

Personal Injury and Insurance

Despite COVID's sudden upset in operations, these Best Lawyers-recognized attorneys have powered through

AVERY MARTINEZ
LAW WEEK COLORADO

The legal world of personal injury and insurance law has experienced a shift over the past few months. With the onset of COVID-19, a unique set of challenges presented themselves to attorneys and firms.

Holly Kammerer, a shareholder at Burg Simpson recognized by Best Lawyers as a Lawyer of the Year for personal injury litigation – plaintiffs, said the biggest impact from COVID on plaintiff person injury case prosecution is the slowdown in cases and the almost “standstill” which has come from COVID-19.

For injured clients, it is always important to seek resolution as quickly as possible, Kammerer said. However, with the pandemic, cases are dragging along slowly due to complications with negotiation and lack of pressure due to the stop of in-person

trials in nearly every jurisdiction.

“Trials are coming to a stop – that’s our leverage we have as plaintiff’s personal injury lawyers against the insurance companies and large corporations – and if they don’t have that looming, they’re really less interested in negotiating in good faith with a client because they don’t feel the pain,” Kammerer said.

Injured clients could be facing loss of homes or jobs, and in some cases both, because of COVID complications, she said. Obtaining medical records or other documents has been met with what Kammerer calls “the COVID excuse,” which includes situations of reduced staff leading to longer waits to receive documents, under subpoena or not. This situation can also draw out prosecution. In Kammerer’s view, remote depositions and settlement conferences aren’t as effective either.

But COVID itself can cause some difficulties. Kammerer added that

one of her deponents called to inform her a half-hour before deposition he would be unable to appear because he had COVID.

She added that many clients have more time now to follow-up on their cases, and the interest in the cases, are heightened as well.

Lance Eberhart, member at Hall & Evans recognized by Best Lawyers for personal injury litigation – defendants, said the substantial interruption of COVID-19 led to adapting and changing “on the fly.”

Eberhart gave credit to the courts for the ability of cases to move along in spite of the pause caused by COVID. He feels that as quickly as there was a realization there was a challenge caused by COVID, people were working on solutions.

Despite the sudden stop of depositions by COVID, online depositions had begun again within weeks. Eberhart mentioned emails talking about successes with online depositions

and tools and programs that made it easy or simple.

Eberhart feels that the ability to adapt to situations and technology have been the hallmark of the changes by COVID. Not having the personal connection with others in the office and finding effective ways to communicate had initial had growing pains, but now integration and communication in the law firm have resumed at a normal pace.

“We were so used to doing these things, and so used to contact with one another ... adapting to that has been the significant innovation in some ways sort of changing the way you practice,” Eberhart said. “Can you be as effective on a screen in taking a deposition as you are in person?”

Kammerer said that now courts are in the process of reopening, she’s cautiously optimistic to see that and

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HEALTH CARE

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something accelerated and got out of control, and then the care is more expensive.”

Annie McCullough, a partner in Polsinelli’s health care operations practice, has also been working with clients in recent months to set up telehealth operations so they are compliant with HIPAA, Medicare reimbursement rules and established standards of care.

Another issue at the forefront of her practice during the pandemic has been hospitals having access to enough providers to meet patient spikes, which has included temporary license expansions and practice priv-

ileges allowing providers to provide care at different hospitals.

Colleen Faddick, who chairs Polsinelli’s health care operations practice, said legal issues associated with testing for COVID-19 have become a significant part of her day-to-day practice, such as who and which facilities can provide tests.

“All of that changes as the technology of testing changes,” she said. For example, states expanded who could be authorized to provide testing using the long nasal swabs, and soon after testing methods also included much smaller swabs easy for people to do themselves and antibody tests.

The federal government’s dictation of who can perform COVID-19 tests when states may already have their own

regulations has prompted “some discussion about whether the federal government has tried to take power from the states inappropriately, which is a nice law school exam question, but practically the question is, should we do it anyway?” Faddick said. “Should we go ahead and act under the federal guidance knowing that the state disagrees? So that becomes your practical question.”

Victoria Lovato, senior counsel at Michael Best who’s also among this year’s Best Lawyers honorees, is a rare health care attorney whose day-to-day practice hasn’t been seismically changed by the pandemic. She focuses on representing health care license holders.

Although the laws at the core of her practice haven’t fundamentally

changed because of COVID-19, she said the pandemic’s pronounced mental health ramifications for providers impacts licensing because mental health can reflect on their fitness to practice. Even in non-COVID times, it’s not uncommon for licensure cases to involve physicians struggling with mental health or substance use, she said.

“I think physicians and lawyers are two of the professions where there’s a lot of burnout and people who aren’t cognizant of their own well-being,” Lovato said.

“It’s always important for me that my physicians are getting the best care possible and are taking care of themselves so they’re safe to practice medicine.” •

—Julia Cardì, JCardì@circuitmedia.com

PERSONAL INJURY

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trials are starting once again to help with the slowdown caused by COVID.

“It’s going to be really a lot different with masks, plexiglass — are the jurors even going to be focused?” Kammerer wondered and expressed concern that jurors would be distracted to some extent by their necessity to be physically in court and around other people.

Protecting everyone’s health, es-

pecially the jurors, was something that Eberhart was concerned about. He wondered how to handle the possibility of getting people sick for performing their civic duties.

“Getting back to trial — I know everyone’s anxious to do it and get things moving along, but it does continue to pose some risk,” Eberhart said, adding perhaps the effectiveness of an attorney in court could be impacted by health requirements — such as masks covering faces or the “awkwardness” of protocols.

He wondered how the credibility of witnesses would be affected by the inability to see a face behind the mask.

Bradley Levin, a shareholder of Levin Sitcoff and recognized as a Lawyer of the Year for litigation — insurance, said one case was slated for trial to take place on Aug. 3. This trial was pushed back to that date on the assumption things would return to normal. The date of the trial was the first day after Chief Justice Nathan Coats’s order on courts expired. This

case in Denver District Court was going to be one of the first in person.

The timetable for the trial moved along, and the judge had discussed protocols on how the jury was going to be selected, wearing masks, face shield and how the trial would be operated.

Levin said adding a limited panel to pool the jurors from was set to take place. Another case he knew of had been continued until next August, on the first date that the court had available for civil trials.

The case was settled just a few

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business days before the trial was to start, but Levin felt it was indicative of the challenge presented of getting a case to trial.

He added his firm was facing the same challenges that many civil cases are facing, and mentioned he heard of a case going to be held completely virtually – which could create its own challenges.

Jeremy Sitcoff, a shareholder at Levin Sitcoff recognized by Best Law-

yers for insurance law and litigation – insurance, said there is another case set to be heard in December. A judge said in a status conference that he did not want to vacate the trial – others vacated around March were vacated to spring of 2021 and he couldn't give a good landing spot.

Despite the unique situations COVID has created, Kammerer said that client contact and communication has stayed a focus in her firm. While it

may be done via the phone or through a video platform, the same level of service and dedication has continued throughout COVID.

Kammerer said in her personal practice she felt like her productivity had remained high throughout COVID, and that more time had been devoted to work because of the lack of commutes by working from home.

Eberhart felt that moving forward, some technology and ability to com-

municate effectively through video platforms, would be used. For the purposes of personal injury litigation, the ability to take the deposition of a person in another state without having to travel there would continue to be present.

Levin felt a sense of optimism for the stability of the work and that his firm will continue to work for clients through whatever the future may hold. •

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COURT OPINIONS

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cesses for “[i]nclusion of territory” within the boundaries of a special district. Therefore, section 32-1-401(1)(a) requires the assent of all surface property owners to an inclusion under that provision, and inclusion is only appropriate if the surface property can be served by the district. Section 32-1-401(1)(a) does not require assent from owners of subsurface mineral estates because those mineral estates, while they are real property, are not territory.

The court affirmed the holding of the Colorado Court of Appeals, albeit on other grounds.

People v. Rigsby

A jury found Derek Rigsby guilty of

two counts of second-degree assault and one count of third-degree assault based on the same criminal conduct. On appeal, a division of the Colorado Court of Appeals concluded the guilty verdicts for second-degree assault and the guilty verdict for third-degree assault were mutually exclusive. The division reasoned that the guilty verdicts could not be reconciled because the second-degree assault convictions required the jury to find that the defendant acted intentionally and recklessly and was thus aware of the risk of bodily injury, while the third-degree assault conviction required the jury to find that the defendant acted with criminal negligence and was thus unaware of the risk of bodily injury. Therefore, the division vacated the judgment of conviction and remanded for a new trial.

The Colorado Supreme Court reversed the division’s judgment. Section 18-1-503(3), C.R.S. (2019), sets up a hierarchical system of culpable mental states in which: “intentionally” or “with intent” is the most culpable, “knowingly” is the next most culpable, “recklessly” is the next most culpable, and “criminal negligence” is the least culpable; and proving a culpable mental state necessarily establishes any lesser culpable mental state(s). Pursuant to section 18-1-503(3), then, by returning a guilty verdict on count 1 and finding that Rigsby acted with intent, the jury, as a matter of law, necessarily found that he acted with criminal negligence, and by returning a guilty verdict on count 2 and finding that Rigsby acted recklessly, the jury, as a matter of law, neces-

sarily found that he acted with criminal negligence.

Hence, even if each of the guilty verdicts for second-degree assault is logically inconsistent with the guilty verdict for third-degree assault, no legal inconsistency exists. And guilty verdicts that are legally consistent are not mutually exclusive. Despite finding guilty verdicts are not mutually exclusive, the Supreme Court held the trial court entered multiplicitous convictions, thereby violating the defendant’s right to be free from double jeopardy.

Accordingly, the Supreme Court remanded to the Court of Appeals with instructions to return the case to the trial court to merge the convictions into a single second-degree assault conviction and to leave in place only one sentence. •



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