



MISSED YOUR REMOTE COURT HEARING DUE TO TECHNOLOGY ISSUES? The Dos and Don'ts for Seeking Redress.

The Covid-19 pandemic has changed just about everything in our lives. Court appearances are no exception. And this is strange because so rarely do court procedures ever change with the times. Most of us, lawyers and laypersons, when we think about court, it's the same old song and dance. You show up early in the morning, pack into the court room with people who are all there for whatever reason, wait for your case to be called, stand at your respective table, wait to be addressed, and then proceed to answer a question or make your argument to the judge. The same way it's been done for more than a hundred years. A decade ago or so, the courts, at least some, introduced the technological breakthrough of telephonic appearances, commonly referred to as Court Call. This shook the legal community. Lawyers, mostly, threw their hands in the air and celebrated. Finally, they did not need to show up in-person for every appearance where they wait forty-five minutes, get called, only to speak for a total of three minutes. This is what happens in just about every Case Management Conference.

Then Covid-19 hit. The courts had to find a new way to conduct daily business, with limited in-person staff, and parties and witnesses prevented from coming into the courthouse. For some time, the courts remained closed without any idea of how business could continue. This forced the courts, an institution strictly committed to tradition, to be creative. In response, the courts adopted what is likely their second technological advancement of the last two centuries. Video conferences (i.e. Zoom). What a relief, right? Well not for everyone.

What happens when you miss your hearing, or even worse, trial? With video and telephonic court appearances, entirely new ways to miss your hearing, other than just failing to show up, now became reality. You may not have a computer with a webcam. You could lose your internet connection right before your matter is called. Your computer dies. Or you could be given the wrong video conference ID and Password taking you to the wrong department. Doubtful, but we've heard such stories. So, what do you do when the Judge makes an unfavorable order or ruling all because you failed to show and missed your opportunity to make your case?

There may be at least two options. The Motion for Reconsideration, and application for relief under the California Code of Civil Procedure section 473 ("CCP 473"). Before we get into it, a motion or application is a request to the court to act or make an order. Motions or

applications have very particular rules and procedures that must be followed precisely if you want the court to consider your request. And every court has different rules and procedures. With that out of the way, let's discuss your options.

A motion for reconsideration is generally the go-to method for redress when a party is unsuccessful after it, or the other party, made a motion for some kind of order. This can be a motion to dismiss (or Demurrer), a motion to compel, a motion to strike, or for summary judgment, to name a few examples. California Code of Civil Procedure section 1008(a) lays out the conditions for when a motion for reconsideration may be made. In pertinent part, the code states a party may, “. . . based upon new or different facts, circumstances, or law, make application to the same judge or court that made the order, to reconsider the matter and modify, amend, or revoke the prior order.” Additionally, the party seeking reconsideration must state by affidavit what application was made before, when and to what judge, what order/decision was made, and what new or different facts, circumstances or law exists that should be considered. *Id.*

If you're an attorney, your case might actually be in front of the California State Bar Court – you know, the court that determines ethics violations and administers discipline. In the State Bar Court, unlike civil courts, another ground for a motion for reconsideration exists when the court actually makes a mistake in its order. According to the California State Bar Rules of Procedure, section 5.115(b)(2) allows a motion for reconsideration to be considered when an order or decision contains one or more errors of fact or law, or both, based on the evidence already before the Court. Perhaps the court accidentally cited overruled case law? Or maybe the court, in drafting its order, confused the facts with another matter entirely? Unlikely, but these grounds for the motion for reconsideration exist for a reason don't they? If you're going to request a motion for reconsideration by alleging this court made a mistake on its own, you better have all of your ducks in a row when it comes to your moving papers.

In review of the standards for a motion for reconsideration, it appears that the motion for reconsideration is not the appropriate path for relief where a party simply fails to attend a hearing because they were prevented in some way from attending. This motion requires a showing of much more. In addition to an explanation of good faith efforts made to attend the hearing, whether by video or telephone, the motion for reconsideration requires a party to thoroughly make the argument it desired or would have presented at the missed hearing. That argument must include new or different facts, circumstances, or law, that were not already presented to the court in the initial or responsive documents filed on the motion. Only if the court is persuaded by this new information and argument, the court may grant relief from its prior order. This is a very high burden to overcome.

Again, the motion for reconsideration essentially requires the absent party to make the argument it would have made, had the party successfully attended the hearing. But it also requires the party seeking reconsideration to declare by affidavit why such facts, circumstances or law, now argued to support reconsideration, were not included in the initial or responsive motion documents. This is your chance to explain what happened. Explain to the court in detail the reason for your absence – whether it was a power outage, you were given the incorrect login information, or the court operator put you in the wrong department. Your explanation for your absence should be equally persuasive to your underlying argument for relief from the court's

order on the motion. Unless you can move the court to believe not only your reasons for your absence, but also why its order is unjust due to new facts, laws, or circumstances concerning the underlying motion, the motion for reconsideration is not for you.

If the court made an unfavorable order because you failed to appear, the other method of relief available is to file a motion following the California Code of Civil Procedure section 473 titled Mistakes in Pleadings and Amendments. Specifically, CCP 473(b) states “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.” This motion is not limited to missed court appearances. In fact, section 473 also allows parties to make amendments where appropriate. For an attorney or self-represented party who misses a hearing due to a legitimate technical issue, where an unfavorable ruling was made, and that party wished to present a statement or argument, a CCP 473 motion would be the precise form of relief that party should seek.

This motion for redress is preferential because it does not require a showing that the underlying order should be amended due to new circumstances, facts, or law, that were and could not be presented to the court in the moving papers or oral argument. Rather, the CCP 473 motion simply asks the court to relieve the party from an unfavorable order, and there is some justification to persuade the court to grant that relief. The justification may be inadvertence or excusable neglect, such as losing your internet connectivity, dialing into the wrong department on Court Call, or your computers microphone and camera don’t work. Whatever the reason may be, you will have to clearly state the factual reasons that you allege to be a mistake, inadvertence, surprise, or excusable neglect, which prevented you from attending the hearing.

Moreover, under the mandatory provision of CCP 473, a party is relieved from the consequences of his or her attorney’s mistake, inadvertence, surprise, or neglect. Relief is available regardless of whether the attorney’s neglect is excusable. *Id.* This is not to imply that the courts will freely grant this sort of relief whenever a party makes an error – it requires a showing that despite good faith efforts, a party has been unfairly disadvantaged at their attorney’s fault. “The relief permitted by this section is an extraordinary and conditional remedy allowed to those who, through no fault of their own, have been deprived of their day in court.” *Estate of Glassgold*, (1950) 97 Cal.App. 2d 859, 865.

If you’re a represented party, and it was your attorney’s error in failing to attend the hearing, you’re much more likely to have a CCP 473 motion granted. As noted above, relief is mandatory when your attorney made the mistake, inadvertence, surprise, or neglect in failing to attend the hearing, and as a result, you were unfairly disadvantaged.

Like any motion to the court, the procedural requirements of notice, a memorandum of points and authorities, and a declaration or affidavit by the party or attorney in support of the reasons why the relief should be granted, must be submitted. In the declaration or affidavit, the party or attorney must set forth the factual circumstances for why they missed their video or telephonic hearing and explain the efforts made to attend the hearing. The declaration is not where the party can make an argument, but rather, a plain statement of facts reciting how and why the party missed the hearing. The memorandum of points and authorities is where the

requesting party will argue why the court should grant relief under the factual circumstances set out in the declaration. The memorandum of points and authorities should include not only CCP 473's authority to the court, but also any case law that may have similar factual circumstances that would be persuasive on why the court should grant relief when a party misses their hearing due to technical issues.

Depending on your situation, you must decide which form of relief to seek when you miss your telephonic or video conference hearing. If the unfavorable order was made simply because you missed your hearing, filing a motion under CCP 473 is the likely proper avenue for relief. If the unfavorable order was made, regardless of whether you would have been present for the hearing, then a motion for reconsideration may be your only hope. Just remember, with a motion for reconsideration, not only will you have to explain the reason for your absence, but you will also have to make a very persuasive argument as to why the court should not have made its order in the first place.

Almost two years into the Covid-19 pandemic, it's apparent that telephonic and video court appearances are here to stay. Technology is unpredictable, and no one is immune from the possibility of missing their telephonic or video appearance. If this happens to you, now you know at least two methods for seeking relief. If you're unsure which form of relief is suitable for your situation, be sure to consult an attorney.

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