



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

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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

justified in predicting the future legal landscape or how individual law firms may fare if faced with legal challenges in particular cases.

Third, consistent with our decision to eschew judging the legality of mandatory retirement adopted by some firms, we determined to adopt a “best practices” template for our report, focusing instead on what practices might better serve law firms and their individual partners reaching “retirement age.” In educating ourselves, we became convinced that there is no natural division between senior lawyers and their firms, and that law firms are well-equipped to adjust existing policies to better serve their own interests and those of their partners and their clients.

We hope that our recommendations will serve as a beginning, not an end, for an examination of practices within our profession that disadvantage people solely because of age. It is also our hope that this initial effort will promote that process.

## **II. Current Lawyer Retirement Practices in New York**

Historically, large law firms have depended on the orderly departure of senior partners to allow for the progression of younger lawyers into the partnership and to facilitate the transition of the firm’s clients to new lawyers. The process of retiring these senior lawyers has not been a significant issue within the profession until relatively recently. However, as the first wave of post-World War II lawyers approaches their early to mid-60s, the issue of retirement has taken on increasing significance. In a relatively brief period of time, literally tens of thousands of

lawyers will reach the point at which most of their non-lawyer contemporaries will leave the active work force.

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 had 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 large number of lawyers who, within a narrow span of years, will all reach the chronological point at which most Americans retire will lead to renewed and urgent evaluation of how law firms should manage the experience of retiring from the partnership.

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 physical and intellectual demands of modern day law practice.
- Changes in society that have created within the profession more varied expectations and goals for retirement.

#### 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. Today, there is anecdotal evidence which suggests that because of the physical and mental demands of law practice, and because many lawyers have been able to provide financially for a comfortable retirement, many choose to retire from law practice between ages 55 and 70. Some pursue new careers in areas such as education, 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 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 most 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. 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 within firms is fierce even among the most senior partners. Also, as partners approach retirement age, there is concern 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 of age or older; and 27% of retired female lawyers were 65 years of age or older.

The Committee 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 by the opportunity to advance financially over their middle-working years; and senior partners, by the time they reach retirement age, have already benefited handsomely from a system that allowed them to prosper in part because of the retirement of those who preceded them. 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 we suggest 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 law firms either do not have written partnership agreements or, if they do have one, it does not include 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 at, for example, age 65, but 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:* 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 made 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 condition the retirement payment or the WIP/AR payment upon the retired partner's agreement not to compete with the firm by practicing with another law firm. 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. 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 (see discussion, *infra.*)

#### In-House Counsel and Public Sector Retirement Practices: A useful Model and Area for Further Investigation

The situation in both the corporate and the public sector varies considerably from the prevailing practice in law firm partnerships. As discussed *infra.*, 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.<sup>1</sup>

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 are no longer consistent with their responsibilities.

We also think it is important that, in the future, this Committee or others examine whether, due to the inability of the public and corporate sectors to mandate universal retirement

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<sup>1</sup> A notable exception is the requirement of mandatory retirement of judges in New York State. We understand that issue is currently being addressed by another Special Committee of the NYSBA.

premised solely on age, sub rosa practices that are, in effect, discriminatory have sometimes been employed, including such things as withholding salary increases, choice assignments, promotions or even initial hiring based on age so as to subtly discourage older attorneys from remaining in place.

We do not pass judgment on these issues but recommend that further studies be made in this area. The studies should be carefully designed and should be carried out utilizing information gleaned from bar associations, legal placement professionals, lawyers, scholars, researchers, foundations and government agencies. We also recommend that such a study on age discrimination in the legal profession be carried out using the study methodologies recommended by the EEOC's October 2003 study on Diversity in the Legal Profession (see their website at [eeoc.gov](http://eeoc.gov)). While retirement policies affecting attorneys employed by corporations would be one topic, the balance of the study would consider hiring, discriminatory pay, assignments and job title issues.

Funding sources for such surveys might be the American Bar Foundation or the New York State Bar Foundation or such advocacy groups as AARP. Other resources for assistance, as well as financing, might be the Senior Lawyers Division of the ABA and the Association of Corporate Counsel in cooperation with the NALP and the NALSC. In addition, New York-based government agencies with jurisdiction in this area may provide additional support or make available existing material gathered in the course of their own investigations or studies on age discrimination in hiring and retention in the legal profession.

### **III. THE STATE OF THE LAW OF AGE DISCRIMINATION AS APPLICABLE TO LAW FIRMS**

#### **A. INTRODUCTION**

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 twenty (20) or more employees, from discriminating on the basis of age against employees or applicants forty (40) years of age and older. 29 U.S.C. §§ 630(b); 631(a).

Like similar New York State and New York City statutes against age discrimination, the ADEA’s prohibitions generally cover all aspects of the employment relationship, from hiring, promotions and compensation decisions to discharge and mandatory retirement policies. 29 U.S.C. § 623(a)(1); N.Y. Executive Law § 296(1)(a) & (3-a)(a); NYC Admin. Code § 8-107(1)(a). There are few exceptions to these general prohibitions.

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 New York and federal laws against age discrimination. As also discussed below, the Code of Professional Responsibility in New York further makes it unethical and grounds for disbarment or other disciplinary action for an attorney or law firm to discriminate against applicants or employees due to age or other protected considerations.

Until recently, however, the involuntary or mandatory age-based retirement of law firm *partners* -- as “owners” and “employers” traditionally considered not to be subject the dictates of the ADEA or other anti-discrimination laws generally applicable only to “employees” -- was widely regarded as lawful and outside the permissible scope of review by agencies such as the Equal Employment Opportunity Commission (“EEOC”) and the courts. But now the law in this area is being refined in response to developments within the profession itself.

The concentration of control within a small fractional subgroup of the partners in increasingly large firms (some “megafirms” have a thousand or more lawyers) and 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* case demonstrates the extent to which the legal profession (at least amongst large law firms) has followed the trend towards 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 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.

