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## Alternative Dispute Resolution

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# ALTERNATIVE DISPUTE RESOLUTION

PATRICK CROWLEY, ESQ., SEATTLE, WASHINGTON

When, four years ago, our office was confronted with the idea of an ombudsman, I must frankly confess that I wasn't too hot about the idea. I had a number of problems. We had had a history of a due process system that I didn't think was working adequately. It was working, but I had little contact with it. Like most, you probably pick your winners and you try them and you take your potential losers and settle them. And there is not much activity prior to the point where it becomes a confrontational situation as far as most retained counsel are concerned.

I was also worried about what effect it was going to have on management, on some of the more hands-on principals of some schools, and maybe some pastors of some parishes. But the Archbishop ordered it instated and that is what we have been living with for four years. It has been 100% effective. I am almost irrelevant when it comes to court litigation in the area of employment law practice. This is something that I am very pleased to report. Employment law is so full of emotion. So many of the participants have constituencies that continue to fight way beyond the time the case is over, or as we would say, settled. But it is not, in effect, really settled.

My four-year interaction with Jessie has been very favorable. I am not here to sell Amway, but I am a convert to this particular cause, at least, the way we have managed to work it in our Archdiocese. The Archdiocese of Seattle may or may not be an appropriate model for every diocese in the country because our charities office, our education office and our parish agencies all have their own independent personnel directors. They also all have their own independent grievance policies. And so by the time Jessie sees them, they have already gone through it, and by the time I see them, they are tremendously worn down. And that is not all bad.

From my prior experience in employment law, I find that very frequently the agency manager who issued the termination notice can become so personally involved that it is very difficult to settle the case. This system takes the personality conflict out of employment relations. You are forewarned because of all the interaction that has gone on as to

what the people are really saying to each other. In that respect, it is very, very cheap discovery because you don't have to wait for the answers for the first set of interrogatories to know whether or not the principal of the grade school, who issued the termination notice, was in full comprehension of all the totality of facts surrounding that termination.

ADR also is quite effective in handling some employment disputes that might otherwise have a lot of public attention. We had one specific incident where an upper Management Director simply had to be terminated. The constituency of this particular director was quite substantial. Yet, working through Jessie, we arranged an ADR process. The employee wanted to go to a nonbinding arbitration. This was worked out with the attorney for the individual. An attorney in Seattle, who specializes in employment law, was selected by the parties to be the arbitrator. And he heard a three-day case, with witnesses and cross-examination, and rendered a nonbinding opinion which resolved the case. We technically won the case. But yet, I think we won it in a true sense because the individual admitted that the problems were overwhelming. I believe in that case we avoided some very serious adverse publicity in the local media.

I believe that ADR has improved relations with the 2,800 employees of the Archdiocese. And when I stop to think about it, in the past twenty-three years that I have been doing this in Seattle for our Archdiocese, I have gone to bench trial only a half-dozen times and never to a jury once. So, if they are all going to settle anyway, I figure why not get in there at the very earliest stage. And it is something that, really, a litigating attorney cannot do. The employees won't speak to me because they know my conflict-of-interest. Jessie, in the scene, can settle many of these cases, which to begin with are fifty percent emotion.

As we said in our outline, there is no panacea here in this type of procedure. Of course, there are some sorts of cases that simply cannot be handled in this manner. If you are suing for \$500, and you want \$500, you simply can't mediate it. Or if you are going to forfeit a sales contract, it is an all or nothing situation. Likewise, the Church on occasion, can be confronted with a hard moral question that simply cannot be solved by mediation, and if it is a case where the Church must take a strong stand, well, it must take it. We haven't run across one of those yet; I am sure they are out there. If you want to create a precedent in law, you certainly don't want to fashion your case in this manner. But as I understand our instructions from Mark Chopko, we are to let his office make the precedent, we are supposed to just function. So, we don't have that problem.

The comment of Bishop Maida, when he said that we all practice law but it should be practiced in a pastoral way, refers to an ideal that ADR can help achieve. It is a very difficult area in which to practice. It involves much, much skill. We have had a number of well-meaning people who have attempted to do this. I cannot say that they failed but they have not

succeeded like Jessie has been able to do. It is not hard ball; it is slow pitch. And it is a very delicate skill. I don't pretend to know how to do it, but I am seeing it work. And I would heartily recommend it to each of you to at least make an attempt on it. If you don't have 2,600 employees, if you don't have 10,000 employees, there are still some things that can be distilled from these principles that I think can apply to large and small dioceses.

SANTIAGO FELICIANO, JR.: True to our word, the formal presentation is over and we are going to get to some questions. One of the things that Jessie had referred to was issues of employment. We have been re-establishing Cleveland's office in the last seven to eight months. We have handled five cases that were non-employee cases. One of them involved parishes suing each other, as well as other instances that were handled through the office. It is my belief that if the office had not been there, even though in beginning stages, those things would have gone completely through litigation.

PHILLIP HARRIS: To your knowledge, has ADR been used in any child sex abuse cases against the Church?

JESSIE CLAYTON DYE: I would like to answer that one. As a reward for doing such a good job with the employment dispute, the Archdiocese asked me to do the pedophilia claims management for the Archdiocese. I would hate to think what they would do if they punished me.

Child abuse is not a dispute. Child abuse is a crime. So, the threshold answer to that is: if there are children at risk, if there is an active abuser out there, you need to call whomever you call. We call the Children Protection Services in our Archdiocese. But whatever the proper authority is, you contact that person. Don't wait to do that. Don't take any chances with that.

That is not really what you are asking though, I hope. I hope we would never think of needing a dispute between a child, or even an adult-child formerly abused, and the abuser. That is out of the question. And I am sure you all understand that. What you are suggesting is that for claims, it would be reasonable to mediate claims brought by a victim against the Archdiocese.

We have been giving that a lot of thought. In a recent meeting with Mark Chopko last fall, we thought that it would be quite reasonable to have some kind of mediation program for these complaints. I think it would be excellent for a national program like the NCCB to have some kind of national mediation. It would be hard for someone who had been abused by a priest from our Archdiocese to see me as neutral since I work for the Archdiocese. It is one thing for them to see me as neutral because I am an employee and they are an employee and the manager is an employee. So we are all sort of in it together. But I think it would be challenging for someone to see me as neutral. However, we could well bring in

another mediator from the community.

I think that is probably doable in claims management in these kinds of cases. I think it would be best done nationally were these kinds of people available to come to different dioceses. It would take the plaintiffs bar buying into it, which might or might not happen. Although the plaintiffs bar has certainly bought into other kinds of mediation in personal injury cases. We might have an answer to that question in a year. We will see.

**QUESTION:** Yes, what I have heard you say today, all of you, the three of you, or basically the four of you, has been very optimistic in the area of conciliation and mediation, but I sense that what you have not said about binding arbitration gives me the feeling perhaps that it is not the best way in which to proceed in this alternative dispute resolution. I would certainly second that if that is in fact your feeling. My own experience has been we have had some experience in that area of binding arbitration in the area of construction litigation which has been forced upon us basically through the necessities of the standard AIA agreements between owner and contractor, *et al.* We have had less than great success in arbitration of construction claims.

But I guess my question to you is, do you perceive that if you were to opt for some form of binding arbitration, there would be problems with respect to the abdication of authority under Canon Law which a Bishop would be thereby enacting in terms of him as the ultimate authority in certain matters to a panel of third party arbitrators? And if so, what would those areas be. And also, in the area of public relations or image of your local Bishop, who is perceived by many to be the ultimate and final Board of Appeal, to what extent is that image affected where the Bishop has made it known, particularly in the area of contracts with his employees, that he has washed his hands of this affair and has now turned over the final decision to a panel of arbitrators? I would just like to get your comment on that.

**PATRICK CROWLEY:** I agree. My personal experience with mandatory arbitration is very negative. In my jurisdiction, we have mandatory arbitration on all claims under \$3,000. And there is no way that you can get out of it. With respect to the abdication of a Bishop's authority, well, I have no grasp of Canon Law. But, we are talking here about nonbinding activity that through my office, my Archbishop decides whether he is going to agree with anything that happens in Jessie's office. If she makes no decisions, the Archbishop makes his own decisions based upon his own independent advice. And in addition to that, a lot of these claims are truly claims in the sense that we would probably be sued anyway. He would not lose it there, I don't think, if he had to go to a court of general jurisdiction. But I tend to agree with you that I don't see how a Bishop can just turn something over to a third party and abdicate either right.

And if we were ever confronted with the situation, I think I would so advise my Bishop.

SANTIAGO FELICIANO, JR.: That is why in the model that you see, we stayed away from binding arbitration. And also there really is not an arbitrary process, even in what we are doing in Cleveland, because it would reflect the Episcopal style. The Bishop was very pastoral. There is no question about that. But ultimately, he is going to want to repose in himself final authority on things. In our diocese and our reality, we don't favor forced arbitration and we are not going to have these arbitrators make a decision, then inflict that on the Bishop of Cleveland. But that is where we are.

JIM SERRITELLA: I would like to make a couple of comments about what killed due process and what made it come back to life, at least in Chicago. I think that one of the things that killed it was the name, due process. At the beginning we got sued because constitutionally due process means a testimonial hearing with confrontation of witnesses and right to cross-examination. And we weren't giving that. Therefore, we were not following our commitment. So, the name due process, we found to be a bad one, so we stopped using it.

Second, the courts have the sheriff to help them enforce decisions. Under the old system, people forgot about conciliation. They went to some kind of mediation or arbitration and they said "the Pastor was wrong in firing the teacher." Therefore, the parish should have paid \$10,000. There was nobody to pay the \$10,000. Then the teacher would sue. Then you would be stuck in court with an adverse due process record in the worst of all possible worlds. You have all the admissions and you lose. Those three things killed the program.

The thing that brought it back to life was my conviction that most of these disputes should not go to court and should be resolved in some other way. So we built the program around an ombudsperson. We called it conciliation. We wrote a process, but our in-service training to the ombudsperson was that if you get to arbitration, or mediation, you have failed. You should never get to mediation and arbitration. Either you resolve the problem as a matter of conciliation, or, if you don't, you leave the parties where they stand and let them sue each other. Because you are not going to do the mediation and you are not going to do the arbitration any better than a court or the American Arbitration Association. If you cannot do it better, then do not duplicate what they do. Do what you do best and that is a pastoral conciliation.

Another thing that gave rise to the resurrection is that you get a conciliator who is there and available and gets to the fire in the first five minutes before positions have hardened and wounds have opened and scars have been inflicted. And the chances of bringing the parties together are greatly enhanced.

And last, do not swamp the ombudsperson. If you are in a place as big as Chicago and all your disputes go to this office, you are going to make sure that that office is a failure. What we did is make sure that every local place, as part of the school's policies and procedures, have a local dispute resolution procedure. And only when that fails do you go to the ombudsperson. You try to tie in the various components of the Archdiocese to the ombudsperson in that way.

Finally, you encase that system in a set of personnel policies about which you do in-service training to your personnel on how to implement them. Having good policies without the in-service training is like having no policies at all. If you have good personnel policies, good in-service training, your people know how to administer them, you tell them to resolve them at the local level if they can; and if they cannot, they go to this conciliation office which is really the ombudsperson. They get there in the first five minutes of the fire and try to resolve it.

The Chicago system has been in place about six or seven years. I know it is the first or fifth largest school system of any kind in the country and we have no personnel litigation coming out of it. Many other kinds of disputes get resolved; not just personnel but also arguments between the DRE and a principal or a pastor and somebody else. The more we try to mimic what a court will do, the more we try to mimic what the AAA will do, the more we will fail. The more that we rely on what is written on a piece of paper in terms of policies and procedures, the more we will fail. The more we rely on the skills of that ombudsperson or conciliator and what he or she can do in the first phase of any dispute, the more the process will succeed.

SANTIAGO FELICIANO, JR.: Thank you. That was our experience in the diocese about five or six years ago, and it made everyone strike due process out. So it was clear what we were talking about was a civil proceeding versus an internal church form. If you look through the forms that Sr. Donna put together, they will confirm what Jim says, you must go through whatever appropriate channels. You do not have an argument with the Pastor or the Principal with the DRA and then you come down—there is the Office of the Vicar, Assistant Superintendent, *et al.* All of those processes have to be followed before they come into Sr. Donna's office. If not, she would be listening to every person who has got a complaint about someone in a church or parish which are numerous.

CHUCK REYNOLDS: I am curious that there is a consensus that you have to get in as early as possible. I am wondering where the role of investigation falls into all of this. You get the two people coming in, and you have radically different stories. How can you possibly conciliate when you don't even know what the facts are? Do you play a role in the investigation process yourself?

JESSIE CLAYTON DYE: You are right. Frequently, people come in and

their stories are like night and day. The first step that I use is to reality-test with the parties, share their stories with one another and clarify where the communication has fallen down. And frequently, when they have stories that are night and day, it has been more a communication issue than anything.

Secondly, if the parties can resolve it without agreeing on the facts, that is great. If they can resolve it with a good letter of recommendation and they don't ever have to go back and say, "you said this and I said that." If there are no ethical issues involved there, that is great. Then we don't have to go through that. However, from time to time, particularly where there are serious legal questions involved, things are not so smooth. For example, we had a sexual harassment case in which we got an enormous demand letter from an attorney, and the attorney for that person would not mediate.

And so I did a fact finding. I went out and I investigated. I did just a regular, garden-variety fact finding. This is the cheap discovery that Pat is telling you about. I talked with all the potential witnesses, people that worked in the parish that would have observed this. I shared my information with both sides from what the witnesses said, and we settled it. Quite reasonably, I might add. So, there definitely is a role for fact finding. I think that that is a very good question at that stage.

*QUESTION:* Once you have played that role, does that taint you in any way? Have you ever thought about the need, in a serious case for instance, to just get somebody completely in from the outside? Please could you look over this situation and do some interviews and let us know what you have found out.

*JESSIE CLAYTON DYE:* That is another good question. When I did the fact finding in this case, it was the most uncomfortable that I have ever been in my role. I am really neutral in the organization, but I was sort of bordering on being a claims manager at that point. Almost bordering on representing the diocese legally. So, I think that that might be a reasonable position to use sometime. It is a fine line, and I agree with your concerns.

*PATRICK CROWLEY:* I think that one of the difficulties that we found in having outside people get involved in the process is that they really did not understand what the game was about. They thought the conciliation process or the ombuds process was an effort to do justice in some legal sense. And the Chicago process makes clear that it is not directed to doing justice in some legal or ironic sense. It is directed to doing a pastoral resolution to the dispute. A pastoral resolution to the dispute may mean we don't care what the facts are, we are getting back together and we are going to be friends. It is more important that we be friends than we have a difference of opinion on the subject. And so we found that the importation of people may be disruptive of the process unless you have a panel of

people and that you have taken the time to indoctrinate them on the subject.

JESSIE CLAYTON DYE: I just want to say that I think that both are true. I think there are advantages to me doing it as you are describing; and ethically in terms of roles and conflicts of interests, it can go either way. So, I think you need to decide.

PATRICK CROWLEY: One of the differences in the example that Jessie gave was the individuals were independently represented by a lawyer who knew exactly what was going on, and if the person had any trouble at all, she should have contacted her lawyer. And if the lawyer knew that I was out there, we could have resolved it. If a person is unrepresented and doing dangerous things, self-defeating things, then I think we could get into trouble.

QUESTION: Have any statistics been acquired or put together with regard to the sizes of the various dioceses or archdioceses that have this type of policy in place? I am thinking of a break-off point from cost perspective—from a small diocese to a large diocese point.

SR. DONNA MIKULA: The study that was done by the Canon Law Society really is a cross section of all dioceses within the United States. There were at least one hundred responses to the study that was done in 1985 and published in 1986. We have dioceses such as Boston, Detroit, New Orleans, New Elm, Madison, Fort Worth, Cleveland, Green Bay, Harrisburg, *et al.* So there seems to be a cross-section as to the size and the makeup of the diocese. That is why I do think it is possible for every diocese but you need to reflect upon your own experience and the relationships that exist with your diocese already in writing that document. I think it can be done.

JESSIE CLAYTON DYE: I would like to give a shot at answering that too. First of all, we have 2,800 people. I work three days a week. I can handle the case load in that time. Dioceses in general are not the more litigious of employers. For that many employees in the public school district, you would properly need a full-time ombudsman.

In the private sector generally, ombudsmen are coming into use for companies of a thousand or more. But you can always have a part time person one day a week for a small archdiocese, as long as it is a professional program.

QUESTION: I think at this point there is the question of validity of the information that is being shared. I think that there is a resurgence, as Jim Serritella was saying, of bringing this back and doing it much more within the context of Church. And as part of "yes," there will be an end product which is advantageous to the diocese, but it is a Church proceeding and there needs to be some healing. As a result, the good part of that is, it will bring down potential lawsuits and bring up employee morale and that sort of thing. It is very important, I think, to couch it in terminology that

this is a Church process. From that point of view, I think, regardless of the size of the diocese, it is my opinion that that and a dollar included would get you on a bus, but this is something that we all need to think about in order to resolve issues and conflicts within our diocese.

*QUESTION:* I assume you, Jessie, are an employee of the Archdiocese.

*JESSIE CLAYTON DYE:* Yes, I am.

*QUESTION:* I have some difficulties in your statements that you can be completely neutral in dealing with these resolutions since you are employed by the diocese. Second, I can foresee some repercussions of your situation, the way your organization operates. Hypothetically, if a disgruntled employee goes to you and has a real solid case based on sex discrimination or age discrimination, and you know, assuming the facts to be true, that the diocese is in substantial trouble, but the employee probably has no realization as to the validity of her potential claim, nevertheless, after checking with the appropriate party, you offer her \$200 or \$2,000 or \$20,000, which is totally unreasonable. But the employee thinks this is great. Thank you very much. I will take my two grand and run. Thereafter, this disgruntled employee contacts a litigator who knows how to litigate these issues and I am somewhat apprehensive that you could be deemed to have been an employee giving legal advice to this employee and put the Archdiocese at risk.

*JESSIE CLAYTON DYE:* Those are two excellent questions and I am glad that you asked them. At least the first question, I think, is really right on with ombudsmen. And if somebody did not ask me that I would have been real disappointed that you were not listening to the presentation.

I would repeat his first question, "How can you be neutral when you are an employee of the Archdiocese?" That is the first question that everybody thinks of when you are dealing with corporate ombudsman. It is an occupational hazard of an ombudsman to face that question and to have to deal with that issue. There are a number of ways that it could be addressed.

First of all, and I would certainly advocate for this, the typical ombudsman always reports to the CEO. In my case, to the Archbishop. What that does is it takes you out of the chain of command so that you are not politically involved with the various levels of departments and so forth. And you can be neutral in terms of what you think and what you do. You are not responsible to a supervisor within the political system.

Second, it is very important that the ombudsman, whoever serves, really in fact be even-handed. That is one of the reasons that we do a survey of user satisfaction after people leave. And one of the questions we ask them is: "Do you in fact feel that this person was neutral?" And so we continue to monitor the perceptions that people have. And, it is always going to be an issue. I am not going to pretend that we solved that one. It

is always going to be a concern.

**PATRICK CROWLEY:** In our particular case and our diocese now, in the example that you gave, Jessie would not settle that case. I would settle that case. I would get a release. There again, it is not going to be my money probably. It is going to be our insurance courier's money and the insurance adjuster is going to be there on the hook too. I see the problem but I think, in our case, we have a couple of backups that make it reasonable to get a valid release. We have previously on at least three other occasions run into instances where I did believe, and other competent advisors have agreed, that a particular person was not equipped mentally to be able to sign a release.