AIPLA
American Intellectual Property Law Association

August 9, 2017

The Honorable Blake A. Hawthorne, Clerk
Supreme Court of Texas
201 W. 14th Street, Room 104
Austin, TX 78701

Re: No. 16-0682 - *In re Andrew Silver*, Relator

Dear Mr. Hawthorne:

This *amicus* letter brief is submitted under Texas Appellate Procedure 11, and it is respectfully requested that this letter brief be received and provided to the members of the Court concerning *In re Silver*, appeal no. 16-0682.

The American Intellectual Property Law Association ("AIPLA") is a national bar association of approximately 13,500 members, including primarily lawyers, but some patent agents as well. Our members are engaged in private and corporate practice, in government service, and in the academic community. They represent a wide and diverse spectrum of individuals, companies, and institutions involved directly and indirectly in the practice of patent, trademark, copyright, trade secret, and unfair competition law as well as other fields of law affecting intellectual property. The Association's mission includes helping establish and maintain fair and effective laws and policies relating to intellectual property. Although AIPLA has over 750 members in the State of Texas, it has no stake in the parties to this litigation or in the results of this case, other than its interest in the correct and consistent interpretation of the laws affecting intellectual property and those who practice in the field.[1]

AIPLA supports privilege for communications between a patent agent and client, when those communications occur within the scope of a patent agent's authority under Title 35, United States Code, as interpreted by the U.S. Supreme Court in *Sperry v. State of Florida ex rel. Florida Bar*, 373 U.S. 379 (1963).[2] Attorney-client privilege is extremely important for all areas of law, including patent prosecution, because it promotes full and frank communications between clients and legal advisors, thereby supporting the broad public interest in the observance of law and the administration of justice. *See Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) ("The privilege recognizes that sound legal advice or advocacy serve public ends and that such advice or advocacy depends upon the lawyers being fully informed by the client,"). It should be recognized, we believe, for all legal advisors.

[1] This letter brief was not authored in whole or in part by counsel to any party in this case, and that no monetary contribution to its preparation or submission was made by anyone other than AIPLA and its counsel. In addition, all parties have been served with this letter brief through the Court's e-filing system.
[2] AIPLA recognizes that some of the documents at issue in the present Silver case may be outside of the authority granted under Title 35, as implemented in Title 37 of the U.S. Code of Federal Regulations, and expresses no view on whether those documents should be deemed privileged.

Texas affords a client the privilege to maintain communications with a "lawyer" in confidence under Texas R. Evid. 503(b), and defines a "lawyer" for purposes of privilege as "a person authorized, or who the client reasonably believes is authorized, to practice law in any state or nation," Texas R. Evid. 503(a)(3). Unquestionably, as set out by the U.S. Supreme Court in *Sperry*, a patent agent is "a person authorized … to practice law in … [this] nation" under federal law, 373 U.S. at 385, and therefore meets the test for "lawyer" under Texas R. Evid. 503.

Moreover, even beyond the fact that a patent agent is, as a matter of law, a "lawyer" within the definition set out in Rule 503, AIPLA believes that the public – within and outside of Texas – has an expectation that communications with agents are privileged when they relate to patent prosecution. In the words of Rule 503(a)(3), an agent is someone "the client reasonably believes is authorized, [for patent applications,] to practice law." To hold otherwise would put this state in conflict with the federal standard affording privilege to confidential patent agent communications, *In re Queen's Univ. at Kingston*, 820 F.3d 1287 (Fed. Cir. 2016), and would be at odds with Rule 503's explicit language. In other words, an affirmance of the lower court decision in this case would disadvantage Texas residents and those doing business with Texas because it would prevent the full availability of privilege, thereby *discouraging* complete and frank communications between clients and patent agents. These considerations are reinforced by sound policy reasons for holding that confidential communications between clients and patent agents to be privileged.

Notwithstanding the importance of this issue, AIPLA has no interest in further burdening the Court with additional lengthy submissions, such as a full brief, because it believes that the Court has received substantial briefing on this issue already. Accordingly, the Association endorses the amicus briefs already received by the Texas Supreme Court from the National Association of Patent Practitioners, Houston Intellectual Property Association, and Austin Intellectual Property Association. Those briefs set forth in further detail why this issue is vitally important.

AIPLA believes that all clients should be able to rely on the benefits that privilege affords: the ability to be represented by those individuals authorized to do so under law (see *Sperry*) and to make sure that those individuals are fully informed (see *Upjohn*) with confidences protected in accord with the privilege landscape provided for in federal court proceedings (see *In re Queen's Univ.*) as clients otherwise expect, Texas R. Evid. 503(a) & (b).

Respectfully submitted,

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