

NYSBA Committee Urges End to Mandatory Retirement

BY LAZAR EMANUEL

Who among us does not know personally a number of lawyers in their 70's or 80's who complain bitterly about their forced retirement from a law firm to which they devoted a lifetime of loyalty and dedication?

Now, a special committee created by NYSBA President Mark H. Alcott has concluded that mandatory retirement of older lawyers ("gray lawyers") is "unacceptable," "unwarranted," and "unwise." "A lawyer's age, standing alone, is not an appropriate criterion for determining professional capacity or employment status." The committee was chaired by Mark C. Zauderer of Flemming Zulack Williamson Zauderer LLP and consisted of law firm partners, corporate counsel, public sector lawyers, judges and one management consultant.

The committee was asked to study and report on all practices in the legal profession that disadvantage lawyers on account of age, including hiring and firing practices. However, responding to the wide range and complexity of the prevailing issues, it decided to limit its report to the issue of mandatory retirement of law firm partners. Although the report specifically avoids advising whether mandatory retirement practices in law firms are legally enforceable – an issue that will be decided by the courts – it does discuss "the extensive legal developments" that have taken place in the area of age discrimination.

Current Retirement Practices

The legal profession has undergone many dramatic changes in the years since World War II. Several factors have contributed to make the issue of retirement more urgent: 1) the median age of practicing lawyers has increased from a median of 46 in the year 1960 to the point at which, by the year 2018, there will be a large number of lawyers who, "within a narrow span of years, will all reach the age at which most Americans retire;" 2) the number of lawyers in the U.S. has increased from 300,000 in 1960 to more than 1 million; 3) the number of lawyers in most firms has grown exponentially; 4) the practice has become more demanding, both physically and intellectually; and 5) changes in social attitudes have created a greater variety of retirement expectations and goals.

A study by the American Bar Foundation reported by the *National Law Journal* in May, 2005 disclosed the following:

- 1) 37% of all law firms have a mandatory retirement age;
- 2) 57% of law firms with more than 100 lawyers have a mandatory retirement age;
- 3) only 13% of firms with fewer than 10 lawyers have a mandatory retirement age;
- 4) the common age for mandatory retirement is 70;
- 5) 57 is the average age for early retirement by lawyers. Somewhat surprisingly, the committee reported that law firms with fewer than 100 lawyers do not usually have written partnership agreements, "or if they do have one, it does not include retirement provisions." In firms with written

provisions, retirement is linked to the lawyer's age, usually between 65 and 70. The provisions usually fall into two categories. In one, the lawyer must give up his equity interest at the mandated age; in the other, a lawyer who reaches the prescribed age remains in the partnership, but for a limited term and, usually, at a declining rate of compensation; at the end of the term, the lawyer leaves the partnership.

A lawyer who retires can expect to receive a variety of treatments. She is sometimes permitted to continue working as a non-equity "partner" or "special counsel," either without pay or at an hourly rate. In some firms, she is not permitted to remain at all. Those firms which permit the lawyer to remain sometimes provide the lawyer with an office and secretary.

Many firms condition non-vested monetary retirement payments on the retired partner's agreement not to compete with the firm by practicing with another law firm; in most cases, the condition does not extend to employment which is not law-related, and, even, to employment as corporate general counsel.

The issues surrounding restrictive covenants affecting lawyers are still in flux. They are affected by provisions in the New York Code of Professional Responsibility and by federal and state statutes and regulations prohibiting age discrimination. Generally, the central question is: is a law partner an "employee" of the firm as that term is defined in the statutes? [Editor's note: We will discuss this question and the case of *E.E.O.C. v. Sidley Austin Brown & Wood*, 315 F.3d 696 (7th Cir. 2002) in the April issue of NYPRR.]

In rejecting the concept of mandatory retirement, the special committee reached the following consensus:

- age-based retirement is inconsistent with generally accepted employment practices in the U.S.;
- the practice compels the law firm to lose the benefit of productive partners simply because of their age;
- firms which make a more substantive, individualized and qualitative analysis of a partner's performance, instead of relying solely on her age, find that this is an important factor in the firm's well being.
- Many lawyers achieve their greatest value to clients as they age – their years of experience give them a perspective and judgment which cannot be matched by younger lawyers.