Unedited transcript of

Preparing for and Conducting a Motion Hearing

from **Mastering Motions for Temporary or Emergency Orders in the Probate & Family Court**

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>>: And so I'm going to to talk quickly about preparing for a motion hearing and then handed back over to Lola to talk about actually conducting that hearing. And so this - we're kind of switching gears back to just any motion hearing and thinking about what do you need to do before you get to court? So...

>>: Katherine?

>>: Yes.

>>: Do you take a question now?

>>: Sure, yeah.

>>: It's related to emergency hearings, so since we're at a moment - let me (inaudible). Question is any thoughts on what to do when opposing parties use emergency or temporary motions to harass the other party? For example, fabricating allegations of abuse, forcing the other party into court.

>>: Yeah, so that's a great question. You know, I think that one thing that is a tool that may be able to be used in that scenario is what we call kind of a gatekeeper order. And that could be requesting that the courts issue an order that a judge basically needs to review pleadings and decide whether or not to schedule a hearing on that motion or that request prior to it being scheduled. And so in a case where there's one party who is, you know, perhaps abusing the litigation process and using that to harass the other party, you could request that the court issue some sort of gatekeeper motion or gatekeeper order saying that the - you know, the other party -

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your request would probably be that the other party not be permitted to file these kind of requests and obtain hearings without there being some sort of checks and balances, i.e. a judge saying, yes, you may file this. Yes, we will schedule this and hear this. So the tricky thing about that is that sometimes when a judge issues a gatekeeper order, it often applies to both parties. So you also want to, you know, talk pros and cons about that with your client and whether, you know, there would be a disadvantage to them to have that kind of order in place.

>>: I also find that they're not super common, they're not super easy to get. So you can ask, but - I mean, you should keep that in mind.

>>: Yeah.

>>: But I don't see a lot - a ton of them being entered. Another question is what is the threshold - do we have an idea what threshold is for what is an emergency? I think you talked a little bit about that.

>>: Yeah. So I gave some examples - and I - of types of scenarios, but I think they're kind of - I actually am a little embarrassed to say, I don't know that there's an actual, you know, legal standard that applies to an emergency motion. But typically in your motion you would be citing a risk of, you know, irreparable harm or a risk of, you know, immediate harm should the court not intervene as soon as possible. So that's the kind of language that I typically use in a motion - in an emergency motion to highlight that this should be treated differently from a standard motion for temporary orders.

>>: I think too, Katherine - I don't know if you are getting clients showing up before you're representing them, like I do. Clients show up with things that have been sent to them from court, their case is already under way. I feel like I've seen an increase in the number of hearings for emergencies. I feel like when I first started practicing very few things were emergencies. We'll just file, wait, get a hearing, just regular course. But now I'm getting clients showing up with the emergencies that have been served on them with hearings in about a week time. So that's also - do with that what you will.

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>>: Yeah.

>>: Just a couple of other things, I guess. Just service by email? What about service by email?

>>: So currently, some of the standing orders that are in place during the pandemic permit attorneys - just, like, without special permission of the court, attorneys can serve other attorneys by email anything other than a complaint, right? So any motion you used to have to do by first class mail, but now that's permissible just over email from attorney to attorney. With a pro se party - an attorney and a pro se party, the pro se party can agree to accept service by email but it's not a default under the standing orders. So I typically err on the side of caution and I will send it by email and first class mail.

>>: There are just two more questions that are related to emergencies, so we'll just do them.

>>: Great.

>>: If that's OK. One is if you're requesting a speedy hearing, how much sooner could we get it scheduled compared to a normal hearing?

>>: Good question. I will give you the - just for the sake of illustration, and if it - like, a Suffolk Probate Court example because that's my kind of home court. If a motion for speedy hearing is granted and a speedy hearing is scheduled, typically I would say it's approximately two weeks from when the motion is filed. And that's, like, right now at Suffolk Probate and Family Court or in the recent past. So that means you could get a hearing within about two weeks. Whereas a standard motion hearing on a standard motion for temporary orders in Suffolk - it varies by judge because each judge handles their calendar a little bit differently. But you'd probably be looking at anywhere from four to 12 weeks or, like, one to three months for a motion to be scheduled for hearing.

>>: This is not to say file everything for speedy hearing. That's not what we're suggesting. That's be judicious with your - the judge's time. You don't

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want to be known as the person who's filing for speedy hearings willy nilly just because you want to get ahead of the curve. It's just not fair and it's not friendly. So last one about emergencies. What do you do if you're asking - what can you do if your action - if your request for a speedy or emergency hearing is denied. Can you request it again?

>>: For a speedy hearing?

>>: Yeah, or emergency hearing.

>>: So if the request for an emergency hearing is denied but your underlying motion is not ruled on, then the motion would still get scheduled in the ordinary course whenever a normal hearing would be set. If your motion is flat-out denied - your request is flat-out denied by the judge, then you, in theory, could request - you could file another motion or another motion for an emergency order in the future. But again, then you really want to, you know, go back to that page of, like, all the considerations about whether you should file a request for an emergency order because, you know, then you already have - you have a pretty good glimpse into what the judge thinks about the claims that are being put forth and you really want to, you know, make a very cautious assessment of the pros and cons of basically asking for the same thing again in a different way. Or what would it take for me to achieve the outcome? Or, you know, what other information would I need to have in order for a judge to be willing to consider this on an emergency basis?

>>: I think maybe also, on a practical level, if you requested an emergency hearing and the emergency has not come to pass in the time that it's taken the judge can make an order on that, do you have an emergency? If you've got enough time to file an emergency hearing - request an emergency hearing, have it be denied, file again and nothing's happened - like, we're talking a child needs surgery, a child is being taken out of the country and can't be returned, somebody's selling a home, somebody's - you know, things like this. You just want to be mindful about what an emergency really is. I know I'm seeing weird emergencies, but you don't want to be in a - there are pro se clients that are showing up at these weird emergencies. You don't want to be an attorney filing emergencies that are

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not - they just - you'd like to get an order quickly. Everybody would like to get an order quickly. That's not a reason to file an emergency. OK. Those are all the questions for now. Keep them coming, folks.

>>: Great. All right. So I'm going to try to - I'm mindful that we have about five more minutes of scheduled time.

>>: Oh, gosh.

>>: I'm going to zoom through the next two slides so that we can hopefully get through all our content and then if people want to stick around for questions. So preparing for a motion hearing, you're going to want to set expectations with your client. That just means - what I usually do is I talk about, you know, our motion says ideally what we want to see the outcome be, but what could you live with, you know? So where is the spectrum of outcomes that the client would be OK with? And know where that, you know, compromise point is. Because again, you may be better off with an agreement on some issues than taking that issue in front of the judge. So talk to your client about that. Exhibits - this is something that you really want to know your court, especially if you're hearing is going to be virtual. It's very tricky to get anything other than your pleadings in front of the judge in time for a motion hearing if you're going to have a virtual hearing. So you want to plan ahead. You want to know if it's the type of court where you can email things to the assistant judicial case manager in advance, where that's not going to be possible. The biggest thing I would say about that is just figure out, you know, how - what you need to absolutely get in front of the court and then do your best to get it there. And at a minimum, make sure that you're giving anything that didn't go along with your original pleading to your - to the opposing party or opposing counsel because, during a Zoom hearing especially, surprises - people can't get their hands on the things that normally you would just hand over to them in the courtroom. And so you may risk not having anybody look at those documents because they haven't been provided in advance to the other side or the court. This is a place where - although if you know certain things are going to be required, like you have a motion pending for child support, you will need a financial statement, a copy of the child support guidelines worksheet prepared in the manner that you would want - you

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know, reflecting the outcome that you're looking for in behalf of your client. If you're asking for a deviation. And this is actually a tip from a Judge Ordonez who provided us with some tips for this MCLE beforehand, make sure you're sending these in advance because the judge is not going to know what to do if you're making assertions about - you know, child support should be X and have provided the judge with nothing to - you know, to show what your client's income is, what the other party's income is and how the child support guidelines would actually result in that. So do your homework to get that in front of the judge. Prepare if you need an interpreter. Certain courts have certain languages available almost all the time, but if it's a unique language or a court that has few or limited English-proficient litigants, you want to make sure you request an interpreter in advance. Should you attempt to settle some or the - all of the issues? I'm not going to go into this because we kind of talk about that. Lola addressed that, I think, pretty well in the very beginning. Also, do your homework, meaning if you're asking for appointment of a guardian ad litem or you're asking for supervised visitation, you should know which centres are open for intakes, which guardian ad litems - guardians ad litem are taking new cases and would they accept state pay if you're asking for that, you know, investigation to be at state pay. So don't show up empty-handed with no recommendations for the court, especially if you're asking for a specific type of relief. And then you want to prepare for probation. In most courts, a - there's a contested motion hearing. You're going to see probation before you see the judge. It is a little bit different from court to court. In some counties, if there's counsel on both sides, they don't automatically send you to probation for dispute intervention. That's really what the function is of the probation office is what they call dispute intervention, which is really kind of like a mediation. And so if there's counsel on both sides, you may not have to go to probation or sometimes judges will just schedule the case to go right to the - to hearing in the courtroom. But if you are going to probation, you will be noticed on your notice of hearing to report to probation first. Or when you get there, you'll be told to go to probation first. So their role is to gather facts and facilitate an agreement. So if - none of it is confidential, so probation officers work for the court. And so anything that is said in that kind of mediation room is not confidential, it can go into a report that would go to the judge or a written or oral report of a probation officer about what took place in the room. So you want to talk to your client

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about that as well - about, you know, anything said in here is not confidential. If there is a restraining order, a 209A abuse prevention order, there is no requirement that the parties be in the same room. In that situation, the - an attorney could meet separately with the opposing party so that the person who has the restraining order is - you know, doesn't have to be in that meeting. Sometimes probation will also separate, you know, the - one party and their attorney from the other party and do kind of shuttle mediation from room to room. So that's another option. When to agree, when not to agree. And, again, this really just comes back to - what are your client's goals? Is there a middle ground? Do you feel that you're better to take your chance of arguing this in front of the judge and risk, you know - and turn over - not risk - and that turn over decision-making power to the judge versus reach an agreement, even if that agreement is somewhat of a compromise? Will you still see the judge? Unless you have a full agreement - sometimes full agreements get approved administratively. If you reach a full agreement in probation, they can just say, go ahead, go home, send the agreement up and have the judge sign off on it and enter it as a temporary order. But if there are - is no agreement or only a partial agreement, then you have a right to go and have a hearing in front of the judge on whatever issues were not addressed. I know we're zooming through, but we want to get you out close to on time. We only have two slides left, so I'll turn it back over to Lola.

>>: OK, I'll do the opposite of my very nature and keep it brief. Who goes first? The moving party will go first. The judge will ask you if this - if you're here on the motion, and you will say yes. And the court will ask you to explain why you're there, and then, of course, opposing counsel will have a chance after you speak. What does the judge know, and what do you need to tell them? Not a lot. They do know the contents of some DCF reports. They have usually run a CARI from the bench, so they know court activities that the other parties are involved in, but anything that happened last week, they may not know. They don't know what happened, necessarily, at the last hearing. They haven't read all of the orders if they weren't the person who entered them. Sometimes our clients go to court with different judges - the judge is sick that day, a different person sees them or they're bringing in 209As from a district court. So you can't expect

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the judge - well, then, they'll flex 209A - but they don't know, like, what - all the things that have happened. So be prepared to make your case fully. Don't assume that the judge knows really hardly anything except the very basics. What happens if the opposing party doesn't show up? What can happen is the court may enter an order in the absence of any party who was not present who's been properly served. What could happen is - people call the probate and family court the court of second chances. What could happen is that the judge can say this is too important an issue to just enter an ex parte order. I'm going to put this off for another time. Things that - like that may include parenting time - removing parenting time from the other party, terminating certain activities that the child is involved in, things like that based on somebody's inability to pay - things like this. So I wouldn't expect that just because the other party doesn't show up that you're going to get your way. But the court certainly has a discretion, and you certainly can make an argument for that if you feel like it's appropriate. I would certainly say if you showed up three times, or even twice, and the other party has not made an appearance and they've been properly served and you know it, ask the judge, respectfully, to enter an order in their absence. Will my client need to testify? It depends on if it's a full evidentiary hearing and what you're asking for. If you're asking for something simple, like child support and you've got pay stubs and you've brought tax returns and you filled out all the paperwork, it's really unlikely that your client will have to testify at a hearing like that. Another example - a different example is if you're asking to terminate parenting time and your client has all of these assertions that they're making about misconduct of the other party while the child is in their custody, your client probably will have to testify or, you know - to that. How are the rules of evidence treated? Seriously, be prepared. Hearsay is not - you can't just show up and say, well, I mean, some of us practice in family law and restraining orders, and there's a slightly more lax standard in those restraining orders. That's not the case in the family - or the probate and family court, so be sure to know what the rules are, what you're allowed to admit. Make sure that if you're objecting - just at certain things - that there are things that are objectionable, that you have - you know the basis and the grounds for the objections that you're making. But be prepared; they are serious. So what if the temporary - I'm sorry, I'm going from there. What if the temporary order contradicts the 209A? The probate and family court has absolute

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right to modify the 209A, so it just cancels out. So you should certainly mention to a judge if something has been decided in the probate - in the district court that would make what they're ordering in their probate and family court impossible. But that is one of the limitations of the statute - of the 209 states - statute is that the opposing party can go to court and request the relief that was not granted in the district court, so be prepared for that. How do I best utilize an interpreter? I think - did Katherine talk about that? Was it on...

>>: I just mentioned making sure that you request an interpreter in advance if it's not something that's like, a default at court. Yeah. So I think - I think with this, I think you just want to make sure that if there is an interpreter during your motion hearing, that you've prepared your client for that, and that you pace your argument accordingly so that the interpreter can keep up. You know, make sure that everybody is giving the interpreter time to do their job.

>>: OK. Do I do the next slide? OK. Last slide. What happens in the time between the hearing and getting the order? From your end, you probably want to contact your client and talk about how the hearing went, what you think may happen and what plans you have going forward. You can kind of debrief the hearing and see if you all are on the same page about what happened, but mostly you just wait - go home and wait. Who will get the order? The moving party will get the order. What is your role in implementing or enforcing the order? It depends on how you practice. I would say the attorney's role is to support the client in implementing the order. If your practice does not offer that, and that's not - if you're limited assistance representation, for example, and your only role was to make that appearance that day, you may not be involved in that. But I certainly - if the order requires that my client enrolls the kids in a certain school, I just remind them that they're supposed to be doing that. And I remind them about what the implications are of non-compliance of the order. Or if my client is ordered to comply with some sort of a parenting center visitation schedule, and they have to do an intake to get themselves on a list for that. Sometimes our clients feel like, well, if it's not me who is going to be out of parenting time, why should I even bother. But the court will take it, you know, the court will consider it in making further orders if your client does

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not comply with at least participating in those - making those orders of resolution. What do I get if I get a bad order?

>>: (LAUGHTER)

>>: I don't know.

>>: If you get a bad order. So that is relative, right? So if you're getting an order that is absolutely the exact opposite of what your client was asking for, I think it's important to just realize - I mean, hopefully you're not asking for something that the law has no basis for your client getting. So if the order is completely flying in the face of anything that would be reasonable by the statute or by case law, you can certainly request modification of the order, or you can file an appeal if you would like to do that, if you practice in the appellate courts, that might be a route to go. But hopefully, you're crafting your argument and asking for things that are reasonable or fairly within the realm of things that the order - that the court can order, so how can you get your requests? How can you request a change for a temporary order in the future? We led off with this, it's really hard. So what you would need to do is file a motion for modification. And the standards are completely elevated at that point. You would be prepared to make some argument that something is different now than it was at the time that the initial order was entered. So we're talking about temporary orders, we're not talking about judgment. But let's say we're talking about judgments. After some time, if there have been substantial changes, you might just request, on the basis of the fact then the regular changes or the kids have grown so old that it doesn't make sense anymore, or, you know, whatever as the circumstance may be. But if it's just you got a temporary order two months ago and you like it, let's go back to the bad temporary order. Three months later, it's not really appropriate to request a modification of that order. I mean, you can ask for whatever you want, but the standard is quite high to get that modified. So I'm not sure if that answers the question. I mean, it was our question, but I think that we - it - don't get a bad order - a bad order.

>>: I think that is our slide. Do you want to do our pointers?

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>>: Yes. So do we have any last questions in the...

>>: Oh, good point. No questions, no questions.

>>: Great, great. Yeah, so for those who are - I know we've gone about 10 minutes past, so you should feel free to sign off and we want to say thank you for your time. We did just want to add - so, as I mentioned earlier, Judge Ordonez, who is on the bench in Barnstable County, did reach out when she saw that we were doing this MCLE and wanted - first, she wanted to participate, but didn't work out scheduling-wise. So maybe next year we can, if we're - if we have this opportunity again, we could invite Judge Ordonez to join us with a perspective from the bench. But we wanted to just quite quickly reinforce a couple things that we've mentioned, but tips that came from the judge. So some of these relate specifically to Zoom hearings. We - so the point about making sure that everything you want the judge to see, you're doing your best to get it to the court in advance of your hearings - was something that Judge Ordonez just couldn't stress enough. You know, if you want the judge to consider it, it's your job to get it there and to notice the other side, make sure they have a copy. The other thing about Zoom hearings, the recommendation or the tips from Judge Ordonez were to do your best to maintain the formality of the hearing. So just because you're on Zoom doesn't mean that you can be in your car or wearing your sweatpants that you might wear every other day that you work remotely. She said it doesn't matter if your sweatpants are on from the waist down, but you should have your jacket on from the waist up to maintain the formality that you would have when you're in the courtroom, and to talk to your client about all of those things as well. You know, our clients may have complicated lives and, you know, kids who are coming home from school, or who are home from school - and making sure that you've talked to your client about making any arrangements that they can so that they're alone and, ideally, not distracted while they're on a virtual hearing and also not in their car, et cetera, and that they're comfortable with the technology. So do a test run of the technology with your client to make sure that it's something that there's hopefully going to be as few surprises as possible on the day of your hearing. So those are a couple Zoom virtual hearing tips from the judge. And then a couple practical tips that she had as well, as far as motion hearings. You know, a

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lot of times, these are very, very stacked heavy, and there's a lot of allegations kind of flying around in competing motions and during a motion hearing. So two important tips she had were number one, to do your best to get ahead of that fact. So if there are things about your client that, you know, nobody's perfect, but if there are things that you know, and you certainly know the other side is going to bring up, if you are the moving party you have an opportunity to speak first, do your best to get ahead of it. And that way it shows that, you know, you may have an opportunity to do some damage control, but also it shows that you're not ignoring or - things that may be, you know, less positive things for your client. So it looks worse to a judge to have there be ignoring, avoiding or for there to be something that looks like a surprise. So that was one tip. And the second is really make sure that you have a conversation with your client and that you review any evidence that they want the court to see. So sometimes, our clients will say, oh, I have this email, or I have this video of the opposing party and it's going to be our smoking gun at this hearing. And the attorney doesn't do their due diligence of reviewing it and actually assessing, number one, does it actually say what we think it says. Does it stand for - you know, one was. But number two, you know, have I - is it - is it a good idea for us to show this to the court. And so make sure that you review evidence, especially like, videos, voicemail, text messages before you offer them to the court. Because, again, the surprises - you don't want there to be surprises. And sometimes our clients can view things in a different way than we would, as far as what they actually mean for their case or simply over promise, you know, the value of a piece of evidence. So - not...

>>: I think this goes back to, also - one of the questions we had on the slides was - how is the rule - how are the rules of evidence cheated treated. They are treated with all of the weight that the rules of evidence ought to be treated. And so when a client says, I've got text messages from the mistress and I want you to offer this to say this. Be careful about that. And they think it's going to shay - to show something about how that - the other person is a terrible parent - is a - an unattentive partner, is a terrible spouse and all these things. But does it show that? And who are these text messages from? And how do you authenticate them? And the client's not thinking about that. The client's usually thinking, I'm really hurt, this person's really done me wrong and so I just need the judge to know

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that. And so be mindful of being over-reliant on whatever evidence that the clients think they have.

>>: All right. All right, well, I think that about covers it. And we only kept you an extra 15 minutes or so. So are there any last questions in the chat, Lola?

>>: Gosh, yeah, there are. This says it's a - question - if I have a client who had an eight-year-old an eight-year-old final judgment, would I file a motion for modification or can I file a new complaint?

>>: If it's a final judgment, then you have to file a complaint for modification because the judgment is final. If you have an active case, where, you know, there's like, a temporary order that you want to change - usually it's called a motion for further temporary orders. But there has to be that open complaint that is already, you know, working its way through the court. So if there is no open complaint and you - the last thing that the court did was issue a judgment, then to change that, you need to file a complaint for modification.

>>: I guess I'd kind of want to know what the person asking the question is looking to modify. Is there a contempt issue? Is there just a modification of the order for any reason? I - those would be my - that would be a follow-up question. I don't think we have time to really get into it, but it might depend on what the issue is that has come up. Was the order not complied with? Was it - does somebody have the inability to comply? 'Cause then it could be - maybe the kids grow up and the house has fallen down, or somebody's lost their job, or somebody can't pay the spousal support anymore, it just, you know, it might depend on some of those issues, but.

>>: All right.

>>: That was the last question. Sorry, it looked like it - a lot, but we've already answered many of them.

>>: Great. All right.

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>>: All right, folks. I think with that, we have used up all of our time and then some. Thank you for coming. And you have our contact information on screen if you'd like to jot it down. But the - I'm pretty sure these details have gone out - or it will go out, so reach out with anything for any reason. We're happy to chat.

>>: Yeah and thank you for the - for the time and the opportunity and the great questions.

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