Legal Ombudsman (LeO) discussion paper
"Publishing our decisions: an evidence based approach"

Comments of the
Chartered Institute of Patent Attorneys
and the
Institute of Trade Marks Attorneys

Introduction

These comments are submitted jointly by CIPA and ITMA, the representative arms of the two Approved Regulators for the Intellectual Property Professions.

Response

Q1 – Do you have any comments or suggestions about stage three of our approach?

We agree that this is a reasonable approach in principle. The publication of anonymous statistics about numbers and types of complaints will be helpful to lawyers and consumers alike, as will the case studies, so long as they are kept brief and relevant.

However, we believe that nine months is too short a period to gather enough information to make the crucial decision about whether or not to identify law firms and individual lawyers. This is particularly so because consumers have twelve months in which to bring a complaint. We doubt whether nine months will reveal statistically significant trends. Also, the real impact of complaints, on lawyers' businesses and the legal profession generally, is unlikely to emerge until some time after the decisions start to be handed down and the publication of case studies and anonymised decisions during stages 1 and 2 may well have a positive impact on the behaviour of lawyers and their firms which cannot be fully assessed within a nine-month period.

Q2 – What data do you think it would be most useful for us to track?

The paper is not entirely clear on this, but it seems that at the moment the plan is to track against type of complaint and law firm name (or sole practitioner name where applicable). This sounds sensible, but we think it would also be good to see tracking of factors such as area of law (so that we can see whether this impacts on IP at all), size of law firm and seriousness of complaint (eg amount of money involved or damage done).

Q3 – Have we proposed to track the right criteria? Do you have any other suggestions for criteria that could be used to trigger publication?

Q2 and Q3 seem to ask the same question, but from different directions. Taking Q3 to relate solely to the triggers for publishing lawyers' names, we think the first three criteria mentioned in section 5 of the paper are the right ones, but the remaining four are less appropriate. In our response to the earlier consultation we suggested:

> *"... we believe there may be a case for identifying lawyers and firms in special cases, for example where there has been a particularly serious failure in service standards; where there have been multiple or ongoing failures; or where there is a strong public interest in identifying the lawyer to prevent reoccurrence of the act complained of. We suggest that the ombudsmen be given the discretion to decide, for each case which comes before them, whether the circumstances justify such special treatment."*

Thus, an exceptionally severe degree of service failure or an exceptionally high level of complaints might be grounds for identifying a lawyer or firm. However, we think it would be dangerous to try to formalise this with set criteria such as are suggested in (5) or (7) of section 5: firms with more than X complaints in period Y. Nor should it be relevant whether or not a complaint is resolved formally (4), or whether or not a remedy is awarded (6).

Another potential trigger might be a particularly bad complaints handling system, or perhaps an unwillingness to co-operate in the investigation. If the poor service had particularly serious consequences, that too might be cause to identify the lawyer.

This said, we note that the LeO's current intention is to apply criteria (1) to (3) initially, and only later to consider applying criteria (4) to (7). We are also encouraged that the LeO are also considering identifying lawyers and firms who "have demonstrated particularly good practice in resolving a complaint": this would help to redress the balance a little. But one has to bear in mind the point that we made in our first response:

> *"... there is a danger, if information published by the LeO is to be presented as a tool for selecting a legal adviser, that the LeO will effectively be providing a promotional opportunity for lawyers and legal firms to publicise their own achievements or their competitors' failures. This would appear to go well beyond the remit and purpose of the LeO."*

– and we were pleased to see that this is quoted in the LeO's summary of responses received (Appendix one, page 20).

Q4 – Once we have tracked our data, what do you think should be the basis of our eventual decision about whether we adopt a policy of identifying individual law firms?

The same considerations as formed the basis of the initial consultation, taking due account of subsequent stakeholder input. Our own views on this are as set out in our first response.

Q5 – Do you have any comments about the timetable we have suggested?

Nine months is too short – see comments for Q1 above.

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There is one additional comment worth making. LeO do not appear to have taken on board the point we made, in our first response, about client confidentiality and we remain concerned that the case studies may inadvertently prejudice the intellectual property rights of a client . It may be thought that publishing "anonymised" case studies will automatically address this problem, but it is possible that even an anonymised report could give away sensitive information about for example a patentable invention. The case studies so far published are clearly drafted in a way to get attention and to make interesting reading, and there is the danger that an invention might be disclosed in order to add the "human touch" to a story. In our response to the first consultation we wrote:

> *We believe that one further issue should be borne in mind when deciding what type of information to publish. Legal services often involve the exchange of confidential and/or commercially sensitive information. This is particularly the case for the work of patent and*

trade mark attorneys, who advise clients on intellectual property rights which could be invalidated by public disclosure (for example technical know-how, potentially patentable inventions or potentially registrable designs). Whatever information is published about the LeO's decisions, such confidential information will need to be properly safeguarded. This may require the omission of salient facts or contextual information, which could affect both the value of the publication to consumers and its impact on the lawyers or firms involved. We have discussed this point further in our responses to Questions 5 and 6.

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