



DEVILLING

Purpose:	To address the devilling of work between barristers
Scope of application:	All self-employed practising barristers
Issued by:	The Ethics Committee
First issued:	November 2014
Status and effect:	Please see the notice at end of this document. This is not "guidance" for the purposes of the BSB Handbook I6.4.

1. "Devilling" is the long-established practice among self-employed barristers by which one barrister obtains the assistance of another, usually a more junior, barrister to carry out work to help the first barrister discharge his instructions. So far as the Ethics Committee is aware, however, no advice has previously been given as to when it is appropriate to devil work or obtain the assistance of a devil, or what steps should be taken to ensure compliance by the barristers concerned with their professional obligations.

2. The BSB Handbook defines devilling as follows (Part 6, definition (67)):

"Devilling" means where a self-employed barrister ("A") arranges for another barrister ("B") in the same chambers to carry out work for A on the basis that A will be responsible for the payment of B's remuneration for such work and will be responsible to the client for the work as if it were his own. "Devil" and "devils" will be construed accordingly."

This definition embraces all arrangements under which a self-employed barrister ("A") engages another barrister ("B") to assist him or her (i.e. the first barrister) in carrying out work for which he or she is responsible to the client. Such arrangements may cover work in the nature of preparing a first draft of a document, researching a point of law, obtaining copies of relevant authorities, preparing a chronology, organizing papers or summarizing evidence: in short work of any kind to help the first barrister carry out his or her instructions.

3. The definition is arguably wide enough to encompass the delegation of oral advocacy by A to B (e.g. attendance at a short procedural hearing). The Ethics Committee is not

however aware that advocacy services have ever been "devilled", and it does not consider that they can be: A cannot ensure that oral advocacy will be performed by B as well as if he or she had performed the advocacy himself or herself; nor can A ensure that B's judgments and decisions taken in the course of an oral hearing will be the same as those that A would have made.

4. It is implicit in the definition that the arrangement is one under which it is intended that B will be separately remunerated *by A* for the work done. The definition does not cover arrangements by which a pupil in receipt of pupillage funding undertakes work for his pupil-supervisor, or for another member of Chambers. Such arrangements have not, historically, been considered "devilling". (The position of "third-six" pupils is however more complex: they do not fall within the definition of "pupil" in the BSB Handbook (Part 6, definition (174)), and may well be considered "devils", particularly if they are not in receipt of pupillage funding and are being remunerated on the basis of work done for each member of Chambers.)
5. The BSB Handbook definition also restricts devilling to such arrangements made by barristers *in the same chambers*. The Ethics Committee does not believe that is historically accurate, although devilling arrangements between barristers in different chambers have become very rare. The Ethics Committee understands that the BSB made a deliberate decision to restrict the definition in this way.
6. "Devilling", as defined, is distinct from "Outsourcing" – i.e. the outsourcing to a third party of support services critical to the delivery of legal services (e.g. clerking services) – which is covered by Rule C86. That rule does not apply to devilling, as the BSB Handbook at gC130 makes clear. Arrangements of a similar nature with barristers in other chambers will, however, constitute "Outsourcing".
7. The term "devilling" will be used here in accordance with the definition set out in the BSB Handbook. It will be assumed that A is the instructed barrister and B his or her, usually more junior, assistant – although there is of course nothing to prevent a more junior barrister engaging the assistance of one more senior.

THE POSITION OF A, THE INSTRUCTED BARRISTER

General

8. A barrister instructed to do or provide any work of any kind will remain personally responsible to the client for the proper performance or provision of that work, regardless of whether he or she obtains the assistance of another barrister in preparing to deliver or provide it. See Rule C20:

"Where you are a *BSB authorised individual*, you are personally responsible for your own conduct and for your professional work. You must use your own professional judgment in relation to those matters on which you are instructed and be able to justify your decisions and actions. You must do this

notwithstanding the views of your *client, professional client, employer* or any other person."

9. Where you have devilled work to B, the work done for or provided to the client must be properly and competently carried out, *to the standard which the client could reasonably expect of you*. Accordingly you must satisfy yourself that any work done or assistance given by B has been properly and competently carried out, such that your instructions will be carried out *as well as if you had done all the work yourself*. In addition, you must ensure that *any decisions or judgments made by B are the decisions and judgments that you would make yourself*. The quality of the service done for or provided to the client by you must not be prejudiced or compromised by your decision to obtain assistance from B. In short, you must supervise and scrutinise B's work with sufficient care and diligence that you can properly adopt the work provided to the client as your own.

Must I obtain the client's consent to the devilling of work?

10. The starting point here will be the terms upon which you will accept or have accepted instructions.
 - (1) Clause 8.3 of the Bar's Standard Contractual Terms for the Supply of Legal Services by Barristers to Authorised Persons 2012 provides that: *"The Barrister may delegate the provision of any part of the Services but will remain responsible for the acts, omissions, defaults or negligence of any delegate as if they were the acts, omissions, defaults or negligence of the Barrister"*ⁱ. This therefore would appear to authorise devilling or other delegation of work without separate client consent.
 - (2) In contrast Clause 6.1 of the COMBAR/ CLSS terms (both versions 1 and 2) make the following provision: *"The Barrister may only involve another barrister or other third party in the performance of the Services under the Agreement if the Barrister obtains the Solicitor's prior consent, that consent not to be unreasonably withheld."* The Joint Guidance on those terms advises that *"If a barrister needs assistance or if the barrister considers that it would be sensible for someone else to be engaged in relation to the work, the barrister should discuss this with the solicitor"*ⁱⁱ. That discussion will include discussion of the basis on which the fees of the other barrister or third party are to be charged, and who is to be responsible for paying them.
 - (3) Many instructions are however still accepted on the "traditional basis" i.e. on the basis of the terms formerly set out in Annexes G1 and G2 to the old Code of Conduct of the Bar (8th ed.), or variants of them. There is no express provision in those terms in relation to the devilling or delegation of work. The Ethics Committee does not consider that a prohibition on the involvement of another barrister is to be implied; and that the position under these terms is therefore similar to that under the Bar's Standard Contractual Terms.

- (4) Public access. Where you have accepted public access instructions, but wish to engage a devil, you must take care to ensure that your contractual arrangements with the client permit devilling. As presently drafted, the Bar Council's Model Client Care Letters do not allow any delegation of work: they all specify that "*I personally* [i.e. the instructed barrister] *will do all the work needed under this arrangement*". If necessary, separate client consent to the involvement of a devil must be obtained.

In every case therefore in which you are considering seeking the assistance of a devil, you should check the terms on which you have accepted instructions, to ensure that such delegation of work is permitted. You should also consider your obligations as a data controller, which will require you to notify your client of the proposed disclosure of personal data to a devil and may, where sensitive personal data are concerned, require explicit consent to such disclosure: see paragraphs 13, 14 and 24 to 34 below.

Do I nonetheless have to tell the client that I intend to engage a devil to assist in the case?

11. In order to answer this question, you will need to consider two issues. The first is this. Even if the *consent* of the client is not required, it may be that the client should be *informed in advance* that you intend to obtain the assistance of a devil. Consideration must be given to Rule C19:

"If you supply, or offer to supply, *legal services*, you must not mislead, or cause or permit to be misled, any person to whom you supply, or offer to supply, *legal services* about:

- .1 the nature and scope of the *legal services* which you are offering or agreeing to supply;
- .2 the terms on which the *legal services* will be supplied, ***who will carry out the work and the basis of charging***;
- .3 who is legally responsible for the provision of the services;
- ..." *(emphasis supplied)*

A client may be misled by omission (e.g. by not being informed of an intention to devil work) as well as by commission. It may be so misled even if the terms on which the work has been accepted themselves *permit* devilling.

12. Whether you need for this reason to tell the client about your intention to engage a devil may depend on the scope of the work that you intend to delegate:

- (1) For example if you were to intend to devil *some central or critical aspect of the work*, and were to carry out that intention without disclosing it to the client, there is a possibility that the client might have been misled as to who was in substance to carry out the work.
- (2) Services provided by barristers are personal services, in which the identity of the service provider is, ordinarily, an important element. The client's usual expectation, even in a case where delegation is permitted, will be that the skills

and experience of the barrister instructed will be fully brought to bear on all critical aspects of the instruction.

- (3) *Unless therefore you can conscientiously assert that you will so supervise and/or scrutinise the work of B that you will be able properly to describe the final product as your own, you should disclose your intention to obtain the assistance of a devil.*
 - (4) However if the intention is to delegate only minor, preliminary or incidental parts of the work required – e.g. organizing papers, preparing a chronology, obtaining copies of relevant authorities, or researching a defined point of law for recent developments – then it is likely that you can properly delegate that part of the work to B without having to disclose that delegation to the client.
 - (5) In any case of doubt, the intention to engage a devil should be disclosed to the client, to avoid any risk that the client might be misled.
13. The second issue concerns data protection. For many tasks, it is likely that you will need to disclose some personal data to the devil. The circumstances in which this may be permissible are summarised in paragraphs 24 to 34 below. This may require you to obtain your client’s consent. If so, and particularly if that consent needs to be explicit, then you might be able to obtain this by giving – and obtaining your client’s explicit agreement to – a sufficiently detailed explanation of what devilling would involve, and what personal information might be disclosed for that purpose, if you were to engage a devil; but you would need to judge whether you have obtained sufficient consent to every disclosure of personal data that you propose to make in each case in which you engage a devil. You would also need to consider whether this was sufficient for you to be able to disclose personal data to a devil which concerns third parties (such as witnesses and other litigants).
14. In the absence of any necessary consent from your client, you would need to consider very carefully whether you could justify a particular disclosure as being “necessary” for a purpose listed in Schedules 2 and 3 to the DPA. The question whether a disclosure of data is necessary is a question of law on which the Bar Council cannot advise you, but you would be wise to exercise considerable caution if you do not have your client’s agreement or consent to a particular devilling arrangement. You should also exercise considerable caution regarding any personal data relating to third parties.

Charging for the work of the devil

15. If you have accepted instructions offered at a set or fixed fee, no separate considerations arise from the involvement of a devil. You will charge the set fee, regardless of the basis on which you may have agreed to remunerate the devil.
16. If however a fixed fee has been agreed and accepted on the basis that the work is *likely* to take *you* a certain number of hours, but you do not spend those hours on the work because you engage the assistance of a devil, there is again a serious risk that the client

will have been misled about the basis of charging; unless you were to disclose in advance your intention to obtain that assistance.

17. If you have accepted instructions on the basis that you will be paid at an hourly rate (cf. Clause 11.2 of the Bar's Standard Contractual Terms) this will – absent specific agreement – prevent you from claiming any fees for any time spent by a devil or other delegate. The BSB Handbook at gC59 indicates as follows:

"If you are a *self-employed barrister*, you would, for example, likely be regarded as having breached Rule C19 if you charged at your own hourly rate for work done by a *devil* or *pupil*. Moreover, such conduct may well breach your duty to act with honesty and integrity (CD3)."

In these circumstances, i.e. if there has been agreement on your remuneration at an hourly rate, but you would nonetheless want reimbursement of some or all of a devil's fees, the client's prior agreement to pay, additionally, for any work done by the devil must be sought.

Accepting instructions with an intention to devil work: additional considerations

18. Whenever you are offered instructions, you must also bear in mind Rule C17:

Your duty to act in the best interests of each *client* (CD2) includes a duty to consider whether the *client's* best interests are served by different legal representation, and if so, to advise the *client* to that effect.

[NB CD2 and Rule C17 remain relevant after instructions have been accepted. You are required to keep the appropriateness of any continuing instruction under review, against the developing circumstances of the case, in order to remain satisfied that the best interests of the client continue to be served by your carrying out the work, rather than someone else e.g. someone more junior or with different experience.]

19. If, therefore, you were to consider that some substantial part of the work which you are being asked to undertake (or which remains to be performed), or all of it, would be better performed – more quickly, more cheaply, more expertly or otherwise in the best interests of the client – by another barrister, separately instructed, you should discuss the separate instruction of that other barrister with the client.
20. The view of the Ethics Committee is that this remains the case, even if the terms of your instructions would permit the devilling of the work: CD2 and Rule C17 cannot be contracted out of simply by terms which permit delegation of work.
21. The client may consider that its interests are best served by you accepting or continuing with the instructions on the basis that some or all of the work will devilled,

subject to it being overseen and ultimately delivered, under your responsibility. But that should be the client's choice, not yours.

Confidentiality

22. If you have accepted instructions on terms that permit the delegation of the work required, that will implicitly allow you to communicate confidentially, and to the extent necessary, the confidential content of your instructions to a devil. Communication of the content of the instructions to a devil, for the purpose of assisting you to carry out your instructions, will not involve any breach of confidence.
23. However, if the terms you have accepted do *not* permit such delegation (cf. Clause 6.1 of the COMBAR/ CLSS terms), it is likely to be a breach of confidence to communicate confidential information to a devil or other delegate without the client's informed consentⁱⁱⁱ. Clause 10.2 of the COMBAR/ CLSS terms (version 2) is explicit in this regard:

"10.2 The Barrister may only disclose Information if and to the extent that:

- (a) disclosure is required by law;
- (b) disclosure is authorised by the Solicitor or Lay Client;
- (c) disclosure is required by the professional rules applicable to Barristers practising in England and Wales;
- (d) the Information is already in the public domain other than as a result of breach by the Barrister of the Barrister's obligations; or
- (e) disclosure is made to a pupil or mini-pupil of the Barrister."

The fact that Clause 10(e) permits disclosure to a pupil or mini-pupil emphasises that disclosure to a devil is not permitted. Such a disclosure would also be a breach of the requirement for lawful processing under the Data Protection Act.

Data Protection

24. In many cases, your instructions will include both sensitive and non-sensitive personal data relating both to your lay or public access client and to third parties. As a controller of that data under the Data Protection Act 1998 ("DPA"), the circumstances in which you will be able to use that data or disclose it to anyone else, including a devil, are restricted to the circumstances set out in the DPA.
25. For many tasks, it is likely that you will need to disclose some personal data to the devil. That disclosure will amount to "processing" the data. The relevant provisions of the DPA require that any disclosure is carried out fairly and lawfully (First Data Protection Principle). For this purpose, you will need either your client's consent or to be able to justify it as being "necessary" for one of the purposes set out in Schedule 2 to the DPA. You will also need to make a fair processing notice^{iv} available to your client, which includes the possibility of disclosure to a devil^v.

26. If the data that you need to disclose concerning your lay client is 'sensitive personal data', then you will need the *explicit* consent of your lay client to the disclosure of that data, *unless* the disclosure is "necessary" for one of the purposes set out in Schedule 3 to the DPA (as well as one of the purposes in Schedule 2).
27. As regards explicit consent, guidance from the Information Commissioner states that:
"... the individual's consent should be absolutely clear. It should cover the specific processing details; the type of information (or even the specific information); the purposes of the processing; and any special aspects that may affect the individual, such as any disclosures that may be made."
28. The most likely purpose of disclosure without consent (under Schedule 3) might be that this is necessary for the purpose of obtaining legal advice.
29. Disclosure of sensitive personal data may not be particularly problematic if your client has agreed that particular parts of your work *will* be undertaken by another barrister on your behalf, and that the necessary personal data will be disclosed to the devil for that purpose.
30. Without such agreement, and without having obtained the required consent from your client in some other way (e.g. as suggested in paragraph 13 above), you will need to consider very carefully whether you can really justify any disclosure as being "necessary" for a purpose under Schedules 2 and 3 to the DPA: see paragraph 14 above.
31. In addition, as a data controller you are required to maintain appropriate organisational and technical measures to ensure that the data is kept secure. This includes ensuring that any person to whom the data is disclosed, in this case a devil, keeps the data secure. The processing of the data by the devil must also be carried out pursuant to a contract made or evidenced in writing, which includes a requirement that the devil is to act only on instructions from you as data controller, and which requires the devil to comply with obligations equivalent to those imposed on a data controller by the Seventh Data Protection Principle, so as to maintain the security of the data.
32. The disclosure of data to a devil may also be prohibited by the terms and conditions of your retainer. Similarly, if your client objects to the use of a devil, any disclosure for such purposes is unlikely to be considered fair or lawful.
33. If the data of third parties is included in the potential disclosure to the devil, then it is unlikely to be practicable to get consent from such third parties. To the extent that such disclosure is necessary for the purpose of obtaining legal advice, consent is not likely to be required, even for sensitive personal data, but you should exercise considerable caution about whether this is the case, certainly if you do not have your client's agreement to the devilling arrangement: see paragraph 14 above. You would also need to make a fair processing notice available to those third parties, unless this is not possible (which may often be the case in relation to third parties) or if it would

involve disproportionate effort: if it would involve disproportionate effort, then a record of the reasons for this should be kept.

34. It will be clear from the brief outline above that your data protection obligations raise questions of law on which the Bar Council cannot advise you, so you will need to take your own view on these questions, and on the steps you may need to take in order for you to be able to disclose personal data fairly and lawfully to a devil. If in doubt, you should not disclose personal data, particularly sensitive personal data, to a devil.

Non-discrimination

35. You must not discriminate in your choices of devils on any unlawful or improper basis: CD8 and Rules C12 and C110-C112.

THE POSITION OF B, THE DEVIL

The duties of the devil

36. As a devil, you will be working for and on the instructions of A, the instructed barrister. You will be paid by A, on whatever basis or terms you will have agreed with A, and will have no right to be remunerated by A's client. Such terms as are agreed should be made or evidenced in writing.
37. Nonetheless you will owe certain duties to A's client. The BSB Handbook at gC46 indicates that:

"If you are a pupil of, or are devilling work for, a self-employed barrister, Rule C15.5 applies to you as if the client of the self-employed barrister was your own client."

Rule C15.5 provides:

"Your duty to act in the best interests of each client (CD2), to provide a competent standard of work and service to each client (CD7) and to keep the affairs of each client confidential (CD6) includes the following obligations:

- .1 you must promote fearlessly and by all proper and lawful means the client's best interests;
- .2 you must do so without regard to your own interests or to any consequences to you (which may include, for the avoidance of doubt, you being required to take reasonable steps to mitigate the effects of any breach of this Handbook);
- .3 you must do so without regard to the consequences to any other person (whether to your professional client, employer or any other person);
- .4 you must not permit your professional client, employer or any other person to limit your discretion as to how the interests of the client can best be served; and

- .5 you must protect the confidentiality of each client's affairs, except for such disclosures as are required or permitted by law or to which your client gives informed consent.

38. On that basis, Rule C15 imposes on a devil not just a duty of confidentiality owed to the client, but also wider professional duties to act in the best interests of that client; and to provide work and service – presumably to A – to a competent standard. Whatever may be the position with regard to duties owed at common law, these professional responsibilities of the devil are owed directly to the client.

Confidentiality

39. Regardless of whether the disclosure of information to you may have involved a breach of confidence by A, you (the devil) will owe the same duties of confidence to the client as does A. Instructions and other documents received from A will be received in confidence.

Data protection

40. If the material to be disclosed to you includes personal data within the meaning of the DPA, then you will have to agree to be subject to the same obligations in relation to that data as you would in a case of your own (i.e. in which you have received instructions directly from a professional or public access client). The difference here is that you are acting a data processor not as a data controller. As such you should ensure that you keep the data secure and follow the instructions of A in relation to such data, which may include more onerous obligations than you consider necessary. You are not entitled to disclose the information except as directed by A or as required by law.

Public Access

41. Public access. There no impediment to you, as a devil, accepting work from A, which A has undertaken to provide or carry out under public access instructions, even if you are not yourself entitled to accept public access instructions. It is A alone who will have accepted the public access instructions, and who must comply with the Public Access Rules.

PRACTICAL CONSIDERATIONS

Conflicts of interest or duty

42. It is important that the devilling of work is properly recorded in each barrister's Chambers' records, so that potential future conflicts of interest or duty can be identified at the outset and avoided.

Remuneration of devils

43. The BSB Handbook contains no rules regulating the payment of fees by one self-employed barrister to another. (Cf. Code of Conduct 8th ed. at paragraphs 406.1 and 406.2.)
44. In the case of devilling, therefore, the basis/ rate of fees to be charged to A by B, the time for payment, and all other terms of payment will have to be a matter of private arrangement between the two barristers. In case of dispute, reference should be made to the barristers' Head of Chambers, or to their Chambers' internal dispute resolution procedure. It may be possible to resolve the dispute using the Bar Council's Mediation and Arbitration Service, but this depends on both parties being willing voluntarily to submit to arbitration or mediation: see <http://www.barcouncil.org.uk/for-the-bar/introduction-to-member-services/arbitration-and-mediation-service/>. Ultimately, however, resort to the civil courts may be necessary.

Fee Notes and Taxation

45. The Bar Council's current understanding is as follows.
46. Work performed by a devil, B, should be the subject of a fee note issued to the instructed barrister A.
47. B must treat remuneration received from such work as earnings from his professional practice and must ensure it is included in computations of his liability to income tax.
48. VAT should be charged by B on his fees for such work, if B is registered for VAT.
49. Barrister A (if registered for VAT) may treat VAT charged by B as deductible "input tax" for the purposes of calculating his or her own liability to pay VAT.
50. For income tax purposes, the fees of B are tax-deductible expenses of A.

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](#).

ⁱ The explanation issued by the Bar Council about these Standard Terms clarifies, at paragraph 42, that *"this provision is to allow devilling or preparation of drafts by pupils; it is not intended to allow other types of delegation of the work required."* But the provision itself is not so limited.

ⁱⁱ The Joint Guidance continues: *"This is not, however, intended to prevent a barrister making proper use of a pupil who is in training with the barrister's chambers. Nor is it intended to prevent a barrister from seeking the assistance of another barrister in order, for example, to check certain points of law or to locate comment on a particular authority..."*. It is not altogether clear how this is consistent with Clause 6.1.

ⁱⁱⁱ This document does not touch on the separate question of whether an instructed barrister can disclose the confidential content of his instructions to a colleague, to the extent necessary to discuss particular points or issues of difficulty. Cf. Code of Conduct 8th edition para 702

^{iv} A fair processing notice requires that specific information as set out in Sch. 1 Part II §2(3) DPA 1998 be provided to the data subject. This includes (i) the identity of the data controller, (ii) the identity of any nominated DPA representative, (iii) the purpose or purposes for which the data are intended to be processed, and (iv) any further information which is necessary, having regard to the specific circumstances in which the data are or are to be processed, to enable processing in respect of the data subject to be fair.

^v You may find it helpful to refer to the practical suggestions made about this in the context of mini-pupils (see section 2 of this document).