



# Why there should be more solicitor Judges.

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18<sup>TH</sup> OCTOBER 2021



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I was party to a discussion recently in relation to litigation – and specifically “bad Judge” – risk. The thrust of the discussion was a general perception amongst practitioners that this had markedly increased in the last 20 years. Pondering this sentiment took me back to a conversation at the very outset of my career about the need for more solicitor Judges. It was a comment made by the senior partner of the firm at which I undertook my first summer placement. The comment was “*the problem with Judges is that they tend to be barristers*”.

I was therefore interested to see this article in the Gazette the other week, and the suggestion that law firms are not doing enough to support their senior practitioners in taking part time judicial appointments:

<https://www.lawgazette.co.uk/news/law-firms-blocking-solicitors-from-bench-circuit-chief/5110124.article>

Certain of the comments underneath call into question, somewhat reductively, the comparative qualities of solicitors and barristers in a judicial context.

Solicitors who work closely with the bar, including solicitor advocates and “might have been” barristers like myself, generally acknowledge the benefits that the split profession brings in this country. There is something to be said for flying hours when addressing the court or sparring with your opponent beyond the four corners of the written argument. A keener knowledge of the law and legal developments undoubtedly helps. Barristers can regularly bury themselves in the law (and are often paid handsomely to do so) whilst the humble solicitor’s lot can seem to be endless wading through the facts of cases which will never see the light of day. These are of course gross generalisations, but we solicitors also have to manage client relationships and run firms on top of our fee earning. All things being equal, barristers have a competitive advantage in the bandwidth they have available to hone an argument.

On the other hand, what we solicitors indisputably do well is facts; proofing, sifting, digging, challenging - from the earliest stages of a matter. This due diligence is directed at both the client and the claim. The credibility of key witnesses, what others in the company/firm/department/industry might say – sometimes gleaned from the mere tone of a passing communication – is all subjected to scrutiny. Getting down to brass tacks is essential, not just for the client, but for a firm like ours which often (and looks to) takes risk in the form of conditional or contingency fees.

An early assessment of credibility and character is therefore essential. Before a case is even taken on we solicitors assume the position of the Judge, seeking to get to the heart of the matter on the basis of objective facts.

And therein can lie the problem. Judges are generally advocates, and the core skill and endeavour of the advocate is somewhat different to the finder of fact.

Effective advocacy is in many ways the application of alchemy to how things are and how they can be made to appear. The skilled advocate presenting a set of facts draws on the same skills as the somewhat entrepreneurial, and thus popular, accountant. The raw figures are what they are, but with a bit of window dressing here, and some artistic licence there, they could justifiably be presented as something else.

If Donne was right (ignoring the religion and politics) that on “*a huge hill, Cragged and steep, Truth stands*”, it is not the advocate who “*about and about must go*” to reach her (Donne’s application of the feminine, not mine). They will certainly be going about and about, but the intention is often to lead the weary follower to an entirely different hill altogether, often newly fashioned, or simply to disorient them.

The heavy hand of the advocate looms large in many modern judgments. It can be told from extensive copying and pasting from written submissions, it is seen in judgments replete with clever answers – often pre supplied – to difficult factual points. The result may weather an appeal but can lack original thought and real world experience. Whether or not the recipient of the benefit, we have all been party to judgments of this nature; judicially safe, superficially attractive, highly partisan. It feels like such decisions are increasingly prevalent, which would explain the sentiment of the discussion related at the outset of this piece.

The role of the Judge is to ascend Donne’s hill. A better analogy might be to lift the patio slabs. Their job is to discern what is really there and not what has been painted.

Why then are we solicitors apparently so reticent to apply our skills in a judicial context? There is much to be gained both for the judiciary and for the large, highly profitable, firms who could afford to support appointments from their senior ranks.

True it is that finding time would be difficult for partners with management positions at the peak of their careers, but a part time appointment would work well with other initiatives to retain the skill and expertise of more senior partners, such as flexible working or consultancy arrangements.

Something is clearly required to redress the present imbalance on the bench. Solicitors should make excellent Judges of first instance. The question is whether those firms who have benefitted the most from the practice of law will rise to the challenge and give something back?



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