

**DICK AND JANE COME OF AGE:
AVOIDING DISCRIMINATION AGAINST THE AGING ATTORNEY**

Presented by:

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State Bar of Texas
LAWYER COMPETENCY IN THE 21ST CENTURY
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CHAPTER 5

Allan is currently the President-Elect of the State Bar of Texas. As a Director at the State Bar level, Allan served on the Executive Committee and as Advisor to Military Law Section. His past State Bar assignments include the Alternative Discipline Task Force; the Mental Health Task Force; and Chair and member of the Texas Lawyers Assistance Program Committee (TLAP). Allan is also an active member and past President of Texas Lawyers Concerned for Lawyers. His commitment to this program and to attorneys throughout the State was recognized in 2004 when he was presented the "Ralph Mock Award" at the TLCL Annual Convention.

In 2012, he received a State Bar "Presidential Citation" for his leadership in the statewide CLE Wellness Initiative, and establishing the "Texas Lawyers for Texas Vets" (pro-bono legal services to Texas Veterans and family members). Allan is also past Director and current volunteer for the San Antonio Bar Association Community Justice Program, and actively encourages other attorneys to volunteer. In 2010 he was the recipient of its Excellence in Pro Bono Award. He is a volunteer mediator with the Bexar County Alternative Dispute Resolution Center. In 2009, over 2000 people in Bexar County were affected by an attorney's misconduct which left these individuals with unresolved traffic tickets. Allan coordinated the efforts of the Community Justice Program, San Antonio Bar Association, and San Antonio Criminal Defense Lawyers Association in an organized effort to provide free legal services to these individuals in the San Antonio Municipal Court. In 2013, he was recognized by the Association of Corporation Counsel with an "Ethical Life Award".

Allan is a past President of the San Antonio Bar Association (SABA) and former Trustee for the Texas Bar Foundation. He also was a previous Liaison to "Amigos in Mediation", a peer mediation program for students. He served on the Professional Enhancement Panel, District 10 Grievance Committee for eight years, and is currently a mentor in the SABA Mentor/Mentee program, to assist young attorneys in the practice of law. Allan has supervised a number of young attorneys as a monitor for the Board of Law Examiners. His level of commitment to this program is illustrated by an out-of-state trip, where he convinced a struggling young attorney to stay and complete a nine-month treatment program. This young man is now a successful public defender, husband and father.

Allan DuBois' service and commitment to the legal profession and community bring new meaning to the words "role model". For over ten years, Allan served as President of the Board of Directors of the San Antonio Council on Alcohol and Drug Abuse (SACADA), whose mission is the prevention of alcohol, drug and tobacco abuse and a better life for our youth. Mr. DuBois led this non-profit organization through challenges that could have defeated the organization, but for his leadership. He currently chairs the Development Committee, planning events presenting the message of living a positive life style.

Most importantly, Allan married Pam 47 years ago(the summer he began law school), and after raising four children, they enjoy participating in the many activities of a dozen active grandchildren.

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State Bar of Texas: State Bar College; Continuing Legal Education Committee (2001-2003, 2006-2008); District 41 Bar Grievance Committee (1993-95); *Texas Bar Journal* Committee; Texas Mentor Program Committee; Past Chairperson and Newsletter Editor- Concerns of the African American Lawyers Section; Past Council Member, Labor and Employment Law Section. *Texas Young Lawyers Association:* Board of Directors (1994-95); Legislative Committee; Women in the Profession Committee; Opportunities for Minorities in the Legal Profession Committee; TYLA Section of the *Texas Bar Journal*. *Other:* State Bar of Oklahoma; Hospice Volunteer.

RECOGNITION AND HONORS:

Best of Health Law 2014: *Background Checks, Social Media and Other Arresting Developments*; **Best of Business Disputes 2013:** *When the Feds Come Knocking: EEOC, DOL and NLRB Investigation for Employers*; **Best of 2013 Litigation Practice:** *Employment Law Update*; **Best of UT Law Online 2012:** *Background Checks, Social Media and Other Arresting Developments*; **Best of 2011 CLE Presentations:** *Employment Law Update: U.S. Supreme Court, Fifth Circuit and More*; **Best of UT Law Online 2011: Employment Law, School Law, Immigration, and Ethics:** *Advanced Leave Issues: FMLA, ADA/ADAAA, USERRA and WC Stuff*; **Best of 2010 CLE Presentations:** *Employment Law Update: U.S. Supreme Court, Fifth Circuit and More*; **2009 Standing Ovation Award:** Outstanding Volunteer, TexasBarCLE; **Best of 2009 CLE Presentations,** *The Art of Smart Hiring and Lawful Firing*.

Texas SuperLawyer® 2003 - 2006, 2011, 2012; Houston's Best Lawyers for the People, HOUS. MAG., Jan. 2006. Ruth E. Piller, *Houston Lawyers are Houston's Leaders*, 39 HOUS. B. J. 29 (2002).

BOOKS:

Katrina Grider (contrib. ed.), *Social Media & Internet Issues*, in PARTY TALK: ANSWERS TO EVERYDAY LEGAL QUESTIONS FOR TEXAS LAWYERS (Texas Bar Books, 2012); Katrina Grider (contrib. ed.), *Family and Medical Leave Act*, in TEX. EMPL. LAW. CHAP. 25 (Laura Franze *et al.* eds., James Pub., 1999); Grace F. Renbarger & Katrina Grider (contrib. eds.), *Family and Medical Leave Act*, in EMPL. LAW HANDBOOK, CHAP. 26 (Brian S. Greig *et al.* eds., Tex. Ass'n Bus. & Chambers of Comm., 1999 - 2002).

ARTICLES:

Katrina Grider: *Goodbye Flipcharts, Hello Plasma Screens*, 68 TEX. B.J. 567 (2005); *Party Talk-What's a Lawyer to Do: A Little Friendly Advice*, 65 TEX. B.J. 902 (2002); *Lawyers Debate Age Discrimination Cases: Is the Burden Too Heavy on Employees?*, TEX. LAWYER (2000); *A Checklist for Avoiding the Legal Pitfalls of an In-House Investigation*, CORP. COUNS. Q. (1998); *Conducting Sexual/General Harassment Investigations: A Checklist for Employers*, EMPL. L. COUNS. (1998); *Of Work and Family: Implementing an FMLA Policy*, TEX. LAWYER (LABOR & EMPLOYMENT LAW SUPPLEMENT) (1997); *Trends in Real Estate Leasing: Whose Duty Under the ADA?*, TEX. LAWYER (1997); Katrina Grider, *Seven Ways to Survive Law Office Politics*, THE TEX. DOCKET (1996); *Human Resources Management for Lawyers: An Employment Law Primer*, 57 TEX. B.J. 173 (1994); *Worker's Comp and the ADA: To Ask or Not to Ask*, 55 TEX. B.J. 818 (1992); *Employer Liability Under FIRREA*, 109 BANK. L.J. 129 (1992); *Hair Salons and Racial Stereotypes: The Impermissible Use of Discriminatory Pricing Schemes*, 12 Harv. Women's L.J. 75 (1989); *Drug Testing of Employees: Privacy Rights v. Drug Free Workplaces*, 57 Okla. B.J. 3189 (1986); *The Award and Calculation of Statutory Attorneys' Fees in Oklahoma*, 11 Okla. City U. L. Rev. 31 (1986).

Katrina Grider & Tracy Bailey, *The Civil Rights Act of 1991*, 55 TEX. B.J. 36 (1992); Katrina Grider & Kimberly F. Gee, *Glass Ceilings in Corporate America*, 55 TEX. B.J. 42 (1992); Katrina Grider, Nathan Wesely, Tracy Bailey & Kimberly F. Gee, *Sexual Harassment: The Reasonable Woman Standard in Hostile Environment Litigation*, 55 TEX. B.J. 52 (1992); Katrina Grider & Nathan Wesely, *Fetal Protection Policies After Johnson Controls*, 55 TEX. B.J. 64 (1992).

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Dick and Jane Come of Age: Avoiding Discrimination Against the Aging Attorney

Katrina Grider

I. THE BABY BOOMERS COME OF AGE

America’s workforce is aging. The Bureau of Labor Statistics (“BLS”) made the following projections of the civilian workforce from 2002-2012:

“With the aging of the post-WWII baby boom generation, those aged 55 and over are expected to make up a larger share of the labor force than in the past. From 1992 to 2002, the share of the labor force for those aged 55 and over increased from 11.8 percent to 14.3 percent. In 2012, their share of the labor force increased to 20.9 percent and is now projected to increase to 25.6 percent by 2022.”¹

For the time period 2006-2016, the BLS stated the following:

“BLS data show that the total labor force is projected to increase by 8.5 percent during the period 2006-2016, but when analyzed by age categories, very different trends emerge. The number of workers in the youngest group, age 16-24, is projected to decline during the period while the number of workers age 25-54 will rise only slightly. In sharp contrast, workers age 55-64 are expected to climb by 36.5 percent. ***But the most dramatic growth is projected for the two oldest groups. The number of workers between the ages of 65 and 74 and those aged 75 and up are predicted to soar by more than 80 percent. By 2016, workers age 65 and over are expected to account for 6.1 percent of the total labor force, up sharply from their 2006 share of 3.6 percent.***”² (emphasis added).

The phenomenon above is often referred to as the “greying of America” as the baby boomer generation reaches retirement age in record numbers. Not surprisingly, lawyers occupy one of the eleven largest categories of occupations with above average concentrations of older employees.

| Large Occupations with Heavy Concentrations of Older Jobholders ³ | | | |
|--|-----------------------|------------|-------------|
| Occupation | 2013 Jobs (thousands) | Age 55+ | Median Age |
| Farmers, Ranchers, and Other Agricultural Managers | 929 | 55% | 56.1 |
| Chief Executives | 1,520 | 39% | 52.5 |
| Real Estate Brokers and Sales Agents | 769 | 39% | 50.7 |
| Property, Real Estate, and Community Association Managers | 654 | 37% | 50.8 |
| Bookkeepers, Accounting and Auditing Clerks | 1,241 | 35% | 50.0 |
| Lawyers | 1,092 | 32% | 47.1 |
| Postsecondary Teachers | 1,313 | 32% | 45.7 |
| Management Analysts | 811 | 31% | 47.2 |
| Secretaries and Administrative Assistants | 2,922 | 30% | 48.5 |
| Janitors and Building Cleaners | 2,275 | 30% | 46.8 |
| Physicians and Surgeons | 934 | 30% | 46.8 |

¹ Share of labor force projected to rise for people age 55 and over and fall for younger age groups, TED: THE ECONOMICS DAILY, DOL Bureau of Labor Statistics (January 24, 2014) at http://www.bls.gov/opub/ted/2014/ted_20140124.htm.

² Spotlight on Older Workers, BUREAU OF LABOR STATISTICS at http://www.bls.gov/spotlight/2008/older_workers/.

³ Employed Persons by Detailed Occupation and Age, 2013 Annual Averages, BUREAU OF LABOR STATISTICS at http://www.bls.gov/cps/occupation_age.htm.

II. THE STATE BAR COMES OF AGE

Significantly, this national trend is also reflected in the state bar—Texas lawyers are aging. The median age of an attorney licensed in Texas today is age 48.⁴ As of December 31, 2013, the membership of State Bar of Texas reflected the following age demographics and generational groups.⁵

| State Bar of Texas Age Demographics (over age 40) | | |
|--|--------------|---------|
| Generation | Ages | Percent |
| Silent or Veteran | 65 and older | 13% |
| Baby Boomer | 51 - 65 | 32% |
| Generation X | 41 - 50 | 22% |

In addition, approximately 34% of all the attorneys licensed in Texas have practiced law for more than 25 years. These age demographics are significant. Baby boomers are the largest group of older attorneys in the state bar. “In demographic terms, about 10,000 baby boomers in the United States will turn 65 every day until about the year 2030, according to the U.S. Census Bureau. In some years, this daily average will exceed 13,000.”⁶

As these trends continue, law firms “will need to confront a number of challenges to accommodate more older employees. Among them are intergenerational relationships, age discrimination, physical job demands, training and flexible work schedules.”⁷ Law firms who successfully attract, retain, train and motivate older attorneys may enjoy a competitive edge with clients.

⁴ *State Bar of Texas Membership: Attorney Statistical Profile (2013-14)*, STATE BAR OF TEXAS DEPARTMENT OF RESEARCH AND ANALYSIS, at http://www.texasbar.com/AM/Template.cfm?Section=Demographic_and_Economic_Trends&Template=/CM/ContentDisplay.cfm&ContentID=27250.

⁵ *Id.*

⁶ Phillip Moeller, *Challenges of an Aging American Workforce*, U.S. NEWS & WORLD REPORT MONEY (June 13, 2013), at <http://money.usnews.com/money/blogs/the-best-life/2013/06/19/challenges-of-an-aging-american-workforce>.

⁷ *Id.*

III. AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967 (“ADEA”)

The numbers above also reflect that 67% of Texas attorneys are in the protected age group under the Age Discrimination in Employment Act of 1967 (“ADEA”). The ADEA prohibits covered employers, including virtually all law firms with 20 or more employees, from discriminating on the basis of age against employees or applicants 40 years of age and older.⁸ The ADEA's prohibitions generally cover all aspects of the employment relationship, from hiring, promotions and compensation to discharge and mandatory retirement policies.⁹

A. Hiring Older Attorneys

Older lawyers seeking jobs often face age discrimination due to preconceived notions about their abilities. For example, some employers may worry that older attorneys cannot adapt to new technologies or will not be mentally sharp to do the work. Other employers incorrectly assume that attorneys who are close to retirement do not need a job.

1. Interviews

Law firms are prohibited from asking questions during job interviews that are designed to reveal a candidate's age, race, color, sex, national origin, religion, genetic information, sexual orientation or preference, disability, veteran status. Regarding age, the following questions are unlawful inquiries:

- How old are you?
- What is your date of birth?
- When did you graduate from high school, college or law school?
- How old are your kids (to guess the applicant's age)
- Could you work for attorneys younger than you?
- How do you think the younger attorneys in the firm, department, office would react if I hired you?

⁸ 29 U.S.C. §§630(b), 631(a).

⁹ 29 U.S.C. §623(a)(1).

- How much longer do you plan to work before you retire?
- Do you plan on retiring? When?
- You have too much experience to be applying for this job.
- We would love to hire you, but you are over qualified.

2. Job Advertisements

Law firms are prohibited from publishing job advertisements that show a preference for or discourages someone from applying for a job because of his or her age or other protected class. For example, an on-line job listing that seeks "recent law school graduates" or "maximum experience less than 10 years" may discourage older attorneys from applying and may violate the law.

3. EEOC Litigation

a. *Strategic Legal Solutions (09/25/14)*

Staffing Company Rescinds Job Offer After Learning Attorney's Age And Bans Her for Complaining About Ageism

The EEOC recently filed suit against Strategic Legal Solutions ("SLS"), a national legal staffing and legal project management services firm.¹⁰ The EEOC alleged that SLS violated the ADEA when it rejected a 70-year-old attorney after the company discovered her age. SLS allegedly retaliated against the attorney when it told her that it would never hire her after she questioned if the rejection was because of her age.

According to the EEOC's lawsuit, SLS offered a New York-based attorney temporary work on a project in Michigan. The attorney accepted, and then SLS asked the attorney for her date of birth. Within 90 minutes of receiving the attorney's date of birth, the company called to withdraw the offer, alleging she could not possibly arrive at the worksite in time to begin work on the next day. The attorney questioned whether the real reason the company suddenly withdrew its offer was because of her age. In

response, the company told her she would be placed on a "do not use" list and she need not apply for future work assignments with SLS.

Robert D. Rose, regional attorney for the EEOC's New York District, pointed out that last year, 22.8% of all complaints filed with the EEOC nationwide included an allegation of age discrimination, and 41.1% included an allegation of retaliation. Rose stated that "it is time to send a clear message to employers: Neither age discrimination nor retaliation for making a discrimination complaint will be tolerated." Kirsten Peters, the EEOC trial attorney assigned to the case, said, "More and more Americans are working past the age of 65, and they have a right to do so free of ageism."

B. Managing Older Attorneys

The ADEA also prohibits the more subtle forms of discrimination against older attorneys. The following is a non-exhaustive list of seven subtle forms of age discrimination.

- #1:** The firm repeatedly compensates or promotes younger attorneys with less skill and experience at a higher level than the older attorneys with more skill and experience.
- #2:** When the going gets tough, the firm lets go of the oldest attorneys first, because the oldest attorneys are making the highest salaries after having been with the firm the longest. Alternatively, the firm lets go of older workers, but retains younger attorneys, or allows them to transfer to different sections within the firm.
- #3:** The firm assumes that older attorneys are not tech savvy, cannot keep up with their younger counterparts, or are too set in their ways to be "taught new tricks."
- #4:** The firm encourages, discusses, or make comments about an older attorney's retirement plans.
- #5:** The firm transfers cases and other work from the older attorney to the younger attorneys in the firm under the guise that clients want attorneys with "new ideas and insights" to do their work.

¹⁰ *EEOC Charges Strategic Legal Solutions with Age Discrimination and Retaliation*, EEOC PRESS RELEASE (September 25, 2014) at <http://www1.eeoc.gov/eeoc/newsroom/release/9-25-14.cfm>

#6: A firm—expressing a desire for "new energy," "new blood" or "fresh faces"—shies away from hiring anyone who looks older than a certain age in order to maintain a youthful firm image.

#7: The firm tolerates inappropriate age related comments and remarks such as:

- “Old fart, geezer, old lady”
- “Old school, set in his or her ways, sounds old on the telephone”
- “I think you are getting to old to handle those types of cases”
- “You are too old to contribute anything else to the firm.”

C. Mandatory Retirement of Law Firm Partners

One issue that continues to stir debate in the legal community is how law firms should handle the growing group of aging lawyers who want to keep working. Historically, many law firms implemented policies designed to encourage older partners to retire—in part to make room for younger partners. According to a 2005 study by Altman Weil, a consulting firm, 57 percent of firms with 100 or more attorneys enforced a mandatory retirement age, which typically ranges from ages 65 to 75. However, these policies and practices have been scrutinized and struck down by the courts and the Equal Employment Opportunity Commission (“EEOC”) as violations of the ADEA.

Consequently, mandatory retirement policies adopted by most private and public sector employers, including law firms, and made applicable to entire classes of employees who reach a certain age are generally considered unlawful under federal laws against age discrimination. These policies may also be unlawful under state law.

1. ABA Resolution (2007)

In 2007, the ABA House of Delegates passed a resolution that urged law firms to abandon mandatory age-based retirement policies for partners in favor of more flexible policies that recognize the value that older attorneys bring to the table. As stated in its endorsed position paper, forced retirement at a fixed age is “inconsistent with accepted employment practices, against public policy and not in the best interest of either law firms or their clients.” The ABA House of Delegates made clear that law firms “should instead evaluate senior partners individually in accordance

with their attributes and interests and the firm’s generally accepted performance criteria.” While the ABA resolution is persuasive, it does not have a legally binding effect.

2. Partner or Employee?

Since many older lawyers are often “partners” in their firms, there is the troubling question of whether they are an employee of the firm or in fact an employer. Law firms are generally set up as a hierarchy. Associates are basically paid employees working to someday be promoted to partner. Partners are traditionally joint owners and business directors, however, a large number of big firms have transitioned to a two-tiered partnership system which separates partners into equity and non-equity. Equity partners have shared ownership of the firm and therefore share in the profits and losses of the firm. Non-equity partners are given limited voting rights within the firm and are paid significantly higher amounts but essentially have the same rights within the firm as associates.

Therefore, a partner must not only prove that discrimination occurred, but must also prove that the ADEA even applies to him or her. True partners, those who manage and control a business, are not covered by the ADEA. *Burke v. Freedman*, 556 F.2d 867, 869 (7th Cir. 1977).

In *Clackamas Gastroenterology Assoc., P.C. v. Wells*, 538 U.S. 440 (2003), the Supreme Court found the following factors were important in deciding who is a partner and who is an employee:

- whether the organization can hire or fire the individual or set rules for the individual's work
- the extent to which the organization supervises the individual's work
- whether the individual reports to someone higher in the organization
- the extent to which the individual can influence the organization
- whether the organization and individual intend that the individual be an employee, as expressed in agreements, and
- whether the individual shares in the profits, losses and liabilities of the organization

3. Recent Cases

- a. *EEOC v. Sidley Austin Brown & Wood*,
315 F.3d 696 (7th Cir. 2002).

**Sidley Austin Settled Lawsuit in 2007 and Paid
\$27.5M to 32 Former Partners**

Sidley Austin settled an EEOC suit for age discrimination by paying \$27.5 million to 31 former partners. The law firm denied the EEOC's allegations that law partners were forced out of the partnership due to their age, but the settlement was been approved by a federal judge.

The payment was divided amongst the 32 claimants, many of whom were former partners who were forced out under a 1999 reorganization. In 1999, 32 lawyers, all over age 40, were told that their status was being downgraded from partner to special counsel or counsel, and that their pay would be reduced by about 10%. They also were told that they would soon have to leave the firm. Included in those claimants were also partners who have been forced out since Sidley, Austin's implementation of a mandatory retirement policy in 1978.

Under the terms of the settlement, the average payout for each employee was just under \$860,000. The highest payment to any one former partner was \$1,835,510.

In 2005, the EEOC brought suit against Sidley, Austin under the ADEA. While Sidley, Austin did not deny forcing the partners out, it argued that partners in a law firm were not "employees" under the ADEA. That argument was overturned, and as part of the agreement the firm agreed that "each person for whom EEOC sought relief in this matter was an employee with the meaning of the ADEA."

The settlement also included an injunction that barred Sidley, Austin from terminating, expelling, retiring, or reducing the compensation of partners, or changing their partnership status due to age. The firm was also prohibited from creating or perpetuating any informal or formal policy requiring that partners retire once they reach a certain age. Any policy that required that the remaining partners give permission for a partner to continue to practice once he or she reaches a certain age, was also prohibited.

- b. *Kelley Drye & Warren*: \$574,000
(2012)

**Kelley Drye & Warren Agrees To End
Mandatory Retirement Policy, and Pay Law
Partner Forced to Give Up Ownership Interest
in Order to Continue Working**

Kelley Drye & Warren, a law firm with over 300 attorneys, paid \$574,000 and ended its policy of requiring partners over the age of 70 to give up their equity in the firm to settle an age discrimination suit filed by the EEOC.

On January 28, 2010, the EEOC filed a complaint against Kelley Drye on behalf of a former firm partner and a class of other similarly situated employees. The complaint alleged that Kelley Drye had a partnership agreement requiring all lawyers who reach age 70 and wish to continue to practice law to relinquish any equity interest in the firm. These senior lawyers were allegedly thereafter compensated solely by an annual "bonus" that was wholly discretionary with the firm's executive committee.

According to the complaint and the EEOC press release, the particular former partner in question had been paid significantly less than younger lawyers with similar client collections, billings and other measures of productivity, even though he routinely collected over \$1 million annually in client fees. This, the EEOC alleged, was an unlawful employment practice in violation of the ADEA .

There was also a retaliation claim in the case. The complaint alleged that after the former partner filed a charge with the EEOC, the firm retaliated by reducing his annual "bonus" from \$75,000 to \$25,000, even though his collections and other measures of productivity had not declined from previous years.

EEOC General Counsel P. David Lopez, stated that "there is no reason why attorneys who are capable of continuing to practice at 70 either should be forced to retire or otherwise be dissuaded from continuing to work in their chosen profession just because of their age. Our strong enforcement of the [ADEA] is critical to ensuring that workplaces are free from discrimination." Jeffrey Burstein, EEOC Trial Attorney in the EEOC's New York District Office, stated, "as Kelley Drye has recognized by its policy change, it simply does not make business sense to arbitrarily force out attorneys with the skill and energy to continue to practice law at a high level even though they are over 70 years old. I urge other law firms to assess their retirement policies."

4. Alternatives to Mandatory Retirement Policies

In lieu of mandatory retirement policies, there are ways that firms can broach with an older attorney the idea of a reduced workload while simultaneously affording that person a level of respect and flexibility to make a transition on his or her own terms. One strategy, is implementing a “wind-down” policy, in which senior attorneys are given a level of flexibility and discretion in reducing their client work over a period of years, and transitioning it to a more junior partner of their choosing. That approach can send a signal to senior attorneys that, while their work is valued, they will likely need to hand it off at some point.

5. EEOC Adopts Final Rules

a. *Reasonable Factors Other than Age (ADEA) Final Rule*

On March 29, 2012, the EEOC issued the “Final Regulation on Disparate Impact and Reasonable Factors Other than Age” (RFOA) under the Age Discrimination in Employment Act of 1967 (ADEA). ***The final rule clarifies that the ADEA prohibits policies and practices that have the effect of harming older individuals more than younger individuals, unless the employer can show that the policy or practice is based on a reasonable factor other than age.*** The rule explains the meaning of the RFOA defense to employees, employers, and courts, and makes EEOC’s regulations consistent with Supreme Court case law. The rule applies to private employers with 20 or more employees, state and local government employers, employment agencies, and labor organizations. The final rule strikes the appropriate balance between protecting older workers from discriminatory, unreasonable business decisions and preserving an employer’s ability to make reasonable business decisions.

IV. PRACTICAL WORKPLACE STRATEGIES FOR OLDER ATTORNEYS

Tip #1: Keep Up with Technology

There seems to be a perception among younger attorneys that attorneys from the Baby Boomer and older generations are inflexible and resistant to learning new technology. However, some studies indicate that such perceptions may be myths. In an AARP survey of older workers in 2012, 75% disagreed with the statement that they have a difficult time keeping up with all the new technology required to do their job. To combat this perception, older attorneys must embrace technology and update antiquated skills—nothing

marks one as “old” more than technological impotence.

For example, it would be worthwhile to acquire basic proficiency in the following technology areas: 1) using and accessing social media (Facebook, LinkedIn, Twitter, *etc.*); 2) navigating personal electronic devices (smart phones, iPads, portable hard drives); and using Microsoft Office Suite and Excel.

Tip #2: Interact with Younger Attorneys in the Firm

Often times, older attorneys get too comfortable interacting only with their peers and those who started at the firm with them and subsequently avoid their younger colleagues. For example, an older attorney unintentionally but habitually avoids his younger colleagues by going to lunch with other senior attorneys rather than inviting any younger colleagues.

The older attorney may not realize that such behavior creates the perception that he or she is not staying connected to the firm. Avoiding interaction with the younger attorneys may negatively impact an older attorney’s career. For example, in some firms, the younger attorneys (mid-40s to mid-50s) may be the decisionmakers in the firm and have significant input into personnel decisions that affect the firm—and by extension—the older attorneys (mid-60s and above).