



### Special Otten Johnson Alert: Coping with Crisis and Thinking About the Future (From Our Home Offices)

*As our communities, nation, and world reel from the impact of the COVID-19 public health crisis, Otten Johnson extends our sincere gratitude to all of the health care providers, first responders, public health leaders, and others who are serving those who are sick and at risk. Since we are business lawyers without the skills or expertise to provide medical care, our contributions to resolving this crisis are largely relegated to working from home to avoid spreading disease and offering financial contributions to worthy organizations supporting our community. But because we cannot help but think of this crisis through the lens of our land use, real estate, and business practices, we are bringing our clients and friends this series of alerts, exploring how the current pandemic affects our work, what we're learning from it, and what the future holds.*

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## Part 4 – What's Going On With The Courts?

April 1, 2020 • [Bill Kyriagis](#)

Part 4 of our series takes a brief break from the world of land use and real estate law to look at how our judicial system is coping with the pandemic. As you'll see, while our courts have slowed dramatically, the world of land use, real estate, and business litigation marches onward. Today's alert discusses how COVID-19 is impacting litigation and courts in Colorado.

### Remote Litigation

While much legal practice can be handled remotely, litigation continues to involve many activities that require in-person interactions. Most civil litigators spend a relatively small amount of their time in courtrooms, as trials and other evidentiary hearings are the only things requiring in-person appearances. Other court appearances are conducted telephonically.

As the vast majority of civil cases settle or are otherwise resolved before trial, most civil litigation can be handled remotely during a time of social distancing. Firms are continuing to make court filings electronically, and judges are issuing orders electronically, as they have for

years. Certain elements of cases are thus proceeding, with most lawyers, law firm staff (including ours), and court staff now working remotely.

Nonetheless, the elements of civil litigation that have thus far required physical, in-person interaction are important. In addition to evidentiary hearings and other courtroom appearances, service of process rules require physical person-to-person interaction in most contexts. With offices not staffed, plaintiffs may have trouble locating and serving registered agents and other defendants to start new lawsuits. Depositions are usually conducted in person, but for now, most are being continued, although it is certainly possible to take depositions remotely. Social distancing requirements associated with COVID-19 will thus impact everything from the commencement of cases, to discovery, to trials. This is creating unprecedented challenges for the bench and the bar.

### Colorado Court Status Update

Federal and state courts in Colorado have issued orders limiting or restricting in-person appearances. A summary of these is as follows:

- The Federal District Court has continued (postponed) all in-person appearances through May 1, 2020.
- The Tenth Circuit Court of Appeals canceled all in-person oral arguments for April and May 2020, and provided that those cases will be decided on the briefs without argument, argued telephonically, or have their arguments reset for a later date. Briefing for cases is continuing, with briefs submitted electronically.
- The Chief Justice of the Colorado Supreme Court, issued an order on March 16, 2020 suspending all jury trials through April 3, except for criminal trials with imminent deadlines. The Court also designated a list of proceedings relating to protecting constitutional rights, and safety and wellbeing, which were designated as essential, and which courts are prohibited from suspending. However, these are generally not relevant in the commercial litigation context. For proceedings not on the list and not prohibited, the order leaves the chief judges of the various judicial districts in the state to determine what operations are necessary to prevent a substantial risk of imminent financial hardship or imminent risk to the health, safety or welfare of any individual or the community at large.
- Individual judicial districts have taken different approaches, which can be found on the [Colorado Judicial Branch website](#).

Generally, courts have reduced operations and staffing, and jury trials are suspended beyond April 3, 2020. Other in-person proceedings are continued as well, or must be done by phone. To the extent not specifically covered by a general order, lawyers and judges are resolving issues on a case-by-case basis, with some cases being delayed already, even if trials are set to occur after existing orders expire. These effects could continue long after social distancing restrictions are lifted, as well. It is possible that there will be a backlog of criminal trials and other pressing hearings, which could displace and delay other trials currently set to occur in the summer.

That said, it is common, even in “normal” times for trials to get delayed past their originally

scheduled dates. Discovery typically spans months, and parties are often unable to complete depositions before the original discovery cut-off in a case. Thus, the present delays may not be too unusually disruptive for most cases. Parties can continue to work on written discovery, and motions can be filed and decided.

### **Special Challenges: Evictions, Foreclosures, and Evidentiary Hearings**

The challenges are pronounced in contexts that require expedited evidentiary hearings. For example, evictions typically go to a hearing within 7-14 days after filing. On March 20, 2020, Governor Jared Polis issued an Executive Order directing state agencies to work with property owners and landlords to “identify any lawful measure to avoid removing or executing eviction procedures against tenants . . . without cause or as a result of late or non-payment of rent . . . .” That particular portion of the order does not limit its applicability to residential evictions, but it is not a binding mandate. Section II.B. of the order does direct local law enforcement agencies to take similar actions in generally suspending residential evictions until the end of April. The order also authorizes, but does not require, county Public Trustees to suspend necessary activities of the foreclosure process. Some have done so, but others have not. It also directs state agencies to “identify practices and policies to combat the threat of residential and commercial foreclosures and displacement to individuals and small businesses.” Consistent with the public policy direction from the Governor, it is likely that many eviction and foreclosure proceedings will simply be delayed.

In other contexts, delaying expedited hearings is not always an option. For example, motions for preliminary injunction typically involve evidentiary hearings that occur within days or weeks of filing. By definition, these motions raise issues presenting a risk of immediate irreparable harm.

### **Courtroom Technology**

Technology offers one response to these issues. The use of courtroom telephone or videoconferencing has always been the exception to the rule. Yet if there is a need for an evidentiary hearing to occur during periods of mandatory social distancing, courts may be open to new approaches. Video technology certainly would allow judges, lawyers and witnesses to all appear remotely. The Denver district courts are allowing in-person hearings to be conducted via videoconferencing, with the parties providing the necessary equipment. At least one trial was conducted this way in Denver within the past two weeks, with the judge in the courtroom, and lawyers and witnesses all appearing remotely by video conference.

Videoconferencing may not be appropriate in all cases, and some judges may not be comfortable with the practice. Videoconferencing may also not be appropriate as a solution for jury trials, which will be impossible until social distancing guidelines are relaxed.

However, in a world in which tens of millions of people are now regularly working remotely for the first time, it does not seem unreasonable to expect that the courts can adapt to the challenge and employ videoconferencing as a workaround. This may be the only viable solution in the near-term for urgent matters that require an evidentiary hearing. To the extent that social

distancing requirements continue in place for months, courts and litigants may become open to the idea of completing entire trials remotely.

Whether this forced experiment results in courts being more open generally to remote appearances by counsel or witnesses going forward remains to be seen. Remote appearances save time and money for litigants, but video witness testimony is often inferior to in-person testimony. For hundreds of years, courts have assumed that live, in-person testimony is the best way to evaluate witness credibility. Unreliable technology could also prove disruptive to the course of a trial. For now, though, it may be the only option for courts to carry out their essential functions.



### Bill's Tip

I am fly fishing as much as possible, while making sure to observe social distancing guidelines (which is really pretty easy to do while fly fishing). Fly fishing = Stress Relief.

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