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# Randall Rader Resigns As Chief Judge of Federal Circuit

Zoe Tillman, Legal Times

May 23, 2014

Chief Judge Randall Rader of the U.S. Court of Appeals for the Federal Circuit will step down as chief judge at the end of May, the court announced Friday.

Rader will continue to serve as an active judge on the Federal Circuit. He'll "also undertake additional teaching, lecturing and travel," according to the court. Rader frequently travels around the United States and abroad to teach and lecture.

The resignation comes as Rader [faced scrutiny](#) over his decision to recuse from two high-profile cases. Both matters involved Weil, Gotshal & Manges and Silicon Valley partner Edward Reines, [according to affiliate publication](#) The Recorder. It wasn't clear whether Rader's resignation as chief was related to the recusals. The Wall Street Journal [reported Thursday](#) that Rader sent Reines an email earlier this year praising his skills.

Rader [released a letter Friday](#) apologizing for the recusals, but he did not say they were the reason for his resignation as chief. Rader said he regretted sending an email to an attorney praising his performance. He did not include the name of the lawyer.

"While I never expected that email to emerge as it did, I realize in retrospect that the email constituted a breach of the ethical obligation not to lend the prestige of the judicial office to advance the private interests of others," he said. "I apologize for that error, which may have led to the perception that the attorney in question was in a position to influence me in my performance of judicial duties."

Rader said he "did not and would never compromise my impartiality in judging any case before me." However, he stressed the importance of avoiding "even the appearance of partiality."

"I was inexcusably careless, and I sincerely apologize," he wrote.

Rader was appointed to the bench in 1990. He's served as chief judge since 2010. The court's announcement didn't explain the reason for his decision to step down. He could not immediately be reached for comment.

Rader [announced his resignation as chief judge](#) at a Federal Circuit Bar Association event Friday morning. According to a copy of his written remarks posted on the association's website, the judge didn't discuss his reasons for stepping down. He said he planned to spend time sitting on federal district courts—his "first love," he said—as well as teaching and continuing to serve on the Federal Circuit.

"No doubt the future will carry many challenges for the Federal Circuit similar to those of the last four years, but it has shown that—working as a body—it can achieve its mission of bringing uniformity to important areas of law while maintaining the high traditions of American jurisprudence," Rader said.

Judge Sharon Prost, a member of the Federal Circuit since 2001, will succeed Rader as chief judge.

Updated at 3:27 p.m.

Contact Zoe Tillman at [ztillman@alm.com](mailto:ztillman@alm.com). On Twitter: [@zoetillman](https://twitter.com/zoetillman).

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# DataTern Lawyer Asks Rader to Explain Mystery Recusal

Scott Graham, The Recorder

May 21, 2014

SAN FRANCISCO — Federal Circuit Chief Judge Randall Rader should explain why he recused himself from an appeal earlier this month after the court had already issued its ruling, the party that lost the appeal told the court Wednesday.

Acknowledging that it's "a matter of great sensitivity," McCarter & English partner William Zucker filed a letter with the U.S. Court of Appeals for the Federal Circuit seeking "full disclosure" of Rader's reasons, including when during the litigation they became an issue.

"Whatever the reason for recusal it should be open to scrutiny so as to avoid any appearance of impropriety," Zucker wrote, adding that the information may figure into his client's petition for rehearing.

Zucker's letter on behalf of patent assertion entity DataTern makes public a question on the minds of many within the Federal Circuit bar. [Microsoft v. DataTern](#) is one of [two high-profile cases from which Rader recused](#) earlier this month, after issuing decisions or orders in each of them. Litigants in both cases are represented by Weil, Gotshal & Manges partner Edward Reines, who vacated his position as chairman of the Federal Circuit Advisory Council the same week.

Neither Rader nor Reines has been willing to discuss the matter, and one member of the advisory council said Wednesday that no explanation has been given yet for Reines' departure.

Emory Law School professor Timothy Holbrook said he'd be shocked if the Federal Circuit complied with DataTern's request. "It is kind of risky to go to the court and ask, 'So why did he recuse himself?'" said Holbrook, noting that appellate judges generally prefer to keep such matters private. "From my perspective no good can come from that."

DataTern may try to argue that whatever conflict Rader had rendered the entire proceeding unfair, Holbrook said, but that argument [would likely be a stretch](#). On the other hand, DataTern could try to use the information in other litigation that's been decided or is pending before the court, he suggested.

DataTern is litigating the same patents at issue in the Microsoft case against other companies

before the Federal Circuit. The court stayed action on them in January pending the Microsoft v. DataTern decision.

Contact the reporter at [sgraham@alm.com](mailto:sgraham@alm.com).

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# Rader Pulls Out of Another Big Case He'd Already Decided

Scott Graham, The Recorder

May 7, 2014

SAN FRANCISCO — Federal Circuit Chief Judge Randall Rader has recused himself from a high-profile case for the second time this week.

The chief judge on Wednesday pulled out of [a dispute between medical device companies over artificial heart valves](#). His recusal led to the withdrawal and reissuance of an April 21 stay order that Medtronic has described as being a life-and-death matter for some heart patients.

On Monday, Rader recused himself from [a patent case involving Microsoft and SAP](#), prompting the court to reissue its April 4 decision without a dissent Rader had written.

Both cases were litigated by Weil, Gotshal & Manges and Silicon Valley partner Edward Reines, though it's not clear that has anything to do with Rader's recusals. Neither Rader, who became eligible for federal pension benefits two weeks ago, nor Reines responded to inquiries about the recusals.

Rader had joined Judge Sharon Prost on April 21 to stay U.S. District Judge Gregory Sleet's order enjoining Medtronic from selling its CoreValve heart valves in the U.S. Sleet had encouraged Medtronic and competitor Edwards LifeSciences to negotiate a "carve-out" for patients who are better suited to the Medtronic product, but had stayed his order for only seven days. Judge Pauline Newman dissented from the stay order.

On Wednesday, Judge Evan Wallach took Rader's place. Prost and Newman technically withdrew the Federal Circuit's stay, but ordered instead that Sleet's stay be extended while the Federal Circuit hears Medtronic's appeal. Wallach issued a brief dissent.

A Medtronic spokesman said the order maintains the status quo.

Patent attorneys contacted Wednesday were at a loss for why Rader recused himself from the two cases. Rader is known to be friendly with Reines, who is president of [the Federal Circuit Advisory Council](#), but one patent attorney noted that Rader is an outgoing sort who's friendly with a lot of attorneys who appear before the court. That doesn't typically cause the judge to recuse himself.

In any event, Reines and SAP might be appearing before Rader again soon. On Wednesday, Versata Development Group asked the Federal Circuit to assign [its dispute with SAP and the U.S. Patent and Trademark Office](#) to Rader and two other Federal Circuit judges who heard a related case between the two companies last fall.

Contact the reporter at [sgraham@alm.com](mailto:sgraham@alm.com).

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# Microsoft v. DataTern: Judge Rader's Dissent Withdrawn

🕒 May 6, 2014    👤 Jason Rantanen

Last month I [wrote about](#) Microsoft Corporation v. DataTern, Inc., in which the Federal Circuit addressed the issue of subject matter jurisdiction over a declaratory judgment action brought by manufacturers where the patent holder had filed infringement suits only against the manufacturers' customers, and had not directly threatened the manufacturers themselves. (I.e.: the reverse of a typical contributory infringement or inducement claim).

In that opinion, the Federal Circuit affirmed the district judge's ruling that there was jurisdiction in three out of four scenarios on the basis that these sets of facts raised the issue of inducement of infringement and contributory infringement by Microsoft and SAP. However, the majority (Judges Moore and Prost) reversed as to the fourth scenario, in which DataTern's infringement charts referenced only third-party documentation for key claim limitations. Judge Rader dissented as to this final category, expressing concern that the majority's holding provides "a roadmap to allow DataTern and its successors to keep Microsoft on the sidelines while running up wins against customers, who are often smaller and less-equipped to defend themselves."

Yesterday, the Federal Circuit vacated the original opinion in Microsoft v. DataTern and issued a new opinion that contains only the majority's opinion. Judge Rader is now recused. The order vacating the original opinion is here: [Microsoft Order](#) and the new opinion is here: [New Opinion](#). A comparison of the two opinions reveals that there are no other substantive differences. No reason for the recusal is given, and neither party appears to have requested that Judge Rader be recused. While recusals are not unheard of, this one is unusual because it occurred after the opinion issued and involved the vacation of a dissent.

One issue that this raises is whether there is a violation of Federal Circuit Rule 47.2, which states that "(a) Panels. Cases and controversies will be heard and determined by a panel consisting of an odd number of at least three judges, two of whom may be senior judges of the court." [Prof. Tim Holbrook](#) thinks not, pointing to Fed. Cir. Rule 47.11, which contemplates recusals after argument:

A quorum is a simple majority of a panel of the court or of the court en banc. In determining whether a quorum exists for en banc purposes, more than half of all circuit judges in regular active service, including recused or disqualified judges, must be eligible to participate in the en

banc process. If a judge of a panel that has heard oral argument or taken under sub-mission any appeal, petition, or motion is unable to continue with consideration of the matter because of death, illness, resignation, incapacity, or recusal, the remaining judges will determine the matter if they are in agreement and no remaining judge requests the designation of another judge.

Note: Thanks to Dennis and Tim for contributions to this post.

Show comments



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Scott Graham, The Recorder

May 7, 2014

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# THE WALL STREET JOURNAL.

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POLITICS AND POLICY

## Top Judge Who Gave Lawyer Praise Recuses Himself From Patent Cases

Laudatory Email Raises Questions About Patent Bar

By ASHBY JONES and BRENT KENDALL

May 22, 2014 5:50 p.m. ET



Federal Judge Randall Rader in his Washington chambers last year. Reuters

A federal judge who wrote an endorsement of a lawyer has recused himself from two patent cases in which the attorney participated, weeks after the court took key actions in both cases.

Earlier this year, Randall R. Rader, the chief judge of the U.S. Court of Appeals for the Federal Circuit—one of the nation's highest federal courts—sent a laudatory email to Edward Reines, a patent lawyer at Weil Gotshal & Manges LLP in Silicon Valley, said people familiar with the matter.

The email raised questions among experienced lawyers in the patent bar because Mr. Reines had appeared before the court—a key venue in U.S. patent law—in two prior cases involving Microsoft Corp. and Medtronic Inc.

Judge Rader originally participated in court actions in both cases. Earlier this month, the Federal Circuit disclosed that the judge was now recused and reissued an opinion in one case and a judicial order in another.

Judge Rader declined to comment through a court spokesman. A Weil Gotshal spokeswoman declined to comment.

The 18-judge Federal Circuit is one of 13 federal appeals courts throughout the country, one notch below the U.S. Supreme Court. Unlike the other federal appeals courts, however, the Federal Circuit specializes largely in one area: patent law.

The court's profile has skyrocketed in recent years, alongside the rise of big-dollar patent disputes, such as those between technology giants Apple Inc. and Samsung Electronics Co. The Federal Circuit has made key rulings in the Apple-Samsung cases and others in the global smartphone patent war, and in recent years has seen an increasing number of its rulings taken up by the U.S. Supreme Court.

One of the more high-profile cases of the Supreme Court's term—concerning whether and when software deserves patent protection—is an appeal from the full Federal Circuit. A ruling is expected by the end of next month. The incident shines a light on the clubby world of patent law, where judges from the Federal Circuit and its top lawyers often develop a familiarity that can spill over into friendship. Judges from that court and lawyers often appear together on panel discussions in Washington and Silicon Valley, and hobnob at patent-law conferences.

Mr. Reines appears regularly in cases before the Federal Circuit, which has become a crucial venue in the high-stakes world of patent litigation, where a single case can be worth hundreds of millions of dollars to the companies involved.

In the email, Judge Rader said he and other court colleagues had been impressed by Mr. Reines's skill as an appellate lawyer, according to people familiar with the details of the judge's note. The judge encouraged the lawyer to share the endorsement with others, a tool that could be used to impress clients, people familiar with the matter said.

It couldn't immediately be learned whether the court received direct complaints about Judge Rader's action.

The email triggered concerns that, in regard to Mr. Reines, Judge Rader's impartiality had been compromised, according to experienced patent lawyers who know both men. Some attorneys familiar with the judge's email said the endorsement was an inappropriate action for a sitting federal judge.

One case pitted Microsoft and SAP AG against a patent holder that had sued the companies' customers. The court ruled in favor of the companies on some issues, but stopped short of granting them a full victory. Judge Rader had partially dissented, saying the court should have sided more fully with Microsoft. Mr. Reines represented Microsoft in the case.

The court earlier this month reissued the opinion on behalf of the remaining two judges on the panel, with Judge Rader's partial dissent removed from the decision.

On Wednesday, the losing party in the case, DataTern Inc., filed a letter asking the Federal Circuit to reveal the reason for Judge Rader's recusal. "We understand that this is a matter of great sensitivity," the letter read. "Whatever the reason for recusal it should be open to scrutiny so as to avoid any appearance of impropriety," the firm told the court.

A spokesman for SAP declined to comment, as did a Microsoft spokeswoman.

The second recusal came in a closely watched patent case involving heart devices. A lower court barred Medtronic from selling its new CoreValve aortic heart valve after a jury found the device infringed on a patent held by rival Edwards Lifesciences Corp. Judge Rader joined a 2-1 majority that put a lower court's injunction on hold. Mr. Reines represented Medtronic in the case.

The appeals court replaced Judge Rader with another judge, and then swapped the order with a new one that also stayed the lower court's injunction.

A spokesman for Medtronic declined to comment. A spokeswoman for Edwards Lifesciences didn't respond to a request for comment.

Until recently, Mr. Reines also chaired the Federal Circuit Advisory Council, a group of prominent patent lawyers that serve as a liaison between the court and the patent bar. Judge Rader appointed him to the position. The court's website now says the chairmanship of the council is vacant. A spokeswoman for Weil Gotshal declined to comment on Mr. Reines's status with the council.

Write to Ashby Jones at [ashby.jones@wsj.com](mailto:ashby.jones@wsj.com) and Brent Kendall at [brent.kendall@wsj.com](mailto:brent.kendall@wsj.com)

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United States Court of Appeals  
for the Federal Circuit



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WASHINGTON, D.C. 20439

CHAMBERS OF  
CHIEF JUDGE RANDALL R. RADER

(202) 275-8500

May 23, 2014

The Honorable Pauline Newman  
The Honorable Haldane Robert Mayer  
The Honorable S. Jay Plager  
The Honorable Alan D. Lourie  
The Honorable Raymond C. Clevenger, III  
The Honorable Alvin A. Schall  
The Honorable William C. Bryson  
The Honorable Richard Linn  
The Honorable Timothy B. Dyk  
The Honorable Sharon Prost  
The Honorable Kimberly A. Moore  
The Honorable Kathleen M. O'Malley  
The Honorable Jimmie V. Reyna  
The Honorable Evan J. Wallach  
The Honorable Richard G. Taranto  
The Honorable Raymond T. Chen  
The Honorable Todd M. Hughes

Dear Colleagues,

During the past few weeks I have recused myself from certain cases on which I previously sat. I feel it necessary to create a public record concerning the circumstances that led to those recusals. More importantly, I wish to apologize for creating the need for the recusals. I will immediately release this letter publicly in order to convey my apologies and protect the court's integrity.

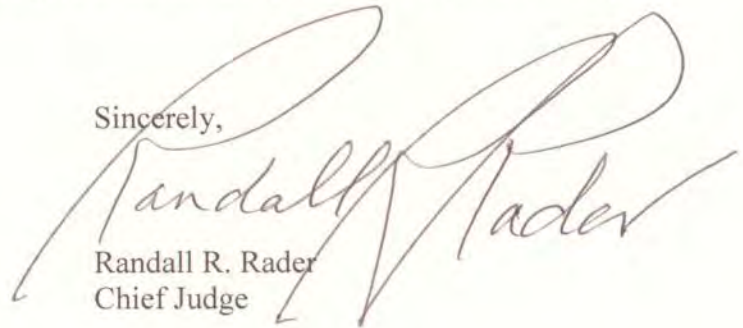
I have come to realize that I have engaged in conduct that crossed lines established for the purpose of maintaining a judicial process whose integrity must remain beyond question. It is important to emphasize that I did not and would never compromise my impartiality in judging any case before me. But avoiding even the appearance of partiality is a vital interest of our courts, and I compromised that interest by transgressing limits on judges' interactions with attorneys who appear before the court. I was inexcusably careless, and I sincerely apologize.

I particularly regret an email message I sent to an attorney who had argued before the court. The email reported, with certain inaccuracies, a conversation I had with another member of the court who had praised the attorney's performance. I added my own praise and urged the attorney to show the email to others. While I never expected that email to emerge as it did, I

realize in retrospect that the email constituted a breach of the ethical obligation not to lend the prestige of the judicial office to advance the private interests of others. I apologize for that error, which may have led to the perception that the attorney in question was in a position to influence me in my performance of judicial duties.

Working with the court, I have taken steps to remedy the breaches for which I was responsible by recusing in cases as to which a question might be raised as to my impartiality. I am committed to adhering carefully to the requirements of the Code of Conduct for United States judges in making any necessary recusal decisions. I am truly sorry for the lapse and will work diligently to ensure that it does not recur. Again, the judiciary's most treasured attribute is its integrity. I will work diligently with my colleagues to ensure and protect our court's standing.

Sincerely,

A handwritten signature in black ink, reading "Randall Rader". The signature is written in a cursive style with a large, looping initial "R".

Randall R. Rader  
Chief Judge

Chief Judge Randall R. Rader  
May 23, 2014

Welcome to this event – an impressive feature of the on-going international series of the Federal Circuit Bar Association! I am proud to be a member of this Bar particularly because it has taken up the mission of improving judicial and adjudicative practice worldwide through this series.

It is fitting that I take this opportunity to make an important announcement. May 30, 2010 was my first day as Chief Judge of the Federal Circuit. May 30, 2014 will be my last. In a week, I will step aside as Chief Judge of the Federal Circuit, opening the position for the new Chief Judge Sharon Prost.

At the very outset, let me take this opportunity to congratulate and commend to you Circuit Judge Sharon Prost. Circuit Judge Prost is the ideal judge to lead the Federal Circuit into its next years of continued transition. She has a marvelous vision of the importance of the Federal Circuit within the national judiciary and as an arbiter of cases that vastly influence the world economy. She also has the universal respect and admiration of her colleagues and the poise to lead all of us, me included as one of her Circuit colleagues, through the challenges of the coming years. On a personal note, the highlight of my tenure as Chief Judge may have been when Circuit Judge Prost took the podium to close the Federal Circuit's joint judicial conference with the Supreme Court of Korea in Seoul. She spoke with such dignity and power about the role of the Federal Circuit in the international judicial community. And I will forever remember her words of kindness to me on that occasion. In sum, the Federal Circuit, and especially me, can celebrate this day with full confidence for the future.

For just a moment, and I promise that I have come to "bury Caesar, not to praise him," I wish to recount some of the highlights of the past four years.

**\*\* Transition of Judges:** The Federal Circuit has acquired six new judges in a brief span and has handled the challenges of accommodating new senior judges and bringing the new colleagues into our court's culture and tradition. These new judges (some of them are already veterans who have presided over numerous panels) are marvelously prepared for the work and mission of the Federal Circuit. The future of the Federal Circuit rests securely in very capable hands.

**\*\* Conversion to Electronic Filing and Case Management:** This project, the first undertaken by the new Chief Judge four years ago, ensures that the "technology court" retains technology leadership. Adopting a system compatible with the District Courts and bar expectations has not been easy and is still in progress, but the benefits are already evident throughout our practice areas.



**\*\* Weathering Sequestration and Budget Cuts:** The Federal Circuit together faced great budget difficulties: precipitous rises in rental costs in the face of drastic budget cuts. In the face of these budget challenges, the Federal Circuit came together to make difficult decisions – moving to a voluntary mediation program (which – with the innovative assistance from the bar and even US Magistrate judges in various district courts -- has managed to keep pace with numbers before the cut) and making staff and other reductions in non-essential programs. Despite a staff reduction of approaching 10%, the work of the Federal Circuit proceeded and proceeds without disruption or disturbance.

**\*\* Continued and Enhanced Cooperation with the Bar:** The Federal Circuit saw its supporting institutions take a broader role in Congressional and public affairs affecting the court. The Federal Circuit also saw its supporting institutions foster coordination and cooperation amongst the Patent Pilot Project District Judges in a series of important conferences and meetings. The Federal Circuit also set in motion processes that allowed leaders in the bar and judiciary to propose measures to cut the costs and improve the efficiency of complex litigation, including a model order limiting e-discovery and another limiting issues in patent cases.

**\*\* Courtroom Renovation:** The Federal Circuit completed the renovation of its courtrooms begun when Chief Judge Mayer appointed one of his colleagues to improve our facilities.

**\*\* International Judicial Cooperation:** The Federal Circuit initiated a series of Joint Judicial conferences in Tokyo, Japan; Beijing, China; and Seoul, Korea. Each of these events had attendance at or above 1000 participants including hundreds of judges in those countries. Those events have both improved international cooperation at the judicial level and also are credited with inspiring improvements both in the US and abroad. For instance, Japan implemented an unprecedented amicus procedure; China's Third Plenum announced plans to create a national IP court patterned after the Federal Circuit; Korea moved to consolidate infringement and invalidity patent jurisdiction in a single court.

No doubt the future will carry many challenges for the Federal Circuit similar to those of the last four years, but it has shown that – working as a body – it can achieve its mission of bringing uniformity to important areas of law while maintaining the high traditions of American jurisprudence.

For me, this transition will enable me to return to my “first love” of sitting as a trial judge in various district courts. Indeed I look forward to serving as a district judge for a sizeable volume of cases in the next few months. In addition, I will have time to pursue the joys and challenges of teaching intellectual property courses at

both US and foreign law schools. And, of course, I look forward to continuing to serve on a court that I helped create years before I became a judge.

In conclusion, I wish to affectionately thank the great judges with whom I serve for their marvelous support throughout my tenure as Chief Judge. I also wish to thank the great leaders of our Bar. I genuinely believe that the Federal Circuit enjoys the support of the greatest group of lawyers anywhere in the world. With the Federal Circuit judges and Bar working together, I see no limits on the prospects for improvement of Federal adjudicative practice.

Thank you. Thank you. Thank you.