

ALTERNATIVE APPROACHES TO DISPUTE RESOLUTION

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A trial in court of record is one way of resolving disputes. It is neither cheap nor speedy and society has long sought for alternative ways to resolve disputes that do not really require full-blown trials. Arbitration and administrative adjudication are familiar mechanisms; small claims courts provide a less formal, less costly and more expeditious means of providing claimants with a day in court. Other alternatives include mediation, conciliation, factfinding and negotiation. The use of ombudsmen should also be mentioned and, in addition, there are various mechanisms of dispute avoidance, institutionalized effort to prevent potential grievances from ripening into claims which will have to be adjudicated or otherwise resolved.

The statement above was excerpted from a report of a conference convened in St. Paul, Minnesota under the sponsorship of the Judicial Conference of the U.S., the Conference of Chief Justices, and the ABA in 1976 to explore a theme raised 71 years earlier by Dean Roscoe Pound: "The Causes of Popular Dissatisfaction with the Administration of Justice." A major conclusion of the attendees at the St. Paul conference was that "alternative methods of dealing with disputes, if properly developed and made widely available in realistic fashion offer great promise of meeting the needs of claimants and, in the process, providing relief to the courts so that they might be available for litigants with claims which only courts can adjudicate." 1/

For the past several years, a wide variety of LEAA sponsored efforts - research, operational funding, training, technical assistance, and information dissemination - have been devoted to exploration of and experimentation with numerous alternatives to conventional adjudication of disputes. One of the first undertakings was a major review and assessment of the state-of-the-art funded by LEAA's research arm, the National Institute of Law Enforcement and Criminal Justice in 1973. The results of this survey, conducted by the American University, are currently being readied for publication in two volumes: The New Justice - Alternatives to Conventional Criminal Adjudication and A Criminal Justice Workers Guidebook: Alternatives to Conventional Adjudication. The primary objectives of the AU study were: 1) to examine the current range of adjudication alternatives; 2) to determine the impact of these alternatives on the activities of criminal justice agencies; and 3) to present an overview of organizational, legal, and evaluative issues and concerns relative to the adoption and implementation of an alternative. A principal contribution of the study is a

1/ ABA, Report of Pound Conference Follow-up Task Force, Griffin Bell, Chairman, August 1976.

45222

matrix showing all possible stages in the criminal adjudication process at which an alternative procedure may be introduced and the agency or actor which may introduce the alternative.

Another major survey effort funded by the National Institute's Office of Research Programs is an assessment of European alternatives to criminal and civil trials and the applicability of these approaches to the U.S. A two volume report prepared under the direction of Earl C. Johnson, Program for the Study of Dispute Resolution Policy, University of Southern California, is being readied for printing. A draft of the volume on European alternatives to criminal trials is attached and the companion volume on alternatives in civil cases is available upon request. As a follow-up to this effort, Professor Johnson has recently been awarded a \$250,000 NILECJ grant for the first year of an anticipated two year in-depth analysis of the transferability of the four most promising European approaches identified in the initial study. Included in this phase is an examination of the possible transfer of some of the procedures used in civil disputes to certain kinds of criminal cases. The four approaches are:

- a. Community Mediation - this procedure is one which involves the selection of lay persons by professional administrators or community organizations to serve as panel participants for mediation and conflict resolutions. At least one domestic version and one substantially different foreign version will be compared with the regular court process and with each other.
- b. Prosecutorial Practices - this procedure is one which involves the giving of expanded power to prosecutors to sanction offenders without the need of judicial approval, i.e. in Belgium and Sweden, prosecutors have been given the power to levy fines while the level of fines is controlled by schedules. These alternatives will be analyzed and applied to U.S. conditions by this study.
- c. Rentalsman - this technique is an example of flexible, role-free, quick processing of landlord-tenant disputes through a mediator/arbitrator specializing in landlord-tenant controversies. It will be compared to conventional adjudication of such disputes in a neighboring jurisdiction where emphasis is on consistency, predicability, and quality of evidence.

- d. Compulsory Mediation - this effort, an outgrowth of the mediation/arbitration program sponsored by the Wayne County Court has been in effect since June of 1971. The study will describe the Michigan process for resolving automobile accident claims, identify the conditions under which it is effective, and compare it with a similar system in England.

The specific focus of Professor Johnson's second phase study will be to evaluate and compare the advantages and disadvantages in terms of manpower utilization, costs and programmatic impact of implementing the four dispute processing strategies. By the conclusion of the second year of funding the study is also expected to devise innovative strategies not currently existing in any jurisdiction which appears worthy of experimentation in the U.S. and to prepare a series of policy recommendations concerning possible major improvements in the U.S. dispute resolution system.

Under LEAA discretionary funding to the National Center for State Courts, Professor Johnson has also published a survey of existing U.S. alternatives in civil cases entitled Outside the Courts. A copy of this report and a cover letter from NCSC summarizing its contents are included in the attached packet of materials prepared by LEAA's National Criminal Justice Reference Service.

In addition to the major research efforts described above, LEAA funds have also been used to stimulate a variety of experimental approaches at the local level. Through block grant funding, for example, 4-A programs (arbitration as an alternative) were funded in 1971 and 72 in Philadelphia, Pa. and Hartford Conn. The basic 4-A concept is one of applying arbitration and mediation techniques to settle private criminal complaints for such cases as disputes between neighbors or acquaintances. Generally a unit of the local District Attorney's office reviews private criminal complaints and determines whether to send them to trial, or with the consent of the parties, arbitration. Informal hearings are held by arbitrators trained by the National Center for Dispute Settlement of the American Arbitration Association and a consent or arbitration award is made. The 4-A approach is still operational in Philadelphia (it has been institutionalized by the Municipal Court); and has also been adopted in Rochester, N.Y., Cleveland, East Cleveland, Akron and Elgin, Ohio and San Francisco, California.

A variation to this approach, using law students as mediators rather than professionally trained arbitrators and including bad check cases as well as citizen disputes, was developed in Columbus, Ohio in 1971 under block grant funding and was later named one of LEAA's first Exemplary Projects. Impressed with the Columbus program's

success in providing a convenient and inexpensive out-of-court forum for minor dispute resolution, LEAA's National Institute sponsored a series of ten regional training workshops in 1974-75 for approximately 500 local prosecutors, members of the judiciary, and citizen groups interested in establishing similar programs. The brochure, replication manual, and training materials developed as part of this technology transfer effort are attached. The Columbus staff have provided on-site technical assistance to help set up a similar program in Chillicothe, Ohio and have also provided advice and guidance to other programs patterned after their model and in various stages of development in communities such as South Bend, Indiana; Orlando, Florida; Omaha, Nebraska; Tucson, Arizona; and Cincinnati and Dayton, Ohio. In Orlando, the Citizen Dispute Settlement project is funded by the American Bar Association's BASICS Project and uses attorneys from the Orange County Bar Association as arbitrators.

Innovative approaches to improved handling of juvenile cases are also being tried. The Community Arbitration program of Anne Arundel County, Md., for example, has been funded by the Maryland SPA since 1974 as an alternative to the formal juvenile court intake process. The program allows juveniles who commit misdemeanors to respond immediately to a police-issued citation and voluntarily become involved in community work and/or available treatment programs. Appearing before a specially trained attorney arbitrator and in the presence of his parents and victim, the youth is offered a variety of options to formal court processing that include community service, counselling, making restitution, and educational remediation.

In Seattle, a block grant funded Community Accountability Program currently employs over 200 community volunteers who serve on Accountability Board Panels. In lieu of formal judicial handling, juvenile cases are presented to the Board which determines appropriate victim restitution or completion of community service tasks. Program staff monitor the completion of the restitution assignment and provides such services as job development, referral and other needed services.

One of the most far reaching and innovative of all of the LEAA funded "alternative" programs to date is the Boston Urban Court Project. This demonstration project in neighborhood government began in May, 1975 and is now in its second year of discretionary funding, with grants to date totalling \$911,480. The program, which is administered by the non-profit Justice Resource Institute of Boston, involves interpersonal dispute mediation, disposition or sentencing panels, and victim/witness assistance in Boston's Dorchester District. Referrals for mediation come from the Clerk of Court--who by state statute hears all citizen-initiated complaints--from the bench and from the district attorney. In the future, referrals also may come directly from the police or the community. As in the Columbus night prosecutor program, disputants may come to mediation during the day, night, or weekends.

The dispute is presented before a panel of three community members. The panel then retires for private deliberations. They later listen to the sides separately before developing a mediated, non-coercive agreement. All mediation agreements are monitored for three months.

Some 236 disputes have already gone through mediation. Follow-ups on the first 84 cases show that 75 percent of the mediations were considered successful with the agreements being carried out on a sustained basis.

The mediation component has been enthusiastically endorsed by Dorchester District court judges. Justices commented on the problems in dealing with family or neighborhood disputes under traditional court processing, including limitations of time and the fact that the parties are intimidated by the trial. Contrasting this with the community mediation approach, Justice James W. Dolan stated, "I wonder how we got along without it. You don't have a loser in the mediation process the way you do in a criminal case."

The disposition or sentencing panel is the most novel of the three components of the Urban Court. Cases are accepted directly from the bench when the judge has sufficient facts for determination of guilt but feels the need for community views and a recommendation before sentencing. A panel is convened with an Urban Court staff member, two community panelists, a probation officer and the defendant. Either the victim agrees to appear himself or gives his story to a victim advocate. The hearings are concluded with a sentencing recommendation that is forwarded to the presiding judge, who retains final authority for the sentencing. Recommendations may range from community restitution to treatment programs for the offender.

Some 93 specially selected and trained community members give their time to the Boston Urban Court project and receive a stipend of \$7.50 for each session they serve.

The third component of the project offers a range of victim services, including emergency housing and funds, aid in filing for victim compensation, security analysis of homes and businesses, transportation to court, moral support, and counseling and referrals for those traumatized by the crimes against them.

Another recent experiment in community mediation is the San Francisco Community Board program which is currently being implemented by Raymond Shonholtz of the University of San Francisco School of Law with private foundation funding. An evaluation design for the

project is being developed with funding from LEAA's National Institute. The evaluation design should be transferable to other jurisdictions interested in emulating the San Francisco approach. The San Francisco effort differs from many of the other programs described earlier in that no prosecutor time is involved. Instead, petty misdemeanor cases involving adults or juveniles are referred to community tribunals following either a citizen complaint to the police or direct police officer intervention. Community interaction is based on narrow geographic areas (two high school districts in the experimental program) affording all parties an opportunity to know and relate to one another. Board members are trained in arbitration techniques, criminal justice procedures, and the use of available community resources and are prepared to hear a variety of cases involving misdemeanor offenses, settlement of specific disputes, hearings on issues of community concern, coordination of restitution programs, etc.

### Future

The foregoing is by no means a complete listing of the alternative approaches to conventional adjudication supported in whole or part by LEAA funds. Substantive law reform: mechanisms for dispute avoidance; formal diversion for a variety of offenses and offender types; administrative processing (e.g., traffic offenses); and improved procedures for small claims courts are additional areas which have received considerable attention but are not touched upon in this paper. The challenge of developing new forums to make the criminal justice system more responsive to the needs of the community is one which has generated considerable enthusiasm and creative thinking both within and outside the Agency and we expect this interest and commitment to continue.

Currently, the National Institute is working toward the development of a research agenda on dispute resolution which will pull together what we have learned to date and identify those issues requiring further assessment. Some of the issues in need of additional exploration and model building, for example, include the types of disputes best handled by alternative forums; the most appropriate resolution mechanisms (e.g. arbitration, mediation); sources of referrals; due process safeguards; enforceability of sanctions; background of the dispute resolver (lay, law student, lawyer, behavioral scientist); and relationship to the formal court process.

As this paper indicates, LEAA has played a major role to date in the stimulation of imaginative, citizen-oriented approaches to dispute resolution. Future activities will be closely coordinated with national opinion leaders interested in this topic area. (e.g. most notably the ABA Committee on Resolution of Minor Disputes) and with the newly formed Office for the Improvement of the Administration of Justice.

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