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RESPONSIBILITY AND ETHICS IN PROFESSIONAL LEGAL EDUCATION

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DRAFT – NOT TO BE CITED

INTRODUCTION

In England and Wales those aspiring to join the main legal professions of solicitor and barrister must complete undergraduate education before taking a one-year professional course. At each stage the individual has alternatives. The undergraduate or ‘initial’ stage (ACLEC, 1996) may be completed either by taking a qualifying law degree or by taking a degree in another subject and then the one-year Common Professional Examination (CPE) course, which provides students with the foundations of legal knowledge identified by the two professions (Law Society/Bar Council, 1999). The professional stage for those aspiring to become solicitors is the Legal Practice Course (LPC); that for aspirant barristers is the Bar Vocational Course (BVC). Both are one year full-time courses available also on a part-time basis over two years. Both are designed to prepare students for the apprenticeship stage of their training as lawyers (the training contract for solicitors and pupillage for barristers) and for practice thereafter. Both are validated by their respective professional bodies.

What differentiates the professional courses from undergraduate legal education? Their content is clearly different. Students must learn the rules under which litigation is conducted and the requirements of lawyers’ transactional work. They must acquire the necessary skills (drafting, research, advocacy and interviewing for the LPC; legal

research, advocacy, drafting, opinion writing, conference skills and negotiation for the BVC). They must know and work within the letter and spirit of the professional Codes. These differences have an impact on the pedagogical approach adopted, whereby more time is spent learning by doing the type of things lawyers do. Thus a major distinction between undergraduate and professional legal education is that the latter is designed to help students to encounter real life problems, process them, then apply their developing knowledge and skills in order to produce a tangible result. The skills involved are those of evaluation, reflection and critical judgment. These are amongst the highest levels identified in Bloom's taxonomy of the cognitive domain of educational objectives (Bloom, 1956: 201-7) and facilitating the development of these skills is not easy. *The risk is that only a low order of skill is developed, recognising only flagrant breaches of standards and responding mechanically. To overcome this risk considerable attention needs to be paid to ensuring that students learn in a reflective and critical manner.*

Less easy still is to develop these skills while also socialising students into the values of the legal profession. These operate on many levels. Expectations are raised of:

- Personal responsibility, initially for one's own learning and later for one's practice;
- Using lawyers' language and understanding why;
- Thinking like a lawyer (a phrase often used but rarely defined);
- Complying with the letter and spirit of the professional Codes.

It is not enough to achieve mere compliance with existing legal cultures. In an age when the professional conduct of lawyers is subject to severe criticism it is also necessary for

students to develop a robust critical approach to current practice *if they are to contribute to the maintenance of high professional values.*

This chapter will explore methods of addressing these needs and will consider how the approach to classroom activities might be developed as well as how these might be enhanced by other activities.ⁱ It will first consider what values need to be addressed on the professional course and explore the reasons for doing so.

WHY VALUES? WHAT VALUES?

The educational process carries values of its own. We all hope to encourage independence and reflection in our students and this value should underlie all we do in our curriculum design and implementation. Education should encourage students to think deeply rather than superficially about the topic of their study. It should encourage a challenge to preconceptions and a questioning of what is presented as given. Legal study introduces values of its own. The scope for disagreement about these values (of justice, liberty, democracy, equality) and their practical underpinning (procedural propriety, access to advice and representation) gives law as a field of study enormous potential from both an academic and an educational perspective. Professional legal ethics introduce yet another series of values which involve rules to be learned at the vocational stage but which are a fascinating source of critical study for undergraduates who wish to know about how law affects people rather than study it in ignorance of this important context.

Professional ethics underpin the work of solicitors and barristers. Contained in Codes (Bar Council, 2001a; Law Society, 2001) it is easy for these to be seen as the embodiment of professional conduct. Stick to the rules and you will act ethically. However this narrowly deontological approach has dangers of at least two sorts.

1. The rules themselves may be subject to criticism. Although criticising the legal profession has become something of a spectator sport in the United States there has been serious academic discussion of the principles underlying the rules (Pepper, 1986; Luban, 1986; Kaufman, 1986; Pepper, 1986a; Luban, 1988). Similar criticism has been more muted in the United Kingdom, but recently critical debate has been growing. Boon & Levin (1999) criticise the ethical standards of both professions. Their analysis explores a number of underlying tensions (for example that between loyalty to the client and honesty, where they tend to favour a degree of shift from the former to the latter) and concludes not only with criticisms of the behaviour of many practitioners but also of the Codes themselves. This in turn focuses attention on the values of an adversarial approach to litigation and the changes occurring in practice. Other criticisms extend challenges to legal education itself, exploring the foundations of legal ethics and the ways in which it might be introduced into the curriculum (Economides, 1998).

2. Even with an ideal set of rules to guide the practitioner there will always be grey areas, areas where conflicts arise between principles or situations where the context forces a rethink of whether the rules should apply in *this* situation. When lawyers' training is

borne in mind it is apparent that lawyers are past masters at justifying different interpretations of rules. This can result in very dubious behaviour where ambivalent or conflict-laden situations arise. It is therefore important to explore the values which underlie the rules, so that students can develop the intellectual resources to apply the rules critically and to question them when they appear to lead to dubious outcomes.

This perspective has received considerable attention recently. The American Association of Law Schools organised a conference in May 1998 the core theme of which was values. The report of that conference concluded: '[t]he importance of teaching values with our students is to help them to understand how their values affect their lawyering ...' (Koh-Peters, 1998: 2). Evans goes further to suggest: 'that "values" are important here rather than "ethics" as such. The latter it would appear are now confused in the minds of many lawyers with the proscriptive rules of conduct and that association tends to kill off (in the minds of practitioners at least) any active exploration of the roots of ethics.' (Evans, 1998: 277). Hutchinson is more pithy: 'Reliance on codes atrophies the moral intelligence and leaves lawyers adrift without a moral compass when the professional rules run out or give conflicting advice.' (1998: 187). This goes some way to explaining the reason why the study of professional ethics in legal education should explore the underlying values, rather than simply concentrating on a rule-oriented approach to ethics.

DEVELOPING ETHICAL APPRECIATION ON THE PROFESSIONAL COURSES

The LPC and BVC are introduced above. Both require the acquisition of prescribed knowledge and the development of certain skills with specific attention to professional ethics. Both are validated by the appropriate professional body which establishes the curriculum and influences pedagogical methods. Beyond that they differ considerably, the LPC being more dominated by subject-specific content, the BVC more by its skills core. Nevertheless, similar approaches using a variety of pedagogical methods are adopted by the many providers and it is hoped that the examples offered below will be useful in many different contexts.

The whole process of legal education is regularly referred to as having stages (academic, vocational, apprenticeship). While this is true (and students can leave at any stage with a qualification of inherent value) it is important that it also be perceived as a continuum of development for those who intend to practise as lawyers (ACLEC, 1996: 22-25). Vocational courses should therefore offer a challenging shift from undergraduate study towards developing professionalism. Course design should emphasise that the vocational year is not their last year as a student but their first year as a professional. Indeed the standards required by the professional bodies lay significant emphasis on developing professionalism during the vocational year.

Bar Council requirements include:

- Students will be expected to display and to develop a professional and responsible approach to the course and to their obligations to staff and other students;

- Students will be expected to demonstrate a sound working knowledge of the Code of Conduct for the Bar of England and Wales;
- Teaching and learning must be designed to enable students to appreciate the core principles which underpin the Code;
- Providers must demonstrate that professional ethics pervade all aspects of their course;
- Students must be assessed and judged competent in professional ethics and conduct.

(Bar Council, 2001b: S. 3: 25 - 27, 30, 31)

The ‘core principles’ referred to above include:

- The principle of professional independence;
- The principle of integrity;
- The principle of loyalty to the lay client;
- The principle of non-discrimination on grounds of gender, race, ethnicity or sexual orientation, and
- Commitment to maintaining the highest professional standards of work, to the proper and efficient administration of justice and to the Rule of Law.

(Bar Council, 2001b: S. 3, 32)

Further ACLEC (1996 p.18) argue:

From the earliest stages of education and training, intending lawyers should be imbued not only with the standards and codes of professional conduct, but also more generally with the obligations of lawyers to help protect individuals and groups from the abuse of public and private power.

This requires students' attention to be drawn to the need for fair treatment beyond the Codes. It involves more than the transfer of information and seems to raise expectations of students that they will not only know and apply prescribed rules (the Code) but also that they will behave professionally in their approach to their studies and those they encounter. How might vocational course providers approach this task of professional development? It will require the provision of information, opportunities to apply that information and assessment of the skill with which the underlying principles are applied. To ensure however, that this approach is truly pervasive requires more. It requires attention to overall course design and to the design of individual sets of learning materials, whether providing information or providing scenarios within which students must display their growing professionalism. Even more it requires the modelling of professional behaviour by teaching staff and others whom students will encounter. The practice described below makes a serious attempt to address all of these

Access to the professional Codes themselves is essential and many providers have library copies, make them available electronically or provide students with their own copy. BVC students are able to use a Manual (ICSL, 2001a) which introduces students to the issues of professional conduct (addressing all the 'core principles' referred to above) and includes a copy of the Bar's Code of Conduct. Students then receive discrete classes in professional conduct, which are based on a series of problem situations. These are generally taken by practitioners to bring in their current experience. Both professional bodies are keen for course providers to make active use of current practitioners in their course delivery. The classes are designed to explore not only areas where there is a right

or a wrong answer, but also those where grey areas abound or different interpretations of the rules might legitimately lead to different responses. It is however important that students recognise ethical dilemmas for themselves without having them flagged up by staff. Moreover, talking about a problem is not the same thing as responding to it. To respond to both concerns students encounter role-plays which are value-laden and which fit into the main subject and skill streams of the course.

DEVELOPING SKILLS: NEGOTIATION AND INTERVIEWING

Both LPC and BVC address the skill of client interviewing ('conference skills' on the BVC). Much of the development of this skill is taught through role-play activities, students taking on the role of lawyer and client. All students receive the brief which contains the lawyer's instructions. In addition, those playing the client receive 'secret' instructions providing them with the information as to the facts behind their problem and their particular concerns. It is possible to use these instructions to plant an ethical dilemma for the students playing the lawyer.

Thus in a criminal case involving alleged shoplifting the student playing the client could be given an instruction such as: 'At a relatively early point in the conference find an opportunity to ask your counsel whether you would be guilty if your little boy picked the

items up and you did not notice them until you were stopped outside the store by the detective.’ To respond to such a hypothetical question would risk assisting the client to construct a false defence with the consequence of misleading the court.

In a civil case the student playing the client could receive this amongst the instructions: ‘your counsel has been warned that you want to discuss disclosure of documents. If he or she does not raise the matter you should inform him of an internal memo, which is embarrassing because it suggests that you were not taking the matter as seriously as you in fact were. Explain that your colleague has suggested that you destroy this document and ask your counsel whether that is the best thing to do.’ To recommend destruction of evidence which goes against your case would breach the Code.

These dilemmas are all answered to degrees by paragraphs 301a and 302 of the Code:

301. A barrister ... must not:

(a) Engage in conduct whether in pursuit of his profession or otherwise which is:

(i) Dishonest or otherwise discreditable to a barrister;

(ii) Prejudicial to the administration of justice; or

(iii) Likely to diminish public confidence in the legal profession or the administration of justice or otherwise bring the legal profession into disrepute;

302. A barrister has an overriding duty to the Court to act with independence in the interests of justice: he must assist the Court in the administration of justice and must not deceive or knowingly or recklessly mislead the Court.

With the first problem students should also be directed to paragraph 705 and the Written Standards for the Conduct of Professional Work paragraph 5.8:

705 A barrister must not:

(a) rehearse practise or coach a witness in relation to his evidence or the way in which he should give it;

5.8 A barrister must ... not devise facts which will assist in advancing his lay client's case ...

In respect of the second problem students should also be directed to paragraph 608:

608 A barrister must cease to act and if he is a barrister in independent practice must return any instructions: ...

(d) if the client refuses to authorise him to make some disclosure to the Court which his duty to the Court requires him to make;

(e) if having become aware during the course of a case of the existence of a document which should have been but has not been disclosed on discovery the client fails forthwith to disclose it;

These are examples of embedded ethical problems, which have relatively clear answers in the Codes. It is important, however, that embedded ethical problems of this

sort do not merely raise difficulties which have clear answers. To restrict activities in this way would be to encourage the view that problems can simply be answered by reference to a set of rules, which is often not the case. It is important, therefore, to include cases which not only force students to know their Code well but also identify areas where there are different arguably legitimate responses.

Example: Criminal Practice

Here, the accused, seeking advice as to plea, has been caught passing a forged note and then found to have a supply of such notes at home. He claims he was not aware of the fact that the note was forged when he passed it. The instructions to the student playing the client include the following:

[!start of indented text!]

‘You think you may have used four other notes successfully. You certainly used two at your local butcher - he didn’t look twice at them...’

‘In reality this is the second time you have bought dodgy notes. The first consignment ... were under the floorboards at [home] when it was searched - they were not found. You still have a large number of these and you would like to know what you should do about this. You want your barrister to advise you as to whether you should mention this in court or stay quiet about it all.’

[!end of indented text!]

The 'correct' answer is different in each case because of the distinction that in respect of the notes passed to the butcher the offence was in the past whilst to continue to retain the notes under the floorboards would involve committing a continuing crime and no barrister could advise a client to commit a crime. Thus in respect of the butcher incident counsel should explain to the client the advantages and disadvantages of asking for the offence to be taken into consideration while leaving the final decision for the client. In respect of the retained notes, however, to advise that he should continue to retain them is not an option. To do so would be a clear breach of the Code under paragraphs 301 and 302 (above). What, however, should the advice be? It is important to ensure that all tutors are informed of crucial perspectives. Teaching guides should be produced to provide the necessary guidance and practical experience so that students' experience is not dependent upon their tutor having recently encountered such a problem. The teaching guide in this case includes the following:

[!start of quote!]

[t]he client may mention the box of other counterfeit notes he has at home and ask for advice. This is again a complex area and even senior practitioners have different views on it. The safest, and I suggest, the preferable approach, is to say: 'Counsel should tell him that he ought to hand them over to the police and that although as counsel he could not assist or report him to the police (duty of confidentiality), it would preclude him in mitigation telling the judge that those counterfeit notes before the court were the limits of his criminality. He could not tell the court that there was a box of money at the defendant's home'.

The Bar Council's adviser on Professional Conduct issues supports this view.

On the other hand, one of our practitioner assessors wrote: 'the suggestion that the client should hand over the box of other counterfeit notes to the police and thus incriminate himself is highly disputable. My own view, shared by one eminent criminal silk and a number of senior juniors who discussed the point over a cup of coffee in the Southwark Bar Mess, is to advise the client to destroy the counterfeit notes immediately.'

If it should come out in conference that he has already successfully passed some other notes in the course of the past few weeks, eg at the butcher's shop, a similar choice arises. One view is that it would be proper for counsel to advise [your client] to 'make a clean breast of the whole thing' and ask for any other offences to be taken into consideration at the same time, especially if he is going to plead guilty to all three charges. The serial numbers on all the notes are the same and a failure to admit any other usage could leave him open to fresh charges being preferred - charges where the court would not be minded to take as lenient a view as they might in this case. If he were to decide to plead guilty to the offences on the indictment, I do not think the prosecution would have much difficulty in being persuaded that this would be an appropriate course of action. The other view, of course, is that he should simply keep quiet (counsel being under a duty of confidentiality). Again, the safest view would seem to be the first.

[!end of quote!]

Thus there may be more than one legitimate approach to a problem and students must recognise the need to apply the rules critically.

Characteristic of the advice in this teaching guide is an interplay of pragmatism and principle. For example, the risk of not confessing to other offences is greater if the notes all have the same serial number. The lawyer should not merely say what *should* be done but also provide the information necessary for the client to make an informed decision. This reflects a fundamental value: that of client autonomy. It is crucial that the lawyer leaves the final decision to the client. What is more, confidentiality is equally crucial here. Some students find it difficult to believe that, knowing a client is planning to commit an offence (such as retaining forged notes) they must not tell the authorities. These are values which underpin the client/counsel relationship and lie at the heart of the Conference Skills course. Indeed they feature in the assessment criteria and it is made clear to students at an early stage that their task is to enable the client to make an informed decision. Students who bully clients or who offer only one alternative without explaining the strengths and weaknesses of that and other courses of action will lose significant credit and may fail their assessment.

Examples From Students' Conference Skills Manual Explaining The Assessment

Criteria:

Criterion 3: Effective Client Communication

There are many aspects of behaviour which contribute towards creating an effective interchange between you and your client. Much of what is required is born of basic common sense and an application of plain ordinary courtesy. It is useful to remind yourself that your client is, after all, a human being, just like you. To work well, and to ensure that the client responds in the most appropriate and co-operative way during the conference, you need to be sensitive to your clients' fears, anxieties and likely needs as well as being aware of the legal predicament in which they find themselves. In seeking to communicate effectively with your client, try to ensure that you:

- a) Make every effort to see that your client feels as comfortable as possible, whatever the circumstances of the conference or the location in which it is held;
- b) Use language which is appropriate and which your client can readily understand;
- c) Listen to what your client is trying to tell you even if you do not think it is necessarily of relevance to the case;
- d) Allow time and space to answer any questions which the client might have or to raise any anxieties with you; and
- e) Demonstrate in a non-patronising way, a suitable degree of empathy/sympathy.

Where possible, and/or appropriate, attempting to satisfy these aims will, in large measure, reassure the client and consequently ensure that you can communicate effectively. However, perhaps the best overall reassurance which you can give a client (in addition to the above), is to remember that at all times you must appear to be completely non-judgmental in your manner and remain entirely objective about the case. (ICSL, 2001b: 12.3.3.)

Criterion 5: Advising

You should ensure that you:

- a) Provide the client with a full evaluation of the strengths and weaknesses of the case;
- b) Set out what realistic options are available to the client;
- c) Explain the legal and procedural issues in clear and unambiguous language;
- d) Check that the client fully understands the implications of the advice you have given;

....

To advise properly really does mean that: a client expects you to provide full and clear advice on his or her problem. You are the expert and you are being paid to exercise your professional judgment on behalf of the client. The final decision on what to do is always up to the client, but remember, the client cannot make any such decision(s) without you providing a clear and full evaluation of the merits of his or her case, and a summary of the available options. ... (ICSL, 2001b: 12.3.5.)

Professional Conduct

Be familiar with the Code and ensure that you observe the rules of professional conduct at all times. You must, of course, act within your instructions at all times and not, for example:

- a) invent facts;
- b) agree to mislead the court in any way;
- c) mislead your client;
- d) provide answers or invent defences for your client;
- e) in any way coach your client. (ICSL, 2001b: 12.3.6)

The aim in designing these learning outcomes is to integrate the underlying values into students' developing skill. It is only their behaviour which can be observed, not any underlying values they may hold. If however an interview can be observed which explores client concerns, uses appropriate language, explains the strengths and weaknesses of a case and proposes alternative routes with their likely outcomes before giving the client the opportunity to make an informed decision there can be real hope that the underlying value of client autonomy has been learnt.

Client autonomy and the duty of confidentiality in criminal matters may give rise to a classic conflict: where the client admits to the crime but asks his lawyer to defend him. Here students have limited options and these are explained clearly. Withdrawal from the case is appropriate but may not lead to the ethically most desirable result. The intelligent client may simply respond by lying to another lawyer. Testing the prosecution case is also permissible (doing all possible to argue inadmissibility of prosecution evidence in the hope that insufficient will remain to establish some essential element of the offence while carefully avoiding challenging that evidence's veracity). A submission of no case to answer might then succeed. If this fails, the defence may offer no evidence

and this needs to be explained to the client. The practical consequences of these alternatives provide powerful scope for exploring underlying values. Here these would include that of loyalty to the client (with the underlying value of client autonomy) and the duty not to mislead the court (stressing the values of an adversarial system).

It is important to distinguish between the situation described above and one where the lawyer simply *believes* that the client is guilty (for example by being presented with an unbelievable defence story). This may provide a starting point for a wide-ranging discussion of the role of the lawyer (representative not judge), the importance of access to justice and the limited circumstances where the lawyer is professionally embarrassed.

Assessing Ethical Issues

It is well-recognised that assessment is a powerful motivator to learning. On the BVC students undertake a total of 10 skills assessments. Five of these will have specific ethical dilemmas embedded in them on a pass/fail basis. An example is provided below. Students who fail must sit a multiple-choice test, which explores their ability to apply the provisions of the Code.

[!example!]

In a Drafting assessment students are asked to draft the particulars of claim in a case arising out of an accident, which took place on scaffolding. Instructions include the following:

‘However, it seems to Instructing Solicitors that, in addition to a possible cause of action under the above Regulations, liability under the Employers Liability (Defective Equipment) Act 1969 should be explored. If considered properly arguable on the evidence, Counsel is instructed to include a claim under that Act, as well as in negligence.’

S. 1 (1) provides that this liability only arises where the injury was caused by a defect in equipment provided by the employer, which is attributable wholly, or in part to the fault of a third party. The evidence shows that the equipment was not defective, but inappropriate. Indeed an expert witness’s evidence says: ‘As domestic stepladders they were perfectly adequate, and no manufacturing defects were apparent.’

There is therefore no evidential basis for asserting a claim based on the 1969 Act. If such a claim were to be included counsel would be in breach of paragraph 704 of the Code of Conduct:

A barrister must not devise facts, which will assist in advancing the lay client’s case and must not draft any statement of case, witness statement, affidavit, notice of appeal or other document containing:

- (a) Any statement of fact or contention that is not supported by the lay client or by his instructions;
- (b) Any contention that he does not consider to be properly arguable...

[!end of example!]

A student who does not take the care to conduct this analysis properly and to decline to assert such a claim would fail the professional conduct element of this assessment.

It must be admitted, however, that a one-year vocational course is not always the best vehicle for a wide-ranging discussion of the values underlying the provisions of the Code. A conference skills class has as its main focus the development of the skills of effective client interviewing. A negotiation or advocacy class is equally focused on those skills, as are classes in the written skills of drafting and opinion writing, although all can provide opportunities for exploring ethical issues. Thus the amount of time available for such discussions is necessarily limited. What is more, in limited time there is a tendency for tutors to refer to the appropriate elements of the Code of Conduct rather than to explore the underlying values. If that were not addressed there would be a failure to meet the Bar Council's requirement:

- teaching and learning must be designed to enable students to appreciate the core principles which underpin the Code. (Bar Council, 2001b: S. 3: 27)

Addressing this problem requires attention to the whole structure of the course ensuring that the activities are sufficiently integrated and varied.

INTEGRATION AND DIVERSITY

Underlying the values identified above is a fundamental matter of developing students' responsibility for their own learning. In the induction programme the perception that this is the 'first year of your professional life' and the change of approach from university can be stressed. Students can be introduced to a greater understanding of the learning process, their own learning preferences (Honey & Mumford, 1986) and how they can gain mutual benefit by learning how to give (and receive) constructive feedback. Another element of the change from university is the expectation of a greater degree of active participation in classes of all sizes. It is now widespread for 'lectures' to be designated 'large groups' with the symbolic function of demonstrating that they are as much a place for active engagement as smaller classes. Large groups need not involve significant didactic presentation. Instead students can be given prior reading and then placed in situations, which require the application of that prior reading (ICSL use a set of Manuals, written by staff at the School and practitioners). They should then be expected to participate actively in the work of the class to develop their expectation that that is how to behave in such large groups.

In the 'knowledge' subjects (on the BVC these are Civil and Criminal Litigation and Evidence) students may have been given directed reading and a set of problem questions to research. Case studies may be presented visually and the students asked to work in small groups to prepare responses, thus encouraging co-operative working methods.

In the skills classes they may be given the papers in a case to prepare before the class and then be expected (for example) to sit in opposed pairs and conduct a negotiation. In large groups the object of this is not to allow a teacher to give individual feedback on the quality of their performance but to inform them sufficiently of the demands of that particular problem so that they are better able to critique a demonstration of a negotiation in the same case. While many students respond well to this approach and gain enormous benefit from it there are others who never overcome the assumption that lecture halls are places where they receive information in a passive manner.

INDIVIDUAL LEARNING AND FEEDBACK

In small groups students may be given opportunities to perform the skills on which they will ultimately be assessed and to engage in collective work. With the oral skills the focus is likely to be to give each student individual feedback on the quality of their performance and an indication as to how they might best improve. That can be done in part by encouraging peer feedback which itself can be structured by the use of questionnaires.

[!example!]

Example: to be used after students have sought to settle a civil dispute; initially to encourage self-reflection and then to provide the basis for peer feedback as they compare perspectives on their experience.

1. How closely did the agreement reflect:
 - your client's objectives;
 - your planned optimum outcome;
 - your worst realistic outcome?
1. Could/should you have achieved more for your client in respect of:
[each of the six identifiable items which were subject to negotiation]?
2. In which order did you deal with the above items? With hindsight, would it have been more beneficial to adopt a different structure?
3. Identify:
 - your most effective argument;
 - your least effective argument;
 - your opponent's most effective argument;
 - your opponent's least effective argument.
4. Identify the first concession you made. Was it too generous? Did you make it too early?
5. What strategy did you plan to adopt? Did you modify this during the negotiation?
6. What did you find most difficult?
7. With hindsight, how could you have planned it more effectively?

[!end of example!]

These classes are supported by sessions where students receive detailed personal feedback on the quality of their work from their tutor. *These performances do not form part of the formal assessment as experience suggests that students respond better to feedback from a tutor who is not also perceived as assessing a (possibly disappointing) performance.* They take away a videotape which contains their performance and their tutor's feedback, both oral and written. To encourage them to reflect on that they receive a Self-Appraisal Questionnaire. Here is one from the Negotiation course:

[!start of form!]

This form is designed to assist the process of critical self-appraisal and requires you to think reflectively on your own performance. **IT DOES NOT FORM PART OF THE FINAL ASSESSMENT OF NEGOTIATION.** You will gain the greatest benefit from this exercise if you are honest with yourself being neither too generous nor too critical.

Complete the form after you have reviewed your performance and had time to absorb the feedback from your tutor. Take time to complete the form; you will need to set yourself realistic and achievable goals. The areas you focus on need not necessarily be the same as those that have already been addressed in the tutor's feedback.

Identify two strengths in your preparation for and conduct of the negotiation:

- 1.
- 2.

State why they are strengths and how you will maintain and develop these strengths:

- 1.
- 2.

Identify two weaknesses in your preparation for and conduct of the negotiation:

- 1.
- 2.

State what you will do differently next time to improve on these weaknesses:

- 1.
- 2.

Once completed return this form to your Negotiation tutor. Retain a copy for your records - it will assist you to chart your progress on the course.

[!end of form!]

Similar exercises are carried out in respect of the written skills, which will obviously not involve video recording.

This integration of learning methods across large and small group sessions needs to be reflected in an integration (as far as possible) in respect of the skills being developed and the ethical issues being addressed. Thus underlying analytical and research skills need to be reinforced in different contexts and a variety of ethical dilemmas need to be built into the different skill and knowledge development programmes in order to reinforce the underlying values in different contexts. The twin development of personal responsibility for one's own learning and the ability to respond to dilemmas in an ethical manner can be further facilitated by other learning approaches.

COLLABORATIVE LEARNING

One innovation designed to develop students' responsibility for their own learning and development is the collaborative learning group. These are timetabled sessions where students meet in their regular groups to conduct directed activities. In order to achieve a high level of participation it is important that these sessions be closely integrated into the existing skills programme and that each session has a clear and tangible outcome. They may be completely unstaffed or they may have a degree of staff input. They should not,

however, become like a conventional staffed tutorial where the tutor is seen as taking responsibility for the conduct of the session, or the function of developing individual (and collective) responsibility for learning may be lost.

Presentation is important. At ICSL we organise these sessions into streams:

- Research and Analysis;
- Critical Appraisal and Reflection;
- Group Learning and Preparation.

This reflects the approaches that are most significant for effective development on a professional course, but other ways of organisation may be appropriate in different contexts.

One way in which this will help to overcome some of the admitted limitations of the approach to professional legal ethics presented earlier is to allow exploration of values underlying the Code. Here is an example of one of the collaborative learning sessions within the Negotiation course and within the ‘critical appraisal and reflection’ stream. Students are required to email their group response to their tutor who will then respond with feedback on their response.

Student instructions are as follows. The Negotiation Manual referred to is ICSL 2001c.

[!start of text box!]

THE ETHICS OF NEGOTIATION

BEFORE THE SESSION:

Read Chapter 8 of the Negotiation Manual.

Check your understanding of how conditional fee arrangements work (see Bar Council website – ‘Rules & Guidance’ – then choose ‘Conditional Fee Agreement’ from top menu).

AT THE SESSION:

Below you have two tasks. Divide your time approximately equally between the two of them. In each case, seek to come to a group view as to the answers. There may be dissenting views.

One member of the group should log on to the PC and between you, you should write down the group view (with any dissents). Email that to your Negotiation tutor.

TASK 1

The Negotiation Manual (p. 88) says:

Never deliberately deceive or mislead your opponent in order to achieve a more favourable offer of compromise, for example, by pretending that you have a witness to support your client’s version of events when you do not. It is, however, acceptable to use ‘bluff’, allowing an opponent to form an impression without positively misleading him.

1. Do you agree with the above paragraph?
2. What underlying values do you think it represents?
3. Did the group arrive at a consensus view as to the paragraph’s ethical propriety?
4. If not, what were the dissenting views?

TASK 2

You are representing the Claimant in a personal injury case where a defence has been entered which also alleges contributory negligence. The case is funded by a conditional fee arrangement drawn up by your Instructing Solicitor and signed by your client. This provides that if you win you will receive your normal fee (£2000) plus an uplift of 40% (based on your initial risk analysis). If you lose you will receive nothing. You consider it likely that if you go to court there is a small risk that you will lose altogether, that you could win outright, but that a finding of contributory negligence is the most likely outcome. You estimate that £18,000 is the most likely final award.

In negotiation at the court door your opponent offers £15,000. This will constitute a ‘win’ for the purposes of your fees.

1. Would you explain your own personal interest to the client?
2. Why / why not?
3. Is there anything wrong in advising the client to accept?
4. What underlying values influence your view?

OUTCOME:

One e-mail (from the whole group) to your negotiation tutor, presenting your answers to the above questions, indicating dissent where appropriate.

[!end of text box!]

There is scope to develop this approach (for example to explore further the underlying values thrown up by the Conference skills example given above) in other collaborative learning sessions. Thus it is possible to combine reflection on the underlying values with an activity, which in itself requires students to take more responsibility for their own learning. The identification of one stream as ‘Critical Appraisal and Reflection’ should, at both a symbolic and practical level, encourage a more reflective approach to student learning.

REFLECTIVE PRACTICE AND PROFESSIONAL DEVELOPMENT

One day each week is designated a ‘Professional Development Day’ and students are encouraged to undertake a variety of activities in it. These include a series of court visits (some arranged by the School, others by the individuals themselves) after which they need to prepare a reflective report to discuss with their personal supervisor. This is structured with specific questions designed to draw students’ attention to the issues they are learning about on their course: procedural matters, the quality of the advocacy etc. Some examples of headings and students’ responses follow:

[!start of example!]

In County Court possession proceedings by a large Housing Association against eight tenants:

COULD YOU FOLLOW THE REASONS? DO YOU THINK THAT THE PARTIES COULD?

‘Yes. The judge took great steps to explain the decision & his rationale both to counsel & to the defendants.’

PLEASE COMMENT ON ANY OTHER PROCEDURAL ASPECTS.

‘Little by way of argument was presented as the judge was predominantly interested in whether the regulations of the Housing Acts had been complied with. All proceedings followed a set ‘menu’ of questions and answers.’

ANY OTHER OBSERVATIONS ABOUT YOUR VISIT?

‘Although the judge was working quickly through the cases one or two of the Defendants expressed their disappointment at the progress of the proceedings & that it was a “waste of time”. I have doubts on whether this style of hearing serves to convey or portrays the correct approach to the application of the law particularly through the eyes of those defendants for whom this will be their first contact with the judicial system and the trial process.’

In a busy Magistrates’ Court:

ANY OTHER OBSERVATIONS ABOUT YOUR VISIT?

‘Whilst we were waiting for the magistrates to come back to give the judgement in respect of another case concerning driving without due care and attention, the barrister from the CPS came over to where we were and started discussing the merits of the case (in particular that the defendant will lose his licence) when the defendant was present and could hear what was being said.’

Before a District Judge in the Magistrates’ Court:

COULD YOU FOLLOW THE REASONS? DO YOU THINK THAT THE PARTIES COULD?

‘Yes. The magistrate spoke very quickly and I think that sometimes the defendant would have difficulty following the procedure. In particular one defendant had learning difficulties. The magistrate knew this but made no attempt to clarify his instructions.’

PLEASE COMMENT ON ANY OTHER PROCEDURAL ASPECTS.

‘On occasions the stip. mag. [now District Judge (Magistrates’ Court)] gave his common sense opinion for eg: A defendant had left a hotel refusing to pay for his breakfast - charged with theft of £11.70. He opted for Crown Court - he was represented. Mag. said he was going to block it going to the Crown Court as a waste of public money - £2k per case. Party told to see sense!’

These responses may then form the basis for individual and group discussions which take place with personal supervisors in the ‘Critical Appraisal and Reflection’ stream described above.

[!end of example!]

The other main activity students are encouraged to undertake is to work with the School's Pro Bono Unit. There is some evidence that working with real clients during the educational experience increases the likelihood that students will go on to work in fields of law which provide a service to the general public rather than exclusively commercial concerns (Maresh, 1997). However, experience suggests that working with real clients is a powerful motivator. It helps to put the skills and knowledge learnt on the course into perspective and encourages students to develop the skills of independent research. The School provides three approaches to pro bono work.

ICSL runs an in-house advice clinic where students work in pairs to interview clients who have made appointments to see them. They work under supervision but otherwise take responsibility for advising their client.

A partnership programme is also in operation whereby we work with a variety of agencies. These include general advice agencies such as advice centres; specific interest groups such as the Terence Higgins Trust and Shelter and other groups such as ProHelp London, who provide an advice service to other charities. This latter opportunity can provide a great experience for students interested in the corporate field. Thus they might find themselves advising on the formal documentation for a charity seeking to establish itself as a company limited by guarantee. One partner provides an opportunity to give a full representation service. The Free Representation Unit (FRU) provides representation in a variety of tribunals, most notably the Social Security and Employment Tribunals and

the Criminal Injuries Compensation Authority. This gives students full responsibility for representing a client before one of these tribunals.

The third pro bono opportunity is also with FRU but is integrated into the BVC course itself. This is the FRU Option, whereby instead of undertaking a programme of study followed by a simulated assessment task, students undertake an employment tribunal case and submit their work on that case for assessment. FRU and ICSL work closely together on this as FRU take responsibility for the initial training and ensuring that the individual is ready to undertake a case, both share the supervision of students and ICSL conducts the assessment process.

An alternative approach is street law.ⁱⁱ This involves students in providing education and training to those in the community who need to understand about their rights and how to realise them. This may take place in schools, prisons or with community groups.

These pro bono activities appear to have a powerful influence on students' learning. They encounter at first hand (often for the first time) the real significance of limited access to justice and the way in which the law impacts upon ordinary people. They face head on the ethical problems that have been introduced in the simulated setting of the skills classes. Their reflective journals provide clear evidence of this.

[!start of case study!]

In an employment tribunal case where the client had been paid without deduction of tax the student was carrying out a telephone interview with his client using the client's daughter as a translator. The student (who spoke the client's language to a fair degree) overheard the client resisting his wife's suggestion that he should lie about his understanding of the tax situation. He pre-empted the daughter by indicating that he had heard the conversation. His reflective journal records:

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

[!end of case study!]

On a more general level students regularly respond to their experience with comments such as: 'It has helped me understand civil procedure in context, fact management, conference and negotiation skills in reality and the power we possess over people's lives.'ⁱⁱⁱ

These approaches are an attempt to provide a diverse range of learning activities, which students can use to develop their sensitivity to ethical issues, their ability to deal

with them properly as they arise in practice and their ability to look critically at existing practice.

Values at the undergraduate stage

ACLEC (1996 p. 18) identify the need for these issues to be developed from the earliest stage of legal education. It would certainly give vocational students an easier transition to the requirements of professional and lifelong learning values. A moment's reflection will see that they are qualities which will be of value in any of the fields into which law graduates might direct themselves. Indeed, it can be argued that they constitute an element of what is essential to 'graduateness' (Bell 1996, p. 1) and will assist university law schools to meet the Benchmarking requirements of the Quality Assurance Agency (QAA 2000). How might these values be effectively addressed in the undergraduate curriculum where the interest in professional ethics is critical and academic rather than oriented towards practice?

*Theoretical approaches abound. Many fascinating suggestions are presented in Economides (1998). Gill, for example, presents how fundamental issues were debated in classical times, opening a rich mine of ideas and analysis (Gill 1998). Dare presents a stimulating example of the use of literature analysing the dilemmas in *To Kill a Mockingbird* to explore fundamental ideas as well as entering a rigorous debate about the limits of the codes and how one might respond (Dare 1998). Rosen explores how a deontological approach encourages cynicism and a retreat into a craftsmanship whose*

only value is that craftsmanship (Rosen 1998). Such discussions, however, are often sidelined into a Jurisprudence course which is usually available only as an option and in 1996 was only offered by 61% of law schools (Harris and Jones 1997). There is considerable support for the view that ethics should be taught pervasively rather than being seen as an add-on (particularly an optional add-on) and this is even more true of the underlying values if they are to be recognised by students as of genuine significance to their understanding of the law. Rhode (1994) gives many examples of how this might be one in the US context. Giddings (2001) suggests how it might be done in the context of teaching criminal law. One aspect of his approach is to use clinical methods, either simulated (where students role-play value-laden problems) or working under proper supervision with real clients. This is a field which has enormous potential. At the Pro Bono Conference in London in March 2001 (SPBG 2001) a network of student, staff and interested professionals was established to assist in the development of opportunities for students to become involved in providing advice and representation to those in need and in developing 'street law' projects which involve working with schools, prisons and community groups to develop their understanding of the law which affects them. These provide powerful learning opportunities to students and give them direct experience of the inequalities in society which inform many of the values they should be considering. Practical assistance may be available to those interested in such developments either through the Solicitors' Pro Bono Group (pro.bono@virgin.net) or the Clinical Legal Education Organisation (law-clinic@shu.ac.uk).

Suggestions of this sort represent a radical change for many law teachers and while research demands remain dominant the impetus for change may be lacking. If

*however initiatives such as the Subject Centres and Institute for Learning and Teaching are effective, there will be a stronger motivation to develop a broader range of learning methods. This book indicates something of the wealth of variety available. Different institutions may, if they choose, develop distinctive learning cultures. This will be most effectively achieved if law teachers themselves develop a reflective approach to their experience of students' learning (Burridge, 2002, **) and use it to develop their own professionalism. In this way, they will be mirroring their students' experiences and providing a foundation for intellectual, critical and professional development at both undergraduate and professional stages. This can only be good for the prospects of developing strong personal and professional values.*

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ⁱ Examples are drawn from the Bar Vocational Course provided at the Inns of Court School of Law and reflect that institution's concern to address the question of professional development actively. My thanks to colleagues, our students and to the School itself for permission to reproduce the fruits of their ideas and work.

ⁱⁱ The College of Law is developing Street Law programmes and has collaborated with universities interested in developing this type of experience for their students.

ⁱⁱⁱ These extracts were first published in Brayne, Duncan & Grimes, 1998, 169-70.