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A CRUMBLING PYRAMID: HOW THE EVOLVING JURISPRUDENCE DEFINING ‘EMPLOYEE’ UNDER THE ADEA THREATENS THE BASIC STRUCTURE OF THE MODERN LARGE LAW FIRM

Jessica Fink*

I. INTRODUCTION

The private practice of law today looks quite different than it did just a few decades ago. For one thing, the size of law firms has changed. Previously, law partnerships consisted of relatively small, close-knit firms in which attorneys made business decisions in a collaborative manner.² However, with the rise of “mega-firms” in the past few decades, law partnerships now might consist of hundreds or even thousands of attorneys, many of whom have never even met.³ Moreover, the demographic makeup of the lawyers working within these firms also differs from that of previous generations: not only have women and minorities entered the profession in rising numbers, but also the average age of attorneys within firms has increased, as many attorneys have continued working well past the age when previous generations retired.⁴

These changes have created a variety of practical and legal concerns for law firms and the attorneys who work there. Specifically, firms have struggled with how to encourage the regular turnover among lawyers when

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2. See *infra* Part II.A.

3. See *id.*

4. See *infra* Part II.B.1.

older partners choose not to “exit gracefully” upon reaching retirement age.⁵ Complicating matters further, U.S. Supreme Court and lower court decisions have made clear that firms which force older partners out of a partnership, or otherwise take adverse action against such partners, might face liability under the Age Discrimination in Employment Act (“ADEA”). These decisions turn upon a finding that older partners might be characterized as employees who are covered by federal antidiscrimination laws, instead of as owners who fall outside of the ADEA’s protections.

When deciding whether a partner qualifies as an employee for purposes of federal antidiscrimination laws, recent cases place substantial emphasis on a partner’s relative power and control within his or her firm. This emphasis on a partner’s power and control, creates complications for many modern large law firms. Such significant firm features as the length of the partnership track for incoming associates, to the percentage of firm profits that partners receive, to the level of turnover among older partners all may be affected by how the courts have defined the distinction between partners and employees.⁶ This article explores some of the complications created by this evolving jurisprudence, and proposes some potential ways in which firms can comply with the letter and spirit of the ADEA while still maintaining internal structures that ensure productivity and profitability.

Part I of this article describes the legal framework for analyzing whether a partner can sue under the ADEA, focusing on two fairly recent decisions in this area: (i) The U.S. Supreme Court’s 2003 decision in *Clackamas Gastroenterology Assoc., P.C. v. Wells*,⁷ a case in which the Court had to determine whether director-shareholder physicians in a medical clinic should be deemed employees for purposes of the Americans with Disabilities Act (“ADA”),⁸ and (ii) the Seventh Circuit’s 2002 decision in a lawsuit brought by the Equal Employment Opportunity Commission (“EEOC”) against the law firm Sidley & Austin (“Sidley”),⁹ in which the agency alleged an age discrimination claim on behalf of 32

5. See *infra* Part I.B.3. For purposes of this Article, “older partners” refers to those individuals within a firm who are most senior in terms of their age. While this Article assumes that “older partners” always will be over 40 years old, the exact age of such individuals may vary from firm to firm, but generally will include individuals who are close to reaching or already have reached the traditional retirement age of 65 years old.

6. While this article focuses on how law partnerships are affected by these legal and social developments, other types of similarly-structured business entities—such as physician practice groups comprised of doctor-shareholders— may face challenges similar to those described herein. Although a discussion of these other types of business entities falls outside the scope of this Article, many of the proposals discussed below likely would apply with equal force in these other contexts.

7. *Clackamas Gastroenterology Assoc., P.C. v. Wells*, 538 U.S. 440 (2003)

8. 42 U.S.C. §§ 12101–12102; 12111–12117 (2008).

9. Following the commencement of the EEOC’s investigation, Sidley & Austin merged with the firm Brown & Wood, and briefly operated under the name Sidley Austin Brown & Wood. The firm currently operates under the name Sidley Austin LLP. See Sidley Austin, LLP, www.sidley.com/ourfirm/history (last visited Nov. 8 2009).

demoted former equity partners in the firm.¹⁰ While several years have passed since the courts rendered these decisions, recent developments within the legal community, combined with current economic conditions, have exacerbated significantly the impact of these cases. Part I discusses the holdings of these two cases, describe some of the reactions within the legal community to these two cases, and highlight some potential concerns regarding the outcomes in these cases, particularly when applied to the modern large law firm.

Because this article focuses on the impact of *Clackamas* and *Sidley* on law firms, particularly the larger ones, Part II sets forth an analysis of the modern large law firm, describing how modern firms have evolved in terms of their hierarchy, demography, goals and objectives. Part II focuses in particular on recent changes within the structure and culture of large law firms and discusses the impact that these changes might have on firm lawyers.

Part III begins to bring together the above information, describing in greater detail how cases like *Clackamas* and *Sidley* might undermine the operations of modern large law firms. Part III will discuss some of the specific steps that firms may take in response to these cases and will describe how those steps might impact lawyers in a firm.

Finally, Part IV proposes some solutions to this dilemma, suggesting ways in which law firms might provide partners with the protections potentially required by *Clackamas* and *Sidley*, while still running their firms in an effective, efficient, and profitable manner.

II. LEGAL FRAMEWORK FOR ANALYZING A PARTNER'S ABILITY TO SUE UNDER THE ADEA

A. GENERAL LANDSCAPE FOR ANALYZING "EMPLOYEE" STATUS UNDER FEDERAL ANTIDISCRIMINATION LAWS

Various federal antidiscrimination laws, including Title VII of the Civil Rights Act of 1964 ("Title VII"),¹¹ the Americans with Disabilities Act ("ADA"),¹² and the Age Discrimination in Employment Act

10. Equal Employment Opportunity Commission (EEOC) v. Sidley Austin Brown & Wood, 315 F.3d 696 (7th Cir. 2002). The author worked as an associate for Sidley's Chicago office from 2001 until 2006. While the author conducted some research related to issues discussed in this Article during her employment with Sidley, she was not involved directly in the litigation between Sidley and the EEOC.

11. 42 U.S.C. §§ 2000(e)-2000(e)(17) (2008), amended by CIVIL RIGHTS ACT OF 1991, 42 U.S.C. § 1981(a) (2005).

12. See *Clackamas*, 538 U.S. 440.

(“ADEA”)¹³ bar discrimination on the basis of certain protected characteristics in the workplace. When such alleged discrimination arises in the workplace, these laws permit employees to sue their employers for claimed violations of these federal laws.¹⁴ None of these statutes, however, provides any meaningful definition of the term “employee.” Rather, each statute in virtually identical terms defines an employee who will be protected under the act as “an individual employed by an employer.”¹⁵

This circular definition of the term employee has led to questions regarding precisely who is covered by these laws, i.e., questions regarding who can bring a claim alleging unlawful discrimination in the workplace. One particularly vexing question that has faced many courts is whether individuals designated as “partners” in their firms can bring suits alleging violations of these antidiscrimination laws. Faced with scant statutory guidance regarding who should be deemed an employee for these purposes, and with little legislative history to resolve this concern,¹⁶ the federal courts largely have been left to their own devices in defining whether “partners” can sue under these laws.

1. Tests Applied by the Federal Courts to Determine Whether a Partner Can Sue under Federal Antidiscrimination Laws

Many scholars and practitioners already have analyzed the various approaches taken by the federal courts for defining who is an employee for purposes of federal antidiscrimination law and for determining whether “partners” fall into this category.¹⁷ Some courts have adopted a per se rule in these cases, holding that anyone proven to be a general partner in a firm according to state partnership law would be barred from bringing a federal antidiscrimination claim.¹⁸ In *Burke v. Friedman*,¹⁹ for example, the

13. 29 U.S.C. §§ 621-634 (2005) [hereinafter “ADEA”].

14. See 42 U.S.C. § 2000e-2(a)(2); 42 U.S.C. §§ 12112(a), (b)(1)-(2), (b)(5); 29 U.S.C. § 623(a)(2).

15. See 42 U.S.C. § 2000e(f); 42 U.S.C. § 12111(4); 29 U.S.C. § 630(f).

16. Stephanie M. Greene and Christine Neylon O’Brien, *Partners and Shareholders as Covered Employees Under Federal Antidiscrimination Acts*, 40 AM. BUS. L. J. 781,786 (2003) (citations omitted).

17. See, e.g., David B. Wilkins, *Partner Shmartner! EEOC v. Sidley Austin Brown & Wood*, 120 HARV. L. REV. 1264 (2007) [hereinafter “Partner Shmartner!”]; Ann C. McGinley, *Functionality or Formalism? Partners and Shareholders as “Employees” Under the Anti-Discrimination Laws*, 57 SMU L. REV. 3 (2004); Greene & O’Brien, *supra* note 16; Stephanie Greene and Christine Neylon O’Brien, *Who Counts? The United States Supreme Court Cites “Control” as the Key to Distinguishing Employers from Employees Under Federal Employment Antidiscrimination Laws*, 2003 COLUM. BUS. L. REV. 761 (2003) [hereinafter “Who Counts?”]; Joel Bannister, Comment, *In Search of a Title: When Should Partners be Considered “Employees” for Purposes of Federal Employment Antidiscrimination Statutes?*, 53 U. KAN. L. REV. 257 (2004); Catherine Lovly & Matthew Mehnert, Note, *Something Every Lawyer Needs to Know: The Employer-Employee Distinction in the Modern Law Firm*, 21 HOFSTRA LAB. & EMP. L. J. 663 (2004); Kristin Nicole Johnson, Note, *Resolving the Title VII Partner-Employee Debate*, 101 MICH. L. REV. 1067 (2003).

18. See Bannister, *supra* note 17, at 263-66 (citations omitted); Lovly & Mehnert, *supra* note 17, at

Seventh Circuit Court of Appeals concluded that a partner in an accounting firm could not be deemed an employee for purposes of Title VII.²⁰ Looking almost exclusively to the definitions of partnership articulated in the Uniform Partnership Act and to decisions interpreting that statute, the court held that partners in general partnerships were not employees, but rather were “employers who own[ed] and manage[d] the operations of the business.”²¹

The Eleventh Circuit echoed this view in *Hishon v. King & Spalding*.²² Citing with approval the Seventh Circuit’s decision in *Burke*, the court echoed the Seventh Circuit’s “hesitation to equate partners with employees,”²³ finding a “clear distinction between employees of a corporation and partners of a law firm.”²⁴ Although the Supreme Court later reversed this decision, finding that the plaintiff could maintain a claim under Title VII,²⁵ Justice Powell’s often-cited concurrence in *Hishon* cautioned that the Court’s decision “should not be read as extending Title VII to the management of a law firm by its partners,”²⁶ emphasizing the significant differences between law partners on the one hand, and employers and employees on the other hand.²⁷

In contrast to this per se rule for excluding partners from the coverage of federal antidiscrimination laws, other courts adopted a more flexible “economic realities test” for determining whether individuals would fall within the protection of these laws.²⁸ Courts adhering to this economic realities approach would not rely solely on the titles of the individuals in question to determine whether they are covered by antidiscrimination law, but rather would focus on the function that such individuals performed within the business entity in question.²⁹ In the context of a partnership, therefore, a court would not rely simply upon an individual’s denomination as a partner to deem him or her excluded from coverage of

678-81 (citations omitted); see also Greene and O’Brien, *Who Counts?*, *supra* note 17, at 767-72 (referring to this approach as the “corporate form” approach, which determines one’s status as an employee “solely by virtue of the selected form of doing business”).

19. *Burke v. Friedman*, 556 F.2d 867 (7th Cir. 1977).

20. While *Burke* employed this analysis to determine whether the defendant employed a sufficient number of employees to be deemed a sufficiently large “employer” for coverage under Title VII, courts have applied the same analysis to defining “employee” for purposes of employer-coverage as for employee-coverage. See, e.g., Greene and O’Brien, *Who Counts?*, *supra* note 17, at 768.

21. *Burke*, 556 F.2d at 869 (footnote omitted).

22. *Hishon v. King & Spalding*, 678 F.2d 1022 (11th Cir. 1982).

23. *Id.* at 1028.

24. *Id.*

25. *Hishon v. King & Spalding*, 467 U.S. 69 (1984).

26. *Id.* at 79.

27. *Id.* at 79-80.

28. Bannister, *supra* note 17, at 266-68; see also Greene and O’Brien, *Who Counts?*, *supra* note 17, at 767-72.

29. Greene and O’Brien, *Who Counts?*, *supra* note 17, at 767.

antidiscrimination laws, but rather would examine factors such as the relationship among partners in the firm, including the amount of power an individual partner actually possesses to formulate firm policies and make decisions in the firm.³⁰

2. *The EEOC's Approach*

In addition to the tests used by the federal courts for determining when a partner can sue under federal antidiscrimination laws, the EEOC has provided some guidance of its own regarding when an individual should be deemed a "covered employee" for purposes of such laws.

The EEOC's Compliance Manual acknowledges that "[i]n most circumstances, individuals who are partners, officers, members of boards of directors, or major shareholders will not qualify as employees."³¹ However, the Compliance Manual goes on to make clear 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,"³² and advises that an EEOC investigator "should determine whether the individual acts independently and participates in managing the organization, or whether the individual is subject to the organization's control. If the individual is subject to the organization's control, s/he is an employee."³³ Moreover, the Compliance Manual sets forth specific factors that the investigator should consider in this respect:

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[; and]

Whether the individual shares in the profits, losses, and liabilities of the organization.³⁴

30. McGinley, *supra* note 17, at 18 (citation omitted).

31. Equal Employment Opportunity Commission, EEOC Compliance Manual, § 2-III(A)(1)(d), (2000), available at <http://www.eeoc.gov/policy/compliance.html> (last visited Aug. 18 2009) (citation omitted).

32. *Id.*

33. EEOC Compliance Manual, *supra* note 31

34. *Id.*

Thus, while the EEOC's test begins with a presumption against characterizing a partner as an employee,³⁵ it allows for the possibility that individuals with the title of partner might be deemed employees for purposes of federal antidiscrimination laws, if these six factors weigh in favor of such a conclusion.

B. THE ISSUE OF DEFINING "EMPLOYEE" REACHES THE SUPREME COURT: *CLACKAMAS GASTROENTEROLOGY ASSOC., P.C. V. WELLS*

In 2003, the U.S. Supreme Court decided *Clackamas Gastroenterology Assoc., P.C. v. Wells*.³⁶ While not addressing the precise issue of when *partners* should be deemed employees for purposes of federal antidiscrimination laws, this case has had a profound impact on lower courts' analysis of this issue. In *Clackamas*, Deborah Wells, a bookkeeper and full-time employee of Clackamas Gastroenterology, sued her employer under the Americans with Disabilities Act.³⁷ In defending against Ms. Wells' suit, Clackamas claimed that it lacked a sufficient number of employees to fall within the coverage of the ADA.³⁸ Specifically, Clackamas argued that the four physician-shareholders who owned the medical clinic and who constituted its board of directors should not be deemed employees for purposes of this statute.³⁹

After reviewing the tests that various lower courts had adopted on this point, the Supreme Court adopted the six factors suggested by the EEOC for determining an individual's employment status.⁴⁰ Moreover, the Court emphasized that "the common law element of *control* is the principal guidepost that should be followed in this case."⁴¹ In other words, while the Court would apply each of the EEOC's six factors to the physician director-shareholders to decide whether the director-shareholders seemed more like owners or employees, a primary consideration would be the amount of control that each director-shareholder exerted over the business as a whole.⁴²

35. McGinley, *supra* note 17, at 18.

36. *Clackamas*, 538 U.S. 440.

37. *Id.* at 442.

38. *See id.* The ADA generally defines "employers" covered by the statute as those having "15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year." 42 U.S.C. § 12111(5)(A).

39. *See Clackamas*, 538 U.S. at 442. *See supra* note 19 (courts have applied a similar approach to defining the term "employee" for purposes of "counting" employees to determine employer-coverage).

40. *See Clackamas*, 538 U.S. at 448-50.

41. *Id.* at 448 (emphasis added).

42. This article does not focus on the reasoning behind the *Clackamas* decision, but rather concentrates on some of the unanticipated potential consequences of that decision. For a more detailed analysis of the background to this case and the Court's reasoning in issuing this significant decision, *see generally* McGinley, *supra* note 17; Lovly and Mehnert, *supra* note 17; Greene & O'Brien, *supra* note

While the Court's decision in *Clackamas* did not focus on how *partners* should be classified for purposes of federal antidiscrimination laws, the Court, like the EEOC, emphasized that merely designating an individual with a particular title (i.e., partner) would not in and of itself exclude that individual from the coverage of these statutes.⁴³ Indeed, the Court observed that "[t]oday 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."⁴⁴ Thus, the Court made clear that someone might possess the title of "partner," but still be deemed an employee for purposes of federal antidiscrimination law, if he or she lacked sufficient control over certain aspects of the partnership. In this respect, the Court's opinion in *Clackamas* sounded a warning to law firms all over the United States—particularly to large firms where many partners possessed limited power and control—that the status of such putative "partners" in these firms might be uncertain for purposes of federal antidiscrimination laws.

C. APPLYING *CLACKAMAS* TO THE LARGE LAW FIRM: *EEOC v. SIDLEY AUSTIN BROWN & WOOD*

Clackamas made clear that neither an entity's status as a "partnership" nor an individual's designation as a partner would automatically bar the partner from bringing a discrimination claim against the firm under federal law. This decision, however, created significant uncertainty for many law firms, particularly those that seemed to fit the description about which the *Clackamas* Court had warned—i.e., those with "hundreds of members," where "control is concentrated in a small number of managing partners."⁴⁵ Were a significant number of partners in such firms *employees* for purposes of federal antidiscrimination law? If so, how might that affect the way in which large law firms were structured? As it turned out, at the same time that the Court issued its decision in *Clackamas*, another case that potentially could answer these questions was making its way through the courts.

1. *The EEOC's Lawsuit Against Sidley Austin Brown & Wood*

In 1999, the law firm then known as Sidley Austin Brown & Wood,

17; Bannister, *supra* note 17.

43. See *Clackamas*, 538 U.S. at 450 (citing EEOC Compliance Manual) ("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").

44. *Id.* at 446 (citations omitted).

45. *Clackamas*, 538 U.S. at 446.

now known as Sidley Austin LLP⁴⁶ demoted 32 of its equity partners to the status of “counsel” or “senior counsel.”⁴⁷ Each of these demoted partners apparently was over 40 years of age, and the EEOC subsequently commenced an investigation to determine whether these demotions might have violated the Age Discrimination in Employment Act.⁴⁸ As part of its investigation, the EEOC requested certain information from Sidley—some of which Sidley provided, and some of which Sidley declined to provide.⁴⁹

In declining to provide some of the information requested by the EEOC, Sidley argued that the EEOC only was entitled to information which made clear that the agency lacked a jurisdictional basis for its investigation.⁵⁰ Specifically, Sidley argued that it needed only to provide the EEOC with sufficient information to establish that the 32 demoted individuals had been “bona fide” partners prior to their demotions, and therefore did not fall within the protections of the ADEA.⁵¹

Sidley had some facts to support its argument that these demoted individuals had been true “partners” in the firm: each demoted individual previously had held the title of “partner.”⁵² In addition, each previously had maintained a capital account with the firm, averaging approximately \$400,000,⁵³ and each had been responsible for the firm’s liabilities, in proportion to his capital contribution in the firm.⁵⁴ Moreover, firm partners, including these demoted individuals, could commit the firm in certain respects, such as by writing opinion letters,⁵⁵ and had various powers with respect to the hiring, firing, promotion and compensation of subordinate attorneys.⁵⁶

In other respects, however, the structure at Sidley differed significantly from traditional notions of law firm partnership: unlike the tightly knit, closely held law partnerships that existed in the profession in earlier years, Sidley had ballooned to almost 900 lawyers worldwide by 1999, 400 of whom held the title of “partner.”⁵⁷ Virtually all of the power within the firm resided within a 36-member, unelected, self-perpetuating

46. See *supra* note 9.

47. Sidley Austin Brown & Wood, 315 F.3d at 698.

48. See *id.* at 698.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. Sidley Austin Brown & Wood, 315 F.3d at 699.

54. *Id.*

55. *Id.* at 703.

56. *Id.*

57. See *The National Law Journal's Annual Listing of the Nation's Largest Law Firms*, NAT'L L.J., DEC. 31, 1999, at C3, (col. 1). By 2002, when the 7th Circuit issued its decision in Sidley, the firm had grown to include over 1,500 lawyers nationwide, 500 of whom were partners in the firm. See *The NLJ 250*, NAT'L L. J., NOV. 18, 2002, at C4, (col. 1); Sidley Austin Brown & Wood, 315 F.3d at 703.

executive committee.⁵⁸ Executive committee members could fire, promote or demote other partners, increase or decrease other partners' compensation, and controlled the various committees within the firm.⁵⁹ In this respect, Sidley's structure bore little resemblance to the vision of partnership that Justice Powell had described two decades earlier in his concurrence in *Hishon*: "The essence of the law partnership is the common conduct of a shared enterprise. The relationship among law partners contemplates that decisions important to the partnership normally will be made by common agreement . . . or consent among the partners."⁶⁰ Such "common agreement" or "consent among partners" simply would be impossible in a firm with the size and structure of Sidley.

Eventually, the dispute regarding the status of these demoted individuals made its way into court, with the EEOC filing a motion to enforce a subpoena for the disputed information with the U.S. District Court for the Northern District of Illinois.⁶¹ Following the district court's order that Sidley comply in full with the EEOC's subpoena, Sidley appealed to the Seventh Circuit Court of Appeals.⁶²

In writing for the Majority in this case, Judge Richard Posner found enough doubt regarding the status of these 32 demoted partners to require Sidley to provide information that related to the "coverage" portion of the subpoena—i.e., required Sidley to provide information necessary to determine whether the 32 demoted partners qualified as employees for purposes of the ADEA.⁶³ Judge Posner made clear that mere compliance with the formalities of state partnership law would not automatically exempt these demoted individuals from the coverage of the ADEA.⁶⁴ Indeed, Judge Posner acknowledged that Sidley qualified as a true partnership, and that these 32 individuals technically were "partners" under applicable state partnership law.⁶⁵ However, the more important question from Judge Posner's perspective involved whether these individuals had the means available to them, by virtue of their partnership status, to protect themselves against discrimination by the firm.⁶⁶ Judge Posner characterized the 32 demoted partners in this case as "defenseless" against

58. *Id.* at 699.

59. *Id.*

60. *Hishon*, 467 U.S. at 79-80.

61. *Sidley Austin Brown & Wood*, 315 F.3d at 698-99.

62. *Id.*

63. *Sidley Austin Brown & Wood*, 315 F.3d at 700; *see also* Leonard Bierman and Rafael Gely, *So You Want to be a Partner at Sidley & Austin*, 40 HOUS. L. REV. 969, 974 (2003) (citations omitted).

64. *Sidley Austin Brown & Wood*, 315 F.3d at 701.

65. *Id.*

66. *Id.* at 704 ("If implicit in the ADEA's exemption for employers is recognition that partners ordinarily have adequate remedies under partnership law to protect themselves against oppression (including age or other forms of invidious discrimination) by the partnership, then exposure to liability [for debts of the firm] can hardly be decisive.").

discrimination by the firm, arguing that “they had no power over their fate.”⁶⁷ Because Judge Posner viewed these individuals as having little protection against oppression by the firm, he refused to conclude that their status as partners under state law precluded their status as employees for purposes of federal discrimination law.⁶⁸

Thus, Judge Posner seemed to believe that an essential factor in determining a partner’s “employment status” was the amount of power and control that the putative partner exercised within the firm as a whole. In other words, the Seventh Circuit seemed to apply with full force Supreme Court’s admonition in *Clackamas* that “the common law element of control is the principal guidepost that should be followed in this case.”⁶⁹ Even John Hendrickson, the EEOC’s Chicago District Regional Attorney who oversaw the *Sidley* litigation, has stated that he viewed *Clackamas* as “profoundly damaging” to *Sidley*’s case because of the *Clackamas* Court’s adoption of the EEOC guidelines with their focus on control.⁷⁰ According to Hendrickson, the *Clackamas* Court’s emphasis on control “[was d]amaging because at *Sidley* . . . virtually *everything* was governed and controlled by a small executive committee and an even smaller management committee—both of which were self-perpetuating and not elected by the partners.”⁷¹

However, even Judge Posner acknowledged the difficulties in applying this notion of “control” to a firm as large and complex as *Sidley*. He referred to *Sidley* as a “large law firm—which in recognition that conventional partnership is designed for much smaller and simpler firms has contractually altered the structure of the firm in the direction of the corporate form . . .”⁷² Judge Easterbrook, in his concurrence in this case, emphasized this point even more strongly, expressing skepticism regarding the proposition “that concentration of decision-making authority within an entity alters the legal status of those who share profits and bear all residual risks of loss.”⁷³ Easterbrook thus seemed to view as somewhat overstated Judge Posner’s focus on the *relative* power of a lawyer in the firm to make important workplace decisions, and implied that even partners who did not serve on *Sidley*’s Management and Executive Committees still might be true “partners” (not employees) for antidiscrimination law purposes.⁷⁴

67. *Id.*

68. *Id.* at 704, 707.

69. *Clackamas*, 538 U.S. at 448.

70. John C. Hendrickson, *Selected Materials on “Emerging Employment Discrimination Claims,”* 782 PLI/LIT 403, 416 (2008).

71. Hendrickson, *supra* note 70. (emphasis in original).

72. *Sidley Austin Brown & Wood*, 315 F.3d at 707.

73. *Id.*

74. *Id.* at 710 (While Judge Easterbrook therefore seemed to view the 32 demoted partners here as “true partners” for purposes of federal antidiscrimination law, he concurred with the court’s opinion in

2. Criticisms of the Clackamas/Sidley framework

Clackamas and *Sidley* thus made clear that a partner's ability to sue his/her firm under federal antidiscrimination laws would turn in large part on the partner's relative power and control within the firm. The decision caught the attention of both practitioners and academics. Indeed, following the conclusion of these cases, a host of scholars weighed in regarding whether the courts had adopted the appropriate test for determining a partner's ability to sue his or her firm under federal antidiscrimination law.⁷⁵ None of these scholars, however, seem to have focused on a broader implication of these decisions, including the extent to which these decisions seem to overlook many realities of the modern large law firm.

Without question, modern large law firms operate in a very different manner than their predecessors operated decades ago. Years ago, firms operated in an informal and almost familial manner, where partners all knew each other and made firm-related decisions collaboratively.⁷⁶ As discussed in greater detail below, however, large firms have changed significantly since those early days, often encompassing hundreds or even thousands of lawyers, with offices all of the country and even the world.⁷⁷ The partners alone in such firms may number in the hundreds, with many partners having little (if any) regular contact with one another.⁷⁸ Accordingly, most large firms have abandoned attempts to govern themselves in a cooperative and decentralized manner, and instead have adopted complex and centralized management hierarchies.⁷⁹ Nothing could be further from the "small, closely-held businesses" that Justice Powell referred to in his *Hishon* concurrence.⁸⁰

This tremendous growth and expansion among law firms inevitably hinders individual partners from exercising the type of control and participation contemplated by the courts in *Sidley* and *Clackamas*. In fact, as much as two decades ago, one federal court recognized the practical problems with using a partner's "control" within a firm to determine his or

this case due to uncertainty regarding the status of other lawyers in the firm to whom *Sidley*'s retirement policy would apply.).

75. See Greene and O'Brien, *Who Counts?*, *supra* note 17.

76. See Elizabeth Chambliss, *The Nirvana Fallacy in Law Firm Regulation Debates*, 33 *FORDHAM URB.L.J.* 119, 119 (2005); see also Marion Crain, *The Transformation of the Professional Workforce*, 79 *CHI.-KENT L. REV.* 543, 570 (2004) ("Law firms once assumed the form of partnerships, characterized by professional values and a familial spirit.").

77. See *infra* at § II.A; see also Chambliss, *supra* note 76, at 119; Johnson, *supra* note 17, at 1084 (noting that "[i]n response to the globalization of the economy, law firms have expanded, opening offices across the nation and around the world.") (citations omitted).

78. See Chambliss, *supra* note 76, at 119 (citations omitted).

79. *Id.* at 127.

80. Johnson, *supra* note 17, at 1084.

her ability to sue. In *Wheeler v. Main Hurdman*, a case examining whether a general partner in a large accounting firm could sue under various federal antidiscrimination laws, the 10th Circuit objected to the notion that a “true” general partnership must “operates like a New England town meeting.”⁸¹ Rather, the court observed that within certain partnerships, “[d]omination’ of a partner in assignment and supervision of work, billing, share of profits, and other matters can result from a myriad of wholly practical reasons . . . ,”⁸² and noted that “a certain amount of ‘domination’ may flow from the necessity of an organizational structure, even in the smallest partnership.”⁸³ Challenging the real-world impact of a focus on “actual control” in determining the status of partners in a firm, the court questioned “[whether] any partnership of any duration would not have employee partners” under such a standard.⁸⁴

The practical problems with this focus on “control” in determining the status of a partner in a firm only have increased in the two decades since *Wheeler*, as firms have continued to grow exponentially.⁸⁵ Large firms simply have become too large and unwieldy to accommodate cooperative deliberation.⁸⁶ In the words of one reporter who covered the *Sidley* litigation, “[s]imply stated, it is nearly impossible to manage a half-billion-dollar business having 200 or more equity partners by giving each of them a meaningful say before responding to 24-hour opportunities and challenges.”⁸⁷ Even if each office of a national or international firm had its own committee of individuals who controlled that particular office’s operations, a large number of non-committee member partners within each office still likely would fail to qualify as “partners” for purposes of federal antidiscrimination law. In fact, within many firms currently, the individuals who manage firm operations, and who therefore possess the greatest amount of power and control, no longer actively practiced law at all, but rather manage the firm on a full-time basis.⁸⁸ Surely, the courts in

81. *Wheeler v. Main Hurdman*, 825 F.2d 257, 273 (10th Cir. 1987).

82. *Id.*

83. *Id.*

84. *Id.* (italics in original). See also *Kirleis v. Dickie, McCamey & Chicolte, PC*, No. 06cv1495, 2009 WL 3602008, 1, 22 (W.D.Pa. Oct. 28, 2009) (observing that “[t]raditionally, partnerships-law firms are not democracies, and often are dominated by one or a few ‘autocratic’ partners, but this reality does not render every other partner in the firm an employee even though he or she retains most of the indicia of ownership and control”).

85. See *infra* at Part II.A; see also *Kirleis*, *supra* note 84, at 22-23.

86. Leigh Jones, *Pitfalls of Mandatory Retirement[:] Mandatory Rules Could Spark Suits*, NAT’L L.J. 1, May 23, 2005, at Col. 1.(.) (asserting that “in today’s huge operations such as DLA Piper Rudnick Gray Carey or Greenberg Traurig, having hundreds or even thousands of partners participating in management decisions is impractical. . . .”) [hereinafter “Pitfalls”].

87. Mary E. Pivec, *Retire? Maybe Not Sidley’s Age Discrimination Case May Lead to More Partner Suits*, LEGAL TIMES, NOV. 11, 2007, at 38.

88. See Chambliss, *supra* note 76, at 130 (citations omitted); see also Quintin Johnstone, *An Overview of the Legal profession in the United States, How that Profession Recently has been*

cases like *Sidley* cannot believe that in such firms the only “partners” are those who no longer practice law.⁸⁹

3. *Reactions to the Sidley Suit*

As the *Sidley* litigation continued, large law firms nationwide watched the case with bated breath. In the words of one partner at the national law firm Seyfarth Shaw commented, “I think every law firm in the country, if they’re not watching, they should be watching how things unravel and to see what the court looks to as being important indicia of being a true partner or really just an employee.”⁹⁰ Firms worried that “[t]his case is going to be used like a can opener by plaintiffs lawyers to pry into law firm decision making, to go after midsize-to-large law firms.”⁹¹ In October, 2007, however, observers lost the opportunity for further guidance from this case, when *Sidley* entered into a Consent Decree with the EEOC, resolving this dispute.⁹² Among other terms, this Consent Decree provided that *Sidley* would pay a sum of \$27,500,000 for distribution to eligible claimants.⁹³ In addition, *Sidley* agreed that “[f]or purposes of resolution of this matter . . . each person for whom the EEOC has sought relief in this matter was an employee for purposes of the ADEA as of the dates when *Sidley* made and carried out the decision to remove him or her from the status of partner”⁹⁴

Even following this settlement, however, many firms remained concerned about the status of their partners. According to a partner at another national law firm, Greenberg Traurig, “[t]he fact that EEOC went after one of the pre-eminent firms in the United States put every other law firm on notice . . . It sends a message to the profession that you have to look at how you structure yourselves and how you treat partners with

Changing, and its Future Prospects, 26 QUINNIPIAC L. REV. 737, 763 (2008) (citation omitted) (noting the increasing reliance in many firms on non-lawyer firm employees in firm management decisions).

89. Professor Ann McGinley has offered an additional critique of many courts’ method of discerning between “true” partners and employees merely labeled as partners. See McGinley, *supra* note 17, at 54-59. Specifically, Professor McGinley argues that most courts place excessive emphasis on a partner’s political power within his/her firm, examining whether the partner has a vote in major partnership decisions or sits on important firm committees. According to McGinley, however, “[p]olitical power alone will rarely protect a partner from the possibility of discrimination.” Professor McGinley therefore argues that, in addition to examining a partner’s political power to determine his/her employment status, courts also should evaluate the partner’s economic and social power within the firm. See *id.* at 55-56.

90. Martha Neil, *Who is a Partner? The EEOC Looks Beyond Titles in Its Age Discrimination Case Against a Law Firm*, 91 A.B.A. J. 34 (2005).

91. *Id.*

92. Consent Decree, United States Equal Employment Opportunity Commission v. *Sidley Austin LLP*, No. 05 cv 0208 (N.D.Ill. Oct. 4, 2007).

93. See *id.* at para. 4(A).

94. *Id.* at para. 1.

respect to retirement.”⁹⁵ The EEOC likewise has emphasized such potential liability, with EEOC Regional Attorney John Hendrickson noting that the agency’s litigation against and subsequent settlement with Sidley “ought to signal that if you are thinking about discriminating on the basis of age and the governance and control of your firm looks a lot like Sidley’s, you’d better think three times before you do it.”⁹⁶

In fact, the concerns expressed by observers regarding future discrimination suits by partners amounted to much more than mere circumspection and paranoia. Following the *Clackamas* and *Sidley* decisions, partners at various other large law firms brought discrimination claims against their firms.⁹⁷ While the specific outcomes in these cases varied, the courts in all of these cases wholeheartedly seemed to adopt the type of reasoning that emerged in both *Clackamas* and *Sidley*, focusing on the amount of control that the plaintiffs had exercised within their respective firms.⁹⁸

Moreover, as discussed in greater detail below,⁹⁹ the American Bar Association (“ABA”) also took action following *Sidley*, adopting a recommendation at its August 2007 meeting which recommended that law firms discontinue their use of mandatory retirement policies, deeming such mandatory retirement “not an acceptable practice” and characterizing such policies as “both unwarranted and unwise.”¹⁰⁰ In making this recommendation, the ABA expressly referred to both *Clackamas* and *Sidley*, citing extensively from the courts’ opinions in these cases.¹⁰¹

95. Ameet Sachdev, *Age Suit could raise bar; Sidley Austin agrees to pay \$27.5 million*, CHI. TRIB., Oct. 6, 2007, at C1.

96. *Firing Partners*, 07-12 PARTNER’S REP. 1 (Dec. 2007).

97. See, e.g., *Kirleis v. Dickie, McCamey & Chicolte, PC*, No. 06-1495, 2007 WL 2142397, 1 (W.D.Pa. July 24, 2007) (deeming plaintiff “employee” for purposes of motion to dismiss in discrimination and retaliation suit by shareholder her against former lawfirm), aff’d on other grounds, 560 F.3d 156 (3rd Cir. 2009); *Panepucci v. Honigman Miller Schwartz, Cohn, LLP*, 408 F.Supp.2d 374 (E.D. Mich. 2005), aff’d on other grounds, 281 Fed.Appx. 482 (6th Cir. 2008) (denying without prejudice law firm’s motion to dismiss gender and disability discrimination suit brought by former firm partner); *Solon v. Kaplan*, No. 00 C 2888, 2004 WL 725893, 1 (N.D.Ill. Mar. 31, 2004), aff’d, 398 F.3d 629 (7th Cir. 2005) (deeming former law firm partner an “employer” in Title VII suit former partners); see also *Martha Neil, Ex-Partner Sues her Law Firm for Bias*, 5 No. 36 A.B.A. J. E-Report 4 (Sept. 8, 2006) (describing sex discrimination and retaliation suit filed by former equity partner against law firm Hinshaw & Culbertson), N.D. Ill. Docket No. 1:06-CV-02958, Entry #15 (Dec. 15, 2006) (indicating settlement of case); cf. *Kirleis*, supra note 84 (granting summary judgment to employer upon deeming lawfirm shareholder an employer, not an employee, for purposes of Title VII and other employment laws).

98. *Kirleis*, 2009 WL 3602008 at 5-26; *Panepucci*, 408 F.Supp.2d at 377-78; *Solon*, 398 F.3d at 633-34.

99. See *infra* notes 165-68.

100. See American Bar Association House of Delegates, DAILY J., Aug. 13-14, 2007, Report 10A at 11-12, available at <http://www.abanet.org/leadership/2007/annual/dailyjournal.doc> (last visited Nov. 18 2009) [hereinafter “ABA Recommendation”].

101. *Id.* at 8-9.

Focusing specifically on the 7th Circuit's decision in *Sidley*, the Recommendation noted that "until recently, the . . . mandatory age-based retirement of law firm partners widely was regarded as lawful and outside the permissible scope of review by [the EEOC] and the courts,"¹⁰² but that the *Sidley* case had "caused the legal profession to sit up and take notice, and to consider whether established assumptions regarding the inapplicability of certain civil rights protections to partners . . . need to be reexamined."¹⁰³

III. THE STRUCTURE OF THE MODERN LARGE LAW FIRM

Clackamas and *Sidley* caused many law firms—and particularly large firms—to reevaluate the operation and arrangement of their firms and question where firm partners fit into this picture. Accordingly, to understand the impact that these cases might have on large law firms, it is important to have a clear image of how the modern large law firm operates, including how these firms have evolved in terms of their structure, demography, goals and objectives. Each of these aspects of firm operations potentially may be altered by *Clackamas* and *Sidley*.

A. THE HIERARCHICAL STRUCTURE OF THE MODERN LARGE LAW FIRM: A CAREFULLY-BALANCED PYRAMID

The common understanding of what constitutes a "large law firm" has changed substantially over the past few decades. Instead of existing as small, closely knit partnerships, law firms have ballooned to gigantic proportions, often encompassing thousands of lawyers all over the world.¹⁰⁴ Concurrent with this expansion in size has been an increasing amount of hierarchy within firms.¹⁰⁵ In fact, many law firms have adopted management structures similar to that eschewed by the court in *Sidley*, where layers of committees and managers run the day-to-day aspects of firm life and where only a handful of the hundreds (or perhaps thousands) of lawyers in a firm possess the final authority to make important firm decisions. As one law firm partner discussing this issue observed, "[r]elegating some decision-making to smaller groups of attorneys is

102. ABA Recommendation, *supra* note 100, at 6.

103. *Id.* at 7.

104. ABA Recommendation, *supra* note 100, at 7.

105. See *supra* at Part I.C.1; see also Hendrickson, *supra* note 70, at 417 (observing that partners in the modern large law firm "are strung out in enormous office complexes around the world. . .," and that many "may have virtually no voice in their own compensation or destiny, no role in governance, and no expectation of genuine long-term job security").

necessary in large firms.”¹⁰⁶

Another result of this growth in law firm size has been a focus on ensuring proper turnover within firms, including within the partnership ranks. For a number of years, large law firms have followed a model in which junior lawyers work for some number of years in an effort to obtain one of a limited number of partnership positions.¹⁰⁷ In their seminal book regarding the structure of large law firms, Professors Marc Galanter and Thomas Palay call this model the “promotion to partner tournament.”¹⁰⁸ Under this model, senior lawyers (partners) in a firm make an implicit promise to junior lawyers (associates) that in exchange for the associates’ diligent and competent work over some period of years, the firm will promote some percentage of these associates to partnership status.¹⁰⁹ Associates who fail to achieve the coveted “partnership” prize depart and are replaced by a new crop of associates, leading Galanter and Palay to describe this tournament as an “up or out” model.¹¹⁰ According to Galanter and Palay, this tournament structure has spurred a dramatic expansion in the size of large law firms.¹¹¹ Every promotion of an associate to partnership status required that the firm not only hire a new junior lawyer to replace this promoted associate, but also hire additional associates to labor for this newly-minted new partner,¹¹² in order to keep the firm’s associate-to-partner ratio from declining.¹¹³

Galanter and Palay’s “up or out” model creates various tensions among the attorneys in a firm. First, the finite number of partnership slots available to associates induces the associates to compete among themselves for these positions.¹¹⁴ In addition, to the extent that this model requires that

106. Leigh Jones, Pitfalls, *supra* note 86.

107. Marc Galanter & Thomas Palay, TOURNAMENT OF LAWYERS 26-32, 99-102 (1991); *see also* David B. Wilkins & G. Mitu Gulati, *Reconceiving the Tournament of Lawyers: Tracking, Seeding, and Information Control in the Internal Labor Markets of Elite Law Firms*, 84 VA. L. REV. 1581, 1582-83 (1998) (citing Galanter & Palay).

108. Galanter & Palay, *supra* note 107, at 100 (citations omitted).

109. *Id.* at 26-32; *see also* Wilkins & Gulati, *supra* note 107, at 1582 (citing Galanter & Palay); Johnson, *supra* note 17, at 1079-80 (citing Galanter & Palay).

110. Galanter & Palay, *supra* note 107, at 28-29; Marc Galanter & William Henderson, *The Elastic Tournament: A Second Transformation of the Big Law Firm*, 60 STAN. L. REV. 1867, 1873 (2008); Ronald J. Gilson and Robert H. Mnookin, *Coming of Age in a Corporate Law Firm: The Economics of Associate Career Patterns*, 41 STAN. L. REV. 567, 571 (1989).

111. Galanter & Palay, *supra* note 107, at 102-08; *see also* Wilkins & Gulati, *supra* note 107 (citing Galanter & Palay).

112. Galanter & Palay, *supra* note 107, at 107; *see also* Galanter & Henderson, *supra* note 110, at 1883.

113. Galanter & Palay, *supra* note 107, at 107; *see also infra* note 143 (discussing significance of firms’ “leverage”—the ratio of associates to partners).

114. Wilkins & Gulati, *supra* note 107, at 1603 (citing Galanter & Palay, *supra* note 107). Wilkins and Gulati point out, however, that not all associates in a firm are competing for a partnership slot. Rather, many associates join a firm with no intention of remaining at the firm long enough to make partner. *Id.* at 1606-07 (citations omitted). Moreover, despite the “competition” among associates for

some number of partners regularly depart from the firm to “make room” for this new crop incoming partners, the model potentially creates tensions among partners.¹¹⁵ Galanter separately wrote about this phenomenon a decade ago, noting that firms must promote their most productive associates to partnership in order to ensure that the “tournament” of associates continues to operate,¹¹⁶ but that an increase in the size of the partnership potentially decreases the income of *all* partners, since a larger pool of individuals would share in the firm’s profits.¹¹⁷ Galanter observed that to maintain the overall income of partners, firms often attempt to push out those who already are partners,¹¹⁸ and observed that “[u]nlike the old country doctor or lawyer who died in harness, a career in corporate law is beginning to resemble one in investment banking, where careers phase out by one’s late forties.”¹¹⁹

Thus, until recently, the structure of most large law firms resembled that of a steadily growing pyramid, with a limited number of partners residing at the narrow “top” of the pyramid and an increasing number of associates making up the wider “base” of the pyramid. The integrity of this structure not only has depended on the steady influx of new associates, but also upon some consistent departure by partners from the top of the pyramid to make room for associates who ascend to the partnership. Recent changes within the legal community, however—and particularly within large law firms—have jeopardized this carefully-balanced structure.

B. RECENT CHANGES WITHIN THE STRUCTURE AND CULTURE OF LARGE FIRMS

For many years, this pyramid structure that characterized the modern

partnership slots, Wilkins and Gulati observe that associates tend to work collaboratively in teams. *Id.* at 1613-16.

115. Elizabeth Goldberg, *The “Old Geezer” Factor Not an Issue at some Law Firms*, THE RECORDER (SAN FRANCISCO), Sept. 4, 2007, at 3 (observing that firms “want to create room in leadership ranks for bright young stars to grow. . .”).

116. Marc Galanter, Address, *“Old and in the Way”: The Coming Demographic Transformation of the Legal Profession and its Implications for the Provision of Legal Services*, 1999 WISC. L. REV. 1081, 1100 (1999). [hereinafter *Old and in the Way*].

117. Galanter, *Old and in the Way*, *supra* note 116.

118. *Id.* at 1100-01.

119. *Id.* at 1101; *cf.* Wilkins and Gulati, *supra* note 107, at 1660 (observing that “[l]aw firms are unwilling to make new partners unless the existing level of demand for the new lawyer’s services satisfies some absolute standard.”). The terms of a firm’s partnership agreement generally will facilitate this result by specifying how a partner can be expelled from the firm: Some partnership agreements might require a majority vote by some or all partners in the firm before a partner can be expelled, while other partnership agreements might delegate the power to terminate, demote, or take other actions against partners to a special executive or managerial committee within the firm. *See* 59A AM. JUR. 2D PARTNERSHIP § 330. In addition, firms can mandate the departure of partners by including within the partnership agreement a clause that requires partners to retire at a specified age. *See supra* Part III.A.1.

large law firm enabled firms to expand both their number of lawyers and their bottom lines. Two recent phenomena, however, have threatened the equilibrium within these large firms: (i) the increase in older lawyers continuing to work; and (ii) the enhanced emphasis on “profits per partner” as a measure of law firm success.

1. Recent trend of older lawyers continuing to work

One significant change that has taken place within the legal profession as a whole, including within large law firms, is the dramatic increase in older lawyers who have continued to work well past the time when previous generations of lawyers had retired. The average age of lawyers in the United States has increased significantly in recent years. In the mid-1980s, there were almost three times as many “younger” lawyers as “older” lawyers composing the American legal community.¹²⁰ For every 100 lawyers in their thirties practicing law in the United States, there were just 35 lawyers in their fifties.¹²¹ By 1995, however, there were 50 “older” lawyers for every 100 “younger” lawyers,¹²² and Professor Galanter projects that absent an unanticipated increase in younger lawyers, there will be 97 “older” lawyers for every 100 “younger” lawyers by the year 2020.¹²³ In many respects, this aging of the American legal community simply reflects an aging of the American workforce more generally. Americans in a variety of professions seem to be stretching their professional lives into what once would have been deemed their golden retirement years. Recent data collected by the U.S. Census Bureau shows that the percentage of working individuals age 62 and older increased significantly between 1990 and 2007,¹²⁴ and this trend seems likely to continue as our economic circumstances delay many older individuals’ retirements.¹²⁵

Several factors might explain this increase in the number of older workers generally, and in the number older lawyers in particular. For one thing, significant advances in medicine have allowed older individuals to remain healthier in their later years, thus increasing the length of their

120. Galanter, *Old and In the Way*, *supra* note 116, at 1085.

121. *Id.*

122. *Id.* at 1102. (observing that the the American legal community also appears particularly “grey” in comparison to lawyers abroad, and noting thateven a decade ago, the number of older lawyers in America roughly equaled the entire legal profession throughout all of the European Union.).

123. *Id.*; see also Goldberg, *supra* note 115, at 3 (noting that “[l]awyers are living longer and healthier, and many want to stay professionally active well into their seventies”).

124. Patrick Purcell, *CRS [Congressional Research Service] Report for Congress, Older Workers: Employment and Retirement Trends*, Sept. 7, 2007, at CRS-5 (on file with author); see also Anna Quindlen, *Stepping Aside*, *NEWSWEEK*, May 18, 2009, at 70 (observing that “[t]he baby boom generation . . . take[s] up more room than any other generation in American history. They now account for about a quarter of the population. And so, inevitably, they have created a kind of bottleneck, in the workworld, in politics, in power”).

125. See *infra* notes 128-129.

career paths.¹²⁶ Economic necessity also undoubtedly plays a role in this phenomenon, as many workers discover that their pensions and/or personal savings are insufficient to support them in retirement.¹²⁷ Such financial considerations recently have moved to the forefront of workers' retirement considerations, as a downturn in the American economy has affected numerous older workers' retirement portfolios to a significant degree.¹²⁸ Finally, changing norms within society regarding aging and retirement also have led to this increase in older lawyers. Many lawyers simply are not ready to give up satisfying and prolific careers solely because they have reached a particular age.¹²⁹

2. Recent increased emphasis on "profits per partner" as a key indicator of firm success

In addition to this increase in the average age among lawyers, large firm practice also has been transformed by a second phenomenon: the increased focus on "profits per partner" as a key indicator of law firm

126. JOHN T. BERRY ET AL., JOINT COMMITTEE ON AGING LAWYERS, NATIONAL ORGANIZATION OF BAR COUNSEL (NOBC) & ASSOCIATION OF PROFESSIONAL RESPONSIBILITY (APRL), NOBC-APRL JOINT COMMITTEE ON AGING LAWYERS, FINAL REPORT (2007), available at <http://www.aprl.net/pdf/NOBC-APRL.pdf>, at 3. (last visited Nov. 10, 2009) [hereinafter "NOBC-APRL REPORT"]; see also Kenneth G. Dau-Schmidt, Esther F. Lardent, Reena N. Glazer & Kellen Ressmeyer, "Old and Making Hay": *The Results of the Pro Bono Institute Firm Survey on the Viability of a "Second Acts" Program to Transition Attorneys to Retirement Through Pro Bono Work*, 7 CARDOZO PUB. L. POL'Y & ETHICS J. 321, 327 (2009) ("As people live longer and come to enjoy productive years beyond the typical work life, they are quite naturally looking for new ways to find personal fulfillment and meaning in the second half of their life").

127. Katherine Bridges and David Cicero, American Association for Retired Persons (AARP), *American Association of Retired Persons, Preparing for an Aging Workforce: A Focus on New York Businesses*, available at http://assets.aarp.org/rgcenter/econ/ny_worker_07.pdf, at 2 (2007) (last visited Nov. 18 2009); see also NOBC-APRL REPORT, *supra* note 126, at 3; John W. Schoen, *The new 'retirement' plan: Just Keep Working*, MSNBC.com, July 28, 2009, http://www.msnbc.msn.com/id/32086450/ns/business-personal_finance (last visited Aug. 18 2009).

128. Quindlen, *supra* note 124, at 70 (noting that many baby boomers "would love to retire but no longer can afford to do so"); cf. Karen Sloan, *Depression Among Attorneys Rises as Economy Sinks*, THE NAT'L L. J., May 5, 2009 (describing increasing depression among older attorneys who "are feeling so desponded because they were close to retiring, and now retirement is gone and their practices are struggling. . .").

129. NOBC-APRL REPORT, *supra* note 126, at 3 (citing the "strong desire among many senior lawyers to continue making positive contributions to society"). Ironically, many argue that individuals achieve their most productive levels in their "older" years. See Linda Morton, Janet Weinstein & Mark Weinstein, *Not Quite Grown Up: The Difficulty of Applying an Adult Education Model to Legal Externs*, 5 CLINICAL L. REV. 469, 523-24 (1999) (charting life cycle phases and noting that individuals tend to "cap career" between ages 45-55); see also Madge S. Thorsen, *Boomer-ESQ's: Another Wrinkle on How to Practice Law?*, 53 PRAC. LAW. 33 ("Unlike athletes or movie stars, but like fine red wines, lawyers almost always improve with age. Past 50 years is the legal profession's 'prime time' and arguably the most productive years of a lawyer's professional life"); Julie Cresswell, *Law Firms are Urged Not to Force Retirements*, N.Y. TIMES, Jan. 19, 2007, at C6 (quoting 67-year-old lawyer's concern that "mandatory retirement ages are getting younger just as people are getting older and leading more productive lives"). Many thanks to Professor Janet Weinstein for raising this point.

success.¹³⁰ Attributed to Steven Brill, the founder of *The American Lawyer* magazine, “profits per partner” measures net operating income, minus compensation for non-equity partners, divided by the number of equity partners.¹³¹ This measure often involves astronomical numbers: According to *The American Lawyer’s* rankings for 2008, the nation’s top-ten earners in terms of profits per partner earned between \$2,290,000 per partner and \$4,010,000 per partner.¹³² Ironically, such numbers represented a “down” year in terms of profits per partner.¹³³

This emphasis on profits per partner pervades the legal market. Rather than using a firm’s success in litigation or its workplace morale as a means of measuring law firm success, many of the observers that “matter”—law students, other lawyers, and law firm ranking sources—all seem to have shifted their focus to profits per partner as a means of gauging a firm’s reputation and prestige. Indeed, profits per partner rankings “have become the industry’s measuring stick . . .,”¹³⁴ not only functioning as a way of making comparisons among firms, but also serving as a marketing tool for firms to use in recruiting new legal talent, since “maintaining a higher per-partner profit . . . creates a competitive edge to help attract top lateral hires.”¹³⁵ Steven Brill, for example, defended his magazine’s publication of these rankings by asserting that “[p]eople who were deciding careers, and looking at law firms as business institutions ought to have some means of comparison.”¹³⁶ Likewise, the chairman of the major law

130. Ameet Sachdev, *Profit motive honing law firms; More partners asked to leave if they fail to meet revenue goals*, CHI. TRIB., Oct. 26, 2006, at C1 (observing that joining the ranks of the top 25-30 law firms in the United States turns on “two widely watched financial benchmarks: revenue per lawyer and profits per equity partner”); cf. Stewart Weltman, *The Faustian Deal and Why We Litigators Must Change the Way We Practice*, Lean and Mean Litigation Blog, May 26, 2008, available at <http://leanlitigation.typepad.com/weltman/2008/05/the-faustian-de.html> (last visited Aug. 18 2009) (observing that “[f]irms are now completely driven by the bottom line. It controls all that is done.”).

131. Andrew Zangrilli, FindLaw for Legal professionals, *Junior Associates—The State of the Legal Profession, Part 2*, <http://practice.findlaw.com/law-practice-management-articles/00006/000455.html> (last visited Aug. 18 2009).

132. *The AmLaw 100[:] 2009 Five Firms Drop Below \$1 Million*, AM. LAW 169 (2009).

133. Posting of Elie Mystal, elie@abovethelaw.com, to http://abovethelaw.com/2009/04/the_amlaw_100.php (last visited Aug. 18 2009) (noting that “overall, the AmLaw 100 confirms what most observers feared. Amy Winehouse had a better 2008 than most American lawyers”); see also *The AmLaw 100[:] The Party’s Over*, AM. LAW 109 (“For most of the past five years, Am Law 100 firms flourished. That came to a crashing halt in 2008.”).

134. Bloomberg News, *Jenner law firm demoting 15-20 partners*, CHI. TRIB., June 13, 2007, at C2; see also Zangrilli, *supra* note 132, (observing that profits per partner “has become the benchmark by which law firms judge themselves.”).

135. Danielle M. Evans, *Non-Equity Partnership: A Flawed Solution to the Disproportionate Advancement of Women in Private Law Firms*, 28 WOMEN’S RTS. L. REP. 93, 95 (2007) (citation omitted); see also Weltman, *supra* note 130, (citing the need “to maintain or raise ‘profits per partner’ in order to keep and lure supposed rainmakers”); Ameet Sachdev, *Mayer move a legal stunner; Cutting partners unusual for firm, but not for others*, CHI. TRIB., May 12, 2007, at CN1.

136. Sachdev, *Mayer move a legal stunner*. . . , *supra* note 135; (quoting observation by managing partner of large law firm Winston & Strawn that “[revenue per lawyer] is the equivalent of earnings per

firm Mayer Brown Rowe and Maw defended the layoff of equity partners within his firm as part of an “objective[] to make sure our stock price stays high.”¹³⁷

In addition to firms marketing themselves to outsiders based upon their profits per partner, this figure serves an important internal mechanism as well, functioning as a means for retaining talent within the firm. Unlike previous generations of lawyers, who tended to remain within a single firm for their entire careers, lawyers today tend to move more freely between firms, often jumping among multiple firms over the course of their careers.¹³⁸ Thus, competition among firms for the most successful attorneys—those with significant clients or with the largest books of business—can be fierce, and firms frequently use profits per partner to woo partners away from a competitor.¹³⁹ Conversely, a reduction in profits per partner can prompt the departure of key lawyers from a firm.¹⁴⁰ Such an exit of key partners, if occurring on a large scale, can threaten the very existence of the firm.¹⁴¹ Firms therefore have come to view this measure of profits per partner as an essential aspect of their survival.¹⁴²

3. *Tensions Created by the Intersection of These Two Developments*

These two developments within the legal profession – the increasing length of lawyers’ careers and the increased emphasis on profits per partner – inevitably will create tensions within many firms, what has been called an

share in the corporate world.”).

137. Sachdev, *supra* note 136..

138. Galanter, *Old and in the Way*, *supra* note 116, at 1094 (citation omitted) (describing changes within large law firms in recent years, including “attorney movement from firm to firm” and the “increased mobility of individual lawyers”); *see also Changing Times: Free-Agent Partners Find Receptive Market*, CRAIN’S CLEV. BUS, 1998 WLNR 1411393 (1998) (observing that “[i]n the legal world, partners are hopping from one law firm to another with growing frequency”).

139. Robert Ankeny, *Staffing becomes target as firms hunt for profits*, 23 CRAIN’S DET. BUS. 13, 2007 WLNR 24613218 (2007) (quoting legal recruiter’s observation that “big firms want to make profits-per-partner look better as they recruit for opening new offices”); Ameet Sachdev, *Jenner & Block law firm cuts several partners*, CHI. TRIB., Mar. 6, 2008, at C1 (describing the increased pressure on partners in large firms to bill more hours and bring in new business and observing that “[h]igher profits can help attract other rainmakers”); *see also* Gina Passarella, *With an Eye of Profits, Firms Tier Up*, THE LEGAL INTELLIGENCER 1 (2006) (“When looking at a firm’s financial prestige, profits per equity partner seems to reign supreme despite grumblings over its alleged manipulation”).

140. *See* Sachdev, *Jenner & Block law firm cuts several partners*, *supra* note 139 (“Firms that don’t keep up risk losing their most profitable lawyers”); Galanter & Henderson, *supra* note 110, at 1891 (“In a competitive marketplace in which rainmaking partners have abundant opportunities at crosstown rivals, expanding the partnership runs the risk of diluting profits and prompting the exit of key lawyers”).

141. *Id.*

142. Martha Neil, *Brave New World of Partnership*, 90 A.B.A. J. 31, 34 (2004). Ironically, this focus on profits per partner has persisted despite skepticism regarding the accuracy of this measurement and significant concerns about firms’ ability to manipulate this figure. [hereinafter “Brave”] *See* Passarella, *supra* note 139.

“increasing tension between profits and size.”¹⁴³ The profits “pie” that firm partners divide among themselves only can grow so large, and so the more partners who claim a piece of this pie, the lower the calculation of a firm’s profits per partner. In this way, law firms differ from other national or international businesses that likewise may be facing an increase in older employees.¹⁴⁴ While a corporation or other large “non-partnership” business must remain attuned to its bottom line (particularly if it is a publicly traded company accountable to shareholders), non-partnerships will not necessarily see profits decrease as the company grows. Indeed, the company may see profits *rise* as the workforce expands, if this increase in manpower helps the company to become more productive. An increase in older lawyers within a partnership, however, will decrease *all* partners’ share in such gains, unless accompanied by a corresponding spike in firm profits. Firms therefore have recognized that remaining competitive (at least in terms of the financial benchmarks that matter) might require rather drastic measures.

One step adopted by many firms to enhance their perceived prosperity has been to trim the size of their partnerships.¹⁴⁵ By decreasing the number of partners who share in the firm’s profits, a firm can increase its profits per partner. This decision to decrease the firm’s partners, however, frequently has hit older partners the hardest. While partnership used to be viewed as akin to a tenured position, much of the job security associated with this lofty status has given way to increasing uncertainty and unrest. In the words of EEOC Regional Attorney John Hendrickson, “as the legal profession has become more like a business, the younger people who are coming up are more anxious to get a bigger piece of the pie and the way to do that is to get rid of the elders.”¹⁴⁶ Professor Galanter has echoed this view, observing that “[a]s firms accumulate ever-larger cadres of partners, there is an increasing pressure on lawyers over fifty, apart from rainmakers and a few specialists and superstars, to make way for younger partners and eventually to leave.”¹⁴⁷ This observation further resonates with law firm

143. Sachdev, *Profit motive honing law firms. . .*, *supra* note 130 (quoting founder of legal consulting firm); *see also* Niraj Chockshi & Zusha Elinson, *Floating on a Turbulent Economy Being Spread Out Helped Firms Weather a Rough Year*, 132 RECORDER (SAN FRANCISCO), Jan. 10, 2008, at 1 (noting that even in year when large firm Littler Mendelson saw increase in gross revenue of 28%, it saw decrease in revenues per lawyer and profits per partner as its headcount grew by half); Gilson & Mnookin, *supra* note 110, at 584 (observing that “firm leverage [i.e., the ratio of associates to partners] is directly related to firm profit: the higher the firm’s leverage, the higher the firm’s per partner profit.”) (footnote omitted).

144. *See supra* notes 124-25 and accompanying text.

145. *See* Ankeny, *supra* note 139 (observing firms tendency to “thin partner ranks to boost profits”); *see also* Sachdev, *Profit motive honing law firms. . .*, *supra* note 130.

146. Julie Cresswell & Karen Donovan, *Happy Birthday, Vacate Your Office*, N.Y. TIMES, Dec. 8, 2006, at C1; *see also* Neil, Brave, *supra* note 142, at 72 (observing that “[t]he tendency in a competitive business environment is to emphasize law practice as a business.”).

147. *See* Galanter, *Old and in the Way*, *supra* note 116, at 1094; *see also* Julie Cresswell, *Law*

partners themselves. As one large law firm partner observed, “To be a healthy institution, you have to encourage people to hand off business to the younger generation.”¹⁴⁸

As attention to a firm’s profits per partner has increased in recent years, numerous large law firms have tried to “push out” older lawyers.¹⁴⁹ In the late 1990s, for example, the Wall Street firm Cadwalader, Wickersham & Taft attracted significant attention when a group of younger partners in the firm initiated a “putsch” to rid the firm of less productive older partners, ultimately increasing the firm’s profits per partner by 22% in one year.¹⁵⁰ Referring to the move as “Project Rightsize,” these younger Cadwalader partners defended their actions, with one partner noting that the decision “wasn’t about greed. . . . [It] was about doing the greatest good for the greatest number of people.”¹⁵¹ A lawyer who represents law firms in labor and employment matters provided a similar assessment of this type of conduct, noting that “[t]he younger people want to make more money. . . . The senior people have been making money for a long time, and for the young people to make more, the old people need to go. It is just as mercenary as it sounds.”¹⁵²

In the decade since the Cadwalader putsch, such conduct has become more commonplace among large firms. In June 2007, the large Chicago-based law firm Jenner & Block de-equitized between 15 and 20 of its equity partners.¹⁵³ The preceding March, Mayer Brown, Rowe & Maw— a firm whose genteel and low pressure culture previously had earned it the moniker “Mother Mayer”—eliminated 45 partners.¹⁵⁴ Indeed, firms across the country have followed this model, trimming partnership ranks in an

Firms are Urged Not to Force Retirements, N.Y. TIMES, Jan. 19, 2007, at C6 (“Law firms that have adopted more corporate like structures have long argued that older partners needed to be moved out to give more opportunities and a bigger chunk of profits to younger lawyers”); *see also* Leigh Jones, Pitfalls., *supra* note 86 (observing that requiring older lawyers to retire upon reaching a certain age “facilitates a routine exodus of older partners, allowing the careers of younger partners to flourish as they take on the work of the old guard.”).

148. Cresswell & Donovan, *supra* note 146; *see also* Nathan Koppel, *The law of profits; Lawyers are finding out partnership no longer has its privileges, as many elite firms are trying to stay profitable by firing and demoting their partners*, CHI. SUN TIMES, July 27, 2007, at 6 (quoting observation by partner in large Dallas law firm that “Partnership no longer is a tenured position . . . You have to get up every Monday morning and prove yourself all over again.”).

149. *See* Wilkins & Gulati, *supra* note 107, at 1616 (citation omitted) (“It is a reality of today’s competitive market that if new partners find that they are generating the lion’s share of the partnership’s profits, they may well decide to terminate some of their older, less productive colleagues.”).

150. *See* Paul M. Barrett, *Putsch and Shove: A Once-Stodgy Firm makes a Flashy Return, But at What Cost?*, THE WALL ST. J., Aug. 17, 1998, at A1.

151. *Id.*

152. Goldberg, *supra* note 115, at 3.

153. *See, e.g.*, Bloomberg News, *supra* note 135 (describing de-equitization of 15-20 equity partners as “a means to boost the average profits earned by equity partners to retain rainmakers and lure new talent.”).

154. Sachdev, *Mayer move a legal stunner. . .*, *supra* note 135; *see also* Koppel, *supra* note 148.

effort to increase profitability.¹⁵⁵ Sidley likewise allowed concerns about profitability to motivate the demotions that lead to the EEOC's suit.¹⁵⁶ According to EEOC attorney Hendrickson, "the highest ranking members of [Sidley] were *repeatedly* quoted about the changes being made to benefit *younger* members of the firm"¹⁵⁷ Recent economic conditions only have exacerbated this problem. Faced with increasing pressure to create a strong financial image despite otherwise-dwindling profits per partner,¹⁵⁸ many law firms have "us[ed] this [downturn] as an opportunity to let go people who maybe were at the tail end of their careers."¹⁵⁹

Thus, this growth in the size of the partnership pyramid—particularly due to the increase in older partners—frequently has run up against firms' bottom-line focus on profits per partner. While many firms' response to this conflict has involved pushing out older partners, cases like *Clackamas* and *Sidley* have demonstrated the legal risks inherent in that strategy.

IV. A CRUMBLING PYRAMID: *CLACKAMAS* AND *SIDLEY* ACCELERATE THE DECLINE OF THIS STRUCTURE

Without question, the courts' decisions in both *Clackamas* and *Sidley* garnered significant attention among legal scholars and practitioners. Much of the scholarship regarding these decisions, however, seems to have focused on whether the courts adopted the appropriate test for determining who qualifies as an employee for purposes of antidiscrimination law, and on the extent to which the decisions might limit employers' ability to take certain actions against the partners or shareholders in a business.¹⁶⁰ Few (if any) scholars have discussed the broader issue of how these decisions might affect the structure and inner workings of law firms, including large law firms in particular. This Section considers *Clackamas* and *Sidley* from that perspective. This Section first discusses the extent to which these

155. See Koppel, *supra* note 148 (noting that midsize Atlanta firm Powell Goldstein recently had demoted or fired partners); see also Bloomberg News, *supra* note 135; Sachdev, *Jenner & Block law firm cuts several partners*, *supra* note 139 (noting that Jenner's cutbacks followed similar reductions at Mayer Brown, Winston & Strawn, and Sonnenschein Nath & Rosenthal).

156. See Wilkins, Partner, Schmartner!, *supra* note 17, at 1265 (describing decline in Sidley's revenues preceding the demotions and noting that demotions of underperforming partners "would immediately improve the firm's profits per partner"); cf. Hendrickson, *supra* note 70, at 416 (describing older partner overhearing reference to demoted partners as "deadwood").

157. Hendrickson, *supra* note 70, at 416 (emphasis in original).

158. See *supra* notes 132-33 and accompanying text (citing recent figures in *The American Lawyer* showing a decrease in profits per partner for 2008).

159. Debra Cassens Weiss, *Law Firms Use Downturn as Opportunity to Ax Older partners, Recruiter Says*, ABA J., May 1, 2009 (quoting legal recruiter regarding impact of layoffs on older law firm partners).

160. See *supra* note 17 and accompanying text.

cases limit firms' ability to mandate the retirement of older partners. It then focuses on some potential ramifications of limiting firms' conduct in this way, speculating as to what steps firms may take to try to remain profitable while still maintaining a large pool of partners.

A. THE IMPACT OF *CLACKAMAS* AND *SIDLEY*

1. *Death Knell for Mandatory Retirement Policies*

Even prior to the decisions in *Clackamas* and *Sidley*, firms were grappling with how they could balance this increasing emphasis on profits per partner against the reality of partnerships that were ballooning in size. In response to this tension, many large firms sought to trim their partnership ranks, particularly by using mandatory retirement policies. Indeed, mandatory retirement policies quickly became a regular feature within large firms: a survey released in May 2005 by Altman Weil, a law firm consultancy, reported that 38% of the 202 law firms responding to the study used some form of mandatory retirement, and that of that group, 57% of firms with 100 or more attorneys had mandatory retirement policies.¹⁶¹

Firms apparently saw such mandatory retirement policies as a relatively simple means to balance their competing concerns regarding promotion to partner and continued profitability. These policies help to keep profits per partner at a high level by limiting the number of partners who receive a share of the profits. In addition, mandatory retirement policies facilitate the transition of work from older to younger partners. As the managing partner of one large law firm observed, “[i]t’s in the business interests of the firm to see work transitioned to other partners at age 70.”¹⁶² Moreover, mandatory retirement policies provide consistency within a firm, alleviating the need for a case-by-case analysis of older partners’ abilities.¹⁶³

In the wake of *Clackamas* and *Sidley*, however, it seems clear that utilizing a mandatory retirement policy creates significant potential exposure for a firm under the ADEA. If any partner who was required to retire under such a policy was deemed an employee for purposes of the ADEA, then he or she undoubtedly would have a viable claim of age discrimination. Thus, some within the legal community have begun to speak out against the continued use of these policies. For example, Marc Alcott, the past president of the New York State Bar Association

161. See Leigh Jones, Pitfalls, *supra* note 86.

162. *Id.*

163. *Id.*; but see *infra* Part. IV.A.1 (discussing the benefits of conducting an individualized analysis of older partners’ abilities to continue working for their firms).

“NYSBA” and an outspoken critic of law firm mandatory retirement policies, has observed that the *Sidley* settlement “suggests the approaching death of age-based retirement policies among the nation’s largest firms.”¹⁶⁴ The American Bar Association likewise has come out squarely against the continued use of mandatory retirement policies, adopting a Recommendation at its August 2007 meeting that law firms cease their use of such policies.¹⁶⁵ After studying both the legal and factual background regarding firms’ use of mandatory retirement policies, the ABA concluded that “mandatory retirement—requiring a partner to leave the firm upon reaching an arbitrary age—is not an acceptable practice,”¹⁶⁶ deeming mandatory retirement policies “unwarranted and unwise,”¹⁶⁷ and citing concerns that mandatory retirement policies violate federal age discrimination laws.¹⁶⁸

Cases like *Clackamas* and *Sidley* therefore have added an additional dimension to the dilemma faced by large law firms that feel trapped by the increasing size of their partnerships and by the need to maximize their profits per partner. While firms previously might have tried to push out older partners in the firm in an effort to maintain flush profits-per-partner, these two cases make it clear that firms which utilize mandatory retirement policies open themselves up to significant exposure under the ADEA.

This restriction on mandatory retirement is not necessarily bad. There are many reasons to limit the use of mandatory retirement within the legal profession. Older partners bring to their work a wealth of experience and insight from which their younger colleagues can benefit.¹⁶⁹ In addition, from a normative perspective, we should not permit any business (and particularly not law firms) to discriminate on the basis of age merely by relying upon a technical definition (i.e., “employee”) under federal law. As the ABA observed in its Recommendation, “[s]ociety has made a judgment in every other field that people should not be put out to pasture arbitrarily, solely because of age. The legal profession should not be fighting a rear

164. *Terminating Partners: What will the Sidley Settlement Mean for law Firm Owners?*, 07-12 PARTNER’S REPORT 1 (Dec. 2007).

165. Anna Stern, *Heeding the Call for the End of Mandatory Retirement*, 21 GEO. J. LEGAL ETHICS 1095, 1095 (2008) (citations omitted).

166. ABA Recommendation, *supra* note 100, at 11.

167. *Id.* at 11-12 (“A lawyer’s age, standing alone, is not an appropriate criterion for determining professional capacity or employment status.”).

168. *See* Stern, *supra* note 165, at 1101-02 (citations omitted). Even before the ABA issued its Recommendation, the NYSBA had adopted a similar opposition to mandatory retirement policies, issuing a report recommending that firms cease utilizing these types of policies and proposing that the ABA adopt this position as well. *Id.* at 1098-1100. The bar associations in several other states subsequently expressed varying degrees of support for the NYSBA’s position. *Id.* at 1100-01.

169. *See* Thorsen, *supra* note 129, at 34 (noting that “clients with serious legal concerns want serious and seasoned advice from masters who have been around the block.”).

guard action against this public policy. . . .”¹⁷⁰

Yet this protection of older partners, particularly by imposing limitations on mandatory retirement, may have significant consequences for law firms and for the lawyers who work there. With a greater number of partners remaining at work in the firm, and a continued emphasis on profits per partner as a measure of success, firms may take any number of alternative steps to try to remain profitable while complying with the ADEA. As discussed in greater detail below, many of these steps present their own set of serious drawbacks for any number of interested parties.

2. Something's Gotta Give: Law Firms' Potential Responses to this Increase in Older Partners

The calculation faced by the modern large law firm is simple: In order to maximize profits per partner, firms either must increase the amount of profits to be divided among partners or must decrease the number of partners who claim a share of this “pie.” Accordingly, to the extent that decisions like *Clackamas* and *Sidley* rule out one approach for limiting the number of partners in a firm—the utilization of mandatory retirement policies—firms will have to use other methods for achieving one or both of these results. Unfortunately, many of the methods may have significant negative ramifications not only for other lawyers in the firm, but also for the legal profession and for society as a whole.

a. Increased billing pressure on associates and partners

One approach that law firms might adopt to ensure stable profits in the face of an increasing partnership is to increase the amount of revenue that individual lawyers bring in. While firms arguably could accomplish this goal by increasing the rates that they charge to clients,¹⁷¹ market competition limits the extent to which firms can increase their rates.¹⁷² Indeed, given the recent economic downturn, clients seem more likely than ever to resist the ever-skyrocketing hourly rates charged by firms.¹⁷³

170. See ABA Recommendation, *supra* note 100, at 11.

171. Galanter, *Old and in the Way.*, *supra* note 116, at 1100.

172. *Id.*; see also Nathan Koppel & Ashby Jones, ‘Billable Hour’ Under Attack, THE WALL ST. J., Aug. 24, 2009, at A1 (“Companies have long complained that legal fees are inflated by a business model in which law firms have high-priced junior lawyers who must be kept busy billing for work that could be handled more efficiently”).

173. See Jim Hassett, *Why Every Lawyer Should Consider a New Billing Approach in 2009*, 28 NO. 3 OF COUNSEL 5, 5 (2009) (discussing desire by companies to protect bottom line in current economic downturn and asserting that “[f]or law firms, that means more pressure from clients for alternative fees”); Sherry L. Talton, *Economy Renews Billable Hour Debate*, A.B.A. LITIG. NEWS, July 1, 2009, available at http://www.abanet.org/litigation/litigationnews/top_stories/billable-hour-alternative-fee.html. (“The economic recession has renewed the debate about the billable hour as more litigation

Thus, to increase the revenue generated by lawyers, firms might pressure attorneys to increase their billable hours.¹⁷⁴ To some extent, this pressure already exists; average billable hours have been on the rise for some time. Firms' billable hour expectations increased from approximately 1,500 billable hours per year in the 1960s, to between 1,600 and 1,800 billable hours per year in the 1970s and 1980s, to 1,961 billable hours per year in the 1990s, with associates often billing in excess of this expectation.¹⁷⁵ More recently, a 2005 study conducted by Professor Susan Saab Fortney and funded by the NALP Foundation found that the mean hours billed by associates at very large firms (defined as firms with over 300 attorneys) had reached 2,059 in 2004.¹⁷⁶

This pressure to bill an ever-increasing number of hours has severe consequences for law firm associates. Many scholars and practitioners already have written about the detrimental impact that this emphasis on the billable hour has had on associates' quality of life.¹⁷⁷ Associates themselves readily recognize this affect, with one of Professor Fortney's respondents commenting that his or her "major life struggle comes from billable hours."¹⁷⁸ Billable hours also devalue associates' work, "quantifying" associates' contributions to the firm using this objective measure over a more qualitative analysis.¹⁷⁹

Finally—and perhaps of greatest societal concern—this increased emphasis on billable hours also raises potential ethical concerns for associates by "increas[ing] the potential for conflicts of interest between the associate's need to meet the firm's expectations and the client's interest in fair billing."¹⁸⁰

Just as associates suffer from an increase in billable hour expectations, law firm partners likewise experience many of these negative effects. As previously noted, partners no longer enjoy the presumption of lifetime job

clients look for ways to reduce legal expenses"); Koppel & Jones, *supra* note 172 (citing survey that found an increase of more than 50% this year in clients' use of alternative billing arrangements).

174. See Galanter, *Old and in the Way*, *supra* note 116, at 1100.

175. Neil Hamilton, *A look at the effects of increasing the hours that associates must bill*, MINN. LAW., Jun. 4, 2001 (describing study conducted by Prof. Susan Saab Fortney and the Texas Bar Association's department of research); see also Susan Saab Fortney, *The Billable Hours Derby: Empirical Data on the Problems and Pressure Points*, 33 FORDHAM URB. L.J. 171 (2005).

176. Fortney, *supra* note 175, at 176.

177. See, e.g., Fortney, *supra* note 175, at 179 (noting that for many survey respondents "billable hours pressure and long hours were at the heart of work-life conflicts"); Hamilton, *supra* note 175 (observing that "[i]ncreasing billable hour expectations creates conflict . . . with the quality of work life itself and with the balance between work life and personal/family life").

178. Fortney, *supra* note 175, at 179-80 (citation omitted).

179. *Id.* at 177 (citations omitted).

180. Hamilton, *supra* note 17 see also Fortney, *supra* note 175, at 178, 187 (citations omitted) (discussing concern that billable hour requirements encourage lawyers to "pad" their time).

security.¹⁸¹ Instead of simply focusing on “making partner” in the early part of their careers, partners now additionally must focus upon “staying partner.”¹⁸² Accordingly, they too must respond to firm expectations, including increasing pressure “to bring in business as well as to contribute to firm revenues by billing long hours.”¹⁸³ This increased emphasis on billable hours not only might cause partners to experience the same quality of life consequences and ethical concerns discussed above with respect to associates, but also might discourage partners from making other “non-billable” contributions to the firm, including the training of associates (discussed further below).

b. Establishment of obstacles to making partner

An additional approach that law firms might take in response to this limit on mandatory retirement might be to make it harder for associates to achieve partnership status. If firms cannot limit the size of partnership pool by requiring older partners to leave the firm, they might accomplish this same task by reducing the number of entering partners.

In recent years, it already has become more difficult for associates to make partner, as a “whole constellation of factors” weigh against an associate’s chances of ever making partner.¹⁸⁴ As the number of students graduating law school has increased in recent years, leading to a rise in the number of incoming associates in firms, many firms have lengthened their partnership tracks and otherwise have made the partnership prize more difficult to attain.¹⁸⁵ For example, firms have created various levels of achievement prior to equity partnership status, such as “of counsel,” “permanent associate,” “special counsel” or “non-equity partner.”¹⁸⁶ Firms also deliberate carefully before making new partners, not only examining the credentials and qualifications of associate-candidates, but also questioning whether the firm’s volume of business in the associate’s field can support the addition of another partner in that area.¹⁸⁷

181. See *supra* Part. II.B.3; see also Wilkins & Gulati, *supra* note 107, at 1615.

182. See Koppel, *supra* note 148.

183. Galanter, *Old and in the Way*, *supra* note 116, at 1095; see also Sachdev, *supra* note 139 (observing that “despite years of rising revenue and profit there is unyielding pressure on partners to bill more hours and bring in new business.”).

184. See Neil, Brave, *supra* note 142, at 33.

185. See Johnson, *supra* note 17, at 1081 (citation omitted).

186. *Id.* at 1082; see also *infra* at Part. III.A.2.c (discussing use of two-tiered equity/non-equity partnership structure).

187. See Wilkins & Gulati, *supra* note 107, at 1661.

(“Law firms are unwilling to make new partners unless the existing level of demand for the new lawyer’s services satisfies some absolute standard. . . . This absolute standard, the amount of demand for new partners in a given area, defines the terms of the competition in which senior associates compete to win partnership slots.”).

If firms continue to face pressure to limit the number of partners who share in firm profits, yet are constrained from cutting older partners from the firm, the obstacles for associates seeking partnership are likely to multiply. Firms might lengthen the path to the partnership prize, funneling associates through an increasing number of preliminary levels before they can share in the equity of the firm. They may look even more carefully at the “business case” for elevating an associate to the partnership, requiring even greater evidence that the firm’s revenue supports adding an additional partner in a given practice area. Stepping up these requirements not only will limit the number of new partners who must share in the firm’s profits, but also would ensure that only those associates who are the most dedicated, hard-working and (presumably) high-billing, and who thus are likely to generate the greatest amount of revenue for the firm, achieve the status of partner in a firm.

c. Increased use of two-tiered equity/non-equity partnership structure

Just as firms might try to make up for their inability to get rid of older partners in the firm by increasing the length of their partnership tracks or creating other obstacles to attaining partnership status, firms also might try to limit those who share in the partnership’s profits by creating additional partnership tiers—specifically, “non-equity” partnership tiers. While such non-equity partnership structures may take on a number of different forms, the defining characteristic of such structures involves the creation of a class or classes of lawyers who lack many of the key attributes of equity partnership: they do not have liability for debts of the firm, receive a set compensation instead of a share of the firm’s profits, and often (although not always) lack the power to vote on firm-related issues.¹⁸⁸ While some firms view non-equity partners as remaining permanently outside of the equity partnership track,¹⁸⁹ other firms see non-equity partnership as a stepping-stone to full equity partner status, during which lawyers have the opportunity to polish their rainmaking skills and adjust to the increased expectations and duties of partnership.¹⁹⁰

Regardless of a firm’s specific motivation for implementing this multi-tiered structure, this structure arguably boosts the profits of equity partners, since the creation of these “lower” partnership tiers limits the number of partners who must share in the firm’s revenues.¹⁹¹ Accordingly, many law firms believe that this stratification will increase their profits per

188. Evans, *supra* note 135, at 95 (citation omitted).

189. Evans, *supra* note 135, at 95 (citing information provided by the National Association for Law Placement) (citation omitted).

190. *Id.*

191. *Id.*

partner.¹⁹² Thus, even before cases like *Clackamas* and *Sidley*, a number of firms already began to shift to this type of multi-tiered structure.¹⁹³

This multi-tiered partnership structure, however, leads to a number of significant drawbacks, both for lawyers within a particular firm and for the legal profession as a whole. First, such a structure can have a negative impact on firm morale, particular among associates who might view this format as an “attempt by powerful partners to hoard firm profits.”¹⁹⁴ After years of slaving away in the name of productivity and profitability, associates understandably might resent having extra steps added to their ascension to full equity partnership. In addition, the establishment of a non-equity partnership tier can undermine opportunities for training and practice development among lawyers in the non-equity tier, particularly in firms where income partner status is viewed as an entirely separate track instead of as a stepping stone to equity partnership. Once a lawyer moves off of the equity partnership track, many law firms may write him or her off, providing lower quality assignments and less feedback.¹⁹⁵

An additional criticism levied against this multi-tiered partnership structure focuses on the impact of the structure on particular groups. Observers have criticized some firms for using non-equity partnership to “weed out existing partners who don’t meet certain [financial and/or professional] criteria,”¹⁹⁶ often in a manner that revolves around internal firm politics.¹⁹⁷ Some firms have used non-equity partnership to punish particular partners,¹⁹⁸ or “to hide ‘dead-wood’ or older partners who simply have retired in place.”¹⁹⁹ In addition, the creation of partnership tiers potentially works to the detriment of women and minorities: the number of

192. See Mark Curriden, *No Tears for Two Tiers . . . More and More Firms are Sure Non-Equity Partner Slots Benefit Everyone*, 20 No. 4 OF COUNSEL 18, 18 (April 2001); see also Lindsay Fortado, *Lawyer’s Ranks are Growing Again at the Nation’s Biggest Firms; National Law Journal Survey Shows Increases Across the Board*, 182 N.J.L.J. 733 (Nov. 21, 2005) (quoting consultant’s view that “law firms make more money on income partners than on associates or equity partners”); but see William D. Henderson, *An Empirical Study of Single-Tier Versus Two-Tier Partnerships in the Am Law 200*, 84 N.C. LAW REV. 1691 (2006) (challenging the assumption that creation of a two-tier partnership structure increases profits per partner in a firm).

193. See Henderson, *supra* note 192, at 1695, 1706 (citations omitted); see also Leigh Jones, *New Partner Class Didn’t Grow; Top Firms’ Overall Totals Match 2006*, Nat’l L.J. 1, (Col. 1) (April 9, 2007) (quoting law firm consultant and former law firm chairman’s observation that “there is a continuing trend toward the expansion of nonequity partnership classes as opposed to equity partnership”); Martha Neil, Brave, *supra* note 142.

194. See Henderson, *supra* note 192, at 1707 (citation omitted).

195. Evans, *supra* note 135, at 97 (citations omitted).

196. Curriden, *supra* note 192, at 19.

197. *Id.*

198. *Id.*

199. *Id.* Notably, in the wake of decisions like *Clackamas* and *Sidley*, firms might run into significant legal problems using non-equity partnership as a potential demotion for older partners seen as not pulling their weight within the firm. Indeed, this is quite akin to the alleged wrongful conduct that formed the basis of the EEOC’s investigation of and litigation against *Sidley*.

female equity partners at two-tiered firms is significantly lower than at single-tier firms,²⁰⁰ and this disparity exists for minority partners as well, who likewise tend to be overrepresented in the “income partner” (as opposed to “equity partner”) category within firms that utilize these tiers.²⁰¹ Thus, firms may be bolstering their bottom lines at the expense of diversity and inclusiveness within their leadership ranks—a result that not only harms those women and minority attorneys who find themselves denied opportunities for advancement, but also “perpetuates inequality within the legal profession.”²⁰²

d. Decrease in associate hiring

Another potential implication of this tension between the need to increase profits per partner and the legal limits on a firm’s ability to reduce its partnership ranks is that firms simply may begin hiring fewer associates. As discussed above, the traditional up-or-out structure in firms has assumed that some percentage of those associates hired each year eventually will make their way to the top of the firm’s hierarchy, attaining the status of equity partner.²⁰³ If firms must clamp down on the number of associates they eventually can elevate to partner in order to maintain the flushness of their per-partner profits, they may reduce the number of associates that they hire to begin with. With law school graduates already clamoring for jobs in the current economic downturn, a further tightening of the job market could present disastrous consequences for this group of new lawyers.

e. Make cuts in associate training or other important benefits

Finally, firms trying to maintain high profits per partner in the face of a ballooning number of partners might try to maximize the size of the firm’s profits by cutting costs. One potential source of cost-savings might be though decreasing the resources devoted to associate training and development. Large law firms spend an exorbitant amount of money on associate training.²⁰⁴ Moreover, firms generally do not recoup the costs of such training immediately, since firms rarely profit from the work of first-

200. See Evans, *supra* note 136, at 97 (citing 2006:National Association of Women Lawyers, *National Survey on Retention and Promotion of Women in Law Firms*, 92 NAT’L. WOMEN’S L.J., Oct. 2006, available at <http://www.abanet.org/nawl/docs/NAWIFINALPUBLICATION10-25-06SURVEYREPORT.pdf>).

201. See, e.g., David Wilkins, *Partners Without Power? A Preliminary Look at Black Partners in Corporate Law Firms*, 2 J. INST. FOR STUDY LEGAL ETHICS 15, 20 (1999) (citations omitted).

202. Evans, *supra* note 135, at 94.

203. See *supra* notes 107-119 and accompanying text.

204. *Law firms: Legal Problems Trouble for lawyers as deals dry up*, ECONOMIST, MAR. 15, 2008, at 89.

year associates.²⁰⁵ Any funds diverted from this training and kept within the firm's general revenues could increase the per-partner profits of the firm.

This is not a new concern; some believe that firms already have allowed their focus on the bottom line negatively to affect associate training.²⁰⁶ In the words of one long-time and experienced litigator, "few if any private sector associates are gaining any concept of the big picture in the cases they work on. They are given zounds of projects to work on as part of a larger group of pyramided lawyers in various matters. But how many are actually an integral part of any case's litigation team?"²⁰⁷ Yet while this concern about insufficient associate training is not new, firms may cut back even further on training if they feel heightened pressure to maintain or increase their profits per partner amidst limits upon their ability to trim the size of their partnerships.

In addition to cutting back on associate training, firms might make additional spending cuts in order to maintain high profits per partner, reducing the "perks" that they traditionally have granted to associates. Indeed, firms already have cut back on perks ranging from 401K matching contributions and firm-provided health insurance coverage, to holiday parties and taxi usage, to reimbursement for cell phone usage and other technology.²⁰⁸ While many of these benefits may seem negligible on their own, they traditionally have been viewed as making life more tolerable for associates toiling away to "meet their hours," and eliminating such perks may impact associate morale significantly.²⁰⁹

Thus, because decisions like *Clackamas* and *Sidley* inhibit firms from limiting the size of their partnerships through the traditional means of

205. See Daniel Willis, *Inner Economist: In Praise of Deferrals*, THE DEVIL'S ADVOC., Apr. 22, 2009, available at <http://www.the-devils-advocate.com/vnews/display.v/ART/2009/04/22/49edbe0ad1e77>.

("Law firms rarely if ever make money from the work their first-year associates do. First-year associates exist to do grunt work. . . and to gain experience so that they can turn into productive and useful mid-level associates. . . . Law firms' clients are aware of this, and they don't like paying to train freshly minted lawyers.")

206. Weltman, *supra* note 130; see also Zangrilli, *supra* note 131 (noting that the "[l]ack of 'real world' legal training haunts most junior associates, who are routinely assigned to tedious document review projects.").

207. *Id.*

208. See Rachel Breitman, *A Year to Forget Morale Plunged as Midlevels Worried about Whether They'd Be the Next to Go, or Whether They'd Have Any Work to Do if They Stayed. A Year to Forget*, AM. L. 61 (2009); see also Karen Sloan, *Goodbye Perks, Hello Paycuts*, RECORDER (SAN FRANCISCO), April 27, 2009, at 1 ("Working from home, reducing hours, the type of assignments received, sabbaticals and technology allowances are among the issues associates are generally more reticent to raise since the downturn hit.").

209. See Breitman, *supra* note 208 (quoting associate who complained that "[t]he firm switched from serving Starbucks coffee to regular, unbranded coffee. . . . As sad as that is, I miss that the most!").

encouraging older partners to leave, firms likely will turn to one or more of the steps described above to maintain or maximize their profits per partner. Regrettably, however, each of these steps likely will have its own negative consequences, both for lawyers within the firm and for the legal profession more broadly. This does not mean that the courts erred in *Clackamas* or *Sidley*. Strong legal, moral and practical arguments can be made in support of these two decisions. These arguments, however, would become all the more powerful if firms were able to abide by the limits that these decisions place on the treatment of older partners while avoiding some of these other negative ramifications.

V. FINDING A BALANCE: WAYS THAT FIRMS' PROFITABILITY CAN COMPLY WITH THE LAW WITHOUT NEGATIVELY IMPACTING ASSOCIATES, PARTNERS, OR CLIENTS

The finding that many law firm partners might fall within the protections of the ADEA need not always lead to the negative consequences described in Part III. Firms do not necessarily have to choose between watching their bottom lines plummet due to a larger partnership pool and creating a working environment of higher billable hours, less training, and less opportunity for attorneys. Rather, firms willing to explore creative solutions to address this new reality of increased protection for older partners not only can avoid these undesirable results, but also might accrue many unanticipated gains.

Firms contemplating a response to *Clackamas* and *Sidley* generally may choose between one of two paths: Firms either might explore ways to trim the size of their partnerships (including by eliminating some older partners) in a manner that will not violate the ADEA, or firms might examine ways to keep older lawyers in the firm and to utilize such lawyers in a manner that maximizes profits. Both of these paths are considered below.

A. APPROACHES FOR DECREASING PARTNERSHIP SIZE BY ELIMINATING SOME OLDER PARTNERS

Firms that wish to maintain or maximize their profits per partner in the wake of *Clackamas* and *Sidley* might look for methods for limiting the size of their partnerships, including by eliminating some older partners, without running afoul of the ADEA. Firms adopting this approach would have several options.

1. Terminate Partners Using Criteria Unrelated to Age

Nothing within the ADEA prohibits employers from terminating or encouraging the retirement of older employees for reasons *unrelated* to age. Thus, firms wishing to trim their partnerships of less productive partners could do so under the frameworks established in *Clackamas* and *Sidley*, even if the partners targeted for elimination were over 40 years old. So long as firms did not make such decisions based upon the *age* of the individuals in question, firms would not run afoul of the ADEA.

One logical manner in which firms could adopt this approach would be to create clear and objective criteria for determining the retention of *all* partners in the firm, regardless of age. Such criteria could include requirements regarding the generation of business; the imposition of some minimum billable hours; obligations with respect to the training and mentoring of younger attorneys; or other presumably measurable criteria. The ABA, in calling for the elimination of mandatory retirement in law firms, has advocated for precisely this type of approach, asserting that “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.”²¹⁰

From one perspective, both lawyers and the firms in which they work might have much to gain from the establishment of such clear and objective expectations. One common complaint about law firm partnership determinations relates to the obscurity that often surrounds such decisions.²¹¹ Adding transparency and clarity to this process might alleviate the stress that lawyers feel regarding these partnership decisions—both among associates waiting for elevation to partnership and among existing partners who feel unease regarding the lack of permanency of their status.

Yet the establishment of such criteria likely would be no easy task: How much new business should a law firm require? What number of billable hours would be sufficient? Different members of firm management may have vastly different views regarding the “right” answer to such questions. Moreover, while a focus on “objective” criteria would reduce firms’ exposure, some firm decision-makers might bristle at the exclusion of more intangible factors such as one’s service to the firm, capacity for teamwork, positive attitude, or camaraderie with clients.

210. ABA Recommendation, *supra* note 100, at 12.

211. *See, e.g.*, Wilkins & Gulati, *supra* note 107, at 1667 (observing that law firms “seel to conceal – pr more often, to reveal selectively – both the rules and the criteria [for making partner]”); *cf.* Wilkins, Partner Schmartner!, *supra* note 17, at 1272 (observing that the establishment of clearer and more objective performance standards particularly would be “welcome news . . . to women and minority lawyers who often find themselves disadvantaged by the unwritten rules that still govern most firms”).

Allowing these less measurable, subjective factors to weigh into a decision increases the possibility for allegations of age bias. Yet to the extent that the firm truly values such intangible contributions by partners, eliminating them from the evaluation of a partner's continued prospects for retention would exclude important elements from the firm's calculations.

2. Increase the Amount of Power and Control Exercised by Partners in the Firm

Perhaps the key to the court's finding that the demoted *Sidley* partners might qualify as employees for purposes of the ADEA was the relative lack of power and control that such partners exercised within the firm, particularly in comparison to the firms' influential Management and Executive Committees.²¹² But *Sidley* made clear that not *all* partners should be seen as employees for purposes of the ADEA. "True" partners—those with sufficient authority in the firm—would remain outside of this statute's protections.²¹³ Thus, firms that wish to exclude partners from the protections of the ADEA (i.e., that wish to ensure that courts view such partners as owners and not as employees) might increase the power that such partners can exercise within the firm, giving such partners more of a voice within the firm's management. However, this solution also would present a host of problems for a firm. First, while the courts in *Clackamas* and *Sidley* emphasized the importance of a lawyer's power and control in determining whether he or she should qualify as an employee for purposes of the ADEA, nowhere did the courts articulate precisely *how much* control would be required to render the lawyer a "true" partner in the firm.²¹⁴ Even more fundamentally, this approach of increasing partners' "voice" within a firm to place them outside of the ADEA seems impractical at best and futile at worst: The more power given to partners within a large firm—particularly a firm with hundreds of partners—the more the firm runs into the very logistical problems that have spurred firms like *Sidley* to create hierarchical committee structures. It simply is not practical to run any large business (law firm or otherwise) by seeking the input of hundreds of individuals every time the business wishes to make an important decision.²¹⁵ Moreover, taken to its logical conclusion, this concept of increasing a partner's power to exclude him/her from the ADEA might hinder a firm's ability to terminate the partner: the more power and control

212. See *supra* notes 66-71 and accompanying text.

213. See *Sidley Austin Brown & Wood*, 315 F.3d at 707.

214. See Bettina B. Plevan & Jennifer B. Wang, *When Is a Partner Not a Partner*, N.Y. L.J., May 22, 2006 (observing that "[t]he nation's large law firms continue to lack clear guidance as to the extent to which and under what circumstances their partners could be viewed as employees for purposes of anti-discrimination and other employment laws.").

215. See *supra* notes 85-89 and accompanying text.

the partner obtains, the greater his/her ability to override any policy that would lead to his/her termination.²¹⁶

Finally, firms could try to increase partners' voices within the firm by adopting something akin to a shareholder proxy method for making firm decisions. Specifically, firms could form management committees similar to that which Sidley utilized, but could require members of the management committee to act in a representative capacity with respect to other partners in the firm, seeking permission from non-committee-member partners to vote on their behalf. This method would allow for fairly smooth firm operations by still limiting the number of participants in the decision-making process without leaving non-committee-member partners entirely stripped of any voice or control over firm operations.

However, this proposal remains problematic for many of the same reasons discussed above. Given the lack of guidance regarding the amount of control necessary to render someone a "true partner" for purposes of the ADEA, this "power by proxy" to non-committee-member partners might not provide enough control to render them "true partners" in the firm.²¹⁷ Moreover, this approach would create its own practical problems: Some partners might not agree to this form of proxy representation and instead might demand an active voice in firm decisions, leading to the familiar concern regarding too many individuals trying to weigh in on firm business.²¹⁸

3. Contractually Restrict the Length of Partnership Tenure Based Upon Non-Age-Related Criteria

An additional option that firms could explore to limit the number of partners in their ranks would be establishing contractual limits on the length of partnership tenure. Firms could include within their partnership agreements a requirement that *all* partners retire (or move to a non-equity status) after a certain number of years as equity partners. This provision would not mandate retirement or demotion at any particular *age*, but rather would trigger after a partner had held his/her position for some number of years, regardless of his/her age at that time. Such a provision would ensure

216. One related approach would be for firms to treat each practice group within the firm as its own separate partnership, thus with the firm as a whole thus functioning as a "partnership of partnerships." Judge Easterbrook raised this idea in his concurrence in *Sidley*. See Sidley Austin Brown & Wood, 315 F.3d at 710 (Easterbrook, J., concurring). From this perspective, individual partners might be seen as having greater control and authority over this smaller, "practice group partnership," and thus might be seen as a "true" partner in this context. However, firms still would face the problem of coordinating the decisions and policies of these mini-firms, likely requiring some sort of centralized management structure. The more powerful this centralized management structure, the more likely courts would be to view these partners as subordinate "employees" for purposes of the ADEA.

217. See *supra* note 214 and accompanying text.

218. See *supra* notes 215-216 and accompanying text.

consistent turnover within a firm's partnership ranks while not necessarily focusing only on the oldest partners in the firm.

One obvious objection to this type of provision would be the age-based *effect* that it would have on firm partners. Affected partners might argue that this limitation according to "years of service" was nothing more than a proxy for age discrimination, and thus constituted intentional, disparate treatment discrimination under the ADEA.²¹⁹ Guidance from the EEOC supports the idea that an employment policy based upon "years of service" can constitute disparate treatment age discrimination.²²⁰ However, recent decisions by the U.S. Supreme Court seem to have undercut this view, holding that disparate treatment discrimination arises only when age does more than simply play a role in some adverse employment action, but in fact serves as the "but for cause" of such adverse action. In *Kentucky Retirement Systems v. EEOC*, for example, the Court acknowledged that pension status which depends upon years of service typically will "go hand in hand with age,"²²¹ but characterized these two concepts as "analytically distinct." Accordingly, the Court held that to prevail in an age discrimination claim, a plaintiff must establish that any differences in treatment were "'actually motivated' by age."²²²

Even if a provision within the partnership agreement linking retirement to years of service did not constitute intentional, disparate treatment age discrimination, a court might find that such a provision would give rise to a claim of disparate impact discrimination.²²³ While this type of "years of service" trigger for retirement might be neutral on its face with respect to any age-based animus, it undoubtedly would impact older partners more significantly than younger partners, since older partners almost certainly would reach such service limits prior to their younger peers. Firms attempting to avoid disparate impact liability thus would have to demonstrate that this retirement requirement was based upon a

219. The ADEA bars employers from engaging in intentional discrimination on the basis of age (i.e., "disparate treatment" discrimination), as well as unintentional "disparate impact" discrimination, where a policy that is neutral on its face has a disparate impact on older works. See *Smith v. City of Jackson, Mississippi*, 544 U.S. 228 (2005).

220. See EEOC Compliance Manual, *supra* note 31, at § 2-II(3) (stating that "[a]n employment action based solely on an individual's years of service constitutes disparate treatment under the ADEA where years of service is a proxy for age") (emphasis in original).

221. *Kentucky Retirement Sys. v. EEOC*, U.S. , 128 S. Ct. 2361, 2366-67 (2008) (citing *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993)).

222. *Id.* at 2367 (citing *Hazen Paper Co.*, *supra* note 221); see also *Gross v. FBL Financial Services*, U.S., 129 S. Ct. 2343, 2351 (2009) (citations omitted) (applying standards from *Kentucky Retirement Systems* and *Hazen Paper Co.* to mixed-motive age discrimination case and stating that a plaintiff in a mixed-motive age discrimination case must establish by a preponderance of the evidence that age was the "but-for" cause of the contested employer action).

223. See EEOC Compliance Manual, *supra* note 31, at § 2-II(3) (observing that an employment action based upon years of service "may also be unlawful if it has a disparate impact based on age") (emphasis in original).

“reasonable factor other than age ‘‘RFOA’’²²⁴ Specifically, in trying to justify a “years of service” limit on partnership, a firm not only would have to establish that this limitation turned upon a “non-age” factor, but also would have the burden of persuading the court that this was a *reasonable* criteria for limiting partnership tenure,²²⁵ and many firms might have difficulty satisfying this burden.²²⁶

4. *Establish Incentives Such as Succession Plans to Encourage Partners to Retire and/or Transition Work to Younger Lawyers*

Finally, firms could encourage turnover among older partners without mandatory retirement by utilizing “succession plans” for the transitioning of work.²²⁷ Such plans could take a number of different forms, from providing for the assignment of certain clients to younger lawyers; to including younger lawyers in significant transactions or cases; to encouraging mentoring between older and younger attorneys.²²⁸ These succession plans not only might increase a firm’s profits per partner by facilitating the retirement of older partners, but also could have other long-term benefits for a firm, such as providing better service to clients and giving younger attorneys important work experiences.²²⁹

One potential complication with this approach, however, is that it requires older partners willingly to participate. The smooth transition of work from an older partner to a younger attorney will require the cooperation of both of these parties. Firms could tailor their succession

224. The ADEA creates an exemption for employer actions otherwise barred by the statute if such actions were “based on reasonable factors other than age.” 29 U.S.C. § 623(f)(1).

225. *See Meacham v. Knolls Atomic Power Lab.*, U.S. , 128 S. Ct. 2395 (2008) (holding that the RFOA exemption is an affirmative defense on which the employer will bear the burden of production and the burden of persuasion, and noting that “[t]he focus of the defense is that the factor relied upon was a ‘reasonable’ one for the employer to be using.”).

226. Related to this idea of contractually limiting the duration of an individual’s status as an equity partner, firms could specify within their partnership agreements that a partner’s equity in the firm (and, therefore, his or her share of the profits) gradually would decline over time once the partner reached a specified age. Such a provision might encourage older partners to leave the firm by making it less financially advantageous to remain, without actively forcing partners to leave. However, the ADEA not only bars employers from terminating protected employees on the basis of age, but also prohibits employers from taking other “adverse actions” against protected employees. *See* 29 U.S.C. § 623(a)(2). Reducing an employee’s compensation constitutes an adverse employment action for purposes of the ADEA. *See* EEOC Compliance Manual, *supra* note 31, at § 2-II(B)(1). Accordingly, firms utilizing this strategy would face the same concerns regarding liability for disparate treatment and/or disparate impact age discrimination as firms attempting to terminate equity partnership status after a set number of years.

227. *Stern*, *supra* note 165, at 1110 (citation omitted).

228. *Id.* at 1110 (citations omitted); *Goldberg*, *supra* note 115, at 3.

229. *See* *Goldberg*, *supra* note 115, at 3 (noting that firms “pi[n] order for up-and-comers to be the primary client contact or lead trial counsel, they need folks who have had their shot to move aside. . .”).

plans to the individual partners involved, including by having older partners work to create the terms of their departures from the firm.²³⁰ In addition, to induce older partners to embrace this approach, a firm could provide additional compensation to those partners who engage in this type of conduct.²³¹ The Chicago firm Sonnenschein Nath & Rosenthal LLP has utilized this option, eschewing a mandatory retirement policy and instead “compensate[ing] partners who transition their work to the next generation at a ‘premium.’”²³² Ultimately, however, the viability of this approach will turn upon older partners’ willingness to transition work to younger partners in their firm.

B. APPROACHES FOR KEEPING OLDER PARTNERS AND UTILIZING THEIR SKILLS AND RESOURCES

While firms might adopt one or more of the approaches described above to trim their partnerships by eliminating older partners, each of these options involves significant legal and/or practical concerns. Moreover, even if firms could navigate these legal and practical difficulties, these strategies provide a short-term solution for a structural problem. If an increasing number of partners continue to work well into their later years, and if profits per partner remain a key indicator of law firm success, firms at some point will have to find a more constructive approach for remaining profitable despite an ever-increasing pool of partners. Thus, while some firms may try to balance the requirements of *Clackamas* and *Sidley* against their desire for high profits per partner by encouraging older partners to retire, other firms might adopt the better approach of retaining older partners and making good use of the resources and experience that such lawyers can provide.

1. Use Older Partners to Train New Associates

One common observation among law firms regarding incoming associates is that new associates tend to “cost” the firm money for the first few months or years of the associates’ practice.²³³ New lawyers frequently

230. *Id.*

231. Stern, *supra* note 165, at 1110. (citation omitted).

232. *Id.* (citations omitted).

233. See E. Joan Blum & Kathleen Elliott Vinson, *Teaching in Practice: Legal Writing Faculty as Expert Writing Consultants to Law Firms*, 60 MERCER L. REV. 761, 768 (2009). (“Although law schools in general have increasingly incorporated practice skills into their curricula, an expectation that a new law school graduate will be ready to practice law ‘right out of the box’ is unrealistic”) (citations omitted). Many law schools have begun to address this shortcoming by developing curricula that provide law students with practical skills and experience. See, e.g., Robert Seibel, *The STEPPS Program Introduces Law Students to Real-World Lawyering*, THE COMPLETE LAW., July 2008 (online publication, link no longer available; article on file with the author) (describing program launched by

graduate from law school indoctrinated with the skill of “thinking like a lawyer,” but rarely possess the practical skills or experience to allow them to hit the ground running as a functioning attorney. Accordingly, partners in large firms often must “write off” many working hours spent by new associates who make errors on or bill excessive time to a project.²³⁴ With better training, these young lawyers more quickly could become profitable members of the firm.

However, associates often have trouble obtaining the training that they need to become productive members of the firm. While the firm has an incentive to ensure that all associates receive adequate training, individual firm partners frequently have “suboptimal incentives” to contribute to provide training to associates.²³⁵ Any time that a partner spends training a younger attorney detracts from his/her all-important billable time.²³⁶ While a partner may have the incentive to train an associate who works predominately for him/her, most associates work for multiple partners, meaning that no single partner may have an incentive to expend precious time on training an associate.²³⁷ Thus, while many firms laud the training and mentoring that they provide to young associates, the facts on the ground indicate that such rhetoric frequently does not amount to much *actual* training.²³⁸

One potential solution to this lack of training in firms involves harnessing the skills and experiences of older lawyers. These more seasoned attorneys possess a wealth of knowledge that could provide substantial benefits to new attorneys.²³⁹ In addition, unlike younger partners who may be focused on generating business and on building their client portfolios, some older partners may wish to move on from the competitive, “rainmaking” aspect of the practice and instead use their vast legal skills in some other capacity. Firms could create additional

California Western School of Law which incorporates lawyering skills, ethics and professionalism); *see also* Amir Efrati, *How Obscure Law School Places Grads at Top Firms*, THE WALL ST. J., May 23, 2007, at B1 (describing efforts by University of Detroit Mercy Law School to revamp third year curriculum by creating courses that simulate real-life practice).

234. *See* Blum & Vinson, *supra* note 233, at FN 25 (observing that “a law firm that hires a first-year associate for \$160,000, plus signing bonuses, should expect to write off fifty to a hundred percent of a first-year associate’s research billings”) (citations omitted).

235. Wilkens & Gulati, *supra* note 107, at 1617.

236. *Id.*; *see also supra* notes 145-52, 181-83 and accompanying text (discussing pressure on partners to maintain high billable hours).

237. *Id.* (citations omitted).

238. *See* Efrati, *supra* note 233, at B1 (noting that many firms “have long complained that law school devotes too much attention to theory and leaves students unprepared to practice. . .”); *see also supra* Part II.A.2.

239. *See* Thorsen, *supra* note 129, at 34 (describing potential for older lawyers to act as “master lawyers who bring senior expertise and skill to the projects of other lawyers, firms, and corporations on a consulting, temporary basis”); (characterizing older lawyers as “masters of their craft, mentors, and sages in the tradition of the ‘wise elder. . .’”). *Id.*

incentives for older lawyers to take on this task. The most obvious way in which firms could create such incentives is by *valuing* the time that older lawyers spend on such training: Instead of training time vanishing into the pool of “worthless,” non-billable time, firms could track the time spent by partners on training and credit such time in calculating such partners’ compensation. To the extent that such training time allows younger associates more quickly to become profitable to the firm, the hours spent training arguably produce as much “value” to the firm as would traditional, billable hours. By giving such hours substantial weight in calculating partners’ compensation, the firm more readily could incentivize older partners to allocate time to this training.²⁴⁰

2. Encourage Older Partners to Engage in Public Interest Work on Behalf of the Firm

In addition to using older firm partners to train new associates, firms also could utilize the skills of experiences of older partners to satisfy the firm’s pro bono obligations. While this strategy may result only in indirect financial benefits for a firm, it may garner other significant firm-wide advantages.

The United States currently suffers from a dramatic shortage of public interest lawyers. In fact, the entire pool of legal services for the poor in this country has been estimated to comprise approximately 6,000 full-time equivalent lawyers—a mere seven-tenths of 1% of all American lawyers.²⁴¹ While the ABA’s Model Rules of Professional Conduct state that every lawyer should perform at least 50 hours of pro bono work per year,²⁴² private attorneys in recent years frequently have failed to satisfy this standard, often due to the increased pressure to maintain high billable hours.²⁴³ Accordingly, the ABA recently reported that four out of five poor individuals currently lack access to legal representation.²⁴⁴

At the same time, as noted above, the United States possesses a substantial (and growing) number of older lawyers.²⁴⁵ By 2011, approximately one-quarter of the nation’s one million attorneys will be over the age of 65.²⁴⁶ If a mere 5% of the practicing attorneys over the age

240. The ABA seemed to contemplate this approach in recommending that firms eliminate mandatory retirement, suggesting that “the willingness to involve other lawyers in [client relationships] and transition to others” should be among the various criteria used to evaluate a partner’s status at a firm. See ABA Recommendation, *supra* note 100, at 12.

241. Galanter, *Old and in the Way*, *supra* note 115, at 1103 (referring to the poor/public interest sector of the legal profession as “vanishingly small”).

242. See MODEL RULES OF PROF’L CONDUCT R. 6.1 (2002).

243. Dau-Schmidt et al., *supra* note 126, at 327.

244. *Id.* at 328 (citation omitted).

245. See *supra* notes 120-25 and accompanying text.

246. Dau-Schmidt et al., *supra* note 126, at FN 7 (citing article in National Law Journal); see also

of 65 devoted their practices to public service legal work, it would double the number of attorneys primarily performing public interest work by 2011.²⁴⁷

One question, therefore, is how best to match this demand for public service legal work with the growing supply of experienced attorneys in this country—and more importantly from the perspective of large firms, how to do so in a way that might create some financial or other business advantages. Over a decade ago, Professor Galanter proposed a program for achieving this feat. After acknowledging many of the challenges faced by older lawyers in the modern legal market,²⁴⁸ Galanter proposed a “Second ‘Public Service’ Career” for older lawyers, in which senior attorneys could transition from purely private-practice careers into careers focused on providing legal services to the poor.²⁴⁹ While Galanter described various formats for implementing this type of program, one option could allow a partner to remain with his/her firm and work as part of the firm’s pro bono department.²⁵⁰ According to Galanter, this approach “would enable firms to fulfill their pro bono obligations while providing an attractive post-retirement option for partners.”²⁵¹

From one perspective, the implementation of this type of “second career” program would not entirely solve the financial dilemma that many firms face: if such “pro bono partners” remained equity partners in the firm, they still would take a share of the firm’s precious profits, thus still decreasing profits per partner. Arguably, however, such partners would create other benefits for the firm—some of which might themselves have a positive impact on the firm’s bottom line. For example, the pro bono matters on which these partners would work could present fantastic training opportunities for young lawyers in the firm, something which could benefit a firm financially.²⁵² Moreover, a strong pro bono commitment could serve as a significant marketing tool for a firm, both in wooing clients and recruiting new associates.²⁵³ Indeed, many law firms have realized that maintaining a commitment to pro bono work plays an important role in recruiting new attorneys, since many law students take this criterion into

Thorsen, *supra* note 129, at 34 (noting that “[t]he first of 77 million baby boomers turn 60 in 2006. They are on the front edge of the largest, healthiest, best education population of Americans ever to move through and beyond their fifties. . . .”) (citation omitted).

247. Dau-Schmidt et al., *supra* note 126, at 1 (citations omitted).

248. Galanter, *Old and in the Way*, *supra* note 116, at 1094-95.

249. *Id.* at 1102.

250. *Id.* at 1106-07.

251. *Id.*

252. *Supra* notes 206-09 and accompanying text; *see also* Dau-Schmidt et al., *supra* note 126, at 328.

253. George B. Cauthen, *A Duty to Serve*, 15 NO. 3 PROF. LAW. 22 (2004) (observing that lawyers may perform pro bono work as a marketing vehicle or to improve public relations, and that “[s]ome firms cite pro bono as a major factor in recruiting. . . .”).

account when deciding whether to work for a firm.²⁵⁴

Finally, by keeping partners within the firm while they perform these pro bono functions, a “second career” program could eliminate costs associated with partner attrition. One significant expense incurred by corporate law firms relates to the costs associated with turnover among attorneys.²⁵⁵ These transition costs not only accrue when younger attorneys leave the firm, but also when older lawyers retire from the practice. Firms that support these types of “second career” programs for older lawyers, particularly where the older attorney remains associated with the firm, “can create an intermediate status between partnership and retirement. . . .”²⁵⁶ Because participating lawyers will continue to have a regular presence in the office, they can maintain contact with clients whose work is being transitioned to younger lawyers, while making themselves available for consultation by such younger lawyers when questions arise.²⁵⁷

Finally, this type of program seems likely to benefit those partners who choose to participate. Many law students commence law school with the idea of doing public interest work after graduation, only to find at the end of three years that their crushing debt load at least temporarily precludes such a career path.²⁵⁸ For many of these individuals, the “golden handcuffs” of private practice eventually may eclipse any plan of entering the public interest legal arena. Yet as partners near “retirement age,” their law school loans undoubtedly have long been paid off, and their years of earning a substantial income with the firm presumably have left many of them with significant savings. Such lawyers thus may find themselves ideally positioned to pursue the more idealistic legal practice that appealed to them so many years ago.

A recent survey conducted by The Pro Bono Institute (“PBI”)²⁵⁹ presents promising data with respect to the potential benefits of this type of

254. Helaine M. Barnett, 2004 Bellwood Lecture at the Univ. of Idaho, *Justice for All: Are We Fulfilling the Pledge?*, 41 IDAHO L. REV. 403, 421 (2005) (noting that “[m]any large private law firms have realized that developing a significant pro bono practice is an important factor in recruiting, as many law students consider it in choosing a law firm.”).

255. Rachele J. Canter, *Turnover: What can you do to keep good lawyers*, 25 LAW PRAC. MGMT. (May/June 1999) (estimating the costs of lawyer turnover to be up to two and a half times an individual’s salary, and noting that clients share this financial burden); American Bar Association, *ABA Commission on Billable Hours Report 2001-2002*, at 7 (on file with author) (“When an associate leaves a firm and a new associate is assigned to a file, the client may end up paying for the hours involved in getting the new associate up to speed.”).

256. Dau-Schmidt et al., *supra* note 126, at 328.

257. Dau-Schmidt et al., *supra* note 126, at 328.

258. Barnett, *supra* note 254, at 425 (citations omitted) (discussing the “burden of law school debt on lawyers wanting to pursue careers in public service.”).

259. The Pro Bono Institute is a non-profit organization housed at Georgetown University Law Center which explores and identifies approaches for addressing the provision of legal services to the poor, disadvantaged, and others unable to secure legal aid. See Pro Bono Institute, <http://www.probonoinst.org/about.php> (last visited Aug. 23 2009).

program. Specifically, this PBI survey examined the results of its previously launched Second Acts ProjectSM, which had been aimed at supporting transitioning and retired attorneys who were interested in pursuing second careers in public interest law.²⁶⁰ The survey focused on large law firms and sought to gather information regarding the firms' retirement practices, existing programs for transitioning attorneys into retirement, and existing policies regarding pro bono work.²⁶¹ In addition, the survey inquired regarding the likely interest of both the firms and their senior attorneys in participating in a Second Acts program, and asked about the advantages and/or problems that respondents foresaw with such programs.²⁶² While the survey included a fairly limited number of participants,²⁶³ most respondents expressed positive views when asked both whether their senior attorneys might be interested in participating in this type of program and whether their firms might be interested in implementing such a program.²⁶⁴ While such results may be little more than a preliminary indication regarding the benefits of this type of program, they present one more potential option for older partners and for the firms in which they work.

VI. CONCLUSION

Even before the decisions in *Clackamas* and *Sidley*, law firms—and particularly large firms—struggled with the potentially conflicting demands of creating opportunities for associates to make partner, while maintaining sizable profits to share among the firm partners. By indicating that older partners might fall within the protections of the ADEA, the courts in these two cases further limited the options available to firms trying to reconcile these competing interests.

Various recent developments within the legal community and within society more broadly have exacerbated the potential impact of these decisions. Firms must deal with a growing pool of older partners who do not want to nor can afford to retire, and cannot be forced to leave the firm. As an increasing number of law school graduates elect to begin their careers at large law firms,²⁶⁵ firms may find themselves more pressed than

260. *Id.*

261. Dau-Schmidt et al., *supra* note 126, at 330-32.

262. *Id.* at 329-31.

263. PBI received responses from forty-five of the 150 firms surveyed. All respondents were relatively large law firms, varying in size from 50 to 1,598 attorneys. The primary offices of responding firms were located in a variety of metropolitan areas, including Los Angeles, Salt Lake City, St. Louis, Chicago, New York, and Washington D.C. *Id.* at 331-32.

264. *Id.* at 337-41.

265. See Galanter & Henderson, *supra* note 119, at 1869 (citations omitted) (characterizing large

ever to make room for these new associates eventually to become partners. Moreover, the emphasis on profits per partner as a key measure of success shows no signs of abating. To the contrary, as economic conditions worsen, firms may find themselves straining even further to present an image of a rosy bottom line. In short, many firms may find that long-held structures for the management of their firms simply no longer work. Firms thus might have to adopt any number of changes to their internal structures and practices in order to comply with the requirements of the ADEA as articulated by the courts in *Clackamas* and *Sidley* while remaining profitable and productive business entities.

Whether firms will succeed in making these changes remains to be seen. Although this article suggests possible steps that large firms could take to maintain sufficiently high per partner profits despite a steadily growing partnership pool, not every firm may be able to make these adjustments. Some large firms instead may crumble under their own weight and size. In all likelihood, the firms that will survive and perhaps thrive in this new environment will be those which do not simply try to get rid of older partners in the firm, but which instead endeavor to take advantage of the vast skills, contacts and experience that these more seasoned lawyers can provide.

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