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## Mediation: A new model for settling sex abuse cases

by Tom Gallagher

Mission Management



The Spokane, Wash., diocese recently announced that a new settlement had been reached with respect to current, pending claims of sexual abuse. The settlement culminates almost a decade of complex litigation and a 2004 bankruptcy filing that cost the diocese \$48 million.

A major complication involved the Morning Star Boys? Ranch, which once had elements of control in favor of the diocese in its governance documents. In reality, the ranch operated on its own and was led for decades by Fr. Joseph Weitensteiner, who himself has been accused of sexual abuse. Prior to the 2004 bankruptcy, the ranch was legally separated from the diocese.

A critical issue post-bankruptcy was how to fund future claims against the diocese and, specifically, some two-dozen unresolved claims filed by former Morning Star Boys? Ranch residents. The future claims fund was woefully underfunded and was collateralized by practically all of the real estate of the parishes and their schools. A funding default would have triggered the foreclosure of parishes and schools.

With the new settlement, the diocese and parishes agreed to put \$1.5 million toward the future claims fund. There will be no foreclosures. All appeals will be withdrawn.

How did all this come about?

In September 2010, when Bishop Blase Cupich was installed as the new bishop of Spokane, he moved quickly to find a solution. He was committed to compensating the victims and preventing foreclosures.

“We had to come to this challenge as a matter of faith,” Cupich said. “I asked each parish to pray for one hour per week to seek God’s grace that we would be able to move forward. This approach gave me a kind of ease, the ability to hold back frustration or anger and to trust that God wanted this [settlement process] to be done for the sake of the victims and the parishes.”

While the diocese had already filed for bankruptcy, litigating the outstanding claims was an equally unappealing option due to the high cost, length of time and potentially devastating effect on the parishes and schools. “A third way was forced upon us, mediation, and it emerged out of necessity,” Cupich said.

Cupich and diocesan attorney Ford Elsaesser first got the victims’ lawyers on board.

Seattle attorney Tim Kosnoff, a former prosecutor who represented the largest number of victims in the Spokane case, agreed. “Bishop Cupich had his back up against a wall. The diocese had no money and was facing a default and Bishop Cupich chose the right path,” Kosnoff said. “Bankruptcy is often a ploy and costly and the professionals get paid far better than the victims, and litigation can be incredibly wasteful. It’s far better to get experienced, knowledgeable and thinking people to structure the thing out.”

The mediation has given the diocese, insurance carriers and plaintiff’s lawyers a working base for settlements, which helps the settlement process go more smoothly and quickly, and that is better for all, Kosnoff said.

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Cupich also had to get the Catholic people involved in the process.

“In the Spokane diocese, finances were essentially decentralized,” Elsaesser said. This resulted in the parishes and schools being actively involved in both the bankruptcy and the subsequent settlement process for future claims.

Cupich stayed in close communication with his priests and the lay leaders of the 82 parishes. He had two regional meetings with more than 200 pastors and parish and finance council members for the purpose of discussing the negotiations, plus four regional meetings with the pastors. These meetings had to preserve confidentiality for the sake of the negotiations.

From these discussions, Cupich received a clearer understanding of what the parishes were willing to contribute to a settlement. “This broad consultation from the entire diocese gave me the ‘vote of confidence’ as I went back into the mediation process,” he said.

Elsaesser said, “My sense is that the parishes understood that Bishop Cupich was committed to getting the job done with the maximum chance of avoiding parish foreclosures and a second bankruptcy.”

Cupich draws four lessons from this two-year process:

- "Understand that you are not going to control the outcome," he said. "The solution is not going to be immediately evident. It's key to have ongoing dialogue with the mediator. You have to see your opponents as your partners, to trust each other and for both sides to let go of trying to control the outcome."
- "Understand that this is going to take a long time to accomplish."
- "You cannot get mad. If you get mad, you will lose."
- "Revisit your goals because you may have had a certain expectation or a certain aspect of a goal, but you should be willing to keep testing these expectations."

According to Elsaesser, "If we hadn't achieved the settlement, whatever would have happened would have been bad and very expensive."

"As dioceses around the country face mass tort claims, they need to be schooled on how to get these claims settled," Kosnoff said. "A lot of good can come out of mediation."

Kosnoff is representing many sex abuse victims in the Helena, Mont., diocese. He speaks weekly with the diocese's attorney, Mike Patterson, which is, he said, "nothing short of remarkable." He is cautiously optimistic a negotiated settlement can be reached in Helena.

[Tom Gallagher writes *NCR's* Mission Management column. Contact him at [tom@tomgallagheronline.com](mailto:tom@tomgallagheronline.com).]

### **Process leads to mutual trust and respect**

The five people most intimately involved in the mediation process for the Spokane, Wash., diocese -- victims attorneys Tim Kosnoff and Dillon Jackson, Bishop Blase Cupich and diocesan attorney Ford Elsaesser and mediator Federal Judge Michael R. Hogan -- began the process wary, if not skeptical. By the end, they had gained each other's trust and respect.

Kosnoff had spent years engaging the diocese and Morning Star Boys' Ranch and he did not know the new bishop. "Tim had his own opinions and feelings about the diocese and had a lot further ways to come," Cupich said. "Tim had a greater hurdle to overcome. To his great credit, Tim allowed himself to be free of his past views and agreed to mediation."

Elsaesser gives equal credit to Jackson. "Dillon was a voice of reason," Elsaesser said. "Dillon agreed to put pending appeals on hold, which allowed the mediation to proceed."

Meanwhile, Kosnoff was impressed with Cupich: "He was shockingly candid with me and this was trust-building. Cupich is a thinking man and a credible negotiating partner."

Hogan, too, said Cupich's openness and straightforwardness made him a valuable partner.

But it was Hogan's skills as a mediator that kept the process moving. "I don't know if there is another mediator in the country as able as Judge Hogan," Kosnoff said. "He has remarkable and unique skill sets."

"I've never seen anything as impactful as Judge Hogan's approach," Elsaesser said.

Cupich agrees. "Judge Hogan is very incisive; he knows people and has a good instinct about what a person's limitations are."

Hogan would show up to mediation in a leather jacket and casual clothes while everyone else was in suits and ties. "Judge Hogan is very careful not to use his power [as a mediator], but people know that he has the power," Kosnoff said.

Cupich said, "Judge Hogan also has a very clever sense of humor and knows when to use it at the right time."

Hogan takes seriously the word reconciliation. "Reconciliation is more than a word to me, but it is what I've chosen to give my life to," he said.

In mediation, "relationships are so important," the judge said. "These vexing problems are really strained because of the emotional overlay and these emotions have to be addressed and respected."

"It's difficult to open oneself to the pain [of sexual abuse victims' cases], but you have to open yourself to the pain," he said.

"The overall idea is of healing for the victims and the church," said Hogan, a non-Catholic who describes himself as an "iconoclastic man of faith."

Hogan cites Ephesians 5 as important for mediation: "Everything exposed to the light becomes visible."

"Honesty, frankness and well-meaning people can get to a settlement," he said.

-- *Tom Gallagher*

### **Online resources**

Bishop Cupich's three-page letter explaining the settlement [www.dioceseofspokane.org/bjc\\_2012/letter-pentecost2012.htm](http://www.dioceseofspokane.org/bjc_2012/letter-pentecost2012.htm)

Background on the decision to enter into mediation [NCRonline.org/node/31234](http://NCRonline.org/node/31234)

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