

PARADOX LOST: THE POTENTIAL OF RESTORATIVE ATTORNEY DISCIPLINE— WITH A CAUTIONARY CALL FOR MAKING DISTINCTIONS

Jeffrey W. Stempel*

One of the unfortunate aspects of the alternative dispute resolution (ADR) movement¹ has been its too frequent tendency to take an excessively sanguine view of the nature of disputes, disputants, and the world.² Although the ADR

* Doris S. & Theodore B. Lee Professor of Law, William S. Boyd School of Law, University of Nevada Las Vegas. Thanks to Bill Boyd, Doris Lee, Ted Lee, Ann McGinley, Jim Rogers, and John White. Thanks also to Jeanne Price, David McClure, Jeanette Barrick and Chandler Pohl for valuable research assistance. © 2011 Jeffrey W. Stempel.

¹ Although the current fashion (and preference of the ADR community) is to refer to “dispute resolution” generally rather than to “alternative” dispute resolution, I continue to find this linguistic aspiration to primacy misplaced. The dispute resolution movement (including its now largest contingency among the ABA sections) is grounded upon presenting alternatives to the default dispute resolution system of litigation. Similarly, the model of restorative justice presented by Brown and Wolf, see Jennifer Gerarda Brown & Liana G.T. Wolf, *The Paradox and Promise of Restorative Attorney Discipline*, 12 NEV. L.J. 253 (2012), is presented as an alternative to the default methods of bar association discipline. Other dispute resolution alternatives are presented as alternatives to default regulatory or administrative methods of dispute resolution. Consequently, it is in my view more accurate to continue to describe this movement—however established it has become—as an “alternative” dispute resolution movement, and I will do so in this paper.

² At least that’s my view. See Jeffrey W. Stempel, *The Inevitability of the Eclectic: Liberating ADR from Ideology*, 2000 J. DISP. RESOL. 247, 250 (2000); Jeffrey W. Stempel, *Beyond Formalism and False Dichotomies: The Need for Institutionalizing a Flexible Concept of the Mediator’s Role*, 24 FLA. ST. U. L. REV. 949, 962 (1997). This stems in large degree from the community relations roots of ADR as a means of resolving problems in neighborhoods or organizations.

A substantial portion of the ADR community disagrees. See, e.g., Lela P. Love & Kimberlee K. Kovach, *ADR: An Eclectic Array of Processes, Rather Than One Eclectic Process*, 2000 J. DISP. RESOL. 295, 301–06 (2000); Zena Zumeta, *A Facilitative Mediator Responds*, 2000 J. DISP. RESOL. 335 *passim* (2000); Gary L. Gill-Austern, *Faithful*, 2000 J. DISP. RESOL. 343, 345–46 (2000).

The larger discussion of whether aspects of the ADR movement, in particular the strongly held view by some that mediation should only be facilitative, is beyond the scope of this Comment. Also beyond the scope of this Comment is the greater question of dispute resolution styles, particularly mediation styles, a topic of substantial, ongoing academic conversation at least since Professor Riskin’s important article charting mediation methodology according to its degree of facilitative and evaluative comment. See Leonard L. Riskin, *Understanding Mediators’ Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7, 17 (1996); see also Jeffrey W. Stempel, *Identifying Real Dichotomies Underlying the False Dichotomy: Twenty-First Century Mediation in an Eclectic Regime*, 2000 J. DISP. RESOL. 371, 377–79 (2000) (noting utility of Riskin “Grid” for assessing mediator styles and that there should not be a bright line between evaluation and

movement has much to recommend and has served an invaluable function in encouraging the legal system to “think” outside the “box” of default litigation or other regulatory schemes, it has too often expressed a Pollyanish³ view of the ease with which disputes may be resolved simply through getting together and trying to solve the problem unfettered by the rules and norms of the more coercive default systems.

Although addressing differences in a non-adversarial or less formal session can often be a dramatic improvement over the formalism, adversarialism, and limited remedial menu of litigation or other coercive regulatory regimes, it is not inevitably an express ticket to smooth and fair resolution of problems. The absence of formalism and procedural protection may further disadvantage the already disempowered.⁴ The emphasis on facilitating a resolution with little

facilitation but rather a flexible approach combining both styles varying with the situation); James J. Alfini, *Trashing, Bashing, and Hashing It Out: Is This the End of “Good Mediation”?*, 19 FLA. ST. U. L. REV. 47, 49–50, 59–72 (1991) (noting, prior to Riskin’s *Grid* article, common view that mediators should not interject legal rules or evaluation of disputant positions into mediation process but observing that in practice significant amount of evaluation occurs).

³ For the benefit of readers under age 50: Pollyanna was the title character of the popular children’s book that was brought to the screen in a 1960 Disney in which young actress Hayley Mills became an overnight star in the title role, winning an Academy Award Juvenile Award (a 1920 version of Pollyanna starred silent movie star Mary Pickford).

Pollyanna grew up in Vermont with her stern aunt where, in contrast to the grim, fault-finding aunt and others in the dour community, Pollyanna kept her spirits up by playing the “Glad Game” in which she sought to find something about which to be glad in all situations. As one might expect from something worthy of a Disney movie (circa 1960) at least, Pollyanna brightens up the world around her, with even her aunt succumbing to the power of positive thinking. (Melo)dramatically, Pollyanna is hit by a car and loses the use of her legs but with the support of the townspeople, who have absorbed her optimism, she learns to walk again. See ELEANOR H. PORTER, POLLYANNA (1913). The book was so successful that it inspired a series of twelve sequels, beginning with *Pollyanna Grows Up* in 1915.

Although the movie has (along with actress Mills) long since faded from public consciousness, the term “Pollyanna” survives as representing an unrealistically upbeat view of situations. For example, a politician who assumes that despite current economic problems, the United States will soon return to low unemployment might be termed a Pollyanna in view of the unconvincing nature of this view in the face of empirical reality. The term and this use is so engrained in American culture that more than 300 law review articles have used it to describe excessive optimism (LexisNexis search conducted Aug. 22, 2011), usually without further explanation. See, e.g., Jennifer Gerarda Brown, *Adjudication According to Codes of Judicial Conduct*, 11 AM. U. J. GENDER SOC. POL’Y & L. 67, 74 (2003) (“Celebrating [a particular judicial decision] may strike some readers as weirdly Pollyanna-esque”); Stephen F. Smith, *Proportional Mens Rea*, 46 AM. CRIM. L. REV. 127, 146 (2009) (noting that prominent criminal law scholar Herbert Packer criticizing work as having “Pollyanna-ish overtones”); Jay Tidmarsh, *Whitehead’s Metaphysics and the Law: A Dialogue*, 62 ALB. L. REV. 1, 61 (1998) (noting that Professor Whitehead defends his work against charges of excessive optimism by stating that he is “no pollyanna”); see also James Boyle, *The Anatomy of a Torts Class*, 34 AM. U. L. REV. 1003, 1010 (1985) (accusing much law teaching of having “Pollyanna historicism”). And this is just the “A” section of this long list.

But in spite of the degree to which poor Pollyanna has become the poster child of unrealistic optimism, many lawyers, schools, and policymakers remain relentlessly (I would say excessively) optimistic about the efficacy of the analyses, doctrines, or dispute resolution devices they champion.

⁴ For example, a number of commentators have argued that women in domestic relations disputes are insufficiently protected by a regime of mediation that focuses primarily on

or no reference to the legal rights and duties of the parties may produce lop-sided outcomes that (in my view) cannot be defended even if they gave disputants the warm glow of resolution at the time.

Mainstream ADR approaches, also in my view, tend to erroneously treat disputants as uniformly reasonable, honest, trustworthy, and acting in good faith when in fact many disputants often act unreasonably, dishonestly, and in bad faith. Some are simply bad people who will take as much advantage as the relevant dispute resolution system or approach in use allows.⁵

As a result of these aspects of real world dispute resolution, I tend to resist the Pollyana-like approaches of what might be termed the “Kumbaya” spirit of much modern ADR thinking that takes an excessively rosy view of the nature of people or their behavior under the stress of disputation.⁶ As a result, I have

obtaining resolution and maintaining harmony to the possible derogation of spousal rights. See, e.g., Penelope E. Bryan, *Killing Us Softly: Divorce Mediation and the Politics of Power*, 40 BUFF. L. REV. 411, 444–45 (1992); Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1548 (1991). My own plea for eclectic mediation rather than purely facilitative mediation divorced (bad pun not intended but not corrected) from legal rights is in the same vein. See *supra* note 2. For an example of what I regard as a sub-optimal mediation outcome for a divorcing wife, see Scott H. Hughes, *Elizabeth's Story: Exploring Power Imbalances in Divorce Mediation*, 8 GEO. J. LEGAL ETHICS 553, 561–62 (1995). For a broader discussion of concerns about ADR and insufficient protection of disempowered disputants, see Jacqueline M. Nolan-Haley, *Court Mediation and the Search for Justice Through Law*, 74 WASH. U. L.Q. 47, 62–76 (1996).

To their credit, Brown & Wolf recognize the possibility of gender-differentiated consequences of restorative discipline. See Brown & Wolf, *supra* note 1, at text accompanying note 293 (noting that “restorative practices may exacerbate gender inequalities” and quoting John Braithwaite’s observation in JOHN BRAITHWAITE, RESTORATIVE JUSTICE & RESPONSIVE REGULATION 154 (2002) that “there seems little doubt that women do more of the restoring than men in restorative justice processes”); see also Brown & Wolf, *supra* note 1, at text accompanying note 181 (referencing empirical work on restorative discipline).

⁵ For example, the mindfulness championed by Professor Riskin and others in negotiation and ADR generally can, in my view, be seen as insufficiently cynical about the number of disputants who will resist good faith efforts to resolve issues but will instead use the good faith of others as a means of delay or avoidance. For a discussion of the emotional “human” component of these negotiations, see ROGER FISHER & DANIEL SHAPIRO, BEYOND REASON: USING EMOTIONS AS YOU NEGOTIATE (2005); Leonard L. Riskin, *Annual Saltman Lecture: Further Beyond Reason: Emotions, the Core Concerns, and Mindfulness in Negotiation*, 10 NEV. L.J. 289 (2010); Jeffrey W. Stempel, *Feeding the Right Wolf: A Niebuhrian Perspective on the Opportunities and Limits of Mindful Core Concerns Dispute Resolution*, 10 NEV. L.J. 472 (2010) [hereinafter Stempel, *Feeding the Right Wolf*]; see also Clark Freshman, *Yes, and: Core Concerns, Internal Mindfulness, and External Mindfulness for Emotional Balance, Lie Detection, and Successful Negotiation*, 10 NEV. L.J. 365 (2010); Ellen Waldman, *Mindfulness, Emotions, and Ethics: The Right Stuff?*, 10 NEV. L.J. 513 (2010). See generally Symposium, 10 NEV. L.J. 289–534 (2010) (discussing Prof. Riskin’s Saltman Lecture on emotion in negotiation).

⁶ Kumbaya (sometimes spelled as “Kumbayah”) is an African-American spiritual song that emerged in the early Twentieth Century that is associated with solidarity, empathy, and caring among human beings. It was popularized by the folk singer Pete Seeger in the 1950s and the folk trio Peter, Paul, & Mary as well as Joan Baez during the 1960s. It became associated with the civil rights movement and became a staple of campfire sing-alongs. In what now perhaps seems ironic in light of the conservatism of the organizations involved (particularly regarding gay participation), almost everyone over the age of 50 who was a Boy Scout, Girl Scout, Campfire Girl, Brownie, Indian Guide, or Indian Princess probably remembers the song and its refrain of “Oh Lord, Kumbaya.” As society became less upbeat/

repeatedly urged caution about accepting an excessive embrace of the purely facilitative model of negotiation, mediation, and other forms of ADR and instead argued for more breathing space for an “eclectic” model of mediation that permits reference to prevailing law as necessary to discourage unfair results.⁷ Similarly, while praising efforts to appreciate the perspectives of the disputants, I have warned against allowing this effort at accommodation to be used by unscrupulous or difficult disputants to the disadvantage of those acting in good faith.⁸

My overall realism-cum-cynicism tends to make me wary of dispute resolution proposals that emphasize facilitation, restoration, or reconciliation to the exclusion of justice in that they may result in outcomes that, even though accepted by the participants at the time of resolution, are problematic in favoring the stronger, more aggressive, less quick-to-agree party. Although intelligent ADR engaged in by disputants acting in good faith is almost always preferred to rock-em, sock-em litigation or its administrative regulatory equivalent,⁹ there are times when the need to see justice done or to coerce

more cynical, the let’s-all-hug-around-the-campfire imagery of Kumbaya became a target illustration of unrealistic togetherness, agreement, and solidarity. See *Kumbaya*, WIKIPEDIA, en.wikipedia.org/wiki/Kumbaya (quoting Australian politician Christopher Pyne that “[t]his will not be a Parliament where all of its history is turned on its head and we all sit around smoking a peace pipe singing Kumbayah”). In recent years, a snack food commercial has mocked the song’s excessive optimism by featuring former New York Jets football coach Bill Parcells, the antithesis of a warm-and-fuzzy personality, leading the team in the song as a result of the uplifting power of the snack food.

⁷ See *supra* note 2.

⁸ See Stempel, *Feeding the Right Wolf*, *supra* note 5.

⁹ While negotiated settlement—the most prevalent form of ADR—has always been a part of dispute resolution, the genius of the modern (1970 to the present) ADR movement has been recognition that although disputants are always free to settle, litigation frequently takes on a life of its own due to high-running emotions, efforts to save face, economic interests of disputants and counsel, etc. Recognizing this, the current ADR orientation of the dispute resolution system has both raised consciousness and institutionalized methods other than trial as part of the standard menu of dispute resolution techniques.

As to the former, disputants (and particularly dispute resolution professionals) now live in a world that tends to regard extensive litigation as wasteful and counterproductive, particularly in its tendency to overlook opportunities to achieve results superior to even winning litigation because of the opportunity for more flexible resolution, lowered cost, greater speed, and a chance to maximize the interests of the disputants rather than merely debating their respective legal positions. This has been a theme of ADR scholarship at least since Fisher & Ury’s classic work. See ROGER FISHER & WILLIAM URY, *GETTING TO YES* 4–5 (1981) (urging focus on interests of disputants rather than their positions in negotiating resolution of disputes); see also, e.g., Jennifer Gerarda Brown & Ian Ayres, *Economic Rationales for Mediation*, 80 VA. L. REV. 323, 325 (1994) (noting ability of mediation to add value by improving degree of trust and communication between disputants as well as opportunity to pursue more creative remedies than available in court).

As to the latter, the success of the modern ADR movement has brought with it court-annexed arbitration, early neutral evaluation, mandatory mediation, the growth of private dispute resolution services, stronger (many would say overly aggressive) enforcement of arbitration clauses and other ADR agreements. Although I share the concerns of those questioning the current infatuation with enforcing mass-produced standardized arbitration clauses of the judiciary (particularly the federal judiciary), there seems to me no doubt that the expansion of ADR consciousness and ADR devices has on the whole been a net positive for American dispute resolution and litigation. *But see* Jeffrey W. Stempel, *Mandating Minimum*

minimally acceptable behavior from recalcitrant or “bad” disputants requires full-blown adjudication or its administrative equivalent.¹⁰

To the extent society too quickly abandons law and rule-based dispute resolution, it risks allowing the less scrupulous and more powerful to take too much advantage, particularly of the naïve, under-represented, or exhausted. Before embracing any particular alternative to formal dispute resolution, society should ask whether there are in place adequate mechanisms to prevent abuse and whether the types of disputes addressed are suitable for such alternative methods in lieu of more formal traditional methods.

In many cases, asking this question should prompt dispute resolvers to adopt a more eclectic approach to facilitating dispute resolution that adequately respects the legal default rules applicable to the dispute. It should also make facilitators and adjudicators more sensitive to the possibility that disputants acting in bad faith are attempting to gain unfair advantage due to the less formal and rule-based ADR methodology being employed.

Seen through my cynic’s lens, the restorative attorney discipline advocated by Brown and Wolf¹¹ more than meets the standard for likely effectiveness—provided that those presiding over it are prepared to make distinctions between those attorneys who are in trouble in spite of their good faith or merely because of an episode of weakness and those who really should be culled from the profession. Because of particular characteristics of the legal profession and attorney disciplinary matters, it is more susceptible to ADR initiatives such as restorative discipline. Several aspects of the practice of law account for this.

First, law is (to the consternation of some who view any licensing program as merely a restriction on competition) a profession to which entry is restricted.¹² Once a licensed member of the profession, an attorney has powerful economic and social incentives to remain licensed. The attorney’s license,

Quality in Mass Arbitration, 76 U. CINN. L. REV. 383 (2008) (criticizing excessive enforcement of “new” or “mass” arbitration clauses imposed on customers as a condition of doing business notwithstanding that consumers are often uninformed or misinformed about the existence and impact of such clauses); Jeffrey W. Stempel, *Keeping Arbitrations from Becoming Kangaroo Courts*, 8 NEV. L.J. 251 (2007) (criticizing use by some vendors of arbitration clauses establishing arbitration systems of questionable fairness and criticizing judicial enforcement of such “agreements”); Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631 (2005) (extensive criticism of mandated arbitration based on reflexive judicial enforcement of arbitration clauses); Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court’s Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637 (1996) (addressing the Supreme Court’s adherence to the historical myth of a Congressional preference for arbitration).

¹⁰ See discussion *supra* note 2; in particular, Stempel, *Feeding the Right Wolf*, *supra* note 5, at 484–95 (arguing that unscrupulous, unreasonable, or stubborn disputants often preclude productive negotiation and mediation and can be forced to honor legal rights only through coercive power of adjudication or its regulatory equivalent).

¹¹ See Brown & Wolf, *supra* note 1.

¹² See STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW & ETHICS 633–99 (8th ed. 2009) (describing extensive regulation and licensing of attorneys, including required schooling, passage of bar examination, character & fitness vetting by state bar regulators, and ongoing discipline); Brown & Wolf, *supra* note 1 (proceeding on the premise that attorneys are subject to extensive licensing, regulatory, and disciplinary apparatus).

often referred to as a “ticket” to practice law in attorney slang,¹³ permits counsel to work as an attorney and to begin to recoup the time and expense incurred in obtaining a juris doctor degree and passing a bar examination.¹⁴ Notwithstanding current recessionary conditions and the likelihood that the economics of law practice will be less lucrative in the future,¹⁵ law is still a pretty good line of work that pays substantially better than most occupations.¹⁶ For finan-

¹³ Relatedly, lawyers often describe disbarment as “pulling the ticket” of the offending lawyer. On repeated occasions over the years, some in open court under oath, I have heard lawyers state that they would not consider certain misconduct because they “wouldn’t want my ticket pulled,” or “want to keep my ticket.” Although this may not be a particularly inspirational manner of describing attorney ethical incentives, it captures well the degree to which lawyers view their licenses as a valuable economic right that they would be loath to lose. That the motivation may be pecuniary rather than principled may be disappointing but it does not diminish the power of the motivation.

¹⁴ And the investment is substantial. Law school tuition, even at public institutions is typically \$20,000 per year and may exceed \$50,000 per year at elite private institutions. Bar examination preparation courses typically cost over \$2,000. This study entails a commitment of roughly three calendar years even for the full-time student who barrels ahead with his or her legal education. During that time, the student’s earning power is greatly reduced but he or she continues to incur living expenses. Part-time evening students typically devote four years to the educational and licensing task and may also lose income despite suffering the burdens of going to law school at night.

In addition, the cruel reality is that the time and money of law school is no guarantee of successful passage of the bar examination. In jurisdictions like Nevada and California, a third or more of the applicants may fail to obtain a passing score notwithstanding that they all were granted law degrees, usually by American Bar Association (ABA) accredited law schools (although California does not require this for applicants). Law graduates may need to take the bar exam several times before passing or may give up after repeated failed efforts.

Logically, people who successfully run this gauntlet will want to retain the prized license obtained even if they may have committed misdeeds that place the license in jeopardy.

¹⁵ See Larry E. Ribstein, *The Death of Big Law*, 2010 WIS. L. REV. 749 (2010) (presenting currently popular arguments that law practice in the aftermath of the recession and stock market crash of 2008 has become less remunerative than in the past).

¹⁶ A recent ABA salary survey found that lawyers on average across the country earn more than \$100,000 per year, with compensation much higher in some markets for senior lawyers. See Janan Hanna & Rachel M. Zahorsky, *What America’s Lawyers Earn*, 97 A.B.A.J. 35 (2011). In Las Vegas, the average compensation levels were \$122,540. See Ian Monroe, *Search Lawyer Wage Data for Your County*, A.B.A.J. (Mar. 1, 2011, 6:55 AM), http://www.abajournal.com/magazine/article/search_wage_data_for_your_county (inserting “Clark County, NV” in the search box provided and selecting the “submit” button). Publications like the *American Lawyer* and the *National Law Journal* regularly run compensation surveys of the largest law firms. The most recent surveys show that partners in large law firms regularly earn mid or high six-figure incomes and often earn more than a million dollars per year. See *A Little More Pay for Partners*, AM. LAW., May 1, 2011, at 145; see also *Partners: A Big Pay Raise*, NAT’L L.J., Aug. 29, 2011, at 16 (nationwide average equity partner compensation of \$383,000 in 2010). Even in relatively smaller urban markets such as Las Vegas, top attorneys can earn seven figure incomes. Although compensation levels for lawyers in smaller firms, government, or representing individuals rather than businesses tends to be significantly lower than in larger commercial firms or successful tort and insurance practices, lawyers still generally do very well compared with other workers.

According to the Bureau of Labor Statistics’ May 2010 estimates, the mean annual wage for all occupations was \$44,410. U.S. BUREAU OF LABOR STATISTICS, MAY 2010 NATIONAL OCCUPATIONAL EMPLOYMENT AND WAGE ESTIMATES; 00-0000 ALL OCCUPATIONS (2010), http://www.bls.gov/oes/current/oes_nat.htm#00-0000. US Bureau of Labor

cial reasons, if nothing else, the typical attorney in trouble will be motivated to participate in good faith in restorative efforts to retain his or her license.

Relatedly, lawyers have an incentive to cooperate and to obtain restoration. By definition, each one has invested substantial time (three years of law school, bar exam study, etc.) and money (tuition, fees, etc.) in becoming an attorney.¹⁷ Further, lawyers in practice for any length of time have also invested substantial amounts of time and money in building a practice and will not want these efforts to be diminished or destroyed by serious punishment such as suspension or disbarment.¹⁸

Statistics' Employment and Wages Online Annual Averages for 2009 reflect the annual average wages per employee was \$45,559 for 2009. *Table 1: Total Coverage (UI and UCFE) by Ownership: Establishments, Employment, and Wages, 2000 – 2009 Annual Averages*, U.S. BUREAU OF LAB. STAT., <http://www.bls.gov/cew/ew09table1.pdf> (last visited January 28, 2012). In determining the National Average Wage Index for 2009, the Social Security Administration calculated the average amount of wages per worker to be \$39,054.62 for 2009. *National Average Wage Index*, SOC. SECURITY ONLINE, <http://www.ssa.gov/oact/cola/AWI.html> (last modified Oct. 19, 2011).

Meanwhile, “[t]he real median household income in 2009 was \$49,777.” CARMEN DENAVAS-WALT ET AL., U.S. CENSUS BUREAU, CURRENT POPULATION REPORTS, P60-238, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2009, 4 (2010), available at <http://www.census.gov/prod/2010pubs/p60-238.pdf>. According to the Bureau of Labor Statistics, the average income of consumer units in 2009 was \$62,857 before taxes. U.S. BUREAU OF LABOR STATISTICS, CONSUMER EXPENDITURES IN 2009, REPORT 1029, 2 tbl. 2 (2011), available at <http://www.bls.gov/cex/csxann09.pdf>. Consumer units are defined as

[m]embers of a household consisting of a) occupants related by blood, marriage, adoption, or some other legal arrangement; b) a single person living alone or sharing a household with others, but who is financially independent; or c) two or more persons living together who share responsibility for at least 2 out of 3 major types of expenses—food, housing, and other expenses. Students living in university-sponsored housing are also included in the sample as separate consumer units.

Id. at 9.

¹⁷ See *supra* note 14.

¹⁸ In general, more experienced lawyers earn more than less experienced attorneys. Compare Hanna & Zahorsky *What America's Lawyers Earn*, *supra* note 16, and *A Little More Pay for Partners*, *supra* note 16 (describing equity compensation for partners at large law firms ranging from \$400,000 to \$4,345,000), with Karen Sloan, *Associate Salary Figures in a Holding Pattern, NALP Survey Shows*, NAT'L L.J., Sept. 10, 2010 (describing starting salaries for associates at large firms ranging from \$130,000 to \$160,000, according to the National Association for Law Placement). See also Ross Todd, *NALP Survey Says Salaries Flat – If You're Lucky*, AM. LAW., Sept. 9, 2010 (describing “median midlevel salary, at \$185,000 for third-years, \$210,000 for fourth-years, and \$230,000 for fifth-years” at large firms in New York and Los Angeles).

This results not only from attorneys working their way up the ladder in government organizations and law firms but also because attorneys responsible for obtaining their own clients frequently invest years in reputation building, marketing, client cultivation, and general “rainmaking” in order to build a larger and more attractive client base that pays higher rates and keeps the attorney more actively employed.

This investment of human capital by counsel can be rapidly depleted if the attorney is unavailable to the client and the client is forced to use the services of another attorney who in turn builds rapport and a relationship with the client. Consequently, even a short suspension of the lawyer's right to practice law can have devastating effects on his or her practice. Lawyers practicing in firms may soften the blow somewhat by persuading clients to work with the suspended attorneys' law firm during the suspension but the personal nature of

Another aspect of the professionalism of licensing and investment is the degree to which an attorney's identity as an individual is at least partially merged with his or her identity as an attorney. To suffer severe discipline such as suspension or disbarment is to be shamed and stripped of that identity.¹⁹

lawyer-client relations makes this less than an effective means for keeping clients during a suspension.

And not to overlook the obvious: an attorney's suspension is hardly confidence-inspiring for clients. Unless the client is extremely loyal or the facts of the matter suggest excessive punishment, clients are likely to consider switching to untainted counsel for future matters even if the suspension is short. Even the less coercive sanction of public censure may have this effect by tarring the lawyer in the eyes of existing and prospective clients.

¹⁹ Lawyers, like other professionals (doctors, engineers, teachers, clergymen) generally enjoy relatively high social status. See Elizabeth H. Gorman & Rebecca L. Sandefur, "Golden Age," *Quiescence, and Revival: How the Sociology of Professions Became the Study of Knowledge-Based Work*, 38 *WORK & OCCUPATIONS* 275, 288 (2011) (discussing how the traditional professions continue to enjoy relatively "high social status and rewards"). But see Regina A. Corso, *Firefighters, Scientists and Doctors Seen as Most Prestigious Occupations*, HARRIS INTERACTIVE Aug. 4, 2009, available at <http://www.harrisinteractive.com/vault/Harris-Interactive-Poll-Research-Pres-Occupations-2009-08.pdf> ("Two occupations have lost substantial ground since 1977 [in the percentage that believe the occupation has 'very great prestige']: scientists, down 9 points to 57% and lawyers, down 10 points to 26%."); Alex Williams, *The Falling-Down Professions*, N.Y. TIMES, Jan. 6, 2008, s.9 at 1 ("[S]ome doctors and lawyers feel they have slipped a notch in social status . . .").

Correspondingly, losing that social status for reasons of alleged or adjudicated misconduct logically threatens lawyers just as people are generally threatened by loss of social status. See Johannes Siegrist, *Place, Social Exchange and Health: Proposed Sociological Framework*, 51 *SOC. SCI. & MED.* 1283, 1286 (2000) ("For instance, the work role offers options for all three functions of successful self-regulation: the experience of self-efficacy (e.g. a satisfying performance, personal development through work), self-esteem (e.g. recognition, adequate remuneration, promotion prospects), and self-integration (social identity beyond the family, participation in networks). Moreover, having a job is a principal prerequisite for continuous income opportunities which, in turn, determine a wide range of life chances. On the other hand, threats to this fragile balance of socio-structural context of demands and rewards, everyday social role functioning, and emotional benefits obtained from successful self-regulation are particularly stressful. Losing a job or being excluded from close relationships are obvious examples of role termination with deleterious effects on affect, well-being and physical functioning . . .").

In recent years, there have been numerous studies that discuss the negative effects of unemployment and lack of job stability. See, e.g., AM. PSYCHOL. ASS'N, *STRESS IN AMERICA FINDINGS* 8 (2010), available at <http://www.apa.org/news/press/releases/stress/national-report.pdf> ("Job stability is on the rise as a source of stress; nearly half (49 percent) of adults reported that job stability was a source of stress in 2010 (compared to 44 percent in 2009)."); Signe Hald Andersen, *Unemployment and Subjective Well-Being: A Question of Class?*, 36 *WORK & OCCUPATIONS* 3, 4 (2009) ("Existing studies have found strong evidence that unemployment negatively affects subjective well-being." (citation omitted)); Sarah A. Burgard et al., *Toward a Better Estimation of the Effect of Job Loss on Health*, 48 *J. HEALTH & SOC. BEHAV.* 369, 380 (2007) ("[W]e find that an involuntary job loss is associated with poorer subsequent self-rated health and increased depressive symptoms . . ."); Partha Deb et al., *The Effect of Job Loss on Overweight and Drinking*, 30 *J. HEALTH ECON.* 317, 317 (2011) ("Losing a job can be stressful. . . . The potential pathways of stress comprise an assortment of psychosocial and economic factors, including stigmatization, uncertainty, severance of social identity and role, unallocated time, and financial deprivation." (citations omitted)); Bidisha Mandal et al., *Job Loss and Depression: The Role of Subjective Expectations*, 72 *SOC. SCI. & MED.* 576, 580 (2011) ("These results are consistent with a large literature that finds a negative impact of job insecurity on mental health.").

Even public censure has these consequences although the attorney's practice may escape economic harm.²⁰

There are, of course, examples to the contrary, both regarding the traditional pedestal of lawyers and the consequences of falling from the pedestal. For example, two of the past three lawyer presidents (Richard Nixon and Bill Clinton) were disbarred. See STEPHEN GILLER, *supra* note 12, at 404–410 (describing Clinton's issues with perjury in *Jones v. Clinton* and impeachment matters), *id.* at 772 (discussing Nixon disbarment); see also *In re Nixon*, 385 N.Y.S.2d 305 (N.Y. App. Div. 1976). But they seem to have continued to live much of their lives unscathed.

Clinton in particular appears to have achieved something like elder statesman status and commands large speaking fees. As this is being written, the cable news network CNN is promoting and running special program on heart disease ("The Last Heart Attack" hosted by Dr. Sanjay Gupta) in which Clinton, who survived a 2004 heart attack, is prominently featured. See Dr. Sanjay Gupta, *Dr. Sanjay Gupta Reports: The Last Heart Attack*, CNNPRESSROOM.BLOGS (Aug. 29, 2011, 2:11:43 PM), <http://sanjayguptamd.blogs.cnn.com/2011/08/29/sanjay-gupta-reports-the-last-heart-attack/>.

Nixon became more of a pariah, at least for a time, perhaps illustrating the degree to which Americans are more tolerant of lack of candor regarding sexual discretions (even if the lack of candor occurs under oath) than efforts to subvert the electoral process and thwart subsequent investigation. But both disbarred former presidents had best-selling memoirs. See RICHARD NIXON, RN: THE MEMOIRS OF RICHARD NIXON (1978); BILL CLINTON, MY LIFE (2004); see also Robin Johnson, *Book Review*, 185 MIL. L. REV. 209, 218 n.78 (2005) (reviewing JOSEPH J. ELLIS, HIS EXCELLENCY: GEORGE WASHINGTON (2004) but noting Clinton's autobiography and referring to it as a "modern classic of legacy-spin"). And Nixon, prior to his death, had achieved elder statesman status, with his opinions on foreign policy considered erudite and valuable.

But most disciplined attorneys lack the economic and public relations opportunities for bouncing back possessed by celebrity lawyers like former presidents. For most, disbarment is a ticket to oblivion and permanent disgrace. See JAMES L. KELLEY, LAWYERS CROSSING LINES IX (2001) (describing ethical stumbles of several attorneys and subsequent status of their lives, usually greatly diminished after their disciplinary problems). Even for those obtaining moral redemption, there is usually at least a substantial downturn in economic status. For example, Mahlon Perkins, Jr., was a partner in the prestigious Big Law firm Donovan Leisure Newton & Irvine. When he misled the court on a discovery matter in major antitrust litigation, his lack of candor led to ejection from his firm and the inability to obtain a paying position with any similar firm even though he staved off disbarment. He subsequently was able to work at the Center for Constitutional Rights public interest organization, which he found rewarding. See Pamela S. Karlan, Commentary, *The Path of the Law Firm: A Comment on Ribstein's "Ethical Rules, Agency Costs, and Law Firm Structure"*, 84 VA. L. REV. 1761, 1767 (1998); David Margolick, *The Long Road Back for a Disgraced Patriarch*, N.Y. TIMES, Jan. 19, 1990, at B6. The Perkins episode both illustrates the negative impact of professional misconduct and discipline and the possibility of restoring errant counsel who are not incorrigible.

²⁰ Even private reprimand may have this effect because, despite the official confidentiality of a private reprimand, the targeted attorney's miscues are by definition known at least to the regulators, who generally are lawyers whose respect the targeted attorney wishes to enjoy. Further, there are undoubtedly leaks in even the most assiduously confidential processes. Word often gets around that Lawyer X has been subject to a private reprimand, which alone imposes an informal sanction and stigma on the attorney.

The power of the legal fraternity and status as a fraternity member is perhaps best characterized by a theatrical ploy that likely rings true. In the play *Angels in America*, the fictionalized version of very real and controversial lawyer Roy Cohn is on his deathbed dying of AIDS and seems to brush off many of the hard criticisms of his career but seems genuinely (particularly when played by Al Pacino in the HBO mini-series) despondent over being disbarred. See TONY KUSHNER, ANGELS IN AMERICA (1994) (describing disbarment as ejection from the one club about which he cared to be a member). Cohn was counsel to

Perhaps most important, the legal profession creates community, an increasingly rare situation as society becomes larger and more transient. Even in large metropolitan areas, attorneys tend to know one another. Reputation and status remains important even if a decline in reputation or status does not visit immediate tangible detriment to the attorney. More commonly, declines in status or reputation because of disciplinary difficulties will result in a decline in clients, referrals from other attorneys, the benefit of the doubt from judges or opponents considering whether to grant an extension or accept counsel's word, or some other aspect of practice.

Beyond this, the community created by bar membership creates a kinship of attorneys. Although this sounds positively corny to the non-attorney, the fraternal aspect of being a lawyer is well-recognized and in my experience accurate. Lawyers tend to like other lawyers, even (or perhaps especially) those they frequently oppose in court. The sentiment was well captured by Harrison Tweed, a classic representative of Big Law (of the firm Milbank Tweed Hadley & McCloy, marketed today simply as "Milbank") and former president of the American Law Institute, The Association of the Bar of the City of New York, and Sarah Lawrence College, who famously (if perhaps a bit chauvinistically) extolled the virtues and camaraderie of lawyers: "I have a high opinion of lawyers. With all their faults, they stack up well against those in every other occupation or profession. They are better to work with or play with or fight with or drink with, than most other varieties of mankind."²¹ The degree to which the profession agrees is reflected quite literally in stone at the Association's headquarters where Tweed's quote is chiseled into the wall in one of the building's most prominent meeting rooms named after Tweed.²²

The fraternal bond of lawyers extends beyond the tap room and even to its polar opposite: attorneys with substance abuse problems. Bar associations and individual lawyers have readily recognized the degree to which the pressures of practicing law may lead some to excessive alcohol consumption, drug use, or

infamous hearings on "un-American activity" conducted by Senator Joseph McCarthy (R-Wis.) during the 1950s. Presumably, some of Cohn's targets during McCarthy's hearings, particularly hearings alleging that the U.S. Armed Forces had been infiltrated with Communists, would be somewhat less sympathetic to Cohn's dying plight.

²¹ See Harrison Tweed, *The President's Letter*, 1 REC. ASS'N BAR CITY N.Y. 8, 8 (1946) (internal quotation marks omitted). For examples of use of the Tweed quotation, see, e.g., RENNARD STRICKLAND & FRANK T. READ, *THE LAWYER MYTH: A DEFENSE OF THE AMERICAN LEGAL PROFESSION* 129 (2008); Bayless Manning, *If Lawyers Were Angels: A Sermon in One Canon*, 60 A.B.A.J. 821 (1974) (but also quoting non-lawyer friend's response that "polecats like to hang out with other polecats"); Ronald D. Rotunda, *Moving from Billable Hours to Fixed Fees: Task-Based Fees and Legal Ethics*, 47 KAN. L. REV. 819, 819 (1999); Charles Alan Wright, *A Man May Live Greatly in the Law*, 70 TEX. L. REV. 505, 519 (1992) (reviewing ERWIN N. GRISWOLD, *OULD FIELDS, NEW CORNE: THE PERSONAL MEMOIRS OF A TWENTIETH CENTURY LAWYER* (1992)).

²² As a member of the Association and New York area resident, I spent a significant amount of time looking at the inscription during lulls in committee meetings, finding it a useful anecdote to the occasional (but infrequent) rambling of some committee members. (For lawyers, time is money and there was in my experience relatively little wasted motion in City Bar Association Committee meetings).

other destructive behavior.²³ A good example is presented by an anecdote related once to me by former Nevada Bar Counsel, who told a memorable and moving story of a lawyer with grave substance abuse problems seeking help. A prominent Las Vegas lawyer dropped what he was doing at the moment to drive the troubled attorney to a rehab center in another state.²⁴ It is hard to imagine an investment banker at Goldman Sachs taking an early quit to do the same for someone at Morgan Stanley or JP Morgan.

In this crucible of community, however imperfect, efforts at restoration are likely to be more successful than they would be in the world at large. As Brown and Wolf persuasively argue, the type of communication and collective problem solving at the center of restorative discipline has a substantial chance of success for lawyers and offers a useful adjunct to the traditional default methods of attorney discipline.²⁵ Empirical evidence from a jurisdiction adjacent to Nevada lends support to this view.²⁶

Despite these positive characteristics making restorative discipline a promising avenue of attorney discipline, there remains the risk that it could be misused by lawyers who are not merely errant but affirmatively untrustworthy. For these sorts of “bad-to-the-bone” (my apologies to George Thorogood) lawyers, efforts at restorative discipline merely prolong the inevitable. Despite the considerable effort invested by the character-and-fitness aspects of the bar admission process, some applicants become licensed but lack the requisite scruples to practice law properly. Or perhaps they evolved into unethical lawyers over time, unable to resist temptation.

Efforts at understanding are a waste of time with these sorts of bad apples. Disbarment is the only realistic option. If efforts at restorative discipline merely postpone the inevitable or permit these bad apples to con regulators, clients, and adversaries so that they can prolong their ability to do harm, it risks becoming a mere tool for the unscrupulous and a sham.

Brown and Wolf are sensitive to this, noting that in recommending model disciplinary procedures, including use of less punitive measures of discipline, the ABA has “carve[d] out certain categories of cases and make clear that [such cases] do not involve” so-called “lesser misconduct” apt for restorative discipline.²⁷ Among these carve outs are situations in which

- the misconduct involves the misappropriation of funds;
- “[t]he misconduct result[s] in or is likely to result in [substantial] prejudice . . . to a client or other person[;]

²³ A quick Google search reveals the websites of scores of organization such as Lawyers Helping Lawyers or Lawyers Concerned for Lawyers.

²⁴ In the interests of those involved, I am electing to keep them relatively anonymous in spite of what I regard as their rather heroic display of concern and public-spiritedness. I heard the story from one of those involved during a 2003 bar committee meeting and am confident in its accuracy.

²⁵ See Brown & Wolf, *supra* note 1, at 297–312.

²⁶ See Diana M. Ellis, *A Decade of Diversion: Empirical Evidence that Alternative Discipline Is Working for Arizona Lawyers*, 52 EMORY L.J. 1221, 1231–32 (2003) (cited in Brown & Wolf, *supra* note 1, within the text accompanying note 94 and note 96).

²⁷ See Brown & Wolf, *supra* note 1, at the text accompanying note 85–87 (internal quotation marks omitted).

- [t]he respondent has been publicly disciplined in the last three . . . years[;]
- [t]he misconduct . . . is of the same nature as misconduct for which the respondent has been disciplined in the last five . . . years”;
- the misconduct involves dishonesty, deceit, fraud, or misrepresentation by the respondent;
- the misconduct constitutes a “serious crime as defined in Model Rule of Lawyer Disciplinary Enforcement 19(c); or
- the misconduct is part of a pattern of misconduct.²⁸

The solution to the problem of “bad apples” in the legal profession is, of course, not the rejection of the restorative ideal but simply galvanizing it with recognition that some offenses and offenders are not apt for restoration and rehabilitation but require severe punishment and perhaps the ultimate sanction of disbarment. Embracing this reality—and being willing to pull the plug on restorative discipline or even skip the effort altogether when dealing with egregious attorney misconduct—hardly undermines the case for attempting to use this more constructive approach to attorney discipline. Rather, it simply requires some realism about the effectiveness of the process.

No dispute resolution process is inevitably apt for all disputes.²⁹ This is why (along with efficiency and resource concerns) society does not require disputants to follow all complaints through to formal resolution but instead allows (and even encourages) settlement or even voluntary dismissal of claims. A similar attitude is required for restorative discipline, mediation, arbitration, expert panels, ombudspersons, or any other ADR device used in lieu of formal adjudication.

If these forums emerge as a bad fit for the “fuss” in question or in light of the nature of the disputants, there is no need to spend inordinate time or resources following the ADR process to full conclusion. More important, those employing these ADR devices should not be so hell-bent on “making” alternatives to punishment “work” as to permit unfair or clearly inadequate outcomes. In some, perhaps even many, cases, the better part of valor will require termination of the restorative process or other aspect of ADR and movement of the matter back to the track of formal adjudicative discipline.

But for problems of attorney misconduct that stem from sources other than intentionally evil conduct by counsel, the restorative ideal holds great promise for rehabilitating momentarily errant counsel rather than making the process excessively formal, brittle, and punitive. Law is a perhaps inherently stressful profession and presents lawyers with (to mix a metaphor) a constant barrage of ethical minefields that may not always be successfully navigated, particularly

²⁸ See AM. BAR ASS’N, *LAWYER REGULATION FOR A NEW CENTURY: REPORT OF THE COMMISSION ON EVALUATION OF DISCIPLINARY ENFORCEMENT*, Recommendation 9 cmt.(1) (1992) (referred to in shorthand reference as Model Rules of Lawyer Disciplinary Enforcement by Brown & Wolf, *supra* note 1, at text accompanying note 92).

²⁹ See 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, 49 (1994); Frank E.A. Sander, *Varieties of Dispute Processing*, 70 F.R.D. 111, 113 (1976); see also Jeffrey W. Stempel, *Reflections on Judicial ADR and the Multi-Door Courthouse at Twenty: Fait Accompli, Failed Overture, or Fledgling Adulthood?*, 11 OHIO ST. J. DISP. RESOL. 297, 302 (1996).

by less experienced counsel working in isolation without the benefit of the support and guidance of more seasoned attorneys.³⁰ As a result, lawyers acting in good faith may make mistakes that violate the rules and norms of professional responsibility, particularly where an attorney is plagued by depression, alcohol or other substance abuse, debt, addiction, or personal problems.³¹

These attorneys are often “good apples” who have simply made mistakes and whose behavior and career paths can be salvaged by a more restorative approach rather than classic prosecution and punishment. A large part of the “battle” for apt use of restorative discipline thus involves separating the errant good apples from the incorrigible, unredeemable, and downright dangerous “bad apples” of the profession—distinguishing between Reinhold Niebuhr’s children of light and children of darkness.³²

Viewed in this more holistic and realistic (if perhaps cynical) light, there is no paradox in the use of restorative discipline methods for attorney discipline. It is a format well-suited for addressing many or even most of the problems that arise in law practice. It also recognizes that taking a “zero tolerance” approach is often a bad idea generally. Many isolated and first-time offenders are salvageable but salvageability becomes increasingly difficult if not impossible when the mode of addressing the office is excessively and inflexibly punitive.

Thus, as Brown and Wolf note, there is a paradox in that “the very phrase[] restorative discipline [is] an oxymoron in the view of some restorative justice theorists.”³³ But as they also note, the apparent paradox is “easily resolved” through a broader and more nuanced focus on what we mean by discipline as well as by the practical considerations attendant to the legal profession.³⁴ As this Comment has emphasized, these practical considerations are important and powerful. Legal discipline is a particularly fertile area for more flexible, rehabilitative, restorative discipline as compared to many other areas of human misconduct.

But the pursuit of restorative discipline must not become an end in itself or a tool for those simply wishing to erect procedural barriers to discipline or delays in discipline. When applied to the merely errant attorney rather than actually unscrupulous attorney, restorative discipline makes perfect sense—

³⁰ Bar discipline records in most states tend to reflect the disproportionate imposition of discipline upon solo practitioners and less disciplinary difficulty for large law firms (although their malpractice rates will nonetheless be higher because they are handling matters of greater magnitude where damages will be greater if things go awry). Critics of the organized bar often suggest this occurs because Big Law is more politically powerful and sufficiently “connected” to avoid harsh bar discipline. Although there is perhaps some truth to this influence-based explanation, my own view is that solo practitioners and small firms have more disciplinary problems because of the nature of their practice in which there is less opportunity to get the guidance of senior counsel and where the nature of the business model involving smaller stakes cases and clients less willing to pay for more thorough examination of the issues prompts attorneys to forge ahead rather than taking the time to assess matters at length.

³¹ See Brown & Wolf, *supra* note 1, at text accompanying notes 28–30 (noting common ethical violations that stem more from negligence than intentional wrongdoing).

³² See Stempel, *Feeding the Right Wolf*, *supra* note 5, at 499.

³³ See Brown & Wolf, *supra* note 1, at text accompanying notes 16–17 (emphasis omitted).

³⁴ See *id.* at text accompanying note 17.

arguably more sense than the restorative process in most other walks of life. So long as not excessively enshrined, it provides a useful adjunct to or expansion of the traditional formal methods of attorney regulation.