

NATIONAL TRIBAL JUDICIAL CENTER  
THE NATIONAL JUDICIAL COLLEGE

**Integrating Traditional Dispute Resolution  
in Tribal Justice Systems**

by

The Hon. Robert Yazzie & James W. Zion

**Learning Objectives**

This session is designed to help you:

1. Know the differences between peacemaking (or traditional dispute resolution) and adversarial methods of resolving disputes among people.
2. Describe the role of tribal judges in facilitating peacemaking or “ODR.”
3. Identify your strategies for integration and implementation.

**Differences**

There are two basic kinds of dispute resolution processes you can see in international law and in traditional dispute resolution. What are they?

*Vertical Systems*

Think of law as a vertical line or as a pyramid. What do you see? Hierarchy, power, force, authority, punishment, class, etc.

What are vertical systems based upon? What are rules? Can we do without them? One of the definitions of “law” is that it is a rule of reason, made by someone in authority (like a king), and promulgated (publicized).

Does that make sense in Indian thinking?

*Horizontal Systems*

Think of law as a horizontal line or a circle. What do you see? Equality, participation, people dealing with their own problems rather than having someone else make decisions for them, discussion, shared values, tradition. According to one legal philosopher, law can be made by “the whole people.” What does that mean? Do people think of law as “rules” or is it something

within them that they just know?

What is the role of feelings in horizontal law, a/k/a circle law, a/k/a ODR (“original dispute resolution”)?

### **The Navajo Peacemaking Story: A Case Study of Integration**

Navajos have had peacemaking for a long time. How does it work? It works in many ways and for many reasons, but consider these four processes: You want to get people into “right relationships,” get them to reconcile their differences, and get them to change the way they think about each other. How do you do that?

1. Discuss the facts or what happened to identify what went wrong and the role of people in the wrong.
2. Express feelings to understand the harmful effects of what happened and find out why it was “wrong.”
3. Reach an agreement on reparation or what needs to be done to make up for the harm.
4. Reach an understanding and agreement about what needs to be done in the future to deal with that kind of behavior and how to prevent misbehavior in the future.

That was done by Navajos in the old days. It was done within families and within small communities of up to 40 families called a “natural community.” It was people who were related by blood, clan and marriage who worked together to survive by grazing cattle, growing crops, gathering food off the land and hunting.

What is your “natural community”? What did your people do to survive? How did they organize themselves to survive?

In December of 1882, a new Secretary of the Interior wrote a letter to the Commissioner of Indian Affairs to complain about the “barbaric” practices of Indians, such as traditional probate, polygamy, traditional marriage and divorce, and the “practices of medicine men.” It ordered the Commissioner to develop a model for an Indian court. He obeyed and the Courts of Indian Offenses came into existence in April of 1883.

What did the rules for the court say?

- The judges would be men.
- They had to wear “citizen’s dress.”
- They could have only one wife.

- They basically used modified state law in a court like a justice court.
- They were appointed by the Commissioner of Indian Affairs under the supervision of a local agency superintendent.
- Judges were to apply the code by imposing it and its rules, rather than use traditional values and procedures.

What happened to the “social contract”? What happened to the ability of people to solve problems on their own? Wasn’t that a model or approach that promoted dependence? How big a problem is dependence today?

A Navajo Court of Indian Offenses was established in 1892 to wipe out traditional law. How did the Navajo judges of that court apply the code?

They largely ignored it — by adapting it to traditional “talking out” process in groups.

They conducted proceedings in their own language.

They used a “talking out” procedure that looked a lot like a Navajo chapter meeting (which Chief Justice Yazzie will explain).

When legislation designed to assimilate Indians started being passed just after World War Two, one of those laws was “P.L. 280.” It put Indians under State civil and criminal law in several states and made it possible for States to extend jurisdiction with Indian nation consent in others. Although “tribal courts” are authorized under the “existing powers” language of section 16 of the Indian Reorganization Act of 1934, the Navajo Nation didn’t create one. They didn’t have to, because of the way the Navajo judges operated their “CFR court.”

When Navajo veterans demanded that their judges should be elected and the Commissioner of Indian Affairs said that *he* was the one who appointed judges, and when a member of the Arizona Legislature introduced a bill to extend Arizona’s jurisdiction over the Navajo Nation, the Courts of the Navajo Nation were established in 1959.

They were set up to look just like a State court so the States would have no reason to impose their law and procedure. What is going to happen if we do that today?

What happened in the Navajo Nation? The new chief justice hired Anglo lawyers to write court rules based on federal and State models; new judges who accepted Anglo law were put on the bench; and they were trained to use Anglo law.

By 1981, the Navajo Nation chairman, Judiciary Committee, council delegates and chief justice recognized that Navajo law had gone too far down the Anglo path and they said they wanted

Navajo tradition put back in the court system.

Why did they think that the Navajo Nation court system had gone too far down the Anglo path? What did the elected leaders think of the work of the judges? What did the people think? Did the court system become as distant to Navajos as the State courts?

Two methods were used to reintegrate Navajo peacemaking into the court system: Identification of the custom of peacemaking and confirmation of it by “law elders.”

The judges of the former Navajo Court of Indian Offenses, and some of the judges in the newer Courts of the Navajo Nation, would recognize community leaders and send cases to them to work on by meeting with the parties and talking things out. When that custom was discovered, Judge Alfred Hardy of the old Navajo CFR court and Judge Homer Bluehouse (the last judge appointed to the old court and a member of the new one) confirmed it.

Some policy decisions were made:

- Since little of the philosophy and practice of peacemaking was known at the time, an Anglo-looking model of court-annexed mediation and arbitration was adopted.
- The court-annexation approach assumed that the judges would make decisions about what cases would go into peacemaking or not.
- The concept of the traditional Navajo leader or *naat'aanii* was recognized, where leadership is based on respect for such leaders, and the 110 chapters or local units of Navajo Nation government were given the authority to select peacemakers.
- Judges were given a supervisory role to approve peacemaking agreements and put them in court judgments.
- The program was adopted by court rules rather than legislation.
- Given ignorance of Navajo traditions and procedures, and a desire to avoid regulating them, they actual procedures were not spelled out in the rules; they were left to develop on their own.
- Peacemaking would not depend upon government funding but upon fees paid by those who used the system.

The peacemaker rules were adopted in April 1982, but the court-annexed program remained largely dormant until 1991, when the Navajo Nation Judicial Branch got Bureau of Indian Affairs funding to hire a peacemaker director and peacemaker liaisons (peacemaking support staff) in the judicial districts. The Navajo Nation later funded the program.

Were there any mistakes in the rules?

- What happens when a judge acts as a gatekeeper and keeps cases out of peacemaking?
- Is peacemaking “mediation”?
- Does “arbitration” fit Navajo core values? What is it?
- Should the procedures of Navajo peacemaking be spelled out in writing once they were known?
- Should judges review peacemaking decisions and enter orders?
- How do you enforce agreements in peacemaking? Should that be done by court enforcement or by more peacemaking?
- Was it a mistake to annex peacemaking to a court system? Should it have been left in families and communities?
- Is peacemaking “hurt” when it is taken out of its community context?
- Should peacemaking sessions be taped (a practice that developed)?
- Suppose someone makes an admission of committing a crime comes out in peacemaking? Should prosecutors (federal, state or Navajo Nation) be able to get tapes or use such admissions to prosecute?
- Is what is said in peacemaking proper hearsay in the form of “testimony” that can be used in later court proceedings?
- What is the role of confidentiality in peacemaking?
- Who must participate in sessions: The parties alone or their relatives?
- What do you do about intimidation of parties?
- What are peacemakers? Are they “judges”?
- Is peacemaking a “court”?
- Should peacemaking be handled by the chapters?
- Should peacemakers organize?

- Can peacemaking be done outside the regular court structure?
- Should peacemaking be used in criminal cases? If so, which?
- Can and should peacemaking address serious matters, such as homicide, rape, or domestic abuse?
- What can peacemaking address?
- What can't it address?
- What level of supervision should the court system have over peacemaking and peacemakers (if any)?
- What are the ethics standards for peacemakers?
- What kind of training is needed for them (discussed in another session)?

## **Conclusion**

To sum up, what are the differences between the objectives of peacemaking and adjudication?

What kind of leadership role should judges take in getting peacemaking going? What is the role of the council? What is the role of community leaders? How can you get your Indian nation and the community to “buy” peacemaking or your own form of traditional dispute resolution?

Should you adopt Navajo peacemaking as your model? If not, why not?

What are you looking for when you get home? How traditional values are taught, learned and preserved? Your traditional “institutions”? Anything else?

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## **Navajo Justice**

*by The Honorable Robert Yazzie  
Chief Justice of the Navajo Nation*

This year, the Navajo Nation quit jailing people for dozens of offenses that used to land people behind bars. Now tribal courts are turning to peacemakers.

In January 2000, the Navajo Nation Council decided to revamp the Navajo Nation Criminal Code. The Council eliminated jail time and fines for 79 offenses, required the use of peacemaking in criminal cases, and required that the courts see to the rights of victims. The Council also incorporated the traditional concept of nalyeeh into the criminal code. Nalyeeh refers to the process of confronting someone who hurts others with a demand that they talk out the action and the hurt it caused so that something positive will come of it.

This decision represents a serious challenge to the courts of the Navajo Nation, whose jurisdiction includes tribal members in Arizona, New Mexico, and Utah. Navajo Nation judges had gotten used to the western revolving-door approach to wrongdoings - jailing, probation, new charges, revocation of probation, and the rest of it. Those hurt by crime were left out - the \$1,000 restitution orders did not address the trauma caused by the crimes. But the Navajos now realize that the prison approach to crime does not work.

The western criminal justice system assumes that the problem is the actor, and imprisonment is primarily designed to work on convicted defendants. In contrast, traditional Navajo justice deals with people's actions. Western adjudication is a search for what happened and who did it; Navajo peacemaking is about the effects of what happened. Who got hurt? What do they feel about it? What can be done to repair the harm? The Navajo Nation courts get close to 28,000 criminal cases each year. The largest categories of crime are assaults and batteries (most often among family members), other crimes against family members, driving while intoxicated and other alcohol-related crimes, and disorderly conduct. The judges have few sentencing options because there is jail space for only 220 people at any one time. Instead, the Navajo justice system is turning to peacemakers.

In Navajo peacemaking, offenders are brought in to a session involving the person accused of an offense and the person who suffered from it, along with the "tag-along" victims of the crime, namely the relatives of the accused and of the person hurt by the accused. (I am hesitant to use the term victim, because we know that in many situations such as fighting within the family, the roles and accompanying labels are not that simple.)

The sessions are moderated by a community leader called a "peacemaker." The action is put on the table. People talk about what happened and how they feel about it.

A harmful act is "something that gets in the way of living your life," and Navajo peacemaking deals with such an act by identifying it, talking about it, and devising a plan to deal with it. One factor especially leaps out that is part of Navajo traditional knowledge. Navajos know post-traumatic stress disorder as nayee or "monster." What is the essence of the cycle of violence, in which children who are abused or neglected become offenders themselves? Nayee. Antisocial personality disorder? Nayee.

Peacemaking is based upon family therapy. As Philmer Bluehouse and James Zion of the Navajo peacemaker system have said, peacemaking is a ceremony that uses traditional practices now being "discovered" by the western world to kill or weaken "monsters." The act is the focus of peacemaking; you get it out, put it on the table, and look at it. The process is much the same as the ceremonial practice of turning abstract monsters into something tangible and concrete before you, and then dealing with them.

Traditional Navajo law requires families to take responsibility for their family members. It is not a coerced responsibility, but one that comes from the respect and love people should have for their relatives. In peacemaking, the relatives of those who hurt someone else come forward to help with restitution and to watch over their relative to be sure he or she does not offend again.

### **Rewriting the script**

Donald Nathanson, a psychiatrist in the restorative justice movement, tells us that the key to violence control is "affect modulation." He says that as we grow from childhood, we learn scripts - ways of responding to things that frighten or anger us. These scripts follow what he calls the "compass of shame," relying on withdrawal, avoidance, "hurting self," "hurting other," or some combination of these. If the script is an intense one, we see withdrawal into alcohol, avoidance by becoming a street person, literally hurting others, and hurting self in drug-dependence, suicide, and other self-destructive behaviors.

Those kinds of scripts are familiar. Harmful scripts cannot be addressed using suppression tactics. They are best addressed by showing people the harmful effects of their conduct and the fact there are better ways of dealing with the things that frighten or challenge them. Navajo peacemaking speaks precisely to "the compass of shame" by subduing harmful scripts and teaching people how to avoid hurting others.

In Navajo thinking, thought is the inner form of speech, and speech is the inner form of action. It's a simple enough concept - as you think, so will you speak, and as you speak, so will you do. If your action is fueled by alcohol or drugs, it is going to hurt others. What does someone who hurts others think or reflect about that? In the Western system, there is nothing other than ineffective punishment to compel someone who hurts another to reflect on what he or she has done. There is nothing to make people face their actions and their effects. There is little to involve those who get hurt, including the tag-along victims - spouses, children, and relatives. We say you should start your day with prayer and by seeking inspiration, and take that inner thinking and turn it into a plan. The plan then becomes action, following on what you thought, planned, and spoke. At the end of the day, you reflect on what you did so that you can do better tomorrow. That is the good way.

### **A symbol of healed relations**

Some are surprised to learn that in traditional Navajo justice, restitution for a wrongdoing can be symbolic. It can be a piece of jewelry or some other item of little nominal value but great symbolic value. Horses are prized highly by Navajos, and they are a form of restitution for serious sexual insults.

How does symbolic restitution help someone who is hurt? Navajos are more interested in what the restitution means than its value. Does the item used for restitution say, "I'm sorry"? Does it

say, "I honor your worth and dignity with this thing that we Navajos prize"? Does it say, "Let this be a symbol and something tangible to remind us that we have talked this hurt out and entered into good relations with each other"?

We know that peacemaking works. It has proven successful in problem areas such as driving while intoxicated, delinquency, family violence, and alcohol-related crime. It allows families to be involved in helping their relatives (whether they were the ones doing the hurting or the ones who got hurt), and it helps everyone look at the monster of the action and its effects.

Can Navajo peacemaking prevent harm in addition to dealing with crimes after they happen? About 25 percent of all Navajos are children nine and under - a huge youth cohort. If we know that a child who is abused or neglected is more likely to enter the cycle of violence, doesn't it make sense to put resources in place for children? Peacemaking supplements child protection programs to help both children and parents. Philmer Bluehouse left the Judicial Branch recently to take Navajo peacemaking into the schools, where he can reach out to the children who are hurt.

### **The peacemaking challenge**

The Navajo Nation Council exercised a great deal of courage and foresight in declaring the system broken and making traditional Navajo justice the preferred criminal justice method. Will this new approach work? It poses difficult logistical problems. There are now approximately 250 peacemakers; how can the Navajo Nation courts recruit and train enough peacemakers to handle 28,000 criminal cases a year?

If you can't build new prisons and fill them, what do you do? You leave the process of putting serious offenders in prison to the federal government under the Major Crimes Act (which punishes felonies committed in Indian Country), and you direct the Navajo Nation justice system to focus upon traditional Navajo justice.

This is a bold experiment, but if it works, it may offer lessons to an America that is beginning to recognize that you can't lock up a major portion of the population (usually people of color). Perhaps there are other ways to deal with crime; the answers may lie in dealing with actions, not actors, allowing people to face and solve their own problems, using peacemaking for crime prevention by getting at the nayee early on, and rewriting old scripts.

We Navajos knew about all that stuff traditionally, and it is time for us to remember.

### **Peacemaking: a family affair**

*by James W. Zion,*

*solicitor to the Courts of the Navajo Nation*

We are so used to presenting problems to powerful decision-makers (judges) for them to resolve that we cannot seem to understand that there are other approaches. But there is an Indian point of view. As Professor Leroy Little Bear of the Blood Nation in Alberta once put it, "The law shamans of White People must be very wise, because they can find the truth based on the lies of lawyers."

Navajo peacemaking is not so much a search for "truth" as it is a quest for reconciliation. Here is a story to explain this.

In 1996, Ethelyn Begay went to her nephew's home with a gun, shot at his dogs, and told him she was going to put a bullet in him. She later went before a judge and was found guilty of threatening and the unlawful use of a weapon. Begay asked if she could take the case into peacemaking prior to sentencing.

This was not simply a dispute between two people that got out of hand. This was a situation where a rural family, living closely together as is the Navajo custom, was fighting over personal property and animals. The arrest and charges were only a symbol of family infighting. The peacemaking session took the occasion of the criminal charges as an opportunity for the family to straighten out their relationships.

The aunt's and nephew's family sat down together and developed a written statement. It said the defendant and her victim "resolved the disagreement, forgave each other, and agreed to live in peace and harmony." The family members also pledged that they would respect each other's possessions and "start communicating in a polite manner, visit one another, and use k'e (clanship) to restore the family relationship."

The judge accepted the family's plea and dismissed the charges against Ethelyn Begay. In another case, a young woman was brought into peacemaking because of her disruptive behavior, linked to drinking. When family members laid the problem out before the young woman, she explained that she was acting out because she wanted to give up drinking, and she was having difficulty doing so. Then, she tearfully related what was bothering her and fueling her drinking: she had been sexually molested by a relative. This was the first time the family knew of that, and they were shocked.

The family came to realize that this "offender" was in fact a "victim" who should be supported in her efforts to deal with a personal tragedy, not punished.

Peacemakers tell me that these cases are not unusual. In the Navajo way, a crime is not an isolated event with an "offender" to be punished and a "victim" to be satisfied with punishment. A crime is evidence that there is something wrong with relationships. An event must be seen in the context of what created it.

Navajo peacemaking allows people to deal with their problems in a very intimate way, so that those in the best position to do something about the causes of crime can make their own choices.

<http://www.futurenet.org/15prisons/yazzie.htm>

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