



## Columbia Law School

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2015

### "N.Y. Motion Practice Overview Part 1" in Pathway to the Profession: From Law School to Lawyer

Gerald Lebovits



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# PATHWAY to the Profession



FROM LAW SCHOOL TO

LAWYER



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# The Legal Writer

## Drafting New York Civil-Litigation Documents: Part XIII—Motion Practice Overview

By Gerald Lebovits

**T**he *Legal Writer* continues its series on civil litigation.

In the last issue, the *Legal Writer* discussed responding to interrogatories. In this issue, the *Legal Writer* offers an overview of motions and their essential components. In the following issues, the *Legal Writer* will emphasize motions to dismiss under CPLR 3211 and summary-judgment motions under CPLR 3212, two weapons in a litigator's arsenal. The *Legal Writer* will also discuss cross-motions and replies.

To draft effective motion papers, litigators must be familiar with the Uniform Rules for New York trial courts and the parameters of motion practice found in CPLR 2211 through 2222. Because of New York's Individual Assignment System (IAS), in which a case assigned to a judge might remain with that judge up to and including the trial,<sup>1</sup> litigators must also know what each judge requires in a motion, including motions in the commercial parts. Judges in one county will have rules and preferences different from judges in the same or different counties. The lack of uniformity among judges causes confusion.

### General Information About Motions

A motion is a request for an order from a court.<sup>2</sup> Some motions are made in writing; others, orally. Motions are powerful litigation tools. A successful motion might help you resolve key substantive issues or even dispose of an entire case. A motion might also help you learn critical information for your client. The common practice is for a party to initiate and move the court for some type of relief, although the court might grant an order it has made on its own motion, or *sua sponte*. Most motions are on notice to the opposing side. Those motions not on notice to the opposing side are called *ex parte* motions. Courts generally disfavor *ex parte* motions. *Ex parte* motions are permissible only when a statute or rule explicitly authorizes them.<sup>3</sup>

### Preliminary Motions

Moving for preliminary relief "protect[s] the movant by maintaining the status quo while the [court determines the] legal and factual issues of the case."<sup>4</sup> Preliminary injunctive relief is an extraordinary remedy a court grants in its discretion. CPLR 6301 and 6313 explain preliminary injunctions and temporary restraining orders.

Request a stay of the proceedings or a temporary restraining order if a risk of imminent harm exists before the court hears the motion on its merits. If you're seeking a temporary restraining order, a court may require you to give notice to the opposing side and give an undertaking.

To obtain a temporary restraining order without notice, you must show that "immediate and irreparable injury, loss or damages will result unless the defendant is restrained before a hearing can be held."<sup>5</sup> Once a court grants a temporary restraining order, the court sets, or schedules, the hearing for the preliminary injunction.<sup>6</sup> If sought *ex parte*, a temporary restraining order might be easier to obtain than a preliminary injunction.

### **Emergency Motions**

A moving party may bring a motion by order to show cause in an emergency. Bringing a motion by order to show cause is an expedited way to move the court for relief when little or no time exists to move on notice. Bringing a motion by order to show cause allows shorter notice than the minimum eight days' notice provided under CPLR 2214(b) for bringing a motion on notice. An order to show cause is obtained *ex parte*, although a court in its discretion may allow the other side to see it and oppose it before the court signs or declines to sign it. Like a motion on notice, an order to show cause must provide the return date (the date the court will hear the order to show), the time, the place, and the relief you seek. The court sets the day and time when it will hear your order to show cause; leave the day and time blank.

### **Ex Parte Motions**

*Ex parte* motions are made to a judge without notice to your adversary. The CPLR authorizes *ex parte* motions in limited situations: attachment (CPLR 6211); temporary restraining orders (CPLR 6313); and orders specifying the manner of effecting service of process (CPLR 308(5)). CPLR 2217(b) requires you to accompany an *ex parte* motion with an affidavit or affirmation stating whether you've moved before for similar relief and the result of that motion. Specify the new facts, if any, on which you base the new motion, if you've asked for similar relief before. When moving *ex parte*, a court might require you as the moving party to post an undertaking.<sup>7</sup> Under the IAS system, submit your *ex parte* motion to the assigned judge.

### **Stay of Proceedings**

Under CPLR 2201, you may move a court in which an action or proceeding is pending to grant a stay of the case. A stay suspends the case. Make your application for a stay in the court in which the matter is pending. You may move for a stay by notice of motion or by order to show cause. Seeking a stay isn't the same as seeking injunctive relief.<sup>8</sup> When a court grants an injunction, it directs a party to do or not do something. The rules about injunctive relief are set forth in CPLR article 63. A

court may grant injunctive relief only if it has the jurisdiction to grant an injunction.

### **Motions to Correct Pleadings**

Before filing a responsive pleading, you may move under CPLR 3024(a), 3024(b), or 3014 to correct pleadings. Under CPLR 3024(b), you may move for a more definite statement if you can't respond to a pleading because the pleading is vague. Under 3024(b), you may move to strike any scandalous or prejudicial material in a pleading. If you can't respond to a pleading because your adversary hasn't separately numbered the allegations or causes of action in the pleading, you may move under 3014 to require your adversary to number its pleading separately.<sup>9</sup>

### **Disclosure Motions**

They're motions in which you seek relief from the court regarding disclosure, called "discovery" in federal court. The reason you'll move for disclosure might be that the other side has failed to disclose information that you sought and you're asking the court to compel the other side to turn it over to you.<sup>10</sup> You might also be asking the court to penalize the other side because it failed to disclose to you information you sought.

Under CPLR 3124, move to compel your adversary to comply or respond to "any request, notice, interrogatory, demand, question or order." Under CPLR 3126, move for penalties against another party. Under CPLR 3126, a court may strike all or part of your adversary's pleadings, dismiss the case, enter a default judgment against your adversary, preclude your adversary from offering information into evidence at trial, stay the proceedings until your adversary complies, or conditionally order your adversary to comply.

A court, sua sponte or on notice by motion, might also grant a protective order to "prevent unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice."<sup>11</sup>

### **Pre-Trial Motions**

A pre-trial motion is a motion in which you seek relief from the court before the trial begins. A pre-trial motion must be on notice to the other parties and in writing.<sup>12</sup> You may move for pre-trial relief (1) by notice of motion with supporting papers<sup>13</sup> or (2) by order to show cause with supporting papers.<sup>14</sup> Motions to dismiss under CPLR 3211 and motions for summary judgment under 3212 are pre-trial motions. Moving to dismiss under 3211 is a quick way to dispose of a case. Under 3212, you may move for summary judgment or partial summary judgment. The *Legal Writer* will discuss more on motions to dismiss and summary-judgment motions in the upcoming issues.

You may file an in limine motion before trial to preclude the other side from offering evidence at trial. You may also file an in limine motion

before trial to get an advance ruling to assure that your evidence will be admitted at trial.

### **Trial and Post-Trial Motions**

Trial and post-trial motions are motions in which you seek relief from the court during trial (or a hearing) or when the trial has concluded. Depending on the individual judge's rules, trial and post-trial motions may be made orally.

Under CPLR 4401 and 4404, you may move for judgment during and after trial. CPLR 4402 allows you during the trial to move for a continuance or new trial. CPLR 4404(a) allows you to move post-trial for a judgment notwithstanding a verdict. CPLR 4404(a) also allows you to move for a new trial in jury cases.<sup>15</sup>

### **After a Judge Has Ruled: Motions to Renew or Reargue**

After a judge has decided a motion against you, you must decide whether to move to renew, to reargue, or to renew and reargue. You'll have to make this motion before the judge who decided against you the first time you made the motion.<sup>16</sup> Identify whether you're moving for renewal, reargument, or both. If you're unclear what you're moving for (renewal, reargument, or both), don't expect the court to figure it out for you.

In a motion for renewal, you must show that you have new facts you didn't offer on the earlier motion that would change the court's determination had it known about the facts initially and that you have a justifiable reason why you didn't offer those facts before.<sup>17</sup> As the moving party, you have the burden to show that the facts didn't exist before or were unknown. You must also show that even with reasonable diligence, you couldn't have discovered the facts to offer them on the original motion.

In a motion for reargument, you're informing the court that it overlooked or misapprehended relevant law or fact.<sup>18</sup> Explain how the court misapplied or misconstrued a statute, rule, or case. Explain the applicable law. But don't repeat your earlier arguments. And don't advance new or additional arguments from your original motion.

### **Form and Content of Motions: General Overview**

- Motions and orders to show cause must comply with CPLR 2101: All papers must be typed or printed in black on 8 1/2 by 11-inch white paper in at least 10-point type.<sup>19</sup>
- Each motion paper must have a caption containing the court's name and venue, the action's title, and the index number.
- Each motion must state whether the document is a notice of motion or an order to show cause.<sup>20</sup>

- Double-space the text but single-space the caption, title, footnotes, and quotations.<sup>21</sup>
- If counsel represents you, the motion must be endorsed with the attorney's name, address, and telephone number. If you're unrepresented, and thus proceeding pro se, endorse the motion with your name and give your address and telephone number.<sup>22</sup>
- If an attorney represents you, your attorney must sign every written motion. The attorney's signature certifies that its contents aren't frivolous.<sup>23</sup>

### **The Essential Components of a Notice of Motion**

A notice of motion, usually one or two pages long, specifies the preliminary information that appears before your motion. The notice of motion gives your adversary essential information about the motion. In your notice of motion, include the following:

- The date,<sup>24</sup> time, court location (address of court and part), and department, if applicable.
- The nature of the order you're seeking.
- The evidence on which you're basing your motion. For example, any affidavits, exhibits, or other evidence on which you're basing your motion.
- The caption of the case, including the venue for the motion.
- The assigned judge's name if the case has been assigned to a judge.
- The index number.
- The name and address of the attorney on the motion.
- Whether you're seeking oral argument. Some judges require oral argument on all types of motions; other judges require argument in limited circumstances. In most New York courts, oral argument is the requirement, not the exception.

### **Affidavits and Exhibits**

Affidavits are the "principal means" to submit evidence to a court in a motion.<sup>25</sup> No evidentiary rules dictate the contents of New York affidavits. But beware attacks from your adversary when you submit affidavits not based on personal knowledge or on documentary evidence: A court will give no probative value to affidavits not premised on personal knowledge or on documentary evidence.<sup>26</sup> If you're relying on pleadings, attach them to your motion in the form of exhibits. How you choose to put together your exhibits (binding them professionally or with clips or staples or hole punches, including a cover and exhibit tabs) is up to you. But make sure you make it easy for the court to find and read your exhibits.

Affidavit(s) accompany a motion. If necessary to your motion, attach documentary exhibits. Affidavits and exhibits help the court rule for you. Affidavits must be sworn before a notary public. An attorney, physician, osteopath, or dentist may swear to information in an affirmation instead of an affidavit.

In an attachment to an affidavit, give the court information or documents obtained during disclosure. Describe in the affidavit the document and why it's important to your motion. In an attachment to an affidavit, you may also give the court testimony from an examination before trial (EBT)—called a deposition in federal court—relevant to your motion. Include the cover page of the transcription and the relevant text.

Your summary-judgment motion must include the pleadings as attachments.<sup>27</sup>

Your motion to dismiss must attach a copy of the complaint.<sup>28</sup>

### **Brief or Memorandum of Law in Support of Your Motion**

You're not required to submit a brief, sometimes called a memorandum of law, to support a motion. But better attorneys do so in important cases. It's not just the facts of your case that will persuade the court to rule for you. It's also how the facts of your case apply to the law. Some attorneys put their legal arguments in their affirmations. But that's the inferior practice: You should save your legal points for your memorandum of law, a document separate from your affirmation. In affirmations, attorneys affirm to the truth of factual statements. Attorneys may not swear to the truth of legal arguments.<sup>29</sup> And judges sometimes can't recall what you've said during oral argument. Submitting a separate memorandum of law lets the judge hear your arguments again. Sometimes judges ask their law clerks to write their decisions, and the law clerks will not hear your brilliant oral argument. It's thus best to submit a separate memorandum of law with your legal arguments.

For more information on writing briefs, consult the *Legal Writer's* column "Writing Bad Briefs: How to Lose a Case in 100 Pages or More."<sup>30</sup> You'll find useful techniques on concision, precision, organization, citation, writing your facts, offering legal argument, and treating the judge and your adversary respectfully. And you'll also learn to avoid legalese, boilerplate, clichés, metadiscourse, negatives, and the passive voice.

In the next issue, the *Legal Writer* will continue with specifics on motions to dismiss.

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1. David D. Siegel, *New York Practice* § 245, at 413 (4th ed. 2005).
  2. CPLR 2211.
  3. Siegel, *supra* note 1, at § 247, at 420.
  4. Jane Chuang, *The "How To" of Successful Motion Practice: Program Outline*, N.Y. City Bar Ctr. for CLE 1, 4 (May 18, 2011).

5. CPLR 6301 & 6313.
6. Chuang, *supra* note 4, at 5.
7. CPLR 6313(c).
8. 1 Michael Barr, Myriam J. Altman, Burton N. Lipshie & Sharon S. Gerstman, New York Civil Practice Before Trial at § 16:270, at 16-32 (2006; Dec. 2009 Supp.).
9. In the Second Department, a motion separately to state and number under CPLR 3014 is distinct from a corrective motion under CPLR 3024. *See Consolidated Airborne Sys. v. Silverman*, 23 A.D.2d 695, 257 N.Y.S.2d 827, 828 (2d Dep't 1965). The First and Third Departments authorize corrective motions under CPLR 3024, not CPLR 3014. *See Alexander v. Kiviranna*, 52 A.D.2d 982, 982, 383 N.Y.S.2d 122, 123 (3d Dep't 1976); *Weicker v. Weicker*, 26 A.D.2d 39, 40, 270 N.Y.S.2d 640, 641 (1st Dep't 1996).
10. For more information, review the earlier issues of the *Legal Writer* in this series on drafting civil-litigation documents: Gerald Lebovits, *The Legal Writer, Drafting New York Civil-Litigation Documents: Part XI—Interrogatories*, 83 N.Y. St. B.J. 64 (Nov./Dec. 2011); Gerald Lebovits, *The Legal Writer, Drafting New York Civil-Litigation Documents: Part X—Bill of Particulars*, 83 N.Y. St. B.J. 64 (Oct. 2011).
11. Chuang, *supra* note 4, at 9 (citing CPLR 3103).
12. CPLR 2211.
13. CPLR 2214(a).
14. CPLR 2214(d).
15. Chuang, *supra* note 4, at 29.
16. Exceptions: when the original motion was ex parte; granted on default; or when court "so ordered" a stipulation. CPLR 2221(a).
17. CPLR 2221(e)(2)–(3).
18. CPLR 2221(d).
19. A summons must be printed in at least 12-point type. CPLR 2101(a).
20. CPLR 2101(c).
21. 22 N.Y.C.R.R. § 202.5(a).
22. CPLR 2101(d).
23. 22 N.Y.C.R.R. § 130-1.1(b).
24. CPLR 2214(b) specifies the minimum time period for noticing a motion, except when moving by order to show cause. Some judges will hear certain motions on certain days of the week. Make sure to check with the court and the judge's individual rules.
25. Barr et al., *supra* note 8, at § 16:62, at 16-13.
26. *Id.* at § 16:65, at 16-13.
27. CPLR 3212(b).
28. Barr et al., *supra* note 8, at § 16:60, at 16-65 (citing *Dupuy v. Carrier Corp.*, 204 A.D.2d 977, 977, 614 N.Y.S.2d 950, 960 (4th Dep't 1994)).
29. *Id.* at § 16:670 at 16-14.
30. Gerald Lebovits, *The Legal Writer, Writing Bad Briefs: How to Lose a Case in 100 Pages or More*, 82 N.Y. St. B.J. 64 (May 2010).

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