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Matthew Bender®

Practice Guide: California Civil Discovery

Publication 1290 Release 28

March 2017

HIGHLIGHTS

2017 Annual Update for Recent Legislation, Rules of Court, and Judicial Decisions.

- This publication has been updated with 2017 California legislation and rules of court, as well as the latest judicial decisions.

This release is the annual update for recent California legislation, rules of court, and judicial decisions. It incorporates the relevant California legislation passed in 2016 and effective on or before January 1, 2017, as well as changes to the California Rules of Court operative January 1, 2017. Changes in this release include the following:

Legislative Changes:

California Public Records Act. The CPRA has been updated to add Gov Code 6253(f) [2016 Cal Stats ch 275]. The new subsection authorizes a public agency that

posts a public record on its website to refer a member of the public that requests to inspect the public record to the site where the record is posted. If the requestor cannot access or reproduce the public record from the website where the public record is posted, the public agency must promptly provide a copy of the public record to the member of the public. See Ch. 1, *Strategy and Planning*, § 1.09[2][e].

Effect of Deposition Notice or Subpoena Requiring ESI. CCP § 2025.280(c) has been added to the statutes governing deposition notices and subpoenas [2016 Cal Stats ch 467]. A deponent required to produce ESI must provide a means of gaining direct access to, or a translation into a reasonably usable form of, any password protected or otherwise inaccessible ESI. See Ch. 6, *Oral Depositions in California*, § 6.05[4], 6.06[2], [3].

Depositions of Party-Affiliated or Retained Experts. CCP § 2034.415 has been added to the statutes governing expert wit-

ness depositions [2016 Cal Stats ch 467]. A party-affiliated or retained expert whose deposition is noticed under CCP § 2025.220 must produce, no later than three business days before his or her deposition, any materials or category of materials, including any ESI, called for by the deposition notice. See Ch. 13, *Exchanging Expert Witness Information*, § 13.23[3].

Rules of Court Changes:

Exhibits. Cal Rules of Ct, Rule 2.114 and 3.1110 now provide that electronic exhibits must meet the requirements in Cal Rules of Ct, Rule 2.256(b), and unless they are submitted by a self-represented party, electronic exhibits must include electronic bookmarks with links to the first page of each exhibit and with bookmark titles that identify the exhibit number or letter and briefly describe the exhibit. See Ch. 4, *Law and Motion Procedure*, § 4.11[8].

Judicial Decisions:

Relevance. In *Moore v. Mercer* (2016) 4 CA5th 424, an action by an uninsured plaintiff injured in a motor vehicle collision to recover the reasonable value of medical services incurred, the terms of agreement between a medical finance company and the plaintiff's providers were relevant and discoverable to prove past medical expenses. See Ch. 2, *Scope of Discovery*, § 2.07[1].

Attorney-Client Privilege—Legal Services. *City of Petaluma v. Superior Court* (2016) 248 CA4th 1023 holds outside counsel is not required to give legal advice about what course of action to pursue in order for the attorney-client privilege to apply, provided the dominant purpose of outside counsel's factual investigation was to provide legal services in anticipation of litigation. See Ch. 2, *Scope of Discovery*, § 2.16[3][d].

Psychotherapist-Patient Privilege—Exceptions; Waiver. In *Gerner v. Superior Court* (2016) 1 CA5th 301, the Medical Board could not enforce an investigational administrative subpoena for a psychiatrist's treatment records after the patient withdrew his complaint and directed the psychiatrist not to disclose the records. The disciplinary proceedings exception in B & P Code § 2225 did not extend to the psychotherapist-patient privilege. See Ch. 2, *Scope of Discovery*, §§ 2.14[3][a] and 2.18[4].

Mandatory Relief From Dismissal or Default Judgment Under CCP § 473(b). Coverage of mandatory relief under CCP § 473(b) has been revised and updated. Updates include practice tips on the application's timing and form, and distinguish mandatory and discretionary relief.

For example:

- *Rodriguez v. Brill* (2015) 234 CA4th 715 holds that mandatory relief under CCP § 473(b) for "any . . . dismissal entered" encompasses dismissals entered as terminating sanction for discovery abuse. See Ch. 3, *Sanctions*, § 3.15.
- *Minick v. City of Petaluma* (2016) 3 CA5th 15 clarifies that what constitutes "a reasonable time" depends on the circumstances of that particular case. A delay is unreasonable as a matter of law only when it exceeds three months and there is no evidence to explain the delay. See Ch. 3, *Sanctions*, § 3.18[2].
- *Martin Potts & Associates, Inc. v. Corsair, LLC* (2016) 244 CA4th 432 holds it is unnecessary for an attorney to provide reasons for his/her claimed "mistake, inadvert-

tence, surprise, or neglect” in order to qualify for mandatory relief under CCP 473(b). See Ch. 3, *Sanctions*, § 3.18[2].

The revisions highlight the disagreement among courts of appeal on whether the phrase “dismissal was not in fact caused by the attorney’s [fault]” (CCP § 473(b)) means relief is not available when the negligence or willful misconduct of the client contributes to the dismissal. See Ch. 3, *Sanctions*, § 3.18[2].

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