How golden is silence?

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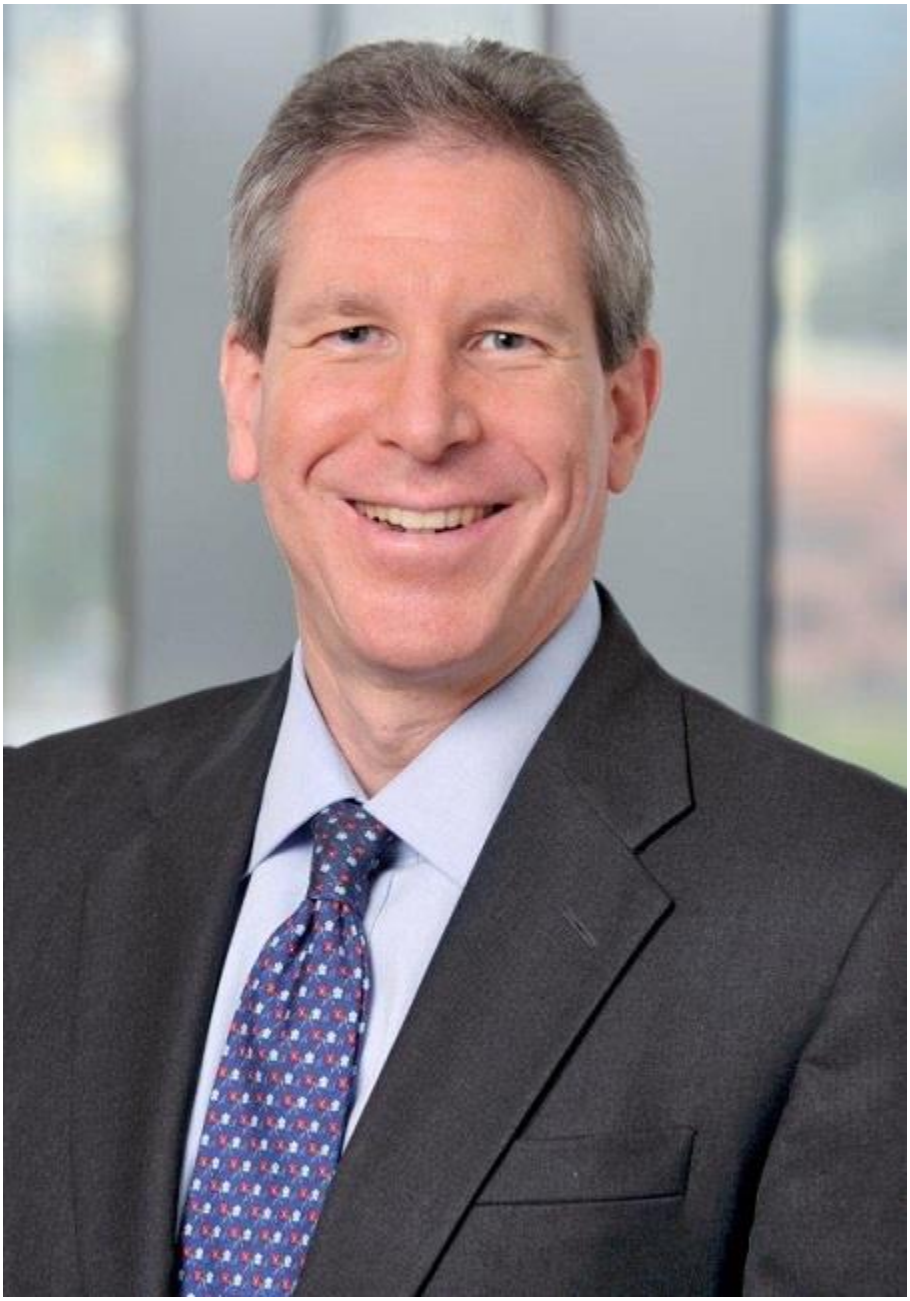

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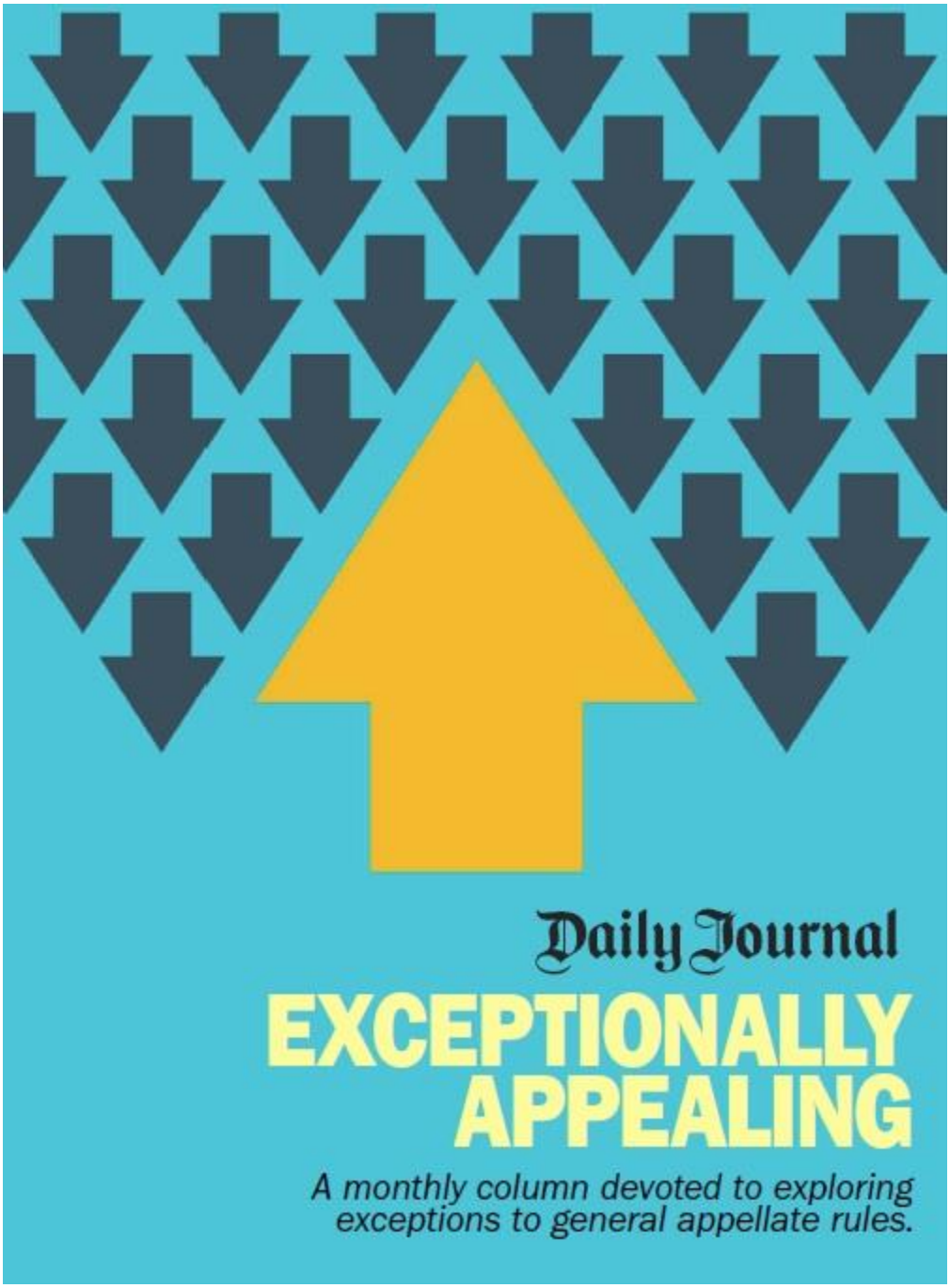

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EXCEPTIONALLY APPEALING

A concept learned early in law school is that silence is not acquiescence. This idea appears in California's jury instructions, CACI 310, which says that if a party does not respond to an offer, then that inaction is not deemed an acceptance, unless the parties understood silence to be acceptance. A related Latin proverb is Qui tacet consentire videtur, ubi loqui debuit ac potuit -- He who is silent, when he ought to have spoken and was able to, is taken to agree. As discussed in *People v. Clemons*, 153 Cal. App. 2d 64, 72 (1957), although the venerable expression "silence is consent" may have "some truth" in certain contexts, "there must be and are times when silence is anything but consent." Let's see how these ideas play out in appellate practice.

Appellate Motions. In the trial courts, remaining silent typically has drastic consequences both in the trial court and on appeal. A party who fails to oppose a motion waives any claim of error on appeal. *See Kashmiri v. Regents of Univ. of Cal.*, 156 Cal. App. 4th 809, 830 (2007); *Bell v. American Title Ins. Co.*, 226 Cal. App. 3d 1589, 1602 (1991). But motion practice is a primary function in trial courts. Appellate courts are different.

The Court of Appeal's primary job is to decide appeals. It's not called the Court of Motions and Appeals. From the court's perspective, appellate motion practice is probably perceived as an annoying ancillary function that courts would be happier not to have to deal with. Motions raising substantive issues are often referred to the merits panel so that the issues can be thrown into the mix of matters being decided on appeal. Motions that are not substantive are often procedural or of such a minor nature as to hardly justify attention. Indeed, it is unusual for an appellate motion to result in significant briefing, let alone a standalone hearing.

Thus, when an appellate motion surfaces, the first question is "Does this really warrant a response?" We began with the general legal rule that keeping quiet is not agreement or consent. Yet arguably the litigation context is one where there is an understanding that silence could be acquiescence. After all, the whole point of having opposing sides is for them to join battle. The crux of our adversarial system is to provide a forum for parties to contradict each other at every turn. California's appellate rules adopt this theory in Rule 8.54, which states: "A failure to oppose a motion may be deemed a consent to the granting of the motion." This "may" language provides wiggle room for court discretion in evaluating when it makes sense to construe silence as consent or when silence is actually meant to telegraph that non-opposition really means "We're not even going to dignify such a meaningless request by bothering to respond."

The 9th Circuit Rutter Guide says that the court "generally will not read undue significance into the nonmoving party's failure to file a response," but the court has discretion to construe a failure to respond as consent. *See* Goelz et al., Federal Ninth Circuit Civil Appellate Practice § 6:562 (The Rutter Group 2018), *citing* *Gwaduri v. INS*, 362 F.3d 1144, 1146 n.3 (9th Cir. 2004).

Thus, the rule that non-opposition to a motion may be considered consent to granting the motion is arguably an exception to the fundamental rule about what remaining silent means. And because every rule must have its exception, even a rule that itself is an exception should have an exception too. Here, that exception concerns appellate sanctions. When a motion for appellate sanctions is filed, no opposition is allowed unless the court sends a notice indicating that it is considering imposing sanctions. And when such a notice is sent inviting opposition to sanctions, the failure to file an opposition "will not be deemed consent." Cal. R. Ct. 8.276(d). Presumably the theory behind that rule is that no party would ever consent to the imposition sanctions.

This somewhat unusual procedure probably arises from the recognition that sanctions motions are often meritless and that allowing briefing in every situation would merely result in a swarm of flying accusations, chest-thumping, and retaliatory motions. This is a setting where responsive silence is so appropriate and appreciated that it's mandated by rule. The same is true for petitions seeking appellate rehearing (or rehearing en banc in federal practice), where opposition is expressly prohibited unless invited. See Cal. R. Ct. 8.268(b)(2); Fed. R. App. P. 35(e).

Appellate Briefing. Moving to briefing, every appellant must, of course, file an opening brief. Cal. R. Ct. 8.200(a)(1). An appellant doesn't really have the option of staying silent after gearing up the appellate machinery; if no opening brief is filed, the court "may" (and presumably invariably will) dismiss the appeal. Cal. R. Ct. 8.220(a)(1). Respondents' situation is different. Although the rules require that every respondent "must" file a respondent's brief (Rule 8.200(a)(2)), failing to do so simply means that the court will proceed to "decide the appeal based on the record, the opening brief, and any oral argument by the appellant." Cal. R. Ct. 8.220(a)(2).

Intentionally not filing a respondent's brief is a bold, if not foolhardy tactic, yet it is not necessarily fatal. Given that appellate courts will reverse only for prejudicial error--and given the many doctrinal presumptions arrayed against appellants--reversal is not guaranteed simply because no opposing brief was filed. Although there is older case law indicating that failing to file a respondent's brief is effectively a consent for a reversal (*Grand v. Griesinger*, 160 Cal. App. 2d 397, 407 (1958)) or is an abandonment of any attempt to support the judgment (*Roth v. Keene*, 256 Cal. App. 2d 725, 727 (1967)), the burden is always on the appellant to prove error.*Votaw Precision Tool Co. v. Air Canada*, 60 Cal. App. 3d 52, 55 (1976). Thus, it is not at all uncommon to see affirmances from cases where no respondent's brief was filed.

Supreme Court Review. We'll conclude by considering answers to petitions for review to the California Supreme Court -- or more precisely, not answering such petitions. Rule 8.500(a)(2) governing the right to answer a petition for review makes clear that answering is optional. Many lawyers find it hard to resist the urge to fight back in response to a petition for review, especially since the answering party is in the catbird seat. But there are real costs -- financial and strategic -- to answering: expenses incurred

in drafting the answer, paying the filing fee, and opening the door to a petitioner's reply. Given the very low odds of review being granted (6 percent at best in civil cases according to the latest Judicial Council's Court Statistics Report), not responding to a petition for review should be considered seriously.

From the court's perspective answers are rarely helpful anyway. The court has a pretty good handle on its own deciding whether a petition presents an important question of law or a situation where the court's limited resources are needed to "secure uniformity of decision." *See* Cal. R. Ct. 8.500(b) ("Grounds for review"). One common approach, short of ignoring a petition entirely, is to file a letter indicating that no answer will be filed unless the court so requests. This is a way to convey that you view the petition as meritless and has the advantages of (1) not incurring a filing fee and (2) possibly spurring the court to rule a bit faster, since it knows there's no need to wait for an answer.

Coda. By definition, litigators earn their living by speaking up, and especially for reactively responding, so it does not come naturally to hold one's tongue. Yet, as Ecclesiastes teaches, there is "a time to be silent and a time to speak." The Exceptional Lawyer recognizes that when speaking is folly, silence is wisdom.