



Mesmer & Deleault, PLLC  
41 Brook Street, Manchester, NH 03104



Memorial Day

## *“Tip of the Month”*

### **An “Offer to Sell” Your Invention May Prevent Its Patentability**

You have invented a device. You’re eager to make money by selling your new device to various buyers. Do you know that even an offer to sell your new device may prevent you from obtaining patent protection?

Under US Patent Law, an inventor is barred from obtaining a patent if the invention was “in public use or on sale in this country, more than one year prior to” the filing of a patent application. This means that if you offer to sell copies of your new device more than one year before you file for a patent application, the on-sale bar under US Patent Law will make your patent application invalid.

A single sale or offer to sell is enough to bar patentability. The bar is not limited to sales by you, the inventor, or by someone under your control, but may even result from activities of a third party, acting either innocently or fraudulently. The on-sale bar requires an offer in the contract sense. It is an offer that rises to the level of a commercial offer for sale. In other words, it is an offer that the buyer could make into a binding contract by simply accepting your offer. Whether the offer for sale is accepted or not is immaterial.

In order to determine whether an offer of your new patentable device was in fact made, the facts surrounding the circumstances of the offer must be considered. A later offer to purchase your device by a buyer does not mean that your earlier activity did not constitute an offer to sell. For instance, sending a prototype to a customer to solicit a sale is sufficient to invoke the on-sale bar. If you contract with a supplier to make your new device and the circumstances of the contract meet the requirements of a commercial offer for sale more than one year prior to the patent application, then the on-sale bar applies.

In summary, it is your attempt to sell your new device (i.e., exploit your invention) rather than the potential buyer’s actual knowledge of your new device that will start the one-year period. Merely offering to sell your new device by way of an advertisement or invoice may be evidence of a definite offer for sale of your new device even though no details of your new device are disclosed.

If you have any questions about patentability of your new invention, please give us a call at 603-668-1971 or contact us by email at [Meslaw@aol.com](mailto:Meslaw@aol.com).

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Frank B. Mesmer, Jr., Esq.  
Robert R. Deleault, Esq.

**(603) 668-1971**

Fax (603) 622-1445

E-mail: [Meslaw@aol.com](mailto:Meslaw@aol.com)