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Ethics In and Out of the Court Room

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Opening premise: Barristers have a Code of Ethics that governs the working relationship with the client, the court and colleagues but ethical dilemmas in practice are rarely straightforward. If you are a barrister you will be asked, at some point in your career, 'how *can you live with yourself and act for someone who is guilty?*' This is just one of the ethical questions the Bar has grappled with and responded to for decades. Do we make value judgements about our client's culpability? Does that affect how hard we fight their case? Why the answer to those questions should emphatically be 'no'. Other answers to ethical questions concerning our role with the client and the court are less straightforward. This lectures teases out some of the most common issues, but every instance depends on its facts and the major value of these notes may well be that it directs the reader to the resources that might help you when limited time to make a 'call' on what to do demands swift analysis and action in response to an ethical and professional crisis. Please read these notes with this caveat in mind: this subject is a complex and becomes all the more so when you have to grapple with the ethics in action in your professional working life. I know it doesn't begin to cover the range of ethical and professional decisions I have had to make in my career. This lecture is intended as an educational overview: not an advice.

This lecture deal with

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

I make it plain that I am talking about the Code of Conduct that applies to Barristers. Those readers who seek guidance on the roles, responsibilities and duties of my colleague solicitors are advised to look to The Law Society for guidance.

The pivotal role of Ethics in Practice: the training starts early

The Inns of Court School of Law (the college that delivers education on the Barristers qualifying exams), the Inns themselves (Middle, Inner, Gray's, Lincoln's), the Bar Standards Board and the Bar Council: all of these institutions have crafted education programmes that train our budding barristers on the role of ethics in the job they aspire to practice in.

Aspiring or newly qualified barristers will be expected to participate in training on ethics at all stages of their professional development: By way of illustration:

- **Vocational Stage (Bar Practitioner Training Programme):** Ethics & Professional Conduct is part of the syllabus. One of three areas which are centrally examined by the Bar Standards Board.
- **Vocational Stage: Qualifying** Sessions will have an element of professional ethics.
- **Application for interview for a pupillage:** nearly every chambers will pose an ethical question during a pupillage interview. Be prepared.

- **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:** 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.

Or must is be assumed that the importance of ethics in practice becomes of less significance the more senior one becomes.

In 2017 Andrew Walker QC, then Vice Chair of The Bar, in Counsel Magazine[1] set out fresh imperatives and initiatives for barristers to enhance their knowledge of ethics in practice precisely because it was and is a core strength of our profession

As he said

> '*No-one would deny the importance of our high ethical standards. They are part of our responsibility to society as advocates and lawyers, supporting the rule of law. They are integral to what it means to be a professional lawyer, and a crucial part of what society expects of us in return for being allowed to conduct activities – particularly exercising rights of audience – that others cannot. They are also an important differentiator – and selling point – domestically and internationally, when comparing ourselves with the world of business and commerce, and with many other jurisdictions in which the effective rule of law remains an aspiration rather than a reality.'*

Andrew Walker QC heralded a reinvigorated approach to ethics reminding us that

> *'Our ethical instincts benefit from discussion, reinforcement and challenge. We can all do more to make the best of the change from what was ostensibly a rule-based Code of Conduct to a less prescriptive one, with Core Duties and Guidance as well. The new approach is unfamiliar, but enables us to identify what underpins our duties and instincts, how best to analyse ethical dilemmas, and the reasons why (and within what limits) ethical conclusions may differ.'*

He was right. Every case we do is different because the clients and the fact of the facts are unique. A rule-based approach will offer potential solutions but cannot dictate answers: resolution of the issue requires the application of discretion and judgment by the barrister concerned.

As a consequence of this refreshed approach to ethics and its application we have a Code of Conduct, supported by Guidance, drawn up by The Bar Standards Board (May 2018; version 3.3)[2].

In addition to the written word we have an invaluable pro bono 'phone in' service to deal with ethical questions from practitioners[3]. It is a hugely important advisory pool. It is part of the Bar Council Ethical Service (EES) rand receives on average around **500 calls a month** in addition to responding to written enquiries by email[4].

The EES is overseen by the Bar Council's Ethics Committee and on the front line we have 26 barrister members across all practice areas; **14 QCs and 12 juniors**. That is in addition to the staff that make the system work and accessible.

Those matters which can't be resolved by a phone call or e mail, i.e. the most serious and complex enquiries, can be escalated to Ethics Committee members with relevant expertise. One shouldn't single out members for praise for the work they do but Rachel Langdale QC must be credited for setting the pace for this work: she is the Chair

[1] https://www.counselmagazine.co.uk/articles/the-only-way-ethics
[2] Find it online at : www.barstandardsboard.org.uk/regulatory-requirements/bsb-handbook
[3] Tel no: 0207 611 1307
[4] Ethics@BarCouncil.org.uk

of the Ethics Committee. Much of which is to be found in this lecture takes as its framework the training that Rachel has developed for delivery across the UK to the Bar.

Points to note when one approaches the EES for advice:

- The EES cannot give legal advice, or bind the BSB (Bar Standard Board)
- 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.

But, and this is significant

- Ultimately, the barrister will need to use their own professional judgement to determine the most appropriate course of action (rC20). Responsibility rests with the individual, not the advisory body

Resources to Access

- Code enforcement date 06.01.14
- Current edition of Handbook in force from May 2018 (version 3.3). **It is your bible**
- Find it online at : www.barstandardsboard.org.uk/regulatory-requirements/bsb-handbook
- Ethics@BarCouncil.org.uk
- Tel no: 0207 611 1307

In summary: you will want to be familiar with The Code of Conduct, with its Core Duties (CD), Conduct Rules and Rules applying to particular groups. I'm going to focus of the CDs and the related Guidance, specifically CDs 1-6. This lecture I not intended to be an exhaustive guide the Handbook.

The 10 Core Duties (CD's)

CD1: You must observe your duty to the Court in the administration of justice
CD2: You must act in the best interests of each client
CD3: You must act with honesty and integrity
CD4: You must maintain your independence
CD5: 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
CD6: You must keep the affairs of each client confidential
CD7: You must provide a competent standard of work and service to each client
CD8: You must not discriminate unlawfully against any person
CD9: You must be open and co-operative with your regulators
CD10: 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.

Take heed that: CD1 overrides any other core duty if and to the extent any other CD is inconsistent with it.

The inter relationship between CD 1, 2, 3 and 6 call for particular attention. For family practitioners they often call up the most difficult ethical dilemma because CD 1 (duty to the Court) can override CD 6 (duty of confidentiality to the client) in part because our courts are concerned with the welfare of the child which is its paramount consideration, and we, as officers of the court, have a duty to serve the Court in the administration of Justice. That can give rise to some very challenging conflicts of interest.

The Codes identify sound statements of principal, but in real life their application to the individual case calls for nuanced judgment: and sometimes there is no an obvious answer for the practitioner: which explains why, as I've said, the Bar Council Ethical Service (EES) receives on average around **500 calls a month** and also responds to written enquiries by email.

Application of the Code in practice

Preparation for trial

Written evidence and pleadings

A cornerstone of fairness in proceedings and the application of CD1 *(you must observe your duty to the court in the administration of justice)* is that the case as pleaded must not be a figment of the barristers imagination: we act on instructions and you have CD 3 and 4 to respect *(you must act with honesty and integrity (3) and you must maintain your independence (4)*).

You can't make evidence up or 'gild the lily'.

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

- Any statement of fact or contention which is not supported by your client or by your instructions;
- Any contention which you do not consider to be **properly arguable**;
- 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;
- (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

Oral Evidence

You can't 'pay' for positive 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;

You must not coach a witness of influence their answers: in plain terms

- 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*, which can sometimes happen if the client is part heard and matters of significance including new evidence has come to light or if practical, arrangements for the care of a child over the interregnum need to be discussed.

The Interplay Between Your Duty to The Court, The Client and to the Principles of Your Profession

Consider the question: *Or 'How can you act for someone who is guilty" or the more nuanced question 'how can you act for someone if you think they are lying?*

CD1: You must observe your duty to the Court in the administration of justice
CD2: You must act in the best interests of each client
CD3: You must act with honesty and integrity
CD4: You must maintain your independence
CD7: You must provide a competent standard of work and service to each client
CD8: You must not discriminate unlawfully against any person

Applying the codes the answer can be answered (and should be answered) unequivocally and emphatically. I can and I do.

In simple terms: <u>your belief is irrelevant</u>**:** whether in terms of your client's guilt or innocence; truthfulness of deceit.

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.

There is a distinction between your *'belief'* and your '*knowledge'*. Your belief is irrelevant, as is your view about the desirability of the case of the client.

You aren't the judge, you weren't a witness, and you don't have any direct knowledge of the primary facts. It is not for you to prejudge what a judge or jury may make of the case. Your duty is to represent your client and act on their instructions (however foolish or loathsome they may be as long as you have given advice so the client can make an informed decision as to how they want you to present their case).

Belief is a subjective response. Your belief may be influenced by the facts of the case, the apparent strength of the evidence, the nature of the case or the client. None of those are relevant to your role as the instructed barrister.

This principle lies at the heart of The Cab Rank Rule. Were it disrespected those who face the most serious consequences for the crimes or acts they have <u>allegedly</u> committed would be deprived of representation.

In layman's terms: The cab-rank rule is the obligation of a barrister to accept any work in a field in which they profess themselves competent to practice, at a court at which they normally appear, and at their usual rates. The rule derives its name from the tradition by which a hackney carriage driver at the head of a queue of taxi cabs is supposed to take the first passenger requesting a ride.

For a look at it in more detail have a read of The Bar Standards Paper **<u>"The Cab Rank Rule: A Fresh View"</u>**[5] . That paper pointed out the the analogy is imperfect – 'a passenger must also take the first cab on the rank, whereas that is no part of the Cab Rank Rule for the Bar. Thus a client, through his solicitor, is at liberty to instruct whomever he wishes. The Cab Rank Rule is to prevent any unjustified restrictions on the client's choice of barrister. This distinction illustrates a fundamental point about the Cab Rank Rule, namely that its purpose is to protect the interests of clients, not the interests of barristers

The BSB review concluded that

> *'The Cab Rank Rule is both important and relevant, and ought to be retained as a rule. It plays an important role in ensuring that even unpopular clients can secure representation by an advocate of their choice. It also brings significant benefits to the public in specialist areas, such as commercial and regulatory law, where its absence would create a Real risk that major players (e.g. banks) could demand exclusivity, depriving potential opponents of much of the talent available at the Bar. Neither we nor others have been able to identify any real disadvantages or positive harm caused by the Cab Rank Rule. The Cab Rank Rule has attracted strong judicial approval (with no dissenting judicial opinion), and is widely replicated across other common law jurisdictions. '*

In professional terms the Cab Rank rule finds expression in RC 29: as a member of the experience and are not professionally embarrassed in some way, then <u>once you are instructed you are obliged to act.</u>

RC 29: 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;

[5] https://www.barstandardsboard.org.uk/media/1460590/bsb_-_cab_rank_rule_paper_28_2_13_v6__final_.pdf

- Any belief or opinion which you may have formed as to the character, reputation, cause, conduct, guilt or innocence of the client.

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[6].

As the BSB review pointed out:

> *'The original justification for the Cab Rank Rule is well-known and generally accepted as a worthwhile and valuable goal – to promote access to justice by ensuring that legal representation is available to all who need or want it, including the odious client or unpopular cause.'*

The Cab Rank Rule ensures that everyone is equal before the law and entitled to representation of their choice. This last point is important. The Cab Rank Rule does not merely ensure that everyone is able to get ***a*** lawyer, but rather ***the*** lawyer of their choice.

There is a related point which is often overlooked: but wasn't by the BSB. Namely that the Cab Rank Rule also provides the barrister with a form of immunity that enables him to represent odious clients without incurring the wrath of the community or a social stigma.
As it points out:

> *'The existence of the Cab Rank Rule and the media and public's awareness of it (albeit that there is room for improvement on this score) distances the barrister from the views and conduct of his client. When a barrister or law student is asked at a social outing (as we all have been) "would you represent a murderer?", he or she is able to answer that he would do so because it would be his professional duty and it is important for the proper functioning of the legal system that everyone – even an odious murderer – is able to obtain competent legal representation. This in turns helps to ensure that the primary objective of the rule is achieved.'*

There are limited exceptions to RC 29, for which we look at Rule 30.

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…

Having accepted the instruction you can only return a case in very limited circumstances

Returning Instructions

rC26 - You may cease to act on a matter on which you are instructed and return your instructions if:
- Your professional conduct is being called into question; or
- The client consents; or

[6] *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**)***

- You are a self-employed barrister and despite all reasonable efforts to prevent it, a hearing becomes fixed for a date on which you have already entered in your professional diary that you will not be available; or illness, injury, pregnancy, childbirth a bereavement or a similar matter makes you unable reasonably to perform the service required in the instructions (note: this doesn't say 'on holiday' and if your clerk has booked you in for work in error because you are booked away. That still not an effective 'out'. You were offered as 'available' and have been booked, you can only be release with the consent of your client); or
- You are unavoidably required to attend on Jury Service (i.e. a public duty exemption).

Ground for return **does not include** the nature of the case or the clients defence to the allegations made.

The Codes set out not just what you are obliged to do but how you are obliged to do it.

As explained: 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

Moreover, your duty is to

- Promote **fearlessly** and by all proper and lawful means the client's best interests.
- do so **without regard to your own interests or to any consequences** to you
- do so **without regard to the consequences to any other person** (whether to your professional client, employer or to any other person)
- You must not permit your professional client, employer or any other person to limit your discretion as to how the interests of the client can best be served; and

rC17 – Your duty to act in the best interests of each client (CD2) includes a duty to consider whether the client's best interests are served by different representation, and if so, to advise the client to that effect.

Your duty to comply with rC17 may require you to advise your client that in their best interests they should be represented by:

- A different advocate or legal representative, whether more senior or more junior than you, or of different experience from yours;
- More than one advocate or legal representative;
- Fewer advocates or legal representatives than have been instructed; or
- In the case where you are acting through a professional client, different solicitors.

In other words, your duty to your client takes precedence over your duty to your instructing solicitor, your colleague barrister, your private reservations and your own professional standing.

Let's go back to the classic dinner party question *'how can you act for someone who is guilty… How can you act for that paedophile/baby murderer?'*

That question presupposes that the person you are acting on behalf of IS an abuser. The competent barrister should assume no such thing. What s/he is required to do is to:

- objectively assesses the evidence on either side
- fight the case based on their client's instructions
- do their level best to disprove the fallacy behind the question

AND

- Let the court decide culpability.

The overwhelming case requires no less of defence than the one where you can see flaws in and gleefully anticipate how satisfied and superior you will feel in court as you pick them out and dispatch them. I have in mind the united expert opinion evident against your client, the CCTV, social media, eye witnesses, and the unsavoury life your client leads. But written evidence served on you is not the same as the case as the evidence may turn out after being tested in cross examination. You can't start the trial half-heartedly, then spot a gap and see a window opening and then change track and apply to start matters afresh. You can't ask for a witness to be recalled on the basis that 'I didn't try very hard for that one as it seemed like a lost cause'.

The Secret Barrister's answer to the question**: '*what do you do if you're having to defend someone that you're pretty sure is guilty?'*** is as good as any I've heard:

> *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*[7].

What of the less noble defence? Your client is guilty, he's told you that, you've told the court that but there's a technical defence to the guilt being found proven and punishable by law.

How can that come about? In my lecture I've talked about the very recent case of David Beckham's (none) conviction for speeding. I shan't rehearse that in these notes because it will become old news very soon. But the point of principle to be taken from it is that Mr Beckham's solicitor, Mr Freeman (colloquially known as 'Mr Loophole') secured a legal victory for his client because the rules set down by statute to lay the basis of charge and conviction had not been followed in practice: mandatory steps and timetable had not been observed.

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."*

In Mr Beckham's case, he had not been served with the notice of intended prosecution (NIP) in 14 days and he could prove that as he had the registered receipt of the NIP. Mr Freeman exploited that deficiency. The offence took place on January 23rd 2018, so the NIP had to be served by February 6th. In fact, it was not received until February 7th that is 15 days after the offence. The statute is drafted in unambiguous terms "*A person* ***shall not*** *be convicted …."* If no service within 14 days.

With thanks to the ever witty and on point Mathew Scott who pointed out that Mr Freeman

> *'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, once he had noticed it, and although I certainly don't want to belittle Mr Freeman's forensic skills, checking that the Notice of Intended Prosecution had been served within 14 days would be something that any reasonably competent criminal solicitor would do.'*

Mr Scott continues:

> *'It is not for lawyers to pick and choose which laws to apply. Law consists of innumerable "technicalities" many of which taken individually may seem pointless, unnecessary, arbitrary, badly worded, inconsistent or plain daft. There's at least an arguable case for saying the law on NIPs is all six of those things. But the rule of law, upon which, it is worth remembering, civilised life depends, means that laws passed by Parliament must be followed by the courts.*

[7] https://www.shortlist.com/news/the-secret-barrister-interview/349916

There is no shame in a lawyer honestly using the law to protect his client from the consequences of his crimes. It is far more important that there is confidence in the rule of law than that every criminal should inevitably be punished.'

The particular challenges faced by a family barrister balancing their duty to the court and the client: acquisition of information adverse to the client's case.

The Family Bar faces particular challenges in balancing and respecting the following duties:

- 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
- You and ethics (C3): You must act with honesty and integrity
- You and confidentiality (C6): you must protect your client's confidentiality

(Bearing in mind that CD 1 trumps all other duties if there is a clash between them)

In terms of the interplay of our duties:

- Our role is to represent our client and to present our client's case to the best of our ability.
- We have a responsibility to facilitate "full and frank" disclosure in family proceedings which imposes a **duty on** us to disclose all material that affects the welfare of the child.
- We cannot conduct a trial, or to continue to represent a client, 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.

By way of illustration: adverse experts reports can't be held back from the parties or the court: we can't 'shop around' for a positive report and sit on the negative one.

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.

If we become aware our clients have contacted an expert outside of the Part 25 Procedure, classically making contact with an overseas expert by e mail having provided information to them protected by Children Act confidentiality, then we have a duty to tell the parties and the court of that conduct and to produce all communications (and the product of them) as a result of it despite the fact that unauthorised disclosure of confidential evidence may place our client in contempt.

Care/Crime Overlap: Disclosure; A Caveat

If the expert report in question was not prepared for the purposes of the care proceedings but for the purposes of criminal proceedings, legal professional privilege may still arise. **In S County Council v B [2000] 2 FLR 161**, Charles J held (at 174C-E) that the father could claim legal professional privilege in care proceedings in respect of his communications with medical experts who had been instructed solely for the purposes of criminal proceedings. Further, the privilege is absolute (see p173B-D) and the duty of full and frank disclosure which arises in care proceedings does not override that privilege (see 183E-185H).

The client's privilege against self-incrimination in family proceedings and its limitations

Because:

- the court is making a decision that has, at its heart, the welfare of a child we can't withhold evidence that's relevant to the welfare of the child and

- pursuant to **Re L** above, Family proceedings are deemed to be non-adversarial family

Barristers face particular ethical challenges when they come into possession of information adverse to the client's case.

That material may give us *'knowledge'* (in contradiction to the *'belief'* I talked of earlier) of material facts and we, as barristers must not with hold it if to do so would *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 court's decision
- A threat to abscond with a child
- A threat to a witness or co respondent
- An undisclosed relationship with someone who is relevant to risk

Unfavourable material may be provided in the form of instructions given in conference, information relayed through instruction, contained in the client's social media that you have access to, or may be contained within documents generated for the purposes of family proceedings in which counsel is instructed e.g. draft statements

In **Re L** above, Lord Jauncey stated that his decision in relation to litigation privilege "… *does not of course affect privilege arising between solicitor and client*". In **S County Council v B (above),** Charles J decided (at 179E-F) that Re L preserved legal professional privilege in respect of communications between solicitor and client, and draft statements and discussions as to the relevant facts between solicitor and client for the purposes of proceedings under the Children Act 1989: **see also Wall J in A Chief Constable v A County Council [2002] EWHC 2198 (Fam) at [96].** Accordingly, legal professional privilege applies to communications with the client in family proceedings (see also Lord Nicholls, in **Re L** on this point). That means that you may have an issue where professional ethics challenge professional privilege.

In that situation you may well have to resolve a clash between:

- your duty to the court
- your duty to protect and respect the client's confidentiality,
- your honesty,
- your independence.

Your dilemma brings into play complex issues of legal professional privilege and litigation privilege (which are hugely complex areas and outside the scope of this lecture).

I advise reading **'Disclosure of unhelpful material in Family Proceedings' issued by The Professional Practice Committee**[8] published July 15, reviewed May 16.

The Statutory Provision: S 98 Children Act 1989

Section 98(1) is one of several statutory provisions which suspends self-incrimination privilege in specified contexts. In this case it renders parents compellable in care proceedings notwithstanding the provision of s 14 of the Civil Evidence Act 1968 (the 1968 Act) (which protects witnesses in civil proceedings from self-incrimination).

[8] https://www.barcouncil.org.uk/media/439961/disclosure_of_unhelpful_material_in_family_proceedings__children_.pdf

It provides that a statement or admission made in the proceedings is not admissible in evidence against the maker (or his spouse/civil partner) in criminal proceedings, except in the case of a perjury charge. As both judges and commentators have observed, however, s 98(2) offers nothing like a guarantee that parents who respond to encouragement or demands of frankness will be insulated against consequences in the criminal forum.

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."*

Given that the CPS tracks the progress of our care cases, which may well precede the criminal prosecution and are often used to inform the decision to charge and prosecute, clients must be told that what they say in the family court (and they are compellable witnesses) is likely to find its way into a judgment, which will be disclosed to the police upon their application. Given that the client can't refuse to answer any question in care proceedings on the ground that it may incriminate him/her, they are effectively only deferring the time when that adverse information comes into the hands of the prosecutorial authorities, not ring fencing it from them.

And so if you come into possession of information, such as an admission, contrary to your client's stated and public case, then you may become professionally embarrassed and have to withdraw if, in evidence on oath, it is not volunteered by the client.

In October 2013 the **Protocol and Good Practice Model – disclosure of information in cases of alleged child abuse and linked criminal and care directions hearings** was issued[9]. It devotes an entire section to the correct approach to disclosure of information from family proceedings for the purposes of criminal investigation or prosecution: outside the scope of this lecture I strongly recommend it be read as a companion to it

The clash between the duty of confidentiality and "the defence of just cause and excuse" to breach of it.

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

[9] https://www.cps.gov.uk/sites/default/files/documents/publications/third_party_protocol_2013.pdf

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 residence.

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 UPSHOT?

What to do if you receive invited and adverse information by or about the client contrary to their stated case or relevant to the welfare of the child?

You advise:

- that whilst you, as their barrister, have a duty to present their case to the best of your ability, you have 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 [10]
- You will advise the client that the material is relevant to the case and should be disclosed
- That full disclosure of relevant material will result in a fair and proper assessment of the child's welfare and will assist the court in arriving at the best possible outcome for the child (usually their child).
- That full and frank disclosure is more likely to result in parents' and/or carers' needs being properly identified, which in turn will have a positive impact upon the child if they are considered able to care for the child.
- That if relevant information were to be withheld (such as a new relationship with an unsuitable partner), then almost invariably it would emerge during cross-examination or further investigation within the proceedings, and the client might then be heavily criticised and his or her case damaged because of his or her failure to be honest and open with the court at the earliest possible stage.
- That in acting for a client you cannot mislead the court in any way. Thus where unfavourable information is withheld on the grounds of privilege against self-incrimination, you 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 claimed3) and in so doing directly or indirectly misleads the court.
- (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.

The Ethical Dilemma May Not End with Withdrawal

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 <u>even if</u> 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 <u>may</u> – and, given the seriousness (and potentially the imminence) required to meet the threshold for disclosure, <u>should</u> – report the threat to the police or other appropriate agency (such as the local authority social services department) able to take appropriate protective measures.

[10] (Per Wall J in Re DH (a minor) (child abuse) at 704/C).

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.

In **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

"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

Each case will turn on its facts. Contact the EES if in doubt as to what to do, speak to your head of chambers and to senior colleagues. But whatever advice you seek out the responsibility to make a decision on what to do rests solely on your shoulders. This may help:

In **A Local Authority v PG [2014] EWHC 63** (FAM) Keehan J dealt with case management issues arising within care proceedings where there were concurrent criminal proceedings following the alleged murder of the mother by the father. In that case the father had been advised by his criminal lawyers not to comply with the direction for filing a response to threshold until the defence statement had been served within the criminal proceedings. Although that was consistent with general practice in cases of linked care and criminal proceedings, and arose in part from an absence of guidance, the court said it was wholly unacceptable in light of the provisions of s 98. The court gave guidance, which made clear that, whilst a legal practitioner may advise a client of the provisions and import of s 98 and the ability of the police or co-accused to make applications for disclosure into the criminal proceedings of it, is wholly inappropriate – and potentially a contempt of court – for a legal practitioner to advise a client not to comply with an order made in care proceedings or to advise a client not to give a full, accurate and comprehensive response to findings sought:

> *"A. when a party to care proceedings is ordered to file and serve a response to threshold and/or to file and serve a narrative statement, that party must comply with that order and must do so by the date set out in the order;*
>
> *B. the importance of parents or interveners giving a frank, honest and full account of relevant events and matters cannot be overstated. It is a vital and central component of the family justice system;*
>
> *C. a legal practitioner is entitled to advise a client of:*
>
> *(i) The provisions and import of s.98 of the 1989 and*
> *(ii) The ability of the police and/or a co-accused to make application for disclosure into the criminal proceedings of statements, reports and documents filed in the care proceedings*
> *D. it is wholly inappropriate and potentially a contempt of court, however, for a legal practitioner to advise a client not to comply with an order made in care proceedings;*
> *E. it is wholly inappropriate and potentially a contempt of court for a legal practitioner to advise a client not to give a full, accurate and comprehensive response to the findings of fact sought by a local authority in the threshold criteria document. This applies both where that advice is limited in time, egg until after a criminal defence statement has been filed and served and, worse still, the advice is given not to make such a response at all."*

Keehan J continued with some examples:

> *"Where a child who is in care has been abducted and a recovery order has been made requiring a person with information as to the child's whereabouts to disclose it, the privilege against incrimination does not excuse compliance with the requirement (Children Act 1989, s.50 (11). Similarly, under the Family Law Act 1986 section 33(2), or where a Location Order is made in the High Court, in a private law context, the privilege against incrimination does not excuse non-disclosure.*

In applications for financial remedies, the current position appears to be that privilege against self-incrimination does not apply to disclosure of information and documents: ***Regina v K (A) [2009] EWCA Crim 1640; [2010] QB 343.*** *In that case the Court of Appeal held that, although the Family Proceedings Rules 1991 (under which K was required to make "full, frank and clear disclosure" of his financial circumstances) do not expressly abrogate the privilege against self-incrimination, they must have been intended to do so "since the court could not discharge the duty imposed on it by section 25 [of the Matrimonial Causes Act 1973] unless the parties were required to disclose all relevant information, even if tending to incriminate them"; see It may however be that this decision is distinguishable in children proceedings where the relevant legislation does make express provision for the abrogation of privilege against self-incrimination and, particularly, the extent to which the privilege is abrogated; see, for example, s.98(1) Children Act 1989 and paragraph 30 above.*

To consider how the clash between the codes can play out in practice I would thoroughly recommend that you call up this paper https://www.barcouncil.org.uk/media/42898/faq_s.pdf which was produced by the Bar Council's Professional Practice Committee to set out questions that are often asked of the ethics committee and provides some suggested answers concerning the Code of Conduct and related professional matters.

This is an illustrative Q/An example taken from it:

Q. Yesterday, my client instructed me that he wished to plead guilty to an offence. We went carefully through all the defences available to him and he signed instructions saying he wished to plead guilty. Today he has written to the Judge indicating that he wishes to change his plea because he was under pressure from others to plead guilty. Am I in difficulties?

A. Probably. Your duty is to ensure that the court is not knowingly or recklessly misled. In this situation, it would be appropriate to ask the client (a) why this was not raised with you originally and (b) why he chose to write to the judge about it. It may be that he can provide an explanation for the sudden change which satisfies you that you will be able to represent him without being concerned about misleading the court. If he does not provide a satisfactory explanation then you should withdraw. If the explanation is satisfactory then it would be sensible to explore why he thought it right to approach the judge rather than deal with this through his advisers. The action suggests a lack of confidence in you which, of itself, might be reason either for withdrawal or for him to seek to instruct new counsel.

Q 'I am instructed in a residence and contact case to represent the father. In conference, the father has told me that if he does not get custody of the child he will make sure that no one else will. I am very concerned by what he might do to the child. However, he has told me that I must not mention what he said to anyone else. Am I able to breach client confidentiality and report the matter to the proper authorities?

Answer: The view of the Professional Practice Committee is that you should first satisfy yourself that the threat is genuine. If you are satisfied, paragraph 702 of the Code of Conduct allows a barrister to breach his duty of confidentiality "as permitted by law"; broadly, the law permits you to do so where there is a danger of harm to a third party. In such circumstances a barrister should report the threat to the police or other agency (such as the local authority social services department) able to take appropriate protective measures. This subject is also covered in more detail in the guidance document: Disclosure of Unhelpful Material Disclosed to Counsel in Family Proceedings. If you are in any doubt you should contact the Ethical Enquiries Line.

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explore why he thought it right to approach the judge rather than deal with this through his advisers. The action suggests a lack of confidence in you which, of itself, might be reason either for withdrawal or for him to seek to instruct new counsel.

I have endeavoured to deal with issues arising between counsel and client, but this lecture would not be complete without mentioning counsel to counsel discussion.

Counsel to counsel discussions: a bubble of confidentiality? No

Take heed of 'counsel to counsel 'discussions: they are not confidential, nor ring fenced re onward transmission of the information conveyed and received.

Q. I acted for the wife in a family matter. During counsel to counsel discussions, I told opposing counsel that I had advised against a particular application being made. My instructing solicitors have now received a letter from the husband's solicitors making a claim for wasted costs in respect of the application on the basis that it was against my advice. It is clear that opposing counsel has revealed matters which I discussed with him in confidence. Is there anything I can do about it?

A. As the Code of Conduct does not recognise counsel to counsel confidentiality, there is nothing that can be done about it. Moreover, counsel is bound by his duty to act in his client's best interests and if he learns something during the course of discussions with his opposite number which would aid his client's case or which it is in the client's best interests to know, then he is duty bound to reveal it. Barristers should bear this in mind when entering into counsel to counsel discussions.

Here's another:

Q. In the course of a conversation with opposing Counsel, I discovered information to which I would not normally have been privy which could affect the way I conduct my lay client's case. What should I do?

A. the Code of Conduct does not recognise "Counsel to Counsel" confidentiality. If you learn something which will affect your lay client's case and which it is in his best interests to know, you should tell him and adjust the way in which you handle the case accordingly. There is a common, but mistaken, belief that communications between Counsels are automatically subject to "Counsel to Counsel" confidentiality, with the result that you cannot tell your client anything which opposing Counsel told you unless you have opposing Counsel's permission. The true position is that communications between Counsels are no different from any other communication between the lawyers for opposing parties. It sometimes happens that opposing Counsel offers to speak to you on a "Counsel to Counsel" basis, or otherwise indicates that he wants you to agree not to tell your client what opposing Counsel is about to tell you. You should not agree to do this without your lay client's permission. You will have to advise your client whether it is in his best interests for you to be given information which you cannot communicate to him. You will need to consider the practical implications of receiving information on this basis. In some cases, it may lead to your becoming professionally embarrassed. (See **R v. B. & G. [2004] 1 WLR 2932.** for an example of a case in which counsel considered that they were unable to continue once they became aware of relevant information which the Judge ordered them not to communicate to their clients.)

Concluding remarks

Being a barrister and being entrusted with trying to make a difference to a case that for the client may change the direction of their life is a privilege and a burden.

Never think that duty is not respected.

Never think we don't strive to live by the highest ethical and professional standards. As Samuel Johnson said: *'integrity without knowledge is weak and useless, and knowledge without integrity is dangerous and dreadful'.*

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

There's many a reason why stress leads to burn out and departure from the Bar.

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 and I, and my colleagues strive to make a difference for those who don't have the skills and voice to do so themselves.

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?

Gresham Professor of Law
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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.