A Sea Change in the Appellate Process?

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Therapeutic jurisprudence in the appellate courts? A "refreshing line of inquiry into the appellate process, opinion writing, and the formulation of legal doctrine"?[1]

Professor David Wexler's essay is certain to engender a sense of fear in appellate judges by its very suggestion that we should undertake such a sweeping reform of the appellate process. But the suggestions should—and will—beget the gnawing feeling that Professor Wexler's analysis of the articles by Professors Nathalie Des Rosiers[2] and Amy Ronner,[3] as well as the questions he poses, require us to explore these ideas further. For those of us who follow the canon of "no advisory opinions" we might stop there. For those appellate courts who use a screening process to divert cases to an alternative dispute resolution track at the appellate level, the suggestion of a dialogue may be less intimidating. The probable salutary effects of a therapeutic jurisprudence are too important to ignore the idea.

In fact, many jurists, only some intentionally, employ aspects of a therapeutic jurisprudence in their writings. While reading Wexler's essay, I recalled my special concurrence in *Williston Education Association v. School District 1*,[4] a case involving salary negotiation between a school board and a teachers' organization.[5] It came to mind because of a letter I received from a University of North Dakota law professor who seldom comments on opinions, but wrote to tell me the concurrence was an obvious plea from the heart to the school board and teacher organization expressing my concern with the viability of the negotiation process.

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1. David B. Wexler, *Therapeutic Jurisprudence in the Appellate Arena*, 24 SEATTLE U. L. REV. 217 (2000)

2. Nathalie Des Rosiers, *From Telling to Listening: A Therapeutic Analysis of the Role of Courts in Minority/Majority Conflicts*, CT. REV., Spring 2000, at 54.

3. Amy D. Ronner, *Therapeutic Jurisprudence on Appeal*, CT. REV., Spring 2000, at 64.

4. Williston Educ. Ass'n v. School Dist. 1, 483 N.W.2d 567 (N.D. 1992) (VandeWalle, J., concurring specially).

5. *Id.* at 572-73.

In *Williston*, the teachers and the school district were involved in a dispute regarding the number of classes each teacher was responsible for under a previously negotiated agreement.[6] Subsequently, the parties negotiated another agreement in which the subject of the prior dispute was not discussed.[7] After the District issued paychecks that did not compensate the teachers for additional classes, the teachers sued the District, alleging they were entitled to compensation for the additional classes they were required to teach.[8] At issue was the meaning of the phrase "extra classes" in the prior negotiated agreement, a dispute which I believed should have been resolved through the statutory framework for negotiations. I wrote:

> I write separately to note my dismay with the fact that the judicial system was required to decide this matter prior to negotiations between the parties to resolve the controversy. . . . Although both parties express various reasons for not doing so, it is apparent each party was aware of the other party's position on the matter. This is not the good faith negotiations to which the statutes refer. . . . Had the parties attempted to negotiate the matter and failed that would be the appropriate time to ask the courts to resolve the controversy. To ask the courts to resolve the issue prior to negotiations discredits the concept of negotiations.[9]

A similar writing came to mind in which I bemoaned the failure of social service agencies and the courts to reunite a parent and child, rather than move to terminate the parental rights, as "the final chapter to a dismal failure not only on the part of [the mother] but on the part of the social service agencies, the courts, and society in general."[10]

After reading Professor Wexler's essay, with the note from the law professor and the objectivity that arises from the passage of time, I recognize these concurrences could and should have been used not as a criticism of the parties and the process, but as a platform to encourage and affirm future participants to use their own resources to attempt to reach a satisfactory resolution before seeking a court ordered solution.

The feeling of dread at our perception of such a sea change in appellate practice may lessen as we realize we need not totally abandon all of our moorings to achieve the positive effects of therapeutic jurisprudence. In any event, the apprehension is lost in the tantalizing issues the essay raises.

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6. *Id.* at 568.
7. *Id.* at 569.
8. *Id.*
9. *Id.* at 572.
10. *In re* J.K.S., 356 N.W.2d 88, 93 (N.D. 1984) (VandeWalle, J., concurring specially).