The Promise of Client-Centered Professional Norms

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In this year's Saltman Lecture, Jennifer Gerarda Brown and Liana G.T. Wolf argue that restorative justice models have much to offer a broken attorney disciplinary system.[1] While their specific proposals are problematic for reasons discussed more fully below, there is considerable merit to the authors' larger point that the lawyer disciplinary system could benefit from incorporating a greater level of client participation. The authors point to a number of the benefits of a more client-participatory attorney disciplinary system, including the opportunity for lawyers to better appreciate the consequences of their misconduct, the opportunity to focus on repairing the harm done to clients, and the opportunity to restore the public's faith in the fairness and legitimacy of the legal system.[2] This Comment focuses primarily on an additional benefit that might flow from more client-participatory attorney disciplinary proceedings: by opening the disciplinary process to the perspectives of clients, the legal profession gets the opportunity to evolve more client-centered norms of professional conduct.

The attorney disciplinary system, Brown and Wolf argue, is overburdened with complaints, the majority of which are based on neglect of client matters and failure to communicate with clients.[3] Complaints are made disproportionately against lawyers in small or solo practice and can largely be attributed to structural challenges: the economic pressure of high volume individual client practice with minimal infrastructural support, which precludes adequate communication and allows cases unintentionally to slip between the cracks.[4] These problems may be exacerbated in some cases by a lawyer's depression or alcohol abuse, which can cause case management to spiral out of control.[5] Relatively few cases involve serious fraud or intentional misconduct.[6]

For clients whose problems begin with poor communication from their attorneys, the disciplinary system treats them to more of the same. Many complaints are summarily dismissed without further investigation.[7] Others languish for a year or more before being resolved, and only a handful result in formal sanctions.[8] Complainants have limited rights to notice and participation in dis-

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[1] Jennifer Gerarda Brown & Liana G.T. Wolf, *The Paradox and Promise of Restorative Attorney Discipline*, 12 Nev. L.J. 1, 254–55 (2012).

[2] *Id.* at 282.

[3] *Id.* at 259–60.

[4] *Id.* at 260.

[5] *Id.*

[6] *Id.* at 259.

[7] *Id.* at 258.

[8] *Id.* at 262.

ciplinary proceedings; in many states, they are not even entitled to a copy of the lawyer's response to their complaints.[9] Attorney discipline is handled as a dispute between bar counsel and the transgressing lawyer, leaving clients out in the cold.[10]

The authors argue that restorative justice models, which have been successfully adopted in criminal and juvenile delinquency proceedings as well as in a variety of other settings, offer unique possibilities for improving the attorney discipline system.[11] As a method of social discipline, they argue, restorative justice programs can balance the need in the attorney discipline system for both control and support.[12] The combination of control and support is lacking in traditional attorney disciplinary systems, which either exhibit high control over errant lawyers through serious sanctions like disbarment or emphasize support for lawyers through educational or treatment programs.[13] By bringing complaining clients face-to-face with the lawyers whose actions or inattention has harmed them, providing an opportunity for lawyers to understand the concrete ways in which their violation of professional rules has caused harm, and by involving a broader range of community stakeholders to deliberate about the appropriate sanctions or reparations, the authors argue that a restorative disciplinary system can both hold lawyers accountable and support their underlying needs.[14]

Although restorative justice models are beneficial in many ways the authors' specific proposals for applying these models to attorney disciplinary processes leaves unanswered many basic questions about fit and implementation. Although the authors' main point is that more client participation in attorney disciplinary systems would be beneficial,[15] they have not made a convincing case for the necessity or appropriateness of the additional apparatus of restorative justice they propose. The authors note that in the restorative attorney discipline processes they envision, a broader and more diverse group of stakeholders, such as family members, law partners, and representatives of malpractice insurance, might be involved in circle discussions that focus on the harm caused by the lawyer's malfeasance and the most appropriate disciplinary response.[16] This suggestion arises by analogy to restorative justice programs like family group conferencing and sentencing circles.[17] However, the authors have not grounded the call for such processes in a detailed analysis of how and where disciplinary complaints fit within the spectrum of restorative justice responses in the criminal justice system.

The authors concede that there has been very little study of what complainants in disciplinary proceedings want, but quickly conclude that "[b]ecause the role of complainants in discipline is so similar to the role of

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[9] *See id.*
[10] *Id.*
[11] *Id.* at 2–3.
[12] *Id.* at 275.
[13] *Id.* at 275–77.
[14] *Id.* at 274.
[15] *Id.* at 254.
[16] *Id.* at 255–56.
[17] *Id.* at 254–55.

victims in criminal prosecutions," they must want the same things that crime victims want.[18] The assumption that complainants in attorney disciplinary cases are like crime victims begs, rather than answers, the question of fit. Although complainants in attorney disciplinary cases may be treated like crime victims in criminal prosecutions, in that they are shut out of attorney discipline processes except when needed as witnesses,[19] it does not follow that they have the same needs for restorative justice processes that crime victims have. Aggrieved clients might be better analogized to contract or tort plaintiffs pursuing private disputes with their lawyers, rather than victims of crime who have experienced deeper violations of their senses of safety, security, and personal integrity. If contract or tort disputants are the better analogy, it is unclear why more traditional mediation processes in which disputing parties work out a limited settlement of their private dispute would not be a perfectly adequate way—and perhaps the most appropriate and satisfying way from a client's point-of-view—to be more involved in the process.

Even accepting the analogy of aggrieved clients to crime victims, the category of "crime victim" is itself diverse, ranging from victims of domestic violence by intimate partners, to store clerks who have been robbed at gunpoint, to college students who have been date-raped, to business owners victimized by juvenile shoplifters, to city park managers battling to clean up graffiti, to homeowners whose homes were broken into while they slept. The value and appropriateness of restorative justice responses may differ among these types of criminal cases based on: the age, vulnerability, and maturity of the victim and the offender; the kind of violation the victim experienced; and the existence of a prior relationship between the offender and the victim. The authors do not tap into the richness and nuance of this diversity by exploring where the prototypical attorney disciplinary case fits along the spectrum of existing restorative justice responses to various types of cases in the criminal justice system and elsewhere.

Particularly puzzling is the authors' call for a greater involvement of multiple stakeholders in restorative attorney disciplinary processes, such as the lawyer's family, the aggrieved client's family, the lawyer's law partners and malpractice insurers, and anyone involved in treatment programs or support groups for the lawyer.[20] This is an important piece of the argument because, according to the authors, the involvement of multiple stakeholders is the primary advantage that their proposed restorative attorney discipline processes hold over existing mediation alternatives.[21] However, unlike the involvement of families in juvenile cases, which arises out of the insight that a child's delinquent behavior is often inextricable from the dynamics of discipline or dysfunction within the child's family, the connection between a lawyer's professional misconduct and the lawyer's family issues are not immediately obvious.

The connection between a lawyer's individual misconduct and unhealthy dynamics within the lawyer's firm is more obvious and seemingly more appropriate. In larger law firms, individual lawyers may be caught within a culture of

[18] *Id.* at 278.
[19] *Id.*
[20] *Id.* at 304.
[21] *Id.* at 268.

questionable litigation tactics, irresponsible billing practices, and supervisory hierarchies that tolerate unethical behavior; it may be difficult to extricate the unethical behavior of the lawyer from the dynamics of the firm.[22] However, as the authors note, the run-of-the-mill neglect and failure-to-communicate cases that dominate lawyer disciplinary proceedings arise largely in solo or small-firm practices, and the questionable business practices that drive the misconduct result largely from lawyers' individual decision-making.[23] Even the "prototypical case"[24] the authors have constructed to demonstrate the need for restorative attorney discipline provides no clues about why a larger and more diverse group of stakeholders would be appropriate or beneficial. In that hypothetical case, a solo practitioner named John Wilson neglects a deadline in a case involving a small businessman named Tom Taylor; yet Wilson has no law partners and the family members of Wilson and Taylor are never discussed.[25]

The authors leave unanswered additional questions about the stage at which restorative disciplinary processes would be utilized and how those cases would be screened and selected. The authors do not clarify whether the restorative disciplinary circles they envision would occur in lieu of investigation, would be used for fact-finding, or would address the question of appropriate discipline once a violation had been stipulated or found.[26] This question is central to the issue of fit between the restorative disciplinary solution the authors propose and the problems with traditional attorney disciplinary systems that they identify. In their discussion of the problems with traditional attorney disciplinary systems, the authors focus on the large number of cases that are summarily dismissed without investigation, noting that the large number of summary dismissals is a leading cause of public dissatisfaction with the lawyer disciplinary system.[27] However, in their discussion of restorative justice programs, the authors note that multiple stakeholder dispositional processes like sentencing circles are "rarely used for first time offenders and relatively 'minor' criminal activities" precisely because they require a high level of investment from community stakeholders.[28] Even more modest victim-offender dialogues require a relatively robust commitment of resources; the authors explain that prior to

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[22] *See generally* Ted Schneyer, *Professional Discipline for Law Firms?*, 77 CORNELL L. REV. 1 (1991) (calling for firm-level discipline to address the lack of fit between individual discipline and group law practice).

[23] Brown & Wolf, *supra* note 1, at 260.

[24] *Id.* at 261.

[25] *Id.*

[26] The authors state that restorative processes would not be appropriate for disciplinary cases where the lawyer denies the underlying charges of misconduct, suggesting implicitly that they are dispositional rather than fact finding proceedings. *Id.* at 310. At another point, however, they state the goal of multiple stakeholder circles is "to give input into the fact finding processes, help make some decisions about the appropriate sanctions to be imposed, and make commitments about how they will aid the attorney in performing the tasks assigned him," suggesting that the process would replace fact-finding at a traditional hearing. *Id.* at 304. At still another point, they suggest that a benefit of restorative justice processes would be "helping complainants to understand when negative outcomes are not the result of professional failure on the attorney's part," suggesting that the processes should be utilized even in cases where there is no actual rule violation, but merely a complaint. *Id.* at 282.

[27] *Id.* at 264–65.

[28] *Id.* at 290.

conducting a victim-offender dialogue, the mediator will first meet with each participant separately to explain the process.[29] But, if an already overburdened attorney disciplinary system is to invest in the more cumbersome restorative justice processes proposed by the authors, it would run the risk of aggravating rather than alleviating the larger problem of summary dismissal of the majority of complaints. Moreover, as the authors point out, a poorly administered restorative justice system can be worse, from the victim's point of view, than no restorative justice system at all.[30]

Despite these unanswered questions about the implementation of restorative justice processes in attorney disciplinary proceedings, there is considerable merit to the authors' more general point that lawyer disciplinary systems could benefit from incorporating a greater level of client participation, something that the authors tell us well-designed diversion and mediation programs already do.[31] As the authors explain, the opportunity for the client to give specific voice to the harm caused by the lawyer's actions or neglect has benefits for both the client and the lawyer: by bringing lawyers face-to-face with the clients they have harmed, a lawyer's "wrongdoing is discussed not just in the abstract or technical terms of the rules, but also in terms of the concrete consequences for the person most negatively affected."[32] In turn, the lawyer's feelings and perspective on the harm may expand "from mere embarrassment about a series of mistakes (e.g., neglecting a matter, failing to return phone calls, and missing a filing deadline) to a fuller sense of shame and sorrow about the consequences those mistakes had on other people (e.g., their frustration, confusion, or additional economic loss)."[33]

Such experiences of face-to-face discussion of concrete harm hold out the promise of an additional benefit not discussed by the authors: an opportunity for the legal profession to evolve better client-centered norms of professional conduct. To many commentators in legal ethics, more client-centered norms may seem to be the last thing that the attorney disciplinary system needs. The problem, in the view of many, is that professional norms already tilt too heavily toward clients and away from the public interest.[34] As I have argued elsewhere,

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[29] *Id.* at 289.

[30] *Id.* at 295.

[31] To the extent that clients are invited to participate in existing mediation and diversion programs, such as the programs in Connecticut and Missouri that the authors discuss, the clients' involvement seems to be grounded in the restorative justice principles that the authors identify. The authors explain that in their home state of Connecticut, the administrator of the negotiated settlement program makes concerted efforts to bring complainants into the discussions about disposition, for the purpose of giving them an opportunity "to confront the lawyer and receive an apology." *Id.* at 266 (quoting an email from Mark Dubois, former chief disciplinary counsel in Connecticut, to author Jennifer Brown). Moreover, they note that some diversion programs include the option of mediation, which gives complainants an opportunity to express the harm done to them by the lawyer's misconduct and a role in shaping the consequences that the lawyer faces. *Id.* at 264.

[32] *Id.* at 303.

[33] *Id.*

[34] For well-articulated versions of this argument, see generally DAVID LUBAN, LEGAL ETHICS AND HUMAN DIGNITY (2007); DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION (2000); WILLIAM H. SIMON, THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS (1998).

however, the profession needs more truly client-centered norms to counteract lawyers' professional tendency to view their clients as walking bundles of legal rights and interests rather than as whole persons.[35] This tendency to "issue-spot" clients and construct their objectives solely in terms of maximizing legal interests can cause lawyers to minimize the importance of the other cares, concerns, commitments, relationships, reputations, and values with which the clients legal interests are intertwined.[36] The call for the legal profession to respond more fully to the actual desires and values of clients is especially apt in the kinds of cases that form the core of our current lawyer disciplinary system: the neglect and lack-of-communication cases that trigger complaints by individual clients against small-firm and solo-practice lawyers.[37] A lawyer who has heard a client's concerns in overly legalistic terms may have actually overlooked the aspects of a client's situation that are most important to the client.

The authors suggest that "factual questions [in disciplinary cases] may raise serious issues about whether violations occurred and, if so, how severe they are, but the underlying rule is rarely in doubt."[38] In my view, exactly the opposite is true; while many of the missteps that ultimately land a lawyer in ethical trouble are clear violations (such as missing a filing deadline), many of the underlying norms of the legal profession are intentionally vague, leaving much of the fine-tuning to the discretionary decision-making of lawyers. The interrelated professional rules governing reasonable communication and the allocation of decision-making between lawyers and clients, which are at the core of much of the client dissatisfaction that triggers bar complaints, are good examples of the ambiguities built into professional norms. For example, ABA Model Rule 1.4, which governs attorney-client communication, states that a lawyer shall "keep the client *reasonably informed* about the status of the matter"[39] and "*reasonably consult* with the client about the means by which the client's objectives are to be accomplished."[40] It also states that a lawyer shall "promptly comply with *reasonable requests* for information"[41] and "explain a matter to the extent *reasonably necessary* to permit the client to make informed decisions regarding the representation."[42] But the rule does little to spell out the degree of communication that it is reasonable for clients to expect from their lawyers.[43] The determination of what level of client participation is necessary

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[35] Katherine R. Kruse, *Beyond Cardboard Clients in Legal Ethics*, 23 GEO. J. LEGAL ETHICS 103, 104 (2010).

[36] *Id.* at 103.

[37] *Id.* at 147–51 (discussing the difficulties inherent in expanding client value-based representation beyond the individual client context).

[38] Brown & Wolf, *supra* note 1, at 297.

[39] MODEL RULES OF PROF'L CONDUCT R. 1.4(a)(3) (2010) (emphasis added).

[40] *Id.* R. 1.4(a)(2) (emphasis added).

[41] *Id.* R. 1.4(a)(4) (emphasis added).

[42] *Id.* R. 1.4(b) (emphasis added).

[43] The commentary to ABA Model Rule 1.4 states that "[t]he client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so." MODEL RULES OF PROF'L CONDUCT R. 1.4 cmt. 5. It goes on to state that "[t]he guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interest, and the client's overall requirements as to the character of representation." *Id.*

to effective representation is spelled out in a different rule, which prescribes that a lawyer must "abide by a client's decisions concerning the objectives of representation and . . . consult with the client as to the means by which they are to be pursued."[44] However, the line between objectives and means is notoriously difficult to draw, leaving the demarcation of ultimate decision-making authority unclear.[45]

In the face of unclear directives in the rules on communication and allocation of responsibility and elsewhere, lawyers must exercise professional judgment about how to act in the highly contextualized situations they confront in law practice.[46] For lawyers whose only concern is to avoid disciplinary sanctions—the prototypical Holmesian "bad men" who care about law only to the extent that it will impose negative consequences[47]—the rules of professional conduct provide a lot of room for lawyer mischief. Because of their punitive nature, traditional disciplinary systems are unlikely to sanction anything less than the most egregious and unreasonable judgments. Some legal ethicists have conflated the freedom to maneuver within the rules with the problem of overzealous client advocacy.[48] The primary problem with this minimal "regulatory" conception, as they see it, is that it crowds out notions of lawyering in the public good with the partisan directive that "the lawyer should defer to her client's instructions and seek to carry them out through any lawful means."[49] However, as others have pointed out, the freedom to maneuver within vague professional rules is not inherently client-centered: lawyers who take a Holmesian "bad man" approach toward lawyer regulation may zealously advocate for high-paying clients but are just as likely to avoid their obligations to their clients when zealous advocacy does not align with their own self-interest.[50] The problem of lawyer self-interest is likely to be aggravated in small and solo practice with clients who are one-shot players with relatively little economic leverage over their lawyers.[51]

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[44] MODEL RULES OF PROF'L CONDUCT R. 1.2(a).

[45] Comments to ABA Model Rule 1.2 suggest that "[c]lients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters," and that "lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected." MODEL RULES OF PROF'L CONDUCT R. 1.2 cmt. 2. Yet, other than the decisions to settle a case or to waive constitutional rights in a criminal case, the rule declines to draw bright lines about how to resolve strategic disagreements between the lawyer and the client. The rule on communication reinforces this general division of responsibility by stating that "a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that are likely to result in significant expense or to injure or coerce others" but that "a lawyer ordinarily will not be expected to describe trial or negotiation strategy in detail." MODEL RULES OF PROF'L CONDUCT R. 1.4 cmt. 5.

[46] *See* SIMON, *supra* note 34, at 195–96.

[47] *See* Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897).

[48] LUBAN, *supra* note 34, at 24–26.

[49] W. Bradley Wendel, *Public Values and Professional Responsibility*, 75 NOTRE DAME L. REV. 1, 9 (1999).

[50] *See* Ted Schneyer, *Some Sympathy for the Hired Gun*, 41 J. LEGAL EDUC. 11, 15–16 (1991).

[51] *Id*. at 23.

For lawyers who aspire to conform their behavior to professional norms that rise above mere avoidance of sanctions, the question is how lawyers are to understand, discover, or interpret those norms. Some of the most interesting recent theoretical work in legal ethics has focused on reinterpreting the norms of client loyalty, partisanship, and advocacy to take account of the role that lawyers play in a liberal democracy.[52] For example, Bradley Wendel has used political and jurisprudential theory to argue that lawyers' primary loyalty should not be to clients themselves, but to advancing and protecting clients' properly interpreted legal entitlements.[53] However, as I have argued elsewhere, the theories emerging from the recent turn toward political and jurisprudential theory in legal ethics tend to position lawyers between clients and the law, requiring lawyers to make professional judgments about what legal interpretations and tactics are legitimate without taking into account the perspectives of their clients about whether the law is worthy of compliance and respect.[54]

In short, the professional understanding of what good lawyering means is highly lawyer-centric. The rules leave it to lawyers to judge the meaning of reasonable communication with clients and to do so within a professional culture that reinforces legalistic conceptions of what clients want. For lawyers concerned only with avoiding sanctions, the reasonable communication standard provides plenty of wiggle room to get away with minimal attention to client concerns, which works to the disadvantage of the very clients who end up filing disciplinary complaints: one-shot clients of solo or small practice lawyers. Even lawyers who aspire to conform their conduct to higher professional norms may be influenced by conceptions of their professional role that give them professional authority to judge and screen the political legitimacy of their clients' goals.

The promise of more client-participatory attorney disciplinary procedures is that they might counteract these lawyer-centric tendencies within legal professional culture and provide a vehicle for importing the perspectives of clients into the definition and interpretation of disciplinary rules and professional norms. Yet, problems in implementing this promise remain. To serve the purpose of reshaping professional norms in ways that better reflect the perspectives of clients, the disciplinary process would have to be open to clients at the earliest stages, the stages at which most complaints are summarily dismissed. It is at these earliest stages, where the system often rejects client complaints as unfounded or *de minimus*, that the most beneficial education of the profession is most likely to occur. However, the prospect that an overburdened lawyer disciplinary system will suddenly absorb a dramatically expanded caseload of *de minimus* violations does not look bright. The more realistic hope for restorative attorney discipline lies in the small spaces at the margins of existing mediation and diversion programs, where the principles of restorative justice have an opportunity to influence and inform local practices. We can only hope that

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[52] *See generally* W. BRADLEY WENDEL, LAWYERS AND FIDELITY TO LAW (2010); DANIEL MARKOVITS, A MODERN LEGAL ETHICS: ADVERSARY ADVOCACY IN A DEMOCRATIC AGE (2008).

[53] WENDEL, *supra* note 52, at 49.

[54] Katherine R. Kruse, *The Jurisprudential Turn in Legal Ethics*, 53 ARIZ. L. REV. 493, 522 (2011).

when clients get a chance in those small spaces to express the harm that their lawyers' inattention or lack of communication has caused, the lawyers will listen.