



THE BAR
OF IRELAND

The Law Library

Submission by Council of The Bar of
Ireland to the Legal Services Regulatory
Authority in response to an invitation for
submissions as part of a public
consultation prior to the making and
issuing of regulations in relation to the
advertising of legal services

November 2019

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.

SCOPE OF CONSULTATION

The Legal Services Regulatory Authority has invited submissions as part of a public consultation prior to the making and issuing of regulations in relation to the advertising of legal services.

The Legal Services Regulatory Authority was established on 1 October 2016 and is responsible for the regulation of the legal profession and ensuring that standards in legal services are maintained and improved. Under section 218 of the Legal Services Regulation Act 2015, the Authority may make regulations in relation to the advertising of legal services, including in relation to the information that may be contained in advertisements published or caused to be published by legal practitioners in relation to legal services they provide and any areas of law to which those services relate.

The advertising regulations to be issued by the Authority may not restrict the advertising of legal services unless the restriction is necessary for the protection of the independence, dignity and integrity of the legal profession, or where an overriding reason exists relating to the public interest and where such restriction is non-discriminatory and proportionate.

The regulations may:

- (a) Specify the category or categories of legal practitioners to whom such regulations apply,
- (b) Make provisions in relation to advertisements that may be published or caused to be published by or on behalf of a legal practitioner, including provision in respect of their content and size,
- (c) Provide for the manner in which the Authority is to determine whether any particular advertisement published or caused to be published by a legal practitioner is in contravention of the 2015 Act or the advertising regulations to be issued by the Authority,
- (d) Restrict the publication by or on behalf of a legal practitioner of any advertisement which in the opinion of the Authority:

- i. is likely to bring the profession into disrepute,
- ii. is in bad taste,
- iii. reflects unfavourably on other legal practitioners,
- iv. is false or misleading in any material respect,
- v. is published in an inappropriate location
- vi. expressly or impliedly solicits, encourages or offers any inducement to any person or group or class of persons to make claims for personal injuries or seek legal services in connection with such claims.

In considering any submissions received in this consultation, the LSRA will be guided by the regulatory objectives set down in section 13 of the Act, which are:

- a. protecting and promoting the public interest,
- b. supporting the proper and effective administration of justice,
- c. protecting and promoting the interests of consumers relating to the provision of legal services,
- d. promoting competition in the provision of legal services in the State, e. encouraging an independent, strong and effective legal profession, and
- f. promoting and maintaining adherence to the professional principles of independence and integrity, acting in the client's best interests, compliance with duties owed to the court and confidentiality.

Following the consultation and other evidence gathering activities, the LSRA will draft the advertising regulations required under section 218. The draft regulations may be subject then to further consultation prior to being issued. The Council would welcome the opportunity to make observations about any draft regulations at the appropriate time.

HOW THE BAR OF IRELAND VIEWS ADVERTISING

Members of the Law Library have since 2007 been permitted to advertise their services. The Council 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.

In a 2005 submission to the then Competition Authority, the Council stated 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. That remains the Council's view.

CURRENT GUIDANCE ON ADVERTISING FOR MEMBERS OF THE LAW LIBRARY

Paragraph 6.13 of the 2019 Code of Conduct for The Bar of Ireland provides as follows:

(i) Barristers may only advertise in a manner prescribed by regulations made pursuant to s.218(2) of the Act of 2015.

(ii) Pending the making of such regulations as are referred to in s.218(2) of the Act of 2015, Barristers may only advertise in accordance with s.218(1) of the Act of 2015 and, if applicable, in accordance with such rules, regulations or guidelines as may be made by the Bar Council pertaining to advertising by Barristers.

(iii) Any such rules, regulations or guidelines as may be made by the Bar Council shall have due regard to the principles contained in s.218(1), s.218(4) and s.218(5) of the Act of 2015 and the provisions of this Code as may be appropriate.¹

Pending the commencement of Section 218 of the Legal Services Regulation Act 2015, members of the Law Library must have regard to the 2008 Guidance on Advertising that was published by the Council on 1 May 2008. (see Appendix 1)

The 2008 Guidance is in five paragraphs. The first paragraph sets out a non-exhaustive list of items that may be included in advertising. The second paragraph sets out a list of items not permitted. The third paragraph provides that it is the duty of barristers to ensure that any advertisement complies with the guidance. The fourth paragraph provides that a breach of the guidance constitutes a breach of the Code of Conduct of the Bar of Ireland. The fifth paragraph requires a barrister in any doubt as to their duties to seek guidance from the

¹ It should be noted that this section of the Code of Conduct for The Bar of Ireland has not yet been commenced in its entirety pending the full commencement of Section 218 of the Legal Services Regulation Act 2015. It is the intention of the Council to commence Paragraph 6.13 in the near future.

Professional Practices Committee of the Bar of Ireland in respect of any proposed advertisement.

It is the view of the Council that the 2008 Guidance on Advertising is very similar to the objectives set out under Section 218 of the Legal Services Regulation Act 2015 and therefore the Council is in full support of the objectives as set out, i.e. that the regulations may restrict the publication by or on behalf of a legal practitioner of any advertisement which in the opinion of the Authority:

- i. is likely to bring the profession into disrepute,
- ii. is in bad taste,
- iii. reflects unfavourably on other legal practitioners,
- iv. is false or misleading in any material respect,
- v. is published in an inappropriate location
- vi. expressly or impliedly solicits, encourages or offers any inducement to any person or group or class of persons to make claims for personal injuries or seek legal services in connection with such claims.

Sub-paragraphs (c), (d), (f) and (j) of the 2008 Guidance have direct equivalents in s.218(5) of the 2015 Act while sub-paragraphs (a) and (e) have partial equivalents.

In general, sub-paragraphs (a) and (b) require that any advertisement is not in conflict with any enactment, code or guidelines. It is the Council's view that adherence by practising barristers to the law and to any applicable codes of practice or conduct and any guidelines issued by regulatory or professional bodies is both desirable and demonstrably in the public interest and that any advertising regulations should contain a similar injunction.

Sub-paragraph (i) of the 2008 Guidance has no equivalent in s.218 of the 2015 Act but it is the Council's view that this is an important and appropriate restriction that the Authority should include in any regulations. The necessity for a provision prohibiting statements about a legal practitioner's success rate is justified by both sub-paragraphs of s.218(4)(a), namely the independence, dignity and integrity of the legal profession and for overriding reasons relating to the public interest. 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. The end result would be that potential clients with difficult or unattractive cases would struggle to find adequate and effective representation. Further, it would inure to the benefit of clients with greater resources to fight cases to the disadvantage of those with fewer resources. 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.

The Council's view is that such a provision is necessary to protect the independence, dignity and integrity of the legal profession and that there are overriding reasons relating both to the public interest and the interests of justice in favour of its inclusion.

VIEWS OF MEMBERS OF THE LAW LIBRARY ON ADVERTISING

In making this submission, the Council sought to survey the views of members of the Law Library in relation to this consultation. The Authority's consultation process has also been brought to the attention of members so that they might make their own submissions directly to the Authority, should they wish.

Among those members who responded, there was broad support for advertising to be permitted along lines similar to the Bar of Ireland's 2008 guidance on advertising. As noted above, it is the Council's view that the objectives set out in the Act in relation to advertising are, to a substantial degree, the same as those set out in the Bar's guidance.

While LinkedIn is widely used, other social media sites appear to be little used for professional reasons. Similarly, the use of members' own websites does not appear to be widespread. On the other hand, members appear to view the publication of articles in legal and other journals and the giving of CPD lectures as effective forms of self-promotion.

It should be noted, though, that the views expressed by members in response to the survey do not come from a sufficiently large number to allow them to be considered, statistically representative of the membership of the Bar of Ireland as a whole. They are nonetheless of some value.

Members were also invited to share their views on any amendments that should be considered. In summary, the views expressed a desire for greater clarity over what is and is not permitted in the form, type, medium and location of advertisements. This included greater clarity on the use of social media, websites, sponsorship and the contents of business cards. The view was expressed that any regulations should allow for transparency in advertising while, at the same time, having regard to the necessity of upholding decent standards amongst legal practitioners. Some concern was also expressed that excessive or undue advertising would operate to the advantage of those practitioners with greater resources to the ever-increasing detriment of those whose resources are not as great.

ADVERTISING REGULATIONS AMONGST INDEPENDENT REFERRAL BARS IN OTHER JURISDICTIONS

A thorough review of the regulations in other jurisdictions where there is an independent referral bar has revealed that there are varying approaches to regulation of advertising from general principles to prescriptive rules. A 'free for all' approach to advertising is not permitted in any jurisdiction as it is recognised that there is a need to ensure that the public interest is protected and that the reputation of the profession is upheld.

It is also fair to conclude that, in general, the principles and objectives employed in those other jurisdictions are in broad keeping with the objectives set out in Section 218 of the Legal Services Regulation Act 2015.

The following table sets out a summary of the position in relation to advertising in other jurisdictions throughout the world where there is an independent referral bar:

ENGLAND & WALES	https://www.barcouncil.org.uk/media/555264/advertising_and_website_profiles.pdf
NORTHERN IRELAND	http://f155c37b9527c4a8c1a3-a15971a48924c42bb509c668e302d36e.r86.cf3.rackcdn.com/Code_of_Conduct_Complete%202019.pdf (Section 30)
SCOTLAND	https://www.advocates.org.uk/media/1417/guide-to-conduct-fifth-edition.pdf (Section 10)
AUSTRALIA	https://www.legislation.nsw.gov.au/#/view/regulation/2015/243 (Sections 76 - 78)
HONG KONG	https://www.hkba.org/sites/default/files/Code%20of%20Conduct%20%28updated%20as%20at%2015%20Nov%202018%29.pdf (Chapter 8)
NEW ZEALAND	https://www.lawsociety.org.nz/for-lawyers/regulatory-requirements/rules-and-regulations
SOUTH AFRICA	https://www.sabar.co.za/GCB%20Uniform%20Rules%20of%20Ethics%20updated%202017%20AGM.pdf (Section 4.17)

OPINION OF THE EUROPEAN COMMISSION ON ADVERTISING

In January 2019, the European Commission published a 'Reasoned Opinion'² addressed to Ireland on account of the perceived incompatibility of certain restrictions under Irish Law on commercial communications by lawyers with European Union Law, in particular Article 24 of Directive 2006/123/EC, under Article 258 of the Treaty on the Functioning of the European Union.

EU LAW - DIRECTIVE 2006/123/EC

Article 24(1) of Directive 2006/123/EC requires Member States to remove all total prohibitions on commercial communications by regulated professions:

"1. Member States shall remove all total prohibitions on commercial communications by the regulated professions."

The legal profession is a regulated profession, as defined by Article 4(11) of Directive 2006/123/EC, since its access and exercise, and the use of its professional titles, are subject to the possession of specific professional qualifications, as defined by Article 3(1)(b) of Directive 2005/36/EC.

A "commercial communication" is defined by Article 4(12) of Directive 2006/123/EC as:

"any form of communication designed to promote, directly or indirectly, the goods, services or image of an undertaking, organisation or person engaged in commercial, industrial or craft activity or practising a regulated profession. The following do not of themselves constitute commercial communications:

(a) information enabling direct access to the activity of the undertaking, organisation or person, including in particular a domain name or an electronic-mailing address;

(b) communications relating to the goods, services or image of the undertaking, organisation or person, compiled in an independent manner, particularly when provided for no financial consideration."

A "total prohibition on commercial communications" includes not only prohibitions of all forms of commercial communications, but also prohibitions of a particular form of commercial communication, by whatever means, in whatever manner and with whichever content possible, as decided by the Court of Justice of the European Union (CJEU) on Case C-119/09.⁴

Article 24(2) of Directive 2006/123/EC obliges Member States to:

"ensure that commercial communications by the regulated professions comply with professional rules, in conformity with Community law, which relate, in particular, to the independence, dignity and integrity of the profession, as well as to professional

² Reasoned Opinion - Infringement No 2013/2192

secrecy, in a manner consistent with the specific nature of each profession. Professional rules on commercial communications shall be non-discriminatory, justified by an overriding reason relating to the public interest and proportionate."

LEGAL ASSESSMENT OF THE COMMISSION IN RELATION TO BARRISTERS

In its Reasoned Opinion the Commission considered section 218 of the 2015 Act. It noted that restrictions on advertising must be necessary for the protection of the independence, dignity and integrity of the legal profession and that there must be an overriding reason relating to the public interest, as well as being non-discriminatory and proportionate. The Commission noted that section 218(5)(d) introduces further principles on the "content" of advertisements, to include the prohibition on advertisements which may bring the legal profession into disrepute, are in bad taste, reflect unfavourably on other legal practitioners, are misleading etc., and on the "manner" of advertisements to include a closed-list of so-called "inappropriate locations".

In the opinion of the Commission, 'all these restrictions, per se, seem justified and proportionate in light of Article 24 of Directive 2006/123/EC, in particular in relation to securing the independence, dignity and integrity of the profession, without prejudice to further scrutiny of compliance with EU law being required of the implementing regulations detailing the exact restrictions to be introduced in the future, as to their concrete necessity and proportionality, as well as their non-discriminatory nature, in light of that same Article 24 of Directive 2006/123/EC.'

Regarding advertising by barristers, the Commission noted that:

'the new Code of Conduct for the Bar of Ireland has allowed, since 25 July 2016, for advertising as per its section 6.13. Section 6.13(ii) and (iii) of this Code currently allows for advertising by barristers in accordance with Section 218 of the Legal Services Regulation Act 2015, pending the making of regulations under Section 218 of this Act by the new Legal Services Regulatory Authority and in accordance with the rules, regulations or guidelines of the Bar of Ireland, if any. There are, to this date, no such rules, regulations or guidelines made, so it is clear that advertising by barristers is currently only specifically governed in Ireland by Section 218 of the 2015 Act. Given that, as mentioned above, Section 218 is in compliance with EU law, in particular Article 24 of Directive 2006/123/EC, the Commission is of the opinion that Ireland is, at this moment in time, not in breach of EU law in relation to its rules on advertising by barristers.'

While the intention of the 2016 Code of Conduct for The Bar of Ireland is exactly as described above, the Commission did not seem to be aware that the 2016 Code was delayed in its commencement owing to delays in commencing the various provisions of the Legal Services Regulation Act 2015 that are now resolved or about to be resolved.

On the substance of the matter, it is undoubtedly the intention of The Bar of Ireland to allow for advertising by barristers in accordance with Section 218 of the Legal Services Regulation Act 2015, and any regulations published under Section 218 of this Act by the Legal Services Regulatory Authority.

CONCLUSION

In making this submission, the Council has had regard to the current position, the views of members of the Law Library, the position in other jurisdictions and the views of the European Commission in relation to advertising of legal services by barristers.

We would welcome the opportunity to review and provide further submissions in relation to the draft regulations to be put in place by the Legal Services Regulatory Authority in advance of their finalisation and publication.

APPENDIX 1 – GUIDANCE ON ADVERTISING, MAY 2008



Guidance on Advertising

Pursuant to Rule 1(6)(b) of the Code of Conduct for the Bar of Ireland

The purpose of this note is to provide advice and guidance as to how, subject to Article 1.3 of the Code of Conduct, barristers may engage in advertising which is lawful in connection with their practice in an appropriate forum.

These guidelines will come into effect on 1st May 2008.

1. For the purpose of guidance, such advertising may include:-

- (a) The name, address (including any electronic address), telephone number, facsimile number, place or places of practice of the barrister and any reference to the location of information provided by the barrister that is accessible electronically;
- (b) Details of professional and academic qualifications;
- (c) Passport style photograph of the barrister;
- (d) Statements of charges and methods of charging;
- (e) Factual information about the nature and extent of the barrister's services and areas of expertise, including experience from another profession, occupation or employment;
- (f) Details of publications and related materials;
- (g) Details of availability;
- (h) Details of membership of, or affiliation to, named associations or organisations (national or international);
- (i) Details of participation in the Direct Professional Access Scheme.

(j) Any other appropriate information consistent with these guidelines and the Code of Conduct

2. Advertising shall not:-

(a) conflict with a barrister's duty under any enactment, the Code, these guidelines or otherwise bring the legal profession into disrepute;

(b) without prejudice to the generality of subparagraph (a), conflict with a barrister's duty under paragraph 2.1 and paragraph 3.1(b) of the Code;

(c) be false or misleading in any respect;

(d) be in bad taste;

(e) be likely to diminish public confidence in the legal profession or the administration of justice or otherwise bring the legal profession into disrepute;

(f) reflect unfavourably on other barristers;

(g) make reference, expressly or by implication, to any other barrister or to any solicitor

(h) make direct comparisons in terms of quality with or criticisms of other identifiable persons (whether they be barristers or members of any other profession);

(i) include statements about the barrister's success rate;

(j) be published in an inappropriate location.

3. It is the duty of barristers to ensure that any advertisement published or caused to be published by them complies with these guidelines.

4. A breach of these regulations by a barrister is a breach of the Code of Conduct.

5. If a barrister is in doubt as to their duty under the Code and these guidelines in respect of any proposed advertising, the barrister must seek guidance from the Professional Practices Committee of the Bar Council in respect of the proposed advertising.

Bar Council
1st May 2008



THE BAR OF IRELAND

The Law Library

Distillery Building
145-151 Church Street
Dublin 7 D07 WDX8

Tel: +353 1 817 5000
Fax: +353 1 817 5150
Email: thebarofireland@lawlibrary.ie
Twitter: @TheBarofIreland
www.lawlibrary.ie