



## Expressing personal opinions to/in the media

<b>Purpose:</b>	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 have acted or expect to act (a situation in which personal comments to the media were previously prohibited)
<b>Scope of application:</b>	All barristers
<b>Issued by:</b>	The Ethics Committee
<b>First issued:</b>	October 2014
<b>Last reviewed:</b>	November 2016
<b>Status and effect:</b>	<b>Please see the important notice at end of this document. This is not "guidance" for the purposes of the BSB Handbook I6.4.</b>

### Introduction

1. At one time, the 8<sup>th</sup> edition of the Code of Conduct contained a prohibition on expressing personal opinions to the media and in public statements in the following terms:

*"709.1 A barrister must not in relation to any anticipated or current proceedings or mediation in which he is briefed or expects to appear or has appeared as an advocate express a personal opinion to the press or other media or in any other public statement upon the facts or issues arising in the proceedings.*

*709.2 Paragraph 709.1 shall not prevent the expression of such an opinion on an issue in an educational or academic context."*

2. As its wording made clear, this did not impose a general ban on expressing personal views and opinions to the media. The prohibition related only to comment on anticipated or current proceedings in which the barrister in question was briefed or expected to appear or had appeared as an advocate.

3. The Bar Standards Board (BSB) amended the 8<sup>th</sup> edition of the Code of Conduct to remove this prohibition, and there is no such provision in the BSB Handbook.

4. The removal of this prohibition does not affect your entitlement to speak to the media as you could before, both generally and in respect of concluded litigation in which you acted, but this remains (as it has always been) subject to your general professional duties (such as to keep the affairs of your clients and former clients confidential, and not to bring the Bar or the

administration of justice into disrepute). Those duties are likely to give rise to considerations similar to those dealt with here, although some of the risks may be reduced if 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 are briefed or expect to appear or have appeared as an advocate.

6. In place of the prohibition, in April 2013 the BSB published Media Comment [guidance](#) on this issue, which can be found on their website. This still applies under the BSB Handbook.

7. The BSB took as a starting point the proposition that freedom of expression necessitated abolition of the former prohibition, but recognised that the special position of the Bar means that barristers' duties will continue to limit the circumstances in which it will be appropriate for them to express personal comments in those situations in which it was previously forbidden.

8. The BSB Handbook also deals with this subject at gC22. The importance of this issue is highlighted by the fact that gC22 appears in section C2 of the Handbook, headed 'Behaving Ethically'. That guidance reads as follows:

*"The former prohibition on **practising barristers** expressing a personal opinion in the media in relation to any future or current proceedings in which they are briefed has been removed. **Practising barristers** must, nevertheless, ensure that any comment they make does not undermine, and is not reasonably seen as undermining, their independence. Furthermore, any such comment must not bring the profession, nor any other barrister into disrepute."*

9. This highlights the need to act responsibly, to exercise your professional judgement, and to have regard to the full range of your professional duties, in deciding whether to make a personal comment or express a personal opinion on the 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. This will be especially important if the proceedings or your comments are likely to attract high levels of media attention.

### **No duty to express personal opinions**

10. The Ethics Committee considers that you are under no obligation to express a personal view to the media in relation to anticipated or on-going litigation. In their view, this is not a legal service, nor is it part of your duties as a barrister to act in the best interests of any of your clients. Accordingly, in their view, you do not have a duty to comply with a request from a client to do so, without your agreement.

11. You may well not be insured against any consequences of expressing a personal opinion to the media. The implications of doing so may therefore be personal as well as professional.

12. If you are under pressure to express a personal opinion, you might find it helpful to explain to your client 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 privilege or confidentiality); making an embarrassing (or even dangerous) 'no comment' the only available response. You might also wish to remind your client that you are trained to act as an advocate in court, and not to make statements to the media.

### **Suggested considerations**

13. If you are considering expressing a personal opinion in relation to anticipated or on-going litigation, then the BSB's April 2013 guidance outlines what it considers to be the primary duties that you must have in mind, namely: the duty to act in your client's best interests, the duty to act independently, the duty to maintain trust and confidence in the profession, and the duty to maintain client confidentiality<sup>i</sup>. The limitations that these duties may place upon you in any particular case will depend on the context: the suggestions made here are merely examples of practical issues that you might need to consider.

14. You should also remember that, as an advocate, your role is to represent your client, and to present your client's case, 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), Core Duty 2 (duty to act in your client's best interests) is subject not only to Core Duty 1 (your duty to the court) but also to Core Duties 3, 4 and 8 (to act honestly and with integrity, to maintain your independence, and not to discriminate): see Rules C4 and C16.

15. Typically, you will need at least to consider the following<sup>ii</sup>:

- 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 arising from your comments.

16. 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 may 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.

17. Revealing information or documents which you cannot properly reveal could place you not only in ethical difficulties but also in legal difficulties, either under the general law or under applicable court rules.

18. You should also give careful consideration to the manner and circumstances in which you are 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 provide a substantive answer. By way of contrast, you may find it more difficult to convey the tone or context in which your comments are made if they are only in writing, particularly if they are brief or are conveyed through social media. You should also bear in mind the likely audience; but also be aware that once you have expressed an opinion about a case, you will lose control over how that opinion that is relayed, portrayed, edited, used or publicised by others, and this could lead to your personal opinion being conveyed to an unintended audience, and/or misrepresented, misconstrued or misused.

19. The BSB guidance also reminds you of the risk of liability in contempt, defamation or malicious falsehood that can arise for you personally, and even for your client if you purport to speak on your client's behalf. You should not be making comments unless you can be sure that your comments will not place your client at any risk in this regard. In addition, if liability arises, then you may well not be insured for any personal liability, or for any liability to your client.

20. You should also be wary of creating a perception or expectation that managing the media during litigation is 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.

21. Different (and in some respects greater) risks may exist with the expansion of media to include "new" or "social" media, such as blogs, social networking sites and Twitter. In particular, expressions of opinion via these more modern forms of media are often instantaneous, may be blunt or unduly simplistic, can be readily and widely disseminated, and may be difficult, if not impossible, to retract.

22. In May 2014, the International Bar Association ('IBA') adopted guidelines to assist legal professions internationally when using social media. The guidelines, entitled 'International Principles on Social Media Conduct for the Legal Profession', may be found on the [IBA website](#). These cover the use of social media more widely (in both the personal and professional spheres), and they do not in any way qualify your duties under the BSB Handbook. 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**

23. 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 to put you in other difficulties.

24. If you express a personal opinion, then that must be your honest personal opinion.

25. In many situations you will need your client's informed consent to the use of confidential information, and this consent will 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 less positive views which you might hold. This may make it difficult for you to express your true opinions accurately or comprehensively.

26. 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 it is contrary to an 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 your duties in expressing your opinion, your client's objections may still be legitimate, and there is a clear potential for conflict and complaint in any event. Unless there is a very good reason to justify the expression of comments 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.

27. 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.

28. Speaking to the media about a current case may also call your motives for doing so into question. You must 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.

29. Developments in a case may lead you 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 not only your independence but also your credibility, thus bringing discredit to the profession.

30. Even if all advocates in a case express personal opinions to the media during the currency of proceedings, there is the potential for all advocates 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 usurp or undermine the proper role of the jury or judge in finding the facts having heard all the admissible evidence, and in reaching decisions as to the law based on the arguments. Even 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.

31. 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 personal opinions which may be used by others to place opposing lawyers in unwarranted professional difficulties.

32. You should not express a personal opinion with the aim of undermining your obligations under the 'cab rank' rule by deterring particular clients or types of client from instructing you in future. Even if this is not your aim, regularly expressing personal views to the media about your on-going cases 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 as such 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 adopting a different position, of advising on a case objectively and with an independent mind, or of complying with your duties as an independent advocate.

33. 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, given that you are or will be acting 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 refer to the professional practice and ethics section of the Bar Council's website [here](#).

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<sup>i</sup> BSB Media Comment Guidance, paragraph 6.

<sup>ii</sup> BSB Media Comment Guidance, paragraph 5.