



**REPORT AND RECOMMENDATIONS
ON MANDATORY RETIREMENT PRACTICES IN
THE PROFESSION**

JANUARY, 2007
NEW YORK STATE BAR ASSOCIATION
SPECIAL COMMITTEE ON AGE DISCRIMINATION IN THE PROFESSION



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The New York State Bar Association

I. Introduction

In his 2006 Inaugural Address, NYSBA President Mark H. Alcott noted the creation of our Special Committee to examine the issue of age discrimination in the legal profession. In a subsequent President's Message in the NYSBA Journal, President Alcott spotlighted issues that confront law firms and so-called "gray lawyers," and he asked our Committee 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." NYSBA Journal, July/August 2006

During the past six months, our Special Committee – comprised of a cross-section of lawyers in private firms, corporations and the public sector, a current and retired judge, and a management consultant – convened to address the issues raised by the Association President and our Mission Statement:

"The Committee shall study and report on practices in the profession that disadvantage lawyers because of age, including those that may arise from:

- law firm hiring and firing practices
- mandatory retirement policies
- "up-or-out" policies
- age-based hierarchical staffing of cases
- policies concerning retaining of counsel
- the fixing of time charge rates
- 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
- other age-discriminatory practices affecting attorneys, as the Committee may identify

The Committee shall take a balanced and objective approach in its examination of these issues, and its report will take into account the rationale and perspective of law firms or other legal employers and their policies and practices in these areas. If reform is needed, the Committee shall recommend steps to promote changes and end any age-related discriminatory practices affecting attorneys. The Committee's report shall recommend changes in law or policy, where appropriate, and shall set forth model policies, best practices and other guidance on these issues, to help facilitate positive changes and promote a more enlightened attitude on this subject within the profession.”

In confronting our task, the Special Committee made a number of decisions to guide our work. First, early on, we formed a view that the issues implicated by our Mission Statement were so important and complex that, given the constraints of time, to attempt to address all of them in a single report would unduly divert our focus and delay presentation of our recommendations. Therefore, we focused our efforts on an issue we felt to be of prime importance (although by no means the only significant issue): the practice of so-called “mandatory retirement” of law firm partners. However, as we note in our section contrasting practices in the public sector with those of private law firms, the practices employed in the former – in which age discrimination is clearly outlawed – provide important insights and suggest areas for future study by this or other committees.

Second, we decided that it was not our role to act as a court or arbiter of the legality of mandatory retirement practices. However, we decided that for the benefit of the bar, it was important to discuss in some detail the extensive legal developments that have been ongoing in the area of age discrimination. Recognizing that case law – such as that exemplified by the *Sidley Austin* case (discussed *infra*) – may ultimately play a much larger role than our recommendations in shaping the future practices of law firms, we nonetheless did not feel

