

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

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UNITED STATES PATENT AND TRADEMARK OFFICE

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November 9, 2017

Transcribed by DONNETTE COWGILL

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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.

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

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