



Expressing personal opinions to/in the media

Purpose:	To assist barristers in deciding whether and when they may express a personal opinion to or in the media, with a particular focus on comments about anticipated or current proceedings in which they expect to act, are acting, or have acted (a situation in which personal comments to the media were previously prohibited)
Scope of application:	All barristers
Issued by:	The Ethics Committee
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Status and effect:	Please see the important notice at end of this document. This is not "guidance" for the purposes of the BSB Handbook I6.4.

Introduction

1. At one time, the Code of Conduct prohibited a barrister expressing personal opinions to the media or making public statements on any anticipated or current proceedings in which the barrister in question was briefed, or expected to appear, or had appeared as an advocate.
2. The Bar Standards Board (BSB) subsequently amended the Code of Conduct to remove this particular prohibition, on the basis that it was an unjustifiable restriction on the barrister's freedom of expression. A barrister may therefore now express his or her personal opinion in the media, or make a public statement, even in relation to such anticipated or current proceedings.
3. Barristers have always been free to speak to the media in respect of concluded litigation in which they acted, on matters in which they have not and will not be professionally involved; and more generally.
4. But any exercise of these freedoms remains (as it has always been) subject to more general professional duties: including the core duties to act in the best interests of each client (CD2), to act with honesty and integrity (CD3), to maintain independence (CD4), to keep the affairs of clients and former clients confidential (CD6), and not to bring the Bar or the administration of justice into disrepute (CD5). Particular care is needed in observing those

professional duties where you do expect to appear or have been briefed to appear in relation to anticipated or ongoing proceedings. (Some of the risks involved in speaking to the media are diminished where a dispute or piece of litigation has reached a final resolution with no prospect of further appeal.)

5. The focus of this document is on when and how you might exercise (or should decline to exercise) your entitlement to comment on anticipated or current proceedings in which you expect to appear, have been instructed to appear, or have appeared as an advocate.

The Code, and Code Guidance

6. Code Rule rC8, which appears in section C2 of the Handbook, headed 'Behaving Ethically' provides that

"You must not do anything which could reasonably be seen by the public to undermine your honesty, integrity (CD3) and independence (CD4)."

7. Additional guidance, specifically on media comment, is given at gC22:

"Media comment

The ethical obligations that apply in relation to your professional practice generally continue to apply in relation to media comment. In particular, barristers should be aware of the following:

- *Client's best interests: Core Duty 2 and Rules C15.1-2 require a barrister to promote fearlessly and by all proper and lawful means the lay client's best interests and to do so without regard to their own interests.*
- *Independence: Core Duties 3 and 4 provide that you must not permit your absolute independence, integrity and freedom from external pressures to be compromised.*
- *Trust and confidence: Core Duty 5 provides that 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.*
- *Confidentiality: Core Duty 6 and Rule C15.5 require you to preserve the confidentiality of your lay client's affairs and you must not undermine this unless permitted to do so by law or with the express consent of the lay client."*

The BSB no longer provides any additional Guidance on this matter (although it used to, and the matter is understood to be under review). (There is however specific BSB Code Guidance on the use by barristers of social media: see below.)

8. gC 22 highlights the need to act responsibly, to exercise professional judgement, and to have regard to the full range of your professional duties, in deciding whether to make any personal comment or express any personal opinion, particularly on facts or issues arising in current or anticipated proceedings in which you have been, are, or expect to be involved. The same applies when considering how far any personal comment or opinion can properly go.

Particular care must be exercised if the proceedings, or your comments, are likely to attract high levels of media attention.

No duty to express personal opinions

9. The Ethics Committee considers that you can be under no professional obligation to express a personal view to the media in relation to any anticipated or on-going litigation. You also cannot be obliged to agree to do so. Communicating with the media is not a legal service: see the definition of “legal services” in Part 6 of the Handbook, which expressly excludes “*communicating to or in the press or other media*”. Nor is communicating with the press or other media part of your professional duties as a barrister, e.g. to act in the best interests of any of your clients. Accordingly, you do not have a duty to comply with a request from a client to express a personal view, without your agreement.

10. You are unlikely to be insured against any consequences of expressing a personal opinion to the media. The Bar Mutual Terms of Cover¹ use the same definition of “legal services” as appears in Part 6 of the Handbook, and that definition is central to the definition of “Insured Practice”. The implications of expressing your personal views in a public statement or to the media so may therefore be personal as well as professional.

11. If you are under pressure from your client to express a personal opinion, you should discuss with him the potential consequences of doing so. You might also find it helpful to explain the risks and potential downsides of your doing so. Those might, for example, include you being asked questions on which you have no instructions, or to which you will be unable to give a full or adequate answer, or any answer (e.g. due to considerations of privilege or confidentiality). An embarrassing (or even dangerous) ‘no comment’ may be the only available response to a difficult question.

Suggested considerations

12. If you are considering expressing a personal opinion in relation to anticipated or on-going litigation, then you must give specific consideration to gC22. The limitations that your professional duties may place upon you in the particular case will depend on the context: the suggestions made here are merely examples of practical issues that you might need to consider.

13. You should remember that, as an advocate, your role is to represent your client, and to present your client’s case, before a court or tribunal in a professional manner: it is not to act as your client’s mouthpiece, or to identify yourself personally with your client’s cause. This is reflected in the BSB Handbook. In particular (in this context), CD2 (duty to act in your client’s best interests) is subject not only to CD 1 (your duty to the court) but also to CDs 3, 4 and 8 (to act honestly and with integrity, to maintain your independence, and not to discriminate): see rC4 and rC16.

¹https://www.barmutual.co.uk/fileadmin/uploads/barmutual/2020_documents/Bar_Mutual_Terms_of_Cover_August_2020.pdf

14. Typically, if you are considering making a personal comment or statement, you will need at least to consider the following:

- a. the nature and type of proceedings;
- b. the stage those proceedings have reached;
- c. the nature of your proposed comments;
- d. what information you are permitted to convey;
- e. whether you need the consent of your client; and
- f. the likelihood of prejudice, to you or your client, arising from your comments.

15. In that connection, you should bear in mind that:

- a. Your duty to protect the confidentiality of your client's affairs under CD6 means that the client's informed consent will be needed if you intend to refer to any matters which are confidential to your client (Rule C15.5).
- b. An expression of a personal opinion on a case may inadvertently reveal aspects of your advice to your client in that case, or information imparted to you by your client in confidence, or other material which is subject to legal professional privilege.
- c. Your comments might refer inadvertently to information or documents which are not in the public domain, or might indicate their existence. This may be a particular risk in criminal cases, in which rulings are made on a rolling basis to establish whether or not particular facts or documents are in the public domain.

16. You should also give careful consideration to the manner and circumstances in which you will be expressing personal opinions. For example, you will have much greater control over what you say in a considered, written statement than you will in the course of an interview (especially a live interview). Your lack of control over an interview may also cause you to be put in a difficult position: for example, if the questions go beyond the limits of what you can properly say, and you thus find yourself forced to refuse to give a substantive answer. (On the other hand a brief written statement, e.g. one conveyed through social media, may fail to convey the tone intended, or the context in which your comments are made.)

17. There may be potential risks of personal liability in contempt, defamation or malicious falsehood, both for you, and also for your client if you purport to speak on your client's behalf. You should not be making comments of your own unless you can be sure that they will not place your client at any risk in this regard. If liability arises, your own or your clients', you are unlikely to be insured in respect of it.

18. You should also be wary of creating any perception or expectation that managing the media during litigation is any part of the service you provide as a barrister. Most members of the Bar have no training or experience in public relations or communications management, and such activities are unlikely to be covered by your professional indemnity insurance.

19. Different (and in some respects greater) risks exist with the expansion of media to include social media, such as blogs, social networking sites and Twitter. In particular, expressions of opinion via these forms of media are usually communicated instantaneously, may be short, blunt or unduly simplistic, can be readily and widely disseminated, and may be difficult, if not impossible, to retract. The BSB had published Guidance on its website on the use of social media by barristers². The International Bar Association ('IBA') has also adopted guidelines to assist legal professionals when using social media. Those guidelines, entitled 'International Principles on Social Media Conduct for the Legal Profession', may be found on the [IBA website](#). They do not, of course, qualify your duties under the Code (including to follow BSB Guidance). However, you may find them helpful in considering the risks which may accompany the expression of personal opinions in social media and in similar contexts.

Practical aspects

20. The following paragraphs may assist you to identify situations in which expressing a personal opinion in relation to anticipated or on-going litigation might breach your Core Duties and/or specific rules in the BSB Handbook, or put you in other difficulties.

21. If you express a personal opinion, then it must be your true, honestly-held, personal opinion.

22. In many situations you will need your client's informed consent to the use of confidential information, and this consent will probably need to be widely drawn, if you are going to be able to say anything of substance. While a client may give informed consent for positive comments to be made, that consent is unlikely to extend to the expression of less positive views which you might hold, based on confidential information you have received. This may make it difficult for you to express your true opinions accurately or comprehensively.

23. If your personal opinion accords fully with your client's case or position in all respects, then your client might have no objection to you expressing that opinion in the media. If it does not – and, most obviously, if at least part of what you truly think is contrary to some aspect of your client's case or position – then your client is likely to have strong objections to you doing so. Even if you would not be in breach of any duties in expressing your opinion, your client's objections may still be legitimate, and there is a clear potential for conflict and complaint. Unless there is a very good reason to justify your expression of comments or opinions less than fully supportive of your client (which will be rare), you should not express a personal opinion if the likely result would be to harm your professional relationship with your client, or to undermine your client's trust and confidence in you.

24. A personal opinion which is not fully supportive of your client's case also has the potential to cause damage to your client's best interests, and may make it difficult for you subsequently to present your client's case to the best of your ability and in accordance with your professional duties.

² <https://www.barstandardsboard.org.uk/uploads/assets/c7cea537-53f8-42a8-9f6d8ef1832a7db9/Social-Media.pdf>

25. Speaking to the media about a current case may also call your motives for doing so into question. You are bound by CD2 and rC15 to promote your clients' best interests without regard to your own interests or those of any other person, and expressing a personal view may call into question whose interests you are serving. Even if this is not what you intend, you run the risk of appearing to promote your own interests over those of your client (e.g. by seeking to distance yourself from an undesirable client), or of using your clients' cases to promote your own views and interests more generally.

26. Developments in a case may also lead you to change your personal opinions about some aspect of that case. If you have already expressed a personal opinion, you may be unable (permissibly) to express a different view, or to 'correct' your earlier comments. This could create unanticipated difficulties, and may damage your independence and also your credibility, thus bringing discredit to the profession.

27. Even if all advocates in a case express personal opinions to the media during the currency of proceedings, there is the potential for all of them to be in breach of their professional duties, not least through damaging the confidence which the public places in the independence and objectivity of the profession and in the fairness and impartiality of the administration of justice. The expression of personal opinions should not be used as a litigation tactic. Such behaviour could be seen as usurping or undermining the proper role of the jury or judge in finding the facts on the basis of admissible evidence, and in reaching decisions as to the law based on the arguments. Even if you do not intend this, there is a risk of you being seen as conducting or encouraging 'trial by media', or of trying to secure an unfair advantage in the litigation by swaying public opinion.

28. You should not express personal opinions in such a way as to create professional difficulties for other lawyers in a case. For example, you should not express a personal (albeit honest) view that an opposing litigant's case is weak, and challenge your opponent to disagree, particularly if you suspect that your opponent's personal opinion is the same as yours. Similarly, you should not express in public personal opinions which may be used by others to place opposing lawyers in unwarranted professional difficulties.

29. You should not express a personal opinion with the aim or effect of undermining your obligations under the 'cab rank' rule i.e. one which will deter particular clients or types of client from instructing you in future. Even if this is not your aim, regularly expressing personal views about your on-going cases to the media may well create a perception that you are not independent. It could also have wider ramifications, e.g. for your duty not to discriminate; and if your independence is undermined, or perceived to be, then this may damage the trust that the public places in the profession. For example, if you regularly endorse the position of particular categories of client in litigation, you may appear to be so wedded to a particular cause that the public will find it hard to see you as capable of considering a different position, of advising on a case objectively and with an independent mind, or of complying with your duties as an independent advocate.

30. Personal views expressed to the media in connection with a criminal trial in which you are involved may come to the attention of witnesses and jurors. Those views may be given particular and undue weight, particularly if you are continuing to act as counsel in the case. Expressing such views could undermine the fairness of the trial, and could involve an abuse

of your role as an advocate. More generally, this type of behaviour could undermine both the administration of justice and your independence, and bring the profession into disrepute.

Important Notice

This document has been prepared by the Bar Council to assist barristers on matters of professional conduct and ethics. **It is not “guidance” for the purposes of the BSB Handbook I6.4, and neither the BSB nor a disciplinary tribunal nor the Legal Ombudsman is bound by any views or advice expressed in it.** It does not comprise – and cannot be relied on as giving – legal advice. It has been prepared in good faith, but neither the Bar Council nor any of the individuals responsible for or involved in its preparation accept any responsibility or liability for anything done in reliance on it. For fuller information as to the status and effect of this document, please see [here](#).