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Drafting NY Civil-Litigation Documents: Part 1—Overview

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Drafting New York Civil-Litigation Documents: Part I — An Overview

Good litigation drafting is a hallmark of good advocacy.

Some attorneys believe that drafting litigation documents means pulling out a form book and filling in the blanks. Other attorneys think that cutting and pasting new information into an old document is good lawyering. Neither option produces a good product. It's easier to devote yourself slavishly to forms than to draft documents from scratch. But attorneys who draft their own litigation documents are more successful than attorneys who use forms. Carefully prepared documents — not cut-and-paste jobs — elicit favorable settlements and win cases.

Forms might be a starting point when drafting litigation documents. They help the novice attorney understand how a particular document should look and what that document should include. In the short run, forms have their advantages. Forms are generic, though, and each lawsuit presents unique facts and circumstances. Forms can't be easily tailored to fit your case. "[B]y definition . . . [forms] are general, abstract, and sometimes even ambiguous."[1] Many forms, moreover, promote legalese over plain and clear writing. No matter how diligently the attorney modifies archaic forms to fit new facts, the form's stilted legalisms will inevitably mar the effort. To some, legalese makes the document impressive and attorneys seem intelligent. But "judges who know about good writing suspect that beneath your legalese lurks linguistic, and perhaps legal, incompetence."[2]

In this multi-part series on writing civil-litigation documents, the *Legal Writer* will discuss drafting complaints in plenary actions and petitions in special proceedings. In the coming months, the *Legal Writer* will continue with drafting techniques for, among other documents, answers, bill of particulars, interrogatories, motions to dismiss, and motions for summary judgment.

The rules governing the form and content of litigation documents vary across jurisdictions, courts, and causes of action. That's why you must "know your local rules."[3] The *Legal Writer* will focus on New York rules.

Pleadings Distinguished From Other Litigation Documents

Pleadings are documents in which a party to a lawsuit alleges facts setting out causes of action or claims for relief. Pleadings are also documents in which a party responds with admissions and defenses; defenses are made up of denials and affirmative defenses. You may deny as untrue allegations your adversary makes; you may also raise affirmative defenses: defenses a defendant must plead and prove at trial. Some pleadings request affirmative relief; some pleadings are defensive or responsive.[4] CPLR 3011 sets out the documents that are considered pleadings.

The pleadings that request affirmative relief include a complaint, a petition, a counterclaim, a cross-claim, an interpleader complaint, and a third-party complaint. A petition is the initial pleading in a special proceeding; it's the equivalent of the complaint in an action.[5] A counterclaim is a claim the defendant interposes against the plaintiff.[6] A cross-claim is a claim one defendant brings against another.[7] An interpleader complaint is a pleading by the defendant against another claimant. A third-party complaint is a pleading against someone who's not yet a party. These complaints are also known as "impleaders."

Defensive or responsive pleadings include an answer and a reply. A party may submit an answer in response to the following pleadings: complaint, petition, counterclaim (against a plaintiff), cross-claim (against a defendant), interpleader complaint (defendant against another claimant), and third-party complaint (against a third party). The answer gives you the opportunity to admit allegations that are true and to deny allegations that are false. An answer also allows you to raise affirmative defenses and counterclaims. Affirmative defenses under CPLR 3018(b) include arbitration and award, collateral estoppel, discharge in bankruptcy, illegality, fraud, the defendant's infancy or disability, payment, release, res judicata, the plaintiff's culpable conduct under the comparative-negligence rule, statute of frauds, statute of limitations, and standing to sue.

A party may serve a reply in several circumstances. A reply is appropriate in response to an answer that contains a counterclaim or an answer that contains an affirmative defense. In your reply, you give a legal excuse or exception to an affirmative defense. A party may also serve a reply in response to an answer to an interpleader com-

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plaint or third-party complaint. An interpleader complaint is a defendant's pleading against another claimant; an answer will be required from the other claimant. Also, a party may serve a reply in response to an answer to a cross-claim that contains a demand for an answer.

Other Litigation Documents

A bill of particulars is an amplification of a pleading: "Parties are required to particularize only that which they have the burden of proof."[8] Serve a bill of particulars only when one is demanded from you. As a plaintiff, you must particularize your claims. As a defendant, you must particularize your defenses, counterclaims, cross-claims, and third-party claims. A bill of particulars is meant to amplify the pleader's contentions, not to offer an evidentiary basis for those contentions.

Motions are requests for court orders. Those orders may resolve some, perhaps all, issues in the case. A court's grant of a motion might result in a final resolution of the case. Or it may resolve some aspect of the litigation, a "housekeeping phase"[9] of the litigation, while the litigation proceeds under the parameters of the court's order. Motions may be made before, during, or after trial and on appeal.

A defendant may also file pre-answer motions, such as a motion to dismiss. A party may move to strike,[10] seeking a court order to remove all or part of the opposing party's pleading. Sometimes a court will treat a pre-answer motion to dismiss under CPLR 3211 as one for summary judgment.[11]

Under CPLR 3213, a plaintiff may also bring a summary-judgment motion in lieu of a complaint. This is a quick way to bring a case based on "an instrument for the payment of money only or upon any judgment."

Parties may also file motions after an answer is filed. These include a motion for summary judgment, a motion to reargue or renew, a motion to compel disclosure, a motion to preclude evidence, a motion for a stay, and a motion for a protective order. To grant a summary-judgment motion, a court must find that no material issue of fact exists to warrant a trial. A party may also move for partial summary judgment, to dismiss a cause of action, or to dismiss a defense.

Lawyers may also draft interrogatories — questions addressed to another party — in the context of disclosure.[12] The questions must be answered under oath and returned.

Also in the context of disclosure is a notice to admit: one party requires another party "to admit stated facts, or the genuineness of a paper or document, or the correctness of photographs."[13] Use this disclosure device only when you reasonably believe no substantial dispute exists about the matter and when the information is within the knowledge of the other party or ascertainable by the other party after an inquiry.[14]

The *Legal Writer* will discuss these litigation documents in upcoming issues.

Actions Versus Special Proceedings and Summary Proceedings

In New York, civil cases are prosecuted as actions or as statute-authorized special proceedings.[15] Examples of special proceedings include CPLR Article 75 proceedings to compel or stay arbitration, or to confirm, vacate, or modify an arbitration award; CPLR Article 78 proceedings to challenge the decision of a government agency or administrative judge; mandamus; habeas corpus; prohibitions; Family Court proceedings; and summary proceedings, such as landlord-tenant nonpayment or holdover proceedings.

General CPLR Requirements

All New York civil litigation documents must comply with the CPLR's style and format rules. Civil litigation documents must be on 8½-by-11-inch white paper.[16] Exempt from the CPLR's 8½-by-11-inch requirement are summonses, subpoenas, notices of appearance, notes of issue, orders of protection, temporary orders of protection, and exhibits.[17] Exhibits can be any size. The writing must be "legible and in black ink."[18]

For a summons, you must use at a minimum a 12-point type; for other documents, use at least 10-point type.[19]

Be careful: Your adversary will look for flaws in your pleadings.

Each document must have a caption containing the court's name and venue, the document's title, and the index number.[20] Some courts require that you include the assigned judge's name. You must name all the parties to the lawsuit in a summons, complaint, and judgment. On all other documents, you need name only the first party on each side and then include "et al." to indicate that more parties exist.

Each document served or filed or submitted to a court must have the name, address, telephone number, and signature of the attorney[21] (or pro se litigant, if the party is appearing pro se) submitting the document. By signing the document, the attorney or pro se litigant certifies the integrity of the document.

Litigation documents must be in English.[22] If you include an affidavit or exhibit in a foreign language, you must attach an English translation and an affidavit from the translator. In the affidavit, translators must provide their qualifications and swear that the translation is accurate.[23]

Be careful: Your adversary will look for flaws in your pleadings. Although the court will disregard defects in form that don't substantially prejudice a party's rights, a party on whom a document is served will be deemed

to have waived objections to defects unless a statement of particular objections — along with the document — is returned to the serving party within two days of receipt.[24]

Pleading Rules

Determine whether your jurisdiction is a "notice pleading" jurisdiction.[25] Knowing whether your jurisdiction is a "notice pleading" jurisdiction will affect how specific your pleadings must be. New York is a notice-pleading jurisdiction. Notice pleading requires parties to give their adversaries notice of their claims or defenses[26] even if you've given the claim a wrong name or you've drafted the pleading poorly. The "[s]ubstance [of the pleading] prevails over its articulateness."[27]

Under CPLR 3013, the "[s]tatements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense."[28] Under the old rules, pleadings had to set forth "facts" on which a party relied, not the evidence by which they could be proved.[29] The modern rules replace "facts" with "statements."

The CPLR eliminates the common law's formality and constraints. Today, pleadings are liberally construed and less rigid. Under the common law, parties had to trade formal pleadings back and forth in the hope that the lawsuit could be narrowed to a few clearly defined factual issues.[30] The plaintiff had to state facts, but stating conclusions or evidence could've been fatal to the pleading. This led to a never-ending cycle of papers and interim disputes over the impossible distinction between fact, conclusion, and evidence.[31] Those days are gone.

CPLR 3014 provides that "[e]very pleading shall consist of plain and concise statements in consecutively numbered paragraphs. Each paragraph shall contain, as far as practicable, a single allegation." This rule is meant to promote common sense and make pleadings clear. Number and state each cause of action or defense separately. Causes of action and defense may be stated alternatively or hypothetically. CPLR 3014 also provides that prior statements in a pleading are "deemed repeated or adopted subsequently in the same pleading."

CPLR 3013 and 3014 will be further discussed in the *Legal Writer*'s upcoming article on drafting the complaint.

CPLR 3017 requires that every pleading containing a cause of action (such as a complaint, counterclaim, cross-claim) contain a "demand for relief" — what the pleader seeks to obtain. Exceptions to this rule exist. For example, in personal injury, wrongful death actions, medical malpractice actions, and any action against a municipal corporation, include a general relief, not a specific dollar amount in damages.[32]

Verification,[33] "an affidavit swearing to the truth of the pleading," of pleadings is optional under the CPLR.[34] Some pleadings must be verified, including in a matrimonial action, a summary landlord-tenant proceeding, and an Article 78 proceeding. Once a pleading is verified, each subsequent pleading must be verified.[35]

Summons and Complaint and Summons With Notice

Under CPLR 304, an action is commenced by filing a summons and complaint or a summons with notice.[36] An action is commenced on filing a summons and complaint in the Supreme and County Courts and even in lower courts like the New York City Civil Court and the district, city, town, and village courts.[37]

A summons with notice in lieu of a complaint served under CPLR 305(b) isn't a pleading.[38] It doesn't require serving an answer. In New York, you may not serve a bare summons.[39] Filing a summons without a complaint or notice will not commence an action. You may serve a summons with notice without a complaint. In the notice, state the nature of the action, the relief you're seeking, and the amount of money sought in the event of a default (except in actions for medical malpractice, personal injury, or wrongful death). A defendant served with a summons and notice may serve a demand for a complaint. With some exceptions under CPLR 320(a), a defendant has 20 days after service of the summons to serve the demand.[40] The complaint must be served within 20 days of the demand. Serving an answer constitutes an appearance. When serving your demand for a complaint, also serve a notice of appearance. A demand for a complaint doesn't constitute a notice of appearance. Likewise, a notice of appearance isn't a demand to serve a complaint.[41] Service of the demand extends the time to appear until 20 days after service of the complaint.[42] Under CPLR 3012(a), an answer or reply must be served within 20 days after service of the pleadings to which it responds.[43]

Advantages to serving a summons without a complaint include getting to the courthouse faster by avoiding drafting a lengthy complaint and settling the case quickly, without driving up legal fees.[44] One reason to serve a summons without a complaint is if you have insufficient time or information to draft an adequate complaint.

The CPLR eliminates the common law's formality and constraints.

One disadvantage is delay in joinder of issue. Issue is joined when an answer is filed. You give the defendant time to serve a notice of appearance and, if the defendant chooses, to serve a demand for a complaint. If the defendant doesn't make a demand, the plaintiff is still required to serve a complaint within 20 days after service of the notice of appearance. Another disadvantage is that it might not toll the statute of limitations. A complaint, even if deficient and inadequate, is likely to toll the statute of limitations. You may amend the complaint later. The *Legal Writer* will discuss amending pleadings in the upcoming issues. A court that dismisses a complaint because of inadequate notice dismisses the case for jurisdictional reasons. You won't, therefore, have the benefit of the six-month tolling under CPLR 205(a). Serving a summons without a complaint also delays disclosure opportunities. The defendant won't have to serve an answer until you've served the complaint. Disadvantages[45] also include applying the six-month tolling period under CPLR 205 as well as obtaining a default judgment against a defendant if the defendant fails to answer.

In the next column, the *Legal Writer* will discuss tips on how to draft a complaint. ■

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2. Barbara Child, Drafting Legal Documents: Principles and Practice 39 (2d ed. 1992) (quoting Robert W. Benson, *Plain English Comes to Court*, 13 Litigation 21, 21 (Fall 1986)).
3. Elizabeth Fajans, Mary R. Falk & Helene S. Shapo, Writing for Law Practice 31 (2004) (italics omitted).
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5. David D. Siegel, New York Practice § 552, at 948 (4th ed. 2005).
6. *Id.* § 224, at 370.
7. *Id.* § 227, at 374.
8. *Id.* § 238, at 400.
9. *Id.* § 243, at 409.
10. Fajans et al., *supra* note 3 at 86–89.
11. Siegel, *supra* note 5, § 279, at 461.
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15. CPLR 103(b).
16. CPLR 2101(a).
17. *Id.*
18. *Id.*
19. *Id.*
20. CPLR 2101(c).
21. CPLR 2101(d).
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23. *Id.*
24. CPLR 2101(f).
25. Suzanne M. Lewis, *Litigation 101: Drafting a Complaint*, City Bar Ctr. for CLE 227, 227 (Dec. 8, 2008).
26. Haydock et al., *supra* note 12, at 86.
27. Siegel, *supra* note 5, § 208, at 344.
28. CPLR 3013.
29. Siegel, *supra* note 5, § 207, at 342-43; *see* Michael P. Graff, *The Art of Pleading — New York State Courts*, City Bar Ctr. for CLE 1, 7 (Dec. 8, 2008).
30. Siegel, *supra* note 5, at § 207, at 342.
31. *See id.*
32. Siegel, *supra* note 5, at § 217, at 357.
33. CPLR 3020, 3022, 3023.
34. Siegel, *supra* note 5, at § 232, at 389.
35. CPLR 3020(a) (some exceptions to verifying pleadings exist).
36. CPLR 304(a).
37. Siegel, *supra* note 5, § 60, at 14–15 (supp. July 2010).
38. Graff, *supra* note 29, at 3 ("except for purposes of removal of an action to federal court").
39. *See* Graff, *supra* note 29, at 5–6.
40. CPLR 3012(b).
41. *Id.*
42. *Id.*
43. CPLR 3012(c) (some exceptions exist where service is extended to 30 days).
44. *See* Graff, *supra* note 29, at 5–6.
45. *Id.*

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