Aging Population of Lawyers Means Colleagues Need to Keep Watchful Eye

By Kendra L. Basner

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The number of people remaining in the workforce after they turn 65 is dramatically increasing and, as a result, employers are facing challenges that they may have never before addressed, or perhaps even considered.

In 1900, 4 percent of Americans were more than 65 years old. By 2000, 12 percent of the country's population was over 65. It is projected that by 2020 more than 17 percent of the country's population will be over the age of 65.

Recent statistics show that the number of men continuing to work after the age of 65 has increased by 70 percent, the number of women in the workforce over 65 has increased by 110 percent, and the number of individuals working after the age of 75 has increased by 110 percent. The reality is that people are living and working longer than ever before.

Cognitive decline and professional competence are issues often associated with aging; however, substance abuse, depression and sleep deprivation can also be potential causes.

High-functioning professionals, such as lawyers, often mask a decline in professional competence longer than other professionals. Undetected cognitive decline can affect not only a lawyer's fitness for performance and duty but also the ability of counsel to defend the impaired lawyer against a legal malpractice claim.

This hot-button topic was hit head-on at the Fall 2014 ABA National Legal Malpractice Conference. At a program entitled “Cognitive Decline: Assessing and Assuring Professional Competence in Lawyer Clients and Partners,” speakers discussed the challenges in identifying cognitive decline in high-functioning professionals and the steps needed to assess, manage and treat lawyers experiencing such an impairment.

The conference, presented by the ABA Standing Committee on Lawyers' Professional Liability, was held Sept. 11-12 in San Francisco.

Kurt C. Peterson of Reed Smith LLP, Los Angeles, moderated the discussion with fellow panelists Anne P. Ray, of Jenner & Block LLP's Chicago office, and Jonathan Canick Ph.D., a member of the departments of psychiatry and neurology at California Pacific Medical Center and an assistant clinical professor at the University of California, San Francisco.
Cognitive Decline in Professionals

Canick provided attendees with provocative statistics and research on the difficulty of identifying cognitive impairment among those in the legal profession because of their superior intelligence.

According to Canick, the average American has a high school degree and has attended at least one semester in junior college. Taking into consideration that only 3 percent of the population has doctoral and/or professional degrees, by virtue of the educational requirements alone any individual who makes the cut into the legal profession is generally considered to function in the above-average to very superior range of intelligence.

The more high-functioning a person is, the less likely he is to show cognitive decline until he is grossly impaired. By the time impairment is obvious, it may be too late. If detected early enough, the condition may be treated, reversed or stabilized. Whether the concern is with a member of your law firm or an attorney-client, the task of detecting impairment at an early stage is critical, and extremely difficult.

Aging is not a neurodegenerative disorder. Chronological age is not determinative of a cognitive problem. Reaction time and learning new information are a couple of cognitive abilities more vulnerable to aging.

However, some cognitive functions grow and expand as we age. Canick pointed to studies showing that at the age of 80, most people retain 70-100 percent of their normal abilities. He further explained that verbal IQ and crystallized abilities, or those abilities influenced by culture and education, retain tremendous stability over a lifetime. Neither profound cognitive decline nor cognitive incompetence is a normal stage of aging or development.

Many people thrive after "the age of retirement." The level of wisdom and maturity of a seasoned professional is unmatched in a younger, relatively inexperienced peer. Canick noted that prominent examples are plentiful in the legal profession, including many sitting on the highest court in the land. Justices of the U.S. Supreme Court have life tenure and several have occupied the bench well after the age of 75, including Oliver Wendell Holmes (90), John Paul Stevens (94) and current Justice Ruth Bader Ginsburg (82), to name a few.

In contrast, Canick cited Justice Henry Baldwin, who was appointed to the Supreme Court in 1830 when he was 50. Within two years he was hospitalized for "incurable lunacy," but continued to serve on the high court for an additional 11 years until his death in 1844 at the age of 64.

The more developed a person's brain, the more capable she is of hiding any impairment. Canick reported that a professional's highly developed routines, practices and conversational and social skills, which are rehearsed and reinforced over a career, can function almost reflexively and automatically, obscuring detection of underlying problems that may be more readily apparent in individuals with lesser ability.

The highly valued skills and abilities a lawyer develops over many years of practice that once contributed to great success are the same qualities that may ultimately contribute to an unfortunate downfall.

Canick emphasized that whether or not an individual has capacity depends on the question: capacity to do what?

Whether a professional can continue to perform at work hinges on the particular skills or abilities needed to perform certain tasks. A competent attorney is expected to perform a variety of cognitive functions in the above-average to very superior range. Measurement and assessment of cognitive functioning, which is objective, normative and quantifiable, can determine if a person can achieve, maintain or has lost the high level of ability needed to accomplish their job and whether they are “fit for duty.”

Canick noted there are tests that contain normative data specifically for attorneys. Learning disabilities, concussions and other abnormalities are also taken into account. However, cooperation by the test-taker
is essential and not always easily obtained.

As he explained, people who test in the highly superior, 97th to 99th percentile are considered “mental giants” and when they fall they become mere mortals. For these highly intelligent individuals, average results are not normal. A decline to the average range, while not noticeable by most, may be very significant. A lawyer may be perfectly capable of functioning in society on a daily basis at this level, but may be incapable of performing the essential duties of his or her highly demanding and exacting profession.

Impaired, but by What?

Canick provided examples of lawyers he has treated who were experiencing cognitive decline. One patient was a 68-year-old attorney who was sure she was suffering from dementia and no longer fit to do her job. In fact, she suffered from a sleep disorder, received treatment, regained her confidence and resumed a successful career.

Another patient had received the diagnosis of Alzheimer’s at age 61 and came to Canick for a second opinion. He noticed that her test results were not consistent with Alzheimer’s. Treatment continued and it was later diagnosed that after years of drinking a bottle of wine each night, the lawyer was suffering from alcohol-related brain damage. After eight to nine months of treatment and no drinking, cognitive function was regained.

A third patient was a rainmaker, the head of a large, international firm. He showed no self-awareness of a problem, but went from testing beyond the 99th percentile to the 1 to 5 percent range. There were obvious signs of decline and members of his firm noticed there was a problem, but no one wanted to confront it because his reputation was still bringing money into the firm and, when even small issues were addressed, he became aggressive. By the time the rainmaker came in for evaluation and treatment, it was too late.

Finally, when a work-up of a 42-year-old Pulitzer Prize-winning author, who seemed to be suffering mid-life memory loss, revealed nothing was wrong, it was eventually determined that she was suffering from having sustained multiple concussions, which would not show up on the tests given. This was treatable.

Dealing With Colleagues and Partners

Law firms are responsible for ensuring the competence of their lawyers. It is difficult to confront the signs of decline in a colleague or client. Lawyers and firms need to be aware of the symptoms that make confrontation essential and acknowledge their responsibility to do so.

Anne Ray reminded attendees that the client is the firm’s number one obligation. If the issues are affecting the client, something must be done, but what? The panelist said there is no easy answer. It depends on the circumstances and the individual. “One size does not fit all,” as moderator Kurt Peterson put it.

Although with age comes experience, maturity, wisdom and judgment, which are extremely valuable qualities, the legal culture generally does not foster talent preservation.

Peterson pointed out that the general mind-set, particularly among big firms, is that a lawyer works really hard for a finite amount of time, then you’re out, and the next generation is ushered in to take your place. It is this all-or-nothing mentality that often overshadows the prompt identification of a potential problem and hinders an amicable solution.

Insurance provides protection in instances of malpractice. However, it is preferable to recognize a potential problem before harm and damage have occurred. Peterson stressed the first and most difficult
problem is “identifying that you do have an issue and having a culture where people intervene.” Awareness and communication are critical to timely identifying potential problems.

Oftentimes, the people within a law office who have the power and authority to address the problem are not always personally aware of the issue because they do not work closely with the impaired individual. Overt signs and red flags may not surface as expected. Therefore, the panelist agreed, it is imperative to communicate openly with support staff and other attorneys who work with that individual on a daily basis and thus are more likely to notice signs of decline.

The firm should initiate such communication if need be since many employees are reluctant to report their “boss” and may even be inclined to protect her. The firm has a duty to investigate. A culture that encourages turning a “blind eye” to rainmakers’ deficits must be discouraged.

Obscuring, hiding, protecting or covering for someone who has lost competence doesn’t just potentially harm clients and the public, it impedes that person from receiving timely treatment for a condition that might be better managed, treated or perhaps even reversed.

Canick highlighted that too often people fall victim to the bias and stereotypes associated with aging, believing that their problem is normal for their age, so that necessary attention is not sought. Sometimes this leads to the decision to retire or resign before even having the source of their disability identified.

In those instances, valuable talent can be wasted and individuals exit their profession without the dignity they deserve. Mandatory retirement can also result in the loss of the most valuable workers. Before dismissal, the firm should consider how it may be able to benefit from the lawyer’s talents and, instead, look to redefine his role.

Casting off the impaired lawyer could send him into a downward spiral. “Losing your mind,” according to Canick, often means losing yourself and your identity, which is particularly true for attorneys who have worked so hard for so long, devoting much of their life to their legal career. The fear of being pushed out of their job may be one reason why a lawyer may consciously try to mask his difficulties. The risk of losing a rainmaker may be a reason why a law firm looks the other way. Ignorance is not the solution.

An ABA Resource

Ray reminded lawyers of their professional and ethical duties, encouraging them to do whatever is reasonable to protect the client, while considering making accommodations for the lawyer. From a risk management perspective, Ray emphasized it is important to make partners, associates and staff aware. Many law firms have anonymous hotlines set up to address such issues. Some state bars have a requirement to report.

As mentioned by the panel and expanded upon in the conference materials, the judiciary has been working to come up with a solution to the problems of dementia and mental illness, particularly in the federal courts where judges’ life tenure results in an aging bench. They have tried to combat these issues by implementing baseline cognitive testing for everyone, not just aging judges, and providing mental health aid and counselors.

Law firms and lawyers have a responsibility to their clients and themselves. The conversation can no longer be avoided and must be encouraged.

A good place to start is the publication Assessment of Older Adults With Diminished Capacity: A Handbook for Lawyers. Produced jointly by the ABA Commission on Law and Aging and the American Psychological Association, the Handbook provides an overview of diminished capacity, assessment and referral information, and includes the Attorney Assessment Worksheet. It is available at https://www.apa.org/pi/aging/resources/guides/diminished-capacity.pdf.
Panelists further encouraged each lawyer to learn what programs and procedures are available through their firm and local and state bar associations.

Response Plan for Law Firms

During the panel discussion, speaker Anne Ray listed some basic steps law firms and others should consider taking when faced with a lawyer exhibiting signs of cognitive decline:

1. Confront the lawyer.
2. Talk to those who work closely with the lawyer.
3. Talk to lawyer's family if necessary.
4. Insist on taking steps to ensure clients and cases are protected.
5. Develop a team around the lawyer.
6. Implement time off for consideration of issues.
7. Mitigate any damages that have already occurred.
8. Monitor appropriate client contact.
9. Change the lawyer's hours.
10. Monitor and adjust the lawyer's contributions to each case.
11. Reduce case load.
12. Increase role as mentor instead of daily case contributor.
13. Full audit of cases.

Some firms have implemented a protocol for dealing with these issues, while others are far from prepared. Moderator Kurt Peterson said his firm mandates that a lawyer can no longer be an equity partner after the age of 70. He said he believes this policy helps to force the conversation about transition. Other firms continue to insist on strict mandatory retirement programs.