



DAILY APPELLATE REPORT

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Civil Procedure: Civil Asset Forfeiture Reform Act claim is barred from judicial review because plaintiffs chose to file petitions for remission, which were denied. *Conservation Force v. Salazar*, U.S.C.A. 9th, DAR p. 11093

Government: Private plaintiff may not bring action under California False Claims Act containing allegations substantially similar to those already in public domain. *State ex rel. Standard Elevator Co. v. West Bay Builders Inc.*, C.A. 1st/4, DAR p. 11099

CRIMINAL LAW

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Criminal Law and Procedure: Restitution order may not order parent to turn over accrued child support payments to victim where children have not reached age of majority. *U.S. v. Dann*, U.S.C.A. 9th, DAR p. 11080

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'NO GOOD CHOICES'



S. Todd Rogers / Daily Journal

Court workers stand outside the Supreme Court building in SF protesting the cuts to the court budget.

Council OKs deep cuts to courts

Judges, workers wanted deeper cuts to administrative agency.

By Laura Ernde
Daily Journal Staff Writer

SAN FRANCISCO — Saying there was no easy way to spread the pain of \$350 million in state budget cuts this year, the Judicial Council voted Friday to cut trial court funding by 6.8 percent this year.

Before the vote, judges and court employees from across

the state implored the council to spare trial courts, which they argued are crucial to access to justice.

But courts administrators said there was no way to absorb the dramatic cuts without touching every part of the branch.

"We have been able to delay this day of reckoning that the Judicial Council is facing this year," said council member Sen. Noreen Ev-

ans, D-Santa Rosa. "There are no good choices."

The majority rejected attempts by some council members to shift more of the burden to the branch's central bureaucracy, the Administrative Office of the Courts, as some AOC critics suggested.

Instead, the council largely adopted recommendations made earlier this month by the AOC and the Trial Court Budget Working

Committee: a 12 percent cut to the AOC and 9.7 percent cuts to the Supreme Court and appellate courts for fiscal 2011-2012.

The council decided to delay action on the ugliest part of the proposal, an across-the-board 15 percent reduction in 2012-2013.

Some of the sharpest remarks of the day came from San Francisco County Presiding Justice Katherine Feinstein, who complained in a public comment period at the start of the council's meeting that the cuts would bring almost all of her county's civil court cases to a standstill. Local court administrators had already sent layoff notices to 40 percent of staff. In October, 25 of the county's 63 courtrooms will be shuttered.

Feinstein said she received many calls of support from her colleagues across the state when she announced the cuts Monday, and was "stunned" that she didn't hear from anyone with the AOC.

"You hold in your hands the ability to mitigate the effects," she said. "The question is whether you will choose to do so."

Doris Cheng of Walkup, Melodia, Kelly & Shoenberger, a board member of the Bar Association of San Francisco, said San Francisco's budget woes will be felt



S. Todd Rogers

Attorney Doris Cheng speaks to the Judicial Council regarding the cuts and how it will affect trials.

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Jurors to settle feud between bond fund titans

By Ciaran McEvoy
Daily Journal Staff Writer

LOS ANGELES — Did celebrated bond-fund manager Jeffrey Gundlach jump ship with stolen trade secrets or did money management behemoth Trust Company of the West push him overboard out of greed? That's the question jurors will be asked to decide to settle a bitter corporate employment dispute the likes of which are rarely waged in open court.

TCW is asking for up to \$200 million in damages while Gundlach claims he and his associates were denied their share of \$1.25 billion in future income.

Jury selection in the trial begins today. Opening statements are expected either Wednesday or Thursday at Central Civil West Courthouse.

The civil trial promises the public a view of the cut-throat competitiveness and titanic self-confidence of bond traders at an elite financial institution. Prevailing at trial will mean one side convincing jurors their well-heeled clients are the aggrieved party — a tall task that legal experts said will require softening the Wall Street bravado that's landed the players in a courtroom.

TCW manages approximately \$120 billion in investments and has its name emblazoned on top of a downtown Los Angeles skyscraper. Gundlach, an investment superstar who reportedly earned \$134 million between 2005 and 2009, has the reputation of an egomaniac with the touch of gold when it comes to portfolio management.

"It might be hard for the jury to feel a connection for either the plaintiff or the defendant in this case," said Donald E. Childress III, a professor at Pepperdine University School of Law.

"In these cases it's not simply about the

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S.F. civil litigator tapped to lead State Bar

By Amy Yarbrough
Daily Journal Staff Writer

SAN FRANCISCO — For the second year in a row, a San Francisco lawyer will lead the State Bar.

On Friday, the State Bar's Board of Governors elected Kecker & Van Nest LLP partner Jon B. Streeter as the next head of the 232,000-member organization, succeeding outgoing president Bill Hebert.

Streeter was chosen following a candidates question-and-answer forum and two rounds of voting, in which he beat out fellow board governors Michael A. Tenenbaum of Thousand Oaks, and Angela J. Davis of Los Angeles. A fourth candidate, James H. Aguirre, of Los Angeles, announced he was dropping out of the race just prior to the start of the forum.

A UC Berkeley School of Law graduate who litigates complex business cases, Streeter, 54, told the board he was prepared to listen and to help the organization "turn the page" following a challenging year.

"It's a tremendous, tremendous honor," Streeter said following the election. "There are so many talented people in this room. To have their vote of confidence means the world to me."

Streeter, who will take the helm at a politically challenging time for the organization, listed among his goals "restoring sense of continuity" to the board and building confidence in the State Bar's prosecution unit.

Earlier this month, State Bar Executive Director Joseph L. Dunn axed four top managers in the agency's prosecution unit. While he didn't elaborate on his reasons for the firings, Dunn demanded the Office of Chief Trial Counsel reduce its much criti

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GUEST COLUMN



Edwin B. Reeser is a business lawyer in Pasadena specializing in structuring, negotiating and documenting complex real estate and business transactions for international and domestic corporations and individuals. He is also experienced in law firm management.

Don't blame undercapitalization for the current financial crisis in large law firms.

One of the reasons being trotted out as an explanation for the current crisis in large law firm financial condition and performance, and of some law firm failures, has been "undercapitalization." If that were true, then the solution to the present crisis would be a simple capital call from the partners or a line of credit from a bank and everything would be fine with the financial condition of such firms. But there are numerous firms with substantial partner capital accounts and large working lines of debt from banks that are struggling. Recently failed large law firms in the AmLaw 100 have had cumulative equity partner capital accounts of \$40 million or more, and working capital lines of credit drawn to outstanding balances of nearly twice the amount of contributed partner capital when they failed. Undercapitalization cannot be a cause or reason for the current crisis; indeed it is not the problem, rather it is merely a symptom.

Working capital is nothing more than short-term

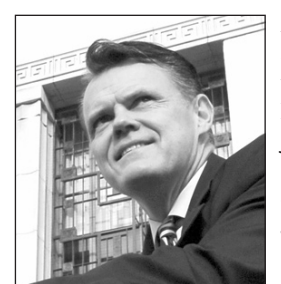
funds rapidly turned over for the law firm to conduct its daily business. If we look at the amounts of capital typically contributed into law firms by their partners and where it went, it is clearly more capital than was necessary for day-to-day operations, and even for financing of aggressive growth. Rather, the missing component tended to be intelligent application of that capital to the business.

How did that occur? Through something that is well understood in the manufacturing and sale of goods, but not typically applied conceptually to the service industry, is a practice called "overtrading." This is a practice that places an unsustainable burden upon the working capital of the firm. In the context of the manufacture and sale of a product, it is the conundrum of selling more goods to make more profits, but requiring more working capital than you have to make more products to sell. Uncollected profits climb, but cash flow turns nega

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MORE NEWS

Litigation Serious Theatrics



An amateur actor in his off time, Thomas Reardon keeps jurors engaged in courtroom drama.
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Corporate Conducting Business



Charlotte A. Lange manages the legal needs of a growing semiconductor equipment trader.
Corporate Counsel Q&A

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Government A Game of Politics



Are hospital privileges for doctors based on medical standards, or do they revolve around bureaucratic politics? By Barbara Hensleigh of Andrews & Hensleigh LLP

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Government The Pro-Institution Movement



The current U.S. Supreme Court takes on a skeptical view that individual rights should be vindicated in federal courts. By Daniel Purcell of Kecker & Van Nest LLP

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BRIEFLY

A state appellate court has sided with the City of Los Angeles in its ongoing battle against companies putting up giant billboards and advertisements on the sides of buildings. In a unanimous decision that reversed a lower court ruling, the 2nd Appellate District panel held that the companies must hand over a slew of internal documents relating to their billboard business to a city prosecutor. The city has charged the companies, World Wide Rush LLC, SMIII Sepulveda Center, LLC, and VDA Property Company, LLC, for allegedly violating the city's ban on supergraphic signs and giant billboards near freeways. The city prosecutor made the discovery request as part of several subpoenas, but the companies argued the prosecution could only seek forensic evidence under the law. The three-judge panel disagreed, holding that records the corporation voluntarily created fall into the category of nontestimonial evidence and are therefore subject to discovery.

Summaries and full texts appear in insert

DISCIPLINARY ACTIONS

Here are summaries of lawyer disciplinary actions taken recently by the state Supreme Court or the Bar Court, listing attorney by name, age, city of residence and date of the court's action.

SUSPENSIONS

Jagroop Singh Gill, 54, Chowchilla (April 18) — Gill's previous order of probation was revoked and a new order issued in which he was suspended for six months with credit given for his period of involuntary inactive enrollment which began on January 14, 2011. He was disciplined for failing to comply with conditions to a previous order of discipline. He was suspended for 30 days and placed on two years' probation for failing to obey the laws of California.

In May 2007, Gill was arrested for driving under the influence of alcohol. A blood test revealed his blood alcohol level to be .34 percent. In May 2008, he pleaded no contest to violating Vehicle Code Sections 23152(b), driving with a blood alcohol greater than .08 percent, a felony, 22350, causing bodily injury and 23578, driving with a blood alcohol level greater than .15 percent. He was sentenced to 300 days in jail and placed on five years' probation. He failed to comply with conditions to the discipline by failing to submit a quarterly probation report for October 2010 and failing to submit laboratory test results for drugs or alcohol for July, August and September 2010.

In aggravation, the misconduct involved multiple acts of wrongdoing, he demonstrated indifference toward rectification or atonement for the consequences of his misconduct and he failed to participate in the State Bar proceedings.

There were no factors in mitigation. The order took effect May 18.

Manuel Angel Gonzalez, 43, San Diego (April 27) — Gonzalez was suspended for 60 days and placed on two years' probation for attorney misconduct in 7 matters by failing to provide an accounting of client funds, failing to return unearned fees, failing to return a client file promptly, failing to perform legal services with competence, failing to communicate by failing to respond promptly to reasonable status inquiries and failing to keep clients informed about significant developments in their cases.

He was ordered to make restitution of approximately \$15,000 to five clients.

In aggravation, the misconduct involved multiple acts of wrongdoing that caused harm to clients.

In mitigation, Gonzales admitted culpability and expressed remorse for his misconduct. Also, he agreed to make restitution to the five clients.

The order took effect May 27.

Michael Lee Goolsby, 44, Irvine (April 21) — Goolsby was suspended for 30 days and placed on two years'

probation for attorney misconduct in three matters by engaging in the unauthorized practice of law in jurisdictions outside California, charging and collecting illegal fees, authorizing telephone solicitations for prospective clients and failing to provide an accounting to a client.

Goolsby represented two clients in home loan modifications for real properties located in Utah and Hawaii. The third client was obtained through an unsolicited telephone sales call in May 2009. The client paid advanced fees but terminated Goolsby employment in November 2009 and requested a refund of advanced fees but Goolsby failed to return the unearned fees.

The State Bar ordered Goolsby to pay restitution of \$11,730 to two clients.

There were no factors in aggravation.

In mitigation, Goolsby had no record of prior discipline since his admission to the bar in 1992.

The order took effect May 21.

Patrick J. Grannan, 52, Irvine (April 21) — Grannan was suspended for 90 days and placed on four years' probation for attorney misconduct in two matters by failing to perform legal services with competence, failing to communicate by failing to keep clients reasonably informed about significant developments in their cases, engaging in acts of moral turpitude, dishonesty or corruption, failing to release a client file promptly, failing to return unearned fees and failing to cooperate with two State Bar investigations.

In aggravation, Grannan has a prior record of discipline. In 2004, he was placed on three years' probation for failing to perform legal services with competence in four client matters and failing to return a client file promptly in one matter. The current misconduct involved multiple acts of wrongdoing that caused significant harm to Grannan's clients.

In mitigation, he cooperated with the State Bar during its investigation and proceedings and entered into a stipulation with the State Bar. He suffered severe financial stress due to his wife's criminal conviction for which she was incarcerated for one year and he suffered other family problems.

The order took effect May 21.

Fernando Vargas Hernandez, 71, San Jose (April 13) — Hernandez was suspended for six months and placed on two years' probation for failing to maintain client funds in trust and failing to return unearned fees. He remains suspended until he makes restitution of \$2,022 to one client.

In November 2008, Hernandez was paid \$3,000 in advanced fees and \$320 in costs to represent husband and wife clients in a dispute involving a construction contract. In December 2008, the clients paid an additional \$3,320 to Hernandez but he failed to file a complaint on behalf of the clients. In February 2009, Hernandez telephoned the

clients are requested an additional payment of \$1,500, the clients then terminated his employment. In May 2009, the client wrote to Hernandez requesting a refund of unearned fees but he failed to return any portion of the fees.

In aggravation, Hernandez has a prior record of discipline. In 1985, he was suspended for 90 days for engaging in acts of moral turpitude, dishonesty or corruption and failing to maintain client funds in trust.

In mitigation, at the time of his misconduct he suffered extreme difficulties in his family. Mental health issues and incarceration of one of his children.

The order took effect May 13.

Errol Ivor Horwitz, 66, Woodland Hills (April 14) — Horwitz was suspended for 30 days and placed on two years' probation for failing to perform legal services with competence and failing to keep clients informed about significant developments in their case.

In November 2003, Horwitz was paid \$2,500 by husband and wife clients to file a petition for permanent residence in the U.S. He made no contact with the clients for two years. In January 2006, May 2006 and February 2007, the clients sent emails to Horwitz asking about the status of their petition. Horwitz replied to the email messages but never met with the clients. In April 2007, he met with the clients and confessed that he had not filed their petition. He returned their documents and returned the clients' advanced fees.

In aggravation, Horwitz has a prior record of discipline. In November 2001, he received a private reproof for failing to perform competently and in March 2004, he received a public reproof for failing to perform competently. The current misconduct was surrounded by bad faith, dishonesty and concealment by failing in his duty to make a report on the status of the clients' matter which caused harm to the clients.

In mitigation, he cooperated with the State Bar by admitting to the charges in the disciplinary notice. Also, during the period of misconduct, his wife became ill and was bedridden which required Horwitz to provide her with constant care. His wife recovered after corrective surgery. He provided pro bono services to a client in an appeal before the Ninth Circuit which was then appealed to the U.S. Supreme Court. The Court remanded the case with instructions and eventually expand the rights of the same family attain political asylum.

The order took effect May 14.

Bradley Lynn Jensen, 45, Aliso Viejo (April 14) — Jensen was suspended for 30 days and placed on two years' probation for attorney misconduct in two matters by presenting an unwarranted defense under existing law, engaging in acts of moral turpitude, dishonesty or corruption and threatening criminal action to gain an advantage in a civil

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matter.

In March 2002, Jensen substituted into case during a state court appeal and was to prepare appellant's opening brief which he filed in October 2002. Respondent's brief argued that Jensen's opening brief was frivolous and it also sought monetary sanctions against Jensen and his corporate client. In December 2002, the previous attorney filed a motion with the Court requesting that he be allowed to substitute back into the case, the court granted the motion. The previous attorney filed a reply brief to Jensen's opening brief and essentially making the same or similar arguments as Jensen. In March 2003, the Court issued an order to show cause (OSC) regarding sanctions against Jensen, the previous attorney and the corporate client. In March 2004, the Court of Appeal held that the appeal was frivolous, without merit and was made for the purpose of delay. The Court also found other issues raised by the appeal were untenable and concluded there was no intentional suppression of evidence by the plaintiff (a city) in the original action. In other aspects of the appeal, the Court held that Jensen and the previous attorney were both equally culpable and the Court was highly critical of their opening briefs. The Court ordered sanctions to be paid jointly and severally to the city in the amount of \$37,765 and \$11,816 to the Court of Appeal. The Court also ordered the previous attorney to pay \$20,000 to the state's general fund and ordered appellant to pay \$244,275 to the state's general fund. In July 2004, Jensen paid \$6,750 to the city and \$5,908 to the Court of Appeal. In July 2004, the Court issued a remit-

titur to its OSC. Jensen failed to pay the balance of the sanctions to the city and to the Court of Appeal. In August 2005, Jensen produced financial records to the Court of Appeal to support his motion to have the amount of sanctions reduced to the amounts already paid to the Court and to the city. In February 2006, the Court ordered Jensen to pay \$250 a month to the city until the balance was paid in full.

In a second matter, in 2004, Jensen used office stationary from another law firm and the name of an attorney in the law firm to send three letters which he signed using the other attorney's name in order to collect on a claim for the loss of an expensive watch which Jensen alleged was taken from his car while it was being serviced at an auto service business. The other attorney had no knowledge of Jensen's scheme and did not authorize Jensen to use the law firm stationary or the attorney's name.

In aggravation, Jensen has a prior record of discipline. In November 2007 he was suspended for 90 days and placed on one year of probation for failing to perform competently. The attorney whose name Jensen used in the letters to settle his claim was not harmed by the misconduct.

The order took effect May 14.

Garabed Kamarian, 51, Glendale (April 13) — Kamarian was suspended for 20 months and placed on four years' probation following his misdemeanor conviction for violating Penal Code Section 32, accessory to a felony after the fact, an act involving moral turpitude and for engaging in the unauthorized practice of law.

In December 2009, Kamarian was placed on interim suspension for violating Penal Code Section 32. The conviction was the result of a real estate transaction in which Kamarian helped a friend and client purchase a house. The friend asked Kamarian to purchase a house because the friend knew he would not qualify for a loan. It was agreed that Kamarian would buy the house in his name, the client would make monthly payments to Kamarian and then Kamarian would file quit claim deed placing the friend and his wife as the property owners. The friend made one payment and then defaulted on the loan. The property went into foreclosure. Kamarian told his friend that he would cure the default and assume the loan but the couple declined the offer.

In a second matter, in April 2009, Kamarian helped a former client with an Internal Revenue Services investigation audit. By December 2009, the IRS matter was not resolved and Kamarian communicated with the after the effective date of his interim suspension when he was not entitled to practice law.

In aggravation, the misconduct was surrounded or followed by bad faith, dishonesty, concealment or overreaching which caused significant harm to the client, the public or the administration of justice.

In mitigation, he cooperated with the State Bar, he took steps to demonstrate his remorse and to atone for the consequences of his misconduct.

The order took effect May 13.

James Hadrian Klinkner, 38, Alamo (April 21) — Klinkner was suspended for 60 days and will remain suspended until he files a final report to a previous order of discipline and until the State Bar Court files a motion to terminate the suspension. He was disciplined for failing to comply timely with imposed conditions.

In December 2008, Klinkner received a public reproof after being found culpable of misconduct in two client matters by failing to perform legal services with competence, failing to communicate by failing to respond to clients' reasonable status inquiries and failing to return a client file. He failed to comply timely with conditions to the discipline by filing his July 2010 quarterly probation report six days late and failing to take and pass the professional responsibility exam.

In aggravation, Klinkner has a prior record of discipline, the underlying matter. The current discipline involved multiple acts of wrongdoing which demonstrated his indifference toward rectification of his misconduct. Also, he failed to respond to the State Bar notice of disciplinary charges that resulted in his default being entered.

There were no factors in mitigation.

The order took effect May 21.

Frank L. Kucera, 61, Oakland (April 13) — Kucera was suspended for 60 days and placed on two years' probation for attorney misconduct in five client matters by failing to comply with a court order by failing to appear for case management hearings, failing to pay judicial sanctions, failing to maintain respect due the courts.

Kucera was a contract attorney and another person and relied on that person's calendaring system that was defective and caused him to miss court dates.

In aggravation, Kucera has a prior record of discipline, a private reproof in August 2000. The current misconduct involved multiple violations of court orders.

In mitigation, he cooperated with the State Bar by agreeing to imposition of discipline without a hearing.

The order took effect May 13.

Robert Yun Lee, 42, Los Angeles (April 21) — Lee was suspended for 60 days and placed on two years' probation following his conviction for violating Penal Code Section 242, battery, a misdemeanor.

In December 2009, Lee pleaded nolo contendere for the Penal Code violation. He was placed on criminal probation for 36 months and was ordered to complete a 52 week domestic violence program.

In aggravation, Lee has a prior record of discipline. In December 2008, he received a public reproof. In January 2010, he was placed on one year of probation for failing to comply with conditions to the public reproof.

In mitigation, he cooperated with the State Bar during its investigation and proceedings.

The order took effect May 21.

Undercapitalization — only a symptom of large firm distress

Continued from page 1

tive and the business fails. Most businesses do not fail because they are not making profits; they fail because they run out of cash. Overtrading is going broke while making a profit.

Of course, when applied to the business of law, this is directly relevant to the hiring and firing of the units of production, the partners themselves, coupled with the management of their compensation. Whether it be through mergers, acquisitions, lateral additions singly or in small groups, and the departures both voluntary and forced, law firms are going through a costly and in many instances unsustainable revolving door of hires that is crushing their profitability at both the partner and associate levels. Accompanying this is an escalation in compensation packages for laterals, triggering distribution policies that are higher than the businesses can afford for both lateral and existing partners.

What is often masked in the financial reports given to partners is that over time significant amounts of contributed capital have been applied to partner distributions, in some instances as *taxable income*. This was the first consequence of overtrading.

Look at the amounts of "working capital debt," and take note that in numerous law firms the expansion of this use of borrowing has been to fund partner draws more than any other single purpose. This use of debt is just an extension or continuation of the same imprudent policies that consumed post tax capital contributions, which instead are now applied to money yet to be collected, distributed and taxed to the partners. This has been the second consequence of overtrading.

So what do you do when the equity partners don't feel comfortable putting in any more capital, and the banks are not interested in extending any more debt? And you don't have the collective partner will or leadership strength to stop overtrading? You resort to conversion of employee compensation, which is effectively a compensation reduction. This is more than just pay freezes or reductions in staff while still demanding the same gross output. Conversion of salaries to profit sharing participations for salaried lawyer classes results in preservation of partner income levels, while reducing income to the salaried contingent. Also critical is the potentially arbitrary internal revaluation of equity partner practices and shifting of income allocations internally within the partnership — something increasingly easy to do with the large firm "black box" compensation models. This is the third consequence of

overtrading that is operative today.

Is there a fourth consequence of overtrading to anticipate? The flogging of clients with ever higher billing rates, the pushing of "productivity" by flogging attorneys for more hours, and the cutting of costs have already reached their limits or are so close as not to present any real opportunity for material impact on results. So realistically there are only two avenues of action left to consider for firms that have arrived at this point — terrible cash flow squeeze brought about by a unsustainable aggressive program of distributions to partners of monies not yet earned. This is a totally inappropriate use of working capital that is not short term, not turned over rapidly, and which when funded through the use of debt greatly increases risk to the survival of the business. The choice? Change your ways or fail.

The essential prerequisite to staying in business is to generate *sustainable* profit, through operating performance, and not pencil strokes using modified cash basis accounting. In most businesses, that means providing superior value to the customer at a lower cost to the provider, retaining your valuable clients and attracting more of them from your competitors. Most law firms have not adequately addressed these elements, and the sooner firms do the more likely they are to be survivors.

Understandably, the preoccupation of many firms in this financial crisis is with immediate short-term survival. But this is not unlike throwing babies out the back of the sled while being chased across the frozen tundra by a pack of wolves, or drinking seawater in a lifeboat while waiting to be rescued. Fatal consequences lay ahead if something major does not occur soon. Remarkably, rather than turn to the effective business solution, the one that most clients want to see, much of the legal industry has instead migrated from the first consequence to the second and now are at the third.

Time to work meaningful change has been squandered, to the cost of thousands of jobs and many more thousands of compromised professional careers. Is this the infamous herd or lemming mentality that law leadership is copying and following as it has for years, the technique of adopting only what works and not what doesn't? Or is it perhaps time to look up and note the proverb, "if you are not changing direction you will wind up exactly where you are headed?" Are your firm's policies different with respect to these fundamental aspects of utilization of capital than those of recently demised law firms that possessed undeniably outstanding law practices? If not, does finding other attributes to differentiate yourself from such failed firms really matter? Just think about it.

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