



THE NUTS AND BOLTS OF OBTAINING EX PARTE RELIEF

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inevitably, all litigators will face an issue that arises in your case that needs the judge's attention right away. It could be a last-minute trial continuance, problems getting discovery responses from a difficult opposing party, adding a party to the action, or amending the pleadings. You look at the judge's motion calendar and the next available date is four months from now. Maybe you have trial in three months, maybe your client just cannot wait that long. Below is a primer on what to do when you need ex parte relief and how to avoid annoying the judge in the process.



What Constitutes an Emergency?

Before spending the time and effort researching the technical requirements of filing your ex parte application, drafting your application, preparing your declaration, and everything else that comes with seeking ex parte relief, first ask yourself, “Why do I get to cut in line?” Too often, attorneys come into court with their ex parte application and cannot give a good reason why the court could not hear the motion on regular notice. If your application wastes too much time and space getting to the emergency, it might not be an emergency. So before filing that ex parte application to immediately compel a corporate person-most-knowledgeable deposition, consider how your motion compares to ex parte applications for temporary restraining orders in domestic violence and home foreclosure cases that your judge might use as its standard for “emergency.”

Sometimes, the court’s calendar makes getting a hearing tough or impossible. Judges want to work with the parties where their calendar has “created the emergency.” When this happens, the best course of action is to file the motion, get the hearing date, and come in ex parte to advance the date.

It helps to show that you were diligent in trying to get the motion filed timely. Although the parties may have agreed to a trial continuance just weeks before the trial, tell the court what specific issues arose necessitating a last-minute trial continuance. Do not just show why the relief is necessary, show why you need relief on an ex parte basis and why a regular noticed motion will not suffice.

What Relief Can You Realistically Hope to Achieve on an Ex Parte Application?

Judges have said it is much easier to maintain the status quo than it is to force a party to do something on such short notice. For this reason, judges can be hesitant to grant a form of mandatory relief. Not only does this encompass your motion to compel document production, but this can include more “mundane” applications like *pro hac vice* admissions or motions to be relieved as counsel.

An easy way to invite the court’s scrutiny is to seek substantive relief. If your ex parte application involves asking the court to decide something on the merits, the judge will likely be more sensitive to the notice requirements and other rule-driven provisions (more on this below) before considering any substantive arguments in your application. Specifically, the judge will consider whether the moving party is trying to gain an advantage

using the ex parte process. If it seems like you are, your ex parte application is likely to fail.

But regardless of what kind of relief you are seeking, the best advice is to ask for it in the first sentence of your application. No judge wants to read a twenty-page ex parte application only to find at the end it is still not clear what relief is sought. And be specific with the relief requested. If you want a trial continuance, give the court an exact date. If your ex parte application is unopposed, say so up front. Clearly and concisely stating what relief is sought and whether the parties agree is an easy way to boost your chances of success.

Complying With the Technical Requirements

California Rules of Court 3.1200 *et seq.* provide the rules for ex parte applications. Before you prepare your application, be sure

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to read these rules in full and consult the Rutter Guide or another treatise to avoid missing anything. Some courts have local rules governing ex parte applications and some judges have their own specific preferences. You should review the department’s posted procedures and consult with the court clerk to check if there are more particular rules you need to follow before going in ex parte.

The most important technical requirement is the declaration showing compliance with the notice requirements. For some judges, failure to include a factual showing that you gave sufficient notice or made a good faith effort to inform the opposing party (and specifying the efforts you made) in your declaration is a “deal-killer.” The first thing some judges look

at in reviewing an ex parte application is who is bringing the application, the procedural history of the case, and the evidence showing the other parties were notified.

Absent exceptional circumstances, you must give all parties notice no later than 10:00 a.m. the court day before your ex parte appearance. Judges have denied relief for failing to give all parties notice, even if your application only affects a subset of the multiple plaintiffs or defendants in your case. Service of the papers must be made “at the first reasonable opportunity.” Check with your court to see if more specific deadlines apply.

The notification may be either in writing or oral, but some judges will consider the nature of the case and the relationship between counsel before accepting your representation that notice was given orally. The declaration must state whether opposition is expected. If your application will be unopposed, let the court know in your caption, in the first sentence, and as often as you can to let the court know the parties agree. Although “parties agree” is not, by itself, good cause and the court can still deny or modify the requested relief, it certainly helps reassure the judge that your application will not prejudice the other side.

Along with the declaration of notice, the application must also include the following: an application containing the caption and relief requested; a declaration showing factual basis for emergency or other statutory basis for ex parte relief (which may be combined with the declaration of notice); points and authorities; and a proposed order. The application must identify the opposing counsel or party by name, address, email address, and telephone number and include a “full disclosure” of any prior applications previously refused in whole or in part.

Regarding the points and authorities, be prepared to have as close to a complete memorandum as possible. In some instances, especially in applications involving substantive issues or for temporary restraining orders, the ex parte application becomes your moving papers. Do not file an ex parte application expecting to get another opportunity to fully brief the issues.

In most cases, an applicant must appear, either in person or telephonically, to have their application considered. Failing to appear could lead to a denial of your application under California Rules of Court 3.1207. If you prefer appearing telephonically, determine if telephonic appearance is acceptable. Per California Rules of Court 3.670(h)(3), if the moving party is appearing by telephone,

the papers must be served no later than 10:00 a.m. two court days before the hearing. The application should also have the phrase “Telephone Appearance” below the title.

There are many intricate details and rules to follow. Failing to follow any one of them may constitute grounds to deny relief. When in doubt, consult the California Rules of Court, your local rules, and the court itself, following the rules to a “T.”

Opposing Ex Parte Applications

By the very nature of ex parte applications, opposing an ex parte application can be difficult. If at all possible, write an opposition. Some judges will hand you a piece of paper to handwrite your opposition on the day of the hearing if you have not filed one. But outside of this procedure, if you are going to file a written opposition, file it sooner rather than later. Always deliver a courtesy copy to the court and always e-file the opposition, regardless of whether you bring a copy to the hearing. The court will read the opposition even if the judge is seeing it for the first time at the hearing. That said, it is best to give the judge ample time to review your written materials.

Another reason to file a written opposition is because you are not guaranteed an oral argument. While it often depends on the relief requested, judges can—and do—issue rulings from chambers. See Cal. Civ. Proc. Code § 166(a)(1) (West). If your judge wants to modify the relief requested, especially for scheduling issues, the judge is more likely to invite the parties to appear to discuss the exact form of relief. But before relying on seeing the judge for argument, check the court’s calendar. When the courtroom is busy with trial (especially jury selection), you are less likely to see the judge. Plan accordingly.

Avoiding Serial Ex Parte Applications

As discussed above, you must disclose prior ex parte applications filed in the case. If the court denied your last ex parte application and you are seeking the same relief again, treat it like a motion for reconsideration. Provide the court with new law or facts that warrant a different decision now. Do not just renew your ex parte application that the duty judge denied last week. This is guaranteed to draw your assigned judge’s ire.

It really comes down to how well the judge knows your case. If the judge has only ever seen the parties at the initial case management conference and believes the parties are cooperating, you are more likely to suc-

ceed. But if the judge knows the attorneys on a first-name basis because you are in court on an ex parte application every other week, do not expect to have the same leeway you had previously.

If Nothing Else, Take Away These Main Points

First and foremost, notice every-one properly and ascertain if they will oppose. Second, be clear about what you want the court to do and state this information up front. Third, have a backup plan. For example, if you want a motion date advanced, be prepared for the possibility the court will continue trial instead. Fourth, understand what factual showing of good cause is required and what evidence you will need to have to make that showing. Last, but not least, do not assume the court knows all pertinent facts in your case. Rather than citing a declaration from a motion a while back, give the court all the information and all the specific issues raised in your application. By design, ex parte applications are hard to grant and easy to deny. Following these tips may not guarantee success in your application, but at least you will have cleared the preliminary hurdles without alienating the judge.



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