The ADEA, Your Partner, and You
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A tale of three aging partners and their firms:

John doesn’t bound up the stairs and greet the staff with the old exuberance. A few of the young lawyers attribute it to “getting past it.” Of course, they are never going to be in that spot because they initiate ideas and bring in clients that John could never reach. Just last week Tim landed a new client from a software/electronic publishing firm. “John wouldn’t have gotten past the guy’s tattoo,” says Tim. “Maybe it’s getting time for him to hang it up.”

John says, “Clients really aren’t that different from 30 years ago; industries may change, but human nature doesn’t. What depresses me is the atmosphere at the office. For the first time in my life, I can feel that the knives are out for me, and I think the reason is that I’m now among the three oldest attorneys in the firm. One has heart trouble and has already announced his retirement, and the other has voluntarily reduced his hours so he can play all the golf he wants. I still feel great and want to practice, but lately, the atmosphere has changed. I would like to see how productive those fellows would be if they felt the ax hanging over their head every time they came in the door.”

Jane has encountered some sex discrimination ever since she graduated from law school, one of three women in her class. That she knows how to fight or finesse. Last week, she lost her job. It was her partner’s two daughters who orchestrated her dismissal. When she got over the shock, she realized that, except for their dad, the two women have eased out everyone over 40 since they joined the firm three years ago. Now Jane is wondering, to her own astonishment, if she is the victim of age discrimination.

Finally, Bill, a senior partner, has a real dilemma. Bill and Jerry joined the firm in the same month. They have been a team through thick and thin, but Jerry just doesn’t contribute anymore.

By Journal Staff

Brian Roberts and Janice Pasaba contributed to this article.
An internal audit has revealed that he billed only 785 hours last year and brought in one new client, a minor traffic claim. The local market has become a lot more competitive and it isn’t fair to the rest of the staff when Jerry doesn’t pull his weight. Bill wants to let Jerry go, but is afraid that Jerry will sue for discrimination even though the numbers show that he is no longer productive.

Federal and state legislation governs discrimination against older people, including law practitioners. The number of age discrimination complaints filed with state and federal authorities more than doubled in the 1980s. In 1984, *Hishon v. King & Spalding* [467 U.S. 69, 104 S. Ct. 2229 (1984)], a sex discrimination case, signaled the end of relative immunity from employment-related litigation for law firms. In *Hishon*, a woman successfully sued after being denied a partnership on the basis of gender. The court considered partnership to be one of the terms of the contractual employment relationship and noted that such relationships may be informal as well as formal. Essentially, the employer in *Hishon* was unable to demonstrate that the firm’s ability to function was “inhibited” by considering employment decisions on the merits. It only takes a minor leap of logic to recognize that this same standard may be applied to age, race, and similar status-based criteria of employment.

The legal marketplace is ever more competitive. As firms have grown to once unimaginable sizes, the rules of the game have been revised. As the profession expands, collegial mores have receded and the individual with a grievance is more likely to file suit. As the Senior Lawyer’s Division has noted, the young go-getters in a law firm may force retirement on the founding partners for lack of productivity, perceived or actual. By 1991, at least 15 cases were reported of law firms sued under the federal antidiscrimination laws. As with other professional entities, a significant proportion of the litigation by lawyers and their organizations involves age discrimination in hiring, promotion, and termination.

Pertinent federal provisions include the Age Discrimination in Employment Act (ADEA) of 1967 [29 U.S.C. §§ 621–34] and the Civil Rights Act of 1964 [Title VII, 42 U.S.C. §§ 2000e–2000e-17, including amendments of 1992]. The two acts have virtually identical language proscribing bias, and Civil Rights Act litigation has generally taken the lead in interpretations later adopted for the ADEA. For impaired practitioners, the Americans with Disabilities Act (ADA) of 1990 offers a strong proscription against employment discrimination. Most states have parallel provisions for federal statutes that may set more stringent standards for employers. All prohibit certain types of discrimination against employees, a category of workers that clearly includes law associates and corporate counsel.

Some firms have felt secure because “we’re too small to be affected by these laws.” However, smallness is no guarantee of protection. In *EEOC v. Rinella & Rinella*, the court issued both temporary and permanent relief to prevent gender discrimination in a small law firm. The firm did not wish its employees to belong to a group called Women Employed and was sued; the firm asserted that provisions of Title VII did not apply both because of the size of the firm and because it did not affect interstate commerce. Because Title VII applies to firms employing 15 or more employees, the issue became whether the firm was a partnership. In this instance, because the law firm was not a partnership, the attorneys working there were counted as employees, thus supplying the official minimum number necessary for suit. Alternatively, the firm was also found to be active in interstate commerce by virtue of its long-distance telephone usage, out-of-state travel by firm members, and the purchase of office equipment and law books from other states. Many, if not most, law offices will meet the minimum size requirement (15 for Title VII and 20 under ADEA) and/or participate in commerce.

The coverage of partners is also problematic. As recently as five years ago, all decisions favored the defendant firm, holding that aggrieved partners were not entitled to protection because their implied control and profit sharing distinguished them from “employees.” In the mid-1990s, however, some partners began filling roles similar to those of employees, and the law has started to recognize the trend. Plaintiffs have stronger cases when they are not among...
managing partners, have undertaken few new duties associated with partnership status, and have no ownership interest in the firm.6

The experience of other professions that organize as partnerships and professional corporations is relevant to the ways law firms must readjust policies to reflect this new reality. For example, in Caruso v. Peat, Marwick, Mitchell & Co., an accounting firm lost an age discrimination suit filed by a 50-year-old partner who was terminated for failure to bring in enough business. The court's decision relied upon factors delineated in Hyland v. New Haven Radiology Associates, P.C., a physicians' corporation. The Hyland "economic realities" factors to determine whether partnership exists include (1) whether the individual has actual control and management responsibility for decisions, (2) whether compensation is a fixed salary, characteristic of employees, or whether the person receives a percentage of the business profits, typical for a partner, and (3) whether the person has a very high level of job security, another earmark of partnership. It is these tests, not the worker's title, that determine partnership. Although partners in large firms such as Peat Marwick are more likely to fit favorable fact patterns for successful suit, the size of the firm does not alone impact the outcome of suit. Where there is no partnership, the employee is entitled to sue.

One important limitation on ADEA protection bears mention: Forced retirement is not prohibited when the worker over 65 has been a bona fide executive or high policymaker for the two years preceding the termination. The individual must be eligible for annual pension benefits of at least $44,000, in addition to the worker's own contribution and Social Security. The ADEA exception is narrow in scope and focuses on duties the individual performed in policy formulation and executive responsibility.

The Trend to File Suit Fits Social and Legal Trends
One factor influencing the trend to file lawsuits is the increasing number of attorneys practicing in large firms.8 Simultaneously, a growing number of corporations have hired in-house counsel, in part to supervise relationships with external law firms. The legal market has become much more competitive, and firms have become far more entrepreneurial and efficiency-oriented. Many have limited the number of associate promotions, and removed or demoted unproductive partners.

The new, client-oriented professional firms are to some extent influenced by stereotypical expectations in work assignments and associations. Clients are courted by traditional means, such as golf afternoons and close social contacts, and may express preferences for a traditional legal representative: a tough-sounding, middle-aged white male. Such stereotypes generally disfavor older workers, particularly those with physical disabilities who may not project a powerful image or appear to have the stamina for prolonged negotiations, trials, or business travel.

Unwarranted stereotypes might play only a minor role in attitudes toward older workers, however. Without a doubt, the dismissal of an unproductive lawyer is essential to maximizing a firm's long-term profitability. Whether an older, perhaps ailing, lawyer continues to contribute to the well-being of the firm is a complex and sensitive decision. Dealing with conflicting pressures requires knowledge of the individual's rights and choices. Imposing change, from the firm's perspective, is a risky business that calls for careful planning to maintain professional morale as well as to protect against successful discrimination suits.

Post-Retirement Practice as a Choice
The older attorney and the firm both profit when each can achieve their goals: secure income and meaningful work for the individual, and profitability for the organization. The hallmarks of efficient management include advance notice of rules governing productivity, management by objective, which provides a basis for performance evaluation, and consistency of treatment for all lawyers in the firm.

Severance and early retirement agreements may induce withdrawal with dignity and financial security, while maintaining for remaining workers the image of the firm as a good, humane place to work. Early retirement plans do not violate the ADEA, provided participation is voluntary; in other words,
the choice cannot be to take the money and leave or be fired. Typical terms include the retiree's agreement not to practice law in the geographic and substantive areas served by the firm, and a waiver of claims against the firm acknowledging the agreement to retire is knowing and voluntary. Such releases are governed by the Older Workers Benefits Protection Act [29 U.S.C. Sec. 626(f)(1)], which among other provisions requires the agreement refer specifically to the ADEA, omit any waiver of claims arising after the date of the waiver, and be supported by consideration in addition to the individual's existing entitlements. The individual must have at least 21 days to consider the agreement and 7 days to revoke after signing. In return, the individual receives a substantial cushion to ease the way to retirement.

Planning for retirement is good business both for the firm and for the individual attorney. A written policy and clear-cut retirement plan not only protects the firm but also is very attractive to current employees and job candidates. If there is no plan, employees may need to broach the issue, to responsibly plan for the future both personally and professionally. It has even been suggested that the ABA investigate a uniform policy on retirement. Another solution is to initiate alternatives that meet the needs of the firm while allowing some choices to their attorneys. For example, some firms meet their pro bono responsibilities by using the services of partners who want to reduce their workload but continue to serve the community as lawyers.

**Hiring of Senior Attorneys**

Antidiscrimination provisions may also assist older attorneys, who in record numbers are out of work and seeking new situations. During 1993, the Equal Employment Opportunity Commission (EEOC) in New York began investigating the common recruitment practice of favoring candidates with only two or three years of experience over a more seasoned practitioner willing to work for the same compensation. The EEOC asserts that seeking candidates with less than a specified number of years' experience may violate the ADEA since the overwhelming majority of qualified applicants with lesser experience will be in their 20s and 30s.

**Extra Protection Regardless of Age: The ADA**

The ADA's broad definition of "disability" makes a powerful tool against discrimination because of physical or mental impairments. The firm has obligations to an attorney with a disability not only to refrain from discrimination but to make accommodations that do not cause the firm "undue hardship." For example, an attorney in need of recurrent therapy, whether mental or physical, is likely to be protected from discrimination by the ADA.

More difficult questions are posed by symptoms that affect clients' perceptions, such as disfigurement or speech impairments, which do not affect the quality of legal reasoning or pace of work output. In such cases, the principal problem is not a real deficit in ability but rather that the lawyer affected is "regarded as having such an impairment." The firm that limits an affected individual's work opportunities has a defense against an ADA claim if it can show that the lawyer is no longer "qualified" to practice in his or her former role, and if the requirements prompting the changes are "job-related and consistent with business necessity" so the impairments cannot be reasonably accommodated.

From the individual, the recognition of impaired work ability may call for a new commitment to a standard of personal best. Facing the trials of illness and chronic disability can be a new source of strength and empathy with colleagues and clients. Confronting the results of debilitating lifelong habits, including "Type A" overwork and alcoholism, can similarly provide a new sense of worth. One "accommodation" assisted by most state bar associations is lawyer assistance programs (LAPs), which can arrange lawyer-to-lawyer counseling on such common burdens as behavioral disorders and depression.

**The Future of Discrimination Suits**

An additional reason to discuss these issues is the changing demographics of the profession. During the period 1977 to 1989, the value of legal services provided grew at nearly twice the rate of gross national product. This growth reflects tremendous
expansion in the service sector of the economy, a characteristic of the new economy. This, combined with the enlarged role of the federal government, has meant that corporations need more services to deal with corporate liability, regulatory agencies, and the problems associated with business growth. Competition in the legal market intensified during the early 1990s as the economy slowed and remains fierce despite the improved economy.

The acute competitive atmosphere has compelled managing attorneys to review staffing, demoting or eliminating partners and associates who are not fully productive. New systems of evaluation applied to tools such as computers and cellular phones have increased the efficiency quotient in law offices. Attorneys who operate at a different pace or who are not perceived as marketable may face discrimination because of age, disability, or other deviation from the "ideal" profile.

**Conclusion**

Any problem of older partners needs to be examined from two perspectives. First, managing attorneys with responsibility for the health and progress of the firm must acquaint themselves with the law and assure themselves that decisions are based on facts, not perceptions. An incompetent or unproductive worker may be dismissed for failure to fulfill a reasonable bona fide occupational qualification. The manager must document the problems and distinguish reality from perception. A wise manager will also provide clear-cut, fair procedures for retirement and creative alternatives.

At the same time, older attorneys can reasonably assume they are protected by the ADEA as long as they are not themselves partners in the operation of the firm.

*The ADEA has the following features:*

- Protects employees and job applicants who are 40 years old or older.
- Prevents forced retirements with an exception for an individual who has held a policymaking or executive position for the two years prior to retirement and is entitled to a benefits package valued at $44,000 per year or more.
- Permits discrimination based upon bona fide occupational qualifications where necessary for normal operation of the business—for example, a firefighter who must meet fitness standards.
- Allows jury trials, back pay, and double damages for willful violations of the law.
- Allows discharge, transfer, or discipline based on reasonable factors, for example, a disciplinary discharge with cause.

**Endnotes**


5. Id. at 27.

6. Id. at 29.


