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OCT 14 2020

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WESTERN DISTRICT OF TEXAS  
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**THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TEXAS**

**NINTH SUPPLEMENTAL ORDER REGARDING  
COURT OPERATIONS UNDER THE EXIGENT CIRCUMSTANCES  
CREATED BY THE COVID-19 PANDEMIC**

This Order is being issued in response to the continued outbreak of novel coronavirus in the United States and the State of Texas. The World Health Organization has declared that COVID-19 qualifies as a global pandemic, having spread across no less than 120 countries with more than 7,787,000 confirmed cases in the United States, as of October 13, 2020 according to the Centers for Disease Control (CDC). The United States District Court for the Western District of Texas has been closely monitoring the outbreak of novel coronavirus (which causes the disease designated as COVID-19), including careful monitoring of the developing guidance from the CDC. The CDC has described the outbreak in the United States as a "rapidly evolving situation" and is providing continuously updated guidance as to the appropriate community response to COVID-19 as conditions worsen. The State of Texas has seen an increase in COVID-19 cases from 63 on March 15, 2020, to 795,000 as of October 13, 2020. The CDC's guidance includes multiple types of migration strategies generally aimed at reducing or avoiding exposure to infected individuals.

As of the date of this Order, there have been thousands of confirmed cases of coronavirus within the Western District of Texas. The State of Texas has made a disaster declaration in response. The CDC and other public health entities have recommended social distancing as a means to limit further community spread of COVID-19. The Court is concerned with the health and safety of the public, Court employees, staff of other entities with whom Court personnel interact, litigants, including defendants in criminal matters, counsel, interpreters, law enforcement officials, and jurors, who must work in close quarters to hear evidence and to deliberate.

Therefore, given the continued severity of the risk to the persons listed above by the spread of COVID-19 in the Western District of Texas, and taking into consideration matters of public health, while reducing the size of public gatherings and the need for travel, the Court orders as follows:

1. All civil and criminal jury trials scheduled to begin on any date from now through November 30, 2020, are continued to a date to be reset by each Presiding Judge. Civil and criminal bench trials may proceed provided all safety provisions are considered. Attorneys should contact the Presiding Judges in the continued cases if they seek to modify any pretrial deadlines.
2. Due to the Court's reduced ability to obtain an adequate spectrum of jurors and due to the reduced availability of attorneys and Court staff to be present in courtrooms because of the public health considerations described above, the time period of the continuances implemented by this Order are excluded under the Speedy Trial Act, 18 U.S.C. § 3161(h)(7)(A). The Court finds that the ends of justice served by ordering

**NTT EX2003  
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IPR2020-1404**

these continuances outweigh the best interests of the public and each defendant's right to a speedy trial. In fact, the best interests of the public are served by these continuances.

3. The court recognizes that not every division within the district is similarly situated. The Western District of Texas is geographically large and encompasses approximately 93,000 square miles and 68 counties with many counties far more populous than others. The public health situation related to the novel coronavirus in each division may differ and judges in individual divisions may determine that the conditions in their communities safely allow for an adequate spectrum of jurors and sufficient availability of attorneys. Accordingly, courts in the district may opt to conduct jury trials within their respective division subject to a determination, based upon the facts and circumstance unique to the division, that conducting jury trials would not compromise the health and safety of Court personnel, litigants, counsel, law enforcement, witnesses and jurors. If judges in a specific division determine jury trials can be safely conducted, the most senior district judge within the relevant division may enter an order making those findings and resuming jury trials for the division despite this order and with notice to the Chief Judge.

Grand Juries will continue in every division as determined and scheduled by the United States Attorney's Office.

4. Judges may continue to hold in-person hearings, sentencing proceedings, and conferences, but counsel may seek relief from those matters by appropriate motions. The parties are encouraged to participate in sentencing hearings, detention hearings, and pleas and civil or criminal motion hearings and conferences by telephone or video. This Order does not impact any court's consideration of particular matters on the pleadings alone.
5. Magistrate Judges will continue to preside over criminal matters, such as initial appearances, arraignments, detention hearings, pleas, and the issuance of warrants. The use of video or telephone for these matters is encouraged.
6. Any events involving the Court that are not case-specific, including, but not limited to, continuing legal education courses, public tours, and administration of oaths to attorneys which are scheduled to occur between now and November 30, 2020, are hereby cancelled and will be rescheduled as appropriate. Naturalization ceremonies may be convened if appropriate social distancing measures can be ensured.
7. All of the courthouses of the Western District of Texas will remain open for business subject to any restrictions imposed by a judge or judges in each division. However, many employees, including some of chambers staff, will be teleworking, but they will be accessible by phone. Electronic filings may continue to be made through the CM/ECF system.
8. Any delivery directed to chambers shall be delivered instead to the Clerk's offices in each courthouse.

9. Unless vacated, modified, or extended, this Order will remain in effect through November 30, 2020, and will then expire.

**FOR THE COURT.**

So **ORDERED** and **SIGNED** this 14 day of October, 2020.



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**ORLANDO L. GARCIA**  
Chief United States District Judge

## C&C Insights

# Texas Patent Judges Diverge on Covid-19 Trial Protocols

📅 October 19, 2020    👤 by Carstens & Cahoon LLP (<https://cclaw.com/author/cclaw/>)

This is a summary of the full article (<https://www.law360.com/articles/1318390/texas-patent-judges-diverge-on-pandemic-trial-protocols>) written by Katie Buehler and published on Law360.

As America starts to open to face-to-face work, both offices and courthouses are continually adjusting to the safety precautions put in place by the government. This is particularly true for two of the most pronounced patent judges in the country: U.S. District Judge Rodney Gilstrap of the Eastern District in Marshall, Texas, and U.S. District Judge Alan D. Albright of the Western District in Waco, Texas. As in-person jury trials resume in Texas, the two judges have contrasting preferences on Covid-19 safety precautions, particularly when it comes to face-covering procedures and scheduling flexibility.



### Face-Covering Precautions

Both judges require everyone in the gallery and anyone in the well that is not sitting at the counsel tables to wear masks; however, they differ in face mask requirements for active trial participants.

Judge Gilstrap believes it is important to see facial expression during a trial, so he asks empaneled jurors and attorneys sitting at counsel tables to wear face shields

only. He explains that face shields “allow for a full view of the lawyers’ and jurors’ faces and expressions while providing substantial protection from projection of breath droplets.”

According to Law360, Judge Gilstrap’s current policy allows attorneys at counsel tables to wear face masks but requires them to remove their masks when speaking at the podium. He added that jurors are given the option to wear face masks if they feel they need to. Before Judge Gilstrap, potential jurors were required to wear face masks during voir dire according to a letter the judge sends out attached to jury summonses.

Judge Albright gives jurors the option of wearing face masks or face shields, and the attorneys at the counsel tables can choose whether to face coverings at all.

With the most significant difference between the judge’s policies, the question arises, how important is it to see people’s faces during a trial? According to Jason Bloom, a jury selection consultant, face masks did make it harder to read

expressions and build a rapport with jurors. However, after a few trials, he felt the juror strikes were no different with the addition of face masks.

### Scheduling Flexibility

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The outbreak of Coronavirus prompted attorneys to seek delays for the trials with both judges. The main concerns that arise are about witnesses not being able to attend trials in person, especially those overseas. Some also argued that public health risks were too high.

Judge Gilstrap held his first trial in August over 4G LTE technology between Optis Wireless Technology LLC and Apple Inc (<https://www.law360.com/companies/apple-inc>). In July, Apple had attempted to push the trial to October but was denied by Judge Gilstrap. The judge said keeping the trial date was the "better choice" and that calling it off would cause "lengthy, protracted delay, which will simply guarantee material prejudice to all parties." Many safety precautions were taken during the trial, including the implementation of plexiglass walls, hand sanitizer, and cautionary temperature checks. Optis received a \$506 million jury verdict (<https://www.law360.com/ip/articles/1300409/texas-jury-says-apple-owes-506m-over-4g-lte-patents>) in the case and deemed the trial worth the risk. The court's precautions made them feel safe, and there have been no reported Covid-19 cases among the attorneys or jurors. Apple's trial has since been cited by parties that want to keep scheduled trial dates.

"This process is a balance between the rights of the parties to secure a fair trial to resolve their disputes and the needs of citizens, counsel and court staff to function in a safe environment," Judge Gilstrap said. "This balance is challenging but necessary. It is both art and science, and there is always room for improvement."

With the extra Covid-19 precautions, trials take longer than they did before. For these reasons, Judge Gilstrap has limited the number of trials he sets per month to one.

Judge Albright agreed four times to postpone the recent trial between Roku Inc (<https://www.law360.com/companies/roku-inc>). and MV3 Partners LLC over Roku TV products, which eventually started in early October and included additional precautions such as social distancing in the gallery.

His coronavirus precautions start with a contact-tracing form that must be filled out ahead of time by every person entering his courtroom. Safety measures were also put into place within his courtroom including hand sanitizer, air purifiers, and plexiglass walls around the witness stand with cleanings between each witness' testimony.

Judge Albright and Judge Gilstrap have both restricted the number of attorneys allowed at counsel tables to three apiece. They have also banned bench conferences, telling attorneys to bring up potential issues during breaks outside the jury's presence.

Overall, the two judges have gone to great lengths to ensure trials are held in a safe and fair manner during this pandemic.

◀ (<https://cclaw.com/2020/10/08/missed-the-deadline-for-apple-to-appeal-judge-gilstrap-verdict/>) ▶ (<https://cclaw.com/2020/10/19/now-patented-verdict-against-apple/>)

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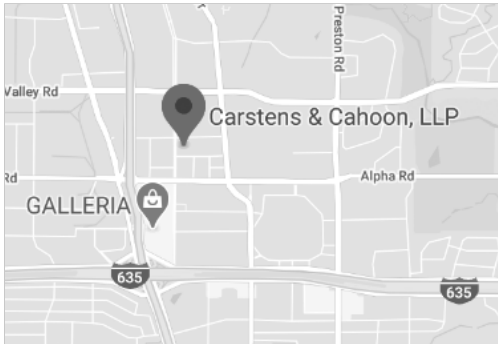
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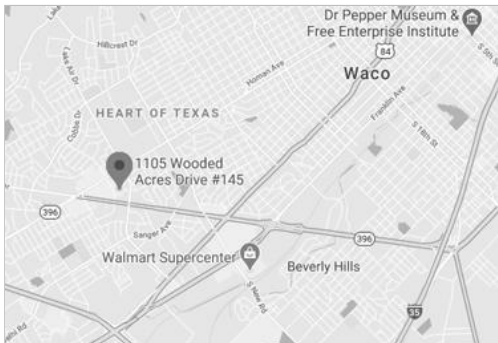
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