

## Practicing Law in the Era of Mandatory Retirement

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When I first met "Mark" for lunch this summer, he appeared to be in his mid-fifties, in excellent health, and talked about his competitive tennis game, needing to put his teenage kids through college and his thriving legal practice that he couldn't imagine giving up in the next 10 years. In reality, Mark was 64, faced forced retirement from his firm in nine months, and wanted to know what his options were for moving laterally to another firm.

As a legal recruiter, I have met a growing number of lawyers like Mark who are bumping up against their firms' mandatory retirement age. This trend will, in fact, accelerate over the next five years for several reasons. Like other sectors of the economy, the Baby Boomers have had a dramatic effect on lawyer demographics. About 60 percent of law partners are now 55 or older and, by some estimates, a quarter of all practicing attorneys will be 65 or older by next year. At the same time the population is graying, however, it is also living longer. Especially with the increasing number of women in the legal profession, the life expectancy of lawyers who are 65 is now almost 20 years, with most of that time spent in good physical and mental health. Finally, the recent downturn in the economy has also caused some lawyers to postpone retirement as their nest eggs have dwindled.

Objectively, there is no question that most older lawyers are up to the challenge of practicing law. Like Mark, the ones with whom I work are almost uniformly in good shape, like what they do and have no interest in retiring for at least another five to 10 years. (The most impressive example of a seasoned lawyer still in his prime I have encountered is Jacob Stein; last spring he asked me to be a guest speaker at the Georgetown Law seminar he teaches on the legal profession along with fellow octogenarian Williams & Connelly lawyer Jeremiah Collins; both maintain active law practices and are as sharp as ever.)

Retirement for the legal profession is similar to the rest of

the economy. Early retirement generally occurs between ages 55 (slightly earlier than the national average) and 62. Normal retirement remains at 65, the historical retirement age under Social Security. Traditionally, law firms didn't have a retirement policy; lawyers worked as long as they wanted to.

Mandatory retirement became popular in the 1980s. The common wisdom then was that the law profession was changing and required a fresh flow of youthful talent. The rationale was that older, less vibrant partners should step aside and let the younger, supposedly hungrier, lawyers take over the reins, thus allowing for an orderly succession of firm leadership and the handing off of client relationships to the next generation. Firms also wanted to introduce consistency and remove the need for a case by case evaluation of each partner's situation that could lead to charges of discrimination.

On the other hand, mandatory retirement has a number of disadvantages. In many cases, partners who hit the established age are still productive and profitable; in some cases it simply doesn't make business sense to jettison such a contributor. Further, the EEOC brought a suit against Sidley & Austin that it had violated the Age Discrimination in Employment Act because the firm had demoted 32 of its partners solely on the basis of age (the Sidley case primarily involved the question of whether the partners were, in fact, employees rather than owners and thus subject to the ADEA). Finally, in 2007 the ABA called for an end to mandatory retirement, determining that no legitimate reason justified such an arbitrary and inflexible policy. As a result of these drawbacks, several firms such as K&L Gates and Pillsbury decided to drop the mandatory requirement of their retirement policies in the last several years.

Nevertheless, today more than half of large law firms have a mandatory retirement age on the books (though some discretion remains in certain cases) Mandatory retirement



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is generally between ages 65 and 75, with 70 as the most common choice. Some firms have a hard and fast rule that the lawyer must leave the firm at a certain age – White & Case and Wilmer Hale, for example, require lawyers to leave the firm at 65. Others have a transition phase during which the equity of partners is reduced over several years (Winston & Strawn, for example, has a four-year transition period beginning at 65). Another model is the mandatory conversion from partner to senior partner or senior counsel, such as the one in place at Squire Sanders.

The good news for older productive partners who don't want to hang up their briefcases is that there are plenty of top-level firms that would gladly welcome them into their partnerships. To be in a position to make a late career lateral move, such lawyers should begin the process of finding a new home at least a year before the drop-dead date. Like in any lateral partner move, potential firms will be interested in the portable business that will likely come with the lawyer. This usually entails the lawyer preparing a business plan that briefly describes the nature of their practice, identifies key existing clients and potential clients if the move occurs, and a three- to five-year history of fees billed and collected and hours worked. Unlike other laterals, a senior partner must also convince a new firm that he or she is committed to practice law full time for at least three and usually five more years to make the hire cost-effective.

Planning for a move like this is critical given the number of potential pitfalls. I recently spoke with a retired partner at a major firm who had followed to the letter the firm's policies and had handed off his substantial book of business to younger partners at the firm. He said he tried retirement, but soon grew bored with golf and just hanging around the house (which was also putting material stress on his marriage), and reminisced about how much he had enjoyed the practice of law. I had to confirm to him what he already

thought, that returning to a firm at his age without business in this economic climate was virtually impossible.

Given the competing interests involved, it is not surprising that firm retirement policies are in a state of flux. Sheppard Mullin, for example, chose recently to extend its retirement age after losing a number of profitable older attorneys, while many other firms are reviewing their policies. My firm, Veritas Lex, has just conducted a survey of the retirement policies of the large firms in Washington and we would be delighted to share the results with anyone interested in the topic.

Mark, by the way, is now happily practicing law at a firm without a mandatory retirement policy and his tennis game continues to improve.

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