

Identifying Courtroom Proceedings That Might Be Video Recorded

1. Who may initiate a request or suggestion to record courtroom proceedings—the assigned judge, a party to the case, the clerk’s office on behalf of the court, the media?

Any of the entities named above may initiate a request or suggestion to record. The Committee’s Program Guidelines state, “The presiding judge will select cases for participation in the pilot, although parties to a case or the media may request video recording of the proceedings” (p. 2). The pilot districts need not wait for a request to record from the parties or an outside entity and are, in fact, encouraged to initiate requests to parties to record proceedings.

Part 2 of this document provides Example General Orders for two approaches for requesting that a proceeding be recorded—a request initiated by the presiding judge and a request initiated by the clerk’s office. If the presiding judge is the one who initiates the question of recording, he or she should consider asking the parties to record most courtroom proceedings held in civil cases—at minimum, all trials and evidentiary hearings. If a court plans to have the clerk’s office notify parties of the opportunity to record, the court should consider giving the clerk’s office authority to send a notice for most civil proceedings—again, at minimum, for all trials and evidentiary hearings. A good test of recording courtroom proceedings requires not only a large number of recordings but also recordings across a range of case types and matters.

When the Committee reports on the pilot project, it will include in the report information about the selection of proceedings to record. Part 3 of this package includes two data collection forms relevant to this inquiry (Form A, “REASONS FOR JUDGE’S SELECTION OF CASE OR PROCEEDING FOR VIDEO RECORDING”, and C, “REASONS FOR JUDGE’S DECISION NOT TO PERMIT VIDEO RECORDING OF PROCEEDING THAT WOULD OTHERWISE BE ELIGIBLE OR FOR WHICH A REQUEST FOR RECORDING WAS MADE”).

2. When the assigned judge or clerk’s office initiates, should they *request* that the proceeding be recorded or merely *suggest* that it be recorded?

This question asks how active the pilot districts should be in encouraging participation in the pilot project. We expect that the more active the courts are the more proceedings will be

recorded. We also recognize that some districts or some individual judges will not, however, be wholly at ease with a proactive approach, and thus we describe several options for identifying suitable proceedings and getting party consent. The language in Form D, “NOTIFICATION OF REQUEST FOR VIDEO RECORDING”, tells the parties that the judge requests their consent to record. Alternative language is offered for courts or judges who are not comfortable with this wording and might instead prefer to simply bring the opportunity to record to the parties’ attention. Similarly, if a judge raises the question of video recording in a conference with the parties, the judge can use language that is more, or less, directive, depending on the judge’s preferences. The first example below is the most directive, the third is the least.

- This district is participating in a pilot project that permits video recording of courtroom proceedings. The recordings will be publicly available on the district’s website. I plan to record all courtroom proceedings in the civil cases assigned to me, unless I hear otherwise from the parties. Please complete this form [i.e., Form E, the consent form, discussed at Point 4, Page 12] and return it to me.
- This district is participating in a pilot project that permits video recording of courtroom proceedings. The recordings will be publicly available on the district’s website. I ask that you consider giving consent to record the upcoming proceeding in your case. Please complete this form [i.e., Form E, the consent form, discussed at Point 4, Page 12] and return it to me.
- This district is participating in a pilot project that permits video recording of courtroom proceedings. The recordings will be publicly available on the district’s website. If you wish, your upcoming proceeding can be recorded. Please complete this form [i.e., Form E, the consent form, discussed at Point 4, Page 12] and return it to me.

The Committee firmly does not encourage pilot districts or judges to be or appear to be coercive, but a respectful request to record, whether in conversation between judge and parties or by written notice from chambers or clerk’s office, would likely create greater awareness of the opportunity to record, more experience with recording for both parties and judges, and more data for the FJC’s assessment of the pilot project.

3. How will others be made aware that they may ask to have a proceeding recorded?

Although the Committee anticipates that the assigned judge and/or clerk's office will initiate the request to record courtroom proceedings, the pilot districts should provide a method for others, such as parties or media, to express an interest in recording a particular proceeding. To inform these entities of the opportunity to record proceedings, the pilot districts might want to provide public information about the pilot project and the opportunity to request that proceedings be recorded. Information should be provided, at minimum, on the district's website. Other avenues courts might consider using are legal publications, forums with the bar, and notice from the court's information officer to members of the media.

Part 3 of this package includes a form, "REQUEST FOR VIDEO RECORDING" (Form B), which should be posted at the court's website. Parties and entities outside the court should use this form to request a recording. Part 4 of this package includes a draft document titled "Notice to the Public: Cameras Pilot Project" that may be adapted by the court and posted at its website to inform the media and others about the pilot project. Part 4 likewise includes a "Frequently Asked Questions" document that, among other things, tells parties and the media how to request that a proceeding be recorded.

4. For which proceedings may the request to record be made?

When establishing the pilot project, the Judicial Conference placed few restrictions on the types of civil cases or the types of proceedings that may be recorded. The Committee's Program Guidelines state, "Participating judges should consider recording different types of proceedings (e.g., trial and non-trial proceedings; a variety of case types; proceedings of varying sizes such as hearings, large cases, and multidistrict litigation; and proceedings with varying levels of expressed public interest)" (p. 2). The only type of proceeding we ask the pilot districts not to record is civil commitments.

The proceedings that seem most likely to be recorded are trials and evidentiary hearings. Pilot judges and districts should not, however, limit recording to trials only or even to proceedings that are considered "significant". The best test of the pilot is to record all types of proceedings, including those that are routine. To obtain a wide variety of recorded events, we ask the pilot districts to consider raising the question of recording with the parties each

time a courtroom proceeding is scheduled.² (If a party firmly refuses, the judge may wish to refrain from asking further so as not to appear to be pressuring the parties to consent.)

5. When a party or other entity requests that a proceeding be recorded and the judge declines to record the proceeding, does the judge have an obligation to report his/her declination?

Yes, the pilot project asks judges to report their reasons for deciding not to record a proceeding. This information will be directly responsive to judiciary policy makers' interest in how often and under what circumstances judges decide that a proceeding should not be recorded. A form for reporting such an occurrence, "REASONS FOR JUDGE'S DECISION NOT TO PERMIT VIDEO RECORDING OF PROCEEDING THAT WOULD OTHERWISE BE ELIGIBLE OR FOR WHICH A REQUEST FOR RECORDING WAS MADE" (Form C), is provided in Part 3 of this package.

Obtaining Consent to Record

1. May parties give blanket consent for recording all proceedings held in a case, or must consent be obtained for each proceeding?

The Committee's Program Guidelines state, "Consent to the recording of one proceeding in a case will not be construed as consent to any other proceeding in a case" (p. 2). Consent must be obtained for each proceeding. Although this requirement may be administratively more demanding, it provides greater protection for the parties and better data for the study. Some proceedings, such as trials, span multiple days; for such proceedings, consent may be obtained only once. If a party who has consented changes its mind during a proceeding, the judge can hear arguments and discontinue recording if appropriate. (See also the discussion at Point 4, Page 12.)

2. What process should be used for obtaining consent?

The process for obtaining consent will very likely look different from court to court because of the courts' differences in managing cases. Although the Committee's Program Guidelines

² The Committee recognizes that this practice may result in more consents than the court has the capacity to satisfy. We ask courts not to refrain from requesting consent, but rather to track the number of consenting cases which cannot be recorded due to limitations on available equipment.

provide some suggestions about how to obtain consent, the Guidelines leave development of these procedures for the most part to the discretion of the court: “The court may (1) establish a procedure for obtaining party consent to the recording of a proceeding selected for the pilot, including a time frame by which consent must be given; and (2) in its discretion, hold a hearing to address objections by parties, witnesses, or others to the proceeding or posting of a recording for public access. Such hearings should not be recorded” (p. 2).

The Committee is aware of two general approaches that might be taken to obtaining consent. The details of each would depend on the judge and/or court. The first approach is to place the consent process in the hands of the presiding judge; the second is to delegate it to the clerk’s office. Part 2 provides two Example General Orders illustrating the two approaches.

If the presiding judge is the one who suggests to parties that a proceeding be recorded, the judge will need to develop a process for raising the question, securing a completed consent/declination form from parties, and placing the form in the hands of the court’s liaison to the FJC. Pilot judges may want to raise the question each time a courtroom proceeding is scheduled, by sending a “NOTIFICATION OF REQUEST FOR VIDEO RECORDING” (Form D) or through an in-person or telephonic discussion with the parties. The advantage of having the judge raise the issue of recording is that, if necessary, the judge can discuss, and perhaps ease, any concerns the parties may have about recording their proceeding. Example General Order #1 in Part 2 illustrates this approach.

A court could take a different approach and ask its clerk’s office to handle the request and consent process. The clerk’s office could send the parties a request to record each time a notice setting a courtroom date is issued—again, using Form D. The parties could then return a consent/declination form to the clerk’s office. This practice could have several benefits: (1) to standardize the process of notification and consent and thus obtain better pilot project data; (2) to ensure that notice is given for every eligible proceeding; and (3) to remove any possibility that a party’s non-consent could influence the judge’s view of that party or its case. Example General Order #2 in Part 2 illustrates this approach.

In addition to using one of the two approaches above, courts may certainly allow parties, media, and other outside entities to initiate a request for recording, but such requests should not supplant the court’s general obligation to initiate the process, either by having the judge make the request or by having the clerk’s office do so.

Whatever process a judge or court adopts, the process should be set out in writing so litigants and others know how the judge or court proceeds. And pilot judges should keep in mind the guidance initially set out by the Committee in its May guidelines: Any hearing held to determine whether to record a proceeding should not itself be video recorded; the hearing should, however, be held on the record.

3. Who should give consent? Must non-party witnesses give consent? If they do not, may a proceeding be recorded?

The Committee’s Program Guidelines state, “Parties must provide consent to the recording of each proceeding in a case” (p. 2). This means that each party to a case must give consent for a proceeding to be recorded. If the parties give their consent, neither the attorneys for the parties nor witnesses who appear on behalf of the parties may prevent recording of the proceeding—i.e., the pilot courts need not ask non-party witnesses whether they consent. It is the parties’ obligation to discuss the matter with their witnesses and to give or withhold consent based on the parties’ best judgment. Parties can indicate on Form E or Form F that consent is extended for some, but not all, witnesses; recording equipment should then be turned off when those witnesses testify. (Forms E and F are discussed below at Point 4.)

If parties appear reluctant to give consent out of concern for their witnesses, judges should talk with the parties about these concerns. Judges should assure the parties that party consent is sufficient to permit recording and that the judge has authority to turn off the cameras when a reluctant non-party witness testifies.³ If parties are aware of this option, it is likely that some proceedings may be recorded that otherwise would not be. (The Example General Orders reinforce this approach; see Clause 4.)

In instances where some witnesses are recorded and others are not, the jury should not be aware of which ones are recorded and which ones are not.

4. How should parties submit their consent or declination to the court?

When parties or, if represented, their attorneys receive notification of the opportunity to record a proceeding, they should also receive a form for giving or declining consent.

Notification is discussed at Point 2, above. The form for consenting or declining, “PARTY

³ If a non-party witness’s camera is turned off, the witness’s voice may nonetheless be picked up by the microphone. The court should determine whether that witness wants only to avoid being seen or also being heard and then turn off the relevant equipment.

RESPONSE TO REQUEST FOR VIDEO RECORDING” (Form E), is provided at Part 3. This form is one of the key data collection forms for the study of the pilot project. Attorneys (or pro se litigants) should use it to tell the court whether the parties consent or, if they do not, why they decline. This form also permits parties to indicate whether particular non-party witnesses should not be recorded.

On occasion the court may encounter a case where the parties have consented to record a proceeding but at the last minute a non-party witness is reluctant to be recorded. To assist the study of the pilot, the Committee would like to know how often a witness asks not to be recorded. See Part 3 for the form titled “REQUEST TO EXEMPT WITNESS FROM VIDEO RECORDING” (Form F). This form may also be used when a consenting party changes its mind after a proceeding has begun (see Point 1, Page 10).

5. If all parties who are present for a proceeding give consent, may recording go forward if a party who does not want to be recorded is not present?

If a party will not give consent for any proceedings in the case to be recorded, then no proceedings should be recorded. But if a party who does not want to be recorded is willing to let recording go forward for proceedings where that party is absent, then consent by the parties who will be present at the proceeding is sufficient to permit recording of that proceeding.

6. Should the consent/declination forms be docketed?

Party consents should be recorded on the docket, but declinations should not be recorded on the docket. In any instance, the consent/declination form itself should not become part of the public record.

Other Matters

1. Should the court notify those present at a recorded proceeding that the event is being recorded?

The Committee’s Program Guidelines state, “The court should remind all persons present in the courtroom that a recording is taking place, so as to limit noise, side conversation, and

other disturbances” (p. 4). Part 4 provides text the pilot courts can adapt for use in their courtrooms.

2. May a judge decide not to release a recording that has already been made, even when the parties have consented to recording the proceeding?

The Committee’s Program Guidelines state, “In the event that the presiding judge decides not to make the recording publicly available, the judge must document, using the forms provided by the FJC, the reasons for the decision and send that information to the FJC” (p. 6). See Part 3 for the form, “REASONS FOR JUDGE’S DECISION NOT TO MAKE PUBLICLY AVAILABLE ALL OR PORTIONS OF A VIDEO RECORDING THAT WAS MADE” (Form G).

There may be a number of reasons not to release all or part of a recording. A hearing may involve, for example, photos of autopsies, surgeries, or nudity. A judge may decide not to release a recording with such evidence. Alternatively, when a judge (or a party) deems certain evidence not suitable for public distribution, he or she can simply turn off the evidence camera during that portion of the hearing. The consent/declination form (Form E) gives parties an opportunity to designate beforehand the portions of a proceeding they do not want to record.