



THE BAR  
OF IRELAND

*The Law Library*

Submission by Council of The Bar of  
Ireland to the Legal Services Regulatory  
Authority in response to draft Legal  
Services Regulation Act 2015  
(Advertising) Regulations 2020

November 2020

## **INTRODUCTION**

The Council of The Bar of Ireland (“the Council”) is the accredited representative body of the independent referral Bar in Ireland, which consists of members of the Law Library and has a current membership of approximately 2,200 practising barristers.

The Bar of Ireland is long established and its members have acquired a reputation amongst solicitors, clients and members of the public at large as providing representation and advices of the highest professional standards. The principles that barristers are independent, owe an overriding duty to the proper administration of justice and that the interests of their clients are defended fearlessly in accordance with ethical duties are at the heart of the independent referral bar.

## **BACKGROUND**

The Council was invited by the Legal Services Regulatory Authority to make a submission in respect of the draft Legal Services Regulation Act 2015 (Advertising) Regulations, 2020 (hereinafter referred to as “the draft regulations”)<sup>1</sup>. The Council last year made a submission to the Authority in the first phase of consultation that led to the drafting of regulations. This submission should be read in the context of that previous submission.<sup>2</sup>

Advertising by barristers has been permitted by The Bar of Ireland’s Code of Conduct since 2007 and is currently subject to guidelines published by the Council in 2008. Those guidelines are broadly similar to the guiding principles contained in the relevant sections of the Legal Services Regulation Act, 2015 (hereinafter referred to as “the Act”).

In that earlier submission the Council said that it is supportive of members of the Law Library and other practising barristers advertising in a manner that protects the public interest; maintains proper professional standards; protects the independence, dignity and integrity of the legal profession; and protects the proper administration of justice. The Council also pointed to its submission made to the former Competition Authority where it said that advertising may permit greater transparency, assist barristers to establish their practices and promote price competition. The Council said in that submission that those were objectives that the Bar seeks to promote.

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<sup>1</sup> <https://www.lsr.ie/consultation-on-draft-advertising-regulations-opens/>

<sup>2</sup> [https://www.lawlibrary.ie/media/lawlibrary/media/Submission-to-LSRA-re-Advertising-Consultation-October-2019\\_For-Issue-07-11-19.pdf](https://www.lawlibrary.ie/media/lawlibrary/media/Submission-to-LSRA-re-Advertising-Consultation-October-2019_For-Issue-07-11-19.pdf)

## **COMMENTS ON THE DRAFT REGULATIONS**

The Council notes that the draft regulations are generally permissive in nature subject to certain specific exceptions. In this regard, the scheme of the draft regulations appear to reflect to a broad degree the provisions of section 218 of the Act.

1. Regulation 2(a)(i) contains a list of various means of communicating an advertisement. The Council suggests that a comma should separate the words “stationery” and “directory entry”.
2. Regulation 3 provides generally that legal practitioners may advertise their legal services. Regulation 4 specifies the restrictions on that general permission to advertise. These specific restrictions mirror the provisions of section 218(5)(d) of the Act. While they are not identical to the restrictions contained in the Council’s 2008 guidelines, they are similar in broad measure.
3. In its initial submission the Council urged the Authority, in drafting these regulations, to include a provision restricting advertising of legal services by reference to the success rate of the legal practitioner in question. Such a provision has not been included in the draft regulations. This restriction has not been included in the specific statutory restrictions listed in section 218(5)(d) of the Act. Section 218(5)(d) is referable to section 218(2). The specifics of sub-section (5)(d) are without prejudice to the general power conferred on the Authority by sub-section (2) to make these regulations. It is submitted, therefore, that the Authority may, by regulation, provide for restrictions other than and in addition to those specified in sub-section (5)(d). Such further restrictions must, by virtue of sub-section (4), be necessary firstly for the protection of the independence, dignity and integrity of the legal profession, and secondly for an overriding reason relating to the public interest. Any such restriction must also be non-discriminatory and proportionate.
4. The Council repeats its earlier submission that the Authority should include in the regulations a prohibition on statements about a legal practitioner’s success rate.

The Council’s concern is that if legal practitioners were permitted to advertise on the basis of their success rates, the inevitable risk would be that legal practitioners would start to select clients principally on the ostensible likelihood of the success of their cases. This could lead to potential clients with difficult or unattractive cases struggling to find adequate and effective representation. It would also inure to the benefit of clients with greater resources to fight cases to the disadvantage of those with fewer resources. Rather than advertising strengthening competition and providing greater choice for clients, such advertising could have the opposite effect, which would constitute a detriment to the public by placing a potential constraint on access to justice. Further, in the area of criminal defence practice, for example, it could lead to the representation only of clients with a

strong possibility of acquittal, thereby undermining an accused's constitutional entitlement to a trial in course of law.

It is a central tenet of an independent referral bar that legal practitioners who are members of such a bar, with limited and specific restrictions, accept instructions on behalf of any client who seeks their services. There is a real concern that this could be undermined.

It is also the case that the efficient and effective provision of legal services to a client in the context of litigation frequently involves the resolution of a dispute to the mutual satisfaction of all parties. It is often, although not always, in the best interests of a client that a dispute is settled in this way without requiring resolution by a court. Advertising by reference to success rate is not consistent with this manner of providing legal services to clients.

A further consideration is that it will be very difficult, in any investigation to ensure compliance with Regulation 4(a)(iv), to ascertain what any practitioner's success rate is.

It is the Council's submission that a prohibition on advertising by success rate is permitted by section 218(2) and that it meets the test set out in sub-section (4).

5. Regulation 5 provides that the consent of clients is required before the publication of information relating to the client or to transactions in respect of which the legal practitioner may have provided legal services. The Council accepts that this is an important provision and welcomes the protection given to clients and the implicit acknowledgement of the central duty of confidentiality owed to a client by a legal practitioner. However, the Council is concerned that the regulation in its present form has been drafted too widely.

Many legal practitioners currently publicise themselves by reference to cases of note in which they have played a role. This can be done in media such as LinkedIn for example or in the biographical notes provided for a conference programme. In general, such information is already in the public domain and it does not compromise the duty of confidentiality owed to a client to say that a named practitioner acted in a named case. The Council submits that it should not be necessary to secure the consent of a client to publicise oneself by reference to such publicly available information, where it is confined to the name of the case and the general area of practice to which it relates.

The Council has a further concern in relation to this provision in relation to the draft definition of client in regulation 2(a) as including a beneficiary to an estate under a will, intestacy or trust. There are many cases in which two beneficiaries under a particular will, for example, are the two disputing parties, in which case one of the beneficiaries could

not in any way be said to be the client of the legal practitioner acting for the other beneficiary. It does not seem correct that a legal practitioner would, in such circumstances, require the consent of the opposing party.

6. Regulation 10(a) provides that an advertisement published or caused to be published by a legal practitioner which does not otherwise make it clear on the face of it that it is so published shall state that it is published or caused to be published by the legal practitioner. Regulation 3 permits advertising by (a) legal practitioners; (b) legal partnerships, multi-disciplinary partnerships or limited liability partnerships; or (c) groups of legal practitioners sharing facilities etc. The Council submits that regulation 10(a) should explicitly refer to the three distinct groups referred to in regulation 3. Otherwise the categories referred to in regulation 3(b) and (c) do not appear to be regulated by this provision.
  
7. Regulation 10(c) provides that an advertisement which includes the name of a legal practitioner shall be deemed for the purpose of compliance with these Regulations, to be an advertisement published or caused to be published by a legal practitioner, insofar as the advertisement is intended to publicise or otherwise promote the legal practitioner. The Council notes that this provision reflects an equivalent provision in the Solicitors Advertising Regulations, 2019. While this provision may be intended to prevent a legal practitioner from seeking to evade inquiry in respect of an advertisement that appears to contravene the regulations, the Council is concerned that, as drafted, it runs the real risk of fixing liability on legal practitioners whose names have been, without their knowledge or consent, included in a communication that comes within the regulations. For example, the draft regulations do not prohibit, as the current Council guidelines do, the advertising of legal services by reference to the name of other legal practitioners. As drafted, this regulation would deem practitioner B to be the publisher of an advertisement in which practitioner A was encouraging clients to come to practitioner A at the expense of practitioner B, in that it publicises practitioner B albeit that it does not seek to promote him or her. This cannot be correct. Nor could it be correct that a firm of solicitors, for example, could advertise, without the knowledge of barrister C, that they always instruct barrister C. The risk would also exist in a communication deemed to be an advertisement in which one practitioner referred to proceedings in which they had acted and where a barrister made reference to the solicitor from whom instructions had been received or a solicitor referred to the counsel instructed. A further situation in which it could conceivably arise is in an online discussion forum for a particular class of litigant in which particular practitioners are recommended. This is not an exhaustive list of examples. None might be considered to be frequent occurrences but they are all realistic possibilities.

Some of these concerns could be addressed by the inclusion in the regulations of a requirement that the practitioner(s) who publishes an advertisement, or on whose behalf it is published, obtain in advance the written consent of any other legal practitioner named in the said advertisement.

There may be considerable advantage in the inclusion of a provision deeming a practitioner to have published an advertisement in which they are named, particularly where a practitioner seeks to avoid liability under the regulations by failing to comply with Regulation 10(a). However, notwithstanding what may be considerable utility, it is the Council's view that, as drafted, the provision is overly broad and does not allow for a situation where a practitioner's name is used in an advertisement without that user's knowledge, consent or connivance. The utility of the provision could be maintained while also taking account of the Council's concerns by changing the imperative of the draft regulation to a rebuttable presumption whereby a practitioner would not be deemed to have published an advertisement, or to have caused it to be published, where he or she satisfies the Authority that the advertisement in question was not published with his or her consent or connivance.

The Council suggests that a provision along the following lines would address any concern in relation to enforcement while protecting against the Council's concerns:

*"An advertisement which includes the name of a legal practitioner shall be deemed for the purpose of compliance with the Regulations, in the absence of evidence to the contrary, to be an advertisement published by that legal practitioner. But insofar as it includes the name of more than one legal practitioner, it will be deemed to be published by the legal practitioner whose business it primarily intends to publicise or otherwise promote"*

8. The Council notes that the investigation and enforcement provisions of the regulations allow scope for infringements to be treated as mere infringements or as misconduct under Part 6 of the Act. The Council agrees that both routes, depending on the circumstances, should be available.
9. Regulation 11(b) creates a three-day time limit within which a legal practitioner must reply to a notification from the Authority within three working days. That period can be varied as considered appropriate by the Authority in any given circumstance. The Council acknowledges that there will be cases in which the Authority considers it appropriate to act with such urgency. Further, it is noted that the regulations empower the Authority to allow a longer period for a reply. However, it is suggested that the regulations should more explicitly allow for a longer period in cases where urgency does not apply. This could be achieved by creating two paragraphs within Regulation 11(b). Paragraph (i) would be

similar to the draft regulations and provide after the words “such letter (or letters)”, “in cases in which the Authority considers urgent, within 3 working days or such further or other period as the Authority may determine as appropriate in the circumstances”. Paragraph (ii) would provide that in all other cases a reply would be required within, say, 14 days or such further period as the Authority may determine as appropriate in the circumstances.

10. Regulation 14 allows the Authority to publish from time to time guidelines for legal practitioners in relation to the publication of advertisements. The Council encourages the Authority to periodically publish guidelines that include details of the substance of advertisements that have been deemed to be in compliance after inquiry by the Authority and advertisements that have been deemed not to be in compliance. It is not necessary that such guidelines identify any party. It is more important that they point to what the Authority considers permissible or otherwise.