[AT] Why "Therapeutic Jurisprudence" Must Be Eliminated from Our Family Courts

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Prefatory note: The phrase "therapeutic jurisprudence" is used in this article to mean "a mental health approach to the law." The term originally was coined in 1987 by Professors David Wexler of the University of Arizona and Bruce Winick of the University of Miami School of Law to mean the study of the therapeutic or anti-therapeutic effects of law and legal procedures. It also has come to be more widely used to mean therapeutic applications in the law, as well as the influx of mental health therapeutic and forensic practitioners into the courts, both of which somewhat predate the coinage. The growth of these ideas in family law, however, has been exponential over the past two decades. Much of the therapeutic jurisprudence currently being applied in family courts around the country, as well as the laws furthering these practices can be traced to trade promotion ideas conceived and lobbied for by various psychological and multidisciplinary trade organizations.

The Unacknowledged Problem

There are many problems with therapeutic jurisprudence in the family courts, which now runs the gamet from all manner of alternate dispute resolution procedures, to excessive guardian ad litem practices, to various court-ordered therapies, to extensive psychological opining and forensic evaluation in court cases. One of the problems with the rise of therapeutic jurisprudence and the placement of non-legal systems and non-legal professionals into the courts has been the subtle denigration of long-established precepts of lawyer independence and due process. One of the many ways this happens in the family courts has been, ironically, through the introduction of subtle and often unrecognized conflicts of interest afflicting lawyers' representations of their

clients, created through the common development of multidisciplinary collegial relationships and business referrals, both informally and through the very multidisciplinary organizations which are promoting therapeutic jurisprudence ideas.

The conflicts of interest arise because most lawyers represent different kinds of clients on ideologically oppositional sides in different cases. The typical family lawyer sometimes represents the wife, sometimes the husband, sometimes the "good guy", and sometimes the "bad guy". If a lawyer coming into a case runs up against an expert with whom he has a referral or employment relationship in other cases, and that expert takes a position adverse to the lawyer's client in the new case, the lawyer will have a very difficult time adequately representing his client. Appropriate representation may require the lawyer to strenuously object to the expert's testimony -- or even the expert himself. But if the lawyer needs the good will and cooperation of that same expert in connection with the lawyer's other clients' pending cases, he cannot do that because he may put those other cases at risk.

The legal community, even in urban areas, is limited and often close-knit. Lawyers in the same area of practice regularly encounter each other in different cases. The pool of forensic experts and guardians ad litem (GALs) tends to be even smaller. The repeated association time and again of these specialists in cases means that at any time and from time-to-time any given one of them may show up on the "wrong side" of a lawyer's case -- and simultaneously also be on the "right side" of other of the lawyer's cases, whether as a hired expert or a court-appointed expert. This creates many of the same dilemmas that ordinary client conflict-of-interest issues do.

How the Conflicts of Interest Affect the Lawyers and Their Clients' Cases

Lawyers in these positions will be tempted to rationalize to themselves, as well as maintain the posture in the community at large, that the expert's opinions, even when they are adverse to his client, are scientifically valid -- even when they may not be, even if they are deeply flawed or completely specious. These lawyers may rationalize to themselves that the validity of the science itself is not their responsibility because, after all, lawyers are not "scientists". The lawyer who naively or purposefully steps down the path of multidisciplinary practice, regularly exchanging referrals and engaging in other close associations with nonlawyer case participants simply cannot avoid encountering this problem.

Lawyers and these other participants in the system have very different roles. When lawyers directly hire paralegals, experts, and others to assist them, there is not as much of a potential conflicts problem, even when these individuals are independent contractors. First, their work is covered by attorney work product unless and until they testify. Second, because they were hired by the lawyer, they are subject to the same conflict of interest rules as is the hiring lawyer, as far as their involvement in other cases and with other people. This is not true, however, in the case of "independent" experts, such as custody evaluators and guardians ad litem. These individuals who render opinions "for the court" as so-called "court-appointed experts" are a very different matter.

These same kinds of conflicts also do not arise when lawyers engage in professional relationships with other lawyers who regularly are on the opposing sides of cases, because unlike the lawyer colleagues, the practitioners of therapeutic jurisprudence are actually case participants -- witnesses and even parties. Although ostensibly working "for the court", they are not akin to neutral judges or magistrates, bailiffs or other courthouse personnel. None of these truly neutral courthouse persons advocates for a position in a case, testifies as a witness, or participates as a party proper as do some GALs. Contrary to the rhetoric, court-appointed evaluators and opining GALs are not neutral participants in the system. Even if they initially were hired under that rubric, once their reports are rendered, and their opinions formed and ready to be given, they have become advocates for one or the other side or issue in a case. Thus, at a point, they are, just as any party would be, pointedly in favor of certain outcomes, and adverse to others.

The routine broad involvement of these expert witnesses thus must be recognized by the legal profession as the egregious misjudgment it is, fostering legal ethical violations that must be addressed by state bar ethics rules.

Ironically, the problem is worse for lawyers who are not ideologues, because these lawyers are more likely to advocate for different client perspectives. Such a lawyer confronts an unresolvable dilemma when an expert the lawyer is relying on in one case takes a similar position, including one that may lack scientific merit, against another of the same lawyer's clients in a different case. Because the expert and the lawyer have been, are currently, or will be in cahoots in these other cases, the lawyer is placed into a conflict, unable zealously to discredit the expert when that is necessary to protect his current client. Bar ethics rules must address this.

The legal profession actually does recognize that the experts themselves have the same temptation to manipulate their opinions to please those lawyers with whom they have ongoing relationships and receive referrals. This undoubtedly contributes to yet more corruption of the judicial system, and even has led to calls to banish these third parties (*see e.g.* Margaret Hagen's *Whores of the Court*, Regan Books, 1997). Nevertheless, lawyers have not, as a group, either recognized or acknowledged how these practices have affected their own ethics and practices.

Why Has No One Said Anything Before?

One possible reason that multidisciplinary ideas have taken such hold in the area of family law and (except for the drug court idea where they are also increasing), otherwise kept in check in other areas of legal practice, is that unlike lawyers who practice in many other substantive areas, and who may retain their clients for years, family lawyers typically need a steady stream of new one-shot clients. Also, family lawyers tend to work in smaller firms, where they are not cross-referring the same clients among different lawyers in different practice areas of the same firm. So family lawyers value those who send them business. As a result, it appears that too many family lawyers, perhaps without recognizing or acknowledging the conflicts of interest that have caused their discomfort and unwillingness adequately to represent some of their clients in some of their cases, in fact have sacrificed these clients on the altar of maintaining their professional relationships, associations, and referral sources.

Some busy family lawyers do admit to feeling "burnout". Some have rationalized that their unwillingness to zealously advocate for their clients, as well as their vague discomfort with some clients and positions, stems from the frequent "high conflict" created by unreasonable clients, or the high emotional toll their cases are taking on them. Others have retained their enthusiasm by becoming ideologues, including proponents of bad science favored by their own favorite therapeutic jurisprudence colleagues. These lawyers take only those cases in which they will not feel conflicted or simply suspend their judgment and integrity in the interests of churning cases and making money. For example, this is seen among lawyers who assert in case after case with very different facts that their clients have been the victims of "parental alienation". The fathers' rights advocates also would lay this charge on the domestic violence practitioners. Whether the ideological lawyer is taking cases which do involve only one kind of client position, or whether the lawyer just "sees" the same things in different cases is not the

issue. The issue is that the lawyer has resolved his cognitive dissonance by committing to propositions outside of law and outside of the lawyer's academic expertise, and -- maintaining a deliberate self-serving ignorance -- is carrying both good and bad ideas into the media of the legal field. This alone explains the constant propagation in family law of bad science, and the seemingly endless "controversies" over bad psychological ideas that are pervasive in the justice system but which do not get resolved by any amount of publication of "good science".

Some lawyers caught in this vortex have justified their lack of vigorous representation, and the coerced settlements they've foisted on some clients, as hailing from a pretextual concern for "the best interests of the [nonclient] children", or as taking the reasonable compromise position, or the high road, or "just helping people to get along". These lawyers have attempt to redefine their jobs, paternalistically, as dictators who must "control" their clients, instead of being agents at law for them. And again, therapeutic jurisprudence explains why this problem has become so much more pervasive in family law than in other areas of law.

Other lawyers profess to themselves and each other and everyone else around a great affinity for mediation and therapy and collaborative resolution, and all manner of alternate dispute resolution (therapeutic jurisprudence) as being superior to traditional justice system litigation and negotiation practices, and in the interests of everyone, because they have been encouraged to think this way by a steady drip of literature emanating from the mental health trade organizations -- as well as new referral retainers. Little in the way of objective research substantiates these opinions, or the resulting negative impact many of them have on formal justice system procedures and due process. This kind of thing again is just not as pervasive in other areas of the law, no matter how heated the conflicts get, and it is one substantial reason the public has such a generally dim view of the family courts and family lawyers. "Therapeutic jurisprudence" is a primary reason the family courts are seen as not working, unjust, and broken.

How Are We Going To Fix This

Given that clients are entitled to their choice of attorneys, and are entitled to independent, unconflicted agents at law who are committed to furthering their interests and goals (as the client, not the attorney, has defined them), one immediately viable solution would be a rule of disqualification of any GAL or forensic expert who previously was associated in any prior case

with either of the lawyers in a current case, and the striking and nullification of all testimony and reports of that expert, no matter at what stage the lawyer may have entered the case.

Court appointed witnesses and parties in other people's private civil cases are interlopers in the justice system and must be excised. The very integrity of the justice system is at stake. To the extent well-meaning individuals promoting these ideas did not fathom the repercussions of them, and were swayed by sweet-sounding "solutions" that simply do not work well in practice, it's time for an honest reappraisal.

In addition, the loss to the justice system, if any, would be slight. It does not actually take an "expert" to do a home study or to investigate readily observable facts. The proof of this is in how often court-hired opiners are not specialists at all, but lawyers and laypersons, and in how often cases in which funds are unavailable to engage so-called mental health experts manage to be reasonably adjudicated **WITHOUT THEM**. The perception of need for psychological expertise in most family law cases is especially misguided too, because, unlike scientific and technical experts in other fields, the field of applied psychology is overrun with political machinations, nonsensical theories, and outright misrepresentations (*see generally*, Robyn Dawes, *House of Cards*, The Free Press, 1994, and other criticisms of applied psychology). Too often what is posited as within the realm of a psychologist's or other mental health practitioner's expertise is not close to research-based or experiential technical knowledge. Much of the time, it is more akin to an expertise in astrology, or theology: there is high familiarity with complicated ideas and methods of calculating answers, and the body of literature that discusses all of that, but the professional output otherwise is somewhere between unhelpful and misleading when it comes to ascertaining the facts and guiding reasonable decision-making.

It is time to start substantially limiting, and even eliminating the use of forensic experts, GALs, and other therapeutic ideas in family court. In the vast majority of cases, custody evaluators and mental health practitioners have no actual expertise to offer. When this is objectively understood, and then considered in light of the problems their presence creates, the solution is no longer arguable.