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LITIGATION REVIEW

# The Fine Art of Drafting Pleadings

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I had the rare fortune of playing the role of fly on the wall when I recently appeared in chambers in the Nassau Supreme Court Commercial Part on behalf of a non-party, where, in the comfort of a spectator's box, I observed counsel for plaintiff and defendants duking it out over motions to dismiss and injunctive relief.

The case involved a dispute among participants in a long-standing real estate investment and development enterprise. The attorneys on both sides were seasoned commercial litigators from respected law firms, one based in Manhattan and the other in Nassau.

Before addressing the substance of the issues arising from the motions, the court chided plaintiff's counsel for needlessly complicating the allegations of the complaint by inserting several factual assertions into each paragraph, thereby making it difficult for the court to identify what the defendants admitted and what was in dispute.

Before defense counsel could relish in the court's displeasure with plaintiff's counsel, the court then turned to defendants' attorney and noted that the counterclaims suffered from the same malady. What happened, the court pondered aloud, to the rule that each factual allegation of a pleading should be set out in separately numbered paragraphs?

In their quest to "tell the story" in their complaints, some litigators turn themselves into novelists, crafting complex storylines and packing paragraphs with intricate facts and details. Others apparently feel compelled to follow their English teachers' admonition that good paragraph structure requires a topic sentence, supporting sentences and a concluding sentence.

The court's observation is one of those refreshing wake-up calls that can invigorate the minds of seasoned litigators (or afford guidance to those on the ground level) as to the fine art of drafting pleadings.

Pleadings involve a special form of writing and have their own rules of practice. On the most basic level, as the court noted above, there are indeed procedural rules under both state and federal practice that require simple factual allegations to be separately pleaded.

In New York state practice, CPLR 3014 provides in relevant part: "Every pleading shall consist of plain and concise statements in consecutively numbered paragraphs. Each paragraph shall contain, as far as practicable, a single allegation."

The federal counterpart is contained in Federal Rules of Civil Procedure 8 and 10. Rule 8(a)(2) requires "a short and plain statement of the claim showing that the pleader is entitled to relief," while Rule 8(e)(1) states: "Each averment of a pleading shall be simple, concise and direct."

Similarly, Rule10(b) provides: "All averments of claim or defense shall be made in numbered paragraphs, the contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances . . . "

While the most difficult part of good drafting is to simplify the complex, following these basic procedural rules can produce significant benefits.

First, pleadings that are simple and straightforward enable the court to quickly and efficiently ascertain the crux of the dispute, as well as the position of each party. Naturally, forcing a court to waste precious time and resources wading through needlessly complex or convoluted allegations is not the best way to persuade it or to establish that a proper cause of action or claim has been asserted.

Nor is it advisable to force the court to spend otherwise avoidable time trying to comprehend what the case is about or precisely which issues are in dispute.

## A Recent Example

By way of example, having recently been forced to spend hours in deciphering the rather tortuous allegations of a 131-page, 276-paragraph complaint in a civil

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RICO securities fraud case on behalf of one of 31 defendants, it became apparent that the court would not be terribly enthused about going through the same exercise.

In fact, as it turned out, at the first preliminary conference in that case, the federal magistrate judge sua sponte directed the plaintiff's attorney to amend the complaint with a view toward greater precision and clarity.

As Senior Southern District Judge Milton Pollack recently observed, federal courts have gone so far as to dismiss complaints sua sponte (albeit with leave to replead) where they have been found to violate the procedural requirements of simplicity:

> The purpose of [FRCP 8] is relatively straightforward. 'The statement [of the claim] should be plain in that it should state facts, not conclusions of fact.' . . . Otherwise the court cannot determine whether the opposing party must respond. 'The statement should be short because unnecessary prolixity places an unjustified burden on the court and the responding party.' . . . Each averment should be direct because a complaint's factual allegations should be relevant to the cause of action brought. . . . When a complaint is not short and plain, or its averments are not concise and direct, 'the district court has the power, on motion or sua sponte, to dismiss the complaint or to strike such parts as are redundant or immaterial.[1]

Similarly, the state courts have often made clear their disdain for imprecise and wordy pleadings:

> The court should not be compelled to wade through a mass of verbiage and superfluous matter in order to pick out an allegation here and there, which, pieced together with other statements taken from another part of the complaint, will state a cause of action. The time of the court should not be taken in a prolonged study of a long, tiresome, tedious, prolix, involved and loosely drawn complaint in an effort to save it.[2]

In a recent case brought by a state prisoner attempting to allege violations of 42 U.S.C. §1983, Eastern District Judge Joanna Seybert issued two instructive decisions granting consecutive motions pursuant to FRCP 8 and 10 to dismiss the complaint and amended complaint, respectively, yet allowing the pro se plaintiff to amend both pleadings in an effort to rectify their defects.[3]

While the case involved a pro se plaintiff, the court's basic suggestions for redrafting the complaint represent sound guidance for any practitioner preparing a pleading:

> If the Plaintiff chooses to so file [an amended complaint], he shall do so in accordance with the following directives: 1. The pleading shall be set forth in numbered paragraphs. Each paragraph shall contain only one factual allegation. 2. The factual allegations, set forth in the numbered paragraphs, shall, where possible, be organized in chronological fashion. 3. Each paragraph shall be short and concise and shall state (1) what is alleged to have occurred; (2) where possible, the date and location that the action is alleged to have occurred; (3) which of the Defendants is responsible for the alleged action; and (4) how the alleged action is related to a deprivation of the Plaintiff's rights . . . [4]

Besides making it easier for the court to comprehend the thrust of the case, following the rule that each paragraph contain only one factual allegation has additional benefits. For example, including several factual allegations in the same paragraph makes it more difficult to identify which factual assertions are contested by the opponent, thereby making it easier to avoid admitting discrete facts that are the foundation of the claim.

Obviously, a plaintiff prefers wherever possible to obtain an admission in response to a pleading. For one thing, to the extent a matter is admitted, plaintiff no longer has the burden to offer proof to establish the fact asserted.[5] As one authority has observed: "The highest form of evidence is an admission made by a defendant in the answer."[6]

Of course, failure to respond to a complaint's allegation in the answer constitutes an admission.[7] Some commentators suggest, therefore, that it is better for a defendant to omit responding to an allegation rather than to admit it explicitly, to make it more difficult for plaintiff's counsel to present the admission at trial.[8]

A complaint that alleges only one factual assertion in each paragraph will thereby make it easier for plaintiff's counsel to explain admissions of fact at trial, even if defendant simply omits responding to the particular paragraph in the answer.

## Conclusion

Drafting pleadings in a simple and succinct manner in which factual allegations are separately alleged is not only required by both state and federal procedural rules, but obviously preferred by courts.

While presenting complex subjects in the simplest, most straightforward manner is often the hardest part of the fine art of drafting, it is likely to yield immeasurable benefits.

## Endnotes:

1. In re Merrill Lynch & Co., Inc. Research Reports Securities Litigation, 218 F.R.D. 76 (S.D.N.Y. 2003).

2. Barsella v. City of New York, 82 A.D.2d 747, 440 N.Y.S.2d 12 (1st Dep't 1981); see also Weissglass v. Weissglass, 52 A.D.2d 582, 382 N.Y.S.2d 534 (2d Dep't 1976) ("the seventh paragraph of the complaint, consisting of some 13-1/2 pages of allegations, which is subdivided into 65 paragraphs, clearly violates the mandate of CPLR 3014").

3. Washington v. Reilly, 2004 WL 1874989 (E.D.N.Y.) and 226 F.R.D. 170 (E.D.N.Y. 2005).

4. Id., 2004 WL1874989 *2.

5. Siegel, N.Y. Prac. §221 (4th ed. 2005).

6. 58 N.Y. Jur.2d, Evidence and Witnesses §324.

7. 2 N.Y.Prac., Com. Litig. in New York State Courts §7:88 (2d ed.); Long v. Long, 281 A.D.2d 324, 722 N.Y.S.2d 151 (1st Dep't 2001); Santiago v. County of Suffolk, 280 A.D. 594, 720 N.Y.S.2d 540 (2d Dep't 2001).

8. See 2 N.Y.Prac., Com. Litig. in New York State Courts §7:90 (second edition).