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SURVEYING JUSTICE

*Keith Swisher**

I. INTRODUCTION

If the state engages an attorney to do a job, in this instance, to provide effective assistance of counsel, it is eminently reasonable to permit measures to confirm that the job is being done.¹

– Richard Klein

Lawyers are supposed to be loyal, diligent, and competent client advocates and at the same time officers of the court, who bear a special duty “to avoid conduct that undermines the integrity of the adjudicative process.”² Courts, in turn, are supposed to license, regulate, and

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1. Richard Klein, *The Relationship of the Court and Defense Counsel: The Impact on Competent Representation and Proposals for Reform*, 29 B.C. L. REV. 531, 582-84 (1988) (noting that counsel “may resist being ‘checked up on,’ but if the long term result would be higher standards of performance for lawyers in criminal cases, that price is worth paying” and proposing that counsel complete a pretrial worksheet for the judge, explaining what has and has not been completed, before a criminal trial may commence).

2. MODEL RULES OF PROF’L CONDUCT r. 3.3 & cmt. 2 (AM. BAR ASS’N 2016); *see also id.* pmb. para. 1 (“A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.”); *id.* pmb. para. 9 (“In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer’s responsibilities to clients, to the legal system and to the lawyer’s own interest in remaining an

supervise their officers of the court.³ In criminal cases, moreover, courts appoint a great deal of the lawyers appearing before them, pursuant to both *Gideon*⁴ and statutory rights to counsel.⁵ Even though courts ordinarily have the power to appoint and remove attorneys in cases, especially criminal cases, they generally do not use that power wisely; subpar attorneys often populate appointment lists and, through those lists or other vehicles, regularly appear before the criminal courts.⁶ Both prosecutorial misconduct and rampant ineffective assistance of counsel fill the courts.⁷ Although no system is perfect, courts have missed a

ethical person while earning a satisfactory living.”).

3. Indeed, in many states, when legislatures (or others) attempt to regulate lawyers qua lawyers, state supreme courts rebuke these attempts as conflicting with the courts’ inherent authority to regulate the practice of law. To varying degrees, courts have generally asserted inherent power over the admission and discipline of attorneys. *See, e.g.*, RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 1 cmt. c (AM. LAW INST. 2000); Charles W. Wolfram, *Inherent Powers in the Crucible of Lawyer Self-Protection: Reflections on the LLP Campaign*, 39 S. TEX. L. REV. 359, 373-77 (1998) (discussing “affirmative” and “negative” uses of the doctrine); *see also* Laurel A. Rigertas, *Lobbying and Litigating Against “Legal Bootleggers”—The Role of the Organized Bar in the Expansion of the Courts’ Inherent Powers in the Early Twentieth Century*, 46 CAL. W. L. REV. 65 (2009) (discussing the history of the inherent powers doctrine and the American Bar Association’s efforts to influence it).

4. *Gideon v. Wainwright*, 372 U.S. 335, 339-45 (1963).

5. Erica J. Hashimoto, *The Price of Misdemeanor Representation*, 49 WM. & MARY L. REV. 461, 497-98 (2007) (“The Constitution requires appointment of counsel in non-felony cases only if an indigent defendant is actually sentenced to imprisonment, a suspended sentence, or probation enforceable by imprisonment. A number of states, however, currently require the appointment of counsel even in minor cases punishable only by fines. . . . A number of other states require the appointment of counsel in all cases in which the defendant is charged with an offense *punishable* by imprisonment, even though the Court made clear in *Scott* that the mere potential for imprisonment does not give rise to a right to counsel.” (footnotes omitted) (citing *Scott v. Illinois*, 440 U.S. 367 (1979))); *see* U.S. CONST. amend. VI.

6. This Essay does not need to dwell on this point because much has already been written about the suboptimal initial appointment process in criminal cases. *See, e.g.*, Hashimoto, *supra* note 5, at 464 (“Outrageously excessive caseloads have compromised the quality of indigent defense representation.”); *cf.* Vanessa Merton, *What Do You Do When You Meet a “Walking Violation of the Sixth Amendment” If You’re Trying to Put That Lawyer’s Client in Jail?*, 69 FORDHAM L. REV. 997, 1005-18 (2000) (providing a dialogue of interaction between two student assistant district attorneys and a defense attorney to demonstrate the problem of ineffective assistance of counsel).

7. *See, e.g.*, BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 165-71 (2011); SAMUEL R. GROSS & MICHAEL SHAFFER, NAT’L REGISTRY OF EXONERATIONS, EXONERATIONS IN THE UNITED STATES, 1989–2012, at 65-67 (2012) (noting that official misconduct, including concealment of material evidence, contributed to a significant number of wrongful convictions); KATHLEEN M. RIDOLFI & MAURICE POSSLEY, N. CAL. INNOCENCE PROJECT, PREVENTABLE ERROR: A REPORT ON PROSECUTORIAL MISCONDUCT IN CALIFORNIA 1997–2009, at 17-41 (2010); *see also* Meredith J. Duncan, *The (So-Called) Liability of Criminal Defense Attorneys: A System in Need of Reform*, 2002 BYU L. REV. 1, 11-44 (noting widespread ineffective assistance and the currently unavailing remedies to the problem); *cf.* Barry Scheck, *How to Fight ‘Bad Apple’ Prosecutors Who Abuse the Justice System*, CNN (Dec. 5, 2013, 3:54 PM), <http://www.cnn.com/2013/12/04/opinion/barry-scheck-innocence-project-prosecutor->

critical opportunity to regulate and improve the practice of law. This brief Essay offers an idea to boost the supervision, development, and as appropriate, removal of counsel who appear in criminal cases.⁸

Most successful large businesses, among others, deploy a form of 360-degree surveys to provide feedback to their employees (including executives and managers).⁹ These surveys give the employee perspectives from a wide array of people with whom the employee interacts at work. For example, the employee's subordinates, peers, and supervisors evaluate the employee's performance and ultimately give that employee input so that the employee may continually improve on the job.¹⁰ Defense attorneys and prosecutors generally receive no such input—not from clients, judges, judicial clerks, staff, witnesses, or anyone else with whom they interact in their profession.¹¹ And judges, who are charged with supervising officers of the court both generally and in the specific cases over which the judges are presiding,¹² neither require nor review such evaluations. This is true even though the judges appoint the attorneys and even though many judges themselves

accountability (discussing the need for courts to use their contempt power to hold prosecutors accountable for *Brady* violations).

8. See *infra* Part V.

9. David K. Kessler, *The More You Know: How 360-Degree Feedback Could Help Federal District Judges*, 62 RUTGERS L. REV. 687, 701-02 (2010).

10. *Id.* at 700-01. To be sure, the surveys can serve additional purposes, including as a factor in determining annual compensation or discipline and helping the organization run efficiently. The employee often does not know the name of the person evaluating them. MOHAMMAD ROUHI EISALOU, HUMAN RESOURCE 360-DEGREE FEEDBACK PERFORMANCE APPRAISAL SYSTEM 1053 (2015) (“Typically, the employee receives anonymous feedback. The names of the individual raters are kept confidential. The system is managed by a third-party, generally, the human resources department.”).

11. To be sure, some informal and sporadic feedback does already occur. As noted in the context of feedback for prosecutors:

There is already some informal feedback, through the courthouse grapevine and judges' and defense counsel's occasional comments to head prosecutors and post-trial debriefings. Likewise, some local bar associations already question their members to evaluate judicial performance. And some experiments with community prosecution ask victims or community leaders to evaluate particular prosecutors' performances. But feedback is so important that it needs to be continual, systematic, and comprehensive.

Stephanos Bibas, *Rewarding Prosecutors for Performance*, 6 OHIO ST. J. CRIM. L. 441, 445 (2009) (footnotes omitted).

12. Cf. MODEL CODE OF JUDICIAL CONDUCT r. 2.5(A) (AM. BAR ASS'N 2010) (“A judge shall perform judicial and administrative duties, competently and diligently.”); *id.* r. 2.5 cmt. 4 (“In disposing of matters promptly and efficiently, a judge must demonstrate due regard for the rights of parties to be heard and to have issues resolved without unnecessary cost or delay. A judge should monitor and supervise cases in ways that reduce or eliminate dilatory practices, avoidable delays, and unnecessary costs.”).

receive a form of such evaluations for professional development or retention purposes.¹³

In this Essay, I suggest a simple remedy: to provide courts with better data for the appointment and removal of attorneys appearing before them, and to provide attorneys with a key professional development tool, courts should implement 360-degree surveys of defenders and prosecutors.¹⁴ This approach will provide attorneys with feedback on their performance from court staff, judges, clients, jurors, victims, and potentially others, and it will provide judges with important data bearing on whether to appoint, remove, or take other action regarding the surveyed attorneys.¹⁵ After discussing 360-degree-based surveys immediately below,¹⁶ I then discuss some likely objections and replies to the central concept, concluding with several recommendations for implementation.¹⁷

II. MULTISOURCE EVALUATIONS IN LAW AND BEYOND

Many businesses and other organizations, and leaders within those organizations, use a form of 360-degree surveys to assess performance and even emotional intelligence. Multisource evaluations are valuable because “collecting feedback from sources with different relationships to the reviewee in an organizational hierarchy creates a complete, or 360-degree, picture of the reviewee.”¹⁸ The process involves, typically, surveying other employees who fall below (subordinates), above (supervisors), and next to (peers) the evaluated employee in the corporate hierarchy.¹⁹ Those outside the organization, such as clients or

13. See *infra* Part II (discussing judicial performance review).

14. See *infra* Part V.

15. See Kessler, *supra* note 9, at 702-03; *infra* Part V.

16. See *infra* Parts II–III.

17. See *infra* Parts IV–V.

18. Kessler, *supra* note 9, at 701 (“360-degree performance management is also referred to as ‘multisource,’ ‘multirater,’ or ‘full-circle’ feedback.” (quoting Edward Prewitt, *Should You Use 360° Feedback for Performance Reviews?*, HARV. MGMT. UPDATE, Feb. 1999, at 8, 8)).

19. *Id.* at 700-01. In arguing that 360-degree surveys should be used for federal judges, David Kessler has explained further the nomenclature and process:

Generally, 360-degree performance review differs from traditional professional development programs because it considers a larger number of sources for feedback. A traditional performance review might, for example, be based only on an employee’s sales data and the opinion of his or her supervisor. In a 360-degree analysis, feedback is collected from at least three sources. First, as in many kinds of reviews, “downward feedback” comes from the reviewee’s “superiors,” the people for whom he works. Second, “upward feedback” comes from the people whom the reviewee manages or directs as well as various customers, including either actual customers outside the company or internal “customers.” Third, “horizontal feedback” comes from the

consultants, might also be surveyed.²⁰ The results are often (but not necessarily) anonymous to the employee.²¹ In the end, the approach gives the employee an insightful picture of how others, including subordinates, view the employee's performance and emotional intelligence (among other aspects).²² In light of the thorough, diverse, and otherwise unavailable feedback, it is perhaps not surprising that the "[e]mpirical literature supports the argument that 360-degree feedback can improve performance."²³

360-degree surveys have been proposed or actually used in legal contexts. In analyzing ways to measure prosecutorial performance, Professor Stephanos Bibas has noted that a prosecutor's supervisor is not the only actor with critical information about that prosecutor's performance:

Many other actors in the system also have relevant information about prosecutors' performance: judges, defense counsel, defendants, and victims all see prosecutors in action. The ideal evaluation system would aggregate information from these actors across hundreds of cases. . . . These ratings would assess and aggregate zeal, investigation, research, rhetorical skill, professionalism, ethics, diligence, courtesy, respect, and satisfaction across a range of cases. Collective evaluation would thus be more subtle, reliable, and resistant to manipulation than a single statistic. This idea parallels the management trend toward 360-degree feedback, aggregating feedback from supervisors, subordinates, peers, customers, suppliers, and even competitors.²⁴

reviewee's peers, either people with whom he has worked on a team or other peers with whom he has interacted. . . . Some programs also include the completion of a self-evaluation by the person receiving the feedback; the recipient's self-evaluation provides a useful baseline against which to compare the other feedback received.

Id. (footnotes omitted).

20. *Id.*

21. EISALOU, *supra* note 10, at 1053.

22. *See* Kessler, *supra* note 9, at 702-03.

23. *Id.* at 703 & n.103.

24. Bibas, *supra* note 11, at 444-45 (first citing THE HANDBOOK OF MULTISOURCE FEEDBACK (David W. Bracken, Carol W. Timmreck, & Allan H. Church eds., 2001); then citing MICHAEL ARMSTRONG, A HANDBOOK OF HUMAN RESOURCE MANAGEMENT PRACTICE 521-29 (10th ed. 2006); and then citing PETER WARD, 360-DEGREE FEEDBACK (1997)). In terms of implementation, Professor Bibas suggested:

[D]esigning the right survey tool would take work, to make it detailed enough to provide useful information yet brief enough that those surveyed would respond.

Prosecutors' offices would email these forms to victims and defendants right after each case, and to judges, defense counsel, and police every few months. Evaluators could also file follow-up reports to flag DNA or suppressed witness evidence that comes to light years later. A web-based survey tool, such as zoomerang.com or surveymonkey.com, could collect and tabulate responses anonymously. A computer

The idea should also resonate with state court judges. Such judges are the model, not the exception: many receive routine judicial performance review, which in many states has evolved into a meaningful process and instrument to evaluate judges and aid them in their professional development.²⁵ In sum:

More than twenty states and territories formally review the performance of at least some state court judges. The reviews generally cover a variety of topics, including the judge's legal ability, her integrity and fairness, and her communication and writing. In addition, some states ask the judge to complete a self-evaluation. . . . While some states solicit feedback only from attorneys, others seek feedback from jurors, court personnel, and other participants in the judicial process.²⁶

The time has come to apply this insightful process to attorneys in criminal courts, or so I suggest below.²⁷

III. THE JUDICIAL IMPERATIVE

Several ethical or structural sources suggest a need for judges to supplement their presently deficient knowledge in making court appointments and supervising attorneys in the courtroom.²⁸ Because judges must promote public confidence in the judiciary, they “should participate in activities that promote ethical conduct among judges and lawyers, support professionalism within the judiciary and the legal profession, and promote access to justice for all.”²⁹ Judges also must ensure that the parties (here, the state and the defendant) receive “the

algorithm could weed out or discount outlier responses.

Id. at 445.

25. NATALIE KNOWLTON & MALIA REDDICK, INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., LEVELING THE PLAYING FIELD: GENDER, ETHNICITY, AND JUDICIAL PERFORMANCE EVALUATION 4-6 (2012), http://iaals.du.edu/sites/default/files/documents/publications/iaals_level_the_playing_field.pdf (discussing judicial performance review).

26. Kessler, *supra* note 9, at 697-98 (footnotes omitted). Judicial performance evaluation (“JPE”) programs have long “provide[ed] relevant useful information to voters in judicial elections.” Jordan M. Singer, *Knowing Is Half the Battle: A Proposal for Prospective Performance Evaluations in Judicial Elections*, 29 U. ARK. LITTLE ROCK L. REV. 725, 736 (2007). Furthermore, “[c]urrently nineteen states, plus Puerto Rico and the District of Columbia, have formal JPE programs, in which sitting judges are periodically evaluated on their performance on the bench.” *Id.* (citing INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., SHARED EXPECTATIONS: JUDICIAL ACCOUNTABILITY IN CONTEXT app. A (2006)).

27. *See infra* Parts III–V.

28. *See infra* notes 29-40 and accompanying text.

29. MODEL CODE OF JUDICIAL CONDUCT r. 1.2 & cmt. 4 (AM. BAR ASS’N 2010).

right to be heard according to law,”³⁰ which “is an essential component of a fair and impartial system of justice.”³¹ To preserve the substantive rights of litigants, moreover, judges must observe “procedures protecting the right to be heard.”³² For pro se defendants as well, courts have at least a general, if not well-defined, interest in ensuring that prosecutors treat defendants fairly in the courts.³³

Furthermore, “[t]aking action to address known misconduct is a judge’s obligation.”³⁴ Thus, “[i]gnoring or denying known misconduct among . . . members of the legal profession undermines a judge’s responsibility to participate in efforts to ensure public respect for the justice system.”³⁵ When necessary to refer lawyers for disciplinary investigation, “[c]ooperation with investigations and proceedings of judicial and lawyer discipline agencies . . . instills confidence in judges’ commitment to the integrity of the judicial system and the protection of the public.”³⁶

Finally, “[i]n making administrative appointments, a judge . . . shall exercise the power of appointment impartially[] and on the basis of merit; and . . . shall avoid nepotism, favoritism, and unnecessary

30. *Id.* r. 2.6(A).

31. *Id.* r. 2.6 cmt. 1; *see also id.* r. 2.6 (“A judge shall accord to every person who has a legal interest in a proceeding . . . the right to be heard according to law.”); *id.* r. 2.6 cmt. 4 (“[A] judge must demonstrate due regard for the rights of the parties to be heard . . .”).

32. *Id.* r. 2.6 cmt. 1.

33. *See id.* r. 2.2 cmt. 4 (“It is not a violation of this Rule for a judge to make reasonable accommodations to ensure pro se litigants the opportunity to have their matters fairly heard.”); MODEL RULES OF PROF’L CONDUCT r. 3.8(b), (c) (AM. BAR ASS’N 2016) (requiring prosecutors to “make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel” and “not [to] seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing”).

34. MODEL CODE OF JUDICIAL CONDUCT r. 2.15 cmt. 1. Judges must report misconduct or take other appropriate action, if they know about or at least reasonably suspect the misconduct:

A judge having knowledge that a lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question regarding the lawyer’s honesty, trustworthiness, or fitness as a lawyer in other respects shall inform the appropriate authority. . . .

A judge who receives information indicating a substantial likelihood that a lawyer has committed a violation of the Rules of Professional Conduct shall take appropriate action.

Id. r. 2.15(B), (D).

[A]ctions to be taken in response to information indicating that a lawyer has committed a violation of the Rules of Professional Conduct may include but are not limited to communicating directly with the lawyer who may have committed the violation, or reporting the suspected violation to the appropriate authority or other agency or body.

Id. r. 2.15 cmt. 2.

35. *Id.* r. 2.15 cmt. 1.

36. *Id.* r. 2.16 cmt. 1.

appointments.”³⁷ To appoint on the “basis of merit,” and not some lesser or arbitrary standard, judges must know something about the lawyer’s performance.³⁸ Likewise, to “promote ethical conduct among . . . lawyers, support professionalism within the judiciary and the legal profession, and promote access to justice for all,”³⁹ judges should ensure that the attorneys they are appointing and supervising are performing ethically and developing professionally.⁴⁰

Notwithstanding these general obligations, judges often have little information about the attorneys they appoint or permit.⁴¹ Worse, they

37. *Id.* r. 2.13(A); *see id.* 2.13 cmt. 1 (“Appointees of a judge include assigned counsel . . . Consent by the parties to an appointment . . . does not relieve the judge of the obligation prescribed by paragraph (A).”).

38. *See, e.g.*, Kelly A. Hardy, Comment, *Contracting for Indigent Defense: Providing Another Forum for Skeptics to Question Attorney’s Ethics*, 80 MARQ. L. REV. 1053, 1067-68 (“Both the ABA Standards and the NLADA [(National Legal Aid & Defender Association)] Guidelines prohibit the awarding of government contracts solely on the basis of cost. Instead, the standards require that the contracting entity consider the following factors to ensure quality representation: the categories of cases the attorney will handle under the contract, the term of the contract, identification of the attorney to perform legal representation under the contract and a prohibition of substitute counsel without prior approval, specific workload standards, minimum levels of experience, a policy for conflict of interest cases and the provision of funds necessary to resolve such conflicts, limitations on the private practice of law outside the contract, and reasonable compensation levels and a designated method of payment.” (footnotes omitted) (citing STANDARDS FOR CRIMINAL JUSTICE Standards 5-3.1, 5-3.3 (AM. BAR ASS’N 1993); and then citing GUIDELINES FOR NEGOTIATING AND AWARDING GOVERNMENTAL CONTRACTS FOR CRIMINAL DEFENSE SERVICES pmbll., Guideline Part IV-3 (NAT’L LEGAL AID & DEF. ASS’N 1984))).

39. MODEL CODE OF JUDICIAL CONDUCT r. 1.2 cmt. 4.

40. *See* Douglas L. Colbert, *Thirty-Five Years After Gideon: The Illusory Right to Counsel at Bail Proceedings*, 1998 U. ILL. L. REV. 1, 49-50 (“The burden of ensuring that indigent defendants receive counsel’s immediate assistance for bail does not fall solely upon public defenders and court-appointed lawyers. Prosecutors and judges also assume crucial roles. Each is charged with a duty of fairness to the accused, with upholding the Constitution, and with safeguarding the integrity of the judicial system. . . . Judicial officers have an even stronger ethical duty to protect the rights of the unrepresented defendant. Indeed, the presiding judge is ultimately responsible to ensure that justice is achieved in each case.” (footnotes omitted)). Furthermore,

[T]he trial judge “has the responsibility for safeguarding both the rights of the accused and the interests of the public in the administration of criminal justice. The adversary nature of the proceedings does not relieve the trial judge of the obligation of raising on his or her initiative, at all appropriate times and in an appropriate manner, matters which may significantly promote a just determination of the trial.”

Id. at 50 & n.265 (first citing STANDARDS FOR CRIMINAL JUSTICE: SPECIAL FUNCTIONS OF THE TRIAL JUDGE Standard 6-1.1(a) (AM. BAR ASS’N 2009); and then quoting *id.*). Appointing or permitting subpar attorneys, who may be engaging in ineffective or unethical representation, appears inconsistent with these obligations.

41. *See* Ronald F. Wright & Ralph A. Peeples, *Criminal Defense Lawyer Moneyball: A Demonstration Project*, 70 WASH. & LEE L. REV. 1221, 1225 (2013) (“Judges evaluate the work of counsel in at least two settings: when they apply constitutional minimum standards of availability and quality, and when they appoint attorneys for indigent defendants. In both settings, judges operate on the basis of extremely thin information.” (footnote omitted)); *see also id.* at 1227-28 (“In

occasionally make appointments because the attorneys have donated to their judicial campaigns or simply because they feel that the attorneys need the money.⁴² Equally as troubling, “[o]nce appointed to represent an indigent defendant, the attorney seems to be subject to little supervision.”⁴³

short, the appointment decision rest on unquantifiable impressions of attorney quality (in ad hoc jurisdictions) or on crude measures of past experience (rules requiring a certain number of prior trials). . . . These judgments, unlike the assessments that judges make under *Gideon* and *Strickland*, could improve if the judge had richer information available about the performance of individual attorneys. The judge guesses about the proper attorney to appoint based on such thin evidence because the evidence is expensive to develop, not because it is irrelevant.”); cf. Meredith Anne Nelson, Comment, *Quality Control for Indigent Defense Contracts*, 76 CALIF. L. REV. 1147, 1177-82 (1988) (“In order for the proposed legislation to be fully effective, attorneys awarded contracts in compliance with the statute must also provide the level of representation indicated by their bid prospectus. The legislation can only operate effectively if the individual contract attorneys and firms operating under the system are accountable to the county administrators for their performance of the contract terms. This [Comment] discusses the need for attorney time records to monitor counsel’s performance and to promote effectiveness and efficiency within the system.”).

42. These appointments may well run afoul of the judicial ethics rules, see MODEL CODE OF JUDICIAL CONDUCT r. 2.13, but their occurrence is difficult to prove. See Catherine Greene Burnett et al., *In Pursuit of Independent, Qualified, and Effective Counsel: The Past and Future of Indigent Criminal Defense in Texas*, 42 S. TEX. L. REV. 595, 619-22 (2001) (“Not surprisingly, judges responding to the survey indicate that factors related to the difficulty of the case, the defendant’s need for specialized knowledge, and the attorney’s degree of experience influenced their appointment decisions. The judicial survey, however, also revealed factors that influence judicial appointment decisions that most would consider inappropriate in the judicial arena Nearly half of the [Texas] judges surveyed reported that their peers sometimes appoint counsel because they have a reputation for moving cases, *regardless of the quality of the defense they provide*, and a comparable number indicated that the attorney’s need for income influences the appointment decision.” (emphasis in original) (footnotes omitted)); see also *id.* at 623-24 (“In the view of the judicial participants, personal and political factors also play a role in the appointment process. Nearly four in ten judges indicated that their peers occasionally appoint an attorney because he or she is a friend, while roughly one-third of judges sometimes consider whether the attorney is a political supporter or has contributed to their campaign.” (footnotes omitted)).

43. Burnett et al., *supra* note 42, at 624-25 (“A majority of judges indicated that there are no formal provisions for monitoring the quality of legal representation in their courts. Even in cases where informal standards are in place, there is reason to be concerned about the quality of legal representation that may be provided by those attorneys who were friends, political supporters, or appointed because of their reputation to move the docket. One prosecutor noted that when he observed ineffective representation he would ‘mention it to the judge who usually does nothing.’ Another commented that he would ‘bring it to the attention of the coordinator who does the appointment—always to no avail.’ Other prosecutors only call attention to the poor representation if it will not harm their case. This sentiment was expressed by a prosecutor who observed that ‘sometimes I tell them [defense attorneys] where they have missed an important point; but only if I know I can effectively counter it.’” (footnotes omitted)). But see AM. BAR ASS’N, TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM 3 (2002), https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.authcheckdam.pdf (“The defender office (both professional and support staff), assigned counsel, or contract defenders should be supervised and periodically evaluated for competence and efficiency.”).

In addition to assisting judges in meeting their mandatory and aspirational duties, periodic, 360-degree feedback (or as close to it as possible) would finally provide judges, over time, with particularly salient information bearing on appointments and removals. Moreover, the feedback itself will likely improve the defense lawyers' (and prosecutors') performance.⁴⁴ As discussed immediately below, however, caution is needed in implementing and reviewing the surveys.⁴⁵

IV. SOME OBJECTIONS AND REPLIES

This idea does present certain risks. A key concern is whether the surveys might interfere with lawyers' independence in a manner that might harm current or future clients or impact negatively a laudable professional value. Lawyers generally cannot "permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services."⁴⁶ Analogously as well, lawyers generally cannot enter agreements that restrict their right to practice law.⁴⁷ Furthermore, lawyers should not permit others to pry into confidential or

44. See, e.g., Adele Bernhard, *Raising the Bar: Standards-Based Training, Supervision, and Evaluation*, 75 MO. L. REV. 831, 845-46 (2010) ("To learn and progress, lawyers need evaluation as well as supervision. Lawyers, as a profession, tend to avoid self-evaluation. But there is simply no excuse for this lack of reflection – especially when there are performance guidelines that provide yardsticks to measure actual performance. Public defenders need careful assessment in order to improve their skills and to progress as lawyers. Public defender clients deserve counsel who receive continual assistance in becoming better lawyers. . . . For example, a defender's client communication skills could be evaluated by looking at notes in the file, observing how the defender speaks to clients, or even interviewing clients to determine how much they understood.").

45. See *infra* Parts IV–V.

46. MODEL RULES OF PROF'L CONDUCT r. 5.4(c) (AM. BAR ASS'N 2016); cf. Bibas, *supra* note 11, at 447 ("Monitoring also sends the message that performance matters and that prosecutors must view judges, defense counsel, defendants, victims, and the public as their constituents. Knowing that they were being evaluated, prosecutors would strive to serve their constituencies better, much as salesmen and customer-service representatives do. Incentives, rather than rules, would guide prosecutorial discretion."). Thus, "[k]nowing that they were being evaluated," prosecutors would change their behavior in a concerning manner. Bibas, *supra* note 10, at 447.

47. MODEL RULES OF PROF'L CONDUCT r. 5.6 ("A lawyer shall not participate in offering or making: (a) a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or (b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy."). The accompanying official comment asserts that "[a]n agreement restricting the right of lawyers to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer." *Id.* r. 5.6 cmt. 1. Here, the analogy is fairly weak, but as an example, the rule inhibits certain interference with the lawyer's practice and the surveys (if the results are low or misused) might result in a court removing the attorney from the panel or rescinding or refusing to renew an indigent-defense contract.

privileged client information.⁴⁸ Because the judiciary appoints lawyers and pays (or authorizes payment) for many criminal defense lawyers, the use of these surveys, including the judicial and prosecutorial responses, could impact the lawyer's independence and professional judgment and (if the lawyer scores low) limit the lawyer's ability to practice before certain courts.

Interestingly, although the governing ethical rules effectively require lawyers to protect their independence from various sources, a key exception (but often an implicit one) is the courts. For example, a lawyer's requirement of candor is heightened to some extent for courts.⁴⁹ This is not necessarily the place to discuss, but perhaps just to flag, that the judiciary (as the most direct regulator of lawyers) has the power to, and does, interfere with lawyers' independence. This regulatory interference unsurprisingly exists, but it often is implemented in commendable or even necessary ways.⁵⁰

Because the judiciary has this power, this Essay assumes that the judiciary could in fact impose the survey suggestions. The question still remains whether it would be wise to do so. In an adversarial system, low ratings from judges or opposing counsel may work to rid the system of worthy advocates; in other words, the surveys might not simply identify advocates who are rendering suboptimal performance, but might also, consciously or subconsciously, be gamed with low scores for those advocates who effectively challenge the respondent judges or opposing counsel.⁵¹ Could, in response, sufficient controls be put into place to eliminate or significantly limit this weighty concern?

48. *See id.* r. 1.8(f) ("A lawyer shall not accept compensation for representing a client from one other than the client unless: (1) the client gives informed consent; (2) *there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship*; and (3) *information relating to representation of a client is protected as required by Rule 1.6.*" (emphasis added)).

49. *See, e.g., id.* r. 3.3. Where this rule, regulating candor toward tribunals, applies, it overrides the lawyer's duty of confidentiality to the client. *See id.* r. 3.3(c).

50. For example, the courts have required that lawyers adhere to the ethical rules and pay into a client protection fund. Ctr. for Prof'l Responsibility, *Client Protection Funds*, A.B.A., https://www.americanbar.org/groups/professional_responsibility/resources/client_protection/tplart02.html (last visited Nov. 15, 2017); *see, e.g., Client Protection Fund*, ST. B. MICH., <https://www.michbar.org/client/protectionfund> (last visited Nov. 15, 2017).

51. *Cf. Burnett et al., supra* note 42, at 624-25 ("This situation is complicated by the fact that what is deemed 'competent' may depend on one's vantage point in the judicial system. A defense attorney from Galveston County noted that 'some judges will not appoint lawyers who they don't think are competent. The problem is that for at least one judge, competence means pleading the case out quickly.'" (footnote omitted)).

One responsive measure would be to pull the teeth out of the idea by using the surveys for only professional development,⁵² not appointments, disqualifications, disciplinary referrals, or other potential uses. The results could even be confidential such that only the surveyed lawyer receives the results. While the resulting surveys would still be an improvement over the status quo (nothing), these limiting measures would also strip away some of the idea's greatest opportunities. Another measure, perhaps equally as drastic, would be to eliminate opposing counsel as respondents. But this eliminates a potentially valuable piece of feedback (including strategic insights for the surveyed lawyer for future dealings with opposing counsel and the benefits to future clients to the extent that the lawyer incorporates the feedback). In light of this value, a better solution might be to recognize that the feedback of opposing counsel might not be objective or even fully candid and to discount it accordingly. Likewise, one judge's negative comments (which could, for instance, represent retaliation against an advocate who thoroughly litigates non-frivolous issues) should not necessarily deserve more weight than the feedback from other respondents. The beauty of these surveys is that over time a clearer, less biased picture will shine through as more and more respondents evaluate the lawyer. Some objective lessons will likely surface in the aggregated data.

Risks to effective advocates are not the only risks, however; risks to responding clients are also present. Clients might reveal, intentionally or inadvertently, privileged information (and almost certainly otherwise confidential information). But clients are permitted to waive privilege and have no confidentiality obligations.⁵³ The risk of prejudice to them

52. Kessler, *supra* note 9, at 687-88, 706-07 (noting in the context of judicial performance review that feedback may be for "professional development (helping judges become more effective) rather than performance evaluation (ranking and grading judges)"). In the peer review context, see Alan Paterson, *Peer Review and Quality Assurance*, 13 CLINICAL L. REV. 757, 767-70, 778 (2007) ("Finally, peer review has not only the potential to penalize, but also the potential to reward. Thus when it comes to deciding in the future which lawyers might make the best judges, peer review assessments may even provide objective evidence to judicial appointments commissions with which to enhance the process of judicial selection."). In this Essay, I am not focusing on peer review, which can mean "the evaluation of specified aspects of service provided by a person or organization against specified criteria and levels of performance by an independent person (or persons) with significant current or recent practical experience in the area(s) being reviewed." Paterson, *supra*, at 759 n.9 (citing RICHARD MOORHEAD ET AL., QUALITY AND COST: FINAL REPORT ON THE CONTRACTING OF CIVIL, NON-FAMILY ADVICE AND ASSISTANCE PILOT (2001)). Peer review, at least informally, might rely in part on the survey results, however.

53. See, e.g., FED. R. EVID. 502 (describing waiver of attorney-client privilege); MODEL RULES OF PROF'L CONDUCT r. 1.6(a) (stating that "[a] lawyer shall not reveal information relating to the representation of a client unless the *client* gives informed consent," without mentioning any such duty on the client (emphasis added)). The ethical rules do not apply to non-lawyer clients. See

is also significantly reduced because the surveys would occur after the case (or at least after one important stage of the case, such as the sentencing or direct appeal) has concluded. Furthermore, the survey results are typically anonymous. The potential for privileged revelations could also be limited (presumably eliminated) by neither asking open-ended questions nor using comment boxes, although this solution would significantly limit the amount of valuable feedback. To avoid the risk that an adversary might try to identify and use privileged information against the client while seeking to preserve the valuable feedback to the surveyed lawyer, a fertile middle ground might be to share the open-ended responses or comments only with the surveyed lawyer.⁵⁴

But defendants' feedback does not just present opportunities for professional development; it also presents opportunities to criticize the attorneys unfairly. The feedback on occasion might well fault the attorneys for failing to meet unreasonable expectations. But judges and disciplinary authorities recognize that criminal defendants often complain about their attorneys—indeed, the system (through ineffective-assistance-of-counsel jurisprudence) virtually necessitates such complaints—so that the defendants may overcome procedural barriers to their attempts to seek collateral relief. Perhaps even more for prosecutors than defenders, defendants' feedback presents obvious challenges, in part because prosecutors are pitted against the defendants and often seek to incarcerate the defendants (among other penalties and collateral consequences). Of course, that criminal defendants do not generally hold favorable opinions of their prosecutors will be no surprise to the reviewing judges. Unlike defenders, prosecutors have no client who can provide (potentially) counteracting feedback. But prosecutors typically have supervisors (unlike small firm or solo criminal defenders), and their supervisors not only function as analogous to a client in certain respects,⁵⁵ but they also can provide another source of feedback to compensate, at least partially, for the loss of actual client feedback. Supervisors, however, might be too distant to evaluate the prosecutor's performance adequately, or they might be too close to evaluate the performance objectively.⁵⁶ In that event, prosecutors will receive less

MODEL RULES OF PROF'L CONDUCT r. 1.6(a). Clients, of course, occasionally but not typically have confidentiality obligations pursuant to an agreement or a duty to a third party.

54. This way, even though the results are anonymous in many such feedback systems, judges or prosecutors would not receive copies of even anonymous responses containing potentially privileged information.

55. Cf. STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION AND DEFENSE FUNCTION Standard 3-1.3 (AM. BAR ASS'N 2015).

56. See H. Mitchell Caldwell, *Coercive Plea Bargaining: The Unrecognized Scourge of the*

credible sources of feedback, but they will still benefit from a variety of other sources—a benefit that they do not currently receive.

For all of the surveyed attorneys, the idea would benefit them, not just clients or courts. Everyone improves from honest feedback, especially from a variety of perspectives.⁵⁷ This opportunity for systematic and thorough feedback can even be viewed as a gift. Although courts are not awash in money, they do have far more money and far more institutional resources than criminal practitioners in solo practice or small firms, which are precisely the constituencies taking the most court appointments.⁵⁸ Courts thus can implement and bear the costs (including time expenditures) of the survey process,⁵⁹ whereas many private practitioners likely could not. Court implementation will enable these practitioners to benefit from the valuable feedback without having to invest the time and money to implement the survey process.

Justice System, 61 CATH. U. L. REV. 63, 88-89 (2011) (discussing Bibas's proposals); *see also id.* at 89 (“When collecting this data, supervising prosecutors would survey defense lawyers and judges who regularly interact with the junior prosecutors, as well as the victims and defendants involved in their cases. Theoretically, the defense lawyers and judges would provide information regarding overcharging, and prosecutors who routinely overcharge would be censured by not receiving promotions. Bibas’s approaches suffer from the general concerns that afflict any internal-oversight system, specifically that policing one’s peers is generally ineffective.” (footnotes omitted) (citing Bibas, *supra* note 11, at 444-47)).

57. As noted above, prosecutors will naturally receive less feedback than their criminal defense counterparts. *See supra* notes 55-56 and accompanying text. Whereas the latter will also receive feedback from their clients, the former has no equivalent. Nevertheless, prosecutors will still benefit over the status quo (i.e., no feedback or only informal, sporadic feedback) by learning the perspectives of the judges, court staff, and opposing counsel.

58. Prosecutorial offices might more easily bear the burden, but even they should welcome the opportunity not to bear the extra time and expense of designing and employing the surveys.

59. *See, e.g.,* EISALOU, *supra* note 10, at 1053. On costs generally, *see* Kim Taylor-Thompson, *Tuning Up Gideon’s Trumpet*, 71 FORDHAM L. REV. 1461, 1511-12 (2003) (“Defenders often discuss client surveys as a potentially fruitful source of information about the lawyer-client relationship. Unfortunately, defender offices rarely conduct them. A host of reasons may explain this phenomenon. Principal among them may be that defenders may lack the technical expertise involved in developing survey instruments or in determining how to contact clients to gather such information. Groups that rely on survey tools note that gathering information requires considerable follow-up. Such efforts may make comprehensive surveys virtually impossible given the demands on defenders’ time. But defenders could consider developing partnerships with graduate schools or law schools such that students might undertake the implementation of the study. Should a surveying procedure prove to be unreasonable, less ambitious efforts to solicit the views of focus groups of clients may still be possible. Ultimately, clients offer a critical perspective because they are the recipients of the representation and their perspectives should contribute to any definition of quality.” (footnotes omitted)).

V. SOME RECOMMENDATIONS

These surveys, effectively implemented in the analogous context of judicial performance review, would provide courts with more salient input than the information (if any) they currently receive about the lawyers appearing in their courtrooms. Defenders who score significantly and consistently low might have their panel or contract status put on probation or rescinded. I (among others) often speak of disqualification,⁶⁰ but removal from a panel or appointment list or the loss of an indigent-defense contract has significantly wider impact. The former simply removes the defender from one case (or related cases), while the latter effectively removes the defender from potentially hundreds of representations in the applicable court or jurisdiction. Because adversarial gaming or implicit or subconscious biases might impact the survey results, however, an appeal process should be built into the system. Low-scoring prosecutors could also be disqualified from a case or even a court, but if so, they will almost surely raise separation-of-powers-related arguments in response. Whether the executive or the judiciary wins that battle,⁶¹ the applicable prosecutors (and their supervisors) will presumably evaluate their performance, which is a fruitful exercise in itself. When misconduct (by prosecutors or defenders) is revealed in the survey responses, referring the lawyers for disciplinary investigation might also be appropriate (or required).⁶²

60. See, e.g., Keith Swisher, *Disqualifying Defense Counsel: The Curse of the Sixth Amendment*, 4 ST. MARY'S J. ON LEGAL MALPRACTICE & ETHICS 374 (2014); Keith Swisher, *The Practice and Theory of Lawyer Disqualification*, 27 GEO. J. LEGAL ETHICS 71 (2014).

61. This hypothetical battle and the underlying legal arguments are beyond the scope of this brief Essay. It hopefully is sufficient to note that both sides have potential arguments to lodge. Courts are generally permitted to regulate (including to disqualify) prosecutors, but courts themselves sometimes recognize separation-of-powers-related arguments when such issues arise. See FED. R. CRIM. P. 16(a), (c)–(d) (requiring various disclosure obligations on the prosecution on penalty of sanction); *People v. McPartland*, 243 Cal. Rptr. 752, 754 (Ct. App. 1988); MODEL RULES OF PROF'L CONDUCT r. 3.8(a) (AM. BAR ASS'N 2016) (prohibiting prosecutions without probable cause); *id.* r. 3.8(d) (requiring affirmative disclosure of exculpatory information); *id.* r. 3.8(e) (imposing limitations on prosecutors' ability to subpoena lawyers); *id.* r. 3.8(f) (imposing limitations on prosecutors' pretrial public statements); *cf.* 28 U.S.C. § 530B(a) (2012) ("An attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State."); *United States v. Supreme Court of New Mexico*, 839 F.3d 888, 921-28 (10th Cir. 2016) (concluding that the applicable rule, essentially equivalent to Model Rule 3.8(e), is preempted with respect to federal prosecutors practicing before grand juries but is not preempted outside of the grand-jury context).

62. See, e.g., MODEL CODE OF JUDICIAL CONDUCT r. 2.15 (AM. BAR ASS'N 2010) (requiring that judges report to disciplinary authorities or take other appropriate action when they learn of a lawyer's ethical violation); MODEL RULES OF PROF'L CONDUCT r. 8.3 (requiring, with various limitations and exceptions, attorneys to report other attorneys' substantial ethical violations).

The survey instruments should be tailored to the lawyer's role. For defense attorneys, the surveys should probe whether the attorneys met with their clients early in the case, asking how much time elapsed before the clients received a meeting with their attorneys.⁶³ The surveys should probe other forms of diligence as well: whether the attorney reviewed the charging document, police report, and disclosure with the client (without prying into the substance of the resulting attorney-client communications). The survey should also inquire whether the attorney promptly responded to the defendant's questions; whether the attorney discussed possible collateral consequences of a conviction; whether the attorney treated the defendant (and court staff, for example) courteously and with respect; and how many attorney-client meetings (whether in-person or telephonic) occurred. Of course, these are just example inquiries; more or different inquiries might be warranted given the court or jurisdiction, among other factors. Moreover, care should be taken in defining terms (for example, "courteously" or "with respect") that might, standing alone, be too subjective or vague to produce valid and reliable information.

For prosecutors, the surveys should inquire whether any required disclosures (and if applicable, discovery) were provided; whether the required disclosures were provided in a timely manner; whether the victim was consulted and provided any required notices; and whether the prosecutor treated court staff, witnesses, the victim, the defendant, and defense counsel courteously and with respect. Prosecutors (and often defense counsel) are frequently repeat-players before the particular court,⁶⁴ thereby increasing the chance that valuable data on their performance can accumulate.

For both sides, though, certain inquiries will overlap. Indeed, several example inquiries above overlapped (for example, treating others with respect and diligently handling disclosures). Furthermore, in completing the surveys, the respondents in essence should be asked: "Would you retain this attorney if you were in the defendant's or state's

63. See, e.g., Burnett et al., *supra* note 42, at 651 ("Standard 3.4A requires appointed counsel to contact his or her indigent defendant within twenty-four hours after notice of appointment. To give teeth to this recommendation, the commentary suggests that repeated failures to make this timely outreach to the indigent client 'is the type of consideration that can be made in reviewing an attorney's continued participation in [the] appointment system.'" (footnotes omitted) (quoting STANDARDS FOR THE PROVISION OF LEGAL SERVICES TO THE POOR IN CRIMINAL MATTERS Standard 3.4A cmt. (ST. BAR OF TEX. 2001), *reprinted in id.* app. A at 688)); see also MODEL RULES OF PROF'L CONDUCT r. 1.3 (requiring lawyers to act with diligence in representing a client); *id.* r. 1.4 (requiring lawyers to communicate promptly and adequately with clients).

64. See Bibas, *supra* note 11, at 447.

shoes?” The feedback (and its implications for performance improvement) is perhaps especially critical in misdemeanor courts, where typically no appeal ever follows;⁶⁵ in other words, no subsequent court will be reviewing, directly or indirectly, counsel’s conduct. The surveys could also ask meta-type questions (for example, whether counsel informed the client or the victim of the survey and encouraged, or discouraged, its completion).

The benefits of the idea have hopefully been exposed, but careful implementation can also minimize the costs and enhance effectiveness. To reduce costs and increase convenience, court administrators should email links to the 360-degree-based surveys to those who have had contact with the attorneys, including court staff, judges, opposing counsel, clients, jurors, victims, witnesses, and others. To increase response rates, the survey should be brief. To increase quality and fairness, representatives from both the defense and prosecution should have input on the questions.⁶⁶ If a jurisdiction desires to use anonymous feedback (as is often but not always the case in the private sector),⁶⁷ it may release the feedback to the surveyed attorney semi-annually or annually (so that the attorney is less likely able to attribute the feedback to particular respondents).

As a much less continuous and less thorough fallback to the multisource surveys suggested above (or in addition to the surveys), judges could meet with representatives of the prosecution and defense together to discuss issues that the judges and their staff have been observing (also known as “justice partner meetings”). These meetings also facilitate feedback from the lawyers to the judges, which is particularly important in jurisdictions that do not use judicial performance review.⁶⁸ To be sure, other communication methods

65. See Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 320 (2011).

66. See, e.g., Carrie Leonetti, *Painting the Roses Red: Confessions of a Recovering Public Defender*, 12 OHIO ST. J. CRIM. L. 371, 380-81 (2015) (noting anecdotal examples of internal performance reviews using dubious criteria or interpretations of criteria).

67. EISALOU, *supra* note 10, at 1053.

68. In addition to providing general feedback, judges can promote additional supervisory and professional development methods. For example, judges should inquire whether the lawyers (defense and prosecution) have adequate ethical supervision and training (and offer to participate in the training as appropriate); and judges should ask whether the prosecuting or defending offices or agencies report errant lawyers to the bar if misconduct is discovered (as the supervisors are ethically required to report). Judges can also ask supervisors to sit in the courtroom to observe any prosecutors who have engaged in subpar or unethical behavior. Similarly, judges could encourage that newer attorneys (including new privately retained attorneys) have mentors. Judges could also encourage that lawyers take continuing legal education in ethics and criminal law.

exist; the point is that the data, once available, should be studied and discussed.

VI. CONCLUSION

Surveys can be costly to design validly and reliably and to implement regularly. With the advent of efficient and inexpensive technology to conduct and collect the surveys, the benefits seem to far outweigh the costs (which in any event will be primarily, but not exclusively, front-loaded).⁶⁹ People are surveyed daily about the sometimes-trivial goods and services they receive. Because no such surveys are typically conducted in the criminal justice system, we leave the public with the troubling impression and reality that the service in criminal courts is not important enough to survey for quality assurance and continuous improvement. Let us hope that the idea of surveys spreads, as it should.

69. See, e.g., Bibas, *supra* note 11, at 447 (“Of course, evaluation and feedback systems are costly. Ratings take time, and surveys and algorithms cost money. Busy lawyers and judges resent more paperwork. On the other hand, judges and defense lawyers may welcome the chance to improve the lawyering they face and be flattered that supervisory prosecutors would listen. Victims and defendants may want to express their thoughts and feelings, particularly when they are dissatisfied with a prosecutor’s performance. Moreover, the costs of rating may well be worth it; at the very least, they are worth trying out. Some of the most successful, profit-oriented companies, such as General Electric, invest lots of time and money in feedback, and other companies imitate their successes. Surely that success testifies to the usefulness and value of the resulting feedback.”(footnote omitted)).