The " clients" of the publicly funded lawyer

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This paper considers concepts of the "client" from the viewpoint of the lawyers working on publicly funded cases in England and Wales. It uses the lens of competence and quality assessment of legal work in the context of peer review, and suggests a picture of the way clients are currently perceived and treated by their publicly funded lawyers.

In Quality and Cost (Stationery Office 2001) the IALS team had researched the client experience by carrying out both a client survey and experimenting with a "standard patient" method, sending "model clients", trained lay people acting as clients, to appointments with solicitors and not for profit providers of legally aided legal services.

Those findings from Quality and Cost relating to clients and model clients have been an essential ingredient in the training of new Peer Reviewers as they provide information not otherwise available to reviewers of the client experience. For the purposes of this paper they have also been compared with information emanating from the more recent Independent Peer Review of lawyers working under public funding in England and Wales[1]. The UK still has the widest public funding scheme for legal work and spends more than any other country per capita on legal aid. The cases that are dealt with address the problems of the most vulnerable in society as they face the might of the State in defending criminal accusations or deal with family problems or problems in housing, employment, education, welfare benefits, immigration, mental health, community care etc.

Existing models of lawyer-client behaviour have posited a relationship between clients and lawyers and suggest the way they perceive each other. From empirical legal research can be gained the context of what has been observed, and socio-legal theory helps to categorise the features which might allow us to recognise the different roles that are being played.

Eekelaar, Maclean and Beinhart (2000), in their empirical study of family lawyers, highlighted legal knowledge as the 'primary commodity' of the lawyer. They describe how the lawyer's role is not limited to delivering advice, but expands to include reassurance and support in practical matters, as well as actively taking measures to reduce tension between parties. At the same time as carrying out this extended role the lawyer is seen to attempt to

[1] See http://www.legalservices.gov.uk/civil/how/mq_peerreview.asp

structure the client's reality and fit within the framework of legal norms. "Solicitors negotiate a position with their clients" (p182) and in doing so do not simply adopt the client's aims indiscriminately, but rather the

> "normative standards within which the solicitor must shepherd the client's interests are there not only to protect the client, but also other parties and the common interest. The client's interests can be pursued only in so far as they are consistent with these standards." (at p187).

As Sarat and Felstiner (1995) explain, in relation to family lawyers in the US,

"At its simplest, clients know their histories and goals and lawyers must learn about them; lawyers know the law and legal process, clients must find out about them" (p 149). But the flow of information in either direction is far from simple: histories and goals are expanded beyond the strategically important by the client, and the law and legal process is revealed by the lawyer in a way that herds the clients in an 'appropriate' direction:

> "They use and communicate their knowledge of the law and their understanding of the legal process as a resource in educating clients about what is "realistic" in the legal process of divorce. They use this knowledge strategically to move the clients toward positions they deem to be reasonable and appropriate." (p.145)

Sarat and Felstiner highlight another function of this managed disclosure of expertise, that of expectation management. The lawyer does not simply trade on knowledge of the rule based systems of law and procedure, but describes justice in terms of the idiosyncrasies of other players in the system and the variability inherent in this very human system,

> "By focusing on the mistakes, irrationality, or intransigence of others, lawyers create an inventory of explanations that puts some distance between themselves and responsibility for any eventual disappointment" (p.146).

These examples of family lawyers at work are not that dissimilar from the way criminal lawyers have been described by Blumberg (1967), albeit the family lawyers are cast in a more benevolent light. Blumberg described the way in which criminal defence lawyers in the US engaged in a "confidence game" in order to process defendants towards a guilty plea.

Tensions between aspects of the lawyer's role are therefore well highlighted in the literature, and these might be expected to reflect on the way the concerns of lawyer and client are expressed. Some of the tension noted by Sarat and Felstiner is that between professionalism and agency whilst some of

the tension exposed by Eekelaar et al. and Blumberg is whether lawyers are entrepreneurs or caring professionals. Eekelaar et. al.(2000) find that their lawyers are both: they are entrepreneurial when they maximise income by promoting their work, seeking income streams, and cutting costs; but there is no such profit maximisation when dealing with individual clients, and their evidence suggests behaviour focussed on the reduction of cost to the individual client. Both of these tensions could suggest that the solicitor is portraying different images to different audiences. To the individual client the lawyer is Sarat and Felstiner's agent, or Eekelaar et al.'s caring professional, to the funder of legal services the lawyer is the entrepreneur or efficient service provider, and to wider society the lawyer is Sarat and Felstiner's moral professional. There may therefore no longer be one image of the client, rather there is the "real" client who is the needy recipient of services, the client as prudent funder of services (perhaps with the taxpayer lurking behind), and the client as watchful society also to be considered.

The Client Survey

As part of the earlier large scale project on Quality and Cost (Stationery Office. 2001), 867 clients responded to a questionnaire asking about various aspects of the way their case was handled. Overall, satisfaction was high, with 73% rating their service as very good or excellent. They gave high ratings on all aspects including:

- Listening to what the client had to say
- Telling them what was happening
- Being there when needed
- Having enough time for the client
- Telling the client what would happen at the end
- Knowing who to speak to
- Standing up for the client's rights
- Paying attention to the client's emotional concerns
- Treating them like they mattered and
- Doing what the client wanted

As a result these still are among the most important messages given to new Peer Reviewers in their training – the necessity of finding that due attention has been paid to these issues in the files they review.

One factor that seemed to lead to dissatisfaction with the service received was the use of multiple advisers. Where more than one adviser handled the case the satisfaction rate dropped from 79% to 54%. This was exacerbated by failing to advise the client why more than one adviser was needed. In a subset of 45% of cases where such a failure occurred satisfaction dropped from 68% to 49% (Quality and Cost 2001). Clients were also dissatisfied when they felt their cases had taken too long, and were generally able to assess this

accurately. This dissatisfaction was worsened where they weren't advised how long the case would take.

The survey also raised issues regarding the completion of cases, with 36% of clients reporting that their cases were not completed. Of these cases 35% had been recorded by the solicitor as completed, and 16% with the client ceasing to give instructions (at p. 131).

Model Clients

As part of the "Quality and Cost" study (Stationery Office 2001) forty-five model client visits were carried out. In these visits trained actors, assigned roles they might have had in real life, were given client scenarios and told to make and attend appointments at solicitors' offices and offices of not for profit organisations, posing as genuine clients. They then provided feedback on the visits to the research team. In addition, peer reviewers were asked to mark the overall quality of the advice given in interview or following letter, as seen through the eyes of the model client.

Again, for the model clients, satisfaction seemed to be high: 82% rated that their adviser had a good or very good understanding of the problem, 84% of the lawyers gave enough time for the consultation, 65% were good or very good at dealing efficiently with the information presented to them. They did however report a high incidence of access problems (pp. 152-153).

The ratings by model clients on the first three aspects above correlate significantly with the client satisfaction scores. Interestingly however, there was no such correlation with peer review scores for either the model client ratings, or the client satisfaction ratings. In this respect at least, it would seem that clients and solicitors do not seem to know, or notice, the same things. A telling example of the ways in which the perceptions differ is cited in Quality and Cost (2001, p.150) : From one model client:

> "The adviser showed an impressive level of concern for my job security, understanding that I could not afford to lose my job. Made a point of telling me that it can be quite common for part time women workers to encounter unfair bosses because they know how much they need the job and think that they will be able to get away with it (i.e. treating them unfairly). Overall he was very helpful, reassuring and personal and tried to think of as many other organisations I could turn to as he could."

And from a peer reviewer relating to the same case:

> "Although very clearly empathetic, this adviser does not really know enough about the law to be using legal aid money. A good example of 'touchy feely' advice."

Independent Peer Review

Peer review is the tool, deriving from the work on Quality and Cost, which is now used by the Legal Services Commission in England and Wales to ensure the quality of the legal work they fund. During the Peer Review process, selected solicitors trained as peer reviewers examine the files of other solicitors and legal advice workers, to assess the competence and quality of the work conducted and they deliver Reports on each supplier's work. In assessing and considering the competence and quality of legal services, they have access to a wealth of examples of work of varying quality. In order to allow the whole profession to benefit from this position they produce guides - "**Improving your quality: A guide to the common issues identified through peer review**". Each guide concentrates on one area of practice, such as family law, crime or employment. The guides do not form an exhaustive list of lawyers' skills, nor are they directive in their approach. They aim to assist solicitors who seek to provide a high quality legal service. But they also provide good evidence of what the peer reviewer lawyers think they and those they review should be seen to be doing.

What the guides say

An analysis of the guides presents a general picture of competent or good quality legal work with the following features:

- An appropriate adviser, with the requisite experience and knowledge;
- A tailoring of approach, including consideration of both client and case characteristics;
- Instructions taken at least adequately, but preferably fully and in detail, and with appropriate effort to visit the client where necessary;
- Advice covering all the issues, including merits, costs, procedure, technical aspects, timescales and outcomes; preferably in writing;
- Analysis that is both comprehensive and detailed;
- Preparation;
- Progression of the case, including pro-activity and prompt advice;
- Appropriate use of resources, combined with good third party communication;
- Maintenance of the file;
- Consideration of methods of alternative disposal;
- Avoidance of error; and
- Consideration and handling of ethical issues.

The guides are however relatively silent on issues of management and administration, advocacy, and legal research.

Of the above, Advice was the most frequently raised issue, and its importance is emphasised for having the effect of improving client understanding, but also, in the case of family law for focusing the mind of the adviser. Family practice was also unusual in its focus on technical and procedural advice, and the absence of recommendations on analysis and preparation.

Progression was another common aspect that was interesting because of its focus on negligence and was the aspect where negligence was mentioned the most. This is one of the few factors that was linked with client dissatisfaction, as was also highlighted in the early study by Rosenthal (1976) where he found the most common form of incompetence was the failure to work quickly and efficiently on cases. Here then the peer reviewing lawyers are noticing not just the same thing as clients, but also the fact that this issue may cause client dissatisfaction to such a degree that there is a risk of a negligence claim.

Discussion

The issues raised in the Guides are not easily split between different foci. All have a direct client focus, but some additionally have a professional or lawyer's work focus such as experience and knowledge of the adviser, tailoring of advice to include case characteristics, adequacy of instructions, nature of advice, analysis, preparation and progression from the lawyer's point of view. Appropriate use of resources sounds more like a professional/business/funder issue, file maintenance and consideration of ethics have a more professional and lawyerly focus; but avoidance of error and consideration of alternatives seem to be about equally focused on lawyer and client.

Progression is one area that both solicitors and clients hold important, although the literature suggests that the objective aims of each may differ. The literature has given us models of the lawyer client relationship based on observed interactions, an external social scientist's view. This paper draws on sources which attempt to gain the actual perspectives of the solicitors and the clients on the inside; to see whether the way they describe and see their roles fits with the existing models.

As described above, legal knowledge can be seen as the starting point, and primary commodity of the lawyer. Whilst the guides make this point, clients do not seem to take much note of this characteristic of the lawyer; they simply take this for granted and may not know if the lawyer lacked legal knowledge but could hold their "image management". The example given above where both model client and solicitor looked at the same case emphasises this difference. The client's lack of any basis on which to judge the legal knowledge base of the solicitor is the foundation for the power imbalance within the lawyer-client relationship.

There are a number of items which echo Sarat and Felstiner (1995) and Blumberg's (1967) description of the expectation management that is inherent in the relationship: items asking for a reasoned opinion on prospect of success, or advice on the weaknesses of the case. This perhaps serves to maintain the client's presumption that their lawyer has dependable legal knowledge, even in cases where the outcome is not as hoped for, and maintains the perception of value that the profession depends upon in the construction of its marketable commodity. Where the case fails, the client is convinced this is due to the features of the case not of the lawyer, and the lawyer's knowledge is proven to be correct. In this way the lawyer is demonstrating his value not only in pursuing a successful case, but also in using his knowledge to empower the client to make informed decisions.

We also see lawyers concerned with ensuring that the profession is seen to provide highly technical and procedural advice, or to demonstrate the legal knowledge of the adviser. This was particularly the case for family law and welfare benefits, areas in which there might be call for the lawyer to provide advice and support outside of a strictly legal domain and where practitioners might feel the need to assure customers of their primary commodity, legal advice. Taking a Weberian perspective (Weber 1978, Abel 1988) it might be said they are keen to emphasise the 'science' over the 'art' of their practice in these cases, thus maintaining the perception of value for the client. Like the peer reviewer quoted above, they privilege the value of knowledge "about the law to [justify] using legal aid money" over 'touchy feely' advice and empathy which fails to distinguish the product offered by the lawyer.

Much of the literature describes a complex process of negotiation, not just between sides, but between lawyer and client. In this process the client's reality is restructured to fit within the rule and norms of the legal system, this process sees the lawyer allowing the client to expand the conversational agenda beyond the legally relevant in exchange for the trust that allows the lawyer to move the client in strategically appropriate directions. The lawyer's strategy here, moving away from a Weberian perspective seems more reminiscent of Parsons' (1964) description of lawyers resisting the pressures of their clients in order to make them realise the hard facts of what the law will permit, and taking into account ideals of the public good. It is this aspect of the relationship that is most visible in the separate accounts provided by lawyers and clients, and in the difference between those accounts. It is here that clients and lawyers negotiate their different aims and objectives, and as such we would expect to see differences in what each holds important.

The previously discussed client viewpoints in this paper would support this description. They like lawyers to have an understanding of their problem, to deal with the information efficiently, and to have enough time to listen to

them. Clients, who perceive these qualities in their lawyers, are inclined to rate them positively: they are satisfied with their lawyer.

The differing viewpoint of the lawyer also shores up this description, with weight given to a full analysis, comprehensive advice (particularly in writing), and the emphasis given to advice on particular procedural and technical issues. These are all as would be expected where the lawyer is trying to ensure the appropriate path is taken, and is trying to persuade the client to take this path.

This difference between client and lawyer perceptions might suggest that in holding legal knowledge as important above softer skills the legal profession is missing an opportunity to add perceived value to the product it offers, and that clients do in fact perceive value in the more basic ability to understand and 'manage' problems and information.

But that suggestion assumes the concept of the client is unproblematic here. An alternative explanation takes into account the funding regime in saying that lawyers are still proving adept at demonstrating they have a marketable commodity, but they are targeting this message at the client funder, not at the client who is recipient of services. The client funder, who also audits files and has access to legal expertise might be expected to recognise and value technical aspects of the service in a way that the recipient of the services would not. This argument would find support in the tone of several items in the guides that call for 'appropriate' use of resources or focus on alternative methods of settlement, thus limiting the cost demanded of the Legal Services Commission. One might of course invoke Parsonian ideals of public good, and of avoiding unnecessary expense to the tax payer but that would involve attributing to the lawyers a world view that ignores a fixed legal aid budget. The alternative is to acknowledge that legal aid lawyers serve at least two masters, and that their views of quality are affected by this.

Some Tentative Conclusions

We have seen then that lawyers seek to establish their value in the eyes of different clients: To the client as service user they manage their image to ensure they are either seen as securing victory, or softening defeat and empowering decision making. To the funder they portray the image of efficient service providers, client empowerment here allowing them to save their own costly time, and dissuading poor cases, or even simply dropping them, where cost may outweigh prospects. Finally, to wider society maintaining the image of a highly competent profession by trying to exclude those who do not meet standards.

It is necessary to take into account also other elements of the context in which the publicly funded lawyers work. Efficiency is now seen as a crucial element

within quality rather than an optional extra to the system of practice – this clearly shows one eye looking at the funding regime and perhaps also the wary taxpayer. Growing control over the scope of public funding leads the concept of the client to be much more defined into highly specific subject categories and subcategories of eligible work, with signposting and referral as separate elements in any fast disappearing attempts at holism. The need to drop cases with insufficient, obvious prospects of legal success as quickly as possible ("drop those dead donkeys with dispatch") means that social exclusion issues become less important than ease of play within the system; and there is a real concern that the most needy and least capable clients will be lost. The powerful idea of "client empowerment" has become overused as a means of shrugging off real need as soon as the money or scope runs out; and divisions between legal advice and legal work providers leave great gaps into which unknowing clients can easily disappear. And the notion that clients may be as equally helped by a web site or a telephone call as a sustained lawyer/client relationship it is suggested may tend to undermine some of the energy and commitment of some public service lawyers.

Meanwhile, most of the lawyers and not for profit organisations we review still manage well that balancing of altruism and access to justice with the need to "make a living" in the manner so well described by Eekelar, Maclean and others. The concern for the "real" client remains the major focus of their work.

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