

Appendix A: Overview of Education and training in ethics relevant to new advocates

This section outlines the education and training in ethics which solicitors, Chartered Legal Executive lawyers (FCILEx), and barristers are most likely to undertake along the way to qualifying and in their early years as advocates. The aim is to provide some context for the discussion in this report. The focus here is on typical routes, and on post-graduate education and training.¹ For solicitors and FCILEx, the focus is also on the obtaining of extended and/or higher advocacy rights, rather than those acquired on qualification and/or which may be exercised by virtue of relevant employment and supervision by an authorised litigator.

The position is described primarily as it was in Autumn 2014 when field work began, to give an indication of the education and training likely to have been undertaken by those taking part in the study. Account has however also been taken of some recent developments.²

Typical route to qualification for solicitors

The main stages in the typical route to qualification for solicitors are:

- qualifying law degree, or for graduates without a qualifying law degree the Common Professional Examination (CPE) or Graduate Diploma in Law (GDL);
- then the Legal Practice Course (LPC) (one year);
- followed by recognised training (two years); and,
- the Professional Skills Course (PSC) (normally taken during the recognised training).

A qualifying law degree, or the CPE/GDL, is referred to as the academic stage of training. For solicitors, the LPC, recognised training and PSC together make up the vocational stage.

Obtaining additional advocacy rights

To exercise rights of audience in the higher courts (the Crown Court, High Court, Court of Appeal and Supreme Court), solicitors must obtain the Solicitors Regulation Authority (SRA) Higher Courts Advocacy Qualification. There are separate qualifications for civil and criminal proceedings, but not for family. Assessments for these may be undertaken whilst still a trainee, but if so the higher courts rights cannot be exercised until admission as a solicitor.

¹ There are other routes, both current and historical, for many of the qualifications covered. In the interests of simplicity neither these, nor in some instances transitional arrangements, are discussed.

² Discussion of the requirements of the Quality Assurance Scheme for Advocates (QASA) in respect of criminal advocacy is omitted due to the scheme being suspended during the period of the study. See <http://www.sra.org.uk/sra/consultations/qasa.page> for the latest consultation at the time of writing.

Ethics education and training for solicitor higher courts advocates

Legal Practice Course (LPC)

The LPC includes a compulsory assessed module on Professional Conduct and Regulation, which must be passed. It is a requirement that at least 8% of the total notional learning hours for all compulsory modules (equating to 88 hours) will relate to this topic.³ The SRA also states that '*professional conduct and ethics are intended to be pervasive, impacting on all aspects of the design, delivery and content for the course*;⁴ at least 5% of the assessment marks for each of three other compulsory modules (Business Law and Practice, Property Law and Practice, and Litigation) must be allocated to professional conduct and regulation questions. Stated outcomes for the LPC include that students should be able to '*understand the key ethical requirements contained in the SRA Principles of Regulation and Code of Conduct, understand where these may impact and be able to apply them in context*'.⁵

Professional Skills Course (PSC)

The PSC involves 72 hours tuition (48 on compulsory elements and 24 on electives). The compulsory elements include 12 hours on Client Care and Professional Standards; these subjects are unassessed. Topics covered under Professional Standards include the Practice Rules, client confidentiality, and conflicts of interest.

Higher Courts Advocacy qualification

There is no *mandatory* training requirement prior to taking the assessments for the higher courts qualification. SRA guidance states:

*You are not required to undertake any training before taking the assessments, but you may decide that you need to undertake additional training ... Whether or not you require additional training is a decision for you.*⁶

Notwithstanding this, providers that are authorised to conduct the assessments also offer training designed to prepare candidates for them. Based on information from three which offer provision in both civil and criminal to candidates generally,⁷ a typical format for the

³ <http://www.sra.org.uk/documents/students/lpc/LPC-Outcomes-Sept2011.pdf> last accessed 9 September 2015.

⁴ <http://www.sra.org.uk/students/resources/legal-practice-course-information-pack.page> last accessed 9 September 2015.

⁵ <http://www.sra.org.uk/documents/students/lpc/LPC-Outcomes-Sept2011.pdf> last accessed 9 September 2015.

⁶ <http://www.sra.org.uk/solicitors/handbook/higherrights/content.page> last accessed 9 September 2015.

⁷ BPP Law School: <http://bpp.com/professional-qualifications-course-details/d/professional-qualifications/Higher/185>, Kaplan Altior: http://www.altior.co.uk/course/Higher_Rights, University of Law: <http://www.law.ac.uk/professional-development/higher-rights-of-audience> all last accessed 9 September

training appears to be that it will consist of four days, divided between written work and practical advocacy, with ethics covered primarily but not exclusively in the written part.⁸

Obtaining the civil and/or criminal advocacy qualification involves passing assessments based on competency standards laid down by the SRA. The majority of these are generic to both civil and criminal proceedings, including standards in respect of ethics; these require familiarity with the Bar Standards Board's Code of Conduct as well as the Solicitors' Code of Conduct. Advocates must be able to:

1. advise the client on suitable representation at court including the possibility of instructing a barrister or a solicitor higher court advocate not from his/her own firm or practice,
2. resolve issues arising from unintentional or inadvertent disclosure of confidential or privileged information,
3. resolve potential and actual conflicts including conflicts arising between the advocate's duty owed to the client and the advocate's duty to the Court,
4. advise on potential conflicts between acting as an advocate for a client and becoming a potential witness for that client,
5. recognise when an advocate may become professionally embarrassed and have to withdraw from a case,
6. advise the client of the advocate's need to maintain professional independence and the associated need to draw any unfavourable law of which the advocate is aware to the attention of the court,
7. comply with courtroom etiquette.⁹

As with the training, the assessments also appear to typically be split between written work and practical advocacy, with ethics featuring in both parts. However there appears to be some variation, with two of three providers specifically allocating a proportion of the marks in the written assessment to ethics but not in the practical assessment, and one indicating a specific ethics component in the practical assessment. Two of the providers also state that candidates may be failed for any serious breach or failure in respect of either ethics, or equality and diversity standards, regardless of overall marks.

2015. The other providers either offer only the civil or criminal qualification and/or focus on bespoke provision to solicitors' firms and other organisations rather than to individuals.

⁸ BPP's course additionally includes a separate one hour online module on Ethics and Performance.

⁹ <http://www.sra.org.uk/solicitors/accreditation/higher-rights/competence-standards.page> last accessed 9 September 2015.

Trainee solicitors may study for the higher rights qualification.¹⁰ They may also take the assessments during the period of recognised training. However, they can only exercise higher rights on applying for the relevant certificate(s) on admission as a solicitor.

Continuing professional development (CPD)

Although in the process of being abolished, solicitors are currently required to undertake a minimum of 16 hours of CPD each year; higher courts advocates must make sure at least five of those hours relate to the provision of advocacy services in the higher courts. This latter requirement lasts for five years. There are currently no specific requirements for CPD undertaken by solicitors to include coverage of ethics.

Future developments

In spring 2015 the SRA approved a new Competence Statement as part of its *Training for Tomorrow* programme. This sets out the competencies which solicitors should possess, together with threshold requirements and legal knowledge required at the point of qualification. The statement includes, under Ethics, Professionalism and Judgement:

- a) Recognising ethical issues and exercising effective judgment in addressing them
- b) Understanding and applying the ethical concepts which govern their role and behaviour as a lawyer
- c) Identifying the relevant SRA principles and rules of professional conduct and following them
- d) Resisting pressure to condone, ignore or commit unethical behaviour
- e) Respecting diversity and acting fairly and inclusively.

The education and training needed to meet the requirements of the Competence Statement on qualifying as a solicitor are to be reviewed.

Typical route to qualification for Chartered Legal Executive lawyers (FCILEx)

The main stages in the typical route to qualification for Chartered Legal Executive lawyers, i.e. Fellows of CILEx (FCILEx), are:

- the Professional Diploma in Law and Practice, followed by
- the Professional Higher Diploma in Law and Practice, and
- a minimum of three years relevant employment.¹¹

¹⁰ Trainees may also satisfy the requirements regarding electives on the Professional Skills Course by opting to study for the higher courts qualification.

The diplomas together make up the academic stage of training, and may be studied for during qualifying employment. However, at least one year of the qualifying employment must be undertaken following completion of the academic stage. Since mid-2013, a FCILEx qualification has also required demonstration of various competencies gained and outcomes achieved during qualifying employment. These cover, in respect of professional conduct: applying the rules of professional conduct appropriately to relevant situations; providing appropriate information to clients and service users; and understanding the need to avoid discrimination and promote equality and diversity.¹²

Obtaining additional advocacy rights

FCILEx in relevant employment may gain experience of advocacy (subject to supervision) in chambers in the County court, High Court and Family court, without obtaining further accreditation.¹³ Extended rights of audience in one or more of civil, criminal and family proceedings may be obtained by way of accreditation. The nature of this changed in Autumn 2014¹⁴ when, in addition to a stand-alone designation of Chartered Legal Executive Advocate, accreditation as a Chartered Legal Executive Litigator and Advocate became available. The main difference between the two designations is that a Chartered Legal Executive Litigator and Advocate can practise as an independent practitioner, i.e. they do not have to be employed by and supervised by an authorised litigator.

For criminal proceedings, the advocacy rights under either designation will cover hearings in open court in Magistrates' and Youth Courts, certain open court hearings in the Crown Court, and certain applications in chambers in the Crown Court and High Court. For civil and family proceedings, Chartered Legal Executive Advocate status will confer rights of audience in open court for some courts.¹⁵ Those applying to become a Chartered Legal Executive Litigator and Advocate may apply for rights of audience in open court, or may choose to confine their application to rights in chambers.

Ethics education and training for Chartered Legal Executive Advocates

Whether applying for Chartered Legal Executive Advocate status, or for authorisation as a Litigator and Advocate, the requirements in relation to advocacy are largely the same and

¹¹ Prior to mid-2013 this was five years.

¹² <http://www.cilex.org.uk/pdf/Work-Based-Learning-Handbook.pdf>.

¹³ CILEx uses the term 'Judge's room' rather than chambers. FCILEx may also appear in open court for limited types of unopposed County Court applications.

¹⁴ I.e. prior to field work for this study.

¹⁵ But not in the higher courts, which include the High Court. So for civil proceedings, open court hearings covered are those in the County Court, civil proceedings in the Magistrates Court, and tribunals. For family proceedings the hearings covered are those in the Family Court. Both civil and family open court rights also cover Coroners' Courts.

remain very similar to those in place prior to 2014. There are two main elements: obtaining a Certificate of Eligibility, and taking an advocacy skills course and passing an assessment.

Obtaining a Certificate of Eligibility to take the advocacy skills course requires qualification at the level of the Higher Diploma in Law and Practice in the relevant category of proceedings, together with demonstration of experience of court advocacy in practice including submission of portfolios of three cases dealt with during the preceding two years.¹⁶ Portfolios, which are externally assessed, must explain among other things any ethical or conduct issues arising in the cases and how they were dealt with.

The advocacy skills course, including assessments, takes place over six full days.¹⁷ It includes case studies to allow assessment of abilities *'to recognise and deal with issues of professional and ethical conduct in the course of advocacy'*. Issues to be assessed may include:

- The overriding duty to the court
- The duty not to engage in conduct which is dishonest/discreditable, prejudicial to the administration of justice or likely to diminish public confidence in the administration of justice or the legal profession.
- The duty to the client to promote and protect their interests, to act in good faith towards them and to avoid or deal with any conflict.
- The interests of the client and the advocate, their employer and any other party to the proceedings.
- The duty not to discriminate against, nor treat less favourably any person, including the client, on the grounds of their age, race, colour, ethnic or national origin, sex, sexual orientation, religion or political persuasion of the client.
- The duty of confidentiality in relation to a client's affairs and misuse of confidential information.
- The duties owed to other advocates in court.¹⁸

Assessors on the advocacy skills course have discretion to take into account any errors relating to gross professional misconduct in determining overall competence.

The first advocacy certificate issued following successful completion of the course will be valid for 12 months, after which it must be renewed. This involves submitting a further three case portfolios, in similar format to before, from their first year as an Advocate.

¹⁶ Those seeking accreditation in respect of criminal proceedings may submit portfolios covering police station advice and representation, as they will not yet have had any rights of audience in criminal courts.

¹⁷ Those seeking rights of audience in chambers only in civil or family proceedings will only attend the first two days.

¹⁸ See the respective civil, criminal and family litigation and advocacy handbooks at <http://www.cilexregulation.org.uk/lawyers/practice-rights/litigation-rights> last accessed 19 October 2015.

Continuing professional development (CPD)

Prior to Autumn 2014 FCILEx had to undertake at least 16 hours of CPD annually. CPD is now measured by outcomes. A minimum of nine outcomes must be achieved annually, of which at least one must be in 'professionalism'; this may include professional ethics, but does not have to. For FCILEx advocates, two of the nine outcomes must be focused on advocacy skills.

Typical route to qualification for barristers

The main stages in the typical route to qualification for barristers are:

- qualifying law degree, or for graduates without a qualifying law degree the Common Professional Examination (CPE) or Graduate Diploma in Law (GDL), then
- the Bar Professional Training Course (BPTC) (one year),¹⁹ followed by
- pupillage (one year).

As with solicitors, a qualifying law degree or the CPE/GDL is the academic stage of training. The BPTC is the vocational stage. Pupillage may be referred to as the professional stage.

Pupillage involves a non-practising period (first six months) and a practising period (second six months). Two courses must be undertaken during pupillage: an Advocacy Training Course (during the non-practising period) and a Practice Management Course.

Barristers may be called to the Bar following completion of the BPTC and must be called prior to starting the practising period of pupillage. Subject to certain conditions, rights of audience in all courts may be exercised during the practising period of pupillage under a provisional practising certificate, and thereafter under a full practising certificate.

Ethics education and training for barristers

BPTC

Professional Ethics is taught as a discrete topic, as one of the compulsory main elements on the BPTC. As such, it accounts for 5% of the total course credits. Teaching and learning should include use of case studies and practical examples, and group discussions. Assessment is by way of a centrally set, closed book exam, which includes both multiple choice and short answer questions; both parts must be passed. In addition, consideration of ethics should be pervasive across subject areas (for example the course requirements for the advocacy credits refer to skills '*undertaken to high ethical standards*').²⁰

¹⁹ The BPTC replaced the Bar Vocational Course (BVC) in 2010.

²⁰ bptc_handbook_2013-14.

Pupillage Advocacy Course and Practice Management Course

These courses are provided by the Inns of Court and Circuits. They may be delivered separately or combined but it appears that either way, ethics (and equality and diversity) are typically covered primarily as part of the Practice Management Course.²¹ Brief information from the Inns indicates that this is likely to be by way of group discussions.²²

CPD: New Practitioners Programme

Under the New Practitioners Programme, barristers must undertake 45 hours of CPD during their first three years of practice. This must include at least nine hours of approved advocacy training and three hours of approved ethics training. The aim of the latter is ‘to enable the new practitioner to identify those situations which raise ethical problems, to understand the principles that govern professional conduct and to apply these principles to given situations’; ethics courses should incorporate discussions of core duties such as the overriding duty to the court, the duty to act in the client’s best interests and duties to third parties.²³ The approved advocacy and ethics courses are delivered by the Inns and Circuits, and may either be combined over a residential weekend, or involve the ethics hours being undertaken separately. It appears that whilst the advocacy courses tend to involve separate programmes for civil and criminal practitioners (and sometimes also for family practitioners and employed barristers) the ethics courses are less likely to do so. However, at least one provider now offers the ethics course for groups of civil, criminal and family practitioners.²⁴

CPD: Established Practitioners Programme

After three years in practice, barristers currently have to undertake a minimum of 12 hours of CPD annually (known as the Established Practitioners Programme) but there is no requirement for those to include coverage of ethics.

Future developments

In summer 2015 the BSB issued consultations under its *Future Bar Training* programme, on changes to education and training from 2017. Key among these is the development of a Professional Statement of the competencies needed by barristers at the point of authorisation to practise; this will influence the future structure and delivery of the academic, vocational and professional stages. The proposed Statement identifies necessary

²¹ Which involves a minimum of six hours and is unassessed, whereas the Advocacy Course involves a minimum of 12 hours and performance is assessed.

²² <https://www.graysinn.org.uk/education/pupils>, <http://www.innertemple.org.uk/education/pupils>, <http://www.lincolnsinn.org.uk/index.php/education/barristers-education>, <http://www.middletemple.org.uk/education-and-training/education-and-training> all last accessed 8 October 2010.

²³ https://www.barstandardsboard.org.uk/media/1652927/cpd_information_pack_2015.pdf.

²⁴ Gray’s Inn.

knowledge, skills and attributes in several areas. These include 'Professional Standards', requiring (among other things) clear understanding and application of core duties, and recognition of and abiding by the paramount duty to the court. Changes to CPD requirements for established practitioners are also proposed; these focus on barristers identifying and planning how to meet their own training needs, and outcomes. However, the proposals do not include any changes to the NPP.²⁵

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²⁵ See https://www.barstandardsboard.org.uk/media/1700434/fbt_triple_consultation_july_2015.pdf.