

TT IP Attorneys Board Submission

This submission is made in response to the Board's Consultation Paper dated April 2017.

1. Not Broken

The first point which needs to be made is that there is no evidence that the current system is broken. There are very few complaints and the Disciplinary Tribunal has almost no work to do. There are much less than one decided case per year. Indeed, the farcical situation has been reached where although it is compulsory for patent attorneys to do an ethics content of at least one hour per year for continuing education, in fact there is nothing new for any lecturer on this topic to talk about.

2. Not Lawyers

The second point which needs to be understood is that patent attorneys are not lawyers. In particular, lawyers handle significant sums of their client's money and are subject to temptations which simply do not arise for patent attorneys. In Australia there are hundreds of solicitors struck off the roll each year and yet to the writer's knowledge no Australian or New Zealand patent attorney has ever been struck off. It is particularly galling for patent attorneys to be lectured to by lawyers as to what is right and wrong given the track records of the two different professions.

3. Allegiance to the Business

The writer has worked as an employee of a partnership, as a partner of a partnership, and as a principal of a unit trust, and these changes in the legal structure of the business have made absolutely no impact upon the nature of the professional work done.

Given that the patent attorney earns his income from the business, the patent attorney's allegiance will always be to the business. In the event that there is some unhappiness on behalf of a client, it is always in the best interests of the business to take immediate action to reduce that unhappiness. For example, issuing a credit note to remove a debit note in dispute, is far more effective in creating a happy client who is likely to tell others of his experience, than any money spent in advertising, glossy webpages or the like.

It is nonsensical to believe that differences in the legal structure of the business will make the supervisors of the business more rapacious or less rapacious than they might otherwise be. Human nature indicates that they will be equally rapacious no matter what the business structure happens to be.

4. Profit Destinations

The legal structure of a business merely determines the ultimate destination of the firm's profit and the amount of tax paid. In the writer's experience clients are not in the least bit interested where the money goes. In respect of firms operating as a trust, profit destinations can include spouses, children, siblings, and corporate beneficiaries. In recent times profit destinations have included public shareholders, however, if this is spreading the profit around the community more widely than it was before, so what?

5. Unintended Consequences

The board should be extremely cautious in letting the Code of Ethics become more prescriptive than it presently is. This is because of the tendency of all prescriptions to have unintended consequences. It can be cogently argued that the powers that be in agreeing to permit patent attorney practices to be incorporated, did not foresee the consequence of publicly listed holding companies of multiple firms. This is clearly the case in relation to speculation about double employment.

6. Double Employment

In view of point No 1 above, no prescription about double employment should be made. In the event of a severe recession, for example, it may be necessary for firms of patent attorneys to reduce the number of their employees, or reduce the number of hours which their employees work. Under these circumstances, an employed registered patent attorney may find that he or she has to work 2 days a week at Davies Collison Cave and 3 days a week at Spruson & Ferguson in order to be fully employed. There is no reason why this should not happen. If the Code Ethics were to prevent this, then this would be a restraint of trade. The existing code quite clearly would prevent such an employed attorney acting on both sides of the same opposition.

Similarly, if one employed attorney at, say, Griffith Hack is a specialist in, say, moulding aluminium alloys, and a new client of Shelstons approaches the firm about some development in that field, why shouldn't the specialist from Griffith Hack be co-opted to help the client of Shelstons?

Further, the proliferation of small practices makes it highly desirable that some sort of patent attorney locum, or subcontractor provider, should be available to enable sole practitioners to take a holiday or have someone run their practice whilst they are ill.

All of these scenarios would presumably be contrary to the Code if the mooted changes regarding double employment were implemented. It is far better to simply leave such things to commercial reality given the foggy nature of everybody's crystal ball.

7. Groups of Firms

In the writer's view no prescription as to what might be termed "transparency" need be made. Many airline passengers are unaware that Jet Star is a subsidiary of Qantas. Many insurance customers are unaware that NRMA Insurance and AMI Insurance are both operated by Insurance Australia Group Ltd. And so on. No harm comes from such ignorance. Those advocating "transparency" may well have a hidden agenda. The publicly listed firms are well aware of their obligations under various trade practices and consumer legislation.

F. P. Old
Fraser Old & Sohn
Sydney, Australia