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A Call for a Paradigm Shift in How Helping Professionals Interact with the Legal System

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Résumé

Cet article est une lettre ouverte dont le but déclaré est d'éveiller la conscience collective des travailleurs sociaux, et éventuellement celle de tous les membres des professions d'aide, au sujet de leur participation, souvent inopportune, à un processus légal antagoniste qui est contraire, sur le plan de l'éthique, à l'essence même de leur travail

Cet article a également été écrit dans l'espoir qu'il provoquerait un changement susceptible d'inciter les membres des professions d'aide à définir les termes de leur collaboration en tant que témoins experts

The lessons of some parables are timeless, if we are willing to learn from them It seems, however, events of catastrophic proportions—including the potential extinction of credibility—are required before we attend to that which we must, for our very survival

Aesop's fable of the mighty oaks ("The Oaks and Jupiter") told many centuries ago is as relevant today as it was then. Moreover, it is relevant specifically to the current alarming decline in the stature of helping professional experts in courts of law. There are many who complain, some who out and out refuse to venture into the arena, and a good number who

are seduced by the lure of fame and riches Even this later group, in spite of public posturing that they love the cut and thrust of the adversarial process, would like much to be changed about their experiences in court.

Helping professionals involved in the legal system can ask the same question as the mighty oaks of the God Jupiter "What good is it to have come to this Earth, struggled to survive through harsh winters and strong, fall winds, only to end up under the woodcutters axe?" To which Jupiter unsympathetically replied: "Are you not responsible for your own misfortunes, as you yourselves provide the handles for those axes?" For Aesop the moral is the same for men and now for forensic experts; we owe our misfortunes to no one but ourselves.

The helping profession of medicine best illustrates the need for a paradigm shift and our inadvertent seduction into providing the handles for the axes with which our stature, credibility, and objectivity are maligned and consequently our value to adjudicating forensic matters is being eroded

Physicians in every culture live by the prescribed edict "do no harm." This behavioral prescript does not qualify or otherwise make distinctions. It is very clear, do no harm to no one under any circumstance No one would argue against this noble ideal.

While not articulated in exactly the same way, all other helping professions subscribe to the "do no harm" prescript. This includes nursing, dentistry, social work, psychology, and psychiatry to name just a few. It is simply unimaginable that doing harm by any helping profession could be justifiable in certain circumstances to certain individuals Surely no one would argue for a qualifier to such a universal principle. To do so, would make it less than the noble ideal it is. It stands to reason therefore that apart from the individual dysfunctionalities of some helping professionals, there is no institutionalized systematic tolerance by any of the helping professions to do otherwise; or is there? Tragically there is

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The helping professions without exception harbour an unknown number of members who willingly, indeed eagerly, align themselves with the legal profession whose institutionalized prescript is to do harm. Their edict is disguised under the euphemism of vigorous advancement of a particular position. This translates into winning. Such a zero sum approach requires that there be a loser. Often to win a case a lawyer will perceive a need for help in the form of an expert to bolster his or her vigorous advancement of a client's case By the very act of accepting a commission initiated by only one side, regardless of rhetoric or rationalization,

such as an up-front retainer or an implication that "my time not my opinion is for hire," the helping professional has compromised the intended role of an expert. Namely, offering an impartial objective and accurate testimony based on science and state-of-the-art knowledge in a given area to help the jury and judge understand the issues at hand.

Not surprisingly, in an adversarial system no lawyer steeped in the culture of law would even dream of jeopardizing a case outcome by hiring such an expert. Moreover, even when hiring a willing expert collaborator in the adversarial process, the lawyer will immediately initiate subtle or overt efforts to persuade the helping professional to distort facts and opinions in favour of his or her case.

The axe handle we unwittingly, or willingly provide is the compromise of our real and perceived objectivity. With this, the messenger can be so successfully attacked that the message is hardly if ever heard. Furthermore, dueling experts are not 'friends to the court' nor are they engaged in a professional debate. In reality they are professionals who have for that circumstance abandoned the edict of "do no harm" and the edict of scientific objectivity in favour of the adversarial strategy to harm and thereby vanquish the other.

Tragically such co-option is not a rarity. By way of illustration consider the proliferation of literature on how to be an expert witness, that invariably constitute directions by which to participate in the adversarial process. Consider also how many books are written, and how many helping professionals subscribe to the notion of 'custody and access' (declaring a winner and a loser) instead of developing and promoting the notion of an empirically supported parenting plan where there are no winners or losers, just appropriately assigned responsibility. This is not merely semantics. Consider also, how many of us become recognized as the insurance company, or the plaintiff expert witness. The same can be said of our reputations as being the prosecutors or the defense's expert witness. We delude ourselves about our objectivity and in the same breath justify pre-trial preparation by the lawyer who hired us or whose position is favoured by our conclusions.

Consider also, the process of providing a so-called second opinion on a report or assessment performed by a colleague. The greatest travesty and degradation to the helping professions is when the second opinion transparently is a bought one, most often evidenced by a visceral attack on the professional who wrote the original report.

Lawyers do what lawyers do because of their training, socialization and sanction by the court overseen by a judge who was once a lawyer and similarly trained. In contrast the co-option of helping professionals into the adversarial process is inadvertent. In spite of our knowledge and skills we largely live unconscious lives like most every one else. As for them so also for us, that which we don't know hurts us. When our credibility is totally lost the legal profession will discard us individually, discipline by discipline and eventually as the

collective. Pre-occupied by the edict of vigorous defense, winning at any cost, we are simply fodder to their cause. They have not, and are unlikely to think of us in any other way. We however, need to be motivated to do otherwise because we have much to offer to legal proceedings through our science without having to be co-opted by the adversarial process.

To do otherwise requires a paradigm shift as to how we allow ourselves to become involved in the legal process. We should be involved not as part of the problem but as part of the solution. Realistically, the required shift will not come from principled, conscious individual effort. While the potential is there, it will simply take too long. Realistically, the paradigm shift and implementation must come from our respective disciplines' regulatory bodies and once prescribed must be unequivocally supported by each and every one of us.

WE MUST ALWAYS BE COURT APPOINTED AND OUR RELEVANT EXPERTISE DETERMINED AND AGREED UPON BEFORE WE BEGIN OUR WORK.

Fortunately, what is required by the paradigm shift is neither difficult nor outside of our cognitive and behavioural repertoire. As in all our other endeavours, we need to become involved in the legal arena on our terms, according to our standards, not as compromised or dueling experts but as true friends to the court. As such we must never work for one side or the other. We must always be court appointed and our relevant expertise determined and agreed upon before we begin our work. Our fees should be equally or proportionally shared by both sides. Ideally, if indeed our role is as a friend to the court our fee should be the responsibility of the court (if not directly, then certainly ordered by the court). This paradigm already exists when a Parenting Plan or Parenting Capacity Assessment is initiated. Although it is noteworthy that when one side is not vindicated, the process quickly reverts to polarizing the helping professional expert, who without fully appreciating the consequences aligns with the side who likes the outcome. Then, purchased second opinions are produced by the other side and the axe handles are once again in play.

In this model, we would never undergo trial preparation by counsel for one side or the other. More importantly, in this model our science not our person, are subject to scrutiny. With this we are not only familiar and comfortable but most of us actually welcome it, recognizing it to be the constructive process that it is; notwithstanding, the strange and unfamiliar rules that govern giving evidence.

In the same vein we should never allow ourselves to be placed in the position of being perceived as providing a purchased second opinion. As such, when we provide a second opinion concerning a report or assessment it must be done with the consent of both parties to a dispute, the cost shared equally. Most importantly, the second opinion must be

provided blindly, without any knowledge of the professionals involved, their discipline or institutional affiliations This will not only guard our real or perceived objectivity but will also structure us to focus on the content of the materials as opposed to the person or status of the writer

Is the legal profession likely to embrace such a paradigm shift? Not likely.

Is the legal profession likely to resist such a paradigm shift? Most likely.

Why would we then engage in this type of adversarial change process when it is so antithetical to our very nature as helping professionals? Because, providing a valuable service to the court on our terms need not constitute a fight. It simply requires a declaration.

Most importantly we must provide our service on our terms because it is the principled thing to do

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