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Reflections on the Well-Pleaded Complaint

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A legal complaint—the document at the heart of a litigator's universe—is not a fictional short story. That's an obvious observation—*or is it*?

The well-known federal directive is that a pleading "must contain … a short and plain statement of the claim showing that the pleader is entitled to relief … . Each allegation must be simple, concise, and direct." Fed. R. Civ. Pro. 8(a)(2), (d)(1). How often does a complaint meet that standard? How often does a complaint go much beyond a straightforward statement of the claim and present a case that is anything but a short and plain statement of a legally cognizable claim?

The obvious answer to both questions is "all too often." And what that also means is that a complaint can lose sight of its fundamental purpose—to present the factual allegations and legal claims that serve as a roadmap *of what a plaintiff must prove at trial.* While the usual goal for a complaint drafter is to plead enough to overcome a motion to dismiss (or, better, to draft a pleading that's ironclad against the defendant even making the motion), the drafter also needs to consider the ability to prove the allegations at trial. Pleading too much, such as conduct allegations laced with subjectivity and adjectives (e.g., "the defendant breached the contract *maliciously, and with evil intent*"), bites off more than the plaintiff needs to chew.

Simply put, a successful plaintiff's case begins with a well-drafted and thought-through complaint. The next time you're asked to prepare a complaint, keep the following in mind as a "checklist" for best pleading practices:

Allege Real Concrete Facts

Like a good newspaper article, a well-pleaded complaint should set forth the "who, what, where, when and how" of the dispute. Why? Because these are the elements of describing circumstances—of the story that needs to be told in a pleading and eventually proved at trial. "The defendant [*who*] entered into a contract [*what*] with plaintiff [*who*] in New York City [*where*] on Aug. 1, 2021 [*when*]." The "*how*" of the situation typically will be the facts of what occurred to give rise to the claim—in other words, the improper, wrongful, unlawful *conduct itself* that becomes the meat of the legal claim. While this all seems obvious, far too often the "W" basics get lost amid the drafter's zeal to file an aggressive sounding, every-claim-in-the-book complaint.

In the "Statement of Facts," or "The Factual Allegations" section of a pleading, the conduct, actions and decisions should be pleaded *factually*. That means you usually (although not invariably, as noted below) should describe the circumstances objectively and without embellishing what occurred by characterization or overly argumentative language. "*All we want are the facts, ma'am,*" as TV detective Joe Friday liked to say.

Another "W", the "why," is often part of equation. Why might "why" be a necessary allegation? Because frequently state of mind—intent, good or bad—is an element for proving a case. The obvious example is a claim sounding in fraud, which (depending on the type) requires proof of deception, bad intent, scienter—the proverbial "intent to deceive, manipulate or defraud"—and the like. But pleading fraud—and proving it at trial—require more than the assertion that "Defendant knowing and purposefully misrepresented the condition of the widget she caused plaintiff to buy."


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Fraudulent intent, as a state of mind condition, is mostly alleged and proven by the factfinder's drawing logical inferences from hard facts. That is, the facts reasonably viewed lead to the conclusion that the defendant knew the widget was in poor condition and intentionally concealed its condition from the plaintiff. For example: "(1) Five days before selling the widget to Plaintiff, Defendant took it to a repair shop. (2) The repair shop did not repair the widget. (3) The Defendant retrieved the widget. (4) Two days later Defendant was observed painting the widget where it was in disrepair. (5) On *X* date, Defendant told Plaintiff that the widget was in good condition, and Plaintiff bought it. (6) Five days later, the paint came off the widget and the defective condition became evident." Is there any doubt that this hypothetical defendant intended to deceive her widget buyer?

State of mind is a determination that pervades many areas of the law. Sometimes a person's words reveal intent. More frequently, the state of one's mind is inferentially discerned by the person's actions. As said long ago, "by their deeds thou shall know them." A well-drafted pleading should allege the conduct and actions that lead, where necessary, to enabling the factfinder to discern a party's state of mind.

Plead the Facts Without Over Pleading Them

This admonition harkens back to the true purpose of a complaint—to serve as an outline of the facts to prove at trial. Piling on more allegations than necessary, particularly ones containing subjective characterization, is generally inadvisable and may be detrimental. If you are suing for breach of contract because the defendant "failed to make payment under Section *X* of the Contract," you don't need to get into the terms of Section *Y* that are not in issue. (Of course, other contractual provisions might be relevant to your nonpayment claim, such as choice of law, forum selection, or the definition of a term contained in "Section *X*," and should then be pleaded.)

Similarly, consider a straightforward defamation case where the (poorly-drafted) complaint alleges that "defendant, *clearly acting wantonly and contumaciously and with malicious intent*, made false and defamatory statements about plaintiff." Why poorly drafted? Because these adjectival characterizations of state of mind are unsubstantiated and hyperbolic. Further, at least when the defamation plaintiff is not a public figure (where the well-known "actual malice" standard applies as added protection for a defendant's free speech rights), plaintiff need not prove that the defendant acted "wantonly," "contumaciously" and the like.

That said, always be cognizant of any special pleading requirements that might be necessary to state an actionable claim. For example, fraud must be pled on particularized factual allegations that delineate the misrepresentation and its context; or, a defendant's defamatory language must be pled in haec verba; or, to vary the prior defamation example, that the defendant did make the offending statements with "actual malice or reckless disregard of truth" where the defamation plaintiff is a public figure.

The bottom line: Plead the facts needed to sustain your claims and to tell your story of defendant's wrongdoing, but without detouring into what does not matter.

The same approach applies to naming parties and pleading claims. The old saw "sue everybody" is bad advice. True, sometimes multiple defendants might fairly be culpable, but the plaintiff's lawyer who names parties indiscriminately does her client a disservice (as well as disserving the court system). Trying to sustain claims against a party having no liability weakens your case against the better defendants, diminishes your all-important credibility and causes your client an unneeded expense. More constructively, don't name the nonculpable party in the first place.

The same holds true for claims. The complaint that asserts duplicative claims fares badly. Judges often disfavor motions to dismiss that ensue when the complaint alleges a legally repetitive claim that adds no value to the plaintiff's case. An obvious example: plaintiff alleges that the defendant breached its contract with plaintiff and also asserts a negligence claim based on mostly the same facts (without alleging the existence of an independent duty imposed on the defendant in tort). Negligence will not hold up. Better to maintain your credibility and litigate the real claim in contract than to over reach at all.

Draft a 'Speaking' Complaint Only for Good Reasons

For most complaints, let the facts themselves speak. "Show, don't tell," is the overarching mantra to effective advocacy. That means—don't dictate what a factfinder should conclude; instead, present the facts cogently, logically and structured to enable the factfinder to reach the conclusion that establishes your story, and your theory of the case. This basic principle should be kept in mind throughout, beginning with drafting the complaint.

Still, one rule of litigation is that no rule is inviolate. Hence, there are instances that warrant the "speaking" complaint—one where you do embellish the story with more-than-usual characterization. More advocacy is embedded into the allegations, with more brief-like arguments emerging from the pleading. There can be sound strategic reasons for drafting this type of pleading.

For example, for a complaint accompanying a motion for a temporary restraining order and a preliminary injunction, a more aggressive posture and tone could be warranted. You will soon be before the judge arguing the merits of your claims, and seeking immediate relief, so a more strident assertion of the facts might be persuasive for pretrial relief. Or, you believe that your case can and should be settled early on; that context and goal also might warrant a more aggressive approach out of the box in order to avoid the long path to trial. But don't go with a speaking complaint without a solid *strategic* reason for it.

One mistaken reason for filing a speaking complaint is because the client wants it. A client will often want to view her lawyer as "sounding tough," meaning that hyperbolic language and aggressive nonfactual characterization should carry the day. Resist that approach. It is not persuasive in the courtroom or in a pleading. When the circumstances don't warrant it, explain to the client why a speaking complaint is ill-advised.

Draft a Complaint You Won't Need To Amend

A plaintiff generally can amend her complaint within a specified time once as a matter of course, and af-

terwards on leave of the court that is to be given "freely." (Fed. R. Civ. Pro. 15(a)(1), (2); CPLR 3025(a), (b)). But avoid amending. Draft the complaint for what you expect and need for trial. Don't think at the start of your case that "I can always amend."

Yes, courts will typically grant a motion to amend. But when you amend your complaint, you are signaling—or, essentially admitting—that you didn't get it right in the first place. Granted, sometimes existing facts might emerge that you did not, and could not, know at the outset. Much more commonly, amending the complaint is the upshot of the defendant's motion to dismiss. But plaintiff first and foremost needs to defend her complaint as pleaded. Frequently in opposition, plaintiff's last contention will be a request for leave to amend "in the alternative." But that is not where a plaintiff wants to be.

Even being granted leave to amend is a lukewarm victory. A pleading "do-over" connotes weakness in plaintiff's case, and undermines the plaintiff and her counsel's credibility. While an amended complaint supersedes the prior one and becomes the operative pleading, the existence and substance of the original pleading do not disappear. Defendant can argue that the plaintiff "initially pleaded differently," "found it necessary to change its allegations," and is "simply trying artificially to bolster an unsustainable case with new-found allegations"—arguments that indeed score points for the defendant. Far better pleading practice is to draft a pleading that on its own will withstand a dismissal motion.

One clarifying caveat: A "supplemental" complaint is different. It sets out circumstances, events or occurrences that happened *after* plaintiff filed the original complaint. The supplemental complaint alleges new facts that relate to plaintiff's preexisting case. For example, after the plaintiff sued for breach of contract, the defendant conveyed a major asset to a third party for no consideration, resulting in defendant's becoming insolvent, thereby making a fraudulent conveyance under the Debtor and Creditor Law. A supplemental complaint raises new, post-filing facts of wrongdoing; it does not undercut the plaintiff's case as does an amended complaint that adds previously overlooked facts or claims.

Know the Law

Of course, you need to know the legal elements of each claim being alleged. But you need to understand the law beyond the basic claim elements. Case law refines the elements of a cause of action and spells out their meaning. Without knowing how the cases develop the elements with required flesh on their bones, you might see your case dismissed on the pleading

Consider the often pleaded quasi-contract claim for unjust enrichment. The *elements* are often stated matter-of-factly—(1) that the defendant was enriched, (2) at the plaintiff's expense, and (3) that it is against equity and good conscience to permit the defendant to retain what is sought to be recovered. These elements can fit within a many factual situations. But undeveloped facts that merely describe these elements will fail to state a claim under New York law. More is required: The plaintiff must plead facts to show "a sufficiently close relationship with the other party," such as concrete dealings among the parties. *Georgia Malone & Co. v. Rieder,* 19 N.Y.3d 511, 516 (2012).

Another example is where plaintiff wants to assert a claim in court but the dispute involves a written agreement that contains an arbitration provision. The specific language of the clause is important, and an often-used provision is that "any controversy or claim arising out of or relating to this contract, or the breach thereof," must be submitted to arbitration. Frequently, however, a dispute involving such a contract arguably does not necessarily come within that language. How does the case law construe that kind of arbitration clause, and can you "plead around" the language to avoid arbitration? As the complaint draftsperson, you need to understand the case law thoroughly to best accomplish your client's goal.

Many times a statute will bear on the sustainability of a claim. A common illustration involves the statute of frauds, and its well-known tenet that an agreement not in writing is void if "By its terms is not to be performed within one year from the making thereof." NY Gen. Oblig. L. §5-701(a)(1). Whether an oral agreement in any given situation is possible of performance within one year has been interpreted in countless cases. Can you plead the facts of your client's agreement to come within the no-more-than-one-year requirement?

In short, do not cut short your legal research and your analysis of the law that applies to your claims. Think and act *proactively*, anticipating how the defendant might challenge your pleading and, thereby, prepare your pleading by presenting the facts as consistently as possible with the law that refines the elements of your claims.

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Focus on this checklist for your next complaint. Doing so will help you get your case off to a solid start and, hopefully down the road, to a winning trial.

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