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Resilience, positive motivation and professional identity

The experience of law clinic students working with real clients

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On the Bar Professional Training Course (BPTC) taught at City, University of London, students may choose options which require them to work with real clients. This exposes them at an early stage in their progress towards full professional status to challenging experiences as they interact with clients, opponents and judges. This chapter presents findings from a research programme that explores their experiences and perceptions of their development and the factors that influence their achieving creative and constructive responses. It explores students' views as to how they might best develop the skills of effective practitioners and the personal insights that will help them to develop resilience without losing their capacity for empathy as they develop their professional identity.

The three clinical options on the BPTC

The BPTC is the one-year vocational course authorised by the Bar Standards Board for the training of barristers between their undergraduate degree and their work experience (pupillage).¹ City Law School (CLS) introduced a live clinic option in 1992, the first such module on a professional course in the UK.² This, the FRU (Free Representation Unit) (Employment) Option, has

¹ Details are at <https://www.barstandardsboard.org.uk/qualifying-as-a-barrister/bar-training-requirements/> accessed 7 May 2019.

² For an early report on this initiative see Nigel Duncan, 'On Your Feet in the Industrial Tribunal' (1996) 2 *Contemporary Issues in Law* 53.

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since been joined by the Domestic Violence and the FRU (Social Security) Option. The three options operate in slightly different ways.

FRU (employment) option

This option operates in conjunction with the Free Representation Unit (FRU), a charity that provides free representation to clients in employment and social security tribunals.³ Students attend a training day organised by FRU and complete a test. If they pass the test they may then apply for the option. CLS provides them with workshops in conference skills, in the emotional issues arising from working with clients and how they might develop their own empathic responses, and in technicalities such as calculating compensation. They may then take out a case.

Many cases settle, although most students have experience of advocacy at case management or procedural hearings. Some proceed to a full hearing and students on the option have won compensation of over £20,000 or a tribunal order of re-engagement for their clients. All will experience one or more client conferences, interactions with the tribunal and opponents, drafting of documents, and they may experience negotiation or various degrees of trial advocacy.

Students are required to undertake at least one case and are assessed on a file which contains two reports. One is the analytical report of their work on the case, evidenced by documentation including the case papers, attendance notes and their own plans and notes. The second report is a reflective report in which students critically consider their own learning from the option.

FRU (social security) option

This operates in much the same way as the FRU (Employment) option except that students are required to undertake at least two cases for submission, because social security cases tend to be factually less complex, and rarely involve cross-examination. Since cases do not settle students are guaranteed an advocacy experience although it differs in nature from that in employment cases.

Domestic violence option

This option is a similar mutually beneficial collaboration with an external organisation, in this case the National Centre for Domestic Violence (NCDV).⁴ Students go through a similar process of training and application.

³ Details of FRU and its work are at <www.thefru.org.uk/> accessed 7 May- 2019.

⁴ Details of NCDV and its work are at <www.ncdv.org.uk/> accessed 7 May 2019.

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Their work on this option involves acting as McKenzie Friends⁵ in telephone conferences with clients who are the victims of domestic violence and who are usually seeking urgent injunctive relief. This is not an advisory task. Instead students take instructions from their client in order to draft witness statements and other documents. These will be checked by NCDV legal officers and the client before being submitted. As a result, training in conference skills is more developed. Students' attention is drawn to the problems faced by many victims of domestic violence, the chaotic lifestyles many have and the trauma of living with a coercive or violent partner. They are trained in addressing inconsistencies in stories, how to explore the client's account without suggesting the client is lying, and yet to recognise when what they are told indicates (for example) that children may be at risk. They may telephone or email supervisors for advice immediately after such a conference, or indicate in the email that covers their draft witness statement that there are particular issues that concern them. It is then a matter for the experienced lawyers at NCDV to finalise the documents with the client.

Students are required to submit three cases for assessment. They submit a file with analytical and reflective components as with the two FRU options.

The research program

For the last three years I have conducted research into the experience of the students undertaking these options, approved by City, University of London's research ethics committee,⁶ subject to the voluntary participation of students, and normal conditions as to explanations of the research, the anonymisation of participants and secure transcription and storage of data. The research in each year has taken the form of online surveys and one or more focus group meetings. However, the participants are far from being a random group. They are all postgraduate Bar students who have opted for an approach to learning that requires work with real clients. Each has chosen a significantly different option which may reflect prior interests and life experiences. Response rates have been reasonable, averaging some 50% of a small cohort of around 50 students, but this provides a self-selecting group. Therefore, I make no claim to statistical significance, especially as the goals of the research in each year shifted slightly. In the first year my main goal was to explore students' experience in order to identify areas where support could be improved, leading to changes in the information and the teaching and learning sessions provided. Student responses identified a variety of concerns, including some relating to the emotional impact of working with clients who were often in distressing

⁵ McKenzie Friends advise clients in the preparation for and during a hearing. Judges sometimes permit them to advocate for their client.

⁶ Approval from City's Research Ethics Committee ref: LREC17002, and funded by a small grant from City's Centre for the Study of Legal Professional Practice.

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circumstances, or working with aggressive opponents or challenging judges. Subsequent iterations of the survey therefore explored these areas in more depth and were informed by my reading of the research into self-determination theory (SDT). I used a thematic approach to the analysis, seeking insights into my research questions from student responses to the survey and to the focus group discussions. This chapter reports on the findings that relate in particular to students' experience of interactions with these others.

In presenting these findings I initially identify the nature of the challenging experiences students faced, in their own words where possible. Students are identified by gender, the chosen option (DV, Emp or SS) where known and the year of their experience. I then consider, informed by SDT, what this suggests in terms of the use of different learning approaches for the development of wellbeing and resilience as individuals develop their professional identity in transition from law students into legal practitioners.

Working with clients

Our students' clients sought their help at times of enormous stress and usually experienced feelings of helplessness in the face of their circumstances and the formality of the procedures that they had to use to seek a remedy. DV clients generally experienced violence from a partner in their homes and sought urgent relief in the form of a non-molestation order or an ouster order. Many Emp clients had lost their livelihoods, often putting the security of their homes in jeopardy. They generally felt that they had been treated unfairly by their employers and in some cases had faced discrimination. Most SS clients were challenging refusals of disability-related benefits. Their physical or mental suffering was exacerbated in many cases by facing extreme poverty where their disability made employment difficult or impossible to find. What was common across all three categories was living in a precarious world characterised by a lack of personal control and a feeling of injustice perpetuated by an unfeeling bureaucracy.

One student was concerned that the limited conference skills training had left him unprepared for his client conference:

[I]t was particularly pronounced I think because of the particular client I had in my first case. She suffered from schizophrenia and heard voices. That was their primary medical condition. I got into the conference with her and about 20 minutes in, with me having written three pages worth of questions I was going to go through with her really pressing the details on various points. She basically stood up and said 'I don't want to do this anymore. I'm going to go'.

At first, I was worried that I'd sort of said something to offend her or done something wrong. It transpired that she was actually hearing voices during the conference and she just didn't feel comfortable staying in the

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room. So we rescheduled it. . . . Same thing ultimately happened but I was so intent on being able to represent her and trying to take the most basic instructions I possibly could from her in order to be able to represent her that in effect I came very close to leading and coaching her in that second conference just to get to the point of being able to continue the case. And at the time that felt like the most pragmatic and sensible thing to do but actually now having studied conference skills I realise it was borderline unethical thing to do.

(M1, SS, 18)

All lawyers recognise that they sometimes encounter clients who are not entirely truthful. The ethical rules are clear: they are required to present their client's case regardless of their personal beliefs as to its accuracy. However, if they notice discrepancies, they owe a duty to their client to draw their attention to them in conference. This could be a significant source of stress. One DV student was told a variety of things by her client that did not seem to fit together. She paused the conference and drew up a chronology.

I was basically going to have to say to her, 'I understand it's very difficult talking about your children being abused but your account doesn't make sense. The judge is going to look at this and instantly go, "This doesn't add up. What happened where?"' And also, in the back of my head, I'm thinking the local authority is going to get an interim care order review. If this is the witness statement, they're going to see that's going to be disclosed to them, they're going to go, 'Her account is inconsistent,' and all the other evidence, they're probably going to go, 'She hasn't protected her children. She's potentially a risk for having not protected them,' because depending on which account you followed depended on what her knowledge of it was. In which case, they'd probably be saying, 'Okay, we want an interim care order. We'll have all three of your children.' You're going, 'You need to get your account quite straight, otherwise, this could have quite serious implications if it doesn't already.'

(F1, DV, 16)⁷

This student is working through her understanding of ethical practice, but here appears to be struggling to combine providing sound professional advice with effectively and empathically communicating with a victim of domestic violence. Another student represented a SS client who appeared to be feigning a degree of disability he did not really suffer.

⁷ This student is reporting in the focus group meeting what went through her mind at the time. In fact, in supervision, she had reported her concerns and had recognised that it was not her role to advise the client, but simply to explore the accuracy of the account while maintaining a trust relationship.

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[The client] showed up at tribunal looking like they were half dead. And I like ran a purely procedural argument on it because I didn't think judges would believe that. And like I've confirmed with my client that it's the way his instructions were. Ran the procedural argument, won the procedural argument and walked out. And my client basically ran home well after that and it was actually kind of sickening to me because I mean you do the best for your client and like you have a duty to act in their best interest and to advocate for them. But I guess sometimes yeah. Sometimes philosophy and the academics of it sort of crash into the real world.

(M2, SS, 18)

This student had clearly learnt from the study of professional ethics how to address the conflicting duties that can arise when advocating for a client whose account they mistrust. His reflection on his moral discomfort gave him greater confidence to direct the professional career he intended to pursue.

Working with opponents

The Employment Option involves the most clearly adversarial work. Early interactions with opposing solicitors were usually constructive and useful, helping students to develop an understanding of how the preliminary stages of litigation were meant to work. By contrast others experienced opponents whose work was minimal, often late and of poor quality. This was a different learning experience altogether in that the problems caused by poor practice became evident when the matter came to the hearing. Students came to realise how thorough preparation, prompt response to tribunal directions and a willingness to consider settlement could save time and costs in the long run.

Students sometimes found themselves challenged by their professional opponents. This could be a positive experience:

I think because the better your opponent I think it brings out sort of a better side of you – wakes you up a bit. I mean it scares you right in the beginning when you realize Oh man I have senior counsel like opposing me. . . . That's something that you know you have to get over it because it's this guy's life right. And this actually means a lot to him because . . . from what my client was saying getting a good outcome was the difference between keeping a roof over his head and his family first.

(M2, Emp, 18)

This student rose to the occasion and felt that he had grown from the experience. So did this student:

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And the source of stress being on my case an opponent who is perhaps the most aggressive person I've ever met in my life who threatened costs in every phone call and email. I understand it's probably a strategy, but you know from the perspective of never having done something like this before or thinking crap will my client get costs? Am I going to screw up here?

(M1, Emp, 18)

Training had alerted students to opponents' tactics of threatening costs whether or not justified, while also needing to be cautious to alert clients to costs risks in appropriate cases.

Working with judges

Students' experience of judges was generally positive, but there were some exceptions. Here is the experience of one student in a Social Security tribunal.⁸

After the judge has done the introductions and the immediate preliminaries he handed it to the doctor to ask questions who launched into a 30 to 40 minute barrage of interrogation almost of questions which went far beyond anything I've seen before both in terms of sort of tone and attitude and style of questioning. It's incredibly hostile and aggressive but also far beyond what she should have been asking about because she was asking effectively the claimant to try and justify the doctor's decisions and why she had been prescribed certain things. So it was a really awful situation for the claimant to bear. And somewhat surprisingly the claimant ultimately broke down completely She burst into tears And I tried to intervene a couple of times during the questioning to try and tame things a bit and bring it back. And the doctor had shut me down.

(M1, SS, 18)

The client ran from the tribunal room and the judges told M1, SS, 18 to follow her to the waiting room. However,

I basically stood firm and said 'No my client is a really vulnerable individual – this style of questioning has not been appropriate. We need to resolve this.' And I basically just made submissions on her behalf in the room. God knows whether I did the right thing procedurally but ultimately it worked out. The judge said okay fine we'll have a quick

⁸ These tribunals are generally constituted of three members, one a doctor, with another who is legally qualified and usually chairs the hearing.

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discussion and then they agreed without having to reconvene – they agreed to grant the application.

(M1, SS, 18)

This student was conscious of a lack of preparation by not knowing the extent to which he could challenge the panel. However, he showed great moral courage after his client had left and achieved the desired outcome. On further reflection of how the experience had changed how he would approach such situations in the future he said: ‘I probably would be more forceful in the tribunal’ (M1, SS, 18). Had he done so he may have avoided the dilemma of leaving his client upset and unsupported in order to challenge the direction the tribunal was taking.

Resilience

If we are to prepare practitioners who will be able to sustain themselves they will need to develop resilience⁹ in the face of the challenges they will encounter. This concept is currently popular but should not be accepted uncritically. Many of the sources of damaging stress on clinic students and lawyers might themselves be addressed. Focusing on resilience risks individualising problems and placing the onus on the person who is facing the excessively stressful situation.¹⁰ Employers are inclined to exploit individualistic solutions in order to avoid making structural or cultural change within the workplace as they may be concerned that it will affect their competitiveness. We need to be alert to this and recognise that the need for resilience should in no way inhibit our challenging things that might be improved.¹¹ That said, it is in the nature of much professional work that people will have to engage with stressful situations and difficult encounters. It is therefore important to address resilience in a way that enhances the capacity of individuals to respond professionally to inevitable challenges while retaining a critical perspective on stressors which might be changed. This has been done with some success in the context of nursing continuing professional development. An intervention of six workshops with a group of nurses

⁹ Psychologists have developed working definitions of resilience. For a useful overview see Sandra Prince-Embury, ‘Review of Resilience Conceptual and Assessment Issues’ in Sandra Prince-Embury and Donald H Safloske (eds), *Resilience Interventions for Youth in Diverse Populations* (Springer, 2014), 13.

¹⁰ Christine Parker, ‘The “Moral Panic” Over Psychological Wellbeing in the Legal Profession: A Personal or Political Ethical Response?’ (2014) 37 3 *UNSW Law Journal* 1103, and in the medical field, Caroline Barratt, ‘Developing Resilience: The Role of Nurses, Healthcare Teams and Organisations’ (2018) 33(8) *Nursing Standard* 43. 1

¹¹ See, for example Dave Webster’s blog, *Critiquing Discourses of Resilience* <<https://davewebster.org/2017/05/14/a-contrary-view-critiquing-discourses-of-resilience-in-education/>> accessed 7 May 2019.

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introduced to a participatory mentoring environment was shown to be effective both in developing personal resilience and making positive changes to the workplace.¹² There is limited evidence of this being addressed in the legal practice context.¹³ Thus the experience of colleagues working in the medical context provides a valuable guide for legal continuing professional development. The context of a short optional module in a one-year professional programme, however, does not allow for such a developed intervention. This, I suggest, is therefore a matter for regulators to require as an element of continuing professional development, as many stressors could, as suggested previously, be reduced or eliminated.

We did introduce changes as a result of the insights that our research gave us.

Interventions

In the light of the responses received in 2016 we introduced an early session on conference skills, initially focusing on practical matters and the ethics of client conferences with some discussion of the emotional issues that clients might bring to their conference and approaches to responding to those. This seems to have been effective (recognising the limited reliability of the small numbers surveyed). In 2016 only 45% of students felt that they had responded well to clients' emotional difficulties, but the following year this had risen to 79%. The percentage who felt they had responded badly dropped from 30% to 7%. Interestingly, in this context, the number who responded 'very well' actually fell (from 23% to 17%). This may have been because they had a greater awareness of the issue and were more critical of themselves, though this, inevitably, is speculation and with these small numbers has no broader significance.

Subsequently we have developed the conference skills session by adding a self-study module that helps students to understand the nature of empathy, techniques that they might practise and use to demonstrate empathy and how this relates to professional practice.¹⁴

Developing resilience

While it is clear that we should do what we can in terms of module and assessment design to minimise unnecessary stress on students it remains the case that legal practice inherently carries stressors. How do we best help students to develop the necessary resilience? In one focus group the facilitator

¹² Glenda MacDonald et al., 'A Work-Based Educational Intervention to Support the Development of Personal Resilience in Nurses and Midwives' (2012) 32(4) *Nurse Education Today* 378, 383.

¹³ A list of Australian responses can be found in Parker (n 10) at Appendix 2. These tend to focus on the individual rather than the structural, thus risking the criticism identified earlier.

¹⁴ The essential elements of that module are presented in the Empathy section.

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related an experience where, facing bullying from a student, her line manager had, in effect told her to ‘toughen up’. Student responses included:

You need to be resilient because I think that it’s something that you might have to find within you and having someone tell you toughen up and be stronger, it’s not really going to – it’s such a horrid thing to tell someone. I would hate it.

(F1, DV, 17)

I think experience was what really helps you with this.

(F1, SS, 17)

I think what helped was that [supervisor] told us practical steps to take rather than tell us to be tough and to be resilient because those things would not have helped us. But taking these practical steps would be telling us how to do it.

(F2, DV, 17)

Students recognised that resilience came, in part, from ‘something within’ them and saw the most effective way of helping them to develop resilience being to provide practical guidance and opportunities to develop competence through experience. This is what all professional development programmes should be seeking to achieve and live clinical work is an important component of that process.

Research into student perceptions of resilience was undertaken with undergraduates studying several different disciplines.¹⁵ Amongst the conclusions drawn is the proposition that:

- Resilience is about the individual, and the context in which they are operating:
 - **Internal factors:** optimism, control, dealing with change and uncertainty, dealing with failure, competence, self-care, goal-setting, expectations of self;
 - **External factors:** relationships (personal and professional), transitions, expectations, formal support, organisational processes, expectations of others.¹⁶

¹⁵ Lydia Bleasdale and Sarah Humphreys, *Undergraduate Resilience Research Project Report* (Leeds Institute for Teaching Excellence, 2018) <http://teachingexcellence.leeds.ac.uk/wp-content/uploads/2018/01/LITEbleasdalehumphreys_fullreport_online.pdf> accessed 7 May 2019.

¹⁶ Lydia Bleasdale, ‘Undergraduate Resilience Research Project: University of Leeds’ (17 November 2017, London & South East PFHEA Meeting).

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These factors suggest that in order to assist students to develop the necessary degree of resilience we may be assisted by self-determination theory.

Self-determination theory

SDT¹⁷ has been used to develop understanding of the social environments that best support our individual well-being and development.¹⁸ According to SDT there are three basic psychological needs which, if satisfied, will enhance intrinsic motivation: autonomy, competence and relatedness. Cognitive evaluation theory (CET) has been developed as a sub theory by Ryan and Deci¹⁹ and explains how the fulfilment of these three basic needs supports the maintenance of intrinsic motivation. Students would be described as intrinsically motivated where they have chosen activities ‘that have the appeal of novelty, challenge or aesthetic value’.²⁰ Having intrinsic goals has been found to be positively associated with well-being and negatively associated with depression and anxiety.²¹

As Sheldon and Krieger explain, writing in the context of the well-being of law students,

people need to feel that they are good at what they do or at least can become good at it (competence); that they are doing what they choose and want to be doing, what they enjoy or at least believe in (autonomy); and that they are relating meaningfully to others in the process, that is, connecting with the selves of other people (relatedness).²²

Students who are intrinsically motivated and have intrinsic goals will demonstrate greater resilience.

With this in mind, clinic students at City were asked about their motivation for choosing a clinic option. The strongest motivator was the desire to improve competence. No student thought this unimportant or slightly important. The next most highly rated was ‘to achieve justice for my clients’, a powerful intrinsic motivator for the challenging work these students will be doing. Third comes communication skills – related to competence but introducing a

¹⁷ For a fuller explanation, see earlier chapters of this volume.

¹⁸ Richard M Ryan and Edward L Deci, ‘Self-Determination Theory and the Facilitation of Intrinsic Motivation, Social Development, and Well-Being’ (2000) 55(1) *American Psychologist* 68.

¹⁹ Richard M Ryan and Edward L Deci, *Intrinsic Motivation and Self-Determination in Human Behaviour* (New York: Plenum, 1985).

²⁰ Deci and Ryan, (n 18) 71.

²¹ Tim Kasser and Richard M Ryan, ‘Further Examining the American Dream: Differential Correlates of Intrinsic and Extrinsic Goals’ (1996) 22 *Personality and Social Psychology Bulletin* 280–287.

²² Kennon M Sheldon and Lawrence S Krieger, ‘Understanding the Negative Effects of Legal Education on Law Students: A Longitudinal Test of Self-Determination Theory’ (2007) 33(6) *Personality and Social Psychology Bulletin* 883, 885.

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recognition of the importance of relatedness: the ability to communicate with others. By contrast, the concept of working with others towards a goal received a relatively low rating. This may be because of the culture of the Bar, in which there is a real pride in independence. Before encountering the team-working realities of practice students may not recognise the importance of effective collaboration. Indeed, the relatively high rating given to 'take decisions within a limited field of activity' is consistent with this perspective and shows some self-awareness of the importance of autonomy.

Two low-rated motivators may tell different stories. Participants may have assumed that down-rating 'Enhance my CV' was the 'correct answer' and given the answer they thought I wanted to hear. By contrast, the low rating given to 'understand myself better' was personally disappointing, given that these students had just submitted a reflective report as part of their assessment task.

Students were also asked about what motivated them in their actual work with clients. The three top-rated options (to 'please my client'; 'achieve justice' and 'win the case') may have been hard to distinguish. However, they were all clearly more highly rated than self-interested motivators. As one student observed:

although my motivation for selecting the option was connected to my studies and my CV; when conducting actual work with clients, these (and the connected statements above) were completely unimportant to the conduct of my work. Once involved in a client's case, the motivation became about them – not born out of any self interest.

(M, SS, 18)

However, one motivator, 'the freedom to make decisions', included to explore students' evaluation of autonomy, was relatively lowly rated. It divided opinion, with six students rating it 'extremely important' but nine rating it as 'unimportant' or 'slightly important'. One student explained:

I tend to be motivated by a desire to do my best rather than please the client. Often by doing my best for a client, this will result in my pleasing them, but sometimes I have to provide them with bad news and the case may not go well for them. I am very competitive, hence why my main motivators are winning, achieving justice and making my own decisions – each of which this module enabled me to achieve.

(F Emp 18)

This led me to think that the three psychological needs (competence, autonomy and relatedness) identified in Self-Determination Theory, do not work in a hierarchy but are better thought of as interacting factors, all of which are significant, but which different individuals may prioritise differently.

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Discussions in one focus group tended to confirm this. Students were introduced to SDT and asked their thoughts about the three needs. One quickly suggested that for her, relatedness was the most important.

I think [relatedness] is more important for me than the others
Because I think what really drives me is helping others and I think . . .
being competent feeds into [relatedness] for me. So, being competent is
very necessary, being good at something is necessary in order to help
people better.

(F1, DV, 17)

This raised an immediate response:

I think competence is the most important thing because especially with
the Bar, you need to know your stuff otherwise you're going to get
terrible barristers, so I think competency is the main thing and autonomy
as well because it's a self-employed profession. And I'm someone that's
always enjoyed working independently And meaningful
relationships I think that is a less important thing.

(F, SS, 17)

This student also explained how she had hated group work at university, where others took the credit for her hard work. She added:

This is why I want to be a barrister because . . . if I do something badly,
I should suffer the consequences; if I do something well, I should have
all the consequences.

(F, SS, 17)

Students then discussed their experiences of barristers they had known who had succeeded or failed to relate openly to them even when undertaking demanding work.

I bumped into a barrister yesterday who I did my very first mini-
pupillage with it was really bizarre, because he was busy, you
know he was about to go into court. But he couldn't just say, 'Oh okay,
good to see you.' He can't really sort of stop for five seconds and I see
other barristers who are brilliant and just switching just like, they'll say
something really communicate with you and then get on with what they
do Those are the ones I aspire to be.

(F2, DV, 17) (general agreement)

Further discussion addressed the interaction between autonomy and relatedness.

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I'd complicate that autonomy element. I think it's kind of a balance of autonomy and then working with other people.²³ I think that's the agenda, sort of unfettered autonomy is – (interrupted)

(M, SS, 17)

So, autonomy needs to be balanced with a meaningful relatedness. You can't just be autonomous on your own. Yeah, there should be a sort of balance on those and then the other things that you were saying and things like empathy also would feed into those things and also would be influenced by those things.

(F, SS, 17)

This, however, was getting too comfortable for M, SS, 17 who said:

These are bit motherhood and apple pie though. Of course, these are important – but sorry, to me 1) might be intellectual fulfilment, so 2) might be remuneration whether that's monetary or psychological or status in society. I think people are different in terms of what they look for. These three might be particularly common but there are other factors that people are looking for too.

(M SS 17)

He may have been thinking of the three elements as motivators rather than needs.

The final student comment before the group had to finish was:

I think for me relatedness or relationships that's particularly key I think in general specifically at the Bar I always think one of the things that resonates with me is the sort of point how you can build your whole career, your reputation that you can lose in five seconds at the Bar. And once it's gone, you're not going to get it back but based on it, you can't be trusted perhaps.²⁴

(M, Emp, 17)

This student discussion tends to support the view that the three needs identified by SDT act together to encourage intrinsically motivated behaviours as opposed to operating in any hierarchy (even a hierarchy that differs between

²³ This suggests that this student had misunderstood the concept of autonomy to mean working alone. However, his observation and the ensuing discussion do raise insights into students' perceptions as to how the elements of SDT interact.

²⁴ This is something of a trope at the Bar of England and Wales. It is a small profession and reputation is enormously significant if barristers are to be able to conduct negotiations or litigation effectively on behalf of their clients.

individuals). Of the three, relatedness was the one that produced more equivocal responses from students. As a result we have introduced training designed to give students insight into the significance of empathy when working with clients and how it develops both their professionalism and their resilience.

Empathy

Students are first reminded that empathy is a professional responsibility: “[barristers] will know how and where to demonstrate empathy and act accordingly.”²⁵ They often confuse empathy with sympathy, so are given an explanation such as: ‘Sympathy refers to the heightened awareness of another’s plight as something to be alleviated. ... Empathy ... refers to the attempt of one self-aware self to understand the subjective experiences of another self. ... Empathy is a way of “knowing”. Sympathy is a way of “relating”’.²⁶

Two main types of empathy are generally recognised. Affective empathy is a spontaneous process which works more strongly with family, friends and people who share our background, culture or experiences. The firing of ‘mirror neurons’ partially activates the same emotion as observed in the other.²⁷ Cognitive empathy is the appraisal of another’s emotional state or situation with focus, reflection and thought as key elements. It can lead us to act and respond in constructive ways. This is necessary for professional empathy which involves:

- Understanding the client’s situation, perspective and feelings;
- Communicating that understanding and checking its accuracy;
- Acting on that understanding with the client in a helpful (professional) way.²⁸

Research into the lawyer-client relationship suggests that this is key to client satisfaction. Cunningham found that client satisfaction is concerned more with the process than with the outcome of representation.²⁹ Research by the Law

²⁵ BSB, Professional Statement for Barristers, Rule 3.4, <www.barstandardsboard.org.uk/media/1787559/bsb_professional_statement_and_competences_2016.pdf> accessed 7 May 2019.

²⁶ Lauren Wispé, ‘The Distinction Between Sympathy and Empathy: To Call Forth a Concept, a Word Is Needed’ (1986) 50(2) *Journal of Personality and Social Psychology* 314, 318.

²⁷ Vilayanur S Ramachandran, ‘The Neurology of Self-Awareness’ (2007) *The Edge* <www.edge.org/3rd_culture/ramachandran07/ramachandran07_index.html> accessed 7 May 2019.

²⁸ Stewart W Mercer and William J Reynolds, ‘Empathy and Quality of Care’ (2002) 52 *British Journal of General Practice* S9–13.

²⁹ Clark D Cunningham, ‘What do Clients want from their Lawyers?’ 2013 *Journal of Dispute Resolution* 143.

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Society showed the importance of the client feeling listened to and respected: ‘She talked to me, as a person, with respect’.³⁰ In order to ensure that clients know we are empathising we can use non-verbal behaviour such as nodding, eye contact, raised eyebrows, appropriate expressions and non-judgmental reactions. We can explore what the client has said with further questions and make verbal statements showing or describing what we have understood. In this way a client-centred interview should seek to do the following:

- 1 Explore and clarify the client’s perspective, circumstances and feelings;
- 2 Listen to understand, using eye contact and mirroring body language;
- 3 Recognise an empathic opportunity;
- 4 Communicate genuine empathic understanding – ideally verbally as well as non-verbally (unconsciously);
- 5 Act on that understanding in a professionally helpful way.³¹

Developing this particular communication skill provides a better experience for the client and also helps the lawyer to understand the client’s position better and enable more appropriate, better-focussed advice. There is also evidence that it can provide personal benefits as well. Researching the use of empathy by general medical practitioners, Roter discovered that increased expressions of empathy are associated with improvements in relationships and increased job satisfaction.³² Working with a similar group of medical professionals, Krasner found that participating in a mindfulness programme that addressed expressing empathy can protect against burnout.³³ Thus students and lawyers can, by providing a better, more empathetic service to clients, take more care of themselves while developing the resilience that they will need to practise effectively and with reduced risk of burnout. This is more the responsibility of employers and regulators than of individuals as it is hard for new entrants to challenge the culture of an existing organisation.³⁴

Conclusion

³⁰ Hilary Sommerlad and David Wall, ‘Legally Aided Clients and their Solicitors: Qualitative Perspectives on Quality and Legal Aid’ The Law Society, *Research Study No 34*, 1999.

³¹ Mercer and Reynolds (n 28) 1; Eliska Prochazkova and Mariska E Kret, ‘Connecting Minds and Sharing Emotions Through Mimicry: A Neurocognitive Model of Emotional Contagion’ (2017) 80 *Neuroscience & Biobehavioral Reviews* 99. In the context of legal education and practice see Chalen Westaby and Emma Jones, ‘Empathy an Essential Element of Legal Practice or “Never the Twain Shall Meet”?’ (2018) 25(1) *International Journal of the Legal Profession* 107.

³² Debra L Roter et al., ‘Communication Patterns of Primary Care Physicians’ (1997) 277(4) *JAMA* 350.

³³ Michael S Krasner et al., ‘Association of an Educational Program in Mindful Communication with Burnout, Empathy, and Attitudes Among Primary Care Physicians’ (2009) 302(12) *JAMA* 1284.

³⁴ See Richard Moorhead, Steven Vaughan and Cristina Godinho, *In-House Lawyers’ Ethics: Institutional Logics, Legal Risk and the Tournament of Influence* (Hart, 2018).

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Given the methodological limitations of this study, any conclusions must be tentative. Further research could seek a larger participant group by developing collaboration between law schools offering similar live client programmes and explore the potential impact of variables such as age, gender, race, orientation or social background. Students' perceptions of their interactions could be verified (to a degree) by exploring how they came across to clients: whether they effectively demonstrated empathy and whether they appeared to be under stress.

For the present, findings suggest that we might take useful steps towards helping our students to maintain their intrinsic goals and motivation in the face of challenging interactions by combining a number of interventions. We clearly need to develop their competence, a matter that all our programmes are designed to achieve. We can provide them with simulated learning experiences that progressively develop their competence, giving them safe spaces within which they may exercise a degree of agency without risk to themselves or clients. Once they have achieved a necessary level of competence (and under proper supervision) they may undertake work with real clients. They can be assisted in doing this if we introduce them to the value of, and the techniques that support the development of, professional empathy. This should become a key element of their professional identity if we encourage a reflective approach to their learning informed by an understanding of the value of intrinsic motivation and what might support it.