



Opposition to motions: Getting the mechanics right

The devil is in the details!

By MICHAEL MORTIMER

Having written and argued 800 or so oppositions to motions over the years, I have developed an effective technique that I always follow. My technique might best be described as “habit” or doing things by rote.

This article will deal with what I call the logistics or mechanics of opposing a motion. In subsequent articles I will provide my top tips of what to do and not do when opposing a defendant’s motion.

Calendaring

When a motion arrives in my office *the first thing I do* is to *immediately* determine WHEN opposition papers must be filed. I check every source that might dictate when papers shall filed. I leave no stone unturned.

Usually, this involves my checking the Rules of Civil Procedure, Rules of Court, Local Rules and court orders. I also have a business calendar that shows every obscure holiday and I also check for information on the applicable court’s Web site.

Here are some reasons why you need to spend 30 minutes on calendaring as soon as the envelope arrives from opposing counsel:

• Federal Court

Check the district court’s local rules. Also read the federal judge’s standing orders. Local federal courts and federal judges often have filing deadlines and procedures that are different than the

FRCP [Federal Rules of Civil Procedure.] Sometimes judges in the same district have different rules!

Keep in mind that federal procedure rules regarding deadlines are totally different than what you may be used to in state court. Look up FRCP rules on how much notice one is entitled to give in order to bring a summary judgment motion and you will see what I mean.

• State Court

Generally, state courts cannot impose any rule that makes filing requirements stricter or more stringent than what is dictated in the Code of Civil Procedure. So unlike Fed court where one must not only check the FRCP, the Local Rules and a judge’s standing orders, in state court you can just rely on the Code to calculate filing deadlines. However, you should always check the local rules to determine the clerk’s window hours, since operating hours are not the same in every court.

Warning: Always check the clerk’s window hours for the day and hour you intend to file your papers. With budget cutbacks, some clerk windows are closed on specified days or operate at reduced times, such as closing at 3:00 p.m. instead of 5:00 p.m.

Once I have figured out the filing deadlines, I immediately write that information in my calendar, PDA, smart-phone and reminder programs. I also plaster Post-It note reminders with this information everywhere.

Bonus Tip: I also send myself an e-mail with this information, so I have it handy. I also e-mail myself detailed information on how a motion was served (whether it was by mail, personal service, etc.) and the date indicated on the proof of service and NOT the date I received the papers. I send this information in an e-mail so that when I feel paranoid I can check and recheck a filing deadline.

Warning: If your staff is sharper than the sharpest pencil in the box, you can rely on them to attend to all of the above. But I would still require staff to provide me with printouts of court Web pages, civil procedure rules, judges orders, etc. so that I can see how they determined the filing deadline. After all, if you blow the deadline, it’s your head and not theirs.

Organization

On the day I receive the motion, I immediately organize things so that I am better able to deal with the inevitable rush and panic that occurs because I waited until the last minute to start writing opposition papers. To that extent I:

• Create electronic folders

On my PC, within Windows Explorer (in what we used to call file manager) I create a file folder and subfolders. I will name the main folder, for example, “Summary Judgment Motion” and the subfolders as “Pleadings,” “Research,” “Exhibits” and “Opposition Papers.” From time to time, I place relevant materials into these folders.



• Scan, convert, label

I then use the office scanner to scan and convert the moving papers into digital PDF format. After placing the pleadings into my computer's "Opposition Papers" folder, I print out a copy of each document. On the first page of each document I write "working copy" (e.g., Pts. and Auth.; Decs; Exhibits.) I do this to differentiate my working copies from the moving party's original papers. Sidenote: I write "Original" on Post-It notes and place one note on each of the moving party's original items, so I know not to put any marks or notations on the originals.

• Download all porn

I used the word "porn" to get your attention. Did it work? A major finger-wag at you if it did. Anyway, what I mean by this is that you should download from Lexis or Westlaw all the cases that the moving party cited in their points and authorities. Download every case to your computer in Word format. Place the cases into your "Research" subfolder.

Bonus tip: You want the downloaded cases in a Word "doc" format because this enables you to copy text from the case and paste the language into your pleadings. If cases are in Word format, you can skip having to manually type text into your pleading.

Bonus Tip: Name each case as follows: "R Smith v Jones - venue." The "R" stands for "research." By putting an "R" as the first letter you can later easily identify and sort the files. Inserting the name of the case in the title makes it easy to find later. Having a few words about the main issue in the case is handy when you are later looking at a list of 50 cases to find the one you need that you need to reference.

Bonus Tip: Print out the main or critical cases. At the top of the first page, label who cited the case (you or the opposing party) and also write a sentence explaining the main issue and holding of the case. Put the printed cases into a file folder for easy reference later, espe-

cially at the hearing, where the court may ask about the specifics of a case. It's handy to grab your research folder and refer to the case the judge is inquiring about.

• OCR

OCR stands for "Optical Character Recognition." After I scan the moving party's papers (typically into Adobe PDF format), I then OCR the relevant sections of the party's points and authorities into Microsoft Word format. I also usually scan the declarations the moving party has submitted and OCR those into Word format too.

The reason I OCR the moving papers is so that I can copy and paste the now-converted-to-Word text into my opposition papers. For example, I might say, "Defendant argues in his moving papers that '[entire quote inserted here]' and further in his papers that '[entire quote here].'" However, while Defendant's argument has superficial appeal, it breaks down on closer examination."

Converting declarations through the OCR process is handy when formulating evidentiary objections to the moving party's proffered evidence. Drafting objections is super-fast if all you have to do is copy and paste the declarant's testimony on the left side of the two-column pleading paper and make your objection on the right side. Again, this process saves you from a lot of typing you would otherwise have to do.

Bonus Tip: The two-column format, with the objected-to evidence on the left and your objection on the right, is a required format as set forth in the California Rules of Court. An alternative is to object in paragraph format, meaning in the first paragraph you state the objected-to evidence, followed by your objection in the next paragraph. However, in my view, the column format is easier for judges to follow and it looks more professional.

Bonus Tip: To make it easy to find the defendant's documents that you have converted into Word format, start the

name of each document with the letters "OCR." For example, "OCR Points and Authorities Smith." Labeling the electronic files this way makes it easy to sort or find documents, especially when you have four or five documents open in Word at one time. In this example "Smith" is the case name. Putting the case name in all files is helpful in case you ever misplace a document (easy to do when opposing a summary judgment motion.) You can just use the Windows search feature to find all documents with Smith in the file name.

Regardless of which format you choose, "OCRing" the moving parties papers saves a lot of typing time by you or your staff. It also prevents transcription errors.

Filing mechanics

There are a few "ministerial" acts you must pay attention to when preparing to oppose a motion. Some acts are required formalities, others are common sense techniques to make sure everything that is required to be filed actually makes it to the courthouse clerk.

• Post-It Note checklist

I always write a checklist on a Post-It of all the papers that must be included for filing. I do this because when I am in a rush, it is very easy to leave out an item when inserting documents into an envelope to be given to the courier for filing. My Post-It note list typically includes:

- Points and authorities;
- Declarations, each declaration by witness name;
- Exhibits;
- Lodged cases notice;
- Objections;
- Number of copies required to be filed;
- Proofs of service.

I refer to this Post-It checklist at the time the papers are being compiled and inserted into the envelope for the trip to the clerk's office. By the time the envelope is picked up by the courier, I will have triple-checked that all items are inside the envelope. This check, recheck



and check again procedure assures that nothing is fatally omitted from the filing.

Federal Court

If you are used to state court procedure, failing to adhere to federal filing details can land you in the sewers of Paris quite quickly. Here are some tips that will prevent this from happening.

• Federal Rules and Orders

I ALWAYS check the federal court local rules and a judge's standing orders to learn how filings are to be handled. For example, everyone knows that most judges require "chambers copy" of all documents to be delivered directly to the judge. This is a federal judge's "standing order" that is frequently forgotten, especially by attorneys used to litigating in state court.

A "chambers copy" for certain judges might mean that (1) each pleading is marked "Chambers Copy – Do Not File" on the caption page; (2) if the pleadings are placed in an envelope, the envelope must be labeled "Chambers Copy – Do Not File;" and (3) usually by the next

court day by an order or rule-specified deadline, the Chambers Copy is delivered to either the main clerk's window or directly to the judge's clerk, depending on how the judge wants it handled.

• Federal filing deadlines

I also note the actual time of day that a document must be filed. For example, in federal court where all cases are now handled electronically (via the Net and/or e-mail), the standard rule is that pleadings can be filed until 12:00 midnight. Before you celebrate this seemingly generous filing deadline, keep in mind that local court rules or a judge's standing orders may require a filing to be completed at an earlier hour, e.g., 4:00 p.m. Check this out ahead of time rather than assume the deadline is 12:00 midnight.

• Light reading

Usually on the day I have received the moving papers, I quickly read the material first page to last. I might make a few notes, but typically I don't.

This is because my "light reading" is to get an overall feel of the papers and to see if there are any surprises that jump

out at or horrify me (e.g., "The 1995 Supreme Court decision renders Plaintiff's 2008-pled cause of action and entire case moot, shows the complaint should not have been filed, that Plaintiff's case should be dismissed with prejudice and that Plaintiff counsel should be sanctioned \$25,000 for his being such a dumb ass.")]

Conclusion

Dealing with motion logistics takes time. Don't wait until a few days before the opposition is due to deal with all this. It is far better to get this stuff out of the way the day the motion is served by opposing counsel.

Moreover, and perhaps more critical, you won't "blow the statute" if you determine on day one what the filing deadline is for your opposition papers. The stuff that lawyer nightmares are made of is finding out the day before you think your papers are due that they were in fact due yesterday or that the court is closed the day you intend to file your opposition.