THINKING LIKE A LAWYER: AN ENGLISH INTERPRETATION

INTRODUCTION OF KEYNOTE SPEAKER BY TINA L. STARK

It is my great pleasure to introduce our keynote speaker, Phil Knott. Phil is a professor of Professional Legal Education at Nottingham Trent University Law School. That is in the real Nottingham, forest and all. His specialty is course design and curricular direct development.

I first met Phil about five years ago when we made a joint presentation for several London law firms. His sophisticated thoughts about transactional education were immediately apparent. Phil has spent much of his time over the past several years working on the overhaul of the UK system for admitting solicitors to practice. He was a member of the training review framework that was commissioned by the Solicitors Regulatory Authority. A particular interest for us, he was directly involved in framing the outcomes required for a new solicitor. As you know, those outcomes played a prominent role in the best practices report.

With that, I give you Phil Knott.

PHILLIP KNOTT*

Good morning everybody. I am delighted to see so many people here. I think looking outwards to other jurisdictions is helpful with a forward-looking conference like this. Why chose England and Wales? Well, I think two reasons. First of all, we both have mature, common law based systems; but our legal education is totally different. Second, we are moving over to an outcomes-based approach, which is very similar to what is meant by Best Practices and also is, I think, very consistent with the Carnegie Foundation report. So I am going to focus on what we do in England and Wales, and in a way, let you make the comparison.

I am going to start by just giving you a little bit of background about the qualification process for solicitors. I am talking about solicitors here, and there are two ways in which you can qualify for that. The first is, take a six-year period from high school effectively. It's a three-year undergraduate law school program followed by a one-year legal practice course, which is where I am primarily involved, and then two years in a law firm. Those last two years in a law firm are what's now called the training contract.

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The other route is a bit closer to what happens here, and this is now a seven year program. This is for students who have received a non-law undergraduate degree, which is similar to what happens with you. Then they will spend one year on a graduate diploma, one year on the legal practice course, and then two years with a law firm. There is a stark contrast with the US because the doctrinal law and the legal analysis skills are taught in that one year graduate diploma, and then the remainder is more practice based. So that’s quite different from the law school structure in the USA, and I think we can bring out some of those distinctions as we go through.

So it’s divided into three stages, and I want just to leave this aside for just a few minutes and make a couple of points. The training framework that I was involved with is going to move towards an outcomes-based approach, which we will explore in a moment. Now a pure outcomes-based approach wouldn’t have a structure, it would simply say, these are the outcomes, and it’s up to you how you get that, and actually the majority of the working group who wanted that to happen, wanted to dismantle the structure. I was in the minority vision, which, from my point of view, fortunately prevailed in the end and retained the structured framework. So the structure provides a framework. The criticism of the situation in England and Wales was that it was very inflexible, too general, it couldn’t cater to the big Magic Circle law firms in London and the small firms in the north of England, and that it was inhibiting access because it was a very formal structure. So we were trying to deal with some of those issues.

The other reason for showing you the sequential stages is that they do match pretty accurately to the Carnegie Foundation’s three stages of apprenticeship. There is a similarity there, and I am going to come back to that at the end.

To move on, what I want to explore now is how the regulatory body, the Solicitors Regulation Authority, went about achieving this outcome approach. Some of you may be confused by the fact that the Law Society of England and Wales is a body that’s traditionally carried out this role, but the Law Society has lost its regulatory role. It is now the representative body of the profession, but the Solicitors Regulation Authority, the SRA, is now the regulatory body. So there has been a change there. A pretty major change because the Law Society has had that role for at least 150 years. So the way that’s been done is to set a series of fairly high level outcomes and I just show you these on the slides, these are just the headlines. So it is the point of admission for qualification that we got knowledge of the law, intellectual skills, transactional skills, client skills, then personal development and finally professional values. Now the actual outcomes cover about three pages, but those are the headings.
Again, you could map those pretty closely to the Carnegie Foundation. The first two are pretty much informative, the second two practical, and the third two professional. So there is great similarity between what was being proposed to the future here. I put the website address there for the SRA, so if you want to look at those, you can pull those down. Just make sure you have the second version of April 2007. That’s the most recent one.

This isn’t where it stops though. It’s not just mandating the end product, which is, I suppose, what a pure, outcomes-based approach would do. It then goes back and gives some more detailed outcomes for those stages. Because it’s the one that’s most dominant, I am going to focus on that middle stage, the legal practice course. From 2009, we will have an outcomes-based set of requirements for the legal practice course. So I am just going to give you the headlines for that, and you can see the way we teach the practical side of lawyering in England and Wales.

Here we have three sections really. The first is professional conduct, the second stage is a series of so called practice areas, and the third stage is the skills. So there are three elements there. Now just to explain those a little bit more. Professional conduct, the way we teach professional conduct is that every core practice assessment has professional conduct questions in it. The professional conduct issues are pervasive in that sense. They run through the teaching and the assessment.

The course is driven by three practice areas: business, real estate, and litigation. Then the students carry on to three elective subjects, which are much more specialized. They may go through a corporate route, they may go for a publicly-funded route, and there other variations between the two. Within that framework, they will carry out their skills.

I am going slightly off topic, but I am going to comment here on what Tina was just saying about the working party. At the moment, we have skills leaders for each of those skills at Nottingham: drafting, interviewing, research and writing. But what we are planning to do for 2009 is we are going to link these skills. So what we are going to do is give the students a fact pattern or a scenario, and their first task will be to interview the client. Their second task will be to go and research the law or the issues brought up by the client’s instructions. The third task will be to give oral advice to the client. Then they will be required to write to the client and send a memorandum to their partner. And then they will be required to draft an agreement arising out of that scenario. So we are going to link all the skills together in an integrated way. That means that people who want to go to the corporate route can have one case study, and those who would want to go publicly-funded practice will have a different case study. So that’s what we are planning to do.
This idea of linking skills is something that we think is very productive moving forward, and the new training framework review gives us the flexibility to do that. In the past, that would have been quite difficult because they would have said, “You have got to do this skill in this way and this skill in that way.” The professional body has been quite tight and quite demanding on how we do things. I will come back to that at the end and reemphasize that point with you.

In the context today’s conference, I thought I would dig a little deeper and just show you what the drafting outcomes look like. It’s not rocket science, but it says that on completion of this area, students should be able to do those three things, and what that means is that every student who wants to become a lawyer must master drafting to a threshold level. It’s not rocket science; it’s not in great depth. And then it goes on to particularize. This is a bit particular, and it gets to certain things which they must do. The first three statements are the principles and then it moves onto particularization of what people must do.

I think that our drafting programs are not as sophisticated as the ones I have been hearing about at this conference. We tend to get assigned a lot of fairly small drafting tasks, but I don’t think we spend enough time on drafting as a transferable skill. So I have learned a lot about depth. I think we go for breadth of coverage through lots and lots of tasks, but we don’t necessarily achieve the depth that you do.

On the other hand, of course, what we have to do is provide drafting for everybody. It means it’s wonderful to hear about drafting programs for relatively small numbers of elective students. We have a rather different challenge. We have anything between 500 and 650 students in our legal practice course, and we have to provide a drafting course and all the other skill courses for all of them. We have a different set of challenges to face. And I suppose it is impressive from the Carnegie Foundation report that they want all lawyers in the US to have exposure to these sorts of skills. So that’s what we do with drafting. That’s really what the outcomes require us to do.

What I want to do now is tell you a little bit about how we do it in Nottingham. I tried to find some sort of descriptors for the Nottingham course, and these are the best ones I came up with. It’s a case study based simulations, learning by doing in a safe environment, and we base it on simplified reality. I am not sure we have a common language, which can defeat us in communication. So case study based simulations may mean that or something completely different. I heard the phrase “deal files” yesterday, and that may be what captures it best. So, in each of the core subject areas we create these case studies, and we teach through the case studies. The way we work it is that we have lectures, but the main learning is in groups of fifteen to eighteen. We ask the tutor to move amongst the students and
work with them, and they work in much smaller groups on the task of the transaction.

The tutor, for us, is a facilitator. It is not a dialog between the students and tutor; it should be a dialog between students with the tutor facilitating what's going on, and we normally require our tutors to know the names of all listed students and to make everyone participate. So someone sitting in the corner will get a directed question sometime during the session to make sure they participate.

That's the way we approach it, and in the legal practice course we bring practitioners in either directly from practice or from other teaching institutions. Then we train the practitioners how to teach. That is the way we operate it. And this is within the framework done over the one-year practice course, which of course is very different from your system, but I think it may give you some insights into how we approach things.

The simplified reality point is important because we often take files from practitioners, but we will sacrifice some level of realism to make them good educational tools. So we don't make them see a full file. We think educationally. We pare it down, and we simplify. We hope it's realistic to a degree but it simplified reality. It doesn't have to have all the bells and whistles on it; we can pare it down.

And then one step further on—and this is fairly common around the country—I will pick on interviewing skills. Learning by doing means that the students are videoed on a performance. They review them and watch the video. Ultimately they will get tutor review. So they learn one on one with the tutor in that situation. It's very expensive. But because the professional body requires us to do it, it's the same level playing field for everyone. And then the assessment of interviewing would be in the context of the students conducting an interview. We have another student playing the client and then they swap over. We don't try to assess with a mark. This is just pass/fail, competent or not competent.

Okay, so that is an overview of the outcomes and how we approach them. When you have a series of outcomes like these—a series of learning objectives—it is nice to think that there might be some overarching cohesive aspect to it. Actually someone I worked with, Steve Nathanson, came up with this idea of problem solving and thinking like a lawyer. And I think this is what legal education in the UK is about. It is about what lawyers think and do, and the unifying theme to me is problem solving. What lawyers do is they solve problems. All lawyers solve problems. Litigators solve problems. Transactional lawyers solve problems. So I think that can be a unifying theme, but again, we are very different jurisdictions.
What I mean by thinking like a lawyer is rather different than what the traditional view has been in U.S. law schools. If I understand this correctly from the Carnegie Foundation report, thinking like a lawyer is about the legal knowledge, doctrinal law, and the legal analysis about those particular first-year skills that are developed in law school. And problem solving means legal, analytical problem solving.

Now, what I mean by problem solving is something different because, for me, it incorporates all the skills we are talking about, and it also incorporates the practice areas, commercial awareness, client awareness, and the whole concept of professionalism. So what I mean by thinking like a lawyer is thinking like a practicing lawyer, i.e. the whole package. And I think you can unify that by saying that all lawyers solve clients’ problems. It’s client problem solving for me that is the unifying factor in the English and Wales approach to lawyer training. I think it’s quite useful to have something that unifies because—if just take an example—if a student is going off at a complete tangent, you can ask the questions. “How is that going to help solve the client’s problem? That’s all very well and interesting, but does it help resolve the client’s problem?” And so, I think it can give you a focus to what you are doing. So, my title is “Thinking like a lawyer.” There may be some irony in that because my interpretation would be rather different from the traditional view in the US.

Okay, so let me just summarize where I have got to. We have, I think, four features from 2009 so the professional body has a very clear role. We are talking about high-level outcome statements, progressive coverage of the apprenticeship, and flexibility about the “how.” The flexibility about the how is the key to an outcome based approach to education. In other words, the outcomes tell you the what, they prescribe what all lawyers must be able to do at the point of qualification or they prescribe what all students leaving a legal practice course must be able to do. But they leave the institutions to decide on the how. The aim of the change for 2009 is to give us much more flexibility to try and do innovative things, but within a clear framework where you should be able to say in theory that all lawyers will be able to achieve those outcomes at the point when they qualify.

I focused on the legal practice course because that really is the one that is coming into being in the most foreseeable future. I will finish off by mentioning that is a much more radical proposal for the training contract. It will keep the idea of someone doing work-based learning before they qualify; you must have a period of time in office before you call yourself a lawyer. But they are going to move to an idea called work-based learning. We should be less formal, more flexible, and allow greater access to people who don’t get access to a formal law firm environment.
Now that is hugely controversial. When best practice was produced, it was going to be brought in, I think, in 2008 or 2009. It has now been pushed back to 2012, and the pilot hasn’t even started yet. So I think the greater move towards outcomes, if it comes in, is going to take a few more years. We are not moving at a rapid pace with this because these issues are very controversial. But legal profession rather likes what it has got at the moment. It doesn’t particularly want massive change and the work-based learning, which means that firms will be more involved in training. It’s up to the student, the trainee, to create a portfolio to demonstrate that they fulfilled all the outcomes. So it’s a really major task.

That is a brief overview then of how we train lawyers in England and Wales and how we are planning the changes. Now I don’t want to particularly step on the toes in your jurisdiction, but I just want to finish off by making one observation and asking one question. Then I will open things up for discussion, and maybe I will tempt you with these two things. So my first point, which is an observation, is that we have a model of what I call sequential progression whereas with the Carnegie foundation, the objective is full concurrent integration.

What we do is we tend to take the cognitive stage first, and then build the practice stage into retaining that cognitive element. So we don’t throw out the law, and then in the training contract we move towards the professional level of apprenticeship. There is a sequential build up, whereas from my understanding with the Carnegie Foundation, its objective is a more ambitious one, which is to start integrating the three apprenticeships from day one. T practice and the profession will be involved in year one. I have been talking to a few people, and I think I have got some very different views on how that should implemented and whether it’s a desirable approach to begin with. I got the impression from looking at the conclusion to best practices though; best practice was perhaps slightly more inclined towards the incremental approach. That was the Carnegie Foundation’s proposal. That is my observation, and I am happy to discuss it and take your questions and observations.

Then my question is whose role is it to determine the outcomes? It could be the individual law school, it could be law schools collectively, or it could be the regulatory bodies. What was evident and impressive about this conference is that it is moving towards a collective view from law schools. They are taking it from the bottom up and starting to develop, in a much more integrated way, the sort of skills teaching we all are doing with transactional work.

I think I would conclude by saying that if we have a goal of having all lawyers getting exposure to a range of practice skills and transactional simulations, then clearly the professional body would have to take some sort of lead on this. So
leave that with you without saying whether it’s desirable or indeed even remotely possible.

That’s the end of my formal presentation. Now, I would like to invite questions.

**QUESTION**

What is the impetus behind this new movement in England and New Wales? Is there some kind of perception that the current system isn’t producing what you want, is it that we now know better how to educate people so we should take advantages of new techniques, or is it something else?

**PHILLIP KNOTT**

I think there were two drives. One is an agenda of access, but that probably isn’t something that would affect us particularly. I think the big agenda was that practice in the UK is becoming more specialized and what we had was a course where everyone did very similar amounts of litigation, real estate, and business. Now by making these outcomes more flexible, we can major and minor. So we will do both, if we want to run a corporate course, we can weigh the teaching towards the corporate area. With regards to litigation, we can weight for some students to major in that side of things, and other students can minor in that. The idea is to make it much more flexible because what the law firms are saying is, “We want people who can become fee earners as soon as possible. We want them to hit the ground running.”

So the drive came from the Magic Circle law firms initially. I worked with them for five years on developing the program, and that’s really become the driver. So, I think what has happened is the profession has taken a lead and required the professional body to respond. So the whole idea for us is having a non prescriptive regime. You have these outcomes and then people can find the different routes through them. That is the theory behind it. But the more controversial idea of dismantling the structure was rejected as I mentioned.

But just to explain, you brought the barrister back into focus. The solicitor is the general practitioner. Everyone who has got a legal problem must go to a solicitor. That is 90% true. Then the solicitor instructs the specialist barrister, particularly when it comes to high level court advocacy. Although in the last two months, solicitors have been able to wear wigs in the High Court, so that’s really been changed.
The idea was to stop the barristers from wearing wigs, but they said, “No... okay, we will let the solicitors wear them.” I mean, given that nearly all judges are barristers, the judge could immediately tell who was the barrister and who was the solicitor. And the barrister side tends to do better before some judges.

Solicitors can now have rights in the higher courts which is to unite them in the past. That is a threat to the junior bar because young barristers find it quite difficult to get the level of work they need to become experts. Barristers are the historically smaller but senior profession. And so I think barristers had a pretty good rearguard action actually over the last ten years. The demise of the barrister was predicted, the fusion of the two branches of all legal profession was predicted, but the bar has handled it. The bar is getting a bit smaller, but it’s surviving. I think the dilemma for the bar is whether the junior bar can get the expertise to become the senior specialist barrister.

**QUESTION**

Do you find that your students come to the legal practice course with a pretty good grounding in both doctrine and the analysis so that they have learned that without any practice phase? Also, if you had three years in which to deal with all of this, would you still go for a sequential approach or would you try something more integrated?

**PHILLIP KNOTT**

You are right in saying that a sequential approach is partly driven by the fact that we have different programs. At Nottingham Law School, we have an academic program and we have a practice program, but the two are relatively separate. So we are driven by that now. I think that thinking like a lawyer in the narrow sense is a massive challenge to students, and I wouldn’t underestimate that the whole thing of learning to analyze and learning the law doctrinally is a big task. So I think the ambition of the full curriculum is whether the students can cope with absorbing that level of doctrinal law and legal reasoning and analysis and the same time work on the practice skills. That would be my question, it’s not a denial, but is a possibility, but I think that is the big challenge about it.

What I would do if I had a three year program with a complete—my fantasy three year program—would be probably to start with the emphasis of the cognitive and move through the program to a final emphasis on the professional. So I wouldn’t divide them. It’s a mixture of sequential and integrated, but I think that would be the way I would do it. I think I would give the doctrinal and the legal analysis, the learning to think like a lawyer in narrow sense, the primary role in the
first year because until that beds down, it is difficult for people to pick up the practice.

The problem with our system is that lot of contracts, which I think is absolutely transactional, is taught in the first year. These kids are nineteen, and I think they have forgotten it and they didn’t have enough knowledge of life really. So I think the major crisis in our system was that academic law professors would say to me, quietly but not publicly, that law should be a post graduate discipline as it is in the US. So that is a great advantage you have I think, the maturity of your students when they come to study law.