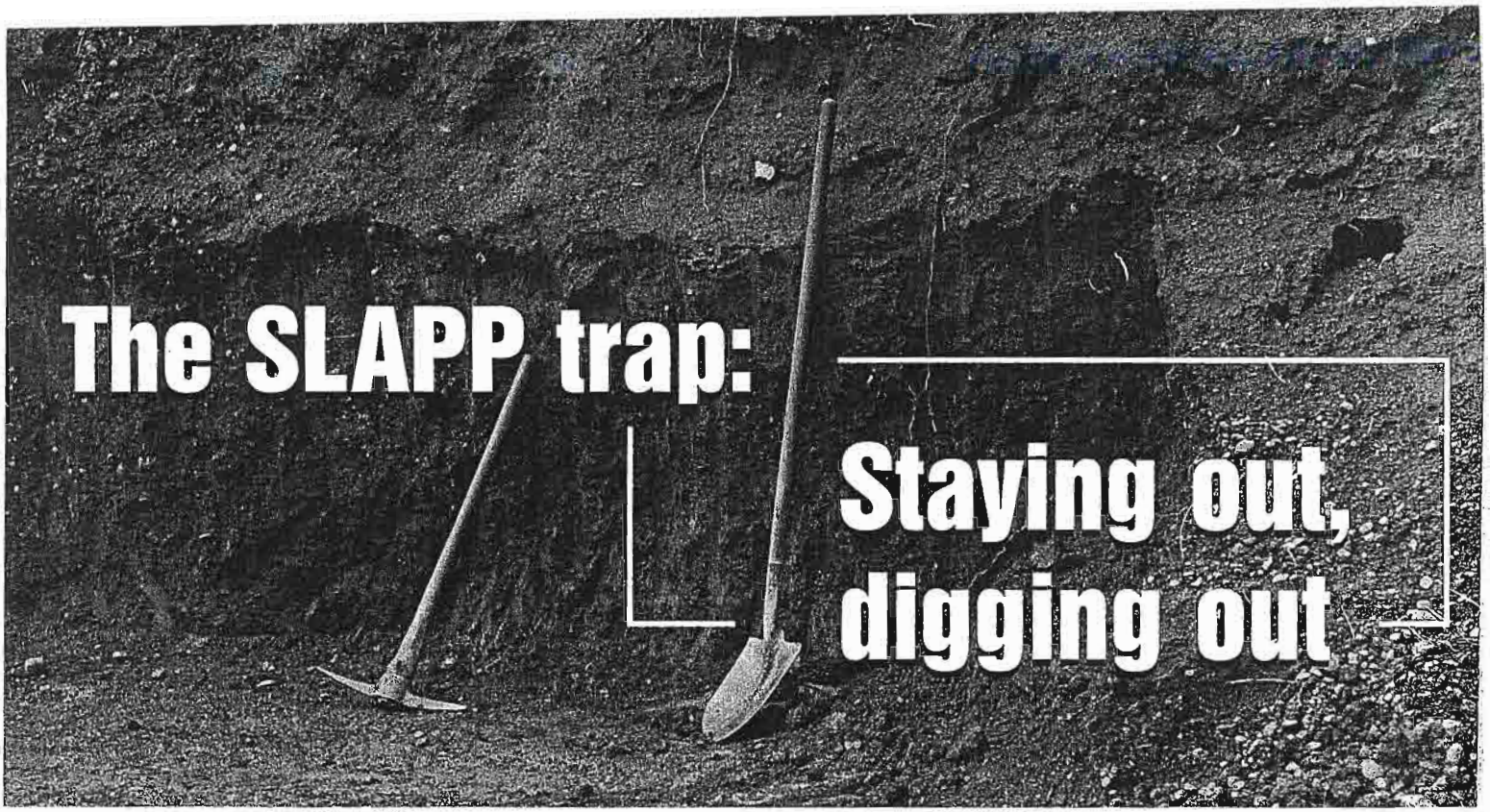

The SLAPP trap: Staying out, digging out

Ten strategic tips for ducking and defeating anti-SLAPP motions

Slip SLAPPING away
Slip SLAPPING away
You know the nearer your destination
The more you may be SLAPP-ed away
— With apologies to Paul Simon

By Herb Fox


Fox

In 1993 I filed suit against a political candidate who, in the heat of the campaign battle, unlawfully obtained my client's credit report. Upon filing the complaint my client, flushed from winning the election, held a press conference to announce the filing of the lawsuit against her former opponent.

The defendant, pinning his hopes on a strong offense, hit back with a cross-complaint for defamation for the statements my client made to the press.

I began to research defenses to the defamation cross-claim and came across a then-new section of the Code of Civil Procedure section 425.16 authorizing a "special motion to strike" claims arising from First Amendment-protected activity.

I immediately filed the motion and quickly won an order striking the cross-complaint in its entirety, and awarding my client attorney's fees. The defendant's offensive strategy backfired. That was easy!

Fast forward to 2011. According to the California Judicial Council, there have been over 5,000 anti-SLAPP motions to strike filed by defendants in California courts since 2000. Moreover, a Westlaw search displays over 475 published appellate opinions in California (and over 1650 unpublished opinions) discussing the statutory scheme (state and federal combined).

Why are anti-SLAPP motions so pervasive?

The answer is simple: an anti-SLAPP motion is perhaps the single, most efficient and effective weapon in a defendant's arsenal. The motion can deliver a quick and lethal blow to plaintiffs, who often must meet a heavy evidentiary burden *before any discovery is taken.* If you are not able (or ready) to meet that burden, the trial court must strike the claim and reward the defendant with a mandatory attorney fee award. And if you do meet that burden and defeat the motion? The order denying an anti-SLAPP motion is (usually) immediately appealable and so the unsuccessful defendant wins for losing by tying up plaintiff's case for years – all before an answer need be filed!

Anti-SLAPP motions are a pervasive danger to plaintiffs and their attorneys. They can be avoided or, if need be, defeated, but only if you begin your planning and due diligence *before* filing your complaint!

A caveat to readers. SLAPP jurisprudence is vast and complex. What follows is a cursory discussion of the SLAPP statutory scheme, and is intended only as a general guide to plaintiffs' counsel.

What's a SLAPP? And why you need to know

"SLAPP" stands for **S**trategic **L**awsuit **A**gainst **P**ublic **P**articipation.

A SLAPP is a complaint, cross-complaint or cause of action that arises from or implicates a defendant's constitutional rights to petition or free speech rights in connection with a public issue (Code Civ. Proc., § 425.16 (b)(1).)

When the statutory scheme was first enacted in 1992, its purpose was to protect citizen groups from frivolous lawsuits by developers and others whose intent was to shut down dissent. (See, e.g., *Dixon v. Superior Court* (1994) 30 Cal.App.4th 733.) But that narrow — scope is no more.

Since 1992, our courts have broadly interpreted a SLAPP to include a panoply of civil actions, from the obvious (e.g., defamation) to the not-so-obvious, for example:

- malicious prosecution;
- intentional interference with economic relations;
- unfair business practices;
- Consumer's Legal Remedies Act;

• insurance bad faith;
• invasion of privacy;
• trademark infringement; and,
• wrongful eviction.

SLAPPs arise from a wide variety of activities, including:
• Web site postings and e-mails;
• Internet chat room conversations;
• on-line ratings of businesses;
• homeowner's association meetings and activities;
• union elections; and,
• virtually anything said or done in the context of judicial proceedings, including pre-litigation communications, court-mandated mediation and arbitrations, and the conduct of insurance companies and their counsel in handling claims.

In summary, almost any activity that – broadly speaking – arises out of an official proceeding authorized by law, in connection with a public issue and taking place in a public forum, or concerns an issue of public interest, can be a SLAPP (Code Civ. Proc. § 425.16(a),(e)). One of the challenges for plaintiffs is that in many cases, a defendant's claim that the action affects protected activity – even if untrue – can result in years of delay until the issue is ultimately resolved at the appellate level.

What's an anti-SLAPP motion and why you need to know

Because a SLAPP has the effect – in theory – of chilling or punishing a defendant's exercise of constitutional rights, the Legislature created a procedural remedy to summarily dispose of these lawsuits by "ending them early and without great cost to the SLAPP target." *(Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53.)

That device, front loaded in favor of the defendant, is the anti-SLAPP "special motion to strike." (Code Civ. Proc., § 425.16.)

Just how quick and deadly is an anti-SLAPP motion? Consider this:
• The anti-SLAPP motion is usually filed within 60 days of service of the complaint (prior to or after the filing of an answer), and the hearing held within 30 days of service of the motion unless the court's docket compels a longer time. (Code Civ. Proc., §425.16(f));
• The filing of an anti-SLAPP motion immediately and automatically *stays all discovery*, subject only to the plaintiff successfully moving for an order allowing discovery limited to the merits of the motion. (Code Civ. Proc., §425.16(g);
• The moving defendant's burden is light: all that the defendant needs to show is that the cause of action arises from an act in furtherance of his or her right of petition or free speech or other protected activity. (*Club Members for an Honest Election v. Sierra Club* (2008) 45 Cal.4th 309);
• If the defendant establishes that the claim arises from protected activity, a heavy burden shifts to the plaintiff to demonstrate a "probability of prevailing," relying on admissible evidence (despite the lack of discovery) to show that the claim is legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited (Code Civ. Proc., §425.16 (b)(1); *Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 741).) Plaintiff must overcome any privilege or defense that the defendant may have to the claim (see, e.g., *Flatley v. Mauro* (2006) 39 Cal.4th 299 (litigation privilege); *Gerbosi v.*

Gaims, Weil, West & Epstein, LLP (2011) 193 Cal.App.4th 435 [statute of limitations]);

- If the complaint arises from protected activity, and if plaintiff then fails to carry his or her burden of proving a probability of prevailing, the trial court *must* strike the cause of action or complaint. (*Jackson v. Yarbray* (2009) 179 Cal.App.4th 75.)
- If the motion is granted, the trial court *must* also award the defendant reasonable attorneys' fees and costs incurred in prosecuting the motion (and that will include appellate attorney fees if the defendant prevails at the Court of Appeal (Code Civ. Proc. § 425.16(c)(1); *Carpenter v. Jack In The Box Corporation* (2007) 151 Cal.App.4th 454);
- The attorney fee provision is one-way; a prevailing plaintiff is not entitled to a fee award under the anti-SLAPP statute absent a finding that the motion was frivolous or intended to delay (Code Civ. Proc., §425.16(c)(1));
- With some exceptions discussed below, if the trial court denies the motion, the defendant may immediately appeal and, by doing so, stay the entire action for the duration of the appeal (Code Civ. Proc., §§ 425.16(i); 904.1(13); *Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180);
- A plaintiff whose action is stricken may also immediately appeal, but that is of little comfort given the cost of the appeal, the lost time, and the fact that the plaintiff must post a bond in order to secure a stay of enforcement of the trial court's attorney fee award. (*Dowling v. Zimmerman* (2001) 85 Cal.App.4th 1400.) Further, a plaintiff's appellate victory can be pyrhhic – winning means a remand to the trial court to begin litigation in earnest, some two or three years after the complaint was first filed; and,
- The Court of Appeal reviews *de novo* both prongs: whether the claim arises from protected activity, and whether plaintiff demonstrated a probability of prevailing. While this standard is favorable to the appellant, it means there can be little certainty about the outcome of an appeal.

In summary, in the world of SLAPP there is no downside for the defendant and no upside for the plaintiff. With an anti-SLAPP motion, the defendant either summarily wins the case and is awarded attorneys' fees, or ultimately loses the motion but succeeds in delaying the case (and discovery) for several years, while the case grows old, evidence grows cold, and plaintiff remains uncompensated.

Defeating anti-SLAPP motions: Early does it

The best – and often the only – time for plaintiff's counsel to plan for and defeat an anti-SLAPP motion is *before filing your complaint!* If you wait until the motion is filed – and if you are not then prepared to oppose the motion – it may already be too late.

After SLAPP... the SLAPPBack

So you filed a SLAPP; the defendant successfully moved to strike it; the Court of Appeal affirmed; the adverse judgment is final; and your client must now contend with a whopping attorney fee award in favor of the opposing party. Bad enough?

It may not be over. After the SLAPP often comes the "SLAPPBack" – a malicious prosecution case against you and your client where the original defendant (now plaintiff) seeks additional damages, including emotional distress and the remainder of the attorneys' fees actually expended but not previously awarded.

So what do you do? File your own anti-SLAPP motion against this new case – after all, it arises from your client's protected right to have prosecuted the underlying case. Right?

Maybe. But in this situation, your anti-SLAPP motion doesn't have all the advantages of the one first brought by the defendant in the underlying case. In fact, the tables are now turned because this particular species of malicious prosecution is actually favored as a matter of Legislative policy, and shaking it loose won't be easy. Give thanks to the 2005 statute creating the "SLAPPBack" special motion to strike. (Code Civ. Proc., § 425.18.)

A SLAPPBack is a claim for malicious prosecution or abuse of process arising from a prior cause of action that was dismissed by way of an anti-SLAPP motion (Code Civ. Proc., § 425.18 (b)(1).)

Normally, malicious prosecution actions are "disfavored." (*Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863.) Not so for the SLAPPBack variety. In fact, the SLAPPBack statute states that such malicious prosecution actions should be treated differently because they are:

> 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 (strategic lawsuit against public participation) litigation and by its restoration of public confidence in participatory democracy.

(Code Civ. Proc., § 425.18, (a).)

In light of the favored status of a SLAPPBack malicious prosecution action, what was a powerful tool for the defendant in the underlying case is now a ghost of its old self. For example, an anti-SLAPP motion seeking to strike a SLAPPBack:

- Does not automatically stay discovery, and allows the plaintiff to seek an ex parte order continuing the hearing to allow for further discovery;
- Does not provide the prevailing defendant an award of attorneys' fees; and,
- An order denying the motion is not immediately appealable; instead, the losing defendant must file a writ petition within 20 days.

(Code Civ. Proc., § 425.18(c),(e),(g).)

Thus where a normal anti-SLAPP motion is stacked in favor of the defendant, a motion to strike a SLAPPBack stacks the "procedural deck in favor of the SLAPPBack plaintiff confronted with a special motion to strike." (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260.)

— **Herb Fox**

Unlike responding to a motion for summary judgment, the normal law and motion deadlines apply to anti-SLAPP motions, and given the statutory policy of expediting resolution you will be jammed if you are not ready to go when the motion is filed. This is especially true if you have not already marshaled the evidence that you need – in admissible form – to demonstrate a probability of prevailing. Although the trial court *may* grant you leave to take discovery that is far from certain, as further explored below.

So what's a plaintiff to do? Here are ten strategies for dodging (if you can) and defeating anti-SLAPP motions.

(1) *Don't file a SLAPP*

Because a SLAPP defendant wins for losing, the best strategy for the plaintiff is to avoid filing a SLAPP if at all possible. There are two basic tactics for avoiding a SLAPP, with different consequences for each.

First, if your client's injuries arise from claims that would obviously be a SLAPP, think long and hard about the costs and benefits of pursuing the claim at all. If you decide to go ahead, make sure you and your client can survive the long haul.

At the same time, ascertaining in advance whether a cause of action is a SLAPP is not always easy, and you need to do your homework thoroughly and carefully. A substantial amount of the appellate jurisprudence concerns whether a particular claim is or is not a SLAPP, and the case law is still evolving. The anti-SLAPP statute's definitional focus is not the form of the plaintiff's cause of action but, rather, the defendant's *activity* that gives rise to his or her asserted liability – and whether that activity constitutes protected speech or petitioning. (*Navellier v. Sletten* (2002) 29 Cal.4th 82.) It does not matter if the lawsuit actually had a chilling effect on the defendant's activity. *(Ibid.)*

Further, some activity that would appear at first blush to be protected for SLAPP purposes has been held not to be. (See, e.g., *Garretson v. Post* (2007)156 Cal.App.4th 1508 [nonjudicial foreclosure as purely private activity not subject to statute]; *D.C. v. R.R.* (2010) 182 Cal.App.4th 1190 ["cyberbullying" is not protected activity]; and *Oasis West Realty LLC v. Goldman* (2011) 182 Cal.App.4th 688 [attorney's acts of petitioning local government contrary to former client's interests is not protected activity].)

Creative pleading, while helpful, may not work. Combining allegations of protected and unprotected activity, for example, will not avoid a SLAPP determination if the protected conduct forms a "substantial part of the factual basis of the claim." (*A.F. Brown Electric Contractor, Inc. v. Rhino Electrical Supply, Inc.* (2006) 137 Cal.App.4th 1118.)

Another strategy that will not work is filing in federal court in order to avoid the state statute. Federal diversity cases are also governed by anti-SLAPP statute. (*United States ex rel Newsham v. Lockheed Missiles and Space Co.* (9th Cir., 1999) 190 F.3rd 963.

(2) *Plead claims that are statutorily exempt*

The second avoidance tactic is to plead a cause of action that is expressly exempt from the statutory scheme – and for which there is no immediate right to appeal.

In 2003 the Legislature, having realized that the anti-SLAPP statutory scheme had become a defendant's playground for chilling the rights of plaintiffs, enacted Code of Civil Procedure section 425.17, which enumerates specific activities as statutorily exempt from anti-SLAPP motions. These include class actions that are brought solely in the public interest or on behalf of the general public; and certain actions against defendants engaged in the business of selling or leasing goods or services, including insurance, securities or financial instruments (Code Civ. Proc., §416.17(b).)

Perhaps the most important aspect of the statutory exceptions is that an order denying the motion on the grounds of exemption is *not* immediately appealable (Code Civ. Proc., § 425.17(e)). The defendant can attempt a writ petition, of course, but the odds of it being granted are long.

SLAPP – continued from Previous Page

The absence of immediate appeal rights is a game-changing limitation that should factor into any plaintiff's pleading strategy. By shaping your client's cause of action into one that fits into a section 425.17 exception – if possible – you check the defendant's right to an immediate appeal and pass Go, moving your case directly into discovery and avoiding a two-year appeal hold and de novo review.

(3) ***If you plan to dismiss, do so early***

If you have filed a SLAPP and you are now considering a voluntary dismissal, act fast.

A voluntary dismissal before the motion is filed – even in the face of a threat of a motion – will insulate your client from attorney fee liability. *(S.B. Beach Properties v. Berti* (2006) 39 Cal.4th 374.)

If, however, you voluntarily dismiss after the anti-SLAPP motion is filed, the court must rule on the merits of the motion as a predicate for awarding attorneys fees if the defendant would have prevailed. (*South Sutter LLC v. L.J. Sutter Partners, L.P.* (2011) 193 Cal.App.4th 634.)

(4) ***Get all evidentiary ducks in a row before filing your complaint***

If there is any reasonable possibility that your client's claim may be a SLAPP, it is vital that you marshal all of the evidence that is possibly available, in admissible form, *before you file the complaint.* Otherwise you will not have time to investigate, review documents, interview witnesses, draft declarations, establish foundation and otherwise analyze and prepare your evidence in the short period of time you will have to oppose the motion.

It is important to remember that if the defendant demonstrates that your client's claim is a SLAPP, the burden will shift to you to make a prima facie showing of facts based on competent admissible evidence that would, if proved, support a judgment in the plaintiff's favor. (Code Civ. Proc., § 425.16(b)(2); *Mann v. Quality Old Time Service, Inc.* (2004) 120 Cal.App.4th 90.) It is dangerous to underestimate this burden.

While there is much gloss about this burden being a minimal showing akin to defeating a motion for summary judgment (see, e.g., *Wilbanks v. Wolk* (2004) 121 Cal.App.4th 883), do not be assuaged. In practice, the trial and appellate courts will look for more than a minimal showing. This is particularly true where there are additional burdens buried in the SLAPP.

For example, in an anti-SLAPP motion arising from a defamation claim by a public figure, the courts will demand clear and convincing evidence of constitutional malice. (See, e.g., *Ampex Corporation v. Cargle* (2005) 128 Cal.App.4th 1569.)

And, in a malicious-prosecution cause of action, the plaintiff will be expected to overcome the defendant's very-low threshold of probable cause. (See, e.g., *Mendoza v. Wichmann* (2011) 194 Cal.App.4th 1430, [reversing a trial court's order that denied an anti-SLAPP motion, finding that plaintiff failed to submit "substantial evidence" showing that no reasonable attorney would have thought the underlying action was tenable].)

(5) ***Draft a draft opposition to the motion when you draft the complaint***

If you know that you are filing a case that is a potential SLAPP, consider drafting a bare-bones opposition to the motion at the same time that you draft the complaint.

Do your legal research regarding the applicability of the anti-SLAPP statute and its exceptions, and plug in the evidence that you have diligently gathered and put into admissible form. Then, when the anti-SLAPP motion hits your desk, you will only need to massage and edit what you have already drafted – and will have time to handle any unexpected defenses and arguments that the defendant has set forth in the motion.

Given the short time that you will have to file opposition to the anti-SLAPP motion – and the all-or-nothing stakes – it is good practice to be prepared.

(6) ***Prepare a discovery motion and file it immediately***

The harsh automatic discovery stay triggered by the filing of an anti-SLAPP

SLAPP – continued from Previous Page

motion includes a safety valve for the plaintiff. The court, on noticed motion and for good cause, may order that *specified* discovery be conducted notwithstanding the stay. (Code Civ. Proc., § 426.16(g)). Even if you believe you already have the evidence that you need to oppose the motion, more is better, and you have nothing to lose by attempting to obtain an order allowing discovery on the factual issues raised by the motion.

But you must act fast. An anti-SLAPP motion must be heard within 30 days of service unless docket conditions require a later hearing. (Code Civ. Proc., § 426.16(f).) Yet it also requires that any motion seeking leave to conduct discovery be *noticed* – thus allowing precious little time for that discovery motion to be heard before the hearing on the anti-SLAPP motion (or, for that matter, for the discovery to take place).

A plaintiff therefore needs to file the discovery motion almost immediately upon being served with the anti-SLAPP motion, and that in turn means that you should have a limited discovery plan in hand, and a motion ready to go, as soon as you are served with the anti-SLAPP motion.

Bear in mind, though, that getting a discovery order is no slam dunk. Unlike a summary-judgment motion, where the statute provides for discovery under some circumstances (Code Civ. Proc., § 437c(h)), in the anti-SLAPP context, discovery is actually disfavored. The court must balance the plaintiff's professed need for discovery with the Legislative policy of protecting defendants from spending resources defending against the SLAPP. (*Britts v. Superior Court* (2006) 145 Cal.App.4th 1112.) This policy has resulted in appellate courts reversing orders allowing discovery where the plaintiff – in the eyes of the Court of Appeal – has not established good cause. (See, e.g., *Paterno v. Superior Court (2008)* 163 Cal.App.4th 1342.)

(7) Consider seeking an attorney fee award for a frivolous anti-SLAPP motion

The sole exception to the one-way (prevailing defendant only) attorneys' fee award requires a showing that the

defendant's anti-SLAPP motion is itself frivolous or "solely intended to cause unnecessary delay." (Code Civ. Proc., § 425.16(c)(1).)

So, consider seeking sanctions. But the burden is steep. You will have to convince the trial court that any reasonable attorney would agree that the motion was "totally devoid of merit." (*Gerbosi v. Gaims, Weil, West & Epstein, LLP* (2011) 193 Cal.App.4th 435.)

(8) *Consult with appellate counsel*

One thing is near-certain about anti-SLAPP motions: there probably will be an appeal. If the motion is denied, the defendant has nothing to lose by taking the matter up, given the de novo standard of review, and has everything to gain by the two or three year automatic stay of all trial court proceedings.

On the flip side, if the motion is granted, the plaintiff has everything to lose by failing to appeal: the case is otherwise over, and there is an attorney fee award to face. Further, the de novo standard of review gives the appealing plaintiff reason for hope.

It is therefore worth an appellate consultation as early as possible in the process – preferably before you file the complaint. Appellate counsel might assist with research and drafting, provide advice on the advisability of filing the complaint, and discuss with you and your client the costs and risks of a subsequent appeal from any resulting order.

(9) *Consider settlement in lieu of battling an appeal*

If you have lost the motion, have an award of fees against you, and filed an appeal, discuss with your client the value of cutting your losses and settling. As stated, the appeal standard of review is de novo, and there are no guarantees how an appellate court will come down. The fee award is enforceable absent an appeal bond, and, if you lose on appeal, the defendant will be entitled to yet another fee award.

Settlement is also worth considering even if you prevailed at the trial court. As appellate counsel retained to defend an order denying an anti-SLAPP motion, I have, on occasion, concluded that the trial court was probably wrong, that the Court of Appeal would most likely strike the complaint – and that the client would then be faced with an attorney fee award for both the lower court and appellate court proceedings.

(10) *Educate your client in advance*

An informed client is a happy client, and full disclosure insulates you, as attorney, from potential exposure. I have had plaintiffs complain that their trial attorney never explained to them the risks of an anti-SLAPP motion before filing the complaint on their behalf. They were now at the Court of Appeal and their case was years away from resolution. They were, as you can imagine, very, very unhappy.

So before you file that SLAPP complaint, make sure that your client understands the risks. Win or lose the anti-SLAPP motion, the matter will be on ice at the Court of Appeal for at least a year, and likely more, before the merits can be discovered or heard in the trial court, and an attorney fees' award looms if the case is ultimately stuck as a SLAPP.

And don't forget to put that disclosure in writing!

Herb Fox is a former research attorney for the Court of Appeal, and is a Certified Appellate Law Specialist whose appellate work includes plaintiff-side insurance bad faith, employment law, and personal injury. He maintains offices in Century City and Santa Barbara. His Web site is www.FoxAppeals.com, and he may be contacted at hfox@foxappeals.com.