**Judge Mark V. Mooney**
LOS ANGELES SUPERIOR COURT

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# Ex parte motions

## WHAT A WAY TO START THE DAY: THE "8:30 WHINERS' CALENDAR"

It should hardly come as a surprise to anyone, but judges really don't like ex parte applications. We are required to review the motion in a short period of time, with limited information and often hearing only from one side. They are disruptive to the court's calendar. On any given day, a judge may already have hearings on four or five noticed motions, several Case Management Conferences, informal discover conferences and a need to review and prepare for the next day's calendar. On top of all that, a jury may be waiting in the hall to resume trial. Then five or six ex parte applications show up to impact an already full day. Most ex parte applications could have been avoided, are unnecessary, or denied. I've even heard one judge refer to them as the "8:30 whiners' calendar."

Since the Los Angeles Superior Court transitioned to eFiling, judges now have a slight "heads up" as to what to expect the next day. Ex parte applications need to be eFiled by 10:00 a.m. of the day before the hearing. That still provides only a limited time to consider the application. If there is written opposition, it may not be available to review until the morning of the hearing.

As we all adjust to the reopening of civil departments in this COVID-19 world, I suspect that there will be a flood of ex parte applications as parties try to get their cases back on track. Parties will file applications in an effort to reposition their place on the court's calendar. Some motions absolutely should be brought on an ex parte basis to protect your client's rights. Others, maybe not so much. In order to increase the likelihood of success on your ex parte application there are a few basic rules that litigants should keep in mind.

### Make the ex parte application your last resort

Before you even consider filing an ex parte application, try to resolve the issue with opposing counsel first. I've had countless hearings where counsel for the party against whom ex parte motion is directed will start with, "If they had only asked me, I would have (fill in the blank)" or the opposing counsel may propose an acceptable compromise at the hearing. I appreciate that when attorneys are actually standing before a judge there is an effort by everyone to appear reasonable. Nevertheless, there are few issues that reasonable minds should not be able to resolve. Particularly at this time, civility and cooperation between counsel should be on a heightened level. Meet and confer. Stipulate to what you can. Narrow your issues. Rushing in to seek ex parte relief should always be a last resort.

If you are able to obtain an agreement with opposing counsel, you do not need to come in ex parte to obtain the court's blessing. Just file an executed stipulation with a proposed order. The goal is to reduce the number of appearances and items on the calendar. Don't come in on an ex parte if you don't need to.

Perhaps the most important thing to consider, is whether or not your application should be brought on an ex parte basis at all. There are a number of provisions for which ex parte relief is expressly authorized. These would include matters such as a request to seek appointment of a receiver (California rule of Court 3.1175); to allow the filing of longer memorandum of points and authorities to support or oppose a motion (California rule of Court 3.1113(e)); to request dismissal for failure to timely file an amended complaint after a demurrer has been sustained with leave to amend (Code of Civ. Proc., § 581(f)(2).

### Exigent circumstances

If ex parte relief is not expressly authorized by statute, your application must explain exactly what the exigent circumstances are that make ex parte relief appropriate. In other words, what is the threat of irreparable harm or immediate danger that your client faces? If your request can be addressed in a properly noticed motion, you will need to have some very compelling reasons why your substantive motion should jump to the front of the line and be considered by the court. Otherwise, your application is likely to be denied based upon a lack of exigent circumstances.

So, what constitutes an exigent circumstance? That may mean different things to different people. Severe inconvenience

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does not equate to an emergency. The fact that the litigation is costing your client a great deal of money will rarely qualify as an exigent circumstance. But, for example, if evidence or property will be destroyed, or a witness permanently unavailable if the court does not act, exigency will likely be found.

Laying out a concise argument is always good practice. It is even more so on an ex parte application. Tell me exactly what you want and why you need to have this decided now. Please do not bog down your application with a litany of the opposing side's past abuses. Give me only what is necessary to put the current dispute in context. There is only limited time to address the immediate issue that brings you before the court. The better you are able to focus your argument, the better a judge is able to focus attention on your application.

Speaking of keeping your argument concise, parties often submit far more exhibits and attachments than are necessary for the court to make a ruling. Somewhere along the line it seems that attorneys came to believe that the more paper you filed with a motion, the more likely the judge will find it meritorious. Ex parte applications are frequently filed with several inches of exhibits attached (or now electronically filed). Given the limited time available to review the application, I sometimes wonder if the attorney even considered how much time it will take to review the 100-plus pages of attachments. I also wonder if the attorney filing the application has even reviewed 100-plus pages. When I see that much paperwork attached to an ex parte application, my first reaction is generally that there appears to be far too much involved to decide any substantive issues on an ex parte basis.

Not all judges allow oral arguments on ex parte applications. It may be decided on the papers alone. You may have no opportunity to address the court regarding the application. This makes it all the more important that your papers be clear, succinct and to the point. It is also a reason to appear remotely for the hearing on the ex parte (at least currently and for the foreseeable future).

Once you have established that an exigent circumstance exists, step back and consider what action you would like the court to take. Because of the one-sided nature of an ex parte application and the obvious due process concerns, only limited forms of relief are available ex parte. Be aware of what a court can or cannot do on an ex parte application. If the code requires something be heard as a noticed motion (such as a motion to amend a complaint after a demur has been sustained), the judge cannot grant your request for relief on ex parte basis. If the relief sought would affect on an opposing party's rights, a noticed motion will be required. (See, *Sole Energy Co. v. Hodges* (2005) 128 Cal.App.4th 199, 207.) Under such circumstances, all you should be asking the court for is an Order Shortening Time to have your motion heard on less than statutory notice. The court is not likely to rule on your substantive motion at the ex parte hearing.

## Don't even ask

There are things a judge cannot grant. For example, a judge cannot shorten notice requirements for a hearing for a motion for Summary Judgement or Summary Adjudication, so please don't ask for it. And yet, some attorneys still do.

Often ex parte applications are brought to enforce a settlement. Be aware that unless the settlement agreement provides for enforcement on an ex parte basis, the court will not consider it. Once the case has been dismissed, the settlement agreement must contain a reservation under Code of Civil Procedure section 664.6 for the court to retain jurisdiction and the court must have agreed to do so on the record. Otherwise, the court is without jurisdiction to consider the matter. If you are bringing an ex parte application to enforce a settlement, make sure you include a declaration and the proper documentation to show the court it can even hear the matter.

By far the most frequent use of ex parte applications is when there is a trial date fast approaching. Suddenly, a variety of discovery or other law motion issues become exigent. I once saw a small plaque on a judicial assistant's desk that sums up this situation perfectly. It read: "Lack of planning on your part, does not constitute an emergency on our part."

It amazes me how often a party's request for ex parte relief is brought *after* the close of discovery or *after* a motion cut-off date. If a party has timely filed a motion, but cannot obtain a hearing date before trial, that is an entirely different matter. The court's online reservation system or congested calendar may prevent your otherwise timely filed motion from being heard before the trial date, then an ex parte application is the appropriate mechanism to bring the issue to the court's attention. On the other hand, if you missed a date, mis-calendared or made an incorrect assumption, many judges will say, "I'm sorry but that problem is on you." If the emergency is of your creation, it will remain your emergency.

## Conclusion

Of course, things happen in the course of litigation that are unexpected and beyond anyone's control. There are personal, professional, and public emergencies. When such emergencies arise, it may become necessary to act quickly to protect your client's rights. As we all struggle through this pandemic, the goals reducing court appearances and the load on the court have taken on a greater importance. Now more than ever I would hope that attorneys fully explore all avenues to resolve their issues prior to seeking court intervention. Sometimes that is just not possible and an ex parte application is your only recourse. Judges may not like ex parte applications, but we do like seeing that justice is done.

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*Hon. Mark Mooney received his undergraduate degree from the University of Southern California in 1978. He attended law school at Southern Methodist University and received his Juris Doctor in 1981. Before being appointed to the bench he was an associate with firms of Hillsinger & Costanzo and Lafollette, Johnson, De Haas & Fesler. He also served as an Assistant United States Attorney for the Central District of California from 1991 to 1995. Judge Mooney was appointed to the Los Angeles Municipal Court by Governor Pete Wilson in 1995. In 1998, he was elevated to the Superior Court for the County of Los Angeles. He currently has an unlimited general civil assignment in the Mosk Courthouse.*