

## Practice Center

LAW AND MANAGEMENT

# Damage Control

*Code of Civil Procedure §473(b) isn't an automatic pass for lawyer mistakes*

By Gary A. Watt

*"Doctors bury their mistakes. Lawyers hang them. But journalists put theirs on the front page."*

— Anonymous

**A**s lawyers we have much to fear from mistakes. Mistakes can be substantive, procedural, tactical. We are trusted by our clients to be "experts" on everything. Yet, the California Daily Opinion Service frequently reveals cases discussing some blunder by the attorney.

Fortunately, attorneys can obtain relief from mistakes under Code of Civil Procedure §473(b), right? Sometimes. As the appellate decisions demonstrate, the type of mistakes that §473(b) covers is limited.

Section 473(b) contains both "discretionary" and "mandatory" provisions. The discretionary provision says, "the court may ... relieve a party or ... legal representative from a judgment, dismissal, order, or other proceeding [resulting from] his or her mistake, inadvertence, surprise or excusable neglect." On its face, this discretionary provision "may afford parties relief from a wide variety of procedural errors commit-



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ted in the course of an action." (Maynard v. Brandon, 36 Cal.4th 364, 372 (2005).)

However, discretionary relief applies to a mistake that is excusable, but only where the mistake is one a "reasonably prudent person," not lawyer, could make. (Zamora v. Clayborn Contracting, 28 Cal.4th 249, 258 (2002).) "[T]he discretionary relief provision of section 473 only permits relief from attorney error 'fairly imputable to the client, i.e., mistakes anyone could have made.'" (Id. (quoting Garcia v. Hej-

medi, 58 Cal.App.4th 674, 682 (1st Dist., 1997)).) "Conduct falling below the [lawyer's] professional standard of care ... is not therefore excusable. To hold otherwise would ... eliminate ... excusability and effectively eviscerate the concept of attorney malpractice." (Zamora, 28 Cal.4th at 258 (quoting Garcia, 58 Cal.App.4th at 682).)

As Zamora dictates, discretionary relief under §473(b) only covers mistakes any reasonably prudent person could make. Examples of the kind of attorney mis-

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# THE RECORDER

131TH YEAR NO. 119

www.callaw.com

WEDNESDAY, JUNE 20, 2007

ALM

takes that fall under the “person” standard include a “glitch in office machinery or an error by clerical staff.” (*Ambrose v. Michelin North America, Inc.*, 134 Cal. App.4th 1350, 1354-1355 (4th Dist., 2005).) Or, a typo. (*Zamora*, 28 Cal.4th at 258 (erroneous substitution of phrase “against” instead of “in favor of” in a judgment was “a clerical or ministerial mistake that could have been made by anybody”).) (Cf., *Pazderka v. Caballeros Dimas Alang, Inc.*, 62 Cal.App.4th 658, 671 (1st Dist., 1998) (omission of fees and costs from offer to compromise not mistake ordinarily made by a person, but a lawyer failing to meet the standard of care).)

Attorney failure to properly interpret a statute will usually not result in discretionary relief. Such “ignorance of the law coupled with negligence in ascertaining it will certainly sustain a finding denying relief.” (*Anderson v. Sherman*, 125 Cal.App.3d 228, 237-238 (2d Dist., 1981).) “Where the court finds that the alleged mistake of law is the result of professional incompetence based upon ... general ignorance of the law or lack of knowledge of the rules, or unjustifiable negligence in the discovery or research of the law ... relief will be denied.” (*State Farm Fire & Casualty Co. v. Pietak*, 90 Cal.App.4th 600, 611 (3d Dist., 2001).)

Thus, attorneys are usually unable to obtain discretionary relief from their failure to properly interpret procedural or substantive law. Relief turns on the reasonableness of the misconception and the justifiability of the failure to determine the correct law. (*Anderson*, 125 Cal.App.3d at 237-238.) Nonetheless, where “elementary legal research” would have cleared up an “obvious point of law,” refusal to grant discretionary relief is proper. (*Id.* at 238.)

Therefore, while attorneys may obtain relief from legal mistakes under the discretionary provision, the circumstances will be narrow and such relief infrequent. The standard of review on appeal is, as the type of relief suggests, abuse of discretion. Moreover, §473(b) cannot be utilized to obtain relief from failing to meet deadlines deemed jurisdictional, such as statutes of limitations, motions for new trial and time to appeal. (*Maynard*, 36 Cal.4th at 372.)

In 1988, the Legislature amended §473(b) to include a mandatory relief — attorney fault provision. It states that “the court shall, whenever an application for relief is made no more than six months after entry of judgment ... and is accompanied by an attorney’s sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect, vacate any ... default ... default judgment or dismissal ...” (Emphasis added.) Use of the phrase “dismissal” in the mandatory provision gave rise to

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some ambiguity in its scope. It appeared that attorney-inflicted legal wounds need not be fatal. And in some appellate courts, that appeared to be the case. However, other courts have narrowly interpreted the mandatory relief provision.

The Supreme Court’s decision in *Zamora* did not turn on the mandatory relief provision, but it described that provision as a “narrow exception to the discretionary relief provision [applicable to] default judgments and dismissals.” (28 Cal.4th at 257.) The purpose of the mandatory provision ““was to alleviate the hardship on parties who will lose their day in court due solely to an inexcusable failure to act on the part of their attorneys.”” (*Id.* (quoting *Huens v. Tatum*, 52 Cal.App.4th 259, 264 (3d Dist., 1997)).) Attorneys seized on the phrase “lose their day in court” to argue for wide application of the mandatory relief provision. Taken to the extreme, such an interpretation could lead to all kinds of “do overs.”

However, the Third District views “lose their day in court” as merely explaining *Zamora*’s description of the “narrow exception” involving default judgments and

dismissals. For example, it held that the mandatory relief provision of §473(b) does not apply to voluntary dismissals. (52 Cal. App.4th at 259.) As *Huens* observed, the question of whether an attorney’s mistaken, voluntary dismissal could be relieved by signing a declaration attesting to fault “is not a difficult one.” (*Id.* at 264.) The court’s answer was “no.” The legislative purpose for the mandatory provision’s reference to “dismissal” was to provide plaintiffs whose cases are dismissed for failing to respond to a dismissal motion with the same relief as defendants that fail to appear. (*Id.*) Beyond the limited grounds of default, default judgment or dismissal motion, *Huens* concludes that no other type of attorney mistake is entitled to relief under the “mandatory” provision. Thus, the Third District’s reading of the statute leaves attorneys only the “discretionary” relief provision with its harsher “reasonableness of the misconception” standard and a court’s mercy (or lack thereof) as a source of relief from all kinds of legal errors.

*English v. IKON Business Solutions, Inc.*, 94 Cal.App.4th 130 (3d Dist., 2001), demonstrates how strict reading of the statute forecloses relief from most attorney mistakes, including those of omission. In *English*, plaintiff moved to vacate summary judgment under the mandatory relief provision. (94 Cal.App.4th at 136.) Plaintiff contended that her attorney’s failure to file a substantive opposition to the motion was analogous to “parties losing their day in court” as that phrase was used in *Zamora*. (*Id.* at 137.) Refusing to join some courts that found that the analogy to losing one’s day in court sets the boundary of the mandatory relief provision, *English*, like *Huens*, held that the provision applies to failure to oppose a dismissal motion, and not other motions. (*Id.* at 141.)

*English* concluded that to read anything more into the mandatory provision of §473(b) goes beyond the Legislature’s intent when it enacted the provision. (*Id.* at 148.) If the Legislature intended to create a mandatory escape hatch for careless attorneys, it could have easily said so. (*Id.*; see also, *Jerry’s Shell v. Equilon Enterprises, LLC*, 134 Cal.App.4th 1058, 1073-1074 (2d Dist., 2005) (noting that

# THE RECORDER

131TH YEAR NO. 119

www.callaw.com

WEDNESDAY, JUNE 20, 2007

ALM

the liberal construction some courts have made could reward and encourage wholly improper attorney conduct including “diabolical” strategic gambles.)

In contrast, the First, Second and Fourth Districts have taken a broader view combining Zamora’s analogy to parties losing their day in court, the mandatory relief provision’s use of the word dismissal and the policy of deciding cases on the merits. The result has been wider potential application of the mandatory relief provision to a variety of situations. This interpretation can better protect clients from attorney folly. (See, e.g., *Avila v. Chua*, 57 Cal. App.4th 860, 868 (2d Dist., 1997) (failure to file opposition to motion for summary judgment analogous to default judgment because day in court lost); *Yeap v. Leake*, 60 Cal.App.4th 591, 600 (2d Dist., 1997) (failure to appear at arbitration hearing relievable); *In Re Marriage of Hock & Gordon-Hock*, 80 Cal.App.4th 1438, 1443 (2d Dist., 2000) (dismissal based on attorney’s failure to appear on date of trial of reserved issues warrants mandatory relief).)

However, as the examples illustrate, even in those courts willing to give the mandatory relief provision wider scope, mistakes resulting in relief must usually be of omission, effectively resulting in the procedural equivalent of a default, i.e., failure to appear. For example, in *Ambrose*, the Fourth District denied mandatory relief because plaintiff’s counsel filed a timely response to a summary judgment motion, which the trial court considered on the merits. (134 Cal.App.4th at 1354-1355.) As a result, plaintiff did have his day in court. (*Id.* at 1355-1356.) And in *Garcia*, the First District held that “there was no complete failure to oppose, but rather an opposition which was ... inadequate in substance.” (58 Cal.App.4th at 683.) In a series of unpublished cases decided in 2006, the First District denied relief from failure to timely file a memorandum of costs, from the filing of a voluntary dismissal, and from failure to file a separate statement of undisputed facts in opposition to a motion for summary judgment. (See *Davis v. Alexander*, 2006 Cal.App. Unpub. LEXIS 11449;

*Friend v. Shierman*, 2006 Cal.App. Unpub. LEXIS 5252; *Scott v. Oldham*, 2006 Cal. App. Unpub. LEXIS 505.)

There may be some unintended consequences flowing from these judicial demarcations. An attorney whose opposition papers are incomplete and substantively weak (for a variety of reasons) could be tempted to not file any opposition at all and/or not appear at the hearing. A signed declaration seeking mandatory relief could follow. While such a gamble would not get anywhere in the Third District, it could work in the other courts of appeal. Such conduct, however infrequent, cannot be what the Legislature envisioned when it enacted the mandatory provision.

George Bernard Shaw once opined that, “a life spent in making mistakes is not only more honorable but more useful than a life spent doing nothing.” Attorneys can take little solace from such musings. Despite their willingness to sign a declaration attesting to their mistakes, attorneys may also find little solace in §473(b)’s mandatory relief provision.