

ARTICLE:

FITTING A QUART INTO A PINT POT: THE LEGAL CURRICULUM AND MEETING THE REQUIREMENTS OF PRACTICE

By **Deveral Capps**

Introduction

Contained within the editorial of volume 7 of Digital Evidence and Electronic Signature Law Review are some bold statements. For those who are not aware of, or perhaps do not recall the editorial, the general thrust relates to the performance of an advocate in court and what amounts to their duty to bring to the court's attention case law and general legal authority pertinent to the matter being judged. Moving on, the editorial identifies the need for lawyers to be trained in electronic evidence to ensure that the law students and trainee lawyers of today are properly prepared for practice tomorrow. The editorial concludes: '*It is negligent to fail to ensure would-be lawyers are properly qualified for the work they will be required to do once they are qualified*'.

Electronic evidence, from electronic disclosure before trial to the admission of electronic materials at trial, must now be viewed as an essential aspect of modern legal training. Yet questions remain about how electronic evidence can be taught effectively within the legal training framework. Also there are issues about whether syllabuses and the requirements laid down by the professional bodies in England and Wales have properly identified the importance of a solid knowledge of electronic evidence for the early years practitioner.

In order to help to address these difficulties, this article will outline the legal education and training framework in England and Wales before examining where evidence, and more precisely electronic evidence, is taught within that framework. It will then explore some of the options available to ensure that the principles of electronic

evidence can be provided effectively.

This article will deal specifically with legal education and training within England and Wales. Clearly different jurisdictions have different requirements for the training of their lawyers and what is proposed for training in London or Cardiff may not translate to other jurisdictions. Also, whilst there are many types of legal practitioners within England and Wales, this article will concentrate upon solicitors and barristers, as an in-depth analysis of all who work in legal practice and especially those that operate in unregulated legal sectors could not be properly addressed within the confines of this article.

This discussion is timely. The Legal Education and Training Review ('LETR'), was given the task of carrying out the most comprehensive and in-depth review of the legal education and training sector since the Ormrod review in 1971.¹ It published its final report on 25 June 2013.² This report made a number of recommendations that will influence the landscape of legal education in years to come.

Training to be a 'lawyer'

The legal education and training framework can be divided into three main stages: the academic stage, vocational stage and professional stage. Obtaining a qualifying law degree, normally an LLB degree, completes the academic stage. Students who hold a non-law degree, or a non-qualifying law degree, may choose to undertake the year long Graduate Diploma in Law ('GDL'), formally known as the Common Professional Exam. In order to be 'qualifying', a law degree must comply with the requirements³ laid down

¹ *Report of the Committee on Legal Education*, Cmnd 4595.

² *Setting Standards: the future of legal services, education and training regulation in*

England and Wales (June, 2013), available at <http://letr.org.uk/the-report/index.html>.

³ *Joint Academic Stage Board Handbook (Joint Academic Stage Board, November*

2012), available at <http://www.sra.org.uk/documents/students/academic-stage/jasb-handbook-september-2011.pdf>.

by the Joint Academic Stage Board ('JASB'). Of these, perhaps the most important is the specified list of legal subjects that must be studied. These are known as the core law subjects and comprise: public law, criminal law, the law of tort, contract law,⁴ land law, equity and trusts and European Union law. Outside of these seven compulsory subjects institutions are free, within certain parameters, to provide their own programmes. Some institutions, for example, make all of their students study jurisprudence, while others offer options in esoteric subjects such as space law or animal law. Evidence, electronic or otherwise, is not a core law subject, though it is not uncommon for it to be included as part of a degree as an optional rather than mandatory subject.

Graduating students who wish to train to become solicitors or barristers, must then complete the relevant vocational stage.

Training to be a solicitor

Once the academic stage has been passed, those who wish to qualify as solicitors undertake the Legal Practice Course ('LPC'), a vocational course regulated by the Solicitors Regulation Authority ('SRA') that comprises the skills and knowledge areas deemed essential for practice as a solicitor.

The LPC programme is divided into two stages. During stage one, students will learn about the conduct and regulation of the profession; wills and the administration of estates; tax, business law and practice; property law and practice; civil and criminal litigation and other essential legal skills: legal research, interviewing, drafting and advocacy. Stage two provides an LPC student with the opportunity to study three electives (or options) that either interest them or are required by the firm employing them as a trainee.

Upon completion of the LPC, the would-be lawyer must then complete a two-year training contract, during which time the Professional Skills Course is completed. This course, again regulated by the SRA,⁵ builds upon the knowledge and skills obtained through the LPC and practice as a trainee. Areas of study required by the SRA are: client care and professional standards; financial and business skills; and advocacy and communication skills. Upon completion of the professional skills course and

training contract, the trainee is fully qualified, deemed fit for practise and admitted onto the solicitors roll.

Training to be a barrister

Once past the academic stage, the prospective barrister must undertake and pass the Bar Professional Training Course ('BPTC'). This is overseen by the Bar Standards Board ('BSB'). The BPTC assesses knowledge in criminal litigation, civil litigation, remedies, sentencing, evidence and the resolution of disputes. Conference skills, opinion writing, drafting and of course advocacy are also fundamental aspects of the programme. Bar students will also undertake two optional subjects that may reflect a student's prospective practice area.

After the BPTC has been completed, the student is called to the bar by one of the four Inns of Court and undertakes 12 months of pupillage. During this time, the pupil must complete two compulsory programmes: the pupil's advocacy training programme and a course in practice management.⁶ Once pupillage has been completed, the barrister is fully qualified and deemed a barrister-at-law.

Continuing Professional Development

Both barristers and solicitors are required to undertake on-going continuing professional development ('CPD') throughout their professional careers.⁷ CPD is monitored by both the BSB and SRA and though broadly the same there are subtle differences between professions. Barristers in their first 3 years of qualification must complete 45 hours of CPD to include 9 hours of advocacy training and 3 hours of ethics – this is known as the New Practitioner Programme. Once the 3 year programme has been completed, the barrister must undertake 12 hours of CPD per year, 4 of which must be undertaken on accredited courses,⁸ although the barrister can choose which courses are taken. Solicitors on the other hand are required to undertake 16 hours per year of CPD with 4 of these hours on accredited courses.⁹ Save for a management course that must be undertaken within 3 years of full qualification, solicitors are able to achieve their requirement as they see fit.

Both the SRA and BSB have recently reviewed the CPD requirements for their respective professions, although

⁴ *The law of contract and tort are distinct subjects but often referred to together as the law of obligations.*

⁵ <http://www.sra.org.uk/students/professional-skills-course/psc-written-standards.page>.

⁶ *Pupillage Handbook (Bar Standards Board, September 2011), p 48, available*

at https://www.barstandardsboard.org.uk/media/261792/pupillage_handbook20august202011c.pdf.

⁷ <http://www.sra.org.uk/solicitors/cpd/solicitors.page>; <https://www.barstandardsboard.org.uk/regulatory-requirements/for-barristers/continuing-professional-development/>.

⁸ <https://www.barstandardsboard.org.uk/regulatory-requirements/for-barristers/continuing-professional-development/>.

⁹ <http://www.sra.org.uk/solicitors/cpd/find-cpd-providers.page>.

no changes were considered until LETR published its final report.¹⁰

Electronic evidence

The main focus of this article is of course to see where, in the legal education framework, electronic evidence is provided or could be taught. At the academic stage, evidence is not a core subject and therefore does not need to be taught, however, on the vocational programmes, evidence must be taught.

The LPC programme has two main identified aims. These are to prepare students for work-based learning and to prepare them for general practice.¹¹ Understanding the rules of evidence is vital for general practice, but the SRA do not prescribe a set evidence syllabus. The LPC is organised by a list of outcomes¹² that the SRA believes an LPC student must be able to achieve by the end of the course, and evidence plays a very minor role. For litigation, LPC students must be able to:

1. Identify, analyse and, if necessary, research the propositions of fact going to the elements and be able to identify, analyse, secure and preserve *evidence* to support propositions of fact; and
2. Identify, analyse and advise on the admissibility and relevance of *evidence* and assess the strengths and weaknesses of each side's case including, where appropriate, the opponent's *evidence*.

For advocacy, LPC students must be able to:

1. Prepare the submission as a series of propositions based on the *evidence*; and
2. Identify, analyse and assess the purpose and tactics of examination, cross-examination and re-examination to adduce, rebut and clarify *evidence*.

None of these are particularly onerous, nor is electronic evidence mentioned as an outcome. Given that the LPC is supposed to prepare students for a training contract, this raises the question whether electronic evidence should be included on the programme?

The BSB has adopted a stronger line when it comes to

identifying the requirements of the BPTC, and each year revises the BPTC course specification requirements and guidance¹³ to ensure that the content on the bar course is both current and appropriate. Evidence straddles a number of the syllabuses on the BPTC, reflecting the fact that evidence is central to the role of the practising barrister. Whilst the term electronic evidence is not specifically mentioned within the requirements, it must be inferred from the general language used in the outcomes. Outcome C13 of the civil litigation, evidence and remedies syllabus¹⁴ requires that a student must 'demonstrate a sound understanding of the law and practice relating to the admission of evidence in civil trials'. Within criminal litigation, evidence and sentencing outcome C9 specifies that a student should know 'the main evidential rules relating to criminal trials'.¹⁵

To summarise the position so far, if we are looking at a lawyer in practice today, they *might* have studied electronic evidence on their undergraduate programme, but as an option. Solicitors *might* have covered electronic evidence on the LPC, though this is not a specific requirement of the SRA. Following on from the LPC, a solicitor is *unlikely* to have covered electronic evidence because it does not feature on a course a trainee is required to undertake, nor forms part of any mandatory CPD. Barristers are *likely* to have covered electronic evidence during their BPTC year. In a similar vein to solicitors, barristers are required to undertake some mandatory CPD, but electronic evidence is not part of this. Both solicitors and barristers *might* therefore have undertaken some electronic evidence CPD as part of their requirement.

Accordingly, we are faced with a situation where lawyers entering practice both now and in the foreseeable future may have little or no understanding of the principles and rules of electronic evidence. This situation is far from ideal. What could therefore be done to ensure all lawyers are fully aware of the importance, use of and admissibility of electronic evidence? There are a number of possible options.

Option 1 – Evidence as a compulsory subject at the academic stage of training

Bringing evidence within the academic stage of training

¹⁰ For the SRA review see <http://www.sra.org.uk/sra/news/wbl-cpd-publication.page>. For the BSB review see <https://www.barstandardsboard.org.uk/regulatory-requirements-for-barristers/continuing-professional-development/information-about-the-cpd-review/>.

¹¹ Information for providers of Legal Practice Courses (Solicitors Regulation Authority, Education and Training Unit, May 2012),

3.23, available at <http://www.sra.org.uk/documents/students/lpc/lpc-information-pack-may-2012.pdf>.

¹² Legal Practice Course Outcomes 2011 (Solicitors Regulation Authority, Version 2, September 2011), available at <http://www.sra.org.uk/documents/students/lpc/LPC-Outcomes-Sept2011.pdf>.

¹³ Bar Professional Training Course Course specification requirements and guidance

(Bar Standards Board, September 2012), available at https://www.barstandardsboard.org.uk/media/1435625/bptc_o81112.pdf.

¹⁴ Bar Professional Training Course Course specification requirements and guidance, p 25.

¹⁵ Bar Professional Training Course Course specification requirements and guidance, p 32.

and making it a core law area has its advantages, not least ensuring that all law students would have a broad appreciation of the subject. However, there are disadvantages.

It should be remembered that not every law student goes on to practise law. When the Lord Chancellor's Advisory Committee on Legal Education ('ACLEC') looked at progression statistics in 1996, less than 50 per cent of law graduates proceeded to qualify as solicitors or barristers¹⁶ and they considered that this number was likely to fall. With only 477 first six pupillages¹⁷ and 5441 training contracts¹⁸ being registered in 2010/11 this would certainly appear true. Especially when it is considered that some 20,000 students register for undergraduate QLD programmes each year.¹⁹ It makes little sense to force every undergraduate student learn evidence when it will, in all likelihood, serve no useful purpose outside of legal practice.

Equally, there is little room in the law degree for evidence to become a core law subject. The LLB is already a full programme and according to JASB, the core subjects must account for at least 50 per cent of the degree.²⁰ Also it should also not be forgotten that the conversion course for non lawyers, the GDL, is a programme normally studied in a single year; an additional core would mean that the GDL would not be viable and it would be unreasonable to prescribe more for a law degree than can be covered in a one year conversion course.

Perhaps making evidence a core subject might work if one or more of the specified JASB subjects were deemed redundant, however, reducing or removing the core subjects is not something that JASB appear inclined to do. In 1996 ACLEC recommended that there be no core subjects and that law schools should be free to determine the legal subjects they provided to their students.²¹ This recommendation has not been implemented.

LETR looked at the core law subjects. In preparation for their report they asked barristers, solicitors and

legal executives whether the core subjects provided law students with a sufficient knowledge base for practice. Only 5.2 per cent of the respondents agreed completely that it did.²² However, 55.7 per cent did agree or agreed somewhat.²³ LETR also asked practitioners to rank in order of importance a number of legal subjects. Of these subjects, procedure and ethics were determined to be most important, neither of which are core. Of the current core subjects, contract law and tort were third and fourth, with criminal law lying in twelfth place.²⁴ Evidence, as a subject or topic was not, unfortunately, provided as an option. On the basis of this and other indicators, recommendation 10 of the LETR report advised that there be a review of the core subjects.²⁵

It is perhaps worthwhile pointing out that in some jurisdictions, evidence is a subject that must be studied at undergraduate level²⁶ and Scotland, Australia and India have such a requirement. Kenya has recently refreshed its mandatory subjects and requires evidence to be a core subject.²⁷ Other commonwealth countries undergoing reform may well follow suit, for example Uganda and South Sudan.²⁸

Education at degree level should allow choice, and adding to the core subjects already prescribed will restrict this. Legal training is a process, and everything does not have to be squeezed into a particular stage when there are other stages where evidence might sit more comfortably. There is friction between the demands of practice and educational liberalism. As June Chapman comments '[t]he English law degree serves two groups; those wanting a liberal education and those seeking entry to the legal profession. Tensions are felt by institutions trying to resist the vocational pull of the profession'.²⁹ Legal education is more than professional practice, and students at degree level should have the freedom to choose their study programme rather than have their education prescribed.

16 *Legal Education and Training First Report (Lord Chancellor's Advisory Committee on Legal Education, July 1996)*, p 19, available at <http://www.ukcle.ac.uk/files/downloads/408/465.d9ea7dd4.aclec2.pdf>.

17 Figures retrieved from <https://www.barstandardsboard.org.uk/media-centre/research-and-statistics/statistics/pupillage-statistics/>.

18 Figures retrieved from <http://www.lawsociety.org.uk/careers/becoming-a-solicitor/entry-trends/>.

19 19,882 in 2009. Figures retrieved from <http://www.lawsociety.org.uk/careers/becoming-a-solicitor/entry-trends/>.

20 *Joint Academic Stage Board Handbook*, 2.1 b.

21 *Legal Education and Training First Report, Recommendation 4.6*.

22 *Setting Standards: the future of legal services, education and training regulation in England and Wales*, p 29.

23 *Setting Standards: the future of legal services, education and training regulation in England and Wales*, p 29.

24 *Setting Standards: the future of legal services, education and training regulation in England and Wales*, p 34.

25 *Setting Standards: the future of legal services, education and training*

regulation in England and Wales, p xv.

26 *Setting Standards: the future of legal services, education and training regulation in England and Wales*, p 142.

27 Part 2 of the second schedule of the *Legal Education Act 2012*, available at <http://www.kenyalaw.org/klr/fileadmin/pdfdownloads/Acts/LegalEducationAct2012.PDF>.

28 <http://www.cilc.nl/index.php?page=sub-saharan-africa>.

29 June Chapman, 'Why Teach Legal Ethics to Undergraduates?', *Legal Ethics*, (2002) Volume 5, Nos.1-2, pp 68-89.

Option 2 – Electronic evidence as a compulsory outcome on the LPC or BPTC

If the laws of evidence are aimed at practitioners, then perhaps it should be taught on a practical level rather than academically. As such, rather than include it in the academic stage, the place for electronic evidence would be during the vocational stage of legal education. As previously noted, evidence is compulsory on both the LPC and BPTC, but electronic evidence is not specified precisely.

Are there likely to be any significant difficulties? From the point of view of need, it is difficult to find any rational reason why a provider of the LPC or BPTC would object out of principle. Electronic evidence is a current and contemporary issue and one that, given the digital age, is more likely to play a greater role in future litigation than less.

However, similar practical problems to those mentioned in the academic stage section above would hold true. Both the LPC and BPTC are already full of content preparing the student for the training contract or pupillage. Adding more to what is already required can only happen if something is removed. Redefining the syllabuses to ensure that electronic evidence is covered appropriately would certainly be a step in the right direction, but again the question is what could be seen as being no longer important and therefore could be removed? Added content must come at the expense of something or at greater cost. If the latter were chosen, this would have an effect upon access to education on courses that are already criticised for the levels of their fees.

LETR has recommended³⁰ that the SRA and BSB set day one outcomes for the vocational courses, which are the irreducible minimum that a legal professional should be able to know or do on entry to their chosen profession. Such outcomes are used on the qualified lawyers transfer scheme, the process that allows barristers of England and Wales and legal professionals from other jurisdictions to qualify as solicitors.³¹ With regards to the LPC and BPTC, this would clearly be a progressive step, but unless a day-one outcome clearly stipulates ‘electronic evidence’, we will find ourselves in the same position we are currently in. Interestingly, LETR recommends that the LPC itself should become less technical and prepare students better for alternative legal careers.³² It appears therefore that

LETR’s focus and the need to properly prepare lawyers for practice at the vocational stage is perhaps more about employment than in the capability to perform a role.

Option 3 – making electronic evidence compulsory CPD

Given the significance of electronic evidence and that its importance is acutely visible during practice, perhaps the simplest way forward would be to introduce a specialised electronic evidence course as compulsory CPD. This might occur either during pupillage or the training contract, or in the early years of practice. If such a proposal were accepted, there would be few if any negatives.

Practitioners would receive up-to-date information on the current law rather than learn something earlier on in their legal training. As it currently stands, a law student has a time limit of 5 years from graduation to commence the LPC or BPTC. Once the vocational stage is completed, students get another 5 years to enter pupillage or start their training contract. Therefore if electronic evidence is provided during the academic stage it might be 10 years old and possibly longer if evidence is taught in the initial year(s) of a law degree. Compulsory CPD would also ensure that the knowledge goes directly to those who will make use of it and not to those who may never practice.

LETR considered CPD in some detail and have made a number of recommendations on the current structure. The view of LETR is that ‘the majority of CPD schemes in the legal services sector are out-of-line with recognised best practice in professions generally and by comparison with “leading edge” schemes for lawyers in other jurisdictions’.³³ When it comes to prescribing CPD content, LETR have left this firmly up to the professional bodies, but have directed through recommendation 17³⁴ that lawyers should be required to plan their CPD based upon their own training needs.

Conclusion

So, where does this leave us? It is clear that electronic evidence is an important area that should be highlighted and taught discretely, but finding the right place for it within the legal education and training framework is not a simple task. The academic and vocational stages are already full. The simplest and most straightforward way would, rather than trying to fit a quart into a pint pot, be to use a separate pot altogether and CPD would certainly

³⁰ *Setting Standards: the future of legal services, education and training regulation in England and Wales, Recommendation 3.*

³¹ <http://www.sra.org.uk/solicitors/qlts/day-one-outcomes-table.page>.

³² *Setting Standards: the future of legal services, education and training regulation in England and Wales, Recommendation 12.*

³³ *Setting Standards: the future of legal services, education and training regulation in*

England and Wales, p xvi.

³⁴ *Setting Standards: the future of legal services, education and training regulation in England and Wales, p xvi.*

serve as a suitable vessel.

In England and Wales, legal education finds itself in an interesting place. The publication of LETR's report means that the professional regulators of legal education will re-examine their training frameworks in the next few years. JASB will review the core law subjects to ensure that the mandatory subjects are indeed essential academic legal foundations; the SRA and BSB will reconsider the content of the LPC and BPTC; and the reviews of professional CPD can now be finalised. Whether this will mean that electronic evidence will play a greater role in the legal curriculum will have to be seen, though if the professional regulators wish to ensure that the lawyers trained today are fit for practice tomorrow, then it most certainly should.

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