

Tribal Court Peacemaking

A Model for the Michigan State Court System?

By Susan J. Butterwick, Hon. Timothy P. Connors, and Kathleen M. Howard

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.

In January 2014, Judge Timothy Connors suggested that the parties consider taking their case to the Washtenaw County Peacemaking Court that had recently begun operating on his docket. 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.

Headed by Judge Connors and attorney Susan Butterwick, the peacemaking court became the first state court to adopt the use of tribal court peacemaking principles to resolve cases. Recognizing that a win-lose, punitive

response to conflict or wrongdoing leads to fear, isolation, and disconnection from family and community—and continues a cycle of behavior that produces more conflict and wrongdoing—Connors saw peacemaking as an alternative to the traditional justice system. He learned about tribal peacemaking over several years of working closely with tribal courts and judges on child welfare matters.

The program began in the fall of 2013 when the Michigan Supreme Court provided funding through its Court Performance Innovation Fund to test the premise that tribal peacemaking principles could be successfully applied in state court proceedings to resolve cases, increase satisfaction of litigants, and improve public trust in justice. The peacemaking court has resolved late-stage cases with long histories of litigation as well as newly filed cases in early stages. In the first year, referrals included family, probate, civil, and district court cases. In September 2014, when Connors became presiding judge of the Juvenile Division, referrals expanded to abuse and neglect and juvenile dockets. Referrals also come from other judges within and outside of Washtenaw County. The initiative has received praise, publicity, and increased awareness from the community.

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

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Fast Facts

- Rooted in ancient traditions, peacemaking differs from other alternative dispute resolution processes in its foundational principle that humans are profoundly connected to one another and to their communities.
- 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.
- "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."

—Sandra Day O'Connor

genes.²¹ In peacemaking, conflict provides an opportunity to build community and human relationships.

Goals of the peacemaking court

Testing the premise that tribal court principles and values could successfully be applied to the state court system, the peacemaking court was charged with developing a replicable model for other state courts. From the outset, Connors received requests from within Michigan as well as other states for information on implementing peacemaking courts in other jurisdictions. 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 may also need to be part of a solution.

Tribal data supports 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 of this writing, the Washtenaw peacemaking court has seen a 94 percent settlement rate. However, to peacemakers, the most significant outcome is not found in numbers, but in the resulting transformation of relationships among the participants.

Recognizing the importance of children and families, the court's commitment to youth is especially strong. Within community partnerships, youth are supported through the peacemaking model before cases are filed (preventing the filing of some petitions) as well as throughout and after the court's jurisdiction.

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. 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 teen 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. This year, a peacemaker referee was assigned to the trial court as a means of further integrating peacemaking practices throughout the court system.

The adversarial approach

Systems (courts, schools, even some models of parental discipline) traditionally have focused on punishing the negative, or choosing "winners" and punishing "losers." There are serious limitations inherent in this philosophy,



as neither those who are the source of trouble nor those affected by it get their most important needs met. Further, the application of narrow remedies to "fix" the outward manifestations of a problem prevents its complete resolution, including its underlying causes and ramifications.

In the Anglo-American justice system, people are judged, defined, labeled, and eventually isolated by a single event—an individual is no longer a colleague, neighbor, or community member, but is instead labeled as a felon, abusive parent, or juvenile delinquent. The community continues the disconnection by separating itself from the individual. Eventually, he or she accepts the label as truth and lives accordingly.

Exacerbating the problem are narrow judicial decisions that cause the reoccurrence of conflict. When the problem is neither fully addressed nor understood at its source, and underlying issues are not resolved and relationships are not repaired, the conflict or event reoccurs. Upon every reoffense, the cycle of judging and labeling continues. The result is that the majority of youth who enter the justice system will reenter multiple times. And narrow win-lose decisions mean disputing families leave the courtroom more polarized than when they entered, without full resolution of the conflict.

The peacemaking approach

The peacemaking court honors three values intrinsic to tribal courts: relationships, responsibility, and respect. Connors has added a fourth value: 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 reoccurrence.

Peacemaking and mediation: similarities and differences

Of all the ADR 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. The confidentiality contract for peacemaking sessions substantially mirrors the provisions of MCR 2.412, the confidentiality rule for court-ordered mediation. Like mediation, final settlement agreements are written by the facilitator, signed by

the parties, and are 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.

Peacemaking is voluntary; a sincere desire to attend is the first step toward achieving its goals. Depending on the issues, attorneys may or may not be present for part or all of a session.

The court system remains available for anyone who chooses it, for cases that did not settle, or for cases determined inappropriate by peacemakers. Nevertheless, cases that remain before Connors or his referee are handled in a manner that honors peace-

making principles in the belief that de-emphasizing punishment of the negative and emphasizing affirmation of positive behavior is the best way to avoid the cycle of wrongdoing and conflict that often results in the traditional system.

Conclusion

Multiple factors point to the need to widen the circle and move peacemaking principles beyond tribal communities and into the state court system. As United States 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

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seek to encompass alternatives to the Anglo-American adversarial model.²

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 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 you and what you 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.³

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.

It is why Abraham Lincoln famously said, "Discourage litigation.... [T]he nominal winner is often a real loser.... As a peacemaker, the lawyer has a superior opportunity of being a good man."

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. The Washtenaw County Peacemaking Court is proving this model holds great value for the court, litigants, and the wider community. ■



A longtime ADR practitioner, Susan J. Butterwick became the program director for Judge Connors' peacemaking court at the Washtenaw County Trial Court in 2013. In 2015, she was appointed as the first peacemaker referee for the court. She is an adjunct professor at the Wayne State University Law School and WSU's Masters in Dispute Resolution program, where she teaches civil mediation. Susan provides civil and advanced mediation and restorative practice training in Michigan and nationally.



Timothy P. Connors has been a state court judge since 1991. He serves by appointment as judge pro tem for the Little Traverse Bay Bands of Odawa Indians and co-chairs the Michigan Tribal-State-Federal Forum. He was awarded Jurist of the Year from the Michigan Foster Care Review Board in 2014 and the Tecumseh Peacemaking Award from the SBM Indian Law Section in 2011.



Kathleen M. Howard recently completed her JD degree at the Wayne State University Law School. She served as an intern for Judge Connors' peacemaking court at the Washtenaw County Trial Court. She is trained in civil mediation, domestic mediation, and restorative justice. She currently serves as a peacemaker and volunteer mediator with Macomb Resolution Center and Wayne Mediation Center.

ENDNOTES

1. Kay Pranis, presentation at the University of Wisconsin Center for Urban Initiatives and Research Conference: *Using Restorative Practices for Community Building* (May 2013) <<http://www4.uwm.edu/cuir/resources/upload/Using-Restorative-Practices-for-Community-Building-Kay-Pranis.pdf>> (accessed May 11, 2015).
2. O'Connor, *lessons from the Third Sovereign: Indian Tribal Courts*, 9 Tribal Ct Rep 12, 14 (1996).
3. Mirsky, *Restorative Justice Practices of Native American, First Nation and Other Indigenous People of North America: Part One* (April 27, 2004) (quotations omitted) <http://www.iirp.edu/iirpWebsites/web/uploads/article_pdfs/naijust1.pdf> (accessed May 11, 2015).