

Columbia Law School

From the Selected Works of Hon. Gerald Lebovits

January, 2011

Drafting NY Civil-Litigation Documents: Part 4—The Complaint Cont'd

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Available at: https://works.bepress.com/gerald_lebovits/191/

JANUARY 2011
VOL. 83 | NO. 1

NEW YORK STATE BAR ASSOCIATION

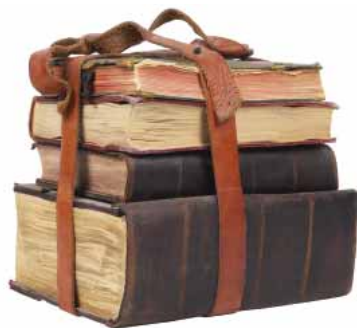
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Drafting New York Civil-Litigation Documents: Part IV — The Complaint

The *Legal Writer* continues with writing the complaint.

4. The Demand for Relief

In the demand or prayer for relief, also known as the *ad damnum* clause, state precisely what you, the plaintiff, want the court to do. This demand universally begins with the word “WHEREFORE.”¹ Depending on the cause of action, you might ask for compensatory damages, punitive damages, costs, or attorney fees.

Recoverable costs and disbursements vary by jurisdiction but can include fixed and limited docket fees, examination before trial (EBT) transcription fees, filing fees, out-of-pocket expenses for service of process and subpoenas, sheriff fees, witness fees, and other expenses.² To preserve claims for costs, include a demand for all costs in your complaint. Whether you can get attorney fees, which are recoverable when the parties agree to them or a statute authorizes them,³ might aid in determining which causes of action you’ll bring. To recover punitive damages and attorney fees, you need not plead them as a separate cause of action. For punitive damages, include in the complaint allegations that show the significant public harm. For attorney fees, include in the complaint these allegations that show the applicable statute or contract provisions that entitle you to obtain attorney fees. Example of a demand:

DEMAND FOR RELIEF

WHEREFORE, plaintiff demands judgment against all defendants as follows:

1. On and for the FIRST CAUSE OF ACTION (breach of contract), awarding compensatory damages in the amount of \$500,000 plus consequential damages in the amount of \$150,000;

2. On and for the SECOND CAUSE OF ACTION (negligent misrepresentation), awarding compensatory damages in the amount of \$500,000;

3. On and for the THIRD CAUSE OF ACTION (fraud), awarding compensatory damages in the amount of \$500,000 plus punitive damages in the amount of \$1,000,000; and

4. On and for the FOURTH CAUSE OF ACTION (rescission), rescinding the contract between plaintiff and defendants;

5. Plaintiff’s attorney fees and legal costs of this suit;

6. Interest at the legal rate;

7. Such other and further relief as the Court deems just and proper.⁴

In this example, the demand for relief is at the end of the complaint. This is the most common method, although many attorneys place the demand for relief at the end of each cause of action when the relief sought in each cause of action is different and when separating the relief will clarify things for, rather than confuse, the reader.

Make your demand for relief complete. In the event of a default, you might be limited to the recovery sought in the complaint.⁵ Although some exceptions exist, the court may grant

whatever relief is appropriate even if you haven’t specifically demanded it so long as it’s within the court’s jurisdiction and the evidence supports the relief.⁶ Include the following language: “. . . and such other and further relief as the Court deems just and proper.” If you’ve proven more than what you’ve demanded in your complaint, move under CPLR 3025(c) to amend the demand in your complaint to conform the pleadings to the proof. Exceptions to the court’s granting relief you didn’t demand: (1) if the plaintiff doesn’t want the relief; (2) if it would cause prejudice to the defendant; or (3) if plaintiff seeks a default judgment.⁷ For example, a court may not grant the plaintiff a divorce if the plaintiff isn’t seeking a divorce, the plaintiff sought only a legal separation, and the defendant never counterclaimed for a divorce. Prejudice exists if the defendants show that they have been hindered in preparing their case or have been prevented from supporting their position. For a default judgment, which occurs when a defendant fails to answer or appear, the court may not award relief that exceeds the amount sought or is different from the type of relief demanded.

You may request different types of relief (equitable or legal relief) in your complaint. As explained in Part II of this series, you may plead in the alternative; likewise, you may request relief in the alternative. For example, you may seek different remedies for the defendant’s negligent conduct and, alternatively, intentional conduct. A court will not, however, grant incon-

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sistent remedies. For example, a court will not grant specific performance and rescission of a contract.

Also, as explained in Part I of this series, don't include a specific dollar amount in personal injury, wrongful-death actions, medical-malpractice actions, and any action against a municipal corporation. Exception: If the action is in New York State Supreme Court, allege in your complaint that the amount of "damages exceeds the jurisdictional limit of all other courts that might have jurisdiction."⁸ The defendant may request a supplemental demand asking that you specify the total amount of damages you're seeking; you have 15 days from the request to serve the supplemental demand.⁹

evidentiary support for the plaintiff's factual allegations.¹³ If a court determines that your complaint is frivolous, you as the plaintiff or your attorney, or both, is subject to sanctions. The court might also strike your complaint.¹⁴

The signature requirement applies to every pleading you serve on another party and file with the court. If you or your attorney omit a signature and you haven't corrected the omission, a court may strike your pleadings.

6. Verification

A verification is a party's sworn statement that the party asserts the allegations in the pleading are true according to the party's knowledge and belief, except as to those matters alleged in the pleading on "information and

knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters I believe them to be true."

If an agent or attorney verifies the pleading, use the following language: "The ground of belief as to all matters not stated upon knowledge is that" (Indicate what documents you've reviewed or conversations you've had with a witness, for example.) "The reason a party did not make this affidavit (or affirmation, if completed by an attorney) is that" (Insert reasons, such as the party is not in the county where the party's attorney has an office.)

Under CPLR 2106, an attorney, physician, osteopath, or dentist whom the law authorizes to practice in the state

Read the complaint from the point of view of each of your different audiences: the court, your adversary, and your client.

The demand for relief is also required in other pleadings: counterclaims, cross-claims, interpleader complaints, and third-party complaints.¹⁰

5. Indorsement and Signature

At the end of the complaint, if you are a pro se plaintiff, sign your name and give your address and telephone number. Also, print or type your name directly below your signature. If attorneys represent you, the attorneys should provide their name, address, and telephone number. You or your attorney may also want to include the following: (1) the date you indorsed the complaint; (2) the place where you drafted the complaint; (3) the party that counsel represents; and (4) the person(s) you served the complaint. The CPLR now requires that your attorney sign.¹¹ Underneath the attorney's signature, have the attorney print the attorney's name. The purpose of the signature requirement is to ensure that you or your attorney has read the complaint and that you or your attorney is bringing the claim in good faith — a complaint that isn't frivolous.¹² A signature also verifies that there is, or will be,

belief."¹⁵ Some causes of action require verified complaints, including sales of goods and performance of labor under CPLR 3016(f), summary proceedings to recover possession of real property under Real Property Actions and Proceedings Law § 741, and matrimonial actions under Domestic Relations Law § 211.¹⁶ If a pleading is verified, each subsequent pleading must also be verified. Exceptions: an answer by an infant, information that may be privileged, or any exception specified by law.

In a multiparty case, only one party need verify the pleading. If a domestic corporation is a party, a corporate officer should verify the pleading. If a party is a governmental body, any person acquainted with the facts may verify the pleading. An attorney may also verify the pleading. In verifying the pleading, the attorney asserts that the attorney has some knowledge of material facts in the pleading after having consulted with a client or reviewed certain documents.

Example of verification by a party: "I, John Johnson, being duly sworn, state: I am the plaintiff in this action. The foregoing complaint is true to my

and who is not a party to the action may affirm the verification statement "to be true under the penalties of perjury" rather than swear before a notary.

CPLR 3022 explains the remedies for a defective verification when verifications are optional as opposed to when they're mandatory.

Edit and Rewrite

Once you as the attorney have finished drafting the complaint, consider your clients.¹⁷ Have them read the complaint to make sure that they understand it and that the complaint is accurate. Clients should be able to read and understand pleadings easily. Your clients are in the best position to see factual errors in a complaint. The complaint should be "geared to their level of sophistication and legal knowledge."¹⁸ If your clients can't understand the complaint, you've alienated those whose help you need. Have your clients review the complaint to check that the facts are accurate and to confirm that the claims in the complaint are the ones your clients want to pursue.

Read the complaint yourself, once for organization and structure and a second time for accuracy and clarity. Be certain you've expressed the allegations simply: "genuinely confusing allegations will give the defendant the opportunity to deny what would otherwise have to be admitted."¹⁹ Proofread carefully; check that paragraphs are numbered consecutively and that references to earlier paragraphs are correct.²⁰

Draft each aspect of the complaint so that you won't waste time and money pursuing fruitless claims or defending your complaint against challenges. The time spent on this careful drafting is minimal compared to the time it takes to respond to motions your adversary raises and for you to bring motions to amend defects in your complaint.

Test the Consequences

Once you finish drafting the complaint, answer the complaint yourself. This exercise will reveal drafting and pleading defects and whether the defendant can avoid answering allegations because of loose drafting. Statements in a pleading are admissions. You should force the other side

If your clients can't understand the complaint, you've alienated those whose help you need.

to make admissions while avoiding making them yourself.

Read the complaint from the point of view of each of your different audiences: the court, your adversary, and your client. Begin with your most hostile audience: your adversary. The defendant might seek to dismiss the case for lack of jurisdiction, improper venue, failure to state a claim or cause of action, and failure to state facts in sufficient detail.²¹ Anticipate these grounds and edit your complaint so that your adversary won't raise them. For every claim you set forth, make sure to list sufficient facts to support each element.

Evaluate the complaint from the judge's viewpoint — an objective standpoint. Consider the tone of the complaint. Does the story portray the plaintiff sympathetically without being melodramatic or maudlin? Is the complaint consistent? Are there contradictions? Before arguing in the alternative, weigh the risks and benefits of doing so: "If you decide to plead in the alternative, use language that makes it clear that you're making alternative arguments, not just contradicting yourself."²²

Attaching Documents to Your Complaint

To substantiate your claims, you may mention documents that corroborate your claims, including checks, contracts, letters, memorandums, and reports (medical, police, and corporate).²³ Documents attached to your complaint become part of the complaint.²⁴ You might want to attach documents to the complaint to legitimize your claims²⁵ and to show that you have provided the requisite notice of a default and an opportunity to cure, if you must allege them. Including other documents shows the court and your adversary that there's substance to what you're alleging. By attaching documents, you're authenticating the documents you've attached at the outset. Although attaching documents might be advantageous to you, consider the disadvantages.²⁶ One disadvantage is that the documents you've attached might not be admissible; they might contain inadmissible evidence. The documents might also contain information harmful to your client. Also, attaching too many documents to the complaint might make the complaint lose its overall persuasive effect. By attaching documents, your complaint will look like a motion for summary judgment.²⁷ That's not what your complaint should look like.

If you're attaching documents to your complaint, make sure to attach them as exhibits. Label them as exhibits and mark them in numerical or alphabetical order. In the complaint,

reference your documents. Example: "In a contract dated October 10, 2010, defendant agreed to ship 200 widgets. A copy of that contract is attached as Plaintiff's 1 and incorporated by reference into this complaint."

In the next issue's column, the Legal Writer will continue with techniques on writing pleadings. ■

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2. Roger S. Haydock, David F. Herr & Jeffrey W. Stempel, *Fundamentals of Pretrial Litigation* 103 (2d ed. 1992).
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5. Ray & Cox, *supra* note 1, at 265.
6. Barr et al., *supra* note 4, at § 15:412, at 15-45.
7. *Id.* at § 15:413, at 15-45.
8. *Id.* at § 15:422, at 15-46.
9. CPLR 3017(c); Barr et al., *supra* note 4, at § 15:422, at 15-46.
10. Barr et al., *supra* note 4, at § 15:410, at 15-44.
11. CPLR 2101(d).
12. Haydock et al., *supra* note 2, at 104.
13. Ray & Cox, *supra* note 1, at 266.
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15. Susan L. Brody, Jane Rutherford, Laurel A. Vietzen & John C. Dernbach, *Legal Drafting* 283 (1994); Michael P. Graff, *The Art of Pleading — New York State Courts*, City Bar Ctr. for CLE 1, 26 (Dec. 8, 2008).
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17. Brody et al., *supra* note 15, at 292.
18. *Id.*
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20. *Id.*
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22. *Id.* at 304.
23. Barr et al., *supra* note 4, at § 15:441, at 15-47.
24. CPLR 3014.
25. Barr et al., *supra* note 4 at § 15:441, at 15-47.
26. *Id.* at § 15:442, at 15-47.
27. *Id.*