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401 Patent Office Cannot Aid in Selection of Attorney

Rule 31. Applicants May Be Represented by Attorney or Agent. An applicant for patent may file and prosecute his own case, or he may be represented by an attorney or agent authorized to practice before the Patent Office in patent cases. The Patent Office cannot aid in the selection of an attorney or agent.

402 Power of Attorney

Rule 34. Power of attorney or authorization. Before any attorney or agent, original or associate, will

be allowed to inspect papers or take action of any kind in any application or proceeding, a written power of attorney or authorization, from the person or persons entitled to prosecute the application or from the principal attorney or agent in the case of an associate attorney or agent, must be filed in that particular application or proceeding.

Usually a power of attorney is made a part of the petition, see 601.02. In order that this power may be valid, the attorney or agent appointed must be registered.

When an application for patent is filed accompanied by a power of attorney or authorization of agent to a person not registered to practice before the United States Patent Office, the Application Branch will send the official filing receipt directly to the applicant, together with an explanatory letter. A copy of the letter will be sent to the person named in the power of authorization and a copy placed in the file without being given a paper number. The name of the unregistered person will not be placed on the face of the file, and the examiner will communicate only with the applicant directly unless and until the applicant appoints a recognized practitioner. An associate power of attorney or authorization from the unregistered person will not be recognized or accepted. If a request for special recognition accompanies the application, the Application Branch will forward the file to the Chairman of the Committee on Enrollment. (Basis: Notice of March 29, 1949.)

See also 1702. If power of attorney is filed after application is filed, see 410.

402.01 Exceptions as to Registration

Rule 342. Limited recognition. Any person not registered and not entitled to be recognized under rule 341 as an attorney or agent to represent applicants generally may, upon a showing of circumstances which render it necessary or justifiable, be recognized by the Commissioner to prosecute as attorney or agent a specified application or applications, but this limited recognition shall not extend further than the application or applications specified.

Sometimes in a joint application one of the coinventors gives to the other the power of attorney in the case. Such power will be rec-

ognized even though the one to whom it is given is not registered.

402.02 Appointment of Associate Attorney

The principal attorney (either original or substituted) may appoint an associate attorney. The associate attorney cannot appoint another attorney; this being indicated by the portion of Rule 34 which states that the power of attorney or authorization must be "from the principal attorney or agent in the case of an associate attorney or agent." See also 406.

402.03 Appointment of Substitute Attorney

In order to simplify the procedure relative to new powers of attorney filed in connection with the formation, dissolution or reorganization of firms, a power of attorney signed by the attorney or firm originally empowered to act appointing a substitute attorney or firm, will be accepted provided that the original power of attorney authorizes a substitution, and provided further that the substitute attorney or firm includes at least one person who was empowered to act under the original power of attorney.

Except as indicated above, no appointment of a substitute attorney will be accepted unless it is signed or concurred in by the applicant or the assignee of the entire interest. In all cases where the substitute power of attorney is accepted, the name of the replaced attorney or firm will be cancelled from the file.

The Docket Clerk of the examining division will enter all proper substitute powers of attorney filed in ex parte cases which are signed by the principal attorney or firm. Other substitute powers of attorney should be forwarded immediately to the Docket Branch for acknowledgment, acceptance and entry when property signed or for return when not in compliance with this Notice. (Basis: Notice of April 23, 1957.)

See 402.07.

402.04 Power of Attorney to a Firm

Rule 346. Signature and certificate of attorney. Every paper filed by an attorney or agent representing an applicant or party to a proceeding in the Patent Office must bear the signature of such attorney or agent, except papers which are required to be signed by the applicant or party in person (such as the application itself and affidavits required of applicants). The signature of an attorney or agent to a paper filed

by him, or the filing or presentation of any paper by him, constitutes a certificate that the paper has been read; that its filing is authorized; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. When an applicant or party is represented by a registered firm, such papers must carry the signature of the firm, or the signature of an individual member of the firm or an individual registered attorney or agent employed by the firm and duly authorized to sign on behalf of the firm in addition to the firm name, and the certification constituted by the signing or presentation of the paper shall be a certification by and on behalf of the firm and by the individual.

Note that, in the case of a power of attorney to a firm, Rule 346 requires (1) the signature of the firm, or (2) the signature of an individual member of the firm, or (3) the signature of an individual registered attorney or agent employed by the firm and duly authorized to sign on behalf of the firm. Under (3), above, the name of the firm must appear but may be either written or typed. The name of the firm may be used on the drawing as in the past. (Basis: Notice of March 7, 1949.)

402.04(a) Firm of Attorneys Changes Name

Where a firm having power of attorney in a case changes its firm name, due, for example, to the addition of a new member or the withdrawal or death of one of the members the prosecution of the case may be continued in the name of the original firm, if desired. (Basis: Notice of Sept. 4, 1894.)

A mere change of firm name will be accepted regardless of whether or not authority to substitute another attorney was included in the original power of attorney. It is entered by the docket clerk of the division by amending the old firm name on the face of the file wrapper. See 402.03 and 410. A notice of the change of firm name should be signed in the name of the firm as constituted immediately before the change.

Notation of change of firm name must be filed in each application involved. It is not sufficient merely to notify the Clerk, Committee on Enrollment.

402.05 Revocation

Extract from Rule 36. Revocation of power of attorney or authorization; withdrawal of attorney or agent. A power of attorney or authorization of agent may be revoked at any stage in the proceedings of a case, and an attorney or agent may withdraw, upon appli-

ation to and approval by the Commissioner; and when it is so revoked, or the attorney or agent so withdrawn, the Office will communicate directly with the applicant, or with such other attorney or agent as he may appoint. An attorney or agent, except an associate attorney or agent whose address is the same as that of the principal attorney or agent, will be notified of the revocation of his power of attorney or authorization and the applicant will be notified of the withdrawal of the attorney or agent.

Upon revocation of the power of the principal attorney, appropriate notification is sent by the Docket Branch. Note: The Examiner notifies associate attorney of his revocation, see 402.05(a).

Revocation of the power of the principal attorney revokes powers granted by him to other attorneys.

Revocation of the power of attorney becomes effective on the date that the revocation is RECEIVED in the Office (in contradistinction to the date of ACCEPTANCE).

402.05(a) Examiner Must Notify Associate of Revocation

An associate attorney whose power has been revoked shall be formally notified of such revocation by the Examiner unless the case is in interference or on appeal. If the case is in interference, the Docket Branch notifies the attorney, the reason being that all parties to the interference must be notified. Such notice addressed to the associate attorney will take the form of the usual letter from the examiner on blank (POL-90) and will be in the following language:

You are hereby informed that the associate power of attorney to _____ in the above-entitled case was revoked _____ by _____

Examiner.

This letter will not be counted as an action on the application in which it is entered.

NOTE: Docket Branch always notifies principal attorney of his revocation, see 402.05.

402.06 Attorney Withdraws

See Extract from Rule 36 in 402.05.

In the event that a notice of withdrawal is filed by the attorney or attorneys of record, the file will be forwarded to the Docket Branch where appropriate procedure will be followed pertaining to the withdrawal.

402.07 Assignee Can Revoke Power of Attorney of Applicant

The assignee of the entire interest can revoke the power of attorney of the applicant unless an "irrevocable" right to prosecute the case had been given.

Rule 32. Prosecution by assignee. The assignee of record of the entire interest in an application for patent is entitled to conduct the prosecution of the application to the exclusion of the inventor.

Extract from Rule 36. An assignment will not of itself operate as a revocation of a power or authorization previously given, but the assignee of the entire interest may revoke previous powers and be represented by an attorney or agent of his own selection.

A power of attorney by the assignee of the whole interest, if the assignment is recorded in the Office, revokes all powers given by applicant.

402.08 Application in Interference

While an application is involved in interference, no power of attorney of any kind should be entered in such application by the Docket Clerk of the Group.

If a power of attorney or revocation is received for an application while in interference, it should be forwarded to the Docket Branch because all parties to the interference must be notified. See 410.

403 Correspondence—With Whom Held

Rule 35 states that when an attorney has been duly appointed to prosecute an application correspondence will be held with the attorney. Double correspondence with an applicant and his attorney, or with two representatives, will not be undertaken. See 403.01, 403.02 and 714.01(d).

In a joint application with no attorney, the applicant whose name first appears in the papers receives the correspondence, unless other instructions are given. All applicants must sign the responses. See 714.01(a).

403.01 Correspondence Held With Associate Attorney

Where the attorneys bear relation of principal attorney and associate attorney, the correspondence will be had with the associate attorney unless the principal attorney directs otherwise. Ex parte Eggan, 1911 C.D. 213; 172 O.G. 1091.

403.02 Two Attorneys for Same Applications

If applicant simultaneously appoints two principal attorneys he should indicate with which correspondence is to be conducted. If one is a local (D.C.) attorney and applicant fails to indicate either attorney, correspondence will be conducted with the local attorney.

If, after one attorney is appointed, a second attorney is later appointed without revocation of the power of the first attorney, the name of the second attorney is entered on the face of the file (Ex parte Eggan, 1911 C.D. 213; 172 O.G. 1091), with notation that the Office letters are to be sent to him. This applies also to associate attorneys.

404 Conflicting Parties Having Same Attorney

See Rule 208 in 1101.01(k).

405 Attorney Not of Record

When an amendment is filed, signed by an attorney whose power is not of record, see 714.01(c).

406 Death of Attorney

MEMBER OF FIRM

Death of an individual attorney does not terminate a power of attorney to his firm. See 5 J.P.O.S. 337, 338. See 402.04(a) for change of firm name due to death of an attorney.

SOLE ATTORNEY

When an attorney listed as deceased by the Committee on Enrollment still appears as the sole attorney of record at the time of taking the next Office action, the Examiner will, as a precautionary measure, mail the carbon copy of the action (labeled COPY) directly to the applicant, the other copy being mailed to the office address of the deceased attorney with the following statement: "The Patent Office having received notice of the death of the attorney of record thus terminating his power, a copy of this action is being mailed directly to the applicant. Applicant may appoint a new attorney."

When, after the death of the attorney of record, an amendment is filed by an attorney whose power is not of record, the amendment should be placed in the file and the applicant and the attorney who filed the amendment

should be notified that it cannot be entered unless it is promptly ratified by the applicant or by an attorney whose power has been made of record at the time of such ratification.

An amendment signed by an assistant in the office of the attorney, the latter having died, may be admitted, subject to future ratification.

It should be observed that the death of the principal attorney results in the lapse of power of any associate attorney appointed by him. Accordingly, an amendment signed by such associate attorney and filed after the death of the principal attorney cannot be entered and should be treated as directed hereinabove in the case of an attorney whose power is not of record.

If the ratification is promptly filed, the amendment should be entered as of the date on which the amendment was filed.

In carrying out these instructions, Primary Examiners should not set a definite time within which ratification must be filed, but the word "promptly" as used above should be used in the notification. The question of promptness or undue delay in ratification should be left for determination when the ratification is filed and the question of entry of the amendment arises. In forming a judgment as to whether any particular ratification has been filed promptly, consideration should be given to the place of residence of the applicant and other pertinent circumstances.

407 Disbarred Attorney

See 105.

408 Telephoning Attorneys

Present Office policy places great emphasis on telephone interviews initiated by the Examiner. For this reason, it is no longer deemed necessary for an attorney to request a telephone interview as specified in the old Optimum Examining Procedure memos. Examiners are no longer required to note or acknowledge requests for telephone calls or state reasons why such proposed telephone interviews would not be considered effective to advance prosecution. However, it is still desirable for an attorney to call the Examiner if the attorney feels the call will be beneficial to advance prosecution of the case. See 713.05.

SPECIFIC TELEPHONE INTERVIEWS

Restriction of invention (812.01).

Multiplicity (706.03(1)).

Many attorneys have offices or representatives in Washington and it sometimes expedites busi-

ness to interview them concerning an application. When the Examiner believes the progress of the application would be advanced thereby, he may call the attorney in the case by telephone and ask him to come to the Office. Listings of Washington representatives of out-of-town attorneys are kept in the offices of the various Directors of Operations.

409 Death, Insanity, or Unavailability of Inventor

If the inventor is dead, insane or otherwise legally incapacitated, refuses to execute an application, or cannot be found, an application may be made by someone other than the in-

ventor, as specified in the following paragraphs.

Rule 44. Proof of authority. In the cases mentioned in rules 42 and 43, proof of the power or authority of the legal representative must be recorded in the Patent Office or filed in the application before the grant of a patent.

409.01 Death of Inventor

Unless it is coupled with an interest (i.e., the attorney is also an assignee or part-assignee), the death of the inventor (or one of joint inventor) terminates the power of attorney and a new power from the heirs, administrators, executors or assigns is necessary (but see 409.01(f)) and also a ratification of any amendment filed after the death of the inventor by the first-appointed attorney. Such an amendment may, however, save the case from abandonment. Therefore ratification is called for together with proof of authority of the one ratifying the action. See *In re Mattullah*, 1912 C.D. 490; 179 O.G. 853. See following paragraphs.

409.01(a) Prosecution by Administrator or Executor

Rule 42. When the inventor is dead. In case of the death of the inventor, the legal representative (executor, administrator, etc.) of the deceased inventor may sign the application papers and make the necessary oath, and apply for and obtain the patent. Where the inventor dies during the time intervening between the filing of his application and the granting of a patent thereon, the letters patent may be issued to the legal representative upon proper intervention by him.

One who has reason to believe that he will be appointed legal representative of a deceased inventor may apply for a patent as legal representative in accordance with Rule 42. Such application will be considered as having been made on the date of receipt of all its required parts, or of the part which renders it complete, (Rules 51 and 53) provided proof of applicant's authority as legal representative is subsequently filed. The filing date corresponding to said date of receipt will be canceled if another person is appointed legal representative. In the latter case, the application will be given an application date no earlier than the date on which the properly appointed legal representative actually executed the papers. The foregoing applies to the legal representative of a deceased sole or deceased joint inventor.

Application may be made by the heirs of the inventor, as such, if accompanied by a certifi-

cate from the court that they are all the heirs and that the estate was under the sum required by state law for the appointment of an administrator.

409.01(b) Proof of Authority of Administrator or Executor

Whenever because of the death of an inventor, the right of applying for and obtaining a patent for an invention devolves upon an executor or administrator, or whenever an executor or administrator desires to intervene prior to the granting of a patent, proof of the authority of such executor or administrator should in all cases be made of record in the Patent Office by filing in the application or recording in the assignment records a certificate of the clerk of a competent court or the register of wills that his appointment is still in full force and effect. Such certificate shall be signed by an officer and authenticated by the seal of the court by which the same was issued. The authority of other legal representatives of the inventor must be similarly established.

Should such certificate of appointment be found to be insufficient for any reason, there may be required to be filed or recorded a certified and properly authenticated copy of the letters testamentary or of the letters of administration, in order that the scope of authority of the persons who seek to intervene may be a matter of record in this Office.

All applications filed by an executor or administrator are initially referred to the Assignment Branch to ascertain whether proper authority has been recorded or "filed in the application" (Rule 44) and for suitable endorsement on the file. If the authority is insufficient, correspondence is conducted by the Assignment Branch. When a reply is received to such correspondence and also in cases where the executor or administrator intervenes (after filing) the case should be sent immediately to the Assignment Branch.

In any case in which the Chief of the Assignment Branch reports that the authority of the executor or administrator of record in the case is insufficient, the Examiner will require the filing in the application or the recording in the Assignment Branch of a certificate of such appointment or a certified copy of letters testamentary or of letters of administration in such case before finally passing the case to issue. (Basis: Order No. 1838.)

In the case of foreign executors or administrators, it was formerly the practice to have the following form executed by a consular officer of the United States and filed in the

application, thus eliminating the necessity of filing any other proofs:

"I, _____ Consul of the United States of America, at _____, duly commissioned and qualified, do hereby certify that there have been exhibited to me papers issued by _____ the authorized authorities in this jurisdiction which show that _____ is the person authorized to act as executor or administrator of the estate of _____, deceased, late of _____.

"In testimony whereof, I hereunto set my hand and seal this -- day of _____, 19___.

U.S. Consul"

Use of such forms has been discontinued by the Department of State. The consular officer may, as heretofore, authenticate the signature of the foreign officer attesting to the papers submitted as proof of authority. Unusual situations may be referred to the Office of the Solicitor.

409.01(c) After Administrator or Executor Has Been Discharged

When an Administrator or Executor has performed his functions and has been discharged and it is desired to make an application for an invention of the deceased, it is necessary for the Administrator or Executor to take out new letters of administration in order that he may file a new application of the deceased inventor.

409.01(d) Exception in Some Foreign Countries

The terms "Executor" and "Administrator" do not find an exact counterpart in all foreign countries and the procedure is governed by the necessity of construing those terms to fit the circumstances of the case. Hence the person or persons having authority corresponding to that of Executor or Administrator are permitted to make application as, for example, the heirs in Germany. The authority of such persons must be proved by an appropriate certificate.

409.01(e) If Applicant of Assigned Application Dies

Where an applicant, carrying on the prosecution of an application after assignment, dies, his administrator may carry on the prosecution on filing letters of administration unless and until the assignee intervenes.

409.01(f) Intervention of Executor Not Compulsory

When an inventor dies after filing an application the executor or administrator should intervene, but the allowance of the application will not be withheld nor the application withdrawn from the issue if the executor or administrator does not intervene. (Basis: Order No. 2076.)

The practice set forth in the foregoing order is applicable to an application which has been placed in condition for allowance or passed to issue prior to notification of the death of the inventor. See 409.01.

409.02 Insanity or Other Legal Incapacity

Rule 48. When the inventor is insane or legally incapacitated. In case an inventor is insane or otherwise legally incapacitated, the legal representative (guardian, conservator, etc.) of such inventor may sign the application papers and make the necessary oath, and apply for and obtain the patent.

The provisions of Order No. 1838, Revised (see 409.01(b)) are applicable in case of insanity or other legal incapacity of an inventor.

409.03 Unavailability of Inventor

Rule 47. Filing by other than inventor. (a) If a joint inventor refuses to join in an application for patent or cannot be found or reached after diligent effort, the application may be made by the other inventor on behalf of himself and the omitted inventor. Such application must be accompanied by proof of the pertinent facts and must state the last known address of the omitted inventor. The Patent Office shall forward notice of the filing of the application to the omitted inventor at said address. Should such notice be returned to the Office undelivered, or should the address of the omitted inventor be unknown, notice of the filing of the application shall be published in the Official Gazette. The omitted inventor may subsequently join in the application on filing an oath of the character required by rule 65. A patent may be granted to the inventor making the application, upon a showing satisfactory to the Commissioner, subject to the same rights which the omitted inventor would have had if he had been joined.

(b) Whenever an inventor refuses to execute an application for patent, or cannot be found or reached after diligent effort, a person to whom the inventor has assigned or agreed in writing to assign the invention or who otherwise shows sufficient proprietary interest in the matter justifying such action may make application for patent on behalf of and as agent for the inventor. Such application must be accompanied

by proof of the pertinent facts and a showing that such action is necessary to preserve the rights of the parties or to prevent irreparable damage, and must state the last known address of the inventor. The assignment, written agreement to assign or other evidence of proprietary interest, or a verified copy thereof, must be filed in the Patent Office at the time of filing the application. The Office shall forward notice of the filing of the application to the inventor at the address stated in the application. Should such notice be returned to the office undelivered, or should the address of the inventor be unknown, notice of the filing of the application shall be published in the Official Gazette. The inventor may subsequently join in the application on filing an oath of the character required by rule 65. A patent may be granted to the inventor upon a showing satisfactory to the Commissioner.

Rule 47(a) and 35 U.S.C. 116 permit a joint inventor to file an application "on behalf of" himself and a joint inventor who "cannot be found or reached after diligent effort" or who refuses to sign application papers. Rule 47(b) and 35 U.S.C. 118 allow a person with a demonstrated proprietary interest to make application "on behalf of and as agent for" the inventor under the same circumstances. Neither section of Rule 47, however, is intended as an alternative to Rule 42 since the language "cannot be found or reached after diligent effort" has no reasonable application to a deceased inventor. In re Application Papers filed September 10, 1954, 703 O.G. 434. See Rule 42 and 409.01.

Application papers submitted under Rule 47 are forwarded by the Application Branch to the Office of the Solicitor for determination whether the papers are proper and complete and whether the verified showing justifies acceptance under either paragraph of the rule. Where a refusal of the inventor to sign the application papers is alleged, the circumstances of this refusal must be specified in the affidavit. Where inability to find or reach an inventor "after diligent effort" is the reason for filing under Rule 47, the affidavit should include the exact circumstances which are relied upon to establish that a diligent effort was made. Where the application is made under Rule 47(b) and 35 U.S.C. 118, the papers must also show the necessity for so filing and must be accompanied at filing by papers establishing an assignment or written agreement to assign, or by other satisfactory evidence of proprietary interest.

Rule 65(b) requires that in Rule 47 applications the joint applicant in applications under

Rule 47(a) or the person having a proprietary interest in applications under Rule 47(b), state his relationship to the inventor and, upon information and belief, the facts which the inventor is required by Rule 65 to make oath to. In applications under Rule 47(b) and 35 U.S.C. 118, in addition, the petition must request grant of the patent to the inventor.

If an application under Rule 47 is accepted, a statement to this effect is entered in the file, a notice sent to the "inventor designee" at his last known address, and the application given a serial number. The Examiner will act on the Rule 47 application in the usual manner except that papers filed by an inventor who did not originally join in the application and papers relating to its Rule 47 status will be forwarded to the Solicitor's Office for consideration.

The Office of the Solicitor will determine, in such event, whether the papers meet the requirements of Rule 65 including the requirement, implicit in that rule, that the oath be made on the basis of actual knowledge of the application papers on file. This knowledge may be demonstrated by reference in the oath to an attached copy of the application.

The "inventor designee" may protect his designation as an inventor and offer evidence to support his position. The Office in such case, although it will allow the "inventor designee" to make his position of record in the file of the application and will grant him access to the application, will not institute inter partes proceedings in the Rule 47 application. The rights of said inventor are protected by the fact that that in an application filed under Rule 47(b) and 35 U.S.C. 118 the patent must issue to the inventor and in an application filed under Rule 47(a) and 35 U.S.C. 118 the inventor has the rights of a joint applicant. In re Application of Hough et al., 703 O.G. 200.

The Office of the Solicitor, after indication by the Examiner that the case is allowable (unless completely executed papers have meanwhile been filed) will notify the inventor designee and set a period of time, usually thirty days, in which he may take any action he considers appropriate. At the same time the record will be finally reviewed to determine whether it shows an adequate effort has been made to obtain his signature. If the application meets the requirements of Rule 47, the Examiner at the expiration of the period set, will be so notified by memorandum and the application may be passed to issue. The fact that the application was made under Rule 47 will be indicated in the heading of the patent.

410 Handling of Papers Received After Application is Filed

The following should be sent to the Docket Branch for acceptance, acknowledgment and entry when properly signed or for return:

- Principal power of attorney. (See 402.)
- Substitute power of attorney signed by applicant or assignee. (See 402.03.)
- Revocation of principal power of attorney. (See 402.05.)
- Withdrawal of attorney. (See 402.06.)
- All powers of attorney or revocation of powers of attorney in applications involved in interference. (See 402.08.)

The Docket Clerk of the Division will enter the following provided the application is not involved in interference:

- Associate power of attorney. (See 402.02.)
- Substitute power of attorney signed by original attorney. (See 402.03.)
- Change in firm name. (See 402.03.)
- Revocation of associate power of attorney. (See 402.05(a).)

The Assignment Branch will consider and enter all papers pertaining to the intervention by an Executor, Administrator, Guardian, Conservator or other such legal representative of the inventor if proof of authority is recorded and not merely "filed" in the application. See 409.01(b) and 409.02.