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Recent Changes and Proposals for AIA Trials

Presenters: Acting Chief Judge Scott Boalick, Acting Deputy Chief Judge Jackie Bonilla, Vice Chief Judge Scott Weidenfeller

November 6, 2018

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Overview

- Claim Construction Final Rule (Acting Chief Judge Scott Boalick)
- AIA Trial Practice Guide (ACJ Boalick)
- SOP 1: Judge Panels (ACJ Boalick)
- SOP 2: Precedential Opinion Panel; Designation or De-designation of Decisions (Vice Chief Judge Scott Weidenfeller)
- Motion to Amend Practice (Acting Deputy Chief Judge Jackie Bonilla)

Question/Comment Submission

To send in questions or comments during the webinar, please email:

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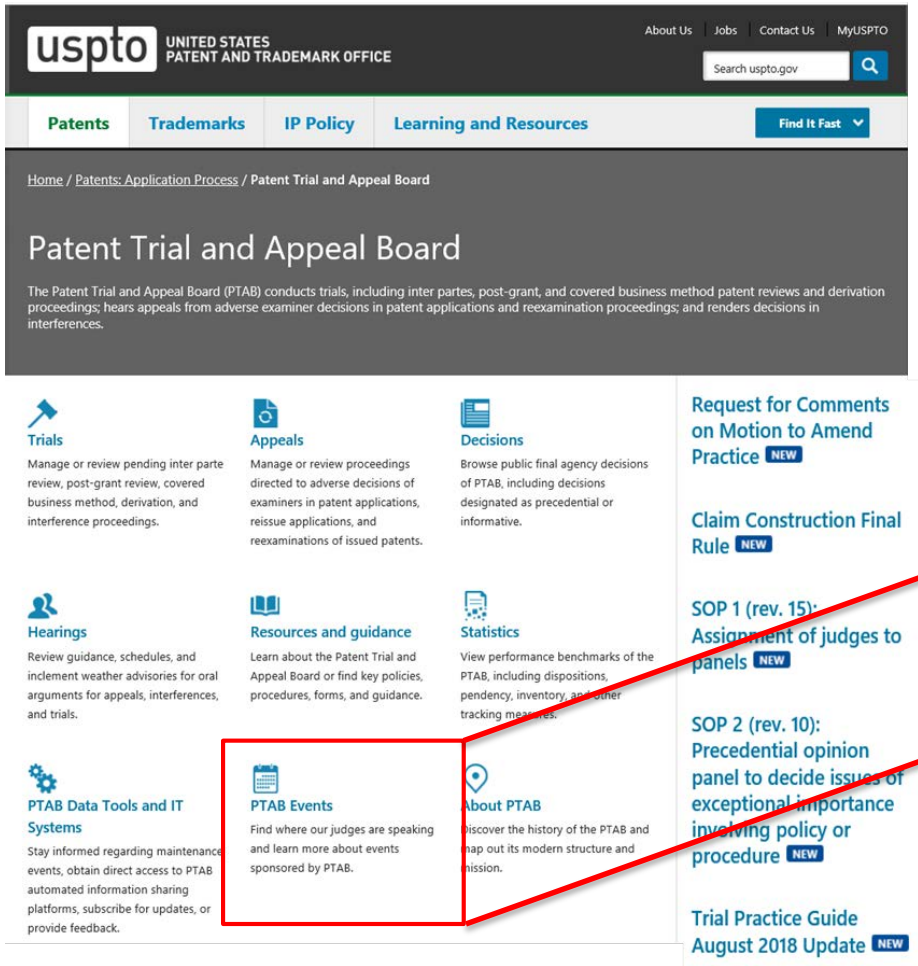
Slides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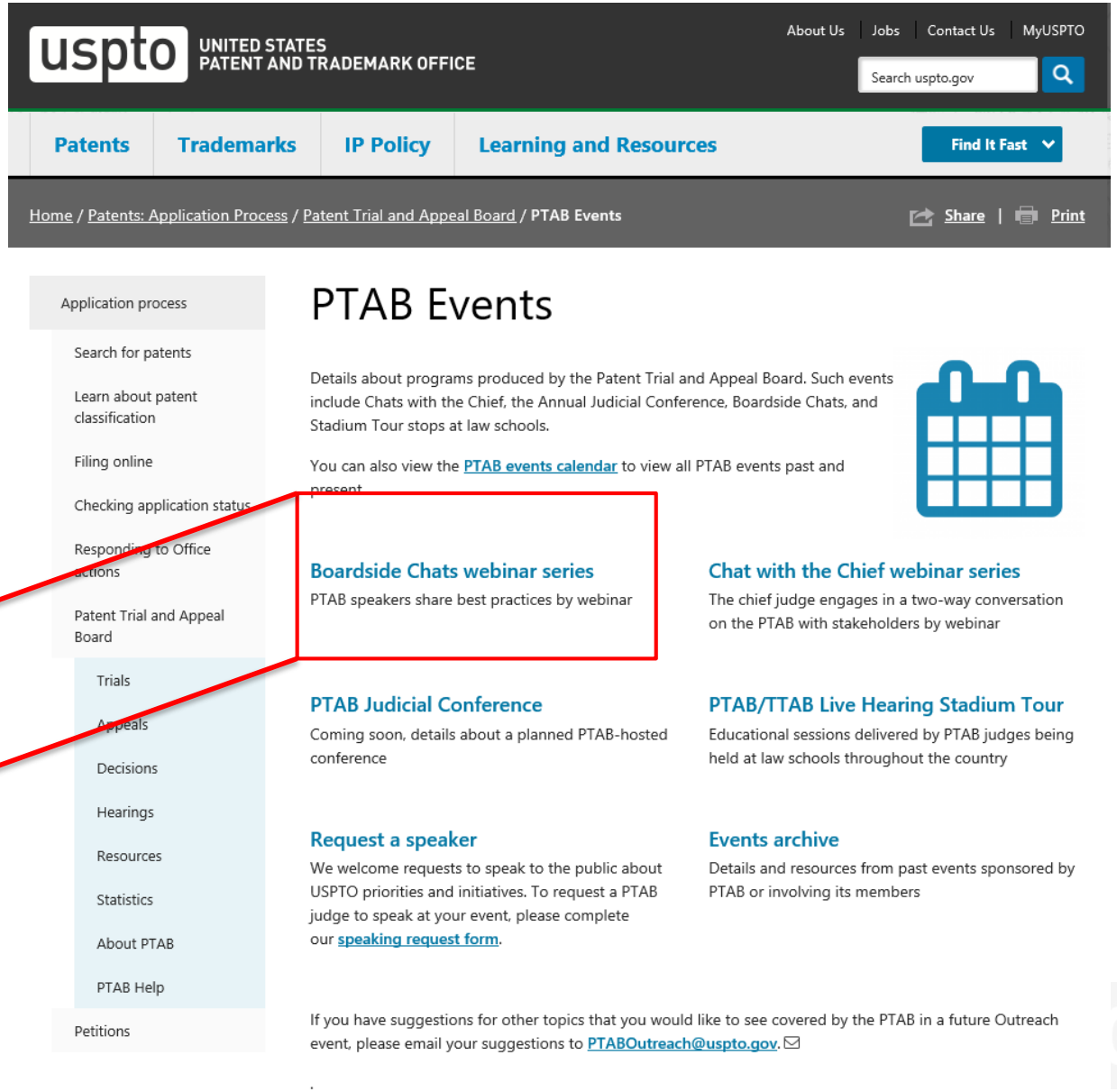
Request for Comments on Motion to Amend Practice NEW
Claim Construction Final Rule NEW
SOP 1 (rev. 15): Assignment of judges to panels NEW
SOP 2 (rev. 10): Precedential opinion panel to decide issues of exceptional importance involving policy or procedure NEW
Trial Practice Guide August 2018 Update NEW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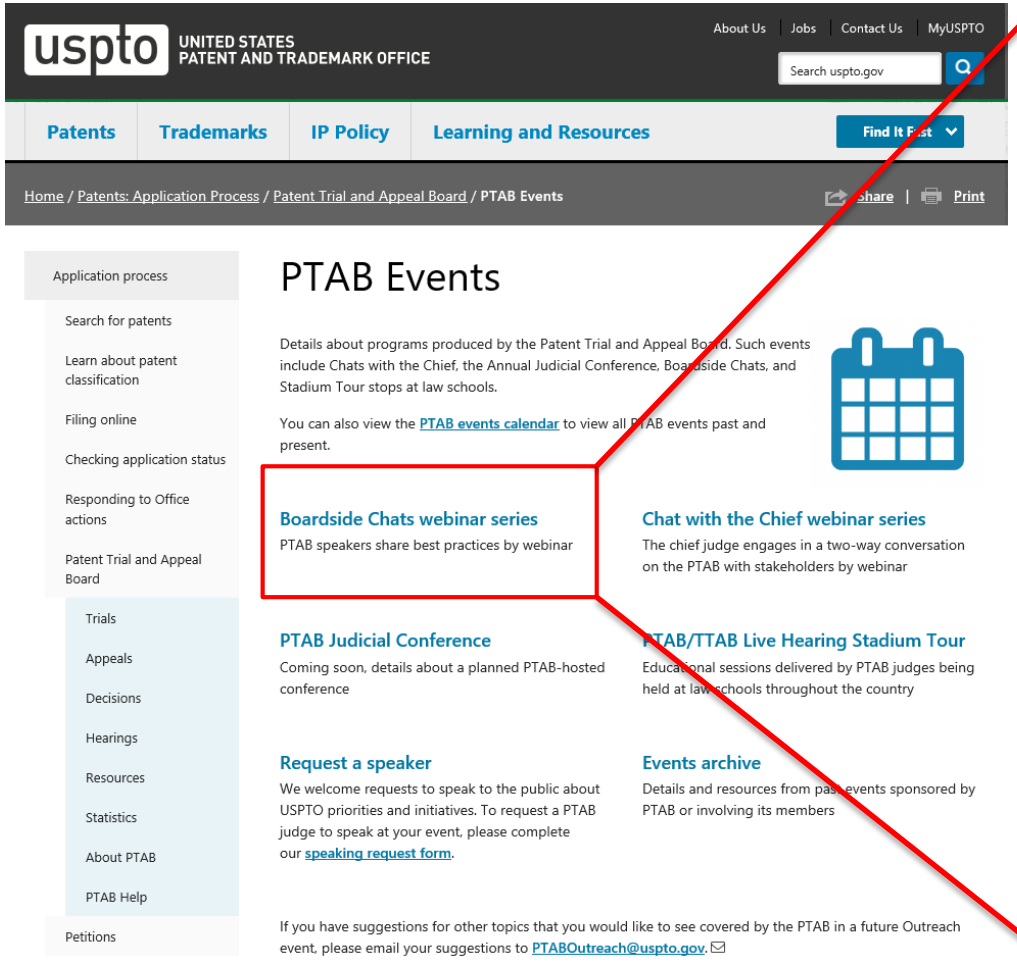
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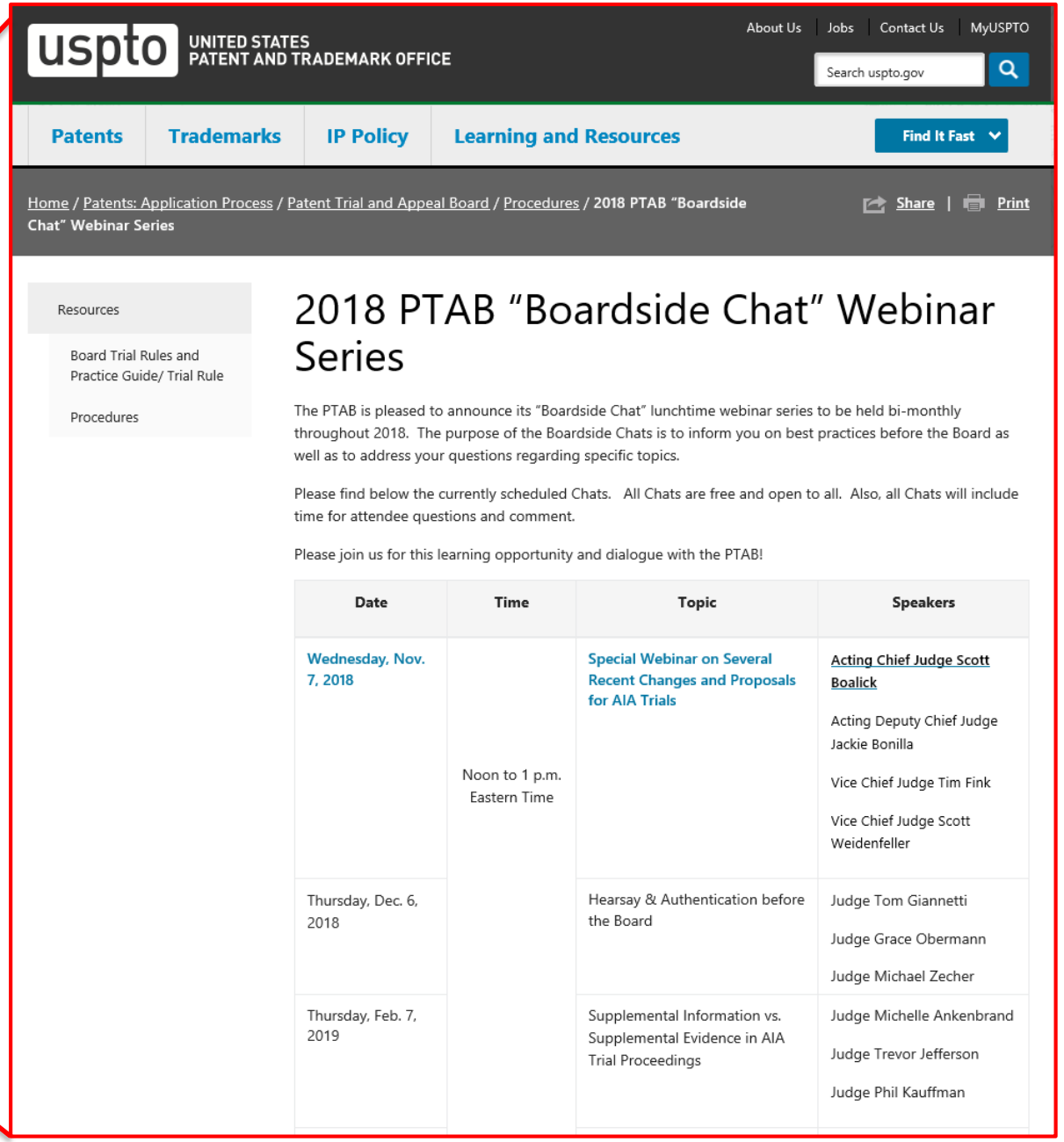
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The PTAB is pleased to announce its "Boardside Chat" lunchtime webinar series to be held bi-monthly throughout 2018. The purpose of the Boardside Chats is to inform you on best practices before the Board as well as to address your questions regarding specific topics.
Please find below the currently scheduled Chats. All Chats are free and open to all. Also, all Chats will include time for attendee questions and comment.
Please join us for this learning opportunity and dialogue with the PTAB!
Date | Time | Topic | Speakers
Wednesday, Nov. 7, 2018 | Noon to 1 p.m. Eastern Time | Special Webinar on Several Recent Changes and Proposals for AIA Trials | Acting Chief Judge Scott Boalick; Acting Deputy Chief Judge Jackie Bonilla; Vice Chief Judge Tim Fink; Vice Chief Judge Scott Weidenfeller
Thursday, Dec. 6, 2018 | | Hearsay & Authentication before the Board | Judge Tom Giannetti; Judge Grace Obermann; Judge Michael Zecher
Thursday, Feb. 7, 2019 | | Supplemental Information vs. Supplemental Evidence in AIA Trial Proceedings | Judge Michelle Ankenbrand; Judge Trevor Jefferson; Judge Phil Kauffman

Claim Construction Final Rule

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Final Rule on Claim Construction in AIA Trials
Background

- The Board currently construes unexpired patent claims and proposed claims in AIA trial proceedings using the BRI standard.
- On May 9, 2018, the USPTO issued a Notice of Proposed Rulemaking to modify the claim construction standard used in AIA Trials.
- Individuals, associations, law firms, and corporations submitted a total of 374 comments on the proposed rule with a significant majority supporting the proposed change.

Final Rule on Claim Construction in AIA Trials

What is the Final Rule?

- The Final Rule replaces the BRI standard in AIA trials with the federal court claim construction standard articulated in *Phillips v. AWH Corp.*, 415 F.3d 1303 (Fed. Cir. 2005) (en banc), and its progeny.
- PTAB will take into consideration any prior claim construction determination made in a civil action, or a proceeding before the International Trade Commission, if that prior claim construction is timely made of record.

Final Rule on Claim Construction in AIA Trials

When does the Final Rule apply?

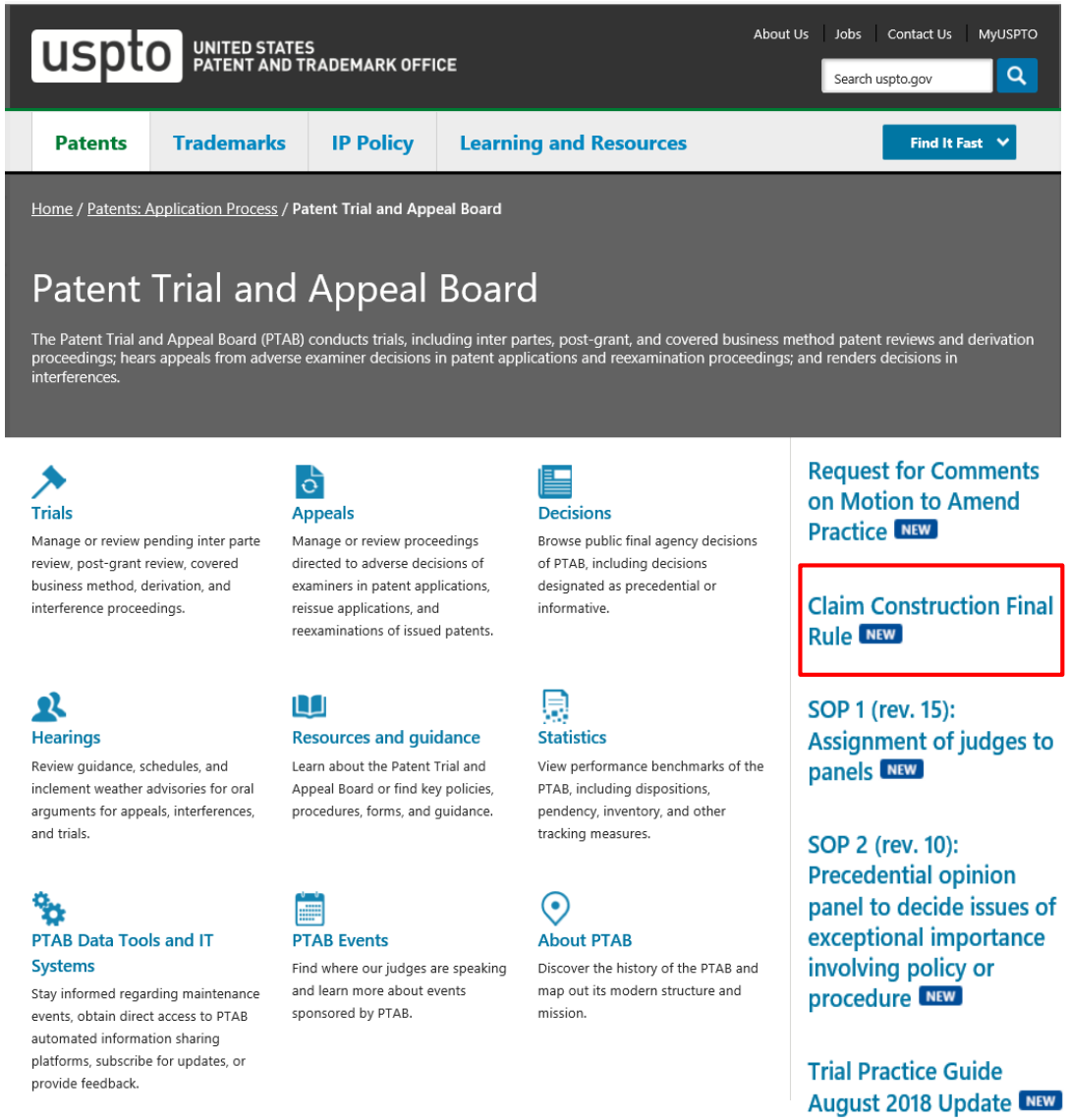
- The Final Rule is effective November 13, 2018.
- The Final Rule will not be retroactively applied and instead will apply only to IPR, PGR, and CBM petitions filed *on or after* November 13, 2018.

Final Rule on Claim Construction in AIA Trials

Why change now?

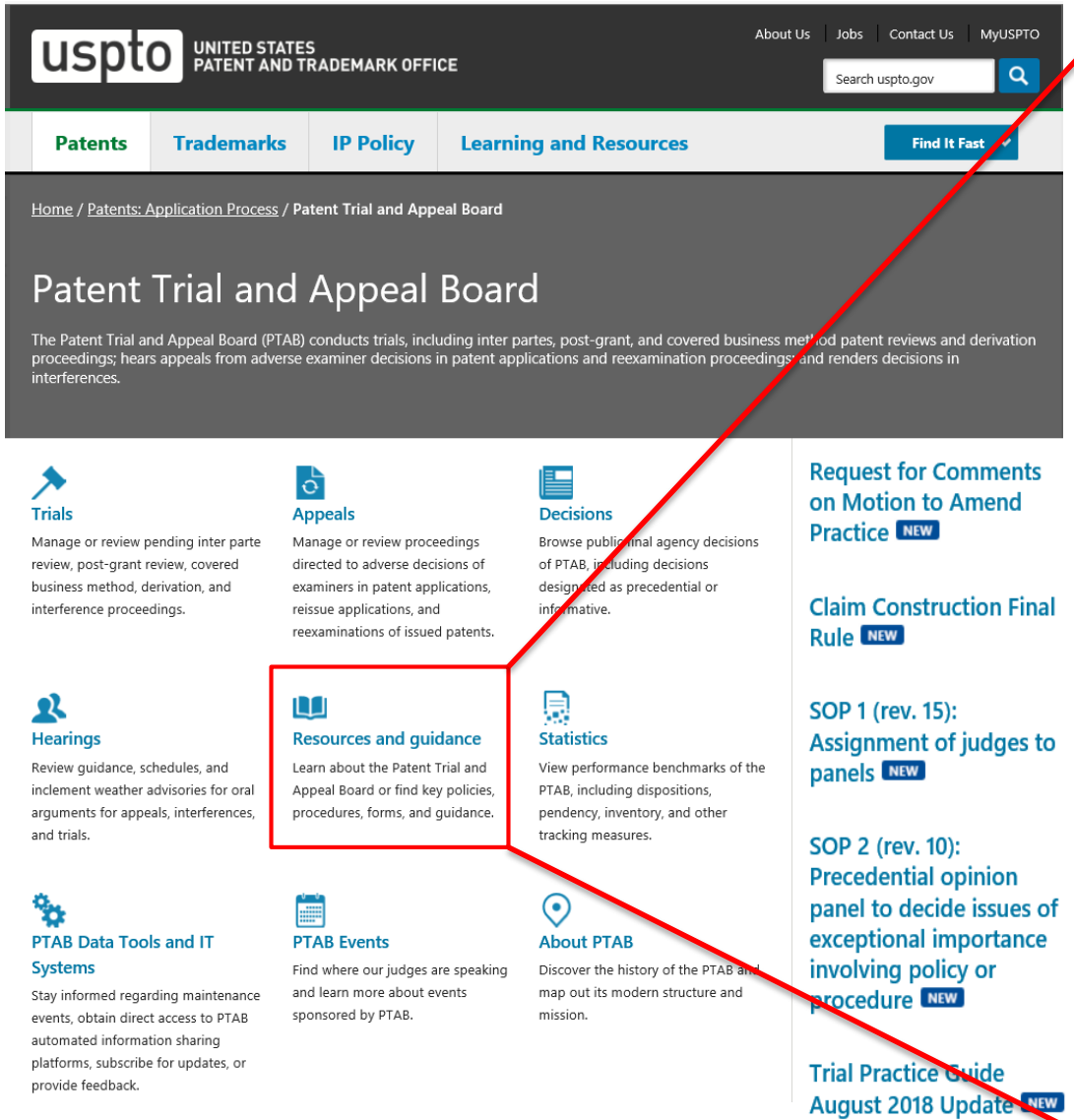
- The rule change will lead, among other things, to greater consistency and harmonization with the federal courts and the ITC and lead to greater certainty and predictability in the patent system.
- Addresses the concern that potential unfairness could result from using an arguably broader standard in AIA trial proceedings.

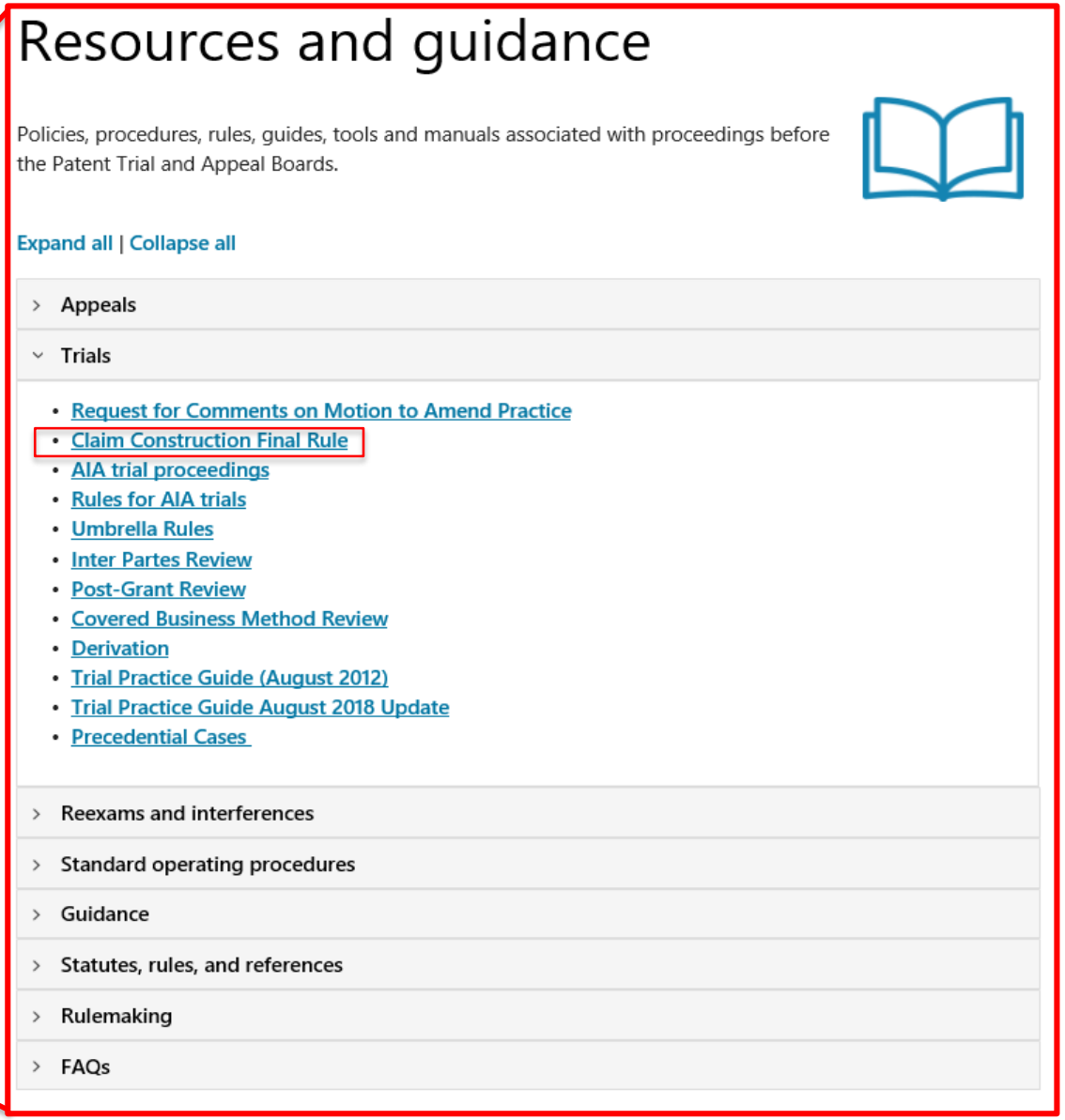
Claim Construction Final Rule



Claim Construction Final Rule URL: https://www.uspto.gov/patents-application-process/patent-trial-and-appeal-board/procedures/ptab-issues-claim-construction

Claim Construction Final Rule





Trial Practice Guide August 2018 Update

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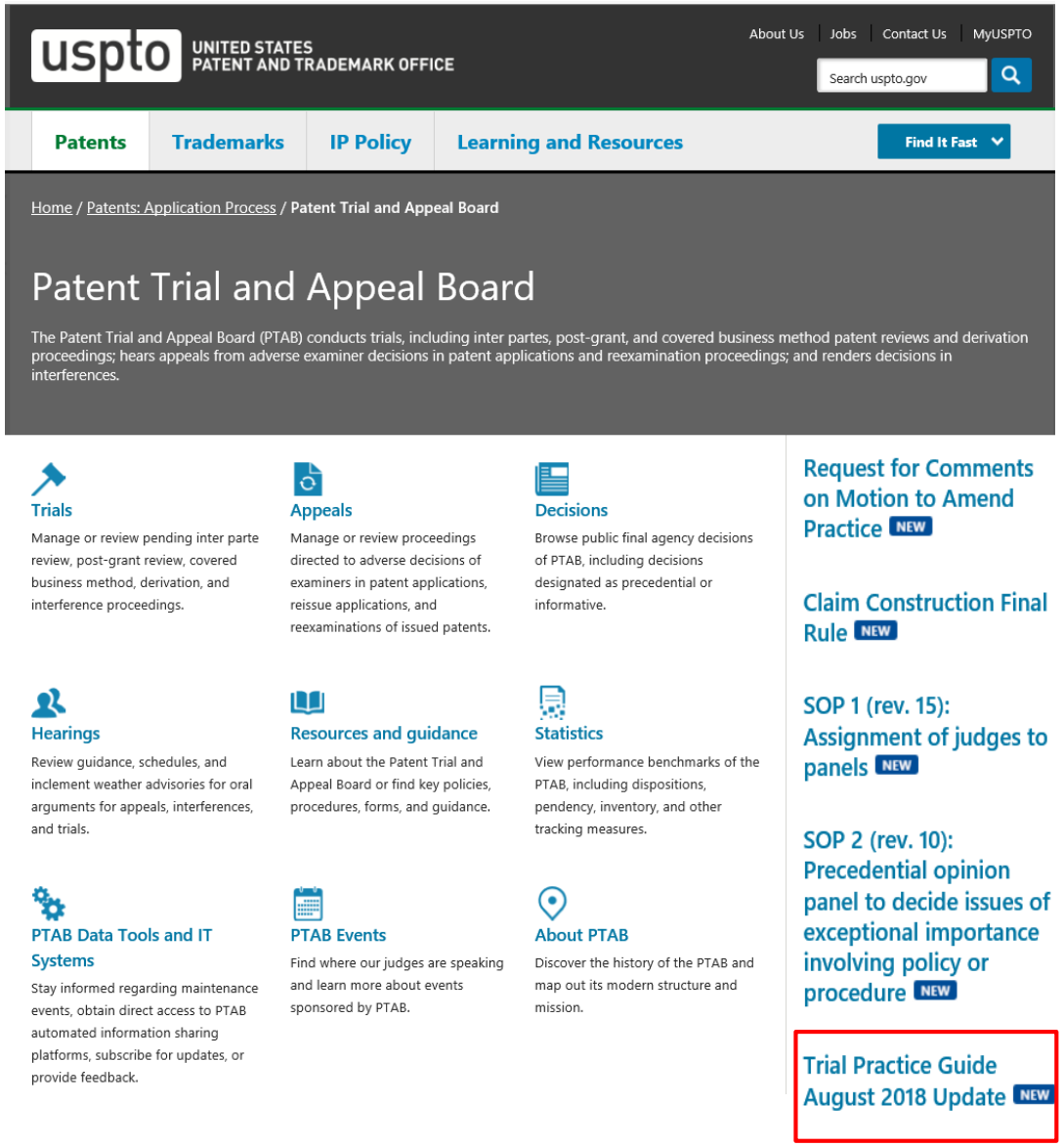
Trial Practice Guide: August 2018 Update

- Guidance on
  - Use of expert testimony
  - Consideration of non-exclusive factors in determining whether to institute a trial
  - Providing for sur-replies
  - Distinction between motions to exclude and motions to strike
  - Procedures for oral hearing, including live-testimony, sur-rebuttal, and default time
  - Providing for pre-hearing conference and potential early resolution of issues

Trial Practice Guide: August 2018 Update



Trial Practice Guide: August 2018 Update URL: https://www.uspto.gov/patents-application-process/patent-trial-and-appeal-board/ptab-trial-practice-guide-august-2018

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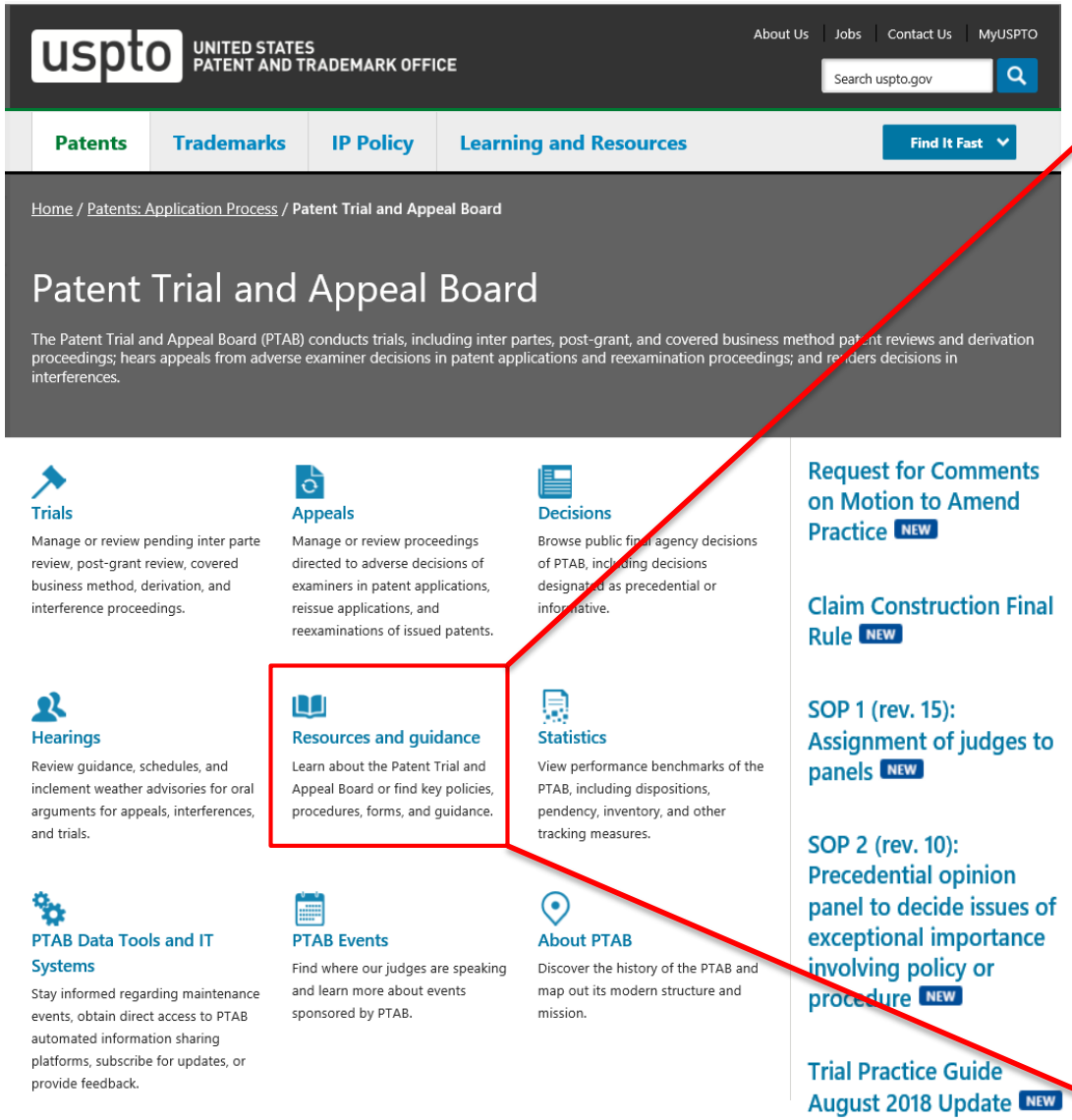

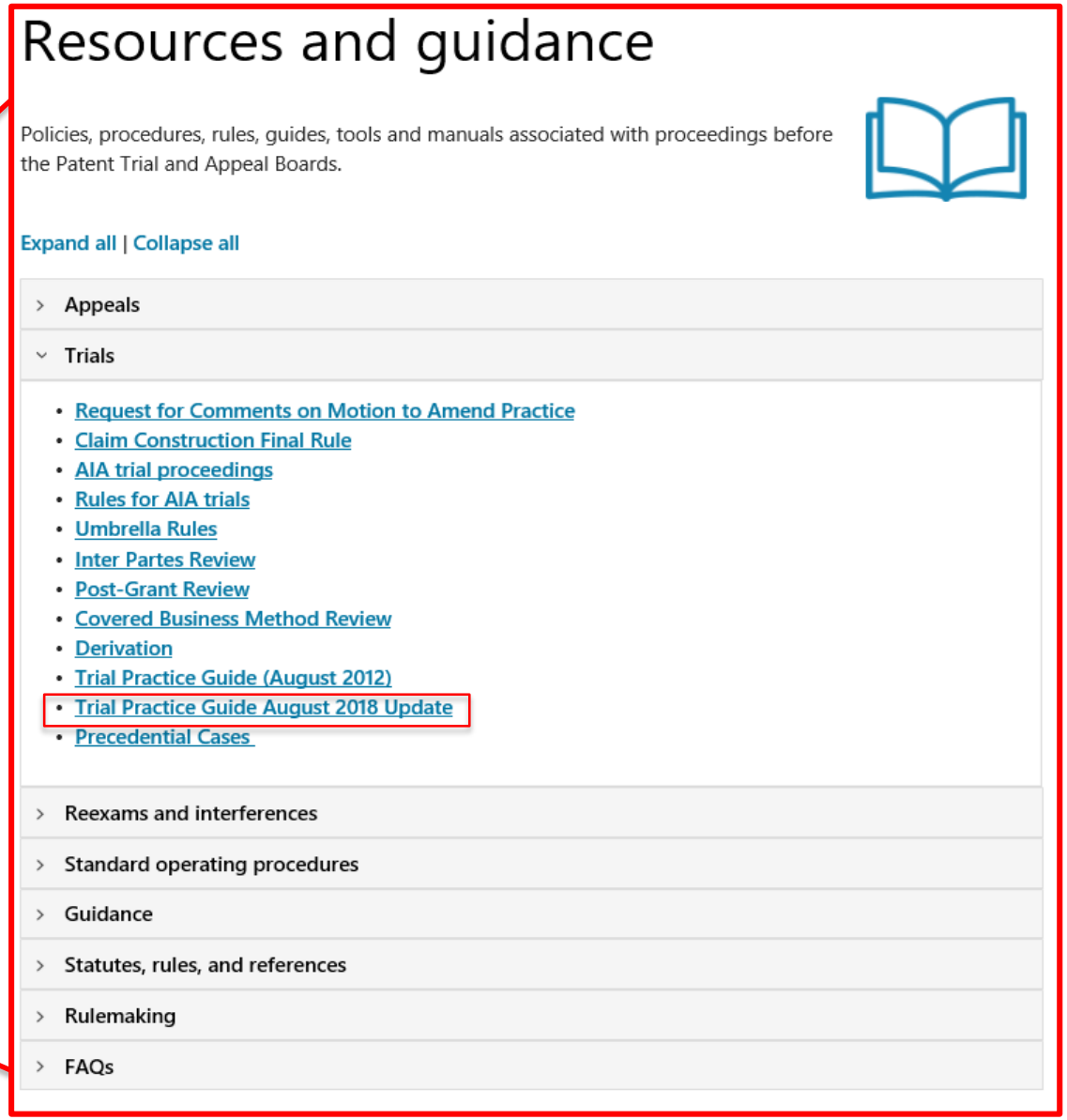

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SOP 1: Judge Panels

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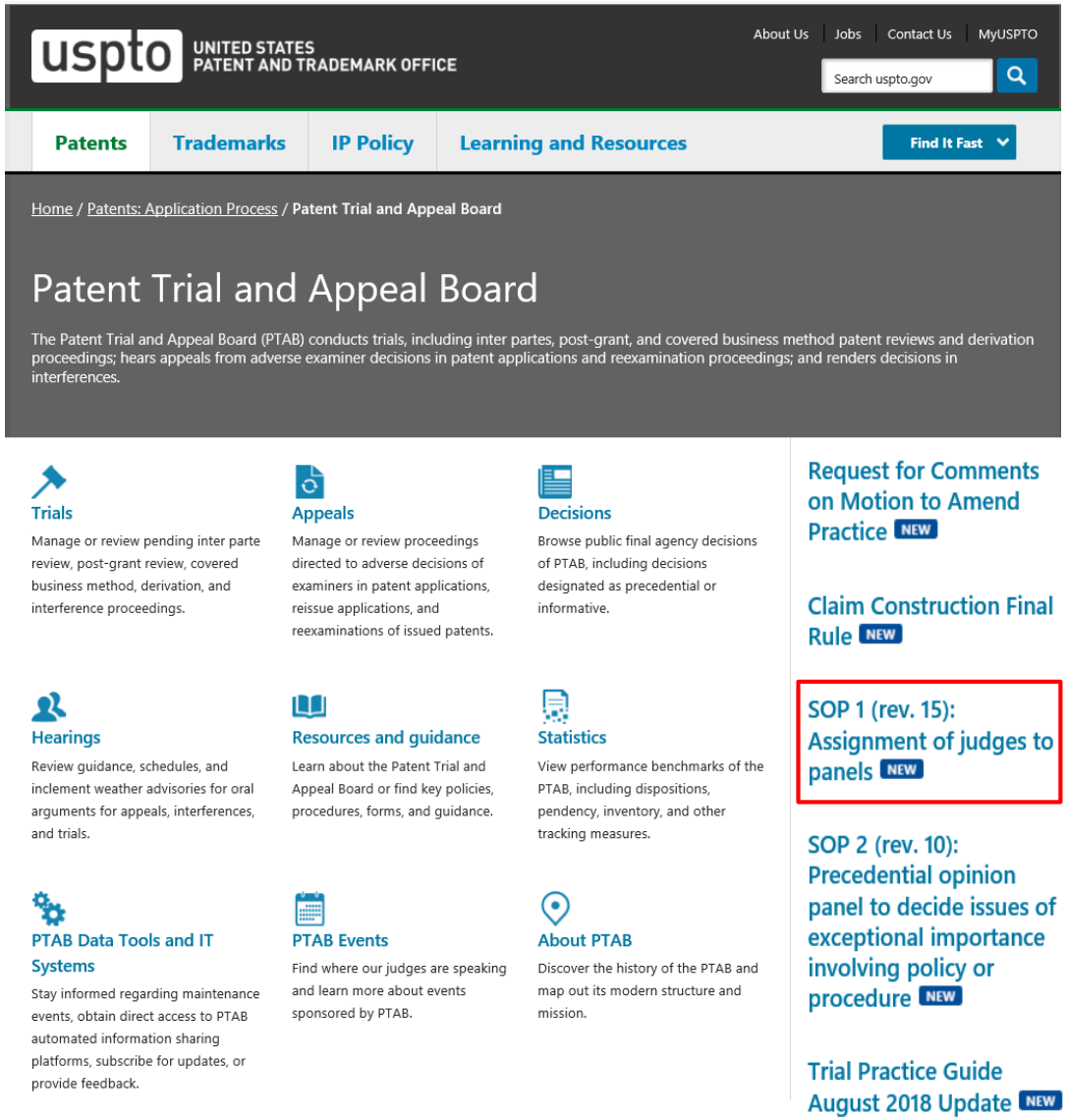
Standard Operating Procedure 1 September 2018 Update

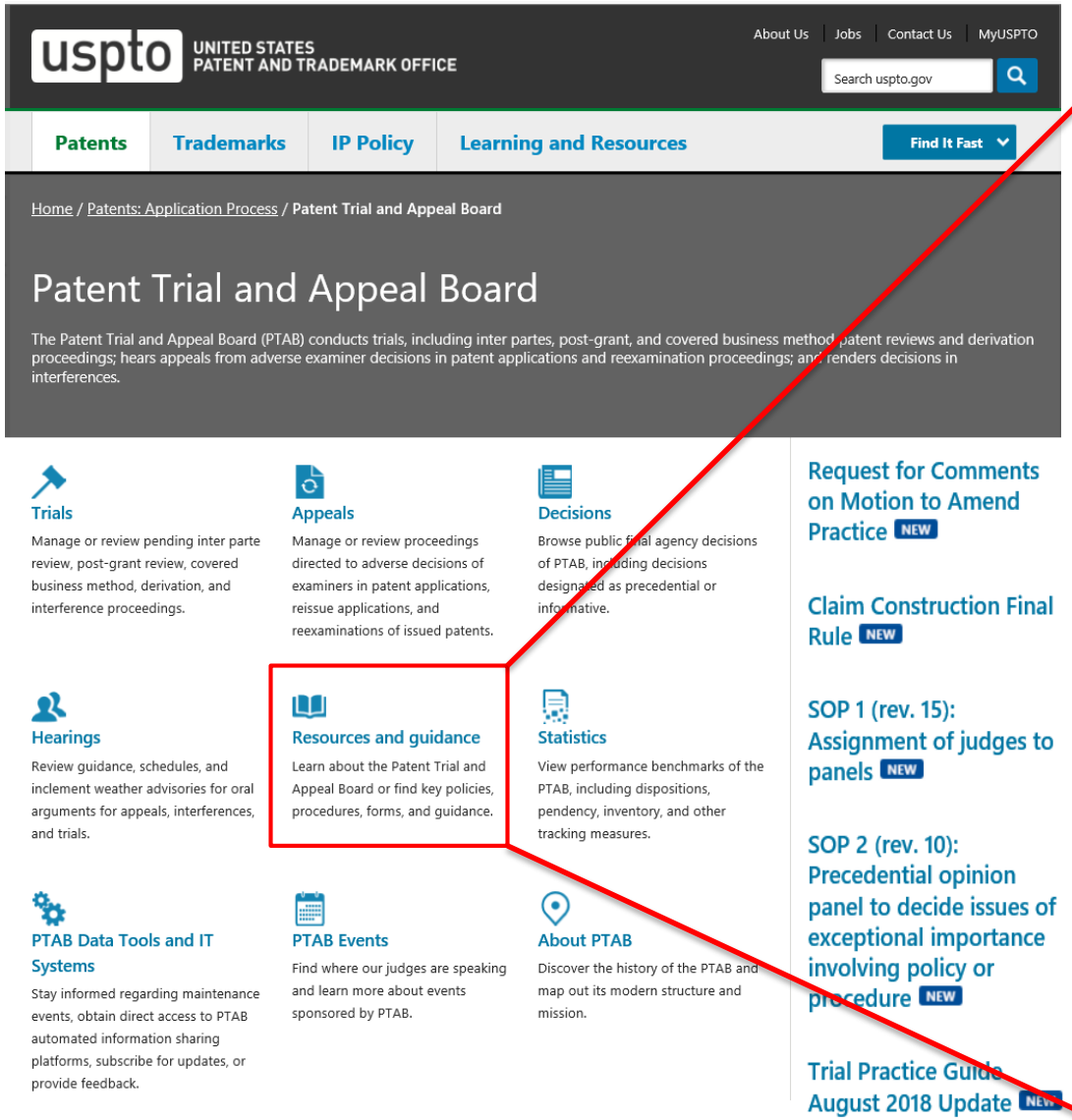
- Explains long-standing practice for paneling appeals and trials
  - Considerations include technology, experience, and workload
  - Conflicts checked before paneling
- Explains why panels change and provides for new Panel Change Order for panels that change after first appearance in a case
  - Reasons are recusal, unavailability, and deadlines
- Explains how and when panels can be expanded
  - A large number of related cases involving different three judge panels can be expanded

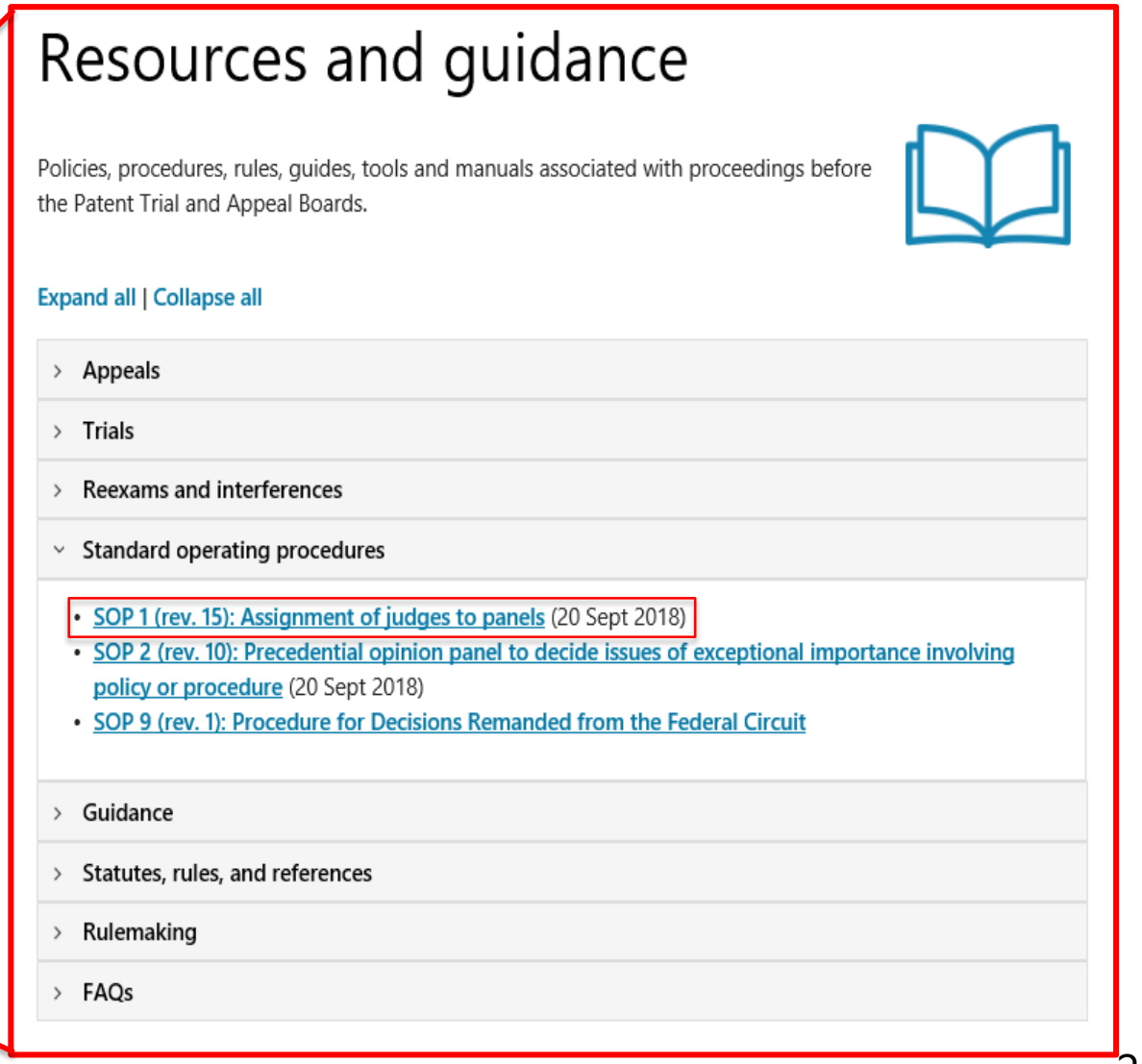
Standard Operating Procedure 1



SOP1 URL: https://www.uspto.gov/sites/default/files/documents/SOP%201%20R15%20FINAL.pdf

Standard Operating Procedure 1





SOP 2: Precedential Opinion Panel; Designation or De-designation of Decisions

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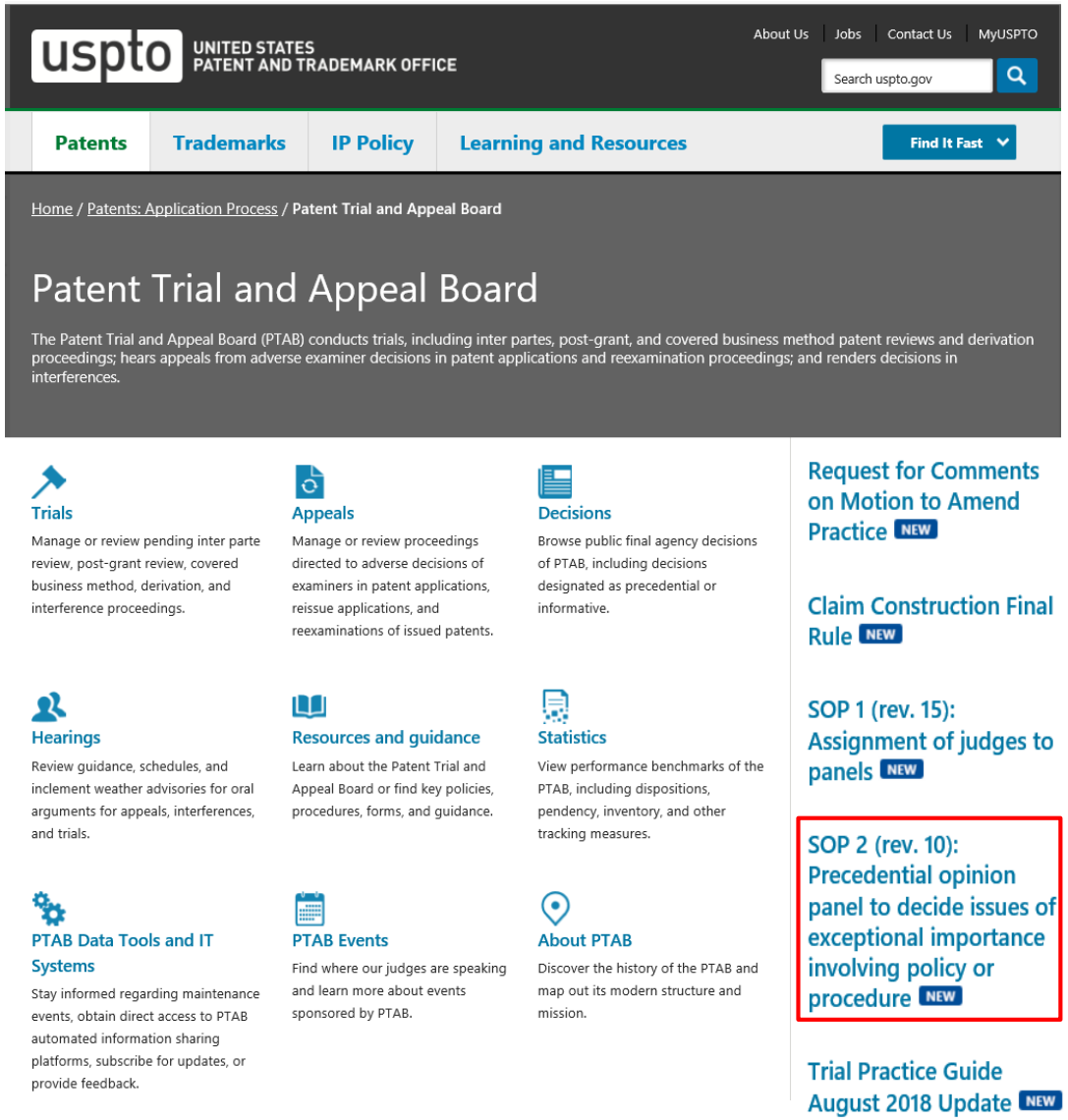
Standard Operating Procedure 2 September 2018 Update

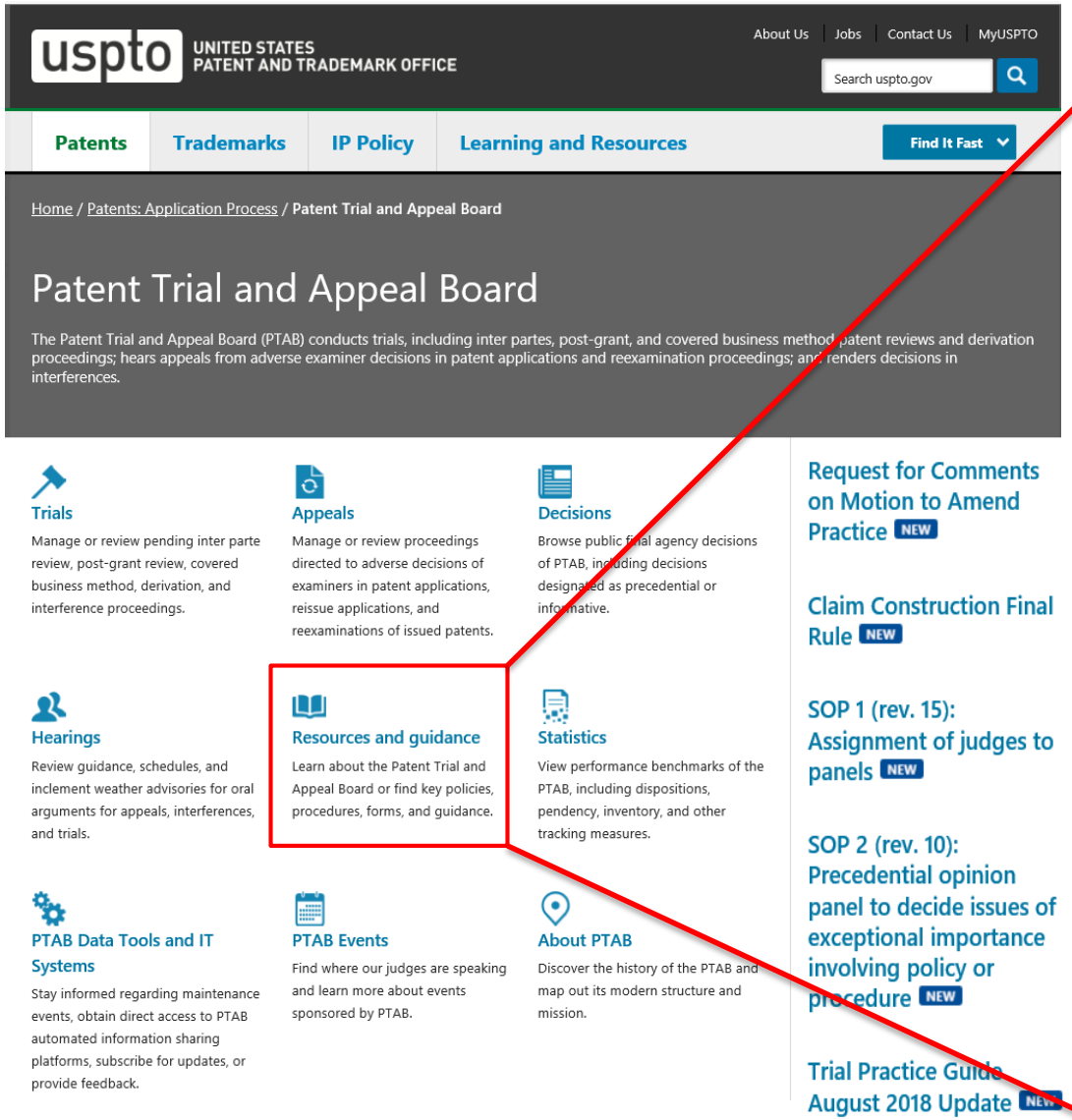
- Provides new Precedential Opinion Panel (POP) for creating binding Board precedent on rehearing
  - By default: the Director, the Commissioner of Patents, and the Chief Judge
- Provides notice to the parties when POP review takes place, as well as the identification of the POP members in a particular case
- Explains the standards, procedures, and timing for requesting POP review in a pending case on rehearing
- Provides for designation and de-designation of precedential opinions by the Director

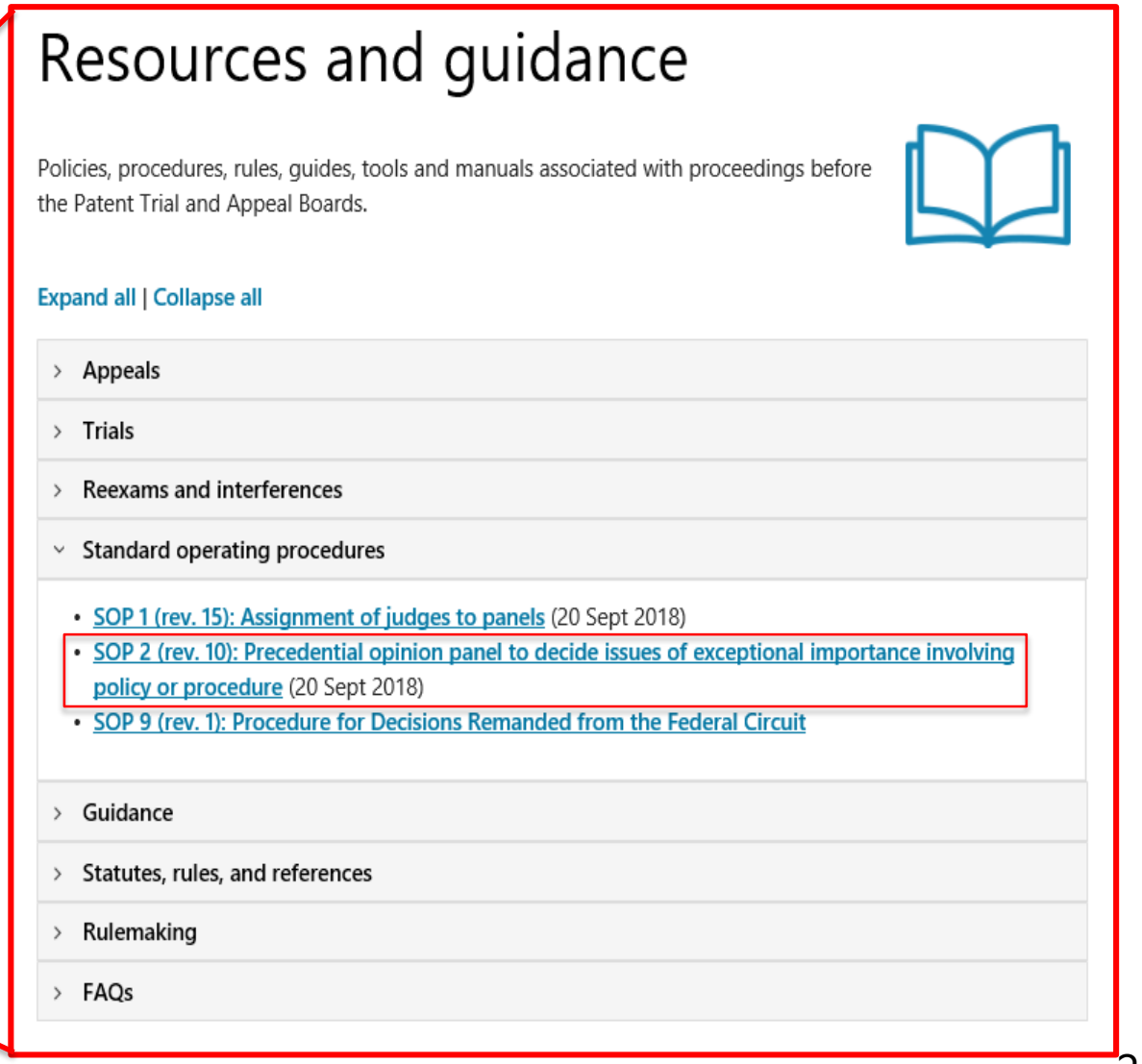
Standard Operating Procedure 2



SOP2 URL: https://www.uspto.gov/sites/default/files/documents/SOP2%20R10%20FINAL.pdf

Standard Operating Procedure 2





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Motion to Amend Practice

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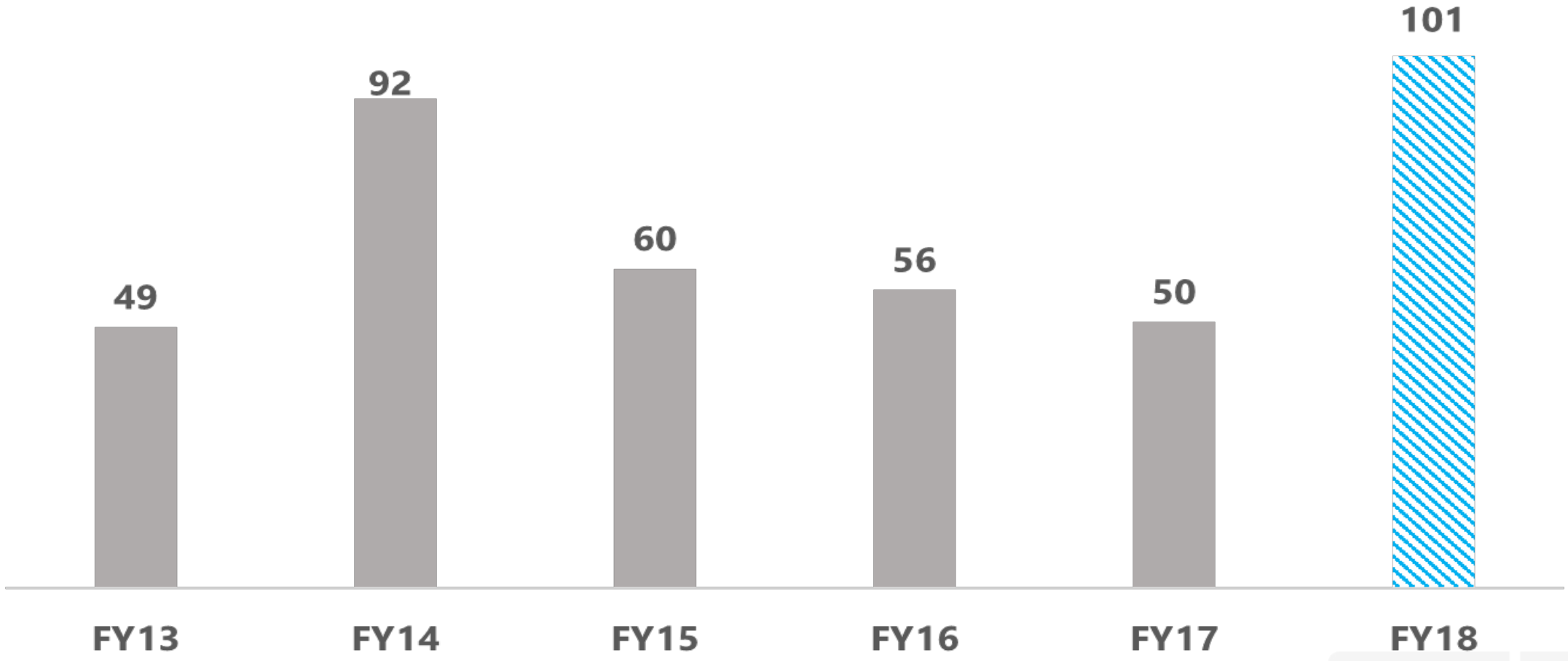
Motions to Amend Filed by Fiscal Year

(FY13 to FY18: 10/1/12 to 8/31/18)



Request for Comments (RFC) on Motion to Amend Practice

- Seeks public input on amendment practice in IPRs, PGRs, and CBM reviews
- Proposes a new motion to amend process and pilot program
- Seeks input regarding burden of persuasion after *Aqua Products*
- Goal is to address stakeholder concerns and provide an improved practice that is fair and balanced
- Comments due December 14, 2018
- Send comments by email to: TrialRFC2018Amendments@uspto.gov

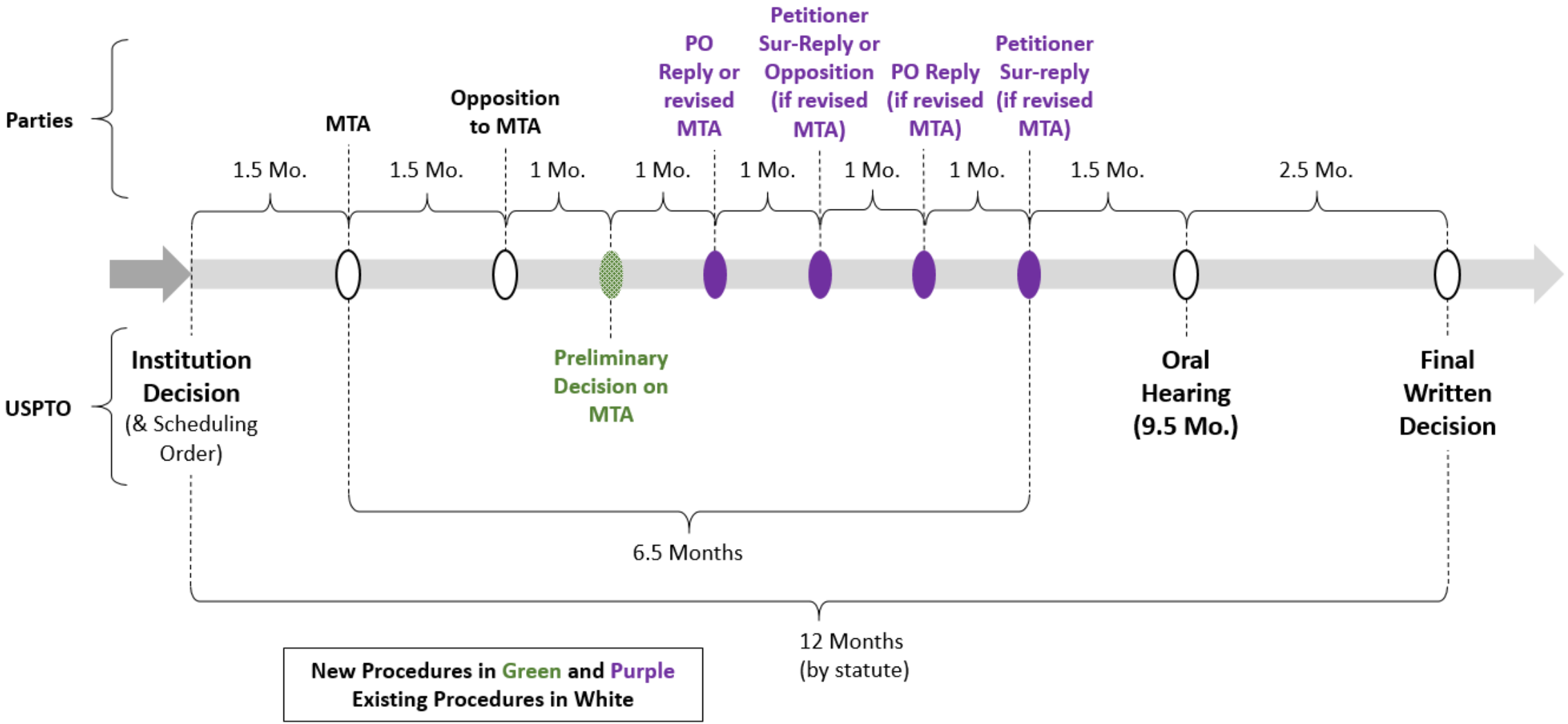
Hallmarks of Proposed New Motion to Amend Process

- Occurs during (and as part of) AIA review
  - Both parties participate
  - Motion to amend (MTA) process completed within 12-month statutory deadline
- Board provides an initial assessment early in the process
  - Issues a non-binding Preliminary Decision addressing MTA and opposition
- Provides meaningful opportunity for PO to revise MTA thereafter
  - Second opportunity to amend after receiving information from petitioner and Board

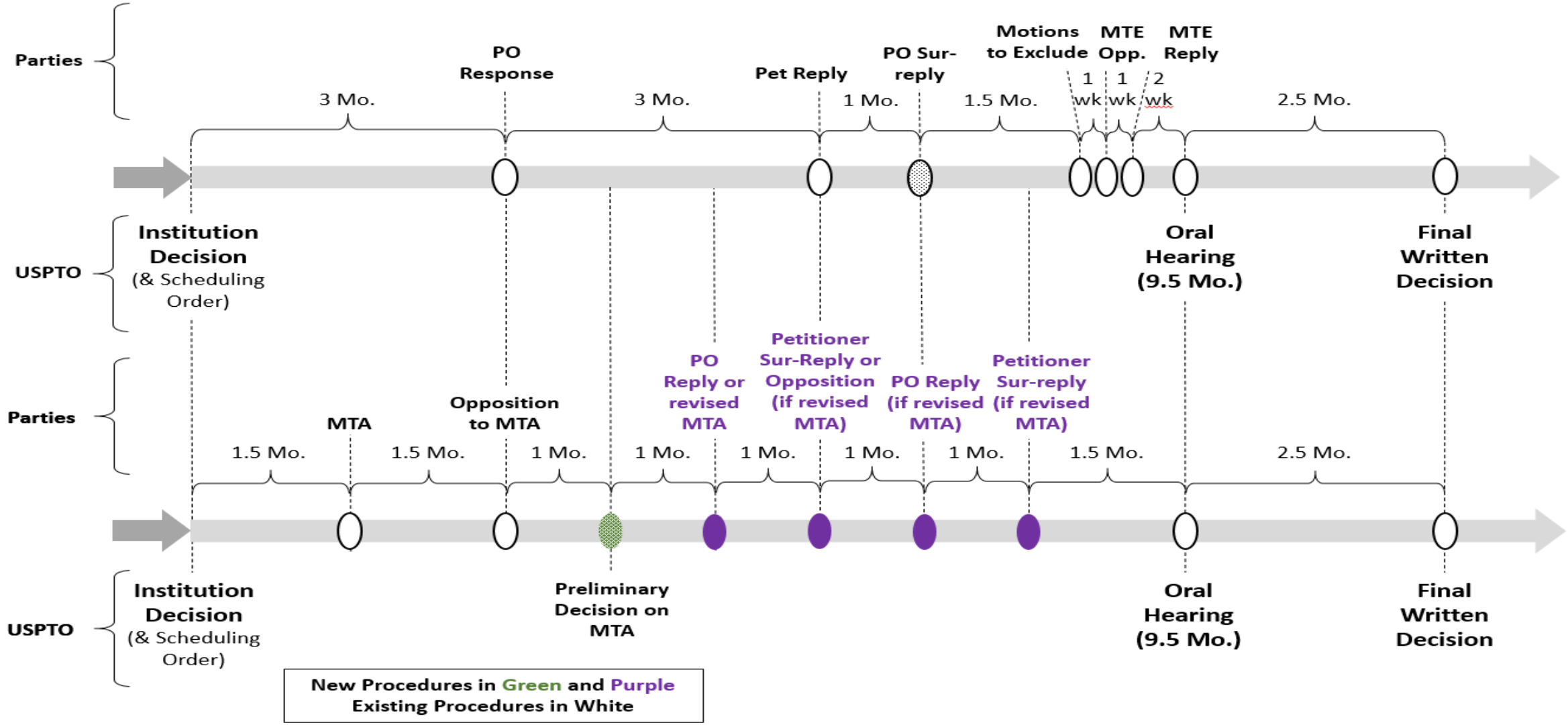
Proposed New Motion to Amend Process

- MTA and opposition are filed earlier than in current process
  - MTA is due 1.5 months after decision to institute
  - Petitioner opposition is due 1.5 months after MTA
- Board issues a Preliminary Decision
  - Issues 1 month after opposition is due
  - Provides an initial evaluation of both papers

Proposed Timeline for Proposed Motion to Amend Process



Overlay of Proposed MTA Process Timeline and AIA Trial Timeline



Proposed New Motion to Amend Process

- **Preliminary Decision**
  - Non-binding initial assessment based on record so far
    - Does not provide dispositive conclusions
    - Not binding on subsequent Board decisions, e.g., final written decision
  - Assesses whether there is a reasonable likelihood that:

1) PO would prevail in establishing that MTA meets statutory and regulatory requirements—*see* 35 U.S.C. 316(d) or 326(d); 37 C.F.R. 42.121 or 42.221; and/or
2) Petitioner would prevail in establishing the unpatentability of any proposed substitute claims

Proposed New Motion to Amend Process

- If Preliminary Decision determines there is a reasonable likelihood that:
  - PO would not prevail in establishing that MTA meets one or more statutory or regulatory requirements; and/or
  - Petitioner would prevail in establishing the unpatentability of any proposed substitute claims

– PO may file (e.g., 1 month after Preliminary Decision):

- Reply responding to opposition and Preliminary Decision; or
- Revised MTA

Proposed New Motion to Amend Process

- **Revised MTA:**
  - May fix statutory or regulatory issues
  - May propose new substitute claims
  - BUT . . . must provide amendments, arguments, and/or evidence in a manner that are responsive to issues raised in Preliminary Decision
  - May not include amendments, arguments, and/or evidence that are unrelated to issues raised in Preliminary Decision or opposition
- Final written decision will address revised MTA and substitute claims therein

Proposed New Motion to Amend Process

- If PO files revised MTA, petitioner may file:
    - Opposition to revised MTA (due 1 month later)
- If PO files reply, petitioner may file:
    - Sur-reply to reply (due 1 month later)
- If PO files a reply, rather than revised MTA, there will be only two papers filed by parties after Preliminary Decision (i.e., reply and sur-reply)

Proposed New Motion to Amend Process

- Opposition or Reply
  - May be accompanied by new evidence that responds to new evidence or issues raised in Preliminary Decision, revised MTA, and/or opposition to MTA, as applicable
- Sur-reply
  - No new evidence other than deposition transcripts of cross-examination of a reply witness
  - May only respond to arguments made in reply, comment on reply declaration testimony, and/or point to cross-examination testimony

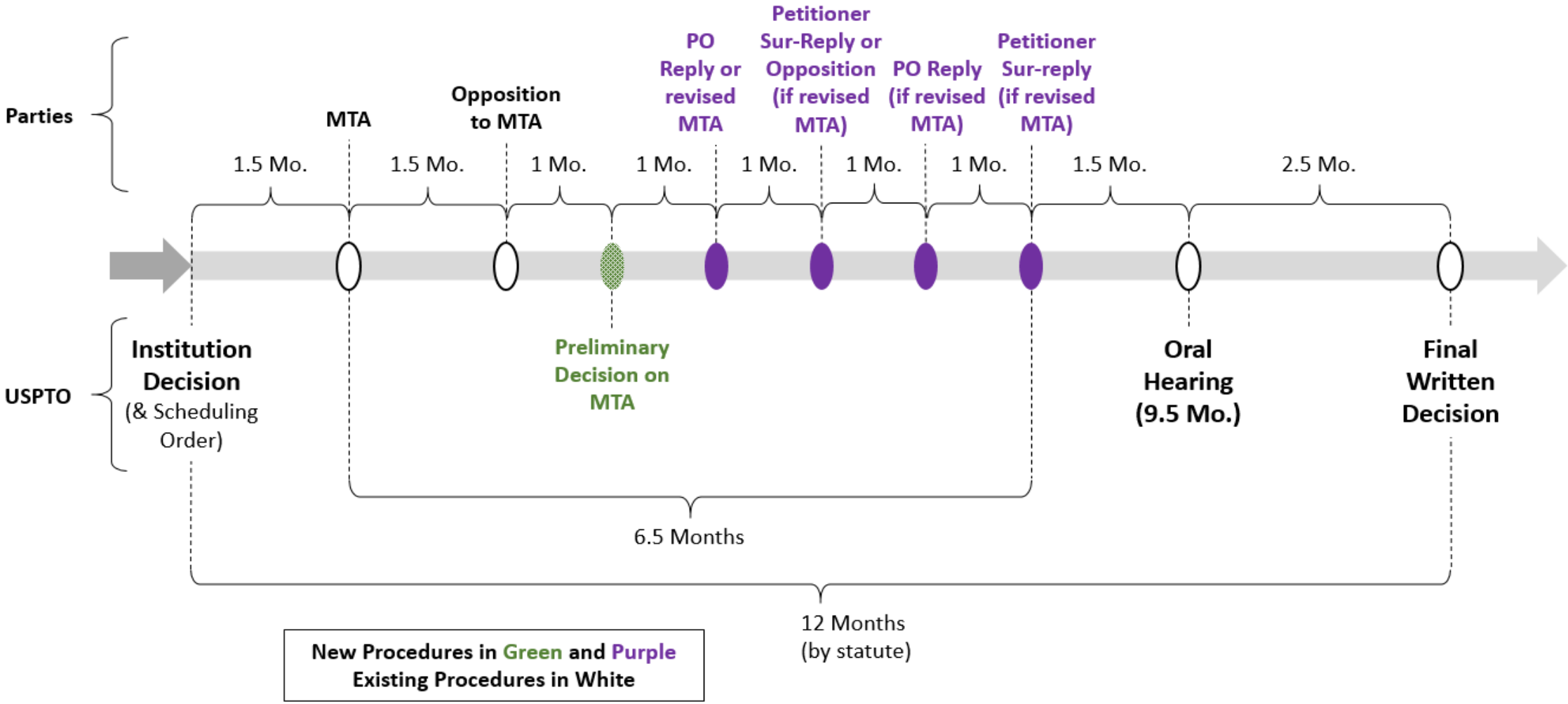
Proposed New Motion to Amend Process

- RFC discusses two alternative paths, depending on how PO responds to Preliminary Decision
  - Alternative 1 (discussed above)
  - Alternative 2

Proposed New Motion to Amend Process

- **Alternative 1 (discussed above)**
  - Applies if Preliminary Decision indicates a reasonable likelihood that MTA will be denied (entirely or in-part) for any reason
  - PO may file first paper (revised MTA or reply) in response to Preliminary Decision
  - Petitioner may file responsive paper (opposition or sur-reply, as applicable) thereafter
  - **Shown in Appendix A1 of RFC**

Appendix A1
Proposed Timeline for Proposed Motion to Amend Process



Proposed New Motion to Amend Process

- **Alternative 2**
  - Applies if:
    - Preliminary Decision indicates a reasonable likelihood that MTA will be granted in relation to all proposed substitute claims; **or**
    - PO chooses not to file a paper (revised MTA or reply) by due date after Preliminary Decision issues
  - Petitioner may file first paper (reply) in response to Preliminary Decision
    - May be accompanied by new evidence that responds to new issues raised in Preliminary Decision, but may not raise new arguments of unpatentability not raised in opposition to MTA
  - PO may file sur-reply thereafter
  - If PO files no paper after Preliminary Decision, briefing schedule for reply and sur-reply thereafter may be accelerated

Proposed New Motion to Amend Process

- **Cross-examinations/Depositions pertaining to MTA**
  - All cross-examinations/depositions of witnesses in relation to direct testimony (provided in declarations) occur after Preliminary Decision issues

Proposed New Motion to Amend Process

- **If petitioner ceases to participate altogether and Board proceeds**
  - Board may solicit patent examiner assistance
    - E.g., from CRU examiner
  - Examiner advisory report, if solicited
    - Issues after MTA (in place of petitioner opposition)
    - Not binding and not a final determination on any legal conclusion
    - May assist PO and Board during AIA trial
  - PO may file a revised MTA or reply in response to examiner advisory report and Preliminary Decision

Proposed New Motion to Amend Process

- Examiner may (if solicited by Board), e.g. in advisory report:
  - Assess whether MTA meets statutory and regulatory requirements and patentability of proposed substitute claims
  - Conduct prior art searches relevant to substitute claims—not original claims
  - Consider relevant papers of record, including evidence and declarations, but . . .

– Examiner would:

  - NOT consider cross-examination testimony, engage in witness credibility determinations, or address admissibility of evidence
  - NOT conduct interviews

Proposed Pilot of New MTA Process

- USPTO anticipates it will:
  - Implement pilot program shortly after comment period for RFC ends on December 14, 2018
  - Issue a public notice providing necessary additional details before implementation
  - Conduct pilot program for at least 1 year, and may extend
  - Apply pilot program in all AIA trials involving MTA where Board issues decision to institute after pilot implementation date
  - Potentially modify pilot program over time in response to feedback and experience

Potential Rulemaking to Allocate Burden

- *Western Digital Corp. v. SPEX Techs., Inc.*, Case IPR2018-00082 (Paper 13) (PTAB April 25, 2018) (informative)
  - The "burden of persuasion will ordinarily lie with the petitioner to show that any proposed substitute claims are unpatentable."
  - The "Board itself also may justify any finding of unpatentability by reference to evidence of record in the proceeding."
  - "Thus, the Board determines whether substitute claims are unpatentable by a preponderance of the evidence based on the entirety of the record, including any opposition made by the petitioner."

Potential Rulemaking to Allocate Burden

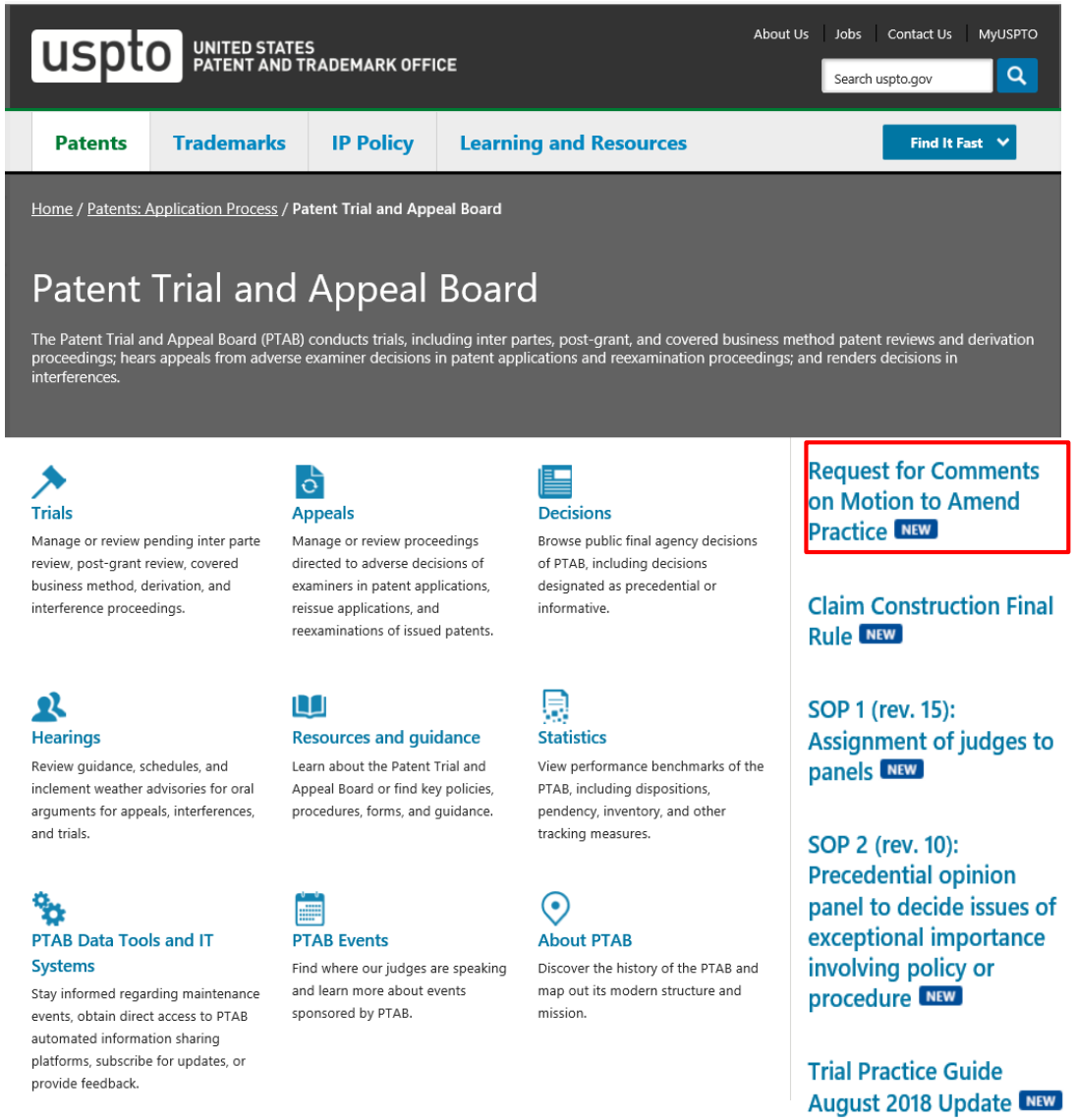
- Should USPTO engage in rulemaking to allocate burden of persuasion regarding patentability of proposed substitute claims?
- If so, should Board allocate the burden as set forth in *Western Digital?*
- If so, under what circumstances should Board be able to justify findings of unpatentability?
  - Only if petitioner withdraws from proceeding?
  - Any situations where petitioner remains in proceeding?

Request for Comments (RFC)

- Comments due December 14, 2018
- Send comments by email to:

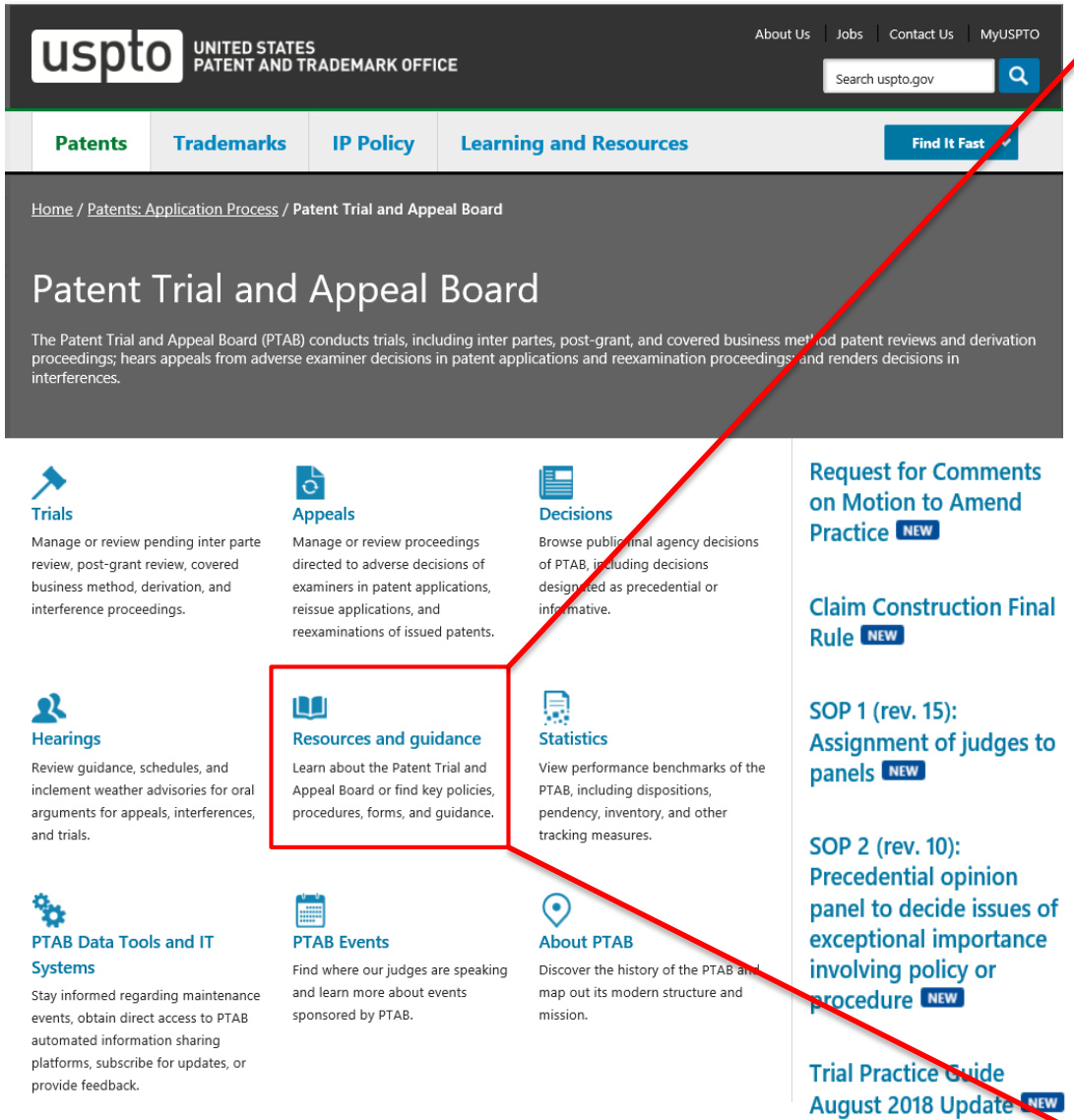
  TrialRFC2018Amendments@uspto.gov

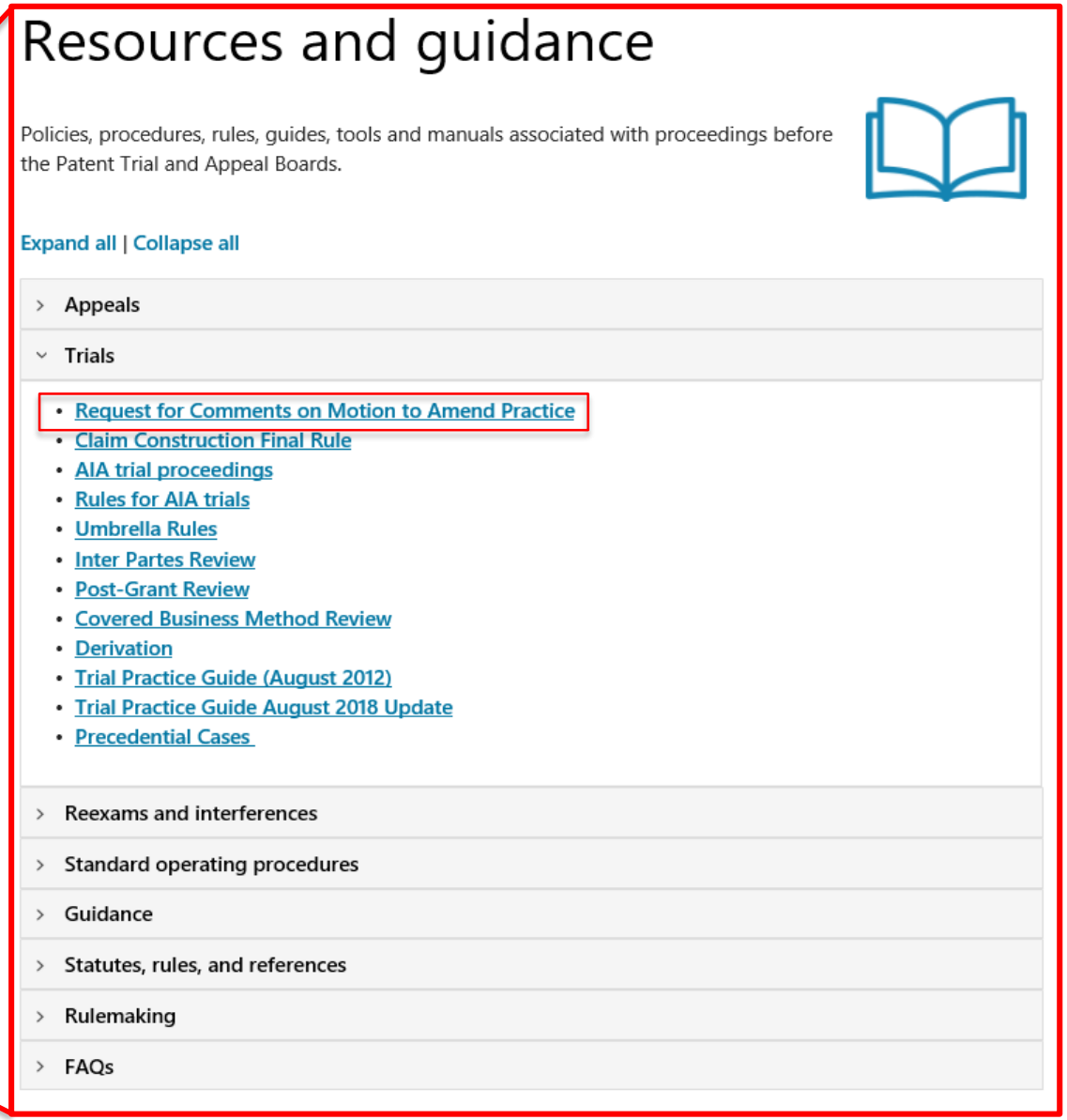
Request for Comments - Motion to Amend Practice



Request for Comments - Motion to Amend URL: https://www.uspto.gov/patents-application-process/patent-trial-and-appeal-board/resources/ptab-mta-rfc

Request for Comments - Motion to Amend Practice





Questions?

Question/Comment Submission

To send in questions or comments during the webinar, please email:

PTABBoardsideChat@uspto.gov

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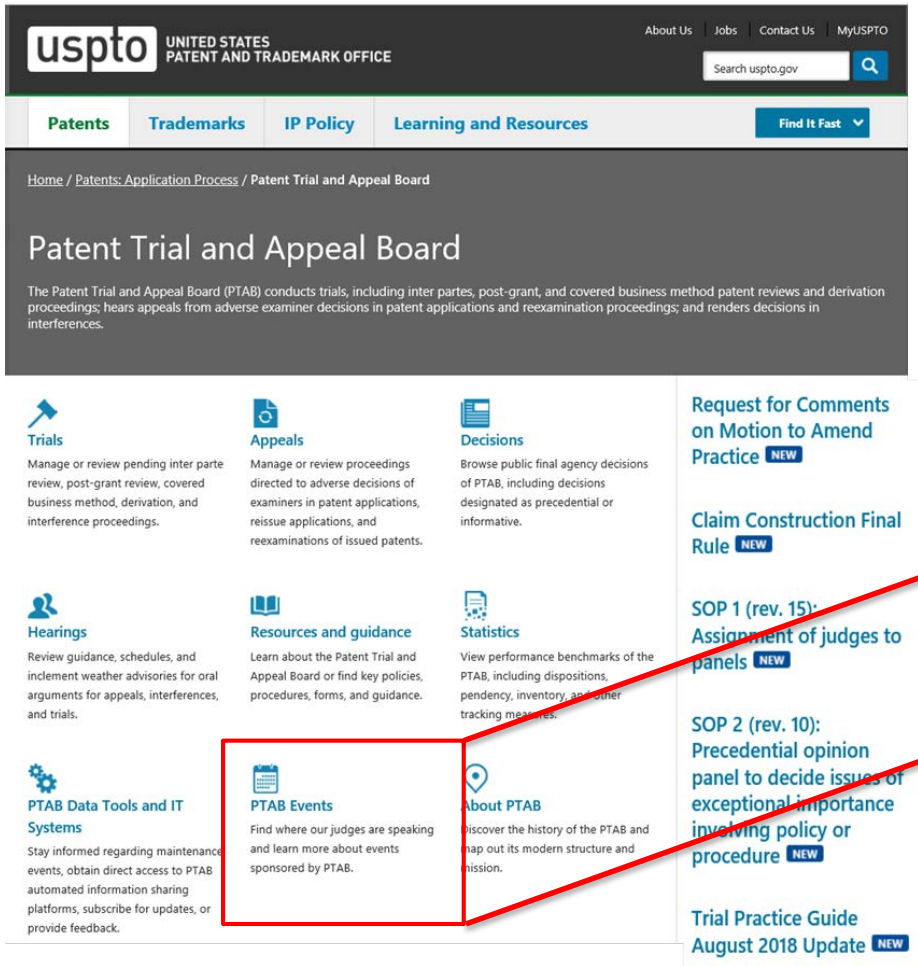
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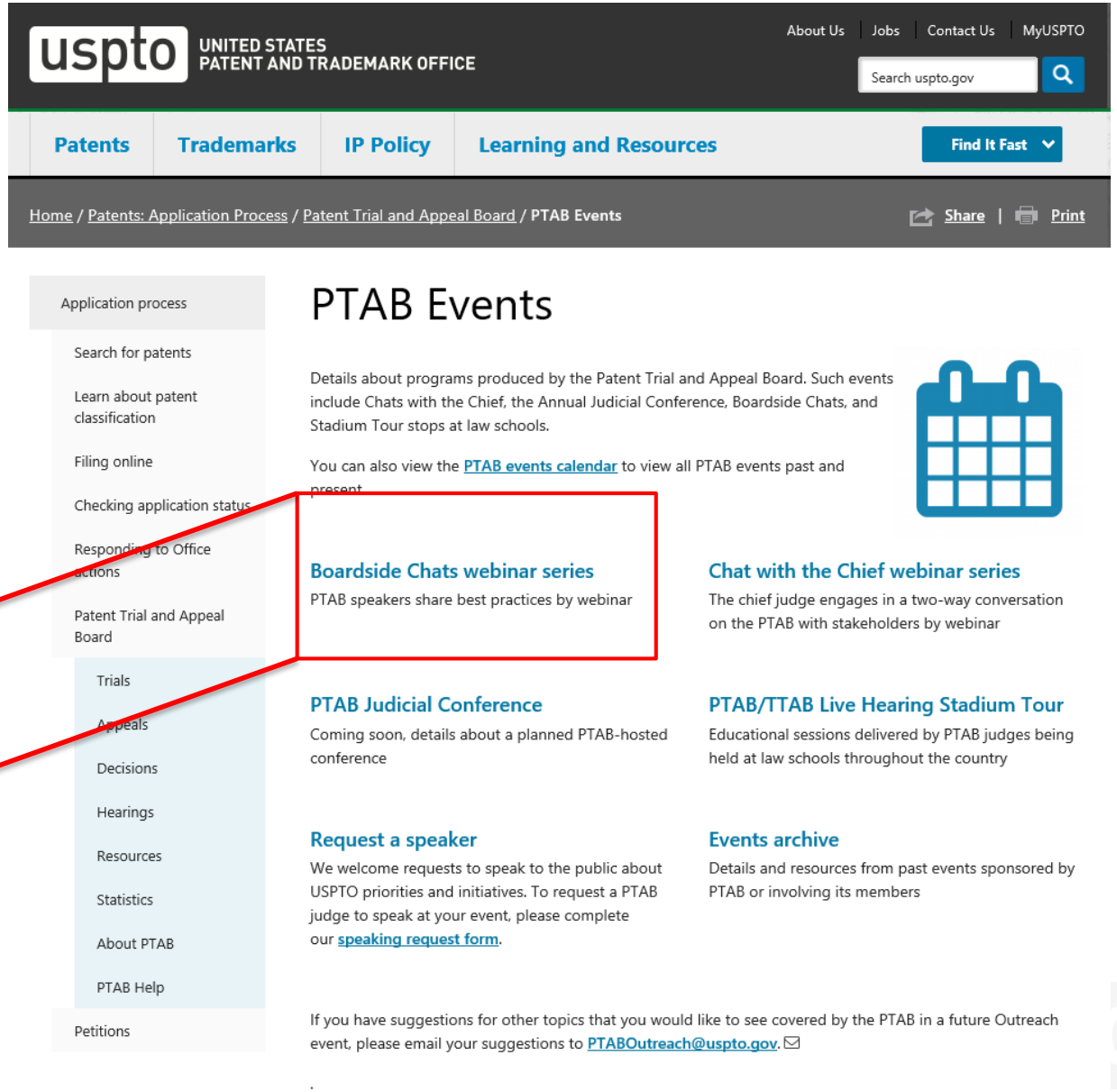
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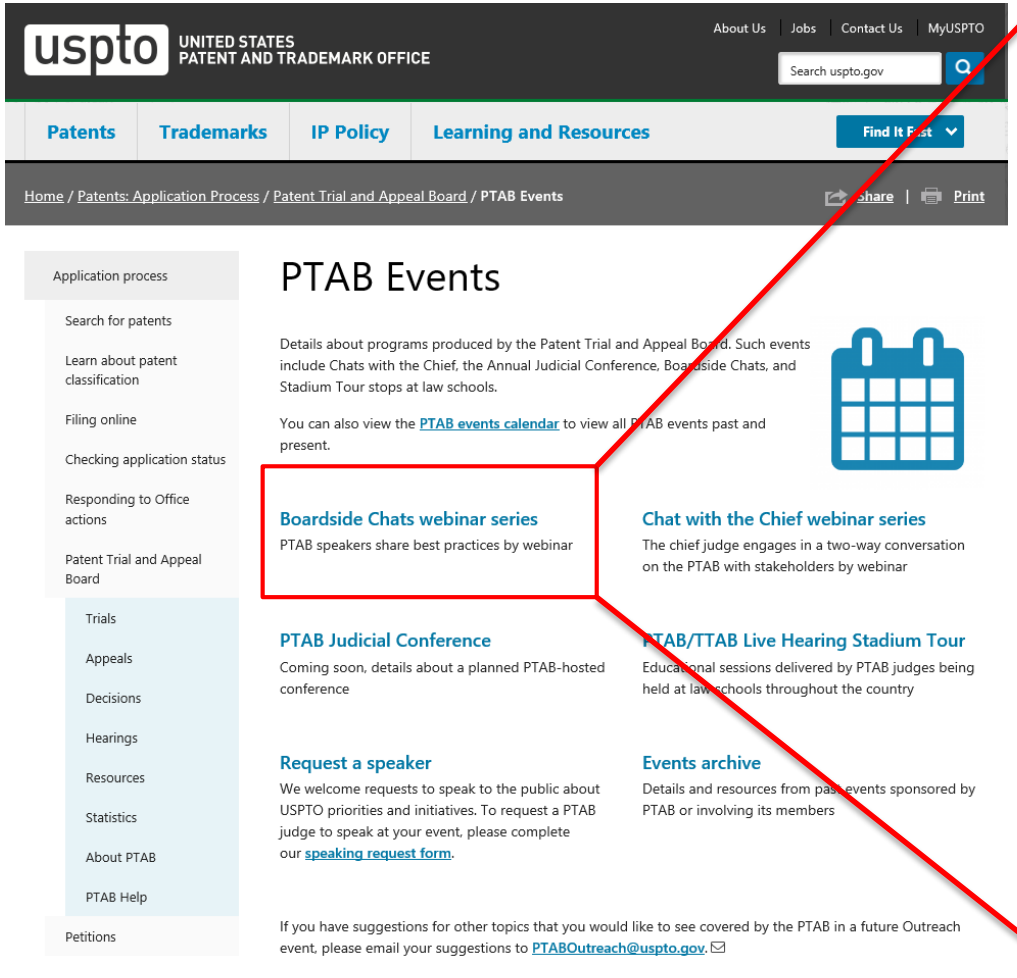
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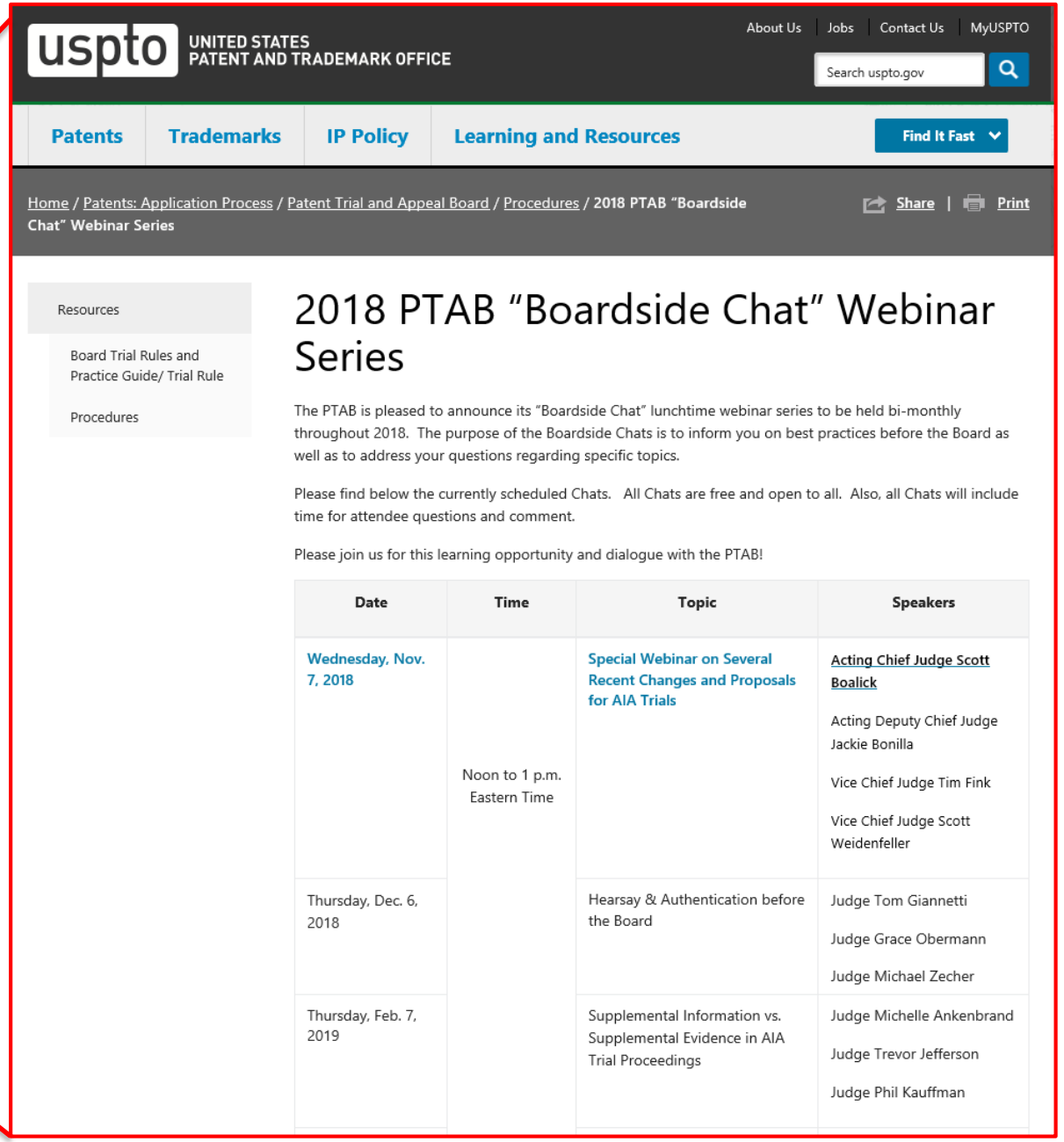
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The PTAB is pleased to announce its "Boardside Chat" lunchtime webinar series to be held bi-monthly throughout 2018. The purpose of the Boardside Chats is to inform you on best practices before the Board as well as to address your questions regarding specific topics.
Please find below the currently scheduled Chats. All Chats are free and open to all. Also, all Chats will include time for attendee questions and comment.
Please join us for this learning opportunity and dialogue with the PTAB!
Date | Time | Topic | Speakers
Wednesday, Nov. 7, 2018 | Noon to 1 p.m. Eastern Time | Special Webinar on Several Recent Changes and Proposals for AIA Trials | Acting Chief Judge Scott Boalick; Acting Deputy Chief Judge Jackie Bonilla; Vice Chief Judge Tim Fink; Vice Chief Judge Scott Weidenfeller
Thursday, Dec. 6, 2018 | | Hearsay & Authentication before the Board | Judge Tom Giannetti; Judge Grace Obermann; Judge Michael Zecher
Thursday, Feb. 7, 2019 | | Supplemental Information vs. Supplemental Evidence in AIA Trial Proceedings | Judge Michelle Ankenbrand; Judge Trevor Jefferson; Judge Phil Kauffman

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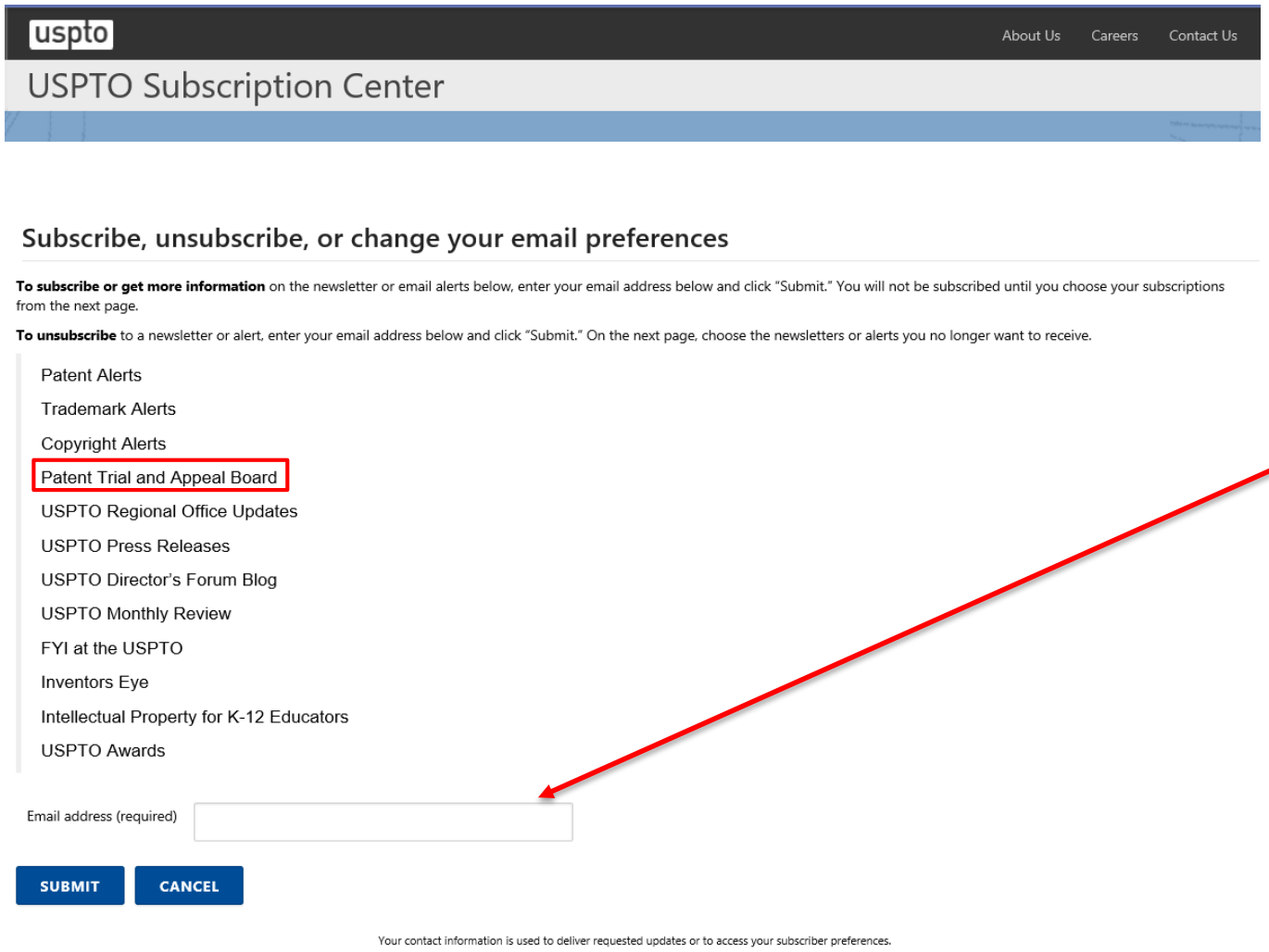

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Next Boardside Chat

- Thursday, December 6, 2018
- Noon to 1 pm ET
- Hearsay & Authentication before the Board
- Presenters:
  - Judge Tom Giannetti
  - Judge Grace Obermann
  - Lead Judge Michael Zecher

Thank You


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