

CLIENT ALERT

Federal Circuit Advisory Council Provides Unofficial Guidance to Further Streamline Patent Litigation

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In late July, the Federal Circuit Advisory Council unanimously approved a Model Order to seek to address the cost and complexity of patent cases due to what it termed the "problematically excessive" numbers of claims, claim terms, and prior art references that have become common in patent cases throughout the country. Just two days after appearing on the Advisory Council's website, however, the Model Order was removed, and the website now maintains a statement explaining that because the Federal Circuit has not sponsored or endorsed the Model Order, it should be understood that the Advisory Council does not sponsor or endorse it either.

Even without official endorsement from the Federal Circuit or its Advisory Council, the Model Order may still provide a useful framework for patent litigators in planning and managing cases. Just as the Federal Circuit Advisory Council's E-Discovery Model Order (which was withdrawn from the Advisory Council's website at the same time) has been adopted or modified by some federal courts, this new Model Order may prove to be useful to the federal courts as well.

The "[Model Order Limiting Excess Patent Claims and Prior Art](#)" is designed to give trial courts seeking to better manage patent cases a framework to adopt or modify so as to restrict the numerous claims and prior art references that parties assert. The Model Order encourages pragmatic decision making at the early stages of patent litigation to avoid unnecessary case management tasks that give rise to disputes that are often unrelated to the ultimate merits.

Under the Model Order, patent holders may initially assert a limited number of claims, and accused infringers a limited number of prior art references, followed by a narrowing down of claims and prior art references as the litigation progresses. While some district courts already have issued orders to deal with these issues on *ad hoc* bases, with the Model Order the Advisory Council seeks to encourage a uniform framework throughout the nation. The Model Order is designed to streamline patent litigation by encouraging parties to identify core areas of dispute early on, and make strategic decisions about the claims and prior art references they assert. The following are key components of the phased implementation of the Model Order, balancing the need for discovery against the desire to streamline patent litigation:

- After the accused infringer produces core technical documents, the patent holder may assert no more than 10 claims from each asserted patent and no more than a total of 32 claims. The accused infringer may thereafter assert no more than 12 prior art references against each patent and no more than a total of 40 references.
- Following the court's ruling on claim construction, the patent holder must narrow its list of asserted claims to a maximum of 5 from each patent, and to no more than a total of 16 claims. The accused infringer must thereafter narrow its prior art references to 6 per patent, and no more than a total of 20 references.
- If the patent holder asserts only one patent, the total patent limits are increased by 50 percent.

The Model Order represents another step to try to achieve effective case management in patent litigation that is otherwise often time consuming for the courts and expensive for the parties. Although the Model Order is neither binding nor officially adopted by the Federal Circuit or its Advisory Council, it nevertheless exists to provide a framework for modification and customization to suit the needs of parties and the district courts, and may at a minimum assist parties and courts seeking guidance on how best to control the costs and complexities of patent litigation.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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