

HOW TO VACATE A DEFAULT

[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.]

If a self-represented Defendant defaults, that is, takes no action after being served with a summons with notice or summons and complaint, he/she may wish to try to vacate (*set aside*) that default. Otherwise, the Defendant may find, within a brief period of time after the default, that a judgment has been entered against him/her for the relief that the Plaintiff demanded in his/her complaint, with possibly severe consequences to the Defendant (for example, damage to one's credit rating, seizure of assets, freezing of bank accounts). The papers to be filed to try and undo a default is a motion to vacate a default. A motion is an application to the court for a specific court order within the confines of an existing lawsuit. A motion seeks to have the court take some action concerning that lawsuit. To vacate a default, your motion papers must show a good reason or excuse for your default and that your claims or defenses have legal merit.

Whenever a motion is to be brought, the person filing the motion is called the moving party or the movant. There are two ways to bring a motion: (a) by notice of motion; or (b) by order to show cause.

A. Proceeding by Notice of Motion

A notice of motion advises all the other parties in the action that the motion is being brought, what they want the court to do, what the supporting papers are, the reasons for the motion, and when and where the motion will be heard. The date of presentation to the court for decision is called the return date (see the Civil Practice Law and Rules (CPLR for short) §2214[a]).

The movant must submit with the notice of motion an affidavit or other proof that explains the nature of the motion and the reasons therefor and which has attached copies of all papers needed to understand the motion. The movant on a motion to vacate a default must submit papers satisfying certain legal standards or else the motion will be denied. He/she will have to support the motion with an affidavit that references specifics, not vague generalities, as to a defense to the complaint. The affidavit must also demonstrate, again with specifics, an acceptable excuse for the default. The court is not interested in vacating a default on behalf of a Defendant who doesn't have a leg to stand on or that came about because the Defendant was irresponsibly inattentive to the case. The affidavit must be signed and sworn to before a notary public who will also sign the affidavit.

All other parties to the case must have a chance to present their ideas or arguments concerning the motion before the court decides it. This is a matter of basic fairness. The movant therefor must serve the papers on all parties. That is, he/she must have a person 18 years of age or older and is not a party to the case mail or deliver a copy of the papers to the attorneys for each party or the parties themselves if they are not represented by an attorney. Certain deadlines must be observed. 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)¹ 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.

Reply papers are papers presented by the moving party where he/she responds to the arguments raised by his/her adversary in the answering papers. Reply papers may not present new matter. No other papers are permitted by the CPLR on a motion.²

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 who 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. It is extremely unlikely that the matter hasn't been to court before when a movant is seeking to vacate a default. Both the motion fee and RJI fee, if applicable, are paid to the County Clerk's Office.

¹ 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."

² 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).

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. 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 are free upon agreement to adjourn motions (within limits) so as to accommodate their schedules. Answering and reply papers are to be served upon all other parties to the case within the deadlines applicable. 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.

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

B. Proceeding by Order to Show Cause

Another means by which 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 Justice and signed by him/her before it is served on the other parties to the case. It requires the other parties to appear on a certain date, at a certain time and 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.

The movant 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, a 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. 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.

When the order has been signed, the movant must “conform a copy,” that is, reproduce on a copy of the papers 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 moving party 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.