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Is it safe to take a vacation?

A written notice of a planned absence or vacation may be a smart move to support an attorney's claim that opposing counsel was notified but it has its limitations.



Bader

Donna Bader

Many of us send out "Notices of unavailability," hoping to keep opposing attorneys from scheduling hearings or depositions that might interfere with our vacation fun. Those notices may not be worth the paper they are printed on, warned the appellate court in Division Three of the Fourth Appellate District in *Carl v. Superior Court* (Nov. 21, 2007, G038766) 2007 WL 4126963. The court held, "To the extent this practice attempts to put control of the court's calendar in the hands of counsel as opposed to the judiciary it is an impermissible infringement of the court's inherent powers." (Opn., p. 1.) In fact, the Court of Appeal indicated the notice was not a "fileable document under the Rules of Court and will be returned to counsel." (Opn., p. 2.) The court noted that such notices had become a common practice.

In *Carl,* the petitioner argued the time to file a petition for writ of mandate was extended because he filed a "Notice of unavailability" one day before the trial court entered its order denying his statement of disqualification. The court construed the function of the notice as "arrest[ing] the power of the superior court to issue any order that would require or impose upon petitioner any legal obligation to act." (Opn., p. 2.) The court rejected petitioner's argument, finding he could not enjoin the trial court from issuing orders, and he did not possess the power to extend the time to petition for relief.

The court in *Carl* complained that it was receiving such notices on a regular basis during the appellate process. It held there is no authority for filing these notices in an appellate court, especially given the "inherent flexibility" of the Rules of Court when seeking an extension of time for "any party who feels the uncomfortable pinch of an oncoming deadline." (*Ibid.)*

They may serve a purpose, particularly at the trial level, to support a finding of bad faith or harassment by an opposing attorney who attempts to "gain an unfair, tactical advantage in litigation" by scheduling discovery when it is known the opponent is going on

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vacation or will be unavailable. (Opn., p.2.; *see also Tenderloin Housing Clinic, Inc. v. Sparks* (1992) 8 Cal.App.4th 299.)

In *Tenderloin Housing, supra,* plaintiff and cross-defendant sued respondents, who were purportedly operating a tourist hotel in violation of city laws. That action was consolidated with a previous action filed by the City of San Francisco, which alleged the same charge. The trial court issued a preliminary injunction, restricting the use at the hotel, and finding the respondents guilty of numerous counts of contempt. In a related appeal, the court sustained six counts of contempt.

Even though the discovery cutoff date had passed in *Tenderloin Housing,* the appellant continued to pursue discovery "in a frivolous and oppressive fashion with an obvious intent to harass and inconvenience respondents and their counsel." (*Id.* at p. 302.) Respondents' attorney, Violet Grayson, who was a sole practitioner, advised appellant's trial counsel that she would be out of town for two and one-half weeks to attend an arbitration hearing in New York, and then she was going to England for a long-planned vacation. Soon after he hung up the phone, appellant's attorney, Timothy Lee, scheduled three discovery motions for hearing during the time he knew Grayson would be gone. Appellant's attorney then served two of Grayson's clients with subpoenas while she was gone, forcing her to call from England to quash the subpoenas. He then set several depositions for dates when Grayson was still in England. When Grayson requested a continuance, Lee said no. A commissioner denied her motion to continue the discovery, requiring that Grayson return to protect her clients' interests. She paid extra for the unscheduled flight and lost four days of her prepaid vacation. When she landed in San Francisco, she was told the deposition was cancelled. Had she not returned when she did, Grayson would also have been in default in responding to a demurrer. Fed up with this oppressive misconduct, respondents filed a motion for sanctions pursuant to Code of Civil Procedure section 128.5.

Without question, the trial court found the appellant acted in bad faith, frivolously and solely to harass the respondents. It noted that an attorney may pursue a legal procedure justified by law, but "the timing thereof may be oppressive and may constitute harassment if it unjustifiably neglects or ignores the legitimate interest of a fellow attorney." (*Id.* at p. 306.) The court noted, "To begin with, it is widely held that 'An attorney has an obligation not only to protect his client's interests but also to *respect the legitimate interests of fellow members of the bar, the judiciary, and the administration of justice.*'" (*Ibid.*) The circumstances and the *timing* made the otherwise acceptable conduct in bad faith and supported a finding of harassment.

Tenderloin does not expressly advocate the use of a "Notice of unavailability." As noted in *Carl v. Superior Court, supra,* "Nothing in *Tenderloin,* however, expressly condones the practice that has grown up around its name. It has simply been made up." (Opn., p. 2.) A written notice of a planned absence or vacation is a smart move to support an attorney's claim that the opposing counsel was advised *well in advance* that he or she is unavailable. Such notice is especially important if the attorney is either a sole practitioner or the only one who can handle the discovery or filings. Rather than simply sending a letter detailing the dates the attorney is unavailable, the practice has grown to such an extent that formal notices are given so that the trial judge can find the notice if the opposing party rushes into court on an ex parte hearing.

On the other hand, the use of the "Notice of unavailability" can easily be abused by an attorney who might seek to control the scheduling of discovery, avoid ex parte hearings, and delay the date on which papers are due, as shown by *Carl v. Superior Court, supra.*

In my opinion, these cases suggest a breakdown in civility in the legal profession. In general, most attorneys are cooperative when another attorney has a planned vacation, an illness, or presents other circumstances that warrant a temporary truce fire in litigation. We are all struggling to find balance in our lives, which means taking a break from our hard work, and enjoying the company of friends and family. Oppressive and harassing conduct that forces us back to the office when we might otherwise be free to pursue other interests deserves a slap on the wrist in the form of a sanction award. (*In this regard, please refer to John Kelley and Peter Vestal's article on "Litigating civilly: Ten self-serving ways to play nice in discovery," which is published in this issue*.) Balance in the lives of our readers remains a strong interest of *Plaintiff* Magazine, and you can expect to read more on this subject in the coming months.

Donna Bader is a certified specialist in appellate law and and is the editor of Plaintiff *Magazine. She has started a blog, "An Appeal to Reason," to alert trial attorneys to tips and cases that will help them in the appellate process. Join her at www.anappealtoreason.com.*

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