In the Southwark CC case where the judge was critical of HCAs: In this case there were 5 HCAs instructed by 3 different firms. Below is set out a response on behalf of 3 advocates instructed and the instructing firm itself:

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1
The advocates concerned refute the accusations of incompetence levelled at them. They assert that this is an instance of a judge who has a strong aversion to solicitor advocates (or higher court advocates, HCAs); and this was a rare trial where all defence advocates were HCAs. The advocates concerned would welcome an enquiry into the matter and invite the Senior Judiciary and other relevant authorities to look into the details of this case, including the conduct of the judge. One thing all parties are agreed upon is that the trial was a fair one. This means that the issue is not one that could be susceptible to appellate review.

2
There was a time when it was considered inappropriate to criticise a judge (whether in the press or elsewhere) as the judge had no means of responding to such criticism. In this case, however, the judge all but held a press conference by arranging a set-piece occasion inviting even the advocate (HCA) of an acquitted defendant to attend a sentencing hearing for others held a few days after conviction; expressly ensuring the presence of the press in court, and then reading his remarks and handing out hard copies thereafter, but giving the criticised defence advocates no opportunity to respond. He concluded his remarks by stating that he hoped his remarks "are widely distributed through the criminal legal profession". The step of writing this response has therefore become necessary but is undertaken with extreme reluctance. No disrespect is intended to judges, but the judicial behaviour catalogued in this document is on a par with that which has been deprecated by the Court of Appeal in a number of recent cases.

3
The advocates instructed by this firm wish to make it clear that the judge was hostile to them from the outset. The advocate who was not criticised (and who, by the way, is self-employed) states: "he was hostile to us all, me included, the whole way through. Much of this was conveyed by facial expression and vocal intonation, and therefore won't show up on the transcript. It was obvious from the first day of trial; none of us said anything until halfway through day 3, so the hostility predated anything we said or did. He would not look at any of us or address any of us directly; he referred to us innumerable times as "solicitors" in tones of contempt." By contrast, he treated the only barrister in the case (prosecuting counsel) with perfectly proper courtesy.

4
Most judges nowadays will simply refer to solicitor advocates as counsel or as advocates. This is not the case in this judge's court. One of the advocates involved recounts the following: "Throughout the trial, he referred to us as "solicitors", which word, each and every time, he pronounced in an exaggerated and strange manner, as if we were alien creatures who did not belong there."

5
Regrettably, the judge's hostility towards the solicitor advocates was in no way limited to contemptuous sneers. At an early stage, once the defence advocates had cross-examined the main prosecution witness, the judge singled out one of the advocates and, in the absence of

the defendants, subjected him to a ferocious attack, asking whether he had ever conducted any crown court trials and demanding to be told whether his client had been advised that he could have any advocate of his choice. This is what the judge is referring to in the second and third paragraph of the remarks he has asked to have circulated. His admission to having made his rebuke “in rather stark terms” gives only the slightest hint of his bullying manner and the intimidating atmosphere in which the advocates had to defend their clients.

6

The specific complaints made by the judge

A: Addressing the jury directly:
This is a complaint about the fourth advocate, who was instructed by another firm and whose client was acquitted. In relation to the jury bundle, when cross-examining a police officer, the advocate made the jury aware of which page he was referring to, as some of them were not sure. That is it. This is a regular practice by both defence and prosecution advocates to assist the court process, not an “address” in terms of a speech in mid-trial as hinted at by the judge.

B: Rules of re-examination:
There was one complaint made by the judge in relation to a question along the lines: "it's been put to you that you are lying about XYZ, what do you say about that?". That is the extent of the matter to which the judge took umbrage. Yet this, again, is a widespread practice across all types of advocates, both senior and junior. In this case, the judge insultingly told the advocate to read the chapter on re-examination in Archbold over the luncheon adjournment. It is a matter for others to decide whether this type of question deserves the stern admonishment made by the judge, or any remark at all.

C: Hearsay:
This relates to an issue where the advocate adduced from his client that he had been told that another defendant was married, thus explaining why he did not wish to get too involved with her, and why he was not truthful about their relationship in police interview. The judge objected to this as constituting hearsay evidence. Clearly, this fact was being introduced to explain the defendant’s state of mind, not to establish the truth of the marriage. This was not hearsay.

D: Misleading the jury about character:
The advocate wished to adduce the defendant’s good character. However, just prior to embarking on his client’s examination in chief, he learnt from the officer in the case that his client had a previous caution, having previously been told that there was ‘no trace’ of the client on any police records. He therefore elicited from the defendant only that he had no previous convictions. The intention was to clarify later whether the caution was correct. The advocate did this in an effort not to mislead anyone and in the knowledge that if the caution was confirmed then it would be put to his client and/or admitted. He now accepts this was a momentary tactical miscalculation. The advocate accepts that it would have been better to discuss this with the judge beforehand. But the atmosphere in the courtroom was extremely fraught as the judge was not according the defence advocates any respect and was intensely hostile.

E: Other issues:
The judge indicates that his list of criticisms "goes on and on" without giving any further specifics. One must assume, however, that he has enumerated his most serious misgivings, as addressed above. There were also trifling errors made by the prosecuting barrister but these were not commented upon, let alone castigated, as perceived defence mistakes were. Defence objections taken to the prosecutor's questioning were only grudgingly upheld. The advocates do not allege pro-prosecution bias but anti-HCA bias. If a judge sets out looking for mistakes by a particular party, then no doubt some will be found, particularly when an unduly stressful working environment is created by the judge. This is precisely what happened in this case.

7
Experience

Of the two advocates instructed by this firm who have been criticised, both had previous jury trial experience, one more so than the other. The one with more experience has conducted numerous jury trials since 1999 and was originally a barrister before transferring and becoming employed by this firm. He has also conducted several cases in the Court of Appeal including one reported case, which was also cited in Archbold. No other judge in over a decade of practice in the higher courts has found the same 'failings' in him as found by this judge. The only possible exception to this is a case where a now retired judge, known for his abusive manner, cut this advocate's cross-examination of a crucial witness short on the grounds that the questions were irrelevant. The Court of Appeal overturned that conviction on the grounds that the judge was wrong.

The advocate with less experience had done all the initial hearings in the case for his client (third defendant) and was instructed at a time when the alleged dishonesty was believed to be in the region of £50,000.00, as indicated in the initial police case summary. As it later turned out, the case was somewhat, but not much, more serious. Essentially, the case concerned a raid where fake credit cards and luxury goods were found in a flat together with all the defendants. However, it was plain that none of them could have been the organizers of the fraud, as the judge correctly acknowledged in his sentencing remarks. After trial, the sentence was four and a half years' imprisonment. Whether it is with barristers or HCAs, there is a tendency on the part of many litigators and barristers' clerks to leave a case with an advocate, especially when the defendant is towards the end of the indictment, as was the case for this advocate. In this case, even if one were to allow that the good character issue could have been handled better, the judge's criticisms of this advocate were out of all proportion to any failings involved and would not have been dealt with in this manner had such failings been made by barristers.

8
The judge's 'suspicions' as to why HCAs were briefed

Contrary to what the judge suspects, no advocates are forced to take on cases in this firm. The judge indicated that finances may have played a part and referred to the sore temptation to keep cases in-house in view of legal aid cuts. To assert this is to assume that solicitors will disregard their professional duties to their clients for financial gain. We categorically reject this assumption. Not only do we, in this firm, maintain the best standards we can, but we are also lucky to have a healthy balance sheet. We have never been financially overdrawn, and live within our means. In the last six months this firm has undertaken three cases where there was a certificate for led juniors. In only one of them did an in-house

advocate undertake the junior brief. The rest of the cases were referred to the self-employed bar. A substantial portion of our work is undertaken by external advocates. We ourselves are a firm that has actively undertaken higher court advocacy since 1994 when Parliament ended the previous monopoly. We will continue to do so in appropriate cases. Our advocates are also briefed by other firms.

9

The judge’s previous record of unacceptable behaviour towards HCAs

This judge has a previous record of unwarranted behaviour re HCAs. Last November, an advocate at this firm (with over 20 years’ experience as a higher rights advocate, including ten years at the Bar) was in a PCMH, with his client facing a charge of controlling a prostitute. In the presence of the client, the judge asked the advocate to forward his CV for inspection as he deemed the case serious. Co-defending barristers were not so asked for their CVs. One of them, whose client was facing a rape allegation, was in fact of only five years’ call and the other about 13 years’ call. As a result, an informal complaint was lodged with the Resident Judge. A formal complaint was not lodged as it was hoped that this was an isolated case of a relatively new judge who appeared still to carry onto the Bench his previously reported concerns as a member of the Criminal Bar Association committee (a part trade union body).

In a separate case, a highly experienced HCA was similarly questioned in front of his client by the same judge, which prompted the client to then ‘sack’ the HCA on the grounds that the judge did not like him. This resulted in another informal complaint to the Resident Judge. As a result the judge now desists from such practices in the presence of the client. These instances are mentioned to show that this judge has - or gives the appearance of having - an issue with HCAs.

10

As solicitor advocates we look forward to the implementation of the Quality Assurance for Advocates project, currently being piloted by MOJ/LSC. It is hoped that the resultant uniform grading of all advocates will remove the unfair stigma (in certain quarters) that attaches to HCAs as somehow being less competent than self-employed barristers. In that event, such thoroughly unpleasant and humiliating experiences as detailed above, should become a thing of the past and we can continue with the proper practice of our profession.

11

The firm will fully co-operate with any official enquiry in relation to this matter if such enquiry is deemed appropriate.

BULLIVANT & PARTNERS

20th April 2009