

**THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK
COMMITTEE ON PROFESSIONAL ETHICS**

**FORMAL OPINION 2020-5: A LAWYER’S ETHICAL OBLIGATIONS WHEN
REQUIRED TO RETURN TO COURT IN PERSON DURING A PUBLIC HEALTH
CRISIS**

TOPIC: Whether a lawyer’s health concerns regarding appearing in court in person during a pandemic can create a conflict of interest requiring withdrawal from the representation

DIGEST: A lawyer who is required to return to court in person during a public health crisis may have serious health and safety concerns which could create a conflict of interest for the lawyer continuing with the representation. Whether such a conflict exists is a fact-specific inquiry and will depend on the lawyer’s personal health concerns as well as the available alternatives for proceeding with the representation. If the lawyer concludes that his or her health concerns and the lack of available alternatives for appearing in court create a non-waivable conflict of interest, the lawyer must take steps to withdraw from the representation. In addition, a lawyer with supervisory responsibilities in a law firm or other organization must comply with his or her obligations to supervise subordinate lawyers and ensure that they are complying with the relevant ethics rules, including the rules relating to conflicts of interest and competence.

RULES: 1.1; 1.3; 1.7; 1.16; 3.4(c); 5.1; 5.2

OPINION:

I. INTRODUCTION

The COVID-19 pandemic has taken an unprecedented toll on the legal profession. Beginning in March 2020, courthouses throughout New York State shuttered, in-person hearings and trials abruptly stopped, and a series of executive orders from New York’s Governor suspended statutes of limitations and other filing deadlines in civil and criminal cases. *See, e.g.*, N.Y. Executive Order 202.7 *et seq.*; N.Y. Admin. Order 78/20 *et seq.* In lieu of in-person court appearances, courts quickly explored, implemented and expanded virtual court operations. Although courts have taken steps to resume in-person operations, including certain in-person appearances and a limited number of trials, some of these plans have also been paused owing to a resurgence of COVID-19 cases. *See* Message from Chief Judge Janet DiFiore, October 19, 2020, available at <http://nycourts.gov/whatsnew/pdf/October19-CJ-Message.pdf> (announcing the start of some in-person civil trials in New York City); Memorandum from Hon. Lawrence K. Marks dated Nov. 13, 2020, available at http://www.courts.state.ny.us/whatsnew/pdf/JT_Memo_Nov13-001.pdf (revising certain statewide practices in trial courts in light of uptick in COVID-19 cases).

In light of the ongoing public health crisis, a lawyer may understandably be hesitant to return to court, especially if doing so poses a significant health and safety risk for the lawyer or the

lawyer's family.¹ This Opinion will address a lawyer's ethical obligations when formally required to appear in court in person during an ongoing public health crisis. This Opinion is not intended to comment on court policies related to resuming in-person appearances, nor is this Opinion intended to draw any blanket conclusions concerning a lawyer appearing in court during a pandemic. As detailed below, the purpose of this Opinion is to provide a framework for lawyers to analyze their ethical obligations under the New York Rules of Professional Conduct (the "Rules") during an unprecedented public health crisis and the obligations owed to clients.

II. DO THE LAWYER'S HEALTH AND SAFETY CONCERNS CREATE A CONFLICT OF INTEREST?

Rule 1.7(a)(2) provides that a conflict of interest exists where a reasonable lawyer would conclude that "there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or *other personal interests*." (emphasis added). The comments to Rule 1.7 do not address the type of personal interest conflict that may arise from a lawyer's fear that continuing with the representation will detrimentally impact the lawyer's health or the health of the lawyer's family members. *See, e.g.*, Rule 1.7 Cmts. [10]-[11] (describing a lawyer's business, financial and familial interests as examples of personal interest conflicts). However, inclusion of the phrase "other personal interest[s]" in Rule 1.7(a)(2) and the accompanying comments supports our conclusion that the Rule is not limited to business or financial conflicts, and that a lawyer's legitimate health concerns as a result of a pandemic or other health crisis would qualify as a type of personal interest conflict under Rule 1.7(a)(2). *See also* Rule 1.7(a)(2) Cmt. [10] (noting that "the lawyer's . . . other personal interests should not be permitted to have an adverse effect on the representation of the client"); N.Y. County Lawyers Ass'n Formal Op. 744 (a lawyer's participation in a law reform activity "may require the lawyer to cease the client representation if the lawyer's personal investment in the activity poses a significant personal interest conflict"); NYSBA Ethics Op. 895 (2011) (personal interest conflict where lawyer's spouse is a senior partner at five-lawyer firm representing opposing party); NYSBA Ethics Op. 973 (2013) (personal interest conflict where lawyer seeks to represent defendant in a criminal appeal claiming ineffective assistance of counsel where the same lawyer handled the underlying trial); NYSBA 1150 (2018) (analyzing personal interest conflicts between real estate lawyer and spouse who is a real estate broker).

As detailed below, a lawyer who is concerned for his or her health or safety as a result of a requirement to appear in court in person should first analyze whether those concerns create a conflict of interest for the lawyer and, if so, whether alternative arrangements can cure the potential conflict. If the lawyer concludes that a conflict exists and there are no suitable alternatives for proceeding with the court appearance, the lawyer must determine whether the conflict is waivable and, if not, whether the lawyer is required to withdraw from the representation.

¹ Although outside the scope of this Opinion, we recognize that a lawyer's client may have many of the same health and safety concerns, which may also trigger certain ethical obligations on behalf of a lawyer to request accommodations from the tribunal.

A. Does a Conflict Exist Under Rule 1.7(a)(2)?

In determining whether a conflict exists under Rule 1.7(a)(2), the threshold inquiry is whether a reasonable lawyer would conclude that there is a significant risk that the lawyer's professional judgment on behalf a client would be compromised by the lawyer's personal interest in not wanting to resume in-person court appearances. *See* Rule 1.7(a)(2); *see also* Rule 1.0(q) (defining a "reasonable lawyer" for purposes of conflicts of interest as "a reasonably prudent and competent lawyer who is personally disinterested in commencing or continuing the representation"). In light of the severity of the COVID-19 pandemic, we have no hesitation concluding that a lawyer's health and safety concerns over returning to court during a pandemic could create a significant risk that the lawyer's professional judgment on behalf of a client could be compromised in certain circumstances.

These concerns could manifest in many different ways. For instance, the lawyer's health concerns, which would weigh in favor of resisting any instruction from the court or a client to appear in court in person, could be in direct conflict with the client's interest to have his or her lawyer present in court to move the case forward instead of seeking an adjournment or an accommodation to appear virtually.² A lawyer could also be tempted to refrain from filing additional motions or requesting other relief in a case if doing so would result in additional court appearances where the lawyer believes that he or she would be required to appear in person. In addition, where no virtual accommodation is available and a lawyer is ordered to appear in person, a lawyer's refusal to abide by the order could result in some other adverse consequence to the client such as delay or a sanction, which would also put the lawyer's interests at odds with the client's interests.

We do not believe that the existence of a pandemic, by itself, creates grounds for a personal interest conflict under Rule 1.7(a)(2). To the contrary, a court may be able to implement adequate health and safety protocols under which a reasonable lawyer would feel comfortable appearing in person. In addition, many court appearances are able to proceed through virtual means, which may be an adequate substitute for in-person appearances without any prejudice to the client. But this must be evaluated on a case-by-case basis and will depend on the risks to the lawyer and the reasonably available options for continuing with the representation. For example, it may be reasonable for a lawyer to rely on a court's screening, sanitization and social distancing procedures and to therefore conclude that the general concern about infection from COVID-19 would not create a personal interest conflict for the lawyer. Similarly, where a lawyer works in a law firm or organization with multiple lawyers, the lawyer may be able to have a colleague cover the court appearance where that is feasible and appropriate. By contrast, a lawyer who may suffer from preexisting health conditions or live in a household with others who are susceptible to infection could reasonably believe that the heightened fear of infection would affect the lawyer's ability to competently and diligently represent the client. In that case where the lawyer is required to return to court in person and the appearance cannot be accomplished through alternative means (either because of prejudice to the client or a requirement by the tribunal) the

² There is also the risk that the opposing party is willing to appear in person and the lawyer's client may be concerned that the opposing party would gain some strategic advantage from being in the same location as the judge or arbitrator while the lawyer would be appearing remotely.

lawyer may conclude that a conflict exists under Rule 1.7(a)(2). In other words, simply because a court decides that it is safe to re-open does not, by itself, eliminate the possibility of a conflict of interest where the public health crisis is ongoing.³

B. Is The Conflict Waivable?

Because we conclude that a conflict could exist under Rule 1.7(a)(2) for a lawyer who is required to return to court in person during a pandemic, the next question is whether that conflict is waivable. For a conflict to be waivable, the lawyer must “reasonably believe[] that the lawyer will be able to provide competent and diligent representation” to the client notwithstanding the conflict. *See* Rule 1.7(b)(1). This too will be a case-by-case determination.

Rule 1.1(a) defines competent representation as “the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” In addition, Rule 1.1(c)(2) prohibits a lawyer from intentionally “prejudic[ing] or damag[ing] the client during the course of the representation except as permitted or required by these Rules.” *See also* Rule 1.3 (requiring a lawyer to act with “reasonable diligence and promptness in representing a client”); Rule 1.3 Cmt. [1] (“A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client’s cause or endeavor”). These rules apply equally during a pandemic or other crisis and a lawyer does not have a relaxed standard of competence or diligence simply because circumstances have changed from the inception of the representation. *See* ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 482 (2018) (addressing lawyer’s ethical obligations after a natural disaster).

Although the exact definition of competence and diligence will depend on the nature of the lawyer’s representation of the client, prior ethics opinions have identified certain basic levels of competence and diligence including the ability to promptly and effectively communicate with the client, the ability of the lawyer to meet deadlines and respond to reasonable requests for information, and the ability to take steps to advance the client’s interest in the representation. *See, e.g.,* NYSBA Ethics Op. 1053 (2015) (recognizing that a lawyer’s use of an interpreter may be required for the lawyer to fulfill duty of competence); NYCBA Formal Op. 2015-4 (2015) (lawyer acting as local counsel “must still fulfill her ethical obligations, including acting competently and diligently, and communicating with the client about developments that are relevant to the representation”); *see also* RPC 1.4(a) (duty to promptly communicate with client).

In the context of a lawyer’s health concerns associated with appearing in person, the lawyer must determine whether those concerns will impact the lawyer’s ability to meet the above minimum standards of competence and diligence. For example, if a lawyer believes that he or she can competently and diligently represent the client while also making other arrangements to avoid the requirement to appear in person (e.g. requesting to appear virtually), then the lawyer would

³ Another potential issue of importance that factors into the conflict analysis is where a lawyer is representing an individual who is indigent or low-income and is fearful that if the lawyer withdraws or does not appear then the client will be left without representation and will not be able to find substitute counsel.

be able to obtain a waiver from the client after disclosing the risks and the reasonably available alternatives to the proposed course of action. *See* Rule 1.7(b)(1)-(4).

If, however, the lawyer's health concerns render it unreasonably difficult for the lawyer to adequately communicate with the client – either because of distancing protocols for a required in-person appearance, lack of access to adequate electronic communication for a virtual appearance, or any other reason – the lawyer may risk providing incompetent representation.⁴ Similarly, if a lawyer refuses to appear in person, there is a risk that the client could face severe consequences such as an indefinite delay of the matter, default or other adverse action.⁵ In that case, the conflict would not be waivable because the lawyer's concerns over appearing in person make it impossible for the lawyer to provide competent and diligent representation.

III. IS THE LAWYER PERMITTED TO WITHDRAW FROM THE REPRESENTATION BASED ON HEALTH CONCERNS?

If the lawyer believes that a non-waivable conflict of interest exists, or if the client is unwilling to waive the conflict, the lawyer may be obligated to withdraw. Rule 1.16(b)(1) provides that a lawyer shall withdraw from the representation “when the lawyer knows or reasonably should know that the representation will result in a violation of these Rules or of law.” Under these circumstances, where a conflict of interest prohibits the lawyer from competently representing his or her client, the lawyer would be required to withdraw under Rule 1.16(b)(1). *See* NYSBA Ethics Op. 903 (2012) (noting that withdrawal is mandatory under Rule 1.16(b)(1) where the representation would result in a violation of the Rules); NYSBA Ethics Op. 1092 (2016) (lawyer may be required to withdraw where act of malpractice creates significant personal interest conflict between lawyer and client).

In addition to Rule 1.16(b)(1), the New York State Bar Association recently concluded that a lawyer may seek to withdraw if the fear of exposure to COVID-19 creates a situation where “the lawyer's mental or physical condition renders it difficult for the attorney to carry out the representation effectively.” *See* NYSBA Ethics Op. 1203 (2020); *see also* Rule 1.16(b)(2) and (requiring withdrawal where “the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client”); Rule 1.16(c)(9) (permitting withdrawal where “the lawyer's mental or physical condition renders it difficult for the lawyer to carry out the

⁴ This concern is particularly prevalent for lawyers who may work with at-risk populations, clients who are incarcerated, or clients who may need access to translators or other third parties required to assist with the representation. Although the effectiveness of any particular court procedure is beyond the scope of this Opinion, we note that if health and safety measures effectively prevent a lawyer from having a privileged communication with his or her client, the lawyer is unlikely to be able to provide competent representation.

⁵ A lawyer's refusal to appear in person could also violate Rule 3.4(c), which prohibits a lawyer from “disregard[ing] or advis[ing] the client to disregard a standing rule of a tribunal or a ruling of a tribunal made in the course of a proceeding.” However, under Rule 3.4(c), the lawyer may “take appropriate steps in good faith to test the validity of such rule or ruling.” Thus, if a lawyer believes that he or she cannot appear in person owing to health and safety concerns, the lawyer should take steps to properly challenge the rule or request other accommodations if available.

representation effectively”). Although we reach a similar conclusion to Opinion 1203, we do so for different reasons – this Opinion analyzes whether a lawyer must withdraw from the representation based a conflict of interest whereas Opinion 1203 analyzes permissive withdrawal under Rule 1.16(c). As we detail above, if the concerns about returning to court in person create a non-waivable conflict of interest for the lawyer, Rule 1.16(b)(1) *requires* the lawyer to withdraw as continuing with the representation would result in a violation of the Rules.⁶ The conclusion in Opinion 1203 further supports this analysis insofar as the lawyer’s mental or physical condition is relevant to whether a conflict of interest exists and, if so, whether it is waivable.

Even where a lawyer is required to withdraw, however, a court could still require the lawyer to continue with the representation. *See* Rule 1.16(d) (“When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation”). In that case, the lawyer should obtain a clear and unequivocal order from the tribunal and consider whether to appeal or comply with that order. In addition, if the lawyer is permitted to withdraw, the lawyer must take reasonable steps to avoid foreseeable prejudice to the client. *See* Rule 1.16(e).

IV. A LAWYER’S SUPERVISORY OBLIGATIONS

Law offices and lawyers with supervisory responsibility must ensure that other lawyers within the firm or organization are complying with the Rules. *See* Rule 5.1(a) (“A law firm shall make reasonable efforts to ensure that all lawyers in the firm conform to these Rules”); Rule 5.1(b)(1) (lawyers with management responsibility in a law firm must make reasonable efforts to ensure that other lawyers in the law firm conform to the Rules); Rule 5.1(b)(2) (lawyers with direct supervisory authority must ensure subordinate lawyers comply with Rules). These supervisory obligations include monitoring and addressing issues related to competence, conflicts of interest, and compliance with court rules. *See, e.g.*, NYSBA Ethics Op. 1012 (2014) (law firm has supervisory obligation to ensure individual lawyers adhere to conflict rules); NYSBA 1085 (2016) (law school clinic supervisor must implement adequate safeguards to check for conflicts).

In the context of a public health crisis, lawyers with supervisory authority must take reasonable steps to address the ethics issues detailed above, including obtaining sufficient information to ensure that matters can be appropriately staffed, addressing any potential issues of competence and conflicts where feasible, and providing guidance to subordinate lawyers to ensure that the subordinate lawyers and the firm are acting in accordance with their ethical obligations. *Accord* ABA Op. 482 (detailing duties of lawyers with supervisory authority after a natural disaster). Subordinate lawyers within a law firm or other organization must promptly raise any potential ethics issues and seek appropriate guidance—including working with supervising lawyers to address the issues—and promptly communicate with the client. *See* Rule 5.2(a)-(b).

⁶ Similarly, if the lawyer’s refusal to appear in person would result in a violation of Rule 3.4(c), the lawyer would also be required to withdraw under Rule 1.16(b)(1). *See* note 5, *supra*.

V. CONCLUSION

A lawyer required to return to court in person during a public health crisis may face a conflict of interest where the lawyer's health and safety concerns create a significant risk that the lawyer's professional judgment on behalf of the client will be compromised. Whether a conflict of interest exists is a fact-specific inquiry and will depend on the lawyer's personal health concerns as well as the available alternatives for proceeding with the representation. If the lawyer concludes that his or her health concerns create a non-waivable conflict of interest, the lawyer must take steps to withdraw from the representation. In addition, a lawyer with supervisory responsibilities must comply with his or her obligations to supervise subordinate lawyers and ensure that they are complying with the Rules, including the rules relating to conflicts of interest and competence.