
“On teaching students to ‘act like a lawyer’: What sort of lawyer?”

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Teaching professionalism is a challenge for educators in any course of professional education. It is also often very confronting for students. In legal education, both students and teachers can find the concepts foreign because of the focus on analytical and logic skills and the lack of application to ‘real life’ requirements of legal practice.

This paper investigates the intersection of clinical teaching and professional responsibility. It investigates the issue of teaching students to “act like a lawyer” and asks the fundamental question: “*What sort of lawyer do we want students to act like?*” In presenting this paper, it is accepted that, certainly in Australia, about 50% of law graduates end up in non-legal practicing, but related professions¹ – and thus an approach to teaching needs to be developed which deals with this reality.

Why do lawyers call themselves members of a ‘legal profession’? Theoretically, the common features of what makes a group of lawyers in any society a profession can be broken down into the following:

1. Licensing or accreditation requirements that set minimum educational requirements for entry (a law degree and any associated professional qualifications) and ongoing training requirements (continuing professional development).
2. High levels of training and intellectual skill.
3. A significant degree of autonomy and the exercise of high degrees of personal judgment.
4. A commitment to the interests of a substantial social value – the medical and nursing profession serve the interests of health, while the legal profession serve the interests of justice.

If these attributes are fundamental to the nature of a ‘legal profession’, are current law students being educated with the aim of educating these qualities?

Accreditation requirements indicate an ability to engage in and a commitment to life-long learning. Legal educators must ask themselves whether this is currently being inculcated in law students. Are students being shown self-directed learning practices in their undergraduate years? How much are they being ‘spoon fed’? Are they being equipped with any tools for ongoing self-directed learning?

The second aspect, that of intellectual skill, definitely appears to be on the legal education agenda.

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1 Vignaendra S, ‘Australian Law Graduates’ Career

Destinations’ (1998) The Centre for Legal Education, Department of Employment, Education, Training and Youth Affairs, 21.

Law school certainly does attempt to sharpen students' intellectual skills by teaching them logic, analysis, synthesis, argument, deductive and inductive reasoning. This is being done quite well, according to the U.S. Carnegie Report, which indicates that within months of arriving at law school, students are able to show developing skills in legal argument, precise language and application of legal rules.²

The training aspect is less convincing and it depends what is meant by 'training'. Are students adequately trained for practice? In this writer's opinion they are not, but clinical legal education certainly attempts to lead the way in the training of practical legal skills such as interviewing, negotiation, letter writing and basic advocacy. It can be forcefully contended that, at its most basic, clinical legal education has managed to build up credibility in these areas.

The third aspect – the qualities of autonomy and personal judgment, are difficult to measure. It is questionable whether these skills are being taught well in law school and this issue will be returned to later.

Finally, there is the issue of commitment to the interests of a substantial social value. Do students leave university with an understanding of what this means? Bound up in this concept is both knowledge and appreciation of ethical issues and an understanding of professional conduct or professionalism.

So – what is professionalism? At first instance, it must be decided what it is not. It is not simply the rules of professional conduct as set out in that particular jurisdiction.³ Parker and Evans call professional conduct rules 'the law of lawyering' and state that such rules are helpful in guiding behaviour, but do not provide any guidance regarding lawyers' values or help a person make choices about what sort of lawyer one should be.⁴

Noone and Dickson set out their minimal requirements for a legal practitioner to be considered professionally responsible as follows:

1. The practitioner fulfils the duties attached to a fiduciary relationship
2. The person is competent in the work they perform
3. S/he communicates often, openly and clearly with their client
4. S/he does not encourage the use of law to bring about injustice, oppression or discrimination
5. S/he identifies, raises and discusses ethical issues with current/potential clients
6. S/he seeks to enhance the administration of justice; and actively engages in serving the community.⁵

Three further requirements can be added to augment this list:

- a) The lawyer should be able to work in an autonomous way – in an independent, self-sufficient and self-directed fashion.

2 William Sullivan *et al* (2007) *Educating Lawyers: Preparation for the Profession of Law*, Carnegie Foundation for the Advancement of Teaching, Jossey-Bass, Stanford. Observation 1.

3 Parker C and Evans A, *Inside Lawyers Ethics*, Cambridge University Press, Melbourne, 2007, 4.

4 *Id.*

5 Dickson J & Noone M.A, *Teaching Towards a new Professionalism: Challenging Law Students to Become Ethical Lawyers* (2001) 4(2) *Legal Ethics* 127 at 144.

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- b) The lawyer should be able to exercise judgment – not only relating to how to resolve a client’s problems, but reflective judgment of their own behaviour and actions.
- c) S/he should have an ongoing commitment to lifelong education – over and above that which is required by continuing professional development points. This requires two things – first, an understanding that good lawyering and professionalism requires an ongoing process of understanding personal limitations and a commitment to remain fresh, innovative and knowledgeable in professional work. Second, it requires the tools to put this understanding and commitment into action.

It is this author’s contention that these three additional requirements are not being inculcated well by mainstream undergraduate teaching. Clinical legal education can and should focus on these requirements and clinicians may be fostering these aptitudes implicitly, but it is possible to be more explicit in mentoring clinical students in these qualities. If clinicians wish to tackle the issue of teaching their students how to behave, rather than simply think, like lawyers then the discussion needs to also deal with teaching professionalism in a generic sense. Are clinical legal educators committed to teaching students to “act like a lawyer”? What sort of lawyer is meant by this? How do clinicians see the profession and their role within it? Are clinicians teaching students to be litigators, advisers, problem solvers, advocates or resolvers of conflict? Or perhaps all of these?

Parker and Evans⁶ posit four possible approaches to lawyering styles. This is a helpful paradigm for clinicians in deciding how to approach clinical pedagogy. The first type of lawyer is the **adversarial advocate**.⁷ This is the traditional approach to lawyering – one that highlights a lawyer’s duty to the client to pursue the client’s interests vigorously within the bounds of the law. This is governed by legality, not by morality or any further social duty or responsibility and adheres to the written rules of professional conduct.

The other approaches they suggest are:

The responsible lawyer:⁸ This position posits that lawyers, as officers of the court and trustees of the legal system, must see themselves as having an overriding duty towards maintaining the institutions of law and justice in their best possible form. For a responsible lawyer, personal moral beliefs are irrelevant – this type of lawyering looks at the ethics inherent in their role as an officer of the court and in the legal system itself.

Of course, the downside of this approach is that by taking a “responsible lawyering’ approach, the lawyer may be in conflict with the need to appropriately serve the client’s interests. In professional conduct rules, this approach is often in tension with the traditional advocate approach and the debate is often “How does the lawyer balance the duty to the court against the duty to the client?” This approach is fairly conservative, as it operates within the current legal rules and frameworks and does not critique the current institutions of law.

The moral activist:⁹ This posits that lawyers should follow their own ethical standards about what it means to do justice. This type of lawyering states that one cannot escape moral culpability for actions by retreating into the limitations imposed by the above two categories. The downside of moral activism is it neglects the tenet that everyone in society is entitled to legal representation no matter what the lawyer thinks of the cause. It prescribes no particular duty to the law or the legal

6 Parker and Evans, note 3 at 21–37

8 *Ibid* at 26.

7 Parker and Evans, note 3 at 24.

9 *Ibid* at 28.

system and indeed encourages lawyers to challenge it. It also places the individual lawyer's value system and commitment to justice (as perceived by that particular lawyer) above the duty to the client. Sometimes it is criticised as being just a demonstration of a lawyer's ego.

Ethics of care:¹⁰ This is concerned with personal and relational ethics. It is particularly concerned with preserving or restoring relationships and avoiding harm. It sees relationships as more important than the institutions of the law or social ideas of justice and ethics. Arguably, this approach has three consequences:

- It encourages lawyers to take a more holistic view of clients and their problems.
- The ethics of care emphasizes dialogue between lawyer and client and a participatory approach to lawyering.
- It encourages non-adversarial resolutions in order to preserve relationships, if possible.

Legal educators, especially clinicians, don't have to teach students to be specifically one or other of the above. However, it is vital that clinicians are aware of the different approaches to lawyering that are being taught and modelled. Clinicians must have a clear idea of what their approach to lawyering is so that clear messages can be provided to students.

Clinicians' pedagogic responsibility

Other clinical scholars have written about clinicians' ability (or duty) to teach legal ethics within a clinical framework.¹¹ Ten years ago Goldsmith and Powles¹² raised this issue in the context of their contention that law schools and the legal profession itself had been derelict in their duty to promote ethical awareness and a sense of professional duty.

They stated: "Without question, law schools in Australia have not done enough to promulgate and promote more substantive conceptions of legal competence and professional responsibility".¹³

Goldsmith and Powles did not limit their discussion to the integration of ethics into clinical legal education or the wider undergraduate curriculum. They called for law school curricula to be developed which will "find and operationalise methods for greater professional self-awareness"¹⁴. They suggested the development of interdisciplinary methods and materials in order to create a wider pedagogy of professional responsibility¹⁵. This thinking can be taken one step further. Clinicians have the unique opportunity to develop clinical pedagogy and to mentor students in a range of broad and fundamental professional skills which can enhance them in their future careers, whether they remain in the law or not.

Accordingly, clinic may be seen as an opportunity to mold a student's entire approach to their future professional career. The question as to whether this is an appropriate use of clinic will be dealt with later in this discussion.

10 *Ibid* at 31.

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

12 Goldsmith A & Powles G *Lawyers Behaving Badly:*

Where Now in Legal Education for Acting Responsibly in Australia in K Economides (ed), *Ethical Challenges to Legal Education and Conduct* (Oxford, Hart Publishing, 1998).

13 *Ibid* at 2.

14 *Ibid* at 15.

15 *Ibid* at 14.

Clinicians would mostly agree that law cannot be taught in a vacuum – many legal educators are drawn to teaching clinic because of a dissatisfaction with the case method of teaching – the disaffection and tedium that law students suffer through this form of teaching is often obvious and palpable¹⁶, as many students realise that the way they learn law has little connection with human transactions in the real world.

Legal education is extremely efficient in its ability to teach students analytical and logical reasoning¹⁷ and not for a moment is it suggested that learning these abilities is irrelevant or unimportant. However, law school has traditionally not been very good at integrating knowledge and skills well with subsequent stages of a professional career.¹⁸ This is an old complaint and has been the subject of other writing.¹⁹ Clinic, however, prides itself on the ability to integrate ‘black letter’ legal knowledge with real life situations and provide students with a context for a deeper understanding and application of legal knowledge.

However, clinic has a broader mandate than just the integration of practical legal skills with knowledge of the law. Clinicians can (and should) take on the mantle of teaching for lifelong learning, which includes the three additional requirements of a professional which have already been enumerated above – autonomy, judgment and a commitment to lifelong education.

Current post graduation traineeship systems are too ‘hit and miss’ to rely on this training to occur after a law graduate joins the workforce – and further, if a large number of law graduates don’t join the profession, they do not have access to whatever traineeship system exists for those entering a legal career. They are expected to walk into a professional occupation understanding what is required to behave professionally with no previous instruction whatsoever. Accordingly, the next part of this paper will identify these skills of professionalism and offer some proposals as to how they might be taught in a clinical environment.

Autonomy

There has been a great deal of scholarly writing about individuals’ self-perceptions of autonomy. DeCharms²⁰ describes the dichotomy of individuals’ feelings of being either “origins” (that is, people who felt their behaviour is determined by the own choosing) or “pawns” (those who feel their behaviour is determined by external forces beyond their control).²¹ More recently, Ryan and Deci’s work²² has modified this dichotomy into a graded theory of internalization – the more internally valued a behaviour is and the more it is internally regulated, the more the individual perceives themselves as acting autonomously.²³

16 *Clinical Buddies: Jumping the Fact-Law Chasm* in Naylor B and Hyams R (Eds) *Innovation in Clinical Legal Education: Educating Future Lawyers — Monograph No 1* (2007) *Alternative Law Journal*.

17 Sullivan *et al*, note 2.

18 Boon A & Whyte A *Looking Back: Analysing Experiences of Legal Education and Training* (2007) 41 *The Law Teacher* 169, 182.

19 See for example Martin J & Garth B *Clinical Education as a Bridge between Law School and Practice: Mitigating the Misery* (1994–1995) 1 *Clinical L. Rev.* 443.

20 DeCharms, R *Personal Causation: The Internal Affective Determinants of Behaviour* (1968) New York: Academic.

21 *Ibid* at 273–274.

22 Ryan R M & Deci E (2000) *Self-determination and the facilitation of intrinsic motivation, social development and well being* 55 *American Psychologist* 68–78.

23 Stefanou C, Perencevich K, DiCintio M & Turner J *Supporting Autonomy in the Classroom: Ways teachers Encourage Student Decision Making and Ownership* (2004) 39(2) *Educational Psychologist* 97–110 at 98.

In a clinical setting, the concept of autonomy involves law graduates being able to work independently and be self-directed in tackling and completing tasks without direction or supervision. It requires self-insight into how a project is broken down into sub-tasks and how work loads and time limits are managed. To a certain extent legal educators have an expectation that this is an attribute learnt by law graduates by the mere fact that they have managed the requirements of studying a law degree. However, it cannot be expected that students will simply learn the skill to act autonomously by implication or osmosis.

If it can be accepted that learning is an “active, self-constructed and intentional process”²⁴ then this process can be explicitly assisted by supporting students’ journey towards autonomous learning and action. Black & Deci, writing in the field of science education, describe this as taking the students’ perspective, acknowledging their feelings and providing them with “pertinent information and opportunities for choice, while minimizing the use of pressure and demands.”²⁵

Further, clinicians can promote students’ attainment of autonomy by supporting their intrinsic motivations to learn skills and progress their casework competently – this can be done by being less directional in the approach to problem solving, by encouraging initiative and showing that the tasks that students are undertaking are valued.²⁶

Judgment

Lawyers and other professionals are constantly called upon to make judgments – not only in relation to the tactics and techniques in solving client problems, but also self-judgment: Did I handle that matter well? How could I have done it better? Was I effective in the way I interviewed/negotiated/advocated?

Sampford and Blencowe point out that lawyers make judgments on a daily basis for clients on a variety on matters not limited to legal issues.²⁷ This will include judgments relating to time constraints, economic factors and emotional issues such as a client’s ability to cope with litigation and how extended conflict may affect a client’s complicated personal or business relationships. Eberle suggests that lawyers (and, it can be added, other professionals) must show “sound judgment, practical wisdom, a process of imagination, careful deliberation, and intuitive comprehension.”²⁸ The CLEA Best Practice Report²⁹ provides a comprehensive list of “good lawyer” traits gleaned from various scholarly writings – the skill of judgment is a regular inclusion in these lists.

It is this writer’s opinion that there would little controversy over the fact that it would be a positive attribute for law graduates to be able to demonstrate good judgment skills, but the issue remains as to how this elusive quality is to be taught. It is essential for students to learn more than just legal or technical judgments based on win/lose scenarios. In this regard clinical teachers can borrow

24 *Id.*

25 Black A E & Deci E L (2000) *The effect of instructors’ autonomy support and students’ autonomous motivation on learning organic chemistry: a self determination theory perspective* 84 *Science Education* 740 at 742.

26 Stefanou, note 19 at 100.

27 Sampford C & Blencowe S *Educating Lawyers to be Ethical Advisers* in Economides, Kim (ed), *Ethical*

Challenges to Legal Education & Conduct, (Hart Publishing Oxford 1998) at 319.

28 Eberle E J *Three Foundations of Legal Ethics: Autonomy, Community, and Morality* (1993) 7 *Georgetown Journal of Legal Ethics* 89 at 123.

29 Stuckey R et al *CLEA Best Practice Report* (2007) *Clinical Legal Education Association U.S.A.* at 51–54.

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from some of the concepts inherent in the notions of therapeutic jurisprudence. The ‘fathers’ of this notion, Winick and Wexler, describe therapeutic jurisprudence as “having a more humanistic orientation, seeking to lessen the excessive adversarialness of lawyering, trying to improve client well-being generally”.³⁰

The interdisciplinary nature of therapeutic jurisprudence, with its focus on a consideration of the emotional and psychological welfare of those who come into contact with the legal and justice system, is an ideology that should be quite familiar to a clinical teacher. By necessity, clinicians usually attempt to solve client problems without recourse to litigation as often clinical clients cannot afford the time, expense and emotional strain associated with court proceedings.

Further, clinicians are not limited by fee considerations and are able to take a broader and more holistic approach to their clients’ problems, which may not be available to a lawyer working in a “fee for service” environment. Clinicians are also often influenced by their students’ idealistic views and their enthusiasm in attempting to assist a client above and beyond the resolution of the immediate problem which the client presented to the clinic. Many clinical teachers have practised in this fashion for years, without realising that they are actually incorporating therapeutic jurisprudence in their approach to practice.

Thus, clinicians can embrace these concepts explicitly in their approach to clinical pedagogy. Therapeutic jurisprudential methodology can be modeled to students so that they can form an appreciation that real lawyering goes beyond technical judgments based on dry and logical analysis. Students working in a clinic should be allowed and encouraged to take into account therapeutic and non-therapeutic consequences for clients.

The second aspect of this equation is the skill of self-judgment and reflective lawyering. The best known work on reflective learning by professionals is by Schön who created the term “reflective practitioner”³¹ In order for student reflection to occur, some basic pre-requisites must be met. Primarily, students must be put into situations which are outside their normal range of experiences,³² so that they find themselves reacting to a novel situation which, in essence, requires some “de-briefing” and will thus trigger the reflective process.

For anyone who has ever worked in a clinical legal environment, it will be obvious that clinic students find themselves in such situations almost on a daily basis. The environment of the clinic itself is usually outside their life experience and presents challenges to them, before they have even had the opportunity to set eyes upon a client. Clinical legal education provides the perfect laboratory for action and reflection. The reflective process can be encouraged in various ways and will often happen as a by-product of clinical work – by informal peer discussion or by the more formal supervisor-led dialogue.

The best way to harness the powerful tool of reflection is to require the writing of reflective journals to provide a structured format for the development and nurturing of meaningful and considered student reflection. It compels students to tackle their clinical experience in a critical and more profound manner – as Ogilvy succinctly describes it:

30 Winick B & Wexler D *The use of Therapeutic Jurisprudence in Law School Clinical Education: Transforming the Criminal Clinic* 13 *Clinical L. Rev.* (2006–2007) 605 at 607.

31 Schon, D *The Reflective Practitioner: How*

Professionals Think In Action (1983) New York: Basic Books.

32 Rogers R *Reflection in Higher Education: A Concept Analysis* (2001) 26 (1) *Innovative Higher Education* 37 at 42.

“Through writing about what and how they are studying, students can move from superficial comprehension to employing critical thinking skills in their engagement with the material.”³³

Reflective journals or learning diaries are becoming widely used educative tools in clinical legal settings. In Australia, many University law faculties have introduced them in recent years as a compulsory part of their clinical law courses.

In many clinical programs, both in Australia and elsewhere, they are a “hurdle” requirement to passing the unit – that is, the required number of diary entries must be provided by the student in order to satisfy the journaling requirement of the unit, but often no further assessment is made of their content. In a small number of clinical units, the actual substance of the journal entries are assessed and a numeric mark given for the work.

There are opposing points of view for and against providing a numeric mark to students in relation to the actual content of the journal entries. Discussion regarding this follows later in this paper.

Ongoing commitment to lifelong education

Clinicians are well situated to encourage an understanding in our students that legal education does not cease when they graduate. Clinic is an excellent location to model the commitment to be up to date in law and procedure. It also requires self-knowledge and honesty about areas of knowledge and skills. A professional not only knows what they know, they know what they don’t know and how to go about remedying this lack of knowledge. This applies to both information and skills. A good legal professional understands the limits of their knowledge in specific legal areas, but also their skills’ limitations and has the honesty and integrity to ameliorate the situation when able to do so.

Lifelong learning skills are bound up with the ability to be self-reflective. Claxton³⁴ believes that the skill of life long learning requires resilience, resourcefulness and reflection. He states:

“Lifelong learning demands...the ability to think strategically about your own learning path, and this requires the self-awareness to know one’s own goals, the resources that are needed to pursue them, and your current strengths and weaknesses in that regard... You have to be able to monitor your progress; if necessary even to measure it; to mull over different options and courses of development; to be mindful of your own assumptions and habits, and able to stand back from them and appraise them when learning gets stuck; and in general to manage yourself as a learner – prioritising, planning, reviewing progress, revising strategy and if necessary changing tack.”³⁵

The UK Dearing Report, (the reports of the National Committee of Inquiry into Higher Education) a series of major reports into the future of Higher Education in the United Kingdom published in 1997, proposed that higher education needed to re-direct its efforts in order to create a situation in which “an effective strategy will involve guiding and enabling students to be effective learners, to understand their own learning styles, and to manage their own learning”.³⁶

33 Ogilvy J *The Use of Journals in Legal Education: A Tool for Reflection* (1996) *Clinical Law Review* (3) Fall 55.

34 Claxton G (1999) *Wise up: the challenge of lifelong learning* (London: Bloomsbury) at 180.

35 *Ibid* at 14.

36 *Report Of The National Committee Of Inquiry Into Higher Education 1997* (Dearing Report) Paragraph 8.15.

The report states that implementation of such a strategy is as not only directly relevant to enhancing the quality of student learning while in higher education, but also to equipping them to be effective lifelong learners. The report called for resourcing to be re-directed so that staff can be less concerned with simple class contact and more engaged in the management of students’ learning, using a range of appropriate strategies.³⁷

Why clinic?

Why is clinic the appropriate place to teach professional responsibility? The immediate response is – if not clinic, where else? Large classes with one lecturer to 150, 100 or even small group teaching of 50 students does not provide opportunities to model, discuss or even simulate professional responsibility. However, the assumption that clinic is the best place to do this needs to be challenged. Can we just assume that a ‘problem first’ approach is a useful pedagogy for learning professional responsibility? Arguably, the smaller and more personal teaching ratio in clinic makes it an ideal venue; the immediate and pressing needs of real clients throws up endless possibilities for the demonstration and development of skills required to learn professional responsibility.

However, many clinical teachers have an intrinsic belief that a student will learn certain skills, including how to act professionally, simply by seeing a real client with a legal problem and then having to deal with it on an ad hoc basis. There is perhaps a belief that these skills will develop instinctively from having to find a solution to that problem ‘on the run’. Certainly, it is possible to learn this way,³⁸ but this concept of “learning by osmosis” must be tested as it is not necessarily the best way to learn professional skills.³⁹

Bergman argues that many clinicians assume that this form of clinical training affects students’ abilities to practise law in a positive fashion.⁴⁰ However, he questions this approach and advocates a pedagogy of discrete lawyering skills which allows for repetition and refinement – a ‘selected skills’ approach⁴¹ which assists the student to develop professional responsibility. Bergman’s position challenges the assumption that clinical work is a superior system of skills teaching and is also better at providing students with concepts of professional responsibility.⁴²

One resolution to this may be the ability for clinics to enhance the “hit or miss” aspect of clinical work by running a thorough, detailed and sophisticated seminar or tutorial program alongside the live-client work in order to support and expand the legal skills learnt in the clinical environment. Arguably, values awareness and professional conduct cannot be taught in one seminar or tutorial – many clinical scholars would argue that it must be taught pervasively across the entire law school curriculum. However, this does not absolve the clinician of the responsibility to also provide a pedagogical basis for tackling both ethical issues and wider issues of professional responsibility in a more formal classroom setting, especially whilst students are undertaking the clinical program and these issues are relevant and immediate.⁴³

37 *Ibid* at 8.18.

38 Sylvester C *et al* (2004) *Problem-Based Learning and Clinical Legal Education: What Can Clinical Educators Learn from PBL?* 4/6 *International Journal of Clinical Legal Education* 39.; Stuckey (2007), Ch 5: *Best Practices for Experiential Courses*.

39 Evans A & Hyams R *Independent Evaluations of Clinical Legal Education Programs: Appropriate*

Objectives and Processes in an Australian Setting (2008) *Griffith Law Review* 13.

40 Bergman P, *Reflections on US Clinical Education* (2003) 10(1) *International Journal of the Legal Profession* 109 at 113.

41 Evans & Hyams, note 39 at 14.

42 *Id.*

43 Evans & Hyams, note 39 at 15.

Further, setting time aside (and if necessary, reducing the client in-take in order to do so) to “workshop” a discussion with the students relating to issues of professional responsibility which have arisen from the day’s clinical work on a regular sessional basis, is a way to expose students to these issues in a pervasive and explicit way, rather than just hoping that students will simply absorb the important lessons of how to behave in a professional, ethical and responsible fashion.

The way forward

1. Assessment Issues

It is one thing to accept the pedagogical rationale for teaching professional responsibility. It is quite another to presume that a fair, transparent and defensible assessment tool can be created for measuring the outcomes of such teaching.

The Clea Best Practice Report can provide some guidance in this area. It states:

“Outcomes should be measurable. It is self-defeating to state an outcome which cannot be assessed. At the same time, it is important not to be bound by the expectations of objective decimal-place accuracy. In this context, “measurable” means ‘a general judgment of whether students know, think, and can do most of what we intend for them.’”⁴⁴

However, attempts to teach professional responsibility to our students loses much of its pedagogical value if not assessed. As Stefani points out,⁴⁵ academics are becoming increasingly aware that assessment of a student’s learning should not be based solely on the student’s ability to create a “product” but on the learning process itself. That is, clinicians should be assessing their students’ ability to learn, as well as testing the outcomes of what has been learnt.

In a clinical environment, supervisors are not just marking students on their ability to write a document or to create a winning piece of advocacy. The students’ ability to learn legal and administrative processes is also being assessed, as well as their capacity to be creative, to make decisions and a myriad of other skills which cannot be simply measured as a “product”. Students can and should be assessed on the journey itself, not on the end result or product.

2. Feedback

The feedback provided to the student when assessing their developing self evaluation skills and their increasing understanding of professionalism is itself a valuable pedagogical tool. Students will pay much more attention to work that is being graded – they will treat it more seriously and, in this increasingly competitive era, will strive to better their marks if only for the pragmatic reason of ensuring their academic transcript will be read favourably by potential employers.

However, the motivation for wanting to achieve better results is, in this author’s opinion, irrelevant. Marks equal incentive and motivation. Educators can utilise that motivation to their students’ advantage by insisting that reflective work is assessable and by providing feedback on the process to the students in order to increase their skills as insightful learners. Graded assessment provides a structure for feedback – an essential ingredient in the learning process. For feedback to be a useful pedagogical tool, it must be timely and frequent, transparent, honest and structured. It

44 Stuckey R *at al*, note 29 at 49.

45 Stefani L *Assessment in Partnership with Learners*

(1998) *Assessment and Evaluation in Higher Education* 23(4) 339 at 344.

must follow a set of paradigms which is common to all students undertaking the assessment task, and it must relate to the assessment criteria provided to the students.

Feedback is a much more straightforward process when supervisors have a structure in which it can be housed. Grading criteria provide that basic structure. Thus, feedback need not be a “free-form” process in which the supervisor comments in a capricious and unstructured way on the students’ journey to understanding notions of professionalism. The use of grading means that the supervisor can relate feedback comments directly to the grading criteria. This provides a format for the supervisor and thus reduces the time consuming demands of the feedback process. More importantly, however, it provides the students with a way of measuring their progress in the learning exercise. They should be able to relate their supervisor’s responses directly to a set of unambiguous criteria that was provided to them at the commencement of the unit.

3. Enhancing clinicians’ teaching skills

To take this thinking forward, practical ways to enhance clinical teaching in this area must be investigated. Curran, Dickson & Noone have already made a compelling appeal for better training for clinical staff.⁴⁶ They were writing about training in the teaching of ethics and their comments are just as apposite to training in generic professional skills, not only for clinicians to hone their own skills, but in how these skills can be modelled and taught to other adult learners. This is necessary in order to develop agreed strategies between clinicians as to the focus of the clinical program and to how much emphasis is being put on the development of these skills. To a certain extent, an agreed assessment regime will determine this focus, but clinicians need to be consistent in their attitude to students and the prominence being made of these issues.

Assessment issues need to be clarified, resolved and promulgated to students. Thus, if the learning goals of the clinic are going to focus on issues of professionalism, this needs to be reflected in the published learning objectives and descriptions provided to students about the clinical units on offer. Unfortunately, many students will merely give the learning goals a quick perusal before launching themselves into their clinical work. Accordingly, supervisors should spend some time individually with each student explaining this methodology at the commencement of the clinical unit. This is certainly a time consuming process, but it will ultimately benefit both student and supervisor in the long term.

4. Course design

Finally, course design needs to be investigated. It may be that better and wider classroom content is required to support a focus on professionalism. This will require a concomitant reduction in casework load and brings to the fore the continuous delicate balancing act that clinics must struggle with, between their role as educational facilities and centres of client service delivery. This area of discussion is an important one, but outside the scope of this paper. However, this author contends that clinics cannot take on additional areas of student learning without having to re-assess the requirements that are placed on the students’ shoulders. If clinicians wish to emphasise the importance of students learning skills of professionalism, then adequate time must be allowed in the formal clinical classroom curriculum and in the supervisor/student relationship to allow both formal (classroom) instruction and informal discussion to take place. At its most basic, the emphasis of the clinic may need to be restructured so that the number of clients that are seen in a

⁴⁶ Curran, Dixon and Noone, note 11 at 12.

given week is reduced, or the seminar/classroom component of the units undergoes a renewal and change of focus.

Conclusion

The literature of legal education does not appear to provide one over-arching pedagogical theory for clinical education⁴⁷ and similarly there is some lack of clarity in both the pedagogy of teaching professional responsibility and its assessment. Teaching professionalism remains very challenging for supervisors and is often confronting for students. Students are often unfamiliar with its requirements because of the focus in much of their legal education on logical and analytical thinking and not on wider generic skills. This author believes clinicians have the perfect opportunity to teach professionalism to law students – the appropriate skills and ideological commitment are also required to successfully respond to this challenge.

Perhaps clinicians can use the much loved Atticus Finch of “To Kill a Mockingbird” fame as a role model for inculcating a sense of professional responsibility in their students. Atticus is a moral beacon in this novel and single handedly guides his children to virtue in a racist and unjust society, treating them with respect and as semi-autonomous individuals capable of insight and judgment.

He attempts to teach them both compassion and tolerance, inviting them to climb inside a person’s skin and walk around in it, in order to understand another’s perspective. He treats everybody with respect regardless of their socio-economic background, skin colour or class. He is courageous and wise and an avid believer in the role of courts as the great levellers of society.⁴⁸ In many ways, he is the ultimate model of legal professional responsibility. A worthy clinical objective may be to consistently model, inculcate and inspire such professional behaviour in clinic students – but ideological commitment and the appropriate pedagogical tools are required in order to do so.

47 L Morton, J Weinstein, M Weinstein *Pedagogy: Not Quite Grown Up: The Difficulty of Applying Education Model to Legal Externs* (1999) 5 *Clinical Law Review* 469 at 493.

48 Dare T “The Secret Courts of Men’s Hearts”, *Legal Ethics and Harper Lee’s To Kill a Mockingbird* in K Economides (ed), *Ethical Challenges to Legal Education and Conduct* (Oxford, Hart Publishing, 1998) at 43.