

Why Do We Bother? The Villified, But Tenacious, Doctrine of Inequitable Conduct

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The United States imposes a disclosure duty upon patent applicants that goes well beyond the corresponding obligations imposed by other major patent systems. The judicially-created penalty for intentional material violations of that duty – the inequitable conduct defense – is also unique.

Critics have amply documented the burdens associated with the inequitable conduct defense and disclosure duty, and have cited these comparative differences. And like many of patent law's other "bad actors", the inequitable conduct defense and disclosure duty have been curtailed via recent legislative and judicial reforms. Yet the defense and duty have survived, despite the antipathy they have inspired, and despite recent developments in the direction of greater harmony between the U.S. and other patent systems.

This paper asks why. Why do we cling to an inequitable conduct defense and an affirmative duty of disclosure for patent applicants, despite all the associated costs, burdens, unintended consequences and complications? It examines a number of potential rationales and explanations, including jurisprudential and practical factors, as well as differences in the litigation systems of the United States and other major patent regimes. It further draws on law and culture scholarship and posits that distinctive American cultural attributes may contribute to the retention of these aspects of the U.S. patent system.