

# Expressing reservations

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unpick the complicated context in which surveyors operate when they offer legal advice

Surveyors operating in certain disciplines will inevitably have to advise on legal matters as part of their duties. Indeed, those specialising in party walls, boundary disputes and dilapidations would struggle to avoid doing so as part of their service. But does this amount to formal “legal advice”, and should it matter if it does?

## Reserved legal activities

Under the Legal Services Act 2007, it is a criminal offence, punishable by up to two years’ imprisonment or a fine, for a person to carry out a “reserved legal activity” without being entitled to do so. Such activities include conducting litigation and making oral submissions in court on behalf of a litigant – rights of audience – probate and notarial activities, administration of oaths and drafting specific legal documents such as deeds of land. This also incorporates drafting “instrument[s] relating to court proceedings” for reward, as defined in Schedule 2, paragraph 5(1)(c) of the act. These are known as “reserved instrument activities”.

“Entitlement” to undertake reserved legal activities is enjoyed either as a person authorised by a relevant “approved regulator”, or as an “exempt person” for the purposes of that particular activity. It should be noted that RICS is not an approved regulator for the purposes of the act, and the only exemption that specifically applies to surveyors concerns reserved instrument activities, as stated above.

RICS members working for profit and not under the direct supervision of an authorised person may nevertheless draw up documents that relate to an existing tenancy, or a document that creates a farm business tenancy, according to the meaning of the Agricultural Tenancies Act 1995 cited in paragraphs 3(5)–(6), and Schedule 3 of the 2007 act.

If a person did not know, or could not reasonably have known, that they were committing an offence under the 2007 act they may have a defence. However, RICS members are unlikely to succeed in making such a defence given that the professional guidelines are readily available, and these clearly outline the standards of competence that are expected of members.

It is therefore imperative that surveyors operating in legal disciplines understand when their role strays into that of reserved legal activities for the purposes of the 2007 act.

While the act strictly regulates the undertaking of reserved legal activities to those so entitled, it does not prohibit the undertaking of all “legal activities”.

Although reserved legal activities are still technically legal activities, section 12(3)(b) of the act expands the definition of legal activities to encompass:

“(b) any other activity which consists of one or both of the following—

(i) the provision of legal advice or assistance in connection with the application of the law or with any form of resolution of legal disputes;

(ii) the provision of representation in connection with any matter concerning the application of the law or any form of resolution of legal disputes.”

The entitlement of non-lawyers to carry out “legal activities” is subject to certain enactments to the contrary; for example, section 84 of the Immigration and Asylum Act 1999 expressly prohibits the provision of immigration advice and services, except by certain persons.

## Scope for surveyors

There is, however, no enactment excluding surveyors from performing certain legal activities. They are able to “assist” with the law or “represent” in the resolution of legal disputes under the framework of the 2007 act, subject only to a prohibition against an unqualified person expressly presenting themselves as a solicitor while carrying out these activities, as per section 20 of the Solicitors Act 1974. Absent fraud, there is no limitation on non-lawyers providing legal advice or representation that is not court-related.

This position is both practical and unsurprising, given:

- the diverse range of tasks and specialisms carried out by surveyors
- the significance of legal knowledge to much of this work
- the official assumption of solicitor-like functions in processes such as rent review arbitrations.

“Representation” in this context is not defined by the act, but must fall short of “the conduct of litigation”, or “court room advocacy”, either written or oral, which are clearly reserved legal activities. Correspondence with one party in relation to a dispute on behalf of another party, however, would not appear to fall within this distinction.

In principle, a surveyor can provide specialist legal advice, for remuneration or otherwise. Such remuneration will not, however, be recoverable as part of a party's legal costs in litigation.

This includes advising on the merits of starting legal proceedings, as recognised in the RICS *Boundaries: Procedures for boundary identification, demarcation and dispute resolution* third edition guidance note: "do not be surprised if the client wishes to proceed with a court appearance even after you have advised that there is absolutely no possibility of the case being successful."

"As a chartered surveyor, you or the professional advisor/solicitor should make clear that the client fully understands the significant penalties that could be attached to proceeding unwisely" ([www.rics.org/boundarygthirded](http://www.rics.org/boundarygthirded)).

The broad way in which section 12(3)(b)(i) of the 2007 act is framed means that advising a party at a later stage is also unlikely to incur anything more than a possible claim in negligence, in the event that this advice proves wrong and the court determines it was reasonable for the recipient to have depended on such advice.

### Exercise caution

RICS guidance notes are also broadly worded, to provide some protection against actions in negligence where functions have been legitimately assumed or contracted for. However, it is implied that a legal opinion should be sought, or caution exercised, when giving advice that touches on legal issues falling outside the surveyor's expertise. As the RICS *Dilapidations in England and Wales*, seventh edition guidance note states: "Surveyors should be aware that the area of dilapidations involves many legal considerations and should avoid advising or taking steps outside their area of expertise" ([www.rics.org/dilapguide](http://www.rics.org/dilapguide)).

The most apposite examples include advice on activities that the surveyor is prohibited from undertaking under the 2007 act, such as the exercise of rights of audience and the drafting of dispositions of land or their interpretation. Advising on the merits of a claim, while permitted, is particularly risky, especially if the client intends to pursue litigation without legal representation.

Understanding where to draw the line for surveyors operating in legal disciplines is the critical issue. Surveyors operating

outside their area of competence when they provide legal advice, or venturing into reserved legal activities where they are not entitled to do so, may fall foul of the 2007 act and face the prospect of criminal prosecution. This is, of course, aside from any parallel civil liability in tort for negligence or regulatory proceedings. ●



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# UPDATE

## RICS celebrates 150 years

RICS marks its 150th anniversary in 2018, and to commemorate this milestone, it is running campaigns for professionals, members and the wider industry.

Pride in the Profession will celebrate 150 years of surveying success by looking at the positive impact the profession has had in society, demonstrating how varied and rewarding a career in surveying can be. We need you to help us by nominating inspiring people and projects to illustrate the benefits that surveying has in the world around us. Submissions can be made via the RICS website ([rics.org/150](http://rics.org/150)), with the best examples to be published there during the course of the campaign.

Cities for our Future, meanwhile, is a global competition run by RICS in partnership with UNESCO designed to address the most pressing issues facing the world's rapidly expanding cities.

Global urban populations are predicted to grow by more than 2.5bn by 2050. This

presents one of the defining challenges of our time, putting unprecedented levels of strain on property, construction, infrastructure and land use.

RICS will challenge students in the fields of surveying, architecture, design and engineering among others to consider the problems posed by rapid urbanisation and to find innovative solutions to the problems facing many global cities. The competition, which launches officially on 15 January, will be judged by some of the leading names from our professions and beyond, and the best idea will be awarded a cash prize.

We're also inviting our members around the world to mentor shortlisted entrants – a great opportunity to help shape future talent. To register your interest, email us at [150@rics.org](mailto:150@rics.org).

Finally, the Pledge150 campaign will also see the organisation partnering with property profession charity LandAid

### STANDARDS

**Recently published**  
**Conflicts of interest global professional statement, 1st edition**

● [www.rics.org/conflictinterest](http://www.rics.org/conflictinterest)

**Forthcoming**  
**Whole life carbon assessment for the built environment professional statement**

**Reinstatement cost assessments of buildings guidance note**

● [www.rics.org/standards](http://www.rics.org/standards)

All RICS and international standards are subject to a consultation, open to RICS members. To see the latest consultations, please visit

● [www.rics.org/iconsult](http://www.rics.org/iconsult)

to raise £2.25m by December 2018, to provide 150 bed spaces for young people at risk of homelessness.

● [www.rics.org/pledge150](http://www.rics.org/pledge150)