

New advertising regulations for barristers

New regulations in respect of advertising by legal practitioners came into effect on December 18, 2020.



Dara Hayes BL

Barristers and solicitors are now governed by the same rules when it comes to advertising. These rules are contained in the Legal Services Regulation Act 2015 (Advertising) Regulations, 2020 (SI 644/20).

Prior to December, advertising by barristers had been governed by our Code of Conduct and guidelines published by the Bar Council in May 2008. Those guidelines have been rescinded and the Code of Conduct is now framed by reference to the Legal Services Regulation Authority (LSRA) Regulations. While the change is significant, it is perhaps more evolutionary than revolutionary. The guidance that had been provided about what might be included in an advertisement is now gone. However, the rules prohibiting certain content remain broadly the same as before. What follows is a brief guide to the new rules, but the Regulations should be read by all practitioners.

Lawful advertisement

The general premise of the Regulations is that it is lawful for legal practitioners to advertise, whether they be individuals, partnerships or groups of practitioners sharing facilities, premises, or practice costs. An advertisement is given quite a wide definition and includes oral, written and visual communications intended to publicise or promote the practitioner in question in relation to the provision of legal services. Under Regulation 4 advertisements shall not:

- be likely to bring the profession into disrepute;
- be in bad taste;
- reflect unfavourably on other practitioners;
- be false or misleading;
- be published in an inappropriate location (hospitals, clinics, funeral homes and suchlike); or
- expressly or implicitly solicit or encourage personal injury claims (although the term “personal injuries” and other such terms may be included in an advertisement).

The use of terms such as “no foal no fee” or “first consultation free” are also prohibited, as is any suggestion that there is no risk to a client of having to pay costs. The Bar Council’s previous guidelines had contained a prohibition on advertising by reference to a barrister’s success rate. A similar prohibition on legal practitioners advertising by reference to success rate

has been included in these Regulations at the urging of The Bar of Ireland, it not having been included in the original draft regulations. The thrust of the submission was that this prohibition is necessary to protect the interests of litigants and their access to justice and effective legal representation, and to guard against any undermining of the cab-rank principle by which we practise, which principle operates in the interest of litigants.

Confidentiality and publicity

Advertisements cannot breach the duty of confidentiality owed to clients without the express prior consent of the client. An exception to this is in relation to matters already in the public domain. It is also permitted to state that you acted in particular proceedings.

Practitioners often, in conference programmes or social networking sites for example, list significant cases in which they have appeared. This practice is permitted by the Regulations, although it is provided that one’s role is not to be overstated.

The purpose of an advertisement, for the purpose of the Regulations, is to publicise or promote a practitioner in the provision of legal services. Where the LSRA deems that the publication of a book or article, or the giving of a lecture, is primarily for publicity or promotion rather than for imparting legal information, such activity can fall under the Regulations. The indicia of publicity and promotion can include: the extensive giving of free copies of books; paying to have your article published or to deliver your lecture; and, the repeated giving of the same lecture or publication of the same article. It may herald the end, for lawyers, of the single transferable speech.

Any advertisement must state by or for whom it was published. If not, it will be deemed to have been published by the practitioner or practitioners that it seeks to publicise or promote.

Breaches of the regulations

A breach of the Regulations can be dealt with by enforcement under the Regulations. It can also be treated as misconduct under Part 6 of the Legal Services Regulation Act, 2015. The LSRA can investigate any alleged breach either on foot of a complaint or on its own motion. Where it finds that an advertisement is in breach of the Regulations, the Authority can issue directions and can seek undertakings in relation to future advertising. It can also apply to the High Court, should it consider it necessary, to enforce the Regulations.

Since its submission to the Competition Authority in 2005, up to and including the submission made to the LSRA last November, The Bar of Ireland has consistently expressed the view that advertising can be to the benefit of both legal practitioners and their clients. These Regulations appear to strike a balance between promoting the good that advertising may bring without undermining the interests of justice.