

REPORT

FEDERAL CIRCUIT HOLDS IN PHILLIPS V. AWH THAT INTRINSIC EVIDENCE IS MORE RELIABLE THAN DICTIONARIES AND OTHER EXTRINSIC EVIDENCE FOR CONSTRUING CLAIMS

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Introduction

On July 12, 2005, the Federal Circuit issued its long-awaited *en banc* decision in *Phillips v. AWH Corp.*, regarding the proper way to construe patent claims and the roles that various sources of claim meaning should play in claim construction.

In brief summary, the Court rejected the formulaic, dictionary-centric approach to claim construction announced in *Texas Digital Systems, Inc. v. Telegenix, Inc.*, 308 F.3d 1193 (Fed. Cir. 2002). The Court reaffirmed the historic approach centered on what one of ordinary skill in the relevant art at the time of the application filing date would have understood the claim terms to mean in the context provided by the intrinsic patent record--the claims, the specification and the prosecution history. The Court confirmed both the "bedrock" principle that the claims, not the specification, define the scope of protection, and the necessity of always consulting the specification to determine the meaning of a claim. The Court viewed the prosecution history as often being less useful than the specification because of the ambiguities introduced by the nature of patent prosecution as a negotiation.

The *Phillips* Court cautioned that extrinsic evidence, including even dictionaries, is a less reliable guide to claim meaning than the intrinsic record. However, the Court confirmed that consideration of such extrinsic evidence is permissible to assist in ascertaining the meaning of a claim term in the relevant art and within the context of the intrinsic record.

Aside from rejecting the *Texas Digital* approach to claim construction, the *Phillips* Court emphasized that there is no prescribed formula for what sources of claim meaning

can or cannot be considered or in what sequence, as long as those sources are not used to contradict claim meaning that is unambiguous in light of the intrinsic evidence. The *Phillips* Court specifically endorsed the approach to claim construction outlined in *Markman v. Westview Instruments, Inc.*, 52 F.3d 967 (Fed. Cir. 1995) (*en banc*), *aff'd*, 517 US 370 (1996), *Vitronics Corp. v. Conceptronic, Inc.*, 90 F.3d 1576 (Fed. Cir. 1996) and *Innova/Pure Water, Inc. v. Safari Water Filtration Systems, Inc.*, 381 F.3d 1111 (Fed. Cir. 2004). However, the Court's restatement of the basic principles of claim construction outlined in those cases is so general and abstract that it is questionable whether it will result in more consistent claim construction analyses by either the district courts or subsequent panels of the Federal Circuit. In particular, the case does little to clarify the circumstances under which the specification implicitly defines a claim term as opposed to merely providing examples of a claimed element.

The majority opinion was written by Judge Bryson and was joined by eight of the other Federal Circuit judges. Judge Lourie wrote a partial dissenting opinion (joined by Judge Newman), agreeing with the majority's claim construction methodology but disagreeing with the majority's claim construction regarding *Phillips'* patent.

Judge Mayer wrote a dissenting opinion (also joined by Judge Newman), disagreeing with the majority's decision to forego consideration of whether it is appropriate for the Federal Circuit to accord deference to any aspect of a trial court's claim construction rulings. Judge Mayer argued that the Federal Circuit should give deference to a trial court's claim construction because many claim construction issues involve subsidiary factual determinations that a trial court is better suited than the Federal Circuit to resolve.

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Background to the Phillips Decision

A "bedrock" principle of patent law, which the *Phillips* Court acknowledged, is that the claims of a patent define the invention that is protected. Prior to *Phillips*, Federal Circuit decisions were in agreement that the claim construction inquiry begins in all cases with the actual words of the claims. *E.g.*, *Markman*, 52 F.3d at 980, and *Texas Digital*, 308 F.3d at 1201. The universally recognized corollary to this rule, which the *Phillips* Court also acknowledged, is that "extraneous" limitations are not to be read into the claims from the disclosed embodiments. Regardless of what claim construction methodology they have endorsed, Federal Circuit decisions also have been consistent in recognizing that claims are to be construed from the vantage point of one of ordinary skill in the art, and that claim terms presumptively have their ordinary and customary meaning in the relevant art.

The tension in the law that ultimately precipitated the Federal Circuit's *en banc* review in *Phillips* is the role that should be played by the specification in interpreting the claims. The *en banc* Court in *Markman* and the panel in *Vitronics* endorsed the traditional views that the specification must always be consulted in construing the claims and, when the meaning of a claim term is unambiguous from the intrinsic record, it is improper to rely on "extrinsic" evidence. However, some Federal Circuit cases retreated from the approach to claim construction endorsed in *Markman* and *Vitronics*, which first looks to construe the claim terms in the context of the intrinsic record. Those cases emphasized the primacy of the claims and circumscribed the role of the specification and prosecution history in defining the scope of protection. *See, e.g.*, *CCS Fitness, Inc. v. Brunswick Corp.*, 288 F.3d 1359 (Fed. Cir. 2002).

Starting with *Texas Digital*, a line of Federal Circuit cases strongly embraced a strict methodology that, in its strictest form, i) applied a "heavy" presumption that the claim terms have their ordinary and customary meaning as used in the relevant art, ii) looked in the first instance to dictionary-type evidence regarding the ordinary and customary meaning of the claim terms, before considering the specification and prosecution history, and iii) only recognized express limiting language in the specification and prosecution history that contradicts or is inconsistent with the ordinary meaning or constitutes a clear disavowal or disclaimer of subject matter. The stated rationale for this strict procedural approach to claim construction was that it guarded against limitations being improperly imported into

the claims, particularly when the specification only discloses a single embodiment.

Despite the many decisions following the *Texas Digital* strict procedural approach to claim construction, other Federal Circuit decisions prior to *Phillips* continued to adhere to the *Markman* and *Vitronics* philosophy that the intrinsic record is the best source of claim meaning and should be consulted first. *See, e.g.*, *C.R. Bard, Inc. v. U.S. Surgical Corp.*, 388 F.3d 858, 862 (Fed. Cir. 2004) (a dictionary definition does not trump the intrinsic record); *Kinik Co. v. U.S. Int'l Trade Comm'n*, 362 F.3d 1359, 1365 (Fed. Cir. 2004) (the best source for understanding a technical claim term is the specification from which it arose, informed, as needed, by the prosecution history).

Against the foregoing backdrop, the Federal Circuit decided to rehear the *Phillips* case *en banc* in order to consider the proper roles of intrinsic and extrinsic evidence, particularly dictionaries, in construing claim terms.

The Phillips Decision

1. Facts

Phillips' patent is directed to building modules for construction of "fire, sound and impact resistant" security barriers and rooms, comprising, *inter alia*, an outer shell having two outer steel plate panel sections. The dispute centered around the construction of Phillips' claim 1 feature of:

"further means disposed inside the shell for increasing its load bearing capacity comprising internal steel baffles extending inwardly from the steel shell walls."

Other claims at issue also recited baffles, although not in the context of a "means" clause. The District Court construed "baffles" as a means-plus-function limitation and limited it to the disclosed baffles, all of which were considered by the Court to be angled baffles extending at an acute or obtuse angle. Phillips' patent discloses that the angled baffles are capable of deflecting projectiles such as bullets and shrapnel from an explosion.

2. The Earlier Federal Circuit Panel Decision

The appeal was initially heard by Judges Newman, Lourie and Dyk. Judge Lourie wrote the majority panel opinion. Judge Newman joined in Judge Lourie's opinion, and Judge Dyk dissented.

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In his panel opinion, Judge Lourie held that the District Court erred in construing "baffles" as a means-plus-function limitation because the word "baffle" is a sufficient recitation of structure. Citing a dictionary, the panel indicated that the ordinary meaning of "baffle" is "something for deflecting, checking, or otherwise regulating flow." The panel then considered the ordinary meaning of "baffles" in view of the intrinsic evidence, and held that Phillips' claimed "baffles" are limited to angled baffles because the specification describes the invention as providing impact resistance, especially against projectiles such as bullets and bombs, which is only obtained by angled baffles, and distinguishes over the prior art on this basis.

In his dissent, Judge Dyk agreed that "baffles" is not a means-plus-function limitation, but argued that the panel decision improperly imported the "angled" limitation into the claims at issue. Judge Dyk argued that the claims at issue should not be limited to angled baffles, arguing that (1) it is improper to limit a claim to the disclosed embodiment, (2) the specification does not state that baffles oriented at an angle other than 90° are essential or are the structure for "all embodiments," and does not disclaim the use of non-angled baffles, (3) "impact resistance" is one of many objects described in Phillips' patent, which also identifies "high load bearing strength" and "thinner gage steel plates" as objects, and (4) it is improper to require each claim to achieve all stated objects.

The *Phillips* panel decision was vacated when the Federal Circuit decided to rehear the case *en banc*.

3. The Federal Circuit En Banc Decision

A. Intrinsic Evidence is the Most Reliable Source of Guidance for Claim Interpretation

The *en banc* decision agreed with the panel that "baffles" is not a means-plus-function limitation and then set forth the methodology for construing claim terms. The Court reaffirmed its prior decisions holding that a patent's intrinsic evidence is the most reliable source of guidance for construing claims (citing *Markman*, *Vitronics* and *Innova*). The Court indicated that some of its other pronouncements on the use of dictionaries require "clarification."

The Court initially reiterated that it is a "bedrock principle" of patent law that "the claims of a patent define the invention." The Court stated that the ordinary and customary meaning of a claim term is the meaning that the

term would have to a person of ordinary skill in the art in question at the time of the invention, that is, as of the effective filing date of the patent application.¹ The person of ordinary skill in the art is deemed to read the claim term not only in the context of the particular claim in which the disputed term appears, but in the context of the entire patent, including the specification.

The Court acknowledged that general purpose dictionaries may be helpful when construing commonly understood words, but that dictionaries may not be helpful for claim terms that have a particular meaning in a field of art. Thus, in order to construe claim terms, the Court stated that one should look to "those sources available to the public that show what a person of skill in the art would have understood disputed claim language to mean," which include "the words of the claims themselves, the remainder of the specification, the prosecution history, and extrinsic evidence concerning relevant scientific principles, the meaning of technical terms and the state of the art."

The Court commented that the claims themselves provide substantial guidance as to the meaning of particular claim terms. The context in which a term is used in an asserted claim can be highly instructive (for example, the recitation of "steel baffles" strongly implies that "baffles" does not inherently mean objects made of steel). Other claims of the patent, both asserted and unasserted, also can be valuable sources of enlightenment as to the meaning of a claim term. The Court reiterated that differences among claims can be a useful guide in understanding a particular claim term, and reaffirmed the claim differentiation doctrine that the presence of a dependent claim that adds a particular limitation gives rise to a presumption that the limitation in question is not present in the independent claim.

Citing *Markman*, the Court also emphasized that the claims "must be read in view of the specification, of which

¹ *Texas Digital* had opted to look instead to "dictionaries, encyclopedias and treatises, publicly available *at the time the patent issued*" in construing claims (emphasis added). Although the *Texas Digital* court cited no precedent, the court reasoned that the date of issuance was the appropriate time frame for construing claims because the intrinsic record is then fixed and the public is on notice of the claims. 308 F.3d at 1202-1203. A number of subsequent Federal Circuit decisions followed *Texas Digital* in using the issue date as the time frame for determining claim meaning.

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they are a part," characterizing the specification as the "single best guide to the meaning of a disputed term." The specification is the primary basis for construing the claims and is more useful than extrinsic evidence in resolving any doubt or ambiguity regarding the meaning of a claim term. The specification also must be consulted to determine whether the inventor specially defined terms (was his own lexicographer) or disclaimed or disavowed claim scope. In those instances, the inventor's intention as explained in the specification is dispositive.

The Court noted that the prosecution history functions for purposes of claim construction similar to the specification. However, the prosecution history may be less useful than the claims and specification because of the lack of clarity that sometimes occurs during prosecution due to its nature as an ongoing negotiation between the Patent Office and the Applicant.

B. Extrinsic Evidence is Less Reliable than Intrinsic Evidence

The Court stated that it may be appropriate to consider extrinsic evidence, that is, evidence external to the patent and prosecution history, such as expert and inventor testimony, dictionaries, and learned treatises, although even dictionary-type extrinsic evidence is generally less reliable than the intrinsic record. According to the Court, extrinsic evidence tends to be less reliable than intrinsic evidence because (1) it usually was not created at the time of patent prosecution for the purpose of explaining the patent's scope and meaning, (2) it may not have been written by or for skilled artisans and therefore may not reflect the understanding of a skilled artisan in the field of the patent, (3) it often can suffer from bias (this is particularly true regarding inventor and expert testimony), and (4) undue reliance on extrinsic evidence risks that it will be used to change the meaning of claims in derogation of the indisputable public record consisting of the patent's intrinsic evidence.²

The Court recognized the validity of the *Texas Digital* Court's desire to avoid reading a limitation from the written description into the claims, but criticized the *Texas Digital* Court's methodology because it placed too much reliance on extrinsic sources and too little reliance on intrinsic sources. It characterized the *Texas Digital* Court's limited role of the

specification as "inconsistent with our rulings that the specification is 'the single best guide to the meaning of a disputed term,' and that the specification 'acts as a dictionary when it expressly defines terms used in the claims or when it defines terms by implication.'" The main problem with over-reliance on a dictionary for claim interpretation is that dictionaries usually are not directed toward the ordinary artisan in the pertinent art, but rather provide an expansive array of definitions. Elevating the dictionary to such prominence focuses the inquiry on a word's abstract meaning rather than on the meaning in the context of the patent. This can result in a disconnect between the patentee's responsibility to describe and claim the invention and the dictionary editor's objective of aggregating all possible definitions of words. Thus, although the Court did not preclude the appropriate use of dictionaries, it indicated that it was improper for courts to overly rely upon dictionary definitions for claim interpretation.

The majority opinion stated that courts can avoid reading limitations into claims by following the Federal Circuit's precedents and focusing on understanding how a person of ordinary skill in the art would understand the claim terms in question. The Court reiterated the axioms that (1) it is improper to import limitations from the specification into a claim, (2) it is improper to limit a claim to a disclosed embodiment even if only a single embodiment is disclosed, and (3) claims may embrace different subject matter than is illustrated in the specific embodiments in the specification.

The majority suggested that courts can avoid importing limitations into claims by keeping in mind that examples are described in the specification in order to teach one skilled in the art how to make and use the invention and to satisfy the best mode requirement. In the majority's view, by reading the specification in this context, it will become clear whether the patentee is setting out specific examples to accomplish these goals, or whether the patentee intends for the claims and disclosed embodiments to be strictly coextensive. (The majority cited, without comment, *Scimed Life Sys., Inc. v. Advanced Cardiovascular Sys. Inc.*, 242 F.3d 1337, 1341 (Fed. Cir. 2001), a widely cited decision in which the Court read the specification as limiting the claimed catheters to catheters with coaxial lumens.) The majority further observed that the manner in which the

² The Court was particularly critical of conclusory assertions made by experts. This strongly suggests that expert testimony and declarations regarding claim construction should be supported by documentary evidence.

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patentee uses a term in the specification and claims usually will make the distinction apparent.³

Finally, the Court stated that while there is no "magic formula," "catechism" or "rigid algorithm" for conducting claim construction, and courts are not "barred from considering any particular sources or required to analyze sources in any specific sequence," courts must "attach the appropriate weight" to the various sources and may not "contradict claim meaning that is unambiguous in light of the intrinsic evidence."

C. The Term "Baffles" is not Limited to Angled Baffles

Turning to Phillips' patent, the Court started by noting that the language of claim 1 explicitly imposes three clear requirements with respect to the recited baffles: (1) they must be made of steel, (2) they must be part of the load-bearing means of the wall section, and (3) they must be pointed inward from the walls. For the reasons discussed below, the Court noted that the intrinsic evidence confirms that a person of skill in the art would understand that the term "baffles" would have its generic (dictionary) meaning of "objects that check, impede or obstruct the flow of

something," the dictionary definition agreed upon by the parties in the *Phillips* case.

The Court reviewed the other claims of the patent, noting that dependent claim 2 and independent claim 17 specifically recite that the baffles are oriented at angles to the panel sections and function to deflect projectiles. The Court reasoned that if the claim 1 baffles are inherently angled, then other claims reciting this feature would be redundant to claim 1.

According to the Court, the specification supports the conclusion that persons of ordinary skill in the art would understand the baffles to be the load-bearing objects. The Court agreed with Judge Dyk's original dissent that the patent describes the deflection of projectiles as merely one of numerous objects of the invention. The Court concluded that a person of skill in the art would not interpret the disclosure and claims to mean that a structure extending inward from one of the wall faces is a "baffle" if it is at an acute or obtuse angle, but is not a "baffle" if it is disposed at a right angle.

In response to AWH's argument that "baffles" should be limited to angled baffles to preserve the claims' validity, the Court held that there was nothing in the prosecution history tending to show that the PTO would have refused to issue the patent unless all claims were limited to angled baffles. The Court further noted that the term "baffles" is not ambiguous, which is another requirement for narrowly construing a claim term to preserve its validity. Accordingly, the Court construed "baffles" as not limited to angled baffles.

D. The Dissenting Opinions

As noted above, there were two dissenting opinions. The partial dissenting opinion by Judge Lourie agreed with the majority's claim construction methodology but disagreed with the Court's construction of "baffles." Judge Lourie, joined by Judge Newman (that is, the judges who joined in the original Federal Circuit panel majority opinion), focused on the fact that all disclosed baffles were angled for deflecting projectiles, and argued that the Court "ought to lean toward affirmance of a claim construction [by the District Court] in the absence of a strong conviction of error."

Judge Mayer's dissent strongly criticized the majority for failing to address the question of whether any deference should be given to a trial court's claim construction. Judge Mayer argued that claim construction inherently involves the resolution of subsidiary questions of fact and that the

³ The lone example cited by the Court regarding this further observation is an 1887 U.S. Supreme Court decision, *Snow v. Lake Shore & M.S. Ry Co.*, 121 U.S. 617, 630, which unfortunately provides limited real world guidance. The claim format used in the late 1800s is not comparable to the present requirements. (Claims were in the form "the combination of" (A + B + C) "when constructed and operated substantially as described.") Further, the facts of *Snow* are unusual. The disclosed invention had two parts that were separately claimed; each part involved different components. The Court held that the claim to the first part was limited to the disclosed arrangement of the components (in which a piston and piston rod were not connected) because the specification did not state that the disclosed arrangement was not essential and did not provide any alternative arrangements of the components, unlike what was described for the arrangement of the valves of the second part of the invention. Although not mentioned by the *Phillips* court, another factor considered important by the *Snow* court was that the patentee's own prior art patent disclosed a different arrangement of the piston and rod that entailed use of stuffing boxes, and one of the express objects of the patent in suit was to avoid the use of stuffing boxes. 121 U.S. at 630.

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Federal Circuit should give deference to a trial court's resolution of such factual questions. He argued that the Federal Circuit's practice of reviewing claim construction questions *de novo* leads to unpredictability because it is "blind to the factual component of the [claim construction] task." He noted that *Markman* hearings are often longer than jury trials and require the trial court to reconcile the parties' inconsistent submissions to arrive at a sound interpretation of the claims. Thus, Judge Mayer argued, deference should be given to trial courts in their claim construction determinations.

Comments and Recommendations

The majority opinion nominally clarified what is the appropriate methodology for construing claims by (1) rejecting any formulaic approach, (2) confirming that certain types of evidence are more valuable than others and placing the greatest weight on the intrinsic evidence, (3) confirming that the specification can define terms by implication as well as explicitly, and (4) confirming that terms are to be given the meanings that they would have been understood to have at the effective filing date of the application, not the date the patent issues. However, it is uncertain whether the Court's general restatement of broad principles of claim construction will result in claims being interpreted more consistently. The likelihood of inconsistency is apparent from the fact that Judges Lourie and Newman construed "baffles" opposite from the majority, even though they applied the same claim construction methodology as the majority.

The difficulty lies in the fact that the majority provided little guidance on how to determine whether the specification implicitly defines a claim term or merely sets forth examples of the claimed element. The fact scenario of the cited *Snow* case is unlikely to be encountered today and represents, in any event, an extreme example of a specification making clear that a single disclosed embodiment is what the inventor regarded as the invention. Further, the main specific point emphasized by the *Phillips* Court--the mere fact that only one embodiment is disclosed, or a claimed feature is present in all of the disclosed embodiments, does not justify limiting an otherwise broadly worded claim to what is disclosed--was not a point of real contention in the prior case law. Rather, where the cases are sharply divided is over what more needs to be present in the specification to justify the conclusion that a claim term should be given a meaning different (whether broader or narrower) than its ordinary and customary meaning in the relevant art.

It is unhelpful that the *Phillips* Court did not mention any of the Federal Circuit's own prior decisions other than *SciMed*. These include, for example, the early, and controversial decision in *Gentry Gallery Inc. v. The Berkline Corp.*, 134 F.3d 1473 (Fed. Cir. 1998), which concluded that a specification lacking the clear and direct signals present in the *Snow* scenario implicitly described the location of controls on a console as an essential feature of the invention. They also include numerous more recent decisions, including several that issued despite the emergence of the *Texas Digital* school of strict construction. See, e.g., *ASM Am. Inc. v. Genus Inc.*, 401 F.3d 1340, 1347 (Fed. Cir. 2005) ("evacuation" is properly construed to require use of a vacuum pump, and to exclude use of an inert gas to "push" reactant gases out of the space, because the specification makes clear that introducing an inactive gas into the chamber is not part of the "evacuation" step); *C.R. Bard, Inc. v. U.S. Surgical Corp.*, 388 F.3d 858, 864-866 (Fed. Cir. 2004) (claimed plugs limited to pleated plugs based on specification statements of "general applicability" and the feature being included in every embodiment); *Alloc, Inc. v. U.S. Int'l Trade Comm'n*, 342 F.3d 1361, 1370 (Fed. Cir. 2003) (claims construed to include a non-recited "play" limitation in view of a specification description that "the invention" is "characterized in that" it includes "play," all figures and embodiments uniformly imply or expressly disclose "play," and the importance and advantages of "play" are emphasized).

By failing to acknowledge any of these cases, or, for that matter, any of the recent cases that have sought to limit the reach of their holdings, e.g., *Liebel-Flarsheim Co. v. Medrad, Inc.*, 358 F.3d 898 (Fed. Cir. 2004), the *Phillips* decision provides limited assistance. All that the *Phillips* Court offered in the way of guidance (perhaps because the Court could not find a consensus for any more specific statements) is that there will remain "some" cases in which it will be "hard" to determine what a person of skill in the art would understand, but that "attempting to resolve the problem in the context of the particular patent is likely to capture the scope of the actual invention more accurately than either strictly limiting the scope of the claims to the embodiments disclosed in the specification or divorcing the claim language from the specification."

In any event, we recommend that existing exculpatory opinions be reviewed, and possibly revised, if those opinions rely heavily on the *Texas Digital* methodology. Moreover, particularly because the majority's opinion reflects a renewed effort by the Court to rely primarily on the words of the claims (albeit within the context of the

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intrinsic record) and to avoid importing specification limitations into the claims with respect to structural and functional features, we have the following recommendations regarding patent application drafting and prosecution:

- Include dependent claims that more specifically recite the structure and/or functions of elements recited in the independent claims (invoke the "claim differentiation" doctrine).
- Do not include functional limitations in a claim if the functional limitations imply structure that is not recited in the claim, except when intentionally focusing on functional properties.
- Consider using different words in different independent claims to describe the same "invention" because, in general, a claim term is construed consistently wherever it is used throughout the claims. Thus, if the same word is used in all claims, that word will have the same meaning in all claims, even if some of the claims would be patentable with a broader meaning for that word.
- If you desire that a word in the claim cover a particular structure, state that desire in the specification. That is, explicitly define the word in the specification so that the word has the intended meaning. (For example, if you desire that the word "round" cover structures that are not perfectly circular (oval, elliptical, etc.), include a statement in the specification that "'round' as used herein is intended to cover structures that are circular and structures that are not perfectly circular such as, for example, oval, elliptical, etc.")
- For important words in claims, make sure that the dictionary definition of that word is not too limiting. Important words can be technical words, as well as words describing the relationship between elements (adjacent, adjoining, over, above, etc.), or the characteristics of elements (hard, soft, conventional, normal, etc.). As noted above, make sure that the specification defines the word to have the desired meaning so that "one skilled in the art" would understand that meaning from reading the specification.
- Disclose numerous features, structures, objects and advantages, but avoid characterizing any of them as "the invention".
- Argue different independent claims separately unless those claims have the exact same patentable features.

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