



Motions to Disqualify Opposing Counsel in Patent Trial and Appeal Board Proceedings

Motions to disqualify opposing counsel often raise difficult issues of legal ethics. Behind any motion to disqualify, two competing interests are implicated: the client's right to the attorney of its choice versus the need to maintain ethical standards of professional responsibility. Few things are as disconcerting to a litigant as the loss of access to trusted counsel.¹ For these reasons and others, disqualification proceedings can be heated battles. Motions to disqualify opposing counsel in proceedings before federal courts are not uncommon,² with such motions being used for both legitimate reasons and "purely tactical reasons, such as delaying the trial."³

With the enactment of the Leahy-Smith America Invents Act (the "AIA"),⁴ the filing of motions to disqualify counsel may become increasingly common in proceedings before the United States Patent and Trademark Office ("USPTO"). The AIA ushered in a new era of administrative trials before the Patent Trial and Appeal Board ("PTAB" or the "Board"), with such trials including *inter partes* review ("IPR") proceedings, postgrant review ("PGR") proceedings, covered business method ("CBM") patent proceedings, and derivation proceedings. Under 37 C.F.R. § 42.2, these trials are "contested cases"—adversarial proceedings that are "adjudicatory

in nature and constituting litigation."⁵ In such contested cases, parties may increasingly seek to file disqualification motions for both legitimate and tactical reasons. Under 37 C.F.R. § 42.10(d), the PTAB is expressly given the authority to rule on disqualification motions.

Parties seeking to use disqualification motions to their advantage may need to temper their expectations, however, as prevailing on such a motion before the PTAB—or even obtaining *authorization to file* the motion—appears to be an uphill battle. The USPTO has stated, unequivocally, that motions to disqualify counsel are "disfavored."⁶ Decisions by the PTAB indicate that it will act in accordance with this notion: as of the date of publication of this *Commentary*, the PTAB has denied authorization to file motions to disqualify counsel in multiple proceedings and has not granted authorization in any.⁷ Further, the PTAB's decisions indicate that it will likely follow the lead of its predecessor, the Board of Patent Appeals and Interferences ("BPAI"), which set a high bar for disqualification of counsel in interference proceedings.

This *Commentary* details the statutory and regulatory bases for the PTAB's authority to act on disqualification motions, along with the rules and BPAI decisions that

are likely to guide the PTAB in ruling on these motions. The PTAB's negative treatment of parties' requests for authorization to file disqualification motions thus far is described.

The PTAB's Authority to Conduct Disqualification Proceedings

Under 35 U.S.C. § 2(b)(2)(D), the USPTO has the power to establish rules and regulations to govern the conduct of attorneys appearing before the Office. Additionally, under 35 U.S.C. § 32, the Director of the USPTO may, after notice and opportunity for a hearing, suspend or exclude from further practice before the USPTO an attorney who does not comply with the rules and regulations established under section 2(b)(2)(D).

In accordance with this statutory authority, as part of its consolidated set of rules relating to PTAB trial practice for IPR, PGR, CBM, and derivation proceedings, the USPTO promulgated 37 C.F.R. § 42.10(d), which expressly delegates to the PTAB the authority to disqualify counsel for cause after notice and opportunity for hearing. The PTAB's authority to conduct disqualification proceedings exists "while the Board has jurisdiction over a proceeding."⁸ In its rulemaking related to the AIA, the USPTO did not establish specific rules governing disqualification proceedings.⁹ However, the USPTO's responses to written comments from intellectual property organizations, businesses, and others (as included with the PTAB's Final Rules of Practice¹⁰) provide some guidance as to when the PTAB might initiate such proceedings and how they might be conducted. In its responses, the USPTO notes, generally, that "[t]he determination whether to disqualify counsel is based on the facts and circumstances of the case, including any response by counsel to the allegation."¹¹ Other statements indicate that the USPTO endorses a restrained approach to disqualification of counsel. Specifically, the Office states that "[m]otions to disqualify opposing counsel are disfavored because they cause delay and are sometimes abused."¹² Finally, the USPTO provides an example situation in which disqualification may be necessary: "Some situations . . . are likely to trigger consideration of whether to disqualify a counsel, e.g., egregious misconduct."¹³

In conducting a disqualification proceeding, the PTAB will likely look to the USPTO Rules of Professional Conduct

("USPTO Rules").¹⁴ These rules apply to all attorneys appearing before the Office,¹⁵ and the BPAI previously applied a similar code of professional responsibility (the Patent and Trademark Office Code of Professional Responsibility ("USPTO Code")) in disqualification proceedings.¹⁶ Pursuant to the authority provided in 35 U.S.C. §§ 2(b)(2)(D) and 32, the USPTO Rules were promulgated in 2013, replacing the USPTO Code to which attorneys appearing before the Office were previously required to conform.¹⁷ The USPTO Rules conform to the Model Rules of Professional Conduct of the American Bar Association, versions of which have been adopted by forty-nine states and the District of Columbia.¹⁸

"[B]y far the most common ground for a motion for disqualification is a claim of some form of conflict of interest that either harms the moving party or calls into question the integrity of judicial process at hand."¹⁹ Thus, sections of the USPTO Rules addressing conflicts of interest may be of particular importance in disqualification proceedings before the USPTO. In the USPTO Rules, Section 11.107 addresses conflicts of interest involving current clients. Under this rule, generally, a current client of an attorney may prevent the attorney from being adverse to it in any matter: "[A] practitioner shall not represent a client if the representation involves a concurrent conflict of interest."²⁰ A concurrent conflict of interest exists, for example, if the "representation of one client will be directly adverse to another client."²¹

Section 11.109 of the USPTO Rules addresses duties to former clients. Under Section 11.109(a), a former client of an attorney may prevent the attorney from being adverse to it if the matter against the former client is "substantially related" to the work the attorney previously did for the client.²² Alternatively, under Section 11.109(b), the former client may prevent the attorney from being adverse to it if the attorney acquired confidential information during the former representation that likely can be used against the client in the subsequent adverse representation.²³ The substantial relationship test of Section 11.109(a) "generally serves as a surrogate for proof that a lawyer obtained confidential information in the initial representation; no proof that the lawyer actually obtained confidences is required. In contrast, to disqualify a lawyer for actually possessing relevant confidences [under Section 11.109(b)], the former client must generally show that the lawyer did in fact obtain such information."²⁴

Although it is clear that the PTAB may conduct disqualification proceedings under 37 C.F.R. § 42.10(d) and that the PTAB may look to the USPTO Rules of Professional Conduct in conducting the proceedings, these rules may raise more questions than they answer. For example, Section 11.107 of the USPTO Rules uses the “substantial relationship” test in former-client conflicts, but the nature of this test varies significantly among the federal circuits,²⁵ and the rules governing the PTAB provide no guidance in determining when two matters are “substantially related.” Further, the rules provide no indication as to the extent to which federal court decisions should govern or influence the PTAB in disqualification proceedings.

For guidance in answering these questions, one may look to decisions from the PTAB’s predecessor, the BPAI. As noted above, the IPR, PGR, CBM, and derivation proceedings currently conducted by the PTAB are “contested cases.”²⁶ To understand how the PTAB may handle disqualification motions in these new contested cases, BPAI decisions in other types of contested cases—namely, interference proceedings—may be instructive. BPAI decisions on disqualification in the context of interference proceedings are described below.

BPAI Decisions on Disqualification in Interference Proceedings

A patent interference under 35 U.S.C. 135(a) is an adversarial proceeding between two or more parties concerning the award of patent rights for a commonly-claimed invention. An interference is declared for the purpose of determining priority, i.e., which party first invented the commonly-claimed invention.²⁷ Derivation proceedings under the AIA, although distinct from interference proceedings, will address issues similar to those that may be raised in interferences and will eventually “replace” interference practice. Interferences will continue to be declared for applications having at least one claim with an effective filing date prior to March 16, 2013.

The PTAB’s predecessor, the BPAI, issued a number of decisions on motions to disqualify opposing counsel within the context of interference proceedings. The most instructive and widely-cited of these decisions is *Anderson v. Eppstein*.²⁸ In this case, Anderson filed a motion to disqualify Paul Kokulis (“Kokulis”) and the law firm of Pillsbury, Madison and Sutro,

LLP (“Pillsbury”) from representing Eppstein in Interference No. 103,708.²⁹ As described below, the BPAI employed a very narrow view of what constitutes a “substantial relationship” and denied the motion.³⁰

The basis for Anderson’s motion was Kokulis’s alleged breach of the duties owed to Anderson as a former client. Anderson’s employer, the National Institutes of Health (“NIH”), retained the law firm of Cushman, Darby & Cushman (“Cushman”) to prepare and prosecute U.S. Application No. 07/365,567 (“the ‘567 application”).³¹ The ‘567 application was the first of a series of continuing applications that led to the grant of the Anderson patent involved in the interference proceeding.³² Kokulis, a partner at Cushman, signed a task order, accepting for Cushman the task of preparing and filing the ‘567 application.³³ In the disqualification proceeding, Kokulis testified that he was not involved in the preparation or prosecution of the ‘567 application and that he signed the task order in the absence of another Cushman partner who was in charge of the NIH work.³⁴ Kokulis further testified that he did not recall seeing any disclosures describing the subject matter of the ‘567 application or having any discussions with anyone about the same.³⁵ The ‘567 application was abandoned in January 1992.³⁶

In September 1995, Cushman merged with the Pillsbury law firm.³⁷ Neither Cushman nor Pillsbury was involved with any of the other continuing applications that led to the issuance of the Anderson patent involved in the interference proceeding.³⁸ Following the grant of the Anderson patent, which was a continuation-in-part of the ‘567 application,³⁹ Kokulis was retained by Eppstein to represent him against Anderson in the interference.⁴⁰ In the disqualification proceeding, Kokulis testified that when he was retained by Eppstein, he did not appreciate that Cushman had been involved with the ‘567 application.⁴¹ Kokulis further testified that none of the individuals that prepared and prosecuted the ‘567 application were with Pillsbury as of the time of the interference.⁴² Anderson moved to disqualify Kokulis and Pillsbury on the basis that Kokulis had been involved in prosecuting the ‘567 application.

The BPAI denied Anderson’s motion to disqualify.⁴³ As an initial matter, the BPAI explained that “[w]hile the PTO has no specific rules which govern disqualification petitions, generally the provisions of the PTO Code of Professional

Responsibility, aided by decisions of federal courts, govern resolution of a disqualification.⁴⁴ The BPAI further noted that “[d]isqualification is resolved on a case-by-case basis, where the moving party *bears a heavy burden* of proving facts showing that disqualification is necessary.”⁴⁵ The BPAI’s identification of the moving party’s “heavy burden” is telling: as described below, the BPAI goes on to endorse a formulation of the “substantial relationship” test that sets a very high bar for disqualification in interference proceedings.

Anderson argued that disqualification of Kokulis and Pillsbury was necessary under the “substantial relationship” test relevant to former-client conflicts.⁴⁶ In addressing this argument, the BPAI observed that some courts adopt a “narrow[]” interpretation of what constitutes a substantial relationship.⁴⁷ Indicating its agreement with these courts, the BPAI stated: “In our view, Anderson must demonstrate that (1) the subject matter of the ’567 application is *identical or essentially the same* as the subject matter in the Anderson patent involved in Interference 103,708, and (2) the relationship between Kokulis and Anderson is a ‘prior representation’ within the meaning of the substantial relationship test.”⁴⁸ The “identical or essentially the same” standard is a narrow interpretation of the substantial relationship test.

Applying this narrow interpretation of the substantial relationship test, the BPAI noted that “the Cushman firm prepared and prosecuted only the first of a series of several continuing applications that ultimately led to the granting of the Anderson patent” and that the Anderson patent was a continuation-in-part of the ’567 application with a different specification and different claims.⁴⁹ The BPAI acknowledged that there may be some overlap between the disclosure of the Anderson patent and that of the ’567 application but indicated that this was insufficient to show a substantial relationship: “Anderson has failed to demonstrate, for example, that the ’567 application describes or essentially describes the interfering subject matter (i.e., the subject matter of Anderson’s claims involved in Interference 103,708). Until that is demonstrated, we decline to find that similar facts and legal issues were involved in the prosecution of [the ’567 application] and in Interference 103,708.”⁵⁰

The BPAI further explained that “some overlap between a few of the ’567 claims and a few of the Anderson patent claims

does not, without more, demonstrate that ’567 is substantially the same or identical to the Anderson patent. Anderson has failed to demonstrate that the claims it compares are identical or essentially the same subject matter.”⁵¹ The BPAI also explained that the ’567 application was not relied on for priority in the interference proceeding and that therefore, there was an inference that the ’567 application and the Anderson patent are not identical or essentially the same.⁵² Based on this reasoning, the BPAI found that Anderson had failed to meet the substantial relationship test.⁵³

Despite this failure, the BPAI noted that Anderson could nevertheless prevail if he could successfully demonstrate that Kokulis actually received confidential information that could be used against him in the interference proceeding.⁵⁴ The BPAI stated, “[w]hen one lawyer at a firm possesses client confidences gained in the course of a prior representation, it can be presumed that the confidences were shared with other attorneys within the lawyer’s firm. However, the presumption is rebuttable.”⁵⁵ The BPAI credited the testimony of Kokulis that he did not receive any information regarding the ’567 application and that he had no involvement in the preparation or prosecution of the ’567 application.⁵⁶ Based on Kokulis’s testimony, the BPAI found that Eppstein had rebutted any presumption that confidences were shared with Kokulis or any attorney at Pillsbury.⁵⁷ The BPAI denied Anderson’s motion to disqualify.⁵⁸

The BPAI’s narrow view of what constitutes a substantial relationship relies on authority from the Second Circuit,⁵⁹ which endorses a “restrained approach” to attorney disqualification that “avoids unnecessary and unseemly delay.”⁶⁰ The Second Circuit applies the “substantial relationship” test strictly, “granting disqualification only upon a showing that the relationship between the issues in the prior and present cases is ‘patently clear.’ Put more specifically, disqualification has been granted or approved . . . only when the issues involved have been ‘identical’ or ‘essentially the same.’”⁶¹ This is a considerably narrower view of the substantial relationship test than is taken by other circuits.⁶² For example, in the Tenth Circuit, courts look to whether “the factual contexts of the two representations are similar or related.”⁶³

Other BPAI decisions in interference proceedings evidence the USPTO’s restrained approach to attorney

disqualification.⁶⁴ As described below, decisions by the PTAB indicate that it will treat disqualification motions in a manner similar to its predecessor.

PTAB Decisions on Disqualification

To date, the PTAB has not given authorization to a party to file a motion to disqualify counsel in an IPR, CBM, PGR, or derivation proceeding. In Case Nos. CBM2014-00131, -00133, -00135, -00136, and -00137, petitioner TD Ameritrade Holding Corp. (“TD Ameritrade”) sought authorization to file a motion to disqualify counsel for patent owner Trading Technologies International, Inc. (“Trading Tech”).⁶⁵ TD Ameritrade alleged that, at a time shortly after the filing of the Petitions in these proceedings, both TD Ameritrade and Trading Tech were clients of the law firm Finnegan, Henderson, Farabow, Garrett & Dunner, LLP (“Finnegan”).⁶⁶ TD Ameritrade argued that Finnegan’s concurrent representation of both parties caused Finnegan to have a conflict of interest.⁶⁷ TD Ameritrade sought authorization from the PTAB to file a motion to disqualify Finnegan from representing Trading Tech based on this alleged conflict of interest. Finnegan stated that Trading Tech engaged Finnegan to represent it in the CBM proceedings after Finnegan no longer represented TD Ameritrade and that therefore, no conflict of interest existed.⁶⁸

In denying TD Ameritrade authorization to file the motion, the PTAB observed that at the time of the inquiry, TD Ameritrade was no longer a client of Finnegan.⁶⁹ The PTAB further noted that “the matters Finnegan handled for TD Ameritrade were not related, substantially to the matters” of the CBM proceedings.⁷⁰ Citing the BPAI’s *Anderson v. Eppstein* decision, the PTAB stated that TD Ameritrade bears a “heavy” burden to show that disqualification is necessary and found that TD Ameritrade had not met its burden:

Disqualification is resolved on a case-by-case basis, where the moving party bears a heavy burden of proving facts showing that disqualification is necessary. *Anderson v. Eppstein*, 59 U.S.P.Q.2d 1280, 1286 (Bd. Pat. App. & Int. 2001) (informative). See also Rules of Practice for Trials Before the Patent Trial and Appeal Board; Final Rule 77 Fed. Reg. 48,630 (August 14, 2012) (“[t]he determination whether to disqualify counsel is based

on the facts and circumstance of the case”; “[m]otions to disqualify opposing counsel are disfavored because they cause delay and are sometimes abused”).

... [W]e see no reason to authorize a motion to disqualify Trading Tech’s counsel from Finnegan in this proceeding. Both parties agree that TD Ameritrade is no longer represented by Finnegan, and TD Ameritrade makes no allegation that Finnegan has, currently, any conflict of interest . . . by remaining as counsel for Trading Tech despite its past representation of TD Ameritrade. Note, in particular, that TD Ameritrade makes no allegations that Finnegan possesses confidential information gained from TD Ameritrade during its representation that is related to these proceedings.⁷¹

Any conflict that existed, the PTAB noted, was merely for a time period in the past.⁷² For these reasons, the PTAB denied TD Ameritrade’s request for authorization to file a motion to disqualify.⁷³

In Case No. IPR2013-00179, petitioner ScentAir Technologies, Inc. (“ScentAir”) sought authorization to file a motion to disqualify counsel for patent owner Prolitec, Inc. (“Prolitec”).⁷⁴ ScentAir’s request was based on a protective order issued in related district court litigation involving the same patent and parties.⁷⁵ The protective order included the following language:

Persons for a receiving party (including without limitation outside counsel and EXPERTS) who access “CONFIDENTIAL-ATTORNEYS EYES ONLY” materials of any producing party shall not, for the period of this action and extending two (2) years following final resolution of this action, draft, supervise, assist, or advise in drafting or amending patent claims or patent specifications, in the U.S. or abroad, related to scent diffusion products or other subject matter of the “CONFIDENTIAL-ATTORNEYS EYES ONLY” materials.⁷⁶

In denying ScentAir’s request for authorization to file the disqualification motion, the PTAB found that the protective order only barred litigation counsel from prosecution activities and that counsel was not barred from litigation or trials before the PTAB.⁷⁷ The PTAB stated that “[a]n *inter partes* review is not

original examination, continued examination, or reexamination of the involved patent. Rather, it is a trial, adjudicatory in nature and constituting litigation.”⁷⁸ The PTAB refused to presume that counsel for Prolitec would violate the protective order, noting that Prolitec’s counsel would be subject to sanctions by the district court if it did so.⁷⁹ For these reasons, the PTAB denied ScentAir’s request for authorization to file a motion to disqualify.⁸⁰

Conclusion

Parties seeking to disqualify opposing counsel at the PTAB should be prepared for an uphill battle. As described above, the USPTO has stated that motions to disqualify counsel are “disfavored,” and the PTAB has denied authorization to file such motions in multiple proceedings and has not granted authorization in any. In addition, the PTAB liberally applies 37 C.F.R. § 42.1(b), which mandates that the rules governing trial practice be “construed to secure the just, speedy, and inexpensive resolution of every proceeding,” and appears to disfavor motions that could cause undue delay in a proceeding.

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Endnotes

- 1 See Keith Swisher, *The Practice and Theory of Lawyer Disqualification*, 27 Geo. J. Legal Ethics 71, 128 (2014); Kenneth R. Adamo, *Attorney Disqualification in Patent Litigation*, 1 Alb. L.J. Sci. & Tech. 177, 179 (1991).
- 2 See *Allegaert v. Perot*, 565 F.2d 246, 251 (2d Cir. 1977) (noting that disqualification motions are “common tools” of the litigation process).
- 3 *Armstrong v. McAlpin*, 625 F.2d 433, 437 (2d Cir. 1980) (en banc).
- 4 Pub. L. 112-29, 125 Stat. 284 (2011).
- 5 *ScentAir Techs., Inc. v. Prolitec, Inc.*, No. IPR2013-00179, Paper 9, at 4 (P.T.A.B. Apr. 16, 2013).
- 6 77 Fed. Reg. 48630 (Aug. 14, 2012), eff. Sept. 16, 2012.
- 7 See *TD Ameritrade Holding Corp. v. Trading Techs. Int’l, Inc.*, No. CBM2014-00131, -00133, -00135, -00136, -00137, Paper 10 (P.T.A.B. July 24, 2014); *ScentAir Techs.*, No. IPR2013-00179.
- 8 77 Fed. Reg. 48618; see also 37 C.F.R. § 41.5(b)(1).
- 9 *Id.* at 48630. In response to the notice of proposed rulemaking relating to PTAB trial practice, the USPTO received several comments that “sought clarification” regarding the disqualification proceedings authorized by 37 C.F.R. § 42.10(d). *Id.* The USPTO stated that such comments were “noted” but “not adopted.” *Id.*
- 10 See Final Rules of Practice, 77 Fed. Reg. 48612-78 (Aug. 14, 2012), eff. Sept. 16, 2012.
- 11 *Id.* at 48630.
- 12 *Id.*
- 13 *Id.*
- 14 See 37 C.F.R. §§ 11.101-11.901.
- 15 Final Rule, Changes to Representation of Others Before The United States Patent and Trademark Office, 78 Fed. Reg. 20195 (Apr. 3, 2013), eff. May 3, 2013.
- 16 See *Anderson v. Eppstein*, 59 U.S.P.Q.2d 1280, 1285 (B.P.A.I. 2001). The BPAI stated that “[w]hile the PTO has no specific rules which govern disqualification [proceedings], generally the provisions of the PTO Code of Professional Responsibility, aided by decisions of federal courts, govern resolution of a disqualification.” *Id.*
- 17 78 Fed. Reg. 20180.
- 18 *Id.*
- 19 W. William Hodes, *Getting Lawyer Disqualification Straight Book Review, Lawyer Disqualification: Conflicts of Interest and Other Bases* by Richard E. Flamm, Banks and Jordan Law Publishing Co., 2003. PP. XXIX, 802, 17 Geo. J. Legal Ethics 339, 341 (2004).
- 20 37 C.F.R. § 11.107(a) (2013).
- 21 *Id.* § 11.107(a)(1). Determining whether representation of a potential client will be adverse to another client can be difficult in patent litigation. For example, those involved in patent litigation must seek to recognize when representation of one potential client, though not directly across the “v” from a current client, nonetheless will cause substantial, practical harm to the current client. For a full discussion of such issues, see David Hricik, *Seeing Adversity in Patent Litigation*, 7 *Landslide* 12 (2015).
- 22 *Id.* § 11.109(a).
- 23 *Id.* § 11.109(b).
- 24 David Hricik, *Trouble Waiting to Happen: Malpractice and Ethical Issues in Patent Prosecution*, 31 AIPLA Q.J. 385, 423 (2003).
- 25 Hricik, *supra* note 27, at 423.
- 26 37 C.F.R. § 42.2 (2012).
- 27 Manual of Patent Examining Procedure § 2301 (2014).
- 28 59 U.S.P.Q.2d 1280 (B.P.A.I. 2001).
- 29 *Id.* at 1282.
- 30 *Id.* at 1290.
- 31 *Id.* at 1282.
- 32 *Id.* at 1286.
- 33 *Id.* at 1287.
- 34 *Id.* at 1284.
- 35 *Id.*
- 36 *Id.* at 1282.
- 37 *Id.* at 1283.
- 38 *Id.* at 1284.
- 39 *Id.* at 1282 n.2.
- 40 *Id.* at 1284.
- 41 *Id.*
- 42 *Id.* at 1285.
- 43 *Id.* at 1290.
- 44 *Id.* at 1285.
- 45 *Id.* (emphasis added).
- 46 *Id.*
- 47 *Id.* at 1286.
- 48 *Id.* (emphasis added).
- 49 *Id.*
- 50 *Id.*
- 51 *Id.*
- 52 *Id.* at 1287.
- 53 *Id.*
- 54 *Id.*
- 55 *Id.* at 1288.
- 56 *Id.*

- 57 *Id.*
- 58 *Id.* at 1290.
- 59 See *Gilman Corp. v. Gilman Bros. Co.*, 20 U.S.P.Q.2d 1238, 1240 (Comm'r Pat. 1991) (citing *Gov't of India v. Cook Indus., Inc.*, 569 F.2d 737, 739-40 (2d Cir. 1978)).
- 60 *Armstrong v. McAlpin*, 625 F.2d 433, 446 (2d Cir. 1980) (en banc).
- 61 *Gov't of India*, 569 F.2d at 739-40 (citations omitted).
- 62 See Lisa Dolak, *Conflicts of Interest: Guidance for the Intellectual Property Practitioner*, 39 IDEA 267, 280-81 (1999). In the context of patent litigation, the Federal Circuit in deciding issues relating to disqualification looks to standards adopted by the regional circuit from which the appeal comes. *Sun Studs, Inc. v. Applied Theory Assocs., Inc.*, 772 F.2d 1557, 1566 (Fed. Cir. 1985).
- 63 *Smith v. Whatcott*, 757 F.2d 1098, 1100 (10th Cir. 1985) (quoting *Trust Corp. of Montana v. Piper Aircraft Corp.*, 701 F.2d 85, 87 (9th Cir. 1983)).
- 64 See, e.g., *Univ. of New Mexico v. Fordham Univ.*, Interference No. 104,761, Paper No. 47 (B.P.A.I. Apr. 2, 2002) (nonprecedential); see also Fred E. McKelvey, *Attorney Disqualification Cases in the PTO*, 62 J. Pat. Off. Soc'y 625 (1980) (discussing procedure in USPTO disqualification cases and substantive law used by the USPTO in deciding such cases).
- 65 *TD Ameritrade Holding Corp. v. Trading Techs. Int'l, Inc.*, No. CBM2014-00131, -00133, -00135, -00136, -00137, Paper 10, at 2-3 (P.T.A.B. July 24, 2014).
- 66 *Id.* at 3.
- 67 *Id.*
- 68 *Id.*
- 69 *Id.* at 3-4.
- 70 *Id.* at 4.
- 71 *Id.*
- 72 *Id.*
- 73 *Id.* at 5.
- 74 *ScentAir Techs., Inc. v. Prolitec, Inc.*, No. IPR2013-00179, Paper 9, at 2 (P.T.A.B. Apr. 16, 2013).
- 75 *Id.* at 2-4.
- 76 *Prolitec, Inc. v. ScentAir Techs., Inc.*, No. 12-C-483, Paper 62, at 3 (E.D. Wis., May 17, 2013).
- 77 *ScentAir Techs.*, No. IPR2013-00179 at 4.
- 78 *Id.*
- 79 *Id.*
- 80 *Id.* at 5.

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