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Drafting NY Civil-Litigation Documents: Part 3—The Complaint Cont'd

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Drafting New York Civil-Litigation Documents: Part III — The Complaint

The previous issue's Legal Writer column discussed the beginning parts of a complaint. The bulk of the complaint is contained in the body. Parts I and II of this series discussed the CPLR's requirements for writing a complaint. Most of the complaint-writing techniques discussed in Part III below and next month in Part IV aren't required under the CPLR, but they're helpful.

3. The Body (continued) Identify the Parties

Although not required, start with an "Introduction" paragraph that tells the reader what the case is about.¹ You may also be more specific and name it "Identification of Parties."² Within the paragraph, you might want to identify the status of the parties in the lawsuit, such as the plaintiff and defendant; the representative capacity (if any) of the party suing or being sued; and the corporate status, if any.³

Use this introductory paragraph to establish the jurisdictional basis of the lawsuit and identify the case's venue. Unlike federal court, which requires that a complaint include a short statement showing that the court has jurisdiction,⁴ you don't need to establish jurisdiction in a New York case between two state residents.

In a New York State court, when there are only two parties, use the first paragraph to identify the plaintiff and the second paragraph to identify the defendant. When the litigation involves more than two parties, include a separate paragraph for each additional plaintiff or defendant. Add the parties' names, addresses, and, if

relevant and available, occupations. List an unknown party as "John Doe" or "Jane Doe."⁵ Identifying the parties gives your audience useful information and sets the stage for your substantive allegations.

Nature of Action Statement

In a complicated lawsuit it's useful to include one or more paragraphs that summarize the complaint's legal and factual aspects.⁶ Although every lawsuit is different and some are more complex than others, try, if practicable, to encapsulate the entire lawsuit in about four sentences. First sentence: Explain how this problem or action

judgment against Defendant for \$3 million in compensatory damages, plus Plaintiff's costs, interest, and attorney fees.⁷

Background Facts

This section tells the reader the plaintiff's version of what happened.⁸ Avoid legal theories and legal arguments. This is the place to highlight all the facts favorable to you, the plaintiff. Make sure to tell a story that's accessible, cohesive, and compelling. If your lawsuit is complex, consider using subheadings to help your readers. In a breach-of-contract case, your subheadings might include "Plaintiff's Business"; "Defendant's

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arose. Second sentence: State why you're suing. Third sentence: Give your causes of action. Fourth sentence: Say what you're seeking from this lawsuit. Remember that this is a brief summary of what will follow. Example:

3. This action arises out of Defendant's breach of its written agreement to provide advanced satellite equipment to Plaintiff. The equipment performed neither in a manner specified in the agreement nor as specified in oral representations. Plaintiff's business suffered damages. Plaintiff initiates this suit for breach of contract, breach of express warranty, breach of implied warranty, negligent misrepresentation, and fraud. Plaintiff seeks a

Services"; "Contract Negotiations"; "The Contract Terms"; "Defendant's Anticipatory Breach"; "Plaintiff's Response to Breach"; and "Materiality of Breach."⁹ If your lawsuit is simple, you might want to use the heading "Facts Common to all Causes of Action."

Sometimes, as the plaintiff, you won't have all the information you need to prove a claim. That's because, at this phase in the litigation, you haven't yet had the benefit of disclosure or further investigation. You may use "information and belief" allegations to allege facts not in your control but which the defendant knows.

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Example: "On information and belief, Defendant knew or reasonably should have known that the computer could not perform as Defendant warranted to Plaintiff."

Causes of Action

This part of the complaint is where you set out each legal theory on which you're seeking relief. Under CPLR 3014, state and number each cause of action separately. To make it easier for your reader to understand, use head-

operated, managed, and controlled" a business raises four separate allegations.¹¹ This makes it tempting for the defendant to deny the allegations if one of them isn't true. Avoid multiple allegations to prevent an evasive reply. Stating each fact separately forces defendants either to admit or deny an allegation in specific terms that reveal the theory of their case. Ideally, each numbered paragraph should be no more than one sentence.

Include necessary facts, but don't repeat facts. Adopt the prior facts in the places where they're needed for a clear presentation of a later claim.

Use objective words and undeniable facts rather than subjective opinions and loaded conclusions.

ings to separate each cause of action. In each heading, sequentially number the cause of action, state the name of the cause of action, and identify the defendant you're suing. Example: "SECOND CAUSE OF ACTION Against Defendants XYZ Corp. (Intentional Infliction of Emotional Distress)." Example: "THIRD CAUSE OF ACTION Against Defendants Law Corp. (Libel)." Headings are helpful. They separate the theories of recovery. Instead of using "cause of action," you may use "Count 1 (Intentional Infliction of Emotional Distress)," "COUNT 2 (Libel)," and so forth. Or: "FIRST COUNT (Intentional Infliction of Emotional Distress)," "SECOND COUNT (Libel)," and so forth.

For each claim, identify the cause of action by name (example: "Breach of Contract"); specify the defendant(s) you're suing on this cause of action; state the cause of action's material elements; state, or incorporate by reference, the facts supporting each element; and specify the relief you demand.¹⁰ If you represent the plaintiff, your goal is to make it difficult for the defendant to deny undisputed facts. For example, claiming that the defendant "owned,

Doing so is called "incorporation by reference."¹² Repeating facts in full will annoy your reader and make you look unprofessional and sloppy. Regurgitating facts is a waste of everyone's time. Incorporate the facts you want to repeat by referring to earlier paragraphs, either from your facts section or from an earlier count.¹³ Usually, a court will deem prior facts repeated every place in the complaint where the facts are needed.¹⁴ Example: "SIXTH CAUSE OF ACTION 15. Plaintiff repeats and re-alleges the allegations contained in paragraphs 1 through 6 of this complaint." Once you've edited the complaint, make sure that the numbers to the corresponding paragraphs match what you're incorporating by reference.

Given the flexible pleading requirements under CPLR 3013, attorneys have leeway in drafting. Whether to plead in brief, general terms or in specific terms will depend on the tactics you'll want to use, although some causes of action require specificity, as discussed in Part II of this series.

How much detail to include in your factual allegations is a matter of strategy. If a trial is inevitable, you might

not want to reveal everything to your adversary. You might, instead, want to reserve information for a more advantageous time. On the other hand, you might include in the complaint lots of information to induce your adversary to settle.¹⁵ The advantage of a detailed complaint is its power to persuade. The disadvantage is that it might give an opponent the facts that could form the basis of an affirmative defense or a counterclaim.

If your allegations are precise and brief, the defendant might be forced to admit them.¹⁶ Admitting allegations saves time and money; anything admitted needn't be proven at trial.¹⁷ If possible, use objective words and undeniable facts rather than subjective opinions and loaded conclusions.¹⁸ Similarly, if possible, prefer verbs to nouns and delete adjectives and adverbs. Frame the allegations in a way that prevents an evasive reply from your adversary.¹⁹ It's better to allege that "Fred drove faster than the speed limit" than "Fred drove recklessly or carelessly."²⁰ It's easier for your adversary to deny the latter because of the legal conclusions asserted.²¹ By being precise, you might gain an advantage over your adversary: Your adversary's response will reveal your adversary's strategy.²² It's far better to write that the defendant physician "left a surgical clamp in the plaintiff's stomach"²³ than to write that defendant acted very negligently.²⁴

It's risky to be overly specific before you know your case fully. Just because your client tells you that the defendant ran a red light while driving 85 miles an hour down Broadway doesn't mean you should include these details in your initial pleading. What if your client is wrong about one aspect of the facts? Think of the impact on your adversary and the judge if you must amend your pleading to eliminate any reference to speeding. If you state in the pleadings that the defendant ran a red light, the defendant might be skeptical that you can prove it and might force you to trial rather than agree to settle.

Fortunately, modern pleadings are liberally construed. You're not required to be overly specific. Draft your complaint to survive a motion to dismiss.²⁵ Your allegations don't have to be long and verbose to survive a motion to dismiss. As long as a cause of action is presented on the face of the pleading, it'll survive a motion to dismiss under CPLR 3211(a)(7).²⁶

To draft good documents, devote the time and effort to ensure that each part of the pleading is succinct and concise.

Choose your words carefully, paying special attention to their positive or negative connotations. Whether you use language that has memorable imagery or abstract language that can easily be glossed over without thought greatly affects the reader's impression. Compare these two examples: "Plaintiff was made a senior salesman by the Widget Company in 2008." *vs.* "The Widget Company selected the Plaintiff 2008 Salesman of the Year." Look at the passive voice using the non-descript language "was made" and compare it to the active voice "selected." Compare these two examples: "Plaintiff was Miss Ajax Company and attended a number of functions in that capacity." *vs.* "Plaintiff was chosen to represent Ajax Company as Miss Ajax Company in numerous official relations with the press and public." Compare "functions" to the words "chosen to represent" and "official relations." Anyone can "attend" a "function"; using abstract words creates little impression on the reader. The second sentence implies a more favorable impression. That the plaintiff was "chosen to represent" implies that she had some merit worthy of review and that the person choosing her had some confidence in her ability to "represent" the company. "Official relations," moreover, suggests that she played a major role; it's more impressive than simple "functions."²⁷ Also, "press and public" suggests she dealt with the public and was under close scrutiny.

Pleading evidentiary facts is neither prohibited nor required.²⁸ Examples

of evidentiary facts include contracts, emails, letters, photographs that fairly represent conditions, and statements. Example: "Defendant delivered the letter, annexed as Exhibit 1." Pleading evidentiary facts might limit issues in the case or cause your adversary to admit those facts. You might want to include evidentiary facts to make your client's story believable. Pleading evidentiary facts can function as a disclosure device: Some attorneys include evidentiary facts to secure admissions from their adversary in cases in which, for example, receipt of notice or correspondence or acceptance of goods might be important. If your adversary moves to strike part of your pleading, the court might strike the excessive evidence as improper and prejudicial.

Conclusions of law are unnecessary in a complaint, but they're not prohibited. You might want to include them if they'll help the reader understand the issues.

Here's an example of the body of a pleading in a negligence action:

FIRST CAUSE OF ACTION Against Defendant John Doe (Negligence).

1. On June 1, 1999, in a public street called Comstock Avenue in Syracuse, Defendant drove a motor vehicle into Plaintiff.
2. Plaintiff was crossing Comstock Avenue when defendant drove into him.
3. Plaintiff was thrown down, had his leg broken, and was otherwise injured.
4. Plaintiff has suffered pain of body and mind, loss of earnings and incurred expenses for care and treatment.²⁹

This pleading contains all the essential elements needed in the body and explains both what happened and the basis for money damages. It also gives the reader an unmistakable picture about the case — all in a few sentences.

Know the rules for joining claims under CPLR 601. Also, be familiar with the rules for consolidating separate actions and conducting a joint trial under CPLR 602.

In the next column, the *Legal Writer* will discuss the final aspects of writing a complaint. ■

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2. 1 Michael Barr, Myriam J. Altman, Burton N. Lipshie & Sharon S. Gerstman, *New York Civil Practice Before Trial* §15:362, at 15-40 (2006; Dec. 2009 Supp.).
3. *Id.*
4. Fed. R. Civ. P. 8(a)(1).
5. Mary Barnard Ray & Barbara J. Cox, *Beyond the Basics: A Text for Advanced Legal Writing* 261 (2d ed. 2003).
6. Barr, *supra* note 2, §15:363, at 15-40.
7. Adapted from *id.*
8. *Id.* at §15:370, at 15-40.
9. *Id.*
10. *Id.* at §15:380, at 15-41.
11. Barbara Child, *Drafting Legal Documents: Principles and Practice* 35 (2d ed. 1992).
12. Barr, *supra* note 2, at §15:384, at 15-42.
13. *Id.* at §15:383, at 15-41.
14. CPLR 3014.
15. Ray, *supra* note 5, at 262.
16. Child, *supra* note 11, at 34.
17. Ray, *supra* note 5, at 263.
18. See *id.* at 262-64; see Roger S. Haydock, David F. Herr & Jeffrey W. Stempel, *Fundamentals of Pretrial Litigation* 110 (2d ed. 1992).
19. Child, *supra* note 11, at 34.
20. See Ray, *supra* note 5, at 263.
21. *Id.*
22. Haydock, *supra* note 18, at 108.
23. Child, *supra* note 11, at 37.
24. *Id.*
25. Ray, *supra* note 5, at 259.
26. David D. Siegel, *New York Practice* § 208, at 343 (4th ed. 2005).
27. Child, *supra* note 11, at 38.
28. Graff, *supra* note 1, at 8.
29. Adapted from *id.* at 37.