

**Judicial Conference for the
United States Court of Appeals for the Federal Circuit
Chief Judge Paul R. Michel
State of the Court
May 20, 2010**

I. COURT MEMBERSHIP

For the past two decades the court's membership has remained fairly stable, with new judges added gradually. But we now face a potentially large and sudden change in membership. The generational turnover began when Judge Schall took senior status in October. I will retire from the bench at the end of this month. To succeed us, the President has nominated Judge Kathleen O'Malley of the Northern District of Ohio, and Edward DuMont, a partner at the Wilmer Hale law firm. Judge O'Malley would be the Federal Circuit's first former district court judge and, if confirmed, will bring a wealth of experience in presiding over jury trials in patent infringement cases. Mr. DuMont, a member of his firm's Appellate and Supreme Court Litigation Group, previously served as an Assistant to the Solicitor General, and recently argued the Princo case before the en banc court.

More vacancies may soon occur. As of June 1, four out of ten active judges will be eligible to take senior status or to retire outright, and another will qualify within two years. That means that the President could appoint as many as nine new Federal Circuit judges during his current term. What such a large change in membership would mean to the court's jurisprudence, only time will tell. I encourage all of you to advise those who influence the selection process. I note that our court lacks anyone from West of the Allegheny Mountains, any Asian-American or African-American and anyone appointed who has specialized in

contract, international trade, veterans or personnel law. Unlike Judge Schall, I will retire rather than take senior status. More about that later. But either decision creates a vacancy for the President to fill. Likely other judges will prefer to take senior status. So we can expect our present group of five senior judges to expand.

II. MORE SENIOR JUDGES

The prospect of more senior judges is a welcome one. Our five current seniors help us greatly to keep current with our increasingly complex caseload. They are essentially part-time volunteers who work for free and provide decades of judicial expertise. And because under the Constitution their salaries may not be reduced during their lifetimes, they do so at little extra cost to taxpayers, just the cost of office space and a small staff. More seniors means more help. When new appointees arrive, the total number of judges increases. In some courts of appeals, judges take senior status upon becoming eligible and even though some continue to carry a full caseload because this enlarges the number of judges and hence the judge time available per case. Our tradition has been different but may need revisiting if our workload continues to expand.

III. OFF-SITE SPACE FOR JUDGES

The prospect of a greater number of senior judges raises a practical problem: where to put them. At present, five senior judges occupy chambers in the National Courts Building complex, but no more chambers are available.

To solve this problem, we worked closely for several years with the General Services Administration to find and lease space suitable for up to five chambers.

Finally, in January, GSA signed a lease for space at City Center, 1401 H Street NW, which is at the corner of 14th Street and H Street. At my urging, Congress has appropriated funding for our rental and build out costs. We are now implementing a design and construction schedule that will complete at least two chambers by year's end. Whether we house senior judges or active judges in that space remains to be decided. But the building is beautiful and, at less than two blocks away, convenient. The new chambers will be large, attractive and desirable.

IV. FOURTH LAW CLERKS

Our productivity is further enhanced by the recent addition of a fourth law clerk for each active judge who desires one. This finally brings us to a level of staffing equal to that of the other 12 circuit courts of appeals, all of whose active judges have been afforded a fourth law clerk for over a decade. I repeatedly urged Congress to authorize and fund these positions and they finally agreed; already we see the benefits. Our backlog is smaller, and dispositions are faster.

V. MEDIATION

We are also assisted in carrying our workload by our mandatory mediation program. It settled 48 cases in 2009, 31 of which were patent appeals. That is the most ever in the program's history. It is roughly the equivalent of having one and a half more full-time judges than we actually do. That is a great help.

VI. SPEEDIER ADJUDICATION

By every measure our decisions continue to be issued more rapidly. As a result, our inventory of pending appeals has dropped from over 1,400 just a few

years ago to only 819 as of April 30. Indeed, as of October 1, 2009 it was 897, so the reductions continue.

One benefit is that we hear cases more quickly. In Fiscal year 2006, for example, only 49% of ready cases could be scheduled for argument without delay. By last year, the number was 84%. This year it will likely rise even further.

Another metric we watch is the percentage of appeals decided within 90 days of argument. This number has ranged recently from 75 to 83%. Likely it will reach 85% this year.

At the end of this document are several graphs illustrating these trends.

VII. OUTREACH

Our court is of course part of a structure of many courts, so connecting with them and with the bar and law schools everywhere is important. One way we do so is sitting outside of Washington.

A. OUT-OF-TOWN SITTINGS

We do this every year, at least once.

Last November, we held arguments in Houston at the University of Houston Law Center and the district courthouse. Our judges also took part in a CLE symposium co-sponsored by the Houston Intellectual Property Law Association and the Federal Circuit Bar Association.

This November, the court will travel to Atlanta to hear arguments at the law schools of Georgia State, John Marshall and Emory University, as well as the district courthouse.

B. VISITING JUDGES

We also invite judges of other courts to sit with us and send our own judges to sit with other courts. Since 2006, nearly forty-two district judges, four circuit judges, and two international trade judges have sat with us. Our active and senior judges have made dozens of visits to the First, Second, Third, Sixth, Eighth, Ninth and Tenth Circuits and have sat in several district courts in both New York and Texas. Inviting judges of other courts also increases the amount of judicial power we can bring to bear on our cases. And, all judges gain perspective and insight from these exchanges concerning how other courts work and how we can better assist one another.

VIII. INFORMATION TECHNOLOGY

The court has upgraded its desk top computers, laptops, Blackberry devices, fax machines, copiers, scanners and cell phones. These upgrades have enabled both chambers personnel and central staff to perform their work with greater efficiency and effectiveness. We are now up to date on new e-technology, as we should be as the nation's technology court.

We recently replaced the court's obsolete phone system and telecommunications infrastructure with a new state-of-the-art Cisco voice over IP telephone system and fiber optic network backbone. The new telephone system was installed entirely by the court's in-house IT staff. Originally consisting only two people, it now numbers twelve. Having such an in-house capability saved money and increased speed of implementation. We also entirely rebuilt our server room, replacing the power infrastructure, adding more servers, improving

physical security, plus installing cooling and power supply back-up equipment. Greater information security has also been put in place as part of a program that continues.

IX. WEBSITE REDESIGN/ OPINION FORMAT UPGRADE

We also worked at increasing service to our bar. I have reported to you in the past about the numerous additions to our court website, such as court calendars, more statistics, local rules and practice tips. The next change will be an overall redesign that will make it faster and easier for users to find desired information. The website will soon be word-searchable and otherwise more state-of-the art. It will also have a new look. And you may have noticed that this week we introduced a new format for our slip opinions, similar to that of Supreme court opinions. We think you will find it both aesthetically pleasing and easier to read.

X. COURTROOM RENOVATION

Increasing efficiency takes many forms. Renovating courtrooms is one of them. Having completed renovation of two of the Federal Circuit's three courtrooms, the court now embarks on renovating its third courtroom. All these renovations include adding infrastructure for enhanced electronic, audio/visual, and recording capabilities, and incorporating aesthetic styles and treatments that reflect the historical archetypes of American and English courtrooms, evoking the timeless majesty of the law. We have nearly trebled the seating capacity of our ceremonial courtroom, resolved a major impediment to disabled parties, counsel and visitors in our second courtroom, and added wireless infrastructure to both.

We have even added videoconferencing capability in both courtrooms affording the option in the future to hear arguments presented from remote sites. The third courtroom will receive the same upgrades.

XI. LIBRARY RENOVATION

Renovations to the Circuit Library began in April of this year. The work includes the installation of glass entrance doors and a new reference desk, as well as new carpeting, seating and study carrels and shelving. Office space in the stack room is under construction into which staff members who now work outside the library will move, thus increasing efficiency and freeing up office space in the courthouse for other uses. With the stronger reliance each year on ever-expanding electronic resources, many little-used paper materials have been removed from the library. Significant investments have been made in the purchase of further online resources such as LexisNexis Congressional Materials including hearings and reports since 1789, BNA publications such as PTC Journal and International Trade Reporter, and Access Science.

XII. EN BANC CASES

In the last year, we decided five cases as a full court.

In August 2009, we decided in Cardiac Pacemakers v. St. Jude Medical that the Patent Act section covering overseas infringement does not apply to method claims.

In December, in Henderson v. Shinseki, we held that recent Supreme Court precedent required that the period for appealing a Board of Veterans' Appeals decision may not be equitably tolled.

In Nebraska Power v. United States, decided in January, we addressed the respective jurisdictions of the D.C. Circuit and the Court of Federal Claims in contract disputes between the Energy Department and nuclear power companies over storage costs for spent nuclear fuel.

In March of this year, we held in Braza v. OPM that a surviving spousal annuity is validly waived by the spouse's signing a waiver form even though she never read it, unless fraud, duress or mental incompetence is shown.

Also in March, in Ariad v. Eli Lilly, we reaffirmed that the written description requirement in the Patent Act is separate from the enablement requirement.

Five en banc cases remain pending:

Last October we agreed to rehear en banc Princo v. ITC, involving a patent misuse defense based on a patent pool licensing agreement. Argument was held in March.

In February, we granted rehearing en banc in Hyatt v. Kappos, asking the parties to brief any limitations on admissibility of evidence in § 145 patenting actions in district court. Argument is scheduled for July 8.

In March, we agreed to rehear Slattery v. United States, a Winstar case, asking whether the FDIC is a non-appropriated funds instrumentality and how the answer to that affects the jurisdiction of the Court of Federal Claims.

In April we granted rehearing en banc in Therasense v. Becton, Dickinson, in which we will reconsider the standards for determining inequitable conduct.

This month, we granted rehearing in TiVo v. Echostar, concerning when contempt proceedings are appropriate as opposed to a new infringement trial on a product that has been altered after the original was found to infringe.

So, we are doing more en bancs and, in my view, it is a good thing.

XIII. THE SUPREME COURT

Last but not least, the Supreme Court continues to take an active interest in our cases, granting certiorari in a Native American case involving the jurisdiction of the Court of Federal Claims. And of course all eyes are on the impending decision in In Re Bilski, concerning the test for patent eligibility.

CONCLUSION

In closing, I want to report on my overall assessment of the state of the court as I hand over the duties of Chief Judge to Judge Rader. It is very good.

Each Chief Judge has strengthened our court. Consequently, each succeeding chief inherited a stronger institution and worked to make it even better. I appreciated all the fine work accomplished by Judge Mayer as chief, particularly the complete renovation of our ceremonial courtroom. I sought to continue the tradition by instituting the next set of upgrades, many of which I described earlier. Judge Rader, as Chief Judge will identify the next steps needed to further improve our court and its service to the litigants, the bar and the country. I know you will all assist him as you have me, and as you did my four predecessors. This collaboration is critical and I salute you for it.

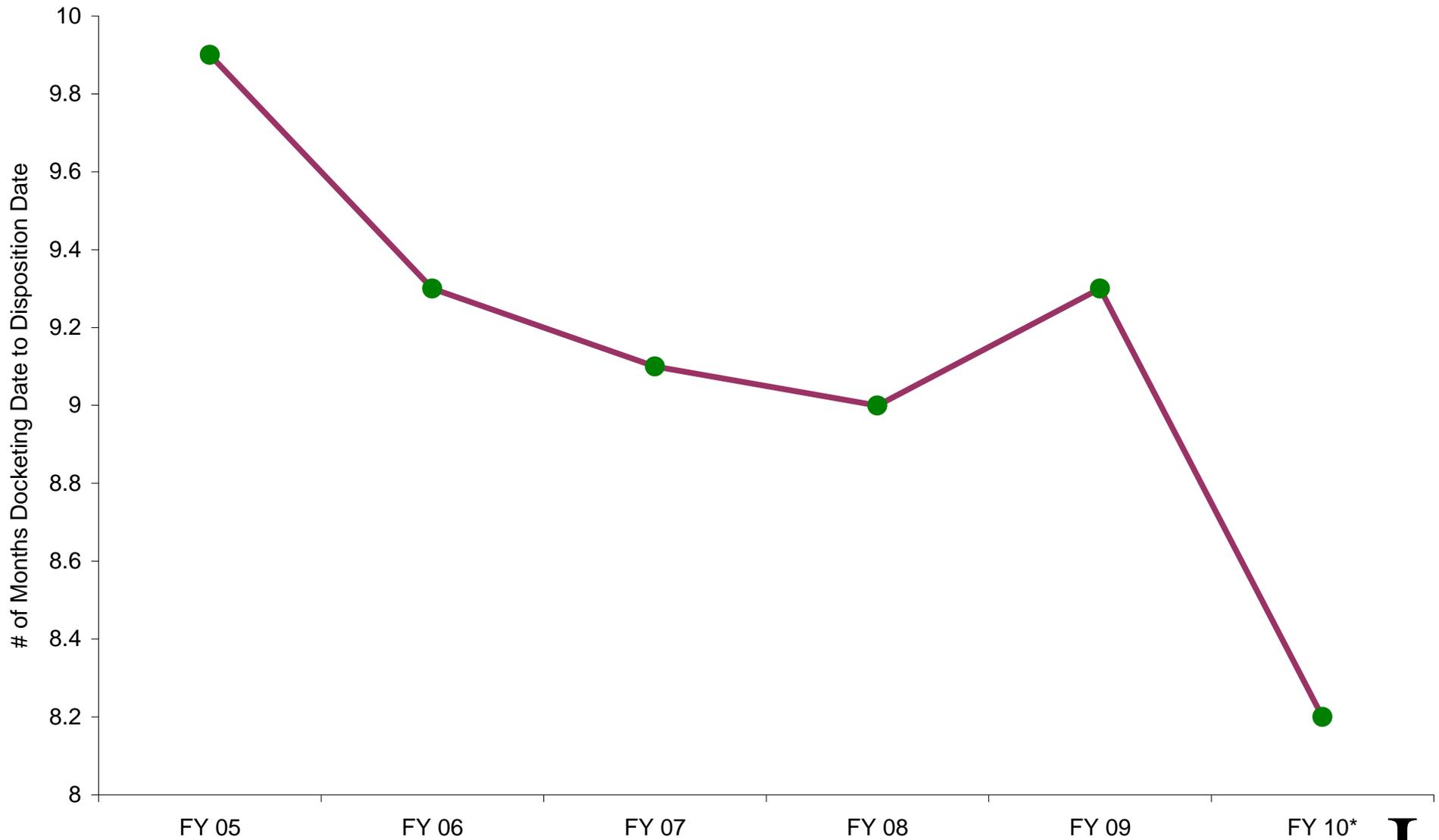
Despite loving every day as a member of this court for over twenty-two years, I will leave the bench in order to be free to campaign for stronger

Congressional support for all the Federal courts and other institutions such as the Patent and Trademark Office that are vital to the economy, the rule of law, and to the future of our country. If I have any spare time, I plan to mediate major disputes, and, if possible, I will also teach and write a book. So I am not in fact retiring, but merely changing my mission. In any event, I will continue to enjoy and benefit from working cooperatively with you.

Thank you for your kind attention and unstinting support over the last five and a half years.

United States Court of Appeals for the Federal Circuit

Median Disposition Time for Cases Decided by Merits Panels

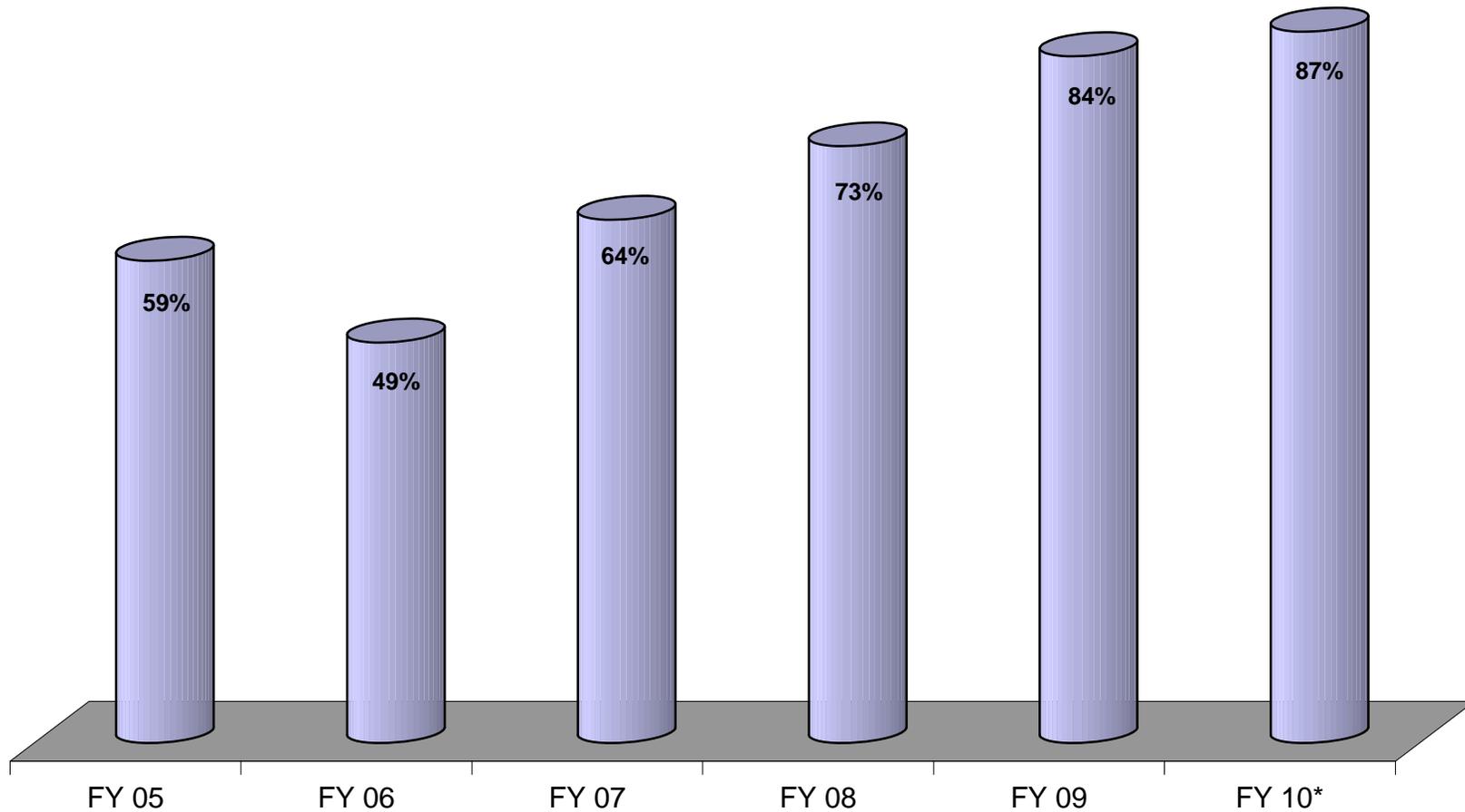


* For the period 10/1/09 through 3/31/10.

United States Court of Appeals for the Federal Circuit

Calendaring of Appeals

Proportion of Appeals Scheduled for Argument without Delay

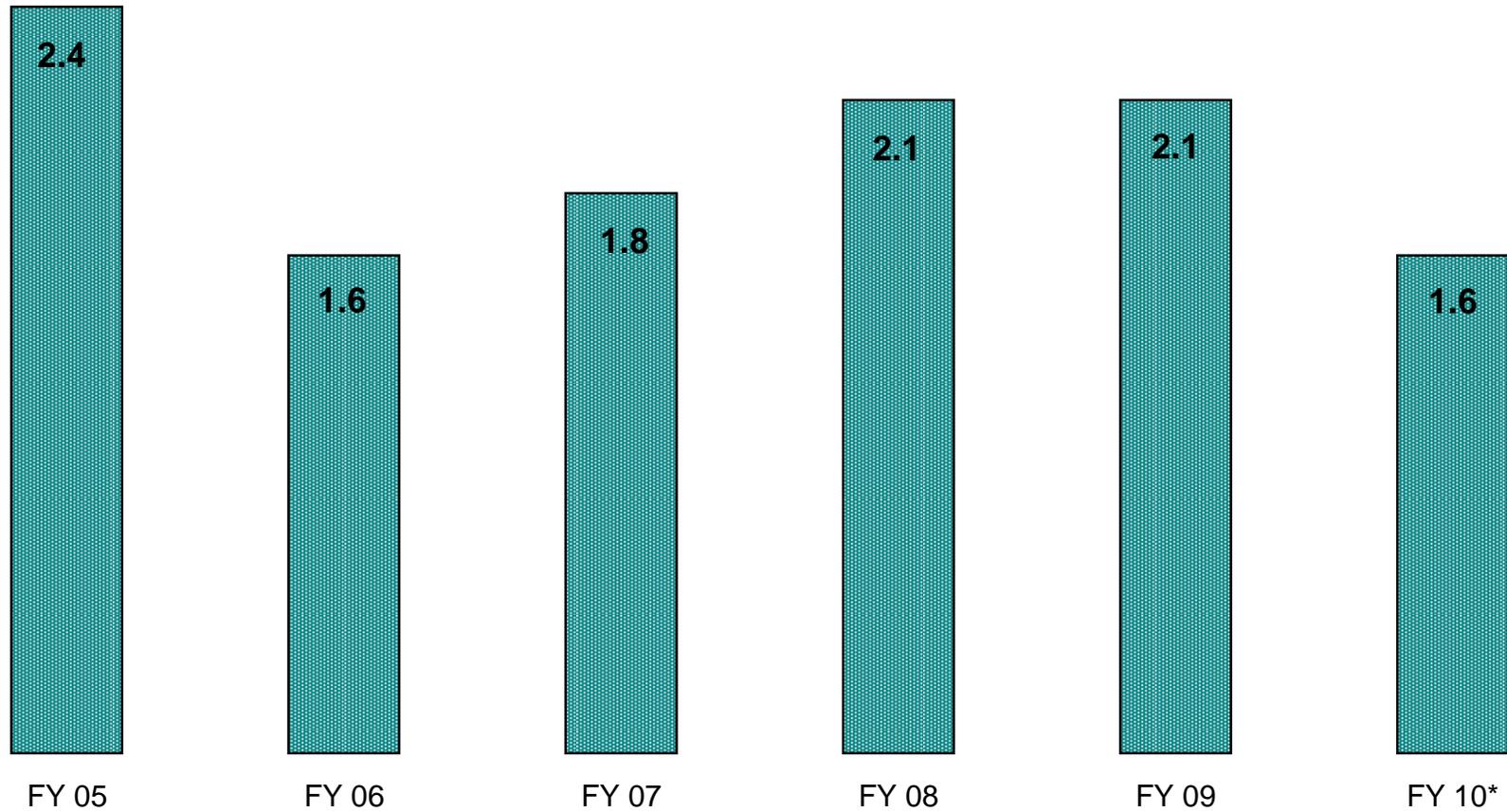


Note: Excludes cross- and consolidated appeals.

* For the period 10/1/09 through 5/31/10.

United States Court of Appeals for the Federal Circuit

Median Time Between Calendar Date and Disposition for Appeals from the United States District Courts (in months)

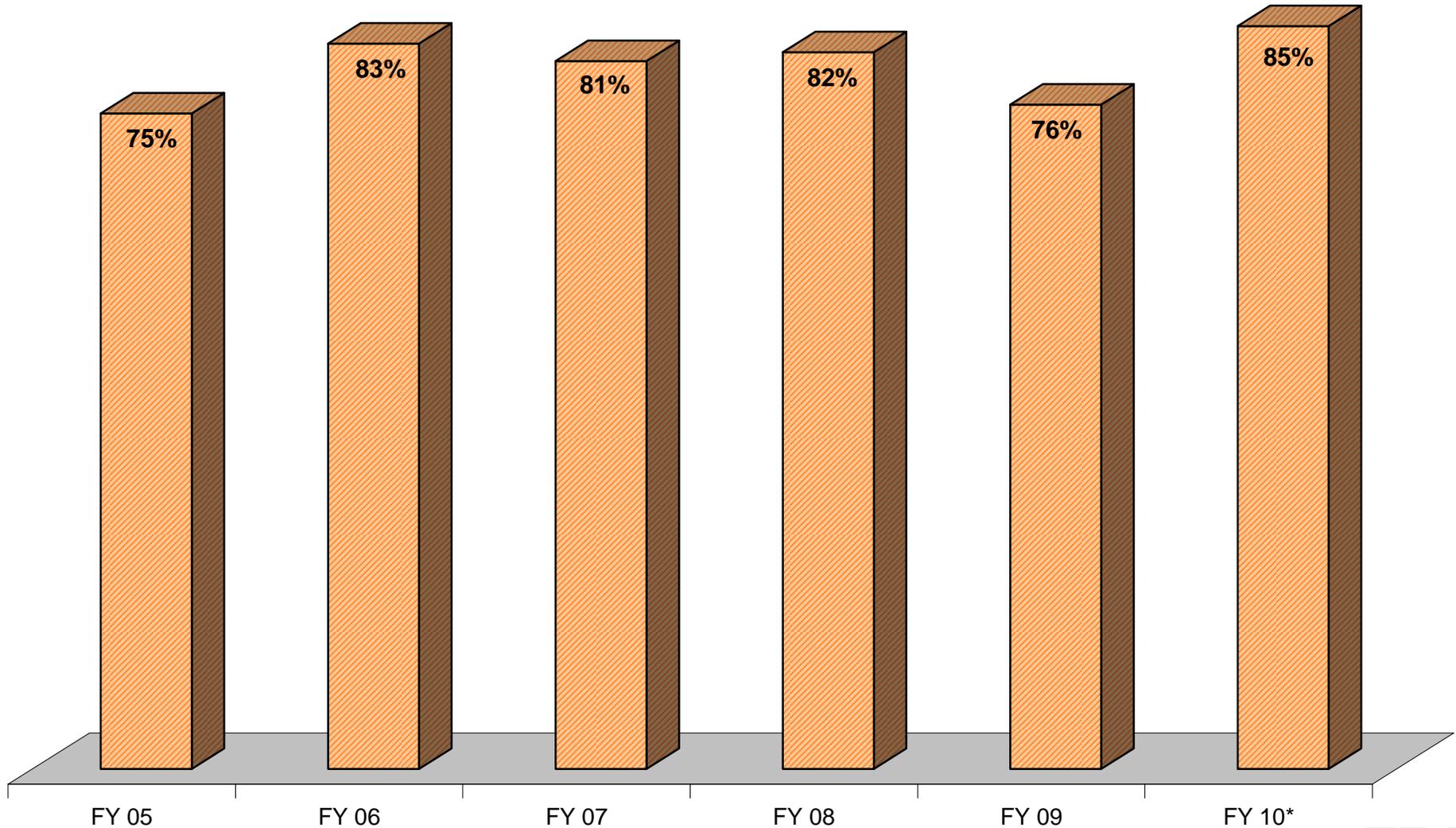


* For the period 10/1/09 through 3/31/10.



United States Court of Appeals for the Federal Circuit

Percentage of Appeals Terminated by Merits Panels in 90 Days or Less After Argument



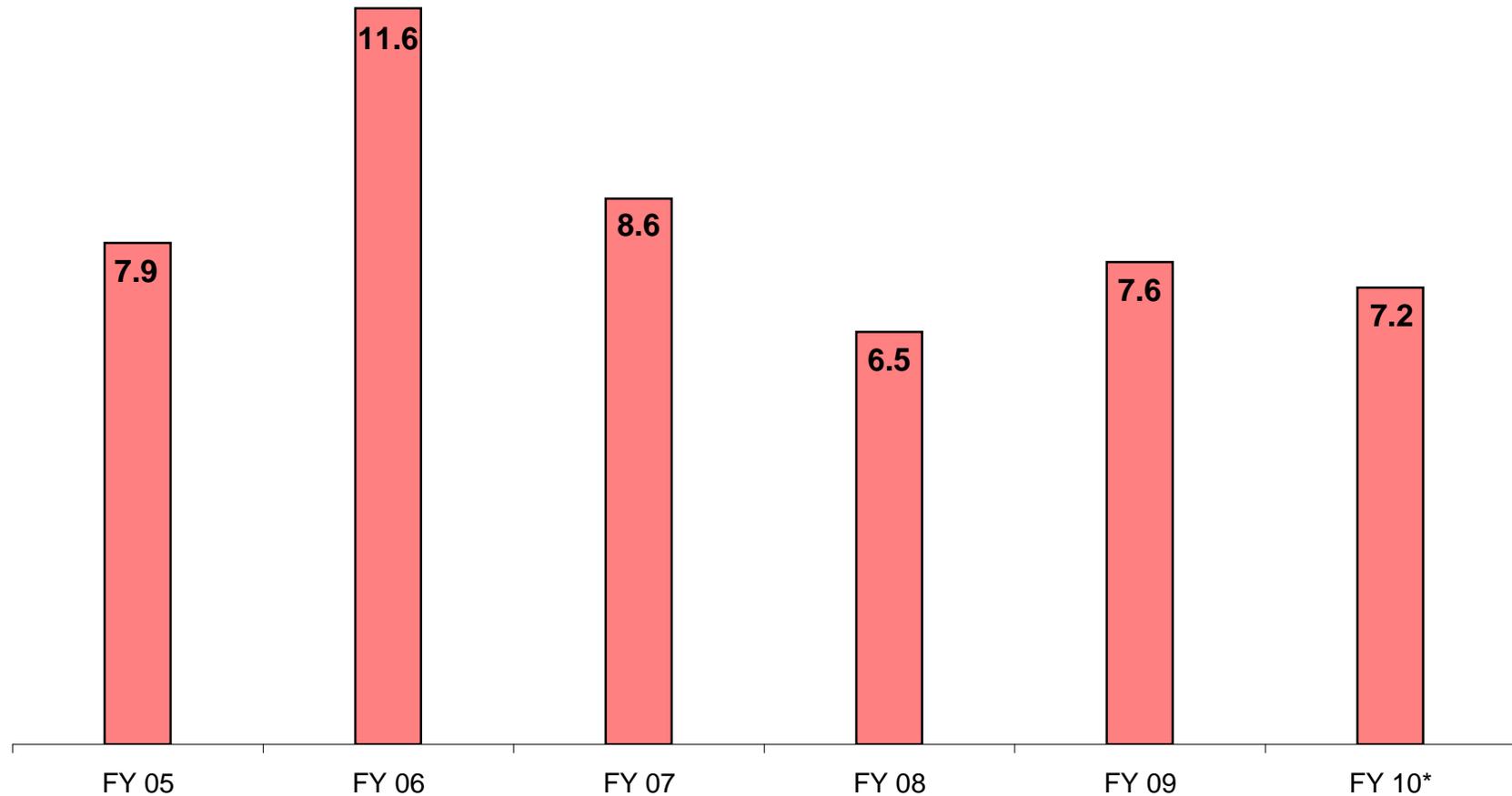
Note: Excludes cross and consolidated appeals.

* For the period 10/1/09 through 3/31/10.

United States Court of Appeals for the Federal Circuit

Inventory Control Index on the Last Day of the Fiscal Year

(Number of months required to terminate current pending appeals
if no new appeals were filed)

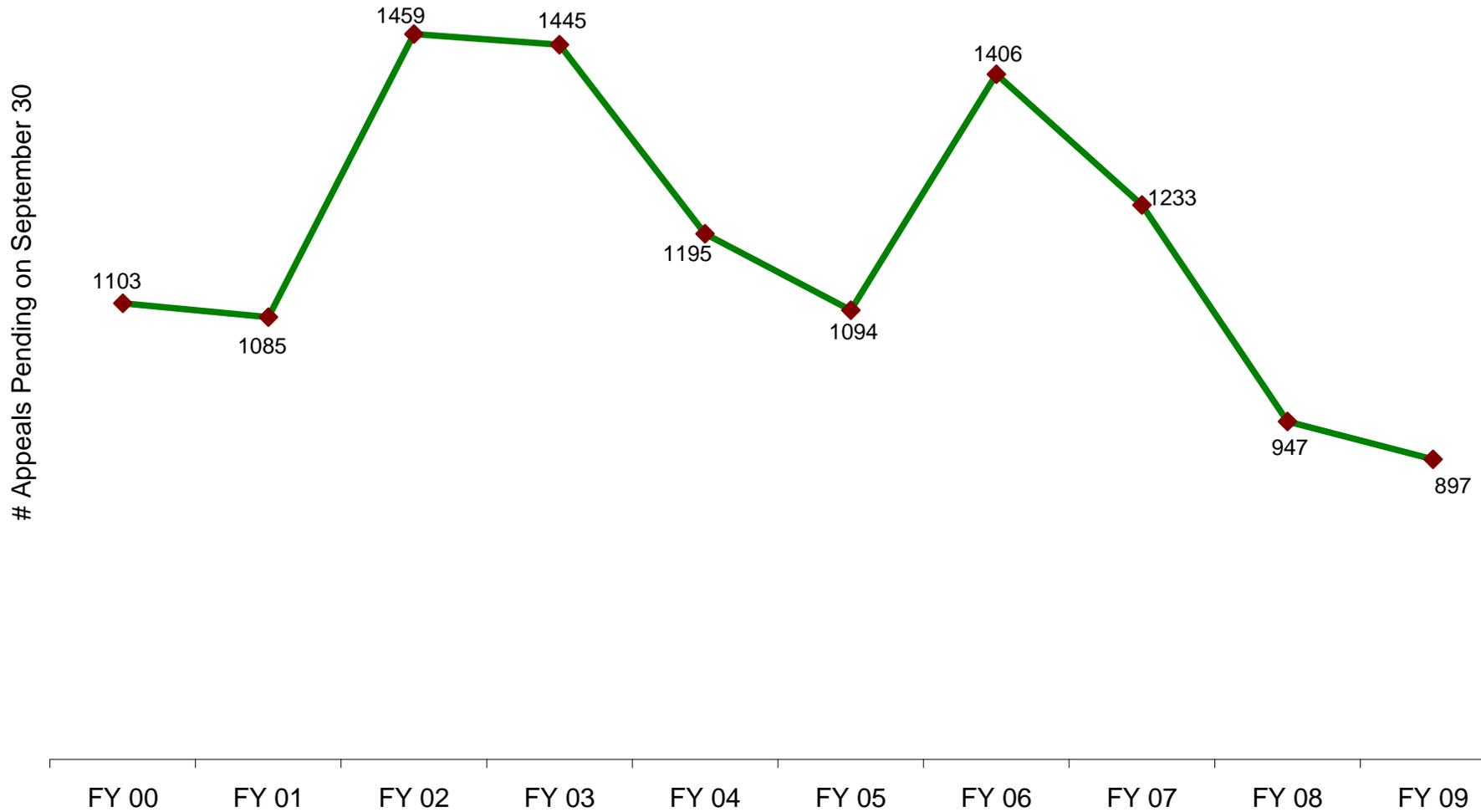


* As of 3/31/10.



United States Court of Appeals for the Federal Circuit

Total Appeals Pending on the Last Day of the Fiscal Year



Note: Includes reinstated, cross-, and consolidated appeals.