

## IPReg Consultation – amending regulations to prevent registration lapses

### 1. Introduction

- 1.1 IPReg has the power to make regulatory arrangements. This is provided for in the Copyright, Designs and Patents Act 1988, s275A(2)(e) (pursuant to the Legal Services Act 2007 (LSA) at s185), the Trade Marks Act 1994 s83A(2)(e) (pursuant to the LSA at s184) and the LSA (s21).
- 1.2 The Legal Services Board (LSB) must approve (or exempt) changes to regulatory arrangements before they can come into effect.<sup>1</sup>

### 2. Background

- 2.1 The Patent Attorney and Trade Mark Attorney Qualification and Registration Regulations 2009 (“the Attorney Registration Regulations”) govern the rules by which individual attorneys may be registered on the Patent and/or Trade Mark Registers. They set out the requirements for ongoing renewal of registration and provide for rules around suspension and/or removal from the register in circumstances where a registered person fails to comply with their regulatory obligations to undergo Continuous Professional Development, hold Professional Indemnity Insurance or provide information to the Registrar as required.
- 2.2 Other than by virtue of removal from the register under the Disciplinary Procedure Rules following disciplinary proceedings, the Attorney Registration Regulations do not prescribe a process by which a registered person can voluntarily remove themselves from the register because of a change of profession, retirement or ill health.
- 2.3 Importantly, there is currently no mechanism in place by which IPReg can refuse to remove a registrant’s request that their name be taken off the register; this is an important regulatory safeguard as it would prevent a registrant from deliberately avoiding disciplinary action by simply removing themselves from regulatory oversight.
- 2.4 In contrast, the IPReg Registered Bodies Regulations 2015 set out at Regulation 10, the circumstances in which registered bodies may be suspended or removed from the register. This expressly refers to IPReg being satisfied that removal from the register would not present a risk to clients, to the protection of the public or to any investigative process.
- 2.5 There is no public interest in preventing safe and effective registered attorneys from leaving the register should they decide they no longer wish to be registered. However, it is fundamental to IPReg’s public protection function to retain disciplinary locus over those registrants who may have caused harm or loss to their clients or who may pose a risk to the public or to the reputation of the regulated professions.
- 2.6 Introducing a rule which prevents those registrants who may seek to evade disciplinary action from being able to do so, will improve IPReg’s ability to protect the public and the reputation of the professions, and therefore actively promote IPReg’s regulatory objectives. The rule will also have the effect of bringing the rules around removal from the register as a registered entity and a registered individual, into alignment.
- 2.7 The effect of the rule change also allows IPReg to assure itself that, where relevant, attorneys have taken appropriate steps in relation to the orderly handover of client

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<sup>1</sup> LSA Schedule 4 paragraph 19

files, taking out run-off insurance and client care so that there is less risk to the public as a result of removal from the register.

### **3. The proposed rule change**

- 3.1 We would usually expect that a registered person who wishes to remove themselves from the register, does so in circumstances where there are no disciplinary or conduct issues. It may be that the registrant wishes to retire, leave the profession, become regulated by another Approved Regulator (such as the Solicitors Regulation Authority), is in ill-health or simply wishes to join the unregulated intellectual property sector.
- 3.2 The process by which this is facilitated would be called 'Voluntary Removal' ("VR"). The registrant would make an application to the Registrar in writing, in which they will declare:
- a. their intent to voluntarily remove themselves from the register;
  - b. that to their knowledge there are no complaints or concerns about their practice or conduct;
  - c. their reasons for leaving the register (this will be optional);
  - d. that they understand they will no longer be able to use any protected title;
  - e. that (in the case of sole traders) they have run-off insurance cover and measures in place for the orderly transfer of their files and client monies.
- 3.3 Guidance on making applications for VR, the necessary forms and IPReg's VR explanatory procedure will be published on IPReg's website.
- 3.4 Where an application is made for VR, IPReg will publish a notice on its website confirming that the registrant has made the application and the date upon which the application will be granted in the absence of any information that might prevent the application being granted.
- 3.5 The notice will usually remain on IPReg's website for three months, though the Registrar will have the discretion to shorten this period should the individual circumstances warrant it. This is to allow time for anyone wishing to provide information to IPReg that may be relevant to the registrant's application, to provide that information. IPReg will also use this time to contact the Legal Ombudsman to inform them that the application has been made. This could reduce the risk that a registered attorney can remove themselves quickly and quietly before a complainant has the opportunity to make IPReg aware of a possible regulatory concern, thus avoiding potential disciplinary action.
- 3.6 If there are no concerns reported or otherwise discovered by IPReg, the application will be granted and the registrant's name will be removed from IPReg's "Find an Attorney" search facility.
- 3.7 In the event that IPReg is notified about a potential concern regarding a registrant who has applied for VR, the application will be suspended while IPReg investigates the potential concern. If IPReg has no regulatory concerns, the registrant will be removed from the register three months after their application is made, or once IPReg's investigation is concluded if that takes longer than three months.
- 3.8 We are also proposing a method by which a registrant can apply for VR whilst there has been a Complaint made against them or they are facing disciplinary proceedings. This would only be in very narrow circumstances such as the serious ill health of the

registrant where the holding of a full public hearing is likely to be disproportionate or against the public interest. VR is unlikely to be granted where the registrant is facing very serious allegations of misconduct.

- 3.9 Again, we would require the application to be made in writing, and it would only be granted where:
- a. to do so would be compatible with the Regulatory Objectives<sup>2</sup>
  - b. the investigation into the Complaint has been completed to ensure that the full extent of the regulatory concerns is known;
  - c. the registered attorney accepts the facts of the Complaint against them;
  - d. the registered attorney has provided evidence that they do not intend to reapply for registration with IPReg for at least five years;
  - e. the views of the Complainant (if any) have been sought and, if provided, taken into account.
- 3.10 Where a registrant makes an application for VR and there is a complaint against them which IPReg is investigating, or they are undergoing a disciplinary process, they will need to declare that they do not intend to seek readmission to the register within the next five years. This will need to be supported by some sort of evidence. This might be for example, where the applicant says they are leaving the profession to change careers and provide evidence of a job offer or registration with a study provider to support that declaration. It may be that the registrant declares they intend to retire from the profession, and their date of birth would support that declaration. The Registrar can ask for more information or evidence as required so that she can be satisfied that the registrant genuinely intends to leave the profession.
- 3.11 Where a registrant undergoing disciplinary proceedings is granted VR and they later seek readmission to the register, the disciplinary proceedings may be considered as part of the application.
- 3.12 In respect of either VR pathway, there is no appeal against the Registrar's decision to refuse a VR application. Registrar decisions are challengeable by way of Judicial Review.
- 3.13 The registrant may make more than one application for VR if their first application is unsuccessful. However, any subsequent application must include either additional grounds for the application or additional evidence to support the application that was not provided in the first application and was not reasonably known by or available to the registrant at the time the first application was made. Repeated applications for VR cannot be used to frustrate the disciplinary process and the Registrar can decline to

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<sup>2</sup> IPReg has a duty under section 28 of the Legal Services Act to act in a way that is compatible with the Regulatory Objectives in the carrying out of its activities. The Regulatory Objectives are set out at section 1 of the Act. These are:

- (a) Protecting and promoting the public interest
- (b) Supporting the constitutional principle of the rule of law
- (c) Improving access to justice
- (d) Protecting and promotion the interests of consumers
- (e) Promoting competition in the provision of services within subsection (2) (these are the type of services provided by authorised persons and may include activities which are not reserved activities)
- (f) Encouraging an independent, strong, diverse and effective legal profession
- (g) Increasing public understanding of the citizen's legal rights and duties
- (h) Promoting and maintaining adherence to the professional principles

entertain a VR application at her discretion.

- 3.14 Where a registrant makes an application for VR during the annual renewal process, we would not require them to pay their practising fee for that year either in full or on a pro-rated basis. There will be no full or partial refunds for attorneys that have already paid and who later leave the register via the VR process.

#### **4. Consultation**

- 4.1 IPReg would like to hear your views on the proposed amendment to the Attorney Registration Regulations, and our proposal for exercising the new process. The proposed draft amendments to the Regulations are attached as Annexe A.

#### **Question 1**

Do you agree that an amendment to the Patent Attorney and Trade Mark Attorney Qualification and Registration Regulations 2009 to allow the Registrar to better control a registrant's removal from the register is a proportionate regulatory assurance measure?

#### **Question 2**

Do you agree with the proposed process of Voluntary Removal in respect of:

- a. registrants not facing any disciplinary proceedings; and
- b. registrants who are facing disciplinary proceedings?

#### **Question 3**

Do you have any comments on the proposed draft regulations or process?

**If you have any comments on this consultation, please send them to:**

[info@ipreg.org.uk](mailto:info@ipreg.org.uk)

**by 12 noon on Thursday 11 October 2018**

## Annexe A

*NB. Proposed amendments are highlighted in red*

### Patent Attorney and Trade Mark Attorney Qualification and Registration Regulations 2009

#### Regulation 7 – Renewal of Registration

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- 7.4 If a registered patent attorney or registered trade mark attorney fails to:
- (a) pay the fee prescribed for renewal of registration in accordance with Regulation 12 within two months<sup>3</sup> from the day on which it becomes payable (the Renewal Date);
  - (b) provide the relevant Registrar with the evidence requested in accordance with 7.2 within one month of being asked to do so;
  - or
  - (c) provide evidence to the satisfaction of the Registrar that he has appropriate Professional Indemnity Insurance in place in accordance with Rule 17 of the Rules of Conduct for Patent Attorneys, Trade Mark Attorneys and other Regulated Persons,
- the Registrar concerned shall notify the attorney at his business address (as shown in the Register) that his name will be suspended for a period of three months or removed from the relevant register within one month, unless the required fee is paid and/or the requested evidence is supplied.
- 7.5 If a registrant's name is suspended from the register under Regulation 7.4, the suspension will be lifted upon payment of the unpaid fees and/or provision of satisfactory requested evidence, together with such further late payment fee as may be prescribed in accordance with Regulation 12.
- (a) If the payment required and/or information requested is not provided within three months of the first day of the Registrant's suspension from the register, the Registrar shall remove the Registrant's name from the register if they are satisfied that removal of the attorney's name from the register would not present a risk or potential risk to clients, to the protection of client money, or to any investigative process.
  - (b) If the Registrar concerned considers the attorney may present a risk of the type set out in Regulation 7.5(a), they shall notify the attorney that they remain suspended from the register until such time as the Registrar considers appropriate.

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<sup>3</sup> IPReg is currently consulting on whether to reduce this period from two months to one month. Please see our consultation on length of suspension and service of documents

## Regulation 9 – Removal of Entries from the Registers

- 9.1 Where IPReg has reached a decision in accordance with its Rules of Disciplinary Procedure that a registered patent attorney or a registered trade mark attorney has been guilty of misconduct or other material breach of any of its rules and regulations, it may direct that the entry for that person be removed from the relevant register, and may further direct that the entry for that person shall not be restored during such period as may be specified; and upon such a direction the Registrar concerned shall accordingly remove the whole entry for that person from the relevant register and the relevant Registrar shall not, except with the prior consent of IPReg, register the name of that person whilst the direction remains in effect.
- 9.2 IPReg shall maintain a Special Record containing the name and particulars of any person whose name has been removed from either of the Registers together with the reason for the removal and such other particulars as are considered appropriate.
- 9.3 The Special Record shall be freely available for public inspection at such times and in such manner as IPReg may direct.
- 9.4 A registered patent attorney or a registered trade mark attorney may apply to the Registrar at any time, to have their name removed from the relevant register.
- 9.5 If an application is made in accordance with Regulation 9.4, the Registrar concerned may take whatever steps are considered appropriate to satisfy themselves that removal of the attorney's name from the register would not present a risk or potential risk to clients, to the protection of client money, or to any investigative process.
- 9.6 If the Registrar concerned is satisfied that granting the application may present a risk of the type set out in Regulation 9.5, they may refuse the application or defer the making of a decision until such time as they consider appropriate.

### IPReg Appeals Rules

#### Rule 2 – Form, timing and fees for appeals

- 2.1 Any person adversely affected by a decision of IPReg, PRB, TRB or the Registrar other than a decision:
- a) under the IPReg Disciplinary Procedure Rules; or
- b) of the Registrar in relation to Voluntary Removal
- may invoke the appeal procedure established by these Rules.