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INTRA-CHURCH DISPUTE RESOLUTION

JESSIE CLAYTON DYE, * PATRICK CROWLEY, ** & JOHN EVELIUS***

JESSIE CLAYTON DYE

I. INTRODUCTION—THE DUE PROCESS PROGRAM

The issues discussed in the previous Articles concern dealing with litigation and protecting the assets of the diocese once litigation has occurred. This Article will focus on the prevention of litigation altogether, and managing conflicts within the diocese and in tort claims against the diocese in such a way that there is a resolution of the case before it proceeds to litigation.

The Due Process Program of the Archdiocese of Seattle was originally designed in 1985 to handle employment disputes within the church workforce. However, it evolved in the last ten years to handle some tort claims against the diocese as well.¹

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¹ See *supra* Section III (discussing the handling of sexual abuse cases).

This is an area of great concern to diocesan counsel, and is another area where mediation is a cost-effective option.

The Archdiocese of Seattle determined in 1985 that there were certain stresses and tensions in the Archdiocesan workforce that required some extraordinary means to resolve them. Our work force, like those of many Archdioceses, evolved from being composed largely of women religious in the schools and priests in the parishes and chancery, to, by the mid-1980's, primarily lay employees. Due to this change in personnel, the resulting alteration in policies, and the issues of just wages, job descriptions and performance evaluations, certain tensions evolved that seemed to require a creative approach. At that time, Archbishop Hunthausen was the Bishop of Seattle. He was a great visionary, and was willing to take risks with programs that were experimental in reality but good ideas theoretically. He was committed to church teachings on social justice, and committed to the Bishops Peace Pastoral.² The Pastoral declared that it was incumbent upon American Catholics to not only prevent war, but to find within our own systems ways of resolving conflicts that were healthy, collaborative, and would uphold the goal of reconciliation in the Faith Community.³ As a result, and with the support of the canon lawyers of the Archdiocese, he and the General Counsel of the Archdiocese of Seattle established the Due Process Program in 1985.⁴ This Program was originally designed to resolve employment disputes within our system.

We have in our Archdiocese about 2,500 employees. Most of these employees are in the Catholic schools or are Catholic school teachers; however, also included in this number are all the employees of the agencies, parishes, and other ministries. All of the employees in these organizations that are within the work force of the Archdiocese have access to the Due Process Program. They can come forward, manager and staff alike, priest and lay, in the event of any type of employment conflict. The sort of employment conflicts that we see on a regular basis in the Due Process Program are the kind that are typically found

² See U.S. CATHOLIC CONFERENCE, *THE CHALLENGE OF PEACE: GOD'S PROMISE AND OUR RESPONSE: A PASTORAL LETTER ON WAR AND PEACE* (1983).

³ See *id.* at 25.

⁴ For a discussion of the first four years of the Seattle Due Process Program, see Jessie Clayton Dye, *Alternative Dispute Resolution*, 33 CATH. LAW. 70 (1990); Patrick Crowley, *Alternative Dispute Resolution*, 33 CATH. LAW. 77 (1990).

in any diocesan practice, and are also typical employment litigation issues: wrongful discharge, failure to promote, discrimination, job descriptions, working conditions, and accomodating disabilities.

The mission of the Due Process Program is to be available for all levels of management and staff, during all kinds of employment disputes, and to create a collaborative atmosphere to resolve these employment conflicts. The goal is to settle them in a good and healthy way, and, finally, to prevent litigation.

Since the Program was established, I've consistently handled about 50 cases a year. Although I receive roughly 50 phone calls and 200 visits in a year, there are about 50 which ultimately require second-party contact, or a mediation, and where there may ultimately be some risk of litigation. The Due Process Program is an ombudsman office, not dissimilar to those serving large companies such as the World Bank and McDonnell-Douglas.⁵ In general, the average corporation has one ombudsman for every 2000 employees. This is similar to our ratio.

The Due Process Program offers four services, each of which is commonly found in ombudsman programs, and I will describe each briefly.

II. PROGRAM SERVICES

A. Conciliation

In the profession of dispute resolution, conciliation involves getting the individuals in a conflict to talk with each other.⁶ As this works out in my practice, it takes the form of a one-party contact with me. One person, either a manager or staff person, will make an appointment to see me, usually to discuss their superior, their employee, or a policy that is troubling them. I will spend time with them, listening to their issues, reflecting to them what their concerns are, reality testing with them about the performance issues and the legal standards. I talk to them about what is within normal limits for this kind of conflict, and

⁵ For a description of the function of a corporate ombudsman office, see Andrea McGrath, *The Corporate Ombuds Office: An ADR Tool No Company Should Be Without*, 18 *HAMLIN J. PUB. L. & POL'Y* 452 (1997).

⁶ Conciliation is "the adjustment and settlement of a dispute in a friendly, un-antagonistic manner." *BLACK'S LAW DICTIONARY* 289 (6th ed. 1990). It is "used in labor disputes before mediation." *Id.*

what they hope to achieve in their particular situation.

Of the 200 cases that come in yearly, I can settle about 150 at the level of conversation with only one of the parties. In these cases, the person goes back into their workplace and is able to negotiate with the other party and resolve the problem themselves. This is a relatively low-level intervention in conflict resolution that is extremely cost effective. Most of the time these cases are completely resolved at the level of the dispute. The employees are content with what they've learned, they've been able to have someone hear their concerns, and they can move on.

In about 50 cases a year, though, I do make a second-party contact. If the employee originally made the initial contact, I will then contact the manager; if the manager was the original party, I will contact the employee. Usually the parties have already tried to talk to each other, and have been unsuccessful. Alternatively, the emotional climate between them is so inflamed that any meeting they attempt only makes matters worse. In those 50 cases a year, I take them through a mediation process.

B. Mediation

The mediation process can involve a number of procedures, depending on the needs of the parties. It may consist of shuttle diplomacy, where I conduct first one one-party meeting, then a second, and continue back and forth on the phone. In other cases, I sit down with the two parties together and help them articulate their concerns. Ultimately, I help the parties to write up a joint agreement stating how they will settle their differences.

It is important to remember that the mediation process often involves employees who have been terminated. The question then becomes one of determining what the employee needs in order to leave in a good way, with closure. What do they need to move on in their careers? At other times, the issue is progressive discipline,⁷ with the employee perhaps feeling the discipline was punitive. These are garden-variety disputes that consistently make up the Program's case load. When the Program was first begun, there was fear expressed that employees who would otherwise perform their duties without complaint, or not protest a

⁷ See ELKOURI AND ELKOURI: HOW ARBITRATION WORKS 915-18, 925-29 (Marlin M. Volz & Edward P. Goggin eds., 5th ed. 1997).

discipline or termination, would be encouraged to make insignificant complaints, or would magnify minor issues. However, over time we have found that as fallible human beings, managers sometimes make errors. Our pastors are now confident that the Program does not create cases and it does not exacerbate them. Our goal is to manage and resolve them, with collaboration and good will. The cost is low.

C. Fact-Finding

After conciliation and mediation, the third service of the Due Process Program is fact finding. From time to time, a case will come into the Due Process office where the legal stakes are high enough and the fact situation is confusing enough to merit further investigation. An example of this was a case where a young man came forward who had been diagnosed with a dreaded illness. He'd been a pastoral minister in this parish for eight years, and six weeks after he made his diagnosis public, he was terminated. He could only conclude it was because of his disability. When I interviewed the pastor, he stated that from the day the minister came back to work after receiving his diagnosis, he talked of nothing but his sickness. The pastor's perception was that the minister had become obsessed with it. It dominated the work group to the point that no one could get any work done, and no one could move on. Despite warnings, the pastoral minister continued to talk obsessively about his problem.

When you hear two such disparate accounts, it becomes very important to understand what happened. I interviewed the staff, and did fairly extensive fact-finding in that case to ascertain what was really going on. The Program conducts a handful of these fact findings each year.

D. Arbitration

The final service that the Due Process Program offers is binding and non-binding arbitration. We hold about one of these a decade, and this is a good thing. As I've spoken with other ombudsmen for other companies around the country, it seems that most top executives do not want their managers exposed to a program that can arbitrarily overturn that manager's decision and cause them to lose face in a public way. Arbitration is sometimes necessary; it can be a useful tool to have in one's repertoire to convince parties to settle or resolve a case. However, it

can be demoralizing for an institution if you must force a decision, as you do through arbitration. It is far better to encourage a settlement and negotiate it in good faith, as you can do through mediation. So, while I have the procedural authority to require an arbitration, I rarely do it.

III. HANDLING SEXUAL ABUSE CASES IN THE DUE PROCESS PROGRAM

One major evolution took place in the Due Process Program in 1989. At that time, the first wave of sexual abuse cases came into the Archdiocese of Seattle. The Program began to do intake and help resolve all claims of ministerial misconduct against the Archdiocese. In this kind of case, I act not as a mediator but as a compassionate claims manager.

Pastorally, the Archdiocese considers that we must be available for anyone who claims to be abused or harmed by any minister of our diocese. Assuming that the complainant has any minimal evidence of a claim, we do uphold this pastoral obligation to them. Our pastoral care usually takes the form of either spiritual counseling, or, more often, psychotherapy, which is paid for by the Archdiocese. There are constraints placed on the psychotherapy in that the focus of treatment must be the abuse, and in terms of its duration. The Archdiocese is fairly open and therapy is easily accessible through our claims process.

We also evaluate the abuse claim for damages, both morally and legally. Lawyers as a professional group generally do not consider evaluating a claim from a moral perspective. We do that within this Program. I credit the Chancellor, Father George Thomas, with his wisdom and leadership in requiring the Archdiocese to evaluate each claim from a pastoral, legal, and moral perspective.

We have found that active listening skills, problem solving skills and openness to dialogue and discussion can be very successfully applied in handling these cases and preventing litigation. It has been our perception that the number of cases is declining. The Archdiocese of Seattle experienced an increasing curve in the number of cases initiated during the late 1980's and early 1990's, when complaints of sexual abuse were gaining increasing legitimacy and publicity.⁸ As the statute of limitations

⁸ See *Church Addresses Abuse: Panel Will Advise Catholic Dioceses on Accused*

in Washington tolls for these claims until the claimant discovers the cause of action,⁹ people were coming forward with claims based on experiences remembered from years past. We now appear to be on the downside of that curve. Additionally, in all dioceses there are improved screening techniques for our ministers. The good news for us is that sexual misconduct cases are declining. We do not expect, however, to be able to eliminate all such cases, human nature being what it is. Sexual misconduct cases will probably level off at a relatively low rate of occurrence. We will continue to use a compassionate and moral system for evaluating these claims.

IV. EFFECTIVENESS

The Due Process Program has an 85 percent resolution rate. This seems phenomenally high, but, in fact, most mediation programs around the country have an 80 to 85 percent success rate.¹⁰ That does not mean that everyone lives happily ever after, but it does mean that people work out their agreements in such a way that they can move on without litigation. In many cases, we write a release of all claims, indicating that the resolution is satisfactory. In our best cases there is a reconciliation and justice. In our least successful cases we have at least saved money.

PATRICK CROWLEY

V. THE ROLE OF THE DIOCESAN COUNSEL IN DISPUTE RESOLUTION PROGRAMS

Diocesan counsel's primary duties in a program such as the Due Process Program are peripheral and supportive, rather than central: avoid conflicts of interest, prepare the releases, and at-

Clergy, SEATTLE POST-INTELLIGENCER, June 18, 1993, at C1 (noting an upsurge in allegations of sexual abuse by clergy).

⁹ See WASH. REV. CODE § 4.16.340 (West, Westlaw through end of 1997 Sp. Sess.) (allowing three years for filing of claim for actions based on childhood abuse from the latest of the occurrence of the act, when the victim discovered or should have discovered the injury was caused by the act, or when the victim discovered the act caused the injury).

¹⁰ See Cindy C. Ettinghoff & Gregory Powell, *Use of Alternative Dispute Resolution in Employment-Related Disputes*, 26 U. MEM. L. REV. 1131, 1150 (1996) (documenting the consistently high success rate of the majority of mediation programs).

tempt to keep the diocese out of additional legal difficulties that could result simply from having such a process and system. I think that we have been successful in all of these goals.

Although initially the potential conflict of interest loomed large as a concern, I presently have less concern. This is largely due to having the Program run by someone who is independent of the affairs of the Chancery Office, and is perceived to be independent by all involved. If you have a hired gun handling personnel affairs, the personnel are the first ones to know that it is a fixed system. In our Program the Archbishop has insisted on that sort of independence. Although Ms. Dye has constraints, as someone who works for the Archdiocese, she has a reputation of having handled successfully some very delicate matters. Ms. Dye also sits on the claims committee when we decide we have a claim to pay. She generally argues quite strongly for the claimant, and I am generally on the other side of it.

The major legal issue that has concerned me over the years, and particularly this last decade, is the manner in which we secure releases. We have obtained dozens of releases claims for sexual abuse, sexual harassment and other claims. We cannot take a release from a minor, or from someone whom we believe is mentally disturbed. We won't pay any money on a damage claim unless we first have a forensic psychological examination conducted by our own independent psychologist. Most people come to us through a therapist or through a lawyer; thus, while some of them are not represented by counsel, most, at least, have a therapist who is advising them.

In our state, we have a very rough test to sustain tort release. Every single element of the tort must have been negotiated in order to make the release stand. To date, no one has questioned the validity of our releases. On those releases, we have to have a witness; we have the claimants' therapist witness it, generally, if we can.

JOHN EVELIUS

VI. EMPLOYING THE ECCLESIASTICAL COURT IN DISPUTE RESOLUTION

Dean Roscoe Pound appeared before the American Bar Association a number of years ago, and said that if we, as lawyers,

wish to learn and understand the history of the legal profession, it is necessary to first learn the history of Christianity. He then referred to the ecclesiastical court, and the many things that it had accomplished and contributed to western civilization, especially to our law.¹¹

In 1977, Archbishop William J. Borders found himself the target of a number of law suits filed by disgruntled employees, teachers, and students that had been expelled or suspended from our schools. He sought a vehicle within the local church of Baltimore to deliver due process to claimants in these cases. During his considerations, he consulted with Monsignor Porter J. White, his canon lawyer and legal counsel, to develop an appropriate response.

I recall the first meeting I had with Monsignor White. As I entered his smoke-filled office, he was seated behind his desk with the canon law text in one hand, and a burning cigar in the other. With excitement in his eyes he read the Latin words, paused, translated them, and said, "We don't have to reinvent the wheel. The wheel is leaning against the wall in the closet of the Catholic Center. The wheel is the ecclesiastical court." He went on to explain that all the ordinary needed to do was to open up another section of the ecclesiastical court to handle matters of conflict within the local church. He explained that each ordinary was the sole judge and sole legislator of this court.¹² The second thing that needed to be done was to name a chief judge to that new section of the ecclesiastical court. He named Monsignor Porter J. White.

Once Monsignor was appointed the judge of the new section of the ecclesiastical court, he looked at me and said, "You find the candidates to be the masters in chancery and I will commission them." My role was professional fun. I wrote letters to Wilson K. Barnes, a retired member of the Maryland Court of Appeals, an Episcopalian; C. Ferdinand Seibert, formerly the Attorney General for the state of Maryland, before becoming a

¹¹ For instance, contract law contains principles, such as the duty of good faith implied in all contracts, derived from equity principles first developed by the ecclesiastical courts. See Howard O. Hunter, *Introductory Notes*, 36 EMORY L. J. 533, 537 (1987). For an explanation of the functioning of ecclesiastical courts in Medieval England, see Peter D. Jason, *The Courts Christian in Medieval England*, 37 CATH. LAW 339 (1997).

¹² See Jason, *supra* note 11, at 345 (discussing the structure of the ecclesiastical court).

part of the Maryland Court of Appeals, a Catholic; Thomas J. Kenney, former U.S. Attorney for the state of Maryland, and a former member of the Supreme Bench of Baltimore City, a Catholic; Avrum K. Riffman and John Serio, both retired members of the District Court of Maryland. Mr. Riffman was Jewish, and Mr. Serio was Catholic.

These individuals were invited to attend a small dinner in the Catholic Center in Baltimore. There, Archbishop Borders commissioned the new court-appointed Monsignor White as the chief judge, who in turn commissioned these members as masters in chancery, to hear matters of contention that came before them.

I handled the first case on behalf of the school system before Judge Thomas J. Kenney in the Catholic Center. This case involved a teacher in the local parish school who had been terminated due to falling asleep in the classroom.

Judge Kenney had been a criminal defense attorney who specialized in representing defendants charged with income tax invasion. His smile was more a smirk than a smile. He told us in the Catholic Center that so far as he was concerned, this was the first case before the ecclesiastical court, and he expected the attorneys to be as fully prepared to handle ourselves as if we were involved in the most important case before a federal court.

After his preliminary comments, there was a 15 minute recess. The school principal came to me and asked, "What do you make of this?" I said, "I believe he's going to see that due process is served in this court." The other attorney came over to me during the recess and said, "Could we talk?" We talked. His client, he said, was suffering from a neurological disorder called narcolepsy, which caused him to fall asleep unexpectedly and without warning. He had a medical certificate. After about ten minutes, the case was settled to the satisfaction of the school principal and the teacher. This was brought to Judge Kenney's attention. He wanted it all put in writing and presented to him in the manner consistent with the Federal Rules. He wanted it by no later than noon the next day.

In closing, let me note that it was St. Paul, in the year 57, who excoriated the Corinthians for taking their disputes against each other into the Roman courts, instead of to the Church fo-

rum. ¹³ As legal representatives of the ordinaries, we today must consider the words of St. Paul and ask ourselves some important questions. Do we Catholics, do we Christians today, have complaints against each other? Are we taking those complaints into the civil courts? Does the message of St. Paul in the year 57 have any relevance to us today? Should we consider Church forums as an alternative to the litigation-filled civil courts? In particular, should the ecclesiastical court be restudied and reactivated? I believe that only you, in conference with your ordinary, can answer those questions.

¹³ See 1 *Corinthians* 6:5-6 ("You should be ashamed: is there really not one reliable man among you to settle differences between brothers and so one brother brings a court case against another in front of unbelievers?") (Jerusalem Bible).

