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Examiner Interviews in Patent Prosecution: How to Advance Prosecution While Maintaining a Clean Record

June 23, 2026

Examiner interviews are one of the most effective tools available to patent practitioners during prosecution. A productive discussion with a patent examiner can clarify remaining issues, more quickly identify claim amendments that overcome the cited art, and help move an application toward allowance more efficiently than a written response alone.

At the same time, patent practitioners should be mindful of the prosecution record being created during examination. Statements made during prosecution can later be scrutinized during litigation, and it can be beneficial to minimize the presence of arguments characterizing the cited art or the claimed invention on the record. Practitioners should be mindful of such issues, as they conduct examiner interviews, and submit formal written responses.

Why Examiner Interviews Matter

Examiner interviews provide an opportunity to discuss rejections directly with the examiner and receive immediate feedback.

A successful interview can help applicants:

- Better understand the examiner’s position
- Clarify how prior art references are being applied
- Identify claim amendments likely to overcome rejections
- Reduce prosecution costs and overall examination time
- Increase the likelihood of reaching allowance

In many cases, a brief conversation can accomplish more than a round or two of written responses.

A Simple Approach to Examiner Interviews

There are multiple ways to conduct an Examiner interview. One strategy includes preparation of a detailed agenda including fully developed arguments differentiating the cited art. While this approach can be effective, and may be preferable where you want the Examiner to have time to consider the arguments in advance of the interview, it can also create a significant amount of material in the prosecution record that you might prefer to avoid.

An alternative approach is to keep the agenda sent to the examiner in advance concise (e.g., use the PTO supplied form PTOL-413), with attached proposed amendments to the independent claim(s). A video conference interview over Microsoft Teams can be requested using the AIR tool, through Patent Center.

Conducting the interview over Teams allows better interaction with the examiner, including screen sharing to better communicate proposed claim amendments, and how the differentiate over the cited art. Using an approach like this, the practitioner can walk the Examiner through any arguments differentiating the cited art, during the interview itself, and gauge the examiner's receptivity to such arguments. The interview might focus on three key topics:

1. The invention and its overall advantages.
2. The cited references and what they actually teach.
3. Proposed claim amendments that distinguish the invention from the cited art.

The goal is to obtain feedback and hopefully agreement from the examiner while keeping the discussion focused on identifying a path toward allowance, while minimizing any material in the written record which may form the basis for prosecution history estoppel during later litigation.

Where agreement with the examiner is reached (or even where agreement is not reached), often the written response submitted after the interview can often be significantly simpler and more concise, reflecting the path forward identified during the interview with the examiner.