

CAYMAN ISLANDS



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PRACTICE DIRECTION NO. 3 OF 2017



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Court Stenographer Services

Introduction

From time to time questions have arisen about the responsibility of the stenographers to cover civil proceedings and to provide transcripts in criminal cases. Recently, the question also arose whether they are obliged to provide copies of any back up audio recordings (“BUARs”) that they may make for the purpose of assisting them in producing the transcripts of proceedings in criminal cases.

The stenographers are engaged to provide verbatim records of proceedings in Grand Court criminal cases. While section 53 (3) of the Criminal Procedure Code (2014 Revision) (“the CPC”) contemplates that this would include criminal proceedings before the Summary Courts, resources have only ever allowed for this to be done in the Grand Court.

The notes kept by the Chief Magistrate and Magistrates will continue to comprise the official record of proceedings in the Summary Courts. Consideration is being given to the introduction of a digital audio recording system for the recording of proceedings in the Summary Courts and further practice directions will be issued when that system is in place.

Section 53(1) of the CPC provides generally that, in the absence of other specific statutory provision, the Judge may give directions as to the manner in which evidence is recorded in any proceedings before any criminal court.

These directions proceed on the basis of that provision (and of course on the basis of the authority vested by section 95(7) of the Constitution) and are intended to explain and clarify the established practice.

1. **Criminal Cases:**

Official Transcripts

The transcript of criminal proceedings recorded by the stenographers and certified as correct by certificates given by the stenographers in keeping with the terms of section 53 (4) of the CPC, will be the official transcripts of the proceedings. In the production and certification of the final transcripts, the stenographers will be at liberty to confirm any details of the evidence or arguments with the defence or prosecution attorneys and, especially as to the details of the judge's summation to the jury, with the trial judge. Experience has shown that even the BUARs kept by the stenographers will sometimes fail to record clearly nuances of pronunciation. For such reasons, attorneys are encouraged to make available to the stenographers copies of written submissions and the judges, copies of written summations.

Daily transcripts

In an ideal world, daily transcripts would be provided on the ongoing basis during trials. This is not however, a tenable proposition because nearly as much time may be required out of court for tidying up the transcripts for certification before release, as needed for recording them in court.

Transcripts will therefore not be available on the daily basis during criminal trials.

It has however been agreed with the stenographers and is now established practice, that daily transcripts in draft (or so much of them as needed) will be provided to the judges if required for the purposes of directing the trials. As these will be in draft, the obvious reason why the same service may not be extended to the attorneys (or defendants in person), is the likelihood that they would seek to rely upon the draft transcripts as a conclusive record of whatever aspect of the proceedings they seek to emphasize, even while they have not yet been certified. More specifically, attorneys would seek to rely upon the draft transcript for the purposes of examining or cross-examining the present or upcoming witnesses, an exercise that would be permissible only if the transcript is certified.

Attorneys will nonetheless still be able to call upon the stenographers, as the need may arise from time to time during a trial, to confirm any aspect of the evidence from their notes.

2. Transcripts for criminal appeal cases

By direction of the Court of Appeal¹, in an appeal against any conviction by the Grand Court, the appellant shall be entitled to receive free of charge a transcript of any stenographer's note made at the trial, at the arraignment of the plea entered to the indictment and the judge's summing up to the jury. In the case of an appeal against any sentence by the Grand Court, the appellant shall also be entitled to receive free of charge a transcript of any stenographer's note of the sentencing proceedings. Court of Appeal Rule 33A goes on to direct that further aspects of the transcripts of criminal trials will be

¹ See Court of Appeal Rule 33A, as introduced by the Court of Appeal (Amendment) Rules 2009.

provided to parties only where truly necessary for the preparation and presentation of appeals. As the need for these further transcripts should arise well in advance of the Court of Appeal hearing, an application must be made in writing to a judge of the Grand Court explaining the need for them in keeping also with Rule 33A. In making such an application, the applicant shall state precisely which further parts of the trial transcript are sought, giving brief reasons why each part of the transcript sought is required. It is therefore clear that an objective of the rule, is to ensure that applicants do not require more of the transcripts than will reasonably suffice for the filing and presentation of appeals.

3. **Recording and transcribing of ex tempore judgments in the Court of Appeal and the Grand Court**

The stenographers have been extremely helpful in the Court of Appeal and the Grand Court by recording and transcribing ex tempore judgments in both criminal and civil appeals and cases. In Grand Court criminal cases the stenographers will provide directly to the judge the transcript they have prepared of any ex tempore judgment or ruling. The judge will then make any amendments, if necessary, and return the transcript directly back to the stenographer. If it is required for purposes of an appeal, that transcript will be included in the appeal bundle. (In the case of distribution to other judges and/or for the Law Reports, the stenographer will put that transcript in Word and PDF formats and email it to the officer responsible for distribution of judgments).

In the Court of Appeal the transcription of ex tempore judgments has usually been **provided for criminal cases although exceptionally, the Court may require this service for a civil case.** In the Grand Court where the stenographers cover all criminal

proceedings, the transcription of *ex tempore* judgments will for civil cases, be provided if exceptionally required by a judge.

This practice will continue subject to the directions below which will apply more generally to the practice in civil cases.

4. **Stenographers notes and transcripts for civil cases.**

The Judicial Administration remains unable to provide stenographer services for civil cases generally although this may change with changes to Government personnel policy to allow for the engagement of stenographers to provide this service.

For the time being, it therefore remains the obligation of the parties, with the approval of the judge, to make their private arrangements for these services in civil cases.

By the agreement of the parties and with the approval of the judge, the private stenographer's notes and transcriptions may be deemed the official record of the proceedings. Failing such agreement and approval, the judge's notes of the proceedings will be the official record.

5. **Digital audio recording for chambers proceedings.**

The Judicial Administration will continue to provide digital audio recording equipment for the recording of chambers proceedings in all divisions of the Grand Court.

Such recordings will be made (with the prior approval of the judge) and the disc provided to the parties for transcription at their expense.

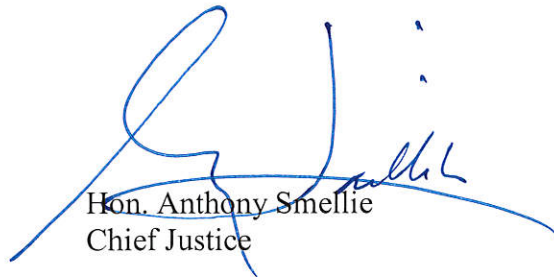
The transcription will not be regarded as an authorized transcript of the proceedings unless and until so approved by the judge; failing which, the judge's notes of the proceedings will be the official record.

6. Back Up Audio Recordings (BUARs)

- BUARs, where they are made, will be the work product of the stenographers, kept for their assistance in providing the official transcripts of the court.
- The BUARs are not expected to be provided to anyone unless so ordered by the court under the following circumstances.
- Upon a written application explaining why it is thought that any part of an official transcript is erroneous, a judge may direct that the BUARs are played back by the stenographer for comparison with the official transcript. This will be allowed in criminal cases only and when Defence and Crown Counsel are both present or where the applicant is a defendant in person, only when the defendant (or an authorized representative) and Crown Counsel are both present.
- A written record will be made of the exercise and of the outcome by the stenographer and must be signed by the stenographer and both parties.
- Where a discrepancy is found as between the BUARs and the official transcript, this will immediately be brought to the attention of a judge (preferably the trial judge if available) who will decide (if appropriate after consultation with the parties) what steps if any should be taken.
- In no circumstances will BUARs simply be handed over to any party.²

² This direction, while recognising the right of an accused person under section 7 of the Constitution to any record of the proceedings (cf *State of Mauritius* [2017] UK PC 16), also recognizes the need for the proper management of the Court Records of and of the demands upon the time of Court officials, in particular the court stenographers.

- BUARs (when kept and relied upon by the stenographer for provision of transcripts) will be kept for a period of 5 years to allow for the expiry of any time for appeal.



Hon. Anthony Smellie
Chief Justice

4 August 2017.