
THE kindest CUT OF ALL: INVOKING DENNY CRANE, ETHICAL STANDARDS AND INTENTIONAL WORDS FOR LAW PRACTICE TRANSITIONS

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*In the 2018 television series *The Resident*, a resident physician demands that the Chief of Surgery—the Seattle hospital’s figurehead for branding and fund-raising—resign his position due to a debilitating condition preventing his competently performing surgery.¹ This resident, a person of power at his workplace strictly by sheer force of his will (lacking practice privileges and authority at the hospital) and allegiance to his Hippocratic Oath, cuts a fantastic figure. We admire his convictions and passion to protect patients, wishing these values were more widely shared and deeply ingrained in minds and hearts of peers across the professions.*

A significant number of Americans, professionals among them, are working into their 8th and occasionally 9th decades. As retirement policies have shifted, fewer employees have fixed pension benefits. Once, these benefits moved older workers into retirement because they had earned maximum benefits with no opportunity for more retirement income.² Additionally, seniors are working longer due to lengthening life spans and improved health, particularly among higher-income seniors with management-level responsibilities.³ “People who have higher education levels work longer,” having “nicer jobs that are more interesting and less physically demanding.”⁴ Moreover, some seniors work later into old age to allay concerns that retirement ultimately will make them “go crazy” while hoping that continuing brain stimulation will be the antidote to pro-

* Of Counsel, Bonnett, Fairbourn, Friedman & Balint, P.C. ©2018, All Rights Reserved by the Author. This paper is for Jerry Bonnett, Greg Fairbourn, Andy Friedman and Frank Balint, who required I make a better lawyer and who, through example, made me a better person. Thanks for that! The main title alludes to William Shakespeare’s *Julius Caesar*; but thoughtful readers comprehend that when a trusted friend aids the impaired lawyer, there kindness abides.

1. *The Resident: Haunted* (Fox television broadcast Apr. 16, 2018).
2. Paula Span, *Of Retirement Age, but Remaining in the Work Force*, N.Y. TIMES (Aug. 1, 2016), <https://www.nytimes.com/2016/08/02/health/retirement-working-longer.html>.
3. *See id.*
4. *Id.* (citing Dr. Alicia Munnell).

gressive dementing illnesses (“PDI” for short).⁵ Finally, research reflects that mixed-age work teams are more productive than other types of groups.⁶ Therefore, the workplace realizes certain gains from combining experience and steadiness of elders with energy and other desirable traits of younger workers.⁷

Applied to attorneys,⁸ these trends defy demands of career and the constraints imposed by State Supreme Court codes of professional conduct governing these professionals.⁹ Part II of this paper summarizes the salient “rules” or “standards” of conduct applying to senior-in-age counsel. Part III ruminates about malpractice implications for employers of attorneys exhibiting symptoms of PDIs affecting their competence, asking whether attorney ethical rules dictate the malpractice standard of care in such situations. Part IV examines in brief the impact in private practice of shareholder agreements provisions on departure—voluntary or otherwise—of equity owners, since attorneys will be working many more years even if their hours of work diminish.¹⁰

I. INTRODUCTION

Dementia as a syndrome is poorly understood by lay persons due to its myriad possible origins, manifestations, and degrees of intensity throughout the spectrum of individuals affected. Furthermore, there is no universally-accepted screen to measure cognitive functioning; and tests often are inconclusive in revealing mild impairment.¹¹ Mild impairment (“MCI”) is presumed not to interfere substantially with independence in activities of daily living. MCI affects between 3% and 20% of adults aged over 65; but perhaps 25% of people diagnosed with MCI “progress” to one or more PDI diagnoses within three years after their initial diagnosis. (On the other hand, as many as 40% of such persons

5. See Bob Woods, et al., *Cognitive Stimulation to Improve Cognitive Functioning in People with Dementia*, 2 COCHRANE DATABASE SYSTEMATIC REVIEWS CD005562 (Feb. 15, 2012); Laura Carstensen, *Forget Old Age, It's Time to Live Long and (Really) Prosper*, WALL ST. J.: THE FUTURE OF EVERYTHING (Dec. 3, 2016, 10:26 AM), <https://www.wsj.com/articles/forget-old-age-its-time-to-live-long-and-really-prosper-1449156361>. I use the acronym PDI (“progressive dementing illnesses”) in this paper as the catch-all expression for all types of dementia illness-related syndromes, conditions, and declines (we abhor calling them illnesses) limiting optimal cognition in adult humans.

6. Carstensen, *supra* note 5.

7. See *id.*

8. See STATE BAR OF CALIFORNIA, A WELLNESS GUIDE FOR SENIOR LAWYERS AND THEIR FAMILIES, FRIENDS AND COLLEAGUES, <http://www.calbar.ca.gov/Attorneys/Conduct-Discipline/Ethics/Senior-Lawyers-Resources/Publications/Wellness-Guide#5> (last visited Sept. 30, 2018).

9. See generally Christina M. Costa, *Preparing for the Senior Tsunami: Cognitive Decline in Aging Lawyers*, 28 GEO. J. LEGAL ETHICS 471 (2015).

10. See JOHN T. BERRY ET AL., NATIONAL ORGANIZATION OF BAR COUNSEL & ASSOCIATION OF PROFESSIONAL RESPONSIBILITY LAWYERS, JOINT COMMITTEE ON AGING LAWYERS, FINAL REPORT 3 (May 2007), <http://aprl.net/wp-content/uploads/2016/07/NOBC-APRL.pdf>; STATE BAR OF CALIFORNIA, *supra* note 8.

11. Am. Bar Ass'n, *How to Recognize and Manage Cognitive Impairment in Aging Lawyers*, ABA NEWS (Sept. 2013), https://www.americanbar.org/news/abanews/aba-news-archives/2013/09/how_to_recognizeand.html.

revert to normal functioning.)¹² “Dementia” is not a specific disease or a fixed condition.¹³ A set of symptoms triggered by diminished brain function, PDIs affect memory, thinking, mastery of language, analytical judgment, and social behavior.¹⁴ PDIs more frequently occur among those of advancing age. In England, for instance, they affect less than 5% of the population under 75 years but 17% of those exceeding 89 years of age.¹⁵

Lawyers who deal with the elderly as primary clients may believe that they can “see the signs;” but not enough other attorneys are aware of indications of progression to PDI from the mild cognitive impairment stage. Virtually no lawyers beyond those working in elder care law can identify numerous PDI types by observing their manifestations. Too many practicing attorneys believe they recognize when a person has brain dysfunction in the PDI range, but we do not.¹⁶

For those less confident, here is a short catalog of behaviors one might expect to observe, however persistent, in an attorney experiencing dementia illnesses, having progressed beyond MCI:

- Forgetting altogether, missing or miscalculating filing deadlines;
- Ignoring or misinterpreting applicable rules of Court or civil procedure;
- Failing to designate someone to act in her behalf in a lawyering function the impaired attorney was to perform but is not able to execute;
- Failing to understand altogether, or confusing, a client’s instructions or a statement of her intentions regarding a course of action;
- Incoherent communication with a client or court official, including engaging in an improper *ex parte* communication with a judge;
- Miscommunication with opposing counsel or court official (for instance, misstating facts or the controlling authority on a legal issue);

12. Hanna Kaduszkiewicz, et al. *Prognosis of Mild Cognitive Impairment in General Practice: Results of the German AgeCoDe Study*, 12 ANN. FAM. MED. 158, 158 (2014), <http://www.annfammed.org/content/12/2/158.full>.

13. BEING HEALTHY, 10 EARLY SIGNS AND SYMPTOMS OF DEMENTIA, YOUTUBE, Mar. 27, 2017, <https://www.bing.com/videos/search?q=promise+to+stop+working+when+dementia+alzheimers+disease&view=detail&mid=E3E225E5CE37C806DEB8E3E225E5CE37C806DEB8&FORM=VIRE>.

14. See STATE BAR OF CALIFORNIA, *supra* note 8. For more on the dementias, free publications are available from the National Institute on Aging. See, e.g., NAT’L INST. OF HEALTH, THE DEMENTIAS: HOPE THROUGH RESEARCH (Dec. 2017), <https://order.nia.nih.gov/publication/the-dementias-hope-through-research> (NIH Publication No. 17-NS-2252).

15. Fiona E. Matthews et al., *A Two-Decade Comparison of Prevalence of Dementia in Individuals Aged 65 Years and Older from Three Geographical Areas of England: Results of the Cognitive Function and Ageing Study I and II*, 382 LANCET 1405, 1407 (2013), <https://www.sciencedirect.com/science/article/pii/S0140673613615706>.

16. Who am I to assert this? Since apparently primary care physicians do not detect impaired cognition in as many as 80% of their patients, see Paul E. Tatum III et al., *Geriatric Assessment: An Office-Based Approach*, 97 AM. FAM. PHYSICIAN 776, 781–82 (2018), and readers are not as well trained as their primary care providers, what qualifies the reader to challenge me? That we do not “see the signs” emphasizes that in-house training of all attorneys in the firm to recognize certain manifestations and other indications (for instance, lawyer-reported sleep-cycle disruption, which is unlikely to be observed first-hand) of incipient dementia is consequential.

- Misinterpreting or ignoring a court order;
- Misunderstanding or miscalculating a client's—or the opposing party's—leverage in a negotiation;
- Failing to perceive the client's position's weakness on a legal issue based upon the client's independent deficits in mental acuity (vital because someone must see the circumstances clearly);
- Failing to turn the lead responsibility in a matter over to a designated co-counsel as instructed or to protest his own inadequate performance;
- Failing to get help (a second opinion or a second review) with drafting or reviewing the substance of key documents or pleadings;
- Neglecting CLE attendance; and
- Failing to use technology appropriately (beginning with using “Reply to All” when sending a communication, thereby informing to many persons with no need to know—or worse yet, informing the opposing party or its counsel with damaging consequences).¹⁷

While the impacts on a practice from these behaviors are obvious, of equal concern is the active concealment of an attorney's advancing PDI. As this paper is published, it is still deemed shameful in many circles for a lawyer to exhibit any “cognitive impairment,” whether arising from a stroke or the onslaught of the PDI¹⁸ (and of course, it is complicated for the person with such impairment(s)—since with a PDI, an impaired person may lack capacity to recognize her impairment¹⁹). Persons with large egos—such as those senior partners in firms or law departments or large businesses who also are civic leaders (in private practice perhaps even their group's chief rainmakers)—will not confess vulnerability nor allow others to pronounce their unfitness for law practice. They may be enabled by firms that depend on charisma and notoriety from these leading figureheads, since their loss to the practice may threaten firm economic stability.²⁰ Bold firms like McGuireWoods, implementing policies that a

17. See MIKE LONG & CHRIS MULLMAN, ADDRESSING CONCERNS ABOUT OLDER LAWYERS (2013), http://www.mebaroverseers.org/DemographicsTaskForce/Docs/ls_colap_2013_cognitive_impairment.auth_checkdam.pdf.

18. See Christine Simmons, *Out of Focus: Lawyers and Firms Can No Longer Ignore Dementia*, AM. LAW. (Feb. 25, 2018, 6:00 PM), <https://www.law.com/americanlawyer/2018/02/25/out-of-focus-lawyers-and-firms-can-no-longer-ignore-dementia-405-8629/>. Simmons notes that she could not obtain permission to identify lawyers for her story suffering from the condition—although perhaps that was from fear of liability to clients served while acting in a diminished capacity, or sanctions from the attorney's licensing authority.

19. See Jayne Reardon, *Cognitive Impairment and Lawyers and Judges Who Retire at Their Desks*, LINKEDIN PULSE (Oct. 6, 2016), <https://www.linkedin.com/pulse/cognitive-impairment-lawyers-judges-who-retire-desks-jayne-reardon/>; North Carolina State Bar, Formal Op. 2013-8 (2014) (discussing responding to mental impairment of firm lawyers).

20. See Jane Genova, *Aging - When Rainmakers (like Denny Crane) Develop Forms of Dementia*, LAW AND MORE (Feb. 26, 2018), http://lawandmore.typepad.com/law_and_more/2018/02/aging-when-rainmakers-like-denny-crane-develop-forms-of-dementia.html. Crane, experiencing occasional lapses in memory (and judgment), is diagnosed with mild cognitive impairment (“MCI”), a precursor to Alzheimer's. Crane wants to purchase a Russian antihistamine, Dimebon, which supposedly slows the progression of Alzheimer's by inhibiting brain cell death and goes to the U.S. Supreme Court to acquire some. See *Boston Legal: Juiced* episode (ABC television broadcast Dec. 1, 2008). In reality, Dimebon ultimately failed to have any greater effect than a

lawyer cannot remain a firm equity partner (a status of virtual invulnerability) beyond the age of 70,²¹ recognize that a time arrives to honest conversations between the lawyer and his employer. Candor about a former partner's mental capacity and transitioning to full retirement is easier when the older attorney's firm ownership status has no bearing on how to deal with the PDI-impaired lawyer.

II. WHAT RULES OF PROFESSIONAL CONDUCT COMPEL AND COUNSEL

Applicable provisions of the Rules of Professional Conduct respecting the individual attorney begin with the rule most directly impacting the impaired attorney.²² Model Rule 1.16(a)(2) states that the lawyer must not represent the client "if the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client."²³ There is no discussion in the rule about the *magnitude* of impairment beyond a vague reference to "materiality"; thus, there is no basis to believe some adjustment for chronological age, occasional forgetfulness, or another means to grade current circumstances on the curve, so to speak, is appropriate.²⁴ That is because eligibility relates back to competence, as described in Model Rule 1.1: a lawyer must competently represent the client. That obligation likewise is not "adjusted for age," physical condition, habits or any other metric. The basic assumption is that any attorney passing the bar examination satisfies Model Rule 1.1 at the outset of a legal career in the relevant jurisdiction. That assumption is subject to reconsideration at any moment a client questions the soundness of the lawyer's mind, regardless of whether a complaint is filed with the licensing board of the jurisdiction.

placebo during 2009–10 period clinical trials. Crane's best friend in the fictional *Boston Legal* firm of Crane, Poole & Schmidt, Alan Shore, sometimes co-works cases with Crane from friendship and to check on Crane's acuity. See *Denny Crane*, BOSTON LEGAL FAN WIKI, <http://bostonlegal.wikifoundry.com/page/Denny+Crane> (last visited Sept. 30, 2018).

21. Cf. Julie Creswell & Karen Donovan, *Happy Birthday. Vacate Your Office.*, N.Y. TIMES (Dec. 8, 2006), <https://www.nytimes.com/2006/12/08/business/08legal.html> (addressing firms with mandatory retirement ages and the challenges of enforcing some).

22. The sentence is a bit bold and may be subject to challenge, so caution is advised in scouring the "applicable to this situation" rules in your jurisdiction, and here is an illustration why. In Arizona, the Rules of Professional Responsibility are codified in Rule 42 of the Rules of the Supreme Court. But Rule 41, Duties and Obligations of Members, contains this relevant Comment [2], stating:

Lawyers must plan for the possibility that they will be unable or unwilling to discharge their duties to current and former clients or to protect, transfer and dispose of client files, property or other client-related materials. As part of their succession plan, *solo practitioners* should arrange for one or more responsible transition counsel agreeable to assuming these responsibilities. *Lawyers in multi-lawyer firms and lawyers who are not in private practice, such as those employed by government or corporate entities*, should have a similar plan reasonable for their practice setting.

RULES OF THE SUPREME COURT OF ARIZONA r. 41 (2018) (emphasis added), [https://govt.westlaw.com/azrules/Document/NAD032AF0661311DC84EA9CBE9F8E38DB?viewType=FullText&originationContext=documenttoc&transitionType=DocumentItem&contextData=\(sc.Default\)](https://govt.westlaw.com/azrules/Document/NAD032AF0661311DC84EA9CBE9F8E38DB?viewType=FullText&originationContext=documenttoc&transitionType=DocumentItem&contextData=(sc.Default)). This rule is not ideal in dealing directly with the impaired attorney, but it affords warning about protecting client interests to "legal employers." See *infra* note 66 and accompanying text.

23. MODEL RULES OF PROF'L CONDUCT r. 1.16(a)(2) (AM. BAR. ASS'N 1983).

24. *Id.*

Model Rules 1.3 and 1.4 remind us that competent lawyers must complete their tasks diligently and communicate effectively with their clients.²⁵ Rule 1.4(b) explicitly addresses the role of counseling. Here, the lawyer must explain issues arising in a matter to permit a client to make informed decisions about the representation. This obligation entails clear speaking and reasoned judgments on the lawyer's part. Finally, related to duties owed directly to clients, the lawyer must properly and promptly account for a client's trust funds.²⁶

The Rules of Professional Conduct currently impose no duty on members of the bar unaffiliated by business ties with an attorney to report behavior suggesting that attorney's impairment to the jurisdiction's licensing authority, other than their somewhat generic statement about "raising a substantial question about his . . . fitness to practice law."²⁷ In contrast, there are explicit rules imposing a duty on the attorney's business colleagues to report evidence of PDI impairment, on two conditions. The first condition is that the colleague must have observed or learned of a lawyer's violation of certain rules of professional conduct.²⁸ The second condition is that the informed colleague must have a resulting substantial question as to the lawyer's "fitness as a lawyer."²⁹ This second condition confounds the colleague lacking a yardstick measuring the "substantiality" factor. Comment 3 to Rule 8.3 provides that *substantial* measures the "seriousness of the possible offense," not the "quantum of evidence of which the lawyer is aware."³⁰ This makes little sense from this perspective: that the first condition must be an actual violation of the professional conduct rules, not a *possible* offense.

Next, Rule 5.1(c) obligates a partner or managerial attorney to take steps in an effort to remediate the consequences of the lawyer's Rule 1.1 violation.³¹ It is this last rule that obligates the firm or law department to do what it can to force the PDI-afflicted attorney to stop practicing law, at least long enough to determine what role (if any) that lawyer can play in the continuing function of the enterprise. The firm or department cannot prevent the impaired lawyer from leaving the enterprise to start her own practice; but the rules appear to proscribe any action by the firm endorsing the departed principal's new practice. This includes actions concealing the departing/departed lawyer's impairment.³²

Another approach has been taken by the Virginia State Bar in a 2016 advisory ethics opinion (LEO 1886).³³ There, the Bar opined that Partners and

25. See MODEL RULES OF PROF'L CONDUCT r. 1.3 and 1.4 (AM. BAR. ASS'N 1983).

26. See MODEL RULES OF PROF'L CONDUCT r. 1.15 (AM. BAR. ASS'N 1983).

27. See North Carolina State Bar, *supra* note 19, at Opinion #2 (referring to Rule 8.3). However, note that there is an exception to such obligation if the "unfit lawyer" is a client at the time the other attorney observes the behavior suggesting unsuitability.

28. See *id.* at Opinion #5.

29. See *id.* at Opinion #2.

30. MODEL RULES OF PROF'L CONDUCT r. 8.3 cmt. 3 (AM. BAR ASS'N 1983).

31. MODEL RULES OF PROF'L CONDUCT r. 5.1(c) (AM. BAR ASS'N 1983).

32. North Carolina State Bar, *supra* note 19, at Opinion #4.

33. Virginia State Bar, Legal Ethics Op. 1886 (2016), <https://www.vsb.org/docs/LEO/1886.pdf> (discussing the duty of partners and supervisory lawyers in a law firm when another lawyer in the firm suffers from significant impairment). The Bar opinion notes that it only addresses matters arising under Rule 5.1 and, there-

supervisory lawyers (i.e., those covered by Rule 5.1) should take precautionary measures *before* an impaired law-firm colleague commits serious misconduct, potentially creating risk for clients and others.³⁴ The Virginia Bar provides that such proactive partners or supervisory lawyers who take appropriate measures are not ethically responsible for the impaired lawyer's misconduct, "unless they knew of the conduct at a time when its consequences could have been avoided or mitigated and failed to take reasonable remedial action."³⁵

In August 2018, the American Bar Association was to debate Resolution 103, incorporating a "wellness policy" that the Working Group to Advance Well-Being in the Legal Profession drafted to afford a framework to legal employers to address impaired lawyers from to several causes, including declining cognitive ability.³⁶ The Model Policy, had it been adopted, would impact ABA Formal Opinion 03-429, the Association's wide-ranging opinion underpinning the North Carolina and Virginia Bar (and other state bar) opinions.³⁷ However, the Working Group withdrew Resolution 103 until the February 2019 House of Delegates meeting in response to comments received from various stakeholders and to obtain additional input.³⁸

III. MALPRACTICE INTERSECTIONS

The impaired lawyer's circumstances coupled with his errant conduct may threaten the private firm's insurability; but that is not an inevitability. The Preamble of the American Bar Association's Model Code of Professional Responsibility (1981) and the later Model Rules of Professional Conduct (1983) state that violations of these rules should not be the evidentiary basis for civil liabil-

fore, has nothing to say about sole practitioners that other lawyers may observe having impairment-related practice problems.

34. *Id.* at 6.

35. *Id.*

36. *See* AM. BAR ASS'N, WORKING GROUP TO ADVANCE WELL-BEING IN THE LEGAL PROFESSION, COMMISSION ON LAWYER ASSISTANCE PROGRAMS, REPORT TO THE HOUSE OF DELEGATES, RESOLUTION 103 (Aug. 2018) [hereinafter MODEL POLICY], https://www.americanbar.org/content/dam/aba/administrative/lawyer_assistance/ls_colap_proposed_resolution_103_impairment_policy.authcheckdam.pdf; *see also* Ryan Lovelace, ABA "Furiously Working" to Craft Proposal on Lawyers' Mental Health, N.Y. L. J. (May 22, 2018 7:53 AM), <https://www.law.com/newyorklawjournal/2018/05/22/aba-furiously-working-to-craft-proposal-on-lawyers-mental-health-389-31601/>. The CoLAP Commission referenced above belongs to the National Task Force on Lawyer Well-Being, which Task Force launched a Website. *See, e.g.*, National Task Force on Lawyer Well-Being, *Creating a Movement to Improve Well-Being in the Legal Profession*, LAWYERWELLBEING.NET (Aug. 24, 2017), <http://lawyerwellbeing.net/wp-content/uploads/2017/11/Lawyer-Wellbeing-Report.pdf>. The Working Group was tasked to study the National Task Force's 2017 recommendations. *See* Katie Stancombe, *Model Law Firm "Impairment" Policies Withdrawn from ABA Annual Meeting Discussion*, THEINDIANALAWYER.COM (Aug. 7, 2018), <https://www.theindianalawyer.com/articles/47797-model-law-firm-impairment-policies-withdrawn-from-aba-annual-meeting-schedule>.

37. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 03-429 (2003), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/aba_formal_opinion_03_429.authcheckdam.pdf (discussing obligations with respect to mentally impaired lawyers in the firm).

38. ANNE BRAFFORD, AM. BAR ASS'N, WELL-BEING TOOLKIT FOR LAWYERS AND LEGAL EMPLOYERS (2018), https://www.americanbar.org/groups/lawyer_assistance/working-group_to_advance_well-being_in_legal_profession.html.

ity³⁹ (all but a few states in the United States have adopted some form of these rules⁴⁰). Were these codes of conduct deemed “lawyer-standard legislation,” claims of attorney negligence *per se* might flood the litigation landscape. Since they are not legally binding rules benefitting individual clients in the true sense,⁴¹ negligence *per se* principles are inapplicable.

Scholars’ debates whether violations of conduct rules are probative of legal malpractice have raged a while. Courts inconsistently rule on admissibility of ethical misconduct to show deviation from the community standard of care in legal malpractice matters. Commentators argued vehemently for courts presiding over legal malpractice claims to “accept . . . expert testimony about the Disciplinary Rules and their meaning as ‘evidence of’ the standards of the community,” as “[i]f the Disciplinary Rules are ‘mandatory in character’ and state the ‘minimum level of conduct’ expected and required of lawyers, [thus] they are the logical starting point for determining the minimum standards of the community.”⁴² Passionate advocates for admissibility of malpractice expert testimony on ethical rules violations assert that

[T]he Rules . . . are indubitably considered to elicit generally accepted behavioral norms. . . . According probative value to evidence of actions reflecting professionalism, or lack thereof, in the legal malpractice arena will . . . create an opportunity to move beyond the apathetic practice of toeing the line . . . in the ethos of the legal culture.⁴³

Accepting the cited author’s premise of an apathetic profession, the quoted stance remains mightily flawed as applied to a PDI-impaired lawyer. For example, consider:

- What generally-accepted behavioral norms are possessed by the demented attorney? How would the person with moderate to severe dementia grasp a concept like “professional norms?”
- How would the impaired lawyer locate on command the ethical line to be toed—or crossed over?
- Would it ever be reasonable to find that a dementia-impaired lawyer acted recklessly or intentionally, unless initially it were proven that (a) the lawyer had been evaluated for a PDI and was advised directly by a medical professional of, and then acknowledged⁴⁴ the extent of,

39. MODEL RULES OF PROF’L CONDUCT, preamble & scope cmt. 20 (AM. BAR ASS’N 1983); Gary A. Munneke & Anthony E. Davis, *The Standard of Care in Legal Malpractice: Do the Model Rules of Professional Conduct Define It?* 22 J. LEGAL PROF. 33, 83 (1998), <http://digitalcommons.pace.edu/lawfaculty/351/>.

40. See AM. BAR ASS’N, CTR. FOR PROF’L RESPONSIBILITY, JURISDICTIONS THAT HAVE ADOPTED THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules.html (last updated Mar. 28, 2018).

41. Stephen E. Kalish, *How to Encourage Lawyers to Be Ethical*, 13 GEO. J. LEGAL ETHICS 649, 668–69 (2000) (arguing that ethics “law” and common law must remain separated).

42. SIMON’S NEW YORK CODE OF PROF. RESPONSIBILITY ANN. 6 (2000).

43. Nicola A. Boothe-Perry, *No Laughing Matter: The Intersection of Legal Malpractice and Professionalism*, 21 AM. U. J. GENDER, SOC. POL’Y & L. 1, 33–36 (2012).

44. Plaintiffs are wished good luck with that evidentiary showing. Psychiatric evidence suggests that anosognosia, a lack of insight and awareness, may prevent a PDI-afflicted person from understanding her im-

his impairment, but (b) the lawyer defiantly continued in law practice, either (i) to prove no such impairment diminishes his skill and judgment, or (ii) to defraud his clients while collecting fees?

Plaintiff references to professional conduct standards are not always barred from admission into evidence. In *Weil Gotshal & Manges v. Fashion Boutique of Short Hills, Inc.*, in the Manhattan Supreme Court, plaintiffs asserting a claim of legal malpractice offered testimony from their expert on specific model rule provisions and corresponding alleged violations without defense challenge.⁴⁵ Admitting an expert's evidence of impairment affecting practicing in violation of Model Rule 1.1 creates two dilemmas. First, if it is possible for a PDI-impaired lawyer performing a relatively routine legal task to do so in a non-negligent manner, that would hurdle a pertinent community standard of care despite a PDI diagnosis. Preparing a simple Will for a client with adult children (guardianship or conservatorship not involved) and no testamentary trust features does not require concentrated analytical thought or insightful judgment; and drafting uniform interrogatories in a simple auto accident case is another illustration of redundant work.

Second, because competent routine task-execution is possible, expert testimony that Rule 1.1 is breached just because the lawyer has a MoCA impairment diagnosis⁴⁶ likely is more prejudicial than probative in addressing the lawyer's negligence in the malpractice claim being litigated. In short, such expert testimony alone does not support the "but for" element of the malpractice claim.⁴⁷ It is simply inappropriate to find any lawyer liable for malpractice because his conduct violated an ethical norm (however vaguely related to the representation) not jeopardizing the client's position in the matter, no matter how repugnant or pathetic the defendant seems.⁴⁸

If an impaired lawyer who comprehends his cognitive condition is not deliberately ignoring his circumstances, the Washington Supreme Court expresses the better view: That lawyer conduct codes did not "purport to set the standard for civil liability," and are "ill-suited for use in the malpractice arena," merely "contain[ing] standards and phrases that, if relied upon to establish a breach of

pairment or his need to accept greater limitations. Perhaps more than 40% of early Alzheimer's patients exhibit symptoms of anosognosia. See Judith Graham, *When They Don't Know They Are Ill*, N.Y. TIMES: THE NEW OLD AGE (Jan. 22, 2014, 1:52 PM), <https://newoldage.blogs.nytimes.com/2014/01/22/when-they-dont-know-they-are-ill/>. This syndrome is the single largest reason why people with schizophrenia or bipolar disorder refuse medications or do not seek treatment. No learning is taking place.

45. See *Weil, Gotshal & Manges, LLP v. Fashion Boutique of Short Hills, Inc.*, 780 N.Y.S.2d 593, 594–95 (N.Y. 2004). Plaintiffs argued to a jury an irreconcilable conflict of interest to the degree that the conflict compromised the law firm's level of advocacy.

46. See *infra* note 50 and accompanying text.

47. See Charles C. Lemley & Kimberly A. Ashmore, *The Lion in Winter: How Firms Proactively and Humanely Can Address Cognitive Impairment in an Aging Lawyer Population*, XXVI PLUS J. 1, 2 (2013), https://www.wileyrein.com/media/publication/125_CLemley-KAshmore%20-%20June%202013%20Reprint%20-%20Lion%20in%20Winter.pdf.

48. In fact, *Boston Legal's* legacy as art was to depict pursuit of justice beyond recognizable limits of conventional lawyering, as cultural norms changed during the mid to late first decade of the 2000s. See Monika Bartyzel, *The Outrageous, Surprising, and Prescient Legacy of Boston Legal*, THE WEEK (Oct. 15, 2014), <http://theweek.com/articles/443282/outrageous-surprising-prescient-legacy-boston-legal>.

the legal standard of care, provide only vague guidelines.”⁴⁹ Without legislative embodiment of ethical behavior, the majority of negligence cases litigated for impaired lawyers (individually) should turn on the imprecise community “standard of care.”⁵⁰

Whether that view should prevail is a different question where an *enterprise* (like a private law firm) is being sued for promoting as an advocate or advisor a known-to-be impaired lawyer. If the firm knew the impaired lawyer had a PDI in the moderate to severe range but continued letting him practice unsupervised, perhaps leveraging his “brand value” by representing clients, expert testimony on Model Rule (or state bar interpretive opinions) violations of the competence standard might be probative of negligent firm supervision.⁵¹ In this moment, jury verdicts cannot influence when to require a lawyer’s winding up her career due to her PDI impairment. But *fear* of a large jury verdict should propel sensible enterprise retirement policies or rapid settlement of legitimate malpractice claims grounded in failed supervision of a practitioner’s impairment-related mistakes or inaction damaging a client’s welfare.⁵²

IV. CONTRACTUAL STATEMENTS

Often, private law firms have buy-sell, shareholder, partner, and similarly denominated agreements governing matters like retirement and buyout of the departing shareholder’s economic interest in the enterprise. In those instances, one may craft detailed provisions enabling a smoother practice transition when impairment threatens the reputation of the impaired person and his employer. Before drafting such provisions, the company should have its attorney review applicable state statutes to determine if legal prohibitions exist barring certain provisions appearing in such equity-owner agreements, corporate bylaws or limited liability company operating agreements, or if limitations apply upon their enforceability. Below are suggested provisions to anticipate later crises.

First, an enterprise agreement could provide mutual covenants that the principals at all times shall comply with the jurisdiction’s attorneys’ Rules of Professional Conduct. Further, it would provide that a principal’s declining to do so entitles the other principals to report the lawyer to the State Bar, unless he

49. Hizey v. Carpenter, 830 P.2d 646, 650–52 (Wash.1992), *reconsideration denied*.

50. *See, e.g.*, Smith v. Haynsworth, 472 S.E.2d 612, 614 (S.C. 1996) (“we concur with the majority of jurisdictions and hold that, in appropriate cases, the [ethics code] may be relevant and admissible in assessing the legal duty of an attorney in a malpractice action. However, we adopt the view taken by the Supreme Court of Georgia . . . [that i]n order to relate to the standard of care in a particular case . . . [a code provision] must be intended to protect a person in the plaintiff’s position or be addressed to the particular harm”); Mainor v. Nault, 101 P.3d 308, 321 (Nev. 2004) (“[T]he district court did not abuse its discretion by allowing [plaintiff’s] standard of care expert witnesses to base their opinions upon the Supreme Court rules because the rules served merely as evidence of the standard of care, not as a basis for per se negligence.”).

51. . SoJin Bae and Megan C. Bright, *Negligent Supervision: Do Partners Have a Duty to Supervise their Fellow Partners?*, MENDES & MOUNT, LLP (Dec. 18, 2014) <http://mendes.com/news/negligent-supervision->.

52. *Cf.* Lemley & Ashmore, *supra* note 47, at 4 n.12 (noting that at some point a firm must act to prevent ongoing representation by the impaired attorney).

sooner agrees voluntarily to seek out a LAP (Lawyer's Assistance Program) organization like North Carolina's Transitional Lawyers Commission.⁵³ This affords leverage for the enterprise in the event the impaired principal will not retire from (or substantially curtail) his practice despite being urged to do so by his fellow principals.

Second, the agreement should provide for waiver of HIPAA confidentiality requirements⁵⁴ coupled with the signatories' covenant to submit to a thorough neuropsychological examination like the Montreal Cognitive Assessment, which evaluates memory, visual-spatial acuity and "executive function"⁵⁵

("Exam") in the event that a threshold percentage of fellow principals request that the seemingly impaired principal do that. Alternatively, the agreement simply could require all principals eclipsing a certain age take the Exam annually or perhaps more frequently.⁵⁶ The agreement further could recite under either alternative scenario a "refuser's" failure to submit to the Exam is an event (a) deemed the refuser's retirement from the enterprise or (b) of default under the agreement, entitling the remaining principals (or the enterprise) to buy out the refuser's equity position. Getting the principals to endorse such a clause is easier to achieve if the enterprise has group disability coverage with robust policy payouts for dementia illnesses. Fear of insolvency in old age without practice-derived income should be mitigated by a disability retirement scenario that triggers immediate and recurring insurance proceeds' payment.

Another sanction for the refuser's failure to submit to an Exam could trigger the refuser's (or his guardian's or custodian's) obligations to pay the (i) full cost of the enterprise's malpractice policy deductible, plus (ii) the full amount of any settlement sum or judgment amount exceeding the enterprise's policy's coverage limits. Success of these provisions' enforceability depends on whether

53. See generally Woody Connette & Mark Scruggs, *Retirement Planning and the Transitioning Lawyer's Commission*, 21 N.C. ST. B.J. 20 (2016).

54. When an individual becomes legally or otherwise incapable of exercising her rights, if that individual has designated another person, referred to as the 'personal representative' in regulations, to act on their behalf regarding their HIPAA rights, the designated personal representative may waive those rights if that designee believes it is in the best interest of the individual. See 45 C.F.R. § 164.502(g); *Guidance: Personal Representatives*, HHS, <https://www.hhs.gov/hipaa/for-professionals/privacy/guidance/personal-representatives/index.html> (last visited Sept. 20, 2018). While typically this is done via a separate Medical Power of Attorney, the agreement could identify that person serving as (or deemed to be) Attorney in Fact pursuant to that instrument.

55. Tatum, *supra* note 16, at 782. Version 3 of the Montreal Cognitive Assessment (May 2011) is available at UNIV. TORONTO: THE HUB, <http://thehub.utoronto.ca/family/wp-content/uploads/2016/12/MoCA-Instructions-English.pdf> (last visited Sept. 30, 2018). The MoCA website of Dr. Nasreddine, developer of this screening tool, is available at MOCA, <https://www.mocatest.org/splash/> (last visited Sept. 30, 2018).

56. Those older principals enrolled in Medicare may be comforted to know that basic screening (a so-called "Mini-Cog Tool") is part of Medicare's Annual Wellness Visit. See Tatum, *supra* note 16, at 781-782. Therefore, principals 65 or older need not feel embarrassed by participating in such screening as part of their routine physical examinations. And those performing below standard under the Mini-Cog assessment, which takes but a few minutes to administer, are recommended for a more in-depth assessment like the Montreal assessment.

the principal is able, when the agreement is signed, to understand the risk associated with failure to submit to the Exam.⁵⁷

Third, the agreement's provisions prohibiting solicitation of firm clients (anti-poaching covenant) should be reviewed and perhaps updated. The aim is to thwart the impaired attorney who, exasperated by "meddling" co-principals, resigns from the enterprise to take his practice and clients elsewhere—presumably to a firm managed by this now-impaired attorney. Naturally, careful drafting is required to avoid allegations that other principals seek to enforce an inappropriate "non-compete agreement" disfavored in many jurisdictions today.⁵⁸ And little need be said reminding the drafter that no agreement's policy or provision should give an impaired attorney's representatives grounds to assert age discrimination or disability law protections.⁵⁹

While documenting the understanding that one can or cannot practice during one's PDI-afflicted phase of life, the realistic approach is to have adult professionals:

- acknowledge their inevitable frailness of body and mind over time,⁶⁰
- anticipate adverse impacts to consumers of continuing professional practice with a PDI, as well as the lawyer's obligations to his profession's image, and
- implore one's colleagues to exercise their compassion and fortitude to spare the PDI-afflicted person's legacy within the enterprise and his professional reputation by rapidly winding up the afflicted person's daily conduct of his practice.

One vehicle for such directives is called an "occupational living will."⁶¹ But while no such vehicle exists in statute or rules of court, such an instrument

57. Obviously, such occasions simply emphasize the importance of having these provisions inserted in the shareholder or buy-sell, etc. agreements when the principals are younger, which, not incidentally, makes their risk more insurable and premium-affordable.

58. See ORRICK, CALIFORNIA LAW ON RESTRICTIVE COVENANTS AND TRADE SECRETS 2 (2013), https://www.americanbar.org/content/dam/aba/events/labor_law/2013/03/employment_rightsresponsibilitiescommittee/wintermeeting/4_orrick.authcheckdam.pdf (noting that California, Montana, North Dakota, and Oklahoma reject the general rule that covenants not to compete are valid if they are reasonable in purpose and scope). Arizona does not favor non-competes, either, finding them "unreasonable" instead. See, e.g., *Orca Communs. Unlimited, LLC v. Noder*, 314 P.3d 89, 95–96 (Ariz. Ct. App. 2013) (holding that Arizona courts will not enforce confidentiality, non-solicitation, or non-compete agreements that are overly broad or poorly drafted). See also Lynda C. Shely, *Law Firms Changes: The Ethical Obligations When Lawyers Switch Firms*, SHELBY LAW (Jan. 8, 2013), <http://shelylaw.com/ethical-obligations-when-lawyers-change-firms/>.

59. See generally Donald J. Labriola, "But I'm Denny Crane!": *Age Discrimination in the Legal Profession After Sidley*, 72 ALB. L. REV. 365, 374–78 (2009), http://www.albanylawreview.org/Articles/Vol72_1/72.1.0367-Labriola.pdf. Under the Americans With Disabilities Act, a legal employer of a certain threshold size cannot discharge an attorney or other employee requesting an accommodation on PDI affliction status alone, as any impairment affecting learning or communicating with others should qualify the person with cognitive disability for protection. *But see Wells v. Mut. of Enumclaw*, 244 F. App'x 790, 791–92 (9th Cir. 2007) (unpublished) (holding the employer had no duty to provide reasonable accommodation to employee who had angry outbursts due to Alzheimer's Disease and related dementia, because the employee never requested accommodation and employer's knowledge of disability did not mean it knew or had reason to know the disability might be preventing employee from requesting accommodation).

60. See Lemley & Ashmore, *supra* note 47, at 3.

could become part of a shareholders' (co-owners') agreement, supplementing the joint understandings each time a signed instrument is delivered by each new owner of the enterprise.⁶² In private practice, adding this component would spur persons otherwise reluctant to charge their fellow principal, or family of that principal, to accept the circumstances that (at least for now) are uncontrollable (this assumes, of course, that each principal delivers the instrument before an impaired lawyer's PDI overtakes him). Naturally, the inability of an impaired lawyer to understand the significance of what he is signing stymies enforceability of these clauses. This is a lack of capacity the impaired lawyer's counsel may seize upon when an impaired and defiant attorney feels "railroaded"⁶³ by his co-principals.

V. CONCLUDING THOUGHTS

Our understanding of dementia's impact trails other organic physiological discoveries despite the neuroscience field's rapid technology expansion.⁶⁴ Dementia illnesses are not going the way of polio anytime soon, even in first-world countries, technology advances notwithstanding.⁶⁵ Perhaps robots equipped with artificial intelligence will take on many lawyering functions, including the role of co-counsel. Indeed, from that perspective a "trained" robot could monitor, evaluate and record findings of its human counterparts' decline into senescence. They even may determine the elegant means of easing out their impaired counterparts from law practice. Until that AI-epiphany arrives, lawyers must become intentional in treating practice colleagues afflicted with PDIs—including those most beloved, respected and renowned in their ranks. It

61. See Kirk R. Daffner, *Reflections of a Dementia Specialist: I Want to Stop Working Before I Embarrass Myself*, WASH. POST (Apr. 15, 2018), https://www.washingtonpost.com/national/health-science/reflections-of-a-dementia-specialist-i-want-to-stop-working-before-i-embarrass-myself/2018/04/13/adb08158-3111-11e8-8abc-22a366b72f2d_story.html?noredirect=on&utm_term=.b36509568933. A form of letter that serves as a written testimonial of the lawyer's intentions and preferences appears as Appendix A.

62. Future generations of aging attorneys will record "testimonials" on video or some digital media incorporating picture and sound, so authentication is simpler and perhaps less susceptible later to "denial" by its maker. The eventual utility of that video testimonial approach presumes, naturally, that the maker is not hearing- or visually-impaired past correction at the time of the video's review by that maker.

63. *But see* Sparrow v. Demonico, 960 N.E.2d 296, 302–04 (Mass. 2012) (holding that without medical evidence or expert testimony explaining how a party's experiences or behavior informs her ability to understand the agreement, to appreciate what was happening, or to comprehend its reasonableness, or, alternatively, that a mental condition interfered with the party's understanding of the transaction or her ability to act reasonably in relation to it, lay testimony will not be sufficient to support a conclusion of unenforceability).

64. See, e.g., Daniela Hernandez, *The Quest to Decode the Brain*, WALL ST. J. (Jun. 15, 2018, 2:55 PM), <https://www.wsj.com/articles/a-sharper-read-on-brain-activity-1529088948>

(noting that instrumentation constantly is being developed to image better and perform more analyses, in addition to genomics advances). Ask any adult, regardless of length of experience with the syndrome or behavioral health training, if she understands what occurs during this process of decline, or if anyone has explained clearly the degenerative syndrome to her as her loved one slips out of touch from her.

65. Sai Janani Ganesan, *How Close Are We To A Cure for Alzheimer's?* FORBES (Feb. 13, 2018, 4:01 PM), <https://www.forbes.com/sites/quora/2018/02/13/how-close-are-we-to-a-cure-for-alzheimers/#149bc4e74c9a>.

surely is unethical to allow lawyers whom we know have diminished in acuity to represent the interests of everyday persons except, perhaps, to perform the most mundane, repetitive lawyering tasks. Equally, it is unjust to indulge increasing numbers of impaired lawyers in tarnishing their (and their enterprises') legacies through doing unintended client mischief. This profession cannot wait for intermediation; it must lead now.

ABA Resolution 103 promoting the Model Impairment Policy for Legal Employers urges all legal employers to lead by adopting its basic principles.⁶⁶ That Model Policy contains an admonition that legal employers commit

to assisting their employees in obtaining treatment when needed. Impairment of a legal employee, due to substance use or other mental health disorder, including *cognitive impairment or dementia*, adversely affecting the individual's well-being [and] also the legal employer's ability to serve [its] clients capably and responsibly.⁶⁷

The Model Policy's definition of "legal employer" is not reserved for private law firms, but applies to any organization that employs lawyers, including without being limited to a corporate legal department, a governmental or municipal agency.⁶⁸

Unfortunately, the Model Policy's current draft creates no expectations that the legal employer undertakes or even monitors the impaired person's counseling or treatment. The employer's designated contact person instead is charged to "notify legal professionals of the availability of lawyer assistance programs, which can refer impaired persons for assessment, counseling, treatment and other supportive services."⁶⁹ While the Model Policy requires no "intervention" with an impaired attorney continuing in practice, it also prohibits a legal employer from aiding a colleague in concealing her impairment, including by knowingly assisting that colleague in providing legal services.⁷⁰ Finally, the

66. See MODEL POLICY, *supra* note 36, at 2.

67. See *id.*

68. See *id.* at 2 n.1. Somewhat strangely, coverage of the legal employer's responsibility extends to aiding legal administrators, paralegals and other "legal assistants," whether full-time, part-time, contract, or temporary. See *id.* at 2. This seems odd initially, since the Model Rules of Conduct do not apply to non-lawyers and LAP programs historically were not for use by such "auxiliary" personnel. However, this text represents the Association's recognition that all legal employees indeed play consequential roles in rendering effective and competent assistance to clients. I would add to the list law professors and clinicians in law schools and paralegal training institutions, as these persons are responsible for the training of legal professionals at all levels of the law enterprise. I assume that judges are deliberately omitted from the ambit of the Model Policy.

69. See *id.* at 2. The Model Policy does not instruct legal employers what to do if an attorney is a "refuser," as that term is used in the text.

70. See *id.* at 2-3. "Knowingly" assisting makes sense as a standard when the impairment of the attorney or other legal employee is not obvious, or colleagues make the too-frequent assumption that a person is "eccentric" or "peculiar" due to advancing age or a protracted period of aloneness. One assumes that this prohibition on enabling will affect the content of any announcement letter notifying clients of the departure of the impaired lawyer to start his own firm. ABA Formal Opinion 99-414 states that "[t]he departing lawyer and responsible members of the law firm who remain have an ethical obligation to assure that prompt notice is given to clients on whose active matters [the departing lawyer] currently is working." ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. No. 99-414 (1999), <http://iadc.fastcle.com/EdutechResources/resources/bytopicid/24414/ABA%2099-414.pdf> (discussing ethical obligations when a lawyer changes firms). In California, its State Bar Standing Committee on Professional Responsibility and Conduct Formal Opinion 1985-86 requires the law firm and the departing at-

Model Policy requires a person believing herself impaired to self-report, either to (a) a member of the legal employer's Executive Committee, (b) its General Counsel or Chief Operating Officer, (c) a leader of the practice group or head of the department in which the individual works, or (d) to another enterprise designee receiving such reports.⁷¹

The absence of compulsion to cease working notwithstanding, the Model Policy moves toward greater protection of the public and of those cognitively impaired legal enterprise-based persons. In some iteration to come, this Model Policy deserves genuine debate and near-term adoption. I mean adoption not just by a remotely situated, loose association of lawyers, but by legal employers across the country.⁷²

torneys to attempt to provide joint notice to affected clients regarding the change, identifying the withdrawing attorney(s), in what field he (they) will practice, and their addresses and telephone numbers. *See* State Bar of California, Standing Comm. on Prof'l Responsibility & Conduct, Formal Op. 1985-86, <http://www.calbar.ca.gov/Portals/0/documents/ethics/Opinions/1985-86.htm>. One wonders if these formal opinions will change, since some firms will balk at sending a joint letter, if the firm does not believe that lawyer should continue representing clients and does not want to be an accessory to concealing diminished competence.

71. *See* MODEL POLICY, *supra* note 36, at 3. And see note 34, *supra*, regarding the individual's odds, with anosognosia, of recognizing her impairment.

72. Adoption of the Model Policy should be expressed in shareholder or partnership agreements in the private sector, as well as in company personnel or policy and procedure manuals, incorporating by reference the salient features in that model policy.

APPENDIX A

The Letter/Video Script, Returned to its Composer

Dear Jericho:

Reluctantly, but with the best interest of the enterprise,⁷³ our profession and your legacy in law practice in mind and, honoring your earlier-expressed wishes, I return to you the enclosed letter/video as you instructed, recalling your pledge to withdraw from representing your client(s) any longer. Let's discuss the swift transition of your caseload as soon as possible. Thanks, Jericho.

Faithfully yours,
Esther

*****THE LETTER*****

Enterprise

Attn: _____, [Managerial Title]

Address

Ladies and Gentlemen:

Reflecting on my obligations to the enterprise and the legal profession expressed in Rules 1.1 and 1.16, I seek not to embarrass others or myself. Therefore, I ask that you honor your [owner/management status] responsibilities by presenting me with this letter at the time you feel with confidence that I am unable to continue to fulfill my professional obligations to our [clients/employees/agency/department] the way most responsible adults would agree is needed to meet the expected standard of attorney performance. I'm enclosing with this letter copies of applicable attorney rules of conduct. However, when you deliver this letter to me, kindly enclose any additional or replacement rules, including later new bar opinions that I should consider in deciding, responsibly, how soon to transition my workload to others.

I would like you to consider, but only if you believe it prudent and productive, having me act as a side advisor, but not act anymore as the "face of the

73. "Enterprise" is intended to be an omnibus word encompassing every sort of legal employer, including a private law firm, a government department's or agency's legal group, or an in-house legal section of a business; in short, it intends to encompass anyone practicing law in a group of attorneys. I have no ready solution for the circumstance of the sole practitioner, except that these persons seek out other solo practitioners, and prevail on them to employ their peer influence in aid (each to the other) before the applicable state supreme court intervenes to address the impairment. The Final Report, *supra* note 9, notes that some bar associations (as does Arizona, *see* note 21 *supra*) recommend each sole practitioner designate successor or inventory counsel or a law practice trustee, or to nominate a caretaker attorney who is duly authorized to sell, close or transfer the law practice in the event of the lawyer's death or incapacity. *See, e.g.,* NEW YORK BAR ASSOCIATION, PROPOSED UNIFORM COURT RULE ON THE APPOINTMENT OF CARETAKER ATTORNEYS, 22 NYCRR Part 1250 (Jun. 27, 2005). God forbid if the caretaker attorney, likely a peer in age of the sole practitioner, has a condition like that of the impaired attorney.

enterprise” with our customers/clients/directors. If at the time you deliver this letter you believe that no value-added results from my continuing participation in any matter I’ve been working on, I ask that you disregard the previous request. I don’t wish to resist being “put out to pasture.” Perhaps, however, my continuing some involvement with a matter is not too risky and may keep my brain engaged, to a salutary end for everyone involved. I trust your judgment about my present utility to the person(s) being served.

I ask you to recall that brain diseases affect a broad spectrum of individuals at vastly different ages. If I am a “younger” person, that doesn’t mean I’m not afflicted with disease or an irreversible condition affecting my analytical abilities and judgment. Don’t, therefore, impose age as a gauge of my mental competency. Similarly, no “mandatory retirement age” should justify continuing with the enterprise “a while longer, just until retirement,” if my competence declines well before that preset age arrives.

Here are my “instructions” or desires about how I am to be addressed if I behave incorrigibly, for instance, if I resist modifying drastically or terminating altogether my role in the enterprise despite your non-medical but instinctive judgments about my competence.

Please offer to have my mental condition evaluated by a licensed behavioral health professional and, concurrently, by a senior member of the State Bar. The bar member should not, of course, be a personal friend or a co-worker. If this pair of evaluators conclude that I am unfit to continue as an attorney at law, please present me with their written evaluation, along with this letter. If the two persons selected for the evaluation concur, kindly proceed no further with this step. If the two evaluators do not concur, please retain the services of a third evaluator who is expert in brain disease or function and present me with that third evaluator’s report when it is complete. I realize that in receiving and reviewing these evaluations, this might implicate PHI under HIPAA.⁷⁴ I hereby waive and release all claims of violations of my rights under that federal statute and accompanying regulations, and under any equivalent state/territorial/provincial regulations or legislation.

If I refuse to (a) engage in the evaluation, or (b) conduct myself sensibly in view of a “diminished capacity” evaluation, please report my refusal, enclosing the evaluations, to (i) the state/provincial Supreme Court and (ii) the applicable human resources person at this workplace. I hereby waive and release all claims of violations of my rights under HIPAA and any equivalent state/territorial/provincial regulations or legislation arising from any involved persons provided with the documents described in this paragraph 2.

Naturally, this is awkward or downright painful, but have courage. Recall why I wrote this letter. Don’t feel ashamed and/or disrespectful for acting as I have instructed here. Realize that today I am repulsed by the idea of lowering the public’s opinion of our enterprise or reducing the professional esteem in

74. Protected health information (or “PHI”) is defined under HIPAA, *see* P.L. 104-191 §1171 of Part C of Subtitle F (August 21, 1996); 45 CFR Part 160.103.

which this enterprise is regarded. Do not let my legacy one of personal humiliation or disgrace – even if I’m unable to understand the consequences of my attempts to keep actively practicing. The Golden Rule applies here. Afford me the privilege of embarking on my retirement with my dignity mostly intact. Regardless of how I behave or react to you in the future, know this. Removal upon my incontrovertible impairment is what I want for myself today, while I am thinking rationally and globally. That also is what I *should* want when you hand me this letter. I am of sound mind and judgment as I sign and deliver this letter to you for safekeeping, to be used at the appropriate time.

With greatest regard for your candor and empathy, I am,

Sincerely yours,

Jericho Warren