

RESPONSE

OF

DEVILS AT THE FACULTY OF ADVOCATES

TO

THE CONSULTATION PAPER ON RULES COVERING THE MODES OF ATTENDANCE AT COURT
HEARINGS

ISSUED BY THE SCOTTISH CIVIL JUSTICE COUNCIL

Introduction and summary

1. In order to become an advocate in Scotland it is necessary to undertake a period of pupillage. This has long been known as “*devilling*”. There are 28 Devils in the current cohort. This is the largest group since 1999, and it is the second-largest ever. Devils range in experience from those who have recently completed a legal traineeship to experienced solicitors with many years of practice in the courts behind them. We undertake this period of unpaid training because we are committed to achieving the standards of legal excellence that the Scottish bar is renowned for. By attaining these standards we believe that we will be in the position to provide a valuable service to the Scottish public and the courts.
2. The current cohort of devils is grateful for the opportunity to respond to the consultation paper on rules covering the modes of attendance at court. A response to the consultation has been the subject of discussion among devils. This document takes account of those discussions. Draft and final versions of this response were circulated among all devils prior to the document being submitted.
3. We adopt and echo the contents of each of the responses made by (i) The Faculty of Advocates, and (ii) the junior end of the junior bar.
4. Accordingly, we largely confine our response to the particular difficulties that the proposed rules will cause in respect of the training of those who wish to become an advocate. We seek also to bring the perspective of those beginning a career at the Scottish bar.
5. In summary we are concerned that the proposed rules would have a negative impact on the training that a prospective advocate receives. In turn that will make it harder to attract, train and retain a high caliber of lawyer committed to spending their career at the Scottish bar. This will, necessarily, have negative consequences on the administration of justice in Scotland, and the reputation of Scotland as a centre of legal excellence.

Our first concern: the lost opportunity to learn from interactions between counsel and the bench

6. An essential part of devilling has always been to learn how to assist the court and put a client's case in a clear and persuasive way. That has generally been done by devils assisting their devilmaster in preparing for a hearing, and then attending court. Devils thereby observe how an established advocate puts a client's case and assists the court in reaching its decision.
7. Where contentious and substantive business is being conducted, video conferences are an unsatisfactory alternative to in-person hearings. Devils are not able to learn how best to engage with the bench in a constructive and helpful manner, because that engagement is frequently reduced or lacking when business is conducted via Webex. There is invariably a time-delay or "lag", often making attempts at real-time interaction between the decision-maker and counsel stilted and unnatural.
8. A key element of a devil's training is understanding how an experienced advocate responds to questions from the bench. Where substantive business is conducted remotely, our view is that devils are able to observe, at best, a passable alternative to the interaction that ordinarily takes place between counsel and the court. Current devils are thereby put at a disadvantage to our predecessors in developing oral advocacy techniques. This makes it harder for devils to develop the skills necessary to serve the courts and clients in future.
9. We are therefore particularly concerned by the terms of Proposed Rule 35B.3. This would establish a general presumption that various substantive hearings will be dealt with electronically. We have explained above why electronic hearings are, in our experience, materially inferior to in-person hearings. It will become harder for devils to develop excellence in oral advocacy when hearings in relation to such substantive matters as petitions for judicial review, legal debates on the procedure roll, proofs in commercial actions, reclaiming motions and appeals are all generally to be held electronically.
10. With the easing of Covid-19 restrictions a significant number of devils have been able to observe substantive business taking place in a physical court room. This has been warmly welcomed. It also allows our cohort to directly compare the experience of devilling in-person with remote hearings. We are clear that the opportunity to learn is far greater where substantive hearings take place in person.
11. As devils we therefore consider it essential that the default position for contentious or substantive business should be in-person and in a court room.

Our second concern: the lost opportunity to learn from interactions between counsel and witness

12. Observing experienced counsel take the evidence of witnesses is a core part of a devil's training. Again, this has traditionally been done by observing what happens in court. Where substantive business is conducted remotely the opportunities observe this are reduced in terms of quality and frequency.
13. Where a civil proof is calling remotely we are concerned that the witnesses' evidence in chief is frequently ordered to be taken by affidavit evidence. This removes the opportunity to observe evidence in chief being taken. This is a key skill of court advocacy, in which devils are expected to demonstrate competence before calling as an advocate. The removal of the opportunity to learn from experienced counsel is of significant determinant to a devil's training.
14. Where the evidence is given orally it suffers from the same technical difficulties as mentioned in respect of our first concern and the interaction is more stilted. It is difficult for devils to observe how productions are being put to the witness. All of this makes it harder for devils to observe and learn best practice in taking evidence from witnesses.

Our third concern: the lost opportunities to learn from interactions with other professionals

15. Where substantive hearings take place online devils miss the opportunities previously afforded to observe discussions that their devilmaster has within the court house. Where a substantive hearing calls online, discussions with opposing counsel no longer take place in Parliament Hall but by telephone or similar means. The same is true of hearings where a devilmaster is being led by senior counsel and discusses the case prior to a hearing. Where the hearing is not being held in person, it is unlikely that devils will be able to observe both sides of the discussion. This position ought not to continue unnecessarily.
16. The same problem exists in respect to negotiations with opposing counsel. Where the hearing calls remotely these would be carried out by telephone or video call rather than in person within the court building. All of this combines to deprive devils of the chance to observe best practice in working with other advocates in an atmosphere of mutual trust and confidence. This is regrettable, since understanding different negotiation styles and alternative ways of assisting parties to settle disputes is an important skill to learn. It assists clients, saves expense, and makes best use of court time. Learning how to do this requires observing the discussions. Devils are currently locked out of most of these discussions in a way that would not be the case were substantive opposed hearings to be conducted in person. We would not wish to see this situation continue unnecessarily.

17. On a similar theme, devils are less likely to be introduced to the instructing agent where hearings are conducted remotely. The proposed rules include (see our paragraph 9 above) a presumption in favour of online hearings for various substantive hearings, many of which will be of some complexity. Understanding how instructions are taken, and how discussions with agents shape what is submitted to the court is an important part of a devil's training. Where hearings are held remotely this is difficult for a devil to access.
18. Further, online hearings mean that devils are likely to be materially deprived of the opportunity to meet with instructing agents at an early stage in a devil's career. This hampers the development of a devil's future practice because it reduces the opportunity to build a network of agents who may wish to instruct that devil once called. Devils and prospective devils are generally acutely aware that there is no guaranteed income for an advocate. Making it harder to develop one's business at an early stage can only serve to put barriers in the way of those with the least financial support behind them. This in turn will have a negative impact on the diversity of those seeking to come to the bar in Scotland.

Our fourth concern: the damage done to Scotland's centre of legal excellence and the loss of collegiality

19. Devils are training in order to begin a career of self-employment. Unlike in a firm of solicitors, where formal structures of support should be in place to provide guidance and supervision, devils enter a branch of the profession where that guidance is (with some important exceptions) informally provided. We are concerned that the general presumption that so many types of important hearing will be conducted online (see our paragraph 9) will damage the collegiality of the bar. It will become harder to get such advice.
20. Where substantive hearings are to be conducted from advocates' spare rooms there will be a reduced need to attend Parliament House or the Advocates Library. Each will remain quieter than before the pandemic. The collegiate atmosphere and the opportunity to seek informal guidance from senior advocates will be significantly reduced. This, in turn will be likely to lead to a loss of support provided to devils and junior advocates. This will make devilling a less attractive prospect.
21. The proposed rules will needlessly undercut Scotland's reputation as a centre of legal excellence and undermine the Advocates Library as a centre of Scottish public life.

Conclusion

22. We consider that the courts responded with agility and wisdom to the Coronavirus emergency. Remote hearings were an intelligent and forward-thinking way to keep justice moving during events that could never have been foreseen in the rules of court.
23. However, a continuation of ideas and rules written for an emergency is a dangerous way to proceed when the proposals are so widespread and consequential.
24. For example, such a presumption as is contained within Proposed Rule 35B.3 (see our paragraph 9 above) would needlessly diminish one of the important centres of Scottish public life in its role as a centre of legal excellence. In our respectful submission such a decision should involve a much wider public debate than this consultation allows for.
25. We are clear that online hearings for substantive and contentious business are inferior to in-person hearings. As a group of people eager to call as advocates and dedicate our careers to the Scottish justice system we respectfully urge that substantive or contentious hearings are held in-person as a general rule.
26. As explained above, we are concerned that these proposed rules would damage the training offered to devils. However, we are aware of the wider implications also. In our view, the proposed rules of court would deprive litigants of access to open justice taking place in a physical court. It would not be appropriate to so fundamentally alter the system of Scottish justice through the Civil Justice Council. A much wider national debate would be required to justify such an important departure from the way in which justice has always been administered in Scotland.
27. We consider that it is important that substantive or contentious hearings are conducted, as a rule, in-person.

Advocates Library

15 November 2021