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Beschwerdekammer in Disziplinarangelegenheiten

Disciplinary Board of Appeal

Chambre de recours statuant en matière disciplinaire

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Case Number: D 0001/20

D E C I S I O N
of the Disciplinary Board of Appeal
of 24 April 2023

Appellant: N.N.

Decision under appeal: **Decision of the Disciplinary Committee of the Institute of Professional Representatives before the European Patent Office dated 19 May 2020**

Composition of the Board:

Chairman: W. Sekretaruk
Members: G. Decker
L. Bühler
A. Hooiveld
S. Arkan

Summary of Facts and Submissions

I. The appeal of the President of the Council of the Institute of Professional Representatives before the EPO ("appellant") concerns the decision of the Disciplinary Committee of the Institute dismissing the complaint as regards the use, firstly, of the title "IP attorney" and, secondly, of the title "European Patent Litigator".

II. By e-mails dated 26 and 27 November 2019, N.N. ("the complainant") brought the following circumstances ("the complaint") to the Disciplinary Committee's notice.

(a) The professional representative and company CEO N.N. ("the professional representative concerned") was using, on her company's website, the title "IP attorney" for two members of the team who were not yet qualified employees. The complainant alleged that this constituted a highly misleading abuse of title, as it created the false impression among clients that these employees were fully qualified to represent them in a court or before an industrial property office. This was creating unfair competitive advantages for the professional representative concerned and her company.

(b) Furthermore, the professional representative concerned was using the title "European Patent Litigator" on her company's website. The complainant alleged that this falsely suggested that the professional representative concerned was entitled and qualified to represent clients in

existing courts, but in fact the European Patent Litigation Certificate actually entitled holders thereof to represent clients only before the Unified Patent Court ("UPC"), which has not yet taken up its activities.

(c) The complainant drew the attention of the professional representative concerned to the allegedly misleading statements and requested several times that she remove them, but to no avail.

III. The Disciplinary Committee sent the complaint both to the appellant and to the President of the EPO to give them an opportunity to comment under Article 12 of the Regulation on discipline for professional representatives ("RDR", OJ EPO 2023, Supplementary publication 1, 146). Neither of them took that opportunity to comment.

IV. The professional representative concerned commented on the complaint in her written defence as follows.

(a) Both terms used were neither protected nor misleading. They clearly indicated the roles of the relevant people, i.e. to assist clients in IP matters or in litigation in patent disputes. They were both different from the protected titles "European Patent Attorney" or "European Trademark & Design Attorney".

(b) As regards the title "European Patent Litigator", the professional representative concerned had successfully completed the course and received the post-graduate diploma "Contentieux des Brevets en Europe" (i.e. "Patent Litigation in Europe"),

issued by the Université de Strasbourg, Centre d'études internationales de la propriété intellectuelle ("CEIPI"). Many peers having the same diploma were using the same title.

(c) The title "IP attorney" was widely used in the market by many IP firms and law firms, and was even used by providers of associated services to IP professionals throughout the IP world, to refer to people assisting their clients in IP matters.

V. Following receipt of the comments made by the professional representative concerned, the Chair of the Disciplinary Committee's Chamber deciding on the complaint discussed the matter with the professional representative concerned over the telephone. He informed her of the preliminary opinion of the Disciplinary Committee that the use of the title "European Patent Litigator" might indeed be considered misleading. In response, the professional representative concerned indicated that she would refrain from using that title on the website and would instead refer to the post-graduate diploma. The file does not contain a note or minutes of the phone conversation.

VI. The Disciplinary Committee did not subsequently send the comments of the professional representative concerned to the President of the EPO or to the appellant. Nor did the Disciplinary Committee inform them of the fact that a phone conversation had taken place between the Chair and the professional representative concerned, or advise them of the content of that phone conversation.

VII. On 19 May 2020, the Disciplinary Committee decided to dismiss the matter. The reasons for the decision may be summarised as follows.

(a) Regarding the use of the title "IP attorney" by non-qualified candidates, the Disciplinary Committee considered that it was outside the scope of its competence to take disciplinary measures in relation to that title, as it could possibly have no relation to European patent work. It further observed that in at least some contracting states there were no special requirements for acting as an adviser on IP-related issues, and also that the term "attorney" was rather vague, especially when not used in relation to a specific contracting state or specific kind of IP right.

(b) Regarding the title "European Patent Litigator", the Disciplinary Committee considered that the use of this title would suggest to the public that the user had a right of representation before a court in litigation actions involving European patents. This did not seem to be the case here for two reasons. Firstly, the CEIPI university diploma did not grant any such right. Secondly, the UPC was not yet operational. Thus, the use of the aforementioned title by the professional representative concerned could indeed be "misleading" within the meaning of Article 1(1), second sentence, RDR ("*In particular, [a professional representative] shall not knowingly make any false or misleading statement*"). However, the Disciplinary Committee observed that the professional representative concerned was no longer using the title "*that potentially could imply a violation of Art. 1(1) RD[R]*", but was referring

now to her university diploma in "European Patent Litigation". Moreover, the Disciplinary Committee had no reason to consider that the title at issue had been used by the professional representative concerned in a "knowingly" misleading manner, as required by Article 1(1), second sentence, RDR. In view of these circumstances, the Disciplinary Committee saw no reason to pursue the complaint.

VIII. On 26 June 2020, the appellant filed notice of appeal against the above decision and submitted at the same time the statement setting out the grounds of appeal.

IX. The appellant's arguments may be summarised as follows.

(a) The use of the title "IP attorney" should not be permitted under the circumstances of the case. Referring to an employee as an "IP attorney" even though the employee did not have corresponding qualifications constituted a misleading statement under Article 1(1) RDR and/or prejudiced the necessary confidence in the profession according to Article 1(2) RDR. At the same time, sections 3(a) and (b) of the Code of Conduct of the Institute of Professional Representatives before the EPO ("CoC", OJ EPO 2023, Supplementary publication 1, 140) were also infringed.

The term "IP attorney" should be reserved for persons with corresponding qualifications, such as a law degree, a national qualification and a right to speak in patent matters before a court. Furthermore, this term closely resembled, or gave rise to an association with, the protected professional title "European Patent Attorney".

Unrestricted use of the term "IP attorney" could open the door to use of the term "European Patent Attorney" by persons without the necessary qualifications.

(b) It should be clarified under which conditions use of the title "European Patent Litigator" was permitted, and in particular whether its use constituted a misleading statement under Article 1(1) RDR in the specific scenario in which a person using this title had obtained the CEIPI "*Diploma on* [sic] *Patent Litigation in Europe*". A substantial number of professional representatives used this title to refer to the fact that they have obtained one of the qualifications mentioned in Rule 12(a) of the "Draft Rules on the European Patent Litigation Certificate and Other Appropriate Qualifications Pursuant to Article 48(2) of the Agreement on a Unified Patent Court". Although the UPC Agreement had not yet entered into force, it was already possible to follow the courses mentioned in Rule 12(a) and to obtain the corresponding certificates. Moreover, the appellant pointed to the existence of the "European Patent Litigators Association" (EPLIT), which presented itself as the association for European Patent Attorneys authorised to act before the UPC.

It was the appellant's duty to appeal the decision, in order to avoid the scenario of one member being prevented from using this title on simple request by the Chair of the Chamber of the Disciplinary Committee deciding on a complaint whilst numerous others would be allowed to continue.

(c) The appellant was not afforded the opportunity to comment under Article 12, second sentence, RDR, as he had no opportunity to provide his comments in response to the comments made by the professional representative concerned or in relation to minutes of the telephone conversation between the Chamber's Chair and the professional representative concerned. No access to the complete file was provided to the appellant. This had led to the need to file the appeal.

(d) Therefore, the decision under appeal should be set aside. This did not mean that a penalty needed to be imposed on the professional representative concerned if mitigating factors were found by the board.

X. In a communication under Article 14 of the Additional Rules of Procedure of the Disciplinary Board of Appeal ("RPDBA", OJ EPO 2023, Supplementary publication 1, 72), the board set out its preliminary opinion in this case. It gave the appellant, the professional representative concerned and the President of the EPO the opportunity to comment on that opinion. Only the President of the EPO filed a response, thereby emphasising the fact that both the President of the Council of the Institute of Professional Representatives before the EPO and the President of the EPO enjoyed the same procedural status in disciplinary proceedings.

Reasons for the Decision

1. *Fundamental deficiencies in the first-instance proceedings - Article 12 RPDBA*

1.1 Under Article 12 RPDBA, if fundamental deficiencies are apparent in proceedings before the disciplinary body that reached the decision under appeal, the Disciplinary Board of Appeal should remit a case to that body unless special reasons present themselves for doing otherwise.

1.2 A violation of a party's right to be heard under Article 25(1) RDR in conjunction with Article 113(1) EPC is considered a fundamental deficiency within the meaning of Article 12 RPDBA.

1.3 The President of the Council of the Institute of Professional Representatives before the EPO and the President of the EPO ("the Presidents") are not parties in the first-instance disciplinary proceedings. However, they have certain participation rights, such as:

- the right to comment before any final decision is taken (Article 12, second sentence, RDR), and

- the right to attend oral proceedings (Article 14 RDR).

It is also as a consequence of the Presidents' participation rights that copies of a complaint must immediately be sent to the Presidents (Article 7(4)(b) of the Additional Rules of Procedure of the

Disciplinary Committee, OJ EPO 2023, Supplementary publication 1, 157) and that decisions of the first-instance disciplinary body must be notified to them (Article 21(1), second sentence, RDR). Moreover, the Presidents are entitled to file an appeal against decisions of the Disciplinary Committee of the Institute or the Disciplinary Board of the EPO under Article 8(2) RDR. It follows that the Presidents have a "quasi" party status. In particular, as far as the right to comment is concerned, there is no substantial difference compared to the party's corresponding right.

1.4 Consequently, an infringement of the Presidents' right to comment under Article 12, second sentence, RDR amounts to an infringement of a party's right to be heard and constitutes at the same time a fundamental deficiency under Article 12 RPDBA.

1.5 In the case in hand, to meet the requirement under Article 12, second sentence, RDR, the Disciplinary Committee had an obligation to send the written defence of the professional representative concerned to the appellant and to the President of the EPO. The Disciplinary Committee was likewise under obligation to draw up minutes of the telephone conversation between the Chair of the Disciplinary Committee's Chamber deciding on the case and the professional representative concerned, and to send these minutes to the appellant and the President of the EPO. However, the Disciplinary Committee failed to fulfil these obligations, thereby violating the appellant's and the President of the EPO's right to comment under Article 12, second sentence, RDR.

1.6 As a consequence of this violation, the board should remit the case to the Disciplinary Committee unless

special reasons present themselves for doing otherwise. In this context, the board notes that the appellant did not file a corresponding request. Furthermore, in the statement of grounds of appeal, the appellant was able to provide the arguments which he did not have the opportunity to set out during the first-instance proceedings. It could thus be argued that the violation was remedied in the appeal proceedings, and the board is in a position to consider these arguments. In view of the above, the board sees special reasons in the case in hand for not remitting the case to the Disciplinary Committee under Article 12 RPDBA.

2. *Admissibility of the appeal*

2.1 The appellant, who is entitled to file an appeal under Article 8(2) RDR, filed notice of appeal and a statement setting out the grounds of appeal within the time limits under Article 22(1) RDR. The formal requirements for an admissible appeal are therefore met.

2.2 Beyond his request that the decision under appeal be set aside, the appellant did not request a specific disciplinary measure under Article 4 RDR that should be imposed. Furthermore, as far as the title "European Patent Litigator" is concerned, he mainly emphasised the need to clarify under which conditions use of this title was allowed. He did not, however, take an explicit position in this respect.

2.3 The question therefore arises as to whether the failure to seek an explicit relief affects the admissibility of the appeal.

2.3.1 Appellants in appeal proceedings before the Disciplinary of Appeal must seek a specific relief - see Article 6(1), first sentence, RPDBA ("*A notice of appeal ... shall state which parts of the decision are appealed against or whether the whole decision is appealed against and the relief which the appellant seeks*"). Consequently, it is not sufficient to merely request that the decision under appeal be set aside.

2.3.2 Disciplinary proceedings deal with alleged breaches of the rules of professional conduct - see Article 6(1) RDR. At the end of the proceedings, the matter will either be dismissed (see Article 6(2)(a) RDR) or one of the disciplinary measures listed in Article 4 RDR will be imposed on the professional representative concerned. It follows that the specific relief sought in appeal proceedings may only be one of the two aforementioned alternatives.

2.3.3 The RDR do not provide for the possibility of having general points of law, such as the (un)lawfulness of a certain conduct of a professional representative, clarified by the board by way of a request for a positive or negative declaratory finding.

2.3.4 Thus, if the first-instance disciplinary body has imposed a disciplinary measure and the appellant considers that a rule of professional conduct has not in fact been infringed and that the matter should have been dismissed, the appellant may only seek the latter relief.

2.3.5 If, on the other hand, the matter was dismissed at first instance and the appellant considers that there has been an infringement of a rule of professional conduct and that the matter should not have been

dismissed, they must request that a disciplinary measure be imposed. In this context, the board is of the opinion that the requirement to seek a specific relief is satisfied if the imposition of a disciplinary measure is requested, but the nature of the measure is left to the discretion of the board.

2.3.6 Lastly, as a court, the board alone is responsible for determining which law applies to a particular case, and how it applies ("*iura novit curia*"). The board applies the law *ex officio*, that is, without being limited to the legal arguments advanced by the parties. It follows that a party is not entitled to demand particular reasoning by the board for the specific relief sought.

2.4 Applying the above considerations, the board concludes on the admissibility of the appeal as follows.

2.4.1 Use of the title "IP attorney"

In his statement of grounds of appeal, the appellant made it sufficiently clear that he considered that the use of the title "IP attorney" infringed Article 1(1) RDR, Article 1(2) RDR and sections 3(a) and (b) CoC as rules of professional conduct. Consequently, he considered the Disciplinary Committee's decision to dismiss the matter erroneous and sought the imposition of a disciplinary measure. The fact that he did not request a concrete measure does not render his request non-specific. By stating that a penalty did not need to be imposed on the professional representative concerned if mitigating factors were found by the board, the appellant instead left the nature of the measure to the discretion of the board (see point 2.3.5 above). As a result, the appeal is admissible in that regard.

2.4.2 Use of the title "European Patent Litigator"

The situation is different as far as the appeal regarding the use of the title "European Patent Litigator" is concerned. The appellant did not take a clear position on the question of whether or not he considered the use of this title permissible. Instead, he merely requested that it "*be clarified whether use of that designation ... constitute[d] a misleading statement under Art 1(1) RD[R]*". This request is tantamount to a request for a declaratory finding, which is not admissible in disciplinary appeal proceedings (see point 2.3.3 above). In the absence of any (admissible) specific relief being sought, the appeal is inadmissible in that regard.

The board notes that this conclusion would not change even if it were to be assumed that the appellant considered the use of the title permissible. While his comments in this regard (see point IX.(b) above) might point in this direction, the only admissible relief in these circumstances would be a request for the matter to be dismissed (see point 2.3.4 above). However, the Disciplinary Committee has already ruled accordingly in the decision under appeal and that decision would not therefore have to be set aside. Furthermore, the appellant cannot request a different reasoning from that given by the Disciplinary Committee, but may (solely) seek a specific relief (see points 2.3.2 and 2.3.6 above).

2.5 As a result, the appeal must be rejected as inadmissible regarding the use of the title "European Patent Litigator".

3. *Dismissal of the matter regarding use of the title "IP attorney"*

3.1 For the reasons reproduced in point VII.(a) above, the Disciplinary Committee dismissed the matter as regards the use, by the professional representative, of the title "IP attorney" on her company's website for two members of her team who were not yet qualified employees.

3.2 This conduct possibly infringed Article 1(1), second sentence, RDR. According to this provision, a professional representative "*shall not knowingly make any false or misleading statement*". This rule of professional conduct is to be read in conjunction with section 3(b) CoC, according to which "*[a] member shall not give any indication on office premises, stationery or otherwise which is misleading to the public*". The board notes that the provisions of the CoC serve for the interpretation of the - rather generally formulated - rules of professional conduct in the RDR and can only be invoked together with a specific provision of those rules (see D 1/18, Reasons 12).

3.2.1 Contrary to the Disciplinary Committee's opinion, the disciplinary bodies listed in Article 5 RDR are competent to decide whether the above conduct of the professional representative concerned constitutes a breach of the rules of professional conduct.

(a) The provisions laid down in the RDR were adopted for the purpose of exercising disciplinary supervision over the professional activities of professional representatives before the EPO (see, e.g., Article 1(1), first sentence, RDR: "*A professional representative shall exercise his*

profession conscientiously and in a manner appropriate to its dignity"; emphasis added). To ensure the necessary context with the EPO, the activities to be scrutinised must furthermore be related to the EPC (see, e.g., the preamble of the CoC: "*This Code is to govern the conduct and other activities of the members in so far as such activities are related to the Convention on the Grant of European Patents (European Patent Convention)...*"; emphasis added. See also D 25/05, Reasons 4).

(b) Consequently, it is irrelevant whether the title at issue "*might have no relation to European patent work*", as held by the Disciplinary Committee. In fact, the opposite is true: what matters is whether the reported conduct concerned activities which are related to the EPC.

(c) This is the case here. The presentation of team members on the website of the professional representative concerned was clearly intended to inform (potential) clients and the public of the professional staff's activities in the field of intellectual property. These activities, especially those of an "IP attorney", readily encompassed activities related to the EPC.

3.2.2 Furthermore, the professional representative concerned made the statement at issue on her professional website, which is comparable to "office premises" or "stationery" within the meaning of section 3(b) CoC.

3.2.3 The key question is whether using the title "IP attorney" for not yet qualified employees (i.e. team members who have not yet passed the European

qualifying examination or obtained any other professional qualification, and are therefore not entitled to represent clients independently) constitutes a statement which is "*misleading to the public*" within the meaning of Article 1(1), second sentence, RDR and section 3(b) CoC.

(a) Regarding the term "misleading", the board deems it appropriate to use the definition as set out in the EU "Unfair Commercial Practices Directive" 2005/29/EC of 11 May 2005. On the basis of Article 6(1)(f) of this Directive, a statement may be regarded as "misleading" if:

- it contains false information and is therefore untruthful, or if

- it deceives or is likely to deceive the target public, even if the information contained therein is factually correct, in relation to an element, such as the qualifications of a person.

(b) In the present case, the target public are visitors to the website of the professional representative concerned. Since the website is (also) in English (as is the title in question), it is aimed at visitors not only in the home country of the professional representative concerned (i.e. Belgium) but all over the world. Visitors may be potential or actual clients of her company, or simply persons who are interested in this company and the persons working there. Visitors to the website are therefore not necessarily familiar with legal terminology.

(c) As the Disciplinary Committee correctly stated in the decision under appeal, the title "attorney", taken in isolation, is rather vague. This is also true when it is used in conjunction with "IP", standing for "Intellectual Property". Likewise, it is true that the title "(IP) attorney" alone is not legally protected, as claimed by the professional representative concerned in her written defence. Consequently, there is no clear and common understanding of what exactly is meant by this title. In particular, there is no uniform view as to whether a person having this title must have obtained a particular qualification. As stated by the professional representative concerned, it seems possible that an "IP attorney" will merely be seen as a person who generally assists clients in IP matters. In the light of the foregoing, it cannot be concluded that the use of this title necessarily constitutes false information, thereby rendering it misleading according to the first alternative listed in point 3.2.3(a) above.

(d) However, it should be noted that there are indeed clearly defined titles containing the term "attorney", such as "*European Patent Attorney*" (see, in this regard, point 1 of the "Recommendation on the use of titles by professional representatives before the European Patent Office", OJ EPO 1979, 452, reproduced in OJ EPO 2016, Supplementary publication 4, 320). The title "*European Patent Attorney*", for example, clearly implies that a person bearing that title:

- has passed a specific examination, namely the European Qualifying Examination - see Article 134(2)(c) EPC

- has then been registered in the list of professional representatives - see Article 134(2) EPC

- and is therefore entitled to represent natural or legal persons in proceedings established by the EPC - see Article 134(1) and (5) EPC.

(e) Furthermore, by way of an example from an EPO contracting state, Article 3 of the Swiss Patent Attorney Act stipulates that "*[a]ny person who uses the title 'European patent attorney' ... must be registered in the list of professional representatives maintained by the European Patent Office*". Article 16 of the Swiss Patent Attorney Act dealing with "*Abuse of title*" lays down that *"a fine shall be imposed on any person who, in ... advertising of any kind, ... uses the title 'European patent attorney' ... or a title that may be confused with* [the title 'European patent attorney'] *without being registered in the list of professional representatives maintained by the European Patent Office*".

(f) In the board's view, it is likely that a significant part of the target public in the present case will assume that the title "IP attorney" is being used as a short form or as an alternative form for the full title "European Patent Attorney", or that it includes this title. Consequently, it is likely that the target public will assume that the persons using the professional title "IP attorney" have the same qualifications as persons using the title "European Patent Attorney"

and are therefore entitled to act before an IP authority, such as the European Patent Office.

(g) This consideration is in line with the definition of the title "IP attorney" given by the European IP Helpdesk of the European Union in the booklet "*10 Steps to Find a Suitable IP Professional*" (currently to be found at https://intellectual-property-helpdesk.ec.europa.eu/system/files/2021-04/EU_IP_HD_Guide_Professional_updated.pdf) referred to by the appellant. According to this definition, an "*IP attorney is a professional who represents their clients before the IP authorities, e.g. the European Patent Office, national patent offices, drafts the IP filings and follows up application procedures*".

(h) More generally and as another possible alternative, the board considers it likely that a significant proportion of the target public in the present case will assume that a person referred to as an "attorney" is generally entitled to legally represent clients independently, i.e. without the involvement of another (supervising) professional colleague. In this context, see also the Oxford English Dictionary, according to which an "attorney" is a "*person legally appointed or empowered to act as representative for another in some or all of the latter's business or legal affairs*" (see entry 2.a at https://www.oed.com/view/Entry/12890).

(i) Applying the above considerations to the case in hand, the board considers that a significant number of visitors to the website of the professional representative concerned are likely to assume that

the persons having the title "IP attorney" are entitled to represent clients e.g. before the EPO, or, more generally, to represent clients without the involvement of another professional colleague. However, these two possible professional activities do not apply to the two team members referred to using the term "IP attorney", who are merely not yet qualified employees. It follows that this statement is likely to deceive the target public (see the second alternative listed in point 3.2.3(a) above) and is therefore to be regarded as "misleading" within the meaning of Article 1(1), second sentence, RDR and section 3(b) CoC.

(j) The Disciplinary Committee also noted that in at least some contracting states there were no special requirements for acting as an adviser on IP-related issues. In the absence of any specific indications about these contracting states and the provisions applicable there, the board is unable to verify this statement. However, even assuming the correctness of this statement, it does not change the above conclusion. The fact that there are no special requirements for acting as an adviser on IP-related issues in a contracting state does not provide any indication as to whether the title "IP attorney" for such an adviser can be misleading; the target public might still associate certain qualifications with the title. This is also true if the Disciplinary Committee's argument is to be understood as meaning that there are EPO contracting states where the use of the title in question is permitted. This use might still cause confusion in other contracting states and thus among persons visiting the website at issue if an

explanatory note or an indication of the contracting state is missing. The board notes that these considerations are in line with point 3 of the "Recommendation on the use of titles by professional representatives before the European Patent Office" (see point 3.2.3(d) above), which reads as follows: "*To the extent that [persons entered on the list of professional representative] can use a national title in a Contracting State, they should also be able to use that title in another Contracting State, provided it does not give rise to confusion with a title protected in that State. Such confusion should not arise particularly in the case of ... any national title used in conjunction with an indication of the State to which it pertains*" (emphasis added).

3.2.4 Lastly, the professional representative concerned must have "*knowingly*" made the misleading statement in question - Article 1(1), second sentence, RDR.

(a) In order for this criterion to be met, the professional representative concerned must have been aware of, or at least condoned, the possibility of the public being deceived by the title in question.

(b) In the present case, the professional representative concerned has always been aware of all the relevant circumstances, i.e. that the two candidates were given the title "IP attorney" on her company's website. Furthermore, at the latest since receiving the complainant's request to remove the statements at issue (see point II.(c) above), the professional representative concerned has also been aware of, or has at least condoned, the

possibility that the use of the title "IP attorney" could be considered misleading.

(c) The board therefore holds that the professional representative concerned acted "knowingly" within the meaning of Article 1(1), second sentence, RDR.

3.2.5 As a result, the board concludes that an infringement of Article 1(1), second sentence, RDR in conjunction with section 3(b) CoC has taken place.

3.3 The appellant further argued that Article 1(2) RDR was infringed, claiming that the use of the title "IP attorney" in the reported circumstances jeopardised the necessary confidence in the profession. He also claimed that section 3(a) CoC was infringed at the same time, as the public reputation of the Institute of Professional Representatives before the EPO, of its members and of the practice of representation before the EPO was clearly at risk if persons without the required qualifications could mistakenly be perceived by the public as European Patent Attorneys or Attorneys-at-law.

3.3.1 The board fails to see a direct link between the mere description of not yet qualified employees as "IP attorneys" on the one hand and an impairment of the confidence in the profession or of the public reputation of the Institute, its members or the practice of representation before the EPO on the other hand. To establish such an impairment, additional steps detrimental to the above legal interests appear to be necessary.

3.3.2 The above considerations notwithstanding, the board holds that in Article 1(1), second sentence, RDR, the

legislator has laid down an explicit provision governing the specific case of misleading statements made by professional representatives. The legislator has thus considered misleading statements to be worthy of sanction only if they are made "knowingly". This requirement would be circumvented if the same conduct were at the same time to be sanctioned under the more general provisions of Article 1(2) RDR and section 3(a) COC, which do not contain the limiting "knowingly"-criterion. Consequently, Article 1(1), second sentence, RDR is to be considered *lex specialis*, which is why a subsidiary infringement of Article 1(2) RDR and section 3(a) COC is excluded.

3.4 As a consequence of the infringement of Article 1(1), second sentence, RDR in conjunction with section 3(b) CoC, the board deems it appropriate to impose a disciplinary measure under Article 4 RDR. In this context, the board considered the following two facts in favour of the professional representative concerned.

- The professional representative concerned has meanwhile refrained from using the title in question for any staff members on her company's website, as the board has ascertained.

- The Disciplinary Board of Appeal has not yet decided on the legal question of whether or not the title "IP attorney" is misleading for non-qualified candidates.

Considering these mitigating circumstances, the board imposes a warning under Article 4(a) RDR on the professional representative concerned.

Order

For these reasons it is decided that:

1. The appeal is rejected as inadmissible as regards the use of the title "European Patent Litigator".

2. The decision under appeal is set aside as regards the use of the title "IP attorney".

3. The professional representative concerned is given a warning under Article 4(a) RDR.

The Registrar: The Chairman:

A. Voyé W. Sekretaruk

Decision electronically authenticated