

The *SHIFT*: Tribal Sovereignty and Peacemaking Courts

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15th National Indian Nations Conference:

Justice for Victims of Crime 2016

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The Shift....and the ripple effect.....

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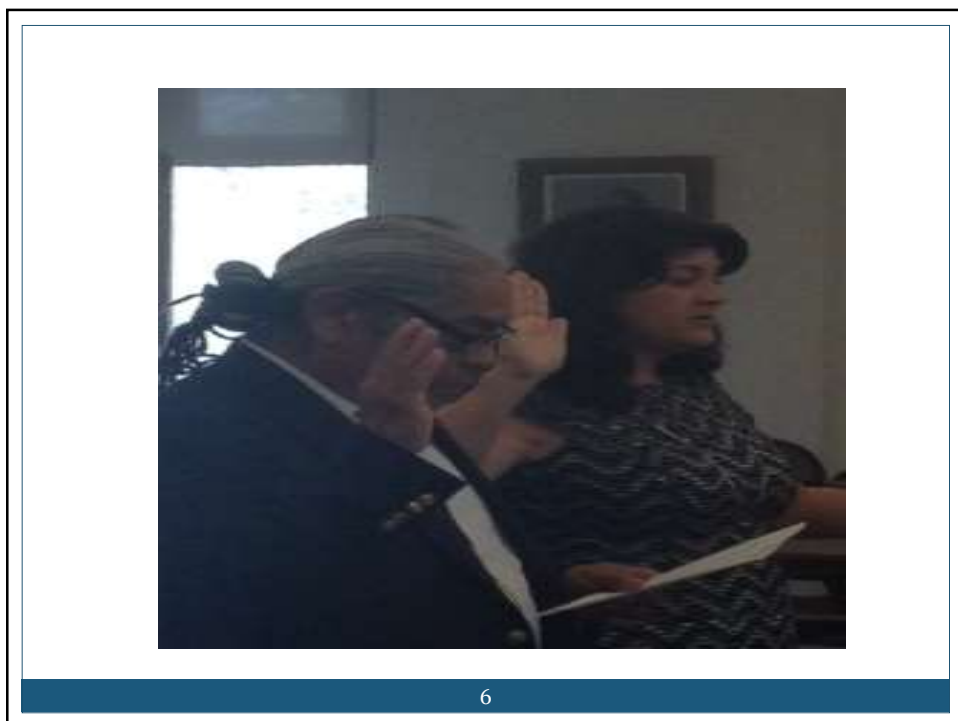
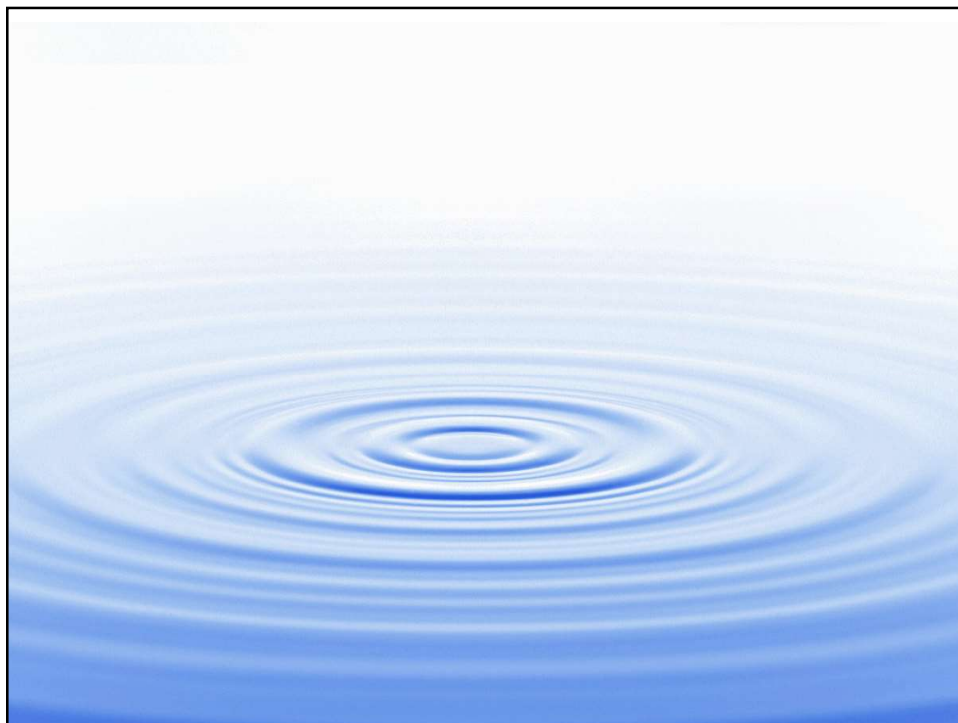
- S: spiritual
- H: holistic healing
- I: issue focused
- F: facilitated discussion
- T: transition

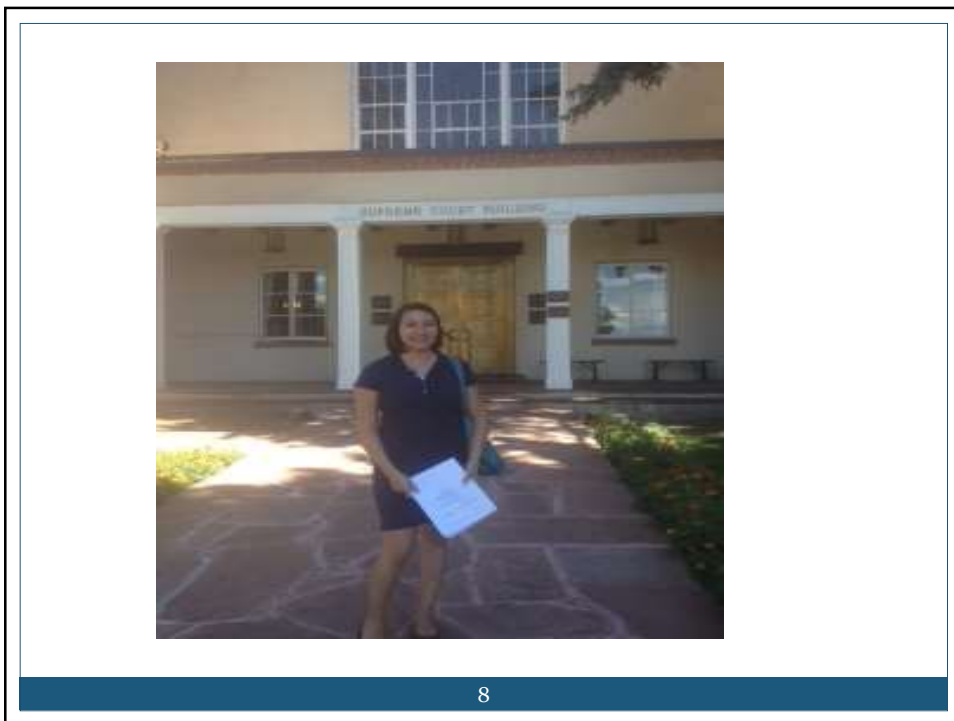
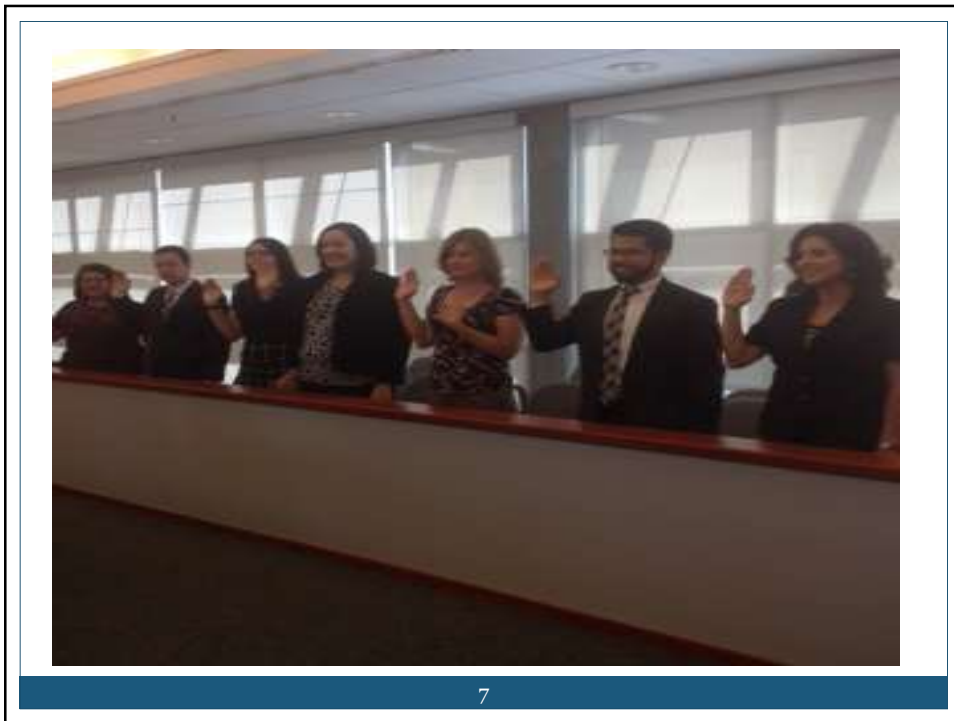
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SHIFT:

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- **S:** Spiritual-where everyone has a chance to Speak and silence is ok.
- **H:** Holistic healing-a Holistic approach moving to Health and wellness
- **I:** Issue focused-be gentle on the person and tough on the Issue; Indigenous wisdom; Indian core values and Indian solutions.
- **F:** Facilitated discussion; Family and community Focused; Fundamental Fairness;
- **T:** Transition to change; Transformation; Time is honored; Team approach





Shifting from...Historical trauma:

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- is cumulative emotional and
- psychological wounding
- over the lifespan and across generations,
- emanating from massive group trauma.
- Native Americans have, for over 500 years,
- endured physical, emotional, social, and spiritual genocide
- from European and American colonialist policy.

Historical Trauma cont.:

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- Contemporary Native American life has adapted,
- such that, many are healthy and economically self-sufficient.
- Yet a significant proportion of Native people
- are not faring as well.

HISTORICAL TRAUMA:

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- **Domestic violence and physical and sexual assault**
- **are three-and-a-half times higher than the national average**
- **in Native American communities;**
- **however, this number may be low,**
- **as many assaults are not reported (Sue & Sue, 2012).**

casey family programs

Breakdown of the family:

- the breakdown in Native American families
- due to the forced removal of Native American children
- can be seen as the reason for the high number of child abuse
- and domestic violence incidents reported in these families. Cole (2006)

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More...

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- Native American children are one of the most overrepresented groups in the care of child protective services (Hill, 2008).
- fewer Native Americans have a high school education than the total U.S. population;
- an even smaller percentage has obtained a bachelor's degree:
- 11% compared with 24% of the total population.

Statistics:

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- Almost 26% of Native Americans live in poverty
- compared to 12% for the entire U.S. population (U.S. Census Bureau, 2006).
- Native Americans residing on reservations
- have double the unemployment rate
- compared to the rest of the U.S. population (U.S. Census Bureau, 2006).

ICWA old law; old patterns; same story:



- out-of-home placement of American Indian and Alaska Native children
- remains significantly higher than the out-of-home placement of non-Native children
- and is disproportionate to the percentage of Native youth in the general population.

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CF1

Should we continue doing more of the same?



- ...continuing to do the same thing but expecting different results:

• **INSANITY**

5 guiding principles:

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1. We have been facing the wrong way
2. Understanding the impact of federal policies and the impact on Native America
3. Understanding the significance of oral tradition and Native American language as the common law of Tribes
4. Re-educate the educated
5. A call for consensus, cooperation, com



SOUTHEAST TRADITIONAL TRIBAL VALUES

"OUR WAY OF LIFE"

- Discipline and Obedience to the Traditions of our Ancestors
- Respect for Self, Elders and Others
- Respect for Nature and Property
- Patience
- Pride in Family, Clan and Traditions is found in Love, Loyalty and Generosity
- Be Strong in Mind, Body and Spirit
- Humor
- Hold Each Other Up
- Listen Well and with Respect
- Speak with Care
- We are Stewards of the Air, Land and Sea
- Reverence for Our Creator
- Live in Peace and Harmony
- Be Strong and Have Courage

UNIVERSAL Native PRINCIPLES:

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- Keep our language
- Respect for Self, Elders and Others
- Kindness, Patience, Prayer and Spirituality
- Pride in children, elders, family, and traditions is found in love, caring and giving
- Be Strong in Mind, Body and Spirit
- Humor – Indian humor
- Hold Each Other Up-support for our people
- Listen Well and with Respect
- Speak with Care and Respect
- Respect for the land, earth and universe
- Reverence for Our Creator
- Live in Peace and Harmony
- Be strong and Have Courage and practice Humility

Fairbanks-FALL15 class preferred preference listed by their most favorable: SILC:

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- ***Integrity***
- ***Diligence/Hard Work***
- ***Bravery “Warrior Spirit”***
- ***Universal law of Respect***
- ***Humility***
- ***Listening***
- ***Resiliency***
- ***Balance***
- ***Camaraderie***

More and more:

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- ***Affirm Integrity/Affirm Respect + love/Affirm Honesty + Contribution:***
- ***Collaboration [working together/team effort]:***
- ***Affirmation***
- ***Authenticity***
- ***Sharing***

More:

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- ***Confidence***
- ***Empathy***
- ***Adaptation***
- ***Happiness/Positivity:***
- ***True to Yourself***
- ***Manners/Hard work***
- ***Issues can be resolved so relationships can be mended & preserved***

Core Values for SILC Fall 2015

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- **Integrity:** Be true to your word, with clients, colleagues and the Court.
- **Diligence/Hard Work:** Go the whole distance; be careful and thorough.
- **“Warrior Spirit:”** Be brave, confident and persistent in your representation. Stay balanced and happy. Be resilient, and adapt.
- **Respect:** Affirm others. Use good manners, and listen well. Bring love and empathy to your interactions. Be positive, and pursue camaraderie with all parties.
- **Humility:** Be authentic, and true to yourself. Resolve conflicts to preserve relationships.

Teachings of the seven grandfathers:

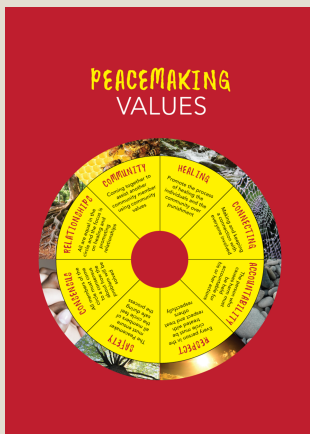
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- *To cherish knowledge is to know **wisdom***
- *To know **love** is to know peace;*
- *To honor all of Creation is to have **respect**;*
- ***Bravery** is to face the foe with integrity;*
- ***Honesty** in facing a situation is to be brave;*
- ***Humility** is to know your self as a sacred part of Creation;*
- ***Truth** is to know all of these things*



Core values for PEACE circles:

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NCJFCJ
Office of Juvenile Justice and Delinquency Prevention

Turn around....*SHIFT*:

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- Placing value on our ways, our traditions, culture and way of life
- We have been looking to the outside for answers ...
- It's time to turn around—the shift---
- And look within our respective tribal communities
- For the answers
- **Draw upon tribal values, traditions and law in a contemporary context**



1. We have been facing the wrong way....

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- A replication society
 - Adoption of federal and state court models
- The “be-like” factor
- Our courts have been strongly criticized for this:
- A pale replication of American justice-in both conception and operation some of the tribal courts are little more than pale copies of the white system. All remedies to their operational problems are directed toward making them better copies. ~ Samuel J. Brakel

2. Understanding the impact of failed federal policies:

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Designed to:

- Assimilate
- And or
- Terminate

An overview of the policies:

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- ***Sovereignty intact--treaty making era***
- ***Removal***—the forced removal of Indian people from their homelands-1838—forced migration of 12,000 Cherokees—4,000 perished—known as the “Trail of tears”; YAN, Choctaw—loss of children, elders and total families
- ***Reservation***—designed to civilize the Indian-isolated land base;-use of military and civilian agents; destroyed an Indian way of life and US obtained major land holdings. Courts of Indian Offenses were authorized;
- ***Allotment***—160 acres—everyone would be a farmer; major decline in total amount of Indian land and served to justify the non-Indian take over of Indian land;
- ***IRA***—model codes and boiler plate constitutions; replaced traditional governments; Aunt Naomi—“the polls are open”!
- ***Termination***—P.L. 280—extended state civil and criminal jurisdiction into five states; enhanced state role; Loss of language; Movement to the cities—relocation; ICRA; Indians are the most regulated citizens
- ***Self-determination***—P.L. 93-638—Santa Fe Indian School; Mississippi Band of Choctaw;
- ***Self-governance***—revitalization of traditional governments, language and culture;

Tribal Sovereignty, the Impact of Federal Policy

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- Pre-contact: tribal sovereign governments intact, Treaty making period
- Movement to the reservation -1850-1887
- Allotment/Assimilation - 1887-1934
- Indian Reorganization Act -1934-1953
- Termination and Relocation -1953-1968
- Tribal Self-Determination and Tribal Governance 1968 to present



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3. Significance of oral tradition:

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- Using **custom** is essential for the **cultural survival** of Indian people and nations
- The **Indian common law** comes directly from the **native language** and our **cultural viewpoint**—
- It becomes the **distinct unique** law of each of the Indian tribes.
- The **elders are valued** for their knowledge and wisdom and serve as a resource for the process
- **The oral tradition—has** been the glue that has kept our people together in the face of severe termination policies of the federal government

3. SHIFT to OUR NATIVE LANGUAGE...

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- “If we have our Indian language... we will always have the customs and laws of our tribe...”

~David Demmert Sr.



4. Re-educate the educated

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- Education has always been valued in Indian country.
- We must **pause and rethink** our education and systems...
- due to the western education model, many of our indigenous concepts were deliberately destroyed and forbidden
- Education was the way to assimilation and termination;
- Now it is the **greatest tool for the protection and strengthening of tribal sovereignty.**
- Elders-keepers of the wisdom
- Understanding the significance of oral tradition
- **Never to replicate past termination and assimilation policies**

5. SHIFT to: Unity, consensus, cooperation and comity

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- **Universal law of respect.**
- **Consensus:** A process of decision-making that seeks widespread agreement among group members;
- general agreement among the members of a given group or community,
- each of which exercises some discretion in decision-making and follow-up action.
- **Comity:** In law, specifically refers to legal reciprocity—
- the principle that one jurisdiction will extend certain courtesies to other nations (or other jurisdictions within the same nation),
- particularly by recognizing the validity and effect of their executive, legislative, and **judicial acts**.
- The term refers to the idea that courts should not act in a way that demeans the jurisdiction, laws, or judicial decisions of another jurisdiction.
- Part of the presumption of comity is that other jurisdictions will reciprocate the courtesy shown to them.
- **Unity:** is the state of being undivided or unbroken.

Sovereignty:

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- **BLACKS LAW DICTIONARY:**
- The supreme, absolute, and uncontrollable power
- by which any independent state is governed;
- supreme political authority; the supreme will;
- paramount control of the constitution and frame of govt. and its administration; the self sufficient source of political power....

Shift to:
Sovereignty--To the Iroquois....Peace was the law....

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- They used the same word for both
- Peace (the Law) was righteousness in action..
- The practice of justice between individuals and nations...
- In their thought peace was so inseparable from the life of man
- That they had no separate term by which to dominate it.

See Paul Wallace, The Iroquois Book of Life, White Roots of Peace (1994) at 26.

American justice is in crises:

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- Interestingly America is looking a traditional Native American processes such as Peacemaking, Sentencing Circles and other dispute resolution processes
- The Native American lens—the traditional dispute resolution process is not “alternative”.
- It has been a way of life for indigenous communities



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Family Conferencing

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- Pre-litigation/pre –peacemaking tool
- Parties agree to meet
- Use consensus process
- Use similar rules as peacemaking
- Very informal
- Results in Family Safety and Wellness Agreement
- Signed by all parties including Tribal Administration
- Administrative process
- Non-compliance...parties agree to peacemaking/court



Indigenous concepts related to peacemaking and traditional dispute resolution:

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- based on a **holistic philosophy** and the world view of the aboriginal inhabitants of North America.
- These systems are guided by the **unwritten customary laws**,
- Traditions and practices that are learned primarily by example and through the **oral teachings** of tribal elders.
- Holistic philosophy is a **circle of justice**
- that **connects** everyone involved with a problem or conflict on a continuum
- with everyone focused on the same center.
~ Ada Pecos Melton – Pueblo of Jemez

Peacemaking?

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- Traditional dispute resolution
- Not mediation
- Formal process
- A division of a tribal court
- Result is an agreed upon document which requires compliance

In Indian country ...our traditional and customary laws:

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- This **law is oral** ---and has been passed from generation to generation
- ...of any given community is not entirely accessible or contained in one place like written western law
- ...is **internal, oral**
- and for the most part –dynamic and not static in nature;

~ Professor Christine Zuni—Isleta Pueblo/UNM

Peacemaking? Why?

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- Whenever you have a **continuing relationship**
- No anonymity in Indian country;
- **Process** is critical and lends itself to *healing*
- The **law evolves** from the process
- **Language** is key
- **Consensus** is necessary
- Brings a **spiritual element** to difficult situations

MBCI: Indigenous law project:

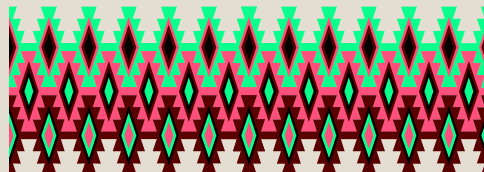
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- **The Project Goal:**
- “Through the process of oral tradition, we are recording the community voice of the Choctaw people by developing a library of indigenous law for future generations.”

ITI KANA IKBI

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- Mississippi Band of Choctaw
- The peacemaker
- The peacemaking process
- Is established by tribal ordinance as a separate court



The peacemaker model:

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- Focuses on **process** – “making things right” “to repair”
- **Prayer** is used initially and at the ending of process
- Both **civil and criminal jurisdiction**
- Use of **customary and traditional law**
- Builds on **trust** and **relationships**-to promote **healing** and **restoration**
- **No attorneys** representation by extended family or advocate
- **Talk** and discussion are necessary- **Native language** can be used;
- **No time limit**
- The **community right** may supersede the individual right
- **Apology** to victim , community, clan
- **Forgiveness** –is essential
- Enforceable as an **order of the court**
- Can give **full faith and credit** or **comity**
- **Completion**--finished; not to be spoken of again

Choctaw	Native American	American
Chahta okla	Community	Individualism
Ittibachaffa	Cooperation	Competition
Ittihalallih	Relatedness	Autonomy

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Choctaw indigenous justice:

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- “...it is a way to put back some of our people’s way into this justice system...”
~ Sr. Youth Court Judge Hilda Nickey 2004





Adaptation of rules:

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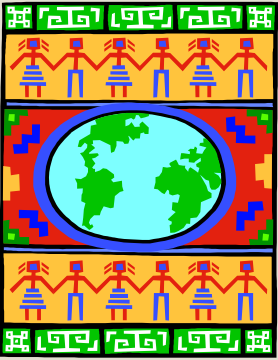


 <p style="text-align: center;"><u>Procedure</u></p> <ul style="list-style-type: none"> ◇ State the purpose of the session ◇ Open with prayer or moment of silence set the sacred space ◇ Introductions <ul style="list-style-type: none"> • Even though people may know each other, it is important to understand each person's role and hear the voices of the participants ◇ Party filing the complaints goes first ◇ Questions <ul style="list-style-type: none"> • Questions are allowed after everyone has an opportunity to speak ◇ Closure <ul style="list-style-type: none"> • Outcome expected • Memorializing the agreement <ul style="list-style-type: none"> • Safety and wellness • Agreement order • Close with prayer or moment of silence • Have all participants affirm each other's participation 	 <p style="text-align: center;"><u>Rules</u></p> <ul style="list-style-type: none"> ◇ Be tough on the issue but gentle on the person ◇ Rule of Respect <ul style="list-style-type: none"> • Respect for self, elders and others ◇ Speaking <ul style="list-style-type: none"> • Speak with care and respect • Only one person talks at a time • Use the talking tool (basket, etc.) • Silence and pauses are ok ◇ Listening <ul style="list-style-type: none"> • Listen well and with respect • Listen to learn • Listening is MORE important than talking ◇ Consensus <ul style="list-style-type: none"> • Consensus is critical • Build off of one another's ideas • Discussion, apology, and forgiveness ◇ Passing is ok
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Other tribal peacemaker models:

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<ul style="list-style-type: none"> • Seneca Nation of Indians • Chickasaw Nation • Navajo Nation • Alabama-Coushatta Tribe of Texas • Ho-chunk • Pechanga <p>Traditional courts:</p> <ul style="list-style-type: none"> • Cochiti Pueblo • Taos 	
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Example: Saddle Lake-Higher Indian Cree:

53

- Affirmation of the Whole-Continuity
- Affirmation of the Creator- World
- Affirmation of the Community-Nationhood
- Law of Harmony
- Law of Relationships
- Law of Discourse-oral tradition; “good talk”
- Law of Truth
- Law of Personal Responsibility
- Law of Pity
- Law of Consequences
- Law of Consensus
- Law of Fairness and Equity
- Law of Duty
- Law of History

Seneca Peacemaking goals:

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- **The goals of the Court include:**
- To protect the **sovereignty** of the Seneca Nation of Indians by hearing our own cases and resolving our own problems and cases.
- To **render decisions** that promotes the health and safety of our children, their families and the Nation.
- To **promote and strengthen the Seneca Nation Judiciary** by making fair and honest decisions.
- To strengthen the **integrity and soundness** of our Courts to benefit the community and foster trust in our judicial system.
- To pursue **fundamental fairness and equity** for all Parties in each case.

Example: Native Hawaiian- Ho' opono pono :

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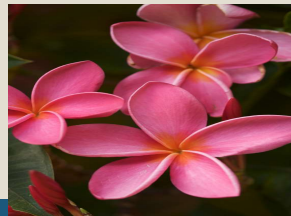
- Pule-prayer
- Statement of problem/issues
- Recognition that injurer and injured are bound together by doing and blaming
- Grudge and fault released from the one holding it
- **Ho' omalu-put it in the shade**—a moment of silence—quieting parties to consider issue at a deeper level



More Ho' opono pono...

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- Injurer and injured must be released—for each feels the pain of the other
- Layers of trouble considered from all points of view
- **Forgiveness**
- Formal and binding statement-I release you from wrong, thus I may be released from it
- The wrong is separated from the person
- Pule-prayer of completion



Use of custom and tradition:

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- The Peacemaker shall have the authority
- to use **tribal cultural teachings and customs**,
- Including present day religious teachings in the peacemaking process
- if the Peacemaker reasonably believes
- that such will further the objective of
- **voluntarily** resolving a dispute.



No appeal:

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- Consensus model
- May have legal counsel review the agreement and order
- In agreement and order---**10 day reconsideration**
- Must be submitted to the court in writing

Peacemaker:

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- Any person selected as a Peacemaker
- must be approved by the Tribal Council; and
- must agree in writing and by oath to serve under the authority of the Peacemaker Code.
- Judges and Peacemaker of the Peacemaker Court are
- officers of the court and
- shall have the same immunities as other judges of other Alabama Coushatta Tribe of Texas courts.

In general:

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- This Code is intended
- ***to provide guidance***, in writing,
- to the Alabama Coushatta traditional method
- of resolving disputes.



Kinds of disputes:

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- Domestic-family disputes-restitution
- Juvenile
- Child custody-CAN-per children's code;
- Domestic violence-forgiveness case
- Probate-simple; tribal law precedent
- Trespass
- Property disputes-repatriation case
- Commercial transactions
- Employee-employer disputes
- IDR-"Inter" dispute resolution [within companies/organizations/tribes, etc.]
- Criminal
- Tribal, state, national and international

The Basket: the weave of tribal sovereignty

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- A talking tool—
- Brings respect and presence of the tribe
- Tears and laughter
- It is symmetrical
- Mind, body, spirit –the weaver
- The tradition of the tribe
- Each part of the weave is important to the whole
- You are the design
- Your input is necessary to the weave
- Without your part....it is incomplete and flawed
- Represents sovereignty
- Used in court/family conferencing/state tribal meetings



The power of the circle:

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- Gathering in a circle is powerful
- Allows us to experience each other as **equals**
- Each person is the same distance apart and no one is seated higher than or stands apart from others in the circle
- A group of people in a circle become **united**
- The circle has no beginning or no end
- Parties who take part in a **circle—the energy forms to build resolution**
- Face to face in a circle—like ripples of water bringing about **change!**

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Washtenaw County Peacemaking Court
Est. 2013
[a state model]

- Relationships
- Responsibility
- Respect
- Redirection

What is it?

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- ***Model created to replace the limitations of an adversarial court system***
- Replace with a more comprehensive, harmonious and balanced solution that
- Integrate the repairing of harm
- ***Healing of relationships***
- And
- **Restoration** of the individual within their family community

Honors tribal court traditions:

66

- Integrates four intrinsic values:
- ***Relationship, Responsibility, Respect and REDIRECTION***
- As a means of resolving conflict and returning ***balance and harmony*** to human relationship

Facilitation:

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- Cases will be facilitated by trained persons from the
- DR Center
- Agreements made during the peacemaking circles are
- BINDING AS A K

Outcomes: [in suitable cases]

68

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

UN Declaration of Rights of Indigenous People:

69

- Indigenous peoples have the ***right to access*** to and
- **Prompt decisions** through
- ***Just and fair procedures*** for the
- Resolution of conflicts and disputes [with due consideration to the
- ***Customs, traditions, rules and legal systems of the indigenous peoples concerned***

Tribal Justice

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- Since time immemorial indigenous communities have employed customary norms as a source of just procedures to guide and inform the behavior of community members.
- The concept of justice is shaped buy those customary norms.
- See April L. Wilkinson, A Framework for Understanding Tribal Courts and the Application of Fundamental Law: Through the voices of Scholars in the Field of Tribal Justice, University of New Mexico School of Law, Tribal Law Journal, Vol. 15 (2015).

Alabama-Coushatta Judicial Symposium

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- “This forum was
- an example of how with **open minds and good will**,
- *parallel judicial systems* can learn from each other--
-
- discovering ***new approaches*** to serving communities
- and avenues for ***cooperation.***”

~ Honorable William Thorne (Pomo), Utah State Court of Appeals, Speaker at the Alabama-Coushatta Tribe of Texas' first Tribal-State Judicial Symposium (2011).

AC State tribal round table

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From the indigenous voices:

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- “...if there is an intent to bring about a peaceful resolution, everyone is involved...everyone feels it...there is an “Indian-ness” about it...instead of let us fight....let us make peace....”
~ Peacemaker Henderson, MBCI



“Tribal Courts are important to ***community and to nation building.*** They’re the mechanisms to promote ***peace.***”

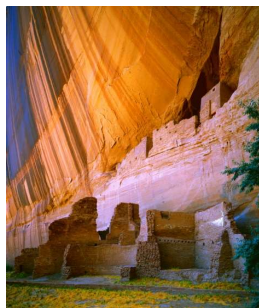
~ Judge Joseph Flies-Away
Hulapai



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The peacemaking process is related to the concept of k'e, or respect. K'e means to restore my dignity, to restore my worthiness.”

~ Robert Yazzie, Chief Justice
Navajo Nation



75

“The **tribal courts** and our **indigenous concepts** of justice shall be the guardians of our people, our communities and our tribal sovereignty”

~ Rae Nell Vaughn
Former Chief Justice
Mississippi Band of Choctaw Indians



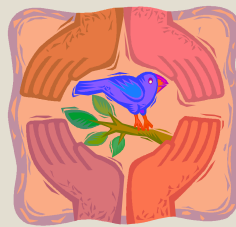
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Holyfield:

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“...we must defer to the ***experience, wisdom, and compassion*** of the [Choctaw] ***tribal*** courts to fashion an appropriate remedy.”

~ *Holyfield*, 490 U.S. at 54.



ICWA and common ground:

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- ***“For the sake of the children...”***
- even the most distressed families and communities
- communicate love and respect
- beneath the confusion and
- reveal a ***tremendous resilience of the Indian spirit***”.

~ Regis Pecos, former Governor, Pueblo de Cochiti

For the sake of the children.....



A paradigm shift for the future: indigenous justice for our youth:

80

- “...working with youth in crises is challenging---we, as judges, have options to use a **therapeutic model**,
- such as peacemaking, to ensure an effective process.
- Our **Native youth** will be our **upcoming leaders**. .. they will be the **ones to carry the torch** for us... to protect our tribal sovereignty in future years.
- Our **Choctaw values and traditional laws** continue to pave the way for our Tribe’s future.”

~ Hon. Kevin Briscoe, MBCI Sr. Youth Court Judge
Current Chief Justice

The price of **peace**.....

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Eternal vigilance....

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- And the eagle which the man of the Five nations saw circling in the sky above him was a reminder that:
- The ***price of peace***
- As of liberty
- Is eternal vigilance.

• See Paul Wallace, *The Iroquois Book of Life, White Roots of Peace*, (1994) at 30.

Sovereignty begins at home....

Cheryl Demmert Fairbanks



Shift happens:

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S: spiritual
H: holistic healing
I: issue focused
F: facilitated discussion
T: transition

YOU can make the difference:

86

**CREATE THE
RIPPLE EFFECT**



Thank you!

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- “Gunalchesh.”*

*A Tlingit thank you.



“Gunalchesh ho’ho’*“



*A very big Tlingit thank you!!!!