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Insights: Publications

5 Key Takeaways | Marketing Your Invention: An "On Sale Bar" Update

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Kilpatrick's **Justin Krieger**, **Denver Office Managing Partner**, recently presented **"Marketing Your Invention: An "On Sale Bar" Update"** at the National Association of Patent Practitioners (NAPP)'s 2026 Annual Meeting & Conference in Seattle, Washington. This three-day event offers timely education and updates on patent law, USPTO practices, and case law developments.

Justin's 5 key takeaways include:

1. Product vs. Method Claims: The on sale bar can invalidate a patent if the claimed invention was offered for sale more than a year before the effective priority date of the patent. An offer to sell an inventive *product*, even under an NDA, can create a prior art event for all the world, including against the selling party and any third party who later independently discovers that product. In contrast, an offer to sell a product made by an inventive *process* triggers the "forfeiture doctrine," which creates a *personal* prior art event for the selling party. So long as the process remains secret, a third party who later independently discovers that process may pursue patent protection for that process.

2. Offers for Sale Anywhere in the World Count: The America Invents Act (AIA) expanded the geographic scope of the on sale bar to include offers made anywhere in the world. Thus, a third party's secret arms-length sale of a product under NDA in Siberia could (if it is later discovered during litigation) invalidate a US patent that was filed more than a year later.

3. Quotations as Commercial Offers: Standard business communications, such as quotation letters that detail pricing, quantities, and delivery conditions, can be legally deemed invalidating commercial offers for sale. This can apply even if the product is described as being in the final stages of development.

4. Limitations of the Grace Period: The AIA's one-year grace period is *not* absolute and essentially functions as a "first to disclose" rule. Although the grace period protects an inventor from his or her own offers for sale, a private sale made by an inventor during the one year grace period likely would not qualify as a "public disclosure" sufficient to disqualify a third party's intervening prior art.

5. Strict Experimental Use Exception: Successfully claiming the experimental use exception to avoid the on-sale bar is rare and requires stringent measures, such as explicit statements of experimental purpose, required confidentiality, and retained control by the inventor. Testing conducted merely to ensure a system satisfies minimum operating standards for contract compliance likely would not qualify as experimental use.

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