Handling Boomers Approaching Retirement

QUESTION:

Here's a question we're facing, as we have a significant number of baby boomers approaching retirement. Our firm has always approached transition / retirement on a fairly ad hoc basis, and we'd like to adopt some guidelines which would offer a bit more certainty on both sides.

Over the past 20 years, most of our attorneys (between the ages of, say, 57-63) begin to slow down somewhat, their total compensation begins to slide downward with their production / hours, and eventually they decide to go Of Counsel (which is close to semi-retirement here). Our Of Counsel arrangements generally include two years of regular firm benefits (including firm contribution for health, dental, life insurance). The initial compensation portion of the Of Counsel arrangement has varied considerably, depending upon the senior attorney's timing and ongoing value to the firm, e.g., does the attorney have many loyal clients whom we hope to transition to others? Will the attorney cease all billable work or merely reduce time over a 2-4 year period? Thus, some attorneys receive a predetermined salary (generally a portion of the prior base salary, but usually with no expectation of a bonus), others receive pay based on a formula, and others receive nothing (but with a possibility of a discretionary bonus if they in fact produce some revenues--either by billable work or client billings).

The Firm obviously would like to capture the senior attorney's good will and client base, if possible, and to assist the senior attorney into retirement. Do you have any suggestions for ways in which law firms can promote the various interests / goals in a fair manner?

RESPONSE:

When it comes to your question, our collective feeling is that **all firms are now entering new territory**, and that implies not having the clearest road map to guide us (as will be evident later here with some of the examples from each of our firms).

First, the question of whether mandatory retirement policies are still available is very much up in the air or is close to crashing to earth. It is unlikely that any of us can predict how all of this is going to shake out. It seems likely that retirement ages will be extended. For now, mandatory retirement policies may still work, but they may not survive in the long term at least for large firms.

Second, while we have not yet personally observed a pattern emerging from the boomer generation, it is clear that on balance they (we) are entering what had been traditional retirement age healthier and more energetic than some of our predecessors. So far, however, we have not yet seen them determined to continue practicing. What is clear is that the half-generation behind the boomers seem eager to have their day in the sun. We will not engage in the current indoor sport of predicting how the X, Y and millennial generations will handle all this. Nor will we comment on the 'retire in place' phenomenon directly.

What we see going forward for firms, in some variation / combination, are the following:

• No mandatory retirement - and the challenge of how to manage a generation of "partners" who will have the legal option of continuing - when most firms have been built on a successful model of generational turnover.

• To deal with the fact of no mandatory retirement will require a clearer and more demanding regime of managing partner performance requirements with less sympathy or tolerance for some form of "wind down" that has characterized many partnerships.

• An increasing use of some form of retirement incentive in exchange for -
- a more programmatic approach to transition of roles and client relationships; and
- which retirement incentives may counter the current trend of eliminating all forms of firm funded (read unfunded) retirement benefit.

• Institutional support (not funding necessarily) for all forms of partner retirement savings - tax advantaged and perhaps not tax advantaged as firms has a greater stake in assuring the ability of their partners to retire.

• More structure (probably contractual) to partners post "retirement age" status with the firm if they continue - and probably not in "partner' status.

• A more purely "what's in it for the firm" approach to "post-retirement" continuation with the firm.

• Generational struggles as some boomers, with the leverage of no mandatory retirement, want to stay on with the firm longer than is good for the firm.

Whatever the approach, we think it important to start the discussions early. All of us have had partners who retired but failed to mention it to anyone with the result that the needed transition didn't take place. We have also seen malpractice issues arise when the partner simply wasn't putting in the required time with an attendant lack of vigilance. Hence, early candid discussions about transition plans are essential.

Your firm needs to focus on what it needs out of the arrangement. Transition of clients is an obvious element but your firm's needs may also include the transfer of community positions or access, the training of others with regard to specific skills etc. Many of these, particularly client and community position transitions, may take some time to do correctly.

There may well be an advantage in having a policy that at a certain age, every partner must come up with a personal business plan which specifically deals with that individuals intentions / hopes as to retirement and transition, whether that retirement is to be within a certain specified period, or whether on a more general basis. That at least will get the thought process for the partner started, making it more difficult to just put off the subject as something to be addressed sometime in the future. That will also get the discussion going without you, as the managing partner, having to approach the individual to, in essence, say that it appears that he or she should be considering retirement.

The bottom line is that firms will be working to create an environment where partners have the ability to retire, an environment which does not encourage their staying on and where firms have to change their fundamental mind-set to facilitating retirement from one of mandating it.

Side Bar:

Various Firms' Experiences

- This is an area in which our better intentions have exceeded our execution. A number of years ago, we established a protocol for attorneys nearing retirement. The protocol included (1) asking partners to give notice to the firm at least five years in advance of intended retirement date, (2) a bilaterally negotiated "glide path" for the five-year period following the giving of notice, and (3) the stated expectation that during the five-year period, the partner would effect transition of client responsibilities to others in the firm. I still think that the protocol makes sense, but the differing expectations and intentions of our partners as they have advanced in years have made it more difficult to follow through with it. In most recent cases, the partner approaching retirement becomes a cash (or income) partner, with annual compensation set by agreement. This kind of arrangement normally does not continue for more than three years, but there is no prescribed time limit. Our experience perhaps demonstrates that it would be desirable to have a retirement protocol that establishes process but does not dictate terms, which probably should be fashioned to suit individual situations.

- For our part, we are still working on a model that we have had for many years. Retirement at 67 with three year phase down prior to that, following customized programs of transitioning client relationships and other responsibilities, reducing work requirements and reducing compensation. We have offered incentives for earlier retirement on an individual and customized basis, usually a variation on a very modest, unfunded retirement benefit that we have in place; and facilitated by longstanding requirements for participation in tax advantaged plans and the addition in recent years of some of the new supplemental plans - all partner funded. We have an option (in the sole option of the firm and subject to the needs of the firm) to continue a former partner as a counsel on a year-to-year contract basis. Interestingly, only two partners in the last ten years have taken this status, on a full time basis, after passing age 67 and in each case for only about a year. We have a senior counsel status which can be customized, is generally not of significant economic consequence to either the firm or the partner, but which can be useful for both. Generally, those roles do not involve any heavy legal practice - or any at all.

- Very fortunately, we adopted a Supplemental Retirement Plan several years ago which provides pretty substantial financial benefits to retiring partners for a five-year period of time after their retirement. It is funded on a graduated basis by all partners - except laterals who arrive too late in their careers to participate. The plan provides, however, that you cannot draw any payments under the plan after age 70. This presents a strong incentive for partners to retire no later than age 65. Otherwise they forfeit the benefit. There are also covenants not to compete that are associated with receiving the payments, but these do not apply to taking on a government position, an academic position, other charity or public service positions, or even a general counsel position. The resulting benefits have been huge to the firm. We now have approximately 30 retired partners, drawing down their SRP benefits. Some are just traveling and golfing, but many others use the income supplement to allow them to do things they've always wanted to do like public service law, serving in the Justice Department, serving as President of the Georgia Conservancy, serving as Ambassador to Australia, or being public company general counsel. There have only been two partners in our entire history with the program who decided to continue practicing past age 65 and forfeit any of their SRP. One was a litigator involved in long and protracted securities class action litigation that he wanted to see to conclusion. It's now concluded and he is drawing his SRP. The other is a Trusts and Estates partner whose client base is still decidedly older than he is and who will celebrate his 70th birthday next week. He performs a great service to his clients and the firm and isn't in anybody's way. So I'd recommend a SRP as a starter. We have approximately $30 million in our SRP capital account which represents previous SRP capital contributions by our partners plus income that has been earned on their previous contributions. In 2008 we will expense $2.3 in SRP payments to partners over and above their return of SRP capital, but this is offset by $4.6 million in new SRP capital payments which will be collected in 2008. We are constantly monitoring the SRP account to try to achieve actuarial sustainability and to insure that it not constitute a drag on current earnings.

- Like many firms, we have for years had a mandatory retirement policy for partners. Partners are required to retire at age 65 with an option to extend this up to age 70 with the approval of the executive committee. During any extended period, the partner receives a fixed compensation based or his or her contribution to the firm. The system has worked well. However, there is a renewed discussion of this policy among partners. For several reasons, I think all law firms are going to be faced with a reexamination of their retirement policies. Self-funded supplemental retirement plans make a lot of sense. These plans allow partners to save significant amounts of money for retirement on a tax-deferred basis. We have had one in place for several years and all equity partners are required to participate. The plan was not universally popular with all partners when it was adopted, but most now recognize its value. If a partner has sufficient retirement assets, it should make it much easier to require or encourage retirement. These plans do not have immediate impact. It takes some years for partners to build up enough assets in them to make a difference. However, they should be carefully considered as part of a firm's long term planning. The sooner the better.

- We handle this on an ad hoc basis. We have a mandatory retirement age of 70. No one has ever questioned it and most people have scaled back well in advance of getting to that age. My observation of my generation is that, even though we are healthier and more energetic than 60-something's of the past, we are less likely to want to hang around the office just to have a place to be every day. The first wave of retirements in my years here was the post-WWII generation. There were not many of them, and they probably got the sweetest deal. The next wave, the pre- and early-boomers, was and is harder because some in that group did not and do not want to come back in the compensation system or transition clients. We have dealt with these in the same way we deal with others in the system who are not acting in the best interest of the firm. By dealing with one or two of the problems, others have gotten the idea. I think a real key is either to have a scaling back program institutionalized or have the ad hoc conversations early and often. It also helps to have a few bell cows that will set the example. Sometimes resentment arises toward the bell cows by the ones who do not want to go quietly. In most of our cases, by age 60, we are cutting compensation back gradually so it does not have to happen all at one time. A personal plan that establishes expectations is essential so that one scaling back does not get ahead of the other. We do not employ a bonus system or an evaluation frequency of greater than annually. Both a semi-annual look and a bonus system might help keep the compensation even with the production. By age 60, people can get to their 401(k)'s. We require that they be funded heavily from the day you make partner. Personal assets, including the 401(k)'s, are the only safely net.

The LAB was formed as a resource to provide pragmatic advice to assist new managing partners with their critical burning issues and help them succeed. **The LAB** is comprised of the following distinguished current and former law firm leaders: Angelo Arcadipane (Dickstein Shapiro LLP); John Bouma (Snell & Wilmer LLP); Brian K. Burke (Baker & Daniels LLP); Ben F. Johnson, III (Alston & Bird LLP); John R. Sapp (Michael Best & Friedrich LLP); Keith B. Simmons (Bass Berry & Sims PLC); William J. Strickland (McGuire Woods LLP); Harry P. Trueheart, III (Nixon Peabody LLP); together with Patrick J. McKenna (Edge International).