

By Donald R. Lundberg

ETHICS CURBSTONE

## The graying of the legal profession

We're all getting older, but the aging of the demographic bulge known as the Baby Boom is noteworthy for our profession. As a Boomer myself, this trend is becoming increasingly less abstract and more existential. A number of recent events have coalesced to focus my attention on this phenomenon:

- At its August annual meeting in San Francisco, the ABA House of Delegates passed a recommendation calling for law firms to abandon mandatory age-based retirement policies and evaluate senior lawyers on an individual basis according to performance-based criteria.

- The ABA has institutionalized immediate past president Karen Mathis' Second Season of Service initiative to support senior lawyers who wish to use their accumulated years of experience and wisdom to give back to the profession and their communities. Check out: [www.secondseasonofservice.com](http://www.secondseasonofservice.com)

- In May, in a first ever collaboration, two traditionally adversarial groups, the National Organization of Bar Counsel and the Association of Professional Responsibility Lawyers issued the final report of its Joint Committee on Aging Lawyers. The entire report is available at: [www.nobc.org/nobc-aprl.pdf](http://www.nobc.org/nobc-aprl.pdf)



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The Indiana Supreme Court just adopted a new rule on attorney surrogates that, effective Jan. 1, 2008, affects lawyers in solo private practice. The rule, adopted on Sept. 10, 2007, is available at: [www.in.gov/judiciary/orders/rule-amendments/2007/admission-discipline-091007.pdf](http://www.in.gov/judiciary/orders/rule-amendments/2007/admission-discipline-091007.pdf) (more about that below).

- More than one matter has reached my desk that raises concerns about lawyers whose aging process has apparently impaired their ability to practice law at a minimally competent level.

### Taking the bad with the good

Like most things in life, getting older is a coin with two sides. Even in a society that celebrates youth, we still look to our elders for the guidance and wisdom that only come after years of accumulated experience. But aging also represents a process that inescapably leads to our deaths. Not just a reminder of our mortality, it is often accompanied by physical or mental decline.

The NOBC-APRL joint report that I mentioned earlier looks closely at both sides of the coin. Its recommendations include:

- Bar associations should increase opportunities for senior lawyers to contribute to the profession through mentoring, pro bono work, and work with bar and public agencies.

- Bar associations should assist lawyers with life transitions through programs and continuing legal education that address issues like practice area changes and retirement.

- Bar associations and lawyer discipline agencies should collaborate to develop rules and procedures addressing lawyer incapacity or sudden unavailability.

- Bar associations should encourage all lawyers to designate successor counsel to close down a law practice in the event of sudden incapacity, disappearance or death.

- Bar associations should encourage lawyers to volunteer as successor counsel and provide training to them.

- Bar associations, lawyer discipline agencies, and lawyers and

judges assistance programs should collaborate to develop guidelines for responding to impaired senior lawyers.

- Jurisdictions should adopt rules for voluntary permanent retired status for lawyers whose conduct does not require a disciplinary sanction but who are no longer competent to practice law.

### Where Indiana stands

Some of the infrastructure to implement these recommendations is already in place in Indiana. Lawyers who are 65 years old or above may take retirement status and be relieved of any obligation to pay annual registration fees and take continuing legal education courses. We have an existing procedure for suspension of law licenses in the event of incapacity or other disabling conditions that affect the ability to practice law. The Indiana Judges & Lawyers Assistance Program offers assistance to lawyers who are experiencing difficulties associated with aging. The Indianapolis Bar Association's Senior Counsel Division has developed a Safe Ask program that makes senior lawyers available to candidly and confidentially answer difficult practice questions from less experienced lawyers. The Indiana State Bar Association Senior Lawyers Section provides another means to get involved in giving something back to the profession.

### A kinder, gentler way

The mental challenges that accompany aging are often marked by an inability to recognize the impairment. When one of our professional colleagues can no longer continue practicing without risk to clients, we have a collective responsibility to encourage our friends to retire from the active practice of law. This is not easy to do, but a

dignified retirement is the best possible exit from practice for lawyers who have had long and distinguished careers.

The lawyer discipline system is not nearly so gentle or dignified. Whether by way of a disciplinary action or a contested disability proceeding, forced lawyer retirement doesn't serve anyone's best interests very well. Because the goal of the lawyer discipline system is to protect the public from harm by lawyers, it must act when other, less restrictive alternatives have not been effective. So make a deal with your buddies that you will tell each other when it's time to hang it up. And agree in advance that you will comply when your friends have the courage to come to you and tell you that it's time.

#### Attorney surrogates

Which brings me to the Supreme Court's important new amendment to Indiana Admission & Discipline Rule 23 that creates an attorney surrogate (AS) protocol. The rule applies to any lawyer in private practice who is neither an employee of another lawyer, a law partnership, LLC, LLP or PC that includes at least one other lawyer, nor of an organization, such as a corporate general counsel's office, that is not itself engaged in the practice of law. In effect, the rule applies to lawyers in solo practice or in quasi-firms that are, in reality, expense-sharing arrangements.

The rule encourages each affected lawyer to designate another lawyer on his or her annual registration statement to act as an "attorney surrogate" in the event of death, disability, disappearance or license suspension. If a lawyer does not so designate, he or she is deemed to have designated an as-yet unnamed senior judge or other member of the bar to be appointed at the time of need.

#### Petitioning

At the time of need, anyone, including the designated AS, if there is one, or a local bar association may file a verified petition in a court of general jurisdiction in the county where the affected lawyer maintained a principal office seeking the appointment of an AS. The petition shall inform the court of

the facts creating the need. Service shall be made on the affected lawyer or, in case of death, his or her personal representative.

The court must act quickly by providing an opportunity to be heard and determining if an event has occurred that meets the

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standard for appointing an AS. The court will presumptively appoint the affected lawyer's designated AS, if there is one, another member of the bar or a senior judge.

### Duties of an attorney surrogate

The AS's duties are to inventory the affected lawyer's files and records; notify clients to obtain new representation; seek appropriate extensions of time in order to allow employment of new counsel; file such papers as are necessary to protect against jurisdictional time limits; notify other appropriate persons or entities of the appointment, presumably including opposing counsel and courts; arrange for delivery of client files and property to clients or successor counsel; take possession of all trust accounts and manage the funds consistent with

Rule of Professional Conduct 1.15(a); and take other actions as appropriate. The AS is not precluded from becoming successor counsel, but this can only be done with the client's agreement.

The rule anticipates that there may be matters in the affected lawyer's office that create conflicts of interest with matters in the AS's office. The AS must be alert to those matters and, having identified them, take no further action other than to notify the superintending court.

### Court oversight

The superintending court's authority is comprehensive. It may make orders as necessary to protect the interests of the affected lawyer, his or her clients and the public. It may also make appropriate orders affecting closed client files, including orders to destroy them.

When the work of the AS is complete, usually marked by delivery of the affected lawyer's files to the clients or successor counsel, disbursement of funds in trust, and disposition of closed files, the AS must file a final report with the superintending court, including an accounting of all funds and property that came under the AS's control. The superintending court shall issue a final order approving the report, if it is in proper form, and discharging the attorney surrogate.

### Limited relief from deadlines

A particularly important provision of the rule is that it suspends statutes of limitations and other jurisdictional deadlines on the affected lawyer's client matters for a period of 120 days from the date the petition is filed, so long as the deadline would otherwise expire on or within 120 days after the date the petition was filed.

### No attorney-client relationship

There is no attorney-client relationship between the clients of the affected lawyer and the AS. However, the AS is bound to apply the same duty of confidentiality to all matters under his or her stewardship as in a formal attorney-client relationship, and communications between the AS and clients of the affected lawyer enjoy the same privilege as pertains to attorney-client communications.

### Fees

The AS may apply for an award of fees for his or her services and reimbursement of expenses. The superintending court shall order fees and expenses to be paid as appropriate by the affected lawyer or his or her estate. That money judgment acts as a lien on the assets of the affected lawyer retroactive to the date the petition was filed. The lien is "subordinate to nonpossessory liens and security interests created prior to its taking effect and may be foreclosed upon in the manner prescribed by law." There is no provision for compensation beyond the assets of the affected lawyer.

### Qualified immunity

Finally, the rule grants qualified immunity from civil liability to the AS for all non-intentional acts or omissions taken as attorney surrogate. This does not immunize the AS from liability for matters the AS takes over as successor counsel.

This is a sweeping new rule that recognizes the importance of each of us taking responsibility for the orderly handling of our client's affairs when we are unable to do so. We owe no less to our clients. Bar associations and the judiciary would do well to use the balance of 2007 to develop protocols and form pleadings to implement this rule. ☛


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