

TESTIMONY
OF
ERIC D. EBERHARD
BEFORE THE UNITED STATES SENATE
COMMITTEE ON INDIAN AFFAIRS
ON
S. 1508, THE INDIAN TRIBAL JUSTICE SYSTEM TECHNICAL AND LEGAL
ASSISTANCE ACT

SEPTEMBER 29, 1999

Chairman Campbell, Vice Chairman Inouye and members of the Committee:

My name is Eric Eberhard. I am a partner in the Seattle office of Dorsey & Whitney LLP. My practice is centered on the representation of Indian tribes, tribal organizations and entities doing business with Indian tribes throughout the country. The Indian Law practice group at Dorsey & Whitney is comprised of 13 attorneys and two non-attorney professionals who work out of offices in Washington, D.C., Minneapolis, Minnesota, Orange County, California and Seattle, Washington. Ten members of our group are Indian.

I thank the Committee for inviting me to be here today to testify on S. 1508, the Indian Tribal Justice and Legal Assistance Act. Among the clients whom I have the privilege to serve is the National Association of Indian Legal Services (NAILS), which has been a pro bono client of the firm since 1995. We are pleased to be able to make the resources of the firm available to the programs funded by the Legal Services Corporation which comprise NAILS.

I am here today to speak in support of S.1508. I commend Chairman Campbell and the Committee staff for their work in developing this bill and I am hopeful that it will receive prompt consideration here in the Congress. If enacted, the bill will authorize the Attorney General to make grants to: (1) non-profit entities which provide civil or criminal legal assistance to Indian tribes, members of Indian tribes or tribal justice systems pursuant to federal poverty guidelines and (2) to national or regional membership organizations and associations whose members consist of tribal justice system personnel to provide for training and technical assistance for the development of tribal justice systems.

Based on my experience in the practice of federal Indian law, I am confident that S. 1508 would assist in the process of developing and strengthening the institutions of tribal justice and creating the legal infrastructure on the reservations which will allow for sustained economic opportunity and growth.

From 1972 through 1978, I worked in legal services. From 1972 to 1973 I worked for the Legal Aid Society of Cincinnati where I was assigned to cases involving landlord/tenant disputes and the problems that were then being encountered by the low income participants in federally subsidized mortgage programs. My work there involved litigation in the state and federal courts as well as the development of new building and landlord/tenant laws for the City of Cincinnati. My caseload at any time consisted of approximately 600 open files. There were eighteen attorneys working in the office who all had similar caseloads. There was little doubt that the services of the office were in great demand by the low income community in Cincinnati.

In 1973, I moved to the Navajo reservation and went to work for DNA-Peoples Legal Services as a staff attorney in the Window Rock office. I was immediately struck by the contrast in my living conditions. My modest, but comfortable apartment in the city was a thing of the past. No longer were the amenities of running water and electricity available in the small cabin I was able to rent from a Navajo family.

No longer was I engaged in the urban practice of poverty law. The libraries, courthouses, law firms, law enforcement, electricity, telephones and fax machines that were so readily available and which had been taken for granted in my practice a few weeks earlier were either gone, in scant supply or only available at great distances. The easiest of tasks became something to be planned well in advance. Contacting a client to prepare for a hearing in court now required weeks and months instead of a few phone calls. Interpreters were necessary for working with most of the clients, for whom Navajo was the first and only language. Conducting basic legal research eventually became possible at the office as the program increased its library resources, but the need to travel several hundred miles to conduct extensive research was a constant during the five years I worked at DNA.

The nearest state court was a sixty mile round trip over a stretch of highway that had more fatalities per year than any other rural road in the United States. The nearest federal district court was about two hundred miles away. The nearest federal court of appeals was 1,900 miles away. The tribal court was more accessible geographically, but was still very much a developing institution. It had only been seven years since tribal law had been codified. Decisions of the courts were not generally reported. Tribal judges had only recently been able to shed their dual roles as prosecutors and judges in criminal cases. Interpreters were needed in any court--federal, state or tribal--in order to be able to present a case involving most of our clients.

In 1973, DNA had been on the reservation for six years. It had been one of the very first programs to be started on a reservation by the Office of Economic Opportunity (OEO). One of the first obstacles the founders of DNA had to overcome was the natural suspicion with which the Navajo people regarded lawyers. The term "lawyer" literally translated into the Navajo language as "one who argues." Being known for being argumentative was not a desirable thing in the world of the Navajos. The name DNA is an acronym for a Navajo phrase which was intended to overcome this problem. The phrase means "lawyers working for the economic revitalization of the People." In order to add meaning to the phrase, DNA attorneys were very aggressive in asserting the rights of Navajo consumers against the operators of the trading posts on the reservation through litigation and through successful efforts to convince the Bureau of Indian Affairs to rewrite the regulations governing the licensing of traders. These efforts helped to move the Navajo economy out of the era of barter and pawn and into the era of wages. DNA attorneys were also instrumental in the development of successful economic enterprises which continue to operate today, such as the Crownpoint Rug Weavers Cooperative. This business, which is owned and operated by the weavers themselves, succeeded in creating a way to market Navajo rugs which results in 100% of the profit going to the weaver. Most weavers who are not participants in the cooperative realize less than 50% of the profit from their artistry.

The job of getting DNA established in the larger reservation communities was still underway in 1973. Opening an office always meant more than renting space, buying furniture and equipment and hiring staff. Most often it meant that program staff and community volunteers had to build a building to house the program, train community members in everything from legal secretary skills to the skills necessary for effective lay advocacy including: legal research and writing, case preparation, basic trial skills, negotiation skills, the law of evidence and procedure. The resources to accomplish these tasks did not exist on or near the reservation. We had to develop them at the same time that we provided a full array of civil legal assistance and some criminal defense assistance to our clients. The compensation DNA was able to pay was not great. My entry level salary as a third year attorney was about \$9,000.00. Five years later I was making \$10,000.00. Things have not improved in any measurable way when it comes to compensation today.

Over time, DNA has contributed to the development of a sophisticated legal infrastructure in the Navajo Nation. The courts are now courts of record with reported and published decisions. Navajo law is fully codified and annotated to make it readily accessible and more predictable. The Navajo Nation is a leader among all governments in alternative dispute resolution systems with its Peacemaker Courts which draw on Navajo custom and tradition for the non-adversarial resolution of disputes.

Former employees of DNA have gone on to become prosecutors, judges--including the current and former Chief Justice and both sitting Associate Justices of the Navajo Nation Supreme Court-- members of the tribal council, attorneys in the tribe's Department of Justice--including two who have served as the Attorney General of the Navajo Nation, and the former President of the Navajo Nation as well as the current Vice President. There is now a Navajo Nation Bar Association and a thriving private sector among the licensed members of the Bar. The impact of DNA has not been limited to the reservation. Former employees have gone on to become assistant attorneys general in several states. At least one is an Attorney General. A few serve in the state judicial systems. Several have served on the staff of the Congress or in the departments of the Executive Branch. Several have become law professors or have continued to practice Indian law with public interest law firms. Many have gone to work as in-house counsel for tribes around the nation. Many more have gone on to become successful in the private practice of law where they continue to contribute to the development of the law both on and off of the reservations. Each year several young Navajos complete college and continue on to law school. And, each year a few young Navajos finish law school and return home to play a role in one of the institutions which comprise the legal infrastructure being built on the reservation.

In short, DNA and the people who have comprised its family since 1967 has been a major catalyst for constructive change in the Navajo Nation and elsewhere. However, much remains to be done. Unemployment and the poverty which accompanies it still afflicts the great majority of reservation residents. At the same time that DNA has been helping the people of the Navajo Nation to settle disputes and build the legal infrastructure necessary for economic growth, the world around the reservation has been changing at an accelerating rate. We have seen an incredible increase in wealth and information in our country in the past thirty years. Even with A of the progress that has been made in the Navajo Nation, the gap between what is available on the reservation and what is available off of the reservation has grown wider.

It is still very difficult and relatively expensive to access the most basic services on the reservation. In my practice, I now take it for granted that I can use my computer to download the most recent decision from almost any court in the federal or state system in a matter of seconds or minutes. The same is true with federal and state statutes. The hardware and software available to me allows me to represent my clients more efficiently and effectively than ever. The access to all types of information and the ability to present it in ways which demonstrate a point or document a need is unparalleled. Unfortunately much of this capability is absent or not consistently available to legal services programs and justice systems operating on reservations. Seventy percent of homes in the Navajo Nation still do not have telephones, much less access to the hardware and software necessary to access the digital world and its wealth of information.

The institutions of justice still lack sufficient numbers of trained personnel. This problem exists at all levels-- from law enforcement, to the courts, to the legislature, to the executive branch and in the private sector. Basic skill training is needed at all levels.

The institutions of justice still lack the basic physical resources. Jails are dilapidated and overcrowded. Courts are operating out of trailers or substandard facilities. Libraries, computers, files, record keeping, docketing and other basic tools of the modern judiciary and law offices are not adequate or are not present in some instances.

S. 1508 is needed to help close the gap and help to create the certainty and social stability which flows from a well developed legal infrastructure.

I hope that my testimony is helpful as the Committee and the Congress consider this legislation. I appreciate the opportunity to be here today and will be happy to be of any further assistance the Committee may deem appropriate.