

## Inside The PTAB's New Oral Argument Training Program

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The U.S. Patent and Trademark Office's Patent Trial and Appeal Board recently unveiled the Legal Experience and Advancement Program, or LEAP, in an effort to train and develop the next generation of attorneys and agents.

In short, LEAP provides up to 15 minutes of extra argument time during an oral hearing for the LEAP practitioner. This extra time is for the arguing party and can be allocated at counsel's discretion, so long as the LEAP practitioner has a substantive role in the argument.

Should the LEAP practitioner need assistance during their argument, a more senior practitioner is permitted to assist and/or correct the record as needed. The incentive of extra argument time coupled with supervisor safeguards makes this program attractive to the PTAB, junior and senior practitioners, and clients alike — it is a great initiative for all involved.

As highlighted in a 2019 study<sup>[1]</sup> by the Women's Committee of the PTAB Bar Association, women (and likely other minority candidates) are underrepresented in appearances at the PTAB. LEAP offers an opportunity for inclusion and is expected to increase the diversity of practitioners appearing before the PTAB.

### Eligibility and Requests

Currently, LEAP eligibility is very specific. It requires practitioners to have three or fewer substantive oral arguments in any federal tribunal, including the PTAB. The meaning of "substantive" is not clearly defined, but the PTAB clarified during a recent webinar that, for example, arguing a discovery dispute is not sufficient to count against the three substantive oral arguments.

Practitioners must also have seven or fewer years of experience as a licensed attorney or patent agent. This seven-year eligibility clock begins running at the earlier passage date of a practitioner's state bar or USPTO registration exam, whichever comes first.



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Requests for LEAP participation are straightforward, simply requiring sending an email<sup>[2]</sup> five business days before the hearing date. The PTAB then provides the LEAP practitioner verification form for completion by the practitioner to confirm their eligibility for LEAP. A combined request and verification form<sup>[3]</sup> is also available from the PTAB.

### **Buy-in of Key Stakeholders Is Important**

Critical to the success of LEAP is buy-in — from all stakeholders and at all levels. The USPTO promotes LEAP as a win-win-win for the board, practitioners and clients alike. The board's buy-in is evident from the creation of LEAP and its early insistence that LEAP participants have a "meaningful and substantive" role during the oral hearing. Further, the board's webinar training series and upcoming mock oral argument "boot camp" underscore its commitment to running and supporting this robust program.<sup>[4]</sup>

The board's efforts will only go so far, however, without enthusiastic participation from practitioners and clients. And after just a few weeks, it is clear that LEAP is off to an impressive start. Firms are recognizing the opportunity LEAP presents for fostering talent development.

Successful firm buy-in requires promoting the program at all levels of the firm, including senior management seizing on the opportunity to develop the firm's next generation of practitioners. Those actively managing PTAB cases can incentivize team members to take ownership in their roles through the prospect of arguing at oral hearing. Moreover, more junior practitioners can (and should) seek to develop their skills and advance their careers by requesting to participate in the program. Senior attorneys have the opportunity to coach and prepare the LEAP participants, which is good professional development experience as well.

At our firm, the program has support at all levels, starting with the co-chair of our patent office litigation practice, who encouraged our experienced PTAB litigators to look for opportunities to involve LEAP-eligible practitioners at oral hearings. He communicated the firm's support of the program to all those who may be interested in participating as LEAP practitioners and for those who want to coach and mentor them.

Fortunately, with numerous arguments already occurring or scheduled, the intended audience for LEAP is getting experience with the support of not only firms, but also the backing of companies that see the value of the program. Clients have agreed to have a less experienced practitioner argue part, or even all, of a case.

Getting the buy-in from clients involves informing, advocating and selling LEAP to them. This includes highlighting the incentive of the 15 minutes of additional argument time coupled with the safeguard that more experienced counsel may assist a LEAP practitioner during oral argument and clarify any statements on the record, if needed.

And it is important to note that while less experienced at oral argument, quite often junior practitioners are steeped in the details of the record and thus are well-equipped to handle certain issues at a hearing that require command of the factual record. More importantly, clients, like firms, have the opportunity to contribute to the long-term benefits of LEAP — the continued development of the practitioners who will be representing them in years to come.

### **A Firsthand Recap of the LEAP Experience**

One of the authors of this article, Timothy Tang, is an associate who recently took advantage of LEAP and completed his first oral argument last month (Apple Inc. v MPH Technologies OY, IPR2019-00819 and IPR2019-00820). Other firms have put associates up for this opportunity as well.

We fully expect LEAP to continue gaining momentum as more practitioners, firms and clients gain comfort with this new attorney and agent development program, so we would like to share Tang's recent LEAP experience.

Leading up to the oral hearing, he conducted a number of moot arguments with multiple attorneys from the firm, the client Apple, and co-counsel to hone and strengthen his arguments. All of this work primed him to present and helped to calm nerves during the hearing. The judges were very attentive to the presentation. They asked tough questions, treating him as any other attorney that argues before them. Because of thorough practice sessions and a yearlong familiarity with the case, he was well prepared to directly answer the judges' questions with poise and confidence.

Based on Tang's experience with his first argument, we would advise other LEAP practitioners to thoroughly know the case — even the elements that you are not directly presenting. Often, arguments overlap, and you may receive questions about that interplay. Being able to respond to questions based on a thorough understanding of the case is very important.

The judges' questions also highlighted the importance of being thorough in all briefing submitted to the board. Because new arguments are generally not allowed, practitioners should be mindful about fully developing their cases in their primary briefs before the hearing. Overall, presenting under the LEAP program was a positive and meaningful professional development experience that will truly impact Tang's approach to future inter partes work.

### **Maintaining LEAP Momentum**

The number of LEAP practitioners that have already argued, or are scheduled to argue, at oral hearings is encouraging and maintaining momentum is instrumental to the success of the program. That means firm leadership must be engaged and involved, instituting internal procedures for identifying, encouraging, and training LEAP-eligible practitioners.

It also means providing feedback internally and to the board. The PTAB has already indicated that it is receptive to suggestions to modify and improve the program as it matures, so if you have comments, do not hesitate to reach out to the PTAB.<sup>[5]</sup> Ultimately, a successful program will be one that provides the most benefits to all stakeholders, especially the next generation of PTAB practitioners.

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[1] <https://www.ptabbar.org/wp-content/uploads/2019/11/PTAB-Bar-Association-2019-Report-on-Women-at-the-PTAB.pdf>

[2] PTABHearings@USPTO.gov

[3] [https://www.uspto.gov/sites/default/files/documents/2020.05.22\\_LEAPP%20Request%20and%20Verification%20Template%206.3.20.pdf](https://www.uspto.gov/sites/default/files/documents/2020.05.22_LEAPP%20Request%20and%20Verification%20Template%206.3.20.pdf)

[4] The boot camp is listed on the LEAP site as "Oral Argument Practicum": <https://www.uspto.gov/patents-application-process/patent-trial-and-appeal-board/leap>.  
And it is on the PTAB Bar Association website  
calendar: <https://mms.ptabbar.org/Calendar/moreinfo.php?eventid=58756>

[5] LEAP@uspto.gov