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Bracing for the "tsunami" of aging Florida lawyers

The thrust of the Bar's efforts is to help aging lawyers be "self-reflective" about where they stand, and educate others how to observe the signs of aging and intervene before it becomes a "real catastrophe"

By Jan Pudlow
Senior Editor

If you've ever had to take the car keys away from aging parents, you know how difficult it can be to balance safety concerns with maintaining dignity.



Facing a "tsunami" of aging lawyers, The Florida Bar is stepping up to the challenge of protecting the public from lawyers who are no longer able to provide competent representation, while striving to protect the dignity of attorneys who have given so much to the legal profession.

The numbers cannot be ignored: 33 percent of Florida lawyers are 55 or older; 21 percent are 60 or older; and 11 percent are 65 and older.

The Bar is responding to the issue of aging lawyers on several fronts:

A new Aging Lawyers Working Group has met once in October. The group includes John T. Berry, director of the Bar's Legal Division; Linda Calvert Hanson, director of the Bar's Henry Latimer Center for Professionalism; Michael Cohen, executive director of Florida Lawyers Assistance; Michael Herkov, a psychologist and associate professor at the University of Florida College of Medicine's Psychiatry Department; and UF Law Professor Jennifer Zedalis.

Together, they are embarking on a plan to help identify lawyers with cognitive impairments before they harm clients and are snared in the disciplinary process. They are also hoping to find ways to help older attorneys continue to share their valuable experience and expertise in less stressful ways than grueling litigation or direct service to clients.

In the works is a confidential "cognitive checklist," a self-assessment lawyers will be able to take online at UF, modeled after the UF College of Medicine's "Florida Cares" program for physicians, to see how attorneys rank among their peers when it comes to sharpness of mind and remembering details.

In short, it will be a voluntary check-up of cognitive functioning and education about aging with possible CLE credits. This self-assessment will also break new ground in collecting anonymous data about aging in the Florida legal profession, to better gauge the size of the problem.

In August, Rule 1-3.5 was amended regarding permanent retirement, an option when an aging lawyer faces grievance proceedings because a complaint has been filed (see story [here](#)).

When the Bar's Hawkins Commission presented its final report in May to a unanimously receptive Board of Governors, many recommendations dealt with aging attorneys. And Jacksonville attorney Jake Schickel has taken steps to create a new section geared toward older lawyers, a proposal still wending through the Bar process.

"It's a very emotional issue," acknowledges Berry. "For many lawyers, our professional identity is wrapped around our personal identity. It goes to the heart of who we are as people. We have to be careful to be sensitive to that. But some of the mistakes we have seen nationally are leaning over backwards to not hurt people . . . to let them practice too long, instead of helping them transition into retirement or something else they can do in their legal careers."

Berry knows a lot about aging lawyers. He chaired a joint committee made up of the National Organization of Bar Counsel, the regulators around the country, and the Association of Professional Responsibility Lawyers, the respondent lawyers and malpractice attorneys.

"We came together, the two groups on different sides, for a two-year study, and we had a unanimous report of the members," Berry said. "It's important to point out this is a red flag for all of us."

That Joint Committee on Aging Lawyers Final Report in 2007 warned the aging lawyers issue is reaching "tsunami" proportions, and gave this five-point overview:

"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:

- * The steady increase in the past 50 years in the number of lawyers admitted to practice each year;
- * The demographic shift in the elderly population [the number of adults over 65 in the U.S. will double in 25 years, from 35 million to 70 million, and the proportion of older adults will increase from about 13 percent to 20 percent of the total population];
- * The dramatic improvements in healthcare, which have extended professional work lives;
- * The strong desire among many senior lawyers to continue making positive contributions to society; and
- * The economic necessity, which will compel lawyers to continue working because their pensions or savings are insufficient to support themselves and their families."

Measuring Cognitive Decline

Of course, many older lawyers still contribute admirably to the legal profession.

Former ABA President and Florida State University President Sandy D'Alemberte, who will be 80 next year, demonstrates he can hold his own during oral arguments before the Florida Supreme Court.

Peter T. Fay, a judge on the 11th Circuit Court of Appeals, was born in 1929 and was admitted to the Bar in 1956. UF law Professor Zedalis, who is 53, notes: "The jurist in residence program was named after Judge Fay. I couldn't keep up with him, and he's sharp as a firecracker."

And Miami federal Judge Paul Huck, who was born in 1940 and will be UF's 2013 jurist in residence, Zedalis said, "has unbounded energy. He'll probably wear the students out."

It's true, also, that much younger lawyers can become cognitively impaired.

"Some at 45 are not as sharp as somebody at 75," says Berry.

"But the odds are that we all will transition into times when we are not as strong physically or mentally,

but that doesn't mean we have to be put on a shelf where we lose all that experience and expertise."

The thrust of the Bar's efforts, Berry said, is to help aging lawyers be "self-reflective" about where they stand, and educate others how to observe the signs of aging and intervene before it becomes "real catastrophe."

"Then we have to use compassion and appropriate challenging to say, 'Let's now check this out.'"

Berry stresses that the aging lawyers issue is about the good of the whole profession.

"We need active involvement from our senior lawyers now. We need their input. We need data. We want to do a lot of outreach to get their ideas. Who has the best solution than those dealing with it? Quite candidly, we all do. Everybody is either going to face being old or not being old. The selling point is this is about all of us."

Another selling point, says psychologist Herkov, is to appeal to lawyers' sense of professionalism.

"I think the way you approach it is what attorneys do is not just a job. If you are stacking shelves at Publix, that's a job. But if you are an attorney, it's not what you do but who you are. It's how you define yourselves," said Herkov, the chief psychologist at Shands Vista Florida Recovery Center, and an expert in the areas of psychological and neuropsychological assessment and fitness-**for**-duty evaluations **for** professionals, including physicians, nurses, attorneys, and judges. While fitness **for** duty **for** a firefighter includes physical strength, fitness **for** duty as a lawyer involves cognitive abilities.

"I've worked with professionals **for** many years. I can count on one hand the number of people who didn't want to do the best job they could. Sometimes, illness gets in the way. One of the ways to approach this is to make it as nonthreatening as possible."

The test he is creating will be brief, online at UF, and anonymous.

"No one can trace it back to you. And you can see how you compare to others your age — not comparing a 65-year-old attorney to a 25-year-old law school graduate," Herkov said.

You may be relieved to learn you are doing just fine, cognitively.

Or, you may learn that you didn't score comparatively well at all, and you "may want to talk to a peer or someone whose opinion you trust. You may want to talk to your physician."

There have been cases of cognitive impairment, Herkov said, that are due to vitamin deficiencies — and even vitamin overdoses.

But, he said, "The basis of the project is acknowledging that as we get older, there is a natural change in our cognitive abilities.

"If you look at something like dementia, once you get to be 65, about 1.5 to 2 percent will meet the criteria toward a diagnosis of dementia," Herkov said.

"And if you think about that, we know people will show signs and symptoms about a decade before that. If you look at Florida, we have about 10,000 attorneys who fall into that demographic."

While the project's design is to allow attorneys to get a confidential assessment of where they are cognitively, Herkov notes that it's usually family members or colleagues who will be first to notice **for**getfulness and mistakes in others.

"Most people don't notice the difference in themselves," Herkov said. "How do you remember what you don't remember?"

A bonus **for** Herkov is that he will be able to gather data on aging lawyers, information that has never been gathered before.

"From our end, we will collect data and be able to come back to the Bar in a year or so and say, out of 1,000 attorneys who have taken the online test, 98 percent are all within the normal range, and that's better than we expected. Or, we could find out that 15 percent are in the impaired range. It's a way to let you know the state of the union. And if there are any steps we need to take to address the issues.

"There's no data I know of that exists on that."

Model **for** the Nation

As executive director of FLA, Michael Cohen says, "we've probably seen four or five cases in the last couple of years," of problems associated with aging lawyers, such as the judge who calls to say a lawyer uncharacteristically shows up late at a hearing and muddles through the facts of a wrong case.

"We didn't see it in the years before, but we weren't looking **for** it," Cohen said.

But now that consciousness has been raised, Cohen frankly admits: "This is a much more complicated issue than substance abuse. With somebody who is suffering substance abuse or mental health issues, I can say, 'If you follow these suggestions, there's a good chance you will recover.' I can't say that with the aging issue.

"We may be able to keep you in practice longer, with an assistant looking over your docket, or taking you out of the courtroom or direct client contact. Eventually, we have to get to the point where the Bar says, 'This is it.'"

Unlike the medical profession, where it is mandatory **for** psychiatrists to take a cognitive thinking test at age 60, Cohen said, no one is suggesting the testing be mandatory **for** lawyers, even though doing it **for** everyone could remove the stigma **for** some. The working group discussed the expense, the expected push-back, and quickly dismissed the mandatory testing idea.

Cohen agrees the goal is to intervene early enough so that "a lawyer after 50 years retires with dignity, rather than retiring due to a Bar complaint."

"Instead of saying, 'Thank you very much, have a nice life,' the Committee on Professionalism is saying, 'You may not be able to do 100 percent of what you did before, but here's something you can do to use your talent.'"

At UF's College of Law, Zedalis said she will make her students aware of what to do when they work with older lawyers and notice signs of impairment.

"You can't let the client suffer **for** fear you are going to hurt someone's feelings," Zedalis said.

"We want our students, though not yet licensed, to think of themselves as lawyers, as far as professionalism, on the first day of law school. We want them to be aware of issues that affect lawyers' ability to provide competent representation," Zedalis said, noting that could be alcohol abuse, drugs, mental illness, or impairment from aging.

"This should be part of the professional identity of law students: The most rewarding thing **for** me will be my pride in my work and my ability to carry it out. There's nothing wrong with admitting you are having difficulty," Zedalis said.

"I have served on a grievance committee. It's a very sad thing to see a complaint that involves inadequate representation, and you learn from your investigation that perhaps the problem is dementia, or

Alzheimer's, that we associate with aging," Zedalis said.

"This is a response not only from members of the Bar, but a collaborative effort to see if there are ways we can address it not just **for** the aging lawyer, but **for** the protection of their clients."

Calvert Hanson, who's been head of the Bar's Professionalism Center since the first of the year, says she is proud that Florida is responding to the challenge of aging lawyers.

If the Bar did nothing, she said, "First off, we would be overlooking some invaluable talent. Clearly, we have some outstanding leaders and phenomenal lawyers who are aging out. They may not have the physical stamina to litigate in the courtroom the way they once did, but they have valuable contributions to make. It would be so sad if we ignored the wealth of talent available."

Also chair of the General Practice, Solo and Small Firm Section, Calvert Hanson said aging lawyers present special issues when they don't work in large firms with human resources protocols and other attorneys to handle cases.

"It's the small firm and solos where it is really a challenge, because you can imagine: If I am an associate and I'm working **for** the second lawyer in the firm, and it's just the two of us, and that lawyer is appearing to be impaired, how do I have that dialog with him? That's a delicate conversation when dealing with the dynamics of the small firm practice," she said.

"The other down side to that is assuming you are my assistant in my law firm, and I'm the solo, and it's in your interest to cover **for** me because otherwise you lose your job. What can happen is the legal assistant, who is well-intentioned and trying to help her boss of many, many years, is basically doing everyone a disservice because the assistant is then practicing law without a license."

Lawyers have an obligation to report when they see a lawyer who is not competent to practice law — even if that lawyer is the managing partner of the firm, she notes.

"This is scary stuff, and it's stuff you don't want to think about, but we can't sweep this under the rug," Calvert Hanson said.

"This is something that we cannot ignore. That's why we are taking the lead. We are going to get a great database so that we can see just how many lawyers are experiencing this decline. Everything is pretty much anecdotal right now, or somebody is running afoul of the disciplinary system. Wouldn't it be ideal if we can catch it before it becomes a disciplinary issue?"

"This is all real cutting edge, and I'm really excited getting the caliber of people we have together on this project. I guarantee this is going to be a very significant program that other states are going to try to replicate."

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