

**EXCERPTS OF CHIEF JUDGE DAVID RUSCHKE PPAC QUARTERLY MEETING
November 16, 2017**

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UNITED STATES PATENT AND TRADEMARK OFFICE

EXCERPTS OF CHIEF JUDGE DAVID RUSCHKE
PPAC QUARTERLY MEETING
November 9, 2017

Transcribed by DONNETTE COWGILL

1 P R O C E E D I N G S

2 JUDGE RUSCHKE: I want to talk a
3 little bit about expanded panel, since that has
4 gotten a fair amount of discussion out there in the
5 public.

6 I think a number of stakeholders are --
7 are unaware that we have a large number of SOPs,
8 standard operating procedures, that are on our
9 website. And SOP 1 is how we -- it's not just
10 expanded panels; it's how we panel cases generally.
11 But there is a large section there on expanded panel
12 practice within the PTAB.

13 The chief judge, myself, has discretion to
14 expanded a panel, but there are four specific
15 reasons at the present time as to why we would
16 expand a panel. One is that it's an issue of
17 exceptional importance, the second one is that it's
18 to maintain uniformity of board decisions, and the
19 last two are essentially written requests from the
20 commissioner who have an issue of first impression,
21 or where it seems as if in the public interest, they
22 should -- we -- we should not be following a prior
23 board decision.

24 So it's really these first two categories
25 that I think are important to look at: issue of

1 exceptional importance, uniformity of board
2 decisions. And one thing that we're doing right
3 now, that we haven't necessarily done previously, is
4 that when we do expand the panel, we are expanding
5 it and providing the reasons for it. And I think
6 that is something that you'll see in every single
7 one of our expanded panel decisions.

8 Again, it's a suggestion for panel
9 expansion. It can frankly be done by anyone, the
10 judge, the merits panel, an interlocutory panel,
11 applicant or patent owner, and a party in an inter
12 partes reexam, interference, or trial.

13 I think this is an interesting slide.
14 This is actually done rarely, and it actually says
15 "rare" in the SOP. I expanded the panels in only
16 four cases in 2017, and in those situations the vote
17 remained unanimous.

18 And some people must have -- and so the
19 reason that I expanded the panel, and you can see
20 here I point to the second bullet point down there,
21 General Plastic. That's the one that ultimately
22 went into a presidential designation. The reason we
23 expand it, which is mainly adding the chief judge
24 and Scott, the deputy chief judge, into the
25 situation is to emphasize this is an important case.

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1 This is where the jurisprudence of the board is
2 going.

3 And in the case of General Plastic, we
4 expanded the panel, we made it informative, and we
5 made it presidential. That could be a trend. I'll
6 just -- I'm just saying, so I'll keep -- so if you
7 see that happening, that's -- this is what -- this
8 is what we're doing. And we will explain it into
9 the -- the opinion as to why we expanded the panel.

10 UNIDENTIFIED MALE: David -- all
11 right. More questions from the audience --

12 JUDGE RUSCHKE: Sure.

13 UNIDENTIFIED MALE: -- on -- on panel
14 expansion, three-part question: One is when and how
15 would parties be informed that the panel will be
16 expanded, when and how. Two, how are the additional
17 judges assigned, by whom And three, who decides the
18 size of the expanded panel?

19 JUDGE RUSCHKE: So right now, the SOP
20 or one, for expanded panels, does not require prior
21 notice to the parties for expansion. So typically
22 when the -- the panel has been expanded, the parties
23 will find out in the decision when it issues at that
24 point. In terms of the number, I think that was the
25 third part.

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1 UNIDENTIFIED MALE: How are they --
2 how are the additional judges assigned and by whom?

3 JUDGE RUSCHKE: Yeah, so those are
4 all decided by the discretion of the chief judge.
5 It's actually sort of laid out in -- in the SOP as
6 well. Again, we have in the past, not since I've
7 been chief, we have expanded it with other judges.
8 Sometimes it has been expanded with the -- the
9 leadership of the board.

10 As you saw there, I've only expanded it in
11 situations where I've added Scott and myself to
12 emphasize a unanimous decision below. But it is
13 within my discretion. As to the numbers, it's
14 recommended to be an odd number, but that also is in
15 the discretion of the chief judge. And as you can
16 see there, we have gone from 3-0 to 5-0 and
17 sometimes from 5-0 to 7-0.

18 I did want to, as I mentioned earlier at
19 the agenda, at -- at the beginning of the -- of the
20 hour, we are officially releasing on our website
21 today "SOP 9 on Remands." This has been a while
22 coming, and I wanted to thank a number of the judges
23 who have worked relentlessly on this.

24 The thing that we wanted to do primarily
25 was to provide guidance to the judges, as well as

1 provide guidance to the public on how to -- how to
2 talk to your clients about what you can expect if
3 there is a -- a remand from the federal circuit back
4 to the board.

5 The key, which we've kind of been saying
6 all along, but now it's officially in the SOP, which
7 is posted on our website as of today, the goal, of
8 course, is issuing a remand decision in a timely
9 manner. That's within six months from the mandate,
10 not from the decision of the Fifth Circuit, from the
11 mandate.

12 I see some external data showing that
13 we're doing quite well with respect to the six-month
14 goal, with a few significant exceptions, but
15 primarily that seems to be working quite well. What
16 we're doing right now is when anytime we get a
17 remand from the Fifth Circuit, we want to make sure
18 that we are as -- as religious as possible, making
19 sure that it's not going to go back up and have it
20 come down again.

21 As a result of that, we find that we're
22 meeting with the panels, the chief and the deputy
23 chief, or our delegates, meet with them. Many times
24 there really isn't an issue going out there, but if
25 there is significant issues we want to know about

1 it. And this provides a very nice mechanism for the
2 panels, letting us know that there is some issues
3 that could potentially be valuable and be
4 interesting out there.

5 Probably the best guidance that we have
6 are these: We've established default procedures for
7 trial and appeal. This isn't just AIA trials. This
8 is also for appeal remand scenarios. So essentially
9 what we did is we looked at all of the remand cases
10 and saw are there essentially similar scenarios
11 where we would allow briefing, additional evidence,
12 or oral argument? And you can see it summarized in
13 the table. This is taken directly out of the SOP.
14 This is for AIA trial work.

15 You see that there's essentially six
16 categories of remands coming back from the federal
17 circuit: Claim interpretation, we got that wrong.
18 We failed to consider evidence. We didn't provide
19 an adequate explanation. We applied the law
20 inappropriately. Number five is very important.
21 That, of course, is due process, denial of the
22 Administrative Procedure Act rights, and improper
23 consideration of the arguments.

24 You'll see here generally that other than
25 in number five, the APA, where that situation is an

1 opportunity where we may allow additional -- an --
2 and even oral argument. In all of the other
3 situations, you always get briefing, that's almost a
4 certainty, but it's going to be an uphill battle for
5 you to get additional evidence and an oral argument
6 in. We just don't see those situations happening.
7 And this, again, is based on the remand decisions
8 that we have to date.

9 And then the -- there is also a default
10 appeal guidance which I -- again is on this slide.
11 And again, there is these six scenarios that we're
12 looking at and again focusing on the fifth row
13 there, where, again, whether it's involving APA or
14 denial of due process. In that situations we will
15 go back in the form of a new ground of rejection
16 where we -- where we reopen prosecution and
17 reexamination. So I commend everybody to the
18 website. Those are the primary highlights of our
19 SOP 9 that I wanted to make sure everybody was aware
20 of today.

21 Last but not least, this is a -- a slide
22 that's somewhat loaded. There's a lot of things
23 here. These are obviously things that are on our
24 minds. I know they were addressed earlier today, so
25 perhaps I -- I don't need to necessarily go into

1 that as well, but obviously Oil States and SAS being
2 argued on the 27th, that's something that's
3 obviously very important to us.

4 And as I said multiple times before, I
5 never thought in a million years that a year after
6 taking this job I would have to try to come up with
7 operational parameters for a situation where in Oil
8 States, a third of our jurisdiction might be taken
9 away or, if SAS, it could be doubled in -- in terms
10 of workload. Who knows?

11 So we're coming up with a lot of scenarios
12 and -- and plans, again, trying to figure how we're
13 going to operationally keep the board moving. The
14 decisions, though, obviously of great interest to
15 us, and we also cannot forget that Wi-Fi One is
16 still pending at the fed circuit in an en banc
17 decision.

18 I want to spend a little bit of time on
19 the other case, on the very low -- the last bullet
20 there that's still pending before PTAB. Of course,
21 I can't say too much about it. This is the one
22 that's gotten a lot of press where Allergan entered
23 into an arrangement with the Saint Regis Mohawk
24 Tribe. That has been ongoing briefing. It's --
25 raises the issue of tribal immunity.

1 If you've been following board cases,
2 about six or seven months ago we entered the -- the
3 arena of sovereign immunity via state sovereign
4 immunity under the 11th Amendment with a case
5 involving the University of Florida. We've had a
6 few cases since then and our jurisprudence
7 surrounding the state sovereign immunity doctrines
8 are evolving.

9 This is a different case now involving
10 tribal immunity. And as I said, we are involved
11 with the briefing on whether the tribe -- on the
12 effect of the assignment of Allergan, the patent
13 owner, to the tribe and its effect on tribal
14 immunity in the -- essentially the moving forward
15 with the trial proceedings from -- from the
16 beginning.

17 The important thing that I think is out
18 there that I think everybody has seen -- it's gotten
19 a fair amount of press as well -- is that in an
20 order within this case we authorized briefing for
21 amicus briefs by particular folks requesting it. In
22 addition, we authorized briefings for any
23 interest -- interested amicus out there.

24 So the briefing period has been opened.
25 We are allowed briefing through December 1st,

1 essentially a four-week period. Briefs are limited
2 to about 15 pages, after which the petitioner and
3 the tribe will be -- have an opportunity to file a
4 response in two weeks to those amicus briefs that
5 are filed.

6 We encourage amicus to -- amici to please
7 try to coordinate and if there's a way that you can
8 file joint briefs, please do. I know that there's
9 a lot of policy issues out there. There might be
10 some repetition. If there's a lot of repetition you
11 might not have your brief read as in depthly (sic)
12 as you might like, so coordination is key.

13 I personally would like to see one thing.
14 Again, this is an issue, a first impression for the
15 board, so one thing it is a friend of the board, a
16 brief that we're asking for, so any help on case
17 law, interpretation of statutes, contrast and
18 comparison to state sovereign immunity would be
19 welcomed by the board. So please feel free to use
20 this time period effectively. We -- we welcome your
21 input.

22 One thing that we have to deal with is
23 that this is actually the very first time that the
24 board has authorized the filing of amicus briefs in
25 any of our cases. We actually do not have an IT

1 system that can accommodate that at the present
2 time. So what you need to do is to send an email
3 directly to trials, t-r-i-a-l-s, @uspto.gov. It's
4 that simple. If you have an issue, please call our
5 general number. That's on the website but it's
6 trials@uspto.gov. That's where to send the amicus
7 briefs, and you have until December 1st.

8 THE CHAIR: David, I have a question
9 from the audience too. Why is PTAB allowing amicus
10 briefs regarding the motion to dismiss filed by the
11 Saint Regis Mohawk Tribe based on sovereign
12 immunity, but not for any of the 17 motions to
13 dismiss based on sovereign immunity filed by state
14 universities? Can you answer that?

15 JUDGE RUSCHKE: I'm not aware that --
16 that in the state cases there were a lot of amicus
17 briefs requested in those cases. So I would have to
18 go back, Marylee, and check and see what happened.
19 But again, if there were -- if those -- if that did
20 occur -- I am not saying that they didn't occur; I'm
21 just not aware that we had a -- a need for the
22 amicus briefs in those situations.

23 THE CHAIR: I'm just -- I'm just
24 reading the questions.

25 JUDGE RUSCHKE: Yeah, I -- no, it's

1 good. I -- actually, I think that's interesting. I
2 would have to go back and see, you know, if there
3 were a lot of requests in those. Sometimes I think
4 amicus requests are denied if the parties can't
5 agree or if the parties feel that there's going to
6 be some sort of delay in the proceedings. And so I
7 would imagine that panels might say no to amicus
8 briefs if the parties can't agree to it. But I -- I
9 don't know if that's the case in those situations.

10 MS. MAR-SPINOLA: David, can you give
11 a little bit more guidance on the issues that you'd
12 like to have addressed in the amicus briefs?

13 JUDGE RUSCHKE: So I -- I actually
14 commend everybody to the order itself, which is in
15 this case. Let me see if I can pull it up here.
16 I'm not sure we provide specific guidance in the
17 order. We actually don't provide additional
18 guidance in terms of the specific issues, Julie,
19 that we -- that we'd like to see. But I think
20 again, in this situation, there's a large number of
21 issues out there.

22 So again, when I -- one thing I think
23 would be helpful is to compare and contrast
24 sovereign immunity under the 11th Amendment versus
25 tribal immunity. That would be particularly useful

1 to us. I think the whole issue of the viability and
2 appropriateness of the contractual arrangement
3 between the patent owner and the tribe and any
4 indication of that appropriateness would be helpful
5 to us.

6 That has obviously gotten a lot of play
7 two days -- two days ago on Capitol Hill in -- in a
8 -- an opinion written by Judge Bryson as well. So
9 there's a lot of those sorts of issues. And maybe
10 that is something that I think would be helpful when
11 you ask about the range of issues.

12 The hearing on the Hill two days ago
13 raised a number of issues, a lot of policy issues
14 there to begin with. And again, not that we don't
15 want to hear policy, but if -- please try not to be
16 repetitive of those issues because I'm sure there's
17 going to be a lot of overlap there. But again, if
18 we can try to see why it necessarily applies in this
19 situation I think is really important.

20 One other issue might be waiver. In what
21 situations is sovereign immunity waived and does it
22 differ between constitutional 11th Amendment
23 sovereign immunity or tribal immunity? I think that
24 would be an important issue to be briefed as well.

25 MS. MAR-SPINOLA: And one that I

1 would offer is, who has jurisdiction over the
2 validity of patents once they've been assigned to a
3 tribe?

4 JUDGE RUSCHKE: I -- I think that's a
5 -- that's an -- a really interesting question. I
6 haven't seen that out there, but I do think that
7 that's something we'd like to see as well. This --
8 and this is an interesting issue and I -- I think
9 one of the things that, as with AIA for the last
10 five years it seems like, you never know what issues
11 are going to be coming up next.

12 So not that this is going to be happening
13 on a regular basis, but I think the board will be
14 looking strongly at these sorts of issues of first
15 impression applied in a patent setting atypically
16 where we will be asking for amicus briefs to help us
17 out.

18 THE CHAIR: Any other questions for
19 David? Okay.

20 Seeing none, David, thank you. That
21 was --

22 JUDGE RUSCHKE: You're welcome.

23 THE CHAIR: -- a great way. I
24 commend the subcommittee of covering a lot of very
25 specific issues that have been raised to us through

1 PPAC, and we appreciate the depth and detail that
2 you provided. And -- and we also appreciate the
3 fact that you always come back. We ask you, you
4 know, to jump through this hoop and you jump forward
5 and back and then through again, and so we
6 appreciate your patience with us and -- but I think
7 the user committee really values the input and so --
8 and we need to work on that manual part for you,
9 so --

10 JUDGE RUSCHKE: Appreciate that.

11 THE CHAIR: -- yeah.

12 JUDGE RUSCHKE: We -- we also --
13 thank you for that, Marylee. We also want to --
14 appreciate the interactions we have with the
15 subcommittee. It's a -- we're really excited about
16 some of the new initiatives that we're doing in
17 collaboration with the subcommittee. Those are
18 starting -- hopefully maybe next time we can spend a
19 little bit of time talking about those.

20 But I -- I do want to compliment Scott and
21 Jana Kengola (phonetic) who always attend with me,
22 and they -- they write down scrupulous notes at the
23 subcommittee and here to make sure that we're
24 responding to -- to the questions you have.

25 MR. THURLOW: Just -- just very

1 quickly on a timing issue. With the one case, this
2 sovereign immunity, not all of us have followed it,
3 so when is -- when is the -- the decision going to
4 come down to institute, I guess.

5 JUDGE RUSCHKE: This is the tribal --
6 you mean the tribal immunity?

7 MR. THURLOW: Yeah, yeah. Tribal,
8 I'm sorry. Yeah.

9 JUDGE RUSCHKE: Do you know if --

10 MR. BOALICK: So it's --- so -- so,
11 Peter, it's already in progress. In fact, this
12 motion came a couple of weeks before the oral
13 hearing. However, it is a joined case, so the panel
14 has extended the -- the deadline because of its
15 power, you know, by the statute. It's -- the final
16 decision will be out no later than April and the
17 order that David referred to has the date. I forgot
18 exactly which date in April, but no later than April
19 you'll see the final decision.

20 Of course the -- that could include a
21 decision on the motion combined with the final
22 decision or a decision on the motion could come down
23 and then proceed with the oral hearing and all. The
24 oral hearing has currently been postponed while the
25 motion is under consideration.

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1 MR. THURLOW: That's it.

2 THE CHAIR: Okay. Yes?

3 MR. THURLOW: Yeah.

4 THE CHAIR: Gentlemen, thank you.

5 Thank you so much.

6 (End of Proceeding.)

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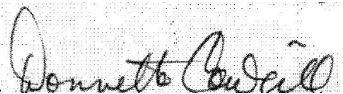
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