



Bar Association for Commerce, Finance and Industry

Submission to the Bar Standards Board CPD Review Group (“CPDR”)

This paper follows a meeting of the CPDR on 16th June 2010 attended by representatives of BACFI and other members of the employed bar and expands and supplements the issues discussed at that meeting.

Key messages:

- **BACFI believes that CPD should be mandatory**
- **Currently there are very few BSB accredited courses which are suitable for employed barristers**
- **Any new system should be based on self-accreditation and it should be down to the individual barrister in conjunction with his employer to determine how to fulfil CPD**
- **Criteria set by the BSB should be qualitative as well as quantitative**
- **CPD criteria should set clear standards**
- **SBA's should be given the right to self-accredit their own courses**
- **The BSB should harness technology – see the NY Bar’s Continuing Legal Education website**

Introduction

The Bar Association for Commerce, Finance and Industry was founded in 1965 to promote the interests and professional status of barristers employed in commerce, finance and industry. BACFI is a Specialist Bar Association, affiliated to the Bar Council but operating independently to represent employed barristers practising outside chambers in commercial organisations.

BACFI is keen to play its part as a representative organisation in helping shape the development of the Bar of England and Wales, by bringing forward the views of its members and pressing for appropriate change. BACFI actively supports the objective of an independent and high quality bar, accessible to all. One of BACFI’s principal strategic objectives is to promote educational activities both for its members and for all new practitioners at the employed bar.

Background and preliminary remarks

As we set out in our submission to the Pupillage Review, BACFI members' organisations represent a wide range across the many sectors of commerce, finance and industry. Our comments do not cover other sectors of the employed bar namely Government organisations such as the CPS, the GLS and firms of solicitors. We understand the Bar Council's Employed Barristers' Committee (which covers all sectors of the employed bar) may make written submissions to you. Our core area of knowledge remains commerce, finance and industry. We make the following preliminary remarks:

- Whilst BACFI members serve on the boards of domestic and international commercial and industrial companies and represent a vital source of independent legal and ethical advice to their colleagues, they generally only give legal advice to their employer. Thus the public interest issues are not the same as for the self-employed bar and for other sectors of the employed bar such as the CPS.
- As we also set out previously in our comments to the Pupillage Review, the size of the legal departments of member organisations range from sole counsel / one or two lawyer teams to large legal departments which operate like law firms.. Training budgets vary but generally the commitment and expense devoted to training will be greater and more embedded in the larger organisations. In smaller organisations training budgets will be limited and very often are targeted for cost-cutting. It is important therefore that training can be seen to add value.
- The expectation of an employer (which means all the internal clients with the employer organisation for whom the barristers works) is that the barrister will be up to date in his sphere of practice, able to deal with matters in line with his level of seniority and within his sphere of competence. Generally, the company does not concern itself as to how this achieved. However, in many legal departments training is an integral part of department strategy in conjunction with the personal development needs of the individual lawyer.

There should a mandatory requirement for CPD

We believe that all barristers should aspire continually to develop their skills and knowledge. We believe that an ongoing programme of relevant CPD can assist professional development. BACFI supports mandatory CPD for employed barristers whilst making the point that most employed barristers would undertake training without any mandatory requirement. In most companies training is a key aspect of employee development. In large organisations, legal CPD is often part of a wider training and personal development programme for lawyers. In such organisations, the fact that CPD is a regulatory requirement is a helpful underpinning to ensure that at management level there is a commitment to devote time and resource to training and importantly to allow the lawyers to devote time to training away from commercial productivity. In smaller organisations or in any organisations where training is not considered a priority or valued (whether such organisation is large or small), it is vital to enshrine CPD as a regulatory requirement. The fact that CPD is a compulsory regulatory requirement ensures that lay bosses, internal clients and other colleagues accept that CPD is an important part of the in-house lawyer's professional qualifications and that time must be allowed for training as part of the working year. It allows the lawyer to stipulate on an annual basis his training requirements and also for the costs of this training to be paid for by the employer organisation. Thus the employer understands that CPD is part of parcel of employing a qualified lawyer and not a nice optional extra.

From the perspective of practitioners, a compulsory requirement ensures that training is given appropriate priority especially when there are other demands on time and resources.

The benefits of CPD

To certain in-house lawyers who are generalists and expected to be able to advise on anything that comes across their desk, CPD is a good way of gaining sensitisation to a wide range of issues. One of the skills of in-house practice is identifying (and then managing) legal risk and determining whether further specific advice is needed.

For more specialist lawyers, CPD is a good way to keep abreast of developments in other areas of the law and to maintain general skills which are so important to ensure that one remains a rounded lawyer.

It is interesting to note that the large law firms have recognised the professional development need among their main clients (the in-house lawyers) which is only partly driven by the CPD regulatory requirement. More fundamentally it is a recognition that most good lawyers never stop learning and want to learn more from the best of their peers. Most law firms develop client seminar programmes which carry SRA accredited CPD. These programmes are generally of extremely high quality (an example is attached at Annex 1). They are carefully designed to be relevant and topical, the sessions are run by their best lawyers in the field, they are held in purpose-built training facilities and are viewed as part of an offering of client non-chargeable extras. The law firms' CPD offerings are a natural extension of their own internal training staff programmes.

Criteria for CPD and self-certification

CPD is not something which can be enforced by regulation if the barrister is not a willing taker. The regulations need to set out appropriate principles based non prescriptive requirements. We need CPD requirements which are clear, fair, consistent, and transparent – it is difficult to see how some currently accredited courses comply with the criteria e.g. “Learning how to use the Internet”.

We suggest that the BSB should lay down some general guidelines as to the types of training that will qualify and that it is left to the individual barrister (in conjunction with whoever he sees fit – e.g. at the employed bar with a line manager) to determine what is appropriate and relevant CPD within the guidelines. Only the individual is in a position to know this.

We believe that the present system of accreditation of providers and courses should be modified. The distinction between accredited and unaccredited is unhelpful. It is not clear what accreditation adds. There should be a possibility of delegation of accreditation to SBAs, employers and others.

The important offering from law firms described above and from commercial organisations are generally SRA accredited but not BSB accredited. There should be automatic cross-accreditation by the BSB for SRA approved courses. Many providers do not seek BSB accreditation because of cost and bureaucracy. By way of example only, one of our members attended a 2 day seminar at a cost £2000 which had SRA accreditation. The organiser contacted the BSB and our member was told that it was up to the member to apply for accreditation and pay the application fee.

Accreditation by the specialist bar associations

If it is felt that providers should continue to be accredited, then we suggest that accreditation should be delegated to the SBAs which have a specialist educational role to fulfill. In the case of BACFI, education and training is our most important function together with our representational role. We understand the educational and training needs of our members and the sector of the bar we represent. Self-accreditation for SBAs should be subject to the guidelines set out by the BSB and to regular monitoring and audit. Alternatively, consideration should be given to the possibility of accreditation at beginning of year for an SBAs outline programme. At BACFI, we spend a considerable amount of time filling in CPD forms which, apart from a few details, are the same for each event.

Qualitative approach

It is vital that the CPD is relevant and appropriate. Relevance to the barrister's practice should be one for the barrister/employer to decide and it is for them to make that qualitative determination. It is critical to avoid a culture of attending any course just to get CPD hours.

We have found that there are few suitable BSB accredited courses which are relevant to employed barristers.

The CPD content should also be left to the barrister to determine. Outside the realm of legal knowledge per se, some "soft" skill training should be allowed; e.g. presentation skills, client care, client education; compliance programmes; negotiation skills, although there may need to be a quantitative limit on the number of hours per year.

Where the employer organisation runs internal training programmes for personal and professional development, CPD needs to fit in with employer's training requirements which will often be more stringent than BSB's. The possibility of employer certification should in those instances be considered with the appropriate checks and controls. An example of such a programme is attached as Annex 2.

Although we recognise that much professional development comes from learning "on the job", we believe that "on the job" learning should generally not be eligible for CPD unless the CPD hours were increased (e.g. as with accountants' good practice indications which tend to lay down a comparatively high number of hours but allow "on the job" hours). However there are instances where it may be appropriate to include "on the job" as eligible CPD, for example where the barrister moves to a new department or speciality or undertakes a secondment which involves new areas of law; rules around this point should not be unnecessarily prescriptive.

We believe that the practitioner should be required to make a declaration that the CPD he has undertaken will be of value to him in his professional development.

Quantitative approach

Our view is that twelve hours per year of CPD is not onerous. Whilst we favour a qualitative approach we also believe that a benchmark quantitative approach would also be helpful. The annual number of hours should be increased from 12 but the number of hours depends on what is included as being CPD eligible. The possibility of rollover of hours without need for a waiver for barristers who are abroad or involved in long term projects should be considered. Barristers working part-time should be held to the same requirements as those working full time.

Medium of delivery

As a general proposition, the BSB should authorise the use of new technologies. There are some innovative and practical ways of gaining CPD which are just as valid and sometimes more effective than the traditional methods. For instance, many law firms organise at fairly short notice “webinars” which are web assisted conference calls (speaking materials can be viewed by web access) at which they assemble their experts on a matter which is topical and where time is of the essence in terms of dissemination of information. It is a more practical option for the practitioner who can attend from the office in an hour rather than a round trip of 2 hours or more out of the office. It also provides an opportunity for discussion which is not available for some of the online courses which are currently accredited.

It is difficult to legislate for every type of new technology and it is has to be the ultimate responsibility of the barrister to determine what is reasonable and beneficial to his continuing professional development.

“Smart” regulation

The overall impression of the BSB, not only in respect of CPD, is that a change of culture is urgently needed if it is to become a respected and credible regulator. The BSB is perceived as being bureaucratic, taking a rigid tick box approach to regulation and out of step with practitioners’ needs (e.g. BSB feedback form used in May was an example; the form was unwieldy and needs to be redesigned if being used again). It is hoped that a less prescriptive approach will cut down on the number of waiver and extension applications which clog up the work of its panels.

The BSB should develop an online system for CPD submissions and do away with unnecessary, inefficient and costly administration. Providers should be able to obtain accreditation online. Practitioners should be able to record CPD “as they go” and view their “CPD account” online with a password. We refer the BSB to the New York State Bar’s Continuing Legal Education website:

http://www.courts.state.ny.us/attorneys/cle/provider_faqs.shtml.

The regulatory emphasis should be on monitoring (e.g. spot checks) and enforcement.

The cost of the CPD system would thus move to the monitoring function. Costs could be covered by fees from those providers who seek accreditation and for those to whom accreditation is delegated. It is expected that an on-line system would be much cheaper to run.

Tailored New Practitioners Programme (“NPP”)

BACFI has worked with the Inns to ensure that the compulsory NPP for advocacy and ethics for 1-3 year employed practitioners is tailored to the needs of employed barristers. We are in dialogue with all the Inns and the ATC to achieve this. Tailored NPP has been running for nearly 3 years at Middle Temple; Inner Temple ran their first tailored EB NPP in June of this year; Grays have decided to run a course and Lincolns are thinking about it. Feedback is obtained after every NPP at Middle and the practitioners tells us that the session is valuable and useful; they tell us that they learn directly relevant skills which they can take back to work and that will improve their day-to-day work as lawyers.

We do not agree with argument that employed barristers should train with self-employed barristers to re-inforce the “One Bar” concept and on the basis that they might switch back to being self-employed. The barrister needs skills which are of immediate relevance; in any event, the NPP is only a nudge as skills are not developed over a weekend.

Other professions and perception of the public

It is essential to consider how CPD is dealt with in other professions to ensure that we can adopt any good practices to the extent possible. It is important that however the system is modified it stands up to external scrutiny.

NPBs

The biggest lacuna in the CPD programme is that barristers without a practising certificate who are offering “non-reserved” legal services are not bound by CPD requirements. In our response to the BSB’s consultation on Authorisation to Practise we have made the point that this category of lawyer should be regulated by the BSB and should be subject to CPD obligations.

Conclusion

We should be pleased to elaborate on any of the points raised in this paper and look forward to the BSB’s proposals for a modified CPD regime.

BACFI

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