

IP Case Management Takeaways 18 Months Into Pandemic

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Eighteen months ago, the world was turned on its head. Not only did our everyday lives change, but so did our business activities.

Along with stay-at-home orders, district courts with the most patent-heavy dockets issued orders in March 2020 for how to proceed during the pandemic.

For example, the U.S. District Courts for the Eastern and Western Districts of Texas, the District of Delaware, the Eastern District of Virginia and the Northern District of California all issued orders encouraging remote telephonic/video conferencing and suspending civil trials.[1]

With roughly half the population fully vaccinated and the resumption of public life, courtrooms have cautiously started to open for in-person hearings and trials, and they are loosening or removing restrictions altogether.[2]

Questions persist as to how much of the pandemic's new normal will remain. What will case lifecycles look like in a post-pandemic world? Will we return to red-eye flights and global travel for depositions?

Will judges conduct Zoom summary judgment and Markman hearings? Will more parties elect to have remote bench trials, which are easier and safer to conduct remotely? Will clients and the bar embrace or avoid jurisdictions that allow for remote proceedings?

With these questions in mind, and with the benefit of 18 months of data and perspective, we consider the lessons learned as well as which remote activities should be here to stay and which — if any — should return to in-person proceedings.

Intellectual Property Litigation by the Numbers

Somewhat surprisingly, there were more patent cases and Patent Trial and Appeal Board filings in 2020 despite the pandemic. There were 4,016 patent cases filed in federal district courts in 2020, an increase of 425 cases over 2019.[3]



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Somewhat less surprisingly, there were almost triple the amount of patent cases filed in the U.S. District Court for the Western District of Texas in 2020 than in 2019 (293 in 2019 and 856 in 2020), reflecting evolving venue preferences after the U.S. Supreme Court's 2017 TC Heartland LLC v. Kraft Foods Group Brands LLC ruling.[4]

At the PTAB, there were about 200 additional cases files (1,538 PTAB petitions in 2020 and 1,322 in 2019).[5] For IP cases in general — patent, copyright, trademark and trade secret — there was a slight dip in 2020, from 13,354 cases filed in 2019 to 11,632 cases filed in 2020.[6]

Although we can only speculate as to why patent and PTAB filings increased during the pandemic, it is plausible that patent plaintiffs may have had more time on their hands or saw an advantage in filing early when the global economy was uncertain.

Depositions

Remote depositions are likely to stick around. Overcoming early reservations by attorneys, vendors rose to the task and made remote depositions both relatively painless and incredibly convenient. The benefits are obvious: no more shipping boxes and printing last-minute exhibits on a break; no more cadres of lawyers traveling from city to city; and lower hotel, airfare, meal and travel costs for clients.

There are, of course, some drawbacks to remote depositions. It is harder to control a difficult or unruly witness, and you can't be certain that a witness isn't Skyping her lawyer on the side. Perhaps the biggest drawback is that reading a witness's credibility is much harder on screen, which in turn makes it harder to decide when to push further and when to move on. This is especially true for expert witnesses. In view of these drawbacks, the depositions of certain key fact witnesses and expert witnesses are likely to continue to occur in person.

Mediation

Although there is undoubtedly something useful about locking parties and their counsel in a room together, remote mediations have proven to work surprisingly well.

Initially, many clients had concerns about the privacy and security of remote mediations, given the highly sensitive and confidential information discussed. But competent vendors once again saved the day by creating complex virtual platforms, putting extra security measures in place, and creating secure breakout rooms.

While many have been concerned that virtual mediations would not be conducive to settlement, we've found the opposite to be true. This likely is due to the shift away from just the single-day mediation during the pandemic. Instead, mediators are checking in with the parties more frequently, sending follow-ups when major case developments take place, and encouraging ongoing party discussions.

Remote mediations also allow flexibility with regard to both scheduling and attendees. An executive is more likely to attend a mediation when it's done remotely.

Like depositions, remote mediation has downsides. For one, technology can and does fail, and your chosen mediator has to be comfortable with the parties' choice of platform or vendor. Second, being physically present together allows the parties and mediator to develop a rapport, build trust, and pick

up on the subtle things like body language.

Remote mediations also are likely here to stay. Although some mediators, clients and attorneys will still prefer in-person sessions, the lower costs and greater convenience of remote mediations likely will encourage many to favor that alternative.

Hearings

Unlike the more clear-cut cases of depositions and trials — discussed below — we predict that post-pandemic hearings will be both remote and in person, depending on the nature of the hearing and the presiding judge. At least some case management conferences and discovery hearings, by contrast, likely will continue to be conducted remotely as they tend to be more procedural and involve less complex issues.

On the other hand, hearings that are complex — like summary judgment or Markman hearings — or that involve any live witnesses are more likely to be in person. Overall, remote hearings are likely have to-be-determined status as they are at the discretion and convenience of the judge. For judges who embraced the conveniences of remote hearings, they are likely to stay.[7] For judges who resisted remote hearings, however, we would expect a return to in-person proceedings.

Beyond judicial preferences, we've found that remote proceedings have reduced the opportunity for informal meetings and discussions between parties and counsel. These sorts of informal meetings often lead to agreements on discovery disputes, both major and minor, and promote settlement discussions. With at least some remote hearings likely to stay, these benefits may fall by the wayside.

Trial

During the pandemic, courts with the heaviest patent dockets took varying approaches to trial. After canceling all trials through the summer of 2020, Judge Rodney Gilstrap in the U.S. District Court for the Eastern District of Texas was one of the first to resume jury trials in August 2020.

Meanwhile, many California judges pushed patent trials well into the summer of 2021 while the state experienced its winter lockdown. For example, in December 2020, Judge James Selna in the U.S. District Court for the Central District of California vacated a jury trial in TCL Communication Technology Holdings Ltd. v. Telefonaktiebolaget LM Ericsson, which concerned a standard-essential patent licensing dispute. That same week, Judge Beth Freeman in the U.S. District Court for the Northern District of California moved a trial from January 2020 to June 2021 after a series of pandemic-related continuances.

While judges took divergent approaches to jury trials, there was an uptick in bench trials. In Delaware, bench trials gave litigants their day in court during a time when in-person civil jury trials had come to a screeching halt. The U.S. District Court for the District of Delaware conducted more than a dozen bench trials during this period, with several notable IP cases: Lundbeck A/S v. Lupin Ltd.,[8] in front of Judge Leonard Stark, Vifor Fresenius Medical Care Renal Pharma Ltd. v. Lupin Atlantis Holdings SA,[9] in front of Judge Maryellen Noreika, and Wonderland Switzerland AG v. Evenflo Co.[10] in front of Judge Richard Andrews.

Similarly, in the U.S. District Court for the Eastern District of Virginia, Judge Henry Morgan presided over a remote bench trial in Centripetal Networks Inc. v. Circo Systems Inc.[11] That trial led to Judge

Morgan's award of \$1.9 billion to Centripetal for willful patent infringement in October 2020.[12]

The shift to bench trials during the pandemic made sense, as they are generally faster and less difficult logistically. As more people are vaccinated and COVID-19 becomes increasingly under control, this trend is likely to reverse. The reason is that jury trials are viewed as more plaintiff-friendly than bench trials. In a 2013 study by Mark Lemley, Jamie Kendall and Clint Martin, the authors evaluated 624 patent trials, 466 were jury trials and 158 of which were bench trials. Patentees prevailed in 62.9% of jury trials, but only 51.3% of bench trials.[13]

A separate question from the bench versus jury trial dispute is whether remote trials are here to stay. As anyone who has done a remote trial — bench or jury — knows, they require enormous amounts of logistical planning and technology. Although trial logistics, e.g., hotels, travel schedules and war rooms, were a significant challenge pre-pandemic, this fell mostly on the parties' shoulders. A remote trial is a different beast altogether, requiring planning from the court and the jurors themselves, if a jury trial.

One of the pioneers of remote jury trials, Judge Marsha Pechman in the U.S. District Court for the Western District of Washington, expressed her "hope that in-person jury trials don't go away." [14]

Despite their benefits, e.g., potential cost savings, remote trials have significant drawbacks. As with remote depositions, the examining attorney in a remote trial loses some of her ability to connect, build a rapport with, and control a witness. This is especially important for expert witnesses in IP trials, who not only need to teach the jury about the underlying technology but can influence the trial outcome tremendously.

In view of the difficult logistics and the benefits of live witnesses, most IP trials are likely to return to in-person proceedings. We just saw an in-person trial happen in July in the Northern District of California in *Plexxion Inc. v. Novartis Pharmaceuticals Corp.*[15]

But a hybrid model — in which some aspects are conducted remotely, and others are conducted in person — might be appropriate for smaller IP cases. Judge Noreika conducted such a hybrid trial in the September 2020 *TriMed Inc. v. Arthrex Inc.*[16] case, with the parties' counsel appearing live in the courtroom but all witnesses appearing remotely via video.

Conclusion

The pandemic did not change the importance of providing top-notch client services, but it did change how those services are delivered. In the span of months, the pandemic drove the adoption of practices and technologies that otherwise might have taken decades of discussion and experimentation to gain footing. And it did so with a population historically resistant to change: lawyers — and Biglaw in particular.

Many of these practices — remote depositions, mediations and hearings — are here to stay, at least in some capacity. With these practices now widespread, IP litigators will need to develop and fine-tune best practices for using them.

Clarification: This article has been updated to more precisely indicate the volume of bench trials in the District of Delaware during the pandemic.

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[1] Standing Order (D. Del. Mar. 18, 2020); Gen. Order 20-03 (E.D. Tex. Mar. 16, 2020); Order (W.D. Tex. Mar. 13, 2020); Gen. Order No. 72-6 (N.D. Cal. Mar. 16, 2020), abrogated by Gen. Order No. 78 (N.D. Cal. June 23, 2021); Gen. Order No. 2020-02 (E.D. Va. Mar. 13, 2020).

[2] For example, as of July 1, 2021, the Northern District of California again allows the public to enter courtrooms and observe in-court proceedings. Gen. Order No. 78 (N.D. Cal. June 23, 2021). https://cand.uscourts.gov/wp-content/uploads/general-orders/GO_78_In_re_Update_Court_Ops_CA_Reopening.pdf.

[3] Lex Machina 2019 Federal district court cases (https://law.lexmachina.com/cases/?case_types-include=27&filed_on-from=2019-01-01&filed_on (last visited on July 13, 2021); Lex Machina 2020 Federal district court cases (https://law.lexmachina.com/cases/?case_types-include=27&filed_on-from=2020-01-01&filed_on (last visited July 13, 2021)).

[4] *TC Heartland LLC v. Kraft Foods Grp. Brands LLC*, 137 S. Ct. 1514 (2017).

[5] Lex Machina 2019 P.T.A.B. Trials (https://law.lexmachina.com/ptab/?filing_date-from=2019-01-01&filing_date (last visited on July 13, 2021)); Lex Machina 2020 P.T.A.B./ Trials (https://law.lexmachina.com/ptab/?filing_date-from=2020-01-01&filing_date (last visited on July 13, 2021)).

[6] Compare Lex Machina (2020 IP cases, https://law.lexmachina.com/cases/?case_types-include=27&case_types-include=23&case_types-include=24&case_types-include=22&filed_on (last visited on July 13, 2021)) with Lex Machina (2019 IP cases, https://law.lexmachina.com/cases/?case_types-include=27&case_types-include=23&case_types-include=24&case_types-include=22&filed_on (last visited on July 13, 2021)).

[7] Judge Orrick in the Northern District of California has released "Scheduling Notes" indicating that he intends to keep civil CMCs and hearings remote. Scheduling Notes, <https://apps.cand.uscourts.gov/CEO/cfd.aspx?7147#Notes> (last visited Aug. 3, 2021).

[8] Case No. 1:18-cv-00088-LPS (D. Del.).

[9] Case No. 1:18-cv-00390-MN (D. Del.).

[10] Case No. 1:18-cv-01990-RGA (D. Del.).

[11] Case No. 2:18-cv-00094-HCM-LRL (E.D. Va.).

[12] *Centripetal Networks, Inc. v. Cisco Systems, Inc.*, No.2:18-cv-00094-HCM-LRL, D.I. 621, Opinion &

Order at 161-162 (E.D. Va. Oct. 5, 2020).

[13] Mark A. Lemley, Jamie Kendall, & Clint Martin, Rush to Judgment? Trial Length & Outcomes in Patent Cases, *AIPLA Quarterly J.* Vol. 41, No. 2 (2013).

[14] Cara Salvatore, How Seattle's Federal Court Has Pioneered Zoom Jury Trials, *Law360* (Nov. 20, 2020), <https://www.law360.com/articles/1331134/how-seattle-s-federal-court-has-pioneered-zoom-jury-trials>.

[15] Case No. 4:17-cv-04405-HSG (N.D. Cal.).

[16] Case No. 1:18-cv-00666-MN (D. Del.).