

Patent Appeal Lessons From Fed. Circ. Remote En Banc Args

By Katherine Helm, Jacob Porter and Jeffrey Edwards

(March 22, 2021, 3:05 PM EDT)

En banc review at the U.S. Court of Appeals for the Federal Circuit is a rare practice indeed. The full court has not sat to hear or rehear a patent case during the COVID-19 pandemic, and it has not granted any petitions for rehearing en banc so far in 2021.[1]

The Federal Circuit has, however, sat remotely en banc for two cases in the past year — both of which have been veterans' cases.[2]

While patent cases account for approximately 60% of the Federal Circuit's docket, veterans' cases have accounted for the vast majority — five out of six — of en banc cases over the past two years.[3] Much can be learned from these en banc cases by all Federal Circuit practitioners.

We dive into these cases in unique detail. While there has been significant coverage of the many high-profile en banc denials, there has been less focus on these two en banc arguments and the one en banc opinion that issued in 2020.

All patent practitioners will find these two cases interesting teaching tools, as they provide insight into how the court might handle aspects of remote en banc review in a patent case, during the pandemic and possibly further into the future.

Federal Circuit En Banc Remote Oral Arguments

Pre-pandemic, Federal Circuit in-person en banc oral arguments were open, free-form affairs. By statute, the en banc court consists of all circuit judges in regular active service, who are not recused or disqualified, as well as any senior circuit judge who participated in the panel decision and elects to sit with the full court.[4]

In practice, en banc oral arguments typically involved the full panoply of eligible judges regularly jumping in to ask questions in any order, engaging counsel or their colleagues. Some observers called the practice unwieldy, and members of the court itself refer to such practice as often being a "waste of time." [5]



Katherine Helm



Jacob Porter



Jeffrey Edwards

On May 18, 2020, the Federal Circuit ordered all oral arguments be conducted telephonically until further notice.[6] This order remains in force, and in February 2021, the court extended its courthouse closure at least until the end of March, with oral arguments being provided via live audio streaming via the court's new YouTube channel, at least through the end of April and until the courthouse reopens.[7]

Given these orders, and amid the continuing uncertainty about the COVID-19 vaccine rollout and courthouse reopening, it is likely that any forthcoming en banc oral arguments in patent cases would follow the procedures followed in the arguments in *NOVA v. Secretary of Veterans Affairs* in October 2020 and *Arellano v. McDonough* in February 2021. The structure, sequence and denouement of these arguments is worthy of analysis for all Federal Circuit practitioners.

These oral arguments were notable both in their length and their organization. First, in both cases, the argument of each side ran for an hour. This is about twice the default 30 minutes per side the court normally allots for in-person en banc argument.[8] Second, in contrast to the free-for-all nature of the pre-pandemic, in-person en banc arguments, the court in these two cases imposed a more structured, turn-taking procedure for the parties and court.[9]

The Federal Circuit's remote oral argument structure is somewhat like that adopted by the U.S. Supreme Court for remote oral arguments. In both instances, and in contrast to many other district and appellate courts, the remote arguments are conducted telephonically, with audio only and no video.

At the Supreme Court, the parties are given scant argument time before the judges begin asking questions in a structured fashion, in turn in order of seniority, starting with the chief justice.

So too here, the Federal Circuit court procedure began with parties begin with two or three — ostensibly uninterrupted, but pragmatically not so — minutes of argument, followed by at least one round of questioning by the court in order of seniority, starting with Chief U.S. Circuit Judge Sharon Prost, and with the petitioner having an opportunity for rebuttal at the end.[10]

The en banc cases argued recently are detailed below.

NOVA v. Secretary of Veterans Affairs

The en banc argument in *NOVA* was held on Oct. 8, 2020. U.S. Circuit Judge Kimberly Moore did not participate.[11] The argument was bifurcated into jurisdictional and substantive parts.

In the first portion, addressing jurisdictional standing, each party had ten minutes total to argue, including two interrupted minutes to start, after which three members of the court — U.S. Circuit Judges Timothy Dyk, Richard Taranto and Raymond Chen — were invited to ask questions, in order of seniority.

Judges Dyk, Taranto and Chen did not represent the original panel — the case was taken up en banc without a prior panel opinion — but rather were selected as the sole judges in Part I of *NOVA* to address the standing issue. Any member of the en banc court was invited to ask questions during the petitioner's two-minute jurisdictional rebuttal.

In the second, substantive, argument phase, each party had 55 minutes for its case-in-chief: three uninterrupted minutes of argument, followed by two rounds of questioning by the entire en banc court in order of seniority — three minutes for each judge's question and answer and one minute in the second round.

Members of the court passed their turn when they did not have additional questions. Any judge was able to ask questions during the petitioner's rebuttal. The time allocations are shown below.

U.S. Court of Appeals For the Federal Circuit (October 8, 2020) <i>En Banc Oral Argument</i> 2020-1321 - NOVA v. Secretary of Veterans Affairs						
Part 1 (standing)						
Petitioner (opening) 8 minutes			Respondent 10 minutes			Petitioner (rebuttal) 2 minutes
2 minutes: uninterrupted	6 minutes: questions from Court*		2 minutes: uninterrupted	8 minutes: questions from Court*		Judges free to ask questions on their own
*To keep the part of the case on standing “simpler,” the Court’s questions in Part 1 only came from Judges Dyk, Taranto, and Chen, called in order of seniority.						
Part 2 (case-in-chief)						
Petitioner (opening) 47 minutes			Respondent 55 minutes			Petitioner (rebuttal) 8 minutes
3 minutes: uninterrupted	Round 1 of questioning: calling on Judges in order of seniority 3 minutes for question and answer	Round 2 of questioning: calling on Judges in order of seniority 1 minute for question and answer	3 minutes: uninterrupted	Round 1 of questioning: calling on Judges in order of seniority 3 minutes for question and answer	Round 2 of questioning: calling on Judges in order of seniority 1 minute for question and answer	Judges free to ask questions on their own

The full court issued its en banc opinion on Dec. 8, 2020, overruling the VA's rulemaking, and holding that Congress' six-year limitations period governed the applicable appeal provision — extending the appeal period from 60 days to six years.

Arellano v. McDonough

En banc oral argument in the second case, *Arellano v. McDonough*, was held on Feb. 4, 2021. There was no threshold standing issue. The court proceeded similarly to the NOVA substantive argument.

After three minutes of uninterrupted principal argument by each side, the full en banc court engaged in two rounds of questions by order of seniority, as in the substantive portion of NOVA. Each member of the en banc court was given an opportunity to ask additional questions during the appellant's eight minutes of reserved time for rebuttal. The time allocations are shown below.

U.S. Court of Appeals For the Federal Circuit (February 4, 2021) <i>En Banc Oral Argument</i> 2020-1073 - <i>Arellano v. McDonough</i>						
Appellant (opening) 51 minutes			Appellee 59 minutes			Appellant (rebuttal) 8 minutes
3 minutes: uninterrupted	Round 1 of questioning: calling on Judges in order of seniority 3 minutes for question and answer	Round 2 of questioning: calling on Judges in order of seniority 1 minute for question and answer	3 minutes: uninterrupted	Round 1 of questioning: calling on Judges in order of seniority 3 minutes for question and answer	Round 2 of questioning: calling on Judges in order of seniority 1 minute for question and answer	Judges free to ask questions on their own

The Future of Federal Circuit En Banc Review

The Federal Circuit denies the vast majority of petitions for rehearing en banc.[12] The concurrence of a majority of active, regular judges, i.e., seven, is required to conduct an en banc argument. During Judge Prost's tenure as chief, the Federal Circuit sat en banc less frequently and issued notably fewer en banc opinions than in previous years.[13]

In the recent pre-pandemic years of 2018 and 2019, the Federal Circuit issued five en banc opinions, three in patent cases and two in veterans' cases.[14] The court has not granted a single request for en banc rehearing in a patent case since 2018.[15]

Despite the low grant rate of such petitions, en banc review remains an important practice before the Federal Circuit. The Supreme Court's low rate of grants of certiorari amplifies the importance of Federal Circuit en banc review as the last practical opportunity for review of a patent or any other holding with

precedential status within the Federal Circuit's subject matter jurisdiction.

Accordingly, losing parties can and will likely continue to seek en banc hearing, rehearing or reconsideration given the stakes involved.

Even where en banc rehearing is denied, reports "confirm the conventional wisdom that a dissent from denial of en banc rehearing increases the likelihood that a case will get the attention of the [Supreme Court] Justices and their clerks." [16] Between Jan. 1, 2015, and Aug. 12, 2020, there were 33 "denials of en banc rehearing that drew at least one noted dissent." [17]

Some reports suggest that the rate of these dissents from denials of rehearing en banc may be increasing in patent cases and speculate that grants of en banc review may increase in 2021 with Judge Moore's upcoming ascension to chief judge. [18]

Given the overall importance of en banc review by the only patent appellate court in the country, we encourage all interested practitioners to visit the court's website and listen to at least a portion of the recent telephonic en banc oral arguments in the NOVA and Arellano veterans cases. [19]

Much can be gleaned from the cadence of the arguments, to assist patent practitioners in learning the subtle art of how to approach en banc oral arguments in the current remote environment in which we find ourselves for the indefinite future.

Katherine A. Helm, Ph.D., is a partner, and Jacob R. Porter and Jeffrey S. Edwards are associates, at Dechert LLP.

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[1] The en banc denials in 2021 and 2020 include: Bd. of Regents of Univ. of Tex. Sys. v. Baylor Coll. of Med., No. 2020-1469, D.I. 60 (Fed. Cir. Feb. 16, 2021) (per curiam) (denying panel and en banc rehearing); In re: Apple Inc., No. 2020-135, D.I. 71 (Fed. Cir. Feb. 3, 2021) (per curiam) (denying panel and en banc rehearing); EcoServices, LLC v. Certified Aviation Servs., LLC, No. 2019-1602, D.I. 76 (Fed. Cir. Feb. 1, 2021) (per curiam) (denying panel and en banc rehearing); Valeant Pharms. N. Am. LLC v. Mylan Pharms. Inc., No. 2019-2402, D.I. 90 (Fed. Cir. Jan. 26, 2021) (per curiam) (denying panel and en banc rehearing); C R Bard Inc. v. AngioDynamics, Inc., Nos. 2019-1756, 2019-1934, D.I. 77 (Fed. Cir. Jan. 15, 2021) (per curiam) (denying panel and en banc rehearing); Biogen MA Inc. v. EMD Serono, Inc., No. 2019-1133, D.I. 99 (Fed. Cir. Dec. 18, 2020) (per curiam) (denying panel and en banc rehearing); Am. Axle & Mfg., Inc. v. Neapco Holdings LLC, 966 F.3d 1347, 1348 (Fed. Cir. 2020) (per curiam) (denying petition for rehearing en banc; 6-6 vote, with 6 dissents); Arthrex, Inc. v. Smith & Nephew, Inc., 953 F.3d 760, 761 (Fed. Cir. 2020) (per curiam) (denying panel and en banc rehearing; 4 dissents); HZNP Fin. Ltd. v. Actavis Labs. UT, Inc., 950 F.3d 867, 868 (Fed. Cir. 2020) (per curiam) (denying panel and en banc rehearing; 4 dissents); BioDelivery Scis. Int'l, Inc. v. Aquestive Therapeutics, Inc., 946 F.3d 1382, 1382 (Fed. Cir. 2020) (per curiam) (denying panel and en banc rehearing; 1 dissent).

[2] The Federal Circuit granted an en banc rehearing in Nat'l Org. of Veterans' Advocs., Inc. v. Sec'y of Veterans Affs, 957 F.3d 1382 (Fed. Cir. 2020), and issued its ruling in Nat'l Org. of Veterans' Advocs., Inc. v. Sec'y of Veterans Affs. (en banc) ("NOVA"), 981 F.3d 1360 (Fed. Cir. 2020) (holding NOVA had standing

and referring to Federal Circuit panel for merits determination); and in *Arellano v. Wilkie*, 970 F.3d 1362, 1363 (Fed. Cir. 2020) (ordering sua sponte en banc consideration), decision pending in, *Arellano v. McDonough*, No. 20-1073.

[3] See "En Banc Cases," Fed Circuit Blog, available at <https://fedcircuitblog.com/en-banc/cases/> (last accessed March 17, 2021).

[4] See 28 U.S.C. § 46(c); see also Fed. Cir. Rules of Practice (March 1, 2021), Rule 35 and accompanying Practice Note (noting that a senior judge may participate fully in the rehearing if that senior judge participated in the original hearing and disposition); see also Rule 47.11 (re quorum needed); Fed. Cir. Internal Operating Procedures 14(7), available at <http://www.cafc.uscourts.gov/sites/default/files/rules-of-practice/IOPs/IOPsMaster2.pdf>.

[5] See Full Court Patent Review Bids Often 'Waste of Time,' Judge Says, Perry Cooper, Bloomberg Law (Feb. 25, 2021).

[6] Administrative Order No. 20-02 at 1-2 (Fed. Cir. May 18, 2020).

[7] See Announcement: Expanded Availability of Oral Argument Live Audio Streaming (Fed. Cir. Feb. 25, 2021); Restricting Court Access to the National Courts Building Through March 31, 2021, Administrative Order No. 2021-06 (Fed. Cir. Feb. 26, 2021).

[8] U.S. Court of Appeals for the Federal Circuit Clerk's Office, Guide for Oral Argument at 5, Version 2.2, (January 2021) available at <http://www.cafc.uscourts.gov/sites/default/files/arguments/OralArgumentGuide.pdf> (last accessed March 17, 2021).

[9] Perry Cooper, VA Rules Fight Heads for Full Federal Circuit in Remote Argument, Perry Cooper, Bloomberg Law (Oct. 7, 2020).

[10] See Press Release Regarding May Teleconference Arguments Order of Business (U.S. Sup. Ct. Apr. 28, 2020), https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_04-28-20.

[11] Eleven of the court's twelve active judges participated; Judge Moore recused herself.

[12] See Presentation: United States Court of Appeals for the Federal Circuit, available at <http://www.cafc.uscourts.gov/sites/default/files/announcements/2009/March5thInnpresentation.pdf>, slide 14 (FY1999-2008) (last accessed March 5, 2021); see also Announcement: "An Overview of the Federal Circuit's Caseload Presented by Chief Judge Michel to the Edward Coke Appellate Inn of Court of March 5, 2009," United States Court of Appeals for the Federal Circuit, available at <http://www.cafc.uscourts.gov/announcements/overview-federal-circuits-caseload-presented-chief-judge-michel-edward-coke-appellat-0> (last accessed March 17, 2021); Federal Circuit information sheet for petitions for rehearing en banc, http://www.cafc.uscourts.gov/sites/default/files/cmecf/Petitions_Rehearing_En_Banc_-_Information_Sheet.pdf, revised Aug. 21, 2018 ("The Federal Circuit grants few petitions for rehearing each year... En banc reconsideration is rare.") (last accessed March 17, 2021).

[13] Katherine A. Helm and Brian M. Goldberg, Chief Judge Leads Federal Circuit in Reconsidering Its Appetite for Skinny Labels, Dechert OnPoint, March 3, 2021, available at <https://www.dechert.com/knowledge/onpoint/2021/3/chief-judge-leads-federal-circuit-in->

reconsidering-its-appetite-.html; See also, The Compendium of Federal Circuit Decisions, <https://fedcircuit.shinyapps.io/federalcompendium> (last visited 3-17-2021).

[14] See *Francway v. Wilkie*, 940 F.3d 1304 (Fed. Cir. 2019); *Procopio v. Wilkie*, 913 F.3d 1371 (Fed. Cir. 2019); *Click-to-Call Techs., LP v. Ingenio, Inc.*, 899 F.3d 1321 (Fed. Cir. 2018); *NantKwest, Inc. v. Iancu*, 898 F.3d 1177 (Fed. Cir. 2018); *Wi-Fi One, LLC v. Broadcom Corp.*, 878 F.3d 1364 (Fed. Cir. 2018).

[15] See *NantKwest, Inc. v. Matal*, No. 16-1794, D.I. 80 (Fed. Cir. Jan. 5, 2018) (ordering en banc oral argument, which took place March 8, 2018, sub nom *NantKwest, Inc. v. Iancu*); see also *En Banc Cases*, Fed Circuit Blog, available at <https://fedcircuitblog.com/en-banc/cases/> (last visited March 17, 2021).

[16] Seth Lloyd, *Agreeing To Disagree*, *En Banc Style: How Often Do Judges Dissent From Denial Of Rehearing En Banc?*, Federal Circuitry (Aug. 14, 2020), available at <https://federalcircuitry.mofo.com/topics/Agreeing-to-Disagree-en-Banc-Style--How-Often-Do-Judges-Dissent-From-Denial-of-Rehearing-En-Banc.html> (last accessed March 5, 2021).

[17] *Id.*; see also, e.g., *BioDelivery Sciences. Int'l, Inc. v. Aquestive Therapeutics, Inc.*, 946 F.3d 1382 (Fed. Cir. 2020) (Newman, J., dissenting).

[18] Fed. Circ. Pat. Decisions in 2020: An Empirical Review, *Law360*, Jan. 11., 2021, <https://www.law360.com/articles/1341846>.

[19] *NOVA v. Secretary of Veterans Affairs*, No. 20-1321 (argued October 8, 2020), oral argument available at http://www.cafc.uscourts.gov/oral-argument-recordings?title=&field_case_number_value=20-1321&field_date_value2%5Bvalue%5D%5Bdate%5D=; *Arellano v. McDonough*, No. 20-1073 (argued February 4, 2021), oral argument available at http://www.cafc.uscourts.gov/oral-argument-recordings?title=&field_case_number_value=20-1073&field_date_value2%5Bvalue%5D%5Bdate%5D=.