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Drafting NY Civil-Litigation Documents: Part 2—The Complaint

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

The Legal Writer continues from the last *Journal* issue with techniques on writing a complaint. The complaint "introduces you and your client to the court."[1] The complaint tells the court and your adversary what you want and why. The complaint also shows how competent you are as an attorney, how prepared you are, and how serious you are about your client and your client's case.[2] Because the complaint is the first and sometimes the last impression you'll make, think before you write.

Before You Write, Consider Your Audience

When you draft litigation documents, your primary audience is the court. Your goal is to persuade the court to rule for your client. Also important is the impact a well-written document will have on your opposition. Clear, concise, and logical documents set the tone to interact with opposing counsel. The best attorneys always produce well-written papers, even when their case has weaknesses. When drafting your papers, frame the lawsuit in a way that causes your adversary to recognize the strength of the case even when the case isn't a slam dunk. The strength of your papers might be enough to secure a satisfactory settlement.

The court and your adversary aren't the only ones who'll read your papers. Others who might see them include your client, counsel for other plaintiffs or defendants, attorneys in your office, the press, and possibly jurors.[3] Non-attorneys like your client must understand your papers.[4] Clients who don't understand what you've written will skim over the material and miss errors. That can be embarrassing and, perhaps, deadly to your case. Write litigation documents, therefore, for all readers to understand.

Obtain the Facts

Gather all the facts.[5] Investigate. Find out what happened from your client and any available person familiar with the issue or incident.[6] Interviewing clients to get the necessary facts is a delicate and difficult task, especially when their injury or loss is traumatic. Many clients omit or forget helpful and even harmful information. Some clients omit information because they fear that you'll disapprove, that they'll disappoint you, that the truth will weaken their case, or that some information is irrelevant even though it is critical to the case.[7] The key to a good client interview is to listen. Be patient and empathetic while clients tell you their story. Without being judgmental, encourage clients to tell their story in detail. Ask the basic who, what, when, where, why, and how: "The more exhaustive you are at the interview and investigation stage, the easier it will be for you to determine (as you research and organize) if the case or the defense has merit."[8]

Always verify your client's facts independently. Failing to investigate your client's story might put you at risk of paying costs, sanctions, or both for commencing a frivolous action.[9] Interview witnesses and get relevant documents and statements from them. Get hospital and medical records,[10] for example.

In a complex case, consult an expert to understand what happened.[11] You might have to speak to a doctor or an engineer before filing a complaint.

If time constraints require you to draft a complaint without having all the facts or without having confidence in the facts your client has supplied, draft the complaint cautiously.

Timing is never on your side. But draft a complaint only after you thoroughly understand your client's situation.[12]

Research the Law

Study the law in your department. New York has four departments; sometimes the law differs from one department to the next. Determine the statutory basis on which your client will bring the action. You must answer a threshold question: Does your client have standing to sue?

Determine what claims are available to your set of facts and what affirmative defenses a defendant might raise. List the element or elements of each cause of action you're pursuing. Choose the theory or theories under which you're seeking recovery. As a tactical consideration, ask yourself whom you can sue. You might have to sue, among others, agents, principals, partners, joint venturers, and any "Jane Doe" or "John Doe."[13] Then ask yourself what claims you can assert.

Also think about what relief you can seek for each claim.[14] Are you entitled to attorney fees? What damages are you seeking? Are you entitled to equitable remedies like an injunction or specific performance? Who'll determine the damages: the court or a jury?

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Determine whether you're entitled to a jury trial.

Consider where you may file the case.[15] Are you bringing the action in federal or state court? Do you have a basis to bring a case in a particular venue? Plaintiffs have the choice of available forums for litigating their claims.[16] The decision you make will depend on the costs involved, the convenience of witnesses, the availability of evidence, the substantive and procedural law in the forum, the judicial attitudes, and the jury verdicts.[17]

CPLR Article 5 addresses venue. A trial will take place in the county in which one of the parties resided when the lawsuit began. If none of the parties resided in the state, the plaintiff may designate the county. Some statutes require that the case be venued in a specific forum, such as cases against governmental entities and officials and actions disposing of real estate. Contracts between parties will specify the forum and venue selection. Look at the contract to see whether you've complied with the terms of that contract.

Ascertain whether you've exhausted all the administrative remedies before you start the litigation. Learn whether you're precluded from bringing the case because you could have brought the case in another court.

Verify whether your county has a Commercial Division before you sue in federal court.[18] Litigating commercial cases in a New York court's Commercial Division is advantageous. It has resources to devote to those cases, and it's familiar with the laws concerning commercial cases. In New York County, for example, the threshold to bring a commercial case is $150,000.[19]

Establish whether the statute of limitations has expired or will expire soon. The time you have left on the statute of limitations will affect how much time you'll have to draft a complaint.

Work backwards. Research your client's cause of action in the New York Pattern Jury Charges. Knowing what the jury, or a judge in a bench trial, must decide once all the evidence is in will help you know what you must plead. It'll also help you determine what you need to prove at trial and how you can do so.

Consult CPLR 3015 and 3016 to see whether your client's case is one in which particular allegations must be pleaded. In a libel or slander case, you must plead the particular words in the complaint. In cases involving fraud, mistake, misrepresentation, willful default, breach of trust, or undue influence, each substantive element must be alleged in detail. This applies to defenses as well as to causes of action. Personal-injury cases covering motor-vehicle accidents in New York must state that the no-fault law does not preclude the claim; you must plead either serious injury or economic loss greater than basic economic loss. You must also plead the law of a foreign country. Pleading federal law or the law of sibling states is unnecessary.

> The strength of your papers might be enough to secure a satisfactory settlement.

Some allegations must be pleaded with particularity. If a party is a corporation, you must plead that it's a corporation and state the type of corporation and the place of incorporation. You must plead prior judgments, decisions, and determinations. Signatures on negotiable instruments are admitted unless you specifically deny them in the pleadings. You must plead that a business possessed a license to do particular business. If you're suing New York City or other local governments and agencies, follow the applicable statutes.[20]

You no longer have to plead contractual conditions precedent.[21] As a responding party, you must deny the performance or occurrence. Otherwise, you've waived it. No requirement exists about pleading "the time an action accrued, satisfaction of the statute of limitations, satisfaction of the statute of frauds, performance of conditions precedent."[22] In New York, you no longer have to plead subject-matter or personal jurisdiction. A defendant may plead subject-matter or personal jurisdiction as an affirmative defense in the answer.

Combine Fact and Law

Once you have all the facts and relevant law, sort the facts to support each element of a claim. Go through your list of elements and find facts to support each element. Sorting facts allows you to confirm that your client has given you all the facts to sustain a claim.[23] If one or more elements are unsubstantiated with facts, you need to ask your client more questions. Although you might have few facts to establish an element, you must plead every element of your claim, or the court might dismiss the complaint.[24] The repercussions are severe: Pleading a claim or defense that has no reasonable basis in law or fact might result in sanctions against the attorney, the client, or both.

Certificate of Merit Under CPLR 3012-a

In medical-, dental-, and podiatric-malpractice actions, include with the complaint a certificate of merit declaring that you, as the attorney, reviewed the facts, consulted with a licensed medical practitioner, and concluded that a reasonable basis for the action exists.[25] If you don't have the time to include the certificate because the statute of limitations is expiring, you may file the certificate later. If you haven't been able to consult with a medical practitioner after making three attempts, state that information in the certificate. A certificate of merit isn't required when the plaintiff is pro se[26] or if you've included an expert report.[27] A certificate of merit isn't required when the action is based upon res ipsa loquitur.[28] As the attorney, you must provide a certificate indicating that you're relying solely on the doctrine of res

ipsa loquitur; attach the certificate to the complaint.

Theories and Remedies

When you have multiple theories of recovery for the same damages under the same set of facts, plead it as one cause of action. If the measure of damages differs, plead and number each cause of action even though the facts might be the same. Examples: employment discrimination cases under city and state law, personal injury, and property damage.

Sort the facts to support each element of a claim.

You may also plead inconsistent claims, even though all the damages sought may not be awarded in a judgment. A plaintiff may ask for recission of a contract and also seek specific performance, all in the same complaint.[29]

Alternative pleading is recognized under CPLR 3014.[30] An example is when a plaintiff doesn't know which defendant damaged the goods but states that at least one of the defendants must be responsible. Another example is when a pedestrian is injured when two cars collide. The plaintiff would then allege that both drivers in the cars are responsible even though the plaintiff doesn't know which car hit the plaintiff.

CPLR 3014 authorizes hypothetical pleading. In one of the examples above, a plaintiff may plead for specific performance of a contract, but may also plead that if the court refuses the relief of specific performance, the plaintiff seeks damages for breach of the contract.[31]

Splitting claims is forbidden: "A plaintiff cannot split a claim into successive lawsuits; full recovery for each claim must be obtained in a single lawsuit."[32] The purpose behind this rule is to prevent a defendant from being harassed by multiple lawsuits. An exception exists when "[t]he liabilities claimed in the prior and subsequent actions are from different sources, instruments, or agreements."[33] An exception also exists when "[t]he elements of proof required vary materially between the subsequent and prior actions." An exception to the splitting rule also arises when "[t]here are different parties in interest in the prior and subsequent actions. The court in the first action would not have had jurisdiction to entertain the omitted claim or, having jurisdiction, would clearly have declined to exercise it."[34] A defendant may waive the rule against splitting.

Ethics

Know your jurisdiction's ethical rules. You must be ethical with your client, your adversary, and the court.[35] Be honest, maintain confidentiality, and avoid conflicts of interest.[36] Conflicts of interest arise when you represent multiple parties in the same litigation. Sometimes your clients might start out having the same interests. But they can develop different interests later in the litigation.

Writing the Complaint: Organization, Content, Form

How you draft the complaint will frame facts and issues in a favorable light: "[T]he complaint is the basis of the court's first — and often lasting — impression of the case and plaintiff's counsel."[37] The statement of claim, often called the body of the complaint, and the demand for judgment and relief form the two fundamental elements of a complaint in civil actions — local rules dictate the substance and form of all other components — "regardless of jurisdiction, court, or cause of action."[38] The complaint is the plaintiff's opportunity to allege facts, evidence, and conclusions that form the basis of a legal claim for a remedy.[39]

The complaint contains six parts: (1) the caption; (2) the commencement, also known as the introductory statement; (3) the causes of action, also known as the body of the complaint; (4) the demand for relief; (5) the signature; and (6) the verification.[40]

1. The Caption.

The caption is the heading for all civil-litigation documents and contains essential information about the lawsuit: the jurisdiction; the court's name; the venue; the title of the case, including names of parties and their positions; the name of the litigation document; and the index or docket number.[41]

a. Name of the court and venue: If you're going to write well, start with the caption. At the top of the page of all court filings is the court's name. Start by eliminating verbiage. For instance, "Civil Court of the City of New York, County of Kings" can easily be shortened to "New York City Civil Court, Kings County." The information is the same, but the modified version uses three fewer prepositions and one less definitive article. Cutting fat in litigation documents is a good, easy way to improve them.

b. Name(s) of the parties: In a summons, complaint, or a judgment, all the parties to the lawsuit must be listed. In all other civil-litigation documents, the attorney need list only the first-named party on each side with an appropriate indication of any omissions: an "et al." at the end.[42] Some law firms routinely list all the parties in every filing out of a misguided view that it makes a filing seem more formal and professional. But in cases with numerous parties, the caption can take up the entire first page. Avoid waste.

c. Title: A proper title for each document is critical for court papers. As the case drags on, the number of documents filed can swell a court's or attorney's file unmanageably. Titling a document "Plaintiff's Memorandum of Law" is essentially meaningless in protracted litigation. Briefly title documents you'll unlikely repeat: "Complaint"; "Answer." If you amend these documents, they should be titled: "Amended Complaint"; "Amended Answer." For all other civil-litigation documents, be concise and specific. The title to your document, "Plaintiff's Summary-Judgment Motion," is adequate because you'll likely move for summary judgment once. For all other

documents, identify the document clearly.

As a courtesy to your adversary and the court, put the date on the first page of the document; anyone trying to assemble the papers in the correct order will find this helpful. Court clerks often stamp the filing date in odd locations; sometimes the dates are legible only after minutes of study. Courts rarely read each document as it is filed. Rather, when it's time to decide an issue, the court will stack the papers, usually in chronological order of submission, and then review them, often chronologically but from time to time in reverse chronological order. Make it easy for the court and its staff to put your papers in order.

Unless a court requests a courtesy copy, don't file one. Courtesy copies needlessly congest both the court file and chambers.

d. Index number: Include the index or docket number on all litigation documents. It's the number that identifies and separates your case from the millions of other cases filed. That's the easiest way for the document to make its way into the right place in the file. One small error in the index or docket number will wreak havoc later. The clerk or the judge might misfile or reject your papers.

2. The Commencement.

The commencement paragraph follows the caption and introduces the complaint; it's separate from the body of the complaint.[43] Write it as a complete sentence without legalese. Modern forms still have archaic language in the commencement paragraph.[44] Here's an example: "Comes now the plaintiff Mollie Anderson and for cause of action and complaint against the defendant herein alleges:"[45] The antiquated language has meaning no longer. Here's a modern approach: "Mollie Anderson, plaintiff, by her attorney Henry Frank, complains against John Hopkins, defendant, and asserts the following in support of her claim:"[46] The modern example is clear and less verbose. Simplify it even further: "The plaintiff, Mollie Anderson, by Henry Frank, her attorney, makes the following complaint:" You need not use the defendant's name; you've used it in the caption, and you'll introduce the defendant to the reader almost immediately — in the body of the complaint. Abandoning legalese removes the dust from the commencement sentence and allows the reader to understand what you're about to allege in the body of the complaint.

Cutting fat in litigation documents is one of the easiest ways to improve them.

3. The Body.

The complaint's body forms the bulk of the complaint. The body of the complaint identifies the parties and sets forth the substance of the complaint. Write plain and concise statements in a series of consecutively numbered paragraphs, each of which should contain a single allegation.[47] A properly drafted complaint must allege each element required to establish a cause of action. You needn't detail all the evidence you expect to prove at trial.[48]

In the next column, the Legal Writer will continue with writing the complaint. ■

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2. *Id.*
3. Susan L. Brody, Jane Rutherford, Laurel A. Vietzen & John C. Dernbach, Legal Drafting 291 (1994).
4. *Id.* at 291–92.
5. *Id.* at 293.
6. Suzanne M. Lewis, *Litigation 101: Drafting a Complaint*, City Bar Ctr. for CLE 227, 227 (Dec. 8, 2008).
7. Elizabeth Fajans, Mary R. Falk & Helene S. Shapo, Writing for Law Practice 48 (2004).
8. N.Y. St. Bar Ass'n, Committee on Continuing Legal Education, *Practical Skills — How to Commence a Civil Lawsuit* 5 (Spring 2009).
9. Brody, *supra* note 3, at 293; 22 NYCRR Part 130.
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11. *Id.*
12. Mary Barnard Ray & Barbara J. Cox, Beyond the Basics: A Text for Advanced Legal Writing 250 (2d ed. 2003).
13. Lewis, *supra* note 6, at 227.
14. Brody, *supra* note 3, at 295.
15. *See* Fajans, *supra* note 7, at 51.
16. Michael P. Graff, *The Art of Pleading — New York State Courts*, City Bar Ctr. for CLE 1, 1 (Dec. 8, 2008).
17. *Id.*; *see generally* CPLR 325, 326.
18. Graff, *supra* note 16, at 3.
19. Rules of the Commercial Division of the Supreme Court § 202.70.
20. For example, General Municipal Law § 50-e applies to tort claims against local governments and public corporations.
21. CPLR 3015(a). When statute imposes a condition precedent, however, or when the claim isn't contractual, satisfaction of conditions precedent must be specifically pleaded.
22. Graff, *supra* note 16, at 13; David D. Siegel, New York Practice § 552, at 352–53 (4th ed. 2005).
23. Brody, *supra* note 3, at 298.
24. *Id.* at 300.
25. Graff, *supra* note 16, at 7; CPLR 3012-a.
26. CPLR 3012-a(f).
27. CPLR 3012-a(g).
28. CPLR 3012-a(c).
29. Siegel, *supra* note 22, at § 214, at 351.
30. *Id.*
31. *Id.*
32. 1 Michael Barr, Myriam J. Altman, Burton N. Lipshie & Sharon S. Gerstman, New York Civil Practice Before Trial §15:390, at 15-42 (2006; Dec. 2009 Supp.).
33. *Id.*
34. *Id.* at §15:391, at 15-42, 15-43 (citations omitted).
35. Brody, *supra* note 3, at 294.
36. *Id.*
37. Barr, *supra* note 32, at §15:191, at 15-29 (2006).
38. *See* Fajans, *supra* note 7, at 39.
39. *Id.* at 32.
40. Ray, *supra* note 12, at 257.
41. *Id.*
42. CPLR 2101(c).
43. Ray, *supra* note 12, at 258.
44. Fajans, *supra* note 7, at 39.
45. Ray, *supra* note 12, at 258.
46. *Id.*
47. CPLR 3014.
48. Ray, *supra* note 7, at 259.