

FRIDAY, JULY 24, 2020

PERSPECTIVE

A checkerboard of compliance

By Mary Ellen Waller

“The first thing we do, let’s kill all the lawyers.” While this sarcastic, controversial line from Shakespeare was proposed by a potential tyrant as a solution to societal problems of bureaucracy, the solution of removing the guardians of independent thinking is also viewed as the surest way to bedlam, disorder, dictatorship and elimination of freedom. Courts must fulfill statutory duties while safeguarding the well-being of the public they serve. Some courts in California are failing to ensure public safety in accordance with state/ local health guidance and are thus jeopardizing the lives of the public, court employees, the bench and the bar.

California courthouses have recently been allowed to reopen following the initial shutdown (with limited access for emergencies only), and of critical importance is ensuring COVID-19 prevention practices are followed. Unfortunately, in several instances this rule is being recognized to be more in breach than in the compliance. Compliance mandates, for example, are being interpreted and followed relatively loosely in some California courts.

In Ventura County, for example, the Sheriff’s Department says they are not enforcing the state mandates for social distancing or face coverings, claiming the requirement is “not a law, only a mandate.” A complaint was filed on June 29 with the director of the County of Ventura Resource Management Agency noting that the re-opened Ventura County courthouse had resumed proceedings

with a judge, deputy and court reporter all failing to wear masks; counsel table and microphones were not being wiped down; social distancing was not present as papers were exchanged with court personnel; and social distancing in the gallery of spectators and those waiting for their case to be called was non-existent.

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This example is not seen in all superior court departments, as some are well in compliance inside their own department. The decision to comply with court administrative orders as well as state/local health mandates thus seems to be left to the discretion of the particular judicial officer who sits in each department.

Two weeks following the referenced complaint in Ventura, with a highly contagious virus surging in California, the dynamic discussed above regarding the Ventura courthouse remains unabated. The courthouse remains noncompliant with public health directives as it was again observed that a courtroom deputy was not wearing a mask, an attorney promptly removed his mask upon entering the courtroom gallery, counsel tables and microphones were not being cleaned and social distancing was not being enforced.

Counties that meet specific criteria can move more quickly than other parts of the state, opening sectors and modifying the state stay-at-home order. The Ventura

County Public Health, with the support and the endorsement of the Ventura County Board of Supervisors, has filed an “attestation of readiness,” stating “Ventura county is very well positioned to move forward in a safe and monitored way.” The attestation form and the May 19 letter of support from the Ventura County Board

of Supervisors are now outdated and fail to reflect the accurate epidemiologic stability of the county and do not reflect the county’s failure to properly monitor its orders. It is notable that the county also states that California Department of Public Health is in “no way assuming liability for its guidance.” Ventura County has failed to revise the attestation to address these rapidly changing circumstances, thus jeopardizing the health and safety of the public. The current variance is having a negative impact on the community, the county has failed to be proactive in modifying its orders, and, the act of continuing to rely upon the May 19 attestation is misleading the public. Counties that have filed variance attestations must be required to provide a current attestation.

Recently, a Ventura County lawyer has filed a brief with the court objecting to the delays perceived inherent in entertaining a request to conduct the hearing remotely and submitted that objection in anticipation of a request for accommodation due to

the pandemic. That objection was framed thusly: “in an effort to get ahead of the issues and prepare the Court for what may come, ... if [a lawyer] might claim that they are unable to complete a trial until the Coronavirus pandemic is over, they would no longer be competent to complete their representation. Under the Rules of Professional Conduct, Rule 1.1, a lawyer shall not intentionally, recklessly, or negligently fail to perform legal services with competence. ‘Competence’ is defined as applying the mental, emotional, and physical ability reasonably necessary for the performance of services. Rules of Professional Conduct, rule 1.16 provides that a lawyer shall withdraw from the representation of a client if the lawyer’s mental or physical condition renders it unreasonably difficult to carry out the representation effectively.”

That filing is a chilling and outrageous attempt to deny equal and full access to the judicial system and a violation of the rights granted to the disabled. How will the California courts handle the COVID-19 state guidelines for the protection of at-risk/ vulnerable populations that are entitled to access to the courts? Essentially, all of those persons are “disabled” under the terms of the Americans With Disabilities Act of 1990. Law firms are employers, anti-discrimination and medical privacy laws don’t disappear when a crisis hits, the COVID-19 pandemic meets the direct threat standard, and workers are entitled to protection. The court must offer telework/video conferencing to allow lawyers and clients with disabilities an equal opportunity to participate.

Further, technological competence is a skill called for in the legal field as being consistent with an attorney's ethical duty. Judges and court personnel must also be required to have technological competence and accessibility during this current state of emergency. If the courts are unwilling or unable to keep up with this responsibility and conduct hearings remotely (via teleconferencing or video conferencing, for example) and instead require parties and their attorneys to come to a courthouse that fails to appropriately follow the mandates designed to protect the public, then there exists a powder keg of health issues for the entire public; this cannot be tolerated. If a member of an individual's household falls into one of the categories identified by the Centers for Disease Control and Prevention as being at high risk for serious complications from the pandemic virus and is advised to not come to work, they too should be permitted to appear remotely. The medical privacy of individuals who have autoimmune disorders and may not have previously revealed these less-obvious disorders to their employers must be protected when filing requests to appear remotely. Guidelines are necessary for handling these requests within the context of court appearances.

The Ventura courthouse — and perhaps other California court-

houses — is a checkerboard of compliance with safety mandates for reopening, there appears to be societal disagreement on the necessity and efficacy of these protections, and polarization in societal values for order enforcement is also present. Some judges are using caution while others less so, if at all. Individual judges are given leeway to use their discretion in enforcement due to their authority to "provide for the orderly conduct of proceedings, including the decision to permit a witness to remove face covering while testifying." This is accomplished through the use of language such as "shall" in court orders pertaining to face coverings rather than the word "must," and in terms referencing social distancing, using language such as "to the extent possible," which of course opens the door for multiple interpretations and applications. "Shall" is not a word of obligation; "must" is the only word that imposes a present legal obligation to impose express requirements in a clear way. Surely, if judges can be required to wear black robes and lawyers to wear courtroom attire, they can also be required to wear a face covering.

This is not the time in history to equivocate as the world faces a public health tragedy. We must utilize the only tools we have presently available to fight this surging pandemic. Courtrooms should be models of vigilance in protecting

the welfare of the public. Compliance is of critical importance, and so far, the Ventura County courts have failed to comply in a sufficient way to protect the public that it serves. Business owners who reopen in Ventura County are required to register and attest to their readiness to assure they will use the best practices for prevention of the spread of the coronavirus, judging from the conduct of some of these lawyers there has been a lack of adherence to this requirement. Robust diligence is necessary to prevent unsound, unfair business practices that fail to protect vulnerable populations at heightened risk. If the Sheriff's Department and the courthouses fail to comply, who is left to ensure that prevention and mitigation practices are being followed? Failure to adhere to public health protocols is a threat to public health and a public nuisance. Lawyers conducting business in the courthouses should be required to provide further attestation (currently, not all counties are requiring business registration for reopening) that they have complied with the protocols to prevent unfair business practices and to insure public safety.

Health and safety are of paramount importance as the courts summon lawyers, their clients and jurors back to these government facilities. Business owners are required to comply with state/

local mandates and the courts, too, must demonstrate responsibility for facilitating a safe work environment. Lawyers are now risking their lives to assist clients who are in desperate situations such as criminal matters, domestic violence issues, and critical child custody situations. The oft-quoted line "let's kill all the lawyers" has never been so close to coming to fruition. The leaders of the California legal community are a greying population, many have underlying autoimmune disease, perhaps we should go forward with the realization that to have them killed would be a costly travesty to civilized society. ■

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