COVERT RECORDINGS

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Many in the legal profession have experienced the issue of covert recordings. It is becoming far more prevalent than it once was due to the advancement of technology in audio, video, CCTV, dashcam and devices such as Ring doorbells.

In considering covert recordings in the case of M v F [covert recording of children] [2016 EWFC 29] Peter Jackson J, said, "Nowadays it is all too easy for individuals to record other people without their knowledge and advances in technology empower anyone with a mobile phone or a tablet to make recordings that would be the envy of yesterday's spies" - that was 9 years ago.

Technology has moved on considerably since then and it has never been easier to make a covert recording of family members, individuals, children or professionals without their consent or permission. Most of us have access to smartphones, and the internet provides a plethora of ever-increasing sophistication and miniaturisation of modern recording equipment.

What consistutes a covert recording?

This is a difficult question to answer, and the court's approach is to deal with it on a case-by-case basis. The Data Protection Act 2018 provides an exemption for personal or household activities. However, a distinction must be made for those recordings that are made for the purpose of proceedings, and it will be for the court to consider the context of how that material came into existence before making it admissible in evidence. According to the Family Justice Council, it is when a recording is made without the consent or permission of the individual(s) subject matter.

What to do when a client tells you that they have a recording they think is relevant to proceedings that the other party isn't aware of?

Initial advice would be not to do it. If the client insists you watch it then it is important that they are made aware of your obligations of full and frank disclosure and duty to the court.

Recordings rarely have the probative value the client believes they do, and it can risk an adverse inference against them for making it in the first place. Covert recordings have an insidious feel to them that more often than not will further damage relationships, and will not be helpful in reaching an agreement. If there is any trust left, then it will most certainly be eroded.

The recording would need to have a substantial evidential value, assist a party in proving something that they would not otherwise be able to prove, and still admissibility would turn on the facts of the case and down to the court's discretion. For instance, in Medway Council v A & Other (Learning Disability: Foster Placement [2015] EWFC B66 recordings of the foster carer were permitted because the case turned on this piece of evidence.

Why has the recording been made?

The motive of the individual making the recording must be called into question. Often a client will say that they had no other way of proving their innocence and the other person's guilt. As professionals we rarely have any way of knowing exactly what preceded the beginning of the recording and there is a risk that the person making the recording acts and speaks in such a way as to influence the narrative of what is recorded. The recording may show one party as irate and aggressive, but what came before that to make them so? It is possible that the recording is an accurate representation and can be taken at face value, or the recorder could have antagonised the other person into that state of emotion.

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It is commonplace that the court and legal professionals often see children subject to proceedings tell the respective parents what they think they want to hear, usually it is the opposite of what they have told the other one, and it is done out of a loyalty and love to each parent not malice. But if the parents have an acrimonious relationship, it leaves them thinking that the other is lying, and this then can lead a party to thinking recordings are their last resort to prove themselves right and the other parent wrong.

Peter Jackson J, considered [para 1] that concealing a device on a child for the purpose of gathering evidence in family proceedings is "*almost always likely to be wrong*". Individuals should be alive to the fact that if they behave in an underhand and mistrustful way this could cause the court to shine a light on them. It could highlight welfare issues that otherwise may not have been considered, and whether that person is capable of putting the child's needs before their own.

Recording professionals.

It is a contempt of court to record court proceedings, and it is a criminal offence to take a photograph or video recording "in court" of a judge, juror, witness or party, or publish the same; Criminal Justice Act 1925 s.41. This applies to partially remote hearings as well as fully remote hearings (see 2 Gubarev v Orbis Intelligence Ltd [2020] EWHC 2167 (QB).

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.

The current guidance from the Bar Council tells us that "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."

Conclusion.

Covert recordings are a mine field for any lawyer to navigate because both you and the client are open to risks associated with producing a covert recording as evidence that could damage the client's case rather than enhance it. The court must be satisfied of a significant evidential value of the evidence; they will consider all of the circumstances of the case and overall a dim view is taken of anyone that does it. It is in rare circumstances indeed that the evidence will be permitted, rather than the norm.