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PERSPECTIVE

Anti-SLAPP appeals: extensions and civility are not bad faith

By Don Willenburg

Civility and professionalism are neither indicia of bad faith, nor "hallmarks of … delay." Yet a recent Court of Appeal decision suggested as much, and an uncritical Daily Journal column about the decision used the quoted words. ("Pursuing frivolous anti-SLAPP appeals is a dangerous game," Jan. 22, 2018.)

Central Valley Hospitalists v. Dignity Health, 19 Cal. App. 5th 203 (2018), is an anti-SLAPP appeal. It is not the court's ruling on the merits of that appeal on which this article will focus, but rather a section titled "Some Closing Observations." Arguably dicta (no sanctions were imposed), these "observations" perhaps reflect more the court's distaste for the merits of this particular appeal and the automatic stay of trial court proceedings during an anti-SLAPP appeal than evidence of actual impropriety.

As the Daily Journal article recited, "[T]he court observed that Dignity Health sought and obtained 90 days of extensions on its briefing, despite the fact that three of the four attorneys on the appellate brief were counsel below."

First, extensions of time are routinely sought and granted on appellate briefs. This is in part due to the fact that "[a]ppellate work is most assuredly not the recycling of trial level points and authorities. Of course, the orientation of trial work and appellate work is obviously different [citation omitted], but that is only the beginning of the differences that come immediately to mind." *In re Marriage of Shaban*, 88 Cal. App. 4th 398, 408-09 (2001). "[A]ppellate practice entails rigorous original work in its own right…. [not] a rehash of trial level points and authorities." *Id.* at 410.

The need for more time was particularly true in this case. As the Court of Appeal recognized, the argument was challenging and sought "to extend SLAPP where it has never gone before." This is not the usual case where extensions merit sanctions, such as *Kim v. Westmoore Partners, Inc.*, 201 Cal. App. 4th 267 (2011), where counsel obtained

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extensions based on representations that the appeal was uniquely complex, "then fil[ed] a brief which was not just boilerplate, but a virtual copy of a brief for another case — including a *boilerplate accusation of misconduct* against appellants' counsel and a *boilerplate request for sanctions.*" In *Central Valley*, counsel submitted lengthy briefs. The decision almost makes that out to be a sign of further delay. In fact, it is a sign that the stipulated extensions were not just for delay but put to use.

Second, 90 days is explicitly allowed by rule: A 60-day stipulated extension for an appellant's opening brief and 30 days for the reply.

Third, opposing counsel *also* obtained the maximum stipulated extension the rules allow, plus additional time by motion — a total of 67 days, more than two-thirds the time for which defense counsel were reprimanded.

Fourth, all these extensions were stipulated. Many courts (including least Los Angeles, Sacramento and Santa Clara) have rules or guidelines that require that reasonable extensions and continuances to be granted as a matter of courtesy. *Central Valley* penalizes such courtesy. A common exception to such required agreement to continuances is if it would prejudice the attorney's client. That was never raised by counsel in this case, only assumed to be so by the *Central Valley court*.

Fifth, briefing periods are but a fraction of the time it takes to process an appeal. Most take well over a year, or two, between filing the notice of appeal and decision. Some of that involves getting the record (though that should be less onerous in an anti-SLAPP appeal with only one hearing); some the time between briefing and argument. The decision recounts 22 months from trial court decision to appellate decision: The extra 90 days from briefing extensions is less than one-seventh that time.

Sixth, that three of the four attorneys on the appellate brief were counsel below is no reason why extensions were improper. It will take the appellate attorney as just as long to get a handle on the record and issues whether trial counsel are listed on the appellate brief or not. Perhaps even more fundamentally, we want to encourage trial counsel to engage an appellate attorney for purposes of the appeal. "[T]rial counsel obviously has become intimately familiar with the case; but, having 'lived with' the case for years, trial counsel's 'objectivity' may be blurred." Eisenberg, "California Practice Guide: Civil Appeals and Writs" (2017) ¶ 1:96, p. 1-25. "Having tried the case themselves," trial attorneys "may lose objectivity and would be well served by consulting and taking the advice of disinterested members of the bar, schooled in appellate practice." *Estate of Gilkison*, 65 Cal. App. 4th 1443, 1449-50 (1998). *Central Valley* cited *Gilikison* (an anti-SLAPP appeal that chided trial counsel for handling the appeal himself), but overlooked this point.

Another, different continuance also drew undeserved rebuke. As the Daily Journal article noted, the appellant "obtained almost one year of continuances of oral argument due to conflicts in counsel's schedule, despite that the attorney whose schedule was at issue was the one attorney who did not participate below." (The decision said "months.")

First, that a scheduling request comes from "the one attorney who did not participate below" is not an indicia of bad faith or a hallmark of delay. That was the attorney who was to present the argument, and again, courts as well as clients are best served by having

appellate counsel attuned to the special perspectives of appellate courts. Clients may also prefer to have counsel other than the ones who lost at the trial level argue the appeal.

Second, counsel did not request any continuances. When the oral argument waiver notice was sent in June, counsel for appellant requested oral argument, but asked that it not be set for the court's calendar for July, September or November. Remember, it usually takes a while between the oral argument waiver notice and the actual scheduling of oral argument, so counsel could have expected it not be calendared that soon anyway, particularly the following month in July.

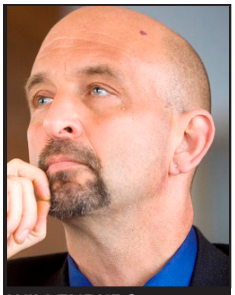
Third, that scheduling request did not cause any significant "delay," and may not have caused any at all. Oral argument took place in October. Notably, if the court had been ready, presumably it could have set argument for August. It did not. Only if the court was otherwise going to schedule argument in September (neither the docket not the opinion so reflect) was there any delay, and even if then only one month.

Another rebuke deserves discounting. The Court of Appeal decision said that after the court sent a letter advising counsel it was considering sanctions, Dignity Health filed a request to dismiss the appeal. The implication is that the request to dismiss was an attempt to "duck" the sanctions. The court's online docket, however, tells a different story. In August, counsel telephoned the court to say they intended to file a request to dismiss. This was apparently because counsel had decided that an intervening California Supreme Court decision effectively eviscerated Dignity's appeal. It was only in response to that civil, professional call to advise the court that dismissal was forthwith and the court need do no further work on the case that the court said, in essence, "hold on, we're bringing you in." There is nothing wrong in the court's decision to refuse to accept a dismissal. But there were key facts missing from the description of that refusal in the decision.

Central Valley reached the right result on the merits: There is no SLAPP violation for claims on which the complaint expressly disavows that it is proceeding. And it is perfectly appropriate for a court to express displeasure with the practical effects of a statute, such as the automatic stay on an anti-SLAPP appeal. That sometimes results in remedial legislation.

Central Valley's slaps at counsel's actions on appeal, however, appear undeserved. One can hope that the California Supreme Court will either depublish the "closing observations" or grant review and revisit the issue. Absent that, one can but hope that other courts will not consider circumstances like those in this case to warrant reprimand on the grounds stated.

Don Willenburg *chairs the Appellate Practice Group at Gordon Rees Scully Mansukhani from the firm's Oakland office.*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