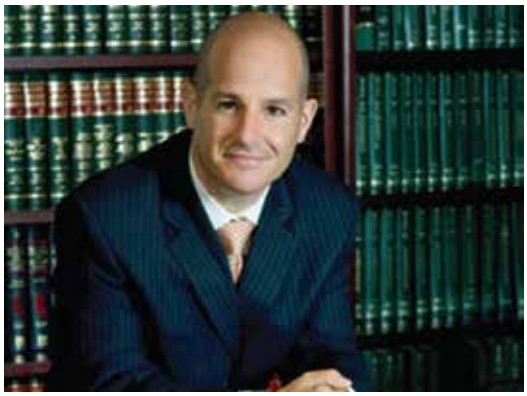
# Morgan Stanley is Infringing Upon Ex-Employees' Constitutional Rights, Lawyers Argue

*By Miriam Rozen*



Joshua S. Bauchner

Partner Joshua S. Bauchner discusses Morgan Stanley's efforts to infringe on his client's constitutional rights in an interview in *Financial Advisor IQ.*

Morgan Stanley never dukes it out in public courts with disgruntled former advisors who have filed lawsuits against the wirehouse if such a scenario is avoidable. But the wirehouse's recent hardball tactics to keep such disputes behind closed doors in arbitration infringe on its former employees' constitutional rights to a fair trial, according to lawyers representing former Morgan Stanley employees.

Following a recent spate of federal trial judges' rulings thwarting former Morgan Stanley employees' attempts to try their claims against the wirehouse in public courts, many of those plaintiffs have filed appeals of those orders.

But in response, Morgan Stanley — most recently in a Nov. 1 appellate brief — has argued that the former employees should be barred even from filing appeals of lower court orders compelling them to arbitrate until they first arbitrate their claims.

"They are determined to waive their former employees' constitutional rights to a trial," says **Joshua Bauchner**, a lawyer at Woodland Park, N.J.'s **Ansell, Grimm & Aaron** who represents Craig Schmell, a former Morgan Stanley senior vice president who has filed a wrongful termination case against the wirehouse and was recently ordered by a trial court to arbitrate his claim.

In 2017, Schmell published a memoir entitled "The Uninvited: How I Crashed My Way Into Finding Myself," which included descriptions of his recovery from alcoholism and drug addiction. In his complaint against his former employer, Schmell alleges that even though he agreed to the edits of the text Morgan Stanley representatives requested prior to publishing his book, he was told he would be terminated if the book landed on store shelves because it created a "reputational risk" for the firm.

But Schmell's complaint alleges that Morgan Stanley used this excuse as a pretext to firing him. He was terminated in October 2017 because of his status as a recovering addict — a disability which federal laws bar employers using as the basis of discriminatory actions.

"Seeking cover for its unlawful motivation, [Morgan Stanley] pretended to care about the content of the book by suggesting edits that would make it acceptable to [the firm] for publication," Schmell's complaint alleges.

But the wirehouse "never had any intention of permitting [Schmell] to publish the book or continue his employment once apprised of his status as a recovering addict," the complaint alleges.

A spokesperson for Morgan Stanley declined to comment on Schmell's litigation for this story, and at the trial court, Morgan Stanley has not yet addressed the merits of Schmell's claims. Instead, the wirehouse's management has sought successfully to persuade the trial judge to order Schmell to arbitrate. In the motion to compel him to arbitrate, Morgan Stanley argued specifically that Schmell had received through an email reasonable notice of its expanded arbitration program and therefore had entered into "a valid arbitration agreement."

On Oct. 15 in Trenton, N.J., U.S. District Judge **Anne E. Thompson** granted Morgan Stanley's motion to compel Schmell to arbitrate his claim and ordered that his claims be stayed pending the outcome of that arbitration, rather than be dismissed.

On Oct. 31, Schmell filed a notice of an appeal of Thompson's ruling. But on the same day he filed that notice, the appeals court clerk issued an order stating Thompson's ruling is not "immediately appealable" and called for Morgan Stanley and Schmell to address the issue by the middle of November.

Because Thompson stayed rather than dismissed Schmell's claims, the former Morgan Stanley senior vice president has no rights at this time under the Federal Arbitration Act to get an appellate court to review or ultimately overturn the trial court's order. The FAA bars what are known as interlocutory appeals when a case is still pending.

According to his lawyer, Schmell intends to request that Thompson dismiss the case "without prejudice" — or the legal equivalent of not necessarily forever — so he can in the meantime file an appeal of the order to compel him to arbitrate.

In another case -- this one filed by **Roberta Antollino**, a former Morgan Stanley sales assistant -- after the wirehouse's management persuaded a federal judge to grant its motion to compel her to arbitrate, a dispute about an interlocutory appeal also arose. Antollino has asked the appeals court to order the trial judge to dismiss her case, also without prejudice, so she may file an appeal of the order compelling her to arbitrate.

But on Nov. 1, Morgan Stanley filed a brief arguing that a court has discretion to grant a stay rather than dismiss a case, even if a plaintiff seeks a dismissal.

"No court has ever said that dismissal is mandatory," Morgan Stanley argues in its brief filed with the U.S. Court of Appeals for the Second Circuit.