

Raising Awareness Of Alzheimer's/Dementia-Related Cognitive Impairment In The Law Firm Setting

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Last October, former Supreme Court Justice Sandra Day O'Connor and her family bravely announced her dementia diagnosis to the public. While O'Connor is not the first member of the legal profession to make such an announcement hoping to raise awareness of dementia's devastating impacts, her story immediately drew renewed calls from inside the profession to address how lawyers—whose very skillset is rooted in cognitive functionality—are affected by dementia-related cognitive impairment. Numerous organizations, including those dedicated to lawyer health and wellness, professional discipline, malpractice insurance, and law office management, have been calling for increased attention to this issue for over a decade as the average age of lawyers in active practice continues to increase. Yet commentators caution that most law firms remain woefully under-prepared to handle this issue should one of their lawyers begin to exhibit signs of cognitive impairment and that individual lawyers are similarly unaware of the ethical obligations vis-à-vis cognitively impaired colleagues. That must change. Every lawyer needs to know something about this difficult and sensitive issue, if only where to turn for assistance should he or she become alarmed by a colleague's behavior in the future.

Here is the issue in a nutshell. Lawyers operate inside an ethical framework inside a self-regulated profession which seeks to protect clients, the public and sound operation of the legal system. Lawyers must provide "competent" representation to clients, and competent representation, under Model Rule of Professional Conduct (MPC) 1.1, requires "the legal knowledge, skill, thoroughness and preparation reasonably necessary." Other rules require lawyers to act with diligence and promptness, communicate effectively with clients, maintain confidentiality, safeguard money, and, specifically under MPC 1.16, decline or terminate representation if a "mental condition materially impairs" the provision of competent representation. Law firm managers/supervisors must ensure that every lawyer in the firm honors her ethical duties under MPC 5.1, and MPC 8.3 contains various reporting requirements for professional misconduct. Enter dementia-related cognitive impairment, including Alzheimer's, vascular dementia, lewy-body dementia and frontotemporal dementia.

Dementia eats away at one's basic cognitive functionality: remembering, reading and writing, calculating and problem-solving, and navigating one's physical and social environment. At some point (and probably sooner rather than later), a dementia-afflicted lawyer can no longer provide competent representation; eventually, he will be unable to function independently at all. Dementia is a looming death sentence with a cruel and insidious decline. At present, there is no cure, there are no definitive or universally accepted diagnostic tests, and the medical community continues to debate causation and risk factors. Medication can slow, but not halt, dementia's progression. While an afflicted lawyer may be able to ethically practice law with ever-increasing oversight and assistance as his cognitive functionality deteriorates, that would only be for a limited time. Thus, the goal must be to help the lawyer retire with his dignity and reputation intact before he commits



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malpractice, incurs a disciplinary charge, or prompts an exodus of disgruntled clients or frustrated staff.

If this nutshell overview seems stark, it is. The American Bar Association (ABA), in two ethics opinions issued in 2003, explained that mental impairments, including Alzheimer's, do not lessen a lawyer's obligation to provide competent representation, (ABA Formal Op. 03-429) and that lawyers "may not shut their eyes" to conduct that reflects "generally recognized symptoms of impairment" (ABA Formal Op. 03-431). These two opinions are complex and highly nuanced; they are perhaps better understood in relation to the drug and alcohol impairment issues, which also affect lawyer functionality, but hold out a hope of recovery. Interested organizations have been striving to translate the ABA's guidance into the arena of dementia-related cognitive impairment from which sufferers do not recover, only decline. There are at least three unique challenges that can complicate detection and effective handling of the issue.

First, dementia-related cognitive impairment must be differentiated from the cognitive decline known to accompany the normal aging process, so as not to foster age discrimination. Aging is a highly individualized process, and many lawyers display mental sharpness well into their 70s and 80s, providing not only competent representation to clients, but invaluable experience and mentoring inside the profession itself. But neurologists tell us that everyone experiences a slowdown in "processing speed" in their 40s and 50s, affecting our ability to focus, multi-task, order events in time and place, and learn new information. To some degree, age-related cognitive decline is inevitable for all of us, but cognitive impairment is not. Cognitive impairment can only be diagnosed by a medical professional and, notably, other conditions (such as hearing loss and medication-adjustment issues) can cause dementia-like symptoms. Certain behaviors, however, do raise a red flag, including:

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- *getting lost in familiar places (town, law library, courthouse)*
 - *forgetting planned events (meetings, appearances, dinners)*
 - *forgetting identities (clients, court staff, firm staff)*
 - *repeating stories, instructions, questions*
 - *exhibiting an uncharacteristic lack of grooming*
 - *being uncharacteristically irritable or sad*
 - *miscalculating monetary sums or misinterpreting court orders*
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Any busy or distracted lawyer can occasionally miss a meeting or garble an instruction; cognitive impairment, however, usually presents a pattern of such behavior or what looks like a change in one's personality or way of "being in the world." Law firms should train lawyers and staff to recognize these and other red-flag behaviors and establish mechanisms for reporting and documenting them for evidence of a pattern. And while lawyers cannot diagnose dementia, those working in close proximity to an afflicted lawyer can be instrumental in detecting the telltale signs and nudging the lawyer toward a medical evaluation.

Second, one of the hallmarks of dementia is denial. The afflicted lawyer may deny the signs because she is confused, afraid or embarrassed; she may also simply not remember her behavior or perceive it as out of the ordinary. If colleagues approach with concern, she may be genuinely astonished; she may also vehemently deny the behavior and become angry or hurt. Loyal staff and protective family members may also deny or excuse the behavior or seek to "cover" for the lawyer, hoping to protect her. Dealing with a cognitively impaired lawyer is a process, not a one-time event; it requires an understanding of the condition's progression and the fact that the process will likely be fraught with emotion.

Third, lawyers are thought to have "cognitive reserve" and traits that may cause them to strongly resist any suggestion of vulnerability. Lawyers, by virtue of their typically high IQs, lengthy educational training, and highly established verbal routines, can hide signs of cognitive deterioration far longer than others; they can also use their abilities to interpret, explain and deflect to mask red-flag behavior. And imagine a senior partner steeped in professional accomplishments, overseeing a vast network of clients and community contacts, suddenly being challenged on his mental acumen on his "home field"—i.e., inside a firm where he trained and mentored every other lawyer therein. It is not hard to envision resistance, especially when dementia can prompt suspicion and anger.

Once dementia-related cognitive impairment is diagnosed (and that can be complex and challengeable, given the lack of definitive or universally accepted diagnostic testing), a law firm really only has two options: surround the afflicted lawyer with the assistance he needs to fulfill his ethical duties or facilitate (perhaps even force) a retirement. Some lawyers (perhaps with the guidance of family) may retire voluntarily, but because denial figures into the dementia equation, such cannot be assumed. If a firm opts to help the lawyer work for a while longer, it might consider reducing hours or requiring mandatory downtime, transitioning the lawyer into more of an inside mentoring role by gradually limiting client contact and responsibilities, assigning a practice support group or a one-on-one dedicated assistant to aid and accompany the lawyer,

or providing "apps" to assist with challenging tasks such as remembering appointments and notetaking. Such steps cost time and money, affecting firms of different sizes and practice areas differently. Such steps may also cause client concern and irritate staff. When and how to assist a dementia-afflicted lawyer continue to practice law until ethically impossible is an area ripe for further development. And while retirement is a separate topic in and of itself, facilitation of the retirement option is easier if the firm already has a retirement policy in place upon which to begin discussion.

As awareness increases (thanks in large part to brave lawyers such as O'Connor, Charles Ogletree, Ron Meshbesher and Don Kent, all of whom have made their dementia diagnosis public), firms should explore proactive ways to handle the issue of cognitive impairment before it arises. While information on how firms are currently handling this issue is limited (likely due to concerns about age discrimination and defamation), some are reportedly experimenting with mandatory retirement or at least a mandatory retirement discussion at a certain age; reservation at partnership of a power to forcibly "retire" a partner showing signs of cognitive impairment; creation of a "senior partner plan" to incrementally reassign clients/responsibilities at a certain age; and the assignment of a "reverse mentee."

And since we all age in the course of our professional lives, it might be wise (in addition to taking care of our own health and pursuing financial, retirement, and succession planning) to consider the value of an "occupational living will" to provide advance instruction to trusted colleagues on how to handle signs of cognitive impairment in one's self. See Kirk R. Daffner, *Reflections of a Dementia Specialist, I Want to Stop Working Before I Embarrass Myself*, washingtonpost.com (April 15, 2018) (available at <https://www.washingtonpost.com>). This, too, is a topic ripe for further development as we grapple with the sobering statistic recently released by the Alzheimer's Association that 5.8 million Americans are presently living with dementia. While the practice of law will itself help to keep our minds active—something researchers believe can reduce the risk of dementia—we cannot escape the inevitability that there are or will be lawyers practicing in our midst with dementia-related cognitive impairment. As members of a self-regulated profession, we must all understand and seek to minimize the related risks.

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Readers can find helpful resources on the websites of various state lawyer assistance programs (LAPs) and the Commission on Lawyer Assistance Programs (CoLAP). Highly recommended are Cliff Collins, *Ready or Not: When Colleagues Experience Cognitive Decline*, Oregon State Bar Bulletin (Nov. 2014) (available at <https://www.osbar.org/publications/bulletin/14nov/decline.html>) and a 6-minute video featuring Texas lawyer Don Kent speaking about the "new normal" as he battles lewy-body dementia (available at <https://sarahamiller.carbonmade.com/projects>). In Pennsylvania, lawyers concerned about a lawyer or judge exhibiting signs of cognitive impairment can contact Lawyers Concerned for Lawyers (LCL) for confidential assistance: LCL Helplines: 1-888-999-1941 (Lawyers); 1-888-999-9706 (Judges).