

**UNITED STATES
PATENT AND TRADEMARK OFFICE**



Ex Parte Appeals Made Easy

James Worth, lead administrative patent judge
Alyssa Finamore, administrative patent judge

November 7, 2019

UNITED STATES
PATENT AND TRADEMARK OFFICE



Question/comment submission

To send in questions or comments during the webinar, please email:

PTABBoardsideChat@uspto.gov

Agenda

- Composition of PTAB
- Ex Parte Appeals
- Takeaways
- Resources

Composition of PTAB

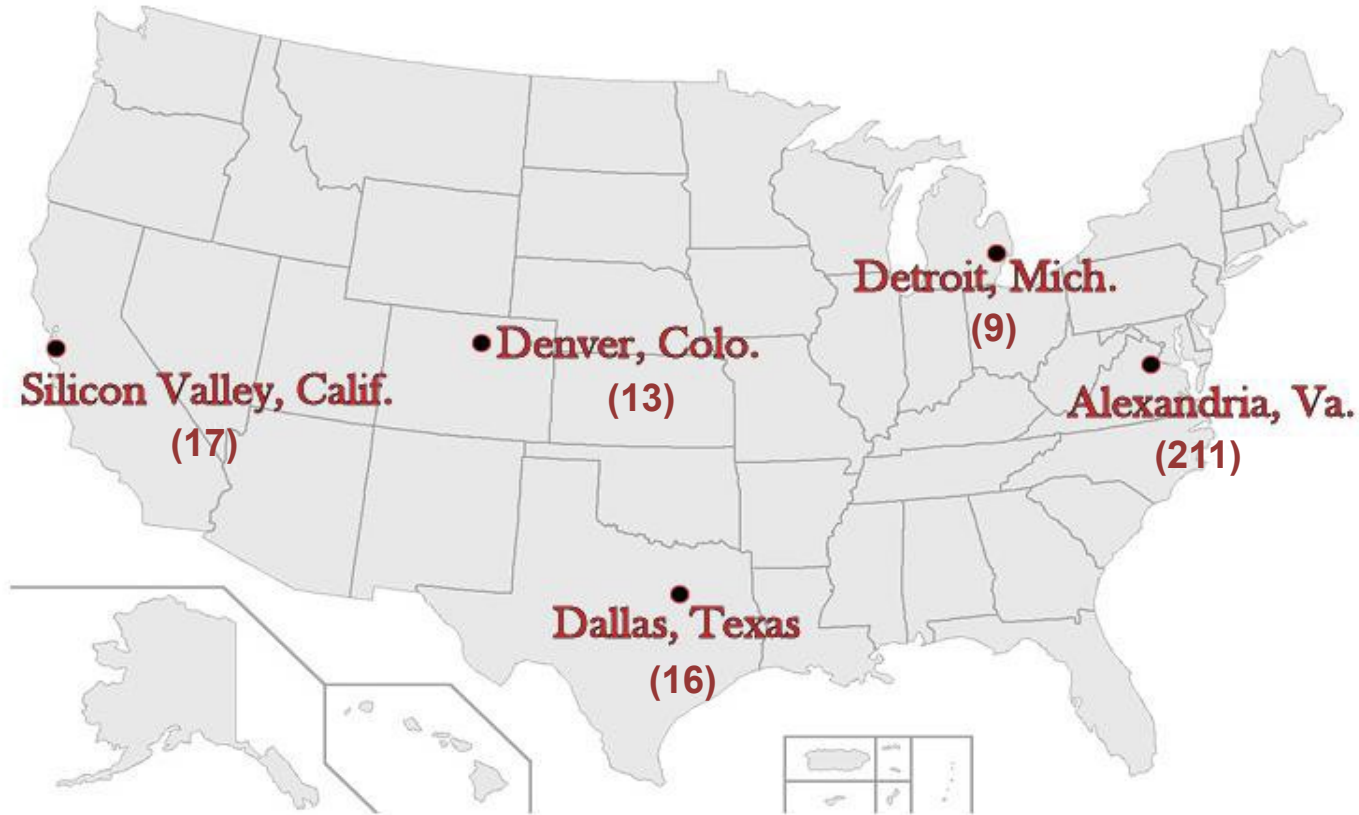
The Board

- **The Board is created by statute (35 U.S.C. § 6)**
 - That statute mandates the Board's:
 - Duties
 - Composition
 - Qualifications for membership
 - Panel form of decision-making (appeals, derivation proceedings, post-grant reviews, and *inter partes* reviews)
- **Original “board of disinterested persons” provided for in Patent Act of 1836**
- **Patent Act of 1861 formed the permanent Board of Appeals of “persons of competent legal knowledge and scientific ability”**
 - President Lincoln appointed George Harding, Esq. of Philadelphia as the first “Examiner-in-Chief”

Statutory members of the Board

- **35 U.S.C. § 6(a) provides:**
 - There shall be in the Office a Patent Trial and Appeal Board. The Director, the Deputy Director, the Commissioner for Patents, the Commissioner for Trademarks, and the administrative patent judges shall constitute the Patent Trial and Appeal Board.
 - Administrative patent judges must be legally and technically trained.

Locations of PTAB Judges



*Alexandria, Va. count includes judges who participate in TEAPP.



Types of PTAB proceedings

- Appeals in *ex parte* patent applications
- Appeals in *ex parte* and *inter partes* reexamination proceedings
- Interferences
- *Inter partes* reviews (IPR)
- Post-grant reviews (PGR)
- Covered business method reviews (CBM)
- Derivations (DER)

***Ex parte* appeals**

Ex parte appeal to the PTAB

- An alternative to continuing prosecution before the Examiner
- Consideration of the application as is, not a forum for making substantive amendments or submitting new evidence
- Generally results in a decision affirming or reversing the Examiner
 - *The PTAB will not issue a patent. We simply review the Examiner's decision.*

***Ex parte* appeal to the PTAB**

- Review by a “fresh pair of eyes,” namely a panel of at least three administrative patent judges
- A more formal, legal environment within the Office
 - Legal briefing
 - Optional oral argument before panel of judges

***Ex Parte* Appeal Process: 9 steps**

- **Step 1:** Adverse Decision of the Examiner
- **Step 2:** Notice of Appeal
- **Step 3:** Appeal Brief
- **Step 4:** Examiner's Answer
- **Step 5:** Appeal Forwarding Fee + Reply Brief (*optional*) + Request for Oral Hearing (*optional*)
- **Step 6:** Oral Hearing (*if requested*)
- **Step 7:** Board decision
- **Step 8:** Request for rehearing (*optional*)
- **Step 9:** Decision on rehearing (*if requested*)

Step 1: Adverse Decision of the Examiner

- This is generally an Office action including a rejection of one or more claims.
- Appeal is taken from the Office action, so the Office action defines the Examiner's position on appeal.
- You cannot appeal from *every* Office action.
 - Application must be twice rejected.
 - The Office action does not have to be final.

Step 2: Notice of Appeal

- You must give notice that you intend to appeal from the Examiner's decision and pay an appeal fee.
- The notice and payment of the fee are due 3 months after the mailing date of the Examiner's decision from which appeal is being taken, e.g., final Office action. This time period is extendable for 3 additional months, so you can file a Notice of Appeal with payment of the appeal fee as late as 6 months after the Examiner's decision.
- Office provides a form:
<https://www.uspto.gov/sites/default/files/documents/aia0031.pdf>

Step 3: Appeal Brief

- No fee due with Appeal Brief
- The Appeal Brief is due 2 months after you file the Notice of Appeal. This time period is extendable for 5 additional months.
- Legal brief (not a form) that includes your arguments and defines the appeal
 - The Appeal Brief identifies the issues the judges will consider on appeal.
 - The judges generally will not go looking for issues, even issues that would resolve the appeal in your favor.
 - If an argument is not raised in the Appeal Brief, it may be waived.

Step 3: Appeal Brief

- No new evidence or substantive amendment
- Must include certain sections:
 - **Real party in interest**
 - **Related matters**, e.g., appeals, AIA proceedings, district court cases
 - Summary of the claimed subject matter
 - **Argument**
 - **Claims appendix**
- A *pro se* appellant needs to only “substantially comply” with certain requirements shown in bold.

Appeal Brief: Argument

37 C.F.R. § 41.37(c)(iv)

Argument. The arguments of appellant with respect to each ground of rejection, and the basis therefor, with citations of the statutes, regulations, authorities, and parts of the Record relied on. The arguments shall explain why the examiner erred as to each ground of rejection contested by appellant. Except as provided for in §§ 41.41, 41.47 and 41.52, any arguments or authorities not included in the appeal brief will be refused consideration by the Board for purposes of the present appeal. Each ground of rejection contested by appellant must be argued under a separate heading, and each heading shall reasonably identify the ground of rejection being contested (e.g., by claim number, statutory basis, and applied reference, if any).

Step 4: Examiner's Answer

- The Examiner's response to the Appeal Brief
 - The Examiner will respond to all of the arguments in the Appeal Brief.
 - The Examiner will consider whether to maintain or modify each rejection.
- Includes certain sections
 - Ground(s) of Rejection to Be Reviewed on Appeal
 - Withdrawn Rejection(s)
 - New Ground(s) of Rejection
 - Response to Arguments

Step 5: Appeal Forwarding Fee

- Due 2 months after Examiner's Answer – NOT EXTENDABLE
- Easy to forget
- Office provides a form for submitting payment of the fee:
<https://www.uspto.gov/sites/default/files/forms/aia0034.pdf>
- May be filed with Reply Brief (optional) and/or request for oral hearing (optional)
 - No fee for Reply Brief
 - Request for oral hearing requires payment of a fee

Appeal Forwarding Fee

Doc code: WFEE.APEAL

Doc Description: Certification and Transmittal of Appeal Forwarding Fee

PTO/AIA/34 (06-14)

CERTIFICATION AND TRANSMITTAL OF APPEAL FORWARDING FEE		Docket Number (Optional)
<p>I hereby certify that this correspondence is being facsimile transmitted to the USPTO, EFS-Web transmitted to the USPTO, or deposited with the United States Postal Service with sufficient postage in an envelope addressed to "Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450" [37 CFR 1.8(a)]</p> <p>on _____.</p> <p>Signature _____</p> <p>Typed or printed name _____</p>		<p>In re Application of _____</p> <p>Application Number _____ Filed _____</p> <p>For _____</p> <p>Art Unit _____ Examiner _____</p>
<p>37 CFR 41.45 specifies that, in order to avoid dismissal of the appeal, appellant must pay the fee set in 37 CFR 41.20(b)(4) within two months of the later of the date of either the examiner's answer, or a decision refusing to grant a petition under 37 CFR 1.181 to designate a new ground of rejection in an examiner's answer.</p> <p>The undersigned certifies that the appropriate fee accompanies this transmittal.</p> <p>The fee for forwarding this appeal is (37 CFR 41.20(b)(4)) \$ _____</p> <p><input type="checkbox"/> Appellant asserts small entity status. See 37 CFR 1.27. Therefore, the fee shown above is reduced by 50%, and the resulting fee is: \$ _____</p> <p><input type="checkbox"/> Appellant certifies micro entity status. See 37 CFR 1.29. Therefore, the fee shown above is reduced by 75%, and the resulting fee is: \$ _____ Form PTO/SB/15A or B or equivalent must either be enclosed or have been submitted previously.</p> <p><input type="checkbox"/> A check in the amount of the fee is enclosed.</p> <p><input type="checkbox"/> Payment by credit card. Form PTO-2038 is attached.</p> <p><input type="checkbox"/> The Director is hereby authorized to charge any fees which may be required, or credit any overpayment to Deposit Account No. _____.</p> <p><input type="checkbox"/> Payment made via EFS-Web.</p> <p>Extensions of time under 37 CFR 1.136(a) for patent applications are not applicable to the time period set forth in 37 CFR 41.45. See 37 CFR 1.136(b) for extensions of time to reply for patent applications and 37 CFR 1.550(c) for extensions of time to reply for <i>ex parte</i> reexamination proceedings.</p> <p>WARNING: Information on this form may become public. Credit card information should not be included on this form. Provide credit card information and authorization on PTO-2038.</p> <p>I am the</p> <p><input type="checkbox"/> appellant <input type="checkbox"/> attorney or agent of record <input type="checkbox"/> attorney or agent acting under 37 CFR 1.34</p> <p>Registration number _____ Registration number _____</p> <p>Signature _____</p> <p>Typed or printed name _____</p> <p>Telephone Number _____</p> <p>Date _____</p> <p>NOTE: This form must be signed in accordance with 37 CFR 1.33. See 37 CFR 1.4 for signature requirements and certifications. Submit multiple forms if more than one signature is required, see below*.</p> <p><input type="checkbox"/> * Total of _____ forms are submitted.</p>		



Step 5: Reply Brief

- Optional
- Due 2 months after Examiner's Answer – NOT EXTENDABLE
- Should be submitted at the same time as payment of the appeal forwarding fee
- No additional fee for the Reply Brief
- Only one Reply Brief permitted

Step 5: Reply Brief

- Legal brief (not a form)
- No new evidence or amendment
- No new arguments that were not raised in the Appeal Brief, unless
 - Responsive to an argument in the Examiner's Answer
 - Addressing new ground of rejection in the Examiner's Answer

Step 5: Oral Hearing Request

- Optional
- Due 2 months after Examiner's Answer or on the date of filing a reply brief, whichever is earlier – NOT EXTENDABLE
- Must include payment of a fee
- Office provides a form:
<https://www.uspto.gov/sites/default/files/documents/aia0032.pdf>

Oral Hearing Request

PTO/AIA/32 (03-13)
 Approved for use through 11/30/2020. OMB 0651-0031
 U.S. Patent and Trademark Office; U.S. DEPARTMENT OF COMMERCE

Under the Paperwork Reduction Act of 1995, no persons are required to respond to a collection of information unless it displays a valid OMB control number.

REQUEST FOR ORAL HEARING BEFORE THE PATENT TRIAL AND APPEAL BOARD		Docket Number (Optional)
I hereby certify that this correspondence is being facsimile transmitted to the USPTO, EFS-Web transmitted to the USPTO, or deposited with the United States Postal Service with sufficient postage in an envelope addressed to "Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450" [37 CFR 1.8(a)]		In re Application of _____
on _____		Application Number _____ Filed _____
Signature _____		For _____
Typed or printed name _____		Art Unit _____ Examiner _____
Applicant hereby requests an oral hearing before the Patent Trial and Appeal Board in the appeal of the above-identified application.		
The fee for this Request for Oral Hearing is (37 CFR 41.20(b)(3))		\$ _____
<input type="checkbox"/> Applicant asserts small entity status. See 37 CFR 1.27. Therefore, the fee shown above is reduced by 50%, and the resulting fee is:		\$ _____
<input type="checkbox"/> Applicant certifies micro entity status. See 37 CFR 1.29. Therefore, the fee shown above is reduced by 75%, and the resulting fee is: Form PTO/SB/15A or B or equivalent must either be enclosed or have been submitted previously		\$ _____
<input type="checkbox"/> A check in the amount of the fee is enclosed.		
<input type="checkbox"/> Payment by credit card. Form PTO-2038 is attached.		
<input type="checkbox"/> The Director has already been authorized to charge fees in this application to a Deposit Account.		
<input type="checkbox"/> The Director is hereby authorized to charge any fees which may be required, or credit any overpayment to Deposit Account No. _____.		
<input type="checkbox"/> Payment made via EFS-Web.		
<input type="checkbox"/> A petition for an extension of time under 37 CFR 1.136(b) (PTO/SB/23 or equivalent) is enclosed. For extensions of time in reexamination proceedings, see 37 CFR 1.550.		
WARNING: Information on this form may become public. Credit card information should not be included on this form. Provide credit card information and authorization on PTO-2038.		
I am the		
<input type="checkbox"/> applicant		
<input type="checkbox"/> attorney or agent of record Registration number _____		
<input type="checkbox"/> attorney or agent acting under 37 CFR 1.34 Registration number _____		
Signature _____		
Typed or printed name _____		
Telephone Number _____		
Date _____		
NOTE: This form must be signed in accordance with 37 CFR 1.33. See 37 CFR 1.4 for signature requirements and certifications. Submit multiple forms if more than one signature is required, see below*.		
<input type="checkbox"/> * Total of _____ forms are submitted.		

This collection of information is required by 37 CFR 41.20(b)(3). The information is required to obtain or retain a benefit by the public which is to file (and by the USPTO to process) an application. Confidentiality is governed by 35 U.S.C. 122 and 37 CFR 1.11, 1.14 and 41.6. This collection is estimated to take 12 minutes to complete, including gathering, preparing, and submitting the completed application form to the USPTO. Time will vary depending upon the individual case. Any comments on the amount of time you require to complete this form and/or suggestions for reducing this burden, should be sent to the Chief Information Officer, U.S. Patent and Trademark Office, U.S. Department of Commerce, P.O. Box 1450, Alexandria, VA 22313-1450. DO NOT SEND FEES OR COMPLETED FORMS TO THIS ADDRESS. SEND TO: Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450.

If you need assistance in completing the form, call 1-800-PTO-9199 and select option 2.



Step 6: Oral Hearing



Step 6: Oral Hearing

- If requested, the Office will notify you of the hearing date. You must reply to the hearing notice and confirm that you will attend the hearing.
- Attendance may be in person, telephonically, or via a video connection.
- Although rare, the Examiner may appear at the hearing.
- Decorum required at all times.

Step 6: Oral Hearing

- You will have 20 minutes to present your case to three judges, who may be in the hearing room or attending remotely.
- Judges will have already read the record on appeal, namely the Office action, Appeal Brief, Examiner's Answer, and Reply Brief (if filed), and may or may not ask questions.
- No new arguments or evidence, absent a showing of good case based on a recent, relevant decision of the PTAB or a Federal Court

Step 7: Board Decision

- Three judges will consider all of the arguments and evidence on appeal, confer, decide whether the Examiner erred in rejecting each claim on appeal, and issue a written decision.
- If the judges decide the Examiner did not err in rejecting a claim, they will sustain the rejection of the claim.
- The outcome of the decision depends on whether the judges decide to sustain all, some, or none of the rejections.

Step 7: Board Decision

- The outcome may be an affirmance, an affirmance-in-part, a reversal, or new ground(s) of rejection.
 - Affirmance: Each and every claim subject to a sustained rejection – no non-rejected claim
 - Affirmance-in-Part: At least one claim, but not all, subject to a sustained rejection
 - Reversed: No claim subject to a rejection – no sustained rejections
 - New Ground(s) of Rejection: The Judges issue a new rejection of one or more claims.

Step 7: Board Decision

- The outcome dictates who is responsible for taking the next step.
 - If the outcome is an affirmance or new ground(s) of rejection, you *must* take the next step.
 - If the outcome is an affirmance-in-part, you *may* take the next step.
 - If the outcome is a reversal, the Examiner will take the next step.

Takeaways

Takeaways: *ex parte* appeals

- An *ex parte* appeal to the PTAB provides:
 - a review by three judges
 - a more judicial forum
 - a determination as to whether the Examiner erred or not
- An *ex parte* appeal does not:
 - issue a patent
 - make a final determination as to patentability
 - prevent the application from returning to the Examiner

Takeaways: *ex parte* appeals

- Make sure an *ex parte* appeal is right for you.
- Consider the alternatives.
 - Response to the Office action
 - Amendment to the claims or new evidence
 - Request for Continued Examination (RCE)
 - Continuing application

Takeaways: strategy

- Evaluate whether you need patent protection.
 - Value is not necessarily the same as patentability.
 - A patent conveys the right to exclude others from using the invention, not the right to use the invention.
 - A patent is not required to commercialize the invention.
 - Have you changed the invention?

Resources

PTAB Website, Appeals

The screenshot shows the USPTO Patent Trial and Appeal Board website. The header includes the USPTO logo, the text 'UNITED STATES PATENT AND TRADEMARK OFFICE', and navigation links for 'About Us', 'Jobs', 'Contact Us', and 'MyUSPTO'. A search bar is located in the top right. Below the header is a navigation menu with 'Patents', 'Trademarks', 'IP Policy', and 'Learning and Resources', along with a 'Find It Fast' button. The main content area is titled 'Patent Trial and Appeal Board' and includes a breadcrumb trail: 'Home > Patents: Application Process > Patent Trial and Appeal Board > Patent Trial and Appeal Board'. The main heading is 'Patent Trial and Appeal Board', followed by a brief description of the PTAB's role. Below this are several sections: 'Trials', 'Appeals' (highlighted with a red box), 'Decisions', 'Hearings', 'Resources and guidance', 'Statistics', 'PTAB Data Tools and IT Systems', 'PTAB Events', and 'About PTAB'. To the right of the main content are three additional links: 'Notice regarding options for amendments through reissues or reexaminations', 'New Pilot Program Concerning Motions to Amend', 'Claim Construction Final Rule', 'SOP 1 (rev. 15): Assignment of judges to panels', and 'SOP 2 (rev. 10): Precedential opinion panel to decide issues of exceptional importance involving policy or procedure'.

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Claim Construction Final Rule **NEW**

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<https://www.uspto.gov/patents-application-process/patenttrialandappealboard>

Additional Resources

- Inventor Assistance Center: <https://www.uspto.gov/learning-and-resources/support-centers/inventors-assistance-center-iac>
- MPEP 1200: <https://www.uspto.gov/web/offices/pac/mpep/index.html>
- 37 C.F.R. §§ 41.30-81: https://www.uspto.gov/web/offices/pac/mpep/consolidated_rules.pdf
- Appeal forms: <https://www.uspto.gov/patent/forms/forms-patent-applications-filed-or-after-september-16-2012>

PTAB Website, Hearings

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Claim Construction Final Rule **NEW**

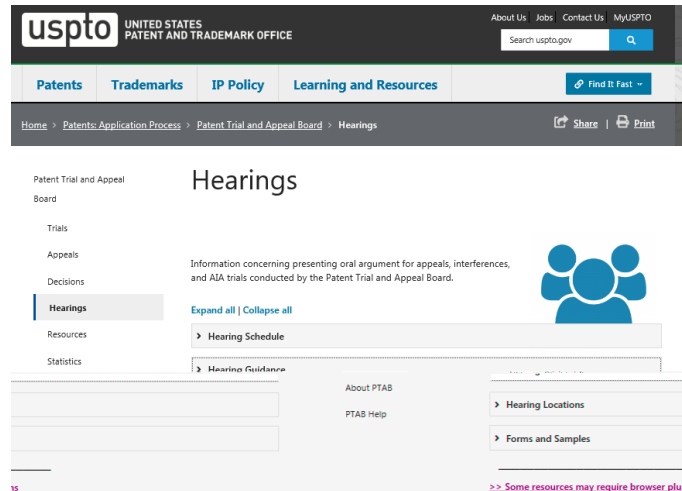
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<https://www.uspto.gov/patents-application-process/patenttrialandappealboard>

Hearings

- Hearings Guide:
<https://www.uspto.gov/sites/default/files/documents/PTAB%20Hearings%20Guide.pdf>
- Hearings page on the PTAB website:
<https://www.uspto.gov/patents-application-process/patent-trial-and-appeal-board/hearings>



The screenshot shows the USPTO website's PTAB Hearings page. The header includes the USPTO logo, the text "UNITED STATES PATENT AND TRADEMARK OFFICE", and navigation links for "About Us", "Jobs", "Contact Us", and "MyUSPTO". A search bar is located in the top right. Below the header is a navigation menu with "Patents", "Trademarks", "IP Policy", and "Learning and Resources". The main content area features a breadcrumb trail: "Home > Patents: Application Process > Patent Trial and Appeal Board > Hearings". The page title is "Hearings". A sidebar on the left lists navigation options: "Patent Trial and Appeal Board", "Trials", "Appeals", "Decisions", "Hearings" (which is highlighted), "Resources", and "Statistics". The main content area contains the text: "Information concerning presenting oral argument for appeals, interferences, and AIA trials conducted by the Patent Trial and Appeal Board." Below this text is a "Hearing Schedule" section with a right-pointing arrow. A "Hearing Guidance" section is also visible. On the right side, there is a "Share" and "Print" button, and a "Find It Fast" button. At the bottom right, there is a "PTAB Help" section with links for "About PTAB" and "PTAB Help". A "Hearing Locations" section is also present with a right-pointing arrow. At the bottom right, there is a "Forms and Samples" section with a right-pointing arrow. A small icon of three people is visible on the right side of the page. At the bottom right, there is a note: ">> Some resources may require browser plugin".

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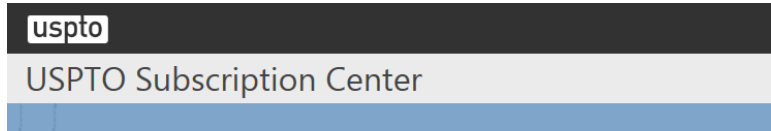
Claim Construction Final Rule **NEW**

SOP 1 (rev. 15): Assignment of judges to panels **NEW**

SOP 2 (rev. 10): Precedential opinion panel to decide issues of exceptional importance involving policy or procedure **NEW**

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