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Inside New Federal Circuit Practice Notes for Expedited Appeals

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Over the past several years, parties have been more frequently seeking expedited appeals at the U.S. Court of Appeals for the Federal Circuit. Most requests are in patent cases, and many are driven by the high stakes associated with Hatch-Waxman litigation in pharmaceutical patent cases. The Federal Circuit has also taken notice of this practice and has recently revised the court's Practice Notes to the Federal Circuit Rules in response.

On November 20, 2014, the court issued new practice notes that govern requests to expedite appeals. From the tenor of the practice notes, and based on previous orders issued in response to motions to expedite, it is clear that the court's new practice notes should be seen as guidance to the bar that motions to expedite will be reviewed more critically by the court. Further, attorneys should not expect to have motions to expedite granted unless they have undertaken some effort to "self-expedite" the appeal.

The New Practice Notes

Attorneys who regularly practice before the Federal Circuit are well versed in the normal deadlines for appealing and briefing. Under Federal Rule of Appellate Procedure 4, a party generally has 30 days to appeal from a lower tribunal decision, or 60 days if the United States is party. Under Federal Circuit Rule 31(a), the appellant's opening brief is due 60 days from docketing of the appeal (or from the service of the certified list in the case of an agency appeal). The appellee's response brief is then due within 40 days of service of the opening, and the appellant's reply brief is due with 14 days.

Practice Areas

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Accounting for the time to file the joint appendix, the time to schedule oral argument, and a few additional days depending on type of service, it will generally take at least six months from the final agency or trial decision until oral argument.

Given that length of time, many appellants routinely file motions, pursuant to Federal Circuit Rule 27, to expedite the appeal. Such motions seek to compress the briefing schedule and accelerate the date of oral argument. In some instances, parties have sought briefing schedules of as little as seven days for the blue brief, ten days for the red brief, and three days for the gray brief.[1] Highly compressed schedules are burdensome not only to the parties but also the clerk's office.

In response to these motions, the Federal Circuit has now issued new practice notes governing motions seeking expedited proceedings. The new practice notes are for Federal Circuit Rules 4, 15, and 27. The new practice note for Rule 4 reads as follows: EXPEDITED PROCEEDINGS. The overall time for an appeal can be accelerated by the expeditious filing of a notice of appeal shortly after entry of final judgment in the trial forum. When a party is considering seeking expedited proceedings on appeal, the party should consider filing its notice of appeal and initial brief well before the applicable deadline. For further information on expedition procedures, see the Practice Notes to Rule 27.

The new practice note for Rule 15, governing appeals from agency decisions, includes an analogous instruction.

These new practice notes capture the court's previous admonitions that appellants are generally free to "self-expedite" their appeals. For instance, in *Cephalon Inc. v. Watson Pharmaceuticals Inc.*, No. 2011-1326 (Fed. Cir. May 20, 2011), the court denied a motion to expedite, explaining that the appellant could file its brief before the normal deadline: Watson may of course significantly self-expedite the case by filing their briefs early. Watson has not shown that the time for Cephalon to file its brief should be shortened. Cephalon should not anticipate any extensions of time to file its brief. The case will be placed on the next available oral argument calendar after the briefing is completed, which is the usual course, and thus no motion is necessary to obtain that relief.

The court has repeated its instruction that the power to self-expedite an appeal is soundly within the appellant's power.[2] Thus, the new practice notes for Rules 4 and 15 make explicit the court's earlier guidance that, if an appellant wants an expedited appeal, the appellant will be well-served to take affirmative steps of "self-expediting" before seeking relief from the court.

The third instruction from the court comes in the form of the new practice note for Rule 27, which sets forth the requirements for motions in general. The practice note for Rule 27 reads as follows: MOTION TO EXPEDITE PROCEEDINGS. While motions to expedite proceedings are not routinely granted, they may be filed in an appropriate case. A motion for expedited proceedings is the procedural vehicle to request the Court to accelerate consideration of an appeal or petition for review, and should be filed immediately upon filing of an appeal or petition for review. Such a motion is appropriate where the normal briefing and disposition

schedule may adversely affect one of the parties, such as appeals involving preliminary or permanent injunctions, or government contract bid protests. A motion for expedited proceedings should be styled as an "Emergency Motion." Unopposed emergency motions should still include a brief review of the grounds for the motion, the specific relief sought by way of a proposed briefing schedule, and the legal argument to support the motion, per Rule 27(a)(4). A motion for expedited proceedings should also include as part of the relief sought a request for an expedited briefing schedule for the motion.

The new practice note for Rule 27 again captures guidance that experienced Federal Circuit advocates have known through individual cases and informal guidance from the clerk's office. First, the court notes that a motion is the proper means for asking the court to accelerate the case schedule and that it "should be filed immediately upon filing of an appeal or petition for review." The latter point is particularly important. The court will be less inclined to grant a request for expedition if the party waits any length of time after the notice of appeal is filed.

Second, with its new practice note, the court has provided additional guidance on the particular types of cases suitable for an accelerated schedule. These are appeals where time is truly of the essence, such as those "involving preliminary or permanent injunctions, or government contract bid protests." Many of the instances in which the court has granted expedited briefing are appeals concerning preliminary injunctions in Hatch-Waxman-related litigation. For instance, in Novo Nordisk A/S v. Caraco Pharmaceutical Laboratories Ltd., 601 F.3d 1359 (Fed. Cir. 2010), overruled on other grounds, 132 S. Ct. 3057 (2011), the court had granted a motion for expedited briefing "[g]iven the urgency of Novo's situation," which concerned a court order requiring Novo to alter its patent listing in the U.S. Food and Drug Administration Orange Book.[3]

Third, a motion for expedited briefing must be styled as an "emergency motion" and all motions — even those that are unopposed — must contain the necessary elements of a motion, including the factual and legal bases for granting the motion. Submitting the motion as an "emergency motion" ensures that the motion is handled within the court with dispatch, so that the motions panel or judge can promptly review the motion. The directive that even unopposed motions must include the "grounds for the motion" and the supporting "legal argument" is another sign that the court intends to scrutinize all motions to expedite.

Finally, a motion to expedite without a proposed schedule is unhelpful. Thus, it is best practice to include a proposed briefing schedule, including a deadline to file the joint appendix, although there's no guarantee that the moving party will get the precise schedule asked for. Then again, be careful what you ask for; you might end up writing a complete appeal brief in seven days.

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[1] See In re Cyclobenzaprine Hydrochloride Extended-Release Capsule Patent Litigation, No. 2011-1399 (Fed. Cir. May 31, 2011) (granting accelerated briefing schedule in view of preliminary injunction issued by district court).

[2] E.g., Medeva Pharma Suisse AG v. Par Pharmaceutical Inc., 430 Fed. App'x 878, 880 (Fed. Cir. 2011) (non-precedential) ("Par may of course significantly self-expedite the case by filing its briefs early."); Broadcom Corp. v. Qualcomm Inc., (Fed. Cir. Jan. 30, 2009) ("Qualcomm may, of course, self-expedite the case by filing its own briefs early."); Kyocera Wireless Corp. v. International Trade Comm'n, 276 Fed. App'x 976, 977 (Fed. Cir. 2008) (non-precedential) ("ATTM may, of course, self-expedite by filing its briefs prior to the due date.").

[3] See also In re Cyclobenzaprine Hydrochloride Extended-Release Capsule Patent Litigation, No. 2011-1399 (Fed. Cir. May 31, 2011) (granting accelerated briefing schedule in view of preliminary injunction issued by district court); Somerset Pharmaceuticals, Inc. v. Dudas, 500 F.3d 1344, 1345 (Fed. Cir. 2007) ("Somerset filed a motion with this court on July 11, 2007 seeking to expedite the briefing schedule for its appeal, which we granted on July 12.").