

**THIS OPINION IS NOT BINDING PRECEDENT OF THE BOARD**

Filed by: Judge Jameson Lee  
Box Interference  
Washington, D.C. 20231  
Tel: 703-308-9797  
Fax: 703-305-0942

Paper No. 42

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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DENNIS H. GIBSON, GREGORY W. HEFLER,  
DALE C. MALEY and RONALD D. SHINOGLA,

Junior Party,  
(Patent No. 5,479,901),

v.

ODED E. STURMAN

Senior Party,  
(Application 08/743,858)

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Patent Interference No. 105,016

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**Order**

On Friday, December 27, 2002, counsel for senior party Sturman, R. Danny Huntington, Esq., attempted unsuccessfully to reach Administrative Patent Judge (APJ) Jameson Lee who was on leave that day. Mr. Huntington then left a voice mail message for Acting Chief Administrative Patent Judge Bradley R. Garris, requesting a one-day extension of time for filing certain papers which were due that day. The message explained that the need for an extension arose from the death of counsel's law partner on December 25, 2002, in connection with which a

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viewing of the deceased was scheduled for December 27, 2002, the day the papers were due.

The message also noted that a discussion was held with opposing counsel, and that as of the time of the message the opposing counsel has not yet agreed or stipulated to the extension. On the same day, Acting Chief APJ Garris instructed APJ John Martin to respond to the request. The request was granted by APJ Martin via telephone that day.

It should be noted that by established procedure in this interference, the parties are permitted to stipulate to extensions of time other than Time Periods 7 and 8 in the preliminary motions period, and a party is not to contact the administrative patent judge unless agreement cannot be reached with the opposing counsel. In this case, counsel for senior party Sturman had contacted the opposing counsel and explained that the need for a one-day extension arose from the death of counsel's law partner on December 25, 2002, in connection with which a viewing of the deceased was scheduled for December 27, 2002, the day the papers were due.

Per 37 CFR § 1.610, the interference rules shall be construed to secure the just, speedy, and inexpensive termination of every interference. Also, 37 CFR § 1.610 provides that the administrative patent judge shall exercise control over the interference such that the pendency of the interference before the Board does not normally exceed two years. Terminating an interference proceeding in a just, speedy, and inexpensive manner, and also within two years is a monumental task that **would require the understanding and cooperation of the parties and their counsel.**

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The administrative patent judge can see no reason why counsel for junior party Gibson could not, under the circumstances, agree to the requested one-day extension of time, or could think, under the circumstances, that the client would have reasonable cause for objecting. In my view, the request was so patently reasonable that the failure of counsel for junior party Gibson to cooperate by agreeing to the one-day extension resulted in a waste of the board's resources as well as unnecessarily increased the cost to senior party Sturman. Party Gibson did not reflect a level of cooperation that is expected by the APJ to have this interference proceed in a just, speedy, and inexpensive manner.

Based on the foregoing, the APJ deems necessary to take appropriate measures to modify those standing procedures which assume reasonable understanding and cooperation from both parties. It is

**ORDERED** that for an extension of time not longer than one business day, for whatever reason and for all time periods except Time Periods 7 and 8 in the preliminary motions stage and except the "Last Time" in the priority stage, party Sturman need not obtain a stipulated agreement from party Gibson and also need not obtain the prior approval from an administrative patent judge, but need only make reference to this order in the paper making use of the extension;

**FURTHER ORDERED** that since nothing reflects a less than expected level of understanding and cooperation on the part of senior party Sturman, the ability to self-approve a one-day extension of time is made available to senior Sturman only, and not to junior party Gibson; and

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**FURTHER ORDERED** that if junior party's lead or backup counsel was without authority to agree or stipulate to a brief extension of time, that situation is unacceptable and either the authority shall be obtained immediately or new lead and backup counsel having that authority shall be appointed, and that if junior party's lead or backup counsel had that authority, then the APJ expects to see a change in the level of understanding and cooperation from such counsel, toward the better, to help achieve a just, speedy, and inexpensive termination of this interference and to make more efficient use of the resources of the board.

Jameson Lee  
Administrative Patent Judge

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**On Request for Reconsideration**

On December 31, 2002, a joint telephone conference was held at approximately 2:30 p.m. wherein counsel for junior party Gibson requested that the APJ reconsider the order transmitted by facsimile earlier that day (Paper No. 42). The APJ was informed that junior party's counsel did respond favorably to senior party's request for a one-day extension, by the sending of an e-mail message. However, it was not known whether Mr. R. Danny Huntington had seen that e-

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mail message by December 27<sup>th</sup> when he first made a call to the board. Presumably, he did not.<sup>1</sup>

Counsel for the junior party further indicated that the e-mail response contained two conditions for her consenting to a one-day extension of time and proceeded to explain what those conditions were, and that it was normal practice to get authorization from the client first as to such matters.

The request for reconsideration is denied. In the circumstances here, an immediate and unconditional consent would have been what the administrative patent judge expects from an attorney with the appropriate level of understanding and cooperation. It should be noted that emergency situations normally occur unexpectedly and when they do occur some deadline is usually just a day or two away. That is the basic character of an emergency as the filing of papers are concerned. There is no time for the opposing counsel to undertake “negotiations,” i.e., consult with other counsel or client, come up with a set of desirable conditions, and then get back to the party requesting the one-day extension at some later time to propose a conditional stipulation, to which the first party must then digest, evaluate, and respond.

In emergency situations such as this, the administrative patent judge expects the opposing counsel to give an immediate and unconditional answer, yes or no, so that the party with the emergency would know whether he or she has gotten the one-day extension or he or she needs to arrange a joint conference call with the administrative patent judge immediately. It is inappropriate, in these situations, to hold the party with the emergency in suspense, not knowing

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<sup>1</sup> Mr. R. Danny Huntington was not a participant in the telephone conference call on December 31, 2002. During the conference call, the senior party was represented by Mr. B. Jefferson Boggs.

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when exactly will an answer be forthcoming and whether the answer will contain further conditions which will need to be evaluated and considered. In short, an emergency situation is not a time for the opposing party to begin a negotiation. If the opposing counsel doubts the authenticity of the emergency, he or she is free to withhold consent but should be ready to explain the basis of such doubt if the judge so inquires at some later time.

For the foregoing reasons, it is

**ORDERED** that junior party Gibson's request for reconsideration is *denied*; and

**FURTHER ORDERED** that counsel for the junior party is authorized to file a copy of the e-mail message to senior party's counsel if it is the junior party's desire to have the interference file contain a record of its eventual consent, albeit with conditions, to the senior party's request for a one-day extension of time.

Jameson Lee  
Administrative Patent Judge