

THE PARADOX AND PROMISE OF RESTORATIVE ATTORNEY DISCIPLINE

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When a lawyer faces a disciplinary grievance—whether initiated by a client, a fellow attorney, or a third party—something, somewhere, has gone terribly wrong. The attorney-client relationship has been broken or abused in a serious way; a client may feel neglected due to an attorney’s failure to communicate, a fellow attorney may have overcome the reluctance lawyers feel to report each other’s misconduct,¹ or a third party may feel unfairly harmed by a lawyer’s actions and accuse the lawyer of playing outside the rules. Each situation signals a profound breach of trust—trust in the attorney-client relationship, trust in shared professional values and codes of conduct, or trust in the legal system to govern its affairs and the actions of those who advocate within it.

Yet the processes for resolving attorney disciplinary grievances pay little attention to the relationships that have been damaged. Instead, the organized bar’s attorney disciplinary proceedings treat respondent lawyers in much the same way our criminal systems treat defendants: the action is framed as a prosecution, operating between the state and the defendant. Other interested parties are only witnesses rather than active participants or decision-makers. Scuttled aside, poorly informed about the progress of disciplinary proceedings and powerless to affect them, members of the public (and sometimes even members of the profession) can feel alienated and cynical about the legal profession’s legitimacy as a self-regulating entity. Thus, the process designed to remedy the grievance actually adds insult to injury and further estranges the parties from

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¹ Julie Rose O’Sullivan, *Professional Discipline for Law Firms? A Response to Professor Schneyer’s Proposal*, 16 GEO. J. LEGAL ETHICS 1, 52 n.228 (2002).

[D]espite ethical obligations to report misconduct, ‘the National Organization of Bar Counsel informed the Commission that judges and lawyers comprise a very small percentage of all complainants’. . . . [A]lthough the Clark Report identified as a problem the reluctance on the part of lawyers and judges to report instances of professional misconduct in 1970, ‘[r]eporting by lawyers and judges of misconduct is still rare, and, in many instances, is motivated more by a desire to disqualify opposing counsel or gain advantage in a legal matter.’

Id. (quoting ABA REPORT OF THE COMMISSION ON EVALUATION OF DISCIPLINARY ENFORCEMENT 44, 95 (Robert B. McKay chair, 1991)).

each other and from the legal system. Clients lose trust both in the individual lawyers who failed them and in lawyers as a group. Third parties generalize their anger and frustration about one unethical lawyer to the profession as a whole.² And attorneys themselves begin to doubt the integrity of their professional brothers and sisters.³

As James C. Turner, the Executive Director of HALT,⁴ sums it up:

Despite decades of calls for reform, the attorney discipline system is still badly broken . . . [T]he vast majority of consumer complaints are not even investigated or are dismissed on technicalities, while only a handful lead to more than a slap on the wrist. Unscrupulous or incompetent lawyers should be held *accountable to the clients they victimize*, but the current system fails to do so.⁵

Turner and other consumer advocates thus call for prompt investigations, open deliberations, and effective quality control that “weeds out” unethical or incompetent attorneys.⁶ These reformers are probably right that individual attorneys and the profession as a whole cannot gain the public trust fully until such reform is achieved.

We particularly agree that many of the woes and weaknesses of the attorney disciplinary system could be mitigated through increased public participation. By making the disciplinary process more inclusive of victim perspectives and more open to participation from multiple stake holders, attorney discipline can combat cynicism among lawyers and the public they serve, build trust between attorneys and their clients, and foster the professional qualities that are captured in both the mandatory rules of professional conduct for lawyers and the aspirational comments that accompany those rules.

Our contribution to this debate is to envision a specific structure and form for public participation in disciplinary processes. We draw upon theory and practice in the field of Restorative Justice. Developed primarily in the context of criminal and juvenile justice, Restorative Justice⁷ animates diversionary pro-

² According to a 2003 CNN/USA Today Gallup poll, eighty-four percent of Americans do not think lawyers have “high ethical standards.” *How Accountable is the Civil Justice System?*, HALT, http://www.halt.org/about_halt/press_room/pdf/HALT_Statistics.pdf (last visited Jan. 11, 2012). The *National Law Journal* reports that sixty-nine percent of Americans think lawyers value making money more than serving individual clients. *Id.*

³ A majority of lawyers surveyed by the Connecticut Bar Association in 2005 thought that “the public does not perceive them to have high ethical standards” and a third of them believed that business and economic pressures would lead to a decline in ethical standards and practices among lawyers. TASK FORCE ON THE FUTURE OF THE PROFESSION, CONN. BAR ASS’N, SURVEY REPORT 3 (2006), available at https://www.ctbar.org/userfiles/Committees/FutureOfTheProfession/Survey_Report.pdf.

⁴ HALT is a consumer advocacy organization founded in 1978 that seeks to “challenge the legal establishment to improve access and reduce costs in our civil justice system at both the state and federal levels.” See *About HALT*, HALT, http://www.halt.org/about_halt/ (last visited Jan. 1, 2012). HALT has taken particular aim at the attorney disciplinary system, issuing the HALT “Report Card” to assess the strengths and weaknesses of each state’s system.

⁵ *2002 Lawyer Discipline Report Card*, HALT, http://www.halt.org/reform_projects/lawyer_accountability/report_card/ (last visited Jan. 11, 2012) (emphasis added) (internal quotation marks omitted).

⁶ *2006 Lawyer Discipline Report Card*, HALT, http://www.halt.org/reform_projects/lawyer_accountability/report_card_2006/index_2.php (last visited Jan. 12, 2012).

⁷ See *infra* Section II for a more detailed description of Restorative Justice Theory and the practices it has spawned.

grams such as victim offender mediation,⁸ conferencing,⁹ and sentencing circles¹⁰ and emphasizes two important elements that are currently undervalued in attorney discipline: 1) deliberation and decision making by a diverse group of stakeholders and 2) discussion that focuses on repairing the damage caused by the offender. A restorative approach sees “that ‘justice’ can only be realized when the stakeholders most directly affected by a specific offence—the victim, the offender and the community—have the opportunity to voluntarily work through the consequences of the offence with the emphasis on repairing the harm and damage done.”¹¹ In our view, the legal profession both constitutes and creates community. By strengthening that community, a more restorative disciplinary process can in turn improve the morale of practicing lawyers, prevent ethical misconduct, and protect the public.¹²

We envision a conversation that could take place between a lawyer facing discipline and the bar, acting through the state’s chief disciplinary counsel. Unlike existing disciplinary processes, however, this more restorative approach would open the conversation to the complaining client, attorney, or third party as well. In some cases, the group of stakeholders could be even larger, expanding to include members of the victim’s family or support network, members of the attorney’s family, law partners of the attorney, therapists who might be treating the attorney in an ongoing way, and even the attorney’s malpractice

⁸ Victim offender mediation, administered by prosecutors, probation officers, or cooperating private agencies, allows offenders in criminal cases to mediate with their victims, sometimes in lieu of trial or as part of sentencing. See generally Jennifer Gerarda Brown, *The Use of Mediation to Resolve Criminal Cases: A Procedural Critique*, 43 EMORY L.J. 1247 (1994) (offering a general description and critique of victim offender mediation).

⁹ Conferencing is very similar to victim offender mediation, because it also gives the victim and offender an opportunity to talk at length about the crime and its consequences. See Trish Stewart, *Family Group Conferences with Young Offenders in New Zealand*, in FAMILY GROUP CONFERENCES: PERSPECTIVES ON POLICY AND PRACTICE 66–73 (Joe Hudson et al., eds., 1996). Conferencing expands the conversation to include other stakeholders, including families, community support groups, police, social welfare agency employees, and attorneys. *Id.*

¹⁰ Sentencing circles, often convened pursuant to state statute, can bring together the victim and perpetrator of a crime, the victim’s family members or other supportive persons, the offender’s family members or other supportive persons, law enforcement officials or the prosecutor, other criminal justice system professionals, and members of the community to discuss the crime and its impact, to support the victim, to determine an appropriate sanction for the offender, and to devise “methods for reintegrating the offender into community life.” MINN. STAT. ANN. § 611A.775 (2009); see also *State v. Pearson*, 637 N.W.2d 845 (Minn. 2002) (trial court properly followed sentencing circle’s recommended sanction when the state agreed as part of the plea agreement that the case would be sent to sentencing circle for recommended disposition—even if the trial court could not properly impose that sentence independent of sentencing circle’s actions).

¹¹ Eugene McLaughlin et al., *Introduction: Justice in the Round—Contextualizing Restorative Justice*, in RESTORATIVE JUSTICE: CRITICAL ISSUES 1, 9–10 (Eugene McLaughlin et al. eds., 2003).

¹² Clark Freshman, *Privatizing Same-Sex “Marriage” Through Alternative Dispute Resolution: Community-Enhancing Versus Community-Enabling Mediation*, 44 UCLA L. REV. 1687, 1692–93 (1997) (recognizing a tension between a “private ordering” aspect of mediation (which allows parties to articulate their own values and adopt consistent resolutions) and a “community enhancing” aspect that uses mediation to encourage individuals to order their activities and resolve their disputes according to the norms of some relevant community).

insurer. Some violations might call for still other stakeholders to be included in the conference because flexibility and attention to specific community characteristics are hallmarks of restorative justice. In short, the conversation would include all who would support the lawyer in her attempts to repair the harm she caused in the past, as well as those who will help her comply with professional standards in the future.

In this conversation, the participants would talk about what went wrong, how the attorney behaved incompetently or unethically, and the impact this had on the other party or parties. The aim would be to let the lawyer hear and understand the consequences of her actions.¹³ The conversation would then turn to determining the form of discipline to impose. Restitution, substance abuse treatment, or service—to the harmed individual or to the community—could all be on the table. More traditional forms of discipline, such as reprimand, admonition, or limitations on the attorney’s future practice, could also be part of the agreement.¹⁴

The “restorative discipline” we envision is both promising and paradoxical. The promise, of course, lies in all the virtues we have outlined above. The paradox is in the very phrase, *restorative discipline*, an oxymoron in the view of some restorative justice theorists. Granted, when discipline is framed only as punishment, it cannot be truly restorative. Any process that focuses exclusively on the defendant’s wrong and the state’s punitive response to that wrong will fail to reach restorative goals. But the apparent paradox in the phrase *restorative discipline* is easily resolved. What is required is greater focus on the fundamental meaning of “discipline,” a word that connotes a rich set of traditions, with strong emphasis on concepts of growth, development, and education.¹⁵

¹³ As is true for criminal cases, this process only works if the lawyer admits the wrong. This is not an adjudicative process to determine whether the lawyer violated the rules. It would work as a diversionary process in cases where the lawyer admits guilt, or where an ethics panel has adjudicated guilt, and the lawyer is willing to admit that guilt for purposes of determining the discipline to be imposed.

¹⁴ We will later consider whether disciplinary conferences could be used in cases of more serious misconduct, where suspension or disbarment will also be necessary. *See infra* at Part II.E.1.c. It should be remembered, however, that when disbarment, suspension, probation or reprimand is imposed, they must be made public. MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 10(D) (2002). Admonition, in effect only a warning, can be issued “[o]nly in cases of minor misconduct, when there is little or no injury to a client, the public, the legal system, or the profession, and when there is little likelihood of repetition by the lawyer.” *Id.* R. 10(A)(5). The U.S. Supreme Court has characterized discipline as “quasi criminal” and says that certain but not all due process requirements apply, including the requirement of fair notice of the charges. *In re Ruffalo*, 390 U.S. 544, 550–51 (1968).

¹⁵ One dictionary defines *discipline* as follows:

1. Training expected to produce a specific character or pattern of behavior, especially training that produces moral or mental improvement.
2. Controlled behavior resulting from disciplinary training; self-control.
- 3a. Control obtained by enforcing compliance or order.
- b. A systematic method to obtain obedience: *a military discipline*.
- c. A state of order based on submission to rules and authority: *a teacher who demanded discipline in the classroom*.
4. Punishment intended to correct or train.
5. A set of rules or methods, as those regulating the practice of a church or monastic order.
6. A branch of knowledge or teaching.

THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 515 (4th ed. 2006) (emphasis omitted).

Our analysis remains mindful that the word *discipline* derives from *disciple*, suggesting a core of instruction and shared values.

The seeming paradox in *restorative discipline* is also quickly resolved from a practical perspective. Although most states model attorney disciplinary processes on criminal prosecution, the states do not see punishment as a primary or even legitimate goal of attorney discipline. Rather, states discipline attorneys in order to protect the public and maintain high quality in the practicing bar.¹⁶ The system also has therapeutic goals, working to keep attorneys on the straight and narrow and guide those who stray back to the right path. Indeed, some states recognize no such thing as permanent disbarment, suggesting that all lawyers, no matter how heinous their offenses, are theoretically capable of redemption and reintegration. Such underlying goals and values in the disciplinary system make it amenable to restorative justice theory and practice; indeed, given these clearly articulated values, the case for applying restorative justice is even stronger in the context of attorney discipline than in criminal justice.¹⁷

This Article proceeds in several steps. In Section I we describe attorney discipline and some of the procedural variety that exists state to state. This section's purpose is not to present a complete survey of disciplinary processes (though given the diversity that our state-based system allows, such a survey would be useful).¹⁸ Instead, this section will give an overview of grievances against attorneys, the standard processes (as well as some innovative programs) states use to resolve those complaints, and the shortcomings of these systems. Section II will introduce an alternative approach, transplanting the theory and practice of restorative justice to the new and fertile ground of attorney discipline. We will provide an introduction to Restorative Justice Theory ("RJT") and describe some of the ways Restorative Practices have been used in criminal law, juvenile justice, and school disciplinary cases. Section II will conclude

¹⁶ Leslie C. Levin, *The Emperor's Clothes and Other Tales About the Standards for Imposing Lawyer Discipline Sanctions*, 48 AM. U. L. REV. 1, 17–18 (1998) (citations omitted) ("Three reasons are typically cited for imposing discipline on lawyers: first and foremost, protection of the public, second, protection of the administration of justice and third, preservation of confidence in the legal profession." (footnotes omitted)); see also ABA JOINT COMM. ON PROF'L SANCTIONS, STANDARDS FOR IMPOSING LAWYER SANCTIONS, 1.1 cmt. (1986 & Supp. 1992); Shelley Lambert & Alexandra Sorota, Current Developments, *Driving on the Wrong Side of the Road: How Lawyers are Sanctioned for Vehicular Homicide in New York and the District of Columbia*, 15 GEO. J. LEGAL ETHICS 865, 865 (2002).

¹⁷ Although restorative justice theory developed in the context of criminal justice, the existence of community and shared values is far less clear in such contexts than in the relatively homogenous and tightly knit structure of lawyers' professional organizations. See Brown, *supra* note 8, at 1292–94; Robert Weisberg, *Criminal Law, Criminology, and the Small World of Legal Scholars*, 63 U. COLO. L. REV. 521, 556 (1992) (restorative theories of criminal justice focus on "social ceremonies of reintegrative shaming that induce moral behavior through loving guilt," but are "circular" because they leave readers "working backward to imagine transforming American culture into something that can fulfill this daunting task.").

¹⁸ Cf. ABA STANDING COMM. ON PROF'L DISCIPLINE, 2007 SURVEY ON LAWYER DISCIPLINE SYSTEMS (2007) [hereinafter ABA 2007 SURVEY], available at <http://www.americanbar.org/content/dam/aba/migrated/cpr/discipline/07-full.authcheckdam.pdf> (collecting statistics on such matters as agency caseload, sanctions imposed, case processing, and staffing issues, but not collecting descriptions of the processes states use to obtain these results).

with design suggestions for incorporating restorative theory and practice into attorney disciplinary processes. Section III will then consider the pros and cons of this approach, attempting to anticipate and answer the objections likely to be leveled at our proposal. We will conclude by defending our claim that the legal profession is—or can be—a community, and that restorative practices in attorney disciplinary proceedings could help to strengthen that community.

I. ATTORNEY DISCIPLINE: AN OVERVIEW

Several studies have evaluated the processes used to resolve complaints against attorneys, and all have reported rather dismal findings. For example, in 2007, the American Bar Association (“ABA”) completed its most recent *Survey on Lawyer Discipline Systems*.¹⁹ The ABA sent a questionnaire to fifty-six lawyer disciplinary agencies and compiled the results by jurisdiction.²⁰ This ABA study found that the nation had approximately 1.4 million lawyers with active licenses in 2007, and during that year 117,598 disciplinary complaints were filed against attorneys.²¹ Despite (or perhaps because of) the large number of complaints filed, the vast majority led to no discipline or to informal discipline in the form of private sanctions.²² Although disciplinary agencies in the United States received 117,598 complaints in 2007, in that same year only 4,782 lawyers were charged with disciplinary violations.²³

With an overload of complaints in each jurisdiction, disciplinary agencies were unable to fully investigate and resolve every complaint. For example, Michigan’s disciplinary authority received 3,293 complaints in a state with 37,668 lawyers, but only 686 of these reached even the investigative phase.²⁴ What could explain the fact that less than twenty-five percent of the complaints filed against attorneys were even investigated? It could be any number or combination of causes: administrative overload, institutional inefficiency, or the failure of many complaints to allege sufficient wrongdoing to justify investigation. Many complaints in Michigan were summarily dismissed for lack of jurisdiction. Whatever the cause, this low response rate makes the disciplinary system look neglectful: “too slow, too secret, too soft, and too self-regulated.”²⁵

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* at Chart 1.

²² *Id.*

²³ *Id.* It is difficult to determine what percentage of the complaints these charges represent, since the ABA oddly chooses to ask disciplinary authorities how many total complaints they receive, and how many *lawyers* they charge, and some lawyers undoubtedly face multiple complaints (so that a larger percentage of the total complaints are resulting in prosecutions than might at first appear).

²⁴ *Id.*; see also James C. Turner & Suzanne M. Mishkin, *Time for a Whupping: Across the Country, Attorney Discipline Systems Disgrace the Profession*, LEGAL TIMES, Aug. 18, 2003, available at http://www.halt.org/about_halt/in_the_news/pdf/turner-legal-times-08-18-03.pdf (reporting that fewer than half of the attorney disciplinary complaints filed in the District of Columbia reached investigation).

²⁵ ABA COMM’N ON EVALUATION OF DISCIPLINARY ENFORCEMENT, LAWYER REGULATION FOR A NEW CENTURY at xx (1992).

So much for the dismal overview. How do attorney disciplinary cases appear up close? A key point for us is that quasi-criminal allegations justifying the prosecutorial structure of attorney discipline—and here we’re imagining lawyers who lie and deliberately cheat their clients, the courts, or third parties—actually arise in relatively few disciplinary cases.²⁶ Instead, when we examine the body of disciplinary complaints filed against lawyers each year, a pattern of much less deliberate wrongdoing emerges: most cases involve some combination of the lawyer’s addiction or mental illness, sloppy business practices, mismanagement of cases, or failure to communicate.²⁷ Thus, much of the misconduct brought before disciplinary bodies arises from economic, structural, and even personal forces that seem to be out of the lawyer’s control; the lawyer’s *intent* may often be to do right, but case load, addiction, or inadequate resources and administrative support drive the lawyer into neglect or mismanagement of client matters. When misconduct does not arise from deliberate or calculated wrongdoing, a system modeled on criminal justice and its requirement of *mens rea* may simply be barking up the wrong tree. The “forum,” to borrow a phrase from Professor Frank Sander, does not fit the “fuss.”²⁸ Much of lawyer misconduct, we argue, lends itself far more readily to a therapeutic and supportive structure than a punitive one.

The most common complaints against lawyers include a failure to communicate with the client and neglect of the client’s matters. For example, in Connecticut the most common offenses alleged from July 2002 to June 2003 were: “neglect (397), lack of communication (237), excessive fee (79), misrepresenta-

²⁶ In the state of Washington, for example, fewer than half of the cases in which discipline was actually imposed involved “dishonesty,” “trust account/theft,” or “criminal conduct,” and one might reasonably infer that cases resulting in discipline contain a higher concentration of such allegations than the general run of complaints. See WASH. STATE BAR ASS’N, 2010 LAWYER DISCIPLINE SYSTEM ANNUAL REPORT 24 (2010), available at www.wsba.org (search for “2010 lawyer discipline system annual report”). [hereinafter WASHINGTON DISCIPLINE ANNUAL REPORT]; see also *id.* at 9 (Washington Office of Disciplinary Counsel received 2,739 new matters; 1,938 were written grievances and an additional 801 matters were oral grievances alleging non-communication and disputes over the clients’ files.).

²⁷ See Cydney Batchelor, *Disciplinary Actions: When Bad Things Happen to Good Lawyers*, GPSOLO, Oct./Nov. 2006, at 48, 49.

After 15 years as a State Bar of California prosecutor, I have become completely convinced that the discipline imposed against attorneys by their licensing boards arises at least 80 percent to 85 percent of the time from the failure of attorneys to document the work they do, their marginal business skills, and their failure to respond appropriately when a disciplinary complaint is lodged against them. Only a very small percentage of legitimate complaints arise from intentional malfeasance by the attorney

Id.; MICHAEL A. BEDKE & JOHN W. KEEGAN, AM. BAR ASS’N YOUNG LAWYERS DIV., COMM’N ON IMPAIRED ATTORNEYS, REPORT TO THE HOUSE OF DELEGATES ¶ I (1995) (“Findings from California and Georgia estimate that 60 [percent] to 80 [percent] of lawyer discipline cases are the result of addiction.”); *Alcohol, Drugs, and other Addictions: Do I Have a Problem?*, STATE BAR OF WIS., http://www.wisbar.org/AM/Template.cfm?Section=Substance_abuse_and_gambling (last visited Jan. 11, 2012) (referring to a “recent report of the ABA” which found that “more than 50 percent of all disciplinary cases involve impaired lawyers”).

²⁸ 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 NEGOT. J. 49 (1994).

tion (66) and conflict of interest (55).”²⁹ According to an annual report of Maryland’s Attorney Grievance Commission, more disciplinary actions were taken for incompetent representation (including lack of communication, lack of diligence, neglect, and failure to abide by the client’s decisions) than for any other violation.³⁰ Similarly, in Michigan most disciplinary orders were due to problems concerning neglect (including lack of communication, lack of diligence, and incompetent representation).³¹ Other states follow suit.³²

These complaints are disproportionately made against solo or small firm practitioners.³³ This higher claim rate appears to stem not from any inherent lack of ethics in solo and small firm practitioners, but rather from challenges that are specific to small scale practice: a client base composed primarily of individuals rather than institutions, lower average hourly billing rates, and a higher volume of clients to balance lower rates.³⁴ An unsustainable business model may take a lawyer in over his head, where he cannot stay on top of client matters or maintain appropriate contact and communication with clients.³⁵

In addition to the size and type of practice involved, several personal factors can increase the likelihood that a lawyer will face discipline. Experts have estimated that lawyers suffer from depression at a higher rate than the national average, with alcoholism and alcohol abuse within the legal profession as high as eighteen to twenty percent.³⁶ Lawyers battling substance abuse, gambling addictions, or “untreated depression spiral downward into a nightmare of unattended cases and dissatisfied clients . . . unable to concentrate, complete

²⁹ Quintin Johnstone, *Connecticut Unauthorized Practice Laws and Some Options for Their Reform*, 36 CONN. L. REV. 303, 327 n.146 (2004); see also Minn. Office of Lawyers Prof’l Responsibility, *Complaints and Investigations*, <http://lprb.mncourts.gov/complaints/LawyerComplaintDocs/Complaint%20Brochure%20-%20English.pdf> (last visited Jan. 21, 2012) (listing common problems such as “neglect and delay,” “getting your file back,” “money and accounting,” and “conflicts of interest”).

³⁰ ATT’Y GRIEVANCE COMM’N OF MD., 36TH ANNUAL REPORT (2011).

³¹ STATE OF MICH. ATT’Y DISCIPLINE BD., 2003 ANNUAL REPORT app. B, available at http://www.adbmich.org/download/2003_annualrpt.pdf.

³² For example, in Minnesota, of the 83 files opened in 2003, neglect and non-communication were the most numerous violations. LAWYERS’ PROF’L RESPONSIBILITY BD. OF MINN., ANNUAL REPORT (2004), available at <http://lprb.mncourts.gov/AboutUs/Documents/2004%20Annual%20Report.pdf>. In Virginia the most common complaint was failure to communicate. VA. STATE BAR, 65TH ANNUAL REPORT: REPORT OF THE OFFICE OF BAR COUNSEL Chart 4 (2003), available at <http://www.vsb.org/anreport/02-03/>.

³³ Mark Hansen, *Picking on the Little Guy: Perception Lingers that Discipline Falls Hardest on Solos, Small Firms*, A.B.A. J., March 2003, at 30, 30–32 (explaining studies from California, New Mexico, Virginia, and Oregon show higher rates of sanctions imposed against solo and small firm practitioners); Hal R. Lieberman, *How to Avoid Common Ethics Problems: Small Firms and Solos Are Often Subject to Disciplinary Complaints and Malpractice Claims*, N.Y.L.J., Oct. 28, 2002, at S4.

³⁴ See Leslie C. Levin, *The Ethical World of Solo and Small Law Firm Practitioners*, 41 HOUS. L. REV. 309, 310, 345 (2004).

³⁵ See *id.* at 324, 345. Solo practitioners, especially, are subject to this problem. See TASK FORCE ON THE FUTURE OF THE LEGAL PROFESSION, CONN. BAR ASS’N, FINAL REPORT 13–18 (2006), available at https://www.ctbar.org/userfiles/Committees/FutureOfTheProfession/Final_Report.pdf. (outlining the challenges small and solo firms face in establishing a viable business model).

³⁶ J. Robert Turnbull Jr., *Lawyers Helping Lawyers: Help When You Need It*, S.C. LAW., Sept./Oct. 2002, at 15.

research, prepare documents or briefs, return calls or meet clients and attend hearings.”³⁷ Thus, the grievances regarding neglect and lack of communication begin.

Consider a prototypical case. A solo practitioner, John Wilson, has a diverse practice, including everything from wills and trusts, to real estate matters, to plaintiffs’ personal injury cases, but he is struggling to make ends meet. Tom Taylor retains Wilson to represent him in a small commercial case against a supplier who delivered defective goods to Taylor’s small business. Wilson files the initial complaint, but then loses track of the case in the whirlwind of developing his practice and maintaining the many other matters he is handling. Wilson fails to return several calls from Taylor checking on the status of the case. Then the case is dismissed due to Wilson’s failure to comply with the defendant’s discovery request. Wilson never informs Taylor of the dismissal. From other sources, Taylor eventually learns of the status of his case. Since the statute of limitations has not run, Taylor retains a new lawyer to file a timely and successful motion to reopen the case.

Still, Taylor is extremely upset with Wilson, and feels that Wilson should not be permitted to go on as he has in ways that could harm other clients (ones who may not be as lucky as Taylor was, retaining the ability to bring his case with a new lawyer). Taylor files a complaint against Wilson with the state’s Attorney Registration and Disciplinary Commission. Under these facts, disciplinary counsel will easily have probable cause to allege that Wilson violated the state’s Rules of Professional Conduct regarding diligence and communication. But the allegations are unlikely to rise to the level of “serious misconduct,” and the processes that could be used to resolve Taylor’s complaint are varied, from traditional grievance hearings to alternative dispute resolution processes such as discipline by consent, diversion programs, mediation, and arbitration. As such, numerous outcomes could arise.

A. *Grievance Hearings*

Most jurisdictions conduct standard adversarial hearings to resolve grievance complaints. While the details differ from state to state, the ABA’s Model Rules for Lawyer Disciplinary Enforcement describe a structure for this process.³⁸ Appendix A describes the ABA model process in detail.

A notable feature of the traditional grievance procedure is the complainant’s limited role throughout the process. Having filed a grievance, the complainant loses all control of the matter, often with highly dissatisfying results. As comments to The Model Rules for Lawyer Disciplinary Enforcement concede, it is not unusual for complaints to be dismissed immediately: “Single instances of minor neglect or minor incompetence, while technically violations of the rules of professional conduct, are seldom treated as such. These complaints are almost always dismissed. Summary dismissal of these complaints is one of the chief sources of public dissatisfaction with the system.”³⁹

³⁷ Joan Newman, *Montana Attorneys Must Look Into the Darkness That Plagues Them*, MONT. LAW., May 2003, at 28.

³⁸ MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 11 (2002).

³⁹ *Id.* R. 11 cmt.

Even when the grievance survives summary dismissal, the complainant is likely to feel unhappy with both the outcome and the process. To begin with, the rules do not require the respondent or disciplinary counsel to send a copy of the respondent's answer to the complainant. One might see some irony in the fact that a client complaining about lack of communication should find that the very process designed to respond to his complaint actually continues the offense. Nor is the complainant entitled to updates as the case progresses through the system.

If the grievance avoids summary dismissal,⁴⁰ the period of investigation will undoubtedly feel interminable for many complainants. The average time from filing a grievance to final disposition runs more than a year in many states; in some states the average is more than 3 years.⁴¹ During this time, disciplinary counsel ordinarily does not inform the complainant about the progress of the case.

Even when the complainant is a third party rather than a former client,⁴² the formal hearing process may be very alienating. Granted, these complainants do not suffer the breach of trust and loss of relationship that a former client does, but they may lose faith in lawyers generally. Though very few people have personal encounters with the attorney disciplinary system, the word seems to spread: one poll found that fewer than one third of respondents had confidence in the integrity of lawyers' self-regulation.⁴³ If complainants receive inadequate regard or compensation from the disciplinary system, they may lose faith in legal processes more generally. The effects of this are not good for lawyers or for the legal profession, but the negative impact is even greater and more widespread if it leads to reduced faith in the rule of law.

If and when a formal hearing begins,⁴⁴ the complainant is likely to feel confused and overwhelmed. The respondent attorney has an obvious advantage based on his understanding of hearings, presentation of evidence, and cross-examination. While the respondent will often be represented by counsel, the complainant is likely to attend the hearing alone. The complainant might be called to testify by the prosecuting disciplinary counsel and be subject to cross examination by the respondent's lawyer, but at no point in the hearing does the complainant have an opportunity to present her testimony as elicited by her

⁴⁰ Recall that in some jurisdictions there is only a twenty-five percent chance that the case will get this far. See ABA 2007 SURVEY *supra* note 18, at Chart I.

⁴¹ 2006 Lawyer Discipline Report Card, *supra* note 6 ("Of the states that did report on the pace of their case processing, the average jurisdiction took nine months just to bring charges against an attorney and an additional five months to impose sanctions. Louisiana, the nation's most inefficient disciplinary body, took an astonishing forty-five months—nearly four years!—to file formal charges in the average case.")

⁴² See WASHINGTON DISCIPLINE ANNUAL REPORT, *supra* note 26, at 9 (showing that approximately fifty percent of disciplinary complaints are filed by current or former clients; the other half are filed by opposing clients, lawyers, judges, other lawyers, the bar association, and "other" complainants).

⁴³ DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION 158 (2000); J. Thomas Greene, *The Practice of Law: Gamesmanship-Commercial Enterprise-Noble Profession*, 206 F.R.D. 312, 323 n.2 (2001).

⁴⁴ "In 2000, 114,000 complaints were filed against the nation's 1.2 million lawyers. Of those, only 3.5 percent led to formal discipline, and just 1 percent resulted in disbarment." Turner & Mishkin, *supra* note 24.

own attorney; she is a witness for the prosecution, not a party entitled to put on evidence of her own.

Meanwhile, the respondent has no incentive to admit his shortcomings or address the pain he has caused the complainant. Instead, the respondent will be driven to make as compelling an argument as possible to deny any violations. Throughout the process, it is unlikely that the respondent and the complainant will ever have the opportunity to engage in conversation. Thus, as is often the case, a formal, adversary structure designed to get at the truth will make some truth hard to discover. As Carrie Menkel-Meadow argues, “Binary, oppositional presentations of facts in dispute are not the best way for us to learn the truth; polarized debate distorts the truth, leaves out important information, simplifies complexity, and obfuscates rather than clarifies.”⁴⁵ Ultimately, the hearing committee resolves the matter, and the committee is not even obligated to send a copy of its decision to the complainant.⁴⁶ Thus, the traditional hearing process fails to achieve the goals of a lawyer discipline system: “first and foremost, protection of the public, second, protection of the administration of justice and third, preservation of confidence in the legal profession.”⁴⁷

Let us return to our hypothetical grievance by Taylor against Wilson. If the state bar uses the formal hearing process to resolve Taylor’s complaint, the case may go nowhere. Disciplinary counsel is likely to characterize the matter as minor neglect and minor incompetence, resulting in summary dismissal because the statute of limitations has not run on Taylor’s case and he retains the ability to sue his supplier with a new lawyer. Attorney Wilson’s conduct, though inconsiderate, disrespectful, and violative of the state’s ethics rules, may not justify the resources required for a formal hearing. Even if the case were to proceed far enough for a sanction to be imposed, it would probably be no more severe than a reprimand, perhaps privately imposed, with no notice to Taylor.⁴⁸ The disciplinary authority might order Wilson to refund some of the attorney’s fees Taylor paid (or waive the fees if still owing). But in the vast majority of cases, bar authorities are unlikely to take any action specifically to improve the future performance of the attorney.

Consider the impact of this process on the complainant, the former client of this lawyer who has run afoul of the rules. Taylor has lost his relationship with Wilson, a person he trusted. Feeling ill-used by the disciplinary system, Taylor’s faith in the legal system may be eroded: he might reasonably suppose that a profession unable to regulate itself effectively is unlikely to do a better job in other realms. Indeed, Taylor is likely to feel as many crime victims do:

[U]nhappy about their lack of a legitimate role in the processing of their cases beyond that of witness for the prosecution, the lack of opportunity to be consulted

⁴⁵ Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Postmodern, Multicultural World*, 38 WM. & MARY L. REV. 5, 6 (1996) (footnotes omitted).

⁴⁶ MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 11(D) (2002).

⁴⁷ Levin, *supra* note 16, at 17–18 (footnotes omitted).

⁴⁸ 2006 *Lawyer Discipline Report Card*, *supra* note 6 (“In the average jurisdiction, only 7.8 percent of investigations yield public discipline. Almost half of the sanctions take the form of private discipline, rendered behind closed doors.”). *But see* Levin, *supra* note 16, at 73 n.329 (“Connecticut, Florida, Illinois, New Jersey, Oregon, and West Virginia do not impose private discipline.”).

about the progress of their cases, the lack of recognition of the emotional, as well as material, harm they have experienced, and the lack of fairness and respect they receive at the hands of the justice system as a whole.⁴⁹

As lawyers like Wilson continue to practice unchecked, the administration of justice suffers along with the public's confidence in the profession.

B. *Current Alternative Processes Meant to Reform Attorney Discipline*

In 1970, the ABA Special Committee on Evaluation of Disciplinary Enforcement ("Clark Committee") studied lawyer disciplinary procedures nationwide.⁵⁰ In its report the Clark Committee highlighted numerous faults throughout the system, such as the secretive operation of disciplinary agencies and the institutional bias that results when lawyers control the system without oversight by judges or lay people.⁵¹ The Clark Committee also found that disciplinary agencies lacked appropriate procedures to easily dispose of minor matters, such as client neglect and failures to keep clients informed.⁵²

Twenty years later, in 1991, the ABA Commission on Evaluation of Disciplinary Enforcement ("McKay Commission") noted considerable improvements when it reviewed attorney disciplinary processes.⁵³ Nevertheless, several points in the McKay Commission's report echoed themes of the Clark report twenty years before. "The McKay Commission recommended a fully open disciplinary process—opening up complaints from the moment they are filed, making hearings open to the public, increasing public representation on grievance panels, abolishing the gag rule on complainants, and getting rid of private reprimands."⁵⁴ The McKay Commission also suggested that the scope of judicial review be "expanded to cover the thousands of complaints that are routinely dismissed each year."⁵⁵ To expedite the processing of minor complaints, the Commission recommended "a multi-door system of lawyer regulation which [would] afford[] a variety of responses to the needs of the public and the profession in addressing these problems."⁵⁶ Several jurisdictions responded with reforms such as discipline by consent, consumer protection models, and diversion programs using mediation or arbitration.

1. *Discipline by Consent*

In response to public dissatisfaction with so many summary dismissals, negotiated settlements between disciplinary counsel and the respondent were instituted as a means of resolving complaints without the expense of a formal hearing. According to the Model Rules for Lawyer Disciplinary Enforcement,

⁴⁹ Heather Strang & Lawrence W. Sherman, *Repairing the Harm: Victims and Restorative Justice*, 2003 UTAH L. REV. 15, 18 (footnotes omitted).

⁵⁰ ABA SPECIAL COMM. ON EVALUATION OF DISCIPLINARY ENFORCEMENT, PROBLEMS AND RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT 1, 1 (1970).

⁵¹ *Id.* at 1–2.

⁵² *Id.* at 92–96.

⁵³ ABA REPORT OF THE COMMISSION ON EVALUATION OF DISCIPLINARY ENFORCEMENT iii (Robert B. McKay chair, 1991) [hereinafter, MCKAY COMMISSION REPORT].

⁵⁴ Deborah M. Chalfie, *Dumping Discipline: A Consumer Protection Model for Regulating Lawyers*, 4 LOY. CONSUMER L. REP. 4, 11 (1991).

⁵⁵ MCKAY COMMISSION REPORT, *supra* note 53, at v.

⁵⁶ *Id.*

“A lawyer against whom formal charges have been made may tender to disciplinary counsel a conditional admission to the petition or to a particular count thereof in exchange for a stated form of discipline.”⁵⁷ Once the disciplinary counsel and the respondent have worked out their agreement, the respondent must present an affidavit to the board.⁵⁸ The affidavit must state that the attorney freely consents to the specified form of discipline, that the lawyer is aware of allegations providing grounds for discipline, that the facts alleged are true, and that the lawyer could not successfully defend against these allegations if prosecuted.⁵⁹ After the affidavit has been submitted, the board may approve or reject the conditional admission of violation.⁶⁰ The court then must finally approve or reject the discipline if it involves suspension, disbarment, or transfer to disability/inactive status.⁶¹

The commentary to the Model Rules for Lawyer Disciplinary Enforcement suggests that disposing of a grievance in this way is often in the mutual best interest of the public and disciplinary agencies. “The public is immediately protected from further misconduct by the lawyer, who otherwise might continue to practice until a formal proceeding is concluded. The agency is relieved of the time-consuming and expensive necessity of prosecuting a formal proceeding.”⁶² Due to these advantages, most states have adopted provisions allowing negotiated settlements between disciplinary counsel and the respondent. Though the titles of the parties differ from jurisdiction to jurisdiction, the underlying content of the process remains basically the same.

Connecticut’s approach to discipline by consent is closely aligned with the terminology of the Model Rules. According to Connecticut Practice Book § 2-82, “The disciplinary counsel shall review the complaint and the conditional admission, shall determine the sanctions to which the respondent may be subject, and shall discuss and may negotiate a disposition of the complaint with the respondent or, if the respondent is represented by an attorney, with the respondent’s attorney.”⁶³ When this section became effective in 2004, the judicial branch of the state supported it for reasons similar to those expressed in the commentary of the Model Rules.⁶⁴ The bar has warmly received structures for negotiated settlements in disciplinary cases.

However, negotiated settlements between the respondent and disciplinary counsel have disadvantages as well as advantages. According to the rules, the complainant is left out of the process entirely. In fact, the complainant is not even mentioned in most of the rules describing the process for such a settle-

⁵⁷ MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 21(A) (2002).

⁵⁸ *Id.* R. 21(D).

⁵⁹ *Id.*

⁶⁰ *Id.* R. 21(A).

⁶¹ *Id.*

⁶² *Id.* R. 21 cmt.

⁶³ CONNECTICUT PRACTICE BOOK (REVISION OF 1998) § 2-82 (2011).

⁶⁴ William J. Sullivan, Chief Justice of the Conn. Supreme Court, Remarks at Connecticut Bar Association Annual Meeting (June 7, 2004) (transcript available at <http://www.jud.ct.gov/external/news/Speech/Sullivan-CBA-04.html>) (<http://www.jud.ct.gov/external/news/Speech/Sullivan-CBA-04.html>) (Allowing negotiated discipline, as requested by “many attorneys who appeared at the hearings held by the commission, will help to reduce the potential for delay and expense in the disposition of many complaints.”).

ment; in most cases she will not even receive notice of the grievance outcome.⁶⁵ Excluding the party who initiated the complaint certainly does not help to increase public satisfaction with the grievance process. Disciplinary counsel's experience with and exposure to a wide array of complaints may allow him to identify certain cases as particularly easy to dispose of by negotiated settlement, but the factors that lead to that conclusion are unlikely to include the feelings, suggestions, or opinions of the complainant. Negotiated settlements may thus take on a boilerplate quality, reflecting little or no attention to the individual complainants, respondents, or incidents giving rise to the violations.

Depending upon how disciplinary counsel administers the program, negotiated settlements may undermine the goals of the lawyer discipline system outlined above. Because the rules give the complainant and other stakeholders no voice in the process (in fact, less than provided at formal hearings), their perception of the fairness of the process could be further diminished. Instead of resolving the particular dispute between the complainant and the respondent, disciplinary counsel may propose, and the respondent may accept, a weak form of sanction such as a warning or reprimand. Without a transparent process to reveal the relationship between the wrong committed and the sanction imposed, if any, negotiated settlements may appear even more arbitrary and self-protective than grievance hearings do. Finally, as is true with discipline resulting from a grievance hearing, if negotiated settlements omit measures to improve the attorney's practice or to prevent similar violations in the future, the process fails to meet its goals of consumer protection.

Much depends upon the orientation and philosophy of chief disciplinary counsel. In Connecticut, because former chief disciplinary counsel Mark Dubois was aware of these pitfalls, he used diversion programs to give complainants an enhanced role in the process:

We always include the complainant[s] in discussions about disposition. We view them as stakeholder[s]. No disposition is final until the Grievance Committee approves it after a public hearing. The complainants come to the hearing, and are given an opportunity to address the Committee. They can argue for rejection, or an alternative disposition. I always try to get them there. I think there is a salutary benefit from being given a voice. Often, they want to confront the lawyer and receive an apology. And the Committee is very solicitous of them, listens to them, and not infrequently will reject or modify a disposition to accommodate their concerns.⁶⁶

As we will discuss below, this simple modification—including the complainant in discussions about negotiated discipline—makes a world of difference. But not all states will have bar counsel as enlightened as Connecticut's. When states adopt negotiated discipline systems, they should draft rules that require victim participation rather than leaving it to the discretion of the program administrators.

⁶⁵ See Burnele V. Powell, *Open Doors, Open Arms, and Substantially Open Records: Consumerism Takes Hold in the Legal Profession*, 28 VAL. U. L. REV. 709, 717 (1994).

⁶⁶ E-mail from Mark Dubois to Jennifer Brown, August 15, 2006 (on file with author).

2. *Consumer Protection Model*

The consumer protection approach to attorney discipline focuses on law as a commercial enterprise.⁶⁷ As such, the model assumes that “consumers of legal services should be entitled to the same types of protections afforded consumers of goods and services.”⁶⁸ This approach focuses on legitimate consumer expectations rather than lawyers’ professional norms; the prime object is to insure reasonable standards of “cost, promptness, and quality of service” rather than to “identify and weed out unethical behavior.”⁶⁹

Imposing discipline on offending attorneys misses the point, according to the consumer protection model: “just as jailing a criminal does absolutely nothing of consequence for a criminal’s past victims, the discipline system does nothing of consequence for a lawyer’s past victims.”⁷⁰ The process would be radically different from current disciplinary procedures because the focus in this model is on compensating people who have been harmed and protecting the public from future harm.⁷¹ For example, lawyers would be removed from all regulatory panels because, from a consumer protection perspective, lawyer self-regulation is a serious conflict of interest.

According to the consumer protection model, complainants are far too marginalized in traditional grievance hearings, relegated to the role of witness only and given fewer rights and protections than the respondent. As we have already seen, disciplinary agencies often fail even to inform the complainant of important developments such as the dismissal of the complaint.⁷² To empower individuals who complain about attorney misconduct, the consumer protection model would establish a neutral, out-of-court forum where non-lawyers would control the regulatory process.⁷³

This model would require lawyers to adhere to pro-consumer laws similar to the ones that apply to other professions. For example, lawyers would be required to make disclosures to clients regarding various options available to the client, the amount of time it would take to achieve the client’s objectives, the costs associated with expected work, and the chances of success.⁷⁴ The lawyer would give all of this information to the client in a plain-language contract.⁷⁵ Additionally, various statutes would require lawyers to issue periodic progress reports to clients and to return phone calls within a specified time.⁷⁶ The guiding standard for this new system would be that of the “reasonable client,” always asking, “What would the reasonable client under these circumstances have a legitimate right to expect?”⁷⁷

⁶⁷ Chalfie, *supra* note 54, at 8.

⁶⁸ Levin, *supra* note 16, at 25.

⁶⁹ Chalfie, *supra* note 54, at 9.

⁷⁰ *Id.* at 6.

⁷¹ *See id.* at 8.

⁷² *Id.* at 7.

⁷³ *See id.* at 10–11.

⁷⁴ *Id.* at 9.

⁷⁵ *Id.*

⁷⁶ *Id.* at 9–10.

⁷⁷ *Id.* at 10 (internal quotation marks omitted).

Contract would be the fundamental theory underlying such a system: “[t]he consumer protection model would view a lawyer’s treatment of the client and the lawyer’s performance of the contract as a business transaction.”⁷⁸ If the lawyer failed to perform his obligations under this system’s implicit contractual terms, the client would be entitled to damages to compensate for direct and consequential losses.⁷⁹ The non-lawyer agency could also adjust fees to reflect poor service, and fines could be imposed for “relatively minor violations of consumer protection laws, especially in cases where the client has suffered aggravation rather than economic loss.”⁸⁰ For injuries such as betrayal of trust and lack of communication, the injured client “would remain free to sue for malpractice and to try for a non-economic damage award.”⁸¹ Discipline would only occur for “very egregious conduct.”⁸² The focus throughout would be on the expectations of the disappointed client rather than the wrongdoing of the attorney.⁸³ The central goals would be resolving the specific dispute, repairing the client’s harm, and protecting the client from future detriment stemming from the lawyer’s misconduct.

These central goals would be reflected in processes as well. As explained above, the consumer protection agency—composed of non-lawyers—could adjudicate claims to adjust fees and award damages. The agency would also allow the respondent and the complainant to mediate a solution if they so desired. If the parties could not resolve the dispute themselves, they could submit to binding arbitration using lay arbitrators.⁸⁴ Such forms of ADR would maintain the consumer protection agency’s focus on resolving the specific dispute between lawyer and client and finding a remedy for the client. Presumably any mediation that occurred would tend to be narrow in focus and directive in style, with little attention paid to the dynamics of the attorney-client relationship. Even in mediation, far greater stress would be placed on determining the nature and extent of the client’s damage and deciding how the attorney should compensate for that harm.

To implement the consumer protection model, states would have to make enormous modifications or additions to their systems for regulating attorneys.⁸⁵ It is not clear whether such a system would displace or supplement a traditional attorney disciplinary system. While many would view the transfer of regulatory control from attorneys to lay people as a good thing, it is important to take into account the costs of diluting self-regulation by attorneys. Because the consumer protection model would emphasize the effects rather than the underlying causes of attorney misconduct, ethical standards could actually deteriorate. So long as sloppy or neglectful lawyers were willing to pay damages and fines, they could continue to practice without any improvement. Thus, the consumer protection

⁷⁸ *Id.* at 9.

⁷⁹ *Id.* at 10.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.* at 11.

⁸⁵ Allen Blumenthal, *Attorney Self-Regulation, Consumer Protection, and the Future of the Legal Profession*, 3 KAN. J.L. & PUB. POL’Y 6, 8, 11 (1994).

model could inadvertently favor wealthy lawyers by permitting them to practice without discipline. Indeed, some lawyers might begin to view such fines and damages as the “costs of doing business.” While the consumer protection model has some virtues in its concern for clients and the harm they suffer, it does not address the harms unethical lawyers can cause to those with whom the lawyers are not “in privity”—such as other lawyers, third parties, and court personnel.⁸⁶ Reform of the attorney disciplinary system should take greater account of client concerns, as the consumer protection model does, but it should not abandon altogether a concern for maintaining attorneys’ high ethical standards in all of their dealings and relationships.

We see a final issue worth noting before we leave the consumer protection model: in its zeal to protect the consumer, what account does this model take of the way a client may have contributed to the lawyer’s professional failure? This is not a subject that receives much attention, but almost any practicing lawyer can tell you that some clients are more difficult than others. This difficulty could stem from a variety of forces in the client’s life: mental illness or addiction, financial distress, emotional upheaval, physical or developmental disability, or failure to cooperate and share information with the attorney. Some of what makes a particular client “difficult” may be purely a matter of personality. Our point here is that any process designed to illuminate a professional failure on the part of a lawyer might fruitfully analyze the interpersonal dynamic in which that failure occurred.⁸⁷ Neither the consumer protection model, nor any existing reform proposal of which we are aware, explicitly builds such an inquiry into the process.

In the case of Taylor and Wilson, a consumer protection model might render some relief for the frustrated client. Taylor could be awarded damages if he could prove any actual losses (e.g., higher attorney’s fees paid to the second lawyer, made necessary by the rush to file the lawsuit within the statute of limitations). The agency would certainly adjust the fee paid to Wilson to reflect the poor service Taylor received. For Taylor’s frustration and disappointment about the shoddy way Wilson treated him, the consumer protection agency would have no remedy; a civil suit for malpractice might yield a recovery for such noneconomic damages.⁸⁸

⁸⁶ See *id.* at 14–16. On the other hand, as contract and tort law expand to provide relief for parties not in privity with tortfeasors and contract breachers, the consumer protection model of attorney regulation might similarly expand the reach of relief it offers.

⁸⁷ This could include, if the process permitted it, dynamics between the respondent lawyer and clients, third parties, opposing lawyers, supervising or subordinate lawyers within the respondent’s firm, and even the interpersonal dynamics with judges and court personnel, since it is at least possible that a judge could contribute to the situation that gives rise to an ethical violation. See *infra* Part II.C.

⁸⁸ See John H. Bauman, *Damages for Legal Malpractice: An Appraisal of the Crumbling Dike and the Threatening Flood*, 61 TEMP. L. REV. 1127, 1163 (1988); Christopher C. Haug, *The Law of Damages in a Legal Malpractice Action*, 24 J. LEGAL PROF. 433, 440–41 (2000); D. Dusty Rhoades & Laura W. Morgan, *Recovery for Emotional Distress Damages in Attorney Malpractice Actions*, 45 S.C. L. REV. 837, 838 (1994).

3. *Diversion Programs*

Diversion programs are another method for states to resolve less serious complaints of ethical violations. On the one hand, the rules allow a large body of cases to fall into this category: a complaint is deemed to allege “lesser misconduct” when, assuming the allegations against the attorney are true, the likely sanction would be less than suspension or disbarment.⁸⁹ On the other hand, the Model Rules carve out certain categories of cases and make clear that they do not involve “lesser misconduct,” such as violations involving misappropriation of funds, deceit, or a “serious crime.”⁹⁰ When the allegations do involve lesser misconduct, disciplinary counsel may refer the attorney to the state’s “Alternatives to Discipline Program.”⁹¹

Disciplinary counsel exercises considerable discretion in deciding whether to make the referral to the “Alternatives” program. The Model Rules encourage counsel to consider aggravating and mitigating factors, whether diversion has already been tried, and the summary question of “whether participation in the program is likely to benefit the respondent and accomplish the goals set forth by the program.”⁹² If a respondent attorney is referred to the diversion program, disciplinary counsel informs the complainant of this decision.⁹³ The complainant may then submit a statement if there is any new information beyond the initial complaint that might be pertinent.⁹⁴ The respondent may decline to participate in diversion and may opt for the formal hearing, but the complainant does not have the power to prevent diversion.⁹⁵ While it might seem strange that an attorney would turn down the chance to receive the more lenient treatment available through a diversion program, recall that when the traditional grievance system handles cases of minor misconduct, the chance of dismissal (pre- or post-investigation) is very high. An attorney might decide that the diversion program is likely to require more of him than the traditional grievance procedure once these probabilities are taken into account.⁹⁶

If the respondent agrees to participate in the diversion program, he negotiates a contract with disciplinary counsel setting forth the terms and conditions of the plan, which may include arbitration regarding fees or other issues, “mediation, law office management assistance, lawyer assistance programs, psychological counseling, continuing legal education programs, ethics school,

⁸⁹ MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 9(B) (2002).

⁹⁰ *Id.* R. 9(B)(1), (5)-(6).

⁹¹ *Id.* R. 11(G)(1).

⁹² *Id.* R. 11(G)(3)(b)-(d).

⁹³ *Id.* R. 11(G)(2).

⁹⁴ *Id.*

⁹⁵ *Id.* R. 11(G)(5); *see, e.g.*, John M. Burman, *Wyoming’s New Disciplinary Code*, WYO. LAW., Oct. 2003, at 43 (In Wyoming, “[a] complainant may, at the complainant’s expense, also seek review by the Court ‘of any disposition of a formal charge without a hearing or a stipulated discipline, except for diversion.’” (emphasis omitted)).

⁹⁶ Margaret Downie, *Ethics in Practice: Criminal Lawyers and the Disciplinary Process*, ARIZ. ATT’Y, May 1997, at 51 (“In reality, however, complying with diversion is often more expensive, time-consuming, and burdensome than accepting a low-level sanction. The benefit, though, is that it helps lawyers solve problems which, left unaddressed, would likely lead to more bar complaints.”).

or any other program authorized by the court.”⁹⁷ Other than submitting the supplemental statement described above, the complainant does not help to decide the alternative terms of discipline, and does not participate in these negotiations. Once the agreement is finalized, the disciplinary complaint is essentially tabled pending successful completion of the terms of the contract.⁹⁸ Arizona has implemented a diversion program very similar to the one described in the Model Rules.⁹⁹

Diversion programs are often cheaper and faster than formal grievance hearings. Since the respondent must first consent to participate in the program, the respondent is likely to be agreeable and open to recommendations on how to improve his practice. An enormous benefit of such programs is that the diversion contract can be specifically tailored to the respondent’s shortcomings to help prevent similar violations in the future.

However, there are also numerous disadvantages with diversion programs. The referral is made without the complainant’s consent and does not attempt to improve the relationship between the complainant and the respondent. The complainant may never get an opportunity to tell his story and receive an apology or other desired remedy. Diversion programs often place such strong emphasis on the future—including rehabilitation of the lawyer and prevention of future misconduct—that they ignore the past and present.¹⁰⁰ Thus, the particular dispute that led to the grievance complaint may never get resolved. The process is likely to increase public dissatisfaction with the legal profession because it leaves out the complainant and other stakeholders.

Additionally, diversion may not give the public adequate protection from incompetent lawyers. One important difference between formal sanctions and diversion remedies is the extent to which they become a part of the lawyer’s permanent record. Once the lawyer has successfully completed the diversion program, the charges are dismissed—and eventually expunged from the lawyer’s record altogether.¹⁰¹ If the lawyer faces a disciplinary complaint in the future, the earlier complaint handled through the diversion program cannot be used as a prior sanction in determining whether the lawyer has committed “lesser misconduct.”¹⁰² In contrast, grievance procedure sanctions can be an aggravating factor in future disciplinary proceedings because those sanctions remain on the lawyer’s record forever.¹⁰³

Granted, the discretionary factors disciplinary counsel considers when making a referral to the diversion program include “whether diversion has been tried before,” but if the record is expunged it is not clear how counsel would be

⁹⁷ MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 11(G)(1).

⁹⁸ *Id.* R. (11)(G)(6).

⁹⁹ PROF’L COMM., ABA SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, TEACHING AND LEARNING PROFESSIONALISM 117 (1996); Diane M. Ellis, *A Decade of Diversion: Empirical Evidence that Alternative Discipline Is Working for Arizona Lawyers*, 52 EMORY L.J. 1221, 1232 (2003); see also ARIZ. SUP. CT. R. 52 (Hearing Panels).

¹⁰⁰ Trina Grillo has discussed the dangers of focusing exclusively on the future in mediation when some parties need to revisit the past. See generally Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545 (1991).

¹⁰¹ Ellis, *supra* note 99, at 1232.

¹⁰² *Id.*; see *supra* note 96 and accompanying text.

¹⁰³ Ellis, *supra* note 99, at 1232.

able to determine this factor. One would hope that even if the definition of “lesser misconduct” excludes expunged offenses, that the discretionary factors would somehow permit disciplinary counsel to prevent repeat offenders from gaming the diversion program to their advantage—but the system contains no firm safeguards to ensure this. Thus, the chance to keep a clean record could motivate many lawyers of good faith to participate in the diversion program with no ill effects. But the danger seems to exist that some lawyers will use the program to screen a series of minor offenses which, taken individually, do constitute “lesser misconduct,” but when considered in the aggregate require more serious treatment by disciplinary authorities. Thus, the public may not learn about the misconduct, and because lawyers can participate in diversion more than once without receiving any sanction, the respondent may be insufficiently deterred from additional violations in the future.¹⁰⁴

In Taylor’s case, disciplinary counsel would inform Taylor of the decision to refer the respondent Wilson to a diversion program. Taylor would likely object to the diversion since he would not be a party and would not receive an adequate resolution of his personal complaint. Nevertheless, the diversion would continue if Wilson agreed to participate. Following an assessment of Wilson’s practice and procedures, Wilson might agree to an MOU requiring him to complete a law office management course. Once the required course was completed, the complaint would be dismissed, potential clients would be unable to learn about this earlier instance of misconduct, and if Wilson faced a disciplinary grievance in the future, disciplinary counsel would be unable to consider the diverted grievance as an aggravating factor in those proceedings.

Jurisdictions also use mediation in their diversion programs.¹⁰⁵ For example, Rule 5.10 of the Missouri Supreme Court Rules on Civil Procedure indicates that “chief disciplinary counsel may refer those complaints that it believes may be resolved through mediation rather than through formal disciplinary proceedings to The Missouri Bar Complaint Mediation Program, which shall attempt to mediate and resolve the matters raised by the complaint.”¹⁰⁶ Although Missouri gives disciplinary counsel considerable discretion, only nonserious matters are eligible for mediation.¹⁰⁷ If the respondent fails to cooperate, the disciplinary counsel may consider that failure to be an additional disciplinary violation.¹⁰⁸

¹⁰⁴ Levin, *supra* note 16, at 28 n.130.

¹⁰⁵ *E.g.*, MO. SUP. CT. R. 5.10; N.Y. ST. R. OF COURT § 605.20(d)(2).

¹⁰⁶ Michael P. Gunn, *The New Complaint Mediation Program*, J. MO. B., Nov./Dec. 1995.

¹⁰⁷ *The Missouri Bar Complaint Resolution Program Guidelines*, MO. COURTS CLERK HANDBOOKS, <http://www.courts.mo.gov/courts/ClerkHandbooksP2RulesOnly.nsf/0/fbe703b8922fd3ea86256ca6005211a8?OpenDocument> (last updated July 1, 2003) (“If the respondent lawyer does not participate, or if there is new information revealed whereby it appears that the respondent has engaged in serious misconduct, the complaint resolution committee shall return the matter to the chief disciplinary counsel.”); *see also* Marvin E. Wright, *Your Missouri Bar Membership: A Great Value*, 54 J. MO. B. 9, 9 (Jan./Feb. 1998) (“Complaints about lawyers that are less serious in nature may be resolved through this [alternative] program.”).

¹⁰⁸ Michael P. Gunn, *The New Complaint Mediation Program*, J. MO. B., Nov./Dec. 1995, at 358.

At the start of the mediation sessions, the parties are informed that all of the proceedings are confidential.¹⁰⁹ During the mediation, the volunteer mediator helps the parties discuss the problem and reach a resolution. If the parties reach an agreement, the panel member writes a “closing memorandum” and sends the memo to the Chief Disciplinary Counsel’s office.¹¹⁰

Diversion programs using mediation do facilitate communication between the respondent and the complainant, and the mediation may lead to a resolution more quickly than formal disciplinary proceedings. However, the perspectives of the respondent and the complainant may be so intensely focused on their particular dispute that they miss the bigger picture. Since other stakeholders are left out of the process, two important failures may occur: first, the mediation may ignore the root cause of the problem, and second, the mediated solution may do nothing to help prevent similar violations in the future. Thus, the interests of the community and the profession in maintaining high ethical standards among attorneys could get short shrift in mediation. Additionally, cases are diverted to mediation based upon the complaint rather than a full investigation. Although the mediator may send the matter back to disciplinary counsel if discussion reveals that serious misconduct has occurred, the facilitative efforts of a neutral mediator are no substitute for investigation by disciplinary counsel, and serious misconduct may get through the disciplinary system without receiving an adequate sanction.

If the parties in Taylor’s case were referred to mediation, there would probably be few sessions. Each party would have the opportunity to explain his actions and hear the other side of the story. Since Taylor was eventually able to file his suit within the statute of limitations, Wilson and Taylor might agree to a fairly straightforward remedy: a refund of all fees paid to Wilson and a release from any fees Taylor still owed.

4. Concluding Thoughts about Attorney Discipline and Attempts to Reform It

This overview of attorney discipline has highlighted some of the primary procedures states use to address complaints about attorney misconduct. It has shown the ways in which a prosecutorial structure creates many of the same problems that plague criminal justice: an overload of cases and insufficient resources to address them; neglect of victim concerns and perspectives; and systems that seem sometimes too lenient (failing to hold guilty people accountable) and other times too harsh (incapacitating people who might be rehabilitated if sufficient time and resources were devoted to their situations). Reformers have designed or proposed innovative approaches to attorney discipline, but their focus on one particular goal (e.g., protecting consumers, preventing backlog in grievance proceedings, or resolving complaints with dispatch) causes them to fall short of reforms that could improve the system in a more balanced, holistic way. The next section turns to our proposal for reform,

¹⁰⁹ MO. SUP. CT. R. 5.31(b).

¹¹⁰ *Panel Procedures*, MO. COURTS CLERK HANDBOOKS, <http://www.courts.mo.gov/courts/ClerkHandbooksP2RulesOnly.nsf/0/4eb9821a2b9eeb5d86256ca60052122e?OpenDocument> (last updated July 1, 2003).

one that implements Restorative Justice Theory and practice, and explains how this approach could dominate other proposals for reform.

II. A NEW WAY: RESTORATIVE JUSTICE THEORY

A. *The Characteristics of an Ideal Attorney Disciplinary System*

Before we delve into Restorative Justice Theory and the ways it gives rise to our proposal, let us pause for a moment to consider, again, the characteristics we might desire in an ideal disciplinary system. First, everyone seems to agree that disciplinary processes should protect the public by decreasing the likelihood of similar misconduct in the future. Unfortunately, as the preceding section showed, significant misconduct often slips through the system unaddressed, allowing misbehaving lawyers to get away with and even persist in their wrongdoing. Moreover, innovative programs designed to grant relief to individual complainants may do so at the expense of the profession's ability to enforce ethical norms and hold lawyers accountable to a larger community beyond the damaged client. Thus, some of the "reforms" may actually reduce the system's deterrent effect.

A second, oft-cited purpose of attorney discipline is to protect and uphold the fair and efficient administration of justice by holding lawyers accountable when they break the rules. Upholding the fair administration of justice is seen as a goal independent of its effect on individual clients or third parties—it is an interest of the justice system itself. When the legal profession uses attorney discipline to mark and sanction unethical attorneys, it helps to define and enforce a standard of ethicality for its own sake. Unfortunately, as we have seen, the disciplinary system's inability to keep up with complaints filed and process them in a transparent way prevents it from setting this standard effectively. Reform programs that further privatize discipline (by, for example, allowing a volunteer mediator, complaining client, and respondent attorney to mediate a resolution) only exacerbate the system's problems with setting standards and upholding professional values in a public way. Too much control is transferred to the hands of third parties who may not share the profession's goals. Two-party mediation cannot advance the goals of attorney discipline because it does not include additional important stakeholders (such as representatives of the bar, family or friends of the attorney and client, or other affected members of the community). Similarly, consumer protection models place undue emphasis on compensating the client's economic loss, with too little attention given to the larger set of societal or professional harms that may have occurred as a result of the attorney's misconduct.

A third—and for our purposes, extremely important—goal of attorney discipline is to restore and maintain the public's confidence in lawyers, the legal profession, and the rule of law. Under current systems, processes are confidential, victims are excluded from discussions, and large numbers of complaints go unaddressed; to make matters worse, lawyers conduct these proceedings with little involvement from lay people or the community. Members of the public feel understandable frustration and distrust when, in their absence, a lawyer who has imposed real harm on a client seems to suffer few negative conse-

quences: the case is dismissed, the lawyer receives only the gentlest reproof, or some punishment is imposed but it is cloaked in confidentiality. At its worst, attorney discipline worsens rather than improves the public view of the legal profession.

But before we swing back to highly punitive approaches, we should consider the therapeutic goal of attorney discipline. After marking a lawyer's behavior as unethical—performing a “shaming” ritual, to borrow the rubric of John Braithwaite—attorney discipline can also claim as one of its goals the “reintegration” of the lawyer into the community of ethical lawyers. Alternative discipline programs that stress education, treatment, or therapy put into effect this set of goals. Ultimately, such an approach circles back to protection of the public; it effects general deterrence by marking those who violate the rules and specific deterrence by discouraging the respondent attorney from harming future clients, lawyers, or third parties. In standard grievance proceedings, however, discipline sometimes results in disbarment or suspension—catastrophic events in the life of a lawyer—when the victim or larger community might have preferred a more creative, less punitive remedy.

So, confidentiality protects the reputations and careers of attorneys who are wrongly accused, and the very nature of self-regulation can too often appear as self-protection to those outside its circle.¹¹¹ But occasionally the machinery operates with finality; it ends a legal career, even though the victim might have preferred a different outcome. Is it in the nature of attorney discipline to ricochet between these most extreme results: lenient neglect or harsh punishment?

B. *Balancing the Extremes*

Ted Wachtel and Paul McCold have observed this pattern in social discipline and have analyzed it as an interplay of two “comprehensive continua—control and support”:

Control is defined as the act of exercising restraint or directing influence over others. Clear limit-setting and diligent enforcement of behavioural standards characterise high social control. Vague or weak behavioural standards and lax or non-existent efforts to regulate behaviour characterise low social control. Support is defined as the provision of services intended to nurture the individual. Active provision of services and assistance and concern for individual well-being characterise high support. Lack of encouragement and minimal provision for physical and emotional needs characterise low support.¹¹²

Wachtel and McCold explain that social control mechanisms can range from “high” to “low” on the “control” and “support” continua, creating a two-by-two box on which systems can be placed and compared:

¹¹¹ See Benjamin H. Barton, *An Institutional Analysis of Lawyer Regulation: Who Should Control Lawyer Regulation—Courts, Legislatures or the Market?*, 37 GA. L. REV. 1167, 1241 (2003) (legislative regulation more likely than professional self-regulation to produce rulings in the public interest).

¹¹² Ted Wachtel & Paul McCold, *Restorative Justice in Everyday Life*, in RESTORATIVE JUSTICE AND CIVIL SOCIETY 114, 116 (Heather Strang & John Braithwaite eds., 2001) (citation omitted).

TABLE 1: SOCIAL DISCIPLINE WINDOW¹¹³

high ↑ Control (limit-setting, discipline) low	punitive authoritarian stigmatizing	restorative collaborative reintegrative
	neglectful indifferent passive	permissive therapeutic protective
low -Support (encouragement, nurture) → high		

Wachtel and McCold note that scholars in various fields have applied this two-by-two box.¹¹⁴ Leadership effectiveness,¹¹⁵ management style,¹¹⁶ and parole officer behavior¹¹⁷ have all been viewed through this lens.¹¹⁸ John Braithwaite extends the model to an even broader set of activities, including “parenting children, teaching students, supervising employees, regulating corporations and responding to international conflicts.”¹¹⁹

When we attempt to locate existing systems of attorney discipline on Wachtel and McCold’s support/control grid, we see that most tend to emphasize either “support” or “control.” As a result, systems end up in the southeast, southwest, and northwest quadrants, but we lack an attorney disciplinary system sufficiently focused on both “control” and “support” to fall into the northeast quadrant.

¹¹³ *Id.* at 117, fig. 8.2.

¹¹⁴ *Id.* at 116–17.

¹¹⁵ RALPH M. STOGDILL & ALVIN E. COONS, LEADER BEHAVIOR: ITS DESCRIPTION AND MEASUREMENT (1957).

¹¹⁶ ROBERT R. BLAKE & JANE S. MOUTON, THE NEW MANAGERIAL GRID I (1978).

¹¹⁷ DANIEL GLASER, THE EFFECTIVENESS OF A PRISON AND PAROLE SYSTEM 289–97 (1964); DAVID DUFFEE ET AL., CRIMINAL JUSTICE: ORGANIZATION, STRUCTURE, AND ANALYSIS 396–400 (1978).

¹¹⁸ Wachtel & McCold, *supra* note 112, at 116–17.

¹¹⁹ *Id.* at 117. See generally JOHN BRAITHWAITE, RESTORATIVE JUSTICE AND RESPONSIVE REGULATION (2003).

TABLE 2: ATTORNEY DISCIPLINE SYSTEMS VIEWED THROUGH THE SOCIAL DISCIPLINE WINDOW

high ↑ Control (limit-setting, discipline)	Traditional grievance procedures when they suspend or disbar. Disciplinary mediation when the parties hold the attorney accountable for the harm to the public and the profession.	?
low	Traditional grievance procedures when they fail to investigate. Disciplinary mediation when the mediator fails to adopt a “norm advocating” style. Diversion programs when they allow violations to be expunged from lawyers’ records in a manner that hampers the disciplinary agency’s ability to track misbehavior and escalate the response to repeat offenders.	Traditional grievance procedures that result in private reprimands that protect the “in group” at the expense of clients and third parties. Disciplinary mediation when a client’s goal is simply to exact remorse and an apology from the attorney.
low - Support (encouragement, nurture)→ high		

If we try to map consumer protection models onto the “social discipline window,” we may have difficulty placing them. Consumer protection is focused on compensating disappointed consumers, not supporting *or* controlling lawyers. Wachtel and McCold’s matrix helps us to see how radical a reform the consumer protection model would be; it abandons the traditional goals of attorney discipline altogether. Thus we can see how it is not proposed to replace attorney discipline—only to supplement it.

Wachtel and McCold’s matrix may also help us tease out the qualities that we wish to maximize in ongoing attempts to reform attorney discipline. Attorney discipline is a regulatory system that must balance control with support. Discipline exerts control when it asserts professional values and holds accountable the lawyers who fail to honor those values. Discipline offers support when it assists failing lawyers to correct their errors, improve their practice, and come into compliance with professional norms. Control is expressed in the promulgation and enforcement of the rules of professional conduct, the clear articulation of conclusions that particular behavior complies with or runs afoul of those rules, and punishment for violators. Support—interestingly enough—is also expressed in the promulgation and enforcement of the rules of professional conduct, as the rules help to educate lawyers and nurture their professionalism. Attorney discipline additionally gives lawyers support in continuing legal education, assistance programs for lawyers struggling with substance abuse or gambling addictions, help with law office management, “hot line” programs that give lawyers quick answers to ethical dilemmas, and some disciplinary proceedings.¹²⁰ In these ways, Wachtel and McCold’s matrix helps us see that control and support are both essential goods in attorney discipline. We should be working to find the optimal value of both. We will argue that Restorative Justice Theory and practice can point toward models that achieve this.

¹²⁰ Namely disciplinary proceedings that result in a requirement that the respondent lawyer seek treatment for addiction or mental illness.

C. Reconsidering the Characteristics of an Ideal Attorney Disciplinary System

We believe that attempts to reform attorney discipline would be more successful if they would consider three criteria that have been missing from accounts to date. First, we should ask more pointedly what complainants want out of the disciplinary process. Second, we should see ethicality not only as a characteristic of the regulated individual, but of the system as a whole. And third, we should consider how the attorney disciplinary system itself sets an example for the attorneys it regulates; we should design attorney disciplinary processes to treat participants the way we want attorneys to treat their clients: with respect, and in a manner that facilitates collaboration and problem solving. We'll discuss each of these criteria in turn.

1. What Complainants Want

Actually, we know very little about public preferences regarding attorney discipline. Public opinion polling tells us something about perceived failures of the system, but fails to solicit suggestions about what should replace it. Several states have begun to survey complainants after the disciplinary process is complete. Wisconsin sends quarterly surveys to participants in the disciplinary system (complainants as well as respondents) to track their satisfaction with the process and its outcome.¹²¹ In most states, complainants do not complete satisfaction surveys, so we lose opportunities to ask people about their experiences with the attorney disciplinary system.

The Office of the Chief Disciplinary Counsel in Texas surveys all complainants and asks: "Do you have any suggestions for improving the grievance system?"¹²² In Vermont, complainants are asked to complete a questionnaire following Assistance ADR Hearings. The questionnaire concludes by soliciting "any recommendations from you about what would have been helpful to you before, during or after" the hearing.¹²³

We might also glean some knowledge from surveys conducted in other fields. Because the role of complainants in discipline is so similar to the role of victims in criminal prosecutions, research into the attitudes of crime victims may yield some interesting and important lessons about discipline complainants. Crime victims seem to find several important features lacking in the criminal justice system, including "a legitimate role in the processing of their cases beyond that of witness for the prosecution" and "recognition of the emotional, as well as material, harm they have experienced."¹²⁴

One of the central findings of research on crime victims is that "emotional and relational forms of reparation seem to be more important to most victims

¹²¹ See email from Keith Sellen to Mark Dubois, August 21, 2006 (on file with author).

¹²² Office of the Chief Disciplinary Counsel, Disciplinary System Questionnaire (on file with author).

¹²³ See Questionnaire (Vermont Lawyer Assistance ADR Panel Hearings) (on file with author).

¹²⁴ Strang & Sherman, *supra* note 49, at 18.

than material reparation.”¹²⁵ This finding has dramatic repercussions for attorney discipline. Standard grievance procedures give no attention to complainants’ potential interest in emotional or relational reparation. Instead, the emphasis in discipline, as in most criminal procedures, is entirely on the guilt of and the appropriate punishment for the offender.

2. *Professionally Responsible Systems*

Attorney discipline constructs professional responsibility as an attribute of individual lawyers. Individuals behave ethically or not, and the system responds to the failures of individuals. Another, complementary way of conceptualizing professional responsibility is to see it as an aggregate quality, something the profession has as a body and demonstrates in its actions, including its regulatory procedures. This view requires the system to possess and live out the same values it demands of the individuals it regulates. Scott Burris and Clifford Shearing have applied this philosophy to public health systems, observing the ways that the regulatory and social service system may itself exhibit symptoms of illness.¹²⁶

In the case of attorney discipline, “sickness” translates to professional failure in the form of unethical or incompetent lawyering. Just as we look for the markers of illness in the system as a whole, to see where it is failing the individuals within it, so too we might look to the ethical failings of attorney regulatory systems, and attorney discipline specifically, to see where it fails to live up to the standards it sets.

Others have discussed at length the ethical soft spots in attorney regulation and discipline. Criticism focuses on the conflict of interest inherent in self-regulation. Some argue that the very standards we set as a profession are self-serving, designed more for our own convenience and profit than for the service of the public. With respect to the standards contained in the model rules of professional responsibility, this seems to be a weak argument. Many of the rules can be seen as profit-restraining rather than profit-maximizing.¹²⁷ Although duties of confidentiality and zealous advocacy may appear to serve lawyers and some clients at the expense of opposing parties and the public, such rules contain important exceptions that reflect significant regard for the public interest and require lawyers to exercise responsibility toward those additional interests, even if it means that they must displease a client.

We can see more strength in the argument that lawyers’ self-regulation creates a conflict of interest if we shift our discussion from substantive ethics standards to the way we enforce them. ABA Model Rule 8.3 imposes upon lawyers a duty to report misconduct if they know another lawyer has violated

¹²⁵ John Braithwaite, *Holism, Justice, and Atonement*, 2003 UTAH L. REV. 389, 400 (2003) (citing HEATHER STRANG, REPAIR OR REVENGE: VICTIMS AND RESTORATIVE JUSTICE 18 (2002)).

¹²⁶ Michael Kempa, Clifford Shearing, & Scott Burris, Changes in Governance: A Background Review, (unpublished manuscript prepared for the Salzburg Seminar on the Governance of Health), available at http://www.temple.edu/lawschool/phrhcs/salzburg/Global_Health_Governance_Review.pdf.

¹²⁷ See Jennifer Gerarda Brown, *Rethinking “The Practice of Law”*, 41 EMORY L. J. 451, 459 (1992) (giving examples of profit-reducing rules of professional conduct).

the rules. This is a sensible rule, since many violations will be visible only to lawyers working closely with, or in opposition to, the misbehaving lawyer. In addition, since many rules violations will be somewhat technical in nature and difficult for lay people to detect, it makes sense to impose upon lawyers the duty to police each other; we have the best access to the information, and we have the greatest ability to process that information to determine whether, on the face of it, a violation appears to have occurred.

But in reality, lawyers are very reluctant to report each other's misconduct. The most important reason is that lawyers in many specialties and geographic locations operate within a fairly tight network. A sense of community and interdependence develops among attorneys who interact frequently. A lawyer who reports another's misconduct may be seen as defecting from the system of mutual cooperation that prevails in many places and fields of practice. Such a lawyer may fear that other lawyers will not want to cooperate with him once he becomes known as a "rat." A slightly more sinister way of putting this point is that a lawyer may expect that someday he might need another lawyer to look the other way when a minor violation occurs; this is an example of the "you scratch my back, I'll scratch yours" mode of practice.

Given these realities, there is good reason to doubt that rigorous policing and self-regulation can occur within the legal profession. But it is also true that outside regulators would probably have even less success in detecting and processing the violations that do occur, because they would not be present to observe much of lawyers' behavior. These empirical questions are important but not dispositive for our purposes. It is enough to note that the structure of attorney discipline as a closed system in which lawyers judge fellow lawyers with little or no input from the lay public, may undermine the system's moral authority. Just as the ABA Model Rules used to suggest that lawyers ask themselves what a "disinterested lawyer" would do when faced with a potential conflict of interest,¹²⁸ so too the profession as a whole might benefit from the views of parties and entities with differing perspectives to deal with the potential conflict of interest inherent in self-regulation.

Our point here is that "being ethical" is a task not just for individual lawyers in their dealings with clients, courts, and third parties, but for the profession as an entity in its dealings with the public. The next section asks what specific qualities we might look for in attorney discipline once we construct ethicality as an attribute of an effective system.

3. *Using the Attorney Disciplinary Process to Model Good Lawyering*

What if we thought about attorney discipline not just as a quality control mechanism, but also as a teaching tool? We might look at attorney discipline as an opportunity to model, for both the lawyers it regulates and the public it serves, the kind of professional and procedural values it wants to nurture.

Two such professional values the disciplinary process could teach have to do with the dynamics of attorney client relationships. Model Rules 1.2 and 1.4 give lawyers some guidance about how the attorney/client team should make decisions about the representation, with clients deciding the "objectives" of

¹²⁸ See MODEL RULES OF PROF'L CONDUCT R 1.7 cmt.5 (1998).

representation and lawyers consulting with clients about “means” to be used to achieve those ends.¹²⁹ This sort of consultation and decision-making requires various skills and activities on the part of the lawyer and the client. They must share information—the client must share information about the facts underlying the legal problem, about her preferences in resolving the problem, and about the consequences she sees flowing from the problem and its resolution. The lawyer must share information about the law, how it might apply to the facts, and what the legal implications of certain decisions might be. Model Rule 1.4 says that lawyers must communicate with a client, giving the client information the client needs to make decisions.¹³⁰

The theme that runs through Rules 1.2 and 1.4 is one that emphasizes effective communication and shared deliberation between client and lawyer. According to this philosophy of lawyering, when attorneys and clients work together as a team, the attorney can more effectively achieve the client’s goals and help the client understand when some goals are not achievable or ultimately desirable. This is also consistent with the profession’s interest in “problem solving” lawyering.

Confidentiality deserves some attention as a professional value, both at the level of the individual attorney-client relationship and with respect to the system as a whole. Within the attorney-client relationship, confidentiality is of course a bedrock principle, part of the oath most lawyers take upon joining the profession, and the foundation upon which many rules of professional responsibility are built.¹³¹ Attorney-client confidentiality makes it more difficult for third parties to learn certain facts, as they must develop and investigate the information independent of the attorney who possesses it.¹³² At its worst, attorney-client confidentiality can facilitate client wrongdoing by preventing the only person who knows about it—the lawyer—from disclosing what she knows. However, the fact that exceptions have developed to permit and in some cases require attorney disclosure of client misconduct reveals the truth about confidentiality: it is not absolute. Sometimes other values—such as the integrity of judicial processes, public safety, and even economic interests—can trump the client’s claim to confidentiality.¹³³

When confidentiality is applied to the attorney disciplinary system, we see that it has some salutary effects. Confidentiality can encourage lawyers who are in trouble to seek help for addiction, mental illness, or financial disorder. Con-

¹²⁹ MODEL RULES OF PROF’L CONDUCT R. 1.2, 1.4 (2009).

¹³⁰ *Id.* at R. 1.4.

¹³¹ Besides MODEL RULES OF PROF’L CONDUCT R. 1.6 (Confidentiality of Information), many additional rules refer back to and fold in assumptions regarding lawyer/client confidentiality. These include rules regarding conflicts of interest, candor to the tribunal, communications with represented parties, and representation of an organization, to name but a few. *Id.* at R.1.7–1.9, 3.3, 3.4, & 4.2.

¹³² So, for example, rather than deposing an opponent’s lawyer or serving a subpoena on an attorney that demands the client’s documents, a litigant must take depositions from fact witnesses and request non-privileged documents from the opponent and third parties.

¹³³ See *id.* R. 1.6 (b)(1) (disclosure to prevent serious bodily harm or death); *id.* R. 1.6 (b)(5) (disclosure in a controversy between lawyer and client or in lawyer’s defense against allegations of misconduct); *id.* R. 3.3 (duty of candor to court may require disclosure of client confidence).

Confidentiality can also create greater incentives for other attorneys to report misconduct when they see it, knowing that if the matter will be handled with discretion, they can avoid a reputation as a “rat.” For lawyers whose mistakes were minor and unintentional, confidentiality can allow them to learn from the disciplinary process without undue reputational harm. Confidentiality is most important for the lawyers who are wrongly accused of misconduct. It allows them to explain to disciplinary authorities (and, through the authorities, to a displeased client or third party) that their conduct was ethical even if it carried some unfortunate consequences for the complainant.

Just as confidentiality is not an unalloyed good in attorney-client relationships, it can also impose some costs in attorney disciplinary processes. We have already seen the way confidentiality can make it difficult for consumers to guard against dishonest and incompetent lawyers. Because confidentiality can allow such lawyers to continue to practice, it both makes future clients more vulnerable and reduces the specific and general deterrent effects of the disciplinary system.

A final downside of confidentiality is less tangible but equally important: proceedings that are cloaked in secrecy can undermine the open administration of civil society and its institutions. If we are to know that our courts and their officers—licensed attorneys—are operating with integrity, we need to know how the remedial quality control mechanisms are working. When HALT and other consumer advocates note the public distrust of lawyers that can grow out of public dissatisfaction with attorney discipline, they are also signaling a breakdown in people’s faith in a crucial part of their government—the courts. The more open and transparent the process, the greater trust members of the public can have in attorney discipline—and this is true even if the process does not operate flawlessly.

We should also note the way confidentiality can impose a kind of social control through stigma and the creation of guilty secrets. In the case of attorney discipline, professional error is treated as a shameful secret rather than a fact of practicing law. This is not to say that we should strive for desensitization through greater exposure of the misconduct, but that more open, democratic discussion of the behavior may help to clarify the many factors that caused it. And with greater understanding of those causes, we could more effectively prevent it in the future. The thesis of this Article is that Restorative Justice Theory provides a framework for designing attorney disciplinary processes that would achieve several goals of reform: giving complainants the experiences they seek, such as emotional engagement and an opportunity to discuss financial or other reparations, holding lawyers accountable for the harm caused by their dishonesty or incompetence, helping complainants to understand when negative outcomes are not the result of professional failure on the attorney’s part, and encouraging a sense of collaboration with the public. To show how restorative justice offers these benefits, we begin with a brief overview of the field in the next section and then apply the theory to attorney disciplinary processes in the section that follows.

D. Restorative Justice: The Record So Far

The theory of Restorative Justice has been described many times by many scholars and practitioners. According to Howard Zehr, a long-time leader in the restorative justice movement, the core principles, inquiries, and concepts of restorative justice all come in related sets of three.

TABLE 3
HOWARD ZEHR ON RESTORATIVE JUSTICE:
PRINCIPLES, QUESTIONS, AND CONCEPTS

Core Principles of Restorative Justice ¹³⁴	Questions for Restorative Processes to Address ¹³⁵	Key Concepts in Restorative Practice
Crime [ethical violation] is a violation of people and of interpersonal relationships	Who has been hurt?	Concern for victims and their needs ¹³⁶
Violations create obligations	What are their needs?	Accountability for offenders, encouraging them to 1) understand the nature and consequences of the harm they've caused and 2) take responsibility for making things right ¹³⁷
The central obligation is to put right the wrongs	Whose obligations are these?	Participation by victims, offenders and communities of care that enables all of them to get information about what happened and then make decisions about how to handle it. ¹³⁸

Since the theory finds its origins in thinking about criminal justice, it is usually described in terms specific to that area, as one of its founders, Mark Umbreit, does here: “Restorative Justice is a victim-centered response to crime that gives the individuals most directly affected by a criminal act—the victim, the offender, their families, and representatives of the community—the opportunity to be directly involved in responding to the harm caused by crime.”¹³⁹ Eric Luna summarized the underlying assumptions that drive this effort to involve victims, offenders, and community members in an introduction to a symposium on the topic:

Substantive restorativeness contends that crime is not just an act against the state but against particular victims and the community in general, and for this reason, affected individuals, family members, and supporters are considered central to crime control and appropriate resolutions. Restorative justice thus seeks the active participation of these stakeholders to address the causes and consequences of crime.¹⁴⁰

¹³⁴ HOWARD ZEHR, *THE LITTLE BOOK OF RESTORATIVE JUSTICE* 19 (2002).

¹³⁵ *Id.* at 21.

¹³⁶ *Id.* at 22.

¹³⁷ *Id.* at 23–24.

¹³⁸ *Id.* at 24.

¹³⁹ MARK UMBREIT, *THE HANDBOOK OF VICTIM OFFENDER MEDIATION: AN ESSENTIAL GUIDE TO PRACTICE AND RESEARCH* xxvii (2001).

¹⁴⁰ Erik Luna, *Introduction: The Utah Restorative Justice Conference*, 2003 UTAH L. REV. 1, 3 (2003).

Because the focus of restorative justice is understanding the cause of crime and helping to repair the victim, restorative practices emphasize “making amends for the offending, particularly the harm caused to the victim, rather than inflicting pain upon the offender.”¹⁴¹ This is not to say that the offender is ignored in these processes. Restorative practices seek to hold offenders accountable for the harm they have caused; “[a]ccountability is demonstrated by recognizing the wrongfulness of one’s conduct, expressing remorse for the resulting injury, and taking steps to repair any damage.”¹⁴²

The “restoration” in Restorative Justice is threefold. First and perhaps foremost, the process will pay attention to the victims of crime, and attempt to restore them to the state of security and wholeness they had before the crime occurred. Heather Strang and Lawrence Sherman have presented data that show when victims participate in restorative justice processes they feel more safe and less anxious or fearful moving forward.¹⁴³ Second, discussion may focus on restoring the relationship between the victim and the offender—understanding the way the offender’s wrongdoing has damaged the relationship and determining the steps necessary to repair the damage. Apology is often a part of restorative processes.¹⁴⁴ In a third sense, restoration will include a larger circle of relationships, including the offender’s place in the wider community. As Steven Garvey explains, the offender has disrupted the essential equality between himself and the victim, and has attempted to somehow make the victim subordinate to the offender or the offender’s own wishes. Restorative Justice seeks to reset the balance:

The real goal of restorative justice is to achieve *reconciliation* between the offender and the victim. The agreement into which the offender enters is only part of the means to that greater end. Because reconciliation is its goal, restorative justice implicitly recognizes that crime does more than cause harm: it damages the trust and equality that ideally define the relationship existing among all citizens of a genuine political community. The offender’s crime breached that trust and denied that equality. The repair of that relationship is thus the real goal of restorative justice practices. When that goal is reached, we say that the offender and the victim have reconciled. They have, in other words, achieved atonement; they are, once again, at one.¹⁴⁵

Thus, while restorative processes are quite clear about the wrongfulness of the offender’s conduct, the focus may be more upon the reasons for the rules that the offender has broken; understanding those reasons helps to clarify the nature of the harm that stems from their violation. To return to the control-support matrix of Wachtel and McCold, “[r]estorative approaches simultaneously exercise high control and high support, confronting and disapproving of the wrong-doing while supporting and acknowledging the intrinsic worth of the wrongdoer.”¹⁴⁶

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ Strang & Sherman, *supra* note 49, at 25–40.

¹⁴⁴ *Id.* at 39–40.

¹⁴⁵ Stephen P. Garvey, *Restorative Justice, Punishment, and Atonement*, 2003 UTAH L. REV. 303, 313 (2003) [hereinafter Garvey, *Restorative Justice*] (footnote omitted).

¹⁴⁶ Wachtel & McCold, *supra* note 112, at 121.

In summary, then, we can understand the theory of Restorative Justice best by reviewing the ideal characteristics and tasks of restorative processes. In general, as Zehr and Mika enumerate, processes which work toward restorative justice:

- *focus on the harms of wrongdoing* more than the rules that have been broken;
- *show equal concern and commitment to victims and offenders*, involving both in the process of justice;
- *work toward the restoration of victims*, empowering them and responding to their needs as they see them;
- *support offenders* while encouraging them to understand, accept and carry out their obligations;
- recognize that while obligations may be difficult for offenders, they should *not be intended as harms* and they must be *achievable*;
- provide *opportunities for dialogue*, direct or indirect, between victims and offenders as appropriate;
- involve and *empower the affected community* through the justice process, and increase its capacity to recognize and respond to community bases of crime;
- encourage *collaboration and reintegration* rather than coercion and isolation;
- give *attention to the unintended consequences* of our actions and programs; and
- *show respect* to all parties, including victims, offenders and justice colleagues.¹⁴⁷

1. History

Many scholars contend that restorative justice has its roots in ancient Arab, Greek, and Roman traditions; Buddhist, Taoist, and Confucian philosophies; and processes used by indigenous communities in pre-state and early state societies.¹⁴⁸ John Braithwaite even suggests that “[r]estorative justice has been the dominant model of criminal justice throughout most of human history for perhaps all the world’s peoples.”¹⁴⁹ Braithwaite’s dramatic claim may be difficult to reconcile with the retributive traditions that some pre-modern societies followed, imposing punishments such as beatings, temporary or permanent exile, or separation from the community.¹⁵⁰ In general, however, many scholars contend that restorative justice principles dominated as the model form of justice during the early period of history, even though competing practices existed.

As the modern state evolved, the victim-centered criminal justice approach was displaced by a state-centered system of punishment. This transition has been linked with the Norman Conquest of areas of Europe, where crime was transformed “into a matter of fealty to and felony against the king, instead of a wrong done to another person.”¹⁵¹ The state-centered criminal justice system focused on legal guilt, determining blameworthiness, and deciding an appropri-

¹⁴⁷ Howard Zehr & Harry Mika, *Fundamental Concepts of Restorative Justice*, in RESTORATIVE JUSTICE: CRITICAL ISSUES, *supra* note 11, at 40, 43 (emphasis added).

¹⁴⁸ See BRAITHWAITE, *supra* note 119, at 3; Chris Cunneen, *Reviving Restorative Justice Traditions?*, in HANDBOOK OF RESTORATIVE JUSTICE 113, 114 (Gerry Johnstone & Daniel W. Van Ness eds., 2007).

¹⁴⁹ BRAITHWAITE, *supra* note 119, at 5.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

ate degree of punishment for the offender.¹⁵² As this ideological framework developed and transitioned in state societies, certain positive aspects resulted, such as the reduction of punishment disparities between similar offenders. However, the main tradeoff was the lost focus on victim restitution and community control.

To address shortcomings in the state-centered system, renewed interest in restorative justice principles began to grow in the 1970s. Around this time, scholars began to study indigenous peoples of the Americas, Africa, Asia, and the Pacific who had retained their restorative traditions in areas without central state power.¹⁵³ At the same time, some of these indigenous groups in North America, Australia, and New Zealand began to reassert their own customary laws and practices in response to foreign punitive systems imposed upon them. For example, the Navajo Nation in the United States began to revive Navajo common law based upon old customs and traditions that focused on peace-making. “Navajo methods seek to educate offenders about the nature of their behaviours, how they impact on others, and to help people identify their place in the community and reintegrate into community roles.”¹⁵⁴ These methods work toward the restorative goal of seeking to achieve reconciliation between victims, offenders, and the community.

In Australia, the Aboriginal community became influential in establishing indigenous courts and indigenous healing lodges as alternatives to prison.¹⁵⁵ In an indigenous court, Aboriginal elders or community members participate in the court process with a magistrate.¹⁵⁶ Sitting on the bench together, they address the offender, express the views of the community, and advise the magistrate of cultural issues.¹⁵⁷ This process establishes and maintains respect for the elders’ authority in the Aboriginal community and allows the elders to strike the balance between condemning the offending behavior and supporting the offender’s potential to be reconnected with the local community.¹⁵⁸ According to a magistrate at the Brisbane Children’s Court, “I can say that since the Youth Murri Court has been held that there has been a reduction in the number of serious offences committed by young Indigenous persons.”¹⁵⁹ He attributes at least a part of this reduction in offenses to the community’s work in sanctioning and reaccepting the offender.¹⁶⁰

In 1989, facing criticism from the indigenous Maori population, New Zealand revolutionized its juvenile justice system.¹⁶¹ Because juvenile offenders were often institutionalized in a custodial setting away from their families without any input from community members, “the Maori community expressed

¹⁵² See Mara Schiff, *Satisfying the Needs and Interests of Stakeholders*, in HANDBOOK OF RESTORATIVE JUSTICE, *supra* note 148, at 228, 238.

¹⁵³ BRAITHWAITE, *supra* note 119, at 5.

¹⁵⁴ Cunneen, *supra* note 148, at 115.

¹⁵⁵ *Id.* at 120.

¹⁵⁶ *Id.* at 121.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 121–22.

¹⁵⁹ *Id.* at 121.

¹⁶⁰ *Id.* at 122.

¹⁶¹ Barbara E. Raye & Ann Warner Roberts, *Restorative Processes*, in HANDBOOK OF RESTORATIVE JUSTICE, *supra* note 148, at 211, 213.

concerns that the existing approach was wholly foreign to its traditional values and destructive of kinship networks essential to its culture.”¹⁶² The Children, Young Persons and Their Families Act of 1989 was therefore passed with a new emphasis on family group conferences to administer juvenile justice.¹⁶³

In 1992, Canada changed its sentencing process in response to an opinion from the Supreme Court of the Yukon in *R. v. Moses*, which favorably cited and relied on Aboriginal principles.¹⁶⁴ This opinion led to the use of sentencing circles.¹⁶⁵ Framing a criminal offense as a breach of relationships with the victim and the community at large, sentencing circles gave the community a role in addressing the causes of the crime and in healing the breach.¹⁶⁶ As more and more restorative practices have reemerged in indigenous justice systems, the appeal of these practices has become apparent and their transplantability has been tested. Thus, restorative practices have begun to blossom in a variety of contexts.

Schools, for example, provide particularly fertile ground for restorative justice principles. Introducing children to restorative justice at a young age can help to foster restorative approaches in the broader context of general social control.¹⁶⁷ The applications in this arena are nearly endless due to the variety of situations and conflicts that develop daily in school systems. Restorative processes have been implemented to deal with bullying, drugs, property theft, bomb threats, and disrespectful behavior—all to repair the harm that has been done to an individual and to the school community.¹⁶⁸ Some schools have even taken the additional step of using restorative practices to be proactive in an effort to build and strengthen social and emotional bonds within the school community. These efforts help to improve students’ problem-solving skills by strengthening their ability to assess emotions and interpret relationships.¹⁶⁹

As corporate crime researchers took notice of the broad applicability of restorative justice processes, they began to inquire about its potential application to corporate criminal law. Some scholars, such as John Braithwaite, argue that a restorative approach is effective for such situations, as long as credible punishment remains as a viable back up.¹⁷⁰ A successful example of restorative justice processes applied in the corporate context occurred in the early 1990s in Australia.¹⁷¹ At that time, a widespread insurance scam had come to light in

¹⁶² Erik Luna, *Punishment Theory, Holism, and the Procedural Conception of Restorative Justice*, 2003 UTAH L. REV. 205, 296 (2003) (footnotes omitted).

¹⁶³ *Id.* at 295–96; see *infra* Part II.D for a detailed discussion of family group conferences.

¹⁶⁴ Cunneen, *supra* note 148, at 124.

¹⁶⁵ *Id.*

¹⁶⁶ The judge retains the discretion to accept or reject the recommendations of the sentencing circle, and the resulting sentences are subject to appellate review. *Id.* See *infra* Part II.D for a detailed discussion of sentencing circles.

¹⁶⁷ Gerry Johnstone & Daniel W. Van Ness, *Restorative Justice in Social Context*, in HANDBOOK OF RESTORATIVE JUSTICE, *supra* note 148, at 265, 266.

¹⁶⁸ Brenda Morrison, *Schools and Restorative Justice*, in HANDBOOK OF RESTORATIVE JUSTICE, *supra* note 148, at 325, 326.

¹⁶⁹ *Id.* at 327.

¹⁷⁰ See generally BRAITHWAITE, *supra* note 119 (describing the pyramid of responsive regulation, which provides increasingly coercive and/or formal processes to deal with misconduct if initial, informal processes are unsuccessful).

¹⁷¹ *Id.* at 22–24.

which several insurance companies had made serious misrepresentations to consumers and were charging for completely useless insurance policies.¹⁷²

In large part, the insurance companies had preyed on uneducated members of remote Aboriginal communities.¹⁷³ High ranking officials in the insurance companies attended numerous meetings with victims, Aboriginal community council members, and regulators.¹⁷⁴ After these meetings, one company voluntarily compensated two-thousand victims and established a consumer education fund for the Aboriginal community.¹⁷⁵ The company conducted a large-scale internal investigation, dismissed numerous agents who had acted improperly, and implemented new compliance policies.¹⁷⁶ If the matter had been prosecuted in court, Braithwaite points out:

[a]t best the company would have been fined a fraction of what it actually paid out, and there would have been a handful of follow-up civil claims by victims. At worst, illiterate Aboriginal witnesses would have been humiliated and discredited by uptown lawyers, the case lost, and no further ones taken.¹⁷⁷

In the regulatory context government agencies are increasingly adopting restorative justice principles. Agencies are employing a dynamic model in which the agency will first initiate a dialogue with the regulated entity in an attempt to elicit reform and reparation for harm resulting from a regulatory violation. If the dialogue is unsuccessful, the agency will escalate its response to become more demanding and punitive.¹⁷⁸ The idea is to begin with more collaborative, informal, and less costly options and to resort to more punitive approaches only when necessary.¹⁷⁹

This approach has been studied in the context of nursing home regulation.¹⁸⁰ For a short period, Australia switched from a criminal enforcement model to a restorative justice model for nursing home regulation.¹⁸¹ Members of the nursing home industry, consumer groups, unions, and aged care interests met and developed thirty-one outcome standards for nursing homes.¹⁸² During inspections, inspectors took the traditional steps of auditing plans and records, but they also spoke with residents and employees about their experiences and about how the quality of care could be improved.¹⁸³ After the inspections, conferences were held to discuss each nursing home's compliance with the outcome standards.¹⁸⁴ These conferences included inspectors and management officials, as well as employees, residents, and residents' family members.¹⁸⁵ At the end of such conferences, the parties agreed to action plans that would

¹⁷² *Id.* at 22.

¹⁷³ *Id.* at 24.

¹⁷⁴ *Id.* at 23.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 23–24.

¹⁷⁷ *Id.* at 24.

¹⁷⁸ *Id.* at 30.

¹⁷⁹ *Id.* at 29–32.

¹⁸⁰ *Id.* at 17–18.

¹⁸¹ *Id.* at 17.

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

improve the residents' quality of care. Over a two-year period, researchers found that compliance improved the most when inspectors used praise for improvements that were achieved, and followed "shaming" of violators with "reintegration."¹⁸⁶

Therefore a rich history underlies restorative justice theory and practice. Restorative justice has grown from a belief that subgroups, smaller institutions, and communities within a larger governmental system can often make decisions about wrongdoing and its consequences more effectively than would larger bureaucracies or the court system in the ordinary process of prosecution and adjudication. Restorative justice makes this claim even in contexts where many of the stakeholders lack experience, substantive expertise in criminal law, or any prior, demonstrated inclination to be involved in deliberations and decision-making about crime. Notwithstanding the absence of preexisting regulatory commitments by these stakeholders, restorative justice theory and practice seeks to activate an innate sense of fairness in participants, so that through their discussions the right course of action will emerge that helps to repair the harm that has been done.

2. Processes

In juvenile justice, school discipline, and corporate and regulatory enforcement, several similar processes are often used to implement the restorative justice values discussed above. To provide further clarification about the actual mechanics of restorative justice processes, this section will describe in greater detail the characteristics of the most commonly used methods: victim offender mediation, circle processes, and family and community conferencing.¹⁸⁷

a. Victim Offender Dialogue

Beginning in the 1970s, victim offender mediation ("VOM") was perhaps the first restorative process to find widespread adoption in western, industrialized cultures.¹⁸⁸ As the name implies, the parties to these mediations are quite limited; the typical participants are the victim, the offender, and a mediator. Usually, the mediator will first work with the victim and the offender in separate sessions to explain the process and to make sure each party is willing and able to proceed.¹⁸⁹ Then the mediator meets with both parties together and guides the discussion. The mediator plays a very active role in managing the dialogue and in ensuring that each party respects the other's turn to speak.¹⁹⁰ The victim has the opportunity to gather information and to receive answers to questions such as why the offense happened. The victim also has the opportu-

¹⁸⁶ *Id.* at 17–18.

¹⁸⁷ For an excellent and very thorough overview of restorative practices as well as empirical research measuring their effectiveness, see Mark S. Umbreit et al., *Restorative Justice in the Twenty-First Century: A Social Movement Full of Opportunities and Pitfalls*, 89 MARQ. L. REV. 251, 254–68 (2005).

¹⁸⁸ Raye & Roberts, *supra* note 161, at 212.

¹⁸⁹ ZEHR, *supra* note 134, at 47.

¹⁹⁰ Robert Weisberg, *Restorative Justice and the Danger of "Community,"* 2003 UTAH L. REV. 343, 357 (2003).

nity to express his side of the story, to explain how he was affected by the incident, and to describe what he seeks as restitution or vindication. The offender, on the other hand, is confronted with a situation that encourages him to listen to the victim and to understand the harm he has caused. In this environment, the offender has the opportunity to empathize with the victim and to accept responsibility for his actions.

In some situations, the parties may prefer indirect VOM where the victim and the offender do not actually meet in person but instead communicate back and forth through the mediator.¹⁹¹ To facilitate discussions in this approach, the mediator may rely on audio-recordings, videotapes, and letters.¹⁹² This model may be particularly useful when there is a power imbalance between the parties and communication may be too intense for one party if attempted on a direct basis.¹⁹³ At the end of victim offender mediation, if the offense did not involve severe violence, the victim and the offender may sign a restitution agreement.¹⁹⁴ If the offense did involve severe violence, an agreement may not be appropriate and the parties may simply benefit from the cathartic experience with expressions of apology and encouragement for the future.

Perhaps because VOM was the first restorative justice practice to be incorporated into a modern, western criminal justice system, VOM has been criticized for focusing unduly upon the offender.¹⁹⁵ Although this critique remains relevant today, programs have made ongoing commitments to ensure the process is more sensitive to victim participants. Pursuant to these commitments, some programs have abandoned the “mediation” label altogether, opting instead to refer to the process as “dialogue.”¹⁹⁶ Victim offender dialogue programs reject the assumption inherent in mediation that the parties share equal status, and thus seek specifically to empower and heal victims of crime.¹⁹⁷

b. Sentencing Circles

In sentencing circles, a facilitator convenes a group of people to develop and recommend an appropriate sentencing plan for the offender. This group can include the victim and his family and supporters, the offender and his family and supporters, other community members, and justice system representatives such as a prosecutor, defense counsel, or judge. This process is rarely used for first time offenders and relatively “minor” criminal activities because sentencing circles require a substantial investment of time and effort from numerous

¹⁹¹ Raye & Roberts, *supra* note 161, at 212.

¹⁹² *Id.*

¹⁹³ *Id.* at 219.

¹⁹⁴ One of the leading organizations in victim-offender dialogue, the Victim-Offender Reconciliation Program Information and Resource Center (VORP), explains at its web site that “[o]ffenders take meaningful responsibility for their actions by mediating a restitution agreement with the victim, to restore the victims’ losses, in whatever ways that may be possible.” *About Victim-Offender Mediation and Reconciliation*, VICTIM-OFFENDER RECONCILIATION PROGRAM INFORMATION & RESOURCE CENTER (VORP), <http://www.vorp.com/> (last visited Oct. 13, 2011).

¹⁹⁵ Raye & Roberts, *supra* note 161, at 213.

¹⁹⁶ See Janine Geske, Keynote address to John A. Speziale ADR Symposium at Quinnipiac Law School (Oct. 15, 2010).

¹⁹⁷ *Id.*

parties in the community.¹⁹⁸ “Key factors in determining whether a case is appropriate for the circle process include the offender’s character and personality, sincerity, and connection to the community; the victim’s input; and the dedication of the offender’s and victim’s support groups.”¹⁹⁹ The sentencing circle relies on a very structured process to make each participant feel comfortable and engaged. To begin with, chairs for all participants are arranged in a circle without any table to act as a barrier between the parties.²⁰⁰ The process then relies on ceremony, guidelines, a talking piece, a facilitator, and consensus decision-making.²⁰¹

Once the participants are seated, the facilitator performs an opening ceremony to explain the purpose of the gathering and to encourage the participants to be open and willing to engage with others. The ceremony encourages everyone to be respectful and positive and to focus on core values. Some of the main goals of circle sentencing include:

- “Empowering victims, community members, families, and offenders by giving them a voice and a shared responsibility in finding constructive resolutions.
- Addressing the underlying causes of criminal behavior.
- Building a sense of community and its capacity for resolving conflict.
- Promoting and sharing community values.”²⁰²

The entire circle establishes guidelines that will govern the process. The participants may have been encouraged to think about proposed guidelines before the circle process began, but the guidelines are not adopted until the circle acts by consensus.²⁰³ The guidelines establish clear expectations for all involved and almost always include provisions about being respectful and listening while others are talking.²⁰⁴

The participants are then introduced to the talking piece—an object passed around in one direction to each participant.²⁰⁵ When an individual holds the talking piece, he or she is exclusively entitled to speak while all others are expected to actively listen. This allows people to be more open and receptive to the comments of others since they are not thinking ahead and formulating their own comment until the talking piece circles back to them.²⁰⁶ This also promotes harmony in the circle: no individual can dominate the discussion and there is no opening for two people to monopolize discussion time with bickering back and forth.

During the process, the facilitator quietly sets the tone for the circle. His opening ceremony establishes the circle as a respectful place where all are allowed to contribute without mockery or embarrassment. Because the guidelines and the talking piece largely work on their own, the facilitator usually

¹⁹⁸ See Weisberg, *supra* note 190, at 357.

¹⁹⁹ *Id.*

²⁰⁰ KAY PRANIS, *THE LITTLE BOOK OF CIRCLE PROCESSES: A NEW/OLD APPROACH TO PEACEMAKING* 11 (2005).

²⁰¹ *Id.*

²⁰² Weisberg, *supra* note 190, at 356.

²⁰³ PRANIS, *supra* note 200, at 34.

²⁰⁴ *Id.*

²⁰⁵ Raye & Roberts, *supra* note 161, at 215.

²⁰⁶ PRANIS, *supra* note 200, at 35.

does not have to actively monitor the dialogue. If, however, any problem arises, the facilitator may speak without the talking piece and may take appropriate actions to remind the circle of the guidelines they adopted through the consensus vote.²⁰⁷ At all times, the facilitator remains a participant in the process and may contribute to the discussion and resolution of the problem.²⁰⁸

The group works toward a consensus resolution after all participants feel that they have fully expressed their thoughts and concerns. Such a resolution usually cannot incorporate every aspect of the discussion, but by paying close attention to everyone's interests, the circle can usually reach an outcome that all are willing to accept and help implement. Because everyone contributes to the decision process, the circle participants usually feel invested in the resolution and are willing to aid in bringing it to successful fruition. The role of the circle participants is therefore "that of judge, jury, and probation officer as well, since the groups for both offenders and victims also monitor offenders and act as victim advocates to ensure that agreements made within the circle are carried out."²⁰⁹ Of course, if the circle does not reach a consensus agreement, the process can usually default to the traditional system used for resolution. Even if that occurs, the traditional system is aided by the increase in information and the action of all participants.

Circle processes have extensive value beyond the sentencing context. For example, circles can be formed to provide ongoing support for a victim or an offender, to resolve community problems, and to address numerous issues in the educational environment. Circle processes can be particularly useful for classrooms at the beginning of the school year to foster community and understanding and to prevent future dissent and bullying.²¹⁰ If the children sit in a circle and follow circle processes, they have the opportunity to learn each other's names and to realize what they share in common. The talking piece ensures that even shy, reserved students have the opportunity to speak in a respectful environment. By encouraging students to take turns, speak out, and be attentive to others, bullying can often be prevented or more easily addressed if it does occur.

c. Family and Community Conferencing

Family group conferencing ("FGC") incorporates family and community members in the process of addressing wrongdoing. Public officials or social justice workers are responsible for consulting the relevant stakeholders to determine if and when a family group conference should be held and who should be invited to attend.²¹¹ The public official or the social justice worker then acts as a facilitator throughout the course of the conference.²¹² The facilitator may not maintain the same level of impartiality that characterizes a mediator; when the facilitator is a public official, he may more explicitly bring his own agenda to

²⁰⁷ *Id.* at 37.

²⁰⁸ *Id.*

²⁰⁹ Weisberg, *supra* note 190, at 359.

²¹⁰ PRANIS, *supra* note 200, at 72.

²¹¹ Luna, *supra* note 162, at 297.

²¹² *Id.*

the meeting.²¹³ In some situations and in some programs, the facilitator may even have a formal script to follow.²¹⁴

Family group conferencing has several advantages over mediation. First, conferencing involves more community members in the meeting to discuss the offense, its effects, and how to remedy the harm; it thus contributes to the empowerment and healing of the overall community.²¹⁵ Second, conferencing acknowledges a wider range of people as being affected by the offense and explores the impact on those people: the primary victim, people connected to the victim, the offender's family members, others connected to the offender, and community members who may have witnessed the crime or dealt with its effects.²¹⁶ And third, conferencing allows a wider range of participants to be involved in assisting with the reintegration of the offender into the community and the healing of the victim.²¹⁷

During the conference, the victim has the opportunity to explain his feelings and the consequences of the offender's actions. The offender has the opportunity to take responsibility and even apologize for his behavior, and other stakeholders also have the opportunity to participate. This environment often supports and encourages genuine remorse on behalf of the offender. "[T]he presence of the victim and his articulation of the harm he has suffered frustrate an offender's attempt to neutralize the offense."²¹⁸ And the presence of the offender's family, "their personal condemnation of the offense, and the visible signs of anguish felt by family members confronted by the harm caused by their own kin all provide exceptionally powerful signals to the [offender] on the wrongfulness of his conduct."²¹⁹ In the end, the participants are expected to come to an agreement about what is to be done: this could include restitution or other reparation for the victim, therapy or other rehabilitative work for the offender.²²⁰ The ultimate success of the agreement often depends on the facilitator's follow-up, "ensuring that the agreed restitution is being made, that the necessary services are provided the [offender], and that all other details in the plan are being met."²²¹ The only restriction on family group conferences "is the public's willingness to finance both the conferencing process and the accompanying social services" that result.²²²

²¹³ See *id.*

²¹⁴ Raye & Roberts, *supra* note 161, at 214.

²¹⁵ For example, "[c]ommunity members and law enforcement can openly discuss the larger effects of the offense and the rationale for its criminalization, thereby validating both the values of the community and the limits of individual behavior." Luna, *supra* note 162, at 299.

²¹⁶ Mark Umbreit & Howard Zehr, *Restorative Family Group Conferences: Differing Models and Guidelines for Practice*, in *RESTORATIVE JUSTICE: CRITICAL ISSUES*, *supra* note 11, at 69, 71 n.210.

²¹⁷ *Id.*

²¹⁸ Luna, *supra* note 162, at 300.

²¹⁹ *Id.*

²²⁰ See Strang & Sherman, *supra* note 49, at 25–26.

²²¹ Luna, *supra* note 162, at 298.

²²² *Id.* at 301.

3. *Effectiveness of Restorative Justice Processes*

A growing number of empirical studies have evaluated the effectiveness of restorative justice processes in general. Almost every study concludes that restorative justice processes satisfy victims, offenders, and communities more than the traditional criminal justice system.²²³ In addition, restorative justice processes can have advantageous side benefits, such as reducing the rate of reoffending.²²⁴ The results are therefore encouraging when a matter proceeds through a restorative justice process. For example, Lily Trimboli's evaluation of the NSW Youth Justice Conferencing Scheme concludes that victims report very high levels of satisfaction about being kept informed, having the opportunity to express their thoughts and opinions, and having a role in deciding how a matter should be resolved.²²⁵ Obviously this study is encouraging for the prospect of restorative justice in attorney discipline cases since a few critical problem areas that we have identified relate to victim dissatisfaction from being uninformed and left out of the process.

Interestingly, regardless of whether cases are randomly referred to restorative justice conferences or whether participants elect restorative justice conferences, evaluations indicate that victims in both groups are often still more satisfied than those whose cases proceed to court. For example, the Reintegrative Shaming Experiments ("RISE") conducted in Canberra, Australia from 1995-2000, took juveniles who had committed personal property crimes and offenders up to the age of twenty-nine who had committed middle-range violent crimes and randomly assigned them either to court or a restorative justice conference.²²⁶ The outcomes in the two groups were dramatically different. While eighty-six percent of victims in restorative justice conferences received apologies from their offenders, only sixteen percent of victims in court received apologies.²²⁷ Ninety-two percent of the victims who took part in conferences said that "all sides got a fair chance to bring out the facts."²²⁸ Interestingly, contrary to the concerns that have been expressed about the effects of gender in less formal processes,²²⁹ there were no differences in the responses of male and female victims who took part in conferences, "including victims of violent

²²³ Hennessey Hayes, *Reoffending and Restorative Justice*, in HANDBOOK OF RESTORATIVE JUSTICE, *supra* note 148, at 426, 432.

²²⁴ Gwen Robinson & Joanna Shapland, *Reducing Recidivism: A Task for Restorative Justice?*, 48 BRIT. J. CRIMINOLOGY 337, 340 (2008).

²²⁵ BRAITHWAITE, *supra* note 119, at 49-50.

²²⁶ Strang & Sherman, *supra* note 49, at 25.

²²⁷ *Id.* at 28. It is actually somewhat surprising that apologies occurred as frequently as they did in the court proceedings.

²²⁸ *Id.* at 35.

²²⁹ *E.g.*, Grillo, *supra* note 100, at 1582-85 (informal processes are more likely to produce results favoring lying participants); Richard Delgado, et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1366 (1985) (those threatened or intimidated by formal court proceedings may favor an informal forum); Lisa G. Lerman, *Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women*, 7 HARV. WOMEN'S L.J. 57, 89-94, 102-07 (1984) (mediation is perhaps "the weakest of available formal legal remedies" for abuse cases).

offences.”²³⁰ In sum, the participants in the restorative justice conferences expressed greater satisfaction than the participants in the court system.

Additionally, in a random assignment evaluation Edmund McGarrell “found that 97 percent of conference victims ‘felt involved,’ compared with 38 percent of control group victims, and that 95 percent of conference victims felt they had the opportunity to express their views, compared with 56 percent of control group victims.”²³¹ In the Queensland Department of Justice conferencing program, where victims may decline to participate, seventy-eight percent of victims who elected conferences indicated the process and the resulting agreement helped to “make up for the offence,” and ninety percent of offenders offered verbal apologies during the process.²³²

The opportunity to receive and the receipt of an apology play a large role in increasing victim satisfaction with restorative justice processes. Obviously restorative justice processes open the dialogue more and provide a more receptive environment for expressing remorse and sympathy. While more offenders offer apologies in restorative justice settings, a greater percentage of those apologies are seen as sincere than those offered in a court setting. In the RISE study, victims viewed seventy-seven percent of the apologies received in randomly assigned conferences to be sincere or somewhat sincere.²³³ On the other hand, only thirty-six percent of victims in randomly assigned court cases viewed the apologies they received as sincere or somewhat sincere.²³⁴

The receipt of an apology is just one form of reparation that means a great deal to many victims. In addition, restorative justice processes allow victims to play a role in preventing future victimization.²³⁵ In Gwen Robinson and Joanna Shapland’s observations of 280 restorative justice conferences, they found that four-fifths of outcome agreements addressed the offender’s future behavior and ways to reduce further reoffending.²³⁶ “[V]ictims’ (and their supporters’) aspirations for offenders were often expressed as a desire to help or ‘save’ others (i.e. potential future victims) from the harm they themselves had suffered at the hands of the offender.”²³⁷

One notable exception to increased victim satisfaction is when a restorative justice process is mismanaged or falls through and the matter ends up defaulting to the traditional court system. In that situation, victims are often more upset than if their matter had simply proceeded to court without raising their expectations of a restorative justice process.²³⁸ “The lesson here is that badly administered programs that do not deliver on their restorative promises to victims can actually make things a lot worse for them.”²³⁹

Although victims generally derive greater satisfaction from restorative justice processes than from the traditional court system, offenders seem to value

²³⁰ Strang & Sherman, *supra* note 49, at 35.

²³¹ BRAITHWAITE, *supra* note 119, at 50.

²³² *Id.*

²³³ *Id.* at 52.

²³⁴ *Id.*

²³⁵ Robinson & Shapland, *supra* note 224, at 341.

²³⁶ *Id.* at 338, 341.

²³⁷ *Id.* at 341.

²³⁸ BRAITHWAITE, *supra* note 119, at 47.

²³⁹ *Id.*

and appreciate restorative justice processes even more than victims. In general, offenders respond favorably to processes that allow them to participate and that seem to be just.²⁴⁰ If an attorney therefore felt he had a genuine opportunity to participate in a just and open process, he should be more inclined to drop the defensive posture that so often arises in grievance proceedings that are reminiscent of litigation. And, the restorative justice process may encourage the attorney to seek help in the future before a problem escalates and impairs the attorney-client relationship.

As Gwen Robinson and Joanna Shapland point out, the environment within a restorative justice process can also help facilitate and reinforce an offender's decision to desist—to gradually decrease offending.²⁴¹ Most agree that restorative processes have the potential to reduce the rate of reoffending, although there are few studies concerning the impact of restorative justice on recidivism and restorative justice advocates continually articulate that reducing reoffending is not a primary goal of the restorative justice practice.²⁴² However, comparative studies between traditional court systems and restorative justice practices have produced mixed results.²⁴³ In particular, there are always variations in how certain researchers define reoffending, in how they count recidivist events, and in the length of time of the follow-up period.²⁴⁴

In a study conducted in New South Wales, G. Luke and B. Lind concluded that restorative justice conferencing for first-time offenders reduced the predicted risk of reoffending by fifteen to twenty percent.²⁴⁵ In an experiment in the United States focusing on first-time offenders age fourteen and younger, Edmund McGarrell found that restorative justice conferencing produced a forty percent reduction in reoffending within six months of the initial arrest compared to a control group randomly assigned to other court diversion programs such as victim-offender mediation.²⁴⁶ G. Maxwell and A. Morris analyzed reoffending results between adults who participated in community panel pre-trial diversion programs and adults who followed a traditional path in court.²⁴⁷ In one diversion program offenders met with panels of community members, and in another, offenders met with community members, police, and victims.²⁴⁸ At

²⁴⁰ *Id.* at 54. Compiling studies across the United States, Mark Umbreit found that offenders in victim-offender mediation programs expressed an 89 percent perception of fairness in the process, while only 78 percent of offenders in unmediated cases found their processes to be fair. *Id.* In an Indianapolis study, Edmund McGarrell et al. found that 84 percent of offenders in restorative justice conferences “felt involved,” compared to only 47 percent of offenders in a control group, and that 86 percent of offenders in the restorative justice conferences felt they had the opportunity to express themselves, compared to only 55 percent of offenders in control groups. *Id.* Additionally, in the Queensland Department of Justice conferencing program 96 percent of young offenders agreed with the following propositions: you “would be more likely to go to your family now if you were in trouble or needed help,” and you have “been able to put the whole experience behind you.” *Id.* at 55.

²⁴¹ Robinson & Shapland, *supra* note 224, at 347, 352.

²⁴² *Id.* at 339–40.

²⁴³ Hayes, *supra* note 223, at 432–33.

²⁴⁴ *Id.* at 433.

²⁴⁵ *Id.*

²⁴⁶ *Id.* at 434.

²⁴⁷ *Id.* at 436.

²⁴⁸ *Id.*

each panel session, the parties discussed the offender's conduct and developed a reparative plan.²⁴⁹ Twelve months later, only thirty-three percent of offenders in the first diversion program were reconvicted compared to forty-seven percent of offenders who proceeded through court.²⁵⁰ And only sixteen percent of offenders in the second diversion program were reconvicted compared to thirty percent of offenders who proceeded through court.²⁵¹ In a U.S. study of the Bethlehem, Pennsylvania Restorative Policing Experiment, P. McCold and B. Wachtel were unable to reach any firm conclusions regarding reoffending rates of young offenders randomly assigned to restorative justice conferencing or the youth court due to the offender's ability to decline to participate in the conference.²⁵² The researchers noted that "[i]t appears that any reductions in recidivism are the result of the voluntary programme diverting from formal processing those juveniles who are least likely to reoffend in the first place."²⁵³ And in the RISE study, conferencing reduced the reoffending rate of young violent offenders compared to those randomly assigned to court.²⁵⁴ But the researchers found no significant difference for property offenders, and drunk drivers who were referred to conferencing actually had an insignificant higher rate of reoffending than those who proceeded through court.²⁵⁵

Lastly, community members who participate in restorative justice processes report high levels of satisfaction. Due to the group setting of these processes, all benefit from enhanced relationships that develop through dialogue and sharing.²⁵⁶ According to the Ministry of Justice, Western Australia, there is "93 percent parental satisfaction, 84 percent police satisfaction, and 67 percent judicial satisfaction, plus (and crucially) satisfaction of Aboriginal organizations with its restorative justice conference program."²⁵⁷ In particular, restorative justice processes can help to restore and build the social bonds of families, to provide support for the offender and victim, and to help prevent recidivism.

E. Applying Restorative Justice Theory to Attorney Discipline

The history, processes, and empirical studies relating to restorative justice theory demonstrate that this theory is ripe for application in new environments and contexts. As such, this section will attempt to transplant Restorative Justice Theory from criminal justice, where it has found most frequent application, to a new area, attorney discipline.

1. Fit

Several key characteristics of attorney disciplinary cases make them good candidates for the application of restorative justice principles and practices.

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² *Id.* at 433.

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ See BRAITHWAITE, *supra* note 119, at 66.

²⁵⁷ *Id.* at 67.

a. A Community of Shared Norms

First, and perhaps most importantly, restorative justice has been most successful in cultures and communities where participants could build agreement around shared values and norms.²⁵⁸ Attorney discipline occurs in a community of (at least theoretically) common values, as lawyers share a common education, oath of office, and ethical code. In a disciplinary case, factual questions may raise serious issues about whether violations occurred and, if so, how severe they are, but the underlying rule is rarely in doubt. The applicable norms should be very clear. The assumption of shared values clearly applies to any grievance brought by one lawyer against another, rare as these cases may be.

But in the far more common run of cases, when a client brings a grievance against a lawyer, the circle must expand to include someone who is not a member of the professional community. It may at first seem unfair to assume that such a person knows the rules of professional responsibility, much less endorses or adheres to those rules. But when clients hire lawyers, they voluntarily enter into the community of lawyers, if only as consumers of their services or participants in the institutions that lawyers serve. Even indigent criminal defendants or members of a class action lawsuit, who may not personally choose their lawyers, still make a choice to *be represented*. When they decline to opt out of that relationship,²⁵⁹ they buy into the community in the same way a client does who personally retains a lawyer. These clients therefore enter into a relationship that is laden with norms.²⁶⁰

b. An Explicitly Self-Regulating Community

In a community that explicitly takes on the responsibility of self-regulation—policing, reporting, and punishing peer misconduct—a transplanted model of restorative justice should find even more fertile ground than it enjoys in the context of criminal law. Many of the stakeholders in a disciplinary case will be lawyers, including the respondent, the chief disciplinary counsel, the respondent's law partners, and in some cases, the complainant. These stakeholders have opted into a profession known to be self-regulating, one that imposes on its members a duty to report misconduct when they come to know of it²⁶¹ and to share truthful information when requested by a disciplinary authority.²⁶² This will not necessarily make them better or more valid partici-

²⁵⁸ For some skepticism about whether a community of shared norms exists in many contexts where victim-offender mediation is promoted, see Brown, *supra* note 8, at 1292–95.

²⁵⁹ Here the double negative is accurate, since this is usually a passive decision and default outcome.

²⁶⁰ Most of those norms are for the clients' benefit and protection, but some can cut against their interests. Confidentiality rules, for example, will usually protect a client, but they are also the animating force in rules against certain types of investigation, preventing *ex parte* communications with another lawyer's client. So the norm of attorney-client confidentiality will both protect the client and protect others (including a client's opponent) from actions the lawyer might otherwise take on the client's behalf.

²⁶¹ MODEL RULES OF PROF'L CONDUCT 8.3 (1983). *See also* cmt. [1] ("Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct.").

²⁶² *Id.* R. 8.1. The obligation to share information applies whether it is the lawyer's own behavior or another lawyer's conduct that is the subject of the disciplinary proceeding. *See*

pants, but it does create a context in which many of the participants have preexisting commitments to engage and work together for the good of the public and the profession—good conditions for a process that requires stakeholders to take responsibility for outcomes.

c. Therapeutic Goals

It is perhaps significant that restorative processes have taken hold most firmly in juvenile cases, where rehabilitation remains, at least in theory, a central goal of the system. In criminal law, where the goal of rehabilitation has been eclipsed by specific and general deterrence, incapacitation, and (in some cases) retribution, restorative programs have been a slightly harder sell.²⁶³ But this factor suggests that restorative justice theory should find a much more receptive environment in attorney discipline, where reintegration of the offender into the community of ethical lawyers remains an important and explicit goal of the system in the overwhelming majority of cases. Disbarment occurs in only a small fraction of the cases that go to a hearing.²⁶⁴ Even when a lawyer is disbarred, many states permit the lawyer to apply for readmission at some point in the future. Thus, even the most grievous offenders are, at least in theory, redeemable. For less serious offenses, other forms of discipline often require lawyers to earn their place in the profession by completing psychological therapy, enrolling in CLE courses, or undergoing drug or alcohol treatment. The system is already designed to give disciplinary counsel some discretion and flexibility when proposing alternative discipline. Ethics committees are similarly granted flexibility when imposing discipline after a finding of guilt. Restorative justice theory merely takes the flexible, rehabilitative power already granted to existing decision makers in the system and redistributes it to include a broader array of stakeholders.

d. Identifiable Stakeholders

This redistribution of decision making power is made easier by the fact that attorney disciplinary cases usually involve a readily identifiable group of stakeholders—people who have been affected by the attorney’s misconduct or will be supporting the attorney’s attempts to repair the harm he has caused and to behave ethically in the future. In fact, it may be even easier to identify stakeholders in disciplinary cases than it is in criminal cases, where restorative justice has been developed most fully. If restorative practices can assist in criminal law, where “the community” is not always readily identifiable, then it should even more readily assist with attorney disciplinary cases.

When an attorney is hired by a client to assist with a private matter, such as a divorce or a personal injury lawsuit, we can say that the general community has an interest in the fair administration of that matter, but the substantive

cmt. [1] (“The duty imposed by this Rule applies to a lawyer’s own admission or discipline as well as that of others. Thus, it is a separate professional offense for a lawyer to knowingly make a misrepresentation or omission in connection with a disciplinary investigation of the lawyer’s own conduct.”).

²⁶³ See Lawrence W. Sherman & Heather Strang, *RESTORATIVE JUSTICE: THE EVIDENCE* 21, 32 (2007).

²⁶⁴ See *supra* note 44.

rulings will directly affect a relatively small circle of people and institutions. If the attorney breaches her duty of care or competence to the client in a way that causes damage, the matter frequently remains private as the client seeks compensation through civil legal malpractice. The fact that the lawyer has also violated a rule of professional conduct will in some but not all cases also give rise to a disciplinary grievance, causing us to reframe the case as one in which the profession has a self-regulatory interest. In current practice, the disciplinary counsel steps in to represent the profession and displaces the claimant entirely as a party; in restorative justice each stakeholder can remain as others are added to the process. Similarly, in current practice, disciplinary counsel represents the interest of the public in maintaining an honest and competent bar; in restorative practice, the process could include specific members of the community who might step forward to express a particular interest in the outcome of the grievance. The fact that disciplinary counsel (or her deputy) is present ensures that the interests of the public and the profession, ordinarily represented in standard disciplinary processes, will not be undermined. But the process is flexible enough to admit the readily identifiable persons and entities with legitimate interests and contributions to make in facilitating the fact-finding, adjudicating, and rehabilitative goals of the process.

e. The Difficult Tension between Confidentiality and Transparency

When a disciplinary complaint is filed against a lawyer, the disciplinary authority does not make that complaint public immediately. Only under special circumstances will the pendency, subject matter, or status of an investigation be disclosed outside the agency.²⁶⁵ The records of the agency usually will become available to the public once the chief disciplinary counsel has found probable cause to believe that a violation has occurred—and has filed and served formal disciplinary charges.²⁶⁶ Even then, the work product of disciplinary counsel, the hearing committee, and the ethics review board will be confidential.²⁶⁷ And while the finding of probable cause triggers formal proceedings that are open to the public, the deliberations of the hearing committee, review board, or court are not. Thus the timing and extent of disclosure to the public reflects a desire on the part of disciplinary authorities to protect the respondent and the complainant at early stages before the allegations are investigated and confirmed; but even after the allegations are confirmed, secrecy will cloak much of the deliberation determining whether and at what level of severity discipline should be imposed.

Confidentiality prior to the finding of probable cause reflects a desire on the part of the bar to make sure that lawyers are not subject to informal sanction and embarrassment too early, before the allegations of a complaint are verified.

²⁶⁵ See MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 16(B) (2002) (Disclosure can occur if respondent waives confidentiality, complaint alleges conviction of a crime or discipline by another state, allegations of the complaint have become “generally known to the public,” or notification is necessary “to protect the public, the administration of justice, or the legal profession.”).

²⁶⁶ *Id.* R. 16(A).

²⁶⁷ *Id.*

Secrecy of the disciplinary counsel's work product and hearing committee deliberations facilitates freer exchange of ideas, argument, and debate within the decision-making authority. While this may improve the quality of decision making overall, it can have the unfortunate effect of enclosing the decision making in a sort of black box from the perspective of the public, including the complainant. Because only a portion of complaints will even be investigated,²⁶⁸ and an even smaller number of these will result in a finding of probable cause, much of what occurs within disciplinary agencies never sees the light of day.

Balancing the confidentiality that protects innocent respondents and theoretically improves decision making with the public's need for protection and the victim's desire to know about discipline is a difficult task. Restorative processes could work within existing confidentiality rules to address demands for greater accountability without publicizing allegations before they are proven. Victims and others immediately affected by the misconduct would get greater access to information at an earlier stage in the development of the case, since they would be directly involved in the discussions. But the restorative approach would also protect interests in confidentiality, because the processes would be open to invited stakeholders rather than the public in general. Because disciplinary counsel would invite people who have already been affected by the alleged misconduct, participation (and thus disclosure) would be limited to people who already know about the incident or behavior giving rise to the complaint. Granted, this would fall short of the completely open, public processes desired by some reformers. But on net, transparency would increase as restorative processes would give greater participation and disclosure of information to stakeholders, who often lack information in the present system.

f. A Relationship of Trust

Perhaps the most important characteristic of attorney disciplinary cases that makes them good candidates for restorative justice theory is that the events giving rise to a grievance usually occur in the context of a relationship of trust, so that one or both of the parties may feel a sense of violation, betrayal, or damage to an important relationship. Restorative processes are well suited to such situations because they devote attention to the relationship in ways the traditional investigative and adjudicative processes do not.

This is most obviously true when the grievant is a client or former client of the offending lawyer. The most common causes of attorney discipline—neglect and failure to communicate—are direct and disrespectful attacks on the attorney-client relationship. The client may rightly feel that the lawyer has breached the client's trust.

A different sort of betrayal of trust can lead one attorney to complain about another's misconduct. Lawyers follow the Rules of Professional Conduct expecting that others will do the same. Although they could gain an advantage over opposing parties and lawyers through certain rules violations—e.g., lying in negotiation or presenting false testimony—they forego these perceived advantages and require others to do as well. When another lawyer breaks that

²⁶⁸ See *supra* note 24 and accompanying text.

social contract, his violation can come at the expense of a lawyer who has followed the rules (or that lawyer's client).²⁶⁹ It is not unreasonable for the attorney who has been harmed to feel a sense of anger and betrayal about the behavior of the offending attorney.

Restorative Justice—both in theory and in practice—emphasizes the repair of relationships as one of its central goals. This feature is believed to be salient even in cases where the relationship between criminal offenders and their victims is quite attenuated, existing only because they are fellow residents of the same neighborhood or town and not because they were actually acquainted prior to the occurrence of the crime. Many victims benefit from restorative processes even when the only relationship to be repaired is that of equal, mutually respectful members of a community.²⁷⁰ How much more, then, might restorative practices help to resolve and repair harm that has occurred in the trust-based relationships among lawyers or between attorneys and their clients?

g. The Benefits of Shaming

To conclude this section about fit, let us say a few words about the emotional component of this process from the respondent-lawyer's perspective. When reintegration of an offender is the ultimate goal, John Braithwaite tells us, processes that include some element of "shaming" may be beneficial.²⁷¹ In this view, an offender's shame or guilt helps to reinforce the norm that has been transgressed. But it also does more, according to Herbert Morris: "[S]hame leads to creativity,"²⁷² moving people to take "the steps that are appropriate to relieve shame."²⁷³ Jeffrie Murphy concurs: "[A]ttention to the shamed self can be a sign of health and a stimulus to moral improvement—the attempt to mold a better character—through the painful prod that such shame provides."²⁷⁴ Stephen Garvey explains how the experience of guilt can lead to a larger series of

²⁶⁹ A knowing violation of a rule also sends a signal, intended or not, of moral superiority, according to Stephen Garvey: "I say through my actions: 'You may have to follow the rules, but I don't. I set myself over and above the rules I expect everyone else to obey. Only the little people follow the rules.' I say, in short: 'I'm better than you.'" Stephen Garvey, *The Moral Emotions of the Criminal Law*, 22 QUINNIPIAC L. REV. 145, 161 (2003). For Garvey, the way to counter this signal is through punishment that calls for atonement from the offender for this false message. *Id.*

²⁷⁰ Stephen Garvey has argued, however, that one of the purposes of punishment is to reset this equality:

When the state punishes, it therefore says two things. First, it says to the offender: 'We condemn what you did. We will not tolerate it here. You are no better than the rest of us, including the one you wronged.' Second, it says to the victim, 'We stand by you. You are a prized member of the community. We know that, and we want you to know that too.'

Stephen Garvey, *Punishment as Atonement*, 46 UCLA L. REV. 1801, 1821 (1999) [hereinafter Garvey, *Atonement*].

²⁷¹ Indeed, Braithwaite has developed the theory of "reintegrative shaming" which incorporates "disapproval of the act within a continuum of respect for the offender" and "rituals of forgiveness." BRAITHWAITE, *supra* note 119, at 74.

²⁷² Herbert Morris, *Guilt and Punishment*, 52 THE PERSONALIST 305, 318 (1971).

²⁷³ *Id.* at 319.

²⁷⁴ Jeffrie G. Murphy, *Shame Creeps Through Guilt and Feels Like Retribution*, 18 LAW & PHIL. 327, 341 (1999).

actions that bring an offender back into a right relationship with the community:

[The offender] must truly feel guilty, for the experience of guilt is the proper moral response to one's wrongdoing. Second, he must willingly undertake steps to expiate his guilt, which he can only do through a series of undertakings designed to repair *all* the damage—material and moral alike—resulting from his crime. Accordingly, he must apologize for his conduct, thereby providing an outward manifestation and declaration of his repentance. He must make reparations in order to repair any material injury he has caused. Finally, he must bear some tangible burden or hardship through which he expresses his remorse, humbles his will, and thereby repairs the moral injury he has caused. A retributivist might call this last undertaking punishment, but that would be a mistake. A punishment is *imposed* on an offender. Here, in contrast, the offender *accepts* the burden, and indeed, welcomes it as the necessary price to be paid to expiate his guilt. We should therefore call it what it is: a secular penance.²⁷⁵

Currently, attorney discipline is not structured to facilitate this cycle from guilt to apology, reparation, and penance. In hearings, attorneys facing discipline understandably concentrate on putting the disciplinary authority to its proof. This is a sensible move in a prosecutorial system, but lawyers often launch a vigorous defense even if some or all of the allegations are true. The adversary system calls for such behavior, after all. Even in states that have adopted alternative discipline, the lawyer negotiates with disciplinary counsel “in the shadow” of disciplinary proceedings, and a narrower range of issues are usually on the table: drug or alcohol rehab, CLE training, or treatment for other physical or mental illness.

Whether the process is litigation or negotiation, a bilateral structure in attorney discipline pits the lawyer's interest in minimizing or avoiding discipline against the disciplinary counsel's interest in disposing of the case expeditiously while also preventing future misconduct by the lawyer. Without the complainant present to describe and hold the lawyer accountable for the harm caused by the misconduct, the process is unlikely to induce much guilt or remorse on the lawyer's part. Indeed, when the case is framed as the action of the bar against the lawyer, the process may induce in the lawyer more feelings of defensiveness than repentance.

Restorative processes, in contrast, bring wrongdoers face to face with the people they have harmed. Their 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. Instead of analyzing only the lawyer and his actions, the participants expand the focus of discussion to include greater analysis of the harm the lawyer has caused. This discussion can correspondingly expand the lawyer's feelings about the incident 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). In economic terms, we could say that the lawyer's behavior has created “negative externalities,” bad spillover effects that impact the bar, the court, other lawyers associated with the respondent, and most profoundly, the complainant. By giving this broader array

²⁷⁵ Garvey, *Restorative Justice*, *supra* note 145, at 313–14 (footnotes omitted).

of stakeholders a role in the process, attorney discipline can more effectively compel the respondent to “internalize” these negative externalities. And the more thoroughly a process can force respondents to come to terms with the costs of their bad acts, the greater the deterrent effect.

2. *Function*

Having persuaded you (we hope) that Restorative Justice theory “fits” the characteristics and goals of attorney discipline, we will try to give a sense of how restorative practices might function in attorney disciplinary systems.

The goal, as we have stated before, is to create enhanced roles for clients or third party victims of attorney misconduct and to permit additional stakeholders (such as the offending attorney’s firm, friends, or family, the attorney’s malpractice insurance carrier, therapeutic professionals or other supporters (such as AA sponsors), as well as friends, family, or other community members wishing to support the client or third party victim) 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 and help him fulfill his professional aspirations and responsibilities in the future.

First, a preliminary note about design: as Stutzman, Amstutz, and Mullet have argued in the educational context, it is a mistake to “propose a cookie-cutter approach to restorative discipline.”²⁷⁶ Instead, they remind us that reformers should be sensitive to the qualities and characteristics that make their communities unique. Restorative Justice Theory thus serves as a guide, but people on the ground have to tailor processes to particular settings. For example, the optimum number of participants may turn in part upon the attorney’s client base: if the attorney is deeply embedded in a relatively small geographic region where people know each other and know him, the wronged client may have neighbors who feel a strong stake in the disciplinary matter. The same could be true when a lawyer serves a particular ethnic, immigrant, or industry group (though in the latter case, competition between the wronged client and other interested “community members” might complicate their bid to participate in the process). Making the concept of “community” meaningful is complex; it is not enough to say that interested “community members” should participate in restorative attorney disciplinary processes. Someone has to decide who should participate in each case given the specific circumstances of the case and the types of communities involved. This will not be a decision that disciplinary counsel, the respondent, or the complainant can make in isolation, but between the three of them, they may think of others who ought to participate (and those others might, in turn, know of additional stakeholders who ought to participate).²⁷⁷

The take-home point is that it will not do to prescribe the exact contours of the process from afar; the bar of each state would need to tailor the process to

²⁷⁶ LORRAINE STUTZMAN AMSTUTZ & JUDY H. MULLET, *THE LITTLE BOOK OF RESTORATIVE DISCIPLINE FOR SCHOOLS* 4 (2005).

²⁷⁷ See generally LAWRENCE SUSSKIND & JEFFREY CRUIKSHANK, *BREAKING THE IMPASSE* (1987) (on public disputing and how to identify stakeholders).

local needs, even giving county, city, or substantive specialty bar associations some say in process design.²⁷⁸ In this section, therefore, we will only sketch a process design that might be used to implement Restorative Justice Theory in attorney discipline. The details of the model would vary from place to place and case to case.

a. Participants

Restorative discipline should use a conferencing model that includes multiple parties, not just the respondent and disciplinary counsel.²⁷⁹ The disadvantages of bilateral plea bargaining²⁸⁰ and even triangular victim-offender mediation in the criminal context have been analyzed by Brown and others.²⁸¹ We do not propose to replicate those processes in attorney disciplinary cases. Instead, we recommend a larger group where a broader array of interests will be expressed and the strongly polarized views of the complainant and respondent softened by other participants.

For example, Braithwaite and Mugford²⁸² as well as Retzinger and Scheff²⁸³ suggest that structuring the process as a conference that includes the offender's support network as well as the victim's network can do a better job than mediation in preventing the complainant from going overboard with "moral lecturing and sarcasm."²⁸⁴ Braithwaite elaborates:

If these invitees really do care about the offender, they will counter moral lecturing with tributes to the sense of responsibility and other virtues of the offender. . . . [T]his is the genius in the design of a Maori *whanau* conference, a Cree healing circle, or Japanese school discipline that is absent in the design of dyadic Western victim-offender mediation.²⁸⁵

Stephen Garvey²⁸⁶ and Paul H. Robinson²⁸⁷ agree that "group conferences and circles are, by virtue of the group dynamics that constitute those processes,

²⁷⁸ Granted, there is a tension between local control, which can give legal communities a greater sense of ownership in their own ethical self-regulation, and centralized state control, which increases fairness by making treatment of unethical lawyers more uniform, preventing local favoritism and lax enforcement in some communities where relationships are too tight. See TASK FORCE ON THE FUTURE OF THE LEGAL PROFESSION, CONN. BAR ASS'N, DRAFT REPORT 31 (June 2006) https://www.ctbar.org/userfiles/Committees/FutureOfTheProfession/CBA_Future_Report.pdf (section on Professionalism notes the advantages of wresting some control from local ethics panels who were reluctant to discipline neighboring colleagues).

²⁷⁹ Restorative processes that utilize this model are community panels or boards, sentencing circles, and some processes with community elders.

²⁸⁰ See generally Albert W. Alschuler, *Mediation with a Mugger: The Shortage of Adjudicative Services and the Need for a Two-Tier Trial System in Civil Cases*, 99 HARV. L. REV. 1808 (1986).

²⁸¹ See generally John Braithwaite & Stephen Mugford, *Conditions of Successful Reintegration Ceremonies: Dealing with Juvenile Offenders*, 34 BRIT. J. CRIMINOLOGY 139 (1994); Brown, *supra* note 8; Suzanne M. Retzinger & Thomas J. Scheff, *Strategy for Community Conferencing: Emotions and Social Bonds*, in RESTORATIVE JUSTICE: INTERNATIONAL PERSPECTIVES 315 (Burt Galaway & Joe Hudson eds., 1996).

²⁸² See generally Braithwaite & Mugford, *supra* note 281.

²⁸³ See generally Retzinger & Scheff, *supra* note 281.

²⁸⁴ BRAITHWAITE, *supra* note 119, at 141.

²⁸⁵ *Id.*

²⁸⁶ Garvey, *Restorative Justice*, *supra* note 145, at 316.

less likely than victim-offender mediation to result in excessively harsh or excessively lenient sanctions.”²⁸⁸

Thus, as we have stated above, the conference could include but not be limited to the following groups or individuals:

- the complainant,
- the respondent,
- disciplinary counsel,
- others from the state bar,
- the complainant’s family or other support network,
- the respondent’s law partners,
- therapists or twelve-step sponsors,
- the respondent’s insurer,
- the respondent’s family or other support network, and
- a facilitator.

The key characteristics that should qualify people to participate in the conference would be that they have been affected in some significant way by the alleged misconduct, or that they will be a part of the attorney’s attempt to repair the harm caused and avoid misconduct in the future.

b. Procedure

Though details can change to fit specific cases, several features of conferencing or circle processes seem to remain constant. These features help to promote equal voice and participation for the people there.

For example, to convey a message of equality, participants sit in a circle.²⁸⁹ This would require some special care, because conference tables in most courthouses and other government buildings tend to be rectangular or elliptical, and these shapes can sometimes give primacy to the people who sit at the ends of the table. If the table is a square, attention and authority can seem to concentrate on the people in the middle of each side of the square, and away from those near the corners. The facilitator could simply arrange chairs in a circle, but this might prove difficult for participants who want to work with documents or computers while the conversation is progressing. A single large, round table would consume a lot of space and would remain the same size whether five or fifteen people were participating in the conference. Large groups might feel too crowded. Small groups would have to contend with large spaces between participants and the difficulty of maintaining equal spacing between people; those more closely aligned might drift toward each other, could create clumps of partisan interest and hinder conversation.

The better approach, therefore, would be for agencies that initiate conferencing to invest in a number of smaller, individual tables that can be easily moved and rearranged to form a circle that is just large enough to accommodate the number of people participating. While it might seem silly and unnecessary

²⁸⁷ See generally Paul H. Robinson, *The Virtues of Restorative Processes, the Vices of “Restorative Justice”*, 2003 UTAH L. REV. 375, 375–77 (2003).

²⁸⁸ Garvey, *Restorative Justice*, *supra* note 145, at 316.

²⁸⁹ Kay Pranis, *Restorative Justice, Social Justice, and the Empowerment of Marginalized Populations*, in RESTORATIVE COMMUNITY JUSTICE 292–93 (Gordon Basemore & Mara Schiff, eds., 2001).

to go into such detail with respect to seating arrangements, many are the neutrals who can recount the mediations that succeeded or failed based upon the physical arrangement of the room.²⁹⁰ Particularly when a process is new to a system, attention to small details can give participants the best chance to make the process work, and the physical arrangement of the room can affect the proceedings before a single word is said.

Kay Pranis has noted that traditionally, “[t]itles are not used in the circle process, thus minimizing institutional authority as a relevant element of decisionmaking.”²⁹¹ Thus, while each participant’s position in the case would be important for others to know (e.g., participants are entitled to know that a malpractice insurer has an interest and perspective that stems from its economic relationship to the respondent), it would not be necessary or helpful to highlight people’s official positions, if any. This would be especially important for participants with governmental positions, such as disciplinary counsel or judges. Consider a case in which a judge had initiated disciplinary proceedings against a lawyer in addition to whatever court sanctions she was authorized to impose. What a dramatic difference it would make if, during the disciplinary conference, other participants referred to the judge as “Ms. X” rather than “Judge X,” or if even more dramatically, the participants decided that they would use first names in their discussions! Some judges would no doubt resist such informality, but this is the sort of equality that facilitates discussion about the personal, emotional consequences of a lawyer’s bad conduct.

A purist approach to circle processes would make use of a “talking piece” (e.g., a feather, a stone, or a foam ball) to structure the discussion. Again, Kay Pranis explains: “The talking piece creates space for the ideas of participants who would find it difficult to insert themselves into the usual dialog process.”²⁹² Because few people in western societies have experience using talking pieces, it can feel strange and a bit stilted at first. But skilled facilitators can use the talking piece to break the ice and cut through the formality that might impede discussion.²⁹³

Once the list of participants is established and they are seated in the room, the question arises: what will they talk about? Restorative Justice asks the following questions, all of which could be addressed in proceedings stemming from an ethical violation or professional failure:

- Who has been hurt?
- Who has a stake in this situation?

²⁹⁰ In fact, Jennifer Brown recalls the first meeting of the American Bar Association Section on Dispute Resolution in Boston, MA. Never had she been around so many people who noticed where people were sitting. At meals, particularly, people would suggest seating that would allow two people to get to know each other, or make it easier for a threesome to hear each other, etc. This sensitivity seemed to be a habit gained from practice.

²⁹¹ Pranis, *supra* note 289, at 292.

²⁹² *Id.* at 292–93.

²⁹³ In William Golding’s 1954 novel, *Lord of the Flies*, children marooned on an island and first used a conch shell as a talking piece to permit everyone to speak without interruption. As the social order breaks down, this procedural regularity becomes harder to maintain. It is the rebels’ disrespect for the talking piece that first signals the breakdown in civilization among the boys.

- What is the appropriate process to involve stakeholders in an effort to put things right?
- What are the needs of those who have been hurt?
- Whose obligations are these?²⁹⁴

Note the contrast between this very open-ended agenda, if one can even call it that, and the tighter approach adopted by many mediators: issues, interests, options, proposals, agreement. Three of the five Restorative Justice questions have to do with procedural issues such as standing, cognizable interest, and procedural rule setting. The substantive questions are about harm and accountability.

Thus, in contrast to traditional disciplinary processes, restorative discipline conferences would focus less on what rule has been broken, and more on what harms have been done. Disciplinary outcomes from the conferences would likely be less the product of the state's rules or guidelines specifying the discipline to be imposed for a certain category or severity of offense, and be more the result of collaboration with the victim to determine the appropriate response to what happened.

In some conferencing programs, a public official within an agency serves as facilitator. For Restorative Discipline, we do not recommend that disciplinary counsel serve in this way. Instead, the attorney disciplinary agency should develop a group of trained volunteers to serve as facilitators; this would allow disciplinary counsel to be present as a party, representing a set of interests distinct from the complainants or the respondents but clearly *not neutral*. If the number of disciplinary conferences began to overwhelm the office of disciplinary counsel, the court could authorize the office to create a legion of deputy disciplinary counsel, lawyers specially selected and trained to attend disciplinary conferences and represent the interests of the bar. The goals of deputy disciplinary counsel would be to explain the profession's view of the case and ensure that the outcome of the conference is consistent with the interests of the public and the bar.

Since facilitators play an important role throughout the proceedings, they should be trained in understanding the needs of the parties and in conflict resolution skills.²⁹⁵ For disciplinary conferencing, process expertise would be more important than substantive expertise in the facilitator. The open ended approach to identifying stakeholders would allow the conference to include any substantive perspectives that might be relevant to the lawyer's professional failure and its effects. Disciplinary counsel (or one of her deputies) would be present, able to ensure that any outcome of the conference is permissible within the framework of the program, so it would not be necessary for the facilitator to bring that expertise to the process.²⁹⁶ Because the facilitator would lack decision-making authority and other stakeholders could represent the interests of the

²⁹⁴ Zehr, *supra* note 134, at 38.

²⁹⁵ Umbreit & Zehr, *supra* note 216, at 74.

²⁹⁶ This structure also distinguishes disciplinary conferencing from victim-offender mediation in the criminal context, where some programs use trained, volunteer lay people to mediate between offender and victims, and no one from the prosecutor's office is present to insure that the state's interest is protected. *See generally* Brown, *supra* note 8 (describing the various ways that victim-offender mediation programs can be structured and administered).

victim and of consumers generally, we could satisfy consumer advocates' call for greater lay participation in attorney discipline—even if most of the volunteer facilitators turn out to be lawyers. If the training and certification programs for facilitators are open to qualified lawyers and non-lawyers, the agency could counter the accusation that attorney discipline is stacked in favor of the profession and against consumers of legal services.

Before the conference itself, the facilitator would explain the process to all of the parties so that they could be prepared to contribute to the conversation. Most of this prep time would likely be spent with complainants and their support network, since they are the least likely to be repeat players or have any familiarity with attorney discipline. Based on the pre-conference conversations, the facilitator could also decide where people ought to sit in the circle. At the conference, the facilitator would explain the process, go over ground rules, and get the conversation started by calling upon someone to begin by telling their story and perspective on what happened. Disciplinary counsel or her deputies would be good choices to get things started, since they are not aligned with either the complainant or the respondent and may be able to give everyone an overview from the profession's perspective. If a talking piece is used, the facilitator could make sure that participants honor it by waiting their turn to speak, and once the full circle has had a chance to speak, call upon participants in follow up conversation. The facilitator's tasks will obviously change depending upon the number and identity of the stakeholders. Some cases will be more emotionally fraught than others and require more of the facilitator's process management. The participants would bring their own agendas to the conversation, and would each likely have one or two topics of most interest. The facilitator, in contrast, would be asking the questions that would guide the participants toward a restorative outcome: Who has been hurt? What are their needs? Whose obligations are these?

If the facilitator and the participants are able to address those questions, they may develop information that can be the basis for agreement about what should be done. This should be a consensus-building process rather than a majority vote, since the number of people present and expressing a particular perspective on the case (e.g., the complainant's family) does not necessarily reflect the wisdom of outcomes they might propose. The state's office of attorney discipline will ultimately be responsible for the disposition of the case, so it is most desirable for disciplinary counsel to be a part of the consensus that forms in the conference.

c. Case Selection for Conferencing

We propose that conferencing could be a substitute for discipline at minor offense levels and a supplement to discipline at more serious levels of offense.

d. Voluntary v. Mandatory Participation

Any diversionary program faces issues about whether to make participation compulsory or voluntary, and whether to treat victims differently from offenders on this point. Disciplinary counsel might say to complainants, "If you want this to go forward you have to participate in the conference; otherwise it

will likely be dismissed or this minor discipline will be imposed.” This is a “choice” that might feel rather restricted from the complainant’s perspective. Similarly, disciplinary counsel might say to respondents, “You have to go to the conference and participate in good faith, otherwise your discipline will be $x+1$ ” (where x is the expected discipline that would be imposed if the case were just adjudicated at a grievance hearing). This would help to mitigate the gaming that respondents engage in when calculating whether moving forward with a formal investigation may prove easier in the end. The problem from disciplinary counsel’s perspective is that the formal discipline likely to be imposed may be difficult to predict without the benefit of the information developed in a hearing. Perhaps this suggests that disciplinary counsel be empowered to threaten uncooperative respondents with discipline of “ $x+1$ ” where x is the discipline that would be imposed *assuming all of the complainant’s allegations were true*. Participation in the conferencing would be nominally voluntary, but with a very coercive feel from the respondent’s perspective.

e. Requiring an Admission of Guilt

Should disciplinary conference occur only if the respondent admits guilt? Braithwaite and Mugford argue that even if a restorative practice is “firmly grounded in the theory of legal pluralism, certain basic procedural rules cannot be trumped.”²⁹⁷ The most important of these, they explain, is that “if the offender denies committing the alleged offense, she has the right to terminate the conference, demanding that the facts be tried in a court of law.”²⁹⁸ This does not require that the offender plead guilty in order to participate—only that the offender chooses “not to deny” the charges. A similar “does not deny” approach could be used in disciplinary cases.

f. Application

With this framework in mind, we can envision how a restorative discipline approach may lead to a more satisfactory process for and resolution of Taylor’s complaint against Wilson. A trained volunteer facilitator may convene a conference to include Taylor and his business associates, Wilson and his office supporters, disciplinary counsel, and any other relevant stakeholders who become apparent during pre-conference discussions. During the conference, with the use of a talking piece, Taylor will have the opportunity to share his frustration and to explain the negative effects that Wilson’s inaction had on Taylor’s small business. Wilson will have the opportunity to explain why Taylor’s case slipped through the cracks and will see firsthand the impacts of his neglect. Confronted with the pain he caused, Wilson may express genuine remorse and may apologize instead of glossing over his “minor misconduct.” Together, the stakeholders will learn from each perspective presented and may be able to reach a consensus on how Taylor will be refunded and on how Wilson—with the help of his support system—will improve his office procedures to ensure such client neglect does not occur again. The conference should help to restore the relationships between the parties, the parties’ trust in the legal

²⁹⁷ Braithwaite & Mugford, *supra* note 281, at 159.

²⁹⁸ *Id.* at 159–60.

system, and Wilson's ability to exhibit the qualities that are expressed in the Rules of Professional Conduct.

III. RISKS, BENEFITS, AND OPEN ISSUES

We recognize that several concerns or objections might be raised to our proposal. This section will summarize some of them briefly. Few of these can be addressed or resolved fully in theory; time and practice will show whether the risks of Restorative Discipline outweigh its potential benefits.

Perhaps the most fundamental objection to restorative attorney discipline stems from a general critique of Restorative Justice: it leverages the public interest for private gain. One of us has explored this concern in some detail before, objecting to programs that use the threat of criminal prosecution to coerce a settlement in cases that might otherwise be characterized as torts and relegated to the civil system.²⁹⁹ In the context of attorney discipline, the concern would be that the bar gives up too much control to victims and other stakeholders, possibly compromising the public's interest in lawyers and their ethical regulation. Does having a neutral facilitator take too much power from disciplinary counsel? We think it unlikely, because in our model, disciplinary counsel or an appropriately deputized individual will be present at the conference to assert the bar's interests.

A related objection might be that the privacy of restorative discipline could allow disciplinary authorities and/or victims to run roughshod over attorneys in ways that the public would not support. Given the variety of stakeholders participating in a restorative disciplinary conference, however, we think it likely that neither the offending attorney nor the complaining client will be able to hijack the proceedings at the expense of other interests.³⁰⁰

Concerns for the integrity of the public interest in criminal cases have generated sound responses from proponents of Restorative Justice. If the rules and procedures governing restorative discipline require that the lawyer admit guilt prior to entering restorative disciplinary proceedings, the more prosecutorial aspects of attorney regulation will safeguard the public interest in regulating unethical lawyers. In this way, as Steve Garvey has put it, law can "form bookends, so to speak, around restorative justice."³⁰¹

Those bookends in turn provide a response to an additional question about restorative discipline, which is what ought to happen if the grieved lawyer fails to repent or the victim fails to "forgive" and agree to the attorney's offer of reparation? Garvey envisions a relationship between restorative practices and ordinary legal proceedings that provides a safety net for such situations. In

²⁹⁹ See generally Brown, *supra* note 8.

³⁰⁰ BRAITHWAITE, *supra* note 119, at 399 ("[C]riminal justice officials who abuse their power face greater risk in a circle than in a courtroom. And of course the accountability of the courtroom is not removed in restorative justice. It remains standing above the restorative justice conference should there be an alleged abuse of process or outcome that causes some participants to refuse to sign an agreement or a prosecutor to contest it."). See generally DECLAN ROCHE, ACCOUNTABILITY IN RESTORATIVE JUSTICE (2003).

³⁰¹ Garvey, *Restorative Justice*, *supra* note 145, at 316; see also Antony Duff, *Restoration and Retribution*, in RESTORATIVE JUSTICE AND CRIMINAL JUSTICE: COMPETING OR RECONCILABLE PARADIGMS? 43, 56–57 (Andrew von Hirsch et al. eds., 2003).

Garvey's view, if an offender fails to repent, the state steps in to punish; if a victim fails to forgive, the state steps in to reintegrate (since a state cannot forgive on a victim's behalf).³⁰²

A contrary critique of Restorative Justice that might apply to our proposal is not that it unduly dilutes the regulatory power of the state, but just the opposite: that such proceedings "expand the net of social control."³⁰³ The concern is that less formal processes will allow the state to impose punishment in a larger group of cases than it would have if it had to try the cases through formal processes in court. This should not be a concern in attorney disciplinary cases since, in contrast to criminal contexts, attorneys have taken affirmative steps to avow the rules of professional conduct and subject themselves to discipline if they should violate those rules.

Some critics may question whether Restorative Justice, developed primarily in the context of juvenile justice, can make the transition into contexts serving adult offenders. As John Braithwaite has noted, however, "the idea that shaming and reintegration ceremonies are valuable only for the young is not well founded," and "preliminary qualitative evidence indicates that it may be extremely valuable for individuals well into middle age."³⁰⁴

A final concern worth mentioning is that restorative practices may exacerbate gender inequalities. John Braithwaite has observed that "there seems little doubt that women do more of the restoring than men in restorative justice processes."³⁰⁵ He therefore worries that "[t]he price tag for communitarian empowerment (which most women say they want in all the interview-based research) is a gendered burden of care."³⁰⁶ Of course, it is not obvious that restorative practice in the context of a professional relationship would exhibit the same dynamics as researchers see in criminal or family contexts. Still, program administrators could address this concern preemptively through training, alerting facilitators to the potential for this gender inequality. After the fact, administrators could also conduct quality control research, keeping track of participants' genders and the results that emerge from their proceedings to detect any patterns reflecting a greater burden on female lawyers or clients.

IV. CONCLUSION: RESTORATIVE DISCIPLINE AND THE NURTURE OF COMMUNITY

Restorative Justice Theory gains greater coherence and relevance when one can point to a community whose norms are at stake in, and may be reinforced by, the process of dispute resolution at issue. Restorative Justice Theory only makes sense in lawyer discipline if we can credibly claim the legal profession as a "community."

³⁰² Garvey, *Restorative Justice*, *supra* note 145, at 316.

³⁰³ Braithwaite & Mugford, *supra* note 281, at 160 ("Given a commitment to flexibility and participant empowerment, one central concern is the prospect of standardization and routinization. It would be easy for ceremonies to be converted into Foucauldian 'discipline', extending the net of state control.").

³⁰⁴ *Id.* at 152.

³⁰⁵ BRAITHWAITE, *supra* note 119, at 154.

³⁰⁶ *Id.*

This raises important questions about the definition and practice of community. As Richard Schragger has written:

[I]n deciding whether a particular community's norm is entitled to respect, we are deciding both whether the community exists and who gets to be included within it. . . . Before one can assert local autonomy in the name of community, one needs a theory of insiders and outsiders that justifies the exercise of autonomy in its name.³⁰⁷

Howard Zehr, a foundational thinker in Restorative Justice Theory, warns that we should not be too quick to conclude that community exists. "The issue is particularly a problem in cultures where traditional communities have eroded, as is true in much of the United States. Furthermore, 'community' can be too abstract a concept to be useful. And a community can be guilty of abuses."³⁰⁸

Richard Schragger offers a "contractarian" theory of community as "a product of individual acts of voluntary association, an outcome of individuals who have consented to join in a group."³⁰⁹ The contractarian theory supports our view of the legal profession as a community. In our view, lawyers are part of a community that is neither geographically nor professionally bound, but cuts across these lines to recognize the interactions, relationships, and interdependencies that are hallmarks of community. When lawyers interact with clients, third parties, court systems, and other entities in the context of legal problems or questions, *the law* creates a set of community norms that can coherently be brought to bear in case of professional failure or ethical violations by the lawyers.

But Schragger also offers what he calls a "deep account of community,"³¹⁰ and this too supports our conception of the legal profession as a community that can provide coherent norms to guide restorative processes. Schragger says, "The deep account of community reverses the direction of individual and community. It rejects the idea that the individual can exist or be sustained outside of, and prior to, his or her relationships with others, prior to a community that infuses individual choices and experiences with meaning."³¹¹ In our legal system, the bar truly can be said to preexist the individual lawyer, while rules of professional conduct preexist and govern the individual attorney-client relationship. Over the years courts and legislatures have respected the right of the bar both to articulate its own professional norms and enforce those norms through disciplinary processes.³¹² A lawyer derives her identity and capabilities from the definition of her role provided by the profession. It is the bar—interacting with individual clients and with governmental institutions—that infuses lawyers' "individual choices and experiences with meaning."

³⁰⁷ Richard C. Schragger, *The Limits of Localism*, 100 MICH. L. REV. 371, 374 (2001).

³⁰⁸ ZEHR, *supra* note 134, at 27.

³⁰⁹ Schragger, *supra* note 307, at 387.

³¹⁰ *Id.* at 393.

³¹¹ *Id.*

³¹² These professional rules may differ from parallel civil and criminal provisions, and a single incident may give rise to processes in the civil, criminal, and disciplinary systems—each with a different goal and thus a different result.

Moreover, it should be easy to see the legal profession as a community because of the many things it does to define “insiders and outsiders”:

- The bar exam and “character and fitness” inquiries control entry to the profession.
- Legal education inculcates shared competencies and values in the people who would join.
- Bar associations foster connection and maintain collegiality.
- Rules of professional conduct set forth behavioral norms that are peculiar to the profession.
- Disciplinary processes maintain ongoing quality control.

In some places, it is true, people in the profession do not know each other; anonymity dilutes the sense of community and mutual care that may have typified the profession in the past. But in many places, or at least in pockets of the profession even in the largest, most anonymous of cities, groups of lawyers know each other well and interact frequently. Sometimes they are competitors, but surely competition is not inconsistent with the formation of community. And whether or not they know each other personally, lawyers who join the bar of a state can be said to have voluntarily associated with the lawyers of that state.

If we are a community, how do we respond when one of us wrongs another?³¹³ Our argument here is that we should respond with an eye toward the harm that has been caused, and include in our range of vision those who often stand on the periphery of existing disciplinary systems. By making the disciplinary process more inclusive of victim perspectives and more open to participation by multiple stake holders, attorney discipline can demonstrate and foster the professional qualities that it seeks to enforce.

³¹³ See Garvey, *Atonement*, *supra* note 270, at 1802 (“[W]hat model of punishment, if any, operates in an ideal community?”).

APPENDIX A

After a grievance complaint has been filed, the contents are reviewed by disciplinary counsel, a private attorney appointed by the court to perform all prosecutorial functions in the disciplinary system.³¹⁴ If the complaint sufficiently alleges misconduct or incapacity, disciplinary counsel conducts an investigation.³¹⁵ After investigating, if disciplinary counsel finds probable cause to believe that the allegations are true, she may recommend probation, admonition, or the filing of formal charges with the state's disciplinary board, to be adjudicated by a local hearing committee.³¹⁶ A copy of the charge is sent to the respondent attorney, who has a specified number of days to file an answer with both the committee and with disciplinary counsel.³¹⁷ Thereafter, a hearing date is set. The respondent has the right to be represented by counsel, to present evidence, and to cross-examine witnesses at the hearing.³¹⁸ The complainant has "the right to make a statement to the [hearing committee] . . . concerning the respondent's alleged misconduct and the effect of the alleged misconduct on the complainant."³¹⁹ After the hearing, the committee makes its decision and serves its report on both the disciplinary counsel and the respondent.³²⁰ Although the hearing is public, the deliberations of the hearing committee are not.³²¹ Appellate review is limited.³²² Any time a hearing committee or review board recommends suspension or disbarment, the hearing committee's report is sent to the court for review at its discretion.³²³

³¹⁴ MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 4 (2002).

³¹⁵ *Id.* R. 11(A).

³¹⁶ *Id.* R. 11(B). Note that states differ on the composition of these ethics review boards, with some requiring significant lay participation, others allowing lawyers to control the boards and the hearings; see *2006 Lawyer Discipline Report Card*, *supra* note 6 ("On most hearing panels just one out of every three members is a non-lawyer. Six states—California, Hawaii, Kansas, Mississippi, South Carolina and Tennessee—do not allow a single layperson to hear evidence in disciplinary proceedings. Idaho is the only jurisdiction in the country where non-lawyers comprise the majority on hearing committees.").

³¹⁷ MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 11(D)(2)-(3).

³¹⁸ *Id.* R. 11(D)(4).

³¹⁹ *Id.*

³²⁰ *Id.*

³²¹ *Id.* R. 16(C).

³²² *Id.* R. 11(E).

³²³ *Id.*