Law Practice, Appellate Practice
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Appellate me too!

Sorry for the bait-and-switch title, but this article is not about what you probably think it's going to be about. Rather, we're here to discuss when is it appropriate to ride someone else's coattails in appellate proceedings.

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EXCEPTIONALLY APPEALING

Sorry for the bait-and-switch title, but this article is not about what you probably think it's going to be about. For starters, although sufficient material probably exists for an appellate #MeToo piece covering exceptionally appalling conduct over the past few years in state and federal appellate courts, that is not this article. Those interested in such issues should peruse last month's 9th Circuit Ad Hoc Committee on Workplace Environment (June 18, 2019). The far more prosaic "me too" to be explored has nothing to do with harassment involving court employees.

So now you're thinking that this piece will instead cover so-called "me-too" amicus briefs. But nope, that's not it either. Plenty of other appellate-practice essays (and various court rules) have exhaustively covered the ground on such disfavored briefs -- i.e., briefs that repeat issues already brought to the court's attention. Such briefs irritate by duplication and are considered a "burden" to appellate judges and court staff. *See* S. Ct. Rule 37.1. The conventional wisdom on me-too amicus briefs -- apart from "don't" -- is "if you must," then forthrightly identify the brief as such -- designed to communicate to the court that additional entities agree with positions already presented -- and keep it as short as possible.

The 9th Circuit's Advisory Committee Note to Rule 29-1 takes the customary position that me-too briefs are "disfavored" but offers an option for amici who wish to join what others have said by a "short letter." That Note also encourages the filing of joint briefs.

This brings us closer to the actual topic for this month's column, which is: When is it appropriate to ride someone else's coattails in appellate proceedings?

Here's the setup: Modern litigation is complicated. Few cases seem to mirror the halcyon days of a single plaintiff suing a single defendant. With complexity as the order of the day, most lawsuits involve either multiple plaintiffs, multiple defendants, or both -- and, concomitantly, of course, multiple sets of counsel on each side to boot. Inevitably, one party comes up with an idea for some sort of motion. If it inures to the benefit of another party, that party -- to save resources and not burden the court with repetitive briefing -- may file a "joinder." This has become so common that lawyers almost reflexively assume that they can safely "join" anything. This assumption can have bad consequences.

Although "standard practice" permits parties "to join in each other's arguments," joining an argument is not the same as joining a motion. *Decker v. UD Registry, Inc.*, 105 Cal. App. 4th 1382, 1390-91 (2003). A party seeking relief for itself technically must bring its own separate motion, even though it may be able to join in the arguments made by another party in support of its motion. Thus, in *Decker*, Defendant 1 filed anti-SLAPP motions and Defendant 2 filed a notice that "he joined" the motions -- but those motions only sought relief for Defendant 1. Thus, Defendant 2 lacked standing to appeal

because he did not bring his own anti-SLAPP motion. Defendant 2's error was in merely "joining" another party's motion, rather than filing his own motion seeking relief for himself -- even though such a motion could be barebones and join the other party's arguments. *Cf.* *Barak v. Quisenberry Law Firm*, 135 Cal. App. 4th 654, 660-62 (2006) (allowing joinder in anti-SLAPP motion when timely filed and specifically requesting relief for the joining party). The same problem can arise with summary judgment motions -- merely filing a joinder to someone else's motion does not count as filing one's own motion. *Village Nurseries, L.P. v. Greenbaum*, 101 Cal. App. 4th 26, 46-47 (2002); *Frazee v. Seely*, 95 Cal. App. 4th 627, 636-37 (2002).

The same principles of joinder basically apply in federal district court. As long as parties are similarly situated and independent filings would be redundant, joinder is generally allowed. *Tatung Co., Ltd. v. Shu Tze Hsu*, 217 F. Supp. 3d 1138, 1151-52 (C.D. Cal. 2016); *Robinson v. Vivendi Universal*, 2005 WL 5748318, *7 (C.D. Cal. 2005) ("Motions to join summary judgment motions are commonplace"). Again, parties who want relief for themselves should be clear that they are not merely rooting from the sidelines by "joining," but instead are seeking to benefit from someone else's motion.

In sum, filing a joinder to another party's motion is fine, but one must be clear about requesting relief for oneself, and must satisfy any particular requirements for the bringing of special types of motions. This sort of piggybacking off of another party's work happens on appeal as well.

California Rule of Court 8.200(a)(5) expressly allows a party on appeal to "join in or adopt by reference all or part of a brief in the same or a related appeal" as an alternative to filing a brief. Similarly, Federal Rule of Appellate Procedure 28(i) allows parties in appeals involving multiple appellants or appellees to "join in a brief" or "adopt by reference a part of another's brief." Many circuits allow this simply by letter. *In re Target Corp. Customer Data Sec. Breach Litig.*, 855 F.3d 913, 917-18 (8th Cir. 2017); *United States v. Harris*, 740 F.3d 956, 969 n.7 (5th Cir. 2014); *United States v. Pryor*, 474 F. App'x 831, 832 n.2 (2d Cir. 2012); *United States v. Cocchiola*, 358 F. App'x 376, 378 n.3 (3d Cir. 2009). The same rationale would seem to apply to appellate motions: It's fine to file a joinder.

The predicate for joining someone else's brief (or motion) on appeal, however, is that one actually be a party to the appeal -- and that crucial step cannot be accomplished by joinder. To be an appellant, one must file a notice of appeal. A party may not "join" another party's notice of appeal. *Salas v. Mercury Ins. Co.*, 2010 WL 3871814, *2 (4th Dist. Div. 3 2010) (one who has not filed a notice of appeal may not simply join in the appeal of a proper appellant); In re G.B., 2011 WL 2447500, *1 n.1 (3d Dist. 2011) (parties purporting to "join" in an appeal are not actually appellants); *United States v.*

Londono, 1993 WL 242991, *1 n.1 (9th Cir. 1993) (Table). One may certainly "join in" a notice of appeal in the sense that a single notice of appeal may be filed on behalf of more than one appellant. But that is a "joint" notice of appeal rather than a "joinder" in an already-filed notice of appeal. Of course, if a party were to file an otherwise timely and proper document titled "Joinder in Notice of Appeal," both state and federal courts would liberally construe that as an independent notice of appeal and ignore the purported "joinder" in the title.

The key lesson is that for a jurisdictional document, like a notice of appeal, there is no room for a free ride. Just as one cannot "join" another party's complaint to start an action, one cannot "join" another party's notice of appeal. Indeed, allowing such a joinder would enable a party to avoid having to do all the fun things that appellants must do to properly perfect an appeal, e.g., pay filing fees and designate a record. This carries over into other appellate filings intended to invoke a court's jurisdiction over a matter. Thus, one cannot "join" another party's appellate writ petition, which is, of course, an original proceeding. *See* Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2017) ¶ 15:141, p. 15-88 ("Any coparty who wants to join in the writ petition should expressly be made a *copetitioner* (or file a separate writ petition)."); *T.H. v. Superior Court*, 2017 WL 5491937, *1 n.3 (1st Dist. Div. 3 2017) (rejecting purported joinder in a writ petition because "preferred practice is not to allow a party to join a proceeding for which he has not complied with the appropriate procedural requirements").

Although joining a writ petition is generally verboten, a few courts have let it slide in situations where allowing joinder was effectively meaningless anyway. *Cf. Bridget A. v. Superior Court*, 148 Cal. App. 4th 285, 300, n.5 (2007) (court exercises discretion to treat "joinder" in writ petition as "a supplemental petition for writ of mandate"); *Mossy European Imports, Inc. v. Superior Court*, 2018 WL 6188268, *9 (4th Dist. Div. 1 2018) (same, because "nothing of substance would have been gained by requiring the City to have copied and pasted Mossy's petition into a separate filing under its own name").

This should hold true for a petition for review. Justice Marvin Baxter's concurring opinion in *Woods v. Young*, 53 Cal. 3d 315, 333 (1991), seemed to indicate that a joinder might be acceptable: "a word of caution is advisable. In future cases, each party who seeks our review should comply with rule [8.500] either by filing a petition for review or by filing an express written joinder in another party's petition." But that loose dicta is a slim reed on which to hang something as important as review by the California Supreme Court.

Although the standard directive is "do your own work," in exceptional situations filing a "joinder" to another party's briefs or motions (as specifically allowed by rule) is perfectly

acceptable. But don't try to become a party to a proceeding by the expediency of a joinder. Cut those corners and you'll find yourself off the road.