



THINK FORWARD

District Courts Struggle to Schedule Patent Trials During the COVID-19 Pandemic

By [Joshua James](#), [Laura Lydigsen](#)

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The U.S. district courts have taken variable approaches regarding how to handle patent trials during the COVID-19 pandemic. Recent developments in patent cases in the District of Delaware, Western District of Texas, and Southern District of New York illustrate the variety of ways courts are dealing with these trials.

District of Delaware

The District of Delaware has tried to start jury trials for patent cases, but expanding COVID-19 cases have caused the court to change its plans.

The court's recent orders in *Sunoco Partners Marketing & Terminals LP v. Powder Springs Logistics, LLC*, No. 1:17-cv-01390 outline both the techniques the court will likely use once patent trials restart in Delaware and the court's current flexibility in moving trials to accommodate the parties' concerns regarding COVID-19. In October 2017, Sunoco brought an infringement lawsuit involving a group of patents for blending butane into gasoline. As of July 2, 2020, when Chief Judge Leonard Stark scheduled a jury trial in the case for August 3, all jury trials in the District of Delaware had been cancelled from March 18 through July 31. The July 2 trial order required witness testimony and cross-examination to be conducted remotely and limited Sunoco to 4 representatives in the courtroom and each of the 2 defendants to 3 representatives in the courtroom. The parties were not allowed to swap representatives during the trial and at least 1 representative "spot" for each party needed to be reserved for local counsel. The order also stated that the trial would be simulcast to another room in the courthouse for other members of the trial teams and the public and that counsel should follow safety precautions, such as out-of-state counsel self-quarantining in Delaware for 14 days prior to trial. The trial order described the procedure as "something of an experiment."

On July 10, Sunoco filed a letter expressing its concerns and requesting a continuance until an in-person jury trial could occur. Sunoco noted that COVID-19 cases in Delaware were increasing and that the state of emergency order in the state had been extended to August 6, 3 days after the trial start date. Sunoco also argued that the pandemic reduced the court's ability to obtain an adequate spectrum of prospective jurors. Sunoco noted that its counsel are located in Houston and the defendants' counsel are located in Delaware, so only Sunoco's counsel would have to self-quarantine for 14 days. The self-quarantine would have to take place without being certain that the trial would proceed. Lastly, Sunoco noted that Philadelphia, where its corporate headquarters are located, recently required people traveling from Delaware to Philadelphia to self-quarantine. This would prevent counsel from holding in-person meetings with witnesses in Philadelphia. On July 11, the defendants filed a letter stating that they also had concerns and would agree to a month-long continuance, but did not agree to an indefinite continuance. They also noted that they would prefer if live witnesses were used except for witnesses

who could not attend for medical reasons.

On July 13, Judge Stark continued the trial. Judge Stark explained his decision by noting that coronavirus cases in Delaware were not declining and new travel restrictions were implemented between Delaware and Pennsylvania. Also, Judge Stark stated that he did not want counsel to travel to Delaware and self-quarantine for 14 days, only to have the trial postponed. This concern turned out to be prescient as the District of Delaware later cancelled all jury trials through August 31.

Similarly, in *ChanBond, LLC v. Cox Communications, Inc.*, No. 1:15-cv-00842, the court was willing to postpone the trial due to COVID-19 concerns. There, the defendant (Cox) filed a request on July 14, 2020, that the August 18 trial be pushed to November because presenting all witnesses by video and limiting the number of counsel who could appear live could substantially impact the trial presentation. ChanBond did not oppose the continuance, which was granted the next day by Judge Andrews.

Western District of Texas

Patent trials have also been delayed in the Western District of Texas, including in *MV3 Partners LLC v. Roku, Inc.*, No. 6:18-cv-00308. MV3 sued Roku in October 2018, alleging that Roku's media players and streaming sticks infringe MV3's mobile streaming patent. A trial was originally scheduled to begin June 1, 2020, but has since been pushed back 3 times because of the pandemic. On July 7, Judge Alan Albright rescheduled the trial for September 8. The rescheduling order noted that counsel were concerned that planning the trial for September could be too soon, but Judge Albright set the trial hoping that the parties would be able to proceed at that time

Southern District of New York

The Southern District of New York recently conducted a remote patent trial in *Ferring Pharmaceuticals Inc. v. Serenity Pharmaceuticals, LLC*, No. 1:17-cv-09922. Ferring filed suit in April 2017 seeking to invalidate Serenity's patents relating to the use of the anti-diuretic compound desmopressin, which is the active ingredient in Ferring's nighttime urination medication Nocdurna®. Serenity counterclaimed that Ferring's drug infringes its patents. A remote bench trial on the counterclaims began on July 6, 2020, without opening statements. All direct testimony was submitted in writing and cross-examination happened live over Zoom. Witnesses, including many overseas, were sent sealed physical binders for their cross-examinations, and digital exhibits were displayed to the entire court via Zoom's share screen functionality. TrialGraphix is handling the trial through a Zoom-based application called TRIALanywhere. Witness testimony concluded on July 15 and closing arguments were held on July 22.

Issues to Consider

As parties approach their scheduled patent trial dates, they should monitor not only court orders, but also COVID-19 orders issued by the cities and states where the court, counsel, and witnesses are located. If a party has concerns regarding an upcoming trial or its procedures, then it should share those concerns with the court as soon as possible. Even if a trial proceeds as scheduled, parties should prepare for at least part of the trial to take place remotely. Counsel and witnesses should practice preparing for and conducting direct and cross-examinations remotely as early as possible. During the last few weeks before trial, counsel and witnesses will want to focus on the substance of testimony instead of the logistics of remote testimony.