



City Research Online

City, University of London Institutional Repository

Citation: Duncan, N. J. (2003). Gatekeepers training hurdlers: the training and accreditation of lawyers in England and Wales. *Georgia State University Law Review*, 20(4), pp. 911-945.

This is the accepted version of the paper.

This version of the publication may differ from the final published version.

Permanent repository link: <https://openaccess.city.ac.uk/id/eprint/4345/>

Link to published version:

Copyright: City Research Online aims to make research outputs of City, University of London available to a wider audience. Copyright and Moral Rights remain with the author(s) and/or copyright holders. URLs from City Research Online may be freely distributed and linked to.

Reuse: Copies of full items can be used for personal research or study, educational, or not-for-profit purposes without prior permission or charge. Provided that the authors, title and full bibliographic details are credited, a hyperlink and/or URL is given for the original metadata page and the content is not changed in any way.

THE TRAINING AND ACCREDITATION OF LAWYERS IN ENGLAND AND WALES

Nigel Duncan*

DRAFT

Introduction

This paper first presents the structure of the requirements for the education, training and accreditation of lawyers in England and Wales in an attempt to provide a context for what follows. It then provides more detail of the requirements of the different stages before turning to look at some critical issues in this jurisdiction, which may throw some light on the current debate about accreditation for the Bar in the United States.

The Professional Context

A divided profession

The legal profession in England and Wales (E&W) is divided into two branches. Solicitors are the first contact for the lay client and will take full responsibility for most non-contentious work and litigation. The Bar is a referral profession, instructed for a variety of reasons. They develop special expertise in trial advocacy and have the right of audience in any court in the land. Many develop expertise in particular specialisms which leads to referrals in non-contentious as well as litigation matters. That said, many solicitors' firms are organised into specialist departments and many solicitors also become specialists. However, they are only able to represent clients in the lower

* LL.B, PGCE, LL.M., Hon FSALS, ILTM, Principal Lecturer, Inns of Court School of Law (Institute of Law), City University.

courts unless they become Solicitor Advocates (a process controlled by the Bar which, if successful, gives them rights of audience).

Organisational structures

Solicitors work in partnerships or occasionally as sole practitioners. Partnerships can be small provincial practices dealing largely with conveyancing, probate, minor civil litigation and criminal defence work or large international firms with thousands of solicitors and an annual turnover of many millions undertaking major corporate commercial work.

Barristers work as independent practitioners, but form sets of chambers to share clerical, library and telecommunications services and to attract briefs from solicitors. As a referral profession they do not need to hold client money and their overheads are lower than those of solicitors. Thus barristers may be instructed for their specialist expertise but also as an economical way for a solicitor to ensure effective client representation in court.

Professional bodies

Each profession is controlled by its own professional body, which establishes requirements for training, accreditation and continuing professional development, and establishes the rules of professional conduct.¹

The Law Society² regulates the solicitors' profession, provides for practising certificates and represents the profession to Government. Barristers are called to the Bar by one of the four Inns of

¹ See: The Bar Code of Conduct; The Guide to the Professional Conduct of Solicitors.

² www.lawsociety.com

Court³. However, regulatory processes are the responsibility of the General Council of the Bar⁴, on which the Inns are represented. The ‘cultural’ life of the Bar is provided in London by the four Inns of Court but outside London the Circuits⁵ are of more importance.

The Training and Accreditation Regime

In the UK, mainstream legal education starts at undergraduate stage with a three-year LL.B. degree. To be recognised by the professions this must include the ‘foundations’ of legal knowledge and certain skills⁶. An alternative is to take an undergraduate degree in another subject and then do a one-year course leading to the Common Professional Entrance (CPE). The CPE has the same requirement for legal and skills content as the LL.B. degree. Having taken this academic stage of legal education students must decide which branch of the profession to pursue. If they wish to become solicitors they must do a one-year Legal Practice Course (LPC); if barristers, a one-year Bar Vocational Course (BVC).⁷ Thereafter there is an apprenticeship stage. For barristers, this is a one-year pupillage; for solicitors a two-year training contract. Both apprenticeships incorporate compulsory courses. Solicitors are enrolled and receive their practising certificates after successful completion of all these stages. Barristers are Called to the Bar after successfully completing their BVC, and acquire limited practising certificates after the first six months of their pupillage.

³ Gray’s Inn, Lincoln’s Inn, Inner Temple, Middle Temple.

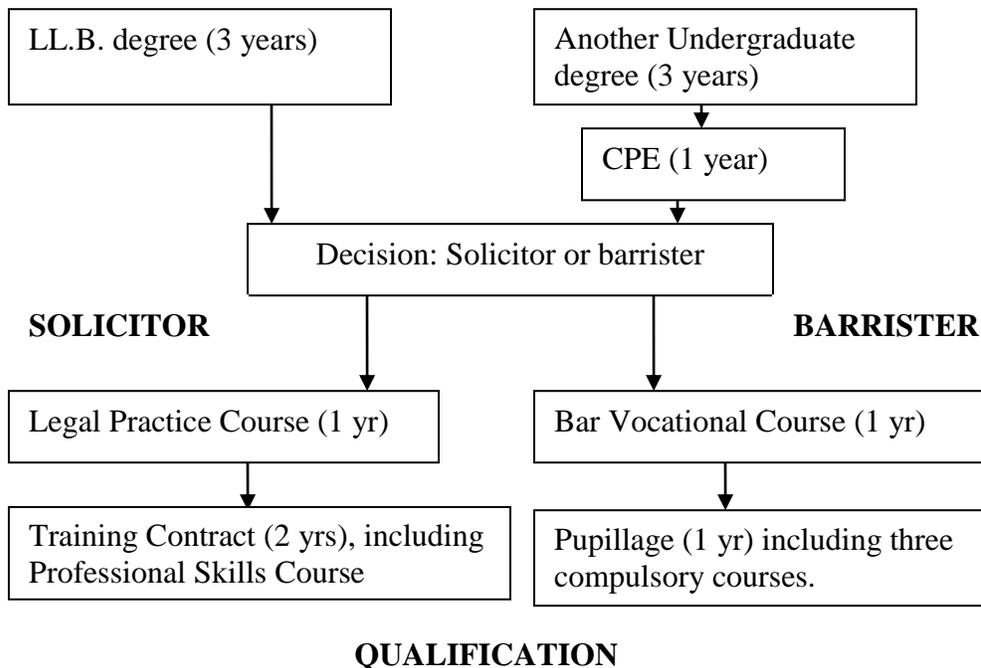
⁴ <http://www.barcouncil.org.uk/>

⁵ Northern, North Eastern, Wales and Chester, Midland, South Eastern and Western, offering training, social and cultural activities.

⁶ Public Law, including Constitutional Law, Administrative Law and Human Rights; Law of the European Union; Criminal Law; Obligations including Contract, Restitution and Tort; Property Law; and Equity and the Law of Trusts. In addition students must be trained in legal research and achieve a number of general transferable skills. The requirements are agreed by the Law Society and the Bar and are common to both branches of the profession, although the Bar requires students to pass with at least a lower second class degree. Details are available on <http://www.legaeducation.org.uk/Degrees/ddownloads.php>

⁷ All these courses may be taken on a part-time basis, in which case the three-year degrees generally take five years and the one-year courses take two years.

This may be conveniently presented in diagrammatic form.



This contains three stages: the Academic Stage (undergraduate), the Vocational Stage (LPC or BVC) and the Apprenticeship Stage (training contract or pupillage). There is one exception to the separation of these three stages. This is the exempting degree at Northumbria University. This four-year course combines the content of the undergraduate LL.B. with the vocational courses and is recognised by both professions. It remains true that the vast majority of lawyers qualify through the three-stage process described above.

I shall address each of these stages in turn. Before doing so, however, I should add that both branches of the profession also have requirements of continuing professional development for qualified lawyers. Although, following accreditation, this falls outside the brief for this paper, it is an important element of the context of the pre-qualifying regime.

The Academic Stage

The Undergraduate LL.B. degree

In the UK, undergraduate studies are funded by the State. The cost of providing courses is met through a state body: the Higher Education Funding Council for England and Wales (HEFCE).⁸ This is supplemented by student fees, currently £1,300. There is no state funding for the vocational stage, although many (particularly larger) solicitors' firms will pay for this stage for those to whom they have offered training contracts. Very few chambers offer similar support to students planning to read for the Bar, although some will fund the vocational year. Furthermore, the Inns provide a considerable amount of sponsorship to help with BVC fees.

In 2002-3 there was an intake of **** undergraduate students. Although 92% of students intend to practise law when they start their degree programme, nearly two-thirds of final year students had not applied for a training contract or pupillage at the end of their final year, and less than 40% do in fact proceed into the legal profession. Some may be deferring their progress, most probably because of the high cost of the vocational stage. Many others, however, will have decided not to pursue the professional route because they have come to realise the intense competition for training contracts and pupillage.

This creates a tension in undergraduate provision which arises between those who consider that degrees should actively constitute the first stage of professional training and those who consider that the degree should be a purely academic activity, a liberal education for its own sake. There is

⁸ Similar bodies exist to support higher education in Scotland and Northern Ireland respectively.

continuing debate as to whether this tension is as real as it is perceived. The Lord Chancellor's Advisory Committee on Legal Education and Conduct attempted to bridge the gap in their First Report,⁹ addressing the training and accreditation of professional lawyers. They presented their report as the rebirth of the liberal law degree¹⁰ yet insisted that this involve the development of certain skills:

- (i) the construction of logical argument;
- (ii) the capacity for abstract manipulation of complex ideas;
- (iii) the systematic management of complex factual information;
- (iv) intelligent, critical reading of texts;
- (v) the use of the English language at all times with scrupulous care and integrity;
- (vi) the related ability to communicate orally and in writing in a clear, consistent and compelling way;
- (vii) competence in retrieving, assessing and using legal texts and information including information technology skills.¹¹

In order to clarify what was meant by the aims of legal education the Report refers to '*intellectual integrity and independence of mind*',¹² and quotes Dawn Oliver's statement:

A liberal education will have as an aim that students should not merely *know or know how to* but *understand* why things are as they are and how they could be different and it is about a 'deep' approach to a subject, in which students try to relate ideas in one subject to those in

⁹ ACLEC, 1996: *First Report on Legal Education and Training*, ACLEC, London.

¹⁰ For a fuller argument on this see Hepple, B. (1996) *The Rebirth of the Liberal Law Degree*, 55, (3) Cambridge LJ p 470.

¹¹ Op. cit. n. 9, Annexure to Chapter 4.

¹² Ibid. para 4.4, italics in the original.

others, to understand what they read, questioning material, making links, pursuing lines of inquiry out of interest.¹³ (emphasis in the original).

The Report suggests how this might be achieved:

‘[t]he intellectual rigour which we advocate involves not just knowing and understanding but acquiring and using relevant skills that allow one to put theory into practice. Learners should be actively involved in solving real problems that require the use of deeply understood knowledge.’¹⁴

The extent to which universities have responded to these suggestions varies considerably.

Where the curriculum has been developed to respond to these demands a variety of innovative methods have been introduced. These have largely involved the introduction of clinical methods familiar in the USA.¹⁵ These approaches prepare students better for a wide range of careers, but more significantly, introduce them to a context for their study of the law which can be hard to achieve in other ways. They learn how the law impacts on the lives of ordinary citizens, a perspective which enriches both purely doctrinal study and theoretical contextual studies such as socio-legal or economic analyses.

The Common Professional Entrance course

¹³ Oliver, D (1994) ‘Teaching and Learning Law: Pressures on the Liberal Law Degree’ in Birks ed: *Reviewing Legal Education*, (Oxford) at p 78, quoted in ACLEC (op. cit. n. 9) at para 4.4.

¹⁴ Op. cit. n. 9 at para 4.20. For fuller argument as to how academic and skills objectives may be combined see Duncan, N. ‘The Skill of Learning’, (1997) 5 JCLI <http://webjcli.ncl.ac.uk/1997/issue5>.

¹⁵ The development of different approaches to clinical legal education in the UK can be found in Brayne, H, Duncan, N and Grimes R: *Clinical Legal Education: Active Learning in your Law School* (Blackstone, London, 1998).

This one-year course attracts a significant minority of entrants to the vocational stage. It has many critics, who either assume that no one-year course can provide enough law to prepare someone for vocational study or regard the exercise of covering the Foundations of Legal Knowledge plus the requisite skills as demanding a narrow, 'cramming' approach to study. Involving an extra year of study as it does, and without state funding, it may also be inaccessible to poorer students. There is no doubt that these are intensive and demanding courses. However, students graduating from them do at least as well on the vocational courses as those with full law degrees and they are regarded as attractive entrants by many firms of solicitors and barristers' chambers.

There are a number of potential explanations for this. The first is that students acquire most of their study and research skills on their prior degree course. They come to the CPE educated as graduates. They are a little older and more mature. Thus they may have many of the characteristics of an American J.D. student when compared with American undergraduates. It is also the case that their knowledge of the basic principles of law is fresher when they start their vocational year than is the case of LL.B. graduates.¹⁶

Finally, it might be observed that this route is the closest approach to the US system, involving as it does, a broad undergraduate education followed by focussed legal education (although the division of that legal education into academic, vocational and apprenticeship remains fundamentally different).

The Vocational Stage

¹⁶ Bermingham, V. and Hodgson, J. *Desiderata: What lawyers want from their Recruits*, 2001, 35 Law Teacher p. 1

This is the stage at which the two branches of the UK profession are split.

The Bar Vocational Course

This was introduced in 1989 and designed to convert undergraduates into professionals by developing their practice skills and knowledge. Thus the new course devoted some 60% of its attention on a series of skills:

Foundation Skills: Case Analysis;
Legal Research.

Interpersonal Skills: Advocacy;
Conference Skills;
Negotiation.

Written Skills: Opinion Writing;
Drafting.

These are taught and assessed largely through simulations, each of which constitutes a realistic brief from a solicitor. The focus differs from undergraduate studies in pursuing the best result for a client (rather than a theoretical study of the substantive law) and requires considerable attention to remedies.

In addition three areas of adjectival law were taught: Evidence, Criminal Procedure and Civil Procedure. At ICSL these are assessed by multiple choice test.

Professional Conduct runs through all BVC teaching with simulated activities designed to throw up ethical dilemmas. It is assessed by having ethical problems 'hidden' in the skills assessments.

Finally, students study two options which are designed not purely to teach a new area of substantive law, but to develop the skills learnt earlier in the context of a new area of practice, addressing the procedural and other peculiarities of that practice area.

The basic contents of the BVC have not changed since 1989. However, the Bar Council maintains a continuous review of the course, its details and the assessment regime.

The Legal Practice Course

The Law Society introduced the LPC in 1993. In some respects it was modelled on the BVC, consciously addressing practice skills and using simulated activity to develop contextual learning. However, the proportion of time devoted to skills was always less as the solicitors' profession demanded more attention to substantive law (in particular business law).

The required elements include the following:

Core Areas: The Ethical; Skills; Taxation and European Contexts plus Probate &
Administration of Estates

Compulsory Areas: Litigation & Advocacy; Business Law & Practice and
Conveyancing, (all to combine substantive law, procedure and
practical skills work).

Elective Areas: Students choose three electives from within the two areas of
'Private Client' and 'Corporate Client' work.

Pervasive Areas: Accounts;
Professional Conduct and Client Care (including Financial
Services;)
European Union Law;
Revenue Law.

Skills Areas: Advocacy; Interviewing and Advising; Writing and Drafting and
Practical Legal Research.

Thus, in effect, the LPC mirrors the BVC to the extent that it combines direct attention to the development of lawyering skills applied in as realistic a context as simulated activity can achieve, and integrated with the learning of those areas of law most important for the type of practice the student is likely to enter. The major content of adjectival law on the BVC reflects the forensic focus of much of the work of barristers, while the major Business Law and Practice focus of the LPC reflects the commercial focus of many solicitors' practices and the inclusion of other substantive subjects reflects the needs of private as opposed to corporate commercial clients. This indeed indicates a tension within the LPC, as few qualified solicitors practise in both fields. Recently a group of the eight largest firms of solicitors organized with three university providers of the LPC to introduce the 'City LPC' which concentrates as much as possible within the LPC framework on corporate commercial concerns.

The Apprenticeship Stage

Both branches of the profession require a period of on-job training before an individual may be admitted. The nature of this apprenticeship stage is influenced by the organizational structure of each branch of the profession.

Solicitors work in partnerships, often enormous. The larger firms recruit during the undergraduate stage, can afford to pay substantial salaries to attract the ‘best’ trainees and they will often provide funding for university and LPC fees as well. They will probably have Directors of Training to ensure that trainee solicitors receive the type of training the firm requires (while complying with Law Society requirements). Smaller firms will not have such resources to deploy and are more likely to recruit during or after the LPC. All firms, however, operate in a competitive commercial world and this provides an incentive to ensure that trainees do valuable work and receive a thorough training. The extent to which this is achieved will be explored below.

By contrast, the independent practising Bar is composed of individuals gathered into sets of chambers not formally constituted as partnerships. Chambers will generally take a collective decision as to how many (if any) pupils to take on but each pupil will be attached to a particular barrister: his or her pupil supervisor.¹⁷ Chambers never reach the size of the larger solicitors’ firms and few produce the level of income of partners in the large global firms. While many chambers do recruit during the undergraduate stage more do so during the BVC year, and fewer aspirant barristers have their fees paid for them by chambers. However, another aspect of the organization of the Bar, the four Inns of Court, provides an alternative funding system. Scholarship awards are offered by all the Inns which may cover or assist with BVC fees. This helps the Bar to compete for the most able students with the better-funded solicitors’ profession. The total support from chambers and the four

¹⁷ The modern term to replace the former ‘pupil-master or –mistress’.

Inns for students going through academic and vocational education and pupillage is currently some £11.7 million annually.¹⁸

Training Contract

This is the two-year work-based apprenticeship for aspirant solicitors. The Law Society lays down certain requirements of a training contract.

Trainees should receive experience of at least three areas of substantive law (chosen from a prescribed list). In respect of each they should receive training in:

- Advocacy and oral presentation skills;
- Case and transactional management;
- Client care and practice support skills;
- Communication skills;
- Dispute resolution;
- Drafting;
- Interviewing and advising;
- Legal research;
- Negotiation.

They should experience contentious and non-contentious work and court and tribunal proceedings and ADR. They should receive three appraisals during the two-year contract and be given ‘adequate guidance’ on a day to day basis.

¹⁸ D. Calvert-Smith: *Taskforce on Funding Entry to the Bar – Report for Consultation*, (2003) General Council of the Bar, 2.25.

Typically, a trainee will undertake four 'seats' during the two years of the contract, thus either returning to an area they choose to practice in or perhaps gaining experience in four substantive areas.

The Law Society recognizes a number of problems with this process. The larger, corporate commercial firms dominate the training contract as they are the best-resourced sector of the profession. It is widely reported that qualified solicitors who decide not to stay in that sector and who move to 'High Street' practice, working mainly with private clients and small local businesses often find that their training contract ill-prepares them for the needs of this sector. Reasons for this are generally presented as the shift from dealing with only small parts of a major transaction to taking full responsibility for many transactions, working in different areas of substantive law and the much greater client contact in small practices. Recent research, however, suggests that problems were more likely to arise from poor quality traineeships.¹⁹

The best experiences seem to have arisen where trainees had been given real responsibility and were able to move into the area of law in which they had spent their 'best' seat as trainee.

I loved my training contract ... I think I certainly learned a lot. When I qualified as a Solicitor I didn't notice the change, and I didn't worry about 'oh! Crikey I'm now responsible for signing letters, and if I give advice I could be sued on it' and things like that. You know that day just came and went for me because I was already doing it.²⁰

¹⁹ A. Boon and A. Whyte: *Legal Education as Vocational Preparation? Perspectives of Newly Qualified Solicitors*, available at: <http://www.ukcle.ac.uk/research/boon.html>.

²⁰ Ibid. p. 42

Very specialist training contracts could create problems. One solicitor who had trained with the Crown Prosecution Service described herself as ‘completely unprepared’ when starting with a busy High Street criminal firm:

I haven’t experienced the defence side because it’s such a different side of life because you’re never near criminals when you’re prosecuting. The nearest you get is with the police; [a] completely different perspective.²¹

This reported experience was within the same substantive field. Others reported that shifts from working with many small clients to a few larger ones were not a problem.²² Greater difficulties may arise when the first post-qualifying job requires practice in a completely different field.

Other problems arose in the larger commercial firms simply because of the pressure put on trainees. The expectation of working very long hours, although reflecting what was expected of fee-earners, was often resented by those on a trainee’s income, particularly when they felt that they were being used as cheap labour rather than being given a rounded and diverse training experience. This could be overcome by camaraderie within the working group.²³

The most effective training experiences seemed to share certain characteristics:

- Being given early responsibility;
- Being kept occupied with a lot of work;
- Being given support and help or constructive criticism when required.

A typical comment was:

²¹ Ibid. p. 43

²² Ibid. p. 42

²³ Ibid. p. 45

I got a lot out of it, I'm not sure all of it was thought about at the top level and I think a lot of it I created myself. But I was allowed the ambit to do what I wanted; I was allowed to run cases, I was allowed to go and meet barristers ... see clients on first interviews and run them on my own unless I needed help on them. So it worked quite well and I suppose there had to be a lot of mutual trust there and confidence in each other.²⁴

These seem to be the core characteristics of an effective apprenticeship experience.

The Professional Skills Course

This 72 hour course must be taken during the training contract and may be provided in-house or by study leave. Trainees must receive training in IT, Business and Commercial Awareness and three skills areas: Advocacy and Communication; Client Care and Professional Standards; and Financial and Business skills. There are also electives which expand on one or more of these areas. Few interviewees found it of much significance to their development.²⁵ Some resented its interference in their working pattern. Others found elements of it irrelevant (advocacy, for example, to an office-based practitioner). It was also suggested that firms resented the cost and disruption, and their consequent lack of interest was demoralizing for trainees.²⁶ There are no specific proposals to abandon or change this requirement. However, the thrust of the Training Framework Review (see below) suggests greater diversity in training methods which would presumably allow firms and educational organizations to propose alternatives.

The Training Framework Review

²⁴ Ibid. p. 44

²⁵ Ibid. p. 46.

²⁶ Ibid. p. 47.

The LPC is kept under review by the Law Society, which is currently reviewing the entire legal education process. An initial consultation paper in 2001,²⁷ followed by a conference,²⁸ led to an analysis of the responses by Professors Boon and Webb of Westminster University.²⁹ This was supported by a more qualitative interview-based study.³⁰ Currently the Law Society is consulting in more detail, but a number of proposals are tentatively put forward.³¹

The general approach is to concentrate on establishing the learning outcomes which aspirant practitioners must display if they are to be deemed suitable for admission, and devising methods of ensuring that these have been achieved. This approach is presented in contradistinction to prescribing in detail the process that students and trainees must go through. It is expected that this will encourage innovation in education and training regimes. Such innovations might include greater integration of the academic and vocational stages, or of the vocational and work-based learning stages. It might even be possible to emulate current medical professional training, where patient contact is experienced in the earliest undergraduate years. Such proposals would include clinical elements, an approach to legal study which is better-developed in the USA than in the UK.

Whatever proposals may eventually be accepted, a requirement for a period of work-based learning roughly equivalent to the existing training contract is seen as essential.³²

The proposed outcomes are presented under five broad headings:

1. general intellectual skills;

²⁷ *Training Framework Review Consultation Paper*, Law Society, 2001.

²⁸ *Rising to the Challenge: Legal Education in the 21st Century*, 5 October 2001.

²⁹ A. Boon & J. Webb: *Report to the Law Society of England and Wales on the Consultation and Interim Report on the Training Framework Review*, see <http://www.lawsociety.org.uk/>

³⁰ see n. 19 above.

³¹ In Discussion Paper: *Proposals for the First Stage of the Professional Education and Development of Solicitors – to the Day of Admission*, see <http://www.lawsociety.org.uk/>

³² *Ibid.* para. 42-47.

2. core legal and technical knowledge;
3. ability to complete legal transactions and progress legal disputes towards resolution;
4. the values, behaviours, attitudes and ethical requirements of a solicitor;
5. professional, personal management and client relationship skills.³³

The first should be satisfied by any undergraduate degree. The remainder, however, are likely to be built on by the various stages (or, by integrated programmes, if developed as suggested above). This should assist the process to become a genuine continuum whether structurally integrated or not.

Any provider would need to demonstrate how their proposed programme would meet the necessary outcomes, and the existing assessments at each stage of an undergraduate and vocational course would be augmented by a final assessment immediately prior to accreditation.³⁴ This assessment would focus on the fourth and (possibly) the fifth headings above, it being argued that the first three would be adequately assessed before the training contract.

This approach, dominated by consideration of outcomes rather than process, does not ignore the problems identified in training contracts. The Discussion Paper makes a number of proposals for work-based learning.³⁵ These include a requirement on trainees to keep a record of their training which would provide evidence of their progress towards and achievement of the overall outcomes. The solicitor supervising the training would need to review that record and certify its accuracy and validity. In order to ensure that this is done effectively revised rules would require the training of

³³ For details of what is conceived under these headings see *ibid.* para 35 – 41.

³⁴ I should stress that this is a proposal for discussion and not Law Society policy. Indeed, it is likely to be controversial in that it adds further assessment to what is already regarded as an over-assessed process. However, if the relaxation of process controls is to be justified by greater control over final outcomes, it seems a conclusion that is hard to resist. It is also of direct significance to anyone considering alternatives to State Bar Examinations as a basis for accreditation. Details of the proposals are in *op. cit.* n.31, para 59 – 66.

³⁵ *Ibid.* para. 48 – 58.

supervising solicitors.³⁶ However, it is anticipated that an assessment at the end of the training contract would itself act as a check on the value and relevance of the work experience undertaken.

Pupillage

Pupillage is a one-year apprenticeship, regulated by the Bar Council, which is divided into two six-month periods. During the second six pupils have a limited practising certificate and may take on their own cases.

Criticisms of the variability of the pupillage experience has led the Bar Council to introduce guidance and other requirements. The Education and Training Department produces a guide: *Good practice in pupillage*,³⁷ containing practical advice and ideas for chambers and pupillage supervisors to encourage best practice, grounded in research into the experience of pupils and the chambers in which they learn. Guidance to pupils comes in the form of a Pupillage File,³⁸ a ring-binder of guidance and information plus pro-forma pages for the pupil to use to record the learning and experience being gained.

Only experienced practitioners may become a pupillage supervisor. In order to take on a pupil the supervisor must practise from chambers or an office in which another lawyer with three years' rights of audience also practises. Only one pupil may be supervised at any one time. Pupillage may be undertaken in law offices as well as in independent chambers. Most of these are available from the

³⁶ Respondents to the first consultation stage had identified concerns that they were not competent to assess pre-qualification competencies, see op. cit. n. 29, para 5.16.

³⁷ J. Shapland and A. Soresby: *Good practice in pupillage*, Bar Council, 1998.

³⁸ A new version is produced annually by the Bar Council under the sponsorship of Oxford University Press.

Crown Prosecution Service or the Government Legal Service, but a few commercial organizations have successfully sought the right to offer pupillages from the Bar Council.³⁹

During pupillage, pupils are required to undergo three training courses:

Advice to Counsel: a course offered in London by the Bar Council and outside London by the Circuits to introduce new pupils to the demands and culture of practice. It is widely criticised by pupils as dry and largely offering guidance on matters already experienced directly.⁴⁰ It may be more useful if offered before pupillage starts.

Advocacy Training: This is provided by the Inns and Circuits to build on the advocacy training provided on the BVC. It is generally well-received although civil chambers may criticise the fact that it focuses on criminal advocacy. Some chambers, as a result, have set up their in-house advocacy training, which is highly praised.⁴¹ New proposals will improve the funding and monitoring of this advocacy training and pupils who fail will not be allowed to practise in their second six pupillage.⁴²

Forensic Accountancy: This demanding course was felt to be irrelevant by most pupils, who questioned the need to attend.⁴³

³⁹ This follows a period of time when a shortage of pupillages (and a leakage of young barristers trained in chambers to employment, seen as a subsidy of employers by the independent Bar) led the Bar Council to permit and encourage organisations employing barristers to offer pupillage.

⁴⁰ See: *Annual Report of the Monitoring of Pupillage Panels* (2003), General Council of the Bar, p. 9.

⁴¹ *Ibid.*

⁴² See T. Dutton QC: *Advocacy Training at the Bar of England and Wales: Organisation, Delivery and Outcomes* (October 2002).

⁴³ *Op. cit.* n.40. Although note that the implementation of the Proceeds of Crime Act 2002 requires lawyers to inform the National Criminal Intelligence Service should they suspect money-laundering or use of other criminally-acquired money. Failure to disclose is an offence, and this may affect attitudes towards this area of learning.

The central purpose of pupillage is to provide experience to the pupil. Supervisors are required to permit pupils to read papers, draft pleadings and opinions and to require pupils to accompany them to court sufficiently to provide enough experience in the areas of practice undertaken by the supervisor. In order to ensure that pupils receive a sufficiently broad experience they are required to keep a checklist which contains a common core and other sections prepared by the various specialist Bar Associations. A third section provides for other experiences, omissions and statements as to how omissions are to be remedied. This checklist must be countersigned by the pupillage supervisor before the pupil receives a certificate of satisfactory completion of pupillage.

Other mandatory obligations include checking that work is fairly distributed during the second six months, as complaints of unfair behaviour by clerks (generally responsible for allocating work within chambers) have long been a characteristic of pupillage.⁴⁴

Other guidance recommends appraisal processes within pupillage and the assessment of pupils after three months. Neither of these is a requirement.

Monitoring and Improving Pupillage

The Bar Council carries out regular monitoring of pupillage by questionnaire and by meetings with pupils. It is apparent from this that the quality of pupillage remains very varied. The methodology of this monitoring values fact-finding over identifying where poor practice takes place (thus the questionnaires are anonymous). This frustrates attempts to address specific instances of poor

⁴⁴ The Bar's Equality Code (see <http://www.barcouncil.org.uk/>) prohibits discrimination on a variety of grounds going beyond the strict requirements of the legislation in force at the time it was introduced.

practice, although the returns of pupillage checklists etc. does identify some chambers with poor practice.⁴⁵

Although the quality of the pupillage experience varies enormously between chambers there are some inherent problems. Pupillage is not only a training process; it is an extended interview on which existing members of chambers will decide whether to offer a tenancy on completion of pupillage. ‘Competitive pupilages’ have been commonplace, where it is known throughout that there are fewer tenancies available for all the pupils in chambers in any one year.

You wander round trying to brown nose up to as many members of chambers, and important ones as possible, and I can’t think that that is effective. I’m sure it interferes with your work to the extent that you are not interested in your work. You are only interested in the politics of gaining a tenancy.⁴⁶

This may make pupils reluctant to admit a failure to understand something as they want to appear superior to others.

If I was sure that I was staying on I would, on more occasions than I do, say ‘look I simply don’t understand this, can you explain?’ I do that sixty percent of the time now, because you want to learn anyway, but forty percent of the time I cover it up with carefully chosen language.⁴⁷

⁴⁵ There continue to be stories of pupils spending many hours photocopying for other barristers in chambers and being sent to move cars where parking restrictions are tight.

⁴⁶ *Op. cit.* n. 37, p. 67.

⁴⁷ *Ibid.* p. 67.

This may be based on a misperception by pupils, as the research found tenants generally seeing asking questions as a sign of interest and intelligence. *Good practice in pupillage* suggests that this should be made clear to pupils.⁴⁸

The introduction of funding for pupillage (see below) may reduce the proportion of pupillages which are competitive in this way. However, times may arise when there is a shortage of work and junior tenants may regard pupils as unwelcome competition.

Junior tenants do view you as a threat and if you show ability, solicitors may brief you, whereas higher up they're looking for new blood. They need a safe pair of hands and it takes a while to be aware of chambers politics. It's good to appear dippy to junior tenants and more sharp and switched on to senior tenants. You have to adjust how you appear.

While up to a point this competitiveness is healthy, if it obtrudes on the training function of pupillage it is damaging. It may be that the proposals now being considered by the New York and Arizona State Bars will avoid these problems as there is not the same necessary link with anticipated employment.

Another factor in the value of individual pupillages is the effectiveness of the pupillage supervisor.

Some propose training:

I do believe it would help pupils if only trained pupil masters were allowed The mere fact that you have managed to survive at the Bar for five years does not qualify you with the right to ruin someone else's life.⁴⁹

⁴⁸ Ibid. p. 67.

⁴⁹ Ibid. p. 79.

There is a concern that introducing a training requirement will seriously reduce the number of people willing to become pupillage supervisors.

Funding pupillage

Recently a major concern has arisen with the funding of education and training for the Bar and the responses to this concern are expected also to address some of the problems with pupillage.

The Bar's limited ability to fund legal education and training led to concerns that it would lose the most able candidates to the solicitor's profession. The high cost of training may also have deterred able applicants from sectors of the community less represented in the profession.

To address this, the Bar has introduced a requirement that all pupillages be funded. Since 1 January 2003, each pupil must receive at least £5,000 in their first six months, and if earnings in the second six months fall below that level they will be made up by chambers. Furthermore, the cost of compulsory courses and reasonable traveling expenses (eg to attend court) will be covered.⁵⁰

It is expected by the Education and Training Department of the Bar Council that the new funding of pupillages will make chambers take their responsibilities more seriously. They will recognize pupils as investments which it is in their interest to train effectively. The Bar Council will continue to monitor pupillage to see whether this prediction will be realised, but recognise limits to the process. The very independence of the Bar (a considerable quality in its own right) and the looser business organisation of chambers make control difficult. It might finally be observed that the practice of paying trainee solicitors during their training contracts (in place for many years) has not dispelled problems as to the quality of those training contracts from the perspective of the Law Society.

⁵⁰ For a discussion of the concerns which led to these developments see op. cit. n. 18 at pp 10 – 23.

Apprenticeship – an Overview.

Whilst the on-job training experienced by both trainee solicitors and pupil barristers is seen by the professions (and by many of the trainees and pupils themselves) as the core of their training process, it is far from perfect. Moreover, systems in place to regulate and monitor it are expensive and often resented by the practitioners on whom they are imposed.

That said, the best examples of both represent the height of young lawyers' learning experiences. While apprenticeship alternatives are not viable (at least in the short term) in the United States context, the characteristics of the best experiences may well be used to inform some of the alternatives now being considered.

Qualitative Variables

Within the framework presented above there have been a number of developments by particular providers of education and training. While not formally required they have been widely welcomed by those engaged in them and by the professions. They might therefore throw some light onto the qualities to be sought in a process of training and accreditation. They generally involve giving students and trainees experience of working with real clients; clinical programmes which, being familiar to colleagues in the USA, I will not explore in detail.⁵¹ Suffice it to say that healthy student law clinics, work placement schemes and Street Law programmes⁵² operate in many UK universities.

⁵¹ For an overview of clinical legal education in the UK see *op. cit.* n.15.

⁵² See R Grimes, *Legal literacy, community empowerment and law schools – some lessons from a working model in the UK.* (2003) 37 *Law Teacher* 273.

What is common to these programmes is that they introduce students (many of whom come from privileged and sheltered backgrounds) to the realities of life for different sections of the community and in particular to the way the law affects those people. They develop effective analytical and communication skills. The advice and representation work goes one stage further to give students experience of doing what lawyers do. Thus a properly designed clinical programme prompts reflection on what has been learned elsewhere, facilitates a critical view of the legal system, profession and approaches to practice and helps to make real the often highly abstract theoretical approaches of critical and contextual scholars.

At the vocational stage clinical approaches are more deeply embedded. Simulated clinical activities play a significant part in both BVC and LPC courses, although they are more dominant on the BVC. Many vocational providers offer opportunities for students to do *pro bono* work alongside their studies.⁵³ These activities are not formally assessed, but are opportunities for students to improve their skills, experience and understanding, thus enhancing their core studies. To encourage this, our students are given a Professional Development File in which they review and reflect upon their progress on the course. This is reviewed at regular stages by personal tutors and encourages integration of the voluntary with the core learning activities.

Work with real clients has been integrated into the BVC at ICSL. Students take on real cases in the employment tribunals. This is fully assessed and forms a part of their credit towards qualifying as a

⁵³ For an example of clinical opportunities for BVC and LPC students at ICSL see <http://www.city.ac.uk/icsl/>, then click 'Pro Bono'.

barrister.⁵⁴ Subsequently some other BVC providers have introduced similar schemes. They are generally highly regarded and provide students with a flying start to their experience of pupillage.

These activities all replace the simulated with the real, which not only provides desirable experience but also the most effective motivation for high-quality work. They offer ways of gaining real experience, which appears to be missing from the current mandatory requirements for professional accreditation in the USA. They are reflected in both the New York and Arizona proposals, although an important difference is that in the UK they are integrated into the academic or vocational course or provided in a controlled and monitored apprenticeship between the end of the course and the start of professional practice. Does this matter? I shall consider this in the next section.

Professional Conduct and Ethical Behaviour

The nature of legal work introduces potential for conflicts and abuse which must be addressed before accreditation. The American profession has probably been more alert to this in recent decades than most, and as I understand it, professional responsibility remains the only compulsory course on the JD. However, it has been widely criticized.

[O]nly three out of forty respondents characterized their ethics course as valuable preparation for legal practice. The vast majority reported that their ethics course merely provided them with formalistic instruction about the rules of professional responsibility that were largely silent on the fundamental contradictions inherent in their practice.⁵⁵

⁵⁴ See N. Duncan, *On your feet in the Industrial Tribunal: a live clinical course for a referral profession*, (1996) 14, J. Professional Legal Education, 169.

⁵⁵ Granfield, R., 1998: 'The Politics of Decontextualised Knowledge: Bringing Context into Ethics Instruction in Law School', in Economides, K., (ed) 1998: *Ethical Challenges to Legal Education and Conduct*, (Hart, Oxford).

We can do better than that by giving students the experience of real clients in all the messy complexity of real cases. In this section I shall report on developments in this field in the UK, together with research and analytical findings from other jurisdictions, in order to make two proposals about the timing and nature of experiences designed to address professional conduct.

Timing

My starting point is the widely-expressed concern that the pressures of the marketplace for legal services are inimical to the highest standards of professional conduct. As Auerbach has said:

Litigation expresses a chilling Hobbesian view of human nature. It accentuates hostility, not trust. Selfishness supplants generosity. Truth is shaded by dissembling. Once an adversarial framework is in place, it supports competitive aggression to the exclusion of reciprocity and empathy.⁵⁶

American and Australian scholars have made related points:

... it is workplace experiences that have the greatest impact on shaping professional behavior. Ethical education may be eclipsed if law students encounter workplaces that are unsympathetic to ethical practice.⁵⁷

... for those students whose first significant work place experience is a 'live client' clinical programme, better values, social awareness and motivations are inculcated because students are under the control of legal educators rather than 'the market'.⁵⁸

⁵⁶ Auerbach, J. 1983: *Justice without Law?* (Oxford, 1983), p. vii.

⁵⁷ Myers, E.W., *'Simple Truths' about Moral Education*, (1996) 45 Am.U.L. 823 at p. 824.

This all suggests that students need to be introduced to the underlying principles (and perhaps the details of the Codes themselves) before entering practice, and even before entering a learning environment controlled by practitioners. Note that Evans does not argue that students should be protected from these pressures, rather that they should first experience them in an environment in which it is possible to explore the problems in principle.

Nature of the experience

If it accepted that some form of clinical experience is valuable in addressing ethical issues it needs to be integrated and progressive. Webb has proposed a three-stage approach to fit the structure of UK undergraduate law degrees. In the first year a foundation course would explore as part of its remit the ethics of the English legal system. This lends a values context to the subsequent skills-oriented work. A simulated clinical element would be introduced in the second year which would combine discussion of professional ethics with a study of the major ethical traditions supported by working through realistic and value-laden simulations. The third stage would be a real client clinical course through which supervisors would facilitate students' application of their ideas and understanding of ethical issues to the discussions of how to conduct real cases.⁵⁹ Webb has further argued:

Students need to be presented with learning situations which enable them to question their assumptions about their roles as a lawyer and to confront situations both where they must face potential (internal) conflicts between personal and professional ethics and (external) constraints on their capacity to act "morally". The use of experiential methods – hypothetical or live

⁵⁸ Evans, A, *The Values Priority in Quality Legal Education : Developing a Values/Skills Link through Clinical Experience* 32. *Law Teacher* 274 at p.284.

⁵⁹ Webb, J., *Inventing the Good: A Prospectus for Clinical Education and the Teaching of Legal Ethics in England and Wales*, 30, *Law Teacher* p.270.

dilemmas, role plays and simulations – and of genuine Socratic dialogue in group work are each central to effective developmental learning.⁶⁰

These arguments are readily applicable to the JD programme, and will enable students approaching accreditation to consider their professional and ethical responsibilities in a more critical and focused way.

There is also limited research evidence to suggest that undertaking live clinical work may have a positive effect on students' values, at least on the specific question of access to legal services.⁶¹ I present the following with caution as I do not wish to assert a correlation between those committed to public interest work and those committed to high ethical standards. However, it is probably the case that those with a genuine concern for some of the profession's core values are likely to be willing to consider other core values seriously.

There is considerable research on students' willingness to undertake public interest work. It consistently shows a decline over the three years of the JD.⁶² For example, Stover found that while 33% of first year students rated public interest practice as their ideal first job, three years later the proportion had fallen to 16%. These studies also showed a decline in the importance law students paid to doing pro bono or social reform work. By contrast, Maresh shows evidence that undertaking

⁶⁰ J. Webb, 'Conduct, Ethics and Experience in Vocational Legal Education: Opportunities Missed', in K. Economides (ed) *Ethical Challenges to Legal Education and Conduct*, (1998) (Hart, Oxford) at 288.

⁶¹ A core value of both the UK and US professions, see ACLEC (op. cit. n. 9, p. 24) and R. MacCrate, *Legal Education and Professional Development – An Educational Continuum: Narrowing the Gap*, 1992, (Chicago: American Bar Association).

⁶² C. Kubey, 1976: *Three Years of Adjustment: Where do your Ideals Go?* *Juris Doctor*, December, p. 34, H. Erlanger & D. Klegon, 1978: *Socialisation Effects of Professional School: the Law School Experience and Student Orientation to Public Interest*, *Law and Society Review*, vol. 13, p. 1, R. Stover & H. Erlanger, 1989: *Making it and Breaking it: The Fate of Public Interest Commitment during Law School*, (University of Illinois Press, Urbana and Chicago). H. Erlanger, C. Epp, M. Cahill, & K Haines, 1996: *Law Student Idealism and Job Choice: Some New Data on an Old Question*, *Law and Society Review*, vol. 30:4 p. 851. A. Stone, 1997: 'Women, Law School and Student Commitment to the Public Interest', in Cooper & Trubek *Educating for Justice: Social Values and Legal Education*, (Ashgate, Aldershot) 1997 p. 56.

a clinical programme with real clients reverses this trend. Over six years she found a consistent tendency for a higher proportion of students to express an interest in public interest work after taking their clinical course than they had before taking it. It might be objected that the students opting for clinical courses would most probably be those motivated towards public interest work. However, this does not explain the *increase* as a result of the experience and the percentage of students expressing the interest before their clinical course was as low as 25% in one year.⁶³

Although this is limited evidence it suggests that a coherent programme such as that proposed by Webb, including work with real clients may be more effective than didactic courses on the professional codes. At the very least, students dealing with real cases within their educational experience will necessarily have come into contact with the ethical dilemmas that are endemic in legal practice and will not have been able to evade them. They will have to have taken decisions and actions, rather than merely talking about what they *would* do.

Conclusion

The approach to training and accrediting lawyers in England and Wales is highly regulated and is clearly inappropriate for translation into the US environment. However, the close planning and monitoring provides rich data to inform developments currently being considered. The UK professions see work experience is seen as essential. To that I would add that it should be preceded by a course which addresses not only substantive and adjectival law, but requires clinical experience, both to introduce students to the values of legal practice before they enter the work environment and to provide the groundwork in the development of the skills they will deploy in practice. The New

⁶³ S. Maresh, , 'The Impact of Clinical Legal Education on the Decisions of Law Students to Practice Public Interest Law', in J. Cooper & L. Trubek, *Educating for Justice: Social Values and Legal Education*, 1997 (Ashgate, Aldershot), p. 154.

York and Arizona proposals contain the seeds of implementing such a programme, but a closer look at the JD is necessary as well.