A man was heard to comment when leaving a Frank Sinatra Concert when Frank was in his 70s "I always wanted to be able to sing as well as Frank Sinatra and now I can!"

"I shall, of course, be retiring as Head of Chambers at the end of the year. A lawyer whose mind is apt to go blank is not just inefficient, he's dangerous." – Hubert Langton, (the already-dangerous) Head of Chambers."

P. D. James in A Certain Justice

"When you are sitting in court in adult diapers, something is wrong."
David Lat weblog Above the Law

I. INTRODUCTION

This program concerns the ethics, disciplinary, and malpractice issues raised by the increasing number of lawyers practicing law well into old age. The focus is on the effects of the natural aging process, not lawyers suffering impairment from serious illness or ongoing substance abuse and alcoholism. It concerns lawyers with mental impairment that may be either temporary or permanent. This includes early stages of dementia and Alzheimer's, and age-related mental impairment resulting from past alcoholism and substance abuse.

David Giacalone's definition of peridementia describes well the level of mental impairment to which healthy, but aging, lawyers are vulnerable:

> Peridementia: The period before actual dementia occurs, in which the subject starts to have a mild version of the loss of intellectual capacity that is associated with dementia – *i.e.*, impairment of attention, orientation, memory, judgment, language, motor and spatial skills, and function (not caused by major depression).

II. WHY IS AGE-RELATED MENTAL IMPAIRMENT A GROWING PROBLEM FOR THE BAR?

A. From the Report of NOBC-APRL Joint Committee on Aging Lawyers

> In the next decade, the number of lawyers continuing to practice beyond the traditional age of retirement is likely to increase dramatically. The factors contributing to this include:
>
> 1. The steady increase in the past fifty years in the number of lawyers admitted to practice each year;
>
> 2. The demographic shift in the elderly population;

3. The dramatic improvements in health care which have extended professional work lives;

4. The strong desire among many senior lawyers to continue making positive contributions to society; and

5. Economic necessity, which will compel lawyers to continue working because their pensions or savings are insufficient to support themselves and their families.

B. From "The Graying Bar: Let's Not Forget Ethics" by David Giacalone

- 76 percent of Baby Boomers intend to continue working after retiring from their regular job.

- Large numbers of Baby Boomers will in fact have no choice but to continue working because of inadequate savings and retirement plans.

- Mandatory retirement is no longer the norm for law firms – age discrimination lawsuits discouraged this policy.

- The trend for lawyers deferring retirement is stronger in nonurban areas and more prevalent with solo practitioners who are over-represented in the over fifty-five-age group. This trend is strongest in real estate law, family law, wills, and criminal law. The significance of this is that the average client is more at risk from age-related lawyer mental impairment than the major clients of urban-based larger law firms.

- Solo and duo firms ignore or do not deal well with age-related mental impairment.

- Regardless of intelligence or education, age is the biggest risk factor for developing Alzheimer's disease, which afflicts 10 percent of people older than sixty-five and up to half of those older than eighty-five.

III. WHAT ARE THE SIGNS THAT AN AGING LAWYER IS BECOMING MENTALLY IMPAIRED?

Various authorities describe the indicators of age-related mental impairment as follows:

A. Episodes of mild confusion and disorientation; skipping steps in necessary tasks; and memory lapses considerably more important than the proverbial word on the tip of our tongues.

B. Impairment of attention, orientation, memory, judgment, language, motor and spatial skills, and function.

C. A pattern of missed filings or hearings, frequent unexplained absences, or multiple instances of neglect and non-communication caused by a lawyer's continuing impairment.

D. Poor decision-making, loss of skill, office staff concerns, dissatisfied clients, mood swings.

E. Older adults are not only more inclined than younger adults to make errors in recollecting details that have been suggested to them, but are also more likely than younger people to have a very high level of confidence in their recollections, even when wrong.

F. In nonurban areas there are a lot of older lawyers who have failed to keep abreast of changes in the law, even in areas where they regularly practice.

IV. AGING MENTALLY IMPAIRED LAWYERS AND THE KENTUCKY RULES OF PROFESSIONAL CONDUCT

A. Mental impairment is not a defense to a violation of the Kentucky Rules of Professional Conduct (KRPC). Its only significance in a Bar disciplinary action is as a consideration for mitigation of any penalty.

B. Mentally impaired lawyers are most likely to violate the following KRPCs:

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

   Comment 5: Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation.

2. Rule 1.2(a) Scope of Representation and Allocation of Authority Between Client and Lawyer: Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued .... A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's

decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

3. Rule 1.3 Diligence: A lawyer shall act with reasonable diligence and promptness in representing a client.

   a. Comment 2: A lawyer's workload must be controlled so that each matter can be handled competently.

   b. Comment 3: Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trust-worthiness.

4. Rule 1.4 Communication:

   (a) A lawyer shall:

   (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

   (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

   (3) keep the client reasonably informed about the status of the matter;

   (4) promptly comply with reasonable requests for information; and

   (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

5. Rule 1.6(a) Confidentiality of Information: A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

6. Rule 1.16(a) Declining or Terminating Representation: Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

. . . .

(2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client;

V. LAW FIRM KRPC REQUIREMENTS WHEN PRACTICING LAW WITH AN AGING MENTALLY IMPAIRED LAWYER

A. The KRPCs require that partners and supervisory lawyers ensure compliance with the ethics rules. Specifically, Rule 5.1, Responsibilities of a Partner or Supervisory Lawyer, provides:

(a) A partner 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.

(b) 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.

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct only if:

(1) The lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) The lawyer is a partner in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

The comments to the rule describe in detail who is covered by the rule and give some guidance on appropriate measures for complying with the rule:

> (1) Paragraph (a) applies to lawyers who have managerial authority over the professional work of a firm. *See* Rule 1.0(c). This includes members of a partnership, the shareholders in a law firm organized as a professional corporation, and members of other associations authorized to practice law; lawyers having comparable managerial authority in a legal services organization or a law department of an enterprise or government agency; and lawyers who have intermediate managerial responsibilities in a firm. Paragraph (b) applies to lawyers who have supervisory authority over the work of other lawyers in a firm.
>
> (2) Paragraph (a) requires lawyers with managerial authority within a firm to make reasonable efforts to establish internal policies and procedures designed to provide reasonable assurance that all lawyers in the firm will conform to the Rules of Professional Conduct. Such policies and procedures include those designed to detect and resolve conflicts of interest, identify dates by which actions must be taken in pending matters, account for client funds and property and ensure that inexperienced lawyers are properly supervised.
>
> (3) Other measures that may be required to fulfill the responsibility prescribed in paragraph (a) can depend on the firm's structure and the nature of its practice. In a small firm of experienced lawyers, informal supervision and periodic review of compliance with the required systems ordinarily will suffice. In a large firm, or in practice situations in which difficult ethical problems frequently arise, more elaborate measures may be necessary. Some firms, for example, have a procedure whereby junior lawyers can make confidential referral of ethical problems directly to a designated senior partner or special committee. *See* Rule 5.2. Firms, whether large or small, may also rely on continuing legal education in professional ethics. In any event, the ethical atmosphere of a firm can influence the conduct of all its members and the partners may not assume that all lawyers associated with the firm will inevitably conform to the Rules.

B. ABA Formal Opinion 03-429 (6/11/03), Obligation With Respect to Mentally Impaired Lawyer in the Firm, in the absence of Kentucky authority on point, is the leading authority for law firm compliance with ethics rules when practicing with a mentally impaired lawyer. It provides this guidance for compliance with Rule 5.1:

> If reasonable efforts have been made to institute procedures designed to assure compliance with the Model Rules, neither the partners in the firm nor the lawyer with direct supervisory authority are responsible for the impaired lawyer's violation of the rules unless they knew of the conduct at the time when its consequences could have been avoided or mitigated and failed to take reasonable remedial action.

C. The opinion offers this guidance on how to deal with a mentally impaired firm lawyer who has violated the Model Rules:

> The partners in the firm or supervising lawyer may have an obligation under Rule 8.3(a) to report violations of the ethics rules by an impaired lawyer to the appropriate professional authority. Only violations of the Model Rules that raise a substantial question as to the violator's honesty, trustworthiness, or fitness as a lawyer must be reported. If the mental condition that caused the violation has ended, no report is required. Thus, if partners in the firm and the supervising lawyer reasonably believe that the previously impaired lawyer has resolved a short-term psychiatric problem that made the lawyer unable to represent clients competently and diligently, there is nothing to report. Similarly, if the firm is able to eliminate the risk of future violations of the duties of competence and diligence under the Model Rules through close supervision of the lawyer's work, it would not be required to report the impaired lawyer's violation. If, on the other hand, a lawyer's mental impairment renders the lawyer unable to represent clients competently, diligently, and otherwise as required by the Model Rules and he nevertheless continues to practice, partners in the firm or the supervising lawyer must report that violation.
>
> If the matter in which the impaired lawyer violated his duty to act competently or with reasonable diligence and promptness still is pending, the firm may not simply remove the impaired lawyer and select a new lawyer to handle the matter. Under Rule 1.4(b), there may be a responsibility to discuss with the client the circumstances surrounding the change of responsibility. In discussions with the client, the lawyer must act with candor and avoid material omissions, but to the extent possible, should be conscious of the privacy rights of the impaired lawyer. Even if the matter in which the impaired lawyer violated the Model Rules no longer is pending, partners and lawyers in the firm with comparable managerial authority and lawyers with direct supervisory authority over the impaired lawyer may have obligations to mitigate any adverse consequences of the violation.

D. The opinion concludes with guidance for when an impaired lawyer is no longer in the firm:

> If the impaired lawyer resigns or is removed from the firm, the firm may have disclosure obligations to clients who are considering whether to continue to use the firm or shift their relationship to the departed lawyer, but must be careful to limit any statements made to ones for which there is a factual foundation. The obligation to report a violation of the Model Rules by an impaired lawyer is not eliminated by departure of the impaired lawyer.

VI. A LAWYER'S DUTY TO REPORT RULE VIOLATIONS OF A MENTALLY IMPAIRED LAWYER NOT IN THE SAME FIRM OR PRACTICE

ABA Formal Opinion 03-431 (8/8/2003), Lawyer's Duty to Report Rule Violations by Another Lawyer Who May Suffer from Disability or Impairment, provides this guidance:

> A lawyer who believes that another lawyer's known violations of disciplinary rules raise substantial questions about her fitness to practice must report those violations to the appropriate professional authority. A lawyer who believes that another lawyer's mental condition materially impairs her ability to represent clients, and who knows that that lawyer continues to do so, must report that lawyer's consequent violation of Rule 1.16(a)(2), which requires that she withdraw from the representation of clients.

VII. AGING MENTALLY IMPAIRED LAWYERS AND BAR DISCIPLINARY ACTIONS

A. Mentally impaired lawyers are subject to Bar discipline just as any other lawyer in practice for violations of the KRPCs. As noted above, mental impairment is not a defense to a rule violation. Its only significance in a disciplinary action is as a consideration for mitigation of any penalty.

B. A Kentucky Supreme Court Rule provides a temporary suspension from practice procedure for mentally impaired lawyers that is an alternative to disciplinary action. Use of this procedure could be the most fair and considerate way of dealing with older lawyers with mental impairment.

> SCR 3.165 Temporary Suspension by the Supreme Court
>
> (1) On petition of the Inquiry Commission, authorized by its Chair, or the Chair's lawyer member designee, and supported by an affidavit, an attorney may be temporarily suspended from the practice of law by order of the Court provided:
>
> . . . .

> (d) It appears that probable cause exists to believe that an attorney is mentally disabled ... and probable cause exists to believe he/she does not have the ... mental fitness to continue to practice law. If the attorney denies that he/she is mentally disabled ... the Court may order the attorney to submit to a physical or mental examination by a physician or other health care professional appointed by the Court. The examining health care professional shall file with the Clerk of the Court a detailed written report setting out the findings of the health care professional, including results of all tests made, diagnosis and conclusions, together with like reports of all earlier examinations by any health care professional of the same condition. The Clerk of the Court shall furnish a copy of the examining health care professional's entire report to the attorney and to Bar Counsel. The Court may order the attorney to produce to the Court and Bar Counsel any relevant medical, psychiatric, psychological or other health care or treatment records, including alcohol or drug abuse patient records, evidencing prior or ongoing treatment for mental disability ... or to execute appropriate releases which would comply with applicable federal and state law in order to permit the treating health care professional to release those records to the Court and Bar Counsel. Any such order and the resulting records regarding the treatment shall be confidential and sealed in the record.

VIII. THE MALPRACTICE RISK OF AGING MENTALLY IMPAIRED LAWYERS

Mentally impaired lawyers can malpractice in all the same ways that unimpaired lawyers do. The major malpractice risk, however, is that mentally impaired lawyers simply lose control of the administration and management of their practice resulting in lack of diligence and procrastination. This in turn leads to missed deadlines and filings as well as statute of limitations violations. One authority describes the problem well:

> Lack of diligence is a special and widespread variety of incompetence. It consists of incompetently failing to act when advancing or protecting a client's interests calls for action. The types of inactivity range from virtual abandoning of the client to procrastination. Some few lawyers in particular matters seem to be seized by pathology of extreme inaction similar to abandoning a client. A pattern repeated in the cases is that a client will have an initial interview with such a lawyer, often an advance fee payment is made, and the lawyer undertakes the representation. Thereafter, the lawyer does little or nothing to advance the client's interests, retains the fee, and fails entirely to communicate with

> the client. Sometimes inaction occurs at a particular sticking point. Representative are situations in which a lawyer apparently handles a matter with reasonable competence but then fails to take a critical step such as filing a pleading or appearing for a hearing. Often procrastination cases are accompanied by a failure to consult with the lawyer's client, failure to return client requests for information about the matter, or misrepresentation of the status of the matter. Variants of procrastination problem seem to affect some types of practitioners or areas of practice, such as probate work, more than others. Procrastination may also be symptomatic of professional burnout, alcoholism, or mental problems. (Wolfrom, Modern Legal Ethics (1986), §5.1, p.191)

Aggravating the liability for lack of diligence and procrastination is that almost invariably there is no defense to the malpractice – the statute of limitations was missed, the personal injury case was irreversibly lost for failure to file a timely appeal, or rules for fees and client trust accounts were violated and the money is gone.

IX. MANAGING THE RISK OF AGING MENTALLY IMPAIRED LAWYERS

What follows is advice from several sources on risk managing the malpractice issues posed by mentally impaired lawyers:

A. From "The Ethical and Malpractice Risks of Impaired Lawyers and Their Unimpaired Associates" by Pete Gullett and Del O'Roark, KBA Bench & Bar, Vol. 70 No. 4, (July 2006):

> **Docket and Work Control**: The catastrophic risk impaired lawyers present is when they lose control of the administration and management of their practice resulting in a deluge of indefensible claims. The best way to prevent this negligence is to implement docket and work control management systems that force frequent periodic review of all active matters in the firm.
>
> Docket systems can be maintained on computers, paper calendars, or a combination of both. Every time sensitive matter in the firm should be recorded in three places – the lawyer's personal calendar, the lawyer's secretary's calendar, and a central firm calendar monitored by a third member of the firm who follows up to assure that the responsible lawyer responds to a reminder on time. Solo practitioners can program their computer to act as their 'third person.' The system should operate to alert lawyers of a pending time sensitive matter with ample lead-time to respond. Reminders then should occur the day before the deadline and the day of the deadline. Computer programs that show this information to lawyers when they first start their computer in the morning are especially effective. If the docket and work control information is maintained

exclusively on computers, daily backup is mandatory and off-site storage of computer data is essential.

Other procedures to use in combination with a docket and work control system are:

- No new file is opened without applicable limitations periods being recorded in the file in writing by a lawyer or that there are none.

- Stamp on the front of a file applicable limitations periods.

- The responsible lawyer after meeting a deadline should record the next deadline for the file.

- Assign an alternative lawyer responsibility to respond to a reminder notice if the responsible lawyer is unavailable or fails to respond.

- Conduct stale file reviews on a regular basis – review all files that have had no docketing or billing activity for three months.

- Inspect at regular intervals all office filing locations for inactive files, stale files, and missing files.

- Establish file-closing procedures that check for whether any required action has been overlooked.

Follow the Money: Mismanagement of funds, conversion, commingling, and failure to account for and return fees are a major impaired lawyer risk. Firms should have a strict system of internal controls to assure that no one person in the firm has the ability to unilaterally expend firm and client funds. Limit check writing authority, require double signatures on high dollar checks, and whenever possible have two people involved in a financial transaction (*e.g.* if one person deposits money someone else records the deposit in the office books). Outside annual CPA audits are recommended.

B. From "Risk Managing Senior Status Lawyers," LMICK Newsletter <u>The Risk Manager</u>, Spring 2006:

> A firm must monitor the activities of senior status lawyers connected to the firm in any way just like other lawyers in the firm:

- Senior status lawyers must use the firm's work control and docketing system, billing procedures, and work product review procedures.

- No firm lawyer, including senior status lawyers, should be allowed to open client trust accounts or fiduciary accounts under their exclusive management – all firm lawyers must use the firm's financial management system.

- Senior status lawyers should be required at least annually to update the firm on:

  - their membership in organizations;

  - service as an officer, director, or other interests in business;

  - performance of fiduciary services such as trustee, conservator, administrator, or executor; and

  - powers of attorney held involving financial matters.

- All members of the firm should be given specific guidance on the relationship of the firm with senior status lawyers.

C. From ABA Formal Opinion 03-429 (6/11/03), Obligation with Respect to Mentally Impaired Lawyer in the Firm:

> The firm's paramount obligation is to take steps to protect the interests of its clients. The first step may be to confront the impaired lawyer with the facts of his impairment and insist upon steps to assure that clients are represented appropriately notwithstanding the lawyer's impairment. Other steps may include forcefully urging the impaired lawyer to accept assistance to prevent future violations or limiting the ability of the impaired lawyer to handle legal matters or deal with clients.
>
> Some impairments may be accommodated. A lawyer who, because of his mental impairment is unable to perform tasks under strict deadlines or other pressures, might be able to function in compliance with the Model Rules if he can work in an unpressured environment. In addition, the type of work involved, as opposed to the circumstances under which the work occurs, might need to be examined when considering the effect that an impairment might have on a lawyer's performance. For example, an impairment

may make it impossible for a lawyer to handle a jury trial or hostile takeover competently, but not interfere at all with his performing legal research or drafting transaction documents. Depending on the nature, severity, and permanence (or likelihood of periodic recurrence) of the lawyer's impairment, management of the firm has an obligation to supervise the legal services performed by the lawyer and, in an appropriate case, prevent the lawyer from rendering legal services to clients of the firm.

D. From "Managing Your Practice – Lawyer Impairment Should Not Be Overlooked" by Emily Eichenhorn, Oregon State Bar Bulletin, July 2003:

> **Dealing with Malpractice**: Quick action in dealing with the lawyer's work files is as important to controlling professional liability losses as intervention is to the lawyer's health. The first order of business is to determine immediately what files the lawyer currently is responsible for and where each matter stands. Designate one person to oversee the process, through whom all decisions and communications must flow. In this way you have a better chance of keeping track of all of the files; you are better able to present consistent information to courts, clients and co-workers and you are less likely to have something slip through the cracks.
>
> Make a thorough search of every file, reviewing every piece of paper. For each matter, determine the last completed action and move forward from there. Examine everything in the lawyer's office: calendars, case management systems, computer files, billing records, time sheets and the piles on the desk and the floor. Check the lawyer's home as well. Leave no stone unturned, no drawer unopened. Stories are now legend of firms discovering file drawers filled with literally years of neglected files.
>
> Reassign every pending file to another attorney. Even if you anticipate that the impaired attorney may return to work relatively soon, or if it appears that there is no need for any immediate action on a particular file, give it to someone else. The firm needs to exercise complete control over all of the work at this point. If appropriate, the matter can be returned to the impaired lawyer at a later time. After you have gotten a handle on and reassigned all open files, review any files that the lawyer has closed in the last year or two. Clarify that all necessary work was in fact completed and handled properly. If necessary, reopen the matters and assign lawyers to clean up anything left undone.

As soon as possible after you have confronted the situation, contact your professional liability insurer for guidance as to how to proceed should you discover malpractice or the basis for potential claims. The insurer can help you sort through your disclosure obligations and, with assistance from claims counsel, determine the best strategy for dealing with clients and the courts. In some circumstances, the insurer may provide counsel to handle some of the open files in an attempt to mitigate any further damage.

X. PLANNING FOR THE TERMINATION OF PRACTICE OF AN AGING MENTALLY IMPAIRED LAWYER

A. Good risk management includes planning for when a firm or individual lawyers in the firm leave the practice of law. This is especially true for solo practitioners. Unfortunately, too many lawyers have no such plan and are caught short when a sudden emergency occurs such as mental impairment, death, disability, or forced retirement of a lawyer. There are several publications available to assist in this planning.

B. The most comprehensive guide is the New York State Bar Association publication The Guide: Planning Ahead: Establish an Advance Exit Plan to Protect Your Clients' Interests in the Event of Your Disability, Retirement or Death (available on the Internet at http://www.nysba.org/PlanningAheadGuide/). A sample of the Guide's table of contents follows:

A. What If? Answers to Frequently Asked Questions

B. Checklist for Lawyers Planning to Protect Clients' Interests in the Event of the Lawyer's, Disability, Impairment, Incapacity or Death

C. Checklist for Closing Your Own Office

D. Checklist for Closing Another Attorney's Office

E. Checklist for Concerns When Assuming Temporary Responsibilities of Another Attorney's Practice Whether Resulting from the Disability or Suspension of the Other Attorney

F. Agreement to Close Law Practice in the Future

G. Authorization and Consent to Close Law Practice (Short Form)

H. Limited Power of Attorney to Manage Law Practice at a Future Date

I. PCs and PLLCs: Appointing the Appropriate Agent to Manage a Solo Law Practice in the Event of a Death, Disability or Other Inability to Practice Law

B. Two Bench & Bar articles addressing the ethics and practical considerations in terminating a practice provide analysis and checklists citing Kentucky authority:

1. "A Guide for After the Death of a Kentucky Sole Practitioner," by Glenn David Denton, Vol. 77, No. 5, 9/2013. (available on Lawyers Mutual's Website at lmick.com – click on Resources, Subject Index, Bench & Bar Articles, 2013, and on the article)

2. "What Happens To Your Clients If Something Happens To You? The Ethics and Risk Management of Leaving the Practice of Law," by Del O'Roark, Vol. 68, No. 5, 9/2004. (available on Lawyers Mutual's Website at lmick.com – click on Resources, Subject Index, Disaster Planning, and on the article)

C. The following observations by a senior lawyer experienced in dealing with aging lawyer issues are informative and quite helpful in showing the personal considerations in dealing with aging.

> Most of my experience is derived from assessing my own competence. At seventy-two and practicing full time (I am the oldest full-time partner in the firm), I am aware of shortcomings in near term memory and hearing. I have read enough to know that is a natural consequence of aging. With that recognition, I take more notes, wear hearing aids when in rooms with high ceilings (like a courtroom) and never hit the send button right away.
>
> When I was the managing partner, we adopted two policies:
>
> 1. Age is not a criterion for continuation in the firm in any capacity. Competence and productivity, along with behavior, is the basis for compensation decisions. If followed, this should avoid (or at least reduce) age discrimination allegations.
>
> 2. All partners age sixty and above will report to their managing partner annually on their health. This is an honor system requirement, but it would be hard to hide major surgery or injury from others. The purpose is to provide a second chair, if it may be required later.
>
> We have a good disability insurance program that minimizes any incentive to hide medical issues that interfere with the practice. Further, the firm substantially

subsidizes an annual physical for partners. There is no requirement to disclose results.

In my case, I have discussed with the managing partner (who I brought to the firm fifteen years ago) my health, as well as that of my wife, since her medical issues affect my practice. He was told in advance of my cancer surgery and we coordinated some hand-offs while I was out (although it was much briefer than either of us expected). I think that we are able to manage issues like this because of the collegiality and trust among the partners.

The one piece that can be improved upon is a client succession plan. If you know a year in advance that you are retiring, the transition to a new client manager is not difficult. But when retirement or major illness that was not anticipated happens quickly, it is too late to orchestrate a smooth transition and hand off. Additionally, I note that in some firms succession plans are harder to implement because older partners have a disproportionate share of equity and voting power. They will then be able to block changes that would work to their financial detriment. Loss of control = loss of income.

That said, the assessment of declining competence is an issue we have addressed, but not in the context of age. In some cases, folks have just lost the incentive and they want to be paid regardless. Data will make that case. Billable hours and business development are easy metrics to collect and assess. The more difficult issue to judge is the quality of their legal advice and products. Review of documents, letters, *etc.* can be accomplished easily because these are documents maintained in a central database. But the shortcoming with that limited approach is the inability to review the facts and determine whether the issues were properly addressed. That is where the assignment of a second chair is important.

I think we will formalize the second chair approach, with a clear understanding that the role of the second chair is to be able to step in on short notice, but also to report to management when there is evidence that competence and judgment jeopardize client representation. The selection of the second chair for an older partner will not be easy and should be a firm policy at a certain age (sixty-five?) so that a partner does not feel that that he is being spied on. It is just good business.

In my case, I have asked my closest friend in the firm to tell me when he perceives that I am slipping. I will not like it, but I trust him. But that approach is not firm policy and the risk is that without a policy, age discrimination is an unnecessarily heightened risk.

THE GRAYING BAR: LET'S NOT FORGET THE ETHICS

David Giacalone
Harvard LawBlog[1]

https://blogs.law.harvard.edu/ethicalesq/2007/03/20/the-graying-bar-lets-not-forget-the-ethics/

My brain's been doing a lot of "Scootering" lately: forgetting a fact, then remembering it, then forgetting it again. (*see* WaPo article, "Where'd We Leave that Darn Fact?," Feb. 11, 2007) For well over a month, I've "forgotten" to fulfill my promise to write about our graying legal profession. That's despite seeing many reminders in the news and coming across the following quote while reading the P.D. James novel A Certain Justice (Seal Book, 1997, reprint 2006, at 294):

> "I shall, of course, be retiring as Head of Chambers at the end of the year. A lawyer whose mind is apt to go blank is not just inefficient, he's dangerous." – Hubert Langton, (the already-dangerous) Head of Chambers

What finally pushed me to finish this lengthy piece is the news from the Alzheimer's Association, that "Alzheimer's Disease Prevalence Rates Rise to More than Five Million in the United States" (March 20, 2007; full report, 28 pp pdf; fact sheet). Apparently, "One out of eight people age sixty-five and older has Alzheimer's, with up to half a million Americans under sixty-five suffering from early onset Alzheimer's. Ten percent of the lawyers in Washington State are over age sixty. If the numbers are similar for the entire country, there may already be 10,000 to 15,000 lawyers with Alzheimer's disease. How many of them are still in practice? [update: (March 22, 2006): "State Bar Association Calls for Increasing Retirement Age for Judges [to 76]," NYSBA Press Release, March 22, 2007].

It's been almost two years since our cranky alter ego "Prof. Yabut" wrote the posting "peridementia and the aging knowledge worker."

> Yabut defined "peridementia" as the period in which the subject starts to have a mild version of the loss of intellectual capacity that is associated with dementia – *i.e.*, impairment of attention, orientation, memory, judgment, language, motor and spatial skills, and function.

As peridementia could very well occur long before one's retirement, Prof. Y wondered when interference with job functioning becomes significant enough that something needs to be said and done about it within a firm or within the bar, given the ethical obligation of lawyers:

1. To provide competent (Model Rule 1.1) and diligent (Rule 1.3) service to clients;

2. To reasonably consult with the client and keep the client reasonably informed about the status of the matter (Rule 1.4);

[1] Links have been removed. Please see https://blogs.law.harvard.edu/ethicalesq/2007/03/20/the-graying-bar-lets-not-forget-the-ethics/ for links.

3. To refuse or withdraw from representation of a client when "the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client" (Rule 1.16a); *and* both,

4. To report to disciplinary authorities the conduct of another lawyer that "raises a substantial question" as to the lawyer's fitness to practice law (Model Rule 8.3) *and*

5. To "make reasonable efforts as a manager or supervisor to ensure that a law firm "has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct." (Model Rule 5.1).

> mid-argument
> the senior partner
> has a senior minute
> . . . . . .by dagosan

Since then, the topic of a graying legal profession has gotten quite a bit of attention. Back in 2005, my alter ego fretted:

> If my otherwise-healthy, middle class and professional, over-fifty friends are any indication, there's a lot of "peri-dementia" going around. People who joked a few years ago about their first batch of Senior Moments, aren't joking any more. We seem to be having "*brainos*" that are quite a bit more worrisome than the increased numbers of typos found in our documents. They include episodes of mild confusion and disorientation; skipping steps in necessary tasks; and memory lapses considerably more important than the proverbial word on the tip of our tongues.

Because "76 percent of boomers intend to keep working and earning" after retiring from their regular job (Merrill Lynch survey, Feb. 2005), and large numbers of Baby Boomers (in both the U.S. and Canada) will in fact have *no choice but to continue working*, due to financial imperatives, Prof. Yabut opined that peridementia could become commonplace in the workplace. And, he asked a few pertinent questions:

> What are actual or potential employers, and co-workers, going to do about peridementia? How should ethical requirements of competence affect the choices made by lawyers and other professionals? Will age discrimination laws become a shield for those who aren't quite as sharp as they used to be? Does society want to offer such protection?

Professors Becker and Posner wrote in 2005 about the related topic of judges and law professors who "Overstay Their Welcome" Judge Posner focused on septuagenarians, noting that a loss in mental capacity from aging "may reduce the value of [their] entire output to zero." Prof. Daniel Solove at Prawfsblawg wasn't convinced that the problem of mental acuity is significant enough to warrant the testing suggested by Posner, but noted that "retirement is often the most effective remedy for dealing with a lazy or problem-generating judge or faculty member," while preserving tenure.

the old days . . .
autumn colors
black and white

. . . . . by Andrew Riutta – Full Moon Magazine (2005)

Becker and Posner were talking about the pre-Boomer generation of judges and lawyers, whose aging problems are already with us. Even more than in 2005, there are strong reasons why I believe Baby Boomer peridementia is also very likely to blossom within the legal profession in the coming decade or two, as *BoomerEsq* decides to work well past the traditional retirement age (a trend already noted in studies such as "The Changing Face of the Legal Profession," which is discussed below):

1. As the Pro Bono lnstitute's Second Acts program has noted, "Legal researchers and demographers have determined that, *over the next two decades*, the number of *lawyers in the United States aged fifty and older will triple*."

2. Many organizations and bar groups are encouraging older attorneys to move into public interest legal roles after they retire from the "first legal career". *See*, *e.g.*, "The Coming Wave," Harvard Law Bulletin, Fall 2006; and Marc Galanter's 1999 law review article "Old and in the Way". The 2002 ABA family law pro bono report noted (at 9): "senior attorneys are a prime source from which to recruit new pro bono attorneys." [Aside: Will peridementia – or worse – follow affluent lawyers who retire from their first careers and enter a public interest Second Act? How will this affect their new, at-risk or low-income clients? How closely can or will "volunteer lawyers be monitored, and by whom?]

3. The trend of Boomer undersaving continues, making it ever more likely that many lawyers will need to continue working well past "traditional" retirement age. (*e.g.*, Register-Mail/ AP, "Boomers May Race Funding Shortage: Saving at Lowest Rate Since Great Depression," Feb. 2, 2007). [Aside: Is it safe to assume that this phenomenon particularly affects "public interest" and "solo" attorneys, who have less income than their professional brethren? What does that mean for their clients?]

4. The factors that are most predictive of delayed retirement – "Lower rates of retiree health insurance offers from employers, higher levels of educational attainment, and lower rates of defined benefit pension coverage" – fit many segments of the legal profession closely. "Why Do Boomers Plan to Work So Long?" (Urban Institute, December 2006)

5. Bar associations are working to convince law firms to end the practice of mandatory retirement for partners, while partners are suing their former firms for age discrimination after being forced out or offered unfavorable retirement packages. Such trends could allow lawyers to keep working longer. *See*, *e.g.*, "Happy Birthday, Vacate Your Office," New York Times, December 8,

2006; EEOC v. Sidely & Austin, press release, Jan. 13, 2005; "Freshfields Hit with Age Discrimination Claim" (TimesOnline, Jan. 31, 2007; via The Barrister Blog); "Law Firms in Dock as Over-50s File First Ageism Suits" (The BusinessOnline, Jan. 10, 2007); and "Mayer Brown 'De-Equitizes' 45 Partners" (New York Law Journal/Law.com, March 5, 2007), plus Prof. Bainbridge, "Does a Partnership Breach Fiduciary Duties by Firing Partners to Become More Profitable?" (March 2, 2007); update (March 22, 2007): New York State Bar Association Calls for Increasing Retirement Age for Judges (Press Release, March 22, 2007), calling for a uniform seventy-six years for all judges, and saying the practice of mandating retirement among attorneys in private law firms was "both unwarranted and unwise."

6. Baby Boomers seem far more inclined than previous generations to deny (or cover-up) the effects of aging (including their gray). They also give very little credit to the ability of the coming generation of professionals (*see* Washington Lawyer, "From the President", Feb. 2007). Ellen Goodman recently pointed out these attributes in her Boston Globe column, "Junior Envy," January 26, 2007, asking "Is it possible that the same generation that famously didn't trust anybody over thirty when they were twenty doesn't trust anybody under fifty now that they are turning sixty?" And, Goodman notes, "One of the charms of the boomers . . . is how they are managing to age without getting old. My favorite factoid comes from a Yankelovich study showing that boomers define 'old age' as starting three years after the average American is dead. It's a new wrinkle on the 1965 lyric by The Who: 'I hope I die before I get old'." [And see "Is Looking Your Age the New Taboo?" (New York Times, March 1, 2007)]

7. With so many of them spending long periods of time taking modern serotonin-uptake antidepressants, Baby Boomers are facing a potentially enormous mental-neurological time bomb. Thus, in his book Prozac Backlash (2000), Joseph Glenmullen, M.D., warns of potential side effects from Prozac and similar serotonin-boosting antidepressants. Dr. Glenmullen points to memory loss problems and structural "silent brain damage" due to the brain's "backlash" reaction to artificially elevated levels of serotonin. The backlash may make users prone to prematurely develop neurological conditions (including dementia) or leave them with unsafe levels of healthy brain cells when faced with the normal aging process. (*see* Chapter 1, "The Awakened Giant's Wrath: Risking Brain Damage") [Could this be why so many Boomers seem to have memory problems at a far younger age than their parents did? Or is it the Teflon and microwaves?] Because lawyers are well-known to suffer depression at rates above all other professions, it is safe to say that a large number of us have experienced long periods of artificially-elevated levels of serotonin.

budget monitoring
all of the managers
show a touch of grey
. . . . . by Matt Morden at Morden Haiku

I strongly agree with pundits who herald the wisdom that can only come with age, and who plead that the elderly be treated with dignity and respect. But, there can be little doubt that many of the mental faculties that are important in everyday law practice are adversely affected by old age. For example, "older adults are not only more inclined than younger adults to make errors in recollecting details that have been suggested to them, but are also more likely than younger people to have a very high level of confidence in their recollections, even when wrong." *See* "Older Adults May Be Unreliable Eyewitnesses, Study Shows," Medical News Today, 25 Feb 2007 (via ldealawg). Moreover, in the vast hinterlands of legal practice in America (outside the realm of elite law firms) – where most lawyers toil and most clients are served – there are a lot of older lawyers who have failed to keep abreast of changes in the law, even in areas where they regularly practice.

For every sage jurist or lawyer who brings glory to the profession, we have all winced over (or smirked at) the courthouse lawyer who has overstayed his welcome in the profession. What will the Bar do to protect our clients (and our profession) when the Overtimers greatly multiply in number over the next couple of decades?

not on the tip of my tongue –
forgetting the name
of the pretty one
. . . . . by dagosan

storm warning
the watercolorist
works in shades of grey
. . . . by Torn Painting from The Heron's Nest

My primary concern continues to be the same as when this weblog was called "ethicalEsq": the welfare of the "average" client, whose lawyers work on Main Street, not Wall Street. The legal profession has never done an adequate job of policing its ethical rules – and that is especially true of the demand that lawyers practice with competence and diligence. (*see*, for example, this post and that one; and my recent piece at shlep on "Family Law Civil Gideon," March 9, 2007). I'm willing to assume that most large law firms ("Biglaw," "White Shoes," etc.) have or will have in place procedures that will help assure that the workproduct of aging lawyers is monitored and competence maintained – with valued partners given the chance to adapt their practices to their changing mental and physical realities. Unless prevented by age discrimination laws, it's most likely, of course, that financially "unproductive" lawyers will be pushed out by larger firms prior to becoming a competence problem [*see* below, and the recent flap over "de-equitization" at Chicago-based Mayer Brown, which has provoked concern from Rick Georges and Eric Mazzone:, and outrage by Larry Bodine (via LegalBLogWatch)].

> ✓ With the obvious disclaimer that no generality fits all members in any category, *I have much less confidence in solo, duo and other small firms being prepared to deal with the problems of aging lawyers*. Despite all the

> attention given to the BigLaw crowd in NYC, such firms make up 80 percent of the practicing bar here in New York State. In "SmallLaw" firms, the person deciding what to do about a problematic older lawyer is very likely to be that very same lawyer (or maybe his brother or childhood friend, who will be facing the same issue soon). [An analogous situation is the lack of built-in monitoring and "self-discipline" in solo and duo firms, which has resulted in a higher incidence of theft from clients by lawyers in such firms (*see* this prior post).]

According to a recent study of the legal profession in Ontario, Canada, the trend of lawyers deferring retirement is most apparent in nonurban areas, and is also more prevalent among sole practitioners – which are "over-represented in the 'over fifty-five' age group" – than large firms. Moreover, the trend is "particularly apparent in the personal legal services fields" (real estate, family law, wills, criminal law). "The Changing Face of the Legal Profession," LawPro Magazine (Vol. 6:1, Winter, 2007; via Stephanie at IdeaLawg). Clearly, the Main Street legal client has more to worry about than clients of Wall Street/Biglaw as the profession ages.

> ✓ *Under the fold*, I look at press, weblog, and periodical coverage of issues relating to the Graying Lawyer, note the general failure to look at the competence/ethics issues, and spotlight a few approaches that have been suggested as possible solutions. If you want some food for thought and a collection of useful links, keep on reading. Ditto if you'd like to help combat the mix of protectionism, pride and poor people's skills that will surely keep far too many lawyers practicing well past their pull date. If you're looking for definitive answers, you may already be suffering from peridementia. [Beware (or Rejoice): this essay grew to 11,000 words.]

In a feature article headlined "'Graying of the Bar' Fueling Concern in Court" (April 9, 2006), The Seattle Times sounded the alarm:

> The so-called "Graying of the Bar" – officially under way this year as the first wave of baby boomers turns sixty – is fueling concern that incompetence due to declining skills, failure to keep pace or dwindling mental acuity may soon rise in the legal profession. It's a highly sensitive issue in a profession that traditionally honors its elders for long careers. And, in fact, many practicing lawyers remain sharp and effective well into their later years. When there are impairments, though, what's at stake for clients can range from a botched defense or an unfair divorce settlement to a lost claim for personal injury.
>
> Firms have their own legal liability to consider, and an aging attorney may face a black mark at the end of an otherwise unblemished career.

Of course, the article doesn't suggest that *all* older lawyers are incompetent. It notes, however, that

> Regardless of intelligence or education, age is the biggest risk factor for developing Alzheimer's disease, which afflicts 10 percent of people older than sixty-five and up to half of those older than eighty-five.

The article continues with the reasonable assertion that, "Of greatest worry are older lawyers who aren't ready to retire and who work alone or in very small firms with little oversight or backup to protect clients." It also notes that, in response to cases they have started to encounter, "A few states, including Washington and Oregon, have created rules and alternatives to formal discipline in dealing with all kinds of impairments. They have trained staff on the symptoms of dementia, developed retirement counseling programs and offered assistance on closing a practice."

> A gray dawn –
> last night's poker cards
> facedown on the table
>
> . . . . . by Rebecca Lilly – A New Resonance 2

Perhaps because the blawgiverse is oriented toward younger members of the profession, there was a surprising lack of response to "The Graying of the Bar" article at law-related weblogs. Despite the piece's focus on disciplinary issues that might arise with the loss of mental acuity, I can find no mention of the article at either The Legal Ethics Forum or Ben Cowgill's Legal Ethics Blog. The f/k/a Gang was just about to enter our punditry hiatus and we didn't even notice the article when it was published. At MyShingle, Carolyn Elefant pointed out that "the problem of a few older lawyers can spoil things for those older lawyers who remain sharp later into their careers" and recommended:

> If you find yourself working with an older solo or small firm lawyer, or up against one in court who you think might be suffering from a mental health issue, why not reach out and suggest tactfully that they seek help from a bar counseling program. Many of these older lawyers have mentored us and now, as they age, we can return the favor.

Stephanie West Allen at Idealawg also had a brief response to the article. In her posting "Some lawyers go gentle into that good night, others do not" (April 9, 2006), Stephanie notes that "The balance between honoring older members of the profession and insuring that clients are adequately served will be requiring more and more attention," and offers the notion of not going gently into the night (a la Dylan Thomas), concluding:

> The head beneath the grey hair often holds much wisdom; perhaps the aging heart represents the glue in a firm's culture and values. I hope we will appreciate what greying lawyers have to give, no matter what form those gifts may take.

Nobody seriously addressed the main point of the Seattle Times article: What *should we do* when decline in mental acuity and productivity actually threaten a lawyer's ability to give the competent and diligent service to clients and the courts – with "reasonably necessary" legal knowledge, skill, thoroughness, promptness and preparation – that is required under our code of conduct? Lawyer coach and management consultant Ed Poll of LawBiz.com did write two columns in response to the ST article – "Too Old to Practice Law?" (May 29, 2006) and "Into the Sunset – How Will You Transition Your Practice" (June 2006) – which (like any good consultant) he combined and recycled into the Law Practice Today article "Should Auld Lawyers Be Forgot and Never Brought to Mind?" (Dec. 2006). Here's how he starts the December LPT article:

> For the first time in U.S. history, four generations are working side by side. Do the benefits of this multigenerational environment outweigh the "graying of the bar" as expressed in a Seattle Times article?

Poll admits being a "lawyer of a 'certain age'," and says "I tend to ignore generational stereotypes." Despite his age, Poll proves that he can create strawmen and obscure issues with the best legal advocates. His LPT article is written as if the Seattle Times piece had said that "age equals incompetence." Rather than suggesting ways to handle the subset of older lawyers whose infirmities have already or are likely to cause incompetence, Poll "explains" why older lawyers are no more likely than younger ones to violate ethics rules. He apparently believes that the solution for the only real problems likely to be caused by lawyer aging is having "a succession plan in place" and keeping up "with evolving professional rules and trends through MCLE" (two services that Poll's LawBiz.com just happens to provide). With such strategies in place, Poll assures the aging lawyer that he or she "should have no trouble remaining in practice as long as desired."

> the aging gourd
> and I
> cast our shadows
> . . . . . by Issa (David G. Lanoue, translator)

At Idealawg, Stephanie Allen West then wrote that aging does not necessarily result in "dimming, dulling, and dawdling," and that she agrees wholeheartedly with Poll that age does not "necessarily equal incompetence . . . nor the lack of creativity." "Graying of the Bar? Try Boomeritis Prevention for Your Body and Your Brain" (Dec. 26, 2006) Of course, Stephanie's conclusion is not the least bit controversial and is in no way contradicted in the Seattle Times piece. Although she doesn't address how to deal with practicing lawyers who do have significantly diminished capacity, Stephanie does optimistically exclaim that there are "many methods by which an aging lawyer can lessen the likelihood of loss of competence and creativity," describing "a few available for the body and the brain." The Idealawg post "Neuro-Boomeritis Prevention for the New Year" (Jan 1, 2007) continues to present such resources, as does her recent posting on her Of Counsel article "Brain Management: Law Firm Leadership on the Neuro Frontier."

> I agree with Stephanie that aging lawyers will in many ways be a blessing for the profession and its clients, and that brain exercise and fit bodies may help some Boomers and older lawyers avoid or reduce a loss of mental acuity. Nonetheless, they surely won't (even if miraculously practiced by all lawyers) totally prevent the diminished capacity that is sure to increase the incidence of poorly served legal clients as the profession super-ages. No amount of optimism or consultant happy talk will let us avoid the competence and diligence issues – as a profession, nor as individual firms and lawyers. [Not even Kevin O'Keefe's prescription for every ailment – launching more lawyer weblogs -- will make the downsides of the graying profession go away.]

> theological debate...
> the creationist greying
> at the temples
> . . . . . Ed Markowski, Bear Creek (2002)

Two more press articles – one in the mass media and one in a legal publication – are worth discussing. On December 8, 2006, the New York Times published "Happy Birthday. Vacate Your Office." The article focused on the issue of mandatory retirement for law firm partners (including stripping them of their equity interests or management roles), and it featured the tale of antitrust lawyer A. Paul Victor, who was forced to leave Weil, Gotshal & Manges at the age of sixty-eight (but recovered smoothly by moving to Dewey Ballantine). The main points in "Happy Birthday" are:

1. Partner retirement is "a decision that a growing number of large white-shoe law firms are grappling with as aging, yet healthy, baby boomer lawyers look to remain vital and integral rainmakers at the firms where they built their careers. Those desires, however, are bumping up against the harsh new realities and economics that rule inside the clubby walls of many law firms."

2. "[A]s law firms adopt a more corporate-like structure that emphasizes revenue and profits per partner, [the options of aging partners] are becoming more limited. That corner office and, more important, the chunk of the firm's annual profit pool, is being designated to hungry up-and-coming lawyers and associates rather than the legal eagles who once ruled the roost."

3. "Unlike corporate America, which, for the most part, dropped mandatory retirement ages decades ago, many big law firm partnerships are keeping up the practice of pushing out older lawyers to make room for new blood. . . . . Anecdotally, mandatory retirement ages seem to be skewing younger at a time when good health and longer life expectancy are increasing."

4. "While many bar associations around the country are trying to steer lawyers facing mandatory retirement policies to *pro bono* work, other associations are trying to change the mind-set behind the policies themselves. Mark H. Alcott, president of the New York State Bar Association, [says] "I'm calling on the profession to recognize that forced retirement of partners is archaic, it's not necessary, and I'm trying to change the culture rather than impose liability and legal solutions on law firms."

5. The Equal Employment Opportunity Commission's age discrimination suit, on behalf of partners from Chicago-based Sidely Austin (*see* EEOC v. Sidely & Austin, press release, Jan. 13, 2005), is being watched closely by the bar (and *see*, "Law Firms Keeping Close Eye on Sidley Case)," Legal Times/Law.com, March 13, 2007).

Despite the treatment of partner retirement in the high-profile New York Times, law-related weblogs gave the article and issue very little play. The Wall Street Journal' s Law Blog, did give a summary of the article, in Peter Lattman's post "Forcing Aging Partners to Retire: Fair or Foul?" (Dec. 8, 2006), which also asked:

> *Law Blog Question of the Day*: Richard Davis, Weil Gotshal's general counsel, told the Times that enforcing mandatory retirement "inherently has some risk," "but on an overall basis, we think it's the right approach." But in a world where the all-stars of American industry routinely play into their 70s and 80s – *e.g.*, Buffett (76), Greenberg (81), Redstone (83), Kerkorian (89) – is it?

Fewer than a dozen people commented on the question. Similarly, there was virtually no response to the posting "When You're Sitting in Court in Adult Diapers, Something Is Wrong" (Dec. 11, 2006), at David Lat's oft-naughty legal weblog-tabloid Above the Law, where you can normally count on a long queue of rude or sophomoric comments in response to Lat's unique slant on lawyer news. Lat says "The story explores the pros and cons of having a mandatory retirement age – a legitimate and interesting policy question. But our primary reaction is summed up this by these commenters at the WSJ Law Blog: 1) "[I]f you're pushing seventy and you really want to trudge into the office every day there may be something wrong with you; and 2) "By sixty-five, these guys have made plenty of money and should find something else to do . . . Leave some room so that the young bucks can have their day in the sun, too." Lat concludes with:

> One obvious rebuttal: many federal judges remain on the bench well into their old age. But which way does that cut? We can think of a number of judges who probably should have retired years ago. [we've omitted links to particular judges -- but point doubters to Leaving the Bench: Supreme Court Justices at the End (2000; reviewed here), by David N. Atkinson. which is filled with horror stories about U.S. Supreme Court justices who held on to their benches far too long.]

Another high-profile treatment of aging partners came in the article "Senior Lawyers Are Still Billing After All These Years," by Zusha Elinson (The Recorder/Law.com, Jan. 2, 2007). Once again, however, issues of competence and service to clients were never broached. Elinson's piece in The Record instead focused on the many ways large firms are dealing with the role of aging partners. Here are key excerpts from the article:

1. "It's a dilemma for many law firms: As their lawyers age, some still want to practice, sometimes at a still hours-intensive pace. Firms must decide how to keep these leading lights lit while making room for new blood – and, at the same time, avoiding, or at least structuring, awkward conversations with once-stellar lawyers."

2. "Large firms have phased out the partner pensions they used to offer. Today, big firms employ a variety of older-partner strategies that range from automatically stripping equity-partner status at a certain age to making individual arrangements." . . . At some other firms, de-equitization comes knocking at an earlier age, at which point partners can decide to retire altogether or remain as of counsel."

3. "Heller Ehrman partners must give up their vote and equity stake earlier, at the age of sixty-five. [Antitrust litigation luminary] M. Laurence Popofsky, a former Heller chairman who now serves as a senior lawyer at the age of seventy, said the policy helps the

firm move forward, making room for new partners and new opinions . . . . Popofsky, like many older partners, now has more control over his schedule in his new role, and for him that's meant fewer hours . . . . Although he doesn't enter a courtroom anymore, Popofsky is still busy writing briefs and counseling clients. 'I have always enjoyed and still enjoy the combat of ideas, which is what I specialize in,' Popofsky said."

4. "Law firm management consultant Richard Gary . . . applauds law firms for finding ways to keep older lawyers around. 'Many of the lawyers whom I know and whom I observe in firms in the [San Francisco] Bay Area may want to slow down as they grow older, but I've encountered very few people who want to retire completely,' Gary said."

5. "The reluctance to talk [at many firms about retirement policy] may have something to do with the pending EEOC case against Sidley Austin in Chicago. The EEOC is seeking back pay on behalf of thirty-one partners it claims were demoted in 2000 to counsel status because of age, arguing that the partners should be considered employees, not owners, and should thus enjoy greater legal protections."

old rocker -
a gray ponytail
keeps the beat

. . . . by dagosan

✓ Popofsky's transition from courtroom warrior to "writing briefs and counseling clients," while reducing his hours significantly, seems like an appropriate move, as he keeps working into his seventies. Similar changes might be an option open to a small portion of aging partners, at large firms. But, the opportunity for analogous flexibility would surely be rare at solo or small Main Street firms. Again, the question must be faced: What should the profession, law firms, and individual lawyers do in response to the diminished capacity that many lawyers will suffer, and the risk of incompetence that may result?

As discussed above, the Seattle Times article "Graying or the Bar" made two important points: (1) "A few states, including Washington and Oregon, have created rules and alternatives to formal discipline in dealing with all kinds of impairments. They have trained staff on the symptoms of dementia, developed retirement counseling programs and offered assistance on closing a practice." I have not been able to find materials online about the Washington and Oregon programs, and would very much appreciate any visitors to this site sharing with us information they may have (or may be able to point us to) about geriatric lawyer ethics issues and activities. Sources might be grievance committees, bar associations (especially lawyer assistance programs), and law schools, as well as professional publications or journals. And,

(2) "Of greatest worry are older lawyers who aren't ready to retire and who work alone or in very small firms with little oversight or backup to protect clients."

I'm looking forward to seeing the fruits of a Breakout Session to be held in Chicago on Saturday, June 2, 2007, as part of the 33rd ABA National Conference on Professional Responsibility and 23rd National Forum on Client Protection (May 30-June 2, 2007). The Breakout Session is titled "Ethics for the Ages: Graceful Graying or Senior Tsunami" According to the Conference website:

> The panel will discuss the aging of the legal profession and its impact on the lawyer regulatory system. What measures can be used to humanely and efficiently address the problems of age-related impairment and illness that are anticipated to arise with increasing frequency among practicing lawyers? Panel Leader: Donald D. Campbell, Kenneth J. Hagreen, Dr. Caroline Harada, Kim D. Ringler. [biographical information, here]

I hope the Session, and materials submitted by the participants, will directly discuss how age-related impairment relates to two important ABA Formal Ethics Opinions: Formal Opinion 03-431, "Lawyer's Duty to Report Rule Violations by Another Lawyer Who May Suffer from Disability or Impairment" (August 8, 2003); and Formal Opinion 03-429, "Obligations With Respect to Mentally Impaired Lawyer in the Firm" (June 11, 2003). Opinion 03-431 is summarized at the ABA professional responsibility website as follows:

> A lawyer who believes that another lawyer's known violations of disciplinary rules raise substantial questions about her fitness to practice must report those violations to the appropriate professional authority. A lawyer who believes that another lawyer's mental condition materially impairs her ability to represent clients, and who knows that that lawyer continues to do so, must report that lawyer's consequent violation of Rule 1.16(b)(2), which requires that she withdraw from the representation of clients.

The summary of Formal Ethics Opinion 03-429 on law firm responsibilities states:

> If a lawyer's mental impairment is known to partners in a law firm or a lawyer having direct supervisory authority over the impaired lawyer, steps must be taken that are designed to give reasonable assurance that such impairment will not result in breaches of the Model Rules. If the mental impairment of a lawyer has resulted in a violation of the Model Rules, an obligation may exist to report the violation to the appropriate professional authority. If the firm removes the impaired lawyer in a matter, it may have an obligation to discuss with the client the circumstances surrounding the change of responsibility. If the impaired lawyer resigns or is removed from the firm, the firm may have disclosure obligations to clients who are considering whether to continue to use the firm or shift their relationship to the departed lawyer, but must be careful to limit any statements made to ones for which there is a factual foundation. The obligation to report a violation of the Model Rules by an impaired lawyer is not eliminated by departure of the impaired lawyer.

The current issue of LawPro Magazine (Vol. 6: 1, Winter, 2007; via Stephanie at Idealawg) is a special "Aging Boomers" edition. Although there's a lot of interesting information in the special issue, the Codger Competence issue is only touched upon indirectly. As mentioned early in this piece, "The Changing Face of the Legal Profession"

(LawPro Magazine, Winter 2007), a Canadian study suggests that the trend of lawyers deferring retirement is more prevalent in small firms, and in non-urban areas, with the trend being "particularly apparent in the personal legal services fields (real estate, family law, wills, criminal law)." In other words: Joe and Jane Client (not the wealthy or Wall Street variety) need the most protection.

Meanwhile, the LawPro Aging Boomer article "The Boomer Challenge: Are Lawyers Ready" (Winter 2007, 4-pp pdf) focuses on how lawyers will be affected by the wave of aging clients (offering, *e.g.*, tips on having an elderly-friendly practice and links to elder law materials). Nevertheless, it makes a couple points quite relevant to Bar Overtimers and their overseers: 1) "Dabblers beware!" – lawyers who work with seniors and their families will need to be well-versed in "Family law, real estate, capacity issues, wills and estates – they're all part of elder law practice and the lawyer doing this type of law needs to know about all of these and more to help the client make the right decisions on a number of issues." Lawyers need to remember that "doing a will cannot be a loss leader" and "a lawyer needs to take the time to interview thoroughly, and then take the time to draft information thoroughly into the will. We must all become more diligent and detail-oriented." 2) As a result, lawyers must "invest in CLE to keep abreast of legislative changes, new techniques, and precedent-setting cases that are redefining behaviour standards."

Stephen P. Gallagher's contribution to LawPro' s Aging Boomers edition, "Winding Down the Law Practice: Retirement as a Renewal Process" deals with the important (though touchy-feely) topic of retirement as a growth stage – "The transition we call retirement is actually the beginning of a new career/life stage called 'renewal.' The key to success in this renewal stage is how well a person prepares for it." Gallagher stresses that "The renewal stage is a time when even 'hardchargers' re-evaluate how they live their lives." It's a stage in which you learn to pursue "your passion, your dream, your own goal, not someone else's." The article tells law firms that they must help in this retirement/renewal process – "which may take years to accomplish" – recommending the provision of pre-retirement coaching, as he did in the July 2004 Law Practice Today (for a similar approach, *see* The Senior Lawyer Boom by Heather Bradley, CPCC, and Miriam Bamberger Grogan, CPCC, Minority Corporate Counsel Association Magazine, July 2006.) There is, however, little here that would help a firm deal with the lawyer whose skills are faded and may have stayed too long. Indeed, Gallagher even suggests firms might end up bringing older lawyers back to solve a leadership scarcity. He asks: "Could it be that the same senior partners that many firms are now looking to sunset may become the untapped resources firms will need to lead the talent pool of the future?"

LawPro does point to a document that should be of great practical help in planning to wind down a law practice. It is the Guide to Closing your Law Practice, which was put together by the Law Society of Upper Canada and LawPro. The Introduction states:

> "There are many circumstances in which you, or others, may have to deal with the transfer or wrap-up of your practice: a transfer between firms, retirement, sudden illness or accidental death. Leaving a law firm will have a greater impact on the solo or small firm where, unlike larger firms, there may be no one available to immediately carry on with, or to wind- up the practice in an orderly fashion.

> "Your duty of competent representation includes an obligation to take appropriate steps to safeguard your clients' interests in all circumstances. A failure to properly plan or prepare for both anticipated and unexpected departures from your practice may expose your clients to significant damages or prejudice, and subject law partners and family members to financial and delay your preparations. The time to plan for retirement is when you are in good health with sufficient time to allow you to thoroughly prepare. If possible, start planning ten to fifteen years before your anticipated retirement date."

Each of the Guide's nine sections "provides a brief overview, a checklist, and references to precedents and articles relating to the topics covered." The section titled "Special Considerations, Illness, Disability or Death" proclaims "Your duty of competent representation includes safeguarding client interests in the event of the lawyer's death, disability, impairment, or incapacity. If you are a sole practitioner (or in a small firm), make arrangements for an assisting lawyer to step into your shoes." Nonetheless, the focus is "preparing for the unexpected," not preparing for or dealing with a slow decline that may precede by many years the definitive "illness, disability or death" that leaves no doubt that a lawyer's practice is (or should be) over. Similarly, the New York Bar Association's Planning Ahead Guide for Solos, which is 168 pages long, never uses a term more specific than "disability," and never addresses who will, or how to, determine disability related to the solo's aging body or mind. [Also, *see* Jim Galloway's Law Practice Tips piece, Indispensable People, for the Oklahoma Bar Association Management Assistance Program]

As best as I can tell, the only segment of the legal profession that has begun to take the issue of aging and fitness to practice seriously (by trying to act in a systematic manner to deal with the problems) has been the judiciary – led by the federal Ninth Circuit (and following the example of programs available in the California court system). Beyond their special responsibilities and very public scrutiny, a look at the demographics of the federal judiciary (who do not face mandatory retirement rules) helps to explain why it is at the forefront of the declining capabilities issue. As judicial "wellness" expert Richard Carlton explains in "Addressing Disability and Promoting Wellness in the Federal Courts" (Judicature, Volume 90, Number 1 July-August 2006), "In subtle and some not so subtle ways, the federal judiciary has become increasingly dependent upon judges over age sixty-five to handle a rapidly growing caseload. As was reported in a Ninth Circuit task force report:

> "... the judiciary needs these judges to continue working, because the number of authorized judicial officers has not kept pace with increasing case loads. There also are many judicial vacancies, some of which have existed for several years. Hence, unlike any other professional model that the task force could find, the federal judiciary encourages, and is dependent on, men and women over the age of sixty-five to handle its crushing caseloads. (Final Report of the Judicial Disability Task Force of the Ninth Circuit Judicial Council, May 2000)
>
> "Few federal judges choose to retire when they become eligible, even though most would continue to receive their full salary. Instead, the majority take what is called "senior status ..."

The Ninth Circuit's report reviewed Article Ill judges eligible to resign in 1999. It found that fewer than 9 percent of the judges chose retirement, while 11.6 percent chose to retain active status (and full caseloads) and 79 percent took senior status (staying on the bench with reduced caseloads). The Ninth Circuit Task Force noted that

> As a consequence, the average age on the federal bench is nearing seventy and is considerably higher than in most state courts. This fact has a profound impact upon the frequency of age-related problems that arise in this population of judicial officers.

The Ninth Circuit implemented many of the recommendations of the Task Force's Report. As Carlton explains, "The Private Assistance Line Service (PALS) was launched in June 2001. PALS is a resource for immediate telephone consultation and for referrals when requested to local licensed therapists who have experience working with legal professionals. Calls are received via a toll-free number known to Ninth Circuit judges, their families, and chambers staff." Although PALS provides assistance to judges suffering from a broad array of problems, "in practice much of the focus is on the special needs of senior judges":

> Due to the particular demographics of the target population (described above), the most common concerns presented are related to aging . . . [T]he majority of calls have been from judges and court staff seeking advice about how best to approach a bench officer exhibiting signs of declining mental acuity due to age, depression, or other health problems.

Clinical psychologist Isaiah M. Zimmerman describes some of the issues raised by an aging judiciary in "Helping Judges in Distress", Judicature, Vol. 90, No. 1 (July-August 2006).

> Aging presents a new set of issues. Due to the gravity and responsibility of their work, mandatory retirement terms are in place in most jurisdictions, except in the federal courts.
>
> *When a sitting judge on active service begins to exhibit signs of cognitive or physical decline, it is quickly noted and guardedly discussed within the court family and bar. At the same time, ranks close around the judge, and there arises a great disinclination to question the judge's capabilities.* It is easier to help judges in senior status, as most face periodic re-certification.
>
> *However, an older full-lime judge may suffer for a considerable period and operate marginally and in denial before help arrives.* The federal circuits have issued guidelines for chief district and bankruptcy judges who may face this matter. A wellness-based judge-to-judge assistance program might help the spouse or family of the judge in question to obtain discreet medical and psychological guidance to deal with the massive denial and indignation often involved. *The properly oriented presiding or chief judge can develop procedures for a graceful and dignified departure by a marginally functioning older judge.*" [emphases added]

mountain village –
the old man doesn't know
the dance

. . . . . by Kobayashi Issa, translated by David G. Lanoue

Clearly, many of the issues raised by mental impairment among aging judges also exist generally for aging lawyers. It is particularly worrisome that aging judges so often put off retirement, despite their special responsibility to the public and the profession and their serving in the public eye. Also quite troubling is their postponing of retirement well past traditional retirement age, despite having ample pensions available to them – a financial safety-net not available to many lawyers. The American Judicature Society editorial "A Fresh Look at Judicial lmpairment" (August 30, 2006) correctly states that courts need to ensure that disability and retirement benefits "are sufficient to allow judges to plan for and consider either partial or full retirement if the effects of aging or bad health make full service no longer the best choice for both the judge and the court." Many lawyers working for government agencies and corporations, as well as a shrinking number practicing in large law firms, can count on adequate retirement benefits if mental acuity becomes a serious issue in their practices. Who is going to ensure such options for Main Street lawyers?

my old age –
even facing a scarecrow
ashamed

. . . . . by Kobayashi Issa, translated by David G. Lanoue

Noting that "public confidence in the judiciary is seriously undermined" when issues such as "declining mental acuity due to age" are ignored, the above-mentioned American Judicature Society editorial, "A Fresh Look at Judicial Impairment," made additional points worth repeating:

1. [C]ourts should have in place resources that make it as simple as possible for judges to obtain help. Policies and practices should afford sympathetic support to a judge with an addiction or disability as long as the judge, too, acknowledges the necessity of finding a remedy.

2. "*Judicial collegiality needs to be redefined so that looking the other way to avoid embarrassment or confrontation is no longer acceptable, and intervention is expected and encouraged.*" (emphasis added)

3. Education about the availability of programs and information about other wellness issues needs to be provided in new judge education and regularly reiterated at judicial meetings in substantive sessions rather than just a five-minute reminder. Handbooks, websites, and newsletters can keep the issue from being pushed to the bottom of the agenda until the next headline. There should also be outreach to family members who may be struggling with how to obtain help for their judicial relative.

4. Judges with supervisory authority should receive intensive training about how to intervene after receiving complaints about a judge's behavior," and "Staff and attorneys need to be encouraged to bring their concerns to the appropriate authorities while a confidential solution is still possible rather than to cover up a judge's behavior until there is a public scandal.

5. . . . a culture change [is needed that will] remove any stigma attached to disability retirement.

cuckoo
what did you forget?
retracing steps
. . . . . by Kobayashi Issa, translated by David G. Lanoue

Clearly, we need to help judges and lawyers understand that they have a duty to resign, retire, or withdraw from practice, when physical and mental disability poses a significant threat to their competence and diligence, and to the adequate performance of their duties to clients.

[By the way, before you say "easy for him to say," please note that I have practiced what I preach: I gave up the practice of law ten years ago (two decades before normal retirement age and without even a flimsy financial safety-net), when chronic health problems made it unlikely that I could consistently or predictably give clients the level of diligence and timely competence they deserve in my solo practice.]

In addition, whether it is collegiality, compassion, or cowardice that keeps colleagues and staff from raising the issue of mental impairment at the bench or bar, we need to change the culture of the profession – including heightening the sense of professional obligation – so that the interests of the public/clients are paramount.

The recently-released "Breyer Report", Implementation of the Judicial Conduct and Disability Act of 1980: A Report to the Chief Justice (Hon. Stephen Breyer, Chair, Sept. 2006, 188 pp. pdf) states that approximately 7,000 formal complaints are filed every year under the Judicial Conduct and Disability Act. In addition to complaints about judicial misconduct, the Act permits any person to allege conduct reflecting a judge's inability to perform his or her duties because of "mental or physical disability." The Report notes, however, that complaints "by court officials were especially rare, averaging only one per year." Rather than use the formal complaint process, the judicial branch continues to use "activity outside the complaint process" as the primary mechanism for dealing with "difficult problems or judicial misconduct and disability." Indeed, "The main problems that the informal efforts seek to address are decisional delay, mental and physical disability, and complaints about the judge's temperament."

✓ Despite all their grousing and gossip in the Lawyers Lounge, attorneys virtually never complain, formally or informally, to court officials about impaired judges. (We may not condone that inaction, but we can all understand the reasons for it.) The Breyer Report wants lawyers to be more active in reporting such problems, and it recommends that: "Circuit councils should ask all courts in the circuit to encourage the formation of committees of local lawyers whose senior members can serve as intermediaries between individual lawyers and the formal complaint process." Unfortunately, without a

significant change in attitude, the recommendation will surely be ignored, as was a similar proposal by The 1993 Report of the National Commission on Judicial Discipline. Although the 1993 recommendation was also endorsed by the Judicial Conference, "few committees have been created" over the past thirteen years. It seems lawyers and judges like the current omerta custom just fine – and, again, it's easy to understand why.

In December 2003, in his column "Ethically Speaking," Delaware lawyer Charles Slanina wrote about ABA Formal Ethics Opinion 03-429 and "a lawyer's professional obligation when a colleague within the lawyer's firm becomes impaired due to a problem such as substance abuse, mental illness or age-related dementia." Slanina reminds the reader:

> The [ABA Ethics] Committee noted that Model Rule 8.3(a) makes it an act of misconduct for a lawyer who knows that another lawyer has engaged in unethical conduct that raises a substantial question about the lawyer's fitness to practice to fail to inform the appropriate disciplinary authority. They go on to conclude that the impaired lawyer's failure to discontinue representation when suffering from an impairment that materially impairs his or her ability to practice (as required by Model Rule 1.16(a)(2)) could raise a substantial question about the lawyer's fitness to practice.

Slanina's summary of Opinion 03-429 continues with the admonition from the Opinion that

> *"a lawyer may not shut his eyes to conduct reflecting generally recognized symptoms of impairment"* such as ongoing memory or other inexplicable behavior not typical of the affected lawyer, including even a single aberrant act. On the other hand, the Committee said that a lawyer need not act on mere rumors or on problems observed outside of the practice of law such as heavy drinking at social events. In order for the reporting requirement to be triggered, "A lawyer must know that the condition is materially impairing the affected lawyer's representation of clients." (emphasis added)

The column then notes several suggestions by the Committee as to how a concerned lawyer may respond to such information:

1. broach the subject with the impaired lawyer;

2. consult with a mental health professional about what the attorney has observed or learned;

3. talk to partners or supervising lawyers in the firm where the lawyer practices; or

4. report the conduct to an approved Lawyers' Assistance Program.

After touting Delaware's "excellent Lawyers' Assistance Program which stands ready, willing and able to assist you and an impaired lawyer," Slanina reminds the reader that the relationship between a lawyer and the Lawyers' Assistance Program Committee is the same as that of attorney and client and is, therefore, exempted from the normal Rule 8.3 reporting requirements. (*see* Model Rule 8.3(c))

Note: According to the American Bar Association Commission on Lawyer Assistance Programs "all fifty states have developed lawyer assistance programs or committees focused on quality of life issues. These programs employ the use of intervention, peer counseling, and referral to 12-Step Programs to assist in the lawyer's recovery process." (Click for a Directory of State LAP Programs.) (Canada has a similar legal profession assistance network.) However, whereas the PALS program discussed above for Ninth Circuit federal judges explicitly offers help for mental impairment issues relating to aging and is frequently used for that purpose, I have not found any information online suggesting that state or local LAPs are trained to deal with such aging issues or advertise the availability of such services. Please leave a comment or send an email if you are aware of LAPs that are working with impairments related to aging, rather than substance abuse or mental illness, with links to any relevant materials.

In 1990, the ABA adopted a Model Law Firm/Legal Department Personnel Impairment Policy and Guidelines (pdf - 28K). It was focused on assisting "lawyers and their support personnel who have impairments arising from emotional or behavioral problems and including drug and alcohol abuse and dependency." Its guidance is also relevant in many instances to impairments relating to aging. For example:

> "Sole practitioners may lack the resources available to law firms to establish programs for themselves and their administrative personnel, if any Bar associations should explore the possibilities of establishing group programs for them."
>
> "The policy statement and guidelines also place responsibility for implementation at a high level, make clear that the policy is proactive rather than passive, and emphasize the importance of confidentiality."
>
> "The Problem: Impairment of professional and administrative personnel contributes to the deterioration of their well-being. It also directly and adversely affects the ability of a law firm or legal department to provide quality legal services and can lead to exposure to unnecessary professional liability, to the "violation of professional conduct standards, to loss of public esteem, and even to criminal law violations."
>
> "The purpose of this policy statement and guidelines is not to punish, degrade or embarrass impaired persons but to identify and assist them to recovery. The emphasis of the policy statement and guidelines is on assistance, treatment and the return of impaired persons to productive service." [Ed. Note: Of course, returning to productive service may not be a feasible goal when aging is the cause of impairment.]
>
> "A personnel impairment program should be structured to make self-referral the most used method of entering evaluation, treatment and rehabilitation programs, but procedures for identification and early intervention by the entity and third-party referrals to LAPs and EAPs are equally important. The availability of these services and resources should be widely publicized (for example, in the entity's newsletter and in new personnel orientations) and listed in the entity's telephone directory."

An article from Bench & Bar of Minnesota, "Ethical Responsibilities for an Impaired Partner" (October 2003) by Kenneth L. Jorgensen, Director, Minnesota Office of Lawyers Professional Responsibility, does a very good job explaining the obligations of firm members when a partner is impaired – due to substance abuse, mental or emotional impairments, or "the mental decline or deterioration associated with aging that can reach the level of impairment before a lawyer retires." Jorgensen makes an apt observation:

> Most law firms recognize the civil liability exposure associated with impaired members of their firm who are unable to properly discharge responsibilities to clients. Apart from malpractice judgments, law firms can suffer loss of clientele and goodwill due to the grumbling of disserved clients. Probably fewer lawyers comprehend the extent of their ethical obligations for an impaired partner or other lawyer employed by the firm.

Jorgensen's article gives a nice summary of the obligations of partners embodied in ABA Formal Ethics Opinion 03-429 – to both (1) adopt measures to prevent impaired lawyers from violating the ethics rules; and (2) report ethical violations committed by impaired lawyers in the firm. He warns of "The Ostrich Phenomenon," which was described by Patricia Sue Heil, in "Tending the Bar in Texas: Alcoholism as a Mitigating Factor in Attorney Discipline" (24 St. Mary's L.J. 1263, 1278-79 (1993). Heil contends that despite the fact our profession is self-regulating:

> …most lawyers are reluctant to report incompetent or impaired work. Instead, impaired attorneys are frequently protected or enabled by their colleagues and staff, which in turn fosters opportunities for misconduct and unethical behavior.

Jorgensen notes that: "This type of 'enabling' behavior is sometimes motivated by misguided concern for the impaired lawyer." Other firm members "rationalize their inaction by characterizing impairment as a personal problem not appropriate for law firm involvement" or simply are "too emotionally uncomfortable" to bring up the matter. He also explains that impairment is not itself an ethical violation. Instead, "The threshold issue is determining whether the impaired lawyer's ability to represent clients is 'materially impaired'." Jorgensen continues:

> A pattern of missed filings or hearings, frequent unexplained absences, or multiple instances of neglect and non-communication caused by a lawyer's continuing impairment clearly meet this standard and require firm action.

And, when an impairment oscillates over time, "the ABA suggests that if the impairment has 'an appreciable likelihood of recurring,' partners may have no choice but to conclude that representation of clients will be materially impaired." Where the impaired lawyer is unable or unwilling to address the impairment, "partners are obligated to take steps to 'assure the impaired lawyer's compliance with the Rules of Professional Conduct.' Where possible, partners may wish to consult with a psychologist, psychiatrist, or other trained health professional."

The article acknowledges that "Confronting an impaired partner is the first and most difficult step in protecting client interests," and covers several practical issues. One additional important topic discussed by Jorgensen is accommodation of the impairments:

> Depending upon the severity of the impairment, some impairments may be accommodated. Accommodations may include reassigning the lawyer to a less pressured environment or changing the type of legal work (*e.g.*, from litigation to transactional representations). Where the impairment is so severe as to preclude accommodation by the firm and the lawyer's ability to represent clients is materially impaired, the firm is obligated to institute measures to prevent the lawyer from rendering legal services to firm clients.

> weak with age –
> can't even break kindling
> with my knee
> . . . . . by Kobayashi Issa, translated by David G. Lanoue

For a look at lawyer impairment from the risk-management perspective, check out "Managing Your Practice: Lawyer Impairment Should Not Be Overlooked," by Emily Eichenhorn (Oregon State Bar Bulletin, July 2003). She notes that firms often aren't aware of impairment issues until they create a major problem. The following two points are among her suggestions to avoid being unhappily surprised:

> Periodic peer review of legal services, as well as regular review of lawyers' progress toward marketing goals, billing and recovery goals or other standards, are processes that can promote interaction among lawyers in a firm and raise the likelihood that impairment will be discovered and effectively addressed.
>
> Sole practitioners can look to share office space or participate in professional organizations to maintain contact with other professionals and build a base of support.

In January 1999, the WSBA BarNews contained a thoughtful and useful article by Zella Ozretich, of the Washington State Bar Association Lawyer Services Department – "Make a New Year's Resolution to Plan for Retirement." Ozretich recommends that:

> Lawyers should resolve to take time to think about retirement planning for themselves and/or for older lawyers in their firm. Is there a plan in place through the firm which will help ease the transition for those who are near retirement age? Does each individual have a plan that includes both the financial and personal implications of retirement?

Ozretich correctly notes, "This is a difficult topic to broach with others, particularly if an older lawyer does not see the need to make adjustments in his or her duties or to retire." She offers the following advice for "When a Lawyer is not Willing to Retire":

> Under certain circumstances, a lawyer may not be ready or willing to retire. The reluctance to retire may be due to lack of financial preparation, or personal connection to the profession as the person's sole identity. If this situation arises, then the firm or others concerned for the individual lawyer and his or her practice may need to intervene. For the lawyer unable to function in the legal milieu because of age-related mental or physical impairment, the issue becomes one of how much

> accommodation and/or support the legal setting can offer before the client, the firm and the lawyer are put at risk.
>
> The firm must then ask how skilled at evaluating the situation are those in positions of authority; how comfortable are the firm members in initiating some sort of intervention; who, what, and where are the resources for the firm when assistance is needed. Like any type of intervention, intervention leading towards retirement should address specifics and include respect for the aging colleague's abilities.

The article has a helpful set of "Compassionate Intervention Guidelines" and discusses how to "proceed with an intervention:

> Treat the person with dignity. Be kind without being condescending. Avoid being confrontational. Talk about the problem as it presents itself now. Plan to address the issue over a period of time. Be specific. Talk about the events and situations you have observed. Talk about the impact of the lawyer's behavior on those people and things he or she values. Avoid using medical terms. Focus on the behavior.

Ozretich also notes that "Lack of planning and the assumption by firms and/or individuals that every lawyer can work in the same capacity indefinitely can contribute to the painful necessity for intervention." She then discusses potential obstacles to taking the needed steps required by a lawyer's impairment (a firm's organizational structure or various contractual obligations; discrimination laws, etc.), and suggests a firm "Consider amending any documents now to avoid problems or confusion in the future," while remembering that such internal organization issues cannot be allowed to prevent necessary action when impairment is causing or likely to cause damage to the lawyer or others.

You may recall my warning above that this essay would offer no definitive answers for treating the ethical issues that arise from the physical and mental impairments that will surely come with the "Graying of the Bar." One point should, however, be perfectly clear: each lawyer, every firm, and the profession as a whole, has the ongoing obligation to help prevent unethical performance due to the diminished capacities that so often come with aging. No profession-wide ethical peridementia can excuse the failure to protect our clients from our frailties.

> {Important Request for Follow-up (March 26, 2007): If you agree that this topic deserves more discussion and the focused attention of bar leaders, law firms, and individual lawyers, please let your local, state and national bar groups know you would like to see "Ethics and the Graying of the Bar" on the agenda of Continuing Legal Education programs (on professional responsibility, office management, retirement planning, etc.), and to see Aging-Competence Intervention actively incorporated into Lawyer Assistance Programs. Click for contact information for: state and local bar associations; the ABA Center for Continuing Legal Education – ABA-CLE, the ABA Commission on Lawyer Assistance Programs; and State LAP committees.

a migrating servant
laid off
at age sixty

. . . . . by Kobayashi Issa, translated by David G. Lanoue

Afterward: There is a lot of wisdom in David Solie's book How to Say It to Seniors: Closing the Communication Gap with Our Elders, (Prentice Hall Press, 2004). Dealing with seniors in general, it offers insight and practical guidance for those who are interested in constructing and implementing respectful and effective ways to help older lawyers transition out of the practice of law, or out of segments of practice in which they are no longer adequately competent. Solie's book helps us to understand "our senior adults' unique developmental agendas": their need to maintain control and search for a legacy (that is, how they will be remembered); to "learn to communicate effectively and effortlessly" with aging family members, friends, colleagues, and clients; and to become advocates for our elders.

> *Follow-up*: Health and Age had a series of excerpts online from How to Say It to Seniors, but they are no longer at the website. You can see extensive excerpts from the book at its Google Books page. Also, go to David Solie's website and weblog.

One important chapter in Solie's book is titled "The Myth of Diminished Capacity". Solie discusses studies, including work by Richard Restak, M.D. that show:

> "[T]he brain of an older person does show some changes in the prefrontal cortex, its prime platform for working memory capacity and the area responsible for processing new information. But all the other brain activities, including IQ and the capacity for verbal expression, language, and abstract thinking, remain gloriously intact. Yes, the body does wear out and slow down – that's a reality of aging. And because of these changes in the prefrontal cortex, the aging brain loses some of its ability to perform multiple mental manipulations. As a result, the external world may begin to fade, distraction set in, and focus becomes compromised. But the stowing of these mental processes enhances the ability to reflect and make informed judgments . . . . " . . . The body's aging forces us to stop the frenetic pace of our youth and middle age, and begin to search for the pattern of what's happening in our lives. In doing so, we naturally turn from the external world, with its pagers and cell phones and instant messaging, and focus on our internal world to begin a lengthy life review. [you can find excerpts from this chapter at Health and Age, Dec. 22, 2004]

Although Solie strongly argues that diminished capacity is a myth, it seems clear from his own words that some mental functions important to lawyering are indeed lessened with age. Our capacities change and in many ways for the better. Nonetheless, the obligation of each lawyer – or of those around him or her – is to acknowledge the changes and act to assure that clients receive the competent and diligent services to which they are entitled.

early Alzheimer's
she says she'll have . . .
the usual
. . . . . by John Stevenson from Quiet Enough

Thank-full postscript: (March 25, 2007) Even when under the spell of peridementia, I hope I'll never forget Mama G's rule about being humble and grateful when someone says something nice about my work. Tonight, I want to thank Diana Skaggs, at the [KY] Divorce Law Journal, for her generous write-up on this post in "Blawg Review #101" – and, especially, for sharing the most kind words of Prof. Alan Childress, who had the best reaction I could have desired from a professor of Professional Responsibility: "It will be required reading for every legal ethics class I teach." [Hey Bar Leaders, CLE classes could use a lot of exposure to this topic, too.] Alan was also the first weblogger to point to this essay, in a post at the Legal Profession Blog. Legal Blog Watch's Carolyn Elefant and Idealawg's·Stephanie Allen West have also pointed here, with very positive words, and I've emailed them with my thanks. I'd tell you what they said, but I'm supposed to stay humble. Stroking is nice, of course, but knowing that more people will be reading and thinking about this important topic is even better. ***Update*** (March 28, 2007): thanks to Evan Schaeffer for pointing here from his Legal Underground; and special thanks to Tim Kevan for putting this post this week at the top of the very selective "Best of the Blogs" section of the Barrister Blog's Weekly Review. ***Update*** (April 2, 2007): Many thanks to George Wallace of Declarations & Exclusions for breaking "Blawg Review" custom and including this essay a second time, in "Blawg Review #102".

Update (April 4, 2007): Special thanks, as expressed at length here, to Jim Calloway, for the most grudging recommendation yet.

> *Follow-up*: *See* "Growing Old Together" by Martin A. Cole, Director Minnesota Office of Lawyers Professional Responsibility, reprinted from Bench & Bar of Minnesota, April 2008, which raises important issues but offers little guidance.

Update (July 7, 2008): *See* our post "TCL Asks "What's Your Exit Strategy?";

spring begins
as it has deigned to do
for a thousand ages
. . . . . by Kobayashi Issa, translated by David G. Lanoue

WORKING PAPER ON COGNITIVE IMPAIRMENT AND COGNITIVE DECLINE

ABA CoLAP Senior Lawyer Assistance Committee

April 11, 2014

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INTRODUCTION

CoLAP, the American Bar Association's Commission on Lawyer Assistance Programs, is dedicated to assisting the legal community with addiction and mental health issues and supporting state Lawyer Assistance Programs. In response to reports of increasing calls regarding older lawyers and judges from lawyer assistance programs around the country, CoLAP created a Senior Lawyer Assistance Task Force in 2008 and turned the Task Force into a Committee in 2009.

CoLAP's creation of a committee dedicated to senior attorney issues does not mean that CoLAP believes that qualifying as a senior attorney necessarily indicates impairment. However, a range of conditions occur more frequently in seniors – including cognitive impairment and dementia, grief from loss of a spouse, hearing loss, vision loss, and multiple other health conditions – that together heighten the risk of impairment in this attorney group. The Senior Lawyer Committee was formed to investigate how lawyer assistance programs could effectively assist with these issues.

Over the years our key areas of focus have been:

- raising awareness of cognitive and medical conditions affecting the senior attorney, and of the availability of assistance;

- assisting law firms, bar associations, and individuals in handling cases of cognitive decline or impairment in a manner that protects the public and the dignity of the senior (or not senior) lawyer or judge;

- providing education and resources to assist legal professionals with the transition to retirement; and

- providing education and resources on best practices in planning for unanticipated absences from the practice.

We have collaborated with the CoLAP Judicial Assistance Initiative, the Tort Trial & Insurance Practice Section of the ABA, the National Organization of Bar Counsel, and the Association of Professional Responsibility Lawyers in addressing these mutual concerns. We have recently begun discussions with the National Academy of Neuropsychology (NAN), the nation's largest professional group of practicing neuropsychologists, to see what we can do collaboratively to assist lawyers and judges dealing with issues of cognitive impairment. We hope to continue our collaboration with these entities and develop new relationships with others as well.

This article was written by members of the Senior Lawyer Assistance Committee, with assistance from NAN and its Policy and Planning Committee, with the hope of raising awareness of cognitive decline in legal professionals and encouraging lawyers and judges to take action to protect clients, the profession, and their colleagues should they

encounter such a situation. We hope that you find it helpful.

I. SIGNS AND SYMPTOMS OF COGNITIVE DECLINE

The degree to which individuals exhibit normal cognitive changes during aging varies, with some people maintaining excellent cognitive functioning throughout life, and others having declines severe enough to significantly interfere with daily functioning. Two key concepts in understanding these different trajectories are normal cognitive aging and cognitive disorders of aging.

A. Normal Cognitive Aging

The brain and central nervous system, like other organ systems in the human body, undergo normal age related decline over time. Thus age based changes in cognitive abilities are an expected part of normal aging. For example, declines in reaction time and processing speed can emerge as early as the late twenties; other cognitive functions show decline in later decades. In general, with increasing age, information tends to be processed more slowly, retrieval of information is less accurate and efficient, learning new information is more challenging, and the ability to multi-task and carry out complex, novel problem solving declines. In contrast, other abilities, including vocabulary, breadth of general knowledge, emotional functioning, and (we hope) wisdom, can remain stable or even improve over time into the upper decades.

B. Cognitive Disorders of Aging

Cognitive disorders of aging are biologically based diseases that cause abnormal cognitive changes that are not age expectable and that are superimposed on normal cognitive aging. One common cause of abnormal cognitive decline is cerebrovascular disease, which includes small and/or large strokes, microvascular ischemic changes, chronic inflammation, and risk factors like diabetes, insulin resistance, high blood pressure, high cholesterol, and obesity. Other causes including history of traumatic brain injuries, excessive alcohol and drug use, and low levels of cognitive activity can also be associated with poorer cognitive functioning as we age. Many of these risk factors and conditions are potentially treatable, highlighting the importance of accurate diagnosis.

The most common cognitive disorders of aging, however, are neurodegenerative diseases that involve progressive deterioration of the brain over time. Neurodegenerative diseases generally have an insidious onset and gradual progression, and are associated with protein-specific neuropathological changes. The most common neurodegenerative disease is Alzheimer's disease, but Parkinson's disease, diffuse Lewy body disease, and frontotemporal dementia are also fairly common. When they present in their typical form, each neurodegenerative disease is associated with a different pattern of cognitive and behavioral symptoms. Short term memory impairments are prominent in early Alzheimer's disease, whereas problems with multi-tasking and attention are common cognitive changes in Parkinson's disease, and behavioral

control and language skills are common deficits in early frontotemporal dementia. Importantly, we now know that neurodegenerative brain changes can begin years before symptoms emerge or become obvious and debilitating. Consequently, some very mild declines in memory, for example, could reflect the symptoms of incipient Alzheimer's disease. It is only later in the progression that the memory, language, behavioral, spatial, and other effects of the disease are severe enough to cause dementia. Dementia is a clinical term and construct used to describe a decline in cognitive and behavioral skills that is severe enough to interfere with daily functioning and the ability to live independently. Dementia is a significant clinical finding insofar as it strongly implies that an individual is disabled in key aspects of everyday life and may no longer be able to carry out work functions.

- **Dementia:** It is important to emphasize that dementia is a syndrome and not a specific disease. It is used as a general term to identify or label a decline in mental ability that is severe enough to interfere with daily functioning and the ability to live independently.

Numerous conditions can potentially cause dementia besides neuro-degenerative diseases, including brain tumors, brain injuries, nutrition deficiencies, infections, drug reactions and thyroid related disorders. Some of these dementias may be reversible but many are not.

Age, family history, genetics, lifestyle, diseases, and accidents are the most common risk factors for all type of dementias. The greatest known risk factor for Alzheimer's is advancing age. The age at onset is typically after sixty-five, and the likelihood of developing Alzheimer's doubles every five years after the age of sixty-five. After age eighty-five, the risk reaches nearly 50 percent.

II. ASSESSMENT OF COGNITIVE IMPAIRMENT AND COGNITIVE DECLINE BY LAP PROFESSIONALS

Lawyers and even LAP Professionals generally do not have the requisite training and expertise to formally assess and definitively diagnose cognitive disorders and associated impairment and decline. Formal assessment/evaluation of cognitive impairment and cognitive decline is referred to specialists in the fields of psychology, psychiatry, and neurology.[2] LAP professionals and lawyers, however, need to be informed and to have available a mental checklist of the 'red flags' that serve to alert us to the possibility that a colleague's cognitive abilities and associated professional abilities have dropped below the level that is required to practice law effectively.

In 2005, the American Bar Association Commission on Law and Aging and the American Psychological Association published Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers. The lawyer's handbook

[2] Neuropsychologists, geropsychologists, neuropsychiatrists, geriatric psychiatrists, and neurologists.

discusses many concepts relevant to the assessment of the senior attorney with cognitive impairment. In particular, the CoLAP Senior Lawyer Assistance Committee has adapted the Capacity Worksheet for Lawyers contained in the handbook to serve as a worksheet and guide' to LAP professionals and other concerned colleagues called on to assess or assist a lawyer exhibiting signs of cognitive impairment or cognitive decline.

Cognitive Impairment Worksheet for Lawyer Assistance Programs

Attorney Name: _____ Date of Interview: _____

Place of Interview: _____

Observational Signs & Symptoms:

Behavioral Functioning at Work	**Observations**
Practice management • Deteriorating performance at work • Making mistakes on files/cases • Difficulties functioning without the help of a legal assistant/other lawyers • Committing obvious ethical violations • Failing to remain current re changes in law; over-relying on experience • Exhibiting confusion re timelines, deadlines, conflicts, trust accounting	
Appearance /dress • Inappropriately dressed • Poor grooming/hygiene	
Interpersonal disinhibition • Making sexually inappropriate statements that are historically uncharacteristic for the lawyer • Engaging in uncharacteristically sexually inappropriate behavior • Disinhibition in other nonsexual behaviors	
Self awareness • Denial of any problem • Exhibits/expresses highly defensive beliefs • Feels others out "to get" him/her, or organized against him/her	
Significant changes in characteristic routine at work	

Cognitive Functioning	Observations
Short-term memory problems (reduced ability to manipulate information in ST memory) • Forgets conversations, events, details of cases • Repeats questions and requests for information frequently	
Executive functioning (slower and less accurate in shifting from one thought or action to another) • Trouble staying on task/topic • Trouble following through and getting things done in a reasonable time	
Lack of mental flexibility • Difficulty adjusting to changes • Difficulty understanding alternative or competing legal analysis, positions	
Language related problems • Comprehension problems • Problems with verbal expression ➢ Difficulty finding the correct word to use ➢ Circumstantiality (providing a lot of unnecessary details; taking a long time to get to the point) ➢ Tangentiality (getting distracted and never getting back to the point)	
Disorientation • Confused about date/time sensitive tasks • Missing deadlines for filing legal documents	
Attention/concentration (problems with dividing attention, filtering out noise and shifting attention) • Lapses in attention • Overly distractible	

Emotional functioning	Observations
• Emotional distress: • Emotional lability (rapidly changing swings in mood and emotional affect):	

Other Observations/Notes of Functional Behavior

Mitigating/Qualifying Factors Affecting Observations
Stress, Grief, Depression, Recent Events affecting stability of client:
Medical Factors / medical conditions: • Sensory functioning (hearing / vision loss) • Family history of dementia • Substance abuse / dependence • Hypertension • Stroke history • Thyroid disease • Chemotherapy • Sleep apnea • Prescription medications • High cholesterol • _____ • _____

PRELIMINARY CONCLUSIONS ABOUT COGNITIVE FUNCTIONING

❑ **Intact** – No or very minimal evidence of diminished cognitive functioning:
❑ **Mild problems** - Some evidence of diminished cognitive functioning:
❑ **More than mild problems** - Substantial evidence of diminished cognitive functioning:
❑ **Severe problems** - Lawyer lacks cognitive capacity to practice law:

Adapted from the "Capacity Worksheet for Lawyers," Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers, by the ABA Commission on Law and Aging and the American Psychological Association (2005).

III. RECOMMENDATIONS FOR INTERVENING ON A VOLUNTARY BASIS WITH A LAWYER EXHIBITING COGNITIVE IMPAIRMENT/DECLINE

A. Approaching the Impaired/Declining Lawyer

1. Partner with individual(s) with first-hand observations of the lawyer's behaviors that are raising concerns about the lawyer's continued competence to practice law and who are trusted by the lawyer.

2. Consider utilizing the Cognitive Impairment Worksheet to gather and organize concerns regarding the impaired/declining lawyer.

3. Have a non-confrontational meeting with lawyer and the concerned individual(s); actively avoid confrontation. (It is recommended to have a preparatory meeting with the concerned individual(s).)

4. Starters/icebreakers.

   a. I am concerned about you because...

   b. We have worked together a long time. So I hope you won't think I'm interfering when I tell you I am worried about you…

   c. I've noticed you haven't been yourself lately, and am concerned about how you are doing…

5. Get the lawyer to talk; listen, do not lecture.

6. While listening, add responsive and reflective comments.

7. Express concern with gentleness and respect.

8. Share first-hand observations of the lawyer's objective behavior that is raising questions or causing concerns.

9. Review the lawyer's good qualities, achievements and positive memories.

10. Approach as a respectful and concerned colleague, not an authority figure.

11. Act with kindness, dignity and privacy, not in crisis mode.

12. If the lawyer is not persuaded that his/her level of professional functioning has declined or is impaired, suggest assessment by a specific professional (in most instances, a neuropsychologist) and have contact information ready.

13. When appropriate, offer assistance and make recommendations for a plan providing oversight (such as a buddy system or part-time practice with co- counsel).

14. When appropriate, propose a voluntary transfer of attorney status to an available non-practicing option, *e.g.*, taking "inactive," "retired," or "emeritus" status.

15. Remember that this is a process, not a onetime event.

B. Do's and Don'ts

1. Do.

a. Be direct, specific, and identify the problem.

b. Speak from personal observations and experience; state your feelings.

c. Report what you actually see.

d. Be respectful and treat the lawyer with dignity.

e. Be cautious when including family members.

f. Act in a non-judgmental, non-labeling, non-accusatory manner.

g. Offer to call the lawyer's doctor with observations.

h. Refer for evaluation, have resources at hand.

i. Suggest alternative status such as inactive status or disability leave.

j. Suggest the potential consequences for inaction: malpractice or disciplinary complaints.

2. Don'ts.

a. Ignore and do nothing.

b. Attempt to diagnose.

c. Insist or threaten if lawyer directs you to back off; attempt to discuss again at a later date.

Adapted from the Texas Lawyer Assistance Program's The Senior Lawyer in Decline: Transitions with Dignity – ABC's of Helping the Senior Lawyer in Need

PRACTICE OF LAW

SCR 3.395 Appointment of special commissioner to protect clients' interests

(1) When it comes to the attention of the Director that: (a) an attorney has been temporarily suspended pursuant to SCR 3.165 and has failed to notify his/her clients of the suspension as required by Court order; or (b) an attorney has been suspended or disbarred pursuant to SCR 3.370 and has failed to notify his/her clients of his/her suspension or disbarment pursuant to SCR 3.390; or (c) an attorney has resigned pursuant to SCR 3.480 and has failed to notify his/her clients of his/her resignation as required by Court order; or (d) an attorney dies; or (e) an attorney abandons his/her law practice or his/her whereabouts are unknown, and no law partner, personal representative of the deceased attorney's estate, or other responsible person capable of conducting the attorney's business affairs is known to exist, the Director may petition the Court, and the Court for good cause may order the appointment of one or more members of the Association to serve as Special Commissioners of the Court.

The Director shall give notice to the attorney by mailing a copy of the petition to the attorney's last known address, except where the attorney is deceased. Within twenty (20) days after the date on which the Director files the petition with the Court, the attorney may file a response to the petition with the Court. The Clerk of the Court shall mail a copy of the Court's order ruling on the petition to the attorney's last known address, to the Director and to the Special Commissioner. The Director in his/her petition may suggest to the Court the names of one or more members of the Association to serve as a Special Commissioner.

(2) A Special Commissioner appointed under this rule may be authorized by the Court to take possession of the files and records of an attorney described in subsection (1) above, to make an inventory of the files, to give notice to the attorney's clients of the unavailability or inability of the attorney to continue to represent the clients, to deliver to the clients all papers and other property to which the clients are entitled, to take any other action which the clients are entitled and to take any other action which the Court deems necessary to protect the interests of the clients.

(3) The Special Commissioner shall not disclose any information contained in any files which are the subject of an inventory without the consent of the client to whom such files relate, except as reasonably necessary to carry out the orders of the Court.

(4) The Special Commissioner shall file a written report with the Court containing a summary and explanation of the actions taken by the Special Commissioner to fulfill the duties assigned to the Special Commissioner by the Court. The Special Commissioner shall mail a copy of the report to the Director and to the attorney's last known address.

(5) If the Special Commissioner takes possession of files of an attorney and the Special Commissioner is unable after a diligent effort to deliver the files to the clients or to new attorneys representing the clients, the Special Commissioner may request the Court to enter an order providing for the storage and safekeeping of such files.

(6) The Special Commissioner shall be entitled to reasonable compensation with the amount to be determined by the Court and to also be reimbursed for necessary expenses actually incurred. In order to receive such compensation or reimbursement of expenses, the Special Commissioner shall file with the Court a motion containing an itemized list of the time spent on the case, the work performed, and receipts for the expenses incurred. The Special Commissioner's compensation and expenses which are approved by the Court shall be paid by the Association, but any amounts disbursed by the Association to the Special Commissioner may be assessed as costs against the attorney pursuant to SCR 3.450 if the appointment of the Special Commissioner arose out of a disciplinary proceeding.

HISTORY: Amended by Order 98-1, elf. 10-1-98; adopted by Order 84-2, elf. 7-1-84

The American Academy of Neurology developed guidelines that summarize the best research on recognizing, diagnosing, and providing treatment options for people with Alzheimer's disease and their families. These guidelines will help provide the best care possible. You can use this summary version to learn more about:

- How you can recognize Alzheimer's disease
- How your doctor will diagnose Alzheimer's disease
- What treatment and care options are available today
- Where you can find more resources

How Can You Recognize Alzheimer's Disease?

Alzheimer's disease is different from normal aging. The symptoms of Alzheimer's disease involve more than simple lapses in memory. People with Alzheimer's experience difficulties in communicating, learning, thinking, and reasoning that can have an impact on a person's work and social and family life. Alzheimer's is a disease that destroys brain cells – which is not a normal part of aging.

The ten most common warning signs of Alzheimer's disease are included in this summary. If you or someone you know has these symptoms, you should see a doctor for a complete examination.

How Does a Doctor Diagnose Alzheimer's Disease?

Alzheimer's disease can be reliably diagnosed with a complete examination that includes:

- A complete medical and psychiatric history
- A neurological exam
- Lab tests to rule out anemia, vitamin deficiencies, and other conditions
- A mental status exam to evaluate the person's thinking and memory
- Talking with family members or caregivers

You can help your physician by being prepared for the appointment. Bring a list of current medications, a log of symptoms or behavior changes and a list of your questions or concerns. It is also helpful to provide an accurate history of the person's medical conditions and any previous treatment.

What Are the Treatment and Care Options Available Today?

Medications are available that help certain symptoms. These are called "cholinesterase inhibitors." They may improve quality of life and cognitive functions including memory, thought, and reasoning. Medication works most effectively for people who are mildly to moderately affected by the disease. Therefore, the early recognition and diagnosis of Alzheimer's disease is very important. However, medications do not reverse or change the progression of the disease.

Research shows that Vitamin E is also an option to help with some symptoms of Alzheimer's disease. Vitamin E is an antioxidant, and it may aid in the breakdown of free radicals that may be damaging brain cells in individuals with Alzheimer's disease. Selegiline is another antioxidant that may help with some symptoms of the disease.

While a cure for Alzheimer's disease is not yet available, research continues for new treatment options.

Changes in activities and medications improve behavior. A person with Alzheimer's disease may display behavior problems such as paranoia, suspiciousness, combativeness, or resistance to maintaining personal hygiene. These behavioral problems can seem overwhelming to families and caregivers. Your physician may suggest various strategies to assist in daily caregiving tasks including:

- Walking or other light exercise that helps reduce problem behaviors
- Playing music, particularly during meals and bathing
- Providing a predictable routine for daily activities, including toileting
- Practicing various skills and positive reinforcement that increase independence
- Considering the medications available to help depression, agitation and psychosis

Caregiver educational programs can delay the time to nursing home placement for the person with Alzheimer's. Caregivers can find out more about educational programs by contacting their local Alzheimer's Association.

Support groups are also available which help improve the well-being of the caregiver, as well as the person with Alzheimer's disease.

Where Can You Find More Resources?

More information is available through your local Alzheimer's Association or your physician.

Find Local Patient Information
Alzheimer's Association
Phone: 1-800-272-3900
www.alz.org/chapter

Find a Neurologist
American Academy of Neurology
www.aan.com

THE 10 WARNING SIGNS OF ALZHEIMER'S DISEASE

The Alzheimer's Association has developed a list of warning signs that include common symptoms of Alzheimer's disease. Individuals who exhibit several of these symptoms should see a physician for a complete examination.

1. Memory loss that affects job skills. It's normal to occasionally forget an assignment, deadline, or colleague's name, but frequent forgetfulness or unexplainable confusion at home or in the workplace may signal that something's wrong.

2. Difficulty performing familiar tasks. Busy people get distracted from time to time. For example, you might leave something on the stove too long or not remember to serve part of a meal. People with Alzheimer's might prepare a meal and not only forget to serve it but also forget they made it

3. Problems with language. Everyone has trouble finding the right word sometimes, but a person with Alzheimer's disease may forget simple words or substitute inappropriate words, making his or her sentences difficult to understand.

4. Disorientation to time and place. It's normal to momentarily forget the day of the week or what you need from the store. But people with Alzheimer's disease can become lost on their own street, not knowing where they are, how they got there, or how to get back home.

5. Poor or decreased judgment. Choosing not to bring a sweater or coat along on a chilly night is a common mistake. A person with Alzheimer's, however, may dress inappropriately in more noticeable ways, wearing a bathrobe to the store or several blouses on a hot day.

6. Problems with abstract thinking. Balancing a checkbook can be challenging for many people, but for someone with Alzheimer's, recognizing numbers or performing basic calculations may be impossible.

7. Misplacing things. Everyone temporarily misplaces a wallet or keys from time to time. A person with Alzheimer's disease may put these and other items in inappropriate places – such as an iron in the freezer or a wristwatch in the sugar bowl – and then not recall how they got there.

8. Changes in mood or behavior. Everyone experiences a broad range of emotions – it's part of being human. People with Alzheimer's tend to exhibit more rapid mood swings for no apparent reason.

9. Changes in personality. People's personalities may change somewhat as they age. But a person with Alzheimer's can change dramatically, either suddenly or over a period of time. Someone who is generally easygoing may become angry, suspicious, or fearful.

10. Loss of in initiative. It's normal to tire of housework, business activities, or social obligations, but most people retain or eventually regain their interest. The person with Alzheimer's disease may remain uninterested and uninvolved in many or all of his usual pursuits.

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