

BY MARTIN COLE

Growing Old Together

Several years ago, Webster's New World Collegiate Dictionary named "senior moment" as its Word of the Year, defining the term as meaning a momentary lapse in memory, particularly one experienced by a senior citizen. I've now reached the age where I no longer find that quite as amusing as I once might have. The legal profession also has reached a stage where "senior moments" are increasingly likely to occur for many of its members. Collectively, lawyers are growing old together.

The overall number of lawyers in Minnesota and the United States continues to increase, as more lawyers enter the profession each year than leave. So the average (mean) age of lawyers is probably going down, not up. But on the other end of the aging spectrum, more and more lawyers are practicing longer and longer without retiring or scaling back their practices. Therein lie a host of potential problems for individual lawyers, law firms, the profession as a whole and for protection of the public—the stated purpose of a lawyer discipline system.¹

Reasons that lawyers are remaining in practice longer include the obvious health care improvements that have enabled more people, and not just lawyers, to remain healthy and active far longer than ever. Thus, many aging lawyers remain highly competent practitioners who ably represent clients and continue to make valuable contributions to the law and society. Less posi-

tively, economic factors such as limited retirement funds worry some lawyers into continuing to practice, even if they would prefer to retire.

As noted, the focus of the lawyer discipline system first must be protecting the public from lawyers who violate the Rules of Professional Conduct. Unfortunately, not all of the aging lawyers

who remain in practice are equally capable of doing so. Rule 1.16(a)(2) of the Minnesota Rule of Professional Conduct offers one clear measure of when that capability should be questioned. The rule states that a lawyer shall not represent a client, or shall withdraw if representation has already commenced, if the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client. From a societal perspective, the issue becomes balancing the need to protect the public from a few aging lawyers who are no longer able to practice effectively, at least on their own, while trying to allow such lawyers to end their careers with dignity. This balance is not always an easy one to strike.

Recognizing a Problem

In recent years, the Director's Office has received a small number of reports about lawyers who may be suffering from the early stages of Alzheimer's disease or dementia. They have gone well beyond the occasional "senior moment" and have started to miss appointments and court dates, misplace client files and property, or repeat tasks they have already performed. In one such instance, family members could not bring themselves to confront the individual in an effort to get the lawyer to cease practicing. No doubt this can be a difficult decision and task to perform tactfully. The alternative, however, may be even more unfortunate when the lawyer is unable to recognize his own diminished ability. Here, it was left to the disciplinary system to deal with the matter based upon complaints and by seeking to impose discipline.² The attorney eventually agreed to retire as part of a stipulated disposition, but only after some acrimonious discussions.

More satisfying and humane is if family, friends, support staff or other lawyers in the firm or in the community take notice of an aging lawyer's early signs of failing and intervene to help the lawyer transition to a reduced practice or retirement, before disciplinary measures are necessary. Partners in a law firm, for example, are obligated to report known violations of the Rules of Professional Conduct by another member of the firm that raise a substantial question as to that lawyer's fitness. Early intervention

may permit the firm to closely monitor the lawyer's ability to continue practicing before such instances of misconduct occur and thereby eliminate the risk of future rule violations, thus preventing disciplinary reporting.³

An important issue facing the aging lawyer population is what is often called "successor planning." This column has previously addressed related issues such as creating an office manual of practices and document locations, identifying a successor attorney who has agreed to handle certain client matters and is willing to assist in transferring files to other attorneys or to return them to clients, and the selling of the physical assets of a law practice. We have also addressed the obligations of lawyers in a firm with an impaired partner.⁴ Lawyers of all ages, especially solo practitioners, should make appropriate contingency plans for their law practices so that clients are not substantially harmed by a lawyer's sudden death or disability. Senior lawyers especially should not put off successor planning any longer.

Resources Available

There are resources within the legal profession to assist aging lawyers or those concerned with the risk of an aging lawyer's performance. For example, the American Bar Association has a Senior Lawyers Division that can act as an information resource. More locally, malpractice insurers, such as Minnesota Lawyers Mutual, can be an excellent resource that lawyers may turn to for help with successor planning procedures. Lawyer assistance programs, or LAPs, deal with individuals with chemical issues or mental health issues such as depression, both of which can affect senior lawyers. They also have information available to assist aging lawyers or those concerned about them.

While the MSBA has a New Lawyers Section and an Elder Law Section, it no longer has a section aimed specifically at senior lawyers as it once did. Elder law deals with lawyers assisting elder clients, but its members are not necessarily elderly themselves. Perhaps this is an area into which the state bar association ought to consider expanding its services, for as noted, there is a growing population of aging attorneys and the corre-



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sponding need for such resources will only increase in the near future. Even if the interest to sustain a separate senior lawyer section is not yet sufficient, recruiting senior lawyers for special projects, especially mentoring or *pro bono* projects, is an excellent option. Continuing Legal Education providers should consider dedicating more seminars to the topic as well. In the meantime, the MSBA's Life and the Law Committee addresses this issue as part of its mission to discuss career satisfaction, mental and chemical health, balance, and other quality of life issues. ▲

Notes

¹ Several organizations have started studying this issue and its effects. For example, in May 2007 the National Organization of Bar Counsel (NOBC) and Association of Professional Responsibility Lawyers (APRL) issued a Joint Committee Report on Aging Lawyers. A copy can be downloaded from

www.aprl.net/pdf/NOBC-APRL.pdf. For additional information, see *The Complete Lawyer*, which dedicated an issue to a Focus on the Graying of Lawyers, www.thecompletelawyer.com/volume3/issue4/index.php.

² Rule 28, RLPR, does allow for a transfer to disability status proceeding to be initiated by the Director's Office without the attorney's consent. A transfer to disability status is very rarely sought without the agreement of the lawyer, however, or without judicial findings of disability.

³ See ABA Formal Ethics Opinion 03-429 (2003).

⁴ Betty Shaw, "Winding Down, Closing Up or Selling Out," 61 *Bench & Bar of Minnesota* 10 (Nov. 2004), p. 12 (www2.mnbar.org/benchandbar/2004/nov04/prof_response.htm); Ken Jorgensen, "Ethical Responsibilities for an Impaired Partner," 60 *Bench & Bar of Minnesota* 9 (Oct. 2003), p. 12 (www2.mnbar.org/benchandbar/2003/oct03/prof_resp.htm).

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