



# Delegated Rehearing Panel

**UPDATE** On September 18, 2023, Section 2.F.iii was updated.

On July 24, 2023, the United States Patent and Trademark Office (USPTO or Office), as part of the **revised interim Director Review Process** (</patents/ptab/decisions/revised-interim-director-review-process>), established a Delegated Rehearing Panel (DRP) to which the USPTO Director may delegate decisions of the Patent Trial and Appeal Board (PTAB or Board) in proceedings under the America Invents Act (AIA), including institution decisions and final written decisions, for further consideration, including those decisions in which a potential issue may have been misapprehended or overlooked by the Board.

## › 1. Purpose of the DRP

In **United States v. Arthrex, Inc.** ([https://www.supremecourt.gov/opinions/20pdf/19-1434\\_ancf.pdf](https://www.supremecourt.gov/opinions/20pdf/19-1434_ancf.pdf)), the Supreme Court explained that “the Director has the authority to provide for a means of reviewing PTAB decisions” and “may review final PTAB decisions and, upon review, may issue decisions himself on behalf of the Board.” 141 S. Ct. 1970, 1987 (citations omitted). As outlined in the interim Director Review process put in place by the USPTO after **Arthrex** ([https://www.supremecourt.gov/opinions/20pdf/19-1434\\_ancf.pdf](https://www.supremecourt.gov/opinions/20pdf/19-1434_ancf.pdf)), the Director may grant requests for Director Review or order *sua sponte* review of any Board decision.

In consideration of the objectives of the Director Review process, and given the discretionary nature of the Director’s ability to review decisions of the Board, the USPTO has set forth the interim processes and procedures for the Director, at her or his discretion, to delegate review of a Board decision to a DRP. That delegation may occur in cases where Director Review has been requested by a party, or may occur *sua sponte*, on the Director’s own initiative.

Until the interim Director Review process is formalized, the Office continues to clarify and update the process. This furthers the USPTO’s goal of promoting innovation through consistent and transparent decision-making, and the issuance and maintenance of strong patents.

## › 2. Delegation of Review to the DRP

### › A. Composition of the DRP

35 U.S.C. § 6(c) provides that proceedings at the Board “shall be heard by at least 3 members of the Patent Trial and Appeal Board [Board], who shall be designated by the Director.” Accordingly, the DRP shall consist of three members of the Board.

The administrative patent judges of the Board include, among others, a Chief Administrative Patent Judge (“Chief Judge”), a Deputy Chief Administrative Patent Judge (“Deputy Chief Judge”), Vice Chief Administrative Patent Judges (“Vice Chief Judges”), and Senior Lead Administrative Patent Judges (“Senior Lead Judges”).

The DRP shall be selected from the Chief Judge, Deputy Chief Judge, Vice Chief Judges, and Senior Lead Judges, excluding judges who served on the original Board panel for the case under review or otherwise have a conflict with the case.

The paneling of members onto the DRP will be carried out impartially and consistent with the procedures and requirements set forth in **Standard Operating Procedure 1** (</sites/default/files/documents/SOP%201%20R15%20FINAL.pdf>) (SOP 1) except that the pool of available judges is limited to the judges noted above.

The DRP process does not otherwise alter the processes and procedures set forth in SOP 1.

For purposes of the DRP designation process, persons serving in an acting capacity for the positions of Chief Judge, Deputy Chief Judge, Vice Chief Judge, or Senior Lead Judge may serve on a DRP.

Any administrative patent judge who advises the Director on a particular case under consideration will not serve on the DRP panel for such a case.

#### ➤ B. Criteria for Delegation to the DRP

The Director is not limited as to which decisions may be delegated to the DRP for review. The Director may determine, for example, that a decision does not present an issue that rises to a level requiring review by the Director but, nonetheless, warrants further consideration within the Board by an independent panel. Such a decision may be delegated to the DRP. For example, the Director may designate a DRP to consider whether a material issue of fact or law was misapprehended or overlooked by the original Board decision.

Consistent with *Arthrex*, the Director retains the authority to review any decision of the DRP on *sua sponte* Director Review, however, parties are not permitted to request further Director Review of a decision of the DRP or the Board on remand. See Section 2.F.iii.

#### ➤ C. Delegating Decisions to the DRP

All requests for Director Review will be reviewed by an Advisory Committee, which will provide its recommendation to the Director. See **Revised Interim Director Review Process** (</patents/ptab/decisions/revised-interim-director-review-process>). Regardless of the recommendation provided by the Advisory Committee, the Director may determine that a decision should be delegated to the DRP.

When the Director determines to delegate a requested Director Review to the DRP, the Director will issue an order delegating review. Similarly, when the Director determines to delegate review of a decision *sua sponte* to the DRP, the Director will issue an order delegating review to the DRP. The Board will also enter an order identifying the panel of judges to which the proceeding has been delegated, consistent with SOP 1 and the composition of the DRP as noted above. In the event that the Director delegates a decision to the DRP to conduct review, including when the Director delegates review of a decision *sua sponte* to the DRP, the DRP panel will determine whether to grant rehearing.

#### ► D. Standard of Review

Subject to any further instruction from the Director in the order delegating the case to the DRP, the DRP shall determine whether the record, including any request for Director Review, demonstrates that the original Board decision misapprehended or overlooked any issue that was previously addressed in papers filed with the Board. *Accord* 37 C.F.R. § 42.71 (d). The DRP may request additional briefing if necessary, but this is expected to be rare. The DRP may order an oral hearing at its discretion.

Once delegated, the DRP will maintain authority and jurisdiction over all issues in the case while the decision is under DRP review. The DRP may, however, delegate authority back to the Board to handle other matters, for example, to address routine interlocutory matters, to conduct conference calls, or to attend to other matters outside of the scope of the DRP review. If authority is so delegated, the Board shall keep the DRP apprised of these matters and provide reasonable prior notice of any intended action, but shall handle matters so delegated independently and without direction from the DRP or the Director unless that direction is specifically set forth in a Director or DRP order. See [Interim process for PTAB decision circulation and internal PTAB review \(/interim-process-ptab-decision-circulation-and-internal-ptab-review\)](#) (“[T]he Director is not involved, pre-issuance, in directing or otherwise influencing panel decisions, and the PTAB panel has final authority and responsibility for the content of a decision.”). Likewise, the DRP will make its decisions independently and without direction from the Director unless that direction is specifically set forth in a Director order.

#### ► E. Decisions by the DRP

The DRP will render a decision in the case (concluding its review) or, if appropriate, may remand to the Board for further proceedings.

In particular, if the DRP determines that the Board misapprehended or overlooked an issue that was previously addressed in papers before the Board, the DRP may issue a decision correcting that issue, or may remand to the Board, as discussed below.

DRP decisions are routine decisions as set forth in [Standard Operating Procedure 2, Revision 11 \(/sites/default/files/documents/20230724\\_ptab\\_sop2\\_rev11.pdf\)](#) (SOP 2). Decisions by the DRP may be nominated for precedential or informative designation using the procedures outlined in SOP 2.

The DRP process places no limitation, however, on the authority of the Director to designate or de-designate an issued decision or portion thereof as precedential or informative at any time, at the Director's sole discretion.

#### › i. Remand to the Board

In cases where the DRP remands a decision to the Board for further proceedings, absent a due date specified in the Director's or DRP's remand order or extension thereof, the Board has established a goal to issue decisions in cases remanded from the DRP as soon as possible. Even for the most complex records, for example, those that may require additional discovery, briefing, and/or an oral hearing, the Board's goal is to issue the decision within six months of the date of the remand. *Accord* [SOP 3 \(rev 2, formerly SOP 9\): Procedure for Decisions Remanded from the Federal Circuit for Further Proceedings \(/sites/default/files/documents/ptab\\_sop\\_3-2023-oct.pdf\)](#). The procedure and pace of a remand will vary depending on the type of case, the legal and factual issues involved, the specific instructions from the DRP, and any other particular circumstances of the case. Upon remand, the Board will issue an order setting forth the date by which a decision on remand will issue.

When issuing a decision upon remand from the DRP, the Board shall decide the matter independently and without direction from the DRP or the Director unless that direction is specifically set forth in a Director or DRP order. See [Interim process for PTAB decision circulation and internal PTAB review \(/interim-process-ptab-decision-circulation-and-internal-ptab-review\)](#).

#### › F. Review of DRP Decisions

##### › i. Appeal

DRP decisions of Final Written Decisions in AIA trial proceedings are appealable to the United States Court of Appeals for the Federal Circuit using the same procedures for appealing other Board decisions. 35 U.S.C. §§ 141(c), 319. DRP decisions of Board decisions on institution are not appealable. 35 U.S.C. 314(d); *Thryv, Inc. v. Click-to-Call Techs., LP*, 140 S.Ct. 1367 (2020).

A *sua sponte* order by the Director delegating a decision to the DRP is treated like a timely request for rehearing for the purposes of 37 C.F.R. § 90.3(b) and, therefore, resets the time for appeal to no later than sixty-three (63) days after final resolution of the DRP process.

### › ii. Requests for Rehearing

Within the time frame allotted under 37 C.F.R. § 42.71(d), a party may file one request for rehearing of a DRP decision, subject to the requirements explained below. As above, in cases where the DRP remands a decision to the Board for further proceedings, a party may file one request for rehearing of the Board's decision on remand, and may not file a request for rehearing of the underlying DRP decision remanding the decision to the Board.

A request for rehearing is not an opportunity to raise new issues, re-argue issues, or disagree with the determinations by the DRP or Board on remand. Instead, the rehearing request must specifically identify what matter was misapprehended or overlooked by the DRP or Board on remand. *Accord* 37 C.F.R. § 42.71(d).

A party may file a single request for rehearing without prior authorization, and that party carries the burden of showing that the decision of the DRP or Board on remand should be modified. 37 C.F.R. §§ 42.20(c), 42.71(d). A response to a request for rehearing is not permitted unless expressly authorized.

A party requesting rehearing must file a request for rehearing in the proceeding for which review is sought, and email the USPTO at [DRP\\_PTABDecision@uspto.gov](mailto:DRP_PTABDecision@uspto.gov) ([mailto:DRP\\_PTABDecision@uspto.gov](mailto:DRP_PTABDecision@uspto.gov)), copying counsel for all parties.

A request for rehearing is subject to the same page limits and formatting requirements in 37 C.F.R. §§ 42.24(a)(1)(v) and 42.6, and is subject to the same timing requirements set forth in 37 C.F.R. § 42.71(d).

During the pendency of a request for rehearing of a DRP decision, jurisdiction over the proceeding remains solely with the DRP. The Board may not take any action in the proceeding while the request for rehearing is pending, without express authorization from the DRP.

### › iii. Further Director Review

**UPDATE**

Parties are not permitted to file requests for Director Review of a decision of the DRP. Where the Board issues a decision on remand from the DRP, a party may file one request for Director Review of the Board's decision on remand.

Moreover, consistent with *Arthrex*, the Director retains discretion to review *sua sponte* any DRP decision or any remand decision of the Board.

#### › G. Conflicts of Interest

If the Director, a member of the Advisory Committee, or any DRP or Board member has a conflict of interest, they shall recuse themselves from the DRP review of that decision.

In determining whether a conflict of interest exists, the USPTO follows the guidance set forth in the Standards of Ethical Conduct for Employees of the Executive Branch at 5 C.F.R. Part 2635 and will consult with the Department of Commerce Ethics Law and Programs Office, as necessary, to resolve any questions pertaining to conflicts of interest. Conflicts may include, for example, involvement in the examination or prosecution of the underlying patent or a related patent at issue.

Additionally, the Office has set forth procedures that the Office will follow in the event of an actual or potential conflict of interest by the Director or Deputy Director of the USPTO. See "[Director Recusal Procedures \(/sites/default/files/documents/Director-Memorandum-on-Recusal-Procedures.pdf\)](/sites/default/files/documents/Director-Memorandum-on-Recusal-Procedures.pdf)" at *Office of the Under Secretary and Director*.

As a matter of policy, PTAB Executive Management Judges will additionally follow the guidance on conflicts of interest set forth in the PTAB's [Standard Operating Procedure 1 \(/sites/default/files/documents/SOP%201%20R15%20FINAL.pdf\)](/sites/default/files/documents/SOP%201%20R15%20FINAL.pdf) and will recuse themselves from any discussion or analysis involving cases or related cases on which they are paneled.

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