TRANSITIONING LAWYERS COMMISSION: WHERE WE ARE AND WHERE WE ARE GOING

In June, 2012, R. Michael Wells, at the time the incoming president of the North Carolina Bar Association, announced the formation of what was originally called the "Retiring with Dignity Task Force." This hand-picked group of lawyers was tasked with combining the work of the Senior Lawyers Division ("SLD") with the work of the Solo, Small Firm, and General Practice Section examining issues related to the end of a law practice. Most of the 2012-2013 bar year was spent reviewing not only the work of the NCBA groups, but also canvassing bar groups across the country to ascertain what had been tried, what had worked, and what still needed to be created. As a working premise, the task force identified three target groups we sought to assist: (1) lawyers who need to retire but are resistant; (2) lawyers who want to retire, but either are unsure of the process or unsure of their financial status; and (3) caregivers within the legal community.

INTERVENTION PROGRAM

The first group, those who need to retire, had been the focus of the work performed by SLD the previous year so the task force had a strong base of information from which to begin its work. The initial areas of concern for this topic were lawyers experiencing cognitive impairments and how to differentiate the work the task force would undertake from the incredible work already being performed by the Lawyers Assistance Program (LAP) which operates under the State Bar's umbrella addressing substance abuse and mental health issues.

Very quickly the task force determined that an intervention program needed to include medical support and advice. Second, the need for confidentiality was identified as a hurdle which needed to be addressed. Finally, a survey of other states revealed that many states are aware of an issue that is growing exponentially, but to date, none have come up with a

comprehensive program directly addressing the concerns surrounding aging and cognitive impairment. Note that the two are not synonymous and they will not be treated as such with the program being designed.

One of the points upon which the members of the task force agreed at an early stage is that in terms of those who need to retire, the key is not to focus on age, but rather on cognitive ability. Touchstones for this thought process can be found in two prominent women who in the past few years have chosen to end incredible careers with grace as they deal with the diagnosis and symptoms of early-onset dementia. One of these women, Pat Summitt, coached one season after her diagnosis and then retired just short of her 60th birthday not because she was unable to perform the duties of her position, but because she was unable to perform those duties to her personal standards. Second, Chief Judge Karen Williams retired at the age of 57 from her position as the Chief Judge of the Fourth Circuit Court of Appeals. "[Judge] Williams' eldest daughter, . . ., said yesterday that her mother made a wrenching decision to leave a job she loves but did so promptly after her diagnosis to make sure she retired before any of her opinions could be questioned." Washington Post, July 10, 2009. Recognizing the need for this program to be essentially age blind, the reality is that the initial group of subjects will involve elders in the profession who are demonstrating cognitive impairment.

A work group was formed led by Robert M. Clay of Raleigh and Bradley Schulz of Beaufort. Bob brought experience in his work with SLD and with the state medical board which is addressing similar concerns with physicians, while Brad has been part of at least three interventions with lawyers who were "missing a step." Brad's experience involved superior court judges who recognized that a treasured member of the local bar needed to stop practicing, but that all concerned would prefer the retirement be voluntary as opposed to coming as a result

of either court or State Bar action. Bob, Brad and their work group worked closely with HRC Behavioral (the same psychological/medical practice which supports BarCares) and developed a model for an intervention program.

From the outset, this model grew out of the mission statement of the NCBA which is "to serve the public and the legal profession by promoting the administration of justice and encouraging the highest standards of integrity, *competence*, civility and *well-being* of all members of the profession" and consists of what the task force has taken to calling a "warm blanket" approach. The idea for the intervention program is that the process will be friends helping friends with the recognition that there are no enforcement "teeth" in the event an intervention is unsuccessful. The program will endeavor to assist those in need to recognize the benefits of a graceful exit from the profession with their honor and reputation intact. Possibly most importantly, the program will be open to all licensed attorneys, whether or not the subject attorney is a member of the NCBA

So, what will this intervention program look like? And, for this group, maybe the more important question, what might a judge's role be in the process? The latter question appears the easier to answer – the role will be much the same as it has been in the past except now you will have a clear process you may choose to utilize. It should be noted that there may, from time to time, be a judge who needs this type of intervention, so Paul Ross and Chief Judge Martin have been included on the task force and are going to involve the judiciary in the training process to ensure that any such need can be met.

THE MODEL

For purposes of putting the program in context, let's begin with a hypothetical. A well-respected and often honored member of the Greenville bar begins missing court dates or appears,

but is relying upon outdated law, is cantankerous with opposing counsel, and generally "missing a step." A pattern is seen by a local lawyer (or the judge). The question is how to address the issue – is it dementia or a natural step in aging or something else? No one is sure, but concern is sufficient to try to find a solution to protect this lawyer from himself.

One interesting aspect of the timing of this manuscript as opposed to the date of the presentation is that if things go as scheduled, what is envisioned (future tense) in the first section below will either have occurred or be occurring at the time of the actual presentation. As with any new program, TLC has a well-formed plan and concept which will undoubtedly run into oddities and challenges requiring tweaks along the way, so with that disclaimer, here is the model.

TLC is recruiting approximately 20 bar leaders and volunteers from across the state to be trained as intervention team leaders. The two primary criteria in selecting this initial class are geographic location and reputational status. Those may seem odd criteria, but the team leaders need to be spread across the state in order to reduce travel time and to increase the chances that the team leader will have some familiarity with the subject attorney. And, recent experience with an unintended trial intervention reinforced the belief that those actually involved in the intervention need to come with sufficient age, experience and status to impress upon the subject attorney that some "young whipper-snappers" are not trying to muscle the subject attorney off their turf. Less colloquially stated, when a subject attorney has been identified as appearing to have started missing a step, the intervention process has a greater opportunity for success if the intervention team has comparable experience and wisdom such that the meaning of the team's words can be given the requisite weight by the subject attorney.

The training will be conducted by HRC Behavioral in single full day (Saturday) training sessions, one in Greenville and one somewhere in the middle part of the western half of the state. The sessions will include testing, lecture and role plays to provide the team leaders with an understanding of the issues, an array of options for dealing with the issues, and with training for both the investigative phase and the actual intervention process. One key area of concern expressed from the State Bar was making certain that the volunteer team leaders were not being left on an island making physical and/or psychological assessments on their own. This training process is the first of multiple steps to insure that is not the case.

Once the team leader training is complete, the NCBA will roll out the program statewide, but hopefully in a controlled manner. Because NCBA leadership has received queries and referrals from those who already are aware of what the task force is trying to create and from others who simply are looking for assistance for a stalwart member of the bar, there is an informal list of potential subjects with which the program will most likely start. Thereafter, the program will be more fully promoted with a toll-free number to the NCBA where a trained staff person will take the call and prepare an intake form.

One decision already made is that the program will not accept anonymous referrals. The team leader and bar staff will work to protect the identity of the referral source and certainly will not publicize that person's identity, but one fear we have heard from lawyers is that the program will be used as a sword to remove disliked or aging lawyers. The first step to avoid that perception is to not accept referrals from anyone not willing to identify him/herself. Additionally, the team leader will need to meet with and interview the reporting individual as part of the initial investigation.

Once a referral is received, the NCBA staff person will determine which team leader is geographically closest and refer the matter to that leader. The team leader will then undertake a preliminary investigation by speaking with the referral source and others to formulate an idea of what indicators are present leading to the referral. The team leader will not be charged with an exhaustive study and will be trained to determine who the best sources and resources might be in a given situation. This phase may include conversations with other lawyers in the firm, with other lawyers in the community, with family members, or with the local judge. The need for confidentiality begins in this phase in order to obtain open and honest observations from folks who might otherwise be protective of the subject.

The State Bar has granted TLC immunity as a Lawyers Assistance Program from Rule 8.3's duty to report misconduct which may come to light during the investigation. If a team leader or other lawyers participating in the intervention process become aware of professional misconduct by the subject lawyer, those individuals will be exempt and in fact prohibited from reporting those acts to the State Bar. Think of this as the "blurt" rule. In order for an investigation and potential intervention to be successful, the subject and those being interviewed need to feel free to be honest and open. A subject with a cognitive impairment is also likely to make statements without the filter necessary for self-protection. The ability to promise and deliver confidentiality enhances the opportunity for a successful process. There needs to be a high level of trust between the team leader, those the team leader might interview as well as with the subject attorney. It should be noted here that in granting LAP status to TLC, a stipulation was that neither the team leader nor anyone else who might be subject to the exemption may act as the trustee in closing down a subject lawyer's office. This stipulation is most likely very important to judges across the state who may find themselves involved in appointing a trustee.

Information gathered in this phase will be shared with the assigned HRC consultant who will assist the team leader in: (a) discerning whether the issue appears to be cognitive in nature and sufficiently advanced to merit an intervention; (b) developing both an outline for the intervention process tailored specifically to the subject and to determine who should be part of the intervention process; and (c) what alternatives should be considered. One key is to make certain there is a support network post-intervention and that network needs to be part of the pre-intervention process.

What happens next depends upon each individual subject and situation, but here are some ideas of the available options:

(A) Team leader will be provided through HRC with a self-administered cognitive test which can be tailored to the individual. These tests are mostly computer-based, but can be altered if the subject is not computer literate. Interestingly, if the subject is uncooperative, the test can be taken by the spouse or law partner and used as one tool in the intervention to demonstrate to the subject what others are seeing;

(B) Computerized Cognitive Assessment – Instead of the self-administered test, the subject could go to a clinician's office and take a cognitive test. With this option the subject would receive a consultation by a HRC psychologist or clinician to go over the results and discuss other possible clinical testing. This testing is included in TLC's program budget.

(C) Neuro-psychological Screening – "Lower level" (or initial) psychological testing would be offered to the individual if warranted by the results of either (A)

or (B) above. The cost of this testing would be borne by TLC and can lead to a medical referral for more extensive ("higher level") neuro-psychological testing which would presumably be covered by subject's health insurance or Medicare. The more specialized neuro-psychological work-up is beyond the financial wherewithal of the TLC program but the intent is to get the subject to the point of a medical referral which in most instances is necessary to obtain insurance coverage for the advanced testing.

The projection is that (C) above will not be necessary for most subjects, but TLC wants the more formalized testing available, if necessary. It is anticipated that either (A) or (B) will be used with most individuals, but rarely if ever will both be used on any one subject.

Intervention is intended and designed to be firm, but clothed in the fellowship of members of the bar. The goal is to allow the subject to be part of the decision to retire and part of the process of winding down or shutting down the practice, but the program also needs to be prepared if that is not practical. The overall purpose of the program is to insure protection of the public from lawyers whose skills are eroding due to cognitive issues, while providing the subject attorney with a graceful exit keeping their dignity and reputation intact. It is hoped that being able to offer the inactive retired status (discussed immediately below) may provide something of an out for those who have placed their entire identity in the title "attorney" or "lawyer."

INACTIVE RETIRED STATUS

The State Bar is circulating a proposed rule change which would add a category to the current inactive status. As TLC undertook the background investigation for the intervention program, it was brought to the task force's attention that there was not a provision in the State Bar's rules which permits a lawyer to retire. Once licensed, you are either "active" or "inactive."

The issue which arose was in the language found on the petition for inactive status. In order to make clear to the public and lawyers alike what "inactive status" means, the language is blunt and somewhat draconian. Individuals on "inactive status" cannot refer to themselves as a lawyer, attorney or counsel, period.

For those lawyers of the generation generally equated with issues of retirement, those who have devoted 40-60 years to practicing law, their profession is often integrally woven into their identity. This identity prevents many from being able to sign a document which to them takes away the core of their identity. Furthermore, some of the stipulations attached to the original inactive status rule were designed to insure that if and when a lawyer sought to return to active status, they would be properly positioned to do so in terms of education and dues (both have to be current at the time you go inactive). In keeping with many things discovered in the past year, the primary focus of the original rule was not retirement, since in the past lawyers rarely retired; they just died. The rule instead was designed to accommodate women who took time off to raise a family or others who for one reason or another took a break from practice, envisioning the possibility of returning. As life spans continue to lengthen, the State Bar realized the need to plan for and to accommodate those who wish to retire and do not plan on returning to practice.

The proposed rule change creates an "inactive retired" status. As proposed, dues and CLE would not be an issue since this status would not envision a return to practice – if you want to preserve that option, then you would elect simply the "inactive status" option for the trial period and presumably could swap that status later if desired. The key distinction between the two is that someone who has elected "inactive retired" may identify him/herself as a "retired

lawyer," "retired attorney" or any other designation which makes it clear to the listener that the individual is no longer authorized to dispense legal advice or to practice law.

While this may seem a somewhat trivial issue, it is surprising how many of our elders would not consider inactive status simply because they would no longer be able to be identified as a lawyer. As noted in a presentation to the State Bar on this issue, we continue to address politicians by their highest elected office's title as long as they live; we call judges "judge," but until this change becomes effective, it would be an ethical violation for a lawyer on inactive status to say he (or she) is a lawyer. It matters.

TURNING OUT THE LIGHTS

The second prong of TLC's original charge involved building upon the work of the Solo, Small Firm and General Practice Section of the NCBA which created a publication entitled Turning Out the Lights. This book is currently in its second edition. Its origins are found in the sudden and unanticipated death of a well-respected sole practitioner. Leaders of the section returning from the funeral realized that there was not a readily available resource for lawyers and family needing to close down a practice where the practitioner was not able to assist. The second edition added model letters and forms for a sole practitioner seeking to voluntarily wind down and close a practice.

Working with the section, a TLC work group is undertaking work on a third edition which will incorporate a "user's guide" providing text in support of the forms and models to make clearer what is required (and what rules or guidelines contain the governing language) and what is elective. The goal is to improve a very good publication by making it even more user-friendly for lawyers and non-lawyers alike. A lawyer couple will lead the writing team using the

wife's insight for guidance; she is retired and he works with a small firm. The writing team's work will be guided by her "what if" thoughts.

SALE OF A PRACTICE

As occurred with the research into the intervention program, studying the Turning Out the Lights model revealed other issues to be tackled. In looking at the existing models for closing a law practice, concerns were raised about the wording of Rule 1.17 and the limitations it appeared to place on the sale of a practice. This led to another change to the rules though this revision did not require a formal rule change, but rather a clarification.

Rule 1.17 of the Rules of Professional Conduct exists to protect attorneys from a situation in which a lawyer purports to sell a practice, then turns around and opens a new office just around the corner. Knowing that most of the old clients would presumably migrate back to the original attorney, the State Bar wanted to protect the clients and the purchasing attorney from an illusory sale by prohibiting the seller from practicing in close proximity after the sale of the practice.

In the current environment, a situation is likely to occur where a new lawyer may want to buy into a practice and transition to full ownership over a defined period of time while still working with and learning from an older lawyer who is seeking to slow down and wind down. 98 FEO 6 seems to permit this model, so the current revisions are aimed more at clarifying that a seller may continue to practice as part of the firm he sold so long as he is with that firm in the role of an employee or of counsel. This avoids the competition concern, but also allows an attorney to exit the full time practice without stopping cold turkey.

This topic may still see further development as law schools and mentoring programs seek ways to increase the percentage of law students fully employed after law school, encourage them

to look at smaller communities across the state, and develop informal mentoring relationships with older attorneys who cannot afford to hire an associate, but may seek a reciprocal arrangement in which each solo practitioner (one new to practice and one approaching the end of a career) may rely upon the other for advice and counsel and to watch each other's clients during vacations or life events without fear of one "stealing" the other's clients. Hopefully, over time, such an arrangement could lead to a sale or transfer of a practice in a mutually beneficial manner.

WHAT'S NEXT FOR TLC?

Looking ahead, TLC is going to spend a good bit of the coming year developing educational programs and materials related to retirement planning for lawyers. Because lawyers have not traditionally retired, there are few models for law firms, for individuals, or for staff and families to follow. Programs addressing such topics have not been given CLE credit in the past. The State Bar has indicated that it would consider, and has in fact awarded, CLE credit for topics related to retirement planning. Such planning is not restricted to financial planning, though that is certainly an element of retirement planning. Emotional and psychological planning needs to occur as well in order to envision a life without practicing law and plan for that future.

Additionally, TLC will spend a considerable amount of time this year examining issues related to caregiver support. What has become abundantly clear is that throughout the legal profession lawyers, judges, paralegals and staff members are under a great deal of stress trying to balance work, immediate family needs and elder care for extended family (generally parents). An example currently existing in one small to mid-size law firm stands as an indication of the pervasiveness of this issue: (a) one partner has been dealing with parents who essentially back-to-back experienced dementia such that the partner for about 10 years was constantly involved with caregiving as first one parent, then the other slid slowly into the abyss of dementia requiring

a greater deal of care and concern with each passing day; (b) an experienced paralegal who lost a sibling to cancer just as she was beginning to deal with two parents living in another city who are experiencing failing health without extensive financial resources – the sibling's death left her as the only remaining relative to provide care for the parents; and (c) a younger paralegal with two small (preschool to elementary school age) children, a husband whose job required a fair amount of travel, a mother who at the age of 60 developed early-onset Alzheimer's and by 63 was in a skilled care unit, a father left to care for his wife while still carrying on with his life, and finally, a mother-in-law (back up childcare provider) who developed terminal cancer. These three individuals represent one-third of the partners in the firm and half of the certified paralegals. What can or should a law firm do to ensure work is completed timely and accurately while still supporting these staff members?

There are many issues which any part of the scenario set out above provide for consideration. For all three, there were steep learning curves in terms of levels of care, cost, insurance coverage, etc. On one level, this would seem not to be a concern for the law firm, but on another level, as a profession, assisting our members in coping with such issues fits within the mission statement of the NCBA. And from a more practical point, the more information readily available, the less work time lost seeking the answers. TLC is building a database which will link to multiple resources from which information can be located. Also, upcoming NCBA programming will include information designed to educate all members of the profession on issues involving elder care.

For law firms, there are philosophical/cultural issues to be resolved in determining how the firm will tolerate and address the stresses and absences employees and members of the firm are undergoing as a result of their roles as caregivers. While the Family and Medical Leave Act

deals with some of these issues, often a law firm is too small to be covered, so the firm must determine its policies and protocols.

Consider as well the risk of errors and omissions which can result from a firm not giving due consideration to the stress level of a caregiver. And, for a solo practitioner or small firm office, what plans need to be made in the event the caregiver finds the need to drop everything and run to the aid of a family member, especially if the duration of the absence is unknown or unclear? Here is where the courts may well also come into play as judges face circumstances related to lawyers operating in a caregiver role. As a profession, we have created secured leave to make sure our members can get away to recharge from time to time. Is there something in the form of a compassionate leave concept which covers not only the immediacy of a death, but critical illness, or some period to allow the grief process to begin before a lawyer (or judge) is compelled to return to court?

And, back to the issue of winding down towards retirement, but in the same vein of issues in which the courts will need to be included – several experienced lawyers have broached the subject of altering the secured leave policy in a manner which would allow lawyers to ease towards retirement. The current rule allows the blocking of weeks. These lawyers would prefer a set number of days annually and consideration of a rule which would increase the number of days after a certain number of years of practice (think in terms of after 30 years of practice, you get one additional secured leave day per year). The idea is to allow younger lawyers to protect the weeks for the mental health aspects originally intended, but allow more seasoned attorneys to use those days to blank out (by way of example) Fridays, then later maybe Thursdays and Fridays (a certain number per year) to begin the emotional process of sampling what retirement might look and feel like.

This last concept is outside of anything the NCBA or State Bar might mandate, but it is an idea TLC will explore a bit and at least get some feedback to determine whether there is enough support to justify a more complete investigation. The concept is interesting; the practicalities given court scheduling practices may be a wholly different thing.

CONCLUSION

Entering the second year of TLC's work, the task force seeks to find answers and suggest solutions for the plethora of questions which have arisen. While as individuals lawyers and judges are not different from anyone else in society, our profession does have different responsibilities. As members of society, lawyers and paralegals are not immune from the role of caregivers for family members, from suffering the ravages of dementia, and from experiencing the heart-wrenching decisions when professional obligations conflict with family duties. TLC therefore is spending a great deal of time and effort in identifying and preparing programs to assist lawyers and judges in dealing with these challenges. Where the legal profession is different is that we also advise clients and in doing so, may find a professional duty to be educated in dealing with these issues in order to provide information to our clients. One certainty is that the work of TLC is just beginning. Whether the task force remains in existence perpetually will be a decision for future NCBA leaders, but the need to continually improve education and programming on these issues appears a certainty.