



A Competence Statement for Solicitors

Consultation questionnaire form

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Question 1

Does the competence statement reflect what you would expect a competent solicitor to be able to do?

Yes

However I have two major issues and some minor comments

MAJOR ISSUES

1. I do not agree with the proposal in A4 para (c) that solicitors should be required to have an awareness of a broad base of legal knowledge. Although this might sound sensible in theory, in my view it is unworkable in practice. I have explained my reasons for this view in the answer to question 3 below.

2. Each statement is followed by a number of examples prefaced with the word "including". One can be sure that within a short time these will be assumed to be the only examples that are relevant. You need to make it clear that these are just some examples. The word "including" ought to be sufficient in theory but in legal documents it is always made clear that what follows the word "including" is only by way of example.

MINOR COMMENTS

A2 – I do not believe that the word "context" is needed in the bold text.

A2 para (d) - the use of the word "relevant" here is ambiguous. Relevant to what? This is particularly important given the issue that I have raised in the answer to question 3.

A3 para (a) – it is not just disclosing when work is beyond personal capability. It is also declining to take on such work in the first place and, where possible, directing the client to someone who is able to take on such work (or be likely to do so).

B5 – the word "advocacy" here may be inappropriate. Solicitors use it only in the sense of representing a party in a dispute in court or in a similar forum - and the majority of solicitors do not advise on disputes, particularly in the case of real estate, commercial and corporate matters. This paragraph will mean nothing to them.

D – the heading should specifically mention clients and I suggest it should be "Working with CLIENTS AND other people". Without clients there would be no purpose in having a business.

D1 para (a) – This is impossible to comply with in its current form. It currently says:

"Ensuring that communication achieves its intended objective"

I can write you a letter saying "You have to be in court on Monday at 10 am" but you can still not turn up. It would be ludicrous if that meant that I was in breach of a

professional requirement. Something like "Ensuring that the purpose of any correspondence is clear to its recipient(s)" would be a better alternative I think.

D2 para (g) – This should be much higher up the list, probably second after existing para (a). Until the scope of work is agreed, nothing else should be relevant.

D3 para (b) – This is ambiguous. Does it mean that tasks should ALWAYS be delegated when appropriate to do so , or ONLY when appropriate to do so? I think you mean the latter so you ought to add the word "ONLY".

Throughout – Solicitors normally use the spelling "judgment" rather than "judgement". Both are correct but in the legal world "judgment" would be more usual.

Question 2

Are there any additional competences which should be included?

No

Question 3

Have we struck the right balance in the Statement of Legal Knowledge between the broad qualification consumers tell us they understand by the title solicitor and the degree of focus which comes in time with practice in a particular area?

No.

I think the proposal that every solicitor should have a basic knowledge of all the areas of law outlined in the footnote to A4 para (d) (and listed in the draft Statement of Legal Knowledge) is (1) unnecessary, (2) unworkable, (3) not needed and indeed (4) extremely dangerous if carried through to the letter.

OVERVIEW

This proposal is based on a two serious flaws.

The first flaw is that it is impossible for any practising solicitor to have the level of knowledge that the consultation document proposes. No-one can be familiar with so much law and practice in the modern world.

The second flaw arises from this pair of sentences in paragraph 21 of the consultation paper. They are mutually incompatible.

"We do not expect practising solicitors to retain active knowledge of all these knowledge areas, or to undertake professional development activities in relation to legal topics which are unlikely ever to have a bearing on their practice area."

followed by

"What we do expect, in line with a broadly based qualification, is that solicitors should be able to recognise possible problems even when these are outside their immediate area of practice."

You cannot have both. If you want solicitors to "recognise possible problems" relating to any particular area of law, they need to keep up to date with that area of law. Advising on the basis of what they learned several years ago, or several decades ago, is simply dangerous. I provide two examples below of why this suggestion is not a good idea.

If consumers really do want solicitors to know a little about everything (which I doubt), they need to be told that, in the modern world, this is not possible.

(1) UNNECESSARY

The reason why I say it is unnecessary is that when first becoming a solicitor, someone will have all the knowledge set out in the Statement of Legal Knowledge (by definition, as the Statement is based on the knowledge that a solicitor needs to have on qualifying). You say in paragraph 20 of the consultation paper that

"We do not expect practising solicitors to RETAIN [emphasis added] active knowledge of all these knowledge areas, or to undertake professional development activities in relation to legal topics which are unlikely ever to have a bearing on their practice area."

So this is a recognition that all the knowledge needed to comply with this requirement is the knowledge obtained at the time of qualification. On that basis, there is no need to provide such a wide requirement for practising solicitors on a continuing basis.

(2) UNWORKABLE

There are two reasons why I say it is unworkable.

First, it would be impossible for any person to retain all the information contained in the Statement of Legal Knowledge for much beyond the time of qualification. I have been qualified for over 30 years. Presumably when I qualified I knew most of what is set out in the Statement of Legal Knowledge, since I passed the Final Examination in 1981. But I have not retained much of that knowledge, since I decided to specialise in commercial property law, and topics related to that. And there cannot be many solicitors who are as interested in the law generally as I am. If I fail the test, so must many others.

(Incidentally, there is no provision currently for how the new rules will apply to existing solicitors. I assume that this is unimportant since no-one is expected to obtain any more knowledge than they had at the time of qualification.)

Secondly, it is entirely impossible for anyone to check whether anyone has this knowledge without setting examinations, which clearly is not going to be done.

Objectives are meant to be SMART, with the M standing for Measurable. This objective is unmeasurable.

Whatever is wrong with the current CPD system, at least it is measurable. Someone either has or has not attended 16 hours of CPD each year.

(3) NOT NEEDED

I question whether solicitors really do need to have a broad knowledge of all areas of law. You mention in paragraph 20 of the consultation paper:

"... research we conducted when developing the Competence Statement which revealed a high level of consensus that solicitors should have a broad base of background legal knowledge, over and above the specialist knowledge required for their area of practice, and about what that legal knowledge should be."

If you asked people whether "a broad base of background legal knowledge" would be helpful, I am sure they would say yes. But in practice people visit solicitors in order to obtain advice on a specific issue. I agree that the solicitor should be able to advise on that specific issue, and other areas of law RELATING TO IT. But no-one goes to a solicitor asking for advice on a property transaction and then asks for advice from the same solicitor about a speeding ticket at the same time. The days of the generalist solicitor who can advise on any and all types of law are long gone, fortunately.

(4) DANGEROUS

This is my most serious objection. I do not for a minute believe that this could be a practical problem for the reason set out under the heading "UNWORKABLE" above - in practice no-one could actually know all this information. However, I do object vociferously to a requirement that is actually dangerous.

The reason why I say this is dangerous derives (as in the paragraph headed "UNNECESSARY" above) from this statement in paragraph 21 of the consultation document:

"We do not expect practising solicitors to retain active knowledge of all these knowledge areas, or to undertake professional development activities in relation to legal topics which are unlikely ever to have a bearing on their practice area."

A solicitor who does not stay up to date with an area of law is (in my view) unqualified to advise in that area of law.

Unqualified to advise, whether in general or specific terms.

And that is not just my view. It is your view as well, given the importance you put on continuing professional development.

Here are two specific examples where law has changed since I qualified as a solicitor in 1983 that would make me unqualified to advise on that area (if I had not stayed up to date).

First, the Landlord and Tenant (Covenants) Act 1995 changed a great deal of landlord and tenant law with effect from January 1996. A solicitor's knowledge of landlord and tenant law before that Act would be of no use at all – and indeed dangerously wrong in certain cases – after January 1996. And yet you are saying that solicitors who qualified before 1996 should be REQUIRED to be able to advise (in the broadest terms, you say) on that area of law after 1996 without the need for any continuing professional development since qualification. How can that make any sense?

Secondly, when I qualified in 1983 I had some knowledge of criminal litigation law and procedures (as I had taken an exam on the subject). I forgot as much of it as possible as quickly as possible, as it was of no interest to me, and I did not keep up to date with it.

Since then there have been all sorts of changes to criminal litigation law and procedures, which mean that I am now over 30 years out of date with my knowledge. It would be absurd to expect me to advise on any aspect of this area of law. The only possible safe approach would be for me to refer the client to a specialist criminal defence lawyer. No other action would make any sense.

In fact it would be a breach of A3 para (a) of the draft Competence Statement to advise in this area ("Disclosing when work is beyond their personal capability").

It would also be a breach of outcome 1(4) ("you have the resources, skills and procedures to carry out your clients' instructions").

AN ALTERNATIVE SUGGESTION

My guess is that someone at the SRA decided that it would be a good idea if the list of topics that had been drawn up with intending solicitors in mind could also be used for practising solicitors. For the reasons that I have explained above, I do not think that that is either practical or sensible.

But I hate to provide objections without also providing solutions, so here is my suggested solution.

This is adapted from my blog article on this topic on the Falco Legal Training website

<http://www.falcolegaltraining.co.uk/consultations/the-proposed-competence-statement-for-solicitors-part-1/>

First of all, I am not convinced that it is necessary to have a Statement of Legal Knowledge for practising (as opposed to newly qualifying) solicitors. I don't think that it is helpful, but I suspect that the SRA thinks that it is necessary. So ideally we ditch any reference to the Statement of Legal Knowledge for practising solicitors.

But I do not expect that to find favour. So, if we do have to have a Statement of Legal Knowledge, I propose that practising solicitors should be required to have the following legal knowledge:

- a detailed knowledge of specific identified areas of law, which might perhaps be the areas listed in paragraph 1 of the draft Statement of Legal Knowledge, "Ethics, professional conduct, including money laundering and solicitors accounts". Perhaps it might also include contract law and tort law and one or two other areas of law that are common to all solicitors' work and that it is reasonable for members of the public to expect all solicitors to have a basic understanding of. But this would not be the full list of topics that are contained in the Statement of Legal Knowledge.
- a detailed knowledge of the law as it applies to their area of practice (which the SRA says that it does not intend to prescribe); and
- an awareness of a broad base of legal knowledge **BUT ONLY WHERE THAT RELATES PERIPHERALLY TO THEIR AREA OF PRACTICE.**

If that suggestion were adopted, it would be necessary to decide whether it is desirable to list all the peripheral topics or to leave them to the expert solicitor.

My preference is not to list the topics, as they would be likely to change over time, and the areas of knowledge would vary from solicitor to solicitor.

Alternatively, perhaps it might be possible to list the peripheral topics with which each type of specialist – property solicitors, civil litigation solicitors, criminal defence solicitors and so on – ought to be familiar. So for property solicitors one might list contaminated land, construction law and dispute resolution for example. But then again one has to ask how much construction law a property solicitor needs to know, and the answer is that it varies depending upon the type of work that the property solicitor undertakes. This then results in the same discussion as the main discussion

in this section, but for a much smaller area of law.

Having reached that conclusion, one wonders why there is any point requiring any objective standards for practising solicitors.

We can divide areas of law into four:

(A) Areas of law that all solicitors need to be aware of, and remain up to date in respect of. They are considered in the first bullet point above.

(B) Areas of specialist law. The SRA has already said that these will not be specified.

(C) Areas of law peripheral to the areas of specialist law. I have concluded that these are too varied to be capable of specification.

(D) Wider areas of law (outside (A), (B) and (C)). I have concluded that it is pointless to require solicitors to retain any knowledge of these since no-one can be that knowledgeable, and no-one has time to stay up to date with them.

My conclusion is therefore that the Statement of Legal Knowledge serves no useful purpose at all unless it contains details of law that all solicitors should be familiar with, as considered in the first bullet point above.

Question 4

Do you think that the Threshold Standard articulates the standard at which you would expect a newly qualified solicitor to work?

I do not wish to comment on this aspect. I am commenting only on solicitors' continuing professional development.

Question 5

Do you think that the Statement of Legal Knowledge reflects in broad terms the legal knowledge that all solicitors should be required to demonstrate they have prior to qualification?

I do not wish to comment on this aspect. I am commenting only on solicitors' continuing professional development.

Question 6

Do you think that the Competence Statement will be a useful tool to help entities and individuals comply with Principle 5 in the Handbook and ensure their continuing competence?

No.

In a well-run organisation, all these competencies will be developed as a matter of course. This is all part of the development of a solicitor from newly qualified to becoming an expert in the field.

And in a badly run organisation, this will not be done as a matter of course – so the fact that there is a Competence Statement is entirely irrelevant.

I do think the Competence Statement will serve two useful purposes however:

- (1) to serve as a minimum requirement for newly qualified solicitors
- (2) to be used as a checklist by training providers, including those within organisations such as professional support lawyers.

Question 7

Are you aware of any impacts, either positive or negative, which might flow from using the competence statement as a tool to assist entities and individuals with complying with Principle 5 in the Handbook and ensuring their continuing competence?

No.

TWO ADDITIONAL COMMENTS

I think every consultation response questionnaire should have two basic sections at the start, both of which are missing in this one.

First, a section in which the respondent explains who he/she is and why he/she is qualified to respond. This will enable you to gauge how much value to ascribe to the response.

Secondly, a section for any additional comments, so that I do not have to write them into an inappropriate part of the document (as I have had to do here).

Incidentally I have been a solicitor for over 30 years, about ten years as a lawyer in practice and about twenty years as a professional support lawyer or legal trainer.

Thank you for completing the **Consultation questionnaire form**.

Please save a copy of the completed form.

Please return it, along with your completed **About you form**, as an email attachment to trainingconsultations@sra.org.uk, by **12 January 2015**.

Alternatively, print the completed form and submit it by post, along with a printed copy of your **About you form**, to

Solicitors Regulation Authority
Education and Training Unit - Competence statement
The Cube
199 Wharfside Street,
Birmingham,
B1 1RN