`Partners' put law firms in labor bind

By: **T. Shawn Taylor**

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When Paul Cravath of the New York law firm of Cravath, Swaine and Moore established what would become the structure for the modern-day law firm at the turn of the 20th Century, partners weren't asked to sign written agreements. A handshake would do.

A lot has changed since then. Now, most law firms require partners to sign formal agreements that spell out all that comes with that title--and, in some cases, all that doesn't.

As law firms have grown, they have become less clubby and more corporate. Today, partner isn't always synonymous with ownership and job tenure. Within a firm, the partners aren't always equal. Some earn a share of the profits; others do not. Some shoulder the firm's risks and liabilities; others have limited liability. Some have decision-making power; others have little say-so or none at all.

Here is where partnership law and labor law have begun to clash. As law firms have merged, creating mega law firms with hundreds of partners who have never shaken hands, the lines between who is a partner and who is an employee have blurred. In Chicago, the Equal Employment Opportunity Commission is challenging the notion that partners in law firms are never covered by federal labor laws.

The stakes are high: The title of "partner" has traditionally meant part owner. As an owner, a partner isn't entitled to protection under federal anti-discrimination laws, as employees are.

Two years ago, the EEOC began investigating the Chicago law firm of Sidley, Austin, Brown and Wood for alleged age discrimination. In 1999, the firm, then Sidley and Austin, told 32 of its partners to either take a demotion to "counsel" or "senior counsel" or leave the firm. Sidley also changed its mandatory retirement age of 65 to a sliding scale of 60 to 65.

An unnamed partner at Sidley told the EEOC the demotions were the product of age discrimination, according to John Hendrickson, regional attorney for the EEOC's Chicago district office. He said the agency also was concerned about statements attributed to managing partner Charles Douglas in business and legal publications that the partners affected by the demotions "were mostly in their mid-50s and early 60s," and that the firm's strategy "will expand opportunities for younger partners and associates."

The decision to force the demotions was made by the firm's 35-member executive committee. None of the firm's other partners, which at the time totaled 377, got to vote on the matter, according to court papers.

Sidley has refused to provide the EEOC documentation about how the 32 partners were selected and employment information about each one. The firm maintains the EEOC has no jurisdiction because partners are not employees covered by the Age Discrimination in Employment Act, which protects employees 40 and over from on-the-job discrimination.

In February, U.S. District Court Judge Joan Lefkow granted a subpoena requested by the EEOC, but Sidley is appealing the decision to the 7th Circuit Court of Appeals, said Paul Grossman, an attorney representing Sidley from the Los Angeles firm of Paul, Hastings, Janofsky & Walker.

Sidley attorneys declined to comment on the investigation for this story. But in court papers, the firm stated the executive committee determined the contributions of the 32 partners "were less than expected" and they "should give up their equity status."

Also in court papers, the firm defended its partnership arrangement, saying its partners own the firm and have contributed to its capital, share in the firm's profits, are liable for its losses and financial obligations and serve on one or more of the firm's 25 administrative committees.

The firm declined to say how many partners left the firm, but those who did received payouts that included their capital contribution and accrued interest, said Bill Conlon, general counsel at Sidley.

"Those two payments are provided for in the partnership agreement when a partner leaves the partnership," Conlon said.

The EEOC's Hendrickson said that because all the decision-making power at Sidley is in the hands of a few partners and because the 32 partners selected for demotion did not have a say in their fates, "in our view, they are not partners."

Influenced by growth, mergers

Sidley and Austin merged with Wall Street firm Brown and Wood last year. Since then, the number of partners has increased to 502 out of a total of 1,413 lawyers. The executive committee now has 45 members.

The case highlights some of the ambiguities that exist in the emerging law firm model, due primarily to large-scale growth, experts say.

In the 1980s and 1990s, changes in the economy and competition from other industries, like large accounting firms that began combining their consulting, accounting and legal functions, threatened to drain the pool of talented lawyers as well as the client base, said **Brian Uzzi, associate professor of management and sociology at Northwestern University's Kellogg School**

of Management.

"Law school grads could now go work in an accounting firm and have a 9-to-5, or go work in a large in-house corporate counsel department, make a nice salary and leave more time for family and a personal life that the partnership model didn't permit," said Uzzi, who is researching large law firms.

To compete, law firms began merging, creating mega-size firms with 1,000 lawyers or more. In addition, some firms shifted to a more corporate employment structure, Uzzi said.

It is becoming more common in large firms for a central management committee to make all major decisions, said Jack Heinz, a law professor at Northwestern University Law School, who co-authored a recent study about the transformation of the urban law practice.

Amid all this change, the partner relationship became less "old boy" and more impersonal, experts say. To protect their client base and retain the top legal minds, some firms began to feel they could not afford to retain partners whose rainmaking abilities--bringing in new clients and billing a requisite number of hours--were lagging. So, they started letting them go.

"It used to be that lawyers would stay in a single firm for their entire careers," said Lisa Lerman, professor of law at Catholic University of America School of Law. "It was a community. The older people were the leaders. They were respected and valued, even if they slowed down some as they got older."

"Now, it seems like whenever someone wants to do something besides bill hours all day, they get moved off to the side."

At some firms, expansion has also led to the creation of two or more tiers of partners that are not all equal. This way, firms are able to offer more promotions and keep the talent from going elsewhere.

"They are calling people partners not for compensation ... but for prestige," said Luis Garicano, professor of strategy and economics at the University of Chicago Graduate School of Business.

Partner may be part of the title--for example, "partner associate" or "partner affiliate"--even if that person is not on the partnership track.

"It's a big problem if everyone is a full partner and entitled to a share of the profits," Lerman said.

Clients also like dealing with partners because they are viewed as important to the firm. Usually, the client doesn't know whether a partner is an equity partner, who shares profits, or a nominal partner, who is one in name only. The business cards look the same.

"Giving somebody the title of partner is a way of enhancing their stature and status and making them appear more valuable," Heinz said. "It's just a title, but people like titles."

Legal opinions vary

With so many of them out there, opinions vary in the legal and academic communities over whether a partner can ever be considered an employee.

"You can name someone anything you want," said Mike Sullivan, a retired attorney who runs an expert witness training and consulting firm in Cheyenne, Wyo.

If a partner can be terminated and has no say in the firm's governance, he said, "then how can you call me a partner?"

"There is so much ambiguity when it comes to partnerships. Even the Supreme Court has failed to define what it is," Sullivan said.

Wayne Outten, a New York attorney with Workplace Fairness, said courts are willing to look beyond the label and consider the economic realities of a partnership to determine who is a bona fide partner. However, he said he has never known of a case like Sidley "where there is such a cleavage between the financial aspect of ownership on the one hand and control on the other hand."

Richard Lieberman, a labor and employment attorney and author of "Personal Foul" about a Notre Dame coach who was ousted because of his age, believes Sidley would be an ideal test case, but he agrees with the firm's position.

"I do think they're true partners. When one decides to accept the invitation to become a partner in a law firm, they are still signing on as an owner of that firm and accepting the notion that they're different than an employee of a corporation," Lieberman said.

There is agreement on at least one point: Law firms have changed forever.

Malcolm "Mickey" Gaynor, a veteran lawyer and a partner with Schwartz, Cooper, Greenberger & Krauss in Chicago, said he feels sad for young lawyers who will never get to experience the job the way he has.

"If I was a kid coming out of school today, I don't think I'd want to be a lawyer. I've had a good time. But it's just not as much fun anymore," Gaynor said. "Just throwing people out wholesale, whether it's legal or illegal, is not fair."