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# Reissue and Reexamination Strategies and Tactics with Concurrent Litigation

San Francisco, January 11-12, 2010

Live Webcast, January 11-12, 2010 — [www.pli.edu](http://www.pli.edu)

New York City, February 11-12, 2010

Chicago, March 11-12, 2010

- Learn best practices and strategies for *ex parte* and *inter partes* reexaminations
- Understand the role of reexamination as a component of litigation strategy
- Gain insight into operation and procedures of the USPTO Central Reexamination Unit
- Hear critical perspectives from District Court Judges, USPTO officials and corporate counsel
- Earn ethics credit!

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# Reissue and Reexamination Strategies and Tactics with Concurrent Litigation

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## Why You Should Attend

The substantial costs and uncertainty of patent litigation require the development of alternative case management strategies. With the emergence of contingency-based patent litigation and the proliferation of non-practicing entities or “trolls,” patent reexamination, in many cases, is a cost-effective strategy for defendants seeking to derail a litigation or limit damage exposure. For example, an early filing of a reexamination may enhance the prospects of staying any related litigation. An active reexamination may facilitate settlement on terms favorable to the third party, create intervening rights, or provide new non-infringement and/or estoppel theories. Similarly, patent owners may leverage reexamination or reissue to inoculate patents from third-party attacks and/or to strengthen their patent portfolio in anticipation of litigation. This program provides comprehensive coverage of reissue and reexamination strategies and tactics with concurrent litigation. The program is taught by a faculty of judges, lawyers, and industry leaders who have earned national reputations in patent litigation and in post-grant proceedings at the USPTO.

## What You Will Learn

- Best practices and strategic considerations for *ex parte* and *inter partes* reexamination from the perspectives of both third parties and patent owners
- Key considerations impacting the selection of *ex parte* or *inter partes* reexamination as an alleged infringer or potential infringer
- The benefits of a patent owner initiated *ex parte* reexamination
- Strategic use of reissue practice and merged proceedings as a defensive tactic
- Insight into the organization, operation and procedures of the USPTO’s Central Reexamination Unit
- Ethical considerations impacting reissue and reexamination proceedings with (or without) concurrent litigation
- The current state of reexamination concurrent with litigation including:
  - empirical studies
  - a view from the bench
- The role of reexamination as component of a litigation strategy

## Who Should Attend

Patent owners and investors involved in patent litigation or considering the initiation of patent litigation; corporate counsel responsible for managing a patent portfolio and responding to third party inquiries; patent litigators advising clients in disputes that involve or may lead to litigation; and patent professionals representing others before the USPTO in the areas of reexamination and reissue.

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Program Attorney: John Mola

# PROGRAM SCHEDULE

## DAY ONE: 9:00 A.M. – 5:00 P.M.

Morning Session: 9:00 a.m. – 12:30 p.m.

### 9:00 Program Overview

**SF & WEB:** Stephen G. Kunin,  
Leonard Richard Svensson

**NYC:** Stephen G. Kunin, Gerald M. Murphy, Jr.

**CHI:** W. Todd Baker, Leonard Richard Svensson

### 9:15 Offensive/Defensive use of Ex Parte Reexamination

Effective use of *ex parte* reexamination is explained, including defensive and offensive tactics. Use and non-use by patent owners and third parties are explored in conjunction with concurrent/anticipated litigation. Guidance is provided on how to structure an effective request for reexamination, including establishing a substantial new question of patentability in view of evolving PTO standards, and differences in claim interpretation doctrines. Prosecution strategies are described with a purview of avoiding, where practicable, the cancellation or amendment of claims leading to intervening rights. The tactical use of serial *ex parte* reexamination requests is presented from the perspective of a third party requester.

**SF, NYC, CHI & WEB:** Gina N. Shishima

### 10:15 Inter Partes Reexamination Overview

Emerging use of *inter partes* reexamination is explained, including use of expert declarations, petitions and appeals. Timelines, estoppel concerns and procedural differences with *ex parte* reexamination will be discussed. Use and non-use by third parties are explored in contrast to *ex parte* advantages and concurrent litigation. The challenges of claim construction, patentee admissions and burden of proof are presented from both patent owner and third party perspectives. Prosecution strategies are described taking into account the risks of estoppel and intervening rights.

**SF, NYC & WEB:** Stephen G. Kunin

**CHI:** W. Todd Baker

11:15 Networking Break

### 11:30 Mechanics of an Inter Partes Reexamination Proceeding

Formalities of an *inter partes* reexamination proceeding are explained, including how to demonstrate a substantial new question of patentability and the criteria used by the CRU for ordering *inter partes* reexamination. How prosecution is conducted and timelines for taking action will be described including the chronology of

## DAY TWO: 9:00 A.M. – 5:00 P.M.

Morning Session: 9:00 a.m. – 12:15 p.m.

### 9:00 Inside the Central Reexamination Unit of the USPTO

The organizational structure, staffing and operating procedures of the CRU will be described. The most recent reexamination statistics will be explained. How the various types of petitions in reexamination proceedings are handled by the CRU is discussed. Hot topics in reexamination are explored, including initiatives to reduce reexamination pendency, dealing with disclosure of information governed by protective orders, proper identification of the real party interest and compliance with the duty of disclosure. How the CRU applies the SNQ standard is reviewed in relation to issues of cumulateness and consideration of previously considered prior art shed in a new light.

**SF, NYC, CHI & WEB:** Robert J. Spar

### 10:00 Ethical Considerations of Reissue, Ex Parte and Inter Partes Reexamination Proceedings

This session will discuss the advantages and disadvantages of reissue versus reexamination proceedings, where issues of inequitable conduct exist or are likely to occur. The ethical considerations with respect to reissue and reexamination proceedings are examined, with particular emphasis on the tension between an attorney's obligation to vigorously represent his/her client and the obligation to disclose

material information to the USPTO. This lecture will also discuss what types of information should be disclosed to the USPTO when there is actual or contemplated litigation involving the same or related patents where there are possibly thousands of litigation related documents of potential relevance. The lecture will explore options as to how an attorney should proceed where he/she is in possession of confidential information that could be material to prosecution. Practical suggestions will be given regarding how to avoid overloading an Examiner with information, which could lead to a charge of "burying" material information. A discussion on the duty of disclosing concurrent proceedings will be provided. Finally, there will be an explanation as to what meets the "real party in interest" requirement for *inter partes* reexamination.

**SF & WEB:** Lorie Ann Morgan

**NYC:** Mary Ann Capria

**CHI:** Thomas E. Spahn

11:00 Networking Break

### 11:15 Issues/Considerations Associated with Concurrent Reexamination: A Litigator's Perspective

When should a request for reexamination be filed? Should you file the reexamination request before a lawsuit, after the trial begins, at the end of the trial or after the trial? Should an *ex parte* or *inter partes* request be filed? How can admissions obtained in litigation be

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typical transactions. Formalities and some strategies arising later in prosecution are explained, including how to prepare an effective amendment/response to the first office action; responding to the ACP and Right of Appeal Notice; use of Rule 181, 182 and 183 petitions to protect your client's rights; when to file a Notice of Appeal and Notice of Cross-Appeal. Strategies for dealing with reopening prosecution are taught.

**SF & WEB: Gerald M. Murphy, Jr.,  
Leonard Richard Svensson**

**NYC: Gerald M. Murphy, Jr., Eugene T. Perez**

**CHI: Eugene T. Perez, Leonard Richard Svensson**

12:30 Lunch Break

Afternoon Session: 1:45 p.m. – 5:00 p.m.

### 1:45 **Inter Partes Reexamination: Case Studies**

A small number of case studies will be presented which illustrate how to navigate the vagaries of procedures used by the PTO in *inter partes* reexaminations. The case studies will be presented with a view to helping practitioners avoid mistakes such as improper paperwork for initial filing requirements and untimely submission of claim amendments and/or evidence.

effectively used in reexamination proceedings? Can you seek attorney's fees or sanctions against the patent owner who continues to assert patent claims in litigation that have been cancelled or amended in concurrent reexamination proceedings? When do amendments and cancelled claims come into effect? How do absolute and equitable intervening rights affect the concurrent litigation? What are the estoppel and injunction risks to the third party in litigation who is unsuccessful in challenging a patent through reexamination? How can reexamination proceedings be used by a third party to bolster an inequitable conduct defense in litigation?

**SF, NYC & WEB: Jackie N. Nakamura**

**CHI: Mark L. Whitaker**

12:15 Lunch Break

Afternoon Session: 1:45 p.m. – 5:00 p.m.

### 1:45 **Reexamination Concurrent with Litigation: Several Short Case Studies**

A case study of concurrent litigation and *inter partes* reexamination: *Callaway v. Acushnet* (Titleist) for the "ProVI" golf balls. An explanation of the initiation of patent infringement in district court by the patent owner, and simultaneous initiation of reexamination in the PTO by the accused infringer is presented. Highlights of the differences in presumption of validity, burden of proof and claim interpretation in these proceedings will be explained from a legal and strategic

perspective. Also provided are the current results in the litigation and in the *inter partes* reexamination proceedings. Some reexamination statistics regarding success and pendency will be presented.

**SF & WEB: Gerald M. Murphy, Jr.,  
Leonard Richard Svensson**

**NYC: Gerald M. Murphy, Jr., Eugene T. Perez**

**CHI: Eugene T. Perez, Leonard Richard Svensson**

### 2:45 **Strategic Use of Merger in Post Grant Proceedings (Reissue, Ex Parte and Inter Partes Reexamination)**

A primer on reissue practice is provided, including the various bases for seeking reissue to correct a granted patent as contrasted to reexamination. The law of broadened and narrowing reissues and the recapture doctrine will be explored. Tactical advantages such as the availability of Requests for Continued Examination and timing of reissue by the patent owner to force merger during *ex parte* or *inter partes* reexamination proceedings are explained. Risks associated with a merged reissue are discussed such as 101/112 concerns and subjecting all original patent claims to examination by the general examining corp.

**SF, NYC & WEB: Scott A. McKeown**

**CHI: Vincent K. Shier**

perspective. Also provided are the current results in the litigation and in the *inter partes* reexamination proceedings. Some reexamination statistics regarding success and pendency will be presented.

**SF & WEB: Matthew Blischak**

**NYC: Jason Lief**

**CHI: Mark R. Buscher**

### 2:45 **Judges' Panel: A View from the Bench**

This panel discussion will include a short presentation from one or more judges regarding how they view concurrent administrative proceedings in the USPTO when handling their cases. A District Court Judge and an Administrative Patent Judge (APJ) will be invited to participate on the panel. The District Court Judge will be asked to comment on what he/she takes into consideration when considering a motion for stay of the district court proceedings and how he/she views the admissibility of evidence regarding PTO proceedings in the event the district court case goes to trial. The APJ will be asked to comment on how much weight is given by the Board of Appeals to any claim construction, rulings, findings, evidence or judgments made by a district court or the International Trade Commission.

**SF & WEB: Hon. Lee Yeakel, Additional Judge  
TBA**

**NYC: Hon. Avern Cohn, Hon. Pauline Newman**

**CHI: Hon. Rebecca R. Pallmeyer, Hon. Lee Yeakel**

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3:45 *Networking Break*

### 4:00 **Reexamination Trends Within the PTO and District Courts**

An analysis of recent trends in the filing of reexamination requests where the patents subject to reexamination have been asserted in an infringement action will be provided. In particular, the timing of the reexamination requests and the stage of their proceedings in relation to parallel enforcement activities in district courts or the International Trade Commission will be explained in relation to the prospects of obtaining stays of the litigation pending the outcome of the reexamination proceedings. Indications of which district courts favor or disfavor granting stays will be proffered in relation to the type of reexamination proceeding initiated, whether patent claims have been rejected, cancelled or amended in the reexamination proceedings and the stage of the litigation.

**SF, NYC, CHI & WEB: Scott P. McBride**

5:00 *Adjourn*

3:45 *Networking Break*

### 4:00 **Reexamination Strategies: A Corporate Perspective**

Corporate leaders will share their view on initial strategic considerations needed for deciding whether to proceed with reexamination requests, including burden of proof in the PTO versus court; concerns of estoppel (applicable to *inter partes* reexamination); discovery; costs of reexamination versus litigation; use of a patent examiner versus a judge/jury; creating absolute or equitable intervening rights. Other strategic considerations will be explored, including using reexamination to suspend litigation; concurrent litigation issues including duty to disclose; using evidence and arguments in reexamination for litigation.

**SF & WEB: Matthew Blischak**

**NYC: Mary Ann Capria**

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5:00 *Adjourn*

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