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California TRIAL GUIDE

Publication 114 Release 55

November 2015

HIGHLIGHTS

This release updates the publication with new case law.

Court sets rules for access to work product of disqualified counsel.

In a case of first impression, the court in *City and County of San Francisco v. Cobra Solutions, Inc.* [(2014) 232 Cal. App. 4th 468, 181 Cal. Rptr. 3d 430] held that when a party's attorney has been disqualified the opposing party may restrict that party from using evidence, work product or pleadings developed by its disqualified attorney. A motion to restrict that use, however, must be timely filed. The case is discussed in Section 3.20[3][b].

Denials of requests for admission ordinarily cannot be introduced at trial.

In a case of first impression the court in *Gonsalves v. Li* [(2015) 232 Cal. App. 4th 1406, 182 Cal. Rptr. 3d 383], held that a party's denials of requests for admission cannot ordinarily be introduced as evidence at trial. The court recognized an exception may apply if there is an inconsistency between the response to a request for ad-

mission and trial testimony. See discussion at Sections 100.02(3)(a) and 20.51[1].

In responding to a *Wheeler* motion, the party's preference for the next-juror-up is not a race-neutral reason for challenging a member of a cognizable group.

In *People v. Cisneros* [(2015) 234 Cal. App. 4th 111, 121–122, 184 Cal. Rptr. 3d 1], the trial court found that the defendant had made a prima facie showing that the prosecutor was excluding male jurors on the basis of group bias. In rebuttal the prosecutor explained that she had not excused the last juror “for a gender based reason, but because I believe the next juror in line [also a male] . . . is a better fit.” The Court of Appeal rejected the prosecutor's next-juror-up rationale, calling it “no reason at all” because “whenever counsel exercises a peremptory challenge, it necessarily means that he or she prefers the next prospective juror to the one being challenged. . . .” The case is discussed in Section 10.90[2][g].

A judgment of dismissal that implements a terminating sanction for discovery abuse is a “dismissal entered” for

purposes of Code of Civil Procedure section 473(b).

In a case of first impression, the court in *Rodriguez v. Brill* [(2015) 234 Cal. App. 4th 715, 719, 725–726, 184 Cal. Rptr. 3d 265], held that the mandatory relief provided in section 473, subdivision (b) is available “when a judgment of dismissal is entered as a terminating sanction for discovery abuse[.]” The case is discussed in Section 100.53[6][1].

As a general rule an attorney has no duty to preserve the confidences of a nonclient.

There are exceptions to this rule, however, as demonstrated by the case of *Acacia Patent Acquisition, LLC v. Superior Court* [(2015) 234 Cal. App. 4th 1091, 184 Cal. Rptr. 3d 583]. *Acacia* is discussed in Section 3.20[1][a][iv].

A website does not qualify as a “published compilation” of information.

In *People v. Franzen* [(2012) 210 Cal. App. 4th 1193, 1206–1214, 148 Cal. Rptr. 3d 863], the court engaged in a thorough examination of the “published compilation” hearsay exception (Evid. Code § 1340) and concluded the exception does not apply to information stored on a website. The court’s opinion is discussed in Section 40.91.

Guidance on how to authenticate an electronic signature under Civil Code section 1633.9 can be gleaned from the defendant’s failure to do so in *Ruiz v. Moss Bros. Auto Group, Inc.* (2014) 232 Cal. App. 4th 836, 181 Cal. Rptr. 3d 781 discussed in Section 30.19[2][b].

Relief from a terminating discovery sanction is available under Code of Civil

Procedure section 473(b).

In *Rodriguez v. Brill* [(2015) 234 Cal. App. 4th 715, 718–720, 184 Cal. Rptr. 3d 265], a palimony action, the court entered judgment for the defendant as a terminating sanction for plaintiff’s failure to respond to discovery requests and to comply with an order that she do so. The court also denied plaintiff’s motion for mandatory relief under Code of Civil Procedure section 473, subdivision (b). The Court of Appeal reversed the order denying relief and the judgment, holding that a terminating sanction is subject to relief under section 473, subdivision (b). The case is discussed in Section 100.53(1)(c1).

When one of several joint clients sues their attorney for malpractice the communications between the attorney and the other joint clients are not privileged.

In another case of first impression, *Anten v. Superior Court* [(2015) 233 Cal. App. 4th 1254, 1259–1260, 183 Cal. Rptr. 3d 422], the plaintiff, one of three joint clients, sued the real-party-in-interest, an attorney, for malpractice. The attorney objected to certain discovery requests by plaintiff asserting the attorney-client privilege on behalf of the non-suing joint clients. The trial court sustained the attorney’s objections and the plaintiff sought writ relief. The Court of Appeal held that the non-suing clients could not assert the attorney-client privilege to prevent the suing client from discovering relevant communications between the attorney and all of the joint clients. The court based its decision on Evidence Code section 958 and sound public policy. *Anten* is discussed in Section 51.10(4)(g).

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Publication 114 Release 55

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