

## **Advanced Drafting of Complaints and Answers: How to Go Beyond Required Content and Reach Multiple Audiences**

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Today's faculty features:

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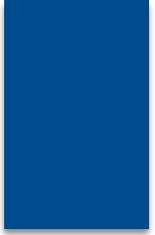
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# Advanced Drafting of Complaints and Answers: How to Go Beyond Required Content and Reach Multiple Audiences

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# About Us

## Payal Salsburg, Laredo & Smith, LLP

- ▶ Represents businesses and executives in litigation, white collar criminal defense, and internal investigations
- ▶ Office in Boston, Massachusetts; previously practiced in Florida state and federal courts

## Sonya Smallets, Minnis & Smallets, LLP

- ▶ Represents employees, primarily in discrimination, harassment, and wrongful termination suits
- ▶ Office in San Francisco, California; practices in state and federal court throughout Northern California

# Purpose of the Complaint

- ▶ Initiating the case by stating legally sufficient claims
- ▶ But has the potential to do much more
- ▶ Defines the playing field
- ▶ Can, and generally should, be a persuasive document
- ▶ Important to think about who your audience is, what you are trying to accomplish

# Content of Complaint (FRCP 8a)

A pleading must state:

- (1) a short and plain statement of the grounds for the court's jurisdiction;
- (2) a short and plain statement of the claim showing that the pleader is entitled to relief; and
- (3) a demand for the relief sought.

# Additional Rules (FRCP 8d)

- (1) Each allegation must be simple, concise, and direct.
- (2) May set out 2 or more statements of a claim or defense alternatively or hypothetically, either in a single count or defense or in separate ones.
- (3) May state as many separate claims or defenses, regardless of consistency.

# Pleading Standards

- ▶ FRCP 8(a)(2)'s requirement that the complaint must contain a "showing that the pleader is entitled to relief" requires the pleading of "factual allegations" that "raise a right to relief above the speculative level" to the "plausible level." *Bell Atlantic Court v. Twombly*, 550 U.S. 544, 555 (2007).
- ▶ The complaint need not state in detail the facts upon which the complaint is based. *Bell Atlantic Court v. Twombly*, 550 U.S. 544, 556 (2007).
- ▶ But it must provide "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).
- ▶ Distinction between factual and conclusory allegations
- ▶ Court, judge, case specific

# Special Matters (FRCP 9)

(b) Fraud or Mistake – must state with particularity the circumstances constituting fraud or mistake.

(c) Conditions Precedent – can allege generally that all conditions precedent have occurred or been performed. When denying that a condition precedent has occurred, must do so with particularity.

(g) Special Damages – must be specifically stated.

# Who are you writing for?

12

- ▶ Judge
- ▶ Plaintiff
- ▶ Defendant
- ▶ Opposing Counsel
- ▶ Insurers
- ▶ Jury
- ▶ Public/Press

# Audience: The Judge

- ▶ Legal sufficiency
- ▶ First impression
- ▶ Use of a summary
- ▶ Scope of discovery

# Audience: The Plaintiff

- ▶ Telling their story
- ▶ Privacy

# Audience: The Defendant

- ▶ Think about who the decision-makers are likely to be and what their motivations are
- ▶ Sympathy: tell a story, isolate the bad actor
- ▶ Fear: reputational concerns, use of a draft complaint

# Audience: Opposing Counsel

16

- ▶ Competence of counsel
- ▶ Willingness to invest resources
- ▶ Risk/exposure
- ▶ Obtaining admissions

# Audience: Insurers

- ▶ Strategizing re all potential sources of insurance
- ▶ Including covered claims

# Audience: The Jury

- ▶ Again, tell a story
- ▶ Do not make promises you cannot keep
- ▶ Avoid the kitchen sink
- ▶ Emotion has to be earned

# Audience: Press/Public

- ▶ First: ethics
- ▶ Not entirely within the lawyer's control
- ▶ But certain kinds of complaints are more likely to generate press and can seek it
- ▶ Remember: reporters and the general public are not lawyers
- ▶ Press commonly occurs right after the complaint is filed
- ▶ Frequently, the complaint is the only substantive information in the public record
- ▶ Tip: Pay attention to the comments!

# Process of Drafting the Complaint

- ▶ Gather information from the Plaintiff
- ▶ Investigate
- ▶ Research legal theories
- ▶ Choose a court
- ▶ Anticipate defenses

# Drafting Tips

- ▶ Remember: there is more to a complaint than legal sufficiency
- ▶ Tell a story
- ▶ Use plain English
- ▶ Do not include unnecessary, potentially harmful information
- ▶ Think carefully about whether you can prove all of the facts you are alleging and whether all the claims are necessary
- ▶ Remember that there is likely to be a lot you do not yet know
- ▶ Consider using form jury instructions for causes of action

# Responding to a Complaint

22

**Avoid liability and even the playing field.**

- ▶ Responding to a Complaint (answering, Rule 12 motions, removing to federal court)
- ▶ Playing Defense
- ▶ Preserving your rights for appeal and shaping the scope of discovery through Affirmative Defenses
- ▶ Flipping the script with Counterclaims, spreading liability with Crossclaims and Third-Party Complaints

# Removal

(28 U.S.C §§ 1441, 1446)

- ▶ Strategy considerations
- ▶ May be based on diversity or a federal question
- ▶ 30 days after receipt of initial pleading or service of summons (if service not required)
- ▶ May be based on amended complaint, pleading, motion, order, or other paper

# Motions to Dismiss (FRCP 12b)

- ▶ Timing of Responses
- ▶ Bases for a Motion to Dismiss:
  - ▶ subject matter jurisdiction; personal jurisdiction; improper venue; insufficient process; insufficient service of process; failure to state a claim; failure to join a party under Rule 19; *misnomer of a party; pendency of a prior action in MA; improper damages*
- ▶ Strategy considerations
- ▶ Check rules to see if partial motion allowed

# Other Rule 12 Motions

- ▶ Motion for judgment on the pleadings
  - ▶ After pleadings are closed but early enough not to delay trial
  
- ▶ Motion for a more definite statement
  - ▶ Before answering
  - ▶ So vague or ambiguous that D cannot reasonably respond
  - ▶ *E.g.*, multiple tortfeasors, defining trade secrets
  
- ▶ Motion to strike
  - ▶ Before answering
  - ▶ Redundant, immaterial, impertinent, scandalous material

# Pre-Drafting To Dos: Getting the Facts

- ▶ Interview relevant witnesses
- ▶ Review relevant documents
- ▶ Construct a timeline of events
- ▶ Parse out allegations and ask your client to respond to each one

# Defenses; Admissions; Denials. (FRCP 8b)

In responding to a pleading:

- (1) (A) short and plain statement of defenses to each claim; and  
(B) admit or deny the allegations.
- (2) Denial must “fairly respond” to the substance of the allegation.
- (3) General denials allowed in good faith, otherwise specific denials.
- (4) Partial denials allowed (admit the remainder).
- (5) “Lacks knowledge or information sufficient to form a belief about the truth of an allegation” is effectively a denial.

# Responding to Allegations

## FRCPP 8(b)

- ▶ ***Admit, deny, lack knowledge or information***
- ▶ Failure to deny = generally, an admission
  - ▶ Unless no response is required under FRCPP 8(d)
    - ▶ Legal conclusions
    - ▶ References to documents
    - ▶ Allegations/counts against other parties
    - ▶ Prayer for relief
- ▶ Parse out each paragraph into discreet allegations, respond to each (in *good faith*)
- ▶ Different approaches to responding to allegations

# Example #1

**Allegation:** 13. [Co-Defendant] is a Delaware corporation with a principal place of business at 100 Sweetheart Avenue, Cambridge MA.

**Option 1**

Defendant lacks information sufficient to form a belief as to the truth of the allegations set forth in Paragraph 13.

**Option 2**

On information and belief, admitted.

# Example #2

**Allegation:** 5. This Court has specific personal jurisdiction over Defendant by his consent. In section 5 of his employment agreement, Defendant agreed that Massachusetts would be the exclusive forum for any dispute pertaining to or arising from the agreement.

## **Option 1**

Admitted.

## **Option 2**

The allegations contained in Paragraph 5 constitute legal conclusions to which no response is required. Further, to the extent the allegations purport to characterize the contents of a document, such document speaks for itself and, thus, no response is required. To the extent that the allegations in Paragraph 5 misstate or mischaracterize the contents of the document, they are denied. To the extent that a further response is required, Defendant denies all allegations in Paragraph 5.

# Example #3

**Allegation:** 18. Plaintiff is a leading provider of cat accessories in the Continental United States and specializes in developing new and innovative catnip flavors.

## **Option 1**

Denied.

## **Option 2**

On information and belief, admitted.

## **Option 3**

Defendant is without sufficient knowledge or information to form a belief as to the truth of the allegations in Paragraph 18.

# Example #4

**Allegation:** 38. On information and belief, Defendant is currently expanding its marketing efforts in the U.S. Northeast and has raided Plaintiff's talent pool in order to gain an unfair competitive advantage over Plaintiff.

## **Option 1**

Defendant admits only that it is currently expanding its marketing team in the Northeast region of the United States. Defendant denies all remaining allegations in Paragraph 38.

## **Option 2**

Defendant admits that it is currently expanding its marketing team in the Northeast region of the United States. Defendant further admits that it has hired several of Plaintiff's employees in the last year. Defendant denies all remaining allegations in Paragraph 38.

## **Option 3**

Denied.

# Example #5

**Allegation:** 54. Despite Plaintiff's multiple requests, Defendant has failed to return Plaintiff's PowerPoint Deck.

## **Option 1**

Defendant admits that Plaintiff has made a number of requests that Defendant return Plaintiff's PowerPoint Deck. Defendant further admits that, although it has provided copies of the Deck to Plaintiff, it has not "returned" the Deck. Defendant denies all remaining allegations in Paragraph 54.

## **Option 2**

Defendant admits that, due to its litigation preservation obligations, it has not destroyed the Deck. Defendant denies the allegation that it has not returned the Deck insofar as it has produced the Deck to Plaintiff during expedited discovery. Further answering...

# Example #6

## Allegations:

117. Plaintiff repeats and realleges the allegations contained in paragraphs 1-116 above.

118. The Contract is a binding and enforceable agreement between Plaintiff and [Co-Defendant].

## Sample

117. Defendant incorporates by reference its responses to all of the paragraphs above as though set forth fully herein.

118. Paragraphs 117 through 123 purport to state a claim against [Co-Defendant], and not against Defendant, and therefore do not require a response. The allegations contained in Paragraph 118 also constitute legal conclusions, to which no response is required. To the extent that a response is required, Defendant denies the allegations in Paragraph 118.

# Request for Relief & Jury Demand

- ▶ Generally deny that Plaintiff is entitled to any of the relief requested in its “Request for Relief”
- ▶ Defendant is entitled to demand a jury trial

# Affirmative Defenses

## FRCP 8(c)

- ▶ accord and satisfaction
- ▶ arbitration and award
- ▶ assumption of risk
- ▶ contributory negligence
- ▶ duress
- ▶ estoppel
- ▶ failure of consideration
- ▶ fraud
- ▶ illegality
- ▶ injury by fellow servant
- ▶ laches
- ▶ license
- ▶ payment
- ▶ release
- ▶ res judicata
- ▶ statute of frauds
- ▶ statute of limitations
- ▶ waiver
- ▶ discharge in bankruptcy

# More Examples of Affirmative Defenses

- ▶ unclean hands
- ▶ unjust enrichment
- ▶ P has not suffered damages
- ▶ P failed to mitigate damages
- ▶ P's contracts are invalid
- ▶ D's conduct was lawful, justified, privileged
- ▶ P's claims brought in bad faith
- ▶ underlying patents invalid
- ▶ necessity
- ▶ consent
- ▶ fair use

***Affirmative v. negating defenses.***

***Highly claim- and fact- specific.***

***Reserve your rights to amend!***

# Counterclaims

- ▶ Compulsory counterclaims – FRCP 13a
  - ▶ Arises out of transaction or occurrence that is the subject matter of the opposing party's claim
- ▶ Permissive counterclaims - FRCP 13b
- ▶ Rules 19 and 20 govern joinder of parties to a counterclaim
- ▶ Strategy Considerations
  - ▶ Preserving compulsory counterclaims
  - ▶ Leverage in settlement negotiations
  - ▶ Recovery/offsetting liability
  - ▶ Controlling discovery
  - ▶ Leveling the playing field

# Crossclaims FRCP 13(g)

- ▶ Any claim by one party against a co-party if the claim arises out of the *transaction or occurrence* that is the subject matter of the original action or of a counterclaim.
- ▶ Strategy considerations
  - ▶ Indemnification
  - ▶ Preserving your claims
  - ▶ Multiple tortfeasors

# Joining Additional Parties

40

- ▶ FRCP 14 – Third Party Practice
- ▶ FRCP 19 – Required joinder
- ▶ FRCP 20 – Permissive Joinder
- ▶ Strategy considerations
  - ▶ Indemnification
  - ▶ Preserving your rights
  - ▶ Multiple tortfeasors

# Helpful Resources

- ▶ PACER – pull complaints/answers in other similar cases
- ▶ Commercially-available samples and checklists
  - ▶ Massachusetts Practice (or your state's)
  - ▶ Thomas Reuters Practical Law
- ▶ Internal firm samples and checklists
- ▶ Publicly-available guidance for your state
- ▶ Google. Google. Google.

# Thank You

42

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