

HOW TO MAKE A MOTION

[NOTE: Persons without counsel are advised to consult with an attorney. Court staff MAY NOT give legal advice, prepare your papers or act as your attorney.]

A motion is an application to the court for a specific court order within the confines of an existing case. A motion may seek the taking of some procedural step within the case or, under appropriate circumstances, request that the case be brought to a head before the court on the merits. The kinds of motions that a party may make are defined by the Civil Practice Law and Rules (CPLR for short).

To illustrate what a motion is, how it is made and responded to, this summary will discuss a motion to dismiss in Section A. The procedures described in Section A can be applied to many other motions as well. In Sections B and C there will be a description of two other common motions. At the conclusion of this summary there will be a motion checklist.

The person who makes a motion is called the moving party or the movant. A person who opposes a motion is called the opposing or answering party.

A. Motion to Dismiss

Generally speaking, a motion to dismiss challenges the legal adequacy of a complaint or petition.¹ A motion to dismiss may also be used when a Defendant claims that the court has no jurisdiction over him or her by virtue of some impropriety in the service of process, because the action was not commenced on time, or for other reasons. In this context “no jurisdiction” means that the court lacks the power to order the person involved to do something.

As to timeliness, every Plaintiff’s case must be brought within one of the various deadlines spelled out in the law, which are known as statutes of limitations. For example, an action for breach of contract must be brought within six years of the breach (CPLR §213). Most personal injury actions must be brought within three years of the injury complained of (CPLR §214). For other limitations, see CPLR Article 2.

All papers on motions must be typed or legibly printed in English, using black ink on 8½ x 11 inch paper using one side of the paper only.

Except when proceeding by an Order to Show Cause (see below), the moving party must prepare a Notice of Motion. This is a document that advises all the other parties in the action that the motion is being brought, what they want the court to do (for example, dismiss the case), what the supporting papers are, the reasons for the motion (*usually called the movant’s grounds*), and when and where the motion will be heard. The date of formal presentation to the judge is called the return date

¹ A Plaintiff may also use such a motion to strike an affirmative defense contained in an answer.

(CPLR §2214[a]).

The moving party must submit with the notice of motion an affidavit, a written statement made under oath and sworn to before a notary public, or other proof that explains the nature of the motion and the reasons therefor and which has attached copies of all papers necessary to understand the motion. For example, if it is contended that the action was not timely commenced, the affidavit must state the facts that show this. To present argument about a point of law, the moving party may submit a separate document called a memorandum of law (*brief*). Legal argumentation and citations to cases and/or statutes (*laws*) should be contained only in the memorandum of law, not in affidavits or exhibits, which should be limited to factual statements and documentary evidence.

The CPLR sets forth deadlines for the service of papers on motions. There are three things to keep in mind. First, there are the basic deadlines set forth; therefore the moving party should choose a return date so that he or she will comply with those deadlines. Second, in most circumstances when papers are mailed rather than personally served, the rules add five additional days to the deadline for a response to allow for receipt of the papers. Third, the moving party may obtain additional time to prepare and serve a reply. That is, if the moving papers are served at a set time in advance and the notice of motion contains a demand in accordance with CPLR §2214(b)², then the movant is allowed additional time to review the answering papers and may submit a reply in response to those papers. The following is a summary of the deadlines:

Standard Time

Moving papers - must be served by hand (*personal service*) at least 8 days before the return date or by mail 13 days (8 + 5) before the return date.

Answering papers - must be served (by hand or mail) 2 days before the return date.

Reply papers - not provided for.

Additional Time - Papers in accordance with CPLR §2214(b)

Moving papers - must be served by hand at least 12 days before the return date or by mail 17 days (12 + 5) before the return date and the notice of motion must contain the 2214(b) demand.

Answer papers - must be served (by hand or mail) at least 7 days before the return date.

Reply papers - must be served (by hand or mail) at least 1 day before the return date.

² The demand should state the following: "Please take further notice that you are hereby required to serve copies of your answering papers on the undersigned no later than the seventh day prior to the return date set above."

No other papers, such as a response to reply papers, are permitted by the CPLR on a motion.³ Attorneys and self-represented litigants are free to, and are encouraged to, consult with each other and agree in writing on a schedule that suits the needs of all, which may be different from the times listed above. A Defendant needs to be careful that he or she does not inadvertently waive any defense depending upon how he or she makes a motion or otherwise responds to the complaint (CPLR §3211[e]).

A timely motion to dismiss pursuant to CPLR §3211(a) extends the Defendant's time to serve the answer until 10 days after an order issued by the court has been entered and notice of entry has been provided. Entry means that the court's order on the motion has been signed and filed with the County Clerk.

All motion papers must be served by mail or by hand upon all parties who have not defaulted in appearing (*all parties except those whose time to answer has already expired and are now in default*), even if the motion does not seek relief against some of them. An affidavit of service must be prepared; one original should be retained by the moving party and a duplicate original should be attached to the papers submitted to the court so that the court can be certain that timely notice was given to all parties to the case.

Before a motion can be filed, the movant must pay a filing fee of \$45.00. If the case has never come to court before, the movant will also need to pay \$95.00 to file a Request for Judicial Intervention (RJI for short) in order to get a Justice assigned to the case. Both the motion fee and RJI fee (if required) are paid to the County Clerk's Office.

The original moving papers must be filed with the Court Clerk's Office at least five business days prior to the return date so that the motion may be put into the court's computer system and placed on the calendar. In the first instance, the place where the motion will be returnable is the assigned Justice's courtroom. Oral (*spoken*) argument may take place there, but usually oral argument takes place only when, where and if the assigned Justice directs. This is so for all motions brought in our court by notice of motion. The parties may agree to adjourn motions (within limits) and with the court's permission so as to accommodate their schedules. Answering and reply papers are to be served upon all parties to the case within the applicable deadlines. The original answering and reply papers, with proof attached that the papers were served on all parties, must be delivered to the courtroom at the call of the calendar on the return date.

A word of caution on return dates. Sometimes the assigned Justice and/or the Court Clerk's Office will direct or require a change in the return date. Accordingly, a few days after you submit your notice of motion you must check with the Court Clerk's Office to see if this has happened. You can do this by calling the Court Clerk's Office, making sure to have the Index Number ready.

³ However, the CPLR does provide that when a motion is made, another party may make a motion of his or her own in response, known as a cross-motion (CPLR §2215).

Once the motion is marked submitted, it is either sent to the Justice assigned to the case for decision on the papers or scheduled for oral argument in front of that Justice. This depends upon the procedures adopted by the Justice in question.

Another way to make a motion is by Order to Show Cause. An order to show cause is a request for relief by motion, but, unlike a notice of motion, it is presented to a judge and signed by him or her before it is served on the other parties in the case. It requires the other parties to appear on a certain date and time (*return date*), at a certain place and to state reasons why the movant should not receive the relief asked for in the order to show cause.

This should be used when there is urgency to the matter or when the movant seeks a stay, often called a Temporary Restraining Order (TRO for short) of some sort from the court. In other words, to temporarily prevent something from happening such as stopping a bank from freezing the Defendant's bank account.

If you are seeking a stay against a public officer, board or municipal corporation (for example, Department of Social Services; City of New York) and want a TRO, you must give the public officer, board or municipal corporation advance notice of this. You must also do an affidavit in support of the TRO, sworn to before a notary public, stating whom you notified and when you spoke to them.

Any party who wants to proceed by order to show cause must prepare a proposed order to show cause and submit it to the court. The return date should be left blank since that will be filled in by the Justice who signs it. Attached to the order should be the affidavit in support and any necessary attachments to the affidavit (for example, copy of the complaint). If there is a memorandum of law, it should be submitted at this time as well. When the papers are ready, they must be submitted to the Court Clerk's Office who will review the papers for form.

If emergency relief is requested, the movant must also submit an emergency affidavit which explains both the nature of the relief sought and why immediate relief is needed. For example, a movant is seeking an order to prevent a former spouse from taking a child/children to another country and states that the former spouse has advised that he or she has plane tickets to leave the country that night and says the movant will never see his or her child/children again. The papers will be delivered to the Justice and, if found satisfactory, signed by him/her. The Justice will fill in the return date and will specify when and how the papers should be served on all other parties.

If immediate emergency relief is not required, the papers are simply left with the Court Clerk's Office staff. After the papers are reviewed, they will either be marked to be returned to you for correction, or sent to the assigned Justice for signature. You can check the status of your order to show cause by calling the Court Clerk's Office. You need to wait at least 48 hours after submission before calling. If your papers need corrections, you should return to the Court Clerk's Office to pick them up and correct them as needed for resubmission. If your papers are correct as to form, they will be forwarded to the assigned Justice's Chambers for signature. If the Justice finds them satisfactory, he or she will sign them, fill in the return date and specify when and how the papers are to be served.

When the order has been signed, the movant must “conform a copy,” that is, reproduce on a copy of the papers with each and every marking made thereon by the Justice. This copy must then be photocopied and served upon the attorneys for all parties to the case in the manner and within the deadline set by the Justice.

After service is made, the movant must see to it that an affidavit of service is prepared. The original must be presented to the court on the return date. The case will be called in the assigned Justice's courtroom. The movant must be present at that time especially if the court granted the stay (TRO) until the hearing date of the motion and the movant wants to continue it until the motion is decided. Movants must ask for this when the order to show cause is called before the court at calendar call. If the other parties don't submit opposing papers and don't appear on the return date, the court may take action on the order to show cause provided that it is satisfied from the affidavit of service that the other parties were properly served with the order to show cause and supporting papers.

The other parties may submit papers in opposition to the motion, usually in the form of opposing affidavits and exhibits. Ordinarily this will be done within the time specified by the Justice when the order to show cause is signed. Opposition papers must also be properly served on the original moving party as well as all other parties to the case.

B. Motion for Summary Judgment

A motion for summary judgment attempts to bring to a head the merits of the case or a part thereof on the basis of the pleadings (complaint and answer in most cases), together with affidavits and exhibits without the necessity of a trial. The movant of such a motion (Plaintiff or Defendant) asserts, in effect, that there is not a real dispute about any relevant fact(s) that would require a trial, and the facts show that the moving party is entitled to a judgment in his or her favor as a matter of law. This motion can only be made after an answer has been served (CPLR §3212[a]). If the motion is made before the opposing party has had a chance to request or to obtain discovery about relevant issues, they may oppose the motion on the ground that it's premature and the court might deny the motion with leave to renew after discovery or hold the motion in abeyance, that is, withhold a decision for the time being (CPLR §3212[f]).

In support of the motion, the movant must submit at least one affidavit, a copy of all pleadings, and any other available proof, such as depositions and written admissions. The affidavit must be made by a person with knowledge of the facts and must set forth all relevant facts (CPLR §3212[b]). The aim of the moving papers on a motion for summary judgment is to show that there are no material facts in dispute and that the facts require judgment in favor of the moving party as a matter of law.

The opposing party on a motion for summary judgment is not required to show that he or she is entitled to judgment as a matter of law. It's enough if the opposing party shows that one or more questions of material fact require a trial before the moving party could win. In that event, the motion must be denied and the case must proceed to trial. On a motion for summary judgment, the job of the court is to determine whether there are factual issues that require a trial, not to decide those issues. The opposing party may not state part of his or her proof and hold back other parts for

another day as there may not be another day. He or she is required to reveal his or her proof and if it's not sufficiently done so as to show that there is at least one real issue of fact in dispute that must be tried, the motion will be granted.

A motion for summary judgment (like nearly all motions) may be denied or granted or it may be granted in whole or in part (CPLR §3212[e]).

C. Other Motions

There are many other types of motions. Another common one is a motion to amend, which is a motion to change or correct a pleading (for example, a complaint or answer). Court approval, or a written agreement of all parties to the case called a stipulation, is usually required before such a change may be made (CPLR §3025[b]). The moving party must attach copies of the existing pleading and of the proposed new pleading, as well as an affidavit showing the merits of the proposed amendment.

Motion Checklist

When submitting a motion, your papers should include the following:

- Notice of Motion and the \$45.00 motion filing fee
 - Supporting Affidavit sworn to before a notary public
 - Exhibits, if any
 - Affidavit of service
 - Completed Litigation Cover (Blueback)
 - Proof of Index Number from the Office of the County Clerk including proof of filing the initiating papers
 - Proof of prior filing of the RJI form
- OR -
- Original and two (2) copies of an RJI and the \$95.00 RJI filing fee

Please check with your local County Clerk's Office to see what forms of payment (cash, check, money order, credit, etc.) are accepted.