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INSIGHTS > HOW THE PANDEMIC IS SHAPING PATENT TRIALS IN DISTRICT COURTS

How the Pandemic Is Shaping Patent Trials in District Courts

02.18.21

Published in Law360 on February 18, 2021. Reprinted here with permission.

This article explores the effect of the pandemic on patent trials. Early in the COVID-19 pandemic, rapidly shifting conditions, state and federal guidance, and many unknowns forced federal district courts to adapt their procedures. Courts faced the task of balancing the safety all involved in the case, including court staff, witnesses and lawyers, with concerns over fairness and access to justice.

COVID-19 Procedures by Jurisdiction

District courts with significant patent dockets, such as the U.S. District Courts for the District of Delaware, Northern District of California, Eastern District of Texas and Western District of Texas, all issued COVID-19 governing procedures that followed three basic steps.

First, these courts continued all civil jury trials for at least one month.[1] Second, they suspended paper filing requirements.[2] Third, they encouraged the use of telephone or videoconferencing instead of in-person proceedings.[3] All four courts continued to issue monthly or bimonthly orders extending the continuance of civil jury trials.

These district courts also issued and extended orders regarding the use of videoconferencing in criminal matters, citing Section 15002(a) of the Coronavirus Aid, Relief, and Economic Security, or CARES, Act.[4] Since neither the CARES Act nor the resulting general orders on criminal proceedings address civil trials,[5] the courts simply added language encouraging the use of telephone or videoconferencing to their standing orders continuing current civil trials.[6]

Current Restrictions on Civil Jury Trials^[7]

District of Delaware

Since Sept. 15, 2020, the U.S. District Court for the District of Delaware has permitted civil jury trials at the discretion of the presiding judge, but no judge has held a patent jury trial since March 2020.^[8]

Beginning this year, however, the District of Delaware has held two patent bench trials. U.S. District Judge Maryellen Noreika presided over a four-day bench trial from Jan. 19-22 in *Vifor Fresenius Medical Care Renal Pharma Ltd. v. Lupin Atlantis Holdings SA*, and U.S. District Judge Leonard Stark presided over a 14-day bench trial from Jan. 15-28 in *H. Lundbeck A/S v. Lupin Ltd.*^[9]

Northern District of California

The U.S. District Court for the Northern District of California suspended all in-person proceedings through Feb. 15.^[10]

Eastern District of Texas

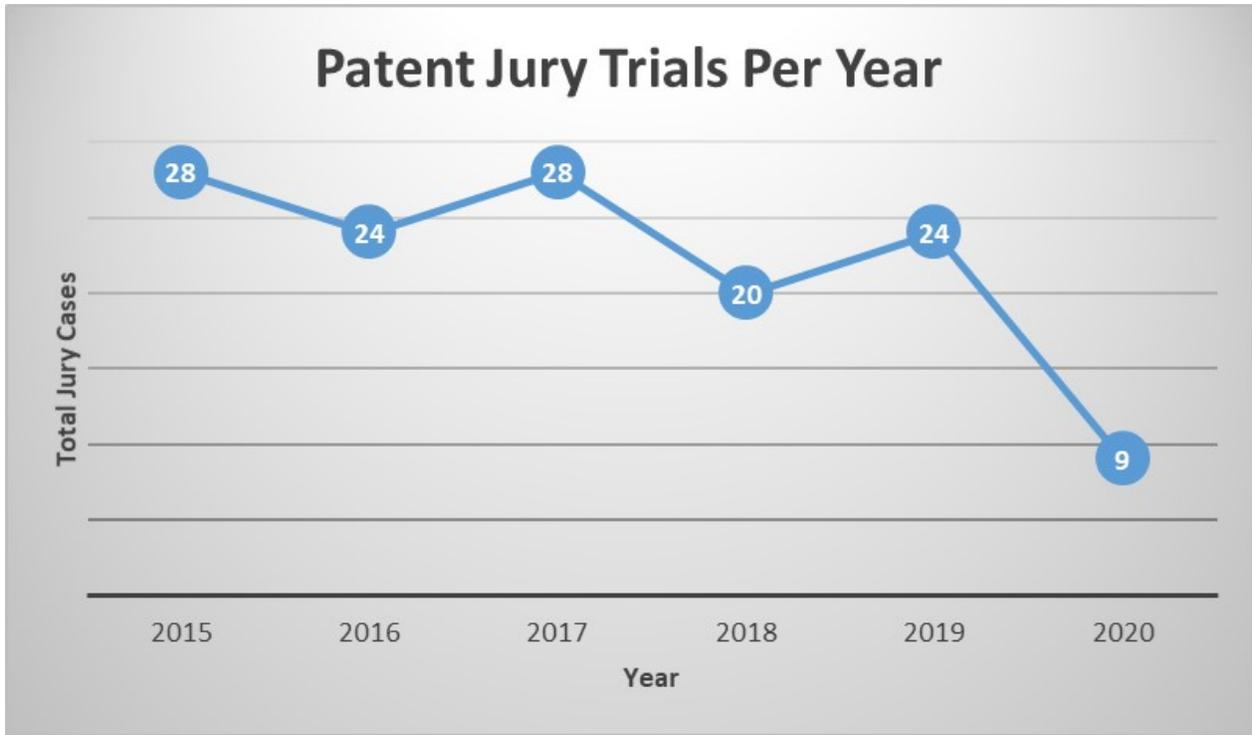
Litigants in the U.S. District Court for the Eastern District of Texas must notify opposing counsel if an in-person proceeding would put those in attendance at risk of COVID-19 exposure.^[11] If a party gives such notice, the parties must meet and confer regarding the appropriate means to conduct the proceeding, including videoconferencing or delaying the proceeding.^[12] After determining the appropriate means, parties must jointly move for the requested relief.^[13]

Western District of Texas

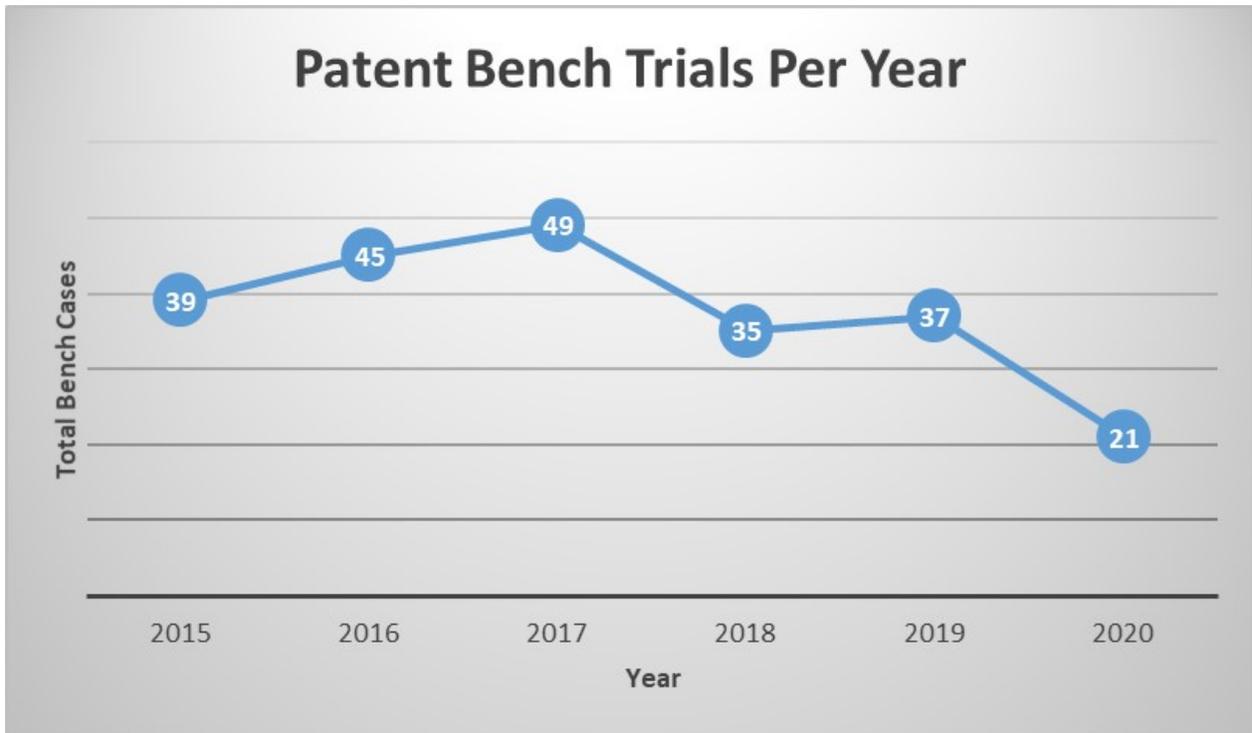
Civil jury trials scheduled to begin before March 31 in the U.S. District Court for the Western District of Texas have been continued to a date to be reset by each presiding judge: “[J]udges in individual divisions may determine that the conditions in their communities safely allow for” in-person jury trials.^[14] One such patent jury trial is scheduled to begin in late February before U.S. District Judge Alan Albright.^[15]

Effect of COVID-19 on Patent Trials

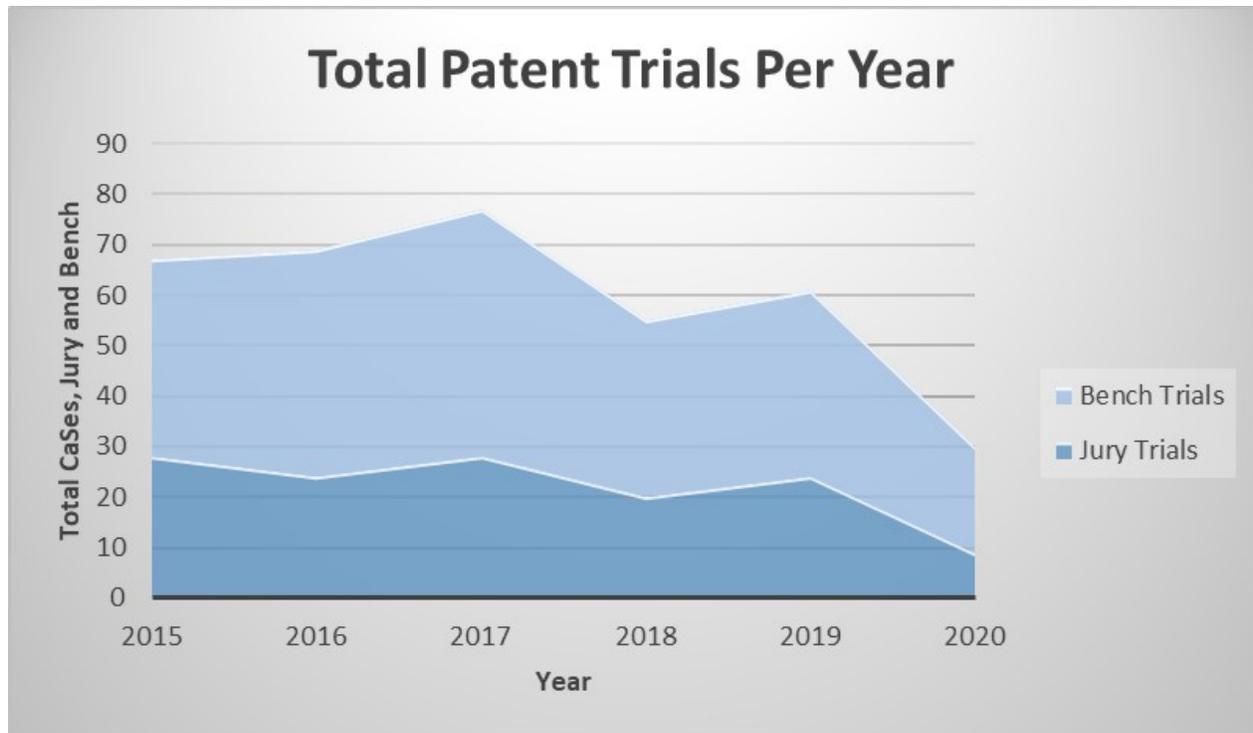
COVID-19 has unsurprisingly hindered courts’ ability to hold bench and jury trials. Last year, seven district courts with significant patent dockets^[16] saw an abrupt drop-off in patent jury trials compared to the previous five years.



The number of patent bench trials also fell in 2020.



Notably, it appears that litigants and/or courts have chosen to postpone jury trials rather than hold them as bench trials, as shown by the overall decline in the total number of patent trials compared to previous years.



Length of Delays Due to COVID-19

Courts have not taken a one-size-fits-all approach to rescheduling trial dates. While some have pushed trial dates back by only one to three months, others have indefinitely postponed trials or rescheduled trial dates by six or more months. The length of delay depends on several factors, including the stage of litigation, the particular jurisdiction and the individual presiding judge.

For example, two trends have emerged from the District of Delaware: (1) early in the pandemic, litigants saw delays of several months for nontrial deadlines, and (2) most trial dates have been postponed indefinitely.

For instance, the court in *TQ Delta LLC v. 2Wire Inc.* initially pushed back all deadlines by three months.^[17] After continuing the trial in August 2020, the court indefinitely postponed the trial in January, stating that “jury trial on Feb. 22, 2021 is not feasible.”^[18]

Similarly, the court in *Blackbird Technologies LLC v. Feit Electric Co. Inc.* postponed the trial in late 2020 until “a date to be determined.”^[19] Likewise, in postponing the trial date in *Sunoco Partners Marketing and Terminal LP v. Powder Springs Logistics*, Judge Stark emphasized COVID-19’s effects on the court’s ability to hold trials, stating that the trial was continued to a date to be determined and “certainly NOT in 2020.”^[20]

Where judges in Delaware have set a trial date, some opted for a significant delay. In *ChanBond LLC v. Atlantic Broadband Group LLC*, U.S. District Judge Richard Andrews postponed the trial

date by nine months, from Aug. 19, 2020, to May 17, 2021.[21] U.S. District Judge William Orrick in the Northern District of California took a similar approach, recently rescheduling the trial date in *Contour IP Holdings LLC v. GoPro Inc.* to May 6, 2021, nearly nine months after its original August 2020 trial date.[22]

In view of the delays and uncertainty in scheduling patent jury trials, some litigants have opted to move forward with bench trials or alternative dispute resolution. For example, Judge Andrews ordered the parties in *Wonderland Switzerland AG v. Evenflo Co. Inc.* to discuss converting a scheduled jury trial to a bench trial, stating that “the court doubts that a jury trial will be feasible.”[23] The parties agreed to a bench trial.

In the Western District of Texas, the parties in *Finalrod IP LLC v. John Crane Inc.* opted for mediation rather than face continuances and uncertain trial dates.[24] Unlike trials, which faced consistent delays, “arbitrations saw little, if any, interruption.”[25] The relative lack of interruption in arbitration was due to some private dispute resolutions forums’ existing means for conducting remote dispute resolution, as well as their quick adoption of new virtual protocols.[26]

Overall, courts in the Northern District of California and the District of Delaware have taken a more cautious approach to restarting patent trials. While hearings, conferences and other proceedings are being successfully conducted over videoconference or telephone, many patent jury trials have been postponed until at least May, if not later.

Patent Jury Trials in Texas

In the jurisdictions surveyed, all five patent jury trials that have taken place since the pandemic’s interruption have occurred in Texas. In the Eastern District of Texas, Chief U.S. District Judge Rodney Gilstrap presided over three trials, with U.S. District Judge Davis and U.S. District Judge Schroeder presiding over the fourth. In the Western District of Texas, Judge Albright presided over the fifth.

Cases before Judge Gilstrap have progressed with relatively little COVID-19 related interruption. The parties in *Optis Wireless Technology LLC et al v. Apple Inc.* requested a two month continuance of the trial date,[27] but Judge Gilstrap moved the trial date by only one month.[28]

Apple subsequently asked that the trial be continued for another two months,[29] but Judge Gilstrap denied the motion, stating that Apple’s expert witness, a professor of internal medicine at University of Texas Southwestern Medical Center, was not able to “project when in the future his ultimate conclusion might change.”[30]

Judge Gilstrap reasoned that the trial should not be continued because it was impossible to say when “an in person jury-trial might be able to go forward.”[31] Instead, Judge Gilstrap expressed confidence in the court’s planned safety measures — e.g., excluding symptomatic and high risk people from the courtroom, limiting the number of people at counsel tables, requiring face shields, and encouraging participants to follow Centers for Disease Control and Prevention guidelines.

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