Insights: Publications

5 Key Takeaways | The Surge of Ex Parte Reexamination

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Kilpatrick's **Justin Krieger** recently spoke at the **31st Annual Patent Law Institute** in Austin, Texas, on the surge of ex parte reexamination (EPR) and how the USPTO has fundamentally altered the post-grant landscape with major procedural shifts in 2026. Justin's session explored the impact of recent policy changes concerning EPRs and how to effectively implement EPR practice into your overall IP strategy. Justin's key takeaways from his presentation include:

1. EPR Resurgence: Ex Parte Reexamination (EPR) filings are experiencing a significant resurgence as Patent Trial and Appeal Board (PTAB) institution rates and inter partes review (IPR) petitions continue to drop. This shift highlights a strategic pivot by challengers seeking alternative avenues to invalidate patents when IPRs become less accessible. Due to the increased number of petitions, the Central Reexamination Unit (CRU) is more critically analyzing EPR requests, although they remain high at ~84%.

2. Inconsistent Application of § 325(d): Following the 2021 Vivint decision, the application of § 325(d) to stop repetitive EPR requests has become broader but highly unpredictable. While defeating an IPR at the institution stage can sometimes shield a patent from a subsequent EPR utilizing the same theories, recent cases demonstrate that the USPTO may still grant reexamination despite identical prior art.

3. New RPI Disclosure Rules: To prevent barred parties from abusing the reexamination system, a July 2026 Notice of Proposed Rulemaking introduces a requirement for third-party requesters to identify all Real Parties in Interest. This proposed rule aims to help the USPTO independently verify AIA estoppel provisions rather than relying solely on the requester's self-certification.

4. Mandatory SNQ vs. Discretionary § 325(d): If a request raises a Substantial New Question of patentability (SNQ), the USPTO Director must generally order an EPR, unlike the discretionary institution standard for an IPR. However, under 35 U.S.C. § 325(d), the Director maintains the discretion to deny an EPR request if the same or substantially the same prior art or arguments were previously evaluated.

5. Patent Owner Pre-Order Papers: Starting in April 2026, patent owners gained the ability to file pre-order papers to challenge whether an SNQ actually exists before an EPR is granted. Despite this new opportunity to present counterarguments early, statistical evidence indicates that these pre-order papers have largely failed to reduce overall EPR order rates.

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