Law Practice, Appellate Practice
Sep. 1, 2020

The need for speed

The hotshot fighter pilots of "Top Gun" are all about speed — fast jets, fast motorcycles, and fast "friends" who haven't "lost that lovin' feeling." Appeals, however, move glacially.

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Prologue. Summer blockbuster "Top Gun: Maverick," the sequel to 1986's hit "Top Gun," was supposed to be released in July. But evil bogie COVID-19 shot that down, beating out everyone from the box office. So now the flick won't be released until 2021. But we can't wait that long for our "Top Gun"-themed appellate article, so you'll have to enjoy this now and the movie later.

Appealing fast and slow. The hotshot fighter pilots of "Top Gun" are all about speed -- fast jets, fast motorcycles, and fast "friends" who haven't "lost that lovin' feeling." Maverick isn't happy unless he's "going Mach 2 with his hair on fire." Maverick and his velocity-driven cohorts are fearless, glamorous, egotistical, and best encapsulated by the call-and-response catchphrase: "I feel the need. The need for speed!" In short, these fast-moving, high-flying, speed-demons are the polar opposite of the typical appellate lawyer and ordinary appeal.

Cruising along. Appeals move glacially. How slowly is that? The following stats may "take your breath away": The median time for a civil appeal to progress in the California Court of Appeal from notice of appeal to decision is 577 days. *See* 2019 Court Statistics Report, Fig. 33, p. 50.) That's over a year and a half. And that's a *median*, meaning that half of all civil appeals take longer. Appeals in the California Supreme Court take just as long, if not longer. Similarly, in the 9th Circuit, the median time for a civil appeal from notice of appeal to disposition in all appeals is 15.9 months. *See* U.S. Courts of Appeals Judicial Business (Sept. 30, 2019) Table B-4A; *see also* Ninth Cir. Jud. Caseload Profile (reflecting a 10.8 month median for all types of appeals and showing how this figure reflects greater speed over recent years). Returning to our naval-aviator theme, these figures show appellate courts are like aircraft carriers: devastating impact once on the scene, but very slow to arrive.

Understanding the lethargic pace of appeals is one thing, but living with this languidity is another. Most of the time, sluggishness is merely a given to be endured, if not savored. But some cases just can't wait.

"Turn and burn." Certain appeals have express statutory preference, and so are supposed to proceed with all deliberate speed. Statutory appellate preferences exist for: "Appeals in probate proceedings, in contested election cases, and in actions for libel or slander by a person who holds any elective public office or a candidate for any such office alleged to have occurred during the course of an election campaign." Code Civ. Proc. Section 44 (such cases "shall be given preference in hearing in the courts of appeal, and in the Supreme Court" and "shall be placed on the calendar in the order of their date of issue, next after cases in which the people of the state are parties"). Keeping in mind that we generally do not enter the Danger Zone of criminal, family, juvy, and other specialized practice areas in this column, other ordinary civil cases with specific statutory appellate preference include: arbitration proceedings (Code Civ. Proc. Section 1291.2); proceedings to recover possession of realty (Code Civ. Proc. Section 1179a), med-mal

dec-relief matters (Code Civ. Proc. Section 1062.5), certain land use actions (Pub. Res. Code Section 21167.1 (environment impacts); Gov. Code Section 65752 (general plans)) -- and even more hyper-specialized areas like particular tax and labor dispute cases. A relatively recent addition to the list (effective 2017) are certain appeals involving the Elder and Dependent Adult Civil Protection Act. Cal. R. Ct. 1294.4(a) ("the court of appeal shall issue its decision no later than 100 days after the notice of appeal is filed").

Appellate courts are also supposed to exercise discretion and grant appellate preference to matters entitled to preference in the trial court. Examples include election matters (including voter registration cases) and litigation involving parties over 70 and in poor health, parties with terminal illness, and wrongful death actions brought by minors. Code Civ. Proc. Sections 35, 36; *see Warren v. Schecter*, 57 Cal. App. 4th 1189, 1198-99 (1997) (court's inherent powers allow granting calendar preference; rationale for trial court preference "is equally applicable to appellate proceedings"). The Advisory Committee Comment to Rule 8.240 also asserts that appellate courts "should" exercise discretion "to grant preference on a nonstatutory ground (e.g., economic hardship)." Mandatory preferences also exist for cases seeking damages caused by a defendant during the commission of a felony (for which the defendant was convicted) and eminent domain cases (Code Civ. Proc. Sections 37, 1260.010). Some directives for swiftness arise from precedent, such as anti-SLAPP cases. *Varian Med. Systems, Inc. v. Delfino* (2005) (Supreme Court encourages resolving anti-SLAPP "motions and appeals as expeditiously as possible").

Federal aficionados know that preliminary injunction appeals get slingshot treatment with expedited appeals set forth in Ninth Circuit Rule 3-3 (e.g., opening briefs due 28 days from docketing the notice of appeal).

"Your ego is writing checks your body can't cash." All that law is well and good, but what really happens to the boots on the ground? Some appellate courts are quick to recognize preference cases and act accordingly. But that's exceptional. Most of the time, courts seem content to let the parties set the pace. Speed junkies should, on their own, ensure for prompt record election and creation, and eschew briefing extensions and grace-period time. Acting that way, and filing briefs early, is exceptional, and signals the "need for speed." But unilateral action is no guarantee the other party (or the court) will likewise hop to it on the double. What if the opposition is a malingering goldbrick? Preemptively striking via motion is the first maneuver.

Rule of Court 8.240 empowers and requires a party seeking calendar preference to "promptly" serve and file a motion seeking speed. The rule uses the term "calendar preference" to mean an "expedited appeal schedule, which may include expedited briefing and preference in setting the date of oral argument." Making a strong case for expedition may spur an order for an expedited briefing schedule, outflanking the other side's Fabian delay strategy. (Feel free to call your indolent adversary a real *Cunctator*, the agnomen of Quintus Fabius Maximus Verrucosus.) Of course, if you fire such a

motion, you must walk-the-walk and march double-time on all matters within your control. Any flagging undermines your plea for speed, and will annoy the brass as much as buzzing the tower.

Also recognize that persuading the court to constrain the other side's time will not necessarily persuade the court to rush itself. Anecdotes abound where courts complacently grant requests to expedite, but then take their own sweet time regarding calendaring and decision-making nonetheless. Euripides' quip, "Slow but sure moves the might of the gods" -- evolving into "The wheels of justice grind slow but fine" -- aptly applies. Whether a motion will spell mission accomplished, it's worth the shot. "Remember, no points for second place."

The field of appeals for which a motion to expedite premised on a statute, rule, or caselaw isn't exactly a "target-rich environment." This means that your special case with a special need for speed probably requires some fancy flying.

"You can be my wingman any time." If an appeal truly justifies utmost speed, then the more effective vehicle may be a writ petition filed in conjunction with an appeal. The key to this approach is acknowledging that although the right to an appeal exists, an appeal is nonetheless an inadequate remedy given the practical urgencies of the situation. Firing all barrels like this maybe an expensive proposition, but it also signals that you're deadly serious about launching every possible salvo. Giving the Court of Appeal the option of fast-tracking an inevitable issue through a simultaneous appeal and writ might work in winning quicker relief, or at least getting a quicker result; writs can be resolved in a matter of weeks when necessary. As Maverick would say: "Too close for missiles; switching to guns."

From 1969 to 1996, the U.S Navy Fighter Weapons School, later renamed Navy Strike Fighter Tactics Instructor program -- but popularly called TOPGUN -- was based here in California, at the Marine Corps Air Station Miramar. Today, however, a different Cold War brews in the area, with the aerial-combat school just a memory, and San Diego now serving as America's ale and lager mecca. With at least 20 breweries and tasting rooms in the vicinity, Miramar has transformed into Beeramar. So expect next month's column to take an Oktoberfest theme.