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ALTERNATIVE DISPUTE RESOLUTION

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In 1968 the Canon Law Society of America authorized a study to develop options for providing due process in the Church. This document was then presented to the National Conference of Catholic Bishops and adopted by the Conference. The original paper was then taken to Rome to be studied by a special committee, which was reviewing the document for acceptance by the Universal Church and reviewing it in terms of the revisions of Canon Law, which was in process at that time. After a few modifications, the document received a *Nihil Obstat* from Paul VI. *Nihil Obstat* is simply a statement which says that there is nothing in this document that is contrary to Catholic teaching or tradition. This occurred in October of 1971. The National Conference of Catholic Bishops, in March of 1972, approved what is called the revised edition of the document *Due Process*. If you need to get a copy of it, I suggest you start with your Diocesan Archivist or you might take a look to the Chancellor or Canon Lawyer. If those sources are not available to you, you certainly can obtain it from the National Conference of Catholic Bishops.

Bear with me as I share with you the introduction to the resolution written by the General Secretary of the National Conference of Catholic Bishops at that time, Bishop Bernardin:

Be it resolved that this National Conference, properly aware of the urgency of the problem, recommends to its members experimentation with procedures such as are outlined in the agenda report which is called *Due Process*, adapted where necessary to local circumstances and to the prompt implementation on the diocesan provincial and regional levels of this and "other well-conceived plans" which may become advisable for that secure protection of human rights and freedoms which should always be among the goals of the Church.

Now we have our Bishops in 1972 talking about adopting this plan and procedure, encouraging experimentation and "other well-conceived plans" for the purpose of protecting human rights and freedom. I think that is significant to reflect on in your own experience in your diocese.

This model is important because most of the original documents, if

not all, were based on the model presented in this document. The Bishops explained their understanding of due process. In Cleveland, we tend to stay away from that phrase because of the constitutional connotations in our society. Maybe Jessie could express her understanding of due process in Seattle. But the Bishops defined due process in this manner; they talk about it phrased in abstract terms: "the question whether there ought to be due process in the Church answers itself, since anyone obviously is entitled to whatever process is due." The Bishops then go on to comment that their understanding of due process is analogous to the concept of due process as it is used in American civil law and they see it more as a principle of justice rather than a principle of law. I think that is something important for you to reflect upon.

The basic structure of this document takes the process that the Bishops call due process and divides it into two areas: (1) the process of conciliation; and (2) the process of arbitration. In the process of conciliation there are five elements or considerations that need to be addressed. The first is that every individual that is involved in a dispute has the right to a face-to-face hearing about the issue in dispute, and has the opportunity to respond to that. Second, their point of view needs to be stated in the presence of a conciliator, that being a third person who can help identify the real reason and to help to identify the issue. Third, the principles of right conscience and proper authority are looked upon in the real world as happening very occasionally. Therefore, an individual cannot come into a conciliatory process and say this is right conscience or this is the power of my authority. In essence, any change for conciliation is automatically closed. There is no openness to any discussion. Fourth, wounds need to be healed quickly and this can be done only in a candid exchange of the truth. Fifth, each person involved in the disagreement must believe and must understand that they belong to a religion whose essence is love. This is the process of conciliation that the Bishops have set out.

Arbitration is defined as "a reference of a dispute by voluntary agreement of the parties to an impartial person or persons or determination on the basis of the evidence and arguments presented by such parties who agree in advance to accept the decision of the arbitrator as final and binding." The process of arbitration then becomes a process of last resort. They also go on to describe the qualities or attributes of an arbitrator. An arbitrator must be neutral, objective, have a judicial temperament, listen well, ask good questions, and be able to understand each party's point of view.

The next section of the document goes on to talk about what the Bishops call structuring administrative discretion. What I would like to say about this is that you have to come up with some kind of philosophical disposition, and I'll refer to that phrase often. What I mean by this is if you are in the process of establishing such an office in your diocese or

in the process of reviewing an office already established, very simply, or even in a more complex manner if that fulfills your needs, you must be able to articulate why you want to have this office, what this office is going to handle and how you are going to handle it. I really believe that you must be able to state this in a simplified form so that you understand, and the persons who are going to use the office understand.

When we talk about discretion, we know that discretion is an important part of solving problems because it allows individuals to tailor decisions to particular circumstances and decisions. However, discretion can not be without limits. Discretion without limits leads to an abuse of power and also threatens the formulation of justice. We talk about competence in setting up an office. You must be able to make a statement of the limits of that office; to list the areas you will address and the areas you will not address. I will speak a little bit more about that later.

Second, you must have some kind of policy statements that can be used as guidelines for making decisions. And I see these policy statements coming not from the Office of Conciliation Mediation, Arbitration, Due Process, but rather from guidelines coming from each agency and office and institution within the diocese. Many of you who yesterday heard Jack Hammel speak, I think, have had an opportunity for some excellent ways in which to do that. The findings should be put in writing for several reasons: (1) it insures that the decision is well thought out and that reasons can also be written and reported and (2) you have a record of a decision which can be used as evidence in the future, if needed. The document is very sensitive to the just treatment of others who are affected by the proceedings. It calls for people to be informed about the things that are going to be said about them, have a chance to respond to that, and also be informed of the decision and how that will affect them.

Since July, I personally have reviewed about thirty documents that I have been able to collect from dioceses throughout the country. In the next section, I will share some of that information and also information that came from a task force study by the Canon Law Society entitled "Due Process in the Dioceses in the United States 1970 - 1985." The Canon Law Society did a study of a fifteen year period of due process in the United States. As Charlie indicated in the survey that was done by Cleveland, one of the weaknesses of this study, that is indicated by the authors themselves, comes across in saying that the offices really are not all together. Some of the information given is inaccurate. It certainly would not stand up to any kind of scientific manner of collecting data. However, it does give us some insight into where the dioceses in this country were for the first fifteen years.

Most documents on conciliation and arbitration began back in the early 1970s. And I have to say from my study, that is where most documents are today. There are a few dioceses that within the last five years

or so have revised their documents. The most recent one that I reviewed was the Diocese of Chicago which was revised in January of 1988. And I believe it was the Diocese of Covington that was going to present a draft in January of 1989.

The reality is that most documents are still the original documents that were written back in the early 1970s. The office has many names. And I think that again, we go back to this philosophical disposition, "what do you want to call yourself?" Some names are Board or Office of Conciliation and Arbitration, Board or Office of Mediation and Arbitration, Due Process Board, Board of Administrative Review, Council of Conciliation, Mediation Panel, or Court of Equity. I think you have the broad spectrum of names and images that that office presents. For example, in Cleveland we call ourself the Office of Conciliation. That certainly has a very different connotation than a Court of Equity. And when you study those two structures, the Court of Equity is very legal in its whole approach. They use terms such as judges, bringing in evidence, witnesses, and so forth. A very very legal structure. An Office of Conciliation is much more relaxed in the terms that are used. Hopefully, much more simple for the people who have to use it, and a much more welcoming process. Again, it is not to say that one is better than the other. It is to say that there is a whole philosophical disposition reflected in there.

These offices have different relationships in dioceses. Some of them are self-standing offices such as the office in Cleveland. Others have their relationship in the Tribunal, which is the canonical justice system of the Church. Then we have singular examples of these offices coming out of a parish, a chancery or a personnel office. It is also interesting to note in the Canon Law Society study that there are three sections to this study, one is the section of conciliation or due process for the diocese. There is also a whole section where the due process office is centered in the Office of Education. The third section is centered around religious congregations. So, if anyone has special interests, that might be a source at which to start.

Funding again for the office varies. There are those that have independent budgets for the Office of Due Process. There are those that share the budget of the Chancery or the Tribunal. Staffing again experiences the same spectrum. There is independent staffing, such as I am for the Office of Cleveland. There are other dioceses that have their staff coming from the Chancery and some from the Tribunal, and still others that are directly related to the Bishop's Office, the Secretary, the Vicar General or personnel. Some dioceses have their staff coming out of the seminary, from a parish staff or from some outside agencies, probably much like your own legal counsel.

The name for the manager for the office varies. And again, I think it is reflective of the disposition of the office. Some names are Clerk, Direc-

tor, Executive Secretary, Administrator, Coordinator, Chairperson, or Vicar of the Board. Time assignment also varies. The person can be full-time, part-time or volunteer. Again, I think that the time element and the time assignment of that person come back to the philosophical position of your diocese. Training is an important element for the conciliators and arbitrators. These persons are individuals that need to be chosen for their sense of fairness and certainly for their sense of Church. We are, especially a group such as is here today, constantly balancing the legalities, with which we all must live and deal, with the sense of Church. We need to have conciliators and arbitrators who have that sense, who can balance charity with a sense of Church and justice.

Before we talked about the competence of an office. Most documents list those things which are called allowable cases, those kinds of things that the office will hear. The area can be that of general competence where any kind of dispute or disagreement will be heard. Some address themselves only to a violation of rights, some to administrative disputes, some to disputes between administrative bodies. The document that you have in your packet from Cleveland gives a list which is rather standard in the documents throughout the country. Again, they are reflective of this original document on due process.

In defining allowable cases, it is very important to identify who can petition. I was quite surprised in reading one document that allowed only Catholics to take advantage of this procedure. I think that we need to do some thinking about that. I do not know how many dioceses in this country can claim an employee staff that is totally Catholic in this day and age. And, if you have that, then I guess you don't have a problem in excluding non-Catholics. But if you don't, I think there is a real justice issue that needs to be addressed in identifying only Catholics as those who can participate.

Next you need to ask who can be the respondents. And basically, what that question is asking is, "Is the bishop going to be called into the mediation, conciliation, arbitration process?" Some bishops willingly will participate in this; others will not. I personally would not like to be in a mediation or arbitration situation to tell the bishop that he is wrong. Now maybe some of you hardier souls out there can deal with that. But I think you need to be very clear in whether or not the bishop can be involved in that situation.

The expenses to those who take advantage of the office vary from no fee at all to a nominal fee of \$10, \$25, \$60 or \$100. Again, each diocese needs to address their decision based on their own particular needs and own particular philosophies. Fees for administrators, again, may depend on whether or not the person is full-time or part-time or a volunteer. Documents that I have reviewed do not pay conciliators for their service. They serve without fee. One or two dioceses pay their arbitrators. Again,

you need to make that decision. In Cleveland, our Chancellor and Charlie, the Director of the Legal Office, feel that we would like to give our conciliators a stipend, a small amount of money at least to cover gas to come to the office.

The Canon Law Society addressed the issue, "How is this office utilized?" Dioceses have reported the number of cases brought to them for a fifteen-year period: 1, 16, 50, 75, 130 and 250. That is quite a range for a fifteen-year period. What kinds of cases were brought? Again, this is reflective of the non-scientific approach to this survey. There were 165 cases that were not identified at all; when the diocese responded, they just said the total number was 165. There were 105 cases that fall into the catch-all category of miscellaneous; 33 were identified as pastoral and 27 were identified as school related. From my individual conversations over the past few months with Directors from offices throughout the country, I have to say that their most important and most constant concern seems to be employment issues.

What are the weaknesses of the office? These weaknesses were identified by those who responded to the survey. First, a lack of publicity: that is what happened in Cleveland. The office was established in 1972. After that, it just existed. There was no kind of publicity, no kind of encouragement for people to use the office, and in some cases, people who came to use the office, were actually discouraged from using it. So publicity is important. Second, a lack of support from priests and bishops: all of you here have enough experience to know that if there is no support from a priest or a bishop for your idea or your program, it is not going to get too far. Third, a lack of cooperation from the parties: individuals must be willing to come into conciliation or mediation. If not, the process cannot happen. Fourth, the process itself can be discouraging. It can be a very long process or it can be a very intricate process. I think that in reviewing your own documents, the answer is to keep it simple, as simple as it can be to respond to your particular diocese. The fifth area of weakness was the number of persons involved in the case. The more people that are involved, the more difficult it is to bring people to conciliation. In writing your document, you need to make the decision whether or not just the individuals involved in the case will be brought into conciliation or mediation, and whether you will allow witnesses, experts coming in to testify, or legal counsel into that process.

In closing, I would like to make several general comments. I think that it is very, very important that you encourage every office, agency, institution, department, every system within your diocese, to have some clearly defined policies and procedures. This is an essential part, as I mentioned earlier, having some guidelines on which to base decisions. If you do not have these policies in place, I would encourage you as much as possible to see what you can do to facilitate that. Once those policies are

in place I would suggest two things to you: (1) that you review the policies to make sure that they are legally accurate and that they are not creating any liabilities for your diocese in implementing these policies; and (2) if you are the person who has to respond to some problem, it is good for you to know what is out there to help you in that response.

In writing your document, I would encourage you to provide for periodic revision. In Cleveland, there is a Board of Conciliation that oversees the office, and it is part of their responsibility to review the document. There are two reasons for this. First, it keeps the document alive. Someone always is looking at it and at least saying, "Oh yes it is fine." Second, what is even better, your experience with the office will allow you to fine tune it and adapt it to your experience in your diocese.

A written summary of the grievance and the attempted remedy is important. When people call with a problem, the context is usually conversational. People need to be heard. They need someone to listen to them. They need someone up there in that hierarchy, that authority downtown, or the diocese, to have a listening ear. However, there comes a point when they really have to identify the issue. And to do that very simply, what you are really must say to them is, "What is the problem?" and, "What have you done to solve it?" In the packet, there are two short forms which were written called Initiator Form and Respondent Form. The person who is bringing the dispute is the initiator and the other individual involved in the dispute, the respondent. Both have the opportunity to distinctly, concisely, and, hopefully, clearly, identify the issue.

Finally, I think we have to always understand that the Church is not a democracy. In spite of the many experiences that we all have had as consultative, collaborative and collegial persons, the bottom line is what the Bishop says happens. But we must be seen as a Church that is charitable and just, a Church that can facilitate resolution of disputes within the gospel spirit, in the gospel message of conciliation.