

Hour-by-Hour Regulatory Changes for Health Care Attorneys

This year's Best Lawyers practitioners have had to adapt to changes in everything from authorized testers to telehealth billing

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Health care law encompasses the gamut from regulatory compliance advisory work to litigation, meaning the pandemic has affected health care attorneys' practices differently. This year's Best Lawyers list includes health care attorneys who specialize in all types of law governing the industry.

Erin Eiselein, a shareholder at Brownstein Hyatt Farber Schreck, whose clients include hospitals, providers and large medical groups, said billing for telehealth services has been a significant point of change during the pandemic.

Before the pandemic, for example, physicians couldn't bill for physical therapy provided remotely. A temporary waiver because of the pandemic allowed doctors to provide physical therapy services using telemedicine, but the waiver was amended soon after its issuance to say it only applied to medical doctors — and then amended again to apply to providers across the board.

Providers understanding how to correctly comply with the sudden changes is important, Eiselein said, because incorrectly billing for medical services can result in fraud charges.

"The law was changing practical-hour by hour," she said. "It was so

difficult to stay on top of all that [and] have that trust with clients that you're getting them correct information. ... It kept us on our toes, to say the least."

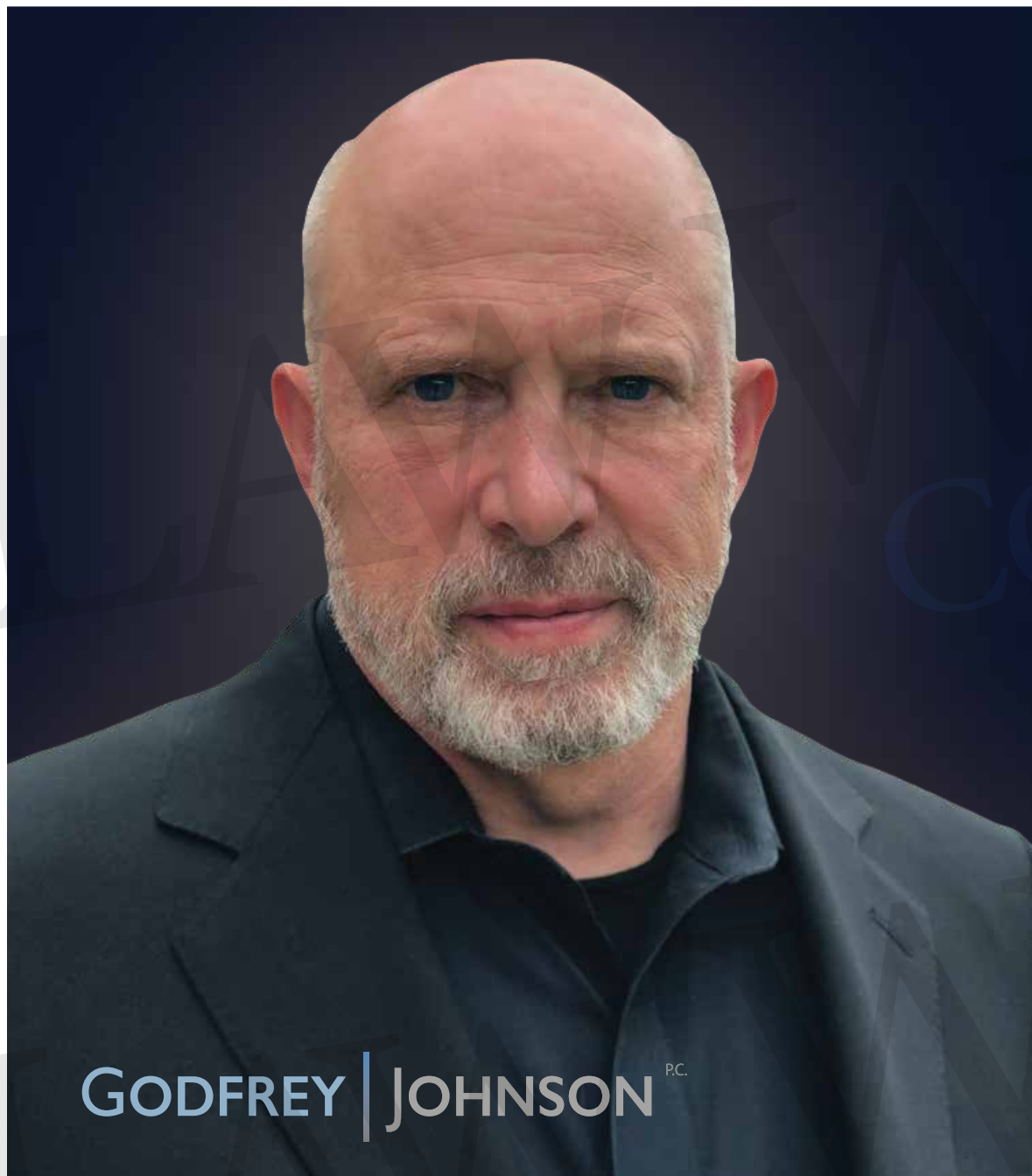
Brownstein shareholder Mike King added health care attorneys have to strike a balance between bringing their clients' attention to aspects of projects and transactions that could carry risk of civil or criminal liability and coming across as overly worried about their clients' liability exposure to the point that they sound like they are crying wolf.

He said the Centers for Medicare and Medicaid Services have concerns about making some shifts to telemedicine in response to the pandemic per-

manent fixtures of health care. King said the concerns stem from worries that too much convenience in accessing health care providers could lead to overuse of health care and overstretched budgets. But he said in his personal opinion, that thinking overlooks potential cost savings and health benefits that come from providing preventative care through telemedicine.

"Theoretically, [with] more front-end, proactive consumption of health care because it's easier to access, my personal opinion is that folks are healthier," King said. "And you have fewer catastrophic scenarios where

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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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