

AGENDA ITEM

July 30-1

Appointment of a Career
Transition Planning Task
Force

DATE: June 18, 2008

TO: Members of the Board of Governors
Members of the Board Committee on Member Oversight

FROM: Judy Johnson, Executive Director, State Bar of California

SUBJECT: Appointment of a Career Transition Planning Task Force

BACKGROUND AND ISSUES

Aging State Bar Membership

Approximately 77 million babies were born in the United States during the years 1946 to 1964. During 2011 the oldest “baby boomers” will turn 65, and, on average, can expect to live to 83. Boomers are now nearly 28 percent of the adult US population. Demographic trends indicate that the average age of State Bar members is climbing steadily, with middle-aged and senior attorneys together comprising the largest demographic group in the Bar; 64 percent of the respondents to a survey of the membership conducted by the State Bar in 2006 were 45 years old or older. The average age of our inactive members is 56, and the average age of California judges is 58.

Unlike their parent’s generation, fewer boomers expect to retire completely from the practice of law by age 65. A recent survey by the Oregon Bar revealed that only 18 percent of respondents were planning to retire completely. Some respondents planned to continue practicing full-time as long as they are able (12 percent), while others were planning to practice part-time (42 percent), either for the income that part-time practice would provide or mainly for stimulation, a sense of purpose, and satisfaction.

The fact that so many of today’s attorneys expect to practice law (at least part-time) well into their later life raises concerns about the adequacy of our membership’s retirement planning, financial planning, and contingency planning. Only 41 percent of the Oregon survey respondents had developed a financial plan that includes specific goals for retirement, and little more than half had discussed non-financial aspects of retirement with close family members and friends. Should the State Bar of California be doing more to facilitate this planning?

Contingency and Transition Planning

Failure on the part of attorneys in private practice to establish contingency plans (sometimes referred to as exit plans) for emergencies, accidents, unplanned absences and for later life is an important issue for the Bar. The death or disability of a lawyer can have significant adverse consequences on an attorney's clients, family and colleagues if arrangements have not been made in advance for appointment of successor counsel (or a practice administrator). When the solo practitioners in the Oregon survey were asked if they had taken steps to protect their clients in the event of death, disability or incapacity, only 21 percent had made arrangements with another attorney to cover their practice in the event of temporary disability or extended absence from practice, and 10 percent had made arrangements with another attorney to close their practice in the event of permanent disability or death. Nearly two-thirds of the respondents (61 percent) reported that they have not taken any steps or prepared any exit plans.

Disciplinary Issues

With an increasing number of attorneys actively practicing law well into later life, we will need to respond to more complaints about attorneys with age-related impairments that have negatively impacted their ability to serve the interests of their clients. Our current disciplinary rules and procedures are not well suited to identifying or responding to such impairment in a manner that protects client interests while preserving the dignity of a valued member of the legal community.

Opportunity for Enhancing the Rules of Professional Conduct

Currently, the State Bar's Rules Revision Commission is developing comprehensive proposed amendments to the Rules of Professional Conduct and an opportunity exists for referring possible enhancements to the Commission for action. Among the potential concepts that could be considered are the following:

1. Whether the rules should require a lawyer to have a "succession plan" (such as an estate plan pursuant to Probate Code §2488 that allows for the appointment of a law practice administrator) that would address issues of sudden death or disability.
2. Whether the rule permitting the sale of an entire law practice should be changed to permit the sale of a part of a law practice. California's rule requires that "all or substantially all" of a practice be transferred in a sale but the comparable ABA Model Rule permits the sale of a discrete geographic area or practice area. Greater flexibility in the sale of a law practice would offer greater options for a lawyer to make a smooth transition to retirement.
3. Whether the rules should be changed to facilitate a lawyer's use of private will registries and depositories. Retention of client files that include original wills, trusts or other instruments are a longstanding practice management concern and the use of private will registries and depositories may ease the burden of file retention and better protect client interests.
4. Whether the rule restricting fee-splits among lawyers in different firms should be relaxed to remove compensation barriers on a lawyer's ability to undertake

to complete the unfinished legal services started by a lawyer in another firm who has become suddenly disabled.

A Board Task Force could consider the policy implications of these or other possible enhancements to the rules and give direction to the Rules Revision Commission for development and action.

RECOMMENDED ACTION

The **Joint Committee on Aging Lawyers** of the National Organization of Bar Counsel and the Association of Professional Responsibility Lawyers (“Joint Committee”) examined the disciplinary problems created by an aging Bar (NOBC-APRL Joint Committee on Aging Lawyers, Final Report, May 2007). The Joint Committee determined that current lawyer regulatory rules and procedures do not adequately protect the interests of clients who are likely to suffer adverse consequences when an age-related impairment significantly affects their lawyer’s ability to practice. The Joint Committee recommended that each jurisdiction take the following steps to prepare for an increase in age-related lawyer impairment:

1. Make a demographic assessment of the lawyers in their jurisdiction.
2. Take steps to identify lawyers with age-related impairments.
3. Provide planning ahead and law practice transfer instruction to their membership (including guidelines for designation of successor or caretaker counsel, sale or transfer of law practice, preservation and handling of client files).
4. Develop local response teams of trained lawyers prepared to act when a lawyer becomes incapacitated or dies without adequate succession planning.
5. Implement programs specifically aimed at addressing impairment of senior lawyers’ ability to practice in the same fashion that similar programs in many jurisdictions successfully assist lawyer impaired by substance abuse and mental and physical health problems.

In June of 2007, the **Senior Lawyers Division of the ABA** submitted a Report and Recommendation (#105) requesting that the ABA House of Delegates adopt a policy “urging bar associations and courts” to “adopt procedures and programs” that would encourage lawyers to plan for law offices contingencies by voluntarily designating successor counsel to step in when the lawyer is disabled, dies, or is otherwise unable to practice law. The **Executive Committee of the State Bar of California Law Practice Management Section** issued a statement that the approach suggested by the ABA’s Senior Lawyers Division is too narrow to protect the interests of clients, and to address the wide array of issues that arise when lawyers fail to plan adequately for their disability or death. Specifically, the Committee stated that the death or disability of a lawyer can have significant adverse consequences on the lawyer’s clients, colleagues, family and the public’s perception of the profession. Therefore, the Committee suggested that the State Bar adopt policies and procedures that educate each of these constituencies about the financial and other benefits that result from early and effective succession planning.

From a member benefit perspective, should the State Bar be helping middle-aged and senior attorneys plan for the later stages of their career? From a public protection point of view, should the State Bar be encouraging more solo practitioners and small firm attorneys to develop exit plans? What other steps should be taken to protect the public, the membership and their families from experiencing adverse consequences associated with aging problems?

FISCAL AND PERSONNEL IMPACT

None known.

BOARD BOOK/ADMINISTRATIVE MANUAL UPDATE

There is no known impact on the Board Book.

STATE BAR RULES IMPACT

None known.

RECOMMENDATIONS/RESOLUTIONS

If the members of the Board Committee concur with the various recommendations above, it would be appropriate for the Board Committee to adopt the following resolution:

RESOLVED, that the Board Committee on Member Oversight recommends that the Board of Governors appoint a Task Force to (1) review the contingency, succession and retirement planning resources and assistance available to the membership from the State Bar; (2) identify any additional instruction and outreach that might be necessary to increase the rate of contingency, succession and retirement planning; (3) consider possible enhancements to the Rules of Professional Conduct and give direction to the Rules Revision Commission for development and action; (4) determine what California-specific instructional materials need to be posted on the website and otherwise distributed to the membership; (5) determine the appropriate role of the State Bar Lawyer Assistance Program in assisting senior lawyers and their families with aging-related challenges; (6) determine how the State Bar might better identify attorneys with age-related impairments before clients suffer adverse consequences; and (7) examine the feasibility of establishing interoffice response teams at the State Bar to intervene when it comes to the attention of the Bar that a member is experiencing age-related impairment.