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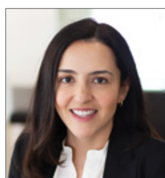
HANDLING UNEXPECTED SITUATIONS AT A HEARING OR TRIAL

A diligent attorney can prepare exhaustively for a court hearing or trial only to have an unexpected issue arise at the proceeding that leaves the attorney feeling ill-equipped to handle the situation. Although attorneys cannot anticipate every potential issue they may encounter in court, they can take certain steps to effectively prepare for a proceeding, deal with any unexpected turn the proceeding takes, and communicate with opposing counsel and the court to get the proceeding back on track.



ROSSANA ARTEAGA-GOMEZ
PARTNER
AXS LAW GROUP PLLC

Rossana practices civil litigation and criminal defense in both federal and state courts. She is an experienced trial attorney, having tried many cases to verdict. In addition to her criminal defense practice, Rossana's experience includes litigating general business disputes, unlawful competition claims, tortious interference claims, employment disputes, and a variety of individual and business tort claims.

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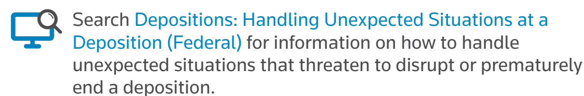
Any number of unexpected situations may arise at a court hearing or trial that can thwart an attorney's presentation or strategy. For example, a judge who typically does not ask questions during a hearing may be particularly interested in the current motion and ask the attorney many questions, or a witness who was supposed to appear to testify may fail to do so because the witness has an emergency or ignores the subpoena.

Regardless of the particular situation, an attorney may be best able to handle unexpected issues if the attorney has a thorough understanding of the facts and issues involved in the proceeding. The more comfortable the attorney is with the subject matter of the hearing or witness examination, the more capable the attorney may be of remaining calm and thinking clearly to address any new issues.

Nevertheless, unforeseen circumstances can rattle even the most well-prepared attorney during a litigation proceeding. This article provides guidance on key steps attorneys can take and best practices they can apply to help prevent or properly address unanticipated issues in litigation, such as when:

- A witness is unclear on logistical matters.
- The judge wants to discuss a motion that is not set for hearing that day.
- The judge sets a deadline at a hearing that the attorney knows cannot be met.
- The judge has a potential conflict of interest.
- A witness who was expected to attend does not show up to a proceeding.
- A witness who was not expected to attend shows up to a proceeding.
- A witness strays off topic while testifying.
- The judge asks the attorney to discuss a case that the attorney does not recall.
- Opposing counsel turns over numerous documents for the first time at an evidentiary hearing.
- The litigants experience technological issues.



Search Depositions: Handling Unexpected Situations at a Deposition (Federal) for information on how to handle unexpected situations that threaten to disrupt or prematurely end a deposition.

A WITNESS IS UNCLEAR ON LOGISTICAL MATTERS

Some problems, such as a witness showing up late for a hearing, are easily avoidable if an attorney takes proactive measures. For example, the attorney should take extra precautions well before a hearing or trial date to ensure that each witness is fully informed of:

- **The time and place of the proceeding.** The attorney should remind the witness in writing of the date, time, and location of the evidentiary hearing or trial and provide directions on how to get to the location.
- **The courthouse rules.** The attorney should explain the rules regarding what items visitors are not permitted to bring inside the courthouse, such as cell phones or food. Making the witness aware of these rules beforehand allows the attorney to:
  - help the witness make any necessary adjustments (such as leaving the witness's cell phone inside the car's glove compartment and making sure to eat a large breakfast that day); and
  - become aware of and avoid other problems that might arise (for example, if the attorney learns that the witness has a medical condition that requires her to eat at a certain time, the attorney can file a motion with the court beforehand asking for an order allowing the witness to bring in food, which also serves to notify the judge that the witness may need to take a break at a certain time to accommodate the witness's medical issues).
- **The courthouse security measures and potential entry delays.** The attorney should tell the witness to arrive at the courthouse fifteen to thirty minutes early to allow enough time to get through security and avoid being late. This is particularly important where:
  - the courthouse requires visitors to show their identification and saves each visitor's information in a database; or

IN SOME CIRCUMSTANCES, HOLDING A HEARING ON A MOTION THAT IS NOT NOTICED MAY CONSTITUTE A VIOLATION OF DUE PROCESS.

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LOGISTICS CHECKLIST

To prevent delays and ensure a smooth start to a litigation proceeding, an attorney should provide witnesses and support staff with a checklist advising them to:

- Mark the date, time, and location of the proceeding in their calendar.
- Note the judge's name and courtroom number.
- Print out directions to the courthouse.
- Bring identification, such as a driver's license, passport, or other government-issued identification.
- Leave electronics, such as cell phones, tablets, or laptops, in the car or at home.
- Eat before coming to the courthouse and avoid bringing beverages or food into the courthouse.
- Arrive fifteen to thirty minutes early.
- Wear appropriate courtroom attire. The attorney should discuss wardrobe specifics with each party, witness, and support staff based on local custom and practice, the judge's rules, and the image the attorney wishes each individual to project. For example, some judges may have written or unspoken rules about attire requirements in their courtroom that attorneys who practice in that court should know. Further, in some cases, an attorney may want a witness to dress a certain way to convey an image that helps support the attorney's case.

The attorney should make sure to update the checklist as courthouse rules change or as other issues come up to help prevent those issues from occurring again in the future.

- the proceeding is a trial with many witnesses or starts on a day of the week when the courthouse tends to be busier.

- **The appropriate attire for court.** The attorney should advise the witness on what constitutes appropriate courtroom attire, rather than assume the witness knows what to wear.

The attorney should consider reducing some of the key points discussed above to a handy checklist that the attorney can share with witnesses, as well as with support staff who can help the attorney coordinate with the witnesses, to make sure everyone remembers what they must do on the day of the proceeding (see *Box, Logistics Checklist*).

THE JUDGE WANTS TO DISCUSS A MOTION NOT SET FOR HEARING

When an attorney appears in court to argue a motion, the judge may decide to proactively move the case forward by also addressing another filed motion that the attorneys or the court have not noticed for hearing on that day. Attorneys in this situation may worry that they are not ready to discuss the motion.

In some circumstances, holding a hearing on a motion that is not noticed may constitute a violation of due process (see *Jenner v. McDaniel*, 123 F. App'x 900, 905 (10th Cir. 2005) (explaining that "[w]hen a plaintiff claims denial of due process, the court inquires into the nature of the individual's claimed interest 'to determine whether due process requirements apply in the first place'") (citing *Bd. of Regents v. Roth*, 408 U.S. 564, 570-71 (1972))). Whether a hearing violates due process depends on whether there is an applicable rule affording the litigant an opportunity for a hearing in the first place and what constitutes notice under the circumstances of the case. For example, if an attorney has filed a motion under a statute or rule that entitles the client to a hearing, the attorney has a stronger argument that conducting the hearing without prior notice violates due process and deprives the client of a meaningful opportunity to be heard. (See, for example, *In re Malek*, 591 B.R. 420, 427-28 (Bankr. N.D. Cal. 2018) (determining whether the underlying statutory provision required a hearing and explaining that notice is "a flexible concept" and "[w]hat will constitute sufficient notice will vary depending on the particular circumstances presented in each case").)

In criminal actions, conducting a hearing without notice can result in a violation of the client's Sixth Amendment right to counsel (see *Morris v. Slappy*, 461 U.S. 1, 11-12 (1983) (explaining that "an unreasoning and arbitrary 'insistence upon expeditiousness in the face of a justifiable request for delay' violates the right to the assistance of counsel") (citing *Ungar v. Sarafite*, 376 U.S. 575, 589 (1964))).

An attorney facing an unexpected hearing should consider whether:

- The hearing will address a housekeeping matter or a central issue in the case.
- The attorney is prepared to address the issue that day.
- Addressing the issue that day may help move the case along.

If the court insists on holding a hearing on an important issue that the attorney is not prepared to address, the attorney should be careful to lay a complete record as to why the attorney did not receive notice of the hearing (for example, because the court did not notice the hearing), the reasons why the attorney is not prepared for the hearing, and what the attorney needs to do to prepare (see below *Attorney Preparedness*).

SUBJECT MATTER OF THE HEARING

In addition to central issues that require thorough preparation to address, cases also involve many

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smaller matters that the attorneys can easily deal with while the judge's attention is on the case. Attorneys should avoid jumping headfirst into a discussion of an issue that requires more preparation and risk waiving any legitimate due process arguments, but they should not be afraid to address less significant issues simply because they have not exhaustively prepared beforehand.

Attorneys should generally approach hearings as an opportunity to take stock of what is happening in the case and be prepared to address small matters that might arise. If the presiding judge likes to be involved and proactive in a case, the attorney may even consider suggesting to the court that it address small matters at the hearing, even if not previously noticed.

ATTORNEY PREPAREDNESS

If an attorney learns that the judge wants to address a motion not set for argument at the hearing, the attorney should take a moment to determine whether it is advisable to proceed on the matter. Attorneys may feel that they must respond immediately when a judge asks them a question in court, but an attorney does not have to speak before the attorney is ready to do so. Depending on the situation, the attorney can either:

- Ask the judge for a short break to consider the issue and whether to proceed.
- Simply pause and take a moment to think about the issue before speaking, if it appears that the judge is not inclined to take a break.

The more knowledgeable an attorney is about the case generally and about the subject matter of the noticed motion, the easier it is for the attorney to think rationally through issues the attorney did not anticipate needing to address at the hearing.

If the attorney prefers not to address the issue that day (even if it is a housekeeping matter), the attorney should:

- Inform the court that the attorney is not prepared to address the matter because it was not noticed for a hearing on that day.
- Explain why the attorney needs time to prepare to address the matter, if the attorney can readily articulate the reasons, so that the judge does not think the attorney is stalling or intentionally delaying the matter. For example, an attorney may need more time to prepare because the motion addresses a complex legal issue that requires the attorney to examine and have an in-depth understanding of:
  - the relevant case law;
  - many underlying records; and
  - the case's procedural history.
- Suggest scheduling the matter for a future hearing.

ADVANCING THE CASE

The attorney should consider whether early resolution of the motion that was not noticed might assist the attorney in moving the case along more quickly. If the issue is one the parties and the court can easily resolve while in court, the attorney may also want to address that motion to save the client the expense of having the attorney participate in a separate hearing to address the issue at a later date.

THE JUDGE SETS A DEADLINE THAT CANNOT BE MET

Attorneys should be mindful that courts take deadlines very seriously. Courts not only have wide discretion in setting deadlines, but also in interpreting their own scheduling orders. (See, for example, *Material Supply Int'l, Inc. v. Sunmatch Indus. Co.*, 146 F. 3d 983, 992 (D.C. Cir. 1998) (finding that the district court had discretion to interpret its own scheduling order as requiring a motion to compel discovery to be made within the discovery period rather than by the deadline for filing motions); *Spears v. City of Indianapolis*, 74 F.3d 153, 157 (7th Cir. 1996) (stating that "[a] good judge sets deadlines, and the judge has a right to assume that deadlines will be honored").)

However, a court may set a deadline that an attorney is unable to meet. If this happens during a hearing, the attorney should immediately advise the court of the problem. To help prepare for this situation before a hearing, attorneys should try to anticipate the types and timing of deadlines the court may elect to set at the hearing and compose explanations of why the attorney or parties cannot meet those deadlines. Because courts prefer to hold litigants to deadlines, it is important for attorneys to provide clear reasons for why an extension is warranted (see, for example, *Spears*, 74 F.3d at 157 (stating that "[i]n exercising discretion regarding enlargements of time, courts should be mindful that the rules are 'intended to force parties and their attorneys to be diligent in prosecuting their causes of action'") (citing *Geiger v. Allen*, 850 F.2d 330, 331 (7th Cir. 1988))).

This issue usually arises in the context of discovery, particularly in cases involving large amounts of paper or electronic discovery. Attorneys handling these cases should create and update a chart of the discovery to help gauge how much information they will need to review for responsiveness to discovery requests and potential privilege assertions, and approximately how much time it may take to review the discovery.

For example, if an attorney has hired a vendor to assist in the collection of electronically stored information (ESI), the attorney should include in the chart:

- **The number of sources of ESI.** Examples of ESI sources include:
  - laptops;
  - cell phones;

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- email accounts; and
- servers.

- **The volume of ESI.** The vendor can determine the number of gigabytes or terabytes of ESI and translate it to the approximate number of pages of information it equals. For example, one gigabyte amounts to approximately 500,000 typewritten pages, and one terabyte represents the equivalent of 500 billion typewritten pages (see Federal Judicial Center, Manual for Complex Litigation, Fourth, § 11.446 (2004), available at *uscourts.gov*). Due to how easily information can now be stored electronically, even relatively simple cases may involve the equivalent of millions of pages of discovery.

Search Collecting Documents and Electronically Stored Information in Federal Civil Litigation and E-Discovery: Processing Electronically Stored Information for more on collecting and processing ESI.

Search Data Collection: Log of Documents and Electronically Stored Information for a sample template counsel can use to track all documents and ESI they produce in a case and receive from clients, parties, and nonparties, with explanatory notes.

BECAUSE COURTS PREFER TO HOLD LITIGANTS TO DEADLINES, IT IS IMPORTANT FOR ATTORNEYS TO PROVIDE CLEAR REASONS FOR WHY AN EXTENSION IS WARRANTED.

Additionally, when preparing for a hearing, the attorney should consider tracking outstanding discovery issues in a checklist. The checklist might address:

- Each outstanding discovery issue in a separate bullet.
- Under each bulleted issue:
  - the steps being taken to address the issue;
  - the estimated time needed to address the issue;
  - the reasons supporting the attorney's time estimate; and
  - a reasonable deadline to propose to the court.

In estimating how much time the parties may need, counsel should take into account how long it may take to complete all applicable discovery-related items, such as coordinating the schedules of in-house counsel and outside vendors before retrieving company records, negotiating an agreement with opposing counsel on search terms for ESI discovery, awaiting responses to subpoenas to government agencies or requests for public records, and negotiating discovery issues with third-party witnesses before filing any motions to compel.

This type of checklist can help the attorney articulate the issues if the court sets a problematic deadline, and also assist the attorney in moving the case along. Additionally, it may obviate the need for court intervention by assuring the judge that the attorney is on top of the discovery issues in the case and working diligently to address them.

THE JUDGE HAS A POTENTIAL CONFLICT OF INTEREST

In some instances, a judge may disclose information or parties may learn information about the judge during a hearing that unexpectedly presents a conflict of interest. Under 28 U.S.C. § 455(a), a judge may be disqualified from a case where the judge's "impartiality might reasonably be questioned."

The standard for recusal under 28 U.S.C. § 455(a) is "whether an objective, disinterested, lay observer fully informed of the facts underlying the grounds on which recusal was sought would entertain a significant doubt about the judge's impartiality" (*Hall v. Georgia*, 649 F. App'x 698, 700 (11th Cir. 2016) (citing *United States v. Patti*, 337 F.3d 1317, 1321 (11th Cir. 2003)); see also Guide to Judiciary Policy, Code of Conduct for United States Judges, Canons 2 and 3 (Mar. 12, 2019), available at *uscourts.gov* (setting out standards for judicial conduct to avoid impropriety and ensure fair, impartial, and diligent performance of duties)). Generally, "bias sufficient to disqualify a judge must stem from extrajudicial sources unless a judge's remarks in a judicial context demonstrate such pervasive bias and prejudice that it constitutes bias against a party" (*Hall*, 649 F. App'x at 700 (citing *Thomas v. Tenneco Packaging Co.*, 293 F.3d 1306, 1329 (11th Cir. 2002) (internal quotations omitted))). The parties may waive a conflict of interest arising under only 28 U.S.C. § 455(a) as long as the conflict was fully disclosed on the record (28 U.S.C. § 455(e)).

Further, 28 U.S.C. § 455(b) sets out a list of specific circumstances in which a judge must be disqualified. Unlike conflicts of interest under 28 U.S.C. § 455(a), parties cannot waive conflicts arising under 28 U.S.C.

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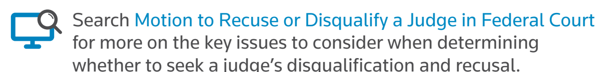
§ 455(b) (28 U.S.C. § 455(e)). A judge who has a conflict of interest under 28 U.S.C. § 455(b) typically *sua sponte* issues an order recusing from the case. If a party knows of the conflict of interest and the judge does not automatically recuse from the case, the party should file a motion to alert the judge to the conflict and request the judge's recusal.

Where a waivable conflict of interest arises during a hearing or trial under only 28 U.S.C. § 455(a), the attorney should request a recess or an adjournment. The attorney should then assess the situation to determine how to proceed and discuss the potential conflict with the client to ensure the client understands the pros and cons of waiving the conflict. For example, the attorney may decide to:

- **File a motion under 28 U.S.C. § 455(a) to recuse the judge after promptly discussing the issue with the client.** The attorney may take this approach where the attorney believes the judge's impartiality is at issue based on:
  - matters that have occurred outside the proceeding; or
  - repeated comments the judge has made during the proceeding.
- **Advise the client to waive the conflict of interest.** This may be the best approach where:
  - the judge is the one who brings the waivable conflict of interest to the parties' attention;
  - the conflict is remote, such as where a family member of the judge owns a small percentage of stock in one of the parties' companies (and the outcome of the proceeding would not substantially affect the judge's financial interest) or the judge has a distant familial connection to one of the litigants; and
  - the attorney is confident in the judge's familiarity with the case, reputation for competence and diligence, and experience with cases involving the same subject matter of the client's case.

Attorneys should keep in mind that the mere fact that the court has disclosed a potential conflict of interest does not mean that the potential conflict will improperly influence the court.



Search Motion to Recuse or Disqualify a Judge in Federal Court for more on the key issues to consider when determining whether to seek a judge's disqualification and recusal.

Search Motion to Recuse or Disqualify a Judge (Federal): Motion or Notice of Motion, Motion to Recuse or Disqualify a Judge (Federal): Memorandum of Law, and Motion to Recuse or Disqualify a Judge (Federal): Proposed Order for sample motion papers a party can use when seeking to recuse or disqualify a judge under 28 U.S.C. § 144 or 28 U.S.C. § 455, with explanatory notes and drafting tips.

AN EXPECTED WITNESS DOES NOT SHOW UP TO A PROCEEDING

A witness who has been subpoenaed to testify at an evidentiary hearing or trial may fail to show up at the proceeding. To help avoid and address this situation, an attorney should:

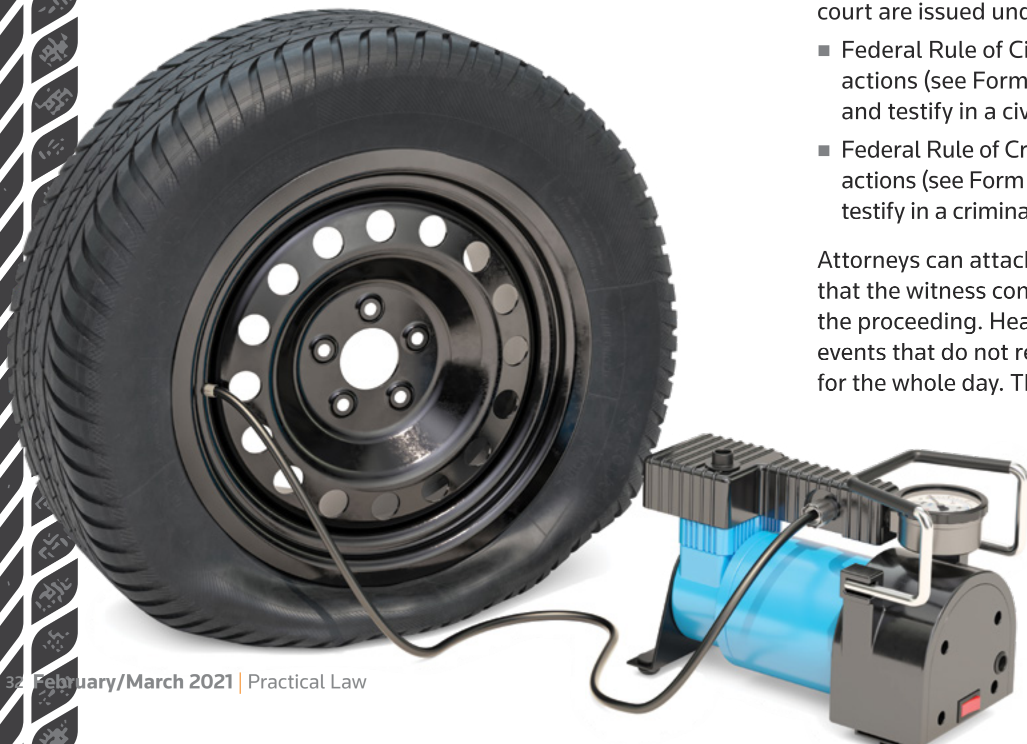
- Make sure to issue a proper subpoena even if the witness is a family member or friend of the attorney's client.
- Prepare to make a motion for an order requiring the witness to show cause as to why the witness failed to comply with the subpoena, if the witness does not appear at the proceeding.
- Understand the standard for making a motion for contempt sanctions, which the court may issue against a witness who fails to comply with a properly issued subpoena.

ISSUING A SUBPOENA

Subpoenas to compel witnesses to appear and testify in court are issued under:

- Federal Rule of Civil Procedure (FRCP) 45 for civil actions (see Form AO 88 (form subpoena to appear and testify in a civil action), available at *uscourts.gov*).
- Federal Rule of Criminal Procedure 17 for criminal actions (see Form AO 89 (form subpoena to appear and testify in a criminal action), available at *uscourts.gov*).

Attorneys can attach to the subpoena a notice requesting that the witness contact the attorney two weeks before the proceeding. Hearings and trials are often multi-day events that do not require a witness to attend every day for the whole day. The notice can inform the witness that:



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THE MERE FACT THAT THE COURT HAS DISCLOSED A POTENTIAL CONFLICT OF INTEREST DOES NOT MEAN THAT THE POTENTIAL CONFLICT WILL IMPROPERLY INFLUENCE THE COURT.

- The proceeding is expected to begin on the date and time noted in the subpoena and is expected to last several days.
- If the witness provides contact information to the attorney two weeks before the proceeding begins, the attorney can give the witness one to two hours' notice before the witness's presence is required in court.
- If the witness fails to contact the attorney before the proceeding begins, the witness is expected to show up in court on the date and time noted in the subpoena.

If a particular witness is not the sole witness to an event, the attorney should also consider issuing subpoenas to multiple witnesses to have a backup witness in case the first witness ignores the attorney's subpoena.

Search Document Requests and Subpoenas in Federal Court Toolkit for a collection of resources to assist counsel with drafting, serving, responding to, and objecting to subpoenas in federal civil litigation.

ORDER TO SHOW CAUSE

If a subpoenaed witness does not appear at the proceeding, the attorney can move the court for an order requiring the witness to explain their failure to comply with the subpoena. In considering this request, a court often expects the attorney to provide proof of service of the subpoena and explain what efforts the attorney made to contact the witness before the proceeding to ensure compliance with the subpoena.

Therefore, if a subpoenaed witness fails to contact the attorney before the scheduled proceeding as requested in the notice attached to the subpoena (see above *Issuing a Subpoena*), the attorney should:

- In a civil action, call the witness a few days before the scheduled proceeding to make sure the witness plans on attending. In civil cases, the attorney who issued the subpoena likely already located and deposed the witness beforehand and knows the witness's contact information. If the attorney did not previously depose the witness or does not have updated contact information for the witness, the attorney should search one of several databases available that assist in locating individuals or hire a private investigator to locate the witness.
- In a criminal action, consider hiring a private investigator to locate and make contact with the witness to remind the witness that the witness's presence is required in court on the date and time specified in the subpoena. In criminal cases, the attorney who issued the subpoena may not have any contact information for the witness other than the address where the witness was served (because parties are not entitled to depositions in federal criminal actions).

If an attorney takes these steps and provides proof to the court, the court may be more likely to issue an order forcing the witness's compliance and may be more willing to delay the proceeding until the witness appears in court.

CONTEMPT SANCTIONS

A court may hold in contempt a witness who:

- Fails without adequate excuse to comply with a subpoena (FRCP 45(g); Fed. R. Crim. P. 17(g)).
- Ignores the court's order to show cause as to why the witness failed to comply with a subpoena by, for example, not going to court on the day of the scheduled hearing on the order to show cause (see, for example, *In re Grand Jury Witness*, 835 F.2d 437, 440 (2d Cir. 1987) (explaining that disobeying a court order can subject a person to civil and criminal contempt); see generally *Bradley v. Am. Household, Inc.*, 378 F.3d 373, 378 (4th Cir. 2004) (explaining the difference between civil and criminal contempt sanctions)).

To sustain a claim of contempt, the moving party has the burden of proving by clear and convincing evidence that:

- The order sets out an unambiguous command.
- The witness violated the command.
- The witness's violation was significant, meaning the witness did not substantially comply with the order.

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- The witness failed to take steps to reasonably and diligently comply with the order.

(*Prima Tek II, L.L.C. v. Klerk's Plastic Indus., B.V.*, 525 F.3d 533, 542 (7th Cir. 2008); see also *United States v. Cederquist*, 641 F.2d 1347, 1352 (9th Cir. 1981) (explaining that before a contempt finding under Federal Rule of Criminal Procedure 17(g) is made for noncompliance with a subpoena, "it must be shown that [the witness] had the ability to comply with the subpoena").)

Search Subpoenas: Enforcing a Subpoena (Federal) for more on motions for contempt sanctions under FRCP 45.

AN UNEXPECTED WITNESS SHOWS UP TO A PROCEEDING

An attorney may issue a subpoena to a witness even though the witness is unlikely to show up in court, only to have the witness unexpectedly appear. In civil actions, it is likely that any witness the attorney has subpoenaed to court has already been deposed and the attorney knows what to expect from the witness's testimony. In criminal actions, however, there are no depositions and attorneys sometimes cannot anticipate what a witness will say on the stand.

If the unexpected witness is not essential and the attorney has already prepared a backup witness, the attorney can simply release the witness from the subpoena. However, in some cases, the attorney may be inclined to release the witness because the attorney feels overwhelmed by the witness's appearance even though the witness may provide important testimony.

To avoid being derailed by a witness's unexpected appearance, attorneys should prepare:

- **A direct examination for every subpoenaed witness.** If the witness is amenable, the attorney or a colleague can run through the examination with the witness during a break in the proceeding to gauge whether the witness should be called to the stand or released.
- **A sample cross-examination for every subpoenaed witness.** The attorney can also run through a mock cross-examination with the witness during a break in the proceeding to help ensure the witness is not detrimental to the attorney's case (for more information, search Cross-Examining a Witness at Trial (Federal) on Practical Law).

A WITNESS STRAYS OFF TOPIC WHILE TESTIFYING

Regardless of how thoroughly an attorney has prepared a witness to testify, the witness may go off on a tangent about a topic that is irrelevant to the proceeding or, worse, potentially detrimental to the attorney's case. An attorney in this situation can simply stop the witness in the middle of the witness's testimony and explain the reason for the interruption. For example, the attorney can say, "I apologize for interrupting you, Mr. Johnson. However, you are not answering the question I asked you. I asked [repeat question here]."

A LARGE DOCUMENT PRODUCTION RIGHT BEFORE OR DURING A HEARING MIGHT BE A STRATEGIC DECISION BY OPPOSING COUNSEL TO DELAY THE PROCEEDING.

The attorney should inform witnesses during the witness preparation sessions that the attorney will interrupt the witness and re-ask a question if the witness misunderstands the question or answers a different question than the one the attorney asks. By preparing this way, the witness is less likely to be confused if the attorney interrupts at the proceeding and will know to pay closer attention to the attorney's question.

Search Preparing a Witness to Testify at Trial (Federal) for more on preparing witnesses for direct examinations.

THE JUDGE ASKS TO DISCUSS A CASE THAT THE ATTORNEY DOES NOT RECALL

An attorney may end up in the unfortunate situation of being asked to discuss a case or an opinion cited in the motion papers that the attorney does not recall, for example, because the attorney's memory of the facts fails in the moment or the attorney did not give the case the attention it required (particularly if the motion papers cite numerous cases).

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When this situation occurs, the attorney should:

- Explain to the court that the attorney does not recall or is not familiar with the facts and holding of the case.
- Either:
  - request that the court kindly assist the attorney by providing the basic facts and holding of the case so the attorney can make the appropriate argument; or
  - ask the court to please recess for a few minutes to give the attorney an opportunity to read the case.

To best prepare for situations like this, the attorney should bring to the courthouse either:

- A printout of each case cited in the motion papers.
- A laptop or tablet with a working internet connection so that the attorney can quickly access the case. In today's technologically advanced climate, attorneys are increasingly expected to have a computer easily accessible in court (see below *The Litigants Experience Technological Issues*).

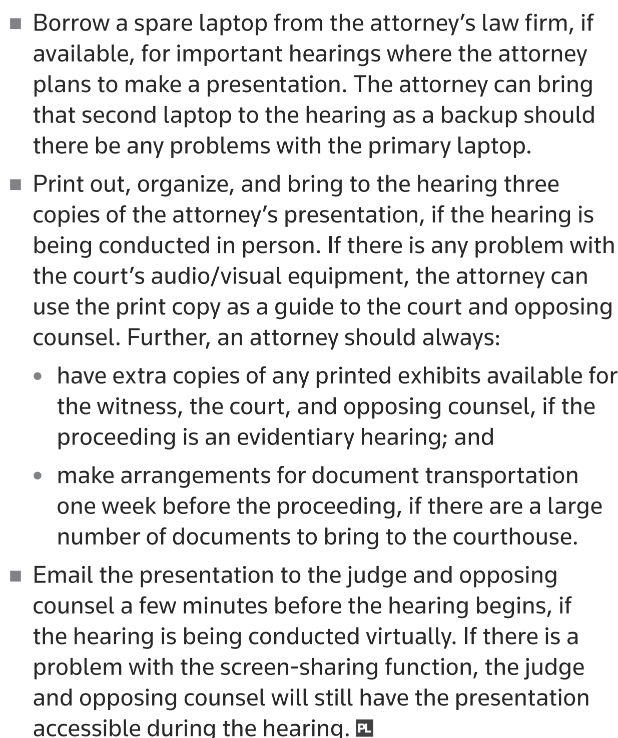
OPPOSING COUNSEL TURNS OVER NUMEROUS NEW DOCUMENTS AT AN EVIDENTIARY HEARING

Even experienced attorneys may become flustered when unexpectedly faced with a large document production by opposing counsel during a hearing. Attorneys in this instance may reflexively ask the court to exclude the documents or reset the hearing. However, an attorney should consider that a large document production right before or during a hearing might be a strategic decision by opposing counsel to delay the proceeding.

Before asking the court to exclude the documents or reset the hearing, the attorney should:

- **Request a short recess to skim the documents.** The attorney should inform the court that the opposing party has just produced a large number of documents and ask for a short recess to skim the records to attempt to determine whether the hearing can proceed, or at least begin, despite the production. A quick review of the records may reveal that they are not relevant to the subject matter of the hearing. Moreover, judges are typically interested in going forward with the proceeding and appreciate the attorney's efforts to move the hearing along despite the late production.
- **Ask colleagues to begin reviewing the production.** If the hearing is a multi-day hearing and the attorney has colleagues available to assist, the attorney should have the colleagues begin reviewing the production. In the meantime, the attorney should ask the court to advise the relevant witness to be on standby after the witness's examination has concluded in case the witness needs to be called back to the stand to address the documents that the other party just produced.

THE LITIGANTS EXPERIENCE TECHNOLOGICAL ISSUES



Most courtrooms today have audio/visual equipment that enables litigants to easily make in-courtroom presentations. Moreover, due to COVID-19, many courts are now holding virtual hearings through platforms like Zoom, which allow participants to conveniently make PowerPoint and other types of presentations by sharing their screen.

However, technology can break down and cause disruptions to the proceeding. To minimize technology issues and avoid delays, an attorney should:

- Borrow a spare laptop from the attorney's law firm, if available, for important hearings where the attorney plans to make a presentation. The attorney can bring that second laptop to the hearing as a backup should there be any problems with the primary laptop.
- Print out, organize, and bring to the hearing three copies of the attorney's presentation, if the hearing is being conducted in person. If there is any problem with the court's audio/visual equipment, the attorney can use the print copy as a guide to the court and opposing counsel. Further, an attorney should always:
  - have extra copies of any printed exhibits available for the witness, the court, and opposing counsel, if the proceeding is an evidentiary hearing; and
  - make arrangements for document transportation one week before the proceeding, if there are a large number of documents to bring to the courthouse.
- Email the presentation to the judge and opposing counsel a few minutes before the hearing begins, if the hearing is being conducted virtually. If there is a problem with the screen-sharing function, the judge and opposing counsel will still have the presentation accessible during the hearing. PL

Trial Toolkit (Federal)

The Trial Toolkit (Federal) available on Practical Law offers a collection of resources to assist attorneys with preparing for and conducting a civil trial in federal court. It features a range of continuously maintained resources, including:

- Preparing for Trial (Federal)
- Civil Jury Trial Considerations Checklist (Federal)
- Bench Trials (Federal)
- Jury Selection (Federal)
- Final Pretrial Order Under FRCP 16(e): Overview
- Corporate Counsel Trial Readiness Checklist
- Scheduling Order Under FRCP 16(b)
- Opening Statements and Closing Arguments in Civil Jury Trials
- Post-Judgment Motion Comparison Chart
- Issue Preservation Toolkit (Federal)

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