

LawWorks Practice Guidance:

In-house solicitors and pro bono: regulatory issues

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1. INTRODUCTION

1. The number of in-house solicitors - working in the corporate and public sectors, and for not-for-profit organisations and charities – is large and growing. This guidance aims to assist in-house solicitors to understand the rules and regulations that can apply when providing pro bono advice, casework or representation.
2. There are specific rules for in-house solicitors but - as this guidance shows - a broad range of legal pro bono can be undertaken to the benefit of many individuals, charities and communities. In fact, so long as other practice requirements are in place, there is little by way of pro bono which an in-house solicitor can't do – if they have the time and enthusiasm.
3. The Law Society's Pro Bono Manual is an excellent resource for those undertaking pro bono work, and includes a section for in-house solicitors. The Manual can be downloaded from the Law Society's website at:
<https://www.lawsociety.org.uk/support-services/practice-management/pro-bono/pro-bono-manual/>
4. LawWorks (the Solicitors Pro Bono Group) promotes, supports and facilitates pro bono legal services that extend access to the law for individuals and communities in need and the organisations that support them. We champion pro bono because of the positive contribution and difference it makes for individuals, communities and society. For more information about LawWorks (including LawWorks' membership) see **Appendix 3**.

Overview

5. This guidance is intended to assist in-house solicitors to understand the rules and regulations that apply to them when volunteering to provide legal pro bono, including:
 - in legal advice clinics or centres;
 - by undertaking casework or representation (including for so-called 'secondary specialisation' work); and
 - by advising charities and other not-for-profit organisations.
6. In this guide we sometimes refer to solicitors undertaking pro bono as 'volunteers' or as 'volunteering'.
7. A key issue for in-house solicitors, and a focus for this guide, is the distinction between legal work which is 'reserved' and that which is 'non-reserved'. For

regulatory reasons (summarised below), it can be difficult for an in-house solicitor to comfortably undertake pro bono which is 'reserved' – however, what we hope this guide will show is that most (if not all) legal work undertaken pro bono will be 'non-reserved' (with some important exceptions).

8. This guide therefore encourages in-house solicitors to consider and focus on non-reserved pro bono activity.
9. In this guide we assume that in-house solicitors have in place a current practising certificate. In-house solicitors who do not have a current practising certificate should consider the rules and arrangements discussed throughout this guidance, especially partnering arrangements (see paragraph 22). It is for individuals to ensure that their practice work complies with the rules governing practice.
10. Many of the regulatory rules applicable to in-house volunteers in one setting are applicable to in-house volunteers in another setting. The main rules and regulations, as well as the key considerations, applicable to in-house volunteers are covered in detail in paragraphs 19 to 66. Paragraphs 67 to 92 then describe any particular issues or requirements arising in specific pro bono contexts.
11. New practice rules proposed by the Solicitors Regulation Authority (SRA) and approved by the Legal Services Board will be introduced in 2019. This guidance concerns the current rules only. LawWorks will produce separate guidance on the new rules prior to them coming into force.
12. This guidance does not deal with the regulation of the *paid work* of in-house solicitors. *This guidance does not constitute advice.* In all cases individual volunteers, and other readers of this guidance, should satisfy themselves that they and the projects they volunteer through (or administer) meet the relevant regulatory requirements. Where appropriate, advice should be obtained before taking or refraining from taking action in relation to any aspect of this guidance.
13. This guidance is based upon the rules as at March 2019.

SOURCES OF RULES

14. The key sources of rules governing the provision of legal services by solicitors are found in:

- The Legal Services Act 2007 ('LSA')
<http://www.legislation.gov.uk/ukpga/2007/29/contents>
- The SRA's Practice Framework Rules ('PFR')
<http://www.sra.org.uk/solicitors/handbook/practising/content.page>
- The SRA's Code of Conduct (the 'Code')
<http://www.sra.org.uk/solicitors/handbook/code/content.page>
- SRA Indemnity Insurance Rules 2013 ('IIR')
<https://sra.org.uk/solicitors/handbook/indemnityins/content.page>

REGULATORS

15. The principal regulators for solicitors are:

- a. The Legal Services Board ('LSB');
- b. The Law Society of England and Wales; and
- c. The Solicitors Regulation Authority ('SRA')

16. The LSB is a statutory body which derives its remit and authority from the LSA. The LSB is, among other things, responsible for overseeing the legal regulators in England and Wales, including the SRA. The LSB is independent of Government and of the legal profession.

17. The Law Society is an approved regulator under the LSA. It is the representative body for the solicitors' profession. The Law Society's regulatory functions are delegated to the SRA, which is an independent arm of the Law Society. It receives around 30 per cent of the practising certificate fees paid to the SRA in order to "support, represent and promote the profession".

18. The SRA sets the rules, such as Codes of Practice, by which solicitors must abide in order to provide legal services.

RESERVED AND 'NON-RESERVED' LEGAL ACTIVITY – AN OVERVIEW

19. The LSA breaks down the work of solicitors into separate 'activities'. These are then graded in terms of whether they are 'reserved' or 'non-reserved' activities.
20. There are relatively few legal activities which in-house solicitors cannot undertake in practice when providing legal pro bono (volunteering). However, there are particular rules which apply to in-house solicitors for the purpose of pro bono - the main restriction arises in respect of 'reserved' legal activities. If an in-house solicitor wishes to undertake 'reserved' pro bono legal activity they need to demonstrate that they are able to do so under PFR Rule 4.10 – i.e., that the volunteering is: i) not 'in the course of their employment' and ii) that the activity is not 'part of your employer's business'.
21. If we assume that in-house solicitors are restricted to only undertaking non-reserved legal activity, the scope of 'non-reserved' activity is actually very broad (subject to additional rules in some areas of law, such as debt advice or immigration work).
22. In addition to the fact that the scope of non-reserved activity which can be undertaken is broad in practice, an in-house solicitor may wish to consider 'partnering' with a law firm which is able to undertake reserved legal activity. The in-house solicitor will be able to take advantage of the firm's authorization, as well as supervision arrangements provided by the firm and potentially coming under the firm's insurance.

Non-reserved legal activities

23. Non-reserved legal activities can be undertaken by in-house solicitors in a pro bono context, subject only to the rules which generally apply to legal practice, such as conflicts of interest and insurance requirements.
 - a) Legal advice
 24. Apart from limited exceptions - namely certain property matters (i.e. 'reserved instrument activities', for which see paragraph 47 and Appendix 2)) and debt and certain consumer advice, both of which are discussed below – legal advice can be provided by qualified in-house solicitors in a pro bono context.
 25. Immigration **advice** is non-reserved and can be undertaken by in-house solicitors when undertaking pro bono work. The restrictions that are in place in relation to certain *paid* immigration work, i.e. legal aid work, are outside the scope of this

guidance. (For ease of reference we deal with the other immigration legal services here. Immigration work relating to courts or immigration tribunals – i.e. advocacy and the conduct of litigation – is reserved by virtue of the overlap of these categories with the reserved categories in the LSA. Consequently, reserved **litigation** work may only be undertaken in partnership with an authorised solicitor and delivered through an authorised entity. This is due to the requirement to be an ‘authorised’ person in respect of ‘representation’ in the First-tier Tribunal (Immigration and Asylum), in accordance with the Immigration and Asylum Act 1999. As explained elsewhere in this guidance, we do not currently recommend that **advocacy** is undertaken under a partnership arrangement, due to its live nature.)

26. **Debt** and **consumer** advice should not be given by in-house solicitors (e.g., in a clinic setting), unless partnered with an authorised person or a clinic or organisation which is authorised by the Financial Conduct Authority (FCA) or otherwise permitted to provide such advice, such as a Citizens Advice service. For more information about the restrictions on providing debt advice, contact LawWorks or view the LawWorks guidance note on our website. The FCA has issued debt counselling guidance at: <https://www.handbook.fca.org.uk/handbook/PERG/17/7.html>

27. An issue which can arise for in-house solicitors is when legal advice may come under the meaning and scope of ‘conduct of litigation’ which is a ‘reserved’ legal activity. There is a more detailed discussion about the ‘conduct of litigation’ below paragraphs 36 – 46), but in summary: legal advice that is non-reserved includes advice as to the merits of any intended legal action, as well as the merits of ongoing formal legal action in a court or tribunal, such as an issued claim in the civil courts. A significant amount of work related to formal proceedings falls outside the reservation – i.e., it is not the ‘conduct of litigation’ and therefore is an ‘unreserved’ legal activity.

28. We hope the clarification on the scope of ‘conduct is litigation’, below, is helpful, as much advice work can be about issues and matters which do involve court or tribunal proceedings or could do so at a future date. Some in-house solicitors have, for example, been reluctant to volunteer to give advice at pro bono clinics because of concern about falling foul of the restriction on ‘conduct of litigation’ (e.g., if asked to advise on a letter from a landlord threatening eviction).

b) Advocacy and representation

29. The ‘exercise of a right of audience’ is a reserved activity and is discussed in more detail below. However, this restriction does not apply to some tribunals – i.e., in-house solicitors are able to represent clients pro bono at these tribunals as this is a

non-reserved activity. Tribunals which do not restrict rights of audience include the First-tier Tribunal (Social Entitlement Chamber), the Employment Tribunal and the Employment Appeals Tribunal. *Conducting litigation* before the First-tier Tribunal (Social Entitlement Chamber), the Employment Tribunal and the Employment Appeal Tribunal is also not a reserved activity, which means that in-house solicitors can run cases (including undertaking representation/advocacy) in these tribunals.

30. LawWorks supports, for example, a programme for solicitors providing pro bono casework and representation for social security tribunal appeals (First-tier Tribunal (Social Security Entitlement)), specifically for employment and support allowance and personal independent payment (PIP) appeals. The regulations do not prevent in-house solicitors taking part in this or similar pro bono projects supporting people appealing benefit decisions.

Reserved activities

31. Unless clearly acting outside the course of their employment or partnering with authorised persons, in-house solicitors should generally avoid undertaking ‘reserved’ legal activities when providing pro bono. The types of legal activities which are reserved – and what comes within the scope of what is reserved - are discussed below.

32. The LSA lists reserved activities as:

- the ‘exercise of a right of audience’ (i.e. advocacy in all courts and *certain* tribunals);
- the ‘conduct of litigation’;
- ‘reserved instrument activities’ (i.e. preparation of certain conveyancing instruments);
- probate activities;
- notarial activities; and
- the administration of oaths.¹

33. The statutory source of the restriction on ‘reserved’ activities is section 15(4) of the LSA. The SRA’s PFR Rule 4.10, which permits in-house solicitors and non-regulated business employers to provide pro bono legal services directly to the public, is drafted in similar if, unfortunately, not precisely the same language as section 15(4)

¹ The LSA schedule 2 addresses the meaning/scope of ‘reserved’ activities in greater detail – see: www.legislation.gov.uk/ukpga/2007/29/schedule/2

of the LSA, but, broadly, is clearly intended to mirror the statutory rule. Both rules contain similar restrictions on ‘reserved’ activities, in particular contained in the phrase ‘part of employer’s business’. In practise, the phrase is extremely difficult to interpret.

Advocacy and ‘exercising a right of audience’

34. While the reservation applies to advocacy before all courts it only applies to advocacy before certain tribunals which operate restrictive rights of audience. Tribunals which do not restrict rights of audience include the Employment Tribunal, Employment Appeals Tribunal and the First-tier Tribunal (Social Entitlement Chamber) – advocacy before these tribunals is not a reserved activity. Note that the First-tier Tribunal (Immigration) does restrict rights of audience.
35. There is a particular reason why the reservation does not apply to the First-tier Tribunal (Social Entitlement Chamber) – this is explained in **Appendix 1**.

The ‘conduct of litigation’

36. The meaning and scope of ‘conduct of litigation’ has been a barrier to some in-house solicitors undertaking pro bono. While the following is quite detailed, we hope it helpful in demonstrating what is not formally ‘conduct of litigation’ and can therefore be undertaken as a non-reserved legal activity.
37. As explained above, advocacy before the Employment Tribunal, Employment Appeal Tribunal and the First-tier (Social Entitlement Chamber) is not a reserved activity. The reservation on ‘conduct of litigation’ also does not apply to these tribunals.
38. Given that in courts and other tribunals the ‘conduct of litigation’ is a restricted activity, it is important to be clear which activities are captured by the reservation and which fall outside its scope. Even in courts and tribunals in which the ‘conduct of litigation’ is reserved, a great many pro bono legal services can be provided to the public in respect of ongoing formal litigation – i.e., they do not come within the scope of ‘conduct of litigation’ and are therefore not a reserved activity. In practice the ‘conduct of litigation’ reservation operates quite narrowly (see below).

Conduct of litigation which is not reserved activity

39. A significant amount of work *related* to formal proceedings falls outside the reservation – i.e., it is work which is not ‘ancillary’ to the conduct of litigation.
40. LawWorks considers that the writing of a ‘letter before action’, or any other step *prior* to commencing *formal proceedings*, would not amount to the ‘conduct of

litigation'. Subject to any other applicable restriction, such activities are not 'reserved' and can therefore be undertaken by an in-house solicitor.

41. *It is only once proceedings have commenced that litigation can be 'conducted'.*

Thereafter, the general thrust of relevant case law (see below) is that 'ancillary functions' – i.e., formal steps in the proceedings, such as the service of a Claim Form - come within the ambit of 'conduct of litigation' and are therefore a 'reserved' activity'. 'Ancillary functions' include activities such as the preparation of costs budgets and witness statements, interim applications and hearings, as well as any other formal step in proceedings.

42. In *Agassi v Robinson* [2006] 1 WLR 2126, it was held that a restricted view must be taken of the meaning of the phrase 'the right to conduct litigation', as section 20 of the Solicitors Act 1974 created a criminal offence for an unqualified person to act as a solicitor. In particular, paragraph 56 of the judgment indicates how the phrase should be interpreted:

"The word "ancillary" indicates that it is not all functions in relation to proceedings that are comprised in the "right to conduct litigation". The usual meaning of "ancillary" is "subordinate". A clue to what was intended lies in the words in brackets "(such as entering appearances to actions)". These words show that it must have been intended that the ancillary functions would be formal steps required in the conduct of litigation. These would include drawing or preparing instruments within the meaning of section 22 of the 1974 Act and other formal steps. It is not necessary for the purposes of this case to decide the precise parameters of the definition of "the right to conduct litigation". It is unfortunate that this important definition is so unclear. But because there are potential penal implications, its very obscurity means that the words should be construed narrowly. Suffice it to say that we do not see how the giving of legal advice in connection with court proceedings can come within the definition. In our view, even if, as the Law Society submits, correspondence with the opposing party is in a general sense "an integral part of the conduct of litigation", that does not make it an "ancillary function" for the purposes of section 28."

43. Following case law the activities set out below do not amount to the 'conduct of litigation' and are therefore not 'reserved':

- The **drafting** of documents for submission to proceedings *prior* to formal issue, including pleadings (such as the Claim Form and Particulars of Claim) and other

submissions – see *Ellis v Ministry of Justice*,² alongside *Agassi*. In *Ellis* it was held at first instance that ‘drafting alone’ of documents *prior* to issue (without the formal step of filing) did not constitute the ‘conduct of litigation’³ (a conclusion not disrupted by the Court of Appeal)⁴;

- **Legal advice** in respect of disputed matters, including ongoing formal issued proceedings (subject to any restriction concerning ‘reserved instrument activities’, see below);
- Except in limited circumstances, all **alternative dispute resolution** (ADR) activity, such as without prejudice correspondence and/or negotiated settlements (face-to-face or otherwise) in respect of ongoing litigation. The exceptions are where ADR has been ordered by a court, including in any order for directions (note: usually courts order a stay of proceedings with the purpose of ADR not being expressly referred to. This alone would probably not be sufficient to bring ADR within the ‘conduct of litigation’. However, because this is uncertain we recommend that in-house solicitors should avoid undertaking ADR pro bono when it has been ordered by the court.) Any formal step taken to bring to an end to ongoing court litigation following settlement, such as an application for a Tomlin Order or any other order bringing an end to the litigation, would constitute a formal step and, therefore, be a ‘reserved’ activity.
- **Correspondence** generally about the litigation, including the merits. This would include, for example, correspondence concerning a breach of a court order or the content of witness statements - that is, witness statements which have been formally served after proceedings have been formally issued, as the *preparation* of witness statements once proceedings have been formally issued is a ‘reserved’ activity).

44. Service of a Claim Form (including any cover letter) and/or service of any other court document, such as a witness statement, are reserved activities, as is formal acceptance. However, litigants in person are permitted to serve their own Claim Form (as well as engaging agents for this purpose).

45. For cases that apply *Agassi* see *PR, SS and TC v Secretary of State for the Home Departments* [2011] EWCA Civ 988 and *Ndole Assets Ltd v Designer M&E Services UK Ltd* [2017] EWHC 1148 (TCC).

² *Ellis v Ministry of Justice* [2018] EWCA Civ 2686, [15] and [42]-[43] (Moylan LJ, with whom Davis LJ agreed).

³ *Ellis*, [16] (Moylan LJ, quoting May J at first instance).

⁴ *Ellis*, [45] (Moylan LJ, with whom Davis LJ agreed).

46. Individuals should contact the SRA in the event that they are in any doubt about whether a particular piece of work is a 'reserved' or 'non-reserved' activity.

'Reserved instrument activities'

47. Individuals, charities and not-for-profit organisations may require assistance with property matters, including advice and drafting of formal documents. In-house solicitors should take care not to undertake 'reserved instrument activities' which are reserved under the LSA, unless partnered with an authorised solicitor or otherwise permitted, e.g. acting through a registered sole practice. However, as with the scope of 'conduct of litigation' it is helpful to be clear what legal work may come within or be outside the scope of 'reserved instrument activities' – this is explained in some detail in **Appendix 2**.

SRA RULES 4.10 AND 4.16

PFR Rule 4.10 – acting ‘in the course of employment’

48. The SRA’s PFR Rule 4.10 permits in-house solicitors and non-regulated business employers to provide pro bono legal services directly to the public – for example, to set-up their own pro bono clinic. The SRA’s Rule 4.10 is intended to mirror the statutory rule, i.e. section 15 LSA.
49. In-house solicitors are permitted to undertake all ‘non-reserved’ activities under Rule 4.10. The restrictions that there are relate to ‘reserved’ activities. In short, the safest approach to Rule 4.10 is to avoid undertaking ‘reserved’ activities when volunteering, unless partnered or taking the prudent step of relying upon an exemption in Schedule 3 LSA, as well as, where appropriate, ensuring consistency with the SRA’s current guidance concerning section 15 LSA referred to below in paragraph 52.⁵ As this guidance assumes that in-house solicitors will generally avoid undertaking ‘reserved’ activities on a pro bono basis, we only briefly consider the restrictions in Rule 4.10 below.
50. There are two main aspects of Rule 4.10 which in-house solicitors should consider. First, the question as to the circumstances in which it applies. Rule 4.10 only applies to pro bono work undertaken ‘in the course of employment’. The SRA in its guidance provides a non-exhaustive list of situations where Rule 4.10 would be likely to apply, giving the phrase ‘in the course of their employment’ a potentially very wide meaning. In practice, this means that it can be difficult to identify situations in which Rule 4.10 clearly does not apply. The second aspect of Rule 4.10 is the phrase ‘part of your employer’s business’, which in effect says that in-house solicitors should not undertake ‘reserved’ pro bono work which benefits employers. As with the potentially wide application of ‘in the course of employment’, its restriction on ‘reserved’ activities also has a potentially very wide scope when considered against the SRA’s guidance.
51. Due to the wide meaning given to Rule 4.10 it may not always be straightforward to establish when in-house solicitors are acting outside the course of their employment. For example, where volunteering outside working hours the in-house solicitor may nonetheless undertake some pro bono work at their desk or utilising other employer support, such as time and resources, a situation in which it is difficult to say with certainty that Rule 4.10 does not apply.

⁵ LawWorks is currently engaging with the SRA with a view to securing changes to its guidance, so as to permit more pro bono work.

52. The SRA's guidance on section 15 of the LSA is at:

<https://www.sra.org.uk/solicitors/code-of-conduct/guidance/guidance/Does-my-employer-need-to-be-authorised-by-an-approved-regulator-.page>

PFR Rule 4.16 – acting outside ‘the course of employment’

53. Rule 4.16 is headed, “Law Centres, charities and other non-commercial advice services” and as such envisages in-house solicitors volunteering outside the ‘course of [in-house/commercial] employment’, e.g., by volunteering in external clinics. ***The express reference in Rule 4.16 to being ‘employed’ by free legal advice clinics has been waived by the SRA*** see Appendix 3 and online at:

<http://www.sra.org.uk/solicitors/guidance/waivers/waiver-employment-status-pro-bono-work.page>. Consequently, when volunteering under Rule 4.16 in-house solicitors may practise in the capacity of a volunteer, instead of entering into an employment relationship with clinics.

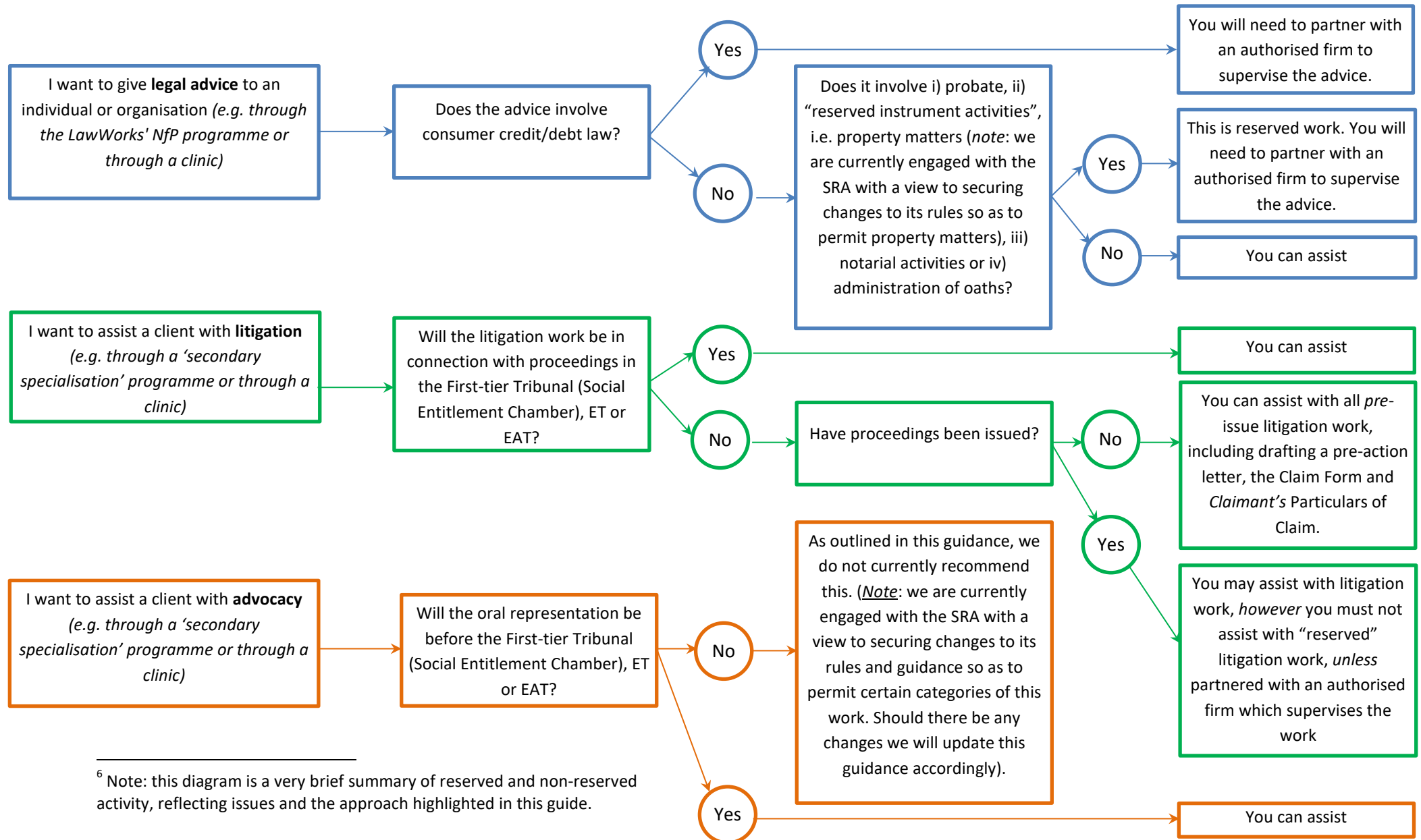
54. As is the case when volunteering under Rule 4.10, in-house solicitors may undertake all ‘non-reserved’ activities when volunteering under Rule 4.16. Due to the potentially very wide application of Rule 4.10 following the SRA's guidance, as well as the potentially very broad scope of the restriction on ‘reserved’ activities contained within Rule 4.10, we assume that in-house solicitors will generally avoid undertaking ‘reserved’ activities when volunteering under Rule 4.16.

Summary

55. In summary, an in-house solicitor can provide pro bono in the following ways (also, see the diagram at page 14 below):

- i) undertaking non-reserved activities acting in the course of their employment through an external pro bono clinic or organisation;
- ii) undertaking non-reserved activities acting outside their employment (e.g., volunteering in their own time);
- iii) undertaking non-reserved activities in the course of their employment in a non-regulated business, with those pro bono services supplied by their employer directly to the public; and,
- iv) undertaking ‘reserved’ activities when clearly acting outside their in-house employment and which are not ‘part of [the] employer’s business’.

In-house solicitors and pro bono: reserved and non-reserved activity ⁶



⁶ Note: this diagram is a very brief summary of reserved and non-reserved activity, reflecting issues and the approach highlighted in this guide.

PRACTISING CERTIFICATE

56. We generally recommend that in-house solicitors who provide pro bono (in a clinic setting or otherwise) should have a current practising certificate.
57. To be qualified to act as a solicitor, you must have been admitted as a solicitor, be on the roll and have a practising certificate (section 1 Solicitors Act 1974). You will be committing a criminal offence under section 21 of the Solicitors Act, as well as being in breach of the PFR, if you use any description which implies that you are qualified to act as a solicitor and you do not have a practising certificate.
58. Non-practising in-house solicitors are permitted to undertake 'non-reserved' activities, such as legal advice, however they must ensure that neither they, nor a clinic or third-party they are providing pro bono for, hold themselves out in any way as practising, for example as being described as a 'qualified lawyer'. Not all members of the public will understand distinctions, such as between 'practising' and 'non-practising', or 'legal advisor' or 'qualified lawyer' as compared with 'solicitor'.
59. Solicitors with one or more of the following words in their job title should have in place a current practising certificate: 'solicitor', 'lawyer', 'attorney', 'legal practitioner' or 'counsel'.
60. The SRA "strongly advises" in-house solicitors with the following words in their job titles to have in place a current practising certificate: 'chief legal officer', 'director of legal services', 'head of legal affairs', 'legal adviser', 'legal and business affairs consultant', 'legal consultant', 'legal director', 'legal expert', 'legal specialist', and 'legal officer'.
61. LawWorks recommends that all in-house solicitors participating in pro bono programmes have current practising certificates in place, or that they ensure that their work is supervised and signed off by a solicitor that does (so that the legal service provided is always in the name of a solicitor with a current practising certificate).

PROFESSIONAL INDEMNITY INSURANCE

62. This section deals with the rules requiring practising in-house solicitors to ensure that their legal practice work is covered by a policy of insurance when providing legal services to the public (including pro bono volunteering). For in-house solicitors, the requirement to insure legal practice work is contained within Rules 4.10 and 4.16 of the PFR, the SRA Indemnity Insurance Rules 2013 and the minimum terms and conditions (MTC) requirements.
63. Practising in-house solicitors (as well as pro bono clinics through which they may practice as volunteers) are under an obligation to ensure that their legal practice work is covered by professional indemnity insurance. (There is no regulatory barrier preventing the employers of in-house solicitors extending their insurance to cover pro bono volunteering, subject to satisfying the regulatory minimum).

The level of insurance cover required

64. Rules 4.10 and 4.16 of the PFR require that in-house solicitors providing pro bono (e.g., in a clinic) are covered by a policy of insurance which is 'reasonably equivalent' to the MTC or, in recently changed SRA language, 'adequate and appropriate'. This reduced insurance requirement for pro bono work was refined down to a requirement merely to have in place 'appropriate' insurance (see: <http://www.sra.org.uk/solicitors/guidance/waivers/waiver-employment-status-pro-bono-work.page>).
65. The phrases 'reasonably equivalent', 'adequate and appropriate' and now 'appropriate' are all intended to encourage clinics / in-house solicitors to move away from the minimum monetary amounts contained in the MTCs (i.e. £2 or £3 million). The background to the SRA's changes in language is that it accepts that not-for-profit organisations have struggled to interpret the phrase 'reasonably equivalent' in practice and by implication have been purchasing too much insurance.
66. LawWorks understands that the SRA's new language, whilst not changing the underlying requirement to have insurance cover in place, is intended to encourage clinics and not-for-profit organisations towards a more realistic assessment of the likely claims that might actually be brought against them. For example, a clinic which exclusively undertook initial advice only or welfare benefits appeals work might look at the upper values handed down to appellants on appeal, as well as any other potential liability, and pitch insurance cover accordingly. Further, terms such as those governing the requirement to give notice, including any time limits, as well as any exclusions, must be realistic and achievable so as to ensure that insurance cover is available in real cases.

PRO BONO IN SPECIFIC CONTEXTS AND SETTINGS

67. This section summarises the rules and practice requirements when:

- volunteering in legal advice clinics or centres;
- advising charities and other not-for-profit organisations;
- undertaking casework or representation (including for so-called 'secondary specialisation' work).

Pro bono clinics

68. There are relatively few legal activities which in-house solicitors in practice cannot undertake when volunteering at clinics. That is principally because the vast majority of pro bono work undertaken through clinics is non-reserved. Further, the SRA, through a combination of waivers and concessions, has removed some of the important regulatory barriers contained in its PFR.

69. The ways in which in-house solicitors are permitted to practise are set out in the PFR, in particular Rule 1.1. In the context of pro bono clinics work, in-house solicitors are permitted to volunteer through free legal advice clinics by virtue of a combination of Rule 1.1 PFR and the SRA position statement as to how it intends Rule 1.1 to operate in practice in respect of pro bono. The SRA's position statement can be found at Appendix 3 and online at:

<http://www.sra.org.uk/solicitors/guidance/waivers/waiver-employment-status-pro-bono-work.page>.

70. Under PFR 1.1 a volunteering in-house solicitor or a Registered European Lawyer (REL) must become an employee of a clinic in order to undertake pro bono work. *However, following the SRA's position statement that is no longer the case, and it is sufficient for in-house solicitors to undertake pro bono work in clinics in the capacity as a volunteer, i.e. outside the course of employment.*

71. Whilst the 3 years supervision rule does not strictly apply to non-commercial organisations or 'special bodies', we nonetheless recommend as best practice that where possible solicitors under 3 years PQE are supervised by a regulated person who is permitted to supervise under the SRA rules, as they apply to regulated individuals and bodies.

Charities and not-for-profit organisations

72. The LawWorks' Not-For-Profits programme is an example of how in-house solicitors can provide pro bono for charities. The programme connects smaller charities and other not-for-profits seeking legal advice with pro bono volunteers among LawWorks member firms and in-house teams.

73. When providing pro bono legal advice for charities (including through the LawWorks Not-for-Profits programme) we recommend that in-house solicitors:

1. ensure they volunteer by practising in compliance with the PFR;
2. only undertake 'non-reserved' legal activities, such as providing legal advice;
3. have in place a current practising certificate;
4. be covered under an appropriate policy of insurance; and
5. ensure that their employer and their employment terms permit them to volunteer.

The PFR

74. For the purpose of the PFR, and in the context of the LawWorks Not-for-Profits programme, it is important to note that LawWorks operates, in effect, as a referral agency for the project. LawWorks does not run or take on client matters. Rather, in-house solicitor employers take on Not-for-Profit cases under Rule 4.10 with individual volunteer in-house solicitors (or, where relevant, sole practitioners) working on these matters. Under Rule 4.10 it is the employer entity delivering the pro bono legal services to the public.

75. In-house solicitors will bear responsibility for the conduct duties contained in the SRA's Code and elsewhere in the SRA rules. There are no conduct requirements on the employer, which is subject to the laws of tort and contract in the usual way.

76. As an alternative to the above, in-house solicitors are, of course, permitted to register as sole practitioners and to take on cases through LawWorks' Not-for-Profits programme accordingly.

77. The rules and regulations concerning reserved and non-reserved activities readers are described above. An issue which may arise for in-house solicitors advising charities is the restriction on undertaking 'reserved instrument activities' (i.e., this is reserved activity).

'Reserved instrument activities'

78. Charities and not-for-profit organisations often require assistance with property matters, including advice and drafting of formal documents. In-house solicitors should take care not to undertake 'reserved instrument activities' which are reserved under the LSA, unless partnered with an authorised solicitor or otherwise

permitted, e.g. acting through a registered sole practice. The scope of 'reserved instrument activities' is discussed in detail in **Appendix 2**.

Insurance

79. Where in-house solicitors provide pro bono advice to not-for-profit organisations through a brokerage service, such as LawWorks' Not-for-Profits programme, individual solicitors usually have conduct of the file for the purpose of the SRA rules and regulations. Whilst legal advice is a non-reserved activity (but see above for when other restrictions may apply), we recommend that in-house solicitors treat their pro bono legal advice work as part of their practise, hence a suitable policy of insurance must be in place to cover any work undertaken (see XX). Work undertaken through the LawWorks Not-for-Profit programme is covered, at LawWorks' discretion, by LawWorks' insurance.

Casework and/or representation as a 'secondary specialisation'

80. Pro bono casework and/or representation can include undertaking legal work in areas of law beyond day-to-day areas of expertise or practice, an approach which is sometimes called 'secondary specialisation'. For example, LawWorks supports a Welfare Benefits Representation project supporting solicitors, with no prior experience of social security law, to represent clients at benefit appeal tribunal. This, and similar projects, achieves success rates at appeal of over 90%.

81. When undertaking secondary specialisation volunteering we recommend that in-house solicitors:

1. ensure that they volunteer by practising in compliance with the PFR;
2. act under the supervision of a solicitor who holds a current practising certificate;
3. have in place a current practising certificate;
4. undertake a programme of training relevant to the casework or representation being undertaken; and
5. be covered by an appropriate policy of insurance.

82. In-house solicitors can undertake secondary specialisation voluntary work, provided either:

- i) they act in tribunals in respect of which all legal activity undertaken in connection with a matter is non-reserved, for example in the Employment Tribunal, the Employment Appeal Tribunal and the First-tier Tribunal (Social Entitlement Chamber); or,
- ii) in tribunals and courts in which the “conduct of litigation” reservation applies, such as the County Court, High Court and the First-tier (Immigration and Asylum) Tribunal, they ensure that either:
 - a] they do not “conduct litigation”; or,
 - b] if they do “conduct litigation”, due to the restrictions on undertaking reserved activities contained in s.15(4) LSA and Rule 4.10PFR, they do so under a partnering arrangement (as described elsewhere in this guidance). Partner solicitors must take responsibility for any work coming within the statutory restriction, the “conduct [of] litigation”, ensuring that it is their own work.

83. As explained elsewhere in this guidance, there are no restrictions on in-house volunteers undertaking advocacy in the First-tier (Social Entitlement Chamber) Tribunal. LawWorks recommends that in-house solicitors do not undertake advocacy in tribunals or courts where advocacy is reserved, whether under a partnering arrangement or otherwise. This is due to the live nature of advocacy which in our view renders partnering arrangements impermissible not least as supervision is difficult to put in place.

Supervision

84. Supervision is an integral part of secondary specialisation. All volunteer solicitors will be supervised by a qualified solicitor with an appropriate level of practice experience; hence solicitors of all levels of call should be prepared for their work to receive considerable levels of oversight, not least as the supervising solicitor will usually have conduct of the file from the point of view of the SRA rules.

85. The substantive rules concerning supervision are contained in Chapter 1 of the SRA’s Code of Conduct, which places client-care at the heart of a solicitor’s practice. There are compulsory outcomes which mean that supervision is mandatory:

O(1.5) the service you provide to clients is competent, delivered in a timely manner and takes account of your clients' needs and circumstances;

O(7.8) you have a system for supervising clients' matters, to include the regular checking of the quality of work by suitably competent and experienced people.

86. The indicative behaviour below reinforces this:

IB(1.3) ensuring that the client is told, in writing, the name and status of the person(s) dealing with the matter and the name and status of the person responsible for its overall supervision.

87. Supervision is the action or process of watching and directing what someone does or how something is done. It can be helpful to think about supervision both in terms of development (which is related to ongoing professional learning) and performance (which is related to standards of legal practice and expectations). It includes day to day support, guidance and advice, and supervisory file review of the technical quality of legal work and case management.

Insurance

88. The legal services connected with secondary specialisation should be covered by a policy of indemnity insurance. The level of insurance will depend upon the type of work undertaken and the entity delivering the legal services. For example, secondary specialisation projects operated by law firms will usually be covered by the firms' insurance policy which should comply with the IIR and MTCs. Secondary Specialisation projects operated by non-regulated businesses under Rule 4.10 or by clinics under 4.16 of the PFR will benefit from the lesser insurance requirement (on individual solicitors) as explained immediately below.

89. Secondary Specialisation projects operated by 'special bodies', such as clinics, are not regulated by the SRA, hence strictly speaking the obligation to ensure that 'appropriate' insurance has been put in place by clinics falls on individual solicitors. Individuals should therefore satisfy themselves that the level of insurance put in place by 'special bodies' through which they volunteer complies with the minimum requirements.

90. Whether in-house solicitors volunteer on secondary specialisation projects under Rule 4.10 or Rule 4.16 PFR the minimum level of insurance is the same, namely that it is 'appropriate'. In practice, this will almost invariably mean a lower minimum level contained in the MTCs.

91. Regulated entities, such as law firms, operating secondary specialisation projects themselves might be subject to a higher insurance requirement, i.e. to comply with the MTCs.

LawWorks' insurance

92. LawWorks has in place a policy of insurance that covers the work of in-house solicitors volunteering on its secondary specialisation programmes.

Individuals who are unclear about the SRA rules should contact the SRA. Where appropriate individuals / companies might wish to consider applying to the SRA for a waiver.

LawWorks cannot accept any responsibility or liability for the information contained within this document which is not a substitute for taking appropriate legal advice.

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Appendix 1: Advocacy and ‘exercising a right of audience’ – First-tier Tribunal (Social Entitlement Chamber)

The First Tier Tribunal is listed as a court for the purposes of the LSA. But para 4(2) of Schedule 2 to the LSA provides that the definition of “conduct of litigation” for the purposes of reserved legal activity “does not include any activity ... in relation to any particular court or in relation to any particular proceedings, if immediately before the appointed day no restriction was placed on the persons entitled to carry on that activity.”

Prior to the coming into force of the relevant LSA provisions, the legislation governing reserved legal activity was the Courts and Legal Services Act 1990. That Act contained restrictions on reserved legal activity which were similar to those now found in the LSA, but the Act went on to provide that, if a person was permitted by a specific court to have rights of audience or to conduct litigation in proceedings in that court, such activities would not constitute reserved legal activity.

Under the Tribunal Procedure (First-tier Tribunal) (Social Entitlement Chamber) Rules 2008, any person (whether lawyer or non-lawyer) may be appointed by a party as their “representative” to “represent that party in the proceedings” (rule 11(1)). Rule 11(5) clarifies that the activities such a person may undertake extend to “[a]nything permitted or required to be done by a party under these Rules, a practice direction or a direction ... except signing a witness statement.” As a result, subject to their appointment as a “representative,” any person (legally-qualified or not) may carry out all litigation activities before the First-tier Tribunal (Social Entitlement Chamber). Since that state of affairs existed immediately prior to the coming into force of the LSA provisions, the proviso in LSA, Sch 2, para 4(2) operates such that any of those previously-permitted activities which would otherwise now be classed as “conduct of litigation” before a listed court are exempt from the definition of “reserved legal activity”.

Appendix 2: “Reserved instrument activities”

As to the scope of this reserved activity, the LSA Schedule 2 defines it as follows:

“5(1) “Reserved instrument activities” means—

- (a) preparing any instrument of transfer or charge for the purposes of the Land Registration Act 2002 (c. 9);
- (b) making an application or lodging a document for registration under that Act;
- (c) preparing any other instrument relating to real or personal estate for the purposes of the law of England and Wales or instrument relating to court proceedings in England and Wales.

(2) But “reserved instrument activities” does not include the preparation of an instrument relating to any particular court proceedings if, immediately before the appointed day, no restriction was placed on the persons entitled to carry on that activity.

(3) In this paragraph “instrument” includes a contract for the sale or other disposition of land (except a contract to grant a short lease), but does not include—

- (a) a will or other testamentary instrument,
- (b) an agreement not intended to be executed as a deed, other than a contract that is included by virtue of the preceding provisions of this sub-paragraph,
- (c) a letter or power of attorney, or
- (d) a transfer of stock containing no trust or limitation of the transfer.

(4) In this paragraph a “short lease” means a lease such as is referred to in section 54(2) of the Law of Property Act 1925 (c. 20) (short leases).”

As can be seen from section 5(1) the reservation covers a broad scope of activity.

Clearly, the filling-out of standard HM Land Registry forms - which give effect to the transfer of interests in land (such as a transfer of the whole of a registered title in TR1 form) or allow for property interests and charges to be entered on the Land Register (such as an application for charge registration in form K1) - will come within sub-paragraphs 5(1)(a) and (b).

In LawWorks’ view the reservation will capture the preparation of the full range of written documents which create, modify, transfer, extinguish, or otherwise ‘relat[e] to’ real or

personal property interests, unless specifically excluded. Such instruments would include, for example, leases (save for the short leases excluded under the chapeau to sub-paragraph 5(3)), deeds of covenant, deeds or contractual agreements creating easements. Further, given that the meaning of ‘instrument’ is not only confined to the creation of, and dealing with, legal rights, other written documents which might typically be considered merely administrative but which ‘affect the pecuniary position of parties’ will also come within the scope of the reservation. Any document which has significant implications for the exercise of property rights will be caught. Examples would be the preparation of the forms entering, removing, or cancelling unilateral notice on the Land Register (forms UN1, UN2, or UN3) restricting a legal owner’s dealing with that asset. Additionally, licenses come within the scope of the reservation even though, strictly speaking, they do not create property rights.

As a consequence of the above, LawWorks considers that only the property-related matters specifically excluded from the definition by virtue of sub-paragraph 5(3) can safely be undertaken as non-reserved activities.

The prudent course is to ensure that ‘unauthorised’ volunteers do not draft any document which creates, modifies, transfers, or extinguishes a property right, and also do not draft Land Registry standard form documents, lest they fall foul of the LSA regulatory regime. Further, volunteers should avoid providing legal advice on the terms of any proposed “instrument”. A rule of thumb might be that general advice on the type of instrument and what it achieves would not be preparation, but advice on the wording the instrument should include would do so. This is obviously a difficult area, and a cautious approach would be prudent given the uncertainty of scope of the LSA's application.

Courts in which the reservation applies

As well as ‘instruments’ relating to property, sub-paragraph 5(1)(c) refers to instruments ‘relating to court proceedings in England and Wales.’ The first thing to say about this aspect of the definition is that it is subject to the same proviso found in respect of the ‘conduct of litigation’ rules regarding courts before which restrictions did not exist immediately before the coming into force of the LSA provisions. That means that the preparation of instruments relating to proceedings in the First-tier Tribunal (Social Entitlement Chamber) remain excluded from the scope of ‘reserved legal activity.’

As to proceedings before other courts and tribunals, in LawWorks’ view the definition of ‘instrument’, i.e. a document itself that has some form of impact on a person’s rights (even if only an affect on their pecuniary position), is not capable of capturing the drafting of pre-action, settlement or other correspondence during a dispute, the drafting of legal pleadings or submissions, or the settling of witness statements or other evidence. That is because such documents, despite being written and relating to court proceedings, are not properly defined as ‘instruments’ since they only advance arguments and/or record facts, rather than affect rights or interests. Of course, some of these documents may constitute the “conduct

of litigation” in courts and tribunals to which the reservation applies. Consequently, documents which go beyond advancing arguments and/or recording facts, affecting rights or interests will be caught by the reservation.

Should in-house solicitors have any doubt about whether a particular item of work is reserved we advise that they do not undertake such work and that they contact the SRA and/or seek independent advice.

Appendix 3: SRA position statement on pro bono

Available on the SRA website: <https://www.sra.org.uk/solicitors/guidance/waivers/waiver-employment-status-pro-bono-work.page>

“Pro bono work and enforcement - our approach

Statement of our position regarding those working in-house or in private practice and who are also conducting voluntary work for a not-for-profit body or community-interest company.

Concerns have been raised by LawWorks (the Solicitor Pro Bono Group) about restrictions on providing pro bono services through a not-for-profit body (NFPB) or community-interest company (CIC) imposed by our rules.

Specifically, Rules 1.1, 2.1 and 4 of the SRA Practice Framework Rules 2011 (PFRs) would normally apply. PFR 1.1 sets out the ways in which a solicitor can practise, including as an employee of a business or organisation, as a sole practitioner or within an authorised body.

We understand there is concern that a volunteering solicitor or a Registered European Lawyer (REL) must become an employee of the NFPB or CIC through which they are providing pro bono services, or become authorised as a sole practitioner in order to comply with Rule 1.1(e), 2.1(e) and Rule 4 of the PFRs. This is because Rule 1.1(c)(ii), (d)(ii) and 2.1(c)(ii), (d)(ii) are not wide enough to permit solicitors and RELs to provide pro bono services through an NFPB or CIC that is not their employer.

This statement is to give comfort to you if you are employed as a solicitor or an REL and want to conduct voluntary pro bono work for an NFPB or CIC outside of your normal practice without becoming an employee of the NFPB or CIC. We want to encourage those willing and able to carry out pro bono work to do so.

What you can do

If you are an individual solicitor with a current practising certificate or an REL and are either employed by an authorised body or are conducting in-house practice (as defined in the SRA Glossary 2011), we will not regard you as being in breach of the PFRs if you conduct work, whether or not it includes carrying on a reserved legal activity for persons other than your employer - including for members of the public provided that:

- you do the work on a pro-bono basis and neither you nor your employer receive any remuneration in any form
- such work is delivered or conducted through an NFPB or a CIC that falls within section 23(2) of the Legal Services Act 2007 (LSA) and which is independent of your employer

- the recipient of the advice understands that the advice is provided by the NFPB or CIC and that you are conducting the work on behalf of that body;
- the work is covered by appropriate indemnity insurance
- the work you conduct is the responsibility of, and you are supervised by, the NFPB or CIC in the conduct of that work

We have previously issued guidance on when an employer needs to be authorised by an approved regulator because of section 15(4) of the LSA. This is not relevant if you are not carrying out reserved legal activities as part of the pro bono work on behalf of a separate NFPB or CIC.

New regulatory arrangements

The new regulatory arrangements proposed by us are simplified and Rules 1 to 4 of the PFRs have been replaced with a much simpler provision in Regulation 9 of the SRA Authorisation of Individuals Regulations. This regulation adds very few restrictions on the way in which you may provide both reserved and non-reserved legal services and limits this to those restrictions which apply under legislation, including in particular, section 15(4) of the LSA.

These new regulatory arrangements have been made by our Board and require the approval of the Legal Services Board before they can come into effect. Until the new arrangements are in place, our position remains as set out in this statement.”

Appendix 4: About LawWorks and LawWorks membership

LawWorks (the Solicitors Pro Bono Group) is a charity (working in England and Wales) which:

- **Promotes** and **supports** pro bono within the solicitors' profession and in law schools;
- Helps to **connect** those needing pro bono legal services with the pro bono volunteers and assistance they need;
- **Advocates** for policy change and the goal of access to justice for all.

With support from the Law Society, we work primarily with solicitors (firms and in-house teams), and also with law schools and law students, and other legal and non-legal volunteers and organisations. LawWorks has around 150 members including some of the largest City firms and International firms with an office in London, national, regional and local firms, in-house teams, law schools and charities.

The LawWorks Clinics Network

We support a growing network of over 240 local independent pro bono advice clinics across England and Wales. We work with lawyers (LawWorks members and non-members), advice agencies, charities and others to establish or develop new clinics, and provide ongoing information and support, for clinic volunteers and coordinators.

Connecting charities with pro bono

Our Not-for-Profits programme facilitates the provision of free legal advice for smaller charities and not-for-profit organisations, supported by volunteer lawyers from among LawWorks' members. We provide free online training videos for charities, covering many of the common legal issues they face.

We also broker opportunities to provide longer-term pro bono assistance by matching small not-for-profit organisations with their own 'Honorary Counsel' to carry out health checks of documents and to be a point of contact for initial advice.

Supporting case work and representation

We support a number of 'secondary specialisation' projects to support the development of more 'in-depth' pro bono, in areas of social welfare law (e.g., bespoke casework and/or representation). This includes supporting firms and individual solicitors to provide representation at 1st-tier social security appeal tribunals, an unpaid wages' project, and (working with the charity Together for Short Lives for a project called 'Voices for Families'), to provide legal advice for parents and carers of children with life-limiting conditions.

A policy voice for pro bono

We also work to address barriers to justice and to provide a 'policy voice' for pro bono - for example, working with regulators to reduce barriers to pro bono, and working with our

members and professional bodies to influence policy on legal aid, court modernisation and other aspects of access to justice.

Pro bono embodies a commitment to access to justice and acting in the public interest. We champion public funding for legal aid, and for law centres and advice agencies.

LawWorks membership: enabling access to justice

By joining LawWorks you will be supporting our charitable work to encourage and support pro bono, and our work to highlight - and address - barriers to accessing justice. The financial contribution of our members is vital to our work.

Our annual membership fee provides membership for all the lawyers, staff and volunteers in the organisation, and gives access to our services and resources including:

- Our Not-for-Profits programme that connects pro bono solicitors with smaller charities needing legal advice. You receive researched and prepared cases, based on your area of interest and expertise, and we are always on hand to help;
- Our weekly news bulletin 'LawWorks Weekly' and a quarterly newsletter;
- Professional indemnity insurance to cover in-house legal team's pro bono work conducted as part of our programmes (when insurance is not otherwise available);
- Legal and professional skills training from expert trainers (and online resources - including recordings of training sessions and associated materials);
- Networking opportunities, including roundtables and events;
- Recognition of pro bono work at the annual LawWorks Pro Bono Awards;
- The opportunity (if you wish) to support our work to influence positive policy change.

The membership fee depends upon the size of the firm (e.g., number of fee-earners based in England and Wales) - with other categories/criteria for in-house teams and organisations.

Membership brings no obligation - but by joining you will be supporting our work to support pro bono and enable access to justice.

Other ways to support LawWorks

Our work is funded by a mixture of membership fees, donations, and grants. None of this funding is guaranteed long term. If you are able to support LawWorks – such as fundraising, making a donation, sponsorship (e.g., for our Annual Awards) or in-kind support - please do get in touch.

For more information about LawWorks please contact: support@lawworks.org.uk

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