

Cross-border aspects of Client-Attorney Privilege

The Swiss Perspective

Presentation by the Delegation of Switzerland

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Structure

The Swiss Approach

The Dilemma

A Possible Way out

SITUATION UNTIL JULY 2011

Swiss Criminal Code – Article 321 Section 1

Breach of professional confidentiality

Any person who in his capacity as ... **lawyer**, defence lawyer, ... or as an auxiliary to any of the foregoing persons **discloses confidential information** ... is **liable** on complaint to a **custodial sentence**

Swiss Civil Procedure Code – Article 166 Section 1

Any third party may **refuse** to cooperate:

- b. To the extent that the revelation of a secret would be **punishable by virtue of Article 321 SCC**

SITUATION AS OF JULY 2011

Swiss Criminal Code – Article 321 Section 1

Breach of professional confidentiality

Any person who in his capacity as ... lawyer, ..., **patent attorney** ...

Swiss Civil Procedure Code – Article 160 Section 1

Parties and third parties have a duty to cooperate in the taking of evidence. In particular, they have the duty:

b. to produce the physical records, with the **exception** of ... **correspondence** between a party or a third party and a **lawyer** ..., or with a **patent attorney** ...

REMAINING PROBLEMS

Legal Uncertainty

Users of the Patent System Affected

- Patent Applicants/Holders
- Patent Advisors

DIFFERENT OPTIONS

Option	Advantage	Risk
Extension	Unilateral	No Reciprocity
Recognition	Unilateral	No Reciprocity
Soft Law	<ul style="list-style-type: none"> • Acceptability • Template for National Law • Suited for Different Legal Backgrounds 	Degree of Predictability and Enforcement
Multilateral Agreement	Maximum Predictability	Too Far-Reaching

THE SOLUTION FOR SCP

Non-binding Soft Law

Non-binding and thus acceptable to greatest number of countries

Template for national laws or for bilateral agreements

Appropriate remedy in the context of a large group of interested countries with varying backgrounds

→ **WIPO Recommendation?**

THE RESULT

Draft for a Recommendation Next Time

- Different legal background
- Preliminary involvement of competent authorities
- Still a draft, so not binding in any way

Thank you for your attention

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