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DAILY APPELLATE REPORT

CIVIL LAW

Insurance: Insured has three years to sue insurer for tortious breach of duty of good faith and fair dealing where policy provision was more favorable than Insurance Code. *Blue Shield of California Life & Health Insurance Co. v. Superior Court (Kawakita),* C.A. 2nd/8, DAR p. 2252

Juveniles: Court lacks jurisdiction over dependency proceedings where there is insufficient evidence to support finding children are at risk of physical harm. *Daisy H., a Minor,* C.A. 2nd/1, DAR p. 2241

Prisoners' Rights: Lethal injection protocol does not amount to constitutional violation absent showing of substantial risk of serious harm despite protocol safeguards. *Dickens v. Brewer,* U.S.C.A. 9th, DAR p. 2246

CRIMINAL LAW

Criminal Law and Procedure: Jury instruction regarding defendant's choice not to testify is valid where language chosen by court sufficiently covers substance of proposed instruction. *U.S. v. Padilla,* U.S.C.A. 9th, DAR p. 2243

Juveniles: Court fails to exercise its discretion in denying minor's deferred entry of judgment without determining minor's eligibility and other factors. *Joshua S., a Minor,* C.A. 1st/2, DAR p. 2233

Summaries and full texts appear in insert

BRIEFLY

A judge has ordered three more film companies owned by financier David Bergstein into Chapter 11 nearly a year after creditors first filed a petition seeking to force those and two other of the financier's entities into bankruptcy. U.S. Bankruptcy Court Judge Barry Russell ordered Bergstein's R2D2, CT-1 Holdings and CapCo Group into Chapter 11 after creditors filed a sealed motion claiming there was enough evidence to force the entities into bankruptcy without a trial. Russell's order gives the trustee overseeing the cases control of about 1,300 films from the companies' libraries, which could later be sold at auction.

A coalition of environmentalists has appealed a judge's dismissal of a lawsuit that aimed to stop development of a 5,000-acre gated resort community on the sprawling Tejon Ranch property north of Los Angeles. Lawyers with the Center for Biological Diversity and other groups filed their notice of appeal Tuesday in Kern County Superior Court. The plaintiffs say Superior Court Judge Kenneth Twisselman was wrong when he ruled in November that Kern County officials did not violate state environmental laws when they approved the Tejon Mountain Village project.

Photo by Jason Jones Photography Inc.

Bryan A. Liang, executive director of the Institute of Health Law Studies at California Western School of Law.

U.S. Drug Industry Fears India Could Trigger War on Patents

Developing Nations Want Generic Drugs To Flourish Instead

By Mandy Jackson
Daily Journal Staff Writer

In the global war on health care costs, drug patent protection has become a new battleground.

The biggest fight over drug makers' intellectual property is brewing in India, where the government is considering giving generic drug manufacturers the right to sell low-cost versions of brand-name medications without consent from the pharmaceutical firms that own the patents. These allowances, called compulsory licenses, would effectively cut off the patent-holding company's access to the country's rapidly growing market.

Brazil, Taiwan and other countries have issued compulsory licenses for drugs developed by U.S. companies when urgently needed medicines were unavailable in their countries. But as India emerges as a leading generic drug manufacturing country, the government's proposal would circumvent the patents for the sole purpose of making drugs more affordable to the country's low-income population.

Legal experts say other developing countries could adopt similar policies, leaving U.S. drug makers, and ultimately American consumers, to pick up the tab.

"Everyone's on tenterhooks. If you're a policy maker, you have to worry about how it's going to shake out," said Bryan A. Liang, executive director of the Institute of Health Law Studies at California Western School of Law.

Patents are protected internationally by the Agreement on Trade-Related Intellectual Property Rights, or TRIPS Agreement, negotiated in 1994 and administered by the World Trade Organization. But in 2001, the Doha Declaration adopted by the WTO let governments circumvent patent rights to meet urgent public health needs. Then, in 2005, TRIPS was revised so that governments could issue compulsory licenses to generic drug makers to sell needed medications in developing countries.

> 'Unfortunately, I think that patents are an easy target when people talk about [drug] pricing.'
>
> — Lila Feisee

"This was contemplated all along. Countries are allowed under TRIPS and subsequent revisions to have compulsory licensing as part of their [patent] regime," said Dan Altman, partner at Knobbe Martens Olson & Bear LLP in Irvine.

However, he added, governments can't annul all of a patent holder's rights. Patent owners are entitled to modest royalties on sales of products manufactured under compulsory licenses.

The licenses create unwanted uncertainty around drug company patents and whether they will be honored in countries around the world. That raises concerns that investors won't fund the hundreds of millions of dollars and decades of research necessary to bring new drugs to the global market.

Altman said pharmaceutical companies also are concerned about development of a "gray market" for their drugs.

"In a developing country, like India, even people that could afford the real price get it at the cheap price," Altman said. "A compulsory license undercuts the cost for the entire country."

In India, the country's Department of Industrial Policy and Promotion recently put out a paper that proposed issuing compulsory licenses to make low-priced generic drugs available.

The report came out at the same time that the Biotechnology Industry Organization, a Washington, D.C.-based trade group, hosted a conference in India for U.S. companies considering doing business in the country.

BIO and its member companies have talked to Indian officials since then about the impact that patent uncertainty would have on their ability to invest in the Asian country.

"Unfortunately, I think that patents are an easy target when people talk about [drug] pricing," said Lila Feisee, vice president for global intellectual property policy at BIO.

See Page 7 — DRUG

GUEST COLUMN

Lateral transfer partners who are getting paid more than longer-term partners have created an internal strain in large law firms. By **Edwin B. Reeser**.

Many recently added lateral transfer partners are receiving compensation packages that are higher, in some cases significantly higher, than longer term partners in the new firm who have comparable metrics (personal billed hours, book of business). In the increasingly opaque, if not downright blacked out, systems of partner compensation that have been evolving in large law firms over the past decade, this has permitted covert reallocations of income to the upper tiers of partners in control of the firm. Obviously it has to be at somebody's expense, and that typically is the lower two-thirds of the partnership, as well as contract attorneys, income or non-equity partners, associates and staff.

One reason for the urgent push to acquire high profile lateral partners is that firms want to pull in as many top line gross revenue producers as they can (that certainly makes sense in a static or declining gross revenue market), but with so many firms in the market to acquire lateral talent to shore up falling revenues, the bidding goes higher for the same basic book of business. It is a very simple supply/demand part of every market. In desperate times, one can expect firms to resort to aggressive measures. One does not fret over the long-term consequences if the short term is a hungry bear chasing you down the trail. Adding high profile lateral partners also serves as a public relations play to persons outside the firm, and within it by relaying the message that top talent thinks their new firm (your firm) is the place with a "future." This helps the existing folks to decide they too are in the right firm and not to return headhunter calls, and for partners in other firms to consider a move to your firm.

It is not a permanent compensation commitment, by any means. The firm will always set some parameters for performance

See Page 8 — LATERAL

Court Should Pick Bar Governors, President Says

By Don J. DeBenedictis
Daily Journal Staff Writer

California lawyers would no longer elect other lawyers to run the State Bar under a proposal put forward by the bar's president. Instead, the state Supreme Court would appoint lawyer members of a new and smaller bar Board of Governors.

The proposal from President William N. Hebert is the first concrete response to a demand from the Legislature that the bar take a sharp look at how it governs itself. Hebert, of Calvo Fisher & Jacob LLP in San Francisco, chairs a legislatively mandated task force to improve how the bar protects the public from bad lawyers.

In a day-long meeting Tuesday, Hebert said the task force should recommend reducing the bar's Board of Governors from 23 members to 17 members by cutting the number of lawyers on the board from 17 to 11, with all 11 appointed by the state Supreme Court.

The governor and Legislature would continue to name six nonlawyer members.

The task force is set to debate Hebert's proposal and any others at a meeting March 2 in Los Angeles. It must send a formal recommendation to the Legislature by May 15.

Hebert said changing to an all-appointed governing board would improve the bar's ability to protect the public because it would get rid of any sense — real or perceived — that lawyers are on the board only to represent lawyers' interests.

Under his proposal, potential bar governors would first be vetted by a merit screening committee before being considered by the Supreme Court. The application and interviewing process would require they learn about the bar's mission and duties.

"You have to learn something about the board before you ever get on the board," he

See Page 7 — COURT

Sex Harassment Claims Fall — Except From Men

By Catherine Ho
Daily Journal Staff Writer

Sexual harassment claims against employers plummeted during the past decade, except among one major demographic — men.

Since sexual harassment historically has been seen as a claim brought by a female employee against a male co-worker or a boss, the increase in complaints filed by men marks a significant shift of gender dynamics in the workplace, as well as in the courtroom.

Sexual harassment claims in general dropped to 11,717 in 2010 from 15,222 in 1999, while the proportion of claims filed by men reached an all-time high of 16 percent this year, according to data collected by the U.S. Equal Employment Opportunity Commission.

The trend is likely fueled by the tight job market, growing acceptance of non-traditional gender roles and a greater awareness of workplace rights, lawyers said. Whatever the reason, the record number of sexual harassment suits filed by men is starting to prompt businesses to rejigger how they view sexual harassment training.

Matthew Effland, a partner at Ogletree, Deakins, Nash, Smoak & Stewart P.C. who represents employers, said some companies' training changed.

"I've adjusted my training to clients to provide examples of what traditionally would be considered reverse harassment or discrimination," he said. "It's more on the functional side of things when you're training people rather than on the policy side."

See Page 7 — HARASSMENT

MORE NEWS

Litigation

Judge David Gunn prefers formal to friendly in running his family law court but says it helps with making tough calls. **Judicial Profile, Page 2**

A judge ruled that a Palo Alto maker of electronic billboards waited too long to sue Morgan, Lewis & Bockius LLP over a botched patent application. **Page 3**

Justice Steven C. Suzukawa was named to substitute for the retiring Justice Carlos Moreno on a major tobacco litigation question currently before the state Supreme Court. **Page 3**

A Court of Appeal on Wednesday ordered a new trial to calculate damages of up to $1 billion against the University of Southern California for undermining the development of a dental implant. **Page 3**

Guinevere L. Jobson of Fenwick & West explains a case from the U.S. Court of Appeals for the Federal Circuit that rejects an attempt to limit standing to file false patent marking claims. **Page 4**

The Roman Catholic Archdiocese of San Francisco went to court this week to fight a $21 million property tax bill. **Page 4**

Corporate

Real Estate Movers and Dealmakers — A roundup of recent real estate transactions. **Page 5**

Government

The 9th Circuit addresses for the first time the constitutionality of impounding vehicles of unlicensed drivers. By Jim Curry of Sheppard Mullin and Erin Fox. **Page 6**

The Arizona shooting case raises intriguing questions regarding what charges will be brought by federal and state authorities. By Katherine Kaso of Loyola Law School. **Page 6**

Gov. Jerry Brown said he will kill a proposal to sell 24 state office buildings to private investors, which would have netted $1.2 billion for this year's state budget. **Page 6**

Creating a Life After Law

By Tom Pollack

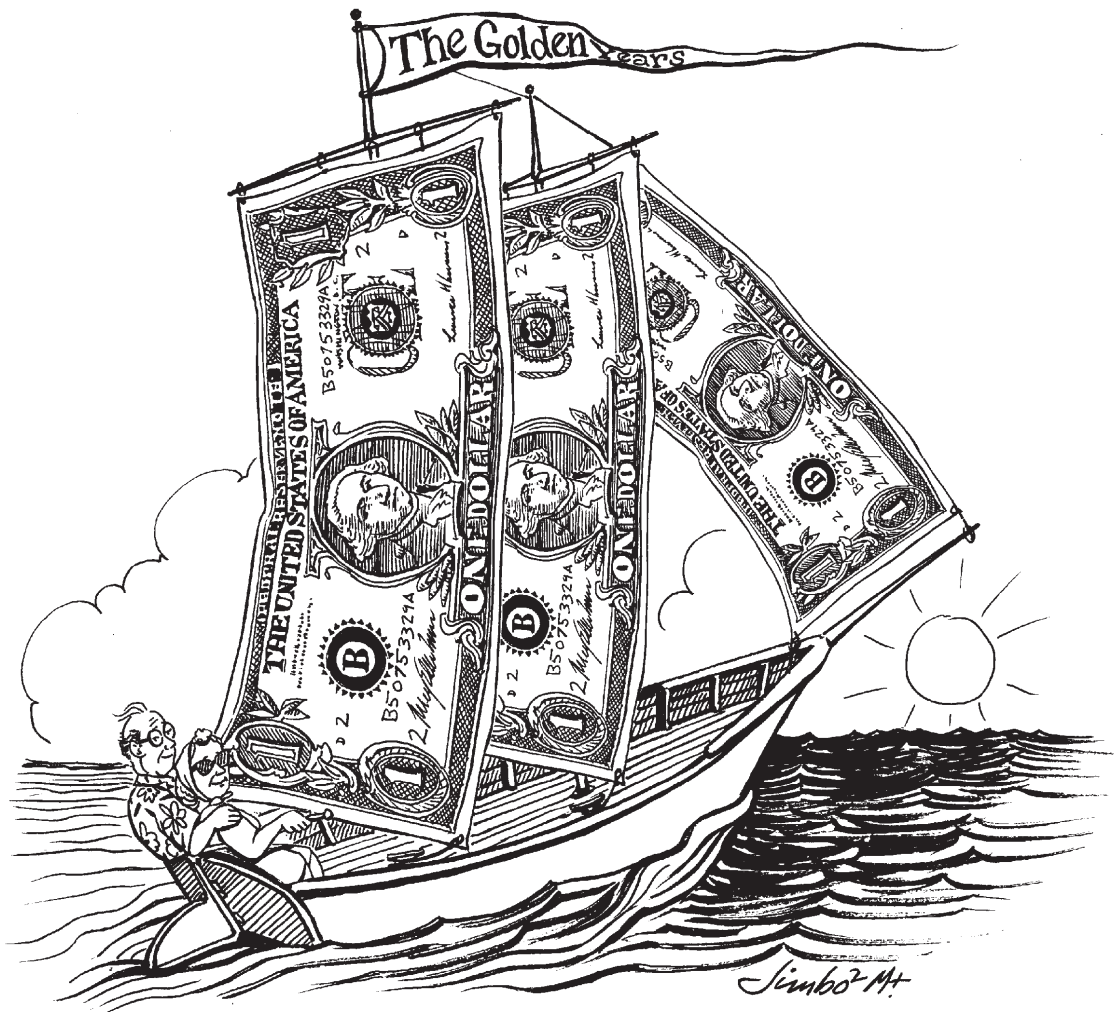
Many lawyers in their 50s and 60s may be fast approaching a major decision point in their lives — what to do when they retire from, or cut back, their law practices. Is there life after a busy and demanding legal career, and what will it look like? Some welcome the prospect of exiting from the stress, hours and demands of lawyering, while others dread not knowing what may replace it. Many wonder what their new life would look like and worry whether something new could provide the gratification or security that kept them in the law for many years.

Many wonder what their new life would look like and worry whether something new could provide the gratification or security that kept them in the law for many years.

The good news is that actuarial statistics indicate that we have much longer to live than our parents' generation. The challenge is what to do with the time. The standbys of prior generations — golf, travel, sand and surf, charitable endeavors — are welcome respites from a busy life, but can we live a satisfying and fulfilling life without more?

After a linear and rigorous lifetime of education, work and professional success, it is a challenge for many of us to envision a wholly new but nonetheless engaging, meaningful and fulfilling life. Indeed, many of us so fear having that conversation with ourselves, and the uncertainty it arouses, that we continue in careers that no longer are truly fulfilling, or look for diversions that are familiar and occupy our time, but present little deep gratification. In doing so, we miss the opportunity to explore what really engages and excites us today, and the opportunity to chart a purposeful course towards the next chapter of our lives.

Transition coaching, a relatively new field that is based on human development and psychology, can be a powerful ally in successfully transitioning from law into the next phase of life. Through skilful listening and questioning, a 'transition coach' helps the client explore what passionately engages him or her, what interests or yearnings might have been set aside long ago in order to pursue a legal career, what blind spots could be inhibiting the client from seeing the array of existing opportunities, and what obstacles may be impeding the client from moving in a new direction. Often the coach helps the client bring into focus and define what only can be dimly seen, if seen at all. Once new interests are unearthed, the coach helps the client find ways to test new endeavors to determine which actually reverberate for the client, and how the client might bring them into being on a permanent basis. The coach then supports the client in taking steps to effect desired changes in his or her life.



In the coaching relationship, attention is focused on helping the client explore what is most important, while at the same time challenging those beliefs that come from outdated but powerfully habituated ways of thinking. For example, I worked with a partner at a large accounting firm who decided that when he retired, he would continue working as an outside consultant for his firm, while teaching accounting at the local university. When challenged, he acknowledged not being particularly interested in either role, but was inclined to them because they were "known quantities," and he was unsure he had other talents. After exploring what else might interest him, he recalled how much he had enjoyed playing college basketball. He had once considered becoming a basketball coach, but a lucrative career in accounting better met his needs at the time. The idea of now becoming an assistant coach to a local high school or college team inspired him, and a new road to explore was thus opened.

The coaching relationship typically extends for four to six months, with follow-up as sought by the client. The relationship is collaborative, and assumes the client has the resources necessary to determine and chart a new course. The coach's role is to help facilitate the client's thinking and exploration, assist the client in recognizing any self-imposed limitations that may stand in the way of realizing new objectives, and aid the client in navigating any internal or external obstacles.

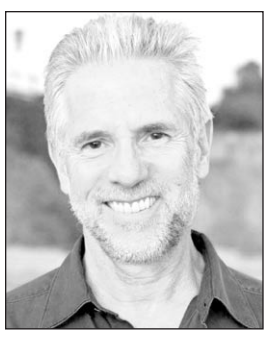
I can attest to the power of transition coaching, both as a coach and a client. For most of my 40-year career in law, I was a partner at a large Century City law firm, specializing in white-collar criminal defense. While I loved the practice, over time I started thinking that it would be energizing and exciting to do something different. Moreover, with my firm's policy of mandatory retirement at 65 on the horizon, I welcomed the potential to do something new with my life. But, what would that be?

In an effort to explore the possibilities, I attended a four-day workshop on transitions given by the Hudson Institute of Santa Barbara. Life coaching itself piqued my interest at the workshop. As I learned more about it, my interest grew. I had always been interested in psychology and human development, and here was an opportunity to immerse myself in learning more in these areas. I enjoyed working with people one on one, and got personal satisfaction from helping people work through issues or problems. Coaching also aligned with my being a good listener and questioner, and being able to read people well. I enrolled in the coaching program at the Hudson Institute and became a certified coach. When I turned 65 two years ago, I became of counsel to my firm, and now spend most of my work life as a transition coach and program facilitator. Coaching has allowed me to develop and use a whole new set of skills, and provides continuing fulfillment in helping people achieve more of what they want in their lives.

During my coaching practice, I have worked with numerous lawyers, accountants, executives, management consultants and others who wanted to explore what awaited them following retirement or resignation from their chosen fields. I have also facilitated many transition programs, including a company-sponsored program for a major accounting firm designed to help retiring partners prepare for their new lives. While all participants' experiences are unique, people entering new phases of their lives express certain common themes: anxiety at what is "next" in life, excitement about the prospect of mindfully exploring the contours of a new and different life, and concern about how to actualize identified goals.

Many of the issues that come up in individual coaching sessions and workshops cut across professional lines. What do I do with my time if I don't have an office to go into anymore? How do I fit into my spouse's life, when she or he plans to continue with a busy schedule that does not include me? What am I really passionate about now, and how do I create a life centered on those things? Will I feel worthy or important if I'm not practicing my profession and garnering the accolades that came with it? With whom will I spend my time when I am not in the office all day with colleagues? The list goes on and on, but what is notable is that by addressing these issues, sometimes with a group of people experiencing similar concerns, participants express a sense of empowerment that they can forge new and gratifying lives. They also stop dreading what might be lurking just over the horizon.

Reflecting on a life after law gives us the unique view from the mountaintop — looking back at what our life has been, and ahead at how we would like to spend our remaining years. It gives us a chance to reflect on what we find purposeful and meaningful, and what deeply nourishes us from intellectual, emotional, relational and other perspectives. We may decide to continue practicing law on a full- or part-time basis. Or, we may pursue wholly new directions. What is important is to consciously decide how we will proceed, rather than remain or get on a random path to the future. One gift that comes with age is the chance to pursue a new and meaningful course that is informed and nourished by the wisdom of our professional and personal histories. Transition coaching is a way to avoid letting old habits and random circumstances forge our futures, and instead to intentionally chart and realize a meaningful and gratifying life ahead.



Tom Pollack, a partner emeritus at Irell & Manella, is an International Coach Federation Professional Certified Coach and the principal of Exploration Coaching in Santa Monica. Additional information on coaching can be found at www.explorationcoaching.com.

In the Lateral Additions 'Game' — The Bear Chase Is on

Continued from page 1

necessary to sustain initial levels of compensation, or may make it clear that it is providing resources and support so that the newcomer can reach a certain level of productivity within a particular period of time that is mutually determined to be reasonably achievable. At least that is the story. The reality is that it is a "no risk" proposition for both. The newcomer gets a short term boost in income, quite possibly a substantial one, while the firm gets the gross revenue that on a net basis is still calculated to be a net contribution to the coffers for the rest of the partnership. That is what the firm in the short term desperately needs to keep profits per partner (PPP) up. The firm gives up more to get it, but they get it. If the expectations materialize, the newcomer gets his or her salary base extended in term, and if not the newcomer settles back to a level that is consonant with other partners producing similar figures. Maybe. Paying headhunter fees of significance, and not wanting the embarrassment of bringing on somebody who does not deliver, are pretty powerful incentives for law firm leadership to not pull the plug too quickly on a high profile newcomer who is overpaid and underperforms. So, absent a very serious meltdown in actual performance versus expected performance, the newcomer can grind along for a year, two years or even three years before there is a return to reality in compensation. Lower or middle tier equity partners and all income partners will not be accommodated so generously. They are expected to be net contributors to the profit pool quickly, and thus their compensation may be expected to be subject to review at least annually and quite probably every six months.

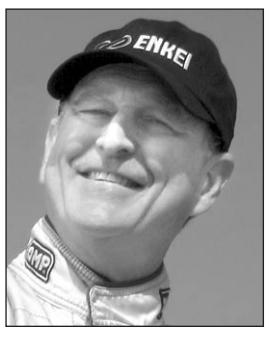
More than one exasperated long term loyal partner has complained: 'What do I have to do to get paid fairly around here? Quit and then get rehired as a lateral?'

This generates an artificially inflated valuation on the high profile portable partner and his or her business book in the market today. And it creates some pretty tough internal pressures on allocation of cash to pay partners, especially if the newcomer does not perform. But even if he or she does perform, there emerges a fierce demand internally that the existing partners with comparable or superior business and hours — get a raise. More than one exasperated long term loyal partner has complained: "What do I have to do to get paid fairly around here? Quit and then get rehired as a lateral?" So this is where the morale and ego issues really get rolling. And the only place to get the money is to step on the income of those in the ranks below to squeeze out and hand over to the upper tier players. Of course, firms try to take care of their good players with good compensation, which is why one of the reasons we see moves is that good players can receive *more* than good compensation thrown at them by competitor firms to change. More than they currently pay their own people for the same performance.

One way to watch for strain is the spread between lower and higher paid partners, which as recent articles have mentioned are now varying from what used to be three or four times the lowest partner compensation, to a multiple of as much as 10 or more times. That is a bit problematic as a stand-alone measure, though it is worth noting. What is more critically important is to look at the evolution over the past 10 years (20 if you can get the data), of what the arithmetic median and arithmetic averages of partner income have been for any particular firm. PPP is something of a "joke" the way it has been gamed by firms, but basically what we see out there is that the average PPP is usually much higher than the median. This should be expected, but it should not be grossly out of balance. So, for example, if the PPP average is $900,000, it would be reasonable to expect a median (half the partners above, half the partners below) figure to be $675, 000 — $700,000. But, if the median is $600,000 or less, you probably have more than two-thirds of your equity partners earning less than the average, or PPP. Look at the trend over time, and if it has changed significantly towards PPP average extending farther and farther beyond the median, there could be a real enterprise stability problem lurking.

Then look to who is getting the higher money and why, and you may find that their contribution is actually quite a bit less relative to what they receive as contrasted with the "middle class." This factor is where the real stability of firms is at risk. The top tier or inner circle has a big basket of business, but on a net basis may be taking more, indeed considerably more, out than it contributes. If the net contributors in the middle class start leaking out of the firm, the source of that cash disappears quickly That is one reason why the firms have difficulty stabilizing as business entities. Like a gyroscope on a string, they have to infuse more energy constantly to keep the spinning essential for the top to balance on the string. That is the lateral additions "game." And if everybody plays it, there will be those who lose. If the game continues long enough, the cost of the energy to play ultimately has every top fall off the string.

Which takes us back to the short-term business strategy when being chased by a bear. The law firm players do not have to be faster than a bear. They just have to be faster than the slowest law firm players, whom the bear will catch up with and eat first. It is not an inspiring business strategy, but it is one that will prolong the feast at the table for those at the top. And that is all that strategy does. For many in management or the upper tier of partners of large law firms, that is more than good enough these days. Even if the bear catches the firm, they will bounce out to a new firm with their business book and do just fine. For those partners below that ranking, the best many can hope for is that their firm is not the slowest, or that they find that pot of gold client that takes them into the upper tier of their law firm.



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