

ETHICAL ISSUES AS YOU AGE OR PLAN FOR RETIREMENT

By Ted A. Waggoner

We older lawyers often talk about our future, maybe not as much as we relive our past glories, as our careers are mostly behind us. We're dealing with issues that our similarly aged friends and family members share. These include hearing, hair, and memory loss; aches and pains that were never a problem before; and the questions—the many questions, internal and external—about our plans for the future.

And then there's retirement. When you do such planning, it's easy to focus only on the numbers—will I have enough money to stop working? Also consider the ethical questions that inevitably arise as we wind down our legal careers.

Consider Bill and Tina. A week after 80-year-old senior partner Bill left the practice in retirement, the now oldest lawyer in the firm, Tina, at 61, is asked by the firm's largest client, "So, when are you planning to retire?" The ethical issues start to appear for Tina, as for the rest of us.

These two lawyers approached their retirement planning differently. Bill quit the practice after he'd made a few mistakes and wasn't so gently pushed out by

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the firm's younger lawyers. Tina plans to quit the practice before she's pushed out.

Let's first look at Bill's situation. He didn't plan to retire. What ethical issues are implicated by Bill's inactions or lack of planning?

WHEN ASKED ABOUT OUR PLANS FOR RETIREMENT, WE MUST TELL OUR CLIENTS THE TRUTH.

ABA Model Rule of Professional Conduct 1.1 (Competence). Bill's planning didn't include assuring clients that his skills would remain effective. He didn't set benchmarks for protecting clients, and he discouraged honest conversations about his effectiveness in handling client matters because of his attitude about retirement. Knowledge, skill, thoroughness, and preparation are no longer enough to pass the competency test in Rule 1.1.

Bill's plan was to leave the retirement decision to one of several groups, including his

partners, the state bar counsel or his defense counsel to a bar complaint, his doctor, and his spouse or children.

Model Rule 1.4 (Communications). Among lawyers' duties is a duty by the lawyer or the firm to keep clients informed about issues that affect their representation. Bill's decision to abruptly leave his clients' futures in the hands of other attorneys in the firm was important information. He should have informed his clients. Lack of planning for what his clients may have needed led to concerns and troubles for Bill's clients, as it has for other lawyers' clients.

Failing to plan is a poor way to address the competence issue because it allows the lawyer to truthfully say, "I'm not going to retire!" Failing to plan isn't the answer for lawyers or for those around senior lawyers, and it leaves many questions behind. That declaration that the lawyer isn't planning to retire may be an honest statement, but it also tells perceptive clients that the lawyer isn't fully capable of competently helping them with their legal needs. It tells clients their lawyer isn't a planner, which is admitting a weakness that most lawyers would prefer to hide.

On the other hand, Tina has her retirement well planned. She's decided to leave the practice at the end of next year. She'll timely notify her clients of her

decision and advise them that they may choose to pick up their case file or that it will be taken over by one of the several lawyers in her firm whom she's carefully chosen to match their legal needs.

That won't entirely prevent ethical issues from arising. Tina may get such questions and comments as: Can I count on you to help my family and answer their questions? I know you and trust your advice. Should I look for a new lawyer?

How does the ethical lawyer, who has planned and thought about the problems of aging and transitioning to retirement, handle these types of questions about her retirement plan or her health? As always, start with your state's version of the ABA Model Rules of Professional Conduct.

Rule 1.4 calls on us to "promptly comply with reasonable requests for information." State ethical opinions shed light on the duty to inform clients when a lawyer leaves the practice; they generally are discussed in the past tense (you left the practice, now tell the clients) or when the lawyer moves from one firm to another (allowing the client to go with the lawyer or to stay with the firm). There's also a duty to let clients know if the lawyer quits working on a client's matter for any reason. But nothing in the rules calls on lawyers to alert clients of an impending retirement.

The problem for the planner. Comment 7 to Model Rule 1.4 says, "A lawyer may not withhold information to serve the lawyer's own interests or convenience or the interests or convenience of another person." Most lawyers will admit to a

desire to stay busy until they quit working and a further desire to get paid for their work. There appears to be a slowdown in the practice as we age, both in terms of client demands and our desire to work at full speed. Giving clients the word that we'll retire in 18 months may prompt the busy client to protect its interests and convenience, instead of its lawyers, and we must respect that decision. The lawyer as fiduciary—putting the clients' interests before our own—gets tested when the questions legitimately start. When asked, we must tell our clients the truth. We may put it in context with the client, but we're required to avoid causing our client or the court system a problem.

The challenge for solos. For a solo lawyer, the question can be more problematic. Do you offer the name of a backup lawyer or a competitor or leave clients on their own to find assistance? Other lawyers are probably not the clients' first choice because

your clients are familiar with and appreciate your work. But the ethics of the matter do call for some resolution. Let clients know that one skill you have, and that they've responded to and benefited from, is planning for their legal issues. Then turn that around and advise them that you use the same skills to plan for yourself. You may have to dodge the question of whether the plan goes into effect this month or next year, but you really are duty bound to discuss your answer to their important questions.

As the Preamble to the Model Rules says, "a lawyer is also guided by personal conscience and the approbation of professional peers." If you leave the practice when it's time—while you have skills in reserve and before others have to apologize for your actions as a lawyer or have to report you to your lawyer's assistance program or bar counsel—we promise we'll speak highly of you and your career. Plan for it. ■

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