

Book Review: How The Mighty Fall

By Edwin Reeser

Jim Collins, renowned business consultant and author of "Built to Last" and "Good to Great," identifies five major stages of decline of a major business organization: (1) Hubris Born of Success; (2) Undisciplined Pursuit of More; (3) Denial of Risk and Peril; (4) Grasping for Salvation; (5) Capitulation to Irrelevance or Death.

His book, "How the Mighty Fall," gives detailed perspectives on each stage, including the critically important fourth — a characteristic of a large portion of Big Law firms today. Apply these five factors to the recently demised large law firms you are familiar with. Then apply them to your own. The next five months, in the environment of continued pressures brought in part by difficult economies, exacerbated by years of bad decisions by the leadership of some firms, may prove to be one of the most challenging in the last several decades.

STAGE 1: Hubris Born of Success

Success Entitlement, Arrogance: Success is viewed as "deserved," rather than fortuitous, fleeting, or even hard earned in the face of daunting odds; people begin to believe that success will continue almost no matter what the organization decides to do, or not to do.

Neglect of a Primary Flywheel: Distracted by extraneous threats, adventures and opportunities, leaders neglect a primary flywheel, failing to renew it with the same creative intensity that made it great in the first place.

Collins observes that "reorganizations and restructurings can create a false sense that you're actually doing something productive. ... It's a bit like responding to a severe heart condition or a cancer diagnosis by rearranging your living room."

"What" Replaces "Why": The rhetoric of success ("We're successful because we do these specific things") replaces understanding and insight ("We're successful because we understand why we do these specific things and under what conditions they would no longer work").

Decline in Learning Orientation: Leaders lose the inquisitiveness and learning orientation that mark those truly great individuals who, no matter how successful they become, maintain a learning curve as steep as when they first began their careers.

Discounting the Role of Luck: Instead of acknowledging that luck and fortuitous events might have played a helpful role, people begin to presume that success is due entirely

to the superior qualities of the enterprise and its leadership.

Leadership transition is a key factor here. A smooth transition of power to a homegrown insider who deeply understands the drivers of the firm's success and exemplifies the "cultural DNA" is greatly preferred. A common mistake is bringing in an outsider as successor, a "visionary" leader who boldly redefines the company, often in a quest for quick growth which catapults the company into the second stage of decline almost immediately.

STAGE 2: Undisciplined Pursuit of More

Unsustainable Quest for Growth, Confusing Big with Great: Success creates pressure for more growth, setting up a vicious cycle of expectations; this strains people, the culture, and systems to the breaking point; unable to deliver consistent tactical excellence, the institution frays at the edges.

Undisciplined Discontinuous Leaps:

The enterprise makes dramatic moves that fail at least one of the following three tests: (1) Do they ignite passion and fit with the company's core values? (2) Can the organization be the best in the world at these activities or in these arenas? (3) Will these activities help drive the organization's economic or resource engine?

Declining Proportion of Right People in Key Seats: There is a declining proportion of "right" people in key seats, because of losing the right people and/or growing beyond the organization's ability to get enough people to execute on that growth with excellence.

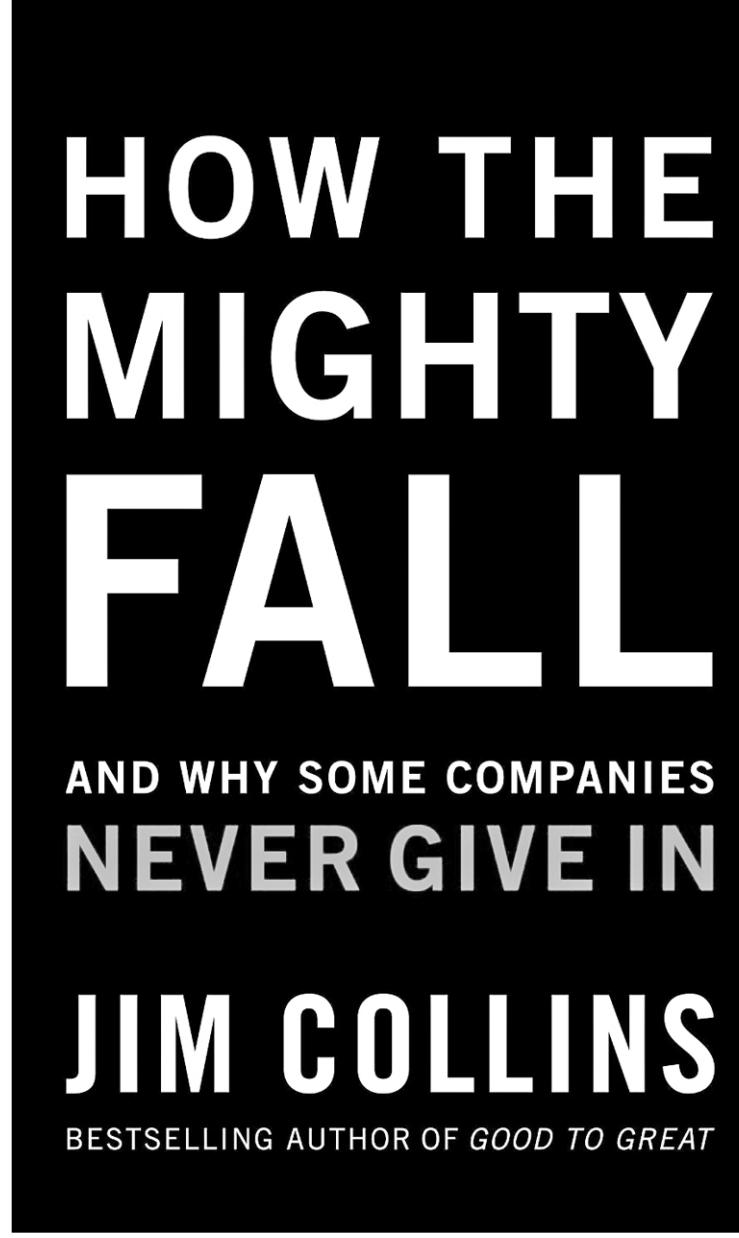
Easy Cash Erodes Cost Discipline: The organization responds to increasing costs by increasing prices and revenues rather than increasing discipline.

Bureaucracy Subverts Discipline: A system of bureaucratic rules subverts the ethic of freedom and responsibility that marks a culture of discipline; people increasingly think in terms of "jobs" rather than "responsibilities."

Problematic Succession of Power: The organization experiences leadership-transition difficulties, be they in the form of poor succession planning, failure to groom excellent leaders from within, political turmoil, bad luck, or an unwise selection of successors.

Personal Interests Placed Above Organizational Interests: People in power allocate more for themselves or their constituents—more money, more privileges, more fame, more of the spoils of success-seeking to capitalize as much as possible in the short term, rather than investing primarily in building for greatness decades into the future.

Collins' concludes this introduction to the second stage of decline by stating, "the evidence leads me to this sobering conclusion: while no leader can single-handedly build an enduring great company, the wrong leader vested with power can almost single-handedly bring a company down."



STAGE 3: Denial of Risk and Peril

Amplify the Positive, Discount the Negative: There is a tendency to discount or explain away negative data rather than presume that something is wrong with the company; leaders highlight and amplify external praise and publicity.

Big Bets and Bold Goals without Empirical Validation: Leaders set audacious goals and/or make big bets that aren't based on accumulated experience, or worse, that fly in the face of the facts.

Incurring Huge Downside Risk Based on Ambiguous Data: When faced with ambiguous data and decisions that have a potentially severe or catastrophic downside, leaders take a positive view of the data and run the risk of blowing a hole "below the waterline."

Erosion of Healthy Team Dynamics: There is a marked decline in the quality and amount of dialogue and debate; there is a shift toward consensus or dictatorial management rather than a process of argument and disagreement followed by unified commitment to execute decisions.

Externalizing Blame: Rather than accept full responsibility for setbacks and failures, leaders point to external factors or other people to affix blame.

Obsessive Reorganizations: Rather

than confront the brutal realities, the enterprise chronically reorganizes; people are increasingly preoccupied with internal politics rather than external conditions.

Imperious Detachment: Those in power become more imperious and detached; symbols and perks of executive-class status amplify detachment; plush new office buildings may disconnect executives from daily life.

Collins quotes the Stanford business school professor Bill Lazier, who imparts the lesson that companies do not fail because of a lack of earnings — they fail from a lack of cash.

Collins observes that "reorganizations and restructurings can create a false sense that you're actually doing something productive. ... It's a bit like responding to a severe heart condition or a cancer diagnosis by rearranging your living room. There is no organizational utopia. All organizational structures have trade-offs, and every type of organization has inefficiencies. We have no evidence from our research that

the defendants eligible for resentencing are serving terms that are now illegal. Further, the parole standard also involves "circumstances tending to show suitability" that are not in the three strikes statute. 16 California Administrative Code Section 2281(d) (1-9).

Defense attorneys will need to be careful to address 'the type' of past offenses. A history of non-strike offenses, such as misdemeanor offenses against women or children, or drunk driving offenses, might show a pattern of public risk crimes.

There are a number of other issues. If the current third strike is a minor felony, but the defendant uses a gun or deadly weapon or "intended" to inflict GBI, then, even if a special allegation for weapons or GBI cannot be filed, the defendant is still precluded from receiving second strike sentencing. This is true even if the defendant inflicted no injury at all, or had no capacity to inflict any injury. This applies to future third strike defendants and those now seeking resentencing.

The "term" on resentencing

any one structure is ideal in all situations, and no form of reorganization can make risk and peril melt away."

STAGE 4: Grasping for Salvation

Here are the markers that identify Stage 4 according to Mr. Collins (and which I think a significant number of firms exhibit glaringly):

A series of "silver bullets": There is a tendency to make dramatic, big moves, such as a "game changing" acquisition or a discontinuous leap into a new strategy or an exciting innovation, in an attempt to quickly catalyze a breakthrough—and then to do it again and again, lurching about from program to program, goal to goal, strategy to strategy, in a pattern of chronic inconsistency.

Grasping for a "Leader-As-Savior": The board responds to threats and setbacks by searching for a charismatic leader and/or outside savior.

Panic and Haste: Instead of being calm, deliberate, and disciplined, people exhibit hasty, reactive behavior, bordering on panic.

Radical Change and "Revolution" with Fanfare: The language of "revolution" and "radical" change characterizes the new era. New programs! New cultures! New strategies! Leaders engage in hoopla, spending a lot of energy trying to align and "motivate" people, engaging in buzzwords and taglines.

Hype Precedes Results: Instead of setting expectations low—underscoring the duration and difficulty of the turn-around, leaders hype their visions; they "sell the future" to compensate for the lack of current results, initiating a pattern of over-promising and under-delivering.

Initial Upswing Followed by Disappointments: There is an initial burst of positive results, but they do not last; dashed hope follows dashed hope; the organization achieves no buildup, no cumulative momentum.

Confusion and Cynicism: People cannot easily articulate what the organization stands for; core values have eroded to the point of irrelevance; the organization has become "just another place to work" a place to get a paycheck; people lose faith in their ability to triumph and prevail. Instead of passionately believing in the organization's core values and purpose, people become distrustful, regarding visions and values as little more than PR and rhetoric.

Chronic Restructuring and Erosion of Financial Strength: Each failed initiative drains resources; cash flow and financial liquidity begin to decline; the organization undergoes multiple restructurings; options narrow and strategic decisions are increasingly dictated by circumstance.

Not all of the markers need apply for a company to fall into this characterization, but the presence of more than a couple should be cause for alarm to a company that it may be in, or sliding into, this very difficult situation. Many major law firms are in this position in my view. A distinct negative correlation is found by Collins between building great companies and going outside for a CEO.

STAGE 5: Capitulation to Irrelevance or Death

"If you have a clear and inspired purpose built upon solid core values, then the noble course may be to fight on, to reverse decline, and to try to rekindle greatness. ... The path to recovery lies first and foremost in returning to sound management practices and rigorous strategic thinking."

Critical to survival, is the role of cash. "You need enough resources to continue the fight. If you lose the ability to make strategic choices, forced into short-term survival decisions that cripple the enterprise, then the odds of full recovery become increasingly remote." Collins quotes the Stanford business school professor Bill Lazier, who imparts the lesson that companies do not fail because of a lack of earnings — they fail from a lack of cash. It is possible to be profitable and bankrupt. This is if anything *tenfold* the case with law firms (my perspective, not that of Collins, who makes no mention of law firms in his study), which as a type of enterprise are powerful cash generating engines, where the critical factor is not one of being profitable, but of being able to distribute enough cash to stakeholders each year to hold the colony together — without weakening the enterprise so completely that it jeopardizes its ability to survive another year. The last marker that is so very critical: never-ever-give up on your core values.

"How the Mighty Fall" not have been written with a focus on the profession of law, but now that law has been trying to grow into big business, the lessons of big business are worth noting before it is too late to avoid learning the hard way.

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Pasadena

Breaking down the three strikes initiative

By Jeffrey A. Aaron

The popular conception of the Proposition 36, the Three Strikes Reform Act of 2012, is that defendants with two strikes would not receive life sentences in future cases if their third felony is non-serious or non-violent, and prisoners serving life sentences for third strikes that were non-violent or non-serious would be resentenced, but this is not completely true. Under Penal Code Sections 667 and 1170.12, these defendants will not get second strike sentencing for their third offense if their current felony or one of their past felonies is among the crimes described in the statutes - even if that offense is not a strike. The changes to PC 667 and 1170.12 largely mirror one another, but a completely new Penal Code section, PC 1170.126, describes the resentencing process. Defendants cannot be resentenced, however, if their third strike or one of their past offenses is among the enumerated crimes.

The current offenses preclud-

ing third strike sentencing are in PC 667(e)(2)(C)(i-iii) and PC 1170.12(c)(2)(C)(i-iii); and the past offenses in subsection (iv). Both must be pled and proven. The current offenses are controlled substance felonies with weight enhancements; a host of sexual offenses; and those offenses in which the defendant used a gun, was armed with a gun or deadly weapon, "or intended to cause great bodily injury [GBI]." There are eight categories of past offenses, including "sexually violent offenses" and various assault and homicide crimes.

The resentencing process in PC 1170.126 is simple. The petition for resentencing can be filed only by persons who would not receive life under the new law, and, absent good cause, within two years of the effective date. Petitioners file in the same court that did the original sentencing.

Their petition must list all the strike convictions resulting in the present term, and all the prior convictions pled and proven. If a defendant serving a third strike sentence of life is not excluded because of his

current or past offenses, he must be resentenced.

The only exception to resentencing is if the defendant poses "an unreasonable risk of danger to public safety." When exercising its discretion to make this finding, the court "may" consider the defendant's criminal history and the types of crimes; the extent of the victims' injuries; the length of prior prison terms; the remoteness of the crimes; and the defendant's "disciplinary record and record of rehabilitation." Finally, a catch-all provision allows the court to consider "[a]ny other evidence" that it considers relevant. Resentencing constitutes a "post-conviction release proceeding" pursuant Article I, Section 28(b)(7), of the state constitution, requiring reasonable notice to victims and granting a right to attend.

The most obvious resentencing issue involves the determination of "an unreasonable risk of public safety." This is essentially a parole standard. The Board of Prison Terms shall deny parole to a life prisoner "if in the judgment of the panel the prisoner will pose an unreasonable risk of danger to society if released from prison." 15 California Administrative Code Sections 2281(a), 2402. It is likely be litigated in three strikes cases since, in the parole context, it has been debated in the California Supreme Court for some time. See *In re Shaputis*, 53 Cal. 4th 192, 209, 215 (2011) (referencing cases). The defense should argue that these cases involve life prisoners seeking parole from valid life terms while

the defendants eligible for resentencing are serving terms that are now illegal. Further, the parole standard also involves "circumstances tending to show suitability" that are not in the three strikes statute. 16 California Administrative Code Section 2281(d) (1-9).

Defense attorneys will need to be careful to address 'the type' of past offenses. A history of non-strike offenses, such as misdemeanor offenses against women or children, or drunk driving offenses, might show a pattern of public risk crimes.

Prosecutors will certainly argue that a defendant with a number of drunk driving offenses, when compounded by prior felonies, presents an "increased risk" which need not be limited to the risk presented by the original third strike offense.

There is no limitation on the kinds of evidence showing the prisoner's "disciplinary record and record of rehabilitation." The judge could consider prison files, declarations, or live testimony from inmates or other guards to testify to even minor prison infractions. The defense might try to expand "the record" of rehabilitation to include the defendant's family members, prison counselors, or religious figures. If the defense cannot get such evidence before the

court as part of the record of rehabilitation, it may try to do so under the catch-all provision as evidence relevant to making the public safety determination.

The Three Strikes Act of 2012 presents a unique opportunity to address some of the inequities of the original 1994 act, but it also contains its share of pitfalls. Both defenders and prosecutors need to review these statutes carefully.

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