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IP Alert | Two Years In: How COVID-19 Continues to Impact IP Litigation

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Two years ago, COVID-19 shut downs were just beginning in the United States. Litigation cases ground to a halt as courts, judges, parties, and attorneys developed new procedures to adjust to a rapidly changing world. Intellectual property (IP) litigations eventually resumed and even continued throughout the pandemic, but the landscape changed and continues to do so. Court restrictions have come and gone in waves, generally tracking the surges in COVID-19 cases. Remote proceedings arrived, and at least some are sticking around. IP attorneys and litigants, used to analyzing and understanding innovation and technology, are having to innovate and adapt on the fly in a changing litigation environment.

As we pass the two-year anniversary of the initial COVID-19 shutdowns in the United States, we revisit the various federal court and IP litigation reactions from the beginning of the COVID-19 pandemic and through its many waves. We look at the resulting trends and changes to see what the future might hold for IP litigation. One thing, however, is certain: as we said back in April 2020, "flexibility remains key."

Early COVID-19 Pandemic Restrictions and IP Litigation Impact

In April 2020, we provided an initial review of how federal courts and judges were adjusting to the unprecedented COVID-19 pandemic.[1] At the time, federal courts were varied in their exact responses. But almost all federal courts began limiting in-person proceedings, applying measures such as: restricting access to courthouses and clerks' offices; continuing trials; cancelling or postponing hearings or other events; permitting telephonic or videoconference attendance; and extending some or all deadlines.[2] For example, the U.S. Supreme Court postponed oral arguments until May 2020, at which point arguments started being held remotely.[3] And the Federal Circuit also began holding arguments by telephone in April 2020.[4]

A month later, we provided an update as it became clear the pandemic—and its impact on IP litigation—would last longer than initially expected.[5] At the time, most in-person proceedings were restricted, but federal courts began to plan for and hold remote bench trials and other hearings.[6] Further, courts and judges began to openly discuss new procedures for all court operations and litigation procedures going forward.[7]

Courts continued these reopening discussions in the summer of 2020, and a COVID-19 Judiciary Task Force—composed of federal trial judges, court executives, and representatives from the federal defender community and Department of Justice—issued a comprehensive report on guidelines to consider for conducting safe jury trials.[8] These guidelines included recommendations for personal protective equipment, communications with and questionnaires for prospective jurors, access to and paths of travel in courthouses and courtrooms, seating considerations, and many, many other potential measures and restrictions.[9] Using a variety of different safety restrictions, some courts felt comfortable enough to begin in-person jury trials. For example, Judge B. Lynn Winmill held a trial in the District of Idaho in June 2020 and required everyone in the courtroom to wear a mask except for the attorney at the lectern and the witness on the stand, although both the lectern and stand were surrounded by plexiglass.[10] Other safety measures included spreading out the jurors, increasing air circulation, cleaning the surfaces during every break, and using an old law library for breaks where jurors could stay 20 feet apart.[11]

Around the same time, Chief District Judge Barbara Lynn held a trial in the Northern District of Texas that included COVID-19 specific questions on mailed voir dire forms to protect high risk individuals.[12] During the trial, jurors were spread out and plexiglass was placed between the jurors, lawyers, defendant, and witness.[13] Everyone wore face masks and gloves except for the testifying witness.[14]

But just as federal courts were opening back up, they began reversing course as COVID-19 cases climbed. For example, in late June 2020 and after holding the jury trial discussed above, Judge Lynn, along with other Texas federal courts, pushed jury trials until at least late July.[15] By mid-July, numerous courts around the country issued orders extending courthouse closures and postponing jury trials until the fall.[16] And throughout the fall and into the winter, many federal courts continued to scale back many in-person proceedings by, among other things, encouraging remote proceedings.[17]

Federal Court Reactions to the Surge in the Winter of 2020 and Dissipation in the Spring of 2021

As COVID-19 cases surged in the winter of 2020, federal courts began addressing the backlog of cases caused by the initial shutdowns by becoming more comfortable with remote technology. For example, the Western District of Washington, Middle District of Florida, and District of Minnesota all held remote civil jury trials by videoconference.[18] Meanwhile, courts such as the District of Massachusetts held bench trials.[19] Others like the District

of Connecticut took a mixed approach, selecting jury members in a civil case remotely but holding the trial in-person.[20] Although there was a learning curve, judges reported a number of benefits provided by remote proceedings, e.g.: the convenience of not having to travel, built-in translation functionality, judges and jurors being able to view exhibits and witnesses' faces up close, and the potential for more diverse jury pools.[21] After gaining some experience with remote hearings, judges also began offering tips to hold them successfully. For example, Judge Alan Albright of the Western District of Texas—who had been holding all hearings remotely at the time—emphasized that lawyers should continue to focus on professionalism when conducting oral arguments and judges should allow pauses after strong arguments to allow the other side to respond, especially for junior lawyers who may be more cautious to interject during a remote proceeding.[22]

As the COVID-19 case numbers began dropping in the late spring and summer of 2021, federal courts optimistically began holding more in-person proceedings. But they were still navigating which precautions were necessary, especially as COVID-19 vaccinations became available. Initial hurdles included determining whether vaccinations could or should be required of jurors or staff and which safety precautions should be taken for those vaccinated.[23] Ultimately, different courts required different measures. For example, jurors in the District of Minnesota were still separated by plexiglass in the jury box.[24] Jurors in the Southern District of Ohio were also separated by plexiglass but also provided a sealed plastic bag with a mask, gloves, hand sanitizer, writing pad, and pen.[25] In the courtroom, jurors in Northern District of Illinois were required to wear masks, while staff and litigants in non-jury proceedings were required to wear masks unless the judge allowed them to remove the mask upon verification that the individual is fully vaccinated.[26] The court also required potential jurors to submit for saliva-based COVID-19 testing, empaneled jurors to test twice a week, and any other participants in a hearing or trial that exceeded two days to submit to testing or participate remotely.[27]

The Delta and Omicron Surges

But the surge in cases caused by the COVID-19 Delta variant scuttled the optimism of the late spring and early summer of 2021. Courts re-imposed additional layers of restrictions, for example: both the District of Utah and the District of Nevada required everyone entering the courthouse to wear a face mask, regardless of vaccination status[28]; the Eleventh Circuit Court of Appeals required everyone entering the courthouse to attest that they were fully vaccinated or, if not, to submit a negative COVID-19 test, wear a mask, and maintain six feet of distance[29]; and the Seventh Circuit Court of Appeals required all lawyers appearing for in-person arguments to be fully vaccinated, while the unvaccinated argued remotely[30]. Other courts, including the Fourth Circuit and Ninth Circuit Courts of Appeals, held off restarting in-person oral arguments altogether.[31]

As cases caused by the Delta variant began to subside, cases caused by the Omicron variant started to surge in late 2021. Due to the intensity of the Omicron surge, and perhaps the unfortunate timing of that surge corresponding with school winter break and the holiday season, appeals courts—including the Federal Circuit,[32] First Circuit, Second Circuit, and Seventh Circuit[33]—ordered remote oral arguments through at least January 2022. Many district courts followed suit by postponing jury trials through January 2022, including, e.g, the Central District of California,[34] District of Connecticut,[35] District of Columbia,[36] District of New Jersey,[37] and District of Maryland[38].

Other courts stayed open during the Omicron surge but increased their safety precautions. For example, the Southern District of New York required people to wear a N95 or KN95 mask, increased the size of the jury box, and added plexiglass booths for testifying witnesses.[39] The District of Minnesota only scheduled trials that lasted a day or two.[40] And federal courts scrambled to collected COVID-19 rapid-testing kits to help protect both the staff and public.[41]

IP Litigation Going Forward

As the Omicron surge subsides and courts begin holding more in-person proceedings, flexibility remains as important as it was at the beginning of the pandemic. More variants and surges are likely, and based on the last two years, restrictions may ebb and flow with the surges, with courts continuing to differ in their specific approaches.

However, remote litigation has proven viable and is likely here to stay in some form. In the past two years, court proceedings such as scheduling conferences, status conferences, and other hearings for discovery or other motions successfully went remote. Depositions, mediations, and arbitrations were also remotely conducted. To a lesser extent, trials, claim construction hearings, and dispositive hearings were held over videoconferences, but these proceedings are more likely to be returning to in-person or at least a hybrid model as the pandemic subsides. And as we saw during the recent Omicron surge, courts are also likely to be more open to only short temporary pauses of in-person proceedings in response to peak surges in case numbers compared to the longer pause at the beginning of the pandemic shutdowns two years ago.

Given these new litigation tools, a litigation strategy should now include when to rely on remote or in-person proceedings. For example, IP litigants may decide to use remote proceedings for more run-of-the-mill witnesses or proceedings (e.g., scheduling conferences, status hearings) and reserve in-person appearances for key witnesses (e.g., inventors, key executives, confusion experts) or key aspects of certain proceedings (e.g., claim construction, technology tutorials, summary judgment hearings, trial). A good strategy will help minimize litigation costs while not losing the potential benefits of in-person hearings, such as using physical exhibits side by side to showcase infringing products, prior art, or alternatives and reading the body language of the judge and/or jury.

Overall, the remote litigation practices ushered in by the pandemic are creating efficiencies in and removing barriers to litigation, while simultaneously introducing a host of new considerations. For example, it will be important to clarify the locations of all parties (witnesses, attorneys, etc.). This will confirm, for example, where the deposition "takes place" for oath and other purposes. In addition, a party's location for remote deposition may be

problematic if, for example, a country's law forbids it. For remote depositions and hearings, it will also be important to verify a reliable video feed and internet connection. During remote proceedings, consider video settings and background, lighting, sound quality, and angles. Similarly, the type of exhibits or demonstratives may be different remotely than in-person, and parties should master the logistics of presenting and using exhibits and sharing screens.

Another lasting impact of the pandemic is the backlog of cases, including IP cases. With the initial pause of litigation and in-person proceedings in early 2020 being longer than expected and the resulting disruptions caused by each subsequent surge and wave of restrictions, it will take some time to sort through the backlog. For now, IP litigants should continue to expect longer decision and time-to-trial times as courts catch up. But over time, remote options may help streamline schedules, and litigants may also see courts press parties to streamline cases to try to push schedules forward at a faster pace.

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[2] Id.

[3] See, e.g., United States Supreme Court Mar. 16, 2020 Press Release, available at https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_03-16-20 (postponing March 2020 oral arguments); United States Supreme Court Apr. 3, 2020 Press Release, available at https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_04-03-20 (postponing April 2020 oral arguments); United States Supreme Court Apr, 13, 2020 Press Release, available at https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_04-13-20 (hearing May 2020 oral arguments by telephone for "a limited number of previously postponed cases").

[4] "Litigating Intellectual Property Cases During the COVID-19 Pandemic," (Apr. 2020), available at https://bannerwitcoff.com/wp-content/uploads/2020/05/UPDATED-IP-Alert-Litigating-Intellectual-Property-Cases-During-the-COVID-19-Pandemic.pdf (original article on page 2).

[5] "Updated: Litigating Intellectual Property Cases During the COVID-19 Pandemic," (May 20, 2020), available at https://bannerwitcoff.com/wp-content/uploads/2020/05/UPDATED-IP-Alert-Litigating-Intellectual-Property-Cases-During-the-COVID-19-Pandemic.pdf.

[6] Id. at fns. i-iv, vi, vii, ix-xi, xiv.

[7] Id. at fns. xii, xv.

[8] "Conducting Jury Trials and Convening Grand Juries During the Pandemic," (Jun. 4, 2020), available at https://www.uscourts.gov/sites/default/files/combined_jury_trial_post_covid_doc_6.10.20.pdf.

[9] Id.

[10] "Socially Distant Jury Trial in Boise Was Likely One of the First of its Kind," (Jun. 10, 2020), available at https://www.idahopress.com/news/covid-19/socially-distant-jury-trial-in-boise-was-likely-one-of-the-first-of-its-kind/article_4e9a75df-4794-5f64-86d8-c06c4826f77d.html.

[11] Id.

[12] "First Post-COVID-19 Shutdown Jury Trial Underway in Dallas Federal Court," (Jun. 3, 2020), available at https://www.bizjournals.com/dallas/news/2020/06/03/post-covid-jury-trial.html.

[13] Id.

[14] Id.

[15] "Texas Courts Re-Closing Amid COVID-19 Spike," (Jun. 29, 2020), available at https://www.law360.com/articles/1287555/texas-courts-re-closing-amid-covid-19-spike.

[16] "Some Courts Slow Reopening Plans as COVID Cases Rise," (Jul. 16, 2020), available at https://www.uscourts.gov/news/2020/07/16/some-courts-slow-reopening-plans-covid-cases-rise.

[17] "Courts Suspending Jury Trial as COVID-19 Cases Surge," (Nov. 20, 2020), available at https://www.uscourts.gov/news/2020/11/20/courts-suspending-jury-trials-covid-19-cases-surge.

[18] "As Pandemic Lingers, Courts Lean Into Virtual Technology," (Feb. 18, 2020), available at https://www.uscourts.gov/news/2021/02/18/pandemic-lingers-courts-lean-virtual-technology.

[19] Id.

[20] Id.

[21] Id.

[22] “Oral Advocacy Insights from Federal Circuit Judge Moore and WDTX Judge Albright,” (Apr. 15, 2021), available at https://nextgenlawyers.com/2021/04/15/oral-advocacy-insights-from-federal-circuit-judge-moore-and-wdtx-judge-albright/.

[23] “As COVID-19 Cases Fall, Juries Get Back to Work,” (May 27, 2021), available at https://www.uscourts.gov/news/2021/05/27/covid-19-cases-fall-juries-get-back-work.

[24] Id.

[25] Id.

[26] In re: Coronavirus COVID-19 Public Emergency Order Concerning Face Masks/Coverings in Public Areas of Courthouses, Amended Order (ND. Ill. May 26, 2021), available at https://www.ilnd.uscourts.gov/_assets/_documents/_forms/_clerksoffice/rules/admin/pdf-orders/CA7%20%20NDIL%20Order%20Amending%20Face%20Coverings%20Signed.pdf

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