2014 Annual Convention

Health Issues for Senior Lawyers (Including Age Impairment Issues)

Senior Lawyers Section

1.0 General CLE Hour

Ohio State Bar Association

April 30 – May 2, 2014 ♦ Columbus
Scott R. Mote, JD
Executive Director
Ohio Lawyers Assistance Program, Inc.
Columbus, Ohio

Mr. Mote received his BA from Wright State University, his MA from the University of Dayton, and his JD from Capital University Law School. His professional memberships include the American Bar Association (Health Law Section; Legal Education and Admissions to the Bar Section), Ohio State Bar Association (Council of Delegates, District 7; Estate Planning, Trust, and Probate Law Section; Lawyers Assistance Committee), Columbus Bar Association (Admissions Committee; Probate Committee), The Florida Bar (Out-of-State Practitioners Division), Ohio State Bar Foundation, Columbus Bar Foundation, Central Ohio Association for Justice, Central Ohio Association of Criminal Defense Lawyers, and the Federalist Society.

Mr. Mote is the Executive Director of the Ohio Lawyers Assistance Program, Inc., which was formed by the Lawyers Assistance Committee of the Ohio State Bar Association. He has been involved with the LAC/OLAP for over 25 years and served as OLAP’s first associate director in 1995, and in July 1999, he became the Executive Director. Prior to making OLAP a full-time endeavor, Mr. Mote was a general practice lawyer and civil litigator for over 25 years. He has made over 400 presentations to lawyers, judges, and law students, including the annual conventions of the OSBA, the Ohio Judicial Conference, the American Bar Association Commission on Lawyer Assistance Programs (ABA CoLAP), and the National Organization of Bar Counsel. Mr. Mote has facilitated over 100 interventions and oversees four other chemical dependency and mental health professionals. He was presented with the 2005 Award of Merit for service to the profession by the Columbus Bar Association, the 2006 Ohio Bar Medal by the Ohio State Bar Association, its highest award for service to the profession, the 2010 OSBA Eugene R. Weir Award for Ethics and Professionalism, and Capital University Law School’s 2013 Alumni of the Year Award. Mr. Mote can be contacted via phone at 800-348-4343; fax at 614-586-0633; e-mail at smote@ohiolap.org; or through the Ohio Lawyers Assistance Program Inc.’s website at www.ohiolap.org.
Health Issues and Grey Matters: Perspectives on Aging Lawyers and Cognitive Impairment

Scott R. Mote, JD
Executive Director
Ohio Lawyers Assistance Program, Inc.
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Health Issues and Grey Matters: Perspectives on Aging Lawyers and Cognitive Impairment

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Dealing with Aging Lawyers

For over 20 years, OLAP has assisted Ohio’s lawyers, judges, and law students obtain appropriate treatment for substance abuse, chemical dependency, and mental health issues. Over the past 10 years there has been a dramatic increase in the number of professionals and students who have no drug and/or alcohol problems, but suffer from various mental health issues.

OLAP receives referrals from a variety of sources, including colleagues, co-workers, opposing counsel, ethics/certified grievance committees, Disciplinary Counsel, defense counsel in disciplinary cases, admissions committees, counsel in admissions cases, judges, magistrates, court administrators, law schools, family, and friends.

Over the last few years OLAP has received many referrals regarding elderly attorneys and their diminished capacity to practice law. We know that these referrals are only going to increase as the years continue. The “baby boomer” generation is now into its 60s, and more lawyers continue to practice longer.

In 2006, 37.3 million Americans were 65 and older; this equates to one in every eight Americans. In 2030 this number will increase to approximately 71.5 million older persons, which is more than two times the numbers in 2000. It is estimated that a quarter of a million of America’s practicing lawyers are already over the age of 55. This number is expected to triple over the next two decades.

1 Administration on Aging (www.aoa.gov).
2 American Geriatric Society (www.americangeriatrics.org).
People in the United States are living longer than ever before. The average life expectancy is now approaching 80 years. There has been a change in the way our health care system manages its patients, and the focus has shifted to making our later years healthier and more productive. We are living longer and healthier lives, and people are postponing retirement for emotional and financial reasons.  

The legal profession is going to have attorneys practicing well beyond previously expected retirement age of 65-70. Most large and midsized firms have policies in place on how to accommodate their aging lawyers, with mandatory retirement requirements in place. But this generally is not the case for smaller firms, office-sharing arrangements, and solo practitioners, who make up the majority of Ohio’s lawyers.

Medical Implications of Aging

Regardless of the area of practice, aging attorneys inevitably will struggle with health issues as they age. For many, the aging process is what will impact their ability to continue to practice law in the same manner in which they have grown accustomed over the years. Each person is unique, and there is no stereotype as to how we age. Not all age-related changes are harmful or negative. Scientists suggest that aging is likely a combination of many factors. Genetics, lifestyle, and disease all affect the rate at which we age.

Normal Aging Brings About the Following:

**Eyesight** – loss of peripheral vision and decreased ability to judge depth. Decreased clarity of colors (for example, pastels and blues).

**Hearing** – loss of hearing acuity, especially sounds at the higher end of the spectrum. Also, decreasing ability to distinguish sounds when there is background noise.

**Taste** – decreased taste buds and saliva.

**Touch and Smell** – decreased sensitivity to touch and ability to smell.

**Arteries** – stiffen with age. Additionally, fatty deposits build up in your blood vessels over time, eventually causing arteriosclerosis (hardening of the arteries).

**Bladder** – increased frequency in urination.

**Body Fat** – increases until middle age, stabilizes until later in life, then decreases. Distribution of fat shifts – moving from just beneath the skin to surround deeper organs.

**Bones** – somewhere around age 35, bones lose minerals faster than they are replaced.

**Brain** – loses some of the structures that connect nerve cells, and the function of the cells themselves is diminished. “Senior moments” increase.

**Heart** – is a muscle that thickens with age. Maximum pumping rate and the body’s ability to extract oxygen from the blood both diminish with age.

**Kidneys** – shrink and become less efficient.

**Lungs** – somewhere around age 20, lung tissue begins to lose its elasticity, and rib cage muscles shrink progressively. Maximum breathing capacity diminishes with each decade of life.

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2 • Health Issues for Senior Lawyers
**Metabolism** – medicines and alcohol are not processed as quickly. Prescription medication requires adjustment. Reflexes are also slowed while driving, therefore an individual might want to lengthen the distance between him or her and the car in front and drive more cautiously.

**Muscles** – muscle mass declines, especially with lack of exercise.

**Skin** – nails grow more slowly. Skin is more dry and wrinkled. It also heals more slowly.

**Sexual Health** – Women go through menopause, vaginal lubrication decreases, and sexual tissues atrophy. In men, sperm production decreases and the prostate enlarges. Hormone levels decrease.4

**Cognitive Impairment**

Symptoms/signs of cognitive impairment include: missed deadlines, repeatedly making the same mistakes and not remembering the first one, confusion, forgetfulness, disheveled appearance, loss of skill set, irritability, dissatisfied clients, disciplinary problems, family member’s concerns, office staff upset/angry, and court concerns. Oftentimes family members or other professionals have noticed a significant decline in one’s cognitive abilities. These cognitive changes are referred to as cognitive impairment. Cognitive impairment occurs when there is a problem with perceiving, thinking, and remembering. Physical illness, mental health issues, alcohol, and drug interactions are all possible causes of cognitive impairment.

Once cognitive impairment is identified, it is essential for the person to receive a full medical evaluation to determine the cause of the impairment. Dementia, Alzheimer’s Disease, and Delirium are all possible medical-related issues that need to be ruled out. While there are many qualifiers and sub-types for each of the disorders listed above it is important to have a working definition of the following disorders.

**Dementia**

The development of multiple cognitive deficits manifested by both: (1) memory impairment (impaired ability to learn new information or to recall previously learned information), (2) one (or more) of the following cognitive disturbances:

A. **Aphasia** (language disturbance);
B. **Apaxia** (impaired ability to carry out motor activities despite intact motor function);
C. **Agnosia** (failure to recognize or identify objects despite intact sensory function); and/or
D. **Disturbance in executive functioning** (i.e., planning, organizing, sequencing, abstracting).

** The cognitive deficits listed cause significant impairment in social or occupational functioning, and represent a significant decline from a previous level of functioning. There will be a gradual onset and continuing decline. Also, these symptoms are not due to any other central nervous system conditions that cause deficits in memory and cognition.

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Alzheimer’s Disease

Alzheimer’s Disease is a brain disease that causes problems with memory, thinking, and behavior. It is the most common cause of dementia. It is not a normal part of the aging process, and it is not the only cause of memory loss. Alzheimer’s disease worsens over time and there is no cure. The treatments available try to slow progression and lesson the symptoms (Alzheimer’s Association).

Delirium

Delirium is a disturbance of consciousness (i.e., reduced clarity of awareness of the environment), with reduced ability to focus, sustain, or shift attention. There is also a change in cognition (such as memory deficits, disorientation, or language disturbance) or the development of perceptual disturbance that is not better accounted for by a preexisting, established, or evolving dementia. The disturbance develops over a short period of time (usually hours to days) and tends to fluctuate during the course of the day. Lastly, upon evaluation this disturbance is caused by the direct physiological consequences of a general medical condition. \(^5\)

Mental Health Implications

As a person ages there are several losses associated with getting older. While many aging people go through the later stages of life successfully and embrace their new phase of life, some people experience mental health issues at this time. There are many mental health issues one may face as he or she ages, but depression can be the most significant and under diagnosed.

While depression and suicide rates among the elderly are significant, depression is not a normal part of the aging process. Suicide is more common among older adults than any other age group, accounting for 16 to 25 percent of the suicides in the United States. \(^6\) Depression is one of the issues most commonly associated with suicide in older adults. However, it is under-recognized and under-treated. Studies have shown that up to 75 percent of older adults who kill themselves visited a physician within a month before their deaths. The risk of suicide increases with other illnesses, and when the ability to function becomes limited. \(^7\)

Over the last several years, OLAP has assisted aging attorneys navigate the difficult process of changing how they practice or retiring from the practice of law. The point at which an attorney needs to make changes or retire is dependent upon how much decline the attorney is experiencing. Each case must be assessed individually. Regardless of the issues facing the attorney, it is essential that those involved with the aging attorney create a positive environment and good rapport. It is essential to uphold the dignity of the individual. We must respect how much one’s self-worth, self-esteem, and self-confidence are all connected to his or her identity of being a lawyer. This difficult life transition can be made more tolerable if we allow the aging lawyer as much control and input as possible during this process.

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Relevant Ohio Supreme Court Rules

Prof. Cond. R. 8.3 Reporting Professional Misconduct (ABA MRPC 8.3)

Judicial Cond. R. 2.14 Disability and Impairment (ABA CJD 2.14)


Rule 8.3: Reporting Professional Misconduct

(a) A lawyer who possesses unprivileged knowledge of a violation of the Ohio Rules of Professional Conduct that raises a question as to any lawyer’s honesty, trustworthiness, or fitness as a lawyer in other respects, shall inform a disciplinary authority empowered to investigate or act upon such a violation.

(b) A lawyer who possesses unprivileged knowledge that a judge has committed a violation of the Ohio Rules of Professional Conduct or applicable rules of judicial conduct shall inform the appropriate authority.

(c) Any information obtained by a member of a committee or subcommittee of a bar association, or by a member, employee, or agent of a nonprofit corporation established by a bar association, designed to assist lawyers with substance abuse or mental health problems, provided the information was obtained while the member, employee, or agent was performing duties as a member, employee, or agent of the committee, subcommittee, or nonprofit corporation, shall be privileged for all purposes under this rule.

Comment

[1] Self-regulation of the legal profession requires that a member of the profession initiate disciplinary investigation when the lawyer knows of a violation of the Ohio Rules of Professional Conduct involving that lawyer or another lawyer. A lawyer has a similar obligation with respect to judicial misconduct. An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense.

[2] A report about misconduct is not required where it would involve the disclosure of privileged information. However, a lawyer should encourage a client to consent to disclosure where it would not substantially prejudice the client’s interests.

[3] [RESERVED]

[4] The duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question. Such a situation is governed by the rules applicable to the client-lawyer relationship. See Rule 1.6.

[5] Information about a lawyer’s or judge’s misconduct or fitness may be received by a lawyer in the course of that lawyer’s participation in an approved lawyers or judges assistance program. In that circumstance, providing for an exception to the reporting requirements of divisions (a) and (b) of this rule encourages lawyers and judges to seek treatment through such a program. Conversely, without such an exception, lawyers and judges may hesitate to seek assistance from these programs, which may then result in additional harm to their professional careers and additional injury to the welfare of clients and the public.
Comparison to former Ohio Code of Professional Responsibility

Rule 8.3 is comparable to DR 1-103 but differs in two respects. First, Rule 8.3 does not contain the strict reporting requirement of DR 1-103. DR 1-103 requires a lawyer to report all misconduct of which the lawyer has unprivileged knowledge. Rule 8.3 requires a lawyer to report misconduct only when the lawyer possesses unprivileged knowledge that raises a question as to any lawyer’s honesty, trustworthiness, or fitness in other respects. Second, Rule 8.3 requires a lawyer to self-report.

Comparison to ABA Model Rules of Professional Conduct

Rule 8.3 is revised to comport more closely to DR 1-103. Division (a) is rewritten to require the self-reporting of disciplinary violations. In addition, the provisions of divisions (a) and (b) are broadened to require reporting of (1) any violation by a lawyer that raises a question regarding the lawyer’s honesty, trustworthiness, or fitness, and (2) any ethical violation by a judge. In both provisions, language is included to limit the reporting requirement to circumstances where a lawyer’s knowledge of a reportable violation is unprivileged.

Division (c), which deals with confidentiality of information regarding lawyers and judges participating in lawyers’ assistance programs, has been strengthened to reflect Ohio’s position that such information is not only confidential, but “shall be privileged for all purposes” under DR 1-103(C). The substance of DR 1-103(C) has been inserted in place of Model Rule 8.3(c).

In light of the substantive changes made in divisions (a) and (b), Comment [3] is no longer applicable and is stricken. Further, due to the substantive changes made to confidentiality of information regarding lawyers and judges participating in lawyers’ assistance programs, the last sentence in Comment [5] has been stricken.

Rule 2.14 Disability and Impairment

(A) A judge having a reasonable belief that the performance of a lawyer or another judge is impaired by drugs or alcohol, or by a mental, emotional, or physical condition, shall take appropriate action, which may include a confidential referral to a lawyer or judicial assistance program.

(B) Any information obtained by a member or agent of a committee or subcommittee of a bar or judicial association or by a member, employee, or agent of a nonprofit corporation established by a bar association, designed to assist lawyers and judges with substance abuse or mental health problems, shall be privileged for all purposes under this rule, provided the information was obtained while the member, employee, or agent was performing duties as a member, employee, or agent of the committee, subcommittee, or nonprofit corporation.

Comment

[1] “Appropriate action” means action intended and reasonably likely to help the judge or lawyer in question address the problem and prevent harm to the justice system. Depending upon the circumstances, appropriate action may include, but is not limited to, speaking directly to the impaired person and notifying a partner, a colleague, or an individual with supervisory responsibility over the impaired person, or making a referral to an assistance program.

[2] Taking or initiating corrective action by way of referral to an assistance program may satisfy a judge’s responsibility under this rule. Assistance programs have many approaches for offering help to impaired judges and lawyers, such as intervention, counseling, or referral to appropriate
health care professionals. Depending upon the gravity of the conduct that has come to the judge’s attention, however, the judge may be required to take other action, such as reporting the impaired judge or lawyer to the appropriate authority, agency, or body. See Rule 2.15.

**Comparison to Ohio Code of Judicial Conduct**

There is no Ohio Canon comparable to Rule 2.14(A). Rule 2.14(B) corresponds to Ohio Canon 3(D)(4).

**Comparison to ABA Model Code of Judicial Conduct**

Model Rule 2.14 is modified to add division (B) that is taken from Ohio Canon 3(D)(4).

**What Used to Be as Easy as Falling Out of Bed**

Gene is 74 years old, and has been a sole practitioner his entire career. His general practice was always steady, with an emphasis on probate matters. He could administer an estate in his sleep. Gene lost his long-term secretary three years ago, and is struggling to operate his practice with part-time help from the local bar association’s secretary referral service. Gene’s technological skills are challenged by making his cell phone work.

Gene has nine open cases in probate court. Six of them have problems with timely filing—inventories and fiduciary accounts are overdue. He has been cited to appear on all of them, and has promised to get things cleaned up. The new due dates have come and gone, and it’s time to send citations again. Two clients have called the court, complaining that Gene is not responsive to their requests to get their parents’ estates finished.

Gene comes in to open a new estate on Tuesday. The paperwork is incorrect, and the filing is refused. A court employee points out what corrections need to be made. Gene is reminded that he has six other cases in arrears. He promises to get everything done by next Wednesday.

Gene is back in court on Friday afternoon with the new case that was rejected on Tuesday. The initial errors are not corrected, and Gene seems oblivious to his mistakes. He argues with the court employee, reminding her that he was doing this legal work before she was born, and since she’s not a lawyer anyway, her opinion is irrelevant.

When reminded that he has six other cases to get cleaned up by next Wednesday, Gene looks surprised, and denies knowing anything about them.

**Solo and Sinking at Trial**

Bob has been practicing for 50-plus years. He’s been a competent lawyer, never any front-page cases, but always timely and professional. He served as local bar president 30 years ago. He practiced with the same excellent firm for most of his career, and his former partners have all retired and moved to sunnier climes or passed away. Bob’s wife of nearly 50 years died last year, and his children and grandchildren are scattered across the country. Now it’s just Bob and his secretary, who has been with him the last 30 years; she’s probably in her early to mid 70s.

For his entire career, Bob has been a well-respected member of the bar and community. The profession has watched him age gracefully, and noticed him slowing down the last 10 years or so. He’s still dressed impeccably, and his secretary came with him to court today (a first!).

Bob represents a small business owner in a lease dispute with a commercial landlord. The roof leaked and the case is about water damage to the businessman’s property. Bob settled with his client’s insurer, and is seeking the rest of his damages from the landlord. It’s a bench trial.
Bob gives an unneeded and disorganized opening statement that is full of references to papers that he drops to the floor twice; his client and secretary retrieve and reorganize them for him. He speaks in halting half-sentences, and looks at the American flag with a blank stare. Defense counsel waives opening statement, and Bob puts his client on the stand. After establishing that his client’s name is David Klein and that he owns the business, Bob stops and looks at opposing counsel for what seems like a minute, saying nothing. He then turns to his client and addresses him as Mr. Anderson, who happens to be the landlord’s representative sitting with defense counsel. Mr. Klein graciously corrects Bob, who seems oblivious to his mistake, and Bob looks at the judge and says, “Please instruct the witness to answer the question.”

Bob’s secretary is quietly crying.