Preserving Catholic Identity in Mergers

An Ethical and Canon Law Perspective

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In today's competitive market, many Catholic hospitals are finding that mergers and joint ventures allow them to become more efficient through shared resources—a great advantage for institutions struggling to survive.[1] Such affiliations can cause conflict, however. For instance, a Catholic hospital's Catholic identity can be questioned if the hospital enters into a merger or joint venture with a non-Catholic provider that carries out practices or procedures the Catholic Church believes to violate moral principles. These alternative forms of association necessitate an exploration of who determines what makes an institution Catholic and what guidelines should be used in that decision.

The 1983 Code of Canon Law, in presenting the general legislation for the Church, does not directly answer these questions in regard to Catholic hospitals; however, it provides some broad guidelines to help establish the Catholicity of a Catholic hospital that has affiliated with a non-Catholic hospital. The Church's ethical teachings provide further guidance in this matter.

The Role of the Diocesan Bishop

The diocesan bishop serves as the chief pastor of those entrusted to his care and establishes the Catholicity of institutions in his diocese. The Second Vatican Council underscored this notion, stating in *Lumen Gentium* that the diocesan bishop is the "vicar and ambassador of Christ." More fully, in paragraph 27, *Lumen Gentium* states:

> The bishops, as vicars and legates of Christ, govern the particular Churches assigned to them by their counsels, exhortations and example, but over and above that also by the authority and sacred power which

Summary A merger or joint venture between a Catholic healthcare facility and a non-Catholic healthcare facility that provides procedures the Catholic Church believes to violate moral principles raises a number of issues to be considered by diocesan bishops. The 1983 Code of Canon Law provides bishops with guidelines to help establish the Catholicity of a Catholic hospital that has affiliated with a non-Catholic hospital.

The diocesan bishop exercises his authority through a threefold ministry of teaching, sanctifying, and governing. These ministries stand as a reminder of his decision-making authority in matters that affect the spiritual state and growth of those entrusted to his care.

Catholic identity, as it is presented in the Code of Canon Law, can be determined through the presence of a relationship between an institution and ecclesiastical authorities, the legal establishment of the entity, and a degree of control that the Church exercises over the institution.

When evaluating a possible merger of joint venture between a Catholic hospital and a non-Catholic hospital that is performing procedures not in accord with Catholic Church teaching, the diocesan bishop must consider what limits must be observed. The good effects of the affiliation must be intended and direct, and the harmful effects must be perceived as unintended and indirect.

The difficulties in determining and protecting the identity of Catholic hospitals in possible mergers or joint ventures should not prevent facilities from considering alternative forms of corporate structures. The Code of Canon Law and the Church's ethical teachings provide guidelines to ensure these possibilities.

indeed they exercise exclusively for the spiritual development of their flock. . . . This power, which they exercise personally in the name of Christ, is proper, ordinary and immediate.[2]

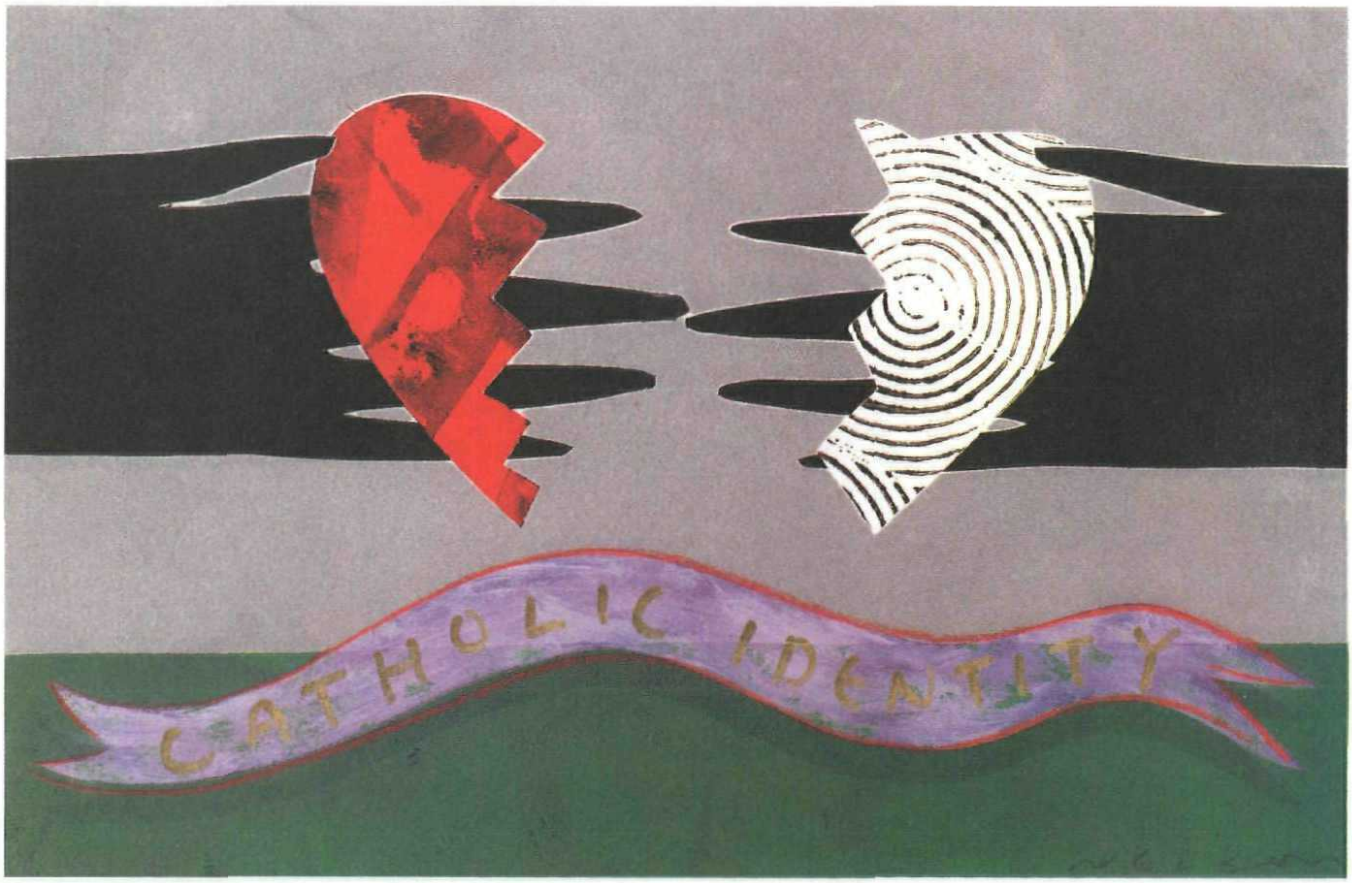
This statement brought about a dramatic shift in the understanding of the diocesan bishop's authority. Before *Lumen Gentium*, bishops were sometimes considered representatives of the Roman pontiff but not of Christ. *Lumen Gentium* changed this understanding by stating that a diocesan bishop has all the necessary authority to make decisions affecting the spiritual development and care of those within his diocese. This authority applies to all apostolic activities within the diocese, including the availability of Catholic healthcare. The entrusting of all necessary authority to the diocesan bishop was later legislated in the 1983 Code of Canon Law (c. 381, sec. 1).

Threefold Ministry

The diocesan bishop exercises his authority through a threefold ministry of teaching, sanctifying, and governing. Through the teaching ministry, the bishop proposes moral and doctrinal teachings to be observed by those entrusted to his care. The ministry of sanctifying occurs when the bishop provides for the administration of sacraments, both parochial and specialized, such as those found in certain chaplaincy services. Through the governance ministry, the bishop makes administrative decisions that affect the management of the diocese. This includes developing standards for the operation of those institutions which function under Catholic sponsorship.

These three functions become more specialized for Catholic healthcare institutions, which look to the diocesan bishop for ministerial leadership on issues principally related to the teaching of the faith. This obligation revolves around doctrinal and moral issues.

The diocesan bishop is obliged to teach on those doctrinal issues which form the very essence of the Catholic faith, one of the most fundamental of which asserts the dignity of the human person. He must teach this doctrine gen-



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erally and as it relates to healthcare. The bishop is also responsible for teaching on moral issues and their application in the healthcare institutions within his diocese.

The threefold ministries of teaching, sanctifying, and governing are essential when the diocesan bishop considers potential mergers and joint ventures between Catholic and non-Catholic healthcare facilities. These ministries stand as a reminder of his decision-making authority in matters that affect the spiritual state and growth of those entrusted to his care. Together, these ministries constitute the diocesan bishop's leadership position, which includes the function of decision maker. Therefore the bishop has the authority to determine what constitutes the Catholic identity of a given institution within his diocese.

> The competent authority must consider the limits of cooperation.

Criteria for Catholic Identity

The Code of Canon Law grants the diocesan bishop the ability to determine the qualities necessary to identify an institution as Catholic and thus as sharing in the mission of the Church. However, the bishop may find it difficult to precisely determine what qualities are necessary. Changes in healthcare administration and finance over the past decade have necessitated a rethinking of those qualities.

In 1978 Rev. Benedict M. Ashley, OP, PhD, and Rev. Kevin D. O'Rourke, OP, JCD,[3] identified six qualities that determine hospitals' Catholicity:

- Catholic hospitals are under the guidance and direction of the diocesan bishop, including his interpretation and application of the *Ethical and Religious Directives for Catholic Health Facilities.*[4]
- Catholic hospitals are sponsored by religious institutes, which assume the responsibility for administrative and nursing staff and hold basic financial ownership and responsibility.
- Catholic hospitals seek out charitable funding on the basis of their Catholic sponsorship.
- Priest chaplains provide for the sacramental and pastoral needs of Catholic hospitals' patients and staff.
- The hospitals' physicians, nurses, and administrators are Catholic or accepting of Catholic ethical norms.
- Catholic hospitals use symbols in their buildings that are an expression of the faith, such as crucifixes in patient rooms and chapels in the facilities.

Status Quo No Longer Applicable To a great extent, however, these six points can no longer be considered the criteria by which an institution is deemed Catholic. Religious institutes may sponsor facilities whose day-to-day operations are entrusted to those more expert in the fields of management and finance. Funding is no longer solely derived from charitable donations, but through a combination of charity, government assistance, and patient revenues. Pastoral care is commonly entrusted to both clergy and laity. Staff is made up of physicians, nurses, and administrators who practice diverse faiths and therefore hold differing beliefs.

Because the criteria suggested by Fr. Ashley and Fr. O'Rourke are no longer completely applicable (with the exception of institutions being under the direction and guidance of the diocesan bishop), some other basis of determination must be explored. The 1983 Code of Canon Law, although not providing a specific set of canons defining the Catholic identity of healthcare institutions, does offer some guidelines.

Rev. Francis G. Morrisey, OMI, suggests that Catholic identity, as it is presented in the Code of Canon Law, can be determined through the presence of three major qualities:

- A relationship between an institution and ecclesiastical authorities, which provides for accountability
- The legal establishment of the entity
- A degree of control that the Church exercises over the institution[5]

Selected canons contained in the 1983 Code of Canon Law reflect these qualities.

Ecclesiastical Accountability Two canons discuss the relationship of ecclesiastical accountability. Canon 803, section 3 considers accountability for schools, stating that "no school may bear the title

Catholic without the consent of the competent ecclesiastical authority." Canon 216 addresses the right of the faithful to participate in the mission of the Church. It notes, however, that "no undertakings shall assume the name Catholic unless the consent of competent ecclesiastical authority is given." These canons suggest that an appropriate authority must approve institutions maintaining they are Catholic. If he consents, the diocesan bishop allows the groups to claim they are Catholic. This approval is not primarily a granting of rights or obligations, but rather the basis by which accountability is to be achieved.

Establishment of the Entity The second quality that indicates Catholic identity is the group's canonical personality granted by the Church. The 1983 code offers two types of juridic person that can be granted to such groups[6]: public juridic person or private juridic person. The difference between the two is primarily based on the rights and obligations granted to them by law. Regardless of a group's personality, it can never acquire its respective rights and obligations without the competent authority at least recognizing its statutes. Canon 299, section 3 states that "no private association of the Christian faithful in the Church is recognized unless its statutes are *reviewed* by competent authority" (emphasis added). A broader application of this principle is also legislated in canon 117: "No aggregate of persons or things, intending to obtain juridic personality, can achieve it unless its statutes have been approved by the competent authority." These regulations are means whereby the Church attempts to protect itself. In other words, it gives the appropriate ecclesiastical authority the opportunity to ensure that the mission and the application of a group's activity, which are defined in its statutes, are consistent with the Church's beliefs and practices.

Degree of Control Supervision is the third quality essential to defining Catholic identity. Control can be exercised in a variety of ways. For instance, the reserved powers written into the corporate bylaws of some healthcare institutions allow the sponsor to maintain a specified amount of control. The bishop's acceptance and implementation of the medicomoral guidelines can also be a means of exercising control over the healthcare institution within his diocese. However, because these guidelines are only recommendations, it is imperative that the diocesan bishop determine some sort of guideline for medical and moral activity to provide the necessary control that protects an institution's Catholic identity.

Of the three qualities Fr. Morrisey suggested, only the third really causes difficulties. They occur when Catholic hospitals are considering mergers or joint ventures with non-Catholic hospitals that practice procedures which are inconsistent with Catholic values. This naturally leads to questions of whether mergers or joint ventures of this sort are prohibited by canon law. Some may be quick to answer in the affirmative, but other points of view must be considered. When considering alternative forms of affiliation, healthcare providers must keep in mind the Church's ethical teachings.

Ethical Guidelines

When evaluating a possible merger or joint venture between a Catholic hospital and a non-Catholic hospital that is performing procedures not in accord with Catholic Church teaching, the competent authority must consider the limits of cooperation. In other words, what are the limits or boundaries that must be observed?

A solution to this question lies in the Church's ethical teachings. These teachings are summarized in Fr. Ashley and Fr. O'Rourke's study, *Healthcare Ethics: A Theological Analysis.* The authors analyze the principle of legitimate cooperation, which is described in these terms:

> To achieve a well-formed conscience, one should always judge it unethical to cooperate formally with an immoral act (i.e., directly to intend the evil act itself), but one may sometimes judge it to be an ethical duty to cooperate materially with an immoral act (i.e., only indirectly intending its harmful consequences) when only in this way can a greater harm be prevented, provided (1) that the cooperation is not immediate and (2) that the degree of cooperation and the danger of scandal are taken into account.[7]

The authors define the relevant concepts of the principle of legitimate cooperation in the following manner. First, *formal cooperation* means actually intending the evil. This includes any action or inaction that flows from a positive intention to do evil. *Material cooperation* takes place when one intends good. It is further distinguished as mediate or immediate. *Immediate material cooperation*, because it is a form of direct involvement in the evil act itself, is ultimately considered formal cooperation. However, Fr. Ashley and Fr. O'Rourke note that *mediate material coopera-*

tion, "which can be proximate or remote, under certain conditions is sometimes justified and even necessary."[8]

For remote cooperation to be justified, the good achieved must outweigh the contribution to the evil act.[9] Second, the effect that the potential scandal of such cooperation would have must be weighed.

Cooperation can therefore be justified when a double effect is truly present.[10] In other words, the good effects are intended and direct, and the harmful effects are perceived as unintended and indirect.

> Cooperation is prohibited in acts the faithful would find seriously scandalous.

Some may suggest that the principle of legitimate cooperation is simply a means of justifying possible mergers or joint ventures between Catholic hospitals and non-Catholic hospitals whose procedures are inconsistent with Catholic teaching. However, the principle *does* have restrictive elements. For example, cooperation is prohibited:

- In intrinsically wrong situations, such as acts of suicide or, as with abortion, when the rights of a third party are violated
- When it involves religious matters that would require involvement in intrinsically evil acts
- In acts that the faithful would find seriously scandalous

Application of Concepts

Joint Ventures An illustration of material cooperation is found in the case of a joint venture between a Catholic hospital and a non-Catholic hospital providing direct sterilizations. If the obstetrics unit is to be shared, could the joint venture be structured in such a way that only remote forms of material cooperation exist? Applying the principle of legitimate cooperation, such a merger could take place with several qualifications.

First, it would have to be clear that the staff of the Catholic hospital is not directly involved in the sterilizations and that the facilities in which these procedures take place are not directly associated with the Catholic hospital. Second, the Catholic hospital would have to clearly state its disapproval of such procedures. Third, the diocesan bishop would have to weigh the good to be achieved in the joint venture. Finally, the bishop would have to evaluate the effect the element of scandal would have on the faithful within his diocese.[11]

In principle, a joint venture of this sort would best be achieved if the obstetrics unit were not physically within the Catholic hospital. Allowing those procedures which are inconsistent with Catholic moral teaching to take place in the non-Catholic hospital or moving them off site creates the perception that the Catholic hospital is not immediately cooperating. This may be an effective way to reduce the scandal so that a greater good may result because of the joint venture.

Although procedures not in accord with Catholic moral teaching should in principle be offered off site or in a separate physical structure, in extreme cases this may be impossible. The evaluation of the magnitude of the potential scandal and the degree of his tolerance to achieve the greater good of providing adequate Catholic healthcare within his diocese rests ultimately with the diocesan bishop.

Mergers These criteria also apply to mergers where the Catholic hospital remains the primary institution and structure. However, the degree of potential scandal and the diocesan bishop's tolerance level in a merger are by far more delicate issues than in the case of a joint venture. This delicacy revolves around the perceptions created by the merger. If in a merger the Catholic hospital remains the primary institution, then the Catholic identity will be more fully applied to the acquired entity. In a joint venture this is less of a problem because to some extent the autonomy of each entity remains.

Points to Remember

In applying these principles, as well as in determining the Catholicity of any institution, sponsors and executives considering potential mergers and joint ventures should remember the following six points:

- The medical and ethical directives approved

by the National Conference of Catholic Bishops are guidelines, not binding legislation.[12] The diocesan bishop may accept, apply, and interpret those guidelines as he deems necessary. Even though the directives are not mandatory, the diocesan bishop has an obligation to provide a set of moral teachings to be used by the healthcare institutions within his diocese.

- The diocesan bishop can allow some forms of cooperation in a merger or joint venture between a Catholic hospital and a non-Catholic hospital that is involved in procedures inconsistent with Catholic medicomoral directives. Toleration of this sort must be based on the principle of legitimate cooperation, which the diocesan bishop evaluates with the assistance of other informed persons. Furthermore, the affiliation's acceptability can be enhanced through negotiations in which the facilities attempt to move unacceptable procedures to another location.
- The bishop must evaluate the effect legitimate cooperation would have on the faithful. In most cases this will be relative to the culture and tradition of the people in the diocese.
- The diocesan bishop's role is essential in establishing a hospital's Catholicity. He should be involved in its earliest stages. The identity of the Catholic hospital rests on his support. His responsibilities are vast, including concerns for the presence of healthcare in the diocese and for the protection of the traditions and values of those he serves.
- For mergers or joint ventures involving material cooperation between Catholic and non-Catholic hospitals, the availability of healthcare within the diocese will influence the bishop's decision. In other words, where a strong Catholic healthcare presence exists within a diocese, he may be less willing to tolerate material cooperation than in a diocese with only one Catholic hospital that otherwise would be forced to close due to financial constraints.
- Conditions that ensure a level of material cooperation should be written into a civil contract or agreement. This becomes a means to guarantee that the qualities necessary for toleration will not deteriorate.

Encouraging New Structures

Determining precisely what constitutes Catholic identity is indeed complex. It becomes a significant issue when mergers or joint ventures are planned between Catholic hospitals and non-Catholic hospitals that practice procedures not in accord with Catholic moral teaching.

The difficulties in determining and protecting the identity of Catholic hospitals in possible mergers or joint ventures should not prevent facilities from considering alternative forms of corporate structures. Mergers or joint ventures can take place in ways that protect the identity of Catholic hospitals. The Code of Canon Law and the Church's ethical teachings provide guidelines to ensure these possibilities. The commitment of the diocesan bishop, sponsors, and hospital executives in using these guidelines will prevent Catholic identity from being called into question or diminished.

These new corporate structures offer possibilities that often outweigh their limitations or the difficulties they present. A commitment to openness in the examination of possible mergers and joint ventures ultimately invites a decision to enter into consultation and dialogue. That process will lead to an honest assessment by those involved of the impact a potential merger or joint venture will have on Catholic identity. It is only with such an assessment that decisions can be made which respond to the needs of the diocesan Church. □

NOTES

1. For an excellent resource on the complexity of mergers, joint ventures, and acquisitions, see *Mergers and Acquisitions Workshop*, Catholic Health Association, St. Louis, 1990.
2. *Lumen Gentium*, in Austin Flannery, ed., *Vatican Council II: The Councilior and Post-Conciliar Documents*, vol. 1, Costello Publishing, Northport, NY, 1975, p. 383.
3. Benedict M. Ashley and Kevin D. O'Rourke, *Healthcare Ethics: A Theological Analysis*, Catholic Health Association, St. Louis, 1978, pp. 149-150.
4. *Ethical and Religious Directives for Catholic Health Facilities*, U.S. Catholic Conference, Washington, DC, 1975.
5. Francis G. Morrisey, "What Makes an Institution 'Catholic'?" *Jurist*, vol. 47, no. 2, 1987, pp. 535-540.
6. For an understanding of juridic person in its private and public forms, see Joseph Howarth, "Juridic Person or Private Association: Choosing a Canonical Structure," *Health Progress*, September 1986, pp. 51-52.
7. Benedict M. Ashley and Kevin D. O'Rourke, *Healthcare Ethics: A Theological Analysis*, 3d ed., Catholic Health Association, St. Louis, 1989, pp. 188-190.
8. Ashley and O'Rourke, 1989, p. 188.
9. Ashley and O'Rourke, 1989, pp. 184-188.
10. Ashley and O'Rourke, 1989, p. 187.
11. Ashley and O'Rourke, 1989, p. 278.
12. *Ethical and Religious Directives for Catholic Health Facilities*.