

# The Wise Lawyer Knows How and When to Cease and Desist

by Jack W. Burtch Jr.

In 2007, the National Organization of Bar Counsel and the Association of Professional Responsibility issued a report that predicted a “senior tsunami” of “age-impaired lawyers” that would be generating a disproportionate number of complaints and disciplinary proceedings.<sup>1</sup> Today, while the growth of our Senior Lawyers Conference has not yet reached flood-level stage, it is true that Virginia’s legal population continues to age. While older lawyers do seem to have more practice challenges, we have been able to help prevent many of the predicted complaints and disciplinary proceedings, thanks to Lawyers Helping Lawyers.

## **Perils of Aging**

Clearly, Virginia’s reputation for professionalism is enhanced by the increasing number of senior lawyers who model civility and pass on their tradition to the newest members of the bar. Unfortunately, some lawyers continue to practice while their faculties deteriorate. Not all senior lawyers face mental challenges, but some suffer from memory loss, communication problems, disorientation, and inflexibility. Studies indicate 8 percent to 19 percent of all people between the ages of 75 and 84 suffer from Alzheimer’s disease,

and that percentage rises to 29 percent to 42 percent in those older than 85.<sup>2</sup>

In the past, lawyers who experienced these problems were already at a generally accepted retirement age, so most left their practices gracefully. But today, a confluence of pressures is forcing some older lawyers to practice longer than they intended — and longer than they should. Baby boomers (born between 1946 and 1960) constitute the largest single demographic among lawyers; in 2011, the first of them turned 65.

## **Hardships of Aging Today**

As these seniors enter the traditional retirement years, they face new challenges. Life expectancy continues to increase, so there may be more years ahead to finance than the previous generation had to consider. Some lawyers started families later, so many now have children heading to college or adult children they still support financially. The economic collapse of 2008 dealt a blow to already-insufficient retirement accounts, while the recession that followed tightened client budgets. Even the word “retirement” has become unpopular, as boomers defiantly proclaim, “60 is the new 40.” Thus, for many in this generation, continuing to work has become either a financial or a psychological necessity.

## **Issues of Impairment**

Age, of course, is not the only cause of cognitive impairment. Drug or alcohol use, serious depression, or chronic disease can also affect mental acuity. Since lawyers experience problems with

drugs and alcohol at twice the rate of the general population, substance abuse contributes disproportionately to lawyer impairment. Yet the Virginia Rules for Professional Conduct requires lawyers to provide competent and diligent service to clients (Rule 1.1;1.3), withdrawing when “the lawyer’s physical or mental condition materially impairs the lawyer’s ability to represent the client.” (Rule 1.16(a)(2)).

sion than would be possible under the disciplinary alternative.

Senior lawyers provide experience, wisdom, mentoring, and models of civility for younger generations. But when the time comes to leave, the wise lawyer — perhaps with the help of compassionate colleagues — knows how to make a graceful exit.



## *Confronting the problem of the impaired senior lawyer is never easy.*

So, when one lawyer is aware that a colleague’s conduct “raises a substantial question” about that lawyer’s fitness to practice law, there is a duty to report the conduct to “the appropriate professional authority.” (Rule 8.3(a)). But disclosure is not required when the information is obtained by, or in cooperation with, a member of an approved lawyer’s assistance program” (Rule 8.3(d)). Enter Lawyers Helping Lawyers.

### **Solutions with Compassion**

Confronting the problem of the impaired senior lawyer is never easy. Although it is essential to maintain the dignity of a professional who may have served the community ably for many years, the public has a right to expect competent help from a licensed attorney.

If the impairment issue is raised through a disciplinary complaint to the Virginia State Bar, the bar’s options are limited to the processes of the disciplinary system. But if a referral is first made to a lawyer assistance program such as Lawyers Helping Lawyers, the senior lawyer can be referred for professional evaluation, counseling, and treatment. If the best course of action is to cease law practice, then that lawyer can make an exit with greater dignity and compas-

### Endnotes:

- 1 <http://www.aprl.net/publications/downloads/NOBC-APRL.pdf>.
- 2 ABA Commn. on L. & Aging & Am. Psychological Assn., *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers* (2005) at 67.



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