



Recordings of Court Hearings & Conferences

Purpose:	To advise barristers of their professional obligations in relation to this subject
Scope of application:	All practising barristers
Issued by:	The Ethics Committee
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Status and effect:	Please see the notice at end of this document. This is not “guidance” for the purposes of the BSB Handbook I6.4.

Introduction:

1. Clients and third parties wanting to record hearings, conferences and other interactions with counsel has increased in recent years, particularly in light of the Covid19 pandemic and the increased use of remote Court hearings. The purpose of this guidance note is to highlight the professional and practical issues that arise.

Court Hearings:

2. As a general rule it is a contempt of court and/or a criminal offence to record court proceedings, including remote hearings (at least without the express permission of the court). Various pieces of legislation give rise to this:
 - 2.1. It is a contempt of court to make sound recordings in a court (criminal or civil) or tribunal, or publish such recordings; Contempt of Court Act 1981 s.9.
 - 2.2. It is a criminal offence to take a photograph “*in court*” (criminal or civil) of a judge, juror, witness or party, or publish the same; Criminal Justice Act 1925 s.41. For these purposes a photograph is taken “*in court*” if “*it is taken or made in the court–room or in the building or in the precincts of the building in which the court is held ...*” or is of the person “*whilst he is entering or leaving*” the court or building; s. 41(2)(c). This extends to video recording, and presumably therefore to television broadcasting; see *R v Loveridge* [2001] EWC Crim and Arlidge, Eady & Smith on Contempt (5th edition) para 10-216. This applies to partially remote hearings as well as fully remote hearings (see

Gubarev v Orbis Intelligence Ltd [2020] EWHC 2167 (QB); [2020] 4 WLR 122). It also extends to video hearings; see *R. (Good Law Project Ltd) v SoS for Health and Care* [2021] EWHC 346 (Admin).

- 2.3. There are specific offenses under the Courts Act 2003 of recording (both sounds and/or images) various types of remote hearings or associated events. So, unless the hearing falls within one of the exemptions provided for by s. 32 of the Crime and Courts Act 2013, it is an offence to record:
 - 2.3.1. A hearing being broadcast under the Courts Act 2003 s.85A; see s.85B(1).
 - 2.3.2. A person who is viewing or listening to such a s.85A broadcast; s.85B.
 - 2.3.3. A live video or audio “link” (i.e. a remote or partially remote hearing involving video or audio participation; s.85C(1).
 - 2.3.4. A person who is viewing or listening to such a live video or audio “link”; s.85C(2).
3. Counsel should also familiarise themselves with the relevant procedural rules on recordings. See in particular:
 - 3.1. Criminal Procedure Rules part 5 (rule 5.5 - recordings and transcription of criminal proceedings in the Crown Court) and part 6 (rule 6.9 - sound recording and electronic communication).
 - 3.2. Civil Procedure Rules part 39.9 (recording and transcription of proceedings).
 - 3.3. Family Procedure Rules part 27.9 (2) (recording, transcription and informal notes of proceedings).
4. If counsel discovers that a client has made an unauthorised recording of a court proceeding, then they will have to consider whether there is a duty to report this to the court. This will depend on all the circumstances of the case, including whether and if so how the client is intending to use the recording in the future. In considering the issue, counsel should note in particular:
 - 4.1. There is in general no duty on a barrister to report historic crimes or contempts, and in general the duty of confidentiality (CD6) positively prevents doing so.
 - 4.2. However, that duty of confidentiality is subject to the overriding duty to the court in the administration of justice under CD1. If the recording (and use of it) will not have an impact on the administration of justice hereafter, then disclosure is probably not permitted or required. If it will, or might, impact on the administration of justice, counsel must consider making disclosure to the court with their client’s permission, and if the client refuses to give permission may have to withdraw from the case under rC25.2.
 - 4.3. As a practical matter counsel is under a duty not to mislead the court pursuant to rC3. If there is a chance the question of the recording will arise during proceedings, then

counsel may wish to pre-emptively avoid being in a position where the two duties conflict, putting them in a position of professional embarrassment.

- 4.4. If the client is intending to publish the recording, i.e. intends to commit a crime in the future, then again counsel must consider making disclosure to the court with their client's permission, and if the client refuses to give permission may have to withdraw from the case under rC25.2. In extreme situations (for example, involving publication of material involving children and sexual abuse) it might be necessary to inform the court even if instructions have been withdrawn, pursuant to CD1 – see, for example, the Bar Council's Guidance on [Disclosure of Unhelpful Material in Family Proceedings \(Children\)](#).
5. If counsel discovers that the other side, or a third party to the proceedings, has made an unauthorised recording then equivalent issues arise, albeit without the issues of client confidentiality. In almost all cases it will also be incumbent on counsel to inform their own instructing solicitors or client of the recording.
6. Counsel have on occasion been asked by judges to record proceedings. Whilst in principle possible (as the Court can give permission under the various statutes for recordings to be made) counsel should treat such requests with extreme caution. It is generally the Courts Service's task to record hearings, and they are obligated to do so in many cases – see procedure rules referred to above. Furthermore the practical difficulties which can arise should not be underestimated, including the potential for simple mechanical failure, or allegations of tampering, leaving counsel in difficulties as a potential witness (or even respondent) in the proceedings. It might even leave counsel open to claims of personal liability. If counsel still intends to comply with such a request, it is recommended that they obtain express directions beforehand as to how the recording is to be made, stored and copied to the court and other parties – as well as an express indemnity in case the recording mechanism fails in any way. Counsel should also consider the data protection aspects of such a situation – including who might be a data processor or controller in respect of the recording, and the obligations in relation to processing, retention and deletion thereafter.
7. The following client questions can also arise in practice:
 - 7.1. **What if I just take a video on my phone or my laptop during the remote hearing?** This is still a criminal offence under the 1925 and 2003 Acts, and possibly still a contempt of court under the 1981 Act.
 - 7.2. **What if I just take a photo or video on my phone of the other side in a conference room at court, or even outside court before or after the hearing?** This is still a criminal offence under the 1925 Act.
 - 7.3. **What if I record what happens before the judge joins the video hearing or after the judge leaves it?** This is very likely still a criminal offence under the 2003 Act, because of the definition of "link" not being limited to whilst the judge is present.

7.4. **Well I did make a recording and then I made a transcript from that recording. Can't you use that and not make me pay for a transcript?** Given that there are mechanisms in place to obtain official transcripts from official recordings of hearings, and given your overriding duty under CD1 to the Court in the administration of justice, it would very probably be a breach of this duty to bypass the official routes and use the product of a criminal offence in the alternative simply to save your client some money.

Conferences with clients:

8. Clients increasingly ask to record conferences (both in person and remote) with counsel.
9. There is in general no obligation on counsel to agree to being recorded, and you are entitled to refuse. However, one exception to this may arise under the Equality Act 2010. If the client has a protected characteristic (e.g. is suffering from a disability, including mental impairment) then the duty to make reasonable adjustments (including the provision of an auxiliary aid) may require counsel to permit a recording to be made.
10. On the other hand, there may be many reasons for it: the client may have some relevant physical or mental condition (see above), they may be nervous and not confident of their ability to understand or to remember, they may not be confident of their ability to take adequate notes, or they may wish to discuss the details of the conference with someone else afterwards.
11. There may also be situations where a recording is positively to be encouraged. For example, under PD57AC (Trial Witness Statements in the Business and Property Courts) the Statement of Best Practice annexed to that PD states at paragraph 3.11(3) that an interview to obtain evidence from a witness (which can include the client) "should be recorded as fully and accurately as possible, by contemporaneous note or other durable record, dated and retained by the legal representatives" – such durable record possibly being by video or audio recording.
12. Therefore in general before agreeing or refusing to allowing a recording you should consider, and if appropriate discuss with the client, preferably in the presence of your instructing professional, why the request is made and whether it is the right thing to do.
13. If, but only if, you conclude that the request suggests that the client lacks confidence in you, it may be appropriate for you to suggest that the client consider instructing somebody else. In extreme situations such a breakdown of trust and confidence might amount to "*some other substantial reason*" under rC26.8 and permit return of instructions, subject to rules rC27 to rC29.
14. If you do allow a recording to be made, you should consider requiring a full copy of that recording for yourself and your instructing solicitors. If you do take or obtain such a recording, you must also consider your ongoing duties as a data controller under the GDPR, including when and in what circumstances you retain and destroy any recording; see [General Data Protection Regulation Bar Council Guide](#).

15. Counsel should also not record their clients without their knowledge and permission. Not only can it give rise to data protection issues, particularly if that recording is then misused, but it may well be in breach of the Core Duties CD2 and CD3 – to act in the best interests of the client, and to act with honesty and integrity.

Important Notice

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