

Report to Legal Management

OUR 29TH YEAR

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Senior Counsel Programs — Or: Older Is Looking Younger To Me All The Time



Alan R. Olson

By Alan R. Olson

As the wave of baby boomers that swept into the legal profession in the early 1970s and '80s approach middle age and retirement, the managers, colleagues and cultures of their law firms need to prepare for a rising tide of phase-downs and retirements — and respond to those individuals who may be resistant to either.

The issues surrounding phase-downs and retirements — both for the individuals and the law firms they call home — are complex, usually challenging and sometimes emotional. Addressing these issues is unlikely to get easier with volume. Moreover, the hard-driving work ethic which characterizes the baby boomer generation, and helped foster the 2,000-plus billable hour standard in many firms, makes it less likely that the legion of lawyers in our generation will go quietly into the night. And as long as they are productive contributors, should they necessarily go — or be quiet?

This article is a compilation of lessons learned by Altman Weil in planning and structuring counsel and senior counsel programs, including some thoughts on effective compensation approaches. It is based on real-world consulting experience with numerous law firms, and is intended to provide a practical introduction to concepts and approaches proven to work well, rather than attempting to cover the complete

spectrum of possible senior partner, senior counsel or of counsel programs.

Terminology

It is important to distinguish between the terms “of counsel” and “senior counsel.” Firms use the term “of counsel” in different ways. Sometimes of counsel is used to refer to a senior lawyer who has passed from full partnership or shareholder status, but may remain affiliated with the firm, in active, semi-retired or mostly-retired status.

Of counsel is also applied to significant numbers of less senior lawyers. Traditionally, “of counsel” or “special counsel” have been used to describe lateral entry positions that do not fit into the typical associate/partner nomenclature, or arrangements that can be generalized as “living together before we get married.” These may involve lateral lawyers

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on a full time, part time, or time-to-be-determined basis. Examples include the general counsel or judge entering or returning to law firm practice; a practice area that is outside a firm's mainstream practice, such as white collar criminal defense or a divorce practice, being actively associated with a law firm on a "look-see" basis; a lateral lawyer with a less-than-full-time practice but with cross-selling potential who wants more than an office-sharing arrangement.

Increasingly, Altman Weil consultants are seeing relatively young lawyers choosing to move from partner status to of counsel or non-equity partner status. These lawyers may want to be relieved of the financial obligations of partnership, or the time commitment of full partnership. With the increasing number of two-career households, the graying of America and its lawyers, it is logical that more people would affirmatively seek to ratchet down the pressure.

We also see increases in the number of firms that are requesting equity partners to move to non-equity status, typically based on performance levels or firm profitability problems that are straining firms' abilities to compensate all relatively senior lawyers at full partner levels. While the firm is the moving party in this situation, it also may reflect some mutuality of choice in those instances where the individual lawyer has chosen to allocate less time to his or her career.

For law firms looking at programs involving senior lawyers phasing down, we generally recommend use of the term "senior counsel" and "senior counsel program," to distinguish it from of counsel or special counsel arrangements with other lawyers that the firm may have. "Senior counsel" is generally viewed favorably by the firm and its senior lawyers, since it connotes a person or group

that has served the firm and is continuing to function in a valuable role.

Add a program Instead of Acting on an *Ad Hoc* Basis

Even in small firms, we recommend developing a senior counsel program rather than dealing with individual situations on an *ad hoc* basis. Too often, nothing happens in an *ad hoc* environment, because the lawyer isn't really looking forward to retirement, or the firm may not want to raise the issue. Without a program in place, it can appear that an individual is being singled out because of age or energy level. These are unpleasant and often inaccurate images. With a program, advance planning is much more likely to occur on a regular basis, without being blocked by the "why me?" inherent in an *ad hoc* system. Moreover, advance planning is critical for clients, for the firm and for the individuals. Failure to plan can risk client relationships, and firm and individual economics, as well as the long-held relationships between senior partners and the firm.

In promulgating a senior counsel program, there needs to be an expectation that, while the process is consistent, the specifics will likely be tailored to the individual. These specifics will likely involve the firm's expectations of the individual and, sometimes, the compensation and resources provided. Some partners phasing down or phasing out from full-partner status want to remain more or less fully active, at least for awhile. Others want to scale back considerably, or may have already, especially if the senior counsel program is new.

Even with flexibility for individual situations and goals, developing a senior counsel program can help establish meaningful roles for those individuals phasing down from full-partner status. In many cases, this correlates more closely with people's actual paths in productivity and

interest in the practice. In other words, being a fully active partner one day, and fully retiring the next, is usually less reflective of individuals' work patterns — many people phase down over a period of years. As such, a structure contemplating 2,000 hours in one year, followed by zero hours the next, is likely to be unduly limiting both to the firm and to the individuals.

Principles

In consulting with law firms, we take the position that the law firm — typically the partnership group represented by its Management Committee — has the decision-making authority, as well as the responsibility, to identify when someone should go to senior counsel status or retire from active practice. It may involve different variations within the two

"Even in small firms, we recommend developing a senior counsel program rather than dealing with individual situations on an ad hoc basis."

frameworks of partner and senior counsel status. These may include retention of partner status at reduced compensation, or moving to senior counsel status while retaining specified levels of practice independence and activities.

The firm's authority and responsibility for the decision is compelled by the best interests of the clients, of the firm and of the individual — and, we would argue, in that order. The bases for the firm's decisions should include, first and foremost, the individual's competency to practice, followed by his or her interest in the

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practice, in serving clients, level of activity and economic justification.

Methodology

With law firm clients, we often recommend developing a process whereby each partner who is five years before anticipated retirement or age 60 (whichever comes first), should begin meeting annually with the management committee or other empowered group to discuss the individual's long term plans. This process should be updated annually. If the law firm already has an annual individual goal-setting format in place, this Senior Partner planning session may simply be part of that.

Initially, it can be expected that many of the senior partners meeting with the management committee will remain full partners for several or more years and be part of the existing compensation system. Even if someone announces they want to begin phasing down, they may still be performing at a partner level for one or more years. Through the individual goal-setting and compensation process, these individual's activities can be planned, discussed and probably accommodated for a time within the regular partner framework and compensation system.

This process may force the firm to address the question "What is a full-time partner?" and set expectations for full-time partner, shareholder or member status. For example, a firm may decide that, aside from lawyers with management or other major responsibilities, a full time partner should not fall below 1,000 billable hours or \$200,000 in collections in two consecutive years without an approved sabbatical or other absence. Obviously, these minimums are illustrations, and may vary considerably, depending on a firm's economics, practice and culture. At this point, if the individual and firm both want the relationship to continue on some basis,

the senior partner may go to senior counsel status. In some firms, other partners who are below this threshold for two or three years might become part-time or non-equity partners, again assuming the firm and individual want to continue the relationship.

When it is time for an individual to change from partner to senior counsel status, the plan can be designed to cover a multi-year period, but should be subject to annual review and renewal, with the firm having the ultimate decision-making authority. This will help maintain and encourage annual planning. In addition, this approach will also help identify and institute phased modifications that may become necessary, such as limits on opening new files or going to court. This approach can help prevent the tragedy of a career ending under the cloud of a malpractice allegation.

Clients

A law firm's clients may be the most important beneficiaries of a law firm's planned senior partner and senior counsel programs. By the time a senior partner begins meeting annually with the management committee — if not earlier — the clients served and managed by the individual must be a major focus of discussion. A plan should be developed for transitioning these clients and the work performed for them — identifying the lawyers working with the senior partner, introductions to clients and training as needed. Ideally, there should be two themes within the plan: the expected transition plan, and a contingency plan in case the senior partner is hit by the proverbial bus and can no longer serve his or her clients.

Client transition planning should cover not only substantive legal work, but particular client histories, client preferences, and what particular clients want from their lawyer(s) as well. The billing and financial inter-

face with the client should also be reviewed, to prevent any sudden changes in how, how often and how much clients may be billed. For example, if a senior lawyer has provided certain services without billing, or has been lax about billing, and the new lawyer diligently bills the client for the same services, the client could be shocked by what is otherwise entirely appropriate billing.

Compensation and Other Support

For senior lawyers going off the partner/shareholder compensation system, in many cases the compensation arrangement is more likely to be objective or formulaic than subjective. In these situations, objective compensation determinations are best tied to:

- a) Collections worked on and brought in by the individual personally; and
- b) Collections brought in from the individual's clients that are being delegated to others.

Usually, percentages for compensation purposes should not be tied to billable hours or billings, although these performance measures can be tracked to help make sure that write-offs are not a problem. Percentages tied to collections create a direct mutuality of interest, between senior counsel and law firm, in the collections process.

Percentages can be graduated. For example: the senior counsel could receive a smaller percentage up to \$100,000 in working attorney revenues, to better cover overhead; then receive that percentage plus 10% for receipts over \$100,000, with the rationale that the overhead has been covered already.

In addition to compensation, the firm can provide the senior counsel with an office, secretarial and clerical

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support, all within reason. If the individual is still fully active or nearly so, this support may be similar to that of a fully-active partner. On the other hand, if the senior counsel is just coming in the office to open his or her mail, a small or even a shared office may be more reasonable. Even very large firms have had to cut back substantially on what they can provide senior counsel who are no longer active.

Conclusion

There are increasing numbers of senior lawyers in law firms.

Development of law firm programs and ongoing planning vehicles for senior partners and senior counsel transitions can represent a win-win-win — for the clients, the firm and the individual. The underlying emotions may still be difficult for all concerned. The practical and professional aspects, however, are likely to fare much better in an environment with planning and a program, than in an *ad hoc* environment. ♦

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