Chapter 4

Motion Practice

The last chapters have provided background information about the nature of persuasion, the ethics and professional responsibilities of a litigator, and the litigation process. The purpose of this chapter is, first, to introduce the trial motion. Whenever you begin a writing project, you should have a clear idea of what you will be producing. Thus, this chapter begins by showing you a typical motion and its parts. It also explains the rules that will govern your motion so that you can determine what a motion in your jurisdiction should look like. In addition, this chapter provides you with background about what happens after a motion is drafted, that is, how it is served, how it is filed, and how it is responded to. Although this book focuses on developing the written product, understanding what happens to that written product after it is written often provides useful context for the writing project. This chapter provides that background.

I. A Trial Motion and Its Parts

To begin, we must clarify what lawyers mean when they use the word "motion." Lawyers use the word "motion" in two very different ways. Technically, the word "motion" refers to a short document (often, only one to two pages) in which the lawyer requests the court to take some action. The one or two page document that makes the request is the motion, and it provides little explanation for why the court should act.

Lawyers also use the word "motion" in a more colloquial way. In this more colloquial usage, the word "motion" refers to not just the request, but all the documents that are submitted along with the request. Those additional documents include, most typically, a supporting memorandum of law and supporting evidence.[1]

Because lawyers use the word "motion" in two different ways—to refer to the motion itself and to refer to the motion and all the accompanying documents—be attentive to the word "motion." If you are ever uncertain about the way in which the lawyer is using the word, just ask.

A. The Motion

As explained above, a motion is a request that a court act. The request can be anything that the court has in its power to order. For example, a motion can request the mundane, such as an order to reschedule a hearing or an order to permit additional pages. Other motions go to the heart of a dispute. For example, a motion can request that a complaint be dismissed, that certain evidence be suppressed, or that a jury's decision be overruled.

Most motions are written. Sometimes, however, events during a trial may prompt a lawyer to make a motion orally. This chapter addresses written motions only.

Written motions have typical parts: (1) a caption, (2) a statement of the relief the party seeks, (3) a brief statement of the grounds for that request, and (4) the attorney's signature. Examples 4-A and 4-B show two different motions and their constituent parts.

"Motion" is not a verb

A party *never* "motions" for summary judgment. A party "moves" for summary judgment. Similarly, a party does not "motion" the court to dismiss plaintiff's complaint; a party "moves" the court to dismiss the complaint.

1. When a lawyer files a motion with a court, the motion may also include a notice of motion, a draft order, and proof of service. To keep things simple, we have focused on the primary parts of an ordinary motion: the motion, the supporting memorandum of law, and supporting evidence.

Example 4-A • A motion to suppress

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR LANE COUNTY

THE STATE OF OREGON,)
)
Plaintiff,)
)
vs.)
)
TRAVIS Z. TREATSKY,)
)
Defendant.)
_____)

Case No. 21-15-18156

DEFENDANT'S MOTION TO SUPPRESS EVIDENCE

Caption

The defendant, through his attorney, Jordan R. Silk, moves this Court for the following orders:

This paragraph is a typical lead-in to a motion's actual request.

1. An order suppressing any and all evidence of the field sobriety tests performed by the defendant on May 21, 2015, and

2. An order suppressing all evidence of the breath test performed by the defendant on May 22, 2015.

The statement of the relief defendant seeks.

This motion is based on the attached memorandum of law and is, in the opinion of counsel, well-founded in law and not made or filed for the purpose of delay.

The motion cross-references the memorandum of law, which explains the grounds for relief. That memorandum is provided at Example 4-C.

DATED this _____ day of November, 2015.

_____
Jordan R. Silk
OSB # 105031
Lane County Public Defender's Office
555 Willamette Street
Eugene, OR 97401
Appearing for Defendant

The lawyer's signature

Example 4-B • A motion to dismiss

United States District Court
For the District of Utah

KATELYN MASON and JENNIFER WELCH, individually and on behalf of those similarly situated,	:	Civil Action No. 14 CV 921
	:	DEFENDANT'S MOTION TO DISMISS PLAINTIFF WELCH'S COMPLAINT
Plaintiffs,	:	
v.	:	
CENTRAL STATE UNIVERSITY OF UTAH,	:	
Defendant.	:	MAY 5, 2015

The first paragraph of the motion states both the relief it seeks (dismissal of portions of the complaint) and the grounds for that relief (Rule 12(b)(6)).

Pursuant to Federal Rule of Civil Procedure 12(b)(6), defendant Central State University of Utah hereby moves to dismiss that portion of the Complaint that relates to plaintiff Jennifer Welch because plaintiff Welch lacks standing.

The next paragraph briefly elaborates on the grounds, but cross-references a memorandum of law for further explanation.

Specifically, all claims asserted by plaintiff Welch must be dismissed because plaintiff Welch, by her own allegations, did not suffer any present or past injury, and she cannot establish future injury because she is graduating this year. For these reasons, and as explained more fully in the attached memorandum of law, she lacks standing to bring her Title IX claim.

Therefore, defendant Central State University of Utah respectfully requests that this Court grant its Motion to Dismiss Plaintiff Welch's Complaint.

Hepworth & Peterson LLP

The lawyer's signature

By: _____
Justin Hepworth, Esq.
jhepworth@wiggin.com
Federal Bar No. ut01386
350 Lake Street
Provo, UT 84601
Phone: (203) 363-7512
Fax: (203) 262-7676
Attorney for Defendant

B. The Supporting Memorandum of Law

Motions are often, but not always, accompanied by a supporting memorandum of law. The supporting memorandum of law explains why the motion should be granted. It explains the relevant law and applies that law to the facts of the case.[2]

Different jurisdictions have different names for the supporting memorandum of law. It may be called a "memorandum of law" in support of the motion, or it may be called a "brief," "a memorandum of points and authorities," or something else entirely. Whatever the name, the supporting memorandum of law is where the court will find all your persuasive arguments.

Although many motions are accompanied by a supporting memorandum, other motions are not. Some requests to a court are so straightforward that no accompanying memorandum is necessary. For example, a motion asking the court to reschedule a hearing would likely not need to be supported by a memorandum because the motion itself would simply explain the conflict and request the change. There would be no need to provide the court with a legal analysis justifying the scheduling change. Other requests are less straightforward and require further explanation. For example, a motion that asks the court to dismiss a case or suppress evidence needs an explanatory memorandum to explain why the requested relief should be granted.

When a memorandum of law accompanies a motion, the memorandum usually has these parts: (1) a caption, (2) an introduction or preliminary statement, (3) the statement of facts, (4) the argument, (5) the conclusion, and (6) the lawyer's signature. Example 4-C provides an example of a full memorandum of law and identifies each of those parts.

2. In some jurisdictions, the legal argument explaining why the motion should be granted is presented in the same document as the motion. For simplicity, this book assumes that the request asking the court to act is one document called a "motion" and the legal argument supporting that request is in a separate document called a "memorandum of law."

Example 4-C • A memorandum of law in support of a motion to suppress

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR LANE COUNTY

THE STATE OF OREGON,	)	
	)	Case No. 21-16-18156
Plaintiff,	)	
	)	
vs.	)	MEMORANDUM OF LAW IN
	)	SUPPORT OF DEFENDANT'S
TRAVIS Z. TREATSKY,	)	MOTION
	)	
Defendant.	)	
	)	

The caption identifies the court to which the motion is submitted, the parties to the litigation, the docket number, and the title of the document.

INTRODUCTION

The introduction to a supporting memorandum provides context for the arguments that follow by explaining the nature of the case and its procedural history. It may also provide a short summary of the arguments that follow.

On May 21-22, 2015, the state violated Article I, Section 9 of the Oregon Constitution when Trooper Evan Sether administered field sobriety tests and then a breath test to defendant Travis Treatsky. Trooper Evan Sether did not obtain warrants to administer those tests. With respect to the field sobriety test, Trooper Sether lacked probable cause to administer the test, and Mr. Treatsky did not voluntarily consent to field sobriety tests. Because the state obtained evidence from the tests in violation of Article I, Section 9 of the Oregon Constitution, all evidence resulting from the field sobriety tests — including results from the breath test — should be suppressed.

FACTUAL BACKGROUND

The statement of facts explains all the facts relevant to the motion and the arguments supporting the motion.

On the evening of May 21, 2015, Mr. Travis Treatsky was driving westbound on Highway 126 after a long day of travel and visiting with family. Earlier that day, Mr. Treatsky had driven from northern California where he attends the College of the Siskiyous to his home in Springfield, Oregon. After the long drive home, Mr. Treatsky visited with his mother and sister, and then drove to visit his stepfather. (Aff. Jordan Silk ¶ 3, Nov. 11, 2015.) Returning home from his stepfather's house, Trooper Sether stopped Mr. Treatsky because the lens on one of Mr. Treatsky's taillights was broken. Trooper Sether observed Mr. Treatsky's fatigued demeanor and concluded that Mr. Treatsky was under the influence of an intoxicant. (Police Rep. of Trooper Sether 1-2, May 22, 2015.)

Trooper Sether asked Mr. Treatsky to perform two separate field sobriety tests. Trooper Sether read to Mr. Treatsky his rights with respect to taking a field sobriety test, and Trooper Sether explained the consequences if Mr. Treatsky failed to take the field sobriety. Those consequences included immediate seizure and then a likely suspension of his driver's license. Mr. Treatsky then took the field sobriety tests. According to Trooper Sether, Mr. Treatsky failed both field sobriety tests. (Police Rep. Sether 2.)

Trooper Sether then placed Mr. Treatsky under arrest, took him to the police station, and administered a breath test yielding a result of 0.08% BAC. (Police Rep. Sether 2).

ARGUMENT

The argument section is the heart of the supporting memorandum. It explains all the reasons the court should order the relief you seek.

The evidence in this case was illegally seized and must, therefore, be suppressed. Article I, Section 9 protects individuals from unreasonable searches and seizures by the state. Under that section, when the state searches an individual without a warrant, such "searches and seizures are *per se* unreasonable unless the state proves an exception to the warrant requirement." *State v. Bridewell*, 759 P.2d 1054, 1057 (Or. 1988). To show an exception to the warrant requirement, the state generally must show either that probable cause and exigent circumstances justified the search or that the individual voluntarily consented to the search. *See id.*; *State v. Nagel*, 880 P.2d 451, 456 (Or. 1994). In this case, Trooper Sether did not obtain a warrant to administer any of the tests. Thus, for each test, the state must show either that probable cause and exigent circumstances justified the search or that the defendant consented to the search. The State cannot meet that test. Thus, the field sobriety tests and the evidence from them were unlawfully seized, and that evidence must be suppressed.

A. Trooper Sether administered field sobriety tests in violation of Article I, Section 9 of the Oregon Constitution.

Because the field sobriety tests were administered in violation of Article 1, Section 9 of the Oregon Constitution, evidence from those tests should be suppressed.

1. Trooper Sether lacked probable cause to administer field sobriety tests.

The defendant's attorney uses an analogical argument to support his argument that the officer lacked probable cause to support the administration of a field sobriety test.

First, Trooper Sether lacked probable cause to administer the two field sobriety tests. A field sobriety test is a search and seizure within the scope of Article I, Section 9. *Nagel*, 880 P.2d at 456. To lawfully administer such a test without a warrant, the officer must have probable cause to believe that the person is under the influence of an intoxicant. *Id.*; *State v. Stroup*, 935 P.2d 438, 440 (Or. App. 1997). An officer has probable cause when the "officer subjectively believes that a crime has been committed and evidence of the crime can be procured by the seizure of the person or the thing"; however, "the officer's belief must be objectively reasonable under the circumstances." *Stroup*, 935 P.2d at 456 (citing *State v. Owens*, 729 P.2d 524, 529 (Or. 1986)). In *Stroup*, the court held the officer did not have probable cause to administer field sobriety tests because the only evidence was "a slight odor of alcohol, bloodshot eyes, and an admission of drinking alcoholic beverages." *Id.* at 441-42. In ruling that the officer lacked probable cause to administer the field sobriety test, the court emphasized that the defendant was initially stopped for an equipment violation, not for unsafe driving. *Id*. at 440.

Here, Trooper Sether had even less evidence supporting probable cause than did the officer in *Stroup.* In *Stroup,* the officer pointed to an alcoholic odor

and bloodshot eyes to establish probable cause. Trooper Sether's only evidence was the defendant's general weariness. (Sether's Report, p 1). And, in both cases, the defendants were stopped for an equipment violation, not for unsafe driving. Thus, Trooper Sether believed he had probable cause based on far less evidence than was present in *Stroup*, where the Court of Appeals found no probable cause to administer field sobriety tests. Accordingly, Trooper Sether's belief was not objectively reasonable, and absent consent from Mr. Treatsky, the State obtained Mr. Treatsky's field sobriety tests in violation of Article I, Section 9 of the Oregon Constitution.

2. Mr. Treatsky did not voluntarily consent to perform field sobriety tests.

In addition to not having probable cause to administer the field sobriety tests, Trooper Sether also never obtained Mr. Treatsky's voluntary consent. In determining the voluntariness of consent to a warrantless search "the test is whether, under the totality of the circumstances, the defendant's consent was an act of free will *or, instead, resulted from police coercion, either express or implied*." *State v. Hall*, 115 P.3d 908, 918 (Or. 2005) (emphasis added).

Police coercion includes informing a person of economic harm and loss of privileges that will result if the person refuses a request to take a test. In *State v. Machuca*, a police officer suspected the defendant of drunk driving and requested the defendant take a blood test. 218 P.3d 145, 147 (Or. App. 2009), *overruled on other grounds*, 227 P.3d 729 (Or. 2010). Before the defendant gave his consent, the police officer read to the defendant the "rights and consequences" of refusing consent. *Id.* The consequences included seizing defendant's driver's license and likely suspension of the defendant's right to drive. *Id.* The defendant then consented to the blood test. *Id.*; Or. Rev. Stat. §813.130(2). Before trial, the defendant moved to suppress the evidence from his blood test. *Machuca*, 218 P.3d at 148. Upon review, the Oregon Court of Appeals held that consent to the blood test was not effective because the consent was obtained "through a threat of economic harm and loss of privileges." *Id.* at 150. Such consent, the court held, "is coerced by the fear of adverse consequences and is ineffective to excuse the requirement to obtain a search warrant." *Id.*

The defendant's attorney uses another analogical argument, this time to support his argument that the defendant did not consent to field sobriety tests.

Here, too, Mr. Treatsky's consent was not voluntary. Just like the officer in *Machuca*, the officer in this case read to the defendant the "rights and consequences" of refusing consent. In this case, as in the *Machuca* case, those rights and consequences included the seizure of his driver's license and the likely suspension of his right to drive. Thus, Mr. Treatsky's consent, like the defendant's consent in *Machuca*, was "coerced by the fear of adverse consequences and is ineffective to excuse the requirement to obtain a search warrant."

Because Trooper Sether lacked probable cause to administer field sobriety tests and Mr. Treatsky did not voluntarily consent to the tests, evidence of the tests should be suppressed.

B. If the Court concludes Trooper Sether lacked probable cause, all evidence obtained as a result of the illegal search must be suppressed.

The results of the breath test must also be suppressed. Oregon employs an exclusionary rule that prevents the state from offering evidence obtained as a result of illegal police conduct. *Hall*, 115 P.3d at 920. "[T]he critical inquiry is whether the state obtained the evidence sought to be suppressed as a result of a violation of the defendant's rights under Article I, section 9." *Id.* If so, evidence from the illegal search and seizure must be suppressed. *See id.*

Here, the illegal search produced evidence that resulted in unconstitutionally obtained evidence. Had Trooper Sether not administered illegal field sobriety tests, he would not have arrested Mr. Treatsky and taken him to the police station, and the breath test would not have taken place. Because Trooper Sether lacked probable cause and voluntary consent to perform field sobriety tests, the breath test and its results were obtained in violation of Article I, Section 9. The Court should therefore suppress all evidence that was obtained as a result of any search conducted in violation of Article I, Section 9.

CONCLUSION

Because evidence of Mr. Treatsky's performance of field sobriety tests and from the breath test were obtained in violation of Article I, Section 9 of the Oregon Constitution, this Court should suppress all such evidence.

The conclusion is a short statement of the relief you seek.

DATED this _____ day of November, 2015.

_____
Jordan R. Silk
OSB # 105031
Appearing for Defendant

The lawyer's signature

C. Factual Support

Sometimes an argument in the memorandum of law needs to be supported by evidence. For example, if the court must interpret a contract, you will need to attach a copy of the contract to the supporting memorandum. If the court is considering a motion for summary judgment, you may need to attach excerpts from depositions to prove that no material issues of fact exist. Sometimes a party or the lawyer submitting the motion will submit an affidavit as evidence of the facts provided to the court, as in Example 4-D. An affidavit is a sworn statement and, in that way, is treated the same as testimony presented in court. Example 4-D shows an affidavit that supports the argument in Example 4-C.

If you are submitting your motion in hard copy, you will likely staple the supporting evidence to the memorandum of law. You may be able to include a tabbed divider or label it as an appendix to make it easier for the court to find. If you are submitting your document electron-

ically, you should look for instructions about whether the supporting evidence and the memorandum should be combined and uploaded as a single document or whether they should be uploaded separately. Always consult the procedural or local court rules to determine the court's particular requirements regarding how to file supporting documents.

Example 4-D • Affidavit in support of a motion

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR LANE COUNTY

THE STATE OF OREGON,	)	
	)	Case No. 21-15-18156
Plaintiff,	)	
	)	AFFIDAVIT IN SUPPORT OF
vs.	)	DEFENDANT'S MOTION TO
	)	SUPPRESS EVIDENCE
TRAVIS Z. TREATSKY,	)	
	)	
Defendant.	)	
_____	)	

STATE OF OREGON)
)
County of Lane)

I, Jordan Silk, being first duly sworn on oath, do depose and say the following:

I am the attorney for the above-named defendant.

I have reviewed Trooper Sether's police report and the DVD recording of the investigation regarding the facts and circumstances relevant to Trooper Sether's DUI investigation of the defendant on May 21-22, 2015. A true and accurate copy of Trooper Sether's police report is attached as Exhibit 101.

Mr. Treatsky confirms that on the evening of May 21, 2015, he was driving westbound on Highway 126 after a long day of travel and visiting with family. Earlier that day, Mr. Treatsky had driven from northern California where he attends the College of the Siskiyous to his home in Springfield, Oregon. After the long drive home, Mr. Treatsky visited with his mother and sister, and then drove to visit his stepfather. Returning from his stepfather's house, Trooper Sether stopped Mr. Treatsky because one of his rear taillight lenses was broken. Trooper Sether subsequently arrested Mr. Treatsky.

DATED this ____ day of November, 2015.

_____
Jordan R. Silk

SUBSCRIBED AND SWORN before me this __ day of November, 2015.

_____
Notary Public for Oregon

II. The Rules That Govern Trial Motions

Above, we have described what a typical motion looks like in a typical jurisdiction. The truth is that motions (and their supporting documents) vary from jurisdiction to jurisdiction. Some local rules require that a separate memorandum of law be submitted with every motion.[3] If that is the rule, then submit a motion that is separate from the memorandum of law. By contrast, in some jurisdictions a separate memorandum of law is not required; rather, the custom or the rule is to combine the motion and supporting memorandum into one document.

Thus, before drafting a motion familiarize yourself with all the rules and customs that govern the motion you are planning to submit. You will usually look for three different kinds of rules: the jurisdiction's procedural rules, "local" court rules, and "standing orders" of the judge before whom you will be appearing.

A. Procedural Rules

The first set of rules to become familiar with are the jurisdiction's procedural rules that govern trial practice. The federal courts and all state courts have their own rules of procedure. Those rules—the rules of civil procedure and the rules of criminal procedure—govern practices in those jurisdictions.

The procedural rules at the federal and state level provide only the most general guidance with respect to motion drafting. For example, the Federal Rules of Civil and Criminal Procedure require that motions be in writing, unless made during trial; state the grounds for seeking an order; and state the specific relief or order sought.[4]

For a limited number of motions, however, the jurisdiction's procedural rules will provide more detailed guidance. For example, the Federal Rules of Civil Procedure require that, when filing a motion for summary judgment, the motion must prove that no fact is in dispute "by citing to particular parts of the record," such as depositions, answers to interrogatories, affidavits, or other materials in the record.[5] Similarly, if a party seeks an order protecting it from discovery, a motion filed in federal court must also include a statement that the parties attempted, in good faith to resolve the dispute.[6]

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3. For example, the trial court rules in Oregon state that a motion to suppress evidence in a criminal case must be accompanied by "the moving party's brief, which must sufficiently apprise the court and the adverse party of the arguments and authorities relied upon." Unif. Tr. Ct. R. 4.060(1)(b).

4. Fed. R. Civ. P. 7(b) (requiring that the grounds for the order be stated "with particularity").

5. Fed. R. Civ. P. 56(c)(1).

6. Fed. R. Civ. P. 26(c).

Thus, although the jurisdiction's rules may not ultimately provide significant guidance for the particular motion you are writing, you should always start your research there, just in case they do.

B. Local Rules

Next, you will want to become familiar with the court's local rules. For management purposes, federal and state trial court systems are further divided. For example, the federal trial court system is divided into ninety-four districts, and state trial courts are often divided by county. Each subdivision usually has its own set of rules. These rules are often called "local rules."

Local rules are rules adopted by courts and apply regardless of the particular judge hearing the case.[7] These local rules tend to provide more specific guidance than the procedural rules. Local rules will often dictate details about the content and format of a motion and its accompanying memorandum of law, including the sections that must be included in a memorandum of law, page limits, margin sizes, fonts, and whether a cover sheet must be attached.[8]

C. Standing Orders

In addition to the local rules that are adopted court-wide, individual judges may issue standing orders—ongoing orders that apply to all lawyers who appear before that particular judge. Standing orders can include the same kinds of information that local rules include. In the case of a standing order, however, the rule applies only to those cases before a particular judge. Not all judges have standing orders, and at the time you are submitting a motion, your case may not have been assigned to a particular judge. Thus, a set of standing orders may not govern your motion. If, however, your case has been assigned to a particular judge, you should determine whether that judge has any standing orders relevant to your case.

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7. The Federal Rules of Civil Procedure explain that, in federal courts, "a district court, acting by a majority of its district judges, may adopt and amend rules governing its practice. A local rule must be consistent with—but not duplicate—federal statutes and rules . . . ." Fed. R. Civ. P. 83.

8. Local rules also often provide a wealth of practical information helpful to an attorney, including the hours that a court is open, where documents are received, how cases are assigned, when motions will be heard, what methods of delivery constitute service, appropriate attire for court, whether cell phones and other electronic devices will be permitted, who must provide playback equipment if a video or other recording is entered into evidence, and much more.

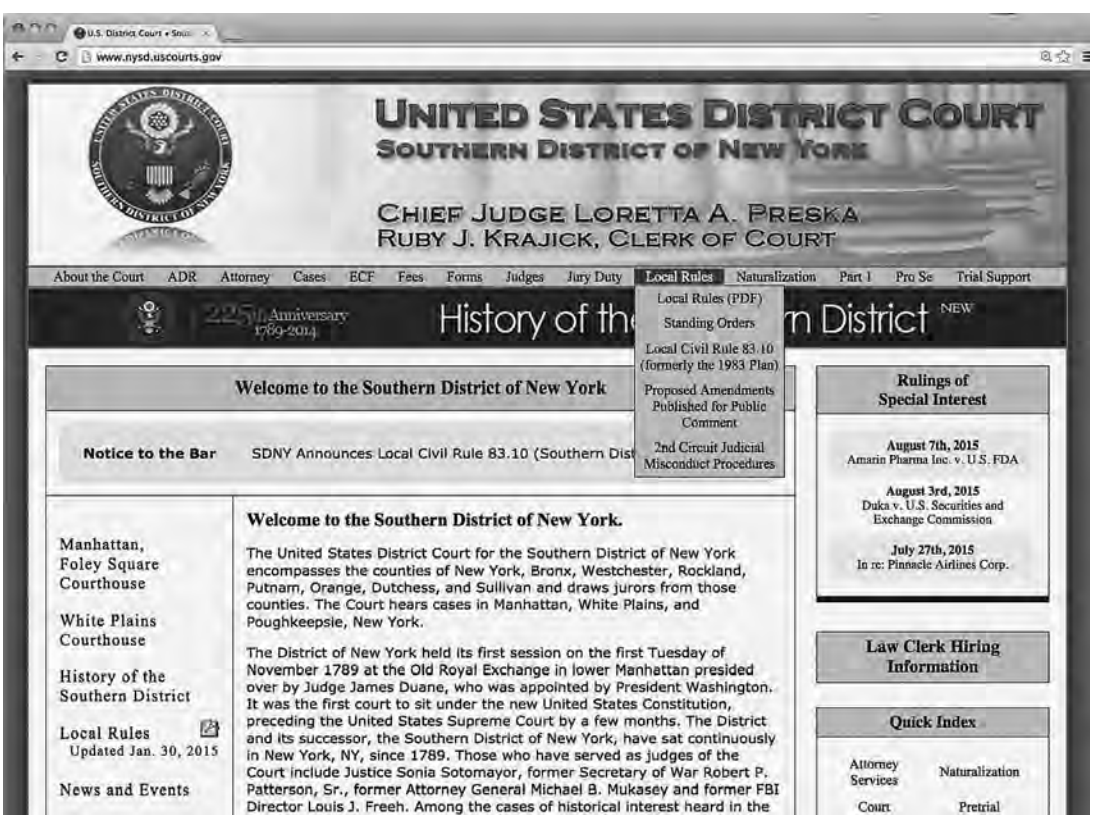
D. Finding the Rules

All of the rules mentioned above are usually available on the website of the court to which you will be submitting your motion. So, go to the court's website first to determine the relevant rules. If you cannot find the rules on the court's website, you can check with the Clerk of Court to determine how to get a copy of the local rules. If your case has been assigned to a particular judge, you can also ask the Clerk of Court if the judge has any standing orders, or you can call the judge's chambers to determine whether the judge has issued any standing orders.

All of these rules—and especially the local rules and standing orders—are subject to change. Whenever submitting a motion, always check to make sure you are relying on the most up-to-date set of rules.

You might want to take a minute right now to find your local court's website to see what they look like. For example, if you searched the Internet for "local rules Southern District of New York," your search will lead you to the home page for the United States District Court for the Southern District of New York, shown in Figure 4-E. To find an example of a standing order, as in Example 4-F, you might search the Internet for "judge standing order."

Figure 4-E • Local rules



Example 4-F • A standing order[9]

Motion Practice Standing Order
Courtroom 303
Judge Christopher C. Starck

Motion practice

All motions shall be set on Tuesday or Wednesday morning. Uncontested or agreed motions shall be set at 9:00 a.m. Contested motions shall be set at 9:15 a.m.

All motions for default judgment shall be set at 9:15 a.m. with copies of the proof of service attached to the motion.

Prior to noticing a motion for hearing, counsel must contact the courtroom clerk and have the matter placed on the call for the desired date. No motions may be noticed for hearing unless counsel personally contacts the courtroom clerk prior to sending out the notice of motion. Failure to follow this rule will cause the Court to strike the motion from the call.

Contested motions shall not be placed on the call for hearing during the first week of the Court's jury trial call, other than by approval of the Court or due to emergency circumstances. Agreed and routine motions are allowed during the first week of the Court's jury trial call.

Complete copies of all contested motions, including motions, briefs, relevant pleadings, and exhibits must be delivered to the Court at least 7 days before the hearing date. Failure to deliver the motion packet in advance of the hearing date may cause the Court to refuse to hear the motion when presented. Multiple copies of the same pleading or motion should not be tendered to the Court. The parties are encouraged to confer and to send a single packet of the motions and exhibits to the Court in an effort to conserve natural resources.

At times, the Court may require electronic copies of the motions and briefs. Counsel shall produce electronic copies of pleading when requested by the Court.

Court reporters are not provided by the Court for oral arguments at motions, other than motions presented during trial.

Entered:_____
Christopher C. Starck

Dated: May 1, 2015

9. Nineteenth Judicial Circuit Court of Lake Cnty. Ill., *Standing Orders of the Nineteenth Judicial Circuit*, http://19thcircuitcourt.state.il.us/resources/Pages/StandingOrders.aspx (last visited Feb. 1, 2015).

E. Following the Rules

Following all the relevant rules is important. In some instances, failing to follow the rules could result in your motion being rejected. If you are filing on a deadline, you may not have time to resubmit. On that basis alone, you could have your motion denied and possibly even lose the case.

While other consequences are less dire, you should still scrupulously follow the rules. First, following the rules will make your arguments easier to absorb. Judges are very busy, and they read many motions and their accompanying legal arguments. They expect the motion and the accompanying argument to look a certain way, to have the sections in a certain order, and to contain all the information required by the rules. To the extent that a motion or memorandum of law does not do those things, the judge has to work harder to follow it and will have less mental energy to devote to the legal argument.

Carefully following the rules also enhances your credibility—that is, your *ethos*—with the court. Following the rules shows the court that you know how to, and make the effort to, find and follow rules. A judge will assume that someone who can find and follow the rules of practice can also find and follow the substantive law. By contrast, if a judge sees that you cannot find and follow the rules of practice, the judge may begin to wonder whether you can find and follow the substantive law. You want the judge to read your motion and memorandum of law with complete confidence that what follows was written by a smart, careful, trustworthy lawyer. Thus, find and follow all relevant rules of practice.

F. Unwritten Rules

In addition to all the formal rules that you must follow, it is worth your while to find out about local customs. Often local jurisdictions have common ways of presenting a motion. Sometimes particular judges have preferences about how information is presented. So, ask around. Ask a trusted colleague for a sample motion or memorandum of law. If you know which judge has been assigned to hear your motion, ask if that judge has preferences about how information is presented. Although you are not bound by these customs or preferences, you and your client will be well-served if you know of them in advance.

III. After the Motion Is Drafted

After you have drafted the motion and gathered any supporting documents, you will serve a copy of those documents on opposing counsel and provide a copy to the court.

A. Service and Its Proof

Each jurisdiction's rules of civil and criminal procedure provide detailed instructions about how to properly serve opposing counsel. The purpose of this book is not to provide those detailed rules, but to give you a picture of that process and of any documents you might have to draft. Thus, we skip over the exact ways in which you will serve opposing counsel and address the document you will have to draft to prove you have served opposing counsel.

"Proof of service" is a document that shows you have served opposing counsel the same documents that you have filed with the court. Failure to provide such proof can be grounds for dismissing the motion. That proof is usually provided in a sworn statement by the person who served the opposing party, as in Example 4-G. That statement is then appended to the documents provided to the court.

Example 4-G • Proof of service when opposing party served by mail

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: PART 28

Index No. 15-SC-52975

Randall Runco,
Plaintiff,

AFFIDAVIT OF SERVICE
BY MAIL

-against-

HammerTime Construction, Inc.,
Defendant.

Glenna Gilbert, being duly sworn, states as follows:

I am over 18 years of age and not a party to this action.

On September 16, 2015, I served Plaintiff's Motion to Compel Evidence on HammerTime Construction, Inc., the defendant in this proceeding. I enclosed a true copy of the attached papers in a properly sealed postpaid envelope. I deposited that sealed envelope in an official depository of the United States Postal Services within the State of New York. The envelope was addressed to HammerTime Construction, Inc., the defendant, at 5555 Broadway, New York, NY, 10036.

Signature:_____

Sworn to me this ___ day of _____ 20__

_____
Notary Public or Court Employee

Alternatively, and as discussed further below, most courts now accept (or even require) electronic filing. If papers are filed electronically, proof of service might be provided as in Example 4-H.

Example 4-H • Proof of service when filing electronically

CERTIFICATE OF SERVICE

I certify that on May 5, 2015, the above defendant's Motion to Dismiss Plaintiff Overdevest's Complaint was filed electronically, and notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing.

_____
Jonathan Bardavid, Esq.

B. Filing with the Court

You will then file your notice of motion, motion, memorandum of law in support of the motion, supporting documents (if any), draft order (if any), and proof of service with the court. Again, you should first consult the local rules to determine how to file with the court.

Traditionally, to file your documents with the court, you or someone you work with goes to the courthouse. Once at the courthouse, you go to the clerk of court and submit two or three copies of your motion and all accompanying documents. The clerk of court examines the motion and the accompanying documents to ensure compliance with the court rules. Once approved, you pay a filing fee. Then, the clerk of court stamps the documents as filed. The stamp shows the date on which the documents were filed. One stamped copy is returned to you so that you have proof that your motion was properly filed.

More recently, many courts have adopted electronic filing systems. In some courts, parties are permitted, but not required, to file electronically. In other court systems, parties must file electronically. In such electronic filing systems, counsel can submit documents to the court electronically. Often, counsel can also serve opposing counsel electronically. Courts with electronic filing systems have detailed explanations about how to use the electronic filing systems on their websites, as in Figure 4-I on the next page.

Figure 4-I • An electronic filing system

C. The Opposing Party's Response

In some instances, you may be the one who drafts, serves, and files a motion and its accompanying documents. In other cases, you will represent the party who is being served. If you represent the party being served, you will have to respond to the motion. You can do so in one of several ways.[10]

1. Statement of non-opposition

If you do not oppose the motion, you can notify opposing counsel of your lack of opposition. At the hearing, opposing counsel can inform the judge of the lack of opposition, and you will not need to attend the hearing. A good practice, however, is to submit a statement of non-opposition. Doing so creates a record of your position and ensures that your position is not misrepresented.

You are most likely to take this route when the matter is a ministerial one, as in Example 4-J.

10. The discussion of opposing party's possible responses was drawn from Thomas A. Mauet, *Pretrial* 336 (7th ed. 2008).

Example 4-J • A statement of non-opposition[11]

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF INYO

CITY OF LOS ANGELES DEPARTMENT OF WATER AND POWER, Plaintiff, vs. GREAT BASIN UNIFIED AIR POLLUTION CONTROL DISTRICT, Defendant.	Case No. SJCVPT-15-41092 Assigned for all purposes to the Honorable Dean T. Stout **PLAINTIFF CITY OF LOS ANGELES DEPARTMENT OF WATER AND POWER'S NOTICE OF NON-OPPOSITION TO DEFENDANT GREAT BASIN UNIFIED AIR POLLUTION CONTROL DISTRICT'S MOTION FOR MANDATORY TRANSFER OF VENUE** Date: July 10, 2015 Time: 1:00 P.M.

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD HEREIN:

PLEASE TAKE NOTICE THAT Plaintiff City of Los Angeles Department of Water and Power has received and reviewed Defendant Great Basin Unified Air Pollution Control District's Notice of Motion and Motion for Mandatory Transfer of Venue and does not oppose the motion. In fact, the Department of Water and Power supports the motion and joins in the request to transfer this action to the Kern County Superior Court pursuant to Code of Civil Procedure § 394(a).

Dated: June 23, 2015

MANATT, PHELPS & PHILLIPS, LLP
Mark D. Johnson

By:_____
Mark D. Johnson
Attorney for the City of Los Angeles Department of Water and Power

2. Consent order

Another possibility is to consult with counsel to determine whether the parties might be able to craft a consent order. This approach, common in state courts but not in federal courts, allows the parties to negotiate a proposed order and then submit it to the court for its approval. Al-

11. Example drawn from a motion of non-opposition filed in *City of Los Angeles Department of Water & Power v. Great Basin Unified Air Pollution District*, No. SICVPT-06-41092 (Cal. Sup. Ct. June 26, 2006).

though a judge is not required to grant an order simply because the parties agree on it, a judge usually will.

3. Memorandum of law in opposition

Finally, you might oppose the motion. When you oppose a motion, you ordinarily do not submit a motion in opposition. Instead, you submit a memorandum of law in opposition to the motion. That memorandum of law explains why the motion should not be granted. A memorandum of law in opposition to a motion has all the same parts as the moving party's memorandum of law in support of the motion.

D. The Moving Party's Reply Memorandum

If the rules permit, the moving party may file a final reply. A reply memorandum, when it is allowed, may have all the same parts as an opening memorandum of law; often, however, it does not. A reply memorandum responds to new issues raised in the opposing memorandum of law; it should not repeat arguments already presented in the opening memorandum of law. Because the reply memorandum addresses only those issues not already addressed in the opening memorandum, the reply is often limited to a short argument section and a conclusion.

Practice Points

- A motion has these typical parts:
  - A caption.
  - A statement of the relief requested.
  - A brief statement of the legal grounds upon which the relief is requested.
  - An attorney's signature.
- When the legal grounds for granting a motion need to be explained in any detail, the motion is accompanied by a "memorandum of law" or "brief." A memorandum of law has these parts:
  - A caption.
  - An introduction.
  - A statement of facts.
  - An argument explaining the legal grounds that support the motion.
  - A conclusion.
  - An attorney's signature.

- Before drafting your own motion
  - Review the governing procedural rules.
  - Review the local rules.
  - If a particular judge will be hearing your motion, determine whether that judge has standing orders or preferences that will affect the motion.
- After drafting your motion, make sure it is properly filed with the court and served on opposing counsel.
- If you are served with a motion, carefully consider whether you, in fact, oppose the motion.
  - If you do oppose the motion, you must submit a reply.
  - If, however, you do not oppose the motion, you can submit a statement of non-opposition.
  - If you can work out a settlement with opposing counsel, you can submit a motion asking the judge to approve a consent order.