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Going Gray: Risk Management for Aging Lawyers

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Much has been written in the past few years about the demographic bulge as the baby boomers in the legal profession move toward and into retirement.¹ As a baby boomer myself (with gray hair, no less), many of my contemporaries have chosen three general paths. First, some have continued practicing full-time. Second, others have closed their practices and retired. Third, still others have tried to blend work and retirement by practicing part-time.

Each of these approaches presents unique issues from the perspective of law firm risk management. In this article, we'll examine both the issues involved and practical steps for addressing them.

Continued Full Time Practice

Justices Oliver Wendell Holmes and John Paul Stevens are ready examples of lawyers working into their 90s. As a learned profession, the skills and intellect that lawyers bring to a case or transaction do not necessarily diminish with age. At the same time, lawyers are not immune to change. Moreover, change in this context doesn't have to mean declining health with age. An important facet of change is our ability to adapt to developments in the practice of law fostered by broader technological, economic and social trends. When I was a black haired associate, for example, my large firm had no desktop

computers (let alone laptops and tablets), no cell phones (let alone smart devices), and no email (let alone social media).

Continued practice beyond a normal retirement age can present challenges for both the lawyers involved and their firms.

For lawyers, our duty of competent representation is neither age-adjusted nor static. On the former, we all have a basic duty of competent representation under Idaho RPC 1.1 (which is patterned on its ABA Model Rule counterpart): “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” The Idaho Supreme Court noted in *Stephen v. Sallaz & Gatewood, Chtd.*, 248 P.3d 1256 (Idaho 2011), that this duty is also reflected in the standard of care.² On the latter, a recent Oregon State Bar ethics opinion made this point in discussing the need to protect client confidentiality in metadata when exchanging documents in electronic form. The opinion, 2011-187, observed that competency today includes a basic understanding of the evolving technology that is reshaping the practice of law.³ Similarly, the ABA’s 20/20 Commission recommended that the comments to ABA Model Rule 1.1 include specific mention of the need to stay current with technology relevant to a lawyer’s practice.⁴ In short, the RPCs and the standard of care don’t cut an older lawyer any slack.

For firms, aging lawyers can present delicate issues if a lawyer develops health problems (physical or mental) that affect the lawyer's ability to practice law. The ABA, in Formal Ethics Opinion 03-429 (2003), addresses this issue at considerable length. The nub of its advice is twofold. First, it stresses, as noted above, that all lawyers have an obligation to provide competent representation under ABA Model Rule 1.1 and state counterparts (such as Idaho RPC 1.1). Second, under ABA Model Rule 5.1(a) (upon which the corresponding Idaho rule is based), firm management has a general duty to make "reasonable efforts" to have internal measures in place that give "reasonable assurance" that all lawyers in the firm comply with the RPCs. Therefore, the ABA opinion counsels that firm management has an ethical obligation (as well as a practical risk management incentive) to address lawyer health problems that may affect the lawyer's ability to practice.⁵ The opinion notes that issues of this kind are very fact-specific, as are the solutions. It emphasizes, however, that simply ignoring the situation is not an acceptable approach.

Retirement

For lawyers retiring from a large firm, the mechanics of winding down their practices often consist largely of transitioning work to others at their firm. For lawyers with solo or small firm practices, however, the logistics can be more complicated. Solo practitioners are essentially closing an entire business. Small firm lawyers, in turn, may be closing their individual practices without necessarily

transitioning work to others at their firm (who may have different practice areas). RPC 1.17 also permits the sale of law practices (including good will), but this avenue remains comparatively rare and clients are not obliged to move their work to the purchaser. Closing a practice may also trigger more general but long-ignored issues such as what to do with an original will or a small trust account balance for a client the lawyer has lost contact with.

For lawyers who are either closing their firms or their practices, insurers and bar associations have developed very useful checklists and forms.⁶ The ABA's Law Practice Management Section also has helpful materials on its web site.⁷ The spectrum of topics covered typically ranges from areas where we have specific professional obligations—such as notifying clients, returning original documents to clients and closing out trust accounts—to other areas that are generic to any business closure—such as terminating leases and discontinuing office phone service. Beyond the specific tasks the checklists and forms address, they also effectively provide a systematic and comprehensive plan for closing down both the professional and business sides of a law practice.

Coordinating a firm or practice closure with your malpractice carrier can be especially important in two areas—file storage and “tail” coverage. Carriers typically have specific file retention guidelines that can vary by state (depending on statutes of limitation and ultimate repose) and practice area (especially for lawyers involved in estate planning or other issues involving minors). Tail or

extended reporting coverage, in turn, can provide continuing coverage for matters you handled while in practice but the potential claims don't arise until after you've retired. The availability and specifics will vary by carrier. But, this can be an extremely important piece of a secure retirement both in terms of financial risk and peace of mind.

Part-Time

Part-time practice can take a variety of forms. Some lawyers, whether at firms or solo practitioners, go part-time as a way to wind down their practices toward eventual retirement. For others, part-time is a form of career change to, for example, working as legal counsel to a non-profit, teaching or supplementing retirement income from a government agency or a corporation with a limited private practice.

Regardless of the form of part-time, the duty of competent representation discussed earlier remains the touchstone. However, the particular path that a lawyer chooses may present different nuances to this fundamental duty.

For lawyers who are trying to combine practicing law at a less frenetic pace with travel or other outside interests, client calls still need to be returned promptly and court papers still need to be filed on time. In other words, the lawyer can be part-time but the work on any particular client's matter must still meet the full-time standard. On this point, a lawyer who is adept at using today's technology has the tools available to maintain a virtual presence even if the

lawyer is out of the office (whether near or far). As the Oregon ethics opinion mentioned earlier reflects, however, lawyers also need to understand how to use the technology in ways consistent with their core duties to clients, such as the obligation to protect confidentiality.

For lawyers exploring second acts that are outside the areas in which they spent the bulk their careers, the guidance offered to young lawyers by the comments to RPC 1.1—the competence rule—is equally apt: if you are entering an unfamiliar substantive area, you need to undertake the requisite study to learn it or associate with a more experienced lawyer in that particular field. Further, lawyers who are experienced in one area need to be attuned to how narrow many of our practices have become over time and be prepared to ask themselves the honest question of how applicable their deep, but narrow, knowledge may be to a completely different substantive area.

Summing Up

Although the baby boom generation may present aging issues more starkly due to the numbers involved, lawyers have been getting old for a long time. Lawyers have also been taking divergent paths to eventual retirement for a long time. Aside from the sheer numbers, however, perhaps the biggest change today is the pace of technological change. For lawyers who want to continue practicing, technology can often make that a realistic possibility. But, those same

lawyers need to maintain their proficiency with practice technology in the same way they are expected to remain current with the law in their practice areas.

ABOUT THE AUTHOR

Mark J. Fucile of Fucile & Reising LLP focuses on legal ethics, product liability defense and condemnation litigation. In his legal ethics practice, Mark handles professional responsibility, regulatory and attorney-client privilege matters and law firm related litigation for lawyers, law firms and legal departments throughout the Northwest. He is a past member of the Oregon State Bar's Legal Ethics Committee, is a past chair of the Washington State Bar Rules of Professional Conduct Committee, is a member of the Idaho State Bar Professionalism & Ethics Section and is a co-editor of the OSB's Ethical Oregon Lawyer and the WSBA's Legal Ethics Deskbook. Mark also writes the monthly Ethics Focus column for the Multnomah (Portland) Bar's Multnomah Lawyer, the quarterly Ethics & the Law column for the WSBA Bar News and is a regular contributor on risk management to the OSB Bar Bulletin, the Idaho State Bar Advocate and the Alaska Bar Rag. Mark's telephone and email are 503.224.4895 and Mark@frllp.com.

¹ See, e.g., National Organization of Bar Counsel-Association of Professional Responsibility Lawyers Joint Committee on Aging Lawyers Final Report (May 2007). Their web sites are at, respectively, www.nobc.org and www.aprl.net.

² See also *Bishop v. Owens*, 272 P.3d 1247 (Idaho 2012) (discussing generally the overlap between RPCs and standard of care).

³ Available on the Oregon State Bar's web site at www.osbar.org.

⁴ ABA materials cited in this article are available on the ABA's web site at www.americanbar.org.

⁵ ABA Formal Ethics Opinion 03-431 (2003) addresses the related issue of the duty of a lawyer who is not a firm member to report another lawyer whose ability to practice may be impaired to the appropriate professional authority.

⁶ See, e.g., the Oregon State Bar Professional Liability Fund's "Closing Your Law Practice" forms at www.osbplf.org and the Washington State Bar Association's "Closing a Practice" page on its web site at www.wsba.org. The advice and forms provided are largely generic and are not tied to particular jurisdictions.

⁷ See, e.g., "Closing a Solo Practice: An Exit To-Do List," ABA Law Practice Magazine (May/June 2011), available on the ABA's web site.