

PATENT TRIAL AND APPEAL BOARD
STANDARD OPERATING PROCEDURE 9

**Procedure for Decisions Remanded from the Federal Circuit for
Further Proceedings**

This Standard Operating Procedure (SOP) addresses the procedure for handling all decisions on cases remanded from the Court of Appeals for the Federal Circuit (Federal Circuit) to the Patent Trial and Appeal Board (Board) for further proceedings. This SOP creates internal norms for the administration of the Board to promote consistency. It also provides guidance to the parties, the public, and the Board regarding Board decisions remanded from the Federal Circuit. This SOP does not create any legally enforceable rights. The procedures described in this SOP are part of the Board’s deliberative process.

The Board has established a goal to issue decisions on remanded cases within six months of the Board’s receipt of the Federal Circuit’s mandate. The mandate makes the judgment of the Federal Circuit final and releases jurisdiction of the remanded case to the Board.

The Chief Administrative Patent Judge (Chief Judge) and the Deputy Chief Administrative Patent Judge (Deputy Chief Judge) believe that identifying and discussing potential issues soon after the Federal Circuit’s opinion will facilitate timely issuance of decisions on remand. Thus, the Chief Judge and/or the Deputy Chief Judge will discuss each remanded case with the panel before the issuance of the mandate, and before the panel expends substantial effort on the case. The Chief Judge and Deputy Chief Judge request that the panel schedule a meeting within thirty days of receiving notice of the Federal Circuit’s decision.¹ The panel

¹ Please note that this meeting is expected to occur *before* the mandate issues from the Federal Circuit. Under Rule 41(b) of the Federal Rules of Appellate Procedure, a mandate “must issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later.” Because there is a 30-day period under Fed. Cir. R. 40(e) for filing a rehearing petition, the mandate usually issues **37 days** after judgment if no party seeks rehearing or a stay of the mandate. However, in cases in which the Director

SRA - Exhibit 2129 Facebook, Inc. et al. v. SRA, LLC

may arrange for the meeting by contacting the Chief Judge's or Deputy Chief Judge's administrative assistant.

The Chief Judge and/or Deputy Chief Judge may assign delegate(s) to meet with the panel in lieu of, or in addition to, the Chief Judge and Deputy Chief Judge. The Chief Judge may also elect to expand the panel assigned to the remanded case in accordance with SOP 1. The Chief Judge, however, expects panel expansion to be a rare occurrence.

Panels should be prepared to discuss the issues presented by the Federal Circuit's decision, as well as the expected procedure for preparing a remand decision. Specific guidance for panels regarding preparing for remand meetings can be found in **Appendix 1** to this SOP. Given the early timing of the meeting in the remand process, the meeting is not intended to address the likely substantive outcome.

The parties should expect the remand process to vary somewhat depending on the type of case and the issues presented. **Appendix 2** to this SOP provides guidance to parties on remand procedures, plus illustrative examples from recent cases. Notably, certain scenarios may necessitate an extension of the six-month goal for issuing a remand decision.

has intervened, Rule 40 of the Federal Rules of Appellate Procedure allows for 45 days for any party to petition for rehearing. Thus, when no party petitions, the mandate will issue **52 days** after judgment in those cases.

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APPENDIX 1

**Guidance for Panels in Preparing for Remand Meetings with the Chief Judge
and/or Deputy Chief Judge**

This Appendix to SOP 9 provides guidance to panels in preparing for the remand meetings discussed in SOP 9. The Chief Judge and Deputy Chief Judge expect that a remand meeting will occur in every remanded case. As noted in SOP 9, the Chief Judge or Deputy Chief Judge may assign delegate(s) to meet with the panel in lieu of, or in addition to, the Chief Judge and Deputy Chief Judge. The Chief Judge also may elect to expand the panel assigned to the remanded case for the specific reasons articulated in SOP 1 (e.g., to address an issue of importance).

The topics to be discussed at a remand meeting depend on the facts and circumstances of each case. In preparing for the meeting the panel should consider the following general topics, if relevant to their particular remand. The panel is welcome—although not required—to provide to the meeting participants a short (e.g., not to exceed two pages), informal summary addressing these and/or other issues in advance of the meeting. The likely substantive outcome need not be determined or discussed at this early stage.

Potential Topics for Remand Meetings

The **procedural history**, including the procedural history prior to the appeal to Federal Circuit, as well as the outcome and rationale of the Federal Circuit decision, as well as the procedural history of any related appeals.

The **issues on remand**, including any specific procedural instructions from the Federal Circuit and the substantive issues the panel may need to address.

Any contemplated **procedures for the proceedings on remand**, including whether the panel anticipates additional briefing from the parties, an additional oral hearing, and/or reopening the record to permit introduction of additional evidence.

The panel should consider whether to recommend that the Chief Judge expand the panel, taking into account the factors expressed in SOP 1.

Any possible **policy considerations**, including whether the Federal Circuit's decision highlights any novel, evolving, or contentious issues of law or policy (i.e., issues not limited to the particular case) or raises any issues of particular importance to the Office or the patent community. The panel should contemplate whether a decision on remand, which involves such an issue, might be considered for precedential designation.

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APPENDIX 2

Guidance for Parties Regarding Remand Procedures

This Appendix to SOP 9 provides guidance to the parties on procedural issues. The procedure and pace of a remand following a Federal Circuit decision will vary depending on the type of case, the legal and factual issues involved, the specific instructions from the Federal Circuit, the recommendations of the parties, and any other particularities of the case. Considerations guiding remand procedures and common remand scenarios based on a non-exhaustive sample of remanded cases are discussed below.

Parties in remanded trial cases are to contact the Board within ten (10) business days after the mandate issues to arrange a teleconference with the panel. Before the teleconference, the Parties shall meet and confer in a reasonable and good faith attempt to propose a procedure on remand. Parties are encouraged to seek agreement, if possible, on remand procedures including, but not limited to: (1) whether additional briefing is necessary; (2) subject matter limitations on briefing; (3) length of briefing; (4) whether the parties should file briefs concurrently or sequentially; (5) if briefs are filed sequentially, which party should open the briefing; (6) whether a second brief from either party should be permitted; (7) the briefing schedule; (8) whether either party should be permitted to supplement the evidentiary record; (9) limitations, if any, on the type of additional evidence that will be submitted; (10) the schedule for submitting additional evidence, if any; and (11) any other relevant procedural issues. Teleconferences with the panel should take place within the first month after the mandate.

Considerations Guiding Remand Procedures in Trials

Although the panel shall consider procedures proposed by the parties, the panel ultimately will decide the procedures to be followed on remand. For example, the panel will decide whether to permit additional briefing and additional evidence (testimonial and documentary) or hold additional hearings following a remand.

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