Long awaited changes to the civil justice system in England and Wales will come into effect from 26th April, 1999 when new Civil Procedure Rules for the High Court and county courts take effect. The rules are a result of Lord Woolf’s report on litigation procedure reform (FirstSource, PLC, 1998, IX (9), 8). The new regime will affect all types of civil disputes, including the full range of commercial disputes from debt collection actions to complex multi-party litigation.

Most companies regularly involved in bringing or defending legal claims will be aware of the Woolf reforms in outline, but they may be less familiar with the detail of the proposed changes and their likely practical impact, not least because of the speed with which the reforms are being implemented.

The final version of the Civil Procedure Rules was published on 29th January, 1999. Now that the nature of the new system is becoming clear, all those involved in managing disputes should be asking: How will they affect my organisation and my legal budget? What steps do I need to take now? What sort of legal service will I need in future?

The impact on corporate litigants

Lord Woolf’s principal objectives were to achieve a cheaper, simpler, more predictable dispute resolution process for all litigants. One of his main aims was to reduce the financial and time costs involved in running commercial litigation in England. As a result, even the most heavyweight commercial disputes will be subject to the new requirement for quicker, simpler, less adversarial litigation.

All new actions started after 26th April, 1999 will automatically come within the new rules, but most existing actions will also be affected to some extent by the changes. There is not much time for those involved in resolving commercial disputes to adapt to the demands of the new system before it comes into force, but companies which are well prepared from the start are likely to have a significant advantage when bringing or defending claims (see inset box “Summary of key changes”).
The key changes are considered below, looking first at the principles underpinning the new rules and then examining the practical issues in the key areas of litigation planning:

- Alternative dispute resolution (ADR) and early resolution of cases.
- Case management.
- Starting a claim.
- Disclosure of documents.
- Witness evidence.
- Expert evidence.
- Costs.

**Underlying principles**

The new civil procedure rules have been completed by the Civil Procedure Rule Committee chaired by Lord Woolf, and were published on 29th January, 1999. A number of specialist topics (including multi-party actions, serving proceedings out of the jurisdiction, appeals and enforcing judgements) will be addressed in further rules to be implemented at a later date (the timing of which is not yet known). The rules retain the spirit of Lord Woolf’s reforms, whilst moderating some of his more radical initial recommendations. The rules are underpinned by four main principles:

- Litigation should be a measure of last resort. The new rules aim to achieve more commercial solutions, more quickly; for example, by encouraging ADR and by introducing “pre-action protocols”, a new offer to settle procedure and a new procedure for summary disposal of weak cases.

  - The courts should have greater control over case management.

  - Litigants should disclose their hand at an earlier stage than at present to encourage earlier settlements; for example, parties will have to state the facts on which they rely and identify the witnesses they need at an early stage.

  - Legal costs should be more affordable, more predictable and more proportionate to the value of the case and the means of the parties.

  - The key areas which companies facing the prospect of litigation should plan for now are discussed below.

**Summary of key changes**

The new Civil Procedure Rules will have a significant effect on how cases are managed. The main changes that litigants will notice include:

- Active case management by the court.
- Parties will be required to consider ADR at the outset of a case and at various points throughout.
- Litigants will need to do much more case preparation at the outset of the case. This will include consideration of ADR, analysis of key issues, identification of relevant documents (especially for disclosure), preparation of case budgets and deciding on witnesses and experts.
- As a result of this early preparation of cases, litigation costs will be more heavily front loaded.
- More management time will need to be invested, especially in the early stages of the case.
- The in-house lawyer may have to undertake more of the initial work in investigating the case and locating documents for disclosure because of the amount of preparation that needs to be done at the outset.
- The court will take into account the respective financial positions of the parties when deciding how a case should progress.
- During the case, the court may order instruction of joint experts.

**Alternative dispute resolution**

Many litigants are still resistant to ADR and reluctant to propose it, despite it having a number of obvious commercial advantages, including confidentiality, flexibility, speed, reduced cost (if the ADR succeeds) and the opportunity to protect an ongoing commercial relationship (see inset box “Alternative dispute resolution”). (For a detailed analysis of ADR, see “Alternative dispute resolution”, FirstSource, PLC, 1994, V(3), 29). Although a number of court sponsored ADR initiatives are now in operation (including mediation schemes in the Commercial Court, Central London County Court, Patents County Court and the Court of Appeal) the objective of the new procedural rules is to extend this approach to all disputes.

Under the new rules, there will be costs incentives to consider mediation or another form of dispute resolution earlier and more often. In an environment where attempts at ADR are expected by the court, there may be tactical advantages for the party that takes the lead.

The key changes are:

- The court will encourage the parties to use ADR if it considers it appropriate. For example, the court may decide to stay the proceedings with or without the parties’ consent whilst the parties explore whether ADR might be used (part 3.12(1f)).
- The parties will be asked to state at each key procedural stage whether ADR has been considered. On the multi-track (see “Case management: Track allocation” below), this will include consideration of ADR at the track allocation stage, at the case management conference, and at the pre-trial review. If ADR is not considered or attempted, the parties are likely to be asked to justify the reasons for this.
- When exercising discretion as to costs, the court may consider the conduct of the parties both before and during the case, and the manner in which they have conducted the action (part 44.3(5)). One of the factors likely to be taken into account is the parties’ approach to ADR (see also “Costs” below).

The practical implications of these changes include:

**ADR screening**

Since ADR will almost inevitably be raised by the court at an early stage, companies will need to carry out an assessment of all cases at the outset to decide if they are suitable for ADR. Where ADR is a realistic option for a sig-
This may mean a significant investment of management time in the case at an early stage. A senior management representative is also likely to be needed to attend the mediation in order to provide the necessary authority to settle. Whilst a number of companies are already attempting mediation in large scale commercial disputes, significantly more management time is likely to have to be invested if, as Lord Woolf anticipates, ADR becomes much more common, if not routine.

Early resolution of cases

In addition to the measures on ADR mentioned above, there are two new measures which are also intended to encourage early settlement of disputes.

A new offer to settle procedure. This will provide financial incentives to both parties to settle early. Previously, a defendant could make a payment into court or make an offer to settle the case (a Calderbank offer) to reduce his costs exposure in the event that the plaintiff failed to beat the payment in at trial. However, no equivalent was available to a plaintiff.

Under the new system, a defendant will still be able to make a payment into court or an offer to settle the case, but in addition a plaintiff (now to be known as a claimant) will be able to make a settlement offer before or after commencing proceedings which will protect his position if the defendant rejects the offer and continues to trial. A defendant who then fails to beat the claimant’s offer at trial will face potentially significant costs and interest penalties (including a penalty interest rate on any damages awarded of up to 10% over base) (part 36.21(2)).

A new summary judgment procedure. Either party or the court can invoke the summary judgment procedure to dispose quickly of weak cases where a claim, defence, or issue has “no real prospect of success” at trial (part 24.2). This test imposes a higher burden of proof than the current summary judgment test which simply requires a defendant to show an arguable case. The extent to which the courts will take advantage of the new lower burden of proof to dispense with weak cases remains to be seen, but if vigorously enforced by the courts it should offer an effective way to obtain early judgment in unmeritorious cases.

Case management

There will be a fundamental shift of control over case management from the parties to the court, which will now actively manage cases, bringing to an end the opportunity for parties to use tactics such as late amendment of pleadings and multiple applications for further discovery to dictate the pace of the litigation.

The key steps will now include:

Pre-action protocols. Even before the case has started, the parties will be required to comply with pre-action protocols, which are codes of practice designed to ensure that they exchange information effectively before issuing proceedings. The most relevant pre-action protocol in commercial cases will be the protocol dealing with instructing experts. This has not yet been published, and is unlikely to be finalised before 26th April, 1999.

Track allocation. The court will allocate cases to one of three tracks (see inset box “Track allocation”): • Small claims track for cases under £5,000.
• Fast track for most cases under £15,000.
• Multi-track (in the County Court and High Court) for most cases over £15,000 (and most cases where the remedy sought is a remedy other than damages, for example, an injunction).

Most commercial actions will follow the multi-track (although this may change in time if, as seems likely, the fast-track financial threshold of £15,000 is gradually raised). (See inset box “Key steps in a multi-track action”.)
The parties will be required to complete a track allocation questionnaire indicating how they consider the case should be allocated, whether any attempt has been made at ADR, whether pre-action protocols have been complied with and any proposals regarding the timetable for the case. While the value of the case will normally be the determining factor for allocation, the court will have a discretion to allocate the case to an alternative track if it considers this to be appropriate. Other factors taken into account will include the type of remedy sought; the complexity of the facts, law and evidence; the number of parties and the parties' own wishes.

When the case is allocated, the court will either give directions (for example, in relation to evidence and disclosure of documents) and set a timetable for trial (in simpler cases) or fix a case management conference (in more complicated multi-track cases) to decide what factual and expert evidence is required, to what extent documents should be disclosed, and to agree the case timetables.

The degree of case management will depend on the track (part 26). The key case management steps in a multi-track case will be track allocation; the case management conference (more than one conference may be needed in a complex case); the listing questionnaire; the pre-trial review; and the trial (these steps are considered further below).

Whichever track applies, it will be the primary duty of the parties to help the court to achieve its "overriding objective" of dealing with cases justly (part 1.1). This includes attempting to agree key issues, procedures and timetables at a much earlier stage than under the current rules.

This new obligation of the parties actively to co-operate is backed by costs sanctions. A party which conducts a case in what the court regards as an unreasonable or oppressive manner is very likely to be subject to adverse costs orders, even if its conduct is not in breach of any specific rules of court or orders made in the particular case. Such costs orders may be an effective deterrent in smaller cases, but whether they will have the same effect in cases involving very large sums is uncertain.

Case management conference. The case management conference applies to multi-track cases only. The objective of the conference, which is held by the judge and normally attended by the parties and their legal representatives, is to set the agenda for the case, consider ADR, narrow the issues, decide on the scope of future work such as disclosure of documents, consider case budgets and costs and set a trial date. The conference will follow the exchange of statements of case (see "Starting a claim" below).

On the fast track, the aim will be to get to trial within thirty weeks from the giving of directions. On the multi-track, there will be greater flexibility, but key milestone dates fixed by the court will have to be adhered to. Defaulting parties face automatic costs sanctions. Litigants will therefore need to ensure that they are able to progress their case in accordance with the court's timetable.

Listing questionnaire. Following disclosure and exchange of evidence, the parties will complete a listing questionnaire confirming that all directions have been complied with. The court may then fix a pre-trial review, or a trial date.

Pre-trial review. A pre-trial review will be required in most multi-track cases. The purpose of the pre-trial review is to ensure that all the issues raised at the case management conference have been dealt with, and to give final directions which may be necessary. At the hearing, the judge (who will usually be the judge who will hear the case at trial) will review the issues to be tried and the parties' costs estimates and set a programme for the trial.

Trial. This will normally be conducted in accordance with the directions previously given by the procedural judge, and will follow a similar format to the existing system.

Such a radical change in approach to case management will mean a number of significant changes to the way that parties approach litigation:

Preparation. Much more preparation will need to be undertaken at the outset of a multi-track case, prior to the case management conference. Many of the tasks and activities in the litigation process will have to be done at an earlier stage than previously, including analysis of the key issues, identifying relevant documents (in order to prepare statements of case and determine the scope of disclosure), preparing a case budget, deciding what witnesses and expert evidence may be needed, and considering whether ADR is appropriate.

While it is, of course, good practice to conduct such investigations as early as possible under the current rules for the parties' own benefit, the difference under the new regime is that the information will have to be shared with the court and with the other side at the case management conference.

A new division of responsibilities. The allocation of tasks between in-house and external counsel will depend on the size and urgency of the case. Large cases will still require significant external resources to co-ordinate the process, review and manage documents, and interview key staff. However, the need to carry out an initial investigation to a tight timetable will mean that more work is done at an early stage in-house. In-house counsel will need systems to warn them of impending claims or disputes, as well as effective document management systems so that they are able to deal efficiently with an investigation in the short time available (see "Document Management: Confronting your skeletons", FirstSource, PLC, 1997, VIII(5), 39).

Focus on key issues. There will be less scope for procedural disputes on peripheral issues. More applications will be dealt with on paper (that is, without the need for a hearing before a judge) and the same "procedural" judge will normally deal with all interlocutory applications on a particular case, up to the pre-trial review stage, which will ensure a more consistent approach.

Management input. A senior representative from the company with authority to manage the case will need to be involved from the outset in discussing the approach to be taken in relation to ADR, and at the case management conference and any other hearings prior to trial, since strategic information about the management of (and budget for) the case will, as mentioned above, probably have to be disclosed not only to the court but also the other side.
Client attendance at the key procedural hearings is at the discretion of the court, although the court may require a party to attend a hearing in person (in addition to his legal representative), for example, if the parties fail to agree on how the case should proceed (part 3.1(2)(d)).

Strategic planning. Providing a case plan with key “milestones” or a flowchart setting out the anticipated steps in the case and the various directions that the case might take will create the right impression with the court, and provide a tactical advantage over an unprepared opponent.

This will be a particular challenge for defendants. Whilst the claimant will normally be able to ensure it has time to address all these issues before it commences proceedings, the defendant will be under increased time pressure to marshal its case in order to submit a substantive defence and to prepare adequately for the case management conference.

It should no longer be possible for a defendant to submit a general denial by way of defence and wait until after the discovery process has been completed in order to specify exactly what is disputed; the court will now require the parties to make this clear by way of an agreed statement of issues in dispute (derived from the statements of case (see “Starting a claim” below) prior to or at the case management conference.

Costs estimates. At present, the management conference should proceed (the parties fail to agree on how the case is to proceed) (see “Starting a claim” below) prior to or at the case management conference.

More detailed estimates are likely to be needed at each subsequent procedural hearing, and at the pre-trial review the court will examine each party’s cost estimates for the trial. Prior court approval will be needed for expensive procedures, such as extra discovery, and the court may refuse to grant permission if it considers the cost to be disproportionate to the value of the case.

Whilst the estimates are intended to be an outline only, rather than a budget limiting what the parties can spend or recover, in order to produce such a budget, parties will have to consider in detail the issues to be contested and the overall case strategy to be adopted. This may be difficult at an early stage in the case. Costs estimates will need to be updated regularly, taking into account the alternative routes that the litigation might follow, and how these different options will affect not only the demands placed on the company’s time and resources but also the structure of the litigation (see also “Costs” below).

Information technology. Many companies operate sophisticated IT systems, and the speed at which so many cases will now be moving has resulted in significant development and investment in new technology by private practitioners. Computerised document management and indexing systems, direct e-mail links between a company and its external lawyers, automatic diarising systems warning of impending deadlines, the ability for any member of the case team to access case information at the touch of a button will become increasingly important, given the introduction of automatic costs penalties for failure to comply with case timetables (see inset box “LITIGATION SUPPORT SYSTEMS”).

ADR is a generic name for a number of informal procedures developed to assist parties in the settlement of disputes without recourse to litigation or arbitration using an independent third party (a neutral). These procedures are confidential and are usually without prejudice. This means that statements made during the procedures orally or in writing cannot be given in evidence in later proceedings. The most common procedures are mediation, mini-trial and judicial appraisal (“rent-a-judge”) (see “Alternative dispute resolution”, FirstSource, PLC, 1994, V(3), 29).

Most ADR procedures are flexible and can be adapted, either in the dispute resolution clause in the contract or on an ad hoc basis at the time of the process, to suit the parties’ particular needs.

In a mediation procedure, a neutral mediator is appointed by the parties to investigate the causes of the dispute and to seek ways of helping the parties to settle their differences. There is normally an opening session of all the parties and the mediator, at which each of the parties briefly outlines its case, followed by a series of “ caucus” meetings between the mediator and each of the parties. The mediator seeks to identify the parties’ common interests and to use this to resolve the dispute. If the mediation is successful, the parties will resolve the dispute by entering into a binding agreement. If there is no resolution, the parties proceed to litigation or arbitration.

Starting a claim

Under the current system proceedings may be commenced in the High Court by issuing a writ, originating summons, originating motion or petition or in the County Court by issuing an originating application or summons. High Court proceedings are subject to rules contained in the White Book and County Court proceedings are subject to rules contained in the Green Book. Both sets of rules prescribe very different methods for issuing proceedings and the documents used to commence proceedings in either the High Court or in the County Court differ greatly in terms of content.
Key steps in a multi-track action

This flowchart shows the key steps in an action on the multi track under the new Civil Procedure Rules. The case management conference will set the timetable.

Prior to proceedings
- Pre-action discovery (part 31.16).
- Pre-action protocols to include protocol on instruction of joint single expert (not yet published).
- Consider ADR.
- Consider offer to settle before proceedings commence (part 36).

Reply
- File with the claimant’s allocation questionnaire (part 15.8). Certificate of service of reply must also be filed with the court.

Case management conference
- The court may fix a case management conference at any time after a defence has been filed (part 29.3). The court will consider what factual and expert evidence is required, the scope of disclosure, whether ADR should be attempted and whether other directions are needed.

Summary judgment
- Summary judgment is available to both plaintiff and defendant or at the court’s own initiative if a claim or particular issue has “no real prospect of success at trial” and there is no other reason why the case or issue should proceed to trial (part 24).

Offers to settle and payments into court
- An offer to settle or payment may be made in writing by either party at any time before or after proceedings have started. The offer or payment may relate to the whole claim or to a particular issue (part 36).

Disclosure
- No set time limit: it will usually depend on the case. Directions on disclosure are given at the case management conference.

Exchange witness statements
- No set time limit: it will usually depend on the case. Directions on witness statements are given at the case management conference.

Exchange experts reports
- No set time limit: it will usually depend on the case. Directions on experts reports are given at the case management conference.

Pre-trial review
- The court may convene a pre-trial review (if required) on at least seven days’ notice to the parties (part 29.7).

Trial
- Unless the trial judge otherwise directs, the trial will be conducted in accordance with any orders previously made (part 29.9).

Issue proceedings
- Use standard claim form (include statement of value setting out the amount claimed where possible (part 7.3)).

Serve proceedings
- Serve within four months of issue (if for service within jurisdiction) (part 7.5(2)).
- Claimant can apply for an extension of time for service of claim form (part 7.6).
- Defendant can apply for service of claim form where it is issued but not yet served (part 7.7).

File acknowledgement of service
- May be filed within 14 days of service of claim form or, where particulars of claim are served, 14 days after date of service of particulars of claim (part 10.3).

File particulars of claim
- File with or contained in the claim form, or within 14 days of service of the claim form (part 7.4). They should include concise details of claim and refer to other matters specified in a practice direction and include a statement of truth (verifying its contents) (part 22.1).
- Serve with a form on which the defendant admits, defends or acknowledges service of claim form (part 7.8).
- Defend in writing by either party at any time before or after proceedings have started. The offer or payment may relate to the whole claim or to a particular issue (part 36).

File defence
- File within 14 days of service of particulars of claim or 28 days of the defendant filing an acknowledgement of service (part 15.4).
- The parties may agree one extension of time of up to 28 days (part 15.5).
- Defence must contain a statement of fact by the defendant verifying its contents (part 22.1).

Counterclaim
- When defendant files the defence or at any other time with court’s permission (part 20.7(3)).

Track allocation
- When a defendant files a defence, the court will serve an allocation questionnaire on each party to be completed by a specified date (part 26.3).
- The court may order a stay (of its own initiative or at the parties’ request) of one month (or such longer period as it considers appropriate) to enable the parties to attempt to settle the case (part 26.4).
- Cases will be allocated to a track (part 26.5). An allocation hearing may be held if necessary.
- Where a case is allocated to the multi-track, the court must either fix a case management conference, or give directions for the preparation of the case, set a timetable for the steps between giving directions and trial, and fix a pre-trial review, trial date or period when trial will take place (part 29.2).
- Procedural judge allocated to manage case up to pre-trial review.
and format. The new rules aim to simplify the existing complicated procedure for starting a claim.

The key changes introduced by the new rules are:

- All claims should be started on a single claim form (part 7.3).
- Where a claim has been issued but not served the defendant may apply to the court to discontinue the claim (part 7.7).
- Pleadings are to be replaced by statements of case from each side, consisting of a concise statement of the positive facts upon which the claimant or defendant will rely. In the case of a defence, simple denials will not suffice (part 16.5). These must be filed with the court. Key documents in support of each party's case should be identified in and attached to the statements of case (Practice Direction supplementing part 16). It is anticipated that there will be little scope for lengthy extensions of time being granted by the court for service of statements of case.
- Statements of case will include a “statement of truth” signed by the party or his legal representative verifying the facts contained in the statement of case (part 22.1(6)). A party who makes a false statement in a statement of case without honestly believing it to be true may be subject to contempt of court proceedings (part 32.14(1) and (2)).

Issues for the claimant. A claimant will need to gather oral and documentary evidence to support his case before proceedings are commenced or at their outset. Proceedings are deemed to have commenced when the claim form is issued by the court at the request of the claimant (part 7.2(1)). At this stage the claimant can (if he wishes) name the witnesses he intends to call in his statement of case and serve with his statement of case copies of the documents he considers necessary to his claim. Claimants may not be able to issue a claim in general terms and on a protective basis in order to avoid being timebarred since the defendant may apply to court to discontinue a claim which has not been served on him (part 7.7).

Issues for the defendant. The defendant will also need to carry out considerable work gathering oral and documentary evidence as soon as a claim against him becomes a possibility or, at the latest, when the claimant's statement of case is served on him. The defendant will need to include in his defence his version of the facts to the extent that they differ from those of the claimant as he will no longer be able to serve a defence simply denying the claims made against him.

Preparation. Companies should consider implementing systems which will enable the quick identification of relevant individuals and documents in the event of potential litigation. Many in-house counsel, have the creation, or revision, of document management programmes on their long term list of corporate housekeeping issues. The new reforms add a real urgency to the establishment of these internal systems and procedures. The much shorter response time which will be available to a corporate defendant under the new procedures will mean that such programmes will be essential pre-emptive measures for corporate litigants, and not merely a measure of good administration.

For example, computerised databases can be used to store information relating to key contracts, such as the individuals involved and the location of relevant documents in a readily accessible form. Computerised databases can also be used to record in accessible form the main discussions which have taken place between the parties and summaries of the principal documents relied upon by the parties in negotiations resulting in the conclusion of key contracts and details of the role and level of involvement of individuals working on key contracts. Similarly, key estate planning documents and regulatory permits, which may become important evidence in litigation, can be stored in this way.

Where a particular commercial relationship is fragile and further disputes are on the horizon, it should become a routine procedure for a statement to be taken from any key internal witnesses who may be retiring, or moving on to other positions, and for the statement to be put onto a legal database, subject to the rules of legal professional privilege. (For detailed analyses of document management and reducing litigation risks, see "Document management: Confronting your skeletons, FirstSource, PLC, 1997, VIII(5), 39 and "Litigation risk management: Surviving the legal jungle", FirstSource, PLC, 1996, VIII(8), 25.)

Disclosure. At present parties are required to give automatic discovery of all documents which are or have been in their "possession, custody or power" relating to matters in question in the proceedings. The test of relevance is construed extremely widely and includes giving discovery of documents which may only lead to a train of inquiry enabling a party to advance his own case or damage his opponent's case (Compagnie Financiere du Pacifique v Pennvian Giano Co [1882] 1 QB 55). The existing High Court rules permit a party to apply to the court to restrict the scope of discovery where it would otherwise be "oppressive" (effectively on a cost-benefit analysis of the cost and effort of giving full discovery as against its likely benefit in resolving the case on a just basis). This limitation provision is, however, used relatively rarely, despite recent judicial encouragement. As many corporate counsel will be too aware, the expense of complying with the discovery obligations is a major, if not the major, item of expenditure in all but the most straightforward commercial cases. Discovery has been singled out by successive civil procedure review bodies, including Lord Woolf's inquiry itself, as a key area for simplification and reform.

Under the new rules discovery is to be renamed disclosure and is intended to become a more cost efficient and manageable process. This is to be achieved by the following measures:

- Pre-action disclosure. The court can make an order for pre-action disclosure (in other words, discovery of documents, usually to the prospective plaintiff, even before proceedings have been issued) in relation to specified documents or classes of documents relevant to the potential claim. The court will make such an order if it considers that disclosure is desirable to dispose fairly of the anticipated proceedings, to assist the dispute to be resolved without proceedings or to save costs (part 31.18). Under the current system pre-action discovery is only available in personal injury cases. However, after 26th April, 1999 applications for pre-action disclosure may be made in all types of cases.

Whilst there is, in theory, a danger that routine pre-action disclosure in all cases may increase litigation by enabling a party to embark on a fishing expedition to establish a cause of action, in practice this should not arise as long as the court strictly interprets the criteria for pre-action disclosure specified in part 31.16. A party will need to demonstrate that the respondent is likely to be a party to subsequent proceedings and that if proceedings had started, the respondent's duty to give "standard disclosure" (see below) would extend to the documents being sought by...
Litigation support systems

Litigation support systems are specialist systems designed to aid the litigation process and are particularly useful in addition to document discovery. They are becoming increasingly sophisticated, particularly through the application of information technology. The Woolf report recommended more widespread use of litigation support technology to assist document management, although this is not expressly dealt with in the rules.

There are broadly three different computerised litigation support techniques: basic indexing, full text retrieval and document imaging. A computerised index will hold objective details of all relevant documents in a database so that searches can be made in a number of ways, for example, by date, author, recipient or subject matter. Full text retrieval enables users to search the full text of documents for key words or phrases. Imaging is like taking photographs of individual documents and holding them on computer. This process copes well with non-textual documents such as drawings and handwriting. The index of imaged documents can be searched but users cannot search for individual words within imaged documents.

In cases with a large volume of documents, these techniques can give a significant tactical advantage and cost savings. For example, using document imaging and indexing instead of a conventional paper library with computer index gives increased accessibility of documents to multiple users in all locations.

Companies should establish how their external lawyers plan to handle documents. Document handling can be outsourced to specialist litigation support companies, which may produce cost savings. Some large firms also offer their own in-house litigation support systems. Where outsourcing is used, it is important for lawyers to conduct quality checks.

If information technology is used, the first stage will normally be to build a basic document index with agreed objective fields. Imaging can then be considered together with enhanced indexing. Full text retrieval can be expensive and of limited value unless terms are used consistently throughout documents. Costs are front loaded so it is important to budget for litigation support costs at the outset, taking into account whether the case is likely to proceed to trial.

the applicant. For those who satisfy this criteria the ability to obtain pre-action disclosure should help to facilitate the early resolution of disputes.

Standard disclosure. On the fast track and the multi-track the parties will initially be restricted to giving standard disclosure of documents, that is, all documents on which a party relies, all documents which a party is required to disclose and certify that he understands the duty of disclosure. They are becoming increasing y sophisticated, particularly through the application of information technology. The Woolf report recommended more widespread use of litigation support technology to assist document management, although this is not expressly dealt with in the rules.

The court may order a party to give specific disclosure of additional material (part 31.12). In deciding whether or not to make such an order the court will consider all the circumstances of the case, and in particular the overriding objective to deal with cases justly set out in Part 1.

Further notification. No provision for supplemental disclosure exists but there is an obligation on the parties to notify other parties immediately of any documents that come to a party's notice (part 31.11).

The new disclosure process has the following consequences:

Preparation. A large part of the work relating to disclosure will now have to be done either before proceedings commence or at the outset of proceedings. The extent to which a party's disclosure obligations will be reduced will depend upon the court's interpretation of the reasonable search (as required by part 31.7).

Bearing in mind Lord Woolf's criticism that discovery has become disproportionate, especially in larger cases where large quantities of documents have to be searched for and disclosed but only a small number become significant to the case (Interim Report, Section V, Chapter 21, para 17 and Final Report, Section III, Chapter 12, para 37) it is anticipated that the court will seek to narrow rather than widen the concept of the reasonable search. Whilst the proposed restrictions on the disclosure of documents should result in cost reductions in practice, the potential savings may be outweighed by the fact that the costs relating to disclosure are likely to become front-loaded.

Division of responsibilities. The burden of carrying out a new initial review to locate documents is likely to shift from the external lawyer to the client. The in-house lawyer of a company is the employee most likely to be required to certify that he understands the duty of...
Disclosure and that he has carried out that duty and to explain the scope of the search pursuant to the standard disclosure obligations (under part 31.10(6)).

**Document management.** Companies should ensure that they have good internal procedures to locate easily all documents relevant to a potential claim. This may help save costs in the longer term. For example, a party may be better placed to resist an application for further specific disclosure if he can demonstrate that he has carried out a reasonable search for documents.

**Witness evidence**

Under the current system witness statements must be prepared and exchanged (usually simultaneously) within 14 weeks of the summons for directions or as ordered by the court. Failure to exchange witness statements results in the defaulting party being unable to call oral evidence at trial unless the leave of the court is obtained. It is now usual practice at trial for the witness’s statement to stand as his evidence in chief and unless the leave of the court is obtained, a witness cannot at trial give evidence in relation to matters not contained in his witness statement unless it concerns new matters which have arisen since the statement was served.

As a result witness statements have frequently become lengthy documents, often over drafted by lawyers to avoid concerns that a witness will not be able to give oral evidence in chief at trial. The new system aims to address these concerns by requiring witness statements to be drafted as far as possible in the witness’ own words and to enable witnesses to amplify on matters contained within their statement when giving evidence at trial where the court considers that there is good reason to do so.

The key changes are:

- The parties will be expected to identify the factual witnesses they need as early as possible, prior to the first case management hearing.
- The court may give directions as to the issues on which it requires evidence, and on the nature of and way in which it requires evidence to be given. It may also exclude evidence which would otherwise be admissible although the basis on which the court might exercise this power is not currently stated (part 32.1).
- A witness may only amplify his statement or raise new matters since his statement was served where the court considers there is good reason to do so (part 32.5).
- Witness statements must be in the form set out in a practice direction (part 32.8).
- Witness statements must include a “statement of truth” by the witness verifying that the facts contained in the witness statement are true (part 22.1).

Failure to comply with the practice direction or the matters set out in part 32 may result in the court refusing to admit the witness statement as evidence and refusing to allow the costs incurred in relation to the preparation of the witness statement.

It remains to be seen whether in fact witness statements will be shorter and simpler as was proposed by Lord Woolf. If this is the case it will result in cost savings for the parties. At least for the present it appears that there will be little change to witness statements unless practitioners change their attitudes towards their drafting.

However, the ability of a witness to amplify his statement or raise new matters at trial where the court considers that there is good reason not to confine the witness’s evidence to the contents of his statement (part 32.5(3) and (4)) may result in more flexibility for the witness when giving evidence at trial. It might also result in witness statements not being subject to elaborate overdrafting (one of Lord Woolf’s principal criticisms of witness statements under the current system). Although, given the court’s discretion on this point, every effort should still be made to avoid the introduction of new evidence at the trial stage unless it is critical.

**Expert evidence**

Under the current system the leave of the court is required to call expert evidence and it is a pre-condition for calling expert evidence at trial that experts’ reports be exchanged in advance. Given that drafts of experts reports and the material used to prepare them are protected by privilege it has become common for experts to be instructed by a party either prior to or at the outset of litigation. Experts can often be reluctant to concede issues because they form part of one side’s team. Even where without prejudice meetings are held between experts prior to trial to narrow areas of disagreement, any points agreed by the expert at the meeting are usually subject to ratification by the expert and his lawyer. Experts have also been criticised as providing a second tier of advocacy at trial.

In order to address these criticisms, the following changes are being introduced by the new rules:

- The court must restrict evidence to that which is reasonably required to resolve the proceedings (part 35.1).
- The court may direct that evidence on an issue be given by one expert only (jointly for both parties) (part 35.7). This is one of the most controversial measures introduced by the new rules as it effectively prevents the single expert from advising each of the parties who have jointly instructed him on the merits of their case. However, the parties will be able to overcome this by each retaining a separate expert to advise on the merits of their case. The rationale for this rule is to save time and money and increase the prospects of settlement. It is anticipated that the court will direct the appointment of a single expert where the issue in the case relates to a substantially established area of knowledge and there is no need for the court to sample a range of opinions.
- An expert’s report must state the substance of all material instructions, whether written or oral, on the basis of which the report was written (part 35.10(3)).
- Where a party has access to information which is not reasonably available to the other side, the court may order a party to prepare and file a document recording the information and serve it on the other side (part 35.9). This rule has the effect of redressing the balance where one party has more resources than the other party.
- The court may at any stage direct a discussion between experts and require them to identify the issues in the proceedings and, if possible, reach agreement on those issues. The contents of such discussions may not be referred to at trial unless the parties...
agree otherwise. A written statement may be produced as a result for the court indicating areas of agreement and disagreement. Any agreement reached between the experts is not binding on the parties unless the parties agree to be bound by it (part 35.12).

There are a number of practical implications of the changes to the rules on expert evidence:

Choosing an expert. Parties will need to consider the instruction of an expert at the outset of proceedings, bearing in mind the court’s duty to control the use of expert evidence and the implied presumption in favour of a single expert when considering whom to instruct. In particular, a party should be aware of the possibility that he may not be able to retain the same expert throughout the proceedings where the court decides that a single expert should be appointed.

In this situation the party may decide that it is prudent to retain more than one expert. One expert may be retained jointly with the other side to give expert evidence to the court whilst a party may retain a further expert to advise on the strengths and weaknesses of the party’s case (although the advantages of this must be weighed against the extra cost involved).

Retrospective effect. Although there is no requirement to disclose to the other side instructions to experts in relation to their giving evidence in court (such instructions are not privileged, the court may order disclosure of any specific document if it is satisfied that there are reasonable grounds to consider that the expert’s statement of the substance of his instructions is inaccurate or incomplete) (part 35.10(4)). When an expert is instructed, a matter of caution, litigants should proceed on the basis that oral and written instructions may have to be disclosed. Care will also have to be exercised when jointly instructing an expert to ensure that no privileged or sensitive information is divulged.

Loss of control. Even where the court allows separate experts, a party will lose some control over his own appointed expert, given that there will have to be co-operation between them.

Costs

The changes being introduced in relation to costs will potentially limit the amount of costs successful litigants can recover. The new rules are intended to ensure that the case is managed efficiently (as at present) and also to control litigation costs more effectively, making them more proportionate to the value of the case and the means of the parties than at present.

The key changes include:

- Cases on the fast track will be subject to fixed costs limiting the amount the successful party can recover. The fixed costs scales have yet to be published.
- When implementing its overriding objective of dealing with cases justly, the court will ensure that the parties are on an even footing, which includes taking into account their respective financial positions (part 1.1(2)).
- The court may take into account the conduct of the parties prior to and during the proceedings when exercising its discretion in relation to costs (part 44.3(5)(a)). The court is likely to take into account such matters as the parties’ approach to ADR and the extent to which they have co-operated in agreeing procedural matters without the need for court hearings.
- The court may also take into account the extent to which the costs sought have been reasonably incurred and are reasonable and proportionate in amount (part 44.5(a)). This may include consideration of the value of the case and the means of the parties.
- Clients must be kept informed in writing of any costs orders made against them in their absence (part 44.2). Failure to do so within seven days of the order being made is likely to result in the lawyer being personally responsible for those costs.
- The court is likely to take into account the parties’ approach to ADR and the extent to which they have co-operated in agreeing procedural matters without the need for court hearings.
- The court may also take into account the extent to which the costs sought have been reasonably incurred and are reasonable and proportionate in amount (part 44.5(a)). This may include consideration of the value of the case and the means of the parties.
- Clients must be kept informed in writing of any costs orders made against them in their absence (part 44.2). Failure to do so within seven days of the order being made is likely to result in the lawyer being personally responsible for those costs.

Costs risks for corporate litigants

Where the parties are of unequal financial resources, or have substantially different views as to how the case should proceed, the court may well require more detailed information about each party’s case budget and resources in order to decide how particular aspects of the case should be prepared. Litigants will need to consider the extent to which the costs they incur are likely to be recoverable if they win the case. Exactly how the courts will seek to achieve greater equality between individual and corporate litigants remains to be seen, but corporate litigants should be aware when planning their case strategy at the outset of the litigation that the court may restrict disclosure, expert evidence or other costs procedures if they are beyond the means of a financially weaker opponent. The new measure may well prove to be effective in equalising the balance of power between parties with differing financial means.

Budgeting for litigation. It is too early at present to predict how the new rules, once established, will affect litigation budgets generally. However, in the short term, as litigants adapt to the new system it seems likely that the front loading pressures imposed by the need to identify key documents and witnesses at the outset, and to plan a case strategy early, will mean that companies have to allow for greater up front costs even if, in the more co-operative climate envisaged by Lord Woolf, more cases settle earlier, so reducing costs overall.

Will the new system work?

The current civil justice system is widely considered not to work well and needs to be replaced by a more efficient system. The success of the reforms will depend on a number of factors, including:

- The co-operation of the legal professions and litigants.
- The willingness of judges to adapt to their new role in pro-active case management.
- Whether additional resources are made available to support the judiciary and court service, which are already under severe pressure. No significant new resources will be available to fund more judicial appointments or to cope with the increased administrative burden imposed on courts through case management (although judges are receiving training).
- There are fears about whether judges will have sufficient time to devote to their new case management role, especially in managing heavy litigation, although it is too early to say how justified these concerns are.

If the reforms are successful, this may in itself create a problem in that although more cases may settle earlier (within or outside the judicial system), this may be matched by a corresponding increase in the number of cases brought and the number of interlocutory hearings needed to resolve case management issues. There is also a risk of “satellite” litigation concerning interpretation of the new rules, particularly in relation to the scope of disclosure.

- A nna G ouge and M ichelle B ramley are solicitors in Freshfields’ litigation department.