

Federal Circuit Bar Association

BENCH & BAR

Newsletter

Pro Bono Program

We give thanks to all member attorneys who volunteer their time and energy to make a difference in the lives of pro bono applicants. In April and May, a number of the government employees pro bono cases attorneys have taken last year were argued in the Court of Appeals in the Federal Circuit, and we would like to celebrate the reversal of Merit Systems Protection Board decision in favor of the appellant. *Cahill v. MSPB* (Fed. Cir. docket # 15-3152). Mr. Cahill's personnel action was based on his whistleblowing activity, but the board found that Mr. Cahill had failed to prove that his allegations are non-frivolous. Jason Romrell, attorney for Mr. Cahill, will provide the details of this case in this month's Pro Bono Digest. Peter Broida and Kevin Owen also reported successful resolutions of MSPB-level cases. Congratulations and we thank you for all you do. If you have any questions or concerns about the pro bono programs, please contact Hee Kim at kim@fedcirbar.org or (202-536-4160).



Click [HERE](#) for more information about the PTO Pro Bono Program

A Midwestern Patent Lawyer in Justice Roberts' Court

Marc Cooperman¹
Banner & Witcoff

Really? There've got to be at least 20 people in line already, and it's only 4:55 a.m. The cabbie asks what's going on this morning (a funny word to use when it's pitch black outside). Just another argument at the Court I reply, as I pay, neglecting to add it's the Cuozzo case being heard and it's my first.

The cold, crisp air feels good - for now. I wonder how it will feel after a few hours waiting outside. My protection from the elements is limited to my appropriately conservative suit and tie, as directed by the Supreme Court's website. When I woke up, Yahoo told me it was 48 degrees; but, thankfully, it predicted clear weather. (My due diligence led me to stories of dedicated visitors waiting in the rain for hours.) Even in my groggy state, I realized my trench coat should have made the trip to D.C. with me. Packing light seemed like a good idea yesterday, back home in the quiet suburbs of Chicago.

Besides, my adrenaline had already kicked in. As I jump out of the cab, I'm staring straight at the Capitol dome in the distance, lit up white in stark contrast against the dark sky. The multitude of trees and gardens surrounding it result in circuitous courtyards guarding its hid-

den entrances. Turning around, the Supreme Court building looms large and close, also lit up but presenting a distinctively different impression. Its granite pillars and tiered plazas are directly accessible by several sets of steps up from the sidewalk in front, as if inviting litigants and visitors to approach.

The line of visitors on the sidewalk who've come to hear argument on the proper claim construction standard for inter partes review proceedings is growing as I watch, but is it the "public" or "bar" line? I'm looking for the latter, hoping my membership in the Supreme Court Bar will finally pay off. Walking past the group in front busily taking selfies, I ask the last well-suited young man in line for information. I'm relieved to learn this is the public line and I haven't blown my chance to see the argument today (which begins five hours from now at 10 a.m.), for which there is limited space (only about 40 seats) available for members of the Court's bar.

With no signs posted, I wander up the steps and spot a security guard. He knows very well what I'm looking for and directs me to a different area for the bar line. I'm surprised to find out no one else is here yet and am immediately concerned that I've got the wrong day for the Cuozzo argument. After quickly checking the Court's calendar, I wonder what I'm going to do for the next several

¹The views expressed in this article are the author's alone and should not be attributed to the Federal Circuit Bar Association, Banner & Witcoff, or any of its clients.

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[Information and Registration]



Some of the topics that will be discussed at the upcoming Bench and Bar Conference are:

- The Next Generation of Leader
- The Intersection of Trade and Intellectual Property
- Appellate Strategies for Special Circumstances at the Federal Circuit: Mandamus, Stays and Expedited Appeals
- Confidential Information and Law Firm Cybersecurity

Many popular sessions returning will include The Federal Circuit Perspective; The Supreme Court Review; The Townhalls and The Reviewed Adjudicators and Change.

For additional information on registration or sponsorships, please visit the [Bench & Bar website](#) or contact Pam Twiford at twiford@fedcirbar.org.

hours. All I have is my phone, which later will have to go into a small locker as the Court has very strict rules on what may enter the courtroom. So I do the natural thing – I open Snapchat and send a few selfies. And, because I'm facing east, I'll get to see the sunrise over the building, which means more photos as the sky grows lighter.

The bar line is lonely, except for the occasional jogger. But it's not too cold. My last minute decision to wear athletic pants under my suit was a good one. At about 6:30 a.m., my first colleague arrives and we introduce ourselves and chat. By 7:30, there are about 10 in line behind me. We have a nice time talking about other patent cases the Court has heard, and the arguments they've seen. What an enthusiastic group of intellectual property nerds we are! A few share their experiences about what we can expect when we're brought inside – a lot more waiting in line, but with the benefit of heat and nearby bathrooms. Several of my cohorts are from the Patent Trial and Appeal Board, and they express confidence that the "broadest reasonable interpretation" standard applied at the PTAB, but not by the courts, will take the day. Being a litigator I lean the other way; strongly questioning the wisdom of patent claim interpretation standards that differ depending on the venue.

Shortly after 8 a.m., the guard takes our line up the steps and into the bar entrance. We pass through security and enter the ground floor of the courthouse, which has a number of exhibits, paintings, and videos. The other end of the floor is our next destination, and there we form another line (now stretching about 50 lawyers long) to have our bar memberships verified; but not for another hour. In the meantime, we hold places in line for each other as we put our items in lockers, use the bathroom, or grab something from the cafeteria. Immediately in front of us is a remarkable statue of Chief Justice John Marshall, and behind him photos and quotations from historic Supreme Court decisions.

After getting through my last hurdle, having my Supreme Court Bar membership verified (I had called ahead the week before to make sure I was still on the roll and to get my bar number), I'm still at the head of the group as we're led upstairs. Another security check is waiting for us there but finally we're escorted into the Court Chamber. The size of the unoccupied, white marble room draped in red surprises me. It feels no bigger than a typical federal district courtroom, though configured a bit differently. Walking past the brass railing and toward the raised Bench, I'm a bit disappointed as I'm seated to the left side, in the second row of chairs. But this turns out to be quite a good (though uncomfortable) seat. During the argument I'm no more than 15 feet from Justice Kagan, and I have an excellent view from just behind the new bar members, who are sworn in at the beginning of the day's proceedings and get first row privilege.

The courtroom quickly fills up including the public seating behind the rail and the press benches to our left. Everyone is chatting as our sense of anticipation grows, even as we are periodically reprimanded to keep our voices down. At 10 a.m., the gavel sounds and the eight Justices enter as announced by the courtroom Marshall. There they are. If you've ever seen your favorite rock star or Hollywood celebrity up close, multiply that sensation by eight to understand what we're experiencing. And they're not only performing, they're playing our "favorites" because they're

talking about IP law. In fact, the case heard immediately before *Cuozzo* deals with attorneys' fees in copyright cases.

Most of the Justices are engaged. Their main interest concerns the proper claim construction standard in IPR proceedings, and they direct the argument to related practical considerations. The similarities and differences of IPR proceedings to patent prosecution on the one hand, and patent litigation on the other, is discussed quite a bit. Ability to amend claims during IPR is covered too. There is scant argument about the U.S. Patent and Trademark Office's rulemaking authority (i.e. using "BRI") and no discussion of the deference courts owe to the USPTO's administrative decisions, despite the parties' extensive discussion of these issues in their briefs. Little time is spent on the second issue before the Court dealing with appealability of PTAB decisions.

The questioning is largely even-handed and the Justice's leanings, if any, are generally not given away. The exception is a series of about 20 questions by Chief Justice Roberts, during the USPTO's argument, in which he describes the USPTO's position as "bizarre," concluding "[i]t's a very extraordinary animal in legal culture to have two different proceedings addressing the same question that lead to different results." Not reflected in the transcript, but during this barrage, Justices Thomas and Breyer (who sit next to each other) lean back in their chairs, briefly exchange comments, and start laughing. It's unclear whether this discourse has to do with the argument, the Red Sox, or something else.

Cuozzo's counsel gets up for a brief rebuttal of a minute or two and faces no further questioning. And that's it, the case is submitted. Two hours of questions and answers, with a smattering of argument thrown in, have flown by. This patent lawyer's first Supreme Court experience is memorable and in the books. Expect a ruling before the Court's recess at the end of June.

For inquiries regarding membership, please contact Darren Davis at davis@fedcirbar.org or 202-780-0970.

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Patent Litigation 2016

April 28th, Chicago, IL

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Horizon Series Webcast Event

SUMMARY

From Frown to Handshake - A Fresh Perspective on Mediation and Negotiation

5/11/2016
WEBCAST

DISPUTE
RESOLUTION
COMMITTEE

Michael Bogdanow
United States Merit Systems
Protection Board

Sara Rearden
United States Merit Systems
Protection Board

On May 11, 2016, the Dispute Resolution Committee presented “From Frown to Handshake – A Fresh Perspective on Mediation and Negotiation.” The distinguished panel members gave attendees and listeners an hour of practical, down-to-earth advice on all aspects of mediation and negotiation. They were Chief Judge Paul Michel, Court of Appeals for the Federal Circuit (Retired); Magistrate Judge John Facciola, U.S. District Court for the District of Columbia (Retired); Deborah

Bynum, Assistant Director, National Courts Section, U.S. Department of Justice; and Joseph V. Kaplan, Founding Principal, Passman & Kaplan, P.C. Michael Bogdanow, Senior Legal Liaison at the Merit Systems Protection Board, served as moderator.

As the webcast’s title suggests, the discussion included ideas for mediating and moving matters forward from “frown,” that is, getting a skeptical or reluctant party to agree to participate in the first place, past impasse, to “handshake” and agreement in many areas of the Federal Circuit’s wide-ranging jurisdiction, including patent and employment cases. The panelists discussed all stages of the process and even offered ideas on drafting a written agreement. Throughout, they provided insightful advice based on their extensive experience in their various roles in the process, whether neutral or as representative for one of the parties. While the panelists did not always agree, each always offered an honest point of view, supported by both logic and their real life experiences. As a result, the webcast provided an invaluable living textbook of practical lessons to be learned from experts currently practicing in the field. Many thanks to the distinguished panel of presenters and to the moderator for moving the discussion forward, which enabled the presenters to discuss a maximum number of helpful ideas. Thanks also to the Dispute Resolution Committee co-chairs Sara Rearden and Howard Miller for organizing this excellent presentation.



SPOTLIGHT ON COMMITTEES

Law Clerks and Students Committee

Committee Chair
Morgan Chu, Irell & Manella LLP

Committee Vice-Chair
Frank A. Angileri, Brooks Kushman PC
Thomas G. Hungar, Gibson, Dunn, & Crutcher, LLP
Andreas Kamber, Kecker & Van Nest LLP

The mission of Amicus Committee is to recommend amicus briefs for the Association. In the past membership year, the Committee has filed a number of amicus curiae briefs before the U.S. Supreme Court, effectuating decisions shaping important policies. *Scott v. McDonald* (15-1054), *Sequenom, Inc v. Ariosa Diagnostics, Inc.* (15-1182), *Cuozzo Speed Technologies, LLC v. Lee* (15-446) amicus briefs were recommended by the committee and filed with FCBA Board's approval. The Committee's recommendations are known to be well-balanced.

Increasing Committee Member Involvement

Association Committees reflect the commitment, energy, and insight of the community through the engagement of their leaders and members. Committees contribute professional insight and host relevant programs throughout the member-year. Have yet to join a Committee? Check out the Committees home page on the Association website to learn more! Already a Committee member and want to get more involved? Contact your Committee leaders to find out ways you can contribute! If you have any questions, please feel free to contact Hee Kim, Committee Coordinator, at kim@fedcirbar.org or via phone at (202) 536-4160.



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Committees are an excellent way to get involved, providing opportunities to network with members and take on leadership roles. Join up to three:

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- Bench & Bar Planning Committee
- Corporate Counsel Committee
- Dispute Resolution Committee
- Diversity Committee
- Federal Circuit Bar Association Journal Committee
- Friedman Memorial Committee
- Global Fellows Committee
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- Government Contracts Committee
- Government Employees Pro Bono Committee
- Hutchinson Writing Contest Committee
- International Trade Committee
- Law Clerks & Students Committee
- Legislation Committee
- Membership Committee
- MSPB Appeals Committee
- Patent Litigation Committee
- Patent & Trademark Office Committee
- PTO Pro Bono Committee
- Regional Programs Committee
- Rules Committee
- Scholarship Committee
- Veterans Appeals & Veterans Pro Bono Committees

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Federal Circuit Bar Association Leaders Circle sponsors benefit from and help guide the Association's premier national outreach. Leaders Circle participants, both firms and corporations, stand among the most skilled in the profession. With their acumen, Leaders Circle sponsors engage core developments significant to the Federal Circuit justice community through over 20 committees (ranging from Amicus to Patent Litigation, International Trade, Government Contract, Patent and Trademark Office).

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- Sessions
 - Skills Excellence (broad spectrum of professional webcasts, telecasts, and sessions)
- Session Planning Participation

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- Watch List - The weekly Watch List includes selected items of subject matter interest - policy, judicial, national, regional, and international.
- Reviewed Adjudicators Digest - Track key decisions first. This digest highlights selected decisions of tribunals reviewed by the Circuit. Tribunals already include PTAB, COFC, CAVC, ITC, MSPB, CBCA.
- Fastcase Legal Research Support
- Pro Bono Digest - Participate in the Association's several active pro bono outreaches - general, government personnel, veterans, and PTO patent prosecution.

Join the 2016 Leaders Circle. Please contact Pam Twiford at twiford@fedcirbar.org or call (202) 765-1139

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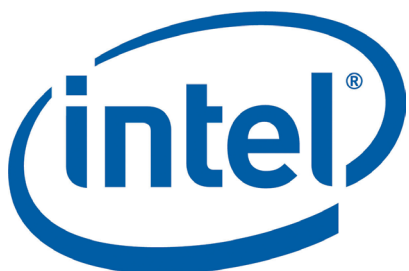


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CALENDAR OF EVENTS

June 22-25, 2016	Bench and Bar Conference
October 4-7, 2016	Global Fellows: Leadership Training (Washington)
October 13-14, 2016	Global Series (Paris)
November 18, 2016	Friedman Lecture on Excellence in Appellate Advocacy (CAFC)
November 18, 2016	2016 Annual Dinner
March 14-17, 2017	Global Fellows: Leadership Training (Munich)

**Dates are subject to change. Webcasts may be added and/or rescheduled at any time, check www.fedcirbar.org for calendar of events.*

THANK YOU

The members of the Association and supporters of the Charitable and Educational Fund encourage a broad variety of activities in support of the legal community of the United States Court of Appeals for the Federal Circuit. Our membership creates scholarly articles, analyzing the legal impact of the court's decisions, as well as current legal educational programs. They plan and attend our regional and national conferences, including the Bench & Bar. Thank you for this ongoing support.

A number of sponsors have chosen to participate on an annual basis in these outreaches through "The Leaders Circle." We also want to express our appreciation to those who have chosen this important way to participate.

For additional information on sponsorship, please contact Pam Twiford at twiford@fedcirbar.org.

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With a subscriber base of over three thousand attorneys, judges, law students and professors, Federal Circuit Bar Newsletter is a monthly publication widely-read by leaders and preeminent practitioners of the Federal Circuit Bar.

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2016 BENCH & BAR CONFERENCE ARE YOU REGISTERED?

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