At N.J. Firms, Mandatory Retirement Is an Idea Whose Time Has Passed

McCarter drops 70-and-out rule; other firms re-evaluating forced ouster

By Henry Gottlieb

ew Jersey’s largest law partnership has abandoned compulsory retirement at age 70, and other large firms in the state are reviewing their own policies in the wake of a nationwide backlash.

For years, lawyers who reached age 70 at McCarter & English in Newark could no longer be paid or take part in firm management, though they could remain of counsel.

But the 400-lawyer firm has now decided to let elders remain as non-equity partners at pay levels determined on a case-by-case basis, says Andrew Berry, the firm’s executive committee chairman.

As a result, he says, litigators William O’Shaughnessy, 70, and Theodore Moskowitz, 72, who were on the firm’s roster but received no compensation under the old policy, are effectively rehired.

The decision adds McCarter & English to the list of firms around the country that have backed off mandatory retirement since the U.S. Equal Employment Opportunity Commission brought a bias case on behalf of 32 nonequity partners subject to mandatory retirement at Chicago’s Sidley & Austin.

An informal Law Journal survey last week suggests that few New Jersey firms are affected by the ferment. Most partnerships in the state don’t have lock-step retirement rules because they aren’t big enough to have the cohorts of potentially unproductive older lawyers that mega-firms fear.

At McCarter & English, which has grown to a regional firm with lawyers in six states, partners are required to decide on reaching 65 whether they want to retire, says Berry. If they say yes, they receive a severance package. If they say no, they can remain as equity partners until age 70.

Under the previous policy, they had to retire to unpaid of-counsel status at 70.

Under the new policy, which gives Moskowitz and O’Shaughnessy a reprieve, they continue at the firm as nonequity partners.

It’s ironic that Moskowitz is one of the first lawyers to benefit from the lifting of the age restriction. At 46, fresh from Seton Hall University School of Law after years in business, he became what may have been the oldest first-year associate in the firm’s history.

He says he pressured the firm to change the retirement policy, but that he can’t say how much he will earn by restoration of his status because compensation will depend on how much work he does.

O’Shaughnessy says he is pleased by the change. “I will continue doing at age 72 what I did when I was 62.”

“I wasn’t ready to accompany my wife to the supermarket twice a week,” he says.

Berry, 67, says he still likes the idea of requiring lawyers to examine their practices at age 65 and deciding whether the severance pay and benefits payable on departure outweigh the
professional satisfaction and potential earnings of the next few years.

The system has worked well, but the weight of public opinion reflected in the Sidley case and the ABA and New York Bar resolutions appears to be against such arrangements, he says.

Lowenstein Sandler’s policy, enacted in 2002, requires partners to retire at age 68. Those who want to stay on can obtain annual dispensations at the discretion of the firm for the next two years, but the extensions end at age 70.

Lawyers can continue to have their own practices, can remain on the firm’s list of lawyers and can even do work for the firm as independent contractors. But they have no equity or say in the firm’s affairs, managing partner Michael Rodburg says.

A grandfather clause exempted partners who were 68 or older in 2002 and some elder statesmen have taken advantage of the clause. At age 76, for example, corporate and tax partner Benedict Kohl is an active partner and is “carrying a full load,” Rodburg says.

“I’d be bored stiff if I weren’t working,” Kohl says. He says that if the 70-and-out rule remains, the firm will someday face a tough decision.

“What happens when the first nongrandfathered person comes along and is doing a hell of a job for clients, as I am, and his clients want him to stay?” Kohl wonders. “What are they going to do, throw him out?”

Rodburg says the idea that age shouldn’t matter when a person has vitality is “very nice in theory.” But age does bring certain debilities, he says, and firms have mandatory retirement for a couple of reasons.

First, it “avoids a lot of difficult conversations” about a topic that is always difficult: evaluating performance. Second, facing a firm retirement date forces people to plan for their future rather than face it suddenly when they can no longer perform adequately.

Still, he adds, “I’m not suggesting either of those reasons would support the current policy, and that’s why we’re evaluating it from a legal and social perspective.”

Both Rodburg and Berry say the policies at Sidley that led to the $27.5 million settlement are distinguishable from their firm’s current or past policies. At the two New Jersey firms, the retirement rules affect equity partners who get to vote on the rules.

The Sidley complainants were nonequity partners who the EEOC contended were employees protected by antidiscrimination laws.

Managing partners at several large New Jersey firms say they have no mandatory retirement rules. Older partners who slip are treated like any lawyers who aren’t performing up to par.

At 130-lawyer Archer & Greiner in Haddonfield, president Gary Lesneski says partners are automatically reviewed at age 68, but what happens to them is decided on a case-by-case basis.

“Nothing is set in stone,” he says. “Our policy is to look at what the person is doing.”

Age triggers no automatic review at 220-lawyer McElroy, Deutsch, Mulvaney & Carpenter in Morristown, 150-lawyer Wilentz, Goldman & Spitzer in Woodbridge and 120-lawyer Wolff & Samson in West Orange, managing partners say.

“We have people who have been valuable and are very good lawyers.” Edward Deutsch at McElroy, Deutsch says. “Why you would force them to leave and give up that asset is beyond me.”

If there is a decline in competency or effort, a partner can remain under a compensation system that reflects the changes.

“We have a number of people in their late 60s and mid-70s even that are compensated on a separate basis, but we keep the talent here,” Deutsch says. He rejects the notion that it’s hard to confront a colleague with the bad news that they have lost it. “You can always deal with people.”

He and David Samson at Wolff & Samson say their firms, which grew from modest beginnings in the past three decades, aren’t old enough to have large numbers of older lawyers.

Indeed, Samson says he believes only one lawyer at the firm has retired for age reasons in the past 20 years.

He says the problem of dealing with older partners has become easier as firms have moved away from requiring capital contributions as a condition of partnership.

As a result, it’s easier to adjust compensation to deal with changes in productivity, he says.

At Wilentz, Goldman, partners who reach 67 are ineligible to serve on key committees, such as those that deal with management and compensation.

But there is no mandatory retirement age. Brian Molloy says his firm’s former managing partner, former State Bar President Matthias Dileo, announced his retirement recently at age 80, “and I still see him in the office once or twice a week.”