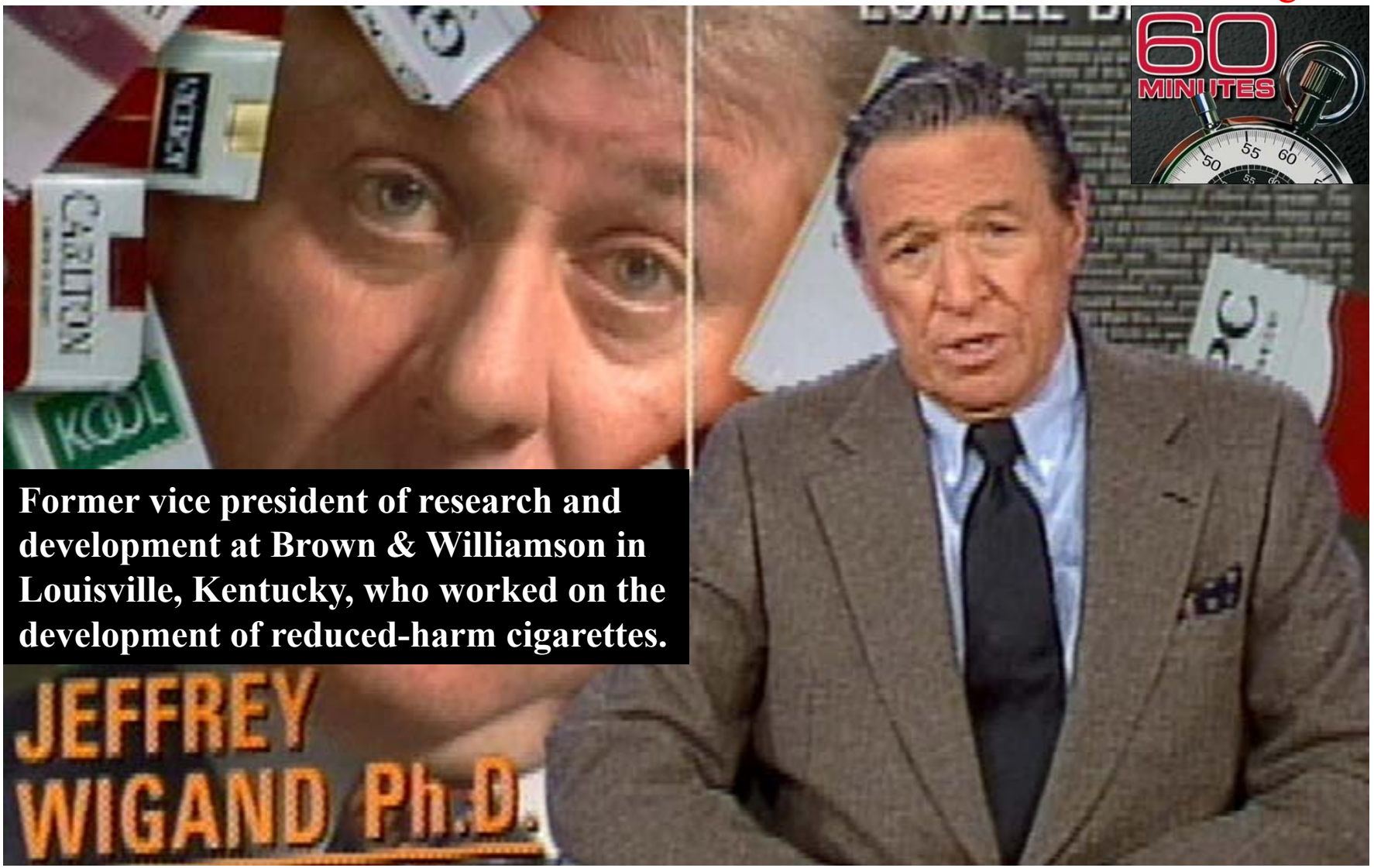
## Defend Trade Secrets Act of 2016

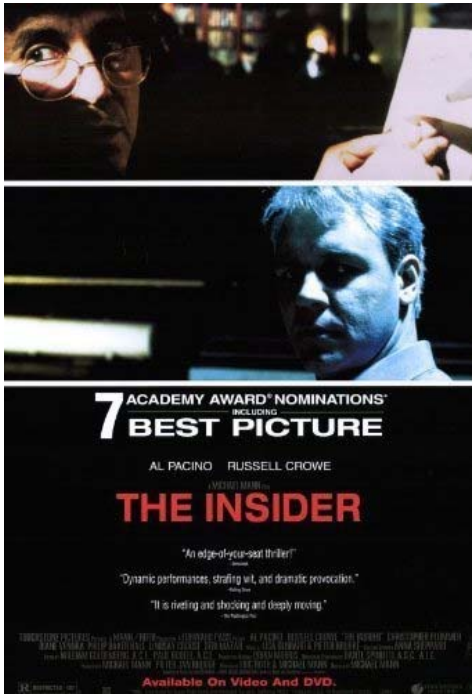
- **Federal Jurisdiction**
- **Ex parte seizures in "extraordinary circumstances"**
- **Immunity for Whistleblowers**

# Issues Unique to DTSA

- Relates to product or service in interstate commerce
- Ex parte seizure (§1836(b)(2))
  - Strict requirements; court must store seized material
  - Must demonstrate Rule 65 order insufficient
- Departing employee injunctions (§1836(b)(3)(A)(i))
  - Conditions on new job must be based on evidence of threat, not just knowledge
  - Rejects the so-called "inevitable disclosure doctrine"
- Extraterritoriality
  - Expressed congressional intent to apply broadly to foreign acts of Misappropriation
  - But existing EEA provision (§1837) requires a U.S. actor or an act in U.S.
- Whistleblower Immunity (§1833(b))

# Public Policy Exception?

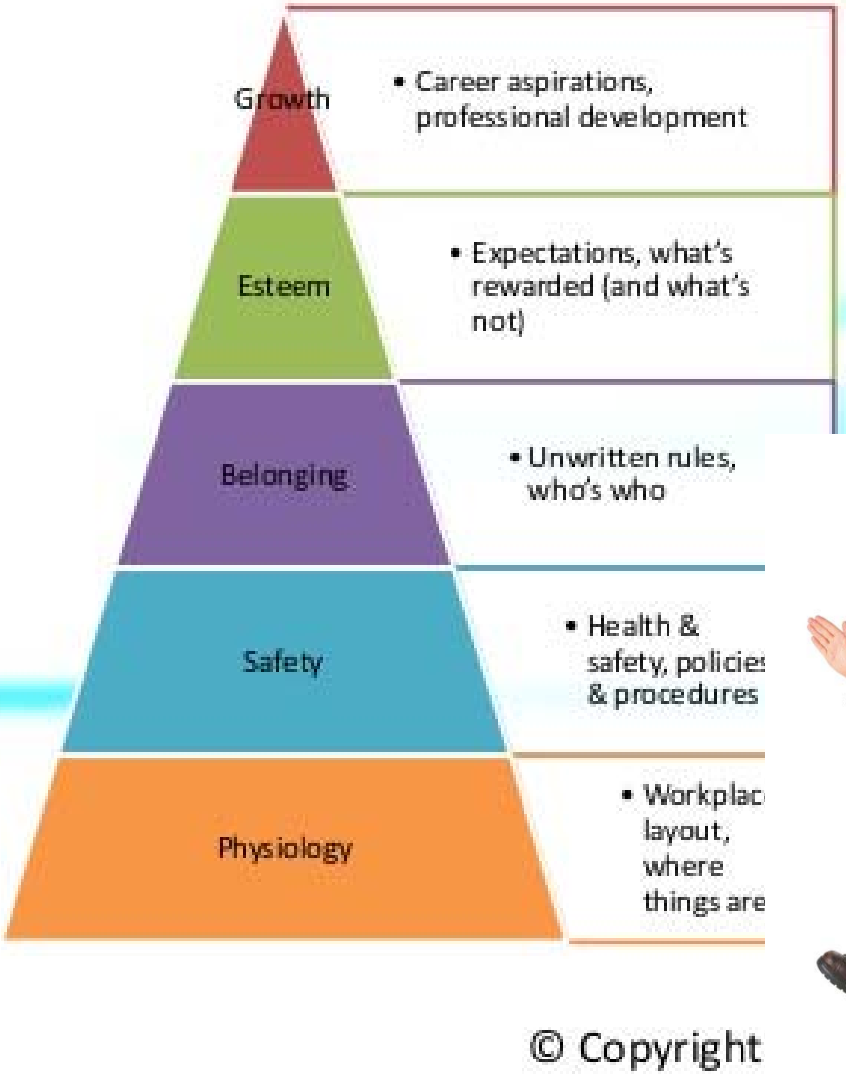




**Wigand is trapped in a war between the government and its attempts to regulate the $50 billion tobacco industry and the tobacco companies themselves, which insist that the government has no place in their affairs. Wigand is under a temporary restraining order from a Kentucky state judge not to speak of his experiences at Brown & Williamson. He is mired in a swamp of charges and countercharges hurled at him by his former employer, the third-largest tobacco company in the nation.**

**May 1996**

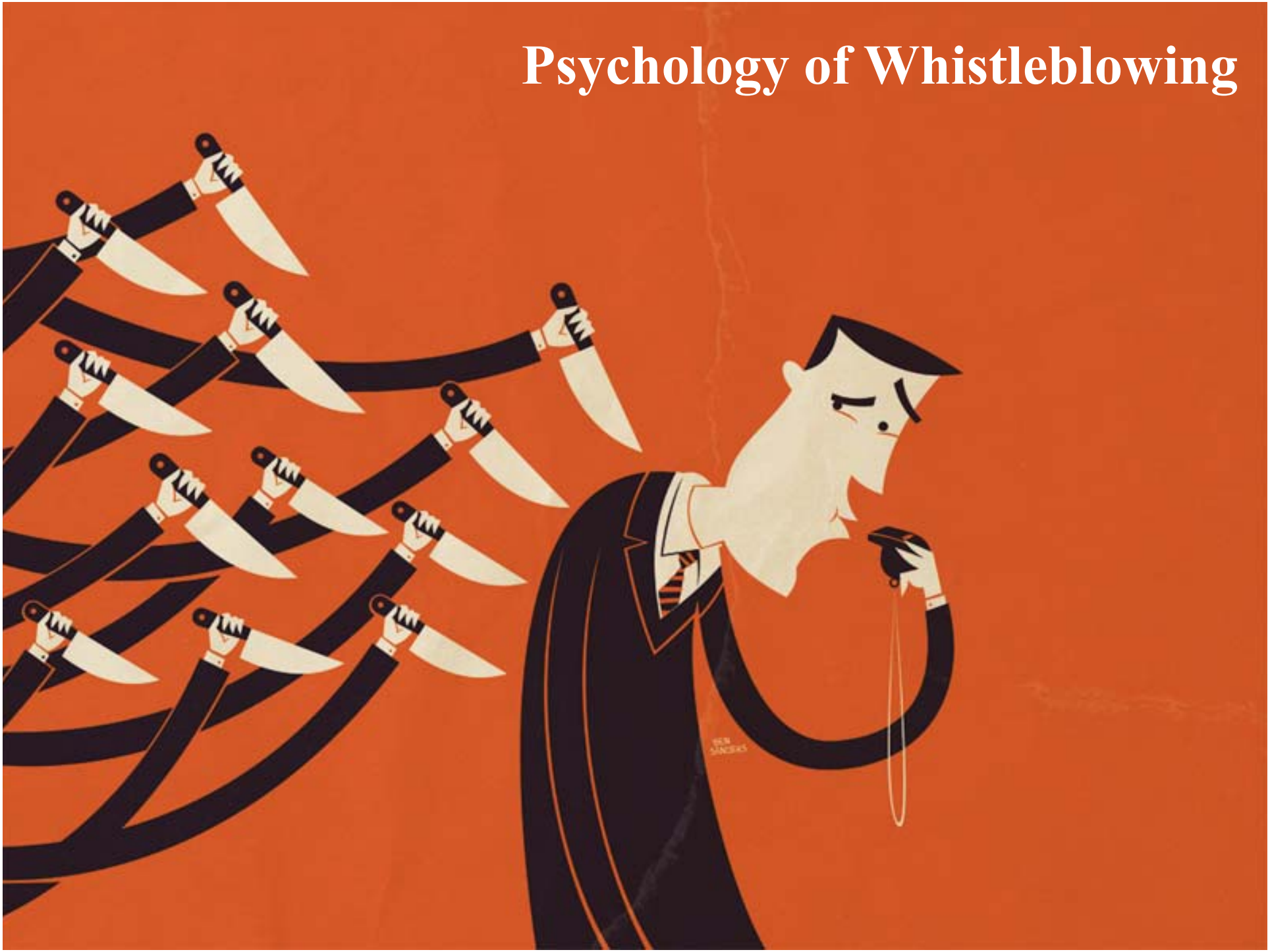
# Psychology of Whistleblowing

## Maslow Meets Onboarding




Orientation is focussed on formalities and avoiding problems, onboarding encompasses how to achieve excellence.

# Psychology of Whistleblowing



DECEMBER 30, 2002 / JANUARY 6, 2003

SPECIAL DOUBLE ISSUE

# PERSONS OF THE YEAR

# TIME

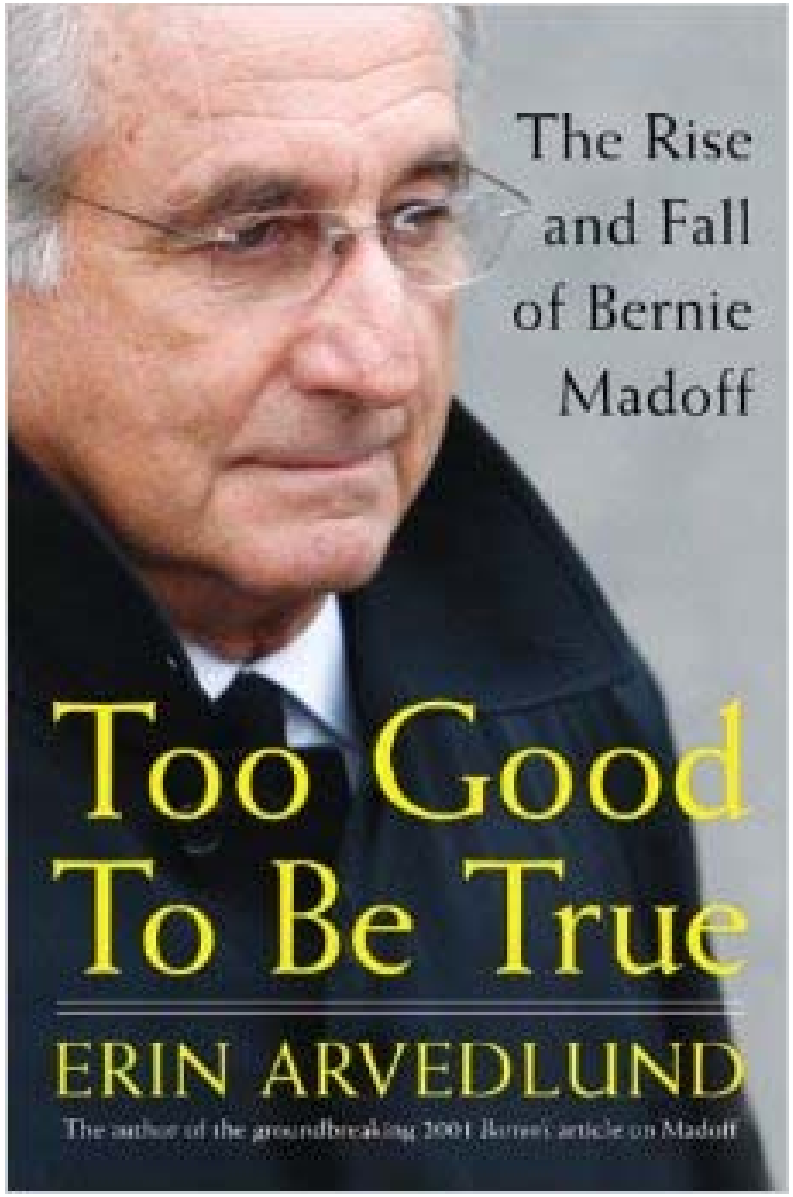
## The Whistleblowers

CYNTHIA COOPER
OF WORLDCOM

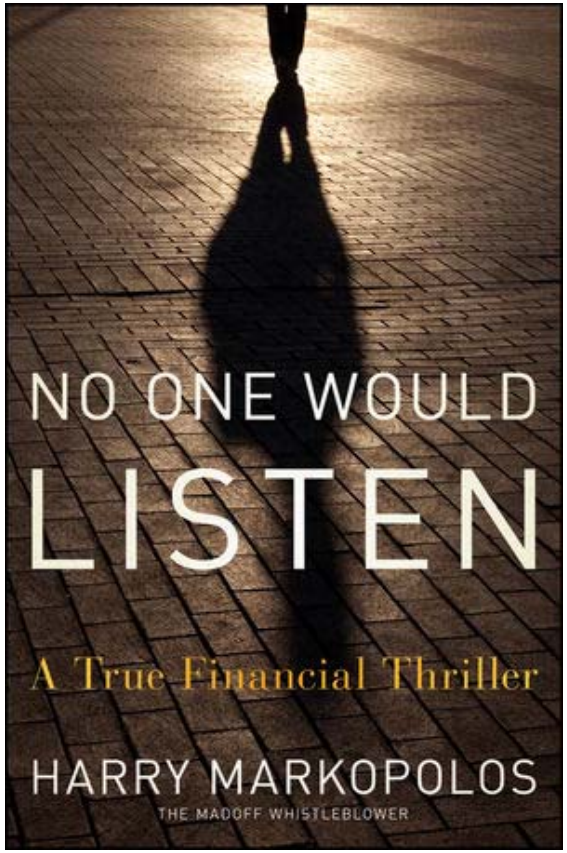
COLEEN ROWLEY
OF THE FBI

SHERRON WATKINS
OF ENRON

www.time.com AOL Keyword: TIME


The Rise and Fall of Bernie Madoff
Too Good To Be True
ERIN ARVEDLUND
The author of the groundbreaking 2001 Barron's article on Madoff


Harry Markopolos
tried to tip off the SEC about the Madoff scandal for 9 years


NO ONE WOULD
LISTEN
A True Financial Thriller
HARRY MARKOPOLOS
THE MADOFF WHISTLEBLOWER

**Trade Secret Protection**

**Reporting Illegal Conduct**

## RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 40, comment c

The scope of liability at common law and under the Uniform Trade Secrets Act for disclosures that do not involve commercial exploitation of the secret information ***is unclear***. * * * [T]he disclosure of another's trade secret for purposes other than commercial exploitation ***may implicate the interest in freedom of expression or advance another significant public interest***. A witness who is compelled by law to disclose another's trade secret during the course of a judicial proceeding, for example, is not subject to liability.

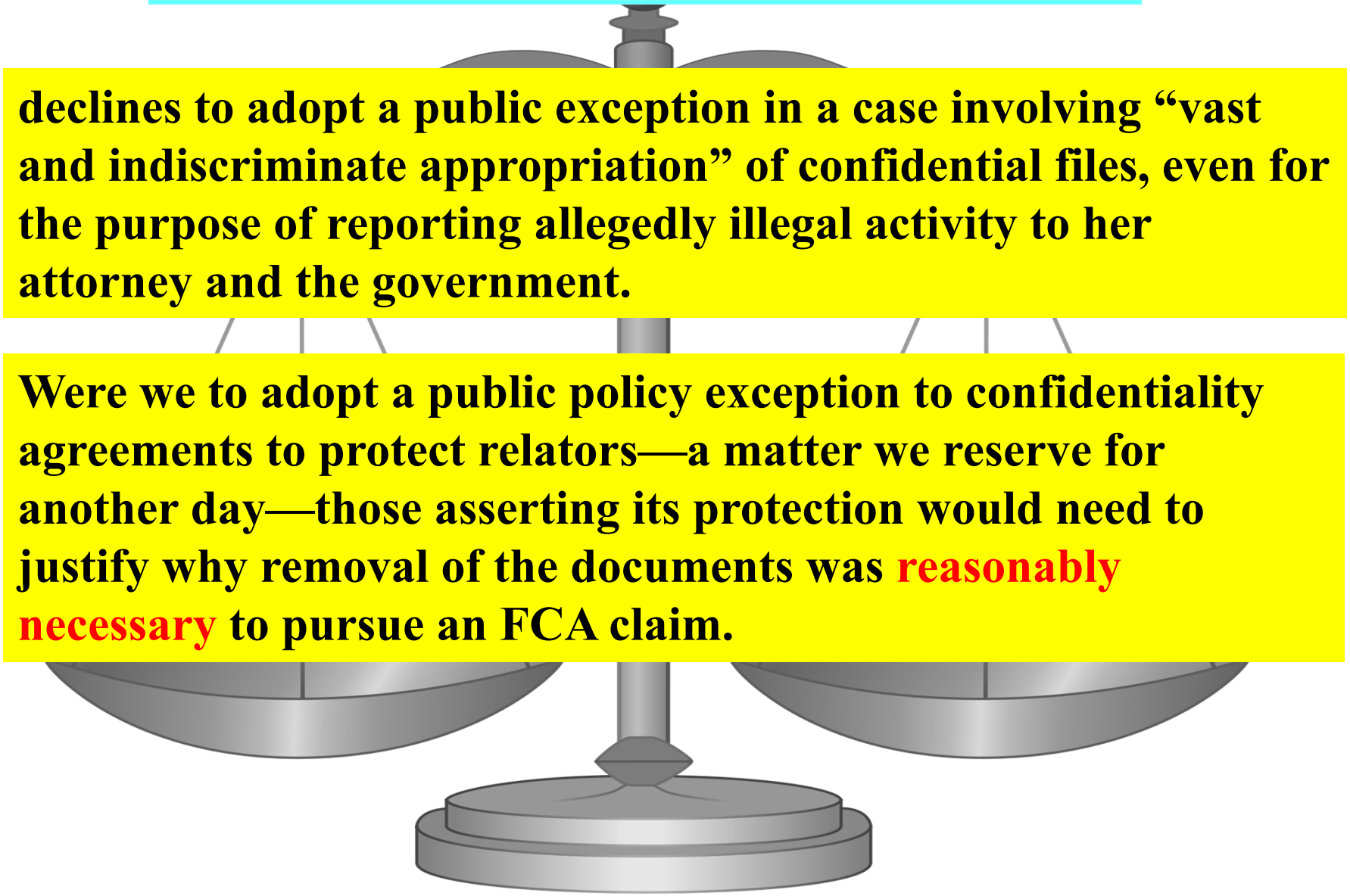
**Trade Secret Protection**

**Reporting Illegal Conduct**

## RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 40, comment c

The existence of a privilege to disclose another's trade secret ***depends upon the circumstances*** of the particular case, including the nature of the information, the purpose of the disclosure, and the means by which the actor acquired the information. ***A privilege is likely to be recognized, for example, in connection with the disclosure of information that is relevant to public health or safety, or to the commission of a crime or tort, or to other matters of substantial public concern.***

# *Cafasso v. Gen. Dynamics C4 Sys.*, 637 F.3d 1047 (9th Cir. 2011)



**declines to adopt a public exception in a case involving "vast and indiscriminate appropriation" of confidential files, even for the purpose of reporting allegedly illegal activity to her attorney and the government.**

**Were we to adopt a public policy exception to confidentiality agreements to protect relators—a matter we reserve for another day—those asserting its protection would need to justify why removal of the documents was reasonably necessary to pursue an FCA claim.**

LEXOLOGY

**Related USA articles**

In Ninth Circuit, whistleblowers not exempt from confidentiality agreements

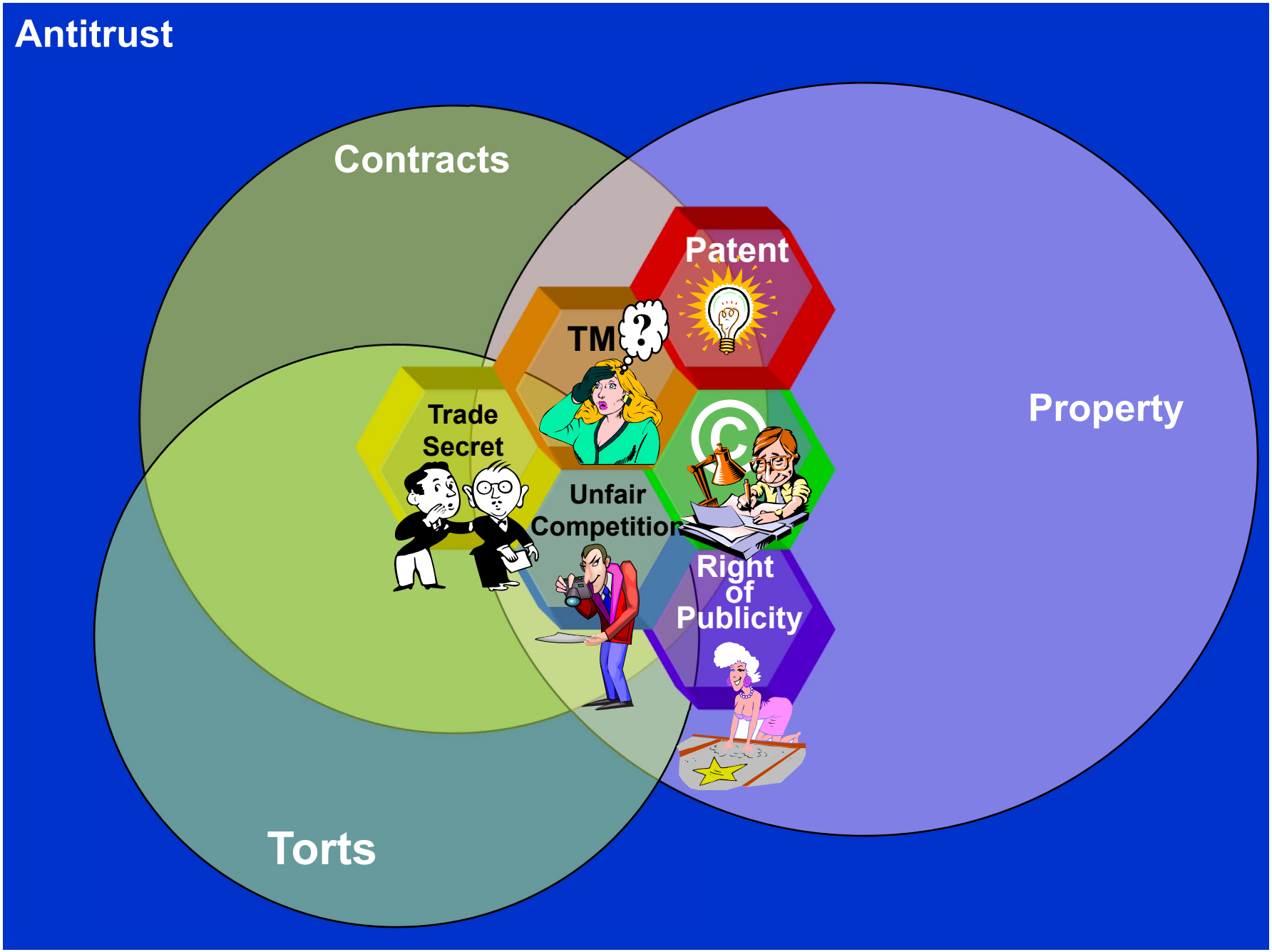
# Employers fight back against whistleblowers

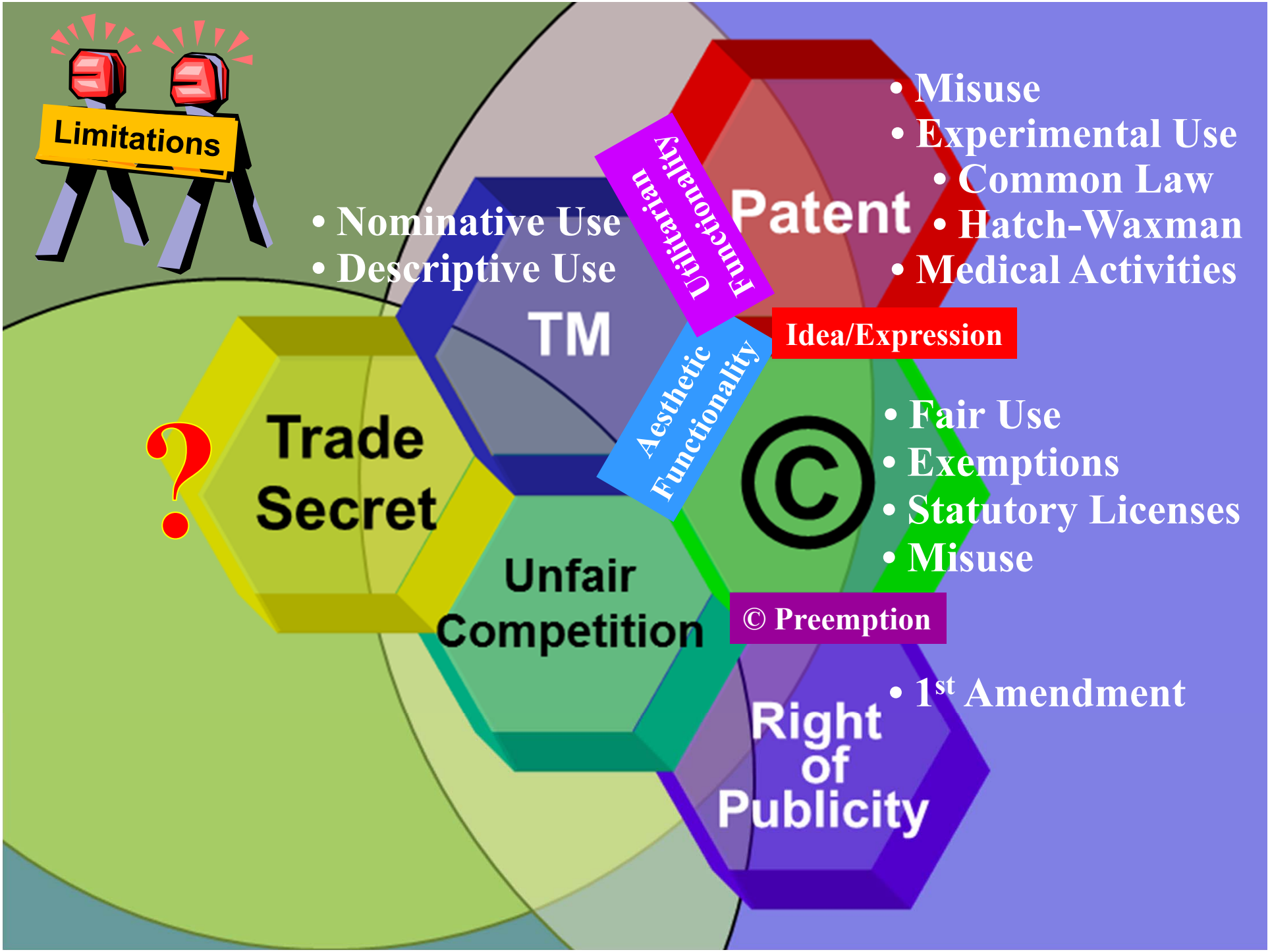
CARLTON FIELDS JORDEN BURT

USA | July 2 2014

In 2013, the federal government recovered $3.8b from settlements and judgments under the FCA. . . .

Fortunately, employers are not without options against employees who make false accusations of wrongdoing. Employers may even have options against employees who have been successful in their FCA cases, but who have breached their employment agreements or who have stolen documents. Courts have recently been more willing to permit counterclaims against employee relators. Additionally, there is at least one case in which an employer filed suit against a whistleblower after *losing* a FCA case.


Antitrust
Contracts
Property
Torts
Patent
TM
Trade Secret
Unfair Competition
Right of Publicity


Limitations
• Misuse
• Experimental Use
• Common Law
• Hatch-Waxman
• Medical Activities
Patent
Utilitarian Functionality
• Nominative Use
• Descriptive Use
TM
Idea/Expression
Aesthetic Functionality
?
Trade Secret
©
• Fair Use
• Exemptions
• Statutory Licenses
• Misuse
Unfair Competition
© Preemption
• 1st Amendment
Right of Publicity

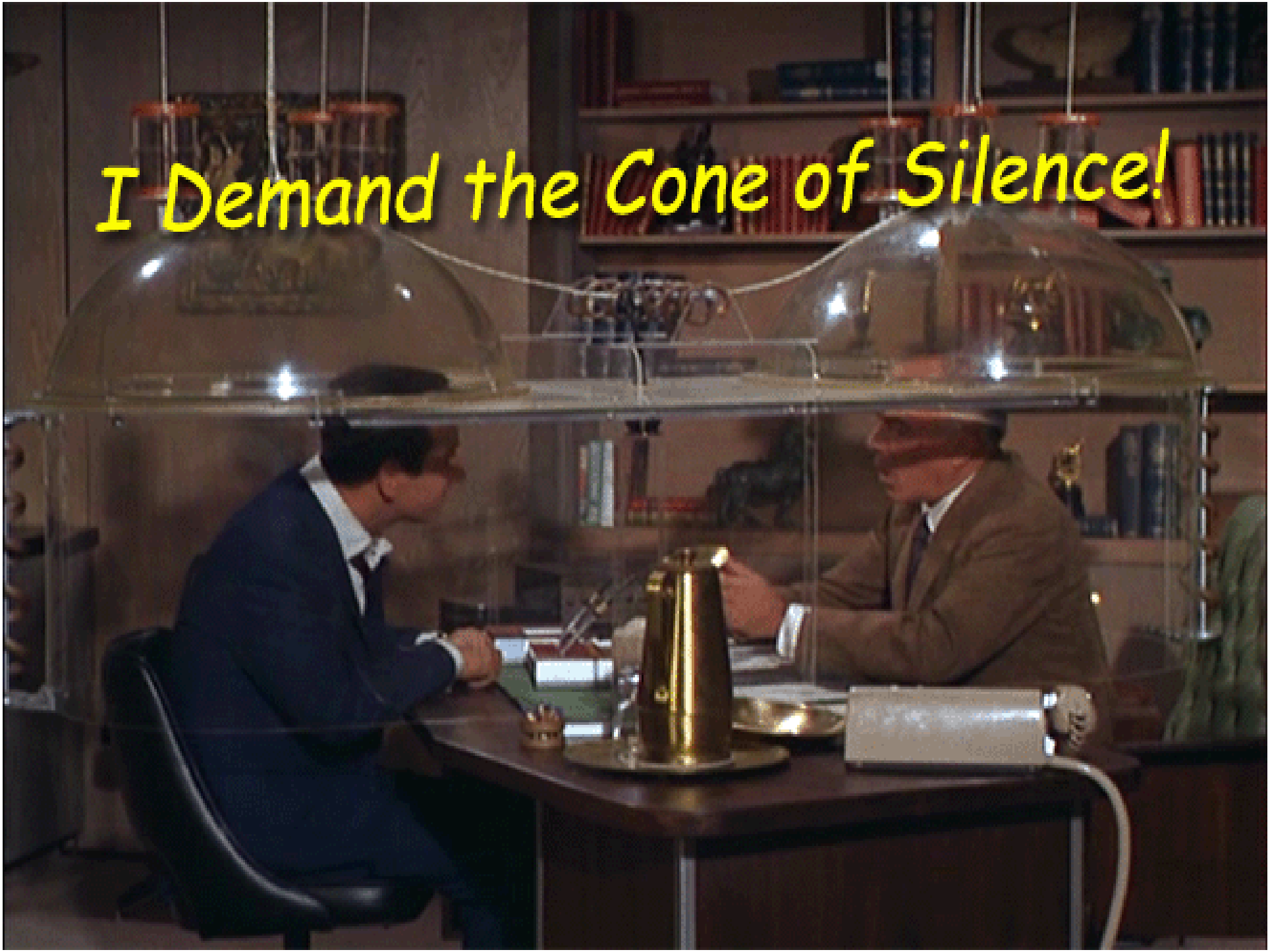
California Law Review

VOL. 105 FEBRUARY 2017 NO. 1

# Tailoring a Public Policy Exception to Trade Secret Protection

Peter S. Menell*

***The growing importance of information resources as well as mounting threats to proprietary information in the digital age propelled federalization of trade secret protection onto the national legislative agenda during the past year. This salience provided a propitious opportunity to address a critical, overlooked failing of trade secret protection: the lack of a clear public policy exception to foster reporting of illegal activity. The same routine nondisclosure agreements that are essential to safeguarding trade secrets can be and are used to chill those in the best position to reveal illegal activity. Drawing on classic law enforcement scholarship as well as established institutions for protecting proprietary information, this Article proposes a sealed disclosure/trusted intermediary exception to trade secret protection. This approach safeguards trade secrets while promoting effective law enforcement. The Article also recommends that nondisclosure agreements prominently include notice of the law reporting safe harbor to ensure that those with knowledge of illegal conduct are aware of this important public policy limitation on nondisclosure agreements and exercise due care with trade secrets in reporting illegal activity. Based on an earlier draft of this Article, Congress adopted a whistleblower immunity provision as part of the Defend Trade Secrets Act of2016.***


I Demand the Cone of Silence!


## Section 7 18 U.S.C. § 1833

(B) IMMUNITY FROM LIABILITY FOR CONFIDENTIAL DISCLOSURE OF A TRADE SECRET TO THE GOVERNMENT OR IN A COURT FILING

(1) IMMUNITY

(2) USE OF TRADE SECRET INFORMATION IN ANTI-RETALIATION LAWSUIT

(3) NOTICE

LATHAM & WATKINS

Client Alert Commentary

Latham & Watkins Benefits, Compensation & Employment Practice May 12, 2016 | Number 1967

**Employee Notice Provision of Defend Trade Secrets Act – Immediate Action Needed**

***New law requires employers to give notice of immunity rights in order to recover enhanced damages.***

# Public Policy Exception


**Immunity From Liability For Confidential Disclosure Of A Trade Secret To The Government Or In A Court Filing.—**

**(1) Immunity.—**An individual shall not be held criminally or civilly liable under any Federal or State trade secret law for the disclosure of a trade secret that—

(A) is made —

(i) in confidence to a Federal, State, or local government official, either directly or indirectly, or to an attorney; and

(ii) solely for the purpose of reporting or investigating a suspected violation of law; or

(B) is made in a complaint or other document filed in a lawsuit or other proceeding, if such filing is made under seal.

**(2) Use of Trade Secret Information in Anti-Retaliation Lawsuit. . . .**

**(3) Notice**

(A) In General.—An employer shall provide notice of the immunity set forth in this subsection in any contract or agreement with an employee that governs the use of a trade secret or other confidential information.