

## IS IT BETTER TO SEEK FORGIVENESS VERSUS ASK FOR PERMISSION?

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Is it better to seek forgiveness versus ask for permission? The court in Henderson v. Pacific Gas & Electric Company (2010) 187 Cal.App.4th 215 found it was not.

In Henderson, plaintiff's counsel waited until the "...eleventh hour to begin opposing a summary judgment motion he had known about for months." (Id. at 219.) "Next, he assigned the preparation of that opposition to a paralegal who he failed to supervise." (Id.) Thereafter, he learned that the paralegal had left the state with the opposition on the last business day before it was due without his having seen it. (Id.) On the date that the opposition was due, the only document he filed was his declaration which "...stated that evidence would be presented at the hearing on the summary judgment motion to show a triable issue of fact existed." (Id. at 220.)

After the opposition deadline had passed, the plaintiff's attorney unsuccessfully sought an extension of the hearing date. The plaintiff's attorney also subsequently filed a new, but late opposition to the summary judgment motion. (Id. at 221.) The court denied the request for continuance, struck the late filed opposition and granted summary judgment against his client.



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Thereafter, the plaintiff sought to vacate the summary judgment pursuant to Code of Civil Procedure section 473(b) which provides a means for relief from judgment entered as a result of mistake, inadvertence, surprise or neglect. The trial court denied that motion applying both section 473(b)'s mandatory and discretionary relief provisions. The appellate court upheld the trial court's ruling finding that the mandatory provisions of section 473(b) only apply to defaults, default judgments and dismissals, not motions for summary judgment. Accordingly, the mandatory provisions could not be used to vacate the summary judgment. Although a summary judgment can

possibly be vacated under the discretionary provisions of section 473(b), the court, exercising its discretion, found that was not warranted under the facts of this case because the attorney's neglect was not excusable.

The decision confirms that attorneys are best served by staying current with their obligations and seeking relief before problems occur. Waiting until after the fact may have dire consequences for an attorney's client.

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