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DAILY APPELLATE REPORT

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Civil Procedure: Use of plaintiffs' names for characters during creation of television show episode is exercise of free speech entitled to anti-SLAPP protection. *Tamkin v. CBS Broadcasting Inc.,* C.A. 2nd/4, DAR p. 3285

Constitutional Law: Picketers' signs condemning country's political and moral conduct at soldier's funeral are protected by First Amendment because speech was of public concern. *Snyder v. Phelps,* U.S. Supreme Court, DAR p. 3307

Constitutional Law: Court errs in denying protesters' preliminary injunction against mall, which had rules that unlawfully prohibited picketing based on content of speech. *Best Friends Animal Society v. Macerich Westside Pavilion Property LLC,* C.A. 2nd/2, DAR p. 3324

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Criminal Law and Procedure: Court retains power over defendant because he was neither discharged nor sentenced to prison between probation revocation and arrest years later. *People v. Leiva,* C.A. 2nd/4, DAR p. 3278

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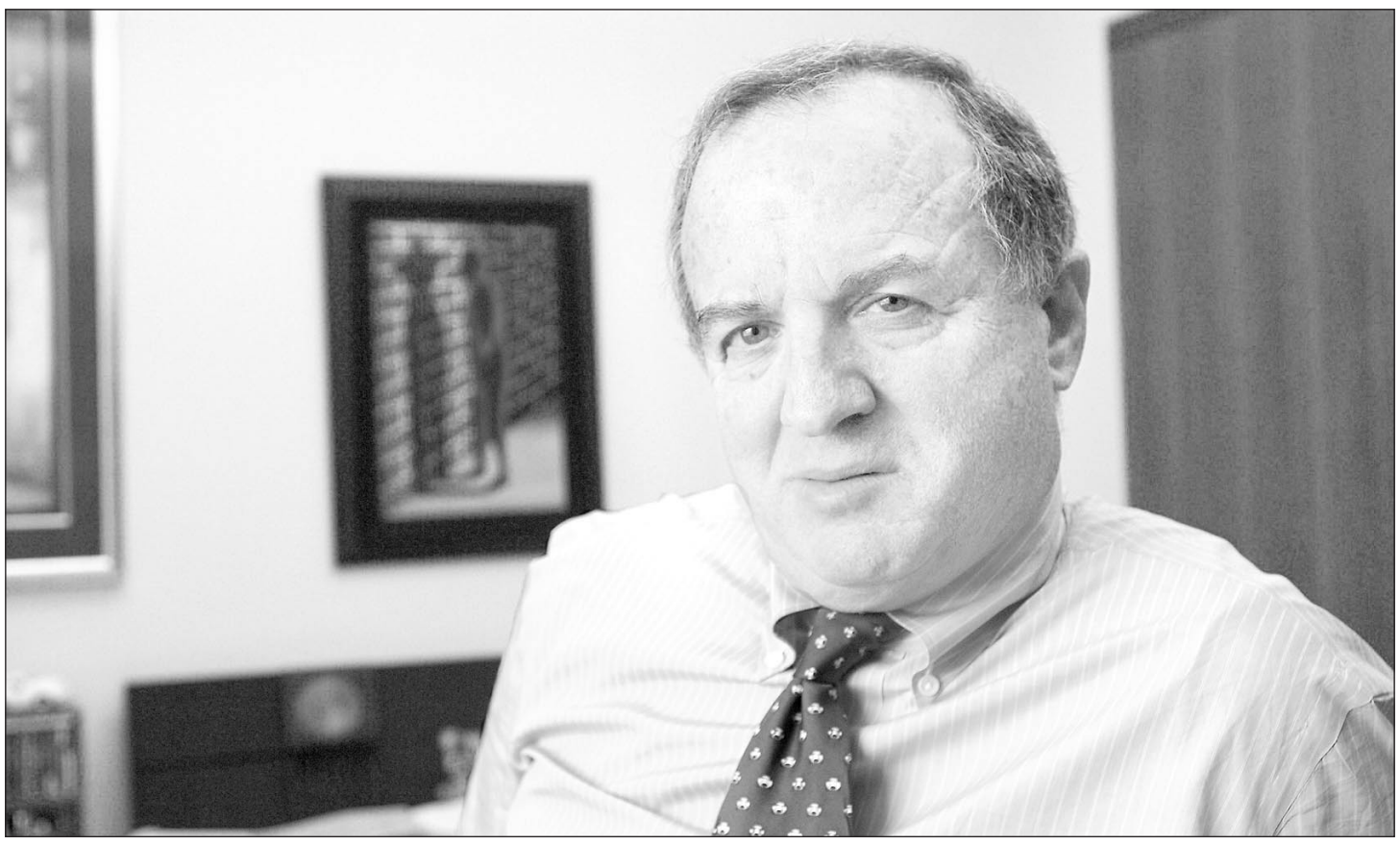

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San Francisco Superior Court Complex Litigation Judge Richard A. Kramer

Hip Replacement Litigation Will Be Heard in San Francisco

Some Lawyers Argued L.A. Should Handle The Hundreds of Cases

By Amy Yarbrough
Daily Journal Staff Writer

SAN FRANCISCO — San Francisco will most likely be home base for a glut of lawsuits against the makers of a recalled artificial hip.

On Wednesday, Superior Court Complex Litigation Judge Richard A. Kramer ruled the some 213 (and counting) state-court cases against DePuy Orthopaedics Inc. should be coordinated in San Francisco and any appeals heard by the 1st District Court of Appeal. But before he did, Kramer couldn't help be wowed by the nearly 50 lawyers who had crowded his courtroom for the hearing.

"Staggering, absolutely staggering," he said.

DePuy, its parent company Johnson & Johnson Services Inc., and two California doctors involved in the design and promotion of the ASR Hip Implant have been hit with lawsuit after lawsuit since the recall was announced on Aug. 26.

DePuy took the product off the market after evidence, including a study in the United Kingdom, revealed the device had a high fail rate and a large number of patients needed a second hip replacement, known as revision surgery. Plaintiffs allege in the suits that DePuy was aware of problems with their product which led them to suffer complications ranging from pain and loosening to high levels of metal ions in the body.

More than 300 cases filed in federal courts have been consolidated and coordinated and are pending before U.S. District Court Judge David Katz in Toledo, Ohio. But whether the state-court cases would be coordinated out of San Francisco or Los Angeles was still up in the air until Wednesday's hearing.

James G. O'Callahan, with Girardi Keese in Los Angeles, argued the cases should be coordinated out of Los Angeles County Superior Court, noting the huge size of the court and its significant resources.

> 'I would not assign something to San Francisco if I thought I couldn't do it.'
>
> — Judge Richard A. Kramer

"It seems to me you have an enormous amount to do," O'Callahan told Kramer. "It's important these cases get handled in an expeditious manner."

Kramer said there was "no wrong decision to be made," in choosing either court. But he noted that the majority of the state court cases to date have been filed in San Francisco and that one of the defendant doctors, Dr. Thomas Parker Vail, is based in the city.

"I would not assign something to San Francisco if I thought I couldn't do it," Kramer said.

Kramer, whose ruling must still be approved by the Judicial Council, said he envisions acting as the coordination judge for all of the discovery and pretrial hearings but that the cases would likely be sent back to the county where they were filed for trial.

Kramer pleased many in the courtroom when he suggested the oldest of the suits against DePuy could proceed to trial as early as September. *Magowan v. Depuy Orthopaedics*, 500668.

That case, filed on behalf of three people who received ASR Hip Implants before the official notice of the recall, already has a Sept. 12 trial date set. The suit, like many of the others, alleges that the plaintiffs' artificial hips became loose, caused them severe pain and that the device's metal-on-metal construction caused dangerous metal ions to be sloughed off into their bodies.

Michael A. Kelly, whose firm Walkup, Melodia, Kelly & Schoenberger is handling *Magowan* and dozens of other DePuy cases, said he was pleased Kramer wanted to move the first case along and said that shouldn't be a problem because he expected the discovery process to be fairly simple.

"I don't think this is very complicated, your honor," Kelly said. "These people either had a problem with the hip that is traceable to the hip, or they didn't. I think we are absolutely ready to gear up, do the discovery."

Drinker Biddle & Reath LLP Partner Michelle Childers, who is representing DePuy, said she had doubts the first trial could take place as early as September. She told Kramer she was nonetheless pleased the cases would be consolidated in San Francisco.

"On the defense … we believe this court has ample resources," Childers said.

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Securities Cases No Longer Yield Fee Lodestars

By Gabe Friedman
Daily Journal Staff Writer

LOS ANGELES — As dozens of major investors were clawing their way out of a $624 million shareholder settlement with Countrywide Financial last fall, plaintiffs' lawyers at Labaton Sucharow LLP scrambled to preserve the deal they'd crafted — including $47.3 million in attorney fees.

By the time a federal judge approved the final Countrywide settlement on Friday, Labaton Sucharow shaved nearly $1 million more off their award request, seeking $46.4 million in fees.

Although such fees might warrant celebration in many cases, that's not how observers of securities litigation received the award. At 7.7 percent of the total recovery in the case, it marks one of the lowest attorney-fee requests for a securities class-action settlement and just two-thirds of the firm's lodestar — the amount of money equal to the number of hours worked multiplied by the hourly rate.

Securities litigation experts said that low percentage is part of a nationwide downward trend in fee requests for such cases due to several factors. These include the increasing frequency that large investors will opt out of the class and directly litigate, the rise of sophisticated investor plaintiffs who negotiate tighter fee schedules, and the glut of plaintiffs' firms flooding the securities bar.

In their class action, institutional investors accused former Countrywide executives of hiding the alarming risk that the real estate downturn could have on the company until it was too late. Countrywide, once the nation's largest mortgage lender, was purchased at a

See Page 6 — SECURITIES

Another Howrey Group Splinters, Now to Pillsbury

By Sara Randazzo
Daily Journal Staff Writer

Partners continue to stream toward the exits at Howrey LLP, where a shrinking number of attorneys are still waiting to hear final confirmation from Winston & Strawn LLP on offers made to more than 75 percent of the Howrey partnership in late January.

Construction partners John R. Heisse II in San Francisco and Robert B. Thum in Los Angeles are the latest California departures. The two moved to Pillsbury Winthrop Shaw Pittman LLP this week, along with 13 other construction attorneys in Washington, D.C., New York and California.

Two additional Howrey construction attorneys, partner John W. Ralls and counsel Samuel W. Niece, opened their own firm Tuesday in Palo Alto: Ralls & Niece LLP, focused on construction law.

The defections follow the departure in mid-February of nine construction partners to Jones Day in San Francisco and Washington, D.C., led on the West Coast by Stephen V. O'Neal and David M. Buoncristiani.

Paul W. Berning in San Francisco is the only construction partner left at Howrey in California. He said Wednesday he has a couple of options pending and expects to make a decision soon.

The 40-person construction group Howrey acquired in fall 2008 from the now-defunct Thelen LLP didn't expect to disband, Heisse said Wednesday, but client conflicts prevented all of the attorneys from going to one firm. A core of the group had practiced together for 20 years, Thum said.

"There's absolutely no acrimony amongst the group," Heisse said. "You don't always get to do exactly what you want."

He and the other members of the construction group received offers from Winston — where Heisse said many of his former

See Page 6 — HOWREY

GUEST COLUMN

With lateral recruiting on the rise, what does this really mean in the context of partner equity accounts? By **Edwin B. Reeser**

Now that the cards are dealt and the ante is up, would you mind telling me what game it is we are playing? Again?

FIRST IN A FIVE PART SERIES

This series explores some of the current illusions and realities of partner capital and capital accounts treatment in some large law firms. It is intended to be illustrative of issues and does not present the profile of any specific individual firm, past or present.

With the broadly announced emphasis on lateral recruiting this year by many firms, let's take a look at what that may entail for partners, and what it means for firms, with respect to the partner capital account.

Mary Doe is a $750,000 annual forecast compensation level equity partner at a large law firm, with a 15-year tenure. Published profits per partner (PPP) for her firm are $1.2 million. Mary is about the "middle of the pack" for compensation as among partners. Her monthly draw has been measured at 60 percent of forecast compensation, less parking, PPO health insurance premiums and other partner charges, which aggregate about $2,000 per month. The firm has adopted for 2008 and the future a "more conservative" draw ratio of 55 percent.

Mary has a current portable book of client revenue that is approximately $2.2 million, which has varied between $1.8 million in 2004 and $2.75 million per year over the past six years, peaking in 2007 and declining about 20 percent from 2007 to 2009, remaining flat in 2010. Her forecast income for 2008 had been $910,000, but actually was $728,000 due to firm-wide profitability pressures brought about by the recession, and in 2009 it declined again to $715,000 compared to forecast of $800,000. With cost cutting and partner headcount reductions by the firm, she rebound-

See Page 7 — EQUITY

MORE NEWS

Litigation

San Diego County Judge Dwayne K. Moring draws on his time as a prosecutor and a criminal defense lawyer when dealing with the young defendants in his courtroom. **Judicial Profile, Page 2**

Shopping mall operators cannot discriminate against demonstrators by setting different rules for who can protest close to a targeted store, a state court of appeal has ruled. **Page 3**

Government

L.A. District Attorney Steve Cooley will appoint Jacquelyn Lacey to chief deputy, giving her campaign to succeed Cooley a boost. **Page 4**

Judicial nominee Goodwin Liu, of UC Berkeley School of Law, on Wednesday faced off against Republican senators for the second time in a year. **Page 4**

An amendment that would allow the U.S. Patent and Trademark Office to keep the fees it collects passed the Senate on Tuesday. **Page 4**

Corporate

To ensure transparency, proxy statements should provide shareholders with a clear explanation behind each compensation decision, write David McFarlane of Snell & Wilmer LLP and Samuel Krause. **Page 5**

What companies should consider now that the financial opportunities provided by IPOs are less attractive now than in previous years. By Thad A. Davis and Kyle A. Withers of Ropes & Gray. **Page 5**

The U.S. and the United Kingdom have taken recent steps to ramp up their anti-corruption regimes, explains Bethany Hengsbach of Sheppard Mullin Richter & Hampton LLP. **Page 6**

Jonathan R. Fitzgarrald of Greenberg Glusker Fields discusses effective strategies for keeping the peace in your law firm. **Page 7**

Who's Holding You Hostage? How to Navigate Law Firm Politics

By Jonathan R. Fitzgarrald

Perfect scenario: Your state's legal publication is accepting nominations for its annual "Attorney of the Year" issue. As one who oversees some aspect of marketing for your firm, and in hopes of someone from your firm being included, you work with three of the attorneys in your office on their individual submissions. Upon publication, you are elated to find out that Mike Rogers, who recently made partner, was chosen. You hear through the grapevine that an attorney more senior to Mike, Harry Robbins, who was also submitted for the award, is perplexed by this "oversight," and he wants a meeting with you to discuss why he was passed over. You are subjected to 20 questions that imply you forgot to mention important matters or did not represent Harry well in the nomination process. Harry asks for a copy of the submission and your correspondence on his behalf.

Despite your best intentions, you are being held hostage by a situation that is largely outside of your control...or is it?

At some point during your legal career, emotionally charged situations — similar to the aforementioned — are sure to surface. Whether it is internally with one of your peers or externally with a client, how you handle these situations could mean the difference between an ongoing, successful future or you deflated on your therapist's couch.

Having directed the marketing at various law firms for the past 11 years, I have personally witnessed more *hairy* situations than I would like to remember. As a result, I have identified five time-tested techniques for successfully navigating the politics of a law firm.

Avoid knee-jerk reactions. Working environments ripe with high achievers require preparedness and professionalism at all times. Heated situations typically involve someone at or above your pay grade staring you down (or barking at you over the phone), demanding answers to questions you may or may not be prepared to answer on the spot. Whenever possible, avoid becoming defensive by buying yourself some time.

> Success in any given situation is significantly increased if you are perceived as unbiased and neutral.

Listen to the individual, let them know that resolving their concern is your priority, and ask if you can get back to them in a specified amount of time. Doing so will allow you to gather your thoughts and examine the facts of the situation before having to respond or propose an appropriate solution. Lapsed time also tends to reduce "heat of the moment" emotions.

Remember role and objective. Success in any given situation is significantly increased if you are perceived as unbiased and neutral. This is best demonstrated by assuming the role of moderator versus that of decision maker. As opportunities present themselves, you are the vehicle between the decision makers (e.g., management committee, practice group leader, etc.) and those attorneys best positioned for the specific opportunity.

In the "Attorney of the Year" example, it is reasonable to assume that the firm had more than three attorneys interested in being considered for the award. It is also not too far fetched to anticipate hurt feelings by someone who was not chosen for consideration. By assuming the role of moderator, you are better positioned to appropriately deal with any recoil that may result from someone unhappy with the outcome.

Also, if spotlighting an attorney's accomplishments was the original intent (as was the case for Harry Robbins), focus on upcoming opportunities. Professional golfer Jack Nicklaus once said, "Focus on remedies, not faults." Brainstorm ways to distinguish Harry from his competitors. In his submission, include a client testimonial, ask one of Harry's esteemed contacts to make the recommendation, or concentrate on one of Harry's unique characteristics that will separate him from the pack.

Focusing on your role and the overall objective of the initiative will demonstrate your ability to maintain the firm's business objectives and reputation, while properly advocating on behalf of the firm's attorneys to position them in the best possible light.

Face the facts. Situations perceived to have gone wrong are typically laced with emotion, ego and hype. In some cases, attorney frustration is amplified as a result of their reputation "on the line," they believe their issue is not being heard or sufficiently considered, or they anticipate embarrassment. Ultimately, their perception quickly becomes your reality.

It is imperative in any situation to identify and work only with the known facts. Stripping the situation of unnecessary emotion will allow a reasonable solution to surface.

As early in the process as possible, it is critical to properly communicate the aspects of the opportunity over which you have control (e.g., the content and timeliness of the attorney's submission), as well as those aspects you do not (e.g., the final selection process). Proper expectation management demonstrates your ability to appropriately position the attorney, while diffusing any emotion that may result by the attorney not being chosen.

Maintain a paper trail. Partner "A" misses his shuttle to the airport = $25. Partner "A" misses his international flight = $1,500. Partner "A" misses the potential client meeting = $500,000. The e-mail paper trail from Partner "A" saying, *"I'll make my own travel arrangements"* = priceless!

No one wants to get into a "he said, she said" situation that could potentially compromise your credibility and good standing with the firm. Whether you detect a problematic situation or not, consider it good practice management to summarize via e-mail significant conversations and action items discussed. Doing so not only minimizes or eliminates the chance of you taking the heat for something you did not do, but more importantly improves communication by ensuring all parties involved are on the same page.

Provide a professional opinion or solution. Creative problem solvers are always in demand. Position yourself as a trusted advisor by being prepared to share your professional opinion or solution when solicited. Whether or not your proposal is employed, something you suggest may ultimately lead to the final course of action.

Frederick L. Collins wrote, "There are two types of people — those who come into a room and say, "Well, here I am!" and those who come in and say, "Ah, there you are."

More than just a professional with marketing responsibilities, you are a (crisis) negotiator. Your success is predicated on your ability in any given situation to "talk someone off the ledge." The stronger your relationship among those individuals you serve, the more persuasive and effective you can be. Strive to know your constituents on a more personal level. By doing so, you will gain a greater respect for them and a better understanding of how to serve them. In turn, they will see you coming and say, "Ah, there you are!"

Jonathan R. Fitzgarrald directs the business development and marketing for Greenberg Glusker Fields Claman & Machtinger LLP, a Los Angeles-based full service law firm specializing in entertainment and real estate law. He is President Elect of the Legal Marketing Association's Los Angeles Chapter.

Equity Partner Capital: How Does It Really Work for the Partner?

Continued from page 1

2009, though firm revenues were basically flat.

Mary has always been a model citizen in the partnership, submitting timesheets daily, getting her bills out timely each month and avoiding costly write-offs or collection problems. Her monthly billings average $185,000, and she carries an average accounts receivable inventory of between $350,000 and $450,000 through the year. She regularly bills between 1,900 and 2,000 hours per year of her own time at $650 per hour, of which 70 percent is on her own matters and the balance is for other partner's clients. She keeps one associate busy full-time and two others busy about 50 percent, a total of about 4,000 hours of associate work weighted at $350 per hour. She also puts in about 60 hours per year of pro bono time, and serves on two administrative committees of the firm.

Mary's firm required a 35 percent of projected income capital account, which in 2004 was $220,500 based on a $630,000 forecast income. She received a "raise" in 2006 to $800,000 after two years of collections at $2.4 million (with an increase in capital to $280,000), and in 2008 a forecast compensation of $910,000 (with an increase in capital to $364,000 and a new partner capital account requirement of 40 percent of forecast income) based upon her $2.75 million collection performance and expectations that it would stay stable or increase. Mary's firm tends to lag a bit on giving raises in income, stating that it is better to be conservative in making increases, but in the last three years has seemed to be willing to make decreases in income immediately with any drop in performance by a partner.

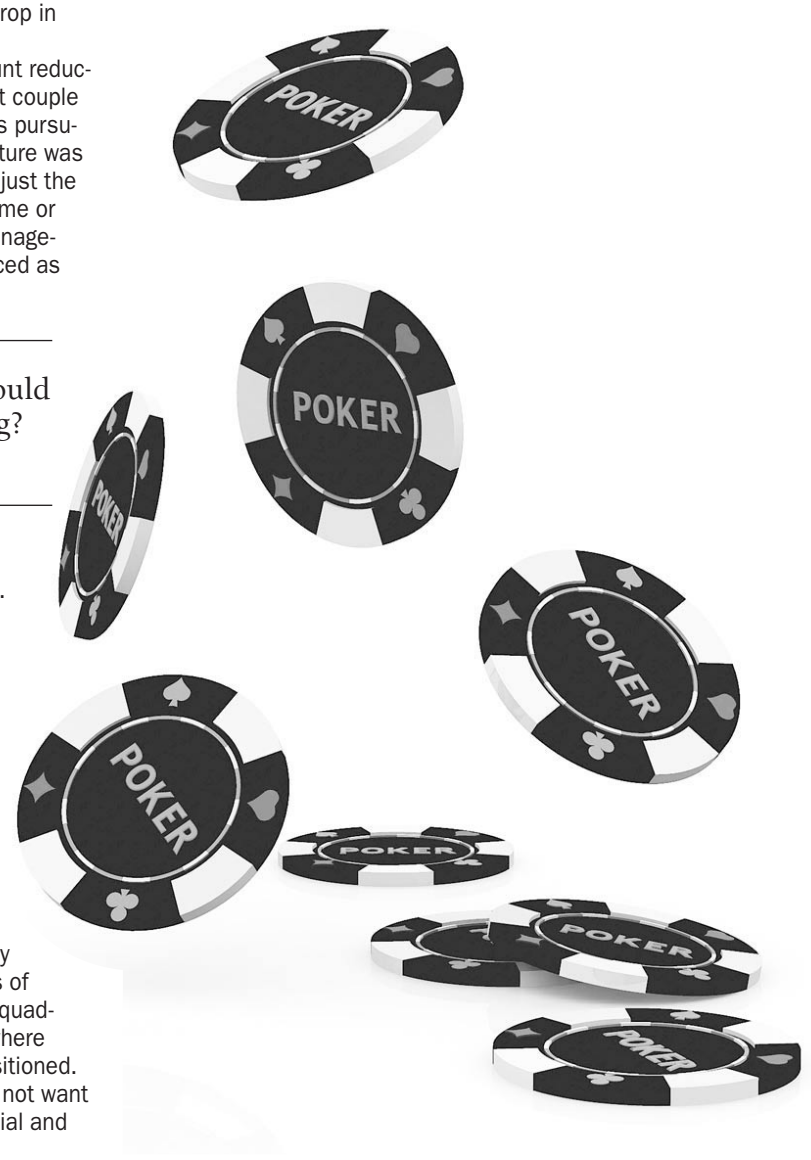
The firm has had some disruption internally, with a net headcount reduction among the associate ranks of about 15 percent over the past couple of years. There was a net decrease last year of 12 equity partners pursuant to an announced strategic restructuring, but in fact the departure was 40 partners and the aggressive lateral addition of 28 partners in just the last year. Another 10 partners were converted from equity to income or contract partner status. It is not always clear to Mary whether management desired all of the departures, though invariably it is announced as being so.

> Now that the cards are dealt and the ante is up, would you mind telling me what game it is we are playing? Again?

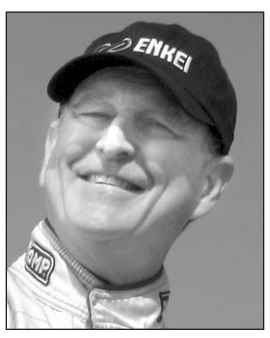
The firm had raised hourly rates by an average of 6 percent per year from 2003 to 2008, but kept them flat for the last two years. Mary's hourly rate was about $500 per hour in 2003. Like many partners, Mary is under hourly rate pressure from her clients who are trying to cope with the financial adversities brought upon by the economic recession. She is well regarded in the market place, but her rate is already perhaps $50-$80 per hour higher than many capable and recognized professionals she competes directly with. Her clients are loyal and appreciative, but have been more vocal than ever that they cannot consider sending to her all of the types of matters they might unless there were lower rate arrangements.

Such types of work have been labeled by management as "commodity" work not in keeping with the strategic plan adopted in 2007 at the firm's annual meeting after a presentation by a famous consulting firm that went on for 30 minutes with dozens of tables, curves, lists of statistics and graphs of firms clustered in quadrants, showing relative financial performance of other firms and where their firm presently was positioned and where it needed to be positioned. Copies are not available for partners because management does not want it leaked to any infamous legal tabloid Web sites due to confidential and sensitive content.

Mary has made a request for rate accommodations to take on this potential additional work — although it is a lower rate, she is confident that it will be comfortably profitable. But management has rejected this. Mary does not do the type of work in the four practice areas that have been highlighted as the emerging backbone of the future firm. In fact, nobody in her California office does that type of work. She is now worried about losing existing work based on rate considerations, and is under pressure to raise her rates to $700 this year, a potentially critical blow for her business book.



It is clear from management that she will have further compensation reduction if she is not able to produce a client roster that can pay the rates this firm expects of its partners, based upon the vision of the firm's future practice composition and compensation targets that management has outlined to the partners, which is held out as the mandate for the direction of the firm. The plan was adopted by a roll call vote at the annual meeting and Mary voted in favor, but mostly because management said it was good, the consultants said it was good, certain key partners said it was good and she really does not get into that stuff anyway. Voting "no" would be akin to being the tallest blade of grass when the lawnmower arrived. Besides, an office in London sounded kind of cool.



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 has served on the executive committees and as an office managing partner of firms ranging from 25 to over 800 lawyers in size.