

UNITED STATES PATENT AND TRADEMARK OFFICE

PUBLIC ADVISORY COMMITTEE MEETING

"We apologize for an incomplete transcript due to technical difficulties on
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Alexandria, Virginia

Friday, February 13, 2009

ANDERSON COURT REPORTING
706 Duke Street, Suite 100
Alexandria, VA 22314
Phone (703) 519-7180 Fax (703) 519-7190

1 P R O C E E D I N G S

2 (9:30 a.m.)

3 MR. RIVETTE: Okay, I think we're going
4 to start the public session. Today it is being
5 webcast. That is new for us. We've never done
6 this before. So, as we go through this process, I
7 guarantee we're going to make some mistakes.
8 Hopefully we will learn from them. Anybody who is
9 watching or listening, please feel free to give us
10 comments on what we're doing right and we're doing
11 wrong, what you like and what you don't like.

12 We typically open the session -- and we
13 did this morning -- with just a reminder that all
14 of the members of PPAC that are -- they are
15 government employees for the time that they work
16 on this issue --

17 Why don't we close that door -- that we
18 leave our prejudices and we leave our interest of
19 any organization that we may have outside of this
20 outside this room. At this point in time we are
21 looking only at the best interests of the U.S. and
22 the U.S. Economy and the U.S. population. So,

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1 that's where we come from.

2 We have an agenda this morning, that
3 we're going to talk about a number of the issues
4 that we had brought up in the 2008 report. If
5 there are any other -- are there any questions,
6 any concerns that we need to address before we
7 start that?

8 John, you want to say anything prior?

9 MR. DOLL: No. The only thing I wanted
10 to say is welcome to everybody, and I wanted to
11 remind everybody here to talk into the microphone
12 because they simply cannot hear you on the webcast
13 unless you talk directly into the microphone.

14 MR. RIVETTE: That's a good thing or bad
15 thing?

16 MR. DOLL: It could be --

17 MR. RIVETTE: I got it. Okay, so let's
18 lead off with the quality issue.

19 MR. ADLER: So, Steve and I.

20 MR. RIVETTE: Marc, you and Steve?
21 Okay.

22 MR. ADLER: Okay.

1 MR. RIVETTE: Let's do some background
2 also on the Echo report --

3 MR. ADLER: All right, would you --

4 MR. RIVETTE: -- and where they can get
5 it.

6 MR. ADLER: Yeah. I don't know where
7 they can get it though.

8 MR. RIVETTE: They can go up, actually,
9 on -- so let me back step. The issues we're going
10 to be talking about today on quality
11 reexamination, pre-examination interviews, a
12 number of the other ones, were in the 2008 report
13 that was sent to the White House and also to
14 Congress or members of Congress. That report is
15 up on the PTO website. The way I get to it easily
16 is USPTO with PPAC and you'll get to the report.
17 I've always thought we should change the name of
18 this thing.

19 MR. DOLL: What would you like to do,
20 Kevin?

21 MR. RIVETTE: I don't know. It's going
22 to be bad.

1 MR. DOLL: (off mike)?

2 MR. RIVETTE: Yeah, yeah, yeah, yeah.

3 But -- so, the first issue up is quality. It's in
4 the score card that we had at the beginning of the
5 report.

6 And, Marc, do you want to lead off on
7 this?

8 MR. ADLER: Okay. So, there were a
9 number of items identified in 2007 PPAC
10 recommendations concerning quality, and I want to
11 take a look at the first ones. Did you want to
12 read, Steve, what we actually, had asked? Then we
13 can see where we are.

14 MR. LOVE: Sure, thanks, Marc. The most
15 direct question that PPAC has asked the Office is
16 if they could provide the PPAC and the public with
17 a definition of quality, and of course there are
18 several different aspects to that but at the core
19 what is the definition of a quality patent that
20 the public can rely on, the Office can rely on.
21 So, that is a principal question that PPAC has
22 asked and put forth for discussion today. There

1 are some subcomponents of that. You know, what
2 makes a quality -- what's quality patent
3 examination throughout the process? What's
4 quality patent application and prosecution from an
5 applicant? But I think the public has struggled
6 to come up with -- in working with the Office and
7 the appropriate definition of just what is a
8 quality patent, and we think that obviously
9 quality is of utmost importance, so a baseline
10 definition that can be widely accepted would be
11 useful to measure the work of the Office and the
12 participation of applicants.

13 MR. ADLER: Yes, but what we actually
14 were asking in this regard was quality application
15 prosecution indicia -- in other words, metrics,
16 definitions of what we think, what you think would
17 be a quality application, quality examination,
18 quality prosecution so that the elements of those
19 definitions could be measured and tracked so that
20 we could see how we're doing. They're not going
21 to be perfect. We don't expect these definitions
22 to be perfect, nor do we expect them to be final.

1 We expected to see this to be a work in process.
2 So, we received the report. We asked for that by
3 this meeting. We received a report for this
4 meeting, and I'll turn it over for a minute to the
5 Patent Office folks to tell us a little bit about
6 what they provided us.

7 John.

8 MR. LOVE: Sure, thank you very much.
9 Just as background, we have what's called the
10 Office of Quality Assurance at the PTO that
11 measures what we could -- our current definition
12 of what a quality examination is and also what a
13 quality patent looks like. That organization is
14 -- I'd like to introduce Paula Hutzell, who's the
15 manager in charge of that organization. It's a
16 separate organization from the Examination Corps,
17 and they report to me as the Deputy Commissioner
18 for Patent Examination Policy. So, we've been
19 doing this for 30 years at least, and our
20 definition of the quality patent really hasn't
21 changed all that much over the course of those
22 years. It has approximately 35 reviewers, and

1 they do a -- there's a presentation we can --

2 MR. ADLER: Could you tell me what it
3 is?

4 MR. LOVE: Yes, but what what is?

5 MR. ADLER: What is that definition?

6 MR. LOVE: Yes. We'll get into what we
7 --

8 MR. ADLER: No, I've read it. I'm --
9 that's why I'm asking. Okay.

10 SPEAKER: Which one is it?

11 MR. ADLER: The quality.

12 MR. LOVE: Briefly, our definition of a
13 quality patent -- of an issued patent -- allowed
14 application is one that complies with all the
15 statutory requirements for patentability. That's
16 what we've historically looked at, and if one
17 claim in that application that has been allowed is
18 considered to be unpatentable under the statutes,
19 then that is -- that whole case is considered to
20 be an error. So, it doesn't matter how many
21 claims are in there. If just one claim, either an
22 independent or a dependent claim, that's

1 considered to be an error, and that would go into
2 the numerator as in our compliance as an error
3 over the number of cases that we've reviewed.

4 Now, with respect to applications that
5 haven't yet gone to abandonment or have not been
6 allowed, we look at several factors. In fact, we
7 look at every factor that's in the Examiner's
8 performance plan. And, as Bob might say, that is
9 very detailed in terms of the examination
10 requirements, field of search, correctness of
11 rejections, interview summaries, treatment of
12 IDSs, treatment of affidavits, clarity of the
13 Office Action, response to the applicant's
14 arguments -- everything that's in their plan,
15 which is quite detailed. If there's a failure in
16 any one of those particular areas with respect to
17 cases that, as I mentioned, have not been allowed
18 or abandoned, then that case is considered to have
19 a error in it, and that's what we call the
20 in-process compliance rate. That's the second
21 measure that we recently introduced about four
22 years ago. So, that's relatively new. Before

1 that, we were just looking at a lot of
2 applications, and this process goes into
3 applications that are -- haven't been finally
4 disposed of.

5 So, in a nutshell, to give you -- you
6 know, that's the definition of how we measure a
7 quality application and a quality patent.

8 I can go through the --

9 MR. ADLER: So, you're looking at these
10 criteria and evaluating them in your review
11 process.

12 MR. LOVE: Correct.

13 MR. ADLER: These are the --

14 MR. LOVE: This is, for example, the
15 in-process omitted rejections, the correctness of
16 the rejections that are in the case, the clarity
17 of them, Examiner's evaluation of matters in the
18 substance of applicant's response, restriction
19 requirements.

20 MR. ADLER: You're actually looking at
21 this from how well the Examiner -- you're looking
22 at the quality of the application in a way as to

1 how the Examiner performed against the statute.

2 MR. LOVE: That's correct.

3 MR. ADLER: But you're not providing a
4 definition of what a quality prosecution in
5 general would look like for applicants.

6 MR. LOVE: No, we are not measuring the
7 quality of the applicant's participation.

8 MR. ADLER: So, you're only measuring
9 how well the Examiners are doing.

10 MR. LOVE: Yes.

11 MR. ADLER: Wouldn't it -- it would be,
12 I think, helpful, if we could help -- all right,
13 so there's that, but did any of these go to --
14 let's talk about the Examiners' metrics. Did any
15 of them go to whether or not the searches -- for
16 example, the quality of the search -- can you tell
17 me what you mean by the overall quality of the
18 search, for example?

19 MR. LOVE: Yes. We have -- in the MPEP
20 we have guidance as to what constitutes a correct
21 field of search, and if the Examiner -- if the
22 search is such that the reviewer doesn't believe

1 that the Examiner complied with those guidelines,
2 then they would consider that not to be a quality
3 search.

4 MR. ADLER: And what happens as a result
5 of errors?

6 MR. LOVE: Well, these are communicated
7 back to the technology centers through the
8 management of the technology centers, and
9 basically they get back to the individual
10 Examiners via the supervisory chain of command,
11 and they are explained to the Examiners and they
12 -- the results I use for rating purposes and
13 evaluation of Examiners for promotion and that
14 sort of thing.

15 MR. ADLER: Okay. Let me -- go ahead.
16 I would like to open it up to other people here
17 that should be asking questions concerning this
18 definition that has been -- I think that's fine
19 for -- this is generally a summary of what they
20 provided, and I want to get a feedback from others
21 about whether this is what we were asking for and
22 whether we would like to see something else.

1 MR. LOVE: Okay, could I just add one
2 additional --

3 MR. ADLER: Sure.

4 MR. LOVE: We have undertaken what's
5 called a Request for Quote, that we've asked for
6 bids on a -- for a consulting study to come in and
7 take a look at the whole quality management
8 process in the court. That was put out, and we've
9 had 17 responses. I'll just read from you that
10 we're looking for -- "to assess the efficacy of
11 the United States Patent and Trademark Office
12 existing quality management program and to explore
13 optimal alternatives to evaluating, measuring, and
14 communicating the success of its quality
15 management program." So, we are opening this up
16 to an outside study similar to the study that we
17 just completed on the production system that we
18 have here, and we expect to be -- we hope that we
19 will be able to select one of the people who have
20 offered a proposal and move on with that.

21 MR. ADLER: Okay.

22 MR. LOVE: Now, having said that,

1 there's also the what I -- we have a secondary
2 quality management system, if you will. This is
3 the formal program that is administered by the
4 Office of Quality Assurance. The TCs have a very
5 active and very detailed program where they are
6 also reviewing the work product of their
7 Examiners. Each TC does it a little bit
8 differently, but they have what they call quality
9 assurance Examiners and they do their own reviews,
10 they do targeted reviews. We help them with that.
11 But that is probably, you know, an order of
12 magnitude many times greater in intensity than
13 what we do in my shop. They are in there working
14 with the SPEs and the Examiners and developing
15 training, reviewing cases, reviewing board
16 decisions; and they also review -- they do many
17 reviews for targeted reviews, they do it for
18 promotion purposes, they do it for signatory
19 authority. So, they have a -- there's a parallel
20 system that's going on, and one of the very --

21 MR. ADLER: It's very internally
22 focused.

1 MR. LOVE: Yes.

2 MR. ADLER: And it's very focused on
3 whether or not the Examiners are doing their job.

4 MR. LOVE: Correct.

5 MR. ADLER: I got to tell you from my
6 view, I was looking at something that was
7 externally focused that was focusing on trying to
8 help applicants and the public improve the quality
9 of what they could do -- for example, things that
10 should be, you know, in a response to a rejection;
11 how to respond -- in other words, I'm trying to
12 help the issue of both -- on quality and pendency
13 by focusing not so much on whether the Examiners
14 are doing a good job but whether or not this whole
15 process can be improved.

16 MR. LOVE: Well, we actually answered
17 that question last year, I think, with out
18 legislative proposal for reform.

19 MR. ADLER: I'm going to just ask others
20 for their comments.

21 MR. PINKOS: Well, there is a list here
22 that you provided, you know, tips from Examiners

1 on the top ten prosecution problems they see, as
2 well as some factors that you all believe define
3 quality from the applicant's standpoint, and so
4 those things were taken into consideration and
5 revealed themselves through the AQS proposal to a
6 certain degree, or do you think that there is some
7 other way to -- we implement these proposed --
8 implement or make widely known or engage with the
9 bar to (off mike) practice is more conformed to.

10 MR. LOVE: Well, many of the TCs have
11 outreach programs in sessions with their
12 customers, and this topic is always on the agenda.
13 We offer suggestions on ways that we think they
14 can improve. IPO Day -- it's -- every year
15 there's a agenda item directed to top ten -- you
16 know, what we see in ways we think we can help
17 them. So, it -- and of course many of these are
18 taken out of the MPEP, which is, you know, focused
19 towards the examination process and the Examiner,
20 but these things are in the MPEP.

21 For example, we have a rather long
22 discussion on what an IDS should look like, and we

1 wish that the practitioners would take a look at
2 that and be a little bit more helpful with their
3 submissions. But we do have quite a bit of
4 detailed explanation as to what we think a helpful
5 IDS would look like.

6 MR. RIVETTE: So, let me ask some
7 questions. It's a very -- from the documents I've
8 read, it's a very internally focused procedure,
9 which is fine. However, there are a number, in my
10 opinion, of external mechanisms that go to patent
11 quality that I don't know if we look at, at this
12 point in time, so let me step back for one second.
13 If I were in business and I had a product, and I
14 had external analysis of that product. In our
15 case I perceive the courts as one of the ways that
16 they look at whether or not we're doing the right
17 job. I look at sister organizations. I look at
18 our own board and reexamine a number of other
19 areas to see if we're doing the right thing. I
20 would be of a mind to be looking at regressive
21 analysis, so if we see patenting that has been
22 found invalid, we could go through an analysis of

1 why was it invalid, was it because of the work we
2 did or not? Was it, you know, the edge case of,
3 you know, we found the one library reference in
4 Zurich, which case we're not going to ever get
5 there from here? Was it a situation where they
6 actually used our prior art and saw it a different
7 way? So, I would be looking at have we thought
8 about doing regressive analysis in all of the
9 outside groups that typically look at our quality?
10 Have we ever thought about that?

11 MR. LOVE: Looking at patents that are
12 actually held invalid?

13 MR. RIVETTE: Yeah, I mean.

14 MR. LOVE: Yeah, I don't believe we do
15 that on a case -- on an individual -- have we
16 thought about it? I'm sure people have over the
17 years. It hasn't been discussed recently to my
18 knowledge, but it's something that could be done,
19 yeah.

20 MR. ADLER: To me, a feedback mechanism
21 from the board, from the court, or from anywhere
22 would be very helpful to improve the quality, I

1 mean, of whatever happens, and I'm looking at this
2 from whether the Examiner did a good job or not.
3 I'm looking at it from whether the overall patent
4 (off mike) was valid.

5 MR. LOVE: We agree wholeheartedly, that
6 we looked at it -- we look at it as a shared
7 responsibility between the applicant, and the PTO
8 and the more exchange of information and the more
9 information before the Examiner of course the
10 better I think inherently we would agree the
11 better product that's going to come out.

12 MR. RIVETTE: Yeah, so No. 1, I think
13 because we've never done this before we're not
14 good at it. We've got to speak really into the
15 microphones.

16 MR. LOVE: Okay.

17 MR. RIVETTE: I guess the sound's been
18 cutting in and out.

19 So, to get back to it, I think there are
20 other ways we could be looking at quality and
21 potentially upping our game by putting in a true
22 feedback loop on the multiple areas that are

1 outside of our organization that do review it.

2 As I look down -- and it's actually this
3 -- the one that's up on the screen -- Examiner's
4 evaluation of matters of substance and applicant's
5 response, and in your other document that you sent
6 out to the PPAC you had whether Examiner has duly
7 set forth their reasoning. I assume that's
8 basically the same thing we're looking at here?

9 MR. LOVE: Well, that's in their
10 rejection. That's a different -- of the clarity
11 of the Examiner's rejection. That's one thing.
12 This is the valuation of -- the Examiner's
13 evaluation of the applicant's response, their
14 arguments.

15 MR. RIVETTE: Okay. Let me take the
16 first, and then we'll go back to the other --

17 MR. LOVE: Okay.

18 MR. RIVETTE: With regard to, you know,
19 whether the Examiner has clearly set forth their
20 reasoning.

21 MR. LOVE: Right.

22 MR. RIVETTE: Just -- and everybody else

1 can chime in. I've heard that -- I'm never going
2 to get this right.

3 SPEAKER: Just move the board in front
4 of you.

5 MR. RIVETTE: Move it in front of me.
6 That's -- okay.

7 MR. DOLL: I'll keep it kind of close
8 (off mike).

9 MR. RIVETTE: When I'm eating it, we'll
10 find out how it works.

11 One of the things that I've heard in the
12 work that I do is that after KSR we're having --
13 the applicants are having a harder time to figure
14 out what those rejections mean, that they're
15 getting a little less specific, a little more
16 difficult to interpret. I don't know if that -- I
17 mean, we can ask the rest of the group if that's
18 what they're seeing.

19 Go ahead, Marc.

20 MR. ADLER: I think that you're -- this
21 won't be a total answer to that, but the increase
22 in the continuation of the RCEs has something to

1 do -- there's a parallel between the lack of
2 clarity in some of the Office Actions and the need
3 to -- and the feeling that applicants -- some
4 applicants have about refiling.

5 MR. RIVETTE: Okay, so one of the things
6 I was thinking --

7 MR. ADLER: These are connected things.

8 MR. RIVETTE: So, one of the things I
9 was thinking about -- and you were talking about
10 the IDS. I think there are a number of things
11 that are related here. So, as we move forward, I
12 think more input from the public is better than
13 less. You've already stated that we've got IDS
14 out there right now, and we'd love information on
15 how people are feeling about it, what they like,
16 what they don't like. Social analysis of these
17 types of problems is something that Wikis and
18 other types of social programs do well, and have
19 we ever thought to start putting out, like, a PTO
20 Wiki and looking at -- you know, putting up the
21 IDS, seeing what other people are saying about it,
22 putting up, you know, a thing on whether or not

1 the Examiners have clearly set forth their
2 reasoning on a rejection. And people can put up
3 comments -- yes, good, bad, indifferent, here's a
4 specific idea. One of the things that I've always
5 seen is that if we allow everybody to kind of
6 review it, they come up with better and better
7 ideas. It's the whole basis for the patent
8 system, right? You turn over the social contract.
9 You turn over your idea. Other people can stand
10 on your shoulders.

11 I'm thinking that we may want to take a
12 look at that sort of thing to help quickly ratchet
13 in some of the ideas and get a feedback loop
14 going. Doesn't mean we're going to take
15 everything. I mean, we still got to feel through
16 it. It's still got a lot of issues, and it can be
17 gamed and all of that. But, my gut is that if we
18 thought about putting in those types of systems,
19 four things where we really do want commentary to
20 find out where we're doing well, to find out where
21 we're doing -- to find out where we could improve
22 and different ideas for it, it might help.

1 Any -- Damon?

2 MR. MATTEO: Yeah. No, absolutely
3 great, and one of the things that -- one of the
4 things I should do is speak into the microphone.

5 MR. RIVETTE: Yes.

6 MR. MATTEO: I absolutely agree with
7 that. Feedback loops are imperative for any kind
8 of best practice, maintenance, and sustenance.

9 Even closer, okay. One of the things I
10 think is also interesting to do is benchmarking,
11 vis-à-vis, for example, JPO, EPO, etc., in the
12 same kinds of domains, analogous kinds of
13 comparisons. Its that something that we actively
14 have going? No. Okay, so they have a wealth of
15 information as well in similar circumstances.

16 MR. RIVETTE: Right.

17 MR. MATTEO: It seems like we should be
18 minding that.

19 MR. ADLER: I think those are excellent
20 ideas. I also think, however -- you know, we
21 asked for a proposal for a definition --

22 MR. MATTEO: Um-hmm.

1 MR. ADLER: -- not a restatement of what
2 you're already doing. There seems to be some
3 difference of view about what we were -- maybe
4 your understanding of what we were asking you to
5 try to do versus what you provided. I'm looking
6 -- I'm still looking for trying to develop a
7 definition of what you think a quality -- not from
8 the Examiner's perspective but from overall --
9 what would be a perfect -- a quality, high-quality
10 examination, whether it's in the periods of time
11 to respond to an Office Action, the length of the
12 Office -- you know, the response to the Office
13 Action, whether you think case law citations in
14 response -- in responses to Office Actions are
15 particularly useful or not -- you know, elements
16 that could help us all improve and shorten the
17 prosecution to the point where we get closure on
18 the first or the second Office Action. And I
19 don't know that what you provided us really moves
20 us yet in that direction. So, I still think I'm
21 -- I'm still looking for a proposal, and I know
22 it's not going to be perfect and we're going to

1 have to discuss it and work on it, but I still
2 think I'm looking for something beyond what we've
3 already seen.

4 MR. RIVETTE: Yeah, right.

5 MR. KIEFF: So, I -- this is Scott.
6 I'll just add maybe on top of that that I think
7 that part of what Marc is saying, John, is that he
8 can -- we can see that implicit in the work you're
9 presenting is a theory of what makes for good, and
10 that shows hard work and good thinking. What I
11 think Marc is asking is to make that hard work and
12 thinking explicit rather than implicit, so --

13 MR. LOVE: Yeah, and certainly we can
14 focus on -- and we know what -- we have strong
15 opinions on what makes a good application, and
16 there's things here that -- there are standards
17 behind here. For example, our standards say that
18 we do a full and complete search on the first
19 Office Action. I mean, that's -- we consider it
20 be -- so that the best art is found, developed,
21 and cited in the first Office Action, and that's
22 implicit in these -- what we're looking at. We

1 expect the Examiners to explain their positions.
2 We expect them to raise every statutory ground of
3 rejection that's applicable so that we don't get
4 piecemeal prosecution. On the applicant side, you
5 know, the AQS speaks a whole lot as to where we
6 feel the process should be, but in reality if
7 that's not going to become a reality, then we
8 certainly have suggestions on how we think the
9 application should be put together, reviewed, and
10 filed. We'd be very happy to do that.

11 MR. ADLER: I think it would be very
12 helpful to many applicants to hear your views and
13 for us to discuss what makes a quality
14 application.

15 MR. LOVE: We'd love to do that.

16 MR. ADLER: Definitions of terms, the
17 claims that track, language that's --

18 MR. LOVE: In the spec.

19 MR. ADLER: -- that's in the spec. You
20 know, examples that are related to the invention
21 and not something else.

22 MR. LOVE: Arguments related to

1 limitations that are actually claimed. That would
2 be a big help.

3 MR. ADLER: Right. I don't think we're
4 talking about a rock. I mean, you know, for those
5 of us who know what we're talking about, I think,
6 you know, a shorter application is better than a
7 longer application of why do you have 500 claims,
8 why don't -- you know -- I think there's some
9 educational value here, as well as a -- that would
10 help us all to help get these cases in better -- I
11 think there's a lot of educational value that lets
12 us -- like the definitions of "quality" that I'm
13 suggesting I think would benefit the Office and
14 the applicants and move these cases better.

15 MR. LOVE: And you're looking at it from
16 a process also.

17 MR. ADLER: Absolutely.

18 MR. LOVE: Point of perspective rather
19 than a digital definition.

20 MR. ADLER: Right.

21 MR. KIEFF: Yes.

22 MR. ADLER: Yes.

1 MR. KIEFF: And then -- and then like
2 any process we would then all have to be totally
3 forthright and complete in our recognition that it
4 will be --

5 MR. RIVETTE: Scott (indicating
6 microphone).

7 MR. KIEFF: -- wrong in a range of ways,
8 right? So, each actor in the process will make
9 errors, and so our evaluation of the process
10 should expect the errors and should predict --
11 should be looking to see different categories of
12 errors and then should be looking to assess how
13 often they happen and their not just magnitude of
14 impact but their type of impact so that a
15 thoughtful understanding of a process to then
16 restate here is one that looks at it as a process,
17 not one that gets things right or wrong but one
18 that happens.

19 MR. RIVETTE: And it's continuous.

20 MR. KIEFF: And that is continuous.

21 MR. ADLER: Right.

22 MR. KIEFF: And then as one that will be

1 always making a range of mistakes so that our
2 analysis of it is getting our hands around the
3 types of mistakes that are being made and the
4 impacts of those mistakes.

5 MR. LOVE: Yeah, that's -- I think
6 that's a great idea, and we can certainly refocus
7 that.

8 MR. ADLER: Thank you.

9 MR. LOVE: And probably -- and of course
10 it's easy for me to say, but in a relatively short
11 period of time we could have a work product for
12 you that would focus on the process from both
13 sides -- the filing process, drafting the
14 application, and the examination.

15 MR. ADLER: But let me just sort of
16 explain that -- you got it, let me just explain a
17 little bit of how I'm thinking on it.

18 When most -- when many applications were
19 written by patent attorneys inside companies, when
20 companies had patent groups, they spent a lot of
21 time training their people to draft applications
22 and they reviewed those applications, and they

1 would -- this was their job. I'm not sure that
2 happens as much any more as it did. So, partly
3 you can't end up with a quality patent if you're
4 not going to start with a quality application.
5 So, it's part of our job to help the applicants
6 understand how to draft a quality patent
7 application and, you know -- and also you know
8 what to expect from the Patent Office and how to
9 respond to the Patent Office. So, I'm looking at
10 this as a process and not -- as Scott said, I'm
11 not looking at this solely from how well the
12 Examiners are doing their job. I wasn't even
13 thinking about it that way.

14 MR. RIVETTE: So, one of the other
15 things that I'm thinking is -- and I'm going to go
16 back to it a number of times -- if we can get
17 public input -- you know, the closer we can get to
18 the practitioners on this topic so that they
19 understand and we understand it -- we can get an
20 iterative loop going, be that on a Wiki, be that
21 on some form so that they can understand how other
22 people feel, so they understand where we're coming

1 from as the Office -- I think we will be doing
2 ourselves a real service.

3 MR. ADLER: And I know that you would be
4 -- if it was done fairly and honestly and openly,
5 that you will get a lot of feedback, because we're
6 all trying to do the same thing.

7 MR. RIVETTE: So, in some of the
8 documents you sent out, John, to the PPAC,
9 designing -- one in particular I'm looking at --
10 "In designing the IPR program, USPTO solicited
11 feedback from practitioners to identify the
12 attributes of examination that served as
13 indicators of high- quality examination and used
14 feedback in developing the IPR review criteria.
15 The IPR program was implemented formally, and the
16 IPR compliance reg was adopted as an Office
17 official metric in the second quarter of 2005."
18 Maybe we could put that on the Web. Maybe we can
19 get those -- you know, we can always get people to
20 iterate on that, and I think we would actually
21 find that -- one of the things I feel right now is
22 many of the practitioners don't feel they know

1 what we're doing and we don't know what they're
2 doing and we've got this cross in the night and
3 we're talking at each other.

4 MR. ADLER: Yeah, can I just give you an
5 example?

6 MR. RIVETTE: That's it.

7 MR. ADLER: Do you have data that
8 indicates the allowance rates for those
9 applications that come that were filed with a
10 prior art search in an IDS versus those that were
11 filed without a prior art search in an IDS? Do
12 you have data on those applications --

13 MR. RIVETTE: So, you don't have data on
14 it?

15 MR. ADLER: In other words --

16 MR. LOVE: We --

17 MR. ADLER: -- because you know, and I
18 know, right, that if you search before you file
19 you're going to do a better job defining your
20 invention than if you try to fix it after the
21 fact. And so, you know, this is our old -- John,
22 I'm looking at you -- this is our old conversation

1 about incentivizing people to do the right thing

2 --

3 MR. RIVETTE: With examples.

4 MR. ADLER: With examples rather than
5 trying to do it by rulemaking and AQS and all
6 that. I'm still thinking that you can change
7 behavior for the better and improve quality by
8 showing people examples of what we're talking
9 about and what really works versus trying to, you
10 know, twist their arms and get them to go along
11 with a program that they don't even understand.

12 MR. DOLL: Let me answer part of that,
13 Marc, and part of the answer is we don't know when
14 an application has actually been searched. We
15 know what percentage of applications come in with
16 an IDS and so we can share that. The problem with
17 that is the number one complaint I hear from
18 Examiners when Peggy and I go out and have town
19 halls with Examiners is a frustration at finding
20 102 references in IDSs that were filed by
21 applicants, so applicants are filing IDSs that
22 they are not considering. They're not drafting

1 their applications, as we've discussed many times,
2 in light of a prior art search. They're not
3 trying to define their inventive contributions.

4 MR. ADLER: Well, then, I think it would
5 be very helpful to provide that data back to them,
6 say -- to the public -- say, you know, if you're
7 going to do a search and you're going to submit an
8 IDS and you're going to -- you still have 102
9 rejections on the first Office Action, you're
10 doing something wrong.

11 MR. DOLL: Right.

12 MR. ADLER: You're either not claiming
13 your invention properly, or you didn't read the
14 references right. And I don't mean this to be
15 critical of any individual applicant or any --

16 MR. RIVETTE: Well, thank you very much.

17 MR. ADLER: Yeah. But it would be
18 helpful to everybody to understand that there's
19 something, you know, that this is a process and
20 you're wasting Examiners' time searching on stuff
21 when you've already searched it and you didn't
22 even read it -- apparently.

1 MR. DOLL: I think many attorneys would
2 openly admit they are filing IDSs without having
3 read those references. I've heard it at Bar
4 meetings.

5 MR. ADLER: I don't understand the
6 point.

7 MR. KIEFF: Well, I think --

8 MR. DOLL: I don't either.

9 MR. KIEFF: I think there are reasons --

10 SPEAKER: -- planet? I mean, why would
11 you -- why would you do that?

12 MR. KIEFF: There are reasons why that's
13 happening that make sense.

14 MR. DOLL: No. There are reasons but
15 they don't make sense.

16 MR. KIEFF: Well, I -- okay, let me try
17 to state -- let me try to state them.

18 MR. DOLL: I will say they're
19 irrational, just to be argumentative.

20 MR. ADLER: Whatever they might be,
21 let's lay that out so that people can debate
22 whether those are rational or irrational.

1 MR. KIEFF: Right, so let me just -- let
2 me just mention them. I think that the thinking
3 goes along the following lines.

4 So, when filing an Information
5 Disclosure Statement, the general driving force is
6 a very healthy respect for the broad power of
7 inequitable conduct to reach a very broad range of
8 actors engaged in the prosecution process and a
9 very broad understanding of their knowledge, okay?
10 So, it is a big net that it casts. When this big
11 net pulls in all of these documents, it is
12 rational -- it is required to disclose them at
13 that point, right? That's the rational decision.
14 Then the next decision becomes now should I read
15 them -- I know that I have to disclose them but
16 should I read them. And I think attorney time
17 that gets billed at hundreds of dollars an hour at
18 that point -- I think the thinking goes disclose
19 and let others read but it is not a bad decision,
20 I think, or a crazy decision to choose not to
21 deploy the hundreds of dollars an hour it would
22 take to read and understand all of those

1 documents.

2 MR. ADLER: So they would rather spend
3 millions of dollars for litigation after they've
4 been sued to defend against the unequivocal
5 conduct.

6 MR. KIEFF: Yes, because --

7 MR. ADLER: You know, maybe we need to
8 educate people that that's -- the tail is waving
9 the dog.

10 MR. KIEFF: Yes, it is -- well, there's
11 a path to pendency to these things, so there are
12 many people --and I think, Marc, you would agree
13 with this -- there are many people who would adopt
14 the view that the time to really search and really
15 analyze the art is before filing the --

16 MR. ADLER: Aye, aye.

17 MR. KIEFF: -- application, not before
18 filing the IDS --

19 MR. ADLER: Aye, aye.

20 MR. KIEFF: -- because only then can you
21 draft a Section 112 disclosure around whatever art
22 you uncover.

1 MR. ADLER: Well, well, maybe --

2 MR. KIEFF: So, I totally agree with
3 that approach.

4 MR. ADLER: And then maybe there's some
5 misunderstanding --

6 MR. RIVETTE: Into the mic.

7 MR. ADLER: Maybe there's just some
8 general basic misunderstanding about that. I
9 mean, just something so basic to me. It seems to
10 be --

11 MR. KIEFF: But when you and I --

12 MR. ADLER: -- regulatory. I mean --

13 MR. KIEFF: Why don't we take this --
14 just one sec, one sec. What Marc and I share --

15 MR. RIVETTE: Wait --

16 MR. ADLER: Dave is looking like he's --

17 MR. KIEFF: But what Marc and I share --
18 what Marc and I may share as a goal for how we
19 would do it and train people to do it -- I think
20 what's important for this discussion is to simply
21 report that there are needs to understand the
22 reasons why people are doing something other than

1 what you and I might recommend and to then better
2 understand what motivates them as kind-hearted,
3 intelligent human beings to do this in a
4 path-dependent way, because I take it they don't
5 think of themselves as stupid or ill- motivated
6 when they're making these decisions. I think they
7 think of themselves as trapped, if you will, and
8 then after they've gone down the path of filing
9 the application, after they've gone down the path
10 of learning the results of the net sweep, they
11 then make the decision at that point okay,
12 disclose, I have to that, and then I might as well
13 tourniquet off the bleeding and at least not bill
14 any more attorney time to carefully reading. I
15 think that's their thinking. Does that match your
16 understanding, David?

17 MR. WESTERGARD: Yeah, I agree with
18 that, and I don't think that anybody here in the
19 process is so misinformed about the need for
20 complete and open disclosures and what the Office
21 will do to them and how they should be considered
22 as to make anything other than an unintentional

1 disclosure or an incomplete description anything
2 other than intentional. This is intentional
3 conduct. These are actors who are knowing -- they
4 know what they're doing. This is not a question
5 of not enough CLE activity for ADIPLA. It's a
6 question of people knowing where the holes are,
7 understanding the likelihood of a thorough
8 examination revealing some defect in the
9 application or -- in the application itself or in
10 the relevance of the art and hope to get through
11 some claims that ought not get through.

12 MR. RIVETTE: So, let me step in right
13 now and let's -- and I know Jim wants to talk.

14 MR. BUDENS: So do I.

15 MR. RIVETTE: And I know Robert wants to
16 talk. What I'd like to do is break this at this
17 point.

18 We will pick it up after we have two
19 esteemed members of our legislative branch talk to
20 us about patent reform.

21 MR. BUDENS: Okay.

22 MR. RIVETTE: So, if we don't mind. I

1 know their time is limited.

2 Christal Sheppard is here, Senior IP
3 Counsel for Chairman John Conyers, House Judiciary
4 Committee.

5 How are you?

6 MS. SHEPPARD: Very well.

7 (Aside)

8 MR. RIVETTE: So, if you could -- and
9 Ryan Triplette, Chief IP Counsel for Ranking
10 Member, Arlen Specter, Senate Judiciary Committee.
11 So, if you could introduce yourselves and then say
12 hello.

13 MS. SHEPPARD: I'm Christal Sheppard.
14 As you were just told, I am actually Chief, Patent
15 and Trademark Counsel for the House Judiciary
16 Committee. I also wear another hat, which is
17 Staff Director and Chief Counsel of the Courts on
18 Competition Policy Subcommittee.

19 One of the biggest things that I'm going
20 to talk about -- but first I'm going to -- should
21 I go first and then you'll introduce yourself or
22 --

1 MS. TRIPLETTE: You can do absolutely
2 whatever you want.

3 MS. SHEPPARD: Okay. One of the first
4 things I wanted to talk about was the new division
5 of where intellectual property is with the
6 Judiciary Committee. The IP issues used to be
7 handled at the subcommittee level, as most of you
8 know. The issues -- specifically patent,
9 trademark, and copyright -- are now being handled
10 by the full committee directly under Chairman
11 Conyers. That's a change from before, so what
12 that means for the patent community -- and this is
13 the one thing I forgot to say, so everything I
14 said before is conditioned on the next remark --
15 is I am speaking for myself as an attorney. We
16 all know the caveat that I speak for myself, not
17 for anyone else, not the members, not for
18 Congress, and probably not for anyone in this
19 room.

20 MR. RIVETTE: Including yourself?

21 MS. SHEPPARD: Well, just myself. Some
22 days I conflict myself, but -- contradict myself.

1 But since there is a change, the IP
2 being at the full committee means that there will
3 be less opportunities for hearings and markups at
4 the full-committee level, because we are competing
5 with very many other interests. That does not
6 mean that the committee is in any way reducing the
7 amount of oversight or reducing the amount of
8 interest in these issues. It just means that a
9 lot of these issues will be taking place and the
10 conversations will be taking place directly with
11 the PTO, will be taking place directly with the
12 stakeholders, will be taking place between the
13 members and the stakeholders, and there will not
14 be so much as hearings as there will be
15 conversations.

16 As for patent reform, you've read in the
17 newspapers and in the blogs that Senator Leahy has
18 stated the Senate side is working very hard on
19 patent reform on (off mike) House side. There is
20 a set of possibilities that all of us know that
21 are possible for patent reform going forward.
22 Those set of possibilities are the House and

1 Senate to come to agreement on language and then
2 to do something together, which is what happened
3 in 2007 in the last Congress.

4 The other possibility is that the House
5 and Senate will not come to agreement on language
6 and will introduce two separate bills. We know
7 that last time that the bills were introduced,
8 they were introduced identically. There was a lot
9 of divergence in the last two years since those
10 bills were introduced specifically on issues, as
11 you well know -- I'm not telling any tales out of
12 school -- on things like damages, inequitable
13 conduct. First-to-file is a big one, because the
14 House person has a trigger, the Senate person
15 doesn't have a trigger. Whether we will be able
16 to come to some agreement where we can introduce a
17 bill that's the same is still questionable, but
18 there's no doubt that this is an issue that's very
19 important to the members, very important to the
20 country, and we will be looking -- we'll be
21 working on that issue shortly.

22 MS. TRIPLETTE: Hi, my name is Ryan

1 Triplette. You really do have to speak right into
2 the thing.

3 I can just have a (off mike) voice. I
4 recognize many of the faces in here. It's nice to
5 see always. I always like being around friendly
6 faces. I am the Chief IP Counsel. Yeah, I'm used
7 to -- in this debate at least not that many
8 friendly people. I'm the Chief IP Counsel for
9 Ranking Member Specter on the Judiciary Committee.
10 As Christal said, this is something that -- this
11 is an issue of patent reform. It's an issue
12 that's very important to many members on the
13 Committee in fact, and historically intellectual
14 property issues generally have been kind of
15 handled by chairmen and ranking -- maybe one or
16 two other members -- and they used to say don't
17 worry, we're taking care of all the issues, you
18 can just vote for it, and historically they have.
19 Yeah. Those days are gone.

20 You have -- you know, the importance of
21 this issue is reflected in the fact that in the
22 Judiciary Committee on both sides but on the

1 Senate where, you know, you have so many other
2 issues going on, you have so many members who have
3 taken a vested interest. You have not just
4 Chairman Leahy and Senator Hatch but you also have
5 Ranking Member Specter and you have Senator Cornyn
6 and you have Senator Kyl and you have Senator
7 Feinstein, you have Senator Whitehouse. I mean,
8 basically I'm naming the roster of the Committee.
9 So, that is both good in the fact that anything
10 that comes out of the Senate will have to be very
11 well considered, but it also means it's going to
12 have a significant impact on how quickly or,
13 contrarily, how not quickly it will move; and I
14 would expect that the Senate will be moving sooner
15 as opposed to later given the statements that have
16 been in the press recently and kind of some of the
17 conversations that have been ongoing. I can tell
18 you that, speaking for Ranking Member Specter, he
19 will not be on a bill that's initially introduced.
20 There is still a significant number of issues,
21 namely damages, and with a loose-knit case hanging
22 out there, he's doing a lot of consideration as to

1 what direction the images -- legislation should
2 take. That being said, this is very important to
3 him. The number of meetings he has taken, you
4 know, in the past several years is just -- it is
5 -- for those who are familiar with the asbestos
6 debate, he has passed this number of meetings he
7 had on asbestos, which quite an improvement.
8 Yeah, that's a lot. That's saying something. So,
9 this has -- this is something that he takes very
10 personally and is always welcoming more meetings.

11 As Christal said, the issues are not
12 going to come as any surprise to anyone. The one
13 issue I guess I would flag is a potential other
14 area -- is the -- do we go to a new (off mike) or
15 do we tweak the inner parties because in light of
16 the numbers that the PTO recently issued, it's
17 given us pause to revisit the issue. So, that's
18 something that will be ongoing. That's not the
19 racked-up issue that so many people think it is.

20 MS. SHEPPARD: We can keep talking or
21 you can ask questions.

22 MS. TRIPLETTE: Yeah.

1 MS. SHEPPARD: So, I suggest you ask
2 questions.

3 MR. BUDENS: I'm going to --

4 MR. RIVETTE: Is anybody here interested
5 in this topic?

6 SPEAKER: Yes.

7 MR. BUDENS: Affirmative. Ladies, if I
8 can ask kind of a loaded question, because I --
9 you know, we've been up and, you know, they're
10 already talking a little bit, too --

11 MR. RIVETTE: You'll have to speak into
12 the mic.

13 MR. BUDENS: What? Eh? Okay. There
14 seems to be a lot -- a change in feeling amongst a
15 lot of people that a move kind of away from a
16 broad scope Patent Reform Bill and more to just
17 focusing in on fixing issues internal to the
18 Patent and Trademark Office. Any feelings about
19 -- are the bills that you all are contemplating --
20 are they going to be more narrow in focus, or are
21 we going to be kind of expecting more of the same
22 -- all the same issues still out there, in which

1 case do we have all of the same players yelling at
2 each other, you know, through the course of the
3 next two years?

4 MS. TRIPLETTE: I can -- I think for the
5 Senate you're going to see a broader bill. I
6 think that there are still going to be the -- all
7 of the issues that we've been discussing over the
8 past couple of years -- they're still going to be
9 incorporated into the bill, and they're still
10 going to be on the table. I actually think what
11 you're going to see is, especially given the --
12 well, there are a significant number of
13 developments that are occurring over at the PTO.
14 I think that the discussion -- how do I put this.
15 Even when patent reform is done, whatever that is,
16 I think that a need to look at reforming the
17 patent system is still going to be here. I'm
18 looking at what we can do to help improve the PTO
19 internally if we can't all -- you know, because
20 we're looking -- this -- it's not just within the
21 Judiciary Committee ambit. We're also looking at
22 things that need to be done in the Appropriations

1 Committee. So, I think that the discussion is
2 actually getting broader if not narrower.

3 MR. KIEFF: So, a few of us have talked
4 about the ways in which over the last, say, 36
5 months or longer, basically two to five years,
6 there has been a large set of court decisions that
7 have meaningfully impacted the patent system, and
8 we're just -- for those of us who have been
9 talking about those issues, we wonder whether it
10 would help for you folks to have more fulsome
11 conversation about what we think is going on with
12 those cases, because we -- those of us who have
13 been talking about them think that they are each
14 individually highly impactful, and even more than
15 that as a group we think they're highly impactful
16 in ways that are not yet understood even by those
17 of us who are perhaps paying too much attention to
18 them. And so the comment is to -- we would ask
19 that you please pay attention to those, and then
20 we would -- the question is would it help you for
21 us to come and talk with you about those things,
22 in which case we would be happy to?

1 MS. SHEPPARD: The reason I pulled the
2 microphone over -- because I was going to answer
3 Robert's question with exactly what you just
4 talked about.

5 There's conversations taking place at
6 the member level about the fact that there have
7 been a lot of changes since the last version of
8 the bill that was introduced in 2007, even changes
9 in case law since it came out of the House
10 Committee.

11 MR. KIEFF: Right.

12 MS. SHEPPARD: We are very aware of
13 that. We have conversations about Quanta weekly
14 for people who come in and talk to us about how we
15 could change damages language to perhaps put in a
16 enhanced gatekeeper function on the front end and
17 change language to essential features. It's --
18 Congress may seem like a bubble, but we're not.
19 We have -- we've had these conversations -- you're
20 welcome to come in and talk to us about it.

21 As to what will be in the bill, we are
22 still working that out, and part of the reason is

1 because of these cases with venue, with damages,
2 with inequitable conduct.

3 MS. TRIPLETTE: And absolutely please
4 talk to us. Please give us any commentary. If
5 you have law reviews, if you have -- I don't know
6 if you -- if any -- if any outside counsel have
7 written summaries, feel free to send absolutely
8 everything. We are going to -- the Senate will be
9 having a hearing hopefully sooner on patent
10 reform. Senator Specter's office has requested
11 that there be at least somewhat of a focus on
12 court cases from the past two and a half years
13 given the landscape.

14 And I was going to say, you know, if
15 you've been in my office recently and those who
16 haven't seen, there's an ever-growing notebook
17 that's currently this big, I believe, now, and I
18 expect another one to add, of the court cases,
19 but, you know, these law reviews and summaries
20 help us view them in the light like the
21 practitioners do, because that's what we need to
22 be looking at these in.

1 MR. ADLER: You mentioned something
2 about re- looking at the appropriations as well as
3 the -- you saw me make a motion this way. I
4 wasn't expecting the case law, but if the -- did
5 the economic conditions in this current economy
6 change some of the calculus that goes into the
7 discussion around the patent reform elements --
8 you know, like, whether it's post-grant or how
9 much that would cost and then you said something
10 about re-exam and the -- did the economic
11 situation change some of the factors in this whole
12 discussion?

13 MS. SHEPPARD: I thought you were going
14 to ask us a different question, but I don't think
15 that the economic concerns have changed the fact
16 that the Patent Office probably needs some
17 reforms, and that's going to be a benefit, and
18 that benefit to the United States economy. In the
19 end, the end result would be a net benefit to the
20 United States economy. We can't ignore the
21 problems at the Patent Office and think by not
22 putting funding there that we can continue to be

1 the IP leaders of the world.

2 The question I thought you were going to
3 ask was more on fee diversion, because the
4 economic conditions perhaps could lead to a
5 reversal from what we've seen in the past, which
6 is complete funding for the PTO with their own
7 funds. We're hoping that we can avoid that
8 happening. We've -- on our House side, we've
9 tried very hard to put in legislation that would
10 end fee diversion. That hasn't happened, and
11 because for reasons that you probably already
12 know. You mentioned appropriations.

13 MR. ADLER: Yeah.

14 MS. SHEPPARD: But that is an issue that
15 we're going to have to fight very hard on.

16 MR. ADLER: Well, I was actually -- I
17 stayed away from fee diversion, because I actually
18 was thinking that there's more need for more
19 funding, not taking away the funding that's
20 already there. I think that the economy and the
21 innovation engine of this economy probably
22 requires more help in this place with ever

1 restructuring our other efforts. But I hope we
2 can have more conversation around that as well.

3 MR. DOLL: I wanted to jump in on what
4 Marc said, because it's extremely important right
5 now as we're looking at the Patent Office budget
6 and the amount of money that we have that we're
7 funding right now. We're looking at processes
8 that we do, such as some of the applications that
9 are filed, the application filing fees that are
10 controlled by regulatory fees, the reexamination
11 process where we lose thousands and thousands of
12 dollars on every application that we examine, and
13 we're having a very rough time with filings being
14 essentially flat or even below what they were the
15 year before, making ends meet with the budget we
16 have.

17 MS. SHEPPARD: We've had conversations
18 about giving the USPTO authority to adjust your
19 own fee schedules. Those conversations are taking
20 place at the member level, so they know the issue.
21 And that's all I can say about that.

22 MR. DOLL: Any help would really be

1 appreciated.

2 MS. TRIPLETTE: Well, I mean, on the
3 Senate side we've definitely -- the appropriators
4 who handle this area -- they're very well aware.
5 There are lots of -- I mean, the one benefit is
6 that you do have with those -- Senator Leahy and
7 Senator Specter -- is you have two appropriators
8 as well, so almost everything that's done
9 generally in the IP space but also in the patent
10 space they're able to wear both hats and
11 understand, and they have had conversations with
12 their fellow members over the past several years
13 on that note.

14 And I would say concerning the question
15 on the state of the economy, I think it just makes
16 this issue that much more important, and that
17 we're trying to understand the impact that what we
18 do and make sure that everything we do is actually
19 improving upon the system.

20 MR. FOREMAN: Historically, it's been
21 innovation that's led the country out of a
22 recession, and I heard you say something about

1 giving the Patent Office the authority to raise
2 fees. Why are we looking at that and maybe not
3 encouraging more innovation by lowering fees and
4 the government stepping in and helping encourage
5 innovation at the company level, at the
6 independent inventor level, and not looking at
7 balancing this budget here that they've got at the
8 Patent Office by charging more but actually
9 encouraging more innovation to occur in the
10 country.

11 MS. SHEPPARD: I don't think I said
12 raise fees. I don't know if you said raise fees.

13 MR. FOREMAN: Well, you said to --

14 MS. SHEPPARD: I said fee restructuring.

15 MR. FOREMAN: -- manage fees and that's
16 what's on the table right now is actually charging
17 more for what's -- what the Patent Office does.

18 MS. SHEPPARD: Well, it would be more
19 restructuring the fees so the fees would be more
20 on the front end versus on the back end. That's
21 the proposals that we've heard. Raising fees --
22 it's always -- it's going to be contentious. At

1 some point they may have to do it. Usually
2 Congress is the place where that happens. The
3 (off mike) about taking place about it right now
4 are more about restructuring, because there are
5 fewer patents that are granted. There is the
6 problem of -- maintenance fees are not what they
7 -- are not sufficient to keep the funding at the
8 level that it has been. So that is what we are
9 considering.

10 MR. DOLL: Okay.

11 MS. TRIPLETTE: And I guess I just want
12 to -- I want to know what I'm -- the question
13 that's being asked here is -- are you asking why
14 are we not talking to appropriators about -- hold
15 on a second -- about getting the Appropriations
16 Committee to kick in more funding? Is that what
17 you're --

18 MR. FOREMAN: It's certainly a
19 possibility. I mean, one of the things that we
20 were hit with --

21 MS. TRIPLETTE: It's a very difficult --

22 MR. FOREMAN: -- when we walked in the

1 building was that there's a significant budget
2 shortfall for the Patent Office, and so rather
3 than stifling innovation, shouldn't we be looking
4 at ways to actually encourage it? And this is
5 certainly one of the organizations where that all
6 happens.

7 MS. TRIPLETTE: Well, I think that
8 everything that we are looking at within any
9 patent reform debate we are looking at making sure
10 it meets the end of encouraging innovation. I
11 mean, certainly (off mike) looking at doing the
12 opposite, but I guess I'm just saying I -- the
13 history with the Appropriations Office and the
14 history -- sorry, Appropriations Committee -- and
15 the history of funding for this Office, although
16 we have not had fee diversion for the past several
17 years -- you know, you had it for -- we had a
18 compromise. That was for the last three years,
19 and then it's been done on an annual basis.
20 That's difficult as it is. It's very difficult as
21 is. And so I think that what our appropriators
22 would say if we were to ask them about this is

1 they would say why are you not looking at
2 improving or streamlining the processes within the
3 PTO to the extent that you can do it up here on
4 the Hill such that it's more efficient and they're
5 getting more bang for their buck rather than
6 asking us for more bucks.

7 MR. MATTEO: I have a broader -- oh,
8 sorry -- have a broader question. I mean, clearly
9 you can't give us specifics, but we've talked
10 about a number of macro events and trends that are
11 happening here -- the state of recent case law
12 over the last 36 to 48 months, the economic
13 crisis, etc -- and what I'd like to ask -- and
14 again I understand that you can't give specifics
15 -- is that any reform presupposes as an antecedent
16 objectives things that need to get fixed. Have
17 these things and other things fundamentally
18 changed the objectives or the things that need to
19 get fixed in the minds of the legislators? Is
20 their fundamental perspective changed, because
21 that will help us understand where some of the
22 specifics will sort themselves out, so have there

1 been broader principle changes in terms of what
2 the reform has to address?

3 MS. TRIPLETTE: That depends on member
4 to member. It's hard for me to say. I can't
5 speak to what principles drive. You know, Senator
6 Hatch or Senator Leahy --

7 MR. MATTEO: The flavor of the
8 conversations that they're having. That would
9 also be interesting.

10 MS. TRIPLETTE: Excuse me?

11 MR. MATTEO: If you can comment on the
12 flavor of the conversations in and around these
13 things, that would also be interesting even if you
14 can't speak with unanimity for everyone.

15 MS. TRIPLETTE: I mean, I can't speak to
16 what conversations that there are between Senator
17 Leahy or Hatch. I can just -- I mean, all I can
18 say is that -- I can tell you that the principles
19 that's driving this -- it's not that they're
20 changing; they're becoming clearer. And
21 resounding call is that -- the need for certainty
22 and so that -- I would say that's been the driving

1 principle and that's where rather than having kind
2 of each different proposed change saying well,
3 this is what we need to do here, this what we need
4 to do here, almost at the base of every call
5 recently in the meetings has been we need to make
6 sure that either the obligation process is more
7 certain or we need to make sure that we have a
8 better understanding of the scope of the patent
9 that comes out of the Patent Office and -- but
10 it's certainty that seems to be the underlying
11 principle now as opposed to kind of different
12 principles for different issues.

13 MR. MATTEO: Okay, because that was very
14 much the case before. At least it felt that way.

15 MS. TRIPLETTE: Um-hmm.

16 MR. MATTEO: Okay. And actually I just
17 have one quick follow-up. You had mentioned
18 something about re- exams, but I couldn't hear
19 what you said. All I heard was
20 something-something re-exams. And could you just
21 repeat that?

22 MS. TRIPLETTE: Oh, I just said that the

1 numbers that have recently come out of the PTO as
2 to kind of the cancellation range and how often
3 it's being used now, it's just giving a reason to
4 re-visit the issue as to whether do we create a
5 new (off mike) system, do we do something to the
6 current inner-party system. Not speaking one way
7 or another, I'm just saying it's giving -- there's
8 new evidence to revisit the issue.

9 MR. MATTEO: Right. When there's a 2X
10 increase, even though the numbers are still pretty
11 low.

12 MS. TRIPLETTE: Um-hmm.

13 MR. MATTEO: Thank you.

14 MR. WESTERGARD: So, when you say to
15 revisit the issue, do you mean to revisit the
16 necessity of a post-grant opposition proceeding at
17 all? Is that what you're suggesting?

18 MS. TRIPLETTE: Yeah.

19 MR. WESTERGARD: And so the proposal
20 would be to take it out of the bill and leave
21 re-exam as a primary vehicle?

22 MS. TRIPLETTE: I mean, I want you to

1 understand I'm not saying that this is going to be
2 anything that's going to happen at all.

3 MR. WESTERGARD: Sure, sure.

4 MS. TRIPLETTE: I'm saying that because
5 there's new evidence of usage and the rates,
6 cancellation rates, it's giving us pause to see
7 what should be actually -- what should -- what
8 should or should not be included in the bill.

9 MR. WESTERGARD: Given the perceptions
10 that I have seen out there that the bills -- the
11 issues that were issues before are still issues
12 today in terms of damages, in terms of AQS, in
13 terms of inequitable conduct, what is the feeling
14 on the Hill about the likelihood of passage, or do
15 we find ourselves in the same battle that we had
16 with the opposing sides last Congress and end up
17 discussing -- have a lot of discussions with no
18 real success on eventual passage?

19 MR. RIVETTE: That's a good question.

20 MS. TRIPLETTE: Do you want to hear the
21 (off mike)?

22 MS. SHEPPARD: I never want to give up

1 on people, so there's always the opportunity. I
2 think there is consensus on some of the patent
3 quality -- and I hate to use the word "quality"
4 after the discussion I just heard. On some of the
5 more -- the initiatives that wouldn't prove patent
6 quality, improvement at the PTO, there is some
7 consensus. There is less disagreement than there
8 is consensus. (off mike) the agreement are on big
9 issues. We'll have more conversations. There are
10 additional players. There are some people who are
11 a little bit busy because of other issues in the
12 market place on the outside who may not be as
13 vocal as they were before, and because of the
14 court cases, some of the things have fallen away.
15 I think I take -- on bridge rights I disagree with
16 a lot of the reports that say that patent reform
17 cannot possibly get done this Congress. The
18 economy is different. The players are different.
19 And sometimes people get softened up after seeing
20 that they've lost. If that's -- so, I mean, so
21 that is a general statement.

22 MR. WESTERGARD: So, who has lost on

1 what issue?

2 SPEAKER: Absolutely (off mike).

3 MS. SHEPPARD: Well, I --

4 MS. TRIPLETTE: -- waiting for that one.

5 MS. SHEPPARD: Right. Well, I meant
6 after the Patent Bill was not passed last
7 Congress.

8 MS. TRIPLETTE: And just to repeat that,
9 I think there's definite -- there is always a
10 possibility there is -- you have staff that are
11 very committed to putting in the hours. I mean,
12 listen, none of us would put in the all-nighters
13 and the extensive hours into this bill that are
14 required because of its importance that we do if
15 we did not think that there was a likelihood that
16 a sound policy bill would result. So --

17 MR. RIVETTE: Any other questions?
18 Steve?

19 MR. PINKOS: Well, I'll just follow up
20 on Louis' point for a second. I think it's really
21 interesting maybe to -- it might be interesting
22 for you all to analyze -- and PPAC as well -- the

1 role that the Patent and Trademark Office does
2 play in innovation in America. In the critical
3 role of -- and I think it's what's sort of driven
4 the patent reform debate is to either have that
5 certainty of quality patents -- I didn't realize I
6 was so far away, Kevin, sorry -- have the
7 certainty that comes with quality patents, because
8 that helps, obviously, to drive innovation. And,
9 to Louis' point, in the early '80s nobody had a
10 computer -- not everyone had a computer at their
11 desk, no one had a cell phone, there weren't
12 satellite semiconductors to a certain degree, the
13 internet hadn't been invented yet, and obviously
14 those types of technological advances led to, in
15 many respects, 25 years of, you know, fantastic
16 economic times for America by -- you know -- by
17 and large. It's interesting that the role that
18 the USPTO plays in that and specifically with
19 fees, you know, maybe the dynamics are changing a
20 little bit and it might be something worth looking
21 at to, you know, with the economic times as they
22 are will some people not apply for patents that

1 would otherwise lead to the innovations that we
2 may need, because if they don't apply for the
3 patents they're probably not going to get the
4 capital that they need perhaps to pursue the
5 commercialization of that. So, it may be worth --
6 we always thought that people, at least in recent
7 times, could bear increases in fees to a certain
8 degree and now may be a time when they can't, and
9 I think what -- again what Louis may have been
10 getting at was -- and this is -- I certainly agree
11 with you -- sort of outside the box of recent
12 discussions of how the PTO is funded, and it's the
13 battle -- of course it's been about diversion and
14 the PTO should just keep what they collect. But
15 you could make a strong argument after studying
16 the role that the PTO in innovation -- that
17 there's a lot of stimulus that could come from the
18 PTO so to speak. I mean, if you look at what the
19 Congress authorizes and where some spending takes
20 place and analyze whether that really will have a
21 stimulative effect, look at the stimulative effect
22 of the innovations that have come in America over

1 the last 25 years. They create tens of millions
2 of jobs. And so there could be just a new way of
3 approaching this where the PTO -- we need to make
4 sure that the PTO is there to meet the needs of
5 innovators and meet the needs of our economy, and
6 that might perhaps require some sort of different
7 funding mechanism.

8 MS. TRIPLETTE: Well -- and I guess I
9 would see that point would offer those who
10 represent industry in the room that would like to
11 make that point to make sure that you have further
12 evidence presented to Congress of it, because the
13 problem is -- right now is the lag time between
14 R&D and it's very, you know, disconcerting to us
15 that we're hearing that R&D is being flashed,
16 which is going to result in fewer innovative
17 products which -- fewer patents -- and it's hard
18 to see that lag time to see, you know, slashing
19 R&D here or cutting back on a number of patents
20 that are being filed now because of overall budget
21 cuts -- what effect that will have three, five,
22 six years down the road. And so that's -- I guess

