



The Lion in Winter: How Firms Proactively and Humanely Can Address Cognitive Impairment in an Aging Lawyer Population

by Charles C. Lemley and Kimberly A. Ashmore

America's lawyer population is aging. Data from the American Bar Association reveals that the percentage of lawyers aged 45 and older increased from 38% in 1991 to 62% in 2005, while the median age of American lawyers increased from 39 to 49 years old between 1980 and 2005. This aging trend is likely to continue as the American population as a whole ages. Indeed, the U.S. Census Bureau expects the number of Americans age 65 and older to double over the next 20 years, and elderly Americans are living longer than ever thanks to medical advances and healthier lifestyles. Of course, lawyers are also getting older, and senior attorneys are continuing to work later in life due in part to improvements in healthcare and, in some cases, unexpectedly diminished retirement funds.

An unfortunate reality for some (although by no means all) people is that advancing age may be accompanied by mental decline due to the onset of dementia. One of the most common and devastating varieties of dementia, Alzheimer's disease, affects an estimated one in eight Americans age 65 and older. By age 85, the likelihood of becoming afflicted with Alzheimer's increases to 50%. This crippling disease is the sixth leading cause of

death in America. It causes irreversible changes in the brain that negatively affect memory, behavior, and mental processes. Eventually, Alzheimer's leads to an inability to perform basic bodily functions, followed by death. The prevalence of Alzheimer's is expected to increase as the "baby boomer" generation ages.

Even the sharpest minds can succumb to cognitive impairment, and lawyers are hardly immune to diseases such as Alzheimer's. As attorneys age along with the rest of the population, law firms can expect to see an increasing number of their own afflicted with dementia. This is a growing concern of which the ABA has taken note in recent years, conscious of the effect dementia can have on senior attorneys' abilities to provide effective representation to clients.¹ A joint committee of two organizations that deal with professional liability issues recognized the need to treat aging attorneys with integrity and dignity while also shielding the public from inadequate representation.²

There are steps that law firms can take to reduce the risk of ethical and malpractice problems stemming from attorney dementia. Law firm attorneys first need to know what is required of them when they suspect a colleague is

suffering from mental impairment. A firm should endeavor proactively to address the concerns raised by aging attorneys within its ranks, and respond appropriately and promptly when problems arise. A firm should educate its attorneys in this regard, and have resources and plans in place for prevention, early detection, and transition out of practice.

Responsibilities Under the ABA Model Rules of Professional Conduct and the ABA Formal Ethics Opinions

Several ABA Model Rules of Professional Conduct ("the Rules") are implicated when an attorney is suspected to be suffering from age-related mental impairment. The Rules require all attorneys to communicate with their clients and to practice with competence, diligence, and promptness. The performance of these basic, essential duties may be jeopardized when an attorney is afflicted with dementia. Rule 1.16(a)(2) requires withdrawal when an attorney's mental impairment materially impairs his ability to represent a client. The ABA has taken a somewhat unforgiving approach in its views on violations caused by mental impairment, stating that "mental

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impairment does not lessen a lawyer's obligation to provide clients with competent representation [and]... the lawyer [who breaches this duty] has violated the Rules even if that failure is the result of mental impairment.”³

The Rules apply to law firms as well as individuals, and they require firms to take preventive steps to guard against potential violations. If an impaired lawyer is in denial about, or unaware of, his affliction, his colleagues and supervisors must take steps to ensure compliance with the Rules. Rule 5.1(a) requires that partners and other managing attorneys establish internal mechanisms to ensure that all of the firm's attorneys conform to the Rules. And under Rule 5.1(b), an attorney who directly supervises another must make reasonable efforts to ensure the other attorney's compliance. This requires “close scrutiny” if the supervising attorney knows that the other lawyer is impaired. Further, Rule 5.1(c)(2) provides that a supervising attorney will be held responsible for another lawyer's violation of the Rules if the attorney knows of the misconduct and learns of it early enough to avoid or mitigate its consequences, but fails to take reasonable steps to do so. For this reason, it is essential for a firm to take prompt action when confronted with evidence of impairment.

A firm's obligations may not end with compliance with Rule 5.1, however. When any attorney has knowledge that an impaired colleague has violated a Rule, the non-violating attorney may have a duty under Rule 8.3(a) to report the misconduct to appropriate authorities. Rule 8.3(a) is not so stringent that it requires every ethical violation to be reported; rather, only those that “raise a substantial question as to the violator's honesty, trustworthiness, or fitness as a lawyer” must be reported. Significantly, “if the firm is able to eliminate the risk of future violations... through close supervision of the lawyer's work, [the firm] would not be required to report the impaired lawyer's violation.”⁴ Where the impaired lawyer is still practicing and supervision is

insufficient to prevent future infractions, though, the misconduct must be reported.

Even after an impaired attorney withdraws from a client representation or resigns from the firm, there are still important considerations for the firm. Under Rule 1.4(b), the attorney or the firm may have to disclose information about the situation to clients. This could be an issue, for instance, where the impaired attorney leaves to go to another firm or to practice on his own. At that point, his clients may have to decide whether to stay with the firm or follow their attorney to his new place of business. If a client has already chosen to stay with the lawyer, the firm has no duty to try to encourage her to reconsider. But if a client is on the fence, the firm may have an obligation to reveal what is necessary for the client to make an informed decision about her representation.

Malpractice Considerations

An attorney's mental impairment will not, in and of itself, give rise to a legal malpractice claim because a cognitively-impaired attorney may provide perfectly acceptable service to any given client. To establish a legal malpractice claim, a plaintiff generally must show that his attorney breached a legal duty, causing the plaintiff's injury and resulting in damages. Thus, an attorney's status as mentally impaired is insufficient, without more, to support a malpractice claim; a plaintiff must be able to point to negligent acts resulting in actual injury and damages.

The standard of care most commonly employed by courts in determining whether a lawyer was negligent is “the skill and knowledge ordinarily possessed by attorneys under similar circumstances.”⁵ This objective standard renders irrelevant an attorney's good faith belief that he has acted prudently. Courts often apply a “but-for” test to the analysis of whether the attorney's negligence caused the plaintiff's injury; the plaintiff must demonstrate that but for the attorney's negligence, he would have enjoyed a more favorable outcome to his case.

This is a challenging standard to meet in any case, especially if the plaintiff's cause of action was not demonstrably strong.

A defendant attorney's mental health may not be relevant to a claim for malpractice because the proper inquiry should be whether the attorney acted negligently; the reason for such negligence (e.g., mental impairment) should not matter. However, it is possible that a plaintiff might be able to access an impaired attorney's medical records due to generous discovery rules. To the extent such discovery is allowed, evidence of cognitive impairment still may be excluded at trial if the plaintiff cannot point to evidence showing the attorney's negligence was caused by cognitive impairment.⁶

If a plaintiff were able to establish a link between an attorney's cognitive impairment and deficient performance, and prevailed in a malpractice action against an impaired attorney, an award of punitive damages would be unlikely. Many courts have been reluctant to impose such damages in legal malpractice actions in the absence of fraud, malice, or some other type of conscious wrongdoing,⁷ and have found gross negligence insufficient to warrant punitive damages.⁸ Such blameworthy states of mind, such as malice and fraud, would likely be difficult to prove where a plaintiff successfully has linked negligent performance to cognitive impairment.⁹

Preventing Malpractice: Developing an Early Detection and Prevention Plan

Law firms have struggled with how to handle aging attorneys. Mandatory retirement policies, once common in firms, fell into disrepute after a highly publicized Equal Employment Opportunity Commission lawsuit against a large firm that maintained such a policy. Indeed, age alone is a decidedly imperfect predictor of cognitive impairment. As an alternative to mandatory retirement policies, firms that wish to avoid significant malpractice exposure may implement

plans to prevent unintentional misconduct due to mental infirmity. These plans may be designed to identify any cognitive impairment early, before serious concerns arise about the attorney's competence to practice, but at the same time it is important to weigh the privacy interests of individual attorneys.

Dementia often causes forgetfulness, noticeable alterations in behavior patterns, impaired judgment, and confusion. A common early indicator of cognitive impairment is the inability to recall basic information. If attorneys notice such behavior in their elderly colleagues, they may be able to take action before any malpractice occurs. For that reason, firms should consider training attorneys to face the situation honestly and seek assistance immediately if they suspect impairment. In addition to reducing the firm's malpractice liability exposure, being proactive also could help shield aging attorneys from the unnecessary feelings of embarrassment and disgrace that often accompany public discipline arising from deficient performance.

As noted above, Rule 5.1(a) requires firms to implement procedures to guard against violations of the Rules. To that end, a firm should consider providing its attorneys and staff with impairment awareness education. Attorneys should be trained on how to spot a potential impairment of any nature, whether caused by substance abuse, mental disability, or some other affliction. Attorneys who suspect a colleague may be impaired should know they can turn in confidence to a designated member of the firm, a mental health professional, or a local Lawyer Assistance Program ("LAP"). Concerned attorneys should be able to express their suspicions to, and seek further guidance from, these individuals and organizations.

In addition to providing a confidential venue for attorneys to share their concerns, state LAPs can be helpful resources for firms seeking to implement effective impairment identification programs. For example, in 2010, the New York State Bar's

Lawyer Assistance Committee released a model policy for law firms to use when addressing attorney impairment.¹⁰ The model suggests, among other things, clearly defining the problem of impairment, issuing a brief policy statement explaining why impairment is harmful to the profession, emphasizing the importance of early detection and treatment, and reviewing the professional-responsibility obligations of all attorneys. Importantly, the model policy stresses the importance of confidentiality and continuing education on these matters, and lists several resources a firm might consider including. The model policy is a useful tool for a firm in any jurisdiction as it works to develop its own firm-wide impairment policies.

Responding to an Identified Age-Related Impairment

Once a cognitive impairment is identified, a firm must decide what action to take. Because the Americans with Disabilities Act ("ADA") may apply not only to associates and counsel but also to non-equity partners, a firm should avoid discharging any of its attorneys based on their disability status alone.¹¹ An attorney with dementia cannot be terminated just for having dementia. The ADA requires the firm to attempt reasonably to accommodate the disability if the impaired lawyer is otherwise able to perform his job.

If the attorney's cognitive impairment is mild, an accommodation in the form of supervision or a change in job responsibilities may be a viable option. Close supervision of an attorney suffering from mild cognitive impairment or the early stages of Alzheimer's may be an acceptable temporary solution for a firm to avoid ethical and malpractice concerns.¹² A firm may reduce the risk of an impaired attorney's condition leading to negligence, and thereby also reduce its malpractice exposure, by having a supervision policy in place and ready to implement when cognitive impairment is detected. All attorneys should be made aware of this policy, and confidentiality should be assured

so as not to embarrass affected attorneys.

If an attorney's impairment is significantly advanced, supervision might not suffice, and any attempt at a reasonable accommodation might fail. In those cases, as discussed above, the firm may have a professional obligation to require that the attorney stop handling client matters and, under certain circumstances, to disclose the circumstances to clients and/or to report any attorney misconduct.¹³ Preventing further representation by the impaired attorney would certainly be the firm's best option to limit its malpractice liability exposure.

A firm should plan for its attorneys' unexpected incapacitation well in advance of any such occurrence by encouraging each attorney to establish a successor or contingency plan.¹⁴ The firm should be able to assure clients that it has a thorough plan of action in the event an unexpected tragedy strikes and an attorney passes away or is suddenly disabled. These plans should provide clear procedures for what will happen in the event an attorney can no longer adequately represent his clients. Instructions regarding the handling and transfer of files and other information, as well as the designation of other attorneys within the firm who will assume the representation if desired by the clients, can be invaluable in the face of unexpected impairment. Such advance preparation would ensure that, in the event of an attorney's unexpected mental disability, firms would know how to handle the incapacitated attorney's clients and files. This could be essential for a firm to avoid unnecessary disruption in client service.

Conclusion

Law firms wishing to reduce the risk of malpractice and ethical issues stemming from cognitively-impaired attorneys should take proactive steps to avoid problems before they arise. Each firm attorney should be educated on how to recognize and respond to signs of impairment. Firms should respond promptly and effectively by

accommodating an impaired attorney when feasible, and preventing him from representing clients when necessary. Firms should establish successor plans to ensure a smooth transition in the event of an unexpected impairment. Proactive measures like these will help ensure a firm's continued compliance with ethical requirements and limit its malpractice liability exposure. 🌈

Endnotes

- 1 See Richard Acello, *Rising Tide: Ethics may require challenges to Alzheimer's-impaired lawyers*, A.B.A. J. (May 1, 2010), available at http://abajournal.com/magazine/article/rising_tide/.
- 2 See John T. Berry et al., Nat'l Org. of Bar Counsel & Ass'n of Prof'l Responsibility Lawyers, Joint Comm. on Aging Lawyers Final Report 2 (2007).
- 3 ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 03-429, at 2 (2003).
- 4 *Id.* at 5.
- 5 Ronald E. Mallen & Jeffrey M. Smith, *Legal Malpractice* § 20:2 (2012 ed.).
- 6 See *Beck v. Law Offices of Terry*, 284 S.W.3d 416, 444-45 (Tex. App. 2009) (upholding exclusion of evidence of attorney's mental impairment as unfairly prejudicial and confusing where there was no direct evidence to support plaintiff's claim that defendant attorney's negligence was caused by his impairment).
- 7 See generally *Mallen & Smith*, *supra* note 6, § 21:16; see also *Gautam v. De Luca*, 521 A.2d 1343, 1349 (N.J. Super. Ct. App. Div. 1987).
- 8 See *Duncan v. Klein*, 720 S.E.2d 341, 347 (Ga. Ct. App. 2011) (upholding lower court's determination that plaintiff was not entitled to punitive damages where defendant attorney had been grossly negligent at worst).
- 9 See, *i.e.*, *McElwain v. Georgia-Pacific*, 421 P.2d 957, 958 (Or. 1966) ("Malice, as a basis for punitive damages, signifies . . . a wrongful act done intentionally, without just cause or excuse.").
- 10 See N.Y. State Bar Ass'n, Lawyer Assistance Comm., NYSBA Lawyer Assistance Committee Model Policy (Apr. 9, 2010).
- 11 See Formal Op. 03-429, *supra* note 3, at n. 5.
- 12 See *id.* at 4 (discussing the option of supervising an impaired attorney, when feasible and effective). Because dementia is permanent and degenerative, supervision would likely not be an effective long-term solution, and eventually a firm would probably have to act to prevent the impaired attorney from assisting clients.
- 13 See *id.* ("Other steps may include . . . limiting the ability of the impaired lawyer to handle legal matters or deal with clients.").
- 14 See *Martin Cole, Growing Old Together*, 65 Bench & Bar of Minn. 16 (Apr. 2008).

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