

# How the Pandemic Is Shaping Patent Trials in District Courts

## WRITTEN BY

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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***

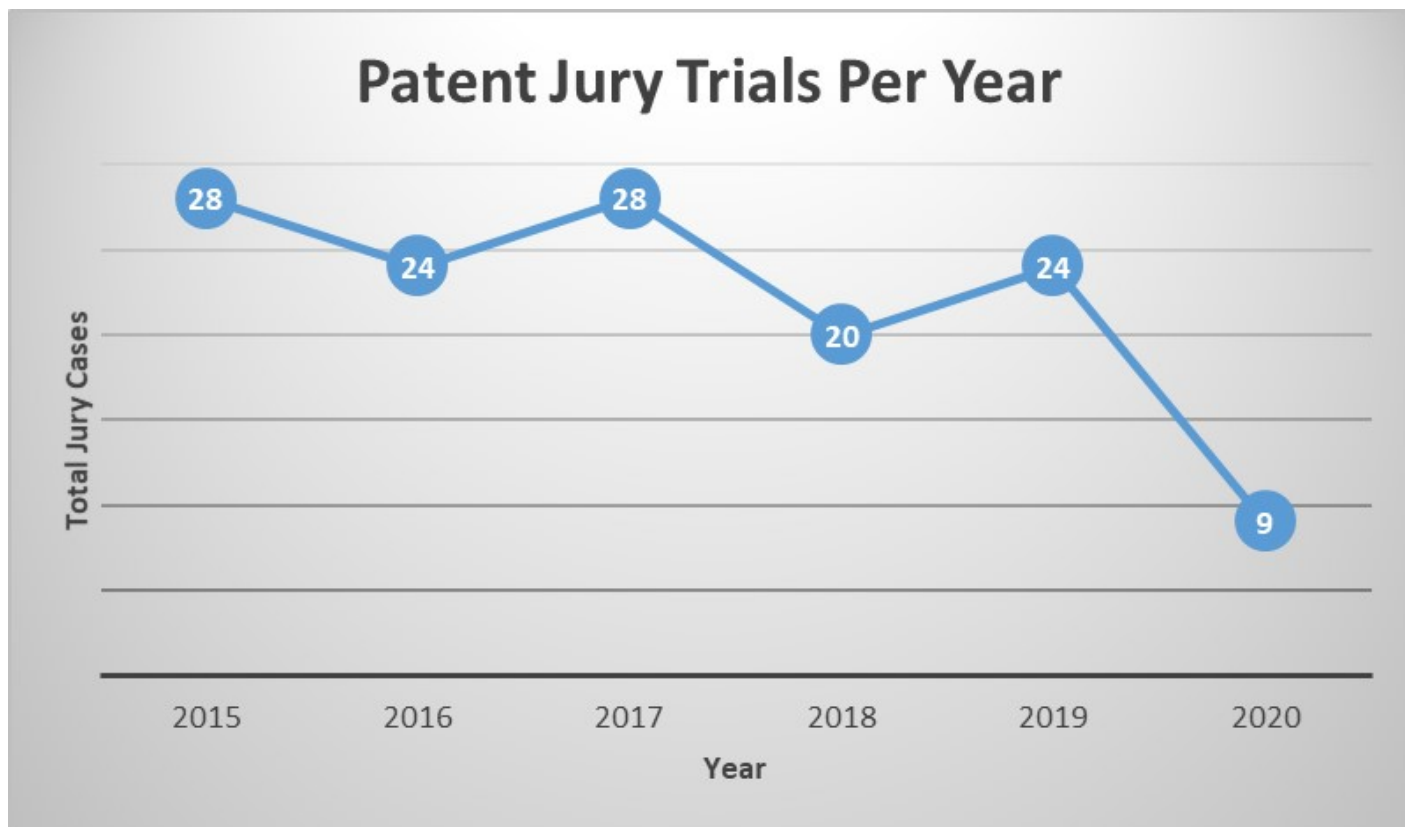
Litigants in the U.S. District Court for the Eastern District of Texas must notify opposing counsel if an in-person proceeding would put those in attendance at risk of COVID-19 exposure.[11] If a party gives such notice, the parties must meet and confer regarding the appropriate means to conduct the 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***

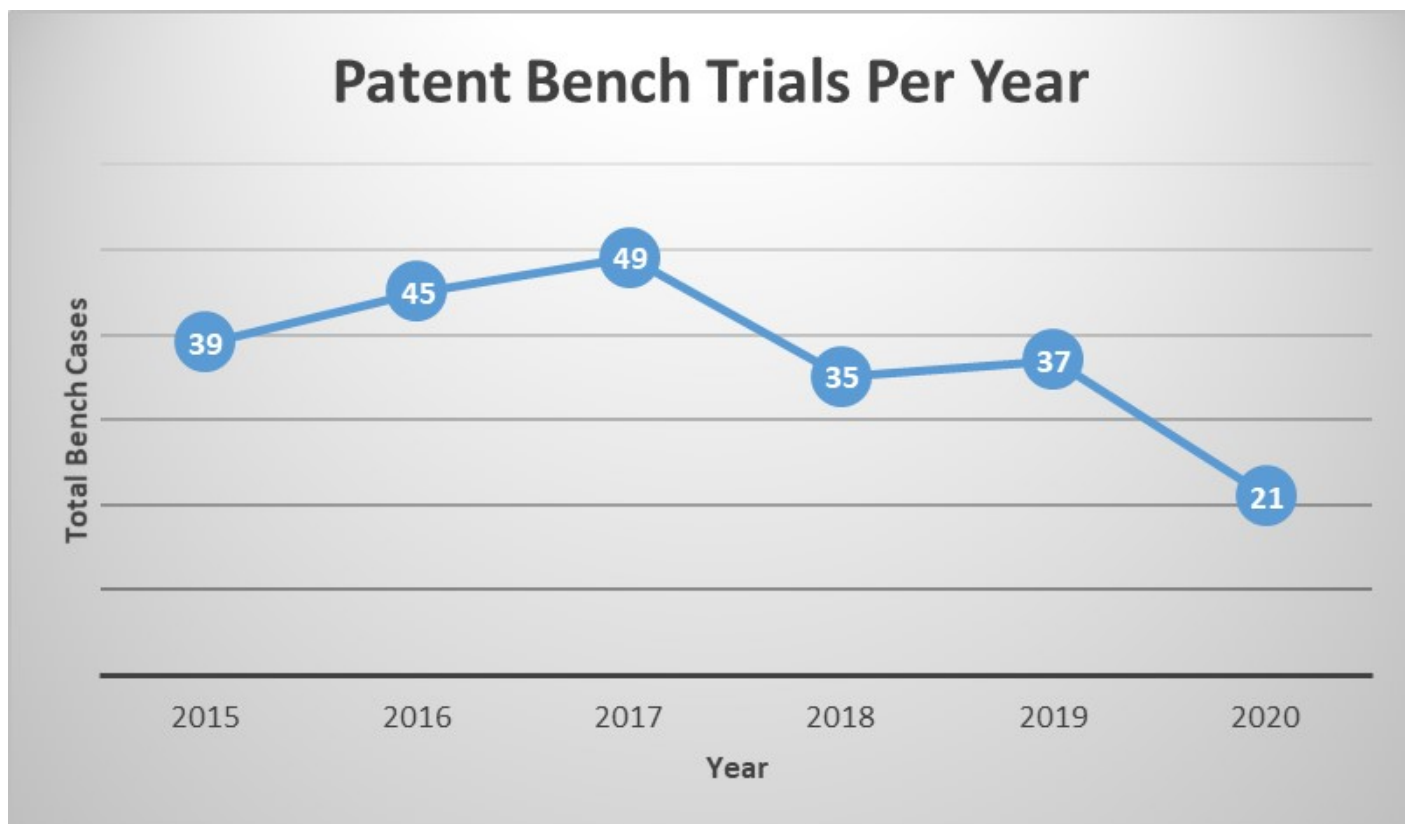
Civil jury trials scheduled to begin before March 31 in the U.S. District Court for the Western District of Texas have been continued to a date to be reset by each presiding judge: “[J]udges in individual divisions may determine that the conditions in their communities safely allow for” in-person jury 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.

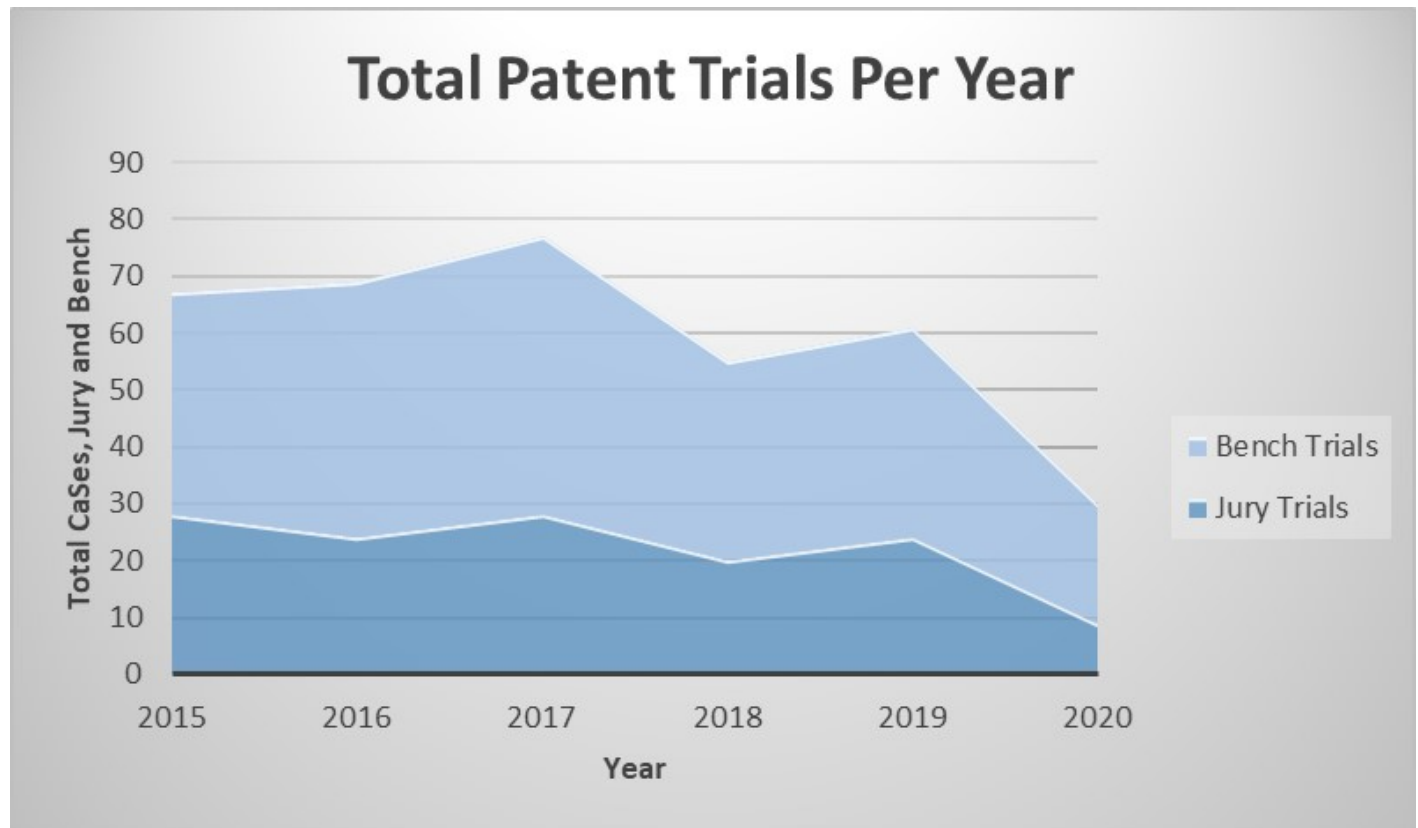


The number of patent bench trials also fell in 2020.



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.

Judge Gilstrap’s two other jury trials cases saw similar case timelines and trajectories. In *GREE Inc. v. Supercell Oy*, the judge granted an initial motion for a continuance, but denied further motions, citing the *Optis* case as evidence that jury trials could be conducted without incident or complaint.[32]

Judge Albright in the Western District of Texas held a patent jury trial in *MV3 Partners LLC v. Roku Inc.* in October 2020.[33] Unlike the above cases in the Eastern District of Texas, there were no continuances of the trial date. Judge Albright's second in-person patent jury trial is scheduled to begin on Feb. 22.[34]

After a delay of two months, Judge Albright moved the case from the closed Austin court to the open Waco court, stating that a virtual jury trial would not be fair and/or appropriate and that further delays would likewise be unfair. [35] Like Judge Gilstrap, Judge Albright cited confidence in the court's safety precautions for the upcoming trial, including mandatory daily COVID-19 testing and use of N95 masks.[36]

## Conclusions

Parties seeking a patent jury trial in 2020 had the most success in the Eastern and Western Districts of Texas. While these courts initially granted limited continuances in view of COVID-19, they quickly began to schedule and hold patent jury trials under new and modified procedures.

District courts for the Northern District of California and the District of Delaware have taken a different tack, rescheduling trials until later this year or postponing them to a date to be determined.

Parties in patent cases should be mindful of the different approaches taken in each jurisdiction and factor that into their decisions regarding whether to seek a continuance — and for how long — if they should postpone their jury trial or proceed with a bench trial and whether an alternative dispute resolution option may be more suitable for their needs.

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***Disclosure: Apple Inc. is a current client of Troutman Pepper. Sunoco Partners Marketing and Terminal L.P. is an affiliate of Sunoco Inc. (R&M), which is a client of Troutman Pepper. The firm does not represent these companies in any matters discussed in this article.***

[1] Court Order March 18, 2020 (D.Del); General Order 20-03 (E.D.Tex); General Order March 13, 2020 (W.D.Tex).

[2] General Order 72-6 (N.D.Cal); Court Order March 13, 2020 (D.Del).

[3] General Order 72-6 (N.D.Cal); Court Order March 18, 2020 (D.Del); General Order March 13, 2020 (W.D.Tex); General Order 20-03 (E.D.Tex).

[4] General Order 74 (N.D.Cal); General Order 20-06 (E.D.Tex); Court Order April 1, 2020 (D.Del); General Order March 30, 2020 (W.D.Tex).

[5] <https://www.congress.gov/116/bills/hr748/BILLS-116hr748enr.pdf>.

[6] Court Order May 27, 2020 (D.Del).

[7] (as of Feb. 16). <https://www.law360.com/articles/1252836#>.

[8] *Id.*

[9] *Vifor Fresenius Medical Care Renal Pharma Ltd. v. Lupin Atlantis Holdings SA*, No. 1:18-cv-0039 (D. Del. 2021) (Minute Entries 1/19/2021 – 1/22/2021); *H. Lundbeck A/S v. Lupin Limited*, No. 1:18-cv-00088 (D. Del. 2021) (Minute Entries 1/15/2021-1/28/2020).

[10] <https://www.cand.uscourts.gov/announcements/suspension-of-all-in-person-in-court-proceedings/>.

[11] Court Order March 3, 2020 (E.D. Tex.).

[12] *Id.*

[13] *Id.*

[14] Court Order February 2, 2021 (W.D. Tex.).

[15] *VLSI Technology LLC v. Intel Corp.*, No. 6:21-cv-00057 (W.D. Tex. 2021) (D.I. 426).

[16] The Northern District of Illinois, the Northern District of California, the Central District of California, the Western District of Texas, the Eastern District of Texas, the District of Delaware, and the District of New Jersey.

[17] *TQ Delta, LLC v. 2Wire, Inc.*, No. 1:13-cv-01835 (D. Del. 2020) (D.I. 1321).

[18] *Id.* Oral order 1/11/2021.

[19] *Blackbird Tech, LLC v. Feit Electric Co., Inc.*, No. 1:15-cv-00056 (D. Del. 2020) (D.I. 198).

[20] *Sunoco Partners Marketing and Terminal L.P. v. Powder Springs Logistics*, No. 1:17-cv-01390 (D. Del. 2020) (D.I. 616); see, *Sprint Communications Company L.P. v. WideOpenWest, Inc.*, No. 1:18-cv-00361 (D. Del. 2020) (D.I. 365) also postponed indefinitely.

[21] *ChanBond, LLC v. Atlantic Broadband Group, LLC*, No. 1:15-cv-00842 (D. Del. 2020) (D.I. 527).

[22] *Contour IP Holdings, LLC v. GoPro, Inc.*, No. 3:17-cv-04738 (N.D. Cal. 2020) (D.I. 505, 508).

[23] *Wonderland Switzerland AG v. Evenflo Company, Inc.*, No. 1:18-cv-01990 (D. Del. 2020) (D.I. 147, 149).

[24] *Finalrod IP LLC v. John Crane Inc.*, No. 7:15-cv-00097 (W.D. Tex. 2020) (D.I. 394).

[25] <https://www.law360.com/articles/1323085/weighing-litigation-vs-arbitration-amid-court-disruptions->.

[26] *Id.*

[27] *Optis Wireless Technology, LLC et al v. Apple Inc.*, No. 2:19-cv-00066 (E.D. Tex. 2020) (D.I. 115).

[28] *Id.* (D.I. 120).

[29] *Id.* (D.I. 341)

[30] *Id.* (D.I. 387).

[31] *Id.*

[32] *GREE, INC v. Supercell Oy*, No. 2:19-cv-00070 (E.D. Tex. 2020) (D.I. 453).

[33] *MV3 Partners LLC v. Roku, Inc.*, No. 6:18-cv-00308 (W.D. Tex. 2020) (D.I. 415),

[34] *VLSI Technology LLC v. Intel Corp.*, No. 6:21-cv-00057 (W.D. Tex. 2021) (D.I. 426);  
<https://www.law360.com/articles/1354281/albright-orders-daily-covid-19-tests-at-intel-patent-trial>.

[35] *Id.*

[36] *Id.*

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