

abt1 REPORT

TWO SLAPPS DON'T MAKE A RIGHT BUT THEY DO CLOG OUR COURTS



James Moneer

INTRODUCTION

The latest twist in the anti-SLAPP law – the so-called SLAPPback – is sure to generate an increase in court congestion in the form of more legal malpractice suits and derivative tort actions. Every time a SLAPP motion is granted in California, the SLAPP filer (i.e., the plaintiff, cross-complainant or petitioner who files a

SLAPP suit) and their attorneys are now subject to a secondary malicious prosecution or abuse of process suit without a meaningful SLAPP defense. The secondary malicious prosecution is referred to as the SLAPPback suit.

AB 1158 was passed into law on October 5, 2005 and is now codified as California Code of Civil Procedure § 425.18 (2005-2006 Reg. Sess.). *Soukup v. Hafif*, 39 Cal. 4th 260 (2006), is the first and only case to date to interpret the

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NEW AMENDMENTS TO THE FEDERAL RULES CHANGE LITIGATION DEADLINES

December and January brought significant changes to the procedural rules governing the timing and conduct of federal litigation, with the majority of the amendments affecting various timing requirements and changing how deadlines are calculated. This article briefly discusses some of the more significant changes to the Federal



Holly Jones

Rules of Civil Procedure, the Federal Rules of Appellate Procedure, the Ninth Circuit Court of Appeals Local Rules and various District Court Local Rules.

FEDERAL RULES OF CIVIL PROCEDURE

Changes to the Federal Rules of Civil Procedure became effective December 1, 2009. The changes largely focus on computation of time. First, the amendments adopt a “days-are-days” approach to deadlines, meaning that each calendar day counts in calculating deadlines, whether it is a weekday, Saturday or Sunday, legal holiday, or a day when the court is inaccessible. When counting, the first day, or the day of the event that triggers the period, is excluded, although the last day of the period is included. As part of the new “days are days” approach, the Rules no longer apply different counting rules depending on whether a given time period is greater than or less than eleven days.

Second, most deadlines have been extended and the time periods in the rules now mainly occur in multiples of seven. This last change will create more predictability: most periods will now end on the same day of the week on which they began. Importantly, no time periods were shortened, although the new rules regarding computation of time may in effect make some time periods shorter than they were before.

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PRESIDENT'S MESSAGE



Dear Friends and Supporters of the ABTL:

When I was growing up and my Mom wanted to influence my choice of friends, she occasionally would repeat to me the old saying "Tell me who you go around with, and I will tell you who you are." I thought of that saying when I began my term as President of the ABTL on July 1.

Although my Mom sometimes used the expression as a way of cautioning me to avoid people she did not approve of, the saying also seems to me to point in a positive sense to one of the great things about the ABTL – its membership. Coming from a variety of different perspectives – plaintiffs' and defense, bench and bar, "big law" and small firms, Downtown and the Westside – the members of this organization nevertheless are united in their dedication to professional excellence and to collegiality. The ABTL is dedicated to improving the bar through education, discussion, and scholarship, and to improving the community by expanding opportunities for deserving law students and assisting those in need. These are important and worthwhile endeavors, and our efforts make a real difference in our profession and in our community. On a personal level, I also have had the privilege over the years of getting to know many extraordinary and interesting lawyers and people through the ABTL, including some close personal friends. For these reasons, I would be quite content to have my Mom's old expression applied to my involvement with the ABTL – "going around" with the other members of this group reflects well on all of us.

It is an honor and a privilege to be able to serve the ABTL as President for the July 1, 2010 – June 30, 2011 ABTL fiscal year. We have big plans for this year and look forward to continuing our "best-in-class" lunch and dinner programs, expanding our educational and information offerings to members through the use of new technologies, growing our Young Lawyers' Division, expanding the membership which is the life-blood of this organization, and continuing to enjoy each others' company. I will be speaking more about these plans and goals at our upcoming events and in future President's Letters.

In addition to looking forward with enthusiasm, I also would like to pause to thank in this letter two individuals who have made very important and often underappreciated contributions to the ABTL for many years. The first is Denise Parga, who has toiled tirelessly and without fanfare for many years to edit the ABTL Reports and to ensure that it has remained the important and first rate publication that it is today. Sadly for us, Denise now is transitioning out of her role. Happily for us, Andrew Sokolowski has agreed to assume her duties as editor. Denise, these thanks are not enough to acknowledge all that you have done, but they are offered profusely and they are richly deserved. Andrew, welcome to you, and thank you for assuming this very important role. The second person I would like to thank in this letter is my immediate predecessor as ABTL President, Scott Carr. Over his years as an officer, Scott led the ABTL through a number of transitions with the skill and low-key grace that make him such a fine leader and person, leaving the ABTL in excellent condition as we begin this new year.

I want to close my first "President's Letter" by reiterating my gratitude for and excitement about the opportunity to lead this special organization. I look forward to working with all of you. I hope you enjoy this excellent issue of the ABTL Report.

Best regards,
Mike Maddigan

ASSOCIATION OF BUSINESS TRIAL LAWYERS

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provisions of section 425.18, the new SLAPPback statute. AB 1158 is the fourth amendment to the anti-SLAPP legislation since it originally became effective in 1993. There are now well over 250 reported decisions interpreting the provisions of the anti-SLAPP law and its various amendments as codified in Code of Civil Procedure §§ 425.16, 425.17, 425.18. At least ten of these decisions emanate from the California Supreme Court, with other SLAPP cases currently pending review.

THE ANTI-SLAPP STATUTE

“The Legislature enacted section 425.16 to prevent and deter ‘lawsuits...brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances.’ [Cal. Civ. P. Code § 425.16(a)]. Because these meritless suits seek to deplete ‘the defendant’s energy and drain his or her resources, the Legislature sought to prevent SLAPP suits by ending them early and without great cost to the SLAPP target.’ Section 425.16 therefore establishes a procedure where the trial court evaluates the merits of the lawsuit using a summary-judgment-like procedure at an early stage of the litigation.” *Soukup v. Law Offices of Herbert Hafif*, 39 Cal. 4th 260, 278 (2006) (citing *Varian Med. Sys. v. Delfino*, 35 Cal. 4th 180, 192 (2005)).

Section 425.16 sets up a two-step procedure for determining, first, whether the challenged cause of action “arises from protected activity.” If not, the motion must be denied as a matter of law. If it does, the court proceeds to the second step and evaluates whether the claim is legally sufficient and substantiated by competent admissible evidence that, if credited, would entitle plaintiff to judgment as a matter of law. *Wilcox v. Superior Court*, 27 Cal. App. 4th 809, 823-824 (1994).

ANTI-SLAPP MOTIONS BEFORE THE SLAPPBACK LAW

The primary benefits of filing a section 425.16 special motion to strike (anti-SLAPP motion) as a means of defending a civil action are derived from its celerity and its compensatory and deterrent power. The motion is essentially the equivalent of a “super summary judgment” motion with a nuclear warhead attached. First, the motion must be filed within sixty days of the service of the complaint and must be noticed for hearing within thirty days after the notice of motion is served under Code of Civil Procedure section 425.16(f). Moreover, filing the notice of special motion to strike effects an automatic stay on all discovery while the motion is pending under section

425.16(g). Once the anti-SLAPP motion is filed, the court cannot grant leave to amend - the complaint must stand or fall as originally drafted. *Simmons v. Allstate Ins. Co.*, 92 Cal. App. 4th 1068 (2001).

The specially-moving defendant has an immediate right of appeal if the motion is denied by the trial court under section 425.16(i). All proceedings embraced within the appeal are automatically stayed pending appellate review under Code of Civil Procedure section 916. *Varian Med. Sys.*, 35 Cal. 4th 180 (2005).

Of most exigent concern, however, is the SLAPP defendant’s right to mandatory attorney’s fees under section 425.16(c) if the motion is successful. This often includes very substantial lodestar enhancements for contingent risk assumed because the SLAPP defendant sits in the shoes of a civil rights plaintiff for purposes of a fee award. *Ketchum v. Moses*, 24 Cal. 4th 1122 (2001); *Computer Xpress v. Jackson*, 93 Cal. App. 4th 993 (2003). Depending on the nature and complexity of the case and the contingent risk assumed, SLAPP fee awards can reach six-figures just for services performed in connection with the motion in the trial court. More fees are awarded if the moving party is successful on appeal. *Dowling v. Zimmerman*, 85 Cal. App. 4th 1400, 1425-1426 (2001). Moreover, a plaintiff appealing from an order granting a special motion to strike is required to put up a bond or undertaking in order to stay enforcement of a judgment awarding attorney’s fees and costs pursuant to section 425.16 (c). *Id.*

Conversely, the plaintiff or cross-complainant opposing the motion is not entitled to any fees for successful opposition unless the motion is found to be completely frivolous. Finally, the plaintiff cannot evade fees by dismissing the action before the hearing on the SLAPP motion. *Liu v. Moore*, 69 Cal. App. 4th 745, 749-753 (1999).

It is well established that all malicious prosecution and abuse of process claims necessarily meet the first prong of the anti-SLAPP inquiry because they arise from oral or written statements or writings made before a judicial proceeding or statements made in connection with issues under review in a judicial proceeding under subdivisions (e)(1),(2) and (4). *Jarrow Formulas v. LaMarche*, 31 Cal. 4th 728 (2003); *Rusheen v. Cohen*, 37 Cal. 4th 1048 (2006). All such suits are therefore subject to a special motion to strike and the plaintiff will be required to meet the second prong burden of establishing a probability of prevailing on those claims. *Id.* With the recent Supreme Court decision in

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Rusheen, however, it is unlikely that an abuse of process plaintiff will be able to show a probability of prevailing given the Court's broad interpretation of the absolute litigation privilege of Civil Code section 47(b) in the abuse of process context.

THE SLAPPback STATUTE

A SLAPPback suit is an action, typically for malicious prosecution, "filed by the target of a SLAPP suit against the SLAPP filer after dismissal of the SLAPP suit as result of the SLAPP target's appropriate use of the SLAPP statute." Soukup v. Hafif, *supra*, 39 Cal. 4th at 279.

The Legislature declared that "SLAPPbacks should be treated differently . . . from an ordinary malicious prosecution action because a SLAPPback is consistent with the Legislature's intent to protect the valid exercise of the constitutional rights of free speech and petition by its deterrent effect on SLAPP . . . litigation . . ." *Id.* at 268. Section 425.18 exempts SLAPPbacks from certain procedures otherwise applicable to anti-SLAPP motions under section 425.16 and sets forth special procedures that apply only to SLAPPbacks. *Id.*

Additionally, the Legislature amended subdivision (b)(3) of section 425.16 to include "subsequent proceedings." The effect of this amendment is to narrowly abrogate the Supreme Court holding in *Wilson v. Parker, Covert & Chidester*, 28 Cal. 4th 811 (2002). *Wilson* essentially held that the denial of an anti-SLAPP motion or motions for summary judgment in the trial court on the ground that the plaintiff had established a probability of prevailing, even though later reversed on appeal, establishes probable cause as a matter of law in a subsequent malicious prosecution action. Newly amended section 425.16, subd. (b)(3) abrogates the *Wilson* holding in the SLAPPback context and deprives a SLAPPback defendant of a substantive probable cause defense where the trial court initially denies the SLAPP motion in the underlying SLAPP action but is later reversed on appeal. This limitation applies only in a SLAPPback malicious prosecution suit.

Second, the SLAPP plaintiff in the underlying suit is more likely to sue his or her former attorneys for malpractice for filing the initial SLAPP suit because not only does the SLAPP filer become liable for the SLAPP target's attorney's fees in the SLAPP action but the SLAPP filer/plaintiff now becomes liable for the costs of defending the second round of malicious prosecution litigation in the SLAPPback suit. If the SLAPPback suit is successful, then the SLAPP filer's

damages attributable to his or her attorney's negligence escalate dramatically with the specter of emotional distress and punitive damages.

SLAPP LAW IN THE SLAPPBACK ERA

Some believe that these changes to the SLAPP statute actually encourage the filing of these otherwise-disfavored torts, i.e., abuse of process and malicious prosecution, as SLAPPbacks because any lawsuit dismissed as a SLAPP suit under section 425.16 in the underlying action, qualifies as a predicate to a SLAPPback suit under section 425.18(b). Thus, a number of causes of action, including defamation, libel, slander, intentional interference and other business torts, declaratory relief actions, negligent infliction of emotional distress, intentional infliction of emotional distress, and the like can all constitute SLAPP suits if they arise from protected activity and are found to be without merit.

Before the SLAPPback statute was enacted, there was a powerful check on the tendency for SLAPP suits to generate derivative tort litigation, which was the anti-SLAPP procedure itself. For example, assume that a plaintiff files a defamation, malicious prosecution or other cause of action arising from activity protected by the anti-SLAPP statute as defined in subdivision (e). The specially-moving defendant files an anti-SLAPP motion, which is granted. The defendant is then awarded mandatory attorney's fees and costs at fair market value. The incentive for that prevailing defendant to file a secondary, derivative SLAPPback malicious prosecution or abuse of process action was strongly curtailed by the specter of drawing a counter anti-SLAPP motion and having to pay the attorney's fees of the SLAPPback defendant (i.e., the plaintiff in the original action) if the SLAPPback malicious prosecution suit is itself stricken under section 425.16. Moreover, the SLAPPback defendant was equally entitled to all the procedural benefits of a section 425.16 motion.

Hence, the anti-SLAPP statute had reached an equipoise by ending meritless lawsuits arising from protected speech or petition activity at an early stage of the litigation. That objective was accomplished without generating further SLAPPback litigation or, potentially, actions against attorneys.

That all changed with the enactment of section 425.18. Although the SLAPPback malicious prosecution defendant has the right to file a special motion to strike the SLAPPback suit, substantially different rules come into play. First and

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Additionally, time periods of a month or more were not revised.

CALCULATION OF TIME UNDER RULE 6

The most significant change for litigators are the amendments to Rule 6, and the switch to the “days-are-days” approach when calculating deadlines. Under the superseded Rule 6, the question of whether or not weekends and holidays were included often depended on whether the time period in question was more or less than 11 days. This approach was confusing and burdensome and often resulted in unnecessary inconsistencies. For example, the Advisory Committee on the Federal Rules of Civil Procedure noted that while a 10-day period and a 14-day period that started on the same day would sometimes end on the same day, often the 10-day period would end later than the 14-day period. The amendments to the Federal Rules of Civil Procedure seek to end this confusion by adopting a consistent and simple approach.

Under the amended Rule 6, regardless of the length of the time period being calculated, every day, including intermediate weekends and holidays, is counted. Rule 6 also now includes a similar “hours-are-hours” counting method. Where a court order, statute, or local rule states a deadline in hours, the deadline calculation begins immediately and every hour is counted. The amended Rule 6 does remain similar to the old Rule 6 in that no time period can end on a day that is a weekend or holiday, or a day on which the courthouse is inaccessible. If a time period would otherwise end on such a day, the period is extended to the end of the next day that is not a weekend, holiday, or day that the courthouse is inaccessible.

The amended Rule 6 additionally seeks to clarify previous ambiguities in regard to the deadlines for filing papers electronically. The “last day” now ends for electronic filing purposes at midnight in the court’s time zone. For filing by other means, the “last day” ends when the clerk’s office is scheduled to close.

EXTENDED TIME PERIODS

Several rules have new time periods to correspond to the changes made to Rule 6. They are Rules 6, 12, 14, 15, 23, 27, 32, 38, 50, 52, 53, 54, 55, 56, 59, 62, 65, 68, 71.1, 72, and 81. The vast majority of the new time periods result in extensions to the previous intervals, and most time periods now occur in multiples of seven. As a result, rules that previously had one-, three- or five-day periods now call for seven-day periods in many cases. Along the same lines,

many periods that were previously ten or eleven days are now fourteen days, and periods that were once twenty days become twenty-one days. A notable exception to this general principle is found in rules 50, 52, and 59, where periods that were previously ten days have been extended to twenty-eight days.

Practically speaking, these extensions in time will often not create materially different results from those under the former Rule. Exclusion of weekends and holidays under the old Rule 6 often would make a five-day time period actually seven calendar days or longer, whereas under the new rules a seven day period will not exclude weekends or holidays.

The amendments also change the way time is calculated for motions to dismiss and summary judgment motions. Rule 56 is a default rule for summary judgment motions and only applies in the absence of any local rule or court order. Under the superseded Rule 56, a defending party could move for summary judgment at any time, while a claiming party could file a motion for summary judgment only twenty days after commencement of the action, or after being served with a motion for summary judgment. When the amended Rule 56 does apply, any party may move for summary judgment at any time until thirty days after the close of discovery. A party opposing a motion for summary judgment must file a response within twenty-one days of service of the motion or deadline date for the responsive pleading, whichever is later. A reply by the moving party is due fourteen days after the response is served. Rule 12, which deals with motions to dismiss, has been changed so that defendants now have twenty-one, instead of twenty, days after service of the complaint to serve and file an answer.

OTHER CHANGES

In addition to the time period amendments, there are other significant changes to the Federal Rules. Rule 13(f) regarding omitted counterclaims has been abrogated as redundant and potentially misleading. The abrogation clarifies that Rule 15 is the sole rule governing amendments to add to a counterclaim. Rule 15 no longer terminates the right to amend as a matter of course following the service of a responsive pleading, instead that right terminates twenty-one days after service of a motion under Rule 12(b), (e), or (f).

The December 2009 amendments added two new rules. Rule 48(c) allows for a juror poll to be taken at a party’s request or on the court’s initiative after a verdict is returned but before the jury is discharged. Rule 62.1 allows for a party to request an “indicative ruling” in the district court on a motion that the

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district court lacks authority to grant because of a pending appeal.

As always attorneys should consult the full text of those rules applicable to their case and should also check any applicable statutes as a number of statutory deadlines have been amended to correspond to the changes to Rule 6.

FEDERAL RULES OF APPELLATE PROCEDURE

Effective December 1, 2009 Federal Rule of Appellate Procedure 26 was amended to correspond to Federal Rule of Civil Procedure 6, and it similarly alters how deadlines are calculated. As with F.R.C.P. Rule 6, F.R.A.P. Rule 26 adopts a “days-are-days” approach to calculating deadlines and ends the distinction between intervals greater than or less than eleven days. Many time periods have been extended under the Federal Rules of Appellate Procedure, although many of the rules continue to have time periods of ten, thirty or forty days. The change to the “days-are-days” approach was the most significant substantive amendment to the Federal Rules of Appellate Procedure this year.

NINTH CIRCUIT LOCAL RULES

Many of the deadlines under the Ninth Circuit Local Rules have been amended to correspond to the changes made to the Federal Rules of Civil and Appellate Procedure regarding computation of time. These amendments also became effective December 1, 2009.

In addition, Ninth Circuit Local Rule 3-4 has been completely rewritten. Under the old Rule 3-4, appellant in a civil appeal was required to file a Civil Appeals Docketing Statement. Under the amended rule, appellant is no longer required to file a Civil Appeals Docketing Statement and instead is now required to file a Mediation Questionnaire within seven days of the docketing of a civil appeal. Appellee may also file a Mediation Questionnaire within seven days of the docketing of a civil appeal, but is not required to do so.

DISTRICT COURT RULE CHANGES

District Courts in California have not been uniform in responding to these changes. The Northern, Southern, Eastern and Central Districts have published amendments to their local rules that can be found on their respective websites. Many changes correspond to the amendments made to the Federal Rules of Civil and Appellate Procedure in that deadlines are extended or amended to occur in multiples of seven.

For example, new Southern District rules require a motion for reconsideration to be filed within twenty-eight

days of ruling instead of the previous thirty days. Additionally, a proof of service for a complaint now must be filed on either the 130th day following the filing of a complaint or on the fourteenth, rather than the tenth, day following an extension of time to serve.

However, a notable number of local rules have not been changed in response to the Federal Rule changes. For example, Central District Local Rule 38-2 has not been amended and still requires that, in a removed case in which jury trial was not demanded prior to removal, the demand for jury trial be filed within ten days after service of the last responsive pleading addressed to an issue triable by right by a jury. While this ten day period (like other periods of less than eleven days) previously would not have included weekends and holidays, the new F.R.C.P. Rule 6 requires weekends and holidays to be included in the calculation of all time periods. This means that periods of less than eleven days, such as this one, will now become substantially shorter in practice. Litigators should carefully check the local rules in their district court and should not assume that all deadlines have been extended, although many have.

In the Central District, the time for filing opposing and reply papers has also changed. Under Amended Central District Local Rules 7-9 and 7-10, in general, oppositions to a motion are due not later than twenty-one days before the designated hearing date, a change from the fourteen-day time period under the superseded rule. Also, replies are now due not later than fourteen days before the designated hearing date, a change from the previous seven calendar day time period.

How these changes will apply to pending cases is not yet clear. For example, it remains to be seen whether and how courts will apply the new rules to cases filed before the new rules became effective, but which are now continuing to proceed in a court where the new amendments have become effective. The Supreme Court ordered that the amendments “shall take effect on December 1, 2009, and shall govern in all proceedings in [] cases thereafter commenced and, insofar as just and practicable, all proceedings then pending.” (See “Supreme Court Transmittal Letters and Orders” at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/SC_March_2009.pdf). In the event of confusion about which rules apply to calculating periods of time that began before December 1, 2009 and end after that date, the best practice is to calculate the different possible results and follow the most conservative calculation.

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THE BURDENS OF E-DISCOVERY GROW EVEN LARGER

The landscape for E-Discovery became even more treacherous and uncertain this past month by an 84-page Amended Opinion and Order issued by a federal judge in the Southern District of New York. Although obviously intended to be an E-Discovery roadmap, the opinion in *Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities*, Case No. 05-Civ 9016 (SAS), emphasizes how unpredictable and uncertain electronic discovery can be. E-discovery is, as the Pension Committee opinion noted, too much of a “gotcha” searching for spoliation rather than searching for evidence.



Mark Neubauer

The judge who wrote the *Pension Committee* opinion, the Hon. Shira A. Scheindlin of the influential Southern District of New York, subtitled her ruling, “*Zubulake* Revisited: Six Years Later”, an obvious reference to the series of her earlier opinions that served as a previous guide in this new age of trying to decipher a standard for electronic discovery.

While this new opinion provides standards for determining how to deal with the spoliation of electronic evidence, such as emails, the application of these standards among the 13 different plaintiffs sanctioned for destruction of electronic evidence varies so much that the opinion ultimately leaves the very uncertainty it sought to resolve. The key for determining the degree of sanction for electronic evidence spoliation is now the “culpability” of the party who destroyed that electronic data. If the party who destroyed electronic evidence acted “willfully” or with “gross negligence”, the lost electronic evidence is presumed to have been relevant to the underlying lawsuit. If the party destroying the electronic evidence was merely “negligent”, then the party seeking spoliation sanctions must show that the lost data was relevant. That later burden of proof is not an easy one, since, if the evidence is truly lost, one can only guess at its missing contents. For those looking for certainty, they look in vain. Judge Scheindlin concedes this culpability standard’s application is “subjective”. Comparing her application of these standards to the 13 plaintiffs she sanctioned in *Pension Committee* and her

other illustrative examples of this misconduct creates as many questions as it answers, thereby defeating the Opinion’s purpose which was to close loopholes rather than open them. For example,

- Failing to issue a written litigation hold and properly supervising the hold program is now not mere negligence but “gross negligence” after *Zubulake 4*. Yet, seven of the thirteen plaintiffs in *Pension Committee* were found not to have instituted a written litigation hold “in a timely manner” but all of them were held merely negligent rather than grossly negligent.
- Which files were searched, how the search was conducted, who was asked to search, what they were told, and extent of any supervision of the search are all questions which can determine whether a party was grossly negligent or merely negligent. For one of the plaintiffs, the search was delegated to an employee and, because the employee had no prior experience conducting searches, received no instruction from the general counsel and had no supervision or contact with counsel during the search, that plaintiff was found to have been grossly negligent. Yet another plaintiff’s president with similarly no experience and no follow-up did the email search himself and was found to be merely negligent.
- Even more disturbing was yet another of the thirteen plaintiffs was found “negligent” where the plaintiff’s general counsel delegated the search to a paralegal, who then distributed a company wide email directing all employees to search their records for documents related to the dispute. In other words, the Opinion suggests e-discovery cannot be just delegated by counsel.
- Not identifying key players in the dispute and ensuring that their records are preserved is said to be gross negligence. Yet, not searching the records of all employees is merely negligent. But who knows at the beginning of a lawsuit who all the “key” players are?
- Failing to seize and preserve the electronic records

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of former employees was held to be grossly negligent. Yet, how many times do employees leave a company during the long pendency of a lawsuit; and

- Failing to preserve backup tapes were they are the “sole source” is also grossly negligence.

To the extent that the *Pension Committee* provides amidst its 84-pages a guideline for e-discovery, the following rules appear to apply:

1. A litigation hold should be properly and timely issued whenever it reasonably appears a dispute has arising. The problem is when a party is on notice of a dispute is often open to debate. Does each angry letter require an immediate company-wide hold notice? But if you want the most risk free approach, at that first moment of any claim or demand—even well before a legal action is commenced—send out that litigation hold. But your burden does not stop there.
2. Follow up to that litigation hold must be done diligently and carefully. If in-house or outside counsel-assign it to a paralegal or other administrative staff, they must first make sure that the staff member is trained in issues of electronic discovery and, secondly, they must personally supervise and regularly follow-up on the activity of the individual to whom the collection is assigned or, under *Pension Committee*, the client—and inferentially the lawyer—could be held “negligent”.
3. Key players should be promptly identified and their records obtained and secured. The problem here is often the key players are not clear at the commencement of the initial notice of the dispute. Periodic rereview of the hold notice recipients should be regularly redone to review who the key players are as the lawsuit develops and make sure they are contacted and their electronic documents preserved.
4. Each employee affected by litigation hold should be individually contacted to make sure the employee is actually paying attention to hold notice and

complying with its directives. It is not enough to distribute the hold and assume that employees are following it.

5. Electronic records of departed employees should be preserved. Often long after a litigation hold is issued, an employee leaves the company. Their laptop or desktop computer is wiped clean and recycled. Someone needs to be expressly responsible for preserving the departing employees’ harddrive which may have electronic evidence stored on the c:/ or other drives and not generally available on the company’s computer network.
6. System backup tapes should be preserved where they are the sole source of the electronic data. In other words, if that individual computer is lost, then the backup tape may be the only source.

All of these rules will add tremendous costs to e-discovery. The safest but most uneconomical choice is to never destroy anything. Departing from that stark choice leaves parties open to be second guessed with the benefit of hindsight as to when a dispute arose and who were the key players. Companies need to review their e-discovery personnel and practices. Containing e-discovery risks will require more active regular policing that litigation holds are being followed long after they were issued. Indeed, the increased burdens from the *Pension Committee* 84-page opinion will be substantial, but the cost of a directed verdict for “grossly negligent” spoliation of evidence could be far greater. E-discovery continues to take on a life—and a cost—of its own.

Mark Neubauer is a partner at Steptoe & Johnson LLP, and a past president of the ABTL (1991-1992).

SAVE THE DATES

FOR THE ABTL'S UPCOMING DINNER PROGRAMS

September 28, 2010

November 16, 2010

REPORT FROM THE ABTL YOUNG LAWYERS' DIVISION

BROWN BAG LUNCH WITH JUDGE MICHAEL STERN



Lin Wang

The Young Lawyers Division of the ABTL held a brown bag lunch in Los Angeles Superior Court Judge Michael Stern's courtroom on March 30, 2010. Judge Stern touched on a range of topics during the lunch, from his personal path to the bench, to preparing for case management

conferences, to his preferred form of jury instructions.

Judge Stern spent the early part of his career with the California Rural Legal Assistance, Inc., helping farm workers and indigents in rural areas. Wanting more trial work, he moved on to become a federal public defender, and then a prosecutor for the Department of Justice. After that, Judge Stern started his own firm in Los Angeles, specializing in intellectual property law.

Since taking the bench, Judge Stern has always diligently prepared for his cases. He gets in at 7:00 a.m., he reads every file in its entirety, and, for a short period of time when he first took the bench, he did all his own research without the assistance of a research attorney.

Judge Stern shared some practical pointers during the lunch:

- His practice now is to only give oral tentatives, not written tentatives;
- Attorneys should not bother spending too much space in briefs on defining the standard for demurrers and motions for summary judgment, as he is well familiar with such standards;
- All lawyers should follow Chapter 8 of the Local Rules;
- He uses CACI jury instructions rather than BAJI jury instructions;

- Almost all motions are decided on the papers; the only way to persuade him during oral argument is to present him with new/different information that the parties did not brief;
- Prior to court appearances, attorneys should spend time observing judges they will appear before;
- For motions for summary judgment, Judge Stern first reviews the opposing sides' separate statements; he cares most about the facts of the case rather than the legal elements; he next reviews the objections; Judge Stern reviews the memoranda of points and authorities last;
- Reply briefs should always be kept short – 10 pages is too long;
- He will often grant ex parte applications to shorten time, but attorneys need to have the underlying motion in hand, ready to go on the same day that they bring their ex parte application to shorten time;
- For case management conferences, the first question that he will often ask is: "When do you want the case set for trial?" In Judge Stern's experience, very few attorneys are ready to answer that question.

Judge Stern has written many articles throughout his years practicing law, and provided the attendees with various handouts concerning trial preparation, pretrial issues, discovery issues, and other practice topics.

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foremost, a defendant who successfully moves to strike a SLAPPback suit has no right to recover attorney's fees or costs for defending the action. Cal. Civ. P. Code § 425.18(c). The SLAPPback plaintiff can, however, recover fees and costs from the defendant if the motion to strike is "frivolous or solely intended to cause unnecessary delay," but makes no provision for such fees or costs to be awarded to prevailing defendants. Cal. Civ. P. Code § 425.18(f).

In addition to immunizing the SLAPPback plaintiff from a fee award, section 425.18 allows the plaintiff to obtain full discovery on an ex parte basis and gives the plaintiff more time to respond to the SLAPP motion. Cal. Civ. P. Code § 425.18(c), (d) and (e). If the trial court denies the special motion to strike the SLAPPback suit, the defendant has no right of appeal and is limited to review by peremptory writ. Cal. Civ. P. Code § 425.18(g).

Hence, there is no cost to a SLAPPback plaintiff bent on retaliation against a SLAPP filer from filing a secondary round of malicious prosecution litigation. As our Supreme Court noted long ago in a landmark malicious prosecution case:

[I]n our view the better means of addressing the problem of unjustified litigation is through the adoption of measures facilitating the speedy resolution of the initial lawsuit and authorizing the imposition of sanctions for frivolous or delaying conduct in the first action itself, rather than through an expansion of the opportunities for initiating one or more rounds of malicious prosecution litigation after the first action has been concluded.

Sheldon-Appel v. Albert & Oliker, 47 Cal. 3d 863, 873-874 (1989)

The anti-SLAPP statute, as it existed before the enactment of section 425.18, did exactly that – it awarded fees for filing meritless litigation in the first action without encouraging subsequent rounds of malicious prosecution litigation.

The pivotal question thus becomes what is the advantage, if any, of filing an anti-SLAPP motion to defend a SLAPPback suit instead of a demurrer or a summary judgment motion? The only advantage of filing a section 425.16 special motion to strike a SLAPPback suit is that if the motion is successful, that SLAPPback defendant then obtains the right to switch roles with the adversary and

become the SLAPPback plaintiff in a tertiary round of malicious prosecution litigation, while being exempt from fees and the other strict procedural provisions of section 425.16. In sharp contrast, if the SLAPPback defendant in suit number two were to successfully demur or file a motion for summary judgment, SLAPPback suit number three would be subject to the traditional rules applicable to special motions to strike under section 425.16 without the limitations set forth in section 425.18. Otherwise, there is no significant procedural or substantive benefit for a SLAPPback defendant to file an anti-SLAPP motion to strike a SLAPPback claim.

CONCLUSION

So how does section 425.18 affect California civil litigation attorneys and our courts? In short, more malicious prosecution suits, more malpractice suits, and more court congestion. As demonstrated in the recent Soukup case, the SLAPPback malicious prosecution plaintiff, Soukup, sued not only the SLAPP plaintiff, Hafif, in the underlying SLAPP suit but also sued every one of the SLAPP plaintiff's former attorneys as well. Thus, malicious prosecution suits are generated against not only the SLAPP filer in the underlying action but also against the SLAPP filer's former attorneys.

The SLAPPback provisions set forth in section 425.18 are likely to generate more malicious prosecution actions against SLAPP filers and their attorneys while at the same time increasing the likelihood that the SLAPP filer will sue their former attorney for legal malpractice due to the greater damages the SLAPP filer will inevitably incur as a direct and proximate result of the secondary SLAPPback suit in addition to the mandatory fees awarded in the underlying SLAPP action. The net effect of section 425.18 is to give prevailing SLAPP targets a "pass" to generate more litigation. This is sure increase the workload for our court system with suits that are SLAPP suits in their own right.

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