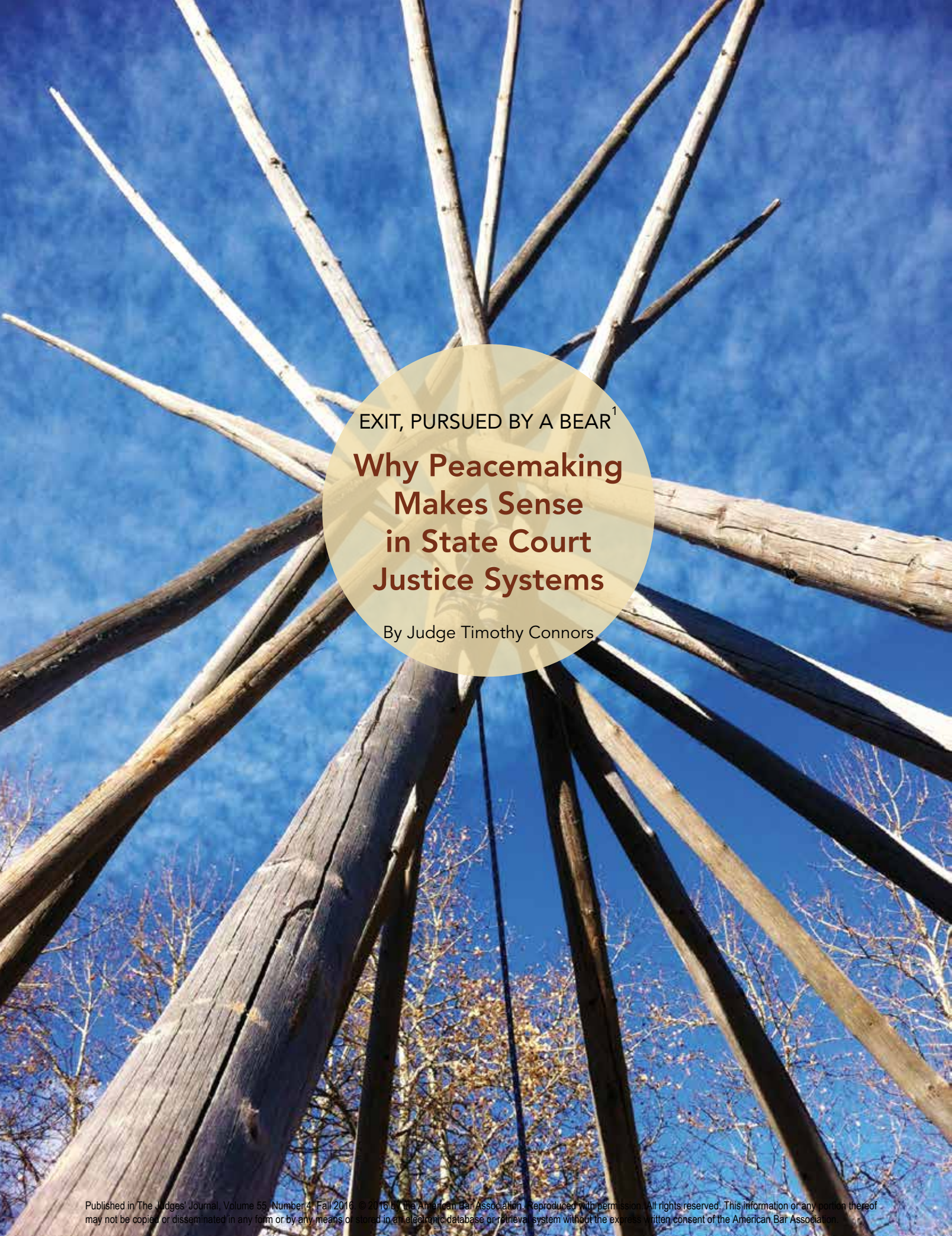

EXIT, PURSUED BY A BEAR[1]

Why Peacemaking Makes Sense in State Court Justice Systems

By Judge Timothy Connors

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For some, Shakespeare's famous stage directive is more than a visual transition. It is a metaphorical recognition that we need to take a different path. The bear is our collective self. It represents how we too often respond to conflict between each other in our justice systems. As Dr. Martin Luther King Jr. observed: "If we do an eye for an eye and a tooth for a tooth, we will be a blind and toothless nation." In the end, the bear consumes us all.

Some believe that tribal court peacemaking offers us that alternative path. This path leaves us with our sensibilities intact and our better selves renewed. I speak now of our collective selves. I speak of a justice system that views the healing of controversy as an institutional foundation to its public responsibility. As a state court judge who has embraced peacemaking in our state courts, I am one of those who believe.

In 2013, our Michigan Supreme Court asked our county to explore tribal court peacemaking philosophies, principles, and procedures and report on whether state courts could benefit from what we learned from our tribal neighbors. We did.

And we can.

We were fortunate to have teachers within our borders. Michigan shares its two peninsulas with 12 federally recognized tribes. Tribal Court Judge Michael Petoskey, a member of the Grand Traverse Band of Ottawa and Chippewa Indians, is the architect of many of our federally recognized tribal courts in Michigan. He was invaluable in providing guidance in both our exploration and implementation of peacemaking. Our path was enlightened by other tribal court judges and peacemakers as well.[2] The foundational basis for our education came from the Michigan Tribal State Federal Judicial Forum of our Michigan Supreme Court. That forum was initially established in 1991 by Supreme Court Justice Michael F. Cavanagh. Justice Cavanagh prophetically commented in the first meeting with our tribal neighbors: "We know that we have more to learn from you than you have to learn from us."

Where Did Peacemaking Come From?

Peacemaking has its roots in indigenous populations both within and without our national borders. Mandela's Truth and Reconciliation Hearings and Ireland's original Brehonic Laws would be just two examples from outside. Currently, many countries are exploring and implementing explorative justice practices. Ireland, for example, has a national commission on restorative justice. Within our borders, many, if not most, of our 567 federally recognized nations have justice systems rooted in peacemaking.

The Native American Rights Fund is nurturing those roots through its Indigenous Peacemaking Initiative. As they explain:

> Indigenous Peacemaking is nothing new. Our nations had ways of dealing with disputes since time immemorial. What is new is that, as western-model court systems have not been able to handle all the disputes in our communities, Tribal Nations are reviving their own traditional ways of dealing with disputes. Since these models almost always involve healing relationships rather than just punishing wrongdoing, the result is that we are also healing our communities by reviving our peacemaking traditions. The Indigenous Peacemaking Initiative is doing what it can to support these efforts.[3]

Rooted in ancient traditions, a fundamental principle of peacemaking is that humans are profoundly connected to one another and their communities. As renowned author and peacemaker Kay Pranis explains, "[C]ommunity, that is, connection with others, is essential to our survival as a species and, therefore, an inclination to be in good relationship with others is embedded in our genes." In peacemaking, conflict provides an opportunity to build community and human relationships.[4]

How Does Peacemaking Differ from Current Approaches?

Professor Shawn Watts is a citizen of the Cherokee Nation of Oklahoma and is the associate director of the Edson Queiroz Foundation Mediation Program at Columbia Law School. He developed and teaches a course in Native American Peacemaking. He has authored an excellent summary chart comparing our traditional court approach to conflict resolution versus mediation versus peacemaking. It is reprinted with permission on page 26.

Professor Cheryl Fairbanks, Tlingit-Tsimpshian who grew up on Prince of Wales Island, Alaska, teaches a peacemaking clinic at the University of New Mexico Law School. As a tribal court judge, Professor Fairbanks has observed firsthand the value of peacemaking in justice systems and has assisted various tribal nations in implementing peacemaking in their communities. Understanding the roots of peacemaking as well as our current state and federal systems, Professor Fairbanks outlines some fundamental differences, between the two. In Professor Fairbanks analysis, our current system emphasizes the following values in conflict resolution:

- Individualism
- Competition
- Autonomy

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Conflict Resolution Comparison

	COURT	MEDIATION	PEACEMAKING
Participation	Restricted; limited to parties and party reps, but often public is permitted to watch	Restricted; limited to parties, party representatives, or supporters	Open; community may attend and participate
Third-party "neutral"	100% in charge with authority to level penalty and impose decision	No authority to make decisions; limited activity	Equal to parties in authority and activity
Issues	Broken laws; civil liability	Civil relationships	Community relationships
Focus	Past conduct; individual responsibility; legal responsibilities	Past, present, and future conduct; party responsibility; needs of parties	Past, present, and future conduct; individual and community responsibility; individual and community needs
Tools	Incarceration; imposed restrictions; imposed damages; coercion	Self-determination; voluntary restrictions; voluntary damages; trust	Reintegration; restoration; support; trust
Procedure	Fixed rules	Fixed rules; flexible guidelines	Flexible guidelines
Results	Winner/loser	Agreement; no agreement	Common ground to maximize all interests
Confidentiality	Public record	Strict; few exceptions	Honored; exceptions
Decision making	Adversarial; state imposed	Consensus; party determined	Consensus; community determined

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In contrast, peacemaking emphasizes as core values for conflict resolution the following:

- Community
- Cooperation
- Relatedness

Of all the alternative dispute resolution processes, peacemaking is closest to mediation and restorative justice. It differs from mediation in that its purpose extends beyond settlement of a case; it differs from restorative justice in that it goes beyond accountability and repairing harm with additional goals of healing relationships and restoring one's place in the family or community.

Peacemaking and facilitative mediation share some similarities. The role of the facilitative mediator and the peacemaker is nondirective and neutral as to the outcome. Both ask questions designed to encourage understanding and self-determination, although the kinds of questions differ with each model. Like some mediators, peacemakers engage in substantial pre-session work with the participants to determine how best to structure the session and screen for issues that would preclude safety or meaningful engagement. The parties and the peacemaker together determine the values or ground rules for the discussion. Like mediation, final settlement agreements are written by the facilitator, signed by the parties, and enforceable in court as a contract between the parties.

The philosophical approach to mediation and peacemaking differs slightly in that mediators are in search of a solution with the focus on the issue(s) and may take an active process role to guide the parties to that point. Peacemaking focuses on relationships; it allows more party ownership of the conflict and the process in the belief that the wisdom for meaningful solutions and healing resides with those in the circle, championing the Native theory that "we know more together than we do individually." The peacemaker first endeavors to help the parties learn to talk to one another so that they can then resolve the problem themselves. Peacemaking participants meet in a traditional circle that sometimes includes support people or others from their families or communities. Parties do not go into separate rooms to negotiate through the neutral, as separation neither facilitates understanding nor enhances the healing of relationships.

Why Should We Consider Peacemaking as an Alternative Path?

Because it works.

When we first explored peacemaking in our state trial court, we adopted three guiding values that were shared with us by our tribal neighbors: relationships, responsibility, and respect. We added a fourth: redirection. The peacemaking process offers an alternative to the limitations of the adversarial system by recognizing the importance of *relationships*. Additionally, a richer understanding of the effect of the problem on all parties leads to meaningful demonstration of *responsibility* and accountability for harmful acts. *Respect* for others amid differences promotes inclusion and reintegration in the community, which in turn leads to *redirection* toward a better path and healing damaged relationships. Peacemaking fosters more comprehensive and tailored decisions that address the causes and effects of the problem and the needs of everyone involved, thereby preventing the cycle of recurrence. We have since modified that fourth. Instead of redirection, which carries with it connotations of superiority, we have characterized our fourth value as *renewal*.

Our initial application was primarily in the probate and family court, although we did use it in successfully resolving a complicated wrongful death lawsuit as well. Disputes regarding custody, elder guardianships, conflicts between neighbors, probate estate distributions, and adult guardianships were all addressed. In 2014, we began application of peacemaking in dependency reunification cases. In 2015, we began application in juvenile delinquency cases.

By way of example, one case description follows: In 2004, a couple filed for divorce in the Washtenaw County Trial Court. Although contentious at the onset, the divorce did not seem out of the ordinary. However, the resulting divorce decree and child support order signaled the beginning of 10 years of courtroom battles over parenting time, custody, and minor details of the divorce order.

After 10 years of their children's lives had elapsed and after spending more than $100,000 on litigation, the parties remained divided on every issue, although they had availed themselves of a long list of services, including mediation, counseling, Friend of the Court, and consultations with child psychologists. The parents continued to disagree on everything related to their children and insisted that every issue come to court. There seemed to be no end in sight.

After five hours of the peacemaking process, the conflict was resolved. After this session, the father explained how the process allowed him to feel like he finally had a voice. The peacemaking referral was the court's last contact with the parties, representing the longest period the couple has remained out of court.

Evaluations in our first year of application concluded the following.

In suitable Peacemaking Court cases:

- 94 percent of cases resulted in an agreement from both parties.
- 82 percent agreed or strongly agreed that the results of the peacemaking were fair as compared to what might have occurred in a court setting.
- 91 percent agreed or strongly agreed that after hearing everyone talk, the participant had a better understanding of the other person's perspective.
- 94 percent agreed or strongly agreed that they would recommend peacemaking to others.

Perhaps more revealing were participant comments:

- "I learned that the others and myself all had truth; it just needed to be pieced together."
- "I learned never to say never . . . we did something that I thought impossible."
- "I learned that there are many different versions/perspectives to the truth . . .

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you need to be open to being empathetic and make an effort to accept the other's views/beliefs . . . not to try to change them but to accept them as their truth."

- "I have no doubt in my mind that if this guardianship petition would have gone through the normal court procedure, there would be no mother/daughter relationship today . . . the Peacemaking Court saved one of the most important relationships one can experience—the parent/child relationship." —*Attorney*

What Is a Suitable Peacemaking Case?

Regardless of subject matter jurisdiction, we have identified three types of conflict where peacemaking may be appropriate:

- Where there is an ongoing relationship between the parties in conflict after the court has adjudicated the conflict.
- Where the person harmed is in need of a deeper understanding of the cause of the harm in order to move on.
- Where the community and the individual who caused the harm need a deeper understanding of the cause and effect of the harm within the community.

Current state court justice systems are structured around "either-or" decision making. The adversarial system looks at problems through the narrow lens of X vs. Y, guilty or not guilty. An individual or relationship is then judged and labeled solely by a single event. The label replaces the person, and we are prevented from solving the whole problem and all that underlies it.

Current systems create division within the community. When we label an individual, we separate and isolate him from the community. He is no longer a colleague, neighbor, or community member, but a juvenile delinquent, felon, offender, neglectful parent, or abusive spouse. The justice system sets him aside and the community will continue to exclude, divide, and separate itself from the person.

Labeling and dividing continue the cycle of wrongdoing. By labeling, separating, and dividing, we do nothing to restore the individual, the community, and the actual harm that was done. Neither the person who caused the problem nor those who were impacted get their needs met by decisions that seek to punish without repairing harm and restoring relationships.

Because we've resolved and restored nothing, the individual eventually accepts the label as truth and continues to live accordingly. This leads to recidivism, polarization, and harmful relationships that tear the fabric of family and community. It is why we can expect the majority of children who enter the justice system to reenter the system. It is why disputing families leave the courtroom more polarized than when they entered.

Goals of the Peacemaking Court

Goals of the program include increasing accountability and understanding, improving communication, and healing relationships between litigants with more tailored and durable solutions that better meet the needs of all parties. It is understood that those affected by the conflict may belong to wider communities—family, workplace, school, neighborhood, or other relationships—that also may need to be part of a solution.

Tribal data support the validity of these methods. The native Alaskan Kake tribe measured the success of peacemaking over four years; the peacemaking project experienced a 97.5 percent success rate in sentence fulfillment compared to the Alaskan state court system's 22 percent success rate. As Tribal Judge Mike Jackson noted, Kake had an epidemic problem with teenage suicides. After multiple waves of outside advice, the epidemic continued. When the community looked within, through peacemaking, they achieved success.

In Washtenaw County, Michigan, through the Dispute Resolution Center, peacemaking programs are provided to local schools in hopes of keeping young people out of the court system. Peacemaking circles can also help families avoid the filing of abuse and neglect petitions, or successfully complete reunification. Eligible cases on the juvenile court docket are referred to the peacemaking process during the court's jurisdiction, and the court is developing a program to provide planning and support for youth transitioning from foster care after the court's jurisdiction ends.

Pre- and post-jurisdictional circles provide a safety net and build community connections. For example, on the day of her release from the county detention center's drug treatment program, a 15-year-old girl sat in a support circle with her mother, the judge, and approximately 20 court and detention staffers, counselors, and other service providers—all of whom spoke to her from their hearts about the values and strengths they saw in her and their hopes for her future. A core support group continued to meet with the teen after her release. Partners providing support to the program include community members, the Dispute Resolution Center, the University of Michigan, Eastern Michigan University, the Department of Human Services, and other local agencies.

The Dispute Resolution Center's trained peacemakers receive referrals from the court. Friend of the Court, juvenile probation, and county detention staffs also are trained to use peacemaking in their cases. In 2015, a peacemaker referee was assigned to the trial court as a means of further integrating peacemaking practices throughout the court system.

Reflections

As U.S. Supreme Court Justice Sandra Day O'Connor wrote in 1996, "The Indian tribal courts' development of further methods of dispute resolution will provide a model from which the Federal and State courts can benefit as they seek to encompass alternatives to the Anglo-American adversarial model."[5]

James Zion, Anglo-American former solicitor to the courts of the Navajo Nation, explains:

> Anglo law is all about rules and principles . . . whereas in Indian justice the process is very important. Disputes are resolved not by rules but by the idea of relationships.
>
> The basic concepts of Indian justice

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> are relationships, reciprocity, solidarity and process, as opposed to hierarchy. . . . Central to Navajo justice is the concept of . . . "what I do has an impact on me." The Anglo world has a lot to learn from this concept. . . . In the Anglo world, the individual trumps relationships, and that's destructive. We need to look at Indian concepts of relationships. People are not simply individuals in society. Everyone owes special obligations to others.[6]

The adversarial model does not work well in every case. Too often, it harms important relationships instead of healing them. The adversarial process cannot always bring the closure and relief that litigants expect. It does not always solve the whole problem, so conflict is often renewed between the litigants after becoming more polarized through the court process.

As a peacemaking forum, the court has a superior opportunity to be a good model for solving problems in a way that is respectful and responsible and that heals rather than harms relationships.

Conclusion

We live in conflict. It is the path we have chosen. As judges, we sit each day at its center. We hear conflict, we see conflict, we touch conflict, we breathe conflict.

To our youth, to our families, to our communities, we serve as milestones on that path of discord. In a legal sense, we are the funnel point in the hourglass. The mass of conflict enters, is funneled, then is analyzed grain by grain, case by case, person by person. We judge the who, what, when, where, and how (seldom why) of an event. We label the event with the labels we have been given and send the litigants on their way. As we do, we tell them we never want to see them again.

> I suspect the feeling is mutual.
> Is that justice? If it is, can it be more than that?
> If it can't, why not?

The experience of those inside the funnel either feeds the discord or dilutes it. If we are really fortunate, it transforms it. The transformation takes the gristle of divisiveness, utilizes the event to occasion reflection on common values, and hears the perspective of those affected. The power of positive human interaction and expression is affirmed and that which is hurtful and destructive is consciously rejected.

We should actively avoid the first outcome, strive for the second at all times, and seek the third whenever possible. Much of our approach to conflict is to resolve it by declaring the triumph of one legal right over the extinguishment of others. When that conflict involves individuals with ongoing relationships, they often part company muttering, "I live to fight another day." The battleground is oftentimes our youth and our families. The fabric of our community continues to fray and eventually our institutions fight among themselves.

Each day, as judges, we oversee conflict involving ongoing relationships. These conflicts need affirmation and renewal of the most basic values of human dignity and compassion. Here, more than anywhere else, the need for a concurrent path of conflict resolution is imperative. Native communities can help us nurture that concurrent path. We are fortunate to have the benefit of their wisdom.

The root of peacemaking is the recognition that we are all intricately intertwined. When we nurture that recognition, we realize that all action, healing or harmful, has a profound ripple effect on others. As institutions, we should always strive to heal, never to harm.

It would be nice to think that we can leave justice systems with our teeth intact, our eyes wide open, and our hearts renewed.

It can be done.

It should be done.

Peacemaking is the path to get there.

Let us write a new direction:

Enter, Peacemaking.

Exit, Bear. ■

Endnotes

1. William Shakespeare, The Winter's Tale, act 2, sc. 3.

2. We received invaluable advice and training from Tribal Judges Angela Sherigan and Daniel Bailey and Peacemakers Patrick Wilson and Austen Breuker from the Little River Band of Ottawa Indians; Tribal Judge Melissa Pope and Chairman Homer Mandoka from the Nottawaseppi Huron Band of Potawatomi Indians; Peacemakers JoAnne Cook and Paul Raphael from the Grand Traverse Band of Ottawa and Chippewa Indians; Tribal Judge Allie Maldonado from the Little Traverse Bay Bands of Odawa Indians, to name a few.

3. NARF indicates: "To learn more about Peacemaking, the History and Present-day Peacemaking, visit the IPI website at: www.narf.org/peacemaking."

4. Kay Pranis, Presentation at the University of Wisconsin Center for Urban Initiatives and Research Conference: Using Restorative Practices for Community Building (May 2013) http://www.4.uwm.edu/cuir/resources/upload/Using-Restorative-Practices-for-Community-Building-Kay-Pranis.pdf.

5. Sandra Day O'Connor, *Lessons from the Third Sovereign: Indian Tribal Courts*, 9 Tribal Ct. Rep. 12, 14 (1996).

6. Laura Mirsky, Restorative Justice Practices of Native American, First Nation and Other Indigenous People of North America: Part One, Restorative Practices E-Forum (Apr. 27, 2004) (quotations omitted), http://www.iirp.edu/iirpWebsites/web/uploads/article_pdfs/natjust1.pdf.

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