

## Senior Moments: An Examination of the Ethical and Practical Considerations of Our Aging Bar

by  
Katherine A. Frye<sup>1</sup> and Brian Oten<sup>2</sup>

Raise your hand if you are part of the Baby Boomer generation?

Raise your hand if you know someone who has dementia or Alzheimer's disease?

Raise your hand if you do not want to practice family law until you die?

If you raised your hand for any of these questions, you should keep reading. Many articles have been written that address representation of a cognitively impaired client and the corresponding ethical obligations and practical measures that can be taken. In fact, the AAML devoted an entire edition of this journal to the topic in 2000. However, few articles have discussed situations in which *the attorney* is cognitively impaired. This article will address what lawyers' ethical obligations are to clients, what their ethical obligations are to confirm the other lawyers in their firm are of "sound mind," and what practical concerns should be kept in mind as lawyers age.

Cognitive abilities can become impaired, and it is never easy to accept one's own aging. Often, people make complaints like "wow, my back is killing me" or "geez, her office has no elevator so my joints are going to ache tomorrow." Commiserating about physical ailments and aging seems to bond humans; however, people rarely talk to one another about the *mental* impact of aging. As experts in family law, we are tasked with maintaining a higher level of cognitive functioning. Almost simultaneously, we crunch numbers, strategize, manage emotions, and advise. It re-

---

<sup>1</sup> Katherine Frye practices law in Raleigh, North Carolina.

<sup>2</sup> Brian Oten serves as the Director of Ethics for the North Carolina State Bar.

quires a great deal of mental dexterity to achieve a level of excellence. And yet, I doubt that you have ever had a conversation with a colleague about concerns related to your cognitive health.

In this article, we are going to provide a detailed examination of the ramifications of our aging bar. First, we will examine the ethical rules that may apply to cognitive impairment along with an examination of the AAML's Bounds of Advocacy. To help analyze the potential risks of cognitive impairment, the article will use a hypothetical situation involving "Bill." We will walk through the risks that occur when cognitive impairment is ignored and discuss the pragmatic ways that our regulatory agencies have handled these types of situation. After an alternative end to our hypothetical situation, the article will conclude with a consideration of ways we can age in our profession in an ethical and graceful manner.

## **I. The Changing Demographics of the Family Law Bar**

The potential for cognitive difficulties attributable to aging may not be a current issue of concern or even an issue on your radar, but it should be. According to the American Academy of Matrimonial Lawyers ("AAML"), as of July 2018, more than 1011 of the 1591 members are over the age of 60, and more than 1218 of us are over 54. Taken in total for the membership, more than 75% of AAML fellows are over 54 years old. The significance of 54 is that this group is the last of the Baby Boomers.<sup>3</sup> It is this population surge that has always served as a line of demarcation for this country. The Baby Boomer generation has reached a variety of milestones from their entry into the work force to the birth of their children. But now, they have reached a new milestone – hitting the age of retirement.

According to the 2014 American Bar Association Lawyer Demographics, there were 1,281,431 licensed attorneys in the

---

<sup>3</sup> According to the Merriam-Webster Dictionary, a "baby boomer" is a "person born during a period of time in which there is a marked rise in a population's birthrate: . . . a person born in the U.S. following the end of World War II (usually considered to be in the years from 1946 to 1964)." *Baby Boomer*, MERRIAM WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/baby%20boomer> (last visited Oct. 3, 2018).

United States. Approximately 34% were 55 or older and 28% were between 45 and 54.<sup>4</sup> The median age has grown by ten years over the last quarter century, which results in the median age being 49 in 2005. This increase in the median age is a result of the aging of that large group of lawyers born during the population boom. As the median age is increasingly older, the general discussions that lawyers engage in will inevitably change. With so many attorney reaching the retirement milestone, now is the time to discuss the aging bar.

When lawyers age, the impact does not occur in a vacuum. The potential for a negative impact affects clients, law partners, opposing counsel, office staff, court staff and many other individuals. In the 2014 ABA Demographic, solo practitioners made up 49% of the over 1.2 million licensed lawyers. This group of solo lawyers will need to plan for their aging in a different manner than other lawyers. Whereas lawyers in a firm can work to establish safety nets within the firm, a solo lawyer needs to develop specific plans of what happens if he or she is unavailable to practice law for a period of time. The specific plans are often referred to as “succession plans,” which are discussed later in this article in detail. Of the remaining 51% of lawyers, only 14% practiced in firms with two to five lawyers, and the remaining 37% practiced in firms with six or more lawyers. This slightly larger group of lawyers in firms will need to analyze not only their individual aging, but also the ethical obligations among lawyers within the firm. The risks to the individual and the risks to other lawyers in firms vary, and ultimately the path lawyers take to react to the situation, or be proactive to the potential situation, will vary based on a variety of factors.

## II. Aging and Ethical Considerations

Before this article analyzes cognitive impairment and aging in more detail, you may wonder why you should care about these issues, especially if you never raised your hand to the questions above. It is because all lawyers have an ethical duty to care about

---

<sup>4</sup> *Lawyer Demographics*, American Bar Association (2014). The 2014 Law Demographics report summarized demographics as of 2005 with comparative years listed for 1980, 1991, 2000, and 2005. Even though the report is dated 2014, the details noted further in this paragraph are as of 2005, not 2014.

374 *Journal of the American Academy of Matrimonial Lawyers*

the impact of their own aging and potential cognitive decline on clients. Whether about the concern is physical aging limitations like chronic back pain or loss of hearing, or cognitive issues like occasional memory issues or dementia, these cruel manifestations of getting older have the potential to alter a client's life (and a lawyer's career) in significant and permanent ways. Consider the following real-life examples of how aging impacted these lawyers:

1. Anderson represents four individuals charged with various traffic offenses. Anderson's debilitating knee problems make it difficult for him to get to court altogether, let alone on time. Anderson has begun to miss calendar call. Distracted with his ongoing knee problems (and accompanying pain), Anderson forgot to call the clerk to inform the court of his absence and request a continuance for his four new clients. As a result of missing calendar call, Anderson's clients were arrested for failing to appear at a scheduled court date. Two clients were arrested at work, and two clients were arrested at home with their children present.
2. Becca represents a client in a personal injury case. Against Becca's advice, the client declines opposing party's settlement offer. Two days later, Becca accepts the settlement offer on behalf of the client, forgetting the client's instruction to the contrary. Becca subsequently fails to inform the client about the settlement and fails to return the client's calls inquiring about the status of the case.
3. Charlie is one of two partners at his law firm, and Charlie's partner is experiencing noticeable cognitive decline. Charlie has observed his partner missing client appointments, and he's heard from staff that his partner missed a few discovery deadlines in at least two cases over the past several months. Charlie is somewhat concerned for his partner's clients; but Charlie doesn't want to upset his partner by suggesting that his partner consider seeing a medical professional or retire altogether. Charlie figures his partner will know when it's the right time to call it quits, so Charlie stays out of the situation. Three

months later, Charlie's partner misses a filing deadline, resulting in the partner's client being barred from further pursuing their claim.

None of the above situations are shocking, and we have all probably heard of something like one of the preceding situations in the legal community. Each of the lawyers in the above situations could find himself or herself facing a bar complaint filed by a client and therefore facing tangible ramifications with the state regulatory body. Let us walk back through each example to understand the ethical problems.

1. Anderson's debilitating knee problems prevented Anderson from carrying out the services for which he was retained. Although unintentional, Anderson's failure to appear and failure to otherwise ensure his clients were properly represented violated Rule 1.3 in that he failed to act with reasonable diligence and promptness in representing his clients.<sup>5</sup> Anderson's conduct also unnecessarily took up the court's time by causing additional delay to his clients' proceedings, thereby violating Rule 8.4(d) by engaging in conduct that was prejudicial to the administration of justice.
2. Becca's failure to remember her client's instruction resulted in her own failure to abide by her client's decision in violation of Rule 1.2(a). Becca's subsequent failure to speak with her client violated Rule 1.4 in that Becca failed to respond to her client's reasonable requests for information and failed to keep her client apprised of the status of the case.
3. Charlie's partner engaged in a number of Rule violations due to his client neglect, but Charlie's knowledge of his partner's declining capacity puts Charlie in a difficult ethical position. Rule 5.1 imposes the duty on lawyers who are principals at their law firms, or otherwise possess comparable managerial authority, to make reasonable efforts to ensure the firm has measures in effect to give reasonable assurance that the conduct of all firm

---

<sup>5</sup> MODEL RULES OF PROF'L CONDUCT R. 1.3. Unless otherwise noted, references to a Rule of Professional Conduct refers to the American Bar Association's Model Rules of Professional Conduct.

376 *Journal of the American Academy of Matrimonial Lawyers*

lawyers conform to the Rules of Professional Conduct. Under this scenario, Rule 5.1(c) could hold Charlie responsible for his partner's misconduct because Charlie knew of the conduct at a time when it could have been avoided, and Charlie failed to take reasonable remedial action. (And this outcome does not even touch the potential malpractice issue.)

Lawyers are a prideful bunch, and aging issues like those involved in the above situations often go unnoticed or are casually explained away. The reality is that aging and other cognitive issues are directly tied to attorneys' responsibilities under the Rules of Professional Conduct. Lawyers who fail to educate themselves about (or choose to ignore) the warning signs of disabling conditions associated with aging put their clients' interests at risk and their professional reputations in jeopardy.

As fellows, we promised the AAML that we would practice law at a level higher than the ethical minimum. This principle is the basis for the "Bounds of Advocacy" that fellows all adhere to in our practices. The Bounds of Advocacy is the roadmap for matrimonial lawyers when the Rules of Professional Conduct leave a gray area. The following sections consider where the Bounds of Advocacy come into play regarding the ethical implications of aging issues facing family lawyers.

Under the Bounds of Advocacy, Rule 1 Competence and Advice, section 1.1 states "(a)n attorney is responsible for the competent handling of all aspects of a representation, no matter how complex."<sup>6</sup> The comment to the rule indicates that family law work represents complex work, which means we must be aware (or be able to obtain the knowledge or retain someone with the knowledge) on legal issues, child development, real estate, tax ramifications, etc. Complex work of this nature requires superior critical thinking skills, along with strategic planning and management of our client's emotions. If we are in a mental state of decline, our ability to perform this complex work will likewise be in a state of decline. We have to be candid with ourselves about whether or not we can still handle such complex work. The irony is not lost here. At a time when we are at the peak of

---

<sup>6</sup> Unless otherwise noted, references to a Rule of Professional Conduct refers to the American Bar Association's Model Rules of Professional Conduct.

our careers - when clients seek our representation because of our experience - we have to start planning for the end of our career. But there is no place for ego when changes in our abilities begin to surface. We must always be cognizant of and realistic about our own abilities as we age so that our client's interests are never put in jeopardy.

The Rules of Professional Conduct similarly recognize this need for lawyers to "self-monitor" for the protection of their clients. Rule 1.16, "Declining/Terminating Representation," states that the attorney must withdraw if physical or mental conditions impede the lawyer's ability to serve. The rule can be difficult to uphold, however, as one may not be aware of cognitive decline. Lawyers are trained to adapt and manipulate to present a set of facts that are favorable to clients; we can be master magicians. This same ability that can make us great lawyers also becomes a challenge when we must be candid about our own mental conditions. So often we can adapt and manipulate our own missteps so that they no longer look like a fault. Because we are susceptible to our having our own skill set work against our candid assessment of our mental abilities, we need to be even more aware of the implications of aging on our practice and work to provide a higher than ethical minimum level of performance. We need to be ahead of Rule 1.16.

Rule 2.5 of the Bounds of Advocacy states that "(w)hen the client's decision-making ability appears to be impaired, the attorney should try to protect the client from the harmful effects of the impairment." But who is going to protect the client from an impaired attorney? Again, the touchstone is the higher standard in the AAML; it is our duty to monitor ourselves (just like we do our staff) to make sure that we are mentally capable to handle these complex cases as we age. Monitoring is something that should not be foreign to us. During our practices, we may have elected to limit the types of cases we have accepted. At other times, we may be out on family leave or on vacation. Perhaps we have scaled back due to health problems or surgery. During all of these times, we would naturally monitor our cases to make sure that we could continue to represent our clients to the best of our ability, despite the time constraints. The only difference is that any changes or modifications to our practice due to cognitive decline are not temporary. These changes likely mark the final

phases of our practice, and that perhaps, is what makes this duty the most difficult one we will ever face.

One goal of this article is to bring attention to an issue that we may discuss when talking about our peers, but that we often fail to examine in terms of ourselves. For example, the September 2018 *ABA Journal* featured a two-page article on the subject of lawyers and cognitive decline.<sup>7</sup> The article generally focused on lawyers' duties to monitor fellow colleagues. Although certainly a piece of the puzzle, discussions should not be limited to just the monitoring of others. Our discussions need to be about monitoring ourselves, as well as establishing proactive plans to help us do so. To that end, this article explores the issues surrounding aging and the practice of law in a bit more depth, including possible options for practitioners. Based on the statistics presented earlier in the article, this is an issue that the majority of AAML members will soon be facing. The AAML should lead this difficult conversation in light of our stated goal to strive for a standard above the ethical minimum.

### **III. Bill's Story: A Hypothetical Aging Lawyer**

To give context to this situation, consider the story of a fictional character, Bill, from your perspective as his colleague:

*During the two decades of your practice, you have only had a few cases with Bill. As a fellow in the AAML, Bill has been a welcomed presence in the domestic litigation cases you have shared. Bill has always been pleasant to work with and has demonstrated all of the standards set out in the Bounds of Advocacy.*

*Recently, you were retained in a matter and learn that Bill is your opposing counsel. As you begin to work with Bill, you notice that he routinely misstates some of the details about the case during your conversations. You wonder if this is a tactic in some way; but you make a mental note of it and move on.*

*At an all-day mediation, you hear a raised voice and then even yelling from another room. The mediator enters your room*

---

<sup>7</sup> David L. Hudson, Jr., *Lawyers and Cognitive Decline: Diminished Capacity May Bring Ethics Problems for Sufferers*, ABA J. (Sept. 2018), [http://www.abajournal.com/magazine/article/lawyers\\_and\\_cognitive\\_decline\\_diminished\\_capacity\\_may\\_bring\\_ethics\\_problems](http://www.abajournal.com/magazine/article/lawyers_and_cognitive_decline_diminished_capacity_may_bring_ethics_problems).



*and asks for you to step outside. He tells you that he has concerns about progress and wants to know if you would agree to resume another day. The mediator informs you that “emotions seem high in the other room, and I think Bill is really tired. It seems that something may be going on with him personally.”*

*Mediation never resumed, and you end up going to court for an interim hearing. At calendar call, Bill does not appear. Upon the judge’s inquiry, you respond that you were sure that Bill was on the way. After calling his office, you become concerned that maybe there had been an accident as his staff indicated that Bill had left for court hours earlier. Almost an hour later, you run into Bill on another floor of the courthouse. He appears disheveled and confused. He says he had no idea about the hearing on the case, and he even accuses you of not providing proper notice.*

*When the hearing finally begins, Bill seems confused and disorganized. During the hearing, Bill seems to trip over many of the background facts of the case; however, as you are examining your client on the stand, Bill begins yelling at you about an objection, not arguing – yelling. The judge has to intervene and asks him to stop yelling; the judge even orders a court recess to give everyone a breather.*

*Several days after the hearing, you decide to call Bill and ask him to lunch. He has been uncharacteristically ill-tempered in your last few interactions. You wonder if he may be going through some personal issues. As a colleague, and as someone who deeply respects Bill’s leadership in the bar, you want to reach out to see what may be going on with him. At lunch, Bill shares with you that he has been having some “senior moments,” and he wants to retire but did not know what else he could do. “I can only play golf so much,” he says. He mentions that his memory is not what it used to be, and he seems to have less and less patience for domestic clients and their situations.*

It is a difficult question to know when “senior moments” signify a greater concern, and to determine the difference between normal aging and impairment. Everyone ages, so normal aging aspects are to be expected; however, identifying when the issue moves beyond “normal” is the key. The first step is examining the difference between aging and cognitive decline.

#### **IV. The Differences Between Aging and Cognitive Decline**

It is inevitable and it is the focus of countless conversations: We are getting older as a society, and we're a little scared of what that will look like. And for good reason — with increased age comes increased health issues, which are costly, disruptive, and, at times, disheartening. Looking at the numbers, this problem is only going to grow. In September 2018, the U.S. Census Bureau projected that by 2035, and for the first time in U.S. history, there will be more people age 65 and older than people age 18 and younger.<sup>8</sup>

Aging and issues with aging are often thought of and discussed in terms of impact on cognition. Cognitive issues certainly are a significant concern when it comes to aging, but aging can encompass a bevy of other maladies. Sensory changes (such as hearing or vision loss), musculoskeletal impairments, immune system deficiencies, and chronic conditions (including hypertension, osteoarthritis, diabetes, and osteoporosis) can all surface as we age, gradually changing the way we live our lives — and practice law. Some physical impairments like hearing loss, for example, can even contribute to cognitive decline, but they often go unnoticed or are ignored. Dr. Frank Lin of Johns Hopkins Center on Aging and Health observed, “Because most hearing loss occurs gradually and insidiously over years, many adults are unaware of their loss.”<sup>9</sup> And yet hearing loss becomes increasingly and significantly prevalent as we grow older, to the point that “clinically-significant hearing loss nearly doubles with each age decade such that nearly two-thirds of all adults over 70 years has a meaningful hearing loss.”<sup>10</sup> Whether due to its gradual and sometimes unnoticeable development, or simply due to pride, only 20% of adults with hearing loss who could benefit from using a hearing aid do so.<sup>11</sup>

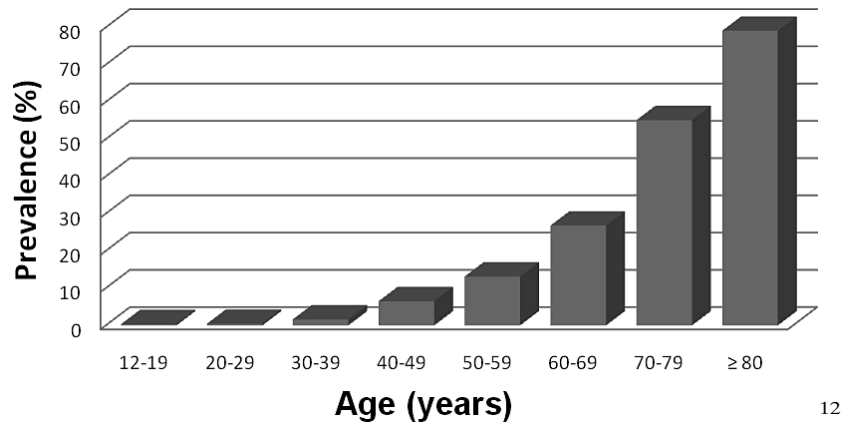
---

<sup>8</sup> U.S. Census Bureau, *2030 Marks Important Demographic Milestones for U.S. Population* (Sept. 6, 2018), <https://www.census.gov/newsroom/press-releases/2018/cb18-41-population-projections.html>.

<sup>9</sup> Frank R. Lin, *Hearing Loss and Healthy Aging*, CAPTIONCALL 3 (2018), [https://captioncall.com/wp-content/uploads/2018/01/Dr.Lin\\_0118\\_Hearing-Loss-and-Healthy-Aging\\_32487\\_FINAL2.pdf](https://captioncall.com/wp-content/uploads/2018/01/Dr.Lin_0118_Hearing-Loss-and-Healthy-Aging_32487_FINAL2.pdf).

<sup>10</sup> *Id.* at 3.

<sup>11</sup> *Id.*

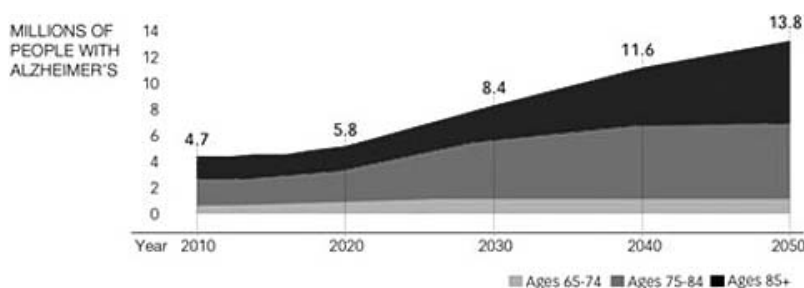


There is a significant link between hearing loss and cognitive decline. As Dr. Lin notes, studies have shown that “hearing loss in older adults is consistently linked with the risk of dementia even after multiple other factors are accounted for in the analyses . . . These studies have demonstrated a direct ‘dose-response’ wherein the greater the severity of hearing loss, the greater the risk of being diagnosed with dementia over time.”<sup>13</sup> Dr. Lin further points out that a study published in July 2017 found that “hearing loss in mid- to late-life was the single risk factor accounting for the greatest proportion of dementia risk.”<sup>14</sup> This is because hearing loss contributes to poor health by increasing cognitive load (poorly heard information requires additional processing power), changing the brain structure, and causing social isolation.<sup>15</sup>

All that is to say, physical impairments come with aging and are just as significant of a concern to the practicing lawyer as cognitive issues should be. Some physical impairments can directly impact a lawyer’s practice by prohibiting a lawyer from functioning as well as she or he used to, and some impairments may actually be a precursor to eventual cognitive issues. However, while these physical conditions can sometimes be more easily addressed, cognitive issues are harder to pinpoint until perhaps it is too late. And yet, with the increasing aged popula-

<sup>12</sup> Graphic source: *Id.*  
<sup>13</sup> *Id.* at 5.  
<sup>14</sup> *Id.*  
<sup>15</sup> *Id.* at 4.

tion, cognitive issues are becoming more a part of our everyday lives. Although there is evidence that the prevalence of cognitive issues, such as dementia, is decreasing in the United States, the growing population of individuals age 65 and older is increasing the number of instances of cognitive impairment.<sup>16</sup> As of 2015, there were 46.8 million individuals with dementia worldwide.<sup>17</sup> By 2030, that number is expected to grow to 74.7 million; by 2050, 131.5 million.<sup>18</sup> As noted in the graphic below, the number of Alzheimer’s dementia diagnoses in the United States is expected to nearly triple between 2010 and 2050.<sup>19</sup>



Source: Alzheimer’s Association

## V. Lawyers and Cognitive Decline

Lawyers will inevitably experience the same aging infirmities as the general population, and we will account for some portion of the numbers noted in the graphic above. The unique skill set

<sup>16</sup> Judith Graham, *Research Shows that the Prevalence of Dementia Has Fallen in the United States*, WASH. POST (June 16, 2018), [https://www.washingtonpost.com/national/health-science/research-shows-that-the-prevalence-of-dementia-has-fallen-in-the-united-states/2018/06/15/636d61ac-6fd1-11e8-bf86-a2351b5ece99\\_story.html?noredirect=on&utm\\_term=.11fc7a337d98](https://www.washingtonpost.com/national/health-science/research-shows-that-the-prevalence-of-dementia-has-fallen-in-the-united-states/2018/06/15/636d61ac-6fd1-11e8-bf86-a2351b5ece99_story.html?noredirect=on&utm_term=.11fc7a337d98).

<sup>17</sup> Martin Prince et al., *World Alzheimer Report 2015 – The Global Impact of Dementia* ALZHEIMER’S DISEASE INTERNATIONAL (Sept. 2015), <https://www.alz.co.uk/research/worldalzheimerreport2015summary.pdf>. See also Kohei Maruya et al., *Identifying Elderly People at Risk for Cognitive Decline by Using the 2-Step Test*, 30; PHYSICAL THERAPY SCI. 145 (Jan. 27, 2018), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5788795/#!po=11.5385>.

<sup>18</sup> *Id.*

<sup>19</sup> *Graphic Source*: Christine Simmons, *Out of Focus: Lawyers and Firms Can No Longer Ignore Dementia* LAW.COM (Feb. 25, 2018), <https://www.law.com/americanlawyer/2018/02/25/out-of-focus-lawyers-and-firms-can-no-longer-ignore-dementia-405-8629/>.

and character traits found in most attorneys present challenges in identifying the effects of aging — particularly cognitive decline; and the nature of lawyers' work can produce disastrous results if the effects of aging are ignored or go unnoticed. To help us understand these lawyer-specific issues, we reached out to Cathy Killian,<sup>20</sup> the Western Clinical Coordinator with the North Carolina Lawyer Assistance Program (“NCLAP”). Over the past years, Ms. Killian has routinely been involved with lawyers who have been experiencing aging or cognitive decline, and based on her interactions, she has seen some trends in how these issues impact lawyers.

Although cognitive decline can (and likely will) occur as a natural part of aging, not all cognitive decline is of such a severe nature that it will necessarily impact, let alone impair, a lawyer's practice. “Cognitive decline is obviously normal as we age but is not necessarily debilitating or impairing,” says Killian.<sup>21</sup> “We all experience slowing down of our cognitive processing ability [as we get older] – retrieval of long-term memory takes longer; learning new information takes longer and is more challenging; and since it takes more effort and focus to accomplish things, our ability to process information rapidly and divide our attention effectively (i.e. multitasking) is significantly impacted.” This normal slowdown is part of the typical aging process; however, when it comes to lawyers whose norm is to function at a higher level, this normal slowdown can become frustrating and even scary for some lawyers. Killian noted that the added stress of the normal aging process can weigh on lawyers in a different way than the general public. The bright side of the equation for lawyers is that practicing law has many facets. With awareness, lawyers can adjust their workloads. They can focus on tasks that may not require the same cognitive dexterity as others. Further, lawyers can use support staff and other attorneys to compensate for these changes.

It is important, though, to understand that with our ability to compensate for aging, it can become difficult to determine when

---

<sup>20</sup> Cathy Killian is a Licensed Professional Counselor, Licensed Clinical Addiction Specialist, Certified Clinical Specialist, and Certified Classical Homeopath.

<sup>21</sup> E-mail from Cathy Killian, Western Clinical Coordinator, North Carolina Lawyer Assistance Program (Aug. 11, 2018) (on file with authors).

384 *Journal of the American Academy of Matrimonial Lawyers*

a lawyer is truly impaired to the point of not being able to practice. In Killian's experience, the early indicators of actual cognitive decline in lawyers include missed events like deadlines, court appearances, and meetings. In other words, short-term memory begins to fade. "A lawyer experiencing cognitive decline may appear sharp on paper," Killian explains:

A lawyer's writing ability for tasks like briefs, motions, or contracts will not necessarily be impacted (or noticed) for a while because the lawyer can go back and review if needed. Language and vocabulary are similarly held intact in these early stages; however, the time it takes these lawyers to accomplish these kinds of tasks becomes much greater, so there is a noticeable reduction in their productivity.

Because a lawyer's ability to think fast on his or her feet is much slower with age, Killian points out that a trial lawyer, for example, may show signs of struggle earlier than a transactional lawyer. "For trial lawyers, it will become very apparent to those who have seen them previously in court. As [the decline] progresses, their long-term memory is impacted, and they forget how to do simple things they have done their entire careers," she explains. As part of the natural tendency to compensate, Killian describes situations in which "some lawyers will ask another lawyer for guidance or another lawyer to take over a task, but the lawyer will often not realize what is truly occurring. They will continually ask their assistant, paralegal, or other partners to do more and more." It is this compensating that can create a risk if it is not monitored.

Another common occurrence Killian has observed is with behavioral changes. Lawyers can be perceived as being very stubborn, "old school," or resistant in general. Obviously, some lawyers have always demonstrated these traits, but Killian points out that for those with cognitive impairment, the increased irritability may occur because the lawyer's executive functioning is not good. "Once-simple tasks such as conceptualizing a problem, making good decisions, planning and carrying out effective trial strategies and the like are part of executive functioning." Killian goes on to explain that lawyers' loss of this critical aspect of their practice becomes, in part, a loss of a lifetime identity. "The lawyer's new-found resistance then," Killian says "is from fear of making a mistake or the inability to process new information or a new procedure. Rather than having to think it through or make a decision, they stick with what is currently in place." These law-

yers are likely unaware of what is driving their resistance though and cannot adequately explain why they are so opposed to whatever is being presented. As the impairment progresses, a lawyer might experience anxiety, anger, depression, and even aggression related to all of these changes.

Unless we successfully retrace the steps of Ponce de Leon in finding the fountain of youth, we are left with the reality that – for better or for worse – aging is inevitable. As we grow older and wiser, we may also grow more stubborn or more forgetful. As we become more aware of our bodies' changing abilities, we may also discover its increasing limitations. Cognitive decline is not unexpected, but the presence of some amount of cognitive decline is not necessarily an impairment requiring the cessation of our law practice. In sum, the grey produced by aging is more than just the hair on our heads – aging creates a grey area for determining capacity and ability for the practicing lawyer. The by-products of aging impact a lawyer's life in different ways than a non-lawyer's life because we have ethical responsibilities to both our clients and the justice system.

## VI. A Return to Bill's Story

Returning to the earlier story of Bill, consider what can happen if we as lawyers ignore aging in ourselves and our fellow lawyers:

*After your lunch with Bill, his client in your shared case retained a new attorney, and you did not see Bill for some time. Even though you briefly saw him at professional meetings and luncheons, you did not see him much for about three years.*

*One day, you received a call from another domestic attorney, and she asked you if you had heard about what happened to Bill. She told you that she witnessed a hearing in which Bill was being represented by someone from his malpractice carrier. He was being sanctioned for his failure to provide documents in a timely manner as part of a discovery request. Bill was sanctioned several thousands of dollars at the hearing. The news was burning through the courthouse. Later that same year, you read in your legal journal that Bill had been censured for his handling of a domestic case.*

386 *Journal of the American Academy of Matrimonial Lawyers*

*On your next trip to the courthouse, you decided to go by Bill's office to drop in on him. To your surprise, you were greeted by another attorney. You soon learn that Bill had been having some "struggles" and that the other lawyer had been appointed to handle the closing of Bill's law practice. You were shocked and dismayed by Bill's fall from grace.*

We returned to Bill's story with the note that signs of his cognitive decline were ignored not only by Bill himself, but also by the attorneys around him. What results is catastrophic to Bill, to his clients, to his fellow lawyers, to the general public, and to the practice of law. The thought of losing our law licenses should be motivation enough to monitor individual compliance with ethical standards; however, in Bill's story, you begin to see that ignoring his "senior moments" had implications for others as well. Ultimately, as a profession that is self-regulated, the burden to handle the implications of Bill's inaction falls to the lawyers in Bill's community.

## **VII. The Risks of Ignoring Signs of Cognitive Decline**

Since Bill's story is not uncommon in the grievance world, it should come as no shock that various groups within and surrounding the legal profession (including regulatory bodies and voluntary associations) have been concerned with the inevitably increasing aging population of lawyers. In 2007, for example, the National Organization of Bar Counsel ("NOBC") and the Association of Professional Responsibility Lawyers ("APRL") published a report of their joint committee created to "examine the effectiveness of the traditional professional disciplinary system model as it applied to aging or senior lawyers."<sup>22</sup> The committee's work focused on studying and analyzing issues associated with the predicted "senior tsunami" of age-impaired lawyers, which they anticipated would produce an increase in complaints from clients and resulting disciplinary proceedings.<sup>23</sup>

One of the recommendations from the committee's 2007 report was to encourage jurisdictions to adopt rules and procedures

---

<sup>22</sup> NOBC-APRL Joint Committee on Aging Lawyers, Final Report (May 2007), <http://aprl.net/wp-content/uploads/2016/07/NOBC-APRL.pdf>.

<sup>23</sup> *Id.* at 5.



allowing lawyers to transfer to disability inactive status with their regulatory agency.<sup>24</sup> North Carolina, for example, has long had a mechanism for a member to voluntarily transfer to disability inactive status with the consent of both the Office of Counsel and the Chair of the State Bar's Grievance Committee.<sup>25</sup> Although the state bar entities involved in this transfer are most often associated with the disciplinary process, the consent transfer to disability inactive status does not necessarily implicate the disciplinary process. Alternatively, the state bar can pursue a member's transfer to disability inactive status; such a pursuit may be prompted by a client's complaint filed against the lawyer, and the transfer may occur either by consent or through a formal hearing before the State Bar's Disciplinary Hearing Commission.<sup>26</sup>

In either route, the ultimate question to be determined when considering whether a lawyer should be transferred to disability inactive status in North Carolina is whether the lawyer is "disabled." The North Carolina State Bar's Rules and Regulations define the term "disabled or disability" as "a mental or physical condition which significantly impairs the professional judgment, performance, or competence of an attorney."<sup>27</sup> Although most lawyers associate the term "disabled" or "disability" in the professional license context with a mental condition, the rule appropriately recognizes that disabilities can arise from both physical and mental conditions. To that end, it seems strange that lawyers do not always consider how their physical limitations can render them disabled from the practice of law. As quick as lawyers may be to identify and argue about someone's physical condition affecting his or her performance or perspective, lawyers seem to forget or ignore the very real possibility that a physical condition could impair a lawyer's professional performance. Perhaps it is our dedication to clients and to our profession that compels us to look past our own physical maladies; or perhaps we're just stubborn. Whatever the case may be, physical conditions can render a lawyer disabled, and the debilitating nature of these physical conditions can have a greater impact that you may initially sus-

---

<sup>24</sup> *Id.* at 22-23.

<sup>25</sup> 27 N.C. ADMIN. CODE 1B.0122 (2018).

<sup>26</sup> *Id.*

<sup>27</sup> 27 N.C. ADMIN. CODE 1B.0103(19) (2018).

pect, especially as our aging bodies continue the unfortunate process of slowing or breaking down. A lawyer's chronic back pain, for example, can prevent a domestic lawyer from traveling to client meetings, to the office, or to the courthouse. A lawyer's loss of hearing can inhibit a criminal defense lawyer from hearing a client during an initial interview, a witness during cross examination, or a judge when instructing the jury. A lawyer's diminished sight (and resulting ability to accurately read) can impair if not terminate an estate lawyer's practice well before the lawyer's mental capacity diminishes. These physical conditions are very real and very common among the aging general population; unfortunately, due to the nature of the work performed by lawyers, these conditions can (and perhaps should) alter, limit, or even terminate a lawyer's practice due to the increased danger posed to clients who are in need of and relying on a lawyer's best services.

While age-related physical conditions are easier to spot in ourselves and in our peers, age-related mental conditions are significantly more difficult to accurately diagnose and sensitively address. After all, a lawyer prides him or herself not on physical prowess, but on mental power and ability. A lawyer's analysis, strategy, and advice helps form our identity, and any threat to that identity being taken away from us seems impossible, indefensibly accusatory, and downright terrifying. How to recognize an attorney's decreased mental capacity must rely on a combination of general knowledge of mental processes and our knowledge of the lawyer in question. Is the person becoming increasingly ornery as a result of decreased processing ability? Is the person slower to speak and react due to diminished capacity, or does the person simply have too much on his/her plate these days? Is sleep (or lack thereof) affecting the person? Are the thoughts of retirement contributing to the newly lackadaisical approach, or is there a measurable decrease in ability?

Following their 2007 report referenced earlier, in 2013, NOBC and APRL joined with the American Bar Association's Commission on Lawyer Assistance Programs ("CoLAP") to further study the issues identified in the 2007 report, to examine the effectiveness of measures enacted by various regulatory agencies in dealing with the challenges posed by the aging population of

lawyers, and to follow up on the recommendations therein.<sup>28</sup> Their 2014 report noted a number of new efforts, including new programs and new regulations, taken by state bars and bar associations to timely identify age-impairment issues in lawyers and provide resources to individual lawyers and local bars in effectively addressing such issues.<sup>29</sup> However, as noted in the committee's 2014 report, "there is an ever increasing risk of more lawyers with age-related impairments and insufficient preparation for transitioning away from practice before a crisis forces that transition."<sup>30</sup> Just as Bill experienced, such crises typically arise in the form of attorney misconduct – be it intentional or unintentional – that ultimately leaves a lasting and significant impairment on the client, the lawyer, the administration of justice, and the profession in general.

General client neglect is the most common complaint against lawyers of all ages. Lawyers who fail to diligently pursue their clients' matters violate Rule 1.3, and lawyers who fail to timely respond (if at all) to client inquiries and fail to provide all necessary information for a client to make an informed decision violate Rule 1.4. Age-related impairments can certainly contribute to (if not be the sole cause of) client neglect as well as a number of other ethical violations, including issues relating to competence (Rule 1.1), unintentional breaches of confidentiality (Rule 1.6), and failure to timely withdraw from representation due to mental impairment (Rule 1.16).<sup>31</sup> Such impairments can also produce misconduct and client consequences much more significant than a failed return phone call. Some senior attorneys have a) taken action without their clients' authorization in violation of Rule 1.2 (including accepting settlement offers or signing a client's name to a document without client permission); b) failed to adequately supervise staff in violation of Rule 5.3, resulting in staff engaging in the unauthorized practice of law to the detriment of the client; and c) failed to properly monitor and handle funds in an attorney trust account in violation of Rules

---

<sup>28</sup> NOBC-APRL-CoLAP Second Joint Committee on Aging Lawyers, Final Report (Apr. 2014), [http://aprl.net/wp-content/uploads/2016/07/APRL\\_Web\\_NOBC-APRL-CoLAP\\_Joint-Report-on-Aging\\_04-2014\\_w-Appendix.pdf](http://aprl.net/wp-content/uploads/2016/07/APRL_Web_NOBC-APRL-CoLAP_Joint-Report-on-Aging_04-2014_w-Appendix.pdf).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 2-3.

<sup>31</sup> *See generally* N.C. Formal Ethics Op. 8 (2013).

390 *Journal of the American Academy of Matrimonial Lawyers*

1.15-2 and 1.15-3.<sup>32</sup> Such conduct constitutes not just violations of the Rules of Professional Conduct, but also potentially criminal acts that can permanently alter the client's life, the lawyer's life, and the lives of everyone associated with the lawyer or client. To be sure, the examples cited are distinguished from the intentional, criminal misconduct committed by the small number of misbehaving lawyers who plague the profession. Nevertheless, the impact produced by significant breaches in the attorney-client relationship – intentional or not – is real and must be recognized as a risk to clients, lawyers, and the profession as a whole, especially in light of the rapidly aging bar. The misconduct must be addressed by the lawyer's regulatory agency in its never-ending effort to protect the public; failing to do so would not only ignore a known problem, but also be a threat to the unique, effective, and appropriate privilege of self-regulation that our profession rightly maintains.<sup>33</sup>

Lawyer misconduct coupled with evidence of age-related impairment is incredibly difficult to address. Any discipline must appropriately address the negative impact of the misconduct on the client's life, and must be crafted in a way that ensures the public will be protected from future transgressions. At the same time, any remedy must sensitively deal with any potential underlying issues producing or contributing to the misconduct. It is not an exact science, and there always remains a risk that the lawyer will attempt to continue practicing in some fashion, regardless of the professional discipline imposed. Still, situations like Bill's will force a state bar's hand in protecting the public by directly addressing whether Bill should continue to practice, and if so, what substantial parameters must be imposed to ensure Bill will not engage in further misconduct.

---

<sup>32</sup> Examples noted are from actual disciplinary cases; identities of lawyers involved were intentionally omitted.

<sup>33</sup> Of the cases referenced in the paragraph above, two resulted in active disciplinary suspensions of the lawyer's license, and two resulted in the lawyer transferring to disability inactive status.

## **VIII. Our Cognitive Decline and the Impact on Our Clients**

Discipline is, unfortunately, only half of the story. The other half consists of the effect Bill's discipline has on his clients and the expenses incurred by the lawyers of Bill's state in "cleaning up the mess" created by Bill's misconduct. Even if Bill went through his disciplinary proceeding and was ultimately found to have engaged in serious misconduct that warranted his removal from the practice, whether through professional discipline or a forced transfer to disability inactive status, the next issue of concern is what happens to his clients. Consider the client Bill directly harmed that formed the basis of his discipline and Bill's other clients who now find themselves without a lawyer to handle their cases. At this point, the state bar has only begun its work on Bill's case as the state bar is now responsible for stepping in to protect the public, which in this case will be Bill's clients.

The client directly harmed by Bill's conduct has few options to move on to new representation or otherwise be made whole. First, the client needs to find a new lawyer to either correct the consequences of Bill's misconduct or continue the representation in a more effective manner. However, the client may not (and likely does not) have funds available to retain a new lawyer after previously paying Bill's legal fee. The client could attempt to recover some part of his or her fee from Bill directly, but such an attempt would require additional, complicated legal action—which would probably necessitate the hiring of a lawyer. Alternatively, the client could file a claim with the state's client protection fund. Nearly all states maintain some type of client protection fund for the purpose of reimbursing victims of attorney misconduct.<sup>34</sup> Typically, the type of misconduct that makes a client eligible for reimbursement is limited to intentional misconduct (often theft of some sort) by the lawyer; these funds generally do not engage in reimbursing clients for what amounts to a fee dispute or other disagreement about the value received from the fee paid to the lawyer. That being said, some funds have rec-

---

<sup>34</sup> American Bar Association Center for Professional Responsibility, Directory of Lawyers' Funds for Client Protection (Feb. 2018), [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/cp\\_dir\\_fund.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/cp_dir_fund.pdf).

ognized the significant and detrimental impact experienced by a client when his or her lawyer is forced to abandon the representation due to disciplinary or disability-related action by the lawyer's regulatory agency. In unique cases, some funds have reimbursed clients for their paid legal fees or a portion of their paid fee based upon the amount of work completed at the time their lawyer became unavailable. Nevertheless, these types of reimbursements are rare, and Bill's client cannot rely entirely on the client protection fund to provide any amount of financial assistance. Bill's client will continue to experience the negative effects of Bill's misconduct long after the disciplinary case is resolved.

What about Bill's other clients? When a lawyer abruptly leaves the profession for any reason, clients are left in the lurch without direction or understanding of what to do next. To this end, many states have adopted the policy that it is the duty of the state bar to step in when a solo practitioner<sup>35</sup> becomes unavailable to his or her clients due to death, disability, or discipline.<sup>36</sup> North Carolina, for example, adopted the following policy in 2014:

The State Bar is the appropriate entity to initiate action to wind-down the practices of lawyers who appear unable to continue to serve and protect the interests of their clients, and for whom no law partner can act. Under such circumstances, the State Bar, by and through its staff, will when necessary and appropriate, seek the appointment of qualified members of the Bar as trustees . . . and support their efforts in winding-down the practices of the subject lawyers. Support shall consist of consultation and direction, as well as compensation in the event no other source of funds is available. Compensation shall be determined and paid by the Executive Director in his or her discretion. The Executive Director is also authorized to reimburse such expenses of

---

<sup>35</sup> Absent extraordinary circumstances, states typically focus on solo practitioners in this regard because law firms are obligated and expected to handle any client issues arising with the unavailability of one of their firm members.

<sup>36</sup> Of the 51 jurisdictions surveyed by the ABA (50 states plus the District of Columbia), 48 reported having some type of administrative rule or process in place to appoint a trustee or caretaker of an unavailable attorney. *See generally* American Bar Association Center for Professional Responsibility, *State by State Caretaker Rules When Lawyer Disappears, Dies, or Is Declared Incompetent* (May 2015), [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/chart\\_state\\_by\\_state\\_caretaker\\_rules.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/chart_state_by_state_caretaker_rules.authcheckdam.pdf).

the trusteeship as he or she deems reasonable and appropriate. The Executive Director shall report to the President, or to any committee he or she may designate, at least annually regarding the trusteeships that have been concluded since the last report, the trusteeships that remain active, and the expenditures that have been made or are contemplated. It is hereby recognized that the primary purpose of each trusteeship will be to protect the interests of the subject lawyer's clients, and that trusteeships will generally be administered to discontinue, rather than conserve or perpetuate, the practices involved.<sup>37</sup>

As a result, when a lawyer becomes unavailable in North Carolina due to death, disability, disappearance, or discipline, the State Bar petitions the court in the lawyer's locality to appoint a trustee to wind-down the unavailable lawyer's practice. Notably, the purpose of the trusteeship is not to preserve the practice until the unavailable lawyer can return to the practice; the purpose is to terminate the practice. To accomplish this, the trustee must first gain access to the unavailable lawyer's client files, sort through the files to determine which cases are active and which are inactive, and attempt to contact all active clients to inform them that they need a new lawyer and they need to come pick up their client file immediately. If the unavailable lawyer maintained a trust account and had client funds deposited in it, upon the lawyer's unavailability, the trustee must also conduct a reconciliation of the account to determine exactly whose money is in the trust account and arrange to have those funds appropriately disbursed. If this process sounds like a hellish nightmare – it is. The process of sorting through a lawyer's office and so-called "file management system" can be extremely difficult, if not impossible.<sup>38</sup> The State Bar bears the initial cost of the trustee's expenses, including the trustee's time and the costs of any assistant employed by the trustee to complete the wind-down process. If the unavailability is due to death, the State Bar is statutorily authorized to pursue reimbursement of the wind-down expenses

---

<sup>37</sup> NORTH CAROLINA STATE BAR, HANDBOOK FOR A TRUSTEE OF THE LAW PRACTICE OF AN UNAVAILABLE ATTORNEY 1 (Apr. 2015), <https://www.ncbar.gov/media/283998/trustee-handbook.pdf>.

<sup>38</sup> The lessons learned through the trustee process are why new attorneys in North Carolina are often prompted at the required CLE Program for New Admittees to consider a contingency plan in the event of an emergency in their practice. Earlier knowledge and discussion with attorneys will hopefully alleviate many of the issues seen as part of the trustee process.

through the unavailable lawyer's estate; otherwise, provisions for reimbursing any expenditures by the State Bar related to winding the lawyer's practice down are typically incorporated into the terms of professional discipline.<sup>39</sup> In reality, however, the State Bar – and thus the lawyers of the state – end up footing the bill for most of the wind-down expenditures in any given year. In Bill's case, any efforts made to seek reimbursement for funds spent winding down his practice would likely be unproductive.

In sum, the effect of Bill ignoring his age-related impairment is substantial: clients are harmed; his hard-earned reputation is lost; and he has to deal with being professionally disciplined (if not removed from the profession entirely). The legal profession suffers a set-back both in terms of reputation and resources spent on investigating and prosecuting the misconduct as well as cleaning up the mess created by Bill when he had to promptly leave the practice. Not every lawyer who has "senior moments" will become impaired to Bill's extent; however, the purpose of the story is to expose the potential risks related to aging as lawyers.

## **IX. Alternative Path for Bill**

Aging in practice is not all doom and gloom. A significant portion of our legal family will face age and disability-related issues over the coming years, and our goal is to start this conversation now so that we are prepared to age with dignity. With this goal in mind, let us return to Bill's story and look at how he could have embraced his "senior moments" differently.

*After lunch with Bill, you agreed to meet again in two weeks. Over the course of the next several months, you had lunch with Bill regularly. You could tell that there was something going on with Bill that was more significant than a few "senior moments."*

*You reached out to some other attorneys, and without disclosing Bill's name, you discovered that your local bar's senior lawyer division was having a social gathering. You called Bill and asked him to go with you to the event. After the social, Bill thanked you for asking him to go with you as he saw a number of his friends who he had not seen in a while, and he had already made plans to*

---

<sup>39</sup> N.C. GEN. STAT. § 84-28(j) (2018).



*start attending their monthly breakfast series on succession planning.*

*At your next lunch, Bill shared with you that he is going to begin working part-time by the end of the year as part of his retirement plan. He wanted to know if you would consider sharing and ultimately taking over some of his more complicated domestic cases. You happily agree to help.*

*Late that same year, you received a call from Bill. He wanted to know if you would consider talking to his students at the local community college. In your call, you learned that as Bill stepped back from full time practice, he began to teach some legal-related classes, which clearly excited him. He shared with you that he would be going inactive with the state bar, but he hoped to remain connected to the legal field in some way.*

In this alternative path, Bill decided to be more proactive about the changes he noticed as he aged. He also took a path that allowed him to retain his dignity and his happiness. A proactive approach to transition to a life after the practice of law requires planning and deliberate consideration of your abilities and your goals. The word “transition” is purposefully used. The success that we have experienced as lawyers does not have to fall by the roadside as we transition from the active practice of law. Instead, these experiences and successes are what endow us with a myriad of opportunities in and out of the legal field.

## **X. Proactive Steps to Address Aging and Potential Cognitive Decline**

Before a discussion of opportunities after people slow down or stop their domestic practices, it is important to discuss how to cease practicing law in an appropriate and ethical fashion. When we began our journey as attorneys, we went to law school, passed the bar exam, and found or created a job. We spent so much time and effort determining how we were going to enter the practice of law and how we were going to succeed in the practice, yet what plan do we have to transition out of active practice? We cannot just walk out the door and wave goodbye; we must have a plan and that plan may look different depending on whether you are a sole practitioner or part of a firm.

Over a decade ago, the American Bar Association passed a resolution calling on law firms to abandon their mandatory retirement policies.<sup>40</sup> It is interesting to compare that resolution to the fact that thirty-three states have a mandatory retirement age for their supreme court justices.<sup>41</sup> Governments believe age guidelines are appropriate for their most senior court justices; however, lawyers appear to believe that an arbitrary age guideline is inappropriate for practitioners. Without a fixed age to retire, how should firms approach the issue? For firms, there should be an analysis and weighing of several issues: client satisfaction, management of risk, consideration of age discrimination laws, and attorney satisfaction. A known, established policy of transition in a firm creates a sense of comfort for lawyers and clients that the firm is addressing this inevitable aging of lawyers in the firm. Lawyers want to know how to transition out of daily practice, and lawyers remaining in the firm need to know that the firm will continue without that lawyer being at the office every day. Instead of aging lawyers being left to devise their own plans, it would benefit firms to have these discussions early and often with all of the lawyers. This ongoing discussion benefits the lawyers and the clients, as well as helps avoid some of the ethical problems created by ignoring the reality of age. These discussions must not run contrary to age discrimination laws; however, with diligence and mindfulness a meaningful discussion can be had that alerts all lawyers to the issues of aging and cognitive decline and helps develop a plan.

A retirement or transition plan for a firm is beneficial, but there is another piece of planning that should always be in place. Every lawyer should have an emergency plan or succession plan in place. Lawyers should know what will happen if their offices are destroyed by fire, or if they are seriously injured in an accident. These types of scenarios can partially be assisted by insurance policies, which creates some sense of comfort. However, there is no insurance policy for voluntary retirement or incompe-

---

<sup>40</sup> Gary Toohey, *Shades of Gray: The Opportunities and Challenges of an Aging Bar*, J. Mo. B (Jan.-Feb. 2018), <http://www.mobar.org/journal/janfeb2018/gray.htm>.

<sup>41</sup> Sandy Adkins, *Most States Require Judges to Step Down After 70*, NATIONAL CENTER FOR STATE COURTS BACKGROUNDER (Apr. 2010), <http://www.mobar.org/journal/janfeb2018/gray.htm>.

tency; instead there is just a mountain of risk. Again, the Rules of Professional Conduct attempt to advise lawyers on what course of action to take as they transition from active to inactive status. Rule 1.6 deems information obtained during the attorney-client relationship as confidential; thus, that information must be protected from inadvertent disclosure. In the retirement (voluntary or involuntary) scenario, this means a lawyer can't just "hand off a client file" without taking precautions to ensure all confidential client information remains protected and that the client is aware of what is happening with his or her information. Furthermore, Rule 1.16 sets out a number of grounds upon which a lawyer may withdraw from representation. The Rule also imposes a particularly heavy responsibility to "take steps to the extent reasonably practicable to protect a client's interests" upon termination of the representation.<sup>42</sup> The development of a succession plan is key to the management of the risks associated with lawyers' inevitable retirement as well as the professional responsibility owed to clients, communities, and the profession.

A succession plan is a written plan that specifies what steps should be taken to transition a lawyer into retirement, or what steps should be taken in the event of a lawyer's death or disability. Some states have implemented ethics rules surrounding the establishment of a succession plan. For example, South Carolina enacted Rule 1.19 in 2013, which serves as "encouragement, especially to sole practitioners, to arrange for the orderly protection of clients."<sup>43</sup> Even though not a mandatory ethical rule, Rule 1.19 offers guidance aimed at client protection in succession situations. Following the adoption of Rule 1.19, South Carolina published materials including written agreements and checklists to assist lawyers in taking on the momentous task of closing a law practice.<sup>44</sup> South Carolina's decision to place its succession plan rule in its Rules of Professional Conduct highlights the importance with which it views the issue of succession planning.

---

<sup>42</sup> MODEL RULES OF PROF'L CONDUCT R. 1.16(d).

<sup>43</sup> S.C. RULES OF PROF'L CONDUCT R. 1.19 (2013), <https://www.sccourts.org/courtreg/displayRule.cfm?ruleID=407.0&subRuleID=RULE%201.19&ruleType=APP>.

<sup>44</sup> South Carolina Bar, *Succession Planning*, S.C. BAR, <https://www.sbar.org/lawyers/managing-your-law-practice/your-career-changes/closing-practice/succession-planning/> (last visited Oct. 3, 2018).

398 *Journal of the American Academy of Matrimonial Lawyers*

Though the Rule is not mandatory, the inclusion of this encouragement in the Rules incorporates a lawyer's care for his or her practice – both present and future – into the minimum ethical standards for lawyers in that state. A clearer message could not be contrived.

South Carolina is not alone in addressing the potential fallout of abandoned practices through regulatory provisions; at least fourteen other states also have adopted similar succession planning rules – whether they are mandatory or voluntary/encouraged conduct.<sup>45</sup> Virginia and West Virginia, for example, have adopted comments to Rule 1.3 of their Rules of Professional Conduct (Diligence) that state a lawyer's duty to diligently represent clients includes the lawyer's duty to make adequate preparations for the lawyer's potential unavailability through a succession plan.<sup>46</sup> Florida has addressed the need for succession planning through administrative regulation, requiring every member of the Florida bar to designate a fellow member of the Florida bar as an "inventory attorney" in the event of an inability to practice under Rule 1-3.8(e).<sup>47</sup> Certain malpractice carriers in Florida (and in other states) require that solo lawyers identify a "back-up" attorney in any application for professional liability insurance coverage. Illinois, on the other hand, requires active attorneys to annually report whether they have a succession plan in place.<sup>48</sup>

Just because a particular jurisdiction has not adopted a formal ethical or regulatory provision does not mean the jurisdiction has not made some effort to address the issue. For example, although North Carolina has a regulatory process to appoint a trustee for a law practice due to a lawyer's unavailability and resources to assist a trustee in winding-down an unavailable law-

---

<sup>45</sup> American Bar Association, Mandatory Successor Rule Chart (June 2015), [https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/mandatory\\_successor\\_rule\\_chart.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mandatory_successor_rule_chart.authcheckdam.pdf).

<sup>46</sup> VA. RULES OF PROF'L CONDUCT R. 1.3 cmt. 5 (2009), <http://www.vsb.org/pro-guidelines/index.php/rules/client-lawyer-relationship/rule1-3/>; W. VA. RULES OF PROF'L CONDUCT R. 1.3 cmt. 5 (2015), <http://www.courtswv.gov/legal-community/court-rules/professional-conduct/rule1.html#rule1.3>.

<sup>47</sup> Fla. R. Regulating the Bar R. 1-3.8 (2018), [https://www.floridabar.org/wp-content/uploads/2018/10/Ch-1-2019\\_04-Oct-12-2018-RRTFB.pdf](https://www.floridabar.org/wp-content/uploads/2018/10/Ch-1-2019_04-Oct-12-2018-RRTFB.pdf).

<sup>48</sup> ILL. SUP. CT. R. 756, [http://www.illinoiscourts.gov/SupremeCourt/Rules/Art\\_VII/artVII.htm#Rule756](http://www.illinoiscourts.gov/SupremeCourt/Rules/Art_VII/artVII.htm#Rule756).

yer's practice,<sup>49</sup> North Carolina chose not to enact a formal rule requiring or even encouraging succession plans due, in part, to the reality of monitoring such a requirement. Instead, the matter was left to the voluntary bar association in North Carolina ("NCBA"), which had already begun work in late 2011 to study the issue of the aging bar, and in 2012 formed the Transitioning Lawyers Commission ("TLC"). TLC spearheaded the effort in conjunction with the North Carolina State Bar and the Senior Lawyers Division of the NCBA, and the State Bar recognized TLC as an official lawyer assistance program, thereby offering the program and its participants the confidentiality necessary to effectively administer the program. The goal of TLC was to help those who *needed* to retire so that they could do so with dignity (as opposed to being forced out of practice as part of a disciplinary hearing), and to provide resources and guidance for those attorneys who *wanted* to retire. As part of TLC's work with the North Carolina State Bar, it was designated as a "Lawyers Assistance Program." This allowed TLC to confidentially work with lawyers who were at risk of discipline. According to the TLC website:

TLC recognizes that the word 'retirement' is too often viewed as a dead end, literally. Retirement is actually just another transitional phase in life. Those who 'retire' from the practice of law can still find activities which use their knowledge and skills to benefit society, but which impose less pressure in terms of deadlines and stress . . . TLC provides educational support as well as the support of other lawyers in working through the transitional process.<sup>50</sup>

This program is specifically aimed at lawyers who show signs of cognitive impairment or similar issues impacting their ability to practice law. The North Carolina program is far from alone, as similar programs have been established in several other states.<sup>51</sup>

---

<sup>49</sup> 27 N.C. ADMIN. CODE 1B.0126; *see also* NORTH CAROLINA STATE BAR, *supra* note 37.

<sup>50</sup> North Carolina Bar Association, Transitioning Lawyers Commission – Transitional Support, <https://www.ncbar.org/members/committees/transitioning-lawyers-commission/transitional-support/> (last visited Oct. 3, 2018).

<sup>51</sup> *See, e.g.*, ABA Standing Committee on the Delivery of Legal Services, *Programs for Lawyers in Transition*, [https://www.americanbar.org/groups/delivery\\_legal\\_services/](https://www.americanbar.org/groups/delivery_legal_services/) (last visited Jan. 8, 2019).

## **XI. Less Formal Options to Address Aging and Potential Cognitive Decline**

What about informal options? Succession planning and state bar programs may seem to be too daunting for some. Another option is to become knowledgeable and immersed in the conversation of aging. At the age of 62, members of the American Bar Association are automatically enrolled in the Senior Lawyer's Division. This division, like many of the ABA, is brimming with information, resources, and social opportunities. The amount of information contained just on its website is impressive, with easy access to relevant articles. State and local bar associations also have senior lawyer groups. Sharing information with others facing similar challenges is at a minimum reassuring.

Another potential avenue for attorneys seeking assistance with retirement issues lies with their malpractice insurance carrier. Insurance companies may offer guidance with a variety of issues facing an aging attorney. In North Carolina, most attorneys have malpractice insurance through Lawyers Mutual, which has been proactive about addressing the issues facing an aging attorney. In July 2018, Jay Reeves of Lawyer's Mutual published a twelve-part blog series entitled "Do You Have a Transition Plan?"<sup>52</sup> This series detailed the process of transition, from initial planning to final steps. According to Camille Stell, Vice President of Client Services at Lawyers Mutual, the discussion among malpractice carriers on the potential transition surge is only just beginning.<sup>53</sup> A national dialogue among members of the bar will help bring more light to this subject so that transitioning becomes an integral part of an attorney's overall lifetime career plan.

## **XII. Transitioning into Retirement**

Let us be honest – aging and talk of retirement are scary topics. It may be even scarier if we have not financially prepared for it. Matrimonial lawyers discuss and dissect client's finances all the time, but we rarely talk about our own finances in a candid

---

<sup>52</sup> Jay Reeves, *Do You Have a Transition Plan?*, LAWYERS MUTUAL (July 25, 2018), <https://www.lawyersmutualnc.com/blog/do-you-have-a-transition-plan>.

<sup>53</sup> E-mail from Camille Stell, Vice President of Client Services, Lawyers Mutual, (Sept. 20, 2018) (on file with author).

manner. Just like our clients, our own retirement plans can be wrecked by our own divorces, financial mismanagement, or inability to fully earn for a period of time. This article is not going to provide financial advice; nevertheless, you may want to consider this article as a reality check. Do you have a financial plan for a secure retirement? If you do not, it is never too late to sit down and develop one. We send our own clients to financial planners, and we should not allow our ego to prevent us from seeking help on the same issues. Our responsibility is to make sure that the tail does not wag the dog as we enter our later years of practice. Attorneys should not feel forced to continue to practice because of a failure to have a financial plan in place for our retirement. Cognitive decline occurs regardless of financial preparedness for retirement. If you cannot financially retire or step back from the practice, you are putting yourself more at risk of falling into the missteps experienced by Bill and other examples noted earlier in this article.

Maybe you have the financial plans in place, but do you have an “identity” plan in place? For some attorneys, the thrill of no longer having deadlines or meetings is very appealing. Enjoying family, hobbies, or traveling is well-earned payment for a long career in law. However, for other attorneys, retirement may not seem like a positive thing. Their very identity is defined by their chosen profession. The idea of not being a lawyer each day is scary. For those attorneys, some second act planning is in order. The first question is whether one wants to stay involved in some aspect of the law, or switch gears entirely. For those individuals who want a non-legal second act, developing a personal list of areas of interest is a good way to start exploring options. Transition from the practice of law provides the opportunity to finally do those things on that bucket list. Why not start now? Learning a new skill or getting involved in something you are passionate about will assist in making your own transition from the practice of law seem less daunting. This may also provide a secondary benefit of finding a way to unwind from the current demands of your career.

If you decide that the law is your comfort zone, but you are worried about the risks of maintaining an active practice, there are still many avenues open, such as becoming a law professor, a legal consultant, or a volunteer in a community organization.

402 *Journal of the American Academy of Matrimonial Lawyers*

These options allow you to step away from the active practice of law, but still utilize your knowledge and experience in a meaningful way.

Now that you may have more time in retirement, you may decide that you would like to practice law by performing solely public service work. You may wonder if this option is available. Many state bars have answered this precise dilemma and crafted programs that utilize the knowledge and experience of retired attorneys to fill gaps in legal aid programs. Access to justice is always an issue for many socioeconomic groups; funding cuts make that access even more difficult. Therefore, state bars have decided to harness the power of some of the most experienced lawyers by allowing them to apply for emeritus pro bono status. Emeritus attorneys are able to continue to practice law with fewer requirements as long as they solely perform pro bono work. As of this year, only six states did not have rules that allow this type of practice.<sup>54</sup>

It is important to examine each state's rules regarding emeritus status as there is quite a variation. For example, in Georgia, one must be over 70 to participate, but in New York, an attorney can begin participating at age 55. Most states do not have a maximum age restriction on emeritus pro bono status. The status is often accompanied by a reduction or complete waiver of bar dues and/or waiver of yearly legal education requirements. States vary on details related to whether malpractice insurance is required or whether direct supervision by another attorney is necessary. Some states even allow lawyers licensed from other states to operate in their state under this or a similar rule so long as they are providing pro bono work under the supervision of and in connection with a nonprofit organization qualified to render legal services to indigent persons.<sup>55</sup> This presents a nugget of possibility for those pondering retirements in a different state.

Lawyers who function under these rules generally provide services as part of an established entity. For example, in North Carolina, attorneys usually work with Legal Aid of North Carolina. However, as AAML fellows, we are in the unique position to help improve the family court system in a very real way for

---

<sup>54</sup> See American Bar Association, Commission on Law and Aging, *State Emeritus Pro Bono Practice Rules* (Aug. 2018).

<sup>55</sup> See, e.g., 27 N.C. ADMIN. CODE 1D.0905.



litigants who are unable to afford private counsel. Many families struggle with issues in family court for years. Further, state court systems are overburdened with cases and are unable to provide the time and resources to help families. It is possible that we can begin addressing this problem by harnessing the power of our aging AAML fellows. As the standard bearers for the practice of matrimonial law, we should lead the charge to make real and meaningful changes in family court by our encouraging senior fellows to apply for emeritus pro bono status. Their knowledge and skill are invaluable and could impact the lives of children and families for years to come. Additionally, we should include our senior colleagues in other professions – accountants and mental health professionals, for example – to join in this effort to make family court more accessible and meaningful to those traditionally without funds to engage such experts. Collaboration among teams of such experienced professionals offers both a rewarding avenue for the professionals, and much needed services to those who often feel shut out of the process.

### **XIII. Conclusion**

As fellows in the AAML, our dedication to a higher standard of practice should be reflected in our being ahead of the legal curve. We should lead the conversation about what the next step means for retiring attorneys. The bottom line is that we should not be practicing law until we die of old age. The risks associated with allowing one's physical and mental capabilities to dictate the age of retirement comes at a tremendous professional risk for ourselves and our clients

The goal of this article was to provide a full spectrum review of the various issues facing our aging bar. There are risks of cognitive decline and ethical pitfalls with age. Just like we educate new attorneys on all of the pitfalls of the legal practice, we should also be mindful of those pitfalls that may occur on the tail end of our practice as well. Lawyers should begin to engage in a dialogue about these challenges. As a societal group that has truly forged the way into significant issues, we all (regardless of age) will benefit from this discussion and the ideas that are generated from those discussions.

We have just one final question for you to consider: raise your hand if you know a "Bill" in your legal community. We are

404 *Journal of the American Academy of Matrimonial Lawyers*

confident that everyone knows a “Bill,” so in hindsight, you may now have wished that someone would have tapped on Bill’s shoulder well before he had his “senior moments” to remind him to make a plan for his second phase of life.

Raise your hand one more time; now bend it over your opposite shoulder and tap . . . this is your reminder.