

ETHICAL CONSIDERATIONS AND RISKS FOR LAWYERS ENGAGED IN RESTORATIVE JUSTICE PRACTICES

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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 walk away from litigation or settlement of litigation happy, let alone truly reconciled or restored in relationship. Last year I introduced the idea of us beginning to employ restorative justice as a way of helping our clients achieve more holistic and satisfying results when it comes to resolving conflicts. In this follow-up to last year's presentation, I will offer a brief recap of restorative justice and then focus on (1) the ethical or professional responsibility aspects of providing this "neutral" or non-adversarial counsel; and (2) the risks associated with using restorative justice in particular circumstances.

BRIEF RECAP: WHAT IS RESTORATIVE JUSTICE AND HOW DOES IT WORK?

Restorative justice is "a response to wrongdoing that prioritizes repairing harm and recognizes that maintaining positive relationships with others is a core human need." (Restorative Justice Network). Restorative justice has its roots in Native American history and has been used in non-Western contexts for generations. In the United States, restorative justice has become increasingly popular in the juvenile criminal and school context where the U.S. criminal justice system or approaches to harm and conflict focus on punishment have not worked. Restorative justice is premised upon the notion that what matters most when it comes to crime or harm, is the fact that human beings and relationships, so fundamentally important to being human, are harmed in the process. (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; and

(5) Seek to put right the wrongs. (Zehr at 32-33).

Thus, restorative justice takes into account the truth that where a crime or a harm has occurred, for healing and true justice to happen, there are at least three interested groups—the victim, the community, and the offender—whose needs must be addressed and each of these groups needs to encounter one another on a human level.

- Identifies needs of all 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 circle gatherings. 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.

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.

WHEN RESTORATIVE JUSTICE PRACTICES ARE USED BY LAWYERS

As lawyers, we most often see ourselves as advocates. Obviously, that is a good thing for our clients—we have agreed to be zealous on their behalf and in advising them of their rights. But as the preamble to the ABA's Model Rules states a lawyer is not just a representative of clients and an officer of the legal system. A lawyer is also "a public citizen having special responsibility for the quality of justice." The rules of professional responsibility, however, at least the way we talk about them, focus on the lawyer as advocate, not the lawyer as someone responsible for the quality of justice or working for the common good.

As Carrie Menkel-Meadow has posed: "What if, for example, we saw lawyers and the legal system seeking to solve not only client problems, but also seeking to work on community-based or even larger social problems? What if needs, as well as rights, were part of the lawyer's vocabulary? Notions of loyalty would be different. So, would there need to be different rules

regarding confidentiality? If, as in other cultures, we began to value harmony and peace, as much as contention and rights, lawyers seeking to reduce, rather than increase, conflict might have to operate in different ways.” SYMPOSIUM: ETHICS AND PROFESSIONALISM IN NON-ADVERSARIAL LAWYERING, 27 Fla. St. U.L. Rev. 153, 159 (1999).

Rules that May Be Implicated in Restorative Justice

Discussion of each of the following Rules and how each applies or might present a risk in the context of restorative justice.

- **Scope of Representation**

Rule 1.2(c): Scope of Representation and Allocation of Authority Between Client and Lawyer

A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

- **What About Confidentiality**

Rule 1.6(a): Confidentiality of Information

A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b) or required by paragraph (c).

- **Does a Conflict of Interest Exist?**

Rule 1.7: Conflict of Interest

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent.

Rule 1.9: Duties to Former Clients

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed consent.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

Rule 2.4(a) Lawyer Serving as Third-Party Neutral

A lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.

Rule 1.12: Former Judge, Arbitrator, Mediator, or Other Third-Party Neutral

(a) Except as stated in paragraph (d), a lawyer shall not represent anyone in connection with a matter in which the lawyer participated personally and substantially as a judge or other adjudicative officer or law clerk to such a person or as an arbitrator, mediator or other third-party neutral, unless all parties to the proceeding give informed consent.

(b) A lawyer shall not negotiate for employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer or as an arbitrator, mediator or other third-party neutral. A lawyer serving as a law clerk to a judge or other adjudicative officer may negotiate for employment with a party or lawyer involved in a matter in which the clerk is participating personally and substantially, but only after the lawyer has notified the judge or other adjudicative officer.

(c) If a lawyer is disqualified by paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in the matter unless:

(1) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(2) written notice is promptly given to the parties and any appropriate tribunal to enable them to ascertain compliance with the provisions of this Rule.

(d) An arbitrator selected as a partisan of a party in a multimember arbitration panel is not prohibited from subsequently representing that party.

Potential Concerns Associated with Using Restorative Justice Practices

- No Attorney-Client Privilege
- Confidentiality of Conversations – Apologies/Admissions
- 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*).

- Confusion
- Lack of Authority
- Disclosure of Harm
- Outcome Enforceability and Permanence
- Liability Insurance
- Payment for Services