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THE BEHAVIOUR OF FAMILY LAWYERS AND THE IMPLICATIONS FOR LEGAL EDUCATION

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Legal educators have often developed courses with the purported goal of teaching students to “think like lawyers.” Yet little is known about the ways various classes of lawyers think or behave. This paper offers some insights through anecdotal observations of the behaviour of family lawyers in Sydney. It must be conceded, however, that even beginning to demystify lawyerly behaviour does little to resolve current debates about the goals and methods of legal education.

DEARTH OF KNOWLEDGE ABOUT LAWYERLY BEHAVIOUR

A number of distinguished scholars have observed that we know relatively little about what various cultures and subcultures of lawyers actually do, much less about how they think.¹ This is indeed ironic since one classical and ubiquitous (though controversial) exposition of the goals of legal education is, to teach students to think and behave like lawyers.²

It is difficult to extract from practising lawyers a helpful description of what they do or how they think — they just do it.³ Only when lawyers or judicial officers criticise other lawyers do articulate hints emerge of what is considered to be proper or appropriate lawyerly behaviour and thought.

Yet it is vital for legal educators and Law Societies to reflect upon and systematise the behaviour of lawyers, just as they attempt to reflect upon and systematise the behaviour of judges. Since “thinking like a lawyer” is often claimed to provide a minor or major goal of legal education, it would be helpful to gather a few insights into this mythical and wobbly yardstick. This will undoubtedly assist to:

1. abandon this goal for legal education until its content is clarified and segmented;
2. decide when, where and how segmented skills should be taught;
3. abandon or restrict this concept as a goal for university legal education;
4. give students realistic expectations concerning the extent to which law school equips them to be legal practitioners.

The record which follows, describing the patterns of behaviour of some family lawyers, is based entirely upon anecdotal observation of lawyers in Sydney. Opportunities may emerge later to record and/or film lawyerly behaviour “behind closed doors” on a more systematic basis.⁴

The study of written records produced within the legal world tends to hide more than is disclosed. Legal correspondence, pleadings, affidavits, court transcripts and judicial judgments all open only very small windows into the dynamics of lawyerly behaviour. No doubt the anecdotal anthropologist may record no more than a few subjective ramblings; but such a method may gain access to more closed doors and honest conversations than a more systematic colleague equipped with questionnaire and tape recorder.

The writer also attempted to record his own responses to practising as a family lawyer before a process of desensitisation set in.⁵

COMPETING IMAGES AND PRACTICES OF “PROFESSIONALS”

Lawyers, and members of other work groups sometimes called “professionals”, find themselves caught between the competing images and the actual practices of their occupation. On the left wing are the images that lawyers like those engaged in other professions are monopolistic, insulated from market forces, exploitative, under-regulated, underaccountable, reactionary, aggressive, overpaid, clerical, opposed to any kind of change, obstructive, pompous, afflicted with jargon and narrow in their understanding of life.

On the right wing are the competing images and practices depicting lawyers as servants, pillars of democratic traditions, hard-working, over-regulated, accountable, carefully changing, devoted to the well-being of their clients, learned, constantly changing by learning and technically proficient. Anecdotes abound to support both ends of the spectrum.

Who wins the battle of anecdotes? Literature, movies and research have proliferated giving examples of both competing images.⁶ As a practising lawyer, one existentially discovers both ends of the spectrum both within oneself and in the behaviour of colleagues on a daily basis. How devotedly can one serve a client who is not paying his/her fees? How often can one keep adapting when there are sunk costs and comfortable habits in tradition?

The right wing images and practices obviously have a high ethical content. They are vigorously propagated by Law Societies. They provide a noble ideal to aspire towards and are an antidote to rampant cynicism. As moral and spiritual beings, some law students long to find that the image is more than an aspiration and that there are indeed legal niches where service, accountability, change and growth are both realistic goals and emerging realities.

The spectrum of anecdotes, images and practices prompts emotive debates around the concept of “professional.” On the left wing, this word represents a grab for power and control by a group of workers; on the right wing, a description of a group of workers who possess a sufficient number of admirable traits.⁷

As the images and practices of the legal profession move towards the low (left) end of the spectrum, a variety of responses occur. In particular, one reaction is to exhort the community to remember the vision, ethical position and history of sacrifice which lie behind justice systems in western democracies.⁸ Precious institutions and habits should not be surrendered readily to cynicism and self-interest. For example,

The greatest single task of a free and democratic society is the just administration of the Law — that civilizing presence which bestows order and preserves personal rights and liberty. Lawyers have the unique privilege of sharing in that fundamental undertaking. In whatever manner they are practising they have a primary duty to serve the administration of justice. No commitment to a client or an employer can exempt a lawyer from that duty to act honestly and fairly within the law. In the discharge of that special responsibility, the profession of law, if it is conscientiously followed, can claim to be honourable.

It is that basic shared responsibility to the community which binds the profession to an ethical system founded on principles of honest and diligent service. Common allegiance to that system by lawyers allows them to retain professional cohesion and identity despite the great variety in their

Such exhortations may have a minor effect to move the images and behaviours of some lawyers towards the high ends of the spectrum of professional behaviour. It is certainly worth advocating some inspirational goals rather than wallowing in a cynical form of entropy and realism.

Nevertheless, as the remainder of this paper argues, a degree of de-mythologising realism concerning what family lawyers actually do, can assist in the construction of new visions and training for lawyers.

Social Changes Affecting the Legal Profession

The spectrum of competing views about professions, including the legal profession, has been highlighted in recent years because of a number of changes taking place in society. These changes have tended to undermine conservative images attached to the medical and legal professions, except at the most expensive, highly specialised ends of those professions. As a result, the legal profession is often described as being in “crisis.”¹⁰

History may describe this stage less dramatically as a moderately painful transition.¹¹ Three decades of transition may be a mere moment for an historian but a lifetime of turmoil for a participating actor.

The changes, which in snowball fashion are both causes and symptoms of the decline of ideological professionalism, include more educated consumers demanding better and cheaper legal services; more aggressive governments seeking to cut legal aid and court expenditure; awareness that many traditional tasks can be performed perhaps even better by banks, accountants, clients and paralegals; fierce competition within the legal profession for client loyalty and payment; the emergence of multi-disciplinary partnerships; the loss of networks and collegiality within the profession; mergers of law firms and the emergence of mega-firms; a shortage of solicitors and barristers;¹² the demystification of the behaviour of lawyers, judges and other officers of the legal system; nominal control by and reactionary or hesitant policies of Law Societies; marketing campaigns by lawyers and Law Societies; increasing overhead costs leading to less service for non-paying or legally aided clients; and a bombardment of legislative and procedural change which increase both de facto specialisation and creeping obsolescence.

WHAT DO FAMILY LAWYERS ACTUALLY DO?

Obviously, attempts can be made to answer this question at different levels of generality. In one well-known article, it was stated at a high level of generality that family lawyers do five things — namely listen, educate, prepare documents, negotiate and, sometimes, litigate.¹³ Similarly, how these tasks are done differs dramatically depending upon personality, learned style and culture. Further, the behaviour of family lawyers differs in the many sub-cultures which exist around Australia and as between country, suburban and city practices.¹⁴ Moreover, the habits learned early in a lawyer’s career tend to persist. Some researchers have attempted to classify the styles of behaviour of family lawyers into categories such as gladiators, bombers, advocates, counsellors, journeymen, undertakers and mechanics.¹⁵

At a lower level of generality, and across most styles, I offer some observations of what family lawyers do.

Listening

They listen to and watch clients. As the client reconstructs his/her version of history, the lawyer listens with occasional questions in order to evaluate the client’s memory, consistency, tendency to exaggerate, expectations of cost, delay and outcome, tenacity to withstand extended negotiations or litigation, unresolved emotional distress, bargaining weaknesses and strengths, ability to do homework and to organize ideas.

Listening is usually accompanied by notetaking and occasional questions aimed to supplement information which the lawyer perceives to be relevant. “Exactly what did the child say as he stepped out of the car?” “Who else was present when that event occurred?” “Can you tell me exactly where the money came from to buy the house?” “Do you

have any documentary evidence of the sale?” “Is there anyone who particularly dislikes your husband?”

The listening process is used to do considerably more than collect the client’s reconstructed version of history and hopes for the future. It is part of an evaluation of the client’s character, motivation, emotional stage, tenacity and ability to understand forthcoming advice. The further questions asked by the lawyer are also the beginning of the education process by which the lawyer indicates that his/her world of relevance does not coincide with the client’s perception of relevance.

Most lawyers restate an edited version of what they hear the client say about the past and hopes for the future. This is done not only to assure the client that he or she has been heard, but also to ensure that the lawyer will act only on correct instructions.¹⁶

Client reconstructions of the past often dwell upon interpretations of who was to blame. Lawyers tend to respond by gently affirming the client’s interpretation – “That must have been very distressing.”

Client and lawyer are like performer and bored, but dutiful, audience — the lawyer will not interrupt the aria, but she will not applaud much either for fear of an encore. Lawyers generally join with, and validate, the client’s vocabulary of blame only to reassure wavering clients of the correctness of their decision to secure a divorce.¹⁷

Discussing fault may also have a utilitarian function of wooing support from the lawyer.

By projecting blame on their spouses, clients work to reinforce that loyalty, to penetrate the objectivity and reduce the social distance built into the traditional professional relationship. Their vocabulary serves to add sympathy to fees as a basis on which their lawyers’ energies can be commanded.¹⁸

Educating — Giving Advice

While hearing the client’s reconstruction of the past, perceptions of relevance and hopes for the future, the lawyer begins an ongoing education process of the client. This usually involves a cyclical process of allowing the client to express his or her subjective perceptions and then reminding the client again of the objective realities of the processes of legal negotiation and litigation. With some clients, these educational comments have to be repeated many times.¹⁹ This education process allows the lawyer attempts to do many things.

Explode myths. By asking questions, the lawyer extracts the myths, expectations and folk lore which the client brings into the lawyer’s office, so that these can be firmly contradicted by examples and stories.²⁰

Contradict bush-lawyers. The lawyer often explains that no two cases are the same. Many clients have been given advice already by friends, relatives and bush-lawyers based on what they have heard.

De-emphasise marital fault. As the client’s history recounts episodes of his or her partner’s fault, the lawyer gently reminds the client of what is considered to be relevant in the legal system. “I know it’s not fair, but that is what Parliament has decreed.” “He has treated you very badly, but I’ve seen our local judges become upset when those kinds of incidents are put into affidavits — we can’t take that risk.”

Confirm what is “normal.” Family lawyers commonly tell clients that past or predicted events are quite normal, common or to be expected. “It’s normal for you to be very distressed at this time.” “It’s normal for husbands to make tactical custody claims.” “It’s normal for valuations to be widely divergent.” “It’s normal for children to be confused on access days.”

These comments help to alleviate a client’s sense of panic or guilt; they may help the client to believe that the process has a predictable pattern; and may convince the client that he or she has a competent and experienced adviser.

Undermine confidence in litigation. Family lawyers attempt to educate clients about the delay, uncertainty and cost of undertaking a contested hearing. Court proceedings are described as “a lottery,” “accident prone” and as “brain surgery with an axe.” “The Family Court cannot give you justice; it will give you a result.” The courts are often depicted as being staffed by the overworked, incompetent or unpredictable.

Judges in particular do not fare well when divorce lawyers describe the legal process to their clients. Many of the lawyers in our sample stress the limited competence of judges and the ways that they can confuse even simple problems.²¹

Clients sometimes do not take in these messages and are often devastated by the process and result of a contested hearing.²² By this educational process, lawyers are able to exert considerable pressure upon their clients to settle out of court. Probably around 90 per cent of disputes which enter the office of a family lawyer settle by agreement.²³

Family lawyers press clients to settle not only for the client's sake. They also have self interest in avoiding disgruntled clients who inevitably blame their lawyers at least in part for the result, process or cost, and then demonstrate a reluctance to pay for the hefty court costs.

Demonstrate insider knowledge. Family lawyers often make comments to clients which show that the lawyer has highly specialised information on how the system really works. "Court delays are currently 14 months." "The lawyer for the other side is a well-known gladiator." "Judge X or counsellor Y is away on holidays."

The purpose of these comments seems to be primarily to give the client confidence that he or she has chosen a wise lawyer and that the lawyer's judgment is worthy of trust.

Warn about danger areas. After hearing a client's story, a family lawyer warns a client about possible pitfalls. These are warnings about future events which may possibly severely prejudice the client's position. Such advice may include warnings: never criticize a parent within the hearing of that parent's child; provide opportunities for contact by an access parent; be aware of the possible income tax, immigration or social security implications of the case; lodge a caveat on readily saleable property; make full disclosure of assets in sworn documents; make copies of any business records which may become inaccessible in the future; or, consider proposed child access arrangements on Christmas Days, statutory and school holidays.

When giving this advice, family lawyers display a substantial dose of street cunning learned in the schools of fear, force and fraud which surrounds some family disputes.

This education process takes place in an atmosphere of support, story-telling and often humour. It is communication by words and body language with important advice being confirmed by letter both to assist the client and to provide self-serving evidence that the advice was in fact given. Only rarely is the oral advice and cajoling backed up by educational literature or videos.

Clerical Functions

Family lawyers demonstrate skills of organizing their thoughts so that client histories and concerns can be translated into pleadings, affidavits and letters via the ubiquitous dictaphone. Constant practice on the telephone and dictaphone refines these organizational and oral skills.

The creation of documents is, of course, assisted by an array of basic precedents accessible on word processors. Because family law is in a constant state of flux, keeping forms and precedents up-to-date is a labour-intensive task. There is a tendency to defer or delegate the task of updating as there are sufficient crises on the production line to divert attention away from constant pressures to regear the machinery.

Creation of documents is often effected under considerable time constraints. Consent orders are regularly drafted in hand-writing in the corridors of the courts and submitted to registrars or judges for approval while the client's adrenalin and motivation to settle are high. These skills of drafting-on-the-run are honed by experience and become more complex as each lawyer encounters potential pitfalls. That is, the substantive additions to documents seem to arise more from personal experience of disaster and from practitioner gossip than from assiduous reading of the latest cases or journals. It is more an oral and anecdotal culture than bookish and systematic.

It is clear that some of these clerical and drafting skills can be readily performed by laypersons with a little assistance. For example, in uncomplicated cases, clients who have the motivation and time to invest are encouraged by lawyers to obtain a do-it-yourself divorce.²⁴

A family lawyer's knowledge appears to be of a different kind from the systematic series of propositions and

exceptions learned at law school. It consists of a process or way of approaching problems. Disorganized client histories are turned into chronologies of what the lawyer perceives to be relevant; further information is then systematically collected or extracted from both client and lawyer for the other side by a slow process of telephone calls, letters, affidavits and production of documents. Inertia, hostility, expense, procrastination and crisis management often make this a drawn out process. This task is symbolised by the adage, “look after the facts and the law will take care of itself.”

Only infrequently do family lawyers appear to undertake systematic research — it is expensive, beyond the means of most clients and legal principles usually only provide one small piece in the jigsaw of resolving the dispute. Some rules relating to procedure and discovery are known by heart but this ignorance about one kind of law is usually effectively padded: by a sound sense of danger; by running cases past colleagues for hints; by techniques of speaking graciously, cautiously and evasively on topics about which little is known; and, if settlement does not eventuate, using barristers as possible insurance against overlooked or unknown rules of law.

Self-Defence

As a dispute moves towards being resolved by a judicial decision, so lawyer control of the situation gradually slips away. The potential for disappointing results and disgruntled clients increases dramatically.²⁵

For the statistically few cases which need an umpire’s decision, the adage “if anything can go wrong, it will” is particularly apt. Little wonder that lawyers have such an interest in damage control of several kinds by staying out of ultimate adjudication.

Family lawyers are particularly aware that today’s client may be tomorrow’s disputant; that a certain degree of client hostility is inevitable given the clumsiness and delays associated with fact collection and negotiation; that their future earning potential depends upon maintaining a reputation for honesty and fair dealing with colleagues and clients; that their licenses and considerable sunk costs to practise as a lawyer can be lost by a Law Society responding to a complaint; that a certain number of clients will be lying, engaging in illegal activities and using the lawyer as a dispensable pawn in a larger game; that a certain percentage of lawyers engage in perjury, trial by ambush and dirty tricks;²⁶ and that commercial partners and legal colleagues are quick to disband a family law department which does not display a healthy profit margin.

Enlightened self-interest, therefore, develops a profound interest in the methods of fear, force and fraud. Underneath the gregarious story telling of the surviving family lawyers lies a reservoir of street cunning and tactics for survival. Because of the turbulent nature of family law practice, family lawyers develop an ability to respond with equanimity and humour to daily disasters. Any other response would lead to burn-out.²⁷ However, experiencing daily disaster also means that surviving family lawyers learn quickly. Seared upon their consciousness are lessons concerning the variety of ways that negotiation, settlements and litigation can go astray.

IMPLICATIONS FOR LEGAL EDUCATION?

What are the implications of these early insights into the behaviour of family lawyers? They intensify, rather than alleviate or enlighten the debates which surround legal education.

Reading about legal education can be depressing for a law professor.... [The] overall assessment of legal education is anything but favourable. If the writing accurately pictures the reality, the following assertions are at least partially true: law professors do not prepare their graduates adequately for law practice; the law school curriculum is neither properly theoretical nor adequately practical; law schools create unproductive stress and anxiety in their students; law students are generally bored after the first semester of study; law professors, despite their protestations to the contrary, stress knowledge of rules rather than broader legal issues; and the law school curriculum inclines students towards serving the affluent. Historically, law schools have claimed with confidence that they teach their students to think like lawyers, but a recent

Observations of the behaviour of lawyers can be used to promote whichever school of thought one already supports. One well-known article places law teachers into five stereotypical categories — the traditional legal scholar, the practitioner-scholar, the clinical law teacher, the interdisciplinary scholar and the activist.²⁹ The traditional legal scholar responds to studies of lawyer behaviour, “It does not matter how lawyers behave or think. Law schools are here to teach how to use a law library, to develop a certain style of analytical speaking, thinking and writing, and to memorise a certain number of fundamental rules and policies. The fact that many practising lawyers may rarely use these skills is irrelevant. Anyhow, these traditionally taught skills will probably be used more often by advocates, judges and law reformers than by desk-bound lawyers.”

The practitioner-scholar responds, “These insights show how important it is to break down the skills of practising lawyers into segments and to offer courses which systematically teach these skills. For example, more resources should be directed towards courses on the theory and practice of interviewing, communication, drafting, time management, negotiation, mediation and organization. Students should not be thrown into the crucible of legal practice and there nervously learn by trial and error or develop bad habits.”

The clinical law teacher argues that these insights into lawyerly behaviour reinforce what he or she has always advocated, “Complex skills are best taught in the messy environment of a functioning law clinic. The stages of doing can be immediately identified, analysed, systematised and improved while student motivation levels are high and habits have not set in.”³⁰

The interdisciplinarian finds considerable encouragement for his or her research and teaching from the study of lawyer’s behaviour, “Anecdotal insights are only the beginning of the studies that can be done by psychologists and by sociologists of the legal profession and legal system. Interdisciplinary approaches open new windows to both understanding and reforming the legal system. Moreover, the fact that the necessary lawyering skills are learned on the job at least to a moderate level of competence, and that approximately 50 per cent of law graduates will leave traditional legal practice within 5 years of graduation, mean that the law school curriculum should concentrate resources on other skills and knowledge which are of more long term benefit to graduates and to Australian society. As many law graduates will end up in influential positions of leadership, the curriculum should emphasise policy, ethics and the process of inter-disciplinary research.”

The activist teacher, committed to the use of the legal system to serve a clearly identified cause (such as the preservation of the environment, assistance to minority groups, feminism, religious freedom or service of the poor) is also heartened by the studies of lawyer behaviour, “Demythologising the behaviour of lawyers makes the legal profession look far less seductive to law students. Students see lawyers more realistically as reasonably skilled and highly-pressured negotiators, managers and clerks.³¹ Students then become more interested in alternative careers before they have committed themselves to a long-term corporate rut. They realize at an early stage that “legal” skills of interviewing, negotiation, organizing ideas, drafting and time management readily lend themselves to many other more noble careers. Technical excellence can be put into the service of a variety of macro or micro causes. It is obviously a wise national and planetary investment to raise the consciousness and understanding of students who will be in positions of leadership both inside and outside the legal community before time constraints, mortgages and habits close openness to ideas. Moreover, pragmatic realism about the nature of the job better prepares students to face the traumatic transition from university to a high-paced lawyer’s office, and to exit traditional legal practice before or after the inevitable at least two years of experience.”

Dispense with University Law Schools?

Demythologising the behaviour of lawyers (and judges) not only provides ammunition for all the competing teaching philosophies within the university law schools, but also fuels another traditional viewpoint. That is, lawyers do not need a university education at all — what they need is some maturity, intelligence, dedication and a system of apprenticeship. A modified version of that view is that any university degree is an adequate prerequisite for legal practice. A general degree provides a maturing delay and a sieve to test basic skills of reading, writing, memorising,

organization of ideas, working to deadlines and communicating. A sufficient number of additional demythologised legal skills will then be learned on the job, just as they are under the present system of legal education. Stephen Gillers has described the movement of students from academy to legal practice:

Thinkers and stars are the exaggerated and romantic lures new lawyers will find scarce in the life to which they graduate. The intellectual tradition, in the academy allegiant to truth and fairness, now accommodates other demands. Stardom — the lawyer's media face — is displaced by the exigencies of overhead and a profusion of the ordinary. Law students, impressed in spite of themselves with the seductive world of employer courtships and professional relationships, may sense these impositions in a diffuse and general way. Soon the details will come more sharply into focus. Assembling, dabbling, disassembling, enforcing, and concealing, though on their own terms defensible and offering as honourable a livelihood as most enjoy, nevertheless describe tasks that are unexpected until they are unavoidable. Then, encountered, these roles to be tolerated, even savoured, will be redescribed in the minds and public presentations of their occupiers as good or grand or glorious, as in service to The Law. So myths abide.³²

CONCLUSION

The study of the behaviour of lawyers is largely untilled ground. It has been protected by myths, stereotypes and lawyer-client confidentiality for too long. This paper has briefly looked at some of the behaviours underneath the labels of interviewer, advice-giver and clerk. Many complex layers of behaviour and motivation remain to be observed, analysed and discussed.

As the behaviour and motivation of lawyers is slowly unravelled by research, the debates about legal education are likely to become more intense than ever. For what purposes should what be taught, to whom, by whom, using what methods, in what milieu and with what resources?³³

The benefit will probably be that as it becomes clearer what lawyers do and do not do, there will be more pressures on law schools to clarify and demythologise what they do and do not do. This will hopefully lead to less student confusion³⁴ and to considerable improvement in legal education. Students may even be told in clear terms what mixture of educational goals and methods have been chosen from the three broad categories of rule-manipulation, policy and ethics, and skills.³⁵

If the gradual demythologising of legal behaviour also promotes the gradual demythologising of legal education, it will be a welcome by-product. Necessarily, both tasks will be driven by outsiders but, hopefully, with some cooperation by those of us inside.

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1 See for example, BB Boyer & RC Cramton, *American Legal Education: An Agenda for Research and Reform* (1973–74) [59 Cornell L Rev 221](#), at 270–74; R Mnookin & L Kornhauser, *Bargaining in the Shadow of the Law: the Case of Divorce* [\(1979\) 88 Yale LJ 950](#); K Kressel, *The Process of Divorce — How Professionals and Couples Negotiate Settlements* (New York: Basic Books, 1985); A Sarat & W Felstiner, *Law and Strategy in the Divorce Lawyer's Office* (1986) 20 *L & Soc'y Rev* 93 [hereinafter cited as *Law and Strategy*]; B Danet, W Hoffman & N Kermish, *Obstacles to the Study of Lawyer-Client Interaction: The Biography of a Failure* (1980) 14 *L & Soc'y Rev* 905; K Kressel et al, *Professional Intervention in Divorce: A Summary of the Views of Lawyers, Psychotherapists and Clergy* [\(1978\) 2 J Divorce 119](#); FK Zemans & VG Rosenblum, *The Making of a Public Profession* (Chicago: American Bar Foundation, 1981); Symposium, *The Law Firm as a Social Institution* [\(1985\) 37 Stan L Rev 271](#). For a discussion of the psychology of the lawyering process, see RS Redmount, *The Transactional Emphasis in Legal Education* [\(1974\) 26 J Legal Educ 253](#); RS Redmount, *Psychological Views — Jurisprudential Theories* [\(1959\) 107 U Pa L Rev 472](#). For discussion of the

jurisprudence of lawyering, see LM Brown & TL Shaffer, Toward a Jurisprudence for the Law Office [\(1972\) 17 Am J Juris 125](#); CD Kelso, Steps Toward a Lawyer Oriented Jurisprudence: Problems, Promises, Procedures and Pitfalls [\(1967\) 19 U Fla L Rev 552](#).

2 See for example, American Bar Association, *Law Schools and Professional Education* (Chicago: ABA Press, 1980); D Pearce, E Campbell & D Harding, *Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission* (Canberra: AGPS, 1987). It should be emphasised that many legal educators do not accept this well-worn goal. They strive to articulate and attain other broader aims.

3 Compare DA Schon, *The Reflective Practitioner* (New York: Basic Books, 1983).

4 In the USA, there are some recent pioneering reports prepared from taped interviews between family lawyers and clients. See for example, *Law and Strategy*, *supra* note 1; A Sarat & W Felstiner, Law and Social Relations: Vocabularies of Motive in Lawyer/Client Interaction (1988) 22 *L & Soc'y Rev* 737 [hereinafter cited as *Social Relations*]; J Griffiths, What do Dutch Lawyers Actually do in Divorce Cases (1986) 20 *L & Soc'y Rev* 135.

5 Daily impressions were recorded into the ubiquitous dictaphone. Compare P Berger & H Kellner, *Sociology Reinterpreted* (Harmondsworth: Penguin, 1982) at 39–40,

If I am to be successful in this situation as an anthropologist -,which means neither remaining the incomprehending outsider nor “going native” — I must, in a very real sense, become a “plural person” (to an extent everyone is that up to a point, especially in a modern pluralistic society, but there is a qualitative jump here). That is, I am both inside and outside the situation, and my activity as a social-scientific interpreter ensures that I maintain this always tenuous balance. The anthropological field researcher is trained to achieve this curious trick, by a variety of techniques; for instance, the practice of keeping continuous field notes, beyond its obvious instrumental utility, is a ritual for maintaining the insider/outsider status.

6 C Dickens, *Bleak House*, first published in book form 1853; S Gillers, Great Expectations: Conceptions of Lawyers at the Angle of Entry [\(1983\) 33 J Legal Educ 662](#).

7 For the debate on how to define a profession, see MS Larson, *The Rise of Professionalism: A Sociological Analysis* (Berkeley: U California Press, 1977); Schon, *supra* note 3.

8 R Abel, The Decline of Professionalism? [\(1986\) 49 Mod L Rev 1](#) [hereinafter cited as Professionalism]; F Riley, The Practice of Law: An Identity Crisis (1989) 27 *L Soc'y* 150; R Abel, Between Market and State: The Legal Profession in Turmoil [\(1989\) 52 Mod L Rev 285](#) [hereinafter cited as Market and State]; PM Brown, The Quiet Revolution in the American Law Profession (1986) 14 *Fordham Urb L Rev* 855.

9 *Professionalism*, *supra* note 8; *Market and State*, *supra* note 8; D Weisbrot, The Changing Face of Australian Legal Practice (1986) 58 *Aust Q* 426.

10 *Market and State*, *supra* note 8.

11 See for example, HJ Berman, *The Interaction of Law and Religion* (New York: Abingdon, 1974).

12 Riley, *supra* note 8, at 50. See also Brown, *supra* note 8.

13 Mnookin & Kornhauser, *supra* note 1.

14 Family Law Council, *Administration of Family Law in Australia* (Canberra: AGPS, 1985).

15 RD Felner et al, Attorneys as Caregivers During Divorce (1982) 52 *Am J Orthopsychiatry* 323; K Kressel, A Hochberg & TS Meth, A Provisional Typology of Lawyer Attitudes Towards Divorce Practice — Gladiators,

Advocates, Counsellors and Journeymen (1984) 7 *L & Hum Behaviour* 20; Kressel, *supra* note 1.

16 See A Sherr, Lawyers and Clients: The First Meeting [\(1986\) 49 Mod L Rev 323](#).

17 Social Relations, *supra* note 4, at 750.

18 *Id* at 764.

19 *Law and Strategy*, *supra* note 1; *Social Relations*, *supra* note 4.

20 J Wilczek, Successful Family Law — Getting to the Heart of the Matter [\(1985\) 59 L Inst J 288](#). Such folk-lore commonly includes, “Women always get custody.” “Property is normally divided equally.” “An innocent partner can stop the divorce.” “If I win, my partner will pay my legal costs.”

21 *Social Relations*, *supra* note 4, at 104.

22 One comprehensive study in Australia which demonstrated a very high level of client satisfaction with lawyer behaviour also showed that at least 50 per cent of clients become dissatisfied with their own lawyer’s performance if the dispute proceeded to a contested hearing. See P McDonald ed, *Settling Up — Property and Income Distribution on Divorce in Australia* (Sydney: Prentice Hall, 1986) at 51–52.

23 Family Law Council, *Annual Report 1988–89* (Canberra: AGPS, 1989). The report notes the percentage of defended matters finalised to total number of orders sought as:

	1984	1985	1986	1987	1988
Custody	9%	9%	8%	9%	9%
Access	10%	11%	13%	13%	13%
Property	10%	10%	9%	11%	14%
Maint.	7%	7%	8%	11%	13%
Injunct	5%	5%	6%	9%	7%

The proportion of cases which go to a hearing compared with the numbers of applications filed remains steady at 9 per cent and 13 per cent for custody and access respectively. Property and maintenance matters which proceed to a hearing are reported as steadily increasing.

24 In 1988, 42.2 per cent of divorce applications were made in person without representation by lawyers. *Family Law Council, Annual Report 1988–89* (Canberra: AGPS, 1989). The recent adoption of forms of pleadings in Family Court may continue to have the side-effect of requiring legal representation in the early stages of property, maintenance and custody disputes. Complex verbal formulae necessarily make laypersons dependent on experts.

25 McDonald, *supra* note 22, at 51–52, notes that one half of the clients surveyed became disgruntled with their own lawyers if their dispute was determined by judicial decision.

26 See RE Crouch, The Matter of Bombers: Unfair Tactics and the Problem of Defining Unethical Behaviour in Divorce Litigation [\(1986\) 20 Fam LQ 413](#).

27 See for example, M Head, *Living with the Emotional Demands of a Family Law Practice* (1983) 57 *L Inst* 1569.

28 JO Mudd, *Beyond Rationalism: Performance-Referenced Legal Education* (1986) 36 *J Legal Educ* 189, at 189–190 nn 1–7; JH Wade, *Legal Education in Australia — Anomie, Angst and Excellence* (1989) 39 *J Legal Educ* 189.

29 See for example, EG Gee & DW Jackson, *Bridging the Gap: Legal Education and Lawyer Competency* (1977) *BYUL Rev* 695.

30 Boyer and Cramton observe,

[T]he following advantages of clinical teaching have been suggested: (1) clinical teaching makes it possible to deal with a greater range of skills and abilities, thereby avoiding the repetitiveness of the normal curriculum; (2) clinical methods can draw upon the emotional dynamics of role adjustment and role obligations to provide new motive force for learning; (3) the law clinic creates an atmosphere of camaraderie and co-operation between students and teachers, rather than polarizing the “two cultures”; and (4) the clinical opportunity to demonstrate competence in “real-world situations can enhance and restore student self-esteem. These claims are highly plausible, but thus far evidentiary support for them has been sparse. Boyer & Cramton, *supra* note 1, at 281–82.

31 See for example, Gillers, *supra* note 6; DC Bok, *A Flawed System of Law Practice and Training* (1983) 33 *J Legal Educ* 570. The activist stance has the important attraction of relieving cognitive dissonance — a psychological and spiritual tension experienced particularly by law students. Lawyers must find some rationalisation or relief from the basic tension of arguing positions which personally they find abhorrent or unconvincing.

32 Gillers *supra* note 6, at 679.

33 Adapted from WL Twining, *Pericles and the Plumber* (1967) 83 *LQ Rev* 396, at 397.

34 Gillers suggests this myth-shaking entry into law school handbooks:

CAUTION: Students often apply to law school in the belief that as lawyers they will do important work, including work that will directly advance justice and fairness in society, if not the world. They expect that a career in law will give their work a meaning absent from other callings for which they may be suited. You should know, before making a final decision to pursue legal training, that although a few men and women do get to do some of this work, the overwhelming majority do not. It has been our experience that law school applicants, through no fault of their own, have an overblown and distorted view of the centrality, excitement, and intellectual challenge of lawyers’ work, including the work they themselves are likely to end up doing. Much of lawyers’ work is repetitive, unimaginative, and routine. Often it is unpleasant, petty, and unkind. For many of you, the economics, and to some extent the ethics, of practice will encourage roles you neither envisioned nor invited. We suggest that you interview some ordinary practicing lawyers in our hometown, and learn exactly what they do in a typical week, before you mail the enclosed application.

Gillers, *supra* note 6, at 662.

35 RF Mager, *Preparing Instructional Objectives*, 2nd ed (Belmont, California: David S Lake, 1984).