

# Senior Lawyers

The newsletter of the Illinois State Bar Association's Senior Lawyers Section

## From the chair

BY PAT LESTON

This is my last column as chair and I am happy to report that the state of the Senior Lawyer Section Council is good. Old, but good. It has been an honor to serve with such a wise, productive, and contributing assemblage.

The Senior Lawyers Section is a venerable group. I am a 46-year ISBA member. That puts me pretty much in the middle of the pack in terms of longevity.

But it has given me the opportunity to work with some of my fellow council members on ISBA projects for over 30 or 40 years. We have multiple ISBA past presidents on the Senior Lawyer Section Council, as well as lawyers who have served and chaired dozens of ISBA committees and section councils. If the group members pulled out each of their

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## Book review: 'Killers of the Flower Moon'

BY GARY T. RAFOOL

During May of 1830, the Indian Removal Act was signed by President Andrew Jackson. This Act authorized the president of the United States to negotiate with southern Native American Tribes for their removal to federal territories west of the Mississippi River in exchange for tribal lands in the Southeastern United States, which were desired by cotton and other farmers east of The Mississippi River.

According to some of the history published by the Cherokee Museum, the Cherokee Nation took their case resisting this removal to the United States Supreme Court, which held in *Worcester V. Georgia*

that the Cherokees were a sovereign nation and could not be removed without their consent.

However, President Jackson ignored this decision, and he continued enforcing the Indian Removal Act. Thus, Cherokee people were forcibly taken from their homelands, incarcerated in stockades, forced to walk more than one thousand miles and removed to "Indian Territory," which is now known as the state of Oklahoma. In the Choctaw language, Oklahoma means "red people."

Over 4,000 Cherokees died during this

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plaques, there would probably be enough lumber to add a new wing to the ISBA Springfield office.

What makes serving on this council so interesting is that I have the pleasure of serving with men and women who have had successful careers, but who have also devoted much of their energies to improving our profession, to improving the delivery of legal services, and to generally making things better.

Statutory changes and corrections do not come out of elves' workshops. They are crafted and developed by conscientious and creative attorneys, trying to make things better. Legal aid, mentoring groups, and CLE programs do not come served on a platter. They are the work product of dedicated men and women of the bar, trying to make things better.

We have over 10,000 lawyers in the ISBA Senior Lawyer Section. It's possible that one or two of them may not read this column. And some are just turning 55, just barely old enough to use their AARP discount at Denny's or Hertz. I ask them to accept my

apologies, because in this short note I want to focus on the senior seniors who remain professionally active.

Unfortunately, we seem to become invisible as we age. When seniors are in commercials, it's most often as a victim of illness, which the advertised medication might cure. If we are depicted in regular television programs, it's often in roles such as "The Good Wife" doddering judge or ditsy old senior partner. I don't take offense, but I don't recognize these characters.

The council members I serve with are a bit grayer than when we first met in ISBA projects. We move a little slower and take more bathroom breaks. But these attorneys continue to bring to the table extraordinary life experience, intelligence, and professional morality. Little by little, we continue to chip away at the problems confronting both society and our profession. It may be a bit late to yell "let's play two", but the senior lawyers I've had the pleasure of working with are still in the game. And we are still trying to make things better. ■

## Book review: 'Killers of the Flower Moon'

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trek and were buried in unmarked graves along The Trail Where They Cried, better known today as The Trail of Tears.

With this very brief background in mind, I have chosen a book for this review entitled 'Killers of the Flower Moon: The Osage Murders and the Birth of the FBI' by David Grann.

This is a 2017 book available in hardcover (296 pages), soft cover, and electronically.

It concerns a series of murders and mysterious deaths between 1921 and 1926 among the Osage Indian Nation in and around Gray Horse, Hominy and Pawhuska, Oklahoma.

The book also describes that Osage land claims go back to the 17<sup>th</sup> Century when they laid claim to what is now Missouri,

Kansas and Oklahoma in addition to lands running west to the Rocky Mountains.

When, in 1803, under President Thomas Jefferson, the Louisiana Purchase took place, the Osage land claim to the Central quarter of our nation was considered a weak point in our expansion, and the Osage Nation was compelled to cede almost 100 million acres of ancestral lands.

Although the Osage Nation was moved several times by the United States government, their plight in 1870 was not as drastic as that of the Cherokee Nation. However, their remaining lands in Kansas were purchased by the government for \$1.25 per acre.

After searching for new land, the Osage purchased 1.5 million acres of mostly barren land in Northeast Oklahoma from

## Senior Lawyers

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### OFFICE

ILLINOIS BAR CENTER  
424 S. SECOND STREET  
SPRINGFIELD, IL 62701  
PHONES: 217-525-1760 OR 800-252-8908  
[WWW.ISBA.ORG](http://WWW.ISBA.ORG)

### EDITOR

John H. Maville  
Hon. Edward J. Schoenbaum

### PUBLICATIONS MANAGER

Sara Anderson  
✉ [sanderson@isba.org](mailto:sanderson@isba.org)

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the Cherokee Nation for seventy cents per acre. Ironically, the Osage chose this land because they felt that it was so undesirable that no one else would ever want it or force them to move again.

Then, starting in 1920, luck changed dramatically for the Osage, because their barren lands sat over large deposits of oil, which, in 1923 alone, generated over \$30 Million (equivalent to approximately \$400 Million today) for them. The Osage, per capita, were considered the wealthiest people in the world at that time.

To extract this oil from under lands owned by individual Osage owners, prospectors, including names like Getty, Skelly, and Phillips, paid them for leases and royalties, which increased substantially as did our demand for oil in the 1920s.

With all of this wealth, the United States government contended that the Osage people were unable to prudently handle their money. So, the government required the Office of Indian Affairs to appoint guardians to oversee the management and spending by Osage owners.

These guardians were drawn from the most prominent men in Osage County, Oklahoma. While many of these Guardians fulfilled their fiduciary duties honestly, there were, unfortunately, a number who did not. There were some who sold food, products, clothing and cars to Osage owners at greatly inflated prices, with many of these items coming from stores owned by the Guardian.

Some of the guardians resorted to murdering individual Osage owners. There were at least 24 known suspicious deaths of Osage owners between 1921 and 1926. It is now suspected that there were significantly more mysterious deaths during this same time period, which were never investigated or solved.

During the times of these suspicious deaths, lawmen, according to the author, were still amateurs, who rarely attended training academies or learned any of the emerging scientific methods of detection, such as fingerprints and blood patterns.

Frontier lawmen were primarily gunfighters and trackers hired to deter crime and apprehend, alive, if possible, or dead, if necessary, offenders.

Actually, in the late 19<sup>th</sup> century, a leader

of the Dalton Gang served as a Sheriff. When these mysterious deaths among the Osage owners started to occur, the Sheriff of Osage County was considered to be corrupt and displayed very little concern about these deaths.

Consequently, the Osage owners resorted to hiring private detectives to investigate these mysterious deaths. Several of these suspicious deaths appeared to be the result of poisoning; however, no coroner in Osage County was ever trained in forensics which resulted in poisoning being the almost perfect way to commit murder.

In 1923, the Osage began to petition for the Federal Government's involvement in these investigations, primarily because it had no great ties to County and State corrupt officials. As a result, agents of the Bureau of Investigation, which had been created in 1908 as an obscure branch of the Justice Department—that in 1935 would be renamed as the Federal Bureau of Investigation finally arrived in Osage County.

These agents were strictly fact finders with no power to make arrests, nor could they carry firearms.

After President Harding and his scandalous (including the Teapot Dome Scandal) administration left office, Calvin Coolidge succeeded as president, and he immediately started cleaning up the Executive Branch of the federal government.

In 1924, according to the author, Coolidge appointed Harlan Fiske Stone as his Attorney General, who, because of the growth of the country and profusion of Federal Laws, concluded that a national police force was important. Stone, then, selected J. Edgar Hoover, who was only 29 years of age, to act as director of this national police force.

Hoover quickly implemented the reforms requested by Stone, which furthered Hoover's desire to remake the investigation bureau into a modern police force by raising its employment qualifications for new agents. Agents were required to have some legal training or knowledge of accounting.

Hoover felt that solving the Osage killings was an important means of establishing his newly-formed bureau. Therefore, Hoover assigned as many agents as he felt necessary to succeed in this investigation.

These agents included a former New

Mexico sheriff and several Texas rangers. Most of these agents operated undercover, such as appearing as an insurance salesman, a rancher and even an Indian medicine salesman claiming to be searching for his relatives.

The book then offers an in-depth look at how this investigation started and proceeded, as well as detailed backgrounds of some of the agents conducting the investigations.

I think an interesting note in the book brought out that the oil leases dried up during the depression, but in more recent times, the Osage have found a new source of revenue in seven successful casinos.

Finally, in 2011, after an 11-year legal battle, the federal government agreed to settle a lawsuit brought by the Osage Nation for \$380 Million. ■

# CLE review of ‘Winding Down: A Primer for the Retiring Attorney and Disaster Planning for Younger and Solo Practitioners’

BY RAQUEL G. (ROCKY) MARTINEZ

The title of this seminar should have been “Winding Down a Practice: A Primer for All Attorneys” or “Selling a Practice and Disaster Planning for All Attorneys.” The given title was a misnomer because it gave the impression that the CLE program was aimed at only those individuals who are close to retirement. This was not the case. I was surprised at how few young and middle-aged persons were in the audience, especially sole practitioners who comprise a large portion of our membership. Perhaps the title had something to do with it? Bottom line: This seminar had a much broader application than only retirement-minded practitioners.

What would happen if you stopped practicing law tomorrow? That is, through no fault of your own (e.g., an unforeseen health crisis). Think about it. Kind of scary, huh?

- Who would notify your clients about what happened?
- What would your malpractice insurance cover – or not cover?
- When would your clients be notified?
- Where would your files and trust account funds go?
- How do you sell a law practice?
- Why should you develop a plan to sell your practice or have someone succeed you?

These were several of the questions that were asked and answered during the CLE program.

A disability could strike any of us at any time. It is irresponsible to think otherwise. “Time devoted to planning for unfortunate circumstances will bring peace of mind to sole practitioners and will be enormously helpful to family and friends attempting to close a law office under difficult conditions”

said John T. Phipps, one of the afternoon’s presenters.

At first, I thought the original title of the seminar sounded as dry as the Sahara and as exciting as watching water boil but, if you look at the “revised” title in an immediate context, it grabs your attention. The program, however, was neither dry nor boring. The CLE program was jam-packed with words of wisdom from experts, cites to related legal authorities and sites on the web for helpful forms. If you were unable to attend the program in person, or via webcast, you may still benefit from the program and the materials by accessing the ISBA’s free on demand CLE programs at <https://www.isba.org/cle/ondemand>.

The program began with John Cesario, senior counsel for the administrator of the Attorney Registration and Disciplinary Commission, who disclosed that the Illinois legal profession is aging, explained how to create a succession plan and identified best practices to avoid receiving an ARDC complaint.

Jeffrey B. Strand, president and CEO of ISBA Mutual Insurance, led the second session by demonstrating the differences between a “term” policy and an “occurrence” policy and how “tail coverage” (or extending the reporting period for a claim) is critical to a law practice.

David Holterman, the associate director and general counsel of the Lawyers Trust Fund, presented the third session which dealt with trust account issues and how complicated things can become when there is an unexpected death or incapacity. He provided answers to a variety of questions and disclosed how advance planning can avoid many of the pitfalls experienced by other practitioners.

Leonard Amari, firm founder and

co-managing partner at Amari & Locallo (and a former ISBA president), discussed tangential relationships with firms—such as co-counsel, of counsel, referring attorney, tenant, etc.—for those instances when someone would prefer “winding down” from the practice of law, rather than an abrupt shutting down.

The final session included John R. Cesario (who did the first session and is from the ARDC), John H. Maville from the Law Offices of John H. Maville in Belvidere, and John T. Phipps from the John T. Phipps Law Office in Champaign. The panel shared words of wisdom regarding selling a practice and disaster planning under proposed Supreme Court Rule 781, the designated representative/succession rule. The ISBA Special Committee on Succession and Transition Planning drafted the proposed rule and all three of the panelists served on that Committee. The proposed rule requires that all licensed attorneys who are engaged in the private practice of law in Illinois designate a representative on their Annual ARDC Registration or certify that they have made such a designation in a valid succession plan or other document.

In light of the foregoing, I recommend that all private practitioners review the proposed Supreme Court Rule 781 along with the related materials. Visit the web page created by the ISBA Special Committee at <https://www.isba.org/committees/successionandtransitionplanning> for articles, CLE programs, and sample documents and/or view the recording of the half-day seminar that took place on April 11, 2019, at the CRO <https://www.isba.org/cle>. The latter suggestion is probably the most efficient method of examining these issues no matter what we call them. ■

# Burned out? Overwhelmed? Meet Dr. Diana Uchiyama and the Illinois Lawyers' Assistance Program

BY MARY F. PETRUCHIUS

The Illinois Lawyers' Assistance Program, or LAP, was founded in 1980. It is a not-for-profit organization that offers free, confidential help to Illinois attorneys, law students, judges, and their families whose lives are affected by substance abuse, addiction, and/or mental health issues. In late 2018, LAP opened an office in Geneva. I recently interviewed Dr. Diana Uchiyama, LAP's executive director, about LAP and her role in the Geneva office.

**Mary:** Diana, before we discuss LAP and what you do, I'd like our readers to get to know you. Where did you grow up? What's your educational history?

**Diana:** I grew up on the north side of Chicago after my parents immigrated here from Germany with my two older siblings. I attended public grammar school until the eighth grade and graduated from St. Scholastica Academy, an all girls' college preparatory high school in Chicago. I received my undergraduate degree from the University of Illinois in Champaign and my Juris Doctorate from Pepperdine University School of Law. I attended Benedictine University for my MS in Clinical Psychology and Midwestern University for my PsyD in Clinical Psychology.

**Mary:** Who were your role models growing up? The influences in your personal and professional life?

**Diana:** I would say my parents and younger brother were the greatest role models in my life. My parents immigrated to the United States with two small children because my parents wanted to provide their children with a better quality of life than they had in Germany. My father was Assyrian from a Catholic family in Iraq, and they were a minority group that was persecuted because of their religion. He

moved to England to attend college and met my mother, who was from Germany, and they eventually got married in Germany. They had two children but neither of my siblings were German citizens, due to my father being a foreigner. My parents decided to move to the United States so that their children would have a national identity and more opportunities than in Germany.

My younger brother and I were born in Chicago and he was born with Down Syndrome. My parents always pushed all of us to become educated, to work hard, to speak up against injustice, and to give back through acts of public service and charity, which has been my biggest motivation in life. And because I have a brother with a disability, I was motivated to provide him with all of the opportunities that I had and to push him to rise above his disabilities, to be an independent human being with a purpose in life.

I think that growing up with parents who were from other countries and who gave so much of their lives to better their own children's lives, made me want to pay it forward in my own career and my own sense of identity. I understand what it means to be poor, to work hard to get ahead, to have a sense of purpose, and to work for the greater good. My parents instilled in me a desire to be motivated not just by money and title, but to better the lives of as many people as you can, regardless of who they are and where they are born.

**Mary:** Why did you decide to become lawyer?

I think that the circumstances of my childhood, including growing up with parents who were from other countries and often being judged by the fact that my parents had accents, influenced me greatly

because I often felt different and like an outsider.

In my family what was really valued was education and hard work, instead of superficial things. Then, having a brother with a significant disability and watching my family fight to get him equal treatment in school and in life, made me passionate about being a voice for the voiceless or for those treated as "less than."

I felt passionate about making sure that people were treated fairly and with a sense of justice and equality, regardless of where they were born. I had a strong desire to pursue a degree in law, specifically in criminal law as an Assistant Public Defender. I wanted to make sure that everyone's rights were honored regardless of education, economic status, or nationality or race.

**Mary:** Diana, take us down through your career path and where it has led you.

**Diana:** After graduating from law school, I first practiced in international health care law, due to the fact that I speak fluent German, while I was waiting to find out if the Cook County Public Defender's Office was hiring. I then applied for a position there and happily was hired. I worked as an Assistant Public Defender for about 12 years assigned to various felony courtrooms, mostly at 26<sup>th</sup> and California.

I then decided to get my master's degree in clinical psychology and, after that, my doctorate. I have blended my work as an attorney and clinical and forensic psychologist. I previously worked at the Kane County Diagnostic Center doing forensic evaluations for the Court and as the Kane County Juvenile Drug Court Coordinator. I have also worked for the Cook County Juvenile Detention Center with adolescents who were charged



criminally as adults. I was the Administrator of Psychological Services for DuPage County, working with a court-mandated population of clients who had substance use, mental health and/or domestic violence and anger management problems. I am now the Assistant Deputy Director of LAP.

**Mary:** What brought you to LAP?

**Diana:** There were a number of reasons that I came to LAP. I had several former legal friends and trial partners who were struggling with mental health and/or substance use issues and, when a few of them or their family members began reaching out to me regarding the problems they were facing, I thought initially that it was an isolated problem. After doing a presentation with a member of the ARDC, however, I found out that the substance use and mental health problems in the legal community were pretty common and very complicated.

Additionally, we had quite a few attorneys seeking mental health, domestic violence, and/or substance use assistance when I worked at DuPage County. Sometimes those attorneys had a difficult time in group settings with other group members. They often felt a great sense of shame at needing mental health or substance use services. That made me feel tremendous empathy for them.

And finally, I have personally known attorneys with whom I was acquainted or worked with, who committed suicide. I felt great distress and sadness that this was happening to my legal community. As a result, I felt that all my education and training was well suited to understanding the specific needs of the legal community and appreciating how hard it is to reach out and access services to get the help needed.

I owe a lot of gratitude to people in the legal community who shared their passion, knowledge, and patience with me as I was learning to become a lawyer. I felt this great desire to give back to the legal community in general because that community had been so good to me when I was a practicing attorney.

**Mary:** What does LAP do?

**Diana:** LAP is a not-for-profit organization that helps Illinois lawyers, judges, law students, and their families concerned about alcohol or substance use or dependency, mental health issues including

depression, anxiety, and suicidal thinking, or stress-related issues such as compassion fatigue and burnout.

LAP's services include individual and group therapy, assessments, education, peer support, and interventions. Our mission is threefold: To help lawyers, judges, and law students obtain assistance with substance abuse, addiction, and mental health problems; To protect clients from impaired lawyers and judges; To educate the community about addiction and mental health issues.

Everything at LAP is free and confidential and many of the staff are attorneys/clinicians or specialize in substance abuse issues. We have offices in Chicago, Park Ridge, Geneva, and satellite offices throughout the State of Illinois. LAP has a board of directors, an advisory committee, and an associate board comprised of lawyers and judges from all over the state.

**Mary:** Have you seen the wellness issues faced by attorneys change since you became an attorney in 1989?

**Diana:** In some ways, yes.

**Mary:** In what ways have those issues changed?

**Diana:** Honestly, looking back I think that the problems in the legal profession with substance use and mental health problems were significant even when I practiced law. I believe, however, that I normalized it as a professional hazard. I felt that it was not unusual for members of my profession to drink heavily or to struggle with relationship issues, burnout, and compassion fatigue. I was surrounded by it on the bench, with my colleagues, and at legal functions I attended.

Until I stepped out of the field and entered into a different working arena, I never recognized that the work attorneys do--the tragedies and traumas we see on a daily basis, the win/lose attitude we all encounter, and the high case volumes we endure would cause a wear and tear and erosion of our physical and mental health. It was not until I began hearing stories about disastrous outcomes of people I worked with or knew, or was asked for treatment assistance or help, that I recognized that something was wrong and unhealthy with our profession.

I also knew that I had the educational ability and expertise to go back and help

people with whom I strongly identify, relating to the personal qualities I share with them. Those qualities include perfectionism, competitiveness, being a problem solver, and possessing an inability to ask for help due to shame and fear. I feel very blessed to be able to do this work and help people realize that asking for help is a strength and not a weakness.

**Mary:** What issues do we as a profession face today that we may not have faced 20 years ago?

**Diana:** The level of stress and anxiety is dramatically increasing. We cannot turn off our brains. We are having higher levels of mental health issues in general, including depression. This is most likely due to poor sleep habits, the presence of social media, and the inability to separate work from home, due to the accessibility of people via email or text. The suicide rate for attorneys is very high and that means that people are suffering alone and in isolation. We need to do a better job of helping people, collectively and individually, in the legal profession, so that no one feels that suicide is the only option to escape the hopelessness and sadness they may be experiencing.

**Mary:** Do the younger lawyers take advantage of LAP?

**Diana:** Younger people in general access LAP services more readily and this may be due to the lower levels of stigma associated with seeking help for mental health and substance use issues in this age group. It is also related to LAP's incredible outreach in the law schools, including staffing every law school in Illinois with monthly office hours using staff or volunteers to identify individuals who may be struggling, and offering them help before they enter the legal field. Forty percent of our clients are now coming from the law student population and over fifty percent of LAP clients are under age 40.

**Mary:** What issues do younger lawyers have that differ from the issues of more seasoned lawyers?

**Diana:** Young lawyers have significant financial issues related to educational debt. They are also just starting their careers, transitioning from being students to being adults with full-time work responsibilities, forming permanent relationships, having

children, purchasing houses, and trying to establish themselves in their legal community. They often feel as though they lack the knowledge or expertise, despite their educational training. They face significant stressors that may increase mental health and substance use issues.

**Mary:** How did the Geneva LAP office come to be?

**Diana:** The Geneva office came to be due to increased demands for services in the western suburbs, including DuPage and Kane Counties. LAP recognized that the legal community there and in the far west, including Rockford and DeKalb, would not be able to easily access services in the downtown Chicago or Park Ridge areas due to distance. We received increased requests for services and felt we needed to meet the demand for an area that was underserved and needing significant assistance.

**Mary:** What services does LAP offer?

**Diana:** We offer assessments, evaluations, and individual therapy in Geneva. I staff that office one or two days a week by appointment. We also provide peer support mentors and refer people to outside agencies as needed, including

psychiatrists, therapists, and substance use providers.

**Mary:** What are your goals for the Geneva LAP office?

**Diana:** We hope to provide group therapy in the future as the demand increases and the desire for these types of services is requested. We also want to increase the involvement of the judiciary and the training of people in DuPage, Kane, and surrounding areas who want to volunteer with LAP. Individuals will be able to go to those volunteers and ask them questions about what LAP can do for them.

**Mary:** How do you envision your future?

**Diana:** I love my job and feel passionate about what I do, so I hope to be a part of LAP for a long time. I hope to increase LAP's ability to assist more people in the legal profession by expanding services statewide, creating more volunteer outreach, involving members of the judiciary and local legal communities with LAP, and increasing financial support for LAP through fundraising and donations.

I want to help people struggling with mental health and/or substance use issues

to recognize LAP as a safe place to seek assistance and access services. We are in the business of aiding legal professionals in need, providing hope for people who are hopeless, and helping people become healthy and optimistic about their work and their futures. I am honored to be serving in this capacity.

**Mary:** Diana, it has been a pleasure and a privilege to interview you and learn about the great work you and LAP are doing for our legal community. How can our readers contact LAP?

**Diana:** They can call LAP's main telephone line at: 312.726.6607 or 1.800.LAP.1233. They may also email me directly at [duchiyama@illinoislap.org](mailto:duchiyama@illinoislap.org). ■

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*Mary F. Petruchius serves on ISBA President James McCluskey's Special Committee on Health & Wellness. She is the PAI (Private Attorney Involvement) Plan Coordinator for Prairie State Legal Services' St. Charles Office. Mary came to Prairie State in July, 2018, after 26 years practicing criminal defense, juvenile, and real estate law.*

# This is when you know it may be time to 'hang it up' as a lawyer

BY MARK HASSAKIS

1. One of the craziest things that can occur and did happen to me by my spouse (or it could be your significant other or partner). . . In the early hours of the morning, and while still in bed. . . my wife learned over and asked "Hey Byron, honey, are you ready for your walk?" The problem was that Byron is our dog and I was still in bed and not ready for my morning walk. You definitely go down further notches on the importance scale toward the end of your career. That may be a "sign".
2. You know that your pace in the

- practice is slowing (and there may be fewer calls for your services, or at least your caseload is reduced so you can now have a "life"). When you finally have a chance after 30+ years to actually have all of your underwear and socks totally straightened in your chest of drawers and no longer on the floor or bed now that your unselfish, singular attention to your clients is now lessening. (Can you believe that it really wasn't until now that I had the time to match all my errant socks!)
3. You finally realize that your

- briefcase is much lighter than normal and you may be resorting to white letter-sized pads rather than the standard, bigger yellow legal-sized ones, not to mention lighter and smaller briefcases in hand that may not even fit a legal-sized file.
4. If you are bigger than a solo firm, you may recall those days when you received a number of prospective clients calling for you, and you only, for their legal matters. But just know that many clients are starting to call for other attorneys in the firm (thinking you don't have the energy

they seek or you may not be as available as before), and thinking you have retired or are now often gone traveling, or you may have "passed" for that matter.

5. Your thoughts may now be more on making or executing your "bucket list" of things to do before you kick the bucket, rather than on your cases.
6. You may be thinking on cutting back on magazine subscriptions, or at least wondering whether you really want the three year subscription commitment and best value, or just the standard one year offering so you know you will be around to read it.
7. You may be beginning to confront all the varied transition issues that confront you as you "wind down" your practice, such as which assistant do you use, consider working full time or part time, or not at all. You may not even realize these before you are told that you need to "hang it up."
8. Are you pondering whether you are comfortable with all your cases safely and securely in the Cloud? Are you worried about that? Can you comprehend and square the risk of "lost" or "misplaced" files in the Cloud, or that could be seized by others?
9. Are you having thoughts of how you will now fill the time you formerly spent serving clients with all this extra time on your hands? Is your primary focus now to enjoy life and to get away or escape from the practice?
10. Have you formulated any strategies for coordinating your remaining client matters you expect not to now complete or not want to do in the future?
11. Are you able to psychologically/emotionally meet the challenges of morphing into a "new" person other than a 100% focused, practicing attorney?
12. Have you now thought of that one place you might like to regularly

visit (other than your main household) after knowing it is time to drastically slow or wind down your cases and clients?

13. You find now that you are doing more than ever before to watch your diet and maintain your health and this is your main focus of life (taking the time to grow your own food or herbs, or shop especially for the healthiest items, or even cooking your own food in a healthy manner, or taking up exercise classes or making more time for the gym, or utilizing fitness equipment at home, or increasing your times to walk)?
14. Have you found with greater time on your hands that you are now devoting more time to your hobbies (music, reading, woodworking, cooking, painting, etc.) or devoting for the first time more of your labor and advice to charities? The current baby boomers will likely be the greatest charitable givers of all time!
15. Have you had thoughts of trying to avoid making that one last mistake (legal malpractice) as you begin to slow down your practice and "exit the game" and begin to slow down your practice?
16. It just may be time when you now particularly notice bigger changes in your memory and patience. Not remembering what you had for lunch yesterday is not likely significant. But preparing for an oral legal argument, or making an extended final appearance in a court case, or remembering and reciting your former mastery of the law in your niche – now these are the potentially worrisome activities that may be cause for concern. Losing your cool in the office and/or losing your patience with staff, co-attorneys and/or clients can be a signal it's time to let go. An infrequent, minor episode is not fatal, but recurrent ones certainly can be.
17. Are you frequently thinking more

on your upcoming social activities rather than committing your focus and efforts on your client matters? This could be a sign that your time in the office is about up . . . And particularly so, if you find that you are frequently "cutting corners" – not fully proofreading letters/documents, losing interest in seeing that all outgoing mail (snail, e-mail or otherwise) is fully double-checked and correct, not tracking all your file matters as closely as you used to, etc. And if you are on medication for any stabilization or health management reasons, for goodness sakes, please have it organized or have a "system" so you are darn sure you take them all timely.

18. It is most definitely a good or great thing to look ahead to your next 10+ day vacation or getaway. If you feel yourself away from the office extensively and/or for longer periods, that is okay too so long as your focus is still keen on the clients – cutting or copying articles in your practice areas and/or about legal issues the crux of your cases; not relying on fate or luck for your best client outcomes, but actually "dialing down" on all the facts and law to fully assure your success.
19. You should likely sense a problem when you find yourself routinely cutting corners when it comes to fully developing all the facts of a case (not going to the scene or gathering all the facts in a case) and knowing and "dialing down" to retrieve all applicable law (both favorable and contra) in your matter.
20. It is okay if when you are out of the office on a trip or extended vacation that you forget about all matters at the office (that is, so long as all your client matters are adequately covered without you). But if you do call near daily when away and find yourself still "glued" to your "technology devices", then you are probably not having the true



break from the office you require. (I always like to ask younger lawyers “Do you have a vacation scheduled for at least 10 days, to commence in the next 12-16 months?” More experienced practitioners should heed this advice as well.)

21. There can also be the possibility and a sign of your pre-occupation with your work and chance that you are holding on too tightly to the office—that you feel constraints on shepherding the office in a smooth transition with the younger members. Hopefully this is not the case for gosh sakes. You do need to have a keen interest in a hobby or the arts or a charitable outlet to fill

your days.

22. Some folks might think your time is up in the office if you have more than a simple passion or interest in recycling (i.e. paper, glass, plastic, foil, wax paper, jars, boxes, etc. or just plain hoarding. Do you? If you fixate on crooked pictures on the wall, wall clocks out of or off time and/or dreams of utopia and perfectionism, watch out. You may still be okay. But do be careful to appreciate and understand all your idiosyncrasies, placing them below your client loyalties.
23. You might get the message when you are on a crowded bus with all seats filled and most everyone

there wishing to give up their seat to you. The signage on the bus reads to “give up your seat” to those with “disabilities or a senior”. Self-evaluate whether you are one or both, or none of these.

So . . . remember to “enjoy” the practice, for as long as you are in it . . . And likewise, embrace your transition from the daily law practice to whatever your interests after the law. Remember, life is short – so grab for all the “gusto” you can. . .

And don’t forget, as a lawyer, to consider leaving something charitably in your will to benefit one of the best legal-based charitable foundations in Illinois, the Illinois Bar Foundation, or to another Illinois legal charity of your choice. ■

# Financial exploitation of the elderly: An overview

BY EUGENIA C. HUNTER

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*If it seems too good to be true, it probably is.* – 16<sup>th</sup> Century Adage  
*Trust, but verify.* – Ronald Reagan  
*If you see something, say something.* – Homeland Security

## The Problem

Financial exploitation of the elderly falls in two general categories: fraud by strangers and exploitation by family and caregivers.

Fraud involves a deliberate attempt to deceive the victim with promises of goods, services or other benefits which do not materialize. Some of the frauds perpetrated on the elderly include: prizes and sweepstakes, investments, charitable contributions, repairs, loans and mortgages, health remedies, funeral, life insurance, travel and confidence games. These come by mail, email, telemarketers and face to face.

Financial exploitation is perpetuated by persons who already have a trust relationship with the elderly person and include: stealing money and valuables,

borrowing money with no intent of repayment, denying services or medical care to conserve funds of the estate, cashing Social Security or pension checks without permission, using credit cards for purposes not intended or without permission and forcing the elderly to part with resources or sign over property rights.

Financial exploiters use deceit, coercion, emotional abuse and empty promises of lifelong care. They isolate the victim from family, friends and other concerned parties. Frequently used means of financial exploitation include joint bank accounts, deeds or title transfer of cars, powers of attorney, and living trusts and guardianships.

While seniors are not the sole victims of fraud and exploitation, certain factors may make them more vulnerable. Decline in functional skills such as memory, hearing, plus isolation and fear of helplessness and going to the nursing home are issues that must be understood to recognize and help

victims.

The largest category of financial exploiters include adult children, grandchildren, and other relatives. Next comes professional caregivers and then close friends and others such as neighbors, handymen, investment advisors and even lawyers. The victim is most often a white female, with the average age of 79, who may suffer some form of dementia or physical impairment and frequently suffers more than one impediment which often makes her dependent on the abuser for her daily needs. She tends to be isolated, fearful of reporting abuse thinking it may lead to further harm, placement in the dreaded nursing home or abandonment.

Warning signs of exploitation include the following: difficulty covering basic needs when income should be adequate, companion who encourages large bank withdrawals, a caregiver or relative who is overly interested in the senior’s financial

affairs, a relative who is reluctant to spend money for needed medical care, bills not being paid, isolation of the elderly by relatives or caregivers, missing check statements and unusual charges on credit card statements, inappropriate legal documents and concern or confusion about money.

## Resources

The Adult Protective Services Act (320 ILCS 20/) gives us some of the tools needed to deal with the problem of financial exploitation of the elderly.

“Financial exploitation” is defined as the use of an eligible adult’s resources by another to the disadvantage of the adult or the profit or advantage of a person other than the adult. An “eligible adult” is an adult with disabilities aged 18 to 59 or any person aged 60 or older, who is not institutionalized. The statute makes a large number of professionals mandated reporters and includes, among others, the usual suspects: those licensed to provide care, social or medical services to seniors, law enforcement, and educators. Reporting is not required when the reporter believes the senior is capable of reporting the abuse themselves. Lawyers and bankers are not mandated reporters because of their professional obligation of confidentiality.

Adult Protective Services are provided locally by 45 provider agencies. Case workers from these agencies conduct investigations and work to resolve abusive situations. Anyone can report abuse. Those who report suspected abuse in good faith and cooperate with the investigation are immune from criminal or civil liability or professional disciplinary action and the reporter shall not be disclosed except by the permission of the reporter or by order of court. [The Adult Protective Services Hotline is 866-800-1409.](#)

After the report is made a trained adult protective services caseworker will respond within 24 hours for life threatening situations, 72 hours for neglect and non-threatening physical abuse and up to seven days for emotional abuse or financial exploitation.

The caseworker will contact the victim and determine what services are appropriate

including financial or legal assistance and protections such as representative payee, direct deposit, order of protection, civil action, including guardianship or referral for criminal charges.

The downside of this law is that a competent adult may refuse services, which in my experience is a problem in the area of financial exploitation (and physical abuse, too!) as many victims are reluctant or refuse to identify a loved one, friend or caregiver as an abuser. In those cases in which the eligible adult has dementia or cognitive impairment, the agency may petition for guardianship.

## Our Challenge

Attorneys who represent or care for seniors are on the front line in protecting them from financial exploitation. When asked to prepare wills, trust, powers of attorneys, deeds, etc. have a frank, private and in depth conversation with your client to determine if they are competent and understand all the implications and consequences of the documents you are being asked to prepare and double check this information before the documents are signed. Discuss with your client the importance of choosing an executor, trustee, agent, etc. that is someone who is trustworthy. Not necessarily the oldest child, the nearest child, especially not the child with a credit card, other financial, gambling or drinking problems, but someone who is trustworthy in every way. Consider provisions in estate planning documents that provide transparency. Do not draft a deed conveying the family home to your client’s children until you discuss the Medicaid and other implications. Let your clients know that they should call you if they receive or are approached by anyone with a questionable scheme or suspected scam. You can check it on the internet and become an instant “hero” to that client.

Most of all read and reread Rule 1.14 - Client with Diminished Capacity of the Rules of Professional Conduct and the Comment every time you deal with a client that you suspect or know has diminished capacity. You may take action if there is risk of substantial physical, financial or other harm, including consulting with individuals

or entities that have the ability to take action to protect your client.

In addition to Adult Protective Services there are other agencies that collect and aggregate information about fraud and financial exploitation: Illinois Attorney General Consumer Protection, U.S. Postal Inspection Service, and Federal Trade Commission. While these agencies may not be able to directly remedy your client’s situation, they do aggregate and act upon the most widespread and egregious complaints both domestically and internationally. ■

# Planning for the long term

BY DONNA J. JACKSON AND CHANTELE HICKMAN-LADD

When planning for retirement, thinking about planning for medical treatment and expenses, long-term care, and possible nursing home stays might not be the first thing that pops into someone's mind. However, these costs might take the biggest bite out of the budget later in one's life. But with proper planning, anyone can be prepared for these possible expenses.

There are different levels of care someone may need or want as they progress into retirement. The care may range from in-home services to staying in a nursing home, and the pricing for those different services will vary based on the level of care being provided. For example, as one ages, they may simply want a homemaker to provide hands-off services, such as shopping, cleaning, or running other errands for them. This person can act as a companion to help with simple tasks. In 2016 the national average for these simple services was \$20 an hour. At the opposite end of the spectrum, nursing-home care in a semi-private room was an average of \$225 a day (\$6,844 a month), and a private room was \$253 a day (\$7,698 a month), in 2016. Other services such as adult day health care centers, assisted living facilities, or board and care homes will fall somewhere in the middle of this pricing scheme. Although the numbers may appear overwhelming at first, there are plenty of ways clients can tackle these growing expenses through savings and investment plans or governmental benefits.

## Government Programs

Social Security is a well-known retirement program that provides income to those who are eligible. Those who are eligible may include retirees, a worker's surviving spouse, a retired worker's children under the age of 18, or an insured worker who became disabled before retirement and the survivors of insured workers who pass away.

Many aging individuals who are eligible to receive Social Security rely on this for income. However, this may not be

enough for these individuals to maintain their pre-retirement standard of living and finance their long-term care. For example, "[f]or 2019, the maximum monthly Social Security retirement benefit for a worker retiring at the full retirement age of 66 years is \$2,861." But "the estimated average retirement benefit for retirees is only about \$1,461 a month." However, there are certain government programs that can help with medical and long-term care expenses.

When it comes to health care, Medicare is the federal government's principal health care insurance program for individuals 65 years-of-age or older, under 65 years-of-age and receiving Social Security Disability benefits, or who have end-stage renal disease. Medicare is broken down into parts A-D. "Part A covers hospital stays, Part B covers physician fees, Part C permits Medicare beneficiaries to receive their medical care from among a number of delivery options, and Part D covers prescription medications."

"Medicare covers medically necessary care for acute care, such as doctor visits, drugs, and hospital stays." Acute care refers to care that the program's administrators view as reasonable and necessary to diagnose or treat an illness or injury—"[r]ecovery is the primary goal of acute care." Therefore, except in very limited circumstances, Medicare does not pay for most long-term care or personal-care services.

Although Medicare is the principal health care insurance program for the above-mentioned individuals, it only pays for about half of the medical costs for eligible individuals after all of the deductions, copayments, and coverage exclusions. In order to fill these voids, individuals may purchase a "Medigap" insurance policy. Medigap policies may not fill all the gaps in Medicare, but it could help.

Unlike Medicare, Medicaid provides for long-term care not covered by Medicare or other medical plans. It is a joint federal and state government program that "covers medical care,

like doctor visits and hospital costs, long-term care services in nursing homes, and long-term care services provided at home, such as visiting nurses and assistance with personal care."

Medicaid is designed to help individuals who have low income and assets. Therefore, Medicaid beneficiaries must meet certain financial requisites in order to qualify. Financial eligibility for Medicaid is based on an applicant's income and countable resources. Federal requirements govern who may be eligible to receive Medicaid benefits overall, but states are given "considerable leeway in how they operate their programs"—meaning "eligibility rules and services that are covered vary from state to state."

Finally, veterans may also be able to receive assistance through the Department of Veteran Affairs. "The Department of Veterans Affairs . . . pays for long-term care services for service-related disabilities and for certain other eligible veterans, as well as other health programs such as nursing home care and at-home care for aging veterans with long-term care needs." The Department of Veterans Affairs may also pay for veterans who do not necessarily have a service-related disability but are in need of financial assistance for necessary care.

## Other Options

Often people choose to save for retirement throughout their lifetime using investment tools such as an individual retirement account. However, there are other options that may help individuals finance their long-term care.

One option for people wishing to prepare for financing their long-term care is long-term care insurance. Long-term care insurance covers those "long-term care services and supports, including personal and custodial care in a variety of settings such as [one's] home, a community organization, or other facility." Because of the variety of benefits one could choose from, long-term care insurance is a great option to consider when thinking about long-term planning.

However, long-term care insurance may be too expensive, or the client might not be able to qualify for coverage. The cost of long-term care insurance is often based on:

- How old you are when you buy the policy.
- The maximum amount that a policy will pay per day.
- The maximum number of days (years) that a policy will pay.
- The maximum amount per day times the number of days determines the lifetime maximum amount that the policy will pay.
- Any optional benefits you choose, such as benefits that increase with inflation.

Furthermore, long-term care insurance premiums may be lost if the policyholder ends up not needing any long-term care. However, individuals may opt out of the long-term care insurance to invest in short-term care insurance instead. This coverage will often be cheaper than its long-term counterpart because it only covers up to one year of care. Therefore, this may be an option for someone who waited too long to purchase long-term care insurance.

Certain life insurance may also be used as a way to help finance long-term care. This can be achieved by investing in a life insurance policy that has a cash value and will allow the client to borrow against that cash value of the policy later when long-term care may be necessary. This

option also allows the policyholder to name a beneficiary to receive the remainder of the benefit upon his or her passing.

Another option for long-term care planning may include entering into an annuity contract. "In exchange for a single payment or a series of payments, the insurance company will send you an annuity, which is a series of regular payments over a specified and defined period of time." This may be structured as an immediate annuity or a deferred long-term care annuity. With an immediate annuity, the "insurance company converts . . . the single premium payment into a guaranteed monthly income stream for a specified period of time or for the rest of your life." Under a deferred long-term care annuity, however, "[t]he annuity creates two funds: one for long-term care expenses and another separate fund that . . . can [be] use[d] however [one] desire[s]." Generally, the rules of the annuity will govern how much someone can access from either fund and when. Furthermore, certain health criteria must be met to qualify for a deferred long-term care annuity.

All in all, there are numerous options to structure financing long-term care. The most important thing is to listen to your client's needs and utilize resources available to help them plan.

### Helpful Resources

National Academy of Elder Law Attorneys (NAELA): NAELA is an

association of attorneys who are dedicated to improving the quality of legal services provided to people as they age and with special needs. The Academy sponsors continuing legal education programs on Elder Law for attorneys throughout the year and provides publications and educational materials to its members on a wide range of Elder Law topics. More information can be found at [naela.org](http://naela.org).

Elder Law Answers: Elder Law Answers provides general information and resources for Elder Law and Estate Planning questions. More information can be found at [elderlawanswers.com](http://elderlawanswers.com).

Eldercare Locator: The Eldercare Locator is a nationwide service that connects older Americans and their caregivers with trustworthy local support resources. Since 1991, the Eldercare Locator has been linking those who need assistance with state and local agencies on aging, as well as community-based organizations that serve older adults and their caregivers. Whether help is needed with services such as meals, home care or transportation, or a caregiver needs training and education or a well-deserved break from caregiving responsibilities, the Eldercare Locator is there to point that person in the right direction. More information can be found at [eldercare.acl.gov](http://eldercare.acl.gov). ■

## Tangential relationships for the 'winding down' attorney: co-counsel, of counsel, referring attorney, tenant, etc.

BY LEONARD F. AMARI

Oftentimes, a lawyer who wants to "quit" the practice of law elects to downsize rather than to completely shut down. More often than not they enter into some informal, tangential relationship with another firm, or another lawyer, perhaps serving as of counsel, co-counsel, referring attorney, or just as a tenant.

Entering into any of these relationships creates the very real risk of vicarious (malpractice) liability. Black's Law Dictionary defines vicarious liability as "the imposition of liability on one person for the actionable conduct of another, based solely on the relationship between two persons: indirect or imputed legal responsibility for

the acts of another."

Also, and especially for the "winding down/retiring lawyer," these relationships can potentially impact a tail/EPR cover, of course. Tail/EPR coverage is a provision found within a claims-made policy (which most of us have) that permits an insured to report claims that are made against the



insured after a policy has expired or been cancelled, if the wrongful act that gave rise to the claim took place during the expired/cancelled policy. Tail coverage requires that the insured pay additional premiums.

## Of Counsel

The generally understood meaning of the term “of counsel” is an effort to identify a lawyer in some way with a firm. It is the identification as an attorney who is not a partner, associate, shareholder, or member of a firm, and who has some sort of a relationship with the firm. The American Bar Association Formal opinion #90-357 identifies the “core characteristic” of “of counsel” as a “close, regular, personal relationship” but excluding “that of a partner (or its equivalent, a principal of a professional corporation), with the shared liability and/or managerial responsibility implied by that term,” and associates, defined as a “junior non-partner lawyer, regularly employed by the firm.”

According to Formal Op. 90-357, there are four types of of counsels, as a practical matter:

- (1) the “part time practitioner, who practices law in association with a firm, but on basis different with that of mainstream lawyers in the firm,” e.g. the winding down lawyer;
- (2) a retired partner of the firm who provides institutional recollections of his or her experiences with the firm and is available for consultation;
- (3) a lawyer, usually a lateral hire, brought into the firm with the expectation that the lawyer will shortly become a member e.g., associate, partner; and
- (4) a lawyer who occupies a permanent senior position in the firm with no expectation of becoming a partner.

These four examples underscore that “of counsel” should not be used to designate more casual relationships which depend on the occasional consultation; the co-counseling in a single case, (discussed *infra*), even if it is of long duration; “a relationship involving only occasional collaborative efforts among otherwise unrelated lawyers or firms;” or a relationship based solely on making or

accepting referrals, (also discussed *infra*).

The name of a lawyer who is of counsel to a firm should not appear in the name of the firm (e.g. in its letterhead with partners and associates) unless the lawyer who is of counsel is a retired name partner of the firm. The “of counsel” is listed, usually, on the right margin of a firm’s stationary, under the heading “of counsel.” There are a few generally applicable issues that take on special significance in an “of counsel” relationship. In consulting various legal articles on the subject, they define the risks, variously, but usually to:

- conflicts/disqualification
- vicarious liability, and
- insurance coverage disputes,
- with perhaps a few difficult to imagine outliers.

A. Conflicts/Disqualification. For conflict purposes, the of counsel affiliation means that the affiliated firm and the of counsel attorney will often be treated as one entity, thus governing disqualification, recusal, and any other conflict imperatives. The problems are further compounded when a lawyer or firm has an of counsel relationship with more than one firm, since all of the lawyers in those firms may be disqualified, even if their only connection is the same of counsel lawyer, obviously the proverbial “Pandora’s Box.”

B. Vicarious Liability. Of course the firm for which a lawyer serves only as “of counsel” is not going to be liable for the independent acts and omissions of the of counsel attorney that were not “within the scope” of the relationship, though those issues may still arise, especially if it would serve the purposes of an adversary in some way, litigation, coverage, denial of coverage, or whatever, and vice versa.

C. Insurance Coverage Disputes. In the unfortunate event of a claim, coverage problems can arise when an affiliated firm has done work on a matter that the of counsel attorney had no involvement in, or awareness of. Unfortunately, his name was listed on the letterhead so he may become named as a defendant. If the of counsel attorney is not covered by the affiliated firm’s malpractice policy, there may be a significant problem because the of counsel attorney’s own policy will often not afford

indemnification and defense coverage either. Or, at the very least, there becomes dueling “coverage denial,” between the malpractice insurance coverage carriers. Why? His policy only covers work done on behalf of clients of the named insured which in many instances is not the affiliated firm. These sorts of “who is the client,” “who is the attorney of record,” and “who is the named insured” are common challenges that underscore the necessity of investigating and addressing the insurance coverage issues early on. Appropriate coverage for the exposures of both the affiliated firm and the of counsel attorney can usually be obtained, so long as the issue is addressed at the outset. My experience is, though probably very limited, these insurance coverage issues are not thought about when establishing this amorphous relationship.

In order to avoid unwanted liability: make sure that you document the scope of your “of counsel” relationships; verify that the other attorney has malpractice insurance and the policy limits; and don’t engage in any practices that would lead the client to believe that you are partners with one another unless that is in fact the case. Also, it is vital to check with one’s malpractice carrier (tail coverage company?) that this relationship is covered and not in violation of the terms of the policy.

## Referring Attorney

It is imperative that the referring (retiring) attorney recognizes the risk inherent in referring matters to another attorney in exchange for the sharing of a fee. Initially and most importantly, be sure that the carrier of the referring attorney’s tail coverage allows his referral/referral fee relationship and is covered. Usually, the referral is an “act” of practicing law and therefore is not covered under the tail policy. As a general principle, attorneys who refer work for a fee become “partners” from a liability standpoint with the attorney to whom the matter was referred. This means that the attorney earning the referral fee can be held legally liable for a malpractice committed by the attorney who receives the referral (the “receiving



attorney”).

In terms of this referring attorney sending another matter for handing to another firm, obviously the referring attorney will be covered for malpractice by the firm handling the matter. The question is whether, for example, if the firm handling the matter becomes guilty of malpractice, without coverage, does the tail coverage of the referring attorney provide coverage?

### Co-Counsel

The referring attorney with tail coverage should be sure to check with the carrier to be sure that this engagement is permitted under the tail for coverage. As with being a referring attorney, a retiring lawyer that engages another attorney or firm as co-counsel on a particular matter or case is basically forming a partnership with its co-

counsel from a risk standpoint with respect to the co-counsel matter.

### Office Sharing

A retiring/winding down lawyer may elect for to be a tenant with another firm, or any lawyer for that matter—very often the case. This could create, arguably, an event of vicarious liability if the circumstances are such, to give rise for the client, fairly, concluding that he or she is a “member” of the lessor’s firm. Therefore, it is incumbent of this, or any, “tenant”/“sub-tenant” to review the arrangement objectively so no impressions are left that would give rise to the incorrect conclusion of the relationship. For example, do not list the name of the retiring attorney in the lessor’s stationary. Be cautious of the perception created by phone numbers and listings. For example,

if using a common switch board operator, do not let the answerer just say the name of the lessor firm, preferably recite “law office” when answering calls.

### Conclusion

Most of us, when we know it’s time to hang it up, usually prefer to do it “softly,” to gradually walk away. The above circumstances offer alternatives, tangential relationships. Just be conscious of the consequences, the risk of vicarious liability, and the potential effect or impact on one’s tail coverage. ■

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