How to Win Without a Lawyer

Motions & Hearings

Getting the Court to Act

Motion sickness happens in court, too!

It happens to people who don't know how to use motions, people who move the court for the wrong reasons.

There's only *one* reason to move the court.

This class will show you how to ***move*** the court correctly to get the job done!

It's easy to do ... once you learn the basics set out in this class.

In this class you'll learn how to move your case forward in a way that's ridiculously easy to understand. We'll give examples and practical tips to help you win your lawsuit … *with or without a*

lawyer.

Whether you're a defendant or plaintiff, you protect yourself from loss by moving your case along, keeping your position alive and kicking so it doesn't fall through the cracks or get lost in the storm of arguments and evidence presented by your opponent.

So, let's get things ***moving!***

Don't let your case slow down.

Move it forward … and *keep* it moving!

You want to win your case, but you also want to get it over with. You and your family need to resume a normal lifestyle after the lawsuit is over, without the emotional stress, prolonged delay, and crushing expenses required to keep on fighting.

Win *quickly!*

Though few things in life are more satisfying that *winning* a lawsuit, it is equally true that few things are more financially draining or emotionally debilitating than a lawsuit that drags on for years on end with constant motions and hearings and depositions and subpoenas and perpetual invasions of your private and public life. That's why you need to move your case effectively … and get it over with.

Do what we teach and you'll put your case on fast track, improving your chance for winning at the same time. In fact, keeping your case moving forward is what it takes to win. Parties who fall prey to the other side's control by failing to move their own case forward with enthusiasm usually end up the losing party.

If you can stay out of court in the first place, of course, you should do so. Nobody in his right mind wants to be burdened by the costs and disruptions common to every kind of lawsuit. The best course of

action when a lawsuit threatens is to attempt settlement.

Do everything reasonable to avoid litigation.

But, if you're stuck in a legal battle and can't avoid conflict some other way (such as when you're the injured party and the other side refuses to pay) you'll be way out in front once you learn what this class teaches about motions and hearings. You'll know how to *move* your case forward, avoid unnecessary delays, and push dispositive issues through the court to a successful and profitable conclusion. [Dispositive issues are those that tend to dispose of a case, issues that are relevant to the outcome, issues that tend to influence the outcome.]

As explained in other tutorials in this course, courts don't usually *move* until one party or the other files a *motion*. Judges do nothing unless one side or the other takes the initiative to *move* the court by filing a *motion*.

Motions by themselves, however, are empty gestures until the court *rules* on them. You can file dozens of motions in your case, but until the court enters orders on your motions (either granting or denying them) you've accomplished nothing of any lasting value. You must not only *move* the court with *motions*, but must *also* make persuasive legal arguments and (in some circumstances) present evidence that encourages the court to grant your motions – while the other side busies itself with arguments and evidence it hopes will convince the court to deny your motions.

That's how lawsuits "move".

We cover motions and hearings in both state and federal courts in this class.

- In State Court: Motions are usually argued at hearings.
- In Federal Court: Motions are usually argued on paper.

  Motions in federal court are usually accompanied by a separate document called a memorandum in which the moving party makes arguments and (sometimes) presents evidence. The non-moving party may then file a responsive memorandum in opposition to the motion, by which the non-moving party makes arguments and (sometimes) presents evidence. The judge then reads the motion and memoranda before entering an order on the motion. In state court you may file a memorandum with your motion if you wish (It's often a good idea with complex motions.) and the opposing party may file a responsive memorandum. More often, in state court, the parties schedule a hearing and appear before the court to argue their motions and (sometimes) present evidence in person.

  There are exceptions to the foregoing general rule. Some state court motions may be ruled on without a hearing. Some federal court motions require a hearing. However, in general, the rule applies. In the following pages we explain what you must do to get a favorable judgment in both state and federal courts.

  In state court (for the most part) if you want a judge to rule on a motion (yours or the other fellow's) you'll probably have to set the motion for hearing. You can set your own motions or the other side's motions for hearing but (with few exceptions) if you don't set state court motions for hearing they may *never* be ruled upon.

  [How to set hearings is explained later in this class.]

  Failure to follow the simple rules for motions and hearings is the reason many people with winnable cases end up losing.

In federal court (with few exceptions) if you're the moving party ("movant"), instead of arguing your motion at a hearing, you argue by filing a memorandum in support of your motion. The motion tells the court what order you want the judge to enter on the books. The memorandum tells the court why the judge should enter the order, explaining the legal and factual basis for your motion and the order you seek. Then the non-moving party files a "response" memorandum in opposition to your motion, arguing the legal and factual reasons why your motion should be denied.

It's no more difficult than that.

Making motions by themselves (in state *or* federal court) is not enough.

Until a judge rules on your motion by entering an order, your motion (or your opponent's motion) simply takes up space in the court's file cabinets.

It's up to you to get your motion ruled upon (yours or the other fellow's).

This is usually at a hearing in state court (where both sides have an equal opportunity to argue for and against) or in federal court after the judge has time to read and consider your motion, your memorandum in support, and the opposing party's response memorandum in opposition.

In the pages that follow we explain motions and hearings (both state and federal) and how to use them effectively to win!

Once you understand the general principles we set out for you in this class (and familiarize yourself with the official rules that control your local court) you're on your way to winning … *with or without a*

lawyer!

An ancient maxim of law states simply, "A judge who rules without first hearing both sides, though his judgment may be just, is not himself just."

Justice implies this essential *right to be heard*.

One might rather say, true justice *requires* the right to be heard. The court should give both parties an *equal* opportunity to present the facts and law on which the court is required to rule with regard to those facts. Each side has a different point of view, but both are given an equal chance to argue their case free from the court's prejudice or penalty.

Anything less is … well … un-American!

But!

Simply arguing to a judge that your "constitutional rights have been violated", and expecting such a simplified argument to cause the court to do anything at all in your favor is a total, complete, absolute waste of time ... no matter what anyone tells you to the contrary.

Courts don't operate that way – nor *should* they.

Courts act on pleadings and on motions that move the court to enter orders (usually after a hearing where both sides argue their motions in person or after the court has read and considered written motions supported by memoranda and responses in opposition, as explained more fully later on in this amazingly valuable class).

The average courtroom is witness to dozens of complex and sometimes heated legal arguments in the space of an average day. The typical judge reads hundreds of pages of pleadings, motions, notices, and memoranda – not to mention official documents and

court records – between the time he arrives at the courthouse in the morning and the hour when he finally heads home to be with his family at the end of the day. Multiply this judicial workload by the number of judges in a typical courthouse, then multiply by the number of days in a year, and you quickly realize why there must be *order* in the court.

Courts have strict rules that govern *everyone* equally … giving each person the right to put forth his arguments succinctly and, as the litigant hopes, convincingly, *while the court tries to pay attention to both sides and render fair judgments in accordance with the court's own rules and established protocols.*

Your "right to be heard" doesn't mean the right to yell back-and-forth like feuding hillbillies. [I was born in the "almost Heaven" state of West Virginia where, in the days of my youth, it was not uncommon to see rusty old cars propped up on wooden soda bottle cases in the front yards of coal miners' shacks, slow-talking farmers punctuating colorful speech with a chaw of Red Man tobacco in their cheeks and the ring of brown-splattered spittoons, and weary wives in gingham bonnets plowing cornfields behind mules. It is, therefore, with affection he refers to fellow state citizens as "hillbillies".]

Arguments *outside* the courthouse are not controlled by strict rules of procedure or rules of evidence, but inside the courtroom everyone is expected to act with dignity and decorum. One hopes people would be civil with each other at home or on the golf course or baseball field, but in the courtroom civility is *imposed by law!* Violators can suffer serious adverse consequences.

Arguments in court are presented with pleadings and motions, sometimes amplified by memoranda or persuasively polite

presentations at hearings or at trial … never by raising one's voice or making offensive comments about the opposing party or attorney. There's absolutely no tolerance for rudeness. Bad behavior always works *against* you.

Pleadings state what a case is about. Complaints state what plaintiffs want. Answers state why defendants should not be required to pay. Counterclaims, cross-claims, third-party complaints, affirmative defenses, and replies (explained in other tutorials in this course) are pleading variations of the basic complaint and answer. Pleadings tell what parties are fighting about.

Motions, on the other hand, state what orders a party wants the court to enter.

Some examples are:

- Motion to strike
- Motion to dismiss
- Motion for more definite statement
- Motion for continuance (or enlargement of time)
- Motion for default
- Motion to amend
- Motion to compel discovery
- Motion for protective order
- Motion (*in limine*) to exclude evidence
- Motion (*in limine*) to include evidence
- Motion for summary judgment
- Motion for rehearing (in state court) or reconsideration (in federal

court)

- Motion for *in camera* inspection of documents

These, of course, are just a few of the more commonly encountered motions. There is no limit (other than reasonableness and the general requirement to stay within the rules of procedure and rules of evidence) to what a motion can *move* a court to do. If a disabled person needs special assistance because of a physical handicap, she can move the court to allow her seeing eye dog into the courtroom. Or, if one is hypersensitive to heat or cold he might move the court to adjust the courtroom thermostat. This doesn't mean the court will necessarily grant such motions. Motions are as often denied as granted. The point we wish to make is that one may move the court to do nearly *anything* that is reasonable *and* within the rules of procedure and evidence. Getting judges to grant our motions (or deny those filed by our opponent) of course, is another matter covered more completely in the pages that follow.

In the typical lawyer's library (or average law library at your local courthouse, law school, or university) are "form books" with page after page of standardized forms for various types of motions, pleadings, and other papers. Though these books may be useful for novices, they don't include all possible motions one might make in the course of a single lawsuit. They're only a guide to get you started.

One such form book used by Florida lawyers was written (and revised many times) by a very fine attorney by the name of Henry Trawick. His book is so often used by lawyers in Florida, that most refer to it merely as "Trawick's" and consider it the bible of motion practice … an excellent guide to help lawyers get started drafting

various motions for various purposes, but not an exhaustive compendium of all *possible* motions.

Many years ago, in a complex case involving widely divergent positions on the facts and law, I filed a unique motion for which there was no "standardized form" in the books. The young lawyer for the opposing party objected to the court, "Your honor, I move to strike Mr. Graves' motion!"

The court inquired, "On what grounds?"

The young fellow replied, "There *is* no such motion."

"Oh?" the judge responded, peering over his bifocals with a covert smile in my direction, "How is that, counselor?"

"I went through Trawick's cover-to-cover," the young lawyer replied. "That motion does not exist."

The judge denied opposing counsel's attempt to strike my motion.

Just because a motion doesn't appear in a form book doesn't make it invalid … *if* it's properly framed and conforms to the rules in other aspects (as mine was in this case).

The court may deny your "unusual" motion, of course, but you can move the court to do almost anything within reason, so long as your motion is intended to move the case *forward* and not interposed to cause confusion, delay, or prejudice to the other side.

If you have access to form books for the jurisdiction where your case is pending (in addition to our excellent class Forms) by all means use them – but be careful to understand that the examples are merely offered as a guide. No two cases are the same. Facts are never identical. Laws apply differently to different facts. Form books are intended only to help you understand essentials that need to be

included in *your* motions. The rest is up to you. Understanding the goal (i.e., the purpose of obtaining a particular order) for a motion is far more important than knowing its technical form.

While on this subject, *never* use fill-in-the-blanks forms!

You *must* know what your legal papers must contain, why such specific content is required, and how the content of your paperwork will affect the court. To imagine you can win a contentious lawsuit merely by filling-in-the-blanks on pre-printed forms is nothing short of foolish. That's why we never offer simple fill-in-the-blanks forms. People who think they can win by filling in blanks on a pre-printed form (or its electronic counterpart) are in for a rude awakening.

Lawsuits are typically knock-down, drag-out battles in which every party suffers some degree of damage. Knowing what we teach greatly increases your chance of winning, but you must remember: Lawsuits are a form of verbal warfare.

The party who knows best how to move the court *wins!*

So, learn what motions do and how they do it.

Every well-stated motion seeks one thing and one thing only – a court *order*!

The singular purpose of every motion is to get the judge to *enter an order*.

If a motion doesn't move the court to enter an order, it is improperly stated.

Many experienced lawyers write motions that begin like this:

COMES NOW the plaintiff, by and through her undersigned attorney, and prays this Honorable Court will compel the defendant to produce the records plaintiff previously requested, stating in support: *blah, blah,*

This is a "prayer", not a motion. It doesn't "move" the court at all. The example merely "prays" the court will do something. Though frequently seen in papers filed by experienced lawyers, it is nonetheless *improper*.

We don't "pray" to judges.

We "move" them!

And, moreover, we move them to enter *orders*!

Only obsequious lawyers "pray" to judges. (Political climbers who'd rather sell their clients down the river than stand up to a judge who disobeys the rules.) Even though a prayer is not a motion, most judges treat them as motions. Nonetheless, this is *not* good practice. We will never teach you to imitate the habits of bad lawyers who seek to ingratiate themselves with judges for political reasons, afraid to talk back, afraid to speak up, afraid to advocate their clients' causes zealously when the judge is clearly in the wrong (lest it adversely affect their standing in the community or their ability to own a nicer car or buy a larger yacht).

We teach you to *move* the court to enter the orders justice demands!

Anything less isn't good enough.

When we want a judge to order someone to do something, we don't ask the court to "compel" them, we don't "pray" the court will compel them, and we certainly don't beg the court to do anything

whatsoever. We move the court to enter orders that *command* people to do what we want … for the very good reason explained below.

When a court enters an order commanding someone to do something, that person is suddenly subject to the potential penalty of being held in contempt if he disobeys. If one is found in contempt of court he may (1) be fined, (2) lose by default, or (3) be hand-cuffed and taken to the jailhouse where he may remain behind bars until he decides to obey the court's order.

That's *why* we move courts for orders *commanding* people to do what we want.

It is the court's contempt power that gets things done.

Courts have power to require a sheriff (state court) or federal marshal (federal court) to put people in jail behind iron bars or take their property away and sell it if they don't obey court orders!

It is ultimately this power we seek when we file lawsuits as a plaintiff.

And, if we're sued as a defendant, this is the power we use to avoid a judgment against us.

Orders issued by a court that lacks the power to put people in jail or take possession of their property are worthless pieces of paper … and such a court (if one existed) could be ignored without fear of penalty.

In this nation, however, both state and federal courts have power to command both imprisonment and sequestration of private property if orders are disobeyed.

What we want from the court when we file motions, therefore, are *orders*.

We move courts to enter *orders*.

The reason is *enforcement!*

I once took the deposition of a fellow after he'd lost a case to my client. I wanted to know what he owned so I could direct the sheriff to levy on his property. I asked him to describe his gun collection (an asset I always ask about in post-judgment proceedings, as it's often a major asset retained by judgment debtors who are down on their luck). This fellow refused to answer when I asked about his firearms. I terminated the deposition at that point and filed a motion for an order commanding him to appear for deposition at a later date and to give me information about his gun collection. I had the sheriff *serve* him with a certified copy of this order. On the date he was to re-appear for his deposition, he simply failed to show. I took an affidavit from the court reporter stating he did not appear and moved the court for an order finding him in contempt. The order gave him an option to appear once more for deposition to answer my questions and avoid contempt charges. Again he didn't show. This time when I took the court reporter's affidavit to the judge, he issued a warrant for the man's immediate arrest. The sheriff picked him up, handcuffed him, carried him to the jailhouse, and locked him in a cell. There he sat until he decided to tell me about that gun collection.

This is power *everyone* has.

You have this power.

Your next door neighbor has this power.

The opposing party in your lawsuit has this power.

This is your right … legal power most people never think about when they're involved in a lawsuit, yet it is the very power that

makes lawsuits effective in controlling people who injure us.

It isn't paperwork that makes the system function.

It isn't the judge banging his gavel on the bench.

It isn't the flag in the front of the room or the high ceilings or the black robe.

It's the inherent contempt power of courts to enforce their orders by force of arms!

Without handcuffs, firearms, and jail cells courts are worthless exercises in futility.

Use the court's contempt power in *your* case by moving for and obtaining orders that command others to do what the law requires. Put heat on the other side if they play games with you or the judge. Don't put up with high-jinks or evasive tactics.

Move for entry of orders that carry the penalty of contempt if disobeyed.

Bring the full force of this power against anyone who disobeys a court order in your lawsuit *and press for full enforcement*!

Every motion should move the court to enter an *order*.

Motions do not "pray".

They don't "request".

Motions *move* the court to enter orders that *command* people and carry with them the penalties of contempt for those who refuse to obey.

If someone in your lawsuit disobeys a court order, move the court for an order to show cause why they shouldn't be held in contempt …

and, if they fail to show cause, move the court to issue an arrest warrant. [An arrest warrant is an order commanding the sheriff (or marshal) to carry out the court's order by force.]

This is how you exercise *your* rights in this country.

Take charge!

If your motion is spoken at a hearing or trial the court may rule on it instantly.

These "spoken motions" are called *via voce* motions from the Latin "by voice".

Via voce motions are made on-the-spot and are usually ruled on quickly.

One example is a motion to strike damaging testimony that should be excluded for hearsay reasons. You've seen many such *via voce* motions on TV.

A cross-examining lawyer demands, "What did your neighbor tell you?"

The witness quickly answers, "She said she saw the defendant enter our backyard and carry away our chickens!"

Counsel for the other side, waking from a day-dream, jumps to his feet, "Motion to strike! Hearsay!"

The court calmly rules, "Sustained."

Motion granted!

But, the toothpaste is out of the tube, and you can't put it back.

The jury heard the testimony.

The judge may direct the jury to disregard the witness' statement,

but you can't un-ring the bell.

A jury will not disregard what they've already heard, no matter how many times the judge tells them they must.

Under most circumstances (this being one of them) a witness should not be permitted to testify what someone else said. If a witness offers to say what someone else said, and the other person's statement is offered to prove the truth of an alleged fact relevant to the outcome of the case (i.e., a material fact), the testimony is inadmissible hearsay.

However, if a *via voce* motion to strike is not made promptly, the damage may be too awful to repair, and the party who objects too late has no one to blame but himself. He cannot complain on appeal that the hearsay testimony caused him to lose. Every party is responsible for paying attention and objecting promptly.

How often have you watched TV (and it *does* happen in real life) as an objection is made *after* a witness testifies? The court sustains the objection, but the damage is done.

The key to making effective *via voce* motions, therefore, is to make them promptly and be prepared to back up your motion with the legal basis for your motion, such as a rule of evidence the court is obligated to enforce.

Via voce motions, unlike written motions, must be made quickly. You don't have the luxury of sitting at your word-processor weeks in advance, researching the law to draft a multi-page treatment of facts and supporting cases and statutes like you do with *written* motions. A spoken motion, like its near cousin the written motion, must have a sound legal foundation. But! That sound legal foundation must be on the tip of your tongue! You must be prepared on-the-spot to

argue the legal foundation for all your spoken motions (and objections) while your opponent tries to interrupt to throw you off your game and persuade the judge against you. Failure to promptly offer solid legal foundations in such circumstances leads to losing lawsuits.

The foundation of a motion, written or spoken, is the legal basis on which the motion is predicated, i.e., law that *controls* the court.

You must be prepared to argue the law that forms the foundation for spoken motions, often in the space of only a few brief seconds.

When you make a spoken motion, the judge will frequently ask, "On what grounds?"

If you stand there stammering, beads of sweat breaking out on your nervous brow as you thumb frantically through the rule book for answers, the court will deny your motion. Your motion may be proper. You may make it in a timely fashion. But, if you cannot give the court a quick response when asked *why* your motion should be granted, most judges will deny the motion and permit proceedings to continue as if no motion had been made.

The court rules then-and-there.

No hearing or carefully written memorandum is permitted.

Written motions, on the other hand, are not created for the first time "in court". They are typed on paper in your office days ahead of time and filed with the clerk, long before a judge gets around to ruling on them. In fact, it's possible to *withdraw* a written motion, if you do so *before* the court rules on it. Some years ago I came to a hearing prepared to argue a written motion I'd filed weeks earlier, only to discover as the hearing began that my client's cause would fare

better *without* the motion … so I withdrew it. I simply said to the judge (with my court reporter taking it all down), "I withdraw that motion, your Honor."

The other side was livid. They wanted to argue against my motion. I saw (before it was too late) that my client's interests would not be served by arguing the motion, so I withdrew it. The other side vigorously tried to convince the judge my motion should be argued, but it was *my* motion, not his … and it was withdrawn as soon as I said those magic words.

As soon as a motion is withdrawn, it's as if it never was made in the first place.

Remember that point. If a motion is withdrawn before the court rules on it, the court must treat the motion as if it never existed. The judge cannot make motions for parties, and the other side cannot re-instate what you've already withdrawn. They may file their own motion, but they cannot make you pursue your motion once you withdraw it.

This is as true of the spoken motion as it is of a written motion. If a motion is made and withdrawn *before* the court rules, it is a nullity … it has no effect.

Not all motions can be made by *speaking* them. Some must be written and filed with the court in advance.

The following, however, are a few examples of *via voce* motions you can make by speaking them during trial or at a hearing:

- Motion to disqualify a witness
- Motion to sequester the venire (to have the jury removed from the courtroom)

- Motion to have a witness declared hostile
- Motion for recess
- Motion to have the thermostat set lower (or higher)

  Motions made *via voce* during trial or hearings are usually ruled upon before further business is taken up by the court, i.e., before further evidence or argument is presented. Once made, a *via voce* motion becomes a pending motion that calls on the court to rule and, in all but a few instances, the court should rule *before* other business is taken up.

  Whenever a judge fails or refuses to do what you believe the judge should do, make your objection immediately *on the record* to preserve the issue for appeal. If you don't object the issue is not preserved. If you don't object, the issue cannot be raised for the first time on appeal. Even if you know an objection will be overruled, object anyway.

  Object often.

  Object clearly.

  Give the legal grounds for your objections.

  And, of course, make certain the court reporter is taking it all down so you have your record for appeal … if appeal becomes necessary!

  Be prepared to make your argument at the time of your spoken motions.

  Speak clearly.

  Make your motions in a timely manner.

  And ask the court in a polite way to instruct the opposing party not to interrupt you while you are speaking!

Written motions (as opposed to spoken or *via voce* motions) are potentially more powerful *because they can be carefully planned days or weeks in advance.*

Planning is power.

A savvy litigant might spend days writing a motion, researching law that supports the motion, reviewing the motion with colleagues to get second opinions before filing it, and only then sending the motion to the court clerk (with a copy to the other side as the rules require in every jurisdiction).

In state court written motions may include extensive legal arguments supported by citations to statutes, court rules, constitutional provisions, and case law (i.e., decisions of appellate courts that should control or influence the trial judge). If the motion involves complex issues it may be filed by itself and supported by a separate memorandum that contains the legal arguments and citations. The non-moving party is not required to file a response but is permitted to do so, telling the court why the motion should *not* be granted, giving legal argument and citations in opposition along with (where appropriate) explanations why the statutes, rules, constitutional provisions, and cases cited by the movant do *not* apply to the facts in controversy and therefore should be ignored.

Federal court motions, on the other hand, are usually accompanied by a supporting memorandum explaining why the motion should be granted, and the non-moving party *always* files a response memorandum in opposition. Motions in federal court state only what the moving party is moving the court to order, while the memorandum in support tells the court *why* the motion should be granted and the order entered.

The non-moving party's response memorandum argues why the motion should *not* be granted, giving argument and citations in opposition along with (where appropriate) explanations why statutes, rules, constitutional provisions, and cases cited by the moving party do not apply and therefore should be ignored.

If a non-moving party's response memorandum misleads the court with citations that don't stand for what's claimed (or if the non-moving party's response is otherwise flawed or dishonest in some material regard) the movant may file a reply memorandum setting out the errors of his opponent's response memorandum.

- Movant files motion and memorandum in support
- Non-movant files response memorandum in opposition
- Movant (at his option) files reply to non-movant's response

No other papers are permitted.

State courts allow memoranda in support of motions (optional with the moving party), while federal courts insist on them. In state court a response memorandum is optional. In federal court it's mandatory and may be the only opportunity a non-moving party has to argue against the movant's motion, since most federal court motions are ruled on without hearings.

In state court, most motions require hearings before the court will rule.

In federal court, the judge usually rules on the papers filed.

We'll examine differences between state and federal court motions in later chapters.

For now, we'll concentrate on what makes a successful written

motion and what a non-moving party can write in response *before* hearing to oppose a written motion.

Content of Written Motions – State Court

The first thing to remember is that you are moving the court to enter an order.

It is an order you seek. Nothing less.

Move the court to enter one.

The next thing to make clear in the first few sentences is the legal basis for the order you seek. If it's a statute, cite the statute *and* quote directly from it to show the court what it says about the court's legal duty to enter the order based on the facts. If the legal basis for an order you seek is case law, cite the case(s) and quote from the opinion(s) directly so the court can see how appellate courts have *required* trial courts in the past to enter the order you seek based on facts. In many cases, there'll be case law, statutes, court rules, administrative codes, and constitutional references that support entry of the order you seek.

Cite *only* those authorities most compelling to your motion's argument.

After stating the legal basis for the order you seek, lay out all facts *necessary* to trigger the command of the statute(s) and/or case(s) cited as legal basis for the order.

Do not discuss facts that have no direct application. They'll only get in the way.

Make it easy for the judge.

Too many words tends to diminish rather than enhance the

effectiveness of motions.

Judges are busy people.

Come to the point.

Say no more than necessary.

Tell the court in simple terms why the order you seek should be entered.

Content of Written Motions – Federal Court

Since you'll support your motion with a memorandum in federal court, it isn't necessary to lay out in the motion itself all the facts relevant to your motion nor all the statute(s) and case(s) that support your motion. That's what the memorandum is for.

What you do want to make clear in your motion is the order you seek with a simple statement of the legal basis and factual background, giving reference to the memorandum in support that you are filing contemporaneously.

Your motion tells the court the order you want it to enter.

Your memorandum will tell the court why it should enter the order.

More is not required. [See our class on Forms for Civil Cases for sample motions.]

Content of the Memorandum in Support – State or Federal

The memorandum in support should, of course, clearly reference the motion it is offered to support. This is done not merely by name (e.g., Plaintiff's Second Motion to Compel Better Answers to

Interrogatories) but also by the service date of the motion as filed (e.g., "… bearing service date of 17 October 2005") so there is no possible mistake about what motion you are arguing for.

The memorandum should re-state your motion *concisely* and support the motion with citations to case law, statutes, court rules, administrative code, and/or constitutional references. Everything in the memorandum should support entry of the order you seek. Where language in the supporting citations applies *directly* to the facts, quote *directly* from the references.

If a controlling case reads, "Upon motion of a party, the court must examine the document *in camera,* …" (i.e., in the court's private chambers) and you do wish the court to examine some document *in camera*, then quote from the statute directly so the court has no wiggle room to deny your motion.

Better still, cite the statute *and* controlling case law in your jurisdiction, so the judge knows that failure to grant your motion will result in his being reversed on appeal!

Judges must obey the law like everyone else.

It's your job to make the record is made clear as to the judges duty.

Many courts limit the number of pages you may use for a memorandum. There are also paper-size, type-size, and margin-size limits that must be obeyed, or your motion may be denied on technical grounds – an avoidable catastrophe that is easily prevented by nothing more than your consulting and complying with the local rules for your court.

Provided you follow the rules, the more you make your memorandum readable and concise, the better your chance for

success. Dry, overly-verbose papers that try to sound "high-brow" and "scholarly" are far less likely to obtain the desired goal than those that speak plainly. In some cases it's appropriate to introduce a bit of humor. Most judges are bored by the unimaginative paperwork they must go through on a daily basis. If your papers take some of the hum-drum out of the judge's job, they will be more favorably received. Highly-technical writing should be avoided.

And, *please* don't use words you don't know nor fail to use your spelling checker.

If your memorandum is difficult to read, your argument will be difficult to follow.

If your memorandum makes the judge smile a little … well … it can't hurt!

Content of the Response (Memorandum in Opposition) – State or Federal

The response memorandum should do two (2) things.

First, of course, it should tell the court why the motion should *not* be entered by citing controlling authorities ignored by the movant, arguing how those authorities that were omitted by the movant are, in fact, the law that controls the outcome.

Second, it should show the court how the movant's arguments are off-point. If the movant cites as legal basis for his motion references that do not apply to the facts of the case, *make that clear in your response!* Quote from the references cited by your opponent to show where the authority is misplaced. It is not uncommon for young lawyers to rely on nothing but headnotes of cases and therefore

miss what the body of the case is saying, *thereby giving you an open door to correct him in your response*. [Headnotes are not legal authority. They appear before written opinions in many reporters but are not part of the judges' opinion. They are tools prepared by salaried editors working for companies publishing official opinions, e.g., West or Lexis. In most cases they accurately describe what a case is about, but sometimes they are wrong. If your opponent hasn't bothered to read the official court opinion in its entirety but took the lazy lawyer's way of relying on headnotes instead, you may have the excitingly satisfying opportunity of correcting him formally in your response memorandum to the court.]

You must, of course, read all the cases, statutes, and other authorities your opponent cites in his memorandum. Read beyond the headnotes, carefully analyzing every word of the official writings to determine whether or not they are controlling law.

Finally, cite your own authorities, explaining why they apply (instead of those cited by your opponent) and finalize a strong argument why your authorities *require* the court to deny the motion.

It's no more difficult than that.

Content of the Reply – State or Federal

Though the movant may not be obligated to file a reply memorandum, there may be times when the non-movant's response memorandum misquotes the law or misapplies the law … in which case the movant is permitted to file a reply (which is to the response memorandum what the response is to the initial motion and memorandum in support.

The movant's reply opposes the non-movant's response – which,

you'll remember, opposes the movant's initial motion.

The reply is not for re-arguing what's already argued in the movant's initial motion and memorandum. The reply should not go over old ground. The proper use of the reply is to oppose error or new argument raised for the first time in the non-movant's response. The reply cites and quotes controlling authority, persuading the court that the argument and authorities set forth by non-movant in his response memorandum are misleading or utterly false.

In federal court, the motion is filed by itself, simply stating what the party wishes the court to rule, while the argument and citations to case law and statutes are filed separately in a memorandum in support of the motion

In state court, the same two-step process *may* be used, but generally state court motions contain both a statement of what the movant wants and also the movant's legal and factual argument (supported by citations to controlling authorities) that tell the court why it should grant the motion. In other words, with most state court motions, the memorandum and motion are combined in one paper.

If argument in favor of a state court motion is unusually complex, however, the movant *may* (at his option) file a memorandum in support (as in federal court) going into greater detail with arguments of law and statements of fact supporting his motion.

As a general rule, if a motion with argument requires more than four pages, make the motion simpler and amplify with a separate memorandum in support.

[Consult local rules and the judge's particular rules to see what state court motions do and do not require hearings in your court's jurisdiction.]

Most motions in state court are presented at hearings prior to the court's ruling. If you don't set a state court motion for hearing (brilliantly reasoned and skillfully written though it may be) the paperwork could lie dormant in the court's files for years before finally being stashed away on microfilm in some storage warehouse at the edge of town. Ultimately, it might be scanned as a digital image in some giant computer database in a faraway city … *never to be seen again.*

"But," you may interject, "doesn't the court *have* to rule on every motion?"

The answer is categorically, "No!"

Some written motions (e.g., motion to reconsider or motion for rehearing) may be ruled on by the court *without further action on your part*. [This may be true in both state and federal courts, but you *must* check your local rules.]

Notice the word "may", however.

Most written motions in state court *require* a hearing … an opportunity for both sides to prepare and present legal and factual arguments in hopes of persuading the judge to rule one way or the other.

Without a hearing, most state court motions will *never* be ruled upon (whether yours or the other fellow's). It isn't fair to allow the court to rule (with a few exceptions we'll examine later in this class) without giving *both* sides an equal chance to prepare and present arguments and, in certain cases, to call witnesses and offer evidence.

This is where "due process" really kicks in! In fact, the very meaning

of due process is nowhere more clear than when we're talking about notices and hearings.

Every person has an equal right to be heard.

Being heard, however, includes the right to receive reasonable notice in advance of the hearing, i.e., to know where and when the hearing will be held, to know the nature of the matter being reviewed, and to have time to prepare – including time to call witnesses, discover evidence, and research law (cases, statutes, rules, or constitutions) that could persuade the judge and control the outcome.

Anything less is not due process!

Anything the court does *without* due process is not American!

To get "due process" in *your* case and protect yourself from crooked lawyers and corrupt judges, you must *demand* it … and *make a record for appeal if you don't get it*.

Filing motions in state court without setting them for hearing is *not* making your record for appeal.

It's up to *you* to move your case.

Strangely, however, many *pro se* people (and even a few experienced lawyers) fail to see the necessity of setting motions for hearing. It's as if they think the judge *reads* all the papers that get filed with the clerk. Nothing could be farther from the truth.

To get a state court to rule on your motions (or the other fellow's motions) you must set the motions for hearing, prepare for hearing, attend the hearing, and argue your cause effectively … while giving the other side an equal opportunity to argue against you.

If you don't set state court motions for hearing, they may never be ruled upon.

In some state court jurisdictions, judges do occasionally read and rule on a few types of motions, however these motions are those that require no evidence or argument that is not contained within the motion itself. If more is required (e.g., case law, statutes, or other legal authority, testimony, or evidence in support) the court is not required to look beyond the motion itself and will not rule until the non-moving party has a chance to argue against the motion (providing his own case law, statutes, or other legal authority, testimony, or evidence in opposition to the motion).

A judge may deny a motion for summary judgment (for example) without a hearing, if he reviews the file and sees, without argument of the parties, there are issues of untried material fact in the record that preclude entry of summary judgment. If the record shows issues of material fact remain, no amount of argument by parties at a hearing can make those issues go away! So, the judge may deny a motion for summary judgment without a hearing … but is not likely to grant summary judgment without one.

Judges are busy people dealing with hundreds of anxious litigants demanding their respective rights, arguing over every kind of diverse legal and factual issues, requiring valuable judicial time to decide dozens of disputes on a daily basis. If it's clear from the record that a motion for summary judgment (for example) is doomed to failure, because the judge can see from examining the record there were issues of material fact when the motion was filed, the court may deny the motion without giving the movant (the person making the motion) a chance to argue his motion at hearing.

If, after reviewing such a motion and studying the court file it's *uncertain* whether a triable issue exists, the judge should insist on a hearing to give both sides an opportunity to argue. Indeed, it would be unlikely for any court to grant summary judgment without allowing the non-moving party a chance to argue why the motion should not be granted. A wise and honest judge will refuse to rule until there's a hearing where both sides have an opportunity to present their side of the story.

Some hearings are "evidentiary hearings", i.e., hearings at which parties are allowed to offer evidence, e.g., live witness testimony, self-authenticating documents, or tangible evidence like bloodstains or fingerprints. Other hearings are "non-evidentiary hearings". In fact, the majority of hearings in civil lawsuits (non-criminal) are non-evidentiary at which lawyers argue motions to dismiss, motions to strike, motions for a more definite statement, motions in limine, and such like motions that do not require *and do not allow* presentation of witness testimony or other evidence.

At a hearing on a motion to dismiss for failure to state a cause of action on which judicial relief can be granted (for example) the judge is required to stay within the "four corners" of the complaint and assume (for the limited purpose of the motion) everything the plaintiff says is true. Then, if any essential elements of the complaint's cause(s) of action are missing, the judge may dismiss part or all of the complaint (usually giving the plaintiff a reasonable time to amend the complaint to cure its deficiency). [Study the class and other materials in this course to learn more about causes of action and their essential fact elements. *Very important!*]

The judge will not allow the plaintiff to bring in witnesses, present documents, or otherwise add anything to what his complaint states

on its face. Such hearings are non-evidentiary.

Two kinds of hearings: Evidentiary and Non-Evidentiary.

Evidentiary hearings are those, not surprisingly, that require evidence to be presented and/or refuted. Examples are a motion for *in camera* inspection of questioned documents or a motion to admit photographs. The court needs the documents or photographs before it in order to rule.

To get a state court to rule on your motion (if it isn't one of the rare motions courts rule on without a hearing), you must first schedule hearing time and give proper notice to the other side as explained in a later chapter in this class.

In federal court, as we said before, your motion does little more than tell the court what order you want the court to enter. You follow this with a memorandum in support of your motion. Your opponent then files a memorandum in opposition. You may then (at your option) file a reply memorandum rebutting the response memorandum that opposes your motion.

In due course (when the federal judge or magistrate) gets around to it, your motion and the parties' respective memoranda will be read and ruled upon … without a hearing.

There are exceptions, of course. There are always exceptions. Check the local federal court rules to see what motions require a hearing and what motions permit a hearing upon petition by one or both of the parties.

Typically, federal court motions are not unlike state court motions.

They seek orders.

The orders sought either (1) command someone to do something,

(2) make findings of fact as legal conclusions from evidence presented, or (3) adjudge one party indebted or otherwise obligated to the other.

The memorandum in support contains the legal basis that justifies entry of the order sought together with a discussion of relevant facts and citations to legal authorities that should persuade the court to grant the motion.

The non-moving party's response memorandum, sets out a different view of the law and facts, making opposing arguments designed to persuade the court to deny the motion.

The movant may file a reply to the response (but is not obligated to do so).

This is called "motion practice".

Because of the formality, delays, and precision involved in federal motion practice, we recommend that *pro se* litigants avoid federal court whenever possible and take their cases to the local state court. Federal court is a labyrinth of legal posturing and protocol that can confuse even veteran lawyers familiar with its procedural niceties. If you can keep your case in state court, where judges are elected (instead of being appointed for life), are answerable to members of the local community, and tend to be less formal and more willing to listen to inartful legal arguments of inexperienced litigants, don't go to federal court. Nearly all issues that can be argued in federal court can be argued in state court. [Exceptions include patent and trademark matters, certain limited cases in admiralty, claims arising under the Public Utility Regulatory Policies Act of 1978 (PURPA), cases involving regulation of railroads, and such like matters where federal statute stipulates exclusive federal jurisdiction.]

This is "concurrent state court jurisdiction". Indeed, there's a presumption state courts have concurrent jurisdiction over federal issues *unless* a particular issue is statutorily designated as "exclusive federal jurisdiction", which is limited to a comparatively few categories of cases. This presumption "can be rebutted by an explicit statutory directive, by unmistakable implication from legislative history, or by clear incompatibility between state court jurisdiction and federal interests". Gulf Offshore Co. v. Mobil Oil Corp., 453 U.S. 473, 478; 101 S.Ct. 2870, 2875; 69 L.Ed.2d 784 (1981).

Federal courts are, for the most part, far more unfriendly to the uninitiated. There are traps where *pro se* litigants can fall prey to the gamesmanship of smoke & mirrors lawyers. These traps are far more numerous in federal court than in state court (where the playing field is somewhat more level between members of the bar and non-lawyers fighting on their own).

If you find yourself in federal court, move to have the case removed to state court with a Motion to Remove. For a discussion on this subject by the United States Supreme Court see: University v. Cohill, 484 U.S. 343; 108 S.Ct. 614; 98 L.Ed.2d 720 (1988).

In this chapter we take a brief look at a few of the more frequently used motions you will encounter in both state and federal courts. For more information on the legal and factual foundation needed for motions to succeed, consult our other tutorials.

Motion for Extension of Time

This motion seeks an order giving movant a later deadline, e.g., extending the time to file a response to some discovery request

[You'll learn about discovery in other tutorials in this course.], to obtain additional discovery, or to take some other action that is constrained by time limitations. The motion needs to show (1) a good faith effort was made to comply within the deadline, (2) that the extension will not unduly burden or prejudice the other side's case, and (3) that the interests of justice will be served by the extension. This motion should be filed as soon as the necessity for more time is known.

Motion to Exceed Page Limit

Many courts put a limit on the number of pages one can use with various documents (motions, memoranda, briefs, etc.). In unusually complex cases, this limit on pages may prevent a party from fully explaining a matter. In most cases the motion will be granted, unless the movant has previously abused an extended court privilege or otherwise acted beyond the scope of proper protocol and procedure.

Motion for Continuance

Judges don't like continuances and generally oppose them. Continuances juggle the court's calendar and delay efficient conclusion of cases. Good cause *must* be shown. The fact you wanted to take a family vacation during the week scheduled for a hearing or trial will probably be insufficient. A death in the family or some other genuine emergency that prevents you from attending will almost always be honored.

Motion to Seal

Sensitive papers must sometimes be filed with the court. The judge

and the opposing party must see these papers to insure due process, however in some cases the party filing the papers has valid reasons for not wanting anyone else to see the papers. The motion to seal seeks an order directing the clerk to put such papers in a sealed file and deny access to anyone who doesn't have a court order authorizing inspection.

Motion for Leave to Amend

A motion for leave (permission) to amend may be filed anytime a party wishes to alter what's been said in a document already filed. It might be a discovery response, a motion, or a memorandum. In most cases it is a pleading. [Pleadings include complaints, answers, counterclaims, cross-claims, third-party complaints, affirmative defenses, and replies. See our other tutorials for more information on pleadings, how to draft them, and what they are designed to accomplish.]

In the case of the initial pleading (the complaint) one may amend without leave of court (i.e., without a motion) so long as the other side has not yet filed an answer. In all other cases, if what's been said needs to be changed, one must file a motion to amend and obtain an order authorizing the amendment. A sample copy of a motion for leave to amend is shown.

FIFTEENTH JUDICIAL CIRCUIT COURT

PALM BEACH COUNTY, FLORIDA

CIVIL DIVISION

Case No. 12345

PETER PLAINTIFF,

Plaintiff,

v.

DANNY DEFENDANT,

Defendant.

_____/

MOTION TO FOR LEAVE TO AMEND

PLAINTIFF Peter Plaintiff moves this Honorable Court to enter an Order allowing him to amend his complaint to add DOROTHY DIRTBAG as defendant and to allege counts against her individually, stating in support:

1. As a result of discovery and the ongoing proceedings in this matter plaintiff has acquired knowledge of torts committed against it by Dirtbag who should be added as a defendant in this action.
2. The torts committed by Dirtbag arise out of fact circumstances common to this action.
3. A copy of the proposed amendment is attached.

WHEREFORE the plaintiff moves the Court to enter an Order allowing him to amend his complaint by appending the pleading attached hereto.

I CERTIFY that a copy of the foregoing was provided to Dewey Cheatham, Esq., 38 Liar Lane, Happiness, Florida 33333 this 19 April 2005.

Peter Plaintiff, Plaintiff

Motion for Default

If the defendant fails to file a responsive pleading (or delaying

motion) within the time permitted for such filings, the plaintiff may move for entry of the clerk's default. Defaults are usually set aside by a showing (1) the failure or delay was a result of excusable neglect and (2) there is a reasonable likelihood that the defaulted party can prevail in the case. The defaulted party cannot proceed until he files a motion and obtains an order setting aside the default.

Motion for Default Judgment

If the clerk enters a default against the defendant, or if any party violates the rules so abusively that default is warranted as a sanction to punish the offending party, one may move the court for entry of an order of default judgment … and the case is over.

Motion to Dismiss

Motions to dismiss may be filed for various reasons. The order sought is one that dismisses part or all of the other side's case. The general rule is for dismissals to be set aside (upon motion by the dismissed party) if the error is cured within a reasonable time. The most common motion to dismiss is filed when the plaintiff fails to state a cause of action (or claim upon which the court can grant relief), however courts generally give plaintiffs additional time to amend complaints to cure this common defect. If one party has not taken affirmative action to move his case along and nothing is done within a certain period of time (varies by jurisdiction) one may move the court to dismiss for lack of prosecution.

Motion for Judicial Notice

A motion for judicial notice can be use in many ways, however it is

important to know there are some things a judge *must* take notice of and somethings it is discretionary whether the judge will grant the motion.

If the matter for which one seeks an order taking judicial notice is a law, treaty, official document (e.g., deed, previous court order, etc.) then the judge *must* enter an order granting the motion and stating that the matter may be relied upon as true or all purposes during the proceeding.

If the matter for which one seeks an order taking judicial notice is one of opinion or something about which reasonable persons may disagree, then the court will usually deny the motion.

If the matter for which one seeks an order taking judicial notice is a fact well known in the community or firmly established in the literature (e.g., that cyanide is poison, that Shakespeare wrote plays, etc.) the judge will almost always grant the motion and state that the matter may be relied upon as true for all purposes during the proceeding.

The principal thing is to consult local rules, because local rules sometimes require *advance notice* to your opposing counsel *before* filing a motion for judicial notice, and failure to follow the local rules may be fatal to your effort.

Motion to Intervene

A motion to intervene may be filed by an individual or other legal entity whose substantial rights, powers, privileges, and/or immunities will be affected by the outcome of the case.

The intervenor must have an actual, present, adverse, and antagonistic interest in the subject matter in both fact and law.

Motion to Strike

A motion to strike seeks an order deleting parts or all of an opponent's paper on the grounds it is scandalous, impertinent, inflammatory, or absolutely false and known to be false at the time of filing. An example is the motion to strike sham, filed when a movant's opponent files a paper containing false statements known to be false at the time of filing. If a plaintiff files a complaint, for example, containing false statements known to be false at the time of filing, the defendant may by this motion obtain an order dismissing the case in its entirety and *with prejudice* so it cannot be amended and filed again. Movant must, however, prove the falsehood and his opponent's knowledge of the falsehood.

Motion for Summary Judgment

If a case presents no issue of material fact (i.e., not one single issue that could affect the outcome) so there remains nothing further to be decided by the court, you can move the court to enter an order of summary judgment. To obtain such an order, however, you must show there is absolutely *nothing* about the facts that can be seen in any way other than favorable to you. If there are any issues of material (relevant) fact remaining in the record of the case, summary judgment motions should be denied. If summary judgment is granted while there are remaining issues of material fact, appeal is necessary. Appeal is not permitted if summary judgment is denied.

Motion for Reconsideration / Re-hearing

This is an often misunderstood motion. Although it is recommended when one loses a motion (because it gives the losing party another

opportunity to make his record in a cogent writing filed with the clerk) it is seldom granted. Moreover, it does *not* toll the deadline for appeal. Don't make the common mistake of failing to file notice of appeal while waiting for the court to rule on your motion for reconsideration. The clock keeps ticking. Failure to file notice of appeal in the time allowed makes appeal impossible.

Motion to Compel Discovery

It's amazing how many *pro se* litigants fail to move the court to compel discovery after receiving from a hired-gun lawyer for the other side bogus responses to reasonable interrogatories, requests for production, or requests for admissions. Most lawyers refuse to file good faith discovery responses. Instead, you'll get, "Objection! Vague, ambiguous, seeks to inquire into the attorney-client privilege, outside the scope of discovery, and not reasonably calculated to lead to discovery of admissible evidence," or something similar intended to throw you off. Don't put up with it! File a motion to compel, citing rules that grant your right to discovery. Explain why things you sought to discover are "reasonably calculated to lead to admissible evidence". If what you seek is reasonable, the court will command the other side to respond accordingly. If you don't file a motion you won't get your evidence, and you'll likely lose your case for lack of proof.

Motion for Protective Order

If discovery (including depositions) is likely to unduly burden or prejudice a party, that party may move for a protective order to either prevent the discovery altogether or require that discovery take place under controlled conditions. If controlled conditions will afford

sufficient protection, the movant should state the conditions requested, instead of seeking to avoid the discovery altogether, since judges are disinclined to deny discovery completely except under the most egregious circumstances.

Motion to Determine Sufficiency

This motion is used to challenge an opponent's response to a request for admissions. The rules require no more than simple "Admitted" or "Denied" responses. *But, the rules are intolerant of objections or outright refusals to respond.*

The penalty for trying to avoid either admitting or denying a fact set forth in the request is to have that fact deemed admitted by court order using a "Motion to Determine Sufficiency" of the responses.

The penalty for lying in a response may be judgment for the requesting party, *if the lie was intentional and can be proven*.

If a party objects, he must give detailed reasons for his objection. An objection by itself does not suffice. Objections must be explained in detail.

If a party fails to either admit or deny or otherwise fails to respond appropriately to a request for admissions, the requesting party may file a Motion to Determine Sufficiency. If the motion is granted, the court's order will deem the improper responses as admissions, in which case everything the other side refused to admit in a straightforward manner as required by the rules will be treated as true for all purposes in the case.

A good thing for you!

Here's a sample motion:

FIFTEENTH JUDICIAL CIRCUIT COURT

PALM BEACH COUNTY, FLORIDA

CIVIL DIVISION

Case No. 12345

PETER PLAINTIFF,

Plaintiff,

v.

DANNY DEFENDANT and

DOROTHY DIRTBAG,

Defendants.

_____/

MOTION TO DEEM REQUEST ADMITTED FOR DEVIOUS RESPONSES

PLAINTIFF Peter Plaintiff, pursuant to Rule 1.370 Florida Rules of Civil Procedure, moves this Honorable Court to enter an Order determining insufficient a response of defendant Dorothy Dirtbag (hereinafter Dirtbag) to plaintiff's request for admissions and deeming same admitted for all purposes, stating in support:

1. This court is not a forum for cute tricks nor a stage for clever use of smoke and mirrors word magic to evade responding to lawful discovery requests pursuant to the rules that control this court.

2. Dirtbag's response to plaintiff's request for admissions is nothing short of a word game.

3. Paragraph 1 of plaintiff's request for admissions sought to establish that a contract forming the basis for this lawsuit

"contemplated" there would be a limit on Dirtbag's ability to trade her stock.

4. Dirtbag evaded answering by claiming contracts cannot "contemplate" because (as Dirtbag asserts with the transparent guile of a pre-schooler) contracts are "inanimate objects".

5. Use of the verb "contemplates" in reference to contracts is well known and widely recognized.

6. The Florida Supreme Court and Fourth District Court of Appeals use this term routinely in written opinions describing what contracts "contemplate". Pandya v. Israel, 761 So.2d 454 (Fla. 4th DCA 2000); Petracca v. Petracca, 706 So.2d 904 (Fla. 4th DCA 1998); Baker v. Baker, 394 So.2d 465 (Fla. 4th DCA 1981); Potter v. Collin, 321 So.2d 128 (Fla. 4th DCA 1975); Belcher v. Belcher, 271 So.2d 7 (Fla. 1972); Bergman v. Bergman, 199 So. 920 (Fla. 1940); Bowers v. Dr. Phillips, 129 So. 850 (Fla. 1930).

7. Dirtbag's resort to word games is in contempt of this Court's lawful authority and should be sanctioned by entry of an Order deeming the requested admission *admitted for all purposes*.

WHEREFORE plaintiff Peter Plaintiff moves this Honorable Court to enter an Order deeming the request referenced herein admitted for all purposes during the pendency of these proceedings..

I CERTIFY that a copy of the foregoing was provided by regular U.S. Mail to the law offices of Dewey, Cheatham & Howe at 38 Liar Lane, Hogwash, Florida 33333 this 19 April 2005.

_____

Peter Plaintiff, Plaintiff

Motion to Show Cause

If a party disobeys a court order or commits perjury (a *material* false statement that was known to be false when made) the proper procedure is a motion to show cause why that person should not be held in contempt. The motion will generally be heard, so the offending party has an opportunity to show either (1) he didn't do *or fail to do* what the movant alleges or (2) that he had good cause to do what he did *or didn't do.* If he cannot show good cause, an order may be entered requiring further performance.

Motion for Contempt

If a party fails to obey a show cause order, a motion for contempt should be made, seeking an order finding the offending party in contempt. In general, contempt orders give the offending party one further opportunity to cure. Failure to cure can result in a warrant being issued for the offending party's arrest.

Motion in Limine

Motions *in limine* are filed before trial to either limit the introduction of evidence or to insure that certain evidence will be allowed. These are a good idea whenever there's a chance the other side may pull a "fast one" and bring in something at the last moment that the jury shouldn't see, or if you're pretty sure the other side will try to prevent you from presenting critical evidence you need to get in.

Here's a sample.

FIFTEENTH JUDICIAL CIRCUIT COURT
PALM BEACH COUNTY, FLORIDA

CIVIL DIVISION

Case No. 12345

PETER PLAINTIFF,

Plaintiff,

v.

DANNY DEFENDANT and

DOROTHY DIRTBAG,

Defendants.

_____/

MOTION IN LIMINE

PLAINTIFF Peter Plaintiff moves this Honorable Court to enter an Order preventing the defendants from presenting at trial argument or evidence in support of the "clean hands" defense and states:

1. The clean hands defense cannot be used as a defense to intentional torts.
2. All allegations of plaintiff's complaint are based on defendants' intentional torts.
3. The clean hands defense is appropriate only in cases where plaintiff seeks equitable relief.
4. The ancient maxim is, "He who comes to equity must come with clean hands."
5. Plaintiff seeks only money damages caused by defendants' intentional torts.
6. Plaintiff does not seek equitable relief of any kind.

7. Therefore, the clean hands doctrine is inapplicable as a defense, and no evidence or argument should be permitted in support of same at trial.

   WHEREFORE plaintiff moves the Court to enter an Order preventing defendants from presenting at trial evidence or argument in support of their alleged "clean hands" defense.

   I CERTIFY that a copy of the foregoing was provided to Dewey Cheatham, Esq., 38 Liar Lane, Happiness, Florida 33333 this 19th day of April 2005.

   _____

   Peter Plaintiff, Plaintiff

Motion to Invoke the Rule

During trials, hearings, and depositions it is generally improper for witnesses to be present if their testimony is not being taken. "The Rule" sequesters witnesses who are not being questioned at the time, so their independent testimony can be obtained when their turn comes. If the court does not invoke the rule on its own, you can move the court to enter an order invoking it.

Motion to Set Aside / Vacate

If an order was granted under circumstances contrary to the fair administration of justice (fraud, false statement, mistake, lack of proper notice, etc.) you can file a motion to have that order set aside *or vacated.* To prevail, of course, you must prove the fraud, false statement, mistake, etc.

Motion for *In Camera* Inspection

On occasion you may run into an obstreperous opponent who refuses to produce some document upon the specious claim that the document contains some "trade secret" or even that the document contains some sensitive information related to "national security". To get past such nonsense, you may file the following motion *and set it for hearing.*

FIFTEENTH JUDICIAL CIRCUIT COURT
PALM BEACH COUNTY, FLORIDA
CIVIL DIVISION

Case No. 12345

PETER PLAINTIFF,

Plaintiff,

v.

DANNY DEFENDANT and

DOROTHY DIRTBAG,

Defendants.

_____/

MOTION FOR *IN CAMERA* INSPECTION

PLAINTIFF Peter Plaintiff moves this Honorable Court to enter an Order compelling defendants to produce for *in camera* inspection the written agreement between them dated 27 November 2013 and states:

1. On 23 October 2013, Plaintiff served defendants with a request to produce the agreement.
2. Defendants have steadfastly refused to produce the agreement.

3. Defendants claim the agreement contains "trade secrets" and should not be subject to plaintiff's request to produce..
4. Upon information and belief, plaintiff asserts the agreement contains terms of an unlawful conspiracy between the defendants that threatens immediate harm to plaintiff if not made a part of the record in this case.
5. Plaintiff further asserts the agreement contains no "trade secrets" as defined by law in this state.
6. The agreement should be produced.

WHEREFORE plaintiff moves this Honorable Court to enter an Order compelling defendants to produce the said agreement for *in camera* inspection by the Court and, if the Court determines that same does not contain "trade secrets" as defined by law in this state, that said document be produced to plaintiff without further unnecessary delay.

I CERTIFY that a copy of the foregoing was provided to Dewey Cheatham, Esq., 38 Liar Lane, Happiness, Florida 33333 this 19th day of April 2005.

_____

Peter Plaintiff, Plaintiff

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These are just a few of the commonly encountered motions you will run into as you fight your battles in court.

There are as many different potential motions as your imagination can create, but these are a few that courts are used to seeing on a daily basis – motions you can file without raising judicial eyebrows.

In both state and federal courts it's a good idea to attach a certificate of good faith to all your motions.

In many courts it is required.

The certificate of good faith shows the court that the movant made an effort to communicate with the opposing party and tried to resolve the matter without requiring the court's valuable hearing time. (Non-lawyers must do this by notarized oath).

All parties affected by a motion should be contacted, and a good faith effort should be made to reach agreement that might eliminate the need for a motion.

It's not enough to phone the other side's office after business hours on Friday to leave a message requesting someone to call you back and then to certify they didn't call.

That's not a "good faith" effort.

At a bare minimum (best practice) you should speak with the other party (or their lawyer) in person. Tell them the gist of the motion you're about to file and ask them for ideas how you might resolve your differences without filing the motion.

Take notes!

Write down the time you called, who you spoke to, what you told them, and what they said to you.

Save your notes!

If they agree to cooperate, so your motion isn't needed, you've gained ground.

If they refuse to cooperate, make absolutely certain you have your notes in case the court wants you to confirm that you made a "good

faith" effort to resolve the matter before filing your motion. Be prepared to tell the court what you said to the other side, who you spoke to, when, and what they said to you in response.

If possible write down their exact words. [Never tape record conversations, either in person or over the phone, unless you first tell the other party *on the tape so you have a record* that you are recording the communication. Violation is a felony in most jurisdictions, punishable by fine and imprisonment. If it takes place during a lawsuit and the court finds out about it, you could be sanctioned (i.e., suffer heavy fines or have your pleadings struck so you cannot win the case).]

Whether they agree or refuse to agree, follow-up with a letter (faxed and mailed) that provides an outline of what was said, requesting the other side to respond to your letter *in writing* if you have misconstrued the position they stated on the phone. In this way, if they do not write back with a different view, they will have a difficult time convincing the court otherwise when you present a copy of your CMA letter. [CMA is shorthand for "cover my apples".]

Once you've done *all* these things, go ahead and file your motion. At the bottom of the motion (below the certificate of service but above your signature) add a certificate of good faith something like this (or worded as local rules in your jurisdiction require):

I CERTIFY that a good faith effort was made to communicate with opposing counsel with a view toward resolving the issues raised by the foregoing motion, however the parties are at an *impasse*.

[You'll learn more about certificates of service and good faith in other classes in this course.]

Just be sure to keep your notes with details of that effort to

communicate. Don't be caught before the judge while the other side complains, "But, Judge! Nobody contacted us about this motion. The first we knew of it was the day we received it in the mail!"

Lawyers sometimes lie.

Don't be victimized by chicanery.

Expect dishonesty.

Fore-warned is fore-armed!

Protect yourself with copious notes of all your communications with lawyers.

If you fail to make a good faith effort to resolve matters before filing motions, some judges will order sanctions against you. In some cases the sanctions can be severe indeed!

Before you can send out a notice of hearing you must schedule time with the court.

You have to make a date with the judge.

In federal court this may depend on local rules you should consult before attempting to schedule a hearing.

In state court the process is not much easier.

However, if you follow the procedures recommended here, you'll fare much better than if you go at it "hammer-and-tong" with no thought for common practice, procedural rules, or proper protocol.

You need a time, date, and place where the court will give you and your opponent time to appear and make your arguments. You also need to reserve a particular length of time, e.g., 30 minutes or 4 hours, or whatever time you anticipate needing so you and your opponent are not rushed.

Judges (most of them) are very busy people. Imagine it's *you* sitting on the judge's bench day-after-day listening to complaints and arguments, moaning and groaning over all kinds of personal problems and it's *your* job to sort out the "good guys" from the liars and thieves. It takes a special kind of person to be a "good judge", and the good ones stay pretty busy. Many judges are out of bed before the sun's up, reading the memoranda and motions scheduled to be heard that day. They can't just drop everything, put everybody else on hold, and hear what you have to say when you're ready to say it. You must get your hearing time scheduled on the judge's calendar *in advance*.

In many busy courts, you must reserve hearing months ahead of time.

If your motion (or the other side's motion) can be heard in 5 or 10 minutes, the court may provide what's called Uniform Motion Calendar (sometimes abbreviated "UMC"). This is hearing time specifically set aside, usually early in the morning (before the court's regular business begins) to hear simple motions that don't require presentation of evidence or prolonged legal arguments.

UMC hearing time is reserved for motions that shouldn't take more than a few minutes to argue.

Dozens of lawyers and *pro se* litigants may show up for UMC hearings, signing in on a roster sheet posted outside the courtroom door, hoping their case will be called before UMC time is up.

If you intend to argue at a UMC hearing, show up before everyone else and put your name at the top of the list so your case gets called first.

UMC hearings, like all other hearings, require an original Notice of

Hearing to be filed with the clerk and copies sent to all parties involved.

[Sample Notice of Hearing in the Reference Menu "Forms" class.]

Scheduling Hearing Time

Motions that can't be argued in a few short minutes must be specially scheduled with the assigned judge.

Scheduling hearing time (or any business with a judge) requires tact and diplomacy.

Judges have secretaries who like to be called "judicial assistants". You'll be tempted to refer to them by the initials "JA" (as arrogant lawyers do) however it's a mistake to let them hear you use those initials, and *never* let them hear you refer to them as the judge's "secretary" (even though that's what they are).

A JA is to a litigant what the school janitor or lunch room lady is to a new school teacher. Make friends *or your life may become a living hell.* The degree of tact and diplomacy required to pull this off varies with the JA. Many are pleasant people anxious to help. Others are horribly insecure wretches who, because their job puts them in a judge's office, believe they are entitled to the highest degree of obeisance. Fail to give these types the respect they think they deserve, and you may find yourself waiting for hearing time far longer than everyone else.

Rude litigants may have their hearings set for the twelfth of never!

If you're courteous and professional (and lucky enough to avoid the Nurse Ratchett type) it's a relatively simple process to get hearing time for a motion.

1. Call the JA.
2. Explain what the motion is and how much time you believe you'll need, allowing time for the other fellow also.
3. Ask the JA for three (3) dates/times on the judge's calendar when the motion can be heard.
4. *Carefully* write down these three (3) dates/times.
5. Tell the JA you'll call back promptly to pick one of the three (3) available times.
6. *Immediately* call all opposing parties and (again being courteous) see if any of the three (3) possible times will work for the other side. If they cannot (or will not) agree to any of the three times, call the JA again to get another three, then repeat with a call to the other side, etc.
7. Once the other side agrees to a date/time, call the JA back acknowledging the date/time you and the other side agreed upon and promising to send a Notice of Hearing to all parties, to the Clerk, and to the JA.

   That's the process.

   If, after making several reasonable attempts, the other side will not agree to hearing date/time, go ahead and set the hearing and send out your Notice of Hearing. If you've kept accurate notes (i.e., how many times you had to call the JA for different dates, who you spoke with at the office for the other side, when you spoke with them, what they said, reasons and excuses they gave) then when the time comes for hearing, if they don't show up, you'll have a record you can show the judge explaining why you went ahead and set the hearing without their agreeing to the date. It is very effective (and

extremely wise) to get a disagreeable opponent pinned down by using letters and faxes to make a *written* record that shows they were unreasonable in refusing to pick a mutually agreeable time.

When I run into a recalcitrant opponent who won't cooperate, I mail and fax a letter confirming what they told me. The letter might read something like this:

Dear Counselor,

This will confirm my communication this morning with your secretary Sue who told me you could not attend a hearing before Judge Grumpy on my motion for more definite statement on any of the following dates:

13 September at 3:30

14 September at 11:00

15 September at 9:15

17 September at 2:30

21 September at 10:45

24 September at 2:45

Nor would she provide me any dates when you will be available for hearing at any time during the next three months.

If I have not heard from you in writing within 5 days of this letter I will assume your secretary correctly conveyed your wishes.

Respectfully yours,

[When I fax such CMA letters to the other side, I always keep a copy and staple to the copy a printed fax log showing the date and time, along with the other lawyer's fax number, when the fax was sent.

Then, if I need it, I'll have something to show the judge to support my position that I did what I was supposed to do and that the other side just might be pulling the judge's leg!]

This letter is mailed and faxed (if the other side has a fax number), and copies are kept so I can show the judge later, if the other side doesn't come around to my way of thinking. Of course, if my opponent is foolish enough to write back trying to explain why we can't have a hearing at any time in the next three months, then I have real ammunition to shoot him down … and I will set the hearing at a time convenient to my own schedule and send out my Notice of Hearing without cooperation from the other side, confident the judge will take a dim view of my opponent's refusing to adjust the calendar so my motion can be timely heard.

Remember: You may set a hearing for your own motions *or* the other side's motions. If the other side files a motion you *don't* want to be ruled upon, of course, leave it to the opposition to set their own motion for hearing. Maybe they'll forget.

If the other side files a motion you're ready to argue, but they won't set the motion for hearing, don't wait for them. Go ahead and set their motion for hearing as soon as you wish, and be prepared to argue when the hearing date arrives.

It is up to *you* to move *your* case along. If that means getting your motions heard and ruled upon, then *you* set the hearings. If it means getting the other side's motions heard and ruled upon, then if the other side won't set their motions for hearing *you* set them.

If the other side won't cooperate by agreeing to a mutually convenient date/time for hearings, follow the procedure outlined above … *and set the hearing anyway!*

Just as everyone is entitled to an opportunity to be heard, so too are they entitled to receive *reasonable* advance notice of when and where a hearing is to take place.

This is given by a paper we call, not surprisingly, the Notice of Hearing.

A proper Notice of Hearing must accomplish eight things:

1. Identify the court.
2. Identify the case.
3. Identify the parties.
4. Identify the motion to be heard.
5. Identify the time and place where the motion will be heard.
6. Identify the judge who will hear the motion.
7. Identify the length of time set aside for the hearing.
8. Provide reasonable advance notice to all parties, the Clerk, and the judge.

   You'll recall in the previous chapter that after we pinned down a date and time, we *immediately* called the JA so that slot would be reserved for our hearing on the judge's calendar. We also let the JA know the other dates/times provided would not be used, making those times available for other parties to bring their motions before the judge.

   In most courts (check your local rules) the *original* of your Notice of Hearing is sent to the Clerk with a copy of the motion (or other pending matter to be heard) and a cover letter requesting the Clerk to file the notice and "forward the entire file to the assigned judge for the court's consideration". If the motion is your motion, you should

file the *original* of your motion with the Clerk along with your Notice of Hearing. [Original documents are those that bear the actual signatures, not copies. There should never be more than one (1) original of any paper filed in a lawsuit. One paper get signed *in ink* and copies are made so everyone concerned has knowledge of what the original says. In most cases (but not all) originals are filed with the clerk and copies provided to opposing parties and the judge.]

Unless local rules differ from common practice, a *copy* of the Notice of Hearing and a *copy* of the motion should be mailed (or hand-delivered) to the JA … just in case you have one of the "good" judges who actually read motions before hearings. "Good" judges want to do their job well, adjudging the parties' motions with fairness and knowledge of the underlying legal and factual arguments. Occasionally, you run into a "lazy" judge who's just earning his salary and isn't about to spend any more time attending to his duty than is absolutely necessary. When I run into such judges as these, I usually begin the hearing with a question to the bench, "Good afternoon, your honor. Have you read my motion?"

If the judge says, "Yes!", we're off on the right foot.

If the judge impatiently glowers down from his high perch with a black-robed frown, his gavel ready to strike, demanding in a gruff stentorian tone, "Get on with it!", at least you know where you stand and (if you've been following the teachings in this course and have a court reporter) you can make certain all essential points of your *written* motion get *spoken* into the record … just in case the judge rules against you so an appeal is needed.

Good judges work hard. The very best take home motions and matters scheduled to be heard the following day … *reading them*

before breakfast! Thank the Lord if you are blessed to have such a judge.

The following is a typical Notice of Hearing that should work in most jurisdictions.

As always, consult local court rules for specifics on practice requirements, forms, fonts, paper size, margins, etc.

IN THE THIRTIETH JUDICIAL CIRCUIT COURT
IN AND FOR SUNSHINE COUNTY, FLORIDA

Case No. 2012-123
Judge Benchpounder

PETER PLAINTIFF,
Plaintiff,

v.

DANNY DEFENDANT,
Defendant.

_____/

NOTICE OF HEARING

PLAINTIFF Peter Plaintiff hereby gives notice he will call up to be heard before the Hon. Barry Benchpounder in Courtroom 5 at the Sunshine County Courthouse, 10 Justice Avenue, Small Town, Florida at 10:00 a.m. on 31 February 2012 his Motion for a More Definite Statement.

TIME RESERVED is 15 minutes.

GOVERN YOURSELVES ACCORDINGLY.

_____

Peter Plaintiff, Plaintiff

[Certificate of Service]

STATE OF FLORIDA
COUNTY OF SUNSHINE

BEFORE ME personally appeared Danny Defendant who, being by me first duly sworn and identified in accordance with Florida law executed the foregoing in my presence.

_____

Notary Public

NOTE: The foregoing is offered merely to show the essential parts of a notice of hearing. Check local rules to ensure this form complies with requirements of your jurisdiction.

So, you've drafted your motion, filed it with the clerk, sent a copy to the judge, and served the other side. [Some judges do *not* want to receive courtesy copies. Others insist on them. If your court allows copies of motions to be sent to the judge before hearings, do so. If the judge reads your motion, the chance of winning at the hearing is much improved.]

You've supported your motion with a carefully-researched and well-written memorandum, setting out relevant facts and legal arguments why the court should grant your motion. [If you're the defendant, of course, you've filed a response memorandum in opposition to the motion.]

You've scheduled hearing time with the judge's Judicial Assistant agreeable to the other side. You've filed your Notice of Hearing with the clerk and sent a copy to the other side (by fax and mail).

Now the day is here.

You've taken your seat. The courtroom doors have closed behind you. The bailiff announces, "All rise!"

Enter the judge.

Everyone stands.

The judge looks around the room before saying, "Please be seated."

Don't sit down!

The judge will announce the hearing, telling everyone including the court reporter you brought to write things down (You did bring a court reporter, didn't you?), "We're here on case number 05-123, Peter Plaintiff versus Danny Defendant. This is the plaintiff's motion for summary judgment. Mr. Graves, please proceed."

The movant goes first.

Don't let the other side interrupt. This is one of the most egregious things crooked lawyers do. They will jump to their feet and interrupt as often as the judge lets them get away with it. After the second or third interruption, stop your presentation long enough to request of the court, "Your honor, I have only a limited time to present my argument. May I proceed without interruption?" Even if the court allows your opponent to continue interrupting, at least there will be less tendency for the judge to overlook obvious rudeness designed to disrupt your concentration. If the other side doesn't have a valid objection, you should insist on being able to speak without interruption. Often a good thing to say is, "Your honor, I need to make my record here, and counsel is interrupting with no legitimate purpose other than to prevent me from doing my job."

You have a right to be heard. It's been bought for you by the blood of

men and women who died for your right to be heard. Remember this, and demand to be heard.

Getting Started

The first question I ask the judge at hearings on my motion is, "Have you read my motion, your honor?"

If the judge says he's already read my motion, then I can refer to it in general as an outline while making my argument – taking care to touch all points so my court reporter writes down every word.

If the judge says he's *not* read my motion, I ask, "Would the court care to take a moment now to review the written motion?"

If the court agrees, I wait silently while the court reads my motion, keeping on guard for my opponent's attempts to interrupt the judge's train of thought (which happens when you're dealing with crooked lawyers).

If the court gruffly commands, "Get on with it, Mr. Graves. Present your argument," then I make certain I touch every point of my written motion completely and in every pertinent regard, with my court reporter writing down every word I say. After all, my written motion was prepared at the office, where I wasn't being interrupted, where I had hours (instead of only a few minutes) to set out my arguments. While writing the motion I had the advantage of doing legal research, reading cases, statutes, rules, and occasionally constitutional provisions in support of my motion … whereas standing in a courtroom, being stared at by a gun-toting bailiff, being listened to by an impatient judge who'd rather be playing golf, and being interrupted by my opponent at every opportunity imaginable, it is far less likely I can keep my concentration on all those points by

simply working from memory.

I use my motion as an outline *and cover every point in detail before sitting down.*

Controlling the Opposing Party

At some point you will finish arguing your motion and sit down.

It's now the other side's chance to shoot holes in everything you just said.

Some unscrupulous bums in the profession will take personal shots at you, insinuate you're trying to deceive the court, even suggesting you're a dishonest person who should never be believed no matter what you may say.

Don't put up with it!

Object!

Make your record!

Do whatever is necessary to be certain the record being taken down verbatim by the court reporter reflects *everything* pertinent that takes place at the hearing, including the things that are done without words.

For example, if the other side makes inappropriately threatening or insulting side-glances in your direction during his argument, speak up.

"Your honor, may the record reflect opposing counsel is making childish faces at me when you aren't looking."

That will put a stop to it.

This is also effective at depositions or any place where the record is

preserved only by what a court reporter writes down. If opposing counsel drums fingers on the table or glowers or rolls his or her eyes in an effort to disarm or discredit the witness, speak up. "Let the record reflect opposing counsel is making threatening gestures at the witness with his fountain pen." If you're up against a crooked lawyer, hang him out to dry!

Avoid helping your opponent – unless you can help him shoot holes in his own case.

If the opposing party cites cases or statutes that don't apply to facts before the court, let the argument continue but make notes. As moving party you should be allowed an opportunity for rebuttal. That's when you explain to the court how the other side misrepresented what those statutes and cases truly stand for. Don't interrupt if the other side is going down the wrong path. You might unwittingly give him an opportunity to correct his errors. It's far better to wait till he sits down before showing the court, in calm, measured tones, that he's misrepresented the law and the facts and is "attempting to mislead this Honorable Court, your Honor."

An exception to not interrupting the other party is when a lawyer for the other side begins telling the court what the evidence is, rather than referring to evidence that's already been *admitted*. Lawyers are not supposed to testify. They weren't present at the time of the matter being testified to, so they don't have first-hand knowledge. If you've studied our class Evidence Made Easy you know that testimony by persons lacking first-hand knowledge is not competent testimony and is, therefore, inadmissible. If a lawyer begins telling the court what the facts are – instead of referring to facts already made a part of the record by admissible testimony and other evidence – jump to your feet.

"Objection, you're honor. Counsel is testifying. Counsel is incompetent to testify as to matters about which he has no first-hand knowledge. I move the court to strike his attempt to testify as to facts beyond his personal knowledge."

In most courts the judge will sustain your motion and instruct the lawyer to stick to legal argument.

Rebuttal Argument

After the other side concludes his argument against your motion, the court may give you a chance to rebut what's been said. This is especially true if the other side raised new points of fact or law that weren't discussed in your own argument. This is the purpose for rebuttal. It's normally not a chance to re-state what you said during your initial argument, but many judges will give you this second bite at the apple (whether or not the other side raised new issues that open the door for rebuttal).

If permitted to do so, make a final summation argument why your motion should be granted *and sit down!*

Above all, don't be afraid. Whether you're arguing in favor of your own motion or arguing against your opponent's motion, if you've done your homework, you already know what needs to be said to make your record and convince the judge. You've already spent hours studying the law and drafting your motion and memorandum (or response in opposition), and if you stick to your paperwork you'll not wander or be drawn off-course by an unscrupulous adversary's intentional interruptions.

Follow the arguments you've already written and *stick to them*.

Don't let the other side throw you off course.

Keep it simple.

Judges are just humans (well, most of them, anyway). They are not the rocket scientists most people tend to believe they are. Many judges "sit on the bench" because they can't make it in private practice as a working lawyer.

Don't be afraid of the judge.

Don't be intimidated by the black robe or imposing high bench he sits on.

Above all, don't think the way to win is by making complex arguments, as if the judge will respect you more and give greater weight to your cause because you couch it in complicated verbiage.

Don't do it.

Talk to the judge (not to the opposing party) and talk *directly* to the judge and *only* to the judge. [At trial before a jury, talk to the jury when presenting evidence and to the judge when arguing law.]

Speak as if you were talking to a small child. Use measured tones, one short sentence at-a-time. Don't imagine for a moment that the judge is "smarter" than you are. He may know more about the law, but in the facts you're trying to present he may be as empty-headed as a box of rocks. Explain your argument the way you would if you were speaking to an acquaintance of only average intelligence.

Be understood.

Maintain eye contact with the judge. Don't look about. Pay no attention to anyone else. Look the judge straight in the eye and, if the judge looks away, pause and wait silently until the judge looks back at you. Scientific studies have proven that people who look away from a speaker are less likely to absorb and retain what's

being said to them. Those who maintain eye contact fare much better, as if one mind speaks directly to the other.

Don't look down (except to find papers on the table or lectern). Look alert.

Speak loudly enough to be heard clearly *and no louder!* Do not emphasize what you're saying by raising your voice or wildly inflecting your pitch. Measure your words, and use vocabulary – not physical emotion – to emphasize strong points. Lawsuits are won with words, not gymnastics or histrionics (no matter what you see on Law & Order or other TV court shows).

Don't allow yourself to be rushed.

You're here for a purpose.

This is *your* time to be heard. Valuable time.

Make the most of it.

Whether you win your motion or not, you're there to make a record of the argument in support of your motion *and of all the judge and opposing party say and do!*

Take your time.

If the judge says, "Hurry it along!", simply thank the court and proceed as before. Determine to cover all the necessary points in your argument. Use *all* the time you are allotted for the hearing. Each side should be given equal time. Use *all* of yours.

If you win, so much the better.

If you lose, at least you'll have made an effective record on which to predicate a successful appeal.

The trick about making your record for appeal is that the better you

make your record at the trial level, the less likely the judge will be to rule against you.

Judges hate to be appealed.

Have your prepared order ready for the judge to grant your motion then-and-there!

Like soccer and all other competitions, reading about them can only partially prepare you for the game itself.

You've learned a great deal from this class about motions and hearings, but mastery can only be gained by doing.

The next step is getting experience on your feet in a courtroom under the demanding gaze of a grumpy judge with a rude attorney on the other side doing his best to make your life miserable. We're confident the information we provided in this class will steer you clear of the more common pitfalls and increase your overall confidence so you can win more often, but the only way you'll know for sure is to jump in the game with both feet kicking!

After you've written and argued a few motions at hearings in front of a live judge with an obstreperous lawyer on the other side doing all he can to distract you from making the important points you need to make, it will come much easier … and what we've taught you here will gradually become second-nature, guiding you to successfully getting all the orders you seek with your motions.

Move the court for orders that accomplish what you want and deserve as a matter of law, and don't settle for anything less!

Make cogent arguments that go no farther than necessary to close the noose on your opponent's neck. Be as brief as possible while taking care to say everything that *needs* to be said.

Then, when you've said enough: STOP.

Too many words get in the way of what's really important.

Early in my career I was arguing the application of a law having to do with how long a trust can remain in effect (i.e., the Rule Against Perpetuities). On the bench was a wonderful old country judge who'd been wearing his black robe longer than I'd been alive.

Half-way through my determined discourse on this interesting legal doctrine he interrupted me.

"Ok, you win."

I was crestfallen.

I'd worked all week preparing my masterful presentation. I'd planned carefully for that hearing. I'd researched dozens of cases, studied the statutes, and dreamed of colorful examples to illustrate my interesting points and how they applied to my client's case.

The judge stopped me dead in my tracks, right smack in the middle of my brilliant performance, before I could get to the really good part and astound him with the majestic fanfare of my dazzling conclusion.

"But, your honor, there's …"

"You *win!* Sit down, please."

I learned a valuable lesson that day.

Once you win, shut up and sit down.

MICHELLE GOMEZ: Your subscription expires October 26, 2020

Take this quiz to see how much you still need to learn.

Some items may seem like "trick questions", but there is only *one*

correct answer to each.

Remember: Reading *carefully* is essential to success in court.

Take this and all quizzes as many times as you wish.

However, to be properly prepared for your battles in court, go back over the classes until you get at least a "B" on every quiz.

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