CONNECTIVITY, CONFIDENTIALITY AND CONFIDENCE: KEY ISSUES IN THE PROVISION OF ONLINE PRO BONO ACTIVITIES

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Abstract

The provision of pro bono activities for law students has become an established feature of the undergraduate legal education landscape in Law Schools in the United Kingdom ("UK") and beyond, providing the experiential elements of clinical legal education programmes. Pro bono activities conducted online, or utilising and enhanced by technologies in other ways (for example, through the development of a mobile phone application providing legal guidance), are increasingly becoming a part of this offering, reflecting wider shifts within legal practice and society and an increasing recognition of the importance of digital literacy skills. This paper will situate these forms of online and technologically-enhanced pro bono activities both within the wider context of contemporary clinical legal education and also as a part of broader professional and societal shifts. It will explore a variety of innovative approaches being taken internationally, including work done by The Open University's Open Justice Centre in the UK, before moving on to focus on a number of key challenges and opportunities which may arise through the increasing provision of these new forms of pro bono activities by Law Schools. These include the potential and pitfalls of the technology involved, issues with confidentiality (particularly in the context of online legal advice) and the issue of how to foster trust in the online environment. The paper will conclude with a number of suggestions for areas requiring further research and discussion to enable contemporary clinicians to fully utilise the potential of online and technologically-enhanced pro bono activities.

Introduction

In the UK, most clinical legal education programmes involve the provision of pro bono activities. The phrase pro bono derives from the latin *pro bono publico* – "for the public good". A definition of pro bono activity is provided by the *Joint Pro Bono Protocol for Legal Work* agreed by the Law Society, Bar Council and Chartered Institution of Legal Executives in England and Wales. This states that:

> *…When we refer to Pro Bono Legal Work we mean legal advice or representation provided by lawyers in the public interest including to individuals, charities and community groups who cannot afford to pay for that advice or representation and where public and alternative means of funding are not available*

> (Law Works n.d, section 1.1).

The focus on advice and representation in this definition is arguably reflected by the emphasis of clinical legal education within Law Schools in the UK, with Drummond and McKeever (2015) pointing out that the predominant type of activity is for students to provide legal advice to members of the public under supervision. However, within this the range of services offered vary considerably. Kerrigan and Murray (2011) show that legal advice clinics can range from in-house advice and representation clinics, which may provide a similar service to the client as that which they would expect if they instructed a law firm, to advice-only services which assist the client in identifying the legal issue and provide a referral service to other agencies. In addition to in-house

activities, students may take part in placements or externships or specialist projects such as the Innocence Project[1], or Free Representation Unit.[2]

As well as the provision of legal advice, there are also a myriad of public legal education activities which law students are involved in, such as Streetlaw,[3] which form an important part of clinical legal education programmes. At first sight these pro bono activities are distinct from traditional legal practice as they do not involve the delivery of individual legal advice. However, they do involve "working to a specific brief and interacting with the public in relation to legal rights and responsibilities" (Kerrigan and Murray, 2011, p.7). Therefore, there is a significant overlap with the form of pro bono activities referred to in the *Joint Pro Bono Protocol for Legal Work*. For the purpose of this paper, the main focus will be on pro bono activities involving the provision of free legal advice and representation, but wider categories of public legal education activities will also be drawn upon on occasion given the close relationship between these different forms.

Traditionally, pro bono work in Law Schools has been carried out face-to-face (Kerrigan and Murray, 2011). This often involves Law Schools' providing either drop-in or appointment-based advice and representation clinics on a number of different areas of law in a face-to-face setting. Some Law Schools locate their Law Clinic in the law faculty whereas others choose to share premises with community groups or other

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[1] https://www.innocenceproject.org/.
[2] http://www.thefru.org.uk/.
[3] http://streetlaw.org.

advice centres. Similarly, public legal education activities have commonly involved small groups of students visiting a school, prison or community group within the locality to provide face-to-face presentations. However, there is an increasing interest in, and the gradual introduction of, pro bono activities which are either conducted online, or harness online technologies to enhance their delivery and impact, both in the UK and internationally. As early as 2001, Barry et al recognised the importance of technology and how it could transform the delivery of clinical legal education. They segmented clinical legal education into three waves (the third wave being its future) and, when considering how it could adapt to the digital age, argued that:

> *Aside from influencing the place of clinical education in the new millennium, technological advances will affect the forms of clinical education by making possible new and different teaching and service opportunities and clinical models*

> (Barry et al, 2001, p.54)

This arguably mirrors an increasing engagement with technology amongst Law Schools as a whole, with many offering forms of blended learning and/or additional online materials to enhance the student experience (see, for example, Allbon, 2013). The increasing role of technology has also been noted in various aspects of pro bono work generally, including the use of online platforms by clearing houses to match firms offering pro bono services with Non-Governmental Organisations and social

enterprises[4] (Khadar, 2016) and the development of online self-help platforms for unrepresented litigants[5] (Udell, 2016). In society overall, this is a time of accelerated cultural and technology change with Sparks and Honey (2014, n.p.) describing the Post- Millennials or Generation Z, as the "first tribe of true digital natives". As these students move through Law School, and potentially into the legal profession, their engagement with technology is likely to increase the importance of online, and technologically-enhanced, pro bono activities in response to increasing professional and societal demands. Indeed, the discussion below demonstrates that this is already occurring with examples ranging from online law clinics in the UK to the development of mobile phone applications and online dispute resolution platforms (for a snapshot of developments in the UK see Smith (2017)).

THE USE OF TECHNOLOGY WITHIN THE LEGAL PROFESSION AND SOCIETY

This movement towards acknowledging and utilising the potential of technology within clinical legal education, the overall Law School experience and the wider provision of pro bono closely reflects wider shifts within legal practice and society as a whole. In terms of legal practice, the use of information technology has become an increasingly significant factor in the delivery of legal services and in the adjudication

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[4] See, for example, https://www.trust.org/trustlaw/.
[5] See, for example, https://lawhelpinteractive.org/.

of civil disputes. Smith and Patterson (2015) show that this is an area with potential to provide innovative solutions to increase access to legal advice and also to disseminate public legal education so as to raise levels of legal capacity. More broadly, technology is starting to drive the overall administration of justice. Online dispute resolution ("ODR") now provides an alternative methods of resolving legal issues. This is a process where legal disputes are resolved via web based systems and there are a number of different versions available. In the United States of America ("USA"), Cybersettle, Inc was one of the first to provide online settlement via an automated dispute resolution platform which has been used predominately in personal injury cases. The claimant and defendant submit their highest and lowest settlement figures if the offer is greater or equal to the opposition's offer the case automatically settles.[6] A French ODR platform called demanderjustice.com provides an e-filing service for litigants in person and, if the dispute cannot be resolved via ODR, the system will create the documents to start legal proceedings.

The Dutch government in particular pioneered the use of ODR with the Rechtwijzer.nl project (translated as "signpost to justice", "roadmap to justice" or "conflict resolution guide") The project was run by the Dutch Legal Aid Board with support from the

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[6] Charles Brofman a US trial lawyer invented Cybersettle. In 1995 he was at court trying to negotiate a settlement with opposing counsel in an insurance claim. They agreed to secretly write down on a piece of paper their settlement figures and hold it up to the court clerk, if the amounts were close the court clerk would put a thumbs up and if not, the papers were destroyed without either side seeing the figures. The court clerk gave them the thumbs up as they were a $1000 apart and they agreed to split the difference and settle the case. This experience prompted Brofman to launch Cybersettle in 1998 using a "double blind" bidding process- see www.cybersettle.com.

Netherlands Ministry of Security and Justice. The University of Tilburg developed the first two generations of the website and the third generation was evolved by the Hague Institute for the Internationalisation of Law ("HiiL").

> *Rechtwijzer 2.0 is the first ODR platform for difficult problems such as divorce and separation, landlord-tenant disputes and employment disputes.* (HiiL 2017)

It launched in The Netherlands in 2014 helping people with divorce related issues and was extended in 2015 to include landlord- tenant, consumer conflicts and employment issues. Rechtwijzer.nl was more than ODR, as it provided legal information and signposting to support litigants in person too. The process began with a series of questions related to the issue in question to help the individual navigate the legal process. It encouraged applicants to consider whether a legal response was the appropriate cause of action in all the circumstances. Research from Bickel et al (2015) which evaluated users' experiences of Rechtwijzer found they commented positively on their interaction with the website.[7] However, the project ran into difficulties, with Rechtwijzer Version 2.0 proving to be financially unsustainable. Building on the lessons learned by Rechtwijzer, Justice42 has emerged- this is a new online divorce platform supported by private investment and being developed by many of the HiiL team behind Rechtwijzer (Smith, 2017).

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[7] The report summarises research conducted with users of Rechtwiger in supporting them in divorce and consumer cases- the satisfaction rates for divorces was 7.51 and for consumer cases 7.29 and they indicated they would recommend the website to other people. A 7 point scale was used ranging from not at all (1) to a large extent (7).

In England and Wales there are also an increasing number of examples of ODR. The Ministry of Justice launched Money Claim Online ("MCOL") in 2002, a form of ODR which allows claimants and defendants to make or respond to a money claim online. A MCOL is for fixed amounts of money of less than £100,000 against no more than two defendants in England and Wales. If the claim is disputed it will proceed to hearing before a District Judge.[8] Low value personal injury cases are being dealt with via a claims portal where the inbuilt case management system runs the process, but it does not resolve the claim, if the matter cannot be settled it still proceeds to a final hearing before a judge.[9] Disputes relating to online purchasing of goods and services can be resolved by an ODR platform provided by the European Commission. A complaint can be made by consumers and traders in the EU, Lichtenstein, Norway and Iceland to be resolved by an approved dispute resolution body the service is either free to use or with a minimal charge. Traders are not obliged to engage with the ODR process but it is mechanism to resolve issues without incurring significant court costs.[10]

This use of ODR reflects the growing mainstreaming of digital processes:

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[8] The guidance for making a claim is available online at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/520203/money-claim-online-user-guide.pdf. This is 27 pages long and therefore arguably somewhat inaccessible for a litigant in person. If the claimant secures judgment and the defendant fails to pay the debt the claimant can also request a warrant to enforce payment online.

[9] http://www.claimsportal.org.uk/en/.

[10] https://ec.europa.eu/consumers/odr/main/index.cfm?event=main.home.howitworks.

> *To serve the needs of a 21st Century society, the justice system must be **digital by***
>
> ***default** and design…. The creation of online justice cannot therefore simply be a*
>
> *matter of digitising what might be called the frontline processes. It must go further*
>
> *than that. It must properly embrace what is described as Online Dispute Resolution.*
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> (Ryder, 2016, n.p.)

The impact of the reduction in legal aid and the rise of litigants in person in the UK has also encouraged the senior judiciary and government to review the use of technology within the traditional court process (Her Majesty's Courts and Tribunals Service, 2015). The importance of digital engagement was outlined by the publication of the 2016 Civil Courts Structure Review by Lord Briggs ("the Briggs Report"). The focus has been on designing a new process that incorporates the experiences of other jurisdictions but is more transformative in nature. The Briggs Report proposes a new online court to be used by litigants which will become a compulsory form of civil dispute resolution for certain types of claim. The value and types of claims the online court will adjudicate on are potentially significant. Lord Briggs recommends the online court should deal with claims up to £25,000 but it should be a gradual process starting with claims up to £10,000 and limited to specified money claims. For example, a dispute with a company where they did not provide goods or services and it is for a fixed amount of money. This would exclude unspecified money claims at present, for example personal injury, professional negligence cases, and non-monetary claims such as injunctions, specific performance and possession of homes. However, it is

expected that in the future unspecified money claims will also fall within the remit of the court. The recoverable costs regime will be the same as used in the Small Claims Track where the Civil Procedure Rules Part 27 Practice Direction states that states the amount paid for legal advice and assistance in small claims is a sum not exceeding £260.00. In addition there will be a further recoverable fixed cost payment for advice at the start to determine the merits of a case. It is not intended that lawyers will be excluded from the online court but limiting it to fixed recoverable costs potentially significantly limits the role lawyers are likely to play in the process, demonstrating that both the legal profession and Law Schools will need to adapt to meet the realities of an online justice system.

Technological innovation is challenging and early pioneers are not always the ultimate beneficiaries but the experience of Rechtwijzer is influencing exciting new developments occurring in other jurisdictions and has contributed to the development of the Civil Resolution Tribunal and MyLawBC.com in Canada.[11] Ambitious technological solutions may be risky but in society more generally, technology is increasingly becoming a key component of our lives - the forecast for the number of smart phone users in the UK by 2022 is 53.96 million (Statista, 2018). Google[12] and other search engines are regularly used to find information and locate services. In 2017 internet use increased further with 89% of adults using the internet in past 3 months. In adults over 75 years of age the growth of internet use is particularly

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[11] https://www.mylawbc.com and https://www.civilresolutionbc.ca.
[12] www.google.co.uk.

marked, in 2011, 20% of adults over 75 years were internet users compared with 78% in 2017 (Office for National Statistics, 2017). Faster mobile speeds enable connectivity on the move, which has led to the increasing popularity of smart phones. There has also been a significant growth in e-commerce with 41.36 million people engaged in online shopping in 2016 (Kemp, 2017). Technology has the ability to allow users to access information, as well as communicating at a distance and at a time to suit them.

The statistics above illustrate that, for the law student of today, the environment in which they will live and work, and potentially practice law in, is imbued with technology. This demonstrates the importance of incorporating this element into clinical legal education programmes to produce citizens, and lawyers, with appropriate digital skills. The meaning of the term "digital skills" is itself evolving (and is also sometimes referred to as digital competency or literacy). However, van Dijk and van Deursen (2014) suggest six categories, including operational and formal skills (for example, knowing how to access the internet and then navigate it using a web browser); information skills (for example, locating, selecting and evaluating relevant information on the internet); communication skills (for example, instant messaging and emails); content creation skills (for example, creating a blog post or forum post) and strategic skills (involving using digital mediums to achieve a particular personal or professional goal). The value of each of these categories to law students and lawyers is clear in terms of both discrete tasks, such as locating a case online and checking its current status and also more broadly, from being able to curate

your online presence when job hunting, to enhancing the profile and reputation of your law firm. It is these digital lawyering skills which are becoming increasingly key within contemporary society.

The provision of online and technologically-enhanced pro bono activities offers key opportunities to integrate and develop this important range of digital skills. This is already being acknowledged by, and reflected in, a range of clinical legal education programmes internationally as a number of Law Schools developing their traditional pro bono work in new and innovative directions.

THE GROWTH IN ONLINE AND TECHNOLOGICALLY-ENHANCED PRO BONO ACTIVITIES

The most developed examples of online and technology-enhanced pro bono activities can arguably be found within the USA, where the use of technology to promote access to justice is more firmly established. Rostain et al (2013) discuss how students at Georgetown University Law Center have developed a 'Same-Sex Marriage Adviser' application that can be used across fifty states in the USA. The purpose of the application is to help users decide whether they are able to get married or cohabit within the state in which they live and what impact it might have on their legal rights. The application is an automated advisor which fulfils an unmet legal need because there are legal and financial consequences for those who are embark on same-sex marriage and many people cannot afford a lawyer to advise them on these issues

(Rostain et al, 2013). In order to build the app, the students create a complex design document which maps the journey of the end-user. Students learn a myriad of skills through this process, not only the ability to identify the relevant law, but also how to deconstruct legal rules in a way that will be accessible and appropriate to the needs of the end-user (Rostain et al, 2013).

Similar projects are happening across a number of law schools in the US because of the Access to Justice (A2J) Author Course Project which developed from a collaboration between CALI- the Center for Computer-Assisted Legal Instruction [13],ITT Chicago-Kent College of Law and Idaho Legal Aid Services. The A2J Author Course Project provides the training materials to facilitate the development of technological solutions to address access to justice issues. At ITT Chicago-Kent they have created a Center for Access to Justice and Technology and in 2010 they started the Justice & Technology Practicum which uses the A2J software to allow students to develop customer friendly web-based interfaces for legal assembly to be built (Staudt et al 2013). Students work directly with litigants-in-person to understand the barriers they face in accessing legal services. The knowledge and understanding the students gain from working with these clients helps and prepares them for designing the document templates required to develop an application (Goodenough et al, 2012).

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[13] Most US law schools are members of CALI- see its mission statement www.cali.org/about/mission
CALI is non-profit consortium of law schools, law libraries and similar organisations.

Also, as part of the Practicum, students learn about the ethical issues that arise with the developments of technology (Staudt et al 2013).

Although the above programmes demonstrate the innovative use of technology within pro bono activities, and by doing so promote access to justice for those who access them, they do still retain face-to-face teaching elements within their wider clinical legal education provision for students. However, a wholly online clinical legal programme is being delivered at Charles Darwin University ("CDU") in Australia[14]. The clinic comprises of three streams, an environmental law stream, a refugee law stream and the indigenous justice stream. The students are placed in external organisations and are supported via skype, email and telephone by supervising lawyers and faculty staff. Ethical issues relating to client confidentiality are taught as part of the class and students are required to sign confidentiality agreements. Documents are shared and created in accordance with the protocols of the external organisation. Students use online databases to carry out legal research (McCrimmon et al, 2016Students in the environmental law stream are either placed with an international pro bono organisation providing advice on climate change or supporting an environmental community legal centre based in the Northern Territory. In the refugee law stream, students are able to observe court hearings via the Federal Court's video link system, whilst in the indigenous justice streams, students are placed with law firms where they carry out legal research, attend meetings and interviews via

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[14] The program began as a pilot in 2014 and in 2016 it became a fully accredited module.

Blackboard Collaborate (McCrimmon et al, 2016). The vast majority of law students at CDU are studying online by utilizing technology they have found an innovative way to create an external placement scheme online.

The project at CDU demonstrates that technology can be used to cross regional and state borders suggesting that, with proper supervision, similar online pro bono projects could be developed internationally (McCrimmon et al, 2016). The variety of online pro bono activities undertaken at CDU also demonstrate that technology is relevant not only to public legal education but also to the specific provision of legal advice and representation.

Indeed, in the UK, the focus of online and technologically-enhanced pro bono activities to date does appear to have been on the use of technology within the Law Clinic setting, mirroring the predominance of this form of clinical legal education activity (Drummond and McKeever, 2015). The University of Cumbria has previously piloted an online Law Clinic (Thanaraj and Sales, 2015). This involved potential clients' completing an online contact form and clicking to accept the clinic's terms and conditions before the query being reviewed by a tutor. If deemed suitable, students would then completed an e-signed agreement with the client and conduct discussions via an encrypted client portal and video conferencing with documents stored securely online (Thanaraj and Sales, 2015). Some other university Law Clinics currently offer email advice, and/or Skype interviews, including Strathclyde University.[15] The Open

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[15] https://www.lawclinic.org.uk/oac.

University's Open Justice Centre has also recently launched a wholly online advice-only Law Clinic, interviewing clients in real time via Adobe Connect and providing advice by email.[16] Members of the public complete a web enquiry form which is then received into a dedicated mailbox from which it is triaged. If the matter is accepted into the Law Clinic, it will then be inputted into the Clio case management system and all communications between students and supervisors relating to the issue will take place online via this platform. The client will be interviewed online (using audio and/or video) via Adobe Connect and will be able to access the resulting letter of advice via the case management system.

As a distance learning provider, The Open University has had to develop an online solution that works for its geographically dispersed student body. Students working in the Law Clinic are based across the UK, and also internationally, rendering face-to-face meetings and discussions impossible. Many also have a range of work and professional commitments which preclude them from accessing pro bono opportunities which are face-to-face or held at particular times and places. For these students, the Law Clinic provides a valuable opportunity to develop both their digital and legal skills in a way which enhances employability and gives them a greater insight into issues around social justice, professional identity and legal values and ethics. At the same time, the clients of the Law Clinic are also widely geographically dispersed and may have lacked the knowledge or resources or ability to source

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[16] http://law-school.open.ac.uk/.

appropriate advice within their local area, The Law Clinic provides them with an accessible way to access this without having to travel or take part in a potentially daunting face-to-face discussion.

The above paragraph demonstrates the specific benefits for students and clients' of The Open University's Law Clinic. However, for Law Clinics within conventional, face-to-face university settings, utilising such online technologies also has significant potential benefits, including smaller overheads (with no physical presence required), streamlined case management processes and wide accessibility to clients who may be unable or unwilling to access legal advice face-to-face (Thanaraj and Sales, 2015). With many Law Schools seeing social justice as an important part of their mission, and during a time when numbers of Law Centres are declining (Ryan, 2017) and geographic areas have been identified as "legal aid deserts" (The Law Society of England and Wales, 2018, n.p.), it is arguably increasingly important for pro bono activities to transcend geographic boundaries and be as accessible as possible to those in need (whilst acknowledging the potential demands of this in terms of finance and resources).

There are also educational advantages in utilising any form of online or digitally-enhanced pro bono activity in terms of developing the digital skills of both students and staff and preparing students for the workplace of the future. Given the aspirations of many law students to work within the legal profession (see Hardee (2016) in the UK context) and the shift towards ODR and digital justice systems, it can

be seen that incorporating relevant technologies within clinical legal education programmes could have a significant impact upon student employability, a key tenet of contemporary higher education policy (Department for Education, 2017, p.8). Digital lawyering skills require an appreciation and understanding of technology. Rule 1.1 in the Model Rules of Professional Responsibility governing lawyers in the USA states that a lawyer should represent a client competently and that "competent representation requires the knowledge, skill, thoroughness, and preparation reasonably necessary for the representation". In the UK, the Solicitors Regulation Authority's ("SRA") Code of Conduct (2011), governing the behaviour of solicitors in England and Wales, includes, in principle 5, para. 2.9, a requirement to exercise "competence, skill and diligence…" with Goodenough and Lauriston (2012, n.p.) suggesting that, if the legal landscape is evolving technologically, "we should ask the question whether a lawyer who has not been trained to understand the technology is indeed competent". Similar technological advancements are also happening in a wide range of other workplaces that law graduates may encounter. Therefore, introducing online or technology-enhanced pro bono activities within clinical legal education programmes offers much potential in terms of the personal and professional growth of students.

However despite these significant advantages, there are also a number of challenges and barriers to overcome which require careful consideration by any clinician interested in utilising digital technologies effectively in pro bono work. The first of

these involves identifying and implementing user-friendly systems and acknowledging the difficulties that the use of such technology may pose for both some clients and students, and even the clinicians supervising the Law Clinic, who may not have the resources, support or appropriate levels of digital skills to utilise the potential opportunities available (Department for Culture, Media and Sport, 2017).

CONNECTIVITY: TECHNOLOGICAL CHALLENGES AND BARRIERS

Identifying user-friendly technology systems that can either act as a vehicle for, or significantly enhance, pro bono activities may be a significant undertaking. It is likely to require a high level of input from other parts of the institution, such as Information Technology and Procurement Departments, which in turn may have resource implications and incur costs and delay. Flood, considering the use of technology in legal education generally, suggests that:

> *… law faculty will have to familiarise themselves more with the technology or providers will have to employ more media and IT support staff to help implement this development.* (Flood, 2015, p.86)

In relation to the implementation of a specific clinical legal education programme, The Open University's Open Justice Law Clinic experience indicated that a significant level of IT support was required, together with other support, for example, in terms of marketing and promotion given the geographically-dispersed nature of the Law Clinic's potential clientele. However, this is not a problem which is unique to clinical

legal education and pro bono activities – a recent report into higher education globally

highlighted the importance of integrating technology across the board, indicating that:

> *Real-world skills are needed to bolster employability and workplace development.*
> *Students expect to graduate into gainful employment.   Institutions have a*
> *responsibility to deliver deeper, active learning experiences and skills-based training*
> *that integrate technology in meaningful ways.*

(The New Media Consortium, 2017, p.2)

It argues that institutions without "robust strategies" for developing online, blended

and mobile learning models "simply will not survive" (The New Media Consortium,

2017, p.2). Although this is a broad generalisation, it is reasonable to assume that

many universities are likely to be investing heavily in technology in the near future,

which may well provide more easily accessible support and resources for clinical legal

programmes and pro bono work.

As well as demonstrating (once again) the increasing important of technology, the

above report also reinforces the relevance of online and technologically-enhanced pro

bono activities to employability. One of the key opportunities afforded by online

clinical legal education programmes is the potential development of a new generation

of digital lawyers, who have the skills to become the legal professionals of the future.

However, it cannot be assumed that all students have these capabilities and skills

when beginning their clinical legal education. It may take a significant amount of

time, effort and resources to up-skill students in a way which enables them to utilise

technology appropriately and efficiently. As Allbon explains, when discussing the

development of a legal skills wiki, "students are less-technology savvy than we often assume" (2013, n.p.) with a seeming familiarity with technology sometimes masking inadequacies around retrieving and evaluating relevant information online (see also Bates, 2013)

Similarly, not all clinicians will have the technical abilities, resources and time to work with their students on developing technologically-innovative projects. These issues may be lessened as the role of technology in higher education continues to develop. However, even if, at present, a lack of time, resources or motivation preclude a significant investment in online and technologically-enhanced pro bono activities for some clinical legal education programmes, it is still possible to explore the potential of such innovations with students and encourage them to think about how they could apply their own personal skillset in this manner, both now and in the future. Such projects also provide interesting ethical issues to discuss with students, for example, does the use of crowdfunding to promote commercial cases as an investment opportunity create negative public perceptions of the justice process (Spendlove, 2015)? Will large, organised groups, who are able to access media publicity, prevail over minority interests and is this appropriate (Davies, 2013)? What should happen when the money raised exceeds the costs incurred (Padgett and Rolston, 2014)? Students can also be encouraged to consider wider issues around the introduction and use of artificial intelligence into the provision of legal services and the future of the legal profession as a whole (for discussion on this see Susskind and Susskind (2017)).

Perhaps the most significant issue in technological terms is that of the digital literacy of the end-user. Collard et al (2011) argue that a prerequisite of being able to access the justice system is the existence of a sufficient level of legal capability (knowledge, skills and attitudes) that enables an individual to engage with the justice system. Legal capability is defined as including the ability to recognise and frame the legal dimension of problems and find out more about the legal dimension of a problem. (Collard et al, 2011, pp.3-4). Thus without the requisite level of legal capability individuals are unable to recognise the legal dimension of their problems and are thus excluded from accessing the justice system. However, evidence suggests that it is not just lack of legal capacity that prevents people dealing with legal problems but also poverty and social exclusion (Buck et al, 2007). This has significant implications because "issues of digital exclusion are exacerbated amongst those who are socially excluded" (Reboot UK, 2018, p.3). As this article has previously discussed, the digitalisation of the court process is already well under way, but if the end-user has a lack of digital skills and confidence this will only serve to further entrench exclusion from the justice system.

It is recognised that increasing digital engagement is paramount to ensuring the successful delivery of online justice. As a result, programmes aimed at developing digital inclusion are increasing, for example, Reboot UK worked between March and September 2017 to assist 35 organisations to support excluded people to enhance

digital skills and confidence (Reboot UK, 2018). The Good Things Foundation[17] is also working to bring together community groups to create the Online Centres Network which will help people who are socially excluded to gain digital literacy skills. For Law Schools using technology in their interactions with end-users (such as in an online Law Clinic) it is necessary to consider what guidance and assistance can be offered to facilitate access to the service, for example, are the instructions given on websites or in emails clear and step-by-step? Is the provision accessible to those with disabilities (such as a visual impairment)? Is there a telephone number for people to call to access IT support? Can hard copies of guidance be posted out? If online pro bono activities are to provide support for those who are most in need, these are key issues to be considered during both the design and implementation of relevant projects. The experience of The Open University's Law Clinic suggests that both piloting the provision and liaising with colleagues with specific expertise in accessibility and inclusion can assist in identifying key considerations in this area. It is also vital to obtain feedback from the end-users to ensure that their needs are both listened to and responded to.

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[17] www.goodthingsfoundation.org.

CONFIDENTIALITY: COMPLYING WITH LEGAL AND ETHICAL DUTIES

Another key issue which arises when considering the development of online and technologically-enhanced pro bono activities, in particular the provision of individual legal advice or representation in an online setting, is the need to comply with the obligations placed on both students and clinicians in the Law School in relation to client confidentiality. This is a challenge already having to be tackled in legal practice, as law firms are increasingly adopting new, more agile technology. Practice management systems are becoming cloud based, which has led to a significant rise in the use of mobile technology.[18] Cloud computing software facilitates access via the web instead of on individual computers and all data is stored off-site. Advantages include the ability to access documents remotely, including via mobile applications, and the option to interact with clients outside of the office. It also provides the functionality for clients to log into the system to access their case. Data is encrypted and is backed-up off site. Cloud computing, and particularly its ability to facilitate mobile access to data, has the potential to offer significant benefits to both law firms and Law Clinics, but it is not without risk, primarily in relation to breaches of ethical obligations of competence and confidentiality.[19] Data security is a concern with the

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[18] See CLIO www.goclio.co.uk. CLIO is an example of a cloud based legal case management software, there are other examples being used by law firms, including Amicus Cloud, Rocket matter, My Case etc. Law firm practice management software automate, and have a number features including managing correspondence, documents, calendars and time recording.
[19] See sections 4.1, 4.3, 4.5 of the SRA Code of Conduct (2011), which require effective controls to be put in place to ensure the protection of client confidentiality and the Law Society of England and Wales practice note on cloud computing (2014).

increased use of tablets and smart phones and the flexibility to work from anywhere. Law firms are at risk of the loss or damage of data and this risk is increasing as the internet is being used to process and transmit confidential client data

The SRA Code of Conduct (2011), at rule 4.1, states that practitioners (including Law Clinics) must achieve the outcome of keeping "the affairs of clients confidential unless disclosure is required or permitted by law or the client consents".[20] Ethical obligations arise not only from the Code of Conduct but also from the statutes which govern data protection and information security[21]. The new General Data Protection Regulations in force from May 2018 impose further obligations on organisations and strengthen individual rights with respect to their personal data, emphasising the need for data controllers and processors to obtain informed consent from individuals, only hold such personal data as is necessary and ensure that information held is both secure and accurate.[22] A significant fine can be imposed for failure to notify a breach and for the breach itself. Otey-Stringfellow (2012, p.224) argues that this increasing amount of regulation creates an "ethical minefield" for experienced lawyers, but even more so for law students and those about to enter the practice of law who are less familiar with their professional and ethical obligations.

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[20] Chapter 4 Confidentiality and disclosure states that protection of confidential information is a fundamental part of the client relationship, it occurs as a matter of law and of conduct. Rule 4.5 states you must have appropriate measures in place to identify and mitigate the risks of client confidentiality. The indicative behaviours which accompany the rules state the systems in place need to reflect the size, complexity and the nature of the work involved (SRA, 2011).

[21] In the UK these include the Data Protection Act 1998, the Regulation of Investigatory Powers Act 2000 and the Computer Misuse Act 1990.

[22] https://gdpr-info.eu/.

Incorporating technology into the pro bono activities offered by clinical legal education programmes gives students the opportunity to be in a real-life situation with clients and deal with confidential information online, thus enabling them to experience and explore the ethical concerns of internet communication. Goldfarb (2012) identifies self-development and self-monitoring as being especially valuable skills of clinical legal education, enabling students to learn from experience and apply that to future choices, to help prepare them for a rapidly changing legal landscape. Using online and technologically-enhanced pro bono activities are particularly useful in giving students time to think and reflect on their use of technology. This can be achieved if provision is made for students to reflect on the professional demands involved in utilising technology in the clinical setting by incorporating reflective writing into the design and assessment of the clinical experience.

There are distinct advantages to introducing technology into the Law Clinic by, for example, incorporating the use of case management software.[23] Using such software provides important preparation for practice and is also a valuable opportunity to address some thorny ethical issues that may arise as a result of its incorporation by providing a greater understanding of its practical use, a greater awareness of the ethical issues likely to arise and experiential learning opportunities to tackle those issues which do actually occur. Ethical pitfalls could include law students preparing

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[23] In the USA, Kuehn, and Santacroce, (2014) found in the 2013-14 Survey of Applied Legal Education that case management software in Law School clinics is the most common type of technology employed in casework with 58.6% reporting its use, up from 48.5% in the 2010-11 Survey and 40.5% in 2007-08.

documents in the case management system and emailing copies to their home computer, risking potential breaches of client confidentiality. Other issues could involve students having documents stored on personal computers after they have left the clinic or sold the computer. An understanding of internet security, and how hackers operate, is required to understand the ethics of working from a public WIFI spot and how free WIFI networks allow hackers to access the network and view the contents of the device. Training in the Law Clinic gives law students the opportunity to identify such ethical and practical issues and learn how to address them.

Online and technologically-enhanced pro bono activities certainly pose new challenges for both legal professionals and law students. Understanding how and where data is stored, the encryption of data, and the risks that arise when devices that hold data are lost are all issues associated with the use of technology. Law students also need to carefully consider the use of social media and think about how to manage an online presence not only for themselves but for their clients, to ensure confidentiality is protected (Colvin, 2015; Lackey and Minta, 2012). More generally, it is also crucial that the clinical legal education curriculum addresses questions of technological professionalism by engaging students in a critical discussion of the potential for technology to revolutionise the legal system and the profession, but also requiring them to analyse, and consider how to respond to, the ethical implications that arise when utilising evolving technologies. By educating law students through

and on technology they will be able to support clients with the innovative changes that are happening in the justice system (Goodenough et al, 2013).

CONFIDENCE: FOSTERING TRUST ONLINE

Whilst much of the above discussion has focused on the technological elements of change and evolution that take place within an increasingly digitalized legal system and society, the wider issues involved speak equally to exploration of, and reflection on, the human side of pro bono work, clinical legal education and the legal profession. For students and practitioners to act effectively and ethically in such a world requires them to consider the impact and consequences for the people involved. When providing forms of advice and even representation online, they may be at a distance from their client or other end-user, but that person is still contending with the myriad emotions that can arise from being involved in a legal query or dispute and having to seek legal help and guidance (Barkai and Fine, 1987). They may present many of the same legal, ethical and practical dilemmas which can arise in face-to-face legal work, alongside which students and practitioners will have to contend with the added pressures of navigating the complexities of the online or technological experience as well (Jones et al, 2017).

As an example, one way this could be contextualised for students is by exploring some of the rich literature that exists on the subject of trust, and considering how this could be applied within an online Law Clinic. The sixth mandatory principle given by the

SRA in their Code of Conduct (2011) is that practitioners must "behave in a way that maintains the trust the public places in you". The concept of trust lacks a single, universal definition, but it can be described as involving a certain level of confidence that something, or someone, will behave in a way that meets your expectations of how it, or they, should behave and that this behaviour will be beneficial, or at the very least not harmful, to you (Brien, 1998). It plays a crucial role within the legal profession, with Webb and Nicolson arguing that:

> *We commonly enter into trust relations because of a perceived risk. For example, clients consult lawyers because they have caused accidents, face financial loss from another's breach of contract or because they want to protect their interests in new business ventures. Trust therefore acts as a mechanism for attempting to reduce risk or control it at acceptable levels. At the same time, trust relations are also themselves risky, precisely because they require an act of faith in committing oneself to the relationship, and because the greater our trust the more vulnerable we are to being unexpectedly let down, if not betrayed. We thus enter trust relationships on the basis of a generally implicit calculus: both that entering the relationship provides a mechanism for dealing with the particular social risk complained of, and that the offer of trust within the relationship indicates that the trustee is not predisposed to cause harm.* (Webb and Nicolson, 1999, p.150)

Trust within the legal profession can operate at the level of both individuals and institutions. For example, an individual solicitor may attend networking events, join relevant associations and spend time reassuring their clients during stressful periods to develop relationships of trust between them and their client on an individual level. At the same time, clients will need to feel a level of trust in relevant legal professions, institutions and processes that will be involved in their issue (Webb and Nicolson, 1999). Clients in an online Law Clinic, or other end-users seeking information on legal topics, are unlikely to know the individual clinicians and law students involved, at least initially. This therefore requires them to place a level of trust in the Law School and in the digital technology they are being asked to navigate.

There is a large body of work on the issue of trust in relation to online consumer transactions, which suggests the level of trust a consumer has in a vendor and website will significantly influence their decision to purchase online (see, for example, Kim et al, 2008). The literature on ODR, although less well-developed in relation to trust, also indicates that it has a key part to play in the process (Rule and Friedberg, 2005). For example, it is likely that issues of trust will arise even prior to the client completing their initial enquiry into an online Law Clinic. There may be questions over the design of the website, its interfaces and the information provided on it that can significantly influence the client's initial decision to request assistance (Wang and Emurian, 2005). Thus this echoes the argument made above about the importance of embedding easily accessible guidance and assistance in any such provision. Even if the client choses to approach the Law Clinic, they may still lack trust in the digital technologies involved

and be reluctant to provide personal information or give full details of their issue without any face-to-face contact. This could similarly impact in relation to public legal education activities online, where users will also be required to have some form of interaction with the online design and content provided.

At an individual level, law students involved with a client will have to consider how they can develop the client's trust in an environment where they are not meeting face-to-face and the usual bodily and visual cues that assist in developing rapport and trust are likely to be missing (Brett et al, 2007). They will have to be aware of the considerable potential for communications to be misconstrued (Brett et al, 2007). There will also be important ethical considerations to be tackled around whether simply having a code of ethics is sufficient to create a relationship of trust, how such a relationship can be effectively fostered and how the use of technology can be balanced with the very human issues involved. This provides a practical opportunity for law students to contextualise their theoretical understanding, considering the possible consequences of limiting the discharge of the lawyer's ethical duty to professional code compliance alone and exploring the utilisation of wider, character-based approaches to legal ethics practice. (Arthur et al, 2014, p.10).

CONCLUSION

Technology is impacting increasingly and significantly on the practice of law. In 1994, Katsch defined the characteristics of a digital lawyer, stating:

> *… The digital lawyer will be employing a broader range of skills and an outlook that reflects not simply what the new technologies do but the manner in which they do it.*

> (Katsch 1994: 1169)

Susskind (2013, p.xiii) predicts that "the legal world will change more radically over the next two decades than over the last two centuries". Technology is driving change and the practice of law is being revolutionised by the development of online courts and virtual law firms, the uptake of technological innovations such as cloud computing and the internet's ability to offer legal knowledge. Every generation practising law has faced different challenges, but an increasingly digitalised legal system and society poses new and ever more complex dilemmas. At the same time, it also offers exciting new opportunities to generate new forms of online and digitally enhanced pro bono activity and enhance the provision and scope of existing offerings. Given these challenges and opportunities, it is ever-more important that clinical legal education programmes engage with these topics and that there is sufficient training to equip law students to address the myriad of issues that being a digital lawyer can encompass. Even if some, or most, of these law students do not then go on into legal practice, many of the technical, ethical and practical lessons they absorb will be of relevance within both their professional and personal lives in the future, as society increasingly shifts towards the greater use and integration of technology in every walk of life.

These wider legal and societal shifts have implications both for clinicians and law students. Benfer et al (2013) states that recognising generational shifts between legal educators and law students is important in thinking about how we educate the millennial generation. For clinicians, this may mean spending time reflecting on how to embed the key pedagogical benefits of clinical legal education within a changing environment, when addressing law students who may be unreceptive to more traditional teaching methods and pedagogies. To prepare law students for the future, the incorporation of digital literacy into the clinical legal education curriculum is essential, but critically, it is not about teaching 'computer' skills. Instead, as Goodenough and Lauritsen (2012, n.p.) argue, it is "about gaining an understanding of the way in which technology works and appreciation of the issues that may arise when using technology", something which online and technologically-enhanced pro bono activities offer through their practical engagement with these theoretical issues. The incorporation of such online and technologically-enhanced pro bono work into clinical legal education programmes can help law students' use and understand technology, not only to develop the skills they require for the practice of law, but also to actively engage in thinking of new ways technology can be used to support access to justice (Giddings, 2013; Boske, 2011).

The development and provision of online and technologically-enhanced pro bono activities within clinical legal education programmes provides the ideal opportunity to consider the impact that technology is having on both society in general and the

practice of law in particular. It gives law students a relatively safe space in which to explore the technological, ethical and practical implications which may arise within the clinical legal education programme itself, but also in their future professional and personal lives as well, particularly if they do become one of the new generation of digital lawyers. This exploration may arise through students tackling specific issues that occur during their work online, such as queries in relation to the use of social media and the guarding of client privacy. It may also be via their consideration of broader digital issues, for example, around the use of crowd funding of court cases and the role of trust in online legal transactions. Of course, a number of these issues could be explored within more traditional clinical legal education settings, but discussing them via the use of, and in the context of, online and technologically-enhanced pro bono activities arguably offers law students richer contemporary opportunities for experiential learning and reflection both in and on action (Kemp et al, 2016; Kolb, 2014; Schön, 1991).

Each generation encompasses a different perspective and outlook on the world, which shapes their attributes and traits, and characterises their behaviours. Clinical legal education's reflective pedagogy, insights into social justice and contextualisation of legal issues are all traditional benefits in terms of its use within the educational and professional development of law students. As clinicians, we now have a responsibility to apply these values to our pro bono work within the online setting in a way which allows law students to experience, reflect on and discuss the potential and pitfalls of

digital lawyering and that will equip them for a potential future in a changing profession. This requires clinical legal education programmes to consider the use of online and technologically-enhanced pro bono activities and to explore topics such as network security, cloud computing, encryption, security, wireless networks and data protection. However, they also need to embed a consideration of ethics into these topics to assist the ethical formation of law students by developing their understanding of their ethical obligations and the ethical issues involved.

Particular topics for further research, to facilitate the adaptation and development of online and technologically-enhanced pro bono activities, include the extent to which technology is, or may be, a barrier towards effective experiential learning for some students, the impact of technology on the client experience in an online Law Clinic setting and the most effective methods to foster online reflective practices by law students. It will also be fascinating to trace how students' conceptions of issues such as confidentiality, privacy and trust are influenced by the digital environment. Overall, the development of online and technologically-enhanced pro bono activities offers both challenges to, but also opportunities for, engagement with pro bono activities and the wider teaching of both clinical legal education, as law follows society as a whole into the dawning of a brave, new, digital world.

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