

From: Helfgott, Samson [e-mail address redacted]
Sent: Wednesday, February 01, 2012 3:25 PM
To: Hirshfeld, Andrew
Cc: Rea, Teresa
Subject: Oath or Declaration

Dear Drew:

Following up our last telephone conversation, we discussed my getting to you some of my comments on how we envision the proposed rules on oath or declaration should be. I'm sorry that the document is so lengthy. As a result, I also am providing you an executive summary of the main points, as we see them. The document itself is broken into three sections. The first discusses in more detail the way we believe the oath or declaration provisions should be. The second section addresses various issues and concerns that were raised in the proposed rules, and I indicate what I believe are easy solutions to those concerns. The third section goes into details of the proposed rules pointing out how specific ones provide major concerns to us.

Please note that these comments are submitted in my name. However, I understand the various national bar associations are going to submit formal comments. I suspect that most, if not all, will be along the same approach that I have taken. Also, I believe in previous comments submitted by AIPLA before the published rules, they provided actual proposed language for at least some of the significant rules involved. I believe in their comments they will be providing a more complete set of marked up rules.

For the sake of transparency, I have no problem with your publishing this as submitted comments. Please feel free to call me if you have any questions or would like to further discuss any of these issues. I do appreciate your addressing the proposed rules on oath or declaration as I think for the sake of procedural harmonization the proposed rules should be considered for modification.

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COMMENTS ON PROPOSED RULES RELATING TO OATH OR DECLARATION

EXECUTIVE SUMMARY

- The inventor and the applicant are two separate entities. The inventor is not automatically considered an applicant.
- Each inventor must be named. This can be done in the ADS. For each inventor, a document is required, i.e. a declaration, a substitute statement or a combined assignment/declaration.
- Once such document is submitted, nothing further from the inventor is ever needed.
- A substitute statement is not an oath or declaration.
- No petitions are necessary relating to oath or declaration issues.
- The document relating to the inventor can be submitted any time before the Notice of Allowance.
- The oath or declaration does not have to name all inventors in a single document.
- An assignee, someone who establishes an interest, an inventor or a joint inventor can each be an applicant.
- The oath or declaration should state only what is required by the AIA, nothing further should be added.
- If the applicant is other than the inventor (or joint inventors), the party in interest who should be consulted for all matters thereafter, including powers of attorneys, reissues, etc. it is the applicant, not the inventor that is responsible for all decisions.
- Adding, deleting or changing inventors is done simply by a supplement ADS. No other documents are needed.

Samson Helfgott
February 1, 2012

COMMENTS ON
PROPOSED RULES RELATING TO OATH OR DECLARATION

I. General Understanding of the AIA relating to Oath or Declaration

1. It is believed that the America Invents Act (AIA) is clear in distinguishing between the inventor and the applicant. It is believed that the only basis for currently requiring an inventor to be an applicant is Rule 1.41. There is no statutory basis for such requirement and under the AIA these two are separate entities. 35 USC 111 only requires an application to be made by the inventor or “authorized by the inventor”. Furthermore, it requires an oath or declaration pursuant to 35 USC 115. The AIA has now changed 35 USC 115 so that a declaration is not always needed. (The use of the term declaration within this document includes “oath or declaration”.)
2. An applicant can be an assignee, someone who establishes sufficient proprietary interest in the matter, or it can be the inventor or/ joint inventors.
3. Regardless of who the applicant is, the inventor or inventors must be named. It is suggested that the best place to provide the names of the inventor is in the Application Data Sheet (ADS). Currently under the proposed rules the ADS is being highlighted as the specific location for the patent office to look for various items, such as any claim for priority. Furthermore, the proposed rules state that the ADS becomes part of the application. As the focus of the ADS appears to be the key element in the application for submitting all bibliographic information, it makes sense to use the ADS for naming of the inventors. To the extent changes are necessary later on, a supplemental ADS can be submitted. It is therefore suggested that the USPTO makes the submission of the ADS mandatory as it is part of the application. To the extent it is not filed at the time of filing, it can be filed upon response to a notice of missing parts and payment of a fee.
4. For each inventor named, there must be a corresponding document. Such document, for each named inventor can either be a declaration, a substitute statement, or a combined assignment and declaration.
5. There is no need to have a single declaration with the names of all the inventors on that declaration. All that is required under the AIA is that there be a separate document for each inventor. (Although there is no prohibition to including more than one named inventor in the single document).
6. The determination of who under the law should be named as an inventor is determined by the applicant. It is not up to the USPTO to determine who is and is not a true inventor. Inventorship issues are best handled through a Derivation action or a court action.

7. Adding or deleting the name of an inventor should simply be done by a supplemental ADS. The applicant determines who under the law should be named as an inventor.
8. The declaration requires only the language recited in 35 USC 115. A simple statement that the inventor indicates that he believes he is the original or original joint inventor and that he has authorized the application to be made. This is to be followed by the declaration.
9. Under the AIA, there is no need to include citizenship, nor a requirement that the inventor has read the application or claims or amendments, nor is there a requirement for the inventor to repeat his obligation under the duty of disclosure, which continues to exist whether it's included in the declaration or not.
10. Once one of the three documents are submitted for an inventor (i.e., the declaration, the substitute statement, or the combined assignment and declaration), the USPTO should be dealing with the applicant. This includes filing of continuations, divisionals, C-I-P's, and even reissues and reexamination requests. To the extent a duty of disclosure must be followed up with the inventor or any other information is needed from the inventor, it is the applicant's responsibility to get all of that information.
11. When filing C-I-P's, whether there are more or less inventors, there is no need for any power of attorney from the inventors. They are out of the picture (unless they are the applicants). Otherwise it is the applicant that is controlling the prosecution, paying the attorney, and any powers of attorney should be only from the applicant.
12. Even in a reissue application, no supplemental documents are required at all from the inventor. It is up to the applicant, who owns and controls the prosecution, to file any reissue request and submit any documents that are needed.
13. The documents supporting the naming of the inventor must be submitted prior to the issuance of the notice of allowance. There is no need to have these documents submitted any earlier. Examination of the patent application can be started with the naming of the inventors in the ADS, not with the declaration.
14. Documents that are submitted in connection with naming the inventor and/or evidencing proprietary interest are statements that require "sufficient evidence". However, the AIA does not indicate that any petition must be filed in connection with these documents. They are simple statements with sufficient evidence that is needed. There is no need for the USPTO to review these with the determination whether it is sufficient or not. The USPTO is not in a position to take discovery, nor to determine what is or what is not adequate under such circumstances. It is up to the applicant to be sure that he adequately provides the information and if there is any challenge, such challenge shall be in the court where the facts can be reviewed, proven, and evidence evaluated.

15. The substitute statement submitted in lieu of a declaration can be submitted by anyone who is an applicant. For example, it can be submitted by one inventor in connection with a missing joint inventor, it can be submitted by an assignee, or it can be submitted by a person showing sufficient proprietary interest to become an applicant. Such statement relates to supporting the naming of the inventor.

Separate and apart from this is the statement in 35 USC 118 submitted by someone who shows sufficient proprietary interest to be an applicant where no specific assignment is present. This document in Section 118 is supporting being an applicant. The substitute statement in Section 115 is the document supporting the naming of the inventor.

Neither document however is a petition, and no review or determination is required by the USPTO of these documents.

16. Powers of attorney are given by applicants, not inventors. It is the applicant who owns the application, controls the prosecution and deals with and pays the attorney. Having a power of attorney from an inventor places the attorney in a conflict position as to whom he is representing, the inventor or the applicant?
17. Under 35 USC 118 where a patent is being issued to an applicant, it indicates that notice to an inventor is required. It is believed that where the inventor himself signed a declaration, such should be deemed notice to the inventor. Where a substitute statement was submitted in lieu of a declaration, in such cases notice to the inventor should be given. However, publication in the Official Gazette should be sufficient notice.

II. Concerns Raised by the USPTO in their Proposal Discussion

1. One of the concerns raised in the discussion of the proposed new rules related to the need to know the names of the inventors at the time of filing in order to be able to permit citation of appropriate art during the course of the prosecution. It is believed, however, that this can be achieved by naming the inventors in the ADS. There is no need to have a declaration at the time of filing. The rules requiring a declaration to start the examination process are not at all needed. It is the name of the inventor that is needed, not the particular document. Therefore, placing it in the ADS satisfies the needs of the examiner to begin prosecution.
2. In the proposed rules, concern was raised in connection with submission of the supporting document relating to the naming of the inventor (i.e., declaration, substitute statement, or combined declaration and assignment) prior to the notice of allowance. It was indicated that should such documents not be present, it will delay the grant since an *Ex parte Quayle* action would have to be given and that would extend the prosecution time.

It is believed that this problem can be addressed in any one of a number of ways without delaying the prosecution. For example, if the examiner is ready to issue the notice of allowance, and should he find that one or more of such inventor

documents are missing, he can instead issue a notice of allowability. Within this “new” notice of allowability, he would indicate the requirement to pay the issue fee within three months as is currently required. He would also indicate that the applicant has a non-extendable one-month time period to submit such missing inventor document. Failure to submit such inventor document within one month, the application would go abandoned and the applicant would have to petition to revive or alternatively file a continuing application prior to the expiration of the one month deadline for filing the inventor document. It is believed this would incentivize the applicant to submit such inventor documents early in the prosecution.

Such incentives can be further made by including in the first office action a notice of any such missing documents. Just as an examiner indicates missing priority documents, missing references under an IDS, acknowledges the presence of an IDS, etc., he can acknowledge the presence of the inventor documents or the lack thereof. In case of such a lacking, the examiner can indicate that such should be provided in response to the office action. Again, should such not be provided, then either a notice of allowability procedure as described above can take place, or simply an abandonment be sent when the patent office is ready to issue a notice of allowance and such documents have not been submitted as is required by the AIA prior to notice of allowance.

However, there is no need to have these documents at the time of filing when it is often difficult to get documents signed by inventors, or substitute statements where inventors cannot be found, etc. Especially under a first-to-file system, applicants will be anxious to get their application on file and as long as they name the inventors, the process can be started. The documents can be submitted later and specifically as the AIA says, until notice of allowance.

3. An issue has been raised that Rule 4 and Rule 51 of PCT was instituted at the request of USPTO to permit them to get declarations from inventors. In order to do so, these PCT rules indicate that although generally PCT does not permit countries to require additional documents from inventors, to the extent the “inventor is an applicant” such declarations can be requested. This “carveout” was specifically created for the USPTO to permit them to get such declarations from the inventors and for that reason defined them as applicants.

Since declarations are still needed to support the “naming of the inventor” USPTO would still require a “carveout”. Furthermore, any “carveout” that is made within the PCT rules should not be such as would potentially open the door to other countries, especially developing countries, indicating that they likewise fit within the carveout and demand additional documents from inventors.

A suggested “carveout” for the United States could be that a country where the inventor is under a “continuous duty of disclosure” throughout the life of the application/patent, such countries can require a declaration from the inventor. It is believed that this “carveout” would be unique to the United States and would

thereby permit requesting a declaration from the inventor without his necessarily being the applicant.

If this carveout is acceptable, although we would prefer having a declaration not including anything beyond what is simply required in the AIA, it might be worthwhile to include in the declaration a statement regarding the inventor's duty to disclose. Since the inventor is in fact under such continuous duty, whether he includes it in his declaration or not, the addition of this language in the declaration does not add any additional legal obligation on the inventor beyond what he is already legally required to provide. However, by adding this language in the declaration, it might enhance and support the "carveout" in the PCT rules, showing that the declaration itself is associated with the "carveout" relating to the ongoing duty to disclose.

Once we can eliminate from the PCT rules the need for inventor to be an applicant, we can actually achieve procedural harmonization with the rest of the world. It will no longer be necessary for the U.S. to have the PCT Request filled out such that the "inventor is applicant for U.S. only". This makes us different and unique from the rest of the world, and by eliminating it we achieve procedural harmonization.

Although the above-suggested carveout could work, other carveouts could work as well, so long as there is no need for the inventor to be the applicant.

My understanding is that if we request a rule modification to PCT by March or April 2012, they would be able to put it on the agenda for the meeting of experts. It is believed that this would be approved as it only relates to the U.S. and the rest of the world would benefit from it. I believe thereafter it would have to pass the assembly in the fall, but it is not envisioned that this change would pose any problem.

III. Specific Comments on the Proposed Rules.

1. The AIA in the first sentence of section 118 makes it absolutely clear that an assignee can make an application for a patent. The proposed rules however recites that the AIA does not mean that an assignee can make application for patent in all circumstances, and instead the only time it permits an assignee to file is under two rules (basically the old rules) where the inventor is deceased (Rule 1.42) or when the inventor refuses to sign (Rule 1.47). Those existed in the past and really do not constitute any assignee filing. In fact, the proposed rules specifically retain Rules 1.41(a) and (b) specifying that the "inventor" is the "applicant". This is misconstruing the AIA to conform to the old rules, not forming new rules to conform to the AIA.
2. 35 USC 115 (h)(2) states that no supplemental statements are required after an original oath or declaration is submitted. The proposed rules indicate the USPTO won't request any more "supplemental oaths" but what they will request oaths "in

compliance”. So they have replaced the word “supplemental” wherever it exists in the rules with “in compliance” and thereby kept everyone of the old requirements for supplemental oaths or declarations, just calling them by a different names. This is like saying, “I can’t ask your age, instead I’ll ask your date of birth”.

3. The AIA makes it clear that you don’t need supplemental oaths for reissues. the rules indicate that the “elimination of supplemental reissue oaths” will only be directed to “lack of deceptive intent”. However, supplemental reissue oaths will still be required for identification of the errors as the applicants continuously go along on the reissue. This is interpreting the AIA to conform with the old rules.
4. The AIA in 35 USC 115(d) introduces a “substitute statement” which is “in lieu of the oath or declaration” and just requires explaining reasons why the inventor is not able to file the oath. It says nothing about filing a petition, it says nothing about an oath or declaration. However, the proposed rules define the “supplemental statement” as a third party signing an “oath or declaration” and the filing of a “petition”. This is contrary to what the AIA states.
5. 35 USC 115(f) specifically states that the document supporting the naming of the inventor must be filed before the notice of allowance. It specifically identified that time and did not make any requirements for filing earlier than that time. Nevertheless, the proposed rules insist on following the old rules, requiring filing the oath or declaration at the time of the filing of the application, and even penalizing the applicant for filing later than that. If a new rule would instead simply require “naming the inventors” in the ADS at the time of filing, all of the issues raised by the USPTO could be resolved without the necessity of filing the actual document until prior to notice of allowance.
6. The proposed rules indicate that the declaration will no longer require identification of citizenship because 35 USC 115 does not require it. Nevertheless, even though Section 115 also does not require that the inventor has read the application or claims, nor does it require reiterating his duty of disclosure, the proposed rules insist on including those. This is inconsistent. On the one hand, part of the declaration is eliminated because Section 115 doesn’t require it, and on the other hand, other parts of the declaration are retained even though Section 115 does not require it. No justification is made why to pick and choose keeping certain matters and eliminating others.
7. The proposed rule indicates that when filing a CIP with a different set of inventors, or when modifying the inventors by adding an inventor, a new declaration is required from all of the inventors. This is based upon the fact that the declaration has to have the names of all of the inventors. There is no basis for this in the AIA. This is simply an old rule that is being followed and forcing the AIA to conform with the old rule. All the AIA requires is that each inventor execute a declaration. It does not indicate they all have to execute a common declaration, nor that all the names have to be in a single declaration. Simply

naming the inventors and having each one submit a declaration is sufficient. Furthermore the AIA is clear that you don't need any more declarations once one is signed. Regardless of whether you change inventors or not, a single declaration from an inventor is all that is needed under the AIA.

8. Proposed Rule 1.32(e) indicates that a power of attorney in a continuation is accepted only if all the inventors are the same. If not, a new power of attorney is required. Reliance for the proposed rule is on the MPEP which requires that all inventors sign a power of attorney. To misconstrue the AIA because of what the MPEP states is wrong. It is the applicant that assigns and selects the attorney. It is the applicant that must deal with the power of attorney. To force inventors to appoint the attorney places the attorney in a conflict position between the inventor and the applicant, and that is improper.
9. Throughout the proposed rules it talks about "applicant or owner" this whole concept is foreign to the AIA. It is clear that the applicant is the person who is the owner. There is no basis for the rules indicating an entity of an applicant which is separate from the owner.
10. The AIA makes it clear that it is permissible to include in this same document both the assignment and the declaration. With respect to the assignment, this is the document which the inventor is transferring all of his rights, title and interest to every part of his invention to the assignee. Nevertheless, with respect to such significant legal step, all that is necessary under the proposed rules is for the inventor to identify the application either by title, application number, or any other vague reference to the specific invention. However when it comes to just naming him as an inventor, although the AIA does not require this, the proposed rules insist that the inventor state under oath that he has reviewed the application, that he understands the application, that he has reviewed the claims, that he has reviewed amendments, etc.

It is totally inconsistent that simply to name him as an inventor, although the AIA does not require this, the proposed rules are requiring significantly more from the inventor than is required for the inventor to give away this same invention.

11. The proposed rules require that when a combined assignment and declaration is submitted, it is necessary for applicant to mark an extra check box on the assignment cover sheet to indicate its use as both an assignment and for use as a declaration. Otherwise it indicates that it will not make a copy of the assignment into the Image File Wrapper (IFW).

The proposed rules indicate that the patent office considered automatically scanning every assignment into the IFW but believes that applicants should be provided with the option of submitting an assignment for recordation purposes without such assignment being part of the IFW file.

The patent office has not provided any substantiation for providing this option to applicants. On the contrary, it is believed that it would be in the best interest of applicants to have every assignment scanned into the IFW. This information is always available by searching the assignment files. However, it requires an extra search, and for an actual copy there must be a wait of a few weeks to get a copy of the document. Since this information is already publicly available, there is no reason why it should not be automatically included in the IFW as a convenience to the applicant as well as third parties so when they search the IFW they can automatically get a copy of any assignment recorded.

To the extent an applicant does not record any assignment, none will exist neither in the assignment record nor the IFW record. However to the extent an applicant records such assignment, whether alone or in combination with the declaration, such should be automatically scanned into the IFW as a convenience for applicants and for anyone searching the file.

12. In connection with filing of a continuing application, the proposed rules acknowledge the new 35 USC 115(g) but then it also includes the existing Rule 1.63(d). As a result, it misconstrues and “shoehorns” the language of the Section 115(g) so that it conforms with the old Rules.

As a result, it continues to require that any declaration for a continuing application specifically name everyone of the new inventors in the continuing application otherwise the declaration is not good.

Nowhere in the AIA is there any requirement that any declaration contain the names of all the inventors. This is squeezing the new statute back into the old rules, which is totally inappropriate.

13. In connection with filing of any continuing application, the proposed rules require statements requesting deletion of inventors, in accordance with the old rules.

The AIA is clear that it is just “naming of inventors.” These should be submitted in the ADS. When a continuing application is filed it is up to the applicant to decide who are the inventors and these are “named” in the continuing application, whether it is a CIP or any other type. If that results in fewer or more than the original inventors they are simply named. To the extent the named inventors in a continuing application have already submitted a declaration nothing further is needed from them. If an inventor is deleted, so be it. Nothing is required from that inventor nor the other inventors. If an inventor is added all that is required is a new declaration, substitute statement, or combined assignment/declaration from the new inventor to be submitted in this new continuing application.

No petitions, no agreements of the other inventors, no acknowledgement from assignee, no other papers are required by the AIA. Simply naming of the inventors in an application is all that is required. For each named inventor a piece

of paper must be provided. That paper is either a declaration from that inventor, a substitute statement, or a combined assignment/declaration.

14. The proposed rules specifically indicate by means of a “reminder” that mere submission of a substitute declaration pursuant to the statute 115(h)(1) is not sufficient. Specifically, they indicate that in addition compliance has to take place with the old Rules 1.48 and 1.324.

This is effectively saying we do not accept the AIA. However, we force the AIA to conform to our old rules. The USPTO should propose new rules in compliance with the AIA, not force the AIA to comply with the old rules.

15. The proposed rules indicate that the only time an assignee can file a declaration in a reissue is in connection with the two (2) cases where they can file on behalf of the applicant. Namely, where he is deceased or unable to be found.

Firstly, that whole premise of limiting assignee filing to those two (2) situations is contrary to the AIA, as previously discussed. The assignee should be able to be the applicant in all instances.

Secondly, the AIA specifically says that there is no further oath or declaration ever required. This includes reissue. At no point do they indicate that reissue is any different from the prosecution of the case. No further oath or declaration is required at any time even for reissue.

16. The proposed rules indicate that if a reissue application broadens any claim in any respect the reissue oath or declaration must be executed by the inventors (except in the situation where he is legally incapacitated or deceased). In cases where the inventors have assigned an invention and the reissue is filed by an assignee, the inventors are no longer involved in that application. They have sold their rights. It is the assignee that is seeking the broadening and the assignee is the applicant. There is no reason to go back to the inventors at all.

Furthermore, the AIA is clear that once a declaration has been submitted in an application no further declarations are required at all. In a reissue application it is the applicant that submits the reissue and no declaration is required from invention.

Likewise, where a continuing reissue application is filed not replacing the parent reissue, the proposed rules requires a new declaration. The AIA does not distinguish whether a continuation replaces the parent or not. It is specific that no new declaration is required in any continuing application, whether it replaces the previous one or not.

17. Rule 1.31, and all other Rules, which recite “an applicant” meaning “an inventor” must be changed. There is absolutely no basis in the statute for stating that an inventor is an applicant. All of the rules reciting this are built on existing rules,

not the statute. On the other hand, the first sentence of Section 118 clearly indicates that an assignee can be an applicant, without any limitations.

18. Proposed Rule 1.47 talks about others who can sign the “oath or declaration on behalf of the inventor”. The statute is clear that when third parties submit documents they are “substitute statements” not “oaths or declarations”. In fact 35 USC 115(d) specifically states that the “substitute statement” is “in lieu” of the oath or declaration. This rule should be changed.

Furthermore, the statute does not require filing of a petition and such requirement should be eliminated. It is not up to the USPTO to decide who is the inventor nor whether the inventor is deceased, disabled, etc. This is a matter of the statement to submit.

19. Proposed Rule 1.47 totally confuses the substitute statement relating to naming of inventor in Section 115, as compared to showing sufficient proprietary interest to file under Section 118. These are two (2) separate documents not necessarily relating to the same situation. For example, it may very well be that the assignee has a full assignment from the inventor. However, by the time the application is filed the inventor is no longer around to sign a declaration. Such assignee would file his substitute statement under Section 115. However he need not file any document under Section 118 since he is an assignee and can automatically be the applicant. Likewise there may be situations where the inventor signed a declaration. However, the application was not filed and by the time filing took place he is no longer available to assign and no document obligating him to assign is available. Nevertheless, a third party or corporation may show sufficient proprietary interest to file the application on his behalf under Rule 118 and would provide the necessary showing that such act is permitted under Section 118.

Specifically, the two (2) documents are separate and address different sections of the statute.

20. Rule 1.63 as proposed misreads the statute. 35 USC 111 indicates that an oath or declaration must be submitted, but only in accordance with Section 115. Section 115 does not require an oath or declaration in every single application. Only where the inventor signs. Otherwise a substitute statement can be submitted “in lieu of the oath or declaration”. Rule 1.63 assumes that every application has to have an oath or declaration and such is not required by the AIA.

Furthermore, nowhere does the AIA say that an oath or declaration must identify each inventor.

Section 115 simply indicates that there must be an oath or declaration from each inventor. There can be only one name on that document simply stating that he is a single or joint inventor, but nowhere does it state in the statute that all inventors must be named in that same oath or declaration.

Likewise, the statute does not require that the person signing the declaration reads, understands, reviewed the claims, amendments, etc. nor does it require that there be an acknowledgment of the duty of the disclosure. This is twisting the statutes to conform to an old rule which, is improper.

Furthermore, the proposed section requires that in any continuing application a separate statement signed by the inventors requesting deletion of the names of the inventors be submitted. This is not required by the statute.

All Section 115 requires is naming of the inventors.

21. Proposed Rule 1.64 is in error. It indicates a “person making the oath a declaration who is not the inventor”. The statute does not provide for any other person to sign an oath or declaration but the inventor. Any other person signs a substitute statement “in lieu of an oath or declaration”.
22. Proposed Rule 1.67 is totally inaccurate. The statute is clear that no supplemental oath can be asked for. Changing the name from “supplemental oath” to “non compliant oath” is a total subterfuge.
23. Proposed Rule 1.172 is in error in connection with requesting any further oaths or declaration from the inventors even in connection with broadening reissues. The statute is clear that once an oath or declaration is received from an inventor you cannot ask for any other even during reissues.

Samson Helfgott
February 1, 2012