FIRM GUIDANCE

A New Lease on Life?

By Edwin B. Reeser

The owner of the premier office tower where Heller Ehrman LLP formerly had its headquarters is throwing the keys to the lender.

Beautifully designed, engineered and constructed, 333 S. Bush is one of the finest office towers in the United States; a fitting, proper abode for one of its oldest and finest law firms. Until the firm imploded, seemingly overnight, last September.

The collateral damage of a single BigLaw firm triggering losses approaching high eight and perhaps nine figures to the owners, and probable additional losses to the lender, mandates serious rethinking of the approach that all building owners, and lenders to building owners, apply to making future lease deals with BigLaw firms.

It may make BigLaw firms and their equity partners more financially at risk.

BigLaw firms have long been sought after as tenants for premier buildings, and rarely had failures that worked severe consequences on landlords. What are the factors that will make a new approach recommended for owners and landlords in their dealings with BigLaw?

One is the change in the legal entity nature of the tenant. More specifically, the change in the strength of the commitment of partners to one another within a law partnership that influences the stability of the business enterprise. Until about 15 years ago, most BigLaw firms were general partnerships, and all equity partners were individually, jointly and severally liable for the obligations of the partnership. Typically, a partner who withdrew did not sever liability under the lease effective the day of withdrawal. Thus, if a 15-year lease was executed while you were an equity partner, and you left sometime during the first lease year, absent a specific release from the landlord and the consent of the remaining partners (which neither will likely give absent consideration and pre-negotiation at the inception of the lease agreement), you would be liable for the remainder of the lease term. Departing partners had a strong interest in the continuing health and financial viability of the firm they left. The "we are all in this together" mantra had real economic underpinnings that moderated behavior and enhanced cooperation among partners.

Every managing partner and leasing lawyer who represented law firms in major leasing transactions 15 or more years ago can attest that one of the watershed events in the lifespan of all law partnerships was the renewal of the partners' collective commitment to stay together as a team upon the execution of a new lease. On occasion, the process of negotiating a major new lease and undertaking its long-term financial commitments precipitated the decision among partners to dissolve or break into parts rather than sign up together for another 10 or 15 years, or reconfigure (sometimes significantly) their methods of operating the business, governing themselves and allocating their profits as a precondition to staying together. That "refreshment of joint undertaking and communal direction" was perhaps painful, but very important. With the advent of the LLP, it became basically unnecessary to go through that process, as there no longer was enough at risk financially to warrant each individual partner's suffering through the process. It also became easier for firm leadership to obtain the partner support required to open new offices in aggressive expansion plans. It may now become difficult to hang on to some of those growth offices when and if the whole firm partnership, on individual partner terms, is asked to guarantee even a portion of a long-term lease for an unpopular office that is not perceived as carrying its share of the performance burden. Indeed, when partners do reflect on the recourse of a landlord in a remote outpost to the capital worth of the entire firm for rent, and what that means financially to themselves individually, that alone could trigger some new and energized discourse within the firm.

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Some BigLaw firms operating as general partnerships did negotiate limitations to partner recourse liability on leases, such as caps to the amounts of such liability, sometimes with partner limits based on ownership share in the enterprise with a factor (eg. 125 percent of proportional share) to be allocated to the liability, often with amortization schedules reducing the amount of liabilities over all or a part of the lease term. Some involved letters of credit to protect landlords against losses from large tenant improvement allowances and free rent in the early years of the lease term. There were negotiated provisions to permit the release of limited numbers of withdrawing or retiring partners, subject to tests of eligibility, usually related to financial health and stability of the firm. Some law firms used multiple entities in their own structure to capture and hold risk within lesser included "buckets," usually on a geographic basis, to insulate the firm at large from regional liabilities. With many tens of millions of dollars of equity partner capital accounts at risk, that alone could be an unacceptable risk to the business even without direct partner recourse. With the supply-side surplus of space that emerged in many city centers and the intense competition for tenants starting in the early 1990s, law firms were able to extract many favorable lease concessions from landlords, and minimizing risk of partner recourse on leases was among them.

During this period, there was the advent of the limited liability partnership, essentially a general partnership but without partner liability for its debts, other than those derived from malpractice, and even then only to the partner who failed in the performance of his or her professional duty (although all of the capital of the partnership would be at risk). Any obligation of the partnership at the time of conversion from GP to LLP would continue to be administered as a GP obligation, so converting the status could not wipe away the exposure that existed at the time the deal was made. But all new contract obligations would be governed by the LLP status of limited liability to partners. Over the ensuing 15 years, virtually all of the obligations of the law firm LLPs were transmuted to nonrecourse status. Today the great majority of BigLaw firms have leases that were entered into after their adoption of the LLP.

Interestingly, many of these new lease deals did not attempt to seek recourse liability on the single greatest fixed overhead obligation of the partnerships, thus giving up significant leverage to assure performance, and which also provided internal incentives to keep partnerships together. The bargaining posture reversed from law firm tenants seeking limitations to recourse, to landlords seeking specific penetrations of the liability shield. Those leases that did require limited recourse frequently did not require all new, incoming partners after the lease was initially executed to execute the limited guarantees, or if they required such signatures, it was often not followed administratively so as to capture all of them. Absent those direct contractual obligations between landlord and "late arriving" partners, over time there can evolve a significant class of equity partners in the partnership without the personal liability exposure of their fellow partners. Not surprisingly, some of these partners were sought after and brought into their new firm because of their significant books of business. Causing the new partner to sign onto the lease guarantees might be an unacceptable requirement, a "deal killer" and thus a "detail" never raised or disclosed, or never consummated. Whether an omission through sloppiness and inattention, or deliberation, the departures of this class of "post lease" partners who did not sign on to proportional and other recourse liability for the lease could cause significant adverse consequences to the partnership — consequences they might not share with their other partners as it related to lease obligations guaranteed only by some — when they subsequently depart with their clients.

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Metaphors Matter: How to Move Past 'Lawyers as Vultures'

By Timothy Tosta

In 1980, linguist George Lakoff and philosopher Mark Johnson shook up the prim and proper world of linguistics by their publication of "Metaphors We Live By." They argued that metaphors are not matters of linguistic construction. Metaphors extend well beyond language. Rather, they are primarily a conceptual construction. Metaphors structure what we perceive, how we think and how we act. Reminding us that the essence of a metaphor is an understanding and experience of one thing in terms of another, Lakoff and Johnson examined as their first metaphor for analysis "argument is struggle." That metaphor, they maintained, structures what we do and how understand what we are doing when we argue.

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Lakoff and Johnson suggested that we talk about arguments as struggle because we conceive of them that way — and we act according to the way we conceive of things. In arguments, we "attack a position." Claims are "indefensible." Criticisms are "right on target." Argument are "shot down." In structuring an argument, we look for "new lines of attack." We "gain ground" in making an argument or we are "wiped out." Finally, arguments are "won" or "lost."

Lakoff and Johnson warn that one of the difficulties of a metaphorical concept is that it can keep us from focusing on other aspects of the engagement that are inconsistent with that metaphor. For example, the argument is struggle metaphor causes us to lose sight of the cooperative and developmentally creative aspects of argument.

The limitation of the argument is struggle metaphor is that it structures our belief of what arguments are, channels our actions in a certain direction consistent with that belief and allows us to ignore opportunities that are inconsistent with the metaphor's premise.

So, please power up your Internet search engine and type in the words "lawyers" and "jokes." I send you here because the structure of humor is premised on the cultural acceptance of certain concepts, which are entirely metaphorical. That is, in order to be funny, a punchline generally has to be culturally known and accepted. The stretch or tension of the metaphorical concept is the energy behind the humor. As I engaged in my search, I found a predominant lawyer metaphor. At first, I thought it was lawyers are sharks, amoral predators, sea scavengers, unconscious, killing machines. Remarkably, this metaphor not only holds ground with legal critics, but finds considerable acceptance with the profession itself. Lawyers talk about some law firms as "shark tanks." We also hold certain practices to be "predatory." James Woods portrayed Sebastian Stark, a hard-driven, unscrupulous defense attorney turned prosecutor for the television series "Shark," which ran from 2006 to 2008. But I found other metaphorical candidates. One was vultures. Another was snakes. Using, no doubt, a much less rigorous methodology than Lakoff and Johnson, I concluded from my research that the predominant American metaphorical concept of our profession is that lawyers are non-human.

Lakoff and Johnson are the first to point out that the metaphorical concept is not truth. It is a belief, usually derived from culture and/or experience. From my perspective, this lawyer as non-human metaphor is all too pervasive in our culture. It damages not only those of us in the profession, but those who believe it to true about the profession. As Lakoff and Johnson note, metaphors "create realities for us." In this sense, metaphors can be self-fulfilling prophecies. What is a prominent belief becomes a guideline for action, which reinforces the metaphor. Thus, in its simplest form, a client may seek out counsel known for ruthlessness and, in the effort to satisfy the client's expectations, the lawyer supplies ruthlessness. And if this behavior proves effective, it is reinforced as a modality of successful lawyering, despite its incremental damage to the practitioner and the profession. Others, modeling on the ruthless lawyer's success spread the conduct, until it tips to become the predominant professional modality. As Lakoff and Johnson observe "What is at issue is not the truth or falsity of a metaphor, but the perceptions and inferences that follow from it and the actions that are sanctioned by it."

I would like to propose a new metaphor for the profession. It is one that I adopted a few years ago for my own practice. Unfortunately, it is esoteric; it requires explanation; and consequently and it is not particularly catchy. But I previously have offered it to hundreds of lawyers to whom I have made presentations. And, it appears to have some traction. I am confident that one of you will find a way to improve on it. You ready? Here goes: Law practice is Aikido.

Aikido is a unique martial art form, created by Morihei Ueshiba in the early 20th century. Ueshiba, also known as O Sensei, or "Great Teacher," developed Aikido out of his need to harmonize his passivist philosophy with his extraordinary martial skills. Even into his 80s, Ueshiba could disarm any foe, resist any number of attackers and pin an opponent with a single finger. In essence, Aikido teaches that when confronted by an attack, the Aikidoist does not strike, but rather enters and blends with the energy of the attacker. That is, he or she moves toward the attacker, and then, at the last moment, slightly off the line of attack, turns so as to look momentarily at the situation from the attacker's viewpoint. As described by George Leonard in "The Way of Aikido," "From this position, many possibilities exist, including a good chance of reconciliation."

According to Leonard, Aikido conceptualizes an entirely different perspective of what an opponent is. That is, Aikido adopts on alternative metaphor. Leonard instructs Aikidoists to "be especially welcoming to your opponent. He or she is your guest, someone who has come to help you play the game. The better the opponent, the better the game. Accordingly, your opponent is to be treated in a gracious manner."

Nothing about this attitude suggests that you bring anything less to the game than your full attention, energy and competency. In fact, Leonard further instructs "Never ease up, this is the finest gift you can offer a true competitor. … You can expect the same in return."

By substituting "game" for "conflict," Aikido shifts its entire focus, energy and tone from struggle to active, creative engagement. The "Ki" of Aikido references universal energy, the same energy known in Chinese healing systems as "chi" and the focus of which is concentrated in the "chakras" in another healing tradition. Ki unites all life forms. Thus, a "hit" in Aikido is recontextualized as a transfer of energy. The recipient of the energy considers it a gift to be put to more positive use.

And, consistent with Aikido's metaphorical framework, the teaching, "protect the attacker," is neither radical nor paradoxical. The moves in Aikido are designed to protect both the one attacked and, as possible, the attacker. That is the nature of the game.

Consider the differences in the quality of the legal profession if the predominant metaphor shifted to lawyers as Aikidoists. If Aikido became the prevailing concept of the profession, what opportunities would reside with individual practitioners, the profession at large and the culture in which our services are performed?

As Leonard notes, to view a situation from the attacker's viewpoint, while remaining centered and balanced, can lead to seemingly miraculous outcomes. Or, in the words of Ueshiba, "The way of a warrior … is to stop trouble before it starts. … The way of a warrior is to establish harmony."

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What if we were to substitute in place of argument is struggle the metaphor argument is collaborative, creative, opportunity? How would our lives be better?

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