Community and Conscience: The Dynamic Tension of Lawyers' Ethics in Tribal Peacemaking

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COMMUNITY AND CONSCIENCE. THE DYNAMIC CHALLENGE OF LAWYERS' ETHICS IN TRIBAL PEACEMAKING

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INTRODUCTION

TRIBAL peacemaking is a modern yet ancient form of alternative dispute resolution (ADR) which Native American peoples have developed to settle conflicts within their communities and with outside groups. Informal methods of peacemaking exist throughout the country, yet few have found their way into the general literature on dispute resolution. Formal peacemaking systems, often developed as an adjunct to tribal court processes, have been reported upon within the Navajo Nation and the White Mountain Apache in Arizona, the Cheyenne-Arapaho and Kiowa Nations in Oklahoma, and the Skokomish, Swinomish, and Sauk-Suiattle Nations of Washington, among others. These tribes number among those which now routinely use peacemakers to mediate and arbitrate a variety of legal matters: child welfare, divorce and custody criminal misdemeanors, and environmental protection. Indian Country has revitalized traditional processes to address these contemporary problems. Ideally peacemaking bridges the cultural gap between the traditional values of Indian people and the Westernized system of adjudication typically available in the tribal court.

This article explores tribal peacemaking not as a quaint anomaly or anthropological artifact. Peacemaking offers a vital and timely innovation in ADR processes. With careful development, tribal peacemaking can become a proving ground for the philosophical and ethical principles which undergird mediation as practiced generally in the United States. This article contrasts tribal peacemaking

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1. I refer here to procedure, not to the substantive law. As others have so ably demonstrated, tribal courts at their best do not merely apply Anglo-American law, but look also to customary law. See Rennard Strickland, Fire and the Spirits: Cherokee Law from Clan to Court 40-52 (1975); Tom Tso, Moral Principles, Traditions, and Fairness in the Navajo National Code of Judicial Conduct, 76 JUDICATURE 15, 16 (1992); Gloria Valencia-Weber, Tribal Courts: Custom and Innovative Law, 24 N.M. L. REV. 225, 256 (1994); James W. Zion, Harmony Among the People: Torts and Indian Courts, 45 MONT. L. REV. 265, 269-73 (1984).
with what I have called “generic” mediation. This comparison reveals a number of
hidden (or not so hidden) weaknesses in the prevailing models of mediation—at
least insofar as mediation is promoted as a means of achieving more humane, more
harmonious results than can be achieved through litigation. Peacemaking holds
special promise for those still searching for ADR models that might not only
resolve immediate legal disputes, but aid in healing human relationships.2

The role of the mediator in tribal peacemaking differs significantly from that of
the generic mediator. In some ways, the need to maintain the agreed-upon values
of the tribe renders the mediator more of an arbitrator. Further, the mediator
usually will know—in fact, know fairly well—all the persons involved. This raises
challenging questions about the meaning of neutrality and its value in the mediation
process. ADR practitioners and scholars of generic mediation have argued
vigorously for neutrality 3 Indeed, neutrality is seen as a central tenet of the
mediator’s ethical obligation.4 Recently, the real meaning of neutrality and

2. See, e.g., Carrie Menkel-Meadow, Pursuing Settlement in an Adversary Culture: A Tale of
Bush and Joseph P. Folger in their new book have eloquently described the ideal which they argue
should guide the mediation movement, if mediation is to fulfill its promise:

[A] growing body of research tells us that, despite diversity among mediators, a dominant
pattern of practice has emerged, and this dominant approach to mediation practice focuses on
solving problems and getting settlements It gives little attention to coalition building or
to transforming disputants through empowerment and recognition. Transformation is a
different kind of goal. It involves changing not just situations, but people themselves, and thus
the society as a whole. The goal is a world in which people are not just better off but better:
more human and more humane. Achieving this goal means transforming people from
dependent beings concerned only with themselves (weak and selfish people) into secure and
self-reliant beings willing to be concerned with and responsive to others (strong and caring
people). In a world in which people remain the same, solved problems are quickly replaced
by new ones; justice done is quickly undone. Therefore, people are made better off in one
instance only to be made worse off in the one that follows, because nothing has changed
fundamentally in the way people tend to act toward each other. But when people themselves
change for the better, so that respect and consideration come naturally, it is possible to imagine
fuller and fairer satisfaction of needs as a permanent condition.

ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, THE PROMISE OF MEDIATION: RESPONDING TO

3. See, e.g., Sydney E. Bernard et al., The Neutral Mediator: Value Dilemmas in Divorce
Mediation, 4 MEDIATION Q. 61, 62-66 (1984); Janet Rikin et al., Toward a New Discourse for
Mediation: A Critique of Neutrality, 9 MEDIATION Q. 151, 152-53 (1991); Leonard L. Riskin, Toward

4. See, e.g., STANDARDS OF PRACTICE FOR LAWYER MEDIATORS IN FAMILY DISPUTES Stand. III
(1984) (“The mediator has a duty to be impartial.”). As explained in the comments, “B. The mediator
disclosed to the participants any biases or strong views relating to the issues to be mediated, both
in the orientation session, and also before these issues are discussed in mediation. C. The mediator
must be impartial as between the mediation participants. The mediator's task is to facilitate the ability
of the participants to negotiate their own agreement, while raising questions as to the fairness, equity
and feasibility of proposed options for settlement.” STANDARDS OF PRACTICE FOR LAWYER MEDIATORS
IN FAMILY DISPUTES Stand. III cmts. B, C (1984). It is revealing to note that under this specialized code
of ethics for lawyer mediators impartiality does not command silence and complete latitude for the
parties to fashion their own agreement. Instead, comment D requires that “If the mediator believes that
any proposed agreement of the parent does not protect the best interests of the children, the mediator
impartiality have come under ever closer scrutiny. Leading innovators in dispute resolution processes raise important questions about when facial nonpartisanship actually hides a more subtle, pernicious bias.

In tribal peacemaking, the parties themselves can differ notably in their definitions and roles. Parties to the mediation often will include not only the individuals most directly involved, but also their kin. Sometimes this causes the tribal process almost to assume a hue of international peacemaking between nations, as the peacemaker must mediate between families and clans, not only individuals. These differences generate fresh inquiries about the nature of and worth ADR typically places upon individual, atomistic rights and decision-making. In many ways, it recalls and reshapes the question: Should the private ordering performed by ADR be permitted to replace increasingly large segments of public ordering? Should parties be allowed to essentially write their own law? Or are their areas where the public, the community interest in affirming particular conduct, must argue against private mediation?

For the attorney attempting to understand peacemaking, the differences in structure can create some profound challenges to prior-developed conceptions of legal ethics, based upon the American Bar Association's (ABA) Model Rules of Professional Conduct (MRPC) or the ABA Model Code of Professional Responsibility (CPR). From time to time, other attorneys and scholars have directed their attention to the systemic tension between the ethics of litigation and the ethics of mediation. Those observations provide a helpful starting point for this article. This article explores further, asking how our concepts of legal ethics that pertain to generic mediation/arbitration may need to evolve. Peacemaking holds potential for achieving not only justice but harmony, not only within tribes, but within many communities.

Section I of this article describes tribal peacemaking, contrasting this ADR process with what I have called generic mediation and arbitration. Section II compares peacemaking among Native American tribes to dispute resolution in other intentional communities, including the Amish, the Quakers, and African tribes such as the Bira. After section II has developed a rudimentary outline showing how communal values can be implemented through dispute resolution processes, section

has a duty to inform them of this belief and its basis.” Standards of Practice for Lawyer Mediators in Family Disputes Snd. III cmt. D (1984). Standard IV places upon the mediator “a duty to assure that the mediation participants make decisions based upon sufficient information and knowledge.” Standards of Practice for Lawyer Mediators in Family Disputes Snd. IV (1984). This may include assuring the development of factual information “such as each would reasonably receive in the discovery process, or that the parties have sufficient information to intelligently waive the right to such disclosure.” Standards of Practice for Lawyer Mediators in Family Disputes Snd. IV cmt. A (1984). The Society of Professionals in Dispute Resolution (SPIDR) promulgated its Ethical Standards of Professional Responsibility in 1986, which include that “Neutrals must act fairly in dealing with the parties, have no personal interest in the terms of the settlement, show no bias toward individuals or institutions involved in the dispute.” Ethical Standards of Professional Responsibility for the Society of Professionals in Dispute Resolution, General Responsibilities (1986). Impartiality is further defined as “freedom from favoritism or bias either by word or by action, and a commitment to serve all parties as opposed to a single party.” Ethical Standards of Professional Responsibility for the Society of Professionals in Dispute Resolution, Responsibilities to the Parties, ¶ 1 (1986).
III sharpens the comparison between the individualistic values upon which most ADR and legal ethics have been constructed and the communalistic values of tribal peacemaking. The clearest points of distinction focus on the attorney’s obligations under the Model Rules of Professional Conduct, as they often clash with the peacemaking function. The final section, although styled as a conclusion, is not so bold as to propose a solution to this complicated puzzle. Rather, I invite further study along suggested lines, study which I hope will facilitate new growth in non-court alternatives where the individual and community find balance.

I. GENERIC ADR AND TRIBAL PEACEMAKING COMPARED

A. An Overview

Alternative dispute resolution is an elastic term which includes consensual dispute processing and dispute prevention as an option in place of litigation. This article focuses on what are probably the best known and perhaps most widely touted ADR processes, mediation and arbitration, as they are typically practiced, taught, and studied in the larger American community and as they are practiced, taught, and studied in Indian Country.\(^5\)

Mediation has been described as “an informal process in which a neutral third party helps others resolve a dispute or plan a transaction but does not (and ordinarily does not have the power to) impose a solution.”\(^6\) By contrast, in arbitration “the parties agree to submit their dispute to a neutral party whom they have selected to make a decision.”\(^7\) ADR terminology, like the field itself, continues to undergo change.\(^8\) For our purposes, “mediation” describes an informal, unstructured process with unbounded presentation of evidence, arguments, and interests, where the party-selected outside facilitator assists the parties in reaching a mutually acceptable agreement. “Arbitration” refers to a process procedurally less formal than adjudication but more formal than mediation.

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5. Both discussions necessitate a certain amount of streamlining in order to identify more easily the commonalities among and differences between the processes. I have made an effort not to sacrifice material details in the attempt to broaden the focus. Nevertheless, I alert the reader that the processes described below might appear significantly different to the participants than they appear to the scholars, trainers, and program designers upon whose written materials I have relied in my research. I invite others in this area, as in other areas of clinical research, to pursue their own such studies to explore more incisively whether the perceptions of participants closely match the outcomes expected by policymakers. Through such studies we should in time develop a clearer picture of ADR’s true effectiveness.


7. Id. at 3.

8. For example, even the term “ADR,” which has been widely accepted as meaning “alternative dispute resolution” is now perhaps taking on an additional and even more accurate meaning: “appropriate dispute resolution,” more clearly indicating the underlying objective of “matching fuss to forum.” See, e.g., John P. Feldman, Soviet Joint Ventures: Providing for Appropriate Dispute Resolution, 23 Cornell Int’l L.J. 107, 120-22 (1990); Robert A. Hillman, Court Adjustment of Long-Term Contracts: An Analysis Under Modern Contract Law, 1987 Duke L.J. 1, 7 n.38. See generally Frank E.A. Sander & Stephen B. Goldberg, Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure, 10 Neg. J. 49 (1994) (analyzing various ADR options available to achieve a client’s goals in different scenarios).
Each party has an opportunity to present proofs and arguments before a party-selected third-party decisionmaker who reaches a principled decision.9

Where does tribal peacemaking fit within this framework? The Tribal Peace Making Conference held by the Native American Legal Resource Center, Oklahoma City University School of Law defines peacemaking broadly as “[a]ny system of dispute resolution used within a Native American community which utilizes non-adversarial strategies, incorporates some traditional or customary approaches and the aim of which is conciliation and the restoration of peace and harmony.”10 The format and style of tribal peacemaking may vary considerably from a court-annexed process which strongly resembles non-Indian arbitration, or mediation, to a sacred ritual with a peace pipe. The terms used by tribes also differ considerably. The process could be called “informal dispute resolution,” “informal tribal court,” “tribal justice method,” or even “tribal judicial forum.”11 The Navajo call theirs the “Peacemaker Program.”12 The Muscogee refer to their mediators as “Law Menders.”13 Regardless of specific nuances in characteristics, tribal peacemaking emphasizes “reconciliation rather than agreement, and the good of the community rather than individual rights.”14

10. Native American Legal Resource Center, Oklahoma City University School of Law, Tribal Peace Making Conference 1 (1993). It might be worthwhile to ponder how widely the definition of traditional law expands, and the historical mindset of the academy seeking to understand tribal law.

In 1926, Malinowski described traditional law as he explained his observations of Melanesian tribes in the Pacific islands: “In looking for ‘law’ and legal forces, we shall try merely to discover and analyse all the rules conceived and acted upon as binding obligations, to find out the nature of the binding forces, and to classify the rules according to the manner in which they are made valid.” Bronislaw Malinowski, Crime and Custom in Savage Society 15 (1984). Law comprises the “various forces which make for order, uniformity and cohesion.” Id. at 2. Malinowski struggled to identify such law as it might be distinguished from custom in order to avoid what he termed the “real difficulties and pitfalls” of the “dogma” of anthropologists in the previous era. Id. at 14. Those errors included “the assumption that in primitive societies the individual is completely dominated by the group—the horde, the clan or the tribe—that he obeys the commands of his community, its traditions, its public opinion, its decrees, with a slavish, fascinated, passive obedience.” Id. at 3-4. Malinowski argued against the then-current concept that an “unwitting or intuitive method of regulating social life closely connected with primitive communism” made law unnecessary. Id. at 11. He argued against the then-current scholarly explanation that such cohesion owed to mere simple-mindedness. Id. at 15-16.

This article will examine later in greater detail how customary law and process may run counter to the atomistic legal ethics of the American system. It may nevertheless be helpful, even at this early stage, to consider how the influence of Malinowski (progressive for his time) often dictates the subtext for debates today. Undeniably, in many minds “traditional law” equates with “savage custom,” something which lawyers are educated to resist at all costs.

12. Id.
13. Id.
14. Id. at 1. It is possible that some parallel exists between the role of the lay gentleman “justice of the peace” function in the Anglo-American system of law and the role of the variously named “law menders.” Consider the advice by Blackstone concerning the need to educate English gentlemen, propertyholders who would be called upon not only to serve upon juries but to
determine questions of right, and distribute justice to his fellow-subjects: it is principally with
Possible Applications Outside of Indian Country

This article does not attempt to perform a comprehensive review of tribal peacemaking as carried out by native peoples throughout the nation. Helpful references to such studies are provided for the interested reader. Nor do I attempt here to redo the masterful work performed by Professor Gloria Valencia-Weber in her analysis of customary law, tribal peacemaking, and tribal courts. Instead, I take one introductory step in the journey which she and other Indian law scholars have recommended. That journey explores how tribal peacemaking can influence processes of dispute resolution outside of Indian Country. I nurture the hope that tribal peacemaking holds promise for other intentional communities—that they can resolve disputes in a manner which affirms not only the individual but also the family, the community.

Is it possible, for example, to apply tribal peacemaking methods to disputes within a neighborhood? The neighborhood could be suburban and affluent, or an urban housing project, or part of an “edge” city in the process of redevelopment. Perhaps that neighborhood has in place a homeowners’ or residents’ or tenants’ association. If a sufficient number of the residents (1) are members of the association; (2) are able to reach agreement on a core set of values for harmonious living; then, (3) when the inevitable neighbor dispute arises, could a voluntary option be presented to attempt peacemaking rather than litigation or even “generic” mediation?

Why might the association prefer peacemaking? The peacemaking process allows a full exposition of both the substantive and emotional issues relevant to the dispute, just as generic mediation does. However, peacemaking invests the mediator with the authority to reinforce particular behaviors in the interest of restoring harmony to the community. Those behaviors may include respecting elders, telling the truth, and making restitution for wrongs committed. Utter neutrality in the peacemaker—based on having no prior knowledge of the parties—is not only non-essential, but in many settings is perceived as a detriment. Thus, unlike generic mediation, the peacemaker may be a member of the association who knows something of the disputants’ prior histories. The peacemaker may even be encouraged to weigh the participants’ statements and

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*this order of men that the commission of the peace is filled. And here a very ample field is opened for a gentleman to exert his talents, by maintaining good order in his neighbourhood; by punishing the dissolute and idle; by protecting the peaceable and industrious; and, above all, by healing petty differences and preventing vexatious prosecutions.*

**WILLIAM BLACKSTONE, A DISCOURSE ON THE STUDY OF THE LAW** (1759), *reprinted in The Gladsome Light of Jurisprudence: Learning the Law in England and the United States in the 18th and 19th Centuries* 53, 56 (Michael H. Hoeflich ed., 1988). Blackstone impliedly recognized that the role of the lay justice of the peace is a delicate one, requiring a character displaying integrity, sensitivity, and sound ethics. The position invites hegemony, which Blackstone cautions must be bridled with knowledge in order to administer true justice. “Else, when he has mistaken his authority, through passion, through ignorance, or absurdity, he will be the object of contempt from his inferiors, and of censure from those to whom he is accountable for his conduct.” *Id.*

conduct based upon that knowledge base. Rather than being perceived as a breach of neutrality, it would be seen as vital for fashioning a resolution truly responsive to the full range of needs for all involved.  

Surely most contemporary neighborhoods are not—or are no longer—truly intentional communities. Typically people have not chosen purposely to live together in a selected vicinity as a group. Instead, people first select an apartment or house which secondarily happens to be in a particular neighborhood. As a mere incident to that initial choice, they accept the homeowners’, tenants’, or residents’ association. Under these stated circumstances one might appropriately contest whether sufficient communal values can be identified and agreed upon to support a peacemaking program.  

On the other hand, a person’s membership in a Native American tribe may be nearly as coincidental as one’s membership in a neighborhood association. Additionally, the bald assertion of tribal status does not in itself assure consensus about and adherence to the core values of the tribe. Indeed, in the development of modern tribal peacemaking systems one of the most critical and often lengthy steps is the painstaking articulation of such common values. Societies sharing common blood ancestry and history must nevertheless reforge the linkages that define their behavior towards one another. Can other communities at least attempt the same? 

Clearly some neighborhoods are moving incrementally in that direction. For example, at the time of this writing, the Des Moines Public Housing Authority has

16. Those of us who remain conversant with Anglo-American history will note that the fastidious call for anonymity in the legal process is quite new. Until recent decades most Americans lived in small towns and areas of low population density where total anonymity was unlikely. Members of the jury surely would know one or more of the parties involved, if not directly and through personal experience, then by reputation. This tradition dates back to the original form of trial by jury in England, where jurors’ “chief qualification was that they were supposed to know somewhat of the truth before they came to court; hence the rules requiring them to be drawn from the vicinity where the facts were alleged.” JOHN H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 88 (3d ed. 1990). During the middle ages it remained common practice that jurors were chosen from among “neighbors to the place where the fact is supposed to be done to the end that by their oaths it may certainly be known, whether the deed was done as the one party affirmeth, or else as the other party demeth.” 1 WILLIAM S. HOLDsworth, A HISTORY OF ENGLISH LAW 331 (7th ed. 1956). As we shall see shortly, this process bears a striking resemblance not only to some forms of Native American tribal peacemaking, but also to that of the Bira in Zaare. See infra part II.A.  

17. Noted social anthropologist Colin Turnbull presented an incisive critique of the Western concept of “community” as it exists in our current society. He argued that compared to the homogeneous ethnic and religious bonds which create the communities of the Amish and Hassidim, secular “communities” may be unable to claim true title. Colin M. Turnbull, The Individual, Community and Society: Rights and Responsibilities from an Anthropological Perspective. 41 WASH. & LEE L. REV 77 100-01 (1984). “Conformity order and uniformity, however voluntary, do not make a community any more than does the mere assertion by a given social unit, be it a rural village or an inner city ghetto or block association, that it is a ‘community.’” Id. at 91. However, this fairly harsh critic of the loose Western concept of community left open the possibility that a community can be created—or revived—as a conscious, intentional undertaking. A group of people “sharing common residence, common interests, common policy and who interact with each other and are a part of a larger society” theoretically can meet the threshold definition of a community. Id. at 100. Nevertheless, this group of people must be limited in size. For “the degree of communality of interests, rights and responsibilities that we imply by the term ‘community’ are only to be found in relatively small populations and geographical areas.” Id.
taken under consideration a proposal to form a tenants' association that, among other duties, would establish a mediation service for disputes involving tenants, landlords, or neighbors. The Oklahoma City Housing Authority is investigating referring disputes to the court-annexed mediation program. Yet, this is what I have entitled generic mediation. What special function could peacemaking processes serve?

Tenant associations in many public housing projects are in the midst of a struggle to regain control over the safety and vitality of their communities. They seek not only a physically cleaner environment, including timely repairs of the facility, but strive to change a culture created by neglect; to change an entire environment of “fear, fighting, drug deals and gunplay.” The chairman of the New Orleans housing authority described it this way: “The attitude has been that you can do it in public housing because no one cares. Much of what’s been tolerated in public housing has not been tolerated in private housing.”

Where does one draw the line of tolerance? President Clinton's 1996 State of the Union Address acknowledged public housing tenants' expressed concerns by prescribing eviction of anyone convicted of a crime. Leases for public housing include a standard provision stating that a “residents and members of their household, or a guest, or the persons under a resident’s control shall not engage in criminal activity. Such criminal activity shall be cause for termination of tenancy.” Housing authorities, operating especially under the vigorous encouragement of tenants, the Secretary of Housing & Urban Development, and the President himself, are now beginning to enforce these standard lease provisions.

Yet, tenants recognize there is more to creating a new environment than merely evicting convicted felons. The behavior of children within the projects is a source of much concern—both children who show signs of present delinquency and those who appear headed in that direction. How can a housing authority staff decision, informally adjudicating an eviction, address this deeper problem? Granted, knowledge of the eviction can have a deterrent effect. As New Orleans’ housing authority chairman explained, putting teeth into the lease provision “creates greater pressure in the household for people to do the right thing. A young person may not be concerned about whether he gets in trouble, but he may think twice if his mother, father, sister or brother is liable to be evicted.”

On the other hand, does this approach present a true and sufficient resolution? It does indeed solve the surface problem. But it does little or nothing to tackle the underlying and more subtle difficulties. First, the decision of necessity is rendered

20. Id. (quoting Ike Spears, Chairman of the New Orleans Housing Authority).
21. Address Before a Joint Session of Congress on the State of the Union, 32 WEEKLY COMP. PRES. DOC. 90 (Jan. 23, 1996), available in LEXIS, News Library, Curnws File, at * (screen) 9 (“And I challenge local housing authorities and tenant associations: Criminal gang members and drug dealers are destroying the lives of decent tenants. From now on, the rule for residents who commit crime and peddle drugs should be one strike and you're out.”).
22. Id.
23. Id.
by a hierarchy outside the daily lives of the tenants. Second, it fails to resolve behavior that falls short of a felony, yet compromises the safe environment all desire for themselves and their children. Can tenants expect that this structure will deal sensitively, yet responsibly, in those situations? Not likely.

Is generic mediation a significant improvement? Probably. However, where rules of behavior and codes of conduct are at issue, true mediation may not fit. Arbitration offers an arena where conduct can be required, but participants may lose the opportunity for the moral development and personal empowerment which mediation can offer.

The voluntary peacemaking model—as an optional, not mandatory, process—may well offer the best opportunity in this setting to achieve much-desired goals. Resolutions should be:

- developed within the tenant community, not through an outside hierarchy or through outside mediators lacking any connection to the daily life of the housing project;
- based upon an agreed-upon set of core values for harmonious living within the housing complex;
- reached through the active involvement of all persons affected, not only the immediate “plaintiff” and “defendant,” but family members and neighbors;
- maintained through the continuing involvement of all persons affected.

With encouragement and guidance, selected public housing projects in various locations throughout the nation could soon provide laboratories for innovations in peacemaking.

I believe that such innovations in dispute resolution will be realized in the not-too-distant future. People stand ready and willing to take responsibility for their own lives, their own families, their own neighborhoods. They wish to revive the physical and moral well-being of the areas they call home. Indeed, I suspect the tenants, residents, and homeowners associations may arrive at peacemaking long before the rest of the legal system.

Which brings me to the purpose of this article. It seems not at all unlikely that when—not “if,” but “when”—non-Indian communities begin to experiment with tribal peacemaking methods, their greatest opposition may come from attorneys. I do not suggest that this anticipated opposition would stem from trivial or self-serving sources. Rather, I believe that such opposition may well emanate from fundamental differences in the ethical development of lawyers under the Anglo-American system of law and the ethics of tribal peacemaking. Hopefully, we can rethink our training that is embodied in the ABA Model Rules of Professional Conduct and in the ABA Model Code of Professional Responsibility. Such a reexamination, at this early date, may smooth the road which innovators in ADR will have to travel.

B. Focusing on Specific Examples of Tribal Peacemaking

This section offers a brief review of tribal peacemaking processes in two well-researched programs—the Navajo Peacemaker Court and the Northwest Intertribal Court System. Although styles of peacemaking can vary widely, these two views
offer a reasonable introduction to the principles involved, based upon sources the reader can readily access.

1. **The Navajo Peacemaker Court**

Navajo peacemaking courts were established in 1982, blending traditional Navajo mediating methods with regular court operations. Ten years later, of the 110 chapters of the Navajo Nation, 43 chapters had selected 87 peacemakers. The peacemaker assembles the parties to a dispute and coordinates mediation with the tribal court.

Traditionally, Navajo leaders were known as "naat'aanii" or "peace leaders" or "peace chiefs." They were chosen by their communities because of their "wisdom, ability to speak well and make plans, and their personal qualities." Their authority stemmed not from a power over others, but from a power to work with others to guide and persuade. These have also become the primary qualifications for modern peacemakers in the Navajo tribal justice system.

Peacemakers are selected by the Navajo community by electing an individual who is respected for integrity and good character, and has the ability to talk people through their problems. The Navajo court also may appoint a peacemaker. No particular educational degrees are required. Typical peacemakers include "traditional medicine men, non-Indian clergy or counselors, traders, Native American Church leaders or other trusted figures of authority." A peacemaker may be related to one of the parties, by blood or clan, and serve unless the other party objects. Such objection might be unusual, given the traditional Navajo understanding of fairness in decisionmaking. As Justice Tom Tso of the Navajo Supreme Court describes it:

In traditional Navajo culture the concept of a disinterested, unbiased decisionmaker was unknown. Concepts of fairness and social harmony are basic to us; however, we achieve fairness and harmony in a manner different from the Anglo world. For the Navajo people, dispute settlement required the participation of the community elders and all those either knew the parties or were familiar with the history of the problem. Everyone was permitted to speak. Private discussion with an elder who could resolve a problem was also acceptable. It was difficult for Navajos to participate in a system

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26. Zion, supra note 24, at 49.
27. Id.
28. Id.
29. Id.
31. Id.
32. Id.
34. Id.
where fairness required the judge to have no prior knowledge of the case, and where
who can speak and what they can say are closely regulated.35

Navajo tribal court judges oversee the peacemaking court. The court’s
involvement also provides an option for parties dissatisfied with the peacemaking
process to discontinue and pursue relief through the tribal court. A wide range of
civil and criminal cases are available for peacemaking. However, as Valencia-
Weber notes, disputes “involving cultural beliefs and a failure to comply with
custom” are the special territory of the Peacemaker Court.36 Similarly, “[d]omestic
disputes and interpersonal conflicts are appropriate subject matter even when
personal and property damage occurs.”37 Often the cases involve “domestic
violence, gang activity, fighting, disorderly conduct, public intoxication and driving
while intoxicated.”38 The Honorable Robert Yazzie, Chief Justice of the Navajo
Nation, believes that peacemaking can even be applied to serious cases, such as
homicide, so long as the peacemaker “can [obtain] the commitment of people to
seriously address their conduct, their intentions and how they can repair the division
between them.”39

He argues that peacemaking—especially for non-felonious, but destructive
conduct—holds a far greater likelihood of long-term success than adversarial
methods of adjudication.40 Why? Because “[i]mposed methods which are not in
harmony with people’s notions of right and wrong do not enforce right or deter
wrong.”41 Force does not result in changed behavior. It does not restructure,
rebuild human relationships. Moreover, as Justice Yazzie explains, adversarial
methods of adjudication not only fail to bring justice, they can “feed a sense of
injustice; they represent conflict which is suppressed by force.”42 Although Justice
Yazzie specifically refers in his analysis to the Navajo Nation, one could readily
understand how this insightful characterization applies with equal force to other
situations, with communities from other ethnic, religious, or cultural backgrounds.43

The process is driven by the dynamics of the Navajo principle that “ke’ bil nil”
or “harmony” can be achieved by restoring “the minds, physical being, spirits and

(1989).
37. Id. at 252.
38. YAZZIE, supra note 25, at 4.
39. Id. Justice Yazzie notes, however, that this might work among Native American tribes that
have the “tradition of a temporary banishment or cool-off period following a homicide.” Id. at 5.
Under these circumstances “[a]n offender could later open negotiations for a peaceful return to the
community with the victim’s family.” Id. He notes that “[o]ther tribes had traditions of mediation and
compensation to the clan where there was a homicide.” Id.
40. Id. at 4-5.
41. Id. at 4.
42. Id.
43. Indeed, Justice Yazzie initiates that connection himself, as he compares the conflict resolution
rationale underlyng peacemaking with the prevailing adversarial model: “As it was with the Rodney
King situation in Los Angeles, injustice fuels underlying problems and sparks a discontent which
comes from ignoring real problems. Instead, we must work to solve problems among individuals so
that they can resolve the ones which affect the community” Id.
emotional well-being of all people involved." By healing the individuals, the Navajo community as a whole can also be healed. Unlike Anglo systems of law which focus on determining guilt and setting punishment, the Navajo peacemaking process focuses on restitution as a means of rebalancing and making whole. Moreover, restitution may have to be made not only to the parties most directly involved, but to all affected entities. Such restitution may be other than monetary damages. It may well take the form of a public apology or service.

The Navajo peacemaking process would be characterized as mediation, in that the parties reach their own decision for resolving the dispute. Yet, the parties can also request that the peacemaker simply render a decision if they believe themselves unable to reach a resolution on their own. It is difficult to fit Navajo peacemaking into either generic ADR “box” because of the fundamental differences in Navajo philosophy and outlook. For even in the mediation model of peacemaking, the peacemaker has somewhat more authority than is provided in a generic mediation model. The peacemaker, as needed, will remind and instruct all participants concerning the legal, religious, and moral principles at issue. As Justice Yazzie described it, “The ultimate goal of the peacemaker process is to restore the minds, physical being, spirits, and emotional well-being of all people involved.”

44. Id.
45. Id.
47. Id.
48. Id.
49. Zion, supra note 24, at 50.
50. The format of the peacemaker’s input is important. The following quotes from an article prepared by Philmer Bluehouse and James W Zion:

The peacemaking ceremony has stages and devices to instruct and guide disputants in their quest for hozho [the balance obtained from being in complete harmony and peace, which are the framework of Navajo thought and justice]. It begins with an opening prayer to summon the aid of the supernatural. The prayer also helps frame the attitudes and relationships of the parties to prepare them for the process. There is a stage where the peacemaker explores the positions of the parties in the universe, verifying that they are in a state of disharmony, deciding how or why they are out of harmony, and determining whether they are ready to attain hozho. It is a form of diagnosis of [an illness to find causes. There are lectures on how or why the parties have violated Navajo values, have breached solidarity, or are out of harmony. Lectures are not recitations or exhortations of abstract moral principles, but practical and pragmatic examinations of the particular problem in light of Navajo values. The peacemaker then discusses the precise dispute with the parties to help them know how to end it. The entire process is called “talking things out,” and it guides parties to a noncoercive and consensual conclusion to restore them to harmony in an ongoing relationship within a community. The relationship aspect is central, because the community is entitled to justice and the return of its members to a state of harmony within it. As within the process of ceremonial healing, the method is effective because it focuses on the parties with goodwill to reintegrate them into their community, in solidarity with it.”

the peacemaker will do explicitly what the mediator—especially in the transformational model of mediation—does implicitly. 52

The peacemaker’s primary role is to assist people in “talking things out,” consulting with each other to develop a consensus which everyone accepts. 53 Key to any such consultations is the Navajo doctrine that while each has freedom to do as they choose, they also have responsibilities in accordance with “k’ee” or “solidarity.” 54 Ideally, solidarity works as an incentive to live in harmony with the extended family of which they are a part. Interestingly, when a person has behaved in an anti-social manner, it is said that the person “acted as if he has no relatives.” 55 Thus, the family becomes a critical means to enforce peace in the Navajo community, replacing punishment with suasion and education.

One might question whether the persuasive methods of family, neighbors, and friends can create an environment where the individual will and well-being are improperly overcome? The first protection against inappropriate pressure comes from the desire of the peacemaker to maintain her authority and not to violate Navajo morals, which hold that forcing another to do one’s will is an evil of itself. 56 The peacemaker’s authority derives solely from the respect conferred upon the peacemaker by members of her community based upon the fitting use of personal influence. If the peacemaker uses her position to bully or connive rather than to assist people in arriving at their own fair resolution, that peacemaker will lose respect and authority. An additional safeguard exists in the continuing oversight by the tribal court. If anyone involved in the peacemaking believes there were pressure, threats, or coercion, she can report this to the tribal court when the decision is presented for review by the tribal judge.

2. Traditional Dispute Resolution in Tribes of the Puget Sound-Olympic Peninsula Region of Western Washington

The Northwest Intertribal Court System (NICS), established in 1979, consists of 15 tribes in the Pacific Northwest. 57 The NICS provides its members’ tribal courts with court services and personnel. 58 Until funding was lost in 1989, the NICS also provided peacemaking services, “emphasizing respectful listening and consensus.” 59 Three tribes, the Swinomish, Skokomish, and Sauk-Suiattle continue their peacemaking programs, and provide helpful illustrations of tribal processes. 60

The Peacemaker Program resolves a wide range of cases. Families in conflict typically involve child custody matters, run-away teenagers, or grandparents’
visitation of grandchildren. Schools, teachers, and parents rely upon peacemaking to resolve conflicts in the classroom. Neighbors and housing authorities use peacemaking processes to stop vandalism, curb problems with destructive pets, resolve rent disputes, and supervise children. Even law enforcement matters have been resolved through peacemaking, especially cases of juvenile vandalism, fighting, or harassment.

Again, one finds that the peacemaker is not a person formally educated in Western law but rather is a person who exhibits leadership by dint of character. The peacemaker typically is an elder with the ability "to speak well and to be slow to anger or take offense." The ability to "speak good words" is appreciated as a gift, indeed a spiritual gift. Commonly, more than one peacemaker, in fact a panel, may mediate a dispute. For private family matters, however, a single peacemaker—a grandmother or grandfather—would serve. Frequently the disputes involve feuds between families and clans. Indeed, the ripple effect of such disputes, stretching from the actual, immediate participants to siblings, to cousins, to relatives of the fourth and fifth degree, can begin to resemble international mediations between warring nations.

The peacemaker summons together generations of the family and clans to permit all sides of a disputed issue to be heard. But first, she assures the proper environment is set. The experience must provide "food for the soul": recognition, respect, and praise to heal issues between people in conflict. Thus, even the setting

61. Id. at 10.
62. Id. at 11.
63. Compare I. William Zartman & Saadia Touval, International Mediation: Conflict Resolution and Power Politics, J. SOCI. ISSUES, Summer 1985, at 27, 32-44 (describing mediator mediation among nations where another nation or group of nations (e.g., the Organization of African Unity) has intervened in order to achieve a peaceful settlement to a continuing dispute). Consider the following quote:

To say that it is not necessary for third parties to be perceived as impartial to be accepted as mediator is not to suggest that a mediator can espouse the cause of one side in a conflict while ignoring the interests of the other. Mediators must be perceived as having an interest in achieving an outcome acceptable to both sides, and as not so partial to one side as to preclude such an achievement. Again, the question for the parties is not whether the mediator is impartial, but whether it can provide an acceptable outcome.

Id. at 37. Thus the mediator may serve three roles: "communicator" (the "telephone wire" starting and maintaining initial contacts between the parties); the "formulator" (finding a formula for managing or resolving the conflict); and—this word is used cautiously—"manipulator" (utilizing the parties' positions and other resources to move them into agreement). Id. at 39-40. Although Zartman and Touval chose the word "manipulator," I believe it overstates the function they describe and is unduly provocative. As the authors describe the actions taken, the role of an intervening mediator is primarily one of persuasion: to bring out the parties' sense of a need for help and enhance the "leverage" necessary to move from stalemate in a painful situation to resolution. Id. at 40-41. Specifically the mediator's role is not merely to "sit by until the parties feel the need" to solve their problem. Id. at 42-43. The mediator "must develop that need, arouse it, even anticipate it, so that as the moment opens the parties will be ready to acknowledge and seize it." Id. at 43. Zartman and Touval state that they use the unfortunate term "manipulator" in order to take "mediation out of the realm of idealism" and bridge the "artificial distinction between the disinterested facilitator" and the 'interested manipulator.'" Id.
for peacemaking may vary. It may occur during a walk outside, or talking around a fire or a meal, or it may occur in a smokehouse (the site of spiritual practice). Regardless, typically the feast provided an important beginning, as a part of building trust. Slowly, the discussion would be brought to the matters in dispute. Speakers might use stories and refer only indirectly or by allusion. This technique is employed in order to separate the problem from the person. Throughout, the peacemaker assures that everyone has an opportunity to speak and that the values of self-discipline, hospitality, generosity, and peacefulness are recognized.

A decision may be reached by consensus, or by the elder explaining the acts of restitution necessary to restore balance to the relationships. Critical to the process of developing a resolution, the peacemaker must provide advice in a non-hurtful manner. Full agreement with the decision is not always required. Nevertheless, those who do not comply with the consensus reached by the majority may find themselves shunned until their behavior comports with the agreed-upon standard. 64

II. COMPARISONS WITH OTHER FORMS OF COMMUNAL DISPUTE RESOLUTION

In this section, we briefly examine three other styles of communal dispute resolution. One likely presents an even greater challenge to the contemporary Western lawyer’s sensibilities than do the models of Native American tribal peacemaking described above. The dispute resolution system for the Bira of Zaire—like most African traditional dispute resolution processes—is a deeply, pervasively religious ritual. The religious content and style have remained wholly unalloyed, unlike some Native American peacemaker programs which operate as an adjunct to the tribal court. As Turnbull explains, the Bira system of law differs from the West in fundamental concepts of time and space; resulting in differences this anthropologist believed may block adaptation to Western law 65.

The speaker had recently moved back to the reservation and was attempting to settle the undivided interests in the family property: Well, that created a huge ruckus among our family members. So I had a confrontation with one of my cousins. He told me I should move back to the city and who did I think I was to come up there and try and take over. They would have first say on that land because they lived there. And that hurt me very much, and I really did consider moving back to the city, but I just dropped the whole thing. And one time I was talking to my aunt about it and she didn’t say anything. She just said, “Well, that’s not right. He shouldn’t have talked to you like that. That’s not right. I’m sorry that happened to you.” I forgot about it, but within two weeks the cousin that had told me off came to my house and brought me a fish and told me he was sorry and that he should never have talked that way to his first cousin; and he was wrong, and I should continue and try to pursue what he knew was for the best of the family. I couldn’t believe it! Then later I visited my auntie and she said, “Have you seen your cousin?” And I said, “Yes, you know what? He came to my house, brought a fish.” She said, “Well, that’s good, you know. That’s good. That’s the way it should be. Cousins shouldn’t be fighting with each other.” And I said, “Did you talk to him?” She said, “Oh yes, I see him every now and then.” But she didn’t make a big issue out of it. That’s the kind of power that elders have.

Id. at 9-10.

64. See Miller et al., supra note 57, at 8. An example of traditional, family peacemaking follows:

65. See Turnbull, supra note 17 at 79-86.
caution holds, notwithstanding some striking similarities to earlier jury practices in England.

We next look at a model which stretches to the other end of the spectrum. From a process which many attorneys would likely view as too amorphous, standardless, and uncertain in result, we examine one which is thoroughly rule-driven. The Amish in America have long avoided involvement in the American civil and criminal justice system, and resolve all the disputes they can internally. This ethnically homogenous religious community maintains a formalized alternative to litigation. It is, however, ADR that blends nominally democratic and undeniably authoritarian processes.

Last, we visit the Quaker peacemaking method, a communal dispute resolution form that historically even managed to encompass and meet the needs of non-Quakers in managing their conflicts. It is especially intriguing that some scholars have linked modifications in Quaker peacemaking methods after arrival in the New World to the possible influence of Native American tribes which use similar processes.66

A. The Bira of Zaire

Turnbull, in his deeply textured, intellectually passionate comparison of American courts and African tribunals, focused especially on the Bira of Zaire, a rural farming people. Various features of the traditional Bira justice system resemble the traditional Anglo-American system of law as it existed when these countries were predominantly rural, too.67 The Bira jury system in a village consists of the kith and kin of the parties involved,68 and thus is also similar to the peacemaking process among the Northwest Pacific Indians. By Bira standards, "a jury of strangers is necessarily a jury of incompetents, the more so since they have no first hand knowledge of the parties or problems before them, and do not have unlimited time with which to study the issues."69 The participation of the entire village assures adequate checks and balances to protect against the exercise of individual prejudice or self-interest.70 Like current scholarly critics of generic mediation processes, the Bira perceive the vaunted objectivity of the Western jury system is a mere sham.71 They believe the village's personal interest in the welfare of the people involved—their "effective interdependence"—will assure a resolution that satisfies all "by restoring and reinforcing the human relationships, the social bonds or rights and responsibilities, that are manifestly in the interests of all."72

While this sounds much like the modernized Native American tribal peacemaking processes described above, the Bira village tribunal operates on an

66. See Valencia-Weber, supra note 1, at 252 n.83 ("The Peacemaker Courts of the Seneca Nation in New York were traditional dispute resolution institutions which were copied by the Quakers in America.").
67. See Turnbull, supra note 17, at 85.
68. Id. at 82.
69. Id. at 83.
70. Id.
71. Id.
72. Id.
even more powerfully religious dynamic. The entire process is less of a hearing and
more of a religious ritual, complete with masks, worn "as a public demonstration
that the judgment rendered is not theirs, but that of the sacred authority they
represent." The unwritten, wholly uncodified rules which they enforce are perceiving
as sacred and are wholly internalized. Punishment is seen as within the
hands of the supernatural. This human court addresses solely the matter of
restitution.

Further complicating the applicability of the Bira village tribunal model is the
fundamental difference in the Western perception of self as an individual positioned
in time and space. The "way of the ancestors" which some Native American tribes
are attempting to rebuild is in strong and unbroken effect in the Bira villages
described by Turnbull. Their cyclic system of belief—that life is a cycle of birth
and rebirth—has a profound impact on their concept of justice. The Bira very
consciously operate simultaneously in both the natural and supernatural worlds, and
recognize an eternal interplay between the two. Thus, there exist reciprocal
responsibilities between both spheres at any moment.

Further, the past conditioned the individual's present and will influence his
future. The ancestors therefore have a vital, immediate impact on the parties of
today and the resolutions reached. That web reaches widely to include the village
which participates in the restitution ritual. The process works in a manner
strikingly different than the Anglo-American, or even than the Native American
processes summarized above. Because the tribunal does not attempt to determine
guilt or innocence, and because all are connected to each other, the Bira tribunal
uses the process first to affirm the positive attributes of the accused. This will be
accomplished through attestations to the person's good character, good acts, etc.
Then the tribunal will distribute blame for the anti-social behavior among all who
even indirectly or unconsciously contributed to the negative attributes which
resulted in the offense.

Clearly, the Bira process of effecting a restitution to society is one that conflicts
irreconcilably with the Western linear concept of time and with the Western
concept of justice.

B. The Amish

The Amish communal conscience as exercised through its dispute resolution
processes presents a model of pervasive authoritarianism that could not likely be
applied beyond the special environment of these homogenous communities, at least
not in contemporary, secular America.

73. Id. at 82.
74. Id. at 84-85.
75. Id. at 85.
76. Id.
77 See id. at 79-88.
78. Id. at 90-91.
79. Id. at 87
80. Id.
81. Id. at 87-88.
America's Amish communities, uncomfortable with the modern day court system, resolve their disputes predominantly within their own social systems. Within their culture, social ordering is mandated in the "Ordnung." This set of regulations is compiled by leaders in the community who are also leaders in the church. The members of the particular community then vote to endorse the rules. In turn, the rules become the foundation on which community leaders base their everyday existence. These rules include a wide range of what is or is not acceptable within the community such as the use of telephones, central heating, automobiles, and regulations regarding dress and personal appearance, and education for young people.

While those observing the Amish community from without may look upon the regulations of the Ondernung as restrictive, the Amish consider it an advantageous way of life through which members may prevent confrontation. The avoidance of confrontation is highly valued in Amish life, as are uniformity and unity. As perceived by the Amish themselves, regulation by the Ondernung allows members to live with a clear conscience; to live freely within the constraints handed down.

A member who fails to abide by the Ondernung faces punishment. The decision is rendered by what is known as "congregational rule," whereby all baptized members vote, under the direction or suggestion of the bishop. In the case of severe offenses, such as adultery, the guilty party may be "shunned" by the community and excommunicated from the church. Baptized members will be forbidden to eat at the same table or accept favors from the excommunicate. Once the person has demonstrated sufficient humility and submissiveness, the offending person may be reinstated into the community.

For those who believe they have been punished unfairly they have no resort. There is no appeals process within the Amish community for resolving transgressions. Only the church has the power to decide whether the accused will be reinstated or permanently ostracized. Even if the person believes he has committed no wrong, he must accept their punishment—or else commit the even greater sin of arrogance or disunity.

83. *Id.*
84. *Id.* at 36.
85. *Id.* at 35.
86. *Id.*
88. Hostetler, *supra* note 82, at 36-37
89. HOSTETLER, *supra* note 87, at 86.
90. *Id.* at 85-86.
91. *Id.* at 86.
92. *Id.*
93. *Id.*
94. *Id.*
95. See *id.* at 82-86. See also Turnbull, *supra* note 17 at 111-21 (presenting an intriguing comparison of the Amish with the forest people of Zaïre, the Mbuti).
C. The Quakers

The Quakers are often spoken of in broadly the same breath as the Amish when discussion turns to dispute resolution in religious communities. Notwithstanding this colloquial lumping, the two systems bear little resemblance. Whereas the Amish system operates virtually as a mirror of the vertical power of the court system, the Quaker system demonstrates the horizontal power of mediation mixed with features of arbitration.

The Quaker justice system evolved from meetings where members of this persecuted faith would discuss the experiences they had suffered at the hands of English law. Eventually they created a system for collecting, recording, and printing what they termed their "sufferings." Over time, they came to serve as precedent for other Quakers and guided determinations made in their monthly meetings. "The Great Book of Sufferings" provided the written set of Quaker customs and principles that shaped the punishment meted out to members for breach of those norms. In time, however, Quaker dispute processing relied upon much more than merely the list of sufferings. As the chief modern scholar of Quaker legal history, William M. Offutt, Jr. describes, "Quaker doctrine did not control Quaker disputes," ultimately. But Offutt notes that in certain recurring interactions between members of the Quaker community, the norms established by the community (as represented in the sufferings) should be followed. Quaker mediation-arbitration reinforced acceptable boundaries of behavior and conformity to community norms—"by Gentle means in a brotherly and loving manner."

While the norms for behavior, developed through accretion of virtual case law, may appear burdensome, the Quaker process for resolving disputes often was not burdensome, at least when compared to the litigation practices of the day. The Quaker's process, termed the Gospel Order, eschewed adversarial confrontation. In its place, the Gospel Order directed parties first to attempt to resolve disputes between themselves in direct reconciliation. If that failed, then the dispute would be taken to two or more Quaker disciplinary mediators. If this attempt at facilitation also failed, then the disputants would take their grievances to a monthly meeting and lodge claims against each other.

When the conflict reached the level of the monthly Quaker meeting, it shifted to a mediation-arbitration model. Interestingly, in time, the Quaker peacemaking model was sought by some non-Quakers as a means of resolving their contentious

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98. Id. at 83-85, 103-04.
99. OFFUTT, supra note 96, at 181.
100. Id.
101. Id. at 147, 151.
102. Id. at 148.
103. Id. at 150.
104. Id.
105. Id.
disputes.\footnote{106} Apparently the Quaker process of arbitration proved attractive. The choice of arbitrators could not be manipulated by the parties; the meeting could appoint arbitrators if the parties could not agree.\footnote{107} The meeting held power of final review over the arbitrators' decision.\footnote{108} Circumstantial evidence was not sufficient to support a determination.\footnote{109} For the intra-Quaker disputes, however, the great value of this process over litigation was that it allowed the meeting flexibility to resolve the underlying relational difficulties, rather than merely the superficial problems. And, of course, ideally, the process permitted the Quakers to restore harmony to the community.

Despite this glowing picture, Offutt points to several disturbing realities, based upon his statistical analysis of Quaker historical records. He notes that compromise seemed most likely when the disputants knew each other and the everyday social pressures of frequent interaction were likely to compel even an uneasy peace.\footnote{110} As he explains, "If one rarely saw one's opponent, the incentive to gain victory at the expense of a harmonious future relationship was greater."\footnote{111} He also points to a difficulty which any system of communal control must avoid. The outside system of litigation proved increasingly attractive as the geographically more dispersed Quakers saw the controls of the monthly meeting weakening.\footnote{112} As that local "persuasive authority" diminished, more Quakers saw "plenty of saints in court who faced no sanctions for breaching doctrine."\footnote{113} This encouraged them, also, to chose litigation over the Gospel Order. Eventually, the Gospel Order dwindled to a merely "supporting role."\footnote{114}

D. The Search for a Contemporary Communal Model that Respects Conscience

The five models of communal peacemaking summarized in Sections I and II, if applied to settings beyond their own immediate communities, would each encounter hurdles. The Bira village tribunal surely deserves admiration, for it puts into practical effect the West African proverb that "it takes a village to raise a child." On the other hand, the process operates successfully because all participants hold to a single, undisputed, deeply held system of belief where religion and law are one and the same. This powerful metaphysical system would not fit in the heterogenous, largely secular world of—for instance—an urban housing project.

If we continue the search for a model of dispute resolution with the capacity to spiritually renew a neighborhood, the Amish "Ordnung" merits more than a glance.

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\footnote{106}{See Alfred L. Brophy, "Ingenium est Fateri per quos profeceris" Francis Daniel Pastorius Young Country Clerk's Collection and Anglo-American Legal Literature, 1682-1716, 3 U. Chi. L. SCH. ROUNDTABLE (forthcoming 1997).
\footnote{107}{OFFUTT, supra note 96, at 151.
\footnote{108}{Id.
\footnote{109}{Id. at 162.
\footnote{110}{Id. at 181.
\footnote{111}{Id.
\footnote{112}{Id.
\footnote{113}{Id.
\footnote{114}{Id.
Lawyers especially might find a certain level of comfort in the idea that the members of the community develop a detailed set of rules. The community enforces those agreed-upon rules through majority vote. Both appear on their face to be procedures generally familiar to voluntary associations or organizations of all sorts with one powerful exception: These rules govern not merely one's monthly activities in a club; they govern how one conducts daily life at work, home, and school, plus in the church.

Moreover, the initial blush of democratic process quickly fades when we peer more closely at the role of the bishop (or other ordained person) in shaping and directing the community’s vote. The lack of recourse for one aggrieved through the process in and of itself would likely cause most attorneys to reject the Amish model as a prospect for adaptation.

I would argue that for another critical reason the Amish model is particularly unsuited for the broader purposes sought in my housing project hypothetical. The hierarchical, authoritarian structure does little to educate or empower the participants. Disputants learn to submit to decisions summarily handed down by the majority, a decision virtually pre-determined by the church authority figure. The lesson is comply or be ostracized.115

The historical Quaker model offers a view of what mediation and arbitration could achieve in a time when this religious community’s size and influence were substantial. In a religion where individual conscience played a vital role, the communal conscience still spoke through the Gospel Order. A modern lawyer might again find some initial familiarity with the historical Quaker mediation-arbitration process. It resembles ADR models employed in some settings today. The non-binding nature of the process—unless the parties chose to make it legally binding—surely would relieve much of the concern generated by the Amish “Ordnung.”

At its best, the Gospel Order provided an opportunity for recognition and reconciliation. However, the social leverage necessary to secure voluntary compliance with, or realignment to, the values of the community depended ultimately upon the members of that community having regular and fairly close contact. Hence, although the historical model of Quaker peacemaking began as a strong moral force within its own community, it eventually lost its ability to persuade gently, as its own members grew more dispersed and more secularized.

This returns us, then, to the prospect of adapting Native American tribal peacemaking to our hypothetical housing project. In the opening paragraph of this article, I describe tribal peacemaking as a modern yet ancient process. The contemporary aspect derives from the fact many peacemaking programs in place today are revivals of old traditions. They had to be renewed, re-researched, and re-shaped because in many areas traditional methods of dispute resolution had become an “endangered species.” This was particularly so among nations whose tribal courts closely mirror Anglo-American courts. As Native American legal scholars, practitioners, and tribal leaders struggled in the past twenty years to secure the place

115. Of course, most Amish would not likely agree with my characterization of their internal legal system. I speak here in terms of how key features of that system would suit or not suit adaptation to other settings.
of customary and traditional law in tribal courts, they also secured the role of
traditional processes for dispute resolution.

Tribal peacemaking has in many ways been recreated in the United States to meet
the needs of persons far more dispersed, far more secularized than a hundred years
ago. The process began with a search examination by the community of what
makes it in fact a community. The tribe recognizes, as Turnbull noted, that order
and conformity alone do not make a community, any more than does simple
physical proximity. The process of developing a tribal peacemaking program
inherently acknowledges another corollary—shared blood, ancestry, or history also
do not, in and of themselves, create a true community. That body of people must
make an intentional decision to identify who they are, what they value, and how
they wish to live in relation to each other.

This act of defining communal values through consensus carries out in a tangible,
external reality the implicit, internal process that drives Bush and Folger’s model
of transformative mediation. The concept of mediation for moral development
challenges the philosophical underpinnings of what most lawyers believe and
practice. I suggest that those attorneys who are able to make their own peace with
this concept may need the reassurance that the moral standards—while not
inflexible—are indeed non-arbitrary and readily discernible.

Tribal peacemaking offers a second critical benefit for our hypothetical housing
project: The power of resolving disputes rests in the hands of the tenants’
association, not in the administrative staff of the housing authority, nor outside
mediators unconnected to the life of the project. Attorneys may balk at the concept
of such genuine empowerment. Our hypothetical posits an environment that may
lack the religious/philosophical world view of the Navajo that coercion is evil. The
Western legal eye may look warily at the prospect of unfair treatment. We must
note, however, that even the Navajo Nation has acknowledged the need to construct
an open-ended, rather than closed system. Even in Navajo country, there is an
awareness of possible improper use of influence.

The tenants’ association peacemaker process could function as a wholly
voluntary non-binding process aimed at consulting with tenants about conduct that
has not yet risen to a level justifying eviction. Moreover, the peacemaker process
could assist tenants in resolving many of the same problems which Indian housing
authorities have encountered (and handled successfully through peacemaking):
vandalism, youth violence, anti-social behavior, truancy. Acting in an advisory
capacity alone, it may not be necessary to provide another layer of review or appeal,
although that, too, could be an option.

III. THE INDIVIDUALISTIC VALUES OF NON-INDIAN ADR CONTRASTED WITH THE
COMMUNALISTIC VALUES OF TRIBAL PEACEMAKING

The reader may have noted the rather grudging reluctance with which I inserted
the option that tenant’s peacemaking might be subject to review. My reluctance is
not due to mere recalcitrance, but to the concern that the suggestion invites an

116. See Turnbull, supra note 17 at 91-92.
117 See Kirke Kickingbird & Lynn Kickingbird, Traditional Peace Making in Oklahoma,
118 See Yazzie, supra note 46, at 180-87
accretion of procedural mechanisms that would quickly render this ADR innovation simply another adjudication.

And yet, I recognize that just as lawyers played a vital role in developing modern forms of tribal peacemaking among Native American nations, so must lawyers play an important role in expanding this form of communal dispute resolution beyond Indian Country. Such attorney involvement is valuable, even where the lawyer’s training may spark initial resistance to the concept. Why is resistance to innovation valuable? Because as members of the legal profession address the sources of the initial opposition, the legal profession may re-examine its role in other settings.

I believe the strongest resistance to a proposal such as our hypothetical tenants’ peacemaking process would derive from the lawyer’s deeply held belief that she has an overriding ethical obligation to protect her client’s individual rights—at all costs—against encroachment by the values of the community. This is where I, as an attorney, see the greatest gap between the models of communal dispute resolution presented in this article and even our generic ADR processes. An attorney will likely find the real difference in the contrast between what we are expected to advise our client in order to protect her personal interests, and how we advise our client in terms of her role within the community.

In this section we examine the principles of legal ethics that are most squarely at issue. The lawyer’s duty to represent her client—zealously—seems to militate against using peacemaking processes if the courtroom or housing authority adjudicatory process would offer procedural and evidential protections that the attorney can use in the client’s favor. The attorney who wishes to take a broader view of what serves the client best may face some troubling issues. For example, the lawyer’s duty to protect against conflicts of interest would seem to run contrary to the entire concept of multiple-party, consensual dispute resolution. The nearly sacred duty to maintain client confidentiality would seem to undermine the peacemaking value of truth-telling, of confession and restitution.

I suggest in this section some preliminary analyses of these issues. Where possible, I offer ways of re-visioning the lawyer’s role in advising her client, further, in viewing the communal dispute resolution process as a whole. I believe that the apparent gap between the individualistic values of lawyers’ ethics and the communal values of tribal peacemaking need not be so wide. It can be bridged in many circumstances.

These questions may appear rhetorical and imponderable. They may be so in fact, except for the insights which the American Bar Association’s Model Rules of Professional Conduct and the Code of Professional Responsibility provide us. By using the ethical conventions agreed upon by the profession as a proxy for the attorney’s own view of her ethical duties, we can at least launch a meaningful discussion. This discussion will not repeat the more expansive philosophical arguments which others have pursued so ably. Legal philosophy and legal ethics,
while they inform each other, are not necessarily the same. Further, in terms of actual practice, lawyers likely consciously follow the latter more than the former.

A. The Individualistic Paradigm

The archetype upon which the legal profession has constructed its ethical principles assumes "that the adversarial system is the lawyer's proper arena."120 Granted, the Rules point to other lawyer roles: the advisor, the negotiator, the intermediary, the evaluator. Nevertheless, the celebrity function, that which receives the lion's share of attention in the minds of the public, the profession, and the Rules themselves, is that of the advocate who "zealously asserts the client's position under the rules of the adversary system."121

This focus on the lawyer as the champion of the individual's rights threads its way throughout the Rules, indeed throughout our centuries-old concept of what it means to be a lawyer.122 I doubt there is a legal ethics casebook in print which does

interested, unconnected individualism is connected with "the decline of holistic, intersubjective communitarianism." Id. at 1178. McClain offers helpful citations to and summaries of the recent literature which embodies the invigorating debate on whether "focusing one-sidedly on individual rights and ignoring civic responsibilities" has affected American jurisprudence. Id. at 1179 & n.27. McClain's presentation is especially well-balanced, for she details how, in her view, neither Rawls nor Dworkin lack an ethic of care and she warns against replacing critiques of political theorists with caricatures. Id. at 1204-27 Cf. Carol Gilligan, In A Different Voice: Psychological Theory And Women's Development 5-23 (1982). Further, she boldly tests how the relational model of justice impacts a decidedly feminist issue: abortion. McClain, supra, at 1261-62. McClain effectively argues:

When the coercive power of the state is brought to bear on certain aspirational notions about what women's moral experience is (or should be) or how people feel (or should feel) about each other, there may be a social cost not yet recognized in the rhetoric of connection. Liberal conceptions of autonomy and personhood should remain a vital component in attempts to realize a vision of interdependency and care.

McClain, supra, at 1264.


121. MODEL RULES OF PROFESSIONAL CONDUCT pmbl. ¶ 2 (1983) ("As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others. As intermediary between clients, a lawyer seeks to reconcile their divergent interests as an advisor, and to a limited extent, as a spokesman for each client. A lawyer acts as evaluator by examining a client's legal affairs and reporting about them to the client or to others.").

122. Indeed, one might fairly suggest that the entire mythology of the Anglo-American system of law is challenged when one examines these issues. Perhaps the confrontation with this mythology is the deeper source of some of the resistance which tribal peacemaking encounters among lawyers and law students accustomed only to non-tribal law. Consider the cultural baseline for legal thought at the turn of this century as presented in an essay by John Maxey Zane, a lecturer on legal history and biography at Northwestern University 1905-1906:

It is a singular fact that but two races in the history of the world have shown what may be called
not recount the story of Lord Brougham, who in 1821 represented Queen Caroline in her trial for adultery.

Brougham apparently had some evidence that would embarrass the king, but would he use it to defend the queen? Brougham let it be known not only that he would use it but that he would consider himself bound to do so. Brougham told the judges: "[A]n advocate, in the discharge of his duty knows but one person in all the world, and that person is his client." He then added, lest there be any doubt, that the "hazards and costs to other persons" are of no concern to the advocate, that the advocate "must not regard the alarm, the torments, the destruction which he may bring upon others [H]e must go on reckless of the consequences, though it should be his unhappy fate to involve his country in confusion." 123

This excerpt of Lord Brougham's rhetoric has survived, indeed thrived, to this day because it rings with a truth. It speaks of a reality most litigators have experienced. It may not be too crude to suggest that this perspective—expressed with more or less moderation—underpins the morality of adversary justice in the Anglo-American system: The attorney is bound as a matter of legal ethics to represent the individual and the individual alone, generally without concern for the impact which such representation may have upon others or the community.

One finds the contemporary expression of this ethos in Canon 7 of the Model Code of Professional Responsibility: "A lawyer should represent a client zealously within the bounds of the law." 124 If we ask a dictionary what "zealous" representation entails, we shall find that the attorney's work for her client would be marked by "enthusiastic devotion"; conduct synonymous with "passion." 125 She would be "fervent," aching with "tireless diligence." 126 We gather here a fair description of emotions, but little guidance as to conduct. The Ethical

126. Id.
Considerations elaborate on Canon 7, presenting numerous scenarios where the attorney’s role as advocate compels the attorney to operate as far more than a single-focused automaton.\textsuperscript{127} Rather, the Ethical Considerations taken as a whole present a fairly clear picture of the ethical lawyer as one who remains fully cognizant of and responsive to the needs of the entire justice system, not solely his client.\textsuperscript{128}

The Disciplinary Rules at DR 7-101 and DR 7-102 probably set forth the best articulated standards of conduct for the zealous, yet ethical, attorney. Under DR 7-101(A), in the effort to represent a client zealously, the lawyer “shall not intentionally fail to seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary Rules.”\textsuperscript{129} A zealous advocate need not be an offensive advocate, under the Code of Professional Responsibility. For the Disciplinary Rule assures attorneys that courtesy, punctuality, and “consideration of all persons involved in the legal process” are not inconsistent with zealous representation.\textsuperscript{130}

Furthermore, DR 7-101(B) carves out an important exception to the single-minded pursuit of client goals. Although the attorney owes a duty to but one person in all the world, his client, the lawyer retains the right (but not the obligation) to “refuse to aid or participate in conduct that [she] believes to be unlawful, even though there is some support for an argument that the conduct is legal.”\textsuperscript{131} At what point does the attorney’s duty to preserve the system of justice—and perhaps the interests of the community—override the attorney’s obligation to present his client’s case as that individual desires?

DR 7-102 appears to address that point in brief, by specifying that a lawyer shall not take actions on behalf of her client “when [she] knows or when it is obvious that such action would serve merely to harass or maliciously injure another.”\textsuperscript{132} A short litany of exceptions follows, which one could summarize thusly: Whereas DR 7-101(B) uses permissive language, allowing the attorney latitude to participate in conduct which the attorney believes is arguably unlawful; DR 7-102(A) forbids the attorney—even in the name of fervent devotion to the client’s cause—from participating when the conduct has sunken to the level of “clear” illegality or fraud, and the attorney’s level of awareness has risen from a level of “belief” to “knowledge.”\textsuperscript{133}

\begin{itemize}
\item[127] See Model Code of Professional Responsibility EC 7-1 to 36 (1980).
\item[128] See, e.g., Model Code of Professional Responsibility EC 7-10 (1980) (“The duty of a lawyer to represent his client with zeal does not militate against his concurrent obligation to treat with consideration all persons involved in the legal process and to avoid the infliction of needless harm.”); Model Code of Professional Responsibility EC 7-27 (1980) (“[A] lawyer should subscribe to or verify only those pleadings that he believes are in compliance with applicable law and rules; a lawyer should not make any prefatory statement before a tribunal in regard to the purported facts of the case on trial unless he believes that his statement will be supported by admissible evidence; a lawyer should not ask a witness a question solely for the purpose of harassing or embarrassing him; and a lawyer should not by subterfuge put before a jury matters which it cannot properly consider.”).
\item[130] Id.
\item[133] Compare Model Code of Professional Responsibility DR 7-101(B) (1980) (using the
Thus, short of illegality or fraud, mere harassment or malicious injury, the attorney operates freely with nearly untrammelled freedom on behalf of the client. Indeed, legal ethics encourage such an energetic, single-minded pursuit of the client’s interests. What happens, then, to the attorney whose client is invited to participate in a tenants’ peacemaking session, or else find the matter referred to the housing authority staff for informal adjudication? In formulating advice to the client, which should the attorney credit more highly—the value of truth or the right to remain silent? What about requiring the other side to prove its case, rather than allowing the client to confess and make amends? What if the one clear way to “win” the client’s case was to entirely discredit a truthful but elderly witness? Does not that explode the communal norm of truth-telling and of respecting one’s elders?

Perhaps it is not the attorney’s role under any circumstances to weigh, value, or credit one position over the other. Perhaps the attorney’s task is merely to present all the options to her client, discuss them, and leave the choice to the client. Surely, this is what our rules of ethics at MRPC 1.2 would suggest. It may be in reality that the greatest victory a peacemaking program could hope for—outside of Indian Country—would be for the attorney even to suggest the availability of this alternative process, much less to endorse its long-term wisdom.

B. Cautions for the Attorney With Wider Vision

The individualistic paradigm which undergirds legal ethics appears reinforced by provisions in the Rules and the Code which could punish the attorney seeking to expand his vision of how best to serve the client. Assume the lawyer is trying to understand how his client can be served within the context of the tribe’s social organization—or, the tenant’s association—employing peacemaking methods. Traditional, customary law or the rules of the tenants’ association may require the client to seek harmony and reconciliation, to rebalance himself within the community.

The client may be required to consider the needs of other members of her family or elders. This extends significantly beyond the typical case of lawyer’s duties to non-clients. In this expanded context, where the interests of so many people are so interrelated, is it possible for confidences to be maintained? Is it possible to avoid conflicts of interest?

1. Conflict of Interest

Attorneys are prohibited from engaging in dual representation, or any representation of a third person which could “materially limit” the lawyer’s responsibilities to that client. Comment 12 to Rule 1.7 provides an example quite permissive word “may”), with MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A) (1980) (employing the mandatory term “shall”).

134. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a) (1983) (“A lawyer shall abide by a client’s decisions concerning the objectives of representation”).

pertinent to tribal peacemaking: "[A] lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference of interest among them."\textsuperscript{136}

Although a peacemaking process would not involve attorneys in the manner of some models of generic mediation and arbitration, the attorney naturally will view her role in terms of the settings with which she is familiar. And those settings, as described by our ethical codes, presume diversity of interests. This is where the process of developing the communal values that shape the peacemaking process will prove critical. The norms created in that document must be clear, simple, and reached by genuine consensus. Furthermore, they must honor the individual as well as the community, and achieve a workable statement of how the community's interests and the individual's interests actually merge for their mutual benefit. I believe that with such a well-thought-out rationale for action, the attorney will find much more support for assuming alignment of interests. Thus, one gap has been closed, in good conscience.

Some practitioners and legal scholars working in the area of elder law have begun the heroic task of redefining professional responsibility to encompass representation of the family unit. They are attempting to move beyond the individualistic, atomistic values represented in a standard reading of the Code and Rules. They reframe the question "Who is the client?" in a way that might include not only elderly spouses, but also their children and grandchildren—all of whom have both a technical and an emotional interest in the outcome of the legal transaction under consideration. Following the lead of Professor Shaffer, they exert themselves "to keep the client group together" rather than merely letting "things fall apart" and then taking "professional refuge from the falling debris by withdrawing from the representation."\textsuperscript{137} They seek ways to practice according to an ethic of care, built upon valuing the community, while at the same time aligning those communal values with the rules of professional responsibility.\textsuperscript{138}

This small but vibrant segment of legal analysts recognizes that "legal ethics mixes treatment of families as collections of individuals and communities."\textsuperscript{139} Ethics rules could limit representation of "the family as a unit when conflicts would interfere with adequate representation of individuals."\textsuperscript{140} It is important to keep in mind that even under a standard reading of the Rules and Code, conflicts doctrine does not require the lawyer to withdraw from all situations where there may be or are conflicting interests. Interests must be weighed against each other, with the

\textsuperscript{136} MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 cmt. 12 (1983).
\textsuperscript{137} Thomas L. Shaffer, The Legal Ethics of Radical Individualism, 65 TEX. L. REV 963, 974 (1987).
\textsuperscript{140} Id. See John Leubsdorf, Pluralizing the Client-Lawyer Relationship, 77 CORNELL L. REV 825, 826-31 (1992); Patricia M. Batt, Note, The Family Unit as Client: A Means to Address the Ethical Dilemmas Confronting Elder Law Attorneys, 6 GEO. J. LEGAL ETHICS 319, 325-31 (1992).
clients holding the scale. If the clients deem the conflicts to be waivable—with full disclosure as to potential outcomes—then the representation may proceed. Thus, even under a conservative application of traditional legal ethics doctrine, the attorney may involve herself in a representation that looks to the best interests of an identified, closed community rather than solely the individual within such a community. The attorney must, however, be certain to fully inform all as to the advantages and disadvantages of the group representation, including the attorney's inability to keep confidences within the group.  

2. Confidentiality

The doctrine of attorney-client confidentiality, which has enjoyed a near-sacred status in the legal profession, is undergoing change, one small step at a time. The circle of clients may slowly be expanding to include the family as an organic community. Similarly, the circle of responsibilities which the lawyer must honor may be widening to include society as a whole. Increasingly, the exceptions to MRPC 1.6 and DR 4-101—read in conjunction with obligations imposed by federal regulations and industry codes of ethics—may require the attorney to think not only of the client's individual protection, but also of the public's needs. In an important reframing of the individualistic perspective, the attorney can be seen as fulfilling her obligation to serve the client and the community as a whole by advising her client to follow the law or industry standards of business ethics—even if following the law entails making a disclosure apparently against the client's interests.

How is this reframing taking place? It is most readily apparent in the arena of federal regulatory policy. The example that springs most quickly to common memory is the recent spate of settlements which the Office of Thrift Supervision (OTS) obtained against five leading law firms that had represented the failed Lincoln Savings & Loan. OTS considered these firms to hold not only fiduciary obligations to Lincoln, but also to the public, under the complex federal scheme for regulating supposedly de-regulated thrifts. According to OTS' Chief Counsel Harris Weinstein, Kaye Scholer Fierman Hayes & Handler, Paul Weiss Rifkind Wharton & Garrison, Jones Day Reavis & Pogue, and others should have advised Lincoln while steering through the "grey" areas of the law to veer to the side of disclosure, rather than concealment. It was critical that the attorneys counseling Lincoln and similarly situated S&Ls recommend regulatory compliance because

141. Professor Pearce presents an exciting suggestion, that the family/group representation be considered under MRPC 1.13 governing the organization as a client. He proposes a family/group version of 1.13 which he calls "Optional Family Representation." Pearce, supra note 139, at 1294-318.

142. See Model Rules of Professional Conduct Rule 1.6(b) (1983); Model Code of Professional Responsibility DR 4-101(C) (1980).


otherwise the newly de-regulated system would be fatally unstable.\textsuperscript{145} To assure stability, Weinstein called upon lawyers to practice not at the minimum threshold level of the MRPC. Instead, he urged corporate counsel to practice what he termed "whole law" that construed a regulatory scheme in a way that protected the public interest, instead of seeking loopholes to advantage their client at the public's expense.\textsuperscript{146}

This current construction of the private attorney's ethical responsibilities to the community represents a significant growth from the 1970s. In that decade, the Securities Exchange Commission (SEC) was fairly isolated in its position requiring attorneys to advise their clients to comply with provisions designed to serve the public good rather than their own individualistic interests. Some contemporary writers cast the SEC as a somewhat rogue agency that improperly forced the lawyer to act as "policeman" more than "advocate."\textsuperscript{147}

We can anticipate even further acceptance of communitarian values in legal ethics over the next decade of environmental lawyering. Futrell explains:

Many aspects of environmental practice may be ill-suited to the adversary model of professional legal ethics, with its creed of zealous advocacy with little regard for the public interest or moral norms. Environmental statutes are motivated by a broad need to protect the public, often from harms that may not be immediate but are far-reaching in their ability to disrupt and destroy.\textsuperscript{148}

Nondisclosure—failure to comply with reporting requirements—subverts and incapacitates environmental regulations. The scheme collapses. Futrell clarifies the point: "Environmental law cannot protect society unless environmental lawyers ensure that it does so."\textsuperscript{149}

To that end, Futrell calls for lawyers to use the Rules and Code (especially MRPC 1.6 and DR4-101) as merely a floor for ethical conduct.\textsuperscript{150} Preferably, counsel should fulfill the injunction of MRPC 2.1 to advise their clients on the "moral, economic, social, and political factors, that may be relevant to the client's situation."\textsuperscript{151} This would entail advising the client of industry-wide standards on ethical issues they face. He refers specifically to the Code of Ethics and Standards of Practice for Environmental Professionals as a means of helping clients comply with moral standards of the larger community.\textsuperscript{152}

These all represent incremental but powerful shifts in how attorneys will be counseling their clients regarding matters of business ethics. The legal ethics

\textsuperscript{145} Id.
\textsuperscript{146} Id. at 512.
\textsuperscript{148} Futrell, supra note 120, at 837
\textsuperscript{149} Id.
\textsuperscript{150} Id. at 838.
\textsuperscript{151} Id. (quoting MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.1 (1983)).
\textsuperscript{152} Id.
questions have been reframed: What is ethical is no longer merely what only serves the client in the short term. Rather, the lawyer increasingly has an obligation to assist her client to perform as a responsible member of the community.

This expanded understanding of the lawyer's ethical role can undergird the development of peacemaking methods to assist communities in resolving disputes according to their agreed-upon codes for living together. Those codes, of course, would need to be set forth with the clarity and even-handedness that the public has come to expect from sophisticated, sensitive private industries and professions. This is not, however, an impossible task. A number of Native American tribes have re-discovered and re-defined their communal values in this way. Why could not other intentional communities follow that lead?

CONCLUSION

This article suggests a novel approach for using ADR to achieve moral growth in a limited number of settings. This is part of what transformative mediation could be, part of what mediation generally could be in order to fulfill the promise these processes hold for revitalizing our society. I invite discussion with others concerning these methods and their applicability. As in any innovation, the first step is probably the most difficult, and the least refined. I look forward to suggestions on how the journey can continue.