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INTRODUCTION

The dream of courtroom battle leads many young lawyers to the door of the prosecutor's office. Seeking to test newly acquired litigation skills against more seasoned opponents, the recent law school graduate relishes the opportunity to wear the white hat in a classic confrontation of good versus evil. It is this "us versus them" mentality that permeates the traditional prosecutor's office.

What the young prosecutor soon finds, however, is an active caseload of 200-300 cases in which the facts of today's new cases blur with those of yesterday's and last week's. For every trial on the misdemeanor docket there are ninety-nine other cases that the prosecutor must handle by way of initial appearance, arraignment, pre-trial conference and guilty plea.

Overcrowded prisons, jails and community corrections facilities force the young prosecutor to realize that not every "bad guy" is going to do the time deserved. This "injustice" begins to gnaw at his core beliefs. He begins to see himself trapped in the endless paper chase that he swore he would never be party to. He fields endless calls from defense attorneys who seem to have only one "wrongfully accused, innocent" client. He covers for every other prosecutor in the office on a moment's notice because prosecutors are said to be "fungible." He sits quietly by as countless victims air their complaints about insensitive cops, defendants getting away with murder, prosecutors too busy to return phone calls, unfeeling judges and the failed "system." Our young prosecutor whose only goal was to save the world soon finds himself daydreaming about packing his bags and going over to the "dark side" of private practice and the billable hour.

It is within this context that the emerging concept of restorative justice may have a chance of taking root in the prosecutor's office.

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There are many prosecutors now beginning to realize that the prosecutor's office is a key player in the management of the criminal justice system. Governmental funding sources are requiring prosecutors to accept responsibility for their actions. The prosecutor must now be an active participant in pre-trial detention decisions that impact jail overcrowding and in post guilty plea/trial sentencing recommendations that impact general system overcrowding.

Some prosecutors now recognize that they are the gatekeepers of the system. Their charging decisions, pre-trial detention positions and sentence recommendations go a long way in deciding which defendants flow to what level of supervision and/or incarceration. Once the prosecutor accepts his role as gatekeeper, it is a short jump to the paradigm shift from the "trail 'em, nail 'em, jail 'em" mentality that pervades the traditional criminal justice system, to the restorative justice mind set that considers every case in light of what outcome best addresses the needs of the victim, community and offender. The restorative justice concept provides another path to pursue, one that addresses public safety demands while meeting the needs of the victim and the community far better than the traditional system. This approach is more personal and involves both victim and community. It is more focused on reparation, restitution and accountability with less emphasis on punishment alone. Restorative justice is much more concerned about remedying harms than exacting punishment.

I. Restorative Justice in Polk County

The Polk County Attorney's Office in Des Moines, Iowa, presently operates several programs that are restorative in nature. However, the office did not embrace the concept of restorative justice at any specific point in time. Rather, the recognition that restorative justice principles have a place in the way prosecutors participate in the delivery of justice has evolved slowly over the past decade, with the building blocks of a restorative justice practice being laid in a somewhat haphazard fashion.

A. Victim Offender Reconciliation

In 1978, the Polk County Attorney's Office established the Polk County Neighborhood Mediation Center (the "Center") as a site where the resolution of relatively minor disputes could occur outside the formal legal process. From 1978 through 1990, the Center, contracting with trained mediators, handled hundreds of cases annually. Most of these cases would otherwise have worked

their way to Small Claims' Court or the Simple Misdemeanor Court.

In 1991, the Polk County Attorney's Office made the decision to institute a Victim Offender Reconciliation Program ("VORP"), loosely modeled after a community-based program in Elkhart, Indiana. The initial cases for this program involved unemployment fraud in which offenders had illegally received benefits. Defendants were given the opportunity to have a felony fraud charge reduced to a non-felony *after* successful completion of a victim offender mediation in which the offender met a state fraud investigator and reached a facilitated agreement concerning the restitution amount and a reasonable payment plan.

It soon became apparent that program referrals could be made in other types of criminal cases in which there was a *real* victim. Prosecutors began referring a variety of non-felony offenses to the program (assaults, thefts, harassments, criminal mischiefs, etc.). In almost all cases, the referrals were prior to guilty plea. Agreements stated that if defendants participated in good faith in a VORP, the state would either reduce the pending charge or recommend a more favorable disposition to the court at the time of sentencing. It became apparent that most offenders and victims were willing to participate in a VORP. Victims routinely reported in post-meeting victim impact statements that their victim-offender meetings allowed them to get answers from offenders about the crime. They also reported that the mediations allowed them to obtain closure in a way not otherwise possible.

Since the inception of the VORP in Polk County over eight years ago, more than 5000 victim offender mediations have been held. Agreements have been reached in more than ninety percent of the cases handled. There are nearly as many felony as non-felony offenses referred to the program with burglaries, robberies, thefts and forgeries the most common. A number of murder, vehicular homicide, kidnapping and sexual assault cases have been handled as well.

While referrals during the first two years of the VORP were exclusively from the Criminal Division of the Polk County Attorney's Office, the criminal court in Polk County now routinely orders defendants to participate in the program. In nearly all felony cases in which there is a crime involving a victim, the presiding judge orders the offender to meet with the victim (if the victim is willing) following the guilty plea and prior to sentencing. The purpose of the meeting is three-fold: (1) to allow the victim and the offender to

talk about the impact of the crime on the victim; (2) to allow the offender the opportunity to apologize; and, if needed, (3) to reach an agreement on a plan of restitution. If an agreement is reached, it is presented to the court at the time of sentencing. In misdemeanor cases where the guilty plea and sentencing almost always occur at the same time, the victim offender meeting is ordered as a condition of the defendant's probation.

The criminal court judges in Polk County recognize that the opportunity to participate in a victim offender meeting is an important need of crime victims. In a 1997 telephone survey by Polk County Attorney staff of victims who had participated in the program, ninety-six percent stated they would choose the program again, ninety-six percent stated they would recommend the program to other victims and eighty-six percent found meeting their offender to be helpful. Of offenders surveyed, eighty-eight percent reported they had apologized to the victim and sixty-two percent stated they felt the victim had a higher opinion of them as a result of the mediation.

More important than the numbers and the statistics is the fact that the VORP process allows victims and offenders to meet in the aftermath of a crime in a way that, until now, has not been possible. Our adversarial system of justice, while necessary to protect the rights of defendants, insulates both the victim and the defendant from the very real human contact that is often necessary. It is becoming increasingly apparent that victims have questions that only defendants can answer. Victims need to express to defendants the grief, fear, anger, and rage experienced as a result of the crime; they need to hear expressions of remorse and apology from offenders. In addition, many offenders do have remorse and want to apologize for their hurtful actions. Many offenders want to somehow make right their wrongs.

While every VORP is an not unqualified success, the overwhelming majority are.

Without the VORP process, a rabbi and members of his synagogue would not have met with two young neo-Nazis who had desecrated their place of worship with Nazi style graffiti. An agreement would not have been reached requiring direct service to the temple and completion of a high school level Jewish history course. A transformation would not have taken place that allowed both victims and offenders to shed their labels and, ultimately, consider each to be their friends.

Without the VORP process, a young woman, sexually abused as a child, would not have obtained the closure that counseling and therapy could not provide.

Without the VORP process, a young man who nearly died as the result of knife wounds suffered in an unprovoked attack would not have met with his assailants, found out why he had been targeted, and been allowed to tell them how the attack had cut short a promising baseball career.

Without the VORP process, the daughter of a woman killed by a drunk driver would not have met with the driver. She would not have learned that, in the minutes after her mother's death, the driver had a vision of the deceased entering his vehicle to comfort him and tell him that it would be alright. The driver would not have learned that the daughter had a similar vision of her mother's actions as she drove to the scene of the accident.

B. Youthful Offender Program

While Victim Offender Reconciliation may well be the most recognizable manifestation of the core principles of restorative justice, other initiatives can also embody these principles. A second restorative justice program initiated by the Polk County Attorney's Office is the Youthful Offender Pre-Trial Intervention Program ("YOP"). The YOP was started in July, 1992 in response to the increasing number of sixteen- and seventeen-year-old offenders waived from juvenile to adult court on felony charges. The program's goal has been to provide first-time felons ages sixteen to twenty-one with services not available in the adult correctional system.

Offenders offered admission into the program are given the opportunity to plead guilty to a non-felony charge and, in most cases, receive a deferred judgment. To obtain this disposition, offenders are released on a pre-trial status to the YOP and must complete all program requirements before being allowed to plead guilty to the non-felony target charge.

The YOP draws upon a variety of community-wide resources to provide a holistic approach to rehabilitation of youthful offenders. Partners in the program are the Polk County Attorney's Office, the Fifth Judicial District Department of Corrections, Employee and Family Resources and others. The program is designed as a sentencing alternative, diverting targeted offenders from prison sentences or ineffective probation sentences by providing programming in the areas of education, substance abuse, attitudinal/behav-

ior change and job training. Incarceration is recommended only for those offenders who do not complete the YOP. Approximately seventy-five percent of offenders complete the YOP and are placed on formal probation following a guilty plea to the agreed upon non-felony charge. Offenders who fail to complete the YOP are prosecuted for the initial offense(s).

II. RESTORATIVE JUSTICE REFERS TO JUSTICE PROCESSES

Restorative justice involves not only just results for all concerned but also just processes. The traditional criminal justice system is cumbersome, to say the least. Repeated court appearances for offenders and victims alike, leave many caught in its web frustrated and disillusioned. In the past few years, the Polk County Attorney's Office has begun to recognize that the prosecutor plays a key role in assuring that the criminal justice system is an efficient one that makes the best use of scarce resources. Toward this end, the office has implemented several programs based on restorative justice principles that seek to streamline the process and ease system pressure at various levels.

A. Structured Fine Program

With the assistance of federal dollars, a pilot Structured Fine Program (Day Fine Program) was started in January, 1992. Operating on the premise that fines should be based on the level of the crime *and* the offender's ability to pay, staff was devoted to computation and collection of these fines. In less than four years, Polk County witnessed a 250 percent increase in both the collection rate and the dollars collected from fines. This occurred at the same time that the average fine for non-felony offenses decreased considerably as the result of lower fines assessed to those least able to pay. State legislation enabling this pilot program lapsed in 1996. However, efforts are underway to push for new legislation that would allow for the continuation of the program.

B. Welfare Fraud Program

A Welfare Fraud Prosecution Program was initiated in the summer of 1998 to streamline the prosecution process, decrease the burden on the court system and on the Department of Corrections, involve the local community, and educate offenders so that recidivism is reduced.

Offenders are offered admission into the program by letters sent by the Polk County Attorney's Office advising them that a referral for felony prosecution had been received from the State of Iowa but that they can earn the opportunity to plead guilty to a misdemeanor if they attend a meeting at the Polk County Attorney's Office, enter into a plan of restitution, and attend a day-long class designed to teach skills in the areas of budgeting, credit issues, stress management and job seeking. They are also advised that they can meet with representatives from Polk County Legal Aid prior to the county attorney meeting. This process of notifying offenders by letter significantly impacts the prosecution process. Most offenders charged with a felony are arrested, booked, jailed, required to post a bond and make an average of five court appearances. The process utilized in this program requires appearance at one group meeting and the day-long class. There is no initial appearance, bond review, preliminary hearing, formal arraignment, pre-trial conference or discovery. In fact, there is no appearance at the courthouse at all, as the guilty plea is taken by a judge at the site of the required class. There is no law enforcement expense that would normally result from an investigation, arrest, booking and incarceration. There is no expense incurred by the Department of Corrections as none of these offenders are placed on supervised probation.

Finally, the community is involved in this program in two ways. First, volunteers provide the programming for the class that each offender must attend. Second, the class is hosted by a local church and participating area churches provide, at no charge to the offender, the noon meal that is served to the offenders. The volunteers and the offenders eat lunch together.

From September 1, 1998 through October 30, 1999, 114 offenders successfully completed the program, returned to court, entered guilty pleas to a misdemeanor and received either a deferred judgment or suspended sentence. All offenders were placed on an unsupervised probation with the requirement that they abide by their restitution plans and pay court costs. The total amount of restitution agreed to and ordered in the 114 cases was $385,536.

C. Truancy Court Program

Initiated in the fall of 1997, the Truancy Court Program, is a joint effort of the Polk County Attorney's Office, the Des Moines Public Schools, and the Polk County District Court. This program attempts to reach the parents of truant elementary school children

before the filing of formal charges. Letters are sent to parents of truant students inviting the parents to attend a voluntary session of Truancy Court. After meeting with a District Court Judge, the parents meet with staff from the Polk County Attorney's Office and sign up for mediation sessions with school social workers. The sessions are facilitated by mediators from the Polk County Attorney's Office Restorative Justice Center.

During the 1997-98 school year, thirteen elementary schools participated in the Program with referrals limited to students from the first, second and third grades. Schools reported that the students in the program averaged a sixty-five percent reduction in truancy days over the course of the school year. As a result of the first year success, the Program was expanded to all forty four elementary schools for the 1998-1999 school year. Preliminary figures indicate a greater than fifty percent reduction in truancy days for the 1998-1999 school year. Because of its success, the program was expanded to students in first though fifth grade for the 1999-2000. Plans are underway to further expand the program to include sixth through eighth grades for the 2000-2001 school year.

D. Bad Check Restitution Program

Initiated in January, 1999, the Polk County Attorney Bad Check Restitution Program aids individuals and businesses victimized by bad check losses and provides bad check writers with an educational opportunity designed to curtail their bad check writing habits. The goals of the program are to increase the accountability of bad check writers and recover losses for businesses, without increasing the administrative burden on the court system. It is offered at no cost to businesses or taxpayers and is funded through fees paid by the bad check writers.

To satisfy the requirements of the Program, and to avoid criminal prosecution, the bad check writer must pay full restitution to the victim and attend an eight-hour intervention class. The class is an integral part of the Program's success in reducing the number of non-sufficient funds checks in Polk County. It is designed to have offenders take responsibility for their actions and to help them recognize problems that might contribute to their bad check writing practices.

E. Drug Court Program

The Polk County Drug Court is aimed at those in the community who are addicted to a controlled substance and engage in criminal

behavior. Drug Court is a collaboration between the Polk County Attorney's Office, the Fifth Judicial District Dept. of Corrections, the Public Defender's Office, Employee and Family Resources and the judiciary. Drug Court is designed to meet the needs of both pre-plea and post-plea offenders. At any given time, approximately forty to fifty clients are under the supervision of Drug Court.

The Court is driven by intensive treatment and supervision of the client. All clients are expected to honestly and accurately report their progress since the last contact with any staff member. Weekly staff meetings are held to discuss problems with the clients. Drug Court requires the offender to attend Court as frequently as weekly, but no less than once a month. Random drug screens are required. The Drug Court Program has four phases with each phase lasting approximately three months. An offender entering the Program is placed in phase one which involves the most intense monitoring and contact. As the offender moves through the Program, the level of monitoring diminishes unless the offender's behavior suggests that a return to more intense monitoring is needed. In that event, the offender may be returned to an earlier phase of the Program. As the judge is a member of the team, all proceedings and processes are overseen by the judiciary. The Court encourages clients who are successful by providing donated passes to sporting events, certificates, and phase changes. Sanctions may involve increased level of treatment, increased supervision, and brief periods of detention in the county jail.

If the offender enters the Court prior to guilty plea, the offender must sign a plea agreement setting forth all terms and conditions of the program, including any fees and expectations. A target charge and sentence is outlined in the agreement as well. Upon completion of the program, the defendant enters a plea of guilty to the target charge and is required to fulfill any additional probation requirements. Offenders who fail to complete the program will be prosecuted for the offense with which they were initially charged. If the offender enters the Court as part of a diverted sentence or probation, the offender must complete the remaining sentence under general probation. Since its inception, more than forty offenders have graduated with only two former clients receiving new criminal charges since their Drug Court graduation.

F. Jail Court

A Jail Court has been created in the Polk County Jail to help alleviate jail overcrowding. The county attorney's office has assigned a full-time prosecutor and a full-time legal assistant to staff the jail courtroom. In addition, a second prosecutor is assigned to handle only felony cases of incarcerated pre-trial defendants. Non-felony cases are placed on a fast track with formal arraignment occurring ten to twelve days following arrest rather than the traditional thirty-five to forty days. The staff assigned to this docket works closely with the judge, public defender, probation officer, substance abuse specialist, and jail review specialist assigned to the jail courtroom. A third full-time prosecutor staffs the county's three extended pre-trial release programs, *i.e.*, Drug Court, Intensive Supervision Pre-Trial Release, and the Youthful Offender Program. The ultimate goal of this team is to expedite case processing without sacrificing community safety.

III. Blueprint Needed

The Polk County Attorney's Office believes it has made progress in addressing victim, community and offender needs in the face of fiscal limitations. However, the office acknowledges that changes in office policy and procedure that have attempted to implement restorative justice concepts have been somewhat piecemeal. While a vague restorative justice vision has guided certain aspects of the office over the past few years, there is no blueprint for what a comprehensive restorative justice system would look like or how it would operate within the county. Assuming that the prosecutor is at the most critical juncture of the system, it may well be that most of the necessary pieces are present in the county to move to the next level.

Perhaps most critical is the existence of an experienced and well-staffed mediation center. Clearly, the foundation of restorative justice is victim-offender mediation in its various forms. If justice can best be realized when victims and offenders are able to meet in a controlled setting, with the assistance of trained facilitators, then access to justice for large numbers of victims can occur only where a system-based Victim Offender Reconciliation Program exists. Polk County has this along with a judiciary that is growing more comfortable with restorative justice concepts. Finally, the county has a prosecutor's office willing to accept responsibility as the gatekeeper of the system. The county attorney's office has demon-

strated the ability to take control of large numbers of criminal cases and work toward fashioning dispositions consistent with restorative justice principles.

The next step is to design a case flow approach that identifies those cases which are appropriate for a restorative justice disposition. A central intake unit, operating under established guidelines and having access to police reports, criminal history information and a victim interview, would direct cases in one of two directions: a restorative justice route or a traditional route.

The cases taking the traditional route would generally be the most serious, *i.e.*, murder, kidnap, sexual assault, and cases in which defendants have lengthy criminal histories. Those taking the restorative justice route would be all others.

Defendants who have cases appropriate for a restorative justice disposition would be contacted within the first two weeks of their arrest and offered an opportunity to meet with the victim of their crime. These defendants would also be provided information about a variety of community resources that might suit the defendants' needs. If the defendant is willing to meet with the victim, the victim is contacted to determine if a victim offender mediation is agreeable. Cases where the defendant does not respond or cases in which the victim does not want to meet with the defendant, are prosecuted in the traditional manner.

In those cases in which a victim offender mediation is held, the parties would be encouraged to reach agreements consistent with both the victims' and the offenders' needs. Victims and offenders participating in these mediations would be given considerable discretion to fashion agreements within a range established by the prosecuting attorney. In most cases, agreements would be structured so that the offender would have to complete all requirements of the agreement prior to receiving a charge reduction or a favorable sentencing recommendation from the prosecuting attorney. This approach would ensure a higher compliance rate and would reduce probation violations, as most conditions of probation would be completed prior to sentencing.

This two-track system does not initially appear to apply to so-called "victimless crimes" such as prostitution, drug offenses, and drunk driving. However, in Polk County, representatives of neighborhood associations have participated in several victim offender mediations involving solicitors and prostitutes arrested in designated areas. Victim offender mediations with drug defendants have taken place in the presence of middle school students with

favorable results for both defendants and students. First offense drunk drivers in Polk County are required to attend a weekend drunk driver education program where, among other things, they meet with panels comprised of victims who have been injured by a drunk driver or who have lost loved ones to a drunk driver.

If restorative justice is to move from being a mere concept to an integrated systemic approach, prosecutors must step forward. The prosecutor's office must honestly assess, in the light of restorative justice concepts, those beliefs that drive case dispositions. As gatekeeper of the system, the prosecutor's office must then scrutinize its own systems and determine where restorative justice concepts can be implemented. Finally, the prosecutor must involve system players, victims, and community representatives in a dialogue that invites them to help fashion an approach to justice that restores equity and makes things right for all concerned.