LOS ANGELES
Daily Journal
www.dailyjournal.com

VOL. 127 NO. 34 THURSDAY, FEBRUARY 20, 2014

GUEST COLUMN

'Growth' is not a law firm strategy

By Edwin B. Reeser

Which one of the following three statements do lawyers not understand?

1. The London Underground is not a political movement.

2. The Gettysburg Address is not where Abraham Lincoln lived.

3. Growth is not a strategy.

Growth is being pursued by a great majority of firms, endorsed as a laudable objective by many. But the approach is not delivering higher profits. Indeed in many firms pursuing growth, operating margins and profits have been steadily declining beyond the initial investment period, when recovery of margins and increased returns were forecast. (This may be contrasted in some of these firms with reported increases in profits per partner, which they achieve

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DAILY APPELLATE REPORT

CIVIL LAW

Bankruptcy: Debtor is entitled to entire award of $8,456 in fees because 'special circumstances' did not exist that would warrant denial, let alone reduction, of fees. *Daecharkhom v. Waugh Real Estate Holdings LLC (In re Daecharkhom),* 9th U.S. BAP, DAR p. 1955

Judges: Founder of bankrupt ski resort who misappropriated resort's funds may not demand that bankruptcy judge disqualify himself when judge did nothing improper. *Blixseth v. Yellowstone Mountain Club LLC,* U.S.C.A. 9th, DAR p. 1952

Real Property: Commercial property buyer cannot hold escrow company entirely liable after slight delay in closing escrow was stretched out for two years by unforeseeable bankruptcy. *Ash v. North American Title Co.,* C.A. 2nd/5, DAR p. 1937

Torts: Alameda County Medical Center must face claim of patient, who underwent surgery for gunshot wounds and discovered remaining stent in abdomen 14 years later. *Maher v. County of Alameda,* C.A. 1st/1, DAR p. 1931

CRIMINAL LAW

Criminal Law and Procedure: Man's probation is upheld because the prosecution neither alleged nor proved that he was ineligible for probation for his current assault and battery convictions. *People v. Hood,* C.A. 4th/1, DAR p. 1958

Joshua Sebold / Daily Journal

Former Korean Prime Minister Kim Hwang-sik hopes to smooth the transition as U.S. law firms enter the Korean legal market following a free trade pact between the two countries.

Law schools add Korea expertise in free-trade era

By Joshua Sebold
Daily Journal Staff Writer

Law firms have been eager to enter the South Korean legal market following a free trade agreement with the United States that went into effect in 2012. Now, with the recent launch of its Korea Law Center, UC Berkeley School of Law is aiming to extend that focus to students, an effort that administrators hope will help budding lawyers better understand and navigate Korea's legal and political systems. The center is being guided by a South Korean heavyweight: former Prime Minister Kim Hwang-sik.

Kim, who stepped down in 2013, said he hoped the project would help smooth the transition as U.S. firms enter his country's legal market. "The center will play an important role at the juncture of the Korean political system and legal system," he said through a translator.

Beginning next month, American firms will be allowed to enter into cooperative agreements with Korean firms, and in 2017, the market will open up further as U.S. firms gain the ability to hire Korean attorneys and merge with law firms there.

Kim, who's spent almost 20 years as a judge and who served on the Supreme Court of Korea, said supporting and developing Korea's legal system has become his top priority at this stage in his career.

He said he wants to help share the perspective of the Korean government with professors at the Korea Law Center to help them improve the relationship between the two countries. Already a large contingent of Korean lawyers have studied at Berkeley, he said.

Alexander H. Williams III, a former superior court judge who serves as an honorary director at the US-Korea Law Foundation in Irvine, said the timing was right for Berkeley to help familiarize students with Korean legal issues, as changes in the market as well as recent litigation between Korean and U.S. companies have presented plenty of challenges for lawyers in the two countries.

"The Samsung litigation vis-a-vis Apple has been huge in triggering a perception in both countries of the need to understand each other," he said.

As Korea has become a larger player on the world stage, other law schools have also stepped up their focus on the region. But few are as tailored to the changing legal market as the center at Berkeley.

UC Irvine School of Law opened its Korea Law Center when the school was founded in 2009. Charles Cannon, the school's vice dean, said the center has helped foster relationships between the university and

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Countrywide under civil investigation

Top executives could face charges in ongoing probe, several sources say

By Henry Meier
Daily Journal Staff Writer

LOS ANGELES — Several years after the Department of Justice declined to pursue criminal charges against top Countrywide Financial Corp. executives over risky lending strategies, the former leaders of the mortgage giant, now owned by Bank of America, remain under investigation by the Central District U.S. attorney's office and could still face civil charges, according to several sources inside and outside the office.

Countrywide co-founder and former CEO Angelo Mozilo is one of the primary targets in the case, as is the company's former chief operating officer, David Sambol, according to sources involved in the case who requested anonymity due to the ongoing nature of the investigation.

The case is being constructed under the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, also known as FIRREA, which has become one of the most popular and effective tools for the Justice Department in the wake of the 2008 financial crisis.

Interviews with potential targets and witnesses were "hot and heavy" in the fall, according to a lawyer whose client is connected to the investigation. However, a member of the U.S. attorney's office who is familiar with the case said a civil complaint is not imminent.

The matter closely resembles the case Securities and Exchange Commission officials brought against Mozilo, Sambol and chief financial officer Eric Sieracki soon after the housing collapse. That case ultimately settled in 2010. The settlement elicited some of the largest civil fraud fines ever against individuals, with Mozilo agreeing to pay $67.5 million.

Unsurprisingly, Leon W. Weidman is spearheading the matter for the U.S. attorney's office, according to the sources. Weidman pioneered the FIRREA prosecution strategy and has advised on numerous DOJ cases, including the massive $13 billion dollar standalone settlement with JP Morgan Chase & Co. last year. He's also been involved in developing a $5 billion case against ratings agency Standard & Poor's, which is currently before U.S. District Judge David O. Carter in Santa Ana.

While some say the FIRREA strategy has been employed with great success — the monetary penalties are certainly eye-popping — others have criticized it as a backup option used in lieu of more punitive, albeit difficult to prove, criminal charges. Recently, U.S. District Judge Jed Rakoff wrote an editorial in The New York Review of Books criticizing Attorney General Eric H. Holder Jr. and the Justice Department for not pursuing more criminal actions under "willful blindness" and "conscious disregard" theories of fraud.

But with the alleged misconduct of banking officials that precipitated the crisis receding further and further into the past, FIRREA is

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Athletes to seek order that NCAA's rules are anti-competitive

By Hadley Robinson
Daily Journal Staff Writer

Former UCLA basketball star Ed O'Bannon and a class of athletes will try to convince a federal judge Thursday that antitrust laws should apply to the NCAA, and a "quick look" is all that is needed to determine the athletic organization's rules are anti-competitive.

U.S. District Judge Claudia Wilken will hear cross motions for summary judgment in the high stakes case challenging the NCAA's longstanding amateurism model that differentiates it from professional sports and prohibits athletes from being compensated for their work or for the use of their names, images and likenesses in television broadcasts and video games.

In November, Wilken certified a class of athletes seeking injunctive relief to stop the NCAA from prohibiting revenue sharing with student athletes, but denied a damages class, significantly decreasing the financial liability for the collegiate organization. The athletes, represented by Hausfeld LLP, want to share compensation for live television broadcasts and re-broadcasts and licenses to use their likenesses in video games.

Supported by many dozens of declarations from college presidents and athletic conference officials, the NCAA, represented by Munger, Tolles & Olson LLP, argues the pro-competitive benefits of its model justify any restraints on athletes and the plaintiffs' arguments cannot be sustained under an antitrust analysis.

They argue the NCAA promotes amateurism, competitive balance, a combination of sports and education, the viability of less popular sports and the large number of athlete participants. Any change, the organization argues, would disrupt those benefits.

"As representatives from more than a dozen NCAA member institutions have testified in these proceedings, the current model of athletics is essential in reinforcing the integration of education and athletics, allowing our colleges and universities to offer a wide array of men's and women's sports," said NCAA chief legal officer Donald Remy.

Though the Supreme Court has upheld the NCAA's amateurism model that purports to uphold the value of college athletics by protecting students from commercialization, many believe the issue requires a fresh look because of the mass industry that has sprouted up around high-profile college sports.

"In the past, courts have been receptive to the idea that this is clearly designed to promote and preserve amateurism," said Daniel E. Lazaroff, director of the Loyola

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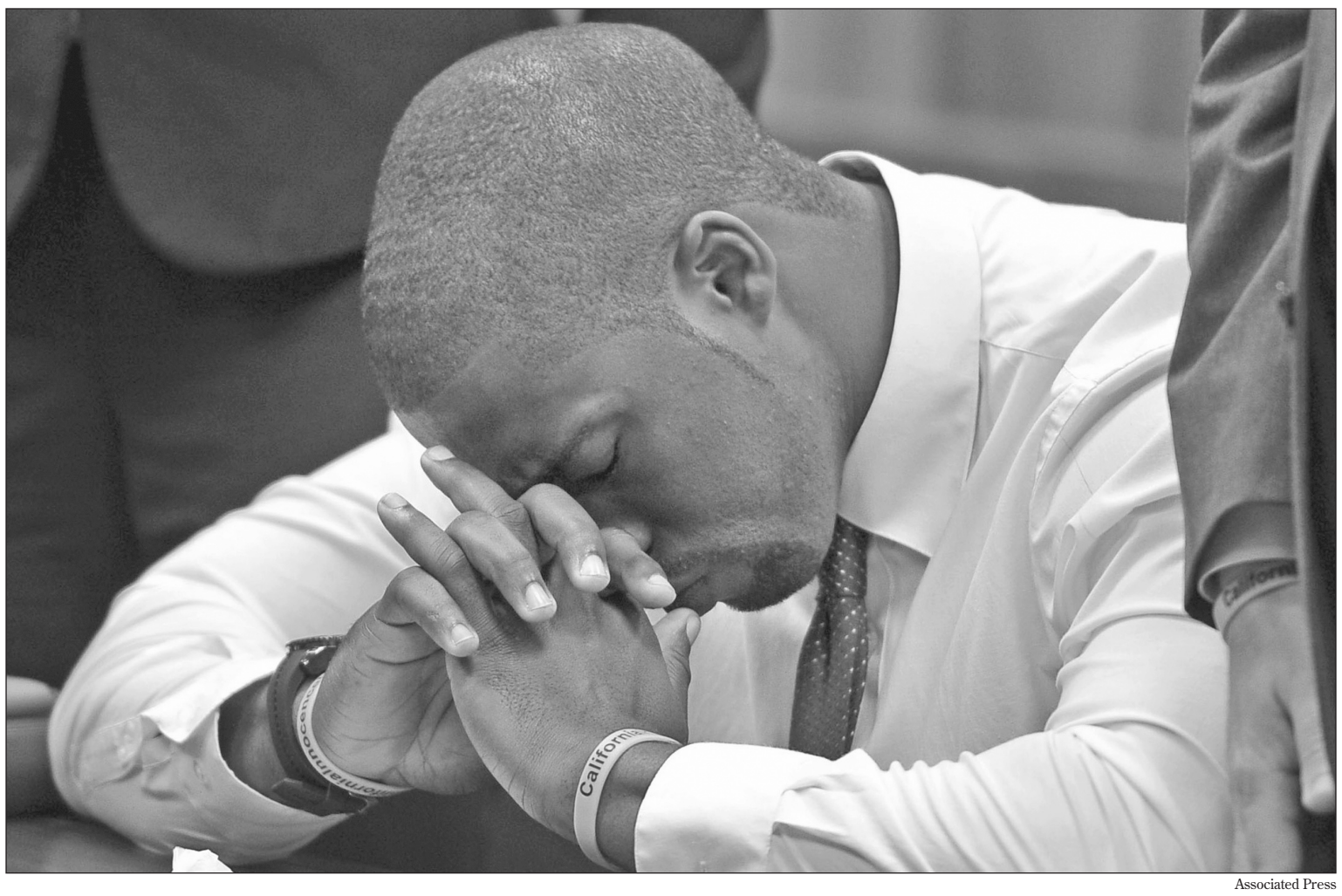
Exonerations up, but more work to do

By Linda Starr



Associated Press

Brian Banks weeps as his rape conviction is dismissed in 2012 in Long Beach. Facing a life in prison, Banks, then 16, had pleaded no contest. After his exoneration, he went on to play in the NFL.

While the record-breaking number of 87 exonerations reported in the 2013 summary of the National Registry of Exonerations is by itself remarkable, it was not the only piece of information in the report worth remarking upon. The data in the report provides rich insight into how the criminal justice system is adjusting to the now undeniable existence of wrongful convictions. It also exposes areas where the criminal justice system needs reforms to try and prevent the wrongful convictions from occurring.

The 87 exonerated people brings the total known from January 1989-December 2013 to 1,281, representing nearly 12,500 years of incarceration, excluding pretrial detention. The extraordinary human costs to these people and to their families cannot be calculated. There is an additional cost to our communities from these wrongful convictions: When the wrong person is prosecuted, the actual perpetrator remains free to continue to commit crimes against others — a huge societal cost. And there is also the fiscal cost. Nearly one-third of the 2013 exonerations were cases where no crime occurred, resulting in unwarranted and expensive prosecutions and litigation, not to mention the unnecessary costs to the state of needlessly incarcerating someone, often for decades.

Another interesting fact from the report is that 17 percent of the wrongful convictions resulted from guilty pleas. This statistic demonstrates that innocent people do in fact plead guilty — pleas that are extorted when they are confronted with long sentences because of enhancements and three-strikes laws that make taking a known, if unjust deal better than the risk of a guilty verdict and the accompanying excessive sentence.

While it is widely thought that DNA evidence is the primary means of exposing wrongful convictions, the report shows that DNA evidence played a role in only one-fifth of the 2013 exonerations. The percentage of exonerations based in whole or part on DNA has steadily decreased, while the total number of exonerations has increased. Obviously, the pool of cases with untested DNA is dwindling. But what we have learned from the DNA cases about the problems that contribute to wrongful convictions has given us the ability to identify those problems in cases where there is no DNA — the vast majority of cases.

The most encouraging fact from the report is the demonstrated continuing trend of cooperation by police or prosecutors in overturning wrongful convictions. In 2013, law enforcement cooperated with or initiated an exoneration in 38 percent of the cases. Some law enforcement appears to be moving past a rigid insistence that all convictions are valid to recognizing that the state's obligation to do justice includes overturning wrongful convictions. But it would be dangerous to become too sanguine about this. Law enforcement cooperation in exonerations alone is not enough. Official misconduct continues to be a disturbingly high contributor to wrongful convictions, appearing in 46 percent of cases. In December, 9th Circuit Chief Judge Alex Kozinski opened his dissent in *U.S v. Olsen*, 2013 DJDAR 16012 (9th Cir. 2013) (ord. denying reh'g en banc) by announcing that there is an epidemic of Brady violations in the land, continued to describe the great danger in ignoring and excusing such conduct, and called on judges to meet their obligation and address the problem, saying "Some prosecutors don't care about *Brady* because courts don't *make* them care."

And it is still the case that many prosecutors and police simply refuse even to consider the possibility that one of their offices' convictions might be wrongful. They do not reinvestigate a challenged case with an open mind, but seek only to defend the conviction and dismiss or ignore anything that calls the conviction into question. They often work for years to block an inmate's access to DNA testing or to information in the prosecution files. This prolongs an unjust incarceration when access leads to evidence that proves the inmate to be innocent and wastes resources litigating when cooperation would have disclosed the evidence that either supports or undermines the prosecution much sooner. Those prosecutors who have admirably confronted the issue, reinvestigated cases with an open mind, and established conviction integrity units must encourage their more resistant colleagues to do the same.

Most significantly, by analyzing the causes that contributed to the wrongful convictions, the report provides us the opportunity to institute the reforms that can help prevent them from occurring. This year, as in past years, mistaken eyewitness identification is a significant contributor to wrongful convictions. Some law enforcement agencies have abandoned the identification procedures known to result in less reliable identifications and now use universally known best practices. Others, including some of the state's largest, refuse to do so, clinging stubbornly to practices known to generate wrongful convictions.

And it cannot be ignored that of the 87 exonerations, one of those inmates was on death row. According to the report, death row exonerations have averaged at about 8 percent of known exonerations while representing only one-hundredth of 1 percent (.0001) of all felony convictions. Despite this fact, it is almost unfathomable that we not only continue to execute people but also seek to speed up the rate in which we do so.

Six of the 2013 exonerations were from California, making it fifth in order of states with the most exonerations. Four of the six were serving life sentences, and five of the six were black males. Of the six exonerations, five included mistaken eyewitness identification, three included official misconduct, and two included ineffective assistance of counsel. Our state would benefit from the adoption of best practices to reduce mistaken eyewitness identifications. It is encouraging that in half of the California cases, the district attorneys' offices cooperated with the efforts. However, it is also important to notice that, consistent with the national statistic, half of the California cases involved official misconduct.

The growing number of exonerations and the trends they demonstrate are reasons to feel encouraged about our progress in identifying and rectifying wrongful convictions. But we should not become complacent. If we fail to respond to what we have learned with the reforms needed to prevent wrongful convictions, we will have shamefully squandered those thousands of wasted years yet again.

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LINDA STARR
Northern California Innocence Project

Law firm 'growth' is an obsession — not a strategy

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by reducing partner rolls — not a strategy either.)

Law firms are a service business, with units of production being people. Growth typically entails adding people, supporting facilities and equipment, and that costs money. Usually the short term operating margins are reduced, as are distributable profits and cash reserves, while the firm invests capital to underwrite the investment and incurs increased expenses associated with growth. Raising rates and flogging more hours from people can improve margins and profits, but client limits have been reached for rates, and growing overcapacity/underutilization within many firms has seen hours per attorney decline. There is not a positive correlation in growth of headcount size with growth in profits per attorney, nor with improved quality of work. Bigger has not been better for clients or law firms, it has just been bigger.

Uncounted business experts through time have understood this, and while it may not be depicted on Trajan's Column, the consequences of "undisciplined pursuit of more" from the expansion of the Roman Empire might have found some place near the top to convey this lesson, amidst all the victorious battles with the Dacians.

"Growth" is not a proxy for health or success. Yet much of the advice law firms receive is that pursuing growth is a good thing. But law is not an enterprise in which growth in size always delivers growth in net distributable profits. Growth returns are often largely consumed with the persons added to the enterprise, and sometimes they take more than they add. Indeed, most law firms with a significant international network subsidize the foreign operations with domestic practices.

Having an office in a far flung locale doesn't mean the firm will now capture all of the work that firm clients operating in that locale have. Not without proof of excellence. Excellence is what resides within the minds and bodies of individuals. It can be developed, its potential within the individual unleashed, and its effectiveness enhanced with a culture of cooperation and teamwork. Recruiting, training, mentoring, promoting and retaining those people with excellence, and the potential for even greater abilities, is paramount. But excellence is not scalable. It doesn't come with size, only with the right people. Pushing people into practice silos and an "eat what you kill" survival mentality in a law firm diminishes or destroys the ability of the enterprise to attract, develop and retain that excellence — and can set the enterprise upon a path of self destruction.

Growing law firms have learned that hoped for economies of scale are smaller than projected or non-existent, and in some situations costs increase. Excellence at the levels clients demand does not reside within every added lawyer. Efficiencies are reduced, operating margins compress and profits fall. If not reversed that trend leads to a tipping point when talent leaves the firm because for the same or less contribution, greater income, security and stability are available elsewhere. The clients follow the excellence, perhaps to other big firms, boutiques or other spin outs. The growing empire vanishes. A "survivor bias" refreshes other firms with an injection of cash flow from the acquired talent and clients.

Notwithstanding the clear evidence that growth doesn't by itself serve to enhance the financial viability of the enterprise, there is a widespread obsession to grow. It must be driven by some need, otherwise it would not be present. Since growth is not positively linked to profit or excellence, neither explain why there is pressure to grow. It isn't linked to better service to clients — they aren't insisting that firms grow. Indeed, the better value proposition clients have been clear in expressing as what they want from their law firms — better, faster, cheaper — is pursued by relatively few law firms.

It is not a "bottom up" initiative. Lower ranks of associates, income partners and even equity partners are depressed with the addition of lateral talent above them. It is degrading to receive the message that the future of the firm depends not on who is in the firm now, but on legions of newcomers yet to be identified and hired.

How can firms be almost frantic in their efforts to pursue growth when such steps work adversely to profit, are not responsive to the changes that clients want, and are not driven by the rank-and-file attorneys who effectively must pay for it?

As it must be the leaders of the firms that have made the decision and push it to adoption, what conclusion could they come to that urgently mandates "growth"? What do they know, but have obviously not communicated fully, that growth does for the enterprise?

Growth delivers more bodies for leverage, as long as most added persons are below the point at which their compensation is less than their contribution to the profit pool. This delivers net distributable revenue to the few — typically 15 percent or less of the total equity partner population — at the top of the pyramid. Thus, growth will deliver higher distributions of income to a select few partners, even in a falling financial performance profile of the enterprise, where the profit pool is compressing overall. How is that possible? Because of the impact of the capital contribution infusions from the new equity lateral partners.

For a time this will work to sustain or even increase cash balances available for distribution even in a profit pool under siege due to increased costs. It is especially true where the firm has a cap on capital contributions at the higher end of the compensation scale, and withdrawing partners are paid out over a term of years.

Why manage a business for a future, when one can harvest a future now? Of course, you can't say that to the partners, so instead the message is: "We are going to grow and expand and be efficient and be successful all over the world."

Each one of those elements of growth, expansion, efficiency and success are steps or objectives, but they are not strategies. They do not provide a sustainable competitive advantage, an added value to the client and to the firm, or new market share. They are all easily copied by competitors and indeed the landscape of the market is flooded with competitors pursuing such non-strategy steps, to no demonstrable superior results for the firm or the clients. No matter how much effort goes into pursuing the approach, the organization dies. In the meantime, millions of additional dollars are withdrawn and distributed to a relatively small number of partners. That may be part of a deliberate plan, or the unintended consequence of the pursuit of a non-strategy by well-meaning but inept leadership, but the outcome is fundamentally the same. Just follow the cash distribution within the firm to get your answers.

Growth becomes absolutely critical because without it the organization's operations will seize up for lack of cash liquidity. Growth is not because the organization is healthy and successful; it is because it is sick.

And if that is correct, what does that imply for a segment of the industry today when "growth" is the mantra for success? As contrasted with success having as a characteristic the impact of some growth by the firm? Focus on the client demand, on where operating profit is delivered, on where value to the client that commands sound pricing for the law firm is where strategies are to be found. A few firms are doing it and making good progress. Hopefully more will turn to strategy that serves clients, and not rely on mistaken adventures that are little more than harvesting cash from their partners.

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