

each personally and substantially participated in the matter.

*Example 4:* A primary patent examiner, having concluded that all the claims in a first application are allowable, conducts an interference search and finds interfering subject matter being claimed in a second application. The examiner has personally and substantially participated in the first and second applications, whether the second application is assigned to and being examined by the same examiner or another patent examiner.

(B) Participation on ancillary matters. An Office employee's participation on subjects not directly involving the substantive merits of a matter may not be "substantial," even if it is time-consuming. An employee whose responsibility is the review of a matter solely for compliance with administrative control or budgetary considerations and who reviews a particular matter for such a purpose should not be regarded as having participated substantially in the matter, except when such considerations also are the subject of the employee's proposed representation. (See paragraph (b)(3)(i)(C) of this section). Such an employee could theoretically cause a halt in a program for noncompliance with standards under his or her jurisdiction, but lacks authority to initiate a program or to disapprove it on the basis of its substance.

*Example 1:* A primary examiner is asked to review the Office actions of another examiner having partial signatory authority for compliance with procedures to ascertain if the other examiner qualifies for full signatory authority. Such participation is not "substantial."

(C) Role of official responsibility in determining substantial participation. *Official responsibility* is defined in paragraph (b)(3)(v) of this section. "Personal and substantial participation" is different from "official responsibility." One's responsibility may, however, play a role in determining the "substantiality" of an Office employee's participation. For example, ordinarily a patent examiner's forbearance on a matter is not substantial participation. If, however, a primary patent examiner is charged with responsibility for review of a patent application assigned to him, and action cannot be undertaken over his objection, the result may be different. If the primary patent examiner reviews Office actions of a new examiner whose Office actions, after several months, are deemed reliable, and passes them on, his participation may be regarded as "substantial" even if he claims merely to have engaged in inaction.

(iv) Official responsibility in complex cases. In certain complex factual cases,

the Office is likely to be in the best position to make a determination as to certain issues, for example, the identity or existence of a particular matter. Designated ethics officials at the Department of Commerce, in consultation with the Office when deemed beneficial, should provide advice promptly to former Office employees who make inquiry on any matter arising under these regulations.

(v) *Official responsibility* is defined in 18 U.S.C. 202 as, "the direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and either personally or through subordinates, to approve, disapprove, or otherwise direct Government actions."

(A) Determining official responsibility. Ordinarily, those areas assigned by statute, regulation, Executive Order, job description, or delegation of authority determine the scope of an employee's "official responsibility". All particular matters under consideration in the Office are under the "official responsibility" of the Director of the Office, and each is under that of any intermediate supervisor having responsibility for an employee who actually participates in the matter within the scope of his or her duties. A patent examiner would have "official responsibility" for the patent applications assigned to him or her.

*Example 1:* A patent examiner, to whom a new application is assigned, is officially responsible for reviewing the application for compliance with statutory, regulatory, and procedural requirements. Upon assignment of the application, the application became a particular matter for which the examiner is officially responsible.

(B) Ancillary matters and official responsibility. *Administrative* authority as used in the foregoing definition means authority for planning, organizing and controlling matters rather than authority to review or make decisions on ancillary aspects of a matter such as the regularity of budgeting procedures, public or community relations aspects, or equal employment opportunity considerations. Responsibility for such an ancillary consideration does not constitute responsibility for the particular matter, except when such a consideration is also the subject of the employee's proposed representation.

*Example 1:* A supervisory patent examiner would not have official responsibility for all patent applications in a technology center or the Office even though she must review the records of all the applications to locate a missing file.

*Example 2:* Within two years after terminating employment, a supervisory

patent examiner, now a registered patent attorney, is asked to represent Q Company in a continuation patent application of an application which was pending during the last year of the supervisory patent examiner's tenure. The continuation application contains a rejection that was first imposed in the parent application by a primary examiner who reported to the supervisory patent examiner. The supervisory patent examiner did not review the Office actions prepared by the primary examiner for the application. She may not represent Q Company on this matter.

(C) Knowledge of matter pending required. In order for a former employee, e.g., former patent examiner, to be barred from representing another as to a particular matter, he or she need not have known, while employed by the Office, that the matter was pending under his or her official responsibility. However, the former employee is not subject to the restriction unless at the time of the proposed representation of another, he or she knows or learns that the matter had been under his or her responsibility. Ordinarily, a former employee who is asked to represent another on a matter will become aware of facts sufficient to suggest the relationship of the prior matter to his or her former office, e.g., technology center, group or art unit. If so, he or she is under a duty to make further inquiry, including direct contact with an agency's designated ethics official where the matter is in doubt. It would be prudent for a patent examiner to maintain a record of only application numbers of the applications actually acted upon by decision, recommendation, as well as those applications in the examiner's art which he or she has not acted upon.

(D) Self-disqualification. A former employee, e.g., former patent examiner, cannot avoid the restrictions of this section on the ground by self-disqualification with respect to a matter for which he or she otherwise had official responsibility. However, as in § 207(a), self-disqualification is effective to eliminate the restrictions.

(vi) *Actually pending* means that the matter was in fact referred to or under consideration by persons within the employee's area of responsibility, not that it merely could have been.

*Example 1:* A staff lawyer in the Office of General Law is consulted by procurement officers on the correct resolution of a contractual matter involving Q Company. The lawyer renders an opinion resolving the question. The same legal question arises later in several contracts with other companies, but none of the disputes with such companies is referred to the Office of General Law. The Office of General Law has official responsibility for the determination of the Q Company matter. The other matters were