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2022 Virtual PCT Training Seminar

Session 3

Selecting a Receiving Office, RO/US Versus RO/IB

Monday, February 14, 2022

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Before We Get Started...

Recording

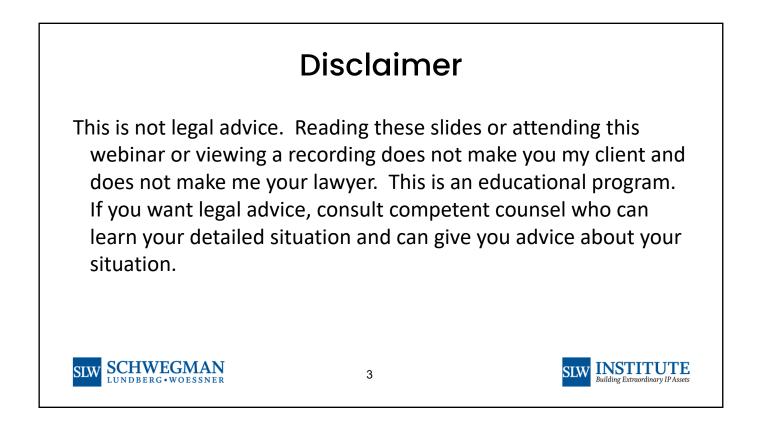A recording of this session will be posted to the Attendee Hub after the live session ends.
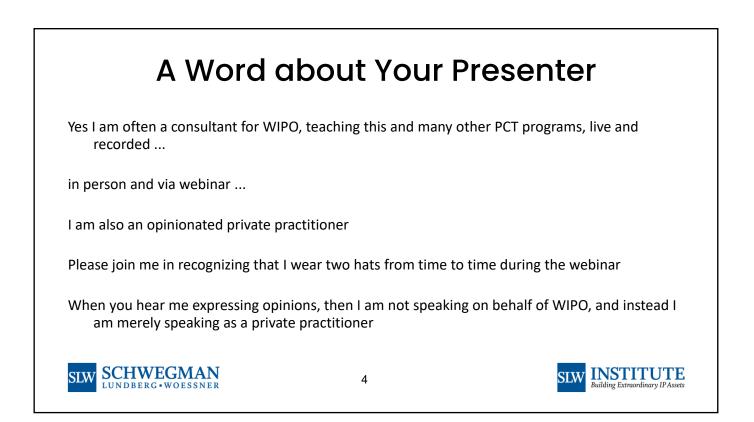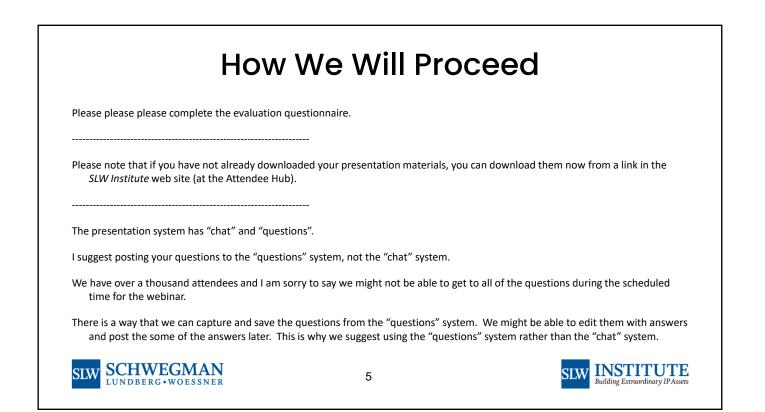
Questions

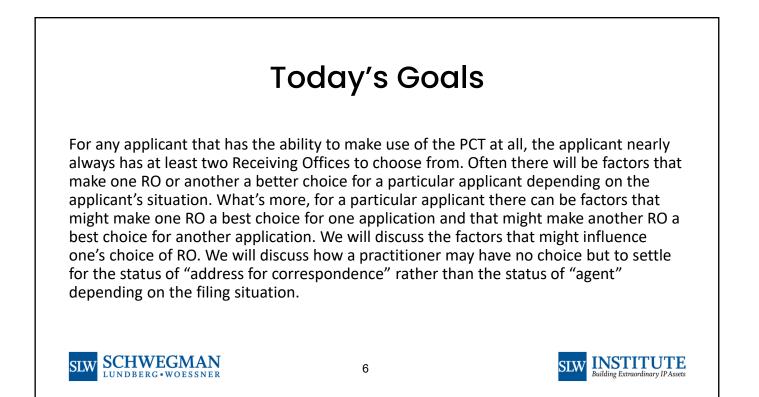Please enter questions in the Q&A feature in the Zoom menu.

Social

Follow us on LinkedIn or go to SLW Institute on slwip.com to see upcoming and on demand webinars.

Disclaimer

This is not legal advice. Reading these slides or attending this webinar or viewing a recording does not make you my client and does not make me your lawyer. This is an educational program. If you want legal advice, consult competent counsel who can learn your detailed situation and can give you advice about your situation.

A Word about Your Presenter

Yes I am often a consultant for WIPO, teaching this and many other PCT programs, live and recorded …

in person and via webinar …

I am also an opinionated private practitioner

Please join me in recognizing that I wear two hats from time to time during the webinar

When you hear me expressing opinions, then I am not speaking on behalf of WIPO, and instead I am merely speaking as a private practitioner

How We Will Proceed

Please please please complete the evaluation questionnaire.

Please note that if you have not already downloaded your presentation materials, you can download them now from a link in the *SLW Institute* web site (at the Attendee Hub).

The presentation system has "chat" and "questions".

I suggest posting your questions to the "questions" system, not the "chat" system.

We have over a thousand attendees and I am sorry to say we might not be able to get to all of the questions during the scheduled time for the webinar.

There is a way that we can capture and save the questions from the "questions" system. We might be able to edit them with answers and post the some of the answers later. This is why we suggest using the "questions" system rather than the "chat" system.

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Today's Goals

For any applicant that has the ability to make use of the PCT at all, the applicant nearly always has at least two Receiving Offices to choose from. Often there will be factors that make one RO or another a better choice for a particular applicant depending on the applicant's situation. What's more, for a particular applicant there can be factors that might make one RO a best choice for one application and that might make another RO a best choice for another application. We will discuss the factors that might influence one's choice of RO. We will discuss how a practitioner may have no choice but to settle for the status of "address for correspondence" rather than the status of "agent" depending on the filing situation.

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How Can You Ask Questions?

- Ask your questions in the "questions" box, not the chat box
- I might try to post some answers in the Attendee Hub later
- Consider posting some questions in the PCT Listserv (email discussion group sponsored by my firm)
- I might post some answers in my blog (Ant-Like Persistence blog)

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Outline for Today

Review the background for selection of ROs

Remind ourselves of some Best Practices about auto-loading bibliographic data to the ROs

Discuss factors that might influence your choice of an RO

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US Focus

Many of today's comments will be very focused on the situation of a US-based applicant

Some of the points discussed today will nonetheless be of interest to applicants in other locations

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What is "Bibliographic Data"?

This is for example:

- Who are the inventors?

- Who is the applicant?

- What is the title?

- Are we claiming priority?

- Which Searching Authority did we pick?

- Is an agent representing the applicant?

This is what we mean by "bib data"

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10

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Common Sense Tells You…

… that no matter which patent office we are talking about, no matter where in the world, of course there needs to be some way that the filer communicates the bib data to the patent office

In the USPTO, the name we give to the thing that communicates bib data to the patent office is …
… wait for it … the Application Data Sheet

In PCT world, the name we give to the thing that communicates bib data to the patent office is … the Request

11

Communicating Bib Data to a Patent Office

It is very much in your interest to do *whatever it takes* to make sure that your bib data get ***auto-loaded*** into the patent office system

It is crucially important to deny the patent office any opportunity to hand-key your bib data

12

Ensuring that ADS Bib Data Get Auto-Loaded into USPTO's Systems

Make sure your ADS is not image-based (make sure it is computer-readable)

Make sure it is in the e-filed submission *in which you do not yet know* your application number

This can be in your choice of EFS-Web or Patentcenter

13

If You Are a US Filer, the Next Question Is, Should You Use EFS-Web or Patentcenter?

You need to be using Patentcenter

USPTO is going to shut down EFS-Web Real Soon Now

Patentcenter is very buggy and needs features

You need to contribute to cleaning up Patentcenter

To do this, you need to be using Patentcenter

And you need to join and participate in the Patentcenter listserv

This is not the same as Ideascale

14

Ensuring that PCT Bib Data Get Auto-Loaded into PCT Patent Office Systems

Make sure you do not hand in your Request as a PDF

If you are using RO/US (USPTO) then make sure you communicate your bib data by means of a ZIP file

Failing to hand in a ZIP file means you are risking malpractice

Astonishingly, in about half of all PCT filings in the USPTO, the filer fails to hand in a ZIP file

This means the filer is ...

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Ensuring that PCT Bib Data Get Auto-Loaded into PCT Patent Office Systems

Make sure you do not hand in your Request as a PDF

If you are using RO/IB it is simply a matter of using ePCT to file the PCT application

This causes auto-loading of the bib data into the PCT patent office systems

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I Will Now Ask Our US Filers… What is It That You Do to Make It So That the Patent Application You Are About to File at the USPTO Will Be Visible to You in Patentcenter and Private PAIR?

Yeah, what?

(attendee scratches his or her head … it has something to do with customer numbers … yeah, we just make sure to use the right customer number or something … hmm …)

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PCT World Has a Thing That is Like Patentcenter and Private PAIR

Okay so when you are filing a new PCT application you ought to do what it takes to make it so that the PCT application you are about to file will be visible to you in the thing that is like Patentcenter and Private PAIR

What is that thing? Customer number? No, it can't be that. Hmmm.

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18

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When You Are Filing a New PCT Application, What Do You Do So That the PCT Application You Are About to File Will Be Visible to You in the Thing That Is Like Patentcenter and Private PAIR

It's different depending on whether you are filing at RO/US or filing at RO/IB

- At RO/US, the thing you do is upload a ZIP file that you created in ePCT
- At RO/IB, the thing you do is e-file using ePCT

19

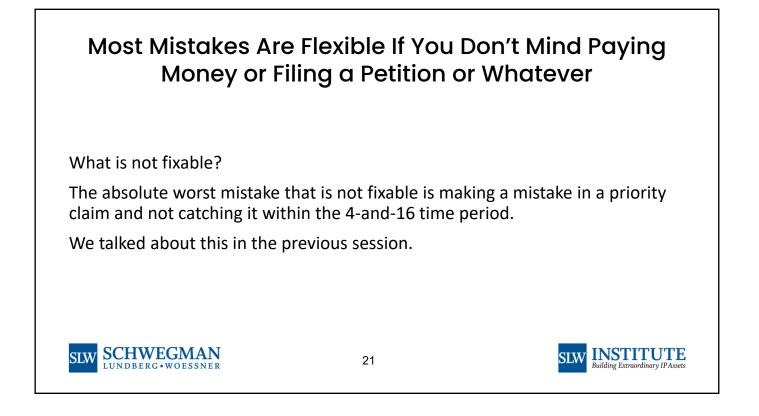# Did I Mention That You Need to Learn to Us Every Feature of ePCT if You Have Not Done So Already?

You need to learn to use every feature of ePCT if you have not done so already.

20

Most Mistakes Are Flexible If You Don't Mind Paying Money or Filing a Petition or Whatever

What is not fixable?

The absolute worst mistake that is not fixable is making a mistake in a priority claim and not catching it within the 4-and-16 time period.

We talked about this in the previous session.

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If You Previously Loaded Your Priority Application into DAS…

Then when you are preparing your PCT Request in ePCT …

ePCT will cross-check your priority claim with DAS …

And if you got a digit wrong in the priority claim, it will catch it right before your very eyes.

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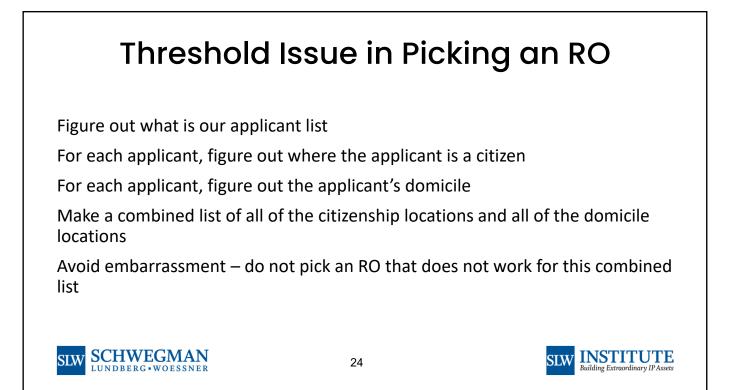
22

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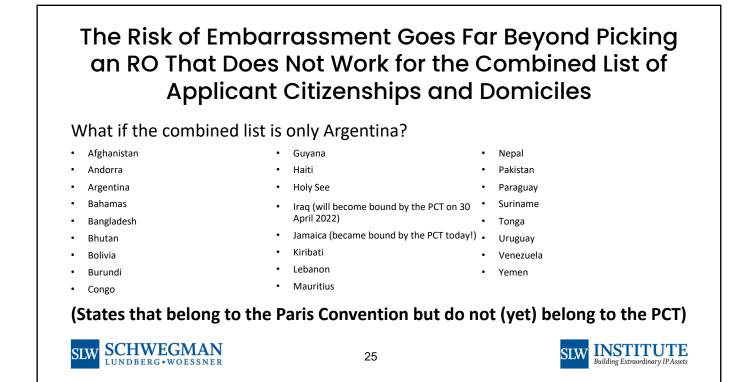# I Think I Forgot to Mention, It Is Good to Learn to Use Every Feature of ePCT

It is good to learn to use every feature of ePCT, including the feature where it cross-checks your priority claim information against what is already in the DAS system and catches your mistakes

Thereby saving you from malpractice or worse

Or worse????

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Threshold Issue in Picking an RO

Figure out what is our applicant list

For each applicant, figure out where the applicant is a citizen

For each applicant, figure out the applicant's domicile

Make a combined list of all of the citizenship locations and all of the domicile locations

Avoid embarrassment – do not pick an RO that does not work for this combined list

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The Risk of Embarrassment Goes Far Beyond Picking an RO That Does Not Work for the Combined List of Applicant Citizenships and Domiciles

What if the combined list is only Argentina?

- Afghanistan
- Andorra
- Argentina
- Bahamas
- Bangladesh
- Bhutan
- Bolivia
- Burundi
- Congo
- Guyana
- Haiti
- Holy See
- Iraq (will become bound by the PCT on 30 April 2022)
- Jamaica (became bound by the PCT today!)
- Kiribati
- Lebanon
- Mauritius
- Nepal
- Pakistan
- Paraguay
- Suriname
- Tonga
- Uruguay
- Venezuela
- Yemen

(States that belong to the Paris Convention but do not (yet) belong to the PCT)

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How to Avoid Getting This Wrong?

Use ePCT to prepare your PCT Request

ePCT will warn you if your applicant list fails to provide an entitlement to make use of the Patent Cooperation Treaty

ePCT will warn you if you attempt to make use of an RO that does not work given your applicant list
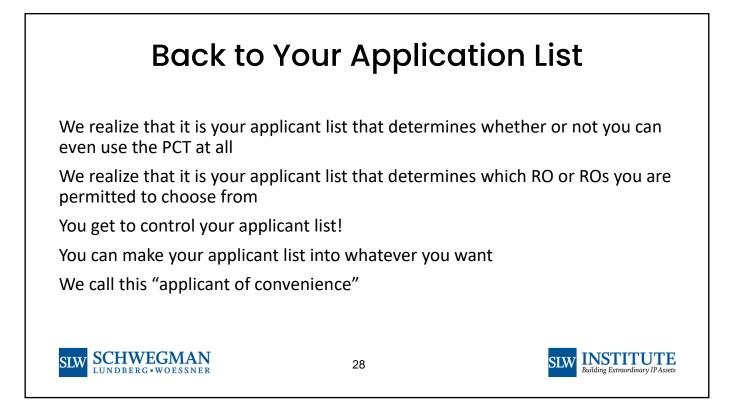
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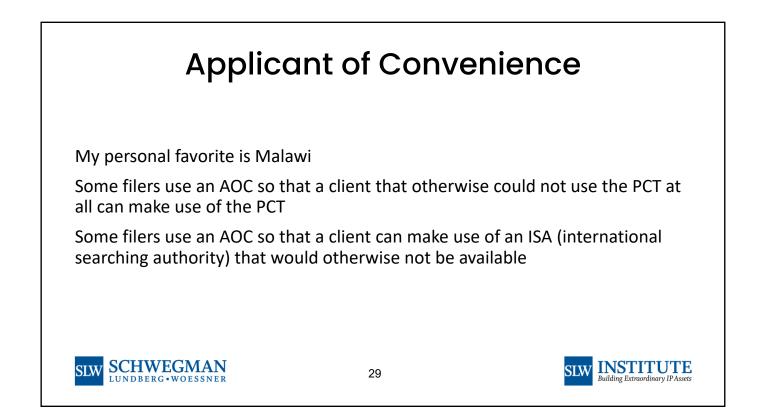
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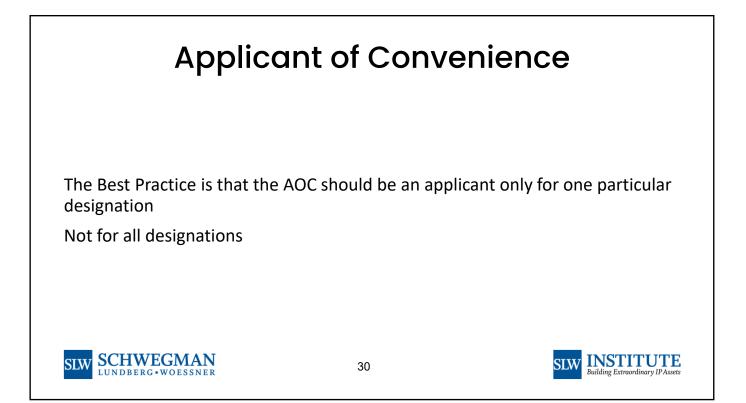SLW INSTITUTE Building Extraordinary IP Assets
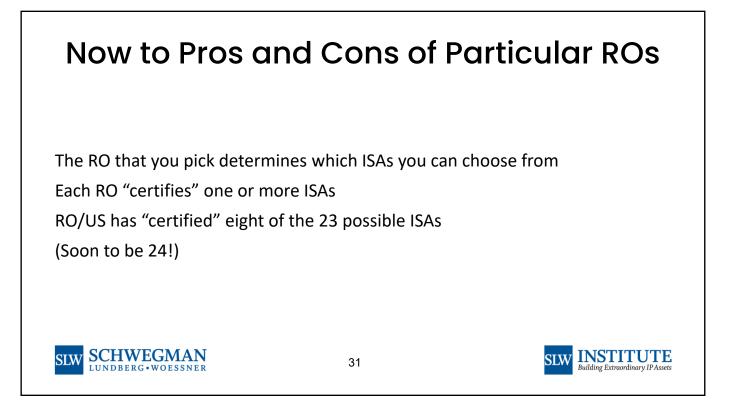
How About PCT-SAFE?

Nope, not good enough

PCT-SAFE is no longer a Best Practice

You need to be using ePCT

ePCT checks your priority claims, PCT-SAFE does not

ePCT is always up to date

ePCT offers many collaborative workflow benefits that PCT-SAFE does not

A US filer might ask, but what about that Federal Register notice from May 6, 2016?

You might go to prison if you use ePCT, said the USPTO. (I am exaggerating!)

Later, USPTO walked it back! Using ePCT will not get you into such trouble.

PCT-SAFE will eventually be discontinued

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Back to Your Application List

We realize that it is your applicant list that determines whether or not you can even use the PCT at all

We realize that it is your applicant list that determines which RO or ROs you are permitted to choose from

You get to control your applicant list!

You can make your applicant list into whatever you want

We call this "applicant of convenience"

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2/11/2022

Applicant of Convenience

My personal favorite is Malawi

Some filers use an AOC so that a client that otherwise could not use the PCT at all can make use of the PCT

Some filers use an AOC so that a client can make use of an ISA (international searching authority) that would otherwise not be available

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Applicant of Convenience

The Best Practice is that the AOC should be an applicant only for one particular designation

Not for all designations

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Now to Pros and Cons of Particular ROs

The RO that you pick determines which ISAs you can choose from

Each RO "certifies" one or more ISAs

RO/US has "certified" eight of the 23 possible ISAs

(Soon to be 24!)

Which ISAs Can You Choose From If the RO You Pick is RO/IB?

You make a list of all of the ROs that you could use given your applicant list and the resulting list of applicant citizenships and applicant domiciles

You make a list of all of the ISAs that all of those ROs would have permitted you to choose from
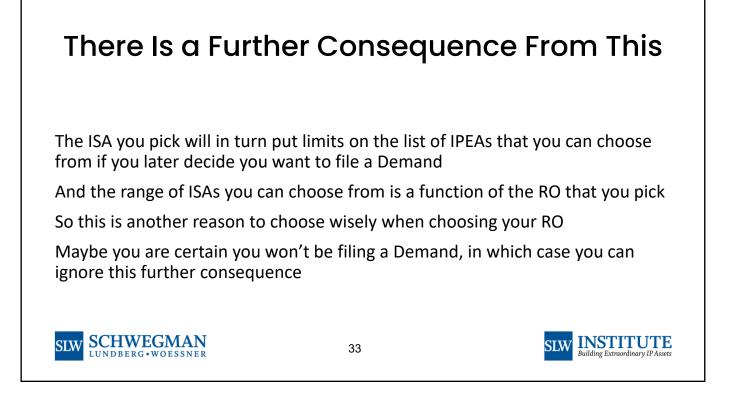
That is the list of all of the ISAs that the RO/IB will permit you to choose from
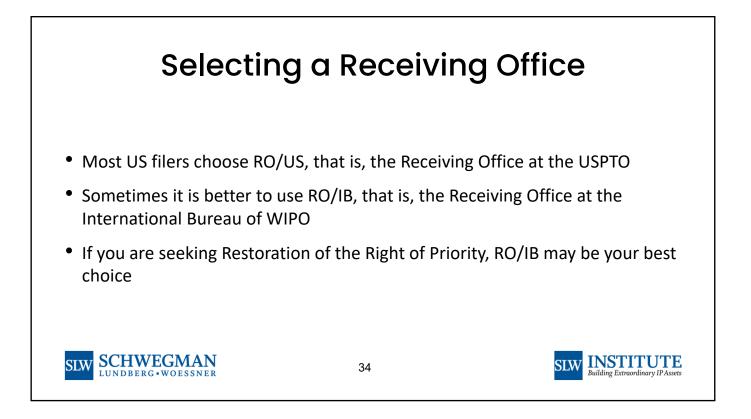
ePCT will calculate all of this for you

Did I mention it is good to learn to use ePCT?

There Is a Further Consequence From This

The ISA you pick will in turn put limits on the list of IPEAs that you can choose from if you later decide you want to file a Demand

And the range of ISAs you can choose from is a function of the RO that you pick

So this is another reason to choose wisely when choosing your RO

Maybe you are certain you won't be filing a Demand, in which case you can ignore this further consequence

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Selecting a Receiving Office

- Most US filers choose RO/US, that is, the Receiving Office at the USPTO

- Sometimes it is better to use RO/IB, that is, the Receiving Office at the International Bureau of WIPO

- If you are seeking Restoration of the Right of Priority, RO/IB may be your best choice

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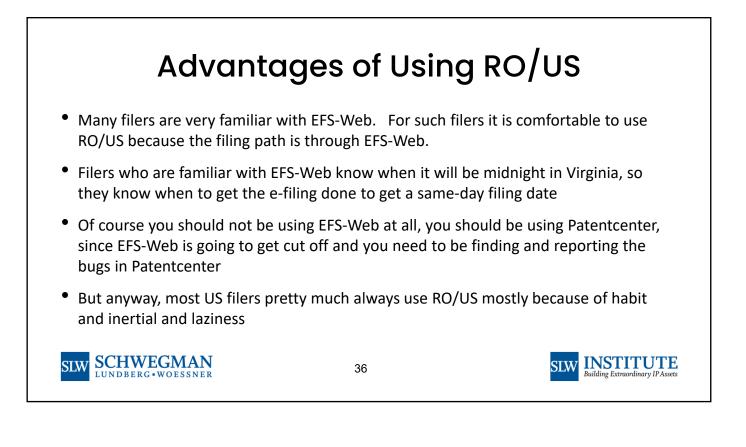
34

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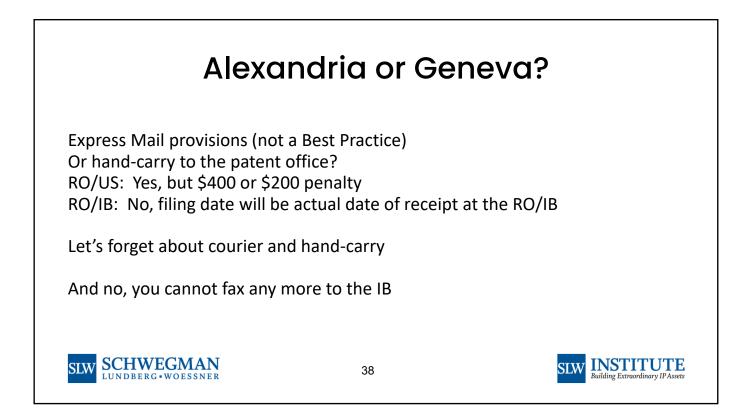*Building Extraordinary IP Assets*

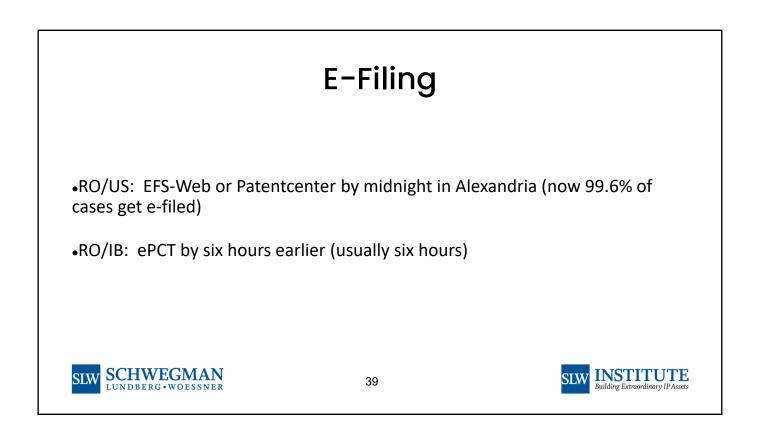# Sometimes Your Case Will Get Bounced from RO/US to RO/IB

Why? Because RO/US "lacks competence to be the RO"

This is not the same as being "incompetent"

It could be that there is no applicant in the applicant list that is a citizen or domiciliary of the US

Or maybe there is some non-English text in the application

Like maybe in a figure, bet you never thought of that!

Then you get a new and different PCT application number

This might make you look sort of dumb in front of the client

Better if you explained ahead of time to the client that the bounce is going to happen

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Advantages of Using RO/US

- Many filers are very familiar with EFS-Web.   For such filers it is comfortable to use RO/US because the filing path is through EFS-Web.

- Filers who are familiar with EFS-Web know when it will be midnight in Virginia, so they know when to get the e-filing done to get a same-day filing date

- Of course you should not be using EFS-Web at all, you should be using Patentcenter, since EFS-Web is going to get cut off and you need to be finding and reporting the bugs in Patentcenter

- But anyway, most US filers pretty much always use RO/US mostly because of habit and inertial and laziness

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Foreign Filing License Considerations

- If you would need a Foreign Filing License to file outside of the US, but do not yet have an FFL, then RO/US is a good choice because RO/US will carry out a security review before transmitting the application outside of the US

- If your invention was made in the US, you will need to get an FFL before filing a PCT application in RO/IB

- If the priority application is substantively identical, and if it was filed in the USPTO, then maybe you already have an FFL for the subject matter of the to-be-filed PCT application

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Alexandria or Geneva?

Express Mail provisions (not a Best Practice)
Or hand-carry to the patent office?
RO/US: Yes, but $400 or $200 penalty
RO/IB: No, filing date will be actual date of receipt at the RO/IB

Let's forget about courier and hand-carry

And no, you cannot fax any more to the IB

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E-Filing

- RO/US: EFS-Web or Patentcenter by midnight in Alexandria (now 99.6% of cases get e-filed)

- RO/IB: ePCT by six hours earlier (usually six hours)

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Filing Fee Reductions

Filing Fee Reductions for e-filing in RO/US:

- $109 – e-filed (EFS-Web or Patentcenter) but the Request is not a ZIP file

- $218 – e-filed (EFS-Web or Patentcenter) and the Request is a ZIP file (Best Practice)

- And note that when you e-file, you avoid a penalty of $400 or $200

- No the $400 non-DOCX penalty will not apply to PCT filings

Filing fee reductions for e-filing in RO/IB:

- $218 – e-filed (ePCT)

- $327 – e-filed and the application body is in XML

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Transmittal Fee

- RO/US: $260, but:

- $130 if filing as a small entity

- $65 if filing as a micro-entity

- RO/IB: $109

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41

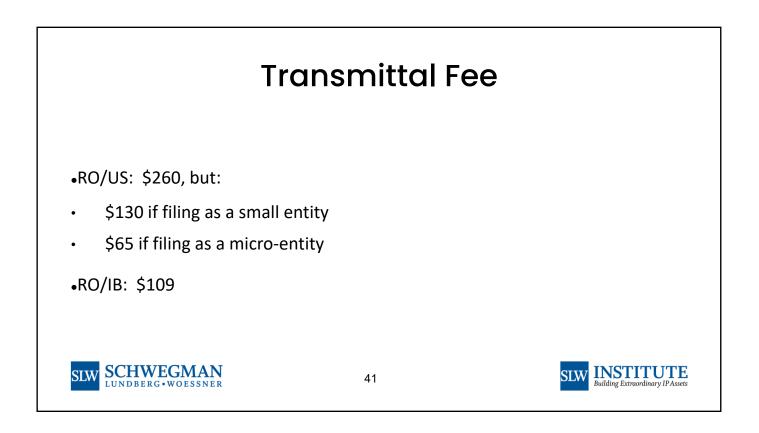**SLW INSTITUTE**
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Alexandria or Geneva? Restoration of the Right of Priority

RO/US: unintentional criterion only

RO/IB: unintentional criterion or in spite of due care (important for later filings in AM, BH, BW, CH, CR, DK, EE, EG, EP, ES, FI, GT, HR, HU, IL, IS, JP, LT, NZ, PE, PL, PT, RS, RU, SE, SK)
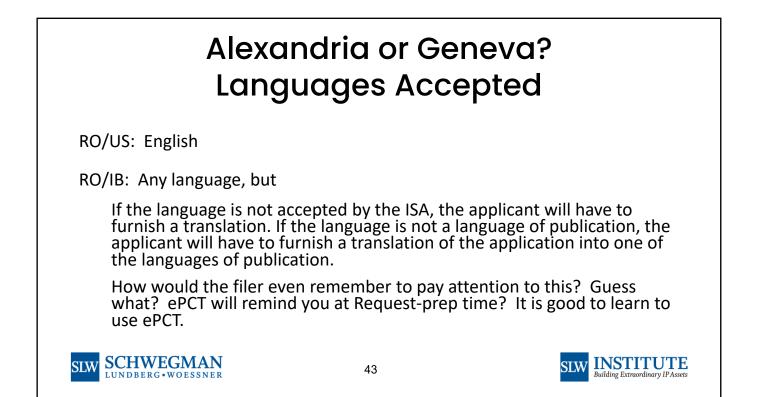
Fee for Requesting Restoration of the Right of Priority

- RO/US: $2100

  - $1050 if filing as a small entity ($525 micro-entity)

- RO/IB: None

IF YOU NEED TO RESTORE PRIORITY, THINK RO/IB!

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Alexandria or Geneva?
Languages Accepted

RO/US: English

RO/IB: Any language, but

If the language is not accepted by the ISA, the applicant will have to furnish a translation. If the language is not a language of publication, the applicant will have to furnish a translation of the application into one of the languages of publication.

How would the filer even remember to pay attention to this? Guess what? ePCT will remind you at Request-prep time? It is good to learn to use ePCT.

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43

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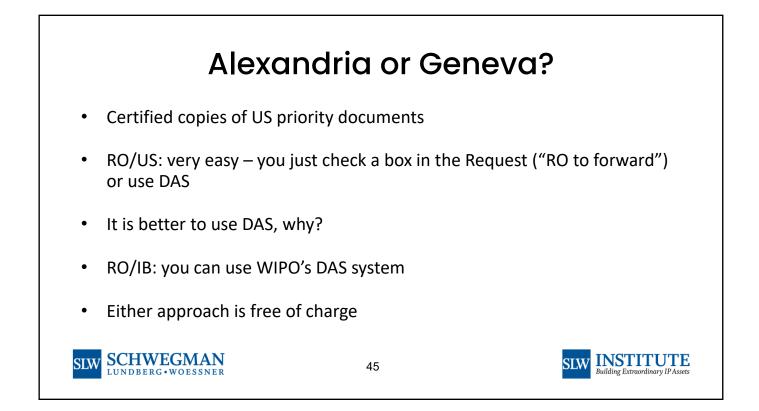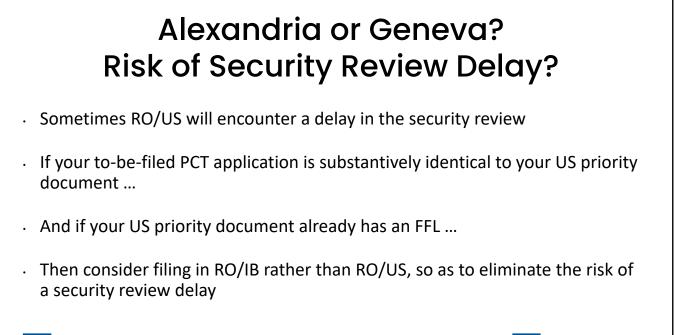

Alexandria or Geneva?
ISA Choices

- RO/US: AU, EP, IL, JP, KR, RU, SG, US

- RO/IB: For a US filer, RO/IB offers at least as many choices as RO/US, but may have additional choices depending on whether there is any non-US nationality or residence among the applicants

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Alexandria or Geneva?

- Certified copies of US priority documents

- RO/US: very easy – you just check a box in the Request ("RO to forward") or use DAS

- It is better to use DAS, why?

- RO/IB: you can use WIPO's DAS system

- Either approach is free of charge

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Best Practice for Filing a Priority Document

- Make sure the priority application is made available to DAS

- In USPTO, this may be done in the ADS (default setting)

- A US provisional might not be filed with an ADS

- If so, then Form PTO/SB/39 may be used

- Similar steps should be followed for a priority document that is being filed in a non-US patent office

- This is a Best Practice

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Alexandria or Geneva?
Risk of Security Review Delay?

- Sometimes RO/US will encounter a delay in the security review

- If your to-be-filed PCT application is substantively identical to your US priority document …

- And if your US priority document already has an FFL …

- Then consider filing in RO/IB rather than RO/US, so as to eliminate the risk of a security review delay

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Alexandria or Geneva?
Processing Time

- Recall that one of the tasks of the Receiving Office is to transmit the Record Copy to the International Bureau (IB)

- Common sense tells us that probably the RO/IB is pretty good at transmitting the Record Copy to the IB

- The RO/US has a recent track record of transmitting the Record Copy to the IB just as fast as RO/IB's track record (the exception being cases that get slowed down in a security review)

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48

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Alexandria or Geneva? Delay Before Case Becomes Visible in the PCT System That Is Like Private PAIR

- If you pick RO/US (or any RO other than RO/IB) then it will take weeks for the newly filed PCT application to be visible to you in the PCT system that is like Private PAIR

- If you pick RO/IB, then your newly filed PCT application will be visible to you in the PCT system that is like Private PAIR *instantly*

- This is one of the reasons that I personally try to e-file in RO/IB whenever I can
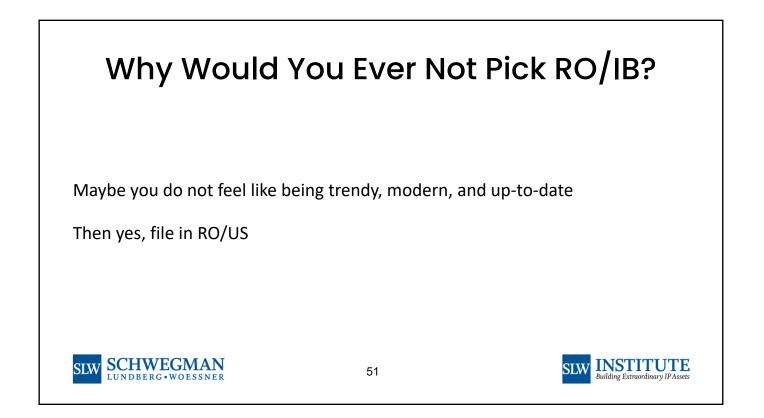
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49

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Why Would You Ever Not Pick RO/IB?

Maybe it is past midnight in Geneva

Then yes, file in RO/US

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50

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Why Would You Ever Not Pick RO/IB?

Maybe you do not feel like being trendy, modern, and up-to-date

Then yes, file in RO/US

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51

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Why Some US Practitioners End Up in RO/IB

Saying it nicely … they have a client outside the US, and they don't want to share any professional fees with counsel in the place where the client is located

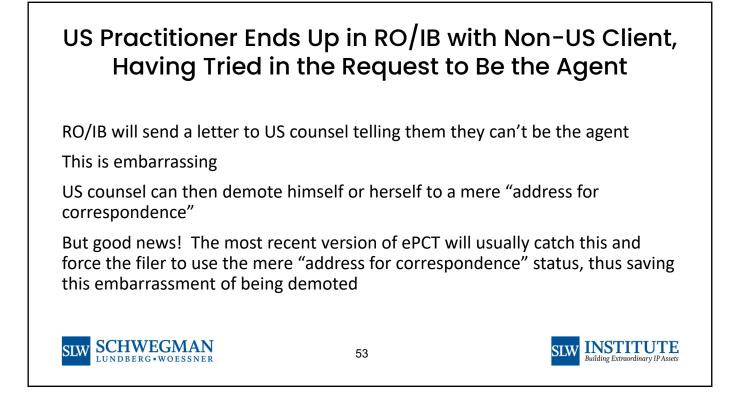They file in RO/US and it gets transferred to RO/IB

Or they plan ahead and avoid embarrassment and file directly in RO/IB

Either way they end up in RO/IB

See next slide

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US Practitioner Ends Up in RO/IB with Non-US Client, Having Tried in the Request to Be the Agent

RO/IB will send a letter to US counsel telling them they can't be the agent

This is embarrassing

US counsel can then demote himself or herself to a mere "address for correspondence"

But good news! The most recent version of ePCT will usually catch this and force the filer to use the mere "address for correspondence" status, thus saving this embarrassment of being demoted

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53

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US Practitioner Ends Up in RO/IB with Non-US Client, Having Planned Ahead Better

US counsel prepares the Request from the outset so that US counsel never attempts to be anything more than a mere "address for correspondence"
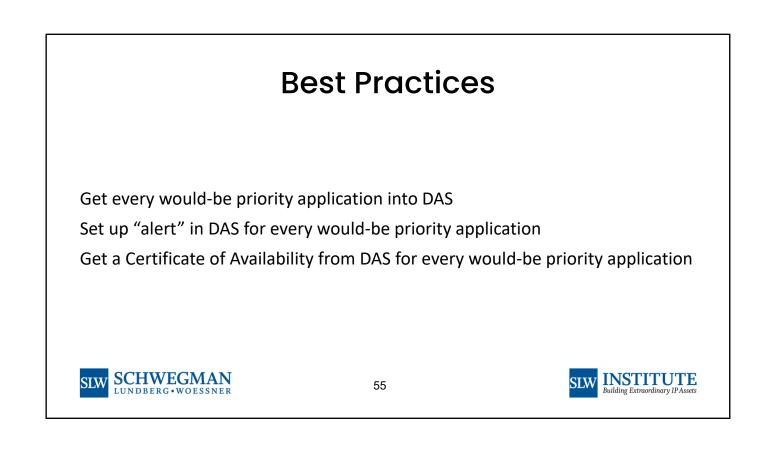
US counsel explains this to the non-US client
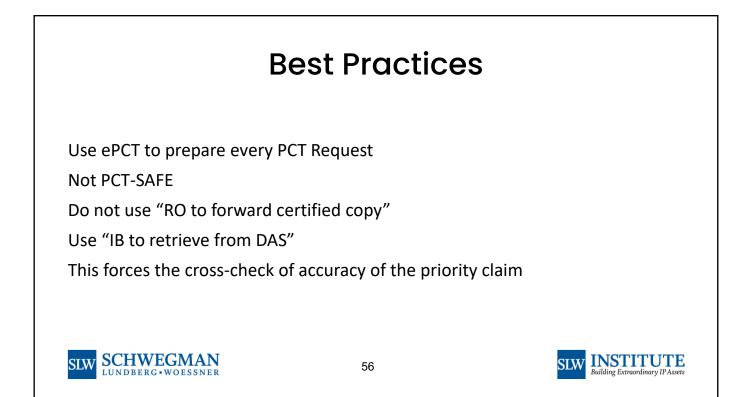
This avoids embarrassment in front of the client

Any later papers, for example at the ISA, will need to be ghost-written for signature by the client

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Best Practices

Get every would-be priority application into DAS

Set up "alert" in DAS for every would-be priority application

Get a Certificate of Availability from DAS for every would-be priority application

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Best Practices

Use ePCT to prepare every PCT Request

Not PCT-SAFE

Do not use "RO to forward certified copy"

Use "IB to retrieve from DAS"

This forces the cross-check of accuracy of the priority claim

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Best Practices

If you do choose RO/US, be sure you are uploading a ZIP file

Make sure the source of the ZIP file is ePCT, not PCT-SAFE

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Best Practices

Make use of the PCT system that is like Private PAIR to manage your PCT applications during the time after they have been filed

Get the benefit of many automatic notifications and warnings in your pending PCT applications

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Countries Where the Only
RO Available is RO/IB

- United Arab Emirates (AE)
- Antigua and Barbuda (AG)
- Angola (AO)
- Barbados (BB)
- Dominica (DM)
- Guatemala (GT)
- Kuwait (KW)
- Laos (LA)
- Saint Lucia (LC)
- Sri Lanka (LK)
- Madagascar (MG)
- Nigeria (NG)
- Saint Vincent and the Grenadines (VC)

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Okay I Give Up. What Exactly Is
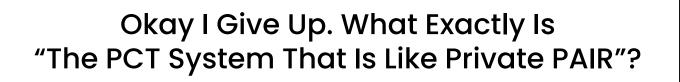# "The PCT System That Is Like Private PAIR"?
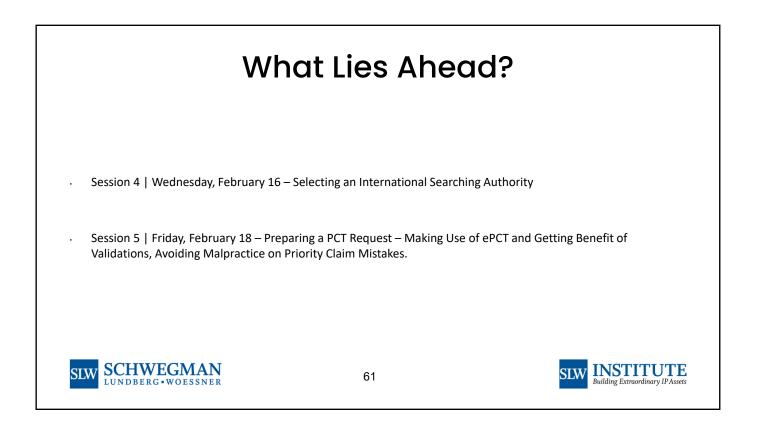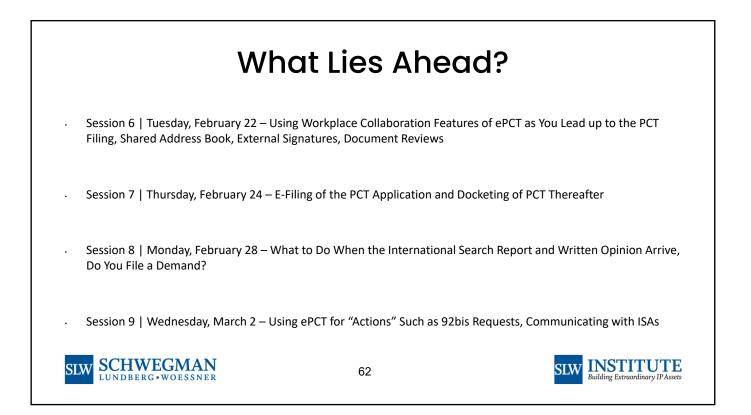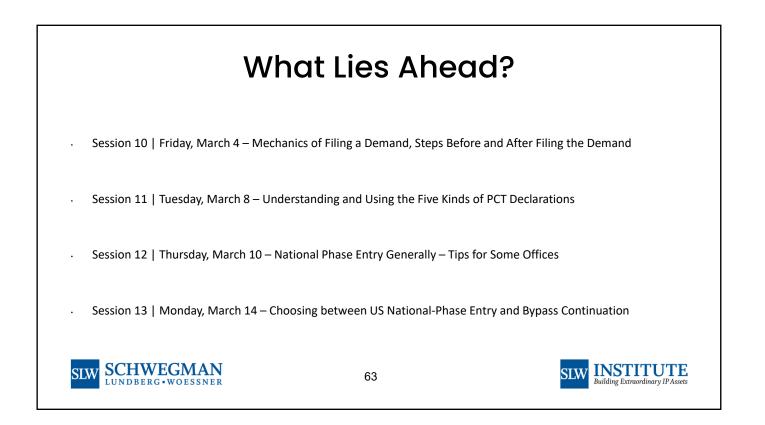
I thought you'd never ask. It is … wait for it … ePCT!

Specifically it is the part of ePCT called "your Workbench"

Did I mention it is important to learn to use all functions in ePCT?

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What Lies Ahead?

- Session 4 | Wednesday, February 16 – Selecting an International Searching Authority

- Session 5 | Friday, February 18 – Preparing a PCT Request – Making Use of ePCT and Getting Benefit of Validations, Avoiding Malpractice on Priority Claim Mistakes.

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What Lies Ahead?

- Session 6 | Tuesday, February 22 – Using Workplace Collaboration Features of ePCT as You Lead up to the PCT Filing, Shared Address Book, External Signatures, Document Reviews

- Session 7 | Thursday, February 24 – E-Filing of the PCT Application and Docketing of PCT Thereafter

- Session 8 | Monday, February 28 – What to Do When the International Search Report and Written Opinion Arrive, Do You File a Demand?

- Session 9 | Wednesday, March 2 – Using ePCT for "Actions" Such as 92bis Requests, Communicating with ISAs

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What Lies Ahead?

- Session 10 | Friday, March 4 – Mechanics of Filing a Demand, Steps Before and After Filing the Demand

- Session 11 | Tuesday, March 8 – Understanding and Using the Five Kinds of PCT Declarations

- Session 12 | Thursday, March 10 – National Phase Entry Generally – Tips for Some Offices

- Session 13 | Monday, March 14 – Choosing between US National-Phase Entry and Bypass Continuation

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What Lies Ahead?

- Session 14 | Wednesday, March 16 – Best Practices and Procedure for US National-Phase Entry

- Session 15 | Friday, March 18 – Making Use of PCT-PPH, and Comparison with Track I and AE

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64

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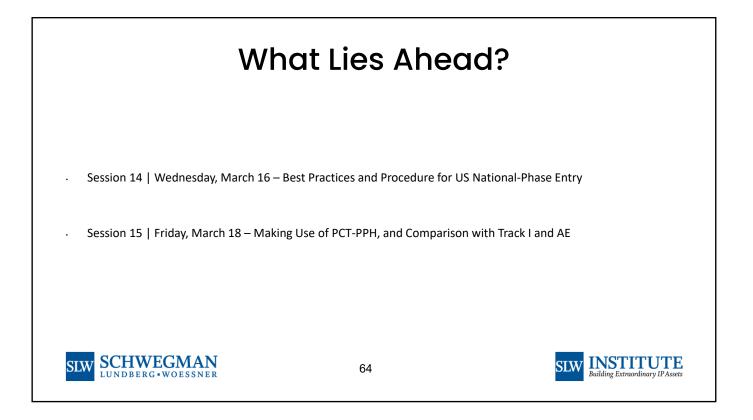*Building Extraordinary IP Assets*

Now maybe a few questions?

Thank you!

See you at the next session!