March, 2011

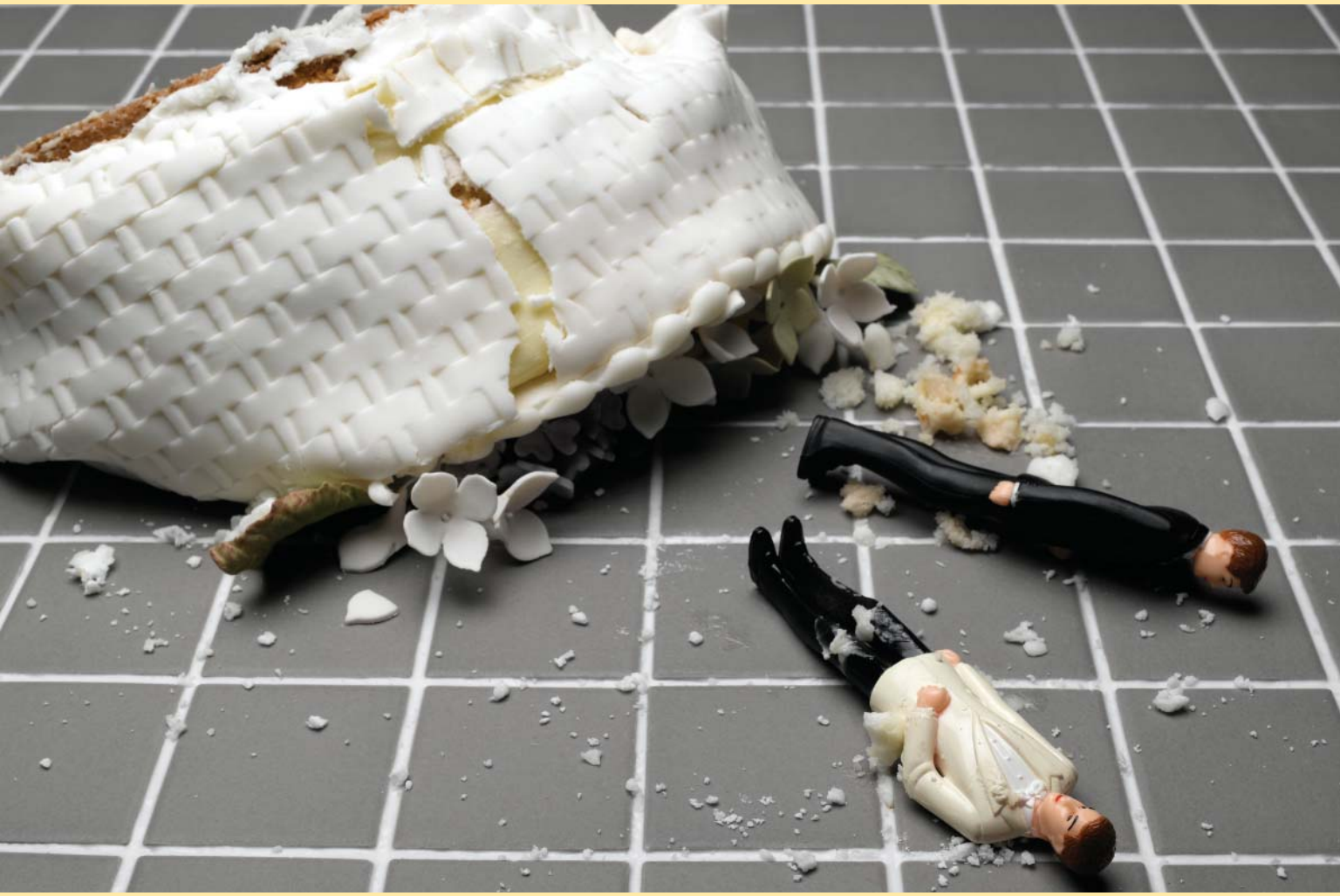
Drafting NY Civil-Litigation Documents: Part 6—The Answer

Gerald Lebovits

MARCH/APRIL 2011
VOL. 83 | NO. 3

NEW YORK STATE BAR ASSOCIATION

Journal



Breaking Up Is Hard[er] to Do

Same-Sex Divorce

by Susan L. Pollet

Also in this Issue

BY GERALD LEBOVITS

Drafting New York Civil-Litigation Documents: Part VI — The Answer

In earlier articles in this multi-part series, the *Legal Writer* discussed techniques for writing pleadings. The *Legal Writer* continues.

If you're the defendant, you've read the plaintiff's complaint, and you're now ready to respond to it in a formal document called the answer.

Deadlines

Depending on the way the plaintiff served the complaint on you, CPLR 320 provides several deadlines for your response to the complaint.

As the defendant, you have 30 days to respond to the complaint. Some exceptions to this rule exist.

If the plaintiff personally serves the complaint, you must answer within 20 days.

If the plaintiff serves the complaint by mail according to CPLR 312(a), you have 20 days after mailing the acknowledgment of receipt form, which you must do within 30 days of receiving the complaint.

If the plaintiff doesn't serve you personally, but serves someone other than you or affixes the summons and complaint to your door, you have 40 days to answer. The 40-day period is calculated as follows: 30 days under CPLR 3012(c) and 10 days from the actual date of service. If the plaintiff doesn't file the complaint on the same day the complaint was served on you, you might have more than 40 days to answer.

If the plaintiff served you by publication under CPLR 315, you have 30 days to answer from the date service is complete. Be aware that under CPLR 316(c), service isn't complete until 28 days after the first publication. You have 30 days plus 28 days — thus, 58 days to answer.

Before you write, serve, and file your answer, assess your options.

Things to Consider Before Answering the Complaint

As a defendant, you have several options before you answer. Some options depend on the strengths and weaknesses of your adversary's case. Other options depend on the strengths and weaknesses of your case. Your financial ability to defend yourself is just as important as your adversary's financial ability to pursue the case. The judge assigned to your case is a factor, too. Another consideration is the potential jury decision based on the type of case you have and the jurisdiction you're in. Before answering, it is critical to think about your ability to resolve the case without engaging in further litigation.

> The starting point for drafting an answer should be your own answers to the allegations in the complaint.

One option you have before answering is to move to dismiss the complaint under CPLR 3211, a pre-answer motion to dismiss. The benefit to moving to dismiss before you answer is obvious: The lawsuit is over if you're successful. The disadvantage is if you're unsuccessful, you must answer, but the lawsuit isn't yet over. You may move to dismiss the action on the merits for the plaintiff's failure to state a claim in the complaint. You may also move to dismiss the action on procedural grounds, such as jurisdiction, statute of limitations, and standing to sue.

If you have 20 days to answer the complaint based on the deadlines discussed above but choose to move to dismiss in lieu of an answer, you must move within 20 days. If you have 30 days to respond to the complaint, you have 30 days to move to dismiss in lieu of an answer. Likewise, you'll have more than 30 days to move to dismiss if you have more than 30 days to respond, and so forth. Under CPLR 3211(e), some exceptions exist for moving to dismiss on the basis of subject-matter jurisdiction, insufficiency of the cause of action, and nonjoinder of a party; you may move to dismiss the complaint under any of these grounds at any time.

Consult CPLR 3211 for all the ways you can move to dismiss the action. The *Legal Writer* will discuss motions in the upcoming issues.

Another option before answering is to remove to federal court a case that started in state court if permitted under federal law. Consult the federal rules before doing so.

Consider settling the case. Settling a case is advantageous because you'll

CONTINUED ON PAGE 53

incur fewer costs and attorney fees than you would defending the case. Settlement results in finality to your case. Sometimes, however, you might not have the luxury of time to settle before you have to answer the complaint. And sometimes bringing up the subject of settlement with the plaintiff after you've only just received the complaint will signal to the plaintiff that your case is weak.[1] At that point, the plaintiff might make unreasonable settlement demands. A "standstill agreement" is one method to engage in settlement negotiations.[2] The case is at a standstill: the plaintiff won't default you for not answering the complaint; no disclosure or other disclosure devices will be used for a specific amount of time that both sides designate. Either party may revoke the agreement if notice is given to the other side.

You might also want to contemplate arbitration or mediation before you answer. It's cheaper and faster, and both sides might leave happy.

You should also consider seeking protection under the federal bankruptcy laws, if that applies to you.[3] Once you've filed for bankruptcy, federal law automatically stays pending state court litigation.[4]

You may also consider not answering the complaint and, instead, allow the plaintiff to seek a default judgment against you.[5] This is almost always a bad option, however. If, for example, you're not subject to personal jurisdiction in New York, you should challenge jurisdiction and incur litigation costs instead of having a default judgment entered against you. If the court lacks subject-matter jurisdiction, assert this defect as an affirmative defense in your answer before the court in which the suit was filed instead of having a default judgment entered against you. You might be insolvent and believe that not answering the complaint is better than answering: Doing so might be an option if the plaintiff is seeking only monetary damages.[6] But you should also consider that one day your client might become solvent, and the default judgment the plaintiff entered against your client might still be enforced. Consider these risks before choosing not to answer the complaint.

If the litigation involves an injury, contact your insurer before answering.[7] Some insurance policies require the insurer to defend against the action. One condition to your insurance coverage might obligate you to notify the insurer of the action. Look at your insurance policy to make sure you comply with any notice requirement.

If you're a pro se defendant, you might not have found an attorney in time to submit an answer. You might have to find an attorney who is specialized in the area of law particular to the lawsuit. Your attorney will need to investigate the facts and research the law before submitting an answer. All this takes time.

If you won't be able to answer the complaint on time, ask the plaintiff, or the plaintiff's counsel if the plaintiff is represented, to extend your time to answer.[8] Adjournments generally range from two to six weeks. Submit a stipulation to the court, signed by you and your adversary, stating the date you must submit the answer. Some plaintiffs will agree to extend your time to answer, but only if you agree that service of the complaint was proper. Don't waive personal jurisdiction so quickly. Attorney and client need to consider the repercussions of this concession. Answering quickly and preserving your defenses or seeking relief from the court is usually the better option.

If your adversary refuses to extend your time to answer, you may move to extend your time to answer if the deadline has passed or even if the deadline hasn't passed. You should move to extend your time to answer by order to show cause.[9] For a court to grant an extension under CPLR 3012(d), you'll need to show a reasonable excuse to justify the extension.[10] For an extension under CPLR 2004, you must show good cause. If you move after the deadline to answer has passed, you'll need to show a reasonable excuse and a meritorious defense because you've defaulted.[11] If you've served the answer after the deadline has passed, you may move for an order compelling the plaintiff to accept late service; to succeed, you'll need to show a reasonable excuse for the delay.[12]

The court will consider several factors to determine whether to grant an extension.[13] One factor is the length of the delay. The longer you've delayed in submitting an answer, the greater the prejudice to the plaintiff. Also, the court will consider whether the delay was deliberate, the defense is meritorious, the failure to respond is excusable, and the defendant has demonstrated a good-faith intent to defend the action.

Purpose of the Answer

The purpose of an answer is to allow you, the defendant, to respond to the complaint. The answer lets you narrow the factual issues in dispute. The answer also gives you the opportunity to assert affirmative defenses, counterclaims, and cross-claims.[14]

If you have objections to the complaint, you can't interpose those objections in an answer. Reserve your objections by moving to strike some aspect of the complaint or for a more definitive statement if the complaint is vague.[15]

You may include in your answer a counterclaim against the plaintiff and a cross-claim against a co-defendant.

The starting point for drafting an answer should be your own answers to the allegations in the complaint. Read the complaint, and use your version of the facts.

Format of the Answer

All answers must conform to the format requirements applicable to all court papers.[16]

Under CPLR 3014, use separate headings separately to plead affirmative defenses. Although separate headings aren't required throughout the

answer, it's helpful to use separate divisions.

Separate headings are useful for the following parts of your answer: (1) introductory statement; (2) jurisdiction; (3) causes of action; (4) parties; (5) response to allegations; (6) affirmative defenses; (7) conclusions; (8) counterclaims; and (9) cross-claims.[17]

Under CPLR 3014, consecutively number each paragraph in the answer.

Different techniques exist for numbering paragraphs in your answer.

Parts to the Answer

Caption: Begin the answer with a caption. Under CPLR 2101(c), state the name of the court, venue (the county where the suit is filed), title of the action, identification of the parties, nature of the paper ("Answer"), and index number of the action. If a judge has been assigned to the case, put the judge's name on the right side of the caption. Copy verbatim the caption from the complaint, including errors the plaintiff made in the complaint. Don't correct the caption in your answer.

> If you fail to respond to any allegation in the complaint, the court will deem the allegation admitted against you. The court will see your silence as an admission.

One technique is the "corresponding-paragraphs" numbering technique.[18] For each paragraph in the complaint, respond to the corresponding paragraph in your answer with the same number as that in the complaint.

> *Example:* 15. Defendant denies each allegation in paragraph 15 of the complaint.
>
> 16. Defendant denies each allegation in paragraph 16 of the complaint.

This technique makes it easy for the court and the plaintiff to track the complaint and the corresponding answer.

Instead of repeating yourself, refer to series of paragraphs at once.

> *Example:* 15–18: Defendant denies each allegation in paragraphs 15-18 of the complaint.

Another option is to address "several non-consecutive complaint paragraphs in a single answer paragraph."[19] This method disregards the numbering scheme in the complaint.

> *Example:* 1. Defendant denies the allegations contained in paragraphs 1, 7, 9, 21, 35–40, 55, and 59 of the complaint.

In multi-party actions, identify the first named party on each side and use "et al." to indicate that one or more parties exist but aren't identified by name. The best practice is to identify all the parties unless doing so is lengthy and cumbersome.[20]

Introductory Statement: Under the caption, include an "Introductory Statement" in which you identify the defendant, the defendant's counsel, the plaintiff, and the pleading to which the answer responds. *Example:* "Defendant XYZ (Defendant), by its attorney Adams, Babtista, Moretti, and Shulman, P.C., for its answer to the complaint of Adam Smith (Plaintiff), states as follows:"

Response to Allegations: After the introduction, include a section titled "Response to Allegations." This is the body of the answer. The body of the answer contains the defendant's responses to the plaintiff's allegations. You must respond to each allegation in the complaint. If you fail to respond to each allegation, the court will deem the allegation admitted against you. The court will see your silence as an admission.

You have several options in the way you answer the allegations. You may admit the allegation. *Example:* "Defendant admits the allegations in paragraph 58 of the complaint." Admitting an allegation in the complaint creates a presumption sufficient to sustain the plaintiff's burden of proof. The plaintiff can use your admission, instead of evidence, to prove the allegation asserted.

Another option is to "deny" the allegation. This is the best option if you know "first hand that the allegation is false, the denial is outright, without any qualifying language."[21] *Example:* "Defendant denies the allegation in paragraph 7."

Another option is to state that the defendant "lacks knowledge or information sufficient to form a belief as to whether the allegation is true."[22] This option is problematic if the defendant is in a position to know the facts.

Another way to handle the matter is to address the allegation. For example, you may state that the allegation is a legal conclusion and that no response is required.

Because the bulk of the answer is contained in the "Response to Allegations" section, the *Legal Writer* will discuss this in depth in next issue's column.

Affirmative Defenses: If you're asserting a defense under CPLR 3018(b), raise these defenses in a section titled "Affirmative Defenses." Separately state and number each defense.[23] *Example:* "First Affirmative Defense"; "Second Affirmative Defense." Each affirmative defense, similar to the cause(s) of action in the complaint, has elements. Lay out the elements to the defense in the answer.

Affirmative defenses aren't the plaintiff's burden to prove in the action; affirmative defenses are for you to plead in your answer and prove at trial.[24]

Under CPLR 3018(b), an affirmative defense is a matter that would be likely to surprise the plaintiff or raises fact issues not appearing on the face of the complaint.

Under CPLR 3018(b), you have several affirmative defenses to choose from: arbitration and award; collateral estoppel; the plaintiff's culpable conduct under the comparative-negligence rule; discharge in bankruptcy; illegality; fraud; the defendant's infancy or other disability; payment; release; res judicata; statute of frauds; and statute of limitations. Other affirmative defenses include adverse possession; truth in a defamation action; laches; qualified privilege; "several only" liability; and standing to sue.

Counterclaims and Cross-Claims: Assert counterclaims or cross-claims after the "Response to Allegations" and "Affirmative Defenses" sections. You may continue with the numbering scheme from the earlier sections, or you may start this section with paragraph number "1." Separately state and number each counterclaim and cross-claim.

Conclusion: The CPLR doesn't require you to include a "Conclusion" section, but a conclusion section might be helpful to identify the relief you seek. The "Conclusion" is similar to the "Demand for Relief" contained in the complaint.

> *Example:* WHEREFORE, defendant demands judgment as follows:[25]
>
> 1. Dismissing the complaint with prejudice;
> 2. Its costs of suit, including attorney fees, incurred in defending this action;
> 3. Interest at the legal rate; and
> 4. Such other and further relief as the court deems just and proper.

If you've asserted any counterclaim or cross-claim, demand your relief after demanding that the complaint be dismissed.

> *Example:* WHEREFORE, defendant demands judgment as follows:[26]
>
> 1. Against plaintiff dismissing the complaint.
> 2. Against plaintiff on the counterclaim in the amount of $___ plus interest;
> 3. Against defendant XYZ Corporation on the cross-claim in the amount of $____ plus interest;
> 4. Against plaintiff and defendant for the costs of suit, including attorney fees incurred in this action; and
> 5. Such other and further relief as the court deems just and proper.

Indorsement: The answer ends with an indorsement:[27] state the defense counsel's name, address, and telephone number. If the defendant isn't represented, state the defendant's name, address, and telephone number. Also state the date counsel indorsed the answer; the city where the answer was drafted; the party or parties defense counsel represents; on whom the answer will be served; the individual attorney and the attorney's firm; and co-counsel or associated counsel. Some attorneys (depending on local rules) include the last four digits of their Social Security number.[28]

Signature: The Uniform Rules require that the answer be signed by the defendant or defendant's attorney, but the CPLR doesn't require counsel to sign the answer.[29]

Verification: If the plaintiff has verified the complaint, the answer must also be verified.[30] See part IV of this series, in which the *Legal Writer* discussed verification in the context of writing the complaint.

Exhibits: You may attach "writings" to a pleading, as exhibits, under CPLR 3014. These exhibits are meant to provide a complete defense to the complaint.

Proof of Service: You must attach on a separate page at the end of the answer proof that you served the answer. You don't need to attach this proof to the copies you've served on the other parties. Attach the proof of service (affidavit of service or affirmation of service) to the original filed with the court.[31]

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

---

1. 1 Michael Barr, Myriam J. Altman, Burton N. Lipshie & Sharon S. Gerstman, New York Civil Practice Before Trial § 15:464, at 15-49 (2006; Dec. 2009 Supp.).
2. *Id.* at § 15:464, at 15-49.
3. *Id.* at § 15:465, at 15-50.
4. *Id.*
5. *Id.* at § 15:462, at 15-49.
6. *Id.*
7. *Id.* at § 15:466, at 15-50.
8. *Id.* at § 15:461, at 15-49.
9. *Id.* at § 15:722, at 15-73.
10. *Id.* at § 15:724, at 15-73.
11. *Id.* at § 15:742, at 15-74.
12. *Id.* at § 15:740, at 15-74.
13. *Id.* at § 15:751, at 15-75.
14. *Id.* at § 15:481, at 15-50.
15. *Id.* at § 15:482, at 15-50.
16. CPLR 2101.
17. Barr *et al.*, *supra* note 1, at § 15:491, at 15-51.
18. *Id.* at § 15:492, at 15-51.
19. *Id.*
20. *Id.* at § 15:500, at 15-51.
21. David D. Siegel, New York Practice § 221, at 365 (4th ed. 2005).
22. Barr *et al.*, *supra* note 1, at § 15:520, at 15-53.
23. CPLR 3014.
24. Siegel, *supra* note 21, § 223, at 368.
25. Barr *et al.*, *supra* note 1, at § 15:505, at 15-52.
26. *Id.*
27. CPLR 2101(d).
28. Barr *et al.*, *supra* note 1, at § 15:506, at 15-53.
29. 22 NYCRR § 130-1.1-a.
30. CPLR 3020(a). Some exceptions exist: In fraud actions, the answer must be verified even if the complaint isn't verified. CPLR 3020(b)(1). A defense that doesn't involve the merits of the case, such as statute of limitations, must be verified. CPLR 3020(c).
31. 22 NYCRR § 202.5(a); Barr *et al.*, *supra* note 1, at § 15:510, at 15-53.

Gerald Lebovits is a Criminal Court judge in New York County and an adjunct professor at St. John's University School of Law and Columbia Law School. He thanks court attorney Alexandra Standish for researching this column. Judge Lebovits's e-mail address is GLebovits@aol.com.