Federal Bar Association
San Diego Chapter

presents:

THE 19TH ANNUAL JUDITH N. KEEP FEDERAL CIVIL PRACTICE SEMINAR

September 20, 2023 | Westin Gaslamp Quarter | 1:00 p.m. – 6:00 p.m.

Pre-Trial and Trial Motions and Procedures

Hon. Cynthia Bashant, U.S. District Judge

Hon. Gonzalo P. Curiel, U.S. District Judge

Hon. William Q. Hayes, U.S. District Judge

— Pre-Trial and Trial Motions and Procedures —

Hon. Cynthia Bashant

The Honorable Cynthia Bashant is a U.S. District Judge for the Southern District of California. Before joining the Southern District's bench in 2014, Judge Bashant served on the San Diego Superior Court since 2000, including as the Presiding Judge for Juvenile Court from 2010 to 2013. Judge Bashant started her career in private practice before spending eleven years as an Assistant U.S. Attorney in the Southern District of California. She is a graduate of Smith College and the University of California College of the Law, San Francisco (formerly Hastings).

Hon. Gonzalo P. Curiel

The Honorable Cynthia Bashant is a U.S. District Judge for the Southern District of California. Before joining the Southern District's bench in 2014, Judge Bashant served on the San Diego Superior Court since 2000, including as the Presiding Judge for Juvenile Court from 2010 to 2013. Judge Bashant started her career in private practice before spending eleven years as an Assistant U.S. Attorney in the Southern District of California. She is a graduate of Smith College and the University of California College of the Law, San Francisco (formerly Hastings).

Hon. William Q. Hayes

The Honorable William Q. Hayes is a United States District Judge for the Southern District of California. He was appointed a District Judge on October 3, 2003, and assumed senior status on August 1, 2021. Prior to his appointment, Judge Hayes was an Assistant United States Attorney, Southern District of California, 1987 to 2003, serving as Chief of the Criminal Division from 1999 to 2003. He previously practiced law in Denver, Colorado, as an associate at Stone and Associates from 1984 to 1986, and as an associate at Scheid and Horlbeck from 1983 to 1984. Judge Hayes has served as an adjunct faculty member at National College in Denver, Colorado; University of Colorado at Denver; Thomas Jefferson School of Law in San Diego, California; and University of San Diego School of Law.

Effective February 1, 2022

HONORABLE CYNTHIA BASHANT
UNITED STATES DISTRICT JUDGE
STANDING ORDER FOR CIVIL CASES

Unless otherwise ordered by the Court, counsel and *pro se* litigants are expected to follow the Federal Rules of Civil Procedure, the Local Rules for the Southern District of California ("Civil Local Rules"), the Electronic Case Filing Administrative Policies and Procedures Manual ("ECF Manual"), and any other applicable rules. The Civil Local Rules and the ECF Manual are available on this district's website: casd.uscourts.gov. Failure to comply with the applicable orders and rules, including the ECF Manual, may result in the Court striking non-complying documents from the record pursuant to ECF Manual Section 2(a) and imposing sanctions pursuant to Civil Local Rule 83.1.

1. Communications with Chambers

Parties seeking a hearing date must refer to the procedure for doing so below. The Court will generally not answer telephone calls; however, parties or counsel may leave a voicemail—including their name, contact information, case number, and detailed message. If appropriate, the Court will return the call.

Court personnel are prohibited from interpreting orders, discussing the merits of a case, or giving legal advice, including advice on procedural matters. Court personnel also will not speculate as to when an order will be issued for a particular motion or *ex parte* application. Letters, faxes, and emails are prohibited unless otherwise authorized by the Court.

2. General Filing Requirements

The parties must comply with all of the formatting requirements in Civil Local Rule 5.1 unless otherwise ordered by the Court. In addition, the parties must scan any documents, including exhibits, to be filed on the docket using Optical Character Recognition ("OCR"). The OCR requirement only applies to parties with electronic-case-filing privileges.

The Court's e-file email account (**efile_bashant@casd.uscourts.gov**) must only be used to lodge or submit proposed orders, required trial documents, or other documents requested by the Court. It is not to be used for communication purposes (e.g., asking questions).

3. <u>Discovery</u>

Counsel must contact the magistrate judge's chambers directly for all matters pertaining to discovery. Any objection to a discovery ruling of the magistrate judge must be filed as a motion pursuant to Civil Local Rule 7.1.

4. <u>Motion Practice</u>

A. Conference of Counsel Prior to Filing Noticed Motions

Any party contemplating the filing of any noticed motion before this Court must first contact opposing counsel to discuss thoroughly—preferably in person—the substance of the contemplated motion and any potential resolution. The conference must take place at least **<u>seven days</u>** prior to the filing of the motion. If the parties are unable to reach a resolution that eliminates the need to file the anticipated motion, counsel for the moving party must include in the notice of motion a statement to the following effect: "This motion is made following the conference of counsel that took place on [date]."

The only exceptions to this meet-and-confer requirement are: (1) in cases where the plaintiff is appearing *pro se* and is not an attorney; (2) for applications for temporary restraining orders or preliminary injunctions; and (3) motions and cross-motions for summary judgment. *Ex parte* applications, which have separate requirements below, and joint motions are exempt from this rule as they are not noticed motions.

B. Hearing Dates

Parties filing a noticed motion may choose any **<u>Monday</u>** between **<u>thirty and sixty days</u>** from the motion's filing date.[1] If the preferred Monday is a federal holiday, then the filing party may select the following Tuesday as the hearing date for the motion. Do not contact chambers for a hearing date. This rule *only* supersedes Civil Local Rule 7.1(b).

Parties *must* also include the following language in the caption of their motions directly underneath the hearing date, unless notified otherwise by the Court: "**NO ORAL ARGUMENT UNLESS ORDERED BY THE COURT**." The Court may resolve motions on the papers submitted and without oral argument in accordance with Civil Local Rule 7.1(d)(1). Consequently, the hearing date does not indicate a date when appearances are necessary; rather, it sets the briefing schedule for the motion. As such, the filing party must *not* indicate a **<u>hearing time</u>** on its motion. The schedule for filing briefs must be in accordance with Civil Local Rule 7.1(e), unless ordered otherwise by the Court.

Parties must contact the assigned magistrate judge's chambers for hearing and scheduling dates needed for cases referred—either by operation of local rule or by order—to the magistrate judge. *See* Civil Local Rules 72.2, 72.3.

C. Oral Argument

i. Procedure

If the Court decides to hear oral argument, it will issue an order, normally two weeks in advance, setting the matter for oral argument.

---

[1] For example, if a party files its motion on Friday, April 1, 2022, then the earliest Monday it may select as the hearing date is Monday, May 2, 2022—because that Monday is more than thirty days after the filing date.

The party may also select Monday, May 9, 2022; Monday, May 16, 2022; or Monday, May 23, 2022, as the hearing date. Finally, Monday, May 30, 2022, is within sixty days from the filing date, but that Monday is a federal holiday. So, the party may select Tuesday, May 31, 2022, as the last possible hearing date.

For motions with numerous references to technical terminology (e.g., in patent cases), one week prior to the motion hearing, the parties must email to chambers (not to be filed) a list of pertinent technical terms and/or proper names, the purpose of which is to assist the court reporter in the transcription of the hearing.

ii. Junior Attorneys

Upon request, the Court will hold oral argument on a noticed motion handled by an attorney with no more than five years of experience. A request for oral argument under this provision should be included in a party's moving papers or opposition. Alternatively, a party may file the request separately before the Court rules on the motion.

D. Proposed Orders

Any proposed orders must be submitted in Word format simultaneously with all motions. In accordance with Section 2(h) of the ECF Manual, proposed orders must not contain the name and law firm information of the filing party, and must not contain the word "proposed" in the caption. Counsel must email proposed orders to opposing counsel and to **efile_bashant@casd.uscourts.gov**, and include the case name, case number, and docket number in the subject line of the email. The case number in the subject line must be in the following format, including hyphens: 21-cv-0270-BAS.

Proposed orders or other documents requiring the judge's signature must not be filed on the docket.

E. Briefing

When the same party is noticing multiple motions for the same hearing date, the motions must be briefed together in one memorandum of points and authorities.

If multiple parties are moving for substantially the same relief, they must make every effort to obtain the same hearing date for their motions.

If multiple parties are moving for substantially the same relief or opposing a motion seeking substantially the same relief sought against them, and noticed for the same hearing date, counsel must make every effort to coordinate and consolidate the briefing or use the notice of joinder procedure to avoid duplication in briefing. If the briefing is not coordinated or consolidated, counsel for each party must file a declaration concurrently with the briefing describing the efforts and explaining why they were not successful.

F. Sur-Replies and Notices of Supplemental Authority

Sur-replies and notices of supplemental authority may not be filed unless leave of court has been granted. The parties must obtain leave of court by filing an *ex parte* request before filing any sur-replies or notices of supplemental authority.

The only exception to this requirement is if there is a change in binding intervening law that is directly on point issued *after* the filing. Under these circumstances, parties may file a notice of supplemental authority that includes a copy of the order or opinion and any case-identifying information. Counsel may not include any argument in the notice.

G. Motions and Cross-Motions for Summary Judgment

If upon being served with a summary-judgment motion an opposing party determines that it intends to file a cross-motion, that party must file an *ex parte* application requesting a consolidated briefing schedule well in advance of the due date for the opposition to the first-filed summary-judgment motion. The Court requires no duplication of briefing and exhibits.

Consistent with Civil Local Rule 7.1(f)(1), Separate Statements of Fact may not be filed unless leave of Court has been granted. Any separate

statements of disputed or undisputed facts will be rejected unless leave of Court has been granted.

No later than **ten days** before the hearing date, the parties must meet and confer in person or by telephone to arrive at a joint statement of undisputed material facts, which must be filed no later than the reply brief. The parties must also email the joint statement in Word format to **efile_bashant@casd.uscourts.gov**.

H. Exhibits

The parties must avoid duplication of exhibits as much as possible. All exhibits submitted in support of motions should be excerpted to include only relevant material. All exhibits must be clearly labeled, dated, and indexed.

I. Objections

Objections to evidence submitted in support of a motion must be contained within the opposition brief, and objections to evidence submitted in support of an opposition must be contained within the reply brief. No separate statements of objections will be allowed.

J. Courtesy Copies

No courtesy copies are necessary for any filings.

K. Failure to Oppose

An opposing party's failure to file an opposition to any motion may be construed as consent to the granting of the motion pursuant to Civil Local Rule 7.1(f)(3)(c).

5. Seeking Leave to File Documents Under Seal

A. Standard

There is a presumptive right of public access to court records based upon common law and first amendment grounds.[2] Hence, motions to file documents under seal are strongly discouraged. The fact that both sides agree to seal a document or that a stipulated protective order was issued is insufficient cause for sealing.

Even where a public right of access exists, such access may be denied by the Court in order to protect sensitive personal or confidential information.[3] The Court may seal documents to protect sensitive information; however, the documents to be filed under seal will be limited by the Court to only those documents, or portions thereof, necessary to protect such sensitive information.

B. Procedure

A party seeking a sealing order must provide the Court with: (1) a specific description of particular documents or categories of documents to be protected; and (2) declaration(s) showing a compelling reason or good cause to protect those documents from disclosure. The standard for filing documents under seal will be strictly applied.

Parties often seek to seal a document only because another party designated the document as sensitive under a protective order, including with a "confidential" or "attorneys' eyes only" designation. In these circumstances, the moving party must first meet and confer

[2] *See Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597 (1978); *Ctr. for Auto Safety v. Chrysler Grp., LLC*, 809 F.3d 1092, 1096 (9th Cir. 2016).

[3] For example, courts have consistently prevented disclosure of letters protected under attorney-client privilege, *see KL Group v. Case, Kay, and Lynch*, 829 F.2d 909, 917–19 (9th Cir. 1987); medical and psychiatric records, *see Pearson v. Miller*, 211 F.3d 57, 62–64 (3d Cir. 2000); records subject to federal and grand jury secrecy provisions, *see Krause v. Rhodes*, 671 F.2d 212, 216 (6th Cir. 1982); and confidential settlement agreements, *see Hasbrouck v. BankAmerica Hous. Serv.*, 187 F.R.D. 453, 455 (N.D.N.Y. 1999); *Kalinauskas v. Wong*, 151 F.R.D. 363, 365–67 (D. Nev. 1993).

with the designating party to determine whether the designating party maintains that any portion of the document must be filed under seal. If so, the moving party must file a motion to seal. In addition, the designating party must file a response to the sealing motion within **seven days** that satisfies the sealing standard described above. If no response is filed, the Court may order that the document be filed in the public record.

6. *Ex Parte* Applications

Before filing any *ex parte* application, counsel must contact the opposing party to meet and confer regarding the subject of the *ex parte* application. All *ex parte* applications must comply with Civil Local Rule 83.3(g). The declaration required by Civil Local Rule 83.3(g) must document the following: (1) efforts to contact opposing counsel, (2) counsel's good faith, in person or by telephone meet-and-confer efforts to resolve differences with opposing counsel, and (3) opposing counsel's general position regarding the *ex parte* application. Any *ex parte* application filed with the Court must be served on opposing counsel via electronic mail with return receipt requested or overnight mail.

Ex parte applications that are not opposed within **three Court days** may be considered unopposed and granted on that ground. The opposing party must immediately notify chambers that they intend to oppose the *ex parte* application. Replies to any opposition will not be considered unless otherwise ordered by the Court.

7. Joint Motions / Stipulations

Pursuant to Section 2(f)(4) of the ECF Manual, all stipulations must be filed as joint motions. Joint motions must be signed by the Court to have legal effect.

8. Settlement and Dismissal

If the parties settle a case, counsel must immediately notify this Court and the magistrate judge of the settlement. Unless a "Notice of Dismissal" is filed under Federal Rule of Civil Procedure 41(a)(1), for which a court order is not

required, the parties must file a "Joint Motion to Dismiss" and email a proposed order to this Court within twenty-eight days of the settlement.

9. Temporary Restraining Orders

All motions for temporary restraining orders must be briefed. While temporary restraining orders may be heard in true *ex parte* fashion (i.e., without notice to an opposing party), the Court will do so only in extraordinary circumstances. The Court's strong preference is for the opposing party to be served and afforded a reasonable opportunity to file an opposition. In appropriate cases, the Court may issue a limited restraining order to preserve evidence pending further briefing.

10. *Pro Se* Prisoner Cases

In cases involving *pro se* prisoners as litigants, the Court expects defense counsel and the government entity with which a defendant is associated to cooperate in facilitating the prisoner's telephonic appearances or personal appearances for any scheduled conference, hearing or trial. This responsibility includes preparing any writs of *habeas corpus ad testificandum* for the incarcerated *pro se* plaintiff and any of his or her incarcerated witnesses, as authorized by the Court.

11. Pretrial Conference

Pursuant to Civil Local Rule 16.1(f)(6), the Court requires that the parties lodge by email to chambers a joint proposed pretrial order at least fourteen days before the pretrial conference. The proposed pretrial order must strictly comply with the requirements set forth in Civil Local Rule 16.1(f)(6)(c). All parties are required to cooperate in completing the proposed pretrial order.

For all pretrial dates—including the motion *in limine* briefing and hearing, final pretrial conference, and other relevant deadlines—parties must refer to the scheduling order issued in their respective case, which is issued by the assigned magistrate judge. Dates in the scheduling order are subject to change by court order.

12. Telephonic Appearances

Telephonic appearances will be permitted *only* in emergency circumstances upon court approval. If a party needs to appear telephonically before this Court, he or she must contact chambers immediately upon learning of the emergency and leave a voicemail. Upon reviewing the voicemail, the Court will contact the party. The party needing to appear telephonically must, nonetheless, arrange to have a colleague appear on his or her behalf.

13. Trial Practice

A. Electronic Equipment for the Courtroom

The Court provides the following audio/visual equipment: (1) monitors; (2) an overhead projector; and (3) computer connections. Counsel should make his or her own arrangements for their respective needs. Counsel should contact the Court's courtroom deputy to arrange a time to allow counsel to review and set up equipment for trial.

Counsel will need an order to bring any laptops, tablets, or other electronic equipment into the courthouse. An order must be obtained by filing an *ex parte* application with this Court. *Ex parte* applications seeking an order permitting electronic equipment are exempt from the meet-and-confer and declaration requirements under Civil Local Rule 83.3(g) and stated above.

B. Jury Selection

Unless authorized by the Court, parties should not submit jury questionnaires. The courtroom deputy will provide counsel with a list of the jury panel in random order before *voir dire*.

The courtroom deputy will seat all prospective jurors (22 prospective jurors will generally be summoned for civil cases). The Court will conduct the initial jury *voir dire*. In appropriate cases, the Court may permit follow-up *voir dire* by the attorneys.

Counsel will exercise peremptory challenges using the "Double Blind Method," whereby the parties simultaneously exercise their challenges.

After each side has exercised its peremptory challenges, the first eight persons not challenged peremptorily or successfully challenged for cause will constitute the jury. All remaining prospective jurors will be excused at that time.

C. Trial Exhibits

In preparing trial exhibits, the parties are directed to contact the Clerk's Office for exhibit stickers. Parties may create their own exhibit stickers as long as the stickers include the exhibit number and case number. Civil trials must only use numbers for identifying exhibits and not letters, unless otherwise ordered by the Court.

For a bench trial, the parties must submit a copy of the trial exhibits to chambers in an electronic-media format (e.g., USB flash drive) one day before trial is set to begin.

For a jury trial, the parties are responsible for bringing their trial exhibits to court on the day of trial. If the parties wish to deliver their trial exhibits before trial begins, they may do so upon making delivery arrangements when they contact the courtroom deputy in accordance with Section 13(A) to bring in any electronic equipment. If the parties choose to submit a courtesy copy of their trial exhibits for the Court, it must be submitted in electronic-media format (e.g., USB flash drive), especially if the exhibits are voluminous; courtesy paper copies will not be accepted.

The parties must also exchange their Final Exhibit and Witness Lists seven days before trial. They must also email a copy of their Final Exhibit and Witness Lists to chambers by the same date.

D. Trial Procedures

Trial generally proceeds from 9:00 a.m. to 4:30 p.m., Tuesday through Friday, unless the Court schedules otherwise. Jury deliberations also generally proceed from 9:00 a.m. to 4:30 p.m., unless the Court schedules otherwise.

In civil trials, it is the practice of the Court to set a reasonable time limit for the entire trial. The time limit set by the Court includes opening statements, arguments, testimony, closing arguments, and any other matters that occur over the course of the trial, excluding jury selection. The Court will keep track of time limits and, upon request, the courtroom deputy will inform the parties of the time spent and remaining for trial. The time limit is subject to exception for good cause shown.

Counsel and witnesses are expected to be present for trial except in case of an emergency. Lawyers must make every effort to have their witnesses available on the day they are to testify. The Court attempts to accommodate witnesses' schedules and may permit counsel to call them out of sequence if warranted. Counsel must anticipate any such possibility and discuss it with opposing counsel and the Court. Counsel must promptly alert the Court to any scheduling problems involving witnesses.

Do not enter the well, except during *voir dire*, opening statements and closing argument. Conduct all examination of witnesses from the podium. Seek permission from the Court before approaching a witness. Keep your visit to the witness stand brief, e.g., by quickly orienting the witness with an exhibit and returning to the podium. When objecting, state only the legal ground for the objection, e.g., "objection, hearsay." Speaking objections are not permitted, unless the Court requests further information from counsel. When a party has more than one lawyer, only one lawyer may conduct the examination of a given witness.

E. Bench Trial

Fourteen days before trial, counsel must serve and file proposed Findings of Fact and Conclusions of Law and an electronic copy of the proposed Findings of Fact and Conclusions of Law must be emailed to **efile_bashant@casd.uscourts.gov** in Word format.

14. Hearing / Trial Transcripts

The court reporter should *only* be contacted to order hearing or trial transcripts, or to ask transcript-related questions (e.g., inquiring about pricing). The court reporter should not be contacted for any other reason.

15. Courtesy

Be courteous and respectful at all times, in all settings. Counsel may expect such from the Court, and the Court expects such from counsel. Please be familiar with and abide by Civil Local Rule 2.1.

HONORABLE WILLIAM Q. HAYES
UNITED STATES DISTRICT JUDGE
CIVIL PRETRIAL & TRIAL PROCEDURES

The Court may vary these procedures as appropriate in any case. Counsel and pro se litigants must strictly adhere to all Court Orders. Unless otherwise ordered by the Court, counsel and pro se litigants are expected to follow the Federal Rules of Civil Procedure, the Local Rules for the Southern District of California, the Electronic Case Filing Administrative Policies and Procedures Manual, and any other applicable rules. The Local Rules and the Electronic Case Filing Administrative Policies and Procedures Manual are available on the Court's website: www.casd.uscourts.gov.

COMMUNICATION WITH CHAMBERS

Telephone calls to chambers are permitted only for scheduling or calendaring motion hearings or as otherwise authorized by the Court. Court personnel are prohibited from interpreting orders, discussing the merits of a case, or giving legal advice, including advice on procedural matters. Court personnel are prohibited from engaging in conference calls. Letters, faxes, and emails are prohibited unless otherwise authorized by the Court.

DISCOVERY

Counsel must contact the magistrate judge's chambers directly for all matters pertaining to discovery. Any objection to a discovery ruling of the magistrate judge must be filed as a motion pursuant to Civil Local Rule 7.1.

PROPOSED ORDERS

Proposed orders must be submitted in Word format simultaneously with all motions that are not fully noticed and set for hearing twenty-eight (28) days or more after the date of filing. In accordance with Section 2(h) of the Electronic Case Filing Administrative Policies and Procedures Manual, proposed orders must not contain the name and law firm information of the filing party, and must not contain the word "proposed" in the caption. Counsel must email proposed orders to opposing counsel and to the following address: efile_hayes@casd.uscourts.gov, and include the docket number and case name in the subject line of the email.

JOINT MOTIONS

Pursuant to Section 2(f)(4) of the Electronic Case Filing Administrative Policies and Procedures Manual, all stipulations must be filed as joint motions. Joint motions must be signed by the Court to have legal effect, other than stipulations signed by all parties that have appeared pursuant to Fed. R. Civ. P. 41(a)(1)(A)(ii).

Ex Parte Motions

The Court may rule upon ex parte motions without requiring a response from the opposing party. If a party intends to oppose the ex parte motion, the party must immediately file a notice stating that the party intends to oppose the ex parte motion and provide the date upon which the opposition will be filed.

Pretrial Motion Practice

Pursuant to Civil Local Rule 7.1(b), all dates for motion hearings must be obtained by calling the law clerk, but may be modified by the Court. The assigned date must appear on the front of the motion. The courtroom and time must not be indicated. After obtaining a hearing date from the law clerk, the party must file its motion within three (3) court days. A party who fails to file its papers within three (3) court days of obtaining the hearing date forfeits the assigned hearing date.

The Court may resolve motions on the papers and without oral argument, in accordance with Civil Local Rule 7.1(d)(1). Unless otherwise notified by the Court, the parties must include the following language on the front of their motions directly underneath the hearing date: "**NO ORAL ARGUMENT UNLESS REQUESTED BY THE COURT**." This serves as notice to the parties that there will be no personal appearances at the hearing. Any party may request oral argument. If the Court decides to hear oral argument, the Court will issue an order setting the matter for oral argument.

An opposing party's failure to file an opposition to a motion may be construed as consent to the granting of the motion, or may result in consideration of facts as undisputed, pursuant to Civil Local Rule 7.1(f)(3)(c).

The Court will take all motions under advisement on the assigned hearing date without notice to the parties.

All motions for summary judgment must be accompanied by a separate statement of undisputed material facts. Any opposition to a summary judgment motion must include a response to the separate statement of undisputed material facts.

Courtesy Copies

The Court does not require courtesy copies for filings less than 20 pages in length, including attachments and exhibits. Courtesy copies must be submitted in accordance with Section 2(e) of the Electronic Case Filing Administrative Policies and Procedures via United States Postal Service mail, courier, or delivery to chambers. The courtesy copy must contain the CM/ECF document header on the top of each page. The Court prefers courtesy copies to be printed double-sided, but will accept single-sided. Please bind courtesy copies on the top left corner only. Please do not use steel prong fasteners at the top. If a filing has more than three (3) exhibits, the exhibits must be tabbed and listed in a table of exhibits.

Tentative Rulings

Judge Hayes does not issue tentative rulings.

ELECTRONIC, AUDIO/VIDEO, AND OTHER EQUIPMENT

Parties may use courtroom technology as set forth in the "Courtroom Technology User Guide" document, available at the Court's website at the "Attorneys" tab under "Courtroom Technology." Parties may call chambers to schedule time to test the equipment at least seven (7) days before the hearing or trial.

For equipment other than that referenced in the Attorney User Guide, parties may request to use other equipment in the courtroom by filing a joint motion, or an ex parte motion if joint motion is not possible, at least seven (7) days before the hearing or trial and email a proposed order to the Court. The proposed order must itemize all equipment and list the dates when it will be used in the courtroom. The order must be presented to security personnel when the equipment is brought into the courthouse.

TELEPHONIC HEARINGS

Unless otherwise ordered by the Court, all oral argument must be attended by counsel in person, and will be heard in open court. If a telephonic hearing is allowed by the Court, counsel appearing telephonically are responsible for arranging the call and must email the Court the correct phone number and any dial-in information at least seven (7) days in advance of the hearing. Counsel must be available at least five (5) minutes prior to the scheduled hearing time.

PRETRIAL CONFERENCE

Pursuant to Civil Local Rule 16.1(f)(6), the Court requires that the parties file and email to Chambers a proposed pretrial order at least seven (7) days before the pretrial conference. The proposed pretrial order must include all elements set out in Civil Local Rule 16.1(f)(6)(c) and any other issues relevant to the trial. All parties are required to cooperate in completing the proposed pretrial order.

The Court will confirm the trial date during the pretrial conference. The Court will schedule a motion in limine hearing date during the pretrial conference. All motions in limine are due two weeks before the motion in limine hearing date. All responses are due seven (7) days before the motion in limine hearing date. Unless otherwise ordered by the Court, the joint proposed jury instructions, proposed verdict form, voir dire questions, statement of the case, exhibit binders and proposed verdict forms are also due seven (7) days before the motion in limine hearing date. The proposed jury instructions, proposed verdict form, and statement of the case must also be emailed to the Court in Word format.

EXHIBITS

Exhibit stickers may be obtained from the Clerk of the Court, in advance of the start of trial.

Exhibits are to be placed in three-ring binders separated by tabs. When convenient for witness testimony, parties may also use three-ring binders with relevant exhibits separated by witness. Unless otherwise ordered by the Court, the parties must provide two (2) copies of the exhibit binders to the Court seven (7) days in advance of the motion in limine hearing date.

TRIAL PROCEDURES

Trial generally proceeds from 9:00 a.m. to 5:00 p.m., Tuesday through Friday, unless the Court schedules otherwise. Jury deliberations generally proceed from 9:00 a.m. to 5:00 p.m., unless the Court schedules otherwise.

In civil trials, it is the practice of the Court to set a reasonable time limit for the entire trial. The time limit set by the Court includes opening statements, arguments, testimony, closing arguments and any other matters that occur over the course of the trial, excluding jury selection. The Court will keep track of time limits and upon request, the courtroom deputy will inform the parties of the time spent and remaining for trial. The time limit is subject to exception for good cause shown.

Counsel and witnesses are expected to be present for trial except in case of an emergency. Lawyers must make every effort to have their witnesses available on the day they are to testify. The Court attempts to accommodate witnesses' schedules and may permit counsel to call them out of sequence if warranted. Counsel must anticipate any such possibility and discuss it with opposing counsel and the Court. Counsel must promptly alert the Court to any scheduling problems involving witnesses.

Do not enter the well except during voir dire, opening statements, and closing argument. Conduct all examination of witnesses from the podium. Seek permission from the Court before approaching a witness. Keep your visit to the witness stand brief, i.e., by quickly orienting the witness with an exhibit and returning to the podium. When objecting state only the legal ground for the objection, i.e., "objection, hearsay." Speaking objections are not permitted, unless the Court requests further information from counsel. When a party has more than one lawyer, only one lawyer may conduct the examination of a given witness and that lawyer alone may make objections concerning that witness.

SETTLEMENT

If the parties settle a case, counsel must immediately notify the magistrate judge of the settlement. If the magistrate judge does not set a deadline for the filing of a "Joint Motion to Dismiss," the parties must file the "Joint Motion to Dismiss" and email a proposed order to this Court within twenty-eight (28) days of the settlement.

GENERAL DECORUM

All persons, whether observers, witnesses, lawyers, or clients must maintain proper decorum while in the courtroom. Counsel must rise when addressing the Court, when examining a witness, and, in jury trials, when the jury enters or leaves the courtroom.

Only water is allowed in the courtroom.

Updated 3/11/2021

HONORABLE GONZALO P. CURIEL
UNITED STATES DISTRICT JUDGE
CIVIL PRETRIAL & TRIAL PROCEDURES

Criminal matters contact:
Courtroom Deputy A. Sacco: (619) 557-5539

Civil matters contact:
Judge Curiel's Law Clerks in chambers: (619) 557-7667

Transcript requests contact:
Court Reporter: Chari Bowery (858) 822-8828

Location: Schwartz Courthouse - Courtroom 2D

These rules will help civil litigants appearing before Judge Curiel. Unless otherwise ordered by the Court, counsel and pro se litigants are expected to follow the Federal Rules of Civil Procedure, the Local Rules for the Southern District of California, the Electronic Case Filing Administrative Policies and Procedures Manual, and any other applicable rules. The Local Rules and the Electronic Case Filing Administrative Policies and Procedures Manual are available on the Court's website: http://www.casd.uscourts.gov.

COMMUNICATION WITH CHAMBERS

Telephone calls to chambers are permitted only for scheduling or calendaring motion hearings or as otherwise authorized by the Court. Court personnel are prohibited from interpreting orders, discussing the merits of a case, or giving legal advice, including advice on procedural matters. Letters, faxes, and emails are prohibited unless otherwise authorized by the Court.

DISCOVERY

Counsel shall contact the magistrate judge's chambers directly for all matters pertaining to discovery. Any objection to a discovery ruling of the magistrate judge must be filed as a motion pursuant to Civil Local Rule 7.1.

PROPOSED ORDERS

Proposed orders shall be submitted in Word format simultaneously with all motions, except motions that are fully noticed and set for hearing at least 28 days beyond the date of filing. In accordance with Section 2(h) of the Electronic Case Filing Administrative Policies and Procedures Manual, proposed orders shall not contain the name and law firm information of the filing party and shall not contain the word "proposed" in the caption. Counsel shall email proposed orders to opposing counsel and to the following email address: efile_curiel@casd.uscourts.gov, and include the docket number and case name in the subject line of the email.

JOINT MOTIONS/STIPULATIONS

Pursuant to Section 2(f)(4) of the Electronic Case Filing Administrative Policies and Procedures Manual, all stipulations must be filed as joint motions. Joint motions must be signed by the Court to have legal effect.

***EX PARTE* MOTIONS**

The Court may rule upon *ex parte* motions without requiring a response from the opposing party. If a party intends to oppose the *ex parte* motion, the party must immediately file a notice stating that the party intends to oppose the *ex parte* motion and providing the date upon which the opposition will be filed.

PRETRIAL MOTION PRACTICE

HEARING DATES

Motion hearing dates are generally set on **Fridays at 1:30 p.m.**

Pursuant to Civil Local Rule 7.1(b), all dates for motion hearings must be obtained by calling the law clerk before filing any motion. Motion papers **MUST** be filed and served *the same day* of obtaining a motion hearing date from chambers. A briefing schedule will be issued once a motion has been filed. The parties must obtain leave of Court by filing an ex parte request before filing any sur-replies.

The Court strongly encourages litigants to be mindful of opportunities for young lawyers to conduct hearings before the Court, particularly for motions where the young lawyer drafted or contributed significantly to the underlying motion or

response. Frequently, the Court will issue a written order and vacate the hearing unless oral argument appears to be necessary. If a written request for oral argument is made in the moving, opposition or reply briefs stating that an attorney with less than five years of experience after becoming a member of the California bar will argue the oral argument, then such a representation will weigh in favor of holding a hearing.

FAILURE TO OPPOSE

An opposing party's failure to file an opposition to any motion may be construed as consent to the granting of the motion pursuant to Civil Local Rule 7.1(f)(3)(c).

MOTIONS FOR SUMMARY JUDGMENT

All motions for summary judgment shall be accompanied by a separate statement setting forth **plainly and concisely** all material facts that the moving party contends are undisputed. Each of the material fact shall be followed by a reference to the supporting evidence. The parties should avoid using the separate statements as a means of presenting or repeating legal arguments that are or should be made in the memorandum of points and authorities in support of the motion for summary judgment. Separate statements assist the Court in identification of the material facts as well as pinpointing the evidence that proves those facts. The failure to comply with this requirement of a separate statement may in the court's discretion constitute a sufficient ground for denying the motion.

Any opposition to a summary judgment motion shall include a response to the separate statement that responds to each of the material facts contended by the moving party to be undisputed, indicating if the opposing party agrees or disagrees that those facts are undisputed. Each material fact contended by the opposing party to be disputed shall be followed by a reference to the supporting evidence. The statement shall also set forth any additional material facts that are pertinent to the disposition of the motion. The parties should avoid using the separate statements as a means of presenting or repeating legal arguments that are or should be made in the memorandum of points and authorities in opposition to the motion for summary judgment. Failure to comply with this requirement of a separate statement may in the court's discretion constitute a sufficient ground for granting the motion.

The separate statement must be in a two-column format with the moving party providing in numerical sequence the undisputed material facts in the first column followed by the evidence citation that establishes those undisputed facts. In opposition, the opposing party shall indicate in the second column whether the fact is "disputed" or "undisputed." If disputed, the opposing party must state in the second column, directly opposite the fact in dispute, the reasons for the dispute and cite the evidence that supports the position that the fact is controverted.

Absent leave of court, separate statements shall be limited to 15 pages and must comply with the font requirements of Civil Local Rule 5.1.

COURTESY COPIES

Courtesy copies of filings that exceed 20 pages in length, including attachments and exhibits, shall be submitted in accordance with Section 2(e) of the Electronic Case Filing Administrative Policies and Procedures via United States Postal Service mail, courier, or delivery to the Clerk's Office. The courtesy copy shall contain the CM/ECF document header on the top of each page. The Court prefers courtesy copies to be printed double-sided, but will accept single-sided. If a filing has more than three (3) exhibits, the exhibits must be tabbed.

SEEKING LEAVE TO FILE DOCUMENTS UNDER SEAL

There is a presumptive right of public access to court records based upon common law and first amendment grounds.[1] Even where a public right of access exists, such access may be denied by the court in order to protect sensitive personal or confidential information.[2] The Court may seal documents to protect sensitive information, however, the documents to be filed under seal will be limited by the

---

1 *See Nixon v. Warner Commc'n, Inc.*, 435 U.S. 589, 597 (1978); *Phillips ex rel. Estates of Byrd v. Gen. Motors Corp.*, 307 F.3d 1206, 1212 (9th Cir. 2002).

2 Although courts may be more likely to order the protection of the information listed in Rule 26(c) of the Federal Rules of Civil Procedure, courts have consistently prevented disclosure of many types of information, such as letters protected under attorney-client privilege which revealed the weaknesses in a party's position and was inadvertently sent to the opposing side, *see KL Group v. Case, Kay, and Lynch*, 829 F.2d 909, 917-19 (9th Cir. 1987); medical and psychiatric records confidential under state law, *see Pearson v. Miller*, 211 F.3d 57, 62-64 (3d Cir. 2000); and federal and grand jury secrecy provisions, *see Krause v. Rhodes*, 671 F.2d 212, 216 (6th Cir. 1982). Most significantly, courts have granted protective orders to protect confidential settlement agreements. *See Hasbrouck v. BankAmerica Housing Serv.*, 187 F.R.D. 453, 455 (N.D.N.Y. 1999); *Kalinauskas v. Wong*, 151 F.R.D. 363, 365-67 (D. Nev. 1993).

Court to only those documents, or portions thereof, necessary to protect such sensitive information.

Parties seeking a sealing order must provide the Court with: 1) a specific description of particular documents or categories of documents they need to protect; and 2) affidavits showing good cause to protect those documents from disclosure. Where good cause is shown for a protective order, the court must balance the potential harm to the moving party's interests against the public's right to access the court files. Any protective order must be narrowly drawn to reflect that balance. Any member of the public may challenge the sealing of any particular document. *See Citizens First Nat'l Bank of Princeton v. Cincinnati Ins. Co.*, 178 F.3d 943, 944-45 (7th Cir. 1999).

PRETRIAL CONFERENCE

Pursuant to Civil Local Rule 16.1(f)(6), the Court requires that the parties email to Chambers a proposed pretrial order in Word format at least seven (7) days before the pretrial conference. The proposed pretrial order must include all elements set out in Civil Local Rule 16.1(f)(6)(c) and any other issues relevant to the trial. The requirement to file a Memoranda of Contentions of Law and Fact, pursuant to Civil Local Rule 16.1(f)(2)(a), is waived. All parties are required to cooperate in completing the proposed pretrial order.

The Court will set a trial date and a motion in limine hearing date during the pretrial conference. Unless the Court orders otherwise, all motions in limine are due two weeks before the motion in limine hearing date. All responses are due seven (7) days before the motion in limine hearing date. The joint proposed jury instructions, trial briefs, proposed verdict form, *voir dire* questions, statement of the case, and exhibit binders are to be placed in a trial notebook, and are due seven (7) days before the motion in limine hearing date unless the Court orders otherwise. The proposed jury instructions, proposed verdict form, and statement of the case shall also be emailed to the Court in Word format.

TRIAL PRACTICE

ELECTRONIC EQUIPMENT FOR THE COURTROOM

The Court now has new audio/visual equipment for counsels' use. The courtroom has individual monitors at counsels' tables, the lectern, the witness box, and the jury box as well as a large 55" gallery monitor for public viewing. A document camera and a DVD/Blue Ray player are now available for use and can be connected to counsels' computers, laptops and tablets. HDMI and VGA video inputs are available at the lectern, witness box and counsels' tables.

Counsel are required to bring their own computers, laptops, tablets, HDMI or VGA adapters and wireless cards, if necessary. Counsel should contact the CRD for details and instructions and with questions regarding the use of equipment not provided for by the Court.

JURY SELECTION

The courtroom deputy will provide counsel with a list of the jury panel in random order before *voir dire*.

The courtroom deputy will seat all prospective jurors (20 prospective jurors will generally be summoned for civil cases). Unless authorized by the Court, parties should not submit jury questionnaires. The Court will conduct the initial jury *voir dire*. Counsel may propose questions to be posed to jurors during the court conducted *voir dire*. In appropriate cases, the Court may permit follow-up *voir dire* by the attorneys.

After *voir dire* of the entire panel has been completed, counsel may make any challenges for cause at side bar. If a challenge for cause is sustained, the excluded panelist shall remain in his or her seat for the time being.

Counsel will exercise peremptory challenges using the "Double Blind Method," whereby the parties simultaneously exercise their challenges.

After each side has exercised its peremptory challenges, depending on the estimated length of the trial, the first seven to nine persons not challenged

peremptorily or successfully challenged for cause shall constitute the jury. All remaining prospective jurors will be excused at that time.

<u>TRIAL PROCEDURES</u>

Trial generally proceeds from 9:00 a.m. to 5:00 p.m., Tuesday through Friday, unless the Court schedules otherwise. Jury deliberations generally proceed from 9:00 a.m. to 5:00 p.m., unless the Court schedules otherwise.

In civil trials, it is the practice of the Court to set a reasonable time limit for the entire trial. The time limit set by the Court includes opening statements, arguments, testimony, closing arguments, and any other matters that occur over the course of the trial, excluding jury selection. The Court will keep track of time limits and, upon request, the courtroom deputy will inform the parties of the time spent and remaining for trial. The time limit is subject to exception for good cause shown.

Lawyers must make every effort to have their witnesses available on the day they are to testify. The Court attempts to accommodate witnesses' schedules and may permit counsel to call them out of sequence if warranted. Counsel must anticipate any such possibility and discuss it with opposing counsel and the Court. Counsel must promptly alert the Court to any scheduling problems involving witnesses.

Do not enter the well, except during *voir dire*, opening statements, and closing argument. Conduct all examination of witnesses from the podium. Seek permission from the Court before approaching a witness. Keep your visit to the witness stand brief, e.g., by quickly orienting the witness with an exhibit and returning to the podium. When objecting state only the legal ground for the objection, e.g., "objection, hearsay." Speaking objections are not permitted, unless the Court requests further information from counsel. When a party has more than one lawyer, only one lawyer may conduct the examination of a given witness and that lawyer alone may make objections concerning that witness.

BENCH TRIAL

Seven (7) days before trial, counsel will submit proposed Findings of Fact and Conclusions of Law by hard copy and an electronic copy of the proposed Findings of Fact and Conclusions of Law shall be emailed in Word format to efile_curiel@casd.uscourts.gov.

SETTLEMENT

A. NON-CLASS ACTION SETTLEMENTS

If the parties settle a case, counsel shall file a "Notice of Settlement" and immediately inform the magistrate judge of the settlement. If the magistrate judge does not set a deadline for the filing of a "Joint Motion to Dismiss," the parties shall file the "Joint Motion to Dismiss" and email a proposed order to this Court within twenty-eight (28) days of the settlement.

B. CLASS ACTION SETTLEMENTS

1. PRELIMINARY APPROVAL

Proposed orders for preliminary approval of class certification and/or preliminary settlement approval must be supported by an affidavit and memorandum of points and authorities establishing that all Rule 23 statutory requirements have been satisfied, including the class certification factors and fairness factors, and should include information about the following:

INFORMATION ABOUT THE SETTLEMENT

a. If a litigation class has not been certified, any differences between the settlement class and the class proposed in the operative complaint and an explanation as to why the differences are appropriate in the instant case as well as any differences between the claims to be released and the claims in the operative complaint and an explanation as to why the differences are appropriate in the instant case.

b. If a litigation class has been certified, any differences between the settlement class and the class certified and an explanation as to why the differences are appropriate in the instant case as well as any differences between the claims to be released and the claims certified for class

treatment and an explanation as to why the differences are appropriate in the instant case.

c. The anticipated class recovery under the settlement, the potential class recovery if plaintiffs had fully prevailed on each of their claims, and an explanation of the factors bearing on the amount of the compromise.

d. The proposed allocation plan for the settlement fund.

e. If there is a claim form, an estimate of the number and/or percentage of class members who are expected to submit a claim in light of the experience of the selected claims administrator and/or counsel from other recent settlements of similar cases, the identity of the examples used for the estimate, and the reason for the selection of those examples.

f. In light of Ninth Circuit case law disfavoring reversions, whether and under what circumstances money originally designated for class recovery will revert to any defendant, the potential amount or range of amounts of any such reversion, and an explanation as to why a reversion is appropriate in the instant case.

SETTLEMENT ADMINISTRATION—The parties should identify the proposed settlement administrator, the settlement administrator selection process, how many settlement administrators submitted proposals, what methods of notice and claims payment were proposed, and the lead class counsel's firms' history of engagements with the settlement administrator over the last two years. The parties should also address the anticipated administrative costs, the reasonableness of those costs in relation to the value of the settlement, and who will pay the costs. The court may not approve the amount of the cost award to the settlement administrator until the final approval hearing.

NOTICE—The parties should ensure that the class notice is easily understandable, taking into account any special concerns about the education level or language needs of the class members. The notice should include the following information: (1) contact information for class counsel to answer questions; (2) the address for a website, maintained by the claims administrator or class counsel, that has links to the notice, motions for approval and for attorneys' fees and any other important documents in the case; (3) instructions on how to access the case docket via PACER or in person at any of the court's locations. The notice should state the

date of the final approval hearing and clearly state that the date may change without further notice to the class. Class members should be advised to check the settlement website or the Court's PACER site to confirm that the date has not been changed. The notice distribution plan should be an effective one.

Class counsel should consider the following ways to increase notice to class members: identification of potential class members through third-party data sources; use of social media to provide notice to class members; hiring a marketing specialist; providing a settlement website that estimates claim amounts for each specific class member and updating the website periodically to provide accurate claim amounts based on the number of participating class members; and distributions to class members via direct deposit.

The notice distribution plan should rely on U.S. mail, email, and/or social media as appropriate to achieve the best notice that is practicable under the circumstances, consistent with Federal Rule of Civil Procedure 23(c)(2). If U.S. mail is part of the notice distribution plan, the notice envelope should be designed to enhance the chance that it will be opened.

ATTORNEYS' FEES—The court will not approve a request for attorneys' fees until the final approval hearing, but class counsel should include information about the fees they intend to request and their lodestar calculation in the motion for preliminary approval. In a common fund case, the parties should include information about the relationship among the amount of the award, the amount of the common fund, and counsel's lodestar calculation. To the extent counsel base their fee request on having obtained injunctive relief and/or other non-monetary relief for the class, counsel should discuss the benefit conferred on the class. Counsel's lodestar calculation should include the total number of hours billed to date and the requested multiplier, if any. Additionally, counsel should state whether and in what amounts they seek payment of costs and expenses, including expert fees, in addition to attorneys' fees.

INCENTIVE AWARDS—The court will not approve a request for incentive awards until the final approval hearing, but the parties should include information about the incentive awards they intend to request as well as the evidence supporting

the awards in the motion for preliminary approval. The parties should ensure that neither the size nor any conditions placed on the incentive awards undermine the adequacy of the named plaintiffs or class representatives. In general, unused funds allocated to incentive awards should be distributed to the class pro rata or awarded to cy pres recipients.

CY PRES AWARDS—If the settlement contemplates a cy pres award, the parties should identify their chosen cy pres recipients, if any, and how those recipients are related to the subject matter of the lawsuit and the class members. The parties should also identify any relationship they or their counsel have with the proposed cy pres recipients. In general, unused funds allocated to attorneys' fees, incentive awards, settlement administration fees and payments to class members should be distributed to the class pro rata or awarded to cy pres recipients.

2. FINAL APPROVAL

CLASS MEMBERS' RESPONSE—The motion for final approval briefing should include information about the number of undeliverable class notices and claim packets, the number of class members who submitted valid claims, the number of class members who elected to opt out of the class, and the number of class members who objected to or commented on the settlement. In addition, the motion for final approval should respond to any objections.

ATTORNEYS' FEES—All requests for approval of attorneys' fees must include detailed lodestar information, even if the requested amount is based on a percentage of the settlement fund. Declarations of class counsel as to the number of hours spent on various categories of activities related to the action by each biller, together with hourly billing rate information may be sufficient, provided that the declarations are adequately detailed. Counsel should be prepared to submit copies of billing records themselves at the court's order.

INCENTIVE AWARDS—All requests for incentive awards must be supported by evidence of the proposed awardees' involvement in the case and other justifications for the awards.

3. POST-DISTRIBUTION ACCOUNTING

Within 21 days after the distribution of the settlement funds and payment of attorneys' fees, the parties should file a Post-Distribution Accounting, which provides the following information:

The total settlement fund, the total number of class members, the total number of class members to whom notice was sent and not returned as undeliverable, the number and percentage of claim forms submitted, the number and percentage of opt-outs, the number and percentage of objections, the average and median recovery per claimant, the largest and smallest amounts paid to class members, the method(s) of notice and the method(s) of payment to class members, the number and value of checks not cashed, the amounts distributed to each cy pres recipient, the administrative costs, the attorneys' fees and costs, the attorneys' fees in terms of percentage of the settlement fund, and the multiplier, if any.

In addition to the above information, where class members are entitled to non-monetary relief, such as discount coupons, debit cards, or similar instruments, the number of class members availing themselves of such relief and the aggregate value redeemed by the class members and/or by any assignees or transferees of the class members' interests. Where injunctive and/or other non-monetary relief has been obtained, discuss the benefit conferred on the class.

Within 21 days after the distribution of the settlement funds and award of attorneys' fees, the parties should post the Post-Distribution Accounting, including the easy-to-read chart, on the settlement website.

The Court may hold a hearing following submission of the parties' Post-Distribution Accounting.

THE PATH TO SUCCESS IN MOTION PRACTICE[1]

By Anthony J. Battaglia, United States District Judge © 2010

Motion practice is an extremely important part of your law practice. Good motion practice will lead to the just, speedy and efficient resolution of issues and cases. You are going to file and argue more motions in your career than file trial briefs and conduct trials. More of your cases will be disposed of by motions, either directly or through post-motion settlement, than by trial. Motions also serve as a great opportunity to hone your advocacy skills for those far and few between trials that you will get and they are intellectually challenging and stimulating, i.e., fun.

Motions come in various forms. From the formal, the oral, the ex-parte, to the in limine. There are a set of core principals that lead lawyers to success. These are of keen interest to new lawyers, and are often ignored or abused by experienced lawyers, but a necessity for success. Here they are:

1. **Know the rules, including the federal, local, chambers, and the rules of professional conduct.** Read them often. They change periodically, so keep current. A failure to comply with the rule can lead to losing the motion, sanctions and, of course, embarrassment. How else will you find out how to get a hearing date, timing for submissions, what font size and style you should use, page limits, how to handle exhibits, and the standard of review for the issue (to name a few things)?

2. **Read every order in your case carefully.** Each judge has different expectations, requirements and desires (substantively, stylistically and procedurally) and they are typically buried inside an order issued in the case. Read them carefully, and don't assume that the judge does the same things, the same way on each occasion. They don't! Read each one you get.

---

[1]Originally published in "For the Record," the Newsletter of the Young/New Lawyers Division of the San Diego County Bar Association, Spring 2010. In 2011, the author was confirmed by Congress as a United States District Judge. The article has been edited over time.

3. **Meet and confer on discovery and other motion related disputes.** This could also be entitled "communicate, don't just talk." Meet and confer requirements are present in the rules (including those on professionalism) and in many court orders. They are designed to help the lawyers discuss the issues, and possibly settle them informally, or at least narrow them for adjudication. This makes the process efficient and expeditious, and judges will appreciate your efforts. Lawyers don't do this enough, they talk, but they don't communicate. You will find that through the communication process, you will have less of a need for the often unnecessary motion work that plagues us all. At hearings, I frequently hear, "judge, if I only knew that's what they wanted, I would have produced it." Get the picture? And, don't despair, you will get plenty of opportunities for the motions that really count, but realistically, you won't waste time and money on needless disputes and you will enjoy your practice more.

4. **Meet and confer in the truest sense of the words.** Pick up a telephone or set a meeting. You cannot resolve issues by e-mail, letter or fax (and don't send copies of your correspondence to the court unless we ask for it). Use written transmissions to confirm agreements, set agendas, or outline issues, of course. But, in the end, you need a real time conversation (and I don't mean instant messaging or tweeting) to be effective!

5. **When it comes to discovery disputes be earnest and reasonable in your demands and agreements.** Seek what you really need. Remember what's discoverable and what's admissible are two different things. In deposition practice, follow Rule 30's restrictions on objections and instructions not to answer. These will be key points in any motion regarding the deposition.

6. **Remember, it is easier to get permission than to get forgiveness.** Before a deadline runs, ask for an extension or for a continuance. It is much more difficult to get forgiveness than permission and the equities and context change when you are in default on some deadline. Equally important, when asked, be reasonable and accommodating whenever you can. Remember, what goes around, comes around. It may seem like a zealous thing to do by saying "no" to an opponents request for an extension, but on most occasions, the

court is going to grant reasonable extensions and continuances. All you will get is a sullied reputation and relationship with your opponent. More importantly, what are you going to do when you are the one who needs the extension on this or some other case? Trust me, everyone needs some slack at some time, and if your reputation is "hold them to the line," you're going to find a lack of cooperation when you need it. It's basic human nature.

7. **In court, be on time.** In fact be early. Take in the surroundings, relax, collect your thoughts! You really don't want to start your argument with "I'm sorry judge, but . . . ."

8. **Always be prepared.** As Mark Twain once said, "It takes me about three weeks to write an impromptu speech." Don't take short cuts or wing it! Know what you know and what you don't know and be candid about the latter.

9. **Know your audience.** You are going to be addressing a busy judge, and your written and oral comments need to take that in mind. In other words, you are not writing for the law review or arguing in a moot court exercise. If the judge has particular idiosyncracies or practices, you need to be aware and comport yourself accordingly. (Remember those chambers rules!) You can pick those up sometimes by showing up early and watching others on calendar before you. You can also learn a lot by asking your colleagues.

10. **Speak up, be succinct, be civil, and don't call your opponent names.** Get to the point, acknowledge your weaknesses and be gracious in your victories and your defeats. Judges never forget a bad sport!

11. **Answer the judge's question directly.** They are asked for a reason, so . . . the questions are real important! Don't say, "I'll get back to that," or "first, let me say . . .," or dance around the question, or worse yet, ignore it!

12. **Avoid jargon, and legalese in speaking and writing.** Examples include, "with all due respect," "assuming arguendo," and the use of terms like, "clearly," and "honestly" which, in court, are often

perceived to mean the opposite of what they mean.

13. **Be succinct in your briefing.** Why do you think they call it a "brief." Justice Roberts has said he has never finished reading a brief and thought, "I wish it was longer."

14. **State the burden, explain why you met it and, therefore, why you should win.**

15. **Minimize footnotes.** Some judges don't read them. Honestly! If it is an important point it should be in the body of the document.

16. **Watch the block quotes.** Select just enough of a quote in context so the point stands out.

17. **Watch the string cites.** Cite the most important case or two, and be sure they are on point. The Judge reads all of them and if there are too many and they really are not on point it will come back to haunt you.

18. **Be careful with pronouns.** Legal writing must be precise! Be repetitive instead of creating ambiguity through pronouns. Whenever there's pronoun ambiguity in a sentence and it's unclear which of two (or more) possible subjects the pronoun is referring to, the simplest fix is to simply restate the correct subject (noun) rather than using a pronoun.

19. **Proofread, proofread.** Spell check won't always save you (it's trial, and not trail).

20. **Practice, practice, practice!** Few of us are natural born public speakers. You need to practice. Never pass on a chance to make an argument or a public introduction, presentation or speech. The more you do it, the better you will get. Use your family, friends and staff, use your mirror . . .You will become more poised and persuasive which will help you in court.

Okay, there are really more than twenty tips here, because I have combined several thoughts under many of the items that went hand in hand. But, it is a succinct enough list that, if followed, will get you through your day to day practice

effectively and efficiently, and should lead you to win all the motions that you should!

articles/path to success in motion practice.