An attitude problem ... ?

One striking example illustrates the problem. In previous drafts of the recently published Civil Justice Rules, the parties were "expected" to help the courts achieve the all pervasive "overriding objective". Now, in the final version, they are "required". What prompted this? It must have been a perception that those governed by the rules could not be trusted to follow the carrot of expectation but should be beaten with the stick of requirement.

The uncharitable might suggest that this shows a rather warped attitude. But it is entirely consistent with the behaviour of those currently charged with implementing the Lord Chancellor's Department's overriding political objective which is to get the new regime up and running at no matter what cost to the customers of the civil justice system.

The aim is to produce a more user friendly system. The aim is to ensure that parties cooperate to achieve the stated objectives. There is, however, little hope of this in the current climate being generated by official press releases.

In an article in this journal on January 22, David Gladwell, the head of the Civil Justice Division laid down a stirring challenge to those involved with the new structure. With relish, he referred to the firmness with which the judges are preparing to exercise their disciplinary powers. He refers to the armoury being full: the "armoury" being the sanctions such as costs orders, "unless" orders, striking-out, refusal to grant extensions of time, refusal to allow documents not disclosed to be relied on. This is referred to as an "exciting" prospect and one which the Judges are "approaching with enthusiasm". In a previous speech, he is reported as saying:

"The knives are being sharpened ... "

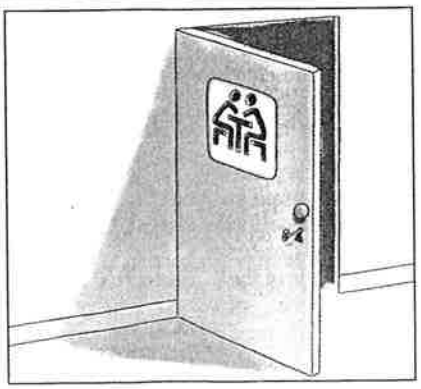
In the same article, he refers to the fact that eight hundred judges are being trained in three day training seminars. I wonder: who is teaching them and what are they being taught? I wonder: can it be shared with us?

As a practitioner leading a civil litigation team in a firm with offices around the country, I fully support the new rules and the thinking behind the reforms. We are aware of the need for change and we are aware of the need to gear ourselves up for that change. We are making sure we are fully up-to-speed with what is required. The reforms are necessary and a great opportunity to create a workable civil justice system. Whatever else I say in this article, I am neither a reactionary, nor a Luddite. We are not scared of change and challenge to improve the system.

But the attitude which I do not like is that which suggests that there is somehow a conflict of interest between practitioners and the judiciary in which the judges, following their secret conclaves, are now well armed to emerge victorious. I perceive the underlying suggestion, which was also prevalent in parts of the Woolf Report, that there is nothing wrong with the way in which proceedings are conducted provided only that practitioners can be forced to set aside their anti-social habits of delay, failure to advise clients and inability to predict costs.

There is a huge fallacy here and it is time that judges and officials realised it. What we do is service clients and try to fulfil their commercial needs. Most of us do plan cases, budget for costs and look at the commercial cost/benefit equation for clients at all times. We are new style litigators, interested in being commercial problem solvers and not simply case processors.

Where we have problems is the complete ineffectiveness of the vast majority of civil courts in addressing their current case management responsibilities. How they are going to cope with the increased expectations, without proportional additional funding escapes me.



We are aware that there is a tension between our duties to the client and our duties to the Court in fulfilling the "overriding objective" and it is by no means clear how this should be resolved.

We are perfectly capable of making sure that we are fulfilling Part I's "overriding objective" and the way we go about this is by educating our clients and informing them of every step which is being taken. This will include making them realise that the risks of being found to behave unreasonably including immediate costs orders (see practice direction reported in *The Times* on February 3, 1999), will fall on them.

"Activist" judicial case managers should realise that the world, even for clients involved in civil litigation, does not revolve around them. There are plenty of reasons, capable of being recognised and agreed between opposing clients, for needing more time to deal with matters and to resolve cases in alternative ways outside the scope even of recognised "ADR". Under the new regime, the courts are going to be far too busy to understand the commercial implications of every matter which they manage and so I regret to say that they are going to make unrealistic orders and generate unrealistic expectations just to fulfil the lessons they have learnt in the mystery seminars which they have been attending.

Let us be in no doubt about this: to comply with case management requirements and to fulfil the judiciary's expectations is going to increase legal costs for clients, if only in terms of "front end loading" and reporting structures. It may lead to a better system but it is not going to be cheaper.

The new regime is going to be difficult enough but it will be far harder if the judges see it as a procedural battle between themselves and practitioners with practitioners exposing themselves to sanctions every inch of the way.

There is probably an attitude problem on both sides of the fence but I hope that I am being open about it. Having got that off my chest, now I can be positive about preparing for exciting and challenging times ahead. o

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