

# An Apologist For Law Firm Capitulation?

Capitulation is not crazy.

Stop foaming at the mouth.

I know that many of the country's largest and most prestigious law firms have capitulated in the face of President Donald Trump's executive orders (or threats of executive orders) punishing the firms for having taken action against the administration's interests.

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But I'm here to tell you that capitulation is not crazy.

Exhale.

Think about this.

You're the managing partner of a fancy-pants law firm. Trump's executive order threatens to revoke the security clearances of your lawyers, deny your lawyers access to federal courthouses, and cancel your clients' government contracts. Security clearances may not matter to your firm, depending on your firm's work, but access to federal courthouses is vitally important to litigators, and the ability of clients to contract with the government is a big-ticket item for fancy-pants law firms.



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By The MyCase Team

Thus: If the government's executive order is upheld, your law firm is out of business.

Should you fight the executive order, or should you settle?

Remember that this calculus changes over time. For Paul Weiss, the first firm to settle with Trump, the future was a blank slate. Paul Weiss couldn't be certain that the executive order, if challenged, would be struck down. Paul Weiss also didn't know whether later firms would settle with Trump — thus spreading the shame of capitulation — or fight the government and win — making Paul Weiss's decision to settle look terribly weak.

For Paul Weiss, what were the chances that the executive order would be upheld? I, at least, would have viewed it as very unlikely that Trump's executive order could withstand judicial scrutiny. The odds of victory in a case challenging an executive order attacking a law firm change over time, as courts create precedents when early challengers win or lose their cases. But let's say that your firm was one of the early ones to be attacked by Trump, and the odds that you would win a lawsuit, and have the order struck down, are as good as the strongest case that I ever saw in private practice: You have a 90% chance of winning.

There are of course no 100% cases; there's always a chance that you lose. In a case challenging the executive order, your case might be assigned to Aileen Cannon or some other Trump-appointed judge looking to be elevated to the Supreme Court. If so, you lose. Your judge might have an entirely different view of the Constitution than the conventional wisdom. If so, you lose. Your judge might have a bad day. If so, you lose.

But, as I said, suppose your chances of winning are extraordinarily good: 90%.

You could settle with the Trump administration and eliminate the 10% chance that your firm will be out of business. Against that, however, you must weigh three drawbacks to settling.

First, there's the matter of principle: Law firms shouldn't capitulate to an over-reaching government! But it's fiendishly difficult to put a dollar value on matters of principle.

Second, you'll have to agree to devote \$40 million, or \$100 million, or \$125 million (depending on when you settled) of pro bono hours to causes endorsed by the Trump administration. I'm just guessing here, but I'd bet that, for many big American law firms, \$100 million in pro bono hours is not that much more than the firm is currently contributing to pro bono causes. The amount that firms commit to pro bono varies by the size of the law firm, the firm's commitment to pro bono, the press of paying work, and a bunch of other things. But big firms might commit close to \$100 million to pro bono whether the firms settle with Trump or not. If you settle, you probably don't have to substantially increase the amount of pro bono work that you provide, so you're not taking a big financial hit.

If you settle, the government will influence your selection of pro bono cases. You can, of course, continue to represent indigent criminal defendants, and outfits advocating for affirmative action, and the like, with your pro bono hours above the \$100 million subject to your settlement. You might have to reduce the help you give to preexisting causes, but you need not abandon them entirely.

As to the hours subject to government approval, I bet the conversation with the government goes something like this:

Firm: We'd like to advocate for diversity, equity, and inclusion.

Trump administration: Screw that! You're going to advocate on behalf of coal companies that want to spew more pollution into the air!

Firm: Why don't we compromise? We'll represent veterans who were improperly denied veterans' benefits.

Trump administration: Okay.

That wasn't so hard, was it?

What else do you lose by settling?

The third big disadvantage of capitulation is that your firm will take a short-term reputational hit. George Conway, and Andrew Weissmann, and columnists at Above the Law, and the rest will scream that you're a wimp — you've capitulated! Those screams will probably last for a month or two, and then we'll be on to the next Trump administration outrage. You can surely survive that.

Clients might leave your firm because you've capitulated to the government. That could hurt, but it's pretty unlikely to happen. Clients work with individual lawyers, and clients probably don't blame those lawyers for the firm's decision to settle. Moreover, the firm settled in part to protect clients — to permit clients to contract with the federal government. Why would you fire a law firm that acted to help you? Beyond that, if you fire your existing counsel — fancy-pants law firm No. 1 — where would you go for legal services? It's true that Paul Weiss capitulated to the government, but so did Kirkland, and Latham, and a bunch of others. The more firms that capitulate, the harder it is to find alternative representation. (And the more sensible it looks for firms to have capitulated in the first place. There's safety in numbers: Everyone's capitulating; we're just one of the crowd.)

Your law school recruiting efforts might be hurt because you capitulated to Trump. Law students are noble; perhaps they won't take jobs at firms that do ignoble things. '

But what's the effect of this? Even if some law students will now refuse to go to, say, Paul Weiss, plenty of other law students will take those jobs. Endless streams of law students itch to work at fancy firms, with great reputations, high pay, and sophisticated work. Maybe the replacement students won't be as good as the folks Paul Weiss wanted to recruit, but how long will it take the world to notice that the quality of a law firm's work is now a little bit worse than it was 10 years ago? Most firms probably lost quality as they expanded through the early 2000s — greater size means less quality control — and I don't think anyone ever noticed the change.

Lawyers may leave your firm because they're outraged by your capitulation. Maybe — but not that many. The lawyer has to be truly outraged by your decision to settle, and most lawyers won't be. The 10% chance that the executive order would be upheld, and your firm forced out of business, makes the settlement decision rational. The outraged lawyer must also make a financial difference to your firm. It's true that some associates and senior counsel have left law firms in recent weeks. Those departures make for good press, but they don't injure the firm. A partner with \$30 million in portable business might matter, and I haven't yet seen any of them move.

Part of the reason for partner inertia is institutional: If a client works with many lawyers at a firm, and only one lawyer is outraged by the settlement with Trump, then the outraged lawyer could change firms, but the client might not. The partner's business was thus not truly "portable." Changing firms would hurt the lawyer who changed jobs but wouldn't matter to the original law firm.

Part of the reason for partner inertia is the fluidity of the situation: Many big firms other than yours — firms with good reputations and the ability to support your clients — have also settled with Trump. Yet more firms might settle in the future. If you're a partner about to jump ship from your current employer, you'd better find a good alternative ship on which to land.

But part of the reason you haven't yet seen partner moves is that transitioning laterally between law firms takes time: Folks transitioning laterally must interview with the new firm. They must clear conflicts. They must otherwise assess whether they fit with the new place. I wouldn't expect those moves to occur within a week or two of a firm's settlement with the Trump administration. Give this time, and perhaps a few significant partners will choose to leave their current law firms. Perhaps firms will pay some price for having capitulated. But you don't know that in advance. We'll see what happens.

There are other aspects of the reputational risk caused by having settled with Trump. There is, for example, Trump himself. Trump loves to boast that important people, or institutions, or countries, kissed his ass. Trump may say that about your firm.

You can live with that.

I'm not yet done with the forms of humiliation you'll suffer. In the past, you always liked to bray about courage at your firm's partners' meetings. You'd puff up your chest and explain how fierce and courageous your law firm was. But now, when push came to shove, you folded like a cheap suit. Of course: A principle isn't a principle until it hurts. Now we know your true principles. But you'll get over that humiliation, too.

Ultimately, put everything in the balance: Weigh a 10% chance of your firm going out of business against a small tilt in a portion of your pro bono commitment and some short-term public relations problems.

Does capitulation prove that you, the professed lion, is in fact a pussy cat? Sure.

But it would look a whole lot worse if the 10% chance of loss came through and your firm went out of business. You'd look like a complete idiot, and a lot of people would be out of work.

Is it easier to fight the government today than it was a month ago? Yes. More firms are fighting (there's safety in numbers), and several firms have won decisions striking down part or all of the executive orders.

Am I terribly disappointed in the firms that have capitulated? I am. Shame on them. I wish them ill.

But do I understand the decision?

Absolutely. Leaders at Biglaw firms may be cowards, but they're generally not stupid.

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