LEGAL DRAFTING

LITIGATION DOCUMENTS, CONTRACTS, LEGISLATION, AND WILLS

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CHAPTER 2

THE INITIAL PLEADING

I. Purpose of the Initial Pleading

In all jurisdictions, the initial pleading *at a minimum* notifies each defendant of the plaintiff's claim and of the relief the plaintiff is seeking, preventing unfair surprise.[1] The initial pleading thus enables the defendant to prepare a response.[2] Due process demands it.

Beyond the minimum, courts differ regarding the amount of detail that they require the initial pleading to convey. Thus, to draft a legally sufficient pleading, an attorney must be acquainted with the standards for determining sufficiency in the jurisdiction where he or she intends to practice.

II. Drafting a Legally Sufficient Pleading

A. Requirement of Legal Sufficiency

A complaint is based on a legal theory, often called a "cause of action." A cause of action is identified by its characteristic elements. For example, a cause of action for negligence is identified by the following elements: (1) the defendant owes a legal duty to the plaintiff to exercise reasonable care to protect the plaintiff, (2) the defendant has breached the duty of reasonable care, (3) the breach proximately caused harm to the plaintiff, and (4) actual damages resulted.[3]

To establish a plaintiff's entitlement to relief, the attorney must set out in the pleading *allegations* sufficient to show the existence of a claim or (in some states) a cause of action. An allegation is a party's assertion concerning a factual matter. To survive a motion to dismiss, a pleading must be legally sufficient according to the standards of the court in which it is filed. To understand how much factual detail is required in a complaint, you must understand the standards by which courts determine sufficiency.

B. Standards in Federal Court

Traditionally, federal courts followed a system of "notice pleading," requiring only that the pleading give notice to the defendant of the claim and the relief requested. The theory underlying notice pleading is that the parties use the pleadings to present their contentions to the court and to limit the issues for trial; exploration of the underlying facts is left to the discovery process.

Federal Rule of Civil Procedure 8(a) provides that a pleading that states a claim for relief must contain "a short and plain statement of the claim showing that the pleader is entitled to relief."[4] On its face, Rule 8(a) does not address the level of detail required to state a claim. Notice pleading—which requires minimal detail—became the rule in federal courts when the U.S. Supreme Court decided *Conley v. Gibson* in 1957.[5]

For as long as it lasted, *Conley* stood for the principle that a complaint should not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."[6] The minimal standard of *Conley* remained the rule for federal pleading until the 2007 Supreme Court case, *Bell Atlantic Corporation v. Twombly*.[7]

The *Twombly* decision retired the *Conley* rule.[8] Together with its 2009 successor, *Ashcroft v. Iqbal*,[9] the *Twombly* decision has created shockwaves throughout the federal court system. In *Twombly*, the Court held that a complaint should survive a motion to dismiss for failure to state a claim *only if* the pleading contains sufficient factual matter, accepted by the court as true, to state a claim for relief **that is plausible on its face.**[10] In the *Iqbal* decision, the Court held that the plausibility standard applies to all civil actions in federal court.[11]

Under *Iqbal* and *Twombly*, a two-pronged analysis is required to decide whether a pleading states a claim. First, the court must identify and disregard factual allegations that are no more than legal conclusions, legal conclusions presented as factual allegations, or unwarranted inferences.[12] Second, to determine sufficiency, the Court must evaluate the well-pleaded factual allegations to determine whether the complaint states a plausible claim.[13]

In *Iqbal*, the Court said that factual allegations must be sufficient "to raise a right to relief above the speculative level."[14] For that threshold to be reached, the plaintiff must plead sufficient facts to allow the Court to draw a reasonable inference that the defendant is liable for the alleged misconduct.[15] According to the D.C. Circuit Court of Appeals, a complaint has enough "factual heft" to show entitlement to relief if it alleges sufficient facts "to nudge the claim for relief across the line from conceivable to plausible."[16]

The law at present is in a state of flux, with some federal courts interpreting *Twombly* and *Iqbal* in a way that narrows the courthouse door-

ways.[17] Depending on how a court applies it, the plausibility standard may impose a heavy burden on plaintiffs, particularly in cases in which the defendants have possession of the bulk of the evidence.[18] For example, in price-fixing cases, the ability to state a claim may depend on the plaintiff's being allowed to rely on inferences from circumstantial evidence.[19] The same is true of federal discrimination claims.[20]

Explanations of the plausibility standard vary greatly. For example, the Sixth Circuit Court of Appeals stated that the plausibility standard requires a plaintiff to plead sufficient specific facts to raise a reasonable expectation that discovery will reveal evidence—a hard row to hoe for a plaintiff.[21] In contrast, the Tenth Circuit characterized the plausibility standard as a "refined standard": a "middle ground between heightened fact pleading, which is expressly rejected, and allowing complaints that are no more than labels and conclusions."[22] The Seventh Circuit stated that a complaint must actually *suggest* that the plaintiff has a right to relief by providing allegations that raise a right to relief above the speculative level.[23]

It remains unsettled how far "*Twombly* and *Iqbal*" have shifted the standard from notice pleading to a significantly heightened standard. Until the U.S. Supreme Court provides further guidance, a practitioner who needs to determine the level of specificity required to achieve "plausibility" must consult the case law in the relevant circuit as well as the position of the particular district court where the action is filed.

C. Standards in State Court

1. Notice and Plausibility Standards

As previously stated, Federal Rule of Civil Procedure 8(a) provides that a pleading that states a claim for relief must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Many states have modeled their rules of procedure on the federal rules.[24] Courts in these states often emphasize that the function of the pleading is merely to give notice to the opposing party.[25] Many cite the Supreme Court's decision in *Conley* as the basis of their standard. For example, the Vermont Supreme Court said that the Vermont rule requires only a "bare bones statement" sufficient to put the defendant on notice of the claim.[26]

The Washington Supreme Court and the Tennessee Supreme Court have declined to apply the plausibility standard.[27] In rejecting the standard, the Washington Supreme Court characterized it as a "drastic change."[28] The Tennessee Supreme Court commented that the plausibility standard was a substantial departure from the liberal notice pleading standard recognized in *Conley*[29] and concluded that to apply the plausibility standard would require a court to evaluate and determine—at the *earliest stage* of the proceedings—the likelihood that the plaintiff will succeed on the merits.[30]

In contrast, the Nebraska Supreme Court adopted the *Twombly–Iqbal* standard and concluded that the plausibility standard is a "balanced approach" (while expressing reservations about the way some federal courts have applied it).[31]

Regardless of the label a state applies to its standard, a particular notice-pleading state might require more factual detail than another state that has adopted the plausibility standard. For example, both Wisconsin and North Carolina courts characterize their standard as "notice pleading" though their Rule 8 equivalents require the pleading to give notice of the transaction or occurrence out of which the claim arose (which seems to require factual allegations).[32] To understand the level of specificity required under your state's standards, you must consult the case law.

2. Fact Pleading

Some states require the pleading of some facts in order for a complaint to be legally sufficient.[33] Many fact-pleading jurisdictions require the pleading of facts sufficient to state a cause of action.[34] Stating a cause of action typically means that the pleader must allege facts to support each element of at least one cause of action. Standards for stating a cause of action might or might not require significantly more detail than pleading under a notice pleading or plausibility standard.

Case law in fact-pleading jurisdictions provides insight into courts' expectations concerning the level of detail the state's rules of procedure require. For example, Maryland's rules of procedure require that a pleading contain only such statements of fact as may be necessary to show the pleader's entitlement to relief or a ground of defense.[35] Maryland's Court of Special Appeals said that a complaint is sufficient to state a cause of action if it contains "just the facts" necessary to establish the elements.[36]

The South Carolina rule, like the federal rule, requires "a short and plain statement of the facts showing that the pleader is entitled to relief."[37] The South Carolina Court of Appeals interpreted the rule to require that the pleader state "ultimate facts."[38] Ultimate facts are discussed in Section IV–C–1 of this chapter.

An attorney in a fact-pleading state who wants to know how much detail is required for legal sufficiency must check state law.

III. Procedural Matters Addressed in the Pleading

A. Pleading Jurisdiction

1. Pleading Subject–Matter Jurisdiction

To have power to hear a case, a court must have subject-matter jurisdiction. Federal Rule 8(a)(1) requires that an initial pleading include "a short and plain statement of the grounds for the court's jurisdiction." If

the necessary allegation is missing, a federal court probably will dismiss the action for lack of subject-matter jurisdiction.[39]

Among the grounds for federal court jurisdiction are diversity jurisdiction[40] and federal-question jurisdiction.[41] For diversity jurisdiction to apply, the case must meet the amount-in-controversy requirement (currently in excess of $75,000 exclusive of interest and costs) and the parties must be citizens of different states (in circumstances not involving a foreign state or a citizen of a foreign state).[42]

Examples: Pleading the Basis of Diversity Jurisdiction

- Plaintiff is a citizen of the state of Illinois and a resident of Cook County.
- Defendant is a corporation incorporated under the laws of Delaware with its principal place of business in the State of Florida.
- This court has jurisdiction pursuant to 28 U.S.C. § 1331. The parties are diverse. The plaintiff seeks damages in excess of $75,000.

For federal-question jurisdiction to apply, the action must arise under the Constitution, laws, or treaties of the United States. In federal question cases, the complaint must establish that there is, in fact, a federal question.[43]

Example: Pleading the Basis of Federal Question Jurisdiction

This action is for trademark infringement and unfair competition under 15 U.S.C. § 1125(a) and for cyber-piracy under 15 U.S.C. § 1125(d).

The format for pleading subject-matter jurisdiction differs among federal courts according to local rules or practice.

In many states, the rules of procedure do not require the pleading to state the basis of subject-matter jurisdiction because the states' courts are courts of general jurisdiction. In states with a different type of system, the rules of procedure may require the pleading of facts sufficient to establish subject-matter jurisdiction. Examples of such states include Arizona,[44] Colorado (if the court is of limited jurisdiction),[45] Florida,[46] Idaho (if the court is of limited jurisdiction),[47] South Carolina,[48] and Wyoming.[49] If your state requires factual allegations to establish the basis of subject-matter jurisdiction, check state law and local practice to determine the necessary allegations and the manner of pleading them.

2. Pleading Personal Jurisdiction

To have power to subject a defendant to its judicial processes, a court must have personal jurisdiction over the defendant, and the defendant must have received notice (typically by service of process). Federal Rule 4(k) addresses the territorial limits of effective service. The burden is on the plaintiff to establish the court's personal jurisdiction over each defendant.[50]

A state court has personal jurisdiction over an individual who is domiciled in the state or a corporation that is incorporated in the state.[51] A state court may also exercise personal jurisdiction over a non-resident defendant who is validly served with process while present in the forum state or who consents to personal jurisdiction. Otherwise, a court may exercise jurisdiction over a nonresident defendant only if (1) the state's long-arm statute authorizes it,[52] and (2) federal due process requirements are satisfied.[53]

State long-arm statutes generally fall into two categories: (1) statutes, such as Florida's, that specify the types of contacts that provide the basis for long-arm jurisdiction (e.g., committing a tort within the forum state[54]); and (2) statutes, such as California's, that extend the state's long-arm jurisdiction to state and federal constitutional limits.[55] A long-arm statute enables a court to exercise personal jurisdiction over a non-resident defendant who has had sufficient minimum contacts with the forum state.

The minimum contacts rule is intended to ensure that a defendant cannot be subjected to a state's judicial processes if the defendant had no substantial, systematic,[56] or purposeful[57] connection to the state. Discussion of minimum contracts is beyond the scope of this textbook, but an attorney filing a claim against a non-resident defendant must determine whether the circumstances would support exercise of personal jurisdiction in light of current state and federal law.[58] The law is complex, and multiple factors must be considered.

Except in some federal question cases, federal courts generally look to the forum state's long-arm statutes for authority to exercise personal jurisdiction[59] and to federal law to determine whether the minimum contracts requirement is met.[60] Many federal complaints address personal jurisdiction, often under a section labeled "Parties," which presents information establishing subject-matter jurisdiction (e.g., diversity or federal question), personal jurisdiction, and the appropriateness of the forum choice. The following is an example, though attorneys in different districts follow different practices.

Example: "Parties" Section in a Case Filed in North Carolina

II. Parties

3. Plaintiff is an individual citizen and resident of the State of North Carolina.

4. Defendant is a Delaware Corporation. **[diversity]** Defendant does substantial business in North Carolina and operates a factory in this district **[personal jurisdiction under long-arm statute]**. A substantial part of the events giving rise to the claim occurred in this district **[appropriate venue under 28 U.S.C. § 1391 (2012)]**.

If the state's long-arm statute lists the circumstances in which the court can exercise personal jurisdiction, the pleading may need to allege facts to show that the state's long-arm statute applies. In Florida, for example, the initial pleading must allege sufficient jurisdictional facts to bring the pleading "within the ambit" of the state's long-arm statute.[61] Below is an example of how one might allege the applicability of the long-arm statute in Florida:

Example: Alleging Applicability of Long Arm Statute

At all times relevant to this cause of action, Defendant, a Delaware corporation, had an office in Alachua County, Florida. Defendant engaged in its manufacturing business in Florida. These actions fall within the ambit of section 48.193(1)(a) of the Florida Statutes.

B. Pleading Venue

After determining which court has power to decide the case, an attorney must determine in which geographic location (venue) to file the action. There are federal district courts all over the country. In any state, there will be more than one trial court.

Federal Rule 8 does not require the pleading of venue, but many lawyers prefer to plead the facts establishing the basis of the selected venue. Though the format for pleading venue differs among federal courts, the following is an example of an allegation from a pleading filed in a federal district court in Colorado:

Example: Alleging Venue in Federal Court

Venue is proper in this judicial district under 28 U.S.C. §§ 1391(a)(2). A substantial part of the events giving rise to the claims occurred in this district, and all parties reside in the State of Colorado.

Venue rules differ among states. Some states may require that the plaintiff allege the basis of venue in the initial pleading.[62] In Florida, where there is case law indicating that the plaintiff should plead the basis of the venue choice,[63] the allegation might be framed as follows:

Example: Alleging Venue in a State Court

Venue is proper pursuant to section 47.051 of the Florida Statutes because the cause of action accrued in Dade County.

Many states do not require that the initial pleading allege the grounds for the plaintiff's venue choice, but attorneys sometimes plead the grounds anyway. To know whether to address the basis of venue choice in a pleading, an attorney should consult the state's procedural law and the pleading practice in the jurisdiction.

If an attorney bases a cause of action on the violation of a statute, the correct venue for filing the action may be specified in the statute. If an attorney files an action based on a contract, the venue specified in the contract's forum-selection provision may determine the venue choice. Forum-selection clauses in contracts are discussed in Chapter 9.

C. Pleading "Special Matters"

In most jurisdictions, special pleading rules apply to the pleading of "special matters." Below are a few examples of "special matters" that are listed in Federal Rule 9:

- Capacity or authority to sue.
- Fraud or mistake.
- Condition of mind (e.g., malice, intent, or knowledge).
- Satisfaction of conditions precedent.
- Special damages.

Before pleading a "special matter" in federal court, an attorney must be familiar with how and when the matter must be pleaded. For example, Federal Rule 9 states that fraud must be pleaded with particularity; thus, a heightened pleading standard applies to fraud. The rule also requires the pleading of special damages.

Most states have an equivalent to Federal Rule 9,[64] though an attorney must look to state law to see which matters are considered "special." For example, North Carolina's version of Rule 9 covers some matters not addressed in the federal rule, such as pleading rules that are applicable to libel and slander, medical malpractice, and punitive damages.[65] North Dakota's version includes a rule for pleading the name of an unknown party.[66] West Virginia's version covers pleading eminent domain.[67] An attorney must be familiar with the applicable "special matters" rules.

D. Demand for Judgment

Pleadings typically include a clause called the "demand for judgment," "prayer for relief," or "ad damnum clause." This clause is typically required in a pleading that requests affirmative relief. Federal Rule 8(a)(3), for example, requires that a pleading for affirmative relief include "a demand for the relief sought, which may include relief in the alternative or different types of relief." State rules of procedure likewise require the complaint to include a demand for judgment.[68]

These clauses are generally introduced by the word "Wherefore," a convention that we recommend you follow (depending on your state's practice). Below are examples of demands for judgment.

Examples: Demands for Judgment

Negligence Case:

Wherefore, Plaintiff requests that the court give judgment against Defendant awarding damages.

Statutory Cause of Action:

Wherefore, Plaintiff, pursuant to section 501.625 of the Florida Telemarketing Act, requests that the court give judgment against Defendant awarding damages, attorney's fees and costs.

Different states have different rules regarding the inclusion of the amount of damages in the demand for judgment. For example, Indiana's rule provides "In any complaint seeking damages for personal injury or death, or seeking punitive damages, no dollar amount or figure shall be included in the demand."[69] New Mexico's rule states: "Unless it is a necessary allegation of the complaint, the complaint shall not contain an allegation for damages in any specific monetary amount."[70]

Attorney's fees are generally available only if a contract provision, rule, or statute authorizes them. In federal court, attorney's fees are usually viewed as special damages and must be pleaded for the plaintiff to recover them.[71] State courts also might refuse to allow a plaintiff to recover attorney's fees if the plaintiff fails to mention or demand attorney's fees in the pleading.[72] Check the applicable law in your jurisdiction.

E. Exhibits to the Pleading

Federal Rule 10(c) provides that a document or instrument attached to a pleading (i.e., an exhibit) becomes a part of the pleading *for all purposes*. If any information in the exhibit contradicts the allegations of the pleading, then the information in the exhibit prevails.[73]

State rules concerning exhibits vary.[74] A few states require an attorney to attach to a pleading any document or instrument on which the pleading is based. For example, the Arkansas rule states, "A copy of any written instrument or document upon which a claim or defense is based shall be attached as an exhibit to the pleading in which such claim or defense is averred unless good cause is shown for its absence in such pleading."[75] Illinois and Mississippi have similar rules.[76] In contrast, Michigan's rule lists the circumstances in which it is *not* necessary to attach a copy of the exhibit: for example, if the instrument is in the possession of the adverse party and the pleading so states.[77] Tennessee has a similar rule.[78]

Regarding exhibits, an attorney should check both the rules of civil procedure and any local rules regulating attachments to the pleading. If your state's rule of procedure relating to exhibits is vague or there is no rule, check local rules.

IV. Fundamentals of Drafting a Complaint

A. Format and Presentation Requirements

Before drafting a pleading, an attorney should review the local rules of the jurisdiction and look at pleadings filed in the same court. As Chapter 1 explains, some courts may have rules regarding paper size, margins, font, spacing, the caption, and the signature block.

As well as formatting requirements, some courts have requirements relating to the presentation of an initial pleading. For example, Pennsylvania's rule of civil procedure 1018.1 requires the plaintiff to attach to the initial pleading a document called a "notice to defend." Some states may require that an attorney attach to the complaint a document called a "civil cover sheet."[79]

B. Identifying and Referring to the Parties

Initial pleadings typically begin with an introductory clause called a "commencement." The commencement states that Plaintiff X is suing Defendant Y. If there is more than one defendant or plaintiff and it is necessary to distinguish the parties in the body of the pleading, the commencement is usually the best place to stipulate how you intend to refer to the various plaintiffs or defendants.

To prevent reader confusion, we recommend that you refer to parties by their party designation (i.e., *Plaintiff* or *Defendant*). If you have only one plaintiff and one defendant, refer to them as "Plaintiff" and "Defendant," using the party designations as name substitutes. If you have multiple parties on each side and have to refer to some of them by name in the pleading, create shorthand forms that include the party designation. Below are examples.

Examples: Referring to Multiple Parties on One Side

Plaintiff Jordan Smith sues Defendants Mark Reed (Defendant Reed), SNZ of Florida Convenience Stores, Inc. (Defendant SNZ), and Hogtown Machinery, Inc. (Defendant Hogtown) and alleges the following:

Note the absence of needless legal jargon in the example above (e.g., "Comes now the plaintiff," "by and through his undersigned attorney," or "hereinafter referred to as"). Unless your jurisdiction requires otherwise, we recommend that you omit needless legal jargon, as it simply takes up space on the page.

C. Four Types of Allegations

1. Description of Types of Allegations

An **allegation** is a party's assertion concerning a factual matter. There are four types of allegations: (1) legal conclusion, (2) ultimate fact, (3) evidentiary fact, and (4) extraneous detail.

A **legal conclusion** expresses—without inclusion of supporting facts—the pleader's opinion about how the law operates or should operate. Consider, for example, a negligence case arising out of a car accident. One legal conclusion that the plaintiff would want the court to draw is that the defendant owed the plaintiff a duty of care (i.e., one element of a negligence cause of action).

An **ultimate fact** is a fact that is necessary to establish an element of a cause of action. In the car-accident hypothetical, ultimate facts would include that the defendant owned and was driving the car (the defendant's ownership and driving of the car gave rise to the defendant's duty of care to the plaintiff).

An **evidentiary fact** is a fact that provides evidence in support of the existence of some other fact. In the car-accident hypothetical, an evidentiary fact would be that the defendant's name was on the title to the car. This fact is evidence of the *ultimate fact* that the defendant owned the car.

An **extraneous detail** is one that merely takes up space on the page. It neither helps establish an element of a cause of action nor supports a

legal conclusion. Whether a detail is extraneous depends on the nature of the cause of action. In the car-accident hypothetical, if the car and its ownership are not in dispute, the color of the car could be irrelevant.

Below are examples of each of the four types of allegations:

Examples: Allegations

Legal Conclusion: Defendant owed Plaintiff a duty of care.

Ultimate Facts: On or about December 1, 2011, Defendant was driving on Main Street a car that Defendant owned.

Evidentiary Fact: At all times relevant to this action, Defendant's name was on the title to the car.

Extraneous Details: On or about December 1, 2011, Defendant owned a blue car that had a leather interior.

2. Use of Types of Allegations in a Pleading

(a) *Use of Ultimate Facts*

At the initial stage of litigation, the court mainly wants to ascertain whether there is enough of a case to go forward. A pleading will usually give adequate notice to the other party if the complaint contains sufficient information to *outline* the elements of the claim or to permit the court to draw inferences that those elements exist.[80] In a recent case interpreting the "plausibility" standard, the U.S. Tenth Circuit Court of Appeals commented that the elements of a cause of action help to determine whether the plaintiff has set forth a plausible claim.[81] Matching facts to elements (whenever possible) makes it clear that the complaint states a claim (or, in a fact-pleading state, a cause of action). Unless your state requires otherwise, we recommend that you support each element of the cause of action with ultimate facts.

(b) *Use of Legal Conclusions*

When determining whether a pleading states a claim or cause of action, courts generally disregard a party's conclusions of law, inferences, and expressions of opinion.[82] Some courts do not object to inclusion in the pleading of some legal conclusions *if* the conclusions are supported by sufficient factual allegations. In *Iqbal*, the U.S. Supreme Court said that legal conclusions can provide "the framework of a complaint" if the conclusions are supported by factual allegations.[83]

Some state courts strongly discourage conclusions of law or conclusory language in a pleading. For example, a Pennsylvania court stated, "A

conclusion of law has no place in a pleading."[84] Similarly, the Illinois Court of Appeals said, "Not only are allegations of law or conclusions not required, they are improper."[85] Some states may be more lenient.[86]

(c) Use of Evidentiary Facts and Extraneous Details

At the outset of a lawsuit, the facts are still undeveloped because discovery has not yet occurred. Courts in some jurisdictions sometimes consider evidentiary facts to be harmless, but most courts agree that such information is not necessary.[87]

Courts in fact-pleading jurisdictions typically do not require the pleading of evidentiary facts. For example, an Illinois court said, "Though Illinois is a fact-pleading jurisdiction..., the plaintiff is not required to prove his or her case at the pleading stage."[88] In some states, courts strongly discourage pleading evidentiary facts. For example, the Connecticut Supreme Court, which requires the pleading of material facts, recently wrote that inclusion of evidence in a complaint is a violation of state rules of practice.[89] Some other fact-pleading states agree.[90]

In addition to omitting evidentiary facts, we also suggest that you omit extraneous details. Courts dislike wordy and convoluted pleadings. A court might even require such a complaint to be amended to conform to the state's pleading rules. For example, the New Hampshire Supreme Court said, "When faced with an excessively burdensome and muddled pleading, the trial court may require the submitting party to file a more orderly and concise pleading."[91]

D. Framing Allegations

1. Making Allegations Plain, Concise, and Direct

The typical requirements that allegations in an initial pleading be "plain" and "direct" indicate that an attorney should write so that an ordinary or extremely busy person (such as a judge) can easily understand the pleading in a single reading. Every sentence an attorney writes should be understandable on one reading.

The requirement that the pleading be "concise" means that the attorney should use no more words than are necessary to make the point. As discussed in Chapter 33, "concise" does not necessarily mean short; pleadings in complex litigation are often lengthy. "Concise" means that each sentence is no longer than it needs to be. Thus, we recommend that you devote at least one phase of editing to eliminating unnecessary words and shortening wordy phrases.

2. Focusing on the Parties

A pleading is a story about a relationship between parties, the actions of the parties, and the wrongful actions of one or more of the parties. It is about responsibility for consequences. Courts do not like allegations that

provide an incomplete, partially developed picture. As you draft a pleading, be clear about who did what.

To keep the reader focused on the parties, the subject of most sentences in a pleading should be the name of the relevant party or parties. In other words, draft most sentences in active voice. Instead of stating that the plaintiff's car "was hit," frame the allegation to state that the *defendant hit* the plaintiff's car. Active voice is discussed in Chapters 31 and 33. Stick with active voice unless you have a strategic reason for doing otherwise (e.g., framing allegations to elicit admissions, as addressed in Section III–D–4–[a]).

If there are multiple defendants, some or all may have acted jointly: make it clear that *each* of those defendants engaged in the wrongful conduct. If all defendants acted together, refer to them collectively as "Defendants." If some but not all of them acted together, specify which of the defendants engaged in the action. If you do not know which one did the relevant action, you may refer to "Defendant Smith or Defendant Jones."

Below are examples of allegations from a complaint against three defendants based on a statute regulating vehicle repair shops:

Examples: Allegations

12. On or about May 10, 2012, Defendant Carr failed to provide Plaintiff with a written estimate of repair costs.

13. On that date, Defendant Alford or Defendant Bailey failed to comply with the vehicle inspection requirements set out in section 90.345(a) of the statute.

14. By their actions alleged in paragraphs 12–13, Defendants violated section 90.345(a) and (b) of the statute.

3. Alleging Time and Place

Federal Rule 9(f) and many states' rules of procedure state that allegations regarding time and place are material for purposes of testing the sufficiency of a pleading.[92] Omitting these allegations is not necessarily fatal to a cause of action, but a complaint or petition lacking this information may be too vague to provide notice to the other party or to enable the other party to respond. Omission of information identifying the time or place could lead to the court's granting the other party a motion to dismiss or a request for a more definite statement.

If certain of the precise date, you can provide it or you can leave yourself some wiggle room by using one of the following:

- On approximately June 1, 2010 ...

- On or about June 1, 2011 ...
- During the first week of June 2012 ...
- During a period beginning on approximately June 1, 2012 and continuing through June 15, 2012....

Dates are only one type of time statement. The following are some other types that keep the reader's sense of time on track:

- While Plaintiff was still on the premises ...
- While Defendant's employees were unloading the truck ...
- After Defendant completed the presentation....

Setting out time statements at the beginning of sentences creates a time line that the reader can easily track throughout the pleading. Thus, for the reader's convenience, we recommend that you put dates or other time statements **at the beginning of the sentence.**

As stated above, the place where the alleged circumstance occurs should also be included. If a shift from one place to another occurs, the pleading should notify the reader of the shift, as in the following examples:

- On July 10, 2010, when Plaintiff returned home from vacation ...
- After Defendant returned to the warehouse with the shipment ...
- Before Defendant arrived at the restaurant....

4. Pleading Strategically

(a) Framing Allegations to Elicit Admissions

Remember that the defendant responds to a complaint in an answer. Under Federal Rule 8(b), the defendant has the following options for responding to allegations:

- Admit the allegation.
- Deny the allegation.
- State that the defendant lacks sufficient knowledge to form a belief as to the truth of the allegation.
- Admit the allegation in part and deny the allegation in part (or plead insufficient knowledge as to the truth of part of the allegation).

An allegation framed to elicit an admission can render valuable information concerning the defendant's position regarding underlying facts, even if the defendant denies the allegation. If you do not frame the allegation to elicit an admission, you will not learn as much.

To get meaningful responses from a defendant, frame allegations of ultimate fact neutrally, objectively, and with precision. A **neutrally framed** allegation sets out the facts free of the drafter's conclusions, arguments, beliefs, and factual inferences. An **objective** allegation is one that focuses on the observable facts instead of on what the party subjectively perceived or concluded about the facts. A **precise** allegation is one that sufficiently identifies the key issues of who, when, what, and where.

Assume that a plaintiff slipped and fell in a convenience store and is suing the store's owner. When drafting the complaint, the attorney could choose to frame the allegations in either a conclusory or a neutral way, as illustrated by the following examples.

Examples: Conclusory versus Neutral Allegations

Conclusory:
On or about June 9, 2012, Defendant negligently failed to remove spilled water or some other liquid that was on the floor of Defendant's store.

Neutral:
On or about June 9, 2012, there was water or some other liquid on the floor of Defendant's store.

If the plaintiff's attorney frames the allegation in the conclusory way shown above and if the defendant's attorney believes that the defendant was not negligent, the defendant's attorney might deny the entire allegation. Thus, the plaintiff's attorney would learn nothing from the denial about whether the defendant's attorney believes that there was water on the floor. By framing the allegation in a neutral way, the plaintiff's attorney forces the defendant to address the crucial fact of whether there was water on the floor.

Framing allegations objectively (instead of subjectively) may draw out admissions. Suppose the following allegations are true. How would the defendant's response to each differ?

Examples: Subjective versus Objective

Subjective:
Plaintiff became interested in buying canning equipment when Plaintiff learned from an advertisement in the July 1, 2011 edition of *Crosstown Deals* that Defendant sold home-canning kits.

Examples: Subjective versus Objective (cont.)

Objective:
Defendant's advertisement appeared in the July 1, 2011 edition of *Crosstown Deals*. In its advertisement, Defendant stated that it sold home-canning kits.

If the plaintiff's attorney uses the subjective language, the defendant would be without actual knowledge concerning the truth of the allegations that "plaintiff became interested" and "plaintiff learned from an advertisement" and might respond accordingly. If the plaintiff's attorney frames the allegation so that it is about the defendant (i.e., that the defendant placed the ad), then the defendant is in a position to respond.

(b) Pleading Alternatively or Inconsistently

Federal Rule 8(d) provides, "A party 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. If a party makes alternative statements, the pleading is sufficient if any one of them is sufficient."[93]

States generally have similar rules.[94] As a California court said, "when a pleader is in doubt about what actually occurred or what can be established by the evidence, the modern practice allows that party to plead in the alternative and make inconsistent allegations."[95] A Massachusetts court explained that the court may grant relief if one of the alternative grounds is sufficient, despite the insufficiency of any other alternative grounds.[96]

For example, if the plaintiff was badly injured by the defendant's escaped horse, the attorney does not have to know at the pleading stage exactly how the horse escaped. If addressing the means of escape is essential, the attorney could allege multiple alternatives: e.g., that the defendant (1) negligently left the gate to the pasture open so that the horse escaped, or (2) negligently failed to maintain the pasture fence in sufficient repair to prevent the horse from escaping, or (3) negligently failed to otherwise prevent the horse from escaping.

In addition to pleading alternative facts, a plaintiff may plead alternative and inconsistent theories.[97] For example, a plaintiff's attorney may plead based on the same set of circumstances both that the defendant negligently injured the plaintiff and that the defendant committed an intentional tort.

A party may also ask for alternative or inconsistent remedies, though the plaintiff would be entitled to only one recovery for the same injury.

E. Organizing the Allegations

1. Sequence of Allegations

The elements of most causes of action (whether laid out by a court or in a statute) typically fit into four key categories:

1) The law imposes a legal duty on the defendant (e.g., based on a contract or statute);

2) The defendant engaged in wrongful conduct (e.g., by breaching the contract or violating the statute);

3) There is a causal connection between the defendant's wrongful conduct and the resulting harm to the plaintiff (e.g., physical injury, economic loss, or property damage);

4) Compensable damage or loss resulted from the wrongful conduct.

We recommend that you use the four key categories as a guide to sequencing your factual allegations. To prepare a rough draft of a complaint, we recommend that you (1) list the four key categories; and (2) under each listed category, set out each fact that establishes the related element of the cause of action. Below is an example of what such a list might look like.

Example: Sequencing Allegations
(Premises Liability case)

1. **Basis of Defendant's Duty**
   - Defendant owned and operated a grocery store located at 111 Main Street, Smith, Georgia.
   - On June 5, 2011, Plaintiff was a customer at Defendant's store.

2. **Defendant's Wrongful Conduct**
   - On that date, water or some other liquid had spilled on the floor of Defendant's store.
   - Defendant knew about the liquid on the floor or had sufficient time to become aware of it.
   - Defendant negligently failed to remove the liquid from the floor.

3. **Causal Connection Between Wrongful Conduct and Harm**
   - Plaintiff stepped into the liquid, slipped and fell backward.
   - The fall caused Plaintiff to suffer a fractured skull.

Example: Sequencing Allegations (cont.)

4. **Compensable Damage or Loss Resulting from Wrongful Conduct**

   - Plaintiff endured pain and suffering, emotional distress, disability, humiliation, and loss of enjoyment of life.
   - Plaintiff incurred medical expenses, including expenses for hospitalization and physical therapy.
   - Plaintiff lost the income that she earned through her work.

2. Grouping Facts Into Paragraphs

Federal Rule 10(b) requires that the plaintiff set out a claim in numbered paragraphs and that each paragraph be limited "as far as practicable" to a single set of circumstances. Most states' rules on paragraph design are similar.[98]

Unless your jurisdiction requires otherwise, we recommend that each paragraph address no more than one element of the cause of action. For example, do not set out facts relating to the defendant's wrongful conduct (breach of duty) in the same paragraph as facts showing the basis of the duty or in the same paragraph as facts showing causation. The reason for that recommendation is to increase the chances that the defendant will respond systematically regarding each element, rather than give a global response to a mixed cluster of allegations. Below is an example of allegations that are organized into paragraphs.

Example: Organizing the Allegations into Paragraphs
(Premises Liability case)

2. At all time relevant to this action, Defendant owned and operated a grocery store located at 111 Main Street, Smith, Georgia.

3. On June 5, 2011, Plaintiff was a customer at Defendant's store.

4. On that date, water or some other clear liquid had spilled onto the floor of Defendant's store.

5. Defendant knew about the liquid on the floor or had sufficient time to become aware of it. Defendant negligently failed to remove the liquid from the floor.

Example: Organizing the Allegations into Paragraphs (cont.)

6. While Plaintiff was in Defendant's store, Plaintiff stepped into the liquid, slipped, and fell backward to the floor. Defendant's negligence caused Plaintiff to suffer injury, including a fractured skull.

7. As a result of Defendant's negligence, Plaintiff endured pain and suffering, emotional distress, disability, humiliation, and loss of enjoyment of life. Plaintiff incurred medical expenses, including expenses for hospitalization and physical therapy. Plaintiff lost the income that Plaintiff earned through working as a waitress.

We also recommend that you keep paragraphs concise. If a paragraph exceeds three or four reasonably short sentences, consider breaking it into two paragraphs. Keeping the length manageable will yield more useful responses (i.e., responses that genuinely identify the facts that are in dispute). On the other hand, overuse of one-sentence paragraphs may cause the allegations to seem disconnected and difficult to follow.

3. Numbering Paragraphs

Typically, paragraphs are consecutively numbered throughout the pleading, though there are exceptions. Connecticut, for example, requires that paragraphs set out under separate counts "be numbered separately beginning in each count with the number one."[99]

4. Cross-Referencing Between Paragraphs

Most states permit cross-referencing from one paragraph into another: e.g., "Defendant negligently failed to remove or repair the condition described in paragraph 8." Limit cross-referencing to the minimum amount necessary to prevent serious redundancy or prolixity problems. Do not force the reader to jump back and forth between paragraphs more than is necessary.

V. Drafting Multi-Count Complaints

A. Dividing a Pleading Into Counts

Contrary to the common practice, most jurisdictions' rules of procedure regarding division of a pleading into counts do not expressly require each count to be based on a separate legal theory (e.g., breach of contract or violation of a statute). Federal Rule 10(b) states that each claim founded on a separate transaction or occurrence should be stated in a separate count if doing so would promote clarity.

Generally, state rules are similar.[100] Oregon is one of the exceptions: "Within each claim alternative theories of recovery shall be identified as separate counts."[101] This is what most lawyers do and what we recommend.

Typically, multiple counts are not required if multiple defendants engaged in the same type of wrongful conduct covered by the same legal theory or if one defendant engaged in multiple instances of the same sort of wrongful conduct (e.g., if the defendant violated eight provisions of the same statute). Check the rules and practice conventions in your state.

B. Re-Allegation and Incorporation by Reference

Avoiding redundancy in a pleading is an important objective. To avoid redundancy, an attorney can re-allege a paragraph containing a previously alleged fact or incorporate the material by reference. Federal Rule 10(c) states, "A statement in a pleading may be adopted by reference elsewhere in the same pleading or in any other pleading or motion." Many state courts have similar rules.[102] Below are examples of re-allegation and incorporation by reference.

Examples: Re-allegation and Incorporation by Reference

Re-allegation:
Plaintiff re-alleges paragraphs 3, 7, and 12 from Count I.

Incorporation by Reference:
As alleged in paragraph 10, Defendant did not obtain the required authorization.

Beware of wholesale incorporation of allegations from one count into another if the allegations contain language that is inconsistent with the legal theory on which the count is based. For example, do not incorporate a paragraph containing the word "negligence" into a count addressing breach of contract, even if the underlying fact was the same for both.

Avoid what some federal courts call "shotgun pleading."[103] One court described a shotgun pleading as containing "several counts, each one incorporating by reference the allegations of its predecessors, leading to a situation where most of the counts (i.e., all but the first) contain irrelevant factual allegations and legal conclusions."[104] Check your state's rules regarding re-allegation and incorporation by reference.

C. Demand for Judgment Following Each Count

We generally recommend placing a demand for relief at the end of each count so that the reader can easily understand what remedies the plaintiff is seeking based on the particular legal theory supporting the count. As always, check applicable law and practice conventions.

D. Headings for Each Count

We recommend that each count in a multi-count pleading be assigned a number and a heading. Below are two pairs of examples:

Examples: Headings for a Two–Count Complaint

Example 1:

Count 1: Negligence

Count 2: Breach of Contract

Example 2:

First Count—Negligence

Second Count—Breach of Contract

VI. Pleading Pursuant to Statute

A. Statutory Causes of Action Generally

Many federal and state statutes provide a party with a right to file an action against persons to whom the statute applies if those persons inflict injury on the party by violating the statute. Many of those statutes allow the party to recover not only damages or injunctive relief, but also attorney's fees. Pleading pursuant to a statute is similar to pleading based on a common-law theory. Generally, the statute will tell you what to plead.

B. Identifying the Elements of the Statutory Cause of Action

1. Understanding the Statute's Structure

To plead pursuant to a statute, an attorney must discern the elements of the statutory cause of action. A systematic approach is useful. Before beginning a close reading of the statute, scan it to get familiar with its overall structure, including its headings. Notice whether the statute sets forth the statute's purpose and application. Notice *where* in the statute the legislature has addressed the following:

- Definitions.
- Identity of the government agency that enforces the statute.
- Regulatory provisions (e.g., requirements applying to persons the statute regulates).

- Administrative provisions (e.g., how the enforcing authority obtains relief).
- Remedies and penalties (including a private right of action).
- Exemptions and exclusions.

By scanning the statute in advance, you may be able to weed out irrelevant sections.

2. Analyzing the Statute

To analyze a statute, make a list addressing the following issues and questions (be precise, or the list will not be useful):

Checklist for Analyzing a Statute

1. Purpose of Statute

If the statute contains a purpose clause, what is the purpose?

2. Existence of Remedy

- Does the statute grant to a party a private right of action?
- If so, what remedies does it provide (e.g., damages or attorney's fees)?

3. Defendant's Duty to Plaintiff

a. Questions relating to Plaintiff:

- What classes of persons is the statute designed to *protect*?
- Are these classes listed in the "Definitions" section?
- If so, what are the criteria for qualifying as a member of the class?
- Does Plaintiff fit into one or more protected classes?

b. Questions relating to Defendant:

- Which classes of persons is the statute designed to *regulate*?
- Are the classes listed in the "Definitions" section?
- If so, what are the criteria for qualifying as a member of the class?

Checklist for Analyzing a Statute (cont.)

- Does Defendant fit into one or more regulated classes?

c. Questions relating to the transaction or circumstances:

- To what type of transaction or circumstances does the statute apply?
- Does the statute name the transaction or circumstances (e.g., "health maintenance contract" or "excavation of protected lands")?
- If so, is that name defined in the statute?
- If so, what are the criteria for meeting the definition?

4. **Violations of the Statute**

- Which sections or subsections do you believe each defendant violated?
- Which conduct by each defendant qualifies as a violation?
- Note: it is generally *not* possible for a party to violate a definition or a purpose clause. To establish a violation, you must identify a prohibition, requirement, or provision imposing liability.

5. **Causation Issues**

- Does the statute require you to allege a causal connection between Defendant's actions and the harm that Plaintiff suffered (e.g., does the statute provide a remedy only if harm "results from" or "is caused by" the violation)?
- If so, then use the statutory language in pleading a causal connection.

6. **Remedies**

- Which injuries, losses, and other harms are compensable under the statute?
- Does the statute authorize attorney's fees?
- If so, make it clear that Plaintiff incurred reasonable attorney's fees

C. Pleading the Statutory Cause of Action

1. Identifying the Statute and Adopting a Short Form

Identify at the beginning of the count (or the beginning of the pleading if you have only one legal theory) the statute on which the cause of action is based. If doing so is not contrary to local practice and if it would help your reader, you can adopt a short form for referring to the statute. The short form could be an acronym or the name by which the statute is popularly known. Below is one possible approach:

> This action is pursuant to Title 10, Chapter 401, Part II, sections 401.10 through 401.20, "The Floregon Membership Facilities Act" (FMFA).

2. Organizing the Allegations

In a statute-based pleading, we recommend that you set out allegations in the following order:

1) Facts establishing defendant's duty.

2) Defendant's wrongful conduct (statutory violations).

3) Causal connection between violations and harm.

4) Damages.

One of the court's first questions is whether the statute applies to the parties. Therefore, it makes sense to establish duty-related facts up front. These include facts that (1) introduce the defendant, (2) show that the defendant qualifies as a potential violator of the statute, and (3) show that the plaintiff fits within the class of persons the statute is intended to protect or benefit.

After setting out the basis of the statutory duty, address the wrongful conduct (i.e., the conduct that violates the statute). After setting out all violations in the order in which they occurred, address causation and then damages.

This organizational approach does not result in a mere relation of the events in the order that they occurred. Instead, it groups facts together according to their relationship to the four categories discussed in Section IV–E–1.

3. Tracking Statutory Language When Framing Allegations of Fact

To the extent possible, frame the facts in the language of the statute. Doing so is called "tracking" the statute. "Tracking" does not mean quoting the statute (which generally should not be done). Tracking means incorporating *only the relevant words* from the statute.

Suppose that you want to show that the defendant is a "health studio" under the statutory definition of that term. Below is an example of a statutory definition and an allegation that tracks the language of that definition (relevant words are underlined).

Example: Tracking Statutory Language

Statutory Definition:
"Health Studio" means a facility where an individual patron can obtain instruction, training, or assistance by contract for the following: physical culture, body building, exercising, dancing, martial arts, or any other such similar activity.

Allegation Tracking the Statutory Definition:
"At all times relevant to this cause of action, Defendant Quantum Physiques was a facility located at 2200 University Avenue, Micanopia, Temple County, Floregon. Individual patrons contracted with Defendant for instruction, training, or assistance in body building. On February 2, 2012, Plaintiff signed a contract with Defendant for membership in its facility.

4. Identifying the Violated Sections and Subsections

After alleging *facts* showing that the defendant violated the statute, identify the violated sections and subsections (1) as a courtesy to the court and (2) to assist the defendant in responding.

Consider Floregon's "Membership Facilities Act," which regulates certain health clubs. Sections 2301(a) and (b) provide the following:

> 2301(a). A membership facility that operates as a health studio shall regularly inspect its machines for defects. If a machine is defective, the membership facility shall promptly disable the machine and post a notice stating that the machine is out of order.
>
> 2301(b). A membership facility that operates as a health studio shall ensure that any service to a defective machine is made by a service agent who is authorized by the manufacturer to make such repairs.

When alleging that a defendant violated Floregon's Membership Facilities Act, we recommend that you take one of two approaches: either the chronological approach or the fact-violation approach.

To use the chronological approach, first set out allegations relating to the defendant's conduct in the order that the conduct occurred. Next identify the violated sections or subsections. Below is an example.

Example: Chronological Approach

6. Defendant failed to regularly inspect the Yogamagic machine for defects. On February 10, 2012, when Plaintiff was using Defendant's facility, Defendant had not disabled the Yogamagic and had not posted a notice stating that the Yogamagic was out of order.

7. Defendant's employee had attempted to repair the machine. On information and belief, the employee was not a service agent whom the manufacturer had authorized to make such repairs.

8. Defendant violated FMFA section 2301(a) by failing to inspect the Yogamagic for defects or malfunctions and by failing to promptly disable or remove the malfunctioning machine from service.

9. Defendant violated FMFA section 2301(b) by failing to ensure that service to the defective or malfunctioning machine was made by a service agent authorized by the manufacturer to make such repairs.

To use the fact-violation approach, first set out the paragraph alleging conduct that violated the statute. Immediately after that paragraph, set out the allegation identifying the violated section or subsection. Below is an example.

Example: Fact–Violation Approach

6. Defendant failed to regularly inspect the Yogamagic machine for defects. On February 10, 2012, when Plaintiff was using Defendant's facility, Defendant had not disabled the Yogamagic and had not posted a notice stating that the Yogamagic was out of order.

7. Defendant violated FMFA section 2301(a) by failing to inspect the Yogamagic for defects or malfunctions and by failing to promptly disable or remove the malfunctioning machine from service.

8. Defendant employee had attempted to repair the machine. On information and belief, Defendant employee was not a service agent whom the manufacturer had authorized to make such repairs.

9. Defendant violated FMFA section 2301(b) by failing to ensure that service to the defective or malfunctioning machine was made by a service agent authorized by the manufacturer to make such repairs.

If you prefer a shorter pleading, you could dispense with the individual paragraphs that identify the violations and simply list all of the violated sections in a single paragraph without elaboration: e.g., "Defendant violated FMFA sections 2301(a) and (b)."

D. Requesting Relief

In the demand for judgment, set out all the relief to which the plaintiff is entitled under the statute. Even if your jurisdiction does not require it, we recommend that you identify the statutory provision authorizing each item of relief. In some instances, a tabulated sentence may be useful. Below is an example.

Example: Demand for Judgment

Wherefore, Plaintiff requests that the court award to Plaintiff the following:

a) treble damages, as authorized by FMFA section 2509(a); and

b) attorney's fees and costs, as authorized by FMFA section 2509(c).

E. Template for Pleading Statutory Cause of Action

Below is a template that may be useful for pleading a statutory cause of action.

Template for Pleadings

Caption

- Identify the court and venue.
- Name all parties on each side.
- Identify the pleading as a complaint or petition.
- Include other information required by relevant rules.

Commencement

- Follow local conventions.
- Stipulate short forms for the parties if desired.

Procedural Issues (<u>if</u> required)

- Establish the court's subject-matter jurisdiction.
- Establish the court's personal jurisdiction over each defendant.
- Establish venue.

Template for Pleadings (cont.)

Body of Pleading

First or Only Count

- Identify the statute (if the pleading is based on a statute).
- Allege facts showing the basis of each defendant's legal duty.
- Allege facts showing each defendant's wrongful conduct.
- Set out causal nexus between wrongful conduct and harm to Plaintiff.
- Set out the resulting items of damage.
- Set out as an un-numbered allegation the demand for judgment, stating all requested relief.

Subsequent Counts

- Same as for first count.
- Use re-allegation selectively: if you use an initial re-allegation clause, choose only facts that fit the theory of the subsequent count.

Signature Block