



NCBA Transitioning Lawyers Commission: An Overview

MARK SCRUGGS
CLAIMS ATTORNEY
LAWYERS MUTUAL

NCBA Transitioning Lawyers Commission: An Overview

I am here today as an emissary of the Transitioning Lawyers Commission ("TLC"), and as a graying member of our profession beginning to wrestle with the questions that many of us must begin to wrestle with, if we are to have a fulfilling life beyond the active practice of law.

I am also here to introduce you to an initiative of your North Carolina Bar Association ("NCBA") aimed at assisting members of the North Carolina bar in transitioning out of the active practice of law and into a satisfying retirement. The TLC is leading this effort, but it is by no means a solo effort. Joining us are The North Carolina State Bar, the Senior Lawyers Division of the North Carolina Bar Association and others who recognize the looming issues facing us as the "graying of our profession" picks up steam.

How did we get here?

The NCBA Senior Lawyers Division ("SLD") led the way in exploring "Retirement with Dignity." The SLD convened a study session in December 2011 and invited members of the medical profession, representatives of BarCARES, the North Carolina State Bar's Lawyers Assistance Program ("LAP"), Lawyers Mutual and the Chief Justice's Commission on Professionalism to participate. That group explored issues and asked how other professionals were dealing with the graying of their professions. The NCBA leadership recognized the need to address this issue, so President Mike Wells created the "Retiring with Dignity Task Force" – comprised of NCBA members and representatives from a number of other groups. During the course of our first year, we renamed the task force the "Transitioning Lawyers Commission" ("TLC").

Why is this topic important?

Let me use myself as an example. I am in my mid-fifties with a 19-year-old college student who has her eye on either medical school or graduate school. Like most of you probably, in 2008-09 I watched as my "nest egg" lost about a third of its value in the stock market. I watched as the equity in my home eroded. I saw and still see that anything close to a comfortable retirement is further away than I would have thought 10 years ago. Perhaps like many of you, I am looking at practicing longer than I might have originally planned due to economic realities.

In addition, like many of you, I truly enjoy being a lawyer and being involved in the law I don't want to retire. My sense of identity and self-worth is linked with being a lawyer. Besides, what else would I do?

So what's the problem?

The problem is we are human and as such subject to human frailties. We are subject to mental and physical frailties that are sometimes age-related and sometimes not. We are afflicted with conditions like Alzheimer's disease and other forms of cognitive impairment that make it difficult if not impossible for us to meet our ethical obligations to our clients. In short, some of us at some point may NEED to retire, and we need to have the tools and the support to know when that time comes. We should be able to transition out of the practice on our own terms and not at the conclusion of a State Bar Disciplinary Hearing.

Some of us some day may just WANT to retire from the active practice of law. We need to have the tools to plan for that time. I think of my father. He retired at age 62 from the Department of Labor and Industry for the State of Virginia. He and my mother were separated so he was alone. He had no hobbies and no interests outside of his job. He sat at the kitchen table with nothing much else to do and died early. That's not going to be my story. But changing the story line is going to take planning on my part. I have to prepare now for the day when I will not have the day-to-day work in the law to keep me busy. And so do you.

So this is the work of the Transitioning Lawyers Commission: Assisting those who need to retire to do so with dignity; assisting those who want to retire with tools and resources for the planning and implementation of a successful transition; and thirdly, assisting Caregiver Lawyers. We haven't talked about this group, but many of us baby boomers may find ourselves in this situation. Sometimes called the "sandwich generation," we are caring for children and parents at the same time. Alternatively, perhaps we will be called upon to be a caregiver for an ill spouse or partner. Whatever the case, there may be personal situations that severely impact our ability to serve our clients and to maintain balance in our lives. The Transitioning Lawyers Commission is looking at ways to help caregiver lawyers too.

So now let's drill down and take a closer look at the work of the Transitioning Lawyers Commission in each of these three areas.

A. First, those who need to retire.

These are lawyers who are experiencing a physical disability, a cognitive impairment or emotional issues, which for our purposes we may think of in terms of the loss of a spouse. To compound the problem, the lawyer may be unwilling or unable to recognize the need to retire with grace and dignity.

It is important to note that there is no specific age bias here. In general, we are discussing lawyers with "snow on the roof," but we have all known 90-year-olds who, while maybe not as sharp as they once had been, were certainly capable of practicing law, and we all have known 60- to 70-year-olds who were experiencing significant issues. Take for example Pat Summit, the former University of Tennessee women's basketball coach. Pat Summit turned 60 in June 2012 and recently retired because her early onset Alzheimer's disease made it impractical for her to continue coaching in a manner she considered acceptable.

We know that physicians have created a program that allows them to take a scalpel out of a surgeon's hands if necessary. Some say that the State Bar can and should handle these situations. I agree the State Bar can, but hesitate to agree that the State Bar should, handle these situations. As a voluntary bar association without licensing powers, a visit from friends at the NCBA seems a kinder, gentler way of intervening to find out what the problem might be and how we can help.

One idea that arose from the Senior Lawyers Division's work last year, and on which the TLC has built, is the concept of an "intervention" program. The intervention program that we are in the process of implementing will be built on the following model:

- **Overview:** Approximately 20 volunteers will train to be interveners. These individuals will be lawyers selected with an eye towards geographic, gender and age diversity. Geography will be the most important consideration. Age contemporaries will be important, but we will need some younger volunteers to address early onset issues if they arise. We will probably train more men than women initially, given the current makeup of the Bar Association in the upper age groups.
- **Training:** Intervenors, who will be team leaders, will undertake formal training provided by HRC Behavioral. We anticipate two training sessions, one in the Raleigh area and one somewhere in the western third of the state. The sessions will be a full day conducted by HRC medical/psychological professionals giving the team leaders instruction and guidance on successfully approaching and evaluating an individual who has been referred to the team leader.
- **Support:** HRC will provide consultations and testing as part of the actual intervention process if and when needed/requested.

More precisely, we anticipate that the program will follow the following model:

- An 800 number at the North Carolina Bar Center will be answered by trained staff who will receive the initial referral. Hypothetically, a legal assistant, lawyer, partner, spouse, or friend would call the NCBA staff and confidentially express concerns about a lawyer who might be experiencing some challenges which seem likely related to a physical or cognitive impairment. The NCBA staff member will locate the closest (geographic) team leader and make the referral.
- The team leader will accumulate background information and send this information to an HRC consultant to determine whether the information indicates a probability of cognitive issues as opposed to other causes. In addition, this background research with family and

colleagues will permit the team leader to plan for the make-up of an intervention team and for a schedule and process for the intervention.

- Now hear me when I say this. The North Carolina State Bar has designated the TLC as a Lawyers Assistance Program to provide an exemption for the members of the intervention team and specifically the team leader from the duty to report ethical violations pursuant to Rule 1.6(c) of the Rules of Professional Conduct. The need for such confidentiality begins in this initial phase so that the team leader may obtain open and honest observations from folks who might otherwise be protective of the individual lawyer. Information gathered in this phase will be shared with the HRC consultant to assist the team leader in developing both an outline for the intervention process tailored specifically to the individual, and to determine who should be present at the intervention. One key is to make certain there is a support network post-intervention, and that network should be a part of the intervention process.
- What happens next depends upon the individual lawyer, but here are available options:
 - (A) The team leader will be provided, through HRC, a self-administered test that can be tailored to the individual. The testing is generally computer-based, but it does not have to be.
 - (B) Computerized Neuro-Psych Assessment- instead of a self-administered test, the lawyer could go to clinician's office and take the test. Professional consultation by HRC or a clinician would be then be provided to the team leader.
 - (C) Neuro-Psych Screening - "lower level" (or initial) psychological testing. This testing would be offered to the individual if warranted by the results of either of the first two options. This could lead to a medical referral for more extensive ("higher level") testing that would presumably be covered by the subject's health insurance or Medicare.

Intervention is intended and designed to be firm, but clothed in the fellowship of members of the bar. The goal is to allow the individual lawyer to be part of the decision and process of winding down, or

closing their practice if that becomes necessary. The TLC intervention program is intended to insure protection of the public from lawyers whose skills are eroding due to cognitive issues, while providing the attorney with a graceful exit with his dignity intact.

One important development that should help with this is a change to the rules governing "Inactive Status." The State Bar is in the process of revising the Inactive Status section of its rules to create a new sub-category of "Retired." Are you aware that currently, if you go on Inactive Status, you cannot hold yourself out as a lawyer? Did you get that? Not only can you not offer legal advice or perform the functions of a lawyer, you cannot tell people you are lawyer. In this new Inactive-Retired status, you would be able to tell folks that you are a "retired lawyer" or "retired attorney." We hope that being able to offer the "Retired Attorney" status may help overcome at least one of the psychological hurdles for those who need or want to retire and who have placed their entire identity in the title "attorney" or "lawyer."

We also hope that over time, the NCBA will be able to expand availability of the voluntary self-administered or lower level testing programs to all NCBA members on a purely voluntary and confidential basis.

What happens after receipt of that call is one area we are studying carefully. We want this to be a "warm blanket" intervention process and we know that it cannot be a one-size-fits-all program.

One issue we will have to address is the "stubborn as a mule" lawyer who refuses to acknowledge any issues, is offended by the visit, and intends to go on as he has been going. This individual will simply continue on his path and in all likelihood will encounter either his malpractice carrier or the State Bar down the road, if there is a true problem. When we discuss "retiring with dignity," the goal is to prevent a lawyer with a sterling reputation from having to leave the profession with his reputation tarnished by simply staying too long and making a critical error. At times, we may have to be persistent to crack through the veneer of denial.

In addition to the intervention program, the TLC intends to provide model policies and practice suggestions for firms to implement. We would make these available through the Center for Law Practice Management at the Bar Association. For example:

- (1) As part of a partnership agreement, there may be set age after which the other partners or firm management reserve the right to intervene and for all intents and purposes "retire" a partner who is exhibiting behavior that might include cognitive impairment or related issues detrimental to the good order of the firm. As lawyers, we understand that such a provision must be carefully crafted to avoid issues of age discrimination, but we expect that such clauses generally would only be enforced when there is a true issue and most often from a place of deep love and concern.
- (2) A reverse mentoring agreement: Author John Jeffries discusses this concept in his biography of Justice Lewis F. Powell, Jr. Justice Powell said that as he grew older and bearing a lifetime appointment, he feared overstaying his intellectual abilities. He sat down with his son and between them they agreed that if young Lewis noted slippage in his father's ability, he would go to his father and let him know. Justice Powell promised in return that he would immediately retire. Justice Powell left the bench before that conversation occurred. Maybe you have heard of other lawyers who are part of similar pacts and who have had that conversation. One can equate that conversation with taking away the car keys from an aging parent. It is a difficult conversation, but one that is necessary not only for the good of the individual involved, but also for the sake of the public (or in our case, protection of the clients and the profession).
- (3) There are some state bars that have a mandatory version of the reverse mentoring concept. In those states, lawyers must designate another lawyer ("assisting lawyer") who will be available to assist in closing down or winding up a practice should something happen to the lawyer. This is not related solely to cognitive issues, but exists to protect the lawyer's clients in the event the lawyer experiences any sudden onset event that prevents the lawyer from serving his clients. This is especially applicable to small firms and sole practitioners. The TLC intends to offer concrete suggestions, if not solutions in the coming months. If you have additional thoughts or suggestions, especially for additional alternative policies and

procedures, we would love to hear them. Our charge and our desire is to develop a plan based in love, respect and concern to assist our brothers and sisters at the bar in recognizing and acting on a need to slow down or step away from the active practice of law.

B. Those who WANT to retire.

To some, this may seem like a no-brainer. You want to retire, so you close the bank accounts, cancel the lease and the utilities, close the door and go home. Were that life was that simple for a professional!

As I said before, transitioning on your own terms requires planning. Planning for the orderly transitioning of your client and the closing of your office, and planning for how you are going to occupy yourself once you no longer have an office to go to every day. One resource that will help you plan for the orderly winding down or closing of your practice is a publication of the Solo, Small Firm and General Practice Section of the NCBA entitled "Turning Out the Lights: Planning for Closing Your Law Practice." The TLC will also make other resources available through the Bar Association website and the Center for Law Practice Management.

An important change that should help lawyers transition on their terms is a proposed amendment to Rule of Professional Conduct 1.17 concerning the sale of a law practice. Under the proposed amendment, the seller may continue to practice law with the purchaser and may provide legal representation at no charge to indigent persons or to members of the seller's family. (Currently, the seller is only entitled to work for the purchaser as an independent contractor.) The comment states that permitting the seller to continue to work for the practice will assist in the smooth transition of cases and will provide mentoring to new lawyers.

You should also include your malpractice carrier in your discussions and plans. You will need to protect yourself from malpractice claims that arise after you retire but result from work you did before you retire. One way to do that is with a "tail policy."

Maybe you don't want to retire "cold turkey," but rather want to start slowing down. This may be easier to do in certain areas of practice than other areas of practice. Does "slowing down" mean taking fewer clients? How do you avoid signaling to your clients that you are slowing down and having them wander off to another lawyer before you are ready? One other concept you will hear discussed is "reverse mentoring" where an older lawyer with a solo practice pairs with a young attorney just starting out on his own. The young attorney may agree to handle clients when the seasoned attorney is on vacation or otherwise occupied. In exchange, the seasoned attorney acts as mentor and support for the younger attorney answering the occasional question and/or reviewing the occasional document. The hope is that a reciprocal relationship will develop. The seasoned attorney will gain trust in the younger attorney to offer advice and even support. Over time, their roles may reverse such that the seasoned attorney can continue to practice even if he is missing a step because he has the safety net of the younger attorney reviewing the work.

As you slow down, can you use your "free time" to develop avenues to continue a life connected with the law even after you transition completely out of the practice? Can you volunteer with a non-profit whose work interests you? Can you take advantage of one of the many volunteer opportunities available through the Bar Association such as the NCBA's Lawyer on the Line Program?

C. Caregiver Lawyers and Staff

This is an area of great interest and focus for the TLC and is one indicia of the Baby Boom generation. The "caregiver lawyer" is the lawyer who is parenting his parents or another elderly or infirm relative.

The reality is that you find more and more lawyers and staff in law offices who need flexibility in order to care for their elders. It is somewhat amazing to observe how many people are fitting journeys of various distances into their normal routine in order to deal with a parent with dementia or with a terminal illness or simply growing older.

How does a law firm address this need? One idea is for the law firm to work out safeguards in the form of processes that will allow the affected lawyer to maintain his normal practice while secure in the knowledge that if he needs to leave the office suddenly to care for a family member, he can do so without fear of a catastrophe at the office. The TLC is looking at developing model policies, procedures and options for law offices with CLE programs to share these ideas.

The Transitioning Lawyers Commission will seek to identify issues, address them if we can and educate lawyers about how we might transition out of the active practice when we need to, when we want to and on our own terms. We will be leading horses to water and praying that with sufficient impetus, but without force, they will choose to drink. We welcome your input into this important work.