

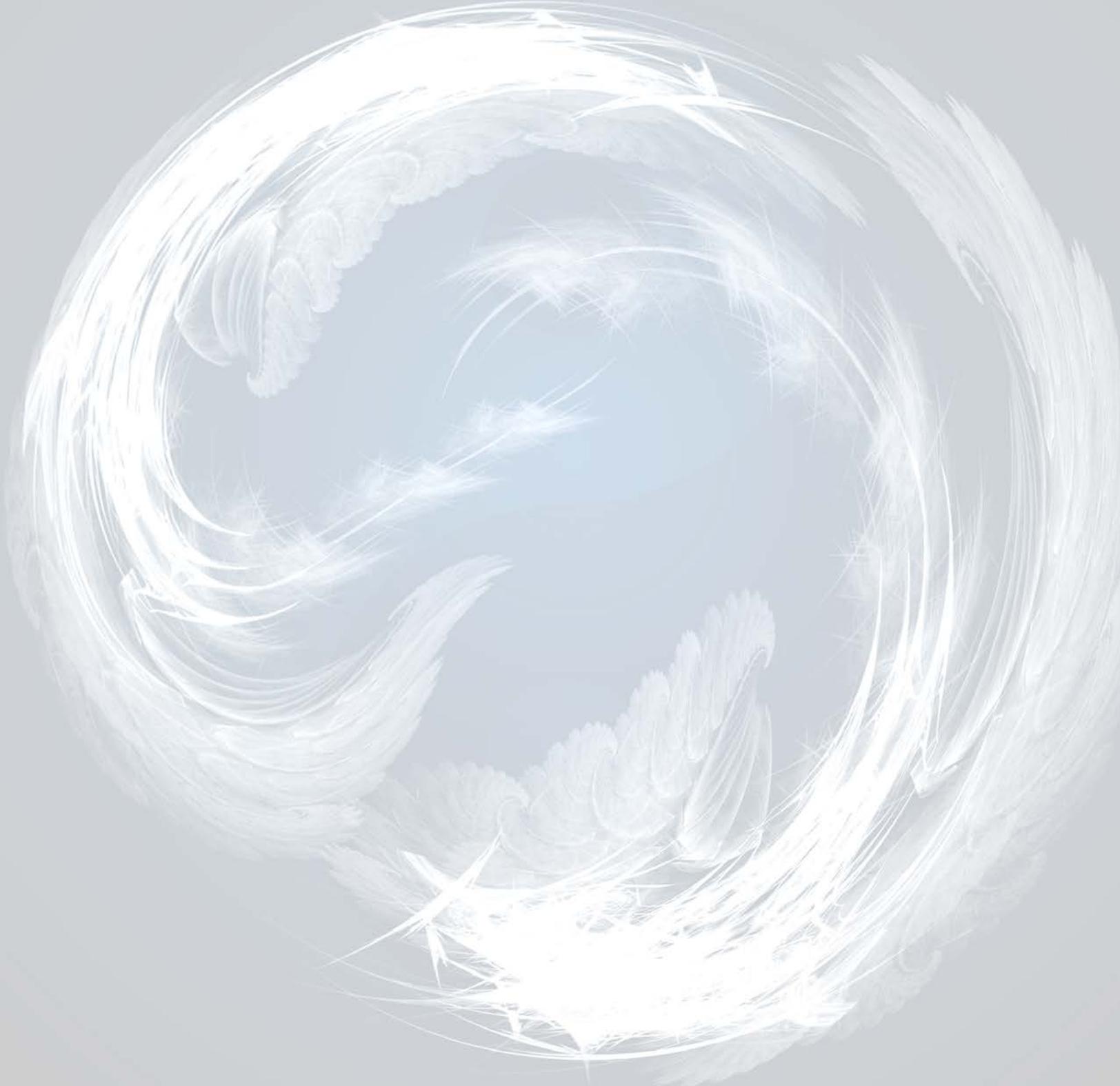
# TRIBAL JUSTICE SYSTEM PLANNING:

## Incorporating Traditions, Customs, Values and Practices

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## I. INDIGENOUS JUSTICE SYSTEM PLANNING

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### A. Historical Tribal Justice Systems

For an extensive period of history, tribal nations were deemed by federal and state governments to lack the structure and laws perceived by outsiders as necessary to maintain safe and peaceful communities. In fact, nothing could be further from the truth. Each of the tribes in what is now the United States had a very distinct set of rules or laws to govern various aspects of their interpersonal relationships, reflect community standards and norms and ultimately maintain peace and safety within their communities. Of course, most tribes maintained their justice systems via oral traditions versus European notions of justice, which involved law built upon legislation and written precedent.

#### 1. Purpose(s) of Tribal Laws

Historically, tribal justice systems were guided by tribal customs, traditions, practices and laws, primarily handed down through an oral tradition.<sup>1</sup> The origins of tribal law and the justice systems established to enforce that law historically varied from tribe to tribe depending upon the belief systems of the tribe and the purpose of laws in the tribal community. For example:

- In some instances, tribal law was derived from spiritual origins and as such, tribal laws reflected the values of the tribe both in substance and in process.
- In other instances, tribal law was derived from necessity in substance and in purpose. For example plains tribes that were nomadic may have had a need to develop rules or procedures for conflict resolution that were primarily designed to end conflict as the demands of the lifestyle warranted a quick resolution to the conflict so that normal communal roles and responsibilities could resume.
- In yet other instances, tribal laws were designed to punish or hold an individual accountable for bad actions as a means to deter behavior, similar to the penal system of the modern day United States.
- Finally, some tribal laws focused on healing and reparation. For tribes that focused on healing and reparation, a victim-centered approach was often implemented. To this end, restoration of the victim and the actions necessary to facilitate that restoration were key.<sup>2</sup>

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<sup>1</sup> Yazzie, "Life Comes From It: Navajo Justice Concepts," Legal Education Series, *Alternatives in Dispute Resolution and Traditional Peacemaking* (Petaluma, CA: National Indian Justice Center, 1993) and Falk, *International Jurisdiction: Horizontal and Vertical Conceptions of Legal Order*. 32 Temple L. Q 295 (1959); Tso, "Decision Making in Tribal Courts," 31 *Arizona L. Rev.* (1989); and Zion, "Searching for Indian Common Law," in Morse and Woodman, (eds.), *Indigenous Law and the State* (Forus Publications, 1988)

<sup>2</sup> Yazzie, supra n.1 at 4.

## 2. Traditional Process

Just as the purposes, origins of substantive laws varied from tribe to tribe, so too did the procedures used to carry out and enforce those laws.

- Some tribes relied upon elders or families to resolve disputes. Examples of such forums and procedures can be found among several tribes including tribes in Alaska and Minnesota. While the process of appointment may vary somewhat from historical procedures, the involvement of elders in such matters in a means to bring culture, custom and tradition into a modern day legal system.
- Some tribes designated specific people within the community to serve a specific justice system role. The most commonly talked about would be peacemakers, who were and are mentors, teachers and leaders in the community. They are people who assist in the resolution of conflict and the restoration of peace within the community.

### B. Justice System Planning

Tribal jurisdictions are limited by existing federal law. Despite that fact, tribes retain all inherent authority to self-governance that has not been extinguished or abrogated. To that end, tribes are free to establish laws and legal procedures that reflect the distinct customs, values and traditions of their respective tribe. Over the years many tribes have adopted an adversarial system of justice modeled after western notions of justice. Tribes had to develop systems that were able to address community needs and tribal courts needed the recognition of state and federal courts. In a sense, the development of modern day adversarial tribal court systems were developed largely in response to the perceptions and requirements of outside jurisdictions as opposed to being developed purely as a forum and process for the resolution of disputes or well-being of tribal communities. The end result for many tribal communities has been a struggle between traditional notions of justice and present-day justice based forums. Present-day justice forums are generally described as follows:<sup>3</sup>

**Tribal Courts:** established by tribal leaders and subject to the authority of tribal leaders or tribal committees.

**Courts of Indian Offenses:** established by the Secretary of Interior under the Code of Federal Regulations and subject to the authority of tribal leaders and the U.S. Department of Interior.

**Traditional Courts:** rooted in oral traditions and subject to the authority of the tribal, religious or spiritual leaders.

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<sup>3</sup> Ada Pecos Melton, Stephen Wall, & Hayes Lewis, *Integrated Justice Systems in America Indian Communities Planning Series: Understanding the Tribal Justice and Law Enforcement Environment*, Summer 2004, Volume 1, Issue 1.

**Family & Community Forums:** rooted in oral traditions and subject to the authority of the clan, elders, or consensus of the participants.

As tribes plan, implement or enhance existing tribal justice systems, there is a tremendous opportunity to incorporate customs, traditions, practices, and values into tribal justice systems procedures, laws and services. Through incorporation of these things, tribes are able to plan and implement justice systems that not only meet the needs of the community but also directly reflect of the tribe as a whole.

### **C. Constitutions, Codes, Ordinances and Laws**

For many tribes, modern day self-governance is dictated by existing tribal constitutions, by laws and/or codes. Tribal constitutions vary from tribe to tribe, however the Indian Reorganization Act of 1934 (hereinafter “IRA”) ushered in an era of tribal constitutional constitutions that were based upon a model or boilerplate constitution provided by the federal government. Whether tribes organized under the IRA or not, many chose to fashion constitutions based upon this model as a means to organize their governments. One important factor pertinent to these constitutions is that they did not reflect distinct branches of government. Typically, they established only a legislative branch vested with full authority to govern the tribe and to establish courts. For tribes adopting this model, this meant little to no separation of powers between tribal courts and the legislative branch, an issue that has on occasion caused difficulties in the administration of justice in tribal communities. These types of issued have ushered in an era of constitutional reform for many tribal communities. As tribes recognize the need to have tribal laws that reflect the traditions, customs, practices and values of the tribe, there has also been an effort to ensure that the political infrastructure of the tribe also reflect tribal culture.

The reformation of tribal constitutions, codes, ordinances and laws is an act of sovereignty and provides a means for tribes to develop a justice system that is a reflection of tribal ways of life. By incorporating code provisions and ordinances that reflect familial structures, language, clan systems and procedures for dispute resolution, tribes are reclaiming their justice systems. A few examples of such reformation include:

- Establish constitutional reform committees in an effort to improve and strengthen the tribal constitutions. The goals of such of constitutional reform committees oftentimes will include the protection of tribal sovereignty and the protection of lands, language, culture and traditions.
- Address enrollment and membership criteria to align with tribal history and the tribal visions for the future.
- Incorporate code and constitutional provisions that set forth procedures and dispute resolution methods that align with traditional methodologies.

- Incorporate customs and traditions into tribal codes in terms of subject matter and process. Some tribes have incorporated traditional adoption provisions into their law and order codes as a means to provide stable home environments for children in a manner that does not require termination of parental rights. Other tribes are utilizing tradition and custom to reshape civil and criminal remedies. There are many other examples of tradition and custom incorporated into tribal codes and rules of procedure. Examples include affording standing to extended family members in custody proceedings, making diversionary courts and programs available to court-involved individuals, and establishing procedures that enable elders and cultural leaders to educate triers of fact in a manner that is respectful to tribal culture and spirituality.

## II. CONSIDERATIONS FOR INCORORATING TRIBAL CUSTOMS AND TRADITIONS INTO TRIBAL JUSTICE SYSTEM PLANNING

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**Step One:** Consider the values, customs, and traditions that exist, or once existed, within your community and in your traditional tribal justice system.

**Step Two:** Determine whether those same values, customs and traditions can be incorporated into your modern day tribal justice system through procedure or substantive law.

**Step Three:** If some values, customs and traditions cannot be incorporated due to legal constraints or changes within your tribal community, consider what the historical purpose of those laws were and whether that purpose can be carried out though existing tribal law.

**Step Four:** Review your existing tribal constitution, codes and ordinances. Consider whether these laws reflect your tribal community. Highlight areas of the law where customs, traditions and values may be incorporated.

Once you have identified opportunities for the inclusion of customs, traditions and values into your tribal justice system, consider what those inclusions might look like. When giving thought to these factors, be sure to include the role that language, arts, familial structures, gender roles, spirituality, and community play in your community. Next, consider how the same can be a resource to your justice system.

## **Language**

For some tribes, language remains strong within the community, while for others, efforts are underway to preserve the languages. Some tribes have implemented language curricula in tribal schools and institutions of higher learning. Consider whether such programs or curricula may be incorporated into your tribal justice system. For example:

- Do you need interpreters to work within your justice system as resources for your tribal court, law enforcement, advocates or other justice system providers?
- Do language based services provide opportunities for court involved youth to learn and grow as a sentencing alternative or diversionary option?

## **Spiritual practices**

With the influence of colonization lingering in most tribal communities, there are diverse spiritual and religious populations within tribal communities. Despite this fact, there may be existing spiritual practices within the tribal community that can be of benefit to court-involved individuals. Identify these resources and consider how the justice system may tap into or coordinate with spiritual leaders and teachers to link individuals to such opportunities. Spiritual leaders and teachers would need to be included in your planning process to ensure there are a variety of services available to court involved individuals.

## **Community and family values**

Laws and justice systems as a whole are a direct reflection of the values of a community. As comprehensive tribal justice system plans are developed, it is important to consider whether your laws and procedures reflect the values of your community and families. For example:

- Do your child and family codes reflect family structures, roles and responsibilities?
- Do your court procedures align with community practices?
- Are Elders, extended family members or clans included in your dispute resolution processes?
- Do your criminal laws reflect behaviors that historically were prohibited?
- Do your criminal laws reflect sentencing alternatives that align with tribal notions of justice?
- If healing and restoration was traditionally an important part of the justice system, do your laws facilitate healing for victims or are they offender centered?

## **Community traditions and cultural practices**

Tribes are rich in community traditions and cultural practices. Whether it be dance, song, arts, or community gatherings, these traditional and cultural practices can provide an excellent opportunity for tribal justice system planners to consider whether court involved or at risk individuals could benefit from participation in such practices. These practices can

provide valuable community service, mentorship and educational opportunities for justice-system involved individuals. Consider the following examples:

- Does your community have an annual celebration that requires volunteer support or community service opportunities? These might include setting up for events, helping with event activities or clean up after events.
- Does your community have an arts program where justice-system involved individuals can learn a new skill or traditional practice?
- Does your tribal college or community offer quilting, beading, cooking, drum-making courses or opportunities.

Often through such opportunities, participants learn valuable skills, cultural practices and develop relationships with mentors.

### **Community-based services**

There might also be many service providers in the community offering opportunities for justice-system involved individuals. Many treatment providers, spiritual leaders and programs working with youth have developed programs that incorporate cultural teachings into their services. Consider whether there are service programs in your community that might offer such opportunities. For example:

- Some tribal communities coordinate culture camps or classes as a grassroots program or programs working in conjunction with tribal agencies. Consider whether such programs exist in your tribal community and how you might collaborate.
- Some tribal communities attempt to reconnect court-involved youth with cultural events and practices as a means to rehabilitate, teach important skills and provide valuable mentoring.<sup>4</sup>

## **III. DIVERSIONARY COURTS: A Forum for Tribal Customs, Traditions and Practices**

Although opportunities exist to incorporate customs, traditions and values into modern day tribal courts, diversionary courts provide additional opportunities for tribal justice system planners to entrench customs, values and traditions in to the justice system. Diversionary courts create opportunities for tribal justice systems to work with individuals who have specific issues or challenges in a more intensive way and in a manner that aligns with customary practices of the Tribe.<sup>5</sup>

### **A. THE DIVERSIONARY PROCESS**

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<sup>4</sup> See <https://www.nttac.org/tribalyouthprogram.org/culturally-based-practices.html> for examples of youth based programs that incorporate culture, customs and traditions.

<sup>5</sup> Tribal Law and Order Act: Long-Term Plan to Build and Enhance Tribal Justice Systems Executive Summary (2011) (recommending diversionary courts as a viable alternative to incarceration).

The diversionary process is one by which justice-system involved individuals can avoid an adversarial process, receive more intensive services and oversight and access services that go far beyond incarceration, fines and other punitive measures. There are two primary steps to the diversionary process including screening, referral and diverting the case.

### **1. Screening**

Generally, once an arrest is made and case is sent to the Prosecutor's Office, the Prosecutor will:

- Review the charges
- Consider eligibility criteria for the diversionary Court (checklists can be helpful to screen & as a referral tool)
- Meet with the offender to discuss "volunteering" for the diversionary Court
- If offender declines, the case proceeds in court (criminal or delinquency)
- If the offender accepts and agrees to volunteer, the case is referred to the diversionary court or program.

### **2. Referral**

Referral to the diversionary court often occurs at a team meeting (if a team concept is incorporated). Alternatively, diversionary courts or programs may designate an individual to accept referrals. During the referral process, there should be:

- Documentation of the referral (written referral process)
- Documentation of the actions of the team or the diversionary court or program personnel (during this phase the individual is recommended for acceptance or denied with a justification)
- Once the individual or family is deemed eligible, the prosecutor must ensure proper steps are taken in court to have the case diverted to the diversionary court
- The process may vary slightly depending on where a case is at within the Court system

### **3. Diverting the Case**

Once a case is screened and the referral made, a justice-system involved individual is then accepted. There remains the matter of transition of the case from the Criminal Court or Juvenile Court into the diversionary court or program. This typically occurs two ways:

*Note: The following information is general in nature and you should consult your tribal rules of criminal procedure to ensure you follow the proper process in your jurisdiction\*\*\**

#### **a. Deferred Prosecution**

- Usually does NOT require a guilty plea;

- An Agreement is signed between the prosecutor and the offender wherein the prosecution agrees to hold off on prosecuting the case so long as the offender successfully completes the diversionary court or program;
- May or May not require a Judge’s approval—check local criminal procedure statutes;
- If the participant is successful in the Diversionary Court the prosecutor’s office will drop all charges and close the file; and
- If the participant is not successful in the Diversionary Court, they are brought back before the Criminal Court for entry of a plea and possibly trial.

**b. Deferred Imposition of Sentence or Judgment**

- Occurs after a whole or partial admission (but generally before a formal guilty plea is made on the record);
- No sentence is imposed, rather the judgment is deferred while the case is diverted to the diversionary court or program;
- Generally requires Judicial approval;
- If the participant is successful in Diversionary Court the judgment will not be imposed; and
- If the participant is not successful in the Diversionary Court, they return to the Criminal Court for imposition of sentence.

**B. DIVERSIONARY COURT STRUCTURES**

Alternative or diversionary courts provide alternatives to adversarial court systems. Examples of diversionary courts include:

- Peacemaker Courts;
- Restorative Justice courts;
- Circle courts;
- Teen Courts;
- Veterans Courts; and
- Wellness Courts.

<b>Peacemaker Courts</b>	Consensus-based decision-making.  Non-adversarial.	Seeks to restore harmony and repair damages to families, communities or relationships.  Finding truth does not drive the court.
<b>Restorative Justice Courts</b>	Views crime as an act against an individual or community rather than the government.	Seeks to repair harm to all involved – victim, community and offender, with a view to putting

	Generally, restorative justice emphasizes the harm caused by criminal behavior.	things right or restoring things as best you can to how they were before the crime occurred.
<b>Circle Courts</b>	All are equal in the circle.  Consensus-based decision making.	Seeks to address the action and the cause of the action; and to repair relationships between victims and offenders.  May be used to address a variety of issues (Criminal, family disputes, civil disputes).  May be used at various stages in a justice system (Pre-release; Adjudication; Post-conviction).  May involve many steps (Application; Healing circle for victim; Healing circle for offender; Disposition Circle to determine the final agreement; Disposition plan).
<b>Youth Courts</b>	Panels of Teens serve as Judges.  Supervision of Judge or Other Adult  Teens adjudicate and determine remedy and or punishment.	Peer Courts are used for minor offenses such as truancy, school behavior issues and other minor violations.  Focus of the youth court can be whatever the tribe wants it to be.
<b>Veterans Courts</b>	The veteran's court model is based on drug treatment and/or mental health treatment courts.  Veterans often serve as mentors in these courts.	Substance abuse or mental health treatment is often offered as an alternative to incarceration. This court recognizes that service men and women may have issues related to their service and that the criminal behavior is a symptom of underlying issues.  Tribes may choose to incorporate cultural or spiritual healing into these types of courts.

<b>Wellness Courts</b>	Team/holistic approach to addressing issues such as addiction.	Require regular court contact/ monitoring.  Regular staffing(s) occur by team (service providers; court officials; probation; school officials, etc.).  Tribes may choose to incorporate cultural or spiritual healing into these types of courts.
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“Peacemaking is not a method of alternative dispute resolution; it is a traditional justice method, which Native Americans have used from time immemorial” *Chief Judge Robert Yazzie, Navajo Tribal Court*

Regardless of the type of court that the tribe is planning or implementing, tradition, customs and values may be incorporated. This is true of adversarial model courts or through separate, traditionally-based courts or diversionary courts. Traditions, customs and values may also be incorporated into larger justice system planning through collaboration with service-based agencies providing services to court-involved individuals. Keep in mind that the inclusion of traditions, customs and values often do not cost much in terms of finances, however funding is available if you need it to plan, implement or enhance your tribal justice system.

## FUNDING RESOURCES

{\*\*\* Insert BJA information\*\*\*}

## TRAINING AND TECHNICAL ASSISTANCE

For more information, resources or support please feel free to contact:

National Criminal Justice Training Center of  
Fox Valley Technical College  
1825 N. Bluemound Drive  
P.O. Box 2277  
Appleton, WI, 54912-2277  
Ph (855) 866-2582  
[www.ncjtc.edu](http://www.ncjtc.edu)

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