

# AIPLA

*American Intellectual Property Law Association*

## **The Protection of the Confidentiality in IP Advice Remedies and Goals for the Colloquium**

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# Where are we in U.S.?

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- Protection of communications between IP professionals and their clients varies greatly from country to country
- U.S. historically has applied attorney-client privilege to protect client's communications to an attorney for the purpose of securing legal advice
- Privilege has been extended by most U.S. courts to apply to communications with U.S. patent agents

# Where are we as to Non-U.S. IP Professionals?

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- Protection for communications of client with non-U.S. IP professionals depends on many factors and is not consistently applied in the U.S. courts
- Confidentiality of client communications for attorneys and other IP professionals employed in companies is also applied in an inconsistent manner

# Overview of Attorney-Client Privilege in the United States

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- Oldest common law privilege protecting confidential communications
- Promotes full communication between attorneys and clients
- Construed narrowly (facts not insulated)
- Broad scope of U.S. discovery in litigation makes it essential
  - Rule 26, Fed Rule of Civil Procedure - Parties may obtain discovery regarding any **nonprivileged** matter that is relevant to any party's claim or defense.

# Remedies & Goals for the Colloquium

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- Carry forward the prior work of AIPPI toward finding international consensus on the need for confidentiality in IP Professional Advice
- Recognition of Common Goals for Protection
  - Communications with Attorneys
  - Communications with Patent and Trademark Agents
  - Communications with Attorneys and Patent or Trademark Agents of other countries
  - Communications with Attorneys and other IP Professional Employed by Companies
- Work toward drafting a broadly stated international standard for Protection

# How Are Changes Made in U.S. Law?

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- Common Law Based on Precedent of Prior Cases
- Federal and State Court Systems
  - Over 650 Federal District Judges in 94 Districts
  - Over 170 Federal Appeals Court Judges
  - Separate Court Systems in 50 states and some territories
- Common Law Changes come slowly based on Court decisions, scholarly writings and public policy influences, and good lawyering
- Statutory Changes Are Difficult to Achieve

# Other Mechanisms to Influence U.S. Legal Change

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- National Conference of Commissioners on Uniform State Laws
  - Non-governmental body to promote uniformity in state laws where desirable and practical
  - Lawyers chosen by the states draft proposed laws
  - Over 200 laws approved and over 100 adopted by at least one state
- American Law Institute
  - Model Acts
  - Restatements (efforts to codify/restate common law)

# Educating the Profession and the Public

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- Raise the visibility of this issue in appropriate legal circles and law schools
- Highlight the proposed international standard to courts and other agencies concerned with intellectual property enforcement and protection
- Gain support from important government and non-governmental bodies for adopting needed changes
- Provide real-life examples of the damage caused by a lack of protection to businesses and national economies

# Potential Benefits of Consensus

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- More unified law and practice as to confidentiality
- Consistent approach to applying the law to non-national IP professionals and IP professionals employed in companies
- Enhanced ability of clients/companies in global environment to analyze and communicate concerning IP problems and issues
- Improved situation for all IP professionals to better advise clients

# Thank you for your attention!

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