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To err is human, to sometimes forgive is CCP Section 473(b)

By Stephen J. Squillario

Given an incalculable number of procedural requirements in the California Code of Civil Procedure, not to mention the Rules of Court and various local court rules, the practice of law is a minefield waiting for any attorney to err and causing sleepless nights for even the best of us. Fortunately, Code of Civil Procedure Section 473(b) offers a potential escape hatch when an attorney's mistake, inadvertence, surprise or neglect has harmed the client.

That said, Section 473(b) only grants relief when certain requirements are met. On one hand, an attorney may obtain discretionary relief on a wide variety of procedural errors committed in the course of an action where the attorney's mistake was excusable but not below the professional standard of care. As the California Supreme Court has explained, "In determining whether the attorney's mistake or inadvertence was excusable, 'the court inquires whether 'a reasonably prudent person under the same or similar circumstances' might have made the same error.'" *Bettencourt v. Los Rios Community College Dist.*, 42 Cal. 3d 270, 276 (1986).

On the other, mandatory relief is available only where dismissal or default was caused by an attorney's mistake, whether or not excusable, which means that the attorney need only admit fault and does not have to provide a reason. The main policies underlying mandatory relief are two-fold. One, granting this relief is consistent with the preference for matters to be decided on the merits. Two, it avoids further litigation in the form of malpractice suits. For attorneys facing the prospect of having to fall on their sword, a subsequent malpractice suit will guarantee more hardship relative to owning up to a mistake.

In addition to providing cautionary tales for the legal profession, appellate courts over the past five years have issued various published opinions illustrating when attorneys may obtain mandatory relief for their clients. For example, such relief is available where a judgment of dismissal resulted from terminating sanctions for a discovery abuse, where dismissal resulted from the attorney's failure to oppose defendants' demurrers and to file a timely amended complaint pursuant to the court's order sustaining demurrers, where the court dismissed the case due to the plaintiff's failure to pay timely the transfer fee after the court granted a motion to transfer venue, and where the attorney failed to respond to a demurrer by filing an amended complaint as intended.

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In contrast, the appellate courts have held that such relief is not available where the court entered judgment against the plaintiff after the attorney failed to appear at trial, where the attorney had previously blamed the client for failing to respond to written discovery and to comply with a discovery order (which resulted in terminating sanctions), where the plaintiff failed to submit the administrative record as agreed before a trial that ended in judgment for the defendant, and where the default was not in fact due to the attorney's error when the attorney had been advised more than once that no response to a petition had been filed.

In sum, these cases demonstrate that mandatory relief requires (1) dismissal or a default, and (2) an actual mistake by the attorney.

In *Jackson v. Kaiser Foundation Hospitals, Inc.*, 32 Cal. App. 5th 166 (2019), the 1st District Court of Appeal declined to expand the scope of the statute's mandatory relief provision. There, the plaintiff voluntarily dismissed, without prejudice, her lawsuit based on the erroneous conclusion of an attorney who she had consulted (but who had not yet appeared as counsel in her case) that the applicable statute of limitations had not yet expired. The plaintiff later retained the attorney on a limited basis to present a motion for mandatory relief pursuant to Section 473(b) based on the attorney's affidavit of fault. The attorney testified that he had advised the plaintiff to dismiss based on his misinterpretation of the applicable limitations period.

The 1st District affirmed the trial court's denial of the plaintiff's motion for relief. It explained that the Legislature added dismissals to Section 473(b) in 1992 in order to put plaintiffs whose cases are dismissed for failing to respond to a dismissal motion due to counsel's mistake on equal footing with defendants who are defaulted for failing to respond to an action. As a result, because the plaintiff's voluntary dismissal of her case, even if based upon counsel's erroneous advice, was not procedurally equivalent to a default, Section 473(b) was unavailable to reverse the dismissal. The court declined to address the issue of the attorney's non-representation at the time of the erroneous advice.

Rather than simply affirm based on the fact that the attorney was not counsel of record, the appellate court elected to address whether Section 473(b) applied under the circumstances. The implication is that a plaintiff can rely upon Section 473(b) based upon legal advice from an attorney who has not made an appearance in the particular action. This makes sense given that a defaulted defendant who has yet to appear can rely upon an attorney's mistake.

Although the court declined to extend mandatory relief to voluntary dismissals even when based upon erroneous legal advice, discretionary relief would, in theory, be available on the basis of a mistake of fact as occurred in Jackson. However, the plaintiff could not resort to this form of relief because the attorney provided erroneous, and thus, inexcusable, advice. As a result, her only potential remedy is to sue the attorney for malpractice. Absent the California legislature amending the statute to permit discretionary relief when the attorney's conduct fell below the standard of care, Section 473(b), as interpreted, only allows mandatory relief to serve the policy objective of avoiding legal malpractice suits. One would think that this policy should apply regardless of the form of relief. Yet, it is conceivable that such a change could lead to a flood of 473(b) motions. Nonetheless, while attorneys tend to view Section 473(b) as a lifesaver, Jackson is a reminder of the limited circumstances in which mandatory relief is available.

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