

Breaking Up Is Hard to Do

What to Do When Your Firm Implodes

By Katerina E. Milenkovski, Litigation News Associate Editor

Recent headlines have heralded the breakup of some large, long-lived law firms. Following significant associate layoffs and partner departures, San Francisco-based Heller Ehrman LLP, once an AmLaw 100 firm, announced its dissolution last fall, after more than 115 years of existence. Thelen, LLP (formerly Thelen, Reid & Priest, LLP), another AmLaw 100 firm with more than 600 attorneys, followed suit when it announced that it would close its doors before the end of last year.

In this difficult economy, attorneys around the country may find themselves wondering: What should we do if our firm falls apart tomorrow? After all, if a breakup happens, a lawyer continues to have ethical duties to clients and the firm amidst the winding up of business concerns.

"I think there are three basic issues that must be addressed when a firm dissolves," says Pamela A. Bresnahan, Washington, D.C., cochair of the Section of Litigation's Professional Liability Litigation Committee. "What is the breakup going to look like? What are the ethical implications? And what will be involved in winding up the firm's business?" she asks.

"First and foremost," cautions Bresnahan, "you have to make sure every client file is accounted for, placed, closed, transferred to a new law firm, or otherwise dealt with. That's the biggest obligation. You have to do that. Then, you do the best with all of the other issues," she says.

Henry R. Chalmers, Atlanta, cochair of the Section's Ethics and Professionalism Committee, echoes this sentiment. "It is important for attorneys to understand that the dissolution of a law practice does not suspend their obligations to clients, courts, creditors, and others," he says.

Existing Opinions on Lawyer Obligations to Clients

Rules or ethics opinions detailing a lawyer's obligations to his or her clients during the dissolution of a law firm exist in many states. Some examples are State Bar of California, Standing Committee on Professional Responsibility and Conduct, Formal Opinion No. 1985-86 (noting that duty is owed to provide fair and adequate notice of dissolution or withdrawal of attorney from firm sufficient to allow client opportunity to make informed choice of counsel); Colorado Bar Association, Ethics Committee, Formal Opinion 116: Ethical Considerations in the Dissolution of a Law Firm or a Lawyer's Departure From a Law Firm; and Florida Rules of Professional Conduct, Rule 4-5.8, Procedures for Lawyers Leaving Law Firms and Dissolution of Law Firms.

"For example, an attorney's obligation to provide his or her clients with competent representation and relevant information continues after dissolution," Chalmers says. "That relevant information is likely to include the fact of the dissolution," he adds.

"It's all common sense, really," says Benjamin Reid, Miami, cochair of the Section's Attorney-Client Privilege Task Force. "It is never pleasant to call a client and tell them that your firm is going out of business. Nevertheless, you have to continue to work really hard, despite what is going on around you," he says.

"Regardless of where you end up or where your client ends up, you can't let anything happen that would prejudice the client. You have to give the client enough information to make the right decision," Reid advises.

"You should even consider hiring counsel to advise you and/or your partners on your continuing ethical duties during and after the dissolution," Reid says.

If dissolution seems likely, Chalmers advises lawyers to "reread your state's ethics rules to be sure you do not run afoul of them in all the mayhem of the moment."

Some states, like Florida, have specific rules governing procedures for lawyers leaving firms and for dissolution of firms. Reid believes those rules provide a good approach to follow, "even if there is no comparable rule in your state."

Florida Rules of Professional Conduct, Rule 4-5.8, advises that lawyers involved in the dissolution of a law firm should generally not unilaterally contact clients or solicit their representation; rather, efforts should be made to inform the clients of the dissolution by the firm, in an agreed upon manner.

Whatever notice is provided, it should explain the client's options for choosing representation—be it by the current lawyer or by any other lawyer or law firm of the client's choosing, the rule says. If the client doesn't make a choice, the lawyer who provided primary legal service shall be considered the client's lawyer until the client advises otherwise, the Florida ethics rule states.

Late last year, in *Gotay v. Breitbar*, a New York appeals court held that a law firm that had dissolved in 1998 could still be held liable for malpractice when it failed to clearly sever its ties to a client at that time, even though the case at issue supposedly had been transferred with one of the departing attorneys to another firm.

"Statistics show that firms that are in distress generally have a greater number of claims filed against them," says Bresnahan. "Something always seems to fall through the cracks. Consequently, you need good risk management—someone to oversee the dissolution process and make sure that all of the files go where they should, and that files in storage are properly

preserved so that you won't have extensive liability after the fact," she cautions.

"One thing we learned from last round of law firm dissolutions is that it is best for everyone involved—lawyers, banks, creditors, vendors—if you can work out a deal," Bresnahan says. "Ideally, you want to structure a dissolution plan so that at the end of the

process, everybody from the newest receptionist to the oldest partner finds employment somewhere," she says.

"When Brobeck dissolved, they brought in placement people to help their employees find new jobs. To me, that was pretty classy," she recalls. ▲

Supreme Court to Consider When Litigants Are Contributors to Judges' Campaigns

Will Appearance of Bias Be Enough to Violate Due Process Clause?

By Henry R. Chalmers, Litigation News Associate Editor

Does the due process clause require a judge to recuse himself when his receipt of campaign contributions from a party creates the appearance of bias? Or does the U.S. Constitution reach only instances of actual bias, leaving regulation of anything less to the legislative process? The U.S. Supreme Court is expected to answer these questions this term in *Caperton v. A. T. Massey Coal Corp.*

The case will review the issue of campaign contributions and the impact of costly judicial elections on the appearance of justice at the state level. The ABA and several civil and business groups filed amicus briefs in support of review. "Judges should be accountable to the law and the Constitution, not the whims of the day or to popular public opinion. We urge citizens in states under the grip of increasingly costly court races to band together and find solutions that remove the potential influence of money from our courts," says H. Thomas Wells Jr., Birmingham, AL, ABA President and former Section of Litigation Chair, in a recent press release.

The plaintiffs in *Caperton* secured a \$50 million fraud verdict against Massey, which was reversed on appeal by the West Virginia Supreme Court of Appeals. After the trial court verdict, but prior to the appeal, Massey's chairman and chief executive officer donated \$3 million to a political action committee to help elect Brent Benjamin to the state appeals court. When Massey's case went before the appellate court, Benjamin refused a request to recuse himself, saying he had no personal financial stake in the outcome. He then cast the deciding vote to overturn the verdict against Massey.

Photographs later surfaced of the court's Chief Justice vacationing with the Massey CEO on the French Riviera while the appeal had been pending. This prompted the court to grant a rehearing and the vacationing Chief Justice to recuse himself. Ironically, Massey also sought, and received, recusal of another justice who had publicly criticized the CEO's campaign contributions. Justice Benjamin, however, again declined to recuse himself and again cast the deciding vote to overturn the verdict.

Benjamin declared that recusal is appropriate only when "the facts asserted provide what an objective, knowledgeable person would find to be reasonable basis for doubting the judge's impartiality."

However, petitioners for certiorari before the U.S. Supreme Court argued that the appearance of bias in the case was enough to violate the due process clause's guarantee of a "neutral and detached judge."

Bill Hangle, Philadelphia, a Section Task Force on the Independence of the Judiciary cochair, agrees. "This is the kind of case that strikes at the very heart of the public's confidence in the judicial system," he says.

Massey has argued that although the Supreme Court has found actual bias to violate the due process clause, it has never found a due process violation based on the mere appearance of a conflict—what Massey calls a "looks bad due process standard."

Defining the contours of such a constitutional right would be unworkable, says Massey.

Penny White, Knoxville, TN, a Section Task Force on the Independence of the Judiciary cochair, disagrees. "It was crucial for the Court to grant certiorari and establish once and for all that there

This is the kind of case that strikes at the very heart of the public's confidence in the judicial system.

is a line beyond which recusal must be granted in cases involving litigants who have made large political contributions to the presiding judge," she says.

However, Laura Lee Prather, Austin, TX, a Section First Amendment Committee cochair, is sympathetic to Massey's argument that a finding of due process violation could chill the exercise of First Amendment rights. "We need to be able to support who we want with our votes and our dollars without fearing that we'll be deprived of the opportunity to have a judge we support hear cases in the normal course of operations," says Prather.

"You can give to the political candidate of your choice," Hangle counters, "but you shouldn't expect the system to close its eyes to the fact that you did so when the contributions would create an appearance of partiality."

"This case offers an opportunity for the Supreme Court to help define the factors that should guide judges in deciding when, in the interest of justice, they should rule, and when they should step aside," Wells says. ▲