

## Motions

A motion is a mechanism by which a party can ask a court for some relief. Motions encompass a wide variety of relief requests. Motions can request things as small as extensions of time in which to file a brief with the court or can ask for something as significant as summary judgment in the case. Motions can sometimes be made orally to a court, but more complex and significant motions generally must be made in writing.

When a motion is made in the middle of a trial or proceeding, the formalities can often be dispensed with. However, we will discuss motions that are made outside the context of the trial and thus require the appropriate formalities.

While motions and motion practice can vary from state to state and court to court, there are certain basic steps that must be completed in the course of filing most motions:

1. Notice of Motion. The notice of motion, sometimes simply called a “motion,” gives notice to the other party in the court that you will be seeking relief. It also must describe the relief that is being sought.
2. An Affidavit or Memorandum in support of the motion. Unless the grounds for relief are self-explanatory, the party seeking relief must make an argument to the court as to why the motion should be granted. In some jurisdictions, this is done by affidavit, which is a sworn statement by the attorney who is filing a motion. A memorandum in support of the motion satisfies the same function, but is not a sworn statement. Whether an affidavit or memorandum is required varies from court to court. Either one will set forth the relevant facts and legal arguments in favor of the motion. Unlike the complaint and answer, this document must be legally persuasive and should be backed up by appropriate citation to applicable law and evidence, if applicable.
3. Proof of Service. A proof of service shows that the motion has been served on the other party. Unlike a complaint, which has very strict service requirements, motions can often be sent by e-mail, fax or US mail. Again, precise rules may vary from jurisdiction to jurisdiction. Proof of service can usually be satisfied with an affidavit by the attorney filing the motion or a member of his or her staff, attesting to the fact that the motion documents were sent to the other side.
4. If there is evidence to support the motion, including affidavits from witnesses or other parties or other relevant documents, they should be attached to the motion.
5. The motion must be filed with the court with the accompanying affidavit(s) and proof of service.

You can ask for multiple types of relief in the same motion.

After the court receives the motion, the clerk of the court will get back to both parties to set a date by which the motion must be responded to. Whether the initial movant (party making the motion) is allowed to submit rebuttal papers to counteract the other party's defense is up to the judge. Oral arguments on the motion may also be set at the discretion of the judge.

In our example, we are just past the pleadings stage. So, let's look at an example of a motion that would normally be filed after the pleadings. The Federal Rules of Civil Procedure, in Rule 12, specify several different possible motions that may be used to attack the sufficiency of a complaint. One of the grounds for a potential motion to dismiss is a "failure to state a claim upon which relief can be granted" under Rule 12(b)(6). This is the one we will use, and we will set it up as a motion filed by the plaintiff, Bernie, to dismiss the counterclaim for intentional infliction of emotional distress.

We will start with the same caption as appears on the pleadings, stating that this document is a notice of motion.

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

-----X

BERNIE SMITH,

NOTICE OF MOTION TO DISMISS

*Plaintiff*

- versus -

TOMMY JONES,

Case Number: 12-34567

*Defendant*

-----X

Having the same case number as the previous documents filed in this case will allow this to be filed appropriately by the court staff.

The notice of motion documents is exceedingly simple and may say something like this:

*Please take notice that, based on the arguments set forth in the attached affidavit, the undersigned will request of this court, on the \_\_\_ day of \_\_\_\_\_, 201\_\_, or as soon thereafter as counsel can be heard, the following relief:*

- 1. Dismissing count two of defendant's counterclaim filed in his answer dated \_\_\_\_\_ for failure to state a claim upon which relief can be granted under Federal Rule of Civil Procedure (12)(b)(6).*
- 2. Such further relief as the court deems just and proper.*

The accompanying affidavit or memorandum lays out the reasons that the relief should be granted. This is similar to any memorandum that accompanies any request to a court. In our case, the relief sought is relatively simple and so the accompanying affidavit will be short and to the point. It should specify the basic facts and legal argumentation that the relief is appropriate.

Let's start with the same basic caption.

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

-----X

BERNIE SMITH,

Plaintiff

AFFIDAVIT IN SUPPORT OF

MOTION TO DISMISS

- versus -

TOMMY JONES,

Case Number: 12-34567

Defendant

-----X

The affidavit itself can be a numbered paragraphs or in standard memo form. We will use numbered paragraphs below. Either way, it should contain legal argumentation along with appropriate citation and reference to attached supporting documentation, if any.

*I, JOHN DOE, being duly sworn, depose and say:*

- 1. I am an attorney duly licensed to practice law in the state of California.*
- 2. I represent Bernie Smith, the plaintiff in the above entitled action.*
- 3. The defendant's answer in the above entitled action alleges a counterclaim against the plaintiff for intentional infliction of emotional distress ("Count 2").*
- 4. Count 2 is based solely on the allegation that the plaintiff yelled insults at the defendant.*
- 5. Under California law, an allegation of "outrageous conduct" is necessary to sustain a cause of action for intentional action of emotional distress. Agarwal v. Johnson, 25 Cal. 3d 932 (Cal. Sup. Ct. 1979). Under this standard, "mere insulting language, without more, does not constitute outrageous conduct" and "liability does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities . . . . There is no occasion for the law to intervene . . . where some one's feelings are hurt." Id. at 946.*
- 6. Moreover, "[e]xtreme and outrageous conduct is conduct which goes beyond all possible bounds of decency so as to be regarded as atrocious and utterly intolerable in a civilized community" and is "not mere insults, indignities, threats, annoyances, petty oppressions or other trivialities." "All persons must necessarily be expected and required to be hardened to a certain amount of rough language and to occasional acts that are definitely inconsiderate and unkind." Godfrey v. Steinpress, 128 Cal. App. 3d 154, 178 (Cal. App. 1982).*
- 7. Count 2's allegations, even if true, allege only that the plaintiff, at most, insulted and behaved rudely towards the defendant. These amount to mere insults that do not satisfy the definition of "extreme and outrageous conduct" under California law.*

8. Therefore, Count 2 of the defendant's counterclaim should be dismissed under FRCP R. 12(b)(6) because it fails to state a claim upon which relief can be granted.

\_\_\_\_\_  
*John Doe*

*Affirmed to me this \_\_\_\_ day of \_\_\_\_\_, 201\_\_.*

\_\_\_\_\_  
*Notary Public*

Note that the document should be notarized like any other affidavit. If the court does not require an affidavit, then a memorandum can be written instead. It can take the same form, need not be notarized.

Under FRCP Rule 5(b), a motion can be served in person, by leaving it at the attorney's office, by mail or by sending it by electronic means if the person consented in writing to receive the motion in this manner. You can e-mail a motion to the opposing party in PDF form, but should make sure to request that the opposing counsel reply to acknowledge receipt and consent to service in this manner. While nothing in the federal rules specifically requires attorneys to accept service by e-mail, unreasonable failure to accept such will not only annoy opposing counsel, but could annoy the judge as well.

Before sending the motion to the court clerk, the movant should prepare an affidavit of service. Like the notice of motion, this is a simple document and may look something like this.

*UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA*

-----X

*BERNIE SMITH,*

*Plaintiff*

*AFFIDAVIT OF SERVICE OF*

*MOTION TO DISMISS*

*- versus -*

*TOMMY JONES,*

*Case Number: 12-34567*

*Defendant*

-----X

*I, JOHN DOE, depose and say:*

1. *I prepared the attached notice of motion and accompanying affidavit.*

2. *I served the accompanying notice of motion and accompanying affidavit upon JANE SMITH, the counsel for the plaintiff, by e-mailing both documents in a PDF file to JANE SMITH's e-mail address on [date].*
3. *I received an e-mail from JANE SMITH on [date] acknowledging that she received the e-mail and consenting to be served by this method.*

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*John Doe*

*Affirmed to me this \_\_\_\_ day of \_\_\_\_\_, 201\_\_.*

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*Notary Public*

When filing papers for the first time in a given court, it is important to either speak to somebody who is familiar with the procedures expected in that court and/or to speak to the clerk of the court to ensure that you follow the rules applicable to that court. Some judges even have their own written set of rules that are unique to that particular court. These may apply to filing procedure, time limitations, hours or days during which motion should be filed or even seemingly trivial issues such as paper type, margins and fonts. The idiosyncrasies that may apply to individual courts make it essential to become familiar with expectations of that particular judge. One five-minute phone conversation with the court clerk can save a lot of aggravation later on.