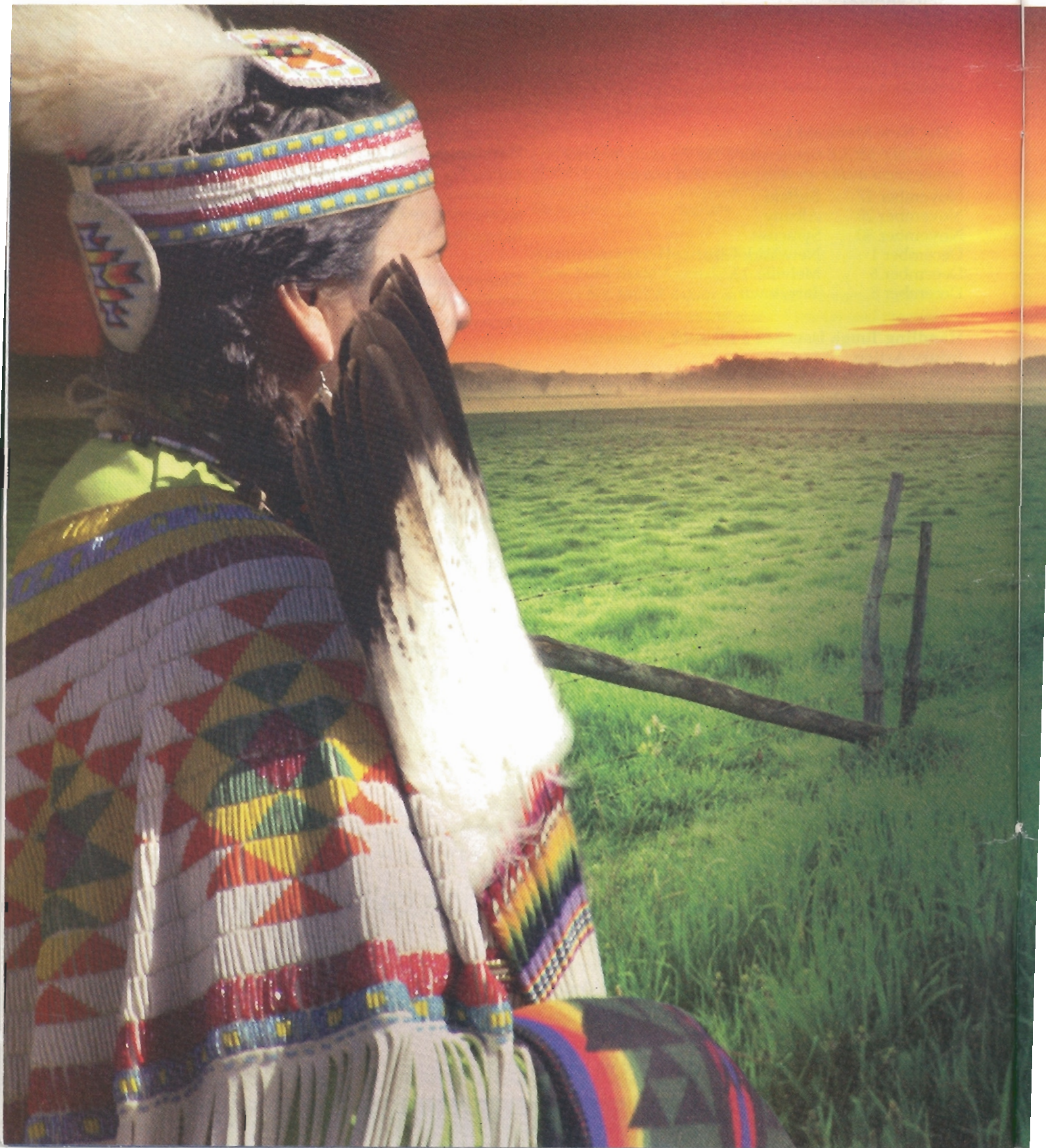


# Building Bridges Between Parallel Paths



# The First New York Listening Conference for Court Officials and Tribal Representatives

By Marcy L. Kahn, Edward M. Davidowitz and Joy Beane

## Introduction

"Excellent!" "Just keep them going!" "This was a fabulous, ambitious and historic undertaking!" These are some of the reactions of participants in the First New York Listening Conference to a two-day program on American Indian law and culture for court and justice system officials. Held in Syracuse from April 26–27, 2006, the Listening Conference ("Conference") brought together for the first time in history more than 140 participants from New York's federal and state court systems and the Indian Nations and Tribes residing in and recognized by New York State. The Conference convened state and federal judges and court officials in sessions with tribal judges, chiefs, clan mothers,<sup>1</sup> peacemakers and other representatives from the justice systems of New York's Indian Nations and Tribes, to exchange information and learn about our respective concepts of justice. It was sponsored by the New York Tribal Courts Committee ("Committee");<sup>2</sup> the New York State Judicial Institute;<sup>3</sup> and the Center for Indigenous Law, Governance and Citizenship of Syracuse University College of Law,<sup>4</sup> in affiliation with the New York Federal-State-Tribal Courts Forum ("Forum").<sup>5</sup> The feedback shows this was no ordinary judicial conference: its origins lie in an outreach process dating back several years on both national and state levels.

The first part of this article introduces the nine Nations and Tribes recognized by the state of New York. The second reviews the origins and development of the federal-state-tribal courts forum movement nationally and includes a synopsis of the development and work of the New York Forum. The third and fourth sections discuss Conference planning and implementation, and summarize the information presented at the Conference. The last section previews the next steps for the Forum after the Listening Conference.

## Recognized Tribes and Nations

The Native American population of New York State originally consisted of the Haudenosaunee and Algonquian Nations. Presently, more than 82,000 Indians from those Nations and others reside in New York.<sup>6</sup> While Native Americans may be found in every county in the state, many from the Haudenosaunee and Algonquian

**MARCY L. KAHN** is a Justice of the New York State Supreme Court for the First Judicial District and co-chair of the New York Tribal Courts Committee. She is a graduate of Stanford University and of the New York University School of Law, where she was an editor of the *Review of Law and Social Change* and initiated a course on Native American Rights Law.

**EDWARD M. DAVIDOWITZ** is a Justice of the New York State Supreme Court for the Twelfth Judicial District and co-chair of the New York Tribal Courts Committee. He is a graduate of Allegheny College and the Cornell Law School. He is the author of the *Practice of Criminal Law under the CPLR and Related Civil Procedure Statutes* and co-author of *Foundation Evidence, Questions and Courtroom Protocols*, both published by the New York State Bar Association.

**JOY BEANE** is Executive Assistant to the Honorable Robert G.M. Keating, Dean of the New York State Judicial Institute, and counsel to the New York Tribal Courts Committee. She is a graduate of Fordham University School of Law and of Barnard College.

---

The authors wish to thank Valorie Perez, Esq., Senior Attorney at the New York State Judicial Institute, for her helpful assistance in the preparation of this article, and Kristen Sentoff, Pace University School of Law, Class of 2007, and Regina Gennari, Pace University, Class of 2008, for their research assistance. The authors wish to express their appreciation to Chief Judge Judith S. Kaye for envisioning this groundbreaking project and for affording them the opportunity to bring it to fruition. This endeavor is an illustration of her favorite four words: "I have an idea."

---

Nations continue to live in communities in New York's Indian country.<sup>7</sup> The Haudenosaunee Confederacy, also known as the Iroquois Nation, or Six Nations, is located, generally, in western, central and northwestern New York. It is composed of the following six Nations and Tribes: the Cayuga Indian Nation, the Mohawk Indians of Akwesasne,<sup>8</sup> the Oneida Indian Nation, the Onondaga Nation, the Seneca Nation<sup>9</sup> and the Tuscarora Nation. The Shinnecock Tribe and the Unkechaug Nation, both part of the Algonquian Nation, make their homes in eastern Long Island. Currently, the governments of the United States and New York State officially recognize the Cayuga Indian Nation, St. Regis Mohawk Tribe, Oneida Indian Nation, Onondaga Nation, Seneca Nation of Indians,

## Leaders continue to send members of their communities to the Forum meetings to serve as their "eyes and ears."

Tonawanda Band of Seneca Indians and the Tuscarora Nation. The state also officially recognizes the Shinnecock Tribe and the Unkechaug Nation.

New York's Nations and Tribes have developed separate and unique justice systems. While many are firmly rooted in traditional justice values, they all vary widely. Some Nations, such as the Tuscarora and Onondaga, do not rely on written law or formalized court systems. Others have written laws and formal courts and procedures, such as the justice system established relatively recently by the Oneida Indian Nation.<sup>10</sup> For the most part, jurisdiction extends to all Indians whether or not they are members of the particular Nation.<sup>11</sup> The systems function and operate independently of each other.

### Historical Developments

#### Federal-State-Tribal Courts Forums

The New York Tribal Courts Committee and the New York Federal-State-Tribal Courts Forum originate from a project of the Conference of Chief Justices, an organization of the chief judges of the courts of the 50 states, the District of Columbia and United States territories, whose mission is to improve the administration of justice in state court systems.<sup>12</sup> In 1985, the Conference created a committee to address state civil jurisdiction over Indians, after questions were raised by the United States Supreme Court's two decisions in *Three Affiliated Tribes v. Wold Engineering*.<sup>13</sup> The Committee on Jurisdiction Within Indian Country, later called the Tribal Relations Committee (TRC), held a series of panels and conferences on tribal jurisdiction.<sup>14</sup> The TRC obtained funding from the National Center for State Courts and the State

Justice Institute to study tribal-state court relations, and set up demonstration forums in Arizona, Oklahoma, and Washington.<sup>15</sup>

In 1991, the TRC held a national conference in Seattle, Washington, with representatives of tribal, federal and state governments and justice systems. The TRC study and demonstration forums emphasized the need for cooperative efforts among federal, state and tribal entities,<sup>16</sup> and the idea of creating forums to address and to resolve jurisdictional conflict expanded after this initial conference. By 2003, 17 states had created tribal-state court forums.<sup>17</sup> In addition, the National Center for State Courts and the State Justice Institute published a 10-page guide for creating a forum, as encouragement for other states.

#### New York's Tribal Courts Committee and Forum

In 2002, Chief Judge Judith S. Kaye of the New York Court of Appeals created the New York Tribal Courts Committee to study the possibility of establishing a federal-state-tribal courts forum in New York and to explore how different justice systems might collaborate to foster mutual understanding and minimize conflict. She appointed Justice Marcy L. Kahn of the New York State Supreme Court to chair the Committee. Justice Edward M. Davidowitz, also of the New York State Supreme Court, soon joined the Committee and, under the guidance of Justices Kahn and Davidowitz as co-chairs, the Committee has worked for more than three years in a variety of ways to accomplish its mission.<sup>18</sup>

#### Emerging Issues and Consensus for a Forum

On May 22, 2003, the Committee met in Liverpool, New York, with representatives of New York's nine state-recognized Indian Tribes and Nations to ascertain their interest in developing a federal-state-tribal courts forum. Since then, meetings have been held semiannually in Liverpool and Syracuse, New York. The initial meeting sought to identify topics of special concern to the Nations.<sup>19</sup> Among the issues discussed were difficulty with implementing the Indian Child Welfare Act (ICWA),<sup>20</sup> especially in ensuring an appropriate tribal role in state family court decisions regarding the placement of Indian children through foster care or adoption;<sup>21</sup> tribal efforts to implement judicial systems and law enforcement through their own governments;<sup>22</sup> and the need to educate and train state court judges on Indian government and culture.<sup>23</sup> The Committee asked that tribal representatives discuss in their home communities the possibility of establishing a permanent forum in New York to address such issues.

At the group's second meeting on November 3, 2003, Native participants agreed to help establish a permanent federal-state-tribal courts forum in New York. Subsequently, the group focused on three main issues: the placement of Indian children by the state family courts



under ICWA; the resolution of jurisdictional conflicts arising from disparate rulings among federal, state and tribal justice systems; and the need to educate state and federal judges on tribal law and culture.<sup>24</sup>

During the three years following those initial meetings, members of the Committee and interested members of all nine Nations and Tribes have met every six months in Syracuse<sup>25</sup> as the New York Federal-State-Tribal Courts Forum Planning Group ("Planning Group") to address these and other issues of continuing and developing mutual interest.

### Creating the Forum

In 2004, the group formalized the New York Federal-State-Tribal Courts Forum, creating and adopting an organizational structure and mission statement. Although these plans call for all nine State-recognized Nations to be members of the Forum, at this writing, in addition to the New York Unified Court System and the United States Courts for the Second Circuit, only the Oneida Indian Nation, St. Regis Mohawk Tribe, Seneca Nation of Indians, Shinnecock Tribe and the Unkechaug Nation have formally designated their members and alternate members to the Forum. While some of the Haudenosaunee Nations have not yet formally joined, their leaders continue to send members of their communities to the Forum meetings to serve as their "eyes and ears."

### Committee Visits to the Nations

As part of the Forum's development, the Committee visited the Onondaga Nation longhouse, where they met with chiefs, clan mothers and council members from the Haudenosaunee, including the Onondaga Nation, Cayuga Indian Nation, Tonawanda Seneca Nation, Mohawk Nation Council and the Tuscarora Nation.<sup>26</sup> Members of the Committee also visited the Tuscarora and Oneida reservations, where they met with tribal officials and toured each Nation's territory.

### First New York Listening Conference

#### The Development of the Listening Conference

As early as its second meeting, the Planning Group proposed an educational session at which tribal representatives could meet with federal and state judges to discuss the key issues previously identified by Native peoples in New York.<sup>27</sup> The prime importance of these issues was readily apparent – ICWA, jurisdiction and judicial education are all interrelated. Problems in one area could not be solved without, at the same time, successfully addressing each of the other issues.<sup>28</sup>

At the Planning Group meeting on March 24, 2005, the Committee proposed a New York Listening Conference to educate state judges on these core issues. The subcommittee formed to plan the Conference<sup>29</sup> was a diverse group that consisted of Natives and non-Natives; federal, state and tribal judges; court administrators; lawyers; tribal administrators; child protective workers; educators; and a tribal chief. The members' spirit of cooperation and perseverance was, by itself, a ground-breaking achievement.

The endeavor could not have succeeded without the professional support of several other entities. The New York State Judicial Institute, as principal sponsor of the event, oversaw every aspect of the Conference, ensuring that its state-of-the-art resources were deployed and that continuing legal and judicial education credit was provided. The Center for Indigenous Law, Governance and Citizenship at Syracuse University College of Law joined as co-sponsor from the earliest stages of the program's development, guiding the curriculum and helping to locate Native speakers. Professor Jo Ann Harris, scholar-in-residence at Pace University School of Law and 2006 Faculty Fellow at the Judicial Institute, served as consultant and project advisor. In addition, the United States Department of Justice, Bureau of Justice Assistance, Office of Justice Programs provided a grant to underwrite travel and accommodation expenses for Native American attendees. Enthusiastic encouragement and wise counsel were provided by the Tribal Judicial Institute<sup>30</sup> at the University of North Dakota School of Law.

The New York State Unified Court System Office of Court Administration and the United States Courts for the Second Circuit were fully committed partners, as were the Native Tribes and Nations: seven of the nine state-recognized Tribes and Nations sent presenters. A total of 140 participants – members of the federal and state judiciary and all nine Tribes and Nations – attended the Conference in Syracuse.

### Conference Programs

#### Opening the Conference

On April 26, 2006, a Wednesday night, the New York Listening Conference opened with words of thanksgiving – The Words That Come Before All Else – from the Tadodaho, Sidney Hill, spiritual leader of the Haudenosaunee and the Onondaga Nation, followed by welcoming remarks from the Tribal Courts Committee and Conference co-chair, Justice Edward Davidowitz. Todd Weber, a Tribal Courts Committee member, opened the conference as moderator of the evening program

addressing principles of restorative justice and its use in traditional tribal judicial systems. Rena Smoke, coordinator of the Mohawk Council of Akwesasne Restorative Justice Program and director of its Akwesasne Community Justice Program, discussed the scope of services and inter-agency cooperation among the Akwesasne Justice Department, the State of New York, and the Provinces of Quebec and Ontario, Canada. She explained that restorative justice focuses on the harm of the wrongdoing, rather than on rules broken, and demonstrations of concern and commitment to the victims: the goal is to restore victims through actions of the wrongdoer in the presence of the community.

The Akwesasne Community Justice Program uses clan mothers and other community members as peacemakers who listen to both sides and guide participants through the justice process. Peacemakers are not decision makers and do not assume roles analogous to those of state court

Council of the Shinnecock Tribe, also spoke about restorative justice.

### Morning Events

On Thursday, April 27, 2006, the Conference reconvened. Justice Marcy Kahn opened the proceedings, taking note of the remarkable gathering of state and federal judges, tribal justice system representatives and tribal leaders. Greetings were also offered by the Honorable Ann Pfau, First Deputy Chief Administrative Judge of the New York State Unified Court System, and by the Honorable Richard C. Wesley, Circuit Judge of the United States Court of Appeals for the Second Circuit, on behalf of their respective Chief Judges.

Brian Patterson, a member of the Oneida Indian Nation Men's Council, also welcomed the assemblage, focusing his remarks on the Guswhenta, or two-row wampum belt.<sup>31</sup> He explained that it represented two

## Clan mothers and other community members are used as peacemakers to listen to both sides and guide participants through the justice process.

judges. Rather, they closely resemble facilitators who assist in bringing the parties to an acceptable, and just, solution. Both the perpetrator and the victim must agree to the process, and only misdemeanors may be settled in this manner. Ms. Smoke concluded by observing that the greatest challenge facing the Mohawk people has been the creation of a judicial and criminal court system that would embrace traditional cultural values while successfully working with federal and local procedures, both in Canada and the United States.

Murray MacDonald, a Crown Attorney for Stormont, Dundas and Glengarry Counties, Province of Ontario, provided a prosecutor's perspective on the Akwesasne restorative justice program, observing that his initial skepticism yielded to great enthusiasm for the program. MacDonald also noted that Canadian law favors the restorative justice approach to sentencing. He explained that although the provincial courts are not bound by findings from hearings conducted by clan mothers and peacemakers, they are generally followed.

In the second portion of the evening program, Valerie Staats, a Mohawk Turtle Clan Mother from the Six Nations/Grand River reservation in Ontario, Canada, and the President of the Native American Council on Alcoholism and Substance Abuse, Inc., presented a talk titled "Rekindling the Sacred Fires: Empowering Change, Transformation and Healing in Indian Country." She addressed issues of addiction, their relation to the punitive judicial process and the restorative and healing processes. Reverend Mike Smith, a member of the Men's

vessels traveling side by side, neither forcing its way into the other nor trying to steer the other, symbolic of the relationship between the Haudenosaunee and the federal and state governments. A lively, traditional welcoming dance by the Niagara River Iroquois Dancers followed.

The first substantive session of the morning, "Indian Country Jurisdiction 101: An Historical Review of Native American Tribal Sovereignty as Reflected in Federal and New York State Indian Law," presented the history of the exercise of sovereign jurisdiction by the Indian Nations since the founding of this country, discussing pertinent United States Supreme Court decisions, acts of Congress and federal and New York State executive policy.

Professor Robert Odawi Porter, a member of the Seneca Nation of Indians and Senior Associate Dean for Research, Professor of Law, and Dean's Research Scholar of Indigenous Nations Law at the Syracuse University College of Law, discussed the historical perspective of state and Indian affairs and the unique relationship between New York and the Indian Nations. While displaying the Guswhenta, Professor Porter explained that New York embraced an active role in Indian affairs and had followed the two-row wampum ideal for much of its history. The foundation for this relationship, he explained, was the Treaty of Canandaigua in 1794.<sup>32</sup>

Professor Jo Ann Harris followed, noting that, with few exceptions, the federal government has asserted primacy over the states in Indian affairs. She explained that

CONTINUED ON PAGE 16

this position is rooted in the constitutional principle<sup>33</sup> that Indian nations are sovereigns and that, absent a specific delegation to states, only Congress has the power to engage in dealings with them that could affect their sovereign jurisdiction.

Forum delegate Peter D. Carmen, General Counsel of the Oneida Indian Nation, next described the interrelationship between jurisdiction and sovereign immunity in his primer titled "Indian Country Jurisdiction 101."

Professor Carrie Garrow, a member of the St. Regis Mohawk Tribe and the Executive Director of the Center for Indigenous Law, Governance and Citizenship at Syracuse University College of Law, emphasized the primacy of treaties and the importance of knowing the

The constitutional principle is that Indian nations are sovereigns.

context in which they were written. She encouraged the audience to endeavor to understand the viewpoints of the federal, state and tribal governments, to better appreciate the significance of each treaty to the tribe.

The second session of the morning covered a representative group of the tribal justice systems in New York. Justice Davidowitz, as moderator, introduced the panelists: Joseph J. Heath, General Counsel for the Onondaga Nation; and Forum delegates Honorable Stewart Hancock, Chief Appellate Judge for the Oneida Indian Nation Court and a former Associate Judge of the New York Court of Appeals; Honorable Robert Pierce, Administrative Judge of the Supreme Court of the Seneca Nation of Indians and Councilor with the Seneca Nation Council; and Chief Harry B. Wallace, the elected Chief of the Unkechaug Nation Tribal Council. Each chronicled the history of the justice system of their respective Nations and made several proposals. Summaries of their remarks were distributed to the attendees and are briefly recounted below.

**The Onondaga Nation.** The Onondaga Nation does not have a separate court system, written laws or statutes. Instead, the Nation employs a community-based dispute resolution system originating at the clan level with its clan mothers. This involves an oral system of traditions and precedents that have existed for hundreds of years. If a solution is not reached, or a dispute is not resolved by the clan mothers, the issue is then brought to the tribal council, or to the longhouse where the parties can present their cases. They and the chiefs attempt to reach a consensus solution that will hold the wrongdoer responsible, benefit the community and help affected individu-

als. There is no police force, but there is a Nation patrol and a neighborhood watch. The Nation has entered into a written agreement with the Onondaga County Sheriff's Office: law enforcement officers may not enter the reservation unless invited by a chief or required to do so because of a life-threatening situation.

Criminal cases can be referred to the Onondaga Town Justice Court and can be returned by that court to the Nation if the offender accepts responsibility and the authority of the Nation. It is the Nation's belief that the community-based dispute resolution system founded on principles of restorative justice is a more beneficial way to resolve minor criminal matters.

**The Oneida Indian Nation.** In 1997, this Nation established a trial court, a peacemakers' division and a court of appeals. A court clerk was appointed as well as trial and appellate judges, who serve alternate terms. The Nation also enacted comprehensive penal law, criminal procedure law and civil procedure acts, which largely follow their respective counterpart statutes under New York State law. Criminal jurisdiction is limited to offenses committed by Indians on reservations and that constitute misdemeanors under New York law.<sup>34</sup> Civil jurisdiction extends to matters relating to conduct, activities or undertakings on the reservation. The rules of civil procedure, which generally follow the New York Civil Practice Law & Rules, apply to such actions.

Most criminal trials are held before a judge, without a jury, unless expressly requested by the defendant. A jury consists of six members selected from the Nation. The maximum sentence on all crimes is imprisonment for one year and/or a fine not to exceed \$5,000. In any event, sentencing emphasizes restitution or the offender's reconciliation with the victim and the Nation; an offender is expected to right his wrongdoing. In large part, rules of evidence codify rules found in New York case law.

In 2000, the Oneidas created their own juvenile justice system, which governs children under the age of 16 who reside on the reservation and who are alleged to be juvenile offenders. Hearings are private – only interested parties may attend – and the proceedings are not considered criminal. Disposition options include placing the child with a guardian or relative, or in an institution, and restitution.

**The St. Regis Mohawk Tribe.** The St. Regis Mohawk Tribe has enacted a vehicle and traffic code and has its own traffic court. There are two peacemaker judges, whose decisions may be appealed to the tribal council. The Tribe also maintains its own police force which has nearly concluded the process of being officially recognized by the state of New York.

The Tribe is currently developing a family court, which is expected to begin operating in the spring of 2007. The court will address all aspects of family life and will have health and human services personnel, as well

as members of law enforcement and court administrative personnel, on its staff. The Tribe is currently determining the litigation and dispute resolution procedures to be used by its newest court.

*The Seneca Nation of Indians.* The Constitution of the Seneca Nation of Indians established a tribal court system composed of a peacemakers' court, a surrogate's court and a court of appeals for each of its two principal reservations. All court judges are elected to four-year terms. The peacemaker court, composed of three judges, handles disputes between Indians on each reservation. Its decisions can be reversed by the court of appeals, which is composed of six judges. That court's judgments are subject to appeal to the tribal counsel. Decisions by the tribal counsel are final and cannot be appealed.

The principles of substantive law upon which the courts rely are known as the "archives." Each court has a set of civil procedure rules. A judiciary law contains procedures for administrating the different courts.

*The Unkechaug Nation.* The Unkechaug Nation does not have a formal tribal justice system; matters are generally referred to the New York state courts. However, the Nation requests that its laws, customs and traditions be considered as the first choice of law when litigating issues in the New York courts, according to Chief Wallace. Regulations adopted in 1964 also provide that a violation of tribal rules may be brought before the tribal council, which, in turn, may refer state law violations to the Suffolk County police department. The Chief made clear, however, that this grant of jurisdiction was not intended to yield sovereignty issues to the state of New York.

### Afternoon Session

At the morning session's conclusion, participants were treated to a stirring lunchtime keynote address by Chief Oren Lyons, Faithkeeper of the Onondaga Nation. Afterward, the Conference resumed with two concurrent sessions.

One panel focused on Indian children in the state family courts. It used frequently encountered scenarios to illustrate ICWA and its application in New York. Discussion was moderated by Justice Hugh Gilbert, Non-Native Co-Facilitator of the Forum, Supervising Judge of the Family Courts for the Fifth Judicial District and Chair of the Supervising Judges of the Family Courts outside the city of New York. The first speaker, James Bay, Assistant Executive Director of the St. Regis Mohawk Tribe Administration, spoke about the work of the Tribe on youth cases and its efforts to end youth displacement from the Nation. He emphasized the need for a tribal voice in proceedings dealing with Indian children in New York state courts.

Margaret Burt, an attorney specializing in trial and appellate work in the area of child welfare, answered questions regarding the use and interpretation of ICWA.

## Indian Nations and Reservations in New York State<sup>1</sup>

### Cayuga Nation of Indians

1,000 enrolled members.

Office: North Collins, Erie County

### Oneida Indian Nation

630 enrolled members.

*Oneida Nation Territory*

Madison County (17,000 acres)

### Onondaga Nation

1,475 enrolled members.

*Onondaga Reservation*

Onondaga County (7,300 acres)

### St. Regis Mohawk Tribe

8,000 enrolled members.

*St. Regis Mohawk Reservation*

Franklin County (14,640 acres)

### Seneca Nation of Indians

6,400 enrolled members.

*Allegany Reservation*

Cattaraugus County (22,640 acres)

*Cattaraugus Reservation*

Erie, Cattaraugus and Chautauqua Counties

(21,680 acres)

*Oil Springs Reservation*

Allegany and Cattaraugus Counties (1 square mile)

### Tonawanda Band of Senecas

1,200 enrolled members.

*Tonawanda Reservation*

Erie, Genesee, and Niagara Counties (7,549 acres)

### Tuscarora Nation

1,200 enrolled members.

*Tuscarora Reservation*

Niagara County (5,700 acres)

### Shinnecock Tribe

1,300 enrolled members.

*Shinnecock Reservation*

Suffolk County (400 acres)

### Unkechaug Nation

283 enrolled members.

### Poosepatuck Reservation

Suffolk County (60 acres)

### 1. Sources:

New York State Office of Children and Family Services, *A Proud Heritage* 62-63 (2001).  
Shinnecock Nation Official Web site: <<http://www.shinnecocknation.com/history.asp>> (last visited July 28, 2006).

The Six Nations of the Iroquois. See <[http://tuscaroras.com/pages/history/six\\_nations.html](http://tuscaroras.com/pages/history/six_nations.html)> (last visited July 28, 2006).

U.S. Census Bureau, *Census 2000 Summary File 1*. See <[http://factfinder.census.gov/servlet/GCTTable?\\_bm=y&-geo\\_id=04000US368-&-box\\_head\\_nbr=GCT-PH18-ds\\_name=DEC\\_2000\\_SF1\\_U8-format=SF-8](http://factfinder.census.gov/servlet/GCTTable?_bm=y&-geo_id=04000US368-&-box_head_nbr=GCT-PH18-ds_name=DEC_2000_SF1_U8-format=SF-8)> (last visited July 31, 2006).

U.S. Environmental Protection Agency Indian Program. See <<http://www.epa.gov/Region2/nations/index.htm>> (last visited July 28, 2006).

She discussed the need to follow ICWA and, particularly, the often-overlooked aspect of ICWA that requires a Nation to be treated in the state courts as, essentially, a third parent with its own rights.

Jamie E. Gilbert, a Tuscarora Home School Coordinator at the Niagara Wheatfield School District in Sanborn, New York, addressed the social services, child protective and foster care services available to Indian children in state family courts. She characterized the Tuscarora Nation's experiences in state court as difficult and reminded the audience that courts should always respect and recognize the importance of clan mothers who intervene in ICWA cases as representatives of the Nation.

The other, concurrent afternoon session, "Criminal Jurisdiction in Indian Country: the Application of 25 U.S.C. § 232," was moderated by Justice Kahn and included three panelists: Forum member Honorable Hugh Scott, United States Magistrate Judge, Western District of New York; Peter Carmen; and Professor Harris. The panel discussed a series of hypotheticals illustrating situations frequently encountered by the courts, and addressed the effect of federal law on the jurisdiction of state courts over crimes committed by Natives or non-Natives in Indian country and on the authority of tribal courts to conduct criminal prosecutions, and the extent and limits of federal criminal jurisdiction.

The final afternoon plenary session was titled "Problem-Solving: Hopes/Wishes for Justice Systems and the Interface Between Native and Non-Native Justice Systems." The panelists were Ms. Gilbert; Marguerite A. Smith, Esq., Shinnecock Tribal Representative, member of the Suffolk County Executive Task Force to Prevent Family Violence; Andrew Thomas, Chief of the St. Regis Mohawk Tribe Police Department; and Chief Oren Lyons. The speakers addressed areas of successful cross-jurisdictional efforts and identified others where similar initiatives might be fruitful, including the development of jurisdictional protocols. The group also emphasized the need for state courts to recognize the role of clan mothers; to continue educational efforts to understand the different cultures and communities within the different Indian Nations; to reach agreements between the Nations and

the state on law enforcement and security issues; and to confront racism and issues of inequality.

Participants at the conference were also treated to generous expositions of Indian culture. Members of several Nations displayed and offered for sale their crafts, jewelry and beadwork. The conference ended with a ceremonial dance performed by the Oneida Nation Dancers and a traditional concluding message by the Tadodaho, Sidney Hill.

The feedback from those who attended the Listening Conference was overwhelmingly positive. This groundbreaking event enabled its participants to learn from one another in novel ways, thereby furthering understanding of one another's respective concepts of justice.<sup>35</sup> Even judges from judicial districts that do not encompass Indian territory learned that they, too, can be affected by emerging trends in Indian law.<sup>36</sup>

### Next Steps

The programs and accomplishments of the First New York Listening Conference will be memorialized through the issuance of a publication under the auspices of the United States Department of Justice, Bureau of Justice Assistance. Additionally, the Forum will pursue strategies suggested at the Conference, for example, by convening regional small group meetings to address discrete local problems in particular judicial districts. One such gathering will bring together tribal clan mothers with law guardians who handle ICWA cases to educate the latter group on principles of governance and culture of the Tuscarora Nation. In addition, the clerks of the tribal courts resident in New York will have the opportunity to attend the annual training seminar offered by the New York State Association of Magistrates Court Clerks. State and federal judges from the Tribal Courts Committee will continue the committee's program of visits to New York's Indian country to meet directly with tribal leaders. The Judicial Institute will develop additional training programs based on the Listening Conference for judges of courts of record as well as town and village justices.

All in all, the participants in the First New York Listening Conference felt they had created a blueprint for building solid bridges between Native and non-Native justice systems in our state, while respecting their discrete, parallel pathways, as symbolized by the Guswhenta. ■



1. Clan mothers are tribal officials who represent their clans and are responsible for the welfare of the community. They are often instrumental in selecting the chiefs and have the power to remove them if their actions do not benefit the clan. The position is hereditary. See <<http://sixnations.buffnet.net/Culture>> (last visited July 19, 2006).

2. See "New York's Tribal Courts Committee and Forum," *infra*, for a description.

3. The New York State Judicial Institute, located in White Plains, is a year-round center for education and research designed to enhance the quality of the courts and ensure judicial excellence in New York. Inaugurated on May 5, 2003,



the Judicial Institute is the first judicial research and training facility built by and for a state court system.

4. The Center for Indigenous Law, Governance and Citizenship is a research-based law and policy institute focused on indigenous nations, their development and their interaction with the United States and Canadian governments. See <<http://www.law.syr.edu/academics/centers/ilgc>> (last visited July 17, 2006).

5. See "New York's Tribal Courts Committee and Forum," *infra*.

6. New York State Office of Children and Family Services, A Proud Heritage, at 1 (2001) available at <<http://www.ocfs.state.ny.05/main/publications/Pub4629ProudHeritage.pdf>>.

7. *Id.*

8. Three governmental bodies exist within the Akwesasne territory: the Mohawk Nation Council, which has its roots in the original Six Nations; the St. Regis Mohawk Tribe, which is the body of tribal governance recognized by the governments of the United States and the state of New York, and which operates in territory within the state of New York; and the Mohawk Council of Akwesasne, which operates entirely within the boundaries of Canada. Unless otherwise indicated, the references to the Mohawk people in this article will be to the St. Regis Mohawk Tribe.

9. The Seneca Nation formerly consisted of two separate tribal organizations, each recognized by the State of New York: the Seneca Nation of Indians, which occupies the Cattaraugus and Allegany reservations, and the Tonawanda Band of Seneca Indians, having its own reservation near Akron, New York. The Seneca Nation of Indians is currently recognized as the Seneca Nation by the governments of the United States and the State of New York. The Tonawanda Band, like the Onondagas, the Tuscaroras and the Cayugas, and in contrast with the Seneca Nation of Indians, still retains the traditional form of tribal government of the Haudenosaunee Confederacy, which involves government based on consensus. *Pootry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 877 n.1 (2d Cir. 1996); see "First New York Listening Conference," *infra*, for a discussion. In this article, the two Nations will be referenced separately and by their currently recognized names.

10. A more detailed description of some of these justice systems was presented at the Listening Conference and is discussed in "First New York Listening Conference," *infra*.

11. See *U.S. v. Lara*, 541 U.S. 193, 210 (2004) (criminal jurisdiction); Indian Civil Rights Act, 25 U.S.C. § 1301(2), (4).

12. Ralph J. Erickstad & James Ganje, *Tribal and State Courts: A New Beginning*, 71 N.D. L. Rev. 569 n.1 (1995); National Center for State Courts, History of the Conference of Chief Justices, at 14 (1993) ("CCJ History"), available at <<http://ccj.nscs.dni.us/HistoryP11.pdf>> (last visited July 31, 2006).

13. 476 U.S. 877 (1986); *Three Affiliated Tribes v. Wold Eng'g*, 467 U.S. 138 (1984). In those cases, a federally recognized Indian tribe living on the Fort Berthold reservation in North Dakota sued in North Dakota state court for negligence and breach of contract in connection with a non-Indian defendant's construction of a water supply system on Indian land. The Court held that the application of a North Dakota statute, which had conditioned resort by Indian tribes to jurisdiction of state courts for purposes of bringing suit against non-Indians on tribes' waiver of sovereign immunity and consent to application of state law in all cases, was impermissible and was preempted by federal law. See CCJ History *supra* note 12, at 29-30.

14. Erickstad & Ganje, *supra* note 12, at 570-73.

15. *Id.* at 571.

16. *Id.* at 572.

17. Marcy L. Kahn, address at meeting of New York Federal-State-Tribal Courts Forum Planning Group, May 22, 2003, at 2 (on file with the authors).

18. In addition to co-chairs Kahn and Davidowitz, the original members of the New York Tribal Courts Committee included the Honorable John F. Keenan, United States District Judge for the Southern District of New York; Karen Milton, Esq., Circuit Executive for the United States Courts for the Second Circuit; Mizzi Diamond, Esq., Executive Assistant to the Deputy Administrative Chief Judge for the Courts Outside of New York City; and Todd Weber, Esq., Principal Law Clerk to the Honorable Jan Plumadore, New York State Supreme Court Justice and Administrative Judge for the Fourth Judicial District. The Committee currently includes judges and court administrators from federal and state courts throughout New York.

19. In order to focus its efforts on developing solutions to conflicts and working toward mutual understanding, the group has entirely excluded from all of its discussions, including those held at the Listening Conference, any reference to issues of taxation, land claims, gaming and matters in litigation.

20. Indian Child Welfare Act, 25 U.S.C. §§ 1901-1923.

21. Minutes of meeting of New York Federal-State-Tribal Courts Forum Planning Group ("Planning Group Minutes"), May 22, 2003, at 2 (on file with the authors). See Indian Child Welfare Act, 25 U.S.C. § 1912(a); 18 N.Y.C.R.R. § 431.18(c).

22. Planning Group Minutes, May 22, 2003, at 2-3.

23. *Id.* at 3-5.

24. Planning Group Minutes, Nov. 3, 2003, at 1 (on file with the authors). Participants also suggested the creation of a database which would include relevant tribal laws, codes, traditions and precedents, for reference by state court judges in cases in which such information is relevant and for interested tribes. Several of the Nations have submitted copies of their written laws which are currently housed at the Judicial Institute. *Id.*

25. Meeting space has been provided through the generosity of the United States Courts for the Second Circuit and the leadership of Chief Judge John M. Walker. Logistical assistance has been facilitated by the Honorable Norman Mordue, Chief Judge of the United States District Court for the Northern District of New York, and Karen Milton, Esq., Circuit Executive for the United States Courts for the Second Circuit.

26. *Id.* at 1. These Nations all operate within the Grand Council of the Haudenosaunee.

27. Planning Group Minutes, Nov. 3, 2003, at 2-3.

28. *Id.* at 1-2.

29. Transcript of meeting of New York Federal-State-Tribal Courts Planning Group, Mar. 24, 2005, at 28, 36-37. See "New York's Tribal Courts Committee and Forum," *supra*.

30. The Tribal Judicial Institute at the University of North Dakota School of Law, founded in 1993, provides technical assistance and training to tribal justice system personnel throughout the country. See <[www.law.und.nodak.edu/npic/judicial/index.php](http://www.law.und.nodak.edu/npic/judicial/index.php)> (last visited on July 24, 2006).

31. The two-row wampum, or Guswhenta, commemorates treaties of the Haudenosaunee with the United States and other nations. It represents the sovereignty of the Six Nations. The two rows of dark wampum symbolize two canoes traveling down the same river. Though they are traveling side by side, the boats do not cross paths. One represents the Haudenosaunee people, as well as their religion and traditions, while the other represents the other nation and its culture. The belt symbolizes that the two entities will never try to steer the vessel of the other; neither will they interfere with the internal affairs or beliefs of the other. The dark wampum is separated by three rows of white wampum, which symbolize peace, respect and friendship forever. See <<http://www.akwesasne.ca/kaswentha.htm>> (last visited July 19, 2006).

32. 7 Stat. 44 (Nov. 11, 1794). Signed by the Chiefs of the Six Nations of the Haudenosaunee and by representatives of the United States, the Treaty of Canandaigua established the peace and friendship between the United States and the Six Nations of the Haudenosaunee and acknowledged the lands reserved to the Onondaga Nation, Oneida Nation, Cayuga Nation and Seneca Nation.

33. U.S. Const. art. I, § 8.

34. The Indian Civil Rights Act prohibits tribal courts from imposing any criminal penalty that exceeds imprisonment for a term of one year. 25 U.S.C. § 1302(7); see Major Crimes Act, 18 U.S.C. § 1153 (re-posing exclusive jurisdiction in the federal government to prosecute certain enumerated major felonies).

35. This effort was aided by conference materials which were distributed on CDs, and which included reference materials on the New York Indian Nations, their culture and history, as well as a bibliography offering hyperlinks to other reference sources.

36. See, e.g., *In re Baby Boy C.*, 27 A.D.3d 34, 805 N.Y.S.2d 313 (1st Dep't 2005), which was discussed during the afternoon ICWA session. (Appellate Division, First Department declined to adopt the "existing Indian family" exception, which avoids application of ICWA in certain cases, holding that ICWA applied in case of private adoption, irrespective of whether the Indian child's birth parents had significant connections to the tribe; case originated in New York County).