

Facing and Addressing Cognitive Impairment in Our Colleagues

Mike Long, JD, MSW

Attorney Counselor, Oregon Attorney Assistance Program



Assessing & Intervening with Lawyers and Judges Exhibiting Cognitive Impairment

The nature of cognitive impairment cases



The Mature Mind

Much of the decline in mental functioning that had previously been erroneously associated with aging is in fact not directly caused by aging, but by declines in physical health and fitness in general and by specific diseases such as microstrokes, Alzheimer's, substance abuse and mental illnesses such as depression. Gene Cohen, M.D., Ph.D



Mature Age

- Midlife reevaluation (early 40s to late 50s)
- Liberation (late 50s to early 70s)
- Summing up (late 60s through the 80s)
- Encore (late 70s to the end of life)



Brain function during the Mature Age

- The brain continues to create new brain cells
- The brain continues to create new neural connections and pathways in response to new experiences and learning



Changes in brain function during the Mature Age

- The brains emotional circuitry matures and becomes more balanced
- Decreased brain hemisphere specialization/ asymmetry



Developmental intelligence during the Mature Age

- Developmental intelligence: wisdom, judgment, perspective, vision
- Developmental intelligence is characterized by 3 types of thinking



Changes in brain function during the Mature Age

The speed that the brain is able to function at declines resulting in decreases in:

- Processing speed
- Reaction time
- Psychomotor speed
- Fine motor skills/dexterity



Changes in brain function during the Mature Age

- The efficiency of short-term or working memory storage declines
- Accuracy of episodic memory declines
- Slower pace of learning
- Increased need for repetition



Changes in brain function during the Mature Age

Changes in decision-making

- More reliance on prior knowledge
- Big-picture vs details



Fitness to practice law defined

Definitions of Essential Eligibility
Requirements for the Practice of Law
(The Supreme Court of Ohio Board of
Commissioners on Character & Fitness)



Impairment defined

The inability to practice law with the skill required to insure the safety and protection of the public.



Normal age-related declines in brain function

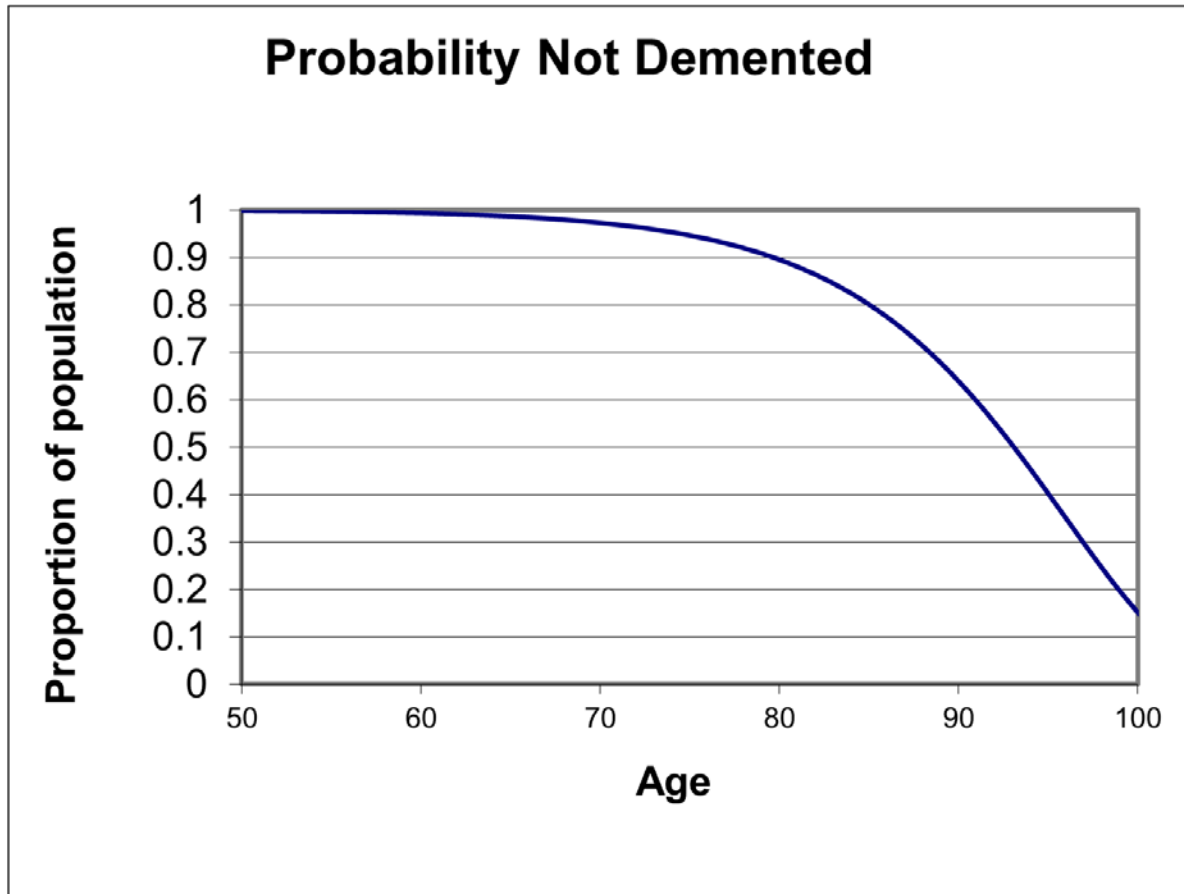
- Declines in the speed the brain functions
- Declines in certain types of memory
- Changes in decision-making



Age-related cognitive impairment

- Normal age-related cognitive decline
- Mild cognitive impairment
- Dementia

Expected prevalence of age-related cognitive impairment





Age-related cognitive impairment

What makes these cases so difficult to address?



Age-related cognitive impairment

- Assessing cognitive impairment



Age-related cognitive impairment

- Intervening with lawyers and judges exhibiting cognitive impairment

Addressing Concerns about Older Lawyers

*Mike Long, Attorney Counselor, Oregon Attorney Assistance Program and
Chris Mullmann, OSB Assistant General Counsel, Client Assistance Office Manager*

Concerns by colleagues, clients, judges and others about the competence of an older attorney are typically triggered when the lawyer's professional performance falls below the level expected by the profession. Examples of events or incidents that trigger concerns include:

- Deteriorating work performance:
 - Being poorly prepared (inattention to details and not keeping current on developing law)
 - Missed appointments/appearances
 - Making mistakes on files/cases
 - Difficulty/inability to effectively represent or articulate a client's interest/position
 - Difficulties managing one's practice
 - Committing ethical violations
- Memory / cognitive difficulties:
 - Exhibiting confusion
 - Short-term memory problems; forgetting conversations, details of cases, events
 - Repeating questions and requests for information frequently
 - Problems with comprehension and verbal expression
- Failures to communicate or respond to clients, opposing counsel or the courts:
 - Failure to return telephone calls
 - Voicemail full
 - Failure to reply to email or respond by mail
 - Failure to produce work product that has been promised
- Irregular office hours
- Appearance: Inappropriately dressed; poor grooming or hygiene

There are a number of potential causes for a lawyer's declining or impaired performance, including:

- Medical/health challenges: Facing medical challenges such as cancer with its corresponding treatments (surgery, chemo, radiation, etc.), heart conditions, stroke, Parkinson's, MS and other neurological disorders
- Taking time off to face a medical challenge and after returning to practice being unable to catch-up or regain control of their practice
- Substance abuse/dependence or other addictions
- Age-related cognitive decline/impairment
- Care-giving responsibilities: Assuming a care-giving role for an aging parent, or an ill spouse, life partner or family member can drain one's energy and emotional resources and be extremely disruptive to one's practice

- Grief: Grieving the loss of a spouse, life partner, child or loved one; or, the loss of one's health and physical capacity

Age-related cognitive decline or impairment

Some instances of cognitive decline/impairment are reversible. This can be the case when the cause is an independent medical condition, alcohol or drug use or a situational stressor. Age-related cognitive decline or impairment typically is not reversible. These are the most difficult situations to attempt to address because the likely resolution is for the older lawyer to stop practicing. Some of the factors making these situations so difficult are:

- Often these older lawyers have had a long, responsible and respected career
- The lawyer's continued subjective perception and belief that he or she is still functioning at a high enough level to continue to practice. The attorney often can't see what they can't see. We have found this even in cases when the lawyer has been formally diagnosed with dementia or Alzheimer's.
- The older lawyer's self-identification as a lawyer. Being a lawyer has not just been a job or career but a significant part of their personal identity and social network. They may have no way to imagine what they would do if they stopped practicing.
- A real or perceived financial need to continue to practice, including the frequent factor that other family members may work for or be financially dependent on the lawyer's ability to continue to practice.
- Loyal staff can be very protective of an older attorney that they have a long-term work relationship with and make great efforts to cover for the older lawyer's deficits, not recognizing the potential harm to clients and the public that the lawyer's continued practice of law poses.

Assessment of cognitive impairment and cognitive decline by LAP professionals

Most lawyer assistance program (LAP) professionals, lawyers and judges generally do not have the requisite training and expertise to formally assess and definitively diagnose cognitive impairment or cognitive decline. Formal assessment and evaluation of cognitive impairment and cognitive decline would be referred to neuropsychologists, neuropsychiatrists, geriatric psychiatrists, and neurologists. LAP professionals, lawyers and judges, however, need a checklist of the 'red flags' that serve to alert us of the possibility that a colleague's cognitive functioning has dropped below the level that is required to practice law effectively. The American Bar Association Commission on Lawyer Assistance Programs has developed such a checklist and recommendations for voluntarily intervening with a lawyer exhibiting signs of cognitive impairment which we have attached to this handout as an appendix.

Options and resources

In Oregon, both the Oregon Attorney Assistance Program (OAAP) and the Oregon State Bar Client Assistance Office (CAO) receive inquiries regarding older lawyers who appear to need assistance or whose behavior has raised concerns. The determining factors with regard to which of these resources the concerned person contacts can be their relationship to the lawyer, their need for confidentiality/anonymity in communicating their concerns and that those concerns remain confidential for the lawyer they are concerned about, their perception of the cause for the lawyer's problems, their perceived ethical obligations, the action or result they believe needs to be pursued and the harm that might result.

OAAP: The OAAP is a confidential, voluntary personal assistance resource serving Oregon law students, lawyers, judges, and the greater Oregon legal community. No information will be disclosed to any person, agency, or organization outside the OAAP without the consent of the lawyer or judge accessing the program. The OAAP can assist someone who is concerned about a lawyer by:

- Serving as a sounding board to assess and discuss concerns about the lawyer
- Suggesting potential options for approaching the lawyer with those concerns
- Participating in/facilitating a meeting with the lawyer and those concerned about him or her, to discuss the concerns
- Identifying/suggesting resources for addressing those concerns, including referrals to medical and mental health professionals and the Professional Liability Fund (PLF) practice management advisors where appropriate.

The OAAP is also available to reach out to the older lawyer, either anonymously or with permission to identify the concerned person(s) who contacted the OAAP, and offer to meet confidentially with the lawyer to discuss how he or she is doing and determine how the OAAP can be a resource or provide assistance.

Communications with the OAAP are confidential with the usual mandatory reporter exceptions (child/elder abuse, intent to hurt self or others). As a voluntary program, the OAAP has no authority to require a lawyer to do anything. If a lawyer experiencing cognitive impairment rebuffs the OAAP's outreach, the OAAP will typically continue to receive calls of concern regarding the lawyer. These calls often provide new opportunities to attempt to reach out to the lawyer of concern.

The OAAP does not provide financial assistance. The Oregon Lawyers Assistance Foundation is a potential resource for limited assistance to Oregon lawyers for emergency mental health and chemical dependency treatment, but not for neurological or neuropsychological assessments.

CAO: CAO is the intake point of the Oregon State Bar (OSB) for all complaints, concerns and inquiries about Oregon Lawyers. It has the responsibility for investigating and determining if there is sufficient evidence to support a reasonable belief that a lawyer has engaged in ethical misconduct. If there is not sufficient evidence of misconduct, the complaint is dismissed. If there is sufficient evidence of misconduct, the complaint is referred to Bar discipline for further investigation. CAO written records are public records open to inspection upon request to the OSB.

In Oregon, a lawyer or judge who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects shall inform the Oregon State Bar Client Assistance Office (ORPC 8.3(a), JR 2-104(A)). In rare cases where a lawyer's impairment or incapacity is so advanced that he or she is no longer capable of competently representing clients, the Bar can petition the Supreme Court to place the lawyer on inactive status (BR 3.2) or seek the involuntary assumption of the lawyer's practice pending resolution of the disciplinary proceedings (ORS 9.705-ORS9.755). Again, this rarely occurs.

With few exceptions, clients with concerns about a lawyer are directed to the CAO. Many lawyers and judges also contact the CAO with their concerns about lawyers. In many instances, the concerns about lawyers that other lawyers and judges report to the CAO lack sufficient evidence that misconduct has occurred. They may, however, raise sufficient concerns about the lawyer's health and level of cognitive functioning. CAO may contact the lawyer to see if he or she is dealing with any challenges or problems that are negatively impacting the ability to effectively practice law. CAO regularly informs the OAAP and PLF of lawyers that have been brought to their attention that they are concerned about so the OAAP and PLF can reach out to these lawyers confidentially.

Addressing concerns about an older lawyer is a process

Those who care about an older lawyer and the legal profession want an older colleague to transition from practice before his or her reputation is tarnished and before clients are injured or negatively affected. It has been our experience that most older lawyers initially resist attempts by others to raise and discuss the concerns they have about the older lawyer's performance, even when those concerns are communicated respectfully by others that they trust. It's important to anticipate that assisting an older lawyer make the transition from practice is typically a process, not a single event.

Appendix: Assessment of and Guidelines for Intervening with Lawyers Exhibiting Cognitive Impairment and Cognitive Decline

Introduction: All of our brains go through changes as a normal part of aging. What changes the least are our powers of recognition – “I know it when I see it.” What may actually get better – at least up to a point -- is our vocabulary, our abstract reasoning (the ability to see concepts and relationships), our emotional stability and that elusive thing called “wisdom.”

Inevitably, there are important cognitive functions that do, to varying degrees, erode over time. Our general cognitive processing (especially of new or novel things) slows; long-term retrieval of information takes longer; learning new information is more challenging; multi-tasking is significantly affected (although no one does this as well as they think they do!); and our spatial memory deteriorates. Cognitive impairment and predictable cognitive decline is not synonymous with a mental illness. None of these things should significantly interfere with our ability to “function normally.” And, in spite of what was once thought, as brain cells die, new ones develop – albeit at a slower pace.

I. General Observations of Cognitive Functioning In Adulthood

Declines in both **motor** and **mental** speed of processing constitute the greatest change in function associated with aging. Age-related declines in working memory place limits on other complex cognitive skills, including learning and recall of new information. As we age, the physical size of our brain cells begin to shrink. Connections between neurons (synapses) begin to function more poorly and eventually die; and fewer neurotransmitters (chemical messengers) are produced.

- In our twenties and thirties, our cognitive functioning is arguably at its peak, although there is evidence of the beginning of neuronal shrinking by the mid 20’s.
- As early as our 30’s, a small amount of brain volume has been lost. Although there is no apparent loss of cognition in any broad sense, sophisticated testing can detect small declines.
- In our forties, our loss of brain volume continues, and may begin to accelerate. Most will notice the slowing of mental processing; and most will note that short-term memory tasks are more challenging.
- In our fifties, an accelerated loss of brain volume begins. Changes in memory and other cognitions become more noticeable. These changes may involve processing speed, multi-tasking, attention to detail, visuospatial processing and the ability to place an event in time and place.
- In our sixties, no surprise, our brain volume continues to shrink. The hippocampus and the amygdala are particularly affected, and these are the parts of the brain that are integral in the integration and formation of short-term memory. Other changes perhaps first noticed in the fifties may become more pronounced. Processing speed slows further; it takes us longer to learn new information or master complex mental tasks; it

becomes more difficult to maintain concentration and tune-out distractions; “senior moments” become more common.

- In our seventies and beyond, people vary widely in their cognitive abilities. Many remain sharp until a very advanced age, while others begin to show the wear and tear of life and diseases.

II. Signs and symptoms of cognitive decline

Dementia: Dementia isn't a specific disease. It is used as a general term to identify or label a decline in mental ability that is severe enough to interfere in daily functioning. At least two of the following core mental functions must be significantly impaired for an individual's cognitive decline to be labeled dementia:

- Memory
- Communication and language
- Ability to focus and pay attention
- Reasoning and judgment
- Visual perception

There are at least 70 causes of dementia, including brain tumors, head injuries, nutrition deficiencies, infections, drug reactions and thyroid related disorders. Some are reversible but many are not. The most common causes of dementia are Alzheimer's, Vascular Dementia, Alcoholic Dementia and Lewy Body Dementia.

Age, family history, genetics, lifestyle, diseases, and accidents are the most common risk factors for all type of dementias. The greatest known risk factor for Alzheimer's is advancing age. The age at onset is typically after 65, and the likelihood of developing Alzheimer's doubles every five years after the age of 65. After age 85, the risk reaches nearly 50%.

No single lifestyle factor has been conclusively shown to reduce the risk of Alzheimer's. Evidence suggests, however, that the factors that put you at risk for heart disease may also increase the chance of Alzheimer's and Vascular Dementia. These factors include lack of exercise, smoking, high blood pressure, high cholesterol and poorly controlled diabetes.

In 2005, the American Bar Association Commission on Law and Aging and the American Psychological Association published *Assessment of Older Adults With Diminished Capacity: A Handbook for Lawyers*. The American Bar Association Commission on Lawyer Assistance Programs has adapted the *Capacity Worksheet for Lawyers* contained in this publication to serve as a worksheet and guide to LAP professionals called on to assess or assist a lawyer exhibiting signs of cognitive impairment or cognitive decline. This worksheet and guidelines for intervening on a voluntary basis with a lawyer exhibiting cognitive impairment/decline has been attached as an appendix to this handout.

Cognitive Impairment Worksheet for Lawyer Assistance Programs

Attorney Name: _____ Date of Interview: _____
 _____ Place of Interview: _____

Observational Signs & Symptoms:

Behavioral Functioning at Work	Observations
<p>Practice management</p> <ul style="list-style-type: none"> • Deteriorating performance at work • Making mistakes on files / cases • Difficulties functioning without the help of a legal assistant /other lawyers • Committing obvious ethical violations • Failing to remain current re changes in the law; over-relying on experience • Exhibiting confusion re timelines, deadlines, conflicts, trust accounting 	
<p>Appearance / dress</p> <ul style="list-style-type: none"> • Inappropriately dressed • Poor grooming/hygiene 	
<p>Interpersonal disinhibition</p> <ul style="list-style-type: none"> • Making sexually inappropriate statements that are historically uncharacteristic for the lawyer • Engaging in uncharacteristically sexually inappropriate behavior • Uncharacteristic difficulties inhibiting anger 	
<p>Self awareness</p> <ul style="list-style-type: none"> • Denial of any problem • Exhibits/expresses highly defensive beliefs • Feels others out “to get” him/her, organized against him/her 	
<p>Significant changes in characteristic routine at work</p>	

Cognitive Functioning	Observations
<p>Short-term memory problems (reduced ability to manipulate information in ST memory)</p> <ul style="list-style-type: none"> • Forgets conversations, events, details of cases • Repeats questions and requests for information frequently 	
<p>Executive functioning (slower and less accurate in shifting from one thought or action to another)</p> <ul style="list-style-type: none"> • Trouble staying on task / topic • Trouble following through and getting things done in a reasonable time 	
<p>Lack of mental flexibility</p> <ul style="list-style-type: none"> • Difficulty adjusting to changes • Difficulty understanding alternative or competing legal analysis, positions 	
<p>Language related problems</p> <ul style="list-style-type: none"> • Comprehension problems • Problems with verbal expression <ul style="list-style-type: none"> ○ Difficulty finding the correct word to use ○ Circumstantiality (providing a lot of unnecessary details; taking a long time to get to the point) ○ Tangentiality (getting distracted and never getting back to the point) 	
<p>Disorientation</p> <ul style="list-style-type: none"> • Confused about date / time sensitive tasks • Missing deadlines for filing legal documents 	
<p>Attention / concentration (problems with dividing attention, filtering our noise and shifting attention)</p> <ul style="list-style-type: none"> • Lapses in attention • Overly distractable 	

Emotional functioning	Observations
<ul style="list-style-type: none"> • Emotional distress: • Emotional lability (rapidly changing swings in mood and emotional affect): 	

Other Observations/Notes of Functional Behavior

Mitigating/Qualifying Factors Affecting Observations

Stress, Grief, Depression, Recent Events affecting stability of client:

Medical Factors / medical conditions:

- Sensory functioning (hearing / vision loss)
- Family history of dementia
- Substance abuse / dependence
- Hypertension
- Stroke history
- Thyroid disease
- Chemotherapy
- Sleep apnea
- Prescription medications
- High cholesterol
- _____
- _____
- _____

PRELIMINARY CONCLUSIONS ABOUT COGNITIVE FUNCTIONING

Intact – No or very minimal evidence of diminished cognitive functioning:

Mild problems - Some evidence of diminished cognitive functioning:

More than mild problems - Substantial evidence of diminished cognitive functioning:

Severe problems – Lawyer lacks cognitive capacity to practice law:

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

Recommendations for intervening on a voluntary basis with a lawyer who exhibits cognitive impairment/decline

A. Approaching the impaired / declining lawyer

1. Partner with one or more individuals that the lawyer trusts, and who have firsthand observations of the lawyer's behavior that is raising concerns about the lawyer's continued competence to practice law.
2. Consider utilizing the Cognitive Impairment Worksheet to gather and organize concerns regarding the impaired/declining lawyer.
3. Have a non-confrontational meeting with lawyer and the concerned individuals; actively avoid confrontation.
4. Starters/icebreakers
 - *I am concerned about you because...*
 - *We have worked together a long time. So I hope you won't think I'm interfering when I tell you I am worried about you...*
 - *I've noticed you haven't been yourself lately, and am concerned about how you are doing.....*
5. Get the lawyer to talk; listen, do not lecture.
6. While listening, add responsive and reflective comments.
7. Express concern with gentleness and respect.
8. Share firsthand observations of the lawyer's objective behavior that is raising questions or causing concerns.
9. Review the lawyer's good qualities, achievements and positive memories.
10. Approach as a respectful and concerned colleague, not an authority figure.
11. Act with kindness, dignity and privacy, not in crisis mode.
12. If the lawyer is not persuaded that his/her level of professional functioning has declined or is impaired, suggest assessment by a specific professional (in most instances, a neuropsychologist) and have contact information ready.
13. Offer assistance and make recommendations for a plan that provides oversight (such as a buddy system or part-time practice with co-counsel).
14. Remember that this is a process, not a onetime event.

B. Do and Don't

1. Do
 - Be direct, specific, and identify the problem
 - Speak from personal observations and experience; state your feelings
 - Report what you actually see
 - Be respectful and treat the lawyer with dignity
 - Act in a non-judgmental, non-labeling, non-accusatory manner
 - Offer to call the lawyer's doctor with observations
 - Refer for evaluation, have resources at hand
 - Suggest alternatives: inactive status, disability leave
 - Suggest the potential consequences for inaction: malpractice or disciplinary complaints

2. Don't

- Ignore and do nothing
- Include family, unless requested
- Insist or threaten if lawyer directs you to back off; attempt to discuss again at a later date.

Adapted from the Texas Lawyer Assistance Program's *The Senior Lawyer In Decline: Transitions With Dignity – ABC's of helping the senior lawyer in need*



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IN SIGHT for Oregon Lawyers and Judges

IMPROVING THE QUALITY OF YOUR PERSONAL AND PROFESSIONAL LIFE

PUTTING THE BRAKES ON AGE-RELATED COGNITIVE DECLINE

What is the most valuable asset of your law practice? Science would suggest that it is your brain. To practice law effectively and ethically, your brain must function at a highly effective level. Historically, neuroscience believed that the brain's capacity for positive growth and development (neuroplasticity) ended in childhood. Decades of research, however, have shown that the brain can and does change throughout life.

Despite this ability to grow and adapt, our brains go through changes as a normal part of aging. What changes the least are powers of recognition – “I know it when I see it.” What may actually get better, at least up to a point, are vocabulary, abstract reasoning (the ability to see concepts and relationships), emotional stability, and that elusive thing called “wisdom.”

Age-related cognitive decline is highly individual. Inevitably, however, some important cognitive functions do, to varying degrees, erode over time. General cognitive processing (especially of new or novel things) slows; retrieval of long-term information takes longer; learning new information is more challenging; and multitasking is significantly affected (although people don't do this as well as they think they do).

Potential Decline in Cognitive Functioning in Adulthood

Decline in both motor and mental speed of processing constitutes the greatest change in function associated with aging. Age-related decline in working memory places limits on other complex cognitive skills, including learning and recall of new information. As we age,

the physical size (volume) of our brain begins to shrink. Connections between neurons (synapses) begin to function less effectively; the projections that transmit impulses from one nerve cell to the next (axons and dendrites) atrophy and eventually die; and fewer neurotransmitters (chemical messengers) are produced.

In our twenties and thirties, cognitive functioning is arguably at its peak, although as early as our thirties, a small amount of brain volume has been lost.

Starting at about age forty, we lose on average 5 percent of our overall brain volume per decade, up until about age seventy, when any number of conditions can accelerate this process. In our forties, most individuals will notice the slowing of mental processing, and most will note that short-term memory tasks are more challenging.

In our fifties, changes in memory and other aspects of cognitive functioning become more noticeable. These changes may involve processing speed, multitasking, attention to detail, and the ability to place an event in time and location.

In our sixties, brain volume continues to shrink; the parts of the brain that are essential in the integration and formation of short-term memory are particularly affected. Other changes perhaps first noticed in the fifties may become more pronounced. Processing speed slows further; it takes longer to learn new information or master complex mental tasks; it becomes more difficult to maintain concentration and tune out distractions; “senior moments” become more common.

OREGON ATTORNEY ASSISTANCE PROGRAM

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In our seventies and beyond, people vary widely in their cognitive abilities. Many remain sharp until a very advanced age, while others begin to show the wear and tear of life and diseases.

Dementia

Dementia is the organic deterioration of the brain's mental processes, usually characterized by memory loss, the impaired ability to think abstractly and systematically, impaired judgment, and personality change. Research has shown at least seventy causes of dementia, including brain tumors, head injuries, nutrition deficiencies, infections, drug reactions, and thyroid-related disorders. A study conducted at the University of Maryland found that 10 percent of patients aged 60 and over who were diagnosed with Alzheimer's disease were actually suffering from brain damage or brain toxicity caused by alcoholic drinking. Some forms of dementia are reversible, but many are not. The most common types of dementia are Alzheimer's, vascular dementia, alcoholic dementia, and Lewy body dementia.

Age, family history, genetics, lifestyle, medical conditions, and accidents are the most common risk factors for all types of dementia. The greatest known risk factor for Alzheimer's is advancing age. The age at onset is typically after 65, and the likelihood of developing Alzheimer's doubles every five years after the age of 65. After age 85, the risk reaches nearly 50 percent.

No single lifestyle factor has been conclusively shown to reduce the risk of Alzheimer's. Evidence suggests, however, that the factors that put you at risk for heart disease (lack of exercise, smoking, high blood pressure, high cholesterol, and poorly controlled diabetes) may also increase the chance of Alzheimer's and vascular dementia.

Slowing the Pace of Cognitive Decline

Science has confirmed in the past 10 to 15 years that the same practices and strategies for reducing cardiovascular disease and diabetes – exercise and diet – also reduce the risk of cognitive decline.

In a ground-breaking study published in 2006, 59 sedentary individuals ages 60-79 were divided

into two groups that spent one hour in the gym three times a week for six months. One group walked on treadmills; the control group engaged in a stretching routine. Both groups had brain scans before and after the gym activity. The study determined that the walkers experienced a significant increase in brain volume in the areas of the brain most closely associated with higher-order cognitive and executive functioning. The group that engaged in stretching did not experience a corresponding increase in brain volume.

Previous research has shown that regular exercise leads to the growth of new capillaries (blood vessels) in the brain, an increase in the length and number of dendritic interconnections between the nerve cells, and an increase in the production of new nerve cells in the brain. These structural changes in the brain result in brains that are more adaptive to change.

A study of 18,766 female nurses found that those with the highest level of energy expenditure (exercise) had a 20 percent lower chance of being cognitively impaired on tests of memory and general intelligence.

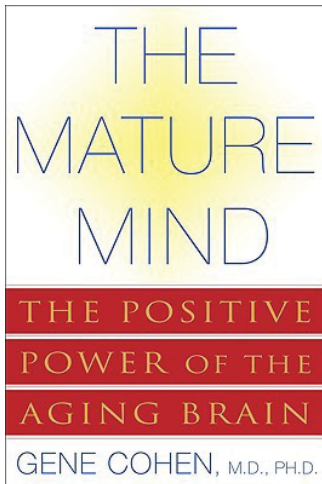
A Finnish study of 1,500 people ages 65-79 found that those who had exercised at least twice a week were 50 percent less likely to have dementia.

To protect the most valuable asset of your law practice and put the brakes on cognitive decline, commit to getting your body moving in an enjoyable way for at least 30 minutes, three to four days a week.

MICHAEL BADGER, PH.D.,
ASSOCIATE DIRECTOR OF THE WASHINGTON
STATE BAR LAWYER SERVICES DEPT.

MIKE LONG, JD, MSW, CEAP
OAAP ATTORNEY COUNSELOR

BOOK REVIEW: THE MATURE MIND: THE POSITIVE POWER OF THE AGING BRAIN



In his theory of human development, psychologist Erik Erikson offered a last, single developmental stage after the onset of adulthood – Mature Age (65 to death). In *The Mature Mind*, Gene Cohen, MD, PhD, a student of Erikson at Harvard, builds upon his developmental model by expanding the Mature Age stage into four overlapping “developmental phases” that span the second half of life.

- **Midlife reevaluation** (early 40s to late 50s): Adults reevaluate their lives (*Where have I been? Where am I now? Where am I going?*) in search of what is true and meaningful.
- **Liberation** (late 50s to early 70s): A time to free ourselves of earlier inhibitions and limitations and a time to experiment and innovate (*If not now, when?*). Partial retirement or retirement provides an opportunity to experiment with new experiences.
- **Summing up** (late 60s through the 80s): A time of autobiographical review, giving back through volunteerism and philanthropy, and a time of resolution.
- **Encore** (late 70s to the end of life): Not “encore” as a final act but as a time of continuation and reflection, manifesting a desire to go on even in the face of adversity or loss, to remain vital, and to live well to the end.

Cognitive Functioning and the Mature Mind

Cohen introduces and summarizes brain science research of the past decade or two in support of these developmental phases. The most important of these findings is that much of the decline in mental function-

ing that had previously been erroneously associated with aging is, in fact, not directly caused by aging per se but by declines in physical health and fitness in general and by specific diseases such as microstrokes, Alzheimer’s disease, substance abuse, and mental illnesses such as depression.

Cohen recognizes that certain aspects of brain function actually do decline with age, principally the raw speed that the brain is able to process information, the efficiency of short-term memory storage, and reaction times. However, solid research over the past two decades has firmly established that:

- New brain cells continue to form or develop, particularly in the region of the hippocampus, which is integral to memory formation.
- The brain is continually forming new neural pathways and rewiring itself in response to new experiences, new intellectual stimulation, and learning. Consequently, “brain cells in the parts of the brain that an older person has used continuously would look like a dense forest of thickly branched trees, compared to the thinner and less dense forest of a young brain. This neural density is the physical basis for the skills and experience of accomplished older adults.”
- The brain’s emotional circuitry matures and becomes more balanced with age, increasing the mature adult’s capacity to successfully ride out emotional storms more flexibly.
- The brain’s two hemispheres are more equally accessed by high-functioning older adults than younger adults, which produces advantages such as coordinated bilateral thinking as the brain ages.

In most people, speech, language, and mathematical and logical reasoning are handled by the left hemisphere. The right hemisphere, in general, specializes in such functions as face recognition, visual-spatial comprehension, and creative and synthesizing functions. Researchers using brain-scanning techniques to compare brain function in younger and older adults have found that young adults engaged in memory and autobiographical recall primarily use the left brain hemisphere, while high-functioning older adults

simultaneously access both brain hemispheres when engaging in these same tasks. Cohen often described this advantage of aging brains as switching from unilateral thinking to bilateral thinking, or shifting from two-wheel to four-wheel drive at about age 50. This research supports the hypothesis that older adults are able to expand the redundant capacity of the brain and counteract age-related neural decline by reorganizing their neural networks. Cohen speculates that “perhaps part of the autobiographical drive among older adults is related to this rearrangement of brain functions that makes it easier to merge the speech, language and sequential thinking typical of the left hemisphere with the creative, synthesizing right hemisphere.”

In *Mature Minds*, Cohen also introduces the concept of developmental intelligence, which mature adults express in deepening wisdom, judgment, perspective, and vision. Developmental intelligence is characterized by three types of thinking/reasoning:

- **Relativistic thinking:** recognizing that knowledge may be relative, not absolute or black and white.
- **Dialectical thinking:** the ability to uncover and resolve contradiction in opposing and seemingly incompatible views.
- **Systematic thinking:** being able to see the larger picture and to distinguish between the forest and the trees.

“Our capacity to accept uncertainty, to admit that answers are often relative, and to suspend judgment for a more careful evaluation of opposing claims is a true measure of our developmental intelligence.” These three types of thinking do not manifest naturally in youth. It takes experience to develop this more flexible and subtle form of thinking. That’s why most of us would not be comfortable with the appointment of a twenty-something-year-old lawyer to the U.S. Supreme Court.

Brain Fitness

Cohen draws from brain research of the past two decades to identify five categories of activities that, if practiced regularly, can significantly boost brain functioning:

- **Mental exercise:** “Engaging in challenging new learning experiences boosts the development of the brain in the second half of life because the new experiences generate new synapses and neural structures.”
- **Physical exercise:** Numerous studies have shown that regular physical exercise, particularly aerobic exercise, boosts brain power and reduces the risk of developing cognitive impairment and suffering cognitive decline.
- **Establishing strong social networks.**
- **Pursuing/achieving mastery of an activity, which instills a sense of control.**
- **Developing challenging leisure activities.**

In sum, Cohen builds a grounded argument that older, mature minds are not better or worse than they were before about age 50; they are structurally and functionally *different*. Since the publication of Cohen’s groundbreaking book, there is an emerging body of research confirming the power and potential of leveraging those positive differences throughout life.

MIKE LONG
OAAP ATTORNEY COUNSELOR
ROGER ANUNSEN
PRINCIPAL, MINDRAMP CONSULTING



FACING AND ADDRESSING COGNITIVE IMPAIRMENT IN OUR COLLEAGUES

A Disciplinary Perspective

OVERVIEW

- Demographics
- Model Rules Implicated
- Ideas for the Future



AGING LAWYER POPULATION

- 2012 – ABA Market Research Department Lawyer Demographics survey:
 - 2005 - 34% of practicing lawyers were age 55 or over compared to 25% in 1980
 - 2005 - median age of practicing lawyer was 49 compared to 39 in 1980



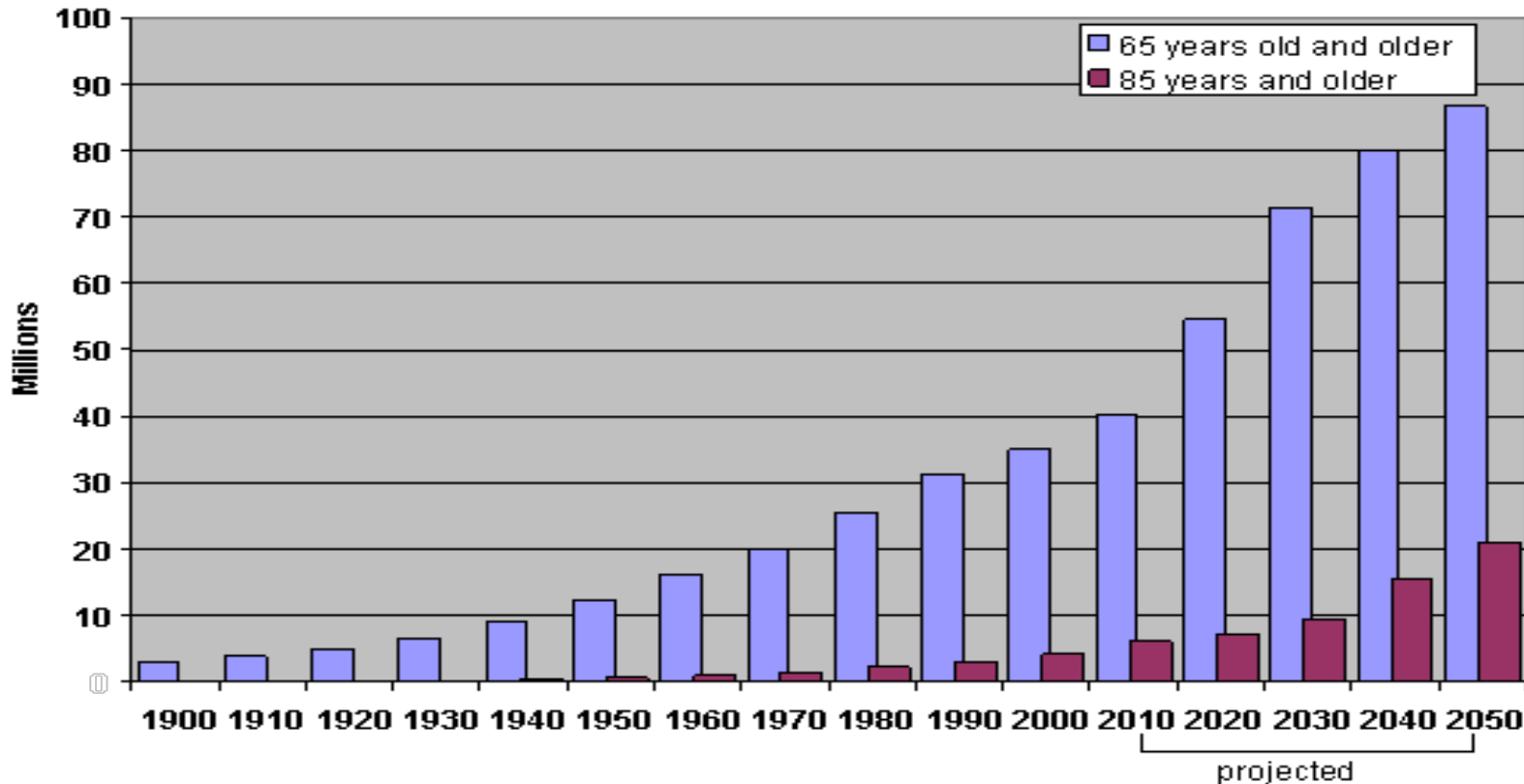
AGING LAWYER POPULATION

- By Jurisdiction – “Senior Tsunami”
 - Michigan – 2010
 - 53.4% of the active members of the State Bar were born before 1961, 11.1% born before 1944
 - Washington – 2012
 - 71% are 50 or older, 21% are 61 or above
 - Florida – 2012
 - 33% are 55 or older, 21% are 60 or older and 11% are 65 and older
 - California – 2013
 - 244,016 attorneys – 20% of lawyers are 65 or older, 22% are 55-64



AGING LAWYER POPULATION

Number of Americans 65 Years of Age and Older: 1900-2050



Source: U.S. Census Bureau



RULES IMPLICATION

- 1.1 – Competence
 - Legal Knowledge & Skill
 - Thoroughness & Preparation
 - Maintaining Competence
- 1.3 & 1.4 – Diligence & Communication
- 1.6 – Confidentiality of Information
 - Communication with EAP and LAP Programs



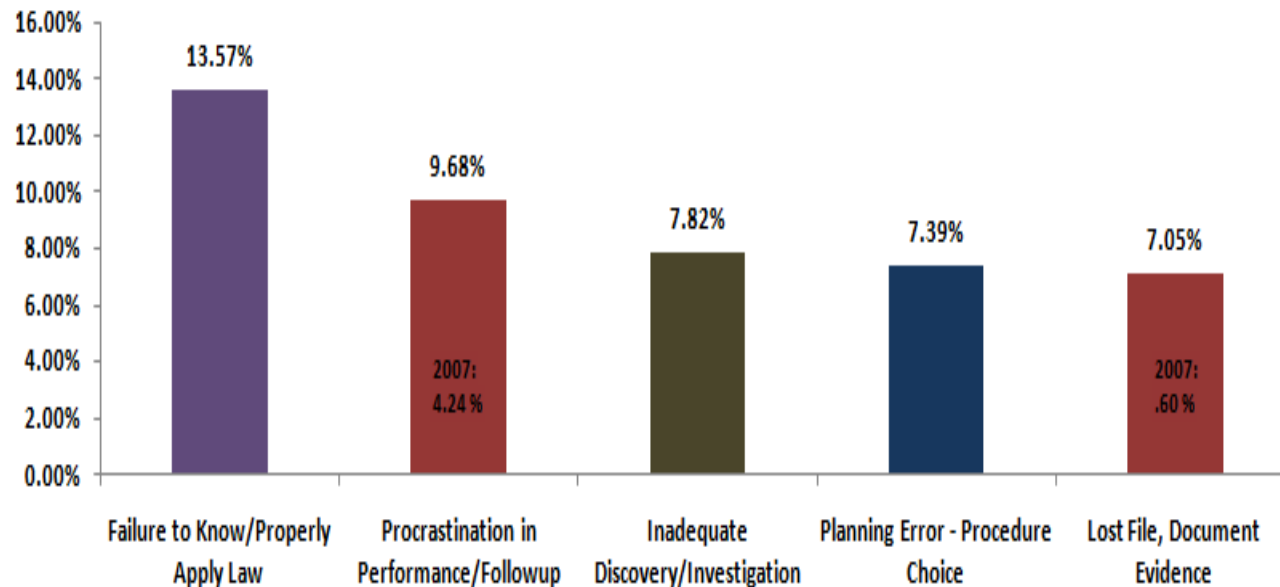
RULES IMPLICATION

- 1.16 – Declining or Terminating Representation
- 1.17 – Sale of a Law Practice
- 5.1 – Responsibilities of Partners, Managers, & Supervisory Lawyers
- 8.3 – Reporting Professional Misconduct



RULES IMPLICATION-MALPRACTICE

Most Common Alleged Errors - 2012



Source: ABA Standing Committee on Lawyers' Professional Liability 2012



RULES IMPLICATION-MALPRACTICE

Claims by Type of Alleged Error - 2012

Substantive Errors	45.07
Failure to know law	13.57
Planning error	7.82
Inadequate discovery	7.39
Failure to know deadline	6.91
Conflict of interest	4.28
Error in record search	3.03
Failure to understand tax	1.37
Intentional Wrongs	10.19
Fraud	4.53
Abuse of process	3.43
Violation of Civil Rights	1.27
Libel or Slander	.96

Client Relations	14.61
Failure to obtain consent	7.02
Failure to follow client instruction	5.71
Inproper withdrawal	1.87

Administrative Errors	30.13
Failure to file document	3.17
Failure to calendar	4.34
Procrastination	9.68
Failure to react to calendar	2.34
Clerical error	3.54
Lost file, document, evidence	7.05

Source: ABA Standing Committee on Lawyers' Professional Liability 2012



IDEAS FOR THE FUTURE

- Traditional Discipline Models
 - Permanent Retirement Status
 - Transfer to Disability Inactive Status
 - Motions to Compel Evaluation
 - Receiverships
- Alternatives to Discipline Models
 - Inactive, Retired and Emeritus Status
 - Succession Planning
 - Education/Outreach

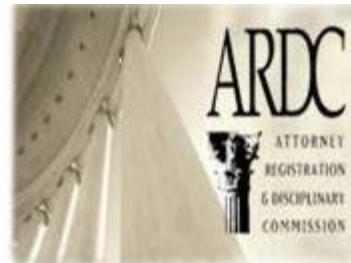


Tracy L. Kepler
Senior Counsel

**Illinois Attorney Registration & Disciplinary
Commission (ARDC)**

**130 E. Randolph Drive, Suite 1500
Chicago, IL 60601**

800.826.8625 | 312.565.2600 | Fax: 312.565.2320
tkepler@iardc.org | www.iardc.org



BASIC PRINCIPLES FOR CREATION AND IMPLEMENTATION OF A PERMANENT "RETIREMENT" ATTORNEY CLASS

AUGUST 2013

THE OBJECTIVE

In 2012 the National Organization of Bar Counsel (NOBC) created a Special Committee on Permanent Retirement ("Committee") to address concerns identified by the May 2007 NOBC/Association of Professional Lawyers (APRL) Joint Committee on Aging Lawyers Report. Specifically the Committee was charged with providing written materials and guidance to the NOBC regarding the creation of a "Retired Status" class in order to enable, and perhaps facilitate, aging attorneys to retire and transfer status within the bar with dignity and to ensure public protection.

The Committee recognizes that jurisdictions use different terminology to refer to, classify, and regulate aging attorneys or senior lawyers seeking to retire. The Committee's objective is to set forth principles or best practices for jurisdictions to consider in adopting rules which provide for voluntary retired status and permanent retired status for these senior lawyers.

The Committee recognizes that there are related concerns, including Client Security or Protection Funds, Receivers, Impairments, and other related issues. The Committee has not addressed the specifics of these concerns in an attempt to achieve tangible progress on the universal creation and implementation of a "Retired Status" of lawyers.

THE PRINCIPLES

1. Each jurisdiction should provide for at least two retirement classes, which are separate and distinct: voluntary and permanent.
2. Permanent retirement status should be reserved for senior lawyers who face complaints or allegations of misconduct or

impairment, and who should not be practicing law, but whose conduct does not require a serious disciplinary sanction such as suspension or disbarment. Permanent retired status should be an option available to a senior attorney who is the subject of a disciplinary complaint, investigation, or allegations of misconduct, so long as the allegations and investigation do not involve misconduct so serious that if proven the misconduct would result in the suspension or disbarment of the lawyer. Each jurisdiction should define the term "senior lawyer."

3. The procedure for applying for permanent retirement status should include a confidential joint petition or agreement.

4. Permanent retirement status, as set forth in the May 2007 report, assures that the impaired senior lawyer will not become active again after resolution of the grievances.

5. Permanent retirement status should not be an option where the senior, age-impaired lawyer has engaged in serious misconduct that would ordinarily result in suspension or disbarment, and may or may not be an option if the impairment requires a transfer to disability status.

6. In order to elect permanent retirement status, an attorney must permanently retire and/or surrender his/her license to practice law in any and all jurisdictions in which the attorney is admitted. Additionally, permanent retirement status should render the lawyer ineligible to apply for admission in any other jurisdiction. Each jurisdiction should notify the American Bar Association Data Bank of any order imposing permanent retirement.

7. Any application for permanent retirement status must be approved by disciplinary counsel or the equivalent authority.

8. A transfer to permanent retirement status may or may not include a method for resolution of pending bar complaints such as fee dispute arbitration or other programs available in a specific jurisdiction.

9. Permanent retirement should not be available to a lawyer who has caused a loss to a client. A jurisdiction may, or may not, choose to consider restitution in determining whether a client suffered a loss. However, permanent retirement status should not be permitted where the client security fund is adversely impacted except upon agreement by the client security fund.

10. A jurisdiction should require that provisions be made for closing the practice of a lawyer opting for permanent retirement status which does not adversely impact that jurisdiction's system of receivership or similar programs.

11. Permanent retirement should not be a bar to later discovered serious charges of misconduct.

12. Permanent retirement is distinct from voluntary retirement. An attorney may elect voluntary retirement where he or she has no knowledge of any complaint, investigation, action or proceeding in any jurisdiction involving allegations of misconduct. Election to voluntary retirement shall not be permanent.

Comments:

Florida believes that permanent retirement should not be limited to aging lawyers, but to those who become ill or may otherwise need/deserve the option, regardless of age. Florida does not limit permanent retirement to aging lawyers, although the remedy is and will be used mostly for seniors. Florida's system has worked well. _Florida notes that the connect to conditional admissions is an issue which a jurisdiction might wish to consider. Florida can impose an admission condition stating that if the lawyer leaves the state, he/she will be disciplined. Florida's default, however, is to allow permanent retirement and to have the jurisdiction to which the lawyer moves decide what, if anything, it wants to do with the attorney.

In Florida, permanent retirement is not confidential. A jurisdiction may wish to make the public nature of the permanent retirement consistent with the jurisdiction's confidentiality provisions.

In Ohio permanent retirement is treated similar to resignations; both are irrevocable. Previously retired status was the same as inactive status .

A concern was raised that a lawyer would not choose permanent retirement if they could continue to practice with a censure or probation. The committee notes that permanent retirement is not a solution applicable in all situations. It is however a tool allowing a disciplinary agency to be more flexible in some situations.

A recommendation was made that we should draft a Model Rule that implements the principles, rather than take the approach which we have taken. The committee considered that approach and opted for a different course. We believe that the above guiding principles help foster a level of consistent approach while providing flexibility for individual jurisdictions to craft rules consistent with their individual procedures and circumstances. Perhaps after several states have done so, and a history of what works best can be accumulated, the drafting of a Model Rule will be more appropriate.

INTERVENTIONS: PRESERVING DIGNITY

Intervention is a group process most often used to help individuals who may not be able to see that they have a problem with alcoholism and/or drug addiction. It is always carried out with respect, concern, and love. The subject is confronted by the facts of his or her behavior, told of the impact their behavior has had on others, and offered hope and a plan to initiate change. The success rate is high and it is a helpful process to all who participate.

A less formal intervention can also be helpful to older legal professionals who may be suffering from cognitive impairment. There may be case neglect or an inability to function. With more lawyers working past a normal retirement age, lawyer assistance programs are often asked for help with these older adult issues.

Frequently the goal of this "soft" intervention is to urge an evaluation by a physician or specialist, eliminate certain work responsibilities, and even encourage retirement where necessary. It can also be to turn over a practice or, in the case of a judge, to leave the bench.

Who Participates in the Intervention?

- The group normally consists of colleagues and family members.
- In some case, it may include a clinical professional.
- It helps to include individuals the subject trusts and respects.
- It is always helpful to include a colleague with a power differential such as a senior partner or a presiding judge.

Steps in Planning an Intervention

- Meet with concerned colleagues and family members to make every member aware of the concerns and problems.
- Establish a goal – getting a thorough medical evaluation, reducing work responsibilities, closing a practice, or retiring from a firm or other legal organization.
- Carefully plan what each participant will say to the individual.
- Preserve the individual's confidentiality

The Intervention Itself

- Focus on the positive. It is important to help the individual feel good about his or her career. Talk about the individual's accomplishments.
- Preserve the respect the individual deserves.
- Celebrate the career – even plan a celebratory event to acknowledge the individual's contribution
- Ask the individual to follow the recommended plan.

After the Intervention?

- Stay in contact with the individual to be certain there is follow through.
- Offer support to the family and friends.

Links to Succession Planning Handbooks

Succession Planning Handbook for Iowa Lawyers, available at
<http://www.iowacourts.gov/wfdata/frame14091-1608/Succession09222011.pdf>

West Virginia State Bar Succession Plans, available at
http://www.wvbar.org/shared/content/member_forms/succession.pdf

Washington State Bar Association, Succession Planning, available at
<http://www.wsba.org/Resources-and-Services/Ethics/Succession-Planning>



NOBC-APRL
JOINT COMMITTEE ON AGING LAWYERS

FINAL REPORT

MAY, 2007
JOHN T. BERRY, CHAIR
DONALD D. CAMPBELL
DANIEL C. CRANE
SARAH DIANE MCSHEA
EDWIN W. PATTERSON III
KIM D. RINGLER

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I. Preface and Dedication

The National Organization of Bar Counsel and the Association of Professional Responsibility Lawyers appointed a Joint Committee on Aging Lawyers in August 2005, to study the challenges raised by aging lawyers and propose solutions and best practices for attorney grievance committees, bar associations, courts and the Bar.

The Joint Committee's Report recognizes that solutions will vary and that many other important bar organizations have made, and will continue to make, important contributions in this area. Many of the Joint Committee's proposed best practices focus on regulation and support for lawyers, rather than discipline, as a more effective route to protection of the public. NOBC and APRL look forward to a lively discussion among lawyers and judges about improvements to the regulation of the profession, with a particular focus on providing for dignified and appropriate strategies for senior lawyers who have contributed so much to the profession, their communities and the public.

Charles W. Kettlewell, a highly-esteemed leader in the professional responsibility field, urged the profession to address the problems facing aging lawyers as a regulatory concern, rather than primarily a disciplinary issue. Chuck Kettlewell was Assistant Bar Counsel in Ohio and a Past President of NOBC. He also was a Founder and the first President of APRL and a recipient of the Michael Franck Professional Responsibility Award (2003). This first NOBC-APRL Joint Report is fittingly dedicated to his memory, in honor of his leadership and significant contributions in the fields of professional responsibility and attorney regulation.

II. Introduction

In August 2005, the National Organization of Bar Counsel (NOBC) and the Association of Professional Responsibility Lawyers (APRL) appointed a joint committee to re-examine the effectiveness of the traditional professional discipline model as it applies to aging or senior lawyers. NOBC and APRL – the preeminent national bar organizations in the attorney ethics and professional responsibility field – share concerns about the potentially serious impact of increased numbers of aging lawyers who remain in the active practice of law. The NOBC-APRL Joint Committee on Aging Lawyers (Joint Committee) focused on improving the protection of the public while preserving the integrity, productivity and dignity of aging lawyers.

The Joint Committee represents the first formal venture by the two organizations to work collaboratively on an issue of vital importance to the profession and the public. The Joint Committee's Report identifies the issues and makes recommendations for how the organized bar, working in conjunction with courts and disciplinary agencies, may effectively address what is likely to be a significant challenge for the legal profession in the next decade.¹ The Joint Committee's Report is intended to be a helpful resource and guide to best practices which may be tailored

¹ Many bar leaders are actively engaged in meeting this challenge head-on. For example, ABA President Karen J. Mathis initiated the highly-successful "Second Season of Service." <<http://www.abanet.org/secondseason>> This month's issue of Your ABA, an on-line ABA publication, reports on just some of the accomplishments of the "Second Season of Service" initiative. <<http://www.abanet.org/media/youraba/200705/article01.html>> In addition, at the 2007 Annual Meeting in San Francisco, the ABA Senior Lawyers Division will present to the House of Delegates its Report and Recommendations on the Advance Designation of Successor, Caretaker or Inventory Attorneys. <<http://www.abanet.org/srlawyers/home.html>>

to individual jurisdictional needs. Jurisdictions will address these problems differently, consistent with their existing rules and regulations.

III. Overview of the Issues

In the next decade, the number of lawyers continuing to practice beyond the traditional age of retirement is likely to increase dramatically. The factors contributing to this include: 1) the steady increase in the past fifty years in the number of lawyers admitted to practice each year; 2) the demographic shift in the elderly population;² 3) dramatic improvements in health care which have extended professional work lives; 4) the strong desire among many senior lawyers to continue making positive contributions to society; and 5) economic necessity, which will compel lawyers to continue working because their pensions or savings are insufficient to support themselves and their families.

Experienced and able senior lawyers make many important contributions to the bench, the bar and the public. Their willingness to serve, often on a voluntary basis, has been critical to the success of many projects and enabled the profession to better serve the public. We do not believe that this will, or should, change.

However, there is a widespread concern that a greater percentage of the coming generation of senior lawyers (the “baby boomer” generation) will remain in active law practice, without adequate support or assistance, beyond the point when their health and abilities indicate professional changes are in order. Full or partial

² 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% to about 20% of the total population. Michael B. Friedman, “Preparing for the Elder Boom,” *Mental Health News* (Winter 2004) <http://www.mhwestchester.org/advocates/oelderboomn1903.asp>

retirement, involvement in senior lawyer organizations providing support or a transition to a different practice setting are just some of the alternative steps for aging lawyers to address age-related deficits and risks, utilize their strengths and experience and preserve a quality of law practice for the public benefit.

Unfortunately, the current rules and procedures for lawyer regulation systems are not as well suited as they could or should be to protect the dignity of those senior lawyers who suffer from age related changes in their professional abilities. The current rules and procedures also do not adequately protect the clients who are likely to suffer adverse consequences when an age related impairment significantly affects their lawyer's ability to continue in active law practice.

A related concern – one that is not limited to senior lawyers – is the sudden incapacity or death of a lawyer who has not made adequate preparation for the continued representation or protection of clients. The impact of a lawyer's death or sudden impairment occurs regardless of age or practice setting. However, the clients of lawyers practicing in law firms or organizational settings are generally less vulnerable because the firm remains responsible for the continued representation of the clients. Solo practitioners may designate "successor" attorneys, to step in to their practices and protect clients in the event of their death or incapacity, a step recommended in many jurisdictions and discussed below.

These concerns apply to lawyers in every practice setting and income level. Lawyers who experience age related changes in their professional abilities may not recognize their limitations and colleagues may be reluctant to raise the issue. While law firms and organizations are increasingly likely to intervene earlier, their efforts

may not adequately protect the public if the age-impaired lawyer then becomes an unsupervised solo practitioner, without the support or resources of the firm. On the other end of the spectrum, law firms or organizations which have mandatory retirement policies unnecessarily waste the talents of experienced lawyers who remain fit to practice even at advanced ages.

The shared concerns of the NOBC and APRL about these complicated and sensitive issues prompted this cooperative effort and the Joint Committee's Report.

IV. The Joint Committee's Study: Scope and Methodology

In August 2005, then-presidents of the NOBC and APRL, Fred Ours and Ronald Minkoff, respectively, instructed the Joint Committee, as follows:

The Committee is charged with creating ways to humanely, and efficiently address the problems that will clearly arise as the profession ages. Hopefully they will be able to fashion procedural and substantive rule proposals which will both protect the public and retain the dignity of the aging lawyer. ... They should think creatively and practically, without barriers, but with the understanding that workable solutions are needed.

The Joint Committee gathered demographic information on the present lawyer population, focusing on select representative jurisdictions, and the anticipated expansion of the population of senior lawyers in the coming decades.³ While the

³ For example, statistics provided by the State of Bar of Michigan show that between 1995 and 2005 the number of lawyers turning 70 has remained roughly static at about 230-250 lawyers. By 2009, that number is predicted to double. By 2011, it is estimated that the number will nearly triple. One member of the Joint Committee described this phenomenon as the "senior tsunami." See also, Robert J. Derocher, "The New Senior Lawyer: Is Your Bar Ready?" *ABA Bar Leader*, 31.5 (May-June 2007): 8, <<http://www.abanet.org/barserv/currentiss.html>>

Committee's loose criteria for defining this group took into account both age and length of time since admission, the Committee recognized that impairment of a lawyer's ability to practice may develop at any age. However, consistent with its charge, the Committee focused on senior or aging lawyers, since this population is statistically more likely to develop age related impairments which, if unrecognized or unaddressed, may adversely affect clients and the ability to practice law.

The Committee surveyed jurisdictions to identify existing programs and services that assist and support senior lawyers who choose to continue practicing. It also examined the impact of impaired senior lawyers who fail to recognize a need to limit or close their practices because of deteriorating or impaired ability.

Many members of the NOBC and APRL, as well as the ABA, various state discipline agencies and state and local bar associations, assisted the Joint Committee in its endeavors and we are grateful for their important contributions to this Report.

The Joint Committee's recommendations are intended to assist jurisdictions in assessing the issues and responding more effectively to protect the public and the dignity of senior lawyers. These recommendations rest on the firm conclusion that senior lawyers are an invaluable resource and continuing asset to the profession, with much to contribute. We urge the organized bar to support the development of new approaches which will better protect the public from lawyers whose age-related impairments threaten their ability to practice law. The number of lawyers who will reach advanced age in the coming decades lends urgency to this task.

V. The Joint Committee's Recommendations for Each Jurisdiction

A. Make A Demographic Assessment of the Lawyers

The Committee recommends that each jurisdiction conduct a statistical assessment to determine the size of its senior lawyer population, both current and projected, and, to the extent possible, determine how many senior lawyers are in active practice. Based upon responses to its requests for information, the Committee found that few jurisdictions know how many lawyers will reach ages 65 or 70 in the next 5, 10 or 15 years and even fewer jurisdictions presently are able to predict how many lawyers are likely to remain in active practice. This information is critical to determine what programs, services and resources are needed to support the population of senior lawyers in each jurisdiction.

Therefore, each jurisdiction should compile at least a rough demographic assessment of its lawyers and determine how many lawyers are presently 65 or 70 years old or were admitted to the bar 40 or 45 years ago, and how many are expected to reach retirement age in the coming decade or two.⁴

The Committee recommends that jurisdictions furnish services and programs and adopt policies to support senior lawyers and more effectively address their professional needs as they continue to practice. While some of the Committee's recommendations, set forth below, apply to all lawyers, regardless of age or seniority,

⁴ Jurisdictions maintain this information in many different ways, but using either age or number of years of admission will produce useful data on the increasing lawyer population. Some jurisdictions even maintain information on the number of lawyers retiring or transferring to inactive status each year.

they are especially intended to help lawyers whose diminished abilities are the result of age-related impairments.

B. Take Steps to Identify Lawyers with Age-Related Impairments

The Committee recommends that each jurisdiction take steps to identify senior lawyers with age-related impairments. Not all jurisdictions presently maintain this information, but it is useful where it is available. Whether a jurisdiction adheres to the more traditional disciplinary model (suspending lawyers with serious age-related impairments) or regularly employs alternatives-to-discipline programs, a statistical survey of the number of age-impaired lawyers will be helpful in assessing the issues and fashioning the best approaches in each jurisdiction.

C. Provide Planning Ahead and Law Practice Transfer Guidance

A lawyer's disability or untimely death can be devastating for clients and colleagues, as well as family members. With advance planning, the impact can be partially alleviated and both the clients' and the lawyer's interests better protected.⁵

The Committee recommends that bar associations and lawyer discipline agencies collaborate in developing rules and procedures to address what happens when a lawyer becomes incapacitated. Most jurisdictions presently have rules providing for the suspension or transfer to inactive status of an incapacitated lawyer. Some jurisdictions provide for the appointment of a receiver of the disabled lawyer's

⁵ For an excellent overview, see Stephen N. Maskaleris, "What Happens When a Lawyer Dies: The Survey Responses of the Organized Bar and Suggested Solutions," (1997); see also Stephen N. Maskaleris and Vivienne K. Cooperman, "What Happens When a Lawyer Dies?" *GP/Solo* 2.1 (Spring 1998).

practice but, in many cases, the existing rules do not fully protect the interests of the clients and the lawyer.

The Committee therefore recommends that bar associations and lawyer discipline agencies develop updated rules, guidelines and checklists for lawyers and the organized bar to follow in the event a practitioner disappears, dies or becomes disabled or incapacitated.⁶

1. Advance Designation of Successor, Caretaker or Inventory Counsel

The Committee recommends that jurisdictions strongly encourage lawyers to make advance provision for devastating contingencies such as sudden temporary or permanent incapacity or death.

Furthermore, the Committee recommends that bar associations and lawyer discipline agencies encourage all lawyers to designate successor or inventory counsel or a law practice trustee or to nominate a caretaker attorney who is duly authorized to sell, close or transfer the law practice in the event of the lawyer's death or incapacity.⁷

This is especially important for a lawyer practicing alone.

⁶ See Ohio model form for a Sample Succession letter attached as Appendix A. North Carolina's "*Handbook for the Trustee of the Law Practice of a Missing, Incapacitated, Disabled or Deceased ("MIDD") Attorney*," has served as a model for other jurisdictions. See Appendix B.

⁷ The New York State Bar Association publishes a comprehensive "Planning Ahead" Guide ("Planning Ahead: Establish an Advance Exit Plan to Protect Your Clients' Interests in the Event of Your Disability, Retirement or Death"), available free online. The Planning Ahead Guide comes complete with downloadable forms, checklists and guidance for the advance designation of a successor attorney. <http://www.nysba.org/Content/NavigationMenu/Attorney_Resources/For_Solos_Planning_Ahead_Guide/For_Solos_Planning_Ahead_Guide.htm>

See also Barbara S. Fishleder, "Planning Ahead: A Guide to Protecting Your Clients'

When a solo practitioner suddenly becomes incapacitated or dies, the lawyer's clients and family may face serious problems. The advance designation of another attorney, however designated, will avoid most of these problems. The primary role of a "back up" lawyer is protection of the lawyer's clients. A successor attorney, whose duties and obligations may be defined in an advance directive, may also be charged with responsibility for protecting the interests of the deceased or disabled lawyer and preserving the value of the law practice so that it may be transferred or sold.

Moreover, the Committee recommends that bar associations and discipline agencies develop and promote CLE programs and publications to encourage all lawyers to designate successor counsel to assume responsibility for their practices in the event of their temporary or permanent incapacity or death.

Some jurisdictions require lawyers to certify on their annual registration statements that they have designated successor counsel or identify such counsel.⁸ Such requirements are not without drawbacks, however, for a lawyer willing to serve as successor or inventory counsel, when initially designated, may not be available

Interests in the Event of Your Disability or Death," April 1999, published by the *Oregon State Bar Professional Liability Fund*. See also ABA Senior Lawyers Division Report to the House of Delegates recommending, *inter alia*, that the ABA encourage lawyers to plan for law practice contingencies and designate another lawyer to assist or assume the lawyer's practice, fn. 1, *supra*.

⁸ See 2007 Delaware Supreme Court Annual Registration Statement. <www.courts.delaware.gov/Courts/Supreme%20Court/?2007annreg.htm> Indiana recently proposed a rule requiring lawyers to designate an "attorney surrogate" on their annual registration forms. Proposed Amended Rule 23, Indiana Rules for Admission to the Bar and Discipline of Attorneys. <<http://www.in.gov/judiciary/orders/rule-amendments/2005/admis-disc-r23;25;29-070105.pdf>>

when needed and, in some situations, may be held responsible for failing to intervene in the practice of an incapacitated lawyer.

In addition, the Committee recommends that bar associations and discipline agencies assist by encouraging all solo practitioners to designate successor attorneys and by identifying and encouraging lawyers to volunteer to serve as successor or inventory counsel, with or without compensation, in those situations in which an incapacitated or deceased lawyer has not designated a successor.

2. Sale or Transfer of a Law Practice

Most jurisdictions permit the sale of a law practice, either by a retiring lawyer or a legal representative.⁹ In many cases, an incapacitated or deceased lawyer's practice may be sold or transferred and, if this is done in a timely fashion, the lawyer or the lawyer's estate will be able to realize some benefit from the sale or transfer. From a client protection standpoint, the sale or orderly transfer of a law practice is desirable since it ensures that the disabled or deceased lawyer's clients will continue to be represented by an active member of the bar.

The Committee recommends that jurisdictions adopt rules permitting lawyers to sell their law practices, with appropriate conditions to protect clients' interests.

3. Preservation and Handling of Client Files and Original Documents

The Committee recommends that bar associations and lawyer discipline agencies develop model policies for maintaining, retaining and disposing of client

⁹ ABA Model Rule 1.17 (Sale of Law Practice) has been adopted in approximately 44 jurisdictions. See also New York Code of Professional Responsibility, DR 2-111 [22 NYCRR § 1200.15-a], similarly providing for the sale of a law practice

files and property, including original documents such as wills.¹⁰ They should also provide training for lawyers on how to implement these policies and identify or provide resources, such as repositories for client files and original documents, to be used if a lawyer dies or becomes incapacitated without a succession plan and the preservation and confidentiality of such documents is in jeopardy.

These resources will be helpful to all practicing lawyers. Regardless of age, we all face the possibility of unexpected or untimely death or incapacity. Our clients, families and colleagues will be better protected if, collectively and individually, we address these issues through advance planning.

4. Law Practice Continuity – Appointment of Caretaker or Response Team When a Lawyer Becomes Incapacitated or Dies Without Advance Planning

The Joint Committee recommends that each jurisdiction, working in conjunction with state and local bar associations, develop local response teams of trained lawyers prepared to act when a lawyer becomes incapacitated or dies without adequate succession planning.

The Joint Committee also recommends that each jurisdiction adopt rules providing for the court appointment of a receiver, trustee or caretaker attorney to take the necessary steps to protect clients and close, transfer or sell the lawyer's practice. Any lawyer so appointed should be bound by client confidentiality rules and jurisdictions should consider adopting detailed rules for the guidance of appointed

¹⁰ See, e.g., State Bar of Michigan Formal Ethics Opinions R-05 (1989) and R-012 (1995) re file maintenance and record retention
<<http://www.michbar.org/opinions/ethics/search.cfm>>

receivers.¹¹ In those jurisdictions where the grievance commission is regularly appointed receiver, the team member or volunteer lawyer could be appointed as co-receiver, which would ease the burden on disciplinary counsel.

When a solo practitioner dies or becomes suddenly incapacitated without adequate succession planning, clients often need assistance in getting their files or property transferred to new counsel. The same type of assistance is needed for clients of an impaired senior lawyer who is suspended or transfers to disability or permanent retirement status.¹²

A lawyer appointed as a receiver, trustee or caretaker attorney ordinarily will be expected to undertake many responsibilities, including an inventory of client files, identification of those matters needing prompt attention, notification to clients that they may need new counsel, delivery of active files and trust funds to clients or third parties and storage or disposal of closed or unclaimed files. The receiver, trustee or caretaker may also act to protect the deceased or incapacitated lawyer's interests,

¹¹ The New York State Bar Association has proposed adoption of a court rule to provide for the appointment of a caretaker attorney in specific circumstances, including the death, incapacity, suspension, disbarment or disappearance of an attorney. The proposed rules provide detailed guidance for the caretaker attorney, who is accountable to the appointing court. (Proposed New York caretaker rule and NYSBA executive summary, attached as Appendix C.) See *North Carolina Trustee's Handbook*, fn. 5, *supra*.

The Rules of the Illinois Supreme Court provide for the appointment of a receiver for a solo practitioner who is disabled or who has disappeared or died. See Illinois Supreme Court Rule 776 <<http://www.iardc.org/rulesSCT.html>> See also, John Cesario, "Serving as a Court-Appointed Receiver for a Missing Lawyer: A Step by Step Guide," *Illinois Bar Journal* (August 2004).

¹² If the lawyer practiced in a law firm, the law firm is responsible for handling the clients' matters and appointment of an outside lawyer or response team is ordinarily unwarranted.

particularly with respect to unpaid legal fees, and notification of clients and return of files may be subject to the rights of the senior lawyer's estate or legal representative to sell the law practice, consistent with the rules of the jurisdiction. Ideally, a receiver or appointed lawyer should be compensated for services and reimbursed for expenses.

Some additional specific steps to facilitate the work of appointed receivers, trustees or caretaker attorneys include the following:

- Bar associations and lawyer discipline agencies should identify and train lawyers to assist impaired senior lawyers in closing their practices voluntarily or serve as receivers pursuant to court appointment.
- Bar associations and lawyer discipline agencies should prepare manuals describing what is necessary to serve as a receiver so that volunteers and court-appointed lawyers have clear directions on what is expected and may determine the most efficient way to complete the necessary tasks.

D. Encouragement and Support for Senior Lawyers in Practice

The Committee recommends that jurisdictions take greater steps to encourage and support senior lawyers.¹³ This recommendation is consistent with the initiative of ABA President Karen J. Mathis in establishing a Commission on a Second Season of Service. One step is recognition in the form of an honorary designation such as “emeritus” or another title accorded to retired lawyers who are admitted to the Bar for

¹³ See, *e.g.*, Cincinnati Bar Association's Senior Attorney Committee, formed to support older lawyers who want to remain active professionally.

more than a certain number of years.¹⁴ Jurisdictions should also consider reducing annual registration fees or bar dues, or both, for lawyers in practice for fifty years or more. A third step is identifying opportunities for senior lawyers who wish to continue to contribute to the profession, for example, mentoring or training younger lawyers or working with the public, bar associations and lawyer discipline agencies.

1. Involve Senior Lawyers as Mentors and in Pro Bono Work

Bar associations and law schools should develop programs to train senior lawyers as mentors for newly admitted lawyers and law students.¹⁵ These institutions should recruit senior lawyers and facilitate mentoring relationships between those newly admitted lawyers and law students who wish to take advantage of the invaluable opportunity to be mentored by an experienced, able senior lawyer.

Bar associations and legal service organizations should identify opportunities for senior lawyers to provide *pro bono* representation to clients. Senior lawyers who retire from private practice are often interested in and willing to provide legal services on a *pro bono* basis. Some states presently permit lawyers, who have taken voluntary retired status and stopped paying annual registration fees, to represent clients on a *pro bono* basis. In some jurisdictions, such representation may be done by the retired

¹⁴ See, e.g., State of Delaware Application for Certificate of Retirement, <<http://www.courts.delaware.gov/Courts/Supreme%20Court/>> State Bar of Michigan, Emeritus Rule 3(F) <www.courtsofappeals.mijud.net/rules/> For a discussion of some concerns about taking “Emeritus” status, see “A Dilemma for the Emeritus Attorney,” *The Mentor*, State Bar of Michigan Senior Lawyers Section (Winter 2006): 6; <www.michbar.org/seniorlaw/pdfs/winter06.pdf>

¹⁵ See Supreme Court of Ohio Lawyer to Lawyer Mentoring Program. <<http://www.sconet.state.oh.us/mentoring/default.asp>>

lawyer acting alone, while in others, it is permitted only under the supervision of a legal services organization.¹⁶

Facilitating senior lawyers' involvement in mentoring and *pro bono* work would benefit the Bar, the senior lawyers and, most importantly, the public.

2. CLE Programs on Senior Lawyer Issues

The Committee also recommends that jurisdictions encourage and provide continuing legal education programs on senior lawyer issues. Senior lawyers may find themselves facing new challenges or significant changes to their law practices. These challenges may arise when the needs of long standing clients change; when the law in a practice area undergoes a substantial change; or when mandatory retirement policies or mergers at law firms force senior lawyers out when they are still productive and wish to remain in active practice.

Bar associations should take the lead and provide courses that assist senior lawyers in making successful transitions to new practice areas. A senior lawyer who is no longer able to keep up with the superhuman demands of an active trial practice, may wish to get involved in working as a mediator or advisor. Tailored CLE courses could assist in enhancing the ability of capable senior lawyers to remain active.

Participation at CLE programs also reduces the professional isolation that some senior lawyers may encounter as long-time colleagues retire or leave practice. The benefits of interacting with other lawyers on issues of professional interest are well known and apply to all members of the Bar. Bar associations and CLE providers

¹⁶ See e.g., Massachusetts Supreme Judicial Court Rule 4:02 (8), permitting retired lawyers to practice on *pro bono* matters, and Massachusetts Senior Partners for Justice, <http://www.vlpnet.org/senior_partners_for_justice>

should extend tuition waivers or reductions to more lawyers, particularly senior lawyers, and should publicize the availability of such waivers, although the waiver process should be confidential.

E. Responding Appropriately to Age Impaired Lawyers

The rules of professional conduct in most jurisdictions require lawyers to report serious misconduct by another attorney, regardless of age or seniority. See MRPC 8.3. Likewise, in most jurisdictions, a partner or supervising lawyer who knows of another partner's or subordinate lawyer's non-serious misconduct is obliged to take remedial action. See MRPC 5.1(b), (c). However, in most jurisdictions, the rules provide little guidance for lawyers, judges and lawyer disciplinary agencies faced with an apparently impaired senior lawyer who is not engaging in serious misconduct, but whose impairment may present a risk of harm to clients or the public.¹⁷

Impaired senior lawyers present many of the same problems in identification and response as lawyers who are impaired because of drugs or alcohol or mental illness. Until a crisis arises, colleagues, clients, courts and family members who may suspect an age-related impairment may be reluctant to interfere or take any action.¹⁸ When an age-impaired lawyer is confronted, the initial response is often denial or

¹⁷ See ABA Formal Opinion 03-429 (“Obligations with Respect to Mentally Impaired Lawyer in the Firm”) and ABA Formal Opinion 03-431 (“Lawyer’s Duty to Report Rule Violations by Another Lawyer Who May Suffer from Disability or Impairment”).

¹⁸ See Jon Kingsepp, “Suddenly I Cannot Practice Law,” *The Mentor*, State Bar of Michigan, Senior Lawyers Section (Winter 2006): 7-8, <<http://www.michbar.org/seniorlaw/pdfs/winter06.pdf>>

resistance – which will be familiar to anyone working with lawyers who are impaired in other ways.

1. LJAPs May Work for Age-Impaired Lawyers

Lawyer-Judge Assistance Programs (LJAPs), now available throughout the country, have helped many impaired lawyers and judges seek effective confidential treatment and remain professionally active. Indeed, for many lawyers and judges, LJAPs have proved to be a more effective alternative than traditional disciplinary action. LJAPs are widely viewed as better protection of the public, since the impaired lawyer is treated and often supervised, a “win-win” situation, in many cases.

The effectiveness of LJAPs in responding to lawyers with substance abuse impairments suggests that the LJAP approach could be equally effective in dealing with the issues presented by impaired senior lawyers. Of course, where an impaired senior lawyer refuses to cooperate and the lawyer’s conduct or impairment poses a threat to clients or the public, a report to a lawyer discipline agency may be the only reasonable alternative.

2. Reporting Age-Impaired Lawyers Presents Delicate Issues

The Joint Committee recognizes that lawyers and judges understandably are often reluctant to confront an age-impaired senior lawyer or report their concerns to a lawyer discipline agency. This is unfortunate for, with early identification of a problem and timely intervention, an age-impaired attorney might have a better chance of a dignified outcome. The present lack of clear procedures or protocols at most lawyer discipline agencies for dealing with age-impaired senior lawyers makes it less likely that lawyers and judges will file a report, unless serious misconduct is involved.

In order to encourage early reporting of concerns, the Joint Committee recommends that lawyer discipline agencies establish clear procedures and protocols and educate the bar about the issues and the agency's determination to treat age-impaired lawyers humanely and with dignity.

Having clear procedures and protocols is also likely to encourage others, including family members and friends, to seek help for an age-impaired lawyer at an earlier stage. Family members who might otherwise have little success in persuading the senior lawyer that changed circumstances require changes in the lawyer's practice might be more willing to communicate their concerns if they were aware that age-impaired lawyers would get help and not invariably face disgrace and discipline.

3. Discipline Agencies May Be Reluctant to Discipline Senior Lawyers

Lawyers practicing in the professional responsibility field are aware that discipline agencies generally will not seek sanctions against impaired senior lawyers, in the absence of serious misconduct, especially when the senior lawyer does not have a significant disciplinary history. In such circumstances, lawyer discipline agencies usually focus on getting the senior lawyer to fix the immediate problem that resulted in the complaint or investigation. If necessary, the lawyer is asked to voluntarily stop practicing, in an orderly manner that protects clients, or to continue in practice, but with appropriate conditions, limits or supervision.

4. Discipline Agencies Should Use LJAP Resources to Respond Effectively to Age-Impaired Lawyers

Lawyer discipline agencies usually devote considerable effort and resources to convincing impaired senior lawyers to voluntarily retire or limit their practices before

seeking disciplinary sanctions. Discipline agencies typically do not have the health care resources or expertise that LJAPs do. Such resources and expertise are often very helpful in determining to what extent the senior lawyer's ability to practice is impaired and whether treatment for the impairment is likely to permit the lawyer to practice in some manner.

Because LJAP is not an adversarial setting and because LJAP communications are treated confidentially, an LJAP can work more effectively with an impaired senior lawyer and facilitate that lawyer's decision, in appropriate cases, to curtail his or her practice, agree to appropriate limitations or voluntarily retire from law practice.

5. Additional Recommendations for Coordinating and Improving Responses to Age-Impaired Lawyers

The bar associations, judges, lawyer discipline agencies and LJAPs in each jurisdiction should collaborate to develop and adopt guidelines and protocols to respond to and assist age-impaired lawyers. The goal should be to preserve the impaired lawyer's dignity, protect clients and maintain the confidence of the public in the integrity of the bar. The guidelines and protocols should include the following:

- Bar associations, LJAPs and lawyer discipline agencies should implement programs specifically aimed at addressing impairment of senior lawyers' ability to practice in the same fashion that similar programs in many jurisdictions successfully assist lawyers impaired by substance abuse and mental and physical health problems.
- Bar associations, LJAPs, and lawyer discipline agencies should provide guidance to lawyers, judges and family members who have concerns about

whether a senior lawyer is impaired and what they should do about it. LJAPs should assist in assessing whether the senior lawyer is impaired and, if so, whether the senior lawyer should transition to a different practice setting or, if necessary, cease the practice of law. LJAPs may report the impaired lawyer to a discipline agency if the lawyer refuses to participate or cooperate, but may not report confidential information unless the lawyer waives confidentiality.

- Bar associations and LJAPs should educate lawyers and judges, as well as non-lawyer bar association and court personnel, on how to identify and properly respond when they encounter an impaired senior lawyer.
- LJAPs should involve health care providers experienced with aging professionals and qualified to determine whether a lawyer is impaired from continuing to practice. They should offer senior lawyers assistance in deciding whether to voluntarily cease or limit law practice. In addition, effective treatment or modified practice settings may permit some age-impaired lawyers to continue to practice with dignity and adequate protections for the public.
- LJAPs, bar associations or lawyer discipline agencies should develop law practice management assessment programs to assess whether age-impaired lawyers who are the subject of grievances should continue to practice, with or without supervision or restrictions. Lawyer discipline agencies in many states routinely use such programs when the lawyer's conduct involves

neglect, failure to communicate or incompetence.¹⁹ Unless the senior lawyer is severely impaired or uncooperative, a law practice management assessment program will assist an LJAP or lawyer discipline agency in determining whether the senior lawyer is able to continue to practice, with improvements in practice management or other conditions such as limits on scope of practice or practice monitoring.

- Each jurisdiction should adopt rules that provide for voluntary and involuntary disability status for lawyers of any age whose ability to practice is impaired permanently or temporarily.²⁰ Disability status can be a useful tool to assure that an impaired senior lawyer leaves law practice without needing to reach a determination of whether the lawyer's conduct requires a disciplinary sanction. However, taking disability status is not always a satisfactory resolution because the senior lawyer may feel that it carries an unnecessary professional stigma.
- Each jurisdiction should adopt rules that provide for voluntary permanent retired status for senior lawyers whose conduct does not require a disciplinary sanction, but who should not be practicing law. Permanent retired status assures that the impaired senior lawyer will not become active again after the current grievances are closed, while allowing the

¹⁹ See State Bar of Michigan's Practice Management Resource Center website at <<http://michbar.org/pmrc/content.cfm>>

²⁰ See, *e.g.*, Colorado Rule 251.23, Disability Inactive Status <<http://www.coloradosupremecourt.com/Regulation/Rules/Chapter20/statdsppad1c.html>> Michigan Court Rule 9.121 <<http://www.megalaw.com/mi/mirules.php>> ; Massachusetts Supreme Judicial Court Rule 4:01 §13 <<http://www.mass.gov/obcbbo/rule401.htm>>

senior lawyer a voluntary dignified exit from law practice. Permanent retired status is not a substitute for discipline if the age-impaired lawyer has engaged in serious misconduct that would ordinarily result in a lengthy suspension or disbarment. Furthermore, permanent retirement is not intended to replace traditional voluntary retirement, which should continue to be available or adopted if the jurisdiction's rules do not provide for it.

VI. Conclusion

The NOBC and APRL are dedicated to improving the legal profession's high ethical standards. We hope this Report will be a useful resource for jurisdictions addressing the issues and challenges that an increasing population of aging lawyers presents. It recommends best practices, rules and programs to respond to these issues.

The Joint Committee's recommendations are intended to preserve senior lawyers' dignity and hard-earned reputations and enhance their ability to continue to contribute meaningfully during the later years of their careers. Lawyers with a depth of experience gained over years of practice deserve recognition as valued members of the legal community. Providing reasonable and dignified options for senior lawyers will not only improve the profession, but will benefit society as a whole.

Dated: May 22, 2007

NOBC-APRL Joint Committee on Aging Lawyers

John T. Berry, Chair
Donald D. Campbell
Daniel C. Crane
Sarah Diane McShea
Edwin W. Patterson, III
Kim D. Ringler

NOBC-APRL Joint Committee on Aging Lawyers

Joint Committee Members:

John T. Berry, Chair (NOBC)

Director of the Legal Division, Florida Bar, Tallahassee, FL
Past President, National Organization of Bar Counsel
NOBC Delegate to ABA House of Delegates
Chair, ABA Standing Committee on Professionalism (2003-2006)
Michael Franck Professional Responsibility Award (2001)

Donald D. Campbell (APRL)

Collins, Einhorn, Farrell & Ulanoff, Southfield, MI
Former Associate Counsel, Michigan Attorney Grievance Commission
Adjunct Professor, University of Detroit Mercy School of Law

Daniel C. Crane (NOBC)

Director, Massachusetts Office of Consumer Affairs and Business Regulation
Former Chief Bar Counsel for Massachusetts
Past President of the Massachusetts Bar Association
Former board member of Massachusetts Lawyers Concerned for Lawyers

Sarah Diane McShea (APRL)

Law Offices of Sarah Diane McShea, New York, NY
Past President, Association of Professional Responsibility Lawyers
Chair, New York State Bar Association, Law Practice Continuity Committee
Former Deputy Chief Counsel, Departmental Disciplinary Comm., NY, NY

Edwin W. Patterson, III (NOBC)

General Counsel, Cincinnati Bar Association
Former Commission Counsel, Ohio Ethics Commission

Kim D. Ringler (APRL)

Law Offices of Kim D. Ringler, Hackensack & Ridgewood, NJ
Director, Association of Professional Responsibility Lawyers
Chair, APRL Public Statements Committee
New Jersey State Bar Association Professional Responsibility Committee

Appendix A

Sample Succession Letter

Courtesy of Gates T. Richards, Esq.

[Date]

[Full name of attorney]
[Street and Suite address]
[City and State]

Dear [Attorney first name]:

This is an update of my letter of [date of last letter] updating and supplementing your agreement to step into the office in the event of my untimely death or disability.

My malpractice coverage is with [name of professional liability carrier], policy number [policy number]. Their telephone number is [telephone number of carrier]. You have been identified as counsel to them. That policy renewal date is [date of policy renewal].

My secretary is [full name of secretary], her address is [full address] and her telephone number is [telephone number].

My paralegal is [full name of paralegal], her address is [full address] and her telephone number is [telephone number].

The office accountant is [name of accountant] and his address is [accountant address]. His telephone number is [accountant telephone number].

The summer clerk is [name of summer clerk], her address is [address] and her telephone number is [telephone number].

The office safety deposit box is located at [name of bank where safety deposit box is located] and its box number [safety deposit box number] and [secretary or paralegal] can give you the key if necessary. I am the only signature allowed on the box.

[Name of executor] is the executor of my estate. That address is [address of executor]. [Name of person with power of attorney] –as a full power of attorney to act on my behalf which includes signature power on all accounts.

[Name of insurance agent] is knowledgeable as to the office insurance policies which would come into play if you have to activate this letter. In addition to the general policies, there is a life insurance policy with [name of life insurance company] and that policy number is [number of life insurance policy]. That policy provides for a substantial amount of money to be paid to the corporation in order to permit the office to stay open until everything can be transferred or resolved. Its renewal date in case of disability only is [date of renewal for life insurance policy].

We utilize not only the 3 x 5 card system indicating follow-up dates with red cards for statute of limitations but also a computer-generated calendar. [Secretary or paralegal] can produce through our computer a list of all current statutes which comes out on a monthly basis.

The office checking account is with [name of bank with office account], account number [office checking account number]. My trust account is with [name of bank with trust account], account number [number of trust account]. The office money market account is with [name of bank with money market account], account number [account number for money market account]. I am the only signatory on all of the accounts.

The computerized billing program is [name of billing program] and [name of person doing billing] can help with that. The word processing program for all computers is [name of word processing program].

Cases in which your office is opposing counsel have been color coded and tabbed on the general file index to avoid conflict and my secretary or paralegal can be of assistance. Such cases can be returned to forwarding counsel for reassignment. A reverse trial calendar can be generated from the computer calendar, which is updated daily for all appointments and/or court settings. The calendar program is [name of calendar program].

My landlord is [name of landlord] and the lease expires on [date of lease expiration].

Sincerely,
[your name]

Appendix B

Handbook for a Trustee of the
Law Practice of a Missing,
Incapacitated, Disabled, or
Deceased (“MIDD”) Attorney

A Publication of the North Carolina State Bar

Revised March 2003

Handbook for a Trustee
Of the Law Practice
Of a Missing, Incapacitated, Disabled,
Or Deceased (“MIDD”) Attorney

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Handbook for a Trustee
of the Law Practice
of a Missing, Incapacitated, Disabled,
or Deceased (“MIDD”) Attorney

A. Introduction

This handbook is designed to assist an attorney who is appointed as the trustee of the law practice of a missing, incapacitated, deceased or disabled attorney. No single document or checklist can answer every question that a trustee will encounter, however. The following material is intended to answer some basic questions and provide sample forms for the trustee.

In many cases, questions will arise for which this handbook provides no answer. In those cases, trustees are encouraged to call the N.C. State Bar (919/828-4620) or their local resident superior court judge for guidance.

The State Bar greatly appreciates the service that trustees provide to the public and the profession by ensuring the orderly winding up of the law practices of missing, incapacitated, deceased or disabled attorneys.

B. When Should a Trustee Be Appointed?

The courts may appoint a trustee to protect the clients of any North Carolina attorney who is “missing, disabled, incapacitated or deceased.” N.C. Gen. Stat. Section 84-28(j).

An attorney is “incapacitated” when he or she has been adjudicated as “mentally defective, an inebriate, mentally disordered or incompetent from want of understanding to manage his or her affairs by reason of the excessive use of intoxicants, drugs or other cause” by a court in this or any other jurisdiction. Discipline & Disbarment Rules of the North Carolina State Bar, 27 N.C.A.C. 1B, Rule .0103(23).

In contrast, an attorney is deemed to be disabled when he or she suffers from a “mental or physical condition, which significantly impairs the professional judgment, performance, or competence of an attorney.” *Id.*, Rule .0103(18).

Appointment of a trustee is usually not necessary if a missing, incapacitated, deceased or disabled attorney (hereafter, a “MIDD attorney”) has a partner or associate who is willing and able to protect the interests of the attorney’s clients. In such a case, the partner or associate ordinarily is able to handle the situation without a formal court order appointing a trustee of the attorney’s law practice.

If the MIDD attorney has no partners or associates, however, it may be necessary for the court to appoint a trustee to wind down the MIDD attorney’s practice. The order of appointment gives the trustee the authority to enter the MIDD attorney’s office, review confidential client materials and take other steps necessary to protect the MIDD attorney’s clients.

If you learn that another attorney has died or has become incapacitated or disabled, don't hesitate to discuss your concerns with the president of your local bar or the legal staff or officers of the State Bar to determine if a trustee is needed to protect the MIDD attorney's clients.

C. Appointment of the Trustee

1. Selecting a Trustee

North Carolina's general statutes do not specify whom the court should appoint as trustee of a MIDD attorney's law practice. Any attorney who practices in the MIDD attorney's judicial district, is in good standing with the Bar, and is willing to perform the duties of a trustee is eligible for appointment. The trustee need not have the same kind of practice as the MIDD attorney. Depending upon the amount of work to be done, it may be wise to have two or even three trustees appointed.

2. Filing the Petition

The N.C. State Bar will often file a petition for appointment of a trustee to conserve the MIDD attorney's law practice at the request of the senior resident superior court judge, a member of the local bar or the proposed trustee. N.C. Gen. Stat. Section 84-28(j). The court may also proceed on its own motion. Id.

The petition should be addressed to the senior resident superior court judge of the district in which the MIDD attorney last resided or maintained a law office. Id. The petition should include the name of the proposed trustee(s) and a statement of the grounds necessitating appointment of a trustee. A sample petition is included in these materials as Ex. 1.

If you learn of a situation in which a trustee may be needed, and would like the State Bar to file an appropriate petition, call the Office of Counsel at 919 828-4620 and ask for one of the staff attorneys.

3. Entering the Order

The order appointing a trustee of a MIDD attorney's law practice must be signed by the senior resident superior court judge in the county where the MIDD attorney last resided or maintained a law office. N.C. Gen. Stat. Section 84-28 (j). The trustee will serve until released by order of the court. A sample order appointing a trustee is attached as Ex. 2.

D. Duties of the Trustee

1. Introduction

The duties of a trustee of the practice of a MIDD attorney can vary widely. In some cases, the MIDD attorney's practice was not active and little needs to be done to protect his or her clients. In other cases, particularly where the attorney had a large practice or disappeared suddenly, the trustee's job may be complicated and time-consuming.

2. Getting Access to the Office & Client Files

After the order of appointment is signed, the trustee should immediately secure the files of the MIDD attorney's clients. If necessary to ensure the security of the files, the trustee should remove the MIDD attorney's files to the trustee's office or other safe location.

Ordinarily, getting into the MIDD attorney's office is not a problem, once the court has named the trustee. Relatives of the MIDD attorney, a secretary or executors of the estate usually will provide the trustee with a key and access to the MIDD attorney's office. In a few cases, however, a trustee has been forced to seek a court order authorizing the trustee to gain access to the MIDD attorney's law office with the help of a locksmith. If a trustee encounters a problem getting access to the MIDD attorney's files or office, the trustee should call the court or the N.C. State Bar.

3. Reviewing Client Files

The trustee's most important duty is to protect the interests of the MIDD attorney's clients. First, the trustee should review the MIDD attorney's files to determine which are active and which are closed. The trustee should keep a list of the files that have been reviewed, the status of the case and what was done with the file. This list ultimately will be attached to the petition seeking discharge of the trustee when the wind down of the MIDD attorney's practice is complete. See Ex. 3, attached.

Rule .0122(b) of the Discipline and Disbarment Rules of The North Carolina State Bar, 27 N.C.A.C. 1B, provides that a trustee appointed to conserve the files of a MIDD attorney is not permitted to disclose any information contained in the clients' files unless necessary to carry out the trustee's duties.

4. Contacting Clients

Next, the trustee should contact each client who has an active matter pending to notify the client that the MIDD attorney is no longer able to handle the client's case. If time permits, it is usually better to contact the clients in writing, as this creates a permanent record. In any event, the client should be advised to select another attorney and to make arrangements to pick up his or her file. A sample notification letter to clients is attached as Ex. 4.

It is often impossible to contact all of the MIDD attorney's clients. In this case, the trustee may place a notice in the local newspaper directing clients of the MIDD attorney to contact the trustee. Such a notice should also advise clients whose files are closed to retrieve their files. A sample notice is attached as Ex. 5.

5. Protecting the Clients' Interests

While the trustee is waiting for clients to pick up their files or select a new attorney, the trustee should take steps to ensure that no deadlines are missed. If necessary, the trustee should file motions for continuances or attend calendar call. In many cases, the trial court administrator will help with calendaring problems. Local judges are sometimes willing to sign blanket orders continuing all of the MIDD attorney's pending cases. The trustee is not required to act as attorney for the MIDD attorney's clients, however, or provide legal services other than those necessary to prevent harm to the clients until they obtain other counsel.

6. Copying Files

The trustee will often make photocopies of active files before the original contents are returned to the client. Keeping copies can protect both the MIDD attorney (or the estate of the MIDD attorney) and the trustee from claims by former clients. It may not be necessary to copy closed files or to copy some items, such as depositions, in active files. If you have a question about whether copies of records from a file should be made in a specific situation, call the N.C. State Bar, or consult the resident superior court judge in the MIDD attorney's judicial district. If copies of file materials are made, the cost must be charged to the MIDD attorney or the estate of the MIDD attorney, rather than to the client.

7. Delivering Files to Clients

When a client picks up his or her file, the trustee must ensure that all of the client's materials are returned to the client. The Rules of Professional Conduct provide that all documents in the file belong to the client, with the exception of incomplete attorney work product and the MIDD attorney's personal notes. See comment 10, Rule 1.16 of the Revised Rules of Professional Conduct. Consequently, completed pleadings, motions, briefs, and evidence such as doctor's reports and similar materials must be returned to the client. This is so even if the client had not paid the MIDD attorney or the MIDD attorney's estate for work done for the client.

When the MIDD attorney's clients pick up their files, the trustee should ask each client to sign a release, indicating that the file has been received. A sample release is attached as Ex. 6. The trustee should require clients to produce appropriate identification before releasing file materials. Absent instructions from the client, the file materials should not be released to anyone other than the client. It helps to tell clients in the initial notification letter how the files will be returned and the reason for the security measures.

Client files can be returned by certified mail with the client's consent. The trustee should keep proof of delivery of the file. Mailing files to the MIDD attorney's clients can be expensive, however, and trustees are encouraged to have clients pick up files in person if possible.

8. Recommending New Attorneys

Often, the MIDD attorney's clients will ask the trustee to recommend successor counsel. The trustee should feel free to make recommendations, so long as it is clear that the selection of successor counsel is up to the client. In many districts, local bar members will agree to complete the MIDD attorney's pending matters at no additional charge to the clients or at a rate agreed to by the MIDD attorney. The trustee may also agree to serve as the attorney for a former client of the MIDD attorney, although the trustee is not required to do so. Prior to doing so, the trustee should inform the client that the client has a right to choose successor legal counsel. No client file should be sent to a successor attorney without the client's prior approval.

9. Dealing with the MIDD Attorney's Office Account

Ordinarily, the trustee will have no duties regarding the MIDD attorney's office or business account, since no client funds should be present in such an account. The trustee's chief obligation is to protect the interests of the MIDD attorney's clients by distributing files as quickly as possible. Clients who believe that they are owed a refund of fees that may be in the office account should be encouraged to seek independent legal counsel to resolve those matters. The trustee should not act as an advocate for the clients in fee dispute matters.

Similarly, the trustee is not obligated to take extraordinary steps to collect fees owed to the MIDD attorney. Before taking any action regarding a MIDD attorney's office account, the trustee should consult the court or the N.C. State Bar. If the attorney in question is deceased, the trustee should also contact the representative of the estate of the MIDD attorney.

10. Dealing with the MIDD Attorney's Trust Account

Trustees often have duties relating to disposition of funds in the MIDD attorney's trust account or other fiduciary accounts. Pursuant to Rule 1.15-2 of the Revised Rules of Professional Conduct, the MIDD attorney's trust account should contain only client funds and a minimal amount to cover bank service charges.

The trustee should first review the MIDD attorney's trust account record, reconcile the monthly bank statements and bring client ledger cards up to date. If the MIDD attorney had a secretary or bookkeeper, this individual is often able to perform most of the auditing tasks for the trustee. The State Bar's staff investigators may also be able to assist, if necessary.

After the trustee determines the ownership of the funds in the MIDD attorney's trust account, the trustee should file a petition, requesting the court to authorize the trustee to disburse funds to the client-owners. All clients who have a claim against funds in the MIDD attorney's trust account should be notified of the hearing on the motion to disburse funds from the account if for any reason there is not enough on deposit in the trust account to pay all claims. No funds should be disbursed to clients without first obtaining a court order. A sample petition is attached as Ex. 7. A sample order is attached as Ex. 8.

Special problems arise in those cases in which it appears that the MIDD attorney may have misappropriated funds from his or her trust account. If the misappropriation was discovered before the trustee was appointed, the State Bar probably has obtained an order “freezing” the MIDD attorney’s trust account. In such a case, no funds may be disbursed from the trust account, except pursuant to an order from the court that entered the restraining order. In these cases, the trustee should work closely with the N.C. State Bar staff to determine ownership of the funds remaining in the trust account. The State Bar usually takes responsibility for filing the petition to disburse funds from the “frozen” trust account. The trustee may be called upon to help notify clients of the petition and to serve as liaison between the clients, the N.C. State Bar and the Client Security Fund.

If the trustee discovers independent evidence of misappropriation of client funds by a MIDD attorney, the trustee should contact the N.C. State Bar or the senior resident superior court judge immediately.

E. Getting Paid

Administering the law practice of a MIDD attorney can be costly and time consuming. The court can award payment of counsel fees to a trustee appointed to conserve the practice of a deceased attorney. These fees are paid from the deceased attorney’s estate and are considered an administrative expense of the estate. N.C. Gen. Stat. Section 84-28(j). A sample letter to be filed with the Executive/Personal Representative of the deceased attorney’s estate is included as Ex. 9. In other cases, it is the N.C. State Bar’s policy to pay a modest fee to the trustee. Trustees appointed to conserve the practices of missing, disabled or incapacitated lawyers should contact the Executive Director of the State Bar upon their appointment to discuss payment of their fees and expenses.

In all cases, the trustee should keep track of his or her time and the expenses incurred, in conserving the MIDD attorney’s practice. The trustee should also record time spent by clerical staff.

In discharging his or her duties, the trustee should be as frugal as possible by, among other things, hiring support staff to do the clerical work and securing inexpensive office and storage space. In some cases, the trustee may be able to use the MIDD attorney’s office and support staff. The trustee should avoid using assistants who are beneficiaries of the MIDD attorney’s estate as such individuals would gain access to client files which may contain information necessary to file a claim against the estate.

F. Reporting to the Court & Discharge

The trustee’s last duty is to report his or her activities to the court and file a petition to be discharged as trustee of the MIDD attorney’s practice. The contents of the petition will vary, depending upon the services performed by the trustee. A sample petition is attached as Ex. 10. At a minimum, the petition should contain a list of files distributed to the clients and a discussion of how the other files were handled. If trust funds were disbursed, a record of the disbursements should be included, so that the court can approve disbursement, if it has not already done so.

In many cases, when a trustee completes his or her duties, there are a number of files left on hand, which no client has claimed, or which are closed. In some districts the local bar office or the clerk of court may be willing to house the unclaimed files for a period of time. The trustee should seek some guidance from the court regarding disposition of any unclaimed file. The court may wish to include a provision regarding the files in the order of discharge.

After the trustee is discharged, he or she should provide a signed copy of the order of discharge to the N.C. State Bar. A sample order is included as Ex. 11.

G. Conclusion

Acting as trustee of the practice of a missing, incapacitated, deceased or disabled lawyer can be a difficult and time-consuming matter. However, it is often a very rewarding experience, as the trustee has the satisfaction of rendering a great service to the public and the other members of the Bar. Each trustee's experience and problems are unique and it is impossible to answer every question ahead of time. Every trustee should feel free to telephone the N.C. State Bar any time a problem arises, however. We're here to help.

CHECKLIST OF DUTIES OF TRUSTEE
OF LAW PRACTICE OF MISSING, INCAPACITATED, DISABLED OR DECEASED
ATTORNEYS

1. Enter MIDD attorney's law office and, if necessary, remove files to a safe place.
2. Inventory the files to determine which are active and which are inactive. Keep a list of the files reviewed with a summary containing the name of the client, nature of the file, work done by the trustee and disposition of the file.
3. Send a letter to each client who has an active matter pending with the MIDD attorney. The letter should notify the client of the need to identify substitute counsel and to retrieve the file. Consider placing a notice in the local newspaper.
4. Take steps to preserve rights of clients while the client is arranging for substitute counsel. Often one telephone call to opposing counsel, explaining the problem, is sufficient.
5. Distribute files to clients, as the clients direct. Keep records of how and to whom the files are distributed. Follow the court order regarding the disposition of unclaimed files.
6. If there are funds in the MIDD attorney's trust account, reconcile the trust account records to determine ownership of the funds.
7. In appropriate cases, disburse funds belonging to clients from the trust account after filing a motion, giving notice to claimants if necessary and obtaining a proper order.
8. Keep track of services provided by the trustee and assistants, along with expenses incurred.
9. Submit a final report to the Court and petition for discharge.
10. Send a copy of the order of discharge to the N.C. State Bar.

WHAT IF?
QUESTIONS TRUSTEES FREQUENTLY ASK

Q. Some of the members of the local Bar have agreed to handle the MIDD attorney's pending files. Can I box up the files and send them over to these attorneys?

A. The trustee should not release a client file to successor counsel without first obtaining the client's consent. The file belongs to the client and may contain confidential information. The trustee should help protect the clients' confidences and the clients' right to select successor counsel.

Q. The MIDD attorney had a large practice and kept all of his files for years. Surely the State Bar doesn't expect me to photocopy all of these materials?

A. It is often desirable for the trustee to retain copies of active files, in case a claim is made against the MIDD attorney or the estate of the MIDD attorney or if questions arise later. This is particularly true if the MIDD attorney was disbarred. However, this is not always practical. The trustee should consult with the N.C. State Bar or the senior resident superior court judge when it appears that making copies of active files is impossible or impractical.

Q. I am about to be discharged as trustee of a MIDD attorney's practice and I have a large number of file materials that have never been picked up by the clients. What should I do with them?

A. The practice varies from district to district within the state. Call the clerk of court in the MIDD attorney's county and see if the court will agree to store the files for a period of time. Alternatively, the files may be stored in rented space or another attorney's office. The court's guidance should be sought regarding the disposition of files including closed or inactive files. The order discharging the trustee should contain some provision regarding storage of files and destruction after a designated period of time.

Q. I just got a settlement check in from an insurance company for a client represented by the MIDD attorney. The check is made out jointly to the MIDD attorney and the client. What do I do with it?

A. Get an order from the court authorizing you to endorse the MIDD attorney's name to the check if the initial order doesn't already give you that authority. Get the client to endorse the check as well and deposit it in the MIDD attorney's trust account. Have the court authorize disbursement of the funds, including approving payment of the MIDD attorney's fee to the MIDD attorney's estate or office account.

Q. I was just appointed trustee of a MIDD attorney's law practice. This is going to be more time consuming than I thought. Am I going to get paid for any of this? What about my clerical assistant.

A. If the attorney in question is deceased, the trustee should first apply to the estate for reimbursement of his or her time and expenses. See G.S. 84-28(i). If the estate is insolvent, and in the cases of missing, disabled and incapacitated attorneys, it is the policy of the State Bar to pay the reasonable expenses of the trustee. Call the State Bar to discuss the particulars of your case.

Ex. 1

STATE OF NORTH CAROLINA
COUNTY NAME COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
BEFORE THE SENIOR RESIDENT
SUPERIOR COURT JUDGE OF THE
JD# JUDICIAL DISTRICT

IN RE: MIDD ATTORNEY,)	
ATTORNEY AT LAW.)	VERIFIED PETITION FOR ORDER
)	APPOINTING TRUSTEE OR
)	CONSERVATOR

Pursuant to N.C. Gen. Stat. § 84-28(j) and 27 N.C. Admin. Code Chapter 1, Subchapter B, Rule .0122 of the Discipline & Disability Rules of the North Carolina State Bar, the North Carolina State Bar, by and through its Director, petitions and requests the Senior Resident Superior Court Judge of the JD# Judicial District to enter an order appointing a member of the Judicial District Bar to serve as trustee of the law practice of MIDD Attorney due to his [death, disappearance, disability, disbarment]. In support of this petition, the North Carolina State Bar shows the Court as follows:

1. According to the records of the North Carolina State Bar, MIDD Attorney was licensed to practice law on <date>. At the time of his death, MIDD Attorney practiced law in County Name County, North Carolina.
2. According to the records of the North Carolina State Bar, the last address of record for MIDD Attorney is <address>.
3. MIDD Attorney practiced law at <address>.
4. On or about <date> MIDD Attorney [died, was disabled was disbarred or disappeared, etc.]
5. As of the date of this petition, MIDD attorney represented North Carolina clients whose interests need protecting.
6. MIDD attorney had no partners or associates capable of winding down his law practice and ensuring that the interests of his clients and/or former clients are protected.
7. On information and belief, there remain funds belonging to clients or third parties on deposit in trust or fiduciary accounts held solely in the name of MIDD Attorney. At the time of his [death disability, disappearance], MIDD Attorney had no partners or associates capable of

carrying out his obligations under Rules 1.15-1 through 1.15-3 of the Revised Rules of Professional Conduct.

8. Trustee Name, an attorney licensed to practice in North Carolina and a member in good standing of JD# Judicial District Bar, has indicated that he is willing to serve as trustee of the North Carolina law practice of MIDD Attorney, pursuant to Section .0122 of the Discipline & Disability Rules of the North Carolina State Bar, for the purpose of protecting the interests of MIDD Attorney's clients.

9. Trustee Name's mailing address is: <address>.

WHEREFORE, the Petitioner prays for:

1. An order appointing Trustee Name, an attorney licensed to practice in North Carolina and a member in good standing of JD# Judicial District Bar, to serve as trustee of the law practice of MIDD Attorney, and authorizing Trustee Name to gain possession of MIDD Attorney's client files, to secure MIDD Attorney's trust and/or fiduciary accounts, to gain possession of MIDD Attorney's attorney trust and/or fiduciary account records (including all bank statements, all canceled checks (front and back), all deposit slips, all check stubs and all client ledger cards) and to take such actions as are necessary to protect the interests of the clients and/or former clients of MIDD Attorney; and

2. For such other and further relief as the Court deems appropriate.

Respectfully submitted, this the ____ day of _____, 2003.

A. Root Edmonson
Deputy Counsel
The N.C. State Bar
P.O. Box 25908
Raleigh, N.C. 27611
(919) 828-4620

VERIFICATION

I, L. Thomas Lunsford, after being first duly sworn, depose and say as follows:

1. I am the Director of the North Carolina State Bar.

2. As Director of the North Carolina State Bar, I am an official custodian of the records of the North Carolina State Bar.

3. As an official custodian of the records, I hereby certify that the records of the North Carolina State Bar reflect the facts attributed to those records set forth in the foregoing Petition.

4. I hereby certify that the facts set forth upon information and belief are believed to be true by the Petitioner.

5. I hereby indicate my request for the appointment of an attorney licensed to practice law in North Carolina as trustee for the law practice of [deceased, disabled, missing, disbarred attorney], MIDD Attorney, to gain possession of MIDD Attorney's client files, to secure MIDD Attorney's trust and/or fiduciary accounts, to gain possession of MIDD Attorney's attorney trust and/or fiduciary account records and funds, and to protect the interests of his clients and/or former clients.

This the _____ day of _____, 2003.

L. Thomas Lunsford, Director
The North Carolina State Bar

Subscribed and sworn before me

this the ___ day of _____, 2003.

Notary Public

My commission expires:

Ex. 2

STATE OF NORTH CAROLINA

COUNTY NAME COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
BEFORE THE SENIOR RESIDENT
SUPERIOR COURT JUDGE OF THE
JD# JUDICIAL DISTRICT

IN RE: MIDD ATTORNEY,
ATTORNEY AT LAW

)
)
)
)
)

ORDER APPOINTING TRUSTEE
OR CONSERVATOR

THIS CAUSE coming before the Senior Resident Superior Court Judge of the JD# Judicial District, pursuant to N.C. Gen. Stat. § 84-28(j) and 27 N.C. Admin. Code Chapter 1, Subchapter B, Rule .0122 of the Discipline & Disability Rules of the North Carolina State Bar, upon the verified petition of the North Carolina State Bar for an order appointing a trustee of the law practice of MIDD Attorney, owing to his [death, disappearance, disbarment, disability]; and based upon the petition before the Court, the undersigned makes the following:

FINDINGS OF FACT

1. According to the records of the North Carolina State Bar, MIDD Attorney was licensed to practice law on <date>. At the time of his [death disability, disbarment, disappearance], MIDD Attorney practiced law in County Name County, North Carolina.
2. According to the records of the North Carolina State Bar, the last address of record for MIDD Attorney is <address>.
3. MIDD Attorney [died, was disabled, was disbarred or disappeared] on <date>.
4. At the time of his [death, disability, disbarment; disappearance] MIDD Attorney had no partners or associates capable of winding down his law practice and ensuring that the interests of his clients and/or former clients are protected.
5. There remain funds belonging to clients or third parties on deposit in trust or fiduciary accounts held solely in the name of MIDD Attorney. At the time of his [death, disability, disbarment, disappearance] MIDD Attorney had no partners or associates capable of carrying out his obligations under Rules 1.15-1 through 1.15-3 of the Revised Rules of Professional Conduct.

6. **Trustee Name**, an attorney licensed to practice in North Carolina and a member in good standing of **JD#** Judicial District Bar, has indicated that **he** is willing to serve as trustee of the North Carolina law practice of **MIDD Attorney**, pursuant to Section .0122 of the Discipline & Disability Rules of the North Carolina State Bar, for the purpose of protecting the interests of **MIDD Attorney's** clients.

7. **Trustee Name's** mailing address is: **<address>**.

BASED UPON THE FOREGOING FINDINGS OF FACT, the undersigned makes the following:

CONCLUSIONS OF LAW

1. The Court has jurisdiction of this cause pursuant to N.C. Gen. Stat. § 84-28(j).

2. **MIDD Attorney**, has [died, become disabled, disbarred or disappeared] and has no partners or associates, necessitating the appointment of a member of the **JD#** Judicial District Bar as trustee of **MIDD Attorney's** law practice, to gain possession of **MIDD Attorney's** client files, to secure **MIDD Attorney's** trust and/or fiduciary accounts, to gain possession of **MIDD Attorney's** trust and/or fiduciary account records (including all bank statements, all canceled checks [front and back], all deposit slips, all check stubs and all client ledger cards), and to take such actions as are necessary to protect the interests of the clients and/or former clients of **MIDD Attorney**.

THE COURT THEREFORE ORDERS THAT:

1. **Trustee Name**, an attorney licensed to practice law in North Carolina and a member in good standing of the **JD#** Judicial District Bar, is hereby appointed trustee of the law practice of **MIDD Attorney**.

2. As Trustee, **Trustee Name** is authorized to take such actions as are necessary to obtain possession of any known client files of **MIDD Attorney** and shall notify **MIDD Attorney's** clients of **his** [death, disability, disbarment or disappearance] and their need to obtain new counsel. **His** duties as trustee shall include receiving calendar notices and moving for appropriate continuances in the various courts; returning files to **MIDD Attorney's** clients and/or former clients; obtaining all records related to **MIDD Attorney's** trust and/or fiduciary account(s); supervising the disbursement of funds from any trust and/or fiduciary accounts to the appropriate persons; and any other act necessary to wind down **MIDD Attorney's** practice and protect the interests of **MIDD Attorney's** clients until all known clients have secured other legal counsel, have chosen to pick up their files and have received all money held in trust for their benefit. As Trustee, **Trustee Name** is authorized to take such actions as are necessary to identify **MIDD Attorney's** trust and fiduciary accounts, as such accounts are defined in Rule 1.15-1 of the Revised Rules of Professional Conduct, and to obtain possession of **MIDD Attorney's** trust account and fiduciary account records. As Trustee, **Trustee Name** shall take such actions necessary to

identify the ownership of any funds in such accounts so that the clients/beneficiaries may be reimbursed, or their funds forwarded as they may direct. As Trustee, **Trustee Name** shall maintain adequate accounts of the funds held in **MIDD Attorney's** attorney trust or fiduciary accounts and shall account to the Court for approval annually or at the completion of the disbursement of the funds. **He** shall be discharged as Trustee upon the completion of **his** duties.

3. As Trustee, **Trustee Name** is hereby authorized to take such actions as are necessary to secure **MIDD Attorney's** trust and fiduciary accounts, including, but not limited to, executing new directives regarding signatory authority over such accounts. As Trustee, **Trustee Name** is also authorized to obtain records relevant to **MIDD Attorney's** attorney trust and/or fiduciary accounts from all financial institutions where accounts in which funds of client or fiduciary funds have been or are deposited by or in the name of **MIDD Attorney**, and to execute authorizations directing such financial institutions to release copies of all relevant records relating to such accounts to representatives of the North Carolina State Bar.

4. This cause is retained for further orders of this Court.

This the ____ day of _____, 2003.

Honorable **<name>**
Senior Resident Superior Court Judge
JD# Judicial District

[ADD IN CASES OF DECEASED ATTORNEYS]

Trustee Name, as trustee, is to be entitled to be paid for the services rendered from the estate of **MIDD Attorney** and to be reimbursed for all reasonable expenses, including expenses for employment of assistants, and shall file a statement with the court for approval of the fees and expenses which will then be submitted to the resident superior court judge for payment from the estate of **MIDD Attorney**.

Ex. 3

Client Files Inventoried by Trustee

<u>Client Name</u>	<u>File No.</u>	<u>Nature of Legal Matter</u>
William Bell	88 CRS 4011	DWI appeal (Closed)
Martha Drake	None	Will (original in file)
John Jones	93 CVD 101	Divorce, Equitable Distribution (open)
Sally Smith	89 CVS 13	Personal injury; settled In 1990 (closed)

Ex. 4

Date

Client Name

Client Address

Re: MIDD Attorney

Dear []:

As you may know, MIDD Attorney has [died, was disbarred, has become disabled or is missing]. Pursuant to a court order entered by Honorable [] on <date>, I have been appointed trustee of the law practice of MIDD Attorney. As trustee, I am responsible for ascertaining the status of MIDD Attorney's trust accounts and obtaining and preserving his client files.

As trustee, I do not represent you or any of MIDD Attorney's former clients. You should immediately make arrangements to retain a new attorney to represent you regarding any ongoing legal matters in which you are engaged if you have not already done so. If you would like the names of attorneys who might be willing to assist you, please let me know.

As trustee, I have in my possession MIDD Attorney's client files. Please make arrangements to come by to pick up your file as soon as possible. Please call before you come so that we may have your file ready when you arrive. Before I deliver your file to you, you must sign a written release authorizing its transfer and acknowledging receipt of the file. As a matter of security, please bring some form of identification, so that we may avoid releasing files to unauthorized persons.

Files that are not picked up will be disposed of by court order.

Thank you for your cooperation.

Sincerely yours,

Trustee of Law Practice of MIDD Attorney

[Include following paragraph only if MIDD attorney has been disbarred for misappropriation of client funds.]

[If you believe that you lost money as the results of dishonest conduct of MIDD Attorney, you may wish to file a claim with the Client Security Fund of the N.C. State Bar. Before pursuing a claim with the Fund, the client should exhaust all other remedies available to recover the money lost. The Client Security Fund is not obligated to pay any claims and has discretion to determine the amount and manner of any payments made. If you wish to obtain a claim form or to discuss a claim, you may contact the N.C. State Bar, P.O. Box 25908, Raleigh, NC 27611, 919 828-4620.]

Ex. 5

NOTICE

Trustee Name, the court appointed trustee for the law practice of **MIDD Attorney**, hereby notifies the public and members of the **JD#** district bar that **MIDD Attorney's** client files are begin held at **<address>**. Clients of **MIDD Attorney** and attorneys who represent former clients of **MIDD Attorney** may arrange to obtain the client files, if any, by contacting **Trustee Name**.

MIDD Attorney's client files will be disposed of by court order if not picked up by **<date>**.

Ex. 6

ACKNOWLEDGEMENT OF RECEIPT OF FILE

I, **Client Name**, of **address**, hereby acknowledge that I have received my file materials from the office of **MIDD Attorney** in the matter of **<file # etc.>**.

I understand that **MIDD Attorney** has [died, was disbarred, is disabled or is missing]. I have been notified that I should retain substitute counsel immediately to handle any ongoing legal matters in which I am involved.

This the _____ day of _____, 2003.

Printed Name

Signature

Address

Telephone

FOR OFFICE USE:

Form of identification presented: _____

Date of identification: _____

Approved by: _____

Ex. 7

STATE OF NORTH CAROLINA

COUNTY NAME COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
BEFORE THE SENIOR RESIDENT
SUPERIOR COURT JUDGE OF THE
JD# JUDICIAL DISTRICT

IN RE: ATTY NAME,)	
ATTORNEY AT LAW)	
)	MOTION FOR ORDER
DECEASED)	ALLOWING DISBURSEMENT
)	OF CLIENT FUNDS
)	

NOW COMES the trustee-conservators of the law practice of **Atty Name**, a deceased attorney, and respectfully request the **County Name** County Superior Court to enter an order permitting the disbursement of certain funds in the trust account of Mr. **Atty Last Name**. In support of their motion, the trustee-conservators show as follows:

- 1) **Atty Name** died on or about **<date>**, leaving no partners or associates capable of winding down his law practice.
- 1) On or about **<date>**, **Hon. <judge>** appointed **Trustee Name** as trustee-conservator of the law practice of **Atty Name**.
- 2) Following the appointment, the undersigned trustee of **Atty Name's** practice, took possession of records relating to the attorney trust account maintained by **Atty Name** at **<bank>**, account number **<>** for the purpose of determining the ownership of the funds in the account.
- 3) With the assistance of the staff of the N.C. State Bar, the trustee-conservator has reviewed the trust account for the period **<dates>**.
- 4) As of **<date>**, the balance in **Atty Name's** attorney trust account at **<bank>** was \$.
- 5) The State Bar's investigation reflects that the following sums are owed to former clients of **Atty Name** and others from the sums on deposit in the trust account:

Payee	Amount Due	For

Total

6) Despite their efforts, neither the trustee-conservator nor the State Bar has been able to determine the owners of the remaining \$_____ in the trust account of **Atty Name**.

7) Neither the trustee-conservator nor the State Bar has received notice of any claim from any former client of **Atty Name** or any other individual or entity.

8) As of the date of this motion, the trustee-conservator is informed and believes that no individual had qualified as the administrator of **Atty Last Name's** estate. The trustee-administrator will serve <>, **Atty Last Name's** closest known surviving relative, with a copy of this motion. § 6-31.

9) N.C.G.S. § 116B-31.5 provides that unidentified funds in an attorney's trust account may be escheated to the State of North Carolina.

WHEREFORE, the trustee-conservator hereby moves the Court to enter an order permitting the trustee-conservator to

1) disburse \$_____ of the funds in the trust account of **Atty Name** as set out in paragraph 6 herein and

2) escheat the remaining \$_____ to the Treasurer of the State of North Carolina pursuant to N.C.G.S. § 116B-31.5.

This the _____ day of _____, 2003.

Trustee Name
Trustee-Conservator of the
Law Practice of **Atty Name**

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Motion to Disburse Funds was served upon persons known to have a potential interest in funds in the trust account of **Atty Name**, by depositing copies thereof into the U.S. Mail in a postage prepaid envelope addressed as follows:

<>
address

<>
address

This the ____ day of _____, 2003.

Trustee Name

Ex. 8

STATE OF NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
BEFORE THE SENIOR RESIDENT
SUPERIOR COURT JUDGE OF THE
JD# JUDICIAL DISTRICT

COUNTY NAME COUNTY

IN RE: ATTY NAME,
ATTORNEY AT LAW

DECEASED

)
)
)
)
)
)

ORDER ALLOWING
DISBURSEMENT
OF CLIENT FUNDS

THIS MATTER came on to be heard and was heard on the ____ day of _____, 2000, by the undersigned Superior Court Judge pursuant to N.C.G.S. §84-28(j) on the motion of the N.C. State Bar for an order disbursing certain funds held in the bank accounts of Atty Name, a deceased attorney. Based upon the pleadings herein and the evidence introduced at the hearing, the Court makes the following:

FINDINGS OF FACT

- 1) Atty Name died on or about <date>, leaving no partners or associates capable of winding down his law practice.
- 2) On or about <date>, Hon. <judge> appointed Trustee Name as trustee-conservator of the law practice of Atty Name.
- 3) Following the appointment of Mr. Trustee Name as trustee-conservator of Atty Name's practice, the trustee-conservator took possession of records relating to the attorney trust account maintained by Atty Name at <bank>, account number <>.
- 4) With the assistance of the staff of the N.C. State Bar, the trustee-conservator has reviewed the trust account for the period <dates>, for the purpose of determining the ownership of the funds in the account.
- 5) As of <date>, the balance in Atty Name's attorney trust account at <bank> was \$ _____.
- 6) The State Bar's investigation reflects that the following sums are owed to former clients of Atty Name and others from the sums on deposit in the trust account:

Payee	Amount Due	For

Total

7) [Despite the efforts of the trustee-conservators and the State Bar, the Bar has been unable to determine the owners of the remaining \$_____ in the trust account of **Atty Name**.]

8) The costs of this action include \$65.00 in filing fees and \$_____ for advertisement of legal notice which funds were advanced by **Trustee Name** as trustee.

9) Neither of the trustee-conservators nor the State Bar has received notice of any claim from any former client of **Atty Name** or any other individual or entity.

Based upon the foregoing findings of fact, the Court makes the following:

CONCLUSIONS OF LAW

1. The Court has jurisdiction of this matter pursuant to NCGS §84-28(j).
2. The funds in **Atty Name's** trust account need to be disbursed to **Atty Name's** former clients as determined by the trustee-conservator's analysis of the trust account.
3. [N.C.G.S. § 116B-31.5 provides that unidentified funds in an attorney's trust account may be escheated to the State of North Carolina.]
4. The costs are properly assessed against the available funds pursuant to N.C.G.S. § 6-31.

Based upon the foregoing Findings of Fact and Conclusions of Law, the Court enters the following:

ORDER DISBURSING FUNDS

1) The conservator-trustees of the law practice of **Atty Name** are hereby authorized to disburse the following sums from the trust account of **Atty Name** at **<bank>**.

- a) \$_____ to the payees set out in paragraph 6 of the Findings of Fact herein;
- b) \$_____ to **Trustee Name**, trustee, for the costs.
- c) [\$_____ to the Treasurer of the State of North Carolina pursuant to N.C.G.S. § 116B-31.5.]

This the _____ day of _____, 2003.

Honorable <>
Superior Court Judge Presiding

Ex. 9

Name
Personal Representative/Executor
Estate of [Deceased Attorney]
Address

Re: Notice of Pending Claim Against Estate of **MIDD Attorney**

Dear Personal Representative/Executor:

As you may know, I have been appointed trustee-conservator of the law practice of **MIDD Attorney** for the purpose of winding down the practice in an orderly manner. A copy of the order is enclosed. Please accept this letter as notice that I plan to apply to the court for compensation from the estate of **MIDD Attorney** for my services as trustee-conservator following the wind down of the practice. Pursuant to N.C. Gen Stat. § 84-28 (j), compensation to a trustee-conservator of a deceased attorney's law practice is considered an administrative expense of the estate for purposes of determining priority of payment.

Please feel free to call if you have questions or wish to discuss this matter. Thank you very much.

Sincerely yours,

Trustee-Conservator
Law Practice of **MIDD Attorney**

Ex. 10

STATE OF NORTH CAROLINA

COUNTY NAME COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
BEFORE THE RESIDENT
SUPERIOR COURT JUDGE OF THE
JD# JUDICIAL DISTRICT
File Number

IN RE: ATTY NAME,
ATTORNEY AT LAW

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PETITION FOR ORDER
DISCHARGING TRUSTEE OF
LAW PRACTICE OF ATTY NAME

NOW COMES, **Trustee Name**, trustee of the law practice of **Atty name** (“Trustee”), and petitions the Court for an order discharging him as trustee of the law practice of **Atty name**. In support of the petition, the Trustee respectfully shows:

1. On **<date>**, upon motion of the N.C. State Bar, the Court appointed **Trustee Name**, Esq., as trustee-conservator of the law practice of **Atty name** for the purpose of obtaining possession of files belonging to **Atty name’s** clients, securing funds held in **Atty name’s** trust and/or fiduciary accounts, obtaining **Atty name’s** trust and/or fiduciary account records, and protecting the interests of the clients and/or former clients of **Atty name**.

2. The undersigned Trustee has now taken all reasonable steps within **his** power to fulfill **his** obligations as trustee-conservator of the law practice of **Atty name**. **He** has returned or attempted to return all client files to their rightful owners. **He** has secured funds held in **Atty name’s** trust or fiduciary accounts and has identified or attempted to identify the persons to whom those funds belong.

3. The undersigned Trustee has reviewed **Atty name’s** clients’ files. An inventory of the client files is attached as Exhibit A.

4. The undersigned Trustee has distributed files to a number of clients and/or former clients of **Atty name**. The Trustee has returned all active client files to the respective clients. A list of the files which have been returned to **Atty name’s** clients is attached hereto as Exhibit B.

5. A number of **Atty name’s** clients, have not picked up their files, despite receiving notice from the Trustee to do so. **[Description of files remaining to be claimed or distributed to clients and description of steps taken to notify clients, for example:** The Trustee now has in **his** possession 5 or less closed client files wherein **he** has written the

respective clients and has received no instructions regarding the storage or return of the files]. A list of the files which have not been claimed by the clients is attached hereto as Exhibit C.

6. Some disposition needs to be made of the remaining files of **Atty name's** former clients. **[Any proposal for storage or disposition needs to be included here, for example:** The Trustee has indicated that **he** is willing to store the remaining closed files at **his** law offices located at **<address>**, and make the files available to the respective clients or their legal representatives should they wish to retrieve them for a period of one year from the date of any order discharging him as trustee, at which time he would destroy any unclaimed files.]

7. The undersigned Trustee has disbursed all funds from any trust and/or fiduciary accounts held by **Atty name** to the appropriate persons. An order approving said disbursements is attached hereto as Exhibit D and an accounting of said disbursements is attached thereto.

8. **[Is there any unclaimed money?]**

9. The undersigned Trustee has submitted a summary of his time and expenses incurred in serving as trustee of the law practice of **Atty name**. The summary of **his** time and expenses is attached hereto as Exhibit E. In carrying out his duties as trustee-conservator, the undersigned Trustee has provided services and incurred expenses in the total amount of \$_____.

WHEREFORE, the undersigned Trustee respectfully requests the court to enter an order as follows:

1. Discharging **him** as trustee of the law practice of **Atty name**;
2. Allowing **him** to retain the unclaimed files of clients of **Atty name** for one year of the date of this order, after which time **he** should be authorized to destroy any files of clients of **Atty name** that remain unclaimed **[or any alternative proposal for disposition of files]**; and
3. Finding that **he** is entitled to reasonable compensation for his services as trustee of the law practice of **Atty name** and reimbursement of expenses incurred while serving as trustee of the law practice of **Atty name** in the amount of \$_____.

This the ___ day of _____, 2003.

Trustee Name, Trustee of the
Law Practice of **Atty name**

Attachment to Petition for Order Discharging Trustee

EXHIBIT A

List of Clients to Whom Letters Requesting Pick Up of File Were Sent

Name	Date
Client A	Jan. 1, 2003
Client B	Jan. 2, 2003

Attachment to Petition for Order Discharging Trustee

EXHIBIT B

List of Files Distributed to Clients of **MIDD Attorney**

Name	File Number	Date Delivered To Client
Client A	Smith v. Smith 93 CVS 1200	Jan. 1, 2003
Client B	In re Foreclosure (MIDD Atty File No.)	Jan. 3, 2003

Attachment to Petition for Order Discharging Trustee

EXHIBIT C

List of Files of Clients Deposited
With the Clerk of Superior Court on <date>

Names

File No.

Attachment to Petition for Order Discharging Trustee

EXHIBIT D

Final Notice to Clients

TO CLIENTS OF **MIDD Attorney**

By letter dated _____, 2003, you were advised that **MIDD Attorney** has [died, became disabled, was disbarred or has disappeared] and that you should make arrangements to pick up your file and obtain a new attorney to represent you in any ongoing legal matters.

To date, neither you nor anyone on your behalf has made arrangements for picking up your file. As of the date of this letter, all active case files of **MIDD Attorney** will be transferred to the custody of the Clerk of <> County, <address>.

No action will be taken on your behalf with respect to any legal matters for which you sought legal advise from **MIDD Attorney**. To preserve any rights you may have, you should seek legal counsel immediately.

Sincerely yours,

Trustee

Attachment to Petition for Order Discharging Trustee

EXHIBIT E

Statement of Service Rendered by Trustee
of Law Practice of **MIDD Attorney**

Service	Time/Hours
---------	------------

Review of files	
Letters to clients	
Discussions with clients	
Preparation of documents	
Court appearance	
Conferences with State Bar & Court	
TOTAL HOURS x \$_____ per hour	TOTAL

Extra Secretarial Help _____ Hours x. \$_____ per hour	
Long distance calls	
Fax costs	
Postage & Mailing	
Photocopying charges	TOTAL

Ex. 11

STATE OF NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
BEFORE THE RESIDENT
SUPERIOR COURT JUDGE OF THE
JD# JUDICIAL DISTRICT
File Number

COUNTY NAME COUNTY

IN RE: ATTY NAME,
ATTORNEY AT LAW

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)

ORDER DISCHARGING
TRUSTEE

THIS MATTER coming on to be heard and being heard by the undersigned Chief Resident Superior Court Judge of the JD# Judicial District upon the motion of the trustee herein for an order discharging him as trustee of the law practice of Atty name, the Court makes the following:

FINDINGS OF FACT

1. On <date>, upon motion of the N.C. State Bar, the Court appointed Trustee Name, Esq., as trustee-conservator of the law practice of Atty name for the purpose of obtaining possession of files belonging to Atty name's clients, securing funds held in Atty name's trust and/or fiduciary accounts, obtaining Atty name's trust and/or fiduciary account records, and protecting the interests of the clients and/or former clients of Atty name.

2. Trustee Name, trustee of the law practice of Atty name, has now taken all reasonable steps within his power to fulfill his obligations as trustee-conservator of the law practice of Atty name. He has returned or attempted to return all client files to their rightful owners. He has secured funds held in Atty name's trust or fiduciary accounts and has identified or attempted to identify the persons to whom those funds belong.

3. Trustee Name has reviewed Atty name's clients' files. An inventory of the client files is attached as Exhibit A.

4. Trustee Name has distributed files to a number of clients and/or former clients of Atty name. Trustee Name has returned all active client files to the respective clients. A list of the files which have been returned to Atty name's clients is attached hereto as Exhibit B.

5. A number of Atty name's clients, have not picked up their files, despite receiving notice from the Trustee Name to do so. [Description of files remaining to be claimed or distributed to clients and description of steps taken to notify clients, for

example: Trustee Name now has in his possession 5 or less closed client files wherein he has written the respective clients and has received no instructions regarding the storage or return of the files]. A list of the files that have not been claimed by the clients is attached hereto as Exhibit C.

6. Some disposition needs to be made of the remaining files of Atty name's former clients. [Any proposal for storage needs to be included here, for example: Trustee Name has indicated that he is willing to store the remaining closed files at his law offices located at <address>, and make the files available to the respective clients or their legal representatives should they wish to retrieve them for a period of one year from the date of any order discharging him as trustee, at which time he would destroy any unclaimed files.]

7. Trustee Name has disbursed all funds from any trust and/or fiduciary accounts held by Atty name to the appropriate persons. An order approving said disbursements is attached hereto as Exhibit D and an accounting of said disbursements is attached thereto.

8. [Is there any unclaimed money?]

9. Trustee Name has submitted a summary of his time and expenses incurred in serving as trustee of the law practice of Atty name. The summary of his time and expenses is attached hereto as Exhibit E. In carrying out his duties as trustee-conservator, Trustee Name has provided services and incurred expenses in the total amount of \$_____.

Based upon the foregoing FINDINGS OF FACT, the Court enters the following:

CONCLUSIONS OF LAW

1. Trustee Name, trustee of the law practice of Atty name, has taken all reasonable steps in his power to fulfill his obligations as trustee-conservator of the law practice of Atty name, to obtain the return of all client files, and to disburse all funds in Atty name's trust or fiduciary accounts.

2. Trustee Name is entitled to an order discharging him as trustee-conservator of the law practice of Atty name.

3. Trustee Name is entitled to reasonable compensation for his services rendered and reimbursement of expenses incurred while serving as trustee-conservator of Atty name's law practice in the amount of \$_____.

4. Trustee Name should be authorized to [add provision regarding disposal of any remaining client files, as proposed by trustee, for example: maintain in storage at his law office for a period of one year from the date of this order those few closed client files that have not yet been retrieved by the clients of Atty name, after which he should be

authorized to destroy any files of clients of **Atty name** that remain unclaimed, after making a reasonable attempt to remove from said files any original documents that may have independent legal significance, such as original wills and stock certificates and the like. **Trustee Name** shall retain any such original documents at **his** law office for a period of ___ years, at which time **he** should be authorized to destroy all unclaimed documents.]

WHEREFORE it is hereby ORDERED, ADJUDGED AND DECREED as follows:

1. **Trustee Name** is hereby discharged as trustee-conservator of the law practice of **Atty name**.
2. [Provision regarding disposal of files, as proposed above, for example: **Trustee Name** is hereby authorized to maintain in storage at **his** law office for a period of one year from the date of this order those few closed client files that have not yet been retrieved by the clients of **Atty name**, after which **he** is authorized to destroy any files of clients of **Atty name** that remain unclaimed, after making a reasonable attempt to remove from said files any original documents that may have independent legal significance, such as original wills and stock certificates and the like. **Trustee Name** shall retain any such original documents at **his** law office for a period of ___ years, at which time **he** is authorized to destroy all unclaimed documents.]
3. [In the event of disability/disbarment/abandonment: the attorney whose law practice the trustee wound down is ordered to pay compensation and expenses to trustee: **Atty name** is hereby ordered to pay \$_____ to **Trustee Name** as reasonable compensation for **his** services as trustee for the law practice of **Atty name** and reimbursement for expenses incurred by **Trustee Name** while serving as trustee-conservator of **Atty name's** law practice. This order is deemed a judgment against **Atty name** for money owed, subject to enforcement under the applicable laws of North Carolina.¹ **Trustee Name's** claim against **Atty name** for payment of money owed is subject to assignment to the North Carolina State Bar to the extent that **Trustee Name's** claim is paid in whole or in part by the State Bar.]

[In the event of death, the deceased attorney's estate is ordered to pay compensation and expenses to trustee: _____ is entitled to reasonable compensation for his services as trustee for the law practice of _____ and reimbursement for expenses incurred by **him** while serving as trustee in the amount of \$_____. Said compensation and expenses are to be paid by the Estate of _____, pursuant to N.C. Gen. Stat. § 84-28(j), as an administrative expenses of the Estate upon presentation of this Order.]

¹ Note: To the extent that the trustee or the State Bar may seek to enforce the order as a judgment against the respondent attorney, the trustee should attempt to serve a copy of the petition seeking discharge and notice of hearing on the respondent attorney, so that he or she will have notice and opportunity to be heard. See attached Form Notice of Hearing.

This the ____ day of _____, 2003.

Resident Superior Court Judge
JD# Judicial District

Appendix C

RESOLUTION ADOPTED BY NEW YORK
STATE BAR ASSOCIATION HOUSE OF
DELEGATES
JUNE 25, 2005

WHEREAS, the Special Committee on Law Practice Continuity was appointed in April 2002 to address the practical, legal and ethical issues raised by the death, disability or disappearance of solo practitioners and small firm lawyers; and

WHEREAS, the Special Committee has issued a report proposing (1) a uniform court rule to govern the appointment of a caretaker attorney for the practice of an attorney who has died or otherwise become unable to practice law; (2) consideration of an amendment to the Civil Practice Law and Rules to provide a stay in court proceedings when a caretaker attorney has been appointed; and (3) designation of the Special Committee as a standing committee;

Now, therefore, it is

RESOLVED, that the New York State Bar Association approves the recommendation of the Special Committee with respect to the adoption of a uniform court rule to govern the appointment of caretaker attorneys; and it is

FURTHER RESOLVED, that the NYSBA Committee on Civil Practice Law and Rules is hereby designated to evaluate and draft appropriate statutory amendments to provide a stay in court proceedings or appeals when a caretaker attorney has been appointed; and it IS

FURTHER RESOLVED, that the Special Committee on Law Practice Continuity is hereby established as a standing committee of the Association, and is charged with (1) continued educational efforts to assist solo practitioners and small firm attorneys to plan ahead for the possibility of sudden absence from practice and (2) to serve as a source for volunteer caretaker attorneys in those instances in which a local bar association is not available to provide volunteers; and it is

FURTHER RESOLVED, that the officers of the New York State Bar Association are hereby empowered to take such other and further steps as they may deem warranted to implement this resolution.

June 27, 2005

**PROPOSED UNIFORM COURT RULE ON THE APPOINTMENT OF CARETAKER
ATTORNEYS**

22 NYCRR Part 1250

**Client Protection; Voluntary or Involuntary Cessation of Law Practice; Caretaker
Attorneys**

- 1250.1 Application
- 1250.2 Who May Seek Appointment of a Caretaker Attorney
- 1250.3 Request for Appointment of a Caretaker Attorney
- 1250.4 Appointment of a Caretaker Attorney
- 1250.5 Duties and Role of a Caretaker Attorney
- 1250.6 Compensation of a Caretaker Attorney
- 1250.7 Bar Association Involvement
- 1250.8 Lawyer Assistance Committee Designation

1250.1 Application

(a) This rule shall apply to an attorney who:

- (1) has resigned or been suspended or disbarred from the practice of law pursuant to Judiciary Law §90(2) or (4), or who is under investigation by a departmental disciplinary committee, a grievance committee or a committee on professional standards;
 - (2) has been judicially declared incompetent or incapable of caring for his or her property; involuntarily committed to a mental hospital, alleged or found to be incapacitated from continuing to practice law by reason of physical or mental illness or infirmity or because of addiction to drugs or intoxicants, or for whom a guardian has been appointed pursuant to Article 81 of the Mental Hygiene Law;
 - (3) has disappeared or abandoned the practice of law;
 - (4) has retired;
 - (5) has died; or
 - (6) has otherwise become unable to practice law, either temporarily or permanently.
- (b) In the event an attorney to whom this rule applies has made adequate provision for the protection of his or her clients in compliance with court rules or court order, or by contract, designation or other arrangement, such provision shall govern to the extent consistent with these rules unless the Appellate Division or Supreme Court determines, upon a showing of good cause, that these rules should be invoked. If the attorney is practicing in a law partnership, professional corporation or limited liability company, this rule shall not be invoked unless a court determines, upon a showing of good cause, that the entity in which the attorney practiced is no longer legally responsible for or able to handle matters previously entrusted to the attorney.

- (c) The purpose of this rule is to protect clients and, to the extent possible and not inconsistent with the protection of clients, to protect the interests of the attorney to whom this rule applies.
- (d) "Respondent", as used in this rule, applies to an attorney who has been disciplined, or is subject to discipline, pursuant to Judiciary Law §90(2) or (4). "Assisted Attorney" refers to an attorney who is not subject to disciplinary proceedings, but to whom this rule otherwise applies. "Caretaker Attorney" shall mean an attorney appointed by a court pursuant to this rule who shall be a member of the Bar of the State of New York in good standing and who may be a member of a law practice continuity committee. An attorney may designate another attorney by contract, appointment or other arrangement to handle or assist in the continued operation, sale or closing of the attorney's law practice in the event of such attorney's death, incapacity or unavailability. An attorney so designated may seek appointment as a "caretaker attorney" under this rule.

1250.2 Who May Seek Appointment of a Caretaker Attorney

- (a) Related to an attorney discipline matter. A departmental disciplinary committee, grievance committee or committee on professional standards may commence a proceeding for the appointment of a caretaker attorney or attorneys in the Appellate Division. In the event that more than one proceeding pertaining to a respondent or assisted attorney is commenced under this rule, the proceedings shall be consolidated before the Appellate Division, which may appoint a caretaker attorney or attorneys, as it deems appropriate.
- (b) Not related to an attorney discipline matter. A member of a bar association law practice continuity committee (defined in §1250.7, below), an attorney licensed to practice law in this state, or any other interested person, may commence a proceeding for the appointment of a caretaker attorney or attorneys, either in the Appellate Division or in the Supreme Court of the county in which the respondent or assisted attorney last resided or maintained his or her office. In the case of an attorney who is alleged to have disappeared or abandoned his or her law practice, a proceeding may not be commenced until a reasonable time has elapsed after the attorney's disappearance or abandonment.

1250.3 Request for Appointment of a Caretaker Attorney

- (a) The proceeding shall be commenced by an order to show cause supported by petition or affidavit for the appointment of a caretaker attorney or attorneys, pursuant to §1250.2, which, unless the court orders otherwise, shall be served personally upon the respondent or assisted attorney, upon at least one of the attorney's partners, if any, the attorney's guardian or other responsible party capable of conducting the attorney's financial affairs, or the personal representative of the attorney's estate, if the attorney is deceased; or in such manner and upon such persons as the court directs.
- (b) The respondent or assisted attorney or his or her personal representative may designate a caretaker attorney and the court shall respect such designation unless the court determines, upon a showing of good cause, that such designation should be set aside.

- (c) All papers, records and documents pertaining to any proceeding commenced under this rule shall be closed and remain confidential until the court directs disclosure of the matter, upon a finding that such disclosure will not prejudice the interests of the respondent or assisted attorney or his or her clients. However, the court may take necessary steps to protect the interests of the attorney's clients, including notification of the proceeding to appropriate disciplinary agencies, to courts to which similar applications have been made, and to other interested persons or entities. Unless the court determines otherwise upon a showing of good cause, the court shall direct that personal or medical information pertaining to the respondent or assisted attorney and information pertaining to such attorney's clients, including their identities and the nature of their matters, be sealed.

1250.4 Appointment of a Caretaker Attorney

- (a) Upon the filing of an application pursuant to 1250.3(a) for the appointment of a caretaker attorney, the court may:
- (1) order an examination of the attorney by qualified medical and psychological experts if the respondent or assisted attorney is alleged to be incapacitated, disabled or incompetent to practice law;
 - (2) appoint an attorney to represent the respondent or assisted attorney if he or she is without adequate representation;
 - (3) appoint a *guardian ad litem* for the respondent or assisted attorney if the court has reason to believe that the attorney has a physical or mental illness or infirmity that may render the attorney incapable to practice law;
 - (4) direct that a hearing be held to determine whether a caretaker attorney should be appointed and pending such hearing:
 - i. limit the disbursement of funds from the respondent or assisted attorney's escrow, special or operating accounts;
 - ii. restrict the transfer or removal of files and client property from the respondent or assisted attorney's office;
 - iii. direct the preparation of a list of all clients, matters pending before any court, tribunal or administrative agency and non-litigated matters entrusted to the attorney;
 - iv. appoint a temporary caretaker attorney; and
 - v. take such other action as is necessary to protect the interests of the clients and the respondent or assisted attorney;
 - (5) dismiss the proceeding.
- (b) If the court determines upon a showing by clear and convincing evidence that the appointment of a caretaker attorney is necessary to protect the interests of the respondent's or assisted attorney's clients, the court may appoint a caretaker attorney to:
- (1) take such action as may be indicated to protect the interests of the clients as well as the interests of the respondent or assisted attorney; and

- (2) perform such other specific duties as are described in §1250.5.
- (c) The court shall review requests by the caretaker attorney for compensation and reimbursement, make findings as to the reasonableness and necessity of the expenses, and fix the amount and source of compensation and reimbursement to be paid to any caretaker attorney appointed under this rule.
- (d) The court may order the caretaker attorney to submit interim and final accountings, as it deems appropriate, which shall be served upon the personal representative and the respondent or assisted attorney, if available.
- (e) Upon application by the caretaker attorney, the personal representative or the respondent or assisted attorney, the court may terminate the proceeding and discharge the caretaker attorney upon a showing that the caretaker attorney has completed his or her responsibilities or that such appointment is no longer required to protect the interests of the clients or those of the respondent or assisted attorney.

1250.5 Role, Duties and Authority of a Caretaker Attorney

- (a) The role of a caretaker attorney is to protect the clients of the respondent or assisted attorney and, to the extent possible and not inconsistent with the protection of such clients, to protect the interests of the attorney to whom this rule applies.
- (b) A caretaker attorney appointed by the court shall enter the offices of the respondent or assisted attorney and may, with the assistance of that attorney if possible, do the following, as authorized by the court:
 - (1) prepare an inventory of the matters being handled by the attorney;
 - (2) protect the clients' rights, files and property;
 - (3) notify all clients represented in pending matters of the appointment of the caretaker attorney or attorneys as promptly as possible, personally or by mail, or both, and, unless the practice is likely to be sold or the assisted attorney is likely to resume practice, advise them to seek counsel of their choice;
 - (4) act as interim counsel upon the request of a client;
 - (5) deliver files and property to the clients upon their request, subject to the respondent's or assisted attorney's right to retain copies of such files or assert a retaining or charging lien against such files or property if fees or disbursements for past services rendered are owed to the attorney by the client;
 - (6) collect outstanding attorney's fees, costs and expenses, and make arrangements for the prompt resolution of any disputes concerning outstanding attorney's fees, costs and expenses;

- (7) collect any moneys and safeguard any assets in the office of the respondent or assisted attorney and hold the moneys and assets in trust pending their disposition upon order of the court;
 - (8) request compensation for his or her professional services and reasonable and necessary expenses;
 - (9) to the extent possible, assist and cooperate with the respondent or assisted attorney and his or her representative in the transition, sale or windup of his or her practice;
 - (10) act as signatory on trust, escrow, IOLA, special and operating accounts, disburse funds to clients or other persons entitled thereto, and otherwise safeguard such funds.
 - (11) submit such accountings as the court may require.
- (c) A caretaker attorney shall maintain or procure professional liability coverage with a carrier admitted to do insurance business in New York, which coverage shall insure his or her work as a caretaker attorney under these rules and, if requested, shall present proof of such coverage to the court appointing the caretaker attorney.
- (d) A caretaker attorney shall not disclose any information pertaining to any matter so inventoried or handled without the consent of the client to whom such matter relates, except as necessary to carry out the order of the appointing court.
- (e) In the event of the death, disappearance or incapacity of a sole practitioner, the caretaker attorney and his or her law firm:
- (1) shall not, except upon approval of the court, serve in any other capacity as counsel for the respondent or assisted attorney, or as executor or administrator of, or counsel to, the respondent or assisted attorney's estate ;
 - (2) may assist the respondent or assisted attorney's personal representative, guardian, conservator or other representative, or his or her estate, in the termination or sale of the law practice under DR 2-111 [22 NYCRR 1200.15-a];
 - (3) shall not without the permission of the court represent a client, other than to temporarily protect the interests of the client, except and until the caretaker attorney purchases the law practice as permitted under DR 2-111 [22 NYCRR 1200.15-a];
 - (4) may be eligible to purchase the law practice under DR 2-111 [22 NYCRR 1200.15-a], but only upon the court's approval of such sale.
 - (5) shall provide such accountings to the personal representative, respondent or assisted attorney as the court may direct.

- (f) A caretaker attorney is governed by the Code of Professional Responsibility and the same rules of professional conduct applicable to the respondent or assisted attorney with respect to client matters or files.
- (g) The caretaker attorney shall be deemed to be a member of a Lawyer Assistance Committee under Judiciary Law §499 and DR 1-103 [22 NYCRR 1200.4], except that the caretaker attorney shall be liable to the clients of the respondent or assisted attorney and third parties for acts or omissions outside the scope of these rules or the court order appointing the caretaker attorney.

1250.6 Compensation of a Caretaker Attorney

Upon application, the court may order that the caretaker attorney or attorneys receive compensation for professional services rendered and for reasonable and necessary expenses incurred as a caretaker attorney, to be paid from the assets or estate of the respondent or assisted attorney; or from fees generated from clients of the respondent or assisted attorney; or from such other available source as the court may direct. Unless the court directs otherwise, such application shall be made upon notice to the personal representative, the respondent or assisted attorney and such other persons as the court may specify.

1250.7 Bar Association Involvement

- (a) The New York State Bar Association or any duly established local or specialty bar association may sponsor a law practice continuity committee to assist attorneys who are unable to continue to practice law or appropriately manage their law practices and to address the needs of clients of such attorneys who have not made other arrangement for the representation of their clients or the orderly transition or termination of their law practices. Such law practice continuity committees shall, among other things, recruit attorneys willing to serve as caretaker attorneys; maintain a list of potential caretaker attorneys for consideration by the Supreme Court or Appellate Division when appointing caretaker attorneys; and provide such resources as are available to facilitate the work of appointed caretaker attorneys.
- (b) Executive officers or governing bodies of the respective bar association(s) may appoint members to such law practice continuity committees, or appointment may be made in such other manner as may be provided in the governing rules of the bar associations.
- (c) If a law practice continuity committee is notified by a client, judge, attorney, grievance committee or any other interested party that there is an attorney to whom this rule may apply, the committee shall determine whether it would be in the best interest of the respondent's or the assisted attorney's clients to commence a proceeding under this Rule for the appointment of a caretaker attorney. In the event that the law practice continuity committee determines that it is in the best interest of the attorney's clients to act, or upon referral of a case pursuant to the other provisions of this rule, the committee through its chair or other designated party may apply to the Appellate Division or the Supreme Court, pursuant to §1250.2 and §1250.3, for the appointment of a caretaker attorney or attorneys, who shall be a member of the Bar of the State of New York in good standing and who may be a member of a law practice continuity committee.

- (d) The confidential information and communications between a client and the respondent or assisted attorney, if learned or discovered by a member or authorized agent of a law practice continuity committee, shall be deemed to be privileged on the same basis as provided by law between attorney and client, and may be waived only by the client.
- (e) A member of a law practice continuity committee or a caretaker attorney possessing knowledge, gained in either capacity, of the respondent or assisted attorney's violation of 22 NYCRR §1200.3 is exempt from the reporting requirements of 22 NYCRR §1200.4.

1250.8 Lawyer Assistance Committee Designation

Any member of a law practice continuity committee who acts pursuant to the provisions of this section, or any caretaker attorney, shall be considered to be a member of a lawyer assistance committee under Judiciary Law §499, except that such member or attorney may be liable to the clients of the respondent or assisted attorney and third parties for acts or omissions outside the scope of these rules or any court order appointing a caretaker attorney.

June 9, 2005

Memorandum in Support
22 NYCRR Part 1250

Client Protection; Voluntary or Involuntary Cessation of Law Practice; Caretaker Attorneys

Purpose

To establish a process whereby a court may designate a caretaker attorney to assist in the temporary management, closure or sale of a law practice on behalf of an attorney who is unable to continue to practice law, either temporarily or permanently. The primary role of the caretaker attorney is to protect the clients of the attorney who is not able or permitted to practice law and, to the extent not incompatible with that obligation, to protect the interests of the incapacitated, deceased, suspended or disbarred lawyer.

Existing Law

There is no current law or regulation that provides a process for the appointment of caretaker attorneys to assist in the temporary management of, assist in the transition or closing of, a law practice on behalf of an attorney unable to practice law, either temporarily or permanently.

Prior History

In 2001, the New York State Bar Association Committee on Professional Responsibility identified the need for a uniform process, following a study of the consequences of attorneys' failure to plan for the management or dissolution of their law practices upon their disability or death. The Committee observed that there was a dearth of appropriate policies and regulations in New York State to address the problems identified.

It was learned that an *ad hoc* approach had developed in various counties, whereby a volunteer attorney was contacted, often by a local Bar Association executive or staff member, to assist with the management of a practice for an attorney who for one reason or another was unable to continue practicing. These volunteers, in many of these situations, devote numerous hours of work sorting through reams of paperwork, analyzing case files, addressing court calendars, etc., often without compensation and with uncertain standing and protection concerning professional liability and client confidentiality issues. In many parts of the state, there is no organized response to the problem.

Motivated by the Committee's report, NYSBA President Steven Krane appointed the Committee on Law Practice Continuity to address the topic of the planned or unplanned cessation of law practice, whether temporary or permanent. The development of this set of rules calling for the appointment of caretaker attorneys in certain defined circumstances became one aspect of the work of the Committee.

Statement in Support

This proposed uniform court rule is intended to address several situations in which lawyers leave the practice of law suddenly or without adequate advance planning or both. The purpose of the rule is primarily to protect the interests of the clients of such lawyers and, to the extent compatible with that goal, to protect the interests of the lawyers themselves. The Appellate Divisions presently have rules providing for the appointment of a receiver to inventory the files of disbarred, resigned and suspended attorneys, as well as attorneys who become incapacitated,

mentally or physically, and are unable to continue practicing law. Presently, such appointments generally occur following a request from a disciplinary or grievance committee, acting upon client complaints. However, studies have shown that there is a far greater need for "caretaker" attorneys, often in situations where the incapacitated lawyer has not been the subject of any complaint or disciplinary proceeding.

Lawyers may be incapacitated temporarily or permanently, physically or mentally, often in circumstances in which their inability to continue practicing was not anticipated. Lawyers practicing in partnerships or professional corporations generally, although not always, have built-in protections for their clients, who are usually represented by the law firm and not by the individual lawyer. In those cases, it is the law firm's responsibility to make sure that the client's interests are fully protected. However, sole practitioners may or may not have done adequate advance planning for their unforeseen incapacity. And, even when a sole practitioner has made adequate advance plans, it may be advisable for the lawyer who is assuming responsibility for the practice of another attorney to be formally appointed by a court as a "caretaker" attorney, pursuant to this proposed rule.

There are several distinct scenarios, some of which are already covered by existing Appellate Division rules, in which it is advisable to seek the appointment of a caretaker attorney. The proposed uniform "caretaker" rules are an effort to ensure that the same remedies are available in all four departments to lawyers, clients, disciplinary and grievance committees and, where appropriate, bar association law practice continuity committees.

The first category involves lawyers who are disbarred, resigned or suspended and who have not complied with the Appellate Division's rules governing the conduct of such lawyers, for example, by not notifying clients of their inability to continue practicing and not returning files to the clients or new counsel, as directed. It is not unusual for lawyers facing serious discipline to disregard their obligations to clients and courts. In such situations, the Appellate Divisions sometimes appoint receivers, either the appropriate disciplinary committee or a lawyer in private practice. Receivers are rarely compensated for their work, which is typically done on a voluntary basis. The proposed rule incorporates existing court rules and expands upon the current practice. The rule provides that the Appellate Division may appoint a caretaker, direct that compensation be paid, either from the disciplined lawyer's practice or from other available sources, and direct the caretaker to undertake specific tasks and responsibilities, as directed by the appointing court, for the protection of clients. The appointment of such outside caretakers will relieve the disciplinary committees of the burden of inventorying and reviewing client files and will also protect clients from the disclosure of their confidential information (and possible waiver of attorney-client privilege), which can occur when a public agency reviews private client files and documents.

The second category involves lawyers who have not been disciplined, but who are under investigation by a disciplinary or grievance committee. Sometimes lawyers abandon their practices and the committees receive a flood of client complaints citing the lawyer's disappearance, incapacity or other unavailability. The appointment of a caretaker attorney in such cases will protect the clients more effectively and enable the disciplinary committee to continue and complete its investigation. A caretaker attorney will attend to the clients' immediate interests -- e.g., by making sure that all clients are notified, that bank accounts and funds are protected, that court dates are not missed or, if already missed, that courts are promptly notified, and, where appropriate, that the attorney's support staff are compensated for their ongoing work and assistance with client matters.

The third category involves lawyers with no disciplinary problems or pending complaints. Lawyers who suffer unforeseen, incapacitating health problems or sudden accidents which render them temporarily or permanently unable to return to their offices or handle client matters may

not require the involvement of a disciplinary committee or Appellate Division, particularly if there are no allegations of impropriety. Such attorneys may even have provided for a colleague to step in to handle their law practice in the event of their disability or incapacity. Even in such situations, it is preferable for the "caretaker" attorney to act with the imprimatur and under the supervision of an appointing court. Just as the Appellate Division rules permit the supreme courts to determine the division of fees between a substituted lawyer and a lawyer who has been disbarred or suspended, so it is appropriate to permit the supreme courts to appoint caretaker attorneys in situations which do not involve allegations of professional misconduct by the temporarily incapacitated, disabled or deceased lawyer. If it develops that there has been misconduct, the proceeding will be transferred to the appropriate Appellate Division.

Finally, the proposed uniform rule incorporates what has been the practice in some departments of relying on bar association volunteers to act as caretakers or receivers for the practices of lawyers who become incapacitated, temporarily or permanently.

The rule envisions the creation of bar association law practice continuity committees throughout the state. Those committees will be able to assist in several ways. They will learn of a lawyer's incapacity, in many cases sooner than clients or the courts and will be able to apply for the appointment of a caretaker expeditiously to protect the interests of the lawyer's clients. They will train lawyers to become caretakers and will develop an experienced pool of lawyers, from which the courts may appoint individuals to act in specific cases. This is not a limitation on the courts' ability to appoint caretakers, but rather a resource, as it has often been difficult to find volunteer attorneys to serve in this capacity.

Many states have similar rules and the proposed uniform court rule is an amalgam of our present court rules and the most successful approaches used in other jurisdictions.

Nothing in the proposed rule will restrict the Appellate Divisions from making any appointment for the protection of clients or limit ability of the disciplinary and grievance committees to investigate and pursue allegations of professional misconduct by any attorney within their jurisdiction. Nothing in the proposed rule will restrict the ability of any attorney to designate a successor attorney to handle or assist in the continued operation, sale or closing of that attorney's practice in the event of death, incapacity or other unavailability. The courts should respect such successor designations, unless there are sound reasons why they should not do so.

Summary of Provisions

Part 1250.1 "Application" describes in what circumstances the court rule shall be applied.

Subdivision (a) describes an attorney to whom the rules apply as one who has been suspended or disbarred from the practice of law, or is under investigation in an attorney discipline matter; one who has been judicially declared incompetent, involuntarily committed to a mental hospital, incapacitated from continued practice by reason of illness, infirmity, addiction to drugs or intoxicants; or for whom a guardian has been appointed; one who has disappeared or abandoned the practice of law; has retired, died or otherwise become unable to practice law either temporarily or permanently.

Subdivision (b) provides that if the attorney has made adequate provision for the protection of clients, that provision shall govern; and, if the attorney was other than a solo practitioner, the rules would not apply unless the entity in which the attorney practiced is no longer legally responsible for that attorney's matters. Pre-planning by attorneys is strongly encouraged. Advance designation of a successor is the best assurance that the attorney's clients and practice will be handled properly and diligently in the event that the attorney dies or becomes

incapacitated. Advance appointment may also increase the likelihood that a practice may be sold pursuant to DR 2-111 [22 NYCRR 1200.15-a], if sale of the practice is desirable. Finally, designation of a successor attorney will alleviate the burden on the courts to address the consequences of failure to plan.

Subdivision (c) states that the purpose of the rule is to protect clients, and to the extent possible and not inconsistent with such protection, to protect the interests of the attorney to whom the rule applies.

Subdivision (d) contains definitions of "respondent" (referring to the disciplined attorney); "assisted attorney" (an attorney not subject to disciplinary proceedings, but to whom the rule otherwise applies); and "caretaker attorney" (appointed by a court pursuant to this rule)

Part 1250.2 "Who May seek Appointment of a Caretaker Attorney" describes the two general categories of persons or parties who may seek such appointment. First, in subdivision (a), the process related to attorney discipline is described, and a departmental disciplinary committee, grievance committee or committee on professional standards may commence a proceeding in the Appellate Division. Otherwise, as described in subdivision (b), a member of a bar association law practice continuity committee, an attorney licensed to practice law in New York, or any other interested person may commence a proceeding for the appointment of a caretaker attorney(s) either in the Appellate division or the Supreme Court of the county in which the respondent or assisted attorney resided or maintained an office.

Part 1250.3 "Request for Appointment of a Caretaker Attorney" describes the process by which the proceeding may be commenced, upon an order to show cause supported by a petition or affidavit; describes service upon required individuals (subdivision (a)); contemplates that the respondent or assisted attorney may designate an attorney to handle or assist in the operation, sale or closing of the practice, which the court should respect, unless upon a finding of good cause shown, such designation is set aside (subdivision (b)); and directs that all papers, records and documents pertaining to the proceeding are closed and confidential, unless the court directs disclosure upon a finding that such disclosure will not prejudice the interests of the attorney or his or her clients.

Part 1250.4 "Appointment of a Caretaker Attorney", subdivision (a), describes the options the court has upon receipt of an order to show cause for the appointment of a caretaker attorney; e.g., ordering an examination by experts of the respondent or assisted attorney, appointing an attorney to represent the respondent or assisted attorney; appointing a guardian for such attorney; and directing a hearing concerning whether a caretaker should be adopted; or, the court may dismiss the proceeding.

Pursuant to subdivision (b), if the court determines that appointment of a caretaker is necessary to protect the interests of the clients, it may appoint a caretaker to inventory matters being handled by a respondent or assisted attorney; to protect the interests of the clients and the attorney; and to fulfill the other duties set forth in Part 1250.5.

Pursuant to subdivision (c), the court may review requests made by the caretaker attorney for compensation and reimbursement, may make findings and fix the amount and source of compensation and reimbursement to be paid to the caretaker attorney(s).

Pursuant to subdivision (d), the court may order the caretaker attorney to submit interim and final accountings and shall direct the caretaker attorney to serve a copy on the personal representative and, if available, the respondent or assisted attorney.

Pursuant to subdivision (e), the court, upon application by the caretaker attorney, the personal representative or the respondent or assisted attorney, may terminate the proceeding and discharge the caretaker attorney once his or her responsibilities are completed.

Part 1250.5 "Duties and Role of a Caretaker Attorney" states that the role is to protect the clients of the respondent or assisted attorney, and to the extent possible and not inconsistent with such protection, to protect the interests of the respondent or assisted attorney (subdivision (a)).

Subdivision (b) lists the responsibilities of the caretaker attorney, including acting as interim counsel upon request of a client, delivering files and property to the clients at their request; collecting outstanding attorney's fees, costs and expenses and resolving disputes about such matters; collecting money and safeguarding assets; act as signatory on trust escrow, IOLA or special accounts, disburse or safeguard funds, as appropriate, and be eligible to purchase the law practice, upon court approval.

Subdivision (c) expects the caretaker attorney to maintain or procure malpractice insurance to cover his or her work as a caretaker.

Subdivision (d) prohibits caretaker attorneys from disclosing information pertaining to any matter handled as caretaker, without the consent of the client, except as necessary to carry out the order of the appointing court.

Subdivision (e) states that in the event of the death, disappearance or incapacity of a sole practitioner, the caretaker attorney or his or her firm shall not serve in any other capacity on behalf of the respondent or assisted attorney; and shall not act as successor attorney, other than temporarily, except and until the caretaker purchases the law practice, as permitted.

Subdivision (f) affirmatively states that the Code of Professional Responsibility applies to the caretaker acting in that capacity.

Subdivision (g) provides that a caretaker attorney shall be deemed to be a member of a Lawyer Assistance Committee as described in Judiciary Law section 499 and 22 NYCRR 1200.4, except that the caretaker would be responsible to clients or third parties for acts or omissions outside the scope of these rules.

Part 1250.6 "Compensation of a Caretaker Attorney" indicates that, upon application and appropriate notice, the court may order compensation to a caretaker attorney for professional services rendered and for reasonable expenses to be paid from the assets or estate of the respondent or assisted attorney; from fees generated by that attorney; or from such other available source as the court may direct.

Part 1250.7 "Bar Association Involvement" describes the process by which the New York State Bar Association or any local or specialty bar association may sponsor a "law practice continuity committee" to assist attorneys to manage their practices or assist in the orderly transition or termination of their practices, as appropriate. Such committees would recruit attorneys willing to serve as caretakers, maintain a list for consideration by the Appellate Division or Supreme Court when making appointment, and provide available resources to facilitate the work of appointed caretakers (subdivision (a)). Such committees have standing to commence a proceeding for the appointment of a caretaker (subdivision (b)).

1250.8 "Lawyer Assistance Committee Designation" provides that members of such committees shall be deemed to be members of a lawyer assistance committee under Judiciary Law Section

499, except they may be responsible to clients for acts or omissions outside the scope of the caretaker attorney role.