

# THE DAILY RECORD

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## No more last minute cross-motions

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You are in the midst of preparing for oral argument on a motion and, at the last minute, your opponent serves you with a cross-motion.

You become enraged, accusing your opponent of engaging in a sneak attack, and ask the court to disregard the cross-motion. The court does not join in your indignation, but adjourns all the motions so you can respond. Of course, this does nothing to squelch your outrage.

We've all been there. However, with the recent amendments to CPLR 2214 and 2215, we hopefully won't be there again. The risk, it seems at least, now is minimized.

Previously, CPLR 2215 permitted a cross-motion to be served three days before the return date of the original motion. If service was accomplished by mailing, as provided for by CPLR 2103(b)(2), this arguably meant your opponent could mail the papers just three days before oral argument, leaving it to the U.S. Postal Service as to whether you actually received the papers before appearing for oral argument.

The amendments that became effective on July 3 seek to change this practice. Pursuant to the new language of CPLR 2214(b) and 2215, a cross-motion now needs to be served at least seven days before the return date of the motion "if demand is properly made."

What is a proper demand? The original notice of motion must expressly state the demand, and the original motion papers need to be served at least 16 days before the return date. In other words, pursuant to the amendments to CPLR 2214(b), an express demand in the notice of motion should state that any cross-motion be served at least seven days before the return date.

For instance, the original notice of motion could state: "PLEASE TAKE NOTICE that, pursuant to CPLR 2214(b), answering papers and any notice of cross-motion, with supporting papers, if any, are required to be served upon the undersigned at least seven days before the return date of this motion."

In addition, the amendments require that the original motion be served at least 16 days before the return date in order to invoke the seven-day cross-motion demand. In other words, if you want a cross-motion (as well as any answering papers) to be served at least seven days before the return date

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of the motion, the original motion papers now need to be served at least 16 days before the return date. Previously, at least to receive answering papers seven days before the return date, the original motion papers only needed to be served 12 days before the return date. Now the moving party has the benefit of being able to request not only answering papers to the original motion, but also papers in support of any cross-motion.

Of course, if the original motion papers are served by mail, then five additional days must be added to the moving party's service requirements pursuant to CPLR 2103(b)(2). That rule has not changed. However, this means that instead of 16 days, original motion papers served by mail and requesting a cross-motion and/or answering papers at least seven days before the return date, need to be served at least 21 days before the return day.

If a proper demand is not made for service of a cross-motion at least seven days before the return date, then the new provisions of CPLR 2214 and 2215 will not apply. Instead, the cross-motion only needs to be served three days before the return date. Even under those circumstances, the days of dropping a cross-motion in the mail three days before the return date are over.

The amendments to CPLR 2215 provide, pursuant to paragraph (a) of that provision, that if the cross-motion is served by mail, three additional days need to be added in the event of mailing. Therefore, instead of three days before the return date, the cross-motion needs to be served six days before the return date if service is accomplished by mail.

This three additional days for mailing provision also applies when a proper demand for service of a cross-motion has been made. If the cross-motion needs to be served seven days before the return date because of a proper demand, and the cross-motion is served by mail, then it needs to be served 10 days before the return date.

Pursuant to CPLR 2215(b), the amendments also provide for one extra day to be added to the service obligations with cross-motions when service is accomplished by overnight mail.

What's the bottom line? If you are the original moving party and want any cross-motion (and answering papers) to be

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served at least seven days before the return date, then you need to include an express demand for the same in your notice of motion and serve original motion papers at least 16 days before the return date. In the event the original motion papers are mailed, serve them at least 21 days before the return date, or add only one business day to the service requirements if you serve by overnight mail, pursuant to CPLR 2103(b)(6).

If you are the opposing party who is served with a proper demand and you want to serve a cross-motion, serve your motion papers at least seven days before the return date. If you are mailing your cross-motion, at least 10 days before the return date; and at least eight days if you serve by overnight

mail.

Finally, the amendments also addressed the time to respond to a cross-motion. Provisions of CPLR 2214(b) now provide that responding affidavits (in addition to reply affidavits to the original motion) must be served at least one day before the return date. Be careful to review the rules of the particular court in which the motion is returnable, however, as the one-day rule very often is modified.

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