

# CONCERNS ABOUT COGNITIVE IMPAIRMENT AND OLDER LAWYERS

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CoLAP, the ABA's Commission on Lawyer Assistance Programs, is dedicated to assisting the legal community with addiction and mental health issues and supporting state lawyer assistance programs. In response to reports from such programs around the country of increased calls regarding older lawyers and judges, CoLAP created a Senior Lawyer Assistance Task Force in 2008 and turned the Task Force into a Committee in 2009. See [http://www.americanbar.org/groups/lawyer\\_assistance/initiatives\\_awards/senior\\_lawyers.html](http://www.americanbar.org/groups/lawyer_assistance/initiatives_awards/senior_lawyers.html).

To clarify, this does not mean CoLAP believes that qualifying as a senior attorney indicates one is impaired. But there are a range of conditions and situations that occur more frequently in seniors, including cognitive impairment, loss of a spouse, hearing loss, vision loss, and a myriad of serious health conditions. The Committee was formed to investigate how lawyer assistance programs could effectively assist with these issues.

Over the years, our key areas of focus have been:

- raising awareness of these conditions and the availability of assistance;
- assisting law firms, bar associations, and individuals in handling cases of cognitive decline or impairment in a manner that protects the public and dignity of the senior (or not senior) lawyer or judge;
- providing education and resources to assist legal professionals with the transition to retirement; and
- providing education and resources on best practices in planning for unanticipated absences from the practice.

We have collaborated with the CoLAP Judicial Assistance Initiative and the ABA Senior Lawyers Division in addressing matters of mutual concern. We have recently begun discussions with the National Academy of Neuropsychology (NAN) to see what we can do collaboratively to assist lawyers and judges dealing with cognitive impairment issues. We hope to continue our collaboration with these entities and develop new relationships with others as well.

This article was written by members of the Senior Lawyer Assistance Committee with the hope of raising awareness of the issue of cognitive decline in legal professionals and to encourage lawyers and judges to take action to protect clients, the profession, and their colleagues should they encounter such situations. We hope that you find it helpful.

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With the increased age of our population, generally, concerns have arisen around the impact of aging on attorney functioning. While the sheer numbers associated with the boomer generation accounts for much of this, the recession and financial asset loss that began in 2008 is causing a lot of attorneys to work further into their “golden years.” At the same time, there have been breakthroughs in neuroscience allowing a greater understanding of what had once been thought to be one single malady—dementia or senility.

This article provides information to help you better understand how brain function changes over time, what cognitive impairment looks like, and how your lawyer assistance program may be able to help when concerns arise around potential cognitive impairment issues.

### **Normal Aging**

All of our brains go through changes as a normal part of aging. What changes the least are our powers of recognition—“I know it when I see it.” What may actually get better, at least up to a point, is our vocabulary, our abstract reasoning (the ability to see concepts and relationships), our emotional stability, and that elusive thing called “wisdom.”

Inevitably, important cognitive functions do, to varying degrees, erode over time. Our general cognitive processing (especially of new or novel things) slows; long-term retrieval of information takes longer; learning new information is more challenging; multitasking is significantly affected (although no one does this as well as they think they do!); and our spatial memory deteriorates. Cognitive impairment and predictable cognitive decline is not synonymous with a mental illness. None of these things should significantly interfere with our ability to “function normally.” And, in spite of what was once thought, as brain cells die, new ones develop—albeit at a slower pace.

In nearly all states, a lawyer assistance program is available to help you obtain appropriate resources to sort out what appears to be cognitive impairment or decline, whether age-related or not, or any other situation causing an attorney distress.

### **Normal Decline in Cognitive Functioning in Adulthood**

Declines in both *motor* and *mental* speed of processing constitute the greatest change in function associated with aging. Age-related declines in working memory place limits on other complex cognitive skills, including learning and recall of new information. As we age, the physical size of our brain cells begin to shrink. Connections between neurons (synapses) begin to function more poorly and eventually die, and fewer neurotransmitters (chemical messengers) are produced.

- In our twenties and thirties, our cognitive functioning is arguably at its peak, although there is evidence of the beginning of neuronal shrinking by the mid-twenties.
- As early as our thirties, a small amount of brain volume has been lost. Although there is no apparent loss of cognition in any broad sense, sophisticated testing can detect small declines.
- In our forties, our loss of brain volume continues and may begin to accelerate. Most will notice the slowing of mental processing, and most will note that short-term memory tasks are more challenging.
- In our fifties, an accelerated loss of brain volume begins. Changes in memory and other cognitions become more noticeable. These changes may involve processing speed, multitasking, attention to detail, visuospatial processing, and the ability to place an event in time and place.
- In our sixties—no surprise—our brain volume continues to shrink. The hippocampus and the amygdala are particularly affected, and these parts of the brain are integral in the integration and formation of short-term memory. Other changes perhaps first noticed in the fifties may become more pronounced. Processing speed slows further; it takes us longer to learn new information or master complex mental tasks; it becomes more difficult to maintain concentration and tune out distractions; “senior moments” become more common.
- In our seventies and beyond, people vary widely in their cognitive abilities. Many remain sharp until a very advanced age, while others begin to show the wear and tear of life and diseases.

## Other Symptoms and Causes of Cognitive Decline

Loss of cognitive functioning can be said to exist on a continuum. For older adults, this ranges from cognitive changes associated with normal aging (discussed above) to mild cognitive impairment (MCI) to dementia.

### ***Mild Cognitive Impairment***

Cognitive impairment refers to the ability to remember, read, write, problem-solve, perform calculations, and navigate around the environment. MCI can involve impaired functionality in any of these domains and yet not interfere with normal daily activities. Most often, the issue is around memory. The memory impairment must be more problematic than that associated with normal aging.

### ***Dementia***

Dementia isn't a specific disease. It is used as a general term to identify or label a decline in mental ability that is severe enough to interfere in daily functioning. At least two of the following core mental functions must significantly impair normal daily activities for an individual's cognitive decline to be labeled dementia:

- memory,
- communication and language,
- ability to focus and pay attention,
- reasoning and judgment, and
- visual perception.

There are at least 70 causes of dementia, including brain tumors, head injuries, nutrition deficiencies, infections, drug reactions, and thyroid-related disorders. Some are reversible, but many are not. The most common causes of dementia are Alzheimer's, vascular dementia, alcoholic dementia, and Lewy body dementia.

In addition to these diseases, age, family history, genetics, lifestyle, and accidents are the most common risk factors for all types of dementia. The greatest known risk factor for Alzheimer's is advancing age. The age at onset is typically after 65, and the likelihood of developing Alzheimer's doubles every five years after the age of 65. After age 85, the risk reaches nearly 50 percent.

No single lifestyle factor has been conclusively shown to reduce the risk of Alzheimer's. Evidence suggests, however, that the factors that put you at risk for heart disease may also increase the chance of Alzheimer's and vascular dementia. These factors include lack of exercise, smoking, high blood pressure, high cholesterol, and poorly controlled diabetes. The symptoms of dementia can also be caused by excessive stress.

Assuming that an attorney is displaying symptoms of dementia due to age is a form of "ageism" because it involves stereotyping based on age. Thus it is important to find out whether a lack of focus or forgetfulness is attributable to an attorney's troubling personal or workplace issue and is unrelated to age. Some of the stressors we are more likely to face as we age include the following:

- *Medical or health challenges:* Facing medical challenges such as cancer, with its corresponding treatments (surgery, chemo, radiation, etc.); heart conditions; stroke; Parkinson's disease; multiple sclerosis and other neurological disorders;
- *Efforts to catch up:* Taking time off to face a medical challenge and being unable to catch up or regain control of our practice;
- *Caregiving responsibilities:* Assuming a care-giving role for an aging parent or an ill spouse, life partner, or family member can drain one's energy and emotional resources and be extremely disruptive to one's practice; and
- *Grief:* Grieving the loss of a spouse, life partner, child, or loved one, or the loss of one's health and physical capacity.

Some instances of cognitive decline or impairment are reversible. This can be the case, for instance, when the cause is an independent medical condition, alcohol or drug use, or a situational stressor. Studies have shown that mild cognitive impairment in these situations can revert to normal cognition. This occurred for 19 percent of the subjects in the Mayo Clinic Study of Aging (Peterson et al 2008) with subjects 70–89 years of age and 20 percent of the subjects over age 65 in the Leipzig Longitudinal Study of the Aged (Busse et al. 2006). Further, there can be more than one culprit in these situations. Thus, an attorney's natural cognitive decline may be exacerbated by stress or some other cause, making it at least somewhat likely that the stress-caused decline can be reversed.

Age-related cognitive decline or impairment typically is not reversible. These are the most difficult situations to attempt to address because the likely resolution is for the older lawyer to stop practicing. Some of the factors making these situations so difficult are the following.

- Often these older lawyers have had long and respected careers.
- Such lawyers may continue to have the subjective perception and belief that they are still functioning at a high-enough level to continue to practice. Attorneys often can't see what they can't see. We have found this even in cases in which a lawyer has been formally diagnosed with dementia or Alzheimer's.
- The older lawyer's self-identification as a lawyer may impede recognition of decline. Being a lawyer has not just been a job or career but, rather, is a significant element of their personal identities and social networks. They may have no way of imagining what they would do if they stopped practicing.
- A real or perceived financial need to continue to practice may affect a lawyer's perception, as is often the case when other family members work for or are financially dependent on the lawyer's ability to continue to practice.
- Loyal staff can be very protective of an older attorney with whom they have had a long-term work relationship, and they may make great efforts to cover for the older lawyer's deficits, not recognizing the potential harm to clients and the public posed by his or her continued practice of law.

### **How Lawyer Assistance Programs Can Help**

Lawyer Assistance Programs (LAPs) exist in all the states. However, their levels of programming and services vary from state to state. Check with your state's LAP professionals to see how they may be able to help. Communications with a LAP are generally confidential. If this is a concern, verify the LAP's ability to maintain your anonymity at the outset.

Most LAP professionals, lawyers, and judges generally do not have the requisite training and expertise to formally assess and definitively diagnose cognitive impairment or cognitive decline. Formal assessment and evaluation of cognitive impairment and cognitive decline would be referred to neuropsychologists, neuropsychiatrists, geriatric psychiatrists, and neurologists and may involve full physical examinations to rule out other causes.

In Minnesota and Oregon and perhaps in your state, LAP professionals will help you informally assess whether a colleague's cognitive functioning has dropped below the level required to practice law effectively. If it appears that this may be the case, assistance would be provided in making a referral.

Additional assistance can include making referrals to develop potential accommodations for cognitive decline through practice management advisors or occupational therapists. If there is a need for help in structuring how to approach an older lawyer, your LAP may be able to assist in serving as a sounding board to assess and discuss concerns about the lawyer, suggesting potential options for approaching the lawyer with those concerns, or participating in or facilitating a meeting with the lawyer and those concerned about him or her.

Those who care about an older lawyer and the legal profession want an older colleague to transition from practice *before* his or her reputation is tarnished and before clients are injured or negatively affected. It has been our experience that most older lawyers initially resist attempts by others to raise and discuss the concerns they have about their performance, even when those concerns are communicated respectfully by others whom they trust. It is important to anticipate that helping an older lawyer make the transition out of practice is typically a process, not a single event. This process requires patience and compassion.