



**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.¹

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

¹ 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). 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.

B. NY ETHICAL PROSCRIPTIONS AGAINST AGE DISCRIMINATION

New York’s Disciplinary Rule 1-102(a)(6) provides that it is “misconduct” and grounds for attorney discipline for “[a] lawyer or a 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)(6). The rule also provides that, when a “tribunal with jurisdiction to hear a complaint” of discrimination issues a “final and enforceable” order, “as to which the right to judicial or appellate review has been exhausted, finding that the lawyer has engaged in an unlawful discriminatory practice,” such a finding “shall constitute *prima facie* evidence of professional misconduct in a disciplinary proceeding.”

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. There does not appear to be any case law treatment of the discrimination prohibitions of DR 1-102(a)(6) in the context of lawyers within a law firm, whether in the context of partners *vis-a-vis* non-partner lawyers or partners *vis-a-vis* other partners.

C. THE CENTRAL ISSUE: ARE PARTNERS “EMPLOYERS” OR “EMPLOYEES”?

The key inquiry is whether partners or shareholders qualify as “employers” and thus are not protected as “employees” under the federal Age Discrimination in Employment Act (“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 to 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 older); N.Y. Executive Law § 296(1)(a) ("It shall be an unlawful discriminatory practice . . . [f]or an employer or licensing agency, because of the age . . . of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment"); N.Y. Executive Law § 296(3-a)(a) ("It shall be an unlawful discriminatory practice . . . [f]or an employer or licensing agency to refuse to hire or employ or license or to bar or to terminate from employment an individual eighteen years of age or older, or to discriminate against such individual in promotion, compensation or in terms, conditions, or privileges of employment, because of such individual's age"); NYC Admin. Code § 8-107(1)(a) ("It shall be an unlawful discriminatory practice . . . For an employer or an employee or agent thereof, because of the actual or perceived . . . age . . . of any person, to refuse to hire or employ or to bar or to discharge from employment such person or to discriminate against such person in compensation or in terms, conditions or privileges of employment").²

² 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). The term "employee" is not affirmatively defined in either the state or city human rights laws, which both apply to employers employing at least four persons; and the city law counts independent contractors towards this minimum. N.Y. Executive Law § 292(5); NYC Admin. Code § 8-102(5). Both the state and city laws also define "person" to include "partnerships." N.Y. Executive Law § 292(1); NYC Admin. Code § 8-102(1). The ADEA and the NYC Human Rights Law allow plaintiffs to prove age discrimination under a disparate impact theory (*see Smith v. City of Jackson*, 544 U.S. 228 (2005); NYC Admin. Code § 8-107(17)); there is conflicting authority as to whether the state law allows plaintiffs to proceed on such a theory. *Compare DiMascio v. General Electric Co.*, 307 A.D.2d 600 (3d Dept. 2003), *Arendt v. General Electric Co.*, 305 A.D.2d 762 (3d Dept. 2003) and *Bohlke v. General Electric*, 293 A.D.2d 198 (3d Dept. 2002) with *Mete v. New York State Office of Mental Retardation and Developmental Disabilities*, 21 A.D.3d 288 (1st Dept. 2005), *Blumberg v. Patchogue-Medford Union Free School Dist.*, 18 A.D.3d 486, 488 (2d Dept. 2005) and *People v. NYCTA*, 59 N.Y.2d 343 (1983). In general, however, the interpretation of New York state antidiscrimination law follows the standards

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 towards 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).

**D. EEOC GUIDELINES ON PARTNERS/
SHAREHOLDERS AS EMPLOYERS OR EMPLOYEES**

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.”

The Compliance Manual also explains 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,

established under equivalent federal statutes. See *Rodal v. Anesthesia Group of Onandago, P.C.*, 369 F.3d 113, 117 n.1 (2d Cir. 2004).

officer, member of a board of directors, or a major corporate shareholder is an “employee” or an “employer,” the EEOC looks at the following six factors:

- 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.

E. THE *SIDLEY AUSTIN* CASE

The legal profession took particular notice of these issues when they were raised in a high-profile case involving the large Chicago-based law firm Sidley Austin. In *E.E.O.C. v. Sidley Austin Brown & Wood*, 315 F.3d 696 (7th Cir. 2002), the EEOC issued a subpoena to Sidley & Austin (as it was called in 1999) designed to determine, *inter alia*, whether thirty-two 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 twenty-five 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 to 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.

F. THE SUPREME COURT WEIGHS IN: *CLACKAMAS GASTROENTEROLOGY ASSOCIATES, P.C. v. WELLS*

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 were shareholders could be counted as “employees” for purposes of the statutory minimum number of employees for coverage under 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.*” (emphasis added). *Id.* at 446.

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. 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.*” (emphasis added). *Id.* at 450.

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.³

G. CASE LAW BEFORE *SIDLEY AUSTIN AND CLACKAMAS*

Although the *Sidley Austin* case has been spotlighted because of its implications for the legal profession, the analysis and issues *raised* therein reflect a line of authority going back to the 1980s involving not only law firms and medical professional corporations but also large accounting firms.

While the *Clackamas* case is certainly the starting point for analysis, the discussion will likely continue to be informed by those earlier decisions in which federal courts had developed some concrete, if not definitive (and *sometimes* overlapping) principles in addressing the question of whether partners qualify for protection under laws designed to prohibit discrimination on the basis of age or other protected categories.

First among these was the so-called *per se* rule, *i.e.*, that partners are *per se* not “employees” under federal antidiscrimination law (an interpretation that is almost certainly no

³ 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 the firm’s daily cash reports, had acted as managing partner for firm, was responsible for managing firm’s finances, was liable for firm 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 an offer 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 & Cohn, L.L.P.*, 408 F. Supp. 2d 374 (E.D. Mich. 2005) (discussing *Clackamas* test in considering argument that former “percentage partner” in law firm could pursue Title VII claim as an “employee”; although declining to resolve the issue without the benefit of discovery); *Simons v. Harrison Waldrop & Uhereck, L.L.P.*, 2006 WL 1698273 (S.D. Tex. June 14, 2006) (applying test set forth in *Clackamas* to determine whether partners in accounting firm organized as LLP should be counted towards 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 an 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”).

longer valid in light of *Clackamas*).⁴ Along similar lines, in *Hishon v. King & Spalding*, 467 U.S. 69, 79 (1984), Justice Powell concurred in the judgment that a law firm associate who was not promoted to partner could sue for sex discrimination under Title VII, but noted in his separate opinion that, despite the Court’s holding, the relationship *among partners* is not an “employment” relationship to which Title VII would apply. He also commented, however, that “an employer may not evade the strictures of Title VII simply by labeling its employees as ‘partners’.” *Id.* at 79 n.2.

A corollary to the *per se* test was the “choice of form” test espoused by the Second Circuit (among others), which posited that an organization’s corporate form, such as a professional corporation as opposed to a partnership, was dispositive in rendering shareholders of the former to be “employees” (even if in all respects such shareholders were the functional equivalent of partners in a partnership).⁵ Later the Second Circuit backed away from the rigidity of this view and began to examine the actual shareholders more closely in determining whether they were protected as employees in any given instance. For example, in *E.E.O.C. v. Johnson & Higgins, Inc.*, 91 F.3d 1529 (2d Cir. 1996), the court held that shareholder/directors of an

⁴ See, e.g., *Burke v. Friedman*, 556 F.2d 867 (7th Cir. 1977) (accounting firm partners were *per se* not “employees” counting towards Title VII’s 15-employee threshold; where partnership generally entails association of individuals managing and controlling a business as co-owners for profit, “we do not see how partners can be regarded as employees rather than as employers who own and manage the operation of the business”); *Holland v. Ernst & Whinney*, 1984 WL 1069 (N.D. Ala. Aug. 17, 1984) (plaintiff did not have ADEA claim because he was a partner).

⁵ See *Hyland v. New Haven Radiology Assocs.*, 794 F.2d 793 (2d Cir. 1986) (shareholder/director in radiology practice organized as professional corporation was an employee under ADEA, even though he was one of only four shareholders who divided profits and losses evenly; use of corporate form precluded analysis of economic realities to assess whether shareholder/director was more like partner); cf. *E.E.O.C. v. Dowd & Dowd, Ltd.*, 736 F.2d 1177 (7th Cir. 1984) (shareholders in law firm organized as professional corporation held not “employees” for purposes of Title VII threshold requirement of 15 employees, where they resembled partners in a partnership more than shareholders in general corporation with regard to management, control and ownership).

insurance brokerage were “employees” pursuant to the common law agency test, which examines: (1) whether the director has undertaken traditional employment duties; (2) whether the director was regularly employed by a separate entity; and (3) whether the director reported to someone higher in the hierarchy. Regardless of the fact that director compensation was based upon a percentage of the firm’s profits, directors were culled from senior managers and continued to perform daily employment duties, all of them worked full time for the firm, and all of them reported to senior members of the board. *Id.* at 1539-40.

Still another approach, the “economic realities” test, focused on the financial relationship between the putative “employee” and the organization.⁶ Other courts looked to a larger universe of factors potentially weighing on whether partners or shareholders should be counted as protected “employees,” in what has been typically referred to as the “totality of the circumstances” test.⁷

⁶ See, e.g., *Wheeler v. Hurdman*, 825 F.2d 257 (10th Cir. 1987) (partner in centrally-managed, 500-partner accounting firm was not an employee under Title VII, ADEA and Equal Pay Act, where she participated in the firm’s profits and losses, had partial ownership of assets of the firm, was exposed to liability as a partner, had voting rights in the firm and had an investment in the firm); *Jones v. Baskin, Flaherty, Elliott & Mannino*, 670 F. Supp. 597 (W.D. Pa. 1987) (attorney-shareholder in law firm organized as professional corporation held to be an employee protected under ADEA, where plaintiff did not receive firm profits or dividends but was paid as an employee, firm was managed by board of directors and committees not including plaintiff, plaintiff held less than one percent of outstanding shares and firm had considerable control over plaintiff’s work); *Fountain v. Metcalf, Zima & Co., P.A.*, 925 F.2d 1398 (11th Cir. 1991) (shareholder in accounting firm organized as professional association held not protected as “employee” under ADEA, where he shared in firm’s profits and losses, was liable for certain firm debts, had a thirty-one percent ownership interest and could vote on amendments to shareholders agreement, admission and termination of new members, and on draws and distribution of profits and income; facts that plaintiff was referred to as “employee” in two firm documents and that one shareholder exercised autocratic control did not alter the fact that the economic reality was that effectively he was a partner in the firm).

⁷ See, e.g., *Caruso v. Peat, Marwick, Mitchell & Co.*, 664 F. Supp. 144 & 717 F. Supp. 218 (S.D.N.Y. 1989), in which the court held that a “principal” in a centrally-managed, 1,350-partner accounting firm could be an “employee” under ADEA where he did not participate in operation and control of the enterprise. The plaintiff had little control over either New York office where he worked or over firm’s national business; his decisions regarding his own clients were subject to approval by senior

On a related note, in the few reported decisions addressing the issue of the ability of law firm partners to bring age claims under the New York State Human Rights Law, New York courts have rejected such claims.⁸ There do not appear to be any reported cases examining the issue under the New York City Human Rights Law.

partners; as a principal, he could not become chairman or deputy chairman (unlike other partners); he could not make any personnel decisions alone; and he was dismissed much like an ordinary employee. The only management power he had was to block a partnership appointment; his primary means of influencing management decisions was to make recommendations to the Partner in Charge; and such recommendations were given virtually the same weight both before and after his promotion to “principal” status. Although he had the right to vote, plaintiff’s vote was not weighted equally with other principals and partners, and even after being promoted to principal, he remained responsible primarily for client services rather than corporate management. Although his compensation was based on “units of interest” held in the firm, such units of interest were allocated on the basis of performance, and subject to change based on review of his work. *See also Simpson v. Ernst & Young*, 100 F.3d 436 (6th Cir. 1996) (nominal partner in centrally-managed, 2,200-member accounting firm was “employee” protected under ADEA; plaintiff “had no bona fide ownership interest, no fiduciary relationship, no share in the profits and losses, no significant management control, no meaningful voting rights, no meaningful vote in firm decisions, and no job security”); *Devine v. Stone, Leyton & Gershman, P.C.*, 100 F.3d 78 (8th Cir. 1996) (law firm shareholders/directors were not employees counting towards statutory minimum in Title VII; analysis is of whether shareholders/directors own and manage the business, including the ability to participate in setting firm policy, even if the right to participate is not equal among all shareholder/directors, and of capital contributions, liability for firm debts and profit-based compensation; plaintiff failed to support allegation that firm controlled work of shareholders/directors; fact that shareholders/directors received bimonthly salary not determinative where compensation based on profits, and evidence also showed that shareholders/directors made capital contributions, participated in development of firm policy and were responsible for firm debts); *Serapion v. Martinez*, 119 F.3d 982 (1st Cir. 1997) (plaintiff law firm partner not protected as an employee under Title VII, based on relevant categories of ownership, remuneration and management, where her compensation was based on firm’s profits, she was exposed to liability for firm debts, she made substantial capital contributions to the firm, received fringe benefits more extravagant than those offered to junior partners and associates, and served as voting member of executive committee and partnership board, regardless of whether other partners wielded more power than her); *Siko v. Kassab, Archbold & O’Brien, L.L.P.*, 1998 WL 464900 (E.D. Pa. Aug. 5, 1998) (partners in law firm organized as LLP may be employees for purposes of Family Medical Leave Act statutory minimum, based on totality of the circumstances, including management, ownership and control; court distinguished cases holding law firm partners not to be employees because they involved general partnerships where each partner was potentially subject to unlimited liability; court also denied summary judgment on issue of whether law firm’s “of counsel” attorneys were employees or independent contractors, since evidence was insufficient to determine whether “of counsel’s” work was performed on the premises of the law firm, whether firm exercised control or how hiring/firing power over “of counsel” attorneys and whether “of counsel” attorneys could refuse to work for the law firm and work for other general contractors instead).

⁸ *See Levy v. Schnader, Harrison, Segal & Lewis*, 232 A.D.2d 321 (1st Dept. 1996) (former law firm partner lacked standing to sue for age discrimination under New York State Human Rights Law because he was not an “employee,” citing Second Circuit’s *Hyland* decision, *supra* note 3); *Ballen-Steir v.*

H. 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 also trigger discrimination liability.⁹ Consequently, the

Hahn & Hessen, L.P., 284 A.D.2d 263 (1st Dept. 2001) (law firm partner could sue under New York State Human Rights Law based on events occurring when she was an associate, but not events occurring after she became a partner; court specifically held that plaintiff was a *bona fide* partner).

⁹ Significantly, neither the ADEA nor its state and city counterparts 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); New York State Executive Law § 296(3-a)(e); NYC Admin. Code § 8-107(1)(e)(iii). 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 Equal Employment Opportunity Commission (“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’s determines whether an individual is a “bona fide executive” based “on the functions performed by [an] employee, regardless of salary.” According to the agency’s guidelines, an individual is a “bona fide executive” if 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 in 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 by which he or she is employed). The EEOC’s guidelines also state that this “exemption does not apply to middle-management employees, only to top-level employees who exercise substantial managerial authority over a significant number of employees and a large volume of business. For example, the head of a significant and substantial local or regional operation of a corporation (such as

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 were 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. 2006), *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 unsettled application of law and practice in this area.

a major production facility), but not the head of a minor branch, would be covered by the term "bona fide executive." The heads of major departments associated with corporate headquarters operations, such as finance and legal, would also typically be covered by the term "bona fide executive." The EEOC's 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." For example, relying on *Whittlesey v. Union Carbide*, *supra*, the guidelines explain that an in-house attorney specializing in labor law, who exercised relatively minor supervisory duties over four other labor law attorneys, and who was far removed from the head of the Legal Department (being one of six attorneys who reported to one of eight assistant general counsel, who, in turn, reported to the general counsel), did not qualify as a bona fide executive or high policymaker where the individual in question also had only a modest impact on policy, had virtually no access to the high policymaking levels of management, and attended meetings of certain committees primarily for the purpose of providing legal advice.

The state and city laws both explicitly state that they do not affect retirement policies or systems which are not a "subterfuge" to evade their anti-age discrimination provisions. New York State Executive Law § 296(3-a)(g); NYC Admin. Code § 8-107(1)(e)(iv). *See* 29 U.S.C. § 623(f)(2). The state law, in fact, specifically states that it does not prohibit the termination of employment of a person who, even with reasonable accommodations, cannot physically perform his or her duties. New York State Executive Law § 296(3-a)(g). *See also Schutz v. Finkelstein, Bruckman, Wohl, Most & Rothman*, 275 A.D.2d 407 (2d Dept. 2000) (law firm's firing of a 60-year-old attorney [no suggestion plaintiff was a partner] because of need for lawyer with more litigation experience, held not to be a pretext for age discrimination under state law).

In sum, partners/shareholders in name only, in those law 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. 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 different 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).

I. 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. Courts in New York State generally approve of post-employment forfeiture-for-competition provisions in non-lawyer contexts, pursuant to what

is known as the “employee choice doctrine,” which postulates that an “employee who elects to leave a company makes an informed choice between forfeiting a certain benefit or retaining the benefit by avoiding competitive employment.” *Lucente v. Int’l Bus. Machines Corp.*, 310 F.3d 243 (2d Cir. 2002).

When the employee in question is a lawyer, though, New York’s attorney ethical rules provide an additional constraint to bear in mind. New York’s Code of Professional Responsibility, Disciplinary Rule 2-108(a), entitled “Agreements Restricting the Practice of a Lawyer,” states that “A lawyer shall not be a party to or participate in a partnership or employment agreement with another lawyer that restricts the right of a lawyer to practice law after the termination of a relationship created by agreement, except as a condition to payment of retirement benefits.” 22 NYCRR § 1200.13(a).

New York courts have consistently held that law firm partnership agreements that impose forfeiture penalties, significant monetary penalties for withdrawing partners who practice competitively with their former firm, even if the agreements do not prohibit competition outright, constitute an impermissible restriction on the practice of law, violative of New York’s Code of Professional Responsibility. In *Cohen v. Lord, Day & Lord*, 75 N.Y.2d 95 (1989), the Court of Appeals held unenforceable as against public policy a provision in a law firm partnership agreement which conditioned payment of earned but uncollected partnership revenues upon a withdrawing partner’s obligation not to compete. According to the Court of Appeals, while the provision in question did not expressly or completely prohibit a withdrawing partner from engaging in the practice of law, the monetary penalty it exacted if the withdrawing partner practiced competitively with the former firm was weighty enough to constitute an impermissible

restriction on the practice of law in contravention of DR 2-108(a). The court added that “the forfeiture for competition provision would functionally and realistically discourage and foreclose a withdrawing partner from serving clients who might wish to continue to be represented by the withdrawing lawyer and would thus interfere with the client’s choice of counsel.” *Id.* at 98.¹⁰ New Jersey courts have reached a similar conclusion.¹¹

¹⁰ *Denburg v. Parker Chapin Flattau & Klimpl*, 82 N.Y.2d 375 (1993) (relying on *Lord, Day* and holding that a provision in a partnership agreement which required the withdrawing partner to forfeit a percentage of the higher of his past or future earnings in the event the withdrawing partner practiced law in the private sector within two years of withdrawal was unenforceable as against public policy because the effect of the clause was to improperly deter competition; interpretation of DR 2-108(a) expanded such that restrictions on the practice of law that “include ‘financial disincentives’ against competition as well as outright prohibitions are objectionable primarily because they interfere with the client’s choice of counsel”); *Judge v. Bartlett, Pointiff, Stewart & Rhodes, P.C.*, 197 A.D.2d 148 (3d Dept. 1994) (holding that an attorney’s employment agreement that specified that he could not engage in the practice of law within a 30-mile radius of any office of defendant for a period of five years and that, in the event the covenant not to compete was violated, he would forfeit 75% of all future payments of the termination benefits, was void and unenforceable since it imposed financial disincentives against competition); *McDonough v. Bower & Gardner*, 226 A.D.2d 600 (2d Dept. 1996) (holding unenforceable a partnership agreement which forced a withdrawing partner to forfeit \$600,000 in earned but uncollected partnership monies if he continued practicing law after his withdrawal; court also found that, since the distribution provision constituted an earned but uncollected sum owed to the plaintiff during his tenure with the firm as opposed to a future, anticipated distribution in contemplation of retirement, provision was not a valid retirement benefit as permitted by DR 2-108(a)).

Although these cases illustrate that a lawyer can sue to invalidate a non-compete provision which violates DR 2-108(a), one federal court recently held that an attorney does *not* have a private cause of action for money damages based solely on a breach of the disciplinary rule itself. *Karas v. Katten Muchin Zavis Rosenman*, 2006 WL 3635330 (S.D.N.Y. Dec. 12, 2006). In *Karas*, the court dismissed the plaintiff lawyer’s claim for money damages based on an argument that his post-employment non-competition agreement – under which he would continue to be compensated for three years after his employment had ended – violated DR 2-108(a) and thus constituted an unlawful restraint of trade. The court distinguished *Lord, Day* and *Denburg* on the grounds that those cases involved breach of contract claims wherein plaintiffs argued that the law firms had improperly denied them monies they were contractually owed on the basis that they had violated their (invalid) noncompetition provisions. In contrast, in *Karas*, the law firm had made payments to the plaintiff to which he was contractually entitled and in fact eventually released him from his noncompetition obligations in the course of the litigation. Under these circumstances, the fact that *Karas*’s non-compete may have violated DR 2-108 could not itself constitute a breach of the contract in which such unenforceable obligations were found, and thus he had no independent damages claims. *Id.* At *3.

¹¹ *See Jacob v. Norris, McLaughlin & Marcus*, 128 N.J. 10 (N.J. 1992) (holding that an agreement signed by plaintiffs stating that they would lose compensation if they continued to represent firm clients within a year of departure, violated New Jersey’s Rule of Professional Conduct 5.6, which forbids outright prohibitions on the practice of law; by “forcing lawyers to choose between compensation and continued service to their clients, financial disincentive provisions may encourage lawyers to give up their

That is not to say that all provisions for the forfeiture of post-employment benefits based on a lawyer's subsequent pursuits will violate DR 2-108. In *Hackett v. Milbank, Tweed, Hadley & McCloy*, 86 N.Y.2d 146 (N.Y. 1995), the New York Court of Appeals declined to vacate an arbitrator's award enforcing a provision in a partnership agreement which reduced certain supplemental payments (above and beyond the departing partner's right to his or her capital contributions and undistributed net profits) in an amount equal to the excess of the former partner's earned income over \$100,000 from any source. The arbitrator had reasoned that enforcement of the provision did not violate *Lord, Day* because it did not require forfeiture of an earned interest and did not discourage competition with Milbank, Tweed (since the forfeiture was based on earned income from any source, whether in competition with the firm or not), and the Court of Appeals agreed.¹²

clients, thereby interfering with the lawyer-client relationship and, more importantly, with clients' free choice of counsel"); *Katchen v. Wolff & Samson*, 258 N.J. Super. 474 (N.J. Super. Ct. App. Div. 1992) (relying on *Jacob* to hold that the financial disincentive provisions contained in partnership termination agreements that provided for forfeiture of plaintiff's equitable interest in the law firm upon his voluntary withdrawal from the firm had indirect restrictions on the practice of law and thus were unenforceable as violative of Rule 5.6).

¹² See also *Bailey v. Fish & Neave*, 7 Misc. 3d 1023(A) (N.Y. Sup. Ct. 2005) (finding valid an amendment to the partnership agreement that transitioned the firm from an accrual-based to a cash-based accounting system and, in doing so, caused each withdrawing partner to forfeit his or her full amount of capital contributions, accrued compensation and share of contingency fees; according to the court, where a provision in the partnership agreement conditions the payment of a share of uncollected revenues upon a withdrawing partner's obligation to refrain from competing with his former firm -- such as in *Lord, Day* -- it is an unenforceable restraint on the practice of law; however, a provision which applies to all withdrawing partners, regardless of whether they subsequently practice law in competition with the former firm, does not; restructured and reduced payments to withdrawing partners set forth in the amendment to the partnership agreement applied to all withdrawing partners, and did not discriminate against such partners who went into competition with the firm), *aff'd*, 30 A.D.3d 48 (1st Dept. 2006); *Seiden v. Gogick, Seiden, Byrne & O'Neill, LLP*, 21 A.D.3d 891 (2d Dept. 2005) (finding valid a partnership agreement that only entitled a withdrawing partner to a portion of the firm's profits, but not the firm's net assets, such as its accounts receivable, work in progress and cash in the bank; court determined that under partnership agreement, plaintiff's post-withdrawal rights were fixed regardless of his post-departure conduct or competition with firm and, accordingly, partnership agreement did not impose an unlawful forfeiture on the withdrawing partner or violate public policy as reflected in DR 2-108(a)).

Notably, the Court of Appeals did not base its decision on the exception within DR 2-108 for those forfeitures associated with a “condition to pay retirement benefits,” which makes sense in light of the fact that the plaintiff had left Milbank for a lucrative partnership at Fried Frank, another large law firm. The “retirement benefits” exception to DR 2-108(a), however, continues to be a carve-out which is potentially relevant to the discussion of age discrimination in the legal profession, and demonstrates that all post-employment forfeiture provisions involving lawyers need not be viewed as presumptively unenforceable even in light of the Court of Appeals’s holding in *Lord, Day*.¹³

IV. RECOMMENDATIONS

It is the consensus of the Special Committee 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 the Committee recognizes that the contractual nature of the

¹³ See, e.g., *Karas v. Katten Muchin Zavits Rosenman, a Partnership*, 2006 WL 20507 (S.D.N.Y. January 3, 2006) (denying summary judgment as to validity of non-compete where there was ambiguity as to whether payments to be forfeited were intended as retirement benefits); *Graubard Mollen Horowitz Pomeranz & Shapiro v. Moskowitz*, 149 Misc. 2d 481, 485 (N.Y. Sup. 1990) (stating in *dicta* that “[a] firm may . . . require an attorney not to represent its clients or not to practice law at all while receiving retirement benefits, but if the attorney decides to forego those benefits, then he may practice and clients may freely avail themselves of his services”).

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 client as they grow older because their years in practice give them a perspective and judgment that is simply not available to younger lawyers; 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. The Committee is 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 transition them 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 conjunction 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 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 retirement age for partners of 65, 68, 70 or 72, 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 life-style 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.¹⁴ 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 law 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 bar association activities that will benefit the profession. 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

¹⁴ It is of interest to note that when a partner loses equity status but continues in the active practice of law for the same law firm, he or she may then be covered by the Age Discrimination in Employment Act as discussed above.

senior partner other than simple retirement, including compensation adjustments, title adjustments, and new work projects.

In this Committee's 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 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. Whether or not the law firm determines to treat a partner after a certain age as a "partner" or assigns some other title such as "Of Counsel" or "Senior Counsel" is, in this Committee's view, not nearly so important as 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.

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 this 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 insecurity, 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 making meaningful contributions are not doing justice either to the firm or the senior partner. Rather than continue the rigidity associated with mandatory age based retirement, those law firms should evaluate the individual senior partner's continuing contribution to the firm's well-being by making the following assessments: (i) the partner's abilities at client origination and development, (ii) the partner's abilities and willingness to service those and others of the firm's clients, (iii) the partner's abilities to transition responsibility for clients to other and younger partners, (iv) the partner's productivity in billable hours, (v) the partner's participation in significant non-billable activities that, in the firm's view, benefit the organization, including firm sponsored *pro bono* activities, and (vi) the partner's cooperation and teamwork to advance the overall interests of the firm consistent with the partner's family or other outside interests.

In making these recommendations, the Committee is not passing judgment on whether the law firm and the senior partner should convert their relationship to one other than partnership; nor is it undertaking to prescribe the precise compensation arrangement between them. Rather, the Committee simply recommends 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.

Finally, as we note in the Introduction to this report and observe in our subsection on In-House Counsel and Public Sector Retirement Practices, our Committee's focus on the issue of mandatory retirement should not obscure the desirability of examining other practices within the profession that may cause disadvantage on account of age. It is our hope that our Association

will examine these practices as part of its continuing effort to assist the profession and serve the public interest.

New York State Bar Association
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APPENDIX

During the course of its work, the Committee had available to it an extensive bibliography of material related to the issue of age discrimination and practices in the profession. In addition, the Committee availed itself of the opportunity to interview, in plenary session, individuals whose experience was valuable in helping us reach our conclusions and frame our recommendations. A listing of these resources follows:

<u>Guests</u>	<u>Affiliation</u>
Charles K. O'Neill, Esq.	Managing Partner of Chadbourne & Parke LLP
Lawrence T. Gresser, Esq.	Managing Partner of a 4 year old firm of 21 lawyers.
Carol M. Kanarek, Esq.	Law firm consultant and legal career advisor
Alan S. Jaffe, Esq.	Retired Chairman and Managing Partner of Proskauer Rose LLP
James C. Cotterman	Principal, Altman Weil Inc., legal consultants
Gilson Gray, Esq.	Retired partner of Hughes Hubbard & Reed LLP
Bradford W. Hildebrandt	Chairman, Hildebrandt International, legal consultants

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