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Problem-defining outside the traditional legal paradigm

Educating lawyers in ADR

Laurence Boulle

Editor's note: This article is an adaptation of a paper presented to the Australasian Law Teachers' Conference in Hamilton, New Zealand, 4-8 July 2005.

The starting point to this article is the changing nature of legal practice. To narrow the gap between legal education and practice in the legal services industry it is necessary to identify and predict some of the contemporary trends in practice. Practising lawyers are regularly confronted by the changing contours of legal work: client participation in legal services, collaborative lawyering, on-line dispute resolution, preventative and neutral lawyering, non-adversarial adjudication, rehabilitative justice, judicial dispute resolution, unbundling of legal services and therapeutic justice.

The new forms of practice are a function of structural changes, such as case management systems and court-referred ADR, new professional behavioural standards, such as 'reasonable prospects' and 'good faith' requirements, and environmental changes, such as[2] multi-disciplinary practice, new forms of global communication and the internationalisation of legal work. The new forms of practice emphasise skills and functions such as problem-definition, process design, team dynamics, integrative negotiation, creative problem-solving and risk analysis.

Elements of legal education

In any occupational practice it is necessary to teach and train students in the knowledge, skills, ethics and other attributes appropriate for the practice.

As regards *knowledge* law schools have always been prominent in this regard, although we are regularly reminded that much of the legal doctrine taught at law school is no longer current even at graduation, let alone in the ensuing years of practice; this suggests that teaching students 'how to do' should be more important than teaching them current legal doctrine. There has also been an upheaval in this area as more and more legal information and data is easily accessible to laypersons and non-legal advisers, even if there are limitations on their abilities to interpret and apply the information to particular circumstances.

As regards *skills* training there have in the past two decades been extensive improvements in skills training in law schools in many jurisdictions. The most significant development in legal education in the last 50 years has been the growth of the skills training curriculum. This has been recognised in various reports on legal education. Today, skills training in negotiation, interviewing, fact-finding, trial and appellate advocacy, reasoning and analysis, writing and drafting, research, information technology and mediation is provided in simulated and clinical settings in many law schools in many countries. One of the ironies here is that the more specifically one proceeds down the path of developing legal micro-skills, such as empathic listening, accurate writing or paraphrasing, the more law teachers are become engaged in imparting the generic skills important for, but not unique to, legal practice.

As regards legal *ethics* this has also become a more significant component of contemporary legal education and jokes are less regularly heard about the lawyer's concept of ethics as being 'that English county near London'.

In relation to the *other attributes* of lawyers it is suggested in this article that law schools need to inculcate in students an attitude of collaborative problem-solving in lawyer practice, not as a moralistic principle but as a hard-edged practical approach. Here there is an assumption, which will require justification in another context, that law in the future will have to operate in social and economic circumstances in which adversarial ways of responding to conflict are less socially acceptable than they have been in the past.

This article advocates the exposure of law students, the practitioners of the future, to the attitudes and behaviours required by one of the 'new and emerging' forms of legal practice which emanate from the various alternatives to adversarial forms of lawyer behaviour.

The theory

One of the constructs which has developed around the new forms of lawyering relates to the client's, or the consumer's, role in the delivery of legal services. The traditional lawyer-client relationship is based on the assumptions of an agency contract. In terms of this relationship the client *retains* their lawyer and provides them with *instructions* and the lawyer advises, assists and represents the client in the wide range of activities which make up legal services.

In this concept of the lawyer-client relationship there are few references to the client's role in the provision of legal services; even some of the extensive investigations into legal education and the provision of legal services make only limited references to the client and maintain a predominantly lawyer focus.

This is buttressed by the ideology of professional *autonomy* and various ethical obligations which effectively confer on lawyers a 'prerogative' in relation to their ability to define the client's problems, to determine the nature of the legal work required to deal with them, and to make decisions on the ways in which the legal work is to be done.

Nowadays this narrow concept of the lawyer-client relationships is challenged by new theories of professional practice. These include:

- The *co-production* theory of legal practice, which emphasises the client's role not only as the traditional principal but also as a producer of legal services. In some professions

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there is a well-developed theory on the co-production of services, but it is less developed in the law.

- *Client-centred lawyering,* which emphasises the perspective of the client, the consumer of the services – as opposed to the lawyer, the legal issue, the matter, the file number, or the amount of billable 6-minute units involved. Client-centred lawyering challenges the depiction of law and lawyers' services which emanates solely from within 'lawyer world', and requires depictions which emanate also from 'client-world'.
- The *unbundling* of legal services, in which lawyers are retained to perform only discrete, identifiable functions and the clients perform others, which include everything from filling in their own forms to making their own court appearances.
- *Self-representation,* which is not strictly a function of the lawyer-client relationship but also has implications for the role of lawyers as it transfers to the consumer a direct role in legal services which can be partly assisted by practising lawyers through the development of self-help kits, coaching for self-representation and other support for the DIY trend in legal servicing.

These developments undermine the traditional principal-agency relationship between client and lawyer in which the client instructs the lawyer who then performs the service with minimal client involvement. In the *co-production* model of professional service the client becomes both principal and producer. According to the theory this arrangement leads to the client being better off than they would be in a dependent relationship, in particular in relation to psychological and emotional benefits derived from the process.

One of the major potential areas of co-production between lawyers and clients relates to the ways in which problems are defined. Traditionally this is a key element of the lawyer's role – the translation of a story or problem into the concepts required for its legal management.

The main shortcoming with the traditional lawyer control of this function is that problem definition by lawyers is ultimately predicated upon the trial or other forms of adversarial combat. Yet these forms of dispute resolution are 'vanishing', as David Spencer and others have pointed out (see article in this issue, p 21). This raises the question of whether this is an area in which the co-production of legal services could be given effect.

The empirical evidence

The general literature suggests that there are moderate to high levels of co-production of legal services. Felstiner and Sarat suggest that clients are deeply involved in a process involving the 'negotiation of reality' with their lawyers but the empirical evidence for these new ways of lawyers and their clients jointly producing legal services is mixed.

Here I wish to acknowledge the pioneering work of Robertson, Corbin and Giddings who have contributed to both the theoretical and empirical understanding on the topic. Use is made in the rest of this paper of their articles, referred to in the list of references.

On the positive side the empirical evidence suggests that:

- There is a significant amount of *unbundling* of legal services in the Australian context, including the client representing themselves in preliminary hearings.
- The *self-help* movement is strong in Australia and comes in four different shapes and sizes which will not be discussed here.
- Personal injuries lawyers in Queensland describe their clients' main roles as being *information-gathering* and *information-supplying,* and then *decision-making* on key issues such as settlement arrangements.
- In relation to *smaller claims* there is evidence of a greater role played by clients.
- There are suggestions that where outcomes would not involve a monetary amount there might be more client involvement, as in parenting, anti-discrimination, employment or commercial disputes.

On the negative side, however, the findings of Robertson, Corbin and Giddings, and other evidence, suggest that:

- Most lawyers remain in a position of strong professional control throughout the provision of legal services including, ironically, the mediation process, even though one might have expected that to be a more participatory forum for clients. In Melbourne personal clients are kept out of mediations by some lawyers – they are still in the Victorian age in terms of co-production.
- Many lawyers mistrust their clients' abilities to participate effectively in the co-production of legal services – clients are seen to be passive service consumers rather than active participants. When they were asked to participate and do so, some clients are inappropriately involved in the co-production of the legal service.
- Lawyers are also sceptical of clients' abilities to gather and supply the information required for personal injury actions and have no basis for estimating which categories of clients might participate most effectively.
- Some structural arrangements, such as contingency and 'no-win no-fee' agreements, potentially impact on a significant role for clients in the co-production of their services.
- There is no high-level expressed demand for the involvement of clients in services, some of whom are prepared to live with the services of the 'expert dictator' rather than the 'benevolent counsellor'.

Clearly there are many variables which will affect the extent to which clients are involved in co-producing their own legal services, as referred to by Robertson and Corbin. They include the nature of the legal problem, its legal and factual complexity, the clients' skill levels in relation to any discrete tasks (or even in understanding issues), and the motivation and intention of clients to have this kind of involvement. There are also significant issues of power and control as between lawyers and clients which affect the realities of this relationship.

It is also true, as Astill and others have pointed out, that client-centred lawyering and unbundling comes at a potential price – for lawyers (in terms of allegations of unprofessional conduct), for the profession (in terms of its codes of conduct and ethical rules), and sometimes even for the client in terms of their constituting a weak link in the service chain.

But there are also factors conducive to further developments along these lines: collapsing of legal aid budgets, high costs of litigation, the identity and reputation of the legal profession, and access to law imperatives. Moreover there could be a cumulative effect here, based on modern demands for consumer rights, more informed consumers, trends in comparable professions, the self-help movement and economic imperatives, which together might entail considerably more client involvement just around the corner.

Co-production is also a relative factor as opposed to a 180 degree turn-around, in the sense that all clients give up some control over their issues, and most clients do not give up all of that control. Co-production involves clients giving up a relatively small amount of control compared with traditional legal servicing.

There is, moreover, an important prototype for law teachers in this regard, namely 'student-centred learning'. Law teachers have over the last decades shifted profoundly to make teaching more learning-and student-focused. Consistency requires that they do the same in relation to legal practice.

The anecdote

I shall now turn to an immodest personal anecdote, on the basis that understanding about the legal system can be personal and anecdotal as well as doctrinal and empirical. After surviving my own legal education in the 1970s I turned first to practice and, after four practice years, to teaching. For the last 15 years I have practised as a mediator, attempting to maintain the scholar-practitioner and practitioner-balance. My practical experience has been in ADR and mediation in a broad number of areas: commercial, family, native tile, community and organisational. I have attempted to be a 'reflective practitioner', causing consternation to my scholar persona. Similarly, I am bemused by my practice persona when trying to write in a scholarly fashion.

In mediation practice I have been struck by how a-theoretical many practitioners are about negotiating behaviour, risk analysis and problem definition. Here I shall focus on the latter issue and relate this back to the topic of the co-production of legal services.

In any dispute there is a question as to how broadly and how deeply it is defined. Disputes can operate and be defined at four potential levels: the legal, the commercial, the personal, and the communal, and those involved in their management have discretionary choices as to which level of definition is adopted.

A recent mediation involved a church synod, represented by the bishop and management committee, and the benefactors of various church-developed community services, represented by a prominent church member who had initiated them. There were numerous legal issues relating to the identity and obligations of the trustee of a public charitable trust. These were extensively defined by the lawyers and would have formed the basis of extensive legal arguments had the matter proceeded to the relevant Supreme Court.

The legalistic definition of the problem was brought into the mediation and resulted in preliminary lawyer skirmishes over legal rights and obligations. However, much of the focus in the mediation was on the commercial and operational realities of the situation: the efficiency, viability and accountability of the various community services and their management systems, and the role of various boards, committees, managers and the synod in bringing these about. This provided a basis for re-negotiating the structural and contractual realities of the situation.

There was also extensive focus on the inter-personal problems which the dispute had raised, in particular between the bishop and the individual who was responsible for establishing the services several years earlier. These were particularly acrimonious, bitter and personal.

Moreover the communal dimension was also present, though less explicitly discussed: the role and responsibilities of the synod, the welfare and security of those benefiting from the services, the interests of church members, and even the State Attorney-General in his capacity as trustee of the public interest.

Incidentally, during the course of the mediation the bishop locked himself in the toilet. Unintentionally, I might add. Such a predicament is not dealt with at mediation school. It was the time of the day when it might have been appropriate to lock all participants together in a confined space. Pliers and screwdrivers were required to extract him. An archbishop might have required larger weapons in the mediator's tool-box, such as hammer and chisel, and a cardinal even more extensive tools of mass extraction.

As indicated earlier there was a choice about the level at which the dispute was defined with potential impact on the way it was managed. Thus the levels of definition of the problem were:

- The legal – the duties and rights of the various parties referred to above
- The commercial/business – the efficient functioning of the community services with mechanisms for their governance
- The inter-personal – the relationships among those immediately involved and among others with more indirect involvement
- The communal – the interests and needs of the wider circles of institutions and individuals concerned.

The mediation process invites a flexible approach to problem definition. It is one of the defining functions of mediators to assist the parties to define disputes at the level most appropriate for the circumstances. The level of definition has implications for how the problem is approached, discussed, dealt with and finally settled. In order to attain non-legal problems it is necessary to define problems non-legally and see them in all the dimensions of their complexity.

Linking theory to evidence to practice

If we take this single issue of problem-definition, what are the implications for practice and for teaching about practice?

One form of co-production of legal services entails the client performing some of the tasks on their own, or at least performing a major part in a collaborative interaction with their lawyer. Theoretically, problem definition would seem to be one of the most appropriate of these functions, although there is little empirical evidence to suggest that this in fact occurring.

In the first place it seems imperative

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that lawyers have a high tolerance of ambiguity in relation to the defining of disputes. However, professionalism generally largely revolves around the ability of professionals to define clients' problems into the codes of the particular profession. It has been said that one of the main functions of lawyers is that of 'translation'; that is, of framing the client's problems in terms of legal issues, processes and possible remedies. This is regarded as a quintessential lawyering function, a matter of high professional skill and one which is essential for bringing the client's problem into the legal domain. It must be reframed, repackaged and restyled so that it can be dealt with by the legal system. This is part of the professional autonomy historically enjoyed by the legal profession.

However, the theory of co-production in legal services suggests that lawyers should engage clients a great deal more in how the problem is defined in terms of the four categories referred to above. This seems to be an area in which clients might very capably be engaged, in light of their personal and commercial needs and interests and the kinds of outcomes they require. The parties in the case study referred to earlier had little interest in a rights-based definition of the problem. If they had been co-producers of this aspect of the legal service the pleadings, the affidavits and the dispute resolution process adopted by the lawyers, as well as the costs thereof, would have looked considerably different. Co-production would have led to greater responsiveness within the legal system, greater efficiency in problem management and arguably greater satisfaction with outcomes.

This approach requires of lawyers new levels of attitudinal and behavioural change. The question arises as to how the basis for these changes can be incorporated into legal education, and when and by whom.

Teaching implications

The implications of the analysis so far is that there needs to be more attention in legal education to the possible ways of defining problems to deal with new realities in dispute resolution, mediation, negotiation, client-care rules, statutory prescriptions and judicial pronouncements. Traditional legal education focuses on defining problems in terms of legally relevant concepts, such as causes of action in common law tort or contract, or statutory concepts of misleading and deceptive conduct, or judicial remedies such as injunctions or damages.

Pleadings constitute a sophisticated art designed to shape a problem in a form easily recognisable in law, such as the legal requirements of the trustee of a public charitable trust, but which at the same time provide an abstract and decontextualised version of the original problem. Once it gets to court in this attenuated and abridged form it is often sent out to mediation or other forms of ADR where the gravitation of the legal definition makes it more difficult to redefine it in terms of the personal, commercial or communal factors referred to in the anecdotal example. This becomes a critical issue in legal practice.

If there is pressure on legal practice to change in this way then legal education should anticipate it and prepare students to define issues not solely in terms of common law concepts, judicial remedies or statutory definitions which are predicated on the possibility of litigation and a court hearing. Lawyers should be educated about the wide range of problem-defining approaches which are available outside this limited scope.

The limitations

There are two tensions relating to this educational challenge.

The first relates to when and by whom these attitudes and approaches are provided within the broad spectrum of legal education and training, and in particular how great is the responsibility of law schools, given the fact that there is no such thing as a 'compleat' law graduate. There are limits to the extent that law schools are appropriate places for developing attitudes, and the meta-skill of 'reflective practice' is required for it to be perpetuated by practising lawyers. This involves law students developing an understanding of how to evaluate practical experiences so as to draw lessons for the future application of the skills and techniques involved. It is seldom taught to prospective lawyers and involves the ability to reflect dispassionately about the professional self, as illustrated in the next paragraph.

At a recent ADR conference an experienced solicitor was defining her role in a high value testamentary dispute involving complex legal issues, high value properties and deep and complicated inter-personal issues. Anyone who has dealt with family companies, wills and estates, family provisions disputes and matrimonial property dramas, is familiar with the phenomenon of inter-generational dysfunction. Here all these elements were combined in one explosive package. Among the insightful observations made by the solicitor was her self-perception of her own usefulness. Despite her extensive involvement in all facets of the preliminary preparations her diagnosis was that her client's best interests would be served if she was not personally present at the negotiations and other arrangements were made. While cause and effect are difficult to establish in these circumstances, the negotiations were highly successful and resulted in a binding plenary agreement.

The second tension relates to how to maintain appropriate boundaries in legal education so that the discipline of law, while having lost its erstwhile claimed autonomy, continues to maintain its core identity. This raises the question as to how lawyers and law teachers should remain essentially legal in nature while there are so many pressures and challenges to go beyond the conventionally legal?

Here we may have to re-assess the idea of what is distinctive about law, as opposed to the other disciplines with which it is inter-mingled. We know that it is a process which is guided by rules and principles of general application, a small part of which is enforced through the judicial system. This starting point allows us to identify the sources of law and its procedures and in some cases to anticipate what courts and other law officials will do in concrete situations. But we know that law and legal reasoning have only a relative autonomy from other normative systems and that all forms of law, including legal education, have a dependence on other disciplines – it is only a question of degree as to

how dependent it is on the other systems.

The irony of the extensive focus on skills development in the contemporary legal curriculum is that the more one delves into the micro-skills of listening, questioning, reframing, paraphrasing and the like, the more one moves away from quintessential lawyering skills towards those which are generically relevant for many occupational and professional practices. The same tension relates to doctrinal knowledge where the disciplines such as economics, anthropology and sociology pull the discipline in their respective directions. Nonetheless as the practice of law changes its contours so too should its learning. ❖

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