



## **Regulatory Guide for In-house Solicitors Employed in the Corporate and Public Sectors**

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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. Professional Regulation Issues

- 1.1 This section is addressed to solicitors who are or will be practising solicitors. In most countries the profession is now regulated by statute. This is because the solicitor operates in a situation of trust. The regulation of the profession should be viewed in the context of the protection of the public.
- 1.2 The *Solicitors Acts 1954 to 2015* provide the principal legislative framework within which solicitors are regulated.

### PRACTISING CERTIFICATES

- 1.3 Section 46 of the *Solicitors Act 1954* requires the Registrar of Solicitors to issue practising certificates, certifying that the solicitors named therein are entitled to practise as solicitors.
- 1.4 Section 54 of the *Solicitors Act 1954*, as substituted by section 62 of the *Solicitors (Amendment) Act 1994*, states that a solicitor who has the necessary qualifications, *inter alia*, that a practising certificate in respect of that solicitor is in force, may act as a solicitor.
- 1.5 Section 55 of the *Solicitors Act 1954* states that an “unqualified person” shall not act as a solicitor. The definition of an “unqualified person” includes persons who are not solicitors, and solicitors who are not qualified to practise. It is a criminal offence for an “unqualified person” to act as a solicitor.
- 1.6 In other words, the law requires that practising solicitors hold practising certificates. Some solicitors employed in the corporate and public services sectors are practising solicitors and other solicitors are not. All employers, quite legitimately, seek to keep overheads to a minimum. If the solicitor is not “practising” there is no necessity for such employer to pay for a practising certificate. Employers will sometimes question the necessity for an employee taking out a practising certificate. Principally, a practising certificate should be taken out by a practising solicitor to comply with the relevant legislation. The holding of a practising certificate results in advantages both for the solicitor and the employer. Third parties dealing with the solicitor may do so more confidently than otherwise. The solicitor can brief counsel. The solicitor can, as a practising solicitor, call on the Law Society, the solicitor’s professional body, for guidance.
- 1.7 Section 56 of the *Solicitors (Amendment) Act 1994* provides as follows:-
  - (1) *No solicitor shall practise as a solicitor unless a practising certificate in respect of him is in force.*
  - (2) *Without prejudice to section 29 (5) of the Solicitors Act 1954, as substituted by section 44 of the Solicitors (Amendment) Act 1994, a solicitor shall be deemed to practise as a solicitor if he engages in the provision of legal services whether as a sole practitioner or as a partner*

*in a solicitor's practice or as an employee of any solicitor or of any other person or body, or as a solicitor in the full-time service of the State within the meaning of section 54 (3) of the Solicitors Act 1954, as substituted by section 62 of the Solicitors (Amendment) Act 1994.*

*(3) Subsection (1) of this section shall not apply to –*

*(a) a solicitor in the full-time service of the State within the meaning of section 54 (3) of the Solicitors Act 1954, as substituted by section 62 of the Solicitors (Amendment) Act 1994, or*

*(b) a solicitor whose name is on the roll and who does not stand suspended from practice and who is employed full-time in the State to provide conveyancing services for his employer, provided that such employer is not a solicitor.*

*(4) In paragraph (b) of subsection (3) of this section “conveyancing services” means services in connection with the preparation of transfers, conveyances, contracts, leases or other assurances in connection with the disposition or acquisition of estates or interests in land.*

## **WHEN IS A PRACTISING CERTIFICATE NEEDED?**

- 1.8 It is the statutory responsibility of each solicitor to ensure that they have a practising certificate in place before providing legal services of any kind whatsoever, either reserved or unreserved<sup>1</sup>. It is professional misconduct and a criminal offence for a solicitor, other than a solicitor in the full-time service of the State or a solicitor solely engaging in conveyancing services for a non-solicitor employer, to practise without a practising certificate. A solicitor shall be deemed to practise as a solicitor if he or she engages in the provision of legal services. ‘Legal services’ are services of a legal or financial nature provided by a solicitor arising from that solicitor’s practice as a solicitor.
- 1.9 It should be noted that it is not permissible for an employer to classify a solicitor employed by the employer as a ‘legal executive’, ‘paralegal’ or other non-solicitor title with a view to avoiding the requirement to hold a practising certificate if the solicitor is engaged in the provision of legal services, regardless of the solicitor’s job title.
- 1.10 Each situation must be examined to decide whether a practising certificate is needed in the particular circumstances. General exhaustive rules are not possible, as circumstances often vary. It is recognised that in an organisation there may be both practising and non-practising solicitors.
- 1.11 The solicitor in a legal department providing routine legal services, commonly provided by solicitors, is a practising solicitor. The legal compliance officer who is employed to monitor

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<sup>1</sup> **Section 58 of the Solicitors 1954 Act** sets out the so-called ‘reserved areas’ in which legal services can only be provided by solicitors and, in some cases, barristers. These reserved areas deal primarily with conveyancing, litigation and probate work. It should be noted that the requirement for solicitors, including in-house solicitors, to hold a practising certificate applies whether the legal services being provided are in reserved or unreserved areas.

and advise on whether proposed projects and actions are legally possible is usually a practising solicitor.

- 1.12 The solicitor in a non-legal role where no legal services of any kind, either reserved or unreserved, are provided by the solicitor is not a practising solicitor.
- 1.13 The Practice Regulation Section of the Regulation Department of the Law Society will provide guidance in these matters and can be contacted at [pc@lawsociety.ie](mailto:pc@lawsociety.ie).
- 1.14 The Regulation of Practice Committee monitors compliance with the legislation in respect of practising certificates and has the formal statutory powers of regulation delegated to it. Applications in respect of practising certificates should be directed to the Practice Regulation Section of the Regulation Department.
- 1.15 The following examples may be useful when considering whether it is necessary to apply for a practising certificate:
- 1.16 A solicitor to whom item 1, 2, 3, 4 or 5 refers is required to hold a practising certificate, while those to which item 6, 7 or 8 refers would not be required to apply for a practising certificate.

## CATEGORIES OF WORK

1. **The provision of routine legal services.** By this is meant the services commonly provided by solicitors. These would include advisory services, representing a client in court, at tribunals or the provision of conveyancing services.
2. **Legal advice.** Corporate bodies<sup>2</sup> may only operate within the framework of enabling legislation, charter, or memorandum and articles of association. A solicitor may be employed to monitor and advise on whether proposed projects and actions are possible within that framework.
3. **The execution of forms as a solicitor.** There are many forms to be filed with Government and other agencies, which are acceptable only if signed by a solicitor. The Companies Office, Form C1 is one example. If not executed by an officer of the company, the form will only be accepted if executed by a solicitor. This should be distinguished from the situation where a solicitor witnesses a form as a solicitor and this is acceptable, not because of the solicitor's expertise, but because of the solicitor's professional standing.
4. **Commercial work.** The solicitor may be involved in drafting and negotiating contracts with third parties on behalf of their employer.

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<sup>2</sup> A company's constitution as defined in the Companies Act 2014, states that private companies limited by shares now have a single constitution rather than a memorandum and articles of association. Other company types, such as the Designated Activity Company (DAC), still maintain a memorandum and articles of association.

5. **Position as advertised.** When the employee was recruited for the position held, was it a requirement for the employee to be a solicitor?
6. **Management.** The solicitor may be a member of the management team and participate in the making of decisions on behalf of the organisation.
7. **Research.** The solicitor may be a researcher in an academic institution or in another organisation where his research is used in the formation of policy.
8. **Non-legal role.** The employee may have qualified as a solicitor but may be employed in a capacity where his work is completely unrelated to law.

## FEE-SHARING

- 1.17 In addition to the general regulatory machinery, the *Solicitors Acts* provide that fee-sharing is not permitted. Section 71 of the *Solicitors (Amendment) Act 1994* provides for the making of regulations to permit fee-sharing.
- 1.18 Section 59(1) of the *Solicitors Act 1954* prevents unqualified persons within the meaning of the *Solicitors Acts* being facilitated to act as solicitors. It would be illegal for a body corporate, a non-solicitor employer, or unqualified employee, to act as a solicitor, even though a solicitor is employed within the organisation. The objective of this section is to ensure that a solicitor's advice is independent. The solicitor has training in legal matters and is subject to the regulatory machinery of legislation. If fees are shared with an unqualified person there is no independence from that person, who may have no training in legal matters, no training in standards of professional conduct and the unqualified person may not be subject to regulatory machinery.
- 1.19 Regulations 3 and 4 of Statutory Instrument No. 343 of 1988 – the *Solicitors (Professional Practice) Regulations, 1988*, so far as relevant to solicitors in the corporate and public services sector provide as follows:

*3. (1) A solicitor shall not agree to share his professional fees with any person, not being either a solicitor or a duly qualified legal agent in another country.*

*... (3) Notwithstanding the provisions of paragraph 1 of this regulation, a solicitor who is employed full time in consideration of a salary to provide services exclusively for an employer who is not a solicitor, may agree with such employer to set-off all or part of any professional fees received by that solicitor from third parties arising from the provision of such services, against (and only to the extent thereof) —*

*(a) the salary paid or to be payable by such employer to that solicitor;*  
*and*

*(b) the reasonable expenses (including secretarial, stationery, telephone and other similar overhead expenses) incurred by such employer in connection with the employment of such solicitor.*

4. (1) *A solicitor shall not accept an appointment by or act as solicitor for any person on the basis that he will be remunerated by a fixed payment irrespective of the extent of the services provided or to be provided by him as solicitor for such person, unless that solicitor shall be the holder of a whole-time appointment under a contract which provides that he shall act as solicitor for such person exclusively within the State, or a defined area within the State, in the provision of services or a defined category of services.*

*(2) The provisions of paragraph 1 of this regulation shall not apply to a solicitor to the extent that he holds an appointment as a State solicitor.*

## **INTERNAL SUPERVISION**

1.19 A solicitor must properly supervise any unqualified staff for whom that solicitor is responsible. The solicitor is responsible for all acts of such staff when they are carrying out work of a legal nature.

1.20 A solicitor's failure to exercise proper supervision of the office or place of business may affect the renewal of a practising certificate under the provisions of section 49(1)(d) of the *Solicitors Acts 1954*, as substituted by section 61 of the *Solicitors (Amendment) Act 1994*.<sup>3</sup> Although the solicitor's staff in an organisation may also be answerable to other superiors in the organisation, the duty of supervision is not in any way diluted for the solicitor in relation to legal work being carried out for the employer/client.

## **TOKEN SOLICITOR**

1.21 Another effect of section 59 of the *Solicitors Act 1954* is that a solicitor should not agree to operate in a situation where the role of the solicitor is merely a token one. Furthermore, a solicitor should not allow his or her name and status to be used by third parties, to enable such third parties to conduct a legal practice, or provide legal services.

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<sup>3</sup> **Section 49(1) of the Solicitors (Amendment) Act, 1994** states that this section applies where a solicitor makes application for a practising certificate, as, for example, in subsection (d), where "the solicitor has an office or place of business in more than one place at any one time (disregarding, where he has a Dublin agent, the office or place of business of such agent) and having been invited by the Society to satisfy them that he exercises adequate personal supervision over each office or place of business, he has failed to satisfy the Society as aforesaid and has been notified in writing by the Society that he has so failed."



## PROVIDING LEGAL SERVICES TO THIRD PARTIES

- 1.22 Section 64 of the *Solicitors Act 1954* prohibits bodies corporate from providing legal services to third parties (such as clients or customers of the body corporate) holding itself out as a solicitor or acting as a solicitor. This also applies to directors, officers and servants of the body corporate. Incorporated practices, limited companies and unlimited companies are all considered to be bodies corporate. Bodies corporate are considered to be “unqualified persons” under the Acts.
- 1.23 The *Solicitors Acts* do not prohibit solicitor employees of a body corporate from acting as solicitors, but rather prohibits them from acting in such a way as to imply that the body corporate is itself qualified to act as a solicitor, and to provide legal services, both reserved and unreserved, to third parties through the medium of the body corporate. For example, an in-house solicitor for a body corporate is entitled to provide legal services solely to the solicitor’s employer. However, the solicitor is not entitled to provide legal services to third parties in the body corporate’s name, and cannot act so as to imply that the body corporate itself is entitled to provide legal services to clients of the body corporate, other bodies corporate (outside of the company group) or to the public generally.
- 1.24 If an in-house solicitor wishes to provide legal services to a party other than their employer, they are required to set up a solicitor firm to provide same, with consequential professional indemnity insurance and other regulatory requirements.

## 2. Professional Indemnity Insurance

- 2.1 It is important for solicitors practising outside private practice to understand how professional indemnity insurance (“PII”) matters affect them. The PII regulations provide that a practising certificate may be refused to a solicitor unless the firm in which they practise provides evidence of PII to the Society or the solicitor is exempted from PII requirements because they work for a non-solicitor body.
- 2.2 As at the time of publication of this guide, the current PII regulations are the Solicitors Acts 1954 to 2011 (Professional Indemnity Insurance) Regulations 2016 (S.I. No. 534 of 2016). Up-to-date regulations can be found on the Society’s website at <http://www.lawsociety.ie/PII>.

### **SOLICITORS EMPLOYED IN THE FULL-TIME SERVICE OF THE STATE**

- 2.3 Solicitors employed in the full-time service of the State are exempt from the requirement to have PII cover in place. Therefore, the compulsory PII provisions do not affect them.

### **PROFESSIONAL INDEMNITY INSURANCE FOR THE CORPORATE AND PUBLIC SECTOR SOLICITOR**

- 2.4 Regulation 3(g) of Statutory Instrument No. 534 of 2016 - The Solicitors Acts 1954 to 2011 (Professional Indemnity Insurance) Regulations 2016 provides exemption for most practising solicitors employed in the corporate sector, as follows:

*Regulation 3(a) shall not apply to or in respect of any solicitor or registered lawyer who provides legal services only as part of an employment within the State to provide legal services to and for his or her employer, provided that:*

*(i) the solicitor’s or registered lawyer’s employer is not also a solicitor or a registered lawyer; and*

*(ii) the solicitor or registered lawyer confirms to the Society in a manner acceptable to it that, for the duration of a relevant indemnity period, the solicitor or registered lawyer has not and will not engage in the provision of legal services to or for any person other than his or her employer; and*

*(iii) the solicitor or registered lawyer shall notify the Society immediately in writing if the exemption from Regulation 3(a) under Regulation 3(g) shall cease to apply in respect of the solicitor or registered lawyer.*

- 2.5 Solicitors with a contract for services<sup>4</sup> with a non-solicitor employer can be exempt from the requirement to have PII in place provided the following criteria are met:
1. the solicitor provides legal services only to the company or group with which they have a contract for services;
  2. the indemnity provided by the company forms a deed of indemnity between the solicitor and the company and is dealt with by way of private company Contract law;
  3. the company is aware that the solicitor does not hold any PII and is required to confirm same in writing directly to the Society, copying the solicitor; and
  4. the solicitor does not, and the company is aware that the solicitor cannot, provide legal services to third parties, including clients or customers of the company, and the company is required to confirm same in writing directly to the Society, copying the solicitor.
- 2.6 Please note that the PII waiver for in-house solicitors extends to services provided during the course of the solicitor's employment with the employer<sup>5</sup>, to or in respect of the employer, any subsidiary or holding company, or any subsidiary of such holding company of the employer, within the meaning of sections 7 and 8 of the Companies Act 2014.
- 2.7 If a joint venture is entered into with another company or group companies, where the group company is not within the employer's group of companies, then no PII waiver shall extend to this joint venture where the employer's group does not have a majority stake.

## **PERSONAL LIABILITY**

- 2.8 Although the solicitor benefits from an exemption in respect of compulsory professional indemnity insurance, it is still important for corporate solicitors to ensure that there are, in fact, adequate arrangements in place to protect that solicitor's own personal liability. There are two aspects to this: employer's indemnities and employer's waiver.

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<sup>4</sup> A contract of service applies to an employee-employer relationship, while a contract for service applies in the case of an independent sub-contractor.

<sup>5</sup> That is, a contract of service, as defined at footnote 4 above.