

# The only way is Ethics

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Professor Jo Delahunty QC



**This lecture will explore the importance of Ethics for an Advocate**



- The core duties of an advocate to the court and to the client
- Professional support & guidance
- Principles in practice
- Why it matters

# Roles of Barrister and Instructing Solicitor

*very very simplified*

- 
- **A Solicitor: Preparation of clients case**
  - Employed (by a firm)
  - Direct access to the client
  - Correspondence with court/parties
  - Gathering of evidence
  - Preparation of Instructions to and Brief to the barrister
- **A Barrister; Advice on and presentation of the case**
  - Self employed (works in chambers)
  - linked to the client via the Solicitor (*save those registered with the Public Access Scheme which enables a member of the public to go directly to a Barrister for legal advice or representation.*)
  - Specialist legal advice
  - Legal submissions
  - Advocacy in court





<https://i.dailymail.co.uk/i/pix/2015>



NO , NO  
NO !!!!







ROLL ON FRIDAY .COM

WE START  
INBUING THE  
**PRINCIPLES OF  
ETHICS,  
HONESTY AND  
INTEGRITY** INTO  
THE CONCEPT OF  
BEING A  
BARRISTER AT  
THE OUTSET OF A  
BARRISTERS  
TRAINING

## **Barristers Training**

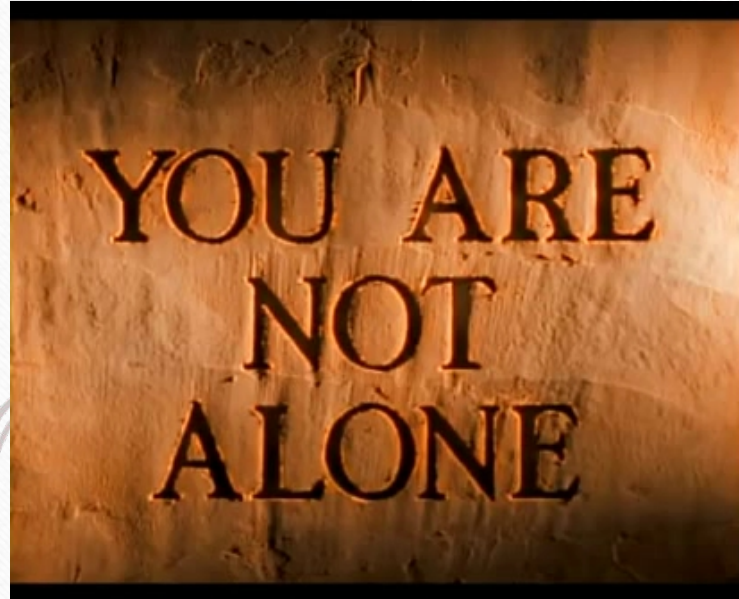
- **Vocational Stage (BPTC):** Ethics & Professional Conduct is part of the syllabus. One of three areas which are centrally examined by the BSB.
- **Vocational Stage (QS):** Qualifying Sessions will have an element of professional ethics.
- **Pupil Stage:** Each of the Inns has their own format for the compulsory pupils' course. Middle Temple ( for example) runs a two week full-time course of lectures, workshops, and court visits. One of the interactive sessions is on professional ethics.
- **New Practitioners Programme (NPP):** Half day course. Workshops of 8-12 NPs, with two trainers; different set of trainers halfway through the programme, so every participant works with four trainers in total. Fictitious cases studies are discussed. Different sets of problems for self-employed and employed practitioners.
- **CPD Day (annually):** interactive session on professional ethics. Different sets of problems for criminal and civil practitioners.



THE INNS : MIDDLE ,  
LINCOLNS INNER GRAYS



CHAMBERS





*THE ONLY WAY IS Ethics .....*

# BAR STANDARDS BOARD

THE CODE OF  
CONDUCT :  
10 CORE  
PRINCIPLES



## 10 CORE DUTIES

- 1: You must observe your duty to the Court in the administration of justice
- 2: You must act in the best interests of each client
- 3: You must act with honesty and integrity
- 4: You must maintain your independence
- 5: You must not behave in a way which is likely to diminish the trust and confidence which the public places in you or the profession



**6:** You must keep the affairs of each client confidential

**7:** You must provide a competent standard of work and service to each client

**8:** You must not discriminate unlawfully against any person

**9:** You must be open and co-operative with your regulators

**10:** You must take reasonable steps to manage your practice, or carry out your role within your practice, competently and in such a way as to achieve compliance with your legal and regulatory obligations.





The Bar Council  
*Integrity. Excellence. Justice.*

- The EES cannot give legal advice, or bind the BSB.
- The EES can make representations to the BSB on general issues raised, but no information about individual queries is shared with them.
- The EES talks the barrister through their dilemma, and help them come to an informed ethical decision.
- **The barrister will need to use their own professional judgement to determine the most appropriate course of action (rC20).**



# LIFE LESSON ALERT

.....

## ITS HARD IN PRACTICE

.... The Bar Council Ethical Service (EES) receives on average around **500 calls a month** and also responds to written enquiries by email.

Overseen by the Bar Council's Ethics Committee: 26 members across all practice areas; **14 QCs and 12 juniors**

Most serious and complex enquiries are escalated to Ethics Committee members with relevant expertise.







Dinner party question no 1

*You're a lawyer: how low will you go?*







## NO COACHING OR NOBBLING !

- You must not encourage a witness to give evidence which is misleading or untruthful
- You must not rehearse, practise with or coach a witness in respect of their evidence;
- You must not communicate with any witness (including your client) about the case in which the witness is giving evidence *unless you have the permission of the representative for the opposing side or of the court,*



# YOU CANT MAKE EVIDENCE UP : YOU CANT OVER EGG THE CAKE

You must not draft any statement of case, witness statement etc. containing:

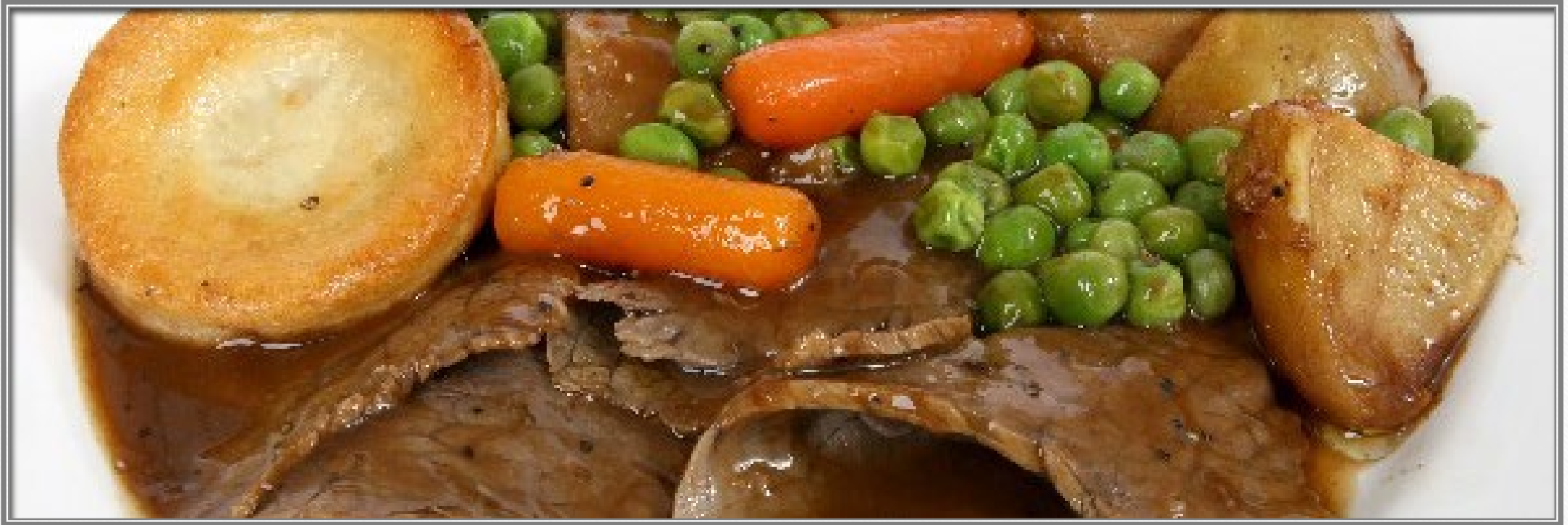
- (a) Any statement of fact or contention which is not supported by your client or by your instructions;
- (b) Any contention which you do not consider to be **properly arguable**;
- (c) Any allegation of fraud, unless you have clear instructions to allege fraud and you have reasonably credible material which establishes an arguable case of fraud;
- (d) (In the case of a witness statement or affidavit) any statement of fact other than the evidence **which you reasonably believe the witness would give** if the witness were giving evidence orally



## You cant corrupt the evidence

You must not make, or offer to make payments to any witness which are contingent on their evidence or on the outcome of the case;





## The Dinner Party Question 2

*‘How can you defend someone you know is Guilty?’*



**Your duty to the Court does not prevent  
you from putting your client's case  
simply because you do not believe that  
the facts are as your client states them to  
be**



# THE RULE OF LAW MATTERS





# The 'Cab Rank Rule' (simplified)

rC29 –



- If you receive instructions from a professional client, and you are:
- a self-employed barrister instructed by a professional client; ...
- the instructions are appropriate taking into account the **experience, seniority and/or field of practice** of yourself...



**you must** accept the instructions  
addressed specifically to you,  
irrespective of.....



- The **identity of the client**;
- The **nature of the case** to which the instructions relate;
- Whether the client is paying privately or is publicly funded;
- **Any belief or opinion which you may have formed as to the character, reputation, cause, conduct, guilt or innocence of the client.**



**Q: WHAT IS MISSING FROM  
THAT LIST ?**

**Q: WHAT IS SPECIFICALLY  
SAID NOT TO BE A REASON  
TO REJECT INSTRUCTIONS?**

**A: I THINK THEY ARE  
GUILTY, THE CASE IS  
HORRIFIC**



<http://i.huffpost.com/gen/703650/o-FRED-WEST-570.jpg?4>



THAT CARDINAL RULE underpins the independence of the Bar and our duty to provide legal representation to those that call for it

It is professional misconduct for a barrister to break that rule

*It doesn't apply to other types of lawyers such as solicitors (whose code of conduct says they can accept or decline work at their discretion as long as they don't discriminate in doing so),*

There are limited exceptions ...



### Exceptions ? Rule 30:

- Conflict of interest
- You are pre booked for another matter
- It is outside your experience or above your seniority
- It requires you to leave the UK or act for a non UK lawyer
- You have not been offered a proper fee for your services (*tia : The complexity, length and difficulty of the case, Your ability, experience and seniority; Expenses which you will incur*)
- Except where you are to be paid directly by (i) the Legal Aid Agency as part of the Community Legal Service or the Criminal Defence Service or (ii) the Crown Prosecution Service:
  - Your fees have not been agreed...
  - Having required your fees to be paid before you accept the instructions those fees have not been paid...



**A BARRISTERS JOB IS .....  
not for the faint hearted**

## OUR ETHICAL CODE OF CONDUCT DEMANDS THAT :

- We must promote **fearlessly** and by all proper and lawful means the client's best interests.
- We must do so **without regard to your own interests or to any consequences** to you
- We must do so **without regard to the consequences to any other person** (whether to your professional client, employer or to any other person)





**The Birmingham 6**

Lord Denning : *"We shouldn't have all these campaigns to get the Birmingham Six released if they'd been hanged. They'd have been forgotten and the whole community would have been satisfied."*

In 1980 he upheld an appeal by West Midlands police against a civil action by the Birmingham Six over injuries they received in police custody. To accept that the police were lying would open an *"appalling vista,"* he said. But 11 years later he admitted he was wrong, saying the West Midland detectives had *"let us all down"*.

## The Guildford 4

Picture by Hugh Russell







I am the advocate: not the judge

I wasn't there



The hypothetical person asking the question

*‘how can you act for someone who is Guilty ‘... “ how can you act for that abuser ?’*

has assumed the alleged “abuser “ IS an abuser.

The competent barrister should assume no such thing, but

- objectively assesses the evidence on either side, fight the case based on their clients instructions,
- do their level best to disprove the fallacy behind the question
- AND
- let the court decide.

## The overwhelming case: CCTV, social media, eye witnesses, a unimpeachable victim account?

- We advise our clients on the strengths of the case against them
- We give honest advice on whether they are likely to be believed.
- We act on our instructions from the client, whatever they may be.
- We adhere to strict rules of law and ethics, and we cannot knowingly mislead the Court.
- We can test the evidence that makes out the allegation but we cannot assert a positive case of innocence
- If a client tells us that he or she has committed the offence in question, then we cannot allow him or her to give evidence of his or her innocence under oath otherwise we would be complicit in their perjury.
- But ultimately, it is not for us to make a judgement on their guilt or innocence.
- That is what the Courts are there for



Secret barrister's interview and answer to the question: **what do you do if you're having to defend someone that you're pretty sure is guilty?**

*Quite simply, defend them to the best of my ability. My job isn't to make a judgment on whether my client is guilty - that's for the jury. If he tells me he's guilty, that's a different matter - I cannot mislead the court, so can't stand up and say, "He didn't do X" if he's told me that he did. But if he says "I didn't do X", then my job is to advise him of the strength of the prosecution evidence and the likely outcome of a trial, and if he still says that the 50 witnesses, DNA experts and crystalline CCTV footage have all got it wrong, **I put on my wig and go into battle for him. Because he may, contrary to how it appears, be innocent.***

<https://www.shortlist.com/news/the-secret-barrister-interview/349916>

'Eye-opening, damning and hilarious'  
Tim Shipman, author of *Fall Out* and *All Out War*



# The **SECRET** Barrister

Stories of the Law  
and How It's Broken



More wine?

<https://grapefriend.files.wordpress.com/2014/04/photo-32.jpg?w=610&h=344>

### Dinner party question no 3

*How can you work in a system where there's one law for the rich and another for the poor?*



## How can 'Mr Loophole' defend David Beckham when he knows he is guilty?



- No dispute that he was driving a Bentley at 59 MPH in a 40 MPH speed limit zone
- Beckham's successful defence was the technical one that a Notice of Intended Prosecution (a legal requirement for a successful conviction) was served outside the 14 day period that the law requires. *"A person **shall not** be convicted ...."*
- In this case it wasn't :
- No service within 14 days: No conviction.



With thanks to Matthew Scott of [“Barrister Blogger”](http://barristerblogger.com/2018/09/06/how-can-mr-loop-hole-defend-david-beckham-when-he-knows-he-is-guilty/)

<http://barristerblogger.com/2018/09/06/how-can-mr-loop-hole-defend-david-beckham-when-he-knows-he-is-guilty/>

The rationale of the rule (which has been part of road traffic law for many years) was explained by Donaldson LJ in *Gibson v. Dalton* [1980] RTR 410:

*“... motorists are entitled to have it brought to their attention at a relatively early stage that there is likely to be a prosecution in order that they may recall, and, it may be, record the facts as they occurred at the time.”*

But because of the is worded, a NIP is not like that. The offence took place on January 23<sup>rd</sup> 2018, so the NIP had to be served by February 6<sup>th</sup>. In fact, although it was dated February 2<sup>nd</sup>, according to Mr Freeman it was not received by Bentley until February 7<sup>th</sup>, that is 15 days after the offence. Note the unambiguous way the statute “*A person **shall not** be convicted ....*”

No service within 14 days, no conviction.



*‘Certainly he is doing nothing professionally improper by advising Mr Beckham of a defence that may be available to him. Indeed, it would be professional misconduct not to tell Mr Beckham about it,*

*Nor is there anything immoral or improper about running such a technical defence, if that is what the client demands. It is not for lawyers to pick and choose which laws to apply. And there is a bigger point here: it is by constantly testing and arguing the limits of individual laws that the rule of law is upheld.*

*But despite this, there is no shame in a lawyer honestly using the law to protect his client from the consequences of his crimes.*



Nick Freeman became known as Mr Loophole after getting a number of high profile clients of motoring charges CREDIT: PA





*Just when you thought it was all so simple ?.....*







### Dinner party Question no 4

*What do you do in a (family) case if you know they are guilty....because they've told you they are?*



The Conduct Rules : a reminder.....

**You and the court (C1) : You must observe your duty to the Court in the administration of justice**

You and your client (C2) : You must act in the best interests of each client

Behaving ethically (C3) : You must act with honesty and integrity

**You must protect your clients confidentiality (C6)**



What to do .....? We advise :

- Our role is to represent our client and to present our client's case to the best of our ability.
- We have a duty of “full and frank” disclosure in family proceedings which imposes a **duty** to disclose all material that affects the welfare of the child.
- We cannot conduct a trial, or to continue to represent them, whilst withholding or concealing relevant information from the other parties and the court.
- The duty of confidentiality which we owe to our client may be overridden where permitted by law.

In **Re L (Police Investigation: Privilege) [1996] 2 FLR 731** the House of Lords decided that litigation privilege does not apply in care proceedings. Lord Jauncey of Tullichettle, with whom the majority agreed, was of the view that *care proceedings are non-adversarial in nature*.

*Litigation privilege has no place, therefore, in relation to reports based on the papers disclosed in such proceedings and obtained from a third party within them. Accordingly all such reports must routinely be disclosed and served within proceedings;* as should communications from any party with court appointed experts.



**In family cases we have additional obligations** that our criminal brethren don't need to shoulder because the court is making a decision that has, at its heart, the welfare of a child and is not determining the guilt or innocence of a defendant that might lead to their imprisonment

**We can't withhold back evidence that's relevant to the welfare of the child**

We can't hold back negative experts report

Unfavourable material may be provided in the form of instructions given in conference, or may be contained within documents generated for the purposes of family proceedings in which counsel is instructed e.g. witness proofs.

**ITS COMPLICATED !**

**You must not**  
*knowingly* or  
*recklessly* mislead  
or attempt to  
*mislead* the court.





Sometimes the client seeks to withhold information which is likely to be relevant to the court in determining the child's welfare, and may even be detrimental to the child if withheld.

An admission

A threat towards other family members.

A threat to subvert the courts decision

A threat to abscond with a child

A threat to a witness or co respondent

An undisclosed relationship with someone that relates to risk



*"It is a duty owed to the court both by the parties and by legal representatives to give full and frank disclosure in ancillary relief applications and also in respect of children "that whilst their barrister has a duty to present their case to the best of his or her ability, their barrister has a higher duty to the court to disclose relevant material to the court even if that disclosure is not in the interests of the client*

**(Family Proceedings: Case Management) [1995] 1 WLR 332** Sir Stephen Brown P set out the principle of disclosure in family proceedings as follows quoting (per Wall J in *Re DH (a minor)* (child abuse) at 704/C) with approval



An admission/a threat : what to do? other than ring The Ethics board obviously!!!!

ADVISE (recorded) that:

- Full disclosure of relevant material will result in a fairer assessment of the child's welfare and will assist the court in arriving at the best possible outcome for the child (usually their child).
- Withheld relevant information would almost invariably emerge during cross-examination or further investigation ( PI / Social media) : that will have a devastating impact on credibility
- A barrister cannot mislead the court in any way.
- **Where unfavourable information is withheld on the grounds of privilege against self-incrimination, a barrister may be obliged to withdraw at a later stage if the client continues to withhold that unfavourable material in oral evidence (where no such privilege can be claimed )**

## Privilege against self-incrimination

The privilege against self-incrimination may arise in respect of the disclosure of information which is likely to lead to a danger of self-incrimination by the client or his/her spouse or civil partner (see **Rank Film Distributors Ltd v Video Information Centre [1982] AC 380, 416C, 419F).**

The privilege against self-incrimination may permit the withholding of information and non-co-operation with the court's investigation which would otherwise be required in accordance with the duty of full and frank disclosure which arises in care proceedings.

However, the privilege does not excuse the client from giving evidence on any matter or entitle the client to refuse to answer any question put to him in the course of his giving evidence (Children Act 1989, s.98(1)).



As Wall J said in **A Chief Constable v A County Council [2002] EWHC 2198 (Fam)** at [96]:

*"A lawyer whose client admits child abuse in a conversation covered by legal professional privilege is placed in a very difficult position. Lawyers have a professional duty not to mislead the court, and plainly cannot conduct the parent's case in a manner which is inconsistent with any admission made to them.*

*However lawyers cannot, without the consent of their clients, breach or waive the privilege. Thus although lawyers may advise their clients to be open and honest with the court, they are also entitled, without breaching professional standards, to advise parents in care proceedings that, subject to section 98(1) of the Children Act 1989, they are not bound to co-operate with the court's investigation.*

*They should, however, in my judgment, advise their clients that anything they say to an expert witness in the context of the latter's investigations, is protected by section 98(2) of the 1989 Act."*

**The duty of confidentiality** and "the defence of just cause and excuse".

Core Duty 6 : We must protect the confidentiality of each client's affairs, except for such disclosures as are required or permitted by law or to which the client gives informed consent.

This exception would apply where the law specifically requires or authorises the disclosure of the information in question notwithstanding the duty of confidentiality.

The exception may also apply where disclosure is in the **public interest and, in proceedings for breach of confidence, it is referred to as "the defence of just cause and excuse"**. A balancing exercise is required in the application of the public interest exception.



## Imminent threats of death or serious injury.

One difficult area concerns threats made by your client against others: for example, a threat to do harm to a child if your client does not get custody.

You should first satisfy yourself that the threat is genuine. If you are satisfied that it is, then you will need to consider what, if any, disclosure you are entitled to make.

The exception may also apply where disclosure is in the public interest and, in proceedings for breach of confidence, it is referred to as "the defence of just cause and excuse".

# THE UPSHOT ?

Subject to questions of privilege.....

- Where a client does not accept the merits of disclosing unhelpful material to the other parties and the court, and does not consent to disclosure as advised, you may be obliged to withdraw from the case and return your instructions.
- You must not continue to act for a client knowing that information exists which ought to have been disclosed in accordance with the duty of full and frank disclosure but which, in breach of that duty, has not been disclosed because your client has refused to permit its disclosure.
- *Any information which reveals a serious risk to the welfare of a child, or serious harm to a third party, may have to be disclosed even if your client dis-instructs you.*



The Bar Council considers that the law permits you to do so where you have reasonable grounds for believing that there is a significant risk of death or serious injury to an identifiable person or persons, at least (or particularly) if the risk is imminent.

In such circumstances, the Bar Council considers that you may – and, given the seriousness (and potentially the imminence) required to meet the threshold for disclosure, should – report the threat to the police or other appropriate agency (such as the local authority social services department) able to take appropriate protective measures.

Any disclosure made without your client's consent should, however, be no wider (both as regards the information disclosed and the person(s) to whom it is disclosed) than is reasonably necessary in the circumstances in order for the threatened victim(s) to be protected.







## Dinner party question 5

*In conference : You do believe me don't you ?*



With thanks to Lucy Reed 'A Blog From the Family Bar' aka 'Pink Tape',  
Barrister, St Johns Chambers, 22.4.18

*'It's not my job to believe you – here's why'*

*And so I tell my clients - If I believe you I can't be objective.*

*If I can't be objective I can't give you sound advice –*

*I can't help you make the call to change course before it's too late, and I can't argue your case to it's best if we do get to trial.*

*Of course my advice is not always negative - but I can't confidently tell you your case is likely to be a winner unless I've given it a good old shake first.*

*Instruct a lawyer who believes you if you like - pay someone to tell you what you want to hear - but far better to have advice from someone who will tell it like it is before you get to the gunfight at the (not) OK Corral and find there are no bullets in your gun.'*



**Your barrister isn't your friend**

**Your barrister is your armour to your defence and the first to charge as your attack**

As Lucy says

*'Don't look for a lawyer who believes you; look for a lawyer who will make the judge/jury believe you.'*

*Lawyers who "believe", who identify too much or become a bit too closely aligned with their clients may not spot the holes in their case, may not spot the train hurtling towards them, may not adequately advise their client of risk or prepare their client for the possibility of an adverse outcome. '*

**I will never say 'I believe you / your child, your partner' : that doesn't mean I won't fight your case with every intention of winning every conceivable point (and more)**

Lucy has this covered too ....

*' Believing a client **or stating such belief** to a client has no useful function. These may be well received, soothing words, but..... our duties to act in the best interests of each client require more. **It is part of a lawyer's job to tell you the hard to hear stuff** (privately of course). And then, to go out there into the courtroom and fight the best possible fight even if the advice has been that the case is weak. That advice might include that (based on experience), the lawyer doesn't think the judge or jury are likely to believe the explanation given. **To a client that can sound a lot like a lawyer who doesn't believe, but it is the hallmark of a lawyer doing their job and honestly telling you what they think may happen.** '*

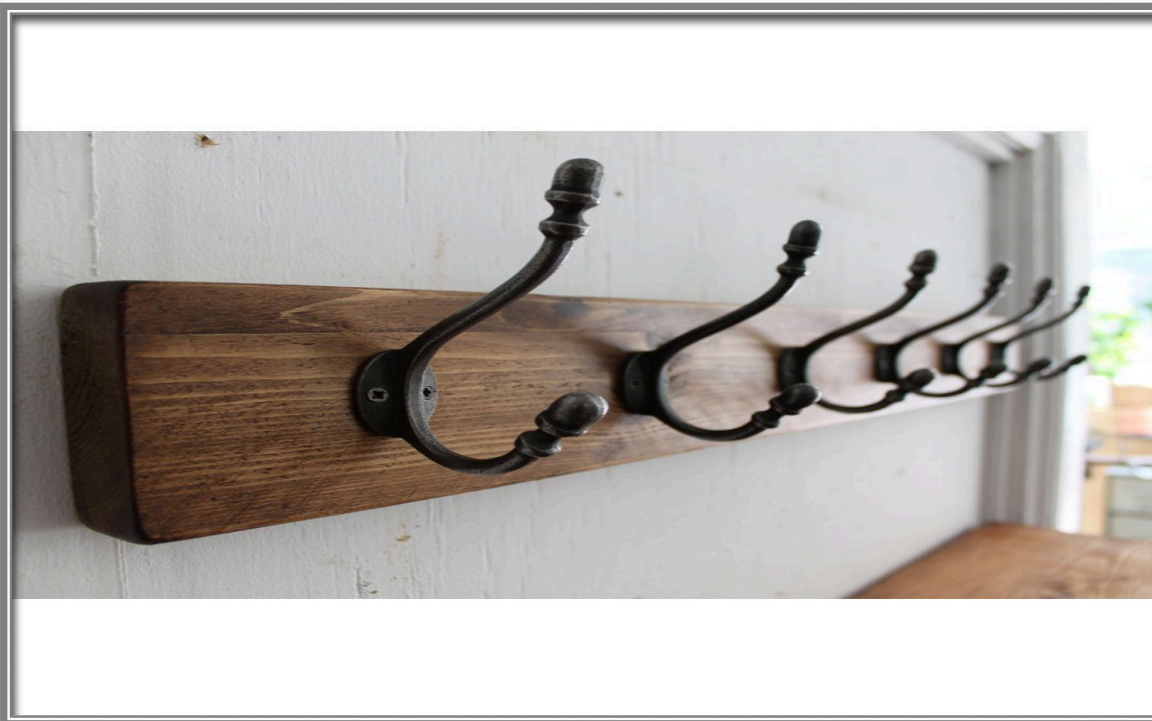


We aren't alone in this: calling on Gordon Exall, Barrister, Zenith Chambers, Leeds, & Hardwicke, London

*BELIEVING YOUR CLIENTS: CAN THEY AFFORD IT? THE  
COMPLEX ISSUE OF "TRUTH" AND "LIES": WHAT DOES THE  
LAWYER DO?*

*There are dangers, often unexpressed and unexplored, in a lawyer believing an account without questioning.*

*Indeed it is possible to go further and say that a client who has a lawyer who automatically believes everything they say has a fool for a lawyer.'*



Time to get your coats , the cab is waiting , the dinner  
party is over

*After all the questions you've asked me: this is what I'd  
like to volunteer for the road*



Being a barrister and being entrusted with trying to make a difference to the case, that for you, may change the direction of your life, is a privilege and a burden

Never think that is not respected

Never think we don't strive to live by the highest of ethical and professional standards

Never think your case is forgotten when you leave out conference room or the court building

There's many a reason why stress and burn out happen at the Bar





**Judge who sent Ellie Butler back to the father who killed her REFUSES to apologise saying merely 'It's not personal'**

## Ben Butler jailed for life for murdering six-year-old daughter Ellie

**Girl's grandfather demands full inquiry into why high court judge reunited her with Butler less than a year before she died**

Ben Butler and his daughter Ellie. Her grandfather, Neal Gray, had warned the high court judge who reunited Butler and Ellie she would have '*blood on your hands*'.





© Murray Sanders

## Accused of killing our son... then robbed of our new-born daughter: The couple wrongly blamed for shaking their rickets-stricken baby to death relive their horrific ordeal

- Rohan Wray and Chana Al-Alas endured murder trial over death of Jayden
- Police and doctors adamant they had beaten him and damaged his brain
- But cleared after post-mortem revealed he had bone-weakening disease
- Then forced to face another hearing to win back custody of daughter Jayda
- 'We've had no apologies from those who caused us this unforgivable agony'

By [SUE REID FOR THE MAIL ON SUNDAY](#)

PUBLISHED: 01:34, 24 April 2012 | UPDATED: 01:37, 24 April 2012



The tough dinner party question is not *‘how do you represent someone you know is guilty’*, but *‘how do you protect someone who might be innocent’*.

Because despite the cuts to legal aid, the closures of courts and the disclosure scandals, I believe in our justice system.

I believe that every person is entitled to a fair trial and to proper representation – if you were accused, if you faced losing your liberty to the State or your child to care wouldn't you demand the same?



Dear dinner party guests,

There are good reasons why a barrister won't "believe" you.

What we believe in is the trial process - it is imperfect, and it doesn't always get to the truth (whatever that is) but it is the best approximation we've got.

*The cabs pulled up at home.*

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## Next lecture

Thursday, 29 November 2018, 7:00PM - 8:00PM [Barnard's Inn Hall](#)

### *Sexual Harassment at the Bar*

2018 saw a seismic change in the willingness of women to speak out about sexual abuse they had suffered at work and the willingness of others to hear and act on it. This year (2018) saw the creation of a #metoo movement called 'Behind the Gown' created by a group of barristers committed to tackling sexual harassment at the Bar. This lecture frankly confronts the anecdotal evidence and suggests ways in which we can learn from it.

**PLEASE NOTE: 7PM START TIME**