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# ETHICAL PRACTICE AND CLINICAL LEGAL EDUCATION

Nigel Duncan\*

DRAFT

## Introduction

This article is designed to explore a variety of ways in which clinical methods can achieve the goals of educators and the professions in the preparation of student lawyers. In particular I intend to show how clinical methods assist in the development of:

- a deeper understanding of the law, and the law in context;
- general transferable skills;
- legal professional skills;
- a sound values basis for ethical practice.<sup>1</sup>

In addition, I hope to show that there are ways of using clinical methods which may also assist us to meet other social concerns such as the extension of legal services and individual knowledge of rights, throughout the community.

This article is based on the UK system of legal education, whereby a degree, usually of three years, is followed by a one-year vocational course (the Legal Practice Course for solicitors and the Bar Vocational Course for barristers) then an apprenticeship of two years' training contract for solicitors or one year pupillage for barristers.<sup>2</sup> However, some of the examples I will draw on relate to differently-structured legal education systems such as that in the USA and I believe that my remarks are of general application. In order to provide concrete examples to illustrate my arguments I have drawn extensively on the course of which I have most experience: the Bar Vocational Course at my own institution, the Inns of Court School of Law (ICSL). Other providers may have differently-structured courses, but all are validated by the Bar Council, and are expected to meet the same standards. The degree to which clinical methods are adopted varies, but (as defined below) is, to some extent, a feature of all the courses.

## Clinical methods in Professional Legal Education.

The concept of 'clinical' methods is derived from medical training where doctors learn by practising first on simulated and later real patients. I define clinical methods of learning as those which require students to learn by undertaking the tasks that lawyers undertake in such a way that they have an opportunity to reflect on the law with which they work, the

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\* Principal Lecturer, Inns of Court School of Law, City University; Editor, *The Law Teacher*; National Teaching Fellow; founder-member: Clinical Legal Education Organisation, Global Alliance for Justice Education.

<sup>1</sup> These are among the central qualities sought in legal education by the Lord Chancellor's Advisory Committee on Legal Education and Conduct (ACLEC 1996) pp. 24-5.

<sup>2</sup> For an explanation of the current system of professional legal education in England and Wales, see Duncan 2004a. Change may be imminent. The Law Society is currently conducting a Training Framework Review. The current state of consultation suggests a relaxation of specific requirements for courses, provided individuals can demonstrate that they have achieved the 'Day 1 Outcomes'. This is highly controversial and it is premature to predict what will emerge from the consultation process. However, it is worth noting that the importance of addressing ethical issues is recognised and that clinical methods appear to be highly regarded (Law Society, 2005)

circumstances and relationships they encounter in that work and the development of their own skills and understanding. This may be done through simulated exercises, through taking on responsibility for real clients in the law school setting or through working with lawyers, judges or others providing advice or representation.<sup>3</sup> To ensure that using these methods goes beyond mere skill development is a demanding requirement to which most providers of professional courses aspire, but are still working towards.

On the Bar Vocational course students learn three adjectival law subjects: Evidence, Civil Litigation and Criminal Litigation and six skills: Case Preparation (incorporating Legal Research and Fact Management), Advocacy, Conference Skills, Negotiation, Opinion Writing and Drafting. They also study two options. Professional Conduct is taught both in discrete classes and integrated as a pervasive topic into the other learning programmes. In describing the use of clinical methods I will be concentrating mostly on the skills development and option courses.

Within the skills development programme I shall concentrate on Conference Skills as a model of how we use these techniques. Students are given a manual (Samwell-Smith 2004) which is a guide to the development of effective client conference skills. They have three introductory Large Group sessions which illustrate the underlying principles. They also give students an opportunity to discover for themselves how difficult it can be to prepare for and conduct an effective conference by conducting a client conference in these Large Group classes. These also provide students with video demonstrations of conferences which they are able to discuss and criticise, informed by their experience of attempting a conference on the same case papers. This barely qualifies as clinical work, although it is certainly interactive. The tutorial programme which follows these involves simulated clinical techniques. Students work with realistic bundles of papers just as if they were being instructed by a solicitor. They are given opportunities to discuss how they have prepared for the conference, and then to carry it out, with fellow-students taking the role of client. After an opportunity for feedback the students who have played client then carry out a conference as counsel.

Reinforcement of learning is approached by requiring students to keep a Professional Development File in which there are pro-forma sheets encouraging them to reflect upon their performance at these tasks. Thus their learning engages the process of Kolb's learning cycle (Kolb 1984) to ensure that they undergo a process of reflection upon their developing skills and understanding, which should inform their subsequent planning and preparation for their next client conference. All colleagues managing an over-full curriculum will recognise that opportunities for reflection in classes are few and far between.

Students have a series of such simulations, progressive in difficulty and in the issues covered. It is worth observing that they also go through similar programmes in the other skills, which tend to reinforce each other as there are many underlying skills (research, analytical, language and communication) which are in varying degrees common to all these skills.

This, with appropriate adaptations to meet (for example) the requirements of the written skills is the basis for the learning of all the skills and the options. One option, however, is approached differently. This is the Free Representation Unit Option in which students learn by representing real clients in the Employment Tribunals. The rationale behind this course is fully presented elsewhere (Duncan 1997). The Free Representation Unit (FRU) is supported by the Bar and provides tribunal representation for impecunious clients whose claims did not attract legal aid. Many of our students undertake cases for FRU on a voluntary basis while they are studying and it is always a valuable experience. The FRU option, however, requires

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<sup>3</sup> The different approaches to clinical legal education are presented in Brayne, Duncan & Grimes, 1998.

students to write a reflective journal while they go through FRU's training and assessment, which they must pass before they undertake their own cases. They may then choose one of those cases to present for formal assessment. They are assessed on their reflective journal as well as their actions representing their client. These journals usually show how they have reflected upon the ethical dilemmas they encounter. This is an example of real-client clinical education.<sup>4</sup>

### **Reflective Practice**

The concept of reflection is fundamental to the clinical approaches presented here. It is designed to entrench learning from experience. As Gary Blasi has observed, we all know people who appear to have repeated the same 20 years experience while learning very little. Others appear to have learnt something new from each of their 20 years' experience. The difference, Blasi argues, is reflecting on experience.<sup>5</sup> This is a crucial element of David Kolb's learning cycle (which through further progressive iterations becomes a learning spiral) and was developed in respect of professional practice by Donald Schön.

There are many ways of encouraging students to engage in reflective practice. Opportunities to reflect on simulated clinical experience can be provided through a structured professional development plan.<sup>6</sup> These take many forms. I have already mentioned the professional development file used at ICSL which encourages students to engage in a Kolbian learning spiral. This is designed to assist students to approach further iterations of a particular type of activity (eg a client conference) having thought hard, on the basis of experience and feedback, about how best to build on their strengths and to overcome perceived weaknesses.

Real client experiences provide opportunities for different types of reflection. Where students take on real cases in 'firms' or tutorial groups, the tutor will facilitate sessions where students discuss their work and critique what they have been doing. This can both improve the continuing work on behalf of the client and help students to understand the qualities of their work to date and what to do to improve those areas which are less developed. Another common approach to using reflection on real client work is to help to contextualise and add a critical perspective to more conventional studies which have already taken place, or which run alongside the clinical experience. Thus Laura Lundy (1995) describes how her students' work in advice centres led them to reflect on what they had learnt on a Welfare Law module. This enabled a more effective academic understanding of those rules themselves by providing experience of how they work in practice, and also, at a meta-level, of the very capacity of rules to provide solutions.

'Reflective practice' has acquired iconic status amongst educationalists. There is, however, limited empirical evidence of its effectiveness. The theoretical justifications are impressive (Kolb and Schön, above) and the common-sense approach: 'how can it be other than good to get students thinking hard about their own experience as opposed to simply blundering into another experience' may convince many. Empirical evidence is inherently hard to come by. It would be unethical to impose on students a method the teacher considered to be inferior. It is, of course, possible to do year-on-year comparisons with past cohorts having introduced a reflective method. However, here the other variables are enormous and virtually impossible

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<sup>4</sup> This is often described as a live-client clinic in the American literature.

<sup>5</sup> Blasi, 1995, at p. 387.

<sup>6</sup> The UK Centre for Legal Education website provides information about personal development planning in law: see <http://www.ukcle.ac.uk/resources/pdp.html> and Prince (2002). All website references accessed May 2005.

to control for. Guidance on using reflective methods in the context of legal education is available in Hinett (2003).

### **The benefits of using clinical methods**

Using clinical methods can produce considerable and diverse benefits.<sup>7</sup> The individual skills students have been developing tend to fall into place when they have the responsibility of undertaking a real case. The need for effective fact management and legal research becomes frighteningly obvious as the date of their hearing approaches. Perceiving how real people are affected by the court system can provide profound insights. As one of my students has commented in her reflection on the experience:

‘It has helped me to understand civil procedure in context, fact management, conference and negotiation skills in reality and the power we possess over people’s lives.’

The different approaches to clinic have their own advantages and disadvantages. Using simulations<sup>8</sup> enables a considerable degree of control over each student’s experience and enables the course designer to ensure a progressive experience over a period of time. Students share their experiences and are thus able to reflect collectively on what they have worked through, providing each other with feedback on their performances and thus developing their ability to use each other as a learning resource. Simulations can be designed so that individuals work alone or in groups. They enable teachers to present situations from the perspectives of different parties to the issue.<sup>9</sup> It is almost impossible for students to avoid some active engagement with their studies where these techniques are adopted. Finally, students usually enjoy their learning and this makes the results of that learning more likely to stick.

However enjoyable and valuable a course based on simulations may be, however, it has its limitations. My students on the BVC report that after several months they become accustomed to interviewing each other, to negotiating with each other and to attempting advocacy in each other’s presence. What had been exciting and new becomes ordinary. We can respond in some ways to this within the concept of simulations. When they start working on their options we change their groups, so that they are working with relative strangers. We also provide them with opportunities (on a voluntary basis) to advise real clients in our in-house advice clinics or by working with one of our Pro Bono Partners<sup>10</sup>. These initiatives help, but ultimately the students know that in the class room they are just working through

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<sup>7</sup> This would not be agreed by all. There are many criticisms of using clinical techniques. They include the view that it is anti-intellectual and only concerned with skill development; that it is an inefficient use of scarce faculty resources; that it limits the control over syllabus content available with more didactic methods. There is no doubt that it can be resource-intensive (but see text below for methods of sharing resources with those responsible for providing legal services). However, any programme concerned narrowly with skill development fails to achieve the potential benefits of clinic. The concern for syllabus-coverage must be challenged, given the short shelf-life of much legal knowledge. What is more valuable is the understanding of legal concepts made concrete through the application of rules to real (or realistic) cases, and the ability to analyse fact patterns and undertake the necessary legal research to enable knowledge and understanding of the changing law. Clinic can achieve this.

<sup>8</sup> The use of simulations is developed in BurrIDGE 1998.

<sup>9</sup> The way this is used in vocationally-oriented courses in the Netherlands is presented in Reijntjes & Valcke 1998. For a more recent presentation of related approaches in Scotland and the Netherlands see Maharg and Muntjiewerff 2002 at p. 320.

<sup>10</sup> For details of these programmes see [http://www.city.ac.uk/icsl/current\\_students/pro\\_bono/index.html](http://www.city.ac.uk/icsl/current_students/pro_bono/index.html).

exercises. They know that if it goes wrong it does not really matter (until it comes to their summative assessments).

This is where working with real clients comes in. On the FRU option my students represent clients with complaints of discrimination and unfair dismissal. These clients are generally poor and often unemployed. Their claim is of central importance to them, and if the student was not aware of that before taking on the case they are as soon as they have had their first client conference. The motivating effect of taking on a real case is wonderful to see. I have seen students whose application in classes was poor putting vast amounts of work into preparing for their tribunal case, and every hour of work provides an hour with learning potential.

The quality of the learning in a real situation is also different. Representing a real client, faced with real opponents, advocating in real tribunals, students know that they are learning about the realities of practice. The care with which they prepare their case and the requirement to reflect upon the process usually produce a deeper learning.<sup>11</sup>

Work with simulations is, of course a valuable preparation for taking on real cases and I would not recommend that students take on the sole responsibility for a client's case until late in their legal education process. However, successful examples of real client work at the undergraduate stage<sup>12</sup> give individual students much more support. For a start they work in teams (often described as firms) and their work is subject to the supervision of a tutor who is normally also a solicitor. Thus they assist each other with the actual tasks of advising and representation, their work is checked before it goes out, and they have regular team meetings which provide the basis for learning from each others' reflection on their work and their developing understanding.<sup>13</sup>

I have so far addressed clinical experience for students on undergraduate or vocational courses. In the United Kingdom all lawyers pass through an apprenticeship after their vocational course: a training contract in the case of solicitors and a pupillage in the case of barristers. At this point they naturally come into contact with real cases and may be given considerable responsibility for them. Well supervised, this can be valuable clinical legal education. Why then not wait until that stage to introduce this experience? In my view this can partly be answered by the way in which clinical experience can inform every other learning experience in both undergraduate and vocational courses. It makes sense of what might be abstruse. It makes concrete what might remain abstract. It should therefore form part of that experience, not follow it. However, there is another reason why I believe that clinical work should form part of the law school experience, but I will leave that until I have introduced my next proposal.

### **Using clinical methods to develop professional values**

In many countries the legal profession is perceived as being in an ethical crisis. In the United States lawyers are often perceived to be highly unethical in their practice, particularly as that practice moves from a professional to a business orientation (Kronman 1993). This public

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<sup>11</sup> By 'deep' learning I mean that which involves the student in linking old and new knowledge to personal experience and distinguishes evidence and argument. By contrast 'surface' learning refers to an unreflective, externally-driven focus on words and sentences. In a deep approach, students seek to understand; in a surface approach they seek only to reproduce. (LeBrun & Johnstone 1994, p. 59-61).

<sup>12</sup> For a detailed discussion see Brayne, Duncan & Grimes 1998, Ch. 3.

<sup>13</sup> For a discussion of how these programmes can inform an understanding of the ethical aspects of legal practice, see Kerrigan and Hall (2003).

perception is all the more galling for the majority who take matters of professional conduct seriously. Recent changes in the UK, such as the introduction of conditional fee agreements,<sup>14</sup> raise new prospects for conflicts of interest and new pressures for unethical behaviour which will face our trainees as they enter the profession. The responsibility for addressing this lies with both established practitioners and legal educators.<sup>15</sup>

Courses in professional responsibility are a required element of the JD in the USA. However, they are widely criticised, in many cases because they attempt little more than rote-learning of the Codes of Conduct and the Commentaries that have been developed to flesh out the Codes (Pipkin, 1979 and Granfield, 1998). Matters are improving and there are honourable exceptions: Columbia,<sup>16</sup> Georgia State,<sup>17</sup> Georgetown,<sup>18</sup> amongst others.

We as legal educators must ensure that our students learn their Codes of Conduct and practise within them. However, Codes are subject to interpretation and can never anticipate every situation which may arise. In terms of formal assessment, it may be that it is only compliance with the Codes, rather than an ethical response to an area left grey by the Codes, that can be subject to 'Pass/Fail' judgements. But learning does not have to be restricted to what can be formally assessed. We clearly also have a responsibility to do all we can to give our students a solid values-base on which to prepare their responses to the ethical dilemmas which will face them.

On the BVC at ICSL we have a number of methods of addressing ethical issues. We provide students with a Manual which contains the Bar's Code of Conduct, discussion of the broader ethical context and a series of practical problems. This Manual (Stead 2004) contains a chapter entitled *The Letter and Spirit of the Code* (Duncan 2004b). This is designed to ensure that students realise that their responsibilities go beyond simple compliance with the Code. Where the Code permits alternative actions or where it is capable of different interpretations students are encouraged to explore the underlying values which inform the Code. Recognising that there may be conflicts between those values or indeed between the values of the profession and their own personal values helps to situate their responses to ethical dilemmas in richer soil than the Code alone can provide.

The Manual is supported by a series of large and small group classes. Practitioners present the issues arising from a number of case studies for discussion with students. In small groups, students role-play realistic situations which have been designed to contain embedded ethical dilemmas, to put their ideas into practice and then have opportunities to discuss and reflect upon their experience. This is an example of simulated clinical work. Moreover, throughout the series of simulated activities that students undertake in their skills development programmes ethical problems arise. Some of these are inherent (as where a student asks her client leading questions in conference, thus receiving confirmation of her

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<sup>14</sup> Agreements whereby the lawyer receives no fee unless the outcome of the litigation is a success, in which case a standard fee plus an uplift based on the likelihood of success is payable.

<sup>15</sup> The responsibility of legal education was recognised in the UK by ACLEC, who included 'legal values' amongst what legal education should achieve and defined these as: '... a commitment to the rule of law, to justice, fairness and high ethical standards, to acquiring and improving professional skills, to representing clients without fear or favour, to promoting equality of opportunity, and to ensuring that adequate legal services are provided to those who cannot afford to pay for them. These values are acquired not only *throughout the legal educational process* but also over time through *socialisation* within the legal professions.' (emphasis in the original) (ACLEC 1996, p. 24.)

<sup>16</sup> See discussion of the clinical programme at Columbia in Brayne, Duncan and Grimes (1998) at p. 220-8.

<sup>17</sup> See <http://law.gsu.edu/ccunningham/PR/>

<sup>18</sup> See [http://www.law.georgetown.edu/curriculum/tab\\_clusters.cfm?Status=Cluster&Detail=25](http://www.law.georgetown.edu/curriculum/tab_clusters.cfm?Status=Cluster&Detail=25)

pre-suppositions, rather than getting the client's actual instructions). Others are built into the problem by asking those playing clients to introduce requests that place the student in an ethical dilemma.<sup>19</sup> This is a clinical approach because the student is faced actually, not hypothetically, with the situation to be resolved, and after the role-play is completed there is an opportunity to discuss and reflect on the best ways of dealing with such a problem.

More profound opportunities to recognise the impact of ethical dilemmas arise in real-client clinical situations. Students undertaking the FRU Option regularly encounter such dilemmas. The requirement of keeping a reflective journal significantly increases the likelihood that they will learn from such a situation. Here is one example of a student encountering an ethical dilemma. In an employment tribunal case where the client had been paid without deduction of tax the student was carrying out a telephone interview with his client using the client's daughter as a translator. The student (who spoke the client's language to a fair degree and had informed the client of that fact) overheard the client resisting his wife's suggestion that he should lie about his understanding of the tax situation. He pre-empted the daughter by indicating that he had heard the conversation. His reflective journal records:

‘In a sense I had averted an embarrassing situation by shooting first and not letting them tell me lies. On the other hand, should I not have waited until they came back to me with an answer (albeit a lie) aimed at me? Or would that have been unethical? Maybe I was exaggerating my ethical duty and should have just pretended not to hear. But then again maybe they should not have spoken that loudly (I could not *not* hear).’<sup>20</sup>

This student was faced directly with a clash between the values of client autonomy and duty to the court.

In a taught situation, students are more likely to respond to ethical dilemmas if permitted to raise them themselves. To do this one can devise a role-play which is value-laden and focus initial discussion on the skills elements. Students will usually raise the values dimension and are likely to accept the results of that discussion more as they will feel a greater ownership of the issues (Koh-Peters, 1998, p. 2). However, this goal may be more effectively achieved on the vocational courses if there has been a sound underpinning of ethical debate in students' undergraduate experience. How might this best be done?

Julian Webb (1996) proposes a three-stage approach to meet the normal structure of an English or Welsh law degree. In the first year a foundation course (such as Legal System) would explore as part of its remit the ethics of the English legal system. This lends a values context to the subsequent skills-oriented work. A simulated clinical element would be introduced in the second year in a 'Legal Profession and Ethics' course which would combine discussion of professional ethics with a study of the major ethical traditions supported by working through realistic and value-laden simulations. The third stage would be a real client clinical course through which supervisors would facilitate students' application of their ideas and understanding of ethical issues to the discussions of how to conduct real cases.<sup>21</sup>

Such a programme, particularly if the ethical issues are reinforced by being addressed in a number of different subjects, will provide the ideal basis for students to undertake a more

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<sup>19</sup> For example, a client accused of an offence of dishonesty may ask counsel whether she would be guilty if a particular event had happened. To answer such a hypothetical question would breach the Code of Conduct as it could lead the client to fabricate a defence and thus to mislead the court.

<sup>20</sup> This extract has been published previously in Brayne, Duncan & Grimes (1998), p. 170.

<sup>21</sup> For a critical commentary on this proposal, suggesting how this be improved by integration through simulation into other subjects on the degree programme, see Evans (1998a).

focussed study of professional ethics on their vocational courses. The earlier opportunity to look critically at the issues provides a remedy for the tendency in many vocational courses to concentrate on the Codes, rather than their underlying values.<sup>22</sup> It supports attempts to consider the underlying values and fundamental tenets of the Codes.

### **The impact of legal education on students' values**

It is inherently difficult to conduct research into the influences on students' responses to ethical dilemmas. The issues are usually of such complexity that apparently different responses may have related values at their roots. However, there has been substantial research in the United States as to the impact of legal education on students' attitudes towards the availability of legal services. This is clearly a matter of core professional values and is recognised by ACLEC (see the quote in footnote 8) as well as by the influential MacCrate Report (1992)<sup>23</sup>.

The research explores this commitment by assessing students' intention to undertake public interest work in the future. It consistently suggests that the proportion of students who are committed to including public interest work in their future professional activities declines as they work through their legal education process (Kubey, 1976; Erlanger & Klegon, 1978; Stover & Erlanger, 1989; Erlanger, Epp, Cahill & Haines, 1996; Stone 1997). For example, Stover found that while 33% of first year students rated public interest practice as their ideal first job, three years later the proportion had fallen to 16%. These studies also showed a decline in the importance law students paid to doing pro bono or social reform work. By contrast, Maresh (1997) shows evidence that undertaking a clinical programme with real clients reverses this trend. Over six years she found a consistent tendency for a higher proportion of students to express an interest in public interest work after taking their clinical course than they had before taking it. It might be objected that the students opting for clinical courses would most probably be those motivated towards public interest work. However, this does not explain the *increase* as a result of the experience and the percentage of students expressing the interest before their clinical course was as low as 25% in one year.<sup>24</sup>

This suggests that in respect of one major value of the legal profession, not only does conventional legal education tend to undermine that value, but that the process is reversed by students undertaking clinical work which brings them into contact with real clients. I do not, of course, extrapolate from this that those who are not concerned with the availability of legal services will necessarily act unethically in other aspects of their practice. However, I would suggest that those with a concern for some of the profession's core values are likely to be willing to consider other core values seriously. What is more, those dealing with real cases within their educational experience will perforce have come into contact with the ethical issues that are endemic in legal practice and will not have been able to evade them. They will have been under a duty to take decisions and actions.

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<sup>22</sup> These approaches are not restricted to the UK legal education system. For an example of integrating simulated work and public service activities in India see Madhava Menon & Nagaraj (1998).

<sup>23</sup> MacCrate identified four 'fundamental values of the profession' each of which generates a 'special responsibility'. Thus the value of competent representation begets responsibility to clients; and (significantly here) the value of striving to promote justice, fairness and morality begets public responsibility for the legal system.

<sup>24</sup> It is true that other studies have shown that students take clinical courses to gain practical experience rather than because of their desire to practise in a particular area (Abel, 1990). This, however, does not undermine the significance of Maresh's findings.

Furthermore, their experience will have addressed ethical issues in a way hard to achieve without clinical experience. Surveys in the USA have shown that ethics courses (compulsory since the Watergate debacle) are perceived as inferior (Pipkin 1979). In a study by Granfield (1998 at p. 308):

‘only three out of forty respondents characterized their ethics course as valuable preparation for legal practice. The vast majority reported that their ethics course merely provided them with formalistic instruction about the rules of professional responsibility that were largely silent on the fundamental contradictions inherent in their practice.’

It is the experience of real clients in all the messy complexity of real cases that overcomes this problem.<sup>25</sup>

### **Why not leave this to the apprenticeship stage?**

I have already suggested above that clinical experience increases the value of other educational experience with which it is integrated. There is a further reason why it is important that it not be left until the vocational course is finished. This is a point which must be expressed with some care, as it risks offending the majority of lawyers who strive to maintain high ethical standards in their practice. It requires two assertions which I shall draw from the work of others. The first is that:

‘... it is workplace experiences that have the greatest impact on shaping professional behavior. Ethical education may be eclipsed if law students encounter workplaces that are unsympathetic to ethical practice.’ (Myers, 1996 at p. 824)

The second is that:

‘... for those students whose first significant work place experience is a ‘live client’ clinical programme, better values, social awareness and motivations are inculcated because students are under the control of legal educators rather than ‘the market’.’ (Evans, 1998b at p. 284)

This is not intended to be a criticism of all practitioners. Practitioners reading this journal are clearly concerned for the quality of legal education and will be taking care to ensure that their trainees would be given appropriate instruction in ethical practice. However, this cannot be true of every lawyer who accepts the responsibility for a trainee. The realities of practice will properly expose trainees to the market and the adversarial nature of litigation. As Auerbach has observed:

‘Litigation expresses a chilling Hobbesian view of human nature. It accentuates hostility, not trust. Selfishness supplants generosity. Truth is shaded by dissembling. Once an adversarial framework is in place, it supports competitive aggression to the exclusion of reciprocity and empathy.’ (Auerbach, 1983 at vii)

These are the pressures which can lead to conflicts of interest or other ethical difficulties. Evans does not argue that students should be protected from those pressures, rather that they should first experience them in an environment in which it is possible to explore the problems in principle. For these reasons, students should be exposed to realistic (or ideally, real) problem situations in the context of their academic and vocational courses, in order to provide them with a sound foundation in values which will strengthen their ability to deal with the vicissitudes of practice.

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<sup>25</sup> This is reminiscent of Donald Schön’s swamp (Schön 1987) and the difficulty of recognising the problems of living in the swamp if you stay on the academic high ground.

## Meeting our social responsibilities

One of the founding characteristics of the codes of professional ethics is the responsibility to promote justice and accessibility of legal services.<sup>26</sup> Currently most Governments are seeking ways to reduce spending on the public funding of litigation. This raises questions as to how any ensuing gaps in provision might be filled.<sup>27</sup> Law schools, whether dealing with the academic or vocational stages of legal education, which develop real client clinical programmes may provide a valuable social service to those clients. This may include the provision of legal advice, full representation in appropriate circumstances, or it could include working with community or interest groups to address perceived injustices or to empower community groups to recognise and meet their own needs. This could be addressed by law schools setting up their own student law clinics,<sup>28</sup> working with other agencies such as (in the UK) Citizens' Advice Bureaux, Law Centres and Advice Centres,<sup>29</sup> or working in a community legal education programme (Jones (1997) p. 247).<sup>30</sup> There has been considerable development of these programmes in recent years, often under the title 'Street Law'.<sup>31</sup> The burgeoning scope for work of this kind in the UK is presented in Brayne (2002) and Grimes (2003). Those interested in the international development of different projects involving law students learning through working with individuals or community groups should contact the Global Alliance for Justice Education through their website at <<http://ls.wustl.edu/Academics/Faculty/Activities/Global/>>.

In recent years the UK Solicitors' Pro Bono Group has actively promoted student work in a pro bono capacity, in the hope that this will establish patterns of behaviour which will continue into practice<sup>32</sup>. This raises a number of issues. Lawyers struggling in publicly-funded areas of practice often take a jaundiced view of lawyers with corporate client experience occasionally offering voluntary work in a field of which they have little current experience. There is the broader issue of whether undertaking pro bono work (whether as a practitioner or a student) undermines attempts to persuade the Government to accept what many would regard as their responsibility to fund proper levels of access to legal services.

This issue becomes particularly pertinent when recent developments by some UK universities are considered. They have entered agreements with the Legal Services Commission to provide legal services. High standards of supervision and client care are required, but where funding comes from both the LSC and the university there is the potential for conflict between educational and serviced-delivery interests. Tensions can arise over the choice of cases accepted or the period of time over which they are likely to be 'live'. This is a complex issue which cannot be fully explored here, but which requires careful management if justice is to be done to both students and clients. Properly conceived and managed, careful co-operation between the legal education community and the various bodies concerned to provide legal services can produce something of mutual value.

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<sup>26</sup> Op cit. nn. 15 & 23.

<sup>27</sup> I do not argue that we should simply accept that government minimise or abandon its responsibility for the provision of proper legal services to those who cannot afford it. However, when faced with clients with an unmet legal need it is incumbent upon us to consider how to contribute to meeting that need while maintaining a principled pressure on government.

<sup>28</sup> For practical guidance see Brayne, Duncan & Grimes, (1998) ch. 3.

<sup>29</sup> Ibid. ch. 4. See also Kibble (1998).

<sup>30</sup> For students to prepare an explanation of a particular legal issue appropriate for a lay audience or readership requires high levels of understanding of that issue as well as communication skills and a sensitivity to the needs of those to whom they are explaining it.

<sup>31</sup> For information and guidance see the Street Law website at: <http://www.streetlaw.org/>.

<sup>32</sup> See <http://www.students.probonogroup.org.uk/>

### **The characteristics of clinical educators**

I will conclude by considering what we need of clinical teachers. It seems to me that there are two essential characteristics. One is that they have a sufficient understanding and practice of educational theory to be able to design and implement experiences for students which will maximise their opportunities for deep learning. The second is that they should have the experience of practice which is necessary for them to act as effective supervisors of their students' attempts to advise and represent their clients. Neither alone is sufficient.

It may not always be possible to find individuals who combine both types of experience. Where this is the case it is essential that teams are developed which include individuals with each type of expertise. For example, my practice experience is limited. I therefore collaborate on my FRU option with one teaching colleague with considerable experience of litigation in the Employment Tribunals<sup>33</sup> and the employment case-worker at FRU, whose practice experience in this field is unparalleled. Between us we can provide learning opportunities which are real, properly supported, and which build in the opportunities for reflection which ensure a truly educational experience. Working collaboratively in this way also provides a good model for the students and I would commend it to anyone.

### **Conclusion**

I have argued that the use of clinical methods of legal education (as presented in the concrete examples in this article and through different models developed elsewhere) provides an effective method of meeting a number of our concerns in professional legal education.<sup>34</sup> It provides the most powerful experience of the real context in which the law operates; it is the most effective way of developing transferable and specific professional skills and it provides a sound basis for ethical practice. It works most effectively when reinforced with built-in requirements for reflection and approaches to curriculum design which expect students to take some responsibility for their own learning. This experience should precede the training contract or pupillage. In designing courses which meet these objectives we can also help with the provision of legal services to those who cannot afford to pay for them. These proposals have been based on the experience of a number of jurisdictions which have very different legal education structures. How best to implement this approach in different jurisdictions will vary, but experience to date suggests that the effort is eminently worthwhile.

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<sup>33</sup> Over the years these have included a part-time Chairman of the Employment Tribunals, a former trade union official and a former Law Centre caseworker.

<sup>34</sup> The question of assessment of students' clinical work goes beyond the scope of this paper. However, for a discussion of this see Brayne, Duncan & Grimes 1998 pp 54-62 and Macfarlane, 1998.

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