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FEATURE ARTICLE

The Implications of Long COVID for Legal Practice

COVID-19 is the gift that keeps on giving. Physicians and epidemiologists have increasingly come to realize that a significant number of patients who survive COVID show persistent symptoms after the initial infection is over. This new illness has come to be called "post-COVID" or "long COVID." And those who experience it find their ability to continue working reduced or even eliminated.

Unfortunately, the symptoms of long COVID may be quite debilitating. According to the CDC[1], these symptoms include:

General symptoms (Not a Comprehensive List)

- Tiredness or fatigue that interferes with daily life
- Symptoms that get worse after physical or mental effort (also known as "post-exertional malaise")
- Fever

Respiratory and heart symptoms

- Difficulty breathing or shortness of breath
- Cough
- Chest pain
- Fast-beating or pounding heart (also known as heart palpitations)

Neurological symptoms

- Difficulty thinking or concentrating (sometimes referred to as "brain fog")
- Headache
- Sleep problems
- Dizziness when you stand up (lightheadedness)
- Pins-and-needles feelings
- Change in smell or taste
- Depression or anxiety

1 https://www.cdc.gov/coronavirus/2019-ncov/long-term-effects/index.html

Digestive symptoms

- Diarrhea
- Stomach pain

Other symptoms

- Joint or muscle pain
- Rash
- Changes in menstrual cycles

Some of these symptoms can be life changing.

The legal profession must recognize that among those who will experience the debilitating symptoms of long COVID will be thousands of lawyers and legal support staff. The human cost of this new, potentially long, chronic illness on lawyers not only poses enormous human issues, but also issues of compliance with the Rules of Professional Conduct. Many of the most debilitating symptoms of long COVID are the same or similar to those of COVID-19, but there is an important difference. Long COVID is a chronic disease and may affect individuals for years. These impacts may have significant effects on an individual's ability to perform at a level necessary to comply with the requirements of professional conduct.

> KRPC Rule 1.1 requires:
>
> A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.

Unfortunately, long COVID may pose a serious risk to an attorney's ability to fulfill this duty. One symptom, "brain fog," appears to be quite common. It is important to consider when or whether "brain fog" has become so disabling that it affects a lawyer's ability to represent his/her client competently.

Many long COVID sufferers also report intermittent extreme fatigue. Consider a situation in which a lawyer awakens on a day she is due in court and—because of long COVID fatigue—is unable to make her appearance. If her illness is undiagnosed, as many cases of Long COVID continue to be, this becomes even more problematic.

In addition to KRPC Rule 1.1, lawyers suffering from long COVID may also run afoul of KRPC Rule 1.3, which requires that:

> A lawyer shall act with reasonable diligence and promptness in representing a client.

The extreme fatigue caused by long COVID might be a problem in preventing affected lawyers from showing the diligence in pursuit of client matters that is ethically required. With long COVID, this is particularly problematic because extreme fatigue may be intermittent so that a lawyer may be perfectly able to handle her responsibilities at some times but not at others. Further, the fatigue may come and go without pattern or predictability.

Another potential negative aspect of long COVID is that many lawyers may resist admitting that they have the illness and believe that they can continue to practice without making any allowances for their symptoms. For solo practitioners who do not have other lawyers working with them on a daily basis, this may be particularly problematic. In firm settings, this poses an additional potential ethical minefield.

KRPC Rule 5.1(a) states:

> A partner in a law firm and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the rules of professional conduct.

KRPC Rule 5.1(b) states:

> A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the rules of professional conduct.

It is not hard to imagine a situation in which a lawyer at a firm is suffering from long COVID and the symptoms are affecting his performance to the point where his continuing to practice without some assistance constitutes a violation of Rule 5.1(b). In such a case, his supervising attorney has to make "reasonable efforts" to assure that the lawyer's behavior does not violate Rule 1.1.

To satisfy KRPC Rule 5.1, firms may need to establish a plan to deal with lawyers (and staff) who might suffer the effects of long COVID. Saul Jay Singer has suggested the following:

> In the face of increased risk of serious incapacitating illness or worse, lawyers must have a ready succession plan for other lawyers to assume responsibility for legal representations and, at a minimum, a plan for promptly communicating with clients and for taking

> necessary protective action. In larger firms, other firm lawyers may be able to step in to take over a representation on short notice, but even such firms should develop a contingency plan to address how client matters will be handled in the event of mass lawyer incapacity or unavailability.[2]

In the case of solo practitioners, he suggests:

> Assuring the continuity of representation can be more difficult for solo practitioners, where there is often no other lawyer to step in to handle cases in the event of the solo's illness or death...Solos should consider partnering with each other in reciprocal agreements to advise clients and courts when the lawyer has become incapacitated or is deceased.[3]

Firms should encourage lawyers to inform their supervisors or the firm management if they believe that they may be suffering from long COVID. Once notified, the firm can take necessary steps to protect the lawyer's clients according to established plans. This can only be accomplished if the firm knows that a lawyer has long COVID and is working at a reduced capacity because of its symptoms. If lawyers try to hide their symptoms, then it may take too long to implement plans to protect clients. The plan must account for the challenge of intermittent, chronic symptoms that may not always be evident.

Of course, whatever steps a law firm takes when dealing with lawyers suffering from long COVID, they should be aware of all federal and state laws that may protect long COVID sufferers from firm actions. Firms should also stay abreast of any changes in the ways such laws develop in the next few years, as long COVID becomes better understood and formal diagnoses of the disease become more common.

It is becoming increasingly clear that long COVID may affect millions of Americans for years to come. Thus, law firms need to recognize their responsibility to accommodate lawyers and staff who have this new, insidious chronic disease. These accommodations must also assure full compliance with the Rules of Professional Conduct and applicable workspace laws and protect clients.

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2 https://www.dcbar.org/news-events/news/legal-ethics-in-the-age-of-the-coronavirus.

3 Ibid.

NEW AUTHORITY

Judges in Church

In July 2022, the Maryland Judicial Ethics Committee issued an extremely interesting opinion. A Maryland judge's church had asked the judge to give a "historical presentation" on the United States Supreme Court decision in Dobbs v. Jackson Women's Health Organization, the case in which the Supreme Court overruled Roe v. Wade. The judge who received the invitation asked the Judicial Ethics Committee whether he could ethically do so. In Judicial Ethics Opinion 2022-24, the Commission answered.

The Maryland Judicial Ethics Committee cited four Maryland Judicial Ethics rules as a basis for its opinion.

1. Rule 18-101.2(a) requires that "[a] judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary."

2. Rule 18-103.1 provides that a judge may engage in extrajudicial activities provided that such participation shall not interfere with performance of the judge's duties; lead to frequent disqualification of the judge; appear to undermine the judge's independence, impartiality, or integrity; appear to be coercive; or make inappropriate use of court resources.

3. Rule 18-103.7 provides that a judge may participate in activities "sponsored by or on behalf of educational, religious, charitable, fraternal, or civic organizations not conducted for profit."

4. Rule 18-102.10. Judicial Statements on Pending and Impending Cases provides:

> (a) A judge shall abstain from public comment that relates to a proceeding pending or impending in any court and that might reasonably be expected to affect the outcome or impair the fairness of that proceeding and shall require similar abstention on the part of court personnel subject to the judge's direction and control. This Rule does not prohibit a judge from making public statements in the course of official duties or from explaining for public information the procedures of the court.
>
> (b) With respect to a case, controversy, or issue that is likely to come before the court, a judge shall not make a commitment, pledge, or promise that is inconsistent with the impartial performance of the adjudicative duties of the office.

> (c) Notwithstanding the restrictions in sections (a) and (b) of this Rule, a judge may make public statements in the course of official duties, may explain court procedures, and may comment on any proceeding in which the judge is a litigant in a non-judicial capacity.

The judge's church had asked him specifically to speak about Dobbs and how the decision "might relate to other rights." This language concerned the Commission:

> It is an understatement to say that Dobbs and the concurring and dissenting opinions have been the subject of much discussion, debate, and speculation. The Requestor did not provide information on the exact substance of what he/she would include in the presentation to the church. But we caution that the Requestor may not include in the presentation anything that could be seen as undermining the judge's independence or impartiality. This is particularly important because the Supreme Court held in Dobbs that the regulation of abortions is the responsibility of individual states. Therefore, it is possible that cases could be brought in Maryland courts on this issue. A judge must be careful not to express any views that could be seen as manifesting a predisposition in deciding issues or cases that could come before Maryland courts. The Code clearly prohibits this.

The Committee took a nuanced approach on the judge's request. They decided that the judge was free to give the presentation on the "historical" aspects of Dobbs, but that the judge could not give "personal views on Dobbs and how it might relate to other rights." The danger the Committee saw in the latter was the possibility that the judge might be called on to decide about such related rights in a future case that came before him, especially because the decision in Dobbs had shifted such cases to the state courts.

In Opinion 2022-24, the Maryland Commission on Judicial Ethics, has provided a useful template for judges called upon to speak about controversial decisions by other courts in venues such as churches.[4] It balances the social utility of having judges speak to the public on current matters of public interest with the need for judges to maintain the appearance of impartiality.

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4 See also, the Maryland Judicial Ethics Committee Opinion 2021-19 on judges teaching "about the law" in educational contexts.

ETHICS & MALPRACTICE RESEARCH TIP

New Articles from *The Current Index of Legal Periodicals*

1. Timothy S. Hall, "We Don't Talk about Bruno:" Of Mental Health, Honesty and Openness, and the Legal Profession, 60 U. Louisville L. Rev. 423 (2022).

   As we have discussed many times, mental health may affect a lawyer's ability to represent his clients with the competence required by Rule 1.1. The difficulty of getting lawyers to admit that they have a problem is also an impediment to getting the lawyer help and protecting his clients.

2. Christina Morris, The Corrective Value of Prosecutorial Discretion: Reducing Racial Bias through Screening, Compassion, and Education, 31 B.U. Pub. Int. L.J. 275 (2022).

   Racial bias in the American criminal justice process is one of our most serious and justifiably discussed problems.

3. Haxhi Xhemajli, The Role of Ethics and Morality in Law: Similarities and Differences, 48 Ohio N.U. L. Rev. 81 (2021).

   Comprehending the differences between ethics and morality and their varied implications for professional responsibility is a vexing challenge that continues to keep lawyers, judges, and law professors awake at night.

A BLAST FROM THE PAST

Excerpt from "Attorney and Client" in James Payn's "Bred in the Bone" (1870)

The following paragraph appeared in *Harper's Weekly* on October 29, 1870, as part of "Bred in the Bone," a story by the popular author, James Payn. At the time of publication, *Harper's* was the preeminent serial publication in the United States, packed with stories, illustrations, and new articles. The chapter in which the paragraph appears is titled, "Attorney and Client," and features a lawyer and client having a discussion. During the discussion, the lawyer exclaims:

> "Hush, hush! my dear Sir; this will never do. It is mere waste of time, though it might have been much worse. Good Heavens! Suppose you had been guilty, and told me that! You would have placed me in the most embarrassing situation, as your professional adviser, it is possible for the human mind to conceive. What I want to know is your story, so far as these two thousand pounds found in your possession are concerned. Whether it is true or not does not matter a button. I want to know whether it seems true; whether it will seem true to a judge and jury. You have thought the matter over, of course; you have gone through it in your own mind from beginning to end — now please go over it to me."

The question for today's lawyer is: What, if anything, is wrong with this conversation? Feel free to email your answer to Mike Hoeflich.

Thanks for reading! May all our readers have a wonderful and joyous 2023!

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