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Notes on Representation of Native Clients

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Summary

Native people, whether influenced by traditional approaches to dispute resolution or by their pragmatic experience with local courts and dispute resolution or by their pragmatic experience with local courts and law enforcement, do not see justice as being done within the forum offered by the state. In search of an authoritative locale for rational dispute resolution, they find arbitrary and apparently irrational treatment in magistrate courts. Conversely, they have found in conciliation before the village council a forum where misconduct is measured against the world that the defendant immediately affects. They find a comprehensible forum in the village to solve their problems or no forum at all. Can participation in a functioning advocacy and adversary system be taught and utilized along with continued functioning of a sub-legal conciliatory system that handles de minimus matters effectively? This paper offers guidance to public defenders and legal services attorneys in representing Alaska Native clients.

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NOTES ON REPRESENTATION OF NATIVE CLIENTS

The Problem

While court decisions and funding of two programs in Alaska, the Alaska Legal Services Program and the Public Defenders Program, have sought to effectuate the right of indigents to representation by attorneys in criminal and civil matters, the structure of justice as it has developed through traditional procedures and transitional and modern structures has placed the issue of the attorney's role in dispute resolution within an unusual perspective. There has been an evident attempt on the part of rural people in Alaska, particularly Native groups, to use forums for dispute resolution of both minor criminal and civil matters that are not formal adversary systems. Where they are operative, they are locally authoritative forums for conciliation of conflicts between disputants and between wrongdoers and the village. Counsels are not used in these systems.

For those who make basic decisions about the extension of advocates into rural Alaska, the problem of implementation is not simply one that can be defined by the rights guaranteed to indigents through case law and as programmatically offered by the OEO Legal Services Program and Public Defenders Program. It is compounded by these factors:

1. Many people do not now want to introduce their problems into an adversary system and thereby lose control of the result in a forum with a process and goals that seem irrational.

2. Many villages do not desire to see offenders who are not recidivists fined or taken away to urban jails. The viewpoint of the village council is global only as it extends to the impact of these punishments upon the social structure of the village.

This point of view has resulted in positive attempts at conciliation in some villages. Conversely, it has resulted in indifference to the utili-

zation of advocates or the magistrate court as a forum for dispute resolution. This viewpoint is a product of more than the traditional experience with dispute resolution. As a result of both inadequate care in hiring and training in magistrate system, as well as the logistical problems of providing professional advocacy or judicial service to the bush on a regular basis, the adversary system has never functioned for Natives in rural Alaska. To any neutral observer, an arrest and appearance before the magistrate's court can rarely mean more than conviction. Assertion of rights to appeals have been little understood and little used when understood when defendants are confronted with the costs of appeal in time that might be used for subsistence hunting or local work. An argued dispute has become more cumbersome than a dispute that is poorly resolved or not resolved at all.

This experience with the legal system has been historically reinforced by officers of the court who have encouraged extra-legal resolution of all but the most serious disputes in the village. Both villagers and officers of the court have assumed that cases that do result in complaints to the magistrates will result in convictions.

Native people, then, whether influenced by traditional approaches to dispute resolution or by their pragmatic experience with local courts and law enforcement do not see justice as being done within the forum offered by the state. In search of an authoritative locale for rational dispute resolution, they find arbitrary and apparently irrational treatment in magistrate courts. Conversely, they have found in conciliation before the council a forum where misconduct is measured against the world that the defendant immediately affects. They find a comprehensible forum in the village to solve their problems or no forum at all.

In nearly every society, the advocate, a non-kin person who argues one's case, has appeared only when:

1. A rational forum for third-party dispute resolution has been established.

2. The complexity of life as it affects that justice system requires a division of labor between a judge and an advocate.

If there is no recognized forum where reasonable men willingly bring their problems or complaints, what then is the role of an advocate? Should he help clients avoid that forum? Can he reconstruct that forum in his practice to better suit his clients needs and that of the larger community?

Several problems then emerge from any attempt to replace the present system with a full-blown advocacy and adversary system in the bush:

1. The entrance of attorneys does not mean that individuals will be receptive to use of the judicial forum to resolve their disputes. They may continue to bring these problems to sub-legal forums such as the council. They may feel they have no forum at all in which to resolve their disputes.

2. The councilmen who engaged in dispute resolution may feel that they can no longer exercise this power. The use of derivatively,through informally granted power from the judicial and law enforcement agencies,will be less regular as cases referred to the courts result in both dismissals and in convictions and not in convictions only..

Can participation in a functioning advocacy and adversary system be taught and utilized along with continued functioning of a sub-legal conciliatory system that handles de minimus matters effectively? Much of the burden for this new form of collaboration will fall upon those who practice in the bush and in their relationships with local leaders and offenders.

An attorney who confronts clients who relate to rural justice as it is now implemented is faced with tasks that are unlike his brother in the city. An attorney in a private dispute may well seek to find who outside of the

court regularly resolves his client's dispute and may suggest that this case be handled in that manner. This inquiry will take place at the initial interview of the client. It would not foreclose court action if the client believes that he would not receive a fair hearing before a local body.

A public defender may seek with the acquiescence of the trooper, local policeman, magistrate and district attorney to refer the case to the council after the initial appearance before the magistrate (and in lieu of a hearing before the superior court) or after a finding of guilt or entrance of a plea to that effect. This might be done after a suspended sentence or as a condition of probation. There is no question that villagers themselves have been satisfied with council disposition of violent matters that might have been considered felonies had they been referred to the courts as well as a host of non-criminal matters that relate to day-to-day social intercourse, gossip, etc., that do have a real effect upon village life according to the records of meetings studied during our field work.

Public Defenders with Native Clients--Some Approaches

Establishment of one's function of autonomous representation for the Native client may be accomplished by considering his attitudes toward authority in conversation with him. Although the approach would be different for Eskimo or for Athabascan defendants, the theme that should be enunciated is similar--that through his attorney his assertion of rights will place into question the status of that authority and the procedures under which the directives of that authority were carried out.

For the Athabascan, that authority, if legitimate and rational, is unchallengable. Thus, the argument for participation through representation

must be that representation will test both the legitimacy and rationality of police tactics. Since the basis of judicial and police authority is empirically unclear to the Athabascan, he may accept the logic of this inquiry on his behalf.

For the Eskimo, the basis of authority is nearly always subject to question if the risks of such a challenge do not appear to be insurmountable. Therefore, a defendant could be persuaded to accept the logic of a system that promotes an internal review of the logic of police behavior and of evidence against him.

The Authority of Law and the Meaning of Guilt

For bush defendants, their traditional attitudes, the teaching of missionaries, and their experience with village councils and magistrates have done little to explain to them the difference between guilty feelings and evidentiary guilt. The logic of the legal system as he knows it seems to be this: If the authorities have treated you fairly, you should cooperate with them and confess your guilty feelings. If they have arrested you and gone to this much trouble, you must be as guilty in their eyes as you feel in this situation. Cooperative wrongdoers are readily reconciled with the community with the imposition of a sanction or, merely, from the public admission of feelings of guilt and contrition. An individual who does not admit his guilt, especially when confronted with written or verbal testimony that implicates him, will have the full load of authority come down upon his head (or, the load of the legal system if the local authority can set the wheels in motion).

The right to remain silent and to question the sufficiency of the state's case through one's attorney are inherently incomprehensible from this frame of reference. However, to bargain one's admission for a lighter

sentence, the essence of plea bargaining, does make sense from this frame of reference. It makes sense to the wrongdoer and it makes sense to the victim. It is rational behavior.

For the practitioner, the essence of representation of a Native whose case has been referred out of the village into the court system is knowing what disposition of the case has taken place prior to its referral to the court system. Why was this case not resolved by local authorities? Was it considered to be one of a series of bad acts by the defendant? Was there an attempt to resolve it before the village council? Who testified before the council? Was there some underlying prejudice that motivated that hearing or that motivated the transmittal of the case to the court? Did the defendant's conduct (his refusal to answer questions, his refusal to appear) motivate the criminal complaint? What penalties are meted out for factual offenses of a similar nature in the village? How do these compare with the likely sanction in court? Did the arrest result from overenthusiastic intervention by the state trooper in a matter that would have been handled locally had that intervention not taken place?

This is the kind of information that a Native paralegal might fruitfully investigate for a public defender. Armed with it, he may better prepare witnesses for trial and cross-examine adverse witnesses, recognizing that they as well as the defendant are reinforced in their attitudes about law from the entirety of their cultural and empirical experience with dispute resolution in the village. The public defender would also be in a better position to suggest that the findings be incorporated into a presentence report prior to the acceptance of the defendant's guilty plea or prior to the imposition of sentence. He may use this information to persuade

the judge to accept village opinions in sentencing the individual if they would seem to benefit his client.

APPENDIX

This format for client interviews may have some utility for Alaska public defenders. It would be useful, for example, to pool information about villages that regularly refer particular crimes to the magistrate. Who characterized these crimes? Do other villages regularly treat these matters internally? Why was your case the exception?

DINEBEIINA NAHILNA BE AGADITAHE

OFFICE MEMORANDUM

July 12, 1971

TO: Attorneys and Counselors-in-charge

FROM: Stephen Conn, Attorney
DNA, Inc.
P. O. Box 967
Shiprock, New Mexico 87420

SUBJECT: An approach to a renewed perception of the place of the DNA advocate within the galaxy of dispute resolving mechanisms.

What follows is a brief outline of questions that may be incorporated into the client interview that will help the advocate or attorney perceive where he sits within the galaxy of disputes resolvers still available to his client who might resolve problems for him. Their origins may be out of Navajo social structure, or anglo bureaucracies that have been imposed and intergrated to a greater or lesser extent with Navajo society. This is not an attempt to turn back the clock but to better understand what role the counselor or attorney is to perform within this essentially pluralistic environment. Put another way, we want to know who shares our interest in particular problems and, perhaps, if they satisfy the client in ways that we do not?

A. Did you try to resolve your problem before coming to D.N.A.? (how? through whom? (person, agency))

An Outline:

1. Does this person usually help people resolve problems like this one? Does he help with some parts of it? Has he already solved part of the problem? (Ed: For example, the third party may attempt to reconcile husbands and wives. However, he may not deal with division of property should that become necessary).

2. Did he call the other (your adversary) and listen to his side?