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Newcases of BUSINESS LITIGATION INTEREST

Orange County Bar Association • Business Litigation Section

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STATE

Appeal—Notice of Appeal—Attorneys' Fees

The court of appeal's decision in *Bertoli v. City of Sebastopol*, 233 Cal.App.4th 353, 182 Cal.Rptr.3d 308 (2015) contains a good reminder that "when a judgment awards costs and fees to a prevailing party and provides for the later determination of the amounts, the notice of appeal [from that judgment] subsumes any later order setting the amounts of the award." In *Bertoli*, the appellant had appealed both from the judgment and the amended judgment and order fixing the amount of fees and costs. The court found that it had jurisdiction to review the amount of fees in the appeal from the original judgment and, therefore, dismissed the second appeal. Of course, it is always safer to appeal from *both* the initial judgment *and* any amended judgment setting the amount of fees, even if doing so is technically unnecessary.

Attorneys—Attorney-Client Privilege—Joint Clients

In general, when an attorney jointly represents several clients in a matter of common interest, communications among them, while privileged as to third parties, are not privileged as between the joint clients. In *Anten v. Superior Court,* 233 Cal.App.4th 1254, 183 Cal.Rptr.3d 422 (2015), the court addressed what happens if one joint client sues the lawyer for malpractice and the nonsuing clients seek to prevent disclosure of communications between them and the lawyer that the malpractice plaintiff sought to discover. Reviewing both the statutory language and the underlying policies, the

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court of appeal concluded that such communications were discoverable.

Attorneys—Disqualification—Duty of Confidentiality to nonclients

Sometimes a duty of confidentiality to nonclients will require an attorney's disqualification; that was the case in *Acacia Patent Acquisition, LLC v. Superior Court*, 234 Cal.App.4th 1091, 184 Cal.Rptr.3d 563 (2015). In that case a law firm represented another law firm in a lawsuit against that firm's former client, Acacia. The gist of the suit was that Acacia misallocated funds received in settlement to reduce contingent fees owing to the law firm. When that case was over, the same law firm that handled the case against Acacia filed a second suit against Acacia, this time on behalf of a consulting expert who alleged that the same settlement wrongfully reduced his fees, too. Acacia moved to disqualify the law firm. The trial court denied the motion, but the court of appeal issued a writ of mandate ordering the trial court disqualify the firm. The court of appeal reasoned that in the first case, the law firm obtained privileged information between its law firm client and Acacia that had been generated in the underlying action when the law firm represented Acacia. The court held that there is no flat rule barring a lawyer from representing a second client in a situation like this, but where the first representation results in a broad disclosure of the nonclient's (Acacia's) privileged materials and a substantial relationship exists between the two matters, disqualification is appropriate.

Litigation—Admissibility of Denial in Request for Admission

In *Gonsalves v. Li*, Cal.App.4th 1406, 182 Cal.Rptr.3d 383 (2015), the court considered whether the denial of a request for admission ("RFA") was admissible at trial. Finding a "somewhat surprising paucity of relevant authority" on the issue, the court turned to out-of-state decisions. Quoting with approval a decision from the Massachusetts Supreme Court refusing to admit the denial of an RFA, the court of appeal recognized that "[a] denial . . . is not a statement of fact; it simply indicates that the responding party is not willing to concede the issue and, as a result, the requesting party must prove the fact at trial." The court further noted that the "[i]ntermediate courts in at least three states have similarly held that denials of RFA's are inadmissible at trial." Thus, the *Gonsalves* court concluded that "denials

of RFA's are not admissible evidence in an ordinary case, i.e., a case where a party's litigation conduct is not directly in issue."

Litigation—Dismissal—Relief from Dismissal—Sanctions—Attorney Fault

One part of CCP § 473 entitles a client to relief from dismissal based on attorney fault. Does this provision apply where a case is dismissed on terminating sanctions? The court in *Rodriguez v. Brill*, 234 Cal.App.4th 715, 184 Cal.Rptr.3d 265 (2015), without acknowledging a split of authority (see *Breliant v. Boyd*, 2015 WL 1954488 (April 30, 2015) (discussing split and disagreeing with *Rodriguez*)), held that a judgment of dismissal for discovery abuse based on terminating sanctions is a "dismissal" for purposes of mandatory relief for attorney fault under CCP § 473. The court further held that when there is no indication that the client played any role in the conduct that led to the dismissal, a client is eligible for relief provided he or she meets the other requirements under section 473.

Litigation—Judgment—Enforcement of Judgment—Postjudgment Attorneys' Fees

In a previous issue of this newsletter, we summarized the decision in *Gray1 CPB, LLC v. SCC Acquisitions, Inc.*, 225 Cal.App.4th 401 (2014), which held that acceptance of a cashier's check for the full amount of an outstanding judgment precluded the later filing of a motion for attorneys' fees incurred in trying to enforce the judgment. The Supreme Court, however, granted review and remanded for reconsideration in light of the decision in *Conservatorship of McQueen*, 59 Cal.4th 602 (2014). There, the supreme court stated that if payment of a judgment is by certified check, "the acceptance of which arguably constitutes satisfaction, the judgment creditor retains, at the least, the option of rejecting the certified check and filing the motion or memorandum for enforcement costs and fees." On reconsideration in *Gray1*, the judgment creditor argued that its refusal to deposit the cashier's check until after filing a motion for enforcement fees was equivalent to "rejecting" the check. The court of appeal disagreed, holding that the creditor "accepted and subsequently cashed the cashier's check" and "cannot claim it did not accept the check because it wanted more money than the check was for." *Gray1 CPB, LLC v. SCC Acquisitions, Inc.*, 233 Cal.App.4th 882, 182 Cal.Rptr.3d 654 (2015).

Litigation—Personal Jurisdiction

The personal jurisdiction question raised in *Greenwell v. AutoOwners Ins. Co.*, 233 Cal.App.4th 783, 182 Cal.Rptr.3d 873 (2015) reads "like an essay question on a law school exam." "[A] California resident owned an apartment building in Arkansas that was insured by a Michigan insurance company under a policy the owner obtained through an insurance agent in Arkansas." In addition to insuring the Arkansas property, however, the policy included "commercial general liability coverage for the owner's property ownership business, which he operated from California." The policy also covered some risks "that could have arisen in California," though the actual dispute in the case "arose out of two fires that damaged the building in Arkansas." Given these circumstances, did the California court have specific jurisdiction over the insurance company? The court of appeal answered "no." Although the court agreed with the insured that the insurer "purposefully availed itself" of the California forum by writing a policy covering risks that could have occurred in California, the court further found that "there was no substantial nexus between the insurer's activities in California and the present action because the owner is not suing the insurer for any California risk that came to fruition."

Litigation—Posttrial Motions—Time to Rule

The Code of Civil Procedure sets jurisdictional deadlines for a trial court to rule on posttrial motions. A party filing a posttrial motion (e.g., for new trial) must file the notice of intention within 15 days of service "*upon him or her* by any party" of a notice of entry or judgment or within 180 days of entry, if no notice of entry is served. CCP § 659. Similarly, the power of a court to rule on a new trial motion expires "60 days from and after service *on the moving party* by any party of written notice of entry of judgment. In *Maroney v. Iacobsohn*, 233 Cal.App.4th 900, 183 Cal.Rptr.3d 257 (2015), the court of appeal reasoned that since these statutes refer to service "upon" or "on" the moving party, service *by* a moving party does not trigger the jurisdictional deadlines to rule. (The moving party had served a conformed copy of the judgment in opposing a motion to tax costs; the court of appeal assumed for purposes of the decision that act was the equivalent of serving a notice of entry of judgment.)