

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.