

Introduction: Pleadings

When you think of pleading your client’s case, you undoubtedly envision yourself delivering a stirring oral argument in front of a judge or a jury. While that is certainly the endgame in litigation, it is not the beginning. Complaints and answers are called “pleadings” for a reason: they are the initial explanation that you craft as a lawyer to explain your client’s position. Although pleadings are written, not oral, they can and should be stirring enough to make your client’s position clear.

Pleadings needn’t be dry. They can and should convey your fervent belief in your client’s cause. While you may not have as much fun pleading in writing as you would orally, you will find the crafting of pleadings intellectually stimulating if you think about the philosophical and historical background of modern day pleading while using the pleadings to tell your client’s story.

One of my favorite law professors was a Harvard-educated hard-ass named Joseph H. Koffler. He taught Torts, in a very idiosyncratic way. First, we had to learn about a subspecialty of his—common law pleading. Way back in 1976, when I took his class, as a first year law student at New York Law School, I refused to be intimidated by his bark,

which was fierce, but which I discovered later had no bite. The peculiar focus on the subject of common law pleading instead of torts caused me to complain constantly about

“Dry” versus “Wet” Or “Juicy” Pleadings

How is it possible to make pleadings less dry? By thinking outside the box.

One way of both amusing yourself and swaying the judge in your case is to think about some way of referring to your adversary in your complaint or response to the complaint that holds them up to ridicule or sounds like a slur. I don't mean using an epithet, like “slimy predatory defendant,” but something more subtle and more persuasive.

For example, when I was a young lawyer, I represented a plaintiff in a commercial dispute against a bank. The majestic sound of the bank's name—we'll call it First Federal Bank of New York—worried the senior partner on the case, who was concerned that the defendant would get the upper hand by naming itself “Federal” for short. So instead, we foreclosed that by using an acronym. The first time we referred to the defendant in the complaint, we called it “defendant First Federal Bank of New York, hereafter ‘FFONY.’ ” The defendant never caught on to what this sounded like when pronounced out loud, and referred to itself throughout the litigation as “FFONY.” I suspect it colored the court's view of the parties. Our client won on a motion for summary judgment.

what we were being taught. I used to fight with him in class without fear. For that lack of fear, he nicknamed me “feminist,” and would never use my actual name again. “Feminist,” he would say, “you can’t see it now, but you’ll be glad I made you learn this.”

He was right.

Common law pleading is now an arcane subject, but every facet of modern legal practice had its beginnings in the common law pleading we inherited from England. Professor Koffler wrote a treatise on the subject, which fascinated him and, because of his teaching, me. Looking back on my many years of practice, I realize how lucky we are today that current legal requirements are more forgiving than they were in the time of our legal system’s beginning. A litigant of old was thrown out of court unless his complaint recited certain “magic words” to begin an action. For example, to accuse a wrongdoer of trespassing on your property, you would have to plead that the defendant “with force and arms broke and entered the close of the plaintiff” even where there was, in fact, no “close” or fence, Berger v. Lexington Lumber Co., 178 S.C. 72, 182 S.E. 156, 157 (S.C. 1935). Failure to use those magic words foreclosed any relief. Today, by contrast, procedural rules spell out that in the interests of justice pleadings should be liberally construed to do justice. The failure to use magic words no longer rings the death knoll for a pleading.

The process of liberalization has proceeded over time; it didn’t happen all at once. When I started practicing law in Pennsylvania in 1980, the remnants of common law plead-

ing still existed. A lawyer had to identify in her complaint which of three areas of law was the basis of the first filing. Did the complaint sound in assumpsit (now called “contract”), trespass (now called “tort”) or equity? Misidentifying a cause of action could result in having that cause, or even the complaint as a whole, dismissed, usually “without prejudice” (meaning the court would allow you to refile a corrected complaint), but, if the statute of limitations had run, “with prejudice” (meaning you were foreclosed from bringing an action). Today, the Pennsylvania Rules state that there is only one form of action—a civil action—for assumpsit, trespass and equity. Pa. R. Civ. Pro. 1001(b). That’s a big change in formalism in a relatively short period of time—less than a generation.

What Is A Dismissal with Prejudice?

If a case is dismissed “with prejudice” it has the same effect as a final judgment on the merits. It begins the running of your time to appeal. It is dispositive of the claims. It has a preclusive effect in other matters involving the same claims.

What Is A Dismissal without Prejudice?

If a case is dismissed “without prejudice” it means that, assuming the statute of limitations has not run, you can refile the action later.

I will leave it to legal philosophers to explain what has caused the shift from strict pleading requirements to the more liberal constructionism of today. But there is no doubt that our legal system has been proceeding toward greater openness and a level playing field for all litigants. The old lawyer's trick of hiding the ball, only to throw it at an opponent on the witness stand for maximum surprise, is now disfavored by rules and by judges. And the magic words are gone, replaced with the sensible requirement that the first court filing—the complaint—state a story in simple language so that the defendant can figure out what the plaintiff is complaining about. (I will discuss later the issue of how much detail in a complaint is required to give the defendant fair notice.) The plain and simple language requirement extends to all pleadings, not just complaints.

For example, N.J.R. Civ. Pro. 4:5-3 says, in pertinent part, “An answer shall state in short and plain terms the pleader’s defenses to each claim asserted. . .”

What is a pleading exactly? Most civil procedural rules define pleadings. For example:

Only these pleadings are allowed: (1) a complaint; (2) an answer to a complaint; (3) an answer to a counterclaim designated as a counterclaim; (4) an answer to a cross-claim; (5) a third-party complaint; (6) an answer to a third-party complaint; and (7) if the court orders one, a reply to answer.

F.R.C.P. 7(a).

At this point in your legal career, even if you have heard of and read complaints and answers, as well as motions to dismiss, you may be in the unenviable position of being asked to draft your first complaint or answer. Where do you begin?

First, and most importantly, read the rules. The rules in your jurisdiction will give you a lot of information—what court you should be in, what needs to be filed as a first filing, whether you need a form cover sheet, whether or not there is a fee for filing, what the timing for answers is, what defenses are available and when they must be made.

What Is A Pleading?

1. Complaint: Written statement, with numbered paragraphs, setting out the story of the plaintiff's case.
2. Answer: Written statement, following numbered paragraphs of complaint, setting out defendant's reply to plaintiff's statement.

Most procedural rules define what a pleading is. For example, F.R.C.P. 7(a) defines the following as pleadings, and allows no others:

- (1) a complaint;
- (2) an answer to a complaint;
- (3) an answer to a counterclaim designated as a counterclaim;
- (4) an answer to a crossclaim;
- (5) a third-party complaint;
- (6) an answer to a third-party complaint; and
- (7) if the court orders one, a reply to an answer.

And be sure you read all the rules that apply. Most jurisdictions have general rules and local rules. For example, in Pennsylvania, the state supreme court has promulgated civil procedural rules. Rule 1035 pertains to summary judgment. Each county court, which is a part of the state system, has promulgated its own local rules that modify or expand the requirements of that rule. So, the Montgomery County Court of Common Pleas has its own version of Rule 1035:

Rule 1035.2(a). Motion for Summary Judgment.

(1) *Filing*. A motion for summary judgment shall be faced with a cover sheet of the moving party in the form set forth in Local Rule 205.2(b) and shall be accompanied by the moving party's proposed order. The moving party shall check the box on the cover sheet requiring a response, if any, per the Pennsylvania Rules of Civil Procedure. Motions for summary judgment are not given a rule return date by Court Administration.

The same is true in the federal courts; the local district courts have local rules supplementing the federal rules. Read all the rules!

What follows is not meant to be an exhaustive compendium of issues arising in the context of pleadings. Instead, my goal is to alert you to the issues so that you know what you have to think about when crafting a complaint or a response to a complaint. By the way, a response includes a motion as well as an answer.

And don't forget, as I just said, to read the rules. That includes the rules of your local state court, or the federal rules, or the local federal rules. No matter your religion, no matter if you even have a religion, as a lawyer the rules should be your bible.

What A Complaint Looks Like

[THE COURT YOU'RE IN]

In The Court of Common Pleas of Bucks County

[THE CAPTION]

Plaintiff

v.

Defendant

[THE CASE NUMBER]

Civil Action No: 95-001

[THE TITLE OF THE PLEADING]

Complaint

[NUMBERED PARAGRAPHS]

1. The plaintiff, Excellent Person, is a citizen of the Commonwealth of Pennsylvania.
2. The defendant, Dirty Scoundrel, is a citizen of the Commonwealth of Pennsylvania.
3. This case arises out of the breach by Dirty of a contract to build a home for Excellent.
4. This is what happened.

[CAUSES OF ACTION]

Count one—Breach of Contract

- xx. Plaintiff repeats here all of the above numbered paragraphs and incorporates them by reference.
- xxi. [Elements of the cause of action].
- xxii. [How all the elements are met].

[RELIEF YOU WANT, aka ad damnum clause]

Wherefore, plaintiff Excellent demands that. . .

