MEET MR. LUCKY BOY

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Let me introduce you to Mr. Lucky Boy. He's a black Labrador retriever who has been part of my life since he was a mere chubby-cheeked six-week-old. He's now 14, and what is commonly called "long in the tooth." I'm not sure where that expression comes from, because his teeth are decidedly much shorter and duller than they were as a young pup. But you get the idea.

Mr. Lucky Boy ("Lucky") isn't as spry as he once was. He has stenosis in his spine which increasingly makes his hind legs uncooperative. He can't understand why his hind legs go out from under him sometimes when climbing the long stairway to the bedroom at night, or when attempting to run for the Frisbee. Worse still, I can often tell that he is trying his best to get those legs to move, but they just aren't getting the message like they used to. After several attempts he looks at me and barks in frustration.

My family's annual cousin's party was held at my home in September. Lucky faithfully brought the ball or Frisbee to every single family member, in order to give them the opportunity to watch his amazing prowess in catching the Frisbee in the air, and retrieving the ball in record time. As he pushed the ball or Frisbee into each hand with a longing look on his face, he touched everyone's heart.

Lucky tried hard to catch the Frisbee, but he could not keep up with it. In his youth he was always ahead of it, anticipating how the wind would carry it, and he would leap up into the air at the final moment and catch it. The same with a tossed ball. It was rare to have it bounce even once before he intercepted it. Everyone used to tell me he belonged on the David Letterman show. But I know he was just being a great Lab, and it wasn't anything special.

This year he walked to where the ball or Frisbee landed, picked it up and walked back with it, handing it to the next family member. I'm not sure he even realized his "performance" was less than in previous years. It made family members sad, because most felt that this was the last family party Lucky would attend. Such is life; nothing lives forever. I'm grateful for the wonderful years we've shared, and for every additional day God grants us. And yes, I am prepared to ensure that he does not suffer when quality of life inevitably escapes him.

As I was happily stroking Lucky's greyed muzzle today, it occurred to me that many of your law firms have a Mr. Lucky Boy. And chances are good that you're wrestling with some issues. Here are some of the thorny questions you may already be dealing with, or will face soon enough:

- Should our firm have an age at which partners should be forced to retire?
- What is a fair exit strategy? Should there be a buyout based on the value of the firm or the goodwill being left behind? Should an initial capital contribution be refunded?
- What if a partner is "losing it" and creating possible increased exposure to malpractice?
- How can we ensure that clients and referral sources are transitioned to the next generation?
- What if a partner refuses to allow changes to occur at the firm, whether it be to technology, procedures, compensation, whatever, and it is hampering the firm's ability to remain competitive?

I'm sure that for a lot of you reading this, many of these questions hit home. Perhaps you're avoiding dealing with them because there are no clear answers, and no consensus. Perhaps no one wants to be the one to start this difficult discussion. And for many of you, respect and a healthy measure of empathy— you know you'll be in the same position some day— make you steer clear of tackling these questions head-on.

Truth be told, your Mr. Lucky Boy deserves better, as do all those lining up behind him at your firm. And your young lawyers are closely watching how you will handle this issue. Depending on how things go, they may decide to stay or move on.

One reader recently wrote to tell me that my columns repeatedly tackle the difficult issues which lawyers try not to face, in a non-threatening and often humorous way, and provide tools to start the process. I could not get a greater compliment. And yes, that is the purpose of this article. I have been getting ample calls on the hot line and privately from firms already in the throes of these issues. A whole generation of baby boomers are quickly marching toward voluntary or involuntary retirement. Ignoring them will not make them conveniently vaporize.

Should your firm have a mandatory retirement age? For many years now the prevailing wisdom has rejected mandatory retirement. Some large firms still hold onto this provision in their partnership agreements. Fortunately, most enlightened firms have eliminated it. Why?

First, most mandatory retirement ages are way too young. Typically 60 or 65. Back when firms started incorporating mandatory retirement that was old. Nowadays it is rare that a lawyer's useful days are done at this age. In fact, I would not consider a recommended retirement age of less than 70 for those who want to continue working. Seventy is the new sixty for most.

The real problem is that by pushing back retirement, there are just too many mouths trying to feed on the partnership profit pie. And that is a real problem which continues to grow, even as profits continue to shrink at many firms. So while I don't believe in mandatory retirement while someone is still capable of contributing to the firm, I do believe that at a certain point partners should become de-equitized, so that a younger generation gets to eat some of that limited profit pie.

Keep in mind also that the larger the firm, the more likelihood that there is exposure to age discrimination claims from partners forced to retire. Some claims have already been litigated successfully, where it was determined that the partner was one in "name only" and had no real say in management of the firm.

It's important for firms to redefine the role of the senior partner. Most attorneys refuse to retire because their entire self-image is tied up in being a lawyer. And not just a lawyer, but one who is highly regarded in the legal community, has a high level of expertise, and for many, is an important economic contributor at their firm.

There are so many important functions which are beneficial to the firm, which a senior attorney is well-suited to perform. Mentoring, quality assurance initiatives with key clients, and ambassador and statesman for the firm in so many well-developed networks, to name a few. You may have to rethink compensation a bit, depending on how it's determined now. But you may also be surprised to learn that your Mr. Lucky Boy is more concerned with remaining relevant and continuing to contribute to the welfare of the firm, than in earning big bucks.

What about buyout? Well, if your firm has a buy-in, then that initial capital investment should be returned upon retirement or de-equitization. The problem is that so many firms have never come to any agreement as to what will happen at the end. And others have agreements created by founding partners who feel they are entitled to be paid for the sweat equity and risk they assumed in building the firm.

Here's what I see in the real world. Firms which have dealt with this issue usually have a requirement to buy out retiring partners based on a valuation of their ownership interest at the time they announce retirement plans. These buy-outs are made over time, typically anywhere from five to ten years.

If the firm is sufficiently large with ample revenues, a phased buy-out may work just fine. However, many firms typically have multiple partners who are boomers and will be retiring in relatively close proximity to one another. That becomes an economic threat at a small or mid-size firm.

A typical scenario is that the first partner who announces retirement gets paid in full. However, when the next one or two announce retirement while the first is being paid off, or even immediately thereafter, it raises serious concerns for the on-going viability of the firm.

The drain on cash often leaves insufficient profits for younger partners to pay themselves a decent living wage. They become resentful. And in many cases, they conclude that it is in their best interest to leave.

The exodus of just one or two "next generation" partners leaves the typical small or mid-size firm unable to generate sufficient revenues to cover overhead, buy-out payments, and have sufficient cash left to pay competitive partner compensation. That triggers the "run for the door" I have written about so many times before. The firm closes, and none of the remaining senior partners winds up obtaining their buyout.

My perspective is pragmatic. Many of you will strongly disagree, but I dare say those who do are likely those who have spent their lives building their firms from scratch. I believe that the pay-back for your sweat equity and risk is the compensation, recognition, and lifestyle you have achieved during your career. Period. I do not believe that buy-outs—other than return of capital buy-in— are appropriate or even practical in today's marketplace. Many years ago it was a different story. But that was then, and this is now.

Keep in mind, that I am not speaking about good will. Some practice areas have considerable good will. Estates, trusts and wills is one such area. A well-established PI practice with a recognizable telephone number and trade name is another. I would always recommend that a solo practitioner attempt to sell such a practice rather than close it down. And I think that a retiring partner in such a practice area should get a small percentage of revenues which will likely flow from their good will after their retirement. When firms ask me how to compute this

value —and it is usually the soon-to-retire partner who asks— I suggest a methodology or two, but always end the discussion with a reminder that "pigs get fed, while hogs get slaughtered."

Speaking of thorny issues, competency is one which is not only difficult, but can have personal repercussions for all partners at a firm. The Rules of Professional Conduct require each attorney to report an attorney who they deem no longer competent to practice law. In reality, what I see is that firm partners are well aware when someone is no longer competent at their firm — whether as a result of age, impairment due to addiction, or psychological issues — and they do their best to cover it up rather than deal with it. They have staff members double and triple check deadlines, have younger attorneys secretly checking documents before they go out, and staff secretly reporting about upset clients.

Most firms have no mechanism for dealing with this issue. I am continually amazed that a majority of firms require a 100% vote of all but the partner under scrutiny to take definitive action. I can understand a supermajority for this serious of an issue. But to realistically think that 100% consensus will be reached on any serious issue is folly.

The worst case scenario would be for a firm to continue to allow an incompetent attorney to practice, while taking active measures to "shore up" deficiencies, and for a malpractice action and/or disciplinary action to be filed. First, the firm's malpractice insurance application would probably be determined to be fraudulently completed based on the answer to the question as to whether the firm knew of any "act, error, omission or circumstance which might reasonably give rise to a claim." A simple questioning of employees who work with the attorney in question would reveal that the firm knew competency was an issue, and failed to report. So the firm could easily wind up with no malpractice insurance coverage, as well as disciplinary action for failing to report the lack of competency. Tack on personal out-of-pocket financial responsibility for any judgments or settlements, and even a strong firm can succumb under the circumstances.

What's the right solution? Clearly worded language in the firm's partnership/shareholder agreement that addresses the firm's ability to terminate an attorney for ethical, criminal, fiduciary, profitability, or competency issues. Get it established and understood *before* an issue arises. And for goodness sake, don't require a 100% vote to approve action. Then hope you never need to call the question.

Insuring a smooth transition of clients and referral sources to younger attorneys is tied to successfully transitioning senior attorneys to new roles. Compensation decisions should include consideration based on how much work a senior lawyer continues to do, but should be heavily weighted to reward successful transitional behavior.

Today's successful firms are by necessity nimble. They must be able to respond quickly to changing market conditions including increased competition, client demands, efficiency initiatives to maintain profitability, and more. Any partner, young or old, who is a constant and serious impediment to this process at a firm threatens the earnings of each partner, and even the viability of the firm itself.

In the "old days", curmudgeons were tolerated. Even if it meant that the firm held off any meaningful change for years until they retired or died. Nowadays, it could mean the difference between survival or demise.

Again, I tend to be pragmatic. Where important strategic changes are under consideration, firms need to take time to educate everyone on the issues, and let all viewpoints be expressed. Issues which create deep disagreements should not have forced conclusions, unless that conclusion is a clear indication that some portion of the firm is better off separated due to fundamental incompatibilities. And that usually works out to the benefit of both groups after the dust settles. However, when it becomes clear that there is a singular impediment to change — that lone devil's advocate who would disagree with a sunny day just to be different—a firm must be able to bring matters to a vote, and move forward.

Whether your firm has a Mr. Lucky Boy, or you *are* its future Mr. Lucky Boy, ignoring the questions and issues which eventually and inevitably will arise is the worst thing you can do. If you need help wrestling with these issues, contact me. I can assist you in establishing a path suitable for your unique firm.

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