

Amendments to the Guidance associated with Rules 4, 14 & 18 of Code of Conduct

Rule 4 - Competence

Regulated persons shall carry out their professional work with due skill, care and diligence and with proper regard for the technical standards expected of them.

A regulated person should only undertake work within his expertise or competence.

Guidance

4.1 *A regulated person should always consider whether, having regard to*

- a) the circumstances (including in particular the gravity, complexity and likely cost) of the work;*
- b) the nature of the regulated person's practice;*
- c) the regulated person's ability, experience and seniority; and*
- d) the regulated person's relationship with the client,*

the interests of the client would be served by the regulated person or some other person providing professional services in fulfilment of the client's instructions.

4.2 *This should be considered as soon as practicable after receiving instructions and from time-to-time thereafter, particularly when circumstances change. If the regulated person considers that the interests of the client would be served by some other person acting, he must advise his client accordingly.*

New text

4.3 *Particular care should be taken when undertaking advocacy and litigation work before the Courts. A regulated person must only undertake advocacy and litigation work which is within their expertise and competence. Normally, this will mean that registered persons only undertake litigation and advocacy in matters where the primary issues at stake relate to intellectual property rights. It will be appreciated that some cases raise a mix of issues. Where a case raises issues which are not within a registered person's competence (e.g. complex issues of employment law in an IP entitlement case), if a registered person is to continue to act they must supplement their team with other legal advisers who have relevant specialist knowledge of such matters. Undertaking advocacy or litigation in cases unrelated to intellectual property rights will be considered prima facie a breach of Rule 4.*

4.4 *The conduct of litigation may only be undertaken either by a person authorised to undertake it or under their supervision. If a firm is acting in respect of a matter and the only person entitled to act in respect of that matter provides notice of their intention to leave the firm or leaves the firm unexpectedly, the firm must immediately take steps to appoint another authorised person to act. The firm must transfer the matter and cease to act if no*

suitable person can be appointed within a month of the authorised person's departure. Continuing to act after that date would place the firm in breach of the criminal provisions of the Legal Services Act.

4.6 Inappropriate exercise of litigation and/or advocacy rights is a matter which is taken very seriously by IPREG. If a registered person is found to have used rights inappropriately this can result in severe disciplinary sanctions including removal rights to conduct litigation and/or advocacy and removal of a registered person's name from the register of patent attorneys and/or trade mark attorneys.

Rule 14 - Duty to act in the interests of justice

Regulated persons exercising any right to appear before a court or tribunal or to conduct litigation must comply with their duties to the court or tribunal and act with independence in the interests of justice. Regulated persons must not knowingly deceive or mislead a court or tribunal. Regulated persons exercising any right to appear before a court or to conduct litigation shall observe the Special Rules of Professional Conduct applicable to Litigation Practitioners.

Guidance

New text

14.1 A regulated person must not submit orally or in any documents or pleadings:

- a) statements of fact or contentions that are not supported by the evidence or instruction of the client;*
- b) contentions that he cannot justify as prima facie arguable;*
- c) allegations of fraud unless clearly instructed to make such an allegation and it is prima facie supported by credible material; note, however that this does not preclude the making of claims of "bad faith" per se (for example, a lack of intention to use a trade mark), unless that claim is specifically directed to substantive fraud.*

14.2 A regulated person must not:

- (a) rehearse practise or coach a witness in relation to his evidence;*
- (b) encourage a witness to give evidence which is untruthful or which is not the whole truth;*
- (c) except with the consent of the representative for the opposing side or of the Court, communicate directly or indirectly about a case with any witness, whether or not the witness is his lay client, once that witness has begun to give evidence until the evidence of that witness has been concluded.*

14.3 A regulated person when conducting proceedings in Court:

- (a) *is personally responsible for the conduct and presentation of his case and must exercise personal judgement upon the substance and purpose of statements made and questions asked;*
- (b) *must not unless invited to do so by the Court or when appearing before a tribunal where it is his duty to do so assert a personal opinion of the facts or the law;*
- (c) *must ensure that the Court is informed of all relevant decisions and legislative provisions of which he is aware whether the effect is favourable or unfavourable towards the contention for which he argues;*
- (d) *must bring any procedural irregularity to the attention of the Court during the hearing and not reserve such matter to be raised on appeal;*
- (e) *must not adduce evidence obtained otherwise than from or through the client or devise facts which will assist in advancing the lay client's case;*
- (f) *must not make a submission which he does not consider to be properly arguable;*
- (g) *must not make statements or ask questions which are merely scandalous or intended or calculated only to vilify insult or annoy either a witness or some other person;*
- (h) *must if possible avoid the naming in open Court of third parties whose character would thereby be impugned;*
- (i) *must not by assertion in a speech impugn a witness whom he has had an opportunity to cross-examine unless in cross-examination he has given the witness an opportunity to answer the allegation;*
- (j) *must not suggest that a witness or other person is guilty of crime, fraud or misconduct or make any defamatory aspersion on the conduct of any other person or attribute to another person the conduct of which his lay client is accused unless such allegations go to a matter in issue (including the credibility of the witness) which is material to the lay client's case and appear to him to be supported by reasonable grounds.*

14.4 In addition to observing the Special Rules of Professional Conduct applicable to Litigation Practitioners, advocates should also be aware of and give consideration to the professional rules of the SRA and BSB as they impact on the conduct of the advocate.

Rule 18 – Publicity

Publicity and promotional activity of any kind by regulated persons is permitted if it is fair, honest, accurate and is not misleading and is not otherwise in breach of these Rules. The letterhead, website and e-mails of firms and sole practitioner registered persons in private practice must show the words “regulated by the Intellectual Property Regulation

Board” or “regulated by IPREG”.

Guidance

18.1 What is acceptable promotional activity will inevitably change over time and will be a matter of subjective assessment in each case. For example, whilst creativity is an essential part of promotion, good taste in content and execution is important.

18.2 Cold calling (by any means) of private individuals or to domestic premises unless a business is being conducted from there would generally be unacceptable, and would certainly be so if directed repeatedly to specific individuals or groups.

18.3 Letterheads must comply with the Business Names Act 1985 concerning lists of partners and an address for service on stationery etc. and the Companies (Trading Disclosures) Regulations 2008 (SI 2008/495) regarding the appearance of the company name and other particulars on stationery, etc. If non-partners are named on a partnership's letterhead, their status should be made clear. A printed line is not sufficient in itself to distinguish partners from non-partners in a list. A similar standard applies to a company or an LLP's letterhead.

18.4 The website and e-mails of any individual or firm providing services to the public in the EU must comply with the provisions of the E-Commerce Directive 2000/31/EC. This requires that the following information is included in electronic communications including e-mails and websites involved in cross-border e-commerce within the EU:

a) details of the professional body with which a firm is registered, which in the case of patent attorneys and trade mark attorneys would be IPREG;

b) the professional title and the member state where it was granted – it is recommended to state that the partners/members/directors of the firm are UK registered patent and/or trade mark attorneys; and

c) a reference to the professional rules applicable to the firm in the member state where the firm is established and the means to access them. This could be achieved by providing a link to the Code of Conduct on the IPREG website.

18.5 Registered persons should only describe themselves or permit themselves to be described as “patent attorney litigators” or “trade mark attorney litigators” or the like if they hold a Higher Courts Litigation Certificate. Similarly, only registered persons who hold a Higher Courts Advocacy Certificate should describe themselves or permit themselves to be described as “patent attorney advocates” or “trade mark attorney advocates” or the like.