

Chris Kenny
Legal Services Board
Victoria House
Southampton Row
London
WC1B 4AD

22nd February 2010

Dear Mr Kenny,

First Tier Complaints - IPReg Response

I am writing to set out the response of IPReg to your consultation on the monitoring of first tier complaints.

We recognise that this is a major strand of the work being undertaken by LSB (with the Consumer Panel) and of the Legal Ombudsman.

IPReg endorses the view that if attorneys and their practices have clear and open, i.e. non defensive, complaints procedures, they are likely to resolve many issues before they become entrenched and, indeed, this can make the difference between retaining or losing a client.

We have welcomed your assurances that regulation needs to be proportionate, outcomes/risks based and that you will not adopt a "one size fits all" approach.

The information provided by CIPA and ITMA suggests that complaints within this particular limb of the legal profession are relatively few. We believe that this is because the profession is generally well run rather than there being large numbers of clients regularly "voting with their feet" by disengaging attorneys whose services have been unsatisfactory.

The details are as follows:

CIPA - Complaints

2005 – 6 (1800 registered patent attorneys – 1580 members of CIPA)
2006 – 8 (1644 registered patent attorneys - 1621 members of CIPA)
2007 – 11 (1720 registered patent attorneys – 1703 members of CIPA)
2008 – 6 (1758 registered patent attorneys -1740 members of CIPA)
2009 – Not yet reported officially but expected to be similar in number

ITMA - Complaints

2005 - 0
2006 - 0
2007 - 1
2008 - 2
2009 - 2

For the purposes of this letter we do not distinguish between complaints resolved informally and those which required a more formal intervention (both being counted here).

We therefore propose that, in relation to Intellectual Property Attorneys, the following would be a proportionate response to this issue.

Rule to be incorporated into the Code of Conduct

Rule 12 of the IPReg Code already requires that

“Regulated persons in private practice must have an established procedure for dealing with complaints. Written details of the procedure must be available whenever a client requests them and a client should be informed in writing, when first engaging the registered person that such a procedure for the resolution of a complaint exists.”

This is an unequivocal rule in the Code but has only been applicable since 1st January 2010. The previous CIPA and ITMA Codes did not specifically require this although IPReg understand that, as a matter of good practice, many firms of attorneys already had a complaints procedure in place and indeed the Business Practice Guidance Note issued by the Institutes to their members includes sample terms of business which state that if discussion with the particular attorney concerned fails to resolve an issue, the client should ask for the matter to be referred to the senior member of the firm appointed to handle clients’ complaints. Also, the complaints handling procedures have indicated that the client should seek to resolve the complaint with the firm, stating:

Many complaints are of a minor nature and can be dealt with by discussion between the Complainant and the Practitioner concerned. Therefore, firms of patent and trade mark attorneys in private practice are strongly recommended to set up an internal procedure for dealing with complaints by clients, and also to advise clients of the existence of the procedure and how to invoke it. Such a procedure may involve a review of the matters under dispute by another member of the firm who would advise the client of his views following that review.

Your proposed rule goes beyond the IPReg Rule in that first it requires alerting existing clients; whilst this is at the earliest "opportunity" we consider that this is unnecessary and unduly bureaucratic.

More importantly it also requires AS A MATTER OF PROFESSIONAL CONDUCT "signposting" the right to complain to the Legal Ombudsman.

We consider that it is disproportionate to introduce such an additional requirement as a matter of professional conduct, as opposed to good practice and contained in a guideline. Breaches of conduct go to the heart of a profession. If the rule were imposed in your form, failure to comply could lead to a reprimand which is kept on record whether or not that failure was an impediment to the resolution of the complaint.

To put attorneys into this potential situation at all is not proportionate but it is certainly not proportionate to do so when they have only just come into the regulatory regime, when there has been little education and training on complaints procedures, when the role of the Ombudsman has not yet been properly published and without the Ombudsman identifying this as an issue for clients of intellectual property attorneys.

There is no evidence that clients employing intellectual property attorneys lack the ability or resource to identify the route to making complaints. We do not consider that, by making the existence and availability of the Ombudsman part of the standard terms of the complaints procedure, it will make these clients any more likely or any more able to complain.

Furthermore a large number of the clients who will receive this information will be corporate clients for whom reference to the Ombudsman will be irrelevant.

We consider that our current Rule is sufficient and appropriate.

Signposting as a Guideline

If, however, you wish to achieve consistency in wording then we consider that the rule as proposed by you should be amended to remove the obligation to refer to the Ombudsman (bullet points two and three) but that a guideline to the rule should be added that advising (but not requiring) that details of the right to complain to the Ombudsman and details how/when that complaint can be made should be included where appropriate and should be contained in any correspondence by an attorney responding to a complaint.

We think this amended Rule should be introduced as at 1st January 2011 at the earliest to enable attorneys to understand fully what is being required of them in terms of notifying existing clients and when the Ombudsman is established, operative and has already engaged in its own publicity.

Education and Training

There should be a multi –faceted approach as follows:

- IPReg will undertake that Rule 12 is identified as a key plank in our education in 2010 of attorneys on their obligations under the Code. We would provide regular briefings on our website. We would ensure that articles are published in the journals of the Institutes and we would ensure that training in complaint handling is provided throughout the year and 2011, preferably through CIPA and ITMA and other ARs but otherwise through commercial providers.
- We would especially work with the sole traders in our community who will need to be able to operate a workable first tier complaints process.
- Additionally we would contribute towards the “joint “information booklet proposed by the SRA representative when we all met. Equally we would support the creation of a central website.
- Our website and those of ITMA and CIPA already refer to the Ombudsman and we would expand that reference to cover the how/when complaints can be made.
- Our application to renew registration for 2011 will contain a statement, to be given by sole traders and entities, that there is an established procedure for complaints handling and all clients are given written details of the procedure on request and notified of the procedure on first engagement. We intend that the application will, in fact, contain a general undertaking that the attorney/practice has read the Rules and agree to be bound by them but we see no reason why an express undertaking regarding complaint procedures under Rule 12 cannot also be given.
- During 2010 and 2011 when the OLC is established we will work closely with the OLC to monitor the presence/absence of a complaint procedure in relation to complaints sent to us and the OLC.
- We have already discussed with the Ombudsman ways in which we will share information and generally work together in a consistent manner. I have agreed that after I have completed the LSB Governance report in April, we will push ahead to have the MOU of general principles and the MOU on practical issues in place with the OLC by the autumn.

Statistics

You have indicated that you are minded to require statistical evidence. You suggest that it is possible that we lack “sufficient information to enable [us] to conclude that complaint handling is currently effective”. We consider that is a very narrow and rather ill informed response.

The Chartered Institute of Patent Attorneys and The Institute of Trade Mark attorneys have been regulating the professions since 1882 and 1935 respectively. The Institutes have never distinguished between conduct and service complaints, so that the figures given above relate to both types of complaint. As can be seen, the number of complaints is very small.

CIPA has monitored the number of complaints it has dealt with and each year has published an analysis of the types of issue raised and has given general guidance on how internal procedures and internal complaints handling procedures can reduce the number of complaints raised formally with the Institutes. This guidance appears to have been taken on board, as few complainants return to the Institute after being advised to take up the issue first with the practitioner.

Therefore we reject your suggestion that poor complaint handling at office level is potentially a serious issue but that we lack the information to know that.

We also object to any requirement that statistics be kept. What purpose would they serve in these circumstances?

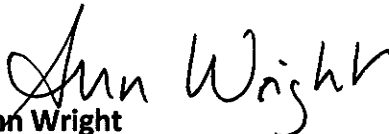
On a secondary but very practical note, we have no budget for undertaking any activity. You have not given us any opportunity to assess the cost and to provide for that cost in the practice fees.

Nevertheless if, after working with the Ombudsman, it appears that we have underestimated the extent to which the profession will have adopted and be complying with Rule 12 (or as at a future date an amended rule as we propose), we would agree that formal monitoring and publication of statistical reports would be appropriate and we would then have no hesitation to recoup the costs of this work through the practice fees; given that the LSB and IPReg will have allowed a two year period of education and training on complaints procedures and for the procedures to have become part of the "day to day operation."

We consider that this is a fair and sensible approach to what may be a problem elsewhere in the legal profession but, in the absence of any current evidence to the contrary, appears not to be a significant issue to intellectual property attorneys but, however, with a clear and published understanding that if our view is unfounded the profession will be required to submit to monitoring, with the associated costs.

This response is given by IPReg but a copy of the final draft has been passed to CIPA and ITMA who support our view.

Yours sincerely,


Ann Wright
Chief Executive