and religious institutions from each other, the Conference exercises no governance over dioceses. Each Bishop is autonomous in his own Diocese, responsible to Rome, and with his own staff and advisors including legal counsel.

Of particular interest to this hearing, I have spent more than 35 years of my legal career dealing with issues concerning the abuse and misconduct of clergy and others who were responsible for caring for children and other vulnerable persons. Some of my experience is serving as defense counsel in litigation involving these claims. But I have also been involved in advising churches and related organizations about how to avoid and prevent abuse and misconduct in their institutions, and how to respond properly and, for present purposes, pastorally to complaints of abuse. I am one of the staff writers of the 2002 Dallas Charter for the Protection of Children and Young People. As the Committee undoubtedly knows, the Charter and its corresponding supporting documents outline a program for the Catholic bishops of the

United States to deal responsibly with complaints of abuse. But the Charter also aimed proactively, and dioceses implemented and expanded programs and procedures to prevent incidents of abuse from occurring and to make institutions that care for children and other vulnerable persons, safer. As a Catholic parent and grandparent, I felt it was my responsibility to do the best that I could see that Catholic institutions were safe and accountable.

Let me also begin with the word of apology and concern for those who have been victimized by sexual abuse, whether inside the Catholic Church or in any other place or institution. What happened to you was wrong, and it should not have happened. I am sorry for what you have experienced and continue to experience. My purpose here is not to deflect or minimize your pain, but rather to join my voice with others in this program to try to find a responsible way forward to deal with your suffering justly.

Overview

In discussion with your staff, I have been asked to reflect on the impact of so-called “window” or “revival” laws on the operations of religious and other nonprofit organizations. In this task, I have examined materials related principally to Catholic dioceses in various parts of the country. However, given my experience in counseling, advising, and defending religious and nonprofit organizations of all denominations and stripes across the country, my observations are generally applicable to other circumstances, outside of the Catholic Church.

I will begin with reflections about the litigation process generally and then move on to catalogue generally some of the impacts of these laws. Others on this panel and other panels will be able to offer more specific and detailed reflections on particular aspects of what I generally provide.

Impacts

Integral to the rule and administration of law is the concept of a statute of limitations. It had been said at common law, that no limitation period ran against the Crown. That meant that as regimes changed, one could face a claim or liability that one thought was settled or resolved. A reform in the English system was the rise of certain settled or proprietary rights, including the idea that when one's period of liability exposure ended, one could move forward without worry that when the next regime arrived, one was again vulnerable. It was akin to a property right – the right to be free of an old debt or liability. That concept persists in modern statutes of limitations, now animated by due process concerns: how can one fairly pursue a decades-old claim against a defendant? When one speaks of “windows” or “revivals,” one is speaking of a law that purports to allow claims that have lapsed by operation of law to be commenced now without regard to the age of the claim. That formerly lapsed claim is “revived.” And the additional time within which to file a claim is a “window” through the formerly applicable limitations period.

And the result is that a person who once had (and now again has) a claim, can sue on that claim, force the matter to be completely litigated through discovery, motions practice, trial and appeal.

I look at these issues as presenting first, the toll of the litigation process itself, second the impact on risk transfer or insurance, and third the impact on resources and programs that are now devoted to public charity to answer these claims. Plainly I believe that these injuries should be redressed, but I do not think civil litigation is the right response.

(1) The very first impact of any law that, decades after the fact, allows for liability through the court system without regard to the age of the complaint or when the incident

occurred is the litigation process itself. Litigation is long, expensive, often overheated, and invariably an unhappy experience for parties and witnesses. And I say this as a litigator. I cannot think of a more difficult way to resolve claims that are so personal and sensitive resulting from childhood sexual assault. In my experience, victims of abuse and misconduct want to be heard, understood, apologized to, and given the satisfaction that those who were responsible for their injuries not only are willing to respond to them and be held accountable, but to take whatever steps are necessary to prevent something this horrific from happening to anyone else. Because of the way our liability system has evolved, that rarely happens in trials. Litigation is always adversarial, always about proving who's right and who's wrong, and always about winners and losers. The winners exult. Losers pay either in money damages or, if the claim is rejected, get nothing except disappointment.

Here, the legislature is considering legislation that would allow for the litigation of claims regardless of when they happened. Given the thousands of cases that have been filed in states that have opened "windows," California, Minnesota, Delaware, and Hawaii, one can expect an avalanche of claims in Pennsylvania in a very short period of time. In New York, which has recently opened such a window, according to the Wall Street Journal, more than 700 claims have been filed since August 14.

Those who file first can seek to be calendared first for trial with the expectation that their claims will be resolved first and therefore compensated before others. Because religious and nonprofit institutions have finite assets that can be used for compensation of claims, if all of the insurance proceeds, unrestricted assets, and cash flow are diverted to compensate the first victims and their attorneys, how will the second or third or twentieth group be compensated? In

these circumstances, mass litigation raises the real prospect of overwhelming the ability of an entity to respond rationally or even serially.

That reality has in turn led to a series of bankruptcy filings involving issues of the Catholic Church especially in jurisdictions that have opened windows. One can review the records in these proceedings to see the same theme emerge: those in charge perceived that a bankruptcy filing was the only way to respond to all claimants fairly and to have any hope or expectation the diocese would be able to operate in service to people in need now and in the future. Even then, as will be developed later, the bankruptcy process has a significant cost. Five of the six dioceses in Minnesota and one religious order have filed for bankruptcy in response to that state's three-year "window." The first New York diocese, Rochester, has filed for bankruptcy. The one-year California window from 2003-04 resulted in one bankruptcy (with another years later). As California considers a new three-year window, no one knows what the new impacts will be.

Finally, assuming one could litigate claims individually or serially, the very process is difficult to administer. For example, in some states, the standard for a claim to be revived is said to be gross negligence. This was the standard in Delaware and is the standard in Hawaii. The concept is not well defined, and often tends to be blurred when matters are actually put to finders of fact, individual jurors. Moreover, how is a jury in 2020 to assess whether an employing entity acted reasonably in response to an allegation of abuse in 1950 – decades before child abuse was reportable, before many significant child protection laws were enacted, before the deceptive practices of perpetrators came to light, and before the impacts of abuse and misconduct were understood? Even if a jury could understand that culture and time, how could it unlearn what it now knows to be correct?

Other panels and presenters will be talking about how they believe it best to resolve these claims in greater detail. In my experience, an alternative dispute resolution process is much better suited for these claims. The process is faster, less expensive, and less about proving who is right and who is wrong. It often can also result in a conversation between those who claim injury and those who are in some measure responsible, even if those in charge now did not create the problem and are moving rapidly to solve and prevent it. It is a place where hurt can be heard and accepted, and apologies can be said and received. Of the available processes to resolve claims of liability, this process is better suited towards healing and reconciliation for religious and nonprofit institutions. It must be remembered that these are not commercial claims between secular entities fighting over money or some deal gone wrong. Those who present these claims suffered deep wounds, which are reflected in the fabric of the church and churches today. They deserve to be healed. I do not believe litigation will have that effect.

(2) A second impact is in the area of liability insurance. Given the distance between incidents and claims, carriers are understandably circumspect when it comes to coverage. Finding policies, and proving their terms and limits is a considerable challenge. The carriers themselves may have gone out of business decades ago; brokerages who sold policies have closed. Even if one can find the policies and gain everyone's cooperation, the limits that were purchased decades ago for 1950s injuries are by no means adequate to provide compensation measured in 21st-century dollars. In a worst case, it may be necessary to sue carriers, further expending resources that alternatively could be used for compensation or the works of charity. Thus, charitable agencies could be caught between two sets of litigants: claimants seeking damages and unresponsive carriers unwilling or unable to provide coverage. At the present time, such litigation persists in Hawaii, and continued conflicts with insurers is part of that reality.

(3) Dioceses and parishes, like other churches, have finite resources. They depend on the generosity of Catholics and others for their support. Their ability to serve financially depends on the success of giving programs such as annual appeals, fees and charges from certain programs, investment income, and grants. There may also be special campaigns and assessments but those often result in restricted funds that cannot be used generally for operations or programs. In times of crisis, dioceses and individual parishes examine how cuts can be made in human or ministry resources or both to “balance the books.” The litigation that has been experienced in the Catholic communities over the last twenty years has been significant. Some commentators report that more than \$3 Billion has been expended to resolve claims of abuse and misconduct; other commentators have wondered what other good might have been done if that money had not been diverted from charity into paying this debt created by the perverse and criminal actions of a few.

It has to be noted here that the Catholic Church has done a remarkable job in addressing the safety of children. Elsewhere, the precipitous drop in injuries to children associated with Catholic parishes, schools and other entities is documented. See Peter Steinfelds, Commonweal (January 26, 2019), found at <https://www.commonwealmagazine.org/pa-grand-jury-report-not-what-it-seems> But all of this progress has left some who were injured decades ago feeling unhealed and unacknowledged. There are a number of ongoing programs aimed at closing that gap apart from any governmental action. The legislative action under consideration would purport to offer another way forward, through civil litigation. As noted above and elsewhere in this record, that process, too, has its costs for victims. And it has also had its costs for churches. Looking generally at the effect on operations now and in the future, here is a catalogue of impacts.

- People- there are substantial cutbacks in diocesan and parish staff to pay the expenses of litigation and claims over abuse and misconduct. Churches operate close to the margin and depend on dedicated staff and volunteers to operate programs that educate children, serve the poor, welcome the newcomer, and heal the sick and distressed. Local churches in the Catholic tradition, especially those on the front lines of these ministries, depend on the support of the central offices in a diocese because they don't have the resources to run those programs themselves. Some dioceses have cut administrative staff by 50%, frozen salaries and benefits, and reduced new spending for staff training and education. This shifts the burden to the parishes which now must provide for themselves, but which are themselves likely targets of revived litigation claims. This directly impacts the parishioners who rely on their local church for ministry and service. But in my view the biggest impact is on those who stay in service who must do more with less to fulfill the mission.

- Programs- dioceses can go from underwriting charity and needs at the local level, to reducing programs and support, financially and programmatically. In the signing statement for New Jersey's window, the Governor conceded that Catholic Church and other organizations face "potentially massive financial liabilities" that could force them to drastically cut back on services on which many vulnerable residents rely. Governor's Statement Upon Signing Senate Committee Substitute For Senate Bill No. 477 (May 13, 2019). In Spokane which was not in a state that opened a window but merely relaxed the standards for bringing claims, the diocese filed for bankruptcy. The subsequent reductions in programs included elimination of the Parish Service Office which provided for youth ministry and religious education; cuts to other supports for youth ministry, clergy education and Hispanic Ministry; and further reductions in services to Catholic teachers. In Los Angeles, which resolved more than 700 claims, the settlement required elimination of a fund that directly provided cash subsidies to needy parishes serving the inner city and migrant communities and the borrowing of the same amount. The Archdiocese went from a position of supporter to debtor, and that more than \$200 Million swing was all reported in the archdiocesan financial statements. The same damage to the ability to aid struggling parishes

and ministries occurred in Delaware, which saw the closing of several schools that served the most needy.

- Patterns of Giving and Support- Dioceses report substantial drops in support for annual appeals either from distrust that funds will go into discharging liabilities or in protest for what had occurred decades earlier. The Bishop of New Ulm, Minnesota, reported a decline of \$1 Million in contributions and bequests over the year that the state's window opened. Beyond cash contributions, certain assets that provided such support have been sold or liquidated. Wilmington reports that its diocesan foundation was liquidated; it had previously provided more than \$3 Million in grants and subsidies to parishes and schools. Properties associated with Catholic Charities were sold which reduced its ability to serve the community.

I wish the Committee well as it studies this question and ponders what to do next. I look forward to the dialogue with the Committee. Thank you for the opportunity to present these views.