

# New York State Bar Association

One Elk Street, Albany, New York 12207 • 518/463-3200



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**Terry J. Brooks, Director of Continuing Legal Education**

Direct phone line: (518) 487-5580

Fax: 518-463-8844

e-mail: tbrooks@nysba.org

## MEMORANDUM

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**TO:** National Conference of Bar Presidents  
National Association of Bar Executives  
National Conference of Bar Foundations

**SUBJECT:** New York State Bar Association activities addressing challenges facing senior lawyers

In his President's message, in the July/August 2006 issue of the *New York State Bar Association Journal*, Mark H. Alcott announced that one of the major themes of his administration would be to promote needed reform: specifically, an end to age discrimination in the legal profession, including the "archaic practice of mandatory retirement." One in every eight Americans is age 65 or older. And, by 2025, it is projected that one in every five Americans will be in that age group. The membership of the New York State Bar Association reflects this trend – with 26% of its members age 56 and over, and 9% age 66 and over. Many practicing "gray" lawyers are not given a choice, but face mandatory retirement. In addition, New York State judges must leave the bench at age 70; a requirement that does not exist in the federal court system. The practice of mandatory retirement must face intense scrutiny to determine whether the forfeiture of seasoned "talent" places an unreasonable, inequitable and unnecessary burden on law firms, the courts and our society.

In response to these issues, Mr. Alcott created two special committees and a task force: the Special Committee on Age Discrimination in the Profession; the Special Committee on Senior Lawyers; and the Task Force on Mandatory Retirement of Judges. What follows is a brief summary of their activities:

**The Special Committee on Age Discrimination in the Profession** was created to examine, and submit a report on, practices in the profession that disadvantage lawyers because of age, including mandatory retirement, up-or-out policies and age-based hierarchical staffing of cases. If reform is needed, the Committee is asked to recommend steps to promote changes and end any age-related discriminatory practices affecting attorneys. Its mission statement charges the Committee to examine:

- mandatory retirement policies;

- non-compete clauses, combined with mandatory retirement policies, that prevent retired attorneys, who otherwise might wish to continue to practice law for a number of years, from engaging in such practice;
- law firm hiring and firing practices;
- “up-or-out” policies;
- age-based hierarchical staffing of cases;
- practices concerning retaining of counsel;
- the setting of time charge rates;
- other age-discriminatory practices affecting attorneys, as the Committee may identify.

The Special Committee configured itself into four subcommittees: (1) Law Firm Practices Subcommittee; (2) In-House and Public Agencies Practices Subcommittee; (3) State of the Law Subcommittee; and (4) Hearing Subcommittee. The Committee agreed that it would take a strong position against age-based retirement policies, where age is the only or principal consideration. The Committee decided it would give special emphasis in its report to “best practices” in this area, with details on how a firm might handle attorney retirement, taking into account a number of considerations and dealing with each attorney on an individual basis. Factors a firm might consider in determining whether a member of the firm should retire would include, but not be limited to, the individual’s preferences in the matter, his/her productivity and competence, and his/her ongoing economic value to the firm, in terms both of service to clients and generation of new business.

The Committee has submitted a report to Mr. Alcott, which will be presented as an informational item to the Executive Committee and House of Delegates at NYSBA’s upcoming Annual meeting in late January, with plans to have the report formally considered at the March meeting of the NYSBA House of Delegates.

**The Special Committee on Senior Lawyers** was charged with the mission of:

- providing opportunities to utilize the expertise of senior lawyers in such activities as delivering pro bono and civic service, mentoring younger lawyers, serving on boards of directors for business and charitable organizations, and lecturing and writing;
- providing programs and services in matters such as job opportunities; CLE programs; seminars and lectures; career transition counseling; pro bono training; networking and social activities; recreational, travel and other programs designed to improve the quality of life of senior lawyers; and professional, financial and retirement planning; and
- acting as a voice of senior lawyers within the Association and the community.

After developing programs of this kind, the Special Committee will take appropriate steps to determine if it should recommend the creation of a Senior Lawyers Section.

This Committee has formed three subcommittees: technology, services, and pro bono. Discussions have focused on the following activities: (1) conducting a survey of senior members of the Bar, to discern what programs the Association should offer; (2) providing CLE programs on financial and retirement planning for senior lawyers; (3) addressing the status of “of counsel” arrangements; (4) clarifying, expanding, and publicizing the state’s “emeritus rule” allowing for pro bono service by retired attorneys who do not pay New York’s biennial registration fee; (5) publicizing information regarding existing pro bono programs designed for seniors; and (6)

providing CLE courses on technology, designed for senior lawyers (e.g., how to use e-mail, Blackberrys, etc.). The chair of the Committee sent a letter to the 15 NY law school deans and several deans from nearby states' law schools to solicit their ideas based on needs of senior attorney alumnae.

The Committee hopes to present an informational report to the New York State Bar Association's Executive Committee at their March, 2007, meeting.

**The Task Force on the Mandatory Retirement of Judges** was appointed in mid-2006 with the mission to examine New York's current system of mandatory retirement for judges and to make recommendations to the Executive Committee on whether this system should be retained, modified or eliminated. The Task Force shall also report on the appropriate means, and their feasibility, of changing some or all portions of New York's system of mandatory retirement for judges. In the development of reports and recommendations, the Task Force may confer with relevant governmental entities, academic and scholarly groups and individuals, other Bar and professional groups, and other sections and committees of the New York State Bar Association.

From the outset, the Task Force has been cognizant of balancing its mission to consider raising the retirement age of New York judges with other important issues of: (1) preserving opportunities for judicial service for a young and diverse pool of qualified candidates; (2) insuring that mechanisms exist whereby additional judges, regardless of how judicial resources are increased, are assigned to courts most in need; and (3) providing adequate facilities and staff for a greater number of judges.

At its meetings, the Task Force has been reviewing demographic and statistical data from: (1) New York's Office of Court Administration, (2) the Federal Interagency Forum on Aging-Related Statistics, and (3) findings from research on aging reported in scientific journals. The Task Force is reviewing material provided by the National Conference of State Legislatures and the National Center for State Courts. Two earlier reports on mandatory judges' retirement, the June 1999 "Report of New York's Office of Court Administration's Task Force on Mandatory Retirement of Judges," and the May 2006 "Report of the Subcommittee to Study Mandatory Retirement for Judges and Certification of Judges To Serve Past Seventy Years of Age," of the New York State Bar Association's Committee on Courts of Appellate Jurisdiction, have been helpful in the Task Force's deliberations.

The views of recently retired New York judges and of outside Bar/professional/judicial groups are being actively solicited.

In addition, the Special Committee on Law Practice Continuity published "Planning Ahead: Establish an Advance Exit Plan to Protect Your Clients' Interest in the Event of Your Disability, Retirement or Death." The guide is available at the NYSBA website: [www.nysba.org](http://www.nysba.org).