



Citing Rader's Weil Email, Patent Co. Wants En Banc Hearing

By **Bill Donahue**

Law360, New York (June 05, 2014, 7:59 PM ET) -- DataTern Inc., a company on the losing end of a Federal Circuit opinion handed down in favor of the [Weil Gotshal & Manges LLP](#) attorney at the center of former Chief Judge Randall Ray Rader's recent ethics troubles, told the court Wednesday that an en banc rehearing was the only way to remove the "taint" from the decision. Judge Rader [apologized last month](#) for an "inexcusably careless" breach of ethics and resigned from his role as chief judge after email surfaced that reportedly showed him lavishing praise on Weil partner Edward Reines, who had appeared in front of Judge Rader on numerous occasions.

Before the story broke, the Federal Circuit reissued two opinions involving Reines and Judge Rader, including [one that was mostly in favor](#) of Reines-repped [Microsoft Corp.](#) and [SAP AG](#) in their bid for a declaratory judgment of noninfringement against DataTern, a patent assertion entity.

The reissued opinion removed Judge Rader's name and erased a dissenting opinion that advocated an even stronger ruling for Microsoft and SAP, but was otherwise the same.

On Wednesday, DataTern said the same-panel reissuance wasn't nearly enough "to avoid an appearance of taint on the integrity of the court, to assure fairness to the parties, and to maintain public confidence in the Court's impartiality."

Instead, DataTern wants an en banc panel to rehear the case and consider a ruling that would vacate the panel's decision and remand for further proceedings with Microsoft and SAP, in front of a new panel.

"The public has the right to wonder whether the outcome of the case was influenced by Judge Rader's close friendship with opposing counsel," DataTern wrote. "This appearance of undue influence requires remediation that can only be accomplished by vacating the opinion as to [one] patent and remanding the appeal to be reheard by a new three-judge panel."

The petition took note of the role Judge Rader played in oral arguments, saying he at one point suggested that DataTern be bound to an "overly narrow construction" that it had never agreed to. DataTern said the eventual panel ruling, as it related to that particular patent, was based on that misunderstanding.

It also mentioned one of the more infamous lines in the reported letter, where Judge Rader told Reines that he was his “friend for life.” That means the two were close even before oral arguments in November 2013, DataTern said.

“As such, Judge Rader should never have participated at all,” the petition said.

The Wall Street Journal first ran reports on May 22 about a laudatory email from Judge Rader to Reines that apparently relayed a conversation he had with another judge who praised Reines' performance. Judge Rader reportedly added his own praise and urged the attorney to show the email to others.

The next day, Judge Rader resigned from his post as chief judge — he'll stay on the Federal Circuit bench — for an email that he said could give the impression that the attorney was in a position to influence his thinking.

"I have come to realize that I engaged in conduct that crossed lines established for the purpose of maintaining a judicial process whose integrity must remain beyond question," Judge Rader wrote.

The judge was careful to emphasize, though, he "did not and would never compromise my impartiality."

Reines, Microsoft and SAP were all unavailable for comment on Thursday.

Microsoft and SAP are represented by Edward R. Reines, Andrew L. Perito and Evan N. Budaj of Weil Gotshal & Manges LLP.

DataTern is represented by Lee Carl Bromberg and Erik Paul Belt of [McCarter & English LLP](#).

The cases are *Microsoft Corp. v. DataTern Inc.*, case number [13-1184](#), and *SAP AG et al. v. DataTern Inc.*, case number [13-1185](#), both in the U.S. Court of Appeals for the Federal Circuit.

--Editing by Chris Yates.