

## Common Mistakes in Summary Judgment

A well-crafted SAI motion can be an intellectual delight (whether granted or denied), but poorly crafted SAI motions are every law and motion judge's misery. Possibly in terms of numbers, and certainly in terms of aggravation and wasted time, errors on SAI motions are the most common type of error in law and motion.

An SAI motion is simply a limited-scope summary judgment motion designed to dispose of only an isolated issue rather than an entire case. As such, an SAI motion must be presented and analyzed according to the same logical progression as a complete summary judgment motion. The logical progression is as simple as one — two — three. One: identify a legal issue raised by the pleadings and brief the relevant law. Two: identify the undisputed facts on which the issue depends. Three: cite the evidence establishing the facts. The purpose of the exercise is



**Judge John Zebrowski**

to cut through adversarial puffery in order to focus with precision on the actual facts. Many SAI motions fail in this effort. Some common errors:

*The Factually Incomplete Motion.* While incompleteness is a malady that can infect summary judgment motions as much as SAI motions, in terms of numbers it seems to occur more often on SAI motions. CCP § 437c(c) requires that total summary judgment be granted if "the papers submitted show that there is no triable issue as to any material fact and that moving party is entitled to judgment as a matter of law." The enactment of CCP § 437c(f) extended the court's authority to adjudication of issues and provides that the (more limited) SAI motion must be granted "if it appears that the proof supports the granting of the motion . . ." A motion which presents an inconclusive factual showing is not sufficient to establish that moving party is entitled to the desired ruling as a matter of law. See discussion in Weil & Brown, *Civil Procedure Before Trial* (Rutter 1989), ¶¶ 10:115, *et seq.* Poorly crafted opposition, or even a complete lack of opposition, does not diminish the moving party's burden of establishing all facts necessary to support the desired ruling. In *Vesely v. Sager*, 5 Cal.3d 153, 169 (1971), the Supreme Court stated the proposition this way: "[s]ummary judgment is proper only if the affidavits in support of the moving party would be sufficient to sustain a judgment in his favor. . . the failure of an opposing party to file [evidence in opposition] does not relieve the moving party of the burden of establishing the evidentiary facts of every element necessary to entitle him to a judgment." The same

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## Analyzing Damages: Perspectives of Plaintiffs and Defendants

Analyzing damages seldom yields a black and white determination. Rather, damages calculated by different experts normally vary by shades of grey within a range of reasonableness. Plaintiffs' experts tend to be on the higher side of the range, while defendants' experts tend to be on the lower side. The relative position within the range depends on the selection of key assumptions, which must be clearly stated, substantiated and documented by experts regardless of their side in litigation.

Attorneys should focus on the sensitivity of key assumptions in their preparation or defense of damage claims. This awareness will improve chances of early settlement or provide effective cross-examination of opposing experts at trial. This article addresses the sensitivity of the following major assumptions which experts analyze in determining damages in typical business and personal litigation:

Number of units lost; Projection methodology; Incremental or marginal profit per unit; Length of the damage period; Responsibility to mitigate damages within a reasonable timeframe; Selection of appropriate inflation and discount rates to adjust future damages to present value; Adjustment of prior damages to present value; Lost value of a business; Valuation methodologies; Establishing proximate cause and demonstrating cause and effect or global allocation of damages; and Substantiation of damage testimony.



**Dr. Barbara C. Luna**

### *Number of Units Lost*

Number of units lost fall into two categories, historical and future. Historical lost units are units lost between the time of the incident and trial. Future lost units are incremental units that would have been realized in the future had damages not occurred. Typically, lost units are determined by projecting unit sales based on sales trends before and after the incident of damage, as demonstrated in Table 1.

The table displays an incident, which occurred in 1987, allegedly resulting in a significantly reduced sales trend from prior periods. The top line of the shaded portion of the table represents projected unit sales but-for the incident and is determined by continuing the unit sales trend prior to the incident. The bottom line represents historical actual and projected actual unit sales and is determined by continuing the unit sales trend after the incident. The shaded area between the two lines

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## Common Mistakes

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concept applies to summary adjudication. The SAI motion must place in evidence each fact necessary to establish the basis for the desired ruling. Proof of some, but not all, of the elements necessary to the issue presented is not sufficient. Careful research and preparation is thus essential to ensure identification and presentation of *all* elements necessary to support the desired ruling on each issue presented for adjudication.

Omission of proof of a material fact may not be cured simply by presenting that proof in the reply papers. The opposing party is entitled to time to respond, and in this circumstance a continuance is the best moving party can legitimately hope for unless opposing party waives objection.

*The Scattered Fact Motion:* CCP § 437c(b) specifies that "all material facts" shall be set forth "plainly and concisely" in the separate statement. A fact not set forth in the separate statement simply does not exist for SAI purposes. The procedural scope of an SAI motion (the matters to which the opposing party must respond and on which the court must rule) is defined by the issues specified in the notice plus the facts and evidence specified in the separate statement. The function of the separate statement is to dispel uncertainty and to facilitate precision and focus. This function would be thwarted if additional facts relied upon could be scattered throughout the various memoranda, declarations, etc.

*The "Two — Three" Motion:* An SAI motion (just as its mother, the summary judgment motion) is a pretrial opportunity to have a judge apply law to fact to reach a relevant legal conclusion. The conditions for such application of law to fact can be created "one — two — three," as discussed above. Many attorneys, however, file truncated "two — three" motions, skipping step one entirely and failing to pose a legal issue. These motions simply present a succession of factual statements together with evidentiary citations in an effort to have facts adjudicated.

There is no reason to believe that clerical listings of facts (rather than judicial application of law to fact) is the intended function of a judge on an SAI motion. If it were, an SAI motion would certainly bear scant analogy to its birth-mother, the summary judgment motion. For further elaboration on this point, see Lewin and Vogel, *Summary Judgment's Abused Step-Child: Motions for Summary Adjudication of Issues*, Cal. Litigation (Fall, 1988); Zebrowski, *The Summary Adjudication Pyramid*, Los Angeles Lawyer (November, 1989); and Calatrello, *Winning Summary Judgments or Adjudications in State Court*, Los Angeles Lawyer (October, 1988).

The SAI motion cannot take the place of normal discovery as a mechanism to determine facts. If it could, such motions would be filed in every case, since every case obviously must involve numerous material undisputed facts. If the parties were not related by a common set of facts, they would have no dispute. The court is not, and never has been, staffed to handle SAI motions in every case. SAI motions require time-consuming evidentiary analysis and attention to detail.

*The "One — Three" Motion:* It cannot be stated too often that the function of an SAI motion is to penetrate dust and smoke and to achieve focus and precision. To accomplish this, the facts relied upon must be clearly identified. Although many motions commence hopefully by properly posing a legal issue for resolution, many soon flounder sadly by leaping to citation of a mass of evidence without specifying exactly what facts are to be found there. The sequence is "one — three"; "two" is omitted. The factual support is left uncertain, rather than clearly specified. The facts must be specified (in the separate statement) in order for the merits to be properly analyzed. Cf. CCP § 437c(b).

*The Uncorrelated Motion:* It is rare for an SAI motion to seek adjudication of only one issue. Most seek adjudication of many, or at least several, issues. Each issue must be analyzed and ruled upon independently on its own separate merits, just as if it were a separate motion. Yet multiple SAI motions are often presented with no correlation whatsoever between the facts and the issues. It is a rare circumstance in which the identical set of facts is both necessary and sufficient to support separate legal conclusions on separate legal issues. Normally one legal issue depends upon one set of facts, while a different legal issue depends upon a different (although often overlapping) set of facts, or perhaps upon a subset of the first set, or maybe upon prior resolution of a preliminary legal issue. The possible combinations are large if not infinite, and it is the moving party's burden to specify which facts are proffered as establishing which issue. Both the opposing party and the court (not to mention the appellate court) need this information.

*The Non-Responsive Response:* Amazingly often, the "responding" separate statement does not correspond to the moving separate statement. For example, moving party's fact number one will be "Bill's eyes are blue." Responding party's fact number one will be "Toledo is in Ohio." This puzzling phenomenon appears to be motivated by responding party's stubborn determination not to allow the moving party to set the agenda. Counsel who do this are working on hormones, not brains. The cold fact is that the moving party does set the agenda, and the responding separate statement must correspond to be effective. CCP § 437c(b) provides "[t]he opposition papers shall include a separate statement which responds to each of the material facts contended by the moving party to be undisputed. . . ." It is foolish to file a "responding" separate statement that lacks one-to-one correspondence with the moving separate statement. The most benign result will likely be a continuance, possibly with sanctions.

*"Unsupporting Evidence":* Evidence cited on SAI motions seems often to be cited with the belief that the judge will not actually read the evidence, and that it is sufficient merely to present a reference which in form appears to be an evidentiary citation. It is consequently quite common to find cited evidence which simply does not support the proposition for which it is cited. It is even more common to have cited evidence which could be interpreted in several ways, some favorable and some adverse to the moving party. (If the evidence could permissibly support a factual determination adverse to the moving party, a fact finder must be permitted to determine the facts; such evidence will not suffice to support SAI in favor of the moving party.) There are several conceivable explanations for this phenomenon, some more sinister than others, but none flattering to counsel. One is that counsel is deliberately attempting to deceive the court. A second is that counsel is so immersed in his case that he has lost the capacity for objective perspective ("can't see the forest for the trees"). A third is wishful thinking. Fourth is simple lack of analytical ability to evaluate within reasonable parameters the logical consequence of relevant evidence. Counsel should pay close attention to the evidence; the evidence is the foundation upon which the issue depends.

*Other Common Errors:* Eliminating errors on SAI motions would probably eliminate close to half of the errors made in law and motion. A potpourri of others would remain. Here are the "Dirty Dozen":

1. Failure to follow the question, response, argument format on motions to compel further response. CRC 3.35.
2. Stating that an exhibit is attached (to a memorandum, declaration, pleading, etc.) but not attaching it.
3. Failing to tab declarations contained within lengthy

documents, thus making them difficult to locate.

4. Presenting as exhibits deposition excerpts not numbered at the bottom. Also common is presenting as exhibits deposition excerpts not numbered at the bottom and in addition stapled shut at the top so that numbers at the top cannot be read.

5. Filing a motion attacking a pleading without clearly specifying which pleading is being attacked. (Complaint? First Amended Complaint? Jones cross-complaint? Thompson cross-complaint? What?)

6. Stapling the first several lines of text shut.

7. Failing to separately enumerate each ground for demurrer, CRC 325(a), or motion to strike, CRC 329.

8. Referring to evidence without clearly citing where that evidence can be found.

9. Mislabeling a document so that the caption states that the document contains items which it does not contain. For example, if a declaration or separate statement is being

filed separately, it is improper and misleading to list it in the caption of the notice and memorandum as contained in that document. On the other hand, a "filed concurrently" reference is not only proper but helpful. Equally problematic is mislabeling a document such that the document does contain items not specified in the caption.

10. Mis-identifying the parties represented. For example, generically claiming to represent "defendants" when representing only some, but not all, defendants.

11. Submitting attorney orders which are not rigorously and scrupulously limited to the order made.

12. Failure to brief separate legal issues separately. For example, it makes little sense to demur on five separate and distinct bases, then to present a memorandum mixing (seemingly at random) discussion of these separate bases. Instead, the memorandum should be clearly segmented into self-contained, separate discussions of the issues. If the issues are related and overlapping, the interrelationship and overlap should of course be briefed, but the memorandum should still be structured to facilitate focused analysis of each distinct issue.

Most errors in law and motion can be eliminated by two ingredients: a smidgeon of thought and a pinch of attitude adjustment. The attitude adjustment required can be accomplished by counsel imagining themselves in the role of the judge and remembering that the job of the lawyer is to create clarity out of chaos, not the converse. An example: suppose you were presented with an SAI motion consisting of memoranda, declarations, etc., standing twelve inches high. Would you undertake to analyze that motion by stacking the documents in chronological order and then reading from top to bottom? A brief experience in handling such motions mixed with a modicum of horse sense would soon produce the answer "no." Instead, an experienced person will likely identify and focus on one aspect of the motion and trace it through the papers to a conclusion, then focus on another, etc., until a complete disposition has been formulated. This procedure, or some variant of it, will necessitate working with the papers in other than a sequential top-to-bottom fashion. If the papers are disorganized, uncorrelated and confused, an obstacle has been created.

Can't the judge figure it out anyway? The answer is usually yes, but this is simply an example of the old adage "ask the wrong question and you will get the wrong answer." The pertinent question is this: can the judge figure it out anyway *in the time that can responsibly be allotted to the effort?* The answer to that question is quite often no. An inevitable part of a law and motion judge's duty is to allocate the finite judge time available across all the matters presented for decision. Discharging that duty responsibly calls for more time on the well-done motion, less on the bad. Time is limited under the best of conditions. Competent attorneys (among which the members of the ABTL can generally be counted) would hardly support limiting time devoted to well-crafted motions in order to free time to unravel a Gordian knot unnecessarily tied by a counsel presenting a confused motion. In the competition for a judge's attention, the well-prepared motion has a clear advantage. The ultimate advice comes from the somewhat abrasive computer-world acronym: *KISS* (Keep It Simple, Stupid). While neither the law nor computers are simple, neither should be further complicated by failure to keep simple that which can be kept simple. Such a failure diverts attention from the substantive merits, which tends to raise a question in a judge's mind: is this attorney diverting my attention from the merits because he or she is afraid that otherwise I may discover just what the merits are?

— Judge John Zebrowski

## abtl REPORT

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## Settlement: An Unsettled and Unsettling Question for the Ninth Circuit

In an almost metaphoric statement on the dilemma of resolving the equities between plaintiffs, settling defendants, and nonsettling defendants, the Ninth Circuit has recently announced two starkly conflicting rules on the federal common law of partial settlement.

The classic partial settlement problem arises when plaintiff P sues defendants D-1 and D-2. P subsequently settles with D-1. Either prior to the trial against D-2 or after P obtains a judgment against D-2, D-2 attempts to sue D-1 for contribution. D-1 contends that the settlement with P bars D-2's contribution claim. The dilemma is finding a rule of law that: a) encourages settlement and thus promotes a less costly resolution of the entire controversy; b) protects plaintiffs' right to a full recovery; 3) is fair to the defendants by allocating plaintiffs' losses among them according to the extent to which each was responsible for the losses; and d) deters misconduct.



James Goldman

Even the omniscient American Law Institute could not resolve this dilemma, and accordingly warned that it took no position on the issue. Restatement (Second) of Torts § 886A ("Contribution Among Tortfeasors"). In Comment M to Section 886A, however, the Institute describes three possible approaches to the problem: 1) allowing an action for contribution against a settling tortfeasor by any other tortfeasor who has paid more than his fair share of the plaintiff's claim; 2) imposing a bar to contribution claims against a settling tortfeasor, perhaps in conjunction with a requirement that the settlement be in "good faith"; and 3) reducing the plaintiff's claim by the pro rata share of a settling tortfeasor's liability for damages. Many states, including California (see *Code of Civil Procedure* §§ 877 and 877.6), have adopted one of these approaches (or some variant thereon) by way of statute.<sup>1</sup> For several years, however, the federal courts have struggled with the issue of what approach should be applied in federal cases. The results have been and continue to be inconsistent. See Davis, "Multiple Defendant Settlement in 10b-5: Good Faith Settlement Bar," 40 *The Hastings Law Journal* 1253 (1989) for discussion of pre-1989 cases in this area as well as an examination of the various types of settlement bar statutes.

In *Kaypro Securities Litigation*, 89 Daily Journal D.A.R. 11255 (Sept. 6, 1989), the Ninth Circuit adopted, as federal common law for class actions under the federal securities laws in which there has been a partial settlement, the third approach described in the Restatement: the rule of pro rata apportionment. The court stated:

This scheme contemplates a partial settlement approved by the district court under Rule 23. Nonsettling defendants are then barred from further rights of contribution against the settling defendants. At trial, the jury is asked not only to determine the total dollar damage amount, but also the percentage of culpability of each of the nonsettling defendants as well as that of the settling defendants. Nonsettling defendants as a whole will then be required to pay the percentage of the total amount for which they are responsible. (Footnote omitted.) *Id.* at 11259.

In effect, the *Kaypro* approach requires litigating the culpability of the absent, settling defendant to arrive at a determination of the proportionate culpability of the nonsettling defendant.

In *Miller v. Christopher*, 89 Daily Journal D.A.R. 11998 (September 27, 1989), a different Ninth Circuit panel, without discussing *Kaypro*, declined to adopt the *Kaypro* approach. Instead, *Miller* adopted the second approach described in the Restatement (which is the approach followed under California law). *Miller* upheld a district court ruling barring a nonsettling defendant in a maritime case from pursuing a contribution claim against the settling defendant on the basis that the settlement was in good faith. *Id.* at 12000.



Rex Julian Beaber

Arguably *Miller* and *Kaypro* are not inconsistent because the *Miller* court qualified its holding with a discussion that did not rule out the use of any of the Restatement's three approaches:

In this case we need not decide whether the good faith settlement bar of the second Restatement approach is better or more consistent with Supreme Court precedent than the third approach's pro rata reduction of plaintiff's recovery. The only options presented to the district court below were to permit post-settlement contribution, which would have the effect of adopting the first approach, or else to deny contribution upon a finding of good faith settlement, in effect following the second approach, but not necessarily precluding the third approach [adopted in *Kaypro*]. Given those alternatives, we conclude the district court chose the wiser course. (Citations omitted.) *Id.*

Notwithstanding this limiting language, the court's analysis favored the good faith bar approach. Thus, it is now unclear whether there are two conflicting rules in the Ninth Circuit, whether there is one rule for class actions and another for individual ones, or whether there is one rule for securities cases and another for maritime cases. Regardless of whether *Miller* and *Kaypro* can be harmonized, the partial settlement conundrum is likely to continue to haunt the courts.

*Kaypro* was brought on behalf of a class of purchasers of common stock of Kaypro Corporation. The defendants included Kaypro, eight of its officers and directors, Peat Marwick Main & Company, Kaypro's auditors, and Prudential-Bache Securities, Inc., the investment banking firm which had underwritten a public offering of Kaypro Securities involved in the case. Plaintiffs had alleged that from August 1983 to July 1984, the defendants had published or were otherwise responsible for certain false and misleading statements regarding Kaypro.

After some preliminary discovery, settlement discussions, under the supervision of a magistrate, resulted in a settlement of the claims against Kaypro and its officers/directors, with those defendants agreeing to pay \$9.25 million against an estimated damage figure which plaintiffs contended to be between \$19 million and \$22 million, but which the nonsettling defendants — Prudential-Bache and Peat Marwick — asserted was not more than \$5 million.

Good faith hearings in accordance with Sections 877 and 877.6 of the California Code of Civil Procedure were thereafter conducted before both the magistrate who had participated in the settlement negotiations and the district judge. The settlement was found to be in good faith, and an order was entered barring all claims for contribution or indemnification against the settling defendants.

*Miller* arose under slightly different circumstances. The case concerned a boating accident. First, one defendant (Christopher)

settled; the plaintiff was willing to accept a relatively small portion of the damages from him due to his lack of financial resources or insurance. Subsequently, the other defendant (Miller), who was insured, settled, paying substantially more. Miller then sued Christopher for contribution. Christopher defended on the basis that he had settled in good faith. The district court held an evidentiary hearing on the good faith issue and concluded that the settlement was not collusive and was in good faith, and that the contribution claim was barred.

In both *Kaypro* and *Miller*, the nonsettling defendants appealed, contending that the bar order impermissibly infringed on their rights to contribution from the settling defendants.

In *Kaypro*, the Ninth Circuit began its analysis by noting that neither the federal statutes at issue in the case (the federal securities laws) nor existing federal common law provided a resolution of the issue, and concluded that it was necessary to establish new federal common law to govern this issue. The *Kaypro* panel, as did the *Miller* panel, considered the three approaches identified by the American Law Institute.

Both panels rejected an approach which flatly prohibits settlement provisions or orders barring contribution rights prior to a full trial on the merits on the basis that this approach would discourage, if not preclude, partial settlements. As explained in *In re Nucorp Energy Securities Litigation*, 661 F.Supp. 1403, 1408 (S.D.Cal. 1987), from which the Ninth Circuit in *Kaypro* quoted:

Any single defendant who refuses to settle, for whatever reason, forces all others to trial. Anyone who is foolish enough to settle without barring contribution is courting disaster. They are allowing the total damages from which their ultimate share will be derived to be determined in a trial where they are not even represented.

The court in *Kaypro* also rejected the approach taken by the California Legislature and later adopted by the court in *Miller* to deal with this potential problem — the good faith hearing procedure established in Section 877.6 of the Code of Civil Procedure — for two reasons. First, the court said that a good faith hearing could not be “efficacious” without a “full evidentiary hearing on all the parties’ relative culpabilities” (89 Daily Journal D.A.R. at 11259) the cost and burden of which would negate the benefits of settlement. Second, the Court concluded that the Section 877.6 approach unfairly forces nonsettling defendants to pay more than the amount for which they are culpable. 89 Daily Journal D.A.R. at 11259. The court reasoned that:

Settlement is attractive to parties because it reduces litigation costs. Therefore, plaintiffs are willing to settle for less than they might receive if a claim were fully litigated. Courts are instructed to allow this discounting when determining whether a partial settlement was entered in good faith. Plaintiffs are willing to forego this money, and courts correctly approve the discount. Nonetheless, under the offset scheme, nonsettling defendants are forced to pay to plaintiffs the amount of the discount.” (Citations omitted.) *Id.*

The alternative adopted by the Ninth Circuit in *Kaypro* contemplates a hearing before the district court under Rule 23(e) of the Federal Rules of Civil Procedure (which requires judicial approval of settlements in class actions). Assuming the partial settlement is found to be fair to the class and not collusive, the settlement will be approved. The nonsettling defendants, however, may only be held liable at trial for that percentage of the total damages for which they are responsible, thereby eliminating a predicate to any contribution claims against settling defendants — the payment of *more* than their fair share of plaintiffs’ damages.

A closer examination of the reasoning in *Miller* and *Kaypro* reveals the real difficulty in resolving the partial settlement dilemma: the court’s conclusion ultimately rests on untested predictions about the economic behavioral effects of the com-

peting rules. In particular, while both decisions acknowledge that the policy of federal courts is to promote settlement before trial, neither panel adequately explains how the approach which it adopts will promote that policy.

There is little question but that the approach adopted in *Kaypro*, especially in the context of the typical securities class action, is likely to discourage at least some *partial* settlements, if not settlements altogether. Plaintiffs may be dissuaded from settling with the principal wrongdoers — generally the directors and officers — even for the limits on any applicable insurance policy for this reason: the amount which those defendants can afford to pay in settlement, and therefore the amount by which the plaintiffs’ claims against the remaining defendants will be reduced, is likely to be significantly less than the damages caused by the settling defendants, for which the nonsettling defendants would be jointly and severally liable in the absence of a partial settlement.

For example, if the total damages are \$50 million and the corporate defendants (the company and its directors and officers) are responsible for 80% of the damages, the other, “deep pocket” defendants, who would be jointly and severally liable for \$50 million in the event there is no settlement and a judgment is rendered against all defendants, would be collectively liable for only \$10 million in the event of a settlement with the corporate defendants. If the corporate defendants have only a relatively small amount — say \$5 million — in insurance coverage and other assets available for settlement purposes, plaintiffs will not likely settle with them, thereby reducing the maximum recovery from \$50 million to \$15 million (\$5 million from the corporate defendants and \$10 million from the others) even if it means that the \$5 million will be exhausted on defense costs.

Although the *Miller* panel recognized this consequence of the *Kaypro* approach, 89 Daily Journal D.A.R. at 11999, the *Kaypro* panel apparently did not and accordingly, failed to consider whether efficiency or fairness is really served by an approach which, in many cases, guarantees that the financial resources of a defendant (including any applicable insurance in the case of an insurance policy in which defense costs are included within the limits of coverage), will be depleted by defense costs thereby increasing the risk that any judgment will be at least partially uncollectible.

While the approach adopted in *Miller* avoids these consequences and will no doubt encourage *partial* settlements, there is no assurance that it is any more conducive to *full* settlements and thus, less costly litigation than other approaches. Indeed, the *Miller* approach creates an incentive for plaintiffs to negotiate piecemeal settlements in order to build a “war chest” to fund the prosecution of their claims against defendants who may have little reason to be in the case except for their “deep pockets.”

Other questions unanswered by *Kaypro* include:

Assuming that a defendant will not settle unless all possible contribution claims are barred, how will the *Kaypro* approach result in avoiding the cost attendant to a good faith hearing in securities cases which include pendent claims with respect to which a different law of contribution, such as that created by Code of Civil Procedure §§ 877 and 877.6, will apply?

Why is it “fair” or consistent with the deterrence and compensation policies underlying the federal securities laws, which adopt, either explicitly or impliedly, the doctrine of joint and several liability, to shift, in the context of a partial settlement, the burden arising from a particular defendant’s lack of resources from the remaining defendants to plaintiffs?

Does the rule apply in individual as well as class actions? (While there would seem to be no rational basis to have a different rule for non-class actions, as noted above, the court in

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## Settlement: Question for Ninth

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Kaypro said that the scheme which it was adopting "contemplates a partial settlement approved by the district court under Rule 23." 89 Daily Journal D.A.R. at 11259.)

What is the basis for the Court's assumption that the good faith hearing process — which is designed in part to ferret out collusive settlements — is too burdensome or any more burdensome than a Rule 23(e) hearing?

What is the basis for the court's assumption that plaintiffs invariably settle for less than the full value of their claims if tried to judgment? (In fact, the parties' assumptions as to the likelihood of a defense verdict and/or the extent of damages are often materially incorrect, and in many settlements — indeed in *all* settlements which allow plaintiffs to avoid what otherwise would have been a defense verdict — plaintiffs receive considerably more from the settling defendant than they would have received had the case gone to trial.)

Ultimately, the problem with the *Kaypro* and *Miller* decisions is their mode of analysis, not necessarily their conclusions. Each panel based its analysis on assumed effects of the competing rules — specifically, the likelihood that the rule adopted would promote settlement and the fair allocation of liability among joint tortfeasors — without any empirical evidence.

For example, the *Kaypro* approach requires that the relative liabilities of the settling and nonsettling defendants be adjudicated in a trial where the settling defendant is not present and represented. In what amounts to the penultimate insult to the advocacy system, the approach assumes that this trial-in-absentia will produce a more accurate measure of the settling defendant's fair share of the liability than actual settlement negotiations subject to trial court review. The evidentiary nightmare of how to deal with admissions of the settling defendant during the settlement negotiations and otherwise is not even addressed. Moreover, *Kaypro*, having extolled the value of settlement, offers a solution where the costs normally saved by settlement — that is, the costs of trying the settled claims — are not saved but simply shifted to the nonsettling defendant. Moreover, since he or she must try this issue without the benefit of the settling defendant's trial preparation, the costs of trying those claims, and hence, the total litigation expense, may actually increase.

The lesson in this analysis is that when competing rules of law are based on untested assumptions about economic behavior, it might be better, rather than guessing about the right assumptions, simply to adopt a rule that produces the least administrative burden on the system and the parties, assuming that it can be done without a substantial sacrifice to interests of fairness.

The good faith bar approach does just that. Good faith hearings are generally conducted after settlement and before trial, and eliminate both a party and a set of liability issues from any subsequent trial. Since the nonsettling defendant knows with certainty the amount by which the total damages will be offset, he or she can approach settlement negotiations with realistic data on his or her own exposure. Moreover, the existence of a relatively well-developed state law in this area will serve as a guide to the federal judiciary and offer some greater certainty to the parties about the likelihood that trial court-approved settlements will survive appellate attack. All in all, the purely administrative advantages of the good faith bar approach offers more to the parties and the judicial system than the possibility that putting the empty chair on trial will lead to a more equitable apportionment of liability and damages.

—James Goldman & Rex Julian Beaber

<sup>1</sup> While the statutes do not define "good faith," courts conducting "good faith" hearings generally consider the likelihood of liability and range of damages, the relative culpabilities of the defendants, the financial resources of the defendants, the availability of insurance, and any circumstances surrounding the settlement that suggest collusion or fraud. See *Tech-Bill v. Woodward-Clyde & Assoc.*, 38 Cal.3d 488, 213 Cal.Rptr. 256, 698 P.2d 159 (1985); *In re Corrugated Container Antitrust Litigation*, 643 F.2d 195 (5th Cir. 1981); *In re Nucorp Energy Securities Litigation*, 661 F.Supp. 1403 (S.D.Cal. 1987); *Nelson v. Bennett*, 662 F.Supp. 1324 (E.D.Cal. 1987).

## Analyzing Damages

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represents historical and future lost unit sales.

Rarely is the trend in unit sales prior to the incident clear-cut and linear. Experts may have discretion in selecting alternative approaches to project future unit sales. Examples of alternatives include decisions to average unit sales prior to the incident, exclude unrepresentative bad or good years, apply regression or other analysis, select different starting dates for analyzing trends, and superimpose economic, industry and competitive considerations in projecting but-for and actual unit sales. Plaintiffs' experts generally want the trend line prior to the incident to slope upward as much as possible, thus maximizing the difference between but-for and actual unit sales, resulting in higher damages. Defendants' experts, on the other hand, want the trend line prior to the incident to be level or downward sloping so that the difference between but-for and actual unit sales is minimized, resulting in lower damages. Additionally, plaintiffs' experts may overlook industry, competitive or market factors which might dampen but-for and projected actual unit sales, whereas defendants' experts may consider external factors which decrease but-for and projected actual unit sales.

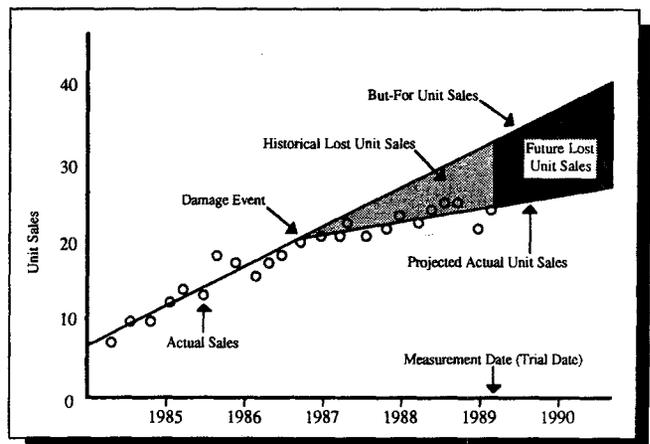


Table 1

### Projection Methodology

The unit sales projected in Table 1 are linear. Linear projections are often used by experts because they are easy to demonstrate graphically and explain to a judge or jury in court. They can be generated easily by linear regression or trend analysis based on historical actual unit sales. Alternatively, non-linear projection techniques or multi-linear regression analysis based on two or more significant factors are sometimes more appropriate to use, but harder to explain. For example, the number of unit sales a toy manufacturer might project could be derived by a non-linear, multi-variate regression analysis based on both historical unit sales and population projections of children of appropriate ages. The choice of projection methodology can make a substantial difference in unit sales projected and lost unit sales claimed.

### Incremental Profit Per Unit

Incremental profit per unit (or marginal profit per unit), rather than average profit per unit, is typically used to determine lost profits. Incremental profit per unit is the additional profit from selling one additional unit, while average profit per unit is total revenue minus all expenses divided by the number of units sold.

Incremental profit per unit normally is the correct profit measure to apply to lost units in order to determine lost profits, because certain expenses, called fixed expenses (i.e., rent and utilities), typically do not vary as unit sales increase and are

relatively constant over a broad range of units until capacity problems require a major step-up in these expenses. Because incremental profit per unit does not include historical fixed expenses, incremental profit per unit is generally greater than average profit per unit. To determine incremental profit per unit, only variable expenses and some semi-variable expenses are deducted from incremental revenue. (Major step-ups in fixed expenses may be deducted from incremental revenue when applicable.) Variable expenses (i.e., material and direct labor) vary directly and proportionately with units produced. Semi-variable expenses (i.e. indirect supervisory labor and indirect materials used for multiple products) vary incrementally as production surpasses certain threshold levels.

The process of assigning expenses to variable, semi-variable and fixed expenses requires an understanding of the business, analysis and judgment on the part of the expert. Experts may differ on the assignment of specific expenses to these three expense groupings. However, they should support and document their reasoning for specific expense assignments. Plaintiffs' experts wanting to maximize lost profits tend to categorize as many expenses as possible as fixed expenses, thereby increasing incremental lost profits per unit. Conversely, defendants' experts wanting to minimize lost profits tend to categorize relatively few expenses as fixed expenses.

#### *Length of Damage Period*

Experts differ regarding the appropriate length of the damage period. Plaintiffs' experts, in order to maximize damages, generally select longer damage periods than defendants' experts. The duration of the selected damage period must be reasonable in view of the plaintiff's time in business, external factors affecting the business and the plaintiff's responsibility and ability to mitigate damages. For example, a 30-year damage period probably is too long for a start-up operation without a proven track record. Similarly, a damage period through age of retirement probably is too long for wrongful termination of a 30-year old employee. On the other hand, a one-year damage period probably is too short for a business in operation for 20 years whose reputation was injured by unfair competition. When a written contract exists with a stated performance period or duration, the length of the damage period is generally the period remaining on the contract from the date of the incident (excluding options).

#### *Responsibility to Mitigate Damages Within a Reasonable Timeframe*

The plaintiff has the responsibility to mitigate damages, if possible, within a reasonable timeframe. The defendant should not be held responsible for subsidizing the plaintiff beyond the time a reasonable party, acting in good faith, could mitigate damages resulting from the alleged action or inaction of the defendant.

Analytically, the responsibility to mitigate damages may be shown by reducing damages over time so that future damages become zero after a reasonable period. For example, a dealer terminated by his major supplier, allegedly without cause, must attempt to find a replacement supplier. Normally, the dealer should be able to find another supplier and rebuild his customer base within a few years. Damages might be calculated over a five or shorter year period, as appropriate for the circumstances. After a year or two of "full damages," projected actual unit sales could be expected to rise and within a few years reach the but-for level. If the dealer decided voluntarily not to find a replacement supplier and go out of business, the defendant should not be held responsible for the plaintiff's lost profits for the next 20 years. Plaintiffs' and defendants' experts often differ as to a reasonable timeframe to mitigate damages, with plaintiffs'

experts generally selecting a longer timeframe than defendants' experts. Sometimes, for example, in a wrongful death matter, both experts agree that circumstances are such that plaintiff cannot mitigate damages.

#### *Selection of Appropriate Inflation and Discount Rates to Adjust Damages to Present Value*

Damages must be stated in dollar at time of trial ("today's dollars"). Profits lost in the future are not worth as much as profits lost today, primarily because of the potential to earn interest during the interim and the risk of future lost profits occurring. Correspondingly, monies received today can be invested in relatively safe long-term instruments and earn compounded interest. Excluding risk considerations, the sum of the monies received today plus compounded interest during the interim equals future lost profits. The concept that future lost profits are not worth as much as lost profits today is called present value analysis. Future lost profits must be discounted by a factor (called a "discount rate") which considers both long-term interest rates and risk of occurrence.

Experts differ on the appropriate discount rate. Plaintiffs' experts tend to select a low discount rate in order to minimize the effect of present value requirements. Often plaintiffs' experts use risk-free short-term Treasury bill or long-term Treasury bond rates and ignore risk considerations of future lost profits occurring in order to achieve as low a discount rate as reasonable, thereby increasing the present value of future lost profits. Defendants' experts often use relatively safe long-term corporate bond rates (higher than Treasury rates) and also add a risk factor to reflect the relative risk of future lost profits occurring in order to achieve as high a discount rate as reasonable, thereby lowering the present value of future lost profits.

Due to ongoing inflation, additional monies are needed to duplicate today's profits in the future. Thus, an inflation factor or growth rate must be considered in the analysis in order to estimate future profits. No expert has the crystal ball to accurately project future inflation rates. Most experts utilize historical average inflation rates for the particular industry or geographical area involved. Information on consumer price indices or wage growth rates for particular industries or geographic areas may be found in government statistics. Experts also utilize projections of growth rates prepared by other industry experts or company management in the normal course of business. Plaintiffs' experts tend to select inflation rates on the higher side in order to maximize future lost profits within a range of reasonableness, while defendants' experts tend to select inflation rates on the lower side in order to minimize future lost profits.

As a check for reasonableness, discount rates selected should be compared to inflation rates selected. Typically, discount rates (which take into account both long-term interest rates and risk of lost profits occurring) should be higher than inflation rates. Historical studies show that over long periods, average long-term interest rates for various types of investment instruments generally were higher than either consumer price indices or wage growth rates for various types of industries and geographical locations.

#### *Adjustments of Prior Damages to Present Value*

Lost profits which occurred prior to time of trial conceivably may be adjusted upward to their present value at time of trial. Individual attorneys and experts differ as to how these adjustments may be made. The disparity of opinions does not necessarily cross plaintiff versus defendant lines. Alternatives for restating prior damages to their present value at time of trial include: No upward adjustment; Application of pre-judgment

*Continued on Next Page*

## Analyzing Damages

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interest; Application of an opportunity cost of capital for the business from time of incident to time of trial; and Application of inflation rates to reflect actual consumer price indices or wage growth rates for the industry or geographic area from time of incident to time of trial.

### Lost Value of a Business

In addition to claiming damages attributable to lost profits, an increasing number of plaintiffs are claiming the lost value of a business. Business valuation techniques call for subjective judgment and the use of assumptions which may be challenged by the opposition's experts. The key to plaintiffs' experts effectively claiming lost value of a business is to present their analyses in a clear, easy-to-understand manner with well-documented workpapers so their claims are not deemed speculative by defendants' experts and the judge.

Lost value of a business is determined by the fair market value of the business but-for the damage incident compared to the fair market value of the business due to the damage incident. The difference between the two values is the lost value of the business. Revenue Ruling 59-60 defines fair market value as "the price at which a property would change hands between a willing buyer and a willing seller when the former is not under any compulsion to buy and the latter is not under any compulsion to sell, both parties having reasonable knowledge of relevant facts."

In order to avoid duplication with lost profits, lost value of a business should be determined at the time the claim for lost profits stops, and then discounted to present value as of the time of trial. If a claim for future lost profits (after time of trial) is not made, then total damages may take the following form: Damages = Lost profits up to the trial date plus lost value of the business as of the trial date.

If, however, a claim for future lost profits is made, then total damages may take the following form: Damages = Lost profits up to the trial date plus projected lost profits through a future date plus lost value of the business as of the future date.

Each of these two approaches has advantages and disadvantages and, depending upon assumptions, may yield substantially different damage amounts. The assumptions include a business' ability to recover from the damage incident, changes in the business' organization and assets, stock transactions, and changes in the industry, market and economy.

Other considerations may include courtroom strategy. The first approach is simpler and therefore may be more appealing to a jury. In addition, lost value of a business at time of trial may appear more concrete than lost value as of a future date, which may be considered speculative. The risk of the first approach to the plaintiff is that the remaining claim for lost profits results in lower damages if lost value of the business is deemed speculative.

Claiming lost value of a business is attractive from a plaintiff's tax prospective as well as an economic prospective. Generally, damages attributable to lost profits are taxable as income whereas damages awarded for lost value of a business are generally treated as non-taxable return of capital. Plaintiffs' and defendants' experts must decide under what circumstances claiming lost value of a business is appropriate.

### Valuation Methodologies

The three primary approaches to determine lost value of a business are: income approach; market approach; and adjusted book value approach.

Normally, all three approaches are considered in valuation analysis. However, depending on the type and size of business, certain approaches may be more applicable than others. For most businesses, the income and market approaches are more relevant than the adjusted book value approach. Industry rules of thumb are used as tests for reasonableness of valuation results.

The income approach is most heavily relied on to value small and middle market operating businesses. Potential buyers base their investment decisions on the future stream of income they expect to receive from an investment. The income approach values a business based on the present value of future income from continuing operations, as adjusted for unusual events (i.e., excessive officer compensation).

For a business whose income is expected to grow or decline, an income projection is prepared and adjusted to present value by applying an appropriate discount rate. Typically, a five-year projection is used, after which income is assumed to stabilize. Stabilized income is divided by a capitalization rate to derive a terminal value for the business. The present value of the terminal value is added to the present value of income during the projection period to derive the business' value according to the discounted earnings approach. Alternatively, a discounted net cash flow approach may be used to value a growing or declining operating business. For a business with relatively level income, a capitalized income approach is applied, wherein income for the coming year is divided by a capitalization rate to derive a value of the business.

To maximize lost value of a business, plaintiffs' experts tend to be aggressive in their projections of income, cash flow and terminal value and to select relatively low discount rates and capitalization rates. Conversely, defendants' experts either assert that lost value of a business is speculative or duplicates lost profits if not applied correctly, or else tend to minimize lost value of a business by adopting more conservative projections of income, cash flow and terminal value and selecting higher discount rates and capitalization rates.

The market approach compares a business to similar publicly-traded businesses and generally ranks second in importance to the income approach. However, for large publicly-traded businesses, the market approach is typically the dominant approach. The key here is selecting appropriate comparable businesses, considering the industry, diversity of product lines and size. Once comparable businesses are selected, an entity's financial status is analyzed and compared to the comparable businesses to evaluate its relative financial status.

The primary valuation technique of the market approach is the ratio of price to earnings (the "P/E ratio"). Price to book value comparisons may also be considered but generally are less reliable than P/E ratio comparisons. The appropriate P/E ratio is determined by analyzing P/E ratios of comparable businesses as of the valuation date and adjusting the resulting P/E ratio to account for the business' relative financial strength, profitability, growth in earnings and the effects of controlling interests. A marketability discount typically is then applied to reflect the difficulty of selling privately-held businesses. The adjusted P/E ratio is multiplied by the business' net income for the year preceding the valuation date to arrive at a value of the business.

Another technique of the market approach is to compare a business to recent sales of similar businesses. Ratios of sales price to earnings and sales price to book value for these transactions are applied to the business' earnings and book value, respectively, as of the valuation date. The market approach also considers prior sales of blocks of the business' stock. Prior stock transactions are given less weight in valuing a business if the transactions were not at arms-length, had prices set by prior agreement or occurred under duress.

In applying the market approach to valuation, plaintiffs' experts tend to select higher P/E ratios and price to book value ratios and lower discounts for marketability in order to maximize the value of a business, whereas defendants' experts tend to be more conservative.

The adjusted book value approach typically is given much less weight than the income and market approaches in valuing operating businesses. An exception to this rule is valuation of real estate holding and investment businesses, whose values are determined primarily by the value of their underlying assets.

The adjusted book value approach is based on the fair market value of net tangible assets plus the capitalized value of excess earnings. Determining the fair market value of net tangible assets often requires appraisals of fixed assets. Excess earnings are due to goodwill attributable to intangible factors such as reputation, management or location. To determine the amount of excess earnings, a rate of return is applied to net tangible assets to determine the normal income these assets should generate. This normal income is then subtracted from the business' projected net income for the year following the valuation date (as adjusted for unusual or non-recurring items). The difference between projected and normal income is then capitalized using a high capitalization rate applicable to intangibles to derive the capitalized value of excess earnings.

Plaintiffs' experts may be aggressive in their appraisals of fair market values of fixed assets and also may select relatively low returns on net tangible assets and capitalization rates on intangible assets in order to maximize the value of a business. Defendants' experts may be more conservative in their appraisals of fixed assets and may select higher returns on net tangible assets and capitalization rates on intangible assets.

As shown in Table 2, the income approach, market approach and adjusted book value approach typically do not yield the same valuation.

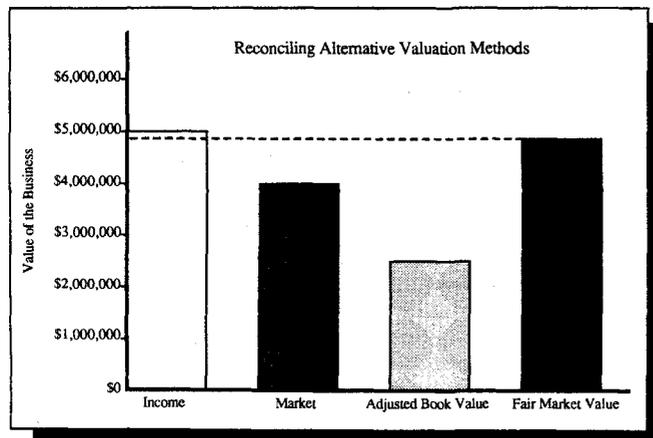


Table 2

Experts analyze the alternative values and determine the relative degree of reliance to be assigned to each approach. Based on this analysis, experts determine the fair market value of the business as of the date of valuation. This value is not a simple mathematical average of the alternative valuation approaches, but rather a judgment based on the experts' overall understanding of facts and circumstances. For example, Table 2 shows that the income approach was relied on more than the market or adjusted book value approaches.

The need to focus on lost value of a business in determining overall damages cannot be overemphasized as plaintiffs' experts are more frequently claiming lost value of a business in addition to lost profits. Both sides need to be aware of subjective underlying assumptions.

### Establishing Proximate Cause and Demonstrating Cause and Effect or Global Allocation of Damages

Underlying experts' analyses of plaintiffs' lost profits and lost value of the business is the assumption that the defendants' actions or inactions proximately caused the damages. It is imperative that plaintiffs or their experts establish the proximate cause of damages and demonstrate the corresponding effect. Frequently, testimony by the plaintiff's damage expert is coupled with testimony from marketing and industry experts and factual witnesses from the plaintiff's business. The demonstration of proximate cause and corresponding effect may be shown further by application of statistical analysis or graphical displays.

Frequently, plaintiffs' experts take a global view of damages and claim that a business' decline in operations and resulting reduction in profits and value of the business are all attributable to the defendants. Defendants' experts try to refute this global approach by demonstrating that other factors, such as poor management, operational difficulties, economic and industry trends, increased competition and product obsolescence, are the proximate causes of the plaintiffs' problems and explain some or all of the damages sought. Defendants' experts utilize statistical techniques, such as correlation or regression analyses, and graphics to demonstrate the explanatory importance of other factors and also rely heavily on the testimony of other experts and factual witnesses.

### Substantiation of Damage Testimony

Experts should explain damage testimony simply and visually, with a statement of the final damage amount followed by a brief explanation of the overall approach used to calculate damages. In more complex cases, further discussion of the underlying issues and analysis may be necessary.

Experts need to respond quickly to cross-examination and have at their fingertips all documents on which they rely. Damage calculations and supporting documentation should be organized in cross-referenced working papers, preferably in a hierarchical structure in which primary findings are broken down into subsidiary calculations supported by source documentation. Cross-referencing helps to assure the integrity of the damage analysis and eliminate errors which undermine overall credibility.

Experts have become an integral part of analyzing damages in both business and personal litigation matters. Not surprisingly, conclusions of plaintiffs' and defendants' experts may vary substantially. However, good experts for either side tend to keep key assumptions supporting their damage opinions within a range of reasonableness. Attorneys should consult with their experts early in a case in order to discuss alternative approaches, assumptions, sources of data and potential weaknesses. The sensitivity of alternative approaches and assumptions on ultimate damages should be explored to evaluate flexibility and shades of grey within the range of reasonableness. Such sensitivity analysis of damages is critical to early settlement or effective cross-examination of opposing experts at trial and may make the difference between winning and losing a case.

—Dr. Barbara C. Luna

### It's ABTL Dues Time

Membership dues (\$75.00) for calendar year 1990 should now be mailed to:

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## Rules Like White Elephants

(A Hemingway nightmare after reading *Litigation Guidelines* by the Los Angeles County Bar Association)

I read the niceness rules and they were good. Men (and some women, I am told) have slaved over the rules to make the world better. Fat chance. Lawyers are lawyers, a rotten lot, even in Paris.

Doc told me that time we were up in Michigan killing caribou that lawyers were rotten. Doc was a lawyer. I could see by the squint in his eye and the snide grin that he knew. That's when I decided to become a lawyer.

If Carstan had not introduced me to the Pernod at Harvard Law, it might have been fine. Perhaps the clean, well-lighted office of the corporate lawyer. Or the deep fresh earth of real estate law. But by the third year the Pernod had acted, my brain was gone, and all I wanted was to fight, to kill, to war. When I told this to the old gringo, I saw the look of fear come into his eyes. "You are a trial lawyer," he said softly. On graduation I enlisted — the ABTL, worst of the lot — and was posted to the heavy fighting in L.A.

When we disembarked, the smoke and haze that filled the air spoke volumes of the fighting, now and past. I was immediately sent to the hottest spot, Central District, U.S. Fed. Walking the halls, I saw the scruffy glassy-eyed men (and women) who had been in it too long, too many defaults taken on the twenty-first day, too many expletives hurled at opposing counsel, too many letters written only to create a record. Civility could not exist here, should not exist. These men (and women) were the killers. Better to place them together, kill each other, be done with it.

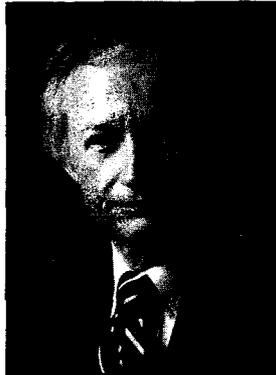
When I left Boston, Francis said, "You'll live a short life." "But happy," I replied.

And at first it was good. The clean swish of the papers as they went out the door to be served on Christmas Eve. The sharp jolt of my "No" as some poor bastard begged for an extension. The queer feeling of exaltation as I crafted a fact out of whole cloth.

But the sanctions. Command had promised us sanctions and soon we had them. We lobbed demands for sanctions into their midst interminably and they gave the same. Year after year after year the shelling grew. One landed outside Whitley's office, sanction demanded for failure to give 1947 telephone number of plaintiff, unexploded, but he went mad just the same.

Yet there were times when the beauty ran clear. To slide the sword swiftly into a deposition witness, after he has been weakened by innumerable bandolier pricks of badgering irrelevant questions was sweet. The startled look on the trustee's face as he realizes the incision I have made when I state for the record: "You immovable beast, we sue your charitable foundation and you won't even tell us whom the hell doles."

It seems only yesterday that Faulkner and I had our *mano a mano* over the deposition table and I bested him. The damn niceness rules would bar it today.



Anon.

Faulkner had the temerity to hire on with a bastard that sued my biggest motion picture studio client over its Trademark. He noticed a 30(b)6 deposition of the corporation.

When I appeared in the deposition room, I could see the fear in their faces.

"What the hell are you doing here with that lion!"

"This is my client. He speaks for the corporation."

"What does he know about Trademarks?"

"He *is* the Trademark!"

Leo let out a roar and they all jumped a foot.

"What was that?"

"That's the rest of the Trademark."

"How can he answer questions?"

"One roar for 'Yes,' two for 'No,' and three for 'irrelevant, immaterial and ambiguous.'"

I could see the sweat forming on Faulkner's lip.

"All right, let him sit here opposite the window."

"My client does not face the sun. It reminds him of his home veld."

"You mean we'll all have to move our seats?"

"It would be advisable."

Faulkner's note-taking hand was beginning to shake. I could see he was the coward I thought him to be.

"I—I can't go on!"

"Then I shall move to dismiss the Complaint for failure to complete discovery and request \$25,000 in fees for my firm and two dead gazelles for my client."

"Damn you! Some day the County Bar will make niceness rules and your ilk will die out."

"To hell with Fascist niceness rules! They will come and they will prevail. But some of us will die with head high and ball low and inside."

Those were the days.

Now it is over. The *regiamenteros* of the County Bar have begun their mop-up. Firing squads go day and night. The old amigos, Nick, Frederick, Henry, Manuel, all dead. What can be said?

Codes of honor were my life. I believed in them. But it was the code of steel, the steel ball of the IBM Selectric, smashing, smashing into paper, day and night, multiplied by millions until the paper crushed all in my way. Now, the young whelps over their Perriers build their code. It is fine, but God help them when the client wants blood.

The old man will see. The young ones will come to him to talk long of the days before we said a farewell to arms.

—Anon.

(The author desires to remain anonymous due to fear of reprisals. However, we may reveal that he is a former Editor of this publication.)

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Judge John ("Jack") Zebrowski was appointed to the Los Angeles County Superior Court in 1986 after serving the same court as Commissioner and Judge *pro tempore* since 1982.