



Legal Services Board – Decision Notice issued under Part 3 of Schedule 4 to the Legal Services Act 2007

The Legal Services Board (LSB) has approved in part the Intellectual Property Regulation Board’s (IPReg) application for approval of revised Special Rules for Professional Conduct for regulated persons conducting litigation and exercising a right of audience before the Court.

This Notice sets out the basis for the LSB approval and the decision taken, including a brief description of the changes.

Introduction

1. The LSB is required by Part 3 of Schedule 4 of the Legal Services Act 2007 (“the Act”) to review and approve or reject alterations to the regulatory arrangements of the Approved Regulators. The Chartered Institute of Patent Attorneys (CIPA) and the Institute of Trade Mark Attorneys (ITMA) are approved regulators. CIPA and ITMA have delegated their regulatory responsibilities to IPReg.
2. Paragraph 25 of Schedule 4 explains that the LSB must approve a proposed change to the Regulatory Arrangements unless we are “...satisfied that...” the approval would fall within one or more of the criteria specified in sub paragraph 25(3) (and listed in the footnote below¹). If the LSB is not satisfied that one or more of the criteria are met, then it must approve the application in whole, or at least the parts of it that can be approved when only part of the application meets the criteria.
3. As provided for by paragraphs 20(1) and 23(3) of Schedule 4 to the Act, the LSB has made rules about how the application to alter the Regulatory Arrangements must be made including the contents of that application. The rules highlight the applicant’s obligations under section 28 of the Act to have regard to the Better Regulation Principles. The rules also require that the applicant provides information about the nature and effect of each proposed change and of appropriate consultation undertaken. Sub paragraph 25(3)(f) requires that each proposed alteration has been

¹ The Board may refuse the application only if it is satisfied that—(a) granting the application would be prejudicial to the Regulatory Objectives, (b) granting the application would be contrary to any provision made by or by virtue of the Act or any other enactment or would result in any of the designation requirements ceasing to be satisfied in relation to the approved regulator, (c) granting the application would be contrary to the public interest, (d) the alteration would enable the approved regulator to authorise persons to carry on activities which are reserved legal activities in relation to which it is not a relevant approved regulator, (e) the alteration would enable the approved regulator to license persons under Part 5 to carry on activities which are reserved legal activities in relation to which it is not a licensing authority, or (f) the alteration has been or is likely to be made otherwise than in accordance with the procedures (whether statutory or otherwise) which apply in relation to the making of the alteration.

made or is likely to be made in accordance with the procedures which apply in relation to making of the alteration. This includes the LSB's rules.

4. The LSB will approve Regulatory Arrangements in so far that they appear to achieve their intended outcome and satisfy the sub paragraph 25(3) criteria. Most notably there must be no adverse impact on the Regulatory Objectives overall and the alterations and the process by which they have been produced must be consistent with Better Regulation Principles.
5. The chronology for handling of this application can be found towards the end of this Decision Notice.

Decision

6. Trade Mark Attorneys and Patent Attorneys are all required to comply with IPReg's Code of Conduct. CIPA and ITMA have individually imposed additional requirements on those attorneys who are authorised to conduct litigation and rights of audience ("litigation practitioners"). This application is for the approval of a single set of Special Rules to cover all litigation practitioners who are subject to regulation by IPReg and largely replicates the provisions of the two existing sets of Rules.
7. The revised Special Rules set out the requirements for litigation practitioners which are additional to the Code of Conduct and include:
 - the duties of litigation practitioners
 - specific provisions for litigation practitioners who are employed
 - provisions on non-discrimination, professional indemnity insurance and client money.
8. The Special Rules as presented could not be approved in full since proposed Rule 5.2(f) (which contains provisions specifically for litigation practitioners who work in associations) was written in a way that could result in a litigation practitioner operating in a way that might be inconsistent with the provision of section 15(4) of the Act.² One of the criteria which could lead to the LSB refusing to approve an application is that granting it would be contrary to a provision of the Act (Schedule 4, 25(3)(b)).
9. Having considered the matter, IPReg agreed that this provision could not be approved. IPReg noted that, as far as they are aware, there are no litigation practitioners working within associations and therefore there would be no impact if this provision was not approved (and therefore removed from the Special Rules).
10. Therefore the LSB has approved in part this application. Proposed rule 5.2(f) has not been approved since it could have the effect of being contrary to the provision in section 15(4) of the Act.

² S15(4) the Act: P [an employer] does not carry on an activity ("the relevant activity") which is a reserved legal activity by virtue of E [an employee] carrying it on in E's capacity as an employee of P, unless the provision of the relevant services to the public or a section of the public (with or without a view to profit) is part of P's business

11. Annex 1 contains the Special Rules for Professional Conduct for regulated persons conducting litigation and exercising a right of audience before the Court, as approved by the LSB.

Chronology

- The LSB confirmed receipt of an application from the IPReg on 30 June 2011.
- The 28 day initial decision period for considering the application ended on 28 July 2011
- The Decision Period was extended to 26 August 2011 on 25 July 2011. It was further extended to 27 September 2011 on 25 August 2011.
- This Decision Notice is being published on our website on 9 September 2011.

Chris Kenny, Chief Executive

Acting under delegated authority granted by the Board of the Legal Services Board

8 September 2011

Annex A

Special Rules of Professional Conduct applicable to Regulated Persons conducting litigation or exercising a right of audience before the Courts

The Patent Regulation Board of the Chartered Institute of Patent Attorneys and the Trade Mark Regulation Board of the Institute of Trade Mark Attorneys working jointly together as the IP Regulation Board (IPREG) now make the following provisions under section 275A of the Copyright Designs and Patents Act 1988 and under section 83A of the Trade Marks Act 1994, respectively, pursuant to Sections 185 and 184 of the Legal Services Act 2007.

Rule 1 – Interpretation

In these Rules, unless context otherwise requires:

“CIPA” means the Chartered Institute of Patent Attorneys;

“ITMA” means the Institute of Trade Mark Attorneys;

“IPREG” means the Patent Regulation Board of CIPA and the Trade Mark Regulation Board of ITMA working jointly together as the Intellectual Property Regulation Board;

“patent attorney register” means the register kept under section 275 of the Copyright Designs and Patents Act 1988 as amended;

“trade mark attorney register” means the register kept under section 83 of the Trade Marks Act 1994 as amended;

“registered person” means —

- a) a registered patent attorney;
- b) a registered trade mark attorney; or
- c) a body (corporate or unincorporate) registered in the patent attorney register or the trade mark attorney register;

“regulated person” means a registered person, an employee of a registered person, or a manager of a body which is a registered person;

“manager”, in relation to a body, has the same meaning as in the Legal Services Act 2007;

“litigation certificate” means a certificate issued by CIPA or ITMA under their authority as authorised bodies under the Legal Services Act 2007 to grant rights of audience or conduct litigation;

“litigation work” shall mean 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” shall mean a regulated person undertaking litigation work;

“employed litigation practitioner” shall mean 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.

Rule 2 – Scope of Rules

2.1 Subject to Rule 2.2, these Rules and the Rules of Conduct for Patent Attorneys, Trade Mark Attorneys and other regulated persons shall apply to litigation practitioners and shall prevail over any other rules of conduct to which a litigation practitioner is subject.

2.2 Litigation practitioners undertaking litigation work in their capacity as:

- (a) a recognised sole practitioner regulated by the Solicitors Regulation Authority;
- (b) a self-employed barrister regulated by the Bar Standards Board; or
- (c) a Manager or employee of an entity or person authorised by another approved regulator to carry on an activity which is a reserved legal activity

shall be subject to these Rules only to the extent that these Rules are compatible with the rules of the other legal regulator regulating that work .

2.3 A litigation practitioner shall be responsible for ensuring that all litigation work performed by a person under his or her supervision will be conducted in accordance with these Rules.

Rule 3 – Duties of a litigation practitioner

3.1 A litigation practitioner conducting litigation or exercising a right of audience has a statutory duty

- (a) to the court to act in the interest of justice; and
- (b) to comply with these Rules and the Rules of Conduct for Patent Attorneys, Trade Mark Attorneys and other regulated persons

and those duties override any obligation which the litigation practitioner may have (otherwise than under the criminal law) if it is inconsistent with them.

3.2 A litigation practitioner whilst under a duty to do the best for a client must never deceive or mislead the Court.

3.3 A litigation practitioner must not make or instruct Counsel to make an allegation which is intended only to insult, degrade or annoy the other side, a witness or any other person.

3.4 A litigation practitioner is under a duty to attend or arrange for the attendance of a responsible representative throughout any Court hearing attended by Counsel.

3.5 A litigation practitioner must comply with any order of the Court which the Court can properly make requiring the litigation practitioner and his or her firm to take or refrain from taking some particular course of action.

3.6 A litigation practitioner must comply with the letter and spirit of any undertaking given to the Court or other party whether or not that undertaking is supported by consideration.

Rule 4 – Conflicts of Interests arising in the course of litigation work

4.1 A litigation practitioner must not accept instructions to act for two or more clients where there is a conflict or a significant risk of conflict between the interests of the clients.

4.2 A litigation practitioner must not continue to act for two or more clients where a conflict of interest arises between those clients.

4.3 Subject to Rule 5, an employed litigation practitioner may only undertake litigation work for a person other than his or her employer if;

- (a) he or she declines to act for that person if any conflict arises between the employer and that person; and
- (b) he or she informs that person in writing prior to commencing the or each piece of litigation work that he or she is an employee and that he or she must decline to act further for that person if any conflict arises between the employer and that person.

Rule 5 – Employed litigation practitioners

5.1 An employed litigation practitioner shall not act in the course of his employment with his employer as a litigation practitioner except in accordance with the following provisions of Rule 5.

5.2 In the course of his employment, an employed litigation practitioner may act for the employer and the following related bodies

- (a) the employer's holding, associated or subsidiary company;
- (b) a partnership, syndicate or company by way of joint venture in which the employer and others have an interest;
- (c) a trade association of which the employer is a member;
- (d) a club, association, pension fund or other scheme operating for the benefit of employees of the employer;
- (e) where the employer is a public body, for another public body or statutory officer to which the employer is statutorily empowered to provide legal services;
- ~~(f) where the employer is an association whose members are limited to persons engaged or concerned in a particular trade, occupation or activity or otherwise having a community of interest and is formed bona fide for the benefit of its members and not formed directly or indirectly for the benefit of the Employed litigation practitioner or primarily for securing assistance in legal proceedings, for a member of such an association; or~~
- (g) a person with whom the employer has a joint interest in the outcome of any proceedings, including in particular any licensee or licensor of the employer, or any joint owner with the employer of any intellectual property rights the subject of the relevant litigation work, providing that such joint interest is bona fide for the employer's benefit and is not formed directly or indirectly for securing assistance in legal proceedings.

5.3 Subject to the following provisions, an employed litigation practitioner may also act for the following persons;

- (a) a fellow employee;
- (b) a director, company secretary or board member of the Employed litigation practitioner's employer; or
- (c) an employee, director, company secretary, board member or trustee of the employer or of a related body of the employer within the meaning of Rule 5.2;

Provided that in each case

- (a) the matter related to or arises out of the work of such person for the employer;
- (b) the employed litigation practitioner is satisfied that such person does not wish to instruct some other representative; and
- (c) no charge is made to such person, in relation to the employed litigation practitioner's costs, unless such costs are recoverable from any other source.

5.4 The employed litigation practitioner shall, before accepting instructions to act for the bodies or persons other than the employer in accordance with these Rules, give written notice to the client that the employer is not able, by way of insurance or otherwise, to indemnify the client adequately in the event of a claim against the employed litigation practitioner for which the employer would be vicariously liable, if that be the case.

5.5 The employed litigation practitioner shall before accepting instructions to act for the bodies or persons other than the employer in accordance with these Rules, give written notice to the client that the employed litigation practitioner is not covered by insurance in relation to professional negligence, if that be the case.

5.6 Where an Employed litigation practitioner is acting for a body or person other than the employer in accordance with these Rules, any information disclosed by the Employed litigation practitioner by the client is confidential and cannot be disclosed to the employer except with the express consent of the client.

5.7 Interpretation

1. "holding " and "subsidiary " Company have the meanings assigned to them by the Company's Act 1985 (as amended from time to time) and two companies are "associated " where they are subsidiaries of the same holding company or companies; and
2. any references to a litigation practitioner's employer include the employer's holding, associated or subsidiary company, and any references to an employee include references to an employee of such holding, association or subsidiary company.

Rule 6 – Non-discrimination

A litigation practitioner in any instance in which he is providing advocacy services In the course of litigation work must not withhold those services:

- (a) on the ground that the nature of the case is objectionable to him or to any section of the public;
- (b) on the ground that the conduct, opinions or beliefs of the prospective client are unacceptable to him or to any section of the public; or
- (c) on any ground relating to the source of any financial support which may properly be given to the prospective client for the proceedings in question (for example, on the ground that such support will be available under the Access to Justice Act 1999).

Rule 7 – Fees

7.1 A litigation practitioner must not charge unjustifiable fees having regard to fees generally charged by professions in the conduct of litigation of comparable complexity and difficulty to the litigation work in question.

7.2 A litigation practitioner who is retained in connection with litigation work shall not enter into any arrangement to receive a contingency fee in respect of that work except if permitted to do so by the Lord Chancellor in accordance with any statute or statutory instrument or otherwise in accordance with any rule of law.

7.3 In order to reduce misunderstandings concerning the levels of fees charged for litigation work, the client must also be informed in writing of the basis on which the work is to be charged.

Rule 8 – Community Legal Service Fund

A litigation practitioner is under a duty to consider and advise the client on the availability of funding for litigation services by the Community Legal Service Fund or any funding available from the wider Community Legal Service to which the client might be entitled under the Access to Justice Act 1999 and any Statutory Instruments thereunder or any succeeding Act.

Rule 9 – Professional Indemnity Insurance

9.1 Each litigation practitioner or his or her firm must take out and maintain professional indemnity insurance cover for litigation work. When commencing and renewing such insurance, each litigation practitioner or his firm shall ensure that the insurance provides cover in respect of each and every claim brought in the United Kingdom or elsewhere in the European Union of at least the Minimum Value (as defined in the next sentence) prevailing at the time of commencement or renewal. The Minimum Value shall be determined by IPREG from time to time but shall never be a value less than £1,000,000.

9.2 A litigation practitioner shall not limit liability for professional negligence below the Minimum Value.

9.4 The provisions of this Rule 9 shall not apply to an employed litigation practitioner when he is acting within the meaning of Rule 5.2 or 5.3.

Rule 10 – Client’s Money

10.1 A litigation practitioner must ensure that any money held on behalf of the client in respect of such litigation work is held on trust for the client in an account which is entirely separate from the litigation practitioner’s personal or professional business account.

10.2 Money which would have to be kept in the separate account includes that which is intended or which may be required to be:

- (a) paid or received from a third party on settlement or as the Court might direct; or
- (b) paid into or received from the Court (including without limitation by way of a Part 36 payment or a payment on account of costs following summary or detailed assessment).

10.3 Money in the separate client’s account must be held to the order of the client or the Court and any interest accruing in the account must inure to the client.

10.4 Money which the litigation practitioner is not required to keep in such a separate clients’ account includes:

- (a) any money receiving on account of expected charges for the litigation practitioner’s services;
- (b) costs to be incurred on the client’s behalf; and
- (c) money paid in settlement of a debt owed by the client to the litigation practitioner.

Rule 11 – Commencement Date and Repeal

11.1 These Rules shall apply to all litigation work effective from **[commencement date]**.

11.2 The ITMA Rules of Professional Conduct for Trade Mark Agents holding and acting within the scope of Litigator Certificates and the CIPA Rules of Professional Conduct for Patent Attorneys holding and acting within the scope of Litigator Certificates shall cease to be effective as of that date.