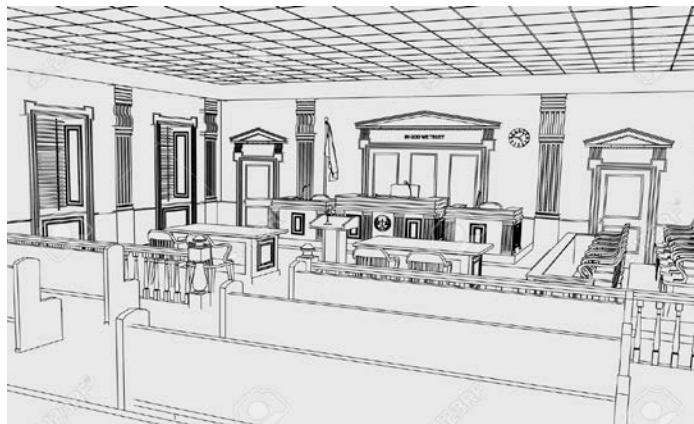


# LEGAL PROFESSIONALS IN THE DIGITAL AND VIDEO AGE

By Mark Segal

With Oksana Tsymbrivska, Liudmyla Gumeniuk,  
Stanislav Batryn, and Leonid Lazebnyi



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## **TABLE OF CONTENTS**

	<b>PAGE</b>
<b>I. INTRODUCTION</b>	1
<b>II. SIXTEEN POINTS CONCERNING THE WORK OF LEGAL PROFESSIONALS IN THE DIGITAL AND VIDEO AGE</b>	2
1. Using video recordings and video dossiers to study other legal professionals	2
2. Using video recordings and video dossiers to improve the performance of legal professionals	2
3. Using video recordings and video dossiers to address malpractice and enforce professional discipline	3
4. Using video recordings and video dossiers to advance the law, practice in courts, legal reforms, and societal interests	3
5. Using video recordings and video dossiers for training legal professionals	4
6. Using video recordings and video dossiers for human resources management	4
7. Using video recordings and video dossiers for legal education in law faculties	5
8. Using video recordings and video dossiers to prepare clients and witnesses	5
9. Using video recordings and video dossiers to prepare for proceedings	6
10. Making video recordings as useful as possible	7
11. Right to access or copy videos prepared by others	7
12. Video recordings as evidence	8
13. How video recording can affect court proceedings	8
14. Privacy rights, security, and the storage and use of video recordings and video dossiers	9
15. Managing video recordings and video dossiers on-line	10
16. Misuse of video recordings and video dossiers	12
<b>III. CONCLUSION</b>	12
<b>IV. APPENDICES</b>	13

## **I. INTRODUCTION**

Modern technology, video cameras, digital information management systems, and social networks are transforming every aspect of our lives. It is completely natural that they should affect the way the courts operate and the way that legal professionals (judges, prosecutors, advocates, and lawyers) perform their work.

The Law of Ukraine “On Ensuring the Right to a Fair Trial” has amended the Law on the Judiciary and Status of Judges to introduce a novel and highly significant change to criminal, civil, and administrative procedure in the courts. Article 11 explicitly authorizes anyone to use portable devices to take photographs, make video recordings, or make audio recordings of any court proceeding, without obtaining permission. Court proceedings can now be recorded, stored, and shared via smart phones, computers, social media, and the internet. There is no need to travel to court or attend in person. Legal professionals can make and use video recordings for a wide range of purposes related to their work. Journalists, civil society organizations, and educational institutions can make and use video recordings to serve their objectives. Video dossiers (collections of videos of individual legal professionals) are being developed and placed on-line. These video dossiers are in effect a virtual profile which can last for years and be accessed from anywhere in the world, and they are beyond the control of any single party. The Open Court Initiative is leading the way and opening the door to many of these developments, through systematic video recording, cataloging, and public outreach throughout Ukraine.

Video recordings can be put to many constructive uses. They can enable citizens to track what their courts are doing through websites, social networks, and other on-line services. They can help legal professionals improve their performance and better serve the interests of their clients. They can promote professionalism and education. They can advance the cause of legal reform by using publicity to bring practice into compliance with the law and international standards, and by stimulating social activism. They can be used to prevent corruption and promote professional discipline. However, video recordings can also be put to unconstructive and even illegal uses, and there are many avenues for abuse. Restrictions might be placed on some uses, since Article 11 also states that “broadcasts of court hearings shall be carried out upon permission of the courts”.

Legal professionals who promptly and fully utilize modern technology and information management facilities will have a distinct advantage over their colleagues and competitors who do not. Legal professionals who continue to work in old fashioned ways will face significant disadvantages. Indeed, they may even be committing malpractice by failing to zealously and fully protect the interests of the state and their clients.

*This paper identifies and discusses sixteen uses and legal/practical issues for video recordings and video dossiers, which arise as part of the transformative process now underway in Ukraine. The objectives are a) to provide ideas about how the court system and the legal profession can use technology and transparency to improve and reform, and b) to raise concerns that should be addressed before they become problems.*

*The order of the sixteen points presented below does not indicate priority or importance.*

*In this paper, the term “legal professionals” includes judges, prosecutors, and advocates. The term “advocate” includes lawyers practicing any kind of law.*

## **II. SIXTEEN POINTS CONCERNING THE WORK OF LEGAL PROFESSIONALS IN THE DIGITAL AND VIDEO AGE**

### **1. Using video recordings and video dossiers to study other legal professionals**

Video dossiers of proceedings, and of legal professionals such as judges, prosecutors, and advocates, are now accessible on-line, and in the possession of an increasing number of governmental bodies, non-governmental institutions and private individuals. This gives legal professionals many new opportunities to study the strategies, tactics, behavior, practices, techniques, gestures, dress, and other characteristics of their colleagues. Advocates have new opportunities to study how judges, prosecutors, and their competitors perform. Prosecutors have new opportunities to study how judges and advocates perform. Judges have new opportunities to study how their colleagues on the bench perform, and learn about prosecutors and advocates who appear before them.

Legal professionals who take advantage of these opportunities in a concerted and systematic fashion have an advantage over their colleagues who do not. Much can be learned from videos of court proceedings involving other legal professionals. Indeed, videos can be replayed and studied in great detail by groups of people, including experts on procedural rules, advocacy skills, body language, etc. Law firms can systematically and scientifically study judges and prosecutors with whom they have regular contact, and advocates who they compete against. This makes it possible to develop specialized/individualized plans for dealing with them. The extent to which this is an “extra service” or a standard best practice is yet to be determined. For example, it could be argued that prosecutors representing the State and advocates representing their clients owe a duty (or at least a duty of due diligence) to use video recordings and dossiers to prepare for trial. Given the quantity of material available, it could ultimately be time constraints and cost concerns which place limits on the amount of effort allocated to this activity, and the amount of expenses which can be incurred.

### **2. Using video recordings and video dossiers to improve the performance of legal professionals**

Video recordings offer legal professionals an excellent opportunity and means to see themselves as others see them. The best way for legal professionals to improve their performance in court and in public is to objectively observe every aspect of what they do. To the extent that “cameras do not lie”, video recordings are the optimal tool for legal professionals to learn about themselves.

The overall skills to consider include ability to make presentations, speak clearly and concisely, get to the point, convince, demonstrate confidence and competence, appear personable, etc. The specific aspects of performance to consider include speaking style, speaking speed, speaking tone and volume, facial expressions, eye contact, gracefulness, stature, body position and location, stances, gestures and use of hands, rapport with other people, etc. The reaction of others to specific conduct is also very important to consider. These are all aspects of “being professional”.

It is beneficial to conduct observation and analysis in a group, with specialists in communication/body language plus other legal professionals. Naturally, this can be embarrassing and intimidating. Most people are not comfortable observing and critiquing themselves. However, legal professionals can learn a lot from this process, and much of this cannot be learned from any other sources.

### **3. Using video recordings and video dossiers to address malpractice and enforce professional discipline**

Video dossiers of proceedings can provide incontrovertible evidence of mistakes, malpractice, and violations of laws and rights by legal professionals. This could involve errors in substantive law, procedural mistakes, violations of international obligations, ethical violations, and infringements of the rights of individuals (from international investors to defendants in criminal proceedings). Video dossiers can be used as evidence in disciplinary proceedings involving judges, prosecutors, and advocates. The Open Court Initiative has set up a Legal Ethics Committee, staffed by eminent and prominent independent experts, to review video recordings, check compliance with standards of conduct, and make recommendations concerning disciplinary action to self-governance bodies for legal professionals. Its proceedings are completely transparent and public, and its conclusions have moral authority. Video recordings can serve as evidence in civil litigation alleging malpractice by advocates. The media could use them to expose and criticize what takes place in the courts, and what legal professionals are doing. Indeed, video dossiers may eventually end up before international tribunals.

These developments are likely to be positive, for the most part. It is well established that legal professionals are more likely to be on their best behavior when they are being videotaped, and know that the video recordings can be put to many further uses, including the enforcement of professional disciplinary rules, malpractice claims, and public relations activities. However, there are many uncertainties regarding how this process will work in practice, and how videos will be treated as evidence (see Point Twelve). There is always potential for misinterpretation and misuse of video recordings in disciplinary proceedings. Protocols and standards for optimally handling video recordings of proceedings in professional disciplinary matters will need to be developed. There is always potential for “trial by media”.

### **4. Using video recordings and video dossiers to advance the law, practice in courts, legal reforms, and societal interests**

Video recordings of court proceedings can be a powerful agent for legal reform, changing court practice, and promoting societal interests like legal reform. For this purpose, law firms, activist advocates, civil society organizations, legal educational institutions, and media are already preparing “**legal portfolios**” which address specific key topics of interest to them and their clients.

Legal portfolios consist of:

- a) Video recordings from actual court proceedings
- b) Citations of legal provisions from national or international law
- c) Legal analysis of how laws and rights are violated, and how/why practice must change
- d) Recommendations, proposals for legal reforms, guidelines for addressing issues, etc.

Legal portfolios can serve as powerful and useful tools for promotional, outreach, awareness-raising, and educational activities. Video recordings of hearings make legal portfolios much more practical and impactful than old-fashioned printed materials and written/textual legal opinions. Potential subject matters are endless, from the conduct of legal professionals to violations of international standards and best practices to unsatisfactory conditions in courtrooms and facilities. Civil society organizations can create legal portfolios with collections of videos of violations of the human rights of the target group(s) they are protecting. Law firms can create legal portfolios which address common mistakes of law in the courts that affect their clients, in order to enhance the

effectiveness of their work. The preparation of legal portfolios may well be supported by journalists who use and promote them on television. Legal portfolios can be shared and used on social networks, to publicize issues and practices. A great deal of commentary takes already takes place on social networks. Clearly, well prepared and strategically used legal portfolios can be a catalyst for meaningful legal reforms.

## **5. Using video recordings and video dossiers for training legal professionals**

Video recordings of court proceedings are extremely useful for designing and developing training that raises professional qualifications. The legal portfolios described above provide legal professionals concrete examples of how their colleagues perform in court, both positive and negative. They highlight substantive issues, procedural issues, and ethical issues/violations. They show *what* legal professionals need to improve, and *how* they can make improvements. They are excellent tools for generating meaningful debate.

Therefore, video recordings can be used by professional trainers of judges, prosecutors, and advocates to precisely define their requirements, as part of Training Needs Assessment. The various institutions which provide training to legal professionals can use video recordings to make sure that it is as practical and topical as possible. Appellate judges can use video recordings of judges in the courts of first instance to define their training agenda. Senior prosecutors and advocates can put video recordings to similar use.

Video recordings and legal portfolios are extremely valuable for developing concrete professional skills through the delivery of training. Judges can improve their skills for managing trials, making rulings, and working with prosecutors and advocates. Areas of importance for prosecutors and advocates include a) opening and closing statements, b) cross-examination, c) presenting testimony, d) handling evidence, e) using body language, etc. For these purposes, legal portfolios should ideally include questions for discussion, practical exercises, role plays, etc.

Ideally, video recordings and legal portfolios should be shared and made mutually available to serve collective objectives relating to elevating the standards of practice in the court system. However, there could be competition between different training institutions and providers engaged in preparing and providing legal portfolios, and also with the many law faculties dedicated to educating future advocates. These institutions may well consider the legal portfolios they prepare to be proprietary material, and prefer not to share them with potential competitors. They may wish to keep them out of the hands of certain groups (such as journalists). Civil society organizations and international donors are less likely to adopt such an approach. In any event, issues regarding access to and use of legal portfolios for training and continuing legal education will require clarification.

## **6. Using video recordings and video dossiers for human resources management**

Video recordings can play a useful role in human resources and personnel management. For example, they can become part of the official employment records of judges and prosecutors, to be reviewed for promotions, career advancement, and disciplinary purposes. They could also be maintained by law firms, as part of employee records. Video recordings provide relatively objective evidence of performance, and can be useful for monitoring progress and professional development.

However, under certain circumstances, it is inappropriate to make harsh judgments of video recordings of legal professionals without knowing details about the case. For example, advocates

may take a specific or non-customary approach for strategic reasons after consulting with their clients, and this should not later be subject to second guessing without knowing the circumstances.

Naturally, issues will arise concerning who has access to video recordings in personnel files, and the extent to which there are rights to rebut or comment upon video recordings. If only a small selection of video recordings is available, there could be issues concerning whether or not it is representative of actual performance. Privacy issues can also arise. Since human resources management and personnel records are usually governed by procedural rules, it will be necessary to have some form of protocols or guidelines covering this subject.

## **7. Using video recordings and video dossiers for legal education in law faculties**

Video dossiers and legal portfolios serve a number of valuable functions for law faculties and legal education facilities. First of all, obviously, they are excellent teaching tools. Legal education is widely regarded as excessively theoretical, and not adequately adapted to developing practical skills. Nothing could be more practical than studying and analyzing what legal professionals actually do in the courts, and the problems and challenges that they actually face. The volume of materials could grow to be immense, as recordings of all different kinds of proceedings and types of cases at different levels of the court system become increasingly available.

The preparation of video dossiers and legal portfolios can easily be integrated into student coursework. This could take place in the context of legal clinics, the preparation of theses, or through coursework and independent study. Law students will greatly benefit from carrying out topical research on court practice for masters or doctoral theses, or in the context of practicums. Some of this work could end up being supported or even sponsored by law firms, civil society organizations, professional associations, and international organizations which decide to advance the state of knowledge on specific issues, encourage research, provide educational opportunities, and support development of the legal profession.

The preparation of video dossiers and legal portfolios can serve as a bridge between the legal education system and many different parties and institutions. They can form the basis of mutually beneficial relationships between law faculties and law firms, between law faculties and professional associations of judges, prosecutors, and advocates, between law faculties and the media, between legal academics and practicing legal professionals, between law students and law firms, between law students and practicing legal professionals, etc. This benefits both the legal profession and the legal education system, by elevating the standards of current legal professionals and by providing practical experience for future legal professionals.

## **8. Using video recordings and video dossiers to prepare clients and witnesses**

Video recordings of actual court proceedings can be extremely beneficial for the advance preparation of people who do not have experience testifying or are unfamiliar with court practice. It is only natural for novices to be concerned and even nervous about testifying or appearing in court for the first time. This can compromise how they present their claims. Therefore, prosecutors and advocates should utilize video recordings for pre-trial preparation of clients, defendants, victims, and witnesses (expert and fact). Both good/positive and bad/negative examples can be shown.

Many topics can be covered, including how to answer questions, how to speak concisely and precisely, how to use body language to make an effective presentation, appropriate demeanor, how

to dress, etc. Advance preparation on such topics is always important, and using video recordings makes it more precise and impactful. Well-prepared people testify more effectively, are less likely to be surprised, and can manage court proceedings in a more relaxed fashion.

Video recordings may also be useful for preparing expert witnesses, even if they have experience testifying. They can benefit from reviewing testimony of opposing expert witnesses in previous similar cases. They can also see how other experts testified in similar kinds of cases. Indeed, some dossiers (such as videos of a regular expert witness) might even have limited commercial value.

## **9. Using video recordings and video dossiers to prepare for proceedings**

There are a number of ways that legal professionals can use video recordings and video dossiers to prepare for court hearings. Generally speaking, they can be divided into two categories.

First of all, many things can be done *in advance of the first court hearing*. For example, it can be very helpful to carry out a general review of the performance of other legal professionals, utilizing video recordings made at previous proceedings. Although this is not directly related to the case at hand, much can still be learned, as described in Point One above.

Second, there are specific practices which can be carried out *during the course of court hearings*, particularly when there is an adjournment. Video recordings from the first day a hearing or the first stage of a case can be reviewed for many purposes. For example, it is possible to check the performance and arguments of other legal professionals, and the testimony of clients, defendants, and witnesses, to pick up things that might have been missed the first time, or search for additional avenues to pursue.

Video recordings offer significant advantages over audio recordings or transcripts. It is possible to closely scrutinize non-verbal communication (body language) and compare it to verbal statements, to evaluate the emotional context and learn more about feelings and emotions, and thus determine when someone is hiding information or being deceptive.

In this context, video recordings make it possible to assess “micro-gestures”. Micro-gestures are extremely short-lived facial expressions or movements, which usually take place in immediate response to stimuli (such as a question), before the person has a chance to take control over words and gestures. Micro-gestures can be extremely revealing. Major companies often carefully study micro-gestures in video recordings of employment interviews. Spoken words can differ from micro-gestures in response to salient questions, such as the nature of the relationship with a previous employer. In some countries, experts in non-verbal communication are retained for the exclusive purpose of observing trials and providing guidance to advocates concerning strategy and tactics, based on what is working and what is not working with the judge and/or jury.

In the same light, video recordings which show both the prosecutor and the judge or both the advocate and the judge can be used to assess the effectiveness of legal arguments. Prosecutors and advocates can evaluate which arguments and points are received with interest, and focus on them during the continuation of the hearing, while disregarding arguments and points which are not well received. Keeping this in mind, judges should learn and practice maintaining neutral facial expressions and body positions, to hide what they think or feel.

Video recordings of prosecutors or advocates who work together on a case, or of advocates who represent different clients or defendants in a consolidated hearing, are useful for building teamwork



and synchronization, and demonstrating mutual support. If prosecutors or advocates send texts on their mobile devices while their colleagues speak, this is an obvious display of disrespect. But they can also undermine colleagues through negative facial expressions or gestures, sometimes without even being aware. Attentive judges and opposing counsel can learn a lot by watching the reactions of colleagues when one prosecutor or advocate speaks. Video recordings can help prosecutors and advocates learn how to work together more effectively and support each other.

It is clear from the above that studying video recordings of one hearing in a continuing case, particularly in the company of experts, can be extremely helpful in preparing for what is to come.

#### **10. Making video recordings as useful as possible**

All video recordings are not created equal. Aside from issues of quality and format, the main factor which affects their value is the camerawork. Technically speaking, video recordings of court hearings are supposed to be panoramic. Zooming in and out and taking close-ups are discouraged. However, in practice, this is difficult to control. Legal professionals cannot be expected to monitor small hand movements or changes in posture of spectators who are using video recording devices. And people making video recordings with hand-held cameras may instinctively/accidentally change the subject matter of their focus in response to developments in the hearing.

As a result, video recordings sometimes focus exclusively or primarily on the person speaking, or on specific designated people, and sometimes they move around the room. But it is usually most useful to see both the speaker and the listener, particularly if the listener is a judge, in order to evaluate their interaction, and capture the response to specific comments and actions. Furthermore, it is highly instructive to see how litigants in civil cases, defendants, and witnesses respond to what is being said, even if it is not being said to them. Panoramic shots are therefore most useful, provided that it is possible to see all of the subjects clearly and in enough detail at the same time.

Unfortunately, the configuration of courtrooms and their small size often affect camerawork and limit the range of video recordings. Seating areas are generally limited, and do not afford a panoramic view. Hearings still occasionally take place in judge's chambers, although this is not appropriate for a number of reasons. Courtroom configurations further complicate camera positioning. Of course, special panoramic cameras may partially overcome this obstacle.

As a result, legal professionals who organize video recording should instruct and supervise those who carry out the work, to make sure that the resulting product is as useful as possible. Naturally, this problem will diminish if (or when) fixed official cameras are installed in courtrooms.

#### **11. Right to access or copy videos prepared by others**

Are there any proprietary or ownership rights in video recordings of court proceedings? The most common scenario is that they are placed on websites or made accessible without limitation (although there are objections to such public access, and Article 11 of the Law of Ukraine "On Ensuring the Right to a Fair Trial" seems to establish some limitations). Logically speaking, it should not be possible to claim ownership over a video recording of a public hearing. However, the legal portfolios discussed above include a) a selection of videos or edited segments of videos highlighting a specific point, which may involve significant time-consuming and painstaking work, and b) legal analysis. This could make them "work product". And since video recordings can be put to uses which create "added value", there may be incentives to prevent free dissemination.

Therefore, proprietary claims and efforts to license or restrict the use of materials containing video recordings could arise. The procedures and standards for resolving such claims are not established.

Some people might avoid or resist efforts to share videos, even if they are not part of a package with “added value”. What happens if one party to a court proceeding makes a video recording, and the other side subsequently decides that it wants to have a copy, but cannot obtain one voluntarily? Should judges be obliged to resolve such disputes? The situation could become more complicated if spectators making video recordings wish to keep a unique copy for themselves. Such spectators could find themselves facing demands from legal professionals. What if spectators request payment for their “costs”, including the purchase of equipment and time spent in court? What if prosecutors or advocates pressure spectators to share copies? What if there are disputes regarding whether or not an entire video has been provided, or only an edited version? What will happen if a video recording is “lost”, or if parts are “not usable”? Should there be certification or classification schemes for video recordings? What about notarial services? There are many scenarios for disputes. Protocols and procedural guidelines are only the starting point for addressing these issues.

## **12. Video recordings as evidence**

There are many possible uses of video recordings as evidence. They could be used to contradict or impeach the testimony of litigants, defendants, or witnesses in subsequent hearings on the same case. They could be used to contradict or undermine testimony in different, subsequent cases. They could prove very useful for impeaching expert witnesses, who may have given contrary opinions or interpretations in prior cases. Video recordings may be used as evidence in lawsuits alleging malpractice or in disciplinary proceedings against legal professionals. Standards and procedures need to be developed to cover how video recordings can be used, how they should be authenticated, and whether there are grounds for precluding their use altogether in certain scenarios.

## **13. How video recording can affect court proceedings**

Most legal professionals are used to public scrutiny. Judges in particular are public figures whose persona is often closely observed by others. Prosecutors and advocates must perform in front of superiors or clients, and are increasingly being interviewed by and making statements to the media. As mentioned previously, legal professionals tend to take account of whether or not a video recording is being made, in which case they are likely to be on their best behavior. This means that they might modify the things that they say, the way that they speak, and how they act. Moderate language may be necessary in order to avoid negative publicity. Expensive or ostentatious clothing, watches, or jewelry might create negative commentary. Indeed, video recording could even alter how legal professionals handle cases. Prosecutors and advocates might be dissuaded from taking legal positions or making assertions that are unprofessional or unpopular. Prosecutors could face public scrutiny for taking strong positions in cases involving minor offenses. Advocates may be discouraged from making unreasonable financial claims in commercial cases.

Many of these effects can be considered positive. Video recording forces legal professionals to moderate and “professionalize” their conduct. And it is becoming more acceptable and accepted, not only in Ukraine. But there may also be instances where prosecutors and advocates decide that acting is more important than fulfilling their duties or even winning. After all, while only a few people are present in the courtroom, millions of people might watch the video recording. In the worst case scenario, court proceedings could be misused or turned into public relations vehicles or

publicity stunts. These issues will have to be addressed through professional discipline, and codes of ethics, since it is “abuse of process” to use court proceedings for any ulterior motive.

The circumstances are quite different for litigants, defendants, and witnesses, who are less likely to have experience before cameras, less likely to use the video recording, and more likely to be uncomfortable when testifying. This may not be a big issue for some litigants, such as representatives of large commercial companies. But defendants in criminal cases are particularly vulnerable, since being charged with a crime automatically creates a certain degree of stigma or prejudice. This situation is exacerbated when defendants are forced to stand behind bars in the courtroom, or wear prison attire. Individuals who are not used to appearing in public can easily be intimidated by the thought of being recorded in compromising circumstances, with unlimited public access to the recording. This could affect the way that they testify. Care must be taken with regard to indications of financial status, such as clothing and jewelry.

Another serious issue is how video recording can affect the content of testimony. Litigants, defendants, and witnesses might subtly modify their testimony as a result of being filmed. They could be pre-occupied with their “legacy”, or worry that specific people (from bosses to family members) might have access to video recordings which portray them in an unfavorable light. This once again raises the distinction between making video recordings and disseminating them.

Some of these issues may be partially mitigated through advance preparations. However, legal professionals should be attentive to all of the potential effects that video recording can have on court hearings, and take preventive measures when feasible.

#### **14. Privacy rights, security, and the storage and use of video recordings and video dossiers**

The right to privacy is protected by Ukrainian law and Article 8 of the European Convention on the Protection of Human Rights and Fundamental Freedoms. In contrast, the Law of Ukraine “On Ensuring the Right to a Fair Trial” does not contain any provisions which explicitly protect privacy in the face of the right to make video recordings of court proceedings.

In the first place, it is necessary to carefully distinguish between the different potential subjects of video recording. Judges and prosecutors are in a certain sense civil servants, and it can be argued that all legal professionals are “public persons”. However, litigants, defendants, and witnesses are most likely not public persons. It can be argued that litigants in civil cases are bringing their dispute into a public forum, and thereby waive certain privacy rights. However, defendants in criminal cases are innocent citizens (by definition, since according to the presumption of innocence they are innocent until proven guilty) who are brought before the public against their will, and are charged with conduct which is almost certainly harmful to their reputation. Special protections are clearly in order for certain kinds of cases, such as those involving juveniles, national security, trade secrets, or organized crime (where witnesses may have reason to fear for their personal security). Spectators in court proceedings arguably have a different status and different legal rights.

It is clear that absent special circumstances, court proceedings should be open to the public. This is a basic principle of transparency and access to justice, and crucial for democratic and accountable governance and the rule of law. But it necessarily compromises certain privacy rights of everyone involved in the justice system. It can be argued that if people have the right to attend hearings, they should also have the right to view them via some form of broadcasting. Otherwise, transparency is artificially limited to those people who can physically come to the courtroom at the specified time,

while those people who are in different locations or who must work during business hours are automatically excluded. However, video recordings are qualitatively different. They last forever, they can be disseminated worldwide in a matter of seconds, they can be manipulated and presented out of context without control of the subjects involved, and they can be used for ulterior motives.

Certain measures can be taken to protect privacy. For example, facial images can be blurred, and the sound can be erased when someone provides private information. However, these measures require editing, which takes time and can be expensive. More problematically, there does not appear to be any requirement to do this, and there are no standard procedures or guidelines. Most problematically, there are no mechanisms for ensuring compliance.

Privacy rights can depend on the specific uses of video recordings and vide dossiers. Therefore, this issue must be considered in context. For example, privacy and proprietary/property rights are often handled differently for educational activities. Does this mean that the balance between privacy and transparency is altered when legal portfolios are utilized for raising professional qualifications? The party making use of the video may also be significant. For example, advocates may object to allowing prosecutors to use videos of their clients on the grounds of privacy, but not be so concerned if the video is taken by a spectator who is a friend of the client.

One major obstacle to protecting privacy is the “inclusive” nature of video recordings. Panoramic videos capture many people, and show their interactions. Video recordings which are used to demonstrate the conduct of one person still include others. Furthermore, sometimes it is necessary to show many people. For example, a video recording that highlights how a judge or prosecutor mistreats a defendant must necessarily include that defendant, in order to show the effects.

Unfortunately, some privacy issues are likely to end up being resolved through litigation. This will be complicated. It could involve multiple jurisdictions be time consuming. There are likely to be grounds for appealing the decisions of Ukrainian courts to the European Court of Human Rights. For this reason, it is important to promptly consider privacy issues and how to resolve disputes.

Security issues will also need to be addressed. Many legal professionals already feel threatened, either by officials or private persons. Many advocates believe that a license to practice law should automatically confer the right to possess and carry a handgun, for self-protection. The right to security and the right to privacy are intricately connected. People making video recordings are already taking the liberty to film and interview legal professionals outside of court facilities. Can legal professionals also be filmed on the streets, in their cars, or near their homes? Can such videos be used to create doubts about their sources of income? Will paparazzi turn their attention from movie stars to legal professionals? Do media representatives have extra rights when it comes to accessing legal professionals in public areas? How will security issues and the official response thereto play out differently in urban centers, medium size cities, and smaller villages? What standards and procedures will apply to requests for protection from legal professionals? Should we expect an upsurge in requests for “protective orders” from legal professionals? Who will cover the costs protection when the need for it arises from work-related causes?

## **15. Managing video recordings and video dossiers on-line**

Ukrainian law and Article 8 of the European Convention on the Protection of Human Rights and Fundamental Freedoms also cover the right of legal professionals to protect their reputation. This

will raise a number of complicated issues as the amount of publicly available information affecting the reputation of legal professionals explodes in the coming years.

The following questions need to be addressed:

- What rights do legal professionals have to access digital/video information about them which is in the possession of governmental institutions, professional associations, academic institutions, civil society organizations, the media, or individuals?
- What rights do legal professionals have to information concerning who is accessing on-line information about them (either specific individuals or overall statistics)?
- Do journalists enjoy special privileges in this regard, in order to conduct investigative journalism and perform research for articles and programs?
- What rights do legal professionals have to modify or respond to digital/video information about them which is on-line?
- What can legal professionals do about websites and apps which facilitate confidential or encrypted sharing of digital/video information about them?
- What are the responsibilities of institutions or individuals with digital/video information about legal professionals to verify and/or update what they store and post? At what point in time can such information be considered “stale”, and thus unsuitable for public dissemination? If a legal professional is charged with misconduct but later absolved, can information regarding the charges still be posted?
- What are the responsibilities of websites that simply “host” information posted by others? Can websites escape liability by maintaining that they are merely platforms, and therefore not liable for or able to control content?
- How can legal professionals address institutions or individuals who base their websites outside of the jurisdiction where they live and work? Can the organizers of websites be held accountable in any jurisdiction where their website is available, or must remedies be pursued in the country where the host website server is located?
- How can legal professionals respond if video recordings of them are used or critiqued in legal portfolios, especially if they are presented as negative examples?
- How can legal professionals respond if video recordings of them are used in public relations materials or even advertisements?
- How should legal professionals respond to websites that present ratings from clients and other information about them, including video recordings and video dossiers? Does posting negative information about legal professionals on-line constitute slander, or interference in contractual relations, if potential clients are dissuaded from retaining them?
- What can advocates do to ensure that comments about them and their work are genuine? It is a well-known fact that many commentaries on websites which review everything from hotels to restaurants to workmen are not legitimate.

These questions are far from academic. Disciplinary bodies, investigators, opposing legal professionals, journalists, academics, potential clients, disgruntled clients, and even curious neighbors may wish to review the on-line persona of legal professionals. Legal professionals must be attentive to what is posted about them on-line, who is accessing and using this information, and how this information is being used. This is necessary in order to take any necessary measures to protect their reputation and on-line persona from inaccurate and potentially damaging information.

In addition to being attentive to the need to *defend* their on-line persona and image, legal professionals can also use video recordings to *promote* themselves. This is most likely to be the case for advocates engaged in private practice, who can pay for advertising and engage in sponsorship which includes video recordings. However, judges and prosecutors are not prohibited from using social media and other outlets to post video examples of their work, as long as it is done in a dignified manner. When applying for a position, legal professionals might consider including video recordings in an “electronic curriculum vitae”. Indeed, there are many innovative ways for legal professionals to use video recordings and video dossiers as part of their branding and image.

## **16. Misuse of video recordings and video dossiers**

It would be a mistake to underestimate the ingenuity and creativity of those who wish to misuse their right to make video recordings of hearings.

Legal professionals are already facing attempts to deliberately harm their reputation or extract payoffs. Individuals claiming to have defamatory materials are contacting legal professionals, including judges, to demand “hush money” for not disclosing them. Legal professionals are facing threats to send potentially damaging materials to disciplinary bodies and media organizations. While this is clearly an illegal form of blackmail, it is difficult to determine how best to protect against or respond to such conduct.

Other less malicious but still not innocuous misuses of video recordings can be envisioned. For example, high resolution panoramic video recordings can be used to zoom in and reveal the content of documents which are in view, computer screens, and mobile phone screens. Legal professionals will have to take care to protect the confidentiality of information that they leave in plain view. Video recordings can also be used for lip reading! If prosecutors and advocates do not cover their mouths when they whisper to their clients or witnesses it is possible for videos of their faces to be analyzed to determine what they are saying. This has been happening for a long time in certain sports. While communications between advocates and their clients are confidential/privileged, and should be immune from surveillance, it can be argued that this right is waived when communication takes place in the plain view of others. And in any event, advocates are not likely to know whether prosecutors are retaining experts in “lip reading” to review video recordings in their offices.

Prosecutors and advocates might also misuse video recordings for their own purposes. The potential for intentional use of court hearings to make public relations videos was discussed in Point Thirteen above. There is always a possibility that prosecutors or advocates might misuse video recordings to obtain advantages, harm the professional reputation of adversaries, steal potential clients, etc.

Given the ingenuity of parties who might wish to misuse video recordings, it is not possible to foresee all of the circumstances and issues which might arise. Therefore, it is important to put in place institutional arrangements for promptly and pro-actively dealing with potential misconduct regarding video recordings and the uses of video dossiers as soon as it arises.

## **III. CONCLUSION**

These sixteen points form an initial inquiry into some of the many ways in which court proceedings, adjudication, prosecution, and advocacy are changing in the digital and video age, and highlight some of the ways that legal professionals can respond. The analysis is by definition preliminary, and sometimes there are more questions than answers. But this is natural and inherent to rapid change in

a legal system, such as the full introduction of video recording under the control of legal professionals and spectators alike. Since it is not possible to resist change, the goal must be to manage it and adapt to it. This can only be accomplished through pro-active consideration and management of the issues that arise, and generating collective wisdom.

Therefore, it is incumbent upon legal professionals to a) consider and take advantage of the fantastic opportunities which are arising from the reform process, and b) prepare for the significant challenges which are inevitable. Legal professionals must engage in dialogue, and start to establish institutional mechanisms and develop protocols/procedures to respond to the changes taking place. Those who do not prepare will not thrive and will not persevere.

Finally, it is important to point out that the digital and video age is rapidly giving way to the virtual age. The pace of change will accelerate, not slow down. Computer capacity grows exponentially. Eighty percent of the information generated by the human race has been generated in the past two years. Books were hand-written for thousands of years, and have been printed for five hundred years, but they have become predominantly electronic in just a few years. What is next?

In the not-too-distant future, we can foresee virtual courtrooms, where prosecutors and advocates duel from their offices or homes using virtual reality headsets connected via satellite, with spectators around the world observing in real-time. We can foresee holographic images being transmitted into courtrooms, eliminating the need for travel and physical presence. We can foresee real time forensic tests. We can foresee virtual iris scans and brain wave analysis used for identification purposes, making electronic signatures seem old fashioned. We can foresee massive databases stored in the cloud with all kinds of laws, decisions, and case materials instantly accessible through three dimensional imaging on specialized glasses. We can foresee voice commands replacing keyboards, and then thoughts replacing voice commands.

As we face this brave new world, we must accept that many changes will take place in ways we cannot foresee. After all, laws and legal proceedings always lag behind technological progress, and the gap is actually widening. Therefore, it is important to imagine, speculate, and develop our sense of vision and purpose. At the same time, it is necessary to keep an eye on the past, to maintain what is valuable. After all, nothing can replace holding a book, many people believe that vinyl records produce better sound than MP3 music files, and fax machines are being used by people who consider them to be more secure than electronic communication.

In the final analysis, legal professionals must focus on performing their duties as well as possible today. This means changing with and adapting to the digital and video age.

**END**

## APPENDICES

### **Almost a fifth of Britain's courts are to be axed as part of Gove's revolution**

From "The Sun", 12 February 2016

#### **CRIMINAL trials could be held in universities and town halls under Ministry of Justice plans to axe nearly a fifth of the country's courts.**

A total of 86 buildings are to be shut or sold off in England and Wales under Justice Secretary Michael Gove's revolution. And the Ministry of Justice admitted that alternative venues such as "civic buildings, universities, and community centres" would instead be used in some cases – notably pre-trial hearings.

Motoring offences and other minor cases may be dealt with "digitally" – via video links.

The Government had announced plans to close 91 courts – but reduced that to 86. This is still equivalent to nearly a fifth of the 460 sites across England and Wales.



Justice Minister Shailesh Vara is confident the digital age means the changes will work

Justice Minister Shailesh Vara said: "The decision to close a court is never taken lightly, but in the digital age I am confident we have measures in place to ensure access to justice is not diminished."

But Malcolm Richardson of the Magistrates Association said the cuts were "chipping away" at the provision of "local and accessible" justice. He added: "Now so many are to go, we hope officials will work closely with magistrates on how best to cope with the additional pressure."





*"Since you have already been convicted by the media,  
I imagine we can wrap this up pretty quickly."*

CN  
COLLECTION

## **Drug Dealing Brothers Who Avoided Jail Are Put Behind Bars After Facebook Abuse Of Judge**

February 16, 2016

Two drug dealing brothers who had previously avoided jail sentences have been put behind bars after they abused the judge on Facebook.

Daniel Sledden, 27, and his brother Samuel (pictured), 22, from Accrington, Lancashire, gloated on Facebook at the beginning of this month after they were handed down suspended sentences for drug offences at Burnley Crown Court. But the pair were hauled back to court today because they celebrated the earlier verdicts by making abusive posts on Facebook against the judge in their case.

The pair were given two-year jail sentences that were suspended for two years in court on February 3 after they both pleaded guilty to supplying cannabis. Within 90 minutes of sentencing, Daniel Sledden mocked Judge Beverley Lunt on Facebook.

He posted: "Cannot believe my luck 2 year suspended sentence (sic) beats the 3 year jail yes pal! Beverly [sic] Lunt go suck my \*\*\*\*\*". His younger brother Samuel posted an offensive comment barely 40 minutes after he walked free. He wrote: "What a day it's been Burnley crown court! Up ur \*\*\*\*\* aha nice 2 year suspended".

When they were recalled to court today, Judge Lunt remanded the pair in custody as she was not prepared to grant them bail. The review of the case was postponed until February 26 so the full transcript of the sentencing remarks could be reviewed to assess the two men's prior expressions of remorse. The pair had written letters of apology.

The judge said remorse was "a vital component" when considering sentencing, but that the length of the original two-year jail terms was not wrong. She said: "It is the issue of suspension. Would I have done so had I appreciated, as I do now, their true views and what they really thought of the court proceedings." Judge Lunt didn't read the Facebook messages out in court because she said they contained "offensive sexual elements". She said the Facebook messages did not amount to a contempt of court because the hearing had concluded.

The Sleddens and their father, William, 45, who also received a suspended jail sentence, had all admitted dealing cannabis from the family home in Hopwood Street between May and September 2014.

China's 'Brother Wristwatch' Yang Dacai jailed for 14 years for corruption  
From "The Guardian", 5 September 2013

Official sparked outcry after being pictured smiling at scene of crash wearing watches deemed too costly for a public servant. A provincial Chinese official who shot to internet fame last year after he was photographed grinning at the scene of a grisly bus crash has been sentenced to 14 years in prison for corruption, state media has reported.

Before last August, Yang Dacai was just another nameless official – the head of the Shaanxi province work safety administration, specifically. But then photographs showing him smiling at the scene of a road accident – a collision between a bus and a tanker carrying methanol that killed 36 people — went viral on Sina Weibo, the country's most popular microblog. Some Weibo users, incensed by Yang's apparent callousness, retaliated by posting photographs of the official wearing luxury timepieces that he could not possibly afford on his public servant's salary. One user nicknamed him "Brother Wristwatch," and the appellation quickly became a symbol of official extravagance in newspapers and internet forums.

Prosecutors concluded that Yang had been unable to explain the provenance of £527,000 in dubious assets and last month he pleaded guilty to taking £26,000 in bribes. Yang was stripped of his post and accused of "serious wrongdoing" last year, soon after the photographs went viral.

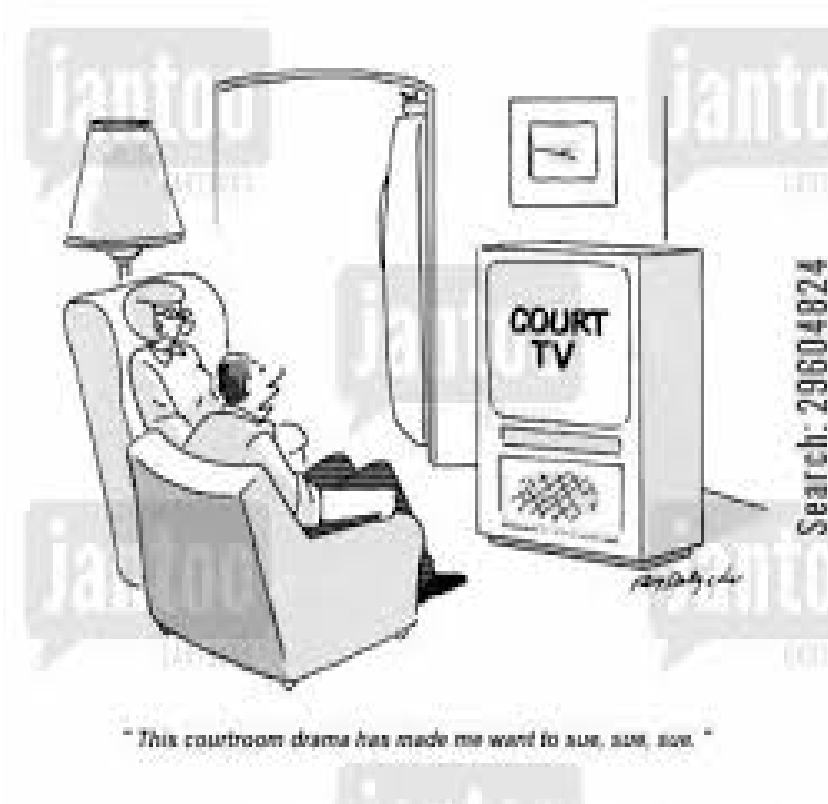
China's newly appointed president, Xi Jinping, understanding the depth of public indignation over displays of official entitlement, has made frugality and an anti-graft campaign the hallmarks of his early tenure. While many of the campaign's targets have been first reported by social media users, the party has gone to great lengths to keep citizen journalism in check, arresting and intimidating scores of would-be whistleblowers.

On Thursday, the state broadcaster CCTV showed footage of Yang at the courthouse in Xi'an, Shaanxi province, dressed in an orange prison vest and smiling despite the severity of his sentence.



He had previously defended his smile at the accident site as an attempt to cheer up anxious rescue workers, and argued that he acquired his watches by honest means.





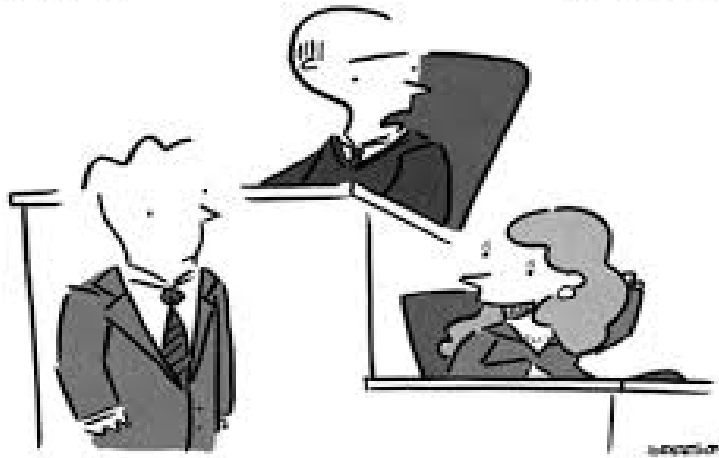


"You can read my decision on my blog:  
[www.yougotjustice.com](http://www.yougotjustice.com)."

**off the mark** .com by Mark Parisi



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"Sustained. The witness will refrain from posing for the courtroom artist."



"Your Honour, if it pleases the court, I'd like to take everyone to the park and buy them an ice cream."

