



IP Law

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Patent Court Clash Pits Chief Judge Against 95-Year-Old Veteran

By Kelcee Griffis and Riddhi Setty

Eye on the Bench

- Moore is sharp questioner, colorful opinion writer
- Newman is court institutionalist, prolific dissenter

An unusual bid by the top judge on the nation's patent appeals court to unseat its longest-serving member involves two long-time jurists who have put distinct stamps on US patent law.

Kimberly Moore, the chief judge on the US Court of Appeals for the Federal Circuit, has launched a proceeding against 95-year-old Pauline Newman, questioning her physical and mental ability to remain an active judge. Moore's unsealed allegations suggest Newman is resisting the effort to sideline her.

The internal battle that has spilled into public view is being waged by two judges who, court watchers say, have taken similar approaches to patent law.

"Based on my recollections of their respective opinions, I don't think that they're very far apart in terms of viewpoints on patents or just generally on the world," said Charles Duan, an American University assistant law professor focused on intellectual property.

Neither Moore nor Newman immediately responded to requests for comment.

'Prolific' Dissenter

Despite similar approaches to the law, Moore, 54, and Newman have different styles on the bench.

Moore is a hawkish questioner at oral arguments and a writer of lively opinions. Newman has a reputation for being a slow and deliberate—yet cutting—dissenter.

Newman became the court's first direct appointee in 1984, after the Court of Customs and Patent Appeals and the appellate division of the US Court of Federal Claims merged to create the modern-day Federal Circuit.

In her nearly 40 years on the court, Newman has gained a reputation as one of its greatest contrarians. Newman has always taken her time issuing decisions and is a careful writer, several former Federal Circuit clerks said.

In a 2017 law review article, Penn State law professor Daryl Lim analyzed Newman's dissents—she's written more than any other Federal Circuit judge. He observed that they “serve as an institutional record for course correction even as the court continues to navigate new fault lines brought about by the America Invents Act, the globalization of patent litigation, and disruptive technologies that challenge the compact of patent law today.”

According to Lim, Newman has contradicted panel majorities on both the court's proper scope and purpose as well as the science behind the cases it hears. For example, in a 2006 patent-infringement case, the majority affirmed the validity of Kao Corp.'s patent for a blackhead removal skin treatment while finding Unilever US Inc.'s Pond's Clear Pore Strips did not infringe it.

Newman—who graduated from Vassar College with a double major in chemistry and philosophy—agreed with the majority on the patent's validity but said her colleagues “misunderstood the chemistry” in the case, leading to an incorrect ruling that Unilever's product didn't run afoul of the patent.

Meredith Addy, co-founder of AddyHart P.C. and a former Federal Circuit clerk who has argued before Newman more than a dozen times, described the judge as “extremely prepared.”

“She knows what the cases turn on. And she asked questions that go to the crux of the case,” Addy said. “From everything I've ever seen, she's the most professional, on-the-ball jurist that I know.”

Newman has also been critical of the direction of the modern patent system, particularly after the America Invents Act, Addy said. Critics of the law, enacted in 2011, say it makes it too easy for patents to be invalidated.

'Inquisitive' Jurist

Moore had a career as a law professor before joining the court in 2006—and it shows in her work.

The George W. Bush appointee “is not shy about expressing her agreement or disagreement or satisfaction or dissatisfaction with the answers given to her by the attorneys arguing before her,” said Paul Gugliuzza, a Temple University law professor specializing in intellectual property and appellate courts. “She isn't keen to let lawyers off the hook very easily.”

Moore also doesn't hesitate to interject personal quips into a session. In December, she revealed that she's a Taylor Swift fan during a panel on a music festival trademark challenged by Apple Inc. She interrupted Apple's counsel, who began by saying, “A 15-year-old Taylor Swift fan buying our music—”

Moore interjected: “Or me, but go ahead.”

Her opinions are “inquisitive” and colorfully written, putting her years as a law professor on display, Gugliuzza said.

For example, her dissent in the *American Axle v. Neapcose* on what inventions are eligible for patent protection called the majority’s opinion “validity goulash” that is “troubling and inconsistent with the patent statute and precedent.”

Moore’s 2015 opinion in *In re Tam* unblocked an Asian-American rock band’s trademark application for their name, “The Slants,” finding that a prohibition on disparaging marks represented unconstitutional viewpoint discrimination.

The band name “pushes people. It offends,” Moore wrote. “Despite this—indeed, because of it—Mr. Tam’s band name is expressive speech.”

When former Chief Judge Sharon Prost passed the baton to Moore in 2021, the Maryland native came with a reputation for fostering relationships among clerks and judges, a style that some hoped would bring together a court split over thorny legal issues.

Moore has signaled she’s using that approach in the dispute with Newman. According to an unsealed court order, Moore and other Federal Circuit judges tried informal avenues to coax Newman into reconsidering her position on the court before resorting to the official complaint.

Gugliuzza said it’s important to note that the chief judge is using a channel established under the the 1980 Judicial Conduct and Disability Act for examining a judge’s competence.

It’s not clear how Moore’s effort to unseat Newman will play out. But it shouldn’t be seen as personal, Gugliuzza said.

“Chief Judge Moore is not acting in her personal capacity to remove Judge Newman from the bench,” Gugliuzza said, adding, “there’s a process here, and the court is following the process.”

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