

Insights: Publications

5 Key Takeaways | Discretionary Denials in IPRs: New Framework, Navigating the Evolving Landscape, Strategies for Survival

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Kilpatrick's [Justin Krieger](#) and [Nicki Kennedy](#) recently presented to an audience of other thought leaders on the topic of “**Discretionary Denials in IPRs: New Framework, Navigating the Evolving Landscape, Strategies for Survival**” to guide patent counsel on the new discretionary denials landscape. Justin and Nicki discussed the implications of the many changes for IPR and discretionary denial and provided best practices and strategies for navigating discretionary denials. They also addressed recent precedential-designated decisions, as well as the actions by the USPTO.

Justin and Nicki's key takeaways include:

1. Discretionary denials now dominate PTAB outcomes under the new Director regime.

Although challenged patents had a high survival rate (**63%**) under Dir. Vidal's regime, those rates have soared even higher. Moreover, institution rates—once around **75% in 2024**—have collapsed under former Acting Director Stewart and Director Squires, with Stewart's “net” institution rate dropping to **~32%** and Squires's current rate of **0% (0-34)**. These drastic declines reflect a seismic policy shift. The result is that IPR petitions face additional briefing coupled with unprecedented front-end filtering before any merits review.

2. “Settled expectations” and long-term knowledge are emerging as powerful denial tools.

Where prior Directors focused largely on *Fintiv* and follow-on petition issues, the new framework elevates “settled expectations”—particularly for patents **six years or older**—as a stand-alone basis for denial. Even younger patents may fall if a petitioner had early, concrete knowledge of the application or issued patent, as illustrated in *Aquestive v. Iono*. Petitioners must now justify filings more thoroughly, documenting legitimate reasons for delay.

3. The new discretionary denial briefing process separates discretionary issues from the merits but creates transparency concerns.

The 2025 framework divides briefing between a discretionary denial brief (DDB) and the traditional POPR, with the Director making all institution decisions in consultation with PTAB judges. Early “bulk denials” under this structure include no reasoning, leaving practitioners without guidance for requesting rehearing. They also do not disclose which judges worked with Dir. Squires on evaluating the petitions. While intended to enhance

independence and efficiency, the shift has raised real concerns over predictability, transparency, and due-process optics while increasing budgets and briefing for Patent Owner and often for both parties.

4. The NPRM proposes the most sweeping practice changes in a decade—including a mandatory “nuclear” 102/103 stipulation.

The proposed rules would require petitioners to stipulate that they will **not assert any §§102/103 grounds in another forum**, even those that are unknown and those that cannot legally be raised in IPRs (e.g., on-sale bar or public use). The NPRM also bars follow-on IPRs and prohibits institution where another tribunal is likely to rule first. Collectively, these proposals would sharply limit the strategic utility of IPRs for defendants in active litigation.

5. Recent decisions highlight new risks: inconsistent claim construction, RPI disclosures, and post-FWD “de-instituting.”

Cases such as *Revvo*, *Tesla v. IV*, and *Corning Optical* show the Director enforcing strict consistency across forums and insisting that all RPIs be fully disclosed—failures now result in vacated institutions or full dismissal. The Director has even vacated **FWDs after issuance**, terminating trials entirely and eliminating appellate rights under *Medtronic v. Bosch*. Combined with the Federal Circuit's dismissal of challenges to the new system, petitioners have extremely limited recourse.

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