Submissions on the Code of Conduct Review 1 June 2017

Trans-Tasman IP Attorneys Board

Review of the Code of Conduct – Consultation Paper of April 2017

My name is Elspeth Victoria Buchanan. I am the owner of the patent attorney practice P.L. Berry & Associates at 277 Kilmore Street, Christchurch, New Zealand.

I have owned this practice since 1977. I have an Honours Degree in Metallurgy, I am a chartered engineer and a member of the Institute of Materials, Minerals and Mining.

I have been a registered New Zealand patent attorney since 1977 and a registered Australian patent attorney since 2003.

I comment on the "Matters for Consultation" as set out below:

Issue 1.
There should be specific provision in the portion of the Code dealing with complaints against registered Attorneys to make it clear that any disciplinary proceedings relating to New Zealand resident Attorneys will be conducted in New Zealand.

Issue 3.
I comment that although brief guidelines can sometimes be helpful, elaborate guidelines which attempt to envisage how every possible set of circumstances should be handled tend to be unduly prescriptive and often result in acting counter to the original intention of the wording. I suggest that in matters of ethics and professional conduct, a combination of common sense and accepted good practice is probably the best general guideline, and detailed guidelines are unhelpful.

Issue 4.
The Code should expressly recognise the possibility of a legal person (as defined) owning and operating a plurality of Incorporated Patent Attorney practices.

I do not understand why it is considered feasible to treat multiple practices which are commonly owned as being genuinely separate practices and not, at the very least, business associates of each other. Centrally owned practices of this type, as a matter of simple fact, are not separate practices:- they are all owned by one legal entity and therefore to regard them as "separate" from each other is a legal fiction.

Certainly, prospective and existing clients can be warned that the various practices are in fact related and are not in truth independent of each other, but are they going to really appreciate the implications of this or, in the case of clients who have been with a particular practice for a long time, even remember that they are now part of a much larger group?

A comparable situation arose in UK in the 1960's and 70's, when the London firm Marks and Clerk started to buy a number of provincial practices (for example Cruickshank and Fairweather in Glasgow). The practices bought by Marks and Clerk were, at least for some years, operated under their original name, to all intents and purposes appearing as independent practices.

I understand that (possibly as a result of complaints), Marks and Clerk were later requested by the British Institute to operate the practices as openly described subsidiaries of Marks and Clerk. In fact, all of these practices are now called "Marks & Clerk".

I would like to make it clear that I am not opposed to commonly owned practices as such, but I think they need to be treated for purposes of conflicts of interest, as a single practice.

If in fact the present intended amendment is made i.e. commonly owned practices are treated as separate practices under the proposed legal fiction, then the minimum information about the practices ownership status should be really comprehensive and should contain examples spelling out to existing and prospective clients exactly what can actually happen e.g.. their own Patent Attorney, to whom they have entrusted confidential information, is owned by the same company who acts for their main competitor.

In paragraph 5 of the Board's Views and Proposals, the comment is made that "clients, too, have some degree of responsibility for knowing about their Attorney." I believe this overlooks the reality of the situation:- many clients, in both New Zealand and Australia, are still surprised to find that it is acceptable and legal for Solicitors and Patent Attorneys to be Limited Companies at all:- this often has to be explained very carefully. To ask clients to effectively be aware of the possibility that their Incorporated Attorney may also be wholly owned by a separate entity that also owns other Attorney firms really is asking rather a lot of a client's level of knowledge, and a detailed and careful explanation would be necessary.

In the comments "Perspectives of Attorney Stakeholders" I endorse the comments made under the heading "Individual/Small Firm Attorneys". I also agree with the view that the Code should provide that it is not permissible for listed group members within the same group to act for clients on either side of a contentious matter.

Issue 5.
For the reasons given in the discussion of Issue 4 above, the conflict of interest provisions should apply to all Attorneys equally i.e. they should apply not only to individual Attorneys and Incorporated Attorneys, but also to commonly owned group practices.

I believe that, as an absolute minimum, if commonly owned practices are going to be regarded as separate, then they should be required to describe themselves on their letterhead, website, facebook page etc and all literature as "name of practice" a fully owned subsidiary of "name of holding company".

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