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# Teaching professionalism in legal clinic – what new practitioners say is important

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## Introduction

Anecdotal evidence suggests new lawyers may struggle as they begin legal practice. Little is known empirically about their actual experiences. This paper provides some insights into what occurs in this transition. It reports on a qualitative study currently underway tracking new lawyers through their first year of practice. Preliminary analysis of data from interviews and from workplace observations suggests clinical legal education can play a significant role in smoothing the transition and helping new lawyers develop their sense of professionalism. into their vocational training year. We track new lawyers in the context of their post-admission practice with a small cohort of recently admitted lawyers interviewed and observed in their day to day practice.<sup>1</sup>

We describe what these new lawyers say is important to an effective transition – developing autonomy, learning to deal with uncertainty and finding an accommodation between their developing professional values and those modelled by their firm and colleagues. Clinical programs offer opportunities for an early reflective exposure to these experiences.

## Legal ‘professionalism’

The notion of ‘professionalism’ involves the development of a ‘professional identity’, much in the sense used in the Carnegie Report:

[Professional identity] which is sometimes described as professionalism, social responsibility, or ethics, draws to the foreground the purposes of the profession and the formation of the identity of lawyers guided by those purposes...[This includes] forming legal professionals who are both competent and responsible to clients and the public...<sup>2</sup>

While the Carnegie Report’s focus was on an ideal legal education, developing a professional identity continues during a new lawyer’s early exposure to practice. The experiences are in effect an apprenticeship – where certain cognitive, practical and formative milestones ideally need to be met. The Report’s authors use the term ‘professionalism’ more or less synonymously with ethics – to connote both the need for competence as well as the need to act responsibly towards clients and the public. The inclusion of competence in the ethics equation is important. Lack of competence may not be ‘unethical’ in the narrower sense of immoral, but it is nonetheless unethical when it fails to deliver on professional responsibility.

Acquiring the skills of competent ‘lawyering’ requires grounding in both theoretical and applied knowledge that can only be gained in the actual practice of law. This is the combination that Schon<sup>3</sup> calls ‘doing-in-action with the aid of knowledge-in action’. It is only through the process of ‘learning to lawyer’ that new lawyers can create themselves as legal professionals. ‘Learning to

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1 All participants completed timesheets during a discrete period (normally a week), showing how they spend their time at work, what type of activities they are engaged in, with whom they interacted and details of the contexts in which they work.

2 William M Sullivan, Anne Colby, Judith Welch Wegner, Lloyd Bond, Lee S Shulman, *Educating Lawyers: Preparation for the Profession of Law* (2007), 14.

3 Schon, D *The Reflective Practitioner* (1983), 141

lawyer' requires 'interactions with others as much as, if not more than, the knowledge [found] in texts', and as such can only really begin once the new lawyer is in some form of practice.<sup>4</sup>

## Methodology

The eleven participants in this pilot project (4 males and 7 females) include newly admitted lawyers in private practice (small and medium firms<sup>5</sup>, specialised family law and criminal law practices) and public practice (government legal department, legal aid and community legal practices). All participants were in practice in the Australian Capital Territory (ACT), an area in which Canberra, the federal capital of Australia is located. The ACT has a population approaching 350,000 and has approximately 1400 practising lawyers (in private and government practice). Participants were identified through a convenience sample that involved contacting a number of firms within the jurisdiction, as well as targeting new lawyers directly through notices in law society publications. Data collection began in 2009 and continued throughout 2010. Participants were tracked in their 'transitory year' of practice which we took to be the first 12 months post-admission.

Ideally, participants were interviewed twice (early and late) in their transitory year. Interviews were also conducted, where possible, with supervisors and with 'significant others' in the practice. Though not constituting a statistically representative sample, the experiences of these participants do provide some empirically-based insights into the lived experience of lawyers new to practice.

This paper is illustrated with extracts from interview data, principally using the comments of one respondent, 'Alison' as a case study.<sup>6</sup> 'Alison' is a lawyer in her late-twenties working in a private mid size firm specialising in a branch of litigation. She described her level of personal wellbeing and satisfaction during her first year as being 'up and down'. She routinely worked about 40-50 hours a week, and only sometimes took more work home. She felt most comfortable with the written responsibilities of her work, and felt less confident in oral tasks, particularly court appearances which with the nature of her practice were routinely required. She spoke positively of the training opportunities her practice allowed her in both internal and external programs. She had been rotated through various 'teams' in the practice, doing a variety of work in each. She was idealistically motivated; expressly saying 'I desperately want to have a career where I feel that I'm making a difference'.

Comments from her interviews and those with her supervisor illustrate factors and experiences which she said influenced her development. While her story is obviously unique, it does highlight the three situational factors which other participants also identified as important in gaining a sense of professional identity. The details of these factors emerged for us through a process of inference and inquiry carried out both before and during the data collection. Before we began we developed a number of hypotheses about what factors would be influential. These were based

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4 Flood, J (1991) 'Doing Business: The Management of Uncertainty in Lawyers' Work' *Law & Society Review* 25(1) 41, 68.

5 The Australian Bureau of Statistics 8667.0 *Legal Practices Legal Practices, Australia, 2001-02* makes a distinction between solicitor practices with 1-2 working principals, 3-5 working principals, and 10 or more working principals though it does not refer to these specifically as these small/medium/large firms, viewed 13 September 2010 at <http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/8667.0Main+Features12001-02>.

We equate a small practice as having up to two principals and a medium practice as having up to five principals.

6 Names of participants are anonymised.

upon our own experience as legal practitioners and legal educators, and also from a review of the relevant literature. We hypothesised, for instance, that issues of acquiring competence and gaining autonomy would be core influences. Although intentionally guided by these pre-conceived ideas, we applied a data analysis approach based on grounded theory<sup>7</sup> to test whether participants identified such factors.<sup>8</sup> Competence and autonomy did emerge as important, but participants also highlighted exposure to situations which we termed 'dramatic learning events' as being particularly influential in their progress.

In a similar way, we found that participants placed particular importance on learning to deal with uncertainty. While we had assumed that learning to deal with the emotionality of practice would be important, we had also surmised that law graduates would not anticipate the extent of its intrusion into their legal work. We had assumed they would see the need to integrate the emotional and intuitive aspects of practice in order to make a successful transition to practice. However, the data analysis showed that dealing with emotions was only one aspect of uncertainty management and that this factor in itself featured far more prominently in what they told us.

From this combined process of inference and analysis we isolated the three factors described as important to a smooth transition. New lawyers said they needed exposure to experiences which allowed them to:

- Develop their confidence and competence in their practice by being permitted to balance personal autonomy with appropriate mentoring and supervision. Participants had much to say about their experience of surviving 'dramatic events';
- Realise that practice was more than a rational and rule-based activity, and one that of necessity involved persuasive uncertainty. Their responses often disclosed feelings of uncertainty about their role as lawyers, about the law itself and about how they were to deal with the complexity of 'real' people displaying 'real' emotions; and
- Find a comfortable 'value accommodation' between their own developing professional sense and the professional values modelled and practised by their firm.

## Results

The importance of each of these factors can be best illustrated using interview comments from participants, principally Alison and her supervisor.

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7 We depart from grounded theory, however, in that we acknowledge that we have brought a number of prior values, experiences and expectations as practitioners and legal educators to our preliminary conceptual development process. This prior knowledge was used in framing our overall research agenda, although the process of coding and reviewing the data was not driven by specific hypotheses or directions.

8 Glaser, G and A L Strauss *The discovery of grounded theory: strategies for qualitative research*. (1967); Strauss, A L and J Corbin *Basics of qualitative research: grounded theory procedures and techniques* (1990)

## 1. ‘Controlled freefall’: Acquiring competency and autonomy through controlled exposure to ‘dramatic learning’ events

The first group of necessary experiences we describe as ‘controlled freefall’. ‘Controlled freefall’ is used to suggest that an effective transition to practice is aided by a work environment that meets the need for competence and autonomy, while exposing new lawyers to ‘dramatic learning events’ within a framework of close mentoring.

### *Why ‘controlled freefall’ experiences are a positive influencing factor*

Professional competency is seen to emerge through a balance of autonomy and supervision. We found strong support in the literature for the need to find an appropriate balance between independence and control. Self-determination theory, for instance, draws a strong connection between the satisfaction of certain basic psychological needs (principally autonomy and competence) as one means to psychological health and well-being.<sup>9</sup> Acquiring such a sense of competence and autonomy was seen as crucial to gaining the ‘essential nutriments’ of psychological health.<sup>10</sup>

We see competency as a baseline professional duty for lawyers. The work that legal professionals do requires the resolution of legal issues, the creative documentation of transactions, the consideration of rapidly changing areas of law, and (at times) the conduct of controversial litigation.<sup>11</sup> Even routine and repetitive tasks require varying degrees of discretion, challenge, skill and expertise. The new lawyer must gain sufficient competency to begin to meet each of these basic requirements. Acceptance by a legal practice of incompetent work can constitute a breach of the practice’s obligations to the court, and to its clients and can lead to disciplinary proceedings against the new lawyer.

‘Autonomy’ refers to action characterised by choice rather than by actual independence. ‘Autonomy’ in the context of legal practice involves the exercise of judgment or discretion to select the relevant knowledge and appropriate techniques for performing particular legal tasks.<sup>12</sup> Autonomy does not denote a completely free rein. Lawyers will remain subject to their clients’ interests and demands, to instructions from their supervisors, and to external constraints of legality, procedure and shared professional norms. Legal practices must provide the necessary ‘autonomy support’ for new lawyers to acquire this capacity.<sup>13</sup> Such ‘autonomy-support’ involves giving them choice as to how to approach tasks where such scope is feasible, and providing a clear rationale when the choice is limited to ensure their perspective as to how things should be done is at least taken into account.<sup>14</sup>

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9 Deci, E L and R M Ryan, *Intrinsic Motivation and Self-Determination in Human Behavior* (1985); Deci, E Land R M Ryan, ‘Self-Determination Theory: A Macrotheory of Human Motivation, Development, and Health’ (2008) *Canadian Psychology* 49(3), 182-185

10 Deci and Ryan, op cit, 2008, 183.

11 Nelson, R L *Partners with Power: The Social Transformation of the Large Law Firm* (1988)

12 Engel, G V (1970) ‘Professional Autonomy and Bureaucratic Organization’ *Administrative Science Quarterly*, 15, 12.

13 Sheldon K M and L S Krieger, ‘Understanding the Negative Effects of Legal Education on Law Students: A Longitudinal Test of Self-Determination Theory’ (2007) *Personality and Social Psychology Bulletin* 33, 883 at 884.

14 This analysis of the self-determination model as applied to law students is taken from Hess, G F ‘Collaborative Course Design: Not My Course, Not Their Course, but Our Course’ (2008) *Washburn Law Journal* 47, 367.

In two longitudinal studies, Sheldon and Kreiger show that enhanced feelings of autonomy and control are particularly important for the success of law students.<sup>15</sup> In the same way, new lawyers will only gain ‘the inner resources to develop and follow’ positive career motivations if their autonomy and competency needs are met:

All human beings require regular experiences of autonomy, competency and relatedness to thrive and maximize their positive motivation. In other words, people need to feel that they are good at what they do or at least can become good at it (‘competence’); that they are doing what they choose and want to be doing, that is, what they enjoy or at least believe in (‘autonomy’); and that they are relating meaningfully to others in the process, that is, connecting with the selves of other people (‘relatedness’).<sup>16</sup>

The participants in our own project confirmed the importance of supervision which allowed this sense of autonomy and competence to grow. When questioned about this, participants consistently described an apparent symbiotic relationship between:

- an exposure to ‘dramatic learning’ events, even those in which they felt as though they were being ‘thrown in at the deep end’, and
- a mentoring/supervisory experience which provided a ‘safety net’ to ensure these experiences were generally positive.

Participants spoke of their development in two parallel ways – increasing their capacity for autonomous practice, whilst being well supervised and supported in their work especially in relation to difficult and unfamiliar tasks. The first twelve months of practice involved finding this balance between excessive hand-holding and unsupervised practice. Participants also related incidents of having ‘survived being thrown in at the deep end’ with close mentoring and supervision allowing them to ‘swim rather than sink’.

This emergence of a growing sense of autonomy was seen as positive and necessary. One participant said, ‘it’s such a tremendous thing to be able to work independently.’ Another felt her autonomy developed as a consequence of receiving direction and feedback about her work:

P: I’m a lot more autonomous now. I’ve got this one case that I’m working on which will come up for trial in February which is mine, instead of working with a senior lawyer. I am the lawyer in charge ...

I: If you’re more autonomous, [your supervisor] doesn’t check your work as often?

P: No, she still checks everything. But I suppose there’s a lot less comments back and that’s not necessarily because I am doing it exactly the way she would have done it. She’ll say ‘that’s different but it’s alright; go and do it that way’. At the start [she would have said] ‘this is the way you should do it until you get your feet a bit more’.

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15 Sheldon, K M and L S Krieger, (2004) ‘Does Legal Education Have Undermining Effects on Law Students? Evaluating Changes in Motivation, Values and Well-Being’ *Behavioural Sciences and the Law*, 22, 261; Sheldon and Krieger, op cit., 2007. See too Leah Wortham, Catherine F. Klein & Beryl Blaustone ‘Autonomy-Mastery-Purpose: Structuring Clinical Courses to Enhance These Critical Educational Goals’, paper presented at the Eighth International Journal Of Clinical Legal Education / Clinical Legal Education Conference, Newcastle upon Tyne, 8 July 2010.

16 Sheldon and Krieger, op cit, 2007, 885.

Effective supervision provided the safety net, even when it appeared to conflict with the new lawyer's own perceived competence in a particular task. This was recognised particularly when there was a change of supervisor:

P: Whereas before I got big ticks over everything, now I am actually getting more scrutiny again.

I: Is that good or bad?

P: Good, really good.

I: But it's making you feel less competent because you're getting more things picked up?

P: Yes, but then I feel like I'm learning more, rather than just flying by the seat of my pants.

For most participants, 'competence' meant feeling in control. They felt this sooner in relation to tasks like drafting documents or managing general correspondence. These were tasks that could be planned and were not immediately time-critical and so permitted research, review and reflection. In contrast, it was irreversible and 'on your feet' tasks, such as giving ad hoc advice or handling unexpected developments in court where they felt less competent and consequentially less autonomous.

Conversely, exposure to experiences outside their comfort zone caused their sense of autonomy to grow. Almost all participants reported instances of 'dramatic learning events' within their first 12 months of practice. These experiences often came unexpectedly and forced them to engage in tasks with which they did not feel immediately comfortable. One participant said:

Getting up [in court] for the first time just for a mention was good. [Then] my first appearance in the Supreme Court was probably a bit of an accelerant 'cause I actually started to feel a little bit confident after that. ... That was a terrific day; I got a real buzz out of that.

While these experiences were seen as crucial, they were insufficient to produce significant increases in competency and autonomy on their own. 'Reflective practice' involving reflective conversations with themselves or with others in the practice was also crucial. These conversations allowed a combined or gradual balancing of the known, safe and comfortable with exposure to the unknown and unfamiliar. Another new lawyer reported the effect of being allowed such exposure:

[My supervisor] has tried to give me a variety of work [to] challenge and to stretch me – we've had some doozies though where I've done the wrong thing [as a result].

This is the combination of experiences we have described as 'controlled freefall'. The transition to effective practice will be hampered where such an exposure is missing or where it is unsustainable after an initial period of development. We observed that where new lawyers had only intermittent exposure to such immersive learning opportunities, they reached a plateau in their development and saw a subsequent decrease in their feelings of competence.

This is well-illustrated by a new lawyer interviewed near the end of his transitional year:

I would probably say that there was a more noticeable change in the first six to twelve months when I was practicing, and then [it] becomes more gradual. Over the last six months, I would say that, yes, I have improved, but I am comfortable with most of what I am doing now so I don't really feel like I am learning as much as I was when I first started and everything was new. ... I don't really feel like I've learnt that much in the last six months.

Where adequate supervision is also missing, development similarly slips. Another participant in a small firm said:

It's rare that any of the other solicitors will look at or know about what I'm doing. So I am not really supervised – they are not really aware whether or not I'm doing well. It wouldn't really be that obvious to them.

Our first conclusion from this preliminary analysis is that it is crucial for new lawyers to be given exposure to such dramatic learning experiences if their sense of competence and autonomy is to grow.

## **2. 'Uncertainty Management': Learning to deal with uncertainty about the role of a lawyer, the law itself and dealing with real people displaying real emotions**

New lawyers quickly made the discovery that uncertainty is a constant in legal practice. Their comments showed an increasing awareness that they needed to learn to manage such uncertainty. The uncertainty they face is essentially value neutral, it can be either positive in the sense of providing opportunities for change and strategic advantage, or negative as a source of confusion, alarm or chaos.

### *Why 'uncertainty management' exposure is a positive influencing factor*

Uncertainty is often treated as something that should be eliminated or conquered. But in a contrasting analysis, Smithson provides a more positive view, suggesting that we are often blinded to the positive aspects of uncertainty:

Readers having difficulty conceiving of positive aspects of uncertainty might wish to consider what freedom, discovery, creativity and opportunity really require, namely uncertainties about what the future will bring so that there are actually choices to be made. No uncertainty, no freedom.<sup>17</sup>

Smithson lists four everyday challenges that by their nature will require an appreciation and an acceptance of the positive aspects of uncertainty:

1. dealing with unforeseen threats and solving problems;
2. benefiting from opportunities for exploration and discovery;
3. crafting good outcomes in a partially learnable world; and
4. dealing intelligently and sociably with other people.<sup>18</sup>

A mix of these factors provide particular challenges for new lawyers and this is exacerbated as the legal profession gives little overt recognition to the value and risks of uncertainty:

[I]n the discipline of law there is no coherent discourse or even conscious or structured consideration of uncertainty – despite the fact that uncertainty is pervasive. ... In the case of law, the daily grist of making and interpreting ever-changing legal rules provides an endless source of [uncertainty for] practising lawyers

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<sup>17</sup> Smithson, M 'The many faces and masks of uncertainty' in Gabrielle Bammer and Michael Smithson (eds), *Uncertainty and Risk: Multidisciplinary Perspective* (2008) 13, 18.

<sup>18</sup> *Ibid* 20.

and legal scholars.<sup>19</sup>

One exception is the analysis provided by Flood who sees managing uncertainty as a central role for lawyers.<sup>20</sup> He articulated two sources of such uncertainty – that due to incomplete grasp of knowledge, and that based on the *limits* of current knowledge itself.<sup>21</sup> A comparison he used is doctors-to-be who come to realise that ‘feelings of uncertainty will *never* depart’ and that at best they must learn to negotiate uncertain situations as their own experience grows.<sup>22</sup> The same realisations come later to lawyers-to-be given that ‘the maw of uncertainty where [appellate judicial decisions] are rarely invoked, and where solutions are not always found but often created’ is something they will only really confront once practice begins.<sup>23</sup>

For our participants their uncertainty arose:

1. where they were not uncertain about the law *per se* but about dealing more with more fluid interpersonal situations involving their clients or other lawyers,
2. where they were in fact ignorant of the specific law and had to find a means to reassure themselves, their clients and peers about this lack of knowledge,<sup>24</sup> and
3. where they knew the law but were uncertain as to its satisfactory application to their client’s particular problem or situation.<sup>25</sup>

Our new lawyers found they needed to manage uncertainty both in resolving open conflicts where uncertainty was already present (in criminal matters, family law conflicts, commercial disputes etc) and in situations where there is no clear likelihood of resolution, but at best a hope of reaching an ‘open ended truce’.<sup>26</sup> As Salacuse says, ‘the challenge [for lawyers in these situations]...is not just ‘getting to yes’, but staying there’.<sup>27</sup>

### Sources of uncertainty

Based on the interview data, we broke this uncertainty into three main categories:

- uncertainty about the lawyer’s role,
- about the law itself, and
- about the need to deal with ‘real’ people displaying ‘real’ emotions.

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19 Jones, J ‘Certainty as Illusion: The Nature and Purpose of Uncertainty in the Law’ in Gabrielle Bammer and Michael Smithson (eds), *Uncertainty and Risk: Multidisciplinary Perspective* (2008) 269, 269.

20 Flood, J (1991) ‘Doing Business: The Management of Uncertainty in Lawyers’ Work’ *Law & Society Review* 25(1): 41. Flood draws on notions of uncertainty management developed by Fox who examined the training of doctors for practice, see Renee Fox, ‘Training for Uncertainty’ in Robert K. Merton et al (eds) *The Student-Physician: Introductory Studies in the Sociology of Medical Education* (1957).

21 Fox, *op cit*, 208-9.

22 Flood, *op cit*, 43.

23 *Ibid*, 44.

24 *Ibid*, 66 gives the example of lawyers in a US firm being uncertain as to just what letters of guarantee used in the UK entailed (the US legal system had no such equivalent). They overcame their uncertainty by showing their clients a dummy letter which they had patched together from extracts contained in a series of reported cases.

25 *Ibid*, 44.

26 *Ibid*, 69.

27 Salacuse, J ‘Renegotiations in International Business’ (1988) *Negotiation Journal* 4, 347 at 347.

New lawyers found the habit of constantly asking questions and waiting for further information to emerge was one strategy by which to confront the uncertainty which arose in these situations. When they felt less certain in 'controlled' situations, such as court work they were hampered because they had less time for reflection. Alison recognised this. She expressed anxiety about her performance in an urgent court application but also realised:

I absolutely learnt a lot. I didn't even know how to talk to a registrar before then, What do I call you even, how much am I supposed to say to you, am I allowed to say [that the other party's] a jerk, how formal do I be? What's prejudicial and I am not allowed to say it? I just didn't know what I was doing, I had to guess and after that I thought, well, if I can handle that then, no worries.

Ideally, the practice in which new lawyers are based will provide them with opportunities to address these feelings of uncertainty through adequate mentoring and preparation. One supervising partner was alert to this:

They don't get sent down to the court, without [preparation]. Before [X] went to court, we would practice. I would throw things at her which I thought the magistrate was going to ask her to make sure that she had the answers. She might say 'I've got to do [some type of matter] in court today', and I would say 'okay, let's sit down and do it'".

Law students may find themselves well trained to think in terms of applying the law to concrete, well-defined problems (to 'pick out the issues from the facts, apply the law, and come to a conclusion') but much less prepared to deal with potential uncertainties, particularly those produced by the emotional aspects of practice. As Maharg and Maughan contend the 'academic stage is grounded upon technical rationality [which effectively] engineers out the affective'.<sup>28</sup> These 'affective' aspects involve the emotional and interpersonal aspects of practice which constitute an underlying element to most legal activities. Technical rationality may remain a critical part of legal practice but new lawyers must also learn to deal with the non-rational aspects. In this sense new lawyers need to learn to live with and adjust to the unknown.

For beginning lawyers the strength of the emotions involved may come as a surprise. Alison said:

I entered into my law degree with the ambition of working in [an area of litigation] and I didn't have many illusions. I suppose the only real thing I wasn't expecting was the terror of the court work...I wasn't expecting it to be so painful. [Also] you think, yep I'm going to go to court and I'm going to win but you don't think of the poor client along the way who is actually having this traumatic time in their life and having every mistake they have ever made being stripped bare. I didn't expect the emotion behind it.

The emotional aspects are heightened in situations of complexity and where full communication is lacking. The lawyer must be open to the particular challenges this produces. Their and their client's motional reactions will influence their judgment and will create situations in which their rational-and-logical skills are insufficient for the task. Learning to manage this becomes a key

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28 Maharg, P and C Maughan, 'Simulation and the Affective Domain' (2010), paper presented at ALT Annual Conference: Making A Difference, Clare College Cambridge, 29-31 March.

additional practice requirement.

As suggested, the uncertainty will be heightened when new lawyers need to undertake new and unfamiliar tasks. Alison recognised that, while she could handle written ‘paperwork’:

Court work is another thing entirely, I feel like I have a bit dunce hat on my head and everyone can see it and they will either poke at me or pity me because of it. The [judges] have been really lovely, and I want to take them at face value and decide that they are just nice people, [but] part of me thinks they’re thinking ‘poor little girl doesn’t know what she’s doing’. I feel extremely incompetent.

The uncertainty we have described comes from anxiety about their professional development process (how do I become successful in my job? what do people expect of me? what do I need to learn?) as well as insecurity about knowing what their job requires (how do I find out this information? what is my client’s problem?).

There is also an overlap between the requirement to have ‘controlled freefall’ experiences and the need to learn to accept and make use of uncertainty. Novel problems and challenging tasks, when supported by appropriate mentoring and supervision, will heighten uncertainty-related exposures. Firstly, there are situations where the new lawyer must confront ‘known unknowns’,<sup>29</sup> that is tasks and situations in which they know that they lack experience or competence (e.g. appearing in court). Secondly, there will be opportunities to discover ‘unknown knowns’,<sup>30</sup> that is where the new lawyer recognises that they are not in fact venturing into completely uncharted territory and that beneath the unfamiliar complexities are more familiar and flexible building blocks. A number of lawyers in our study reacted with joy and pride to moments when they realised they could in fact do something that they initially thought was beyond their reach. Thirdly, new lawyers must always confront ‘unknown unknowns’; that is blind spots, surprises and unpredictable twists in the practice of law which will be entirely new to them.

The transition to a competent legal professional is marked not only by filling in gaps in knowledge and experience, but also by bringing to awareness what is already known. At the same time, new lawyers find they must remain comfortably alert to situations in which there can never be any certainty. It is in such situations that we concluded that new lawyers must learn to manage and make use of the effects of uncertainty in their practice as part of their growing sense of professional identity.

### **3. ‘Value Match’: Finding a comfortable value accommodation between one’s own values and those modelled and practised by their practice**

New lawyers consistently reported the need to be comfortable with the professional values modelled in their practice and to find a satisfactory balance between their own values and those practised by their colleagues.

#### *Why finding a ‘value match’ is a positive influencing factor*

The notion of ‘values’ has an obviously wide meaning. It can refer to personal values and the

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<sup>29</sup> Bammer, G and M Smithson, et al. The Nature of Uncertainty in *Uncertainty and Risk: Multidisciplinary Perspectives*. G. Bammer and M. Smithson (eds). (2008), 289.

<sup>30</sup> Ibid.

need for the new lawyer to feel their personal values are aligned with those of the practice. Our particular focus is limited more to shared 'professional' values, in the sense of a shared 'concern' with professional responsibility.<sup>31</sup> The new lawyer will develop their own sense of this responsibility as they become more accustomed to practice. They will begin to develop their own 'ethical compass' to guide their professional behaviour. This compass will of course be refined and calibrated by the practice in which they work. The 'version' of professional responsibility articulated by the practice will reflect its own particular circumstances in terms of its history and its practitioners' interests,<sup>32</sup> the type of legal work they perform, its size and location, and the particular characteristics of its clientele.<sup>33</sup> It is in the intersection between these two that the new lawyer needs to find a comfortable match or at least an acceptable accommodation.

The practice's sense of professional responsibility will be reflected in its 'ethical infrastructure' – its stated policies and procedures and its unstated customs, work and management practices.<sup>34</sup> These influences will provide direct and indirect incentives and disincentives to encourage the practice's new lawyers to act and behave in certain ways.<sup>35</sup> Their own behaviour will be subtly altered to adopt these shared values, attitudes and customs.<sup>36</sup>

In the process of developing and refining their own ethical compass, new lawyers may need to accommodate an underlying desire to make a contribution to the community, to contribute to what Hyams calls 'the interests of a substantive social value'.<sup>37</sup> Their practice may give them scope to do this, or it may frustrate their attempts to contribute to social justice.<sup>38</sup> Such frustration can cause the new lawyer 'a considerable level of disquiet'.<sup>39</sup> The championing of 'truth and justice' by law schools may have fostered a career orientation towards an altruism, and it may not be accommodated to the reality of practice.<sup>40</sup> Even new lawyers practising in areas with a conscious

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31 Sullivan et al, op cit, Observation 3.

32 Nelson, R L *Partners with Power: The Social Transformation of the Large Law Firm* (1988).

33 This is illustrated vividly in research undertaken by Winter of mid-tier personal injury firm in Sydney, New South Wales with 'with strong Catholic foundations and an established reputation for personal client contact and service'. See Winter, R (2010) 'The Principled Legal Firm: Insights into the professional ideas and ethical values of partners and lawyers' *Journal of Business Ethics*, forthcoming, 4

34 See Chambliss, E and D B Wilkins, 'Promoting Effective Ethical Infrastructure in Large Law Firms: A Call for Research and Reporting' (2002) *Hofstra Law Review* 30, 691 and Parker, C, A Evans, L Haller, S Le Mire and R Mortensen (2008) 'The ethical infrastructure of legal practice in larger law firms: values, policy and behaviour'. *University of New South Wales Law Journal*, 3 (1).158-188.

35 The Queensland Legal Services Commissioner has an 'ethical culture check' which practices can use to assess their firm's ethical infrastructure. See the QLSC website <http://www.lsc.qld.gov.au/537.htm>

36 Briton, J (Legal Services Commissioner, Queensland), (2008) 'Incorporated legal practices: Dragging the regulation of the legal profession into the modern era' paper presented at the 3rd International Legal Ethics Conference, Gold Coast, 13-16 July .

37 Hyams, R (2008) 'On teaching students to 'act like a lawyer': What sort of lawyer?' *International Journal of Clinical Legal Education* 13, 21

38 Simon, W H *The Practice of Justice* (1998), 1.

39 Moorhead, R and F Boyle, 'Quality of Life and Trainee Solicitors: A Survey' (1995) *International Journal of the Legal Profession* 2, 217, 218

40 Evans, A and J Palermo, 'Australian Law Students' Perceptions of Their Values: Interim results in the first year – 2001 – of a three-year empirical assessment' (2002) *Legal Ethics* 5, 103. See too Seligman et al. 'Why lawyers are unhappy' (2005) <http://www.austlii.edu.au/au/journals/DeakinLRev/2005/4.html> and Schlitz, P J (1999) 'On Being a Happy, Healthy and Ethical Member of an Unhappy, Unhealthy and Unethical Profession'. *Vanderbilt Law Review* 52, 871

public service orientation (such as legal aid or community justice centres) may be disappointed when they find that they are at times forced to act as little more than ‘agents of the state ... rationing justice’, rather than directly meeting social needs.<sup>41</sup>

New lawyers may of course find other means to express this commitment. Some of our participants said that where their paid work did not provide it they looked to satisfy this instead through pro bono work. Alison said:

I do volunteer work [every week], which I love. [The pro bono practice] has more clearly articulated where they’re going, they put out what their goals were and their purpose statement and it was something like ‘to help people using your resources and compassion’ and I saw it and thought that’s what I want and that’s fantastic and excites me.

Alison had expressed early disquiet about whether she could find a convergence between her own values and those modelled by her practice

I am trying to figure out whether you can be ruthless and ethical or whether they are two separate things. Yes, [the practice partners] encourage you to be ethical by the letter of the law, [but] I have experienced instances where I was treated in a way which I felt was unethical, in a holistic way, or I was asked to treat somebody else that way and refused and felt the ire of [the partners] because I refused to do it.

When interviewed six months later she was even more convinced that the value match she had tried to accommodate was not working:

I struggle with it [the way the firm operates], this is the area that I find problematic. I think it’s meant to sound clever but [the way the firm operates] comes across as cunning. It feels manipulative and dishonest, even though, I am sure that’s not the intention. It’s probably what my goal [should be, that is being] more strategic about how I handle a case, it just doesn’t sound it, that’s all. And it doesn’t feel it.

She subsequently left the practice. When interviewed later she was more explicit about the source of her discomfort:

[T]o me it speaks to the culture of the firm, the direction that they’re taking, the direction that they’re willing to take, the actions that they’re willing to take to get ahead, and I don’t want to have a part of that.

But most other lawyers had achieved a satisfactory value match. One said:

I think I fit in quite well. I’ve got friendships and relationships here. I’ve got a commitment to access to justice... but I think it’s good that we’re all here, we’re all on the same page, it’s about access to justice, it’s not about money.

Another said:

I want to be an ethical lawyer, money isn’t everything and [they] agree – I’m not permitted to take short cuts.

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41 Sommerlad, H ‘The Implementation of Quality Initiatives and the New Public Management in the Legal Aid Sector in England and Wales’ (1999) *International Journal of the Legal Profession* 6, 311

This is our third tentative conclusion – that new lawyers need to be able to develop their own sense of professional responsibility and to find a satisfactory match between their own values and those modelled in their practice.

## **How CLE programs can assist in developing legal professionalism**

It is these three factors (balancing autonomy and supervision, managing uncertainty and finding a value accommodation) which were seen as important in developing a professional identity. Participation in legal clinic can provide a much earlier exposure to these experiences. Our preliminary findings have caused us to reflect more critically on the three clinical programs in which we are directly or indirectly involved:

- A Youth Law Clinic, operating from the Youth Law Centre in partnership with both Australian Capital Territory (ACT) Legal Aid and a national legal firm;
- A Community Law Clinical Program, operating in partnership with the ACT Welfare Rights & Legal Centre (a community justice centre); and
- A Legal Aid Clinic operating in partnership with ACT Legal Aid.

These programs are ‘live client’ clinics and so our focus has been mainly on the scope for exposure to such experiences offered by these programs. But we see an important role for other forms of clinic, particularly for simulation clinics as important means to provide similar exposure.

Legal clinics offer students a range of opportunities dependent upon the work the clinic undertakes, the experience and ability of individual students, the balance it strikes between student learning and client care, the needs of the community the clinic serves, the resources available and the attitude of the legal community in which the clinic operates. Each program affords different opportunities to teach and model approaches conducive to learning professionalism.

## **What contribution can clinic make to developing competence and autonomy?**

As we have detailed, participants spoke of the benefits of autonomous practice supported and supervised by effective mentoring. However ‘in a clinical setting, the concept of autonomy [which makes the presumption of] law graduates being able to work independently and be self-directed in tackling and completing tasks without direction or supervision’ faces particular challenges.<sup>42</sup> One is the need to ensure client care. Another is the need to overcome the learned dispassionate analysis, demeanour of non-involvement and neutrality which law students may bring with them as a consequence of their legal studies background.<sup>43</sup>

These challenges can be overcome in various ways, most notably through clinicians ‘being less directional in the approach to problem solving, by encouraging initiative and showing that the tasks students are undertaking are valued.’<sup>44</sup> This may simply be through ‘answer[ing] a question

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42 Hyams, R (2008) ‘On teaching students to ‘act like a lawyer’: What sort of lawyer?’ *International Journal of Clinical Legal Education* 13, 21, 26

43 Maharg, P *Transforming Legal Education, Learning and Teaching the Law in the Early Twenty First Century* (2007), 222

44 Hyams op cit

with a question',<sup>45</sup> in a way that encourages students to suggest their own solutions and learn for themselves. As Kerrigan highlights, clinics can offer unique opportunities for exposure to 'disorienting dilemmas' and these are very similar to the dramatic learning events we have discussed. Such dilemmas can start students on the path of self evaluation and lead to increases in their competence and confidence. Kerrigan gives as an example a client interview that goes 'horribly wrong', and where the student's sense of failure provides the 'disorienting dilemma' which can lead to a critique by the student and colleagues, not just of that interview, but of the way students communicate with clients and others about the law.<sup>46</sup> Similar dramatic leaps can come from experiencing a supervised court appearance (where the jurisdiction allows it), conducting a solo client interview or taking responsibility for preparing particular parts of a client's larger matter.

The benefit of this early exposure is to allow considerations of the exercise of good judgment to be part of student's development of a professional identity. Hyams refers to such judgment as an 'elusive quality' which is difficult to teach.<sup>47</sup> He suggests that one starting point may be to encourage students to take a holistic approach to their clients' problems and in the process consciously note and evaluate the factors that are influencing their own judgment. This approach can foster the 'potential to analyse critically rather than merely reproduce the discourse of professionalism' and so begin to develop a personal professional identity.<sup>48</sup>

### **What contribution can clinic make to dealing with uncertainty?**

As we have detailed, participants reported learning to manage uncertainties similar in many respects to those faced by students in clinic. Clinic has a significant role to play in giving students the skills and confidence to deal with uncertainty. Contact with 'real' clients with 'real' problems can enrich student learning by highlighting that there are uncertainties over which the student has little or no control. Duncan says this 'realness' of practice produces much closer attention:

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.<sup>49</sup>

The tools of reflection and collaboration can be successfully deployed to make students more comfortable with such aspects of uncertainty. Clinicians can facilitate collaborative reflection to encourage students to discuss the uncertainties they confront and reassure them that others are confronting similar concerns. Reflection can foster and encourage students to critically consider contextual and systemic issues. Reflection can take the form of spontaneous, informal, 'taking the teaching moment' discussions, as well as being embedded in a more formal learning structure. Collaboration with other students can make the most of these informal learning opportunities, as

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45 Macfarlane, A and P McKeown, 'Clinical Practice:10 lessons for new clinicians' (2008) *International Journal of Clinical Legal Education* 13, 104

46 Kerrigan, K (2007) 'How do you feel about this client? - A commentary on the clinical model as a vehicle for teaching ethics to law students', *International Journal of Clinical Legal Education* 24

47 Hyams, op cit.

48 Maharg, op cit, 191

49 Duncan, N (2005) 'Ethical Practice and Clinical Legal Education' *International Journal of Clinical Legal Education* 7,11

students give each other feedback and share their experiences.

Clinic gives students the opportunity to also recognise the limitations of the law in the context of human problems. Students conducting client interviews may find that problems are often emergent; with sometimes both the student and the client not know the full issues until they are worked through – with issues continuing to emerge during the interview. This realisation requires flexibility on the part of the student and increased preparedness to keep asking questions. As a supervisor explained about our recently graduated lawyers:

The thing they'll struggle with is [that] they think that most things are definitive, that there is a solution. And that that solution is to be found either by going through a text or going through a case, and it's not so.

Noone and colleagues note that clinicians themselves can operate as role models for students.<sup>50</sup> The clinician can model client interviews to give students the opportunity to see them deal directly with uncertainty. Students can learn that saying to a client 'I don't know but I can find it out' is a legitimate way of dealing with content uncertainty. Students lacking confidence in their own capacity to deal with client emotions can see the approach a clinical teacher takes to deal with such matters.

A clinical program can also provide opportunities to explore various paradigms of 'lawyering', such as those identified by Parker (adversarial advocate, responsible lawyer, moral activism and ethics of care).<sup>51</sup> Clinic gives students the chance to reflect about where they fit in these paradigms and consider what they think makes an ethical practitioner. Being aware that their behaviour as 'role models' is also being observed requires clinicians themselves to be more explicit about the role they are adopting and the type of lawyering they are displaying.<sup>52</sup>

## **What contribution can clinic make to finding a value accommodation?**

As we have detailed, participants spoke of the need to find for themselves a practice which did not pressure them to suppress their values but allowed them to cultivate and develop their own ethical compass.

We agree with Hyams that 'learning by osmosis' or 'on the run' is no way to learn or acquire a sense of professionalism.<sup>53</sup> Expecting that ethical learning will naturally occur simply through exposure to real or realistic cases is misguided.<sup>54</sup> What is required instead is a much 'broader and deeper engagement with what it means to be a lawyer and the moral attitudes, decisions and outcomes implicit in legal practice'.<sup>55</sup> A well structured clinical exposure provides a pre-practice means to do this.

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50 Noone, M A, Dickson J. & Curran E. (2005) 'Pushing the Boundaries or Preserving the Status Quo? Designing Clinical Programs to Teach Law Students a Deep Understanding of Ethical Practice' *International Journal of Clinical Legal Education* 8,104

51 Parker, C 'A critical morality for lawyers: Four approaches to lawyers' ethics' (2004) *Monash University Law Review* 30,49-74.

52 Hyams, op cit, 24; Noone et al, op cit,106

53 Hyams, op cit, 29

54 Kerrigan, op cit, 7

55 Kerrigan, op cit.

Clinic plays an important role in engaging students in discursive discussion about the sort of lawyer they aspire to be, and where they see themselves fitting into the profession. Duncan argues that it is important that students are exposed to at least a simulation of the pressures of legal practice 'in an environment in which it is possible to explore the problems in principle...in order to provide them with a sound foundation in values which will strengthen their ability to deal with the vicissitudes of practice'.<sup>56</sup> This is a theme also echoed by Noone and her colleagues:

The contest of views about what is ethical legal practice and the different lawyering paradigms provides fertile ground for debate and growth amongst students to which clinical supervisors can contribute with their blend of practice, academic rigour and reflection. In this way students begin to develop a deep understanding of ethical practice.<sup>57</sup>

Discussing professional values in a clinical setting can assist students to begin to identify their own professional sense, and so be better able to assess in the future whether a particular practice will suit their professional identity.

Pepper<sup>58</sup> stresses the importance of giving scope to students' intuition in developing their ethical judgment. Extrapolating to a clinical situation, students need to be encouraged to ask themselves 'Is this the right thing to do? Is there some perspective from which it is the wrong thing to do? Will it harm people who do not deserve to be harmed? Is it dishonest, even though not unlawful?'.<sup>59</sup> The opportunity to consider such questions and then have one's judgment exposed to discursive examination can provide invaluable preparation for acquiring an ethical intuition.

For many, it may seem to be asking too much of a clinical program that it play all these roles, particularly given the relatively limited time most students will spend in such a program.<sup>60</sup> But adding engagements in simulation clinics can extend the valuable exposure to the types of experiences our new lawyers have highlighted.<sup>61</sup>

## Conclusion

Participants reported that a practice which allowed them to find a suitable balance between autonomy and supervision, which helped them to recognise and deal with the uncertainties of practice and which allowed them to find a comfortable value accommodation positively aided their development as professionals. An appropriate clinical experience can assist law students to be ready for these experiences long before practice.

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56 Duncan, op cit, 17

57 Noonan et al, op cit, 111

58 Pepper, S L How to Do the Right Thing: A Primer on Ethics and Moral Vision (2010). University of Denver Sturm College of Law Legal Studies Research Paper No. 10-01. Available at SSRN: <http://ssrn.com/abstract=1542170>, accessed 30 August 2010

59 Pepper, op.cit.

60 In Australia at least, though this is less likely to be the case in the US for example.

61 We have now implemented such an approach in the Graduate Diploma in Legal Practice at the Australian National University based on and adapted from the program developed by Paul Maharg at the University of Strathclyde. The program of practical legal training exposes students to the experience of what it is to be a professional and what it means to be an ethical practitioner well before their admission to practice.

