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Three rules for challenging a judge

Henrik Timmann · Thursday, November 4th, 2010 · Landmark European Patent Cases

There are three compulsory rules you must observe when challenging a judge on grounds of bias:

- 1) Be prepared.
- 2) Use good reasons.
- 3) Have a worthy goal.

I wish to exemplify this by a hearing I had just recently:

As some of you may know, the current presiding judge of the appeal board for patent infringement cases in Duesseldorf, Dr. Kuehnen, was formerly presiding judge of one of the panels at the District Court. His promotion lead to a number of cases where he could not participate in the appeal proceedings due to his prior involvement in the same case in first instance.

However, a “prior involvement” which excludes the further participation of a judge in second instance is only present, according to German law, if the relevant judge actu-ally participated in handing down the appealed first instance verdict. If the judge only participated in first instance hearings or in court orders that did not directly lead to the appealed verdict, he is generally not hindered to preside the board of appeal in the same matter.

In the reported case Dr. Kuehnen was the presiding judge of the first instance panel when we filed the complaint. He participated in the initial court management hearing and he contributed to two court orders for taking evidence by getting an expert opin-ion on technical questions. Shortly after the second court order he left the panel and became the presiding judge of the appeal board. When the first instance decision was handed down, the panel was already presided by another judge.

To the surprise of defendant’s attorneys, Dr. Kuehnen appeared again in the appeal proceedings as the presiding judge of the board of appeal. Defendant challenged this. However, because defendant was not prepared, he did a number of procedural mis-takes: First he objected that Dr. Kuehnen was inhibited to preside due to his “prior in-volvement”, which – as mentioned above – was not true. Secondly, when he decided to challenge Dr. Kuehnen on grounds of bias instead, he did not take into consideration that this objection was time-barred concerning all grounds that were already present at the beginning of the hearing because he did not raise this issue immediately when the hearing started. Instead defendant had read his motions at the beginning of the hearing and had waited until after the preliminary opinion of the board of appeal on the case had already been

presented by Dr. Kuehnen. As a result, defendant eventually had to base his challenge on very poor grounds, and was consequently rejected by the court. The discussions on this issue lead to a heavy delay in the continuation of the hearing and I think it even has interfered with a good presentation of defendant's arguments on the merits of the case.

In my opinion, defendant's challenge was also without a worthy goal from the very beginning. Even if defendant would have prevailed with his request to remove Dr. Kuehnen from the bench, it was out of question that the board of appeal would not have changed its (well reasoned) preliminary view on the case just because of this modification in its manning. In the end I believe it would have saved us all a lot of time and trouble if the request had never been filed.

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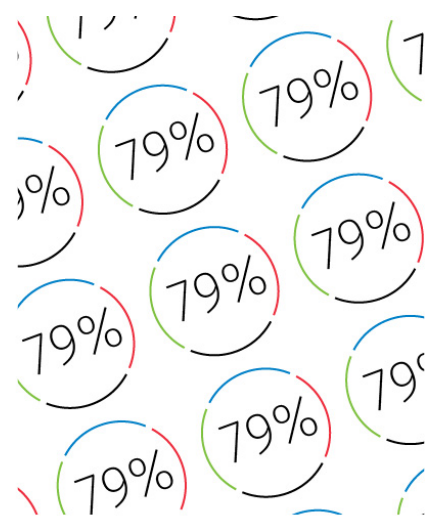
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