JUDICIARY OF
ENGLAND AND WALES

LORD JUSTICE MOSES

THE EBSWORTH LECTURE

LOOKING THE OTHER WAY

MIDDLE TEMPLE

MONDAY 13TH FEBRUARY 2012

We know what judges write about the advocates who appear before them:

> *"Reggie never learnt swordsmanship but he was effective with a blunt instrument and certainly had a stout heart. What was almost unique about him and makes his career so fascinating is that what the ordinary careerist achieves by making himself agreeable, falsely or otherwise, Reggie achieved by making himself disagreeable. Sections of the Press, which he permanently antagonized, liked to parody his name by calling him Sir Bullying Manner. This was wrong. He was a bully without a bullying manner. His bludgeoning was quiet. He could be downright rude but he did not shout or bluster. His disagreeableness was so*

pervasive, his persistence so interminable, the observations he made so far fetched, his objectives apparently so insignificant, that sooner or later you would be tempted to ask yourself whether the game was worth the candle; if you asked yourself, you were finished."

We know what advocates write about judges:

> *"An appearance before Lord Goddard was more troublesome to the stomach than a dawn attack on a heavily defended enemy position. When Sir Walter Monkton rose to move that the editor of the Daily Mail be committed to prison for contempt, he was one of the most distinguished leaders of the Bar and one of the foremost men in the country. His hands were shaking uncontrollably behind his back. Was this just ordinary nerves, or possibly the consequences of a hangover? A glance at Lord Goddard put those thoughts out of one's mind. A gleam of light shone down directly upon the hunched figure of the Lord Chief Justice. The large court seemed to be quaking under the impact of his personality. Not only the assembled Directors of the Daily Mail, but everyone else held his breath. When called upon to stand up, the editor sat immobile with fear and had to be pulled to his feet by Valentine Holmes. The crisp prison sentence and equally crisp warning to the newspaper's directors followed. One left the court in no doubt of the majesty of the law."*

Those were the days, and how very unlike the life of our own dear Brian! And no points to Sir Reginald Manningham Buller under Performance Indicator 54.6 (page 17)….*demonstrates an astute and responsible approach throughout their advocacy…*and nul points to Sir Walter Monkton under Performance Indicator 132.3, *able to maintain poise notwithstanding the most extreme circumstances and pressures.* And as for the majesty of the

law…let us forget about the majesty of the law and focus on the most significant feature of the new system of Quality Assurance, the participation of the trial judge. Without such participation, it is believed, the system will fail. Is the very concept of assessment of an advocate's performance by a trial judge in criminal cases inconsistent with and likely to hinder the objectives the Quality Assurance Scheme is designed to achieve?

The system is designed to regulate the quality of all advocates appearing in the criminal courts including QCs, advocates employed by the CPS, solicitors and other in-house advocates. Cases will be assigned to 4 levels of accreditation, from Magistrates Courts at Level 1, to what are described as the most serious novel and difficult homicides and sexual offences at level 4. I should pause only to observe that the difficulty of an advocate's task bears little relationship to the level of the case; have you ever fought a hopeless handling case in front of a bored judge? Advocates will only be permitted to *complete* cases assigned to their levels and below. The idea is you move up the ladder, and as Derek Wood QC has written, seek to avoid the snakes. The competence of the advocate will be assessed by two forms of evaluation: judicial evaluation and evaluation by an approved assessment organisation. But do not think, even there, that you can avoid the steely gaze of the judicial viper…judicial evaluation is, we are told, the key form of assessment. Even if you use an assessment organisation (a far more expensive process) to move up a level, an advocate will need a judicial assessment on at least two occasions. Re-accreditation will be required every five years, if it takes place in an assessment organisation it will require at least one judicial assessment. No single evaluation will be determinative. You must ask for an evaluation in

advance of the hearing (lest the judge lose all recollection of your brilliance three minutes after you have left court). You must ask for five assessments and you can choose your best three.

The judges will then fill in an evaluation form. The forms are to be *submitted to the advocate's regulator.* It is the regulator who assesses the assessment of the judge; a team, under a manager employed by the regulator, will decide whether the advocate has the competence to move up a level or to be re-accredited at the same level. You should recall that there is not one advocate's regulator…there are three, one for the Bar, one for the solicitors and one for the legal executives, and an über-regulator, the Legal services Board. The advocate may wish to join in Arthur Clenham's enquiry of Mr Barnacle at the Circumlocution Office: *how shall I find out? Why you'll…you'll ask 'til they tell you. Then you'll memorialise that department (according to regular forms which you'll find out) for leave to memorialise this department. If you get it (which you may after a time) the memorial must be entered in that department, sent out to be registered in this department, sent back to be countersigned in that department and then it will be regularly before this department. You'll find out when the business passes through each of these stages by asking at both departments 'til they tell you.* No-one has yet explained why the simple solution of one advocacy regulator regulating the legal service of advocacy cannot be created; if one of the purposes of the LSA 2007 was to open up the courts to advocates whether they be solicitors or barristers, how dispiriting that the division is to be maintained in separate regulation for a single legal activity.

If the regulator is concerned on receipt of the evaluation form it may request further information *and* if necessary commission an independent assessor to attend court with the advocate to observe and assess their performance. It might be as well, I interpose, to go and watch the judge…assessment of the judge's performance might well cast illumination on that which gave rise to the concern in the first place.

The Scheme contains proposals in relation to what a coy agony aunt in the back page of Woman's Own used to call *problems of under-performance*. Training providers will be contracted to train those who are under-performing and advocates who wish to refresh their skills. There will be an Assessment Panel who will decide whether an advocate is under-performing at a particular level, composed of those with experience of advocacy assessment and training and those with judicial experience. If you are under-performing you may be asked to be reassessed after a set period and undergo training in the meantime…then be reassessed as competent, or reduced to lower levels.

There will be a system of appeals before an independent panel from an expert pool of professionals of all three branches, and judges…to identify either procedural errors or, in an interesting variation of Wednesbury unreasonable, whether the decision is one which no reasonable person would find *comprehensible*, not the usual Wednesbury test of whether the conclusion is outwith the range of reasonable decision or perverse, but rather whether the reasonable person can understand the decision…well, a lot of very silly decisions are perfectly comprehensible…to wit…no.

There will be structured training for all judges who must carry out the task of assessment. This has been delegated to the City University which has produced a DVD showing actors playing advocates and an assessment with a voice-over from a retired judge…it has been tried out on representatives of the Council of Circuit Judges who speak well of the training save that those who saw the film disagreed with one of the voice-over assessments. The training was supposed to take but three hours but, in its present form, is likely to last one day.

Since all who assess at whatever level must be trained, the timetable may be somewhat delayed…the criminal courts are to be divided into three circuits (a combination of the existing circuits), and the first circuit, unnamed, was due to be training judges between January and March and implementing the scheme in April, the other two following in the period October to December 2012 and the third in January to March 2013. A scheme proposed back in 2009 in relation to one aspect of advocacy, the criminal trial, has taken, or will have taken, four years to put in place. How long will it take to introduce assessment of other fields of advocacy? But we are reminded, whatever our dismay at the delay, in somewhat, I have to say, waspish tones, *it should be made absolutely clear that the regulators remain committed to the implementation of a quality assurance scheme. The fundamentals of the scheme are in place, have been agreed and are not open for re-negotiation.*

The difficulty with any criticism, at least from a judge, is that the objectives of the Scheme are so plainly to the good. No-one should seem to cavil at a system designed to maintain and improve the quality of advocacy on

which the rule of law and the adminstration of justice depends. But is the deployment of a judicial marker likely to achieve or inhibit that objective?

At the Bar conference in 2010 we were assured that it was *entirely unsurprising that the judges support the quality assurance scheme.* Three reasons were given: first, that historically judges controlled rights of audience, second, that judges are the consumers of advocacy services and third, practicality…in the present cash-strapped times, who but the judges will in practice carry out the assessments…?

I would like to us consider those three reasons, first, the curious reliance on history.

The Legal Services Act 2007 was the culmination of a process designed to lay siege to what was perceived to be the last citadel of the powers privilege and pretension of a special interest group, the legal profession. And whose fault was that perception? We the judges boasted of control, and paraded our ability to determine who should and who should not appear in our courts. Here is the Attorney-General seeking to defend the Bar's monopoly when it was feared solicitors would monopolise advocacy in the County Court in Parliament on 15 July 1851:

> *"The business of the advocate in all our courts, superior or inferior, should be conducted by men of trained education as advocates, of established position as gentlemen, as men of honour…if any monopoly at all were allowed to exist, it would surely be better to place it in the hands of a highly-educated class of men, rather than in those of an inferior class."*

And so the County Courts Act 1852 prohibited one attorney employing another as advocate, a ban continued until s.60 County Courts Act 1984, 132 years later.

Ahh, 134 years later, you may say, attitudes had changed, in November 1985…a solicitor with a small private practice, but also a senior legal assistant for Times newspapers, sought to make a statement in open court to announce the settlement of a libel case brought against Cyril Smith by Leo Abse and other members of the Labour Party. The Court of Appeal saw off the attempt: "*every court must retain the untrammelled power of regulating its own proceedings…from the accumulated wisdom of the courts…as well as my own experience both as advocate and judge…it is essential that those who act as advocates in our courts (i.e.barristers), particularly in the higher courts, should be a member of a profession or professions subject to a strict code of discipline and etiquette and who have been thoroughly trained and practised in the skills of advocacy in the proper and expeditious conduct of litigation and in the law"* Then the court gave the game away…it was, they said, not a matter for government but for the courts…*I confess to some surprise that the views of the government were prayed in aid of this application. It is fundamental that the courts are wholly independent of the executive…if and in so far as the government was impressed by considerations of the public interest those same considerations might be relevant but the views of the government are not. If the government wishes to give effect to those views, it can only do so by persuading Parliament to legislate.*

And Parliament did…they picked up the gauntlet thrown down by the judges, took up the challenge. At first it was baulked. Mrs Thatcher failed

despite the appointment of a Scottish broom: the Courts Act 1990 proved not to be as radical as the Bar, with its £750,000 campaign, had feared. In 1990, as Simon Jenkins wrote, the Bar had, unlike the miners, too many friends in high places.

But it was in the age of Blair and Brown, the age of the Audit Society, that the Clementi review and the Legal Services Act 2007 achieved success in *the final dismantling of the protection of a socially exclusive profession from market forces*, a closed society seeking to protect itself from outside interference under the cloak of self-regulation…chaps regulating chaps. How piquant it is then that judges, perceived as the very embodiment of a socially exclusive society, members of the Garrick and Atheneum, and worse, as Baroness Hale calls them, members of the officer class, should be called on to participate. After all, if history is to teach anything it is surely that it was the judges who asserted the very power which Clementi and the LSA sought to remove.

Of course, the answer is that judges are not what they were…it would be monstrous to compare the modern sensitive judiciary to the ogres of the past. The very fact that judges are now to be trusted to participate in the process of modern regulation demonstrates that they are now at the forefront of a modern society devoted to equality, diversity and free from the antique protectionism of a bygone age. If you were a higher court advocate would you entrust your assessment to the judge in a court centre where a majority of the judges had been barristers and had grown up together?

If history provides no rationale, let me turn to the second justification, that the judge is a consumer of advocacy. In a jury trial it is hardly accurate to describe the judge as consumer of the advocate's services…on the contrary it is the jury not the judge who in the end must be persuaded…such persuasion will often be way beyond the level to which a judge's credulity may be stretched. As every jury advocate will tell you in a seemingly hopeless case, fulfilling a duty to persuade a jury may be at the cost of pleasing the judge. Do we really want a generation of criminal trial advocates who go into the court with the intention of pleasing the judge? Is that what quality assurance means? Of course there will be judges who appreciate where the advocate's duty and loyalty lies…but by no means all, and it is expecting a great deal of young advocates who, as they will be required to do, have notified the judge in advance that they are seeking evaluation to stand up to the judge when he thinks that the cross-examination has gone on long enough.

That pre-eminent advocate Michael Beloff QC has said that the *object of the exercise of advocacy was not to show how clever the advocate is but how clever the judge.* But the BSB may have taken that apothegm too far. One of the regulatory objectives of the LSA is to encourage an independent, strong, diverse and effective legal profession. The obligations of independence may clash with the judge's ideas of what the case requires. Everyone thinks they can run someone else's case better than their own…judges are not immune from that self-deception, and the Court of Appeal and the Supreme Court live by the belief that they can. The advocate's job may well be to insist that that is not the case, even when the judge who has missed the point persists in his belief that it is he, and only he, who has spotted it.

The advocate's job may be not only to clash with the judge's ideas but even to clash with the judge. Now I am prepared to acknowledge that the days when it was necessary to get up a row with the judge and attract the sympathy of the jury have long gone, well, almost, and so touchy-feely have the judges become that aggression to the judge is more likely to attract the sympathy of the jury for the judge than for the advocate. Of course, any advocate worth his salt will be prepared to stand up to the rebarbative and recalcitrant bench. But we who have appeared in the criminal courts are no strangers to the experience of the oleaginous opponent who is clearly anxious to promote his chances of a recordership or even a share of the consolidated fund or taking silk, by a deferential acceptance of his honour's demands.

Nor should we forget that advocates will know what the judge has said about them…the completed evaluation forms are passed back to them. What will it be like when your clerk or business manager tells you that you are in front of so and so, who but last week marked you down for your inability to understand the most elementary concept of the rules of bad character?…or more probably marked you down because of your refusal to accept the judge's blatant misconception?…you can hardly expect a successful application to have your case taken out of the list because of the judge's previous evaluation of your advocacy skills to succeed. Of course there will be judges you dislike appearing before, just as there are on occasion those whose advocacy skills seemed more calculated to irritate than to convince. But surely the one thing to be avoided is to create a formalised scheme in which the trial in which an advocate is seeking an evaluation becomes, as Derek Wood put it, a job application in which there is to be a judicial thumbs up or thumbs down.

And if there are doubts as to the effect on the independence of the advocate, test it this way…suppose judges were to be assessed by the consumers of their judicial services, the advocates. Would not the first protest be that such a process would be an interference with *judicial* independence. How will the judges feel if their evaluations were to be sifted and assessed by a Judicial Standards Board?

What about the client, awaiting trial? He wants to know or at least believe he has the best…he wants the assurance of quality *before the trial.* After the trial is, as Clementi and the Legal Services Institute teach, far too late…what is necessary is what is described as *before the event* assurance and not after the event insurance…that there can be disciplinary sanctions for failures to conduct a trial properly is of no comfort to a prisoner suffering the effect of the failures in his cell. The justification for quality assessment is the assurance it will provide *before* the event to a consumer who lacks knowledge to know who is the best and who is the worst and will not have the power to pursue a complaint, still less gain any advantage from doing so. It is what is described in competition theory as information deficiency or asymmetry which justifies the need for quality assurance.

But if the need for information lies at the heart of quality assurance, how much is the client entitled to know?…surely that the judge has confidence in his advocate or at least no more nor less than in his opponent. There can, as anyone who has appeared in the criminal courts knows, be no more dispiriting effect on a client than the belief that the judge has no faith in his brief. Is he to be told that his brief has tried but failed to obtain that judge's fiat for moving up a grade? Is he to be told that his opponent has recently

been evaluated by that very judge as satisfying performance indicator level 4, 13.5, *acts as a role model for others?* Presumably the interests of transparency will not go that far…but I am not confident. The advocate will be shown his own evaluation but not his opponent's, but the wily old bird, no stranger to the dock, might well want to know. Was the curt dismissal of defence counsel's application a reflection of the judge's assessment of her qualities, and the mutual billing and cooing between the judge and her opponent a sign that he had gained the judge's imprimatur?

And the felon is even more likely to want to know what the judge thought once he is convicted. There is, as you know, a growth industry in the Court of Criminal Appeal: that is, attempts to show that your advocate was so bad, his misjudgements so glaring, that the appellant was deprived of a fair trial and the verdict is unsafe. So far the CACD has been unable to stem this flow, despite repeated assertions that it is the inadequacy of the evidence and not the inadequacy of counsel which matters. Grounds challenging the competence of counsel lead to a compulsory waiver of privilege and a torrent of inevitable but unattractive reasons from erstwhile counsel previously retained as to why the client was in fact guilty, how troublesome they were, and as to why it is not the advocate's fault but rather that of their client. Will the appellant ask to see his counsel's grade, and the judge's previous evaluation? There is, I suggest, cause for a profound unease in the notion that, in the very trial which you face as an accused, your advocate has asked to be assessed. What effect is *that* going to have on your brief? Is she on your side or just trying to mollify the judge?

Surely the last thing we want is defensive advocacy. The need to be marked, to move up a level or maintain one's grade is, I believe, deeply inimical to the proper relationship between advocate and judge and, more importantly, the trust the client has in that relationship. The accused must believe that his brief will tell the judge to go to the devil, if that is what his case demands.

The obvious riposte is that judges do participate in the endorsement and selection of advocates seeking advancement, whether to join a Treasury Panel, to become a Recorder or judge, or in an application for silk…such an analogy seems to me profoundly false; the analogy demonstrates a profound misunderstanding of the scheme. To spot those who excel is not difficult. To report the ill-prepared, inadequate foozler is to be encouraged. But the regular day-in and day-out marking and measuring of the average advocate is something, I suggest, wholly different. It will be relentless, fraught with difficulty and for the reasons I have suggested, damaging to that delicate and subtle relationship between advocate and trial judge. So I suggest that the criminal trial judge is far from the consumer of the criminal advocate's services. If advocates behave as though they are seeking to impress the judge with their wares, or, as the Minister Bridget Prentice, who believed that legal services were a product to be available to the consumer off the shelf, would have it, proffer the judge a tin of Baked Beans, they may well not be doing their job.

Let me turn then to the third justification: practicality. The attraction of quality assessment lies in its apparent objectivity. The client seeks the comfort an apparently objective licence or seal of approval provides. But

where advocacy is concerned, how reliable *is* that process of comfort and assurance?

The essential problem of any system of assurance or audit lies in the need for auditable measures of performance: they have to be replicated and consistent. Quality must be made measurable. Assessment requires verification and verification demands some correspondence between performance and the standards against which the performance is to be measured. Performance can only be measured if there exist clear standards and measurements. If there are no such measurable standards then the claimed objectivity is a mere cloak for subjectivity, and is no more than the exercise of a shallow ritual of verification.

So let us consider the standards the system requires the judges to apply. The advocate may agree with Sir Patrick Hastings that *no-one has yet known <u>what</u> are the qualities which must be possessed by any advocate if he is to reach the highest rank?,* but the Master of the Rolls does know. In his speech to the Bar Conference he summarised the qualities of a good skilled advocate in a short paragraph and 8 sentences…they *never use a long word where a short one will do, wherever it is possible to cut a word out they cut it out, their submissions are well prepared, they know their brief and which points have merits and they concede where concession is proper…they serve their client and assist the court.* The Bar Standards Board in its Statement of Standards would not disagree, but they go somewhat further than those 7 or 8 qualities. Derek Wood QC wrote recently of the painstaking detail of the 161 Performance Indicators, in the Statement of Standards which form the basis of the judicial evaluation…his analysis cannot be faulted…it's a pity he didn't

count the subdivisions. Forgive me if I fail PI level 1 112: *is audible* or even level 3: *appropriate pace*…under the heading *organisation,* PI 54: *identifies the best argument to pursue,* 54.1*: presents fluid flexible and highly proficient submissions to a standard of excellence,* 54.2: *Advocate's presentation skills reflects the increased seriousness and complexity of cases dealt with by a level 4 advocate,* 54.3: *Fluent articulate and then in bold* ***intuitive*** advocate, 54.4: *pinpoints the essence of the case or issue without wasteful consideration of alternative issues,* 54.5: *submissions unfailingly delivered with poise,* 54.6: *demonstrates an astute and responsible approach throughout their advocacy* and 54.7: *powerful submissions expressed very succinctly.* And my favourite…level 2 PI 121:…KNOWS WHEN TO STOP.

Every known handbook on the art of advocacy has been culled for every phrase and epithet, synonym and tautology. The distinctions are eye-watering in their sophistication and subtlety…a level 3 advocate must *comprehend the nuance of a case and readily offer sound solutions to situations as they arise…*whereas a level 4 advocate must pass this standard, since the standards are cumulative and in addition *demonstrate an astute and responsible approach throughout their advocacy.* It is gratifying that judges are deemed to be endowed with an aptitude lacking in philosophers from the time of the Pre-Socratics in 6th Century BC to the present day, the ability to identify wisdom (Level 4 PI 13 *demonstrates wisdom in all aspects of advocacy*) and to distinguish it from the mere *demonstration of a common sense approach, pursuing only important issues (*Level 3 PI8.6).

Assessment of these standards has to be reduced to a Criminal Advocacy Evaluation Form, colour-coded in a spectrum from primrose,

apricot, lavender and cerise to indicate the different levels; for the tick boxes on the front sheet, sienna is substituted for the apricot, magenta for the cerise and eau de nil for the lavender. Judges will be pleased to know that the subdivisions in the statement of standards are reduced to the 161 headlines. They will no doubt overcome the difficulty that the judicial printers provided by Courts service print only in black and white. The form must be filled in by the judge so as to distinguish by a tick between the not-yet-competent, the competent, the very competent who can move up a level, and those not possible to evaluate…and it is then passed to the different regulatory boards to be…examined, scrutinised, assessed by a team led by a manager and composed of some legally qualified and some unqualified. And so the forms will pile up until put into electronic form and may be the subject of query, re-assessment, appeal and record…and no doubt retrieval at every stage of re-accreditation. And perhaps I may be forgiven for recalling the Frankfurter Allee in East Berlin, of rooms and rooms of files, of an office buckling under the weight of its own data demands…*societies which try to institutionalize checking on a grand scale slowly crumble under the weight of their own information demands, under the senseless allocation of scarce resources to surveillance activities and under the sheer human exhaustion of existing under such conditions, both for those who check and for those who are checked.*

What of the benefit? Any system of assessment must itself be measured. How will you measure whether the system is fit for the purpose it seeks to achieve? Fewer advocates failing to achieve the grades they wish for? More advocates failing? We cannot judge advocates by the outcome of their cases,

success cannot be measured as if verdicts of not guilty were 4 starred A levels…and if it was it would only lead to the protest that the judges, like the examiners, are not what they were. The BSB suggests laudable aims with which no-one should disagree: that the system will assist in eliminating discrimination…and that equality and diversity monitoring will also ensure that due regard is paid to progression through the levels by different groups…collected evidence will help regulators promote equality in the profession. But how is that to be achieved…by telling a group of judges in a particular area that they are failing too many women or those from ethnic minorities to a disproportionate degree?

The BSB identify a further benefit…it will provide, they say, *a structured and more transparent method of career progression: advocates - a major reason, they assert, that advocates seek employment is a lack of structured progression in the self-employed Bar.* In that respect the BSB's aim seems to me not only to have missed the target but to have struck the range marshall plumb between the eyes. The point of self-employed advocates, their raison-d'etre, is to avoid the structure of employment, to avoid the steady trudge up the career path and the comfort of a seat at the partners' table but rather to demonstrate the courage of independence.

It is necessary to ask how the process of checking will affect the checked. In his report Clementi sought a confident, strong and effective legal profession. What of the effect on the confidence of the advocate?

The system has targeted an aspect of legal service, the performance of which is not only of great importance but the most vulnerable, the most

susceptible and the most difficult to evaluate, criminal advocacy. It is the most susceptible because its practitioners are the least well paid and the most vilified of those who offer legal services. It requires no imagination to appreciate how the young criminal advocate feels, with possibly £50k of accumulated debt, expected to clear it from receipt of small delayed payments, deprived at the end of the month even of the prospect of meeting their hotel bills, but picked out as the guinea-pigs of this process. It is they who will be assessed and their counterparts in commercial chambers, sitting behind two other more mature juniors and a heavy-weight silk boring for England or for Russia, will not be assessed…it is the young criminal advocate who must knock on the judicial door asking for the return of the evaluation form, the hoped for rise from level 1 to 2.

They may be comforted by the fact that they will not remain alone. If Clementi and the Legal Services Act are to have any credibility they must apply to all forms of reserved activity, all forms of advocacy and litigation. There is no hint in either that criminal advocacy is to be carved out as a special case.

But when will it be possible to achieve a system for everyone else…and by what process? It is highly unlikely it will be by judicial evaluation of advocacy…many of those who offer legal services would not dream of going anywhere near a court or only very rarely…how are they to be assessed? And what of those, from a civil background, who will be instructed to defend or prosecute in the criminal courts? Must they wait for accreditation, and how is that to be won? Will Irwin J, hearing the medical negligence case in which I appear for the Claimant, certify me as fit to defend next month at Southwark? How was Dr Bodkin Adams to obtain the services of Geoffrey Lawrence QC,

who Devlin had wrongly believed was not equipped with the arts of the jury advocate? Do we really believe legal services will be enhanced by making it even less possible for an advocate to display his skills in a variety of litigation: do you really want to keep Sidney Kentridge in the commercial court?

I have heard that there are those who still believe that the system may achieve protection for the self-employed barrister against higher court advocates. But if that is their belief, they should be disabused. If that were the purpose of the quality assurance system it would be the very opposite of the purposes of the Legal Services Act…what an absurd paradox that a system designed to break down anti-competitive practices in the public interest should encourage and nurture the turf-war between Bar and higher court advocates. And if there is a belief that the Bar can achieve protection through the system of quality control, then the judges should play no part in a system which is fostering that belief.

The good advocate is a brave and happy advocate…can anyone, who has spent any time in court listening to advocacy, really believe that a system of marking will encourage, influence or inspire, or will it deaden and crush in the pursuit of a bland and colourless uniformity?

But pessimism is not enough. It is incumbent on those who criticise to propose a sunnier more optimistic prophylactic. I have a proposal which I believe is calculated to provide assurance without the negative scratching of the marker's pencil. Judges should be encouraged with greater frequency to report the incompetent or, worse, to be retrained or struck off. But the need to

be done with the poor or hopeless should not be allowed to damage the rest. There is a better way than marking.

Anyone who attends courses and seminars appreciates that their essential value lies in meeting, listening and observing others, the sharing of skills and discussion. It is how the judicial college trains its judges and how the young advocates learn: for example in the advocacy courses conducted by the Inns and SE Circuit Summer Courses at Keble. There you can watch and listen to see how advocates learn and improve, by the encouragement and suggestions of the more experienced colleague and judge. The Bar Standards Board should require the advocate, civil or criminal, to attend such courses at regular and frequent intervals, and to participate in discussions and exercises, and watch how their colleagues throw off the bad habits acquired as they grow older but no wiser in the performance of their advocacy.

It is a sad feature of the Inns of Court that they figure in the lives of the young and the old but play so little part in maintaining and improving those in between. If, as I believe, they have the skills and the facilities to teach the beginner, those should also be deployed to all advocates those whom the public and the BSB demand should maintain their expertise and improve.

And I have no better authority for the expectation that *that* is the way to maintain and improve performance than the BSB itself. *It* believes that those who under-perform, or wish to return as an advocate, will be helped by retraining; it is an essential part of their scheme. Assessment centres will seek to replicate conditions at a trial. Why should such processes be limited to those who fail or those who wish to regain their skills?

The report of the working group on continuing professional development increased the hours for the development of professional knowledge and skills but, I suggest, mistakenly advised that CPD should not be confused with quality assurance…it says the *mixing of the two would be unusual and problematic*…well, is not the measuring of advocacy unusual and problematic…?

I should have thought that rather than earning your CPD points by listening to yet another lecture or indulging in the titillations of an unverifiable activity, participation by every advocate, barrister and solicitor, together in regular and sustained courses, in which all the Inns should take the lead and in which those of different experience and the judges participate, will enliven and encourage, as it inspires and stimulates the beginner. Let there be Academies of Advocacy, with compulsory and regular attendance for all advocates.

There is nothing new in such a suggestion. In 1563, the first Italian Academy was founded in Florence, the Accademia del Disegno. Do not be misled by its title…it taught not merely drawing but the art of rhetoric…there its founding members and its students studied and copied and shared drawing and another art…the art of persuasion…the difference in those skills is not as great as may first appear. In sixteenth century Florence there was developed a doctrine peculiarly apt and fitting for the maintenance and improvement of advocacy, a doctrine which might even appease the BSB…it is *sprezzatura*…a lively and unaffected nonchalance…the ability to complete a line, a single brush stroke, without any effort or guidance…small wonder that the artist and those who sought to develop the art of persuasion worked together. It could

have been the author of performance indicator 76 level 4, Advocacy is instinctive and appears effortless and not, as it was, Michelangelo, who said *what one has most to struggle and work for…is to do the work with a great amount of labour and sweat in such a way that it may afterwards appear, however much it was laboured, to have been done almost quickly and almost without labour and very easily.*

Pliny the Elder tells us that in the 4th Century BC the artist Apelles claimed higher status than his rival Protogenes because *he knew when to take his hand away from a picture*…I only wish the quality assurance scheme could say the same.

Please note that speeches published on this website reflect the individual judicial office-holder's personal views, unless otherwise stated. If you have any queries please contact the Judicial Office Communications Team.