

**In The Matter Of:**  
*Pauline Newman American Inn of Court*

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*USPTO Meeting - Concurrent Post Grant Proceedings*  
*Vol. 1*  
*January 15, 2014*

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1 PAULINE NEWMAN AMERICAN INN OF COURT  
2  
3 JANUARY MEETING ENTITLED "ROMANCING  
4 THE USPTO - CONCURRENT POST-GRANT  
5 PROCEEDINGS: DOS, DON'TS, AND TIPS  
6 FOR CREATING A STRONG RECORD FOR  
7 APPEAL OR CIVIL ACTION

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10 The Meeting in the above-mentioned matter  
11 was held on Wednesday, January 15, 2014, commencing at  
12 6:16 p.m., at the United States Patent and Trademark  
13 Office, Madison Auditorium, 600 Dulaney Street,  
14 Alexandria, Virginia 22314, before Amanda J. Curtiss,  
15 Public.

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21 REPORTED BY: Amanda J. Curtiss

1 PANELS OF JUDGES AND PRACTITIONERS:

2

3 ERIN DUNSTON, BUCHANAN INGERSOLL & ROONEY

4 TODD WALTERS, BUCHANAN INGERSOLL & ROONEY

5 OLIVER ASHE, ASHE PC

6 JUDGE SCOTT BOALICK, U.S. PATENT AND TRADEMARK OFFICE

7 JUDGE MICHAEL TIERNEY, U.S. PATENT AND TRADEMARK OFFICE

8 JUDGE LIAM O'GRADY, U.S. DISTRICT COURT FOR THE EASTERN  
9 DISTRICT OF VIRGINIA

10 DON COULMAN, INTELLECTUAL VENTURES

11 PHILLIP HIRSCHHORN, BUCHANAN INGERSOLL & ROONEY

12 PAULINE NEWMAN, U.S. COURT OF APPEALS

13 FOR THE FEDERAL CIRCUIT

14 PAULINE NEWMAN, AMERICAN INN OF COURT

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PROCEEDINGS

JUDGE LIAM O'GRADY: Welcome to all of you. We're excited for our program tonight. Erin has done a terrific job putting together a wonderful panel of people who actually know the regulations and have interpreted them, and I think are going to be terrifically informative and help us through what's going on as of today in the Patent Office.

And I want to welcome all of you and of course on behalf of our leader, Judge Newman, unparalleled leader Judge Newman, it's so nice to see her tonight and thank you. And of course Ted Essex joins us. Our former leader Al Tramosch is here and we're pleased to see Al and who's been a regular and our original and first and foremost president.

So on behalf of Judge Lauren and myself, welcome again, and I'm going to turn the program over to Erin Dunston at this time. Thanks, Erin.

MS. ERIN DUNSTON: Welcome everyone. We have a lot to cover tonight, and it's a pretty hardy set of information. So there are two handouts this

1 evening. One that's a copy of the slides, and then  
2 another is just portions of 37 C.F.R. So I'm not going  
3 to cover every slide this evening, but you do have it  
4 to refer to. And if you have any questions, we'll  
5 hopefully have time left to be available for follow-up  
6 questions. And we will try and have the slides posted  
7 also on the Inn of Court website.

8           So to go through relatively quickly,  
9 tonight we're focusing on concurrent post-grant  
10 proceedings, the dos, the don'ts and tips for creating  
11 a strong record should you go up on appeal or file a  
12 civil action. The primary ones that we're going to  
13 discuss tonight are inter partes reviews, or IPRs,  
14 post-grant reviews, PGRs, covered business method  
15 patent reviews, or CBMs, and not much of a focus  
16 tonight, but derivation proceedings are another option.  
17 [SEE SLIDE 4] This is a nice summary of where to look to  
18 for the rules governing the various proceedings in 37  
19 C.F.R. 42.1 to 80, you've got the umbrella rules that  
20 cover all types of proceedings. And then basically the  
21 100s, you have the inter partes review information.

1 200s, PGRs. 300s for the CBMs. And 400 for the  
2 derivation proceedings.

3 [SEE SLIDE 5] This is the basic timeline, and we're going  
4 to come back to this at several points tonight, for the  
5 trial proceedings. Generally, for example, with an  
6 IPR, the petitioner files the petition and then the  
7 patent owner has three months to file their preliminary  
8 response. It's not mandatory, but they have that  
9 option. And the panel's going to talk a little bit  
10 tonight about some pros and cons of doing that. And  
11 then no more than three months after that, the Board  
12 will decide whether or not to institute the proceeding.

13 The patent owner then has their actual  
14 response, and if they wish to, they can move to amend  
15 the claims. And before that, the patent owner has  
16 their discovery period. Then the petitioner has their  
17 discovery period, and the petitioner replies to the  
18 response and any opposition to the amendment. Go back  
19 to more discovery by the patent owner, and then the  
20 patent owner does their reply.

21 And the next major event is the hearing set

1 on the request. The hearing occurs, and then there  
2 will be a final written decision.

3 The goal for these proceedings is from  
4 instituting the proceeding to the decision hopefully  
5 not more than 12 months, but that can be extended for  
6 cause.

7 [SEE SLIDE 6] This is a nice summary of the differences  
8 between -- or among, rather, IPRs, PGRs, and CBMs. All  
9 patents are eligible for IPRs, whereas only the first  
10 inventor to file patents are eligible for PGRs. The  
11 petitioner cannot have filed an invalidity action, and  
12 the petition may -- must be filed no more than one year  
13 after service of the infringement complaint. And for  
14 IPRs, it's only 102 or 103. So 35 U.S.C. Section 102  
15 and 103 anticipation and obvious only -- obviousness  
16 only for IPRs based on patents or printed publications.  
17 Whereas once PGRs come into play, your options are  
18 greater. You can do 101 and 112 other than best mode.  
19 CBMs, both first inventor to file and first to invent  
20 are eligible, but it has to be a covered business  
21 method patent, and that is set forth in the

1 regulations. The petitioner has to be charged with  
2 infringement, and like PGRs, you have 101, 102, 103,  
3 and 112 except best mode.

4 [SEE SLIDE 7] What is the standard for instituting one of  
5 these proceedings? For an IPR, the petition itself  
6 must demonstrate a reasonable likelihood that the  
7 petitioner will prevail as to at least one of the  
8 claims challenged, whereas for PGR and CBM, the  
9 petition must demonstrate that it is more likely than  
10 not that at least one of the claims challenged is  
11 unpatentable.

12 [SEE SLIDES 8-19] And these generally are just some details  
13 and some specifics on the general information I just  
14 went over, so you can review that basically at your  
15 leisure.

16 [SEE SLIDES 20-22] Very recently, which was wonderfully  
17 convenient, the Board posted some statistics and these  
18 are as of January 9 of 2014. So again, if you're  
19 curious as to how many have occurred, how many have  
20 been filed, in what art areas, how often the patent  
21 owner is filing that preliminary response, and



1 basically the disposal rate and situation, that's in  
2 here and also on the Board's website.

3 [SEE SLIDES 24-25] Little bit of a summary of the various  
4 proceedings. And then here's where you may also want  
5 to look back to. Some helpful links. [SEE SLIDES 26-27]  
6 The AIA generally, the regulations, PTAB and whatnot.  
7 And then this one is especially helpful and hopefully  
8 will work. The Board has on its website representative  
9 orders, decisions, and notices, and they categorize them.  
10 So if you're looking for a particular issue, that's a  
11 wealth of information there.

12 Okay. So that we can get to the panel,  
13 we've developed a little bit of a fact pattern building  
14 upon the facts that the Inn of Court has used so far  
15 this year. [SEE SLIDE 28] And turns out that Dr. Rube  
16 Goldberg got over his ethics issues that we addressed  
17 last time and he successfully got two patents, the '123  
18 Patent and the '456 Patent.

19 The '123 Patent is a big one. It's got 80  
20 claims. It's a got a mix of composition claims and  
21 method claims. And then the '456 is much smaller. It

1 only has 11. The '123 issued back in June of 2010, and  
2 the '456 issued just last year in April. Excuse me,  
3 was filed in April and issued just over a week ago.

4 Dr. Goldberg has given all of his rights in  
5 both patents to Globocorp. And this past August,  
6 Globocorp sued Smith Company for infringement of  
7 certain claims of the '123 Patent here in the Eastern  
8 District of Virginia, and the case was assigned to  
9 Judge O'Grady. And Globocorp has in mind that it's  
10 going to sue Smith Company for infringement of the  
11 '456.

12 Smith Company wants to file one or more  
13 IPRs on the '123 Patent and the '456 Patent. Smith  
14 thinks that certain claims in the '123 Patent are  
15 invalid under 101, and then they think many of those  
16 claims are anticipated by the Jones publication, and  
17 other claims are obvious in view of the Jones  
18 publication combined with the Day and the Reavis  
19 publications. And they also think that all of the  
20 claims of the '456 Patent are obvious in view of two  
21 publications.

1           So tonight we've assembled a very talented  
2 panel. We have Todd Walters and Oliver Ashe, who are  
3 experienced interference practitioners and also are  
4 starting to do these IPRs and be very much involved in  
5 these new post-grant proceedings. We have from the  
6 Patent Trial Appeal Board Judges Boalick and Lead Judge  
7 Michael Tierney. We have Eastern District of Virginia  
8 Judge Liam O'Grady. We have Don Coulman of  
9 Intellectual Ventures, and Phil Hirschhorn from  
10 Buchanan, Ingersoll and Rooney.

11           And tonight, Todd and Oliver are going to  
12 serve or take the role basically of PTO counsel. Todd  
13 for the petitioner, who's going to be Smith Company,  
14 Oliver for the patent owner or Globocorp.  
15 Dr. Coulman's going to give us the in-house perspective  
16 for both the petitioner at times and the patent owner.  
17 The judges are going to share some comments from what  
18 they've observed so far. And Phil's going to take the  
19 role of District Court counsel for the patent owner.

20           So the first question goes to Todd. If  
21 Smith Company wants to file an IPR on this '456 Patent,

1 you know, they approach you, where do you start?  
2 What -- what things do you start thinking about and  
3 how -- what happens between when you're approached and  
4 getting that petition on file?

5 MR. TODD WALTERS: Well, the first thing,  
6 Erin, that you really have to do, particularly when  
7 you're facing Oliver Ashe in a proceeding, is make sure  
8 that you understand what the claims mean. And in these  
9 proceedings, the claims are going to be given the  
10 broadest reasonable interpretation. So you have to go  
11 through every claim that you want to challenge element  
12 by element and make sure that you understand exactly  
13 what the claims mean.

14 Once you have that figured out, I think  
15 it's a good idea for you to create claim charts and  
16 then go through the prior art and make sure that you  
17 have in the prior art identified where every element of  
18 every claim that you want to challenge is found. And  
19 there will be holes in some claims, and you're going to  
20 have to find out how to fill those holes in terms of an  
21 obviousness argument. And then after you get your

1 claim charts figured out, you're going to have to be  
2 able to explain to the Board ultimately why one would  
3 combine the references to arrive at the claimed  
4 invention and why it is obvious.

5           It's really checking all the elements off  
6 and if you have to combine references, providing an  
7 explanation of why one would combine the references, in  
8 my mind. If you can do that, you have a good chance of  
9 being successful. But you have to support that then  
10 with an expert who can go through and identify what  
11 each of the terms mean, identify where each of the  
12 elements of the claims are found, and identify why when  
13 you're combining references there would be a good  
14 argument of obviousness.

15           MS. ERIN DUNSTON: We mentioned earlier  
16 that Smith Company really likes its 101 argument on  
17 that '123 Patent. How are you going to work that into  
18 the IPR?

19           MR. TODD WALTERS: Yes. So with the IPRs,  
20 the only thing that you can raise is anticipation and  
21 obviousness in terms of an attack on the claims. A 101

1 challenge is not available in an IPR. You would have  
2 to do that in a post-grant review, and that's not  
3 available with regard to the '123 Patent because it's  
4 not a post AIA patent.

5 MS. ERIN DUNSTON: Okay. Also, the '123  
6 Patent, even with regard to the anticipation or  
7 obviousness issues, it has a lot of claims. 80 claims.  
8 They want to challenge many of those. You've got a  
9 60-page limit at 14 font for that petition. How are  
10 you going to address that many claims in that short a  
11 document?

12 MR. TODD WALTERS: And I think when you  
13 look at a patent that has a lot of claims, and  
14 particularly if the claims are long claims, you will  
15 recognize once you put your claim charts together that  
16 you're going to have page limitation problems with  
17 filing an IPR. What a number of people are doing and  
18 doing successfully and really without challenge is  
19 they're filing multiple IPRs on the same patent on the  
20 same day. That allows you to get additional pages. It  
21 allows the Patent Office to collect additional fees,

1 and that seems to be going rather smoothly. So that  
2 would be my recommendation.

3 MS. ERIN DUNSTON: Judges Tierney and  
4 Boalick, how do you feel about that? What if you're  
5 getting more than one IPR on a given patent, what are  
6 your thoughts there?

7 JUDGE SCOTT BOALICK: I guess we feel good.  
8 The -- I mean, if nothing else, I think the page limits  
9 help focus the mind and the effective advocacy because  
10 contrasted with, say, the page unlimited filings that  
11 we had in some of the prior inter partes reexams which  
12 would go on for hundreds or thousands of pages, I think  
13 the focused argumentation that's required here and the  
14 effective advocacy which I think can be put forth by  
15 the folks here in this room really help again focus the  
16 issues for decision in -- in these proceedings. And  
17 Mike, do you have further?

18 JUDGE MICHAEL TIERNEY: Well, keep in mind  
19 one of the things that we did in these proceedings was  
20 to try and ensure that we had a streamlined process.  
21 Because as you saw earlier, we do have a strict

1 timeline which from the date we institute and the date  
2 we complete, Congress told us to get that done in no  
3 more than 12 months. Now, there could be a good cause  
4 exception. But trying to meet the timelines when you  
5 have what Judge Boalick mentioned, 300 pages, say even  
6 1000 pages in a petition would be a little bit  
7 burdensome not only on the office, but also on a patent  
8 owner. So we did come up with some page limits.

9 We understand there are circumstances where  
10 you may need more pages. If there's 80 claims, you  
11 can't meet the 60-page requirement. We need to have an  
12 escape valve essentially. One way of handling this was  
13 to allow a second petition. The statute provides for  
14 it. So where a second petition comes in, that's just a  
15 part of the way it's handled. But again, we do want to  
16 encourage parties to not necessarily file a second  
17 petition where only one would suffice.

18 Keep in mind, we want to keep things  
19 focused. The fact that you have ten different  
20 arguments, ten different references does not mean you  
21 should necessarily keep filing petitions to get every



1 one of those arguments before us. You want to focus a  
2 judge's attention. Too many challenges may make for an  
3 unfocused petition. You may find that many of these  
4 become redundant or are completely denied. So again,  
5 you have that escape valve to use a second petition,  
6 but use it judiciously.

7 MS. ERIN DUNSTON: Okay. So for an IPR,  
8 the base fee is 9,000 for the request and 14,000 for  
9 the post institution fee. So you've got about \$23,000  
10 and maybe even some more depending upon the number of  
11 claims.

12 So Dr. Coulman, what do you think as  
13 in-house counsel for Smith Company, you know, you're  
14 going to do at least one of these, maybe more. What  
15 are your thoughts on those fees and, you know, how does  
16 that compare to District Court and any other  
17 distinctions that you've seen as in-house counsel?

18 MR. DON COULMAN: So I think that what you  
19 see very quickly is although the \$23,000 price of an  
20 IPR seems expensive for those that are familiar with  
21 reexams, reexams a couple years ago, I would argue that

1 when you look at the costs, both the attorney fees and  
2 the expenses of filing, it's still much less than the  
3 costs for litigation. So I think there's a lot of  
4 advantage to the in-house counsel if you have had a  
5 patent filed against you in suit to consider an IPR.

6 There's also the timing issues. The timing  
7 is going to be much quicker in an IPR. As Judge  
8 Tierney alluded to, it's 12 months. It's approximately  
9 18 months from the date you file a petition, you will  
10 have a decision from the Board.

11 I'd also like to emphasize from in-house  
12 counsel the need for strategy. And I'll say strategy,  
13 strategy, strategy over and over again, because I think  
14 the '456 Patent alludes to something that I would be  
15 asking in-house counsel -- or I mean, outside counsel  
16 handling this matter for me. And that is if you notice  
17 the filing date of the '456 is first to invent, so PGR  
18 is available on '456. So you have to look at the IPR,  
19 the PGR. What is estoppel? They're both, as far as I  
20 know, they are still the same, even though I know the  
21 technical amendments package was trying to change that.

1 But the PGR threshold for the initiation is more likely  
2 than not, whereas the initiation of an IPR is a  
3 reasonably likelihood of success. I would argue that  
4 more likely than not is probably 50/50, reasonable  
5 likelihood is greater than 50 percent. So I'd like  
6 outside counsel to provide guidance as to whether I  
7 should consider a PGR or an IPR.

8 Discovery in the PGR also I believe has a  
9 lower standard. We don't have a lot of information on  
10 these because the first to invent patents are not  
11 really out there yet, although I think there's a few.  
12 But discovery in PGR has a lower standard. It's good  
13 cause versus an IPR which is in the interest of  
14 justice. So basically initial discovery in an IPR, as  
15 we'll get into later, is going to be very minimal.

16 MS. ERIN DUNSTON: All right. So I'm going  
17 to ask Todd also, Smith Company was sued for  
18 infringement on some of the claims of the '123 Patent,  
19 claims one to 20 and 40 to 55, here in the Eastern  
20 District of Virginia, and Smith Company was served with  
21 that complaint on August 24, 2013. What wrinkles or

1 issues does that bring to the petition drafting  
2 process?

3 MR. TODD WALTERS: For IPRs, they will only  
4 have one year from service of the complaint to get the  
5 petition on file, so they're going to have to work  
6 pretty hard to get their petition in good shape, get  
7 their expert lined up, get their evidence lined up, get  
8 their declarations from experts, and be prepared to  
9 file desirably in advance of the one year deadline  
10 because a lot of petitions can get bounced for a number  
11 of reasons. But it would be good to file it before  
12 that -- that deadline, well before it, to find out if  
13 you have a problem. But in any case, make sure you  
14 file it at least by that one year anniversary.

15 MS. ERIN DUNSTON: And with regard to that  
16 one year anniversary, to the PTAB judges, may you file  
17 on that day literally one year from service of the  
18 complaint or is that being construed as just shy, you  
19 know, 364 days from service of that complaint?

20 JUDGE SCOTT BOALICK: Well, when we look at  
21 the language of the statute, it says the petition is

1 filed more than one year after the date. So one year  
2 is okay. It's not more than one year. So 366 days  
3 would be a problem.

4 MS. ERIN DUNSTON: Okay. Great. And I  
5 forgot to mention earlier, the panel has been kind  
6 enough to permit this proceeding to be transcribed. So  
7 we have a court reporter in the back, and while it may  
8 not be binding, it may be helpful. And we will get  
9 that posted as soon as we can on the website.

10 Okay. Going back a little bit to the fact  
11 that not all of the claims of the '123 Patent were the  
12 subject of that infringement suit. To the PTAB judges,  
13 does the one year clock still start ticking for the  
14 claims that were not part of the infringement suit?

15 JUDGE SCOTT BOALICK: So, again, it says  
16 that it is for the patent, so yes, it's for all claims  
17 of the patent. It's not claim by claim. It's the  
18 service and the filing is on the patent itself.

19 MS. ERIN DUNSTON: All right. So we are  
20 going to fast forward in time, and it turns out that  
21 Todd and Smith Company got everything done and they

1 were able to file the petition within the one year.  
2 And so now turning it over to Oliver Ashe and  
3 Dr. Coulman as counsel for Globocorp, they just got  
4 this valentine. You've -- you now have this petition  
5 and you actually got three of them; two for the '123  
6 Patent, and one for the '456.

7 So, Oliver, what do you do first or what  
8 runs through your head?

9 MR. OLIVER ASHE, JR.: Well, I think at  
10 this point, I would probably have been advising  
11 Globocorp for several months now that this type of  
12 proceeding was a distinct possibility. Given the  
13 numbers that we see from the Patent Office, I think  
14 about 80 percent of the cases that are involved in the  
15 IPR proceedings are involved in concurrent litigation.

16 So the first thing is if you're involved in  
17 litigation, part of your checklist should be preparing  
18 for potential IPR. And if you don't do that, you're  
19 going to be behind when you actually get these  
20 petitions served on you. And I think a recurring theme  
21 with my comments tonight will be to plan ahead and act

1 promptly.

2           And as Mr. Coulman suggested, everything  
3 about these proceedings involves strategy. And in that  
4 sense, they're very similar to interferences in the  
5 sense that they are very front-loaded in terms of the  
6 finances and also substantively planning out what your  
7 game is going to be. You do not want to be involved in  
8 these proceedings with a strategy of fighting fires as  
9 they appear in front of you. If you do that, you get  
10 burned.

11           So if I received these petitions, we were  
12 served petitions, the fact pattern says that they were  
13 served within the one-year period so that's something  
14 that I would immediately check off my list in terms of  
15 things that I would need to be worried about and  
16 striking them.

17           But the very first thing that is triggered  
18 by the service of the petitions is mandatory  
19 disclosures, and that would include identifying the  
20 real party in interest, related proceedings, your lead  
21 and backup, lead counsel. These are all things that

1 really need to be thought out ahead, especially, for  
2 example, if the patent is co-owned or exclusively  
3 licensed, you might want to give some thought to if  
4 this type of petition is filed, who is going to be my  
5 lead counsel? Under the agreements that are already  
6 existing, do they contemplate an IPR proceeding? And I  
7 know from interference experience, oftentimes the  
8 agreements talk about prosecution and litigation and  
9 interferences fall somewhere in the middle. So the  
10 first 21 days you might have an internal fight about  
11 who's selecting counsel, who the counsel's going to be.

12           So these are all just coming back to the  
13 theme of you really need to be thinking ahead, and  
14 especially if you're in litigation, anticipate that  
15 this would be coming. So because I was advising  
16 Globocorp, we have all of that covered.

17           The first thing -- the next thing that  
18 we're going to look at is the patent owner preliminary  
19 response. And really, this is the mechanism for patent  
20 owner to have a voice in the proceeding before the  
21 Patent Office decides whether they're going to



1 institute a trial. And there are -- I see it as kind  
2 of a spectrum of issues that you could address in this  
3 patent owner preliminary response.

4 At one end of the spectrum, there are  
5 things such as statutory bars that might apply,  
6 estoppel against the petitioner. But as you kind of go  
7 down toward the other side of the spectrum, you get  
8 into more substantive issues such as claim  
9 construction, which could be a critical issue for your  
10 pending litigation. And then at the very far end of  
11 the spectrum would be the actual merits of the case.

12 So early on you need to decide what issues  
13 are you going to address in the patent owner  
14 preliminary response. I think that you would be well  
15 advised to identify and address any issues that go to  
16 standard. Is there a statutory bar? Is there estoppel  
17 that applies against the petitioner? Then you really  
18 need to decide on a case by case basis how much you  
19 want to get into some of these more substantive issues,  
20 such as claim construction.

21 And really when you get to the far end of

1 the spectrum in terms of addressing the merits for  
2 exposed grounds of patentability, I think in most  
3 instances you'd be doing yourself a disfavor to address  
4 those issues because what you're doing is laying out  
5 your position on the record. The Board is more likely  
6 than not they're not going to give a lot of weight to  
7 your attacks if it's really a dispute as to fact and  
8 would likely turn into a dispute between experts, but  
9 what you've done is you've laid your position out early  
10 on and then the proceeding gets going and really the  
11 petitioner has about six to nine months to study and  
12 pick apart your position before they need to respond.  
13 So there are some strategic disadvantages I think to  
14 really getting into substantive issues.

15           The next thing that happens is if these  
16 petitions are granted and a trial is instituted,  
17 another minor procedural detail that can really make a  
18 difference is the patent owner has an opportunity to  
19 object to evidence immediately. And if you don't do  
20 that, you forego your ability to later move to strike  
21 that evidence.

1           So in interferences, this wasn't a big deal  
2 because there was always an appeal to a District Court  
3 that would be available to supplement your evidence.  
4 Here I see it as a much higher value target because you  
5 can't supplement your evidence. The only route of  
6 appeal for these proceedings is through the Federal  
7 Circuit. So really your objections early on within the  
8 first ten days if you -- after the trial is instituted,  
9 those need to be on record.

10           Other things that you would want to think  
11 about early on as soon as you're aware of the  
12 petitions, what is really the strength of these  
13 patentability arguments? Is it possible that I'm going  
14 to want to amend my patent claims? And there are  
15 proceedings for doing that. You can file a motion to  
16 amend or substitute your claims. You can also disclaim  
17 certain claims, and that's something you need to inform  
18 the Patent Office about very early on once the trial is  
19 instituted, and that's a big decision. So you want to  
20 be thinking about that well before the trial's actually  
21 instituted.

1           I think there are also potential issues  
2 with regard to discovery, and Erin, in the timeline,  
3 you see on the lower part of it there are three periods  
4 that are identified there: patent owner discovery  
5 period, petitioner discovery period, and another patent  
6 owner discovery period. There's actually potentially  
7 discovery even before the trial is instituted. If you  
8 have a question regarding real party in interest, for  
9 example, it's possible that you could approach the  
10 Board and seek discovery on that issue.

11           So all of these issues you need to be  
12 thinking about ahead of time. That particular fact  
13 doesn't apply to this case, but it just reinforces you  
14 need to really think through this and you need to be  
15 planning through this, because once the trial is  
16 instituted, as Judge Tierney emphasized, the Patent  
17 Office is under very strict time constraints to resolve  
18 the issues.

19           So that is, you know, my initial take on  
20 how I would advise the client and hopefully where we  
21 would be on the day that you receive those petitions.

1 MS. ERIN DUNSTON: Do you have anything,  
2 Dr. Coulman?

3 MR. DON COULMAN: Yeah. So I have as  
4 in-house counsel for Globo, I would be asking Oliver to  
5 determine for me whether or not if the petition and --  
6 or there's most likely it's just the petition, but if  
7 there are procedural errors. If you look at these  
8 IPRs, initially I think the Board has done a fabulous  
9 job with their paralegals and the staff and everything  
10 of looking at these petitions and early on they were  
11 finding a lot of issues and they were pointing those  
12 out and giving people opportunity to change. What's  
13 not clear at least to me from the rules is what happens  
14 when the Board misses an issue such by -- such as  
15 attorney arguments in the claim charts? That's  
16 something that the PTO has done a great job, I think  
17 they still are predominantly doing that, but as we see  
18 the number of these dramatically increasing, as a  
19 patent owner I have concerns.

20 And basically what I'm asking Oliver to do  
21 is to win. I want him to win. I want him to prevail.

1 So what I'd ask is if the Board does not catch an  
2 issue, how do you handle that? Do you just put it into  
3 your patent owner preliminary statement or do you ask  
4 the Board for a conference call? Because what are  
5 the -- what are -- what is the likelihood that the  
6 Board on somewhat of a technical, arguably a technical  
7 issue like attorney arguments being in the claim  
8 charts, are they going to really deny the trial? Or  
9 generally if the Board catches this early on, they will  
10 grant the filing date, then they give a few days for  
11 the petitioner to correct and the patent owner still  
12 has to go forward with their three months from that  
13 docket date to file the patent owner preliminarily  
14 response.

15 But what happens if the patent owner finds  
16 this a month in? Are we supposed to have a conference  
17 call or do we just put it in a patent owner preliminary  
18 statement? Because I want to know how I can get rid of  
19 this IPR, and so I may push that to Judge Tierney.

20 JUDGE MICHAEL TIERNEY: Just a brief  
21 comment. We've had -- our paralegals do a very nice

1 job going through, screening the cases, and but no  
2 one's perfect. There's going to be times where things  
3 are not 100 percent caught. We understand that.  
4 However, we have to understand rule of reason really  
5 does apply. And we actually had one case and the  
6 paralegal says we -- the party wants a conference call  
7 and the judge said why do they want a call? The case  
8 has just been filed, it's in the first month. And the  
9 party wanted a call because they'd found, the paralegal  
10 didn't know, that the footnote was in single space  
11 instead of double space, and they wanted to strike the  
12 petition which would have then, because of the bar,  
13 precluded us from going forward altogether. I think  
14 the judge handled it very well. He said we don't have  
15 the need for a call on this. If they feel so inclined,  
16 they can point it out in their patent owner preliminary  
17 response.

18                   However, keep in mind these are rules,  
19 they're not statutory requirements to single space,  
20 double space. If there's minor defects that weren't  
21 caught by our paralegals, do we really want to be

1 spending much time on that? And we're free to put it  
2 in a patent owner preliminary response, but --

3 MR. DON COULMAN: Okay.

4 JUDGE MICHAEL TIERNEY: So noted.

5 MS. ERIN DUNSTON: To the judges, about  
6 what percent of the time in IPRs are you seeing that  
7 the patent owner does that preliminary response? And  
8 how, if at all, does it impact your decision or help  
9 you make your decision whether or not to institute a  
10 proceeding?

11 JUDGE SCOTT BOALICK: It looks like you  
12 have the answer on the screen here as far as the number  
13 of times we're seeing petitions that have the patent  
14 owner preliminary response. I think how does it impact  
15 our decision? I mean, the Board will make a decision  
16 with or without the preliminary response; however, the  
17 preliminary response can be helpful to point out  
18 reasons why no trial should be instituted, say if there  
19 are bars. And this has happened where the preliminary  
20 response pointed out that the filing should be barred,  
21 that's helpful because in the absence of that, we might



1 think this appears to be a bar but we haven't heard  
2 from the other side.

3           Also in the areas of claim construction, if  
4 you don't set forth your claim construction, you're  
5 essentially relying on the Board to proceed without  
6 your instructions to us on how you think claims could  
7 be construed. So essentially I think there's, as in  
8 many of these things, a strategic decision on the part  
9 of the patent owner as far as whether and when they'd  
10 like to file these. And as you can see, some number,  
11 slightly less than half of the time we're seeing  
12 preliminary responses filed.

13           JUDGE MICHAEL TIERNEY: Just want to point  
14 out, if you look at the statistics you'll note almost  
15 all covered business method challenges have a  
16 preliminary response, and that's because as Oliver  
17 mentioned and Judge Boalick mentioned, if you have  
18 questions of standing, the time to bring it up is in  
19 your preliminary response because it could prevent  
20 the -- preclude the trial from going forward. And  
21 almost every case in the covered business method,

1 there's a challenge I assume that doesn't meet the  
2 requirement. You also see issues of real parties in  
3 interest, we have had a few issues of those come up.

4 And I know one judge here has actually  
5 declined to institute because a real party in interest  
6 issue has been identified where the real party had not  
7 been properly identified. When the real party was  
8 identified, they were precluded under 315 B, which is a  
9 bar more than one year service of the complaint. So  
10 those are challenges we typically see in claim  
11 construction issues.

12 MS. ERIN DUNSTON: Is it correct that if a  
13 patent owner elects not to do the preliminary response,  
14 they can alert the Board in less than three months?  
15 And what, if anything, happens to the Board's clock and  
16 is that a potentially a good strategy for the patent  
17 owner to get this moving and give the other side less  
18 time?

19 JUDGE SCOTT BOALICK: Certainly if the  
20 patent owner decides not to file preliminary response,  
21 they can notify the Board which at that point

1 essentially start -- we know that we're going to start  
2 working on our initial decision on whether to  
3 institute. So it does potentially accelerate the  
4 proceeding. And from the standpoint of the amount of  
5 time from the initial filing, it might decrease that  
6 time because in the absence of the filing or notifying  
7 the Board that a preliminary response will not be  
8 filed, the Board is essentially waiting 'til the date  
9 passes for that -- that filing before the clock starts.  
10 In other words, it will be a longer time before the  
11 decision. So, yes, you can accelerate things.

12 JUDGE MICHAEL TIERNEY: And just to point  
13 out, when we're talking the clock for the Board, the  
14 three months up there, it's a statutory clock. Once  
15 the waiver occurs, it starts the statutory clock so you  
16 know within three months you'll have a decision.  
17 Hopefully three months. Two months and 30 days maybe,  
18 but we will not miss the statutory deadline.

19 MS. ERIN DUNSTON: And that was one  
20 question what the word waived meant there. Whether it  
21 was the patent owner telling you I'm not going to file

1 one? Okay. All right.

2           So we're going to fast forward in time a  
3 little bit. It turns out that one of the petitions for  
4 the '123 Patent was granted, and the petition for the  
5 '456 Patent was granted. So two proceedings have been  
6 instituted. And this is basically to the entire panel  
7 but we'll start with Todd because he does have a  
8 flight to catch pretty soon. You know, now what? This  
9 proceeding has started, or perhaps with the judges and  
10 then to Todd, can you walk us through those initial  
11 stages what to expect and the order of events?

12           JUDGE SCOTT BOALICK: Okay. So this is  
13 after the petition has been instituted, so we have the  
14 decision on institution involved. In that decision,  
15 there's a scheduling order that comes out that will set  
16 the initial schedule for the trial. It will set up a  
17 time for an initial conference call. What's happening  
18 in the meantime at the Board is the panel is meeting  
19 and discussing the issues that they see, and in the  
20 meantime the parties will alert the Board as far as any  
21 motions that they intend to file in preparation for the

1 initial conference call.

2           So that's -- those are our initial stages  
3 where we are working to see what motions are going to  
4 be filed, whether there are -- at the call itself, we  
5 have a number of things that we discuss including  
6 whether there will be any amendments to the claims that  
7 are being thought of, whether there are any settlement  
8 negotiations and what stage those negotiations are in.  
9 Also if the parties wish to adjust the dates, generally  
10 they are free to agree among themselves to adjust many  
11 dates in consultation with the Board, except for the  
12 date of the hearing essentially is almost never  
13 adjusted. But they're free to propose adjustments.

14           Also, if there are any discovery matters  
15 they've already agreed upon or any other initial  
16 matters that need to be discussed, they're free to  
17 bring that up at the initial conference call.

18           JUDGE MICHAEL TIERNEY: Just want to point  
19 out also that many times, this is our first instance  
20 where we're actually having an initial conference call  
21 interactions with the parties themselves. Once in a

1 while we will have conference calls before the  
2 institution such as the real party in interest question  
3 or maybe a question of discovery pre-institution, but  
4 almost always my first call is going to be the initial  
5 conference call. That's where I get to hear from the  
6 parties, what are their thoughts on the schedule, are  
7 they going to be able to meet these dates, are there  
8 reasons -- for example, I had one party say this is my  
9 wedding anniversary on this date, we've already got the  
10 tickets paid for, I need to move it back a week. The  
11 other party was nice and agreed to change it. But  
12 those are the kind of conversations we want, that back  
13 and forth with the judges and the parties discuss where  
14 we expect this case to go. Key issues is discovery  
15 mention, protective orders, are there any settlement  
16 talks.

17           Also because these are fairly new  
18 proceedings, we've been doing them over a year but  
19 still there's quite a few people that do not have  
20 practice in them. Once in a while you have a party who  
21 needs to have a little more guidance on our rule

1 packages and how we handle discovery issues, how we go  
2 forward with say motions to amend. Because unlike ex  
3 parte prosecution, the motion to amend process is much  
4 more restrictive. By statute, remember it's not an  
5 unlimited right to amend, it's more a right to amend  
6 than it is a reasonable number of claims. So these are  
7 the kind of issues we want to have a discussion on and  
8 get that back and forth so we can see where we are  
9 going in the case.

10 A key issue for us is we don't like  
11 surprises. Surprises can cause delay thus increasing  
12 expense. So by having the conference call, we reduce  
13 the likelihood that one or another in the case will be  
14 surprised.

15 MS. ERIN DUNSTON: Okay. So Todd, walk us  
16 through maybe those first few months after institution.

17 MR. TODD WALTERS: Yeah. I can repeat what  
18 Oliver said about getting ready, and that is you should  
19 plan ahead for institution of the trial. Because once  
20 the trial does start to go forward, it's going to go  
21 forward with or without you. When they set the

1 schedule, the Board really means it. And I had a  
2 recent experience where we had an expert who fell ill  
3 and had to go through treatment, and the Board was very  
4 sympathetic to the extent that they would give five  
5 weeks of extra time, but they weren't going to change  
6 that final date and they wanted us to work it out so  
7 that we could get all of our discovery in, all of our  
8 papers in, and be ready for that final hearing.

9           So if I can give any advice, it is try and  
10 figure out in advance what the schedule will be.  
11 You'll know about when the trial will be instituted,  
12 and you'll know then pretty much when papers will be  
13 due. Make sure your witnesses are going to be  
14 available. And if they're not available, I'll tell you  
15 what the Board told me. That is, you better find  
16 another substitute expert for that 645 pages of  
17 testimony, and that expert better be ready to sign off  
18 on those declarations.

19           So these cases will go forward with or  
20 without you. Make sure you're prepared and make your  
21 witnesses are ready.



1                   MS. ERIN DUNSTON: And Oliver, you touched  
2 on it earlier and Don a little bit, to amend or not.  
3 What are your thoughts there? And Judge Tierney  
4 mentioned there's a general presumption of basically a  
5 one to one correspondence there. Do you think it  
6 conveys any sort of weakness or do you think it's just  
7 a tough decision you essentially have to reach? Any  
8 thoughts there?

9                   MR. OLIVER ASHE, JR.: Sure. I think it  
10 depends mostly on the patentability grounds that have  
11 been asserted. If they're strong grounds and you think  
12 that you can amend the claims, walk away with something  
13 that is allowable and still of value to you in the  
14 litigation or, you know, whatever your purposes are, I  
15 don't think that there's any adverse inferences, at  
16 least from -- from the Board's perspective, and this is  
17 just my sense, that, oh, they think they have a weak  
18 case, it's essentially a position. So that would be --  
19 that's my view on it.

20                   MS. ERIN DUNSTON: Do you have any thoughts  
21 or anything to add, Don?

1           MR. DON COULMAN: So the one thing that,  
2 you know, with the -- the discovery, one of the things  
3 that you need to understand very carefully with IPR I  
4 think in some of the initial IPRs that were filed in  
5 2012, a lot of litigators were thinking that it was,  
6 you know, open-ended discovery like litigation, and it  
7 is not. The IPR discovery is extremely difficult I  
8 would say for additional discovery other than the  
9 declaration. It's the standard that you must meet is  
10 in the interest of justice. And I'm not exactly sure  
11 what circumstances I can provide that would meet that  
12 standard. So the standard for District Court is much  
13 lower obviously and so discoveries could be very  
14 limited.

15           I'll also point out that the Federal Rules  
16 of Evidence generally apply, so as a patent owner, you  
17 need to be looking at the Daubert standard -- well, as  
18 both parties, you're going to be looking at the Daubert  
19 standard. You know, in the deposition, how reliable is  
20 that expert? There's already one or two cases I've  
21 seen where there's been motions to exclude because the

1 expert changed positions.

2 In one case that I'm aware of, the expert  
3 filed, they filed a petition, they filed the  
4 declaration, the expert said certain things. And then  
5 in a subsequent deposition, the expert said, oh, no, I  
6 made a mistake. This is not what, you know, this  
7 element -- this element is not taught by this in the  
8 prior art, it's really taught by this. That decision  
9 hasn't come out yet, as far as I know, and so it  
10 remains to be seen where the Board's going to go there.

11 You know, there's also the re -- I'll point  
12 out that there's a responsibility for court reporters  
13 and everything. In IPRs, the deposition cost and that  
14 are I think the flip of what it is in District Court.  
15 The proponent of the declaration is the one who will  
16 bear the costs, so that I think is the opposite of what  
17 District Court is, and that's something that one needs  
18 to be aware of. And that's about it.

19 MS. ERIN DUNSTON: So up to this point,  
20 we've been focusing an awful lot on these proceedings  
21 before the Board, but we also want to take a look at

1 what's going on in the District Court proceeding.

2 So there are now concurrent proceedings.

3 We have the infringement litigation in the Eastern  
4 District of Virginia before Judge O'Grady, and then the  
5 IPRs going on before the Board. Phil, as lead District  
6 Court litigator for Globocorp, the patent owner, what's  
7 going through your head now? What are you thinking  
8 about?

9 MR. PHILIP HIRSCHHORN: Let me start from  
10 the beginning. We filed as the litigator, not  
11 registered in the PTO. I -- I know I'm not going to be  
12 able to go in and do an IPR on my own, so I'm looking  
13 really from the get go, I know that there's a  
14 likelihood that there's going to be a 102 or 103  
15 challenge. I'm thinking about that ahead of time, and  
16 what Todd said and what Oliver said, I think we could  
17 all agree is that we're going to try and prepare ahead  
18 of time as best we can as the patent owner for  
19 anticipating what is actually going to come down the  
20 road.

21 Now, in the end, I'm not going to know all

1 of the art that Smith Company may be relying on in  
2 their petition, but I have the advantage. I am in the  
3 District Court. I'm in the Eastern District of  
4 Virginia. We're going to move quickly, and so I'm  
5 going to try and move that case along so I can get to,  
6 if I wanted, a claims construction. I can keep Smith  
7 Company off balance, and at the same time I start  
8 looking for who's going to help me in the office. And  
9 I talk to Oliver and Todd. Todd tells me he has a  
10 conflict. Won't tell me what that conflict is. He  
11 surfaces later as Smith's counsel. But Oliver and I  
12 are now linked at the hip and really should be. And no  
13 matter what I'm doing in the District Court, no matter  
14 what is happening in the PTO before the PTAB, we are  
15 going to have to be working very, very closely together  
16 from this point on. And I think it goes right back to  
17 all of the preparation that Oliver was talking about.  
18 It's knowing what the references are, knowing what the  
19 elements are, knowing how we're going to have a  
20 strategy to defeat any one of these individual  
21 references or their combination.

1 MS. ERIN DUNSTON: You mentioned that  
2 you're not registered to practice before the Board. Do  
3 you want to hop in a little bit and see that here?

4 MR. PHILIP HIRSCHHORN: I do. I want to be  
5 involved. I've been involved already. Don hired me  
6 when he did in his dual roles as both Smith's counsel  
7 and Globocorp's counsel. He recognized that that was a  
8 possibility. But, yes, I want to be involved. I think  
9 I've got something to offer. I am a litigator. I look  
10 at things statistically that way, and I think it's a  
11 slightly different look than somebody who's involved in  
12 the office has all the time. And I'm going to try and  
13 have Oliver help me to get into the office through pro  
14 hac. Can you do that for me?

15 MR. OLIVER ASHE, JR.: Sure. Yeah, there  
16 is the ability to request that Phil be admitted for  
17 purposes of the case. It's discretionary for the  
18 Board, and I think that some have been granted. But  
19 perhaps Judge Tierney would comment on it in terms of  
20 the Board's views on those types of motions.

21 MS. ERIN DUNSTON: And two things there.

1 As Phil mentioned, you know, he's been litigating this  
2 '123 Patent for some time. You know, he knows it like  
3 the back of his hand, so he wants in. But he'd also  
4 like one of his colleagues to get in, Susie. She has  
5 not yet been involved with the litigation, but she  
6 would like to. So if the judges could talk a little  
7 bit about if -- if they have these requests for both  
8 Phil and Susie to come in, what -- what they're  
9 thinking.

10 JUDGE MICHAEL TIERNEY: I'll start off here  
11 and let Judge Boalick chime in. Generally just high  
12 level. Keep in mind that these kind of discussions, if  
13 you recall, there was proponents where it was going to  
14 be only registered practitioners because there is the  
15 motion to amend process, then there was the litigation  
16 position which is this is more litigation style so  
17 there would be some discovery with the litigators  
18 brought in. The office has went ahead and adopted a  
19 rule which is actually proposed by the ABA and IPO  
20 which is lead counsel will be a registered  
21 practitioner. Backup counsel, though, may be a

1 litigator who pro hacs in, and in those circumstances  
2 what we're looking for by rule as we set forth is where  
3 it's experienced litigator who is familiar with the  
4 subject matter before us.

5           So what we're looking for, and we've found  
6 out with some pro hac decisions, I think Scott, Judge  
7 Boalick I should say, you have a decision which goes  
8 through and explains the details that's required. But  
9 generally are you in good standing with your bar? Are  
10 you familiar with our practices? In other words,  
11 you've read our practice guide and rules. If you're in  
12 good standing, you're familiar with the subject matter  
13 involved, generally we're going to let you in.

14           However, I say however, there are instances  
15 where it's opposed. We allow for an opposition to  
16 occur. You get five days. And I'd say very rarely is  
17 it opposed, but once in a while when it's opposed,  
18 certain facts may come to light which then we have to  
19 decide. But if it's unopposed, you've met the  
20 requirements, I won't say always but almost always we  
21 let you in. Judge?



1           JUDGE SCOTT BOALICK: So the only thing I  
2 would add, other than I know Judge Tierney has denied  
3 pro hac in at least one instance, perhaps he'd like to  
4 describe the circumstances. There is that -- earlier  
5 there was a link that had been shown to the Board's  
6 website that has representative orders, and there are  
7 representative orders discussing the factors for pro  
8 hac vice admission. And I would recommend if you  
9 haven't looked at that, you go ahead in your time  
10 afterwards before you would file such a motion, go have  
11 a look at those orders on the website.

12           JUDGE MICHAEL TIERNEY: Just to conclude on  
13 this point. The case in point, I did deny. I believe  
14 it was the first denial, but it was an opposed motion  
15 for pro hac and there are certain facts involved that  
16 may not be -- go case by case, I would say. Please  
17 look at the case in particular. You can see the facts  
18 involved and why it was denied.

19           MR. TODD WALTERS: Your Honor, as counsel  
20 for Smith, I'm really concerned about this Susie person  
21 because, quite frankly, she's a much better lawyer than

1 Oliver and Phil, and she doesn't know squat about the  
2 case. And I'm just wondering how -- how are they going  
3 to get her in pro hac vice?

4 JUDGE SCOTT BOALICK: Well, again, as Judge  
5 Tierney described, it would be a motion. You would be  
6 free to oppose it. I'm not sure if the reasons because  
7 she's a better lawyer would be sufficient grounds, I  
8 doubt that, but you would have the opportunity to  
9 oppose.

10 MS. ERIN DUNSTON: If Susie had done a lot  
11 of homework kind of off the record, even though she  
12 hadn't made an appearance in the litigation or that  
13 sort of thing, is active involvement up to that point  
14 necessary or is there not that clear a line?

15 JUDGE MICHAEL TIERNEY: There is no real  
16 bright line. Keep in mind, it is a motion. It's going  
17 to be taken case by case and the facts presented. If  
18 the person has shown again from the rule experienced  
19 litigator who can testify that they're familiar with  
20 the subject matter before us, then by the members where  
21 we've made a decision, just showing that they've read

1 our rules, read our practice guides, show some  
2 familiarity. If the opposition comes in and the facts  
3 presented where is she's brilliant and I don't want her  
4 in, that may not be given a whole lot of weight, but --

5 MS. ERIN DUNSTON: All right.

6 JUDGE SCOTT BOALICK: And I would just add  
7 that in general that there's sort of maybe a policy  
8 towards favoring the ability of a litigant to choose  
9 their counsel. So unless there are reasons not to  
10 bring counsel in, generally we look in favor of the  
11 litigants being able to choose their counsel. As long  
12 as they agree, for example, to be bound by the ethical  
13 rules of practice, PTO, and demonstrate the other  
14 factors that need to be shown.

15 MS. ERIN DUNSTON: All right. And now  
16 we're going to turn it more to Phil and Judge O'Grady.  
17 Phil, you mentioned this a little bit earlier but, you  
18 know, the infringement action for the '123 Patent has  
19 been going on now for about four months. Do you want  
20 to let it proceed or do you want to try and get it  
21 stayed? What are your thoughts about the timing about

1 that, and what are some of the pros and cons of doing  
2 so?

3 MR. PHILIP HIRSCHHORN: Let's just talk.  
4 We brought the litigation to bring a litigation to  
5 conclusion and get the finality as quickly as we can.  
6 We did not do a preliminary injunction in this case,  
7 but we're in the Eastern District of Virginia for a  
8 really good reason which is we know it's going to move  
9 quickly. We know, like I said earlier, it's going to  
10 put the Smith Company on the defensive from the  
11 beginning. If they're not anticipating the lawsuit  
12 coming, they're going to be in those first few months  
13 trying to figure out what their defenses are, what sort  
14 of art is out there, if they have a 102 or 103 defense,  
15 and look for other defenses they might have.

16 At this point, looking at this case right  
17 now, I want to move this thing forward. I want to move  
18 this case forward. For Judge O'Grady, I know he is  
19 going to hold to that schedule. I know that I can get  
20 to a trial. If we're going to get to trial within a  
21 year, it will be a done case and then we can move up to

1 the Federal Circuit if we need to.

2 But I think that what the pros and cons are  
3 is, you know, we -- we chose the forum, we're moving  
4 ahead with the patent, and we want to try and get our  
5 claims construed in the District Court the way we want  
6 them also to be construed when we're at least to some  
7 extent in front of the office. And so again, I'm  
8 working closely with Oliver, even though there's a  
9 slightly different standard for how the claims are  
10 going to be construed, to get to a point where we  
11 believe we have a construction that we can live with  
12 that makes sense for that patent and those claims that  
13 we've asserted, and that will hopefully put all those  
14 102 and 103 issues to the side. So those are the types  
15 of things I'm thinking.

16 MS. ERIN DUNSTON: And to Judge O'Grady,  
17 Smith Company has asked, and again Smith is the accused  
18 infringer and the petitioner, they want to stay that  
19 litigation pending the outcome of the IPR. What do you  
20 think about when deciding whether or not to grant a  
21 stay, and how does timing affect your decision in that

1 regard?

2 JUDGE LIAM O'GRADY: Timing is very  
3 important obviously. In four months, we've gone  
4 through the initial motions to dismiss and worked  
5 through those, a scheduling order is issued, and  
6 discovery is proceeding. I failed to introduce my  
7 colleague, Judge Anderson, but he's -- he's in sitting  
8 every Friday in court on every patent case that we have  
9 in the building because they tend to be litigious  
10 making decisions. Phil has been told to pick his top  
11 ten claims and the rest will be tried at a later date,  
12 so he's working through that and we're moving forward.

13 So, I mean, as you and Phil highlighted  
14 just last week, a district judge in the Eastern  
15 District of Texas issued a decision using the four  
16 point test that comes out of broad innovation and, you  
17 know, the Board required to look at, one, whether a  
18 stay will unduly prejudice or present a clear and  
19 tactical disadvantage to the nonmoving party; whether a  
20 stay will simplify the issues in question in the trial  
21 of the case; third, whether discovery is complete and

1 whether a trial date has been set; and fourth, whether  
2 a stay or denial thereof will reduce the burden of  
3 litigation on the parties and on the court. And the  
4 litigation that Phil's filed is much broader than the  
5 litigation brought in the Patent Office and, you know,  
6 it may be a real infringement issue, you know, that one  
7 party may be screaming infringement, infringement.  
8 Claim construction is really not the key. Another  
9 party may be saying there's no damages in this case,  
10 Judge and, you know, there's no reason we ought to be  
11 here. We need to look at the damages. And those, you  
12 know, as Judge Barn, and I'm sure Judge Newman  
13 remembers, you know, famously said that claim  
14 construction is one -- is one dispute among many in a  
15 patent case. It doesn't even deserve its own name. It  
16 should never have given it a markman because it  
17 heightens the importance of claim construction when  
18 it's one of many issues that's presented by the court.

19           And, you know, I'm not sure I agree with  
20 that because I think claim construction is a critical  
21 element and one that really deserves, but it highlights

1 the fact that there's a lot going on in patent cases  
2 and that the obviousness and anticipation is just one  
3 of those issues. And so every case is different.  
4 District Court has given broad discretion to decide  
5 whether to stay a case or not. Culturally it doesn't  
6 happen in the Eastern District of Virginia. We move  
7 quickly through the case. We're uncertain as to what's  
8 going to happen when we lose control over how long a  
9 case has been stayed. You know, we have six-month  
10 reporting requirements. We have three-year reporting  
11 requirements, annual reporting requirements. And, you  
12 know, they ding you for sitting on cases for any great  
13 length of time.

14 On the other hand, this is -- this is  
15 tremendous promise for District Courts. You know,  
16 we're looking at now a system to evaluate 102 and 103  
17 and 101 at times that looks a lot more friendly to a  
18 District Court. There's discovery, although it may be  
19 limited. There are time limits that have been set.  
20 There are decisions which are being rendered by highly  
21 competent people who understand the science better than



1 we do, who are able to digest significant amount of  
2 more information than we can in a much shorter perhaps  
3 span of time. So all those are very attractive.

4 So I think, you know, a lot of districts  
5 around the country, this is -- this has been, and I  
6 know from anecdotally, this has been very well received  
7 by district judges who are anxious to get a final  
8 decision on invalidity and move forward with the  
9 remainder of the case. It's a harder sell in my  
10 district because we're halfway through the case now and  
11 the train is at full -- full speed. It's difficult  
12 when only one portion of the litigation will be  
13 resolved to stop the train. And in this case, I would  
14 not stay. This is a hypothetical. I would not stay on  
15 the advice of Judge Anderson.

16 MS. ERIN DUNSTON: And speaking of  
17 schedules, I see it's 7:20 so we'll try and wrap this  
18 up within about the next ten minutes.

19 But about three issues I'd like to address  
20 before we do. Perhaps starting with the judges. It's  
21 been hinted on a little bit, but thoughts of estoppel

1 and claim construction, and again, building a record  
2 should you need to go up to the Federal Circuit. What  
3 are your thoughts on the whole estoppel and claim  
4 construction issues percolating with these post-grant  
5 proceedings?

6 JUDGE MICHAEL TIERNEY: All right. I'll  
7 jump in on the claim construction issue. I think one  
8 of the -- one of the key features that we put in place  
9 that wasn't required by statute but it's one that we  
10 obviously listened to the public and it's claim  
11 construction. If you look at our decisions to  
12 institute, which are done within six months and  
13 actually quicker if it's waived, the claimant responds  
14 or files it early, we try and endeavor and it takes  
15 quite a bit of time and resources but it's something  
16 we're very proud of, is that we have given guidance on  
17 claim construction. We realize it may be one part of a  
18 bigger case, but when you're talking about an inter  
19 partes review or a covered business method review, you  
20 are looking at claim construction being a very key  
21 issue for those cases. So it does take a -- it moves

1 the case in the right direction because quite often,  
2 claim construction if I decided early a preliminary  
3 construction, decisions to institute for preliminary  
4 decision is not based on a complete record, but you  
5 give at least some guidance to the parties as to given  
6 this record here, here's our thoughts where we're going  
7 with claim construction, and it tells the parties go  
8 ahead and change the record in a way that it's more  
9 favorable to you or try to -- if there's something that  
10 you disagree with, you know, help us out on the record  
11 in this direction. But if you're not going to change  
12 the record, here's where you're going to end up on  
13 claim construction, and it gives you at least some  
14 guidance.

15           We've seen at least some cases that are  
16 settling now and one of the things that at least I as a  
17 single judge, I'm looking at my colleagues here, I  
18 think the guidance we're giving in decision issues  
19 beneficial from a settlement point of view because it  
20 gives you at least some idea of here's how a panel  
21 would come up and decide if we should issue a final

1 decision on claim construction, how it may effect such  
2 issues as infringement exception. Now, an estoppel,  
3 would you like --

4 JUDGE SCOTT BOALICK: I think estoppel will  
5 be interesting to see how that evolves over time.  
6 Essentially we're here at the very beginning of this to  
7 see how well that the terms raised or could have been  
8 raised, how will those terms be interpreted. For  
9 example, I think we have our view of whether certain  
10 issues would be estopped, essentially if they don't --  
11 if we -- the Board does not proceed on a certain  
12 ground, it's difficult, at least this is my own  
13 personal view, to see how that could have been raised  
14 because the Board essentially said we're not going to  
15 proceed with that issue. So would there be estoppel on  
16 that? It would be interesting to see if the courts  
17 agree with me on that view.

18 So that's essentially my -- my thoughts  
19 today on estoppel are let's see how that evolves. It  
20 will be interesting. It may end up shaping quite a bit  
21 of strategy depending on how that gets interpreted.

1                   JUDGE MICHAEL TIERNEY: Just one quick  
2 point. Congress is looking at trying to change the  
3 raised, reasonably could have been raised and PGR to  
4 just a raised standard. It's an issue for discussion.  
5 Covered business method right now is only what is  
6 raised, so IPR is raised or reasonably could have been  
7 raised. But step back and think if you're going to  
8 litigation, you're concerned about the estoppel and you  
9 don't want to bring all, what do we need to bring to  
10 the Board in the redundancy arguments and challenges.

11                   Keep in mind, whatever you bring to us,  
12 bring your best shots. Bring your best challenges to  
13 us. Don't hold back. If you're holding back thinking,  
14 well, I'll save a couple for later on, that's clearly  
15 falling in the reasonably could have been raised. So  
16 bring forward everything you have so you don't fall  
17 afoul of a reasonably could have been raised challenge.  
18 PGRs, stay tuned. We'll see how it plays out. And in  
19 CBMs, again, it's only that which is raised. So they  
20 have at times only say 101 or prior art, and there may  
21 be a hint that there might be other challenges that

1 they're going to bring forward. But again, it depends  
2 on which forum you're in. If you're in IPR, keep in  
3 mind it's reasonably could have been raised.

4 JUDGE LIAM O'GRADY: Erin, I want to make  
5 sure we left some time for Judge Newman. I'm very  
6 interested in her thoughts on our panel discussion  
7 today, so please build in that extra time.

8 MS. ERIN DUNSTON: Yes, absolutely.  
9 Anything, Todd, and then we'll move to that?

10 MR. TODD WALTERS: Yeah. Just very quickly  
11 on the estoppel issue, and this is really leading to  
12 the question for the judges of the Board. Everyone  
13 talks about petitioner estoppel and that if you go  
14 forward with a petition and you lose, then you're  
15 precluded in District Court or other proceedings, and  
16 the statute clearly lays out that estoppel. But  
17 there's also at least indication on the PTO's website  
18 that there's patent owner estoppel associated with the  
19 proceedings, and that estoppel can apply to pursuing  
20 claims that would be anticipated or obvious over  
21 subject matter you lost in, for example, an IPR.

1           What's unclear to me, and if we could get  
2 some guidance it would be very helpful, is what about  
3 the standard of raised or could have been raised? If  
4 you could have put a claim in through amendment, is  
5 that something that you could have raised in the  
6 proceeding and then if you didn't, you failed to do  
7 that, are you estopped from doing that going forward?  
8 I think that's a very interesting question that we  
9 could all use some guidance on.

10           JUDGE MICHAEL TIERNEY: One of the things  
11 that we did during rule making is we looked at  
12 estoppel. And petitioner estoppel, as you mentioned,  
13 it's a statutory basis. On the rule for patent owner  
14 estoppel, we did have a statutory basis which is we had  
15 to set forth rules of governing the proceedings of not  
16 just the IPR but relationship to the proceedings. One  
17 of the concerns that we had that was looked into was  
18 what happens when a patent owner would come back, they  
19 lose in the IPR in claim A, they come back and put in a  
20 duplicate, an exact copy of claim A before an examiner  
21 through a continuation application. Clearly we had to

1 take into account that you can't just say, well, I've  
2 lost it before the Board, I'm going to go back before  
3 the examiner with the same claim and see what happens  
4 there.

5           So we put out a rule based -- which is  
6 based on statute of course, a provision that there's  
7 patent owner estoppel. If you lose a claim that which  
8 is not patently distinct is a cause for denial. In  
9 other words, don't put a claim before an examiner which  
10 is A or A prime where that prime portion is, you know,  
11 obvious and you have a second reference, it's obvious  
12 that you had the same reference you lost over. But if  
13 it is patently distinct, it's a separate and distinct  
14 patent or invention, there would not be an estoppel.

15           MR. TODD WALTERS: Even if you could have  
16 added that claim through amendment or substitution in  
17 the proceedings?

18           JUDGE MICHAEL TIERNEY: That is correct.

19           MS. ERIN DUNSTON: We're going to do one  
20 quick plant with Phil. Evidently you're worried about  
21 that Reavis publication and the '123 Patent. Are you



1 thinking even possibly about ex parte reexam and -- and  
2 this is an impossible question. Tell me about  
3 Fresenius in 30 seconds.

4 MR. PHILIP HIRSCHHORN: 30 seconds. As the  
5 patent owner, and I mentioned this at the beginning and  
6 one of the reasons I wanted to be in the Eastern  
7 District of Virginia is to get to the end of the road  
8 and to have, you know, some sort of finality. And I  
9 think as -- and I remember when the Fresenius decision  
10 came down in July or whenever it came down and looking  
11 at it and talking with a colleague and thinking we have  
12 these cases before federal judges, three judges who are  
13 deciding these issues and trying to get to finality. I  
14 as the patent owner who initiated the litigation want  
15 to get to finality. And I think, you know, and I  
16 really think the PTO wants to be at finality, too. We  
17 all want to be at finality in some way. And I think  
18 the way that Fresenius has come down, and at least this  
19 balance between what is filed and what is not, when  
20 you're having any type of bifurcation in a case, when  
21 you have multiple appeals in a case, so much work can

1 go to waste.

2           You know, I love to be in litigation. I  
3 love to be in litigation for a long time, but I like to  
4 get to a result. That result could be a settlement.  
5 That result could be finality. It may be something  
6 that happens in the PTAB, but I want to know that the  
7 work that we're doing is something that's progressing  
8 in the right way. And I think the current Fresenius  
9 decision is creating a situation where the Smith  
10 Company may want to keep all the balls in the air as  
11 long as they can. And as a -- as a patent owner's  
12 counsel, I want to see that finality. I don't want to  
13 see all the balls in the air.

14           MS. ERIN DUNSTON: And with that, in view  
15 of the time, Judge Newman.

16           HON. PAULINE NEWMAN: Thank you. I'll be  
17 brief, but I'm very glad to share with you some of the  
18 thoughts which came to mind as I listened to this  
19 extraordinarily interesting and -- and excellent  
20 presentation. But after all, let me remind us that if  
21 the patent is really important, it's likely to end up

1 in court. Judge O'Grady mentioned some of the -- most  
2 of the aspects which are involved, but the last word,  
3 ours, we don't have the last word either. And the  
4 courts are quite likely to focus on why we have these  
5 exotic, complicated new procedures. Why in the world  
6 were they -- were they legislated? It's pretty clear  
7 the idea was to provide greater certainty, to move up  
8 in time the time for certainty, and to do something or  
9 other about the extraordinary cost of taking a patent  
10 which has gone through the procedures in the office and  
11 at the same time is to start all over again.

12 So we -- we have the problem in the first  
13 place, as was explained to the Congress, of the  
14 uncertainty as to a patent that's issued by the Patent  
15 and Trademark Office. Then we have the question of  
16 finality, commercial finality, finality for the  
17 purposes of investment decisions, and also finality for  
18 purposes of judicial process. In theory, you get one  
19 shot at correcting errors, achieving justice. Here we  
20 have a system that seems never ending. We have a  
21 search, the profound search in the nation for

1 correctness of solution in disputed areas. That's the  
2 goal of getting it right. And as I mentioned, cost,  
3 because we know that justice can be very expensive.  
4 And it was very much brought home to the Congress that  
5 the cost of justice in connection with the patent  
6 system can defeat the purposes of the system to start  
7 with.

8           So here we are with the extraordinarily  
9 complex procedures, to me still incomprehensible,  
10 although thanks to all of you I perhaps have a better  
11 sense. Are we creating another monster, procedures  
12 that are understood by the insiders and that the judges  
13 can't penetrate? Well, perhaps that wouldn't be so bad  
14 if the insiders had the last word, but they don't. We  
15 have the last word, a court of generalists by design as  
16 far as we're concerned. But we've seen often enough  
17 that the last word comes from the true generalist by  
18 design as the national structure of the judicial  
19 process.

20           So when that happens, what is the result?  
21 Ideology, policy, common sense, if I can use the words

1 of KSR, this is what dominates. So although I couldn't  
2 agree more with all of you that the patent system does  
3 need a better way of achieving finality and resolving  
4 patent disputes early and correctly, but everything  
5 that's done at every step that we've been discussing  
6 this evening runs the risk or perhaps the advantage of  
7 being second guessed by someone else. And of course  
8 practitioners and litigators know this, and that's one  
9 reason for the added complexities all the way along.  
10 We have judges who are not experts, who are likely to  
11 bring that horrific concept of common sense, perhaps  
12 even a sense of economics to the law that we're all  
13 trying to administer.

14           So you who practice these procedures, the  
15 judges on the Board, the litigators, the District Court  
16 all are very much aware that there is another look.  
17 And I must say to my view, this is important because  
18 most of the inventors out there don't know what we --  
19 what you in this room know as to how patents are read  
20 and what they mean and how they may eventually be  
21 applied and enforced. But the nation depends, our

1 future as a nation depends on the intellectual endeavor  
2 of innovation.

3           So what I want to do is remind us as we  
4 work our way through these systems to understand why  
5 they were created and to have that very much in mind at  
6 each step. This was not I think contemplated as the  
7 last word in how to resolve patent disputes. There's  
8 no doubt in my mind that there was a need for change  
9 and for improvement, so let's all have in mind together  
10 the direction in which we're going, the improvements  
11 that we need, and how to get there and figure it out.

12           So that's my thought on all of this. I do  
13 compliment the panel on the depth and profundity and  
14 clarity of their understanding and explanations. Let's  
15 build on all of this to try and come out where we in  
16 the nation needs to be.

17           JUDGE LIAM O'GRADY: There's a reason why  
18 you have the final word, and that's because that was  
19 wonderful. Thank you so much for putting us in the --  
20 in a broader thinking capacity, because that's exactly  
21 where we all need to be. So thank you very much, Judge

1 Newman.

2 Erin, any final -- I would like to thank  
3 you so much for putting the panel together and for  
4 leading us through what's been I think a really  
5 informative discussion tonight. And thank you for all  
6 the panel members who have joined us and participated  
7 and contributed so much. Thank you.

8 MS. ERIN DUNSTON: Again, thank the panel.  
9 Really, really appreciate it. Thank you for your  
10 attention. Make sure you sign in if you have not  
11 already. We are going to try and get CLE credit for  
12 tonight, but we're applying retroactively so do be sure  
13 to sign in.

14 And that concludes the program, so please  
15 welcome to the reception afterwards. Thank you.

16 (Proceedings adjourned at 7:38 p.m.)

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1 Commonwealth of Virginia

2 County of Fairfax:

3 I, AMANDA J. CURTISS, a Notary Public of  
4 the State of Virginia, Fairfax County, do hereby  
5 certify that the within-named proceedings took place  
6 before me at the time and place herein set.

7 I further certify that the proceedings were  
8 recorded stenographically by me and this transcript is  
9 a true record of the proceedings.

10 I further certify that I am not of counsel  
11 to any of the parties, nor in any way interested in the  
12 outcome of this action.

13 As witness my hand this 22nd day of  
14 January, 2014.

15

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18

Amanda J. Curtiss, CSR

19

Notary Public

20 My Commission Expires:

21 October 31, 2015



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