



THINK FORWARD

Model Order Limiting Excess Claims and Prior Art

July 22, 2013

Today, the Federal Circuit Advisory Council issued a Model Order that it hopes will assist trial courts in crafting orders that reduce litigation costs and streamline patent cases. The Model Order may be found [here](#). Recognizing that litigants often wait until the eve of trial to reduce the number of asserted patent claims and prior art references, the Model Order offers deadlines intended to enforce a more efficient case structure.

While mindful that discovery and the litigation must progress before parties may effectively evaluate their positions, the Model Order sets deadlines for an exchange of identification of asserted claims and prior art references. One exchange is to occur after the production of “core” technical documents, and the other after the court issues a claim construction order. The first exchange requires the plaintiff to identify preliminarily no more than 10 claims per asserted patent, but no more than 32 asserted claims. In response, the defendant must identify preliminarily no more than 12 prior art references for each asserted patent, with a limit of 40 overall references. The second exchange requires the plaintiff finally to elect no more than 5 claims per asserted patent, but no more than 16 asserted claims. In response, the defendant must finally elect no more than 6 prior art references for each asserted patent, with a limit of 20 overall references.

Recognizing that its parameters may not fit all circumstances, the Model Order provides a mechanism for a party to seek modification. This might include a request to modify the default limits based on the complexity of the relevant technology or commonality among the asserted patents. However, the Model Order requires a showing of “due diligence” by the party seeking modification and recognition of “due consideration for prejudice,” in an effort to serve the goal of effective case management.

If you have any questions about the Model Order and how it may impact your business, please feel free to contact one of our [litigation attorneys](#).

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