

Hej,

Bifogat finns en enkät med frågor som rör den gränsöverskridande regleringen av sekretess i förhållandet mellan ombud och klient (Client Attorney Privilege, CAP). Vi vill gärna att du tar dig tid att svara på den.

Sverige deltar aktivt i arbetet med att harmonisera immaterialrättslagstiftningen inom EU, internationellt via WIPO och inom den informella sammanslutningen Grupp B+*. Vi har bland annat engagerat oss i frågan om den gränsöverskridande regleringen av sekretess i förhållande mellan ombud och klient.

Grupp B+ har tagit fram en enkät för att få användarnas syn på det fortsatta arbetet och kring vilka aspekter som är viktigast att nå harmonisering. Svaren från de svenska aktörerna sammanställs för att sedan delges, jämföras och diskuteras med övriga medlemsländer vid nästa plenarmöte 2016.

Målet är att inför den sammankomsten kunna presentera konkreta förslag på lösningar.

Vi välkomnar era svar och synpunkter på enkäten senast **den 29 februari 2016**. Svaren sänds till **CAP-remiss @prv.se**

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**Bakgrund Grupp B+*

WIPO:s ständiga kommitté för patenträtt (SCP) förhandlar den internationella harmoniseringen av materiell patenträtt och frågan om gränsöverskridande reglering av sekretess i förhållande mellan ombud och klient. Förhandlingarna inom SCP har tyvärr präglats av motsättningar och har därför istället fortsatt inom en informell krets – Grupp B+.

Gruppen omfattar i dag de viktigaste patentländerna: EU:s medlemsstater, USA, Japan och Sydkorea men ännu inte Kina. Medlemmarna har plenarmöte i Genève en gång per år.

PRV
PATENT- OCH REGISTRERINGSVERKET

A. General aspects

1. In your opinion, is there a need to protect communications between patent attorneys (non-lawyer/lawyer) and clients in cases having cross-border aspects?

2. Notably:
   - Please explain why/ why not.
   - Please define the kind of communication that should be covered by that protection.

3. Have you been confronted with situations where the client attorney privilege was an issue?

4. Notably:
   - Please describe the circumstances (countries/sender and recipient of communication/kind of communication etc. involved).
   - Please describe the reasons, why the issue arose.
   - Please describe the solution of the issue.
   - If yes, how often in the last 5 years?
   - How many times since you started practising (if applicable)?

5. Is your interaction with your clients (e.g. communication, decision making process) influenced by the differences in national approaches to client attorney privilege issues?

6. In connection with the cross-border client attorney privilege, what do you think is essential to be regulated by a multilateral agreement?

7. In your opinion, what are possible reasons against adopting a multilateral agreement?

B. Specific aspects on the proposed multilateral agreement

1. What professionals should be covered by the agreement?
   - By what criteria should the professionals be identified?
   - What definition should be used to ensure that the professionals covered are defined sufficiently clearly?
   - How should the different terminology in different jurisdictions be taken into account?

2. What advice should be covered by the agreement?
   - What definition should be used to ensure that the advice covered is defined sufficiently clearly?

3. Should there be a provision in the agreement that stipulates a certain flexibility for the participating countries?

Remissinstanser:

Advokatsamfundet

AIPPI

FICPI Sweden

IP-samfundet

SEPAF

SFIR

SIPF

SPOF

SUF

Svenskt Näringsliv

Margareta Linderoth

Business Sweden

Företagarna

LIF

Stockholms handelskammare

Svensk Handel

Sweden Bio

Swedish Medtech

Teknikföretagen

Sekreterare utredning om auktorisation av patentombud (2005:130)

Svar på enkät med frågor som rör den gränsöverskridande regleringen av sekretess i förhållandet mellan ombud och klient (Client Attorney Privilege, CAP). Enkäten skickades ut av näringsdepartementet och PRV.

A. General aspects

1. In your opinion, is there a need to protect communications between patent attorneys (non-lawyer/lawyer) and clients in cases having cross-border aspects?

Yes.

2. Notably:

− Please explain why/ why not.

There is always a need for an open communication between client and attorney and such communication often contains aspects (facts, analysis, arguments) which are or could be disadvantageous to the client if disclosed to third parties. If there is a need to always consider the possibility that such potentially negative aspects may be made available to a counterparty, the communication will be hampered by caution to not include anything that can negatively affect the client if it was made public. This will reduce the possibility for clients to obtain and for attorneys to provide good advice.

− Please define the kind of communication that should be covered by that protection.

All direct communication (oral, written, electronic) between an authorized attorney and a client that has engaged the services of an attorney, except communication that involves external parties or is otherwise clearly non-confidential.

3. Have you been confronted with situations where the client attorney privilege was an issue?

Communications are frequently structured so that they fit into the current limited scope of client attorney privilege.

4. Notably:

− Please describe the circumstances (countries/sender and recipient of communication/kind of communication etc. involved).

The client attorney privilege aspect is present in all matters relating to countries with extensive discovery proceedings.

- Please describe the reasons, why the issue arose.

The clients wish to safeguard their interests as far as possible.

− Please describe the solution of the issue.

Potentially negative aspects are either not provided (at least not in written form) or the communication containing such aspects are prepared and sent in a manner which maximizes protection under existing rules, e.g. by the use of professionals who are covered by existing rules.

− If yes, how often in the last 5 years?

Example from one of SwedenBIO member companies: As noted is the client attorney privilege rules considered in all matters relating to jurisdictions with extensive discovery proceedings – at least 5 times a year i.e. approx 25 times over the last 5 years.

− How many times since you started practising (if applicable)?

See above which would give a total of approx. 135 instances.

5. Is your interaction with your clients (e.g. communication, decision making process) influenced by the differences in national approaches to client attorney privilege issues?

Yes, communication may be overly cautious due to lack of knowledge of specific national regulations.

6. In connection with the cross-border client attorney privilege, what do you think is essential to be regulated by a multilateral agreement?

To specify what types of communications may be considered to fall under the privilege, formal requirements to identify a communication as falling under the privilege, and requirements on the parties and their officers/representatives to be eligible for the privilege.

7. In your opinion, what are possible reasons against adopting a multilateral agreement?

We can see no such reason.

B. Specific aspects on the proposed multilateral agreement

1. What professionals should be covered by the agreement?

Attorneys at law and patent attorneys authorized by the states that are parties to the agreement.

− By what criteria should the professionals be identified?

Proven (officially certified) knowledge of IP law, competition law, and private law as it relates to patents.

− What definition should be used to ensure that the professionals covered are defined sufficiently clearly?

Reference to national law providing conditions for certification of the relevant professionals.

− How should the different terminology in different jurisdictions be taken into account?

Inclusion of national terminology in the agreement, optionally with reference to national law.

2. What advice should be covered by the agreement?

− What definition should be used to ensure that the advice covered is defined sufficiently clearly?

Any exclusive communication between an attorney and a client. That it is exclusive means that it is not also communicated (before, at the same time, or later) to persons that are not in the same client-attorney relationship. A person should be considered as included in the same client-attorney

relationship if he or she is a professional as defined above or the legal successor to a party in the client-attorney relationship.

3. Should there be a provision in the agreement that stipulates a certain flexibility for the participating countries?

Preferably not. If there is any flexibility, the provisions of the multilateral agreement should provide minimum requirements.

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