



Mini-Pupils: Implications for your Practice

Purpose: To address issues arising when mini-pupils are taken on

Scope of application: All practising barristers, but concentrating on the self-employed

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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.

Background

A. Mini-pupillages have for several decades been an established part of the Bar's engagement with those considering, or interested in, a career at the Bar. They perform an important role, not just in enabling those with a possible or actual interest in a career at the Bar to experience practice at first hand, but also as part of the Bar's efforts to increase equality and diversity within the profession, and to improve the accessibility of a career at the Bar, particularly to those from less advantaged groups within society¹.

B. Mini-pupillages give rise to some potential ethical and legal issues for barristers and their chambers. The Bar Council is not aware that these issues have given rise to any problems in practice, but it is right that you should be reminded of them in the light of the ever increasing use of electronic communications and documents, new practices in the use of contractual terms, and the requirements of the BSB Handbook.

C. Similar issues may arise with mini-pupils taken on by employed barristers and those working in entities, but the involvement of employment relationships may assist (or complicate) the situation, depending on your circumstances and the nature of the

¹ The Bar Council includes in this description schemes such as those run in partnership with the Social Mobility Foundation.

relationship between the mini-pupil and the employer or entity. As the situation will be context-dependent, the focus here is on self-employed barristers; but you may still be assisted by referring to what is said below. If you wish to discuss how you might deal with similar issues in your particular circumstances, then the Bar Council's Ethical Enquiries Service would be happy to help.

What are mini-pupillages?

D. The term "mini-pupillage" may be applied to a variety of arrangements. Often, the term will refer to students in higher or further education spending a few days, a week or more in chambers, but it may also apply to others such as those still at school².

E. The main aim of most mini-pupillages is to provide experience of the work of a barrister, to enable mini-pupils to decide whether to pursue a career at the Bar. This will usually be achieved by mini-pupils shadowing members of chambers, looking at examples of case papers, analysing legal or factual problems, and discussing with barristers what is involved in those cases and problems, and in a career at the Bar more generally. Some mini-pupillages may also involve an element of assessment by chambers.

F. Other forms of work experience in chambers are not covered here. They may well need to be treated with greater caution, particularly as regards confidential information and personal data.

Issues to be considered

G. If you or your chambers are to take a mini-pupil, then you are likely to need to consider the following issues, and to decide how to manage the risks to which each may give rise in your own practice. These are distinct, but will inevitably overlap:

- (1) Confidentiality and privilege
- (2) Data protection
- (3) Client understanding/wishes, and
- (4) Conduct of mini-pupils.

H. In considering these issues, you should remember that mini-pupils will not usually be subject to the Code of Conduct in the BSB Handbook, or to any other professional obligations of a similar nature. This can be contrasted with the position of pupils, who are subject to the Code of Conduct and other provisions of the BSB Handbook (particularly rC15.5 and gC46 in relation to confidentiality).

² Additional considerations relevant to the case of student placements are set out in the Bar Council's Note at https://www.barcouncilethics.co.uk/wp-content/uploads/2017/10/CONFIDENTIALITY-AND-DATA-PROTECTION-ISSUES-STUDENT-PLACEMENTS.clean_.pdf

I. The Bar Council hopes and anticipates that a considered, structured approach to mini-pupillages should lead to mini-pupillages continuing to be available, and to perform their important role, in most practice areas, and encourages you and your chambers to develop an approach that enables you to continue to comply with your obligations in a practical and efficient way.

A possible approach

J. The Bar Council's main suggestions regarding mini-pupillages, much of which is based on what is believed to be current good practice, are set out in summary in the following numbered sub-paragraphs. You must decide for yourself how best to deal with the issues and risks. This summary cross-refers to passages in the main text, but it is no substitute for reading and considering the whole of this document:

(1) Identify what types of personal data you may control in the course of your practice, and those types of work or case in which you are more likely to be controlling a greater amount of personal data or personal data which carries greater risks (for example, personal data which falls into the Special categories of data set out in Article 9 GDPR or which relates to criminal convictions and offences or related security measures under Article 10 GDPR). This should cover personal data of both your clients and third parties (e.g. witnesses, opposing parties and their representatives, family members of a client or another party).

(2) Identify those types of work or case in which the disclosure of personal data and of confidential information to mini-pupils is likely to present greater risks, or be less desirable or appropriate.

(3) Take the result of the preceding points (1) and (2) into account in deciding how best to address your duties of confidence and data protection, and in considering the following suggestions.

(4) Decide whether (and when) you can put yourself in a position to be able to disclose personal data, and confidential information, to mini-pupils. If you consider that you can, and that it would be appropriate to do so (bearing in mind the importance of mini-pupillages, as outlined above), then identify the necessary steps and ensure that you take them. If you consider that you cannot, or that it would not be appropriate to try, either in some areas of work or categories of case, or in the particular case, then avoid any disclosure of such data to mini-pupils in those situations.

(5) In those circumstances where disclosure of all or some types of personal data and/or confidential information to mini-pupils may be permissible and appropriate, take the steps necessary to comply with your legal and ethical obligations. These

might include the following steps. These steps are not put forward as mandatory, or as being the only way in which you can comply with your obligations, but you may find them helpful for this purpose:

(a) Consider making provision in your contractual terms or acceptance of instructions, allowing you to disclose confidential information and personal data to mini-pupils even in circumstances where you take the view that you do not need to do this as a matter of law. The disclosure of confidential information is dealt with in some of the standard conditions for accepting instructions in current use, but not in all. The disclosure of personal data may be rather less well covered, and you will need to do more in cases involving Special categories of personal data. You should bear in mind that in some situations, disclosure could happen inadvertently.

(b) Take steps to give, and to bring to the attention of your lay or public access client, the notification required by Articles 13 and/or 14 GDPR that you may process their personal data by disclosing it to mini-pupils. This might include publishing a fair processing notification on your chambers/professional website (referred to in your contracts or acceptances of instructions), and/or adding it to what you are already giving to your lay or public access clients about complaints handling procedures (or at least adding a reference and link there to a notice set out on your chambers/professional website).

(c) You may want to cover the issue of consent to data processing in a similar way, or you may prefer to deal with this on a case-by-case basis. In deciding how to approach this, bear in mind points (1) and (2) above. Bear in mind also that you are unlikely to be able to obtain consent from each data subject, where the personal data of third parties is involved. You will need to find an alternative lawful justification for the disclosure to the mini-pupil of personal data of third parties.

(d) Where you have not already catered adequately for the disclosure of confidential information and/or your client's personal data, consider obtaining consent on a case by case basis, if it is appropriate for you to do so in any particular case. Written consent is preferable, but it may be appropriate to seek explicit oral consent to a mini-pupil being present during a formal or informal conference or consultation and to record that such consent has been given, and that could be done at the time (although it would be good practice to give prior warning of this).

(e) Where you are acting on the instructions of a professional client (rather than on a public access basis), you will need to decide to what extent you can rely on the terms of your contract or acceptance of instructions, and your other dealings, with your professional client as regards the lay client's consent to the

disclosure of confidential information and/or non-sensitive personal data, and as regards the passing of any fair processing notification on to your lay client. In many cases, you may feel comfortable to rely on an agreement or confirmation from your professional client, but there will be others in which it will be prudent or necessary to seek confirmation directly from your lay client.

(f) Where your case papers contain personal data in the Special categories/relating to criminal convictions and offences relating to your lay or public access client, you are likely to need that client's explicit consent to disclose that data to a mini-pupil. This will require you to go further than steps (a) to (e). You will need to decide in each case whether you are confident that your lay or public access client has received your fair processing notification, and has given explicit consent to this.

(g) Before seeking client consent in any particular case, consider whether it is appropriate for you to do so, and whether it is necessary and appropriate for you to be disclosing the confidential information or personal data relating to that client/case in any event.

(h) Keep a record of any consent obtained in an individual case.

(i) Where your case papers contain personal data – particularly personal data in the Special categories/relating to criminal convictions and offences – relating to someone **other than** your lay or public access client (such as another litigant, a witness, or a family member of your client or another party), then make a considered decision whether a mini-pupil can be allowed to read or hear anything relating to that case, other than in open court. Listening to an oral disclosure by your client of such data relating to third parties which is merely discussed in the course of a conference is not likely to be processing by the mini-pupil providing that they do not consult, record, use, disclose or disseminate the information, but care would be needed. Subsequent disclosure by the mini-pupil is likely to amount to processing, and may lead to liability for you if it is considered that you have procured the disclosure by the mini-pupil.

(j) Obtain signed confidentiality and data protection undertakings from all mini-pupils who are not minors, and have a system in place to ensure that this happens. Retain copies, and contact details for mini-pupils (subject to your data processing obligations in relation to their personal data). The Bar Council sees no reason why both sorts of undertaking cannot be included in the same document. You should also consider whether it would be appropriate to require mini-pupils to sign processor agreements in the form required by GDPR Article 28 – this is considered in section 2 below.

(k) Decide whether each mini-pupil understands and can be expected to comply with such undertakings. If they are too young to sign a binding contract, then you will have to take steps to limit their exposure to confidential information and personal data.

(l) If you cannot be confident about a particular mini-pupil, then do not take that person on, or limit what they can see and hear: see point (6) below.

(m) If you cannot be confident about what information or data you can disclose to a mini-pupil in a particular case, then do not allow a mini-pupil to see or be involved in that case, or limit what they can see and hear.

(n) Take care to identify any specific cases in which there are any express or implied limitations on what (if any) confidential information or personal data you can disclose: you will have to comply with those obligations in those particular cases. Have a procedure in place to ensure that you give effect to any data subject's objection to the disclosure of personal data.

(o) Exercise your common sense and professional judgement in relation to each mini-pupil as regards the cases, clients and information that they may see and hear whilst they are with you. There will be cases, clients, and situations in which it will not be appropriate to disclose any confidential information or personal data (even if permissible), or even to ask for any necessary permission to do so. For example, you might conclude that no sensitive material of any sort should be disclosed to any mini-pupil, or that no personal data should be disclosed to any mini-pupil who is still at school or under 18³, except insofar as that information is ordinary personal data (not in the Special categories or relating to criminal convictions) which has become a matter of public knowledge by reason of being revealed in proper circumstances during a public hearing.

(p) It would be good practice to limit disclosure of confidential information and personal data to what is necessary for the purposes of the mini-pupillage, and to ask mini-pupils not to make notes, if the case involves personal data in the Special categories of data set out in Article 9 GDPR or which relates to criminal convictions and offences or related security measures under Article 10 GDPR. At the end of their mini-pupillage they should be required to return any notes or copies which they may have in their possession.

(q) Your chambers may want to put policies and procedures in place for ensuring that these issues are addressed consistently in relation to mini-pupils whilst they are in chambers, and ensure that all members of chambers are

³ See footnote 2 above.

aware of those policies and procedures. If you wish to be able to proceed on the basis that others have complied with any policies and procedures, then you need to know that they are being adhered to.

(r) It may also assist all members for each set of chambers to identify the types of data processing that may occur during mini-pupillages in chambers, taking into account the areas of work and types of cases being dealt with in chambers, how data is processed in chambers, and how mini-pupillages are conducted, so as to assist members in identifying risks and minimising those risks. This could help to minimise the burden of risk assessment in individual cases.

(s) A considered and documented assessment of the risks of the misuse of confidential information and personal data (in areas of work, categories of case, or in individual cases) could prove helpful to you if something were to go wrong. The aim of this would be to enable you to demonstrate that you took a risk-based approach to considering the issues in that case, and ideally this would provide a clear record showing that you made a proper and considered assessment of the risks of any disclosure. That might partly be undertaken on a general or chambers-wide basis – e.g. in relation to particular areas of work or categories of case – but whatever is done at a chambers level, it is you who will be responsible for any issue arising in your own cases, so you must still pay attention personally to confidentiality and data protection issues whenever you have a mini-pupil. In particular, you may need to supplement any general or chambers-wide risk assessment with a case-specific risk assessment in relation to a particular set of papers which you are proposing to show to a mini-pupil, or a particular situation in which you are proposing to involve a mini-pupil. This might cover the nature of any information and personal data which you are considering disclosing to the mini-pupil, the purposes of the disclosure, whether it is permissible, and what steps you may need to take to ensure that the mini-pupil can and will deal responsibly with it.

(t) In some cases, it may be wise to make a record of your reasons for making a disclosure, but if you are in doubt, then the safer course would be not to make the disclosure.

(6) In relation to some areas of work and categories of case, or where you have doubts as to whether a mini-pupil can sufficiently be trusted with confidential information and personal data, you will need to think carefully about how you structure the mini-pupillage and what you allow the mini-pupil to see and hear. You will need to look for ways of avoiding breaches of confidence and misuse of personal data, and minimise the risk of either happening inadvertently. The following suggestions may assist in this:

(a) Mini-pupils will be able to attend and watch hearings which are open to the public.

(b) Mini-pupils will be able to attend and listen in to formal or informal conferences where there will be no mention, discussion or electronic recording of any personal data relating to your lay or public access client or to a third party.

(c) Matters which have been referred to in public during a hearing are no longer confidential, and discussing such matters with a mini-pupil would not involve any breach of the duty of confidentiality. However personal data referred to in public at a hearing will still be subject to GDPR restrictions on processing, and may not be disclosed to or discussed with a mini-pupil otherwise than in compliance with GDPR – see section 2 below.

(d) You might consider using anonymised case papers or hypothetical instructions, or setting generalised tasks.

(e) Where the only issue is data protection, you may still be able to let a mini-pupil read papers supplied to you only in hard copy (where those papers are not otherwise held in such a way as to bring them within the scope of the GDPR/DPA 2018 – but see sections 2.3-2.6 below.

(7) Be conscious of the potential wishes and sensitivities of your clients in relation disclosure to mini-pupils, or their presence when advising or appearing at a hearing. [3.1-3.5]

(8) Ensure that mini-pupils understand the standards of behaviour expected of them when in chambers, in court, and in the presence of clients. [4.1]

1. Confidentiality and privilege

(a) The starting point

1.1 Every barrister owes a core duty (CD6) to keep the affairs of each client confidential. This duty must be complied with in respect of mini-pupils.

1.2 Rule C15.5 expands on this by providing that your core duties including an obligation to "*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*".

1.3 This duty of confidentiality arises as a matter of law.

(b) The general legal position on disclosure of confidential information

1.4 The prudent approach will be to obtain informed consent from your professional or public access client as a matter of course to the disclosure of confidential information to mini-pupils. This may most conveniently be done in your contractual terms or terms of acceptance of instructions, but can also be done at a later stage. Contractual terms and the obtaining of consent are considered in sections 1(c) and 3 below.

1.5 If the terms of your contract or instructions do not deal with this, then the question whether allowing a mini-pupil to read papers or to listen in to discussions would be a breach of confidence (in the absence of explicit consent), or be "*permitted by law*", is a question of law. The Bar Council is not aware of any authority on this issue, and cannot advise you on it.

1.6 The Bar Council's own view is as follows⁴, but it remains to be seen whether the courts will agree with this:

(a) The courts are likely to hold that you may disclose confidential (including privileged) information to a mini-pupil without being in breach of your duties of confidence if:

(i) the mini-pupil is subject to an obligation to maintain confidentiality similar to your own; and

(ii) you reasonably believe that the mini-pupil fully understands that obligation, and will comply with it.

(b) However, there may be something in the particular circumstances (e.g. a term of your contract with your professional or public access client, or particular instructions⁵) which might prevent disclosure or restrict the information that can permissibly be disclosed.

1.7 In forming this view, the Bar Council has taken into account its belief that the mini-pupillage system is a matter of common knowledge among professional clients, and that they can be expected to be aware of it. They are, thus, well able to propose any specific contractual terms that they or the lay client might wish to include in their contract with you if either they or the lay client do not wish any confidential or privileged information to be disclosed to mini-pupils.

⁴ Which is believed to be consistent with the view it took on this issue in the 1990s.

⁵ Relevant circumstances might also include a client's refusal to agree to a contractual term permitting disclosure to a mini-pupil.

1.8 Public access clients (and lay clients) may be less aware of the mini-pupillage system, but it is not dissimilar to the internships and work experience offered in many professions and businesses, the existence of which the Bar Council also regards as common knowledge, and thus as being known commonly to public access clients and lay clients.

1.9 Accordingly, any different degree of knowledge on the part of public access clients will not necessarily mean that you cannot disclose confidential information to mini-pupils in a public access case, but it would be sensible to cater for such disclosure in your client care letter in any event: see further below.

1.10 You should also bear in mind the possibility that you could be held personally liable to your client for any breach of confidence committed by a mini-pupil, even if the disclosure by you to the mini-pupil was permitted.

(c) The terms of your contract or instructions

1.11 You will in many cases be entering into express contracts with your professional and public access clients. You will in any event be setting out the terms on which you are willing to accept instructions: see rC22 and rC125.

1.12 The terms of such contracts, the terms on which you accept instructions, or the terms of your instructions themselves, may have a bearing on the extent of your duties of confidence. They may make these duties stricter than would otherwise be the case, or they may allow you to make certain types of disclosures.

1.13 There may also be something else in the terms or nature of the relationship with a particular professional or lay client which affects the general position.

(c)(i) Stricter duties of confidence

1.14 In those cases in which your obligations are stricter, the general steps suggested below (including a confidentiality undertaking) may not be sufficient for you to allow a mini-pupil to be party to confidential information relating to that client or matter.

1.15 You will need to be alert to this in relation to your own clients and matters, and to ensure that neither you nor anyone for whom you may have some responsibility (e.g. a clerk or a pupil) allows a mini-pupil to become aware of that information. This will require you to ensure that you do not allow a mini-pupil to observe or become involved in any work you may do on that matter, or on any matter relating to that client, or to read any related case papers; but it may also require you to decline personally to take a mini-pupil at all, if there would be a risk of a breach of confidence (e.g. through a mini-pupil being able to see papers in your room relating to that matter or client, or overhearing a telephone conversation).

(c)(ii) Terms giving consent to the disclosure of confidential information

1.16 Your contracts, or the terms on which you accept instructions, may include provisions allowing you to disclose confidential information to mini-pupils. Three examples of particular published terms (as at the date of publication of this document) are considered below.

1.17 In public access cases, it will be your responsibility to ensure that any consent that you obtain from your public access client is properly informed. If you wish to do this by including a provision in your client care letter or contract, you will need to be able to show that the client knew that he was giving that consent and that it was properly informed. This will apply whether or not there is an intermediary. You should be wary of placing any reliance in this regard on an intermediary who is not a qualified and regulated lawyer. You should also refer to paragraphs 1.32-1.33 and section 3 below.

1.18 Where you are dealing with a professional client, you may feel able to rely on your professional client's authority and his or her own duties to your lay client to explain the terms of the contract with you, and thus may feel able to rely on any consent given in this way as being "informed consent". This will be a matter for you to decide in each case, but the Bar Council would ordinarily expect you to be able to do so. If not, then the situation will be similar to that in paragraph 1.17.

1.19 There are likely to be some cases in which your professional or public access client does not agree to the inclusion of terms of this nature. There may also be cases where you consider it inappropriate to suggest them. Some relevant considerations in this regard are set out in section 3 below.

(c)(iii) Examples of standard terms

The Standard Conditions of Contract for the Supply of Legal Services by Barristers to Authorised Persons 2012 (Updated for the GDPR in 2018)

1.20 These terms make express provision for the position of mini-pupils.

1.21 Clause 5.1 provides as follows:

"5.1 The Barrister will keep confidential all information provided to him in connection with the Case unless:

5.1.1 he is authorised by the Authorised Person or the Lay Client to disclose it;

5.1.2 the information is in or comes into the public domain without any breach of confidentiality on the part of the Barrister; or

5.1.3 he is required or permitted to disclose it by law, or by any regulatory or fiscal authorities, in which case, to the extent that he is permitted to do so, he

will endeavour to give the Authorised Person and/or the Lay Client as much advance notice as possible and permitted of any such required disclosure. "

1.22 Clause 5.3 deals with the position of mini-pupils (and pupils), in the following terms:

"Unless the Authorised Person expressly informs the Barrister to the contrary in advance in writing, the Barrister may allow the Instructions to be reviewed by another barrister or by a pupil (including a vacation pupil or mini-pupil) in chambers, on terms that that other barrister or pupil complies with clause 5.1."

1.23 As these are terms to be entered into with your professional client, you may feel able to rely on them as giving the necessary "informed consent": see above.

1.24 Accordingly, subject to that last point, these terms allow you to disclose confidential information to a mini-pupil, so long as the mini-pupil is subject to an obligation in the terms of clause 5.1.

The COMBAR/CLLS terms (version 3, 27.4.18⁶)

1.25 Clause 10.2(e) permits you to disclose Information (defined in clause 10.1) to a pupil or mini-pupil, but clause 10.3 stipulates that you will be responsible if the pupil or mini-pupil fails to keep that Information confidential. As the COMBAR guidance points out (paragraph 65), this is a strict liability provision, although the guidance also states that Bar Mutual Indemnity Fund Ltd ("BMIF") has confirmed that cover will be available for that liability under the standard BMIF terms.

1.26 As stated in paragraph 66 of the COMBAR guidance, this permission to disclose does not cover "secondees and interns" who are not mini-pupils. If you adopt COMBAR/CLLS terms, therefore, you should ensure that you do not disclose any 'Information' to anyone within this description. Whilst the Bar Council would understand the term "mini-pupil" to cover all of those arrangements that would ordinarily fall within that term (as indicated earlier), it cannot advise (never mind give a definitive view) on the meaning of terms used in COMBAR/CLLS contracts, or on where the boundary lies between mini-pupillages and secondments/internships. You should accordingly be alert to any situation that might instead fall within the phrase "secondee or intern".

1.27 As these are terms to be entered into with your professional client, you may feel able to rely on them as giving the necessary "informed consent": see above.

⁶ The current version at the time of the last review of this document was version 3(27.4,2018), but clause 10 was not changed between version 3 and version 2 (or 2.1).

1.28 Those comments apply to versions 2 and 3 of the COMBAR/CLLS terms. Version 1 of those terms could be understood as prohibiting the disclosure of confidential information to a mini-pupil. You should ensure that you are aware of any cases in which version 1 may still apply to ongoing matters.

The BSB's Model Public Access Client Care Letters

1.29 These make no reference to mini-pupils, but do cover confidentiality⁷.

1.30 It is unclear whether disclosure to mini-pupils would be permissible under the terms of a letter in the form of one of these models without more, so you would be wise to consider including a specific provision allowing you to share confidential information with mini-pupils (and perhaps cover pupils at the same time) on terms requiring mini-pupils to maintain the client's confidentiality.

1.31 You might find the standard terms referred to earlier in this document of some assistance in modifying the standard client care letters, but you should also bear in mind that your public access client may not understand the terminology used.

(d) Obtaining client consent subsequently

1.32 In principle, you will always have the option of seeking express consent from your professional, public access or lay client to the disclosure of confidential information to a mini-pupil. This could be done in writing or orally. Section 3 below deals with the question whether it is appropriate for you to seek that consent, and the timing of any request.

1.33 Your client may well take a steer from you on this, so you should take care not unduly to influence your client's decision. You should also bear in mind that your client is likely to be relying on your judgement that the mini-pupil is trustworthy.

(e) Confidentiality undertakings from mini-pupils

1.34 For many years now there has been a practice, which is believed to originate in advice on confidentiality and mini-pupils issued by the Bar Council in the 1990s, of requiring mini-pupils to sign confidentiality undertakings, and of ensuring that they fully understand the importance and effect of their obligations of confidence and of legal professional privilege, before they see or hear any confidential or privileged information.

1.35 As part of your duties to maintain confidentiality, this practice should continue, and should be implemented in every case, even where the terms of your contract with

⁷ Each of the model letters (for clients with an intermediary, for intermediaries themselves, and for clients without an intermediary) includes a provision dealing with confidentiality. You should refer to the latest version of each of those letters for the currently suggested terms.

your professional or public access client permit you expressly to disclose confidential information to mini-pupils.⁸

1.36 For this purpose (and in order for you to be able to rely on such an undertaking having been obtained, without checking for yourself), you should take reasonable steps to ensure that your chambers have a system in place for obtaining and preserving records of these undertakings. Your obligations under the BSB Handbook are likely to require you to do this (subject to rC90). If you or your chambers have not introduced such a system before now, then you should now do so.

1.37 The form and content of a confidentiality undertaking will need to be tailored to the needs of each set of chambers, and should take account of the contractual terms being used in chambers. Given the variety of possible contractual terms, the Bar Council does not suggest any particular form of wording for this⁹.

1.38 Any confidentiality undertaking should clearly extend to all information that a mini-pupil may hear, as well as any material that they may read.

1.39 It would be wise to provide a copy of the signed confidentiality undertaking to each mini-pupil. The originals should be retained by you or your chambers. You should also ensure that you keep an appropriate record of each mini-pupil's contact details for an appropriate period of time, subject to your normal data protection obligations in relation to the processing of each mini-pupil's personal data.

1.40 Chambers' policies in relation to these undertakings should be agreed with the chambers' Equality and Diversity Officers.

⁸ It is difficult to see circumstances in which it would be permissible or appropriate to include a contractual term which allowed this to be done without placing an express obligation of confidentiality on mini-pupils.

⁹ The Bar Council believes that the form of wording proposed in the 1990s was along the following lines: *"In consideration of the members of [X] Chambers [at X] allowing me to do a mini-pupillage/work experience in Chambers, I undertake to all Members of Chambers that I will maintain absolute confidentiality over all matters I learn from reading papers, attending conferences, discussing cases with members of Chambers and attending private court hearings or otherwise."* This may not now go far enough: e.g. it might be preferable (to aid enforceability) to add negative undertakings not to use any information except for the purpose of the mini-pupillage and not to disclose it to anyone or in any way; and it might be prudent for the undertaking to be given to all members of chambers both individually and collectively. You might also want to use plainer language (e.g. "keep secret" rather than "maintain absolute confidentiality"). You will in any event need to tailor it to any relevant contractual terms (e.g. to what is required by clauses 5.1 and 5.3 of the Standard Conditions of Contract, quoted above). An undertaking along these lines may also not be sufficient for other forms of work experience.

(f) Mini-pupils' understanding of, and compliance with, duties of confidence

1.41 In addition to obtaining a confidentiality undertaking, you should also ensure that the mini-pupil understands what it means, and will comply with duties of confidence.

1.42 This involves several elements.

1.43 The first element is an explanation of the nature of confidentiality, and its critical importance in the lawyer-client relationship. Mini-pupils may have no real awareness of either of these things, or of the seriousness of the duty of confidence.

1.44 As part of this, an explanation may be needed of the strictness of the duty of confidence. For example, mini-pupils may not realise that telling friends or family about things they have read and heard is strictly prohibited, and that it makes no difference if they ask their friends or family to keep secret what they tell them. Similarly, they may not realise the risk of inadvertent breaches of confidence in the ways in which they use social media.

1.45 The second element is the extent of what may be confidential. You should ensure that mini-pupils understand that confidentiality (and privilege) will extend not just to written information but also to what they hear (and potentially to what they see): for example, in conference or consultation, or in discussions with lay or professional clients at court.

1.46 The third element is to reach a judgement about each individual mini-pupil. A judgement needs to be made on a case by case basis as to whether it is appropriate to take someone on as a mini-pupil and, if so, as to the degree to which it is appropriate to disclose confidential information to them. You should give careful consideration to the age and degree of maturity and responsibility that you can reasonably expect from each mini-pupil, and reach a sensible judgement as to whether (and the extent to which) the mini-pupil can properly be trusted to maintain confidentiality.

1.47 In forming your judgement, you should bear in mind that it may not be practicable to avoid a mini-pupil being exposed to at least some confidential information, and that there may be both practical and legal obstacles in the way of enforcing obligations of confidence against those who are under the age of 18¹⁰.

1.48 It is your responsibility to form a judgement on whether or not a mini-pupil understands, and will comply with, a confidentiality undertaking.

¹⁰ See fn 2 above

1.49 Your judgement about this is also likely to inform any discussion about confidentiality between you and your professional, public access or lay client: see below.

1.50 If there is a real doubt about the extent to which a mini-pupil can properly be trusted to comply with a duty of confidence, you should not take the risk. This may in some cases mean declining to take the mini-pupil on at all, but other measures may be possible: for example, restricting a mini-pupil to watching members of chambers in open court, and avoiding any confidential discussions in their presence. Similar considerations may apply in relation to personal data, particularly sensitive personal data, so you may find further assistance in these circumstances in section 2 below.

1.51 In at least some cases, it may be sensible to make a record of the reasons for deciding that it was appropriate to disclose confidential information to a mini-pupil.

(g) Use your judgement and common sense

1.52 Whatever the strict legal position, there will be particular cases and particular clients in relation to which or whom it would not be appropriate or wise for mini-pupils to be entrusted with any confidential information.

1.53 This will usually be a matter of common sense, but this may, for example, include cases involving particular sensitivity of any sort, clients who are particularly difficult to deal with, clients who are distrustful of lawyers or the legal system, or cases involving difficult litigants in person (who may not understand, who may object to, or who may seek to take advantage of, the involvement of a mini-pupil).

1.54 You should exercise your judgement in these cases, whether or not they also involve personal data (see section 2 below).

(h) Manage the risks

1.55 A prudent approach to confidentiality and mini-pupillages is likely to involve identifying and managing the risks involved.

1.56 To assist in managing and minimising the risk of a mini-pupil causing a breach of confidence, it may be prudent to limit the disclosure of confidential information to what is necessary for the proper conduct of a mini-pupillage, and to keep disclosure to a minimum.

1.57 You may also wish to prevent mini-pupils from taking away with them any notes that they may have made during a mini-pupillage, and might include agreement to return any notes in any confidentiality undertaking.

2. Data Protection

2.1 Data protection law raises different issues from confidentiality, although there will be some overlap in practice. This is not the place for a detailed exposition of your legal duties, but the following may assist you in deciding what you need to consider in relation to mini-pupils, and how to manage the risks which a mini-pupillage may pose in relation to personal data.

(a) Introduction to the legal position

2.2 Every individual self-employer practising barrister is a data controller under the GDPR and the Data Protection Act 2018 (“DPA”), and thus obliged to observe the data protection principles in relation to all relevant data. The circumstances in which you will be able to use that data or disclose it to anyone else, including a mini-pupil, are restricted to the circumstances set out in the GDPR and the DPA. The GDPR contains a number of new concepts and imposes new obligations on data controllers including:

- (a) Principle of accountability – data controllers are responsible for, and must be able to demonstrate compliance with, data protection obligations.
- (b) Principle of transparency – personal data must be processed in a transparent manner, with data subjects being notified of processing.
- (c) Data minimisation – there are stricter rules relating to the extent of personal data which is kept, and to the period for which it may be kept.
- (d) Data breach notification – subject to limited exceptions, data breaches must be notified to the supervisor authority and data subjects.

2.3 Your obligations as a data controller will apply to all of the electronic records you hold which contain personal data, and will also apply to any paper records insofar as they are stored in a filing system or other system of sufficient sophistication to provide the same or similar ready accessibility as a computerised filing system. If paper records are printouts of electronically-held documents (which would include e-mails and attachments to e-mails), then they are to be treated as electronic records.

2.4 Personal data under the GDPR means any information relating to an identified or identifiable person (‘data subject’). An identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic or cultural, or social identity of that natural person.

2.5 Many cases are likely to involve at least some personal data, at least if there are communications between you and your professional or public access client. It is a rare case where such communications are not electronic or not recorded electronically or are not intended to be part of a structured filing system.

2.6 As a controller of that data under the GDPR and the DPA, the circumstances in which you will be able to use that data or disclose it to anyone else, including a mini-pupil, are restricted to the circumstances set out in the GDPR and the DPA. The definition of processing in Art. 4(2) covers “any operation or set of operations which is performed on personal data, whether or not by automated means, such as ...consultation, use, disclosure by transmission, dissemination or otherwise making available”. Allowing a mini-pupil to read a document which you have received electronically and which contains personal data is likely to involve processing by you in the form of a disclosure and processing by the mini-pupil in the form of consultation and therefore may be regarded as “processing” that data under the GDPR and DPA.

2.7 Article 5(1) requires, amongst other things, that any personal data be processed lawfully, fairly and in a transparent manner, and for specific, explicit and legitimate purposes. You will need to establish (and be prepared to demonstrate) one of the specific legal grounds for processing in Article 6. This means in effect that you will need to be able to justify disclosing the data to the mini-pupil as being necessary for one of the purposes set out in Articles 6(1)(b)-(f), or you will have to obtain from your client and anyone else whose personal data is given to the mini-pupil “freely given, specific, informed and unambiguous” consent “by a statement or by a clear affirmative action” (for the purposes of Article 6(1)(a)). You will also need to make appropriate reference to the possibility of disclosure to a mini-pupil in your GDPR policy.

(b) Personal data which is *not* in the GDPR Article 9 Special categories or data relating to criminal convictions and offences

2.8 The GDPR contains different requirements for “ordinary” personal data on the one hand and for personal data which is in the GDPR Article 9 Special categories or relates to criminal convictions and offences (formerly known as “sensitive personal data”) on the other hand. The definition of Special categories personal data is set out below. In the case of ordinary personal data, at least one Article 6 basis for lawful processing must be satisfied.

(i) In the present context, the bases likely to be relevant are (a) consent (which must be informed consent and must be indicated by a clear and affirmative action) and (b) that processing is “*necessary for the purposes of legitimate interests*” of the barrister or the person (the mini-pupil) to whom it is disclosed, except where “*such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular*”

where the data subject is a child." Signing the back of a brief is an easy way to record consent, if a paper brief is available, otherwise a concisely and clearly worded form may need to be provided and signed.

Where you are acting on a public access basis, you will be in a position to obtain your client's consent directly (but see para.1.17 above). Where you have a professional client, it may be more difficult for you to obtain consent directly from your lay client: see below.

The Bar Council cannot advise you on the application of criterion (b) above, and you must take your own view in any given case. In the event that you reach the wrong conclusion, you may be at risk of action by the Information Commissioner's Office or proceedings by the data subject if you disclose personal data to a mini-pupil relying only on that criterion. Any such disclosure should involve a proper consideration of the potential impact on the data subject: if you fail to do this, the risk of such action will be greater.

Having said that, the view and expectation of the Bar Council is that whilst greater care and judgement will be called for in some cases, disclosure of personal data not in the Special categories/relating to criminal convictions will usually be permissible under criterion (b) above, in view of the nature of the data which is likely to be disclosed, and the importance of mini-pupillages for the profession's aims in the areas of equality, diversity and social mobility, and of widening access to the profession, as well as their importance in enabling those undertaking them to make more informed career choices and in aiding recruitment into the profession.

(ii) **In addition**, processing must be fair and transparent, and must comply with the requirements of Article 13 of the GDPR. One practical result of this is that disclosure to a mini-pupil of a client's personal data which is not in the Special categories/relating to criminal convictions will only be permissible if notice of the potential disclosure of personal data to a mini-pupil is brought to the attention of your lay or public access client beforehand. The GDPR also applies to personal data relating to third parties other than your client. This is considered separately below.

Notification to your client could be included in any contract or acceptance of instructions with the professional client. Alternatively, that consent or acceptance could refer to a notification on your chambers/professional website. In order to be effective, however, such a notice (or its existence on the website) needs to be brought to the attention of the lay client. As with consent (see above), this ought not to cause any difficulty in a public access case, but may call for more effort where you have a professional client.

It is thought that none of the standard terms considered in section 1 above includes provisions which are sufficient to amount to notice of potential disclosure to mini-pupils in the manner required by GDPR Articles 13 and 14.

A second practical result is that any disclosure of personal data in breach of confidence will automatically be a breach of the GDPR, because it will have been unlawful.

GDPR Article 14 also requires notification to data subjects, and may require notification to persons other than your client. However, no notification is required by Article 14 where the personal data must remain confidential subject to an obligation of professional secrecy, for example data covered by legal profession privilege.

2.9 Receipt by your lay clients of a privacy notice is also important as part of obtaining their informed consent, as they need to be able to understand what disclosure may take place, the purposes and lawful basis for processing, the retention periods for the personal data and know when they have the right to withdraw consent.

2.10 If you have a professional client, then you will need to take a view on what steps you need to take to satisfy yourself that the necessary notification has been received by the lay client, and (if you need this) that you have your lay client's consent to processing. In doing so, you would need to consider the risk of your lay client later challenging this successfully. The risks may be greater where you do not have a written contract agreed by your professional client. In order to deal with this, you might decide to adopt a standard procedure (either yourself, or across chambers), but you should ensure that you pay attention to whether you might need to go further than your standard procedure in any particular case. In general:

(a) Communicating the necessary information directly to your lay client in these respects would be the ideal situation from a data protection perspective, but this may often not be practical.

(b) You might feel able to rely on confirmation from your professional client that your lay client has (i) received the notification (so that the processing is not deemed unfair), and (ii) consents to disclosure, if you decide that consent is required.

(c) You might include a fair processing notification with the same document which gives notice to your lay client of your chambers' complaints procedures (as required by the BSB Handbook). If so, then you might feel able to rely upon the provision of that document to the lay client beforehand in the same way as you might currently do for the purposes of the BSB Handbook.

2.11 It will be a matter of personal judgement in each case whether you feel comfortable relying on your professional client in these respects. The Bar Council cannot advise you about this. It does, however, anticipate that you will usually feel able to rely on what you are told by a responsible professional client, and feel able to defend your exercise of judgement in doing so if it were ever to be challenged.

2.12 If there is real doubt as to whether your professional client has taken the necessary steps, or whether your lay client has understood the notification then you may need to make further enquiries to satisfy yourself of the situation.

2.13 You also need to have procedures in place to ensure that any objection is effective, because if your client does object to disclosure then it cannot take place.

(c) Personal data in the GDPR Article 9 Special categories or relating to criminal convictions and offences

2.14 Personal data in the Special categories corresponds approximately to “sensitive personal data” as defined in the Data Protection Act 1998. For the purposes of the GDPR (Article 9(1)), it refers to personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, and the processing of genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person’s sex life or sexual orientation. The processing of this type of data is prohibited unless a specified condition for lawfulness is satisfied. In the present context, this is likely to be that (1) the data subject has given explicit consent, except where the law provides that consent does not override the prohibition on processing, or (2) processing is necessary for the establishment, exercise or defence of legal claims. In [recent guidance from the ICO](#) the meaning of “legal claims” has been explained, which recognises that it includes “processing necessary for obtaining legal advice [or] establishing, exercising or defending legal rights”. This means that it is not limited to situations where contentious proceedings are underway or imminent. Schedule 1 of the DPA 2018 adds more conditions under which processing of personal data in the Special categories may take place.

2.15 Article 10 GDPR imposes a prohibition on processing data relating to criminal convictions and offences except where permitted under national law. The DPA 2018 permits processing of such personal data where processing is necessary for the purpose of, or in connection with, any legal proceedings (including prospective legal proceedings), is necessary for the purpose of obtaining legal advice, or is otherwise necessary for the purposes of establishing, exercising or defending legal rights.

2.16 In a public access case, you will be able to obtain explicit consent with your client (but see para.1.17 above). Where you are instructed by a professional client, obtaining explicit consent from your lay client will require more than is suggested in

paragraph 2.9 above. In this case, you will need to be satisfied that the necessary notification of data processing has reached your lay client and that your lay client has given consent explicitly. Whether you are able to be confident – and to show, if necessary – that this has happened will be a matter of evidence. You will need to make a decision in each case as to whether you can be confident that this has happened.

(d) Personal data relating to someone other than your client

2.17 You may also have control over personal data (both sensitive and non-sensitive) relating to people other than your client: common examples include a witness, another party, or a family member of your client or another party.

2.18 It will be rare for you to be able to obtain consent to disclose personal data from any person who is not your client. As a result, as regards personal data not in the Special categories/relating to criminal convictions and offences:

(a) You will usually be able to rely only on criterion (b) in paragraph 2.7(i) above, for the reasons explained in that paragraph.

(b) If you are entitled to rely on criterion (b), then you will still need to deal with the notification requirement under Article 14 GDPR in order for the processing to be fair and transparent. The operation of Article 14 and its applicability to barristers is dealt with in the GDPR Bar Council Guide for Barristers and Chambers at §45-67 [link].

2.19 As regards personal data in the Special categories/relating to criminal convictions and offences, the situation is likely to be particularly difficult. Although you may need to process the personal data yourself to deal with your instructions on any legal claim, the rights and freedoms of the data subject may override your interest in disclosing such data to a mini-pupil. In practice, this may mean that in many categories of case it will be difficult, without the third party's explicit consent, for you to make any disclosure of this type of personal data to a mini-pupil, unless the data has already been placed in the public domain as a result of the deliberate actions of that third party (the 'data subject') – see GDPR Article 9.2(e). This may make it difficult to involve a mini-pupil in some categories of case, and in some individual cases in other areas of practice.

2.20 The areas of practice in which there are likely to be categories of case which throw up difficulties with personal data in the Special categories/relating to criminal convictions and offences might well include crime, family, immigration, employment, discrimination, mental health, personal injury and clinical negligence, but this is not intended to be an exhaustive list of practice areas and care should be taken to identify such data by all practitioners.

(e) Lack of consent

2.21 If someone asked for consent to the disclosure of their personal data refuses to give consent, or does not give a sufficient consent, then you should proceed on the basis that they have not consented, and that it will be unlawful to disclose their data if their consent to this is required.

(f) Suggestions for dealing with these data protection issues

2.22 You need first to identify those situations in which you may be disclosing personal data to mini-pupils relating to your clients or to third parties, particularly personal data in the Special categories/relating to criminal convictions and offences. The Bar Council anticipates that you will rarely give mini-pupils access to your computer equipment or to a chambers network, but if a mini-pupil is provided with papers, and those papers are held electronically or in a relevant filing system, the disclosure by any means of any of the information which is contained in personal data may amount to processing that data for the purposes of the GDPR. Accordingly, the disclosure of information relating to a case to a mini-pupil will often involve some processing of personal data. You would be wise to assume that there will inevitably be times when you are doing this.

2.23 Two aspects of mini-pupillage may be easier to manage than others.

2.24 The first is attendance by mini-pupils at court hearings. Where those hearings are in public, no issue as to the processing of personal data is likely to arise, except in any discussions which do not take place in open court (e.g. discussions with your professional, lay or public access client outside court). Where personal data is not data in the Special categories/relating to criminal convictions and offences and has already been revealed in open court, then you may be able to justify the disclosure of that information to a mini-pupil in the course of discussions after court (relying on the "legitimate interests" basis for processing). This may enable you to show more case papers to a mini-pupil after the start of a hearing than beforehand. But (in the absence of explicit consent) you will not be able to disclose to a mini-pupil personal data in the Special categories/relating to criminal convictions and offences, even after that data has been referred to in public in court.

2.25 The second is conferences or consultations in the presence of the lay (or public access) client (whether at court or elsewhere).

(a) Disclosure to a mini-pupil in conference by the barrister will still be processing by the barrister.

(b) However, where appropriate, this may give you the opportunity to seek and obtain your lay or public access client's informed consent directly to a mini-pupil reading papers after the conference, having explained the need for that consent and what it extends to, ensuring that you cover the topics quoted

above. Before doing this, you should consider the advice below in deciding whether it is appropriate to seek such consent, or to act on it.

(c) If you are able to plan ahead, and if time permits, you may also (where appropriate) be able to seek your client's specific prior consent to a mini-pupil reading your existing papers **before** the conference.

(d) You will still need to ensure that you do not make an impermissible disclosure of third party personal data to the mini-pupil. This is likely to be particularly problematical where the data is in the Special categories/relates to criminal convictions and offences. Such data relating to third parties which is disclosed to you or discussed in the course of a conference should not, as a rule, be disclosed to a mini-pupil or processed by a mini-pupil. In some cases, it may just not be possible for the mini-pupil to be present during a conference.

2.26 More generally, including where you wish mini-pupils to be able to read case papers, which contain personal data, you may wish to consider the approach set out in paragraph J above. You should at the very least give careful consideration to the data protection issues outlined above.

2.27 You may wish to obtain written undertakings from mini-pupils in relation to data protection. It is likely to be appropriate to take the same approach to obtaining undertakings, to ensuring that they are understood, and to assessing likely compliance, as has been suggested in relation to confidentiality undertakings (paragraph 1.34 to 1.51 above). These might, for example, include undertakings along the lines of those in GDPR Article 28 to follow all instructions concerning any personal data disclosed to them, to return any and all notes at the end of the mini-pupillage, to keep all such information secure, to protect such information from unauthorised or unlawful access or disclosure, accidental loss, destruction and damage, and not to disclose it to anyone.

2.28 You should use your common sense and judgement, and manage the risks, in relation to the misuse of personal data, in the same way as you should in relation to confidential information: see paragraphs 1.52 to 1.57 above.

(g) Mini-pupils who live or work abroad

2.29 You must not disclose personal data to a mini-pupil if there is a risk that personal data will be transferred outside the UK or the European Economic Area, unless the transfer is to country which the European Commission accepts as having adequate data protection laws. Unless the mini-pupillage occurs outside the jurisdiction of the European Community, this prohibition should provide little additional difficulty in most cases, at least where the mini-pupil has signed a confidentiality undertaking. The effect of such an undertaking should be that there is no subsequent disclosure. However, if you consider that there is a risk of disclosure

to a third country, you should consider your legal duties in the context of the protections provided by the particular country in question. There may be more of a risk if the mini-pupil wants to take away notes of conferences etc., so you may want to avoid this risk by requiring the mini-pupil not to make or retain such papers.

3. Client understanding/wishes

3.1 Where you have a pupil with whom your client comes into contact, it is good practice to ensure that the client understands who your pupil is, their role, and that they owe obligations to preserve the confidentiality of the client's affairs. It will in any event be good manners in most situations to introduce the pupil to the lay and professional client where the pupil is present at court or in a conference or consultation.

3.2 There will also be cases in which it is wise to seek confirmation from your professional and/or lay client that they have no objections to the pupil observing and discussing your work on their case, irrespective of the legal or contractual position in that regard.

3.3 The same applies with mini-pupils, except that you may, in some situations, need to exercise greater care to take into account the client's actual or likely wishes, and to ensure that the client understands who the mini-pupil is, and what their role is. In some cases, clients may need to be reassured on such matters, including that the mini-pupil will be obliged to keep the client's confidences, and you may even need to explain that they are not paying for the mini-pupil. You should, as usual, exercise common sense and ensure that you appreciate any likely client sensitivities and concerns.

3.4 As long ago as 2001, the Bar Council reminded barristers of the need to deal appropriately with clients when advising them in the presence of mini-pupils, especially where the issues are sensitive. In addition to points dealt with elsewhere in this document, the following were suggested:

(a) Clients should be warned, if possible in advance, that it is proposed that a mini-pupil will sit in a conference. If a hearing is held in public, there is no bar to the mini-pupil listening to the hearing, but it would be polite to explain their role in advance.

(b) It should be made clear to clients that it is open to them to object to the presence of the mini-pupil in conference or consultation (or in any discussions at court), and that they are under no obligation to agree to this.

3.5 This remains good practice, but in some situations set out above it will be right for you to go further and to seek positive consent in advance to the presence of a mini-pupil.

4. Conduct of mini-pupils

4.1 Mini-pupils will often not be aware of the standards of personal conduct to be expected of them, particularly when they come into contact with clients, judges, other lawyers, and court users. The onus is on you to ensure that they understand what is expected in any particular situation, and to ensure that they are aware of the need to deal professionally with clients and others. In some circumstances you may be personally responsible for their conduct; but even if you are not so responsible, it is good practice and should be seen as a professional courtesy (if not also a duty) to try to ensure that mini-pupils conduct themselves appropriately, and do not behave *inappropriately*. Your duties to the court, to your client, to witnesses, and to others participating or involved in the administration of justice may require this.

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 see [here](#).