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TRAINING AND ACCREDITING LAWYERS IN ENGLAND AND WALES

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DRAFT

This essay will present the current training and accreditation regimes operating in England and Wales in order to explore the lessons which might be considered by those responsible for the same tasks in the USA. It will focus on those aspects that are seen as crucial for the preparation of effective, ethical lawyers and explore the methods which have proven to be most effective.

In England and Wales the legal profession is divided into two branches: solicitors, who are the first contact for clients and undertake most transactional work, and barristers, who are specialist advocates. Both branches of the profession retain responsibility for the training and accreditation of their lawyers, and the methods used share important common characteristics. There are academic, vocational and real experience stages.

The academic stage constitutes an undergraduate law degree or, for a significant minority of students, a degree in another subject followed by an intensive one-year course covering the 'foundations of legal knowledge'.[1] The vocational stage involves a one-year course: the Legal Practice Course (LPC) for solicitors, the Bar Vocational Course (BVC) for barristers, which focus on the skills and knowledge required for the different types of practice. The final stage: training contract for solicitors, pupillage for barristers, is supervised work in a law firm or barristers' chambers.[2]

Although there are differences between the training provided for the two branches of the legal profession the underlying principles are the same. In particular, what is regarded as crucial is largely common to both. The LPC addresses a number of core practice areas, three electives and the skills of Advocacy; Interviewing and Advising; Writing and Drafting and Practical Legal Research. The BVC focuses on Evidence, Procedure and Remedies, two options and the skills of Case Analysis; Legal Research; Advocacy; Conference Skills; Negotiation; Opinion Writing and Drafting. The integration of learning new areas of law with the skills of practising them is common to both. This is approached by working with realistic sets of papers in a simulated clinical setting. Students get practice and receive feedback on their developing skills in analysing cases, researching the law and applying these to various tasks in the interests of their clients.

Similarly the real experience stage is informed by a common approach. There are differences. Pupillage is one year, during the second half of which pupil barristers may

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[1] 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.

[2] A full description of these various stages and courses is provided in Duncan: *Gatekeepers Training Hurdlers: the Training and Accreditation of Lawyers in England and Wales*, 20 GA. ST. U. L. REV. 911 (2004).

take on their own cases. The training contract lasts for 2 years and trainees typically have four 6-month 'seats' to gain diverse experience within their employing law firm. These differences flow from the different nature of the work and organisational structure of the professions. However, the requirement to gain real experience under supervision is seen as essential.

The academic stage is assessed like other undergraduate degrees, usually by a mixture of coursework and final unseen examinations. Assessment on the vocational courses is often more varied and practice-focused. I shall present some concrete examples below. Assessment of the real experience stage is done by the supervisor and generally constitutes a broad judgement of readiness for practice. This is often seen as a mere 'signing-off' with limited quality control and the Law Society is currently considering ways of ensuring that trainees undergo a thorough assessment of their readiness for practice at the end of the entire process.[3]

The essential elements of these programmes include learning the substantive law; training in the skills required to apply that law and experience of supervised working on real cases. No element of that would be regarded as dispensable.

A number of developments designed to improve the quality of student learning are currently taking place. A variety of methods are being used to develop a more reflective learning practice, both to improve the quality of learning and to encourage a more integrated approach which will be a foundation for continued professional development once in practice.[4] Clinical programmes, including the increased use of live-client clinics, are increasingly used at the undergraduate stage, and are widely used at the vocational stage.[5] These are most commonly a voluntary additional activity, although they are sometimes an assessed part of the course.[6]

Of crucial importance is the ability to practise in an ethical manner. US legal education already recognises this in the requirement for all JD students to undertake a course in professional responsibility. However, these courses are widely criticised as mere formalistic instruction on the Codes,[7] although there are significant exceptions, often using clinical techniques to explore the conflicts and grey areas left by the Codes. Although some undergraduate courses address legal ethics, UK legal education mainly

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[3] The Training Framework Review. A variety of documents explaining the development of these ideas may be seen at http://www.lawsociety.org.uk/newsandevents/news/view=newsarticle.law?NEWSID=231708 by following the links displayed there.

[4] At my own institution students keep a Professional Development File containing a structured reflective journal and evidence of their engagement with course and voluntary activities. This is regularly reviewed by personal tutors.

[5] Those available at my own institution can be seen at http://www.city.ac.uk/icsl/current_students/pro_bono/index.html

[6] Details of the first example of this may be seen in Duncan, *On Your Feet in the Industrial Tribunal: A Live Clinic Course for a Referral Profession*, 14 J.PROF.LEGAL EDUC. 169 (1996). For the most developed example in the UK go to: http://northumbria.ac.uk/sd/academic/law/slo/?view=Standard

[7] See 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).

deals with these issues at the vocational stage. The BVC uses simulated clinical techniques to require students to respond ethically to embedded dilemmas. They are encouraged to go beyond narrow readings of the Code in the Manual with which they are provided[8] and are assessed by writing and role-play tasks into which ethical dilemmas have been embedded.

Two elements of this are particularly significant. Students are required to *act* ethically, not merely to proclaim what they *would do*. Moreover, they encounter such dilemmas in a supportive context before facing the pressures of legal practice. The pressures of the marketplace for legal services may be inimical to the highest standards of professional conduct.[9] Students need to be introduced to working with the Codes before entering practice, and even before entering a learning environment controlled by practitioners.[10] Although their learning experiences encourage a more sophisticated approach, the formal assessment (whether their responses to dilemmas are correct or not) is based on compliance with the Codes.

Assessment of any of the requirements of good lawyering, to be effective, must be consonant with the programme of learning, reliable and valid. This requires the design and implementation of assessment tools which reflect the activities students have been using to learn, which reliably produce the same grades for students performing at the same level and which reflect what they will need to do once in practice. I shall illustrate an attempt to achieve all three with the Conference Skills course on the BVC taught at my own institution. Readers may wish to contrast this with the approach on the current US bar examination, where reliability may be high but, being restricted to paper and pen tests, faces a major challenge in achieving validity.

Students are provided with a theoretical base in the form of a Course Manual[11] and develop their skills through role-play on a series of realistic briefs designed to address progressively the demands of effective client interaction. Those playing clients are given instructions so as to require the student playing counsel to address, for example, ethical issues. Their assessment takes the form of a client conference on video, using an actor to play a standardised client. This provides consonance with the learning process and a high degree of validity as the briefs are designed to achieve realism.

Reliability is more difficult to achieve. Our approach is to bring the assessment team together to observe recorded conferences and mark according to detailed criteria.[12] They all assess the student performance and then discuss the mark given under each criterion. The use of weighted criteria helps to achieve a degree of objectivity and the discussion

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[8] See Duncan: 'The Letter and Spirit of the Code' in Stead (ed) *Professional Conduct*, Oxford University Press, 2004.

[9] See Auerbach's comments on the effects of litigation on ethical behaviour in *Justice without Law?* (Oxford, 1983), p. vii.

[10] For a thorough argument for using clinical methods to address professional ethics prior to entry into practice see Evans, A, *The Values Priority in Quality Legal Education : Developing a Values/Skills Link through Clinical Experience* 32. Law Teacher 274 at p.284.

[11] Samwell-Smith (ed): *Conference Skills*, Oxford University Press, 2004.

[12] These criteria are laid out in Duncan, op. cit. n. 2.

both identifies the issues which arise and achieves a common approach to the standard to be applied. Once all student work has been graded statistical moderation is carried out and grades reviewed where significant deviations are identified. All failed grades are double-marked and finally a sample of assessed student work is sent to an external examiner for checking.

This produces a valid and reliable assessment of students' readiness to turn to the third stage of their training: the work experience. They have shown readiness for this across both oral and written skills. They then turn to working on real cases under supervision in a real law office where they encounter real clients. This progressive approach ensures that students learn their skills in a controlled environment once they have mastered substantive law; that they are assessed as competent before they encounter real clients; and that they gain real experience under supervision before they take responsibility for their own cases. Clients are protected from exposure to lawyers who have not undergone this developmental experience and been assessed as having benefited sufficiently from it.

Many of the characteristics of these programmes are widely available in American law schools. The US experience of clinical programmes, for example, far exceeds that in the UK. However, as long as it remains impossible to guarantee that newly-qualified lawyers have experienced (in simulation or in reality) communication with a client or advocacy within a court room there must be doubt about their competence to practise and their readiness to meet the inevitable ethical demands of practice. The UK approach is not appropriate for transfer to the US situation. However, its key components: valid and reliable assessments of practice skills and supervised introduction to the realities of practice should, in this author's view, be a required element of the accreditation of every lawyer.