

Rule Change Application
Schedule 4, Part 3, Paragraph 20(1)
Legal Services Act 2007

-

IPReg Litigators' Code of Conduct

CONTACT DETAILS

Ann Wright

Chief Executive

The Intellectual Property Regulation Board

Fifth Floor, Outer Temple

222-225 Strand

London

WC2R 1BA

Tel: 020 7632 7171

Email: ann.wright@ipreg.org.uk

The purpose of the Litigators' Code of Conduct

Since 1st January 2010 all registered patent and trade mark attorneys have been subject to the IPReg Code of Conduct. The Code (**attached**) is principles based. The format and scope of the Code is such that it extends to litigation practice without conflict.

Litigation rights, meaning rights to conduct litigation and, separately, rights of audience, are explained in the Appendix.

However, in light of the very specialist nature of the work, litigation rights have, for some time, been the subject of additional qualification requirements. IPReg is currently reviewing those requirements and will shortly be issuing a consultation.

IPReg already requires litigators to undertake additional CPD.

Before IPReg, litigators were subject to special rules issued by CIPA and ITMA and, strictly, these have remained in force and are repealed by the provisions of the new Litigators Code.

Last year IPReg consulted on its proposed Litigators' Code. This Code is to supplement the general IPReg Code.

The proposed new Litigators' Code

The proposed new code (**attached**) drew heavily from the specialist rules issued by CIPA and ITMA.

The text in 2.2 which is highlighted was incorporated after the consultation and in the light of the comments from the BSB.

The Consultation

A three months consultation was held. The draft was issued to all AR's and posted on the website (with links to the document from the CIPA and ITMA websites)

Probably in the light of the similarity to the CIPA and ITMA special rules, the responses to the consultation were limited.

No individual responses were made. In fact the only actual responses were from the BSB and CIPA and ITMA.

The BSB drew attention to the potential of conflict between the BSB Code and the IPReg Litigators' Code where a barrister was employed in an attorney firm. The BSB believed that there were currently no more than 10 barristers who might potentially fall within the scope of the new IPReg Litigators' Code but suggested that a memorandum of understanding might be used to clarify how joint regulation might be managed. IPReg has amended the Litigators Code to address this; considering that a memorandum was unnecessary at present given the small number.

Both CIPA and ITMA considered that the Litigators Code was satisfactory; making some minor comments (also highlighted).

Meeting the Regulatory Objectives

The additional professional obligations imposed by the Litigators Code:

- improve access to justice; and
- protect and promote the interests of the consumer.

Even the most sophisticated consumer can find litigation daunting and the adversarial approach intimidating. Emotions tend to run high in litigation. The process can be costly.

IPReg considers (as CIPA and ITMA did before) that there is, therefore, a need for more detailed (less principles based) regulations to ensure that consumers are protected when they are, arguably, particularly vulnerable and certainly “out of their comfort zone.”

Attached to this application is a table identifying the relevant section of the general code and the corresponding (i.e. supplemental), provisions of the Litigators Code; supplying more detailed reasons why these supplemental provisions are considered necessary.

It is arguable that the introduction of the code also supports the regulatory objective of promoting and maintaining adherence to professional principles but as the litigators’ code is SUPPLEMENTAL to the general code we consider that this secondary.

In relation to the other regulatory objectives namely:

- protecting and promoting the public interest
- supporting the constitutional principle of law;
- promoting competition in the provision of services
- encouraging an independent strong diverse and effective legal profession; and
- increasing the public’s understanding of a citizens legal rights and duties

IPReg considers that the introduction of the new litigators’ code has no impact.

Better Regulation Principles

In developing its proposals IPReg has taken into account the Better Regulation Principles as follows:

- **Accountable:** Breaches of the Litigators’ Code will be dealt with under the same Disciplinary Rules as are breaches of the main code. In practice a litigator who is found to be in breach of the litigators’ code will also be in breach of the corresponding section of the general code.
- **Proportionate:** IPReg is strongly of the view that for the reasons stated above, litigators need to be subject to certain additional professional obligations consistent with the highly specialised area of practice and the particular vulnerability of clients during proceedings

- **Consistent:** Whilst the litigators' code is more prescriptive it is still largely principles based and is, therefore, consistent with the general IPReg Code to which it is supplemental.
- **Targeted:** the code is targeted at a specialist area of legal practice.

Transparency is dealt with in relation to the consultation process described above.

Therefore, IPReg sees no dis-benefit to publication of the Code; it is an extension of the IPReg general code and essentially replaces, albeit under the regulatory umbrella, the special litigators' rules to which CIPA and ITMA members (the vast majority of the profession) were already subject.

The Application

Application is made for the approval of the LSB to the new Litigators Code.

Next Steps

Approval and publication of the Code is the first step towards publication of a full suite of documentation in relation to litigation rights. It is however the intention to publish the Litigators Code immediately after approval.

29th June 2011

Comparison between the IPReg General Code and the New IPReg Litigators' Code

IPReg Code (IC)	Litigators Code (LC)	Comments
Integrity (5)	Duties (3)	<p>IC contains a general statement that attorneys must put clients' interests first subject to law and any overriding duty to the courts.</p> <p>LC clarifies the duties owed by the attorney to the court.</p>
Conflicts (7)	Conflicts (4)	<p>IC recognises the possibility of one attorney acting for two clients in a related matter where there is informed consent.</p> <p>LC expressly states that the attorney cannot act or continue to act where there is a conflict or a significant risk of conflict. There is no possibility of informed consent.</p>
Conflicts (7)	Employed Litigators (5)	<p>This provision is necessary to ensure a third party is not prejudiced and an employed attorney is not place in a position of conflict where, for example, that attorney is employed by a corporate which is sponsoring the external development of a product.</p> <p>The attorney is place under specific obligations:</p> <ul style="list-style-type: none"> - to be satisfied that the other prospective client doe not wish to instruct some other representative; - to ensure that no charge will be made to the other prospective client (unless the cost are recoverable from another source) - to notify the other prospective client that the attorney has no professional indemnity cover; <p>to ensure that any information given to the employed attorney by the other client is kept confidential from the attorneys own employer expect with express consent.</p>
Anti-Discrimination (15)	Non-Discrimination (6)	<p>LC expressly states that an attorney cannot refuse instructions of the grounds that:</p> <ul style="list-style-type: none"> - the nature of the case is objectionable to the attorney or any section of the public, - the conduct opinions or beliefs of the prospective client are unacceptable to the attorney - on any ground relating to the financial support which might be given to the prospective client
Fees (10)	Fees (7)	<p>LC expressly prohibits any contingency fee arrangement except if permitted by law.</p>

Fees (10)	Community Fund (8)	LC places an express obligation on the attorney to advise the client on the availability of funding for litigation services.
Professional Indemnity Insurance (17)	Professional Indemnity Insurance (9)	LC imposes a minimum cover of £1m (the IC only recommends £1m)
Financial Matters (11)	Clients money (10)	<p>LC contains detailed obligations regarding the holding of client money.</p> <p>These provision are necessary because during general day to day work attorneys rarely hold client money (except on account of intended disbursements)</p> <p>LC confirms the trust relationship; recognises that the money is held to the order of the client and provides that interest accrues to the client.</p>

Annexure(s)

Rules of Conduct for patent attorney, trade mark attorneys and other regulated persons

Litigators' Code of Conduct

Clean draft can be provided once the comments (if any) of the LSB are given and incorporated as necessary.

APPENDIX

Definitions

A **right to litigate** is the right to conduct litigation in court; that is the right to initiate court proceedings and be the attorney of record.

A **right of audience** is the right to appear before and speak in front of a judge.

History & current rights

Registered Parent Attorneys automatically on qualification get the rights to:

- Handle patent appeals before the high court

- Conduct patent and design litigation and appear in the patents county court

- Conduct appeals before the designs tribunal

In all three above all RPAs have both litigation and advocacy rights i.e. both the right to be on the record and appear before the relevant courts.

Patent litigators additionally can conduct IP (i.e. patent, trade mark and design) litigation in the High Court and County courts. They also get a limited right to appear before the High Court in interim matters. Currently in order to do so they must complete an LLM and certify that they have 6 month litigation experience.

Registered Trade Mark Attorneys get no rights automatically on qualification

Trade mark litigators have similar rights to patent litigators but they must complete an LLM and certify that they have 6 months litigation experience.

Why Different?

The differences between the position of patent (& designs) and trade marks is largely historical. Appeals in trade mark matters can be made to the appointed person where rights of audience are unrestricted. Hence no explicit right of audience similar to the right to appeal patent and design matters are required.

When established, the Patent County Court did not have a jurisdiction over trade mark matters. All trade mark litigation used to take place in the High Court. This has now changed and it is anomalous that whereas RPAs can litigate and appear before the PCC in patent and design matters, both RPAs and RTMAs need to acquire an additional litigator's qualification to undertake trade mark litigation. These are the issues under review.