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Keep it candid at the USPTO

Applying for a patent in the United States is a dialogue, largely in writing, between the applicant and the Patent and Trademark Office (PTO). The PTO must keep applications secret for at least 18 months after filing, following which most are published. Until the patent issues or the application is published, the dialogue is secret, conducted out of public view. Only the applicant, the applicant's lawyer(s) and an often overworked patent examiner know the application was filed or have a say in whether a patent will issue. Others knowledgeable about the invention's field have no opportunity to comment or present evidence and arguments on whether an invention deserves patent protection.

Therefore, the PTO insists it be informed of all information important to its decision whether the invention described in a patent application meets statutory and constitutional standards for a patent. The PTO calls this "duty of candor and good faith in dealing with the Office", owed by "every individual associated with the filing and prosecution of a patent application". This requires the applicant, her lawyer or others subject to this duty to disclose any:

- prior art of which they are aware;
- information establishing that an invention claimed in the application is unpatentable; or
- information refuting or inconsistent with an applicant's arguments to the PTO favouring patent issuance or opposing the PTO's argument of unpatentability.

Penalties for not meeting the PTO's requirement for forthrightness and honesty can be severe. An otherwise valid patent can be rendered unenforceable if a court later determines one of the obligated individuals failed to comply with the duty of candour and good faith during the application process. Utmost honesty must be the foundation on which an application rests.