

Legal Ethics, Litigation and the Pandemic

By Carole J. Buckner, Partner and General Counsel, Procopio, Cory, Hargreaves & Savitch, LLP¹

The pandemic is raising some challenging issues regarding dealing with ongoing legal practice when illness may strike the lawyer, the client, or the lawyer's team, impacting litigation. For example, what are the lawyers' ethical obligations, where a case is set for arbitration or trial, and the key client witness becomes ill and cannot testify? What if, on the eve of trial, the key paralegal at the center of a large, complex litigation matter is disabled by illness and cannot participate? Or, what if lawyers at high risk of illness are ordered to participate in a live arbitration, in violation of State statutes prohibiting such a gathering, at the insistence of opposing counsel and the arbitrator? This article discusses a lawyer's ethical obligations in litigation dilemmas arising from the pandemic.

Duties of Competence & Diligence

Lawyers have a duty of competence, and in California, this duty includes not only the obligation to apply the appropriate level of learning and skill to the client's matter, but also requires that the lawyer have the "mental, emotional, and physical ability reasonably necessary for the performance of legal services."² Lawyers who face issues of competency can associate other counsel or refer the matter to another lawyer.³ A supervisory lawyer also has the responsibility to assure that subordinate lawyers and nonlawyers perform in a competent manner.⁴

A lawyer dealing with pandemic-related illness must consider whether the lawyer continues to have the physical and mental capability needed to represent the client in a competent manner. Lawyers dealing with the pandemic-related illness of another person involved in the case must consider whether the lawyers can continue to handle the case in a competent manner, given the circumstances. Where a lawyer becomes ill, or is at high risk of illness, the lawyer must consider alternatives to protect the interests of the client, including seeking the assistance of other colleagues at the same firm, associating in new counsel or as a last resort, withdrawing from representation. The quarantine of a key witness preventing testimony could also require the lawyer to seek a continuance of the matter. The illness of a key member of the team may put the lawyers' competence at risk, such that the lawyer may have to request a continuance in order to take steps to comply with Rule 1.1.

Lawyers also have a duty of diligence requiring that they shall not repeatedly, intentionally, or with gross negligence fail to act with diligence in representing a client.⁵ Reasonable diligence is defined as acting with commitment and dedication to the client's interests, and not neglecting, disregarding or unduly delaying a legal matter. The illness of a lawyer or nonlawyer on the lawyer's legal team may interfere with this duty of diligence, requiring consideration of alternatives, including seeking a continuance, association of other counsel, referral to other counsel and as a last resort, withdrawal from the

¹ The author represents lawyers and law firms, and serves as an expert witness on issues of legal ethics and professional responsibility. The views expressed are solely her own.

² Cal. Rules of Prof. Conduct (CRPC), Rule 1.1(a) and (b).

³ CRPC Rule 1.1(c).

⁴ CRPC, Rules 5.1, 5.2 and 5.3.

⁵ CRPC 1.3.

representation. Lawyers considering continuances should act with professionalism, courtesy and civility and advise clients that refusing to agree to reasonable extensions and continuances is inappropriate.⁶

Duty of Communication

Lawyers are obligated to consult with clients about the means of accomplishing the clients' objective in connection with the representation, and also to keep clients apprised of significant developments related to the representation.⁷ In addition, lawyers must advise clients about any limitations on the lawyer's conduct, in the event that the client expects assistance not permitted by the Rules of Professional Conduct or other law.⁸ Lawyers must provide an explanation of a matter to the extent reasonably necessary for the client to make informed decisions about the client's representation.⁹

The illness of a lawyer or paralegal whose experience and knowledge of the case cannot be replaced readily on the matter requires consultation with the client as well as an explanation of all alternatives available to the client. In some cases, it may suffice to replace the person who is ill with another lawyer or paralegal, while in other situations doing so may be very challenging or even impossible. The unavailability of a key witness due to pandemic related illness requires a detailed explanation of the impact of the absence of the witness on the case, and the related options of continuing the matter, including associated expense.

Compliance with Applicable Law

Lawyers are obligated to support the Constitution and the laws of the United States, and of the State of California.¹⁰ In addition, lawyers cannot counsel clients to engage in or assist clients in conduct that the lawyer knows violates any law or rule.¹¹ On the other hand, lawyers are obligated to obey orders of the court and an arbitrator as well.¹² Laws and regulations concerning the pandemic are constantly shifting and changing with regarding to limitations on gathering. Lawyers have a duty to keep abreast of these changes, and advise their clients regarding the impact of these limitations on ongoing litigation. A lawyer must advise clients that the lawyer cannot insist on gathering live in violation of pandemic-related law. Lawyers ordered to gather in violation of law should seek reconsideration.

Conflicts of Interest

Where the lawyer's personal interests create a significant risk or material limitation on the lawyer's services, a conflict of interest may arise.¹³ A lawyer's personal health concerns may manifest in different ways that are adverse to the interests of those of the client. The lawyer's request for accommodations

⁶ California Attorney Guidelines of Civility and Professionalism, § 6 (2007).

⁷ CRPC, Rule 1.4(b) and (c).

⁸ CRPC, Rule 1.4(d).

⁹ CRPC, Rule 1.4(c).

¹⁰ Cal. Bus. & Prof. Code § 6068(a)

¹¹ CRPC, Rule 1.2.1.

¹² See, e.g., Cal. Bus. & Prof. Code § 6103; *In re Jackson* (1985) 170 Cal.App.3d 773, 778.

¹³ CRPC, Rule 1.7(b); see, e.g., New York City Bar Formal Op. 2020-5 (Dec. 2, 2020) (NYCB Op.) addressing A Lawyer's Ethical Obligations When Required to Return to Court in Person During a Public Health Crisis, available at <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/formal-opinion-2020-5-a-lawyers-ethical-obligations-when-required-to-return-to-court-in-person-during-a-public-health-crisis>

or the refusal of a lawyer to abide by the orders of a tribunal could put the client at risk of sanctions.¹⁴ Even where a court decides to reopen its operations, a conflict of interest may arise where the public health crisis is ongoing.¹⁵ A lawyer's health concerns may create a conflict of interest if there is a significant risk that the lawyer's judgment would be adversely affected by the lawyer's own personal interests.¹⁶ A lawyer may seek a waiver of the conflict of interest if the lawyer believes that competent and diligent representation is possible through other arrangements, such as using alternate counsel, or appearing virtually.¹⁷

Withdrawal

Where lawyers are unable to fulfill their ethical obligations, so that they know that the representation will result in violation of the Rules of Professional Conduct or the State Bar Act, withdrawal from the representation is mandatory.¹⁸ Where the lawyer's mental or physical condition renders it difficult for the lawyer to carry out the representation effectively, withdrawal is permissive.¹⁹ The fear of contracting COVID-19 may render the representation difficult in a variety of ways. A lawyer may be reluctant to meet with a client in person, or may seek a premature disposition to limit exposure to the disease, or hasten completion of a hearing.²⁰

Withdrawal is permissible when the client "knowingly and freely assents."²¹ Where the matter is pending before a tribunal, permission must be requested from the tribunal, and a lawyer shall not terminate a representation before the tribunal without such permission.²²

Pandemic-related illness can create a variety of issues in litigation and arbitration. Careful attention to the lawyer's ethical duties protects both lawyer and client. Lawyers working with professionalism and civility will successfully navigate the challenges of the pandemic.

¹⁴ NYCB Op.

¹⁵ NYCB Op.

¹⁶ NYSB Op.

¹⁷ NYCB Op.

¹⁸ CRPC, Rule 1.16(a)(2); and see, e.g., New York State Bar Formal Op. 1203 (Oct. 8, 2020) (NYSB Op.) (addressing withdrawal from representation based on attorney health concerns, available at https://nysba.org/ethics-opinion-1203/?utm_campaign=Membership&utm_medium=email&_hsmi=97307801&_hsenc=p2ANqtz-_z8p94mbYMzMcg1162dy_t44n8sM6A5-NJfrR65LUmovMpJYbPJvR5YQ-3ERFjM_-lwK9Z-h0ZfVM7y7ZcGDtqcjCdEw&utm_content=97307801&utm_source=hs_email)

¹⁹ CRPC, Rule 1.16(b)(8).

²⁰ NYSB Op.

²¹ CRPC, Rule 1.16(b)(6).

²² CRPC, Rule 1.16(b)(c).