Consultation: removing restrictions on providing pro bono advice

Introduction

1. IPReg considers that providing pro bono advice is an important way in which consumers and small businesses can get legal advice that they are otherwise unable to afford. IPReg considers that clients receiving pro bono advice should get similar regulatory protection as clients who pay for advice.

2. This consultation proposes changes to IPReg's regulatory arrangements to remove the current restrictions on in-house patent and trade mark attorneys providing pro bono advice. It also proposes changes to allow attorneys who are not actively practising to provide pro bono advice. In both cases, provision of pro bono advice would require the consumer protection measures (e.g. professional indemnity insurance (PII), continuing professional development (CPD) and complaint handling) set out in IPReg's regulatory arrangements to be in place.

3. **This consultation closes on Wednesday 9 October 2019 at 5pm.**

The Legal Services Act (LSA)

4. The LSA[1] makes it a criminal offence to provide a reserved legal activity[2] if a person or firm is not authorised to do so. The LSA[3] sets out when an employer ("P") needs to be authorised in order for its employees ("E") to provide reserved legal activities: when P employs E and E is carrying out reserved legal activities, P does not itself carry out a reserved legal activity unless part of its business is to provide reserved legal activities to the public or a section of the public.[4] So, for example, if an engineering company employs a patent or trade mark attorney to provide it with intellectual property law advice including conducting reserved legal activities, the engineering company does not have to be authorised by IPReg, providing it does not provide reserved legal services to the public or a section of the public (but the individual patent or trade mark attorneys must be authorised). However, if a firm of trade mark and patent attorneys provides reserved legal services to its clients, the firm and the trade mark and patent attorneys must all be authorised by IPReg.[5]

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[1] LSA section 14

[2] Reserved legal activities are defined in LSA section 12 as: the exercise of a right of audience; the conduct of litigation; reserved instrument activities; probate activities; notarial activities; and the administration of oaths.

[3] LSA section 15(4)

[4] Although there is provision in LSA section 15(9) for the Lord Chancellor to define what is meant by the public or a section of the public, this power has never been used.

[5] For the purposes of this consultation, the LSA section 15(6) provisions on independent trade unions have not been considered.

The LSB's Statement of Policy

5. In February 2016, the LSB published its Statement of Policy on regulatory arrangements for in-house lawyers. This followed a consultation in which the LSB analysed restrictions in regulatory arrangements that went beyond the requirements of the LSA.

6. The LSB's Statement of Policy states that it expects restrictions in regulatory arrangements that go beyond the LSA to be justified by a sound evidence base and to have been considered in the light of wider regulatory arrangements. It also expects the impact on consumers of any restrictions to have been assessed, as well as the extent to which there is consistency in approach between different legal regulators.

IPReg's restrictions on in-house lawyers

7. The LSB's analysis of IPReg's regulatory arrangements showed that there are a number of areas where our regulatory arrangements go beyond the minimum required by the LSA. The LSB mapped the impact of our rules on corporate work undertaken by an employee ("E"):[6]

Table 3: Intellectual Property Regulatory Board: The IPReg rules on corporate work indicate that if the patent attorney or trade mark attorney is an employee of a non-authorised employer they can provide services to their employer P, and to others, C, in specified circumstances (segments with ✓). They cannot provide services in the segments marked ✖. The grey-shaded areas represent those segments that do not appear to be aligned with provisions of section 15(4).

Type of legal activities E can provide:		**Type of consumer E can provide legal services to:**		
		E's Employer (P)	Persons connected to P (C)	Persons not connected to P (not C)
Research, advice on transactional matters and document preparation	*Unreserved activity: e.g. will writing*	✓	✓	✖
	Reserved activity: probate, reserved instruments, administration of oaths	✓	✓	✖
Notarial activities[7]	*Reserved activity: notarial practice*			

[6] See pages 15-17 of the LSB's consultation document
[7] IPReg is not authorised to regulate notarial activities.

Advice on (potentially) litigious matters and work required to prepare such advice	*Unreserved activity: e.g. advice on proceedings*	✓	✓	✗
	Reserved activity: conduct of litigation	✓	✓	✗
Representation (in person)	*Unreserved activity: e.g. mediation, representation in lower courts*	✓	✓	✗
	Reserved activity: rights of audience	✓	✓	✗

IPReg's current regulatory framework

Rules of Conduct

8. IPReg's Rules of Conduct set out various definitions of the work that patent and trade mark attorneys can undertake:

- The definition of "corporate work" is "*professional work undertaken by an employed regulated person acting solely as an agent on behalf of:*

  a) their employer;

  b) a company or organisation controlled by their employer or in which their employer has a substantial measure of control;

  c) a company in the same group as their employer;

  d) a company which controls their employer;

  e) an employee (including a director or a company secretary) of a company or organisation under (a) to (d) above, where the matter relates or arises out of the work of that company or organisation; or

  f) another person with whom a person under (a) to (e) above has a common interest."[8]

- The definition of "professional work" is "*any services provided by a regulated person in the course of business providing legal services and/or ancillary services (whether or not legal services)*".[9]

[8] Rules of Conduct Rule 1 - Interpretation
[9] Rules of Conduct Rule 1 – Interpretation

9. The requirements in the Rules of Conduct to have professional indemnity insurance (PII)[10] and complaint handling procedures[11] do not apply to attorneys who "*limit their professional activities to "corporate work""*. The Rules state that this "*means only undertaking work on behalf of their employer and individuals or companies associated with their employer*". However, attorneys undertaking "corporate work" may act on behalf of third parties unrelated to their employer where there is a "common interest" in such work.[12]

Practice Fee Regulations 2018: inactive attorneys

10. IPReg's Practice Fee Regulations define different categories of attorney. One of these is an "inactive attorney" which is defined as "*an attorney who is not available to conduct any patent and/or trade mark work for a client or employer*".[13]

Continuing Professional Development (CPD) Regulations

11. IPReg's Continuing Professional Development Regulations waive the CPD requirements for attorneys who are not in active practice during the period of their inactivity.[14]

Litigation practitioners

12. IPReg's special rules for attorneys who conduct litigation or exercise a right of audience before the Courts (Litigation Rules) contain the following definitions:

    - "litigation work" – "*conducting litigation or exercising a right of audience before the UK or community courts including any work undertaken within the scope of a litigation certificate*";
    - "litigation practitioner" – "*a regulated person undertaking litigation work*";
    - "employed litigation practitioner" as "*a litigation practitioner who is employed by an employer who is not regulated by IPReg or another legal services regulator under the Legal Services Act 2007*".

    The Litigation Rules limit who an employed litigation practitioner can act for.[15]

[10] Rules of Conduct Rule 17 – Professional Indemnity
[11] Rule of Conduct Rule 12 – Complaints Handling
[12] Rules of Conduct: Rule 2 – Scope. Note that "common interest" is not defined.
[13] Practice Fee Regulations 2018: Regulation 1
[14] CPD Regulations: Regulation 4.3 – Waivers
[15] Litigation Rules: Rule 5 – Employed litigation practitioners

Discussion

13. IPReg has not seen any evidence that the current restrictions on in-house attorneys and inactive attorneys doing pro bono work are justified. We therefore want to remove them. However, it is essential that appropriate consumer protection measures are in place when pro bono work is undertaken. We consider that these measures are:

    - Attorneys remain bound by the Rules of Conduct and other rules and regulations that IPReg has made including (but not limited to):
        - Acting with integrity and putting their clients' interests foremost;
        - PII – we recognise that it may not be possible for in-house attorneys to obtain insurance on the same basis as attorneys or firms in private practice. However, we would expect them to be covered by PII that is reasonably equivalent to IPReg's requirements for attorneys in private practice;
        - A complaints procedure with recourse to the Legal Ombudsman;
        - CPD requirements; and
        - Disciplinary rules.

Question 1: what are your views on our proposal to allow in-house attorneys and inactive attorneys to do pro bono work?

Question 2: are there other categories of attorney that are currently prevented from providing pro bono advice as a result of IPReg's regulatory arrangements? Please provide examples and suggestions as to how the restriction should be removed.

Proposed rule changes

14. IPReg considers that, given the way in which its regulatory arrangements are inter-related, it would be clearer (pending the planned full review of all its regulatory arrangements) to introduce a new rule specifically for pro bono advice:

    a) Proposed new rule: Rules of Conduct - Rule 22 Pro Bono Advice[16]

    - An attorney undertaking "corporate work" may conduct work on a pro bono basis for clients who do not fall within the definition of "corporate work" in these Rules of Conduct;

[16] There would be a consequential change to the numbering of subsequent rule.

- An "inactive attorney" may conduct patent and/or trade mark work on a pro bono basis for clients;

providing the following conditions are met:

- The work is covered by professional indemnity insurance that is reasonably equivalent to the requirements in Rule 17 of these Rules of Conduct;
- The attorney does not undertake any reserved legal activities; and
- The attorney adheres at all times to the requirements in IPReg's regulatory arrangements including these Rules of Conduct.

Question 3: what are your views on IPReg's proposed approach and on the proposed drafting? If you consider that the drafting could be made clearer, please provide suggestions.

b) CPD Regulations - Proposed amendment to Regulation 4.3 – Waivers

For avoidance of doubt, persons entered onto either the register of patent attorneys or the register of trade mark attorneys who are not in active practice (that is who are not available to conduct any patent and/or trade mark work for a client or employer) are exempt from any CPD requirements under these Rules during the period of their inactivity from practice unless they conduct such work on a pro bono basis, in which case the entirety of these Regulations apply to them including, for he avoidance of doubt, compliance with the minimum CPD requirements.

Attorneys who have not been in active practice for [2] or more years must complete the minimum CPD requirements before they start providing pro bono advice.

Question 4: what are your views on the proposed amendment to the CPD Regulations? If you consider that other changes need to be made, please provide drafting suggestions.

Question 5: what are your views on the proposal that attorneys who have not practised for 2 or more years must undertake CPD before they start providing pro bono advice?

c) Litigation Rules

We want attorneys who are qualified litigators to be able to provide advice on a pro bono basis – but they would be doing so on the same basis as any other attorney (i.e. not specifically in their role as an "employed litigation practitioner").

The definition of "employed litigation practitioner" refers only to reserved legal activities (which cannot be provided on a pro bono basis other than through a regulated firm). Therefore we do not consider that any amendments are required to the Litigation Rules.

Question 6: what are your views on whether the Litigation Rules need to be amended? If you consider that they do need to be amended, please provide drafting suggestions for the changes.

Proposed Guidance on Pro Bono Advice

When considering whether to undertake pro bono work, all attorneys (whatever their employment status) should have regard to the LawWorks Pro Bono Protocol which was developed to ensure that it is clear what pro bono work is and the standard to which it should be done.

Question 7: what are your views on this approach to guidance?