

# LAW SOCIETY SUBMISSION

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**Legal Services Regulation Act 2015**

**Section 218 – advertising of legal services regulations**

Legal Services Regulatory Authority

1 November 2019

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#### ABOUT THE LAW SOCIETY OF IRELAND

The Law Society of Ireland is the educational, representative and regulatory body of the solicitors' profession in Ireland.

The Law Society exercises statutory functions under the Solicitors Acts 1954 to 2011 in relation to the education, admission, enrolment, discipline and regulation of the solicitors' profession. It is the professional body for its solicitor members, to whom it also provides services and support.

The headquarters of the organisation are in Blackhall Place, Dublin 7.

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## 1. Introduction

- 1.1 This submission is in response to the invitation from the Legal Services Regulatory Authority (“the Authority”) to the Law Society of Ireland (“the Society”) to make submissions prior to the Authority issuing regulations in relation to the advertising of legal services, pursuant to section 218 of the Legal Services Regulation Act 2015 (“the Act”).
- 1.2 This submission considers the scope and nature of regulations the Authority may be required to issue, and is based on the Society’s experience in regulating solicitors’ advertising.
- 1.3 Pursuant to section 4 of the Solicitors (Amendment) Act 2002 (as amended), the Society introduced the Solicitors (Advertising) Regulations 2002 and operated same at executive and committee level until February 2019, when the Society was notified by the Department of Justice and Equality that the European Commission (“the Commission”) had issued a Reasoned Opinion in January 2019 in respect of the incompatibility of the Solicitors (Advertising) Regulations 2002 (‘the 2002 Regulations’) with Article 24 of the Services Directive 2006/123/EC (‘Article 24’). Article 24 requires Member States to remove all total prohibitions on commercial communications by regulated professions. The Reasoned Opinion carried with it the threat of infringement proceedings against Ireland for its non-conformity with Article 24 in respect of the 2002 Regulations. As a result, the Society repealed and replaced the 2002 Regulations with the Solicitors Advertising Regulations 2019 (‘the 2019 Regulations’), with the commencement date 1 June 2019.
- 1.4 The Society is satisfied that the 2019 Regulations are compliant with Article 24. In addition, the 2019 Regulations were drafted to reflect the spirit and intention of section 218 of the Act (and in certain parts repeat verbatim the terms of the section). As such, the 2019 Regulations (copy attached) represent a useful regulatory template.
- 1.5 This submission identifies issues arising from specific sections of the 2019 Regulations that the Authority may wish to consider in terms of the practical enforcement of any future regulations.
- 1.6 While a statutory analysis of primary legislation goes beyond the scope of this submission, it is worth mentioning that primary legislation has also been impugned by the Commission’s Reasoned Opinion, in particular section 71(3) and section 71(5)(d) of the Solicitors Act 1954. In repealing and replacing the 2002 Regulations with the 2019 Regulations, the Society has endeavoured to craft new regulations in a manner which addresses the concerns of the Commission. Nevertheless, it is possible that, pending the commencement of section 218 of the Act, only an amendment of primary legislation would address all of the concerns of the Commission fully and the Authority should keep this in mind when developing its own regulatory regime.

## 2. Executive Summary

- 2.1 As per the Reasoned Opinion of the Commission, regulatory bodies can regulate advertising in terms of form, content and size if the regulations are reasonable, justified and proportionate for ensuring the independence, dignity and integrity of the profession, or if there is an overriding public interest. It is with this in mind that the 2019 Regulations were drafted.
- 2.2 The purpose of this submission is to set out issues identified as a result of the Society's enforcement of its regulatory regime in respect of solicitors' advertising.
- 2.3 Various sections of the Solicitors Advertising Regulations 2019 are identified, which the Authority may wish to consider in contemplation of the making and issuing of regulations in relation to the advertising of legal services. In particular, the Authority should consider:
- The various technological advancements in online advertising, particularly in respect of 'hidden' technology and the scope and influence of the Google search engine platform as a replacement for traditional business listings such as the Golden Pages;
  - The effectiveness of general prohibitions on advertisements that: (i) are likely to bring the solicitors' profession into disrepute, (ii) are in bad taste. (iii) reflect unfavourably on other solicitors;
  - Issues arising from specific prohibitions on advertisements that refer to claims for damages for personal injury;
  - Issues arising from prohibitions on the phrase "no win no fee";
  - The distinction between an advertisement and a communication intended to provide information on the law.
- 2.4 It is hoped that the Authority can benefit from the experiences gained from the Society's pro-active enforcement of its advertising regulations when drafting further regulations under section 218 of the Act.

### 3. Definition of advertisement

#### Regulation 2(a)

- 3.1 “advertisement” means any communication (whether oral or in written or other visual form and whether produced by electronic or other means) which is intended to publicise or otherwise promote a solicitor in relation to the solicitor’s practice, including:
- (i) any brochure, notice, circular, leaflet, poster, placard photograph, illustration, emblem, display, stationery directory entry, article or statement for general publication,
  - (ii) any electronic address or any information provided by the solicitor that is accessible electronically,
  - (iii) any audio or video recording, or
  - (iv) any presentation, lecture, seminar or interview,

*which is so intended but excluding a communication which is primarily intended to give information on the law.*

#### Analysis

- 3.2 While regulation 2(a)(ii) (which reflects verbatim the definition contained in section 218(8) of the 2015 Act) refers to information that is available electronically, the definition of advertising does not specifically refer to modern online advertising and marketing tools and practices. Indeed, all forms of social media and various types of “hidden technology” (such as metatags and Google AdWords) are not expressly defined as forms of advertising.
- 3.3 The use of search engines such as Google to source legal services is particularly pertinent, as such search engine technology has replaced traditional business listings (e.g. the Golden Pages) as the preferred way for solicitors to attract new business. Therefore, the Authority may wish to consider refining and updating the definition of advertisement to reflect current and future forms of advertising and marketing.
- 3.4 Over the years, the Society has considered in detail the use of Google and Google AdWords as marketing tools and whether the definition of an advertisement could be broadened to encompass this practice. Google now offers a range of services that include those outlined in the following paragraphs:

#### ‘Dynamic search ads’

- 3.5 This service scans a website to determine which search queries to show advertisements for, based on the key words entered. If a search is relevant to the content on a website, Google will automatically generate an advertisement on a

search listing, with a landing page to the website relevant to the search query. Therefore, a website can appear in a search result without the relevant keywords necessarily being entered into the search toolbar.

- 3.6 To provide control over when dynamic search ads will appear, Google organises a website into recommended categories that the site owner can select to target. If a search is entered that is relevant to a website, Google will automatically generate an advert listing. The advertisement's heading and landing page is generated based on the products and services offered by the website, as well as the search terms entered. The site owner can then see which search terms are triggering their website. Dynamic search ads also permit the site owner to view a sample of how the adverts appear, giving the site owner control over how their website and content is displayed.
- 3.7 This presents difficulties in terms of what constitutes an advertisement in the sense that the solicitor is not necessarily the author of a search result advertisement anymore, but rather is paying for a service that generates an advertisement that is, in part, based on the search terms entered into Google. The content of a website could then be used to generate a dynamic ad by way of metatags. For example, a solicitor could label all of the images used on their website 'no win no fee'. This information, combined with a person searching Google under the term 'no win no fee', would then generate a search listing for the solicitor, with a link that might read 'no win no fee solicitor'. As a result, the solicitor would be in breach of regulation 8(c), despite having no content on their website that breaches regulation 8(c) (see below for further on metatags).
- 3.8 An AdWord user does however have ultimate control over the description lines of each advert, with an 'ad preview' function enabling the user to confirm that the service searched for is in line with the description lines used.

### 'Keyword insertion'

- 3.9 This dynamically updates the text of a search result advertisement to include the keywords that caused the solicitor's advertisement to show. This creates highly targeted, specific advertisements that closely match a search result. This can be used in the headline, either one of the description lines or the displayed URL of a search result advertisement.

### Other forms of advertising

- 3.10 By extension, the definition of advertisement could also make explicit reference to other popular forms of advertising. These include:
- Guerrilla advertising
  - Broadcast advertising
  - Product placement advertising

- Cell phone and mobile advertising

### Ambient advertising

- 3.11 Ambient advertising is where an advertisement is placed on unusual items or in unusual places. An ambient advert does not have to be placed outside but can be found anywhere and everywhere. These kinds of adverts often make someone think about a certain place or thing differently. Examples are messages on the back of car park receipts, on hanging straps in railway carriages, posters inside sports club locker rooms and on the handles of supermarket trolleys.
- 3.12 The increased use of ambient advertising to promote a service or practice should be kept in mind if a revision of the definition of advertising is considered necessary.

### 'Metatags'

- 3.13 The definition of advertisement could also be extended to include the use of metatags. A metatag is an HTML tag containing information for search engines about a specific website. Metatags contain keywords or phrases alerting search engines of a website's content to be included in search results for users requesting related information, without such keywords or phrases appearing on the face of the website.

### Broadening the definition of advertisement

- 3.14 One way of updating advertising regulations to reflect the power and influence of Google might be to extend the existing definition of "advertisement" to expressly provide that search terms which a solicitor causes to be linked to their advertisement are considered part of the advertisement. Thus, if those search terms are prohibited phrases they do not escape from consideration as part of the advertisement. For example:

*"any communication (whether oral or in written or other visual form and whether produced by electronic or other means and, where produced by electronic means, includes any search words, phrases or terms, which the solicitor, or any person acting on the solicitor's direction, behalf or instruction, causes to be linked to the communication) which is intended to publicise or otherwise promote a solicitor in relation to the solicitor's practice, including-*

- (i) any brochure, notice, circular, leaflet, poster, placard photograph, illustration, emblem, display, stationery directory entry, article or statement for general publication,*
- (ii) any electronic address or any information provided by the solicitor that is accessible electronically,*
- (iii) any audio or video recording, or*



*(iv) any presentation, lecture, seminar or interview,*

*which is so intended but excluding a communication which is primarily intended to give information on the law”.*

- 3.15 Any change to the definition of advertisement would of course require a change to primary legislation. While the Society recognises that this does not form part of the invitation by the Authority for submissions, given its extensive experience, the Society felt that it should identify all practical issues for consideration.
- 3.16 Care would need to be taken in relation to such a proposed revision of the existing definition as it might be contended that it would encompass listings which are automatically generated by the search engine (without any direct input on the part of the solicitor) and over which the solicitor does not have ultimate control (albeit that it could only arise, one assumes, from the content of the website over which they do have control). As a consequence, both legal and IT advice on this issue and the proposed wording of any amendment to the existing definition would be required.
- 3.17 The Society makes no recommendation in this regard but wishes to alert the Authority to issues arising from practical enforcement.
- 3.18 Finally, it should be noted that any limitations on the manner in which a solicitor may advertise might well be the subject of scrutiny or challenge, in particular vis-à-vis EU law.

## 4. Limitations on the right to advertise

### Bad taste, disrepute and the maintenance of the integrity of the profession

#### Regulation 4(a)

- 4.1 *An advertisement intended to publicise or otherwise promote a solicitor in relation to the solicitor's practice shall be in such a form as shall not –*
- i. be likely to bring the solicitors' profession into disrepute;*
  - ii. be in bad taste;*
  - iii. reflect unfavourably on other solicitors.*

#### Analysis

- 4.2 Although subsections (i)-(iii) may appear subjective, the current practice of alerting a solicitor to an alleged breach, permitting the solicitor the opportunity to respond and to take any remedial action if required, before referring the matter to the Committee (if necessary) has proved to be a successful model in resolving advertising breaches.
- 4.3 The role of the five person committee in adjudicating on subsections (i)-(iii) answers any criticism that the Society's executive is acting as an arbiter of taste, particularly given the fact that the committee is comprised of a mixture of solicitor and lay members. Indeed, such a composition ensures that a balanced and objective view is adopted.
- 4.4 It is agreed that maintaining the integrity of the profession is of paramount importance and robust regulations in the area of advertising helps ensure this.

#### **Recommendation 1**

It is the recommendation of the Society that there is no change to these provisions, or to the manner in which they are interpreted and enforced.

#### Regulation 4(a)(vi)

- 4.5 *An advertisement intended to publicise or otherwise promote a solicitor in relation to the solicitor's practice shall be in such a form as shall not expressly or impliedly solicit, encourage or offer any inducement to any person or group or class of persons to make claims for damages for personal injuries or to contact the solicitor with a view to such claims being made.*

## Analysis

- 4.6 One difficulty presented by this prohibition is in respect of solicitor firms making reference on their firm website to the amount of damages awarded by the courts. It could be argued that the citing of legal case law is merely commentary on the law and that such is permitted under the regulation 11 exemption. That said, reference to reported awards of damages are often used in a context that might breach regulation 4(a)(vi) (i.e. 'if you have been affected in a similar way, contact us to secure as high an award of damages as possible').
- 4.7 By extension, solicitors who are advertising in breach of regulation 4(a)(vi), but are doing so on the basis of a court ruling, may also claim that there is an overriding public interest to notify the public of a change in law, and that they have a corresponding duty to notify the public of the legal remedies available. This is often done by reference to a reported case. Although the advertisement might not make any overt mention of the monetary value of a likely award, the inclusion of a reported case might nevertheless create an overall effect that offends the spirit of regulation 4(a)(vi).
- 4.8 The Society makes no recommendation in this regard but wishes to alert the Authority to potential issues arising from practical enforcement.

## 5. Prohibition on the phrase “no win no fee”

### Regulation 8(c)

- 5.1 *Without prejudice to the generality of Regulation 4, an advertisement published or caused to be published by a solicitor with a reference to “personal injuries” to the extent permitted by these Regulations and section 71(4) of the Act of 1954, or words or phrases of a similar nature as provided for in clause (b), shall not include words or phrases such as “no win no fee”, “no foal no fee”, “free first consultation”, or other words or phrases of a similar nature which could be construed as meaning that legal services involving claims for damages for personal injuries would be provided by the solicitor at no cost to the client.*

### Analysis

- 5.2 This prohibition may present difficulties for a number of reasons. A solicitor is prevented from advertising professional services involving claims for damages for personal injury on a “no win no fee” basis, but they can explain what the term “no win no fee” means in their advertising (under the exemption granted by regulation 11). This exemption has often been opportunistically used to circumvent the prohibition.
- 5.3 It has been argued that to permit a solicitor to provide services on a “no win no fee” basis, but not to advertise that they provide services on a “no win no fee” basis undermines the spirit of both section 68 of the Solicitors (Amendment) Act 1994 and the newly commenced section 150 of the Legal Services Regulation Act 2015. By extension, it has been claimed by solicitors in practice that this prohibition is tantamount to a blanket ban that is anti-competitive (though the Commission approved regulation 8(c) of the 2019 Regulations).
- 5.4 In addition, solicitors often assert that the provision of legal services on a “no win no fee” basis is a critical necessity in enabling persons to pursue their legal remedies and therefore the advertising of same has an over-riding public interest.
- 5.5 In response to these issues, the Society’s position remains that professional services cannot be advertised as “no win no fee”, but an explanation of the term *can* be advertised. This approach is useful when responding to allegations of a blanket ban, as the Society has at all times permitted an explanation of the term to feature on solicitors’ advertising.
- 5.6 The Society makes no recommendation in this regard but wishes to alert the Authority to potential issues arising from practical enforcement.

## 6. Communication intended to provide information of the law

### Regulation 11

- 6.1 (a) *Without prejudice to the generality of Regulation 4 the following shall be deemed not to be an advertisement but to be a communication which is primarily intended to give information on the law:*
- (i) *subject to clause (b) of this regulation, a book on a legal topic written by a solicitor,*
  - (ii) *subject to clause (c) of this regulation, an article on a legal topic written by a solicitor where no part of the space of which is paid for by or on behalf of the solicitor; or*
  - (iii) *subject to clause (c) of this regulation, an oral presentation or media interview given by a solicitor relating to a legal topic where no part of it is paid for by or on behalf of the solicitor.*
- (b) *In relation to subclause (i) of clause (a) of this regulation, the circulation by a solicitor to persons (whether or not on request) at no cost or reduced cost to such persons of a book on a legal topic written by the solicitor may be deemed not to be a communication which is primarily intended to give information on the law but rather to be in fact a communication which is primarily intended to publicise or otherwise promote the solicitor in relation to the solicitor's practice.*
- (c) *In relation to subclauses (ii) and (iii) of clause (a) of this Regulation, a repeated publication of the same or substantially similar article on a legal topic written by a solicitor or the repeated oral presentation or media interview given by a solicitor on the same or substantially similar legal topic may be deemed not to be a communication which is primarily intended to give information on the law but rather to be in fact a communication which is primarily intended to publicise or otherwise promote the solicitor in relation to the solicitor's practice*

### Analysis

- 6.2 This exemption is routinely relied upon by solicitors when publishing legal updates to the blog section of their firm website, or via their social media channels, as regulation 11 classifies (in certain circumstances) a publication not as an advertisement but as a communication which is primarily intended to give information on the law.
- 6.3 Solicitor firms regularly publish to the blog/news sections of their websites information relating to personal injury cases and settlement awards. These news items are often featured in mainstream media and as such it is argued by solicitors that the regulation 11 exemption would apply to these news items because; (a)

commentary on the law is permitted, (b) the provision of factual information on the law is permitted, (c) the information already exists in the public domain.

- 6.4 Nevertheless, any reference to a settlement figure that is contained in any part of a solicitor's website may constitute a breach of regulation 4(a)(vi).
- 6.5 The exemption is also exercised in respect of the common practice of a solicitor firm publishing legal advice columns in local newspapers.
- 6.6 When determining whether an article should be classified as a communication primarily intended to give information on the law rather than an advertisement (as defined) the following test must apply:
- the publication is an article on a legal topic,
  - no part of the space has been paid for, by or on behalf of the solicitor,
  - the publication has not been repeated with the same or substantially the same content.
- 6.7 Where a publication satisfies this test, the exemption under regulation 11 would apply and the article is considered a communication primarily intended to give information on the law. Where an article does not satisfy this test, i.e. if it has been paid for, by or on behalf of the solicitor, or where it has enjoyed repeated publication, the article is subject to the regulations in the normal way.
- 6.8 During the drafting stage of the 2019 Regulations, the EU Commission requested the Society to add the terms of paragraphs (a) and (b) of Article 4(12) of the Services Directive 2006 to the list in 12(a)(i)-(iii). This was to further expand on what does not constitute an advertisement. This suggested change was not implemented as it was considered unnecessary and regulation 11 was therefore retained verbatim.

### **Recommendation 2**

It is the recommendation of the Society that the Authority retains this exemption in its own regulatory regime as it provides a useful means of distinguishing between advertisements and information pieces that serve an overriding public interest.

## 7. The powers available to the Committee

### Regulation 14(g)

- 7.1 *The Society, through the committee, has the power to:*
- *direct the solicitor take such remedial action as the committee thinks fit;*
  - *require an undertaking in writing that the solicitor will forthwith desist from such breaches or alleged breaches and will not repeat same in future pursuant to regulation 14(h);*
  - *levy the solicitor with the costs of the investigation pursuant to regulation 14(g)(i);*
  - *issue the solicitor with a reprimand in writing in such terms as the Society deems appropriate and reasonable pursuant to regulation 14(g)(ii);*
  - *give the Registrar a direction in relation to the solicitors practising certificate in accordance with section 59 of the Solicitors (Amendment) Act 1994, including the imposition of conditions on a solicitor's current practising certificate;*
  - *refer the matter to the Solicitors Disciplinary Tribunal for an inquiry into the solicitors conduct on the grounds of alleged misconduct pursuant to section 7(1) of the Solicitors (Amendment) Act 1960 as substituted by section 17 of the Solicitors (Amendment) Act 1994;*
  - *take such other action as the committee deems appropriate*

### Analysis

- 7.2 The Committee has considered the robustness of the powers under regulation 14(g) and is of the view that the current powers available to it to enforce the regulations are reasonable and proportionate. Therefore, no expansion or reduction of the powers are considered necessary.

#### **Recommendation 3**

It is the recommendation of the Society that similar powers are expressly referred to by the Authority in any regulations adopted pursuant to section 218 of the Act. The Committee is satisfied that its existing powers are adequate and appropriate in effectively enforcing the regulations, both by way of deterrent and punitive measure.

## APPENDIX

- Solicitors Advertising Regulations 2019
- Article 24 of the Services Directive 2006/123/EC
- Reasoned Opinion of the European Commission
- Emails from Department of Justice and Equality and European Commission dated 16 April 2019