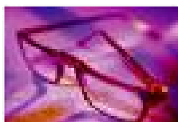

Ethics and the Aging Lawyer

There's a Senior Tsunami forming on the horizon, and it's not just that our aging population is causing stresses to the Medicare and Social Security programs. Lawyers, as a group, are getting older too, and we are feeling better and are still enjoying the practice longer than did lawyers in the generations before us. Unfortunately, there is a dark side to all of this.

The Great Recession has put many retirement plans on hold, and many of us—even those of us who may be past our prime—have simply not been able to retire. Any lawyer who has experienced the problems of a partner who should quit but won't knows the heartbreak of seeing someone start slipping who was once respected and admired, with the resulting embarrassment for everyone involved, including clients. A lawyer who is having trouble keeping up because of age-related problems, be they mental or physical, is an impaired lawyer. Impairment for the aging professional often comes slowly, and it's sometimes too late before anything is discovered and effectively addressed.

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A recently issued ethics opinion can be found on p. 74. Ethics Opinions and the Rules of Professional Conduct are available at www.azbar.org/Ethics

Lawyers who are impaired, or who practice with or against impaired lawyers, must understand that there are ethical obligations involved that may affect them and other members of their firm. Remember first that the impaired lawyer risks violations of ER 1.1 (Competence) and ER 1.3 (Diligence),[1] the main things we look at in standard of care (malpractice) determinations. Many of the older lawyers among us are not as technologically savvy as they should be, which may affect their ability to do effective research, or to do conflict of interest checks on firm databases.

But that's not all: To the extent that the impaired lawyer inadvertently discloses privileged papers, or loses or misplaces files and other documents containing confidential information, ER 1.6 (Confidentiality of Information) may be violated and, to the extent that lawyer is not aware of or is simply not checking conflicts of interest, he (and his firm) may be at risk of violating ER 1.7 (Conflicts of Interest: Current Clients), ER 1.8 (Conflict of Interest: Current Clients: Specific Rules) or ER 1.9 (Duties to Former Clients), the main things we look at in standard of conduct (breach of fiduciary duty) determinations. Or a lawyer's trust account may not be kept up to date, an ER 1.15 and Rule 43 violation. Finally, don't forget that we are required by ER 1.16(a)(2) (Declining or Terminating Representation) to decline or terminate the representation when our physical or mental condition materially impairs our ability to represent a client.[2]

So much for what we have to be aware of as we get ready for the next Senior Lawyers Luncheon.

If you have, or suspect that you may have, an impaired lawyer in your firm, you need to know about ER 5.1 (Responsibilities of Partners, Managers, and Supervisory Lawyers). If you are a partner or have managerial or supervisory responsibilities in your law firm, you are required to make sure that all lawyers, including the senior people in the firm, conform to the Rules of Professional Conduct. That includes competence, diligence, avoidance of conflicts and the other ethical considerations discussed previously. And if you ratify the acts of an impaired lawyer, or if you have managerial responsibilities over an impaired lawyer in your firm and fail to prevent his harmful conduct or fail to mitigate its effects, you may be personally responsible for any trouble he causes. (Take a look at ER 5.1(c).[3]) And as if that weren't enough to worry about, ER 1.4 (Communication) requires us to keep our clients informed about the status of their matters, and to explain to them facts necessary for them to make informed decisions regarding the representation, which arguably might include whether that senior lawyer in your firm is up to representing them and might need to be replaced with a younger partner. These

—continued on p. 82

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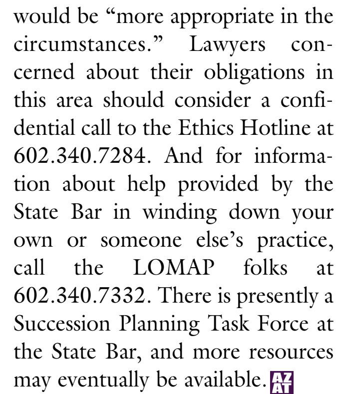
 —continued from p. 12

considerations require tough decisions on your part and, frankly, there are simply no easy answers to help you make them. If you've ever had to confront a partner with one of the situations we've discussed, you know that there are seldom any happy endings.

Last but not least is the troublesome ER 8.3 (Reporting Professional Misconduct), the much-maligned "rat rule," which requires us to "inform the appropriate professional authority" when another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's fitness as a lawyer in other respects. We may be loathe to report such conduct to the disciplinary authorities, especially when the lawyer is a member of our own firm. But Comment [3] to ER 8.3 has come to the rescue here, allowing compliance if the report goes to "some other agency, such as a peer review agency" when such would be "more appropriate in the circumstances." Lawyers concerned about their obligations in this area should consider a confidential call to the Ethics Hotline at 602.340.7284. And for information about help provided by the State Bar in winding down your own or someone else's practice, call the LOMAP folks at 602.340.7332. There is presently a Succession Planning Task Force at the State Bar, and more resources may eventually be available.



endnotes

1. Rule 42, ARIZ.R.S.CT.
2. *See* cases collected at ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT ¶ 31:1009.
3. *See* the Arizona cases collected at DANIEL J. MCAULIFFE, ARIZONA LEGAL ETHICS HANDBOOK § 5.1:300 *et seq.* (2d ed. 2003).