

STATE BAR OF TEXAS



2014 State Bar of Texas Task Force on Aging Lawyer Issues Report **3-18-2014**

Overview

The State Bar of Texas Task Force on Aging Lawyer Issues was appointed in the Summer of 2013 to look at issues associated with aging lawyers as they relate to the practice of law and interaction with the public. The Task Force, Chaired by Terry Tottenham of Austin, was made up of attorneys, judges, and public members from throughout the state and submits this report and recommendations to the State Bar Board of Directors for its consideration.

Background

More attorneys are practicing law well past typical retirement age, which is generally considered to be in a range between 65-70 years of age. Attorneys continue practicing for a variety of reasons, including financial necessity, and the desire to continue helping people. Anecdotally, there are some lawyers who continue to practice law into their 80's, whether it's handling a few cases periodically or attempting to maintain an active case docket.

As individuals age, some develop a loss of cognitive abilities and develop other health related issues, which impact their ability to handle client matters. Unfortunately, some attorneys are finding themselves in the disciplinary system often because of some of these health issues. The issues go deeper than just having a forgetful memory. Missing deadlines, forgetting court dates, losing case files, and lack of comprehension of facts are just a few examples of problems that have resulted in grievances being filed against an attorney in these circumstances.

The task force looked at these types of age related issues and determined that the main focus should be education from two perspectives: by developing educational components for lawyers, judges, law partners, and family members on how to handle attorneys that present a loss in cognitive abilities; and by reviewing the educational requirements for lawyers that continue to practice law past the age of 70.

Administrative Requirements

Currently, Emeritus attorneys (those attorneys that are 70 years or older as defined by the State Bar Act) are exempt from the Minimum Continuing Legal Education (MCLE) requirements and are exempt from paying membership bar dues (and the legal services fee and occupation taxes.¹) There are approximately 7,081 attorneys that are classified in the State Bar membership as being over 70 years of age.

The Task Force believes there are no reasons from a policy perspective to eliminate the

¹ The Legal Services Fee and Occupation Tax are legislatively mandated fees and set by the Texas Legislature.

exemption from membership bar dues for emeritus attorneys. The membership dues exemption is considered a special benefit for those individuals who have been members of the bar for a considerable amount of time. The Task Force recommends that member dues exemptions remain in place for Emeritus attorneys.

The number of attorneys approaching 70 years of age has increased significantly in the last 15 years and will continue to increase over time. With more attorneys practicing past 70 years of age, and with no requirement to take CLE courses, there is a concern that many are not staying current on the law because they are not required to do so.

The Texas Board of Legal Specialization has no MCLE exemptions for attorneys age 70 years or older. Board certified attorneys in this age group are still required to take a specified number of CLE hours every year in their specialization in order to keep their board certification. Similarly, Doctors, Nurses, and CPA's in Texas have no age exemptions when it comes to mandatory education courses.

The Task Force believes that it is important for all practicing attorneys to remain current on the law and legal practices/procedures. Ultimately, there is greater public protection if attorneys are better educated in their respective practice areas. Emeritus attorneys who want to continue practicing will benefit from staying current on the law and will provide better legal representation to their clients. The best way to accomplish this is to take legal education courses in their respective practice areas. However, absent a requirement to take CLE courses, there is a lesser likelihood that Emeritus attorneys will continue to take classes to stay current with the law.

Therefore, the Task Force recommends that the State Bar of Texas eliminate the MCLE exemption for Emeritus attorneys who wish to continue to practice law. This means that they would be required to comply with the MCLE Rules and Regulations and be required to take 15 hours of CLE every year. Emeritus attorneys that practice law and do not meet the MCLE requirements should be suspended from practicing law as part of the State Bar's normal administrative suspension process for non-compliance.

In order to eliminate the MCLE exemption for Emeritus attorneys, the State Bar Rules and MCLE Regulations need to be amended. The Task Force recommends that this proposed policy change be submitted to the State Bar Minimum Continuing Legal Education Committee (MCLE) for consideration and that they determine what rules need to be amended in order to accomplish this policy change. The MCLE Committee should then present any rule amendments and an implementation schedule to the State Bar Board of Directors for consideration.

For Emeritus attorneys who do not wish to practice law, they may claim Inactive Status or claim "Non Practicing" as their Membership status. This means that they are not required to comply with the new proposed MCLE Requirements because they are not practicing law in Texas. If they do wish to resume practicing law, they will need to subsequently take the appropriate CLE hours to become eligible to practice.

Additionally, the Task Force recommends that TexasBarCLE consider offering reduced pricing for Emeritus attorneys that register for their courses. Offering reduced price courses as a benefit in this context will help reduce the cost for Emeritus attorneys to complete the MCLE requirements.

As with any major new implementation process, there could be some potential unintended

consequences that arise. For example, there could be inadvertent suspensions of Emeritus attorneys in several capacities: 1. The State Bar suspends a deceased attorney for non-compliance. This situation could occur because the State Bar may not be aware that a particular Emeritus attorney has passed away and suspends that attorney inadvertently. 2. The State Bar suspends an Emeritus attorney for non-compliance who is not practicing and who is not aware of the new MCLE requirements. This could create tension and frustration for a number of Emeritus attorneys in this situation. Because of this, the Task Force recommends the State Bar take every possible effort to educate its membership if and when this change is made.

Education Recommendations

The Task Force discussed alternatives for educating lawyers and the public about aging lawyer issues. The main theme was to identify and develop resources that could be used by local bars, attorneys, law office administrators, judges, and family members on how to address these issues.

Educational efforts should include topics such as identification of cognitive impairment, transitioning into retirement, and pro bono opportunities. The Task Force has identified the following educational opportunities:

1. Develop a website page on the State Bar's website dedicated to aging lawyer issues that can serve as a primary reference point for information. Among other things, the website should contain information about TLAP services, cognitive issues, succession and retirement planning, opportunities for pro-bono and volunteer legal activities, educational seminars, and local resources.
2. Consider creating a DVD and webcasts that have educational information pertaining to aging lawyer issues and that can be available for CLE credit. These CLE's could be offered at reduced cost to Emeritus attorneys. Consider creating a planning committee or other similar type of group to help determine content.
3. Consider creating a resource kit for local and specialty bar associations and Sections. These kits could have written information, DVD's, sample agenda's and suggested speakers for CLE events so that local bars can put on programs on aging lawyer issues that are eligible for CLE credit.
4. Consider distributing resource kit to judges through the Texas Center for the Judiciary. Such information will be similar to resources developed for local bars.
5. Consider sending targeted email communications to Emeritus attorneys pertaining to Aging Lawyer issues. For example, consider distributing information on succession planning and retirement specifically to solo and small firms.

Pro Bono Opportunities

Many retiring attorneys find that they are disconnected from the legal community once they have retired, but still have a desire to give their time and legal skills to assist others. The Task Force thought it was important to identify alternatives for retired attorneys to assist the public, including various pro bono opportunities. There are numerous opportunities for these attorneys to volunteer their services, and the Task Force believes that these opportunities should be made readily available and easy to find on the State Bar's website through the Aging Lawyer Issues website.

The Task Force identified the following opportunities for service for retired lawyers:

1. Volunteer to take a legal case through a legal aid or pro bono provider to give direct assistance to low-income persons in specified cases.

2. Provide assistance to low-income clients in rural areas through the use of technology.
3. Volunteer at legal advice clinics through a legal aid or pro bono provider.
4. Volunteer to help staff legal hotline's that are run by various local bar associations.
5. Get involved in statewide or systemic access to justice initiatives.
6. Participate in a mentoring program. There are several other programs (DVAP and HVLP) that offer mentoring to attorneys who agree to handle pro bono cases.
7. Volunteer to provide legal advice to non-legal non-profit organizations that need legal assistance.
8. Serve on committees and sections at both the State Bar and the local bar level;
9. Participate in Local Bar activities;
10. Participate in various Moot Court or Mock Trial events through high schools, law schools, or the Texas Young Lawyers Association.
11. Volunteer at self-help centers throughout the state to assist indigent pro se litigants;
12. Volunteer at Domestic Relations Offices to assist low income persons;

Mental Health/Cognitive Issues Recommendations

The Task Force consulted mental health professionals as it developed its work. Several issues relating to cognitive and psychological problems were identified. As a result, it was determined that it would be useful to identify and develop resources to assist in the following areas:

1. Development and/or dissemination of an online screening tool for cognitive impairment. Tools such as these can give individuals a self-assessment in order to identify potential cognitive problems. For example, the Florida Lawyers Assistance Program is working with the Florida Bar and the University of Florida to develop a screening tool that is specific to lawyers.
2. Development of resources available to help with difficult conversations about cognitive impairment, including but not limited to an outline for conversations; development of criteria for and active listing of specific referrals of therapists/mental health professionals who can be supportive/facilitate conversations; development of criteria and list for referrals to psychiatrists/neuropsychologists for testing.
3. Acquire and/or develop print educational materials for dissemination. Post same on Task Force website listing all SBOT resources.
4. Develop CLE programming regarding signs and symptoms, difference between normal aging and causes for concern, what do if you have concerns about self or others, making a graceful exit, prevention issues and SBOT resources. Develop pre-packaged programs that can be used by local bars.
5. Develop materials to assist attorneys in transition from practicing law to retirement, focusing on financial planning and psychological aspects, including successor planning issues.
6. Consider development, education or support for lawyer retiree support group/mentoring/succession/mixed practices programs.

Disciplinary System Recommendations

One of the Task Force's objectives was to explore a means by which aging lawyers experiencing cognitive decline can cease practicing law short of having to voluntarily resign their law license or

face a disciplinary sanction. There is currently no satisfactory procedural mechanism in the disciplinary system to address lawyers with cognitive issues that are impacting their practice and many result in being disciplined.

To this end, the task force reviewed the current membership status provisions in the State Bar Act and State Bar Rules to determine whether revisions would be required. Ultimately, the Task Force determined that these issues were extremely complex and needed further study in order to develop a solution without creating unintended consequences. Therefore, the Task Force recommends that the Commission for Lawyer Discipline study these issues to determine whether any changes are needed to the disciplinary system to address these problems. There should be alternative solutions developed to deal with grievances which are the result of cognitive issues due to aging since they can be exacerbated if the reaction to them is solely punitive. At the same time, the Commission will continue to weigh the important duty of client protection as it addresses the problems and recommends solutions

Conclusion

The population of attorneys continuing to practice past the traditional retirement age is rapidly growing. The Aging Issues Task Force sought to identify the issues that affect attorneys in this age group and to develop resources to address these issues. The main effort involved education from two perspectives, recommending that continuing legal education be mandatory for attorneys that practice law past 70 years of age, and that the State Bar develop educational initiatives to assist the legal community in dealing with cognitive problems and in transitioning into retirement. The Task Force believes that raising awareness about these issues and providing resources for attorneys will benefit the legal profession and the public.

This report is submitted on behalf of the Aging Issues Task Force, whose members include: Terry Tottenham, (Chair), Pablo Almaguer, Jerry Bain, Betty Blackwell, John Hatchell, Floyd Jennings, Kyle Lewis, C.E. Rhodes, Linda Thomas, Hon. Barbara Walther, and Hull Youngblood. The Task Force would also like to thank State Bar staff members Linda Acevedo, Chief Disciplinary Counsel, Ann Foster, Special Projects –Legal and Attorney Services Division, Ray Cantu, Director of Special Projects, and Trish McAllister, Executive Director of the Texas Access to Justice Commission, for their assistance.

Respectfully Submitted,

Terry Tottenham, Chair

Summary of Recommendations

In summary, the State Bar Task Force on Aging Lawyer Issues makes the following recommendations to the State Bar Board of Directors:

Summary of Issue	Recommendation
Administrative Requirements	<ol style="list-style-type: none">1. Eliminate the MCLE age exemption for Emeritus attorneys and require Emeritus attorneys who practice law to take 15 hours of CLE every year.2. Emeritus attorneys that practice law and do not meet the MCLE requirements should be suspended from practicing law as part of the State Bar's normal administrative suspension process for non-compliance.3. The Task Force recommends that this proposed policy change be submitted to the State Bar Minimum Continuing Legal Education Committee (MCLE) for consideration and that they determine what rules need to be amended in order to accomplish this policy change. The MCLE Committee should then present any rule amendments and an implementation schedule to the State Bar Board of Directors for consideration.4. TexasBarCLE should offer reduced pricing for Emeritus attorneys that register for their CLE courses.
Education Recommendations	The Task Force and the State Bar should develop educational materials to provide information on Aging Lawyer issues to attorneys, local bars, judges, and law firms. A website should be developed on the State Bar website to serve as a portal of information on topics related to aging lawyer issues. Additionally, CLE's, brochures, and information packets should be developed for distribution throughout the state.
Pro Bono Opportunities	The Task Force will develop information to publish information on its Aging Lawyer Issues website to connect lawyers to alternative careers and pro bono opportunities throughout the state.
Mental Health/Cognitive Issues Recommendations	The Task Force will continue to develop tools to assist with <ol style="list-style-type: none">1. Identification of and how to handle cognitive problem issues2. Psychological aspects related to retiring attorneys.
Disciplinary System Recommendations	The Task Force recommends that the Commission for Lawyer Discipline study disciplinary issues related to cognitive impairment to determine whether any changes are needed to the disciplinary system to address these problems. There should be alternative solutions developed to deal with grievances based on cognitive issue mistakes due to aging.