



The Florida Bar – Education Law Committee  
Presents  
Education Law Certification Review  
Monday, February 29, 2016  
8:30 a.m.-5:00 p.m.

Sponsored By  
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Materials  
Volume II

Attached hereto find Volume II of copies of the materials to be presented at the Certification Review Seminar.

7. Sally Culley. Student Speech – First Amendment Concerns.
8. Pat Gleason. 2016 Open Government Update.
9. Laura Pincus. Individuals With Disabilities – Education Improvement Act of 1997 (IDEA)
10. Joe Goldstein. Procurement and Bid Protests.
11. Gregory Haile. Higher Education Administration.
12. Paul Carland. Florida's Administrative Procedures Act.
13. Chris Anderson. Florida's Code of Ethics and its Commission on Ethics.
14. Nevin Shafer. Intellectual Property.



## Sally Rogers Culley

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Sally Culley practices in the areas of employment, commercial litigation, and insurance coverage and bad faith. Her clients include large banks, mortgage servicers, and insurance companies, public entities (e.g., school boards, cities, port and housing authorities), and smaller, local businesses.

Sally represents employers, both in the public and private sector, in defending employment-related claims, including claims of discrimination, wage and hour violations, whistle-blower violations, wrongful termination, harassment, and retaliation. She also provides consulting and training services designed to prevent such claims. Finally, Sally assists with the creation and enforcement of non-compete agreements.

The representation of clients in commercial litigation matters comprises another segment of Sally's practice. In this part of her practice, she handles matters involving contract disputes, fraud, and RICO (Racketeer Influenced and Corrupt Organizations Act) claims. Sally also represents clients in mortgage and construction lien foreclosures, quiet title actions, construction litigation, bankruptcy, and collection matters.

With regard to the insurance industry, Sally assists insurers with matters involving coverage and bad faith claims, evaluating such matters and participating in litigation where necessary.

### Education

University of North Carolina, Chapel Hill School of Law - J.D. , 1996  
Samford University - B.S., Business Administration, *magna cum laude* , 1993

### Bar Admissions

- Florida (1996)

### Court Admissions

- U.S. District Courts of Florida (Northern, Middle, Southern)
- U.S. Court of Appeals, 11th Circuit

### Professional & Civic Activities

- Central Florida Association for Women Lawyers
- Orange County Bar Association, Business Litigation Section
- Orange County Bar Association, Young Lawyer's Section
- American Bar Association
- The Florida Bar

# Student Speech

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First Amendment  
Concerns

# First Amendment:

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■ **Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.**

U.S. Const. amend. I (emphasis added)

## *Tinker v. Des Moines Independent Community Sch. Dist., 393 U.S. 503 (1969)*

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- In December 1965, a group of adults and students decided to publicize their objections to the hostilities in Vietnam by wearing black armbands during the holiday season.
- A school policy was adopted prohibiting the wearing of a black armband.
- Several students wore the black armbands, five were suspended, and three filed a petition seeking an injunction restraining school officials from disciplining the students.

## *Tinker v. Des Moines Independent Community Sch. Dist.*, 393 U.S. 503 (1969)

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- “First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”
- *Id.* at 506.

*Tinker v. Des Moines Independent  
Community Sch. Dist.*, 393 U.S. 503 (1969)

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- “On the other hand, the Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools.”
- *Id.* at 507.

# Ruling in favor of:

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## The Students

There was no evidence that the wearing of a black armband would cause any material or substantial disruption in the school.

## The takeaway:

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A school district may not prohibit speech unless it:

- materially disrupts classwork,
- creates substantial disorder,
- invades the rights of others, or
- it is reasonably foreseeable that the speech will do so.

*Bethel School District No. 403 v. Fraser,*  
478 U.S. 675 (1986)

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- 17-year old high school student gave a speech at a school assembly nominating a classmate for student government elections.
- The speech was full of sexual innuendos and metaphors.
- The student was suspended for 3 days and prohibited from speaking at graduation.

## *Bethel School District No. 403 v. Fraser, 478 U.S. 675 (1986)*

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- U.S. Supreme Court ruled:
  - in favor of the school,
  - based on its finding that the speech was lewd, offensive, and indecent – and thus distinguishable from the political speech at issue in *Tinker*.
- The Court emphasized the school's responsibility in imparting upon students lessons of civilized behavior and the importance of protecting minors from vulgar language.

## *Hazelwood School District v. Kuhlmeier,* 484 U.S. 260 (1988)

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- High school principal pulled two stories that concerned teen pregnancy and parental divorce from a school newspaper.
- The U.S. Supreme Court found in favor of the school, distinguishing *Tinker* on the basis that *Tinker* dealt with a student's personal expression, but that *Kuhlmeier* dealt with school-sponsored speech.

*Hazelwood School District v. Kuhlmeier*,  
484 U.S. 260 (1988)

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- According to this case, school-sponsored speech may be restricted to a greater degree than a student's personal expression.

## *Morse v. Frederick, 551 U.S. 393 (2007)*

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- During the Olympic torch relay, a student unfurled a banner that read “BONG HiTS 4 JESUS” directly across the street from the school.
- After the student refused to remove the banner, he was suspended.

## *Morse v. Frederick, 551 U.S. 393 (2007)*

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- U.S. Supreme Court found that there was no First Amendment violation because the speech was not protected since it took place during a school-sponsored activity and could reasonably be viewed as promoting illegal drug use.

# So how to analyze?

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- It's a Balancing Act



# Things that the courts consider:

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- Location of the speech
- Type of speech
- Effect of the speech

# 1. Location of the Speech

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- On campus
- Off campus
- Off property but considered on campus

## On campus speech

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- *Tinker v. Des Moines Independent Community Sch. Dist.*, 393 U.S. 503 (1969)
- *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986)

## Off campus speech

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- *Thomas v. Board of Ed., Granville Central Sch. Dist.*, 607 F.2d 1043 (2d Cir. 1979)
- *Evans v. Bayer*, 684 F. Supp. 2d 1365 (S.D. Fla. 2010)
- *Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205 (3d Cir. 2011)
- *J.S. v. Blue Mountain Sch. Dist.*, 650 F.3d 915 (3d Cir. 2011)

## Off property but considered to be on campus

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- *Morse v. Frederick*, 551 U.S. 393 (2007)
- *Boucher v. School Bd. of the School District of Greenfield*, 134 F.3d 821 (7th Cir. 1998)
- *J.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847 (Pa. 2002)
- *Doninger v. Niehoff*, 642 F.3d 334 (2d Cir. 2011), *cert. denied* 132 S. Ct. 499 (2011)
- *Bell v. Itawamba Co. Sch. Bd.*, 799 F.3d 379 (5th Cir. 2015)

## 2. Type of Speech

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- Political Speech

- *Tinker v. Des Moines Independent Community Sch. Dist.*, 393 U.S. 503 (1969)

- Lewd, Offensive, and Indecent Speech

- *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986)

# Type of Speech (cont.)

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## ■ Bullying/Harassment

- *Kowalski v. Berkeley Co. Schools*, 652 F.3d 565 (4th Cir. 2011)

## ■ School-Sponsored Speech

- *Hazelwood Sch. Dist. V. Kuhlmeier*, 484 U.S. 260 (1988)

## Type of Speech (cont.)

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- True Threat – no protection
  - *Watts v. United States*, 394 U.S. 705 (1969)
  - *Lovell v. Poway Unified Sch. Dist.*, 90 F.3d 367 (9th Cir. 1996)

### 3. Effect of the Speech

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#### ■ Level and Foreseeability of Disruption

- *Tinker v. Des Moines Independent Community Sch. Dist.*, 393 U.S. 503 (1969)
- *J.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847 (Pa. 2002)
- *Bell v. Itawamba Co. Sch. Bd.*, 799 F.3d 379 (5th Cir. 2015)

## Do the same rules apply to colleges?

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- The U.S. Supreme Court has not yet decided this issue.
- Footnote in *Kuhlmeier* case: “We need not now decide whether the same degree of deference is appropriate with respect to school-sponsored expressive activities at the college and university level.” *Hazelwood Sch. Dist. V. Kuhlmeier*, 484 U.S. 260, 273, n.7 (1988).

# Representative Cases

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- *McCauley v. Univ. of the Virgin Islands*, 618 F.3d 232 (3d Cir. 2010) considered 5 factors:
  - the different “pedagogical goals of each institution;”
  - the *in loco parentis* role of elemental and high school administrators;
  - the disciplinary needs of elementary and high schools;
  - student maturity; and
  - the fact that many university students live on campus.

## Representative Cases (Greater Speech Protection):

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- *Student Gov't Ass'n v. Bd. of Trustees*, 868 F.2d 473 (1st Cir. 1989)
- *Husain v. Springer*, 494 F.3d 108 (2d Cir. 2007)
- *Kincaid v. Gibson*, 236 F.3d 342 (6th Cir. 2001)
- *Oyama v. Univ. of Hawaii*, --- F.3d --- (9th Cir. 2015)

## Representative Cases (*Tinker* Standard):

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- *Axson-Flynn v. Johnson*, 356 F.3d 1277 (10<sup>th</sup> Cir. 2004)
- *Keeton v. Anderson-Wiley*, 664 F.3d 865 (11<sup>th</sup> Cir. 2011)

# Thank You!

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Presented by:

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## Pat Gleason Biography

Pat Gleason serves as Special Counsel for Open Government for Attorney General Pam Bondi. She has also served as the Advocate for the Florida Ethics Commission and Chief of the Administrative Law Section in the Attorney General's Office. She is a graduate of Florida State University College of Law in Tallahassee. She is the editor of the Sunshine Manual and the Public Records Guide for Law Enforcement agencies.

# 2016 Open Government Update



**Patricia R. Gleason**

**Florida Attorney  
General's Office**

## **Web-based resources at [Myfloridalegal.com](http://Myfloridalegal.com)**

- 1. Training PowerPoints and two hour open government audio presentation**
- 2. Text of circuit court and county court opinions cited in Sunshine Manual**
- 3. Formal and Informal Attorney General Opinions**
- 4. Link to First Amendment Foundation and other open government websites**
- 5. PDF version of Sunshine Manual**



## I. Public Records Law Overview and Update

## A. Scope of Public Records Act

- I. **Florida's Public Records Act, Ch. 119, F.S., provides a right of access to the records of state and local governments as well as to records of private entities acting on their behalf.**

## A. Scope of Public Records Act

2. In the absence of statutory exemption, this right of access applies to
  - a) All “documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software or other material, regardless of the physical form, characteristics, or means of transmission”
  - b) made or received pursuant to law or ordinance or in connection with the transaction of official business
  - c) by any agency [includes a private entity “acting on behalf” of a public agency]
  - d) which are used to perpetuate, communicate, or formalize knowledge.

## A. Scope of Public Records Act

**Example: *NCAA v. Associated Press*, 18 So. 3d 1201 (Fla. 1st DCA 2009), review denied, 37 So. 3d 848 (Fla. 2010)**

**“Records created and maintained by the NCAA are not generally subject to disclosure. However, the documents at issue in this case were examined by lawyers for a public agency, Florida State University, and used in the course of the agency’s business.**

**Because the documents were received in connection with the transaction of official business by an agency, they are public records. The NCAA has failed to show that an exception applies under state or federal law, and thus, the records must be disclosed.”**

## B. Public Records Case Update

- I. ***Economic Development Commission v. Ellis, 40 F.L.W.D2451 (Fla. 5th DCA October 30, 2015)***
- **Issue : Does the EDC, a private non-profit economic development entity, constitute an “agency” subject to Ch. 119, F.S., because the county has contracted with the EDC to provide economic development services?**

## B. Public Records Case Update

**Conclusion: The trial judge erred when he used only the “delegation” test to determine that the EDC was an “agency” based on the EDC’s contract with the county to perform economic development services because there was not a “clear, compelling, complete” delegation of a governmental function to the EDC. Therefore, the judge should have applied the “totality of factors” test outlined in *News & Sun-Sentinel Co. v. Schwab, Twitty & Hanser Architectural Grp. Inc.*, 596 So. 2d 1029 (Fla. 1992).**

## B. Public Records Case Update

2. *Lake Shore Hospital Authority v. Lilker, 168 So. 3d 332 (Fla. 1st DCA 2015)*

### Issues

- 1) **May an agency restrict inspection of public records to a limited period of time?**
- 2) **May an agency refer a requestor to a website in response to a public records request for paper copies of an agency record?**

## B. Public Records Case Update

### Conclusions:

- I) **No.** An agency policy which permits public records to be inspected only between 8:30 and 9:30 am Monday through Friday with 24-hour advance notice violates the Public Records Act. Per s. 119.07(1), F.S., an agency must permit inspection during “any” reasonable time. While the custodian may reasonably restrict inspection to those hours during which his or her office is open to the public, the Authority went too far by restricting inspection to a single hour on a weekday morning. In addition the 24-hour automatic delay is invalid because prior case law establishes that “an automatic delay no matter how short” violates the Act.

# Public Records Case Update

- 2. **No.** The court noted that there was some legal precedent supporting the Authority's position if the request was solely for electronic access, but here the request was for paper copies. Access to public records by remote electronic means is merely an *additional* means of inspecting or copying public records. “This additional means of access, however, is insufficient where the person requesting the records specifies the traditional method of access via paper copies.”

# Public Records Case Update

**3. *Board of Trustees, Jacksonville Police and Fire Pension Fund v. Lee, review granted, 147 So. 3d 521 (Fla. 2014).* Oral argument held 2/3/15.**

- **The Florida Supreme Court has agreed to review of *Lee v. Board of Trustees, Jacksonville Police and Fire Pension Fund, 113 So. 3d 1010 (Fla. 1<sup>st</sup> DCA 2013)* in which the First District found that a lower court erred by refusing to award attorney's fees to the successful petitioner based on a finding that the agency's failure to produce public records was neither knowing, willful, nor done with malicious intent.**

# Public Records Case Update

- **4. *Morris Publishing Group, LLC v. State*, 154 So. 3d 528 (Fla. 1<sup>st</sup> DCA 2015), review denied, 163 So. 3d 512 (Fla. 2015).**
- **Conclusions: State Attorney (SAO) office policy of requiring payment of a deposit before redaction and production of public records is “facially reasonable.”**
- **SAO does not have a legal duty to combine its review of discovery for trial with a public records request even if doing so will be economically efficient and result in less delay.**

# Public Records Case Update

**5. *Consumer Rights, LLC v. Union County*, 159 So. 3d 882 (Fla. 1st DCA 2015), review denied, 177 So. 3d 1264 (Fla. 2015).**

**Conclusion: A delay in producing public records does not in and of itself create liability under s. 119.12, F.S. An award of fees is proper only if the delay is “unjustifiable” which it was not in this case. The petitioner made the request “in a suspicious email that could not be easily verified, directed it to a general email account that might not be checked by the person having anything to do with the records at issue, waited four months without saying anything and then sued the county, claiming a right to attorney fees.”**

# Public Records Case Update

- 6. **Williams v. State, 163 So. 3d 618 (Fla. 4th DCA 2015)**
- **Conclusion: The trial judge erred whether she dismissed a petition for writ of mandamus filed by an inmate seeking to obtain the *Miranda* waiver form introduced at his trial. The judge should have issued an alternative writ based on the inmate's assertion that the form he received from the clerk after multiple requests was not the actual *Miranda* form used at his trial. If the response does not settle the factual issue, the judge should hold an evidentiary hearing.**

# Public Records Case Update

- **7. *Barfield v. City of Tallahassee*, 171 So. 3d 239 (Fla. 1st DCA 2015)**
- **Conclusion: Tallahassee Police Department should not have refused access to an entire email and attachment forwarded from FSU and relating to a domestic violence incident allegedly involving an FSU football player. “[W]hile ‘active criminal investigative information’ is considered exempt from public records disclosure ... see s. 119.071(2)(c)1, Fla. Stat., the statute expressly excludes ‘[t]he time, date, location, and nature of a reported crime’ from the exemption.”**

# Public Records Case Update

- 8. ***Town of Gulf Stream v. O'Boyle, 2015 WL 3970612 (S.D. Fla. June 30, 2015)***
- **Conclusion:** The alleged filing of large numbers of frivolous public records requests, which are often intentionally inconspicuous, followed by lawsuits when the requests are not addressed does not constitute a predicate act under the RICO Act. **Case dismissed.**

# Public Records Case Update

- **9. *Holley v. Bradford County Sheriff's Dept.*, 171 So. 3d 805 (Fla. 1st DCA 2015)**
- **Conclusion: Trial court erred when it dismissed petitioner's public records lawsuit without an evidentiary hearing based on agency's unsworn statement that it did not possess the records. In addition, trial court erred by denying access to the records based on confidential informant exemption without examining the records in camera to see whether they could be redacted to remove information identifying conf. informants.**

# Public Records Case Update

- 10. ***Department of Economic Opportunity v. Consumer Rights, LLC, 40 F.L.W.D2809 (Fla. 1st DCA December 18, 2015)***
- **Conclusion:** Trial judge erred by awarding attorney fees for DEO's failure to timely respond to public records requests because CR failed to comply with s. 284.30, F.S., requirement to serve copy of pleading claiming fees on the Department of Financial Services. Appellate court rejected CR's argument that s. 284.30, F.S., did not apply to public records requests.

# Public Records Case Update

***III. Knight News, Inc. v. University of Central Florida, 41 F.L.W.D335 (Fla. 5th DCA February 5, 2016)***

- **Conclusion:** Student disciplinary records are “education records” subject to the confidentiality afforded by FERPA. Accordingly, the court upheld UCF’s refusal to produce information that would identify students who were the subject of allegations of misconduct relating to student government and/or hazing. FERPA does authorize release of certain information when the alleged misconduct constitutes a crime of violence or a non-forcible sex offense, but this case did not fall within one of these exceptions.

# Public Records Case Update

- 12. ***Gray v. Lutheran Social Services of Northeast Florida, No. 14-CA-4647 (Fla. 4<sup>th</sup> Cir. Ct. December 1, 2014), per curiam affirmed, No. 14-5793 (Fla. 1<sup>st</sup> DCA December 16, 2015)***
- **Conclusion: Attorney's fee award based on LSS' alleged violation of public records law denied. "Gray in an effort to ambush LSS, purposely denied LSS any advance or written notice of his demands, purposely failed to provide any contact information, and purposely appeared on a busy work day in hopes of manufacturing an attorneys' fee, to be shared with Gray. It was nothing more than a scam."**

# Public Record AGOs

- **I.AGO 15-06 to Alan Zimmet, General Counsel for Pinellas Suncoast Transit Authority**
- **Conclusion: Surveillance tapes from a security system for a public building constitute information which reveals a security system which is confidential pursuant to ss. 119.071(3)(a) and 281.301, F.S.**

# Public Records AGOs

- **2. AGO 15-10 to Hal Airth, Attorney for Suwannee Valley Transit Authority**
- **Issue: Are sealed job applications which received by an agency but rejected before the applications were opened public records subject to inspection and copying under s. 119.07?**
- **Conclusion: Job applications, like other personnel records, are public records subject to public disclosure requirements once they are received. Job applications may not be “sealed” to foreclose public access.**

# Public Records AGOs

- **3. Informal Opinion dated August 27, 2015, to Raul Gastesi, Town Attorney for Miami Lakes**
- **Issue: Is a settlement demand sent by plaintiff to the defendant city a public record?**
- **Conclusion: The Opinion quotes language from the Sunshine Manual stating that draft settlement agreements furnished to an agency are public records.**



## Sunshine Law Overview and Update

## **A. Scope of Sunshine Law—Section 286.011, F.S.**

**The Sunshine Law applies to any gathering of two or more members of an elected or appointed public collegial board when they meet to discuss any matter which will foreseeably come before that board for action. Advisory committees can be included even though their powers are limited to making recommendations. Staff committees can be subject to the Sunshine Law if they have been delegated some “decision-making” authority (such as the authority to screen and rank proposals) as opposed to mere fact-finding or information-gathering.**

## A. Scope of Sunshine Law—Section 286.011, F.S.

**Example: Sarasota Citizens for Responsible Government v. City of Sarasota, 48 So. 3d 775 (Fla. 2010)**

**“All governmental entities in Florida are subject to the requirements of the Sunshine Law unless specifically exempted.” However, a county administrator’s discussions with staff and consultants while negotiating a memorandum of understanding with a baseball team did not violate the Sunshine Law because the administrator’s “so-called negotiations team only served an informational role . . .”**

## **B. Requirements of the Sunshine Law**

- 1) Meetings must be open to the public**
- 2) Reasonable public notice of such meetings must be given; and**
- 3) Minutes of the meetings must be promptly prepared and open to public inspection.**

## **B. Requirements of the Sunshine Law**

**Note: Although not a part of the Sunshine Law, s. 286.0114, F.S., requires, subject to limited exceptions, that public boards provide an opportunity for public comment prior to taking official action on a proposition. Boards are authorized to adopt rules or policies that provide time limits for speakers; procedures for allowing a representative of a group to speak, as opposed to all members of a large group; and procedures or forms for an individual to use to inform the board of a desire to be heard, to indicate his/her position and a representative; and designate a specified period of time for public comment.**

# Sunshine Law Update

- *I. Ribaya v. Board of Trustees of the City Pension Fund, 162 So. 3d 348 (Fla. 2d DCA 2015)*

**Issue:** Whether the trial judge erred when he dismissed on grounds of mootness the Plaintiff's declaratory judgment action alleging that a board violated the Sunshine Law when, pursuant to a board policy (since changed) he was issued a trespass warning after using inappropriate language during a meeting recess and not allowed to attend board meetings for 90 days.

# Sunshine Law Update

- **Conclusion: The DCA reversed and remanded, noting that “the standard of review of an order dismissing an action for declaratory judgment is somewhat different in the context of a Sunshine Law challenge . . .” When the complaint alleges a violation of the Sunshine Law, the trial court’s discretion to dismiss with prejudice “should be very limited.” While the appellate court could not say at this point whether Ribaya’s exclusion violated the law, if a violation is found, then all action taken at the affected meetings could be void.**

# Sunshine Law Update

- 2. ***State v. Dorworth, No. 14-MM-5841 (Fla. Orange Co. Ct. October 21, 2014), affirmed, No. 14-AP-48 (Fla. 9th Cir. Ct. August 19, 2015)***
- **Court dismissed a misdemeanor charge filed against a lobbyist who was accused of violating the Sunshine Law by relaying information between board members and thereby aiding the members to meet without complying with the Sunshine Law. The judge said that by charging the lobbyist, the state attorney “expanded the reach of the Sunshine Law to private citizens; and the Legislature did not intend for the statute to apply to private citizens.”**

# Sunshine Law AGOs

- **I. AGO 15-03, to State Attorney Bruce Colton, issued January 28, 2015**
- **Conclusion: A dismissal with prejudice pursuant to a settlement agreement that confers continuing jurisdiction on the court to enforce the terms of the settlement agreement would operate as a conclusion of the litigation for purposes of s. 286.011(8), F.S., making the transcript of a settlement or litigation strategy session which was closed to the public while the litigation was ongoing, open for inspection and copying.**

# Sunshine Law AGOs

- **2. AGO 15-13, to Pam Booker, City Attorney for City of Port St. Lucie, date September 17, 2015**

**Issue: Does s. 286.011(8) prohibit the Mayor, who is a named defendant in two lawsuits filed against the City and various City officials from attending ‘shade meetings’ to discuss the litigation? Does the Code of Ethics prohibit this?**

**Conclusion: The Sunshine Law does not prohibit the Mayor from attending because “the possibility that the mayor will be found individually liable after the merits of the case are decided does not preclude him from attending shade meetings while the case is active pursuant to s. 286.011(8), F.S.” However, the AG’s Office is unable to comment regarding possible prohibitions within the Ethics Code; these questions should be directed to the Ethics Commission.**

# Sunshine Law AGOs

- **3. Informal Opinion to Robert Sugarman, Attorney for Board of Trustees for City of Boca Raton Police and Firefighters Retirement System, dated August 5, 2015**
- **Issue: May four members of the board travel out of state to conduct interviews of investment consultants and their teams without violating the Sunshine Law if they provide notice of the trip, set up live interactive audio/visual feeds and refrain from expressing impressions, taking votes or other formal action?**
- **Conclusion: No**

# Sunshine Law AGOs

- **4. Informal Opinion to Michel Stebbins, Attorney for Capital Trust Agency Community Development Entity, dated December 1, 2015**
- **Issue: When may the board conduct a meeting via electronic means?**
- **Conclusion: A local board may allow a board member to attend and participate electronically under certain circumstances, but a quorum must be physically present in order to carry out official business. Electronic access may be used to allow public access if no formal action will be taken, such as workshops. Approval of the minutes constitutes official action.**

# Sunshine Law AGOs

- **5. Informal Opinion to Lynn Barrett, General Counsel North Broward Hospital District February 17, 2016**

**Conclusion:** The material submitted by the District “reflects the existence of an investigation and subpoena.” However, the exemption in s. 286.011(8), F.S., does not apply in the absence of an on-going judicial or administrative proceeding. Section 905.27, F.S., provides restrictions on disclosure of grand jury testimony; however, “this office has not been provided with any information suggesting that a grand jury has been impaneled in this matter.”

# 2016 Legislative Highlights

- **A summary of open government legislation passed in the 2016 legislative session**

## Open Government Examination

**1. The Sunshine Law applies to:**

- A. Leon County School Board
- B. Federal Trade Commission
- C. Florida House of Representatives
- D. All of the above

**2. The three basic requirements of the Sunshine Law are:**

- A. Meetings must be open to the public, noticed to the public, and minutes promptly recorded
- B. Meetings must be open to the public, noticed to the public and an agenda prepared
- C. Meetings must be open to the public, minutes promptly recorded, and computers provided for public use
- D. Meetings must be open to the public, noticed to the public and noticed to the press

**3. An advisory board is NOT subject to the Sunshine Law if it is:**

- A. Appointed by a school board to make recommendations to it on proposed renovation of a school building.
- B. Appointed by city manager to make recommendations to him/her on a proposed renovation of city hall
- C. Appointed by a circuit judge to make recommendations to him/her on a proposed renovation of the courthouse.
- D. None of the above.

**4. The following persons are subject to the Sunshine Law**

- A. A state agency division director who is an ex officio nonvoting member of a state advisory council
- B. A mayor who is a member of the city council but can vote only to break a tie
- C. A mayor who is not a member of the city council but can veto legislation
- D. Both A and B are correct

**5. If a city council believes that it is in the public interest, which of the following meetings may be CLOSED to the public:**

- A. Meetings to discuss sensitive personnel issues involving accusations of sexual harassment against the city manager
- B. Meetings to discuss an ongoing investigation of a city department
- C. A hearing on a complaint alleging that a city resident has violated the building code
- D. None of the above.

**6. Which of the following statements are correct?**

- A. If a city council is considering whether to take disciplinary action against an employee, the council may exclude the employee from the meeting but all other persons must be allowed to attend.
- B. The council board may prohibit a member of the public from tape recording a meeting if a council member objects to the taping.
- C. If a member of the public wishes to videotape a board meeting, the council may require that the videotaping be nondisruptive.
- D. None of the above

7. A county commission is holding a special meeting to consider whether to discipline an employee for sexually harassing several coworkers. The coworkers have asked the commission to close the meeting because of the embarrassing nature of the sexual harassment. The commission would like to close the meeting to the public in order to protect the privacy of the sexual harassment victims. If a county commission believes that the commission meeting should be closed to protect privacy rights, it can

- A. Close the meeting only if the Legislature has passed a law which exempts that type of meeting from the Sunshine Law
- B. Close the meeting based on the right of privacy provision in the Florida Constitution.
- C. Both A and B are correct
- D. None of the above

8. Two members of the city council are talking to each other at a football game. A reporter is with the council members and able to hear the entire conversation. The council members:

- A. Have not violated the Sunshine Law because even if they were discussing city council business, the meeting was public because a newspaper reporter was present.
- B. Have violated the Sunshine Law if they were talking about matters that foreseeably could come before the city council for discussion or action
- C. Have violated the Sunshine Law if they were talking about city council matters that have been scheduled for a vote by the city council
- D. Both B and C are correct

9. The members of a board that is created under both state and federal law are:

- A. Subject to the sunshine law and public records law in the same way as the members of a school board
- B. Not subject to either the sunshine or the public records law because federal agencies are not subject to the Sunshine Law.
- C. Subject to the sunshine and public records law if they choose to be but are not required to comply
- D. Subject to the Sunshine Law but not the public records law.

**10. The Florida Supreme Court ruled that the Sunshine Law applied to advisory committees in the following case:**

- A. Board of Public Instruction of Broward County v. Doran
- B. Town of Palm Beach v. Gradison
- C. Associated Press v. NCAA
- D. B and C are correct

**11. A city council member meets privately with another member of a city council to discuss a contract which is under consideration by the council. Which of the following is true?**

- A. The State Attorney could charge the council members with a noncriminal infraction for violating the Sunshine Law.
- B. The Attorney General could charge the council members with a noncriminal infraction for violating the Sunshine Law.
- C. The Florida Ethics Commission could charge the council members with violating the Sunshine Law.
- D. All of the above.

**12. On May 1, 2010 a city held an election to fill three seats on the city council. John Smith has been a member of the city council since 2005 and was reelected to office. Jane Doe and Mary Jones have never served on the council and both were elected. All three will be officially sworn in on June 1, 2010. Which of the following meetings are subject to the Sunshine Law?**

- A. A meeting held on May 2 between Jane Doe and Mary Jones.
- B. A meeting held on April 30 between Jane Doe, Mary Jones, and John Smith.
- C. A meeting between held on June 2 between Doe, Jones and Smith.
- D. A and C are correct

**13. A county commissioner, county manager (county employee), sheriff, city commissioner and city police chief want to meet to discuss whether the county should make improvements to the jail. Which of the following statements is correct?**

- A. The meeting should be open to the public because both the city commissioner and county commissioner must comply with the Sunshine Law.
- B. The meeting is not subject to the Sunshine Law.
- C. The meeting is subject to the Sunshine Law because the sheriff and county commissioner are elected officers of the county.
- D. The meeting is subject to the Sunshine Law because all of these individuals bear some responsibility for the county jail.

**14. A city commissioner wants to send an email from her personal computer to the city manager (city employee) about an item on the city commission agenda. Which statement is correct?**

- A. The email is a public record.**
- B. The email is not a public record because personal emails are not subject to the public records law.**
- C. The email is not a public record but the city manager should not respond to the email because the response would violate the Sunshine Law**
- D. The email is a public record but the city manager should not respond to the email because the response would violate the Sunshine Law.**

**15. A husband and wife have both been elected to the city council. Which of the following statements is correct?**

- .
- A. Both the husband and wife must resign from the city council or get a divorce.**
- B. Either the husband or wife has to resign because the Sunshine Law prohibits them from serving together on the council.**
- C. Both the husband and wife may serve on the council but must comply with the Sunshine Law when they discuss city council business.**
- D. Both the husband and wife may serve on the council but must file a conflict of interest form before each city council meeting.**

**16. A town council has met at 10 AM on the first Monday of the month for years. However, due to a clerical error, the notice for the council's last meeting did not appear in the newspaper. However, since town residents know that the council always meets on the first Monday, members of the public were in attendance at the meeting. The notice error was not discovered until after the council met and approved a contract. No one from the public has objected to the contract approval. Which of the following is correct?**

- A. Since the notice error was inadvertent and no one objected, the council did not violate the Sunshine Law and the action to approve the contract is valid.**
- B. Although the board technically violated the Sunshine Law because the meeting was not noticed, since the error was inadvertent and no one objected, the council may simply ratify the contract approval without discussion at the next scheduled meeting.**
- C. Because the meeting was not properly noticed to the public, the council violated the Sunshine Law and must hold a full and open discussion of the contract at its next meeting; otherwise, a judge could rule that the contract is invalid.**
- D. Even though the meeting was not properly noticed to the public, the meeting did not violate the Sunshine Law since members of the public were in attendance.**

**17. A city council is considering whether to buy a piece of property. A statute makes the records showing the market value of the property confidential and exempt from the public records law but there is no statute which exempts the meeting from the Sunshine Law. The council wants to close the meeting while it decides what to offer for the property. Which of the following statements is true:**

- A. The council can close the meeting if it first determines that the public benefit in closing the meeting (council can obtain a better deal for the property) outweighs the benefits of keeping the meeting open.
- B. The council can close the meeting because the Legislature has enacted a statute making the market value records of the property confidential and the council therefore has implied authority from the Legislature to close the meeting.
- C. The council cannot close the meeting.
- D. A and B are correct.

18. A city council has applied for a grant from a federal agency. The application requires each council member and his or her spouse to include a copy of their tax return. Federal law makes these returns confidential in the hands of the federal agency but they are not exempted from disclosure under Florida law. Which of the following statements is correct?

- A. The tax returns of both the spouses and the councilmembers are subject to disclosure under the Florida public records law.
- B. The councilmember tax returns must be disclosed under the Florida public records law but, due to the right of privacy provision in the Florida Constitution, the spouse returns are confidential.
- C. Because the tax returns are confidential in the hands of the federal agency, neither the councilmember nor spouse returns are public under the Florida public records law.
- D. None of the above.

19. The Department of Children and Families has received a request for a report prepared by the chief inspector general that reviewed whether the agency had acted properly in its care of a foster child. The report includes both public and confidential information. Which of the following statements is correct?

- A. Since the report contains both public and confidential information, the Department should refuse to produce the entire document.
- B. If it would be burdensome to redact confidential information, the Department may simply release the entire unredacted document if it believes that it would be in the public interest to do so.
- C. In order to make it easier in the future to respond to public records requests, the Department may permanently destroy or obliterate the confidential material from the original document.
- D. The agency must redact the confidential material and then release the remainder for public inspection without destroying any portion of the original document.

20. A mayor has received a public records request for her emails. Which of the following emails are public records?

- A. Email messages from the mayor that are sent from her personal home computer in which the mayor explains to the city manager why she believes that city hall must be renovated.

- B. Email messages from the mayor that are sent from her personal home computer in which the mayor asks her brother whether he would like to accompany the mayor and her family on their annual vacation.
- C. Email messages from the mayor that are sent from her government computer in which the mayor asks her father whether he would like to accompany her and their family on their annual vacation.
- D. A and C are correct.

21. A legislator, city commissioner and judge are members of a committee that is planning its first meeting. Which of the following statements is true?

- A. If the committee was created by statute, it is subject to the Sunshine Law.
- B. If the committee was created by a judge, it is not subject to the Sunshine Law.
- C. Both A and B are correct.
- D. Neither A nor B are correct

22. A city council is planning a meeting to discuss a controversial issue. What steps can the council take to help ensure that the meeting is not disrupted?

- A. Require that everyone seeking to enter the building where the meeting is being held to go through weapons screening.
- B. Require that everyone sign in and show their driver's license prior to entering the meeting room.
- C. Ban the use of video cameras or tape recorders in the meeting room.
- D. None of the above.

23. A city police department receives a public records request for photographs of a crime scene from a closed robbery case. There is no statutory exemption from the public records law that applies to the photographs. Which of the following statements is correct?

- A. The department is not required to release the photographs because the public records law does not apply to photographs.
- B. The department must release the photographs.
- C. Unless release of the photographs would violate accepted police standards and procedures, the department must release the photographs.
- D. Unless the person taking the pictures has asked the department not to release them, the department must release the photographs.

24. A state employee, Rip V. Winkel, is given a written reprimand for sleeping on the job. The employee files a grievance, and after a public hearing, the grievance committee rules that the employee should have been given a written warning instead of a reprimand. The committee enters an order declaring that the reprimand is invalid. A few weeks later, the agency receives a public records request for all records relating to Mr. Winkel's employment. Which of the following statements is correct?

- A. Because the reprimand was overturned, the agency should destroy it.
- B. The reprimand is a public record and must be provided in response to the public records request although the agency may add a notation that the reprimand was overturned by a grievance committee.
- C. Because the reprimand was overturned, the reprimand should be placed in a sealed envelope and the agency should not produce it in response to the public records request.
- D. The reprimand is a public record because the grievance committee should not have held a public hearing on the grievance.

25. A city recreation advisory committee is voting to elect officers. The Chair has proposed that the members use written ballots. She would prefer that members be able to simply identify the person they are voting for, and not themselves, on their ballots if they choose. Which of the following statements is true?

- A. Because the committee is only an advisory committee, the members are not required to use written ballots that include the name of the person voting and the person they voted for. The members can simply mark their choice on the ballot and remain anonymous if they choose.
- B. Because the vote is only to elect officers rather than to discuss or take action on recreation issues, the members are not required to use written ballots that include the name of the person voting and the person they voted for. They can simply mark their choice on the ballot and remain anonymous.
- C. The members must use written ballots that include the name of the person voting and the person they voted for.
- D. The committee is not allowed to use written ballots and can only cast votes via roll call.

26. Two city commissioners plan to meet at a restaurant with city police officers to have an informal discussion over breakfast about working conditions and salaries at the police department. The city commission is responsible for establishing police salaries on an annual basis although there is no agenda item dealing with these issues at the upcoming meeting of the city commission. The commissioners want to know whether the Sunshine Law applies to the meeting. Which of the following statements is correct?

- A. The Sunshine Law does not apply to the meeting because it is an informal discussion between two commissioners, as evidenced by the fact that it is being held at a restaurant rather than in the city commission chambers.
- B. The Sunshine Law applies to the meeting and therefore, the commissioners should provide public notice of the restaurant meeting, allow the public to attend, and keep minutes.
- C. Because the Sunshine Law applies to the meeting, the commissioners should not hold the meeting at the restaurant and instead should have the discussion at an open public meeting of the commission that is duly noticed and held in a public place.
- D. The Sunshine Law does not apply to the meeting because only two members of the commission will attend and the issues are not scheduled for a vote at the commission meeting.

27. A state licensing board held a workshop meeting to discuss possible legislative changes to the licensing law. The meeting was properly noticed and open to the public. No votes were taken. After the board meeting, the secretary prepared minutes. When a newspaper reporter asked for a copy of the minutes, the secretary refused saying that the minutes were not public record until the board approved them at its next meeting in accordance with Roberts Rules of Order. The refusal to provide the minutes until approved at the next meeting of the board:

- A. Is a violation of the Sunshine Law and the Public Records Law
- B. Is a violation of the Public Records Law but not the Sunshine Law
- C. Is a violation of the Sunshine Law but not the Public Records Law
- D. Does not violate either the Public Records Law or the Sunshine Law.

28. The sheriff's office is investigating whether the city manager stole grant funds allocated for a city program. As part of its investigation, the sheriff's office has obtained copies of city financial records relating to the grant program and these copies are now in the hands of the sheriff's office. Sheriff investigators also visited city hall and reviewed the manager's employment evaluations. A newspaper makes a public records request to the city finance department and the city personnel office for the employment evaluations and also for the financial records. The newspaper's public records request does not mention the sheriff's investigation. Which of the following is correct:

- A. Because the sheriff's office has obtained copies of the financial records as part of a criminal investigation, the city is not required to release those records to the reporter. However, it is required to release the employment evaluations since the sheriff's office only reviewed these records and did not obtain copies.
- B. Because there is an ongoing criminal investigation and the financial records and the employment evaluations are relevant to the investigation, the city is not required to release the records to the reporter.
- C. Even though there is an ongoing criminal investigation, the city must release the employment evaluations and financial records that are in its possession.
- D. None of the above.

29. A reporter is writing a story on whether the school district has wasted money buying all the school lunches from McDonalds. He makes a public records request for the financial records relating to food purchases. The District responds that the information is contained in a database that includes both public information and confidential social security numbers. None of the district's software programs can redact the social security numbers. The reporter wants to know what the District's options are under the Public Records Law. Which of the following statements is correct:

- A. The District must acquire or develop a program that will redact the social security numbers and cannot charge the reporter for the cost of the program.
- B. The District may if it chooses acquire a program to redact the social security numbers, but is not required to do so.
- C. The District must acquire or develop a program to redact the social security numbers and may pass the cost of the program on to the reporter.

D. The District can choose whether to provide the data in electronic or hard copy format and the reporter must pay the costs of the medium selected by the District.

30. Which of the following cases deal with access to public records in digital or electronic form?

- A. Booksmart Enterprises Inc. v. Barnes and Noble College Bookstores Inc.
- B. Seigle v. Barry
- C. National Collegiate Athletic Association v. Associated Press
- D. B and C.

31. A city clerk has received over 150 public records requests over the past year from John Jones. Each of the public records requests asks for records relating to Mr. Jones' ex-wife who is a city employee. Jones is very rude and obnoxious when he comes to city hall to make his requests. Which of the following options is available to the clerk?

- A. Because the Mr. Jones is so rude, the clerk would be authorized to ban him from city hall and instead require him to make his requests in writing or over the telephone.
- B. Because Mr. Jones has asked for an extraordinary number of records, the city clerk would be authorized to ask him to specify the particular records that he wants.
- C. Because Mr. Jones has made numerous public records requests which all relate to his ex-wife, Mr. Jones could be charged with stalking.
- D. None of the above.

32. A state agency is rewriting its public records policy and has asked for employee suggestions on how to improve the current policy. Which of the following suggestions is consistent with the public records law?

- A. In order to ensure the most efficient utilization of staff, the agency should establish a specific two hour period during the day, such as 2PM to 4PM during which the public may request public records.
- B. In order to ensure that records are properly processed, the agency should develop a public records database for the agency records custodian to use in recording public records requests and responses.
- C. In order to ensure that records are properly processed, the agency should develop a written form that the public is required to use when requesting public records.
- D. All of the above are consistent with the public records law.

33. An agency purchasing director has decided that it is time to renegotiate the contract for the agency computer system. The director creates a advisory committee composed of staff and one outside person to review the bids and rank the proposals. The director is not bound by the committee's rankings and can award the contract to any of the qualified firms that submitted bids. Which case does this fact scenario most closely resemble?

- A. **Town of Palm Beach v. Gradison**
- B. **Silver Express v. Board of Trustees**
- C. **Port Everglades Authority v. International Longshoremens' Association**
- D. **Pinellas County School Board v. SunCam, Inc**

**34.** Due to budget cuts, a county commission faces the difficult decision of laying off a number of employees. County employees are upset about this and plan to attend the upcoming commission meetings and demonstrate against the proposed layoffs. Which of the following options are permissible under the Sunshine Law?

- A. In an effort to help provide a more tranquil atmosphere for its discussions, the commission could start holding public meetings at the local country club.
- B. The county manager could hold one on one meetings with each of the individual commission members to discuss the options and come to a consensus as to which employees to lay off thereby avoiding a confrontation at the commission meeting.
- C. The county commission could establish a 24 hour on line electronic bulletin board that would be available during the entire month of June where county commissioners, county employees, and the public could discuss the proposed layoffs.
- D. None of the above.

**35.** School board member Smith is concerned about the school superintendent's proposal to eliminate teacher tenure and tie teacher salaries to student performance on the FCAT. She writes a letter to the other school board members about her concerns and files a copy of the letter as a public record in the school district offices. No school board members respond to Smith's letter. Several weeks later, Smith notices that there is an item on the agenda which calls for a school to be closed. She wants the school to remain open. Smith calls school board member Brown to ask him to vote with her on the issue. He responds that he hasn't decided which way to vote and will have to wait until the meeting to make up his mind. Which of the following statements is correct:

- A. Smith's letter to the school board members and the telephone conversation with Brown violated the Sunshine Law.
- B. Neither Smith's letter to the school board members nor the telephone conversation with Brown violated the Sunshine Law.
- C. Smith's letter to the school board members did not violate the Sunshine Law, but the phone conversation with Brown violated the Sunshine Law.
- D. Smith's letter to the school board members violated the Public Records Law.

**36.** A newspaper reporter conducts separate individual interviews with county commissioners Smith and Jones as well as the county manager (a county employee) about their views on an upcoming agenda item. After his interview, Smith telephones the county manager and they discuss what each said to the reporter. Smith then calls Jones to discuss his conversation with both the reporter and the county manager. Which of the following statements is correct?

- A. The individual one on one interviews between each commissioner and the reporter violated the Sunshine Law because the reporter asked each commissioner how he felt about an upcoming agenda item.
- B. Smith's telephone call with the county manager violated the Sunshine Law.
- C. Smith's telephone call with Jones violated the Sunshine Law.
- D. All of the above.

37. Wal Mart executives have contacted the City of Tallahassee and indicated that they might open up a store on the FSU campus. However, before the executives will talk to the City they insist that the City enter into an agreement providing that if Wal Mart locates in Tallahassee, all City records pertaining to Wal Mart will not be kept at City Hall but instead will be scanned and stored in a digital database maintained by Wal Mart and accessible only through use of a password. Which statement is correct?

- A. The City should not enter into the agreement unless it receives assurances from Wal Mart that they will provide the password to anyone who asks for it as long as the requestor has a legitimate need for the records.
- B. The City should not enter into the agreement unless it receives assurances from Wal Mart that Wal Mart will also maintain hard copies of the digital records.
- C. The City should not enter into the agreement unless it receives assurances that FSU will also be allowed access to the Wal Mart records.
- D. The City should not enter into the agreement.

38. An employee is working on an investigative report. The investigation has been going on for several weeks and the employee has prepared a number of drafts of the report. A public records request is filed with the agency seeking "all records relating to the investigation." Which of the following constitutes a public record?

- A. An early draft that never left the employee's desk and was never circulated to anyone within or outside the agency.
- B. A draft report that was sent to the employee's supervisor and was returned with a note "need to make changes"
- C. A draft report that was emailed to the supervisor but the supervisor has not gotten around to reading it yet.
- D. B and C.

## **ANSWER KEY**

- 1. A
- 2. A
- 3. C
- 4. D
- 5. D
- 6. C
- 7. A
- 8. D
- 9. A
- 10. B
- 11. A
- 12. D
- 13. B
- 14. A
- 15. C
- 16. C
- 17. C
- 18. A
- 19. D
- 20. A
- 21. C
- 22. A
- 23. B
- 24. B
- 25. C
- 26. C
- 27. A
- 28. C
- 29. C
- 30. D
- 31. D
- 32. B
- 33. B
- 34. D
- 35. C
- 36. C
- 37. D
- 38. D

**Laura E. Pincus**

Laura E. Pincus, Esquire, is the Deputy General Counsel for Academics in the Office of General Counsel for the School District of Palm Beach County. Her duties include, but are not limited to, attending IEP/504 meetings, Due Process hearings, Charter Schools, Policies, Student Discipline, Expulsions, assisting schools with Legal Issues such as custody, DCF and court orders. Laura works with other attorneys in the office and the General Counsel to guide the School Board and Superintendent. Prior to her position in the Legal Department, she was the Director of Exceptional Student Education for the School District of Palm Beach County, where her responsibilities included oversight of programs for special needs, 504, gifted, and ESE pre-k programs. Before joining the Exceptional Student Education Department, Laura served as in-house counsel for the School District of Palm Beach County and then Miami-Dade Public Schools, handling a variety of academic issues including ESE, Section 504, Student Discipline, Expulsions, Alternative Education, Choice Programs, and custody issues. Laura Pincus received her J.D. from Nova Southeastern University. She also earned a Master's Degree in Education and a Bachelor's Degree in Communication from The American University in Washington, D.C. She is a member of the Education Law Committee of the Florida Bar and earned that certification as well in 2015. Laura is also an adjunct professor at Nova Southeastern and at FAU.

# Individuals with Disabilities Education Improvement Act of 1997 (IDEA)

Laura E. Pincus

February 29, 2016

# Exceptional Student Education (ESE)

- Eligibilities are:
    - Autism Spectrum Disorder (ASD)
    - Deaf/Hard of Hearing (DHH)
    - Dual Sensory Impaired
    - Emotional/Behavioral Disability (E/BD)
    - Gifted (Florida)
    - Hospital/Homebound
    - Intellectual Disability (InD)
    - Other Health Impaired (OHI)
    - Orthopedic Impairment
    - Specific Learning Disability (SLD)
    - Traumatic Brain Injury (TBI)
    - Visually Impaired (VI)
    - Language Impaired (LI)\*
    - Speech Impaired (SI)\*
    - Occupational Therapy (OT)\*\*
- \* also a related service  
\*\* must be accompanied by another eligibility

# Historical Perspective

- 1915: Children with mental and physical handicaps are exempted from new compulsory attendance laws
- 1926: First special education class started in Jacksonville
- 1968: Florida special legislation mandated a 5-year ESE plan
- 1975: Congress enacted the Education for All Handicapped Children Act (Public Law 94-142)
- 1986: EHA amendments mandate services from Birth
- 1997: IDEA Amendments expand initiatives from high school to adult living
- 2002: NCLB
- 2004: Individuals with Disabilities Education Improvement Act revised the IEP, due process and discipline provisions
- 2007: Florida adopts Sunshine State Standards Access Points for students with disabilities

# IDEA Basics

- Right to a Free Appropriate Public Education (FAPE)
- Procedural Safeguard Rights for Children and their Parents
- 1997: emphasis on improving results
  - Meaningful access to general curriculum
  - High accountability (including in NCLB/education reform efforts)

# IEP

- Individualized Education Program
  - Must be developed within 30 days of eligibility
  - Must be reviewed and revised annually
  - No pre-determination
  - Must be developed with the following people around the table:
    - Parents (must be invited)
    - General Education Teacher of the Child
    - Special Education Teacher of the Child
    - Evaluation Specialist
    - Local Education Agency (LEA) representative

# IEP Considerations

- Strengths of student/Concerns of parents
- Results of most recent evaluations
- Performance on statewide or district-wide assessments
- Academic, development and functional needs of student
- Positive Behavior interventions where behavior impedes learning
- Limited English Proficiency needs
- Braille
- Communication needs
- Assistive technology considerations
- Need for extended school year (ESY)

# IEP Content Requirements

- Statement of student's present levels of academic achievement and functional performance
- Measurable annual goals
- Benchmarks or short term objectives
  - Required when student is taking the alternate assessment or within the discretion of the IEP Team
- Statement of special education and related services to be provided
- Statement of individual appropriate accommodations for statewide and district assessments (and whether student will take FAA)
- Projected date services to start
- Statement of how often progress will be reported to the parents
- Transition information
- LRE information

# Least Restrictive Environment

- “LRE”: To the maximum extent appropriate, students with disabilities must be educated in the least restrictive environment
- Special classes, separate schooling or other removal of students with disabilities from the regular education environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily

# Continuum of Services

- Regular classes
- Resource room
- Itinerant instruction
- Special classes
- Special schools
- Home instruction
- Instruction in hospitals and institutions

# Placement Decisions

- Must be made by a group of persons, including parents and other persons knowledgeable about the student, the meaning of evaluation data and the placement options
- Placement must be reviewed annually
- Based on the student's IEP
- Close as possible to the student's home
- Presumption: student will attend the school he/she would attend if nondisabled

# Free Appropriate Public Education

“Basic floor of opportunity” *Board of Education of the Hendrick Central School District v. Rowley*, 553 IDELR 656 (U.S. 1982)

FAPE does not require a “Cadillac,” but it does require a “Chevrolet.” *Doe v. Board of Education of Tullahoma City Schools*, 20 IDELR 617 (6<sup>th</sup> Cir. 1993)

“Appropriate” is determined on a case by case basis. Always individual and based on unique needs of student.

# Discipline Provisions

- 10-day limitation (beyond 10 is considered a change in placement)
- Manifestation Determinations: (1) the behaviors resulted from or were a manifestation of an inappropriate placement or educational program for the student and (2) if the misconduct resulted from the student's disability.
- FBA/BIPs (Collect ABC data; develop an individualized plan to address target behaviors)
- Interim Alternative Education Setting (IAES): 45 school days
  - Weapons (weapon, device, instrument, material, or substance, animate or inanimate, that is used for, or is readily capable of, causing death or serious bodily injury, except that such term does not include a pocket knife with a blade of less than 2 ½ inches in length)
  - Drugs (controlled substance not legally possessed)
  - Serious Bodily Injury (substantial risk of death; extreme physical pain; protracted or obvious disfigurement; or protracted loss or impairment of a function of a bodily member, organ or mental faculty.
  - Review 6A-6.03312

# Procedural Safeguards

- Prior Written Notice
- Records
- Evaluations
  - IEEs
- Due Process/OCR/State and Local Complaints
  - “Stay Put”
- Consent/Withdraw
  - Review 6A-6.03311

# Questions?

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# Joseph M. Goldstein

Partner

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#### PRACTICE AREAS

Government Contracts  
Administrative Law  
Government Law  
Litigation  
Construction  
Equine Law

#### INDUSTRIES

Construction  
Defense  
Government Contracts  
Real Estate

#### BAR ADMISSIONS

The Florida Bar

#### COURT ADMISSIONS

U.S. District Court,  
Southern, Middle and  
Northern Districts of  
Florida

U.S. Tax Court  
U.S. Court of Federal  
Claims

Businesses involved in disputes or government bid protests turn to Joseph M. Goldstein for several reasons: his expertise, trial experience and government background. He is the Managing Partner of the Fort Lauderdale office, where he is a member of the Litigation Department. Mr. Goldstein holds an office in Tallahassee as well. Mr. Goldstein is among the less than one percent of attorneys who are Florida Bar Board Certified in Business Litigation. His qualifications in this area enhance his practice, which focuses on business litigation; government contracts, including bid protests; litigation involving noncompetition agreements; and real estate related disputes. He generally represents defense companies, technology firms, construction firms and government service providers.

#### REPRESENTATIVE CASES

- As the result of a bid protest trial, Mr. Goldstein successfully helped a technology company receive a government contract after its proposal was initially rejected.
- He reversed a potential debarment from government contracting for a construction services company that was under allegations of improper conduct.
- He successfully defended a business in a dispute involving alleged theft of proprietary materials and noncompete agreements. This was done through prosecution of an evidentiary hearing and settlement negotiations, including overturning an injunction prohibiting competition.

#### AUTHOR

- Author, Practitioner Insights, "Government Employee May be qui tam Relator Under Federal but not State False Claims Act"
- Florida State Procurement Handbook
- Author, Chapter on Florida Procurement Law, American Bar Association, Section of Public Contract Law, "Guide to State Procurement, a 50-State Primer on Purchasing Laws, Processes and Procedures."

#### RECOGNITION

- Martindale Hubbell A-V Rated
- *The Best Lawyers in America*®, selected for inclusion in Administrative Law, 2011, 2012, 2013, 2014, 2015
- *The Best Lawyers in America*®, selected Administrative/Regulatory Law "Lawyer of the Year" in Miami, 2014
- *South Florida Business Journal*: Listed as a "Power Leader" in the South Florida region, 2014



## Joseph M. Goldstein (cont.)

- *South Florida Legal Guide* - "Top Lawyers in South Florida," selected for inclusion, 2011, 2012, 2014
- *Florida Super Lawyers*, selected for inclusion in Business Litigation in 2006, 2008, 2009, 2010, 2011, 2012, 2013, 2014
- *Florida Trend's Florida Legal Elite*, selected for inclusion: 2014

### BACKGROUND

A former Assistant General Counsel for the federal government, Mr. Goldstein has experience in government contracting law and is well known within local and state procurement divisions. He has also been a part-time hearing officer for Broward County for bid protests and debarment hearings under the Broward County Procurement Code. He is a former member of the City of Plantation Planning & Zoning Board. The American Bar Association, Public Contract Law Section, has appointed Mr. Goldstein to the following leadership position: Vice-Chair of the State and Local Procurement Division for the 2012-2013 year.

After graduating from law school, Mr. Goldstein served from 1989 to 1991 as a law clerk for Judge Patricia Fawsett on the U.S. District Court, Middle District of Florida. Following his clerkship, Mr. Goldstein fulfilled his military commitment arising from his ROTC scholarship. He was selected to serve in the Air Force General Counsel's Honors Program at the Pentagon, where he served on active duty from 1991 until 1994. There he represented the Air Force in more than 150 bid protests before the General Services Board of Contract Appeals and the General Accountability Office. He conducted legal reviews and negotiations with major defense contractors and assisted the Department of Justice in prosecuting fraud and qui tam suits. He left the Air Force as a Captain and was awarded the Meritorious Service Medal.

Mr. Goldstein is currently the Vice Chair for the Broward Public Library Foundation and a former Chair man of the Board of the Leadership Broward Foundation. He also formerly served as a Manager for the Plantation Eagles Soccer Club Athletic League.

### EDUCATION

- Georgetown University Law Center, LL.M., Tax, with distinction, 1994
- Nova University, J.D., *magna cum laude*, 1989
- Cornell University, B.S., Urban and Regional Studies, 1986

### AFFILIATIONS

- American Bar Association - Past or Present State and Local Procurement Division, Vice Chair; State and Local Bid Protest Committee, Vice Chair; State Law Database Coordination, Co-Chair
- Florida Bar Board Certified, Business Litigation
- Former Chair, Florida Bar 17th Judicial Circuit Grievance Committee "D"
- Former Chair, Leadership Broward Foundation
- Vice Chair, Broward Public Library Foundation
- Board Member of the Broward Workshop, [www.browardworkshop.com](http://www.browardworkshop.com)





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## **Education Law Certification**

## **Procurement and Bid Protests**

# Introduction

- Procurement and Bid Protests
- Joseph M. Goldstein
- Board Certified in Business Litigation
- 954.847.3837
- [jgoldstein@shutts.com](mailto:jgoldstein@shutts.com)



# Goals for Presentation

- Help Pass Test
- Issue Spotting
- Florida Administrative Code § 6A-1.012 (2/25/2009) – purchasing rule
- Fla. Stat. § 255.0516 (2015) – opt in for bid protest
- Fla. Stat. § 120.57(3) (2015) – bid protest procedures



# Background

- Requirement and Rules for Competition
- 3 Types of Procurements
  - Invitation for Bids (IFB)
  - Request for Proposals (RFP)
  - Invitation to Negotiate (ITN)
- Bid Protests
- Detailed Written Materials



# Basic Public Procurement Concepts

- No Common Law Requirement – No Constitutional Requirement
- Nearly All Government Has Requirements
  - Purpose – prevent favoritism and inspire public confidence in public spending
  - Fair and Open
  - Document decisions



# Government has Broad Discretion

- Honest Discretion – even if reasonable people may disagree
- Arbitrary or Capricious – without facts or logic
- Even greater discretion to reject all bids



# Chapter 287 Rules Do Not Apply

- State Agencies Only
- Executive Level
- Does Not Include Schools or Universities.  
*Dunbar Elec. Supply, Inc. v. School Bd. of Dade County*, 690 So.2d 1339, 1340 (Fla. 3<sup>rd</sup> DCA 1997)
- CCNA, 287.055(2014) - applies



# Educational Institutions

- Law and Rules of State Board of Education or Board of Governors
- Fla. Stat. § 1010.04(1) (2014)
- Fla. Stat. § 1011.07 (2014) and FAC 6A-1.091 (12/5/1974) (regarding use of internal funds).



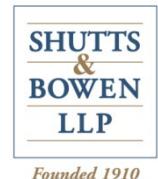
# Educational Facilities

- Fla. Stat. §§ 1013.45 – 1013.512 (2014)
- School Districts - FAC § 6A-1.012(7) – above \$50,000



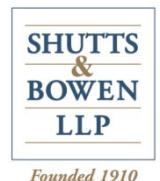
# Universities

- Board of Governors Regulations, Chapter 18
- Competitive solicitations must be used for the purchase of all goods and services greater than \$75,000. BOG Regulation 18.001(2) (3/28/13)
- No dividing up
- If only one, re-procure or continue



# Colleges

- Fla. Stat. § 1010.04(1)(a) (2014) (“Purchases and leases of the Florida College System shall comply with the requirements of law and rules of the State Board of Education.”)
- FAC 6A-14.0734(1) (6/20/07) - compete among three sources above \$65,000



# Exceptions to Competition

- Fla. Stat. § 1010.04(4) (2014) (authorizes rule where impractical)
- FAC § 6A-1.012(11)
  - Legal Services
  - Academic Program Reviews
- Single or Sole Source – post for 7 days
- Emergencies – agency cannot create – limited competition
- Piggybacking – State/Term or Others – must be competitive (implied)



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# Competitive Solicitations

- Three Types: IFB, RFP, ITN
- Bids (IFB) – low price, responsive and responsible
  - Responsiveness - Minor Irregularities v. material deviation
  - Late Bids – have consistent practice
  - Definitive Responsibility
  - Not most responsible
  - Litigation History



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# More Complex Methods

- Proposals (RFP)
  - Responsive and Responsible
  - Best Value: Price and Technical
  - Low Price, Technically Acceptable (LPTA)
- Negotiation (ITN)
  - Responsive and Responsible
  - Best Value: Price and Technical
  - Best and Final Offers
  - Negotiation



# Common Issues

- Make Available to all through public posting
- Clear and Fair Specifications
- Reject All



# Bid Protests

- School Board Not State Agency for Bid Protest
- For purposes of this subsection, the definitions in s. 287.012 apply. Fla. Stat. § 120.57(3)(g)
- So Not Mandatory Under Chapter 120
- Fla. Stat. § 255.0516 (2014) – opt in



# Bid Protest Bond

- Bond –
- 25k or 2% lowest bid, the greater (500K+ projects)
- 5% all other projects
- Opportunity to Cure?



# General Procedural Rules

- Notice of Protest – 72 hours
- Formal Written Protest – 10 days
- Bid Protest Bond



# Standard of Review/Proof

- Award Decisions - clearly erroneous, contrary to competition, arbitrary, or capricious.
- Reject All - whether the agency's intended action is illegal, arbitrary, dishonest, or fraudulent.



# Attorney's Fees

- If at the hearing the agency prevails, it shall recover all costs and attorney's fees from the protestor
- Bid Protest Bond Protects Agency
- If the protestor prevails, the protestor shall recover from the agency all costs and attorney's fees



**Gregory A. Haile, Esq.**, is the General Counsel and Vice President for Public Policy and Government Affairs for Broward College. Mr. Haile was educated at the Columbia University School of Law, where he was a *Harlan Fiske Stone Scholar* and served as the Editor-in-Chief of the National Black Law Journal; and Arizona State University, where he graduated *magna cum laude* and was selected from among more than 13,000 students as the most outstanding undergraduate in his college. Mr. Haile joined Broward College after starting his legal career as a corporate litigator. Further, Mr. Haile has served as an adjunct professor with Broward College teaching Business Law and Ethics, Miami Dade College teaching Business Law, and this summer he will teach a 4 credit course in Higher Education Law and Policy at Harvard University. He also recently completed a fellowship at the Vanderbilt University Higher Education Management Institute.

In 2011, Mr. Haile became the first in-house chief legal counsel for Broward College, which has approximately 4,000 employees and approximately 68,000 students. He oversees broad-ranging legal issues relating to tax, immigration, employment, labor, copyright, real estate, construction, tenure, FERPA, and numerous other areas. He has also developed and oversees Broward College's centralized compliance system serving in partnership with more than a dozen divisions throughout Broward College. Further, he oversees all local, statewide, and federal government affairs for Broward College, including advocating before local political leaders, state legislators, and members of the U.S. House of Representatives and the U.S. Senate to enhance their understanding of higher education issues, the impact of potential or pending legislation on institutions of higher education, and the impact of Broward College on the community at-large. He has developed relationships resulting in visits from leaders within the current U.S. Presidential Administration, as well as other national and statewide political leaders from both major political parties. He also helps Broward College develop and prioritize its policy agenda and he co-leads community engagement efforts, including serving as the conduit between Broward College and local, statewide, and national organizations with shared interests. Mr. Haile also spends significant time serving the community-at-large. Currently he chairs the Gold Coast Council for Leadership Florida, chairs the alumni committee for the graduates of the Florida College System Chancellor's Leadership Seminar, co-chairs the Arizona State University Alumni Group of Florida, and serves on the Board of Free the Slaves (a Washington DC based NGO established to eradicate slavery throughout the world). He has also chaired and served on numerous other boards.

# Education Law Certification Examination Webinar

1

**HIGHER EDUCATION ADMINISTRATION  
GREGORY A. HAILE**

**FEBRUARY 29, 2016**

# Topics Regarding Higher Education Administration

2

- Title IV Financial Aid
- Faculty Tenure/Continuing Contract and Promotion (including Evaluations)

# Title IV Financial Aid

3

## Brief History

- Title IV of the Higher Education Act of 1965 (HEA) (Higher Education Act of 1965, Pub. L. No. 89-329, tit. IV, 79 Stat. 1232 (codified as amended in scattered sections of 20 U.S.C. §§ 1070 to 1099c-2, 42 U.S.C. §§ 2751-2756b, 2006 & Supp. IV 2011)) established the foundation for federal student aid in higher education.
- The HEA serves to ensure that every student, regardless of personal wealth, should have the opportunity to pursue career training or a degree.
- Prior to the Servicemen's Readjustment Act of 1944 (G.I. Bill), federal support for higher education took the form of direct support for public institutions, such as land grants for state universities through legislation.
- The G.I. Bill created a student-aid program oriented around portable subsidies.
- Title IV of the HEA further expanded upon this model by offering grants to the neediest students and a guaranteed student-loan program to low-and middle-income students. The guaranteed student-loan program encouraged private lenders to offer student loans on favorable terms to the borrower.

# Title IV Financial Aid

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## Eligibility (All Institutions)

- The state government, the higher education industry, and the federal government (thru the Department of Education) determine eligibility.
- Title IV requires states to establish “minimum standards for integrity, financial stability, and educational quality.”
- States also regulate higher-education providers through a variety of channels unrelated to Title IV eligibility, such as consumer-protection statutes and the Consumer Financial Protection Bureau.
- Title IV requires higher-education institutions to be accredited by a federally recognized accrediting agency, such as SACSCOC (Southern Association of Colleges and Schools Commission on Colleges).

# Title IV Financial Aid

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## Eligibility (All Institutions)

- Accrediting agencies, which are made up of professionals from the education industry, evaluate educational methods.
- The Department of Education certifies accreditation organizations and only certified accreditors may grant the accreditation required for Title IV eligibility.
- If an institution's former students have unacceptably high cohort default rates (30% or greater for three consecutive years, or 40% in the latest year, or both) on Title IV loans, for example, the institution loses the ability to accept Title IV funds (The default rate is a measure of the number of students who default on their student loans compared to the total number of students who began repayment on their loans at the beginning of a measured period).

# Title IV Financial Aid

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## Eligibility (For Profit Institutions)

- The 90/10 rule requires that a school receive at least 10 percent of its revenue from non-Title IV sources. Federal and state student aid from other programs, such as veterans' benefits or federal and state job training grants, count toward the 10 percent, along with institutional loans offered to students by the school itself.
- Institutions are barred from offering recruiters incentive-based payments based on securing enrollment or financial aid.
- Institutions must offer programs that prepare students for “gainful employment in a recognized occupation.” Applies to for profit programs and certificate programs at private non-profit and public institutions.

# Faculty Tenure/Continuing Contract and Promotions (including Evaluations)

- Colleges and universities generally establish criteria for evaluating the quantity and quality of service by faculty members and require consideration of this service in promotion, tenure/continuing contract, and other reward measures.
- The criteria for rewarding faculty members should be consistent with the educational goals and objectives of the institution.

# Faculty Tenure/Continuing Contract and Promotions (including Evaluations)

## A. Types of Evaluations

1. Evaluations by supervisors;
2. Assessment by peers;
3. Self-evaluation; and
4. Student evaluations of instruction.

*Carley v. Arizona Bd. of Regents*, 153 Ariz. 461, 737 P.2d 1099 [39 Ed. Law Rep. 1294] (App. 1987) (reliance by institution on student evaluations in denying tenure/continuing contract not violative of academic freedom to express controversial ideas, because ‘academic freedom is not a doctrine to insulate a teacher from evaluation by the institution that employs him’); *Martin v. Parrish*, 805 F.2d 583 [35 Ed. Law Rep. 1011] (5th Cir.1986) (termination based on student complaints of faculty member profanity in class upheld).

# Faculty Tenure/Continuing Contract and Promotions (including Evaluations)

## B. Categories of Evaluation

1. Research, Publications, and Scholarship
  - Most important category of evaluation at doctoral granting institutions, not community colleges.
2. Teaching Effectiveness
  - Generally by peers and students.
  - Primarily subjective.
  - In *Agarwal v. Regents of the University of Minnesota*, 788 F.2d 504 (8<sup>th</sup> Cir. 1986), dismissal of a tenured professor upheld because student evaluations found him incompetent and harassing.
  - In *Conway v. Pacific University*, 324 Or. 231, 924 P.2d 818 (1996), poor student evaluations were the basis for denying tenure/continuing contract to a professor.

# Faculty Tenure/Continuing Contract and Promotions (including Evaluations)

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## B. Categories of Evaluation

### 3. Service

- Service to the college and university or the community.
- This is given very little weight, and is rarely if ever the sole basis for denial of reappointment, promotion, or tenure/continuing contract.

### 4. Working Relationships

- *Johnson v. Michigan State University*, 547 F. Supp. 429 (W.D. Mich. 1982) involved a medical school's denial of tenure/continuing contract to a faculty member who repeatedly complained about her office facilities and secretarial support. She was described as abrasive, intimidating, authoritarian, and incapable of accepting criticism by her colleagues. The court upheld her tenure/continuing contract denial.

# Faculty Tenure/Continuing Contract and Promotions (including Evaluations)

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## **C. Just Cause for Termination Following Tenure/Continuing Contract**

- Due Process.
- Tenure/continuing contract is not a guarantee of permanent employment and a tenured faculty member's employment can be terminated for "just cause."

# Faculty Tenure/Continuing Contract and Promotions (including Evaluations)

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Courts have found just cause to terminate for the following reasons:

1. Immorality, actions of moral turpitude, or evident unfitness to teach.
  - For example, using vulgar language routinely and unnecessarily in the classroom, physically assaulting another person, having a sexual relationship with a student.
2. Abusive Conduct
  - For example, being rarely prepared for classes; having little interest in his students and failed to interact with them; failing to keep office hours; failing to advise students; being uncooperative with colleagues and the administration; ignoring superiors' directives as well as the university policies and procedures; and recklessly, and untruthfully, accusing superiors of incompetence and discriminatory practices.

# Faculty Tenure/Continuing Contract and Promotions (including Evaluations)

13

Courts have found just cause to terminate for the following reasons:

3. Insubordination, Contract Breaches, and Violations of University Rules and Regulations
  - For example, missing classes after being expressly denied permission to miss classes and after it had been determined that missing classes would adversely affect the students, or breach an exclusivity agreement to only work for the university.
4. Incompetence
  - For example, negative faculty ratings, bad student ratings, and refusal to resolve problems with faculty.
5. Academic Dishonesty
  - For example, plagiarism.

## Faculty Tenure/Continuing Contract and Promotions (including Evaluations)

14

Courts have found just cause to terminate for the following reasons:

### 6. Financial Exigency.

- Tenured professor with an outstanding professional record of scholarship, teaching, and public service can have her contract terminated due to financial exigency.

# State Colleges/Community Colleges

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## **6A-14.0411 Employment Contracts for Full-Time Faculty.**

\*\*\*

(3) Each board of trustees, after receiving a recommendation from the president and ensuring that input has been received from the faculty, shall establish criteria which must be met by a full-time faculty member before a continuing contract may be awarded.

(a) Such criteria, shall include:

1. Quantifiable measured effectiveness in the performance of faculty duties;
2. Continuing professional development;
3. Currency and scope of subject matter knowledge;
4. Relevant feedback from students, faculty and employers of students;
5. Service to the department, college, and community; and,
6. Criteria determined by the board under subsection (8) of this rule.

(b) Such criteria may include:

1. Educational qualifications, efficiency, compatibility, student learning outcomes, character;
2. Capacity to meet the educational needs of the community;
3. The length of time the duties and responsibility of this position are expected to be needed; and,
4. Such other criteria as shall be included by the board.

\*\*\*

(6) In order to contribute to the continual growth and development of faculty, each board shall adopt policy requiring periodic post-award performance reviews for faculty under continuing contract. Periodic reviews of continuing contract faculty shall use the criteria under subsection (3) of this rule.

# Questions?

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## **J. Paul Carland, II, General Counsel**

J. Paul Carland, II, has been specializing in the area of education law since 2001. He is currently the General Counsel to The Seminole State College of Florida. As General Counsel, he is responsible for advising the Board of Trustees and President as well as faculty and staff on all legal matters affecting the College. He also supervises all legal service providers and outside counsel and supports institutional compliance through his management of the Legal Affairs Office. Previous to that, he served as General Counsel to The Broward County School Board in Fort Lauderdale, Florida from June of 2011 to January of 2016. The Broward School Board was the 6<sup>th</sup> largest school board in the nation serving over 250,000 students in over 250 schools. It had an annual budget of over \$3 million dollars and employed over 30,000 employees. Before serving the Broward School Board, Mr. Carland served as General Counsel to the Hernando County School Board in Brooksville, Florida for five years. Before that, he served as Staff Attorney to the Lee County School Board in Fort Myers, Florida for over four years. As a K-12 lawyer, he was a member of the Florida School Board Attorneys Association (FSBAA), the Florida Bar's Education Law Committee, and the National School Board Association's Council of School Attorneys (COSA). He has served on the FSBAA's Board of Directors (2010-2011) and as President (2009-2010), Vice President (2008-2009), and Treasurer (2007-2008). In December of 2010, he received the Richard "Spike" Fitzgerald Annual Award from the Florida School Board Association (FSBA). He has been a member of the Florida Bar since 1991 and is authorized to practice in all courts in the State of Florida as well as the federal courts for the Southern and Middle Districts of Florida and the 11th Circuit Court of Appeals. In 2013, Mr. Carland was certified by the Florida Bar as a specialist in education law.

# FLORIDA'S ADMINISTRATIVE PROCEDURES ACT

J. Paul Carland, II, Esq.  
General Counsel  
The Seminole State College of Florida

Florida Bar - Education Law Certification  
Review Course  
February 29, 2016

# APPLICATION

- The Act governs various “agency” functions.
- Definitions
  - “Agency” includes “educational units” – 120.52(1)
  - “Educational units” - 120.52(1)(a)
    - “Educational unit” means a local school district, a community college district, the Florida School for the Deaf and the Blind, or a state university when the university is acting pursuant to statutory authority derived from the Legislature - 120.52(6)
    - University not subject to APA when acting pursuant to its authority granted via Article IX of the Constitution (such as when imposing disciplinary sanctions against a student for violation of its student code of conduct) – Couchman v. University of Central Florida, 84 So. 3d 445 (Fla. 5<sup>th</sup> DCA 2012)
  - “Educational units” enjoy certain exceptions to the Act – see 120.81(1)
    - Exceptions to the general requirements in the statute will be noted in this overview where applicable by *italicized text with reference to the specific exception.*

# WHAT'S COVERED\*

- Public Meetings
- Rulemaking
- Rule Administration
- Due Process

\*Not including procurement

# PUBLIC MEETINGS

Note: The requirements for public comment at “Board or Commission” meetings are found at §286.0114, F.S., not in Chapter 120.

- Notice - 120.525
  - Must “notice” meetings, hearings and workshops (non-emergency) “by publication” no less than seven (7) days in advance
  - Publication by educational units – *120.81(1)(d)*
    - *By publication in a newspaper of general circulation in the affected area;*
    - *By mail to all persons who have made requests of the education unit for advance notice of its proceedings and to organizations representing persons affected by the proposed rule; and*
    - *By posting in appropriate places so that those particular classes of persons to whom the intended action is directed may be duly notified.*
  - Publication must include notice on the agency’s website
  - Must include “statement of the general subject matter to be considered”

# PUBLIC MEETINGS

- Agendas - 120.525
  - Shall be prepared for meetings at least seven (7) days in advance of the meeting
    - *Agendas for “special meetings” of School Boards shall be prepared at least 48 hours in advance - 120.81(1)(j)*
  - “The agenda, along with any meeting materials available in electronic form excluding confidential and exempt information, shall be published on the agency’s website.”
  - After the agenda is “made available,” changes may only be made for “good cause” as determined by the “person designated to preside” over the meeting and as stated on the record

# PUBLIC MEETINGS

- Emergency Meetings - 120.525
  - Grounds - immediate danger to the public health, safety, or welfare that requires immediate action
    - Must publish in writing the specific facts and reasons for finding need for emergency meeting
      - Publish at the meeting or prior to it
      - Findings and procedural fairness are subject to judicial review
  - Notice - fair under the circumstances and necessary to protect the public interest
  - Agency only takes action necessary to protect public interest

# RULEMAKING

- Definition - 120.52(16)
  - “Rule” means each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency and includes any form which imposes any requirement or solicits any information not specifically required by statute or by an existing rule. *The term also includes the amendment or repeal of a rule.* The term does not include:
    - (a) Internal management memoranda which do not affect either the private interests of any person or any plan or procedure important to the public and which have no application outside the agency issuing the memorandum.
    - (b) Legal memoranda or opinions issued to an agency by the Attorney General or agency legal opinions prior to their use in connection with an agency action.
    - (c) The preparation or modification of:
      - 1. Agency budgets.
      - 2. Statements, memoranda, or instructions to state agencies issued by the Chief Financial Officer or Comptroller as chief fiscal officer of the state and relating or pertaining to claims for payment submitted by state agencies to the Chief Financial Officer or Comptroller.
      - 3. Contractual provisions reached as a result of collective bargaining.
      - 4. Memoranda issued by the Executive Office of the Governor relating to information resources management.
  - *Does not include curriculum – 120.81(1)(b)*
  - *Does not include statewide standardized tests required by law or administered by FDOE – 120.81(1)(c)*

# RULEMAKING

- Authority – 120.536 & 120.54(1)
  - No inherent authority - must be a grant of rulemaking authority and specific law to be implemented (enabling statute)
    - *School Boards - general authority see §120.81(1)(a) and §1001.41*
    - *Colleges – general authority see §1001.64(4)*
    - *Universities – “regulatory” authority see §1001.706(2)*
- General Requirements – 120.54
  - Cannot delay implementation of a statute pending rulemaking unless statute expressly states it is not effective until rulemaking complete
  - Where required by statute, must “draft and formally propose” rule within 180 days of effective date of statute unless it states otherwise
  - Each rule shall only contain one subject
  - No retroactive rules
  - For rules adopted after 12/31/2010 - material may only be incorporated by reference if:
    - The material has been submitted electronically with the rule and is available to the public via hyperlink in the rule; or
    - If there are copyright concerns, a statement to that affect must accompany the notice for the rule and include the location where the material is available for inspection
  - A rule may incorporate another rule by reference
    - Any subsequent changes to the incorporated rule are automatically included in the referencing rule unless the referencing rule says otherwise
  - *No requirement to file documents with the State as is the case with other agencies – 120.81(1)(e)*

# RULEMAKING

- **Procedures – primary components** (DISCLAIMER: The author is aware of a wide disparity in practices / procedures amongst “educational units.” Interpretation and application of procedures in the statute can be awkward for these units as such are not required to make certain filings, etc., as are required of executive agencies. The following is strictly a review of what is in the statute.)
  - Rule Development
    - Notice (mandatory)
      - Subject
      - Short explanation of purpose and effect
      - Specific legal authority
      - Preliminary text (draft rule)
      - Not required when intended action “repeal”
      - No clear timeline (just “before” adoption process)
      - *Remember 120.81(1)(d) exception for education units with regard to filing and publication of notices*
    - Workshops (optional – required upon demand)
      - Notice of workshop published at least 14 days before workshop
      - Staff must be present to answer questions
      - May use facilitator, mediator or other ADR tools if necessary
    - Negotiated rulemaking (optional)
      - Notice of session at least 30 days before session occurs
      - Agency selects representative groups / persons to serve on committee
        - Persons can apply to serve on committee
      - Committee meetings must be noticed and open to the public
      - Committee must be chaired by “neutral facilitator or mediator”
      - The process is not considered “agency action”

# RULEMAKING

- Procedures (continued)
  - Adoption
    - Notice
      - Same basic requirements for Rule Development plus:
        - Identification of statutes being implemented or interpreted by rule
        - When and where notice of rule development was published
        - Published 28 days prior to action
        - Mail notice to anyone mentioned in the rule or anyone who has made a prior request for such
        - *Remember 120.81(1)(d) exception for education units with regard to filing and publication of notices*
    - Public Hearings
      - Optional except where requested by any “affected” person (request required within 21 days of notice)
      - Due process hearing (120.569 and 120.57) available where:
        - Person “timely asserts” proceedings affect substantial interests, and
        - Can demonstrate proceedings do not provide adequate opportunity to protect those interests
    - Modification
      - If after hearing (or time has expired to request same)
        - Only for “technical changes” that do not affect the substance of the rule, or
        - Publish notice of changes with reasons for same and file it with JAPC
    - Withdrawal
      - Any time after notice but before adoption (in whole or in part)
      - After adoption but before becoming effective (filing), only for the following reasons:
        - JAPC objects (or objection is being considered)
        - Final order entered in rule challenge
    - Filing (effective date – unless later effective date noted in the rule)
      - with Agency Head (generally within 90 days after notice of final adoption)

# RULEMAKING

- Procedures (continued)
  - Third Party Initiation
    - By any person “regulated” by the agency or “having substantial interest”
    - May seek adoption, amendment or repeal of a rule
    - Agency must initiate rulemaking within 30 calendar days or deny the petition with a written statement of its reasons for denial
      - Regarding unadopted rules – initiate in 30 days or have public hearing to consider whether or not public interest served to continue “case-by-case” application
        - If case-by-case approach adopted, must publish “statement” of reasons and file same with JAPC
  - Record
    - Required to maintain copies of notices, summaries, comments and other materials for as long as the rule is in effect
    - If repealed, records can be destroyed in accordance with state retention schedules
    - “Pertinent material” received by agency within 21 days after notice or before final public hearing

# RULE ADMINISTRATION

- Statements of Regulatory Cost – 120.541
  - Required (see also 120.54(3)(b)) for adoption, amendment or repeal when:
    - Rule adversely impacts small business; or
    - Rule likely to directly or indirectly increase regulatory costs in excess of \$200,000 in the aggregate in the state within 1 year
    - Where citizen has filed a good faith proposal for lower costs alternative (see below)
    - *Not required with regard to personnel related rules for school districts or FDOE rules related to certification – 120.81(1)(l)*
  - Must include
    - Economic analysis
    - Good faith estimate of number of persons affected
    - Good faith estimate as to cost of implementing rule and impact on state or local revenues
    - Good faith estimate of transactional costs to citizens as a result of the rule
    - Analysis of impacts on small business (and small counties / cities)
  - Substantially affected persons may submit good faith written proposals for lower cost regulatory alternatives to a rule (w/in 21 days of notice of adoption)
    - Agency must respond
  - Failure to prepare statement of regulatory cost or respond to citizen alternative is “material failure” to follow rulemaking procedures
    - May be raised in rule challenges under certain conditions

# RULE ADMINISTRATION

- Variances and Waivers – 120.542
  - Procedure
    - Initiated by the filing of a petition by a “person subject to regulation by an agency”
      - Petition must note the following:
        - (a) The rule from which a variance or waiver is requested.
        - (b) The type of action requested.
        - (c) The specific facts that would justify a waiver or variance for the petitioner.
        - (d) The reason why the variance or the waiver requested would serve the purposes of the underlying statute.
    - *Notice Requirements – see 120.81(1)(d) for educational units*
    - Within 30 days after receipt of a petition the agency shall review it and request submittal of all additional information (if necessary)
    - Within 30 days after receipt of such additional information, the agency shall review it and may request only that information needed to clarify the additional information
    - An agency shall grant or deny a petition within 90 days after receipt of the original petition, the last item of timely requested additional material, or the petitioner's written request to finish processing the petition - if not granted or denied within 90 days it is deemed approved
    - The decision to grant or deny the petition shall be supported by competent substantial evidence and is subject to ss. 120.569 and 120.57

# RULE ADMINISTRATION

- Variances and Waivers (cont.)
- General
  - A public employee is not a person subject to regulation under this section for the purpose of petitioning for a variance or waiver to a rule that affects that public employee in his or her capacity as a public employee.
    - *Additionally, students are not persons subject to regulation for these purposes – 120.81(1)(k)*
  - Variances and waivers shall be granted when the person subject to the rule demonstrates that the purpose of the underlying statute will be or has been achieved by other means by the person and when application of a rule would create a substantial hardship or would violate principles of fairness.
    - “substantial hardship” means a demonstrated economic, technological, legal, or other type of hardship to the person requesting the variance or waiver
    - “principles of fairness” are violated when the literal application of a rule affects a particular person in a manner significantly different from the way it affects other similarly situated persons who are subject to the rule

# RULE ADMINISTRATION

- Rule Challenges – 120.56

- General
  - Who may file?
    - Any person substantially affected by a rule or a proposed rule may seek an administrative determination of the invalidity of the rule on the ground that the rule is an invalid exercise of delegated legislative authority.
  - The petition seeking an administrative determination must:
    - state with particularity the provisions alleged to be invalid with sufficient explanation of the facts or grounds for the alleged invalidity and facts sufficient to show that the person challenging a rule is substantially affected by it, or that the person challenging a proposed rule would be substantially affected by it.
    - be filed by electronic means with the division
  - Within 10 days after receiving the petition – DOAH must assign an administrative law judge (ALJ)
  - The hearing must be held within 30 days thereafter, unless the petition is withdrawn or a continuance is granted by agreement of the parties or for good cause shown.
    - good cause includes written notice of an agency's decision to modify or withdraw the proposed rule
  - Within 30 days after the hearing, the ALJ shall render a decision and state the reasons therefor in writing.
  - The standard of proof shall be the preponderance of the evidence.
  - Hearings shall be conducted pursuant to ss. 120.569 and 120.57
  - ALJ's order shall be final agency action.

# RULE ADMINISTRATION

## • Rule Challenges (cont.)

### • CHALLENGING PROPOSED RULES; SPECIAL PROVISIONS

- Multiple filing deadlines depending on different points in the adoption process
- The petitioner has the burden of proof
- Burden then shifts to the agency to prove that the proposed rule is not an invalid exercise of delegated legislative authority
- ALJ may declare the proposed rule wholly or partly invalid
- Agency may continue with the rulemaking process even after a petition has been filed

### • CHALLENGING EXISTING RULES; SPECIAL PROVISIONS

- Petition may be filed at any time during the existence of the rule
- Burden solely on petitioner
- Rule may be declared wholly or partly invalid

### • CHALLENGING AGENCY STATEMENTS (Unadopted Rules); SPECIAL PROVISIONS

- Petition must include the text or a description of the “statement”
- ALJ may extend the hearing date beyond 30 days for good cause.
  - Automatic stay if the agency files notice of rule of rulemaking
  - Stay in effect as long as the agency is proceeding expeditiously and in good faith to adopt the statement as a rule
  - ALJ may vacate the stay for good cause shown

### • CHALLENGING EMERGENCY RULES; SPECIAL PROVISIONS.

- Assignment of an ALJ must occur in 7 days
- Hearing must be held within 14 days
- ALJ shall render a decision within 14 days after the hearing

# RULE ADMINISTRATION

- Biennial Review and Report – 120.74
  - NEW FOR 2015-2016
    - “(9) EDUCATIONAL UNITS – This section does not apply to education units.”

# DUE PROCESS

- Hearings
  - 120.569 – applies in any proceeding affecting “substantial interests” (with certain exceptions)
    - Procedures
      - Petition / request for hearing (requirements and compliance)
      - Notice and hearing date
      - Signing and certifying filings / pleadings
      - Swearing witnesses, subpoenas
      - Evidence rules
      - Witnesses
      - Recommended Orders
    - *Does not apply to universities or colleges in student hearings – 120.81(1)(g)*

# DUE PROCESS

- Hearings
  - 120.57(1) – Additional Procedures
    - Hearings involving disputed facts
      - Hearings conducted by ALJ
        - *Student discipline hearings may be conducted by educational units – 120.81(1)(f)*
        - *14 day notice of hearing requirement can be waived by educational units – 120.81(1)(h)*
      - Examination of witnesses
      - Evidence (hearsay, other bad acts)
      - Record (including transcript)
      - Summary proceedings (final order authority - no fact dispute)
      - Relinquish jurisdiction (no fact dispute)
      - Standard of proof (preponderance)
      - Exceptions
      - Final Order
    - *Does not apply to universities or colleges in student hearings – 120.81(1)(g)*
  - 120.57(2) – procedures in summary proceedings involving no disputed facts  
*(see also 120.574 for summary hearing with facts)*
  - 120.57(3) - procedures regarding bid protests

# DUE PROCESS

- DOAH - Uniform Rules of Procedure
  - 120.65 - The division shall have the authority to adopt reasonable rules to carry out the provisions of this act.
    - CHAPTER 28-101 ORGANIZATION
    - CHAPTER 28-102 AGENDA AND SCHEDULING OF MEETINGS, HEARINGS, AND WORKSHOPS
    - CHAPTER 28-103 RULEMAKING
    - CHAPTER 28-104 VARIANCE OR WAIVER
    - CHAPTER 28-105 DECLARATORY STATEMENTS
    - CHAPTER 28-106 DECISIONS DETERMINING SUBSTANTIAL INTERESTS
    - CHAPTER 28-107 LICENSING
    - CHAPTER 28-108 EXCEPTION TO UNIFORM RULES OF PROCEDURE
    - CHAPTER 28-109 CONDUCTING PROCEEDINGS BY COMMUNICATIONS MEDIA TECHNOLOGY
    - CHAPTER 28-110 CONTRACT SOLICITATION OR AWARD BID PROTESTS
    - CHAPTER 28-112 Exception to Uniform Rules Relating to State Employment

# DUE PROCESS

- Mediation – 120.573
  - By agreement
  - Deadlines in 120.569 and 120.57 are tolled
  - Must conclude within 60 days of agreement to mediate (unless otherwise agreed)
  - Agreement to mediate must include
    - How to select mediator
    - Allocation of costs
    - Understanding regarding confidentiality

# DUE PROCESS

## ▪ Attorneys' Fees

### ▪ CHALLENGES TO AGENCY ACTION

- ALJ shall award reasonable costs and reasonable attorneys' fees to the prevailing party where the nonprevailing adverse party has participated in the proceeding for an "improper purpose"
  - "Improper purpose" - participation in a proceeding primarily to harass or to cause unnecessary delay or for frivolous purpose or to needlessly increase the cost of litigation, licensing, or securing the approval of an activity
  - ALJ shall also consider whether the nonprevailing adverse party has participated in two or more other such proceedings involving the same prevailing party and the same project as an adverse party and in which such two or more proceedings the nonprevailing adverse party did not establish either the factual or legal merits of its position, and shall consider whether the factual or legal position asserted in the instant proceeding would have been cognizable in the previous proceedings. – if so, it shall be a rebuttable presumption that the nonprevailing adverse party participated in the pending proceeding for an improper purpose
  - "Nonprevailing adverse party" means a party that has failed to have substantially changed the outcome of the proposed or final agency action which is the subject of a proceeding.

### ▪ CHALLENGES TO PROPOSED AGENCY RULES

- When a proposed rule or portion thereof is invalid, judgment shall be rendered against the agency for reasonable costs and reasonable attorney's fees, unless the agency demonstrates that its actions were substantially justified or special circumstances exist which would make the award unjust.
  - An agency's actions are "substantially justified" if there was a reasonable basis in law and fact at the time the actions were taken by the agency.
  - If the agency prevails, fees shall be awarded if the appellate court or administrative law judge determines that a party participated in the proceedings for an improper purpose.
  - No award of attorney's fees as provided by this subsection shall exceed \$50,000.

# DUE PROCESS

## • Attorneys' Fees (cont.)

- CHALLENGES TO EXISTING AGENCY RULES
  - Same provisions as those applicable to challenges to proposed rules
- CHALLENGES TO UNADOPTED RULES
  - Shall be awarded
  - Notification by agency to ALJ that rulemaking has commenced shall automatically stay proceeding
    - Stay remains in effect so long as the agency is proceeding expeditiously and in good faith to adopt the statement as a rule
    - ALJ shall award reasonable costs and reasonable attorney's fees accrued by the petitioner prior to the date the notice was published, unless the agency proves to the ALJ that it did not know and should not have known that the statement was an unadopted rule
  - Fees and costs may only be awarded upon a finding that the agency received notice that the statement may constitute an unadopted rule at least 30 days before a petition was filed and that the agency failed to publish the required notice of rulemaking
    - Notice to the agency may be satisfied by its receipt of a copy of the petition, a notice or other paper containing substantially the same information
    - Award may not exceed \$50,000
  - If the agency prevails, fees shall be awarded against a party if:
    - determined to have participated in the proceedings for an improper purpose
    - or that the party or the party's attorney knew or should have known that a claim was not supported by the material facts necessary to establish the claim or would not be supported

# DUE PROCESS

- Attorneys' Fees (cont.)
  - APPEALS
    - Reasonable fees and costs to prevailing party
    - Standard: a) appeal was frivolous, meritless, or an abuse of the appellate process, or b) agency action which precipitated the appeal was a gross abuse of the agency's discretion.
      - court shall award reasonable attorney's fees and reasonable costs to a prevailing appellant for the administrative proceeding and the appellate proceeding if the agency improperly rejected or modified findings of fact below
    - NO \$50,000 cap, unlike other subparts
  - Other fee provisions
    - §§57.105 and 57.111 authorize attorney's fees and costs
      - Nothing in Chapter 120 shall affect the availability of attorney's fees and costs as provided in those sections

# DUE PROCESS

## ▪ Licensing – 120.60

- Applications
  - Each applicant shall be given written notice when agency intends to grant or deny, or has granted or denied, the application for license
  - Notice must state with particularity the grounds or basis for the issuance or denial
  - Unless waived, a copy of the notice shall be delivered or mailed to each party's attorney of record
  - The issuing agency shall certify the date the notice was mailed or delivered
- Discipline
  - No revocation, suspension, annulment, or withdrawal of any license is lawful unless, prior to the entry of a final order, the agency has served, by personal service or certified mail, an administrative complaint which affords reasonable notice to the licensee of facts or conduct which warrant the intended action and unless the licensee has been given an adequate opportunity to request a proceeding pursuant to ss. 120.569 and 120.57
  - If the agency finds that immediate serious danger to the public health, safety, or welfare requires emergency suspension, restriction, or limitation of a license, the agency may take such action by any procedure that is fair under the circumstances

# DUE PROCESS

## ▪ Ex Parte Communications – 120.66

- In any proceeding under ss. 120.569 and 120.57, no ex parte communication relative to the merits, threat, or offer of reward shall be made to the agency head, after the agency head has received a recommended order
- If the agency head receives an ex parte communication
  - He or she shall place on the record of the pending matter all written communications received, all written responses to such communications, and a memorandum stating the substance of all oral communications received and all oral responses made, and shall also advise all parties that such matters have been placed on the record.
  - Any party desiring to rebut the ex parte communication shall be allowed to do so, if such party requests the opportunity for rebuttal within 10 days after notice of such communication. The presiding officer may, if necessary to eliminate the effect of an ex parte communication, withdraw from the proceeding, in which case the entity that appointed the presiding officer shall assign a successor.
  - Any person who makes an ex parte communication prohibited by subsection (1), and any presiding officer, including an agency head or designee, who fails to place in the record any such communication, is in violation of this act and may be assessed a civil penalty not to exceed \$500 or be subjected to other disciplinary action.

# DUE PROCESS

## Judicial Review – 120.68

- Appellate district where the agency maintains its headquarters or where a party resides or as otherwise provided by law
- Must file notice or petition for review as per the Florida Rules of Appellate Procedure within 30 days after the rendition of the order being appealed
  - The filing of the petition is not an automatic stay (with some exceptions for licensing matters)
- Judicial review of any agency action shall be confined to the record transmitted
  - Record determined in accordance with the Florida Rules of Appellate Procedure

The reviewing court's decision may be mandatory, prohibitory, or declaratory in form, and it shall provide whatever relief is appropriate irrespective of the original form of the petition. The court may:

1. Order agency action required by law; order agency exercise of discretion when required by law; set aside agency action; remand the case for further agency proceedings; or decide the rights, privileges, obligations, requirements, or procedures at issue between the parties; and
2. Order such ancillary relief as the court finds necessary to redress the effects of official action wrongfully taken or withheld.

The court shall remand when:

- There has been no hearing prior to agency action and the reviewing court finds that the validity of the action depends upon disputed facts;
- The agency's action depends on any finding of fact that is not supported by competent, substantial evidence in the record of a hearing ...however, the court shall not substitute its judgment for that of the agency as to the weight of the evidence on any disputed finding of fact;
- The fairness of the proceedings or the correctness of the action may have been impaired by a material error in procedure or a failure to follow prescribed procedure;
- The agency has erroneously interpreted a provision of law and a correct interpretation compels a particular action; or
- The agency's exercise of discretion was:
  - Outside the range of discretion delegated to the agency by law;
  - Inconsistent with agency rule;
  - Inconsistent with officially stated agency policy or a prior agency practice, if deviation therefrom is not explained by the agency; or
  - Otherwise in violation of a constitutional or statutory provision;

# DUE PROCESS

- Investigations
  - Participant rights — 120.62
    - Every person who responds to a request or demand by any agency or representative thereof for written data or an oral statement shall be entitled to a transcript or recording of his or her oral statement at no more than cost
    - Any person compelled to appear, or who appears voluntarily, before any presiding officer or agency in an investigation or in any agency proceeding has the right, at his or her own expense, to be accompanied, represented, and advised by counsel or by other qualified representatives

# MISC.

- **Exemptions from the Act – 120.63**

- Agency must apply to the Commission
- Grounds
  - Conflicts w/ federal law or rules
  - Regards tax benefits
  - “[S]o inconvenient or impractical as to defeat the purpose of the agency proceeding or purpose of the Act would not be in the public interest in light of the nature of the intended action and the enabling act or other laws affecting the agency”
- Exempt only where alternative procedure established that is “consistent, insofar as possible, with the intent and purpose of the act”

- **Disqualification of Agency Personnel – 120.665**

- Party “to a proceeding” must file a “suggestion” in “reasonable time” before the proceeding (?) – before hearing)
- Grounds – bias, prejudice or interest
- If disqualified person...
  - Appointed – appointing authority may appoint substitute
  - Elected – Governor may appoint substitute
  - Member of collegial body and quorum remains – no need for substitute

# MISC.

- Noncompliance with Agency Action and Enforcement – 120.69 and 120.695
  - Notice of violation / non-compliance first
    - Must be “minor violation” (as determined by the agency upon review of its rules)
      - Minor = violation does not result in economic or physical harm to a person or adversely affect the public health, safety, or welfare or create a significant threat of such harm
    - Must identify rule that was violated, advise how to comply with the rule and give time frame in which violator must come into compliance
    - Fines permitted but only as “secondary” compliance effort
      - No criteria for how to calculate fines / penalties
  - Enforcement
    - Petition in circuit court where subject of enforcement is located
      - By agency, or
      - Substantially interested person who is resident of Florida
        - At least 60 days prior notice to agency head or Attorney General and any violator
    - May seek declaratory relief, temporary or permanent equitable relief, fine, forfeiture, penalty or other remedy provided by statute, or any combination
    - Res judicata and collateral estoppel apply
    - Prevailing party entitled to fees and expert costs

**C. CHRISTOPHER “CHRIS” ANDERSON, III** received his J.D. from The Florida State University College of Law, after majoring in history at Huntingdon College in Montgomery, Alabama. Chris is a member of The Florida Bar and its Administrative Law Section, the Jefferson County Bar Association, the Florida Government Bar Association, and the State General Counsel's Association. He serves as General Counsel and Deputy Executive Director of the Florida Commission on Ethics, an agency he has served in a number of positions over many years. Previously, he served as an Assistant State Attorney in the Second Circuit, as an Assistant Public Defender in the Seventh and Second Circuits, as a Senior Attorney for the Department of Insurance, as an Assistant General Counsel for the Department of Corrections, and as a private practitioner. Also, Chris is a past recipient of the Florida Association of County Attorneys' Ethics Award and its Appreciation Award, and he is a frequent speaker on statutory ethics and related topics at Bar CLE programs and other events.

# Florida's Code of Ethics and its Commission on Ethics

# Presented by

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# History of Florida's Ethics Laws

- Relatively recent emphasis
- Post-Watergate
- Governor Askew—Sunshine Amendment
- Commission on Ethics
- Part III, Chapter 112, Florida Statutes

# Florida Commission on Ethics

- Nine members (appointed)
- Meets approximately every six weeks
- Administers Article II, Section 8, Florida Constitution, and Part III, Chapter 112, Florida Statutes
- Handles ethics complaints and “referrals,” issues advisory opinions, and administers financial disclosure laws

# Persons governed by ethics laws.

- Public officers
- Public employees
- Local government attorneys
- Not Federal employees and officers
- Not Article V Florida judges and justices
- Various “hybrid” entities
- Not most independent contractors
- Some charter school persons

# Types of ethics laws/standards

- Financial disclosure requirements
- Gift bans
- Gift disclosures
- Expenditure bans
- Voting/participation conflicts
- Anti-nepotism
- Various “flat out” Prohibitions
- Agency/locality additional standards

# Anti-nepotism

- F.S. 112.3135
- Bans certain hiring
- Bans certain advocacy
- Does not prohibit two relatives from merely working together
- Has exemptions for public school districts, community colleges, and state universities
- But see F.S. 1012.23(2) & 1002.33(24)
- Does not apply to a paramour

# Doing business with one's public agency prohibition

- F.S. 112.313(3)
- Restricts rentals, leases, or sales between one's (or one's spouse's or child's) business and one's public agency or political subdivision
- Has exemptions, including exemptions listed in F.S. 112.313(12)
- Qualified blind trusts, F.S. 112.31425

# Conflicting employment and contractual relationships

- F.S. 112.313(7)
- Mirrors, but is broader than, F.S. 112.313(3)
- Exemptions in F.S. 112.313(12)
- Additional exemption in F.S. 112.313(15)
- Can be negated by F.S. 112.316, like F.S. 112.313(3) can be negated by F.S. 112.316

# Employees holding office

- F.S. 112.313(10)
- Different than Florida Constitution dual office-holding
- Example of violation is county commissioner employed by same county's road department
- Example of situation that is not a violation is county commissioner employed by Florida FDOT
- But see new F.S. 112.3125

# Dual public employment

F.S. 112.3125

New via Chapter 2013-36,  
L.O.F. (CS SB 2)

# State licensing board members

- F.S. 112.313(11)
- For example, cannot be on Florida Board of Dentistry and simultaneously be an officer of the Florida Dental Association
- CEO 83-78

# F.S. 112.313(17)

- Restricts members of Board of Governors of State University System and trustees of universities from serving as Legislative lobbyists

# Misuse of public position

- F.S. 112.313(6)
- Most complaints
- Most difficult to prosecute
- Encompasses bad/evil conduct
- Not triggered by policy decisions alone
- Requires “corruption”
- Blackburn, 589 So. 2d 431 (1<sup>st</sup> DCA 1991)

# Use of inside information

- F.S. 112.313(8)
- Usually redundant to F.S. 112.313(6)
- Can encompass ultimately public information

# Solicitation/acceptance of certain gifts

- F.S. 112.313(2)
- Amounts to bribery
- Requires quid-pro-quo
- A rare occurrence and even rarer to prove

# Unauthorized compensation/gifts

- F.S. 112.313(4)
- Is based on actual or constructive knowledge
- A more useful tool than F.S. 112.313(2)
- Somewhat displaced by F.S. 112.3148 and F.S. 112.3215
- Barker, 677 So. 2d 254 (Fla. 1996)

# Gift prohibitions and disclosures for R.I.P.E.s

- F.S. 112.3148
- Applies to reporting individuals at the state and local level, and to procurement employees at the state level
- Prohibits gifts from “lobbyists,” their cohorts, and vendors, valued at more than \$100
- Requires reporting of certain gifts
- Prohibits solicitation of any lobbyist/vendor gift
- Somewhat superseded by F.S. 112.3215 regarding state level employees and officers
- And see new F.S. 112.31485

# Political committee gifts

F.S. 112.31485

New via Chapter 2013-36,  
L.O.F. (CS SB 2)

K-20 Education Code gift  
provision

F.S. 1001.421

\$50

School Board members &  
their relatives

# Honoraria and honorarium event-related expenses

- F.S. 112.3149
- Interplays with FS 112.3148, and possibly F.S. 112.31485
- Superseded somewhat by F.S. 112.3215 for state-level personnel

# Lobbying and expenditures (state level--executive branch)

- F.S. 112.3215
- Expenditures (gifts) severely restricted by December 2005 special session amendments to law
- Applies to Reporting Individuals (RIs) but not to Procurement Employees (PEs)
- Augments, but did not repeal, gifts law codified at F.S. 112.3148

# Local government attorneys

- F.S. 112.313(16)
- Do not exist at state level
- Three types: public employee, public officer, independent contractors
- Subject to some or all of Code of Ethics
- Written contract provision required to funnel extra business to one's law firm
- Cannot represent client before government client's unit of government

# Revolving door/post-office-holding & during-term-of-office restrictions

- F.S. 112.313(9)—state level
- F.S. 112.313(14)—local government level
- Lasts for two years after leaving public position
- At state level, prohibits “representation” before all of one’s former “agency”
- At state level, applies to SMS, SES, and certain others
- Requires personal representation for compensation—is not vicarious to other members of one’s private firm
- Subject to limited grandfathering
- Legislators, new provision

# Additional restrictions—state level

- F.S. 112.3185
- Do not require SMS/SES or similar status
- Contains restrictions applicable while publicly employed and after leaving public service
- Post-public-employment restrictions are complicated to apply to a given situation
- Is not a blanket post-public-employment ban

# Voting conflicts law

- F.S. 112.3143
- Applies to members of government collegial bodies, including advisory bodies
- Amended via Chapter 2013-36, L.O.F., & Chapter 2014-183, L.O.F.
- CE Form 8A at state level, Form 8B at local level—both Forms recently amended
- Triggered by “special private gain or loss” to the public officer personally or to certain others
- Different applicability at state, versus local, levels; and as to appointive, versus elective, officers

# Financial disclosure (CE Form 6)

- Filed by Constitutional officers and certain others
- Called “full” disclosure
- Requires lots of detail
- Is a goldmine for the press
- Not filed by many state employees or local government employees
- Now posted online
- Also, Form 6X and 6F are sometimes filed

# Financial Disclosure (CE Form 1)

- Called “limited disclosure”
- Is the form most often filed by public employees who file financial disclosure
- Has percentage threshold versus dollar amount choices/options
- Due within 30 days of hiring
- Due on or before each July 1 thereafter
- CE Form 1F is due within 60 days of leaving one’s public position
- Form 1X is sometimes filed

# Disclosure of specified business interests

- F.S. 112.3145(5)
- Required of Form 6 and Form 1 filers
- Concerns disclosure of “businesses granted a privilege to operate in this state”
- Forms 6 and 1 contain a list of such businesses

# Client disclosure (quarterly)

- F.S. 112.3145(4)
- Applies to Form 6 and Form 1 filers
- CE Form 2
- Applies to representations by a public officer/employee and to those by members of his or her private firm
- Has certain exceptions

# More stringent ethics standards

- Are not preempted by the Code of Ethics or the Commission on Ethics—F.S. 112.326
- May be problematic
- May be subject to vested rights, union contract rights, or other restrictions
- May be good in particular, limited situations
- Do not waive “floor” of state ethics laws
- Should be based in reason and logic

# Thank you!

# J. NEVIN SHAFFER, JR.

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*"If you are in business, you have intellectual property!"<sup>sm</sup>*

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## Nevin's Bio



John Nevin Shaffer, Jr. earned a Bachelor of Science degree from the U.S. Naval Academy in 1970, and a Masters of Business Administration from the University of Houston at Clear Lake City in 1976. He received his Juris Doctor degree from St. Mary's University and was admitted to the Texas and U.S. Patent Bars in 1980. He was admitted to the Florida Bar in 2002 and the Alabama bar in 2009. He is an AV rated lawyer and a Florida Board Certified Intellectual Property Law Specialist.

As a registered patent attorney, Nevin may practice patent law in all fifty states. Nevin is licensed to practice before the United States Patent and Trademark Office, the Court of Appeals for the Federal Circuit, the Alabama, Florida and Texas Supreme Courts, and all lesser Alabama, Florida and Texas courts. Nevin prosecutes applications for a variety of electrical and mechanical devices, including computer software applications, semi-conductor devices, and sophisticated measuring devices. He no longer litigates, but he is available for consultation on matters involving litigation and has successfully litigated patent, trademark, and copyright infringement actions, including presenting the winning oral argument at the Court of Appeals for the Federal Circuit in a patent infringement case.

Nevin is a member of the Alabama, Florida and Texas Bar Associations, the Mobile Bar Association and the Escambia - Santa Rosa County Bar Association. He is a past president of the Austin Intellectual Property Law Association. Nevin spent six years in the U.S. Navy as an engineering officer. His last duty was as engineering and executive officer of a patrol gunboat in which his responsibilities included the maintenance and operation of its electrical and mechanical equipment, including a J-79 jet engine. He is a retired Commander, U.S. Navy (USNR-R). Nevin and his family moved to Gulf Breeze, Florida in the summer of 2000. In 2009 Nevin opened an office at the University of South Alabama Technology and Research Park and he commutes regularly between Mobile and his Gulf Breeze office.



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# J. Nevin Shaffer, Jr., PA

Nevin earned a Bachelor of Science degree from the U.S. Naval Academy in 1970, and a Masters of Business Administration from the University of Houston at Clear Lake City in 1976. He received his Juris Doctor degree from St. Mary's University and was admitted to the Texas and U.S. Patent Bars in 1980. He was admitted to the Florida Bar in 2002 and is a Florida Bar Board Certified Intellectual Property Law specialist. He was admitted to the Alabama Bar in 2009 and is a member of Mobile Bar Association with an office Mobile, Alabama.

As a registered patent attorney, Nevin may practice patent law in all fifty states. Nevin is licensed to practice before the United States Patent and Trademark Office, the Court of Appeals for the Federal Circuit, the Texas and Florida Supreme Courts, and all lesser Texas and Florida courts. He has published articles and written a book, *Protect Your Great Ideas for Free!*, on intellectual property law and is a professional speaker. He regularly conducts lectures and seminars on the subject at local universities, businesses and professional associations. Nevin has prosecuted applications for a variety of electrical and mechanical devices, including computer software applications, semi-conductor devices, and sophisticated measuring devices. He has also successfully litigated patent, trademark, and copyright infringement actions, including presenting the winning oral argument at the Court of Appeals for the Federal Circuit in a patent infringement case.

Nevin is AV rated and a member of the Alabama, Texas and Florida Bar Associations and the Escambia Santa Rosa County Bar Association. He is a past president of the Austin Intellectual Property Law Association. Nevin is a Vietnam veteran and spent six years in the Navy as an engineering officer and instructor. His last sea duty was as engineering and executive officer of a patrol gunboat. He is a retired Commander in the U.S. Navy.

# INTELLECTUAL PROPERTY: VALUABLE ASSETS YOUR BUSINSESS HAS THAT ARE A MYSTERY TO MOST

WHAT IS IT?  
HOW DO YOU GET IT?  
HOW DO YOU PROTECT IT?

# QUIZ

## True or False:

1. A good patent claim includes lots of details of the invention such that a person of ordinary skill in the art can read and understand the invention.
2. A provisional patent is a short form of an actual patent application.
3. “Patent Pending” gives the owner the right to stop other people from making, using or selling the invention.
4. Businesses should keep track of their mistakes or failures as trade secrets.
5. Only big businesses have trade secrets that are worth the time to protect.

# QUIZ, cont.

True or False:

6. If you pay for software to be developed by another company, Copyright law says you do not own the copyright.
7. Copyrights protect the idea and patents protect the expression of the idea.
8. As between PIZZA HUT and DOMINO'S PIZZA, PIZZA HUT is better because it more closely describes the services.
9. A brand consists of two parts: an adjective and a descriptive term.
10. A patent is better to have than a registered trademark because a patent lasts longer.

# Change is coming....

Fast!

Date Idea Introduced

Idea  
Assimilation  
World wide



# Ray Kurzweil

## THE SINGULARITY:

Live until 2020 and live forever!

By 2030 computers will be able  
to simulate the processing  
power of a brain

[singularity.com](http://singularity.com)



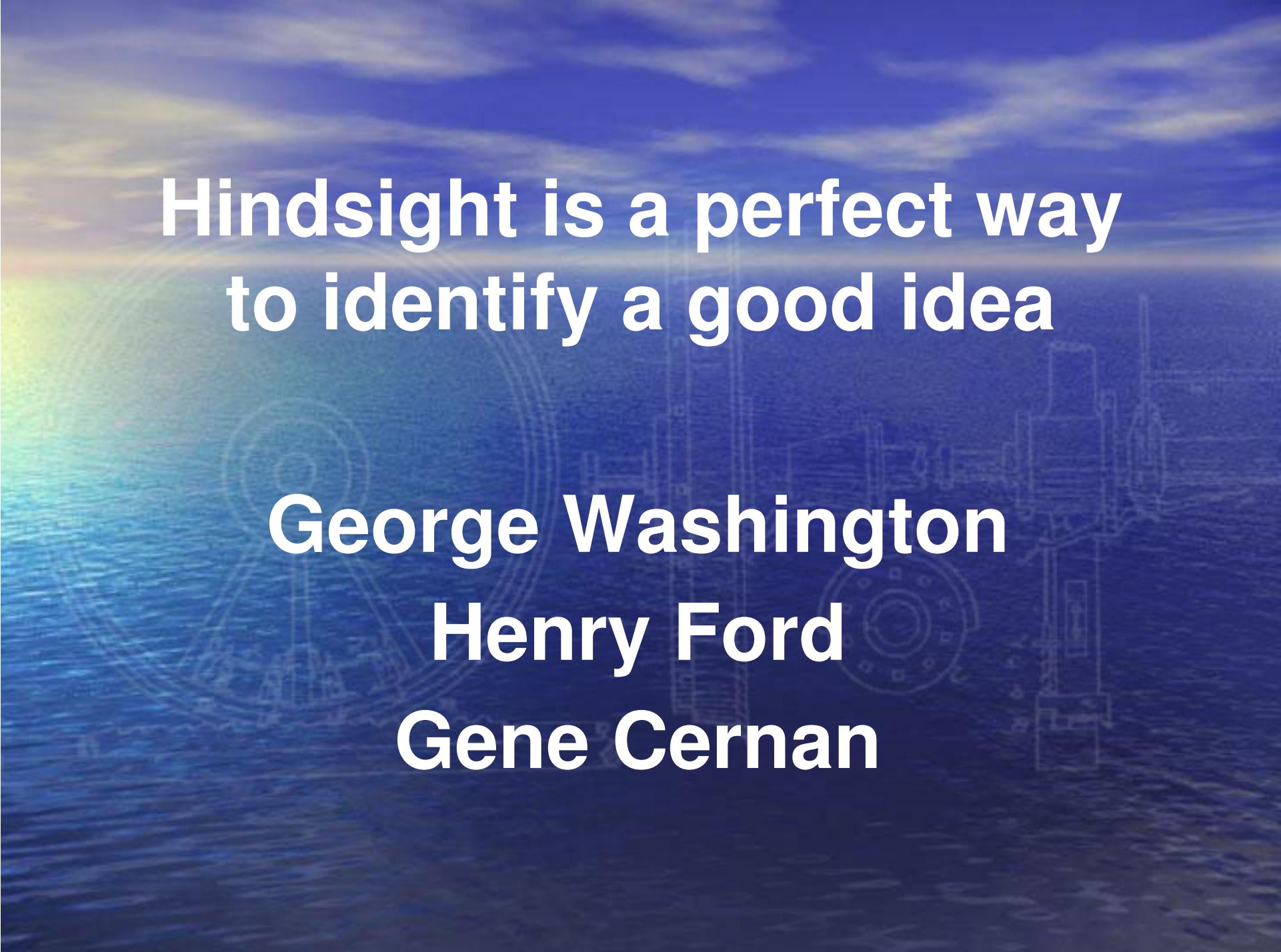
RECENTLY IN THE NEWS:

A PAPER BATTERY YOU CAN FOLD

A THERMAL INVISIBILITY CLOAK

COMPUTATIONAL POWER OF 1,000  
BRAINS ON A MICROCHIP

[newsletter@kurzweilai.net](mailto:newsletter@kurzweilai.net)



Hindsight is a perfect way  
to identify a good idea

George Washington  
Henry Ford  
Gene Cernan



Hindsight is also great  
at identifying  
not so good ideas!

912,152.

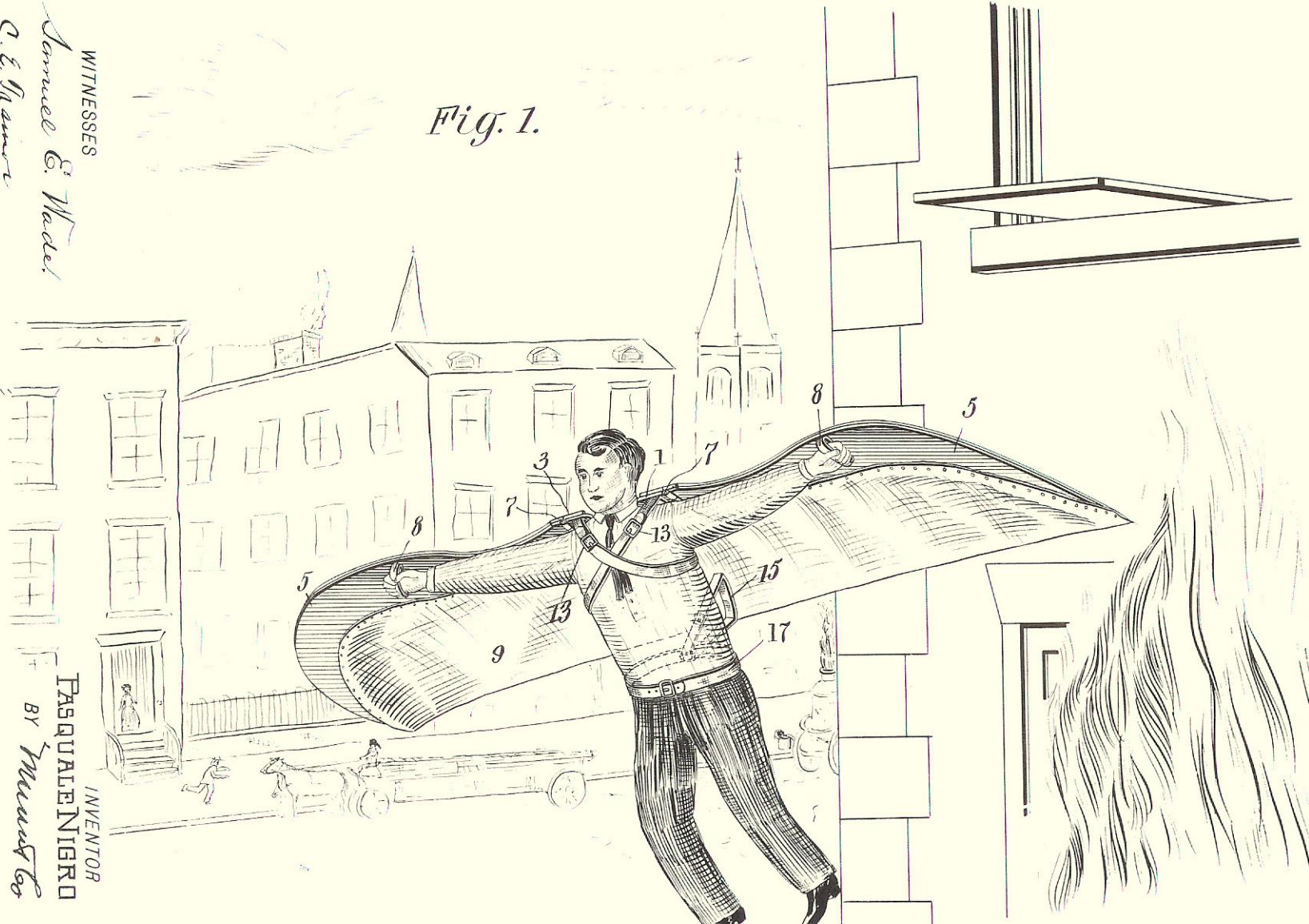
FIRE ESCAPE.

APPLICATION FILED MAY 15, 1908.

Patented Feb. 9, 1909.

2 SHEETS—SHEET 1.

Fig. 1.



## [54] ANTI-EATING FACE MASK

[76] Inventor: Lucy L. Barmby, 9550 Jackson Rd.,  
Sacramento, Calif. 95826

[21] Appl. No.: 134,557

[22] Filed: Mar. 27, 1980

[51] Int. Cl.<sup>3</sup> ..... A61F 5/56

[52] U.S. Cl. ..... 128/136

[58] Field of Search ..... 128/133, 136, 137

## [56] References Cited

## U.S. PATENT DOCUMENTS

853,025	5/1907	McCalmont	128/133
1,297,842	3/1919	Harilee	128/136
1,629,892	5/1927	Storms	128/136
2,276,612	3/1942	Ellis	128/136

3,189,073	6/1965	Todd	128/133
3,818,906	6/1974	Stubbs	128/136

Primary Examiner—Kyle L. Howell

Assistant Examiner—C. W. Shedd

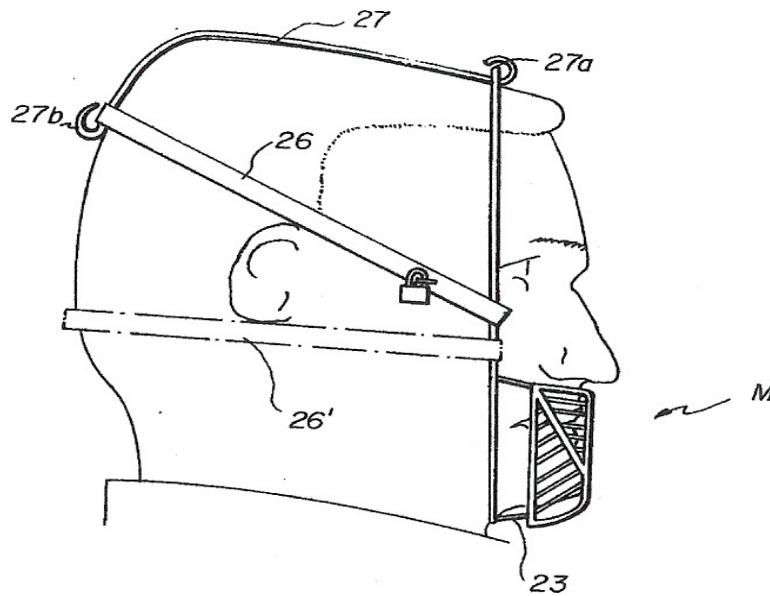
Attorney, Agent, or Firm—Blair, Brown & Kreten

[57]

## ABSTRACT

An anti-eating face mask which includes a cup-shaped member conforming to the shape of the mouth and chin area of the user, together with a hoop member and straps detachably engageable with a user's head for mounting the cup-shaped member in overlying relationship with the user's mouth and chin area under the nose thereby preventing the ingestion of food by the user.

2 Claims, 3 Drawing Figures



[54] BIRD DIAPER

[76] Inventors: **Lorraine Moore; Mark Moore**, both of 217 S. Glen Ave., Watkins Glen, N.Y. 14891; **Cely Giron**, 9388 Sawtooth Way, San Diego, Calif. 92129

[21] Appl. No.: **08/951,171**

[22] Filed: **Oct. 15, 1997**

**Related U.S. Application Data**

[60] Provisional application No. 60/029,142, Oct. 21, 1996.

[51] **Int. Cl.** <sup>o</sup> **A01K 23/00**

[52] **U.S. Cl.** **119/868; 119/853**

[58] **Field of Search** **119/714, 853,  
119/868**

[56] **References Cited**

**U.S. PATENT DOCUMENTS**

1,949,004	2/1934	Boardman	.....	119/853
2,190,115	2/1940	Fuqua	.	
2,703,553	3/1955	Cooke	.	
2,882,858	4/1959	Dlugi	.....	119/868
4,353,330	10/1982	Baumgartner	.....	119/868
5,218,928	6/1993	Muck et al.	.....	119/714

**FOREIGN PATENT DOCUMENTS**

672569 10/1963 Canada .

943116 11/1963 United Kingdom .  
981247 1/1965 United Kingdom .

**OTHER PUBLICATIONS**

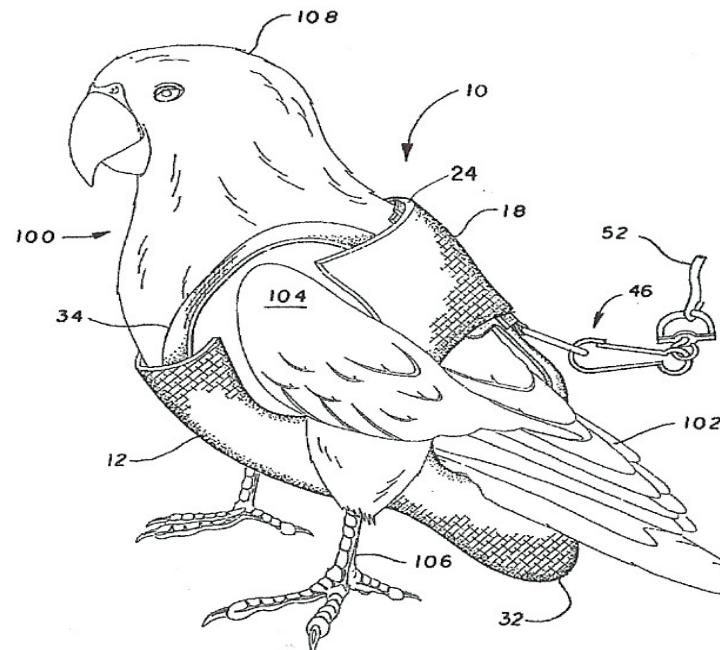
Penny Ward Moser, "Dreams, Schemes, and 3,300 Better Mousetraps," *Discover*, p. 85, Dec. 1985.

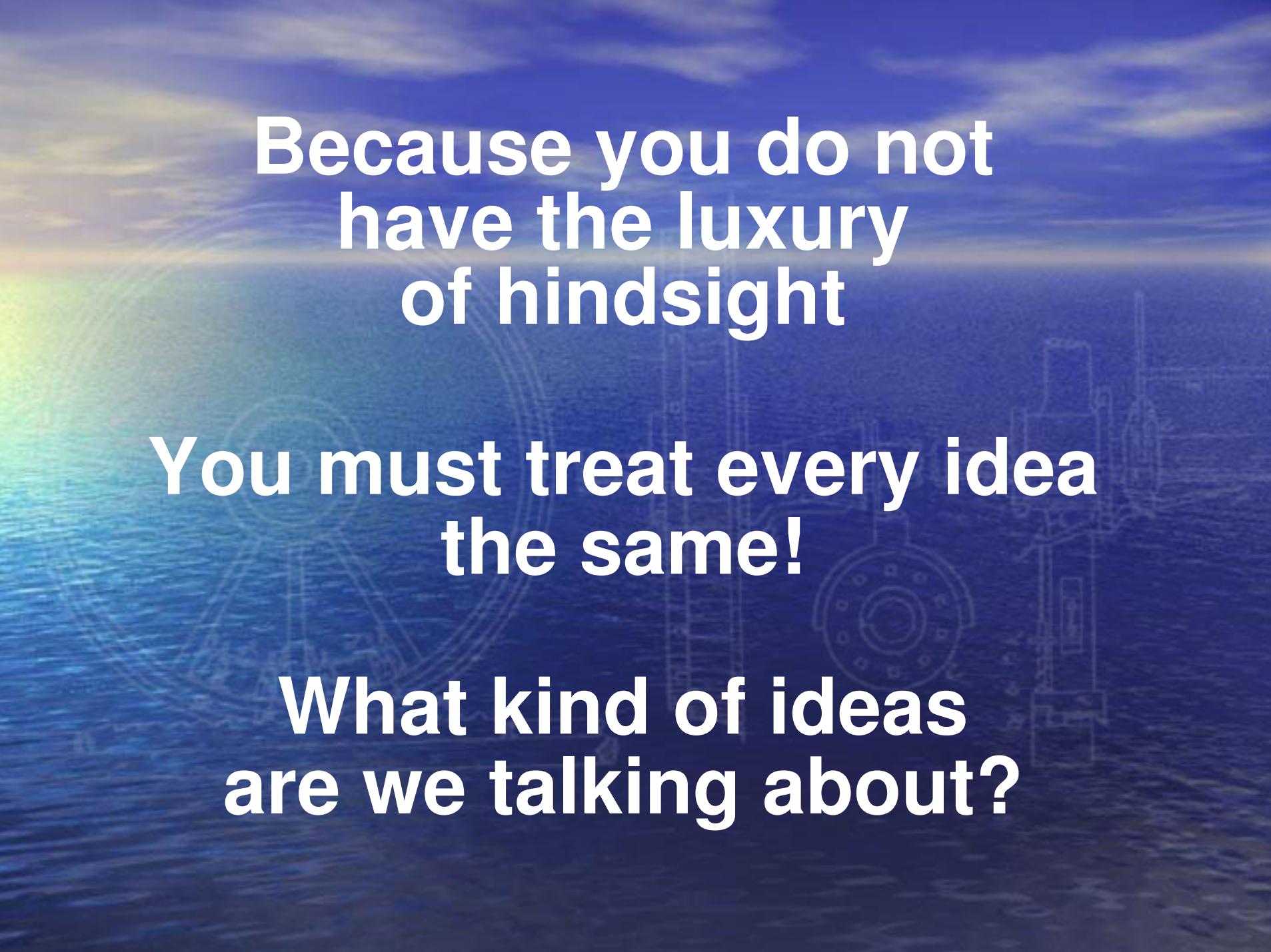
*Primary Examiner*—Robert P. Swiatek  
*Attorney, Agent, or Firm*—Richard C. Litman

[57] **ABSTRACT**

A bird diaper for an uncaged pet bird to wear, featuring an enclosed pouch for receiving and containing excrement, and apertures to accommodate both the wings and the tail of the bird. Elastic straps and hook and loop fastener components (e.g., VELCRO) secure the diaper onto the body of the pet bird without restricting movement. The bird diaper is fabricated from spandex (e.g., LYCRA) or another stretchable, lightweight material, allowing absorption of bird excrement to prevent leaks and facilitating easy cleaning using soap and water. The bird diaper can incorporate decorative designs, bright colors and is available in different sizes. The bird diaper also has a leash which is insertable within the hook and loop fasteners. The leash serves to restrain or limit the bird's area of free flight.

**18 Claims, 7 Drawing Sheets**





Because you do not  
have the luxury  
of hindsight

You must treat every idea  
the same!

What kind of ideas  
are we talking about?



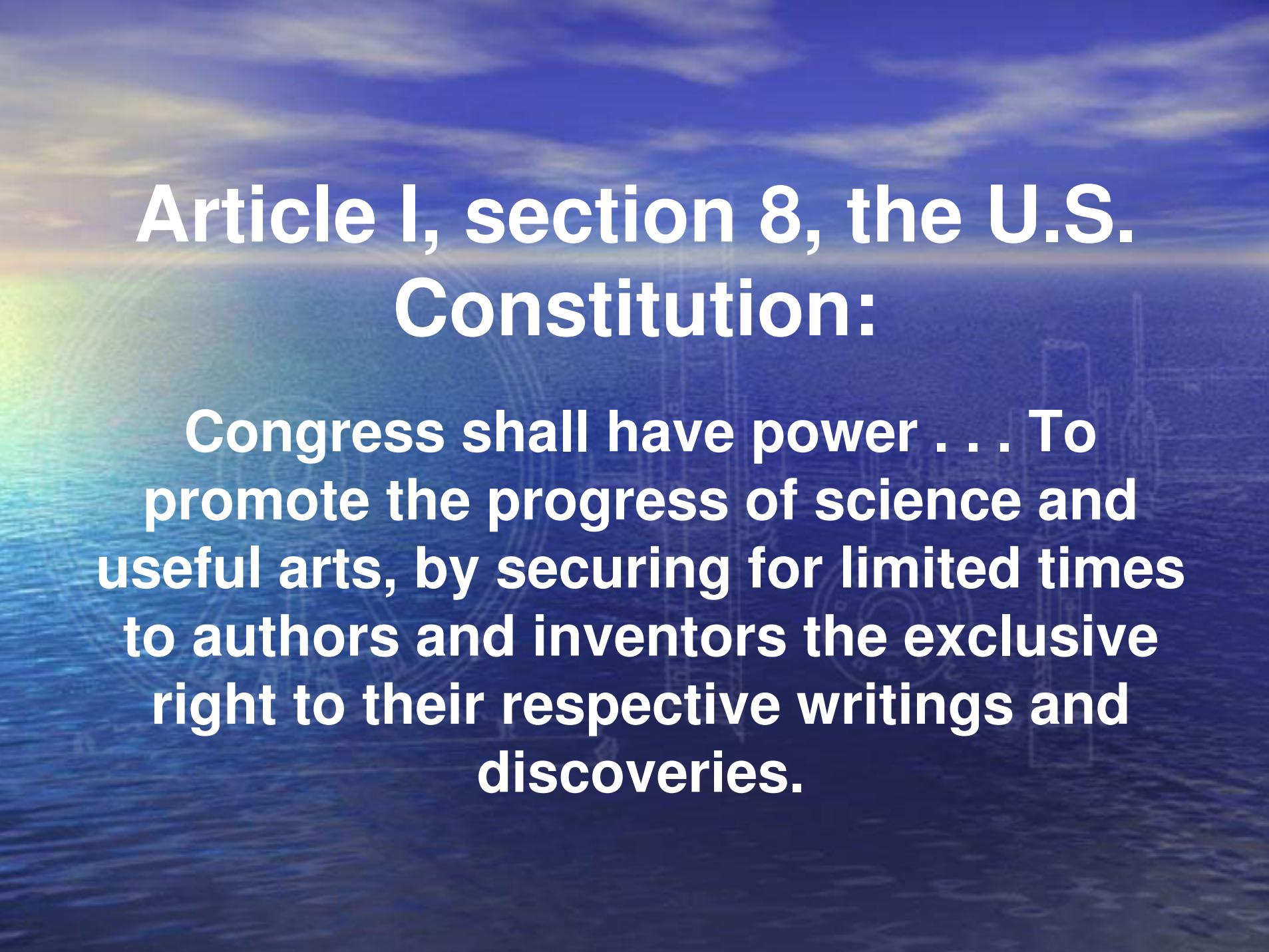
**Ask yourself...**  
**Have you ever dealt with:**

- New devices or products?**
- Brands for any products or services?**
- Works of art or authorship?**
- Lists of sources or other means  
or methods for doing a job  
that are kept secret?**



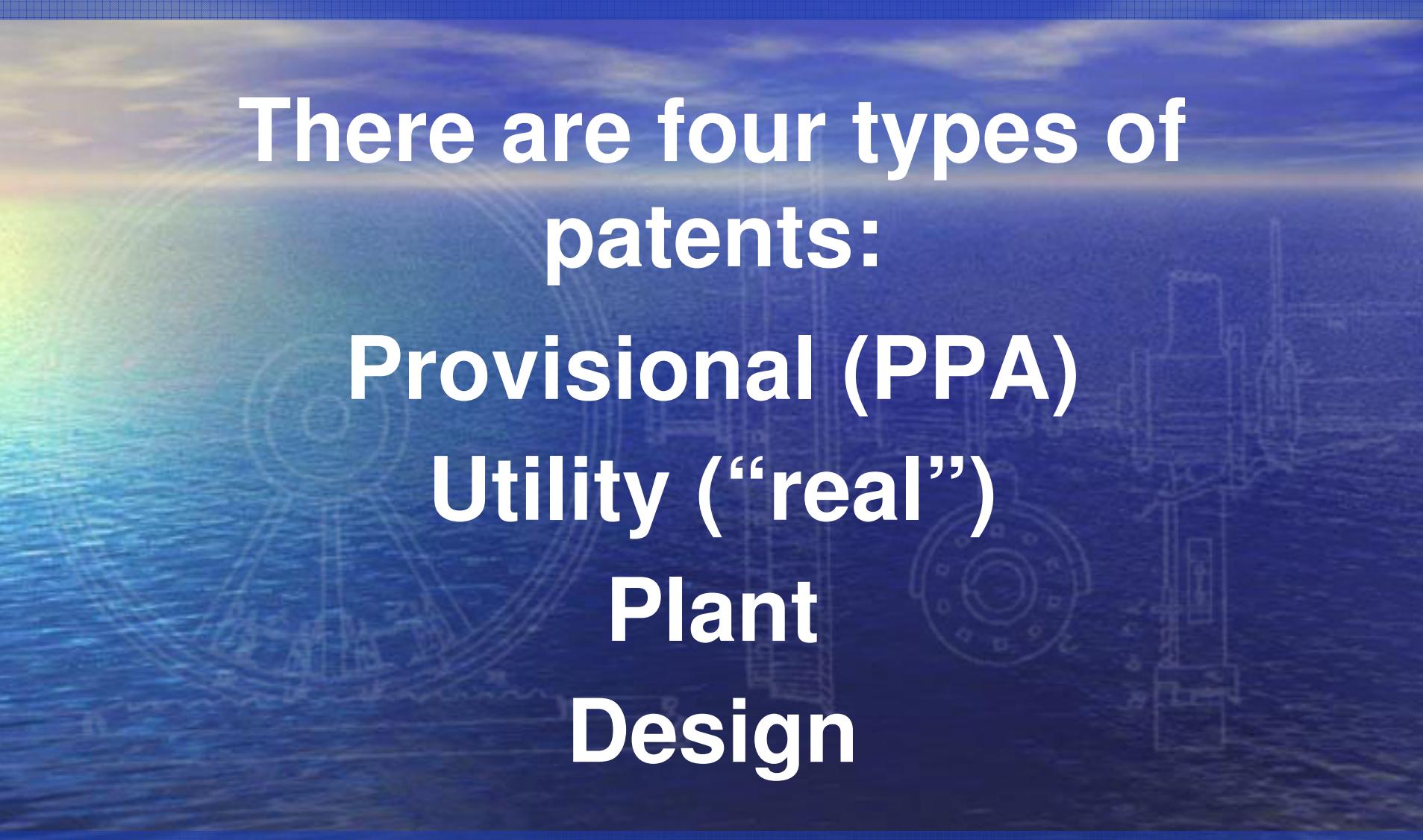
**Of course you have!  
And Intellectual property  
is your friend!**

**PATENTS  
TRADEMARKS  
COPYRIGHTS  
TRADE SECRETS**



# Article I, section 8, the U.S. Constitution:

**Congress shall have power . . . To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.**



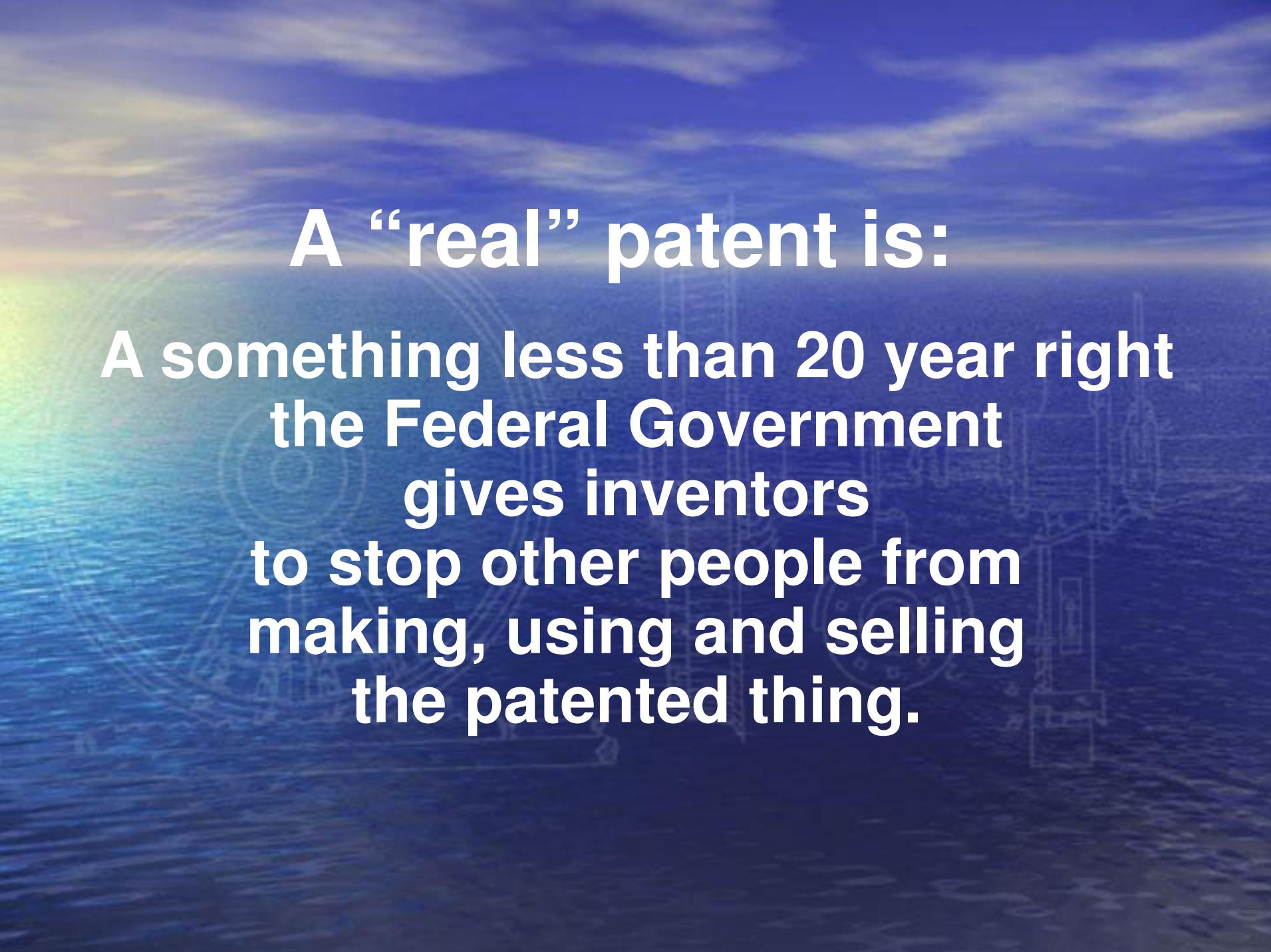
There are four types of  
patents:

**Provisional (PPA)**

**Utility (“real”)**

**Plant**

**Design**

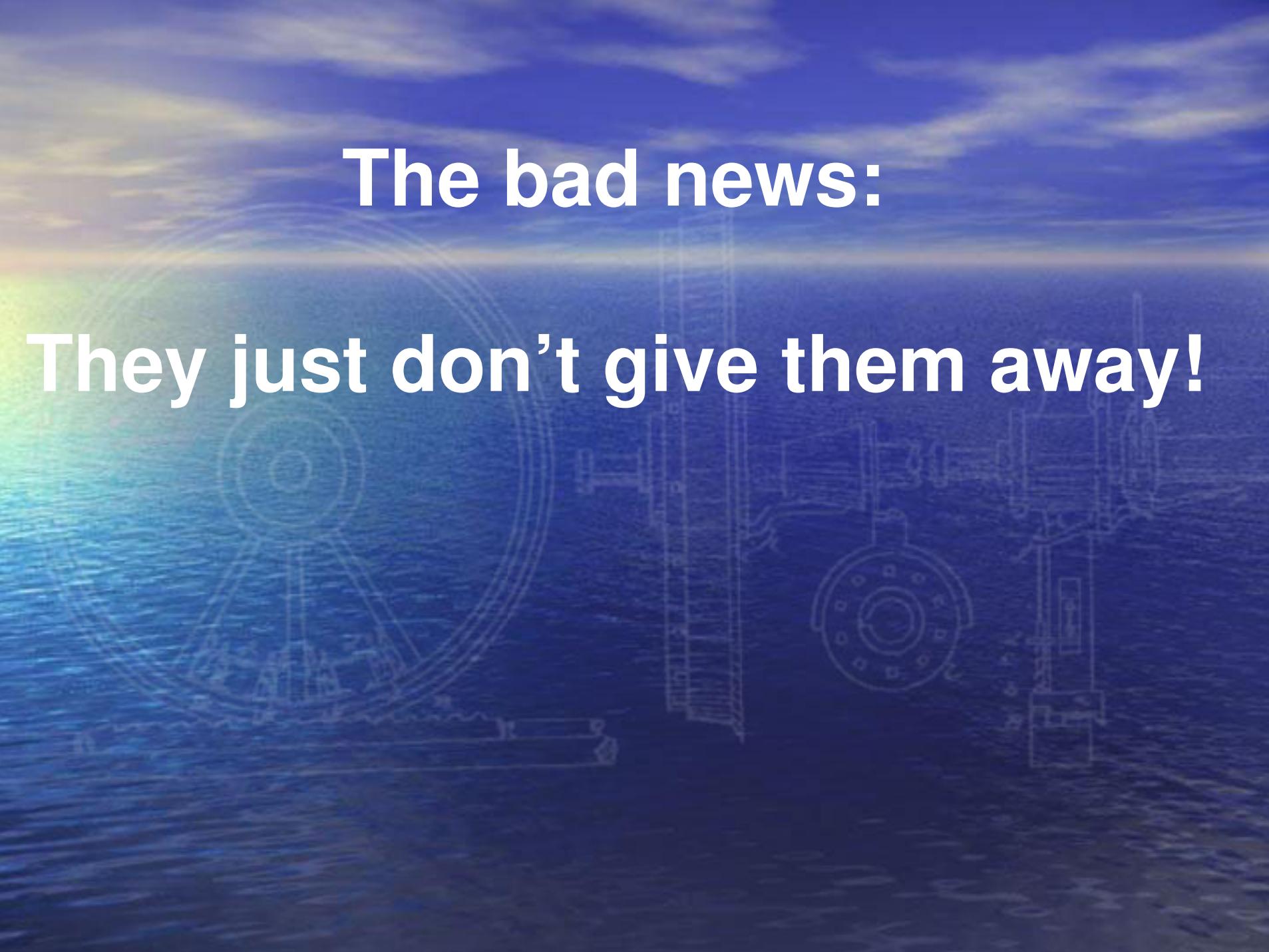


**A “real” patent is:**

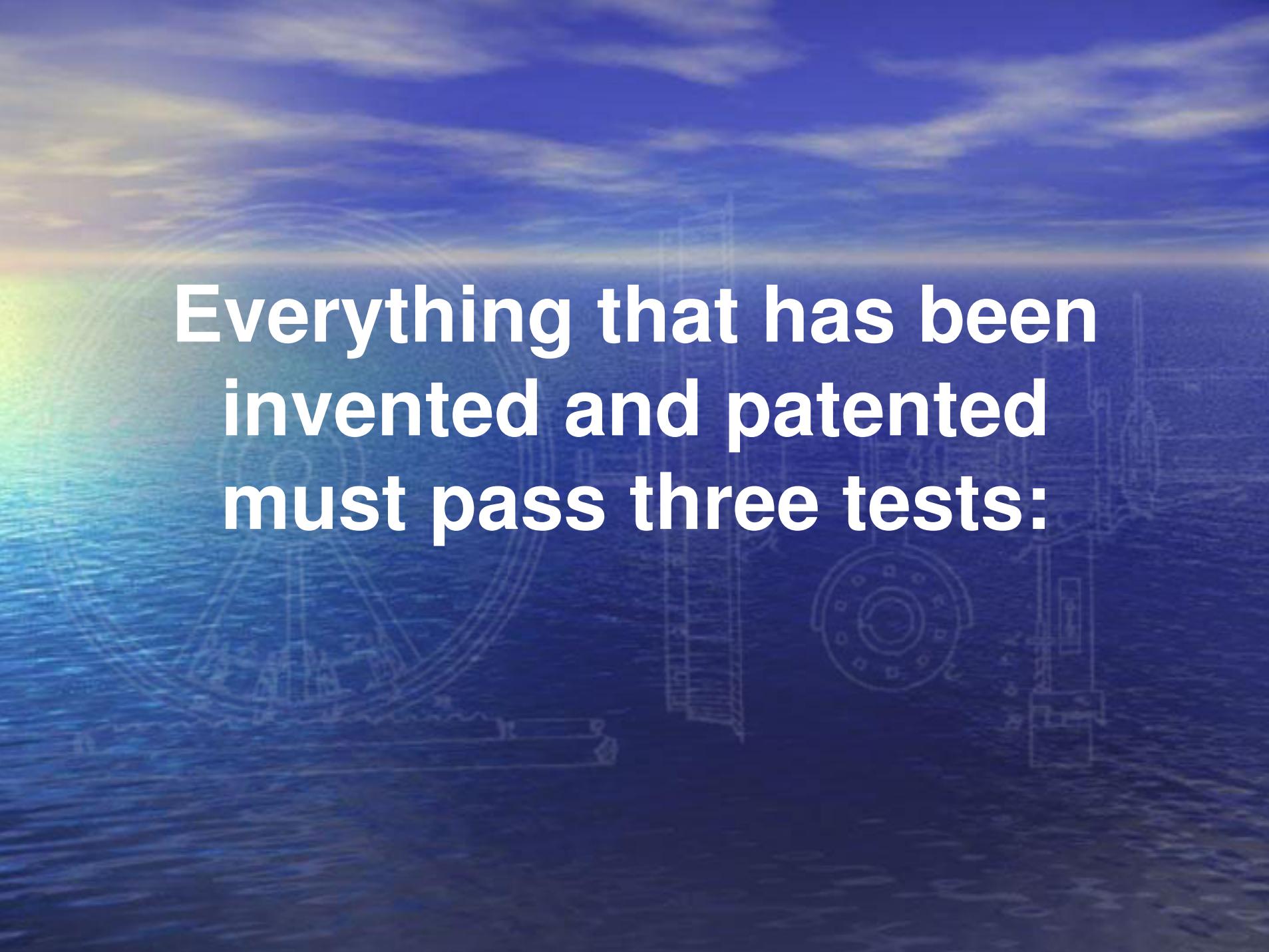
**A something less than 20 year right  
the Federal Government  
gives inventors  
to stop other people from  
making, using and selling  
the patented thing.**



The good news...  
Monopoly!



The bad news:  
They just don't give them away!



**Everything that has been  
invented and patented  
must pass three tests:**



# **Useful, New and Non-Obvious Improvement**

**Chester Carlson**

# Patent Options

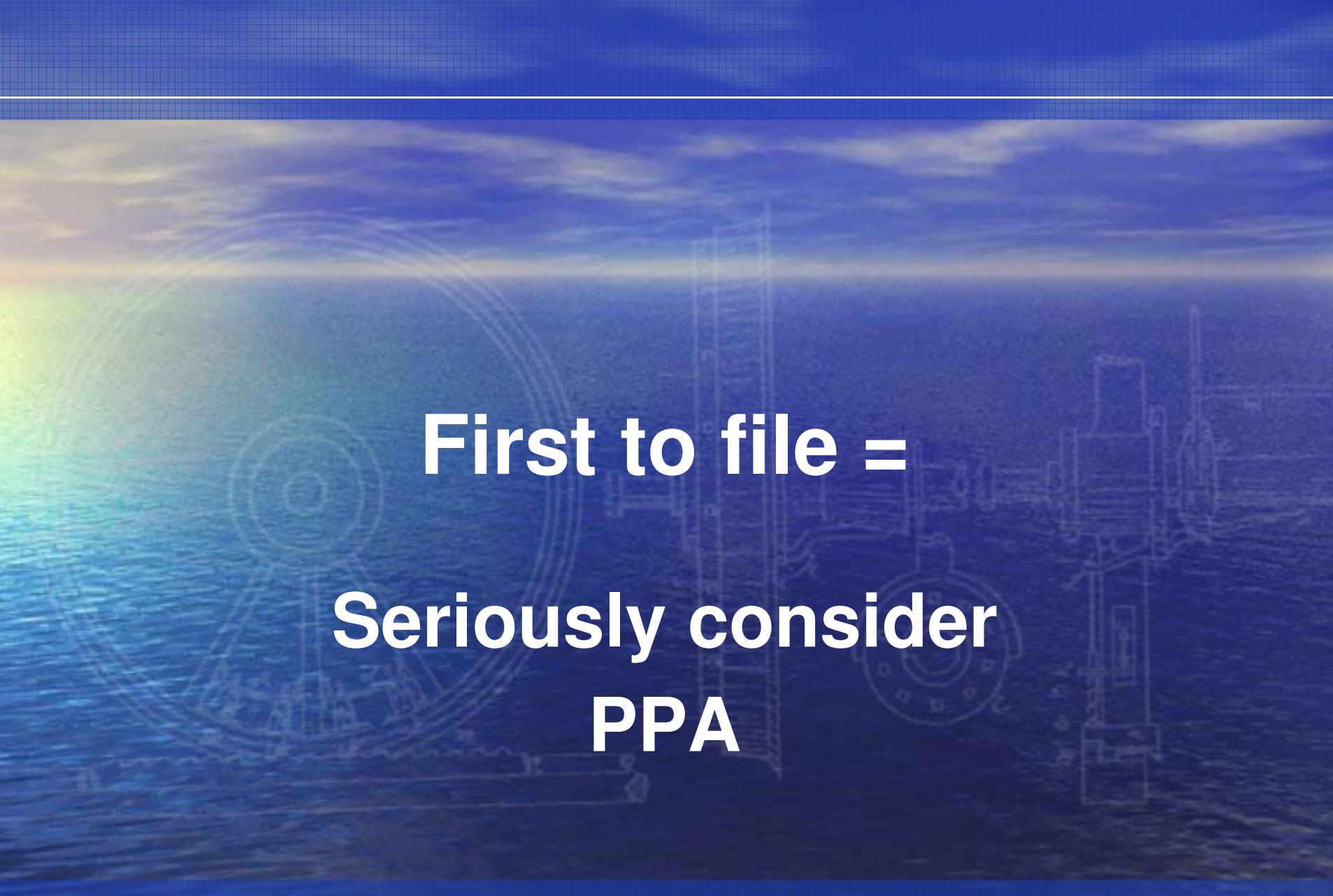
1. Patent Search

2. PPA

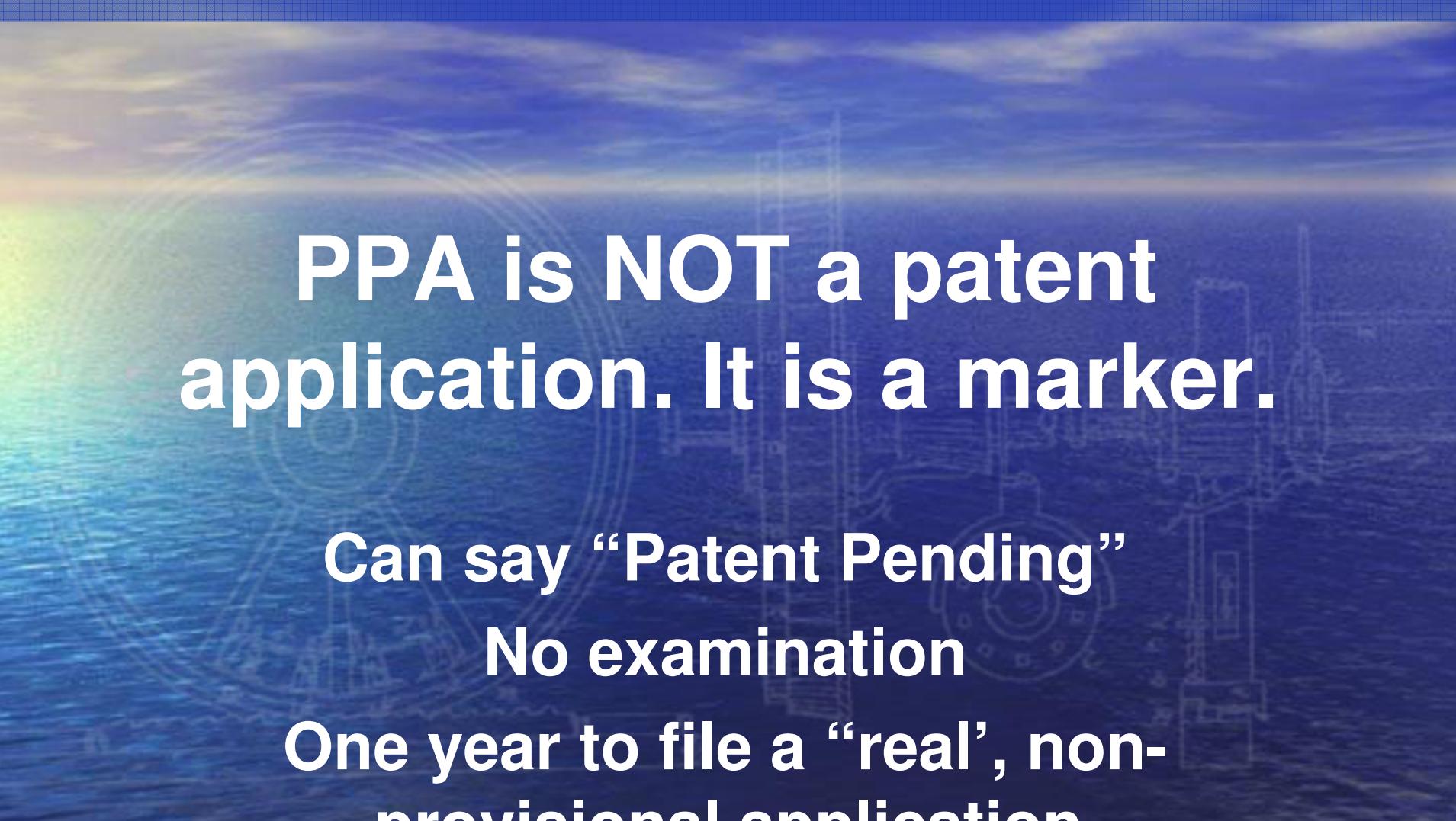
3. Patent  
application



**PATENT SEARCH =  
GO-NO GO TEST**



**First to file =**  
**Seriously consider**  
**PPA**

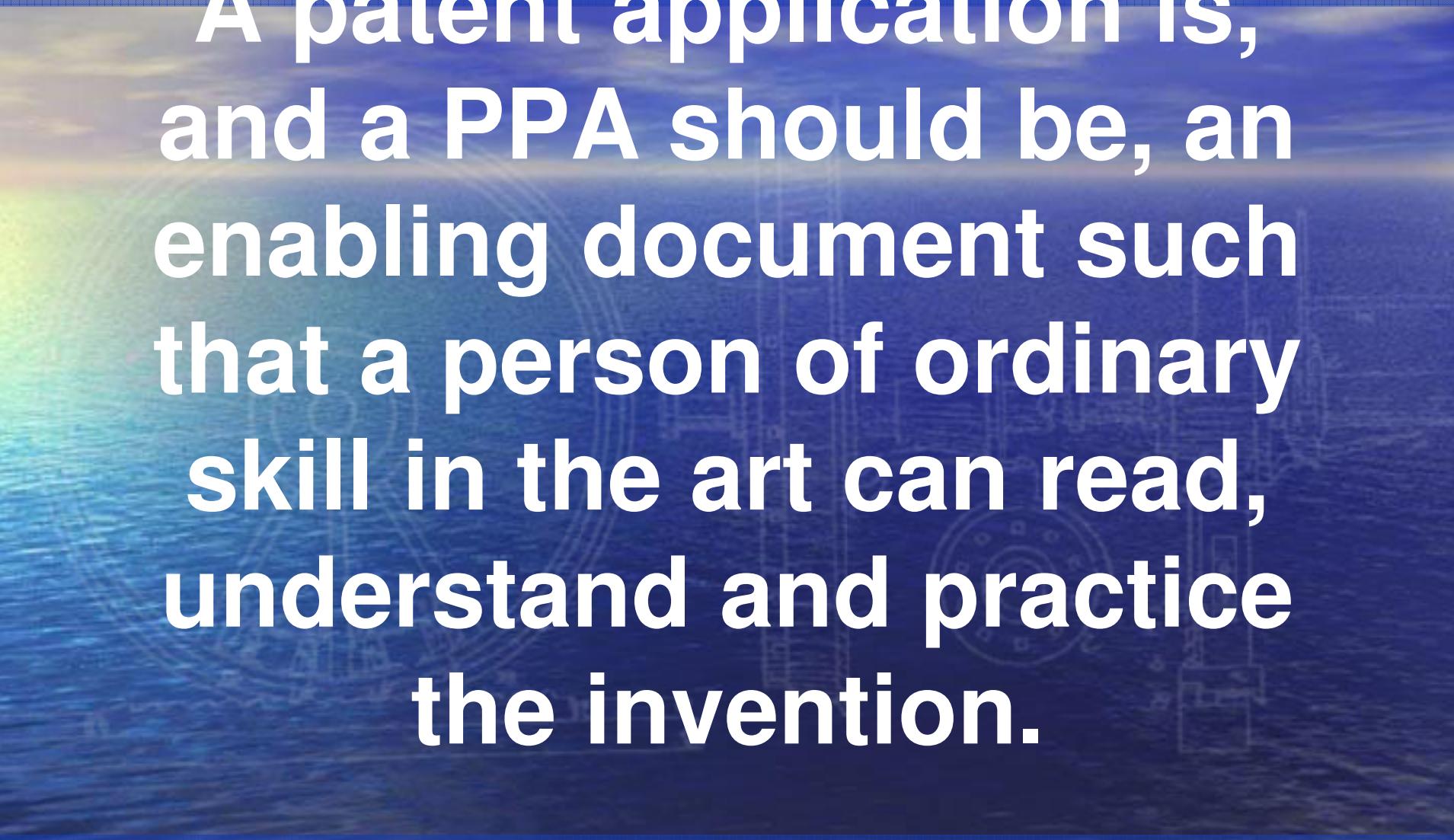


**PPA is NOT a patent application. It is a marker.**

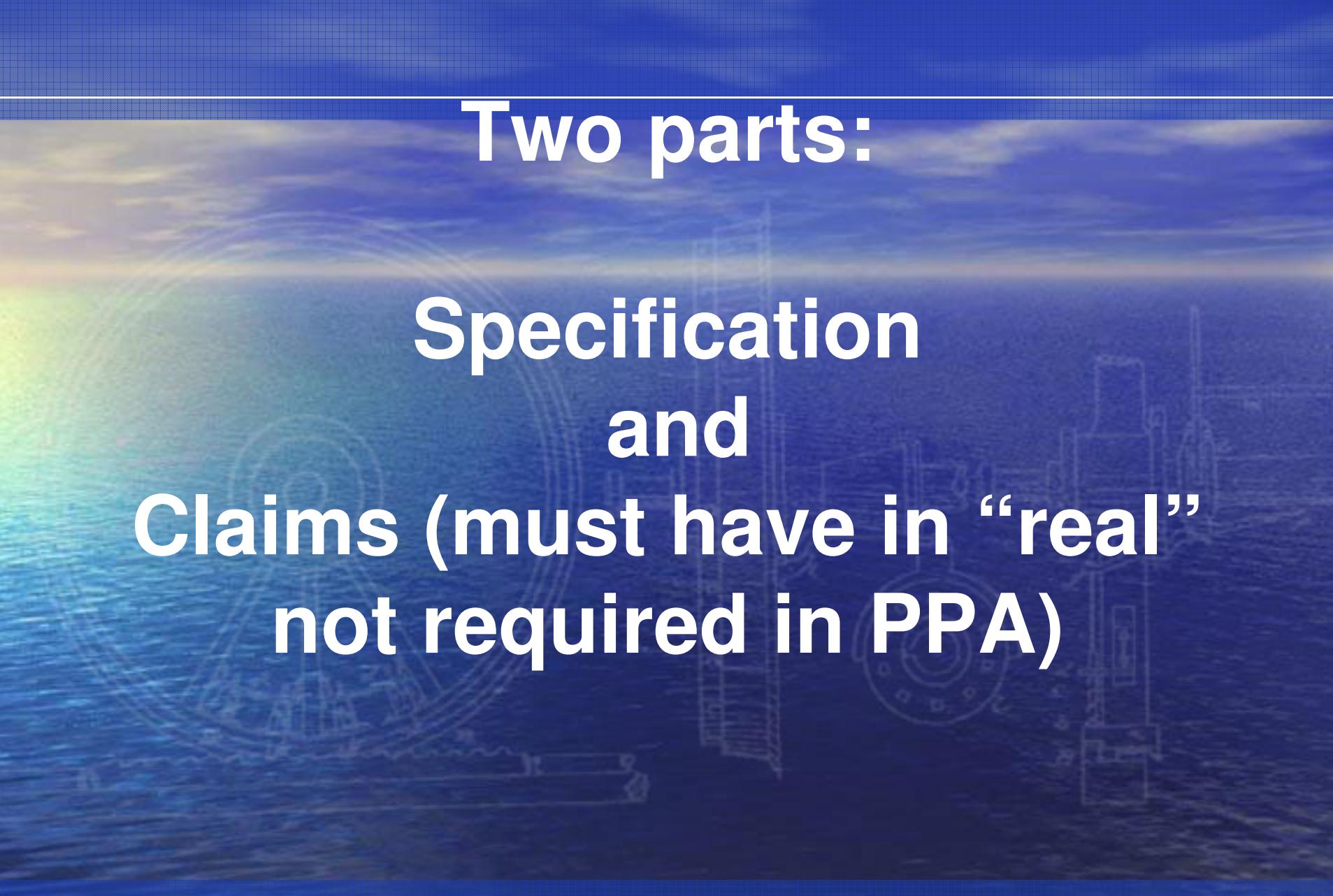
**Can say “Patent Pending”**

**No examination**

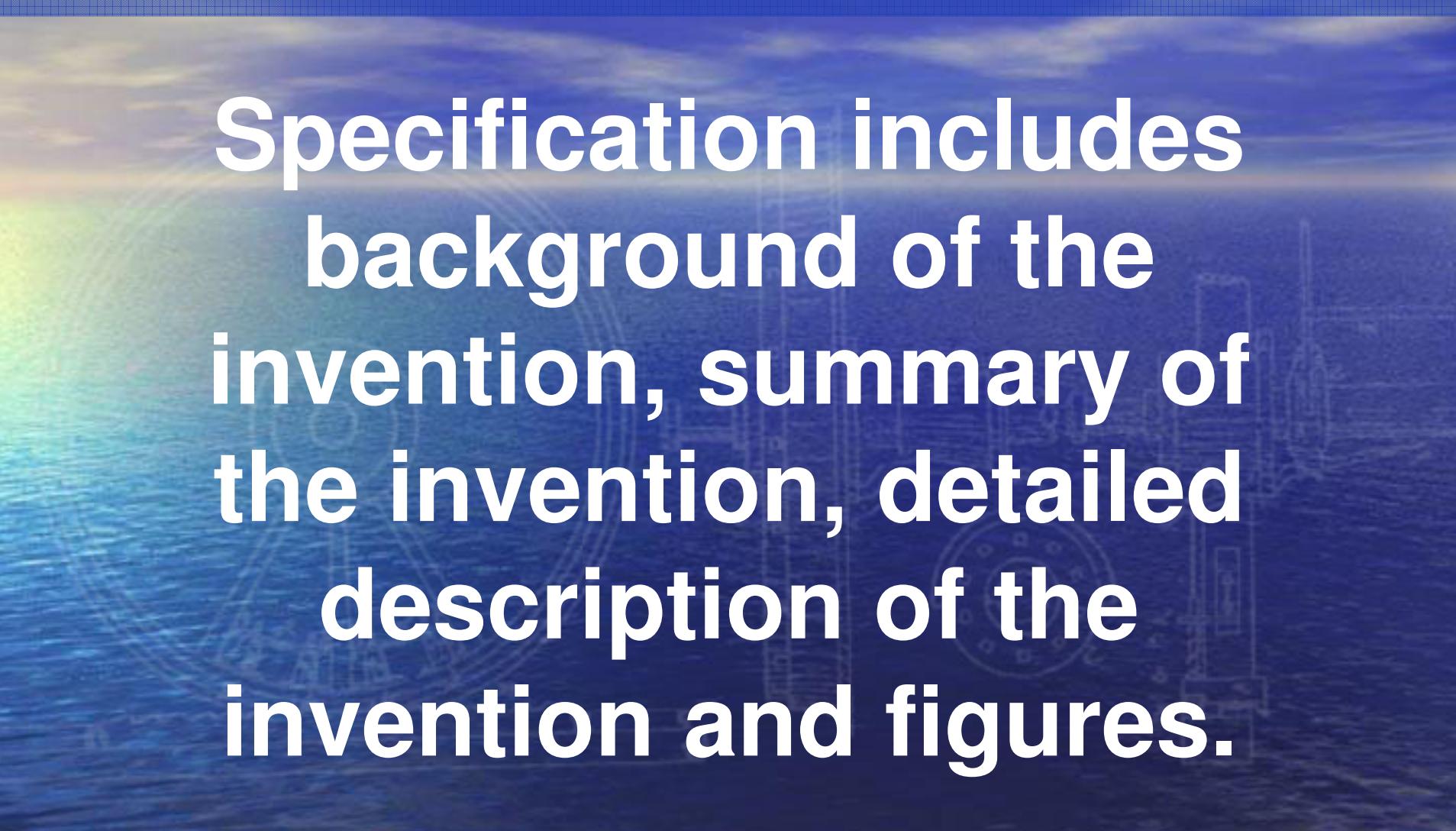
**One year to file a “real”, non-provisional application**



**A patent application is,  
and a PPA should be, an  
enabling document such  
that a person of ordinary  
skill in the art can read,  
understand and practice  
the invention.**



**Two parts:**  
**Specification**  
**and**  
**Claims (must have in “real”**  
**not required in PPA)**



**Specification includes  
background of the  
invention, summary of  
the invention, detailed  
description of the  
invention and figures.**

**The Claims, however, are what  
you get if you get a patent!**

**They are analogous to meets and  
bounds description for real  
property.**

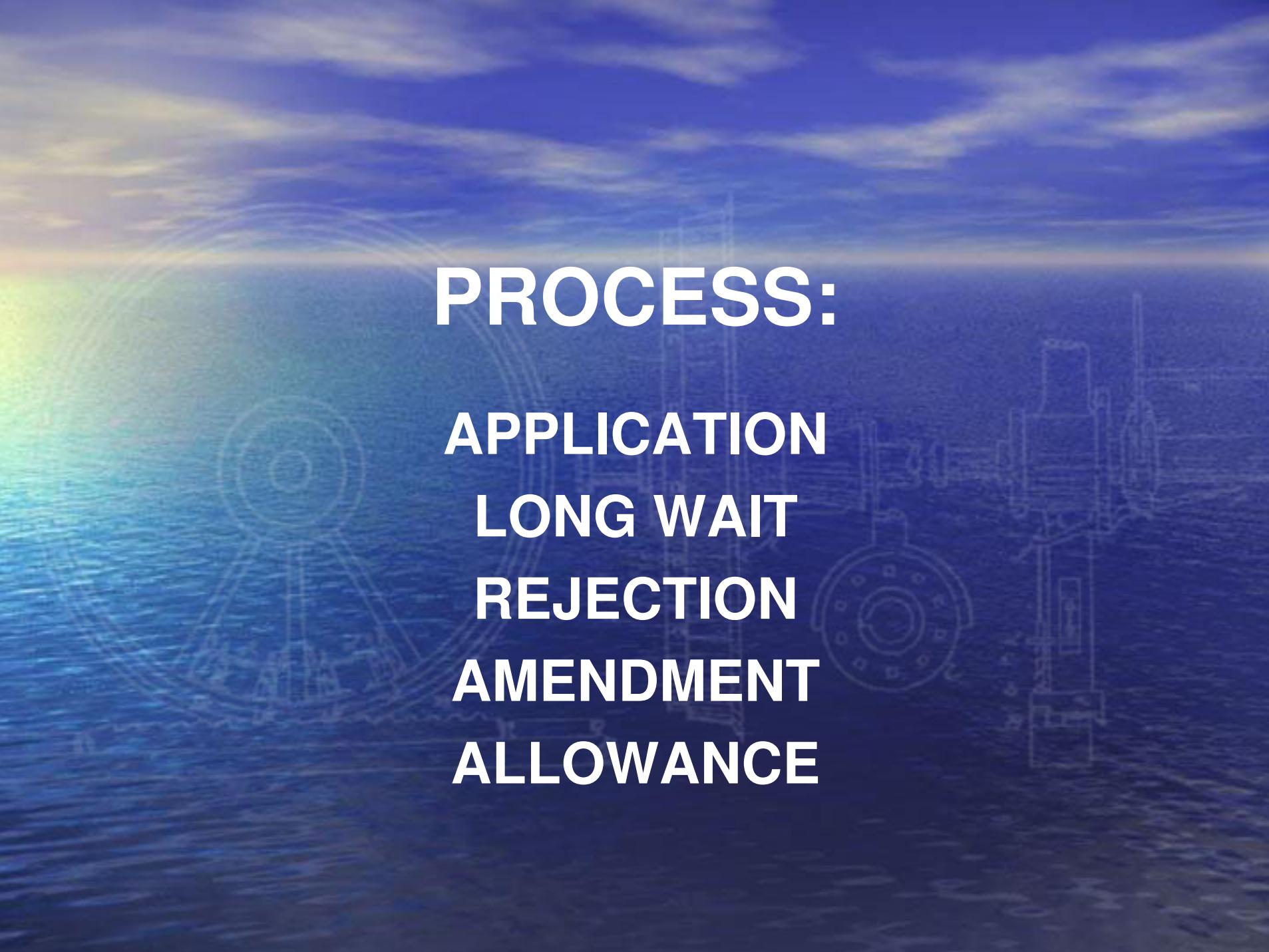


**CLAIMS**

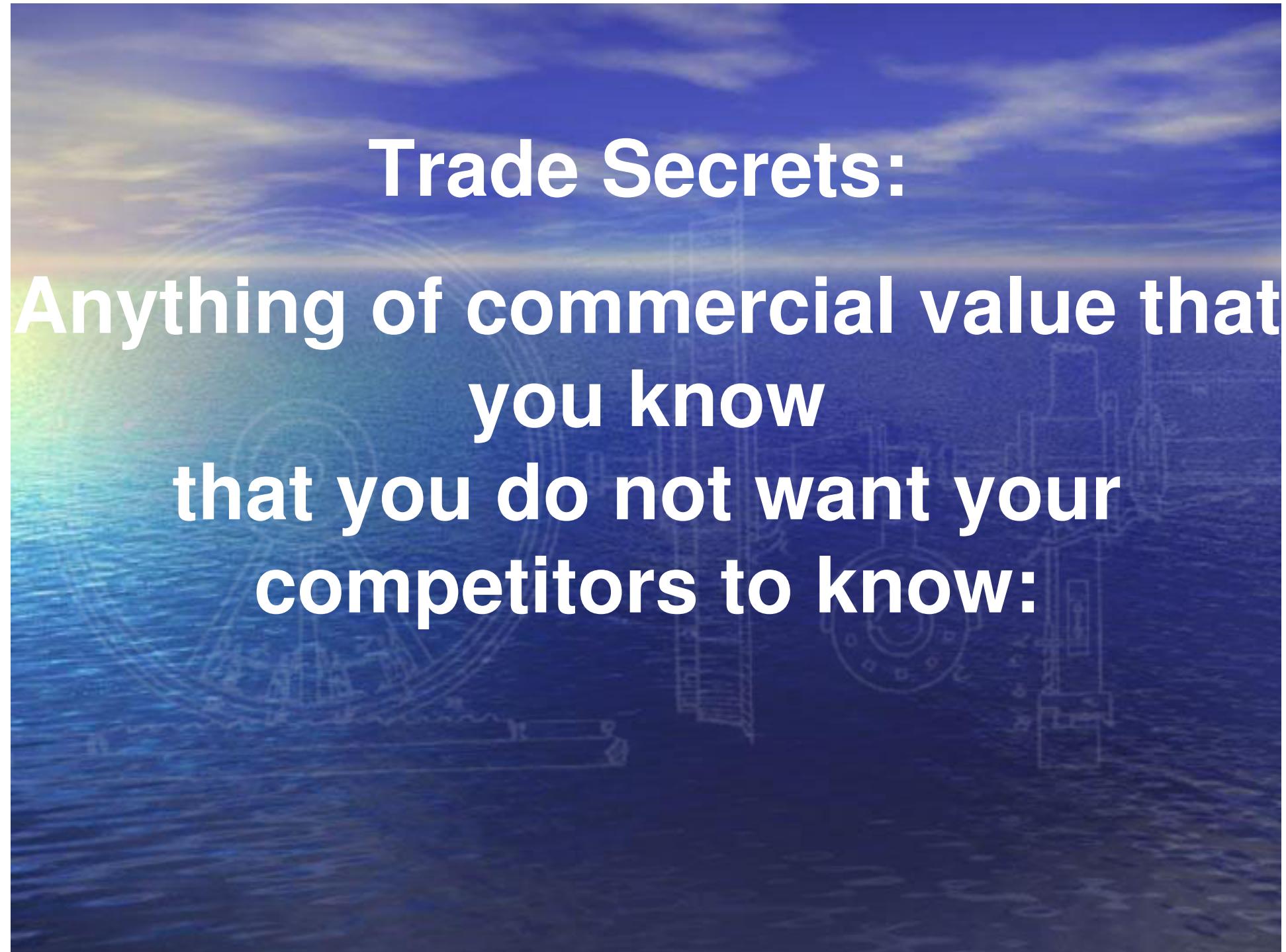
**BROAD =GOOD  
NARROW=BAD**



**Patent Application:  
Once filed = Patent  
Pending! For both PPA  
and real.**



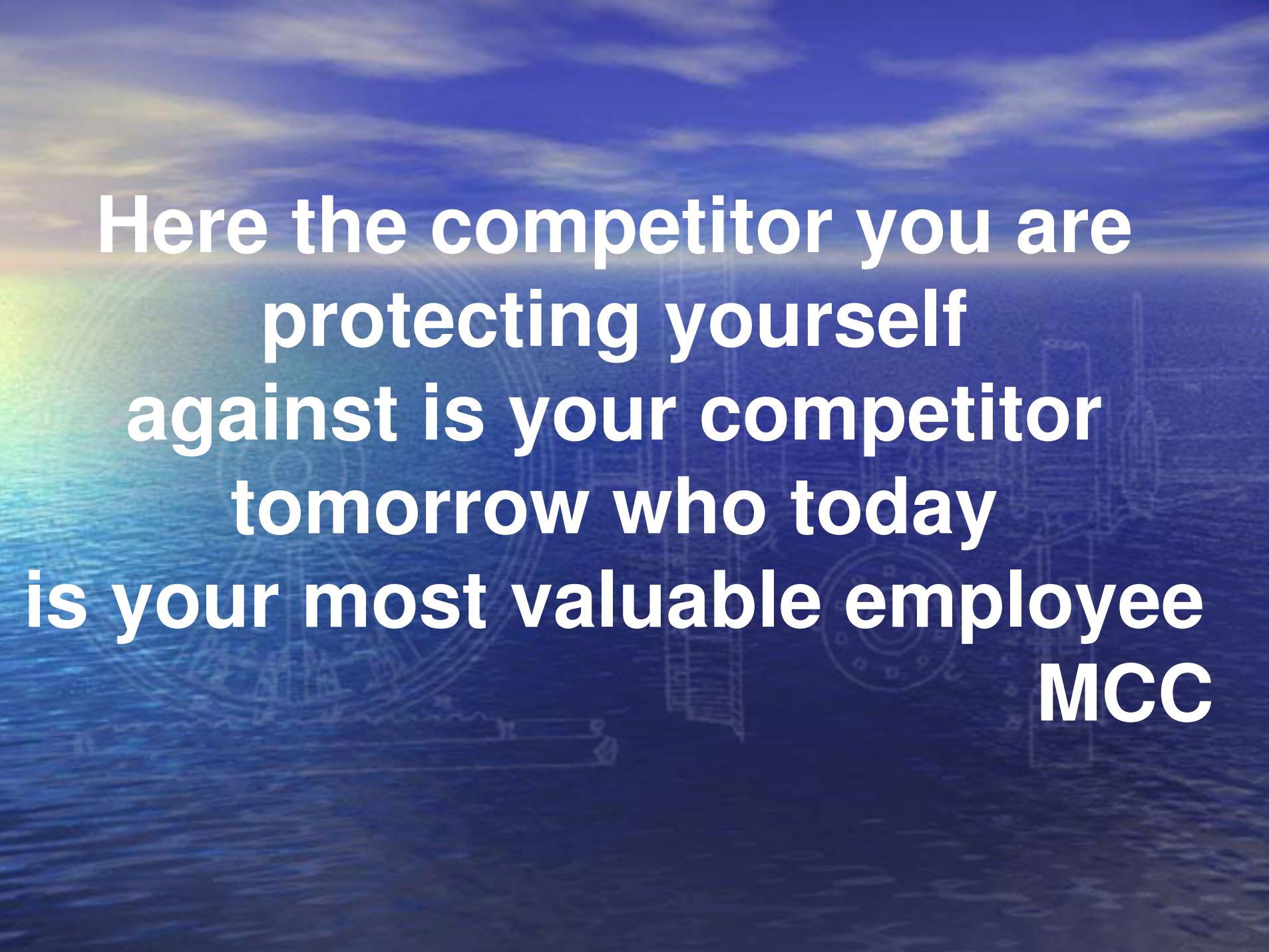
**PROCESS:**  
**APPLICATION**  
**LONG WAIT**  
**REJECTION**  
**AMENDMENT**  
**ALLOWANCE**



**Trade Secrets:**  
**Anything of commercial value that**  
**you know**  
**that you do not want your**  
**competitors to know:**



**Chemical formula -  
Algorithms  
Data Compilations -  
Business Plans**



Here the competitor you are  
protecting yourself  
against is your competitor  
tomorrow who today  
is your most valuable employee

MCC



**NON-COMPETE=**  
**STARVATION**

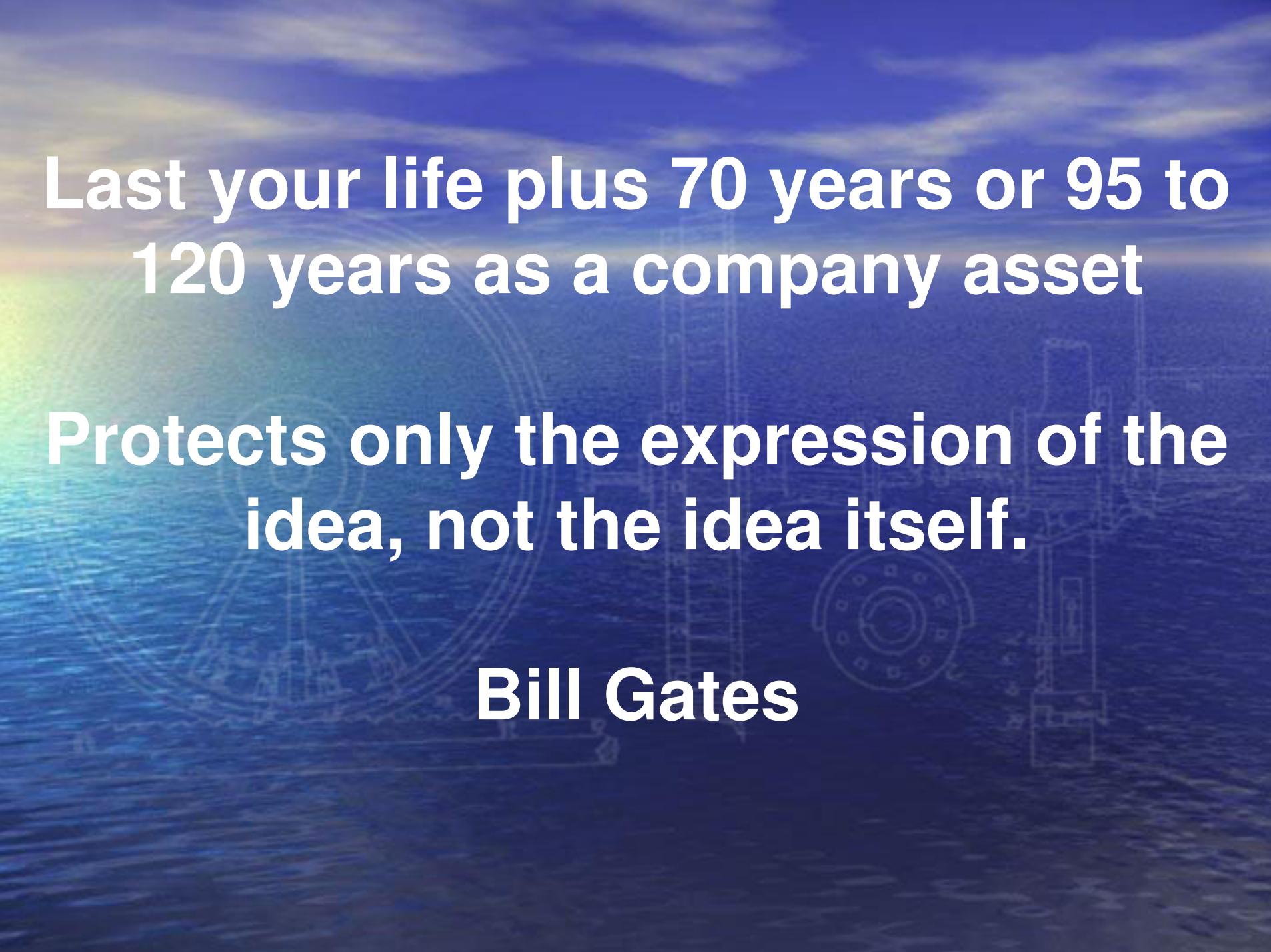


TRADE SECRETS=  
STEALING



# Copyrights

## Original works of art and authorship



**Last your life plus 70 years or 95 to 120 years as a company asset**

**Protects only the expression of the idea, not the idea itself.**

**Bill Gates**

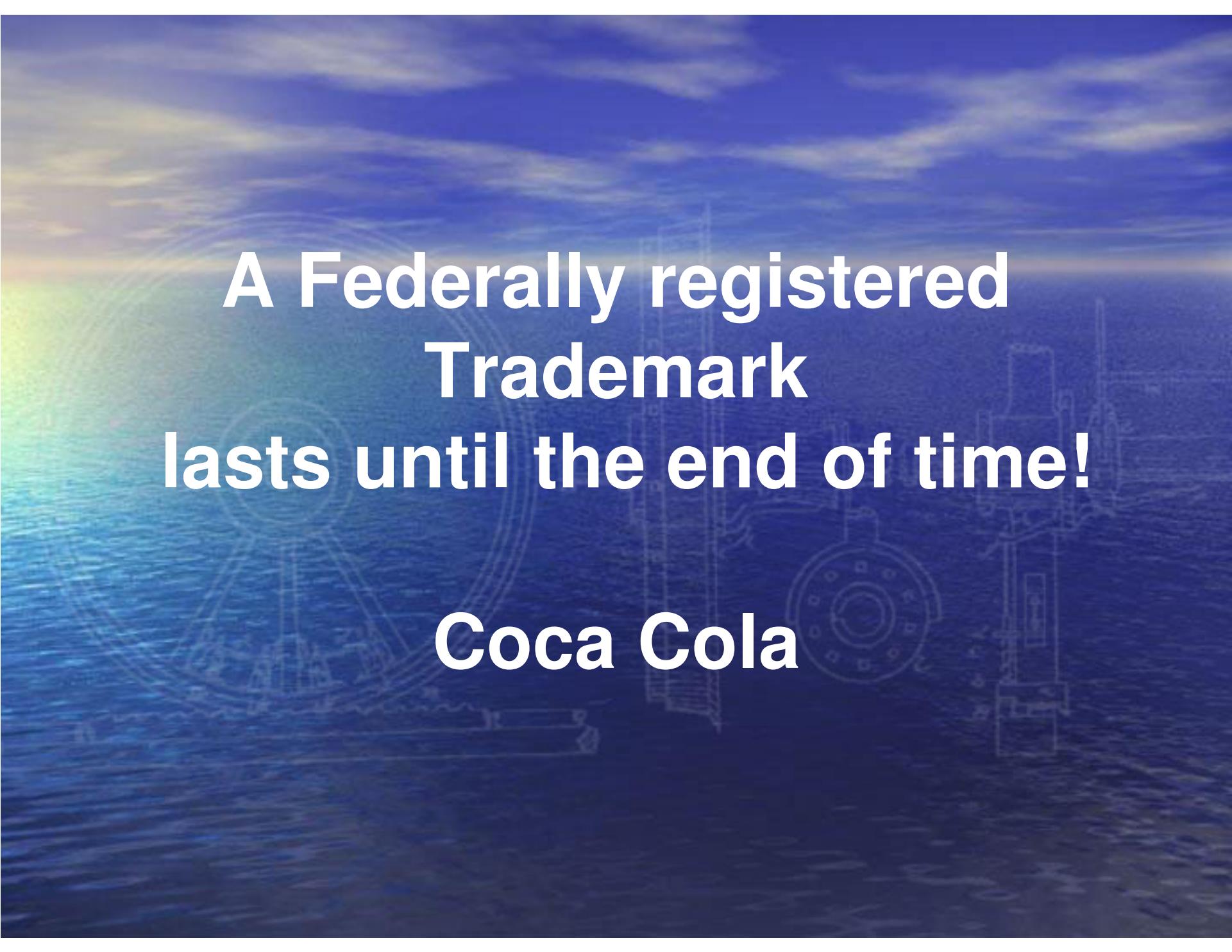


**RULE=**

**JUST BECAUSE TECHNOLOGY  
ALLOWS YOU TO DO  
SOMETHING DOES NOT MAKE  
IT LEGAL!**

# Trademarks

**Any word, symbol or slogan  
that is used to identify  
and distinguish  
your goods or services  
from  
all other similar goods  
or services**



A Federally registered  
Trademark  
lasts until the end of time!

Coca Cola



**BUT YOU CAN NOT  
REGISTER A MARK**

**THAT IS DESCRIPTIVE OF THE  
THING BEING SOLD**



THE EASIEST MARKS TO  
REGISTER AND THE BEST  
MARKS

BEAR NO LOGICAL RELATION  
TO THE THING BEING SOLD  
THINK  
APPLE COMPUTER!

# **Three Folder Plan for Protecting Every Idea!**

**Folder No. 1: A Written witnessed record  
of the idea**

**Folder No. 2: Signed NDA/ Confidentiality  
Agreements**

**Folder No. 3:\$\$\$\$\$= Commercial Viability**



People with ideas  
are the world's greatest  
asset  
and they are visionaries!

But remember this!



The list of things that can  
not be done is endless!



**“THERE IS NO REASON  
ANYONE WOULD WANT A  
COMPUTER IN THEIR HOME”.**

**- Ken Olson, President ,  
Chairman & Founder of  
Digital Equipment Corporation.**



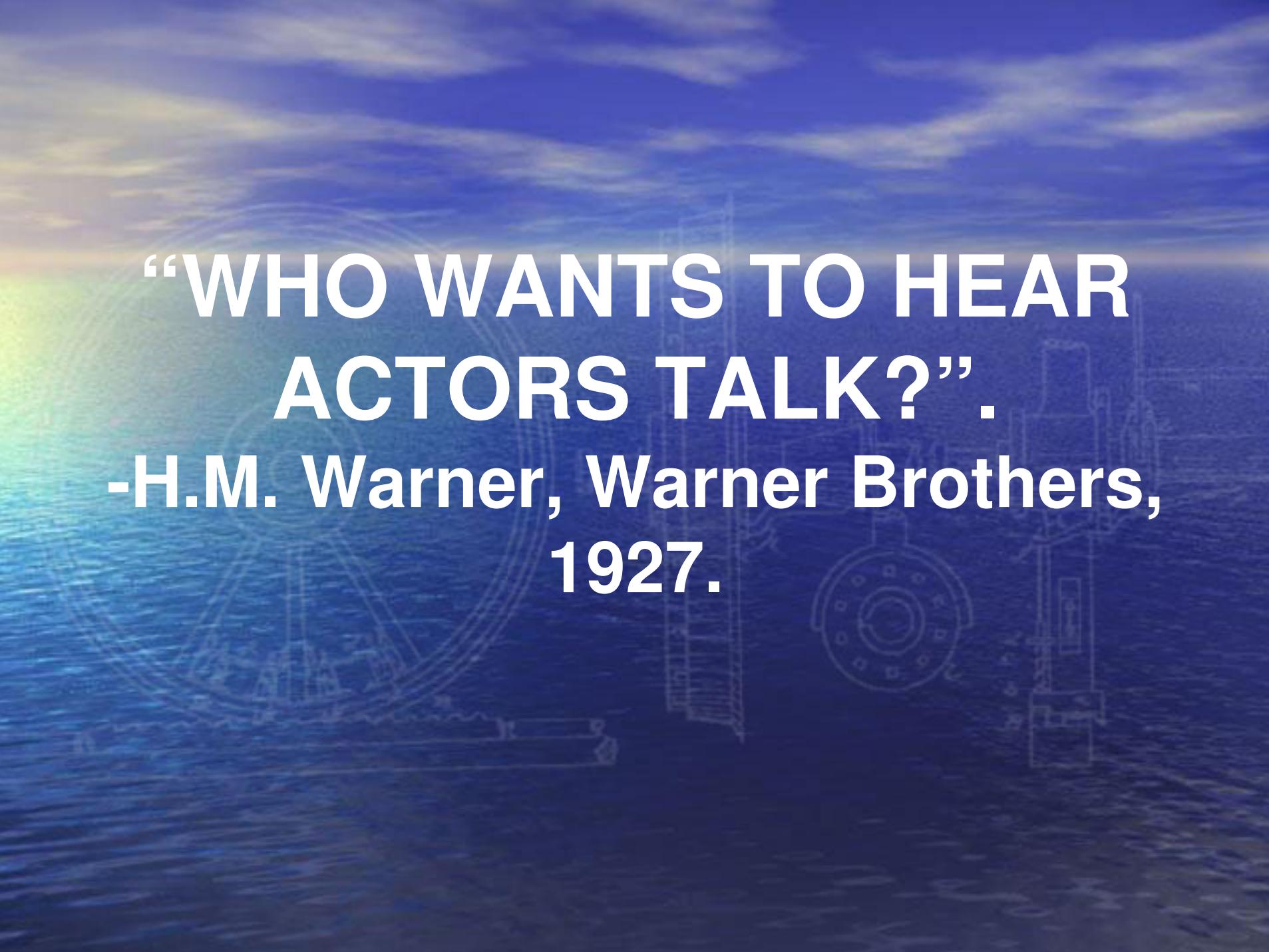
“THIS TELEPHONE HAS TOO  
MANY SHORTCOMINGS TO  
BE SERIOUSLY  
CONSIDERED AS A MEANS  
OF COMMUNICATION”.

- Western Union internal Memo,  
1876.



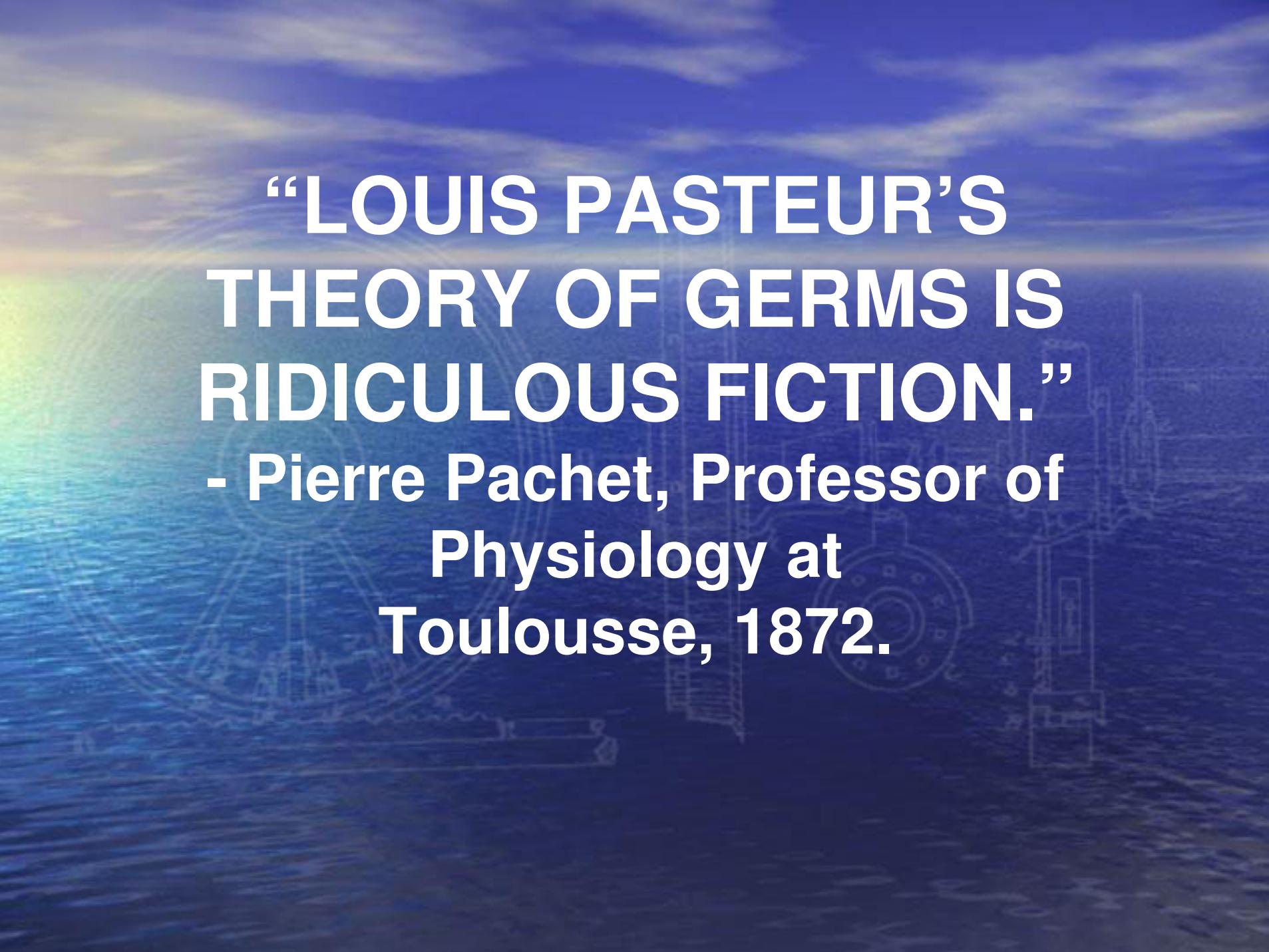
“HEAVIER THAN AIR  
FLYING MACHINES ARE  
IMPOSSIBLE”.

- Lord Kelvin, President  
Royal Society 1895.



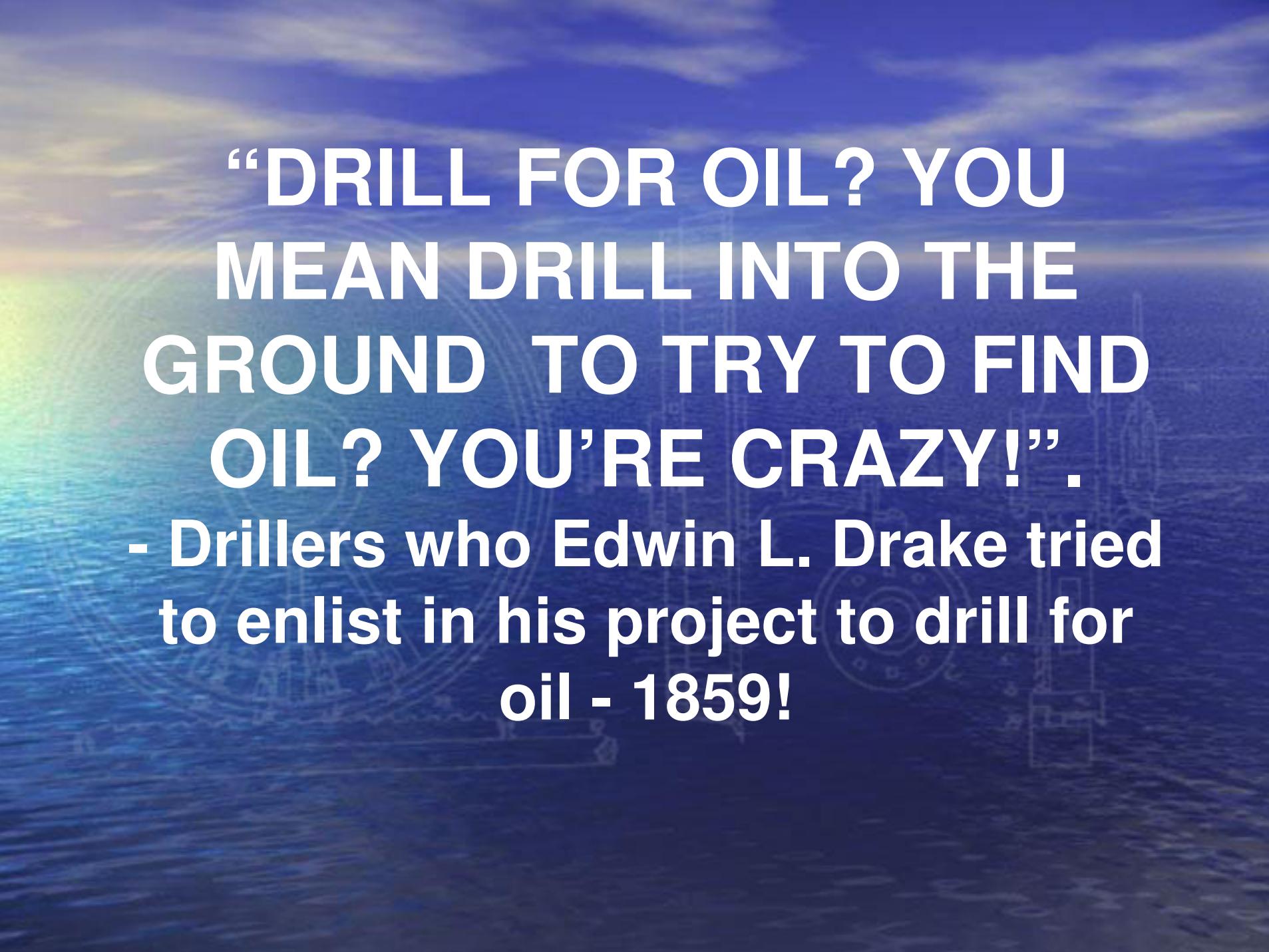
“WHO WANTS TO HEAR  
ACTORS TALK?".

-H.M. Warner, Warner Brothers,  
1927.



“LOUIS PASTEUR’S  
THEORY OF GERMS IS  
RIDICULOUS FICTION.”

- Pierre Pachet, Professor of  
Physiology at  
Toulouse, 1872.



**“DRILL FOR OIL? YOU  
MEAN DRILL INTO THE  
GROUND TO TRY TO FIND  
OIL? YOU'RE CRAZY!”.**

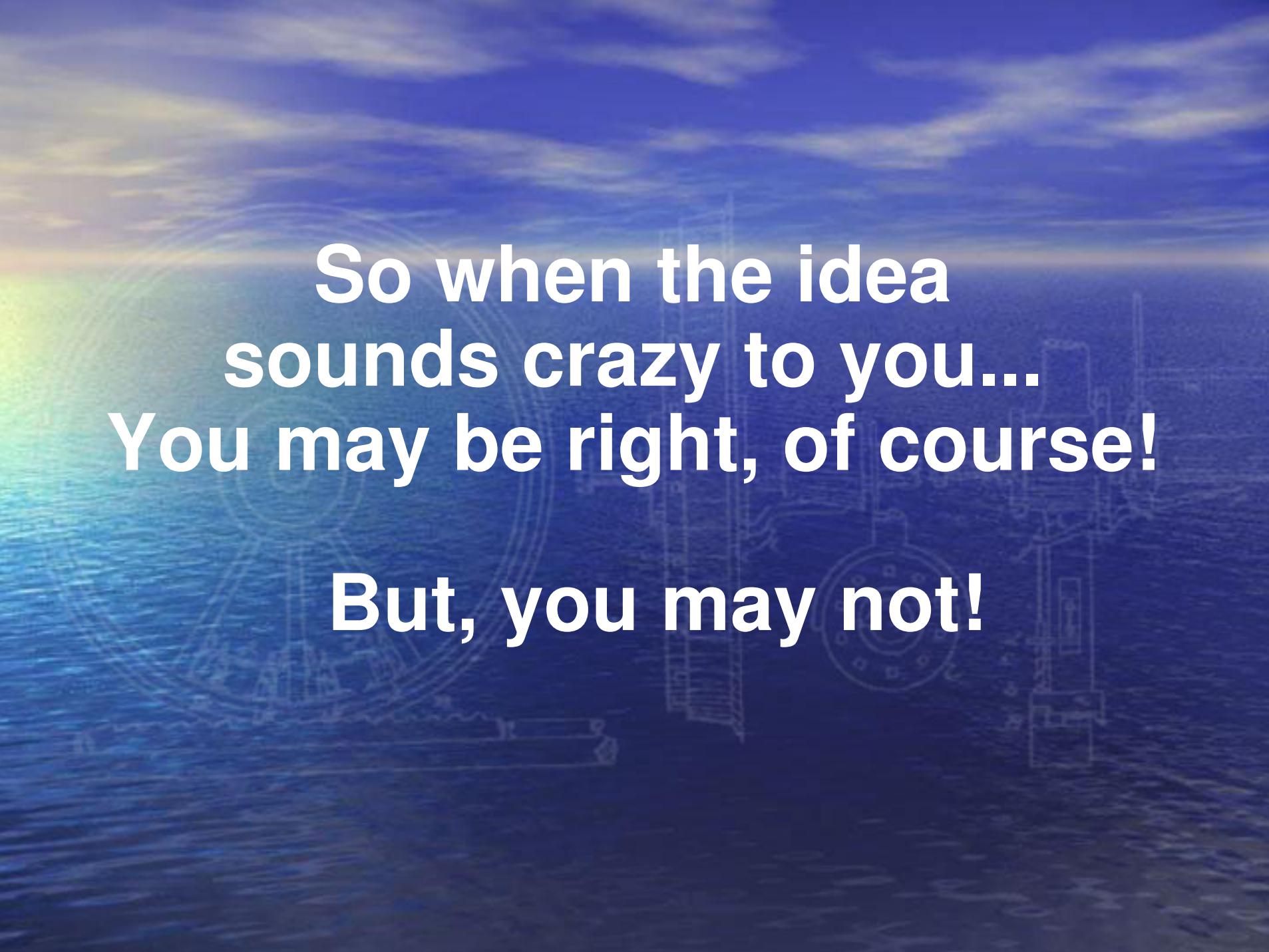
- Drillers who Edwin L. Drake tried to enlist in his project to drill for oil - 1859!**



And my personal  
favorite...

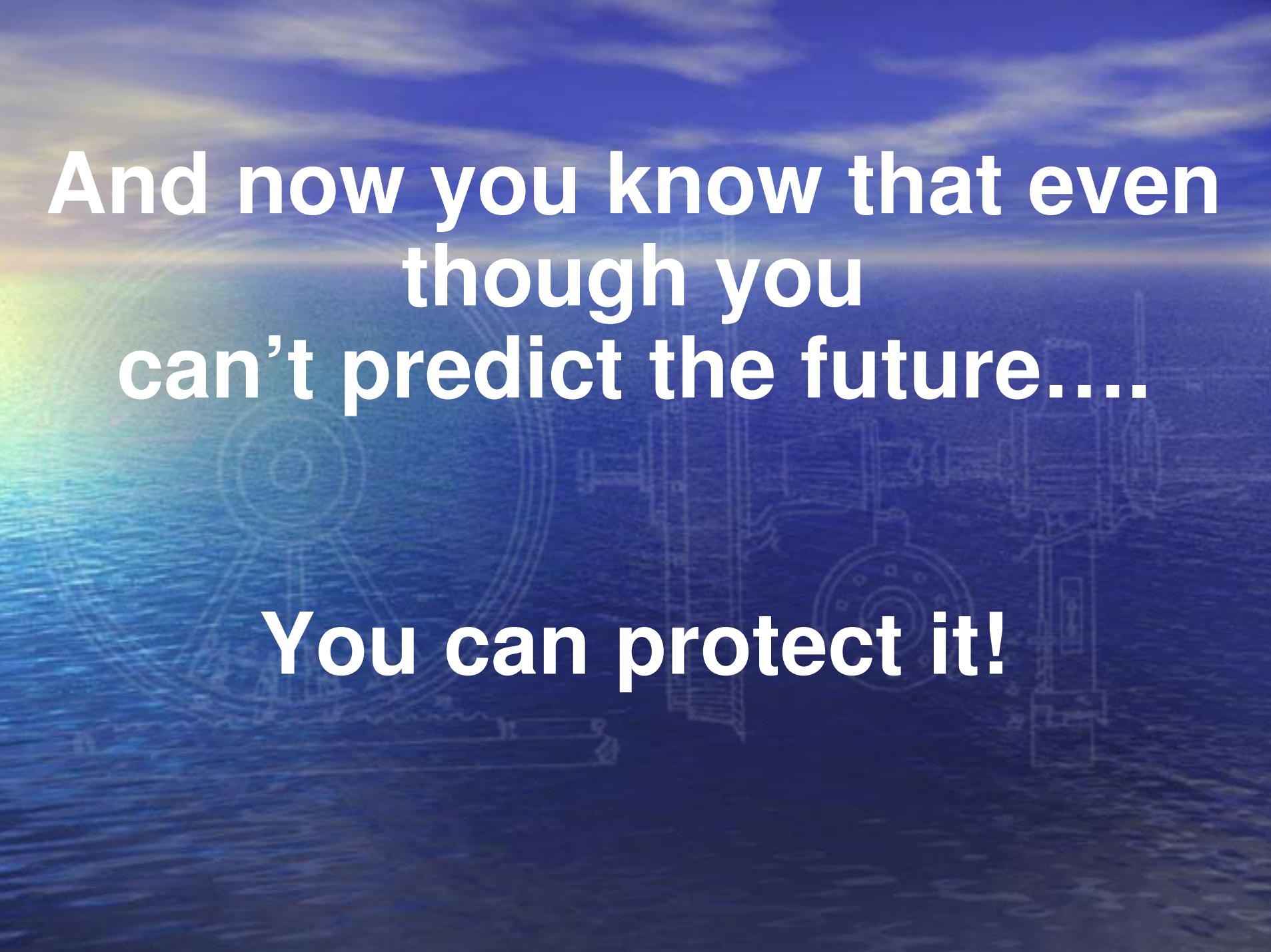


“EVERYTHING THAT CAN BE  
INVENTED HAS BEEN  
INVENTED.”



**So when the idea  
sounds crazy to you....  
You may be right, of course!**

**But, you may not!**



And now you know that even  
though you  
can't predict the future....

You can protect it!



# QUESTIONS?

NEVIN SHAFFER

850-934-4124

[nevin@jnevinshaffer.com](mailto:nevin@jnevinshaffer.com)