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COMPETENCE AND SKILL ACQUISITION IN LAWYER CLIENT INTERVIEWING.

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Summary

This study considers the competence of lawyers in carrying out the work of interviewing their clients and the value of training and experience in acquiring client interviewing skills.

Literature on legal skills is first surveyed to assist in understanding the concept and help decide on methodology. Literature on client interviewing and the educational value of experience are reviewed to provide background to subsequent studies.

The first study provides an overall framework for solicitors' work and monitors, through observation and questionnaire, the work of a number of solicitors over a four day period. Client interviewing is found to take up a larger proportion of solicitors' professional work than other categories noted, and observation proves to be a more sound basis for studying detail than a questionnaire approach.

The second study assesses the competence of 27 new trainee solicitors at interviewing clients through a detailed monitoring of their performance over thirteen tasks using eighteen different techniques and providing thirteen heads of information. Their performance exhibited many of the deficiencies recognised in the literature.

The trainees were then randomly allocated to three treatment groups. One group received full training, one received training without audio-visual feedback of first interviews and the third (control) received no training at all. They all then undertook a second interview which was similarly assessed. Training was found significantly to enhance performance over the spectrum of measurement, and audio-visual feedback especially enhanced behavioral aspects of performance.

In the final study, solicitors and trainees ranging widely in experience were video-taped interviewing their clients and similarly assessed. Experience was not found to have the expected effect of enhancing performance significantly except in some minor respects, but it did increase the feeling of confidence in interviewing ability.

In conclusion, suggestions are made for stronger linking of training with experience in the production of new lawyers.

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DEDICATION

To all clients who have suffered from poor communication by their lawyers; and to all lawyers who, by their assistance here or otherwise, dedicate themselves to effective and caring work for their clients.

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DECLARATION

The work reported in Chapter Three, in an expanded version, has been published by the Law Society Research and Public Policy Unit as "Solicitors Skills", a monograph, in June 1991. The work reported in Chapter Four has been published in a different form as 'Lawyers and Clients: The First Meeting' in (1986) 49 MLR 333. Extracts from Chapters Five and Six informed elements of text appearing in parts of "Client Interviewing for Lawyers" Sweet and Maxwell, London 1986. By its nature the empirical work of data collection and assessment was carried out by others, blind to the hypothesis under test in each experiment. Their work is acknowledged above and in the appropriate text.

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CHAPTER ONE

TEACHING AND LEARNING LEGAL SKILLS

Introduction

Legal education is in a state of transition, it is moving away from a system based almost entirely around the learning of caselaw towards a mixed approach combining the teaching of legal skills together with the law to which they apply.[1]

The system of legal education in England and Wales has traditionally been based upon a division into three sections. An undergraduate degree in law was the usual pre-cursor to Law Society or Bar exams followed by an "on the job" training through articles and pupillage. The law degree was thought to provide a sound academic training in how to think like a lawyer, the professional course and exams to introduce aspiring practitioners to the more practical and procedural aspects of law and legal subject matter and the articles/pupillage stage to teach the new practitioner how to practice.

The approach of the teaching was indirect. Through assimilating a large number of cases and by going through an analysis of the law, the skills of case handling and statutory interpretation were assumed to be inculcated at the University level. Largely dictated

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1 Law Society Green Papers on Legal Education 1988 Training Tomorrows Solicitors, 1990; Lady Marre "A Time for Change: Report of the committee on the Future of the Legal Profession", General Council of the Bar and the Council of the Law Society, 1988; Twining, W. "Taking Skills Seriously" in Gold, N., Mackie, K. and Twining, W. "Learning Lawyers' Skills" Butterworths 1989. See also Wilson, G 'English Legal Scholarship' (1987) 50 MLR 8; Partington, M. 'Academic Lawyers and Legal Practice in Britain' (1988) 15 Jo. of Law and Soc. 374; McAuslan, P. 'The Coming Crisis in Legal Education' (1989) 16 Jo. of Law and Soc. 310; Feldman, D. 'The Nature of Legal Scholarship' (1989) 52 MLR 498; Daintith, T. 'Legal Research and Legal Values' 1989 52 MLR 352.

notes and heavy examinations would broaden the practical and procedural law learned at the professional qualification stage and might also produce hard working routines and the ability to withstand pressure over exams. The socialising aspects of on the job learning and watching others would somehow produce the lawyers necessary for the future of the profession.

External factors began to make changes in this picture. With the massive expansion of the profession occurring over the mid to late 1980s it became necessary to attract more non-law graduates.[2] A smaller number of these had always come into the solicitor's side of the profession, but they began to be more attractive to the larger firms (the main hirers of trainees) during this period. The nature of law firms and the character of the practice of law also began to change.[3] Firms became larger and a larger proportion of new entrants were concentrated in the largest firms. Work in those firms became much more specialised in order to take advantage of the economics of size. The amount of law produced by trial courts and tribunals, appellate courts and coming off the stutute book was increasing considerably so that it was not possible for one practitioner to maintain a working knowledge of a wide variety of legal subject matter. It became clearer to the Bar and the Law Society that a new approach to professional training had to be adopted. Interestingly, it was the traditionally more conservative Bar who made the first major changes in its own qualifying course moving towards a skills based course in 1988. The Law Society intends to do likewise by 1993.

Another approach of the traditional system of legal education was its "front loading" effect.[4] All of legal education and training had previously occured at the beginning of a

2 See Abel, R. "The Legal Profession in England and Wales" Blackwell 1988 Chaps. 10-12 and cf. especially pps 144-145.

3 See Abel, R. op. cit. Chap. 14; Gallanter and Palay "The Tournament of Lawyers" 1991; and Marre op. cit. p.37.

4 I am indebted to Dr Karl Mackie for the original analogy given at a seminar at the

lawyer's life. Like the front loading washing machine, everything had to be put in at the beginning. In the late 1980s the Law Society began to move over to a system of compulsory continuing legal education, which it is intended to adopt for the entire practising profession by 1995. In this system, it will be possible to "top-load" further education and learning throughout the "wash" of a practitioner's working life.

Certain skills and law will not be relevant for all practitioners at all stages. To learn, for example, about interviewing clients as a trainee solicitor in a large firm may mean that such learning will not be used for some two to three years. Training needs to be given at a time when it is relevant and useful and so that its messages are not lost by the time the trainees have to practice what they have learned. A combination of formal teaching and learning by experience is aimed at by the continuing legal education approach.

However, many of the assumptions underlying both the old and new policies in legal education and training are unproven. It has been strongly argued that it is better to teach both law and skills through a direct method concentrating on the issues and the outcome intended[5] but there is little empirical information to prove that this is the most effective way of teaching. Is it, in fact, possible to train lawyers in legal skills and what are the most appropriate and most effective methods for such training? Do people pick up the legal skills adequately through experience and is training beyond a certain level of experience unnecessary? At what stages in practitioners' experience would training on each legal or managerial skill be most appropriate?

It is the intention of this study to begin to answer some of these larger questions and to point the way to further research in this area. The changes which have occured and are

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Institute of Advanced Legal Studies in 1990.

5 See Twining op. cit. and Mackie K. in Gold, Mackie and Twining at pps 8-17.

continuing to occur in England and Wales are not isolated. A background literature of legal skills exists within the North American tradition, largely as a result of the clinical legal education movement over there. This, in turn, was a reaction to the perceived unethical behaviour of North American lawyers as well as a somewhat "rose-tinted" appreciation of apprentice based training over here. Similar changes to those occurring in England and Wales are mirrored or have been foreshadowed by changes in the legal education systems of the Bar and Solicitors in Australia, Canada, New Zealand and other parts of the old Commonwealth. Neither are the ideas or issues particularly new. Many of them were discussed in 1971 in the Ormrod Report of the Committee on Legal Education[6] and critical reactions to the traditional system of legal education are noted there and elsewhere from the late 19th Century onwards.[7]

In the next Chapter it is therefore intended to review some of the literature regarding legal skills, in order to gain an understanding of the current state of knowledge of what legal skills are considered to be and how they might be taught. In order to test out the state of competence, and the teachability, of legal skills one skill will be isolated and considered in detail. An introduction to the literature on client interviewing is therefore next addressed. Finally the Chapter considers literature on the value of experience and experiential learning so that this also may be tested out in the legal context.

Chapter Three details the first research exercise. This is intended to test out different methodologies for assessing the work performed by solicitors. It also details findings on the proportion of time lawyers spend on different tasks within their work using the particular skills associated with those tasks. In this research, the proportion of time spent on client interviewing is found to be the largest proportion of time spent on legal work.

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6 Cmnd 4595.
7 See Abel op. cit. Chap. 17.

The fourth chapter begins to concentrate in detail on the legal tasks and skills areas identified within client interviewing and how such work might be assessed. In a laboratory setting, 27 trainee solicitors carry out video taped interviews which are subsequently analysed to determine in detail the quality of the lawyers' performance. These trainees are selected in their first few weeks of articles, at the stage at which they migh carry out their first client interview. Their performance and the findings of the study are compared in detail with the existing literature.

In Chapter Five a further experiment is detailed in which the twenty seven trainee solicitors are randomly allocated to one of three different treatment groups. Two of those groups are subsequently trained by different methods and their interviewing performance is then assessed after training and compared with a control group who did not receive any training at all before their second interview. In this way it is possible to assess the value of training for these young lawyers and what differences training, and different forms of training, make to their competence.

Chapter Six then turns to the question of learning by experience. Lawyers, spanning a wide range of experience, interviewing first time clients on a first interview, were video taped in their offices. The results of the analyses of these tapes were also assessed on a similar basis to the previous Chapters. Some findings are then detailed on the effects of experience in picking up this important legal skill of client interviewing; and it is possible to assess whether experience alone, or the "school of hard knocks", is the best teacher.

Chapter Seven finally brings together the cumulative effects of the research and discusses the overall findings in relation to the current policy issues mentioned above.

CHAPTER TWO

A REVIEW OF THE LITERATURE

This Chapter reviews three different areas of literature in preparation for the following research. Initially it addresses the general literature on the nature of legal skills in order to discuss the concept of a legal skill, to discuss the methodology to be adopted in researching such skills and to review the literature on legal training.

The review then begins to narrow down to consider the state of knowledge regarding lawyer client interviewing which will be the central focus of the research, providing an introduction to currently existing research. A more detailed exposition and evaluation of that literature will be concentrated in Chapter Four, where it can be assessed against the results of the experiment reported there.

Finally the Chapter considers in outline some literature in psychology related to learning context and the importance of experience in learning legal skills. These have been fundamental issues for the protagonists of Clinical Legal Education in the United States and in the United Kingdom and Chapter Six will address experimentally questions related to the value of experience.

LAWYER SKILLS

The research to date on lawyer skills reveals several common themes, but these frequently return to two fundamental problems: the confused nature of the debate surrounding the teaching of lawyer skills and the need for further research of both an empirical and analytical nature into how lawyers spend their time. Most of the research

is also concerned with foreign jurisdictions and with the education of students at undergraduate level and as such it expresses some different concerns from a study dealing directly with solicitors' skills.

One of the prominent themes in the literature is the problematic concept of a 'skill' in itself. This has been expressed in explicit terms by Twining[1] and reviewed by Mackie who suggests that the word "skill" represents a convenient linguistic tool implying a need to grapple with a continuum of "practical expertise".[2] There does however appear to be a consensus that skills represent the underlying fundamental abilities required to perform all lawyer operations.

The need to define and articulate an objective concept of lawyer skills and tailor this definition to meet achievable educational aims is the fundamental concern of much of the research into lawyer skills in legal education. Definition has also become inextricably linked with the context within which such education occurs ie. its place in the continuum of practical experience.

Mackie lists some major features of skills.[3] Thus they are:

(i) goal directed

(ii) learnt (by practice)

iii) involve coordinated activity which is a response to the environment

(iv) involve a repertoire of 'micro skills' or sub-elements

(v) involve a transition from learning to accomplishment, usually by a shift to intuitive responses for sub-elements.

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1 "Legal Skills and Legal Education"; W. Twining: (1988) 22(1) Law Teacher 4.
2 "Lawyers' Skills: educational skills" by Karl Mackie in 'Learning Lawyer Skills': Gold, Mackie and Twining eds. p.10.
3 'Lawyers' skills: educational skills'; Karl Mackie in 'Learning Lawyer Skills' : Gold, Mackie and Twining eds. p.9.

The goals of educators must be defined and kept within manageable limits. They are therefore likely to differ at progressive points in the continuum of experience. This may affect the defining of a skill where such a definition is produced within a specific educational context. The definition in effect can become 'goal-centred'. It is argued that this is true of most of the research to date, and therefore the greatest importance should be placed on an empirical investigation into the defining of solicitors' skills. Workable models of legal skills must be tailored to their various educational contexts, whereas an empirical analysis of what lawyers do in fact would provide a surer basis upon which such contextual choices could be made.

From Mackie's criteria, the importance of the environment in stimulating 'coordinated activities' should also be noted. The educational context inevitably delimits the extent of such an 'environment'. The significance of such a delimitation may be seen most sharply where models for producing skills definitions are based upon observable performance in skills by students as in the work of both Rutter and Cort and Sammons (below). Where definitions are produced in limited environments, they become 'environment-centred'. An empirical framework could help to offset the limitations of any educational environment, allowing for more explicit choices to be made as to which educational objectives are more deserving of merit. One possible danger is that without such a framework important aspects could be omitted or underemphasised in curricula, because a particular educational environment fails to expose their significance in terms of actual lawyer operations.

The problematic nature of skills also feeds into the debate surrounding the nature of skills training, and especially the idea that skills training might be 'anti-intellectual'[4] and

4 See, for example: Irvin C. Rutter 'A Jurisprudence of Lawyers Operations' (1961)

therefore not a fitting subject for the attention of the academic establishment. This latter aspect of the debate may seem to be a concern only for academic lawyers, who may prefer to leave the training of skills to professional courses where they have a more obviously direct utility .[5] It would be misleading to limit the importance of this element of the debate, since to do so would gloss over a fundamental concern.

This concern is most explicitly expressed in the work of Rutter.[6] He points out that (i) the study of doctrine is a skill in itself[7] and (ii) it is impossible to understand the role of doctrine until it is integrated within the "context of lawyers' operations". Thus any attempt to bisect legal education into practical and theoretical aspects is misguided and obscures the understanding of both academic and professional concerns. As Rutter points out, for the most part lawyers' operations are unrecorded; never having been recorded in an organised or systemised form:

> "The result is that there is substantially no operational culture or heritage of the legal profession, except as it may be derived from doctrinal materials. Operational learning dies with each generation, except to the extent that it is handed down by oral tradition".[8]

Cort and Sammons make a similar point [9]; a failure to make explicit an analysis of legal

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13 Jo. of Legal Education 301,304; Twining op. cit., p 9.

5 Gerard Nash 'Skills Course or Clinic' (1980) 54 Australian LJ 535. Perhaps ironically the author of this piece advocates the teaching of clinical courses in undergraduate law schools whilst refuting the teaching of skills. But see also 'Integrating doctrine, theory and practice in the Law School curriculum: the logic of Jake's Ladder in the context of Amy's Web', (1988) 38 Jo. of Legal Ed. 243, 245, and Phil Jones in "A Skills-based approach to Professional Legal Education" 1989 Law Teacher 173.

6 Rutter op. cit., p 306-309.

7 Ibid. p. 307: "The fact is that not only is the study of doctrine not theory, but it constitutes an intensely practical skill, perhaps the most important single skill of the practicing lawyer".

8 Ibid. p. 302.

skills limits "corrective feedback" to students and hampers attempts to evaluate student work on skills training. Their concern may logically be extended to fully trained lawyers. Without an explicit model to conceptualise their own skills, lawyers are encouraged to misconstrue what they are doing and thus discouraged from an effective evaluation of their own abilities and needs for improvement. Similarly the importance of legal skills to the practicing lawyer, and to those seeking to understand the practicing lawyer, suggests that analysis of lawyer skills "may provide legal education with the clear and organised educational objectives it seems to be missing".[10]

Cort and Sammons, and Rutter attempt some analysis of lawyer skills. These studies have several common features which limit their usefulness. They are concerned with (what in England would be) undergraduate students and their primary concern was to incorporate some "operational learning" into the undergraduate curriculum and as a consequence to assess that learning. This involved an attempt to identify what elements might constitute fundamental lawyer skills; since to merely teach basic legal operations (e.g. drafting of certain legal documents) would reduce the learning value of each item of operational learning by failing to articulate its relationship with the nature of the lawyering process. Thus Rutter suggests individual lawyer operations involve a set of underlying, common skills [11]. In so doing he criticises an attitude to lawyer skills training which fails to make such a distinction. He notes that much of the literature on a lawyer skill (such as cross examination, for example) consists of often worthless explanation of dramatic incidents or the giving of truistic advice [12].

9 H. Russell Cort and Jack L. Sammons, "The Search For Good Lawyering : A Concept and Model of Lawyering Competencies" (1980) 29 Cleveland State Law Review 397: 415-418.
10 A J Pirie, "Objectives in Legal Education: The case for Systematic Instructional Design" (1987) 37 Jo. Legal Education 576,590.
11 Rutter op. cit., 312 and 316. He suggests with regard to cross examination that the underlying skills are:

1. fact management

Rutter's method of discerning such underlying skills is to take three aspects of lawyer operations and analyse them in an attempt to suggest their fundamental sub-skills. Exposition to lawyer operations on an undergraduate timetable is necessarily limited by time and so he considers only three operational courses: a 'Facts Course' (dealing with the nature and role of facts in legal operations), 'Legal drafting' and 'Appellate Advocacy'. His analysis then is a response to what can feasibly be covered in the time available with undergraduate students and as such is an analysis limited in its scope and depth. Nor is his analysis based on any empirical observation of how lawyers spend their time.

Cort and Sammons use a slightly different method of analysis, but one also not based upon empirical study. Their method of defining what they call the "Six Major Competencies" [13] is not based upon an observation of the process of lawyering but upon the observable products of student attempts to carry out lawyer operations [14]. Student performance on black-letter law does not necessarily correlate with their actual ability to perform lawyer operations (crucial to Cort and Sammons because they wanted a uniform method of assessing students on clinical courses)[15] and the students studied by Cort and

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2. application of doctrine
3. experimental technique (e.g. strategic considerations)
4. lifelong experimental techniques (e.g. trial demeanour).

12. Ibid. p.314: "... skillfullness is not achieved by spurious precepts that amount to nothing more than directions to do the job effectively."

13 Cort and Sammons op. cit., lists the six major competencies.
   1. Oral Competency
   2. Written Competency
   3. Legal Analysis
   4. Problem Solving Competency
   5. Professional Responsibility Competency
   6. Practice Management Competency

14 Ibid., p.140.

15 Clinical Courses in American Law Schools are like the 'clinical year' in medical training, in which students work on real cases with real clients/patients and that work becomes part of their coursework for qualification.

Sammons, were responding to simulated and controlled clinics. Thus this 'Competency Model' is not based upon a conception of what lawyers do in practice except in so far as the simulations approximated lawyer operations.

Cort and Sammons therefore have produced a tool for creating an analysis of lawyer skills (or "competencies"). Their method was essentially to observe the errors of lawyers (in their case law students) and then attempt to ascertain the competencies required by lawyers by formulating hypotheses which constitute a diagnosis for the error. A major problem with such an approach is that errors do not necessarily provide the best method of observing what skills are a necessary part of good lawyering. Although they can help provide both specific and general descriptions of what skills may be necessary, they do not of themselves give an indication of the importance and significance of such skills. This requires an empirical analysis of what lawyers actually do.

Assessing what lawyers do

Empirical research into the skills lawyers actually apply has been scant. As Twining states "...teaching, learning and assessing individual professional skills is under-theorised and under researched" [16]. Not only could such research provide the basis for a more complete analysis and understanding of skills (not based simply upon student assessment), it could help in the most effective allocation of the training of such skills [17].

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16 W. Twining, 'Taking Skills Seriously' (1986) Commonwealth Law Bulletin' 12 (1) 231,232.
17 W. Twining, 'Legal Skills and Legal Education' (1988) 22 (1) Law Teacher 4,12.

Rosenthal in his classic work on lawyer competency points to the need to be able to "evaluate systematically and reliably the performance of lawyers". [18] He rejects two methods of assessment as arbitrary [19] and prefers three other tests, which were 'standard of performance tests'. One of these involved an assessment of case handling by an expert panel of lawyers. This would be an expensive method of research, which is also susceptible to the subsuming of criteria of evaluation under the guise of expert opinion, and may serve to replicate the faults of past generations in the next. The second test he proposes involves using a similar method to Cort and Sammons and evaluates minimum standards by 'problem spotting'. This has the disadvantages mentioned above and also only allows for improved skills up to an adjudged minimum standard (although this need not, of course, be static). The final suggestion is a "systematic and detailed specification of what lawyers actually do when they serve clients" [20]. If standards were clearly articulated then the criteria for assessing "lawyering" could provide an explicit model for lawyer skills and negate a need to have lawyers assessed by their peers.[21] He envisages further research along the lines of the last suggestion recognising the absence of knowledge in this area and pointing out "...that the state of the enterprise is very primitive".[22]

The final piece of research of relevance is an attempt by Baird to determine the activities of the legally trained from six U.S. Law Schools[23], their use of legal skills and the utility of legal training. The major part of this research was a postal questionnaire which

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18 D.E. Rosenthal, 'Evaluating the Competency of Lawyers' (1976) 11 Law and Society 257,258.

19 These tests were an exam based test which he felt were only suitable to screen out the inept. The second test was to measure a lawyer's status within the legal community (which would involve obscure criteria of worth probably involving hidden prejudices).

20 Rosenthal op. cit., p. 266.

21 Ibid., p. 266.

22 Ibid., p. 270.

23 Leonard L. Baird, 'A Survey of The Relevance of Legal Training to Law School Graduates' (1978) 20 Journal of Legal Education 264.

sought the opinions of lawyers of differing age groups upon the areas of practice, general knowledge and skills they found most important to their working lives. Of the eight most significant areas six were found to be in the nature of lawyer skills [24]. Whilst this is illustrative of the importance of lawyering skills to the practicing lawyer it provides only secondary evidence upon which an empirical model of what skills a lawyer employs (and needs to employ) can be based. It provides a self assessment of each lawyer's perceived needs which may not necessarily relate to how lawyers spend their time. Respondents may concentrate their attention upon areas which they particularly enjoy, or they consider to be meritorious or high-profile, or conversely areas with which they have difficulties.

Although it is not a research report, one should also mention the list of "legal skills", set out as specific knowledge areas and abilities in Marre[25]. This list, which is devised to fit in with the existing academic and vocational stages of legal training, is intended like previous, North American writings to generate an agenda for legal syllabus change. The list is intended to be comprehensive, but is rather too specific to be so. It also does not categorise its listed elements into core and derivative abilities, thereby proving difficult to use.

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24 The most significant areas for the lawyers polled were: ability to synthesize law and facts, ability to be effective in oral communication, knowledge of statutory law, ability to write, research, counselling clients, negotiation and the drafting of legal documents.

25 'A Time for Change: Report of the Committee on the Future of the Legal Profession" Chair Lady Marre C.B.E. Presented to the General Council of the Bar and the Council of the Law Society, July 1988, pp. 113-115. In terms of vocational training see also Neil Gold, "The Professional Legal Training Program: Towards Training for Competence" (1983) 41 Advocate 247 and (1983)1 The Journal of Professional Legal Education 1.

Summary

It would seem therefore that much of the literature demonstrates the need for research in the area of lawyer skills. Empirical and analytical study of what lawyers do is essential if legal education is to be made relevant and professional competence is to improve[26]. The existing literature strongly rejects as artificial the divide between theoretical and practical training of law, and seeks to make lawyer skills explicit to aid direct instruction and heightened awareness. However, no existing research provides an empirical basis for illustrating or assessing lawyer skills. Current models are related to the teaching and assessment of undergraduate students and are not founded on any empirical base, but upon the writers' analysis of the educational relationship between student and lecturer. Furthermore much of the research is ageing and from the U.S.A. and as such must be applied with care to any consideration of solicitors' skills in the United Kingdom.

INTERVIEWING AND COUNSELLING

Client interviewing and counselling has been selected as the major focus of this study because of its centrality to legal work and the large proportion of lawyers' time involved in client handling. It will serve therefore as a strong example of a lawyer skill for closer study and analysis.

Although the early work of socio-legal scholars was concerned mainly with the study of subjects such as the trial courts, disputes settlement processes generally and juries, some more recent work[27] has begun to look at the lawyer/client relationship. A clear

26 For example: Cort and Sammons op. cit., p. 431; Rosenthal op. cit., p. 266; Twining op. cit. as note 1 p. 12.
27 e.g. D. Rosenthal, *Lawyer and Client: Who's in Charge?* (1974); "Evaluating the

understanding of the lawyer/client relationship would be a fundamental step in the testing and application of current social theory on the legal profession. It must also be an essential step in the development of teaching and training methods for a more able profession.

There seems to be a general recognition, even in jurisdictions without a separate Bar, that the major part of lawyers' work takes place in the lawyer's office using the skills of interviewing and counselling, negotiating and drafting.[28] American social scientists certainly seem to have spent much more time on the "Perry Mason" or "Rumpole" image[29] of the trial court lawyer than is warranted by the proportion of time spent by most lawyers in the courtroom.

The first interview between client and lawyer is portrayed as a crucial period of mutual assessment. Mutual confidence must be built up, the lawyer must be given basic information on the client's case and the client be given some understanding of the way the law operates in relation to his/her problem.[30] The lack of communications skills possessed by lawyers is well noted in the Consumers' Association survey in 1977[31] and the Benson Report suggests that good communication is the most important reason for clients' satisfaction with their solicitors and bad communication a major reason for their

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Competence of Lawyers" (1976) 11 Law and Soc. Rev., 257; M. Cain "Towards a theory of General Practice Lawyers - A Radical Approach" (1979) 7 Int. Jo. of Sociology of Law 331 and M. Spiegel, "Lawyering and Client Decision-making: Informed Consent and the Legal Profession" (1979) 128 Univ. of Penn. L. Re. 41.

28 See, e.g. G. Goodpaster, "The Human Arts of Lawyering: Interviewing and Counselling" (27) Jo. of Leg. Ed 5; Danet et al., at note 36 below; and D. Riesman, "Towards an Anthropological Science of Law and the Legal Profession" 57(2) American Journal Sociology 122: "[M]ost lawyers today recognize that their most important work is done in the office, not in the courtroom; the elaborate masked ritual of the courtroom holds attraction only for the neophyte and the layman."

29 See, e.g. R. Levy, [1974] North Carolina Law Review 1083.

30 See e.g. D.A. Binder and S.C. Price, "Legal Interviewing and counselling, A Client-Centred Approach, 1977 West. Introduction.

31 Which? Consumers' Association Report, May 1977, p.297.

dissatisfaction.[32] One can only speculate how many potential clients are put off by the profession's poor reputation in communication skills. Many of the complaints received generally about lawyers concern this problem.[33]

Traditional legal education spends a great deal of time familiarising potential lawyers with the law as it is found in statutes, law reports and textbooks, but very little time is spent looking at the lawyer/client relationship. If the handling of a case hinges on the information obtained from the client and the client's agreement to a course of action, the efficiency of lawyers' interviewing techniques is a crucial area for investigation. A study of communication on the first occasion the lawyer and client meet would therefore seem to be a useful beginning for an understanding of that relationship, and what may go wrong. This fact has not escaped the recognition of the major researchers. Research in this area however, has not progressed easily partly because of the reluctance of the profession to be involved.

Rosenthal in *Lawyer and Client: Who's in Charge?*[34] notes his own failure to be allowed to sit in on lawyer/client interviews or tape them. Others, such as Harrop Freeman,[35] Brenda Danet et al[36] and Maureen Cain[37] have recorded similar results, although some work in progress has shown more success recently.[38] Rosenthal in 1976

32 *The Royal Commission on Legal Services final Report*, Cmnd. 7648, 7648-1 ("Benson"). See, e.g. Vol. One 3.36-37, 22.29-31, 22-62, Tables 22.3, 22.4; Vol. Two 8.228-230, 2.238, 8.252-272, Tables 8.34, 8.35, 8.36, and 8.37. See also B. Curran, "The Legal Needs of the Public" (1978) 64 A.B.A.Jo. 843-52.

33 See Solicitors Complaints Bureau Annual Report 1990.

34 See note 27 above.

35 *Counselling in the United States* (1967), p.53.

36 Danet, Hoffman and Kermish, "Obstacles to the Study of Lawyer-Client Interaction: the Biography of a Failure" (1979) 14 Law and Soc. Rev. 923 ("Danet").

37 See note 4 above. It seems that Cain was allowed to observe some interviews but not to tape them.

38 See, e.g. Janet Gilboy, *The Perspectives and Practices of Defense Lawyers in Criminal Cases*, Ph.D. dissertation Northwestern University, Evanston, Illinois, 1976 and (1979), 70 Jo. of Crim. Law and Criminology, p.1. There has also been participant observation in Holland by Miek Berrends in Gronigen and in California and New York

returning to the theme of lawyer competence in general compared the amount of work carried out in the evaluation of the medical profession and cried out for research to take lawyers at least as far as the medical evaluation has reached.[39] Among Rosenthal's suggested areas of interest[40] are recordings of lawyer-client consultation "especially initial client interviews."

The existence of some research into the complexity of the lawyer-client interview and its own centrality in lawyers' work singles this area out for closer scrutiny. In Chapter Four, it will be possible for detailed exposition of the literature on client interviewing to be compared item by item with the findings of the research itself.

LEARNING BY EXPERIENCE

Some basic texts within the psychology of education will be considered first in order to lay out the state of knowledge in general on experiential learning. Subsequently some texts relating to the importance of experience in the theory of Clinical Legal Education will be considered. Finally some of the fundamental questions to be addressed in the experimental work will be posed.

How Knowledge Develops: Declarative Knowledge, Procedural Knowledge, and Expertise

The work of educational psychologists regarding the nature of knowledge and the

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by Austin Sarat and William Felstiner. See Law and Soc. Rev. Where lawyers have been studied closely it has often been the public sector of "legal-services-for-the-poor." See, e.g. Carl J. Hosticka, "We don't care about what happened, we only care about what is going to happen: Lawyer-Client Negotiations of Reality" (1979) Social Problems vol. 26, No. 5, p.599.

39 "Evaluating the competence of Lawyers" (1976) 11 Law and Soc. Rev. 257.

40 Ibid. at p.285.

mechanisms by which such knowledge is learnt provides a basis for understanding the effects of experience. Learning is not seen so much as the simple consumption of knowledge, but the learner is, "a goal-oriented intelligence who constructs knowledge rather than absorbs it."[41] The role of the educational process is therefore directing and improving the ability of this 'goal-oriented' intelligence.

Education is seen as a "process not a product" by Jerome Bruner.[42] Knowledge is said to be not merely the ability to, "produce previously rewarded responses to specific stimuli, or to recall specific words or sentences; *the acquisition of knowledge* refers to information that can be expressed in many different ways, either verbally on in other modes."[43] Learning is shown therefore to be cumulative, involving a systematic and interactive relationship between memory, behaviour and the student's adjustment to an environment.[44] The process changes as the nature of students' knowledge shifts. First, students begin to demonstrate increasingly intelligent behaviour and 'declarative knowledge' (the ability to state concepts and categories in a propositional form[45]) shifts towards a more sophisticated and useful form of understanding, known as 'procedural knowledge'.

Procedural knowledge incorporates both the rapid, if not automatic, recall and use of declarative knowledge (e.g. by a better organisation of knowledge within memory[46]), and also includes the acquisition of a wide range of skills[47]. This is said to be "not

41 Lesgold and Glaser (eds.), Foundations for a Psychology of Education (1989, Hillsdale, New Jersey), Preface x. This 'goal direction' echoes Mackie's list of skills features set out above. I am indebted to an unpublished work by Richard Moorhead on "Clinical Legal Education and Learning by Experience" for uncovering the texts reviewed in this section and his comments on them.
42 Bruner, J. "Learning and Experience".
43 Estes in Lesgold and Glaser, op. cit.
44 Estes, op. cit., p.6.
45 Estes, op. cit., p.26.
46 See, for example, Estes, op. cit p.14.
47 Estes, op. cit., p.26.

necessarily accessible to verbal awareness and [is] not necessarily acquirable without actual practice."[48]

Experience therefore now begins to enter the process outside of formal or declarative learning. The importance of experience and an expanded knowledge base to this process of knowledge development is stressed by deGroot;

> "We know that increasing experience and knowledge in a specific field ... ...has the effect that things ... ... which, at earlier stages, had to be abstracted, or even inferred are apt to be immediately perceived at later stages. To a rather large extent, *abstraction is replaced by perception ...* ... As an effect of this replacement, a so-called 'given' problem situation is not really given since it is seen differently by an expert than it is perceived by an inexperienced person."[49]

Knowledge acquisition is therefore shown as a development from declarative information, through a process of sophistication and organisation mediated by experience until intelligent use of procedural knowledge becomes the automatic product of expertise. Interactive learning processes assist the mind to new schemes of procedural and perceptual knowledge, deepening understanding and enhancing perception. They therefore use the advantages of experience within the control of a learning environment, thereby mixing sophisticated (not exclusively verbal) articulations of procedural knowledge and more declarative techniques.[50]

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48 Ibid. p.26.
49 DeGroot in Bransford et al in Lesgold and Glaser, op. cit. p.203.
50 Declarative techniques are intended to describe educational methods which rely largely on the stating of knowledge in propositional form (most typically the lecture). Other teaching methods, such as the tutorial or seminar, increase levels of interaction but still maintain a significant declarative base.

The Importance of The Learning Context

If both types of learning are to be properly combined attention must therefore be paid to the contexts in which they occur. A major problem is that knowledge which has been learned in one context may not easily be transferred to another, the familiar problem of inert knowledge.[51] A student may therefore learn and reproduce knowledge within defined circumstances such as an exam in Trusts whilst not being able to adapt the same knowledge within another context such as an exam in Family Law or on hearing the contents of a relative's will even though the knowledge may be equally useful in all contexts.[52] Formal or declarative modes of learning may encourage such inertia by asking students to demonstrate what they "know rather than whether they utilize what they know."[53] Experimental work has also shown that students trained to identify concepts within a variety of contexts are better at applying their knowledge across more varied domains.[54]

The concept of experience has been used, thus far, to consider post-learning experience but pre-training and early experiences are also seen as extremely important in the perception and understanding of ideas.[55] Training will provide an overlay on earlier experience and later experience will further mediate the training. Learners need therefore to be taught how to understand experience and how to learn from it, in order to break outside of the lines of demarcation which different forms of knowledge acquisition provide.

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51 See, Bransford et al, op. cit. p.211-213.
52 See Moorhead op. cit..
53 Op. cit. p.214.
54 Bransford et al. p.218.
55 Estes, op. cit. p.20.

Educators therefore have a key role in developing perceptions of experience. Estes has demonstrated that, "if in a particular type of problem the learner's first experience leads to perceiving symptoms or other cues as individual units, then this tendency persists, whereas if during early experience attention to patterns is rewarded, then the higher order units come to dominate performance."[56]

There is a considerable view expressed that experience by itself will not necessarily be beneficial.[57] If it is not clear what should be learned from the mass of incoming information deriving from the world of reality, inaccurate or wrong messages can be learned. Learning needs some distance, and the keenness of individual perception mixes personal emotion with any ability for intellectual analysis. Learners need to be taught and encouraged to see experience as an instructional tool and so develop their own systems for learning in later life.

In the unstructured environment of the real world, "individuals are often called upon to provide their own goals, means, spurs to action or persistence, and rewards for progress."[58] Teaching students how to develop their own learning strategies for the handling of experience should include these.[59] Problems in post-education lives become more complex and less well-defined, such that even identifying when a problem *exists* may be a fundamental skill in itself.[60]

Voss, on the other hand, reports research comparing the problem solving abilities of

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56 Estes, op. cit. p.20.
57 See e.g. Voss, op. cit.
58 Dweck in Lesgold and Glaser, op. cit. p.126.
59 Effective teachers have been shown to establish a hierarchy of goals. The lowest of these being knowledge of the facts, followed by an understanding of rules and theories, and then establishing an ability in students to develop their own rules and theories. Voss, op. cit. p.283.
60 See, Voss in Lesgold and Glaser, op. cit. p. 257.

three groups of people: undergraduates just *beginning* a course on Soviet Domestic policy, undergraduates who had just *completed* the course; and experts in Soviet domestic policy. He found virtually no differences between the abilities of the two sets of undergraduates whereas experts demonstrated markedly more sophisticated approaches to problem-solving. Even the undergraduate students that had all the necessary declarative knowledge for solving a problem (having completed the course) would be unlikely to utilise this knowledge in their representation or solution of the problem itself. They had failed to develop the procedural knowledge necessary for problem solving in such circumstances.[61] Training within the isolated context of the world of learning was not sufficient for transportation of the ideas learned, into the real world. Experience, post-learning, however, was seen to provide the necessary effect.

In another study reviewed by Voss diagnostic reasoning among expert, trainee, and student medics was compared. While the three groups approached the problem in the same way the experts demonstrated a better knowledge of the disease involved and a "superior skill in interpreting the cues given by the patient; *errors made by the less experienced individuals were primarily attributable to an inappropriate interpretation of cues.*"[62] The crucial differences between the expert and the novice were not seen primarily as differences in substantive knowledge but the ability to see what they were looking for and understand its significant in the uncontrolled and interactive environment of 'real-life'. A doctor unable to interpret patient cues might render substantive knowledge useless. An inexperienced young lawyer presented with a client may therefore be less likely to recognise the nature of the issues involved however well trained in substantive law.[63]

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61 Voss, op. cit. p.270.
62 Voss, op. cit. p. 283.
63 Similar findings of failure to interview clients effectively have been found recently in legal settings. See, e.g., Sherr (1986); Economides (1991) etc as reported more fully later.

Clinical Legal Education and Educational Goals

Dweck compares two types of educational goal relevant to student motivation and ability to learn. 'Performance goals' are said to aim at obtaining favourable judgements on ability (or avoiding negative judgements), whilst a 'learning goal' aims at increasing general ability and understanding and an ability to figure out something new.[64] While both can be successful, learning goals are dependent upon the confidence of the participating student [65] and allow for the adoption of more personal, and progressive standards.[66] Dweck concludes that, "generating a learning framework, providing experience with mastering difficulty of coping with failure within that framework, and giving explicit attention to cognitive-motivational mediators can create the conditions for building abilities and confidence in those abilities."[67] These 'cognitive-motivational mediators' therefore encourage learners to perceive situations as learning experiences rather than opportunities for failure, and personal progress becomes the incentive to learn.

Clinical legal education is an important example of an open context in which the lines of demarcation between training and experience are removed, therefore increasing the confidence necessary for learning goals and explaining how to learn from experience. The work of the educational psychologists is echoed in the writings on clinical legal education.[68] Rutter, as mentioned above, argues the importance of integrating a

64 Dweck, op. cit. p. 96.
65 Dweck, op. cit.
66 Dweck. op. cit. p.98.
67 Dweck. op. cit. p.199.
68 Within the U.K. context see e.g. Macfarlane J., Jeeves M. and Boon A., "Education for Life or for Work", 1987 N.L.J. 835; "Hitting the Target: Matching Teaching Strategies to Learning Objectives in Undergraduate Legal Education" 1987

practical understanding of lawyering into the legal curriculum. Law schools, he observes, focus almost exclusively on the teaching of legal doctrine. Such a focus not only ignores the wider body of knowledge and skills necessary to competent lawyering, it restricts a comprehension of legal rules themselves, and restricts the teaching of the 'intensely practical skill' of applying doctrine.[69]

Bellow describes how experiential learning can deepen and change the understanding of legal rules:

> "... experience produces a qualitative change in the mode and content of knowing, which cannot be replicated by the transmission of information or the discussion of cases ... in a classroom. The way in which ideas are understood after they have been used feels different in a sense that is not fully explained by the fact that they are more readily remembered."[70]

Bellow's process mirrors the process of development from declarative to procedural knowledge and represents an internalising of the pathways involved in certain types of understanding and problem solving. The application of rules within real-life contexts is seen by its protagonists as a central educational benefit of clinical education. Students are forced to consider legal rules and then take real decisions, and back in the classroom they can explore and examine their own behaviour and attitudes. Such real-life decisions undoubtedly also enhance the emotional involvement and motivation of students.[71]

N.L.J. 815 and "Clinical Anatomy: Towards a Working Definition of Clinical Legal Education" 1988 The Law Teacher 61.

69 Rutter, A Jurisprudence of Lawyers' Operation op. cit.

70 Bellow, *On Teaching The Teachers*, p.382.

71 Stone, 'Legal Education on the Couch' (1971) 85 Harvard Law Review 392, 429.

One of the strongest arguments for Clinical education has been made in the field of ethics and professional responsibility. Clinical education places students in role as lawyers with real clients, allowing them to consider their emotional and moral reactions.[72] The process of supervised adaptation allows the student to develop a moral framework which relates to real-life situations, rather than theoretical abstractions. Practice does not allow for such reflection,[73] as Barnhizer observes:

> "The experiences of employment and entry into the legal profession which confront students immediately upon graduation from law school create intensely significant economic, political, and peer pressures to conform to prevailing standards ... It is difficult enough to withstand these forces if the individual has already developed a clear and strong understanding of his personal sense of responsibility and fundamental values. If the individual has not developed a workable system of responsibility, however, it will be virtually impossible to transcend experiences."[74]

Lawyers, like doctors, have been taught how to manipulate the ideas and rules of their disciplines without any fundamental operational framework: ethical, social or political.[75] The experience of practice without the tutoring or monitoring of the clinic

72 Condlin, op. cit. p.4, and Burger, W.E. "The Role of the Law School in the Teaching of Legal Ethics and Professional Responsibility" (1980) 29 Cleveland State Law Rev. 377.

73 Peden comments on empirical studies that showed, "graduating students without any experience in practice demonstrated a higher standard of ethical or public responsibility than lawyers actually in practice," by saying that ethical standards should be inculcated, "*before* students have any prolonged contact with the practicing profession." 'The Role of Practical Training in Legal Education: American and Australian Experience' (1972) 24 Jo. of Legal Ed. 503, 517.

74 Barnhizer, 'The Clinical Method of Legal Instruction: Its Theory and Implementation' (1979) 30 Journal of Legal Education 67, 74-75.

75 Research into criminal lawyers suggests that the theoretical understanding that defence lawyers have of criminal justice is rapidly challenged by the practical realities of defence work (at least realities as the courts and prosecution lawyers paint them). Lack of any 'operative rationale' for their theoretical conceptions encourages a quick and

does not seem to encourage the learning of legal skills.[76] Clinical education seems to provide a half-way house in which operational standards and skills can be meaningfully learnt, although one writer has cast some doubt on how well clinical legal education has dealt with questions of morality.[77] One can only echo Condlin's view that thorough research into the nature of the education and training process and the skills and values that are taught is needed.[78]

Although clinical education moves the emphasis from learning substantive knowledge to more process oriented learning,[79] this should not be seen as the academic ceding to the practical. Phil Jones suggests that "The argument is rather that professional knowledge can not be conceptualised within the theory-practice dichotomy."[80] Clinical education, he suggests, begins to address issues surrounding the learning of both practical and intellectual skills necessary for a good lawyer: "Professional knowledge, though, involves constructing problems from situations which are puzzling, troubling and uncertain. It requires a combination of knowledge, skills and attitudes that cannot be separated out into separate spheres and learned in separate institutional processes."[81] A

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unquestioning adaptation to the behaviour of those lawyers they come into contact with. Blumberg, "The Practice of Law as a Confidence Game," op. cit. Baldwin and McConville "Plea Bargaining".

76 See, e.g. Sherr (1986), Economides (1991). Rosenthal evaluated the negotiation skills of U.S. lawyers and suggested that 77 per cent of a sample of personal injury claimants did worse than they should have done: Douglas E. Rosenthal; Lawyer and Client: Who's in Charge? (New York, Russel Sage Foundation 1974).

77 Condlin idiosyncratically suggests that clinical education is founded on an 'immoral' learning process because early teachers had no articulate theory of instruction. He suggests that teacher-student communication should be an object of study, similar to the approach of Watson, A "The Lawyer in the Interviewing and Counselling Process" 1976.

78 Condlin, op. cit.

79 See e.g., Boone, Jeeves and Macfarlane; 'Clinical Anatomy: Towards a Working Definition of Clinical Legal Education', op. cit.

80 Jones observes that the profession complains that, "law graduates lack the ability to write in clear English or construct a written argument andit argues that law graduates have very real gaps in their knowledge of the substantive core." Phil Jones, 'A skills-based approach to Professional Legal Education', 1989 Law Teacher. For academic criticisms of lawyer competence see notes 70 and 73, above.

81 Jones, op. cit. p.187.

shift towards an integrated learning environment such as the clinic encourages students to learn interactively as a means of developing both substantive and procedural knowledge as well as learning how to learn for themselves.

Summary

The systems for learning law and legal skills are therefore presented in the literature as a stark choice between two extremes. On the one side is traditional "declarative" knowledge taught within undergraduate study and at the stage of Law Society Finals. On the other extreme is the "procedural" knowledge of 'how it is really done', not taught but learned (if at all) through experience or passive modelling. Clinical Legal Education sits between the two in an attempt to integrate them within an open context.

Two questions arise from this literature against the background of lawyers' assertions that the only way to learn such knowledge is from the experience of doing the work itself. Can training by itself be sufficient without experience? Can experience be sufficient without training, in picking up legal skills? These issues will be addressed in Chapters Five, Six and Seven.

CONCLUSION

Three areas of literature have been reviewed in order to understand the state of knowledge on the nature of legal skills, the importance of client interviewing among these and the importance of experience in learning such skills.

In succeeding Chapters these themes will be developed further in an enquiry first into the gaining of lawyering skills and then into client interviewing specifically.

CHAPTER THREE

SOLICITORS SKILLS

This chapter is an account of preliminary research undertaken in order to discover the relative importance of the different skills used by solicitors in their work. In this study, which also compares different methodologies for researching lawyers' work, the amount of time solicitors spent on different observable tasks was monitored. It was then possible to discover how much time, on average, solicitors spent on the work of client interviewing as compared with other legal skills.

Objectives

In order to assess how important a particular skill, or the use of such skill in particular tasks is to solicitors, an holistic framework for categorising all such skills and the tasks in which they are used must be constructed. This must serve as an index into which all forms of solicitors' work can be categorised.[1]

With a framework, or prototype framework developed, the next stage will be to test out two different methods of data collection. It seems likely that a direct observation method, with a trained observer sitting with each solicitor and watching what they do,

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1 It should also provide a meaningful system of categorisation which can allow analysis of observable phenomena which can subsequently be related to teachable skills recognised in the relevant literature.

will be most accurate [2]. However, any observational method may be intrusive and cause phenomena which would otherwise not have occurred[3]. Observation is also expensive in its use of observers' time.

Questionnaire methods might not be as accurate, but would there be any areas where differences in accuracy were minimal? Would there be some items which it would be easier for a subject to assess of his/her own accord and some matters which only an observer could pick up? Would solicitors show any great resistance to answering questions, or anywhere near as much resistance as they might show to having an observer in the office. These were the questions on which it was intended that the study should throw some light.

Skills and tasks framework

From the review of the literature it will be noted that existing holistic frameworks for analysis of lawyers' skills, suffer from the following major deficiencies:-

1. They are accented towards a pedagogical medium and not a practice medium - this means that they concentrate on assessment of student type problems rather than mature practitioner problems, and they deal with assessment of students' legal work outside of the business environment of a real lawyer's office.

2. The current research is American and therefore does not sufficiently distinguish the work of trial lawyers, or barristers, from the work of more office-bound lawyers or solicitors.

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2 Although observer reliability itself should be tested post-training and at regular periods during a longer study, this was not attempted in this study.

3 The "Hawthorne" or "experimenter" effect.

3. Not only is the literature related to a different jurisdiction and, possibly therefore, some differences in lawyer activity and behaviour, but it is also ageing. As mentioned in the introduction,current changes within the legal profession may be making enormous differences in the tasks and skills undertaken by lawyers.

Framework Design

The most open observation-based model for constructing a framework would have involved untutored observers with a sociological or psychological training in noting behaviours to sit in on large numbers of lawyers and thereby build up through a slow process an observed framework. At the other end of this spectrum a definitive overall set of tasks and skills could have been stated from the beginning and observers trained specifically to note what type of behaviours would fall within each category.

The first method would have taken far too long, have been too costly and would ignore the benefits of the existing literature and the intuitive knowledge of the researchers. The other extreme alternative would have prevented observers from reacting to the real problems of research or actual observation of tasks and skills not previously considered by the framework designer.A midway was therefore sought. An open framework was furnished to the observers and they were trained in its usage. This contained a number of firm headings for each category to be observed and allowed the observers to expand sub categories within the settled headings, after consultation with the senior researcher.In the event, very few changes needed to be made and most of these were in the form of additions to sub-categories. In a wider range study of wider differences in work and work practice it is thought that further sub categories might appear, but that these would be unlikely to affect the major defined categories.

Tasks Rather Than Skills

Within a pedagogic or didactic teaching approach it is possible to analyse the skills of a lawyer starting with wider general headings of commonly associated skills such as "Communication Skills".[4] Under this heading one might for example propose written communication skills and oral communication skills. Underneath each of those sub headings one would probably wish to differentiate between written communication skills in the form of letters and written communication in the form of contracts or pleadings or wills etc. On the oral side one might wish to differentiate between oral communication between a solicitor and client, communication by advocacy in a courtroom and communication through negotiation with other parties.

The major heading of communication skills would be useful within the pedagogical context since many of the same issues or central reasoning would be appropriate to all of the categories, sub categories and sub-sub- categories. Thus, for example, comments on clarity of communication would be appropriate to mention generally as well as specifically for written and oral communication. However, it will be noted that there are major differences in the skills involved in each of the sub-categories and sub-sub-categories. These would, within a learning context, be dealt with specifically and not generally.

Effectively, therefore, the skills of communication would be broken down into a number of different tasks which lawyers perform, each task using some or all of those skills. In terms of empirical observation it is much easier to start with the observed tasks and subsequently to link the known skills which apply to them into a teaching analysis for

4 See e.g. Cort and Sammons op. cit.

education and training. Although the existing literature on lawyer's skills is sparse,the literature and information on general skills and skills teaching is greater. There is therefore little difficulty and less argument about which skills apply to which tasks. The framework for observed analysis was therefore separated out into lawyers' observable tasks, rather than beginning with the more general approach of the skills used in such tasks.

Managerial/Administrative Skills

A major difference between the framework used in this study and those mentioned in the literature, is the inclusion of a set of categories of managerial and administrative tasks now recognised as being carried out by lawyers as part of their work. Previous studies have concentrated only on the"professional " legal skills and have not looked at the skills used in selecting, handling, training and supervising the people lawyers interact with in their daily work. Neither has the previous research taken into account the financial administration of a business in which lawyers are now involved, the marketing of their wares which lawyers must now do in order to attract business, the handling of democratic group decisions of a partnership and construction of a strategic plan to deal with a changing environment. If, as is known intuitively, lawyers are heavilly involved in such work (especially in the larger firms) research should note this and education and training should be prepared to provide support and assistance for these new lawyering tasks. A range of such skills was therefore also included as a major sub-division of the study.

The Tasks Framework

The final version of the tasks framework is set out below.

FRAMEWORK FOR PILOT STUDY IN SOLICITOR'S SKILLS

There will be two main areas of skill division in the study. Professional skills will cover all of those areas which would normally be expected to fall within the skills and tasks a lawyer would need to carry out in his/her work. A separate heading will include all the administrative/managerial skills necessary for the lawyer's work, the running of the business and the supervision of staff.

Professional Skills

1. Interviewing Client.
   - (a) For the first time on this case.
   - (b) On a subsequent occasion.
     - (i) by telephone
     - (ii) in face to face meetings
   - (c) Attending police interview of client.
2. (a) Interviewing Witnesses or Potential Witnesses
   - (b) Interviewing/handling expert Witnesses
3. Legal Research
   - (a) In primary sources
   - (b) In secondary sources
4. Reading and assessing
   - (a) Incoming letters
   - (b) Incoming documents or the file

5. Discussion with other lawyer in firm
   - (a) On same level in firm or out of firm
   - (b) Superior
   - (c) Inferior
6. Drafting
   - (a) of letters to client
   - (b) of letters to the other side
   - (c) of letters to others
   - (d) of legal documents e.g. contracts, pleadings, wills etc
   - (e) of attendance notes and other notes to file.
7. Negotiation
   - (a) with other side
   - (b) with other party
     - (i) by telephone
     - (ii) by letter or other written form
     - (iii) by face to face meeting.
8. (a) Conference with Counsel
   - (b) Attendance at Court or Tribunal or other Hearing (waiting on Counsel).
9. Advocacy
   - (a) Before the Magistrates Court
     - (i) Full Criminal trial hearing
     - (ii) Plea in Mitigation
     - (iii) Other Hearing
     - (iv) Family hearing.
   - (b) County Court
     - (i) Before the Registrar on pre-trial review

(ii) Before the Registrar on hearing of action

(iii) Before the Judge on full trial

(c) Full Hearing before a tribunal e.g. industrial tribunal etc.

(d) In the High Court

(i) Before Master

(ii) Before a Judge

(e) In the Crown Court

(i) Bail application

10. Travelling time.

11. Dead time.

12. Taking oaths/swearing affidavits etc.

Administrative/Managerial Tasks and Skills

1. Supervision of Staff

2. Delegation of Work

3. Training of Staff

4. Selection of Staff

5. Review of Staff Performance

6. Making, and Organising Implementation of, Policy Decisions of Partnership in Meetings

7. Marketing of the Firm

8. Financial Management of the Firm

9. Personnel Management

10. Instruction or discussion with support staff.

11. Costing of files and, filling out Legal Aid forms etc.

12. Managing practical details of office (e.g. premises, furniture etc.)

(a) General (of firm)

(b) Personal (desk/files etc.)

Overlap

It is inevitable, when attempting to produce a comprehensive framework, that some possible overlap will exist between some categories. Although observers found some difficulty with this, their problems could be handled easily after discussion with the senior researcher. In any event the tasks sub-categories were constructed to allow for noting of all observed tasks. Further analysis of observations would be most likely to lump together the categories on which there was overlap.

A good example of such overlap was the category of 'Drafting letters to the other side' and the category of 'Negotiation by letter with the other side' (Task(6b)). A further example is the 'Supervision of staff', the 'Training of staff' and the 'Delegation of work'. Very often a lawyer would start off an interaction in one mode, move over to a second and go on to a third. Observers were told to note what they felt the interaction involved as well as asking the subjects what they considered they had been doing. It was important therefore for observers to gain an intimate impression of atmosphere on each occasion in order to make these distinctions; but they found little difficulty in doing so once the process was explained.

Research Design

In order to carry out the objectives stated, measurements in accordance with the above framework were taken in two different ways.

1. Observation Method

An observer sat with a subject lawyer for four days of a working week. This length of time was selected so that the subject solicitors would not feel, in any one week that they had no time to themselves. Rather like a store pricing its items just below a round figure (eg. £19.95 instead of £20.00), this was intended to make the idea of observation a litle more desirable than if it had been for a whole week. Also, it was thought that four days would allow enough time for the subject to become used to the observer and therefore behave in a normal manner. It was also thought that if there were major differences between one day and another in a lawyer's routine, these would not be systematic in accordance with a specific day of each week but would probably be taken into account by looking at four whole days.

Observers were told that they need not be present for an entire working day if the subjects observed worked exeptionally long hours. However,where this was found to be so, observers were asked to go in early in the morning on at least one day and leave late at night on at least another day in order to see whether the work done during those periods was vastly different from the work carried out during the middle of the working day. Observers were trained to carry out the analysis by framework, to discover further information about the subjects and the firms and how to handle the likely problems of observation including protestations of "confidentiality" and "disappearing" subjects, seating arrangements, lunch hours etc. Observation was carried out by three legally trained observers, two of whom had extensive experience of legal practice, and two of whom had training in sociology as well as law.

2. Interview and Questionnaire Method

At the end of each four days' observation the observers carried out an interview together with a questionnaire of their subjects. The subjects were asked to answer what proportion, in percentage terms, they felt they had spent of the observed period on the tasks mentioned in the framework. This would provide a direct comparison with the proportion actually observed by the observers. This method of interview/ questionnaire, was carried out between the observer and the subject after a period of four days acquaintance. It was hypothesised that this might be very different from an interview/questionnaire carried out with a person not previously known. In addition the subject would have already been sensitized to the task categories by the end of the fourth day since the observer would have asked questions throughout the observation period along the lines of the category framework.

Each interview/questionnaire took between ten to twenty minutes. In most cases the subject was allowed to see the framework in order to work out percentages. At no time was the subject told how those assessed percentages matched up against the observed percentages (in any event they would not have been computed by that stage).

THE SUBJECTS: NOTES ON THE SUBJECTS AND FIRMS STUDIED; REPRESENTATIVENESS AND SPREAD.

This study aimed to find the relative time spent on different tasks and to test methodology. It was therefore intended to provide a range of subjects in terms of seniority, status,geographical location, type of work, firm and working pattern. Although such a range would inevitably be limited with a small number of subjects, a fair degree of diversity was attempted. Such diversity would not necessarily be statistically

representative but might include elements from both ends of the spectrum. Although it was intended to include two women and six male subjects in the study, in the event one woman had to be substituted because her holiday period did not coincide with the needs of the study. The remaining female lawyer also happened to be the only sole practitioner in the study. It was therefore not possible to select any differences between her and other subjects on the basis of gender alone.

The Subjects and Firms in Outline

A detailed description of each of the subjects, and the firms in which they worked is published elsewhere.[5]

In summary, the subjects studied have the following characteristics:-

Subject A was a senior assistant solicitor working mainly on criminal legal aid in a five partner firm in a town in the south-west of England with a population of about 150,000 in 1981.

Subject B was the newest partner in a five partner firm in a small city in the West Midlands with a population of approximately 75,000 in 1981. His work involved mainly insolvency, civil, matrimonial and personal injuries litigation.

Subject C was a sole practitioner in a town of approximately 60,000 people. She worked mainly on matrimonial, civil and criminal litigation and some conveyancing.

5 See Sherr, A "Solicitors and their Skills" Law Society RPPU Research Study No 6. Details of the situation, organisation and work of the firms and the solicitors concerned can be found there including the individual lawyers' reactions to the research and the skills in which they said they needed most training.

Subject D was an assistant solicitor with a twenty partner firm with two London offices. His work was mainly in company law with some commercial and Financial Services aspects.

Subject E was a young partner in an eight partner firm in the Chancery Lane area of London. He specialised in medical negligence with some employment, building contract and general litigation.

Subject F was an assistant solicitor in a thirty-three partner firm in a large industrial city in the north-east of England. His work consisted entirely of insolvency matters.

Subject G was a senior partner in the property department of a thirty-six partner firm in the City of London. He specialised mostly in planning.

Subject H was a senior assistant solicitor in a seventy partner firm in the West End of London and his work consisted mainly of construction law litigation.

The eight subjects varied considerably in age, experience, status, type of work, type of firm and geographical location. There were, however, a number of similarities in the concerns they expressed for training both in professional skills and managerial skills. The most common concerns appeared to be for training in personnel management and in negotiation or advocacy. There were also needs expressed for wider general training in doctrinal law, training in the rules of evidence and training in more specific areas of doctrinal law. Drafting is noted as problematic in one case and legal research was a concern for at least one lawyer. Only one of the subjects mentioned dealing with clients as a cause for training concern, although a good deal of research shows that poor client communication is the largest source of clients' dissatisfaction with their lawyers. A

number of the subjects do refer specifically to this issue in a positive way.

Management of time and priorities caused a problem to a number of the lawyers. It is possible that there may be a relationship between this and levels of stress and effective productivity which needs to be studied. Intuitive findings need to be substantiated in this area.

A wide range of levels of work independence and supervision are seen in the study, as well as some very different approaches to what is involved in a solicitor's work. Any suggested systems for the education and training of lawyers must also take these differences into account.

RESULTS

The observers chronologically monitored the work of their subjects and subsequently totalled items falling within the different work categories set out above.

The Work Solicitors Do

With the enormous caveat of the very small number of subjects involved in the study, it is possible to show the mean proportions of time spent by solicitors on general task categories of work. The bar chart under Table 3.I below shows how their time is divided up.

Table 3.I Overall Observed Percentage of Solicitors' Time

Category	**Time %**
Administration and management	22
Dead Time	16
Interviewing clients	13
Drafting	11
Reading & assessing papers	9
Discussions with other Lawyers	7
Travelling	6
Negotiation	5
Advocacy	3
Legal Research	2
Interviewing witnesses	2
Time with Counsel	0.5
TOTAL	98

Table 1. OVERALL % OBSERVED SOLICITOR TIME

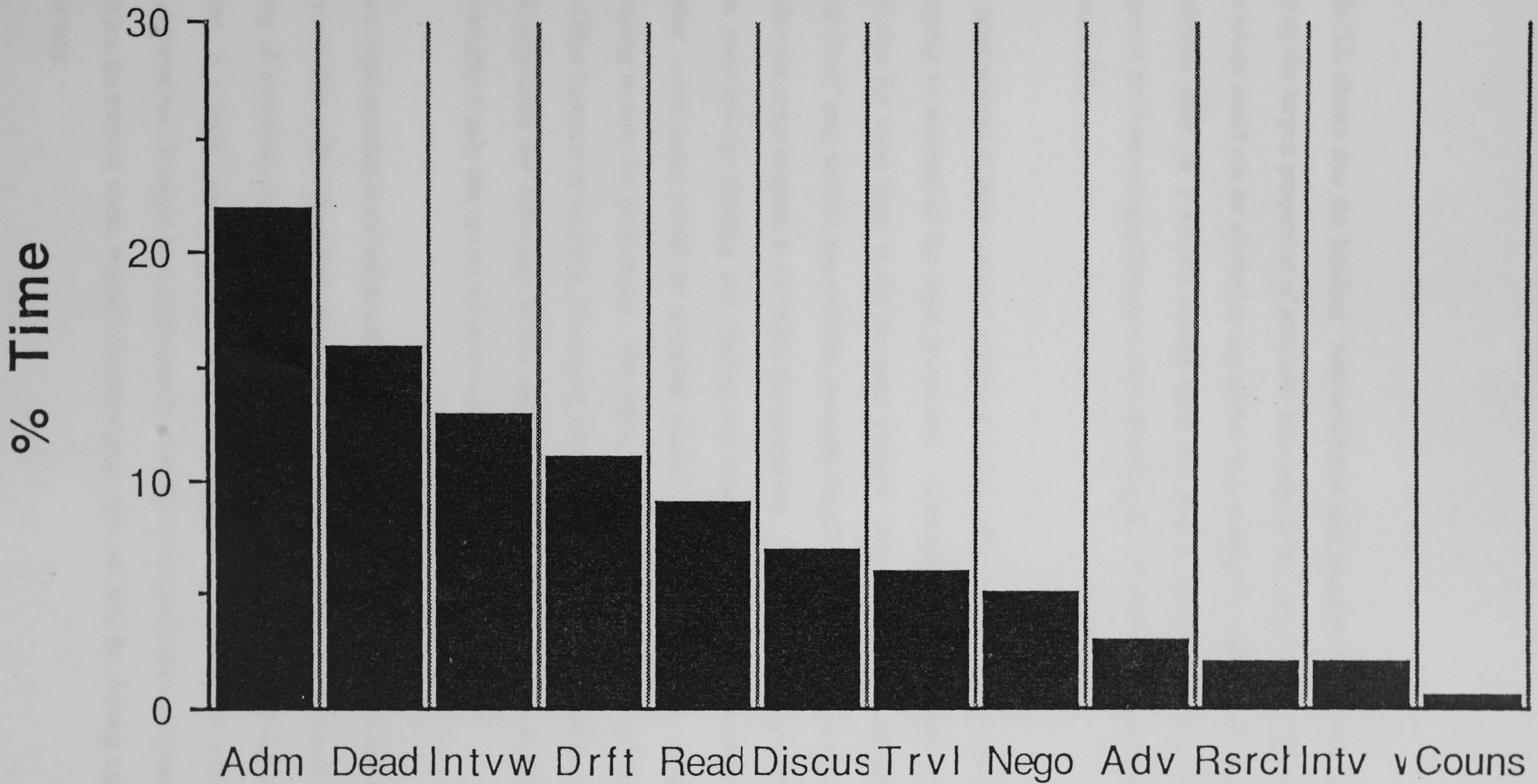

Table 3.I. shows that the heading "Administration and Management within the Firm" takes up the largest proportion of solicitors' time with 22%. Next in line is "Dead Time", time which could not be allotted to any of the other categories and was the unavoidable in-between time, as a subject moved from one task to another. The next highest categories are Interviewing Clients at 13%, Drafting at 11% and Reading and Assessing papers at 9%.

The large amount of time involved in administration and management may well come as a surprise to students of the legal profession. Although noted intuitively within the profession for some time, it has not been possible until now to chart its proportion. "Dead Time" may well be unavoidable, although when looked at more closely it may be possible for some subjects to minimise this proportion. The amount of time involved in client interviewing, drafting and reading and assessing papers will probably be no surprise, since these would be expected routine tasks of all lawyers; though it is interesting to note the proportions. The other, larger amounts of time are Discussions with Other Lawyers in the Firm, Travelling, Negotiation and Advocacy. There is a fairly small proportion for Advocacy in this sample, although it is clear that it would rise considerably if only one or two subjects were looked at.

Classic legal practice involved intuitively a fair degree of discussion between different lawyers within a firm regarding the cases on which they worked. This would involve sharing of expertise, testing out ideas, checking the law or simply gaining a second opinion. It is interesting to note that 7% of the lawyers' time in this sample was spent in such discussions. It might have been thought that levels of specialisation in many firms which are the current norm, would have done away with the need for sharing experience in this way.

Categories and Sub-Categories

It will be noted that only the major categories of tasks and skills have been set out above. Observers were able to note finer distinctions during the period of the research and used to the full all the sub-categories existing in the analytical framework. However, the subjects were unable to make such distinctions in their interview/questionnaire responses and limited themselves to the main categories. A major finding of this study, therefore, is that only observers are able to make finer distinctions in allotting, categorising and analysing the time spent on discreet tasks. Subjects are unable, or unwilling, to make such distinctions. A review of the framework will show that such distinctions will certainly be necessary for the construction of an accurate picture of universal solicitors' practice. Such distinctions will almost certainly also be necessary for the provision of a comprehensive education and training programme. For the purposes of the major statistics reported here, however, only the overall category percentages are noted since comparisons can only be made by using these figures.[6]

Observation Versus Interview Questionnaire as a Mode of Assessment and Data Collection

Table 3.II sets out a comparison, by way of t-tests, of the two major systems of data collection attempted in the pilot study. The objective of this statistic is to note whether there are any significant differences between the scores noted under each major category item by the observing researcher and by the subject's own assessment during the interview-questionnaire.

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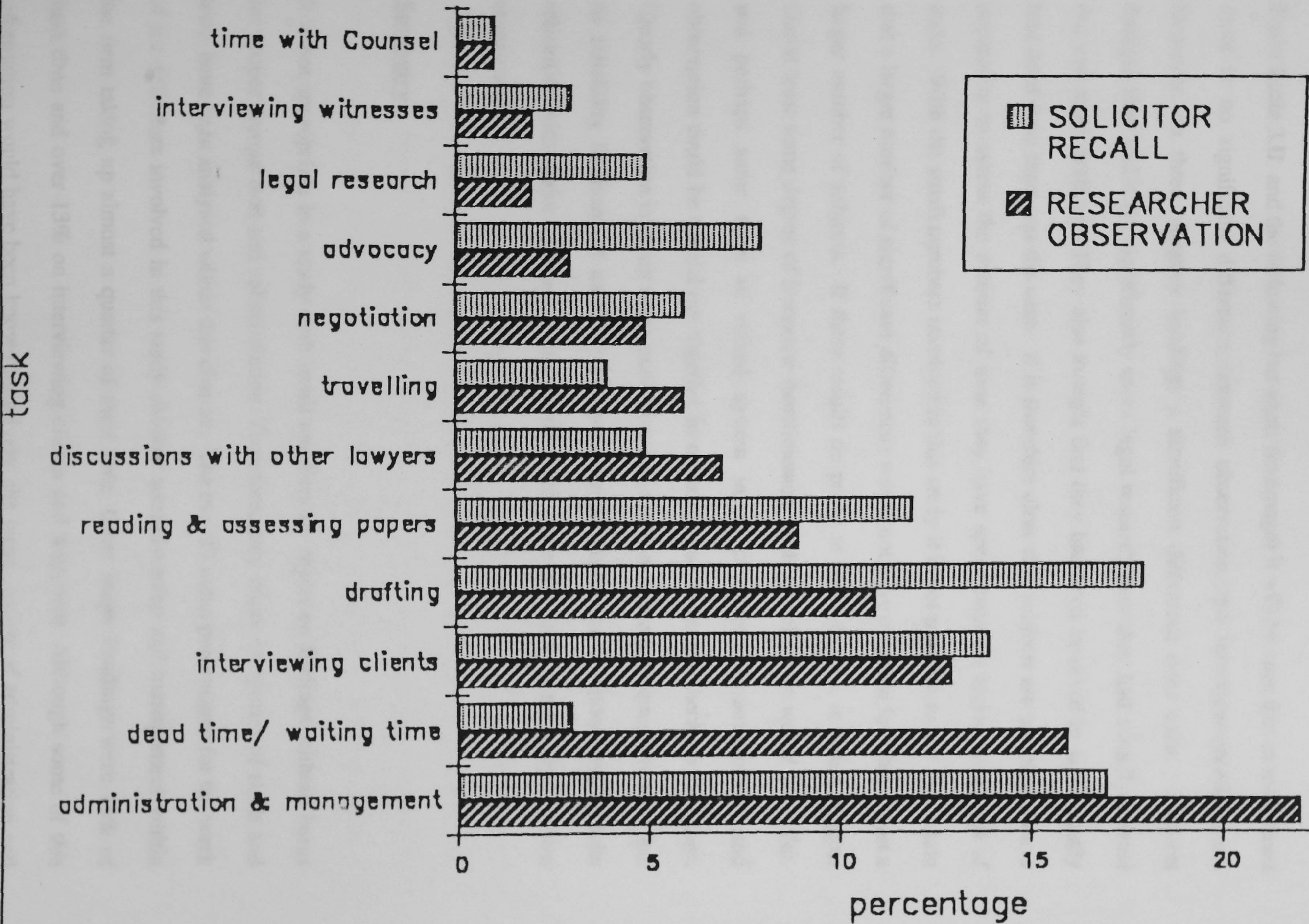
6 The detailed sub-categories as seen by the observers are presented in the published report in frequencies op. cit.

Table 3.II A comparison between observed and interview questionnaire findings. (t-test)

Item	Researchers observation MEAN	Interview questionnaire MEAN	T	(df)	P
Admin	22.0 (15.7)	17.3 (17.8)	1.3	(7)	.24 ns
Dead time	16.3 (13.3)	3.5 (2.9)	9.4	(7)	.000 **
Int. Clients	12.6 (10.0)	13.8 (8.5)	0.4	(7)	.7 ns
Drafting	11.3 (8.3)	18.1 (8.9)	-2.9	(7)	.02 *
Reading	9.3 (6.3)	12.5 (12.6)	-0.97	(7)	.36 ns
Discussions	7.1 (6.0)	5.4 (4.8)	1.7	(7)	.13 ns
Travelling	5.9 (8.3)	4.5 (6.0)	0.5	(7)	.66 ns
Negotiation	5.4 (2.8)	5.9 (6.6)	-0.3	(7)	.8 ns
Advocacy	3.1 (4.1)	8.5 (14.3)	-1.6	(7)	.16 ns
Research	2.3 (2.3)	5.5 (4.5)	-2.7	(7)	.03 *
Int. Witnesses	2.0 (2.4)	3.5 (4.5)	-1.3	(7)	.23 ns
Swearing Affidavits	0.3 (0.7)	0.4 (0.5)	0.6	(7)	.6
Counsel	0.8 (.1.6)	0.9 (1.5)	-0.14	(7)	.89ns


DIFFERENT METHODS OF ESTIMATING HOW SOLICITORS SPEND THEIR TIME
SOLICITOR RECALL
RESEARCHER OBSERVATION
task
time with Counsel
interviewing witnesses
legal research
advocacy
negotiation
travelling
discussions with other lawyers
reading & assessing papers
drafting
interviewing clients
dead time/ waiting time
administration & management
0
5
10
15
20
percentage

From Table 3.II and the following bar chart (overpage) it will be seen that in most cases there is no significant difference between observation and interview-questionnaire. However, on three category headings a significant difference does exist. Subjects thought they had done significantly more legal research than they had actually carried out and more drafting. They also thought that they had been involved in significantly less dead time than was the case. It is therefore clear that subjects are not able always accurately to assess the amount of time they have spent even on major categories of tasks. With the small numbers involved in this study it is not possible to say for certain that a larger number of significant differences would not have occurred had there been a larger number of subjects. If these results do prove to be replicable, it would suggest that at least some degree of interview-questionnaire mode of collection would be useful, and perhaps some form of mixed system in which interview-questionnaire and observation could be carried out together in order for one to keep a check on the other. Clearly observation is much more expensive and more intrusive than questionnaires but its reliability in terms of anything beyond a broad distinction is undoubted, and its reliability with major categories also seems much more certain than the subject's own assessment.

Summary

It is not appropriate in a study with small numbers to report on findings without bases for proper comparison and substantiation. Therefore, only major categories of skills and tasks have been analysed within this chapter. The overall mean percentages for the work of the solicitors involved in this study showed administration and management within the firm taking up almost a quarter of their time. Other major headings were 16% of dead time and over 13% on interviewing clients and witnesses. Although some of this information would have been known intuitively, the large amount of administration and

management is an interesting new finding. There seems to be a fair degree of similarity between a subject's own assessment on interview-questionnaire and a researcher's observation of that subject's work provided that only major task categories are looked at. Subjects are unable to provide details of the break-down of their work and a significant difference appears on at least three out of thirteen major category headings. Therefore, although there is some reliability to be found in the interview-questionnaire method it is only on gross findings and it is not certain even for these. Observation therefore provides the most complete and seemingly most accurate assesment.

Critique

Both methods of assessment, observation and questionnaire, are dependent upon the design of the framework for their success in providing an objective breakdown of skills. This empirical study is based to an extent on a previously untested framework of lawyer skill, but the production of empirical results demands such an analytical framework is defined. Only through an attempt to define and use such a framework can its value be ascertained. The study allowed for appraisal and modification of the original framework design. In general, as the study progressed the number of categories of task/skill were expanded to take into account areas which other categories did not clearly cover.

It was also apparent that a number of the skills were capable of further breakdown into sub skills, although the feasibility and desirability of further breakdown is questionable. So, for example, drafting is a combination of research, reading, assessing and drafting of documents. It would be a simplification of the skill of drafting to omit reading and assessing documents from an assesment of drafting although research may legitimately

be distinguished. Pragmatically it would be difficult to observe a difference between the two as drafting may involve the subject jumping from reading to drafting and back again several times in carrying out the same task. A further example might be client interviewing. Clearly this can be broken down into a series of sub-skills and stages. These would not be easily observed within a study of this level of generality. Such areas of concern should be the subject of separate analysis.

A different problem is of categories overlapping. At times the distinction is clear, at others a value judgement must be made. In one sense overlapping categories are not such a problem; their homogeneity allows them to be welded together when the results are assessed, if desired. The converse is not true : overbroad categories cannot be split into sub-categories post-observation without further research upon which to base such a division. A further minor difficulty relating to all the methods used is that they are subject-centred to one degree or another. The researcher is of necessity dependent upon the subject for information. This is especially true for measurement based on a subject's own estimates, but it is also true for the researcher based observation.

Research Method One: Observation by a Researcher

This method has the major advantage of providing an accurate estimate of how subject solicitors spend their time. There are nonetheless problems related to the overt nature of the observation. It is suggested that these should not be exaggerated and do not conflict as severely as the other method with the study's aims. The problems are due primarily to the possibly intrusive nature of a researcher in the lawyer's office. This is an example of the Hawthorne or "experimenter" effect.

The problem takes two forms. The first is an incentive, provided by observation, to

work actively. Thus a subject may tend to concentrate on observable activity (out of a desire to appear to be working hard, or even to make things more interesting to the researcher) deferring the more passive tasks to another time, when the observer may not be present. There is a greater possibility of this with office-bound lawyers who have more opportunity to modify their behaviour than would a solicitor with a larger amount of court work (constrained as they are by court procedures and etiquette). It is of note that the one subject who commented directly upon this aspect of the research also stated he found the effect useful, as it enabled him to work more precisely and raised his awareness of what he was doing. Thus the study may have had an incidental, educative effect.

Several of the subjects made similar observations, although one subject felt that the researcher had a negative effect upon his concentration. The incentive to work actively is possibly further expressed in a desire, occasionally observed by the researchers, to provide examples of typical or important aspects of the subject's work. There may be a similar desire to show the researcher as much as is possible of the subject's practice. This is a possible source of distortion in the results , but it may also have desirable effects. The 'distortion' expands the tasks and skills that can be observed, without such an expansion being entirely unreal. The subject is unlikely to be able to concoct interesting work, nor is he or she likely severely to disrupt a normal working pattern given the effect that this would have on the work which must be done. A further problem with the researcher-based method of observation is that it is difficult, if not impossible, to observe all of the lawyer's working time. Inevitably subjects worked at home. One subject in the study did all the office work (especially drafting) in one block between 6 a.m.and 8 a.m. when the researcher's presence was strongly discouraged. Similarly there were times when, in spite of assurances as to confidentiality, the researcher was asked not to be present. These do not generally create such a problem as it is often clear how the time is

being spent (e.g. a client interview, or a bail application) although this is not always the case (e.g. the early morning office work mentioned above).

It would seem that an assessment based upon researcher observation may be subject to some distortions. The researcher cannot always be present (and these times may be used for certain types of skill, especially the more passive ones) and when the researcher is present, the invasiveness of the researcher may distort how a subject spends his or her time. This may change marginally the observed tasks the subject performs, but in any event this distortion is unlikely to be large because of the workload of most lawyers. If encouraged to work as normal the lawyers seem likely to seize the opportunity of working relatively uninterrupted as they would usually. It is important to note against any disadvantages that this is the only method capable of extracting clear, detailed results on finer distinctions of tasks carried out, other than delineating major categories such as "Interviewing" or "Negotiation". Such distinctions would be of paramount importance for any detailed analysis of lawyer skills.

Research Method Two: Subject's Assessment (by estimate)

It will be remembered that the basis of this observation is an estimate,without the aid of time sheets or a diary, as to how the subject solicitor spends his working week. On an intuitive basis one might imagine that the estimate would be a rather crude method of observation. It can be seen above that there is some reliability on gross measurement of task types, although not all, compared with observed results. These might not be so accurate where there are no objective (ie. researcher's) estimate against which the subject's results can be compared as this might encourage the subject (unconsciously) to

adopt a less objective stance towards his/her estimates. One possible tendency is to exaggerate (in terms of time spent) the significance of the important or 'high-profile' lawyer operations. Tasks which are crucial to the client in some way (eg. advocacy) or involve the subject in some stressful situation (eg. negotiation) are likely to dominate the subject's mind. It follows that any evaluation of time spent upon general lawyer tasks is likely to be distorted by the prominence of these high-profile tasks.

A further aspect of the same problem is the subject's tendency to concentrate upon a limited number of the framework's categories; the ones that the subject overtly recognises as lawyering tasks (eg. client interviewing) or which tend to take a significant part of the subject's time. Furthermore the subject was often unable to give estimates upon the categories of the framework as it stood. They often expressed the view that drafting, for example, could only be estimated en bloque. Thus this method distorts the structure of the framework. With subjects often making different decisions about what they felt able to quantify, this distortion can be different for each subject. Not only does this distort the framework, it decreases its sensitivity by necessitating the amalgamation of several sub-categories to enable valid comparisons between the subjects to be made. This can prevent important distinctions between sub-categories, and necessitated the amalgamation of the results of each of the categories under Professional Skills and also caused the amalgamation of all the administrative tasks into a single category of "administration".

It can be seen that these problems dislocate the results from any objective, framework-based assessment of solicitor skills in favour of a myriad of subjective assessments, based upon individual preconceptions of what lawyers do and ought to do. Thus each subject effectively re-writes the framework, limiting the sensitivity of the research and preventing proper analysis as the results will not be based upon the designed framework

but upon numerous modifications of it.

Conclusions

Each method has its problems. Method one presents difficulties in the dislocation the presence of the researcher may cause. It has been suggested that pressure of work will limit the effect of such a dislocation. Nonetheless this method may tend to exaggerate more "active "tasks. There is, however, no reason to believe that the other method is likely to produce less of an error in this respect. Indeed, method two will exaggerate the high profile lawyer tasks(which are generally the most active) while removing from scrutiny some of the lower profile tasks entirely.

Both methods are subject to any faults in the framework design. The second method rather masks the problem by weakening the role of the designed framework in the research by producing results only partially related to it. In particular method two produces results governed to a large degree by how the subject perceives a lawyer's work. This perception is determined by cultural and experiential notions of what constitutes lawyering whereas it has been seen that what is lacking in research into solicitor skills to date is an empirical analysis of what lawyers actually do. Method two only provides a crude view of what lawyers think they do. It is not without worth as it show the areas which preoccupy solicitors; nonetheless it cannot approach the production of an empirical breakdown of solicitor time.

Method one is not perfect in this respect, given some of the solicitor's work will take place beyond the researcher's eye, but it does provide the most systematic and sensitive empirical analysis of solicitor skills based on a framework which does not lie in the

subject's unconscious but is made explicit and is therefore open to scrutiny. In addition the statistical reliability of the above methods, must also be considered. The interview-questionnaire system of subject assessment seemed to compare well in terms of reliability with a researcher's observations but is unable to tease out anything more than gross differences in proportions of time spent on selected tasks. Observation is clearly therefore seen to be the best method and will be used for the further studies presented in subsequent chapters.

AHS.C:\A VAVWORD

CHAPTER FOUR

NEW LAWYERS' COMPETENCE IN CLIENT INTERVIEWING

This chapter details research into lawyers' abilities to interview clients and represents the first part of an experiment aimed at assessing the value of training young lawyers in interviewing skills. The research reported in Chapter Three has demonstrated that client interviewing takes up the largest proportion of solicitors' time among the legal tasks involved in their work. The literature review has also shown the primary importance of client interviewing skills from the client viewpoint and the deficiencies in lawyers' communication skills as noted in numerous studies and reports. The competence of new lawyers in client interviewing and how any deficiency is manifested has not been studied in detail. This study is intended to begin the discovery of how problems occur in the interview and whether training or experience can remedy these.[1] Some 27 trainee solicitors in their first weeks of practice were filmed interviewing clients and their performances assessed.[2]

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1 See also Economides, K. and Smallcombe "Preparatory Skills Training for Trainee Solicitors" published by the Law Society RPPU - another study detailing lawyers' interviewing deficiency, but this time in relation to Trainees.

2 The second part of the experiment is reported in Chapter Five.

Sample

Some 20 firms of solicitors were approached, and nine of those firms permitted trainee solicitors to participate in this study. The sample generated for this study was thus based on the co-operation of a few firms and trainees newly appointed to those firms. The fact that the research involved a training scheme for these new lawyers may well have acted as a major incentive to their involvement.[3]

The question of sample[4] is probably the most difficult one to be faced by any researchers into the ways lawyers operate. As Danet, Hoffman and Kermish[5] found, it is not easy to gain the cooperation of lawyers for any such project and a system of random selection of a sample may certainly have to be sacrificed in favour of obtaining any sample at all.[6]

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3 Rosenthal, in 14 *Law and Soc. Rev.* 923 hypothesises that the failure of researchers to obtain access to the legal Profession might be connected with the absence of a "fixed social objective" that the researchers declare they are trying to attain. In this study the participating firms were able to accept training as such an objective.

4 For the second part of the experiment the trainees were randomly assigned to one of the three experimental treatment groups, thereby ensuring that if any systematic bias existed such as the particular selection biases of the firms the trainees came from, it would be equally present in all three groups.

5 Danet, Hoffman and Kermish, "Obstacles to the Study of Lawyer-Client Interaction: the Biography of a Failure" (1979) 14 Law and Soc. Rev. 923 (hereinafter referred to as "Danet").

6 However a random sample is only one way of ensuring that uncontrolled variables are considered. By using strictly random procedures for selecting populations one can be statistically confident that variables have an equal chance of distribution within the resulting sample as in the population at large. But, if perfect random selection in this way is impossible another way to account for uncontrolled variables is to control them within the actual sample: this was carried out in the second half of this study-the design of which allowed for such manipulation. The results of the study reported in this chapter do not allow for such manipulation. It is worth noting that even a random sample of Lawyers' firms may be subject to systematic bias by allowing the lawyer to preselect the cases which the researcher may view. This seems to be accepted as a precondition of such research. See. *e.g.* Cain op. cit.

Procedure

An attempt was made to recreate reality within certain confines in order to sharpen the focus of the experiment onto a minimised set of factors. The clients were drawn from a pool of previous and existing clients of local Legal Advice and Law Centres. They were paid £4.00 each to attend and relate their problem in the same way as they would have done when meeting their lawyer for the first time. This enabled control over the subject matter of interviews which in turn enabled some control over lack of legal knowledge as a factor in lawyer's performance. It also circumvented many of the problems of confidentiality.

The Research: How Good Are They?

The research aimed to investigate how well newly qualified lawyers were able to conduct a first interview with a new client and to find where particular problems lay.[7] The trainees had all written their Final Law Society Examinations and were therefore at their peak of general across-the-board, legal knowledge; but had not yet had contact with clients.[8] By using this group it was intended to control for any differences in

7 The organisation of the experiment was an exercise in administration as well as hard physical work (for an account of some of this see David Andrews, 'In Camera' *The* Guardian September 23, 1981). Special thanks are due to David Webb, Ed Denehan, John Flood, Viv Gerrard, Rob Ross and Lorraine Sherr for bussing, shepherding, entertaining and coffeeing clients and guiding and filming Lawyers; and to the Audio-visual and Psychology Departments and School of Law at Warwick for their assistance. Thanks also to Dr. Derek Rutter now at the University of Kent at Canterbury for helpful advice from idea to inception.

8 Two of the subjects had taken their Finals six months previously whilst the remainder had just completed them, but none had yet experienced individual contact with clients.

legal knowledge which might have affected interview performance.[9]

All 27 subjects (17 male and 10 female) conducted a 20 minute interview. They were randomly ordered, and randomly assigned to clients. The nature of the clients' own particular cases was not considered as a variable, as it was interviewing technique and not "the law" that was to be investigated.[10] An underlying hypothesis of the research was that there can be a basic set of interviewing tasks and skills which operate whatever the legal content of the case.

The lawyers were instructed to interview the client for up to 20 minutes treating the interview as a first interview with a new client on a new case. The interview was recorded on video-tape. The lawyer was required to draw up case notes for the "file." The case notes and the video-tapes were then analysed as shown in Table 4.1.

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9 Although they would have all studied basically the same subjects for the Solicitors' Finals, some might have studied more of certain subjects at University than others. In order to balance this, some two weeks before the experiment, *all* trainees were given a 'top-up' course of reading in the law relating to any subject matter the clients would raise which was not covered by Solicitors' exams.

10 Cases involving only welfare benefit calculations were excluded since interviews in these cases typically might involve long periods of reading and checking calculations against scales and would therefore not be good material for the exercise.

Table 4.I System of Assessment

Data	*Assessment*		
	Information	Tasks Performance	Skills Performance
Video-tapes	Information emerging during the interview	(a) By practising lawyers (b) By legal interview trainer	(a) By practising lawyears (b) By legal interview trainer
File Notes	Information noted down by lawyers		

Information

The prime objectives for the first meeting between lawyer and client are a subject of some discussion in the academic literature. Some seem to suggest that it is most important to set up a rapport between the two, to engender mutual confidence.[11] Others point out the need for the lawyer to ascertain with some urgency what the client has consulted the lawyer about.[12] There is agreement that a basic outline of the problem should be obtained and this would seem to conform to the practitioner's view of the process.[13] The interviews in this study were therefore assessed first in terms of the information the lawyers elicited.

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11 See, *e.g.* A. S. Watson, *The Lawyer in the Interviewing and Counselling Process* (1976) pp.11-16 and Benson, op. cit., Vol. 1, 22-29; M. K. and B. P. Schoenfield, The Art of Interviewing and Counselling" in *The Practical Lawyers Manual on Lawyer/Client Relations* ALI-ABA 1983 pp 3, 7-8.

12 *See e.g. D.* A. Binder, S. C. Price and P. Bergman, The Lawyer as Counselor 1991.

13 See, *e.g.* Laurence Sherman, *The Practical Skills of the Solicitor* (1981) pp 4-12.

Andrew Watson in "The Lawyer in the Interviewing and Counselling Process" discusses the "'diagnostic' mind-set" of lawyers.[14] He says they too often do not try to understand why the client has come to see the lawyer or what motivates clients and their actions. It is not easy to gain a full understanding of this area, not least because the client may not "'know' exactly what he wants." Hosticka, in his empirical study of the work of some publicly funded lawyers in Boston, shows results which echo Watson's criticism.[15] Watson also cogently argues[16] that "the client's goals will shape the outcome of the interview regardless of what the lawyer does or does not do." It is therefore more sensible to take these into account and work with them, rather than ignore them. It was thus interesting to see how successful the lawyers were in gathering such information as well as the information which seemed more relevant to the legal position.

Method

Information was broken down into 12 major categories,[17] as set out in Table II below. These categories were adapted from the categories of information used in D. R. Rutter and G. P. McGuire's, work on medical students' history taking techniques (Rutter).[18]

14 pp.10-16.

15 C.J. Hosticka, "We don't care what happened we only care about what is going to happen: Lawyer-Client Negotiations of Reality" (1979) Social Problems Vol. 26, No. 5 p.599.

16 pp.32-33.

17 There were also numerous sub-categories such as the following relating to heading 1. "1. Client Personal Information: (a) full name, (b) full address, (c) telephone number, (d) work, (e) marital status, (f) children, (g) form of residence, etc." The analysis of these details is not reported here, but the full breakdown of information headings are on file with the author. A full list of all the headings appears in "Client Interviewing for Lawyers", Sherr. A, Sweet & Maxwell, London 1986 @ pps. 128-130.

18 "History Taking for Medical Students. I Deficiencies in Performance, 11 Evaluation of a Training Programme" (1976) *Lancet* II 556-560.

The Rutter categories were adapted to this form after testing them out on a small number of interviews. Added to these headings was a category for assessment of how understandable the file notes would be to another lawyer picking up the case without having met the client.

The work of assessment of information was carried out by two objective observers with graduate legal knowledge who were randomly assigned to mark. The observers manually recorded the information on to prepared record sheets enumerating the 12 major categories and some 85 sub-categories. The observers were instructed how to code the information systematically into the categories and sub-categories resulting in a comprehensive breakdown of all information for subsequent analysis.

Ratings of the quality of the information for each lawyer for each category were assessed on a seven point scale ranging from 1 "bad" through 4 "neither good nor bad" to 7 "good." Assessment in this manner was carried out on the basis of information observable emerging during the interviews by reference to the videotapes as well as information which was noted down by the lawyers in their case notes for the "file."

Results

Table 4.II compares the ratings of information emerging in the interview (by reference to the video-tapes), with information noted by the lawyer in file notes. The scores shown here are the percentage whose performances were bad at a "failure" level *(i.e.* 1-3 score on the 7 point scale).

Table 4.II Information Emerging and Information Noted By Lawyer

Category of Information	% Scoring 1-3 on notes	% 1-3 on tapes
1. Personal Information about client	56	30
2. Other parties	63	41
3. Witnesses	85	71
4. Problem (legal) subject categorisation	56	71
5. Events	67	41
6. What the client wants	70	41
7. Previous advice and assistance	96	78
8. Legal Proceedings	93	82
9. Next client/lawyer contact	85	78
10. Work to be done by lawyer	48	63
11. Work to be done by client	83	78
12. Advice given	82	59
13. Clarity of notes	56	—

The information noted by the lawyers was poor. 56 per cent. of the lawyers failed adequately to record the clients' personal information including full names, addresses, telephone numbers, etc.[19] 85 per cent. failed to obtain adequate information about witnesses and 70 per cent. failed to identify what the client wanted as a result of coming to the lawyer. 56 per cent. of the lawyers could not place the problem in legal subject category and the incidents and events involved in the cases were inadequately elicited in 67 per cent. of the cases.

These problems led to inadequate performance in the rest of the interview. 96 per

[19] See note 17 above.

cent. of the interviewers failed to inquire about any previous legal assistance on the matter (this would cause enormous problems if another lawyer were already handling the case) and even more importantly 93 per cent. failed to inquire about any legal proceedings past or pending. 85 per cent. did not suggest or plan the next lawyer/client contact which was especially important since this was a first interview with the client.[20]

The best score on information noted down by the lawyer, on which a relatively low 48 per cent. "failed", concerned the work to be done by the lawyer. However, the disparity between what the lawyers noted they had to do and what they told to the clients is interesting. The analysis of the tapes of what was said in the interview to the client shows a much higher rate of 63 per cent. "failure" on this point. This seems to suggest that the lawyers were aware of the work they had to do and recorded it in their notes, but did not communicate or feel it necessary to communicate this to the client, a point noticed in the *Which?* report on lawyers and also by the Benson Commission.[21] Similarly, there is less failure, and the lawyers were therefore better, at recording problem subject categories in their notes, than informing the client of such categorisation.

82 per cent. of the lawyers did not inform the client of any work needed to be done by the client such as gathering papers, making calls, etc. The same number failed in terms of their recording of the legal advice they gave, although here the situation was reversed and there is a lower failure rate of 59 per cent. on the analysis of the tapes of the advice they actually gave the client at the time. From both the lawyer's and the client's point of view it may be just as important to note down advice given, as to give

20 This fact might have been a direct result of the experimental nature of the study and the lawyer's knowledge that in reality there would be no follow-up, though they were instructed to treat this in every way as a real first interview.

21 Which? Consumer's Association Report, May 1977, p.297. The Royal Commission on Legal Services Final Report, Cmnd. 7648, 7648-1 ("Benson"). See, e.g. Vol. One 3.36-37, 22.29-31, 22-62. Tables 22.3, 22.4; Vol. Two 8.228-230, 2.238, 8.252-272, Tables 8.34, 8.35, 8.36 and 8.37. See also B. Curran, "The Legal Needs of the Public" (1978) 64 A.B.A.Jo. 843-52.

correct advice. Even the clarity of the notes, which would be extremely important for future reference to a file, was failure standard in 56 per cent. of the cases.[22]

The importance of file notes was stressed to the lawyers before the interviews but it was also thought that the interview tapes should be analysed so that it could be determined whether any problems were simply a matter of remedying note-taking skills rather than interviewing technique.[23] Although there was generally a lower percentage of failures on the analysis of the tapes, the failure rates were still very high, including 71 per cent of the lawyers failing to categorise the problem for the client and an equal number failing to inquire properly about witnesses. The figures regarding "client personal information" and "other parties" fared rather better in the actual interview (only 30 per cent. and 41 per cent. failed respectively). However, the lawyers did not feel this information sufficiently important to put into their files and it might have therefore been forgotten and not passed on to another lawyer taking over the case. Inquiries about previous advice and assistance and any relevant legal proceedings were still particularly low even on the tapes (78 per cent. and 82 per cent. failing respectively).

As the information the lawyers obtained was seriously incomplete, the analysis of the interviews was carried further. A detailed look at the skills and techniques employed by the lawyers could perhaps shed more light on this poor information output.

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22 Such problems have been noted most recently in the Solicitors Complaints Bureau Annual Report 1990, "There is a continuing failure to keep attendance notes of interviews and instructions given."

23 Indeed, some previous research in the medical arena has concentrated more on the notes than on what actually occurred in the interview. See Rutter and McGuire note 18 above.

INTERVIEWING: ANALYSIS IN DEPTH

The way the interview was conducted was analysed in two ways. The interviews were assessed in terms of (i) the necessary tasks to be carried out in a first interview and (ii) the skills and techniques used in carrying out those tasks.

1. Tasks

The legal interview can be analysed by division into three main stages according to the functions involved and the level of active involvement of each participant.[24] The first main stage involves helping and enabling the client to tell the story naturally and is characterised by little speech on the part of the lawyer, other than encouragement. In the middle section of the interview the lawyer begins to take a more obviously active role, questioning the client on ambiguities or gaps in the factual details or gaining more depth of information on particular points. This is rounded off by the lawyer's summing up of the major facts and the client's wishes, to check with the client that they have been properly understood. Both lawyer and client generally participate about equally at this stage.

Finally, the lawyer gives the advice or outlines the plan of action by "counselling" with the client all available options. The lawyer then makes sure that the client is in agreement, and begins to carry out the plan of action involved, setting the next contact

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24 These three stages roughly correlate with the first three stages mentioned in Goodpaster. "The Human Arts of Lawyering: Interviewing and Counselling" (1975) 27 Jo.Leg.Ed.. 5, 33; Redmount, "Humanistic Law Through Legal Counselling" (1969) 2 Conn.L.Rev. 98, 110-111; Binder and Price, *op. cit.*, pp.53 59 *et seq.* They also relate to the six phases of doctor-patient consultations discovered by P. S. Byrne, and B. E. L. Long in their D.H.S.S. study, *Doctors Talking to Patients*, pp.19-29.

before terminating the interview. Here the activity is mainly from the lawyer.

Method

(a) *The Construction of the Tasks Model.* In this research the stages of an interview were broken down further into an organising plan of some 13 major tasks it was considered important for a lawyer to cover in the first interview.[25] The interview was divided sequentially into these tasks, and the relationship between them and the three stages enumerated above is set out in Table III below.

[25] This list of tasks was developed out of a teaching and assessment programme at the University of Warwick and is similar to interviewing task lists used in teaching or assessment at The University of Miami and in the American Bar Association Client Counselling Competition.

Table 4.III The First Interview-The 13 Tasks by Stages[26]

Stage	Tasks	
Stage One	1. Greeting, seating and introducing	6.
	2. Eliciting story with opening question or helpful silence	N
	3. Obtaining basic outline of personalities and case from client's own unhindered words	O T E
Stage Two	4. Questioning on facts for gaps, depth, background and ambiguities and relevance	
	5. Summing up and recounting lawyer's view of facts, *AND* checking for client's agreement or amending	
Stage Three	7. Stating advice and/or plan of action	T
	8. Repeating advice/plan of action *AND* checking for client's agreement or amending	A K
	9. Recounting follow-up work to be done by client	I
	10. Recounting follow-up work to be done by lawyer	N
	11. Stating next contact between lawyer and client	G
	12. Asking if Any Other Business and dealing with it	
	13. Terminating, helping out and goodbyes.	

Viewing such interviews on video-tape one can detect where one stage ends and another begins from the relative postures, demeanour and activities of the participants, although there is some blurring at the edges between stages. Some tasks and stages must occur within a definite sequential relationship and it would not be good, for example, for advice to be given before the facts are ascertained. In other cases the sequence was not important, such as whether the lawyer's follow-up tasks were stated before the client's follow-up tasks.

(b) *Assessment*. The interview content was broken down in this manner so that an assessment rating could be taken of the performance of each task by each lawyer. Assessment was carried out by practising lawyers with significant interviewing

26 More detail will be given of the somewhat cryptic task headings as the results are analysed in the text. Note taking, which must occur to some extent before, during and after the interview, cannot be confined to any one stage. The task categories often refer to task clusters which are usually carried out together rather than single tasks.

experience, *i.e.* at least three years of practice in "personal" law. They were randomly assigned to mark.[27]

Results

The results of the assessment are both long and detailed. Rather than reporting them en masse and devoid of commentary, they are set out serially here together with supporting literature and some comments on findings. A discussion section then brings comments on all findings together.

Stage One: Opening the Story. Since the client's first reactions and first impressions are likely to be formed by the first part of the interview and it will affect everything that occurs subsequently, it is most important to get off to the right start.[28] The social norms of greeting, rising and seating are all but essential in a culture in which they are expected between equals.[29] The lawyer should also introduce him/herself and not presume that the client has read a name off the door or heard the receptionist use it.

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27 In the initial research the assessment was repeated by an American Law Professor with some 15 years' practical experience who was also experienced in training lawyers how to interview.
It was hypothesized that practising lawyers would be viewed by the legal profession as the best judges. However, such lawyers would also have been educated and trained within the same system as the experimental subjects they were assessing. The assessments of the American lawyer who was also an experienced interviewing trainer were used as a basis of comparison. The experiment thus not only judged performance subjectively by the criteria of the system of legal education and training in England and Wales but more objectively by an outsider's view. It was also thought that somebody who had taught interviewing and counselling might have a particular insight into the skills and tasks involved. This is more fully reported in "Lawyers and Clients: The First Meeting" Sherr, A. 1986 49 MLR 333.

28 A. S. Watson, *Op Cit.*, pp.132-135.

29 A.S. Watson, op cit, pp.5-6; T.L. Shaffer, op. cit., p.90.

Such introduction should perhaps also include a description of status or position in the firm. Whether the client is to be interviewed by the senior partner or an articled clerk is something which perhaps the client should be told right from the start. Too many lawyers assume that the lawyer-client relationship exists from the moment the client enters the lawyer's office. Clients must be given a chance to make up their minds whether they have sufficient confidence in their lawyer and whether they are likely to get on well together.[30]

On absolute measurements (on a Yes/No basis, *i.e. not* rated over seven points) taken by the legal interviewing trainer *all* the lawyers greeted the clients, 93 per cent rising to greet them and 85 per cent. indicated where they should sit. However, 41 per cent. did not introduce themselves[31] and 63 per cent. of the lawyers failed to tell the clients their status or position.

On the qualitative measurement as can be seen from Table 4.IV there was a 37 per cent. failure rate for the whole exercise.[32]

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30 A.S. Watson, op.cit, pp.132-135.

31 Korsch *et al's* classic study of doctors, shows that doctors failed to introduce themselves in over half the consultations; "Practical Implications of Doctor-Patient Interactions-Analysis for Pediatric Practice" (1971) *American Journal of Diseases of Children* 121, 110.

32 One lawyer, one hopes in jest, asked the helpers filming the interview beforehand if the client was to be "paying" or "non-paying" as this might make a difference as to how the lawyer would want to greet him or her.

Table IV - Tasks-Stage One

Rating

Task		Bad or very bad (1-3)	Neither good nor bad (4)	Good or very good (5-7)
1.	Greetings, seating and introductions.	10 (37%)	11 (41%)	6 (22%)
2.	Opening questions or helpful silence.	5 (19%)	17 (63%)	5 (19%)
3.	Obtaining basic outline of personalities, parties & case.	7 (26%)	12 (44%)	8 (30%)

It is important that the most "open" type of opening question or facilitation be used by the lawyer to enable the client's story to come out naturally, in a way which is more likely to be indicative of the "real needs" of the client, as well as the factual details of the problem the lawyer might consider more important. Watson[33] notes the necessity of not guiding the first "exploratory" interview too much so that the client can "set his own direction." Similarly Shaffer[34] notes Kinsey's method of obtaining information on the most intimate of subjects by asking the most open-ended interviewing questions.

A helpful silence on the part of the lawyer is therefore the most "open" method possible, but a client may need a word or two of encouragement to begin. This open-ended beginning is likened by some of the writers to the opening of a funnel,[35] and the beginning of "a series of questions which moves from the general to the specific." The lawyer is haunted by time constraints, and legal training conditions lawyers to narrow down the issues as soon as possible to a manageable problem with some "legal"

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33 *Op cit.*, p.22. Any guidance or hints that the lawyer gives about what s/he wants to hear, will naturally encourage the client to tell the lawyer what it seems to the client the lawyer wants. This may distort both the area of information the client presents and the manner or emphasis with which it is presented.

34 T. L. Shaffer, *Legal Interviewing and Counselling*, (1976) p.80.

35 Watson, *Op. cit.*, p.32.

relevance which the lawyer has some training to handle. This is perhaps partly why theorists such as Johnson[36] see lawyers in the guise of controllers of the clients' reality. Clients' problems do not naturally fall into such easy categorisations without some selection or editing of possible information. Thus an early insistence on narrowing down the field of inquiry may prevent the lawyer seeing the client's view of the problem (as opposed to the lawyer's formulation of a legal "matter") and also gaining information on what the client really wants from coming to see the lawyer.

The results showed some understanding of these difficulties and only 19 per cent. of the subject lawyers failed on Task 2. 63 per cent. obtained a mid-level score ("neither good nor bad") by jumping off too soon on what seemed to them to be the problem and immediately narrowing the range of inquiry.

There was a slightly larger failure rate (26 per cent.) on Task 3, when it came to "active listening,"[37] and asking infrequent open questions to keep the flow of the story going. The interview trainer assessed a much higher level of 44 per cent. failure on this task. There were, however, some 30 per cent. who fared above average on this element, all scoring at the 5 level of "fairly good" ability. The interview trainer, tending generally more to the extreme ends of the scale, showed 37 per cent. above average.

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36 T. J. Johnson, *Professions and Power* (1972). Similar in their conception with this approach are Rosenthal e.g. D. Rosenthal Lawyer and Client; Who's in Charge' (1974); 'Evaluating the Competence of Lawyers (1976) 11 Law and Soc. Rev. 257; M. Cain "Towards a Theory of General Practice Lawyers - A Radical Approach (1979) 7 Int. Jo. of Sociology of Law 331 and M. Spiegel, 'Lawyering and Client Decision-making: Informed Consent and the Legal Profession" (1979) 128 Univ. of Penn. L. Rev. 41, Bankowski and Mungham, *Images of Law* (1976); 1. Illich, *Disabling Professions,* (1977). And see the findings of Hosticka, "We don't care about what happened, we only care about what is going to happen: Lawyer-Client Negotiations of Reality' (1979) Social Problems Vol. 26, No.5 p.599.

37 See Shaffer op. cit., pp.124-125; Binder and Price, *op. cit.*, pp.20-37.

Stage Two: Questioning, Fact Sorting and Understanding. Task heading number 4 involves factual questioning, factual sorting and probing for inconsistencies and uncertainties. These seem to represent more closely tasks which lawyers see themselves as needing to carry out, largely because they seem to be related to the forensic task of questioning in courts.

There may be some need even in a first interview to test the client's story. But, in the image of at least the television court lawyer,[38] mercilessly cross-examining witnesses or setting them to trip up on their own words "Rumpole" style, until they break down in the witness box, is probably the exact opposite of what is desirable within the interview.[39] A careful use of the whole range of open to narrow questions, with a strong reliance on the "open" end of that range is advocated by the literature.[40] Benjamin, in his seminal work on "The Helping Interview" shows how a pattern of continuous question and answer from which neither person can extricate themselves teaches clients that it is their purpose to *answer* and not ask questions, and only to answer *when asked.* This encourages "inappropriate dependence on lawyer expertise" by the client.[41] It also allows the lawyer to narrow down the area of inquiry to subjects which seem appropriate to legal response or can be placed within common legal concepts.[42] Facts can thereby be cleansed of emotion and lawyers saved from the burden of understanding the client's plight instead of just "translating"[43] or manipulating it into legal form. This may mean that client's needs are derogated to lawyer's needs. It may also prevent the lawyer from obtaining factual information necessary even from the lawyer's view of legal relevance.

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38 See note 6 above.

39 Shaffer *op. cit.,* p.112 *et seq.,* and "Standards for Judging", of the American "Client Counselling Competition." Many also question its desirability at trial, see, *e.g. P.* Bergman, *Trial Advocacy,* (1979), pp.177-178.

40 See, *e.g.* Binder and Price, op. cit, pp.38-48 and Watson, op. cit. pp.36-39.

41 Shaffer op. cit., p.123.

42 See Cain. op. cit., p.333.

43 See note 42 above.

Table 4.V Tasks-Stage Two

Rating

Task		**Bad or very bad (1-3)**	**Neither good nor bad (4)**	**Good or very good (5-7)**
4.	Factual questioning, gaps, depth	9 *(33%)*	9 *(33%)*	9 *(33%)*
5.	Summing up, recounting, checking client agreement	14 *(52%)*	7 *(26%)*	6 *(22%)*
6.	Note taking	9 *(33%)*	11 (41%)	7 *(26%)*

The lawyers in our study performed across the board with equal numbers in each collapsed score category for this heading, Task number 4. This means that although 33 per cent. scored in the highest category (all at the "5" score level), another 33 per cent. actually failed, which failure figure may provide explanation for some of the poor results already noted in relation to the Information analysis above.

The lawyer's tendency heavily to structure an interview into narrow lines of inquiry may be fatal to a proper understanding of the client's problem if there is also no attempt to check the lawyer's comprehension of the story with the client. It is implicit in the concept of the lawyer "collaborating"[44] with the client that the lawyer should check back with the client that the client's intended story and needs have been perceived by the lawyer. Task 5 was therefore a vital element in conducting a first interview, and a crucial first step for the lawyer before proceeding to advise or work out a plan of action for the client. Byrne and Long in their study of "Doctors Talking to Patients"[45] note how summarising can be used either to "close off" or "open up" a part of an interview. Task 5 was intended specifically to measure whether the lawyer allowed the client to comment, and therefore if necessary disagree with and modify,

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44 Shaffer, *op. cit.*, pp.234 *et seq.*
45 (D.H.S.S. 1976), at pp.50-53.

the summary. It therefore represents only the concept of "summarising to open up" in Byrne and Long's categorisation.

The 52 per cent. failure (73 per cent. as measured by the expert) for this task is one of the highest failure rates in this section. It bears out the frequent complaints about lawyers' remoteness and inability to communicate to clients what is going on in their minds.[46] It is also interesting to compare the even higher failure rate for Task 8 below, which similarly involves obtaining the client's agreement.

The task of note-taking, which does not naturally fall into any one category[47] and should probably take place before and after, as well as throughout, the interview, receives much discussion in the literature. The content of the notes has already been analysed in the Information section above, and here the assessment was of the manner in which notes were taken. Freeman and Weihoffen[48] mention the distortion effect resulting from the client's perception of those parts of the interview being noted down by the lawyer as being more "important." They suggest that no notes be taken and a recording device used for better recall. Similar views are expressed by Meltsner and Schrag.[49] Some clients however object to recording devices and lawyers may object to the extra time needed to listen to recordings. Kinsey managed his research whilst making short notes in the presence of his interviewees without affecting their relationship,[50] and note-taking during interviews seems to be the model used by solicitors in England and Wales.[51] It is also necessary for the lawyer to take notes during an interview to remind him/herself of questions to be asked later in the

46 The *Which?* Report, *The Royal Commission on Legal Services Final Report*, Cmnd. 7648, 7648-1 ("Benson"). Sec. e.g. Vol. One 3.36-37, 2.29-31, 22-62, Tables 22.3, 22.4; Vol. Two 8.22-230 2.238, 8.252-272, Tables 8.34, 8.35, 8.36 and 8.37. See also B. Curran, "The Legal Needs of the Public" (1978) 64 A.B.A. Jo. 843-52..

47 See note 24.

48 West, *Clinical Law Training: Interviewing and Counselling* (1972) pp.21-22.

49 *Public Interest Advocacy- Materials for Clinical Education* (1914), p.141 and by Watson, *Op. cit.*, pp.34-35.

50 Shaffer, *Op cit.*, p.76.

51 See, *e.g.* Sherman, note 27, pp.6-8.

interview itself.

Assessment of Task 6 was therefore on the basis that the lawyers would take notes[52] when necessary but that it should be done unobtrusively or in some other way so as to have a minimal effect on the interview. 33 per cent. of the lawyer subjects failed on their note-taking largely because it was performed in such a way that eye contact was lost for long periods of time and the client's natural flow was thereby discouraged.

Stage Three: Advice and the Continuing Relationship. In the Information section an assessment was made in terms of the quality of the advice given by the lawyer and also what was written down in the notes about such advice. In the Tasks section, assessment (this time by the practising lawyers and Law Professor) was on how well the lawyer subject gave the advice or set out possible plans of action. The task and the content were here measured together. The assessors were instructed not to favour lawyers who knew the immediate answers to the questions asked, above those who gave a cogent plan of action for dealing with the problem in a way which was apposite for the client and the problem. What was to be measured was interviewing and counselling ability rather than specific legal knowledge.

Until this stage in an interview the lawyer will need the participation of the client to tell the story and answer questions. At this stage the tendency among many lawyers is to handle the client's problem as if it were an examination question on which to exercise the mind. Douglas Rosenthal's thesis shows the advantages of the "participatory" model[53] of the lawyer-client relationship, which participation is perhaps most crucial at the problem-solving stage since most professional problems "involve open, unpredictable, individualized choices, understandable to a layman, for

52 This was necessary in any case for the purposes of the Information section above.
53 See note 36 above.

which there is no single best answer."[54] Watson[55] and Shaffer[56] endorse Rosenthal's findings and Binder and Price have developed a similar theory of "Client-centred decision-making."[57] The need to involve the client in making decisions is therefore well recognised in the literature and in the ethical codes.[58]

This is, however, only one of the noted difficulties for professionals giving advice. Even before a collaboration has been reached, it may be difficult for a client to grasp the advice given, especially if it is couched in technical language. This is probably partly because of the combined effect of the atmosphere and situation in which clients find themselves,[59] and partly because lawyers may not be good at explaining the legal position and what they have in mind in lay terms. The lawyers' difficulties stem from the need to cover all possibilities and to safeguard their own legal position from a subsequent negligence suit.[60] It is also difficult for them to take so many steps back to their first day of law study and remember how it felt to be a newcomer to the strange language and world of the law.

Another source of difficulty in providing advice arises out of the client's expectations and the lawyer's management of his or her own image. This is well alluded to in Alfred Benjamin's book The Helping Interview,[61] in which he tries to dissuade interviewers from using questions as a weapon:

> "As for you, the interviewer, you have asked your questions

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54 *Ibid.* at p.13.

55 *Op, Cit.* pp 141-143

56 *Op Cit. p p 234-253*

57 Op Cit. pp.147-155

58 ABA Code of Professional Responsibility E.C. 7-7, 7-8, 7-102.

59 See P. Ley P. W. Bradshaw, D. E. Eaves and C. M. Walker. "A method for increasing patients' recall of information presented to them," (1973), 3 *Psychological Medicine* 217-220 for a similar effect in doctor/patient studies.

60 M. Spiegel, "Lawyering and Client Decision-making: Informed Consent and the Legal Profession," (1979) U. of Penn. Law Rev. 41.

61 (1969) Quoted in Shaffer *op. cit.* at p.123.

> and gotten your answers; now show your tricks. If you do not
>
> have the solution up your sleeve, if you cannot help after the
>
> long third degree, what right had you to ask? What are you good for?"

The lawyer is caught in a quandary. The client may expect some form of immediate advice or opinion and will need the reassurance of being given some assistance in order to maintain confidence in the lawyer. However, the lawyer may not be able to give a firm opinion. The result is often that the lawyer delivers to the client a vague generalisation and an uncertainty hedged with provisos. This may have a far worse effect than a straight statement of procedure and plan of action which might include the admission of the necessity for legal research and some time for consideration.

Table 4.VI Tasks-Stage Three

Task	**Bad or Very Bad (1-3)**	**Rating Neither Good nor Bad (4)**	**Good or Very Good (5-7)**
7. Stating advice/plan of action	12 (45%)	8 (30%)	7 (26%)
8. Repeating advice and checking client's agreement	16 (59%)	6 (22%)	5 (19%)
9. Recounting client's follow up	17 (63%)	7 (26%)	3 (11%)
10. Recounting lawyer's follow up	15 (56%)	7 (26%)	5 (19%)
11. Setting next contact	18 (67%)	5 (19%)	4 (15%)
12. Asking for Any Other Business and dealing with	25 (93%)	0 (0%)	2 (7%)
13. Terminating and goodbyes	19 (70%)	4 (15%)	4 (15%)

With these difficulties noted in the literature it is perhaps not surprising that 45 per cent. of the lawyers scored at a failure rate on the presentation of advice or plan of action. It should be noted though that the construction of advice is one of the major

skills which is actually taught at the degree and professional qualification stages, albeit usually advice in a written form. It is the focus of most examinations and papers. Such a high level of failure in an area given specific coverage in legal education therefore shows clearly a gap between legal education and legal practice.

Tasks 8-11 of Stage Three cover some fairly mechanical elements which are an essential part of giving advice. This particular area has been covered more extensively in the literature relating to doctors and patients, than lawyer-client communication.[62] Surveying the literature Ley suggests two major cognitive hypotheses for information failures in doctor-patient communication: failure of comprehension and failure of memory.[63] Failure of comprehension stems from the complexity of the material, the recipient's lack of elementary technical knowledge and misconceptions which prevent proper understanding.[64] These can be aided by more simplified explanations and the opportunity for the advisee to express uncertainty and misconception. Failure of memory can be assisted also by categorisation of parts of the advice,[65] repetition and "client specific" rather than general advice statements.[66]

On the basis of these findings and the need for participation by both parties to the interview, Task 8 assesses whether, and how well, the lawyer subjects repeated their advice or plan of action. This repetition was in order to gain their client's understanding and acceptance, or present a modification acceptable to the client . There was a 59 per cent. failure for this heading (76 per cent. according to our "expert" interviewing teacher). This was a larger failure group than Task 5 the other task involving the need for client agreement. This suggests perhaps that the lawyer

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62 P. Ley in S. J. Rachman (ed.), *Contributions to Medical Psychology* (1977) pp 19-29.

63 *Ibid.* at pp 19, 24.

64 *Ibid,* at p.19.

65 Such as, "I am going to tell you: What is wrong with you; What tests will be needed; What will happen to you; What treatment you will need; First, what is wrong with you ..." Ibid. at p.76.

66 *Ibid.* at p.25.

felt even more clearly that the advice stage was much more the lawyer's arena for decision and the client's agreement even less necessary.

Concerns and findings similar to those expressed in the medical literature have been repeated in the reports on the legal profession by both the Consumers' Association and the Benson Commission.[67] Complaints, when analysed, "are seen to amount to (often justified) bitterness that the clients have not been kept adequately informed of progress; the steps in the conveyancing, negotiating or litigation process, whichever applies, have not been explained in a comprehensible way. People fear the unknown ... they are often worried. Not keeping clients in the picture of what is happening (or not happening) . . . is an indictment of what amounts to nothing more than thoughtlessness on the part of solicitors."[68]

Task headings 9, 10 and 11 involve the lawyer in setting in motion the, now agreed, plan of action. They are also intended to measure the lawyers' attention to the above concerns by giving clear details of what the lawyers expect their clients to do, what the lawyers will be doing and how the two will next contact. These tasks mirror categories 9, 10 and 11 in Table II, the Information section. In the present exercise the way these tasks were carried out, including both the quality of the information involved, as well as the way it was communicated, was rated by the practising lawyers.

A frequent complaint about lawyers which does not seem primarily to relate to communication is that of delay.[69] Even if they do spend time when meeting the client

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67 *Which?* Consumer's Association Report, May 1977, p.297. *The Royal Commission on Legal Services Final Report*, Cmnd. 7648, 7648-1 ("Benson"). Sec. e.g. Vol. One 3.36-37, 22.29-31, 22-62, Tables 22.3, 22.4; Vol. Two 8.22-230 2.238, 8.252-272, Tables 8.34, 8.35, 8.36 and 8.37. See also B Curran, "The Legal Needs of the Public" (1978) 64 A.B.A. Jo. 843-52.

68 Benson, para. 22.29.

69 See, *e.g*. Benson, Vol. 1, para. 22.18, Lay Observers Reports.

explaining the law in detail it still seems to the client a long time after the meeting before anything occurs. This may of course be due to the lawyer's pressure of work, the presence of more remunerative cases, the court's schedules or a multitude of other possible factors.[70] However, clients' dissatisfaction is almost certainly due to one main factor, the difference between their expectations and their lawyer's actual performance. If the client is told precisely what to expect from the outset, the chances of dissatisfaction must be lessened. There is also an important reassurance effect for the client in being told specifically what steps to take and not to take, what papers to gather and calls to make. It gives clients the feeling that they are positively involved in the progress of their case.[71] This detailed exposition approach gives the "concrete-specific" advice suggested in relation to the doctor-patient relationship above.[72] It is also proper that the lawyer should explain what procedural steps are going to be taken and how long each of these is expected to last.[73] There is no special mystery which needs to be kept from the client and the greater the client's awareness of the procedure and practical steps necessary, the greater the chances of a client's expectations being closer to reality. This is most likely to increase client satisfaction and enable the client to provide real help to the lawyer, rather than pester the lawyer with telephone calls to find out what is happening.[74]

There is a very high proportion of failures on these headings, 63 per cent., 56 per cent. and 67 per cent. respectively, and these are among the larger rates of failures on all exercises. One possible explanation is that these "continuation" plans may have been perceived by lawyer and client alike as the more unreal of the tasks involved in the "experimental" interview situation which both knew would go no further. These very

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70 Benson, Vol. 1, para. 22.20.

71 See, *e.g*. Shaffer, *Op*. cit. Chap. Four, "Collaboration".

72 At note 65.

73 Benson, Vol. 1, Table 22.15 and para. 22.30.

74 See Watson, *Op*. cit., p.39 for clients' "anxiety" resulting from not being kept informed leading to hostility, resistance to carrying out instructions and "failure to pay the bill."

poor scores might therefore be something of an artefact of the experiment. On the other hand the findings of Benson[75] and the Lay Observer[76] so clearly substantiate exactly these criticisms of lawyers that it is difficult to dismiss these findings because of the "laboratory" nature of the research.

Clients will often present with one problem which they feel is the most acceptable, whilst not immediately reporting another problem or problems which may be more urgent or more crucial.[77] Even where the main problem is well established during the interview, there may be numerous peripheral issues which are equally worrying to the client. It is extremely awkward even for the trained professional to react properly to this situation. It involves summoning up concentration and empathy, immediately after these have been relaxed in face of the impending end of the interview, and returning to Stage One again when the lawyer expected to be working in Stage Three.[78] However, it is essential to ask if the client does have anything else they want

75 *The Royal Commission on Legal Services Final Report*, Cmnd. 7648, 7648-1 ("Benson". See, e.g. vol. One 3.36-37, 22.29-31, 22-62, Tables 22.3, 22.4; Vol. Two 8.228-230, 2.238, 8.252-272, Tables 8.34, 8.35, 8.36 and 8.37. See also B. Curran, "The Legal Needs of the Public" (1978) 64 A.B.A. Jo. 843-52.

76 Annual Reports of the Lay Observer 1975-1982 repeatedly confirm "delays and lack of information" to be the most frequent cause of complaint" see, *e.g. 1980, p.5.*

77 See, e.g. Watson, *op. cit.*, Chap. 11, "'Learning to Listen," especially pp.48-57. This subject is treated more extensively in the medical literature; Balint especially talks of "using some symptoms as an excuse to get into the consulting room."

78 Byrne and Long (note 45 above) found only a definite 5-6 per cent. of cases where a patient's "By the way, doctor" or "while I'm here doctor" or "My sister asked me," occurring right at the end of an interview, turned out to be the real reason for being there. A larger number of interviews where the real reasons only appear secondarily are interviews where the client/patient keeps making indirect reference to the "real" reason until the doctor notices.

to mention, or another problem.[79] A substantial failure rate for Task 12 might have been expected since, without training, one might only learn such knowledge from experience. 93 per cent. failure (100 per cent. as measured by the expert) was however quite overwhelming. Only 7 per cent. managed to ask whether there was anything else the client wanted to mention, let alone deal with any answers given.

Shaffer talks about a "sunshine termination" of the legal interview which is clearly based not only on Task 13 but on all that has gone before it to create a "relationship."[80] Effective termination clearly also relates to time available and strategies for dealing with time demands.[81] Under Task 13 the lawyer has the opportunity of giving a helpful lasting impression, utilising normal social skills in helping clients with coats, etc., and their way out of the office. Unlike Task 1, which one would think intuitively is a similar event, the lawyers here had a high failure rate of 70 per cent. in closing the interview. Most of the lawyers managed to complete the interview on time and some even finished early, one interview taking only 11 1/2 minutes. Some, however, had to end rather abruptly and this accounted for part of the poor score. Many of the lawyers were more intent on making up their file notes than getting up out of their seats and seeing the client properly to the door.

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79 A recent example of this problem in a legal context is the client of a local advice centre who spent an hour, with her mother, talking to a lawyer about her intention to divorce her husband before she mentioned that, when they left her mother's home to come to the advice centre the husband had been waiting outside trying to grab their baby from a younger sister who was minding the baby. Such was their faith in the power of the law that the two had felt it was more important to come and talk to the lawyer about divorce than deal with the more urgent practical situation at home. I am indebted to Dr. David Metcalfe (now Professor of General Practice, Manchester University Medical School) for his description of the patients who, with their hand on the door knob about to leave, tell their real reason for coming.

80 Op. Cit. pp.303-304.

81 See below under Skill heading 14.

Summary

The overall impression on the basis of analysis of the lawyers' interviews by tasks and stages was that their performance was worst in the last stage and particularly bad on Tasks 11, 12 and 13. The lawyers were generally not good at giving their clients the opportunity to tell their own story and to agree or disagree with the lawyers' view of the facts and law. They were also poor at informing the clients of the details of what was going to happen or what might happen on their case. The general mode of operation for the lawyers was to narrow down the factual area of inquiry as soon as possible with series of questions and to force the issue into a semblance of legal category with which they were acquainted.

II. Skills

In this section the lawyer's conduct of the interview overall was rated in accordance with the level of ability shown in skilful application of good interviewing techniques. The lawyers would be using these skills and techniques in order to carry out the tasks listed above. Unlike the tasks, the usage of these skills would not necessarily be confined to a particular stage of the interview and might carry on throughout. By analysing the interview in this way it was hoped to find out not only what particular tasks presented difficulties for the lawyers but also, in what particular skills their strengths and deficiencies lay, thus causing the successes and failures noted above.

Method

The skills to be used in the first interview were broken down into categories partly adapted from some of the studies in doctor/patient communication and supplemented by categories which, after pilot studies, seemed helpful in analysing the lawyer-client relationship.

Table 4.VII Skills Headings

1. Handling personal and confidential topics.
2. Not accepting client's jargon.
3. Not over using legal terminology.
4. Precision in obtaining information.
5. Efficiency in obtaining information.
6. Picking up client's verbal cues.
7. Not over-repeating of same topics.
8. Clarifying gaps or confusions.
9. Controlling the client and "irrelevant" information.
10. Facilitating the client to talk.
11. Not using "leading" or "closed" questions.
12. Not using complex questions.
13. Ease with client.
14. Empathy with client.
15. Reassurance of client.
16. Time control throughout.
17. Opening/closing ease and control.
18. Giving advice and counselling.

Skill headings 1, 2, 4 and 6 to 12 are adapted from Maguire and Rutter's work on evaluating student doctors.[82] Heading 3, over using legal terminology, was not addressed in that work (in terms of medical terminology) and was included as a result of the more general complaints about professionals' communication problems. Skill headings 5 and 13-18 were developed out of analysis of videotapes of law students' practice interviews[83] and partly out of discussions with the assessors who found such headings a helpful complement to the others. Although some of the headings in their abbreviated form in the list appear tautologous, they each had a precise meaning which is mentioned below in the text.

Assessment

Assessment was carried out by the same groups of assessors as in the Tasks section above: the United Kingdom practising lawyers and the American Law Professor. The skills were similarly assessed on a 7-point scale ranging from 1 (bad) through 4 (neither good nor bad) to 7 (good). The United Kingdom lawyer assessors were randomly assigned to mark.

82 See note 18 above.

83 These were part of a teaching and assessment programme at the University of Warwick, School of Law.

Results

Table 4.VIII Skills Results 1-3

	Rating		
	Bad or Very Bad (1-3)	**Neither Good nor Bad (4)**	**Good or Very Good (5-7)**
1. Handling personal and confidential topics	11 (41%)	13 (48%)	3 (11%)
2. Not accepting client's jargon	3 (11%)	20 (74%)	4 (15%)
3. Not over using legal terminology	5 (19%)	8 (30%)	14 (51%)

Personal and Confidential topics. Heading 1 was designed to cover the skills involved in listening to, and asking questions about, sensitive personal matters which would normally be treated as confidential outside the lawyer-client relationship.

It is not normal to remove one's clothing at the request of a stranger, but when the stranger is licensed to practise medicine the mere request to do so is taken to be sufficient reason. Lawyers demand perhaps an even more intimate uncovering of confidential facts and feelings than physical nakedness, but this may not be fully appreciated by the lawyers involved.[84] The lawyer therefore needs to develop a sense of trust by adopting a "non-judgmental, non-moralising posture" avoiding critical comments and acknowledging the possibility of discomfort on the part of the client.[85] The lawyer's natural discomfort in hearing sensitive information and outpouring of emotion may also cause conflicts such as whether to take a passive or active role in

[84] 'The horrible thing about all legal officials, even the best, about all judges, magistrates, barristers, detectives and policemen is not that they are wicked (some of them are good), not that they are stupid (some of them are quite intelligent), it is that they have got used to it." G. K. Chesterton, quoted in T. L. Shaffer and R. Redmount *Lawyers, Law Students and People* (1977), p.22.

[85] Watson *op. cit.*, pp.7-9.

relation to what is said and whether to demonstrate or hide any emotion that the client stimulates.[86] Only 11 per cent. of the lawyers fared well on this heading, although 48 per cent. managed to reach the average point. This was the lowest number of lawyers reaching the 5-7 (Good to Very Good) marking group for all the skills headings, but not the largest number failing.

Language. Headings 2 and 3 are opposite sides of the same coin. It was hypothesized that some communication problems between professionals and lay clients were the result of the use of language inadequate for the communication task in hand, by both parties. The interviews were analysed from the point of view of the lawyer's abilities. Treatment of language is therefore divided into lawyer's acceptance of client's incorrect, imprecise or ambiguous expressions (Skill 2), and lawyer's over-use of legal terminology which might confuse, put off or frighten the client or in a way that may dissuade the client asking for explanation (Skill 3).

Watson demonstrates how a person seeking help will "try to adopt the language and frame of reference which he imagines the helper uses."[87] Thus clients attempt to use legal (or their idea of legal) terminology perhaps imprecisely or incorrectly in order to elicit what they imagine to be the appropriate response.'[88]

Matching the results against each other it is interesting to note that only 11 per cent. and 19 per cent. of the lawyers respectively failed these tests but the proportion scoring well is far greater for the second heading than the first. This suggests that legal education may equip lawyers better to cope with their own output of legal

86 Watson *Op. cit.*, p.98, Binder and Price pp.20-37.

87 Watson *Op. cit.*, p.12.

88 This is not an area in which easy conclusions can be drawn. Kinsey's experience (as related by Shaffer *op. cit.*, 78-81) is once again instructive. He explains that euphemisms should not be used as substitutes for franker terms, since "evasive terms invite dishonest answers." On the other hand using the vernacular has the effect of showing a real understanding of lifestyle and cultural context (an English example might be using the term "on the sick" for being in receipt of Sickness Benefit), provided the vernacular is unambiguous.

terminology than with jargon input from their clients.[89] It also confirms the findings of the next section that lawyers are better equipped generally to deal with law rather than fact.

Table IX Skills Results 4 8

Rating

		Bad or Very Bad (1-3)	**Neither Good nor Bad (4)**	**Good or Very Good (5-7)**
4.	Precision in obtaining information	10 (37%)	11 (41%)	6 (29%)
5.	Efficiency in obtaining information	11 (41%)	13 (48%)	3 (11%)
6.	Picking up client's verbal cues	6 (22%)	17 (63%)	4 (15%)
7.	Not over repeating same topics	10 (37%)	12 (44%)	5 (19%)
8.	Clarifying gaps or confusions	8 (30%)	14 (52%)	5 (18%)

Obtaining Information. The quality of the information itself was addressed in the first assessment section above. In this section headings 4 to 8 cover the skills involved in eliciting those facts from the client. Few university level or professional courses introduce lawyers to what often becomes the major part of the work, finding the facts.[90] The tenor of legal education is to train students how to "think like a lawyer" but not how to act like one.[91] Legal education concentrates on sifting and presenting the arguments and findings relating to a given and finite set of facts. Young lawyers who have spent some four years being trained only to answer examination questions

89 Even the expert assessor marked the lawyers as highly on heading 3.

90 See, *e.g. W.* L. Twining, "Taking Facts Seriously" (1984) 34 J. Legal Educ. 22 more generally J. W. Frank, *Courts on Trial* (1949), *Law and the Modern Mind* (19 "Why not a Clinical Lawyer-School?" (1933) 81 U.Pa.L.Rev. 907.

91 See, *e.g. F.* K. Zemans & V. G. Rosenblum, *The Making of a Public Profession,* (1981).

with neatly laid out facts, are likely to feel unease when faced with the uncertainty and complexity of real life problems whose facts have not been sifted for legal relevance. Since legal practitioners usually spend far more time fact finding than on legal research the ability to obtain information with precision is an essential item in lawyers' work.[92] Yet, on heading 4, "Precision in obtaining information," 37 per cent. of the lawyers scored at a failure rate with 45 per cent. reaching the mid point.

The lawyers performed similarly on Skill 5 "Efficiency in obtaining information." Whilst "precision" aimed at a careful identification of what facts might be necessary, "efficiency" attempted to measure the general approach of the lawyers and how effectively they kept to a structure for obtaining the facts.

If lawyers are imprecise and inefficient in obtaining information, how does the imprecision and inefficiency occur? This was the subject of the next three headings aiming to isolate or emphasise particular deficiencies in this area.

Much of the literature concerns the hidden meanings behind clients' presentation of verbal information. The form of expression as well as the content, sudden lapses into silence after implicit statements,[93] and shifts in conversation[94] are all taken to be important sources of information on unconscious feelings, as are "paraphrases" or "Freudian slips.[95] Just as important, although understudied in the literature, perhaps because it is so obvious, is the necessity to listen carefully also to the direct and straightforward meanings of what is being said by the client. Observation of both experienced and inexperienced lawyers interviewing has shown numerous examples of relevant and sometimes crucial facts stated and repeated by a client which are not

92 See the short summary of research to this effect in Shaffer, *op. cit.*, pp.1-2.
93 Watson *Op. cit.*, pp.48-53, Binder and Price *Op. cit.*, pp.25-28.
94 Shaffer *Op. cit.*, p.125.
95 Watson *Op. cit.*, p.5O.

picked up by the lawyer. It seems that the lawyer's concentration on facts thought by the lawyer to be strictly legally relevant to the (lawyer's perception of the) case may deafen the lawyer to anything else the client may say. The majority of the lawyers performed at the average point on "picking up verbal cues" with some 22 per cent. failing.[96]

The problems mentioned above in Stage Two of the Tasks analysis regarding questioning of the client arise again here. It is necessary for the lawyer to maintain the client's confidence that the lawyer understands and is supportive of the client. However, inconsistencies, gaps and confusions will undermine the lawyer's belief in the veracity and honesty of the client.[97] Questioning must therefore take place, but in a careful, understanding way. Over repetition of the same topics was thought to be a problem likely to be suffered from by inexperienced interviewers. It wastes time and may show a lack of cohesive plan. It also telegraphs to the client the lawyer's lack of understanding of the case and can lead to annoyance on the part of the client and lack of confidence in the lawyer's ability. The larger proportion of the lawyers were in the average category for Skills headings 7 and 8 but there were still 37 per cent. and 30 per cent. failure rates respectively for these.

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96 A good example of problems arising when lawyers fail to pick up verbal cues happened in one interview where a client who came in for another problem was in fact a battered wife who alluded to this many times. The cues were not picked up at all by the lawyer even though this problem was directly relevant to the problem she was presenting and was far more urgent. Fortunately, the remote control camera crew pointed the problem out after the interview and the client was then given help by one of the solicitors involved in a local Law Centre.

97 Watson, op. cit., p.23 describes a method of "cross-corroboration" of the lawyer's impressions by introducing questions "at random times and out of context" in order to give the lawyer a clearer picture, without giving the client too much of a hint about where the lawyer thinks the inadequacies of the story lie. Such inadequacies, when part of a truthful story, are likely to result, he says, from a particular psychological motivation such as the need to block out an incident or person because that memory may be painful. Direct questioning (although it may be necessary later) will at this point elicit a similar response from the client, hence the need for a more indirect method. Such a method of questioning seems more applicable to a later interview in the relationship than the first time that the lawyer and client meet.

Table 4.X Skills Results 9-12

Rating

	Bad or Very Bad (1-3)	**Neither Good nor Bad (4)**	**Good or Very Good (5-7)**
9. Controlling the client and "irrelevant" information	8 (30%)	13 (48%)	6 (22%)
10. Facilitating the client to talk	5 (19%)	11 (41%)	11 (40%)
11. Not using "leading" or "closed" questions	10 (37%)	8 (30%)	9 (33%)
12. Not using complex questions	1 (4%)	13 (48%)	13 (48%)

Facilitation and Control. Attention was then turned in headings 9-12, to the manner in which the lawyers started and stopped the flow of information and narrowed or opened the area of inquiry. There is a difficult tension in interviewing between the need to obtain the facts precisely and concisely by testing a client's story on the one hand, and the need to gain clients' confidence by giving them the chance to express themselves as fully as they may wish.[98] This tension is also related to the amount of time spent on the interview as shown in Figure 1.

98 Watson, op. cit., p.30.

Figure 4.1 Time Control in the Interview

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ELICITING INFORMATION | **T H E** | **ESTABLISHING MUTUAL TRUST**

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Y

<- *T I M E* +>

Some sociologists of the professions have described them as "agents for social control"[99] and Terence Johnson in his classic work "Professions and Power"[100] also refers to the professional as defining "both the needs of the consumer and how those needs should be met." An alternative view, by way of a normative rather than descriptive approach, may be found in the work of Rosenthal.[101] His thesis is that the results of a shared and equal relationship between lawyer and client, including amounts obtained in compensation, are greater than one in which only the lawyer is "in charge." His observations conclude that although a lawyer should be aware of the ability to control an interview, more control is often used than is really necessary or beneficial.

Legal practitioners intuitively seem to have a clear sense of the need to control the

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99 See, *e.g. E.* Freidson, *The Profession of Medicine* (1970).

100 (1972). See also Hosticka. "We don't care about what happened, we only care about what is going to happen: Lawyer-Client Negotiations of Reality' (1979) *Social Problems* Vol. 26, No. 5. p.599.

101 *Op, cit.* pp.13-15.

client in order that information which is irrelevant to the legal case does not pour forth in an interview. It is, however, questionable whether much or any information given by a client is likely to be irrelevant to the lawyer's assessment of the legal case and the practical needs of the client. It is therefore somewhat doubtful how much control in this sense is necessary for the effective handling of a case. Although there is clearly some relationship between control and time constraints in an interview, this aspect was to be measured specifically under a later heading.

On this somewhat problematic skill of controlling the client and irrelevant information (Skill 9) the lawyers were assessed as being poor, with 30 per cent. faring badly and 48 per cent. operating at the mid-point.[102] Perhaps unexpectedly, in view of the literature mentioned above,[103] the lawyers were rather better at Skill 10, Facilitating the Client to Talk.

The discipline of strict legal inquiry, where a logical sequence of questioning is followed, would assist the lawyers' training in marshalling their thoughts so as not to ask "complex" questions, a term of art meaning more than one question at the same time. It is interesting that heading 12 should be among the highest of good scores and lowest of failure rates.

Conversely, the lawyers did not perform as well when it came to heading 11 by using too often the cross-examining style of "leading" and "closed" questions. This counterbalance appears on closer scrutiny to be a further example of the narrowing down aspect mentioned above.[104] The lawyers tended to concentrate in their questions

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[102] It may be that the lawyer assessors expected more "control" than, from the Rosenthal viewpoint, would be necessary and marked accordingly. Our expert thought the lawyers fared rather better at their control, marking them at 33 per cent. failure, 25 per cent. average and 41 per cent. in the Good-Very Good Category, but his marks generally tended more to the extreme than the lawyer assessors.

[103] See notes 12, 13 above.

[104] See the Summary at the end of the Tasks section.

and thinking process on more and more narrow factual areas, without giving their clients the opportunity to broaden out the issues. Seen as a funnel with a wide area at the top, the questioning seemed to narrow further and further until it was within the narrow constrictions of the funnel and legally acceptable or seemingly legally relevant subject area. One approach to escape from this constriction would be to start off a "new funnel" with further open questions, and more funnels after that. Questioning strategy does involve sequential restriction of issues in this way, and in order to interview effectively it is necessary to close one issue and move on to the next. This the lawyers seemed to find difficulty in doing. It would be wrong therefore to view the good result for Skill 12 without also noting how it was gained.

Table 4.XI *Skills Results 13-17*

			Rating	
		Bad or Very Bad	*Neither Good nor Bad*	*Good or Very Good*
		(1-3)	*(4)*	*(5-7)*
13.	Ease with client	6 (22%)	11 (41%)	10 (37%)
14.	Empathy with client	11 (41%)	8 (30%)	8 (29%)
15.	Reassurance of client	16 (59%)	6 (22%)	5 (19%)
16.	Time control throughout	12 (45%)	8 (30%)	7 (25%)
17.	Opening/closing ease and control	17 (63%)	5 (19%)	5 (18%)

Reassurance and time. Headings I3 to 17 attempted to inquire into how the lawyers balanced their own "professional" needs of objectivity, formality and time constraints against the necessity to reassure their clients, gain their confidence and empathise with their clients' difficulties. The time tension can again be viewed clearly under these headings.

Much of the client's ease toward the lawyer will result from attention to the physical

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surroundings of a lawyer's reception room and the office or interview room,[105] which were not items within the lawyer's control in this experiment. But the lawyer must also adopt what Watson calls "a non-judgmental and non-moralising posture"[106] so that the client will be able to tell the whole story as the client sees it and so that the lawyer will be able "to listen more closely to what his client tells him"[107] without feeling the need to react other than showing interest. This may come in the form of what Binder and Price call "non-committal acknowledgements" such as "mmm," "really" and "interesting" (or just "head-nodding"),[108] or "active listening" by reflecting back to the clients feelings they have expressed in the interview.[109] The lawyers seemed overall to fare quite well on this skill with 41 per cent. at the mid-point and 37 per cent. above.

Showing empathy is a rather more active skill and may require more active listening, reflection of feelings back to a client and "motivational statements" such as explanations of why particular information is necessary.[110] Clear statements of understanding will often be necessary[111] and a consciousness shown throughout the interview of the needs of the client. The lawyers scored less well in this category with 41 per cent. below the mid-point.

Benjamin refers to "reassurance" of the client as "directed toward helping the client achieve a sense of comfort about the interview relationship."[112] This stands opposed to a more intuitive understanding of "reassurance." Such an understanding would be

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[105] See, *e.g*. L. Shurman, *The Practical Skills of the Solicitor*. and T. L. Shaffer. *op. cit.* pp.94-105.

[106] Op. cit.. p.7.

[107] Watson. *Op. cit.*, p.7.

[108] *Op cit.*, p.24.

[109] *Op cit.*, pp.25-37. For a strong reaction against this 'community of two' see W. Simon, "Homo Psychologicus: Notes On A New Legal Formalism', 32 Stanford Law Rev. 487, (1980).

[110] *Op Cit.*. pp.105-108.

[111] Watson *Op. cit*, pp.8-10.

[112] See Watson, *Op Cit.*, p.92 and A. Benjamin. *The Helping Interview* (1969) pp.108-155.

more directed towards the lawyer removing the anxiety of the case from the client by taking the responsibility for the case off the client's shoulders and on to the lawyer's. If a collaborative relationship between lawyer and client is to occur then this latter form of reassurance is not helpful.[113] This is therefore a somewhat problematic heading for assessment. Our lawyers proved very poor at this skill, 59 per cent. falling in the 1-3 category and a further 22 per cent. functioning at the mid-point.

The skill of time control in an interview is most difficult to master in any helping situation where the interviewee is placing some reliance on the interviewer. The time itself that the professional "gives" is part of the service offered to the client.[114] Rarely is there enough time in an initial interview to address all the lawyer's and all the client's concerns. The lawyer in a first interview should therefore concentrate on obtaining an overview of the facts and needs of the client[115] whilst checking that there is nothing urgent which needs to be carried out before they can meet or communicate again.

It is helpful to give a client a clear idea of the amount of time the lawyer has available for the interview so that the client does not have unreal expectations of what will occur.[116] As measured by the American Law Professor only 15 per cent. of the lawyers thought of doing this in an open way verbally. The remainder either chose a non-verbal method of communication such as looking at their watches, or simply ignored the problem altogether until it became too late. It is also the job of the lawyer to control the interview so that it is possible to carry out the necessary tasks within the time allotted. It was hypothesized that such control would be more difficult and more crucial at the beginning and end of the interview. The lawyer would be setting the

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[113] Watson, *op. cit.*, p.86.

[114] Watson, *Op. cit.*, p.132.

[115] Binder and Price, *Op. Cit.*, pp.53-86.

[116] See how this affects doctors in P. Ley, ' Psychological Studies of Doctor-Patient Communication" in S. J. Rachman, *Contributions to Medical Psychology* (1977) Vol 1, p.9. See also Watson, *op. cit.*, p.37.

scene and creating expectations of time available at the beginning, and would be even more conscious of time running out at the end.[117] The interview is likely to be a cathartic experience for the client who is anxious when beginning and and should be more reassured at the end. If there is difficulty in ending, it could well be because of a feeling of lack of reassurance, or something more to say, or absence of agreement with the advice or plan of action offered. It was interesting to see that many of the new lawyers experienced difficulty in controlling their allocation of time available, 45 per cent. failing to reach the mid-point. This rose to 63 per cent. when the opening and closing critical phases were assessed, which seems to suggest that the difficulties involved are manifested more clearly in those parts of the interview.

To summarise this section, there was a tension for the lawyer subjects between the needs for time control and the needs to show ease, empathy and reassurance to their clients. They did not perform highly in either group of skills but they did seem to be somewhat better at showing the more natural social skills of ease and empathy. Time control appears to be a skill which needs some practice and experience or may need specific training to develop in a beneficial manner.

[117] The Counselling part of the interview which occurs towards the end, may be especially time consuming. See Binder and Price, *op. cit.*, pp.190-191.

Advising and Counselling.

Table 4.XII *Skill Result 18*

		Rating		
		Bad or Very Bad	*Neither Good nor Bad*	*Good or Very Good*
		(1-3)	*(4)*	*(5-7)*
18.	Giving advice and counselling	18% (67%)	4 (15%)	5 (18%)

The advising and counselling of the client are the main "products" of the legal interview and the "service" for which the client has approached the lawyer. In the Information section we looked at the quality of the advice as noted down by the lawyer and as occurring during the interview in terms of its informative role. In the Tasks section assessment by the practising lawyers covered how well the advice or plan of action were set out by the experimental subjects. Here in the Skills section more attention was paid to the interactive skills involved in both advising and counseling clients.

A distinction may be drawn from the American writings on this subject between "advising" and "counseling" *(sic)* clients. "Advising" seems to mean the lawyer suggesting to the client one particular course of action which the lawyer considers best for the client. "Counseling" seems to mean the presentation of a number of options to the client and helping the client go thoroughly through those options, whilst allowing the client to make the final choice.[118] Explained in this way it does not necessarily need to borrow too strongly from ideas based in the psychotherapeutic relationship.[119]

"Counselling" is not a word which seems to be easily accepted by English ears and

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[118] See, *e.g.* Binder and Price *op. cit.* pp.135-191. It also conforms to Styles 4-7 of the Byrne and Long diagnostic styles, *op. cit.*, pp.103-112.

[119] Watson, op. cit., pp.141-156.

does not appear in any of the English short practitioner guides,[120] although almost all of the American texts refer to both "interviewing" and "counselling" *(sic)* in their titles.[121] Counselling as explained above, the presentation of more than one option and allowing the client to choose, is essential to a more collaborative relationship along the lines of the Rosenthal model.[122] The American literature does not however in general differentiate between the work to be carried out in first and subsequent interviews. The major work of counselling the client seems more likely to occur in a subsequent interview when all the legal options have been researched by the lawyer and all the necessary facts obtained. If any counselling as such is to take place in a first interview it may concentrate more on the immediate plan of action rather than the long term goals of the client regarding the case.

There are numerous pitfalls in both advising and counselling clients. The skills involved cover the more traditional skills of "thinking like a lawyer," applying law to facts, as well as the skills of developing practical alternatives and explaining all of these to a lay client. Apart from the legal analysis (which was not the primary focus of this study) errors can also be made for example in the use of difficult language, withholding background information or procedure, failing to perceive that advice is often the telling of "bad news," and not being aware of client reaction to the advice.[123] The high level of 67 per cent. of the lawyers below the mid range for this heading is the highest "failure" rate noted by the English practitioner assessors on any of the skills in the list. They clearly felt the lawyers were not at all skilful in advising and counselling. The American assessor was not quite so pessimistic, however, with only 41 per cent. falling in the 1-3 range and an equal number rising into the 5-7 range. It

120 See, *e.g.* Shurman, *op. cit.* note 23. A welcome harbinger of change is the note by M. A. Haley, 'Legal Services and Counselling: Changing Attitudes for Changing Times," [1983] L.S.Gaz. 2293-2294.

121 Binder and Price *op. cit.*, Freeman and Weihoffen *op. cit.*, Shaffer *op. cit.* and Watson *Op. cit.*

122 See Watson *Op Cit.*, p.142.

123 See below under the Discussion.

could therefore be that the English assessors were looking more for the "advising" model than the "counselling" one.

Summary

From a general view of the Skills section it seems that the lawyers were more adept at language skills such as dealing with client's jargon, legal terminology, client's verbal cues and not using complex questions. They also showed some skill in facilitating the client to talk. They were poor at investigative skills and even less able to handle personal topics, show empathy or give reassurance, although they did show social ease with the client. Finally, control of time in the interview and advising and counselling were their areas of least skilfulness. Not surprisingly, the skills items which were particularly related to the lawyer-client interview seem to have been more poorly handled than those which the inexperienced lawyers would have already encountered in normal social discourse.

DISCUSSION

Table 4.XIII *Comparison of Average Numbers of Lawyers Falling in 1-3 Range by Section*

	Information (notes)	*Information (tapes)*	*Tasks*	*Skills*
Average % falling in 1-3 range.	72.2	61	50.2	34.7

Table 4.XIII looks at the proportions of bad performers in each section of this study. The numbers were computed by averaging out the percentages falling in the 1-3 category for all the categories in each section. The highest "failure" rates occurred in

the Information section with 72.2 per cent. average failure on the notes and 61 per cent. average failure on the tapes. The Tasks section shows an average of 50.2 per cent. of the lawyers falling into the 1-3 category and the Skills section comes out best with only 34.7 per cent. falling below the mid-point.

Table 4.XIV *Comparison of Average Numbers of Lawyers in 5-7 Range by Section*

	Tasks	*Skills*
Average % falling in 5-7 range.	20.03	25.4

When one looks at the other side of the coin, the "good" performing category within the 5-7 range, there is not a correspondingly higher percentage in the Skills than the Tasks section (see Table 4.XIV above). Although the Skills are still about 5 per cent. higher than Tasks, the previous 15 per cent. difference has largely been swallowed up at the mid-point (4 grading). Whilst the lawyers are clearly better at the Skills than the Tasks, there is not a large percentage falling into the "good" category for either.

Judging from this assessment the lawyer subjects appeared to possess at least some measure of behavioural skills necessary for the work of interviewing clients and dealing generally with people and their problems. They appeared to have much less of a conception of when and how to use those skills to further the tasks necessary to be carried out in a first interview. They showed little obvious framework for the use of their skills. This perhaps caused them to lose sight of some of the tasks or to carry out the tasks improperly or in a confusing order. All of this had the effect of poor information gathering within the interview.

It seems therefore that social experience and legal education do provide new lawyers with some of the basic skills necessary for being a lawyer. What is more lacking is an understanding of the contexts in which these skills are to be used, insight into the roles and activities of lawyers and proper frameworks for putting such skills into

practice. The subject lawyers appeared to treat their clients more as walking examination questions to be opened up to rigourous scrutiny, than as people with problems. The lawyers showed many of the "controlling" characteristics discussed in the literature, deciding both what the client's problem was and how it should be solved, through the narrow confines of legal categorisations. The lawyer subjects pounced on words with legal connotation and concentrated their questioning on areas which sounded legally relevant long before their clients had finished describing the elements of their problems.

The lawyers did not give their clients time to tell their stories properly. They did not check that they had understood the clients' facts and feelings correctly or that their clients agreed with their advice or plan of action. Because of this, collaboration between lawyer and client, or even an agreeable working relationship were unlikely sequels to these first interviews. The working model was more clearly that of the "High Priest" of the law handing down mystical pronouncements to grateful recipients. If the most important objective of a first interview is to achieve a good working relationship between lawyers and clients based on mutual understanding and confidence,[124] our lawyers were not successful. As we have already seen they were even less successful if the most important objective is to gather all the information at the first interview.

Learning the law in isolation of the social context in which it operates can be seen as a significant gap in legal education which leaves those emerging into at least the solicitor's branch of the profession inadequately equipped to perform competently as practising lawyers. It may be argued that the appropriate uses of skills learned at the academic and vocational stages will "come" in time and with experience during the practical stage of training in articles. It is however doubted whether experience, untutored and uncorrected, is by itself a sufficient teacher to guard against the

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124 See note 25 above.

entrenchment of poor techniques and poor attitudes towards clients. The clients who have to suffer during this learning process should also be taken into account. It is also submitted that there are some aspects of interviewing which are not intuitive and that no amount of experience can teach. They need to be explained and discussed and worked with, in the context of a teaching environment.

In the next two Chapters some of the questions raised by this Conclusion will be addressed. Chapter Five asks whether interviewing and counselling can be taught and, whether certain teaching methods are better than others. Chapter Six will question whether experience alone is an effective teacher.

The study in this Chapter has shown major deficiencies in the abilities of new entrants to the profession to carry out one of their most important functions, that of interviewer and counsellor. However, the study concentrates on new entrants to the profession and places them under "laboratory conditions" with "acting clients" and time restrains. It will therefore be necessary in the research in succeeding Chapters to investigate the work of more experienced lawyers in the natural context of their own office environment with real clients.[125]

[125] The initial research for this paper was funded by the Nuffield Foundation Small Grants Scheme for innovations in teaching methods. Thanks are due to Derek Rutter for inital advice; Peter Smith for some of the assessment; William Twining, Alan Paterson and Sol Picciotto for reading early drafts, and most of all to Lorraine Sherr for advice; assistance and encouragement from idea through implementation to final draft. If, faults there be, our combined legal skills will probably enable us to apportion blame elsewhere.

CHAPTER FIVE

INTERVENTION - THE VALUE OF TRAINING

Introduction

This chapter reports the next stage in the research into client interviewing skills. The trainee solicitors whose performance was assessed in the last chapter were randomly divided into three groups for training. Two groups each received a different type of training before they undertook a second interview which was recorded for assessment. Their 'trained' performance was compared with their original interviews and those of the third, control group who received no training between their first and second interviews. The two different forms of training were also compared.

Objectives

The research was intended to test the value of interview skills training, and particular forms of training, including audio-visual play-back of interviews. In so doing the research was intended to test the view among many in the legal profession that skills of practice, such as interviewing, can only be learned through the experience of "sitting-in" on existing lawyers.

In addition the research was intended to investigate whether an increase in interviewing skills could lead directly to an increase in quality of information obtained in an interview.

The Training Course

1. The Preparatory Reading Materials

Reading materials, which had been used for some years in an interview training programme at Warwick University Law School, were refined by a group of students and staff who had taught from or studied with the original materials. The materials were not intended to tell the reader how to conduct an interview but rather to open the reader's mind to the interviewing process and to his/her attitudes towards that process and clients. Subsequent seminars were then intended to enquire further into such attitudes and examine agreements with or resistances to those readings. The readings were not provocative but might be seen to be so to a young lawyer who had not come across such ideas previously.

2. The Interviewing Film

The course included a film made on video-tape in the Warwick Audio-Visual Centre of a teaching doctor talking to law students on how he trained his doctors to interview their patients.[1] The medical analogy is interesting and useful, since most law students will have been in a doctor's surgery but few will have been in a solicitor's office. It is also often useful to visualise a situation as it applies to someone else i.e. the professional/lay-person relationship as seen through

1 Doctor David Metcalfe was then Senior Lecturer at the University of Nottingham School of Community Medicine and is now Professor of Medicine at the University of Manchester.

doctor/patient eyes, rather than as the lawyer-client relationship.[2]

3. Seminars

The course involved seminars intended to bring out the reactions of the trainee solicitors to the reading materials, the film and also their first interview which took place on the morning after arrival and before dissemination of the reading materials or any tuition. The individual perceptions of the trainees were brought out by group leaders and discussed to show that fears about interviewing were common, and in order to reinforce ideas already received but not accepted. The approach however was non-directive and the accent was on the individual trainee working out his/her own particular stance.

A second seminar concentrated on the thirteen point plan of necessary tasks to be performed at a first interview seen in the previous chapter, used here in prescriptive mode. This was a further occasion for some discussion and comment.

4. Audio-Visual Play-back

Trainees had replayed to them the video-tape of their first interviews and those of other trainees in their seminar group. Normally audio-visual replay is arranged by stopping the tape at particular points for comment and discussion. For the purposes of this course the replay was performed with a minimum of discussion so that the effect of the audio-visual replay itself could be measured, rather than

2 See how this can be utilised in a training context in Sherr, A "Client Interviewing for Lawyers", Sweet & Maxwell 1986, pps 8-10.

the further discussion it would foster.

5. The Experimental Aspects and Measurements taken

The teaching programme was administered to the 27 trainees in a controlled manner to allow for quantifiable assessment. The trainees were randomly assigned to three groups, A, B, and C. For ethical reasons every group received the full training programme; for experimental purposes this was administered in the following way.

i) All trainees underwent an initial interview which was audio-visually recorded, after which:

ii) Group A received the full teaching programme and then carried out a second interview.

iii) Group B received the teaching programme without audio-visual replay and then carried out a second interview. (Subsequently they received audio-visual feedback).

iv) Group C carried out their second interview (and then received the full programme of training).

TABLE 5.1 Plan of the Experiment

Group	Plan of Course Timing					
A	Interview 1	Teaching	A.V. Feed-back	Interview 2		
B	Interview 1	Teaching		Interview 2	A.V. Feed-back	
C	Interview 1			Interview 2	Teaching	A.V. feed-back

Comparisons of the six sets of interviews allow for analysis of the various inputs from the programme in the following way:

Stage 1 assessed all the first interviews to provide a baseline standard of the interviewing abilities of the trainees. This was reported in full in the previous chapter.

Stage 2 compared the second interviews of groups A and C. This comparison allowed assessment of the full programme compared with no training in interviewing.

Stage 3 compared groups A and B thereby assessing the effect of audio-visual replay.

6. Assessment

The video-tapes and casenotes, which the trainees were asked to make up during and immediately after their interviews, were then analysed as shown in the following table, with the same assessors as in Chapter Four, working blind as to the hypothesis under examination.

TABLE 5.II Plan of the Assessment

Date		Assessment	
		Tasks Performance	Skills Performance
Video Tapes	Quality of information obtained	(a) By practicing lawyers (b) By expert	(a) By practicing lawyers (b) By expert
File Notes	Quality of information recorded		

Scoring was carried out as before on seven point scales. For the purpose of statistical analysis within this chapter (Chi square tests) they were grouped as follows:

Scores 1 - 3 = "bad"

4 = "neither good nor bad"

5 - 7 = "good"

"Failure" was taken to include all "bad" scores (i.e. 1 - 3), allowing a leniency by classing average scores as pass scores.

A summary of the findings is stated first followed by details of the individual comparisons and full data and performance charts, as they are quite numerous.

RESULTS SUMMARY

STAGE 1

The general performance was poor, as has been reported in full in the previous chapter. The failure rates on thirteen categories of analysis of information obtained, and information obtained and recorded varied between failures of 30% and 96% with an average failure rate of 67% on those categories. Failures on skills performance of eighteen categories of skill was also far ranging with an average failure rate of 35% for these categories. Failure rates on the thirteen tasks ranged between 19% and 93% with an average failure rate of 50% on the thirteen categories.

STAGE 2

The trained group performed significantly better than the untrained group as is shown in Table 5.III which is a summary of the comparison between fully trained Group A and untrained Group C

TABLE 5.III A Comparison of Trained and Untrained Groups at Second Interview

> = greater than
≈ = approximately equal to

	Evaluation	Source	Sig.Level	Findings		
			P<	Good	Average	Bad
1.	Information recorded	Notes	.02	A>C	A>C	C>A
2.	Information obtained	Tapes	*ns	*A>C	*A>C	*A>C
3.	Skills	Lawyer assessors	.01	A>C	A>C	C>A
4.	Tasks	Lawyer assessors	.01	A>C	A>C	C>A
5.	Skills	Expert assessment	.005	A>C	A>C	
6.	Tasks	Expert assessment	.001	A>C	C>A	A≈C

* See note under Table 5.IV

A comparison of lines 1 and 2 in Table 5.III shows that the clients were producing the information to both groups but that the untrained group did not record it and failed to act on it (see lines 3 - 6). In comparing their first and second interviews (in order to assess the gains due only to the experience of the first interview) half of group C actually decreased in their scores (see below). Group A individually shows no decreases and most increase. The fact that some of the control group increased shows that there may be some gain as a result of experience alone for some individuals, but training clearly enhances this and also helps those who do not gain by experience alone.

STAGE 3

The group trained with audio-visual replay performed significantly better on most measurements than those trained by readings and teaching alone, as is shown in Table 5.IV which is a summary of comparisons between the fully trained Group A and the partially trained Group B.

TABLE 5.IV A Comparison of Fully Trained and Non-Video Replay Trained Groups

	Evaluation	Source	Sig. Level	Findings		
			P<	Good	Average	Bad
1.	Information recorded	Notes	ns*	A=B*	A>B*	A=B
2.	Information obtained	Tapes	ns*	A>B*	A=B*	A=B*
3.	Skills	Lawyer assessors	.001	A>B	A=B	B>A
4.	Tasks	Lawyer assessors	.01	A>B	A=B	B>A
5.	Skills	Expert assessors	.10 (trend)	A>B	A=B	A=B
6.	Tasks	Expert assessors	.01	A>B	B>A	A=B

* These findings did not reach statistical significance; explanations under the "Findings" column refer to the numerical figures (actual findings).

As there is no significant difference on lines 1 and 2 in Table 5.IV above, it would seem that audio-visual replay does not particularly enhance the quality of information obtained or recorded and training by readings and teaching is sufficient for this aspect. However the way in which the information is obtained and the interview conducted in terms of effect on the client seems to be improved by the use of audio-visual teaching technique. This is reflected in the significant differences found on the tasks and skills measures (lines 3 - 6).

THE RESULTS IN DETAIL

The results which are summarised above are investigated in more detail below. In particular it has been possible to analyse statistically not only

(i) the difference in performance of each group on second interview

and

(ii) the difference in performance between groups on second interview

but also

(iii) the differences in change in performance of each group between the two interviews.

Performance change between first and second interviews

Table 5.V. details the results for changes of each group on totals of Information (notes), Tasks and Techniques using t-tests.

Table 5.V. Analysis of difference between first and second interview performances

Assessment		Group		
		A	B	C
Information	t=	1.8 (.05)	1.67(.10)	.15 (ns)
Tasks	t=	1.5 (.10)	.77 (ns)	.2 (ns)
Techniques	t=	2.2 (.025)	.31 (ns)	.73 (ns)

(Significance levels in brackets)

The partially trained (B) and untrained group (C) show no statistically significant differences between their performances on first and second interviews, although Group B shows a trend. The fully trained Group A shows significant differences on two out of the three items.

The breadth of change is shown on the following bar charts 5.V (a) and 5.V (b) of the overall changes per group and there is also a chart of the individual direction of change of each person for the Information (Notes) item 5.V(c). It will be seen that the greatest increases from first to second interview for information obtained and noted lie in the two trained groups (Charts 5.V.(a) and (b)). It will also be seen that the greatest direction of individual change upwards also lies with the two trained groups and the fully trained group has very little downward change.

Chart 5.V.(a) Information (Notes) totals First/Second Interview for each group

Second Interview for each group.

Heavy=2nd
Broken =1st

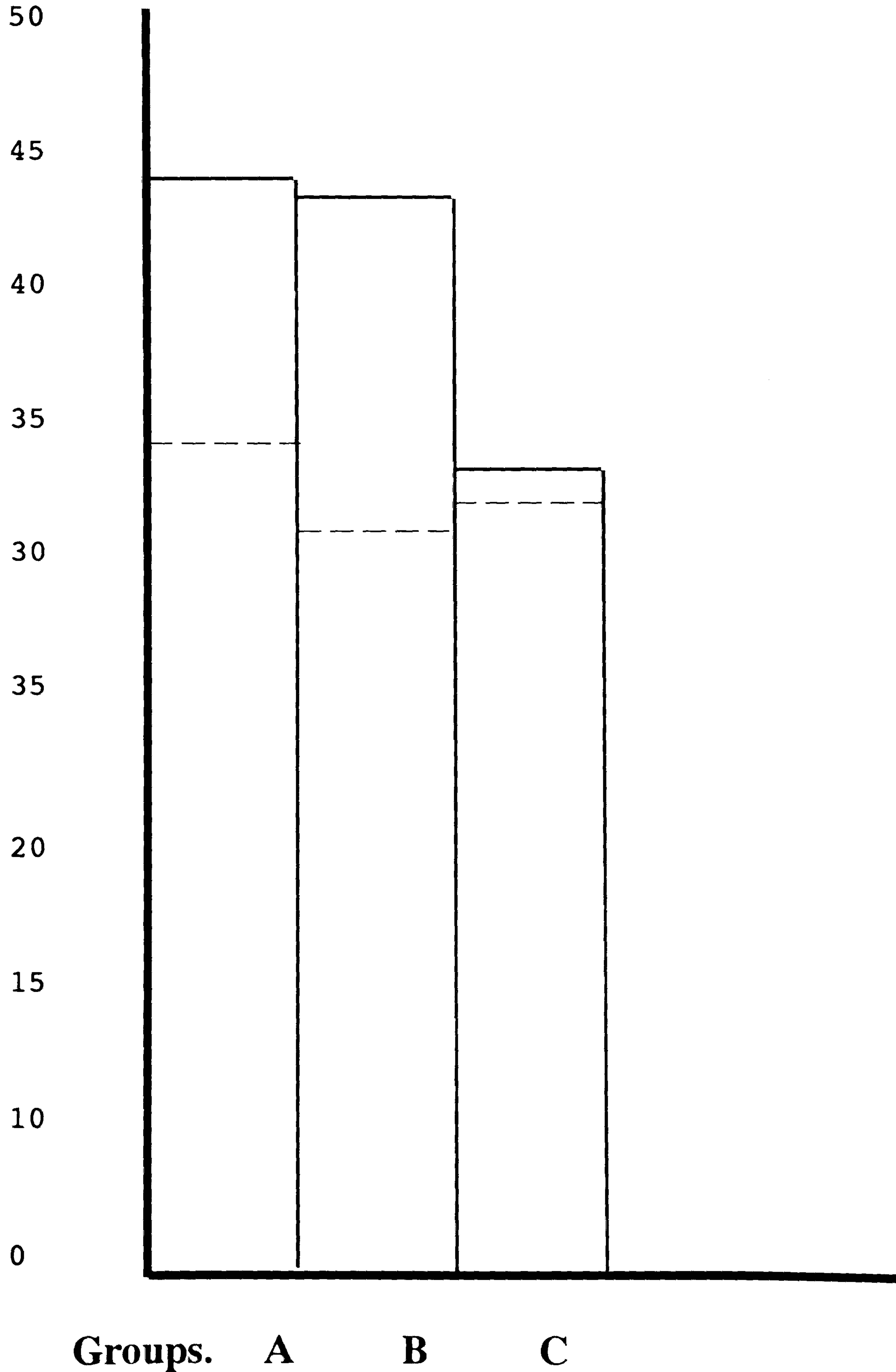
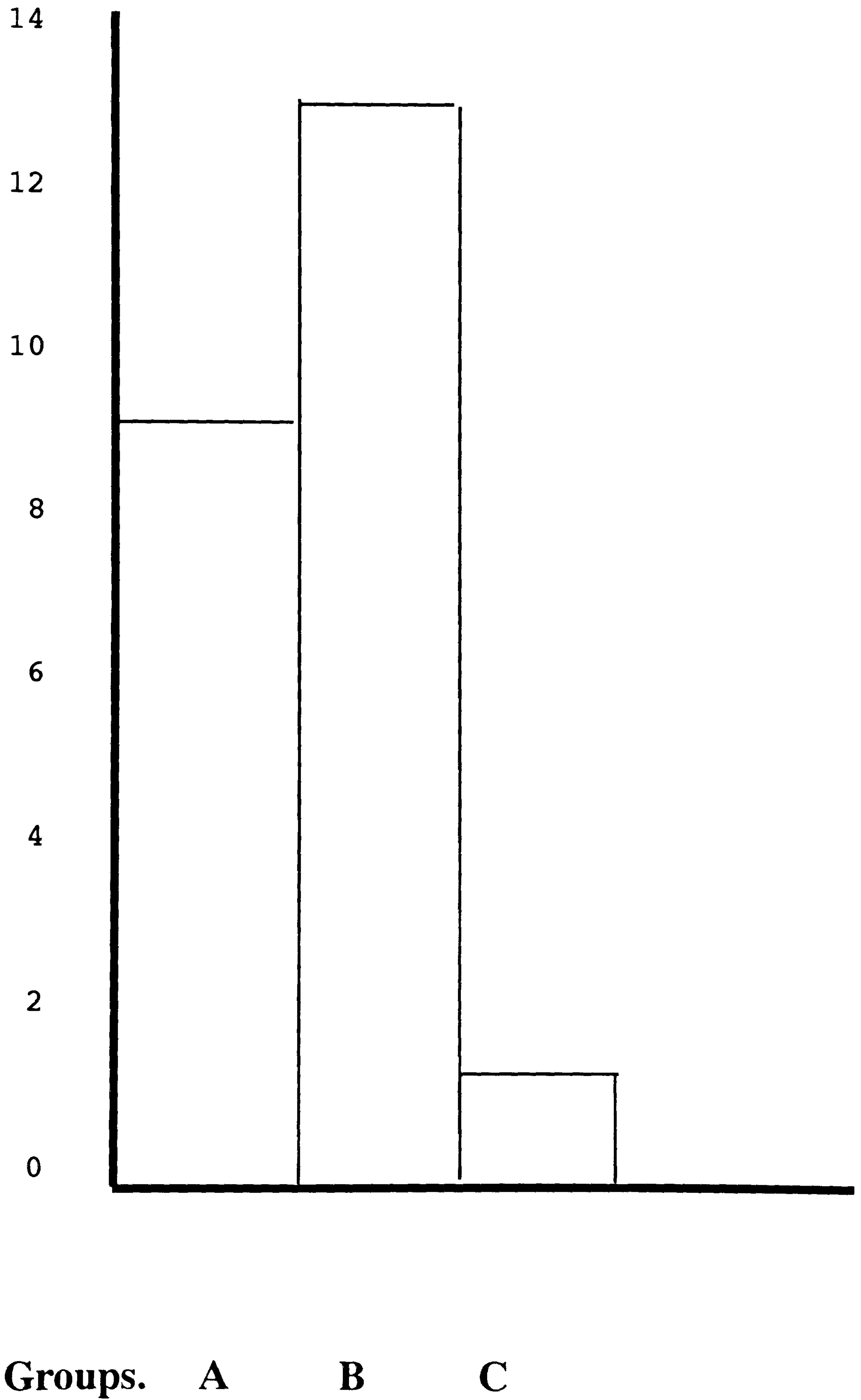


Chart 5.V.(b) Information (Notes) totals
Difference between First and Second Int.



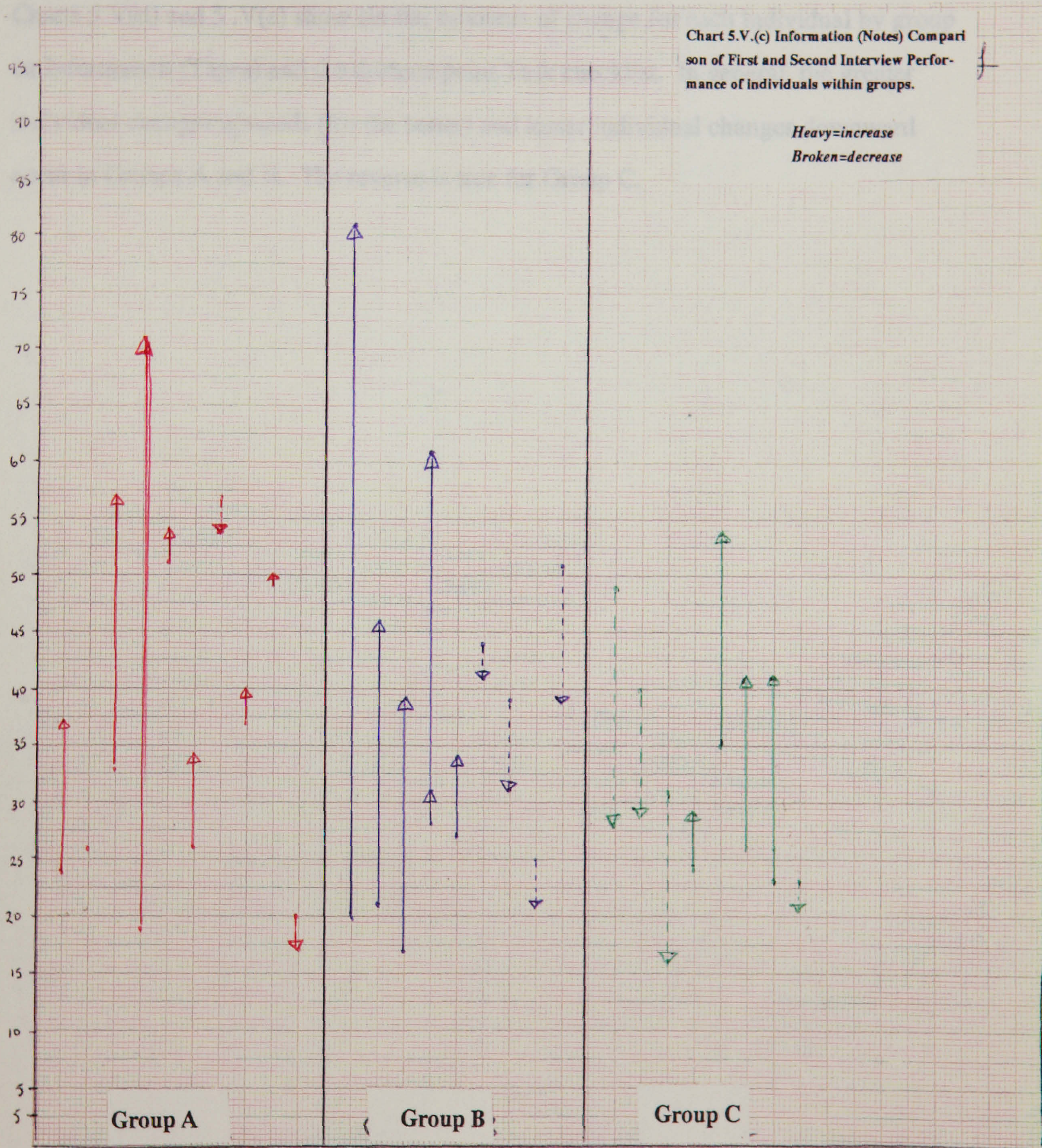


CHART 5. V. C.

Charts 5.V(d) and 5 .V(e) show similar amounts of change for each individual by group on Information (Tapes) and the thirteen point Task checklist. In general, the greater individual changes upwards (for the better) and lesser individual changes downward occur in Groups A and B. The reverse is true for Group C.

Chart 5.V.(d) Information (Tapes) Comparison of First and Second Interview Performance of individuals within groups.

Heavy=increase
Broken=decrease

Group A

Group B

Group C

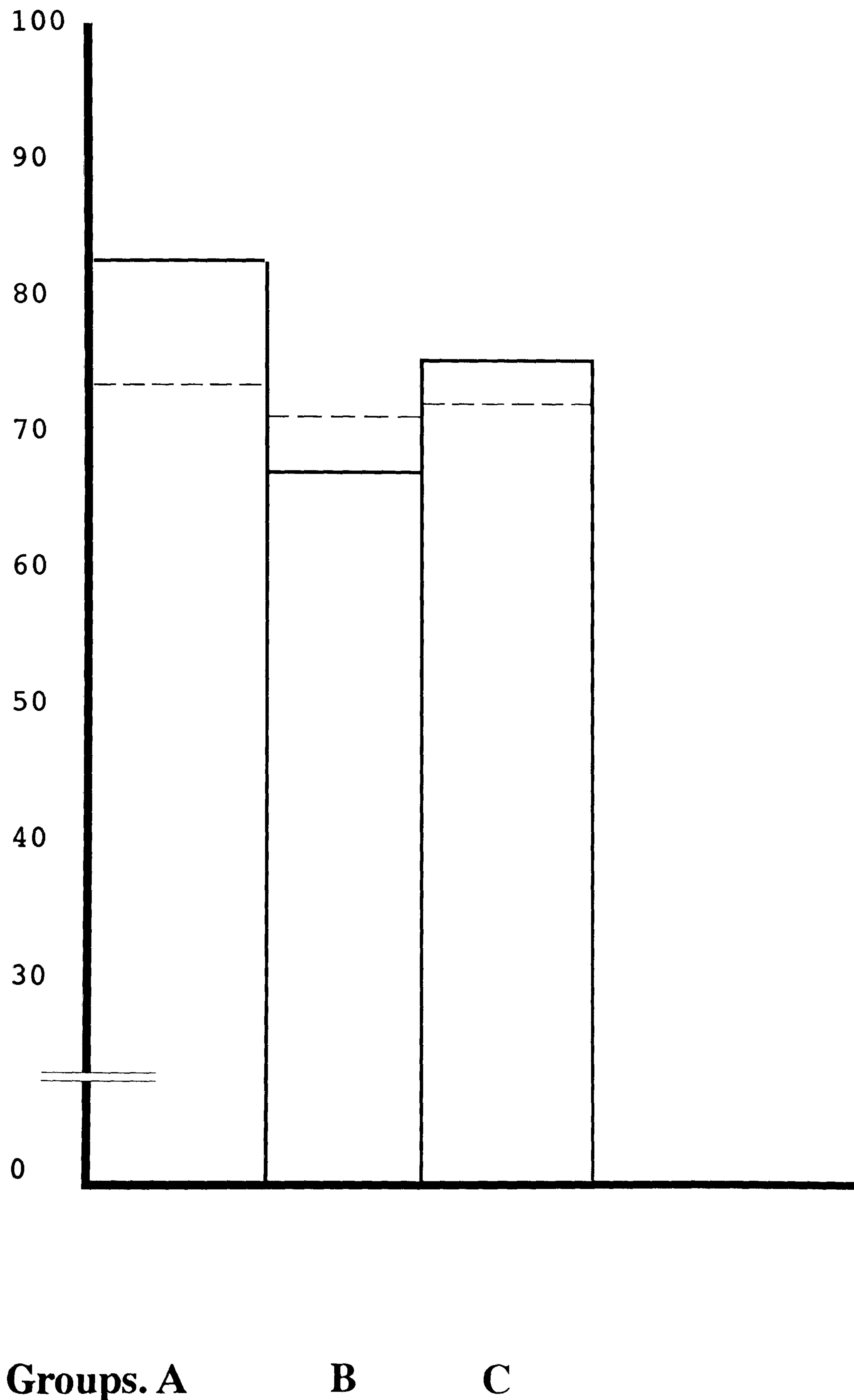
Chart 5.V.(e) Tasks: Comparison of First and Second Interview Performance of individuals within groups.

Heavy=increase
Broken=decrease

Chart 5.V.(f) Techniques: Totals First/

Second Interview for each group.

Heavy=2nd
Broken =1st



An effect which appears to be masked in Tables 5.III and 5 .IV is shown in Bar Chart 5 V (f) which demonstrates group change on Techniques between first and second interviews. It will be seen that Group B performs very similarly on average with the other two groups on first interview but drops its techniques performance on the second interview. Group A, whose behavioural techniques were well enhanced by the audio-visual playback of their first interviews, improve markedly and Group C improves rather less. Clearly the behavioural impact of the interview playback was stronger than experience alone (Group C) but Group B's training lacked this dimension and fell by as much as Group C rose.

Second Interview Detailed Comparisons

On the series of measures analysed, individual areas of performance are of interest and are set out below. Total scores were also calculated to give a measure of overall performance and comparisons were carried out.

Table 5.VI Comparison of Trained and Untrained Groups in Information Noted

Variable	**Group Mean Score A**	**C**	**T Sig**
1. Client personal information	4.1	4.5	.3 ns
2. Other parties	3.8	3.4	.4
3. Witnesses	1.7	1.9	.4
4. Problem subject categorisation	3.4	2.7	.25
5. Events	3.9	3.4	.28
6. What the Client wants	4.9	2.8	.04
7. Previous advice and decisions	1	1	ns
8. Legal proceedings	1.7	1.1	.18
9. Next contact between client and lawyer	3.7	1.9	.04
10. Work to be done by lawyer	3.6	2.9	.28
11. Work to be done by client	3	1.4	.04
12. Advice given	4.2	2.1	.01
13. General clarity	4.8	3.8	.11
Total Scores	44	32.4	.05

It will be seen that overall the trained group A performed significantly higher than the untrained (C). This can be accounted for on individual items by noting the four out of thirteen points of significant difference:

(a) On "What the client wants" Group A performed significantly better than Group C at .04 level. The mean score for A was 4.9 and for C, 2.8.

(b) On "Next contact between client and lawyer" Group A performed significantly better than Group C at 0.04 level. The mean score for A was 3.7 and for C, 1.9.

(c) On "Work to be done by client" Group A performed significantly better than Group C at 0.04 level. The mean score for A was 3 and for C, 1.4.

(d) On "Advice given" Group A performed significantly better than Group C at 0.01 level. The mean score for A was 4.2 and for C, 2.1.

Table 5.VII Comparison of Trained and Untrained Groups on Information (Tapes)

Variable	**Group Mean Scores**		**T(Sig)**
	A	**C**	
1. Client personal information	4	5.3	.09
2. Other parties	4.5	4.8	.4
3. Witnesses	3	2.1	.2
4. Problem subject categorisation	2.3	1.6	.2
5. Events	5	5.1	.4
6. Complaint	5.4	5.4	.4
7. Previous advice and assistance	1.8	2	.4
8. Legal proceedings	1.1	2.3	.08
9. Next contact between client and lawyer	4.5	2.8	.07
10. Work to be done by lawyer	4	4.6	.2
11. Work to be done by client	3.4	2.4	.1
12. Advice given	4.1	5	.2

Although there were no significant differences on the 12 points there were three trends.

(a) On "Client Personal Information" Group C tended to perform better than A at the .09 level. The mean score for C was 5.3 and for A, 4.

(b) On "Legal Proceedings" Group C tended to perform better than A at the 0.08 level. The mean score for C was 2.3 and for A, 1.1

These are both counter intuitive results and, coupled with Table 5.VI above, suggest that the training had more effect on appreciating and noting the information than simply

eliciting it.

(c) On "Setting the Next contact between client and lawyer" Group A tended to perform better than Group C at the 0.07 level. The mean score for A was 4.5 and for C 2.8.

Table 5.VIII Comparison of Trained and Untrained Groups on Tasks : Lawyer Assessment

Variable		Group Mean Score A	C	T (Sig)
1.	Greeting seating introductions	4.7	4.5	.2
2.	Opening question or helpful silences	4.9	4.3	.02
3.	Obtaining of basic personal & parties information on details depth	4.9	4.1	.03
4.	Factual questioning on details depth and gaps with legal relevance	4.5	4.1	.2
5.	Sum up facts, recount check back, clients agreement	4.8	3.5	.005
6.	Note taking	4.3	3.9	.1
7.	Statement of advice and/or plan of action	4.3	3.9	.1
8.	Repetition of 7 plus client agreement or modification	4	3.9	.4
9.	Recount client follow up	4.1	3.1	.06
10.	Recount lawyers follow up	4.3	3.9	.2
11.	Set next meeting or contact	3.8	3.2	.2
12.	Any other business	3.7	2.1	.02
13.	Termination and goodbyes	4.2	4.4	.3
Total Scores		**56.3**	**48.2**	**.10**

5 out of the 13 points were significantly different although the totals show only a trend.

(a) On "Opening Question" Group A performed significantly better than Group C at the 0.02 level. The mean score for A was 4.9 and for C, 4.3.

(b) On "Basic Information Outline" Group A performed significantly better than Group C at the 0.03 level. The mean score for A was 4.9 and for C, 4.1.

(c) On "Note Taking" Group A performed significantly better than Group C at the 0.005 level. The mean score for A was 4.8 and for C, 3.5.

(d) On "Recount Client Follow-up" Group A performed significantly better than Group C at the 0.06 level. The mean score for A was 4.1 and for C, 3.1.

(e) On "Any Other Business" Group A performed significantly better than Group C at the 0.023 level. The mean score for A was 3.7 and for C, 2.1.

TABLE 5.IX Comparison of Trained and Untrained Groups on Tasks: Expert Assessment

	Variable	Group Mean Score A	C	T(sig)
1.	Greeting seating introductions	5.1	4.7	.28
2.	Opening question or helpful silence	5.6	4.1	.001
3.	Obtaining basic personal, parties info and case outline	4.7	4.3	.2
4.	Factual questioning on details depth and gaps relevance	5.2	4.1	.07
5.	Sum up facts, recount check back-clients agreement	2.4	2.6	.3
6.	Note taking	5.3	4.8	.1
7.	Statement of advice and/or plan of action	5	4.6	.3
8.	Repetition of 7 plus client agreement or modification	3.9	2.9	.1
9.	Recount client follow up	4.1	1.9	.015
10.	Recount lawyers follow up	4.9	3.9	.1
11.	Set next meeting or contact	3.4	2	.08
12.	A.O.B.	2	1.4	.1
13.	Termination and goodbyes	4.4	3.1	.06

It is interesting that the expert saw a different set of significant differences in his assessment, only two of which were the same headings as the lawyer assessors. From the expert's point of view there were two significant results and three trends out of the 13 points.

(a) On "Opening question" Group A performed significantly better than Group C at the 0.0015 level. The mean score for A was 5.6 and for C, 4.1. This was similar to the lawyer assessors in Table 5.VIII.

(b) On "Factual questioning in detail, depth and gaps" Group A tended to perform better than Group C at the 0.07 level. The mean score for A was 5.2 and for C, 5.1.

(c) On "Recount client's follow-up" Group A performed significantly better than Group C at the 0.015 level. The mean score for A was 4.1 and for C, 1.9. This once again agreed with the lawyer assessors.

(d) On "Setting next meeting or contact" Group A tended to perform better than Group C at the 0.08 level. The mean score for A was 3.4 and for C, 2.

(e) On "Termination and good-byes" Group A tended to perform better than Group C at the 0.06 level. The mean score for A was 4.4 and for C, 3.1.

Overall, from both sets of assessors for the thirteen headings there were five found to be significant and three trends all in the direction of A performing better than C.

TABLE 5.X Comparison of Trained and Untrained Groups on Techniques: Lawyer Assessment

	Variable	Group Mean Scores A	C	T Sig
1.	Coverage of personal information	4.6	3.88	.08
2.	Acceptance of clients jargon	4.85	4.38	.088
3.	Overuse of legalese	4.8	4.4	.1
4.	Precision in obtaining information	4.45	4.13	.2
5.	Picking up clients verbal cues	4.45	4.31	.3
6.	Overrepetition of same topic	4	3.5	.1
7.	Clarification of gaps or confusions	4.5	4.06	.2
8.	Useful control of clients & irrel info	4.4	4.63	.3
9.	Facilitation encouraging client talk	4.85	4.5	.1
10.	Overuse of leading and closed questions	4.45	4.75	.2
11.	Use of complex questions	4.9	5.13	.2
12.	Ease with client	4.9	4.56	.2
13.	Empathy with client	4.6	3.56	.018
14.	Time control throughout	4.25	4.25	
15.	Opening and closing ease in control	4.4	4.31	.4
16.	Reassurance of client	4.4	4.06	.2
17.	Quality of advice given and plan of action	4.1	3.88	.3
18.	Efficiency in obtaining information	4.45	3.75	.07
TOTAL SCORES		**81.65**	**76.06**	**1.01ns**

One significant finding and three trends appeared but the overall totals showed no significant difference.

(a) On "Coverage of Personal Information" Group A tended to perform better than Group C at the 0.08 level. The mean score for A was 4.6 and for C, 3.875.

(b) On "Acceptance of Clients Jargon" Group A tended to perform better than Group C at the 0.08 level. The mean score for A was 4.85 and for C, 4.375.

(c) On "Empathy with Client" Group A performed significantly better than Group C at the 0.018 level. The mean score for A was 4.6 and for C, 3.56.

(d) On "Efficiency in obtaining information" Group A tended to perform better than C at the 0.07 level. The mean score for A was 4.45 and for C, 3.75

TABLE 5.XI Comparison of Trained and Untrained Groups on Techniques: Expert Assessment

Variable		Group Mean Scores A	C	T sig
1.	Coverage of personal info	3.4	3.75	.3
2.	Acceptance of clients jargon	5.4	4.5	.027
3.	Overuse of legalese	5.5	5.25	.3
4.	Precision in obtaining information	4.9	3.88	.09
5.	Picking up clients verbal cues	5.2	4.13	.013
6.	Overrepetition of same topic	5.1	4.63	.17
7.	Clarification of gaps or confusions	5.2	4.38	.07
8.	Useful control of clients & irrel info	5	4.13	.1
9.	Facilitation encouraging client talk	5.3	4.5	.1
10.	Overuse of leading and closed questions	5	3.63	.042
11.	Use of complex questions	5.5	5.5	1
12.	Ease with client	5.1	4.25	.1
13.	Empathy with client	4.7	4.25	.2
14.	Time control throughout	4.1	4.63	.2
15.	Opening and closing ease and control	4.4	3.88	.2
16.	Reassurance of client	5.1	5	.4
17.	Quality of advice given and plan of action	4.7	4.13	.2
18.	Efficiency in obtaining information	4.4	4.13	.3
19.	Picking up clients non-verbal cues	4.3	4.63	.2

The expert assessed 3 of the 19 points with significant differences and there were two trends. These all showed the trained group performing above the untrained, on different categories from those noticed by the practitioner assessors.

(a) On "Acceptance of Client's Jargon" Group A performed significantly better than Group C at the 0.027 level. The mean score for A was 5.4 and for C, 4.5.

(b) On "Precision in Obtaining Information" Group A tended to perform better than Group C at the 0.09 level. The mean score for A was 4.9 and for C, 3.875.

(c) On "Picking up Client's Verbal Cues" Group A performed significantly better than Group C at the 0.01 level. The mean score for A was 5.2 and for C, 4.125.

(d) On "Clarification of Gaps or Confusions" Group A tended to perform better than Group C at the 0.07 level. The mean score for A was 5.2 and for C, 4.375.

(e) On "Over-use of Leading or Closed Questions" Group A performed significantly better than Group C at the 0.042 level. The mean score for A was 5 and for C, 3.625.

Overall therefore, there were four significant findings and five trends found by the two sets of assessors all of which demonstrated the superior performance of the trained over untrained groups.

Stage 3 Detail - The Value of Different Forms of Training

Table 5.XII Comparison of Fully Trained and Partially Trained Groups' Totals

Variable	**% Good**		**% Average**		**% Bad**		**Chi 2**
	A	**B**	**A**	**B**	**A**	**B**	**sig.level**
Information noted	36.2	38.5	12.3	8.6	51.5	53	ns
Information tapes	44.2	37.6	7.5	8.3	48.3	54.1	ns
Skills (lawyers)	62.8	35.8	15	17.9	22.2	46.3	.001
Skills (expert)	64.7	56.1	17.4	22.2	17.9	19.9	.10 trend
Tasks (lawyers)	59.2	40.2	18.5	18	22.3	41.9	.01
Tasks (expert)	54.6	39.3	12.3	26.5	33.1	34.2	.01

This is a more detailed exposition of Table 5.III above and shows in figures how the significant differences on the total systems of assessment are made up. It is clear that although both trained groups are obtaining similar amounts of information and noting it down there are significant differences in the effective use of the nineteen techniques through the medium of the thirteen necessary tasks. In other words although the information each group obtains and notes down is similar, the behavioural approach to the interview is significantly different in the fully trained group from the group which did not have audio visual training.

CONCLUSION

In this Chapter the twenty seven trainees who had undergone a video taped first interview when they arrived at the beginning of their course, were randomly assigned to three different treatment groups. One group received a full training course made up of lecture, video and seminars together with audio-visual feedback on their first interview

performance. A second group received training without seeing the films of their first interviews and a third group received no training at all. This third (control) group received seminars on other topics and visits to local places of interest, so that they did not feel disadvantaged.

All groups were then given a second video-taped interview which was assessed by practicing lawyers and an expert on the information obtained, the tasks undertaken and the techniques adopted. It was then possible to assess the difference made in intereview performance by training and by different training methods.

Training made a very clear difference to performance on all assessments measured, enhancing the performance of the trained groups significantly. Audio-visual feedback made a further difference especially noted in behavioural measures; but did not appear to add to performance in terms of information gained above the results from other forms of training.

In order to hold constant the interviews assessed it was necessary for this and the previous experiment to adopt a 'laboratory' approach with controlled interview times, office lay-out and types of client. In order to test out the methodology adopted in Chapters Four and Five it was then necessary to turn to the real world of client interviewing, the Solicitor's office, and to discover what effects experience might have in producing better lawyers.

CHAPTER SIX

EXPERIENCE AND SKILL IN THE LAWYER-CLIENT INTERVIEW

Introduction

The ability of new lawyers to carry out basic client interviews has already been assessed in Chapter Four above.[1] That assessment considered how well new lawyers undertook the different tasks which should be carried out in such an interview, the techniques for carrying out such tasks and the information gathered in the interview itself. The findings corresponded with previous research into consumers' satisfaction with lawyers' communication abilities.[2] It studied trainee solicitors as they enter the profession, without training in interview skills. Chapter Five then considered the effect of a short training course, how such training should be carried out and the efficacy of different training methods.

The Law Society proposals for changes in the system of training for new lawyers from 1993 now suggests a change of approach which will involve the teaching of lawyering skills at the postgraduate level. This will be followed up by a programme of compulsory continuing legal education intended to provide law and skills 'top-up' throughout a practitioner's career. For most lawyers, however, formal training in legal skills such as interviewing has not existed and any ability or knowledge has been picked up on the job through the experience of watching others, or carrying out the work itself. Indeed, a strong presumption has existed among many practitioners that experience is the only way of learning such skills. This study is intended to examine the effectiveness of the method of learning by experience

1 It also appears in Sherr, A. "Lawyers and Clients: The First Meeting" (1986) 49 Modern Law Rev. 323.
2 See e.g. fn. 21 in Chapter Four and the Marre Report op. cit. pps 52-53. .

within the context of lawyer-client interviewing, and to note where training might best be injected into this system.

The first two studies set out in Chapters Four and Five were carried out under laboratory conditions with people who had been clients of local advisory centres. This study took place in the "real world" of lawyers' offices in which 143 first interviews with new clients were video-taped and then subjected to analysis. Lawyers and clients were willing participants and refusal rates among clients were low.[3] Lawyers were selected from a spectrum of experience starting with trainee solicitors and ranging to lawyers in the 40 - 49 age group.

METHOD

The video tapes of client interviews were assessed, as in the two previous studies, in three ways. Expert legal assessors considered how well the lawyers had performed on some thirteen tasks which should be carried out in a first client interview, how well the lawyers performed on some nineteen techniques or sub-skills which should be used in lawyer-client interviewing and also on the quality of some twelve categories of information emerging during the interview.

In addition the lawyers who had carried out interviews were asked immediately afterwards to consider how well they felt the interviews had gone including their communication with the client, the advice they had given, how satisfied they thought the client had been with the

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3 There were six refusals by clients on grounds of sensitivity of the issues involved and confidentiality; and two occasions where lawyers felt that the interview should not continue to be taped because of sensitivity of the client or issues. Lawyers from a range of firms spread geographically (see below) were contacted initially to secure their involvement in the study. There were a number of refusals at this stage and it proved impossible to provide a statistically random sample on this basis. In the event, the overall differences between the lawyers and firms studied and the national norms were not great; and these are set out below.

interview and their perceptions of the degree of shared control between lawyer and client in the interview.[4] The clients were similarly questioned on standard forms immediately after the interviews about their perceptions of how the interview had gone, thus enabling a direct comparison of both parties' reactions.

A number of other measures were also taken. Where a second client, or someone else, accompanied a client into the interview, they were also asked to assess how the interview had gone on a similar form. Delay in starting the interview was also noted, as were the conditions of the reception area and the waiting room. The time of the interviews was noted and the length of the interview. Full details of the lawyers' experience in interviewing prior to the studied interview were noted as was any training in interviewing and how they were "broken in" to interviewing clients by themselves. Information about the firms was also gathered, their geographical location, the mix of work and a client's eye view of perception of atmosphere within the firm.

DESCRIPTIVE DATA

A. Client Characteristics

Social Class Gender and Race

In the 143 interview tapes analysed, 62.8% of the clients were judged by the lawyers to be "middle class" and 26.4% "working class".

53.4% of the clients were male and 46.6% were female. Of those accompanying the clients into the interview 19 were male and 24 female. The researcher assessed 65.3% as working class and 30.6% as middle class. Most clients were white (76.9%). 15.5% were Black/Caribbean in origin and a further 4.8% were Asian.

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4 See Rosenthal, D. "Lawyer and Client: Who's in Charge" op. cit.

The ages of the clients ranged as follows:

Table 6.I Age of Clients

Age of Clients	%
15 - 19	11.5
20 - 24	12.2
25 - 29	12.9
30 - 39	25
40 - 49	20.9
over 50	14.4

B. Lawyer Characteristics

Gender and Race

68% of the lawyers were male and 32% were female. The majority of the lawyers were white (98.6%) with the remainder coded as Asian (1.4%).

Table 6.II Age of Lawyers

Ages of Lawyers	%
20 - 24	20
25 - 29	16.6
30 - 39	61.4
40 - 49	2.1

23.8% of the lawyers were trainee solicitors (articled clerks) and 75.5% were qualified.[5]

5 Differences according to the various levels of experience will be analysed.

Length of Practice

The length of time the lawyers had been practicing was recorded.

Table 6.III Length of Practice

Length of time	%
First six months	1.2
Second six months	4.7
Second year	1.2
First five years	21.0
Six to ten years	48.8
Eleven to twenty years	23.3[6]

Interview Experience

Note was taken of the difference in time since their first solo interview and the date of the research for subjects in the first five years of qualified practice. The mean time was 75.98 months.

For this sub group a note was taken of any prior training in interviewing. The majority had no training, no subject recording training at University, Polytechnic or Law Society courses. A small group had specific instructions from their seniors and one subject had training as part of a previous employment.

Interview experience prior to articles was also often limited. The majority of subjects

6 As lawyers carried out more than one interview for the study, demographic data was only gathered once for each lawyer.

under 5 years qualification reported no such experience, with a small group reporting exposure at advice centres and another group gaining experience in other jobs.

Introduction to Interviewing

None of the lawyers had been allowed to interview prior to the third month of articles and a few only conducted their first solo interview at six months. As the method of introduction to interviewing may be a crucial factor in competence and confidence it was of interest to note that a small group were simply plunged into their first interview whilst the remainder sat in on interviews; a form of passive modelling. No subject reported that a more experienced lawyer had sat in on their first interview to give critique or feedback (active modelling).

C. Characteristics of the Firms

Work Orientation

Subjects described their firms. 68% were seen as mainly business oriented, 29.5% as mainly personal law and 2.3% reported a mixture. Subjects estimated the percentages of time dedicated to various subject areas of law by their firm.

Table 6.IV Type of Work

Subject	Mean %
Commercial/business	5.3
Criminal	27.5
Property	22.1
Matrimonial	28.1
Personal	11.4

The subjects recorded a mean of 62.2% legal aid work carried out in their firms. The Chambers and Harwood Study showed 18% of cases in the law firms they investigated being funded by Legal Aid and those cases produced only 10% of gross fees.[7]

Geography

55.7% of the firms were based in the inner city, 20.5% in the city suburbs, and 23.9% were from towns.

Size

Solicitors

43.2% of the firms had between 2-5 solicitors, 31.8% had between 6-10 solicitors and 25% had over 11 solicitors. 13.6% of the firms had no trainee solicitors, 23.9% had 1 trainee, 58% had 2-5 trainees and 4.5% had 6-10 trainee solicitors.

7 Law Society Annual Statistical Report p.61.

Partners

11.4% of firms had one partner, 43.2% had between 2 and 5 partners, 34.1% between 6 and 10 partners and 11.4% over 11 partners. In the most recent Law Society study of the make-up of the profession it was found that 27% of firms were sole practitioners, 74% had less than five partners and less than 10% had more than 8 partners.[8] The Law Society Annual Statistical Report for 1990 shows 37.1% sole practice firms and 43.6% of firms with 2-4 partners.[9]

Formality

The formality of the firms was assessed as follows:

Table 6.V Formality of the Firms

	%
Extra informal	14
Informal	43
Middle	37.6
Formal	1.1
Extra formal	4.3

Reception and Waiting Room

Waiting rooms were rated on a 1 - 5 scale from 1 = pleasant to 5 = unpleasant. The mean

8 See Chambers, G. and Harwood Richardson, S. "Solicitors in England and Wales. Practice Organisation and the Private Practice Firm. RPPU 1991 p.9.
9 Ibid. P.16.

score was 2.8 with no firm scoring at 5 and 6.8% scoring at 4.

1.9% of firms had privacy from the street in the waiting room, 9.5% were very public waiting rooms and the remaining 88.6% were neither completely open to public view nor private.

Greetings by the receptionist were coded by the researcher. 54.5% were friendly, 25% middle and 20.5% formal.

Some basic provisions were also looked for. The following table shows in what proportion of firms these were present.

Table 6.VI Waiting Room Provisions

Provision	%
Telephone for waiting clients	1.9
Directions to the toilet	10.7
Toys for children	13.6
Political/community literature	24.3
Legal or Welfare literature	28.2
Information on housing/mortgages	40.8
Plants	54.4
Pictures on the walls	59.2
Ashtrays	74.8
Papers	86.4

D. Interview Characteristics

INTERVIEW LENGTH

Interviews lasted a mean of 38.6 minutes (standard deviation 23.1) ranging from the shortest, 4 minutes, to the longest interview at 140 minutes.

Timing

Interviews took place on all days of the month and all months of the year under study, except December. 18% of the interviews took place in the morning (before 1.00 p.m.) and 81.6% in the afternoon. The afternoon appeared to be a more convenient time for both parties, and morning court appearances meant that many of the lawyers were not available then for interviewing clients.

Delay

Waiting time has been noted as a major factor in ultimate dissatisfaction in medical consultations[10] and lawyers' clients have also complained of being kept waiting without explanation. In these legal interviews one client was seen over half an hour early, and 6.2% of clients were seen between 11 and 30 minutes early. The majority of clients (50.3%) were seen either on time or within ten minutes before or after their appointment time. Some 30.3% of clients were seen between 11 and 30 minutes late and 7% were kept waiting in excess of half an hour.

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10 See Ley, P. "Psychological Studies of Doctor-Patient Communication" in S.J. Rachman (ed) 1977 'Contributions to Medical Psychology' Vol. 1 Pergamon Oxford pps 9-37.

When delays occurred, the reasons for delay were noted in Table 6.VII below.

Table 6.VII Reasons for Delay

Reason for Delay	Number
Late return of lawyer	2
Lawyer involved in work	33
Lawyer/client appointment time differs	2
Delay by client[11]	16

Collection

The way the clients were collected from the reception area may also be of importance in the way an interview proceeds. A detailed analysis of how the different firms carried out this procedure is presented below:

Table 6.VIII Client Collection

Client Collection Method	%
1.Lawyer comes out and escorts client to room	43.3
2.Secretary escorts client to room	2.1
3.Researcher asked to escort client to room	24.8
4.Receptionist/Secretary tells client where to go	23.4
5.2-4 and Lawyer comes out to greet	2.1

11 On four other occasions a short delay occurred whilst the researcher checked whether the client was happy to be involved in the research.

Interruptions

Interruptions occurred and were noted by the assessor in 43 of the interviews as shown in Table 6.IX below. An interruption can destroy the confidentiality of the interview and may belie the lawyer's show of interest in the client. It is therefore interesting to see how often these occur in practice.

Table 6.IX Interruptions

Dictaphone usage	32.6%
Received substantial t/call	23.3%
Outgoing telephone call	9.3%
Received but denied call	2.3%
Left room	2.3%
Someone entered	2.3%
Other interruptions	27.9%

E. Case Characteristics

A range of some 14 different categories of legal matter were covered by the interviews under research. The most common type was Family matters (accounting for 31%), followed by Criminal (accounting for 28%). A breakdown of the categories is shown in Table 6.X below:

Table 6.X Work Categories of Cases

Category	Frequency	Percentage
Family	43	31.0
Crime (incl. juvenile & Motoring)	39	28.1
Personal Injury, Medical Neg. and Criminal Injury	14	10.0
Employment	7	5.0
Wills and probate	6	4.3
Housing, Landlord and Tenant	5	3.6
Consumer	4	2.9
Discrimination	4	2.9
Neighbour disputes	4	2.9
Immigration	3	2.2
Conveyancing	2	1.4
Complaints against police etc	2	1.4
Welfare Benefits	2	1.4
Other	4	2.9
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	139	100 (99.7)

This table can be compared with the figures found by Chambers and Harwood under slightly different headings assessed according to case numbers and by income.[12]

12 Op. cit. pps 47, 51.

Table 6.XI Chambers and Harwood's Percentages of Case Categories by Numbers and Income.

Category	Case numbers	Income
Business affairs	12.4	28.6
Commercial Property	9.8	18.2
Criminal	7.9	4.0
Resid. Conveyancing	31.0	21.2
Family	8.5	5.7
Child Care	1.5	0.9
Probate	8.3	7.1
Personal Injury	7.9	5.3
Housing	2.6	2.0
Bankruptcy	2.6	1.3
Employment	1.3	1.3
Consumer problems	1.1	.5
Personal finance	1.	1.3
Welfare Benefits	0.4	.1

It is clear that the sample of practitioners studied here deals much more with Criminal and Family law than the 'average practitioner' portrayed by Chambers and Harwood. This is also borne out by the comparative figures for work funded by Legal Aid mentioned above (62.2% compared with 18% for Chambers and Harwood).

EVALUATION OF THE INTERVIEWS

A series of evaluations were carried out. The interviews were evaluated immediately afterwards by each lawyer and client separately. Subsequently, a more detailed evaluation was carried out by an expert legal assessor trained in evaluation.

THE LAWYER'S AND CLIENT'S EVALUATION OF THE INTERVIEW

After the interviews both the lawyers and the clients completed an evaluation form. A series of satisfaction items were covered. These were rated on a 7 point analogue scale - 1 representing low satisfaction and 7 maximum satisfaction. To ensure against response set or bias every second questionnaire altered the labelling of these poles. For the purpose of the analysis these were transformed. Table 6.XIIcompares the mean scores for the lawyers and the clients.

Table 6.XII Comparison of Lawyer's and Clients' Perceptions of the Interviews

	Mean Scores				
Lawyer		Client		**Paired T**	**Sig P**
How satisfied were you with the way you spoke to the client?	**5.2**				
How satisfied do you think the client was?	**5.2**	How satisfied were you with the way you were spoken to?	**6.7**	**14.9**	**.001**
How satisfied were you with the advice and plan of action you stated?	**5.5**				
How satisfied do you think the client was with the advice/ plan of action?	**5.3**	How satisfied were you with the advice/plan of action	**6.6**	**10.9**	**.0001**
How confident was the client in you?	**5.3**	How confident were you with your lawyer?	**6.6**	**11.0**	**.0001**

In general the lawyers were very satisfied with their interviews and thought that their clients had been even more satisfied. The Lawyers were asked how satisfied they were with the

way they had spoken to the client. The mean rating was 5.2 on the 1 - 7 scale (SD2.3, mode 6.0). 9.9% of the sample rated their communication under the midpoint with a further 12.2% self rating at maximum. The lawyers were then asked to rate how satisfied they thought the client had been with the lawyer's communication. The mean was similarly high (5.2 with a SD of 1.2). Only 8% thought this was under the midpoint and a further 43% thought they had performed at, or just under, the maximum.

Overall client ratings were significantly higher than those of their lawyers on a matched pairs t test. Their satisfaction with the way the lawyer spoke to them scored a mean of 6.7 (SD 0.8) with 73% maximally satisfied and only 0.7% scoring under the midpoint.

Lawyer interviewers were also generally satisfied with the advice and plan of action they had given their clients (mean 5.5, SD 1.4). Again 9.4% scored under the midpoint whilst 54.7% scored at or just under maximum. They felt the clients were also highly satisfied with this advice (mean 5.3, SD 1.3). Only two subjects thought clients were dissatisfied (scoring at 1) whilst 47% thought their clients to be maximally satisfied (points 6 or 7). The lawyers also felt they had gained considerable client confidence (mean 5.3, SD 1.2) with only one subject (0.7%) scoring at 1 and just under half (48.6%) scoring at 6 or 7.

Clients rated the advice or plan of action suggested by the lawyer (6.6 mean, SD 0.9) again significantly higher than the lawyers with 72% maximally satisfied and 0.7% again scoring below the midpoint. Client confidence in their lawyers was also significantly higher than the lawyers thought with a mean of 6.6 (SD 0.9). 2.2% scored confidence in their lawyers below the midpoint and 73% were at the maximum level.

When asked who they felt was 'in charge' of the interview, 2% of both lawyers and clients said that the client was in charge, 33% of lawyers thought control had been shared equally

between themselves and the client and 59.5% thought they had been in charge. The perceptions of the client are contrasted below in Table 6.XIII

Table 6.XIII "Who's in Charge?"

Who 'In Charge'	**Lawyer Response**	**Client Response**
Client	2%	2%
Lawyer/Client equally	33%	51.4%
Lawyer	59.5%	38.5%

Clients agreed that they were not in control. However, more thought they had joint charge than their lawyers endorsed.

Over half the lawyers gave further comments on the interview (52.7%). Of these, 43.5% were negative comments, 25.2% were positive, 1.6% mixed and 27.4% neutral.

62.2% of clients gave further comments on their questionnaires. Of these, 7% made negative comments, 79.1% made positive comments, 4.7% made mixed comments and 7% made neutral comments.

36 of the interviews had a second "client" present and these clients were also asked to complete questionnaires. General satisfaction was high (all subjects scored at 6 or 7 of the schedule) and satisfaction with advice was also high, with 30 subjects scoring at 7, and the remainder at 5 & 6. Confidence in the lawyer was also high (all subjects rating at 6 or 7). Overall the presence of a second client sheds a favourable light on the interview. It may be that more proficient interviewers are more at ease and therefore happy to invite partners in. However, the well-being and confidence of the client may also be greatly enhanced by the

presence of a social support or partner.

The considerable literature surveyed above[13] on client dissatisfaction with their solicitors' communications skills seems at variance with the generally high level of satisfaction reflected in the questionnaire responses of this client sample. It is apparent that their own perceptions of how well their initial interviews were conducted are even higher than those of their lawyers.

In general client satisfaction with professional work is high and dissatisfaction with doctors' communication has been distinguished from happiness with the work itself[14]. A distinction between the work of lawyers and doctors may be instructive here. The medical doctor often carries out the entire transaction of diagnosis, advice and treatment within the singular context of one consultation. The initial interview with a lawyer is only the first step in a more protracted transaction. Lawyers' image management may therefore be easier for the lawyer[15] who can promise much in the first interview but whose work and communication may not necessarily live up to these early expectations.

Important distinctions may therefore be drawn between the first blush of a client's cathartic unburdening of their problems to a listening professional and subsequent consideration of the lawyer's interviewing performance compared with the reality of work carried out and promises fulfilled.

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13 See Fn. 2 above.
14 See Ley, P. op. cit.
15 See e.g. Blumberg, 'The Practice of Law as a Confidence Game' (1967) 1 Law and Soc. Rev. 15.

EXPERT EVALUATION OF INTERVIEW PERFORMANCE

All interviews were videoed and the video tapes were subsequently subjected to further analysis in accordance with the methodology developed above[16]. Assessment was conducted by an experienced legal interviewing trainer, who was also professionally and academically qualified in the practice and teaching of law. The assessor was trained in the methodology of assessment and worked blind to the hypotheses under examination. The data for the whole sample is reported below. Subsequent breakdown is also reported.

A 13 point plan based on the fundamental tasks of an interview were applied to the interviews as in previous chapters. Table 6.XIV below sets out the tasks together with the performance. Tasks were rated as before on a 7 point analogue scale (1 = very bad, 2 = bad, 3 = fairly bad, 4 = average, 5 = fairly good, 6 = good and 7 = very good).

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16 See Chapter 4.

Table 6.XIV : Task Competence: Average scores and Percentage falling below average

Variable	**Mean Rating**	**% < Av**
Greetings seating and introduction	4.2	37.3
Opening question or helpful silence	3.9	45.1
Obtaining basic personal/party info	4.1	35.3
Factual Questioning	4.8	17.6
Sum up facts/recount/check	3.8	57.8
Note taking	3.9	37.3
Statements of advice/plan of action	4.8	13.7
Restate advice and obtain client agreement	4.2	32.7
Recount client follow up	4.2	28.7
Recount lawyer follow up	4.5	27.7
Set next meeting/contact	4.3	29.7
Ask AOB	3.3	76.5
Termination and goodbye	4.2	21.6

Overall, performance was scored around the average point for the tasks assessed. However, a high percentage of the interviews scored below average (very bad, bad or fairly bad) on all items. There were particular problems with some key elements of an interview. The opening sections of the interview were poorly carried out, leaving the entire listening stage with more than a third of performances below average. Higher scores were obtained for questioning and advice but summarising facts and checking with the client for their accuracy was especially poor with 57.8% below average. The highest failure rate of 76.5% below average concerned asking the client if there was anything further they wanted to mention and between a fifth and a third of the subjects scored poorly on all other variables.

Questioning and advising are highly important tasks but their efficacy can be seriously impaired by poor listening at the beginning of the interview. It also seems clear that the preferred style of questioning rather than listening to the client is not so efficient in use of time and is less satisfying to clients.

A further series of measures revealed that although 83.7% of the lawyers stood up to meet their clients when they entered the room and 84.5% seated them adequately, 38.3% did not greet them and 83.2% did not introduce themselves properly. Beyond the social niceties, 76.6% did not specifically gain the client's agreement to the lawyer's understanding of the facts as expressed and 51% did not get the client's agreement to the advice or plan of action offered. 85.4% of the lawyers did not enquire whether there was anything else the client wished to discuss before ending the interview. As mentioned in Chapter Four, in medical interviews a syndrome (appropriately identified as the "hand on the doorknob syndrome") reveals that many major problems (sometimes the main reason for attendance) are revealed on departure.[17] Intuitively, this may well be a factor in legal interviews. However, getting up from their seats at the end of the interview, as in the beginning, was not a problem for the 88.3% who did so but 22.6% did not actually manage to say goodbye.

Interview Techniques

A further analysis, rated in similar fashion, was undertaken into the proper use of 19 techniques employed over the range of the above tasks by the lawyers under observation in accordance with the methodology developed above.[18] The data is presented in Table 6.X V below.

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17 Byrne and Long "Doctors talking to Patients" op. cit..
18 See Chapters Four and Five.

Table 6.XV Technique Competence: Average Scores and Percentage falling below average

Techniques	Mean Score	%<Av
Coverage of personal information	4.3	36.3
Over-acceptance of client's jargon	4.6	5.0
Overuse of legalese	4.0	31.4
Precision in obtaining information	4.3	29.7
Picking up clients verbal cues	3.9	42.2
Overrepetition of same topics	4.5	9.8
Clarification of gaps or confusions	4.7	14.9
Useful control of client and irrel info	4.8	12.7
Facilitation of client talk	4.0	49.0
Overuse of leading and closed questions	3.8	40.2
Use of complex questions	4.7	5.9
Ease with client	4.4	25.5
Empathy with client	3.5	51.0
Time control throughout interview	4.7	18.6
Opening and close ease & control	4.4	23.9
Reassuring of client	4.3	30.9
Quality of advice/plan action	4.5	32.0
Efficiency in obtaining information	4.2	32.0
Picking up clients non verbal cues	3.8	29.0

Once again overall performance inclined towards the average but there was greater variability in scores on individual items. Few lawyers scored below average on handling clients' jargon, overrepetition, complex questions or control of client. The highest failure rates were on facilitating of clients to talk, picking up verbal cues and showing empathy

with the client. These demonstrate how the deficiencies at the listening stage of the interview noted above are expressed through poor technique in encouraging client involvement. Over-use of leading and closed questions similarly portrays the tendency toward lawyer-centred activity,[19] through questioning rather than listening. Covering personal information, overusing legalese, precision, reassurance, efficiency and picking up non-verbal cues all show failure rates around the 30% level; and the quality of the advice or plan of action given shows a similar rate of failure.

An overall rater assessment on absolute categories noted that 64.4% used legalese, 88.5% were able to avoid complex questions, 92.2% did not inform the client about the time available for the interview. Whereas 92.9% of the lawyers gave advice during the interview and 70.1% gave a plan of action either as an alternative or as an extra.

Information

As in previous studies, the quality of the information obtained and given by the lawyers was also rated in similar fashion over 12 separate headings in order to assess the effects of competence levels in tasks and techniques. Table 6.XVI below sets out the ratings.

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19 See Binder, Price and Bergman "The Lawyer as Counsellor" 1991, pps 20-21.

Table 6.XVI Information Quality: Average Scores and Percentage below Average

Information	**Mean**	% < Av
Client personal information	4.4	31.4
Other parties	3.8	38.2
Witnesses	3.7	36.3
Problem subject categorisation	5.1	2.9
Events	4.4	31.4
What the client wants	4.9	14.7
Previous advice or assistance	4.1	24.5
Legal proceedings	4.3	22.5
Next contact for Client/Lawyer	4.2	35.4
Work to be done by Lawyer	4.5	25.7
Work to be done by Client	4.2	23.5
Advice given	4.5	28.0

The lawyers were very good at pigeon-holing the subject matter of the client's problem into a legal subject category and there were only 14.7% failures in extracting and understanding what the client wanted out of their difficulty. There were 22-24% failures on the existence and details of legal proceedings and any previous legal advice or assistance but comparatively higher levels of failure on the events occurring which gave rise to the problem, the other parties involved and any witnesses to material events. These would be important information concerns in the continuation and representation of the client's case.

Interview expert codes made further comments which were not contained within the analysis schedules. Such comments were made on 59 interviews and of these comments, 54.2% were negative comments about the interviews, 16.9% positive and in 28.8% they

were mixed.

Experience and Competence

In this study it was then possible to compare interview performance with the level of the lawyers' experience. Correlations were run between length of qualification and performance of the lawyers on task and techniques abilities. If interview competence improved with practice, the passage of time or experience, there would be a significant correlation between level of performance and length of qualification. Pearson correlations showed no significant relationship, (techniques r=0.06 p=0.3 ns, tasks r=0.12 p=0.2 ns). This result is counter intuitive. Lawyers certainly feel that they improve with experience and the literature surveyed in Chapter Two certainly suggests that major improvement can result from experience.

A closer examination was therefore made of what might be signified by the notion of experience. The concept of "experience" could involve simply the passage of time, the amount of practice a lawyer has had in interviewing, or more specifically practice in the presence of, or following, training? It is also possible that competence could grow in a stepwise fashion with a concentration in growth around practice milestones such as the passage from trainee solicitor (articled clerk) to qualified solicitor.

To set about examining some of these issues, a comparison was first run between the interview results of trainee solicitors (TS) and qualified solicitors (QS).

Comparison of Trainee Solicitors and Qualified Solicitors

Comparisons were run on all variables between the interviews conducted by articled clerks

and those conducted by qualified solicitors. Table 6.XVII below sets out findings based on the lawyer and client questionnaires.

Table 6.XVII Comparison of Trainees and Qualified Solicitors on Lawyer and Client Assessments

Variable	Mean Score		
	T/S	Q/S	
1. Lawyer Questionnaire			
How satisfied were you with the way you spoke to the client?	4.3	5.4	(2.9**)
How satisfied do you think the client was?	4.1	5.4	(3.8***)
How satisfied were you with the advice and plan of action you stated?	4.7	5.7	(2.3 ns)
How satisfied do you think the client was with the plan/advice?	4.7	5.6	(2.4*)
How confident was the client in you?	4.6	5.6	(2.9**)
2. Client Questionnaire			
How satisfied were you with the way you were spoken to?	6.7	6.8	(0.3 ns)
How satisfied were you with the advice/plan of action?	6.7	6.7	(0.1 ns)
How confident were you with your lawyer?	6.8	6.6	(0.6 ns)

* P<.01
** P<.001
*** P<.0001

This data shows that the qualified solicitors rated their own interview performance

significantly higher than the trainee solicitors rated theirs on all variables except their own satisfaction with their advice and plan stated (which was also higher, but not at a significant level). This is in sharp contrast to the clients' perceptions. The clients do not differentiate between the groups and showed similar satisfaction with trainee and qualified solicitors alike. This means that although the qualified lawyers had the perception that their interviews were significantly better than the trainee solicitors' perceptions of their own interviews, this effect may be the result of the confidence of experience rather than any improved performance; at least no improved performance discernable by the clients.

It should be noted that overall mean client appraisals were high and some ceiling effect might hide any variation. Furthermore self-ratings were, on average, high. This is in contrast to the objective observer ratings which were generally lower. These findings could not however be accounted for by demographic and timing factors. The groups did not differ significantly in length of interview (mean length was 29 minutes TS and 40 minutes QS t=1.5 ns). There was also no difference in the age of clients seen (t=0.04 ns).

Comparisons were then drawn on Tasks and Techniques Assessments for the two groups. The findings on Tasks are set out in Table 6.XVIIIbelow.

Table 6.XVIII Comparison of Tasks Scores between Trainee and Qualified Solicitors

Tasks	Mean Score TS	QS	
Greetings seating and introduction	4.2	4.1	0.4 ns
Opening question or helpful silence	1.8	3.9	3.6 **
Obtaining basic personal/party info	3.7	4.1	1.1 ns
Factual Questioning	4.3	4.9	1.4 ns
Sum up facts/recount/check	2.9	4.0	2.2 *
Note taking	4.2	3.9	0.7 ns
Statements of advice/plan of action	5.1	4.8	0.8 ns
Restate advice and obtain client agreement	4.2	4.2	0.0 ns
Recount client follow up	4.1	4.3	0.5 ns
Recount lawyer follow up	4.9	4.4	1.1 ns
Set next meeting/contact	4.7	4.3	0.9 ns
Ask AOB	3.4	3.3	0.4 ns
Termination and goodbye	4.3	4.2	0.5 ns

* $P < 0.01$

** $P < 0.001$

The qualified solicitors scored significantly higher on two of the 13 items, Opening Question and Summarising Facts and Checking back with the client on accuracy. The performance of the two groups did not differ significantly on the other 11 items. Mean scores were fairly consistent, being slightly above the midpoint. Significant differences,

were not accounted for by qualified solicitor excellence, but by poor performance on particular items by the trainees. This would suggest that in general the effects of experience are small but there are one or two specific areas where improvement can be directly related to it.

The techniques scores for the two groups were also compared as shown in Table 6.XIX below.

Table 6.XIX Comparison of Techniques Scores for Trainee and Qualified Solicitors

	Mean Score		
Technique	**TS**	**QS**	
Coverage of personal information	4.0	4.4	1.0ns
Over-acceptance of client's jargon	4.4	4.6	0.5ns
Overuse of legalese	3.2	4.1	2.0 *
Precision in obtaining information	3.9	4.3	1.0ns
Picking up clients' verbal cues	3.7	3.9	0.7ns
Overrepetition of same topics	4.3	4.5	0.7ns
Clarification of gaps or confusions	4.1	4.8	1.8 +
Useful control of client and irrel info	4.3	4.8	1.5ns
Facilitation of client talk	3.3	4.0	1.2ns
Overuse of leading and closed questions	3.6	3.8	0.7ns
Use of complex questions	4.4	4.7	1.2ns
Ease with client	4.3	4.3	0.0ns
Empathy with client	3.7	3.4	0.5ns
Time control throughout interview	4.6	4.7	0.3ns
Opening and close ease & control	4.3	4.4	0.2ns
Reassuring of client	4.3	4.4	0.3ns
Quality of advice/plan action	4.4	4.5	0.6ns
Efficiency in obtaining information	4.4	4.3	0.8ns
Picking up clients non verbal cues	4.0	3.6	0.6ns

Qualified solicitors were significantly better on not overusing legalese and tended to have higher ratings when clarifying gaps and confusions. On the remainder of the items there were no significant differences between the groups.

In summary therefore, it would appear that qualification of itself and experience in general do not make a significant difference to the general levels of competence in client interviewing shown by the lawyers in this sample. A small number of discrete areas do show higher levels of competence by qualified lawyers. They appear to be better at opening questions, summarising information, not using legal jargon and clarifying gaps and confusions than their trainee counterparts. Otherwise attainment, or lack, of competence do not appear to differ significantly between practitioners on behavioural assessments at these two levels.

A comparison was also made of the information obtained and given by the two groups of lawyers. Table 6.X X below sets out the findings:-

Table 6.XX Comparison of Information Scores for Qualified and Trainee Solicitors

Variable		Mean Scores		
		TS	QS	Sig
1.	Client Personal Information	4.0	4.6	1.2 ns
2.	Other parties involved	4.1	3.9	0.6 ns
3.	Witnesses	3.7	3.8	0.4 ns
4.	Problem subject categorisation	4.9	5.2	1.2 ns
5.	Events	3.8	4.5	1.6 ns
6.	What client wants	4.6	4.9	0.9 ns
7.	Previous advice	4.6	4.2	1.2 ns
8.	Legal proceedings	4.2	4.4	0.4 ns
9.	Next contact (Client/lawyer)	4.7	4.2	0.9 ns
10.	Work to be done by lawyer	4.4	4.5	0.1 ns
11.	Work to be done by client	3.9	4.3	1.3 ns
12.	Advice given	4.3	4.5	0.4 ns

There were no significant differences found on a detailed test on any of the items measured. Although behaviourally there had been some three areas of significant difference in the qualified lawyers' performances out of the 13 tasks and 19 techniques headings measured, there were no information based categories on which the qualified lawyers performed significantly better than the trainees.

The mean scores were slightly above the midpoint on all factors for both groups. This lack of difference was therefore not due to the fact that both were performing at excellent levels which would create a ceiling effect. It seems that according to the criteria used for

assessment, the passage of time and experience were not sufficient by themselves to enhance interviewing abilities. The quality of performance of experienced lawyers was not differentiated by the observers on any information category measured. The small areas of observed difference in behaviour did not seem to effect any significant difference in the quality of information emerging.

It was therefore decided to test whether any more subtle differences occurred further up the scale of experience. A comparison was run between the interview performances of qualified solicitors in the 2-5 year range with solicitors who had been qualified between 11 and 20 years.

The analysis first considered the Lawyer and Client questionnaires.

Table 6.XXI Comparison of Junior and Senior Qualified Solicitors on Lawyer and Client Questionnaire Answers

	Variable	Mean Scores		t sig
		2-5	**11-20**	
1.	Lawyer satisfaction with way spoke	4.9	5.7	1.8 (.08) trend
2.	How satis. lawyer thought client with 1	4.9	5.8	2.1 (.04) *
3.	Lawyer satis. with advice etc	5.3	6.2	2.1 (.04) *
4.	How satis. lawyer thought client with 3	5.4	5.9	1.01 ns
5.	How confident lawyer thought client	4.9	5.9	2.6 (.01) *
6.	Client's satis. with way lawyer spoke	6.9	6.8	0.2 ns
7.	Client's satis. with advice etc	6.8	6.8	0.2 ns
8.	Client's confidence in lawyer	6.6	6.5	0.3 ns

*significant at P<.05 level.

It would appear once again that the more experienced lawyers were significantly more satisfied with their performance than the less experienced lawyers. However the clients again did not show that they noticed any significant difference between the two groups. It would seem that experience leads to greater confidence in one's own abilities but this is not necessarily borne out by the results as perceived by the other party to this transaction, the client. It was therefore interesting to see whether any other differences could be found by analysis of the other forms of assessment carried out.

Table 6.XXII Comparison of Junior and Senior Qualified Solicitors in Total Scores

Variable	**Means**		**t sig**
	2-5 yr	**11-20 yr**	
Tasks	52.2	56.3	1.4 ns
Techniques	78.1	85.3	1.9 (.07) trend
Length of Interview	36.2	35.5	0.1 ns

There was no significant difference in total scores between the two groups on the Tasks assessment by expert assessor but there was a trend towards better performance on Techniques in the more experienced groups. Overall this did not arise out of longer interviews by one group or another since there was no significant difference in the length of their interviews, the means of which were very close at 36.2 minutes and 35.5 minutes.

The quality of information gained by the two groups was then analysed in further detail.

Table 6.XXIII Comparison of Junior and Senior Qualifiers on Information

Variable	Mean Scores Group		t Sig
	2-5	11-20	
Client Personal Information	4.1	4.6	1.2 ns
Other Parties	3.9	4.0	0.04 ns
Witnesses	3.7	3.7	—
Problem subject categorisation	4.9	5.7	3.4 .002*
Events	4.2	5.0	2.0 .06 trend
What client wants	4.8	5.1	0.6 ns
Previous Advice	4.0	4.3	0.9 ns
Legal Proceedings	4.4	4.3	0.3 ns
Next cont act	4.4	4.0	1.1 ns
Work to be done by lawyer	4.2	4.7	1.2 ns
Work to be done by client	4.2	4.2	0.2 ns
Advice given	4.4	4.9	0.9 ns

On ten out of the twelve scores there were no significant differences showing that experience only appeared to enhance information emerging in an interview in two ways. The more experienced lawyers were better able to pigeon hole their subject matter quickly and see it as falling within a particular problem subject categorisation. They also tended to obtain better information about the events involved in the case. Considering the number of other items on which no significant difference was found it would seem that experience had very little effect on the information obtained as a result of the client interviewing performance of the lawyers studied.

DISCUSSION AND CONCLUSION

Contrary to intuitive expectation and a prominent view among practitioners, experience largely seemed to enhance confidence in a few discrete areas of performance only. In general it did not make much difference to interviewing ability. Improvement in competence appeared to be picked up either at an early stage prior to monitoring in this experiment or not at all.

This would account for the feeling among practitioners that they do inevitably get much better with experience, since such a perception would be equivalent to the confidence the more experienced practitioners showed here in their interviewing performance. Unfortunately that difference is simply not borne out by the objective assessments of their interviewing ability, by clients or expert assessors. Clients could not tell any difference at all and there were few headings where experts, blind to the hypothesis being tested, were able to discern any significant differences.

It is conceivably possible that some greater changes occurred in the inexperienced group prior to their assessment in this study. This seems unlikely considering the similarity of their profiles and results to the trainees under study in Chapter Four. However, the fact of their involvement in client interviewing by themselves connotes some background experience in interviewing even for the trainees studied in this Chapter. Trainees and solicitors up to 5 years experience were all asked how many interviews they had carried out prior to this study and how many months before the study they had started client interviewing by themselves. They were mostly unable to guage how many prior interviews there had been, suggesting these were numerous. The number of months since they had first carried out a client interview showed a mean of 76 months with the lowest at 8 months.

Even the most inexperienced therefore showed some background in this form of work.

Nevertheless it could well have been expected that experience would show a sequential gradual progression in competence throughout the years of practice. This was certainly not found. Neither was there a stepwise progression at the Trainee to Qualified stage, or between solicitors of 2-5 years qualification and those within the 11-20 years range.

All of this contrasts quite markedly with the results of training shown in Chapter 5. Experience over time does not appear to turn out vastly better client interviewers, and is a very poor second compared with the results of training.

CHAPTER SEVEN

DISCUSSION AND CONCLUSIONS

This study has looked at the concept of a legal skill, how competent new lawyers are in carrying out the specific skill of client interviewing, how new lawyers might be trained to carry out that skill, and how effective experience is in providing competence in client interviewing.

It began in Chapter Two by considering some approaches to defining legal skill and task areas and existing research methodology for studying the work of lawyers. The literature on client interviewing as a specific skill area was introduced in brief. The state of knowledge within educational psychology was then reviewed to discover how experience could contribute to skills acquisition.

Experimental research was begun in Chapter Three. The range of work carried out by lawyers in their offices was studied in two different ways. The lawyers were closely observed for some four days and in a questionnaire afterwards, they were also asked what they had thought they had spent their time on. It was then possible to assess whether information about lawyers' work could best be obtained by a questionnaire method or through a method which involved observation. The results showed that observation was clearly the better method for obtaining detailed results on lawyers' work. It also appeared to be more accurate than the questionnaire approach which relied on the memory and perceptions of the lawyers involved about their own work.

The results themselves were also interesting. On average, solicitors spent a larger

proportion of their time on administration than any other single type of task. The highest proportion of their time spent on a task involving professional legal skills, as opposed to managerial or administrative, was spent on client interviewing. Client interviewing was therefore shown to be a most significant element in lawyers' work. It had already been acknowledged in the earlier literature review that poor communication with clients had been a major source of client dissatisfaction with lawyers' work.

In Chapter Four it was therefore decided to assess rigourously, the competence of new lawyers in client interviewing. In a "laboratory" study involving a number of new trainee solicitors, their interview performance was video-taped and this and the notes they made after the interview were closely analysed by lawyer assessors and interviewing experts. The young lawyers were found to be deficient in the skills they used at interview, in carrying out a framework of tasks for conducting the interview and in the information they obtained and noted down as a result of the interview. Many of the complaints from consumers, and in other studies, about poor communication were substantiated by this study.

Could the new lawyers be trained in the skills of client interviewing in order to enhance their poor competence? This was the question posed at the beginning of Chapter Five. The trainee solicitors where randomly assigned to one of three groups, each for a different "treatment" after the first interview. One group was given a full programme of training which included lectures, seminar, a film and the audio-visual replay of their first interviews. The second group was given a programme of training identical to the first group except that it did not include the audio-visual play-back. A third "control" group were given no programme of training in client interviewing, but received a "placebo" set of seminars on their articles of traineeship and were then exposed to a second client interview.

The second interviews of all three groups where then assessed and analysed. The groups with training came out significantly ahead of the untrained group and the group which was trained with audio-visual feedback came out significantly better in behavioural measures than the trained group which did not receive that feedback. It is clear from this study that it is possible to train new lawyers in the skills of client interviewing with a significantly improved performance.

In Chapter Six, attention was then turned to the more traditional way in which lawyers have been said to pick up their legal skills, experience alone. In order to assess the effect of experience, some 148 real client interviews where taped in the offices of practicing lawyers. Agreement was obtained from both lawyer and client beforehand and each filled out a questionnaire afterwards. Subsequently the video-taped interviews were subjected to a similar analysis as those in Chapters Four and Five. Contrary to expectations, there was no significant general improvement noted on statistical analysis consonant with the effect of experience alone. Neither was there any major improvement between particular groups in the experience continuum. Trainee solicitors were found to be not significantly worse than qualified solicitors, except in a few respects. Similarly, solicitors of 11-20 years qualification were not significantly better than solicitors of up to 5 years qualification except under a few headings. These differences were interesting, but were small in number, being of the nature of the number of differences which might statistically occur over such a large number of results.

Critique

The literature review pointed most clearly to the need for empirical research in this area and the small amount of existing empirical data. As well as providing a number of

foundational platforms for an empirical analysis, this study has also demonstrated some of the difficulties of such research.

Observation of a subject is time consuming and therefore expensive as a methodology. Although it has no rivals for accuracy and detail, it needs to be balanced with some volume of questionnaire approach in order to be pragmatically effective. The expense of observation also shows up the sampling and access difficulties which exist regarding research into legal work and the legal profession. Observations of a few subjects may not provide sufficiently representative a sample in order to generalise findings across the whole profession. Similarly, the difficulties of obtaining access on a random basis will lessen the importance of sets of individual findings. Only the replication of such research on a wider basis can provide sufficient certainty on which to make major policy decisions. Although strong indications can be found here for the directions such findings might take, they ought not to be seen as conclusive.

Another possible source of bias lies in the modes of assessment themselves. The framework developed in Chapter Three for 'real-life' lawyers is an innovation for which previous holistic categorisations of student clinical work were not helpful. Its newness as a measuring tool means that it is untested elsewhere. Although refined within this research itself it would be helpful to see its application in further research, for a fuller validation.

The system adopted for assessment of client interviewing has a firmer background in the literature relating to doctor-patient communications. Although extensively adapted for lawyer-client interviewing, its use here in three separate studies would appear to indicate its robustness as an instrument of measurement.

Finally, the form of the research on the effects of experience was cross-sectional, looking at a range of experience all at one time. Ideally, such research should also be carried out through a longitudinal method, watching a particular cohort of lawyers over a long period of time in order to note exactly how and when any changes in competence occur. This was not possible within the confines of the time-scale allotted here, but is certainly research which should be carried out in the future.

An interesting panorama of results can now, therefore, be surveyed. The poverty of competence in client communication so amply demonstrated in the literature is entirely borne out in detail here. How might this be remedied? It is very clear that training can be a significant effect on new trainee solicitors at the beginning of their careers. It would be interesting in relation to further study to see whether similar training would have a similar effect on solicitors later on in their traineeship or further into qualification. It is conceivably possible that catching the trainees in their first few weeks meant that some of what they might have picked up through experience was otherwise transmitted through training. This seems to be unlikely as the control group in Chapter Four, which had also had the experience of a first interview but no training, actually regressed on a number of measures by the second interview. But, on the basis of the experiments shown here, it is strictly only possible to say that training can be of such significance at this early stage. Further research should test whether training can have similar effects at later stages in a lawyer's career.

The next major result is the strength of the counter-intuitive finding in relation to the effect of experience. The almost complete absence of an experiential effect on competence in this skill is startling. It is conceivably possible that a major experiential learning period in relation to interviewing had taken place initially before even the most inexperienced trainee came in front of the video-camera. This would appear to be, once

again, unlikely. It would seem to be more certain that experience itself can account for a certain amount of change in competence, but it is unlikely by itself to produce the vast changes seen as a result of training.

This study shows proof of the value of training in legal skills whilst it shows proof of a comparative lack of value in experience alone. It would perhaps have been convenient to have found particular periods during the continuum of experience when training would have been more, or less, effective and applicable. Unfortunately that sort of information is not available on the basis of these results. Either such periods do not exist, or they were simply not found in this exercise.

How then does this match up against the literature addressed in the beginning of this study? A framework of legal tasks and skills encompassing the work of solicitors, rather than clinical students, can be constructed and utilised for assessing the proportion of different types of work carried out by different solicitors and producing averages across the profession. Some comments can also be made about methodology. Whereas previous studies have mainly been based on questions asked of lawyers, it has been possible here to compare that method with observation regarding an equivalent time span and work subject matter. In the comparison, the questionnaire method came off a poor second, suggesting that studies based on the approach may be problematic.

It has also proved possible to isolate one legal task area and to strip down the components of that task into a number of sub-sets of tasks, skills, techniques and results. It has then been possible to assess performance on each of these elements through the use of both experts and practising lawyers.

It is suggested that a detailed system for assessing competence such as that developed

here is more likely to produce an objective result than an overall judgement made on a gestalt basis (I know it when I see it) by a peer. The studies set out here also show the sensitivity of such a system of measurement in considerably different results seen within the different contexts studied.

For both educational and policy purposes, it is important to understand and know what is involved in the work of the lawyer and also how to measure when that work has been performed well or badly. Legal professionals are often assessed by their clients and rarely by objective outsiders. It appears to be far easier to satisfy clients that a job has been done competently than it is to satisfy experts within the same field as the professionals studied. Where the work of lawyers is to be assessed, for whatever reason, it would seem best therefore not simply to base such assessment on the service perceived by clients, but to aim also to understand more objectively whether the work has actually been carried out in a competent way.

Such issues are currently of major importance in deciding new systems for the delivery of legal services. The franchising of legal aid concerns a new set of contracts between the Legal Aid Board and individual firms of solicitors. As a part of this contract, firms have to ensure the competence of their work. Systems such as those developed within this study enable competence to be judged.

Similarly, in relation to training, it is important for both teachers and practitioners to have a basis agreed by the profession on which to decide how lawyers should carry out their work properly. Any system which begins to articulate such a basis must be useful for the production of new lawyers.

It is hoped that this study will have hammered the final nail into the coffin of the

argument that all practitioners need is experience to help them learn how to perform the work of the lawyer to a standard of competence. Similarly, the argument that it is not possible to train people in legal skills - you are either born with them or not - can also be laid finally to rest. Looking to the future, methods of instruction such as those involved in clinical legal education which combine training with experience should be carefully considered.

This would suggest that the approach, currently being adopted by the Law Society, of bringing training and experience closer together is broadly correct. Efforts, however, will have to be made to ensure that any formal learning contexts are reinforced by monitoring of performance in real-life experience. Similarly, lessons learned within the experience context will be best utilised if broadened by seminar room discussion.

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