

**DATE:** July 18, 2013

**TO:** RAD/MOC Senior Lawyers Working Group

**FROM:** Pearl G. Mann, Chair  
Robert A. Hawley, Deputy Executive Director

**SUBJECT:** RAD/MOC Senior Lawyers Working Group Report

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## **INTRODUCTION**

The issue of aging in America is a subject of obsessive current interest. There is a great deal of discussion generally on aging and its effect upon physical, mental and emotional capacity within the general population. The subject is also of great interest and concern to professional regulators and associations, due to the effect aging has on one's ability to perform in accordance with professional standards.

A significant initiative of Patrick Kelly's term as State Bar President has been to focus upon this issue. He initiated the Senior Lawyers Working Group overseen jointly by the Board Committee on Regulation, Admissions and Discipline (RAD) and the Board Committee on Member Oversight (MOC) to study the area and determine what, if any, activity was appropriate in this area by the State Bar. The Working Group met in November 2012, March 2013, May 2013, and at this July 2013 meeting of the Board. A public hearing was conducted on June 3, 2013. A follow-up telephone conference meeting was held June 24, 2013.

This is a report to the Board of Trustees on the activity and goals of the Working Group to date. The Board is requested to adopt the report, endorse the direction of the work reported to date, and encourage the continuation of the efforts reflected in the report.

## **DISCUSSION**

Virtually every bar association in the nation is contemplating a senior lawyers committee, section, publication, or other form of activity to address the issue of aging lawyers. The focus ranges from providing social networking and support activities, to enhanced education and professional engagement opportunities, to fostering enhanced mentoring and pro bono service, to heightened regulatory standards to assure continued high quality professional performance is delivered to the public. A leading example is the Senior Lawyers Division of the American Bar Association (ABA) and the work of the National Organization of Bar Counsel (NOBC). The ABA has a variety of resources for senior lawyers: financial and retirement planning; pro bono work opportunities; healthcare options;

public education; volunteer opportunities; help in closing or selling a law practice; tools for achieving work/life balance. The ABA also has a variety of special publications for senior lawyers: *Turning Points: New Paths and Second Careers for Lawyers*; *Partner Departures*; *Experience*, the senior lawyer magazine. [See, [Senior Lawyers - ABA Portal](#).] The NOBC issued a report on the regulatory aspects of the issue in 2007, noted below, and is continuing to examine the issue.

### **The State Bar of California's Perspective: Regulatory Focus**

The central perspective of the State Bar of California on this subject, as a regulatory agency as opposed to a bar association, is the standard governing attorney conduct that aging potentially evokes. Rule 3-110 [Failing to Act Competently] sets the disciplinary standard of competence within California. This rule makes it a disciplinary offense for an attorney to “intentionally, recklessly, or repeatedly” fail to perform legal services with “competence.”

Relevant to the work of the Working Group is the rule’s definition of “competence.” Under rule 3-110(B), “competence” is defined to include the “1) diligence, 2) learning and skill, and 3) mental, emotional, and physical ability reasonably necessary for the performance of such service.” [See, [Rules of Professional Conduct - Rule 3-110 Failing to Act Competently](#).]

This third component of the disciplinary definition of competence is highly relevant to the focus of the Working Group. An attorney who “intentionally, recklessly or repeatedly” fails to demonstrate the “mental, emotional, and physical ability” reasonably necessary to render competent legal services is committing a disciplinary offense.

This competence standard is not unique to California. It is common throughout the nation giving rise to a NOBC/APRL Joint Committee Report that has been a resource of focused interest to the Working Group. *The National Organization of Bar Counsel (NOBC) / Association of Professional Responsibility Lawyers (APRL) Joint Committee on Aging Lawyers: Final Report (May 2007)* originates from the joint work of the NOBC, the national association of attorney regulators and APRL, the national association of lawyers involved with professional responsibility standards, many of whom defend attorneys facing disciplinary prosecutions. [See, [APRL-NOBC Report on Aging Lawyers](#).] This report outlined the issues and provided a “road map” for regulatory agencies to follow in adopting action plans involving aging lawyers. The Joint Report offered recommendations for regulatory jurisdictions to consider when addressing this subject.

In addition to carefully considering the 2007 report, the Working Group invited representatives of the NOBC to address the group on this subject at its public meeting June 3, 2013. The Chief Disciplinary Counsel from the Supreme Court of New Mexico, William Slease, updated the Working Group on the continued work of the NOBC in this area since

its report was issued in 2007. The NOBC's President this term, Murray Greenberg, who also happens to be a Senior Deputy Trial Counsel in the State Bar of California's own Office of the Chief Trial Counsel, further updated the Working Group on the work of the NOBC in this area at the Working Group's telephone Conference call meeting June 24, 2013.

### **The NOBC/APRL "Roadmap"**

The NOBC's "Roadmap" for regulatory agencies to address the senior lawyer issue from a regulatory perspective includes the following:

1. Make a demographic assessment of the lawyers within your jurisdiction, determining age demographics focusing particularly on the ages of those attorneys who remain actively practicing law.
2. Undertake substantive steps to identify lawyers who have age related impairments.
3. Provide planning assistance and law practice transition guidance to assist lawyers who need to reduce or move out of practice. Among these tools include vehicles for surrogate, successor or care taker counsel, sale or transfer of a law practice, guidelines for preserving and handling client files and key documents, meaningful responsive action when a lawyer becomes unexpectedly incapacitated or dies without advanced planning leaving clients unrepresented.
4. Explore ways to encourage and support senior lawyers continuing in practice. Examples here include senior lawyer mentoring, meaningful pro bono work, linkages with young lawyers, and special continuing education programs.
5. Responding appropriately to age impaired lawyers. Here, regulatory agencies are called upon to determine how best to address age impaired issues involving lawyers as they encounter the disciplinary system.

### **The State Bar's Goal: Accomplishments**

The Working Group found that the State Bar of California is already addressing many of the issues raised in the 2007 NOBC/APRL Joint Report.

1. Demographic Assessment: The most recent demographic survey of the State Bar's membership was conducted in December 2011. Among other things, that survey establishes that 48% of practicing attorneys are over the age of 55. The "About the Bar "Bar Numbers" page of the State Bar's website tracks lawyers by age. There are currently 240,680 total members of the State Bar of California, 177,700 actively engaged in practice. In general, there are approximately 75,850 total

members age 60 or over representing 30% of the total membership and nearly 43% of the active membership. There are 16 members who are 100 years old. [See, [Member Demographics](#).]

2. Law Practice Transition Guidance: The State Bar has developed an Attorney Surrogacy Program [See, [Attorney Surrogacy](#).] and an abandoned practice redress process in accordance with Business and Professions Code Sections 6180 and 6190 [See, [B & P Code § 6180](#) & [B & P Code § 6190](#).] The State Bar makes available for free [Guidelines for Closing or Selling a Law Practice](#).
3. Support Continuing Practice: The State Bar maintains the Emeritus Attorney Pro Bono Practice Program that allowed attorneys 70 years and older to maintain their membership without annual dues while performing pro bono services through a qualified legal services provider. This program was modified and renamed but still applies to qualified attorneys. This has been a long standing program and is mentioned favorably in the 1996 resource, *The Senior Lawyers Organizing and Volunteering: A National Profile*, noted below.
4. Responding Appropriately in the Disciplinary System: Business and Professions Code Section 6007 provides for the non-disciplinary involuntary inactive enrollment of a lawyer who is found to be incapable of performing, but will not accept it. [See, [B & P Code § 6007](#).]
5. It is worthy of historical note that the State Bar at one time had a Senior Lawyers Committee. This committee was one of the State Bar's diversity "Access Committees" and was combined into the current Council on Access and Fairness. An effort was made thereafter to create a Senior Lawyers Section. However, sufficient funding was not available to maintain such a section. The State Bar is prohibited by Business and Professions Code Section 6031.5 from subsidizing the Sections. Each Section must survive on its own dues generated revenue. Funding challenges have made it impractical to maintain a senior lawyers committee or section.

Under the direction of the Working Group, the following initiatives have been undertaken.

1. A public meeting/summit on senior lawyers was conducted Monday, June 3, 2013 at the State Bar's Los Angeles office. At this public meeting, Dr. Diana Homeier, Assistant Professor of Clinical Medicine at USC's Keck School of Medicine, board certified in family and geriatric medicine, and Dr. Susan I. Bernatz, a Ph.D. forensic neuropsychologist, offered clinical, medical, psychological and other perspectives on the issue of aging professionals; Williams Sleese, Chief Disciplinary Counsel for the New Mexico Supreme Court, updated the Working Group on the NOBC's work in

this area; and Jay Foonberg an authority on senior lawyers spoke, addressing the issue from the perspective of the senior lawyer.

2. Working Group Chair Pearl Mann and Board Regulation, Admissions and Discipline (RAD) Committee Chair Karen Goodman, presented a panel discussion at the State Bar's Solo and Small Firm Summit in June entitled "Relief Practitioner: How to Plan for the 9<sup>th</sup> Inning of Your Legal Career," targeting issues of relevance to senior lawyers. Also at the Solo Summit were programs on "Planning for the Death or Disability of the Solo Practitioner," and several other substantive programs designed for the needs of solo and small firm practitioners. The program by Pearl Mann and Karen Goodman is also slated to be presented at the State Bar's Annual meeting in the fall.
3. The State Bar has launched a senior lawyers web page outlining resources and materials available to senior lawyers. It is currently located in the State Bar's "Ethics" and "Competence" web area. The focus of the page is upon competence and performance related issues. This is a work in process and is being advanced and updated with the guidance of the Senior Lawyers Working Group. [See, [Senior Lawyers Resources](#).]
4. On April 18, 2013, the Board's Member Oversight Committee (MOC) conducted its first public hearing on Mandatory Continuing Legal Education (MCLE) program reforms. A segment of the agenda was reserved for a presentation by the Senior Lawyers Working Group. On MOC, and in attendance at the hearing, were Working Group Chair Pearl Mann, and members David Pasternak and Loren Kieve. Loren Kieve chaired the hearing as Chair of MOC. State Bar President Patrick Kelly was also in attendance. At this meeting a discussion occurred regarding whether the State Bar should consider special or enhanced MCLE requirements for senior lawyers.
5. At the MCLE hearing, the current definition of "competence" in Rule 3-110, Rules of Professional Conduct, noted above, which defines competence to include 1) legal training; 2) diligence; 3) the mental, emotional and physical ability to perform was raised to support recommendations from MOC on enhancements to the MCLE requirements to focus on this aspect of competence. MOC is contemplating MCLE reforms in this area.
6. The Working Group is working closely with the State Bar's Lawyers Assistance Program (LAP). LAP is a logical platform for support and outreach to lawyers on issues related to the stress and impact of aging on behavior and cognition.
7. Consistent with the liaison relationship established with LAP, LAP Acting Director Richard Carlton developed a "Wellness Guide for Lawyers", modeled after the

wellness guide that the federal courts have developed for judges. The Wellness Guide is posted on the Senior Lawyers Resource Page of the State Bar website. [See, [A Wellness Guide for Senior Lawyers and their Families, Friends and Colleagues.](#)]

8. The State Bar currently has a publication, "Guidelines for Closing or Selling a Law Practice" available on the website and now featured on the new senior lawyers web page. [See, [Guidelines for Closing or Selling a Law Practice.](#)] Aspects of this publication are being reformatted to become a resource guide for senior lawyers.
9. The Montreal Cognitive Assessment Test (MoCA) has been adopted by other jurisdictions as a simple assessment of cognitive dysfunction due to age. MoCA is intended to be administered by another, not self-administered. MoCA has been featured on the State Bar's Senior Lawyers Resource page. As a result of the information received at the public summit on senior lawyers, MoCA is being replaced on the website with the Self-Administered Gerocognitive Examination (SAGE) from Ohio State University Neurology Department. The SAGE is designed to be self-administered and is much easier to score than the MoCA. [See, [Sage Test.](#)]
10. The State Bar has retained Helen Carr in the past to create and update the State Bar's "seniors" publications. She recently updated the State Bar publication "Seniors and the Law." [See, [Seniors & the Law: A Guide for Maturing Californians.](#)]

The Working Group has identified the following initiatives for future and ongoing development:

1. Continue to focus upon and explore education and MCLE enhancements that will alert practitioners and the public to effectively identify and address cognitive impairment in professional performance.
2. Explore with LAP the development of a video educational tool for practitioners and the public to effectively identify and address cognitive impairment in professional performance. This was a project that was identified by William Slease from New Mexico, and the LAP program is currently actively exploring it.
3. Develop a periodic communication to senior lawyers on "wellness" issues modeled after examples we have seen in other jurisdictions. LAP is working with the State Bar Office of Communications to explore this.
4. CYLA has expressed interest in working with senior lawyers on mentoring and other joint and mutually beneficial projects. The "connection" between CYLA and senior lawyers will continue to be explored with CYLA and its State Bar staff.

5. Expand internal State Bar communications on the subject of senior lawyers to assure that issues raised in matters presented to the State Bar are properly identified by staff when they involve senior lawyer issues. OCTC Enforcement, State Bar Court, Probation, the Ethics Hotline, the LAP program are all attempting to assure that issues involving senior lawyers are properly identified and processed.
6. Seek to effectively track issues in the disciplinary system and on the Ethics Hotline involving cognitive impairment for future assessment.
7. Continue to track the NOBC's ongoing work in this area, particularly their exploration of a "permanent retirement" attorney license status for senior lawyers who should not continue practice due to cognitive impairment.
8. Continue to expand the services that the LAP program can provide in this area to assist and educate lawyers. For example, LAP currently provides initial career counseling to young lawyers struggling to find the right job or practice niche. LAP is exploring adding retirement planning for senior lawyers to that mix. This is within LAP's budget. The concept is to target members as they approach retirement age to encourage them to think about how much longer they want to practice full-time, what sorts of activities they might want to do after they cut back (like the mentoring programs that have been discussed), and how they are going to go about funding their retirement or reduced practice lifestyle. Like the existing career counseling, the LAP would only pay for a couple of initial sessions with a contracted, certified planner. If the member wanted to go forward with the local planner to develop a more thorough plan, that would be at his or her expense.
9. Continue the existence of the Working Group in some form to assist with these ongoing and future initiatives and assure appropriate board oversight.

## **Key Resources**

### **Existing State Bar Resources**

1. "*Seniors & the Law: A Guide for Maturing Californians*." This popular State Bar publication addresses issues facing all seniors.  
[See, [Seniors & the Law](#).]
2. Get The Legal Facts of Life: "*What Should I Know About Elder Abuse*" This is one of many pamphlets available in the State Bar's consumer education program.  
[See, [What Should I Know About Elder Abuse?](#) ]
3. Business and Professions Code Section 6180-6185. This statute provides a vehicle for giving notice to clients and for disposing of a law practice, when an actively



practicing lawyer dies, resigns, is disbarred or suspended or otherwise becomes unable to continue to serve client needs. Under the statute, if necessary, the jurisdiction of the county superior court can be invoked over the remaining practice to facilitate the disposition of the practice. [See, [B & P Code §§ 6180-85.](#)]

4. Business and Professions Code Section 6190. This statute, like Section 6180, provides a vehicle for disposing of an active law practice when an actively practicing lawyer is unable to continue to serve client needs. As with Section 6180, if necessary, the jurisdiction of the county superior court can be invoked over a law practice to facilitate the disposition of the practice. [See, [B & P Code § 6190.](#)]
5. Business and Professions Code Section 6007. This statute provides for the non-disciplinary involuntary inactive enrollment of a lawyer who is found to be incapable of performing, but will not accept it. [See, [B & P Code § 6007.](#)]
6. The State Bar of California Attorney Surrogacy Program. In 2010, the State Bar implemented an Attorney Surrogacy Program, the centerpiece of which is the vehicle for designating a law practice “surrogate,” or “executor,” to handle a law practice in the event of incapacity. This continues to be available on the “Ethics” page of the State Bar’s website. [See, [Attorney Surrogacy.](#)]
7. The State Bar of California, *Guidelines for Closing or Selling a Law Practice*. This guide is available on the Ethics page of the State Bar Website. [See, [Guidelines for Closing or Selling a Law Practice.](#)]
8. The State Bar has long maintained an Emeritus Attorney Pro Bono Practice Program that has allowed attorneys 70 years and older to maintain their active membership without annual dues while performing pro bono services through a qualified legal services provider. This program was recently renamed the Pro Bono Practice Program and not limited to 70 year old attorneys. [See, [Pro Bono Practice Program.](#)]
9. General Senior Lawyer Resources at: [Senior Lawyers Resources](#); and [FOR SENIORS](#).

### **External Resources**

10. *The National Organization of Bar Counsel (NOBC)/Association of Professional Responsibility Lawyers (APRL) Joint Committee on Aging Lawyers: Final Report (May 2007)*. This report originates from the joint work of the NOBC, the national association of attorney regulators and APRL, the national association of lawyers involved with professional responsibility standards, many of whom defend attorneys facing disciplinary prosecutions. This report outlines the issues and provides a “road



map” for regulatory agencies to follow in adopting action plans involving aging lawyers. [See, [NOBC-APRL Report](#).]

11. *Senior Lawyers Organizing and Volunteering: A National Profile (1996)*. This lengthy review, almost 17 years old, is a publication developed by the American Bar Association Center for Pro Bono, a project of the Consortium on Legal Services and the Public, under the leadership of California lawyer Mary Pat Toups. This is an exhaustive review, state-by-state, of various senior lawyer programs and activities as they existed in 1996. [See, [Senior Lawyers Organizing & Volunteering](#).]
12. *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers (2005)*. This is a joint production of the American Bar Association Commission on Law and Aging and the American Psychological Association. The publication is intended to assist lawyers in evaluating the mental and emotional capacity of their clients in trust and estate and other areas where capacity is a key client issue. It is also a very valuable resource to assist with assessing the capacity of lawyers themselves. [See, [Assessment of Older Adults with Diminished Capacity](#) .]
13. *The Florida Bar News, “Bracing for the Tsunami of Aging Florida Lawyers” (November 2012); The Florida Bar Journal, “Aging Gracefully” (February 2013)*. These two articles from the Florida Bar provide a sound outline for the State Bar to consider in developing an action program in California. [See, [Bracing for the "tsunami"](#) & [Aging Gracefully](#).] They track closely the recommended course of action set forth in the NOBC/APRL Joint Report above.
14. *The Oregon State Bar Bulletin, Managing Your Practice, “Plan Ahead: Are you Prepared for the Unthinkable?” (2005)*. This is a guide available to Oregon lawyers from the Oregon State Bar on preparing for the transition out of active practice without damaging your client. [See, [Managing Your Practice](#).]