AMERICAN BAR ASSOCIATION

ADOPTED BY THE HOUSE OF DELEGATES
August 13-14, 2007

RECOMMENDATION

RESOLVED, That the American Bar Association recommends that mandatory age-based law firm retirement policies be discontinued; and

FURTHER RESOLVED, That the American Bar Association recommends that law firms evaluate senior partners individually consistent with the firm's performance criteria.

REPORT

Until recently, lawyers over the age of 50 constituted a minority of the profession. In 1960, for example, the median age of lawyers in the United States was 46. By 1980, after the baby boomers had entered the profession, the median age of lawyers dropped to 39. However, as these baby boomers have advanced through their careers, the median age in the profession has increased. By the year 2018, the youngest baby boomers will be in their mid-50s and the oldest will be in their early 70s. This development should lead to renewed and urgent re-evaluation of law firm retirement policies.

Other events have occurred during the past 50 years which have contributed to the importance of the issue of retirement. These include:

- The growth of the profession from about 300,000 lawyers in 1960 to more than 1,000,000 today.
- The dramatic growth in the size of law firms.
- The increased lifespan and enhanced health of senior lawyers.
- Changes in society that have created more varied expectations and goals for senior lawyers.
- Adoption of laws and policies that have eliminated mandatory, age-based retirement from most sectors of the economy.

In response to concerns about the effects of these changes on the profession and on older lawyers, the New York State Bar Association, through its President, Mark H. Alcott, appointed the Special Committee on Age Discrimination in the Profession. The Special Committee was directed to examine law firms' use of mandatory retirement policies, up-or-out policies, age-based hierarchical staffing of cases, and non-compete clauses, and to recommend changes in law or policy, where appropriate, to end age-related discriminatory practices affecting attorneys.[1] The Special Committee presented its report to the New York State Bar Association's House of Delegates on March 31, 2007, at which time it was unanimously approved.

What is "Retirement"?

"Retirement" can mean different things to different attorneys. To some, it is freedom from a lifetime of stressful, if intellectually challenging work; to others, it is a dreaded point of no return, a "ringing down of the curtain" on a professional career; and for still others, it may mean a transition to new pursuits, within the law profession or outside of it. Many choose to retire from law practice in their 60's. Some pursue new careers in areas such as education,

[1] The Special Committee's membership consists of Mark C. Zauderer (chair), Candace Dohn Banks, Sean P. Belter, Thomas E. Bezanson, Catherine Bocskor, Paul J. Bschorr, David N. Ellenhorn, John Eric Higgins, Jerome Lefkowitz, Hon. Milton Mollen, James C. Moore, Francis H. Musselman, Wendy C. Pelle-Beer, Hon. Karen K. Peters, M. Catherine Richardson, Richard Rifkin, Joel A. Rose, Kelly A. Ryan, Rachelle Stern, Judith Taft, Jay W. Waks, and Kelly M. Welch.

investment management, consulting and dispute resolution. Others pursue personal interests or work without compensation in the not-for-profit sector. However, many lawyers choose to stay in practice into their 60s, 70s or later, either because of client demands, the satisfaction which they derive from law practice, or because of personal financial needs. And it is the members of this group, especially those in large (more than 100 lawyers) law firms, who are more directly impacted by age-based mandatory retirement policies.

Historically, those attorneys who achieved partner status in larger law firms acquired a form of contractual tenure by virtue of the partnership agreement they signed. As these partners matured, they were able to anticipate working and billing fewer hours but could expect to remain at their firm until a dignified, gradual retirement occurred, often beginning in their late 60s or 70s. Many law firms addressed retirement issues one lawyer at a time, with discrete discussions, carefully crafted compensation packages, benefit plans and provisions for some type of office space and secretarial assistance. Today, however, the practice environment in many law firms has changed. Respected senior partners are expected to contribute as much, if not more, than their younger colleagues, and the competition for professional status and compensation is fierce, between the generations and even among the most senior partners. Also, as partners grow older, some firms are concerned whether those partners will continue to be productive. Hence, whether a lawyer should be required to leave a firm at a certain age or under certain circumstances has become an important issue.

In its May 2005 issue, the *National Law Journal* reported the results of a study about law firm retirement policies conducted by the consulting firm Altman & Weil for the American Bar Foundation. The survey revealed that 37% of law firms surveyed had a mandatory retirement age; 57% of law firms of 100 or more attorneys had a mandatory retirement age; 13% of law firms having fewer than 10 attorneys had a mandatory retirement age; 70 years was the common age when retirement was required; 57 years was the average age at which attorneys started early retirement; 75% of retired male lawyers were 65 years or age or older; and 27% of retired female lawyers were 65 years of age or older.

The New York State Bar Association is well aware that partners of many large law firms believe the practice of mandatory retirement is not only good for their firms but one that is the fairest to all partners. To a large extent, this view reflects fundamental changes in the practice of law that have taken place over the past few decades: firms have grown dramatically in size, often through combinations or “acquisitions”; both lateral and “home grown” young partners are motivated to advance financially over their middle-working years; and senior partners, by the time they reach retirement age, have already benefited handsomely from the firm’s prosperity. Finally, some law firm managers feel that maintaining a uniform retirement age spares both the firms and some senior partners an unpleasant and demoralizing confrontation of a partner whose skills and productivity are declining with age.

As suggested later in our recommendations, we believe that these apparent crosscurrents are more illusory than real, and that there is no natural ideological fault line between the interests of senior lawyers and their law firms. Rather, the challenge for the profession is to recognize their common interests and to find ways to enhance the interests of both.

What are the Current Law Firm Policies on Retirement?

Written provisions for the circumstances under which a lawyer must retire are very much limited to the largest (more than 100 lawyers) law firms. As the Altman & Weil report noted, for the most part, smaller firms either do not have written partnership agreements or, if they do have one, it does not contain retirement provisions.

In current practice, in those instances in which an agreement addresses the issue, partnership retirement provisions generally link retirement to the partner's reaching a certain age. Most commonly that age is between 65 and 70. In general, such provisions fall into one of two categories:

1. the partner must leave the equity partnership at a specific age; or

2. the partner remains in the partnership but, at a specific age, for example age 65, his or her share of the profits decreases at a pre-established rate over a fixed period of years, following which he or she must leave the partnership.

Once the partner leaves the partnership, many firms will permit the retired lawyer to remain working at the firm in a non-equity capacity. Some firms continue to characterize such lawyers as "partners," while others characterize them as "special counsel." Some firms continue to pay non-equity partners on an hourly basis for services provided, while others do not make such payments. Some firms do not permit lawyers to remain after having reached the agreed-upon age, believing instead that retirement policies should be applied evenly and without exception to all partners.

Fundamentally, however, most written partnership retirement clauses make the event a function of the partner's age.

What Post-Retirement Benefits are Common?

Law firms that require a partner to retire typically afford the retired partner certain benefits:

Retirement Income or Pension. Historically, these payments were paid to the retired partner on a monthly basis. Many of these payments came from the firm's current revenues and accordingly were unfunded; however, today, for the vast majority of law firms making such payments, the payments are more from previously-funded sources.

Return of Capital. This is most commonly paid to the retiring partner within one year of his or her retirement.

Accounts Receivable/Work in Progress at Time of Retirement (AR/WIP). Such payments are usually unfunded and are paid over a number of years; they are often keyed to the firm's current revenues.

Use of an Office and Administrative Assistant. Many law firms continue to provide office space and secretarial assistance as well as participation in partnership meetings.

Many firms require partners, at a fixed age, not only to retire but also not to compete with the firm by practicing with another firm. Such firms often condition the retirement pension payment or AR/WIP payments upon compliance with the non-competition clause. Some firms agree that earning income from a non-law related endeavor (*e.g.,* investment banking, government positions), or even becoming a corporate general counsel, does not constitute competition and thereby trigger the forfeiture provision. However, some firms have a very expansive view of what constitutes competition. Needless to say, funded retirement benefits paid for by the partner in the form of deferred income cannot be forfeited because of competition with another law firm. On the other hand, many senior lawyers believe that even un-funded retirement benefits have been earned through service to the firm and should not be subject to forfeiture on retirement, especially when the retirement is not chosen by the partner but is mandated by the firm because of the partner's age.

In-House Counsel and Public Sector Retirement Practices: A Useful Model.

The situation in both the corporate and the public sectors varies considerably from the prevailing practice in law firm partnerships. As noted below, it is unlawful to impose mandatory retirement on most public and corporate attorneys. The only exceptions permitted under existing law are for senior, policy-making executives. Accordingly, the practice followed by many law firms of mandating retirement at a specific age would not be permitted in either the public sector or a corporate law department except, perhaps, for the highest ranking attorneys.

The public and corporate sectors can serve as a useful model to law firms that have a concern about older attorneys refusing to leave despite diminishing abilities. These sectors have developed procedures for dealing with older (or, for that matter, younger) attorneys whose abilities or contributions are no longer consistent with their responsibilities.

Ethical Proscriptions Against Age Discrimination

In 1990, New York became the first state to adopt a disciplinary rule relating to discrimination in the practice of law. Disciplinary Rule 1-102(A)(6) provides that it is "misconduct" and grounds for attorney discipline for "[a] lawyer or law firm" to "[u]nlawfully discriminate in the practice of law, including in hiring, promoting or otherwise determining conditions of employment on the basis of age, race, creed, color, national origin, sex, disability, marital status, or sexual orientation." 22 NYCRR §1200.3(a). Similar rules have been adopted in several other states.[2] The text of the rule itself underscores the professional obligation of the legal profession to abide by the mandates of such prohibitions within its own house.

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[2] *See* Cal. R. Prof. Cond. 2-400 (B)(1)("In the management or operation of a law practice, a member shall not unlawfully discriminate or knowingly permit unlawful discrimination on the basis of race , national origin, sex, sexual orientation, religion, age or disability in…hiring, promoting, discharging, or otherwise determining the conditions of employment of any person"); Ill. R. Prof. Cond. 8.4(a)(9)(A)("A lawyer shall not…violate a Federal, State or local statute or ordinances that prohibits discrimination based on race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status by conduct that reflects adversely on the lawyer's fitness as a lawyer. Whether a discriminatory act reflects adversely on a lawyer's fitness as a lawyer shall be determined

The State of the Law of Age Discrimination as Applicable to Law Firms.[3]

In 1967, Congress enacted the Age Discrimination in Employment Act (ADEA) "to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment." 29 U.S.C. §621(b). To achieve these ends, the ADEA prohibits covered employers, including virtually all law firms with 20 or more employees, from discriminating on the basis of age against employees or applicants 40 years of age and older. 29 U.S.C. §§630(b), 631(a). The ADEA's prohibitions generally cover all aspects of the employment relationship, from hiring, promotions and compensation to discharge and mandatory retirement policies. 29 U.S.C. §623(a)(1). Consequently, mandatory retirement policies adopted by most private and public sector employers, including law firms, and made applicable to entire classes of employees who reach a certain age are generally considered unlawful under federal laws against age discrimination. These policies may also be unlawful under state law. *See, e.g.*, N.Y. Executive Law §296(1)(a) and (3-a)(a).

Nevertheless, until recently, the involuntary or mandatory age-based retirement of law firm partners was widely regarded as lawful and outside the permissible scope of review by agencies such as the Equal Opportunity Commission (EEOC) and the courts, because partners were deemed to be "owners" and "employers." As such, they were considered not to be subject to the dictates of the ADEA or other anti-discrimination laws which are generally applicable only to "employees." But now the law in this area is being refined in response to developments within the profession itself.

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after consideration of all the circumstances, including [1] the seriousness of the act, [2] whether the lawyer knew that it was prohibited by statute or ordinance, [3] whether it was part of a pattern of prohibited conduct, and [4] whether it was committed in connection with the lawyer's professional activities"); Iowa R. Prof. Cond. 32:8.4 (g)("It is professional misconduct for a lawyer to…engage in sexual harassment or other unlawful discrimination in the practice of law or knowingly permit staff or agents subject to the lawyer's direction and control to do so"); Minn. R. Prof. Cond. 8.4(h)("It is professional misconduct for a lawyer to…commit a discriminatory act, prohibited by federal, state, or local statute or ordinance, that reflects adversely on the lawyer's fitness as a lawyer. Whether a discriminatory act reflects adversely on a lawyer's fitness as a lawyer shall be determined after consideration of all the circumstances, including: [1] the seriousness of the act, [2] whether the lawyer knew that it the act was prohibited by statute or ordinance, [3] whether it the act was part of a pattern of prohibited conduct, and [4] whether it the act was committed in connection with the lawyer's professional activities"); N.J. R. Prof. Cond. 8.4(g)("It is professional misconduct for a lawyer to…engage, in a professional capacity, in conduct involving discrimination [except employment discrimination unless resulting in a final agency or judicial determination] because of race, color, religion, age, sex, sexual orientation, national origin, language, marital status, socioeconomic status, or handicap where the conduct is intended or likely to cause harm"); Ohio R. Prof. Cond. 8.4(g)("It is professional misconduct for a lawyer to…engage, in a professional capacity, in conduct involving discrimination prohibited by law because of race, color, religion, age, gender, sexual orientation, national origin, marital status, or disability").

[3] For an additional discussion of the case law relating to age discrimination see *Report and Recommendations on Mandatory Retirement Practices in the Profession*, New York State Bar Association Special Committee on Age Discrimination in the Profession (January 2007), available online at
http://www.nysba.org/Content/ContentGroups/Reports3/AgeDiscriminationRetirement.pdf.

The concentration of control within a small fractional subgroup of the partners in increasingly large law firms (some "megafirms" have a thousand or more lawyers), and the question of whether, in such situations, law firm partners (or, in firms organized as professional corporations or LLCs, shareholders or members, respectively) themselves would be protected against discrimination on the basis of age or other protected factors, has been highlighted by the well-publicized case brought by the EEOC against Chicago's Sidley Austin. In fact, the *Sidley Austin* case demonstrates the extent to which the legal profession (at least among large law firms) has followed the trend toward the centralized organizational structure which was the trademark of large accounting firms in previous decades. That case has caused the legal profession to sit up and take notice, and to consider whether established assumptions regarding the inapplicability of certain civil rights protections to partners – and the policies (including mandatory retirement or demotion) flowing from those assumptions – need to be reexamined.

The key inquiry is whether partners or shareholders qualify as "employers" and thus are not protected as "employees" under ADEA and other state and local anti-discrimination statutes. *See* 29 U.S.C. §623(a)(1)("It shall be unlawful for an employer to fail or refuse to hire or discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment because of such individual's age" of 40 years or more).[4] Case law treatment of the issue generally comes up in one of two contexts: (1) a former partner/shareholder him- or herself brings a lawsuit as the plaintiff alleging that he or she is protected as an "employee" under anti-discrimination law, or (2) a plaintiff former lawyer employee – though not necessarily a partner or shareholder him- or herself – argues that the employer's individual partners/shareholders should be counted toward the applicable statutory minimum number of employees required for that employer to be covered by the relevant anti-discrimination law (e.g., 20 employees under the ADEA).

The EEOC Compliance Manual, as amended in May 2000, states that "[i]n most circumstances, an individual is only protected if s/he was an 'employee' at the time of the alleged discrimination, rather than an independent contractor, partner, or other non-employee." EEOC Compliance Manual §2-III (May 2000). It similarly states that "[i]n most circumstances, individuals who are partners, officers, members of boards of directors, or major shareholders will not qualify as employees." However, the Compliance Manual goes on to explain that "[a]n individual's title…does not determine whether the individual is a partner, officer, member of a board of directors, or major shareholder, as opposed to an employee." *Id.* Accordingly, EEOC investigators are directed in every case to determine whether the individual acts independently and participates in the management of the organization or is subject to control of the organization. *Id.* In determining whether a partner, officer, member of a board of trustees, or a major corporate shareholder is an "employee" or an "employer," the EEOC looks at the following six factors:

[4] The ADEA defines "employee" simply as "an individual employed by any employer," whereas "employer" is defined as "a person engaged in an industry affecting commerce who has twenty or more employees." 29 U.S.C. §630(f); 29 U.S.C. §630(b). "Person" is defined as "one or more individuals, partnerships, associations, legal representatives, or any organized group of persons." 29 U.S.C. §630(a).

- Whether the organization can hire or fire the individual or set the rules and regulations of the individual's work;
- Whether and, if so, to what extent the organization supervises the individual's work;
- Whether the individual reports to someone higher in the organization;
- Whether and, if so, to what extent the individual is able to influence the organization;
- Whether the parties intended that the individual be an employee, as expressed in written agreements or contracts;
- Whether the individual shares in the profits, losses and liabilities of the organization.

Id.

The legal profession took particular notice of these issues when they were raised in *E.E.O.C. v. Sidley Austin Brown & Wood*, 315 F.3d 696 (7th Cir. 2002). In that case, the EEOC issued a subpoena to Sidley & Austin (as it was called in 1999) designed to determine, *inter alia,* whether 32 former equity partners who were demoted to "counsel" or "senior counsel" were protected as "employees" under the ADEA. The Seventh Circuit, in an opinion written by Judge Richard Posner, upheld the district court's enforcement of the subpoena. In doing so, the court observed that the firm was controlled by a self-perpetuating executive committee with the power to fire, promote, demote, and set compensation by assigning percentage points of the firm's overall profits to each partner, and that the only firm-wide issue on which all partners voted in the previous 25 years was the merger with Brown & Wood.

Significantly, the court's opinion noted that an individual's status as a partner under state law was not dispositive as to whether such partners qualify as "employers" ineligible for protection under the ADEA: "The two classes, partners under state law and employers under federal antidiscrimination law, may not coincide." *Id.* at 704. In addressing whether the partners could qualify as "employees" under the ADEA, the court noted the similarities between the 32 demoted partners and regular employees of a corporation:

> It is true that the partners can commit the firm, for example by writing opinion letters; but employees of a corporation, when acting within the scope of their employment, regularly commit the corporation to contractual undertakings, not to mention tort liability. Partners who are not members of the executive committee share in the profits of the firm; but many corporations base their employees' compensation in part anyway, but sometimes in very large part, on the corporation's profits, without anyone supposing them employers. The participation of the 32 demoted partners in committees that have, so far as appears, merely administrative functions does not distinguish them from executive employees in corporations. Corporations have committees and the members of the committees are employees; this does not make them employers. Nor are the members of the committees on which the 32 served elected; they are

> appointed by the executive committee. The 32 owned some of the firm's capital, but executive-level employees often own stock in their corporations. We shall see that there is authority that employee shareholders of a professional corporation are still employees, not employers, for purposes of federal antidiscrimination law.

Id. at 703.

A year after the Seventh Circuit's *Sidley Austin* decision, the United States Supreme Court addressed the issue of which classifications of individuals qualify for protection under anti-discrimination law (albeit not specifically in the context of the legal profession or age discrimination). In *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440 (2003), the Court held that doctors who practiced medicine together in a professional corporation in which they also served as directors and shareholders could be counted as "employees" for purposes of the statutory minimum number of employees for coverage under the Americans with Disabilities Act (ADA). In language that could anticipate an application to law firms, the Court explained that "[t]he question whether a shareholder-director is an employee…cannot be answered by asking whether the shareholder-director appears to be the functional equivalent of a partner. Today there are partnerships that include hundreds of members, *some of whom may well qualify as "employees" because control is concentrated in a small number of managing partners*." *Id.* at 446 (emphasis added).

The Court held that the touchstone of the inquiry regarding whether a shareholder or director in a professional organization is an "employer" is whether the individual is able to assert control. Some might argue: if an individual is forced against his or her will to retire from a firm, how can it be argued that he or she is able to assert control over the firm? In *Clackamas*, the Court referenced the six factors of the EEOC's Compliance Manual in performing this inquiry, while stating that none of them alone is determinative. *Id.* at 449-50. The Court commented further that "[a]s the EEOC's standard reflects, an employer is the person, or group of persons, who owns and manages the enterprise. The employer can hire and fire employees, can assign tasks to *employees* and supervise their performance, and can decide how the profits and losses of the business are to be distributed. *The mere fact that a person has a particular title – such as partner, director or vice president should not necessarily be used to determine whether he or she is an employee or a proprietor.*" *Id.* at 450 (emphasis added).

Thus, although *Clackamas* involved shareholder/directors, rather than partners, the Supreme Court's analysis in determining "*employee*" status and protections under federal antidiscrimination laws is authority that has been considered in cases involving law firm partners.[5]

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[5] *See, e.g., Solon v. Kaplan*, 2004 WL 725893 (N.D. Ill. March 31, 2004)(plaintiff law firm partner who received share of firm income, received copies of firm's daily cash reports, had acted as managing partner for firm, was responsible for managing firm's finances, was liable for firm's debts, made individual capital contribution, had an equal vote with other partners, held himself out as a partner and who, after his partnership was terminated, refused to continue his employment in a reduced capacity as an administrative employee held not an employee for purposes of ADEA and Title VII, citing *Clackamas*); *Panepucci v. Honigman Miller Schwartz and Cohn, L.L.P.*, 408 F. Supp.2d 374 (E.D. Mich. 2005) discussing *Clackamas* test in considering that former "percentage partner" in law firm could pursue Title VII claim as an "employee," although declining to resolve the issue without the benefit

Implications for Law Firms

If law firm partners were to be protected as "employees" under the ADEA (and its state and local statutory counterparts), they would have the ability to claim age discrimination with respect to hiring, firing, compensation, terms, conditions and privileges of employment. 29 U.S.C. §623(a). In the *Sidley Austin* case, the employment action at issue was the demotion of a group of partners to "counsel" or "senior counsel." Mandatory retirement policies at age 65 or older, although common at many large firms, are essentially a form of overtly age-based employment action, and as such may trigger discrimination liability.[6] Consequently, the *Sidley Austin* case raises the possibility that the termination of a whole generation of partners' relationships with their firms pursuant to such retirement policies could be the basis for a new spate of age claims against big firms, especially if control within firms should become more concentrated amongst a fraction of those accorded partner status.

The far-reaching implications of this concern for law firms was made ever the more apparent with the Seventh Circuit's recent decision in the *Sidley Austin* case that the EEOC could seek monetary relief on behalf of the demoted partners even if such partners were administratively barred from bringing suit on their own behalf. 437 F.3d 695 (7th Cir.), *cert. denied* ___ U.S. ___ (2006). Although the court's decision is in line with Supreme Court precedent (*see EEOC v. Waffle House*, 534 U.S. 279 [2002]) and, thus, did not break new ground doctrinally, it underscores the unsettled application of law and practice in this area.

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of discovery); *Simons v. Harrison Waldrop & Uhereck, L.L.P.*, 2006 WL 1698273 (S.D. Tex. June 14, 2006) (employing test set forth in *Clackamas* to determine whether partners in accounting firm organized as LLP should be counted toward statutory minimum number of employees under ADEA; "[t]he *Clackamas* inquiry is designed to identify situations in which an employee is given a title traditionally reserved for someone in ownership position without any of the attendant rights, privileges and responsibilities of control. In such an instance, a shareholder, director or partner may in fact be an employee.")

[6] Significantly, the ADEA does not prohibit mandatory retirement at 65 for an employee who was engaged in a "bona fide executive or a high policymaking position" for the last two years of his or her employment and who is immediately entitled to a nonforfeitable annual retirement benefit of at least $44,000. 29 U.S.C. §631(c)(1). Courts have held that in-house counsel who have significant executive and/or policymaking authority and are engaged in business, not merely legal, duties, would qualify for this exemption. *See Whittlesey v. Union Carbide Corp.*, 567 F. Supp 1320 (S.D.N.Y. 1983), *aff'd* 742 F.2d 724 (2d Cir. 1984); *Stinneford v. Spiegel, Inc.*, 845 F. Supp. 1243 (N.D. Ill. 1994); *Breckenridge v. Bristol-Meyers Co.*, 1987 WL 15468 (S.D. Ind. Feb. 16, 1987). Enforcement guidelines issued in May 2000 by the EEOC provide some further direction on what it takes to be considered either a "bona fide executive" or a "high level policymaker." *See EEOC Compliance Manual*, §2-III. The EEOC determines whether an individual is a "bona fide executive" based "on the functions performed by [an] employee, regardless of salary." According to the guidelines, an individual is a "bona fide executive" of the following criteria are satisfied: (1) Management of the organization or a department or subdivision of the organization; (2) Direction of the work of at least two other employees; (3) Authority to hire or dismiss other employees or his/her suggestions as to personnel decisions are given particular weight; (4) Customarily and regularly exercises discretionary powers; and (5) no more than 20 percent of his or her work time (or 40 percent if the work is a retail or service establishment) is devoted to activities unrelated to those described in requirements 1 through 4 above (this requirement does not apply if the individual is in sole charge of an independent establishment or a physically separated branch establishment, or if he or she owns at least a 20-percent interest in the enterprise). The guidelines define "high policymaking positions" as those held by "certain top-level employees who are not 'bona fide executives,' but who nonetheless play a significant role in developing and implementing corporate policy."

In sum, those who are partners/shareholders in name only, in those firms which concentrate control among a select few and thereby fall into *Sidley Austin's* theoretical trap, may be entitled to the same protections against age discrimination in compensation, assignments, forcible retirements, demotions and the whole host of adverse employment actions against which regular counsel, associates and other law firm employees are protected. As such, however, it should be kept in mind that simply being protected as an "employee" under the ADEA and other laws does not automatically create liability on the part of the law firm employer for mandating that the individual retire. In each case there may be defenses available to the law firm, such as (1) where age is a *bona fide* occupational qualification reasonably necessary to the normal operation of the particular business; (2) where the treatment accorded the plaintiff is based on reasonable factors other than age; (3) where the employment practices at issue involve an employee in a foreign country and compliance with the ADEA would cause the employer to violate the law of that country; (4) where the employer is observing the terms of a bona fide seniority system or employee benefit plan; or (5) where the employee's discharge or discipline was based on good cause. *See* 29 U.S.C. §623(f).

Restraints Upon Competition – Forfeiture and Non-Competition Clauses

A related concern of which law firms considering the implications of the *Sidley Austin* and *Clackamas* cases for their own organizations should take note is the law surrounding forfeiture and non-competition agreements. Rule 5.6(a) of the ABA Model Rules of Professional Conduct, the substance of which has been adopted by a majority of states, provides, "A lawyer shall not participate in offering or making…a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement." In most jurisdictions, such agreements have been held judicially unenforceable as against public policy. *See generally* ABA/BNA Lawyers' Manual on Professional Conduct 51:1201 *et seq*. However, the rule contains an exception for "agreements concerning benefits upon retirement"; this exception is potentially relevant to the discussion of age discrimination in the legal profession, and demonstrates that not all post-retirement forfeiture provisions involving lawyers should necessarily be viewed as presumptively unenforceable. In that connection, it should be noted that many such law firm non-competition clauses have no geographic or temporal limits. Hence, the partner is forced to retire from the firm and is prohibited from practicing law anywhere else, at any time, on paid of forfeiting his or her pension and other benefits – a particularly harsh result.

Recommendations

The direction in which the case law is moving raises questions that should be considered by large law firms. But there is a larger issue here. Society has made a judgment in every other field that people should not be put out to pasture arbitrarily, solely because of age. The legal profession should not be fighting a rear guard action against this public policy. On the contrary, it should be at the cutting edge of fairness and equitable employment practices.

It is our consensus that mandatory retirement – requiring a partner to leave the firm upon reaching an arbitrary age – is not an acceptable practice. Modern experience demonstrates that

this practice is both unwarranted and unwise. A lawyer's age, standing alone, is not an appropriate criterion for determining professional capacity or employment status. A blanket policy of mandatory retirement of law partners is, at best, shortsighted. It also short changes not only the individual lawyer but the firm and society as a whole. While these recommendations should not be read as a wholesale condemnation of the retirement practices of law firms, and we recognize that the contractual nature of the relationship between partners and their firms needs to be accorded substantial deference, it is our consensus that:

- In general, mandatory age-based retirement is inconsistent with accepted employment practices in this country that prohibit employers from requiring employees to retire at a specific age.

- Such practices are against the best interests of law firms, clients and the profession in that they compel the law firm to lose the benefit of productive partners simply because of their age.

- Partnerships which rely on age as the determining factor for retirement fail to make the more substantive, individualized qualitative analysis of the partner's performance which, in terms of the firm's well being, is far more important than the partner's advancing years.

- Many lawyers achieve their greatest value to their clients as they grow older because their years in practice give them a perspective and judgment that is simply not available to lawyers at an earlier stage in their career; to deny clients the advantage of such wisdom serves the best interests of neither the client nor the law firm.

We do not suggest that partnership is, or should be, a guarantee of life tenure, and we are well aware of the economics of law firm practice and the need for senior partners to pass on client responsibilities to younger partners. Nevertheless, consistent with this pressure, a senior partner can and should be evaluated individually in accordance with his or her unique attributes and interests and the firm's generally applicable performance criteria, including the full range of strategic and tactical legal abilities and lawyering skills. Criteria such as billable hours, business generation, *pro bono* activities, as well as the ability to create or maintain client relationships and the willingness to involve other lawyers in them and to transition to others, administrative activities, mentoring, collegiality, recruiting activities, marketing, and other functions that support their firm's morale, reputation, growth, stability and profitability, are all relevant. These performance criteria, and not age, should help determine a professional's employment status, duties and compensation in connection with the needs of the particular firm.

In addition, other subjective assessments may well be appropriate in evaluating the senior partner. With age often come other individual personal and family goals that may require adjustment from the previous total commitment to the practice required by most firms. For example, billable hours may be a more germane standard for judging younger partners' overall performance, while transitioning of clients, experience, and the ability and need to act as a source of information concerning the law firm's history, culture and heritage, and the ability and need to act in a training capacity, may be more important criteria for senior lawyers in some firms. These latter criteria are by nature more subjective than such quantitative standards as

billings and collections but are, nevertheless, of great significance to some law firms and may be more appropriate standards for evaluating the value of senior lawyers.

Accordingly, the "best practices" in this area should be governed by flexibility and individual consideration of the needs of both the firm and the individual partner. While this may mean that management will need to consider the individual merits of each partner reaching what might otherwise be considered "retirement age," this is really no more than what should, and is, routinely required of management as part of any annual or periodic review. Such a review may appropriately be conducted within the subjective context of the particular partner rather than solely by seemingly objective standards such as hours billed or receipts collected (although the weight to be given to these considerations must be left with the individual firm).

Whether one considers a "typical" retirement age for partners to be 65, 70, 75 or older, it must be readily recognized that every individual partner's situation is different, as each has different attributes and provides varying utility to the ongoing well-being of the law firm. Not only will the continuing skills and contributions to the firm's bottom line vary among partners reaching "retirement age," but his or her personal interests and goals may suggest very different approaches to "retirement."

Some individuals may wish to retire completely once they reach a certain age. Other partners with advancing age may choose to adopt lifestyle changes consistent with a desire for more time with family, for travel, or to pursue other endeavors, yet may wish to continue to practice with perhaps a substantially reduced compensation or change in title or equity status.[7] Others may wish to continue with the firm on a semi-active basis, particularly where they are given the opportunity, albeit at reduced compensation based upon performance, to make a meaningful contribution to the firm's well-being. Finally, there will be those partners who, despite advancing age, continue to carry on a full-time practice and continue to be the trusted adviser and lawyer for their clients, all contributing to the continued financial success of the law firm.

Even if a senior partner is no longer controlling the business of clients or is no longer billing long hours, that partner may still be making a contribution to the law firm by, for example, mentoring younger attorneys, assisting in the editing of legal documents, providing counsel to others in the firm based upon his or her years of experience, handling important *pro bono* cases which redound to the benefit of society and, incidentally, the credit of the firm, or working on various civic, philanthropic or bar association activities that will benefit the profession and enhance the reputation of the firm. Given that the so-called "lock step" compensation system once prevalent in most institutionalized law firms is now almost universally an historical footnote, there are many variables to be considered for the senior partner other than simple retirement, including compensation adjustments, title adjustments, and new work projects.

In our view, each of those interests and attributes should be accommodated within a law firm's particular structure in accordance with the firm's particular needs. Individual

[7] It is of interest to note that when a partner loses equity status but continues in the active practice of law for the same firm, he or she may then be covered by ADEA, as discussed above.

compensation and title or status decisions, fairly arrived at, will provide both the law firm and the individual senior partner an arrangement that will accommodate the wishes and needs of each. What is important, in our view, is giving the individual who is still willing and able the opportunity, at a fair level of compensation, to continue making a contribution to the firm's well-being, and to continue to be affiliated and identified with the firm.

In every situation, firms should be guided by flexibility, not rigidity. In some firms, it may be appropriate to consider special categories of partner or counsel positions that can accommodate the best interests of more senior partners and the firm. One of those interests may be, as suggested by the New York City Bar Association, increasing the engagement of senior partners in the firm's *pro bono* programs as part of that lawyer's continued employment by the firm. Similarly, senior lawyers may wish to expand their involvement in board responsibilities in a variety of not-for-profit endeavors, an effort which will often benefit the attorney, the firm, and society as a whole.

In keeping with such an individualized, flexible approach to retirement, some firms may find it appropriate to utilize a transition program in which transferring a senior partner's client relationships to more junior partners may take two years or more; during that time, the senior partner should be appropriately compensated in light of the firm's general compensation criteria, while at the same time being accommodated if the senior partner wishes to reduce his or her work load or pursue other interests. At the conclusion of the transitioning period the senior partner and firm could then arrive at a relationship that works best for both. Retirement may be an appropriate option at the end of such a transition period, but it should not be mandatory. Continuing to provide office space and staff post-retirement is an option that may advance some firms' interests and allow senior attorneys to continue to work on a negotiated compensation basis or to pursue other interests.

In sum, the firm and the senior partner should be able to fairly work out a relationship that is mutually beneficial. Matching individual skills, interests and compensation to firm needs benefits all concerned. From a firm's point of view, flexibility is surely better than forcing a partner at a pre-determined age to leave and possibly take his or her clients to another firm. From the individual's point of view, it is certainly preferable to have choices at "retirement age" rather than to be forced into departure. Firms or senior partners may, of course, opt for any one of a variety of relationships as discussed above. Firm management should welcome, indeed encourage, individual partners to discuss these transition options with management.

We have noted that non-funded pension plans are increasingly a vestige of the past. This may leave at least some senior attorneys who are deprived of the choice of continuing to work at their firms with a degree of economic uncertainty, despite the existence of other, tax-deferred retirement plans from which they benefit. This comes at a time of increasing life expectancy. Accordingly, age-based mandatory retirement may impose financial burdens greater now than in prior generations when such retirement plans were devised.

Law firms should recognize that many partners who are retirement-eligible have the capacity and desire to make meaningful contributions to law firm practice. Firms that continue to enforce rigidly the mandatory age-based retirement of their partners without regard to their

individual capabilities and inclinations to continue to make meaningful contributions are not doing justice either to the firm or the senior partner, much less to clients. Rather than continue the rigidity associated with mandatory age-based retirement, firms should instead evaluate each older partner just as it evaluates each younger partner, by assessing their (1) record of client origination and development, (2) service to the firm's clients, (3) successful transfer of responsibility for clients to other and younger partners, (4) productivity in billable hours, (5) participation in significant non-billable activities that benefit the firm, including pro bono, administrative and mentoring activities, and (6) teamwork and cooperation to advance the firm's interests.

In making these recommendations, we are not passing judgment on whether the law firm and the senior partner should convert their relationship to one other than partnership, nor are we undertaking to prescribe the precise compensation arrangement between them. Rather, we simply recommend that each law firm ensure that the senior partner is given the opportunity to continue to make a meaningful contribution to the success of the law firm, consistent with the individual partner's capabilities and the firm's needs.

Respectfully Submitted,

Kathryn Grant Madigan, President
Mark H. Alcott, Immediate Past President
New York State Bar Association
August 2007

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GENERAL INFORMATION FORM

To Be Appended to Reports with Recommendations
(Please refer to instructions for completing this form.)

Submitting Entity: New York State Bar Association

Submitted By: Mark H. Alcott, Immediate Past President

1. Summary of Recommendation(s).

   Recommends that mandatory age-based law firm retirement policies be discontinued and that law firms evaluate senior partners individually consistent with the firm's performance criteria.

2. Approval by Submitting Entity. This report was approved by the New York State Bar Association House of Delegates on March 31, 2007.

3. Has this or a similar recommendation been submitted to the House or Board previously?
   No.

4. What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?

   None of which we are aware.

5. What urgency exists which requires action at this meeting of the House?

   No urgency exists, beyond the fact that we believe the Association should be on record as endorsing the discontinuance of mandatory retirement policies.

6. Status of Legislation. (If applicable.)

   N/A

7. Cost to the Association. (Both direct and indirect costs.) None.

8. Disclosure of Interest. (If applicable.)

   N/A

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. Referrals.

Senior Lawyers Division
Section of Litigation
Business Law Section
Section of Individual Rights and Responsibilities
Law Practice Management Section

10. Contact Person. (Prior to the meeting.)

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11. Contact Person. (Who will present the report to the House.)

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