

Caution! Employees Not at Work:

Some Risks in Terminating Non-Performing or Absent Employees

by Renee Inomata

Many companies today are experiencing a decrease in business as a result of the slowing economy. Companies are struggling to reduce costs, including headcount. Although it may seem logical to eliminate a non-performing or absent employee – after all, they do not maximize the company's value – that decision may be fraught with unforeseen hazards.

Although a company may be able to lawfully terminate a non-performing or absent employee, if the employee is not performing or is absent due to a physical or mental condition – or a perceived

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physical or mental condition - the company may be subject to significant liability. With the recent changes in the federal Family and Medical Leave Act and upcoming changes in the federal disability and likely in the state sick leave laws, employers should consider the following before letting any employee go:

1. Determine that the employee's non-performance or absence is not due to a serious medical condition. Additionally, make sure that the employee's non-performance or absence is not due to a perceived medical condition. If the

IN THIS ISSUE

Caution! Employees Not at Work –
Some Risks in Terminating Non-Performing or Absent Employees

Auction Rate Securities –
The Erosion of Customer Trust in
Investment Professionals

Amazing Clients[®]

Holland Mark –
CEO Chris Colbert and President
Rob Waldeck

company thinks that the employee suffers from a medical condition, even if the employee does not actually have such a condition, the employee may be entitled to certain job protections. State and federal disability laws prohibit employers from discriminating against any employee with a qualified disability.

continued on page 4

AMAZING CLIENTS[®]

Holland Mark – CEO Chris Colbert and President Rob Waldeck

Simple, Truthful, Successful

There is one simple organizing principle at the Holland Mark advertising and communications agency – the Truth.

It's not what everyone expects from corporate advertising and messaging, but it is right there on page eight of the Employee Handbook: "We tell the truth to you [our employees], to our clients, to ourselves. We never fussy it up, we never qualify and never hedge."

CEO Chris Colbert says this commitment to the truth has inspired employees and clients alike, causing the Holland Mark brand to rise Phoenix-like from a pile of ashes. "I first created the brand in the 1980s, and with my

team built the largest independent marketing and advertising agency in New England by 1999. Then the dot.com bubble burst, 9-11 happened, and some of our largest clients went under. It was tough to do, but we had to shutter our doors," he recalls candidly.

For roughly five years, Colbert walked the solo path of a "creative consultant," gathering his thoughts until he was inspired to launch a new agency founded on the rock-solid cornerstone of Truth and flying under the old Holland Mark flag.

The re-conditioning and re-launch of the brand really took shape in 2007, when Colbert met a professional soul-mate named Rob Waldeck who saw the world through the same lens. They talked for more than four hours the first time they met, and Waldeck soon brought his 10-person full-service graphic design firm, TPG Creative, under the Holland Mark umbrella, re-branding the graphic design operation as HM Studios.

Now Waldeck is president of the entire Holland Mark agency, which already has

more than 20 employees and dozens of clients, ranging from small start-ups to Fortune 100 companies. Sounding like an alter ego to Colbert, he says of this success: "Truth is our core value – it's what attracts the best employees and the best clients to our agency."

Colbert says that the commitment to truth means that "we must recommend to clients what is best for them, whether or not it is best for us." He points to the case of a banking client that asked Holland Mark for advice about an advertising campaign. "After analyzing their business, we told them they would be better off spending the money on training and development of their loan officers if they wanted to get more revenue in the door," Colbert recalls, adding that "we are here to build relationships and not to make a quick buck."

He says that sometimes the commitment to truth is also about "doing what is hard to do." That can mean advising a client to invest money in direct-mail marketing when, in some circumstances, it is likely to pay

continued on page 3

Auction Rate Securities – The Erosion Of Customer Trust In Investment Professionals

by Joshua N. Cook

A bedrock principle of the securities industry is trust – particularly between an investor and his or her broker. The auction rate security debacle, which is just one facet of the historic economic crisis that began with the subprime meltdown and may lead to an equally historic federal bailout, has severely eroded that trust. Little attention, however, has been devoted to the impact this has had on the customer-broker relationship.

To understand the problem, one must first understand the basics of auction rate securities. Typically known as ARS, auction rate securities are bonds with variable interest rates set at auctions every 7, 28, or 35 days. Sometimes known as auction rate preferred shares or municipal auction rates, ARS were generally regarded by investment professionals to be safe, liquid investments – the perfect place to hold cash on a short term basis. From the 1980s through 2007, the ARS market grew to \$330 billion. Catastrophically, in February 2008, the ARS market suddenly collapsed, leaving hundreds of thousands of investors' assets frozen.

For municipalities and businesses issuing bonds, ARS were preferable to conventional bonds because ARS allowed issuers to obtain long term financing at short term interest rates. Although ARS were essentially long term bonds, the short intervals between auctions mimicked short term investments; consequently, the issuers paid short term (low) interest rates.

Each ARS was sold at an auction where security holders offered their shares for sale and buyers bid to purchase them. In a normal auction, buyers outnumbered sellers and all "sell" orders were filled. Whenever sellers outnumbered buyers, however, the auction "failed" and no holder was allowed to sell that ARS until the next auction. As long as the auction continued to fail, no one could sell. The ARS retained their value, but they simply could not be sold.

To prevent auction failure and maintain the liquidity of the ARS market, the brokerage overseeing an auction would step in as a buyer of last resort. Investors took comfort in the fact that brokerages were ensuring ARS liquidity – although they were not obligated to do so – by preventing auction failure. But brokerages assumed this role more frequently than desired. For example, in the two years prior to February's historic string of auction failures, one brokerage intervened to prevent the failure of more than 85% of its auctions.

As a result of the subprime crisis that gained momentum in 2007, brokerages were under pressure with their own credit and liquidity problems. Thus, they were unwilling to continue pouring money into ARS just to maintain the liquidity of that market. When brokerages finally could take no more and withheld their support in February 2008, many auctions failed, the entire ARS market quickly collapsed, and ARS investors (including brokerages themselves) were stuck with illiquid long term bonds.

Auction failures trigger complex penalty rate systems. Some ARS issuers, typically municipalities, were forced to pay high penalty rates to their bond holders. Many of these issuers decided to redeem the securities and those ARS holders got their money back. Most municipal ARS that were not redeemed recovered their liquidity when buyers were lured back by high penalty rates, allowing their auctions to resume. Other ARS issuers, such as student loan companies, faced penalty rates much lower than the rates set at auction. These issuers had no incentive to redeem their ARS, and investors faced the unwelcome prospect of holding billions of dollars of investments they could not sell.

As a result, investors filed dozens of lawsuits against their brokers and brokerages for failing to properly disclose the risks associated with ARS and their

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opaque auction process. At the same time, state and federal securities regulators began investigations and enforcement actions against several large brokerages. For brokerages with substantial portions of their own inventories frozen in the ARS market, taking on additional illiquid assets seemed an impossible solution. However, due to the immense legal pressure, by the end of August 2008, several of the largest Wall Street brokerages had agreed to repurchase more than \$50 billion of ARS from their customers. In an effort to assure skittish shareholders and creditors, many firms announced that the regulatory settlements would not impact their bottom lines – leaving many investors to wonder why the problem arose in the first place.

Even if the ARS market were to fully recover or every brokerage eventually bought its customers' ARS, the damage has been done. The lack of transparency in the auction process and the apparent industry-wide misunderstanding of the actual risk to investors were brought to light only when liquidity concerns led brokerages to stop supporting auctions. Whether through vigilance or chance, some investors managed to avoid the ARS debacle. Most investors, however, rightfully relied on securities professionals for expert guidance and were trapped with unmarketable investments. The ARS debacle has highlighted the fragility of the broker-customer relationship, and a culture of candor must prevail from brokerage to broker to customer if the industry is to avoid similar problems in the future.

Holland Mark –

CEO Chris Colbert
and President Rob Waldeck
Simple, Truthful, Successful

continued from page 1

better dividends than a sexy advertising campaign. “Advertising is the default setting because it is easy to do, but it is not always the best tool for increasing sales, so we have to be prepared to help clients in other ways,” Colbert says.

Professional service providers, for example, are unlikely to get the most bang for a buck from an ad campaign, he asserts. “That is why ad agencies don’t advertise themselves. The professional service category is built on trust and referrals,” Colbert explains. He suggests that making an investment in a marketing database for contact and relationship management is often more valuable. “But you can’t think of a database as a panacea. It is one tool and you have to be trained how to use it well,” he advises.

When advertising and messaging is the client’s focus, truthful clarity is of the utmost importance. “People get hit with thousands of messages every day, so you have to break through the clutter with one simple, compelling and truthful message,” Waldeck contends. “You can’t get caught up in the shiny new object syndrome that causes people to change messages like they change clothes,” suggesting that audiences will not remember or believe a weathervane approach to messaging. “A great example of this is the Volvo brand. They stuck with one message and they own it. When you think of Volvo, you think ‘safety,’” says Waldeck.

Waldeck also contends that Holland Mark’s greatest tool for messaging and marketing has been its employee handbook. “It really tells you who we are and what we stand for,” he explains, noting that clients love to talk about it. “I sent it to one person who sent me back a note saying that his marketing department called it the best work they had ever seen.”

Among other things, the handbook pledges to employees:

- Clarity of expectations;
- Real-time knowledge of where you stand against those expectations;
- The support, guidance, resources and training to meet or exceed expectations; and
- The candid and constructive feedback you

holland-mark



ROB WALDECK, President & CHRIS COLBERT, CEO

require when not meeting expectations.

“The truth is critical to what we do and the commitment to it begins internally. If we are truthful with ourselves, then we will be truthful with others,” says Waldeck.

The employee handbook also provides a picture window into the internal management and workings of Holland Mark, which clients love to see. It is an agency with a unique internal structure and a clearly-articulated philosophy of doing business.

The handbook reveals that Holland Mark has no pyramid-like organizational chart. Instead, it has a web of interactivity among multiple professionals charged with creative, accounting, technological and human resources responsibilities. “We have no traditional hierarchy because hierarchies are designed to replace individual accountability for effective communication with top-down dictation,” Waldeck says.

He asserts that hierarchy is unnecessary and counter-productive for committed and talented employees. “We look to hire people who are better than us in some way, and we want each of them to be capable of driving the bus.” In fact, the handbook spells out what it takes to be a Holland Mark bus-driver, including: an unquenchable thirst for learning; a sense of intellectual and creative urgency; a willingness to take on your fears; an unwavering accountability; and an attitude of selflessness toward the team.

The handbook also spells out the five goals of the corporate team that are a constant standard for daily aspiration. Waldeck says it takes a special kind of person to sign on to these objectives:

- Every client feels as if they are our only client;
- We always meet our commitments;
- We work together to create brilliance in every aspect of what we do;
- We have fun every single step of the way; and

- We are profitable to enable growth and giving back.

Holland Mark team members also sign on to an ambitious five-year plan that calls for reaching specific objectives by 2013, including:

- Becoming the largest independent creative agency in New England;
- Becoming a leader within the Boston business community;
- Becoming a major contributor to the social good;
- Becoming the best company in Boston to work for; and
- Becoming a great company that will exist long after the founders are gone.

But the main theme of the whole handbook is about the relationship between trust and truth. “We believe that if you tell the truth and live the truth, then you will deliver nothing but the truth to your clients,” says Colbert, who adds that the institutional commitment to the truth acts as a kind of screen through which only the best employees and clients will pass.

He suggests that a good screen is essential to getting the right people on board the company bus, stating that “people” form the most critical of the five “P” formula to good marketing: product; pricing; promotion; placement; and people. “Rob and I see this the same way, and that’s why we built the agency around our commitment to people,” says the CEO, who lists “humans” as one of his primary interests on his Facebook page.

Colbert says that Burns & Levinson provides the perfect complement of outside legal service because “they have a similar philosophy and approach to us.” He credits his lawyers with being “pragmatic, truthful and very approachable,” adding that “they tell us what is in our interest even if it is not easy to hear it.”

Waldeck agrees, adding that “our lead lawyer, Tom Reith, is especially good at listening to us and bringing just the right people to the table to get what we need quickly and efficiently.” The Holland Mark president notes that Burns & Levinson has handled a wide array of matters in a consistently professional way, providing sound advice and negotiating and drafting workable agreements related to employment, trademark and commercial matters. “They are who we turn to first because they understand who we are and they appreciate that we need practical advice and good value because even a successful start-up company has to scrutinize every dime.”

Caution! Employees Not at Work:

continued from page 1

An employee with such a disability cannot be terminated, disciplined or otherwise suffer an adverse employment action because of that disability. The Federal Americans with Disability Act Amendment, effective on January 1, 2009 will broaden the scope of protected disabilities.

2. If the employee's non-performance or absence is due to the employee's serious medical condition or that of the employee's immediate family member, make sure that the decision to terminate employment is not in retaliation for taking a lawful leave of absence. Similarly, make sure that the decision to terminate is not in retaliation for complaining about or participating in any investigation of the company's failure to comply with applicable discrimination laws.

3. Determine that there has been no confusion between the employee's entitlement to and length of leave under common law and the reasonable accommodation requirement under disability discrimination laws. For example, an employee is entitled to a leave of absence for a medical condition or birth of a child under the Family and Medical Leave Act or the Massachusetts Maternity Leave Act. Once these leave periods are exhausted, companies may be tempted to terminate employment if the employee does not immediately return to work. In some instances, however, an extended leave may be considered a reasonable accommodation for a qualified disability.

4. Determine that there has been no confusion in the employee's entitlement to, and length of, a leave versus how that leave is compensated. Laws, including the Family and Medical Leave Act and Massachusetts Maternity Leave Act, require that an eligible employee be given a leave of absence and promise to resume the same or similar employment position. Insurance – such as short-term disability and workers' compensation – and company policies – such as paid vacation, paid parental leave and/or paid-time-off – provide compensation during the time of leave. Not uncommonly, companies decide to terminate an employee because the employee has been denied or has

exhausted short-term disability insurance coverage or has used up paid vacation time or paid maternity leave. Even if the method of compensation during a leave has expired or is not applicable, the employee still may be entitled to be absent for a longer period of time, although perhaps without pay.

5. If the reason for nonperformance or absence is due to the employee's medical condition or that of the employee's immediate family member, the employer should obtain verification of the condition, expected time until return to work and limitations on job duties from the employee by his/her health care provider. For those companies subject to the Family and Medical Leave Act, failure by the employee to provide appropriate medical verification may be sufficient grounds to designate the absence as an unexcused absence and, thus, grounds for termination of employment. However, if the company has not tentatively designated the leave as Family and Medical Leave and requested the medical verification for such leave, the company may be required to provide a longer period of time for leave than originally calculated by the company.

The area of absences, both intermittent and full-time, for medical conditions and reasonable accommodations for eligible employees with qualified disabilities is already quite complicated. Pending state and federal legislation and amendments to existing laws will likely increase the burden on employers to be vigilant about employee absences and returns to work to avoid inadvertent liability, particularly in these difficult economic times. Be sure to contact your counsel to stay on top of the latest nuances in this ever-changing area.

Focus

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