



Hon. Holly J. Fujie

Motion practice: A judicial perspective

Tips from the bench on bringing your ex parte application or motion

I am writing this based upon my almost five years on the bench, during which time I have seen the same errors countless times. As such, I believe that it could be helpful, especially to less experienced lawyers, to set out these simple rules to make prevailing on your ex parte application or motion more likely.

Ex partes

Always remember that an ex parte application is meant to be used only in an *emergency*. We see with alarming frequency applications seeking continuances of trials that are ten months in the future or where there is otherwise time for a noticed motion. Reserve ex parte applications for situations where you cannot wait for a regularly-noticed hearing. In situations where, because of court congestion, the first available date for a noticed hearing is after the date on which action must be taken, as sometimes occurs in our Court, reserve the first available date, and in your ex parte papers explain the situation and request a hearing date that meets the statutory requirements.

If you find out about a situation that will require relief from the Court, do not wait *until* it becomes an emergency requiring ex parte relief. The Court requires you to state in a declaration when the alleged emergency arose. An example: "At the deposition of defendant X on [recent date], I learned that she had additional information regarding the incident that had not been previously received in responses to discovery, thus necessitating [specific discovery or relief]. I met and conferred with [opposing counsel] to seek a stipulation to the requested relief, but [I did not receive a timely response or the request was denied]." If that occurred weeks before the ex parte is brought, it may be denied because of failure to take timely action or because a regularly-noticed motion could have been filed.

When requesting emergency relief, think about what the Court might consider

to be an emergency and whether the emergency nature of it could have been avoided. For example, coming in ex parte on the morning of a trial date to which you stipulated and saying that you have a pre-paid vacation starting the next day is not likely to get you relief, regardless of how sympathetic the judge is to your vacation schedule. You planned a vacation knowing the trial date (or you stipulated to a date that overlapped with your vacation), and the Court is unlikely to grant relief. If it is truly an emergency, make sure that it is very specifically set out in the papers, as many judges do not hold hearings on ex partes.

If you want a continuance because you need to complete discovery or you want to mediate, do not use conclusory or conditional language (*e.g.*, "I need to complete discovery and we *may* decide to mediate.") The judge wants to be assured that you have been diligent in pursuing the case and that the continuance being sought is a realistic one and you will not return later to seek yet another continuance because you are still trying to complete discovery and have finally decided to mediate. The supporting declaration should say something like "The parties have scheduled the remaining depositions as follows: (1) plaintiff on October 2, 2016 at 10 a.m.; (2) Dr. X on October 3, 2016 at 2 p.m., etc. After the depositions are completed, we have a scheduled mediation before the Hon. Jane Smith, ret., on November 5, 2016 at 10 a.m."

If you want to oppose a continuance, again, be specific as to why you would be prejudiced by a continuance. Do not just say that your client needs to go to trial sooner rather than later; explain why that is so. For example, if the client has been unable to work since the accident and is undergoing financial hardship as a result, state details about the situation in a declaration. Also, be realistic about discovery that still needs to be completed.

Recognizing that notice time for ex partes is always minimal, try to submit written materials in opposition and do appear at the hearing if it is an important issue. While many judges do not have hearings on ex partes, some do, and the judge may have a question that is not covered by the papers (although they should all be covered by the papers!). Also, if there were delays in your serving the complaint or in proceeding with discovery, explain why they occurred and set forth in detail your own diligence in pursuing the case. And if the reason why a continuance is being requested is that you just added and served a new defendant, do not just say "But they can just get copies of all the deposition transcripts and written discovery!" Instead, try to negotiate a reasonable time period for their discovery.

Noticed motions

Before you file or oppose a motion, consider the following: (1) is the motion necessary to advance your client's case (anger at opposing counsel, for example, is not a reason to file or oppose a motion); (2) what is the motion/opposition going to cost my client and what is the likely result (my Court sees a surprising number of unopposed motions which possibly could have been resolved by stipulation); and (3) is the relief I am seeking within the Court's jurisdiction and its custom and practice? (If this judge is known for never granting certain types of motions, is it worthwhile to bring it?)

If there is a requirement or a custom in your court for counsel to meet and confer before a motion is filed (or even if it is not), meet and confer in good faith and, if possible, do so in person, or by phone if not, rather than exchanging endless voluminous letters. Be sure to include a declaration that sets out your meet and confer efforts.

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If discovery is being sought, consider what you really need or can really produce and try to work towards resolving the issue without resorting to a motion to compel.

If the court provides for an Informal Discovery Conference (IDC), take advantage of that and be prepared to demonstrate your good faith to the judge in attempting to resolve the issue. Many IDC Statements waste space complaining about the other side, often in excruciating detail, or say generically that the other side “only objected to the special interrogatories” without saying what the special interrogatories sought, and why they are calculated to lead to the discovery of admissible evidence.

Listen to the judge in the IDC. Although it is, as indicated, an “informal” proceeding, the judge will generally be frank about what is likely to occur if a motion to compel is brought/heard. We often hear counsel say “Well, I’ll take my chances on a motion” when they don’t hear what they want to hear from the judge. This attitude does not recognize that the judge is unlikely to change positions between the IDC and the hearing, thus resulting in sanctions. Do not go into an IDC with an impassioned and indignant speech more appropriate for a jury. The judge is trying to resolve a discovery matter, not decide your case.

If you are able to reach an agreement on discovery but you have already filed a Motion to Compel (which should not happen, as the parties should agree to extend the time to file a Motion until after supplemental responses as provided), do not keep the motion on calendar for the sole purpose of getting sanctions. This is generally seen as a waste of everyone’s time, and the Court is unlikely to award sanctions when there is no accompanying relief to order.

It should obviously go without saying, but follow all rules, including local rules and the judge’s own rules, including page limits and format.

Check all citations and verify their current validity. *Make sure the cited case and page cites support directly what you say they do.* If quoted language in the case sounds like it supports your position but the case goes against your position,

consider how the Court will view the discrepancy. Address authority on the other side before it is presented by your opponent. No exclamation points and no vilifying the other side. (Actually, you should limit underlining and italics.)

When preparing a motion or opposition, do not waste much space stating the obvious authority, *e.g.*, the standards for a demurrer or a motion for summary judgment or a request for a continuance. Only when you are asking the Court to diverge from the general standard or where the relief requested is unusual is it necessary to recite the authority for such an action.

Be specific about the relief you are seeking and why you are seeking it. If you want to get a protective order against your client’s deposition being taken before you receive certain discovery, state exactly what it is you expect to receive in responses, when you expect to receive it, why it is necessary for your client’s preparation, and when you would be able to have the deposition taken. Just arguing that something is unfair is not sufficient.

For *every* factual statement you make, for example in opposition to a Motion for Summary Judgment, have a citation to an admissible piece of evidence that directly addresses that fact. When there is a sentence without a citation, we do not necessarily assume that the citation following the next sentence supports the first sentence. The same goes for every legal statement you make; you need to give a legal citation for that proposition.

Do not string cite and do not cite to cases standing for general propositions when you are trying to support a more specific legal position.

Make sure that your argument follows logically. Do not assume that the judge will read everything as a whole, and that if a fact or issue is not properly supported or explained on page 5 the judge will see that you cleared it up on page 10. Avoid what I call the “huh?” moment – when I have to read back and forth through a lot of paper and different documents to figure out what the attorney is trying to tell me. Believe it or not, some judges may not make the effort.

When opposing a motion for summary judgment, focus your papers on establishing at least one clear dispute regarding a material factual issue. It is not an argument just that your client is badly injured or defendant is a bad person.

Use headings effectively to outline your argument

Read your papers in hard copy before you put them in final form. When you read on paper, you can catch overuse of a word or a lack of flow in the argument.

Before making a request for judicial notice under Evidence Code section 450, *et seq.*, make sure that the matter as to which you are seeking judicial notice falls within the categories for which judicial notice is necessary/appropriate. For example, you need not seek judicial notice of pleadings in the same case, and you should not seek judicial notice of a personal letter or a Wikipedia article.

Make sure that your declarations and other evidence provide adequate foundation for the facts stated and are not subject to a valid objection.

Proofread carefully before filing

Oral argument: While Court Call is certainly a valid tool to use if necessary, be judicious as to when you use it and when you appear in person. If a motion is really important to you, think twice before you decide not to appear in person. Sometimes the Court uses its observations of your demeanor in argument to weigh certain issues. Also, if you are not in court and the other side has brought a court reporter, it is very difficult for the court reporter to transcribe your part of the hearing accurately.

As a note, the Court will be testing video Court Call, which may be considered as a solution

Think about whether you need to bring a court reporter to preserve your rights in the event of appellate proceedings. Also, consider whether you need to bring a translator (for example for a Petition to Approve Settlement where

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your client will be testifying) to the hearing.

Again, this should go without saying, but dress formally (conservatively) for Court. That means generally a suit with a jacket or a conservative dress. No loosened ties, no revealing blouses.

Speak formally and respectfully to everyone in the Court. Treat the Judicial Assistant and Courtroom Clerk as if they were the judge.

Leave twice as early for court as you think you need. If you are late and are not there when the Court calls your case, even for trial, the Court will decide or dismiss the case and you are going to have to explain that to your client. If you find yourself running late, call the Court and tell them your expected arrival time.

Always let the Court know that you are submitting on the tentative if that is what you want to do. Some attorneys see a tentative in their favor and just assume that it will be the order of the Court so they do nothing. Often, the Court will

take a motion off-calendar if no one calls in (or emails) to submit. Sometimes, the Court will require a call or email to submit on the tentative even when the tentative is to continue the hearing. Be cautious and call in or email every time you have a tentative ruling.

Listen carefully to the questions the judge asks and answer them *directly*. Do not say "I will get to that later." There may not be a later and the moment will be lost.

If there is a tentative decision that is against you, address the points with which you disagree and do not rehash what is in your papers. Do not engage in bickering with the other attorneys or with the judge. Appear reasonable and not unreasonably wedded to an extreme position.

If the tentative is in your favor, and the judge has asked questions of the other (losing) party, and then asks you if you have anything to say, do NOT restate your argument or even address issues

raised by the losing party, just say "Thank you, Your Honor, I submit on the tentative, but if you have any questions I would be happy to address them."

Stop arguing when the Court has stated its ruling

Address the judge as "Your Honor" on the bench, not "Judge."

Never use the phrase "With all due respect" and do not roll your eyes or sigh at anything said (it happens far more than one would expect or we would hope).

And believe it or not, I find it necessary to say, Do NOT wink at the judge at ANY time!

Holly J. Fujie is a judge on the Superior Court of Los Angeles County in California. She was appointed by Governor Jerry Brown in Dec. 2011. She was elected in 2014 for a term that expires in Jan. 2021. ☐