AMERICAN COLLEGE OF TRIAL LAWYERS

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SPEAKING NOTES:

THE NEED FOR MENTORING OF YOUNG TRIAL LAWYERS

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I. INTRODUCTION

- pleasure to once again be among Fellows of the College

- particularly pleased to participate in this Leadership Workshop as my close friend and former law partner, Jeff Leon, begins his Presidency

- thank you for inviting me to join you

II. TOPIC

- I have been asked to address the continuing need for mentoring of young trial lawyers with an eye, especially, to what can be done to assure a future generation of skilled trial lawyers

- this request reflects, as I understand it, the College's commitment to find more and better ways to mentor and teach young lawyers so that they can have opportunities – as we all did – to develop trial skills

- no small topic; no small challenge

- propose to divide my remarks into three parts:

(1) NECESSITY – why is a renewed commitment to the mentoring of young trial lawyers necessary?

(2) IMPORTANCE – why is it important? Why should the College care?

(3) HOW – how can we go about it? What, if anything, can be done to foster a new generation of skilled trial lawyers?

III. DISCUSSION

(1) NECESSITY – WHY IS IT NECESSARY?

1) FIRST REASON: Decrease in Number of Civil Trials

- the number of civil cases proceeding to trial has steadily declined since the 1970s; those that do go to trial are frequently complex, costly and lengthy, and tried by more senior and seasoned lawyers
- the phenomenon of the "Vanishing Civil Trial" is hardly new and the reasons for it are many and varied
- has been the subject of detailed study by the College, and others, for many years
- consider, for example, the Dallas Symposium convened by Past President David Scott a decade ago (2008), specifically to consider the implications of the "Vanishing Trial"

- that Symposium led to the College Report of the same name which identified many of the factors contributing to the diminishing number of civil trials, and the implications for the future of the College and the civil justice system
- similar studies have been undertaken by various Bar organizations and, in some cases, professional regulators (See for example, the ABA Litigation Section 2003 *Report of the Task Force on Training the Trial Lawyer*)
- the important point, for the purpose of my remarks, is that the reduced number of civil trials means that young lawyers are not getting experience in court to learn their trade, producing a significant skills deficit in many new lawyers
- this lack of courtroom experience means, quite literally, that many new lawyers:
    - are learning by "trial and error", often at the expense of their clients
    - don't have a clue what to do in a courtroom except in a very theoretical sense
    - often don't have any real trial experience until they've been at the Bar for 10+ years!

- are sometimes admitted to partnership in established law firms without ever having run a trial

2) SECOND REASON: Rise in Numbers in the Profession and in Numbers of Sole Practitioners

- *enormous increase in number of people entering the legal profession and in the number of sole practitioners*
- serious problem: In Canada, at least, we are unleashing huge numbers of new lawyers each year without sufficient mechanisms in place to ensure adequate post-call skills training
- many can't find jobs and so end up hanging out their own shingle, alone or with peers: no senior or experienced lawyers down the hall to provide advice, support or guidance
- in my province for example, Ontario, the Law Society (regulator) reported in May 2018 a 60% increase in law graduates from 2007 to 2012
- of course, not all of them seek to practise law or to become trial lawyers. But the data suggests that there are too many new lawyers to rely on traditional or classic mentoring systems

3) THIRD REASON: Competitive Legal Culture and Costs of Litigation

- Increased costs of litigation and an intensely competitive legal culture:

- have reduced opportunities to take juniors to court because clients won't pay for it
- demand for increased billable hours erodes commitment to *pro bono* and non-remunerative projects
- greater emphasis on the billable hour, together with client-imposed costs controls = limits opportunities for juniors

4) FOURTH REASON: <u>Disappearance of Traditional Mentoring Opportunities</u>

- change in form of in-firm mentorship and/or associate skills training
- the days of one-to-one apprenticeship mentoring (where a young lawyer spent all their time with a mentor, watching how they worked) are largely gone: firms are too big, too many lawyers, too costly. (Traditionally, training provided by law firm supervising partners, or older, more experienced members of the Bar)
- replaced by institutional mentoring programs – within and outside formal law firm structures (*i.e.* various Bar organizations; independent mentoring corporations, court sponsored programs and the like)
- hundreds of such programs across Canada and the United States

- as well, mentors are aging and, increasingly, retiring and, as I have said, the traditional apprenticeship mentoring system has all but disappeared → dwindling supply of civil trial mentors
- all this translates to fewer civil trials, fewer opportunities to learn in court and what one author has called the "atrophy of opportunity" [Tyler G. Draa in *Mastering the Mechanics of Civil Jury Trials*, Oct. 2015]

(2) IMPORTANCE: WHY IS A RENEWED COMMITMENT TO THE MENTORING OF TRIAL LAWYERS IMPORTANT? WHY SHOULD WE CARE?

- I suggest there are at least two important reasons

FIRST REASON

- *first*, because in both our respective countries, the law and trial lawyers are important. Our constitutional democracies and civilized societies cannot function without them
- in this country, the importance of the law and specifically, the rule of law, is reflected in the Supremacy clause of the U.S. Constitution which, as you know, provides that the Constitution and the laws of the United States made

thereunder are "the supreme law of the Land". And not to forget, the Seventh Amendment right to civil jury trials

- in Canada, the preamble to the *Constitution Act, 1982*, one of Canada's two principal constitutional documents, provides: "Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law."

- in light of these provisions of both constitutions – in the U.S. and in Canada – it is hardly surprising that many of the critical issues of the day are resolved in the courtrooms of both nations

- so, as well, are matters that touch the lives and rights of ordinary people. On a daily basis in the courts of our nations, at both the trial and appellate levels, cases are dealt with that have a profound impact on the lives of individuals. In every instance, lawyers, some experienced, some quite young, play key roles in the court-driven resolution of disputes. The resolution of these kinds of issues cannot be left to the efforts of untrained or unschooled novices

- as long as there are disputes involving human beings, as long as the law deals with affairs between human beings, there will always be the need for human advocates and court resolutions

- for this reason alone, it is essential for young trial lawyers to learn proper practice and advocacy skills, including those related to client representation,

behaviour in court, dealings with other lawyers, the nuts and bolts of conducting a trial, and the like

SECOND REASON

- *second, the visibility factor and, relatedly, the confidence factor*

- the law and lawyers are highly visible in the public eye and in the public domain, not only because of trials that attract notoriety but also because lawyers are routinely involved in proceedings that shape public discourse

- lawyers and judges are the face of the justice system. What they do and what they say matters. And this leads to the "confidence factor": confidence in lawyers, confidence in our justice systems

- the public perception of lawyers is a mixed one. A former colleague of mine on the Ontario Court of Appeal put it this way:

> There is a fascinating dichotomy in the general public perception of lawyers. In most opinion polls that rank various occupations under the rubric Trust, lawyers consistently finish near the bottom, often close to journalists. Yet, if you ask most parents what occupation they would like their own children to pursue, lawyers finish near the top, close to doctors.

[MacPherson J.A., Ontario Court of Appeal, 1999]

OVERARCHING CONCLUSION:

- the lack of courtroom training opportunities for young trial lawyers has important implications – and concerning ones – for:

- **litigators who want and need trial experience**
- **clients seeking experienced trial counsel, and**
- **the civil justice system as a whole**

- as trial opportunities erode, the overall quality of advocacy thins

- it is no stretch to say that the future of the legal profession, continued public confidence in the administration of justice, and the continued viability of organizations like the College depend on assuring a reliable pipeline of well trained, committed and professional trial lawyers – both male and female

(3) HOW CAN WE ASSURE A FUTURE GENERATION OF SKILLED TRIAL LAWYERS?

- I have no magic answers, perhaps not even any original ones

- I also recognize that there is no ready substitute for actual courtroom experience

- I appreciate that there are dozens of mentorship programs now offered across the U.S. – perhaps in every State. Some, no doubt, have much to offer. In

addition, the College's Code of Pre-Trial and Trial Conduct, and its companion version in Canada, have been of enormous assistance. But, more needs to be done

- so, in no particular order of priority, let me make the following suggestions:

POSSIBLE MEASURES

1) - *first*, there is a need for collective action. We must recognize that *no one entity or organization* can successfully meet this challenge

- in my view, there is an important role not only for law firms but, as well, for individual senior lawyers, this College, judges and regulators

- collective action, I believe, is the way forward

2) - *second* – ways must be found to *increase in-Court observation opportunities* for young lawyers

- as others have recently highlighted in Canada, visiting the courthouse as a spectator and tracking down those counsel seen in the courtroom to ask questions during recesses used to be "regular fare" for young lawyers

- not today. Seldom part of a young lawyer's routine

- why can't this be proactively encouraged?

- and it shouldn't be confined to trials: young lawyers should be encouraged to attend the entire panoply of trial related events: depositions, motions, pre-trial hearings, client meetings, meetings with other counsel, etc., at the very least as observers

- young lawyers learn habits quickly, and by "osmosis". As others have said, the challenge is to make sure they are good ones

- what about encouraging law firms to commit to two or three days a month of in-court observation, with an obligation on the junior to report back. (For example, some firms explicitly allot each associate a set number of hours per year to accompany experienced attorneys to trials and hearings. Associates are permitted to treat the hours as billable, although they are not.)

3) – *third* – for those trials that do go forward, senior counsel should ensure the *sharing of argument/and witnesses*

- must bring junior lawyers to court and "cut them" a piece of the action

- if clients won't pay for junior counsel (and many won't), firms should absorb it and tell clients it's at no cost to them

- not a new idea but honoured more in the "breach" than in practice

- this isn't merely an act of "generosity" by senior counsel. In my view, it should be seen as a professional responsibility

- I've never seen a case on appeal that was lost because a young lawyer took part in argument. I *have*, however, seen cases won on appeal because of the submissions made by junior counsel

4) – *fourth – responsibility here for judges too*

- junior counsel should be welcomed and *called on*: must get to their feet

- this is a tradition in my former court, at least with many judges who were former advocates or Deans of Law

- judges should always call on or invite argument from junior counsel and, I suggest, should see it as their responsibility to do so (the junior usually wrote the factum/brief anyway)

- work here to be done by College with the judiciary – not all judges see it this way. They should.

- some recent initiatives: I learned recently that in New York and elsewhere, the rules of some courts have been amended to invite junior lawyers to argue motions they have helped prepare, or to question witnesses. Some judges have

introduced a 'two lawyers' in argument rule – for example: "the court is amenable to permitting a number of lawyers to argue for one party if this creates an opportunity for a junior lawyer to participate". (*i.e.* Senior District Judges in the Eastern District of New York.) (Division of issues is commonplace in Ontario, both on appeal and at trial.)

- the same rule is aimed at assisting women to have more lead counsel roles *i.e.* to incentivize diversity

- one such rule change – in the Federal District Court for the Eastern District of New York – reads as follows:

> Junior members of legal teams representing clients are invited to argue motions they have helped prepare and to question witnesses with whom they have worked. Opportunities to train young attorneys in oral advocacy are rare because of the decline of trials. Where junior lawyers are familiar with the matter under consideration, but have little experience arguing before a court, they should be encouraged to speak by the presiding judge and the law firms involved in the case. This court is amenable to permitting a number of lawyers to argue for one party if this creates an opportunity for a junior lawyer to participate. The ultimate decision of who speaks on behalf of the client is for the lawyer in charge of the case, not for the court.

- other judges have begun to take additional measures to ensure that young lawyers, especially women attorneys, are afforded "on their feet" time in court. I am told that some judges in the United States:

- address questions directly to the associate who appears in court with a senior lawyer
- are appointing more young lawyers, women in particular, as lead counsel in class actions and as special masters, referees, receivers or court-appointed mediators
- have issued orders that if a female attorney, minority attorney or junior associate is likely to argue a motion, the court, on receipt of such a representation, may be more likely to grant a request for oral argument of that motion

- in other words, some judges are amending their individual court rules to encourage young attorneys to take advantage of these courtroom opportunities. (See 2017 New York State Bar Association Report entitled, "*If Not Now, When? Achieving Equality for Women Attorneys in the Courtroom and in ADR*")

- other judges might be encouraged to follow suit and to devise similar measures. And Fellows could take the lead in seeking such changes to promote and support young trial lawyers – men and women alike – in obtaining speaking and leadership roles in the courtroom

- I also note that, in Canada, some retired judges have accepted in firm positions to assume oversight of firm mentoring programs for young lawyers

5) - *fifth – arbitrations.* With divergence of cases outside the courts and the increase in ADR, the number of private arbitrations has shot through the roof, at least in Canada

- I recognize they are not trials. But they are fertile training grounds

- there's always some issue or benign witness that can be dealt with by a junior

- in Canada, many private arbitration panels are comprised of or chaired by retired judges. I understand the same is true in many U.S. jurisdictions. They (the judges) will get it, especially if the College begins to encourage judicial recognition of an obligation to assist in training young advocates beyond the ranks of a judge's own law clerks

- more difficult to do, I think, with mediations but even with mediations the presentation of argument or parts of the oral evidence can often be divided

6) – *sixth – design of court linked pro bono duty or amicus counsel programs, utilizing the services of young trial lawyers.* I recognize the College's deep commitment to *pro bono* initiatives, both domestically and abroad. But I refer

now to initiatives that are specifically designed to permit young trial lawyers to gain courtroom experience. Two examples come to mind:

(1) Ontario Court of Appeal – Pro Bono Ontario operation of *amicus* duty counsel roster for motions on appeal – almost all young counsel – weekly. (PBO's mission is to increase access to justice. It develops cost-effective programs that connect low-income citizens with lawyers from the private Bar who donate legal services.) PBO does the same thing for motions in Ontario's Divisional Court and at Civil Practice Court in Toronto, and provides full *pro bono* representation at trial and for motions in Small Claims Court

- all these initiatives provide courtroom opportunities for young lawyers. They are duty or *amicus* counsel programs specifically designed to get lawyers into court and on their feet, and to provide legal assistance to self-represented litigants
- in Small Claims Court, in particular, junior lawyers can serve as duty counsel at motions, settlement conferences and trials – some of which are multi-day trials as Small Claims Court becomes increasingly complex and its monetary jurisdiction rises

- the mechanics are simple: PBO recruits and schedules duty counsel; court staff encourage self-represented litigants to schedule their matters on duty counsel days; court staff forward the materials to duty counsel; and duty counsel appears to help the self-represented litigants and the court
- these lawyers are routinely engaged on important questions, such as motions for leave to appeal, security for costs, the granting of stays or extensions of time
- as *amicus*, the lawyers have the flexibility to determine how they can be most helpful. This involves a combination of orienting the self-represented litigants, offering guidance on how to advance a legal argument, conducting negotiations with opposing counsel, assisting with written materials, and making oral submissions to ensure the litigant's best foot is put forward
- sometimes duty counsel appearances blossom into deeper, high impact involvement. Many lawyers have gone from the role of motions duty counsel to serve as *amicus* on the actual appeal. In one case, a junior lawyer went from duty counsel in the Ontario Court of Appeal to counsel for the respondent in the Supreme Court of Canada

- the *amicus* role can also lead to other engagements. By seeing duty counsel multiple times each week, judges also know that a group of talented lawyers is available if unique situations arise. On numerous occasions, Ontario judges have reached out to PBO to request *pro bono amicus* to advance a position that needs to be heard for the court to gain a full appreciation of a matter. (For example, applications under the *Criminal Code of Canada* by self-represented accused for the appointment of counsel, at the expense of the provincial Attorney General). Every time a judge has asked, a lawyer has gladly stepped forward to help on a *pro bono* basis

(2) Ontario Court of Appeal – Inmate Appeals Program. Duty counsel for unrepresented accused – on motions and appeals

- this program helps inmates who have nowhere else to turn, gives criminal counsel a great opportunity to help, and provides the Ontario Court of Appeal with the comfort of full argument from both sides
- formerly known as the Ontario Inmate Appeal Duty Counsel Program, this program started as a pilot program in 1999. Defence counsel identified that a number of incarcerated inmates, often the most disadvantaged individuals, were forced to represent themselves in complex criminal

appeals without legal assistance in either the preparation or argument of their appeals. The pilot project received the support (and continues to do so) of the Ontario Ministry of the Attorney General and the Court of Appeal for Ontario

- today, there are 40 lawyers who volunteer their time to act as duty counsel on a roster basis
- ultimately, all these organized *pro bono* opportunities show that helping the public and gaining advocacy experience go hand in hand
- in addition to organized *pro bono* programs, young lawyers should be provided with mentors in the area of *pro bono* practice. Many senior litigators have made *pro bono* work a centerpiece of their practice Naturally, these litigators want to work with junior lawyers who are keen to embrace a similar commitment
- I ask whether the same type of program for motions – and perhaps some appeals – in uncomplicated civil cases could be developed
- in the United States, other *pro bono* opportunities may be available – for example: asylum hearings (before the Bureau of Citizenship and Immigration); child in protection or child neglect proceedings; juvenile justice clinics; adoption proceedings; minor debt collection actions

7) – *seventh – develop shadowing programs with Fellows and Judges*

- **shadowing programs: young lawyers can be assigned or "matched" to Fellows of the College to shadow the Fellow's work x number of days per year or, to meet once per month**

- **same Fellow with same junior lawyer, but junior from outside Fellow's firm (often "external" mentors are the most effective – this reduces stress, anxiety and fear of in-firm repercussions for young lawyers)**

- **same practice areas**

- **same thing with judges: juniors can work with law clerks**

- **explore with Chief Justices of trial and appeal courts**

- **shadow a judge throughout a trial, a week of appeals or motions, etc.**

- **appropriate confidentiality agreements can be entered into**

- **trial judges in Ontario have so few law clerks, I think they would be delighted**

- Untapped pool: role for retired judges, retired barristers to serve as mentors

- one commentator recently put it this way:

> In my early years at the Bar, I learned by sitting in the offices of more senior lawyers while they were busy being lawyers. I saw them handle difficult clients, obstreperous opponents and sometimes cranky judges. I listened while they worked through ethical dilemmas, and I observed their professionalism firsthand. They cajoled, they negotiated, they argued. Sometimes it was successful and sometimes not - - but none of it was anything I had been taught in law school. (One of the partners I "watched" also taught me a lesson about priorities. Whenever his wife called, no matter what he was doing, he always took her call, if only to tell her that he would need to call her back. No one taught me that in law school either).

- why not try to retrieve that mentorship methodology or create a similar one, through appropriate matching programs run by the College, alone or in association with those groups already attempting to do so?

8) *Arrange for Mock Appeals and/or Argument of Mock Trial components before Judges, or pre-trial exercises before a presiding judge* (similar to the College's Boot Camp Training Programs)

- in Ontario, this is done now for law students and law clerks

- why not for young trial lawyers? (a short appeal or part of a trial: X/E or argument)

- no risk to the client; real benefit to the young lawyer

9) *Increased use of College sponsored "boot camps"*

- I understand these to be trial skills training programs targeted at assisting young trial lawyers to learn and improve their forensic skills. They have been conducted, I understand, in numerous States, often with the involvement of judges – great tool for training young trial lawyers

10) Continue *joining with various existing clinical programs at law schools for the supervision of young lawyers' trials and for the conduct of trial skills programs* – for example – program in the San Francisco Superior Court on the criminal side (the supervision of representation of criminal defendants) and the program by Pennsylvania Fellows in 2017 with Temple University

11) Consider developing *College designed pre-trial seminars*

- could the College perhaps develop a 2 or 3 day course, perhaps offered online, designed to:

  - lay out the mechanics of conducting a trial

  - outline procedural considerations and a pre-trial check list

  - advising on:

    - how to prepare a witness

- how to interact with the judge and opposing counsel
- courtroom etiquette

12) *Numerous mentoring measures could be introduced in Fellows' law firms*

i) secondments or internships for young trial lawyers

- with local prosecutor's offices (to try misdemeanor cases)

- in Canada, with provincial ministries responsible for criminal prosecutions

- with securities commissions and other quasi-judicial bodies to participate in their hearings

- *i.e.* "Lawyers on Loan" programs (Dallas, Kansas City, Boston, for example) (See 2004 ABA Report of the Task Force on Training the Trial Lawyer)

ii) continued use of formal internal mentorship and trial skills and trial advocacy training programs

iii) acceptance of small or non-complex retainers at reduced rates expressly to afford trial and pre-trial experience to young lawyers: special fee arrangements

iv) one-to-one partner/associate matching

v) commitment to *pro bono* work: obvious lawyer training opportunity

vi) establish full or part-time supervisory/management position for associate trial training

vii) establish formal benchmarks for associate development, detailing the professional experiences young lawyers should have achieved by set career points

viii) send associates to professional trial advocacy and mock-trial programs

13) *A word about young women trial lawyers*

- I wish also to comment briefly on the particular challenge of finding ways to assure adequate training of young female lawyers

- numerous studies confirm that women counsel in the courtroom – at least in civil cases – remain a minority, especially in the role of first chair at trial

- for example, the 2017 New York State Bar Association Report that I mentioned earlier indicates that female attorneys account for only 25% of all attorneys appearing in commercial and criminal cases in state courts

- in complex commercial cases, the numbers are worse: 31.6% in one-party cases to less than 20% in cases involving five or more parties

- given the number of women students graduating from law school (in Ontario it has been more than 50% for many years) we must ask: Why are the numbers of female trial lawyers appearing in court so low?

- The 2017 NYSBA Report concludes:

> The low percentage of women attorneys appearing in a speaking role in courts was found at every level and in every type of court: upstate and downstate, federal and state, trial and appellate, criminal and civil ex parte applications and multi-party matters.

- causes of this are many, not least of which are the significant problems of retention of women in the legal profession generally, the lack of an abundance of senior female role models (loss to the Bench), and the continuing issue of sexism in the courtroom

- in Ontario – perhaps also in the U.S. – considerable inroads have been made in the criminal law field, particularly at the appellate levels

- in Ontario, the Ministry of the Attorney General has developed a cadre of female appellate counsel, many quite young, who routinely argue cases in my former court
- many more than on the civil side, where individual retainers still govern

- problems remain: how to get young women attorneys into court; how to ensure adequate training

- some firms and Bar organizations have taken this on, utilizing targeted mentoring measures:

i.e.: i) training sessions that specifically address the development of women's trial skills and, importantly, strategies to balance work and parenting. Of the many trial advocacy training efforts undertaken by the College through the Teaching of Trial and Appellate Advocacy Committee, have any focused particularly on the challenges faced by young female attorneys? Might they do so in the future?

ii) other measures directed at "Women's Initiatives" in law firms (*i.e.* sponsorship, formal tracking programs, etc.), revised hiring criteria for outside counsel by in-house corporate counsel that require diversity and the like

- the 2017 NYSBA Report is a valuable resource in this regard

- I think also of the College's introduction in 2014 of the Women Fellows Luncheon, designed to bring women Fellows and judges together with young women lawyers who aspire to be trial lawyers

IV. CONCLUDING REMARKS

- the challenge before us is significant but not insurmountable

- tools are many

- multi-faceted approach should be adopted; College should consider:

  - involvement of Fellows directly

  - outreach to:

    - judiciary (current and former)
    - regulators
    - law schools
    - prosecutors and the criminal Bar

  - fostering an attitude of professional responsibility: every Fellow has an obligation to engage in mentoring – indeed, every lawyer does

  - encourage regulators and judges to say so

  - at the end of the day, in my view, Fellows can lead on these issues if they adopt a simple attitude towards the mentoring of young trial lawyers, embodied in the classic song by The Hollies (and by Neil Diamond): "He Ain't Heavy. He's My Brother."

- Thank you.

APPENDIX A

Reasons for Decline in Trials

- **overall costs of litigation**
- **time spent on pretrial discovery has skyrocketed**
- **growth of ADR industry (ABA: arbitrations in 1990 – 60,808; in 2001 – 218,032 (*i.e.* more than triple))**
- **more contentious, more complex litigation**
- **unpredictability of jury verdicts and judicial resolutions (*i.e.* tort reform groups' complaints re punitive damages)**
- **increase in number of out of court settlements (costs of settling less than costs of litigating)**
- **increase in lawyer hourly rates**

APPENDIX B

Examples of Current Canadian Mentoring Programs

1. **OBA Mentorship Program – matching of pairs based on areas of interest or personal characteristics**

2. **Law Society of Ontario – Coach and Advisor Network**

- **product of Law Society's 2015 Task Force on Mentoring**
- **provides lawyers and paralegals with access to short-term, outcome-oriented relationships with Coaches and Advisors drawn from the profession. Coaches support the implementation of best practices and Advisors assist with substantive and procedural law inquiries on client files**
- **"CAN" recognizes that lawyers and paralegals need different types of support at different times. CAN serves as a complement to existing mentorship programs in Ontario**

- **under this program, an Advisor can assist with a 30-minute call about a particular issue on a client file and a Coach can support achieving a specific goal over three months**