

ASSESSMENT CHALLENGES IN CLINICS: A SOUTH AFRICAN EXPERIENCE

1. INTRODUCTION

The course in clinical legal education is a compulsory year course presented to students in their final year of LLB studies at the University of the Witwatersrand in Johannesburg. Each student spends a compulsory two hours in the clinic (the “Wits Law Clinic”) every week where they consult with clients and take on matters for litigation. Each clinical session runs for four hours, with students rotating after completing a two hour clinical session. Each clinic is supervised by a clinician, who is a qualified practicing attorney. Each student has to attend an additional compulsory 45-minute tutorial with the clinician every week to which he/she has been allocated, where clients’ cases are discussed, strategy planned and where students are instructed on the execution of the matters. Students furthermore have to attend a 90-minute lecture by the clinician every week. Towards the end of the academic year, 90 minutes per week is devoted to trial-advocacy exercises. Throughout the year, students are required to manage the cases allocated to them, outside the times set out above. The management of the cases is under the supervision of the clinician, who assumes the ultimate responsibility.

The Wits Law Clinic divided the clinic in specialized units, operating on different days of the week, rather than running a general clinic every day of the week.¹ Due to large student numbers², and only nine clinicians on staff, the students are required to work in pairs. Even with the pairing of students, the clinician has to train and supervise 23 student pairs individually. Each student pair carries a case load of between eight to ten matters throughout the year. The clinician, who is required to lecture, assess, and conduct weekly tutorials with each student pair - and to research and publish in peer-reviewed journals - is also tasked with supervising the entire student case load. As a result, clinicians are forced to work within severe time constraints. The clinic, which runs as an attorney’s practice, does not close during student vacations and are manned by the clinicians during those periods.

¹ The different units are: family law, consumer law, refugee law, labor law, urban housing and evictions, law of delict (tort) and a unit dealing with criminal law, manned by interns, as students have no right of appearance in South African courts.

² The ideal ratio between clinical supervisor (“clinician”) and students in clinical courses has been suggested to be between 1 : 7 and 1 : 12. At the Wits Law Clinic the ration over the past three years has ranged between 1 : 38 and 1 : 46. See M A du Plessis “Assessment challenges in the clinical environment” 2009 34(2) *Journal for Juridical Science* (South Africa) 91 – 115 at 92.

2. ASSESSMENT

The current assessment structure for this course is: a written test (at the end of the first of four teaching blocks - on law and procedure), 10%; a written test (at the end of the third block – on the drafting of legal process) - 15%; trial advocacy skills - 5%; an assignment on analyzing a court trial which the student attended - 10%; an oral examination - 10%; and the assessment of the case file work - 50%.

The criteria for the assessment of the case file work are: the quality of the statement taken from the client; the ability to analyze problems; the ability to assess and plan strategy; the execution of strategy; drafting skills; verbal communication skills; and a sense of responsibility and attendance.

3. FACTORS THAT INFLUENCE ASSESSMENT

Specific factors that influence student assessment were identified as: large student numbers which make the assessment of individual students' interviewing skills in the clinic difficult, if not impossible; language barriers between students and clients; students working in pairs; specialization within the clinic; the education and experience variance amongst students; the students' (lack of) knowledge of substantive and procedural law; clinicians' varying experience in supervision and assessment; students' expectations; and the prescribed exit-levels outcomes set by the South African Qualifications Authority.

Of all these factors, the most challenging is the inability to properly assess the students' interviewing skills.

4. THE CHALLENGE OF ASSESSING INTERVIEWING SKILLS OF STUDENTS

The client pool mainly consists of the indigent in the community, often living in abject poverty. (To put this in perspective, it may be helpful to point out that South Africa's Per Capita income is approximately one fifth of that of the United States'). Their financial status is determined by way of a means test. On an average day about 150 clients attend the clinic, which operates for four hours with student counselors in attendance. The overflow of clients after the formal four hours of clinic duty, are attended to by interns. The clinic comprises of a large floor area, divided into cubicles where the students consult with the clients. Students are required to briefly discuss the client's problem with the clinician in the clinic, where a decision is taken to either take on the matter, provisionally open a file for the matter

which will be discussed in more detail during the tutorial session, or to dismiss the matter. Due to the large number of students, often waiting in queues for direction from the clinician, together with the pressure of screening as many of the waiting clients as possible during the formal clinic time, the clinician is unable to observe and assess the actual interviews which the students are conducting with the clients. The problem of properly assessing interviews is compounded where students are to be assessed individually, when working in pairs. Often the pairing of students is “unequal” in the following respects:

- where one of them is bi- or multilingual;
- where one has a better understanding of the substantive or procedural law, or a better general knowledge; or
- where only one has an understanding of the culture and traditions of the client.

4.1 Student challenges during interviews

Apart from the challenge for students to correctly identify the legal problems clients present them with, they often encounter challenges not specifically pertaining to law.

4.1.1 *Challenges with identifying problems*

When consulting, clinic clients tend to present to the students or clinic lawyer a rather large bouquet of problems, the majority of which has little to do with the law and the rest is so intertwined with general poverty that their actual legal problems are often very hard to distill. Simply being able to formulate the mandate is only half the battle won.³

A number of issues may arise where students are faced with problems not solely based in law, and which they often may have to deal with during interviews, without the assistance of supervision of the clinician:

- to what extent can a student be expected to comment on problems of a non-legal nature?
- are students qualified to comment on problems of a non-legal nature?

³ W de Klerk “Unity in adversity: Reflections on the clinical movement in South Africa” 2007 (12) *International Journal of Clinical Legal Education* 95 – 104 at 97.

- are students able to select the correct forum to which to refer clients?
- when students refer clients to the appropriate forum, will they do so correctly and with the required empathy?
- are students equipped to withstand a client's possible anger and frustration when they perceive a referral as a dismissal of their problems?
- are students equipped to retain their and the clients' focus on the one problem, identified to be in law, amongst the many others presented?

4.1.2 *Language barriers*

South Africa has 11 official languages. The university's language of instruction is English. Clients who frequent the clinic are often not able to articulate their problems in English. The range of problems presents specific problems:

- one student out of a pair may be fluent in the language the client's language of choice, thereby isolating the other student from his/her student partner during all client communication;
- the student communicating with the client may assess the client's problem while he listens and then merely gives a shortened, and possibly not fully accurate, version thereof to his/her student partner;
- a student who is fluent in a particular language may be identified by fellow students to consult with all clients wishing to communicate in that language, effectively limiting his/her access to the pool of clients;
- in the absence of a student able to communicate in a particular language, an administrative staff member who happens to be fluent in that language may be asked to act as a translator. Students may be unsure whether the translation is accurate, causing friction with the translator in front of the client. The particular translator used in this informal manner may not be available during follow-up consultations;
- there may be no student or other staff member available to interpret the language the client prefers to communicate in. All communication will then necessarily be conducted in either English or another language, which may be a second or third language for both the client and the student;

- a notice in the waiting area, inviting clients to indicate their language of choice may be abused by clients who are sufficiently proficient in English, but insist on their indigenous language, thereby ensuring that they consult with a student with a similar cultural background as their own. This may lead to the overloading of some students, often to the detriment of others vis-à-vis work exposure;
- how will a clinician be able to assess communication sent out in a language other than English, where only the client and the student communicating with him/her is proficient in that language?

The assessment of students by clinicians, when faced with the issue of language barriers, may have either a positive or a negative impact: should the student, who can not communicate with the client, be credited for all that is done right to the detriment of his/her partner? Alternatively, should the same student be penalized for errors made due to (mis)communication?

4.1.3 *Racial and cultural differences*

The South African landscape comprises a myriad of races and cultures, hence referred to as “the rainbow nation”. Although the average South Africans are ostensibly known for their tolerance, this quality is often tested to the extreme in the clinical environment. Students are reminded of some basic cultural protocols, such as a more formal dress code during client consultations, to show respect.

In some indigenous cultures:

- eye contact is perceived as challenging behavior, whereas in others avoiding eye contact is perceived as a sign of distrust or a lack of respect;
- a man leads and a woman follows, whereas the opposite is true for other cultures;
- a man may sit, but a woman must stand – or vice versa for other cultures;
- an elderly man will not discuss his problems with, or take advice, from a woman; and
- certain “code language” is used to describe a scenario.

Although the clinic is situated in an urban area, some clients travel from rural areas where certain customs are strictly adhered to. Students are required to respect customs and protocols and when not possible, to explain to clients why the consultation may be different to what they are used to, or expect.

Clients are often unable to distinguish between cultural or indigenous customs and practices and the law regulating the society. Students who do not know these customs and practices often have difficulty advising clients. Some clients may withhold certain information from the students, for example:

- issues relating to money. This information may be vital in the execution of their cases, but their cultural custom prevents them from discussing details about money;
- issues relating to family. In some cultures family ties are formed that do not correlate with the concept of a family in a legal sense. Clients may possibly refer to someone who is a distant family member, or to someone who lived with them for a period of time, as a brother or a sister. They may also refer to an aunt or other elderly lady, who was involved in their upbringing as a mother. Students who fail to clarify the correct legal relationship between the client and such third party may give incorrect advice. Students may also, when the true nature of the relationship is discovered, perceive the client as a liar and experience it as a breach of the attorney/client relationship. Many students therefore feel that they must first fight their way through a maze before they are able to assist the clients.
- Confusing use of language. Clients regularly confuse the words “he” and “she” in the English language. In some indigenous languages there is no differentiation between the genders. Some clients find the application of genders confusing and students find it equally confusing to follow the conversation.

4.1.4 *Aggression, intimidation, abuse and gratefulness*

In isolated instances clients may display aggression when they disagree with the students’ advice. Students are specifically trained in coping under these circumstances. When a client becomes verbally abusive, students are required to assess whether the behavior is as a result of frustration on the part of the client where he/she does not understand the advice, or whether he/she understands the advice, but disagrees with it. They are also trained in dealing with the rare occasion where they feel intimidated or threatened, or are bribed or asked to “lie for me, because that is what lawyers do”. When students are unable to cope with the situation, the clinician must intervene.

On the other hand, students are also instructed in dealing with grateful clients who insist on paying them something for the assistance. No money may be accepted, as the clients are assisted for free.

Large gifts must be refused politely and small tokens of appreciation must be declared to the clinician, who will decide on the appropriateness of accepting the same.

4.1.5 *Fear*

Students may on occasion experience fear. This may happen, for example, when the client is a traditional healer (sometimes referred to as a “witch doctor”), or a client wishes to sue a traditional healer. Whereas students from a culture where they understand the role of traditional healers may treat the client in the normal fashion, other students may dread such a consultation and may even refuse to deal with such a matter, as a result of the fear and their perception of possible supernatural consequences when dealing with such a matter. The assessment of a student who portrays fear poses a unique challenge for the clinician where such fear is real – other than a general fear to deal with a matter which a student perceives to be too difficult.

4.1.6 *Education and experience variants amongst students*

Legal problems do not manifest in a vacuum. Students’ education levels and experience of the environment outside the constraints of law vary. Some students will have the advantage of being better equipped to understand the circumstances surrounding clients’ problems, than others. This disparity between student partners is highlighted during the stage of interviewing clients already. One of the student partners may require additional tutorial intervention to address skills shortages.

5. TUTORIAL INTERVENTION

Many of the challenges students face during interviews, as detailed above, only become evident during the weekly tutorial sessions. Clinicians may note students’ feedback on the interviews they conducted, which may contribute towards the final file assessment mark. This may become problematic when students query the marks awarded, as the only evidence would be tutorial notes. These notes may be incomplete due to time constraints during tutorials, as the tutorials are intended for feedback and instruction on the cases that were taken on for litigation. A student’s recollection of the tutorial may, when the mark is queried, differ vastly from that of the clinician. Less experienced clinicians may find

allocating marks in this manner particularly difficult, especially when the marks allocated are monitored by an external examiner.

6. SOLUTION

The solution to the assessment of interviewing skills, taking into account the challenges students face during interviews, may be found in the introduction of reflective journals on the interviews students conduct in the clinic. The concept of reflective journals has been considered in the past, but were dismissed mainly because of time constraints experienced by clinicians and students alike (especially when the other forms of assessment - discussed in paragraph 2 above - already applied is taken into account). A further concern was that students may tend to distort or invent details for presentation in their reflective journals – this manipulation can be construed both ways: they may either present their experiences as being without any problems, trusting that this approach may earn them a good mark, or they may feel that discussing most of their interviews as problematic may have the same effect. A further concern was consistency in the assessment of reflective journals across the different specialized units within the clinic, as some units require a much wider knowledge and interpretation skills by students than other units, depending on the field of specialization.

These concerns can be overcome by providing students with clear guidelines. Students must be encouraged to be truthful and not succumb to:

- Feelings of incompetency, inability to deal with cases or fear, as they find all or most of their interviews as problematic;
- Perceptions of themselves as indomitable, as all their interviews are perfect;
- Writing down what they think the clinician may want to hear – this strategy may fail if the capabilities they claim to possess are not reflected in their case file work

Students should be encouraged to detail the problems they experience during interviews. These problems can be discussed with the clinician where solutions may be found. The skills students develop as a result of a previous problematic interview may be applied successfully during subsequent interviews, which in turn may be reflected upon in the journal. Solutions found in this way may lead to a successful re-interview of a client.

Clinicians may invite journal feedback from students on their experiences when language barriers are encountered. Students may also be invited to comment on their experiences where one of the student partners does the translation and leave the work to be done by the other partner. Whether one of the partners feels excluded, both with regard to the communication, the quality of the work done as a result thereof and the feedback to the client by only one of the partners, may also be reflected upon. Students may be invited to air their views on the assessment of that particular matter. The same journal feedback may be invited where students feel that there was a disparity in the knowledge of substantive and procedural law, as well as general knowledge, between him/her and his/her partner, when executing on clients' matters. The contents of at least this part of each individual student's journal should remain confidential to ensure that students feel that they may freely discuss problems they encounter with their student partners.

Interview and statement taking form the basis upon which the decision is made whether to accept a case for litigation. Proper interviewing skills are therefore a key component of the students' total clinical experience and the assessment of these skills is therefore essential

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