

You Don't Always Get a Second Chance

By Paul Kujawsky

If you have to prepare an opposition to a motion for summary judgment, you probably shouldn't hand it off to your paralegal to write. If you do, make sure she finishes it before she leaves on a cruise to Alaska. Otherwise, the resulting failure to timely oppose the motion will not be considered excusable inadvertence, mistake, surprise or neglect under Code of Civil Procedure Section 473(b). And since the mandatory relief provision of Section 473(b) for inexcusable neglect doesn't apply to summary judgments, even firing the paralegal when she comes back from vacation will not erase the sting of screwing up the case.

This is what we learn from the 5th District Court of Appeal's opinion in *Henderson v. Pacific Gas & Electric Co.*, F058223, published Aug. 5, 2010. Susan Henderson worked for PG&E, but apparently they didn't get along well. She sued the company for breach of contract and employment discrimination. PG&E eventually moved for summary judgment.

Henderson's attorney was a sole practitioner who was no doubt quite happy, in these economically sluggish times, to have a busy caseload. Fortunately, he had a paralegal in whom he had confidence, so he assigned the drafting of the opposition to her while he worked on other matters. Unfortunately, she had vacation plans.

The filing deadline was Monday, Sept. 8, 2008. On Thursday, September 4, the paralegal called the attorney from home, where she had taken most of the case file, to assure him that the opposition would be on his desk the next morning. But on Friday, September 5, she left him a new message: she would e-mail the opposition directly to an attorney service. The service would file and serve the opposition on Monday. And she sailed away to Alaska.

One imagines the lawyer sleeping poorly that weekend. And rightly so. On Monday the attorney service told him that it had not heard from the paralegal. He scrambled to file something — a declaration that he would present evidence at the hearing on the summary judgment motion, showing the existence of triable issues of material fact. Over the next several days he received e-mails of some of the paralegal's work product, and filed points and authorities, declarations and responses to PG&E's separate statement of facts.

In a September 15 ex parte application to continue the hearing on the summary judgment motion, the attorney, in the words of the Court of Appeal, "stated that he was throwing himself on the court's mercy relating to the late filing and service of the summary judgment opposition." Finally, on September 17, he filed a new set of documents constituting Henderson's opposition to the PG&E summary judgment motion.

But it was too late. At the September 22 hearing on summary judgment motion, the court treated the ex parte application as a plea for a second chance under Code of Civil Procedure Section 473 (b), and gave it the thumbs down. The court granted PG&E's summary judgment motion.

On March 20, 2009, Henderson filed a motion to vacate the summary judgment, now explicitly relying on Section 473(b). Same result — motion denied. Henderson appealed.

The Court of Appeal affirmed. Section 473(b) provides for discretionary relief from attorney neglect. The relevant language is: "The court may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding

taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect. Application for this relief shall be accompanied by a copy of the answer or other pleading proposed to be filed therein, otherwise the application shall not be granted, and shall be made within a reasonable time, in no case exceeding six months, after the judgment, dismissal, order, or proceeding was taken."

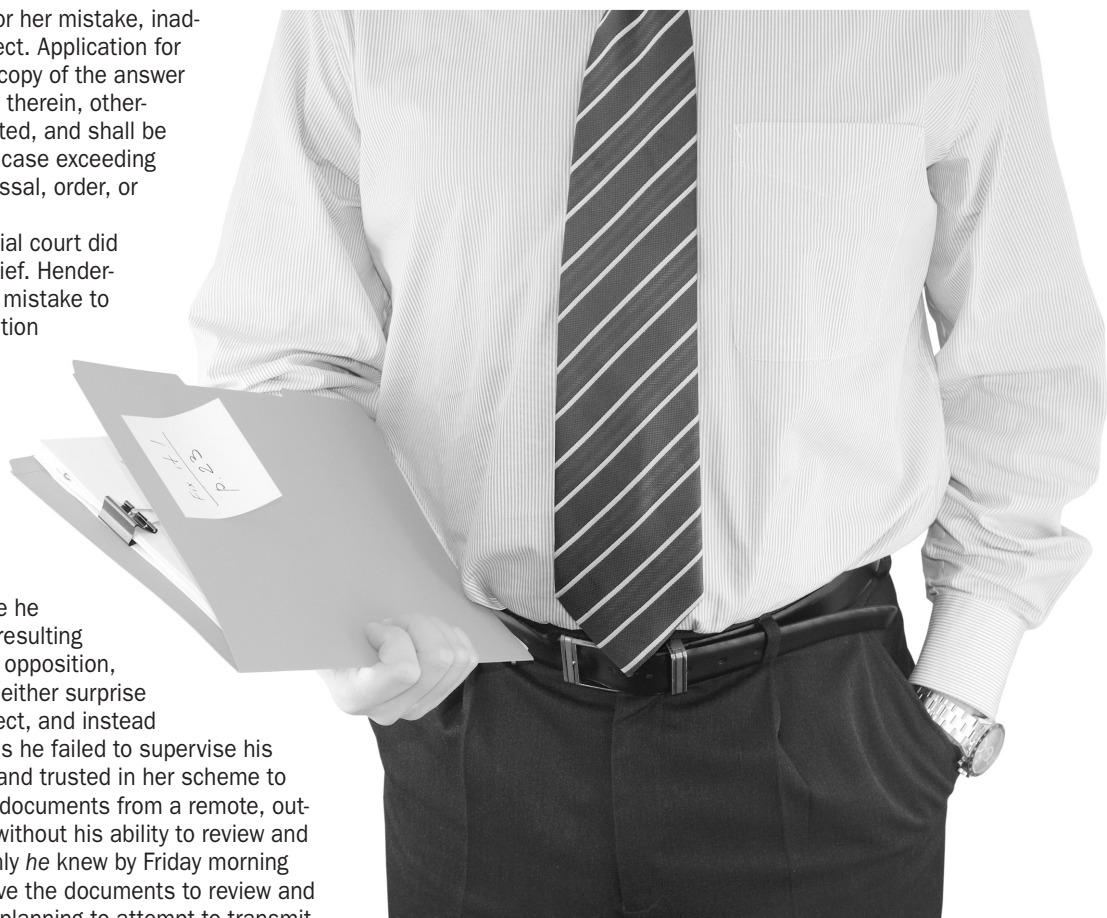
The Court of Appeal held that the trial court did not abuse its discretion in denying relief. Henderson's argument that it was excusable mistake to rely on a paralegal to draft the opposition inspired a rare judicial double exclamation point: "She asserts this is the type of mistake a reasonable sole practitioner might make!!"

Not so, retorted the court: "[T]he trial court reasonably could conclude that his paralegal's inability to complete the assignment within the deadline he gave her, thereby resulting in late-filing of the opposition, did not constitute either surprise or excusable neglect, and instead was inexcusable as he failed to supervise his employee closely and trusted in her scheme to file and serve the documents from a remote, out-of-state location, without his ability to review and sign them. Certainly he knew by Friday morning that he did not have the documents to review and his paralegal was planning to attempt to transmit them from Seattle or the cruise ship. Instead of immediately informing opposing counsel or the court of this problem and requesting either a continuance of the hearing or an extension of time to file the opposition, he gambled that the paralegal's plan would work and the documents would be filed on time. He gambled and lost."

Henderson fared no better with Section 473(b)'s "fall on your sword" clause, by which the party gets a break if her lawyer admits that the mistake was entirely his, even if inexcusable: "Notwithstanding any other requirements of this section, the court shall, whenever an application for relief is made no more than six months after entry of judgment, is in proper form, and is accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect, vacate any...resulting default entered by the clerk against his or her client, and which will result in entry of a default judgment, or...resulting default judgment or dismissal entered against his or her client, unless the court finds that the default or dismissal was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect."

The appellate court found that this provision does not apply to summary judgments. It agreed with the line of cases represented by *Huh v. Wang* (2007) 158 Cal.App.4th 1406, which noted that "[b]y its express terms, the mandatory relief provision applies only to defaults, default judgments, and dismissals." It rejected *Avila v. Chua* (1997) 57 Cal.App.4th 860, the single case holding that the mandatory relief provision of Section 473(b) applies to summary judgments.

The attorney, in the words of the Court of Appeal, 'stated that he was throwing himself on the court's mercy relating to the late filing and service of the summary judgment opposition.'



The lessons for the trial lawyer are clear. "Just in time" may be a workable business strategy for the production and distribution of pencils, peanuts and the like. But the concept doesn't translate at all well to preparing and filing legal papers. If at all possible, finish writing in plenty of time before the filing deadline, including a cushion for the odd unexpected emergency.

If you've lost a summary judgment, don't plan to rescue your client by admitting that your conduct was flagrantly, even flamboyantly boneheaded. The mandatory relief provision of Section 473(b) doesn't apply to summary judgments. On the other hand, if you want to plead excusable mistake or neglect, don't let a paralegal operate without supervision, regardless of whether she skips town or not.

Otherwise, when you consult with an appellate lawyer after losing the case, you may hear, "I wouldn't say this is a particularly viable appeal, but is your malpractice coverage current?"



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Judges Can Help Prevent Underage Drinking

By Linda Chezem

Trial court judges throughout the United States see the wreckage and ruined lives caused by underage drinking every day in both juvenile courtrooms and adult courtrooms. We all know that 18- to 21-year-olds can get into all kinds of trouble, especially when alcohol is involved.

To be clear, everyone needs to understand that underage drinking is our nation's worst illegal drug problem for kids. Alcohol is a drug, it's illegal for kids to drink, and alcohol kills and injures more young people than all other illegal drugs combined.

Judges are in a unique position in the community when it comes to preventing underage drinking. We can make significant contributions both in the courtroom and beyond the bench to help protect public and personal safety — without compromising judicial canons of ethics. Of course, every state is different in its rules on judicial behavior, and every judge is different in her or his personal beliefs about taking action beyond trying cases. But after seeing a particular social pathology manifested again and again, one that's so harmful to young people, many of my colleagues and I believe it's time to do more.

I don't want to see young lives ruined if I can help prevent it. Too many people are still acting on the false belief that underage drinking is a minor transgression to be winked at, not punished or prevented. But, that's not true: It's a crime and it's dangerous, much more dangerous than young people and their parents and other adults often realize.

First of all, underage drinking can quickly lead to a criminal record for a host of crimes that are committed when young people drink. A criminal record can mean losing a college scholarship, getting kicked out of school or losing a job. And it can stay with you for your entire life, especially in the age of the Internet and electronic databases. Expunging a juvenile record is no longer just a matter of tearing up a file. For those over 18 years of age, some states have no mechanism that allows for expunging a criminal record — ever.

But underage drinking also can mean losing your life, or unintentionally taking the life or seriously injuring another person, as sometimes happens in underage driving under the influence and alcohol-fueled violence and injury. It can mean being the victim or perpetrator of date rape or physical assault while under the influence of alcohol. It can lead to all sorts of property crime caused by the mixture of youthful risk-taking and alcohol.

I advise all judges, lawyers, probation and other court officers to learn more about the problems of underage drinking that we see so often in our courts. Solid, basic research and information on underage drinking can be found on the National Institute on Alcoholism and Alcohol Abuse Web site, <http://www.niaaa.nih.gov>. There's also a lot of information developed in the last decade about how underage drinking damages the maturing brain. This is enough to give any jurist and other court officers a good understanding of the problem. Judges can use this information to articulate in the courtroom how detrimental and dangerous underage drinking can really be. Many judges today are doing that.

But there's much more that a judge can do. Judges have a unique position and voice within the community, and all judges — no matter what state they serve — can talk publicly about how the administration of justice can be improved. Judges are frequently invited to speak to public gatherings, such as civic lunches and community meetings, and also to participate in continuing legal education programs and other law-related activities. These are excellent opportunities to educate the public and legal community about the human, legal and community costs of underage drinking.

In Indiana, Dr. James Klaunig, the state toxicologist, and Dr. Lisa Kamendulis, a pharmacology and toxicology professor at Indiana University, worked with me to develop a program on alcohol, science and the law for continuing legal education for judges, prosecutors and defense lawyers. Similar programs have been used elsewhere around the coun-

try. Also, I frequently speak to community groups about underage drinking, using creative means to get the message across. I've presented mock trials with high school students, using the story of "Goldilocks and the Three Bears." But instead of porridge, I substituted beer. The students learned about all the crimes that can accompany underage drinking in addition to minors in possession of alcohol, crimes such as theft, trespass, public intoxication, destruction of property and breaking and entering. High schoolers learned what can happen if they get arrested for alcohol-related crimes.

Also, we can become creative in the courtroom. Justice should be reformative. When we send kids back out into the community after their

court cases are over, we need to try to prevent them from re-offending and even further damaging their lives and threatening public safety. In our courthouse, I worked with other court officers, probation and community groups, to secure funding for screening, assessment and intervention programs to deal with the problems of underage drinking and other crimes involving at-risk youth. Part of the Lawrence County Circuit Court Life Skills program for juveniles included developing skills to avoid the underage use of alcohol by focusing on positive and healthy behaviors. Other judges have helped create specialty courts to deal with cases related to underage drinking, such as DUI courts, within both juvenile and adult courts. In those specialty courts, specific attention is given to the defendants' use of alcohol and monitoring the defendants' behavior while under the court's supervision. Again, each state and

each court has the flexibility to organize the court program according to local needs.

Today, many judges, attorneys, law enforcers and members of the community understand that underage drinking is a serious threat to public health and safety, that prosecution for many crimes can result from underage drinking, and that it can ruin young lives. But unfortunately, not everybody sees it that way. Too many young people, parents and members of the legal community still see underage drinking as a harmless rite of passage. Judges can be instrumental in changing our communities and our society so there can be a universal understanding of the true dangers of underage drinking, and a commitment by all to take action to prevent it.

Linda Chezem has extensive experience as a trial and appellate court judge. She currently holds an appointment as professor in Youth Development and Agriculture Education at Purdue University. She also holds adjunct appointments at the Indiana University School of Medicine, Purdue School of Science and the Indiana University School of Health, Physical Education and Recreation. She is a senior research fellow at Sagamore Institute and consultant to the National Institute on Alcohol Abuse and Alcoholism.

