How A NJ Clergy Abuse Probe Will Reshape Defense Strategy

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-- The New Jersey Supreme Court has cleared the way for a grand jury to investigate clergy abuse claims, bringing forward a rarely used prosecution tool that experts say will have reverberations on the strategies taken by lawyers representing powerful individuals and institutions even beyond the Catholic Church.

The state high court's ruling hinged on whether accusations of clergy sex abuse should be delved into with a grand jury presentment. Presentments are reports that can lead to criminal charges or merely serve as guidance for enforcers, the public or policymakers, and which the law designates for looking into matters of public interest.

While the justices on June 16 declined to directly conclude clergy sex abuse accusations qualified as a "public affairs or conditions" under Rule of Court 3:6-9, which governs grand jury presentments, **they held** that no law allowed the Roman Catholic Church to block the grand jury from being seated. The challenge was brought by the Diocese of Camden, which argued that a grand jury presentment on clergy abuse would be unauthorized and premature.

The decision put defense attorneys on notice that their clients could face a grand jury if their alleged misconduct implicates a public interest. Experts also indicated, however, that this glimpse of the government's playbook in any given case buys the defense more time

to strategize in order to get the best result for their client.

Presentments give prosecutors "a lot more latitude, potentially to investigate an institution where there appears to be criminal activity," noted Greg Gianforcaro, a Phillipsburg, New Jersey, attorney who represents clergy abuse victims.

"Now, any institution, whether private or public, involved in any criminal conduct which could impair or impact the public or address a public concern — now it is clear that the prosecuting authority can investigate and convene a grand jury," Gianforcaro told Law360.

"And from a criminal defense side, it permits that process regardless of whether a person whose name might be associated with that institution" can give a different side of the story, he added.

The Diocese of Camden said it is now willing to "cooperate fully" with the investigation, noting in a July 17 statement to Law360 that it dropped its challenge to the grand process after oral arguments but before the New Jersey Supreme Court issued its opinion. The diocese is **among several** around the nation that **have gone bankrupt** under the financial strain of civil lawsuits over clergy abuse.

"To the victims and all those impacted by abuse, we reaffirm our sorrow, our support, and our unwavering resolve to do what is right, now and always," the diocese added.

Grand Jury Process

Most criminal cases are generated with a complaint from prosecutors

that gets resolved through a plea deal, in which defendants may waive their right to have a grand jury decide if there's enough evidence to bring charges. Some materialize via direct indictment, where prosecutors go directly to a grand jury without filing a criminal complaint, but they still typically emanate from a law enforcement investigation, said Bob Bianchi, a former Morris County district attorney who is now in private practice at The Bianchi Law Group LLC.

In New Jersey, the presentment process can only occur when ongoing "public affairs and conditions" warrant a formal probe, said John W. Baldante of Baldante & Rubenstein PC, whose law firm also represents clergy abuse plaintiffs.

"The question you have to ask is: Does the grand jury investigation serve an important public policy?" Baldante said. "The answer here is yes. It's hard to imagine a more important public interest than the protection of children from sexual abuse."

Baldante's take echoed the case state Attorney General Matt Platkin made to the court in defense of using a grand jury for the probe.

A jurist known as an assignment judge has considerable power over the process. The judge has the discretion to accept or reject the presentment, and whether to make it public. The judge also may ask the grand jury if criminal charges are warranted if the jury didn't immediately seek an indictment.

Presentments are a "unique and very infrequently used" process, according to Bianchi.

To that end, Jessica Frisina, assistant professor of law and director of the criminal defense and advocacy clinic at Rutgers Law School, said most Garden State attorneys aren't accustomed to handling presentments because they've been rare in recent times.

The case law the justices discussed dates to the early 1900s.

While the state and federal constitutions, state statutes, and state criminal procedure rules remain unchanged in the wake of the opinion, Bianchi said lawyers in several practice areas may need to tweak their strategy roadmaps.

Defense Strategy

First, Bianchi said, information subpoenaed in civil discovery could also be subpoenaed by a grand jury, published in a presentment and funneled into an indictment. Civil attorneys should be guarded about the potential criminal ramifications of civil discovery and seek to quash civil subpoenas, he cautioned.

Baldante noted that in many states, grand juries have preceded civil and bankruptcy filings, but in New Jersey, the opposite occurred. He agreed evidence uncovered in past civil suits will probably be similar to information the grand jury weighs.

Second, though the Diocese of Camden lost its attempt to torpedo the grand jury proceeding before it started, the litigation placed any hypothetical defendant on notice that a grand jury is being impaneled, Bianchi said.

"Most of the time we don't know our people are under a grand jury investigation," he said, speaking as a defense lawyer. "Now you know; it's happening. You don't have to go to a client and guess."

That means defense lawyers have more time, and more information, available for strategy, Bianchi said.

Third, defense lawyers should assume the attorney general's office will bring the full weight of state resources — not just county or local coffers — against any potential targets, Binachi said.

"That's where the super danger is," he said. "Now you have statewide jurisdiction. Now there seems to be an appetite to look."

Therefore, Bianchi said, defense lawyers should consider where prosecutors might be inclined to grant immunity from prosecution in return for grand jury testimony.

"Anytime somebody comes to me, as a criminal lawyer or as a civil attorney, I'm wondering where they are in the chain of events that could lead to criminal liability," Bianchi said.

The Racketeer Influenced and Corrupt Organizations Act "allows charges against anyone who's a spoke in the wheel," he continued. "A prosecutor could take laudable conduct and criminalize it."

Defense attorneys should also strategize whether institutional procedures and processes could constitute either aiding and abetting or a cover-up of a potential crime, Bianchi said.

If prosecutors seem inclined to target senior individuals in an organization's hierarchy, a client with inside information about how the organization functioned could benefit from an immunity agreement, Bianchi theorized.

Frisina noted that subpoena targets can assert their Fifth Amendment right against self-incrimination during grand jury proceedings unless the state grants blanket immunity from anything they say while testifying. Anyone with immunity who still does not testify can be held in contempt, she said.

Without immunity, anyone subpoenaed to testify for a presentment should assume criminal charges could follow, said Brett M. Rosen, a certified New Jersey criminal trial attorney with Proetta Oliver Fay & Rosen LLC.

"I would still treat it as a potential crime action coming down the pipeline," he said. "I would advise them the same way they're facing criminal charges — not talking to family, friends, or detectives."

Records subpoenas are typically harder to challenge, Rosen said.

Because grand juries called to issue presentments can only focus on "public affairs and conditions," Frisina said attorneys worried about possible grand jury probes and presentments should counsel institutional clients and their leaders about how to avoid degrading public affairs and conditions such that an investigation might occur.

A defendant who faces a direct indictment may benefit from receiving a notice to appear for an arraignment conference, she noted. That could

allow the defendant to "surrender peacefully in a courtroom rather than face unexpected arrest on the street," she said.

By contrast, defendants charged by complaints often face inconvenience, embarrassment, missed work, childcare issues, struggles with the police and sometimes even violence when they are arrested, usually without warning, she said.

Additionally, a case commenced via a grand jury presentment coupled with a direct indictment would skip the preindictment conference some New Jersey defense attorneys are accustomed to using to negotiate a lenient plea deal, Frisina said.

Typically, attorneys argue that the immediate acceptance of guilt during a preindictment conference saves court resources and should result in leniency, Frisina noted.

However, "because New Jersey law does not actually guarantee their clients a plea deal at any time, including at that preindictment conference, proceeding directly to indictment does not deprive their client of any particular right," she said. "Once plea bargaining begins after arraignment on the direct indictment, defense attorneys can generally rely on the same arguments that they might have made at the preindictment conference."

Prosecution Strategy

Bianchi, the former Morris County district attorney, said prosecutors need to determine who to target and who to immunize. They could grant immunity to top leaders, hoping their testimony could lead to the

conviction of an actual abuser, or they could immunize lower and mid-level operatives to prosecute higher-ups, Bianchi theorized.

"Individuals who are in positions of authority who never in a million years believed they were in harm's way, could be," he said.

A prosecutor would select a target, "call their lawyer, and you say: look, cooperate with us, or we'll do it the hard way," he said. "Then you go up the chain."

"Prosecutor Bianchi would want to get as many offenders as possible, but the other part of Bob Bianchi the prosecutor says this might not have occurred but for the institution allowing it to happen," he continued, detailing a hypothetical thought process. "So, I'm working both sides of that fence."

"It's a prosecutorial decision," Bianchi explained. "There's a cost-benefit analysis that's going to change, morph and modify as you go along. Along the line, you have to make some compromises."

By investigating and issuing a presentment, a grand jury could also help prosecutors cut through the Roman Catholic Church's complicated hierarchy and organizational structure, Bianchi said.

Bianchi said he struggled with the organization of the church when he prosecuted the murder of the Rev. Edward Hinds, a priest from a church in Chatham who was stabbed 44 times by a janitor. A grand jury with statewide reach could probe the structure Bianchi said was difficult for him to understand as a county prosecutor.

Frisina said prosecutors are unaccustomed to following the lead of a grand jury.

"In the vast majority of criminal cases, the prosecutors prepare and present evidence of an alleged crime and ask the grand jury to consider finding probable cause to charge the defendant with that crime based on the evidence they have presented," she said. "As a result, most prosecutors will not have experienced grand jurors initiating independent investigations or requesting evidence outside the scope of the prosecutor's presentation."

--Editing by Orlando Lorenzo.

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