

NOBC-APRL-CoLAP
SECOND JOINT COMMITTEE
ON AGING LAWYERS
Final Report - April, 2014

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INTRODUCTION

In August 2005, the National Organization of Bar Counsel (“NOBC”) and the Association of Professional Responsibility Lawyers (“APRL”) appointed a joint committee to examine the effectiveness of the traditional professional disciplinary system model as it applied to aging or senior lawyers. The NOBC-APRL Joint Committee on Aging Lawyers (“Joint Committee” or “NOBC-APRL Joint Committee”) studied and analyzed the issues, identified a number of problems and possible responses, and recommended actions and approaches to dealing with what was widely predicted to be a “senior tsunami” of age-impaired lawyers, some percentage of whom were expected to generate an inordinate number of complaints and disciplinary proceedings around the country. The Joint Committee’s Report was issued in May 2007 (“2007 Report”) (available at <http://www.aprl.net/publications/downloads/NOBC-APRL.pdf>).

In September 2013, the NOBC and APRL, together with the American Bar Association’s Commission on Lawyer Assistance Programs (“CoLAP”), appointed a Second Joint Committee on Aging Lawyers (“Second Joint Committee” or “Committee”) to further study the manner in which the legal profession is preparing for its aging lawyer population and to follow up on the recommendations

in the “2007 Report”.¹ The Second Joint Committee’s focus centered on whether jurisdictions have experienced or are anticipating non-disciplinary challenges associated with an aging lawyer population, including age-related impairments and retirement or semi-retirement, and what practices have been or should be implemented for effectively dealing with those challenges to avoid harm to clients and discipline for the lawyer. In addition, the Second Joint Committee considered means to reap the benefits to the bar of practitioners who have practiced for many decades.

THE ISSUES

The 2007 Report highlighted three critical issues. First, the report discussed the fact that the legal profession was facing a “senior tsunami,” as a greater percentage of lawyers moved into age classes typically associated with being a “senior citizen.” Second, the report discussed the good news/bad news of having an aging bar. The good news is that there are a greater number of lawyers with tremendous experience, insight and wisdom that can be shared with newer members of the bar. These same lawyers can devote themselves to valuable public service and improvement of the profession. The bad news is that there is an ever increasing risk of more lawyers with age-related impairments and insufficient

¹ In October 2012, the NOBC began studying the scope and effectiveness of the recommendations contained in the 2007 Report and then recommended that a second Joint Committee be formed to follow up on the efforts of the first Joint Committee.

preparation for transitioning away from practice before a crisis forces that transition. Third, the report identified steps that every bar should take to identify and effectively assist the increasing population of aging lawyers, while protecting the public.

Not surprisingly, these issues have not changed since 2007. Thanks to the work of the NOBC/APRL Joint Committee and its 2007 Report, many jurisdictions responded to the anticipated “tsunami” by planning and implementing programs that serve as a model for addressing difficult and sensitive issues for all involved. This Committee’s hope is that by sharing some of the initiatives taking place in many jurisdictions, all jurisdictions will develop comprehensive programs to aid one of the profession’s most valuable resources, *i.e.*, its senior lawyers.

A WORD ABOUT THE INTENT OF THIS REPORT

At the outset, any discussion of an aging lawyer population carries with it the risk that some will view the discussion as an offensive attack on senior lawyers.² That is not the intent or focus of this Committee or this report. The fact is that we are all aging and any discussion about the possible problems and risks that entails necessarily, and obviously, involves our collective interests and

² *See, e.g.*, Results of the 2013 Florida Bar Survey on Senior Lawyer Programming, Unsolicited Comments Provided by Respondents: “As a lawyer who is part of the age demographics that is the subject to this survey, I find it is condescending and discriminatory.” “The last thing any ‘senior’ attorney wants is to join a section that turns out to be a continuing seminar on aging and the liability risks of cognitive decline.” “Stay out of the medical profession. You cannot create a section solely to place lawyers out to pasture.”

obligations. A thirty year old lawyer who has not begun planning for retirement is facing an aging-lawyer issue because some day that lawyer will likely want to retire and should be planning for it now.

The intent of this report is not to disparage aging or senior lawyers. The observations and recommendations contained in this report are intended for the benefit of the profession at large. The Joint Committee hopes this report provides all jurisdictions with useful information about existing and recommended programs that effectively address the problems presented by lawyers with diminishing capacities with dignity, regardless of age. For example, a program designed to help with lawyers facing mental or physical incapacity or impairment will apply equally to lawyers who are thirty-five years old as well as those who are eighty-five years old. We must accept the fact that lawyers, like the general population, are moving as a group into an older demographic profile while remaining in practice.³ Along with the aging-lawyer population comes an increased risk of age-related challenges. Ignoring these challenges because the issues are sensitive, uncomfortable or may cause some lawyers to feel singled-out would be a

³ In 2013 the American Bar Association Market Research Department Lawyer Demographics reported that in 2005, for which the most recent statistics were provided, thirty four percent of practicing lawyers were age fifty-five or over, compared to twenty-five percent in 1980. *See* http://www.americanbar.org/content/dam/aba/migrated/marketresearch/PublicDocuments/lawyer_demographics_2013.authcheckdam.pdf. Likewise, the median age of a practicing lawyer in 2005 was forty-nine as compared to thirty-nine in 1980. *Id.* Given the large percentage of baby-boomer lawyers this trend is likely to continue such that within a few years more than fifty percent of lawyers will be in their fifties or older.

disservice to the profession and the public. Those elderly lawyers who remain fit are the focus of this report only insofar as their experience and longevity in law practice can serve as a resource to the legal profession.

THE JOINT COMMITTEE'S METHOD

In December, 2012, the NOBC circulated a survey to its members (the “2012 Survey”) to research whether jurisdictions had or were anticipating non-disciplinary challenges associated with an aging lawyer population and what best practices could be recommended to deal with those challenges. Twenty-one jurisdictions responded to part or all of the 2012 Survey. The Committee followed up with an additional survey conducted at the NOBC’s 2014 Midyear Meeting (collectively the 2012 Survey and the 2014 Midyear Meeting survey are referred to as the “Committee’s Surveys”). The Committee thanks the jurisdictions that responded to the Committee’s Surveys for their assistance in providing information on the aging lawyer population and the programs that these jurisdictions have planned or that are already in place. The Committee also learned of some programs through additional research beyond the results generated by the Committee’s Surveys and had valuable feedback to its inquiry from members of APRL and CoLAP. This additional information is also included in the Committee’s recommendations. The Committee also thanks John T. Berry,

Director of the Legal Division for the Florida Bar, who served as Chair of the 2007 Joint Committee, for his invaluable contributions to the Committee's work.

THE 2007 REPORT RECOMMENDATIONS:
WHAT IS IN PLACE AND WHAT IS STILL NEEDED

A. Make a Demographic Assessment of the Lawyers

The 2007 Report recommended that each jurisdiction conduct a demographic assessment of its lawyers to determine how many are presently 65 or 70 years old and how many are expected to reach retirement age in the coming two decades. Of the jurisdictions that responded to the Committee's Surveys, the majority had conducted a demographic assessment that included information on lawyers in age ranges from 50-54, 55-59, 60-64, 65-69 and seventy years old or more. In those jurisdictions, lawyers aged 65 or older represented from just under 9% to 20% of the jurisdiction's total active lawyers. Most jurisdictions reported that 13% to 16% of their active lawyers were 65 years of age or older. This is significant for a number of reasons. First, a lawyer who is 65 or older has likely been practicing for forty or more years. Such a lawyer will have a wealth of valuable experience and institutional knowledge about the practice of law in his/her jurisdiction. The ability to share this experience with newer members of the bar, and provide a resource and connection for newer members represents a tremendous opportunity for both the bar and the older lawyer.

Second, is another side to the age statistics that makes it important for all lawyers to be familiar with the demographics of the profession: age-related dementia, and specifically Alzheimer's, typically begins to appear in individuals who are 60 or older.⁴ Starting at age 65, the risk of developing the disease doubles every five years.⁵ According to the Centers for Disease Control and Prevention, 25-50% of the 85-and-older population exhibits some signs of Alzheimer's or age-related dementia.⁶ The unavoidable conclusion is that as lawyers age and remain in practice, statistically a greater number will experience cognitive impairments, as well as other significant medical problems, such as heart disease and strokes. Age-related dementia and Alzheimer's present special problems for lawyers in that individuals suffering from such diseases may not appear obviously impaired or incapacitated until the disease is quite advanced. In addition, the prospects of recovery and effective treatment are often uncertain or unlikely. And, while any impairment may affect a lawyer's ability to function at full and optimum capacity, diseases of the brain strike at the core of what many lawyers do on a daily basis – think, analyze, evaluate, and advise.

⁴ *See* Centers for Disease Control and Prevention, Dementia/Alzheimer's Disease, available online at <http://www.cdc.gov/mentalhealth/basics/mental-illness/dementia.htm>.

⁵ *See id.*

⁶ *See id.*

It is therefore imperative that the legal profession create programs and devote the necessary resources to assist the lawyers who will need help and support, while continuing to protect the public.

Many jurisdictions have taken the important first step of making a demographic assessment of their lawyers. For those jurisdictions that have not done so, best practices dictate that demographics be gathered as soon as feasible.

B. Take Steps to Identify Lawyers with Age-Related Impairments

The 2007 Report recommended that each jurisdiction take steps to identify senior lawyers with age-related (or non age-related) impairments. The steps that jurisdictions have taken to identify lawyers with impairments are varied and include: (1) relying on lawyers reporting impaired lawyers to regulatory authorities or to a lawyers assistance program under the jurisdiction's version of Model Rule 8.3; (2) petitioning the Supreme Court or Disciplinary Board for a mental health evaluation of lawyers demonstrating signs of impairment and requesting that such lawyers be suspended or placed on disability or inactive status; (3) relying on lawyers self-reporting; and (4) educating lawyers about impairment issues. The majority of responding jurisdictions rely heavily on lawyer assistance programs to take reports of lawyers demonstrating signs of impairment and to educate lawyers and others on recognizing signs of impairment. Those jurisdictions often characterized this as an "informal" approach.

Several jurisdictions have projects in place or have developed tools to more systematically evaluate lawyers who may be suffering from age-related (or non age-related) disability or cognitive impairment, assist lawyers who may have age-related impairments, and educate the public (and family members and law firm staff) on impairment issues. For example, one jurisdiction (Kansas) reported that it offers approximately 20 education programs devoted to lawyer assistance issues and maintains a website and a 24 hour hotline for reports related to lawyer incapacity, whether due to age, substance abuse or some other condition. Another jurisdiction (Florida) has worked with medical providers to develop a confidential, online self-assessment form that a lawyer can complete to determine if the lawyer's behavior indicates possible impairment. This tool has been modeled after a similar assessment form used by physicians and compares the lawyer's functioning to other lawyers of similar age.

A third jurisdiction (New Mexico) developed a training video to be shown at State Bar annual meetings, continuing education seminars, and other programs, in which physicians discuss how lawyers, their colleagues, staff, family and friends can recognize and identify signs of impairment. This jurisdiction is also considering the use of an assessment form that can be used for either self-assessment, or the assessment of others who may be exhibiting age related impairment.

Another jurisdiction (Indiana) has produced a video designed to illustrate how a newer lawyer might approach other members of his or her law firm with concerns about a senior lawyer. Using a role play model, the video demonstrates how difficult it can be to raise concerns about a lawyer's cognitive functioning, the resistance and disbelief that others around the lawyer might display, and the importance of pursuing the matter and considering available resources that might be employed.

Another idea the Committee considered was the possibility of jurisdictions preparing a video for distribution on the internet that will assist non-lawyer third parties in winding up the affairs of a law firm when a lawyer unexpectedly leaves the practice. This video would include general information about who to contact, how to get help, and what steps to take and to avoid in wrapping up a law practice.

Another jurisdiction (North Carolina) is recruiting volunteers who will be trained to recognize and intervene when a lawyer appears to be demonstrating cognitive impairment.⁷ This jurisdiction has made available resources, including a worksheet for use in assessing lawyers with signs of cognitive impairment and a checklist for individuals who are considering intervening in a situation where a lawyer may be showing signs of cognitive impairment. This jurisdiction is also

⁷ See North Carolina Bar Association Transitioning Lawyers Commission, Model Protocol for Assisting Lawyers Approaching the End of A Career, (2013), available at <https://www.ncbar.org/media/29307503/tlcbook.pdf>

designing CLE courses to raise the bar's awareness of the issue of cognitive impairment in lawyers.

Best practices indicate that while relying on self-reports by impaired lawyers and on third-party reports of impaired lawyers is important, educational initiatives to increase awareness of lawyer impairments and encourage reports of such impairments is critical and more effective. Educational initiatives include training videos, live CLE programs, assessment guides and forms or checklists, and easily accessible websites that include discussions on cognitive impairment and cognitive decline. All educational material should be widely available and routinely reviewed and updated for content accuracy. The materials should include access to confidential resources for self-help, medical treatment, and the professional assistance of colleagues willing to help impaired lawyers.

Training and education initiatives should involve experienced members of lawyer assistance programs who are familiar with the issues related to identifying, treating and assisting lawyers with other impairments. While lawyers and judges have an ethical responsibility to recognize the signs and symptoms of a colleague who may be impaired and, if feasible, to assist the colleague in obtaining help, most lawyers probably are not familiar with the warning signs of cognitive impairment (either in themselves or in others) and most lawyers are not familiar with the resources available for such impaired lawyers. Educational initiatives

should include programs on how to conduct a self-assessment and how to recognize and address cognitive impairment issues in others. This would include discussing the common warning signs and symptoms of mild cognitive impairment, Alzheimer's disease and reversible causes of cognitive impairment. Such programs should also include discussion on when neuropsychological or other testing is appropriate. Programs should also discuss the resources available for assistance and referral. Periodic announcements in publications that reach bar members offering and encouraging the use of training materials and assessment forms would be a valuable supplement to the training materials themselves. Additionally, education initiatives should involve medical professionals who can best articulate the issues and assist in developing assessment tools and identifying treatment options for use by lawyers, their colleagues, staff, families and friends.

To assist jurisdictions with accessing resources, the Joint Committee recommends that the NOBC, APRL, and ABA CoLAP websites include links to the online resources listed in this Joint Report.

C. Provide Planning Ahead and Law Practice Transfer Guidance

The 2007 Report recommended a number of steps lawyers should consider for insuring a smooth transition of client matters in the event of an unexpected, long-term interruption or cessation of a lawyer's practice. While the 2012 Survey did not specifically seek information on this issue, the subsequent Midyear meeting

survey and this Committee’s research has shed light on progress made in this area. Similar to the steps taken to identify a lawyer with an age-related or other incapacity issues, most jurisdictions recognize the need to undertake a broader education initiative to encourage lawyers, particularly small firm and solo practitioners and lawyers in niche or boutique practices within larger firms, to engage in advance planning for unexpected practice interruptions or cessation. Some jurisdictions have already published articles on the aging of the profession and the need for lawyers to engage in advance planning for unexpected events.⁸ Likewise, a number of jurisdictions, including California, Colorado, Florida, Iowa, North Carolina, Washington, and West Virginia, have excellent succession planning manuals and/or online resources that provide step-by-step suggestions and useful forms for lawyers to use in effective succession planning.⁹

Additionally, Comment 5 to ABA Model Rule 1.3, on “diligence,” highlights the voluntary effort by the profession to direct lawyers, especially those

⁸ *See, e.g.*, Disciplinary Note, Succession Planning, William D. Slease, New Mexico Bar Bulletin, April 3, 2013; Shades of Gray: The Opportunities and Challenges of An Aging Bar, Gary Toohey, Missouri Bar Precedent, Fall 2011; Succession Planning for Solo and Small Firm Practitioners, Jill A. Snyder, Maryland Bar Bulletin, October, 2010; Growing Old Together, Martin A. Cole, Bench & Bar of Minnesota, April, 2008.

⁹ *See, e.g.*, Colorado Supreme Court, Office of Attorney Regulation Counsel, Planning Ahead: A Guide to Protecting Your Clients’ Interests In the Event of Your Disability or Death (One of Which is Inevitable), available at http://www.coloradosupremecourt.com/pdfs/General/Closing_Practice.PDF; West Virginia State Bar Succession Plans, available at <http://wvbar.org/wp-content/uploads/2012/04/succession.pdf>; Washington State Bar Association, Succession Planning, available at <http://www.wsba.org/Resources-and-Services/Ethics/Succession-Planning>. See also New York State Bar Association’s Planning Ahead Guide, currently being updated by the Practice Continuity Subcommittee of the Law Practice Management Section.

in solo practices, to plan ahead by designating an “inventory” attorney with limited authority to review client files and take immediate action to protect the interests of the clients. Many jurisdictions already have rules that provide for inventorying or receivership attorneys to step in and distribute client files and funds when a lawyer is obliged to cease practice. Some states have rules authorizing appointment of conservators or similar agents, including the state attorney regulation office, to perform this function.¹⁰ The time and expense involved in closing a lawyer’s practice, whether it is done by outside successor counsel or bar counsel, can be significant. Voluntary action by local lawyers and bar associations often is on an ad hoc basis, without much guidance on how the volunteer lawyer should communicate with clients and courts about the incapacity of the impaired lawyer. There are a myriad of issues that may be involved, including outstanding fee claims and entitlement to unpaid fees by the impaired lawyer, conflicts of interest implicating the unwitting successor or inventory counsel, potential professional liability by the successor or inventory counsel to clients whose interests may have been harmed, and the role of the impaired attorney’s family and office staff, among other things.

¹⁰ The American Bar association has compiled a fairly comprehensive list addressing resources available for lawyers’ succession planning, including state caretaker rules, and guides for dealing with lawyer disability and other unexpected events. This material is available at http://www.americanbar.org/groups/professional_responsibility/resources/client_protection/client.html#Retirement.

The Committee is also aware that some jurisdictions, including Arkansas, California, Florida, Indiana, South Carolina and Wyoming, either have taken or are taking steps to enact rule changes or add commentary to existing rules to require or encourage lawyers to name successor attorneys and develop a comprehensive succession or transition plan.¹¹ Further, the Committee understands that several professional liability insurers ask lawyers to identify an attorney who can serve as a backup or inventorying attorney in the event that the insured lawyer's practice is interrupted or terminated.

One effort to address succession issues as they pertain to client files is being undertaken by the ABA Standing Committee on Client Protection (SCCP). The SCCP is currently considering whether to issue guidelines or seek a formal ethics opinion to address the definition of client files, permissible charges related to providing the client a copy of the file, the appropriate retention period for client files, the need for lawyers, particularly those in solo practice, to have a succession plan agreed to by a successor counsel, and the development of a plan for the orderly distribution of client files upon the cessation of a lawyer's practice or the

¹¹ *See, e.g.*, Arkansas Rules of Professional Conduct, Rule 1.3 comment 5 ("To prevent neglect of client matters in the event of a sole practitioner's death or disability, the duty of diligence may require that each sole practitioner prepare a plan that designates another competent lawyer to review client files, notify each client of the lawyer's death or disability, and determine whether there is a need for immediate protective action"); Disciplinary Code for the Wyoming State Bar, Rule 23(a), Protection of Client Interests ("Solo practitioners shall execute a 'Designation of Surrogate Attorney Form' as provided by the Wyoming State Bar).

dissolution of a law firm. This initiative will have significant implications for all jurisdictions and their lawyer regulation offices, given the relatively high percentage of solo practitioners in the legal profession. The burden of inventorying and distributing files, reconciling trust accounts and distributing funds, while protecting client interests and conserving resources, is great, particularly when the attorney who failed to adequately plan ahead is suddenly no longer available to deal with the issues.

Another possible comment jurisdictions should consider adding to their Rules to encourage lawyers to identify successor counsel and raise the awareness of the risks of not doing so is as follows:

Lawyers have an ethical duty to assure that clients receive all original documents generated during a representation and if a client does not receive all original documents, the lawyer has a duty to safeguard that property for the length of time required for the practice area. Original wills and other estate planning documents should not be retained by the lawyers unless the lawyer has designated successor counsel who has agreed to safeguard the documents if the lawyer ceases to practice law, whether by reason of retirement, disability, or death. Failure to designate backup counsel may result in the State Bar perfecting a conservatorship of the client files and ultimately seeking court authorization to destroy the documents, after reasonable attempts to notify former clients to retrieve their documents.

The Committee applauds the increasing awareness that all jurisdictions have of the need for lawyers to engage in succession or transition planning as well as the work being performed by the SCCP. Increased education on the topic and

guidance in the form of rules, commentary to existing rules and working guidelines will be some of the most effective means of improving the bar's awareness of and response to this critical need.¹² Additionally, if one is not already in place, each jurisdiction should consider developing a succession planning manual and an improved mechanism for insuring that lawyers, particularly those in solo practice, make arrangements for successor counsel who can assist in case of an emergency or other circumstance that interrupts a lawyer's ability to continue to serve his/her clients. Further, in addition to or in supplementation of rules or rule commentary addressing the need to name a successor lawyer, bar associations should consider organizing practice continuity committees and training volunteers to serve as successor counsel when needed.

D. Encourage and Support Senior Lawyers in Practice

The 2007 Report recommended that jurisdictions take steps to support senior lawyers in practice consistent with what has been referred to as the Second Season of Service.¹³ Among other things, the 2007 Report recommended using senior lawyers as mentors and involving them in *pro bono* work thereby taking advantage

¹² A compelling article on the importance of succession planning to which every practicing member of the bar should be referred is Death of a Practice: After Lawyer Dies Her Friend is Faced With Closing Down Her Firm, Susan A. Berson, ABA Journal, January 2013, available at http://www.abajournal.com/magazine/article/death_of_a_practice_terminally_ill_lawyers_friend_faces_closing_down_firm.

¹³ In August, 2006, then ABA President Karen J. Mathis introduced the Second Season of Service initiative to the ABA. As part of that initiative, the ABA formed the Commission on Second Season of Service to assist lawyers in the transition from full-time practice to pursue other interests and opportunities such as *pro bono* and volunteer work.

of the wealth of experience senior lawyers possess. Several jurisdictions, such as Arizona, New Mexico, Utah and Ohio have taken steps that effectively implement this recommendation.

The Committee encourages all jurisdictions to consider implementation of similar programs to match seasoned lawyers with new members of the profession. Such mentoring matches may address *two* issues facing the legal profession – 1) assuring continuing competent legal work by aging lawyers at risk for or experiencing some impairment and 2) providing employment opportunities for recent graduates. A mentoring relationship gives the new lawyers a chance to learn from seasoned experienced practitioners (full of wisdom, war stories and practical knowledge), while helping assure that senior lawyers continue to provide competent diligent representation in an increasingly technologically-complex practice environment (see RPC 1.1’s requirement for understanding relevant technology). Given the significant increase in unemployed and underemployed new lawyers, as well as the upsurge in new lawyers immediately opening solo practices, mentoring matches are likely to benefit both new and senior lawyers. Moreover, a mentorship program may provide an opportunity for a senior lawyer to eventually transition out of practice knowing that his or her firm and clients are in the hands of a lawyer committed to the clients and trained to take over and operate the business.

Other examples of existing programs that encourage mentoring include creating a license category for senior lawyers such as “emeritus.” A lawyer holding an emeritus license pays lower bar fees and may be able to practice in a limited setting, perhaps limited to *pro bono* matters, usually under the supervision of a fully licensed lawyer. The emeritus lawyer will typically forgo compensation for his or her work and is typically required to provide legal service through an approved or recognized legal services organization.

Further, many law schools either have or are developing clinical law programs for students to serve otherwise underserved legal needs. (New York’s Chief Judge has adopted a requirement for a minimum of 50 hours of *pro bono* work as a condition of admission for new bar applicants).¹⁴ Recruitment of senior lawyers to serve as mentors in such programs is desirable in that it provides a resource and connections to the bar for the soon-to-be or newly admitted lawyers while utilizing the skills and experience of the senior lawyer.

The Committee is also aware that many jurisdictions have either formed or are forming a senior lawyers division within the bar. At least one jurisdiction (Florida) has learned through a survey within its state that senior lawyers are particularly interested in support from their bar in finding employment

¹⁴ See <http://www.nycourts.gov/attorneys/probono/baradmissionreqs.shtml>.

opportunities, obtaining details on closing or selling a law practice, and learning about technology.¹⁵ An active senior lawyers division can assist in identifying such needs and interests and facilitating the bar's support to its members. The Committee encourages each jurisdiction to explore the formation and funding of such a division within the bar. These divisions would be well-suited to matching needs with newer lawyers to the potential benefit – financial, rainmaking, training and affiliations -- of all parties.

E. Responding to Age-Impaired Lawyers

The Committee recognizes, as did the NOBC/APRL 2007 Committee, that maintaining respect for and the dignity of an aging lawyer is critical while simultaneously protecting the public that lawyers are privileged to serve. Virtually every jurisdiction reported a disciplinary mechanism to address lawyers whose age-related or other impairments put the public at risk. But as one Committee member observed, discipline does not make an impaired lawyer well, nor has it been shown to be the most effective mechanism for actually protecting the public from impaired lawyers. Moreover, this Joint Committee's focus was on addressing impairment and other age-related challenges for lawyers before the lawyer becomes entangled in the disciplinary system. To that end, the Committee was

¹⁵ See Results of the 2013 Florida Bar Survey on Senior Lawyer Programming, April, 2013, at 7-7b.

encouraged to learn that many jurisdictions have implemented or are considering programs designed to identify and detect impairment issues at an early stage.

For example, the 2007 Report recommended that each jurisdiction adopt rules to provide for voluntary and involuntary disability status, both temporary and permanent. Several jurisdictions that responded to the Committee's Surveys reported having such rules and using them in matters not involving lawyer misconduct under the Rules of Professional Conduct.¹⁶ The Committee recommends that those jurisdictions that have not already done so consider adding such rules. Such rules should make it clear that the proceedings under the rules are not disciplinary proceedings and do not involve a finding of misconduct against the attorney. Additionally, such rules may provide for both voluntary and involuntary transfer of a lawyer to temporary or permanent disability status.

Likewise, the 2007 Report recommended that each jurisdiction consider enacting a permanent retirement rule for lawyers whose actions do not warrant discipline but who, nevertheless, should never again practice law. Many jurisdictions reported having a retirement class or category of license. In 2012, the NOBC created a Special Committee on Permanent Retirement (the SCPR Committee) to address this issue. The SCPR Committee's report and

¹⁶ *See, e.g.*, Colorado Rules of Civil Procedure, Rule 251.23, Disability Inactive Status; Florida Rules of Discipline, Rule 3-7.13, Incapacity Not Related to Misconduct; Internal Operating Rules of the Kansas Board for Discipline of Attorneys, Rule 220, Proceedings Where an Attorney is Declared or is Alleged to be Incapacitated; New Mexico Rules Governing Discipline, Rule 17-208, Incompetency or Incapacity.

recommendations are attached as Appendix “A” to this Report. The Committee urges each jurisdiction to consider the attached report and adopt its recommendations for establishing a permanent retirement license class.

One of the critical recommendations of the 2007 Report was that disciplinary agencies use judges and lawyers assistance program (“JLAP”) resources to respond effectively to age-impaired lawyers. Almost all states now have one form or another of a JLAP program. Responses by forty-eight states and the District of Columbia to a recent CoLAP survey revealed that fifty-three percent of JLAP programs are structured as an agency within a bar, thirty-one percent are structured as an independent agency and sixteen percent are an agency of the state courts.¹⁷ Services offered by each program vary, depending on funding. Most JLAP programs do offer assessments, interventions and referrals at a minimum.¹⁸

The vast majority of jurisdictions responding to the Committee’s Surveys reported heavy reliance on JLAPs in addressing lawyers with age-related challenges. Jurisdictions reported using JLAPs formally and informally to assist lawyers demonstrating age-related impairments, including one-on-one consultations with a lawyer and an JLAP member, more traditional interventions,

¹⁷ ABA Commission on Lawyer Assistance Programs 2012 Comprehensive Survey of Lawyer Assistance Programs, pp. 3-4. *See* http://www.americanbar.org/content/dam/aba/administrative/delivery_legal_services/lc_del_2012_lap_comprehensivesurvey.authcheckdam.pdf

¹⁸ *Id.* at pp. 10-12.

referrals to employee assistance type programs, and designation of a crisis response team to transition a lawyer out of practice, provide counseling and other medical and social services or referrals for the lawyer, and orderly distribute the lawyer's client files and funds.

Several years ago, the CoLAP Senior Lawyer Committee drafted, with input from several states' JLAPs, the Cognitive Impairment Worksheet for Attorney Assistance Programs. This worksheet helps identify signs and symptoms of cognitive impairment, and has a best practices section on how to approach and handle with dignity a lawyer exhibiting cognitive impairment. Further, the ABA CoLAP Senior Lawyer Committee is currently in the process of drafting a paper on cognitive impairment and cognitive decline that will include the worksheet.¹⁹ Also attached is an Illinois intervention guide with suggestions for conducting a dignified intervention for a lawyer exhibiting signs of cognitive impairment issues. *See* Appendix B.

The Committee strongly recommends that each jurisdiction develop a formal, working plan to utilize its JLAP in the efforts to identify and assist lawyers demonstrating age-related impairment. There are many reasons why JLAPs are

¹⁹ As of the date of this report, the latest available draft of the ABA CoLAP Senior Lawyer Committee Working Paper on Cognitive Impairment and Cognitive Decline, which included the worksheet is available at http://www.americanbar.org/content/dam/aba/administrative/lawyer_assistance/ls_colap_working_paper_on_cognitive_imp.authcheckdam.pdf

more effective than discipline and diversion programs. Among other things, a lawyer's ability to access an JLAP rather than face discipline will likely foster more self-referrals by lawyers facing age-related illnesses and fewer professionals are likely to go "underground" and leave their illness untreated. Further, JLAPs have medical and other experts and resources to both assess a lawyer facing age-related challenges and provide treatment alternatives in a confidential and less-threatening environment. Likewise, JLAPs provide better opportunities of an earlier intervention when a lawyer begins demonstrating symptoms of age-related impairment and, therefore, problems are identified before a lawyer becomes entangled in the discipline system, with the attendant harm to the public that precedes the disciplinary complaint. Based upon the experience in identifying and treating lawyers with substance abuse, JLAPs are also ideally suited to conduct early interventions or crisis management with a lawyer exhibiting age-related incapacity. JLAPs are also better able to provide hope and advocacy for an aging lawyer by, among other things, offering life coaching, assistance in how to retire, or a redirection allowing a senior lawyer to serve in different ways. Likewise, JLAPs can provide advocacy for the professional's health while preserving dignity, reducing shame and fear, yet still protecting the public. This contrasts with the more traditional discipline model where significant resources are expended on a disciplinary investigation and prosecution that will only force the lawyer out of the

practice without assistance to the lawyer and often end an otherwise stellar career on a disciplinary note.

The Committee also encourages NOBC and APRL leadership to work in tandem with CoLAP and the ABA in developing new and effective educational tools and programs to deal with this growing issue. As a first step, NOBC, APRL, and CoLAP websites should work together to provide resources for regulatory authorities and lawyers, family members and staff to help evaluate lawyer impairment and provide resources to assist with assuring the wellbeing and dignity of the impaired lawyer and the protection of the lawyer's clients.

Another recommendation of this Committee is to coordinate liaisons between each jurisdictions' young lawyer section/division and the jurisdictions' senior lawyer section/division to promote a working partnership between the sections to pair new, un-employed lawyers with senior lawyers who may need some assistance in managing their offices. By fostering such two-way mentoring, jurisdictions will create voluntary affiliations that encourage senior lawyers to mentor new lawyers with their years of practical experience while simultaneously affording senior lawyers the benefit of the new lawyer's knowledge of technology and attention to detail.

The ultimate goal of the Joint Committee is to encourage jurisdictions to implement programs for the early detection of lessening skills, provide assistance

to age-related impaired lawyers (and their staff and families) before there is an ethics violation, and assure that senior lawyers are treated with respect and encouraged to share their valuable wisdom with new lawyers.

APPENDIX A

BASIC PRINCIPLES FOR CREATION AND IMPLEMENTATION OF A PERMANENT “RETIREMENT” ATTORNEY CLASS

BASIC PRINCIPLES FOR CREATION AND IMPLEMENTATION OF A PERMANENT “RETIREMENT” ATTORNEY CLASS

AUGUST 2013

THE OBJECTIVE

In 2012 the National Organization of Bar Counsel (NOBC) created a Special Committee on Permanent Retirement (“Committee”) to address concerns identified by the May 2007 NOBC/Association of Professional Lawyers (APRL) Joint Committee on Aging Lawyers Report. Specifically the Committee was charged with providing written materials and guidance to the NOBC regarding the creation of a “Retired Status” class in order to enable, and perhaps facilitate, aging attorneys to retire and transfer status within the bar with dignity and to ensure public protection.

The Committee recognizes that jurisdictions use different terminology to refer to, classify, and regulate aging attorneys or senior lawyers seeking to retire. The Committee’s objective is to set forth principles or best practices for jurisdictions to consider in adopting rules which provide for voluntary retired status and permanent retired status for these senior lawyers.

The Committee recognizes that there are related concerns, including Client Security or Protection Funds, Receivers, Impairments, and other related issues. The Committee has not addressed the specifics of these concerns in an attempt to achieve tangible progress on the universal creation and implementation of a “Retired Status” of lawyers.

THE PRINCIPLES

1. Each jurisdiction should provide for at least two retirement classes, which are separate and distinct: voluntary and permanent.
2. Permanent retirement status should be reserved for senior lawyers who face complaints or allegations of misconduct or

impairment, and who should not be practicing law, but whose conduct does not require a serious disciplinary sanction such as suspension or disbarment. Permanent retired status should be an option available to a senior attorney who is the subject of a disciplinary complaint, investigation, or allegations of misconduct, so long as the allegations and investigation do not involve misconduct so serious that if proven the misconduct would result in the suspension or disbarment of the lawyer. Each jurisdiction should define the term "senior lawyer."

3. The procedure for applying for permanent retirement status should include a confidential joint petition or agreement.

4. Permanent retirement status, as set forth in the May 2007 report, assures that the impaired senior lawyer will not become active again after resolution of the grievances.

5. Permanent retirement status should not be an option where the senior, age-impaired lawyer has engaged in serious misconduct that would ordinarily result in suspension or disbarment, and may or may not be an option if the impairment requires a transfer to disability status.

6. In order to elect permanent retirement status, an attorney must permanently retire and/or surrender his/her license to practice law in any and all jurisdictions in which the attorney is admitted. Additionally, permanent retirement status should render the lawyer ineligible to apply for admission in any other jurisdiction. Each jurisdiction should notify the American Bar Association Data Bank of any order imposing permanent retirement.

7. Any application for permanent retirement status must be approved by disciplinary counsel or the equivalent authority.

8. A transfer to permanent retirement status may or may not include a method for resolution of pending bar complaints such as fee dispute arbitration or other programs available in a specific jurisdiction.

9. Permanent retirement should not be available to a lawyer who has caused a loss to a client. A jurisdiction may, or may not, choose to consider restitution in determining whether a client suffered a loss. However, permanent retirement status should not be permitted where the client security fund is adversely impacted except upon agreement by the client security fund.

10. A jurisdiction should require that provisions be made for closing the practice of a lawyer opting for permanent retirement status which does not adversely impact that jurisdiction's system of receivership or similar programs.

11. Permanent retirement should not be a bar to later discovered serious charges of misconduct.

12. Permanent retirement is distinct from voluntary retirement. An attorney may elect voluntary retirement where he or she has no knowledge of any complaint, investigation, action or proceeding in any jurisdiction involving allegations of misconduct. Election to voluntary retirement shall not be permanent.

APPENDIX B

INTERVENTIONS: PRESERVING DIGNITY

Janet Piper Voss

**Illinois Lawyers' Assistance Program
5/1/2013**

INTERVENTIONS: PRESERVING DIGNITY

Intervention is a group process most often used to help individuals who may not be able to see that they have a problem with alcoholism and/or drug addiction. It is always carried out with respect, concern, and love. The subject is confronted by the facts of his or her behavior, told of the impact their behavior has had on others, and offered hope and a plan to initiate change. The success rate is high and it is a helpful process to all who participate.

A less formal intervention can also be helpful to older legal professionals who may be suffering from cognitive impairment. There may be case neglect or an inability to function. With more lawyers working past a normal retirement age, lawyer assistance programs are often asked for help with these older adult issues.

Frequently the goal of this "soft" intervention is to urge an evaluation by a physician or specialist, eliminate certain work responsibilities, and even encourage retirement where necessary. It can also be to turn over a practice or, in the case of a judge, to leave the bench.

Who Participates in the Intervention?

- The group normally consists of colleagues and family members.
- In some case, it may include a clinical professional.
- It helps to include individuals the subject trusts and respects.
- It is always helpful to include a colleague with a power differential such as a senior partner or a presiding judge.

Steps in Planning an Intervention

- Meet with concerned colleagues and family members to make every member aware of the concerns and problems.
- Establish a goal – getting a thorough medical evaluation, reducing work responsibilities, closing a practice, or retiring from a firm or other legal organization.
- Carefully plan what each participant will say to the individual.
- Preserve the individual's confidentiality

The Intervention Itself

- Focus on the positive. It is important to help the individual feel good about his or her career. Talk about the individual's accomplishments.
- Preserve the respect the individual deserves.
- Celebrate the career – even plan a celebratory event to acknowledge the individual's contribution

- Ask the individual to follow the recommended plan.

After the Intervention?

- Stay in contact with the individual to be certain there is follow through.
- Offer support to the family and friends.