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## Drafting NY Civil-Litigation Documents: Part 14—Motion Practice Overview Cont'd

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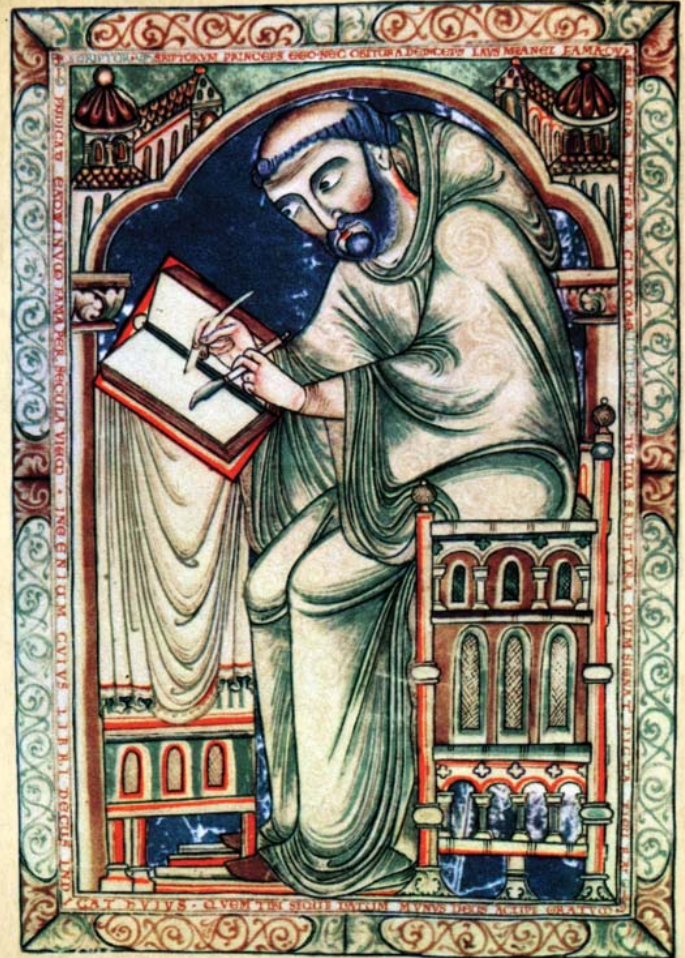
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# Journal



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*by Gary D. Spivey*

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

In the last issue, the *Legal Writer* discussed the motions that litigators have in their civil-practice arsenal. The *Legal Writer* briefly discussed the form and content of motions. It also discussed a motion's component parts: the notice of motion;<sup>1</sup> the supporting affirmations, affidavits, and exhibits; and the brief, or memorandum of law, in support of the motion. In this issue, the *Legal Writer* continues with more on motion practice.

### Motion Practice Overview

The documents in motion practice are your motion papers, also known as your moving papers. This includes your notice of motion along with supporting affirmations, affidavits, and exhibits and your brief, also called a memorandum of law. Your adversary might want to answer your motion. Your adversary's papers are known as the opposition, or opposition papers. You might then want to respond to your adversary's opposition. Your response is called a reply.

You must prepare, serve, and file the notice of motion along with supporting affirmations, affidavits, and exhibits to have a court clerk calendar your motion before a judge. Also serve and file your brief, or memorandum of law, if you write one. A brief is helpful but not required.

Attach as exhibits to your motion copies of the pleadings if your motion puts the pleadings in issue. Attach them even if they're in the court file. If you're seeking to add or amend pleadings, moving to intervene, cross-claiming, or adding a party, include copies of the older pleadings

and your proposed pleadings.<sup>2</sup> If you don't attach a copy of the pleadings, or the old and proposed pleadings, a court might deny your motion.<sup>3</sup>

Many of the rules discussed below apply to actions and special proceedings in New York, although this column is directed toward actions. Special proceedings sometimes have their own rules and unique procedures. So does Federal Court. Determine what kind of case you have and which court will hear it before consulting the rules below.

### Serving Motions

Serve all copies of your motion and any supporting papers on all the parties appearing in the action.<sup>4</sup> You must also serve all parties in the action irrespective of the number of motions you make, and even if you're opposing or replying to a motion.<sup>5</sup>

You don't need to serve a party who has failed to appear.

When you're moving to join additional parties, you needn't serve the prospective parties with copies of your motion, but you may do so as a courtesy.<sup>6</sup>

Serve your motion papers the same way you'd serve other papers. The CPLR provides that "papers may be served by any person not a party of the age of eighteen years or over."<sup>7</sup> Follow the CPLR 2103 requirements for serving motion papers.

If an attorney represents a party, you must serve the party's attorney. If the same attorney represents more than one party, serve only one copy of your motion papers on that attorney.<sup>8</sup>

Serve the party's attorney by any of the methods outlined in CPLR 2103(b) (1)–(7). Under CPLR 2103(b)(1), you may deliver the motion personally on the attorney, in hand. Or, under CPLR 2103(b)(2), you may mail the papers to the attorney at the address the attorney designated; use the address on

**Attach as exhibits to your motion copies of the pleadings if your motion puts the pleadings in issue.**

the attorney's notice of appearance. If the attorney has not designated an address, mail the motion to the attorney's last known address. Or, under CPLR 2103(b)(3), you may leave the motion papers at the attorney's office with a person in charge. If no one's in charge, you may leave the papers in a conspicuous place. If the office is closed, you may drop the papers in the letter drop or box at the attorney's office. Or, under CPLR 2103(b)(4), if you can't serve the papers at the attorney's office, leave the papers at the attorney's New York residence with a person of suitable age or discretion. Or, under CPLR 2103(b)(5), you may transmit the papers to the attorney by facsimile. Or, under CPLR 2103(b)(6), you may serve the papers by overnight mail at the address the attorney designated; if no address is designated, serve the attorney's last known address. Or, under CPLR 2103(b)(7),

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you may serve the papers electronically (email) if the chief administrator of the court has authorized this method of service and if the party has consented to this method of service. Most practitioners who serve by email do so because the case is part of an electronic filing (e-filing) program through the New York state courts and the court rules allow for service by email.<sup>9</sup>

The CPLR explains that if a party to the action is pro se or you can't serve the party's attorney, you must serve the pro se party as outlined in CPLR 2103(b)(1), (2), (4), (5), or (6).<sup>10</sup>

If you serve your motion papers or opposition papers by facsimile, use facsimile only when your adversary designates a facsimile number for service of papers. CPLR 2103(b)(5) provides that

[t]he designation of a facsimile telephone number in the address block subscribed on a paper served or filed in the course of an action or proceeding shall constitute consent to service by facsimile transmission in accordance with this subdivision. An attorney may change or rescind a facsimile telephone number by serving a notice on the other parties.

Serve the motion and supporting papers at least eight days before the return date—the date the motion is scheduled for the judge to hear it in court. If you're opposing a motion, serve your opposition papers at least two days before the return date.<sup>11</sup> The moving party might not always receive the opposition papers in time for the return date. If you're the moving party, give your opposing party enough time to oppose your motion. For example, file your moving papers at least 16 days before the return date. Your adversary will have to serve its opposition papers at least seven days before the return date. If you need to reply to those papers, do so at least one day before the return date. See below for more information on replies.

In the last issue, the *Legal Writer* discussed bringing motions by order to show cause. You may not bring a notice of motion earlier than the eighth day after you've served the motion papers;<sup>12</sup> therefore, if you want the motion heard faster, you'll have to bring your motion by order to show cause. If you move by order to show cause, it's up to the court to determine the return date, the method of service, and the service date for the order to show cause and any opposition papers.<sup>13</sup> Practitioners usually leave blanks on their orders to show cause for the court to choose the dates.

When you serve your motion papers by mail, add five days to the return date.<sup>14</sup> For example, on an eight-day notice of motion, the return date will be 13 days after mailing (eight days' notice plus five days for mail equal 13). On a 16-day notice of motion, the return date will be 21 days after mailing (16 days plus five days for mailing equal 21 days).<sup>15</sup> A court might deny your motion even if your adversary doesn't appear on the return date if you didn't account for the five days it takes for mailing and for your adversary to respond on time.

If you use a facsimile to serve your papers, no additional time need be added to the CPLR service period. CPLR defines "facsimile transmission" as "any method of transmission of documents to a facsimile machine at a remote location which can automatically produce a tangible copy of such documents."<sup>16</sup> Facsimile is almost instantaneous; your adversary receives your motion almost as soon as you send it. If you use an overnight-delivery service to serve the motion, add one day to the prescribed CPLR time periods.<sup>17</sup> The CPLR defines "overnight delivery service" as "any delivery service which regularly accepts items for overnight delivery to any address in the state."<sup>18</sup> On an eight-day notice of motion, for example, the return date will be nine days after mailing (eight days' notice plus one day for overnight mail equal nine).

You may always ask your adversary for more time to oppose a motion or to reply or to postpone the return date of the motion; if your adversary doesn't consent, you may ask the court for more time on the return date.<sup>19</sup>

## Filing Motions

You must give the court all the motion papers you've served. File your papers by the return date, at the latest, with the clerk's office or motion support office.<sup>20</sup>

When you file your papers, attach an affidavit of service to the motion papers. Provide in the affidavit of service (or affirmation of service, if an attorney effectuates service) the date of and the method of service.<sup>21</sup>

If a judge hasn't yet been assigned to the case, accompany your motion with a Request for Judicial Intervention (RJI). File your RJI along with your motion and serve it on all the parties. Otherwise, the court clerk won't accept your motion papers.<sup>22</sup>

Check for specific filing rules with the motion support office or the clerk's office in the county where you're filing your motion papers. You'll have to pay a fee when filing your motion.<sup>23</sup> The clerk of the commercial part or other specialized court parts might have different filing rules and fees. Check CPLR Article 80 for an explanation of court fees.

Local rules and the assigned judge's rules often discuss requirements pertaining to motions. Some judges require practitioners to deliver their motion papers directly to the judge's chambers even after the practitioner filed the motion. Some judges like courtesy copies. Others hate them.

## Opposing the Motion

If you've been served with a motion, you must decide whether to oppose it.<sup>24</sup>

If you don't oppose the motion, some courts will determine whether the law supports the motion. But many will grant the motion on



default, without thinking about it too much. You should therefore oppose your adversary's motion even if you think the motion is meritless.

Also, most courts won't allow attorneys who haven't opposed

**A cross-motion is as effective as a motion on notice. It seeks affirmative relief, just like a regular motion.**

a motion in writing to oppose the motion orally. The failure to submit written opposition results in a default.<sup>25</sup>

Sometimes you might not need or want to oppose a motion. Your client might not want to spend the money to oppose the motion. Sometimes filing opposition papers will unnecessarily delay your client's case. Sometimes your adversary's motion is inconsequential: Your adversary may, for example, move to extend your adversary's time to do something in the case or move to correct a technical problem. And sometimes you'll know that the judge will grant the motion despite your opposition. Consider the possibility of consenting to the motion in these circumstances.

If you draft opposition to the motion, label your opposition. Example: "Plaintiff's Opposition to Defendant's Motion to Dismiss." Name the exact motion you're opposing. If you're opposing more than one motion, draft a separate affidavit (or affirmation) for each motion.

You may also serve and file a brief or memorandum of law if you have a legal basis for opposing the motion. If you have only a factual basis to oppose the motion, affirmations, affidavits, and exhibits might suffice to explain to the court why you're opposing the motion.

You must serve your opposition papers on all parties.<sup>26</sup>

## Cross-Motions

A party seeking relief against the moving party may do so by moving in a separate motion or by cross-moving. If you cross-move, the same court or judge will hear the motion and the cross-motion at the same time. Under CPLR 2215, a cross-motion is a demand for relief by someone other than the moving party. In your cross-motion, you may demand relief that doesn't respond to the relief the moving party sought. You may demand several different types of relief or relief in the alternative.<sup>27</sup>

A cross-motion is as effective as a motion on notice. It seeks affirmative relief, just like a regular motion.

If you seek affirmative relief from the court but you put in opposition papers instead of cross-moving, it would be error for the court to grant you the relief you seek.<sup>28</sup>

Any party served with a motion may cross-move.

You must serve your cross-motion on the moving party.<sup>29</sup>

If you're seeking relief from a non-moving party, don't cross-move. File a separate motion.

If you're cross-moving, serve and file a notice of cross-motion.<sup>30</sup> You'll have to pay a court fee when you file your notice of cross-motion.<sup>31</sup>

May you cross-move if you've been served with a motion but the motion doesn't directly affect you? CPLR 2215 suggests that you may cross-move if you're seeking affirmative relief. When in doubt about cross-moving, move in a separate motion, and file your notice of motion and supporting affidavits.

You may oppose your adversary's motion and cross-move at the same time. All the papers you'd need to serve and file are in your opposition and a notice of cross-motion. Your notice of cross-motion is all you need to alert the court and your adversary that you're seeking affirmative relief.<sup>32</sup> And your opposition papers might contain all the evidence the court needs to decide your cross-motion. CPLR 2215 provides that "a party may serve upon the mov-

ing party a notice of cross-motion demanding relief, with or without supporting papers" provided you comply with CPLR 2215(a) and (b). If you need to give the court additional information — information not in your opposition papers — to support the affirmative relief you're seeking, you may submit in your cross-motion any affidavits, exhibits, and brief or memorandum of law.

The amount of time you have to serve your cross-motion depends on the amount of notice in the original motion. Serve a notice of cross-motion at least three days before the return date.<sup>33</sup> If you serve by mail, add three days; therefore, you'd need six days' notice before the return date (three days' notice plus three days for mailing). If you use overnight delivery you'll need one day's notice. Therefore, you'd need four days' notice before the return date (three days' notice plus one day for overnight mail).

If the original motion gave you at least 16 days' notice and demanded that you respond to the motion at least seven days in advance of the return date, you must serve your cross-motion at least seven days in advance of the return date. If you mail your cross-motion, you must give at least 10 days' notice (seven days' notice plus three days for mailing). If you use overnight mail, you'll need to give one day's notice. Therefore, you'll need eight days' notice before the return date (seven days' notice plus one day for overnight mail).

You may, but you're not required to, accompany your cross-motion with supporting papers to substantiate your cross-motion.<sup>34</sup> A court may decide the cross-motion on the papers in the original motion.

## Moving Party's Reply

You may want to reply to your adversary's opposition papers. If you reply, don't repeat the arguments you made in your original motion, and don't

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assert new arguments. Only if your adversary raised new legal arguments in the opposition papers should you address those arguments in a reply.<sup>35</sup>

If you raise new arguments in your reply, your adversary won't have the opportunity to respond in a sur-reply. The CPLR doesn't mention a sur-reply. If your adversary submits a sur-reply, a court will not consider it. In its discretion, though, a court may sua sponte ask for a sur-reply.

**Don't risk defaulting for failing to appear on the return date for oral argument in a court that requires a personal appearance.**

A lawyer must offer a good reason to explain to the court why a sur-reply is appropriate.

If you gave your adversary eight days' notice on the original motion, you probably won't have any time to reply to the opposition papers. If you gave your adversary 16 days' notice on the original motion, your adversary will have seven days to oppose the motion, and you'll have one day before the return date to reply.

You must file all papers with the court no later than the return date.<sup>36</sup> Because of time constraints, some practitioners bring their reply papers to court on the return date. If you do that, file your reply and bring a courtesy copy for the court and, possibly, your adversary.

### Appearance on the Return Date and Oral Argument

In some New York counties, you'll need to request oral argument formally on a motion. To request oral argument formally, writing "oral argument requested" on the notice of

motion, order to show cause, opposition paper, or notice of cross-motion will be sufficient.

In other New York counties, and depending on the judge, a court might require oral argument on a motion. Appear on the return date and be prepared for oral argument.

In other counties, and depending on the judge, you might have to request to submit your motion without oral argument.

Judges have the discretion to allow, limit, forbid, or require oral argument on a motion.<sup>37</sup> Some judges require oral argument on some motions but not on others. Some judges require oral argument on the return date; other judges will schedule the argument or a motion conference for a later date.

Follow the court procedures in your county and the individual judge's rules.

Don't risk defaulting for failing to appear on the return date for oral argument in a court that requires a personal appearance.<sup>38</sup> If your adversary fails to oppose your motion or to appear in person (if required), the court will grant your motion on default if you made out a prima facie case for the relief you're seeking in your motion. If your adversary defaults, your adversary may move to vacate the default under CPLR 5015(a)(1) if your adversary demonstrates an excusable default and a meritorious defense or claim.<sup>39</sup>

If you and your adversary agree, you may adjourn the motion. If the court or judge's rules permit, prepare a stipulation of adjournment and submit it to the court clerk or judge. You may not adjourn a motion by stipulation more than three times (no more than 60 total days) unless the judge's rules permit longer or frequent adjournments.<sup>40</sup>

In the next issue, the Legal Writer will discuss motions to dismiss and some nuances to CPLR 3211(a) and (b). ■

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1. See CPLR 2214(a) ("A notice of motion shall specify the time and place of the hearing on the motion, the supporting papers upon which the motion is based, the relief demanded and the grounds therefor.").
2. 1 Michael Barr, Myriam J. Altman, Burton N. Lipshie & Sharon S. Gerstman, New York Civil Practice Before Trial at § 16:101, at 16-16 (2006; Dec. 2009 Supp.).
3. See, e.g., *In re Curcio v. Kelly*, 193 A.D.2d 738, 739, 597 N.Y.S.2d 731, 733 (2d Dep't 1993) ("The court further properly denied the appellants' request for leave to interpose a cross claim nunc pro tunc, since their motion papers failed to annex a copy of the proposed cross claim."); but see, e.g., *Anderson Props., Inc. v. Sawhill Tubular Div., Cyclops Corp.*, 149 A.D.2d 950, 950-51, 540 N.Y.S.2d 82, 83 (4th Dep't 1989) (granting plaintiff leave to serve amended complaint asserting additional causes of action; plaintiff had failed to serve cross-motion requesting this relief and did not give court proposed amended pleading or affidavit showing that proposed amendment had merit.).
4. Barr et al., *supra* note 2, at § 16:101, at 16-16.
5. CPLR 2103(e).
6. Barr et al., *supra* note 2, at § 16:1-4, at 16-16.
7. CPLR 2103(a).
8. CPLR 2103(b).
9. See generally Gerald Lebovits, The Legal Writer, *E-Filing: Mastering the Tech-Rhetoric*, 83 N.Y. St. B.J. 64 (May 2011).
10. CPLR 2103(c).
11. CPLR 2214(b).
12. *Id.*
13. Most courts prohibit parties from serving replies on orders to show cause. See, e.g., N.Y. County Justices' R. 13(b); *Forward v. Foschi*, 2010 N.Y. Slip Op. 52397(U), 31 Misc. 3d 1210(A), 929 N.Y.S.2d 199, 2010 WL 6490253, at \*9, 2010 N.Y. Misc. LEXIS 6625, at \*29 (Sup. Ct., Westchester Co. 2010) (Scheinkman, J.) ("This Court's rules and practice guide specifically advise counsel that replies are not accepted on motions pursued by orders to show cause. The submission of replies delays the disposition of motions and, thus, it would defeat the purpose of the order to show cause procedure to invite replies."). But reply papers are allowed in the New York City Civil Court's plenary part. According to the Unified Court System, "If you have received opposition papers prior to the hearing date of the Order to Show Cause, you may have time to prepare an affidavit in reply . . . . You must serve a copy of the reply affidavit on the other side and bring extra copies and the original, along with proof of service, to the courtroom on the date the Order to Show Cause is to be heard. If you did not have time to prepare reply papers and feel that it is necessary, you can ask the court for an adjournment

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for time to prepare papers. The judge may or may not grant your request." <http://www.nycourts.gov/courts/nyc/civil/osc.shtml> (last visited Feb. 23, 2012). The rule is nearly verbatim for Housing Court. See <http://www.nycourts.gov/courts/nyc/housing/osc.shtml#reply> (last visited Feb. 23, 2012).

14. CPLR 2103(b).

15. Barr et al., *supra* note 2, at § 16:107, at 16-17.

16. CPLR 2103(f)(3).

17. CPLR 2103(b)(6).

18. *Id.*

19. CPLR 2104.

20. CPLR 2214(c).

21. See 22 N.Y.C.R.R. 202.8(b) (uniform rules for Supreme and County Courts); see generally CPLR

2214(b).

22. 22 N.Y.C.R.R. 202.6.

23. CPLR 8020(a).

24. Barr et al., *supra* note 2, at § 16:130, at 16-19.

25. See, e.g., *Kohn v. Kohn*, 86 A.D.3d 630, 630, 928 N.Y.S.2d 55, 56 (2d Dep't 2011).

26. See CPLR 2214(c), 2103(e).

27. CPLR 2215(b).

28. Barr et al., *supra* note 2, at § 16:145, at 16-20.1, 16-21.

29. CPLR 2215.

30. *Id.*

31. CPLR 8020(a).

32. CPLR 2215; see *Palmieri v. Salsimo Realty Co.*,

202 Misc. 251, 252, 115 N.Y.2d 88, 90 (Sup. Ct., Bronx Co. 1952).

33. CPLR 2215.

34. *Id.*

35. For more on reply papers, see Gerald Lebovits, *The Legal Writer, Or Forever Hold Your Peace: Reply Briefs*, 82 N.Y. St. B.J. 64 (June 2010).

36. 22 N.Y.C.R.R. 202.8(a); see CPLR 2214(c).

37. 22 N.Y.C.R.R. 202.8(d).

38. *McGoldrick v. 2100 Park Assoc.*, 279 A.D.2d 287, 288 (1st Dep't 2001); *Brosnan v. Behette*, 186 A.D.2d 165, 166 (2d Dep't 1992).

39. Barr et al., *supra* note 2, at § 16:172, at 16-22, 16-23.

40. 22 N.Y.C.R.R. 202.8(e)(1).

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