

‘FAVOURABLE VARIATIONS’: TOWARDS A REFRESHED APPROACH FOR THE INTERVIEWING CLASSROOM

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Abstract

This paper considers the skill of client interviewing, or client counselling, reinforced in many common law countries by competence statements and as a mandatory component of vocational legal education. Over-reliance on interviewing protocols in the classroom creates a risk that students will develop a rigid, rehearsed performance which does not effectively reflect the nuanced nature of legal practice, or encourage them to develop a personal practice.

It is suggested that, as a significant microcosm of legal practice, interviewing should be treated as a threshold concept or capability. Literature around interviewing performances, including differentiation between novices and experts suggests that variation theory can be a useful means of helping novice students to understand the significance of the different variables in the client’s problem; to transcend this threshold and to supplement the interviewing protocol in developing towards a personal professional practice.

I INTRODUCTION

This article is derived from a panel presentation that was developed for the ninth Global Legal Skills conference held in Verona in May 2014.¹ Our law school has a broad range of students: undergraduate, vocational, postgraduate, and research students. This includes both students who are new to the law and students who are already experienced practitioners. The law school also teaches students who wish to qualify into three of the eight legal professions regulated under the Legal Services Act 2007 in England and Wales.² Members of

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¹ Jane Ching et al, ‘Client Interviewing in Diverse Contexts: Its Global Implications [panel], Global Legal Skills-9, John Marshall Law School Chicago/University of Verona, 21-23 May 2014’ < <http://bit.ly/1FSKgUR> >. This article also draws, in general terms, on the work of the Effective Lawyer-Client Communication Project: Clark D Cunningham, ‘Evaluating Effective Lawyer-Client Communication: An International Project Moving from Research to Reform’ (1999) 67 *Fordham Law Review* 1959.

² In alphabetical order: barristers, chartered legal executives, costs lawyers, licensed conveyancers, notaries, patent attorneys, registered trade mark attorneys and solicitors. In addition, some accountancy professions are regulated for the purposes of providing legal advice under the Act.

most of these groups, however, are expected to ask questions and to provide advice to clients, which may be called ‘interviewing’, ‘interviewing and advising’, ‘client counselling’ or ‘conferencing’. Consequently we chose interviewing as the theme for the panel and, in this article, ‘interviewing’ will be used as a generic term. Within this umbrella topic, however, we also began to notice differences between the student groups in the way they approached this activity. The aspiring solicitors were students on a broad-based Legal Practice Course as a precursor to a training contract in the workplace, in most cases studying full-time. They were likely to have limited, if any, prior experience in legal practice. Typically, they focussed heavily on the questioning stage of the interview and expressed concern about the stage where they were expected to advise on the law. By contrast, the aspiring trade mark attorneys were taking the specialist Professional Certificate in Trade Mark Law and Practice course in parallel with employment in the intellectual property sector. Typically they moved very quickly into advising on their client’s specialised problem, without giving the client a great deal of time to explain concerns and objectives.

Much academic work in interviewing is, however, focussed not on difference between students, professions, career stage, problems or clients, but on standardisation and consistency. For example, the British Columbia protocol,³ similar to the Calgary/Cambridge model used in medicine⁴ has been developed as a core tool for teaching and assessment. The standardised clients initiative, drawing from work in medicine, is designed to achieve greater consistency in assessment.⁵ In this article, however, the author wishes to explore the concept of variation, rather than consistency, as a means of reinvigorating the teaching of interviewing. The activity is, therefore, first viewed through the lens of threshold concepts as a way of establishing its disciplinary significance and ‘troublesomeness’. The idea of variation theory is then proposed as a way of helping students to transcend this threshold in the classroom. It is argued that a variation theory approach can help students develop confidence in dealing with the interplay of variables within a client’s problem and facilitate them in developing an ethical and professional theory of practice. In order to do so, a starting point is to examine what exactly it is that one is teaching.

³ Law Society of British Columbia, ‘Litigation Interviewing and Advising Guide’ <http://www.lawsociety.bc.ca/docs/becoming/InterviewGuide.pdf>.

⁴ JM Kurtz, ‘Calgary - Cambridge Guide to the Medical Interview-Communication Process’ http://www.gp-training.net/training/communication_skills/calgary/calgary.pdf. The model has been adapted for use with undergraduate medical students: Anne Simmenroth-Nayda et al, ‘Psychometric Properties of the Calgary Cambridge Guides to Assess Communication Skills of Undergraduate Medical Students’ (2014) 5 *International Journal of Medical Education* 212.

⁵ For example, Karen Barton et al, ‘Valuing What Clients Think: Standardized Clients and the Assessment of Communicative Competence’ (2006) 13 *Clinical Law Review* 1. There is not space in this article to cover the considerable literature on client evaluation of lawyer performance, including the discussion of the intrinsic difficulties in identifying what clients are in a position to assess. For examples, however, see Avrom Sherr ‘Lawyers and Clients: The First Meeting’ (1986) 49 *Modern Law Review* 323; Hilary Somerlad, ‘English Perspectives on Quality: The Client Third Way?’ (1999) 33 *University of British Columbia Law Review* 491; Richard Moorhead, Avrom Sherr and Alan Paterson, ‘What Clients Know: Client Perspectives and Legal Competence’ (2003) 10 *International Journal of the Legal Profession* 5; Nieke A Elbers et al, ‘Exploring Lawyer-Client Interaction: A Qualitative Study of Positive Lawyer Characteristics’ (SSRN Scholarly Paper ID 2562304, Social Science Research Network, 1 March 2008) <http://papers.ssrn.com/abstract=2562304>.

II WHAT IS 'INTERVIEWING'?

In England and Wales, 'interviewing and advising' or 'conferencing'⁶ is a required component of the vocational stage of professional education for barristers, solicitors and trade mark attorneys.⁷ In the USA, the activity is known as 'client counseling'.⁸ 'Client consultation' has, however, been adopted as a global term by the Louis M. Brown and Forrest S. Mosten International Client Consultation Competition.⁹

In Australia, interviewing and advising is covered in simulation in practical legal training (PLT) courses linked to the APLEC competences,¹⁰ Graduate Certificates and Diplomas in (Professional) Legal Practice, the Tasmanian Legal Practice Course; and with real clients in work placements and clinics connected with such courses. Where periods of articles, traineeship or other supervised legal training are required, or are an alternative to PLT, entrants will, of course, be exposed to the activity in the workplace as they are in the post-Legal Practice Course training contract in England and Wales. Where PLT is incorporated into the LLB or JD, it may appear in distinct units (as in the University of Newcastle's JD/GDLP).¹¹ Alternatively, as in the second year Torts module offered by Flinders University in its Bachelor of Laws and Legal Practice course, the skill may be integrated with another topic. This uses the legal topic as a context for development of the skill, which is introduced in a first year unit.¹² In New Zealand, interviewing and advising occupies at least 23 hours of the required Professional Legal Studies course and 10% of its assessment.¹³

Prior to the vocational stage, the picture is more diverse. Clearly where an Australasian LLB/JD mandates or offers work-integrated learning, placement or clinic, students will inevitably be exposed to client interviewing in a real world context. In the classroom, mediation, negotiation and advocacy are more likely to appear as distinct units in JD/LLB courses than interviewing, although, as at Flinders, the skill may be used as a teaching vehicle for other material. That said, Bond University includes client interviewing in a compulsory

⁶ This term is used by the Bar in England and Wales in recognition that interaction has, historically at least, been with another professional, usually a solicitor, rather than with a lay client.

⁷ It is sometimes available at undergraduate level: see for example: Mary Holmes and Judith Maxwell, 'Use of Role Play and Video in Teaching Communication Skills to Law Students, The' (1987) 5 *Journal of Professional Legal Education* 151. In my own institution, it is included in the third year Preparation for Professional Practice module.

⁸ Anon, 'Legal Interviewing and Counseling Bibliography' (1984) 18 *Creighton Law Review* 1503.

⁹ Anon, *Brown Mosten International Client Consultation Competition* (No date) <<http://www.brownmosten.com/>>.

¹⁰ Australasian Professional Legal Education Council, 'Competency Standards for Entry Level Lawyers' http://www.aplec.asn.au/Pdf/Competency_Standards_for_Entry_Level_Lawyers.pdf.

¹¹ University of Newcastle, *Juris Doctor (JD) / Graduate Diploma in Legal Practice - Details* (No date) Desktop <<https://gradschool.edu.au/programs/details/juris-doctor-graduate-diploma-legal-practice-12334>>.

¹² Flinders University, *LLAW2211 Torts 2 [Interviewing]* (2016) Topics 2016

<<http://www.flinders.edu.au/webapps/stusys/index.cfm/topic/main?subj=LLAW&numb=2211&year=2016>>.

¹³ New Zealand Council of Legal Education, 'Professional Legal Studies Course and Assessment Standards Regulations 2002' http://www.nzcle.org.nz/Docs/Course_Assess_Stand_Regs.pdf regulations 3.4 and 5.2.

legal skills module;¹⁴ Victoria University has a mandatory third year course combining interviewing and negotiation skills¹⁵ and the University of Wollongong offers a compulsory communication skills course which includes some aspects of interviewing.¹⁶ Outside the formal curriculum, competitions may be organised by student societies: as at La Trobe,¹⁷ Melbourne,¹⁸ Otago¹⁹ and the University of New South Wales.²⁰ These may feed into the national competitions held by the Australian Law Students' Association²¹ and New Zealand Law Students' Association,²² and thereafter into international competitions.

Clearly, after qualification, employers and individual solicitors may undertake continuing professional development which includes a focus on interviewing skills²³ as well as informal learning in practice. This article, however, is principally concerned with the treatment of the skill at an introductory stage and with the classroom teaching of interviewing.

Where interviewing is carried out in a classroom simulation or in competition at this introductory stage, a conventional approach is to require students to both ask questions and provide initial advice on the same occasion during a thirty minute appointment. The client may be played by a student, staff member or trained standardised client, working from a brief. The student may have been given very limited, if any, prior information about the client's problem. He or she is expected to introduce the appointment effectively; question the client about the problem, their concerns and goals; provide initial advice on the relevant law; work with the client to explore a range of possible solutions and conclude with a clear list of next steps. The student may be encouraged to use a protocol setting out the structure and components of a "good" interview.²⁴ Such a protocol

¹⁴ Bond University, *Legal Skills Subject Outline* (2016) Bond University <http://outlines.bond.edu.au/LAWS75-111_JAN_2016_16866_2_1>.

¹⁵ Victoria University, *Interviewing and Negotiation Skills* (No date) Victoria University <<https://www.vu.edu.au/units/blb3130>>.

¹⁶ University of Wollongong, *Subject Information LLB 150 Communication Skills* (2016) University of Wollongong <https://sols.uow.edu.au/owa/sid/CAL.SUBJECTINFO?p_subcode=LLB%20150&p_year=2016&p_source=WebCMS>.

¹⁷ La Trobe Law Students' Association, *Law Students Association, La Trobe Law School* (No date) La Trobe Law School <<http://www.latrobe.edu.au/law/law-students-association>>.

¹⁸ Melbourne University Law Students' Society, *2015 Corrs Chambers Westgarth Client Interview Competition* (2015) Melbourne University Law Students' Society <http://mulss.com/competitions/client_interview>.

¹⁹ Society of Otago University Law Students, *Client Interviewing* (No date) Society of Otago University Law Students <http://www.souls.co.nz/site/competitions/client_interviewing.aspx>.

²⁰ UNSW Law Society, *Client Interviewing* (No date) UNSW Law Society <<http://www.unswlawsoc.org/client-interviewing/>>.

²¹ Australian Law Students' Association, *Competitions* (No date) Australian Law Students' Association <<http://alsa.net.au/competitions/>>.

²² New Zealand Law Students' Association, 'Conference 2015 Competitors' <<http://www.nzlsa.co.nz/2015-conference-competitors/>>.

²³ See, for example, *Legal Profession Uniform Continuing Professional Development (Solicitors) Rules 2015* reg 6.1.3. Skills are not referred to specifically in the New Zealand equivalent, but are by no means excluded: *Lawyers and Conveyancers Act (Lawyers: Ongoing Legal Education—Continuing Professional Development) Rules 2013*.

²⁴ Law Society of British Columbia, above n 3; Amy Dimond, 'Assessment 4 – Client Interview'

<http://thestudentlawyer.com/2012/12/31/assessment-4-client-interview/>. Similar criteria are used in competitions: The Client Interviewing Competition for England and Wales, 'Assessment Criteria' http://www.clientinterviewing.com/pages/assessment_criteria_guidelines.htm.

Advice is also available from professional bodies and in textbooks: Law Society of England and Wales, 'Initial Interviews'

<http://www.lawsociety.org.uk/support-services/advice/practice-notes/initial-interviews/>. Deborah Maranville, 'The Very Basics of Legal Interviewing' <http://webcache.googleusercontent.com/search?q=cache:vXxZG-31CpkJ:https://courses.washington.edu/civpro03/resources/interviewing.doc+&cd=3&hl=en&ct=clnk&gl=uk>;

Nancy Chen, *How to Conduct an Effective Client Interview* <http://www.liv.asn.au/YoungLawyersBlog/November-2012/How-to-conduct-an-effective-client-interview>;

Peggy Goodman, *Initial Interview with a Potential Client* (Spring 2008) LexisNexis Legal Newsroom Lexis Hub

<http://www.lexisnexis.com/legalnewsroom/lexis-hub/b/how-to-build-your-professional-skills/archive/2008/01/31/initial-interview-with-a-potential-client.aspx>

may also be used as the assessment criteria and will, by definition, represent a particular concept of a 'good interview', normally one that is 'client-centred'.

This model is, however, not necessarily consistent with modern practice. In many areas of practice it is increasingly rare for the lawyer to have such limited prior knowledge about the problem, or for a lawyer to provide extempore advice. It is also increasingly rare that lawyer-client interaction is face to face. The classroom activity may be isolated in some courses from follow up activities such as retainer letters and attendance notes or taking the steps (such as writing a letter to an opponent) that have been agreed in the interview. There is a risk, in addition, that over-reliance on interviewing protocols could become a highly formulaised end in itself, divorced from legal practice. Whilst the protocol has a useful role in signalling what is important and as a starting benchmark,²⁵ such over-reliance can produce simplistic rote responses;²⁶ unthinking recourse to a pre-determined list of do nothing/negotiate/litigate as solutions;²⁷ and override a student's normal empathy.²⁸ It may therefore, it is argued, detract from development of an informed personal approach to practice.²⁹

The craft of interviewing, as taught in law schools, often seems to be home-grown. Useful work in other disciplines, for example: therapeutic counselling³⁰ and social work,³¹ psychology and cognitive science;³²

²⁵ So, for example, the authors of the Carnegie Report, taking a largely cognitive approach to the development of expertise comment "Once enacted, skilled performance can be turned into a set of rules and procedures for pedagogical use ... But the opposite is not possible: the progression from competence to expertise cannot be described as simply a step-by-step build-up of the lower functions. In the world of practice, holism is real and prior to analysis", William M Sullivan et al, *Educating Lawyers: Preparation for the Profession of Law* (Jossey-Bass, 2007) [electronic edition] location 1675.

²⁶ For example: "My name is Alex and I'm a trainee solicitor at [name of firm]. Can I just reassure you that everything you tell me today will be confidential? Have you ever been to see a solicitor before?" In fact, the relevant rule of conduct provides for exceptions to the duty of confidentiality 'when required ... by law': Solicitors Regulation Authority, *SRA / SRA Handbook - Code of Conduct - Confidentiality and Disclosure / Solicitors Regulation Authority* <http://www.sra.org.uk/solicitors/handbook/code/part2/rule4/content.page>

²⁷ Body language, in the author's experience, may give away the novice student's preferences, even if she or he is nobly attempting to set out the advantages and disadvantages of each solution to enable the client to make an autonomous decision. 'Do nothing' and 'litigate' seemed frequently to be accompanied by a minuscule shake of the head, but 'Or I could write a letter ...' with a vestigial nod.

²⁸ Julian S Webb and Caroline Maughan, *Teaching Lawyers' Skills* (Butterworths Law, 1996), 93 provides the following example: 'Client (clearly distressed): 'My mother died two weeks ago.' Lawyer: 'Right. Have you brought the death certificate?'

²⁹ Contrast in this some of the medical equivalents, which make explicit reference to the personality and norms of the advice-giver as a component of the interview. For example, Royal College of General Practitioners, 'The GP Consultation in Practice' http://www.gmc-uk.org/2_01_The_GP_consultation_in_practice_May_2014.pdf_56884483.pdf, 12; Hanneke CJM De Haes, Frans J Oort and Robert L Hulsman, 'Summative Assessment of Medical Students' Communication Skills and Professional Attitudes through Observation in Clinical Practice' (2005) 27 *Medical Teacher* 583.

³⁰ Hugh Brayne, 'Counselling Skills for the Lawyer Can Lawyers Learn Anything from Counsellors?' (1998) 32 *The Law Teacher* 137.

³¹ In a US context, where interviewing is not a mandatory component of pre-qualification education: Stephanie K Boys, Stephanie Q Quiring and Carrie A Hagan, 'Social Work Skills Can Fill the Gaps in Legal Education: Law Student Opinions of Their Preparation for Practice with Clients' (2015) 3 *UK Law Student Review* 87.

³² See Mark K Schoenfeld and Barbara Pearlman Schoenfeld, 'Interviewing and Counseling Clients in a Legal Setting' (1977) 11 *Akron Law Review* 313; John MA DiPippa, 'How Prospect Theory Can Improve Legal Counseling' (2001) 24 *University of Arkansas at Little Rock Law Review* 81; Jean R Sternlight and Jennifer K Robbenolt, 'Good Lawyers Should Be Good Psychologists: Insights for Interviewing and Counseling Clients' (SSRN Scholarly Paper ID 1127724, Social Science Research Network, 5 May 2008) <http://papers.ssrn.com/abstract=1127724>; Amina Memon, Christian A Meissner and Joanne Fraser, 'The Cognitive Interview: A Meta-Analytic Review and Study Space Analysis of the Past 25 Years' (2010) 16 *Psychology, Public Policy, and Law* 340; Beryl Blaustone, 'Improving Clinical Judgment in Lawyering with Multidisciplinary Knowledge about Brain Function and Human Behavior: What Should Law Students Learn about Human Behavior for Effective Lawyering?' (2010) 40 *University of Baltimore Law Review* 607; Simon Easton and Lucy Akehurst, 'Tools for the Detection of Lying and Malingering in the Medico-Legal Interview Setting' (2011) 79 *Medico-Legal Journal* 103.

linguistics³³ and conversation analysis;³⁴ probability and risk analysis³⁵ and, from medicine, substantial activity in the creation,³⁶ evaluation and meta-analysis³⁷ of protocols, appear, in the author's experience, to be unfamiliar to lawyers in practice and comparatively rare in the classroom.³⁸ The contribution of personality type,³⁹ learning style⁴⁰ and possibly gender,⁴¹ the implications of affect,⁴² empathy⁴³ as distinguished from sympathy⁴⁴ and emotional labour,⁴⁵ and the demands of intercultural communication⁴⁶ are all topics that could be drawn on to enhance teaching of the activity.

³³ Clark D Cunningham, 'A Tale of Two Clients: Thinking about Law as Language.' (1989) 87 *Michigan Law Review* 2459; Clark D Cunningham, 'The Lawyer as Translator, Representation as Text: Towards an Ethnography of Legal Discourse.' (1991) 77 *Cornell Law Review* 1298. There is a significant canon relating to legal language and lawyers' use of language, very little of it written or contributed to by lawyers themselves. An exception is John M Conley and William M O'Barr, *Just Words, Second Edition* (University Of Chicago Press, 2nd ed, 2005). A substantial list of linguistic analyses in the context of interviewing is provided in Linda F Smith 'Was It Good for You Too? Conversation Analysis of Two Interviews' (2007) 96 *Kentucky Law Review* 579, 588, n 45.

³⁴ Linda F Smith, above n 33.

³⁵ Jane Ching, 'Communicating Risk: Words or Numbers?' (2006) 10 *The Commercial Litigation Journal* 2; Norman Fenton and Martin Neil, 'Avoiding Probabilistic Reasoning Fallacies in Legal Practice Using Bayesian Networks' https://www.eecs.qmul.ac.uk/~norman/papers/fenton_neil_prob_fallacies_June2011.pdf.

³⁶ These include sub-specialist protocols, some of which might be capable of adjustment for use in legal practice: Kim Blake et al, 'A Structured Communication Adolescent Guide (SCAG): Assessment of Reliability and Validity' (2005) 39 *Medical Education* 482; Matthew Kutcher et al, 'Rating a Physician by Adolescents Using the Structured Communication Adolescent Guide (SCAG)' (2009) 1 *The Internet Journal of Medical Education* <https://ispub.com/IJME/1/2/10318#>; F Tromp, JJJJM Rademakers and TJ Ten Cate, 'Development of an Instrument to Assess Professional Behaviour of Foreign Medical Graduates' (2007) 29 *Medical Teacher* 150.

³⁷ For example, Gregory Makoul, 'Essential Elements of Communication in Medical Encounters: The Kalamazoo Consensus Statement' (2001) 76 *Academic Medicine* 390; Jonathan Silverman, *Models of the Consultation* (2003) SkillsCascade.com <http://www.skillscascade.com/models.htm>; F Daniel Duffy et al, 'Assessing Competence in Communication and Interpersonal Skills: The Kalamazoo II Report' (2004) 79 *Academic Medicine* 495; Julie M Schirmer et al, 'Assessing Communication Competence: A Review of Current Tools' [2005] *Family Medicine* 184.

³⁸ The impact of scholarship and theory on vocational teaching may in some contexts, operate despite, rather than because of, its situation in academic institutions. The conflicted role of the vocational teacher (in jurisdictions which separate this role) has, however, had limited discussion in the literature. See however, Judith Willis, 'Legal Practice Course Teachers: What Can Their Stories Tell Us?' (2010) 19 *Nottingham Law Journal* 22 and Kristoffer Greaves, 'Is Scholarship of Teaching and Learning in Practical Legal Training a Professional Responsibility?' (2015) 49 *The Law Teacher* 22.

³⁹ Beatriz Molinuevo and Rafael Torrubia, 'Does Personality Predict Medical Students' Attitudes to Learning Communication Skills?' (2013) 4 *International Journal of Medical Education* 155.

⁴⁰ Antje Lumma-Sellenthin, 'Students' Attitudes towards Learning Communication Skills: Correlating Attitudes, Demographic and Metacognitive Variables' (2012) 3 *International Journal of Medical Education* 201.

⁴¹ Carrie Menkel-Meadow, 'Portia in a Different Voice: Speculations on a Women's Lawyering Process' (1985) 1 *Berkeley Women's Law Journal* 39; Hilary Sommerlad, 'Researching and Theorizing the Processes of Professional Identity Formation' (2007) 34 *Journal of Law and Society* 190.

⁴² Marc W Patry et al, 'Better Legal Counseling through Empirical Research: Identifying Psycholegal Soft Spots and Strategies' (1998) 34 *California Western Law Review* 439; David Dryden Henningsen and Ioana Cionea, 'Role of Comforting Skill and Professional Competence in the Attorney-Client Relationship, The' (2007) 57 *Journal of Legal Education* 530; Francesca Bartlett and Lyn Aitken, 'Competence in Caring in Legal Practice' (2009) 16 *International Journal of the Legal Profession* 241; Robin Wellford Slocum, 'An Inconvenient Truth: The Need to Educate Emotionally Competent Lawyers' (SSRN Scholarly Paper ID 1889756, Social Science Research Network, 19 July 2011) <http://papers.ssrn.com/abstract=1889756>; Susan Daicoff, 'Expanding the Lawyer's Toolkit of Skills and Competencies: Synthesizing Leadership, Professionalism, Emotional Intelligence, Conflict Resolution, and Comprehensive Law' (SSRN Scholarly Paper ID 2448922, Social Science Research Network, 2012) <http://papers.ssrn.com/abstract=2448922>; Felicity Wardhaugh and Colin James, 'A Client-Focused Practice: Developing and Testing Emotional Competency in Clinical Legal Interviews' (2014) 20 *International Journal of Clinical Legal Education* 633.

⁴³ Mohammadreza Hojat et al, *The Jefferson Scale of Physician Empathy: Further Psychometr... : Academic Medicine* LWJ http://journals.lww.com/academicmedicine/Fulltext/2002/10001/The_Jefferson_Scale_of_Physician_Empathy_Further.19.aspx; Mohammadreza Hojat et al, 'Physician Empathy: Definition, Components, Measurement, and Relationship to Gender and Specialty' (4, Thomas Jefferson University, 2002) 1; Sylvia K Fields et al, 'Measuring Empathy in Healthcare Profession Students Using the Jefferson Scale of Physician Empathy: Health Provider -- Student Version' (2011) 25 *Journal of Interprofessional Care* 287; John H Davidson, 'Empathy and Integrative Thinking: Talmudic Paradigms for the Essentials of a Medical Interview' [2014] *Medical Humanities* medhum <http://mh.bmj.com/content/early/2014/01/24/medhum-2013-010444>.

⁴⁴ Mohammadreza Hojat et al, 'Empathic and Sympathetic Orientations Toward Patient Care: Conceptualization, Measurement, and Psychometrics' (2011) 86 *Academic Medicine* 989.

⁴⁵ Lloyd C Harris, 'The Emotional Labour of Barristers: An Exploration of Emotional Labour By Status Professionals' (2002) 39 *Journal of Management Studies* 553; Chalen Westaby, 'Feeling like a Sponge': The Emotional Labour Produced by Solicitors in Their Interactions with Clients Seeking Asylum' (2010) 17 *International Journal of the Legal Profession* 153; Chalen Westaby, 'A Qualitative Study of the Impact of Law Clinics on Students' Perceptions of Emotional Labour Expectations' (2014) 48 *The Law Teacher* 248.

⁴⁶ Carwena Weng, 'Multicultural Lawyering: Teaching Psychology to Develop Cultural Self-Awareness' (2005) 11 *Clinical Law Review* 369; Katerina Lewinbuk, 'Can Successful Lawyers Think in Different Languages?: Incorporating Critical Strategies That Support Learning Lawyering Skills for the Practice of Law in a Global Environment' (SSRN Scholarly Paper ID 1017061, Social Science Research Network,

Increased attention to the teaching and assessment of interviewing is, it is suggested, strongly justified, The activity requires a student to combine skills, knowledge and (professional and ethical) attitudes in establishing rapport with a (possibly difficult)⁴⁷ stranger; listening and questioning; knowledge of the law; ability to ‘teach’ the law to the client; knowledge of the real world; evaluating advantages and disadvantages of possible solutions; and management of clients’ expectations.⁴⁸ The student is also expected to behave professionally and ethically whilst doing so. Interviewing is, therefore, both an intense microcosm of legal practice⁴⁹ and an opportunity to experience the impact of substantive law on individuals.⁵⁰ It represents, therefore, a very clear example of integration of the three ‘apprenticeships’ identified in the Carnegie review of North American legal education: the intellectual and knowledge-based; the practice-based and the ‘apprenticeship of identity and purpose’.⁵¹ Its significance is reinforced when it appears in the competence frameworks of employers⁵² and professional bodies.⁵³ A good interview by a novice could, indeed, be treated as a kind of professional apprentice piece. The protocols are extremely useful, and even necessary for novices, but they are not sufficient. If they allow students and teachers to reduce interviewing to a sequence of rehearsed calls and responses, they may be dangerous. Interviewing is more complex, more difficult and more nuanced than this: “[a] threefold movement between law as doctrine and precedent to attention to performance skills ... and then to responsible engagement with solving clients’ legal problems”⁵⁴ A way of recognising

26 September 2007) <http://papers.ssrn.com/abstract=1017061>; Annette Demers, ‘Cultural Competence and the Legal Profession: An Annotated Bibliography of Materials Published Between 2000 and 2011’ (2011) 39 *International Journal of Legal Information* 22.

⁴⁷ It may have been more explicit in some of the earlier approaches, as here, where the course was originally taught by counsellors and included an explicit reference to dealing with difficult people: Gary Tamsitt, ‘Methods of Instruction in Interviewing and Counselling and Negotiation’ (1986) 4 *Journal of Professional Legal Education* 33.

⁴⁸ Scott Barclay, ‘New Aspect of Lawyer-Client Interactions: Lawyers Teaching Process-Focused Clients to Think about Outcomes, A’ (2004) 11 *Clinical Law Review* 1.

⁴⁹ Louis M Brown, ‘Trouble with Law School Education: A Consultation as a Microcosm, The’ (1984) 18 *Creighton Law Review* 1352.

⁵⁰ Alan Leaver, ‘Contextualising Law: An Attempt to Operationalise Theory by Teaching Interviewing in the Law School’ (1994) 5 *Legal Education Review* 195.

⁵¹ William M Sullivan et al, above n 25, locations 427, 429 and 432.

⁵² For some examples, see Julian Webb et al, ‘Briefing Paper: Knowledge, Skills and Attitudes Required for Practice at Present’ <http://letr.org.uk/wp-content/uploads/012012-competence-frameworks-analysis.pdf>.

⁵³ For example: Australasian Professional Legal Education Council, above n 10; Chartered Institute of Legal Executives, ‘Application for Fellowship Rules (Work Based Learning)’ <http://www.cilex.org.uk/pdf/APPLICATION%20FOR%20FELLOWSHIP%20RULES%20Final.pdf>; Conseil des Barreaux Européens – Council of Bars and Law Societies of Europe, ‘CCBE Recommendation on Training Outcomes for European Lawyers’ http://www.ccbe.org/fileadmin/user_upload/NTCdocument/EN_Training_Outcomes1_1196675213.pdf; Federation of Law Societies of Canada, ‘National Entry to Practice Competency Profile for Lawyers and Quebec Notaries’ <http://flsc.ca/wp-content/uploads/2014/10/admission4.pdf>; Solicitors Regulation Authority, ‘Qualified Lawyers Transfer Scheme Outcomes’ <http://www.sra.org.uk/solicitors/qfts/day-one-outcomes-table.page>; Solicitors Regulation Authority, *Training for Tomorrow: A Competence Statement for Solicitors* (12 March 2015) <http://www.sra.org.uk/sra/consultations/competence-statement.page>. In England and Wales, unusual examples of competences frameworks designed as a description of more expert practice can be found in advocacy: Bar Standards Board, Solicitors Regulation Authority, ILEX Professional Standards, ‘QASA Handbook for Criminal Advocates’ <http://www.qasa.org.uk/QASA-Handbook.pdf>; Queen’s Counsel Appointments, ‘Guidance for Applicants 2015-2016’ <http://www.qcappointments.org/competitions/current-competition/>. One of the paralegal organisations also offers competence statements at a range of levels – Institute of Paralegals, ‘Competency Standards’ <http://www.theiop.org/national-competency-standards/contract-terms.html> – as may employers. For some discussion of the range in use, see Julian Webb et al, above n 51. See also National Conference of Bar Examiners, ‘A Study of the Newly Licensed Lawyer’ (National Conference of Bar Examiners, 2012) http://www.ncbex.org/assets/media_files/Research/AMP-Final-2012-NCBE-Newly-Licensed-Lawyer-JAR.pdf.

⁵⁴ William M Sullivan et al, above, n 26, location 1766.

this, and re-envisioning and refreshing the interviewing construct, is, it is suggested, to relate it to ideas about threshold concepts.

III IS IT USEFUL TO THINK OF INTERVIEWING AS A 'THRESHOLD CONCEPT'?

A threshold concept, as identified by Meyer and Land⁵⁵ in work from 2003 onwards, is one which is specific to a discipline and at least likely to be:⁵⁶

- a) Transformative (occasioning a significant shift in the perception of the subject);
- b) Irreversible (unlikely to be forgotten, or unlearned only through considerable effort);
- c) Integrative (exposing the previously hidden interrelatedness of something); and
- d) Troublesome.⁵⁷

Proposals for threshold concepts in law⁵⁸ have included the rule of law and precedent,⁵⁹ uncertainty,⁶⁰ 'analogy, materiality, responsibility, allocation of risk',⁶¹ 'contingency',⁶² research⁶³ and 'malleability'.⁶⁴

⁵⁵ Jan HF Meyer and Ray Land, 'Threshold Concepts and Troublesome Knowledge 1: Linkages to Ways of Thinking and Practising within the Disciplines' in C Rust (ed), *Improving Student Learning - Ten Years On* (Oxford Centre for Staff and Learning Development, 2003) 412; Jan HF Meyer and Ray Land, 'Threshold Concepts and Troublesome Knowledge (2): Epistemological Considerations and a Conceptual Framework for Teaching and Learning' (2005) 49 *Higher Education* 373; Ray Land et al, 'Threshold Concepts and Troublesome Knowledge (3): Implications for Course Design and Evaluation' in C Rust (ed), *Improving Student Learning Diversity and Inclusivity* (Oxford Centre for Staff and Learning Development, 2005) 53; Jan Meyer and Ray Land, *Overcoming Barriers to Student Understanding: Threshold Concepts and Troublesome Knowledge* (Routledge, 1 edition, 2006); Ray Land, Jan Meyer and Jan Smith (eds), *Threshold Concepts Within the Disciplines* (Sense Publishers, 2008); JHF Meyer and Ray Land, 'Threshold Concepts and Troublesome Knowledge (4): Issues of Variation and Variability', *Threshold concepts within the disciplines* (Sense Publishers, 2008) 59; JHF Meyer and Ray Land, 'Threshold Concepts and Troublesome Knowledge (5): Dynamics of Assessment.' (2008); Jan HF Meyer, Ray Land and Caroline Baillie (eds), *Threshold Concepts and Transformational Learning* (Sense Publishers, 2010).

⁵⁶ Both O'Donnell and Rowbottom are troubled by the conditionality of Meyer and Land's definition, which Rowbottom argues makes it difficult to identify threshold concepts empirically: Darrell Patrick Rowbottom, 'Demystifying Threshold Concepts' (2007) 41 *Journal of Philosophy of Education* 263. O'Donnell, indeed, argues that 'the growing literature on the hypothesis demonstrates alarming latitude in interpretation and slippage into arbitrariness and meaninglessness': Rod O'Donnell, 'A Critique of the Threshold Concept Hypothesis and an Application in Economics' <http://www.finance.uts.edu.au/research/wpapers/wp164.pdf>; 2.

⁵⁷ Slightly simplified from Jan HF Meyer and Ray Land, 'Threshold Concepts and Troublesome Knowledge (2)' above n 55, 373-4. Other factors which have been used in delineating threshold concepts are liminality (see Ray Land, Julie Rattray and Peter Vivian, 'Learning in the Liminal Space: A Semiotic Approach to Threshold Concepts' (2014) 67 *Higher Education* 199), reconstitution (ie, a change in identity or ontology); boundedness (confined to only a single aspect of the discipline) and the idea that mastery of a threshold concept 'will incorporate an enhanced and extended use of natural, symbolic or artificial language in a manner that characterises particular disciplinary discourses': Caroline Baillie, John A Bowden and Jan HF Meyer, 'Threshold Capabilities: Threshold Concepts and Knowledge Capability Linked through Variation Theory' (2013) 65 *Higher Education* 227, 229.

⁵⁸ See, for example, Aidan Ricketts, 'Threshold Concepts in Legal Education' [2006] *Directions: Journal of Educational Studies* 2; Julian Webb, 'Threshold Concepts: A New Tool for Learning Law?' (2008) 17 *Directions* <http://78.158.56.101/archive/law/resources/directions/previous/issue17/threshold/index.html>; Gerlese Åkerlind et al, 'A Threshold Concepts Focus to First Year Law Curriculum Design: Supporting Student Learning Using Variation Theory' (2010) <http://thresholdvariation.edu.au/content/conference-papers>; Helen Carr et al, 'Developing Threshold Concepts in Legal Education' (UKCLE, 2010) <http://78.158.56.101/archive/law/resources/research-teaching-nexus/threshold/index.html>; Claire McDiarmid and Elaine Webster, 'Contingency and Contested Narrative: A Threshold Concept in Legal Education' [2010] *UKCLE newsletter* <http://78.158.56.101/archive/law/resources/directions/issue-20-spring-2010/contingency-and-contested-narrative-a-threshold-co/index.html>; Melissa H Weresh, 'Stargate: Malleability as a Threshold Concept in Legal Education' (2014) 63 *Journal of Legal Education* 689. Use in cognate disciplines, here, English literature, Rob Abbott, 'Crossing Thresholds in Academic Reading' (2013) 50 *Innovations in Education and Teaching International* 191 and here, searching for information Virginia M Tucker, 'The Expert Searcher's Experience of Information' in Christine Bruce et al (eds), *Information Experience: Approaches to Theory and Practice* (Emerald Group Publishing Limited, 2014) vol 9, 239 could also be applied to some aspects of legal activity.

⁵⁹ Jan HF Meyer and Ray Land, 'Threshold Concepts and Troublesome Knowledge (2)' above n 55, 374.

⁶⁰ '[T]he key threshold objective in the learning of law was identified as being able 'to think like a lawyer' – this includes an understanding of uncertainty, that there is not necessarily a quick or simple or one right answer, but extends more broadly to accepting different ways of arguing and different possibilities for analysis of the facts and problem at hand': Gerlese Åkerlind et al, above n 58, 2.

⁶¹ Julian Webb, above n 58.

⁶² 'That law is characterised by a combination of certainty and uncertainty': Elaine Webster and Claire McDiarmid, 'Contingency in Practice: Applying a Threshold Concept in Law' (2012) 55

http://www.nairtl.ie/documents/BookofAbstracts_ONLINE.pdf?PHPSESSID=be9b1e9ab9356a4ab602bb26cae384d9.

⁶³ Melissa H Weresh, above n 58, 713.

⁶⁴ '[T]he latitude a lawyer has in articulating legal principles': ibid 710.

A *Can a skill be a concept?*

Of the list above, however, only one item (“research”) is clearly a skill. There is, however, necessarily skill involved in recognising a concept; and concepts are necessary underpinnings to the exercise of skills.⁶⁵ Indeed it has been argued that ‘practical elaboration into the domains of applied strategies and mental models’ – that is, application - should be an additional characteristic of a threshold concept in any event.⁶⁶ Weresh argues, however, that ‘legal reasoning’ is too extensive to be treated as a single concept.⁶⁷ She provides a list of components of ‘thinking like a lawyer’ based on the understanding and analysis of legal arguments and their application to facts, but also referring to alternative courses of action and taking a ‘client-centred approach’ which are relevant in interviewing.⁶⁸ The skills of legal reasoning and ‘thinking like a lawyer’⁶⁹ might, consequently, be described not as single concepts but as bundles that represent a ‘way of thinking and practising’ in the discipline.⁷⁰ ‘Legal reasoning’, has, however, been selected as a threshold concept for substantial work in Australia,⁷¹ and giving advice to a client used as a vehicle to explore it.⁷² Ricketts identifies use of threshold concepts as fostering ‘[a] sceptical approach to legal knowledge (and to the assumptions that traditionally accompany it)...’⁷³ Recognition of uncertainty and malleability⁷⁴ of law have already been suggested as threshold concepts. Indeed, the authors of the Carnegie report suggest that “[t]he mark of professional expertise is the ability to both think and act well in uncertain situations”.⁷⁵ Interviewing involves

⁶⁵ Lori Townsend, ‘What’s the Matter with Threshold Concepts?’ <http://acrlog.org/2015/01/30/whats-the-matter-with-threshold-concepts/>. Janet Rountree, Anthony Robins and Nathan Rountree, ‘Elaborating on Threshold Concepts’ (2013) 23 *Computer Science Education* 265, 280.

⁶⁶ Melissa H Weresh, above, n 59, 709.

⁶⁷ *Ibid* 707.

⁶⁸ O’Donnell (an economist) criticises threshold concepts envisaged in this way as inappropriately normative, above n 56, 9: ‘Thinking like an x’ means thinking in the conceptual categories foundational to the currently dominant discourse in x, and also practising x in the standard ways. It then becomes contrary to one’s training to view the world through other lenses, or even to do x in ways which depart from professionally sanctioned frameworks.’

⁶⁹ Noel Entwistle, ‘Concepts and Conceptual Frameworks Underpinning the ETL Project’ (Occasional Report 3, School of Education, University of Edinburgh, March 2003) 1 <http://www.etl.tla.ed.ac.uk/docs/ETLreport3.pdf>, 5, relied on in Sarah Barradell and Mary Kennedy-Jones, ‘Threshold Concepts, Student Learning and Curriculum: Making Connections between Theory and Practice’ [2013] *Innovations in Education & Training International* 1.

⁷⁰ Gerlese Åkerlind et al, above n 58; Australian National University, Queensland University of Technology and University of Technology, Sydney, *Law Case Study* (2011) Threshold Concepts and Variation Theory <http://thresholdvariation.edu.au/content/law-case-study>.

⁷¹ Gerlese Åkerlind et al, ‘A Threshold Concepts Focus to Curriculum Design: Supporting Student Learning through Application of Variation Theory’ (Australian Learning and Teaching Council, 2011) 1 http://www.thresholdvariation.edu.au/sites/default/files/pp8-885_anu_Åkerlind_final_report_v1.0_.pdf, 4.

⁷² Aidan Ricketts, above n 58, 9.

⁷³ Given the reliance earlier in this paper on medical examples, and the similarity between some of the legal protocols and the medical consultation protocols, this factor has been identified as a critical difference between medical reasoning in diagnosis and treatment, and legal reasoning: ‘Both professionals advise their clients and both make professional decisions; and, of course, both may turn out to be wrong. Yet “wrongness” here is not the same. ... the doctor’s wrongness will be determined by the facts themselves and this falsification will, if definitively established according to scientific method, be accepted (finally) by everyone in the community of medical science. A lawyer’s wrong prediction is not a wrongness that attaches just to the facts of the litigation problem; it attaches as much to how the judges have manipulated the (virtual) facts distilled from the litigation facts.’ Geoffrey Samuel ‘Is Legal Reasoning like Medical Reasoning?’ (2015) 35 *Legal Studies* 323, 347.

⁷⁴ William M Sullivan et al, above n 25, location 184. Consequently they identify ‘enabling students to learn to make judgments under conditions of uncertainty’ as one of the six core tasks of professional education, *ibid*, location 347.

dealing with uncertainty and malleability, and demands a degree of scepticism. By definition, acting as a lawyer in an interviewing situation engages ‘way[s] of thinking and practising’ in the discipline.

Baillie et al, take the relationship between threshold concepts and skills further by blending threshold concept theory with capability theory to provide a proposal for ‘threshold capability’. This incorporates the underpinning threshold concepts (the ‘what’) with development of professional skills-oriented capabilities (the ‘how’);⁷⁶ and acknowledges the need for a trajectory of learning within that skill. They argue that it leads to ‘knowledge capability’ (‘a personal sense of oneself as a professional’⁷⁷) that is consistent with the disciplinary-specific nature of threshold concepts as well as with the third cognitive apprenticeship suggested in the Carnegie Report.

There is nothing in principle, therefore, to prevent a skill such as interviewing being treated as a threshold concept or as a bundle of threshold concepts. As a demonstration not simply of *thinking* like a lawyer but *acting* like a lawyer, interviewing also engages capability.

B Thresholds and portals

A threshold concept can be considered as akin to a portal, opening up a new and previously inaccessible way of thinking about something. It represents a transformed way of understanding, or interpreting, or viewing something without which the learner cannot progress.⁷⁸

It is suggested that interviewing is such a portal for two reasons. First, as a microcosm of practice, it requires the student to deal with law, facts, client objectives and the interplay between them in a way that is uncommon in academic legal education. Secondly, because the outcome relies on evidence presented by the client and extracted by the student, it exposes students to ambiguity and to their own role as lawyer in determining an appropriate solution for the client. The fact that a client might not provide reliable information, or that the most obvious legal solution may not be appropriate because the client cannot afford it, are examples of transformed ways of understanding which are necessary for effective practice. The link to effective practice is significant, as the threshold here is not, as it is for some of the other candidates for threshold concepts in law, at the beginning of legal study.⁷⁹ If a threshold concept can be a bundle of skills and abilities, or a ‘threshold capability’ in its

⁷⁶ Caroline Baillie, John A Bowden and Jan HF Meyer, above n 57.

⁷⁷ Ibid 239.

⁷⁸ Jan HF Meyer and Ray Land, ‘Threshold Concepts and Troublesome Knowledge 1: Linkages to Ways of Thinking and Practising within the Disciplines’ in C Rust (ed), *Improving Student Learning - Ten Years On* (Oxford Centre for Staff and Learning Development, 2003) 412. Identification is not without difficulty: Sarah Barradell, ‘The Identification of Threshold Concepts: A Review of Theoretical Complexities and Methodological Challenges’ (2013) 65 *Higher Education* 265; K Quinlan et al, ‘Methodological Challenges in Researching Threshold Concepts: A Comparative Analysis of Three Projects’ (2013) 66 *Higher Education* 585.

⁷⁹ Melissa H Weresh, above n 58, 708.

own right, then it follows that there must be an initial realisation – here, of the implications of the interplay and ambiguity – which supports a trajectory in developing increased skill thereafter.⁸⁰

Proponents of threshold concepts acknowledge that there is variation in what students bring to their learning (‘pre-liminality’⁸¹) and this, it is suggested, affects the nature of the threshold. The specialist trade mark attorney students, for example, are already secure in their technical knowledge and professional demeanour because they are already in the workplace. However, the idea that it could be useful to allow the client space to explain, and investigating by asking more than a perfunctory number of questions, was often highly problematic for them. On the other hand, the aspiring solicitors were anxious to ask, and reluctant to provide initial advice on areas of law that they, possibly, felt they had forgotten. Understanding the students’ initial position supports an understanding of the transformative nature of the activity.

C Transformative

Weresh⁸² and Barradell⁸³ agree that transformativity (strongly related to troublesomeness) is, of all the suggested characteristics, the most prominently identified in discussions of the threshold concept paradigm. Over-reliance on a protocol, if it results in routinized and over-rehearsed performance, produces convergence, as if adherence to the structure and use of a small repertoire of pre-determined solutions was in fact sufficient for practice. Reconceptualising the activity in terms of threshold concepts allows us to aim higher: to a personalised,⁸⁴ ethical and creative professional practice as an inherent part of the Carnegie Report’s second and third cognitive apprenticeships. This is, of necessity, transformative.

D Irreversible and integrative

The requirement of irreversibility demands that, once the threshold has been passed, there is no going back. It is suggested that, provided there is no over-reliance on a protocol, once a student has experienced the implications of the interplay of law, facts and client as a precursor to real legal practice, this cannot be undone. Where Baillie et al’s blended capability approach provides a useful supplement to build on the epiphany involved in

⁸⁰ O’Donnell and Rowbottom both have difficulties with the idea of the ‘threshold’ not as a limit to be breached but as a stage of progression, particularly where failing to make the breakthrough, or to make it in a particular way, does not prevent passage to the next stage: Rod O’Donnell, above n 56, 7.

⁸¹ Jan HF Meyer and Ray Land, ‘Threshold Concepts and Troublesome Knowledge (2)’ above n 55, 384; Ray Land, Julie Rattray and Peter Vivian, above n 58.

⁸² Melissa H Weresh, above n 58, 695.

⁸³ Sarah Barradell, above n 71, 267.

⁸⁴ The authors of the Carnegie Report see discussion of the differing roles of the lawyer, conflict between them and student awareness of “not only the various sorts of lawyer they might become but also of the various kinds of approaches they can take toward lawyering itself” as key components of the second cognitive apprenticeship. William M Sullivan et al, above n 25, location 1868.

transcending the threshold is in making a clear linkage with skills and activities and in seeking to provide students with the capability for what has been referred to as ‘post liminal variation’.⁸⁵ This involves a rather more positively framed capability to deal with new problems and new people as part of a trajectory of learning extending past the vocational classroom into practice: As the preceding discussion has indicated, interviewing necessarily involves integration of legal knowledge with skills in investigation and in advising, and also in orality, empathy,⁸⁶ ethics and personal relationships. As the authors of the Carnegie Report put it, “knowledge, skill and judgment become literally interdependent: one cannot employ one without the others, while each influences the others in ways that vary from case to case.”⁸⁷ The need to integrate is why interviewing is troublesome.

E Troublesome

Interviewing deserves attention because it is troublesome. This troublesomeness is blurred by over-reliance on protocols which suggest that all that need be mastered is a suitable performance, in the correct order, of the components of the protocol. A number of aspects of interviewing may be highly problematic for novice students in ways that their teachers may not appreciate, or have forgotten.

A student without extra-curricular experience of acting, debating/mooting or playing a musical instrument may not have been assessed in anything performance-based before. The very orality of the activity may consequently be difficult, even before one has attempted to tackle the implications of affect (or ‘professional non-affect’⁸⁸), or individual theory of practice.

Still more troubling are ideas related to uncertainty, malleability, fallibility in the information provided by the client and how it is provided, and the idea that there may be multiple solutions to similar problems, any of which might be ‘right’ for a particular client, of a particular culture, in particular circumstances. In this respect, interviewing constitutes a substantial barrier for at least some students, despite - or possibly because of - its explicit links with legal practice. This troublesomeness may manifest differently for different kinds of legal advisors, as in the example in this paper, for the trade mark attorneys and the solicitors.

F Why treat interviewing as a threshold capability?

⁸⁵ Ray Land, et al, ‘Threshold Concepts and Troublesome Knowledge (3)’ above n 55, 60.

⁸⁶ Lynn Clouder, ‘Caring as a ‘Threshold Concept’: Transforming Students in Higher Education into Health(care) Professionals’ (2005) 10 *Teaching in Higher Education* 505.

⁸⁷ William M Sullivan et al, above n 25, location 1171.

⁸⁸ A perception that it is part of the role of the lawyer actively not to demonstrate affect was found in a study of barristers: Lloyd C Harris, above n 45.

Webb suggests that the value, for teachers, in identifying threshold concepts lies in what we then do about them.

The explicit use of threshold concepts may ... help us achieve three things. First, it may provide a counter-balance to the tendency to overload the curriculum with substantive legal rules. This has often served to restrict students' learning to a ritualised use of formal knowledge, at the expense of a deeper, more personalised, understanding of the law. Secondly, it may also help us provide students with greater opportunities to acquire independence in using legal concepts, since abstract knowledge is more likely to become personalised and transformative through use. Thirdly, it follows that a focus on threshold concepts also holds out perhaps greater potential for moving students beyond their established ways of thinking and problem solving.⁸⁹

The question is, however, whether the protocols used in interviewing teaching help students to avoid ritualisation; develop a personal style and theory of practice and move beyond the ways of thinking and problem-solving used in academic study when there is no client present. The alternative is that, in an attempt to support novices with integration and with troublesomeness, they inadvertently promote the 'mimicry' perceived by the proponents of threshold concepts as a marker for failure to transcend the threshold. Protocols are useful, but they do not 'solve' interviewing teaching.⁹⁰ Viewing interviewing in the light of threshold concepts/capabilities highlights the complexity and disciplinary significance of the activity not only for students, but also for teachers. It allows us to rethink and to refresh what we do.

Because it pays attention to the ways in which students understand and experience concepts strongly connected with their discipline, and, in this extension, apply skills and develop capacities, the threshold concepts movement is strongly linked to phenomenographic enquiry and to use of variation theory as a teaching approach.⁹¹ If threshold concept theory identifies the significance of the issue, then variation theory, it is suggested, helps us determine what to do about it.

IV CAN WE TRANSCEND THE PROTOCOL BY FOCUSING ON VARIATION?⁹²

A Phenomenography and Variation Theory

⁸⁹ Julian Webb, above n 59.

⁹⁰ The authors of the Carnegie Report, while recognising the utility of such approaches as articulating and distilling expert performance so that it can be practised and discussed by novices, nevertheless describe them as "training wheels", William M Sullivan et al, above n 25, location 2447.

⁹¹ Jo McKenzie, et al, 'Spaces of Variation in Understanding Uncertainty and Legal Reasoning: Extending Understandings of Transformation, Irreversibility and Liminality in Coming to Understand Threshold Concepts' (2010) <http://thresholdvariation.edu.au/content/conference-papers>.

⁹² Mandy Lupton, Gerlese Åkerlind and Jo McKenzie, 'Phenomenography and Variation Theory Applied to Teaching and Learning Legal Reasoning', *Phenomenography & Variation Theory Symposium* (2010) <http://thresholdvariation.edu.au/content/conference-papers>; Gerlese Åkerlind et al, above n 58.

Phenomenography developed in the 1970s as a method of enquiry seeking to generate ‘experiential description’⁹³ of individuals’ experiences of a phenomenon. It is particularly suited to educational research:⁹⁴

In a sense phenomenographic research mirrors what good teachers do. It tries to understand what the students are doing in their learning. It attempts to discover what different approaches students are taking and to understand these in terms of outcomes of their learning activities. Good teachers do that as a preliminary to further action to help their students come to understand the concept concerned and, of course, many do it instinctively.⁹⁵

A phenomenographic researcher uses interviews or scenarios to extract individuals’ understandings of, or responses to, a phenomenon. The responses are then categorised into groups, and the groups sorted into a scale. (the ‘outcome space’).⁹⁶ Because threshold concepts/capabilities are inherently troublesome, and areas where variations in student understanding and experience may contribute to the difficulty, a phenomenographic approach to investigation of the problem is a natural progression.⁹⁷ An example is provided by an Australian study of the threshold concept ‘legal reasoning’. This categorised students’ understandings of what the concept/skill entails into the following set of categories:

1. A formulaic process for predicting a legal outcome
2. An interpretive process of arguing for an outcome that serves your client
3. A dynamic, responsive and innovative process for developing the law to reflect changing society – lead/support
4. Law as a tool for change. Recommendation to Parliament⁹⁸

⁹³ Ference Marton, ‘Phenomenography - Describing Conceptions of the World around Us’ (1981) 10 *Instructional Science* 177, 180.

⁹⁴ Paul Ashwin, ‘Variation in Students’ Experiences of the ‘Oxford Tutorial’ (2005) 50 *Higher Education* 631; Paul Ashwin, ‘Variation in Academics’ Accounts of Tutorials’ (2006) 31 *Studies in Higher Education* 651; Ioanna Stamouli and Meriel Huggard, ‘Phenomenography as a Tool for Understanding Our Students’ (Dublin City University, 2007) http://doras.dcu.ie/447/1/Stamouli-huggard_ISEE07.pdf; Gerlese S Åkerlind, ‘A Phenomenographic Approach to Developing Academics’ Understanding of the Nature of Teaching and Learning’ (2008) 13 *Teaching in Higher Education* 633; Stella-Maris Orim et al, ‘Exploring Nigerian Postgraduate Students’ Experience of Plagiarism: A Phenomenographic Case Study’ (2013) 9 *International Journal for Educational Integrity* 20.

⁹⁵ J Bowden, ‘Curriculum Development for Conceptual Change Learning: A Phenomenographic Pedagogy’, 9, cited in Keith Trigwell, ‘Phenomenography: An Approach to Research into Geography Education’ (2006) 30 *Journal of Geography in Higher Education* 367.

⁹⁶ For phenomenographic research methods, see, for example: Peter Ashworth and Ursula Lucas, ‘What Is the ‘World’ of Phenomenography’ (1998) 42 *Scandinavian Journal of Educational Research* 415; Peter Ashworth and Ursula Lucas, ‘Achieving Empathy and Engagement: A Practical Approach to the Design, Conduct and Reporting of Phenomenographic Research’ (2000) 25 *Studies in Higher Education* 295; John A Bowden and Eleanor Walsh, *Phenomenography* (RMIT University Press, 2000); Samantha Sin, ‘Considerations of Quality in Phenomenographic Research’ (2010) 9 *International Journal of Qualitative Methods* 305. In its earlier manifestations, the approach was criticised as pejoratively judgmental in categorising perceptions according to their ‘correctness’: ‘In practice, phenomenographic studies usually concern students being asked to describe their understanding of a concept, a text or a situation, with the researcher then sorting the descriptions into a ‘handful’ (very often five!) categories ... Invariably one of the categories displays ‘correct meaning, correct knowledge or correct understanding’ whilst the others are recapitulations of earlier, now supposedly discredited accounts’, Graham Webb, ‘Deconstructing Deep and Surface: Towards a Critique of Phenomenography’ (1997) 33 *Higher Education* 195, 200-201. For a response, see Eva Ekeblad, ‘On the Surface of Phenomenography: A Response to Graham Webb’ (1997) 33 *Higher Education* 219; Noel Entwistle, ‘Reconstituting Approaches to Learning: A Response to Webb’ (1997) 33 *Higher Education* 213. In a meta-analysis, Harris has, in addition, found a variety of frameworks in use in describing the concept being investigated phenomenographically, not all clearly linked with theory. Lois Ruth Harris, ‘Phenomenographic Perspectives on the Structure of Conceptions: The Origins, Purposes, Strengths, and Limitations of the What/how and Referential/structural Frameworks’ (2011) 6 *Educational Research Review* 109.

⁹⁷ ‘Starting from the idea that using the findings from phenomenographic studies in teaching by introducing the students to the variation of conceptions found, it seems natural that the notion of variation as ‘the mother of all learning’ arose as the central idea ...’ Bo Dahlin, ‘Enriching the Theoretical Horizons of Phenomenography, Variation Theory and Learning Studies’ (2007) 51 *Scandinavian Journal of Educational Research* 327, 328.

⁹⁸ Australian National University, Queensland University of Technology and University of Technology, Sydney, above n 71.

Phenomenographic research, therefore, *describes* variations in experience. The account, earlier in this paper, of the different ways in which aspiring solicitors and aspiring trade mark attorneys understand and approach interviewing is phenomenographic in nature. Variation theory, which developed in the 1990s, ‘can be seen as a more theoretical extension of phenomenography, in that it attempts to explain *how* people – particularly students – can experience the same phenomenon differently and how that knowledge can be used to improve classroom teaching and learning’ (emphasis added).⁹⁹

Bussey et al, however, identify that variation theory of itself does not necessarily take into account students’ prior knowledge of the phenomenon (in threshold concepts terms, their pre-liminality¹⁰⁰) or the influence on teachers of teaching materials (such as interviewing protocols).¹⁰¹ In the context of interviewing, these may be highly significant, as students will bring with them prior experience of being interviewed (perhaps for a job); social skills; understanding of their own culture (if not necessarily the culture of others) and assumptions about the role of the lawyer.¹⁰² Students such as the aspiring trade mark attorneys, already in the workplace, also bring with them experiences of what lawyers do in practice. This prior experience and current context is critical to the nature of the threshold presented by the interviewing activity. For both groups, however, an important element of the troublesome nature of the threshold is provided by the interplay between, and impact of, variables involved in the legal and factual scenario; the needs and objectives of the client, and the theory of practice of the individual lawyer. It is, therefore, argued that a way of helping students to transcend the threshold and avoid reductive use of protocols – as well as to acknowledge their own emerging theories of practice - is to employ the techniques of variation theory in classroom interviewing teaching.

Those techniques are, in the literature, conventionally divided into the following stages.¹⁰³

1 Contrast/Discernment

⁹⁹ Tan puts it even more simply: ‘Phenomenography and variation theory offer an alternative, by examining the *variation within*, rather than the *differences between*, experiences ...’. Kelvin Tan, ‘Variation Theory and the Different Ways of Experiencing Educational Policy’ (2009) 8 *Educational Research for Policy and Practice* 95. See also on this topic, Thomas J Bussey, MaryKay Orgill and Kent J Crippen, ‘Variation Theory: A Theory of Learning and a Useful Theoretical Framework for Chemical Education Research’ (2013) 14 *Chem. Educ. Res. Pract* 9, 11

¹⁰⁰ Pang and Marton, however, designed different teaching approaches to suit students with, or without a strong initial grasp of the subject matter. Ming Fai Pang and Ference Marton, ‘Interaction between the Learners; Initial Grasp of the Object of Learning and the Learning Resource Afforded’ (2013) 41 *Instructional Science: An International Journal of the Learning Sciences* 1065.

¹⁰¹ Thomas J Bussey, MaryKay Orgill and Kent J Crippen, above n 100, 26.

¹⁰² The latter, as Smith points out, may of course be drawn from inappropriate sources, such as film or television; Linda F Smith, above n 33, 595.

¹⁰³ They are sometimes seen in a different order. So Lam, for example, takes separation before generalisation Ho Cheong Lam, ‘On Generalization and Variation Theory’ (2013) 57 *Scandinavian Journal of Educational Research* 343, 345.

Variation theory, more so than threshold concept theory, is distinctly based on activity, learning by doing and ‘the capability¹⁰⁴ to do something with something’.¹⁰⁵ Consequently, the first stage in a variation theory approach involves highlighting what is to be learned (‘the object of learning’) bringing it to attention by contrasting it with what it is not, and doing so through experience rather than didactic instruction.¹⁰⁶ In the interviewing context, therefore, a teacher might begin by encouraging students to explore the differences between a lawyer-client interview in which advice is given and similar activities: job interviews, journalism, therapeutic sessions, careers advice, cross-examination, taking a witness statement. In later interviewing activities, this technique might be extended to assist students in distinguishing the significance of the parts of an interview set out in the protocol from the whole, and the relationship between those parts.¹⁰⁷

2 Generalisation

In the generalisation phase, the ‘intended learning object’, now distinguished from what it is not, is emphasised by exposing students to multiple examples to enable them to develop a meaning for it. This approach is also intended to allow students to begin to work out what is essential (for example, that it is always necessary to establish the terms of the retainer with the client) and what is irrelevant. Students might conduct, and watch, a range of interviews with different kinds of clients, about different kinds of problems, leading to different kinds of solutions.¹⁰⁸ If a variety of interviewers, using a variety of styles, was included in the sample, this would provide a foundation for discussion of the influence of different styles and theories of practice later on.

3 Separation

By contrast with generalisation, the separation stage works in reverse. Here individual components of the learning object are varied, whilst other aspects are deliberately kept constant. It is the dimension or value that is

¹⁰⁴ See, for example, Ference Marton and Amy BM Tsui, *Classroom Discourse and the Space of Learning* (Lawrence Erlbaum, 2004), 4: ‘[T]he object of learning is a capability, and any capability has a general and specific aspect. The general aspect has to do with the nature of the capability, such as remembering, discerning, interpreting, grasping, or viewing, that is, the acts of learning carried out. The specific aspect has to do with the thing or subject on which these acts are carried out, such as formulas, engineering problem, simultaneous equations, World War II or Franz Kafka’s literary heritage.’

¹⁰⁵ Ulla Runesson, ‘What Is It Possible to Learn? On Variation as a Necessary Condition for Learning’ (2006) 50 *Scandinavian Journal of Educational Research* 397-400.

¹⁰⁶ ‘We cannot discern a particular quality based on the sameness of this quality among different instances (eg all the males in this world would not help us to discern maleness), we can only discover it by juxtaposing it with another quality (ie femaleness)’, Lo Mun Ling and Ference Marton, ‘Towards a Science of the Art of Teaching: Using Variation Theory as a Guiding Principle of Pedagogical Design’ (2012) 1 *International Journal for Lesson and Learning Studies* 7, 10.

¹⁰⁷ Ho Cheong Lam, ‘Elaborating the Concepts of Part and Whole in Variation Theory: The Case of Learning Chinese Characters’ (2014) 58 *Scandinavian Journal of Educational Research* 337.

¹⁰⁸ This could be supplemented by electronic resources. See, for examples: Kathy Lynch and Gregor Kennedy, ‘Understanding Common Interviewing Pitfalls: An Evaluation of Legal Interviewing Skills’ (2002) 18 *Australian Journal of Educational Technology* 147; Maxine Le Brun, ‘Maximise Modelling, Minimise Drudgery, Enhance Learning: Developing and Customising an Expandable Web Site That Teaches Law Students How to Interview and Counsel Clients’ (2002) 3 *Journal of Information, Law and Technology*; Robert H Mnookin and Susan Hackley, *Lawyers & Clients The Initial Interview* (2008) <https://www.pon.harvard.edu/shop/lawyers-clients-the-initial-interview/>.

varied that becomes the object of learning.¹⁰⁹ It is at this point that the variation theory approach is able, it is suggested, to address the heart of the troublesomeness of the threshold. In the real world of legal practice, different solutions are suitable for different problems and different clients (and, arguably, for different lawyers). As suggested above, grasping this is irreversible and may also be transformative. To address this, a group of students might, for example, all conduct a short interview using a scenario in which two family members are in dispute about an item of property. In some copies of the scenario, however, the item is worth \$500; in others \$5,000 and in others \$50,000. The range of proposed solutions and their relationship to the value of the item – the cost/benefit analysis – could then be the focus of discussion with the teacher. This exercise can be repeated with other factors which experience suggests novices fail to address effectively: the client’s level of risk-tolerance; the credibility of the available evidence; limitation; the ability of the client to fund litigation; the client’s negotiation position and attitude towards their opponent;¹¹⁰ and, sometimes critically, what, if any steps the client has already taken him- or herself to attempt to remedy the situation.¹¹¹

4 *Fusion*

In the final stage, many factors are varied, and the student is invited to work with this simultaneous variation of features in relation to each other. This is, of course, the situation in the workplace where there is no control over the problem or the client. It also represents the integrative aspect of the threshold, blending all three of the Carnegie cognitive apprenticeships .

For more expert practitioners, and for practitioner students reflecting on their own practice, however, this more sophisticated stage could also be replicated in the classroom by increasing the number and complexity of the variables in the situation: overlapping areas of law; interviews by videolink; interviewing through an advocate or interpreter¹¹² and cross-cultural interviewing generally. In some of the interviewing student competitions, after the event reflection on action is also required. Such a debrief might also, it is suggested, provide permission for students to develop - or at a more senior level, interrogate - their own theories of

¹⁰⁹ '[C]ritical features can be discerned if they vary while non critical features are invariant. If two aspects vary together they will fuse, and the two features cannot then be easily differentiated.' Lo Mun Ling and Ference Marton, above n 107, 11.

¹¹⁰ Which may be subject to cultural difference: in a scenario involving an unpaid loan made to a family member, we encountered not only personal but also cultural reluctance to sue a relation.

¹¹¹ From perhaps bitter experience in practice of clients who had already exhausted options, or managed to make their position worse, before consulting a lawyer. An example of patterns of variation used in teaching legal reasoning in this way is provided in Mandy Lupton, Gerlese Åkerlind and Jo McKenzie, above n 93.

¹¹² Gary L Blasi, 'Lawyers, clients , and the 'third person in the room' (2008) 56 *UCLA Law Review* 1.

practice, as well as to explore the identification of variables in the situation and their impact on the solutions proposed.¹¹³

V WHAT SHALL WE VARY?

A defining characteristic of the threshold concept is as a portal to a discipline and in particular to the practices of that discipline. Phenomenography exposes variations in understanding (and misunderstanding) of such concepts and practices. Variation theory deliberately explores the implications of what is constant or varied in experience of a concept or practice to enhance learning. Each treats the individual learner as significant in the process, and the threshold concept, in particular, highlights transformation in, as Webb suggests, reducing ritualization and promoting personalised use of knowledge. In this section, we take the idea of the threshold concept/capability as promoting personalisation one step further into development of a personal theory of practice. In a variation theory approach to the teaching of interviewing, different theories of practice may have been exposed as variations in themselves. The troublesome nature of the threshold may differ for trade mark attorneys and solicitors, but equally, so may an appropriate theory of practice. Both individual and practice sector distinctiveness may be unduly flattened by over reliance on a protocol. A protocol, indeed, emphasises what is constant in interviews, rather than what varies. Repeating activities that are the same does, of course, contribute to learning, by allowing patterns ('schemata') to be developed from multiple examples.¹¹⁴ A protocol which represents a 'good interview' has embedded in it factors which are not necessarily brought to students' direct attention,¹¹⁵ and which form part of the hidden curriculum of the subject (or indeed the profession).¹¹⁶ Consequently an initial step in determining the variations to be addressed is to consider factors that might be particularly troublesome for students who are (only) at the threshold.

1 Using studies of experts and novices to identify troublesome factors as candidates for selection as "variations"

¹¹³ Cedric Linder and Delia Marshall, 'Reflection and Phenomenography: Towards Theoretical and Educational Development Possibilities' (2003) 13 *Learning and Instruction* 271.

¹¹⁴ Jian-Peng Guo et al, 'Learning from Comparing Multiple Examples: On the Dilemma of 'Similar' or 'Different'' (2012) 24 *Educational Psychology Review* 251, 259. See also Anne Hewitt, 'Critique of the Assessment of Professional Skills, A' (2007) 17 *Legal Education Review* 143.

¹¹⁵ Ho Cheong Lam, above n 108.

¹¹⁶ Bo Dahlin, above n 98, 341.

The majority of interviewing students on vocational courses will normally be the novices whom the protocols are designed to support. Salthouse suggests that novices suffer a combination of ‘processing limitations’, only some of which are, it is suggested, addressed by the standard form of protocol:

- a) Not knowing what to expect (ameliorated by the structure and key prompts provided in a protocol);
- b) Lack of knowledge of interrelations among variables (not addressed in the protocol but the core focus in a variation theory approach);
- c) Not knowing what information is relevant (not addressed in the protocol but the core focus in a variation theory approach);
- d) Not knowing what to do and when to do it (protocols and specimen seek to address this but may inadvertently suggest that there is a limited number of possible solutions);
- e) Lack of production proficiency (ie, needing to work through all variables mechanically; this may be assisted by the focus on highlighting and evaluation of key variables in a variation theory approach);
- f) Difficulty in combining information (not addressed in the protocol but the core focus on a variation theory approach).¹¹⁷

A protocol can assist, therefore, with items a) and d). As a variation theory approach to the threshold alerts learners to the existence and implications of variations, it is suggested that supplementary use of this approach can usefully address items b), c), f) and to some extent e).

If the threshold is seen as a ‘capability’, however, this carries with it the obligation to develop strategies for moving past the threshold, which includes increasing the *range of variables* to be taken into account when proposing a solution.¹¹⁸ In vignettes provided by Blasi,¹¹⁹ Ned, the novice straight out of law school, analyses the law and concludes the client should make an application for summary judgment.¹²⁰ Ellen, the expert, comes to the opposite conclusion based on her alertness to variables – and the interplay between them – including the

¹¹⁷ Timothy A Salthouse, ‘Expertise as the Circumvention of Human Processing Limitations’ in K Anders Ericsson and Jacqui Smith (eds), *Toward a General Theory of Expertise: Prospects and Limits* (Cambridge University Press, 1991), 294.

¹¹⁸ Jeanette A Lawrence, ‘Expertise on the Bench: Modeling Magistrates’ Judicial Decision-Making’ in Michelene TH Chi, Robert Glaser and Marshall J Farr (eds), *The Nature of Expertise* (Lawrence Erlbaum, 1988) 229. Lawrence, evaluating the sentencing approach of three Australian magistrates – two expert and one novice – found distinctions in approach in:

- a) overall frames of reference;
- b) in some, but not all, cases, selection of relevant information;
- c) inferences drawn from available information;

such that the ‘experience’ of the experts had created ‘patterns for reducing workloads’; similar goals and perspectives as well as ‘ideas about what to look for, and ways to follow up leads in the data. The simulations of the experts were markedly different from that of the novice in pulling leads out of the files and reports’ (256-7). See similar results in Leah M Christensen, ‘Paradox of Legal Expertise: A Study of Experts and Novices Reading the Law, The’ (2008) 2008 *Brigham Young University Education and Law Journal* 53, 117.

¹¹⁹ Gary L Blasi, ‘What Lawyers Know: Lawyering Expertise, Cognitive Science, and the Functions of Theory’ (1995) 45 *Journal of Legal Education* 313, 395.

¹²⁰ *Ibid* 321.

effect of an application on the dilatory strategy of the opposing lawyer; the likely approach of the judge (and, as the judge would also be the trial judge, the effect on trial); the legal cost/benefit of bringing the application and the likelihood of appeal.¹²¹ All of these – as with the list drawn from experience given earlier - are variations that might be highlighted with students.

Colon-Navarro carried out a study of expert/novice differences using an immigration law scenario. His experts had studied, taught/supervised and practised immigration law for between three and twenty years and were able to start with a very specific, filtering set of questions designed to determine which of a limited number of possible scenarios fitted the situation.¹²² In this, they were more similar to the trade mark attorneys whose ‘pre-liminality’ includes a tightly defined repertoire of issues: registration of a mark domestically and/or internationally, infringement of a mark, challenge to registration of a mark. Possibly because they were already in practice, the trade mark students were also particularly conscious of some variables such as limitation and budget, which the aspiring solicitor students were, in the main, less likely to have thought of. By contrast, the aspiring solicitor students could be met by a client with a lengthy story stuffed with red herrings that might impact on a range of areas of law. This suggests that it is useful to interrogate the pre-liminality and current context of the students in selecting variations that are not already be in their repertoire.

The troublesome variations do, however, appear to be more strongly related to selection and evaluation of facts¹²³ rather than the structure of the interview, which is scaffolded by the protocol. Colon-Navarro found a much smaller difference between experts and novices in the kinds of questions used (closed or open-ended); number of facts elicited; the relationship between number of facts elicited and the appropriateness of the solution suggested and in the hierarchy of solutions suggested for the problem. He did, however, find that the experts were more likely to close the interview with a clear plan of action (and to exhibit confidence in it). This factor is related to Salthouse’s finding that novices may be unclear about ‘what to do and when to do it’ and indicates a need not simply to identify variations in the situation, but to be in a position to evaluate their implications for the solution. The solution is, it is suggested, a component of the threshold: in conventional academic study covering only the first Carnegie apprenticeship, students are generally asked only to advise on the law, rather than suggest pragmatic solutions which may not include assertion of legal rights in litigation.¹²⁴

¹²¹ Ibid 322.

¹²² ‘[A]ll the expert attorneys asked the client how they had entered the country, whether or not they had relatives in the US, whether or not the client had been detained by the Immigration and Naturalization Service, and whether or not the client was presently employed’.

Fernando Colon-Navarro, ‘Thinking Like a Lawyer: Expert-Novice Differences in Simulated Client Interviews’ (1997) 21 *Journal of the Legal Profession* 107, 132.

¹²³ Ibid 117. The scenario used for Colon-Navarro’s exercise included a number of deliberate ‘red herrings’. This, therefore, represents Salthouse’s ‘not knowing what information is relevant’.

¹²⁴ A similar phenomenon has been seen in a comparative study of medical students and doctors where it was suggested that, as earlier education tended to focus on diagnosis, ‘less advanced students, when confronted with a management task, are likely to deal with it as if it

Clearly a comparatively short university based interviewing course cannot create expertise in its students either in the law or in the skills of eliciting information, analysing and solving problems. The protocol approach is an attempt, of course, to provide the novice with some of the armoury, at least in terms of structure, that might be adopted by the expert.¹²⁵ Beyond the protocol, attention to the implications of the different variables within the situation can, it is suggested, highlight the fact that variables are present and provide some permissions, not provided by the protocol of itself, to adapt the lawyer's response to meet them. This is a first, transformative, step in developing an individual theory of professional and ethical practice.

2 Using different theories of practice to promote independence and capability

There has been in the United States, a longstanding debate¹²⁶ about the role of client centred 'counselling' as opposed to a more directive, lawyer centred approach which might be more precisely described as 'advising'.¹²⁷ The protocols, however, appear to represent a 'client centred' theory of practice.¹²⁸

A client centred approach is not, of course, wrong, and such an approach can be derived empirically for teaching purposes¹²⁹ However, the implications of client centredness, which may be more or less troublesome

were a diagnostic task, which is the kind of task they have some experience with'; Alireza Monajemi, Henk G Schmidt and Remy MJP Rikers, 'Assessing Patient Management Plans of Doctors and Medical Students: An Illness Script Perspective' (2012) 32 *Journal of Continuing Education in the Health Professions* 4, 5.

¹²⁵ An approach endorsed, at least as a starting point, by the authors of the Carnegie Report. An approach to educational design based on deconstruction of expert practice is provided in Joan Middendorf and David Pace, 'Decoding the Disciplines: A Model for Helping Students Learn Disciplinary Ways of Thinking' (2004) 98 *New Directions for Teaching and Learning* 1..

¹²⁶ The debate may have been prompted by the different focus on litigation in that jurisdiction: Louis M Brown, above n 49. See also for some examples: Thomas L Shaffer et al, 'Symposium: Client Counseling and Moral Responsibility' http://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=1261&context=law_faculty_scholarship; Robert F Cochran, 'Which 'Client-Centered Counselors'?: A Reply to Professor Freedman' (2011) 40 *Hofstra Law Review* 355.

¹²⁷ A more palatable modern conception of the directive approach, particularly evident in the trade mark attorney approach might be more closely aligned to teaching. See also Scott Barclay, above n 48, 1 n 4 summarising earlier socio-legal discussion of the topic. Further, 'Legal counseling is an exercise in value choices; in the choice between equality and authority; between historical tradition and immediate needs and circumstances, between transcendent social values and immediate private preferences, between possibility and compulsion, between humanistic concern and the values of rigor and discipline, between concern for self and concern for others, between self-limiting honesty and self-aggrandizing seeking, between the exercise of power and the predominance of humane concern, between change and constancy, and the list of opposites could go on. The tendency to view counselling as a simple ministerial act or an essentially technical exercise misses the richness and complexity of the choices and interchanges in value that go on, both procedurally and substantively, as the enterprise is transacted from beginning to end by lawyers and clients', Robert S Redmount, 'An Inquiry into Legal Counseling' (1979) 4 *The Journal of the Legal Profession* 181, 183.

¹²⁸ For examples, see:

'... identify possible courses of action, the legal and non-legal consequences of a course of action (including the costs, benefits and risks) and assist the client in reaching a decision', Solicitors Regulation Authority, 'Legal Practice Course Outcomes' <http://www.sra.org.uk/students/lpc.page>.

'They should be given work that helps them understand the need to ... help the client decide the best course of action', Solicitors Regulation Authority, 'Training Trainee Solicitors' <http://www.sra.org.uk/trainees/training-contract.page>

'Identifying possible courses of action and their consequences and assisting clients in reaching a decision', Solicitors Regulation Authority, , above n 53.

'Encourages client to make decision (if appropriate, lawyer makes recommendation); Law Society of British Columbia, above n 3.

'They should assist the client in his or her understanding of problems and solutions and in making an informed choice, taking potential legal, economic, social and psychological consequences into account.' The Client Interviewing Competition for England and Wales, 'Assessment Criteria' http://www.clientinterviewing.com/pages/assessment_criteria_guidelines.htm

¹²⁹ Liz Curran and Tony Foley, 'Integrating Two Measures of Quality Practice into Clinical and Practical Legal Education Assessment: Good Client Interviewing and Effective Community Legal Education' (2014) 21 *International Journal of Clinical Legal Education* 69; Liz Curran, 'We Can See There's a Light at the End of the Tunnel Now': Demonstrating and Ensuring Quality Service to Clients' (SSRN Scholarly Paper ID 2396964, Social Science Research Network, 29 March 2012) 1 <http://papers.ssrn.com/abstract=2396964> 35-36.

to different individuals, could usefully be brought to the fore for students.¹³⁰ A variation theory approach, indeed, suggests that students can only really understand what a client centred approach is by experiencing it as contrasted with something else. Exploring the implications of client centeredness, rather than simply prescribing it, would, it is suggested, aid in exploration of the third Carnegie apprenticeship's ethical and professional implications of, on the one hand, telling the client what to do or, on the other, working with the client to reach a consensus about what to do.

Comparison of the behaviour of experts when compared with novices does not assist in examination of differences in approaches *between* experts in, for example, being more, or less, client centred. There is a developing range of empirical evidence about differing theories of practice amongst lawyers. Wilkinson, Walker and Mercer, for example, in 2005, investigated Canadian lawyers' concepts of their own role: as mentor or hired gun.¹³¹ Sandberg and Pinnington, in 2009, found a hierarchy of increasingly sophisticated 'ways of practising corporate law' amongst Australian lawyers: from 'minimising legal risks so clients can achieve what they want to achieve'; through 'managing legal risks so clients can achieve what they want to achieve'; 'managing commercially important legal risks so clients can achieve what they want to achieve' to 'identifying clients' level of risk tolerance and managing it so they can achieve what they want to achieve'.¹³²

Most useful in this context is, however, the conversation analysis conducted by Smith in 2007 of two US attorneys, both asked to carry out an interview of a client on the basis of the same, simulated, scenario.¹³³ Conversation analysis considers language used, formal or informal,¹³⁴ politeness and power. Indeed, Smith suggests that conversation analysts 'urge that well-meaning instructors should not prescribe a structure for an interview without first understanding the structure in the conversations that are naturally occurring'.¹³⁵

One of Smith's pair of attorneys followed a client centred model, providing the client space to explain the problem before following up with questioning in the approach recommended by the protocols. Attorney B,

¹³⁰ Pinnington and Somerlad found young Australian solicitors to have tacit conceptions of what 'competence' meant that, once surfaced, may be alarming: 'the ability to bill more hours, establish and maintain relationships with clients, command a degree of respect from colleagues and the business community, possess a business orientated approach to work and display a keen interest in increasing one's knowledge and expertise, whether this be through more credentials or diversifying interests in other niche areas of law pertinent to the work group'. Ashly H Pinnington, and Hilary Somerlad, 'Competence Development and Participation in Transient Knowledge Communities', *Development of Competencies in the World of Work and Education* (Fakulteta za družbene vede, University of Ljubljana, 2009) http://www.decowe.org/static/uploaded/htmlarea/files/Competence_Development_and_Participation_in_Transient_Knowledge_Communities.pdf, 15. For different perspectives on the attitudes of young lawyers, see Jean E Wallace, 'Work Commitment in the Legal Profession: A Study of Baby Boomers and Generation Xers' (2006) 13 *International Journal of the Legal Profession* 137; Susan Swaim Daicoff, 'Working with Millennials in the Law' (SSRN Scholarly Paper ID 2449621, Social Science Research Network, 1 June 2014) <http://papers.ssrn.com/abstract=2449621>.

¹³¹ Margaret Ann Wilkinson, Christa Walker and Peter Mercer, 'Testing Theory and Debunking Stereotypes: Lawyers' Views on the Practice of Law' (2005) 18 *Canadian Journal of Law and Jurisprudence* 165.

¹³² Jörgen Sandberg and Ashly H Pinnington, 'Professional Competence as Ways of Being: An Existential Ontological Perspective' (2009) 46 *Journal of Management Studies* 1138.

¹³³ Linda F Smith, above n 33.

¹³⁴ Coupland provides an example of instinctive change of register by a lawyer from the formal to the informal to extract reassurance on a sensitive issue (whether the client would be likely to injure her child) in Justine Coupland, *Small Talk* (Routledge, 2014) xvi.

¹³⁵ Linda F Smith, above n 33, 585.

on the other hand ‘made many of the mistakes we warn our students about. He interrupted the client’s narrative very early and tried to control the interview in ways that prevented rather than helped the client to present the situation’.¹³⁶ Attorney B, possibly as a result, had to work harder in asking questions, asking twice as many as Attorney A, of which almost 80% were either leading or required a yes/no answer.¹³⁷ He also appeared to prejudge the nature of the client’s problem, spending time asking about an irrelevant topic and driving the interview by reference to particular case theories rather than, in the method adopted by Attorney A, asking questions by reference to an apparent sequence of ‘what happened to get us here, what is happening now in light of this problem ... and what solutions might one imagine’.¹³⁸ Nevertheless, the client preferred the approach of Attorney B, possibly because ‘[h]is frequent pursuit of legal theories and questioning about what the opposing party was claiming not only convinced the client that he knew the law well, but probably convinced her that he cared about her situation and solving her problem’.¹³⁹ Smith’s results endorse the protocols that recommend a client-centred initial stage of allowing the client space to talk. She also suggests an approach which might lead us to treat our solicitor and our trade mark attorney (and other practitioner) students differently:

.. novice interviewers who do not have substantial substantive law expertise [should] question by developing the story presented and [ask] related questions about the present and the possible future without worrying overly much about what ‘legal theories’ to explore ... An attorney with subject matter expertise might well focus on topics that are typically legally relevant, beginning each topic with an open question and following up with narrow questions in the t-funnel structure.¹⁴⁰

Rapport, however, particularly when the response may, as with Smith’s client, be counterintuitive, is more complex, particularly if there is pressure on the novice interviewer to adopt a style that is foreign to them:

it is probably much more feasible for law students (and for attorneys) to learn about their own conversational styles and tendencies than to arbitrarily adopt unnatural styles. ... If a law student realizes she speaks quickly, tends to interrupt without realizing it, and feels the need to be in charge of the conversation, ... we can work with her to become more aware of others’ styles of talk, and to let the client at least begin with a complete narrative.¹⁴¹

In a modern context, it is suggested not only that it is professionally responsible and, indeed, ethical, to surface and explore these differences in approach but that doing so may be critical because teachers will, increasingly, need to equip students and lawyers to work in a cross-cultural and multi-disciplinary context.¹⁴²

¹³⁶ Ibid 582.

¹³⁷ Ibid 594.

¹³⁸ Ibid 639.

¹³⁹ Ibid 642.

¹⁴⁰ Ibid 644.

¹⁴¹ Ibid 646.

¹⁴² See, for example, the discussion of the different approaches to listening of Finnish and US lawyers in Sanna Ala-Kortesmaa and Pekka Isotalus, ‘Dimensions of Professional Listening Competence in the Legal Context’ (2015) 21 *International Journal of the Legal Profession*; and manifestations of client-centred interviewing in a US-Japanese context in: Kris R Nielsen, ‘Cross-Cultural Interviewing and

They will, it is suggested, not only need to have penetrated the threshold represented by this microcosm of practice, but to have developed independence and capability in developing it beyond the initial threshold.

VI CONCLUSION

Competence statements validate the argument that interviewing is a key legal skill, indeed, a threshold capability which renders ‘thinking like a lawyer’ concrete. Protocols provide valuable support for learners in supporting process and providing prompts for critical issues as well as in tacitly endorsing a client-centred approach to practice. They are not, however, an incantation or a magic spell. If, as suggested in this article, client interviewing is a threshold concept or, more helpfully, a threshold capability, then this highlights its critical position as a microcosm of, and a portal towards to, legal practice. It is also an activity that is, for students, often troublesome, and troublesome in different ways for different kinds of student. There is, it is suggested, more empirical work to be done, on a phenomenographic basis, to determine the different ways in which students perceive and experience interviewing, as well as how they relate it to their understandings of the normal world of social relations and to their concepts of what lawyers are and what legal practice entails.

Interviewing is by definition a task involving combining and evaluating the interplay between variables, including the individual lawyer-interviewer and the client-interviewee. It is an archetype of the interrelationship between the three apprenticeships identified in the Carnegie report. The next step is, it is suggested, to focus in teaching and in design of scenarios and client briefs on helping students work beyond the protocol. This entails engagement with the variables in the situation, their interrelationships and their implications in analysis and determination of viable solutions for this client, in relation to this problem, at this time. In doing so we work with students where they are, as individuals whose pre-liminality already includes sophisticated modes of social interaction, some of which can be translated with confidence into the professional arena. It is not only useful that interviewing should be taught by reference to variation but, in pursuit of client service and development of ethical theories of practice which are more than merely espoused, necessary that it should. There is more to be done in working towards an understanding of variations, both favourable and injurious, for the enhancement of future legal practice:

Counselling: Client Oriented Perspective between Japanese and American Partners’ (2013) 5 *Journal of Legal Affairs and Dispute Resolution in Engineering and Construction* 2 as well as, more generally: Earlene Baggett, ‘Cross-Cultural Legal Counseling’ (1984) 18 *Creighton Law Review* 1475; Joan B Kessler, ‘The Lawyer’s Intercultural Communication Problems with Clients from Diverse Cultures’ (1988) 9 *Northwestern Journal of International Law & Business* 64; Clark D Cunningham, above n 33; PS Kirkbride, SFY Tang and K Westwood, ‘Chinese Conflict Preferences and Negotiating Behaviour: Cultural and Psychological Influences’ (1991) 12 *Organization Studies* 365; Annette Demers, above n 46; Jessica H Stein, ‘Coalition, Cross-Cultural Lawyer, and Intersectionality: Immigrant Identity as a Barrier to Effective Legal Counseling for Domestic Violence Victims’ (2011) 11 *Connecticut Public Interest Law Journal* 133.

This preservation of favourable variations and the destruction of injurious variations, I call Natural Selection, or the Survival of the Fittest.¹⁴³

¹⁴³ Charles Darwin, *On the Origin of Species by Means of Natural Selection, or the Preservation of Favoured Races in the Struggle for Life* (John Murray, First, 1859), 81.