

DO WE VALUE WHAT CLIENTS THINK ABOUT THEIR LAWYERS? IF SO, WHY DON'T WE MEASURE IT?

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Introduction

In *Measuring and Managing Patient Satisfaction*, published by the American Hospital Association, the authors confidently assert:

Health services providers today are confronted with two principal challenges. The first is to gain insight into what is important to the patients they serve. The second is to "move the needle," or make measurable changes in the patients' experience of the health care encounter.¹

They link these health care priorities with the evolution of customer-centered service throughout the business world: "customer satisfaction is considered by most to be at the core of good business practices." However, in striking contrast to the health care industry (or indeed any other service industry), lawyers generally do not use even the most rudimentary methods for finding out how their clients experience the services they provide and thus have no way of measuring "how the needle moves" even if they seek to improve client satisfaction.² The failure of the legal profession to gather data about client satisfaction in a systematic way may be attributable to a widespread assumption among lawyers that clients care primarily about outcomes not process, an assumption inconsistent with growing evidence from social science research that the quality of lawyer-client communication is an extremely important determinant of client satisfaction.

The Effective Lawyer-Client Communication (ELCC) project was initiated in 1998 and has at various times included participants from Australia, England, India, Israel, Scotland, South Africa, and the United States and from a wide variety of disciplines.³ The long-term goal of the project is to determine whether international and interdisciplinary collaboration on the issue of lawyer-client communication can actually change basic institutional practices and beliefs in the legal profession. The project is guided to a significant degree by the example of the medical profession, where a greatly increased emphasis on patient satisfaction is both a cause and an effect of extensive social science research on doctor-patient communication. The analogous experience in the health care field indicates that the critical first step is to develop a practical and cost-effective method to assess the effectiveness of lawyer-client communication that correlates that assessment with the degree of client satisfaction.

Over the past 30 years, medical education has given increasing emphasis to the use of "standardized patients" both for teaching and licensure.⁴ This methodology was

¹ Krowinski (1996), William J. & Steven R. Steiber, *Measuring and Managing Patient Satisfaction*, Chicago: American Hospital Publishing p. ix.

² See Cunningham, C.D (1999). Evaluating effective lawyer-client communication: an international project moving from research to reform," *Fordham Law Review* 67, 1959

³ For more information, see the ELCC web site: <http://law.gsu.edu/Communication/>

⁴ Stern, D. (2004) Outside the classroom: teaching and evaluating future physicians, *Georgia State University Law Review* 20, 877, 893-94

developed in response to two concerns about its predecessor, the “oral examination,” in which a student would interview and examine a patient in the presence of a faculty physician, and the faculty would then query the student about the reasons for asking the patient certain questions, the findings on examination, and the nature of the disease diagnosed in the case. This testing method was seen to have two major shortcomings: variability in the patient case, and variability in the examiner. Standardized patients are individuals trained to perform a previously-scripted role in an initial clinical examination – always responding in the same manner to the same question, with the same physical complaints, and body language throughout the interview. They are also trained to fill out a written evaluation form after completion of the simulated examination.

The medical profession has concluded that this methodology has made the assessment of clinical skills much more reliable as well as providing an excellent opportunity for students to practice communication and examination skills in a controlled setting prior to examining real patients with real conditions. In the United States most medical schools have some standardized patient experiences for students, either as an educational or as an assessment program and effective in 2004 all medical students must pass a multiple-station examination using standardized patients. Last January, in connection with a conference at the GSU College of Law on new approaches to assessing competency to practice law, we visited the Atlanta Clinical Skills Assessment Center, one of the five centers around the country where the simulated patient examination is administered to medical students. That experience combined with discussion at and around the symposium has prompted the Glasgow Graduate School of Law to explore potential collaboration with the Effective Lawyer-Client Communication Project to run a pilot program in Scotland using standardized clients to assess solicitor candidates.

The Scottish context

In comparative terms, Scotland is a small jurisdiction. With a legal profession of 10,000 solicitors and over 400 practising advocates serving a population of around five million, it is in size smaller than the legal bar of many states in the US. Solutions to the problems of professional education are therefore those that are appropriate to jurisdictional size, character and history. However it is one of the themes of this project that whatever the size and legal structures of a jurisdiction, there are many educational issues common to even those jurisdictions significantly different in size, structure and culture. The second theme deals with what has been for legal educationalists in Scotland a particular concern, and that is the problem of educating for practice; and especially the design of active and ethical forms of learning that are most effective for training and education at the professional stage. Before we give examples of this, the current initial training and education of law students and trainees in Scotland will be outlined.

The training of both advocates and solicitors in Scotland takes the same route at the initial stages. All lawyers in Scotland must qualify with a LLB from an institution recognised by the Law Society of Scotland, or they must pass the Society’s examinations. The great majority of students take the degree route into the profession.

The LLB can be studied in a variety of curricula. Those students taking the LLB as their first degree after leaving school can take an Ordinary, three-year degree, in which they take a minimum of optional subjects apart from those core subjects deemed necessary by the Society. They can also extend this to an Honours degree lasting four years, and most students take this opportunity. Those students who already have a degree in another discipline may condense the Ordinary three-year LLB degree into two years.

The first two or three years of the undergraduate degree are spent predominantly in the study of the subjects that are deemed by the Society to be the core of knowledge demanded of a lawyer – the ‘qualifying subjects’:

- Public Law and the Legal System

- Scots Private Law
- Scots Criminal Law
- Scots Commercial Law
- Conveyancing
- Evidence
- Taxation
- European Community Law⁵

In addition there are non-law options, and an emphasis generally on the skills of academic performance in case-analysis, essays, dissertations and the like.⁶

After qualifying with an LLB degree, students who wish to enter the legal profession then begin the three-year course of professional training and education. This begins with a course called the Diploma in Legal Practice. Equivalent in many ways to the Legal Practice Course in England and Wales, the Diploma sets out to train law students in practice skills and knowledge, and to equip them for the two-year traineeship that follows the Diploma. The curriculum, around 28 weeks in length, is set by the Society, and consists of the following subjects:

- Civil Court Practice
- Criminal Court Practice
- Private Client
- Conveyancing
- Practice Management
- Financial Services & Accounting
- Professional Ethics
- *Either* Company & Commercial *or* Public Administration

Learning objectives are specified by the Society for each of the above subjects, but local centres are given flexibility to design the syllabi and the assessments for the above subjects. The course is taught predominantly by tutor-practitioners working in specific areas of the law, and designed and administered by the local centres. Course materials in the form of student and tutor handbooks for each of the above subjects are issued by the Society to the providers every year, and the Society takes responsibility for updating these materials. The authors are largely drawn from the profession, and they produce what are for the most part resources for seminar discussion and workshops. The texts are an admixture of styles and precedents with some explanatory and didactic text.

Currently there are five Diploma providers, all of them attached to university law departments or schools: Aberdeen, Robert Gordons, Dundee, Edinburgh and the Glasgow Graduate School of Law (a joint initiative between the universities of Glasgow and Strathclyde). Course fees currently stand around £3,750 -- £4,000, with course materials costs (around £200 or so) above that. These fees, together with subsistence costs, are borne by students. Uniquely in the UK, approximately 60% of Scottish students obtain some form of fee grant (£2,750) and subsistence allowance, and this is calculated on the basis of academic results obtained by students in the qualifying subjects studied in the early years of their LLB degrees. The cost of the Diploma compares favourably with the cost of initial professional training courses elsewhere in the UK.⁷ Nevertheless, recent research undertaken by one of the authors on behalf of the Scottish Executive does indicate that the cost of the professional training programme, on

⁵ See *Law Society of Scotland Examination Syllabus and Reading List*, at <http://www.lawscot.org.uk/> under 'Education & Training'. The treatment of these areas of law is different in each of the universities offering qualifying law degrees

⁶ For a summary, see <http://www.ukcle.ac.uk/directions/issue2/survey.html>

⁷ Comparable fees in Northern Ireland stand at around £4,000, more in Ireland and up to almost £8,000 for the LPC. It should be pointed out, however, that a number of the larger and City firms in England pay LPC fee costs.

top of the increasing levels of undergraduate student debt, does deter significant numbers of students from entering the programme.⁸

Either before their Diploma or during it, students require to obtain a traineeship with a practising solicitor or a legal service employer in Scotland. On successful completion of the Diploma, they enter into a two-year contract of training with this employer. The traineeship is monitored by the Society: trainees are required to submit logs of work undertaken in the office, and review sheets are completed every quarter and submitted to the Society for monitoring. These form part of the ongoing assessment of the training programme known as the Assessment of Professional Competence (APC)⁹

In the period 6 – 18 months into their traineeships, trainees are required to take another course called the Professional Competence Course. This course is designed to build upon the knowledge and skills developed in the Diploma, and relies upon the office experience that trainees will have gained in their traineeship to date. At the start of their second year of training, trainees obtain a restricted practising certificate which enables them to practise in the courts under certain conditions. They can also, with the permission of their employer, spend six months of their training in another EU country. At the end of their second year, having fulfilled all the conditions of the Society, obtained a discharge of their training contract and a signing-off statement from their employer, they can apply for a full practising certificate and entry to the profession.

In the 1990s, after considerable debate about the shape and content of the Diploma, the curriculum retained the same broad outline. A course in Practice Management was added to the curriculum; learning outcomes were clarified; and the structure of some subjects was reviewed and altered – notably Financial Services & Accounting. Perhaps most important, the Society signalled where, in the syllabus learning outcomes for each of the subjects, skills could be learned; and for the first time in the history of the Diploma since its inception in 1980, identified a body of professional skills that ought to be the focus of a considerable portion of the course, namely advocacy, negotiation, client interviewing, precognition-taking, legal writing, drafting and legal research.¹⁰

Current issues in professional education in Scotland

Teaching and learning in every discipline is a site of struggle between competing discourses. Whatever methods we use to teach skills and knowledge at the professional stage involve us in many assumptions about how we learn professional skills, knowledge and values, what we learn and why, and what we expect students and trainees to do with that learning. This is not new. We can see the roots of such assumptions in enlightenment Scotland, in the developing discourse of a Scots legal system where educational vectors were powerful influences upon the profession and society.¹¹

⁸ Anderson, S., Maharg, P., Murray, L. (2003) *Minority and Social Diversity in Legal Education*, Edinburgh, The Stationery Office. Also available at: <http://www.scotland.gov.uk/library5/justice/masd-00.asp>

⁹ For more detailed information on this, see LSS website, <http://www.lawscot.org.uk/>, under 'Education & Training', at 'The Post-Diploma Traineeship Training Programme'. It was originally envisaged that the TPC would contain an element of open-book examination; but following a series of closely documented trial assessments, it was decided not to proceed with this form of assessment.

¹⁰ Set out in an unpublished paper, Law Society of Scotland, (1999) *Learning Outcomes for the Diploma in Legal Practice*

¹¹ See for example the words of Adam Ferguson addressed to law students among others, on ethical and professional practice:

'Now is your time to begin Practices and lay the Foundation of habits that may be of use to you in every Condition and in every Profession at least that is founded on a literary or a Liberal Education. *Sapere & Fari quae sentiat* are the great Objects of Literary Education and of Study. ... mere knowledge however important is far from being the only or most important Attainment of Study.'

The Habits of Justice, Candour, Benevolence, and a Courageous Spirit are the first Objects of Philosophy the Constituents of happiness and of personal honour, and the first Qualifications

At present, the Law Society is considering the place of such assumptions, and the knowledge, skills and values that lie at the core of the professional programme – and all within the context of a predominantly European, postmodernist, post-Clementi future.¹² An initiative such as the Effective Lawyer-Client Communication project that analyses basic institutional practices and beliefs is an essential first step in the analysis of models of practice, the place of professional practice in a particular set of skills, and the creation of effective forms of educational interventions. It is important to conduct research on this, and to make such research available to educational and professional practice communities in Scotland and beyond.

The ELCC project may therefore help to resolve some of the current issues facing legal educators and the Society in Scotland, which include the following:

Outcomes

Outcomes and standards need to be implemented with consistency throughout the professional programme at each level. How should the DLP link up to the traineeship? The PCC? How are the skills of interviewing, for example, taken through various levels of sophistication in skill & knowledge?

Variability across programmes of study in the DLP

At present there is considerable variability between programmes at the level of implementation. Quite apart from detailed outcome statements, there is a need to identify good practice and use that to standardise the client-centred orientation of students and trainees, providers and firms. In the example of interviewing skills, for example, are there equivalences between the standards of the GGSL and other providers of the DLP? If not, why not, in a small jurisdiction such as Scotland?

Joined-up educational planning across elements of the professional training programme

The Diploma, PCC, traineeship and assessment of training exist separately. They need to be harmonised, so that there are coherent approaches to skills learning and knowledge-building among the different stakeholders.

Example: interviewing skills

An example of this in practice – albeit in a constrained way at the moment – is the development of interviewing skills on the GGSL Diploma. At present, following on from a lecture, multimedia unit and two workshops on this skill in the Foundation Course, students can practise on unseen scenarios throughout the Diploma. Their performances are videotaped, and sent to a tutor who gives feedback on the taped performance. At the end of the second semester students then go through the same cycle of *tell-show-do* in the same skills-set but at a higher level of sophistication – this time, the second set of interviews is actually a second interview with the same client, instead of yet another initial interview. A little later, students are assessed by videotaped unseen client scenario, with the role of the client played by another student or actor. Tutors assess the videotapes, and give feedback to those students who are deemed ‘not yet competent’, who repeat the assessment.

for human Society and for Active life.

Quoted in Sher, R.B. (1990), *Professors of virtue: the social history of the Edinburgh Moral Philosophy Chair in the eighteenth century*, in *Studies in the Philosophy of the Scottish Enlightenment*, ed. M.A. Stewart, Clarendon Press, Oxford, pp.117-8, quoting Adam Ferguson's *Lectures*, mss EUL, 1775-6, fols.540-41

¹² The Society has, for instance, recently issued a Foundation document to the profession, educational providers and others (co-authored by Maharg), and is currently in process of wide consultation over the final contents of the document.

For GGSL staff, there are a number of issues that remain unresolved in this area of skills teaching & learning:

1. the teaching interventions are based on a number of different models of what constitutes good professional interviewing; and while they mesh well within the curriculum, there has been no fundamental analysis of the underlying models taught, and the relationship of such models to models of client-practitioner interchange.
2. the assessment schedule, though fair, is unvalidated and has not been tested for reliability to the same level of rigour that is apparent in medical curricula.
3. the assessment schedule links well with teaching interventions, but does not necessarily give staff proof of transferability of specific skill-sets either to practice or to other areas of skilled performance, eg negotiation
4. in the future GGSL want to give detailed feedback to other stakeholders in the professional training programme (eg training firms) on students' skills learning and achievements; and this needs to be done in as streamlined, relevant, and focused a form as possible
5. any alternatives to the present system in the GGSL require to take into account cost and practicality of implementation

An ELCC project that investigates the possible deployment of standardised clients in the Diploma in Legal Practice may be a useful way of developing such professional skills as interviewing. The medical educational practice of standardised patients provides a useful model; and we shall hear more about this at the workshop from Dr Jean Ker of the Clinical Skills Unit, University of Dundee Medical Faculty, based at Ninewells Hospital, Dundee. Dr Ker has used standardised patients extensively in medical education. There are similar forms of highly-structured role play in use, such as 'mystery shoppers', in other areas of occupational and professional practice, all of which deal with the issues summarised by the title of this brief position paper. We hope that the LILI workshop will begin the process of thinking about how such a model can be rigorously developed and adopted in legal education, not only for Scotland but for elsewhere in the UK as well.

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