Quality of Legal Services in Australian Family Law

Rosemary Hunter and Ann Genovese[1]

The Justice Research Centre recently completed a study that compared the services received by legally-aided and self-funded clients in family law.[2] One aspect of this study was to examine the differences, if any, of the quality of services received by self-funding clients, legally aided clients of private solicitors, and clients of legal aid commissions in four Australian states. This paper examines the approach and outcomes of this component of the research.

Before we could begin to compare the quality of the legal services provided to self-funding and legally-aided clients, we had to give careful consideration to the measures we could use to do so, in a context in which there is no universally mandated quality assurance scheme for the delivery of legal aid and/or family law services. Although there have been a number of calls for monitoring of the quality of representation provided to legal aid clients,[3] the Australian legal aid system has tended to rely on the professionalism of solicitors doing legal aid work, rather than to impose bureaucratic quality standards. LAQ is the only Legal Aid Commission to have introduced quality requirements, as part of its preferred supplier scheme.

Other possible sources for understanding what quality may mean in the context of Australian family law include the specialist accreditation schemes operating in three of the four states covered by our study (South Australia excluded), quality accreditation standards under the QIL Code or ISO 9001, or the codes of practice for family lawyers promulgated by professional associations.[4] The Family Law Act and Family Law Rules also impose a series of obligations upon family lawyers in relation to fair and conciliatory behaviour, cost disclosure, and

---

[1] Professor Rosemary Hunter is Professor of Law and Director of the Socio-Legal Research Centre at Griffith University, Australia. She was previously Principal Researcher at the Justice Research Centre, where she managed the Centre's study of legal aid services in family law. Dr Ann Genovese is a Senior Researcher with the Justice Research Centre, Law &Justice Foundation, NSW, Australia

[2] Rosemary Hunter, Ann Genovese, Angela Melville and April Chrzanowski (2000) *Legal Services in Family Law*, Justice Research Centre, Sydney. The research was funded by the Federal Attorney-General's Department. This paper appears as Chapter Seven of that report. The report can be read in full at http://www.lawfoundation.net.au/jrc/reports/family.pdf

[3] eg. Senate Legal and Constitutional References Committee, *Inquiry into the Australian Legal Aid System: Third Report* (1998), 52–53; Jeff Giddings, 'Legal Aid Services, Quality and Competence: Is Near Enough Good Enough and How Can We Tell What's What?' (1996) 1(3) *Newcastle Law Review* 67.

[4] See eg. The Law Society of New South Wales, *Family Law Advisory Code of Practice*, (Sydney, 1992); The Law Institute of Victoria, Family Law Code of Practice (Melbourne, April 1992 revision). The ALRC has recently recommended the development and implementation of national model professional practice rules, including specific rules for family law practitioners: *Report No.89: Managing Justice — A Review of the Federal Civil Justice System* (2000), 225–43.

an emphasis on the rights and interests of children. For example, section 14D places an obligation on solicitors to advise parties about primary dispute resolution methods in accordance with Part III of the Act, section 65E requires the 'best interests of the children' to be the paramount consideration in children's matters, Division 10 of Part VII delineates precisely how the 'best interests of the children' are to be determined, and Order 38 r 7 sets out a solicitor's duties to enter into fair and reasonable cost agreements with their clients.

As sources for developing quality criteria there are, however, problems with all of the foregoing. The potential problem with both quality assurance (QA) schemes and specialist accreditation as sources of quality criteria is that they are not uniformly subscribed to across the practice community.[5] They are discretionary processes, and as such the standards to which they may encourage their participants to aspire may not be valuable or reliable measures when attempting to compare the quality of legal services across registries, firms, and funding sectors. As far as the codes of practice and more general statutory duties are concerned, there is no real way of monitoring solicitor behaviour in relation to them. Although there are mechanisms by which solicitors who do not meet some of these requirements can be penalised, disciplinary action is uncommon, as it depends on a process of detection and complaint by clients or other practitioners to formal legal disciplinary bodies.[6] Further, the mere existence of all of these professional standards can not be taken to imply their acceptance as sources of or standards for quality practice and client service.

We found it necessary, then, to undertake a qualitative investigation of solicitors' current understandings of quality and the derivation of those understandings. In other words, we set out to investigate the 'culture' of family law and how it operates as a source of quality standards, rather than attempting to measure the quality of legal aid services against any absolute threshold or standard that may have no meaning or significance for those who practice in the area.

Exploratory Research on Quality

The English authors of The Quality Agenda rejected peer review of solicitors' files as a means of determining the quality of legal work, based on lack of consensus among peer reviewers on particular aspects of quality. This occurred, however, in the absence of any opportunity for peer reviewers to discuss their

---

[5] See eg. Kris Will, 'Formal Quality Systems: An Introduction', *Victorian Law Institute Journal*, vol.70, no.2, 1996, 31.

[6] Each State has their own legal complaints board, for example, in NSW the Office of the Legal Services Commissioner, in South Australia the Legal Practitioners Conduct Board, in Queensland and Victoria the Office of the Legal Ombudsman. Complaints can in general be made to these boards by clients, and negotiation between the client and the solicitor involved will then be handled by the Board's complaints officers, leading, if possible, to a remedy or restitution for the client. An important power of most of these boards is the ability to review decisions of the Law Society, Bar Association (and in NSW the Department of Fair Trading) if any of these other bodies have dismissed complaints that they may have handled at first instance (in Queensland, access to the Legal Ombudsman is available only after a complaint has first been dealt with by the Law Society). In family law, the majority of complaints handled by these boards relate to costs, and most commonly the disclosure of disbursements. See eg. The Office of the Legal Services Commissioner, *Annual Report 1997–98*, Sydney, 53–60.

respective conceptions of quality, or to agree and define the quality standards to be applied.[7] We were interested to see what quality standards practitioners would articulate if given the opportunity.[8] We did this initially by means of an exploratory study, in order to derive measures that could be used for the purposes of the comparison study. We did so by inviting a larger group of 'peers' to discuss quality in the abstract rather than with a practitioners,[9] about quality in family law services by means of a small number of open-ended questions, with prompts if a particular issue was not mentioned in the course of the conversation. The questions were distilled from a reading of the quality literature, and designed to cover the four major aspects of quality identified in The Quality Agenda, being: structure, process, inputs, and outputs.[10]

This exploratory research into the cultural understandings of quality indicated that the skills most valued by family lawyers were client focused, but also emphasised technical competence. In relation to skills which focused primarily on the client, the most important were empathy, insight, patience, sensitivity to the client's needs, and the ability to ask the client the appropriate questions in order to understand their circumstances. Distinguishing between 'adequate' and 'good' service in order to determine some comparative elements was something our respondents found difficult, with the results being criteria set at a fairly high standard.[11]

It was also seen as essential to be able to manage the client's expectations. This was understood to mean educating clients about what was achievable in their case, so that their expectations came within the range of outcomes the practitioner realistically expected that the Court would deliver.

Further, legal qualifications and knowledge were mentioned as a foundational prerequisite, not a guarantor, of skill, but having well prepared documents (which were viewed as being monitored by the Court's requirements) was seen as extremely important. Document preparation was thus interpreted by practitioners as a technical competency that existed outside of, but in addition

---

[7] Cost disputes can also be sanctioned to a certain extent by the Family Court. *The Family Law Rules*, O 38, r 27 (5) provide that the court or a judicial registrar may set aside a costs agreement if the obligations upon solicitors set down by that Order are not complied with.

[8] Avrom Sherr, Richard Moorhead and Alan Paterson, *Lawyers — The Quality Agenda*, Vol.1 (HMSO, 1994), 57.

[9] For an argument about the value of identifying lawyers' understandings of their work, see Lynn Mather, Richard J. Maiman and Craig McEwen, '"The Passenger Decides on the Destination and I Decide on the Route": Are Divorce Lawyers "Expensive Cab Drivers"?' (1995) 9 *International Journal of Law and the Family* 286, 287.

[10] We recruited by the 'snowball' method via members of the project's steering committee. Twelve of our participants were in private practice, 11 were from Legal Aid Commission in-house family law practices, and two were from a women's legal service, included because of their role in referring clients to private practitioners. We were able to consult via focus groups with the Sydney practitioners. The remainder of the consultations were done by telephone.

[11] Sherr et al., *Lawyers — The Quality Agenda*, vol.1, 19. The questions were: 1. How do you assess a good lawyer in family law? (prompts: in terms of your own work performance, lawyers you work with and/or oppose); 2. What is an adequate level of legal service? What more is required for a good level of legal service? Are there different levels of service given to different (eg. legal aid) clients? (prompts: time, cost, communication, outcomes); 3. As a lawyer, what do you think is expected of you, and by whom? (prompts: profession generally, opponents, clients, firm/LAC, court, any other); 4. What steps are necessary in order to ensure that a case runs smoothly? How would you describe good case management?; 5. Do you rely on/refer to any articulated standards in relation to quality? (prompts: practicing certificate, Law Society, legal complaints body, firm-based quality standards, any others). The participants were not shown the question sheet before, during or after the discussion, and the order of questions was adapted in each case to follow the flow of the conversation.

to, the knowledge that could be gained through formal (university) qualifications.

Our exploratory study showed that practitioners placed a strong emphasis on experience as a source or means by which all of these 'good' service skills were developed. By contrast, they did not ascribe any value to imposed quality standards such as total quality management (TQM), accreditation, or Law Society codes of practice as a source for developing or improving skills.

Output aspects of quality such as time and case outcomes were not top of mind issues for our exploratory group of family lawyers, as they were not mentioned without prompting, and they produced no consensus results. This may be because of the nature of the practice area, in which the time it takes to resolve a case is often out of the solicitor's control, being dependent on the nature of the matter, the client's position and personality, the other party's behaviour, and possible court delays, and the notion of a 'good' outcome is tied to the facts of the case rather than being objectively determinable. There was a consensus result however in relation to the issue of approach to practice, our exploratory study suggesting that Australian family lawyers adhere to a culture of resolution, and are prepared to resolve matters through negotiation.

Findings from the Solicitor Interviews

We interviewed a total of 83 solicitors (60 from the private sector and 23 from Legal Aid Commissions) who participated fully in the research by assisting us to gain access to their clients and files. We also interviewed a further 20 private solicitors who did not participate in this way, in order to determine whether there was anything 'unusual' about the private solicitors who agreed to participate in the study, particularly in relation to their views on questions of quality in legal services. We found almost no significant difference between the two groups in this respect, other than in the contribution they thought other lawyers had made to their skill development. Participating lawyers were significantly more likely to say that other lawyers had been important in their skill development (through mentoring, peer exchange or seeking advice from counsel), while non-participating lawyers were significantly more likely to say that no other lawyers had been important in their skill development.[12] However in relation to the kinds of skills thought to be necessary for family lawyers, the behavioural norms applied in running a case, and sources of quality standards, the two groups expressed very similar views.

The following discussion, then, is based on the interviews with participating lawyers, but the conformity of their responses with both the findings from the exploratory phase and the responses given by the sample of non-participating lawyers indicates that they are representative of the wider community of family lawyers.

[12] More in line with 'competence plus' and 'excellence' on Sherr et al.'s quality continuum: ibid, 7–9.

Skills

In relation to the nature and description of skills thought essential by practitioners to deliver a quality service in family law, our final findings overwhelmingly reproduced the findings from the exploratory study. The skills ranked as the most important by solicitors clearly divided into those which focussed upon the client, and client relations, and those which were technically directed (that is, seen as crucial to being a good lawyer and running cases with technical skill). Importantly, the majority thought a combination of both were crucial (63.4%), although it could be argued that client focussed skills were more significant, as there were more practitioners who thought that purely client focussed skills were important (30.5%) as opposed to those who emphasised a purely technical focus (6%).

The participants' description of what these client and technical skills actually were mirrored the descriptions given in the exploratory stage of the research. The client skills of greatest common importance to practitioners were: empathy and understanding; the ability to listen to what the client is trying to express; patience and tolerance (with clients' backgrounds and personal problems, as well as their anger/frustration related directly to their family law matter); 'people skills' (a range of skills including a sense of humour, client rapport, ability to like people and have insight into how they work); and 'communication'. Comments made about 'communication' (too often a hollow catchall phrase borrowed from customer relations) could be dissected to understand what family lawyers actually meant when they placed importance on 'communication skills'. Overwhelmingly, communication was interpreted to mean a responsibility to listen to what the client was trying to say, but to inform them clearly about the process they were about to go through, and what was most likely to happen to them at all stages of the process of resolving their case. (For example, how much the case was likely to cost, how long it would take, what the court process entailed, what the client's legal options were, what the Court was designed to do).[13]

The emphasis that solicitors placed upon communication skills as an important element of a quality service was supported by the results of the client surveys. The mean score from the client surveys in response to the question relating to understanding was 4. The mean score in response to the questions relating to solicitors listening to the client and explaining what would most likely happen to them was 4.1. This tends to indicate that the client-based skills solicitors believed to be important in delivering a quality service correlated with the client's assessment of the service they received.

In terms of technical skills, the most frequently mentioned were legal/procedural knowledge, and judgement (described as the ability to focus on what was relevant to the case, to "credibility test" the client, to ask the right questions in order to give good advice,[14] and to evaluate the legal relevance of issues raised

[13] c^2=17.631, df=1, p<0.001.

[14] To test if solicitors emphasized communicating with clients in practice, we included a number of questions in our file coding sheet. These questions required coders to make an assessments on a 4 point scale of the solicitor's

versus the needs of the client with 'common sense').[15] Again, the evidence from other aspects of the research indicates that family law solicitors do in fact possess good technical skills. Not only were these rated highly by clients on the client survey, but the files showed only two of the solicitors involved in the study and four opposing solicitors had technical shortcomings, and in only one instance was an opposing solicitor clearly technically incompetent.

Solicitors' interpretations of 'communication' and of 'judgement' demonstrate why the majority think a combination of client and technical skills are important when attempting to deliver a quality service.[16] That is, in order to communicate effectively with the client, it is crucial to be able to interpret the technical procedures, and to predict for them the operation of the Act, the conventions underpinning the Court's discretion, and Court procedure. The client-based/technical-based skill divide is, in some respects, arbitrary, as both types of skills contribute to how a solicitor manages or handles their client.

Managing Expectations

An emphasis on the need to manage the client's expectations reproduced our findings from the exploratory research. The importance of a solicitor's ability to manage expectations was supported by the finding that 84% of our respondents believed that it was necessary to draw boundaries with their clients.[17]

Many commented that they "played devil's advocate" with their clients, taking the part of the Court or the LAC in an attempt to focus their client on the legal/funding context in which their matter was to be run. Respondents also identified that this was an important means of reducing the emotional identification that can occur between solicitor and client in the running of a family law matter, which they identified as being disadvantageous to the case.[18]

Practitioners' reliance on extrinsic mechanisms like the Act and the Legal Aid guidelines, as a means of managing the client, was emphasised by all our

---

communication with the client (eg: frequency of returning phone calls, forwarding correspondence, notifying of results of court appearances, etc.). All of these required some judgment by coders, and as a consequence, the results were significantly affected by coder bias. Splitting the data to control for coder bias yielded some trends. Solicitors with self-funding clients were more likely than those with legally-aided clients to send their clients copies of letters to the other side, and accredited specialists were more likely than non-accredited specialists to respond promptly to correspondence. Overall, none of these trends was significant, indicating a fairly consistent standard of communication with clients about the progress of their case amongst our sample.

[15] Twelve per cent (n = 13) of clients indicated that their solicitor had failed to ask them something they felt was important, indicating a small number of solicitors may not have met the standard expected for the exercise of good judgment. However, the fact that this number is small does indicate that most solicitors were able to deliver a good standard of technical skills by asking the relevant questions to extract the appropriate information to give advice.

[16] cf. David M. Engel, 'The Standardization of Lawyers' Services' (1997) 77 *American Bar Foundation Journal* 817, 820, who argues that "judgment" consists of 'legal experience' (the capacity of the lawyer to apply prior experiences in legal practice to the needs of the client), 'legal reasoning' (the ability to perform logical operations involving legal concepts) and 'the legal mind' (the ability to understand and apply in specific cases fundamental principles and values of law and the legal system). So defined, judgment is not an absolute quantity, but "may range along a continuum from the routine and the standardized to the creative and the unique". In the family law context, our respondents were rather more absolutist in their understanding of judgment.

[17] English solicitors interviewed by Hilary Sommerlad made similar points: 'Access to Justice and Quality: A Bespoke Service or the Procedural Approach?', paper presented to the Legal Aid in a Changing World Conference, University College London and Legal Aid Board Research Unit, London, 4–5 November 1999, 140–42.

[18] See also Mather et al., '"The Passenger Decides on the Destination and I Decide the Route"', 289; Austin Sarat and William L.F. Felstiner, *Divorce Lawyers and Their Clients: Power and Meaning in the Legal Process* (OUP, New York, 1995), 58.

interviewed solicitors when we enquired how important the client's expectations were to determining strategies to run their matters. The overwhelming majority of solicitors felt that the client's expectations were very important (only one disagreed). They differed, however, in how they dealt with those expectations. There was a divide between a small minority who allowed the client to drive the case, and those, compromising 93% of respondents, who preferred to manage the client's expectations in such a way as to meet the merit criteria imposed by the Legal Aid guidelines, or to meet the outcome the practitioner expected from the Court.[19] Those who let the client 'drive' the matter (7%) believed that if the client did not receive what they wanted as a result, they had not been properly represented (an assumption more in line with 'traditional' legal practice in commercial litigation or personal injury). Our analysis of files indicated that this seemed to be regardless of the merits of the claim (for example, refusing to acknowledge the other party's contributions in property matters), or the impossibility of a settlement being negotiated (for example, in sexual abuse or child protection cases).

The file analysis similarly indicated only a minority of cases (5%) in which the solicitor acting for the other party was criticised for failing to manage their client more firmly. Most of these solicitors were male. These solicitors, for example, failed to ensure that their client complied with the final orders in the case, refused to make concessions and stuck to their instructions of trying to make the opposing party look as bad as possible, pursued their client's strategy of trading a property settlement for contact, or took their client "too seriously". In three of these cases the solicitor interviewed felt that the solicitor on the other side was "not providing appropriate advice" on issues relating to domestic violence or child abuse, allowing their clients to persist with violence towards their former partners or minimising incidents of abuse rather than attempting to control their client's behaviour.

It is interesting to note that no public sector lawyers belonged to the category of solicitors who said they let the client drive the matter, and the private solicitors who did so undertook less legal aid work than other private solicitors.[20] It could be argued then that the merits test as prescribed by the Legal Aid guidelines plays an important role in determining how solicitors manage client expectations. Some solicitors who acted for legally-aided clients felt strongly that the merits test forced them to comply with very directive client management standards.[21] (For example, informing a client that regardless of their wishes, an application for resistance would be impossible on a merit basis if they had voluntarily forfeited contact with their child for a number of years,

[19] By contrast, the clients interviewed by Hilary Sommerlad wanted their lawyer to identify with them and their cause: 'English Perspectives on Quality: The Client-Led Model of Quality — A Third Way?', paper presented to the International Legal Aid Conference, Vancouver, 16–19 June 1999, 7.

[20] We included questions in the file coding sheet which asked the coder to identify the solicitor's approach to the client — had they followed all the client's instructions/identified with the client, or directed the client on what was a reasonable process or a reasonable outcome or both? This would have provided a check against solicitors' reports in the interviews, however the responses gained were significantly affected by coder bias, and were ultimately uninterpretable.

[21] Of the 7.4 % that allowed clients to drive matters, n = 5. The mean percentage of legal aid work done by this group was 25%, compared with 48% for those who relied on the system.

and the solicitor would thus be unable to act, a scenario that would not necessarily arise if the client was self-funded.) This was offered as a justification for 'whistle-blowing' by at least one private practitioner, who said he would feel compelled to report either a legally-aided client, or an other party, to the LAC if he felt their case had no merit, and that they were wasting legal aid money.[22]

As should be expected from any solicitor in any area of practice, our respondents articulated their obligation to work within the framework demarcated by the Act, its interpretation by the Court, and the operation of the Rules. Our results indicated that our respondents generally agreed that these conventions were the most important determinants of how they managed client expectations. Most solicitors indicated that the client's expectations needed to be heard, but the next step was to test those expectations against the likely outcome, from the court's perspective, and to communicate this very clearly to the client at the earliest possible opportunity.[23] In this way, the court acted as an "abstract" if not an actual audience for the client's case.[24]

Solicitors overwhelmingly described using the law to manage clients as a way of ensuring that clients' expectations were realistic, or "hosed down".[25] (One solicitor said she tells her clients very clearly that the law is not justice, so they realise that what they hope to achieve is very different from what the law will allow.) They felt that this was essential, as if the client was led to expect something beyond what was achievable or able to be delivered legally, they would be dissatisfied with their service, which had negative repercussions for the lawyer and the client.[26]

This meant that solicitors had to be careful not to let the client 'drive' the case, although they had to balance this with the fact that the final decision does rest with the client. As a strategy, this meant giving clients options,[27] and showing clearly where each one would end up, and what the results would be if followed, within the parameters of the system.

We tested the value of the community-held opinion about client management as an element of good service by asking clients specifically if their expectations

---

[22] See also Bryna Bogoch, 'Power, Distance and Solidarity: Models of Professional-Client Interaction in an Israeli Legal Aid Setting' (1994) 5 *Discourse and Society* 65, 83; Christine Parker, 'The Logic of Professionalism: Stages of Domination in Legal Service Delivery to the Disadvantaged' (1994) 22 *International Journal of the Sociology of Law* 145. Both Bogoch and Parker see lawyers using legal aid eligibility guidelines as a means to control and disempower the client; however they do not also consider the ways lawyers control self-funding clients.

[23] This would seem to involve solicitors' own understandings of merit rather than current LAC interpretations.

[24] See also Sarat and Felstiner, *Divorce Lawyers and Their Clients*, 57, 69. Sarat and Felstiner argue that "defining the legally possible is one of the divorce lawyer's basic devices in efforts to exercise power in lawyer-client relations". This may well be true, even if one does not accept that law is sufficiently open-textured to allow any outcome.

[25] Robert H. Mnookin and Lewis Kornhauser, 'Bargaining in the Shadow of the Law: The Case of Divorce' (1979) 88 *Yale Law Journal* 950, 994.

[26] See also John Griffiths, 'What Do Dutch Lawyers Actually Do in Divorce Cases?' (1986) 20 *Law & Society Review* 135, 160; Mather et al., '"The Passenger Decides on the Destination and I Decide on the Route"', 295.

[27] See also Peter Carne, 'Management of Your Family Law Practice', Family Law Residential, Kooralbyn, Queensland, 1992: "Right from the start the solicitor has to control the client. This control will hopefully ensure that the client will come through the matrimonial dispute less scathed emotionally and financially than he or she would have otherwise, and, for the solicitor, avoids dealing with a client who at the end of the process is dissatisfied both with the result and the legal costs".

changed after discussions with their lawyer, and if they did, how they felt about those changes. The fact that 24% of clients indicated that their expectations changed as a result of discussions with their lawyer (the majority for the worse), tends to indicate that solicitors are in fact 'hosing down' client expectations if they float either above what the solicitor expects the court may award or above what the legal aid guidelines may allow to be pursued.

We also found that clients whose expectations had either not changed or been raised indicated a high level of overall satisfaction with their solicitor. By contrast, clients whose expectations were lowered by their solicitors gave their solicitors a much lower mean satisfaction score. Accordingly, although the overwhelming majority of practitioners appear to be providing a good service to their clients by managing client expectations in relation to the benchmarks provided by the system, many clients clearly do not appreciate being informed that the prospects of their claims are not as they hoped. To some extent, this disrupts our respondents' opinion that not to manage expectations leads to client dissatisfaction.

Our respondents therefore relied overwhelmingly on the formal conventions of the family law system as the touchstone for managing their clients. This is hardly a remarkable finding. The more complex issue, however, is whether there are other conventions beyond the Act or the legal aid guidelines that were significant to practitioners' conceptions of a good legal service in family law.

Importance of the Client's Background to Service Delivery Standards

Interestingly, the skills mentioned by the exploratory group that made a service 'good' as opposed to 'adequate', such as speaking to the client in plain English, and an awareness of and commitment to dealing with issues like domestic violence, were mentioned by our respondents, but not in proportion to the discussion of the other skills such as patience, empathy and communication. Again, this mirrored our exploratory research. Of the five solicitors who did mention these skills as being of primary importance, two worked for LACs, and two did a high proportion of legal aid work in private practice. Arguably, these particular practitioners were more attuned to dealing with these issues, as the funding status of their primary client base ensured they were far more likely to assist people of different cultural backgrounds, or people with greater conceptual difficulty caused by lack of education/poverty or mental illness.

As a general observation, despite the lack of unprompted comment by solicitors on sensitivity to race, gender, violence or abuse as primary service delivery issues, there was consensus on the skills thought necessary to provide a good service in family law. These skills (empathy, an ability to listen, an ability to communicate process and expected outcome with the client, an ability to manage the client's expectations and use good technical understanding or judgment when doing so), are not, as we might have thought from our original research, merely aspirational standards expressed by an elite group of

professionals.[28] Rather, these skills were accepted by practitioners across the board as measures of good practice and, as a consequence, good service.

Accreditation versus Acculturation

To understand the source of this broad consensus regarding the skills necessary to deliver a good legal service in family law, we specifically asked solicitors if 'other lawyers had been important in the development of [your] skills?' In particular, we were interested to examine the relative importance of formal practice standards (such as those provided by accreditation programs) and informal acculturation. Most interviewed solicitors (62.4%) believed that peer exchange was the most important way by which they developed their skills, either by observation in court, seeking advice from counsel, or through other solicitors they worked against or for, especially in close-contact structured negotiations where clients were present, such as Legal Aid or conciliation conferences.[29] As one junior solicitor observed, watching others provided a culturally delineated standard for good lawyering skills which younger solicitors were quick to follow:

> *You spend so much time dealing with other members of the profession, in conferences, or in huddles outside of court rooms, and everything like that. Your standing within the profession is really important because it reflects on your ability to negotiate with other sides, including knowing when negotiation is futile and knowing when to put a stop to it.*

The most important aspect of peer exchange was the ability to gain feedback or advice from colleagues. This was a key aspect of practice for many solicitors working within LACs, which seemed to foster and promote a very 'open-door' policy on staff supervision, training, and advice giving at all levels.

Peer exchange was a far more significant means of learning skills than any other method or possible source of standard setting, such as accreditation. Accreditation was not mentioned at all in relation to the 'skill development' question, and when accredited specialists were specifically asked why they had chosen to become so, only 11.3% of those eligible for accreditation[30] commented that it was in order to build skills. The most common reason given for becoming accredited was to gain a market advantage (31.8%). One solicitor explained this very clearly:

> *I let it go the first year [it was offered]. At the time I thought I will use this as a shield or a sword in the sense that you use your accreditation to make an impact on the market, and say "I am the accredited specialist, come to me". But after one year the 5 people in [my town] who became accredited so widely advertised they were specialists, I thought*

---

[28] When clients were asked if there was anything their solicitor never asked about, only 2 (from 113) mentioned domestic violence, indicating that the majority of solicitors do in fact have a high level of awareness (more than 2 of our sampled cases involved domestic violence). Further, in response to Question 31(f) of the client survey which asked if the solicitor 'spoke in a way [you] could understand', the mean result was 4.3, indicating that solicitors may be undervaluing a 'good' skill that clients indicate is well practiced.

[29] The 25 solicitors interviewed in our exploratory research had an average of 15 years' experience in family law. This raised the possibility of skewed results arising from an atypical group, but the larger group of interviewed practitioners indicated no difference of opinion on these points.

[30] cf. Bruce L. Arnold and Fiona M. Kay, 'Social Capital, Violations of Trust and the Vulnerability of Isolates: The Social Organization of Law Practice and Professional Self-Regulation' (1995) 23 *International Journal of the Sociology of Law* 321.

> *I'd use my accreditation as a sword…if I am going to maintain my position in the market I have to become an accredited specialist.*

Accreditation within the Australian context is therefore not automatically viewed by practitioners as a signifier of quality service,[31] an opinion that is transmitted through peer exchange. As one solicitor commented, she had no intention of becoming accredited "because people who have done it have said that it's not worth it". In fact many practitioners commented on their distrust of accreditation as a signifier of anything but a desire to gain market share (24.2%). One practitioner stated baldly that "you don't need a certificate to be a specialist". In fact, for many who had no intention to become accredited, it was felt that a solicitor's years of experience in family law was a preferable indicator to a client that they would be provided with a good service. (Although how the client would actually be expected to know this was not addressed.) As one (non-accredited) solicitor commented:

> *I think that an experienced family law practitioner will still get the work that an accredited family law practitioner will get and I've seen some accredited family law practitioners produce some pretty dodgy work.*

It was notable, too, that clients were no more satisfied with the services provided, or the results achieved, by accredited specialists than they were with the performance of non-accredited family lawyers.

Public sector solicitors were more likely to view accreditation favourably, as an opportunity to build skills. This was particularly so in NSW, where solicitors accepted as policy the need to become accredited as soon as they were eligible. The NSWLAC obviously saw accreditation as an investment, providing structured support for those doing the course, including paying fees and organising study groups. Solicitors indicated that they thought the policy rationale was so that "the Commission could market themselves" on the basis of having accredited specialists. This suggests that for the NSWLAC, accreditation is in fact a signifier of good service because of the skill enhancement obtained by those doing the course. Considering that the 'market' for the Commission's services is given, it would be fair to assume that the NSWLAC views accreditation as an important means of using any existing industry processes in order to badge their solicitors as 'quality service providers' for Government and the practice community. This perhaps can be viewed as a pre-emptive public relations strike against the historical suspicion that public legal aid services are somehow not as good as those provided by the private sector. In contrast to the NSWLAC, LAQ saw no immediate value in promoting or paying for accreditation courses, preferring to spend money to send their staff to specialist mediation courses. This arguably reflects the emphasis in LAQ on primary dispute resolution methods, especially conferencing, as a mandatory requirement for all potential grant recipients to gauge the suitability of their matter for further funding.

[31] Respondents from South Australia were unable to answer this question as that State has no specialist accreditation program.

The more traditional method of skill learning, mentoring as defined by the master/articled clerk relationship, was experienced by only 22% of our interviewees. These relationships were more likely to be mentioned by senior male practitioners as methods by which they learned good family law skills. This group of practitioners, all in private practice, were also far more likely to think that aside from their initial mentoring, no other lawyers had been helpful in their skill development.[32]

To some extent, this could be explained by the changing nature of legal practice generally, and family law practice in particular. In many Australian states, traditional 'apprenticeships' no longer exist as a formal method of gaining practice qualifications in any area of law, having been replaced by six months of focussed skill study at Colleges of Law. The practitioners who had experienced mentoring and placed no importance on peer exchange were slightly more likely to be male. These were the same practitioners who had in fact begun their practices in family law in 1975 when the Family Law Act was enacted, and some had even had experience under the precursor to the current Act (the Matrimonial Causes Act 1959). Hence they had not been exposed to this pedagogical shift. Similarly, the percentage of women within the profession generally has grown since 1975,[33] and there was perhaps a greater readiness by many of our female respondents to discuss the exchange/interchange of ideas about practice and to give or receive advice about skill development. Of our respondents, it was women who were more likely to comment on assisting or mentoring younger solicitors, even though they may not have been mentored themselves. However, this was not carried out through the traditional 'master/apprentice' relationship, but as part of the general practice of peer exchange that occurs amongst family lawyers as a community. As one female senior solicitor, who herself had not been mentored but "thrown in the deep end", commented: "We are lucky in Adelaide, we're a small profession and people are supportive…and [if you] see a new person struggling you try and give a few clues and be available to talk."

These comments also raise the issue of the relevance of location to any discussion of quality in family law. Our statistical analysis yielded no significant results when comparing groups of practitioners in different registries, supporting the homogeneity of views about the content or nature of good service skills in family law. However, from a qualitative perspective, location was viewed as quite important in terms of how these skills were acquired. As a general observation, solicitors practising in smaller cities (like Adelaide and Townsville) were very quick to comment about the conciliatory and helpful nature of their colleagues within the practice community. Similarly, in rural, isolated practice communities, such as Armidale and Bundaberg, solicitors mentioned local organised network/discussion groups as a formal mechanism

[32] See also John H. Wade, 'New and Recycled Services by Family Lawyers: Responding to a World of Change' (1997) 11 *Australian Journal of Family Law* 68, 89–90.

[33] Mean years in practice for those that were mentored was 15.22, and for those that felt no other lawyers were important in their skill development was 16.13. By comparison, the mean years in practice for those more likely to mention peer exchange as the most important factor in their skill development was 11.87. Of the 18 mentored solicitors, only 2 public sector solicitors and only 7 female solicitors had been mentored.

for providing peer exchange about practice problems and issues. In other locations, there was a less active culture of peer exchange. This was most notable in Dandenong, where our sample was dominated by male practitioners of the 'old school', and our results indicated that they were more likely to think that no other solicitors had been of assistance in the development of their skills. However, this perception may be because of the small numbers from this registry included in our sample.[34]

Experience

When asked what else has assisted their development as a family lawyer, most of our interviewees mentioned experience (64.6%). In many respects, this reinforced the importance placed by solicitors on peer exchange, as the most significant aspect of 'experience' was experience in practice. Other perspectives on experience were also mentioned, such as life/age, or personal experience (ie: family breakdown or just the fact of having a family, which was seen to provide a foundation for better empathy with the clients). Other important factors were broad knowledge/experience of other areas of law (for example, criminal law was seen to assist with evidence, commercial litigation with file management), and previous occupations (especially social work/teaching, which some practitioners felt assisted them to have a broader understanding of the social problems people face).

Sherr has been dismissive of input measures such as qualifications and experience, arguing that while they are easily quantifiable, there is no evidence of any correlation between either measure and legal competence.[35] The fact that crude 'years in practice' or 'degree of specialisation' are not useful measures of a good service was in fact reinforced in our research by the fact that there was no correlation between the aggregate score for client satisfaction and the lawyer's number of years in practice, the percentage of work they did in family law, or the fact that they were accredited.

However in both our exploratory and follow up interviews, respondents showed that in the Australian context there are several sustainable reasons why 'experience' may contribute to the development of skills for good family law service delivery. Firstly, it could be argued to provide opportunities to interact with/observe other family lawyers, and learn initial skills from them (although this development trajectory arguably plateaus rather than continues to rise at some stage). It provides opportunities to understand clients better by their own life experience, age, family experience, or extended experience with clients, including exposure to and understanding of domestic violence issues.[36] It provides an opportunity to develop judgment (knowing when to settle, making

[34] In the mid 1970s, only 20% of law graduates were women. This rose to 35% in the mid 1980s, and by the late 1990s, 50% of law graduates are women. Keys Young, Research on Gender Bias and Women Working in the Legal System (NSW Department for Women, 1995).

[35] The sample of Dandenong solicitors was small (n = 7). It is interesting to recall that Dandenong solicitors received the lowest aggregate service rating from the client surveys, while also having relatively high levels of inputs into their cases.

[36] Avrom Sherr, 'The Value of Experience in Legal Competence', in Australasian Professional Legal Education Council, *Skills Development for Tomorrow's Lawyers: Needs and Strategies — Conference Papers* (Sydney, 1996), 133, 153.

an assessment of how to proceed according to the features of a particular case). Finally, it can be argued to provide an opportunity to gain exposure to the system,[37] which dictates and monitors approach to practice through forms, rules, and the stages of the court process (a point to which we will return).

Nevertheless, experience in this sense clearly does not simply equate with numbers of years in practice. This leads researchers of quality somewhere through the looking-glass when it comes to considering 'experience' as a measure of good legal service delivery. It seems that the measurable aspects of experience are essentially meaningless, while its meaningful aspects are essentially unmeasurable!

A Conciliatory Culture (?)

Our exploratory research also indicated that a conciliatory approach to practice in the jurisdiction was a commonly held view, and our follow up research reinforced this consensus to a point. For example, in the open-ended interviews, when asked to describe the most important skills of a family lawyer, several practitioners described skills in terms of an approach to practice, and the most important of these was to be conciliatory (that is, to negotiate, be reasonable, or flexible). To test the exploratory findings, and the preliminary comments offered by some practitioners in relation to the skill question, we sought comments from our interviewees on the counter-view, that is we asked them: 'what is your attitude to practitioners who behave aggressively', and 'what proportion do you think are in that category?'

A majority (69%)[38] thought that other solicitors with aggressive tendencies were bad solicitors, and did not understand the nature of the area of practice or its commonly held standards. For example, one suggested that aggressive family lawyers "don't know the nature of the law", and another offered that "[the] court doesn't like it and [it] doesn't win you any friends". Despite this, a third of respondents (31%) felt that aggression is "sometimes in the client's interests", or "is the only response to a situation", or is "part of the client's instructions". Significantly more men than women believed aggression to be an acceptable part of practice.[39]

Only three of the files analysed included evidence of the solicitor taking an aggressive approach, apparently without direct instructions from the client to do so. Two of these cases involved the solicitor putting unfair pressure on an unrepresented opponent. The view that there were many occasions on which it was perceived appropriate to act aggressively was, however, emphasised by the

[37] By contrast, two of the case files involved inexperienced opposing solicitors dealing ignorantly/inappropriately with their client's violence and failing to understand its effect on the victims.

[38] Including local legal and judicial culture, as noted by Sarat and Felstiner, *Divorce Lawyers and Their Clients*, 106–107.

[39] Note that not all solicitors provided an answer to this part of the question. The question actually asked solicitors: 'What is your attitude to other family practitioners who behave dishonestly or aggressively?', and 'How many do you think are in that category?' Many 'split' the question, choosing to comment on either aggression or dishonesty, but not both. The percentages given reflect those that responded to the issue of aggression (n = 45). From the overall sample (n = 83), 27.4% commented that they thought dishonesty was 'really bad', and was described as 'beating up matters for fees', and a 'breach of duty to the [Family] Court', and viewed as 'damaging to the profession's image.

litany of aggressive behaviours listed by solicitors about their opposition, when coders asked for comments on the behaviour of the other solicitor in relation to the file analysis. These aggressive tactics included: tendering affidavit evidence on the dates of court appearances, causing adjournments and added cost for the other party; refusing to negotiate with a legally-aided client; making unreasonable settlement offers and wasting time; "revving up" their clients and obstructing settlement; filing applications at Registries a long distance from the other party's home making it difficult for that party to attend court; advising their client not to pay penalty costs; dealing directly with the other party rather than through their legal representative; and "aiding and abetting" their client to intimidate and manipulate the other party. Aggressive solicitors tended to represent self-funding clients, whereas the targets of the aggression tended to be legally-aided. Even so, such behaviour was evident in only a minority (7%) of cases.

In order to elicit from our interviewees the extent to which they, and other players in the system, believed in settlement (ie: fostering a conciliatory approach), we asked them a series of questions: 'When is it best to settle and when is it best to go to court in family law cases?, and 'Is there an expectation that family law cases should settle and from whom?'

All of our respondents believed that it was best to settle cases, as it was felt to be to the client's economic benefit, to the benefit of the children, and to the long term benefit of the macro family relationship, as it gives control over the result rather than leaving it to the "lottery" of a judge's decision.[40] This last point, that to allow a family law matter to be decided by a judge was a "gamble", was in some respects a surprising sentiment to be expressed by practitioners. It would seem to contradict the strong emphasis our respondents placed upon the technical skills and knowledge needed to predict the range of outcomes a court would order when advising clients and managing their expectations. However, practitioners tended to articulate the view that a judge's decision may in fact be a 'lottery' as a means of encouraging clients to settle. As Sarat and Felstiner have also noted, the 'lottery' element may relate to the question of which judge will be assigned to hear the case, and how that judge will or will not deal with the individual features of the case.[41]

This point aside, there was a consensus regarding expectations of settlement amongst our respondents. As one solicitor mentioned, "Well, as a general proposition, it is always better to settle. Family lawyers will tell you that, trot it out as sort of a motherhood statement but it's probably true." However, this did not necessarily mean settlement procured just through solicitor negotiation or out of court conciliation. For the majority, settlement was viewed as occurring within the structure of the Family Court, which meant that settlement and issuing of proceedings were not mutually exclusive positions to take. What is of interest were the different reasons that our interview subjects gave as motivations for going to court.

---

[40] $\chi^2 = 6.501$, df = 2, $p < 0.05$.

[41] See also Sarat and Felstiner, *Divorce Lawyers and Their Clients*, 117–122.

For only a minority of our respondents, the decision to go to court (or issue proceedings) "depended on the client", that is, was client determined or driven (14.6%). For some clients, even after they had been "educated" about what to expect from the system and the potential range of outcomes, and had been advised accordingly, they still felt the need to go through the court process, for "catharsis", "to be heard", or "to have their day in court". These clients seemed to fall into two categories, clients who were vexatious ("the lunatic fringe", as one solicitor described them, who could never see reason), and those who would be destroyed through a negotiation process (female survivors of domestic violence, or those whose relationship was based on other forms of power imbalance). Some solicitors indicated that clients sometimes needed a person in authority (a judge or registrar) to make orders to ensure that they would be abided by, if the client and the other party were incapable of compromise.

Twelve percent of our interviewed solicitors indicated that they went to court only when the other party or the other solicitor was so intractable, vexatious or aggressive that negotiation outside the system became impossible. This group spent significantly less time in practice doing family law,[42] indicating that effective management of the opposition is a skill that is improved through practice experience in the jurisdiction.

The overwhelming majority (73%) responded that they went to court to "facilitate settlement". They were not so precise as to delineate the cause as either their client or the other party, but believed it was the key moment in the handling of a case when a family lawyer's judgment (the skill described previously, and seen as important by so many lawyers) would be put to good use. For many others also, the question of cost was a key reason in their decision to issue proceedings. That is, if negotiations had been going on fruitlessly for months soaking up legal fees, it was felt that it was "better to go to court and get it over and done with".

For the majority of our interview subjects, to issue proceedings on the other party was seen as a way to force them into the system, providing formalised procedures for negotiation.[43] This reliance on the system as a tool for settlement was also reinforced in our research by comments some solicitors made to coders when asked to comment on their files. Many solicitors with this perspective felt that settlement would occur in property matters at the Order 24 conference. In children's matters, if expert evidence was required, solicitors felt settlement would occur once the expert's (usually a psychiatrist or psychologist) report had been tendered.[44] It was felt that Order 30A reports formed the foundation upon which a judge's decision was made, allowing solicitors to predict accurately in advance what the orders were likely to be, and to advise their client about settlement accordingly. Otherwise, many solicitors felt that once it was known

---

[42] ibid., 117.

[43] Kruskal-Wallis $\chi^2 = 7.722$, df = 2, $p < 0.05$.

[44] See also Richard Ingleby, *Solicitors and Divorce* (OUP, Oxford, 1992), 31, 34; Tom Fisher, Tony Love, Lawrie Moloney, Kathleen Pearson and Damien Walsh, *Traditional Divorce: Consumer Perceptions of Legal Aid Clients Choosing Traditional Legal Processes* (National Centre for Socio-Legal Studies, LaTrobe University, 1993), 16–17.

which party the child representative preferred, settlement became possible, as the court was likely to follow the "sep. rep's" opinion, automatically reducing one of the party's hopes for a favourable result from the court. This was felt to occur either at or before the pre-hearing conference,[45] or at the door of the court at final hearing.

Hence for the community of family lawyers, the Court (as the interpreter and arbiter of the Act) is perceived as an essential part of the settlement continuum, in the process Galanter has termed "litigotiation".[46] The opportunities that the court provides for clients to settle were described by one respondent in this way (and the formula was repeated many, many times):

> *I must say I think it is a good idea to initiate proceedings…because there are so many checks and balances in place in the Family Court …. [U]sually I would start off a matter either by giving the client an option to talk to their partner after I have given them advice or I will write a gentle letter [to the other party] saying, "well look, you know, I think this is what you should do, go and see a solicitor and we will start from there." So, I always start from the try and negotiate point of view… [T]hen you find out fairly quickly as to whether you think the parties, or …their respective solicitors, are moving any closer together. And if they are not…, I think, …it's often better to apply to the court than go through that. Because what you're getting if you let parties drag on too much is Custer's Last Stand, they're both firmly entrenched, they know what divides them, and it then becomes a win/lose situation. Whereas if you put them through a mediation-type process, through the court, it's a Registrar telling them what he or she thinks might happen, it's a counsellor telling them to be child focussed, and it tends to bring them together.*

The perceived centrality of the Family Court to the settlement process may also help to explain why solicitors generally preferred to refer their clients to Family Court counselling than to community-based mediation. Sixty-three per cent of the cases in the file sample involved Family Court counselling, but only 8% involved community-based mediation. Solicitors considered that Family Court counselling was better equipped to handle children's issues, was free, had a good success rate, the counsellors had greater expertise and knowledge of family law, and settlements reached through counselling were more reasonable, workable and just, had greater authority, and were more easily recognised by the Court. Notably, the solicitors who particularly commended Family Court counselling were either in-house solicitors or private solicitors dealing with legally-aided clients, indicating that Family Court counselling is considered to be better equipped to deal with legal aid cases.

There are a variety of reasons why community-based mediation might be seen as more appropriate for self-funding clients and less appropriate for legal aid clients. For example, some solicitors thought community-based mediation was suitable for cases involving small amounts of property, where it could provide a

---

[45] The ALRC has suggested that the Family Court's case management guidelines should in fact be amended to allow for earlier ordering of O30A reports in cases of need, defined as those involving unrepresented litigants, and allegations of family violence or child abuse, although it did not recommend ordering family reports specifically for the purposes of settlement. ALRC, *Discussion Paper No.62: Review of the Federal Civil Justice System* (August 1999), 336.

[46] The ALRC has noted that although the pre-hearing conference is not designed as a dispute resolution event, both the Court's and its own data indicated a high settlement rate at this stage: ALRC, ibid.

cheaper solution than lawyer negotiations. Twelve solicitors (16%) said they would encourage clients to attend mediation if they were well-educated, articulate, reasonable, able to communicate with the other party, and aware of their rights and entitlements — characteristics that tend to be related to funding status:[47]

> *I think the people that are able to go to mediation and reach agreement usually have more education, usually are articulate and usually the separation has been more amicable. So in those circumstances they're able to reach an agreement… And they are generally pretty open-minded people, they're not passionate, they haven't had abuse, there haven't been a range of other factors. As soon as there are extraneous factors and allegations, mediation just doesn't work and it's not appropriate. The Centacare people work with a different socio-economic group of people and they assist clients to reach agreement and often, because there is not as much fight about it, they're able to do so.*
>
> *…it's usually the ones that are privately funded that go to mediation.*

Thirty percent of solicitors said they do not encourage their clients to go to community-based mediation if there is a power imbalance between the parties, although the existence of unequal bargaining power was more likely to be related to gender in general than to funding status in particular:

> *If there are power differences, and there usually is, then mediation tends to make it worse. The person, usually the husband, who has control speaks the most, and is able to browbeat the other party. The mediator, unfortunately, may then also take his side, so the woman is ganged up from all sides. Sometimes they are a mess afterwards, they need counselling to get over the counselling. Mediation is a great idea, but not in the context of power inequality, which is usually the situation in family law, in which case you need a lawyer present.*
>
> *More often than not there is one party in a position of power, whether it's psychological, money, or so on and so forth, and mediation does nothing. All it does in fact, it's been my experience, is exacerbates the power position, the power controls. So the person who is passive or dominated, they continue to be dominated and the mediation agreements are quite unjust and inequitable.*

Other reasons for not encouraging community-based mediation included: its unavailability in the local area; lack of knowledge about the services provided; lack of confidence in the competence of mediators or their knowledge of the Family Law Act; and resistance from particular groups of clients: "I've got a really, really high NESB population here, like incredibly high, and they just won't use those services in a million years on their own volition". Six solicitors felt that mediation was unnecessary. As long as both clients have legal representation, then the solicitors should negotiate. One pointed out that unnecessary mediation causes further delays, and as the clients would have to come back to their solicitors for advice on the agreement anyway, it also increases costs. Several others thought that if clients were able to communicate, they should be encouraged to negotiate themselves.

---

[47] Marc Galanter, 'Worlds of Deals: Negotiation to Teach About Legal Process' (1984) 34 *Journal of Legal Education* 268; see also Rosemary Hunter, *Family Law Case Profiles* (JRC, 1999), 85.

Overall, 53% of solicitors stated that they did not encourage their clients to attend community-based mediation, 37% said they would encourage their clients to attend subject to some form of proviso from the list above, and only 10% gave unqualified support. Twenty-eight percent thought that community-based mediation did not help at all, while 70% thought that it helped in some cases and hindered in others. The main form of hindrance noted was agreements that were "bizarre", unenforceable, impractical, unworkable, "wishy-washy", or unfair. One solicitor explained that some property agreements simply gave a 50/50 split, without considering factors such as the number and ages of children, who was the primary care giver, contributions, etc., which would be considered by the Court. Another complained that "we are supposed to be acting in the best interests of the children, but if people come to an agreement by consent they can agree to the most abominable outcomes for children and nobody seems to give a darn".

Another possible reason for solicitors' cool response to community-based mediation lies in their answers to the question 'is there an expectation of settlement in Family Court cases, and by whom?' These answers indicated that solicitors wish to be seen to be actively engaged in settlement activities by their peers and by the Family Court.[48] Seventy-six percent of those who responded to this question, for example, believed that other solicitors expected settlement. Interestingly, however, solicitors doing a large proportion of legal aid work seemed slightly more inclined to think that other solicitors did not expect to settle.[49] This perhaps indicates some of the current difficulties experienced when attempting to provide services to legally-aided clients, which were illuminated by our questions to solicitors regarding their files. These difficulties included opposing solicitors acting in an aggressive strategic fashion and refusing to negotiate, as they knew a client was legally-aided, and would not be able to obtain funds for protracted negotiation. It also perhaps reinforces the fact that some (male) solicitors acting for privately funded clients are more likely to allow the client to 'drive' their case, regardless of merit, whereas legally-aided clients, by virtue of the guidelines controlling their funding, must abide by their solicitor's assessment of merit and how strenuously a matter can be pursued, or face the consequences of having their funding terminated.

Overall, however, the most important factor in creating an expectation to settle was the policy and procedure of the Family Court. All of our participants who commented on the court's expectation believed that the Family Court expected settlement. The primary reason for holding this belief, as already indicated, was that primary dispute resolution was written into the Act itself, and that the intention behind the legislation was then translated to practitioners, and ultimately clients, by the different stages and directions for settlement provided

[48] Evaluations of community-based mediation services have confirmed that the clients of those services tend to be middle-class and self-funding: Anthony Love, Lawrie Moloney and Tom Fisher, *Federally-Funded Family Mediation in Melbourne: Outcomes, Costs and Client Satisfaction* (Attorney-General's Department, January 1995), 33–34; Lawrie Moloney, Tom Fisher, Anthony Love and Sandra Ferguson, *Managing Differences: Federally-Funded Mediation in Sydney: Outcomes, Costs and Client Satisfaction — Synopsis, Key Findings and Recommendations* (Attorney-General's Department, July 1996), 10–12.

[49] See also Ingleby, *Solicitors and Divorce*, 158; Mather et al., '"The Passenger Decides on the Destination and I Decide the Route"', 307.

by the Court.[50] These included: the provision of initial Family Court counselling for clients; the provision for settlement conferences before final hearings; comments delivered to participants in litigation by judicial officers at these stages in the process before final hearing; and even the delay to reach final hearing itself.[51] It was felt that the Court only expected "the very worst" cases to go to final hearing, and always expected child sexual abuse cases to reach final hearing, where assiduous assessment of evidence was essential for the protection of children, in order to comply with the philosophy of section 65E.

A substantial proportion of practitioners (27.3%) gave as their reason for the Court's expectation of settlement the Court's own statistics concerning rate of settlement. These statistics are disseminated in Court documents,[52] at conferences, and in continuing legal education forums. Interestingly, there was no consensus amongst our interviewees about what these figures actually were (a range was given from 85-97%), but this in itself did not seem to be relevant. The very existence of an observable resolution rate provided not simply a record but a personal benchmark, so that individual solicitors knew how many of their cases they should in fact be attempting to settle before final hearing, to be considered an appropriate and participatory player within the system.

One solicitor summarised the power statistics have on the profession, creating a self-fulfilling prophesy:

> *The [Family Court] expect a high number of settlements to get their statistics up. They have to tell Government I suspect. They…have a strong view that everything should settle…and at the end of the day, statistically, that in fact will happen.*

The LACs were also viewed as playing a role in enforcing the rate of settlement through their funding guidelines. For example, many Queensland solicitors mentioned the fact that LAQ requires clients to attend mandatory conferencing before grants of aid are made as improving their settlement rates. Practitioners, however, viewed LACs in all states as playing a role in reinforcing the desired settlement rates they believed were expected by the Family Court. As one public sector solicitor commented:

> *I think I have had a percentage of 92% settling since I have been at Legal Aid, and I know that is higher than the average but yeah, that's my ratio. I have only run four full hearings in the Family Court…since I have been at Legal Aid in three and a half years.*

These statistics are then conveyed by solicitors in both the private and public sector to their clients as part of the process of managing client expectations, "hosing them down" and educating them about the importance of settlement. As one private practitioner commented:

---

[50] The mean percentage of legal aid work done by those solicitors who did not expect other solicitors to settle was 53.4%. The mean percentage of those who thought other solicitors did expect to settle was 45.4%.

[51] The ALRC has also noted that while the Federal Court's mission statement refers to "deciding disputes according to law", that of the Family Court refers to helping families resolve disputes by agreement, with a final judicial decision as a "last resort": *Discussion Paper* No.62, 316.

[52] See also Carole Brown, 'Integration of Dispute Resolution Services Within the Family Court', paper presented to the Second World Conference on Family Law and the Rights of Children and Youth, San Francisco, 1999, 2.

> *There [is] an expectation amongst the profession who know the statistics, but the clients don't, they really think it's going to be gloves off in every situation and they are amazed that the procedures that are there that make settlement so easy. [The Court] is expecting the majority to settle, [it's] pouring resources into achieving that. Ninety-five percent do.*

As some of the client survey responses may suggest, however, the desire to conform to expected (high) rates of settlement may lead solicitors to over-manage their clients, rather than taking a more critical view of the relevance of statistical patterns to individual cases.

A Unique Practice Area

The indication that the Family Law Act stands at the normative apex of the community of Australian family lawyers also explains why our respondents are of the view that family law is different to other areas of practice, which reproduces another finding from our exploratory research. For them, the Act, although obviously prescriptive in terms of their behaviour, is nevertheless viewed positively.[53] As one solicitor commented: "family lawyers should have the commitment and philosophy of the Act and act on it; other areas of law are inflexible and uncreative". The key rationale for this opinion returns to the consensus belief that family lawyers need to have good client-based in combination with good technical-based skills, with the requisite judgment ability to turn an emotional problem into a legal problem, with legal solutions that must be negotiated in a conciliatory fashion.

Lawyers from other practice areas, according to our participants, were not capable of understanding these elements of family law practice in combination. As one family lawyer noted:

> *You often get common lawyers who dabble in family law having a very different approach to people who mainly do family law work. They try to run it like a common law file…it's…a conceptual thing.*

Another of our participants, a legal aid lawyer who works primarily in criminal law, echoed this sentiment when he reflected on why he doesn't feel he can do more family law work:

> *I would find it too hard. Not too hard, too frustrating because of just human beings, the fact that they seem to get readily involved in these conflicts which don't resolve, they are just ongoing festering wounds…the [clients] are in perpetual dispute beyond the law.*

This perspective is interesting, because most family lawyers believe that to be a good family lawyer, certain characteristics must be innate in order to give a practitioner the capacity and willingness to remain in the area in order to build skills. When asked if the characteristics necessary to be a good family lawyer could be learned through experience, 33.8% of our respondents believed it was

---

[53] See eg. Family Court of Australia, *Report to the Chief Justice of the Evaluation of Simplified Procedures Committee* (August 1997), 64–66, showing 7% of cases proceeding to judgment in 1995 and 1996. The equivalent figure for 1997–98 was 5%.

through experience alone, reinforcing our findings on peer exchange and practice experience as crucial to skill building. However, 45% were of the belief that experience practising family law is crucial, but as a means to improve innate characteristics, such as empathy, patience, and tolerance for the human condition. As one private practitioner explained:

> *[It's] nature and nurture. You have to have [communication and personal skills]…that's what enables [you] to remain in family law, as opposed to commercial litigation or straight commercial, where you don't need those personal characteristics. You've got so much client contact that you've got to have it to start with and then you refine and develop it, otherwise we'd be social workers.*

It was statistically significant that those that did a greater percentage of work in family law were of the belief that 'good' family lawyers needed to have innate characteristics (like patience and other client-based skills), that could be improved through experience.[54] Experience measured as 'percentage of work in family law' rather than 'years in practice' might then have some value as a quality measure, as it would capture the consensus belief of practitioners that individuals with the right qualities remain practising in the area, therefore acting as an indicator of their suitability to be 'good' family lawyers. It is difficult to specify, however, what proportion of family law work would qualify for this purpose (more than 10%? more than 50%?). There was no relation established in the client surveys between the percentage of work in family law and client satisfaction with the service they received, but at the same time, none of the solicitors whose clients participated in the survey did less than 20% of their work in family law.

The shared perception of the uniqueness of family law as an area of practice also emphasises the advisability of quality standards being tailored for particular practice areas. For family lawyers, because of the strong shared consensus of what constitutes 'quality', it would appear to be unstrategic and perhaps quixotic to attempt to impose upon them bureaucratically developed, general purpose quality standards for the legal profession as a whole. As an indicator of what the acceptance rate of such regulatory quality service standards might be amongst family lawyers, only 16.9% of the legal practices involved in our research currently have quality accreditation or TQM procedures in place. Many solicitors in these firms did not appear to take imposed and named quality mechanisms seriously, commenting that they were "not really sure what they are". Further, comments about industry imposed schemes (such as advisory codes of practice designed by Law Societies) as sources for standard setting were conspicuous by their absence when our respondents were asked to comment on how they learned the skills necessary to deliver good service and to function within the community of practitioners. This included the absence of reference by Queensland solicitors to the quality assurance elements incorporated into LAQ's preferred supplier scheme guidelines.

---

[54] Sarat and Felstiner claim that lawyers generally act as apologists for existing legal arrangements: *Divorce Lawyers and Their Clients*, 86, although the situation conveyed to clients may not necessarily accord with the lawyer's own views.

Conclusions

The emphasis on the Family Court as an arbiter of professional behaviour as well as an arbiter of clients' disputes was a common and recurring theme throughout all of the responses we received from solicitors in relation to their approach to practice. It therefore appears that the Australian jurisdiction does in fact have normative quality standards, as prescribed by the Act (and to the extent of directing client management, the legal aid guidelines), that the practice community accepts, and to which they adhere.

In addition, to give effect to the philosophy of the Act and to ensure matters are "within range" of how the Court interprets that Act, solicitors deal with their clients in particular ways. These methods of client interaction then become accepted as normative standards of a good service, and include, as our research demonstrates: an ability to be able to communicate process to the client, an ability to exercise judgement when considering the client's individual needs and expectations and to consider their relevance to legal principles, an ability to manage the client's expectations in accordance with the expectation delineated by the Act. Our respondents acknowledged that maintaining these standards is not always easy or possible. They suggested that there will always be cases driven by "the lunatic fringe", or those that can not help but go to court because of child abuse factors. However, even these cases, which solicitors view as those in which it may be appropriate to act aggressively, are controlled to a certain extent by Act, and by the 'best interest of the child' provisions.

This said, there are certain innate qualities that the majority of our practitioners believed to be important in order to be a good family lawyer (such as empathy, the ability to listen, and patience or tolerance), that could not be determined by the Act. Yet these qualities were considered to predispose solicitors to practice in the area, and it was a commonly held belief that they too could be enhanced by exposure to the precepts of the law in practice.

These findings from our research indicate that Australian family lawyers are very directive of their clients because of their adherence to the Act, which demands that they manage client needs very tightly. This raises the question of whether this practice overrides clients' interests, which may call family lawyer community standards as they currently exist into question as reliable indicators of good service. The client surveys, however, did not indicate widespread dissatisfaction, although clients were resistant to being managed away from their initial goals. In terms of satisfaction with their lawyers, the lack of significant differences between the responses of legal aid and self-funding clients, and between the clients of private and salaried legal aid solicitors suggest fairly consistent service delivery between different groups of lawyers, and supports the conclusion that Australian family lawyers belong to a cohesive practice community culture, bounded by consistent professional norms.

In this respect, our findings differ substantially from the assertions of the ALRC that there is a variable standard of proficiency amongst family law practitioners, and that "based on the comments of the Family Court, some litigants and practitioners, there is a real need for the profession to seek to improve practice

standards in this jurisdiction".[55] The ALRC appears to be generalising from complaints about a small minority of lawyers, whereas all of the evidence available to us indicates that such generalisations are not justified. This also casts doubt on the ALRC's proposed remedies for the 'problem', although its suggestion that a mentoring system be introduced, under which experienced specialists would provide advice and assistance to less experienced practitioners, is in fact quite close to the informal method of family lawyer socialisation currently in place.

Solicitors' reliance on the Family Law Act as the source of understandings of good practice raises further questions about any perceived need by government in the near future to expend funds on the design and implementation of bureaucratic criteria to measure and guarantee quality in legal aid service delivery. Such criteria may prove to be appropriate in other practice areas,[56]673 but within the current state of Australian family law, it would appear more efficient to direct available funds into the system that monitors and directs current practice, in order to improve existing services. Even if the accepted standards of behaviour and service delivery were felt by government to be in need of change, it would appear that the most effective way to achieve this would be to harness the existing avenues by which standards are transmitted within the practice community — through amendment to the Family Law Act or Rules, reinforced by the Family Court.

Finally, legal aid lawyers in both the public and private sectors currently appear to provide an equivalent quality service to their clients. The Senate Legal and Constitutional References Committee[57] speculated that the "exceptionally high" quality of the work of in-house solicitors, despite lower wages, may be due to higher job satisfaction, commitment, and other intangible factors.[58] In-house solicitors in NSW in particular said that despite cutbacks to legal aid they still enjoyed working for the LAC. They described the in-house practice as supportive, encouraging, and staffed by people who are genuinely interested in their work, and explained that their positions as in-house solicitors gave them access to interesting cases. Some felt that the LAC is not given enough recognition for the quality of service that it does offer:

> *I've got nothing but praise for the support and supervision that I get… I don't feel just like a work horse, and there's a lot of lawyers who came out with me who don't feel valued at all.*
>
> *…they are a bunch of very dedicated individuals who are working through some difficult times.*

---

[55] $c^2 = 8.265$, df = 3, $p < 0.05$.

[56] ALRC, *Report No.89*, 242–43.

[57] They may also be appropriate in other aspects of family law work, such as child representation. Our findings relate only to the representation of adult legal aid clients. LAQ, for example, proposes to introduce child representative accreditation through the use of standards.

[58] Senate Legal and Constitutional References Committee, *Inquiry into the Australian Legal Aid System: Third Report*, 47.

As suggested above, in addition to these utility-based explanations for the high quality work of public sector family lawyers, the quality of their services is regulated by the fact that in-house solicitors share the same professional norms and hold themselves to (at least) the same standards of service as their private sector colleagues. Our interviews gave some indications of future potential problems, however.

When we asked our respondents if they were satisfied with the service they could provide to their clients, no public sector lawyer actually felt unsatisfied with the service they delivered. But unlike private sector lawyers who were slightly more inclined to give a definite response to the question (ie: yes or no), public sector lawyers were more likely to feel satisfaction with service was dependent on the amount of money or time available.[59] One in-house solicitor said they were "satisfied with the people I work with, satisfied with the organisation, not satisfied with the resources that we are allocated, because we don't have financial resources". Another considered that cuts to legal aid had not drastically impacted on their practice so far, but if cuts continued, the quality of service would inevitably decrease. A third explained:

> *I believe Legal Aid offers an excellent service. I believe that service is significantly hampered by the financial constraints upon it and I think that is getting worse…you just can't have parity of legal services… I don't think [the funding restraints are] affecting the quality at all, I just think it's the quantity and extent that is the problem.*

Interview and file data cited also suggests that the 1997 legal aid guidelines (particularly the overall funding cap) appear to have encouraged some private sector lawyers to abandon the conciliatory approach and run aggressively strategic campaigns against legally-aided clients, in order to truncate or exhaust their grant of aid. This is an issue that goes not to the quality of legal aid services per se, but to the ethics of dealing with legally-aided opponents, although different legal aid policies could also obviate such tactics.

The family law quality 'eco-system' itself currently appears to remain intact. However the concerns of legal aid lawyers as to quantity of service, and the realisation that the legal aid guidelines form part of the formal structures that prescribe solicitor behaviour, suggest that the terms of these guidelines are capable of affecting the quality of service delivered to legal aid clients. Because of the tendency towards commonality of approach, shifts in one sector are likely ultimately to impact on all family law clients regardless of funding status. Moreover, any attempt to introduce extrinsic quality assurance measures into a legal aid system that in other respects makes quality service more difficult to sustain, would be likely to have little actual impact on how solicitors deal with their legal aid clients, and may have the effect of hastening the exit of private solicitors from the provision of legal aid services in family law.

Bibliography

[59] Twenty-two percent of public sector lawyers felt this way compared to 11% in the private sector, although the numbers were very small in this category (n = 11).

Arnold, BL and FM Kay, 'Social Capital, Violations of Trust and the Vulnerability of Isolates: The Social Organization of Law Practice and Professional Self-Regulation' (1995) 23 *International Journal of the Sociology of Law* 321.

Australian Law Reform Commission, *Discussion Paper No. 62: Review of the Federal Civil Justice System*, ALRC: Sydney, 1999

Australian Law Reform Commission *Report No. 89: Managing Justice — A Review of the Federal Civil Justice System*, ALRC: Sydney, 2000

Bogoch, B 'Power, Distance and Solidarity: Models of Professional-Client Interaction in an Israeli Legal Aid Setting' (1994) 5 *Discourse and Society* 65

Brown, C 'Integration of Dispute Resolution Services Within the Family Court', paper presented to the *Second World Conference on Family Law and the Rights of Children and Youth*, San Francisco, 1999

Carne, P 'Management of Your Family Law Practice', paper presented at the *Family Law Residential Conference*, Kooralbyn, Queensland, 3-5 July 1992

Engel, DM 'The Standardization of Lawyers' Services' (1997) 77 *American Bar Foundation Journal* 817

Family Court of Australia, *Report to the Chief Justice of the Evaluation of Simplified Procedures Committee*, FCA: Melbourne, 1997

Fisher, T, T Love, L Moloney, K Pearson and D Walsh, *Traditional Divorce: Consumer Perceptions of Legal Aid Clients Choosing Traditional Legal Processes*, National Centre for Socio-Legal Studies, LaTrobe University: Melbourne, 1993

Galanter, M 'Worlds of Deals: Negotiation to Teach About Legal Process' (1984) 34 *Journal of Legal Education* 268

Giddings, J 'Legal Aid Services, Quality and Competence: Is Near Enough Good Enough and How Can We Tell What's What?' (1996) 1(3) *Newcastle Law Review* 67

Griffiths, J, 'What Do Dutch Lawyers Actually Do in Divorce Cases?' (1986) 20 *Law & Society Review* 135

Hunter, R *Family Law Case Profiles*, Justice Research Centre: Sydney, 1999

Ingleby, R *Solicitors and Divorce*, OUP: Oxford, 1992

Keys Young, *Research on Gender Bias and Women Working in the Legal System*, NSW Department for Women: Sydney, 1995

Law Society of New South Wales, *Family Law Advisory Code of Practice*, Law Society of NSW: Sydney, 1992

Law Institute of Victoria, *Family Law Code of Practice*, Law Institute of Victoria: Melbourne, 1992 (April revision).

Love, A, L Moloney and T Fisher, *Federally-Funded Family Mediation in Melbourne: Outcomes, Costs and Client Satisfaction*, Attorney-General's Department: Melbourne, 1995

Mather, L, RJ Maiman and C McEwen, '"The Passenger Decides on the Destination and I Decide on the Route": Are Divorce Lawyers "Expensive Cab Drivers"?' (1995) 9 *International Journal of Law and the Family* 286

Mnookin, RH and L Kornhauser, 'Bargaining in the Shadow of the Law: The Case of Divorce' (1979) 88 *Yale Law Journal* 950

Moloney, L, T Fisher, A Love and S Ferguson, *Managing Differences: Federally-Funded Mediation in Sydney: Outcomes, Costs and Client Satisfaction — Synopsis, Key Findings and Recommendations*, Attorney-General's Department: Melbourne, 1996

Parker, C 'The Logic of Professionalism: Stages of Domination in Legal Service Delivery to the Disadvantaged' (1994) 22 *International Journal of the Sociology of Law* 145

Sarat, A and WLF Felstiner, *Divorce Lawyers and Their Clients: Power and Meaning in the Legal Process*, OUP: New York, 1995

Senate Legal and Constitutional References Committee, *Inquiry into the Australian Legal Aid System: Third Report*, Parliament of the Commonwealth of Australia: Canberra, 1998

Sherr, A 'The Value of Experience in Legal Competence', in Australasian Professional Legal Education Council, *Skills Development for Tomorrow's Lawyers: Needs and Strategies — Conference Papers*, Sydney, 1996

Sherr, A, R Moorhead and A Paterson, *Lawyers — The Quality Agenda*, Vol.1, HMSO: London, 1994

Sommerlad, H 'Access to Justice and Quality: A Bespoke Service or the Procedural Approach?', paper presented to the *Legal Aid in a Changing World Conference*, University College London and Legal Aid Board Research Unit, London, 4–5 November 1999

Sommerlad, H 'English Perspectives on Quality: The Client-Led Model of Quality — A Third Way?', paper presented to the *International Legal Aid Conference*, Vancouver, 16–19 June 1999

The Office of the Legal Services Commissioner, *Annual Report 1997–98*, OLSC: Sydney, 1998

Wade, JH 'New and Recycled Services by Family Lawyers: Responding to a World of Change' (1997) 11 *Australian Journal of Family Law* 68, 89–90.

Will, K 'Formal Quality Systems: An Introduction' (1996) 70(2) *Victorian Law Institute Journal* 31