

## RECONCILIATION THROUGH RESTORATIVE JUSTICE PRACTICES

### INTRODUCTION

As Christian lawyers, we can often find the law insufficient to bring about the reconciliation our clients need to move on after a significant event in their lives or business—whether that is loss of employment or job changes; injury whether at work or elsewhere; conflicts on the board, or with co-workers, family members, or neighbors; financial losses or improprieties; abuse of some kind; or criminal behavior. In our culture today, litigation is often the first instinct for those that have been harmed. And as soon as litigation becomes even a possibility, clients and lawyers alike take steps toward protecting information, reducing legal risk, and preparing for battle. Of course, litigation can be a powerful source of accountability, can compensate for losses and harm, and sometimes can change behavior. But if you've practiced law for any period of time, you know that it is rare for anyone to go away happy, and even rarer indeed for reconciliation of any kind to happen. Plus, litigation does not have anything to say to the communities in which our clients live, work, and play. Our system is set up this way – it is an adversarial system, most often between two parties.

What if something different were possible? What if we, as lawyers, could use our skills, education, and expertise to facilitate healing, reconciliation, and restitution? What if we could offer more holistic and ultimately satisfying options for our clients? I believe seeking to bring about reconciliation through the use of restorative justice principles is an answer. As I will set forth in this presentation, restorative justice, through the active participation of victim, offender, and community, is a unique and ancient concept that can be used to reconcile the most complex conflicts, heal deep wounds, and bring about accountability and just restitution.

Christian lawyers have a unique opportunity to demonstrate their belief that God is reconciling all things to himself by using restorative justice principles to help their clients resolve disputes that might otherwise end up in litigation. This workshop (i) provides an introduction to restorative justice, explaining its origins, purpose, and unique perspective on harm; (ii) describes how restorative justice works and how it differs from current legal approaches to conflict and harm; (iii) application of restorative justice principles in the civil (as opposed to criminal) context; (iv) the role of a lawyer in restorative justice practices and particular areas to look out for; and (v) two case studies in which restorative justice just might be “working.”

## WHAT IS RESTORATIVE JUSTICE?

Restorative justice is not a term that is really part of the common parlance. Yet, its precepts have gained ground through its successful use in certain criminal contexts. Before we define restorative justice and explain what it is, let us consider the criminal justice system in the United States. That system is premised upon the following ideas: 1) crime is a violation of the law and an offense to the state; 2) violations create guilt; and 3) justice requires the state to determine guilt and impose punishment. (Howard Zehr, *The Little Book of Restorative Justice* at 21). In other words, the purpose of the criminal justice system is to identify the guilty and punish them for violating state or federal rules. A criminal defendant is charged with the violation of a criminal statute implemented by the government. But neither the victim nor the offender have much of a role in the criminal justice process. The victims rarely participate, and the law encourages passivity from the offender.

Restorative justice, on the other hand, is premised upon the notion that while crimes do involve lawbreaking and an offense to the state, they more fundamentally cause harm to actual people (victims) and communities, and to the offenders themselves. (Van Ness, *Restoring Justice* at 12).

According to a leading proponent of and thinker in the area of restorative justice, a restorative philosophy comprises five actions:

1. Focus on the harms and consequent needs of the victims, as well as those of the community and the offender;
2. Address the obligations that result from those harms (the obligations of the offenders, communities, and society);
3. Use collaborative processes;
4. Involve those with a legitimate stake in the situation, including victims, offenders, community members, and society;
5. Seek to put right the wrongs. (Zehr at 32-33).

To pursue these five actions, four questions necessarily arise: (a) what happened (harm)? (b) Who was hurt (stakeholders)? (c) What will help? (needs) and (d) What can we do (process)? Thus, restorative justice takes into account the truth that where a crime or a harm has occurred, there are at least three interested groups—the victim, the community, and the offender. It is these three groups that can benefit from restorative justice more than just criminal justice.

In order for survivors, survivor advocates, and the community to find help and healing from restorative justice practices, those deemed responsible need to address the harm (both the direct harm and any harm that may have happened in the post-reporting process), be encouraged to have empathy and responsibility for the survivors, provide opportunities for survivors to find treatment, encourage and provide a process for survivors and the community to heal, and implement steps to prevent future harm.

Definitions:

“a response to wrongdoing that prioritizes repairing harm and recognizes that maintaining positive relationships with others is a core human need.” (Restorative Justice Network)

“Whether we see it as theory, process, or social movement, restorative justice refers to practices rooted in the idea that both the origins and outcomes of crime can be articulated as needs in communities, victims, and offenders. Restorative practices strive to acknowledge and address those needs as a way to create healing and transformative opportunities for those directly impacted by

crime.” (Hass-Wisecup & Saxon, Restorative Justice: Integrating Theory, Research, and Practice at 13)

#### HOW DOES RESTORATIVE JUSTICE WORK?

- Identifies needs of those involved.

Victims of harm need three things: (1) acknowledgement of the harm; (2) information about what happened and why; and (3) empowerment because harm typically causes disempowerment and diminishment of value. (Zehr). Agents of harm generally need (1) to accept of responsibility; (2) participate in providing restitution to the victim and the community; and (3) reintegration into the community. A community’s needs overlap with victims’ needs.

- Engages a specific process called Circles

The concept of circles is ancient, arising at a time before there were central laws that governed societies. When circles developed, people governed themselves so when harm was done within a community, that community had to figure out how to go on living with one another. And so one of those ways was to form these circles to bring about understanding, healing, and restitution for the one that was harmed and to restore the agent of harm to the community.

Circles are conversation spaces that are designed for varying reasons. Some are to allow for listening and problem solving among those impacted by a particular crime, offense, or traumatic event. Some are regular circles formed in a community to allow for ongoing conversation and resolution of conflict and trust building. The foundation of circles designed to create restoration is that all the stakeholders – the victim, agent of harm, and community members participate. This is the place where repentance and real transformation can occur.

Elements of a circle: circle keeper, ceremony, talking piece, values, questions

- Examples: provide examples from South African Truth and Reconciliation Commission, Canadian commissions, education, and Chicago

#### HOW CAN RESTORATIVE JUSTICE PRACTICES BE USED IN THE NON-CRIMINAL SITUATIONS?

- Alternative Dispute Resolution

- Traditional options: mediation, arbitration, Christian conciliation
- What are the parties’ goals and motivations?
- Benefits/Downsides

- Settlement of Lawsuits

- What are the parties’ goals and motivations?
- Any protection? Rules of evidence governing settlement negotiations – FRE 408

(a) Prohibited Uses. Evidence of the following is not admissible — on behalf of any party — either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction:

(1) furnishing, promising, or offering — or accepting, promising to accept, or offering to accept — a valuable consideration in compromising or attempting to compromise the claim; and

(2) conduct or a statement made during compromise negotiations about the claim — except when offered in a criminal case and when the negotiations related to a claim by a public office in the exercise of its regulatory, investigative, or enforcement authority.

(b) Exceptions. The court may admit this evidence for another purpose, such as proving a witness's bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

- Benefits/downsides
  - Reconciliation through restorative justice practices
    - What are the parties' goals and motivations?
    - Protection? Section 735 ILCS 5/804.5 - Parties to a restorative justice practice
      - (a) This Section is intended to encourage the use of restorative justice practices by providing a privilege for participation in such practices and ensuring that anything said or done during the practice, or in anticipation of or as a follow-up to the practice, is privileged and may not be used in any future proceeding unless the privilege is waived by the informed consent of the party or parties covered by the privilege. The General Assembly affords this privilege in recognition of restorative justice as a powerful tool in addressing the needs of victims, offenders, and the larger community in the process of repairing the fabric of community peace. The General Assembly encourages residents of this State to employ restorative justice practices, not only in justiciable matters, but in all aspects of life and law.
      - (b) As used in this Section:
        - "Circle" means a versatile restorative practice that can be used proactively, to develop relationships and build community, or reactively, to respond to wrongdoing, conflicts, and problems.
        - "Conference" means a structured meeting between offenders, victims, and both parties' family and friends, in which they deal with the consequences of a crime or wrongdoing and decide how best to repair the harm.
        - "Facilitator" means a person who is trained to facilitate a restorative justice practice.
        - "Party" means a person, including a facilitator, an individual who has caused harm, an individual who has been harmed, a community member, and any other participant, who voluntarily consents to participate with others who have agreed to participate in a restorative justice practice.
        - "Proceeding" means any legal action subject to this Code, including, but not limited to, civil, criminal, juvenile, or administrative hearings.
        - "Restorative justice practice" or "practice" means a gathering, such as a conference or circle, in which parties who have caused harm or who have been harmed and community stakeholders collectively gather to identify and repair harm to the extent possible, address trauma, reduce the likelihood of further harm, and strengthen community ties by focusing on the needs and obligations of all parties involved through a participatory process.
      - (c) Anything said or done during or in preparation for a restorative justice practice or as a follow-up to that practice, or the fact that the practice has been planned or convened, is privileged and cannot be referred to, used, or admitted in any civil, criminal, juvenile, or administrative proceeding unless the privilege is waived, during the proceeding or in writing, by the party or parties protected by the privilege. Privileged information is not subject to discovery or disclosure in any judicial or extrajudicial proceedings.
- Any waiver of privilege is limited to the participation and communication of the waiving party only, and the participation or communications of any other participant remain privileged unless waived by the other participant.

(d) Evidence that is otherwise admissible or subject to discovery does not become inadmissible or protected from discovery solely because it was discussed or used in a restorative justice practice.

(e) The legitimacy of a restorative justice practice, if challenged in any civil, juvenile, criminal, or administrative proceeding, shall be determined by a judge. In a hearing conducted pursuant to this subsection, the judge may consider information that would otherwise be privileged to the extent that the information is probative of the issue.

(f) The privilege afforded by this Section does not apply if:

(1) disclosure is necessary to prevent death, great bodily harm, or the commission of a crime;

(2) necessary to comply with another law; or

(3) a court, tribunal, or administrative body requires a report on a restorative justice practice, but such report shall be limited to the fact that a practice has taken place, an opinion regarding the success of the practice, and whether further restorative justice practices are expected.

- Other state statutes as examples: Virginia Code Ann. Section 19.2-11.4, Alaska Rules of Criminal Procedures 11(i)
- Benefits: wholistic treatment of the problem, victim sensitive, reconciliation driven, voluntary, restitution that is specific, change is possible, fewer lawsuits in the long run (?); can be used in a secular setting; allows for a tangible demonstration of the gospel
- Downsides: protection in most states, legal risk of admissions/concessions, requires maturity and work, right now, few places that offer the process, voluntary, seen as soft or hippie-dippie
  - “Institutionalization [of restorative justice] brings pressures to be efficient and cost-effective. These objectives do not ‘square well with the emphasis on ritual, the taking of time to tell stories, and the inherent inefficiency of circle process’” (Mary Ellen Reimund, *The Law and Restorative Justice: Friend or Foe? A Systemic Look at the Legal Issues in Restorative Justice*, at 691)
- Any actual examples?
  - New York City Commission on Human Rights v. Prada: restitution <https://www.witlegal.com/insights/blog/quick-look-restorative-justice-principles-emerge-in-settlement-of-civil-cases/>
  - Childhood sexual abuse – Hidden Water, led by Sethu Nair
- Restorative Justice in the Church
  - Exploration of how restorative justice principles might apply to church abuse situations.
  - Overall restorative plan: restitution, victim care, reintegration, repentance

#### WHAT IS THE ROLE OF THE LAWYER IN RESTORATIVE JUSTICE?

- Reframing the role of the lawyer
- Ethical concerns
  - Rule 1.7 Conflict of Interest
  - Rule 2.4: Lawyer Serving as Third-Part Neutral
  - Rule 1.2: limitation on scope of representation

- Constitutional concerns
- “rule of law” –

“We also must not lose those qualities which the legal system at its best represents: the rule of law, due process, a deep regard for human rights, [and] the orderly development of law.” (Reimund at 691-692 (quoting Howard Zehr, *The Little Book of Restorative Justice*).

#### CASE STUDY

Example of ongoing restorative justice process in two situations – one involving a community impacted by child sexual abuse and one involving a church that experienced a collective trauma.

- Role of the lawyer
- Process undertaken
- Timing
- Frustrations
- Benefits

#### QUESTIONS