

External Examiner's Report July 2015

Litigation Skills

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Overview

On 6th August 2015 at the offices of CIPA I met with LSC Chief Examiner and (by conference call) a PEB GB Lay Member. Both greatly assisted in answering my queries, as did Georgina Sear, CIPA's Head of Education. I was assisted by the Awarding Meeting Monitoring form prepared by the PEB GB Lay Member during the meeting held on 29th July from which I was absent.

My visit also enabled me to sample scripts from the Written Examination, view video clips of the Oral Examination, and review the online learning materials, the Delegate Pack, and the Tutors' teaching materials.

I make the following points in overview:

1. The Written Examination Paper is appropriate for testing LSC Learning Outcomes.
2. The Oral Examination task resulted in outcomes more focused on presentation skills than advocacy, and I understand how tutors will be trained to teach it is being reviewed to ensure outcomes capture the essence of persuasion in submissions advocacy.
3. The marking outcomes for the written paper are highly commendable, with no apparent scope for improvement other than the introduction of a formal moderation process to complement the existing standardisation.
4. Training in oral skills is at present in lecture form, where candidate progress is likely to be limited. I have made recommendations for both the teaching and the assessment criteria weighting.
5. Inconsistency between tutors is a concern. I have recommended that this be tackled by a slightly more prescriptive approach in face-to-face sessions, where tutors' notes do more than duplicate the content of PowerPoint slides as is the tendency at present.
6. The on-line materials are generally superb, and I form the impression that their unpopularity with some delegates (as judged from Evaluation Feedback) was based on discomfort at the necessary volume of material.
7. The pass rate is very high. One candidate out of 24 did not pass. I am not concerned about this because:
 - it is a small cohort
 - all delegates are qualified patent attorneys who would be expected to cope with the LSC with little difficulty
 - the LSC is plainly sufficiently rigorous.
8. I am happy to sign off the marks.
9. All concerned are to be commended for the production and delivery of the LSC to such a high standard in its first year.

The question paper in relation to the learning outcomes of the course (IPLC1 Written examination)

1. The written examination paper was an appropriate vehicle for testing the Learning Outcomes. Its questions compared favourably with 'short answer questions' employed by the Bar Standards Board on the Bar Professional Training Course. The coverage of Learning Outcomes was well balanced, and I was assisted in considering this by the helpful inclusion of the targeted outcomes via the assessment grid for each question on the confidential copy.
2. The paper was very well edited, formatted and presented, providing the fullest assistance and fairness to those sitting it. I gather that the paper attracted no adverse comment from delegates.
3. The mark scheme was well balanced, distributing the marks evenly through each question. There was clarity for candidates in indicating a 'one mark per point' regime. Both of these aspects contributed highly to the fairness of the paper.
4. The range of difficulty in the questions, stipulated in the draft Setting Specification, was successfully implemented.
5. The examiners' mark scheme answers were generally comprehensive, and took account of all likely responses deserving of marks. The Principal Examiner accommodated a small number of further valid answers which had not been anticipated by the examiners setting the paper. This readiness by the Principal Examiner as required by the PEB, to re-visit the mark scheme speaks highly of the fairness in the system, and in no way discredits the mark scheme.
6. Although the mark scheme answers provided to markers were generally clear and comprehensive, I would strongly urge that in future they be referenced with precision to the location in the face-to-face and/or online course materials where they are to be found. This requirement should be added in the draft Setting Specification document. It will enable routine scrutiny, quality assurance, and save time if a candidate should seek clarification on where a topic was covered in the course materials. I was particularly impressed by the excellently designed mark sheet, providing maximum possible assistance to examiners and, once again, fairness to the delegates.

The oral examination in relation to the learning outcomes of the course (IPLC 2 – Oral examination)

The Oral Examination was an appropriate vehicle, to an extent, for the demonstration of Learning Outcomes. However, in several important respects, it could have better achieved its ancillary function of assessing delegates' submissions advocacy which I understand to be a skill which the LSC course is intended to foment at a basic level:

1. The task was to make an opening speech in the IPEC. Although an effective test of 'presentation skills' it did not provide delegates with the opportunity to demonstrate a defining ingredient of submissions advocacy, which is to attempt to persuade the judge to adopt one's standpoint, whatever that judge's inclination to do the contrary. Given that very little persuasion takes place in an opening speech (because no evidence has yet been heard, and little comment is possible), the context of the task limited its effectiveness as a test of realistic advocacy.
2. As opening speeches do not occur in the IPEC, there was a lost opportunity to achieve realism.
3. To address both 1 and 2 above, I therefore suggest therefore that, *from 2016*, a closing, rather than opening speech be considered, to provide opportunities to persuade by the use of comment in a realistic context. The Chief Examiner suggests helpfully, and I agree, that a straightforward way of achieving this would be to provide to delegates a transcript of the evidence contained in a free-standing document separate from the trial bundle. [As to the latter, I note that a small expedient step was needed this year to overcome some uncertainty over the admissibility of evidence in the assessment; I note that it caused no problems, and have no concern that this would arise again as the QA process is implemented].
4. Notwithstanding the above, the mark scheme (4, 8, 8) only provided the most persuasive advocate with a maximum of 8 marks in recognition of his/her skill. My view is that, with immediate effect, there should be a greater apportionment of marks to criterion number 2 (I suggest 10 marks). This will properly reward the minority who deliver their submissions unscripted and unread, and subdue the tendency to do the opposite, which is inherently unpersuasive and anathema to real advocacy.
5. I note that a further suggestion for tackling the reading problem in the Awarding Meeting on 29th July was that the volume of permitted notes should be limited. I think determined 'reader' delegates would defeat this by shrinking their type size, thereby gluing themselves even more studiously to the page. After many years of teaching advocacy myself, my view is that there is no alternative than 'training out' this habit. The face-to-face class should deal explicitly with it, with feedback during in practice sessions making clear that reading may be not attract a pass mark under a new mark scheme (which I have suggested above as allowing 10 marks rather than 8 for the persuasion criterion).

The Awarding Meeting also discussed whether casual dress should be permitted/discouraged/forbidden during the oral examination. The agreed action was to 'advise them to dress formally'. My view is that formal clothing assists in encouraging an organised, professional approach, and neutralises any possible subjectivity in the examiners.

Outcomes of the marking

Examiner Selection

I have helpfully had confidential sight of a seven-point scoring system used for the selection of examiners which I regard as providing great transparency and leverage in the making of examiner appointments. It is a very well-considered document in which I put full confidence.

Examiner Training

Given this was the first iteration of the course, I note that although no didactic training of examiners took place, there were three respects in which training was provided:

- a) A question-writing day at the CIPA offices, at which potential examiners wrote and peer-critiqued questions;
- b) Distribution of a document entitled 'Marking and Awarding Instructions for Examiners'. This provides compulsory procedures for Script Marking and Standardisation. Like all other materials it is impeccably presented and easy to follow, no doubt maximising the compliance I observed when sampling scripts;
- c) The standardisation meeting provided for in the document above.

The standardisation seems very sound (3 scripts, a review of the mark scheme, double marking of first three scripts). However, at present this document contains no provision for moderation in the conventional sense of that term. Paragraph 5.5 on page 10 refers to the Principal Examiner's moderating of marking, but this refers to his/her discretion to ask an examiner to re-visit previously marked scripts, mark under close supervision or stop marking. I would suggest, in addition, a routine of random monitoring of scripts by the PE or CE as follows:

- at least one script per examiner, and;
- in every case where the mark is within the 3 marks below the pass boundary (with any fail re-marking to follow as a third tier)

The consistency achieved by the training described above is nonetheless very evident from the scripts which I sampled (details below).

Supervision

I am instructed that supervision reaches down through the hierarchy of Chief Examiner, Principal Examiner, and Examiner. This seems to me a logical and practical arrangement. I am instructed that it has worked well in this first year.

Appraisal, which is one of the outputs of the Supervision, has not yet occurred. It will either confirm each Examiner in their post /confirm them in post subject to taking different approaches/not re-appoint. I understand I will see the outcomes of process in due course.

Reliability and Fairness of Marking Outcomes as judged through sampling

1. Written Examination

I carried out sampling of scripts to examine consistency across eight questions between the two markers, one of whom is the Principal Examiner.

I selected questions for which each had given the same mark and reviewed the markers' method. The scripts and questions were:

Script a) Q8, scoring 1 and Q9, scoring 2

Script b) Q2, scoring 3 and Q14 scoring 1

Script c) Q1 scoring 2 and Q7 scoring 2

Script d) Q6 scoring 4 and Q10 scoring 6

I am pleased to confirm that an identical approach was taken by both markers and the marking task has been impeccably performed by both.

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The mean average mark of 68% is most encouraging.

The results confirm that the questions span an appropriate range of difficulty, as required by the draft Setting Specification.

I re-marked the paper of the sole failed delegate and agreed with the mark.

2. Oral Examination

All delegates were double-marked, which I regard as a sensible and necessary precaution for a live skills assessment which is a notoriously subjective task.

The performances were consistent with what I would expect from the design of session 4.6 which I have referred to above. Typically:

- the need to persuade was overlooked by candidates
- the judge was not engaged by candidates, mostly being talked 'at' rather than 'to'
- eye contact is awkward, often darting around the room to places where the judge was not sitting

Candidates made submissions up to a point, but were constrained by not having some testimony on which to comment. With this they would be more inclined to rise to the challenge of persuading the judge with their own independent lines of argument. However, as to the marking outcomes, the mark scheme did enable a meaningful assessment of what had been taught. I would like to commend the two examiners for never being more than two marks apart across all 24 delegates. For 9 delegates they were only one mark apart (the mean averages being 16.1 and 15.8 out of 20). This level of consistency is rare and very much to be applauded.

There are no irregularities reported by the Examination invigilators in their reports.

3. Overall on marking outcomes

I do not detect any bunching of marks and the spread appears regular (two peaks, for no apparent reason, and not prompting any concern).

Quality assurance of the course (face-to-face and on-line)

Face-to-face

(a) Sessions underpinning the written examination

I went through the tutors' materials and delegates' pack in detail. These were educationally sound in setting out the session objectives in keeping with best practice. Session plans and timings were meticulously prepared and presented. Delegates were provided with PowerPoint slides in hard copy.

I noted that all the content was exhaustively reproduced in the slides (good) but that the tutors' notes were largely duplicates of those slides, often verbatim. The advocacy class (4.6) is the most relevant example, because this is where the natural emphasis is on spontaneity and freedom from the written word. Any dominance of PowerPoint in an advocacy session will militate against the very outcomes being pursued. This is a training point which I think should be impressed on tutors when they are recruited. I do note that no such complaint about this has been made in the Evaluation Feedback, but the point is obvious.

I am happy to note that the course is already evolving to include in the tutor notes the points to watch for, common errors to avoid etc. This will assist in ensuring consistency while allowing tutors the freedom to teach in their own way.

(b) Sessions underpinning the oral examination

I note that the principles of advocacy are taught as in a 45-min lecture in session 4.6, and that those principles concern speech making, rather than any other variety of advocacy such as witness handling, but the latter is quite unnecessary for the purposes of the Learning Outcomes. The content seemed to me well chosen, correct and clearly presented. As an introduction it worked well, although I would suggest the following:

- (i) advocacy would be more usefully described as a 'skill' which can be mastered with practice rather than, as at present, 'an art'. Characterising it as an art is likely to feed the sense of mystique which deters the faint-hearted from giving it their best.
- (ii) A good practice, although perhaps logistically precluded, would be for tutors to sit in on one class of another tutor per weekend to provide any peer feedback and gain perspectives for their own teaching. I gather that this good practice is already encouraged and been implemented to an extent.
- (iii) Reference to the burden of proof is currently lacking from the session. It will be easy to include, along with emphasis on how advocates typically bring a judge towards or away from that threshold (uppermost, the need to comment on evidence and the weight to be attached to it by the judge).
- (iv) Insofar as it goes, the quality of the current session is good. But it attempts to train delegates in a skill without establishing a context; as a result, rather like teaching horse-riding from the confines of an office, the results will be always limited. An endemic tendency to read and be tied to a script, noted from video performances in the oral examination, is the main consequence (an acknowledged

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concern of the Chief Examiner). I would suggest that the customary approach to skills teaching be employed, namely the opportunity for delegates to practise, make errors, and build through constructive feedback. This will enable delegates to be 'trained away' from reading a script.

- (iv) My observation above about PowerPoint is relevant here. The notes accompanying the first 9 slides of the advocacy class 4.6 only duplicated those slides. Slides 10-13 usefully diverged with new independent material, but the duplication resumed at slide 14. This is of no consequence for a charismatic tutor. But I see it creating a risk of others possibly only reciting the slides, usually fatal to the teaching of 'skills' topics such as advocacy (and hardly desirable for knowledge classes either).
- (v) In future years, some advocacy demonstrations may usefully be introduced, perhaps online, to illustrate good use of the papers, eye contact etc.
- (vi) Given the importance of written advocacy in the form of skeleton arguments, I discussed with the Chief Examiner the scope for some training in the drafting of these, if only as a way of achieving greater clarity and structure what should be raised orally. We concluded that time would be too short to enable any meaningful training or assessment in these.

On-line

I went carefully through all of the hard-copy online materials and thought them generally superb. Only a few minor errors were noted in Unit 2 (e.g. 'Patent Act' [sic] in a few places rather than Patents Act).

The Unit 1 material on case theory was exemplary, with my only reservation being over the stated need to identify the 'emotional basis' of a case. This was not explained and I think will have puzzled delegates, as it did me. I suggest that what was intended was 'the common sense basis for why your client should win'.

I did not view these materials on-line or on a screen, and did not have an opportunity to view the tasks set for delegates. I was therefore unable to reach an opinion on the justification for the complaint at para 4.2 of the Evaluation Feedback that 'online course notes inexplicably didn't contain information needed to answer online questions'. No doubt this will be investigated. I gather from the Head of Education that the volume of online reading was unpopular with delegates. I detect that it was only this necessary volume, rather than any actual defects, which prompted unfavourable feedback comments, and I have no concerns.

Recommendations

The following is a summary of recommendations for immediate implementation I have made in the body of my report above:

1. Referencing of sample answers back to their location in face-to-face and online course materials where they are to be found. This requirement to be added in the Setting Specification document.
2. In the Oral Examination, a greater apportionment of marks to criterion #2 (I suggest 10 marks).
3. Formal dress to be encouraged at the Oral Examination.
4. Be watchful over dominance of PowerPoint, particularly in Oral Skills training.
5. Time permitting, tutors to spend a little of their down time peer-observing another tutor.
6. Introduce advocacy demonstrations, perhaps online.
7. Random monitoring of scripts by the PE or CE.
Suggestion only:
 - (a) at least one script per examiner, and:
 - (b) in every case where the mark is within the 3 marks below the pass boundary (with any fail re-marking to follow as a third tier)