ILLINOIS STATE BAR ASSOCIATION

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Senior Lawyers

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

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From the chair

BY PAT LESTON

Welcome to the Senior Lawyers Section for 2018-19. You may not remember signing up for this ISBA section. Because you didn't. You are automatically a member if you are over the age of 55 or have practiced law in excess of 25 years. Many of our senior practitioners have served on or chaired multiple substantive law committees over their years of ISBA membership. Past President Irene Bahr created the Senior Lawyers Section Council to provide additional opportunities for our most experienced counselors to continue to share their knowledge, expertise, and ideas. And you are now a member.

The Senior Lawyers Section has approximately 10,400 members, slightly more than the 10,000 members of the

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Illinois adopts the Uniform Bar Examination – What's this all about?

BY LEONARD F. AMARI

Our Illinois Supreme Court recently adopted the Uniform Bar Exam (UBE) to be the main component for bar admission. Thirty jurisdictions have, as of this writing, determined to use the UBE as a part of their bar admissions process.

The UBE is a nationwide test that allows test takers to transfer scores between states, which improves the mobility of Illinois attorneys. The July 2019 examination will be the first time the UBE will be administered in Illinois.

The Illinois Board of Admission to the Bar held public hearings around the state in 2016 to provide information on the UBE and to seek comments regarding its potential adoption. The comments received were overwhelmingly supportive of the change. That same year, the Illinois State Bar Association, through its Assembly, its supreme governing legislative body, recommended the adoption of the UBE.

The Structure and Format of the Uniform Bar Exam

The UBE is made up of three parts: (1) two Multistate Performance Test (MPT) tasks, (2) the Multistate Essay Examination (MEE), and (3) the Multistate Bar Exam (MBE).

Multistate Performance Test (MPT)

The MPT on the UBE has two parts, both of which are tasks designed so that new lawyers should be able to complete them, and "designed to evaluate certain fundamental skills lawyers are expected to demonstrate regardless of the area of law in which the skills are applied."

For the MPT tasks, the applicant is given the laws that apply to a fact scenario and asked to analyze those laws and write a brief, a memo, or other written product, providing 90 minutes for each MPT task.

Multistate Essay Exam (MEE)

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From the chair

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Young Lawyers Division. I once chaired the YLD. We sponsored leadership conferences, began low cost Nuts and Bolts practice seminars, and weighed in on the issues of the day. We did not have many clients or much money, but we had a lot of fun. It seems like that was just yesterday. But somehow, apparently while I was not paying attention, 33 years passed by. I now find myself chair of the Senior Lawyers Section Council. It's an accomplished and energetic collection of 20 middle-aged men and women (assuming an average life expectancy of 140), ready with ideas and ideals to keep the profession moving forward. And we still have a lot of fun.

As in past years, we anticipate sponsoring or cosponsoring multiple CLE programs, geared directly to the interests of our membership. Council members and past ISBA presidents O'Brien and Amari will be presenting a new edition on "Winding Down Your Practice." This program touches on an extraordinarily complex range of topics, including tail insurance, file and record retention, and various sale of practice issues. This is a "must attend," whether you are looking at retirement, slowing down, or just wintering in a warmer climate. Getting out is complicated.

In past years, Council member Don Mateer has done his best to assist some of us into the twenty first century technology world. Don put together hands-on, one day computer seminars for senior lawyers, held at the College of DuPage. The initial success of "How Do You Turn This Thing On" was followed last year by "Basics and Beyond." Since each attendee is at his/her own terminal, the instructors are able to take into account individual skill levels in making their presentations. We will look at last year's reviews and suggestions to put together next spring's program. Watch your ISBA announcements for a time and place. Remember, your grandchildren will not always be there to help.

The Senior Lawyers Section Council typically publishes three newsletters per year, focused on topics of interest to our unique membership. Recent articles included listings of CLE programs relevant to senior lawyers, security planning for your electronics, and succession planning. Please feel free to submit your own unpublished article on any topic of interest to senior lawyers.

Stay connected. Our section website is at ISBA-Seniorlawyers@connectedcommunity.com. Give us your thoughts and comments on existing programs or newsletter articles. Submit an article. Send along ideas for future seminars or programs. Let's make this another fun year. ■

Illinois adopts the Uniform Bar Examination – What's this all about?

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The MEE is made up of six essay questions, and provides 30 minutes to answer each one.

Multistate Bar Exam (MBE)

The MBE portion of the UBE is an extensive multiple-choice test, allowing six hours to answer 200 multiple choice questions that span all of the first year law subjects, from Constitutional law to real property.

In her extensively researched and very considered article on the adoption of the UBE, author Kellie R. Early states:

The UBE is more than just a shared set of test components. At its essence, it is an agreement to give full faith and credit to examination scores generated in participating jurisdictions based upon the fact that all UBE jurisdictions uniformly administer, grade, and score the same examination.

Certain policies are followed by UBE jurisdictions in order to produce

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comparable scores, enhance score portability, and ensure reliable transfer of scores. Jurisdictions agree to adhere to these policies in order to be recognized as UBE jurisdictions and generate scores that qualify to be certified by the National Conference of Bar Examiners (NCBE) as UBE scores. These policies define what the UBE is and, by extension, what it is not. (The Bar Examiner, September 2011)

The acceptance of the UBE by the National Conference of Bar Examiners essentially recognizes that an individual who performs to an acceptable level on a high-quality licensing test has attained clear recognition that should be accepted in other jurisdictions. Of course, other aspects of the licensing process—character and fitness screening, decisions about how to ensure that admittees are aware of the important variations in state law, and setting the pass/fail line below which a UBE score will not be accepted—will remain the province of each state board of bar examiners.

Driven in no small part by the current crisis of law schools in America, the considerable debt burden with which law students graduate today, and the diminishing job market, anything that increases mobility in the profession is an idea whose time has come.

Another example of reviewing and improving the historical law school paradigm is the trend of law schools to permit applicants to take the Graduate Records Examination (GRE) in lieu of the Law School Aptitude Test (LSAT). The GRE is given more often during the year and emphasizes math and science. For example, as of this writing, The John Marshall Law School and Northwestern Law School accept the GRE.

Of course, in Illinois, our high court has continued to retain jurisdiction of the examination process, maintaining its authority to decide who may sit for the bar exam and who will be admitted to practice, determine underlying educational requirements, make all character and fitness decisions, set their own policies regarding the number of times applicants may retake the bar examination, make ADA decisions, and grade the MEE and MPT.

Our Illinois Supreme Court remains on the cutting edge of licensing lawyers as evidenced by its adoption of the Uniform Bar Examination. ■

Why file the last will and testament?

BY MICHAEL J. MASLANKA

Many clients with whom you consult may be surprised to learn that Illinois law requires that the will of a decedent must be filed with the Clerk of the Circuit Court shortly after the decedent's death (755 ILCS 5/6-1). That provision reads:

> **Duty to file will — altering, destroying or secreting**
>
> (a) Immediately upon the death of the testator any person who has the testator's will in his possession shall file it with the clerk of the court of the proper county and upon failure or refusal to do so, the court on its motion or on the petition of any interested person may issue an attachment and compel the production of the will, subject to the provisions of Section 5.15 of the Secretary of State Act.
>
> (b) If any person wilfully alters or destroys a will without the direction of the testator or wilfully secretes it for the period of 30 days after the death of the testator is known to him, the person so offending, on conviction thereof, shall be sentenced as in cases of theft of property classified as a Class 3 felony by the law in effect at the date of the offense. The 30-day period does not apply to the Secretary of State when acting pursuant to Section 5.15 of the Secretary of State Act.

You may advise the client to go ahead and file the will, or you may offer to do so for the client. The client may ask why the law requires the filing of the last will and you can respond with some of the reasons given in Illinois court cases.

According to the Illinois Supreme Court in *Boryca v. Parry*, 24 Ill. 2d 320 (1962), the filing of the will promptly can diminish or eliminate the chance of personal gain by someone withholding the last will from being filed. Additionally, the prompt filing of the will of the decedent can diminish or eliminate the chances of defeating the testator's intent, through the possible loss or waste of probate property that was intended to be passed by the will.

In *Nolin v. Nolin*, 68 Ill. App. 2d 54 (3rd Dist.), the third district stated that the filing of the last will promptly is not only required by statute, but is done to help reduce the risk of the original will being altered, which would create a fraud upon the court and defeat the testator's true intent.

Additionally, you may tell your client, that the nominated executor, if he or she does not promptly file the will, could lose his or her priority to be appointed executor under the will, and such a situation could occur and create problems if there is any family disharmony. (755 ILCS 5/6-3)

> **Duty of executor to present will for probate**
>
> (a) Within 30 days after a person acquires knowledge that he is named as executor of the will of a deceased person, he shall either institute a proceeding to have the will admitted to probate in the court of the proper county or declare his refusal to act as executor. If he fails to do so, except for good cause shown, the court on its motion or on the petition of any interested person may deny him the right to act as executor and letters of office may be issued by the court as if the person so named were disqualified to act as executor.

Years ago, there was a daily penalty for not filing the will promptly. There is criminal liability for altering or secreting the will.

So, when advising the client to get that will filed, even if it is the will of a family member who died months or years ago, you can explain why the law is the way it is. ■

Book review: *Being Mortal*

BY GARY T. RAFOOL

It has been said that most people in the United States spend more time planning their next vacation than they do planning how they want to live the last years of their lives.

While we go to great lengths planning for retirement—starting at an early age and usually at the beginning of one's career—we rarely, if ever, give any thought to how we will live out our final years.

How we might plan our later years is the subject of the book I have chosen for this review.

It is a 2014 book titled *Being Mortal: Medicine and What Matters in the End*. It is available in soft cover (263 pages) and electronically.

The author is Dr. Atul Gawande, a surgeon and a staff writer for *The New Yorker*, as well as a professor at Harvard Medical School.

According to the author, scientific advances have turned the process of aging and dying into medical experiences to be managed by health care professionals, such as hospitals and nursing homes, which many times appear unprepared to deal effectively with these issues.

The author also points out that old age has changed from being a rarity in the past to its current state where, in 2014, 14 percent of the U.S. population was over 65 years of age and China is the first country in the world with more than 100 million elderly people.

In addition to living longer, the elderly are living more independently and away from their children. Unfortunately, this independence cannot be maintained forever and, sooner or later, all of us who are fortunate enough to live into "old age" will not be able to function strictly on our own without some kind of outside help. However, medicine, according to the author, seems to have failed to agree on just what kind of outside help is best for the elderly. Equally worrisome, and far less recognized, medicine has been slow to confront the very changes that it has been responsible for, or to apply the knowledge it has to making old age better.

The job of doctors, according to the author, is to support the quality of life, which means providing as much freedom from the ravages of disease as possible and enabling the retention of enough function for active engagement in everyday life. He also feels that most doctors treat the disease and figure the rest will take care of itself. But, if it does not, such as when a patient becomes infirm and goes to a nursing home, the doctors assume that it is then no longer a medical problem.

Again according to the author, the very old usually do not fear death but they fear what happens to them short of death, namely, losing their hearing, their memory, their best friends and their way of life.

Dr. Gawande shares several case studies of not just elderly patients, but elderly patients with incurable terminal diseases and illnesses and the choices presented to them. The choices are frequently various treatments which are not really meant to cure the disease, but to extend their lives. One such case study was that of his father, a urologist, who developed terminal cancer and had to make treatment choices that did not involve the quantity of his life, but the quality of his life during this incurable illness preceding his death.

There are several chapters in the book about nursing homes, including their history, evolving from poor houses to hospitals to what we now call nursing homes. These facilities were originally created to make more hospital beds available.

This description also sheds light on the rigidity of nursing home life, such things as being told what to do, when to do it, when to eat, what to wear, when to sleep, when to bathe, and the succession of roommates who are never chosen with any input from the patient. In other words, the aim of present day nursing homes, according to the author, is caring and safety, but includes nothing about making a patient's remaining life worth living.

The book also explores "assisted living," which it considers an intermediary station between independent living and life in a nursing home. It also discusses several fairly new concepts of care, including "green houses" and "living centers with assistance," where resident patients have control of heat, air conditioning, meals, pets, clothing, personal care and medications, but can summon help at any time they need it. Ordinarily, "green houses" are small with no more than 12 residents.

Finally, the book discusses hospice care for terminal illnesses and diseases, at any age, as a possible choice to make life better at its end. With hospice care, the time of death in most cases is about the same as for those who continue with more medical tests, treatments and surgeries, but end of life costs are much lower. In 2010, 43 percent of Americans died in hospice care rather than in hospitals or nursing homes, and more than half of those receiving hospice care were at home while the remainder died in an inpatient hospice facility or a nursing home.

The underlying theme of this book appears as a part of its epilogue. Medicine has been wrong because it thinks its job is to ensure health and survival. But, the author points out, it is larger than that; the job should be to enable wellbeing, making lives more meaningful in old age and during terminal illnesses, and maintaining the integrity of one's life. ■

Death, disability, disappearance, or disbarment

BY RICHARD C. GOODWIN

If you participated in the ABA Senior Lawyer's Division (SLD) webinar "So It's Time: Responsible Planning for Closing the Law Office CE1807SIT" on July 11, 2018, you would know the significance of those words.

The webinar brought together three practitioners to share their expertise on planning the closure of a law practice: Edgar W. Pugh, Jr, Pugh Moak PC of Bloomfield Hills, Michigan; Joan M. Burda of Lakewood, Ohio; and Ted A. Waggoner, Peterson Waggoner & Perkins, LLP of Rochester, IN.

The caption does not include all the reasons you may need to close a practice. I closed a practice in about 72 hours when my reserve unit was activated and deployed; another time I closed the practice in two months to go on the bench. The planning was the same each time.

Surrogate Rule

The rule essentially requires every lawyer who does not have another lawyer in a fiduciary relationship with the lawyer's clients to have a Surrogate Attorney named with the Supreme Court. Does your state have a "surrogate" rule? Should they have one?

Ted Waggoner discussed how the surrogate rule works in Indiana. Included in his materials are the "Indiana Attorney Surrogate Rule, Best Practices and Forms" published by the Indiana State Bar Association in 2010.

Ed Pugh discussed Michigan's approach in the absence of a formal rule. In Michigan, the appointment of a receiver in the case of disability, impairment, or incapacity of an attorney is under the direction of the Attorney Grievance Commission.

Planning for Death & Disability

Joan Burda recommended you identify a "triage lawyer" to close, sell, or transfer your practice. Then execute a detailed, written agreement defining the relationship and duties with that lawyer and draft documents necessary to accomplish closure, sale or transfer of the practice.

Make a Checklist

Joan and I discussed the need for check lists. The lists should include bank account numbers, passwords, insurance policies, document locations, client contact information for clients and opposing counsel, court personnel, insurance agents, landlords, and any other entity or person associated with your practice.

Law Practice

The transfer of your practice is subject to the rules and ethical regulations of your state bar. The rules vary from state to state and probably change. I was not allowed to sell my practice under the rules of my state, so I ended up notifying my clients I was closing my practice and sold my furniture. (See "What to Expect When Selling Your Practice" by Peter A. Giuliani)

Clients

You or your representative should give clients a specific date the practice closed or will close and the reasons why, if possible. Once clients are notified, expect them to start hiring other lawyers.

Make arrangements for clients to pick up their files and/or deliver the files to your clients or other attorney of the client's choosing. **GET A RECEIPT.**

Know the legal implications of referring your clients to another attorney—i.e., if the other attorney gets sued for malpractice, do you get sued as well for making the referral?

KEEP A COPY OF THE FILES.

Courts

Keep judges, their staffs, and courthouse personnel informed. If your plans are tentative [in my case my deployment plans were cancelled then reinstated], let the courts know the status of your plans so courts can re-schedule cases.

Your best friends in the courthouse can be the court clerks and the secretary/administrative assistants for each judge. Do not forget the court reporters, transcribing services, process servers, and other services you use.

Write each judge, especially the chief administrative judge and clerk of court of every jurisdiction in which you appear, giving them the date of your departure and contact information.

File "withdrawals of appearance" in *every* case in which your appearance is entered. Do not rely on the 'other' attorney to take care of this. As long as your appearance is in the case, you are responsible. Check your local ethics rules. List your client and opposing counsel in the certificate of service.

Insurance: Buy a 'Tail' to Your Malpractice Insurance

Talk with your malpractice carrier and the bar counsel of your state bar to insure you understand and implement any requirements of the malpractice insurer or the state bar and highest court's ethics rules.

My malpractice carrier recommended I purchase a "tail" to my malpractice insurance. It required a one-time payment and insured I was covered against any future malpractice claims.

Review your health, property, and other insurance plans and coordinate with those carriers to be sure any necessary coverage continues, if necessary.

Escrow

This NOT your money. Refund unused escrow funds to your clients. Transfer other funds back to the entity which gave you the funds.

If at the end you have funds you cannot return, find out if you can transfer the funds to your state's "unclaimed money" fund along with whatever information you have about the source of the funds. The

name varies from state to state, so this may take some investigation. The unclaimed money fund will list the money, source and amount, which is easily accessible on the internet.

Check with your state bar to make sure there are no other ethical implications.

Clean Up

Accountant

Get your books in order. Coordinate with your accountant to determine if there is a particular date and/or manner in which you should close your practice. Determine how and where your books should be maintained.

Pay any and all outstanding bills and arrange for other bills to get paid—personal and professional.

You should have your general account in one bank and your escrow account in another. Talk to someone at each bank to insure money is accessible and payments or receipts can be made. Send a letter to *each* bank setting forth the date of your departure and contact information.

Taxes

If you paid any taxes of any kind, expect the governmental entity to keep in touch. Ten years after I went on the bench, I was still getting letters from the state and county governments threatening me with felony charges for failing to file and/or report or pay income, workers' compensation, and other taxes on a practice I closed 10 years earlier. Yearly letters telling them I had closed my practice, changed jobs, and moved out of state did not deter the correspondence. After 10 years, the letters stopped coming.

Files

KEEP A COPY OF EVERY FILE YOU TRANSFER. (This is redundantly important.)

Then there is the client who has moved and you cannot find, or in some cases is the guest of a government entity (prison) or deployed. Consider maintaining a current listing in both your state and county bar directories after you leave private practice so you can be located. Determine whether physically and ethically you can file any relevant papers and/or documents with the clerk of court in the last jurisdiction where the client resided. Records filed with the court are generally easily found and available to the client.

Family

Update Your Will and Power(s) of Attorney

This is an opportune time to update any wills, powers of attorney, healthcare powers of attorney, etc. You may need to consider executing a limited power of attorney so someone can oversee your practice and/ or write checks from your general and/or escrow accounts.

Dependents

If you have dependents, review guardianship documents, support documents, etc. Notify doctors or other healthcare providers. When I deployed, my ex-wife was the custodial parent. She needed paperwork and identification cards to insure all of my children's healthcare needs were met during my deployment as well as having access to the commissary, PX, etc. If your dependents are still young, visit the teacher for each child, then the principal. A teacher/principal cannot fix a problem they know nothing about. You will be amazed how caring teachers and principals are when one parent is deployed.

Finally

Again, I invite you to get the transcript and materials for the webinar online, which includes the contact information for each of the panelists.

Don't forget to turn out the lights! ■

If you have any tips on this subject please forward them to Richard Goodwin at jagret@gmail.com and we will include them when we update this article.

Richard Goodwin spent almost 20 years in private practice in Maryland and the District of Columbia trying cases in both state and federal courts. He has over 20 years of service as a federal administrative law judge with 4 agencies. He retired from the U.S. Army Reserves in 2002 as a Colonel in the Judge Advocate General's Corps and was awarded the Legion of Merit and 2 Meritorious Service Medals. He is past chair of the Judicial Division of the American Bar Association. He is a graduate of the College of William and Mary (A.B.), Xavier University (M.B.A.), Northern Kentucky University, Chase College of Law (J.D.).