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A Paralegal's Guide for Drafting Pleadings

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AGENDA

Pleadings (10 minutes)
- What Is a Pleading
- Rule 11
- Timing After Pleading Is Filed and Served

Best Practices When Drafting Complaint and Answer (10 minutes)
- Investigation
- Causes of Action, Possible Counterclaims, Other Claims
- Drafting
- Waiver of Defenses

Requirements for Complaint (10 minutes)
- Heightened Pleading Standard
- Pleading Special Matters
- Particularity

Docketing Tips (10 minutes)
- Service
- Default
- Time Frames Under Rules for Pleadings, Motions, Discovery

Motion Practice (10 minutes)
- Motions to Dismiss
- Motions for Summary Judgement
- Discovery Motions
- Meet and Confer

Timelines and Best Practices (10 minutes)
- Background Work for MSJ and Trial Preparation
- Timelines
- Sanctions

Questions and Answers (5 minutes)

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Introduction: Purpose of This Program

- Review the basics of pleadings and motion practice in federal court.
- Explore best practices for drafting complaints, answers, counterclaims, crossclaims, and third party pleadings.
- Explore best practices for pre-trial motions and discovery motions.
- Docketing practices.

What Is a Pleading?
Fed. R. Civ. P. 7(a)

- A pleading
  - Complaint;
  - Answer to complaint;
  - Answer to crossclaim;
  - Third party complaint; and
  - If the court orders, a reply to an answer.
- The complaint, answer, and five other enumerated pleadings — an answer to a counterclaim, an answer to a cross-claim, a third-party complaint, an answer to a third-party complaint, and a reply to an answer — are the "[o]nly . . . pleadings … allowed."

What Is a Pleading?

- A pleading is a written document filed by parties in civil litigation that sets forth the parties' respective claims and defenses, contains facts and claims and requires a responsive pleading. Federal Bar Association Legal Definitions.
- Main pleadings are plaintiff's complaint and defendant's answer. Black's Law Dictionary 1339 ((10th ed. 2014)). See Rule 8, Fed. R. Civ. P.

Form of Pleadings
Fed. R. Civ. P. 10

- Caption includes name of court, title of action, file number and a designation under Rule 7(a), Fed. R. Civ. P.
- Caption must contain names of all the parties.
- Numbered paragraphs limited to a single set of circumstances.
- Each claim founded upon a separate transaction or occurrence and each defense, other than denials shall be stated in a separate count or defense.
- Statements may be adopted by reference.
- Any copy of a written instrument is an exhibit and is a part therein for all purposes.

Signing Pleadings, Motions, etc.
Fed. R. Civ. P. 11

- Every document must be signed by one attorney of record or party personally if unrepresented.
  - "[C]orporations, partnerships or associations" may not appear in federal court except "through a licensed attorney." Rowland v. California Men's Colony, 506 U.S. 194, 202 (1993).
- Must have address, email, phone.
- Court must strike an unsigned paper unless omission is promptly corrected.

Signing Pleadings, Motions, etc.
Fed. R. Civ. P. 11

- Signature is a certification that “to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances.”
  - No improper purpose;
  - Claims, defenses warranted by existing law or nonfrivolous argument;
  - Facts and denials have evidentiary support.

Sanctions—FRCP 11

- Keep in mind that a violation of Rule 11 can result in sanctions not only for the party but for the firm and the attorney, jointly and severally.
  - In fact, Rule 11(c) states “Absent exceptional circumstances, a law firm must be held jointly responsible for a violation committed by its partner, associate, or employee.”
  - Therefore, ensuring that every document filed with the court is signed by the attorney responsible, and signed by the employee who oversaw the certificate of service, is of the utmost importance.

Sanctions—FRCP 11

- Must include a reasonable investigation and the attorney should evaluate the client's statements to consider whether they have first-hand knowledge. *Mike Ousley Prods., Inc. v. WJBF-TV*, 952 F.2d 380, 383 (11th Cir. 1992) (counsel sued one defendant relying solely on hearsay furnished by his client); *Bockman v. Lucky Stores, Inc.*, 108 F.R.D. 296, 298 (E.D. Cal. 1985), aff'd, 826 F.2d 1069 (9th Cir. 1987).
- Pleadings and motions held to be unwarranted by existing law that is settled precedent may be subject to sanctions. *Hewitt v. City of Stanton*, 798 F.2d 1230, 1233 (9th Cir. 1986)(counsel unaware of authority that should have been known is no defense to sanctions).
- Be aware of the 21-day Safe Harbor Provision. See, e.g., *Huggins v. Lueder, Larkin & Hunter, LLC*, 39 F. 4th 1342, 1344 (11th Cir. 2022).
- PRACTICE POINTER: 1. ARE ALLEGATIONS OBJECTIVELY FRIVOLOUS; AND 2) SHOULD THE PERSON WHO SIGNED HAVE BEEN AWARE OF THIS? *See, e.g., Baker v. Alderman*, 158 F.3d 516 (11th Cir. 1998).

Overview of Pleadings

- A pleading and a motion are often confused. Know the difference.
- Most Rules of Civil Procedure differentiate between a pleading and a motion.
- Most jurisdictions have detailed local rules that govern filing, requirements for documents, docketing, requesting oral argument and presentation.
- Back to PLEADINGS….

Complaint

- The initial document filed with the court, which commences the action.
- Its purpose:
  - Identifies the parties;
  - Establishes jurisdiction and venue;
  - Tells the story of the dispute (General Allegations);
  - Sets forth the counts and causes of action;
  - Can be verified by the client to confirm the factual details;
  - Each separate allegation is numbered;
  - Must be sufficiently pled to survive a Motion to Dismiss.

Answer
Fed.R.Civ.P. 12

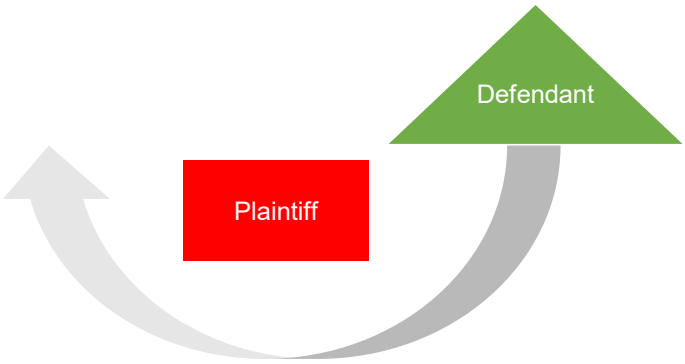
- A written pleading filed by a defendant to respond to a complaint;
- Defendant answers after proper service;
- Defendant responds to each numbered allegation with:
  - Admit;
  - Deny (must respond to the substance);
  - Lacking knowledge or information sufficient to form a belief about the true of the matter asserted and therefore denying the same;
  - Affirmative Defenses;
  - Prayer for relief.

Answer



Counterclaim

Defendant countersues plaintiff.



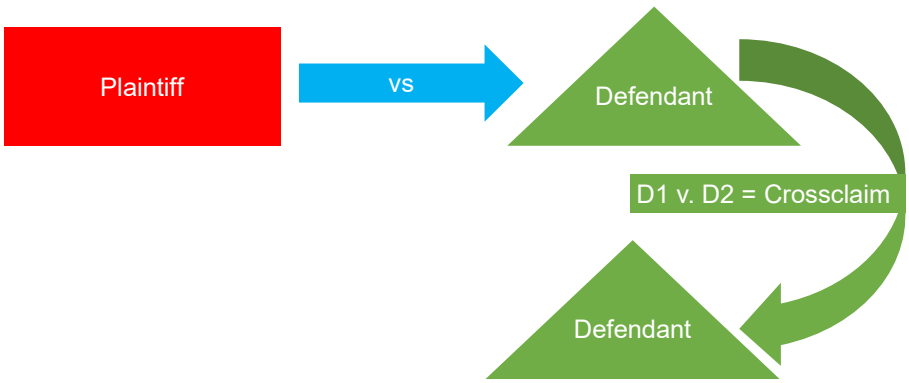
Counterclaim
Fed.R.Civ.P 13

- Compulsory or Permissive.
  - Compulsory: A pleading must state as a counterclaim any claim that, at the time of its service, the pleader has against an opposing party if the claim:
    - Arises out of the transaction or occurrence; and
    - Does not require adding another party.
    - Exceptions include:
      - Claim subject to another pending action; or
      - Opposing party did not establish personal jurisdiction.

  - Permissive: Any claim that is not compulsory against opposing party.

Crossclaim
Fed.R.Civ.P 13

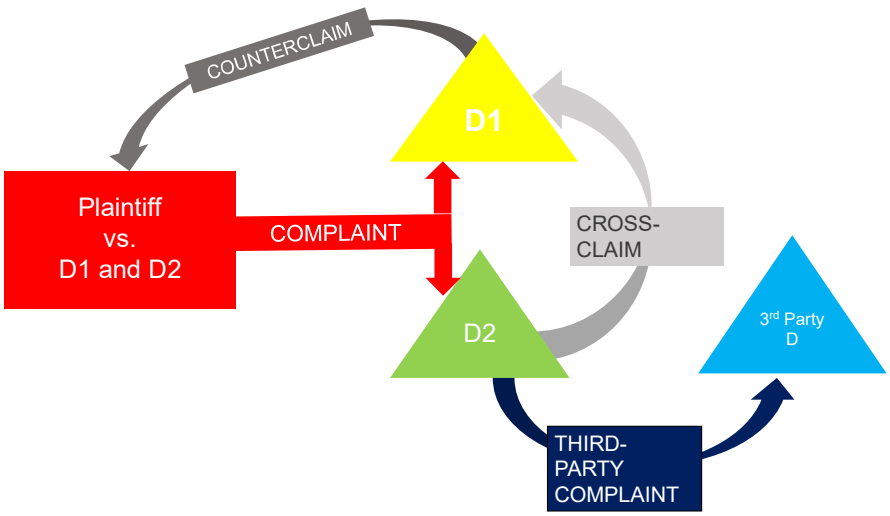
A claim brought by one defendant against another in the same proceeding.



Third Party Complaint
Rule 14, Fed.R.Civ.P.

A defending party may, as a third-party plaintiff, serve a summons and complaint against a nonparty who is or may be liable to it for all of part of the claim against it.

Overview of Pleadings



Best Practices for Drafting the Complaint: Interview and Investigate

- Pre-filing Investigation is necessary.
  - Who are witnesses?
    - Ex parte communications with represented persons who may be adverse is prohibited. Rule 4.2 American Bar Association Model Rules of Professional Conduct.
    - Identify and locate the key players as early as possible.
  - Where is your evidence? Gather it early!
    - Emails;
    - Computer files;
    - Texts;
    - Social media;
    - Send out Litigation Hold letters to your client and opposing counsel early to ensure that evidence is not lost.
  - Create your timeline and add to it as case progresses.

Best Practices for Drafting the Complaint: Causes of Action

- Research Causes of Action and Statutes of Limitation
  - Create your Preliminary Proof Outline
    - Identify all possible causes of action.
    - Set forth the elements for each.
    - Apply the facts that you have gathered to support the allegations.
    - Continue to add to the evidence as the case progresses.
    - Determine the possible defenses in advance and create an outline of defenses.
  - Statutes of Limitation
    - Review the various statutes of limitation in your jurisdiction.
    - A civil statute of limitations applies to a non-criminal legal action, including a tort or contract case. For example, some statutes of limitation can be as short as one year. For contract actions, it can be much longer. Establish the date of loss or the date of breach.
    - Bringing an action outside of the statute of limitations could lead to dismissal and an award of attorneys' fees and costs.

Best Practices: Drafting

- Are your parties correct? Spelling, spouses, companies, trusts, beneficiaries, etc. Consider Doe Defendants.
- What are the Local Rules for Forms of Papers? Font size, spacing, number of lines per page. For example, AZ LRCiv requires party names be capitalized using upper- and lower-case types. It will be thrown out if done incorrectly.
- Create a clear and concise summary preliminary statement.
- Tell the story in chronological order.

Best Practices: Drafting

- Each paragraph sets forth a simple and objective statement of fact that supports a legal claim.
- Try to avoid allegations “upon information and belief.”
- Consider whether the Complaint should be verified by your client.
  - Certain causes of action, i.e., 29 U.S.C. § 501(b) (union member claim for breach of fiduciary responsibility of officers), require verification.
  - Most don’t, but there may be instances where you want your client to verify.

Standing and Parties

- Determine whether your client has standing to bring the complaint.
- Identify all of the persons, entities, agents, principals who will be or may be parties and consider unidentified "Doe" defendants.
- Determine the possibility of crossclaims, counterclaims and third-party complaints and prepare for affirmative defenses in advance.

Jurisdiction: Amount in Controversy and Diversity

- Federal district courts have original jurisdiction in all civil actions where the amount in controversy exceeds $75,000 and the adverse parties are "diverse," i.e., citizens of different States. 28 U.S.C. § 1332.
- Diversity of citizenship must be "complete," meaning that "no plaintiff may be a citizen of the same state as any defendant." *Ware v. Jolly Roger Rides, Inc.*, 857 F.Supp. 462, 463 (D.Md.1994) (*citing Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267, 2 L.Ed. 435 (1806)).
  - A natural person is deemed a citizen of the state of domicile. A corporation is deemed a citizen "of any state in which it is incorporated or has its principal place of business." *Id.*

Subject Matter Jurisdiction

- Federal Courts are courts of limited jurisdiction and have jurisdiction over civil cases "arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331.
- A federal court has an independent duty, at any level of the proceedings, to determine whether it properly has subject matter jurisdiction over a case. *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010).

Prayer for Relief

- Is your prayer for relief complete? Depending upon the attorney's preference, request whether each count should have a separate prayer for relief – especially if the relief varies from count to count.
- Preserve your right to a jury trial. See Rule 38, Fed. R. Civ. P. It can be included in the Prayer for Relief, serving with written demand no later than 14 days after the last pleading directed to the issue is served and filing the demand.
- A party can waive the jury trial unless it is properly served and filed. *Id.*

Requirements for Complaint

- Fed. R. Civ. P. 8(a) states:
  - A pleading that states a claim for relief must contain:
    - (1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction, and the claim needs no new jurisdictional support;
    - (2) a short and plain statement of the claim showing that the pleader is entitled to relief; and
    - (3) a demand for the relief sought, which may include relief in the alternative or different types of relief.
    - *Bell Atlantic Corporation v. Twombly*, 127 S. Ct. 1955 (2007). Under the relaxed pleading standards, the idea was “not to keep litigants out of court but rather to keep them in.”

“Heightened Pleading”

- ***Twiqbal***
- A colloquialism for two Supreme Court cases that require plaintiffs to show that their claims are “plausible.” *Bell Atlantic Corporation v. Twombly*, 550 U.S. 544 (2007)(Anti-trust case).
  - “[A] plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* at 555.
- The heightened pleading standard was not just limited to anti-trust cases but “to all civil actions and proceedings in the United States district courts.” *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (U.S. 2009).

Two-Pronged Approach to Analyzing Complaints

- First Prong: Does your complaint state and plead facts and not just conclusions? *Twombly*, 550 U.S. at 570.
- Second Prong: Do your factual assertions plausibly suggest an entitlement to relief? *Iqbal,* 556 U.S. at 578.
- A claim must be dismissed if the plaintiff has "not nudged [its] claims across the line from conceivable to plausible." *Twombly*, 500 U.S. at 570.

Which States Have Adopted Twiqbal or a Similar Standard?

- Be aware of the states that have adopted Twombly and Iqbal and its evolving precedent. See, Willis, J. and Buford, F. Pleading Standards in the Federal and State Trial Courts, 10 Litigation Commentary & Review, Spring 2018.
- Following the standard will strengthen your complaint and fend off Motions to Dismiss.

Pleading Special Matters: Capacity or Authority to Sue
Fed.R.Civ.P. 9(a)

- Generally, except when required to show that the court has jurisdiction, a pleading need not allege:
  - (a) a party's capacity to sue or be sued;
  - (b) a party's authority to sue or be sued in a representative capacity; or
  - (c) the legal existence of an organized association of persons that is made a party.

Pleading Special Matters: Capacity or Authority to Sue
Fed.R.Civ.P. 9(a)

- To raise those issues, a party must do so by specific denial, stating supporting facts specifically within the party's knowledge.
- If you fail to raise the issue, it waives the defense. *Wagner Furniture Interiors, Inc. v. Kemner's Georgetown Manor, Inc.*, 929 F.2d 343, 345–46 (7th Cir.1991); *Delta Consulting Grp., Inc. v. R. Randle Const., Inc.*, 554 F.3d 1133, 1140 (7th Cir. 2009).

Pleading Special Matters: Fraud or Mistake; Conditions of the Mind – Fed.R.Civ.P. 9(b)

- In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.
  - State "time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentation." *Schreiber Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986).
- Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally.

Pleading Special Matters: Fraud or Mistake Fed.R.Civ.P. 9(b)

- Rule 9(b) gives defendants notice of the claims against them, provides protection for their reputations and reduces the number of frivolous lawsuits brought about to extract settlements. *In re Suprema Specialties, Inc. Securities Litigation*, 438 F.3d 256, 270, Fed. Sec. L. Rep. (CCH) P 93694 (3d Cir. 2006); *In re Burlington Coat Factory Securities Litigation*, 114 F.3d 1410, 1418, Fed. Sec. L. Rep. (CCH) P 99485, 38 Fed. R. Serv. 3d 557 (3d Cir. 1997)); § 20:19.Pleading standard, 9A Ariz. Prac., Business Law Deskbook § 20:19 (2018-2019 ed.).

Pleading Special Matters: Fraud or Mistake
Fed.R.Civ.P. 9(b)

- Rule 9(b) also requires that plaintiff plead the "date, place or time of the fraud, or through alternative means of injecting precision and some measure of substantiation." *Gutman v. Howard Sav. Bank*, 748 F. Supp. 254, 257, Fed. Sec. L. Rep. (CCH) P 95631, 18 Fed. R. Serv. 3d 967 (D.N.J. 1990); Wellness Pub. v. Barefoot, 2008-1 Trade Cas. (CCH) ¶ 76040, 2008 WL 108889, *14 (D.N.J. 2008) (quoting Gutman).
- Plaintiff must also allege who made the representation, to whom, and the general content of the misrepresentation. *EcoDisc Technology AG v. DVD Format/Logo Licensing Corp.*, 711 F. Supp. 2d 1074, 1085 (C.D. Cal. 2010) (plaintiff's false advertising claims grounded in fraud; Rule 9(b) applies).

Does Fed.R.Civ.P. 9(b) Apply to State Law Causes of Action?

- Rule 9(b) may apply to state law causes of action.
- A federal court will, therefore examine whether the complaint states, with particularity, the elements of fraud, and that the circumstances of the fraud are stated with particularity under the federally imposed rule. *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1103 (9th Cir. 2003)

Docketing Tips: Complaint

- Serve Defendants within 90 days after complaint is filed. Fed.R.Civ.P. 4(m).
- Local Rules set times for dismissal for want of prosecution, usually six months.
- Don't forget corporate disclosure statement, which must be filed with first appearance. Fed.R.Civ.P. 7.1(b).

Answer
Rule 12(a)(1)(A), Fed. R. Civ. P

- A pleading in which a defendant responds to the plaintiff's complaint.
- Must be served:
  - Within 21 days after being served with complaint;
  - If waiver of service under Rule 4(d), within 60 days after request for waiver sent;
  - See Rule 12 for other deadlines for responsive pleadings depending upon the defendant.

Docket Watch: Default
Fed. R. Civ. P. 55

- Clerk can enter default "[w]hen a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise." Plaintiff requests entry.
- In judge's discretion, default may be set aside for "good cause."
- Factors a court will consider when determining "good cause:"
  - Whether default willful;
  - Prejudice to the adversary;
  - Whether defaulting party has a meritorious defense;
  - Defendant's explanation;
  - Good faith;
  - Amount in controversy;
  - Timing of Motion to Set Aside. 10A Fed. Prac. & Proc. Civ. § 2682 (4th ed.)

Answer

- Be sure to respond to each paragraph and admit, deny, or deny based upon lack of information. Fed. R. Civ. P. 8 (b)(1)(B).
- Failure to deny, except for amount of damages, constitutes an admission. Fed. R. Civ. P. 8 (b)(6).
- Denials
  - General
  - Specific
  - Lack sufficient knowledge to form a belief and deny same.

Answer: Jurisdiction and Venue

- A motion to dismiss for improper venue is permitted by Fed. R. Civ. P. 12(b)(3).
- A motion to transfer forum non conveniens is filed after the answer. 28 U.S.C. § 1404.
- If you plan on filing a motion to transfer venue based upon forum non conveniens, raise that ground as an affirmative defense in your answer. See 28 U.S.C 1391, et seq.

Answer: Defenses

- Don't forget the catch-all denial, including all numbered and unnumbered paragraphs.
- Affirmative defenses must be asserted in the answer or they may be waived. Rule 8(C), Fed. R. Civ. P.
- 12(b)(2) through (5) may be waived.
- List of affirmative defenses, Rule 12 (b), are not exhaustive. *See, e.g., John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 133 (2008).
- So review all possible defenses in detail, negative and positive.
  - Negative defense is an attack on plaintiff's prima facie case, i.e., no causation.
  - Affirmative defense is one that admits but seeks to avoid liability.

Answer or Motion?

- On or before deadline to file a responsive pleading or answer, you may:
  - Move to dismiss;
  - Move to make more parts more definite or certain; or
  - Move to strike parts of the complaint.
  - If you move for partial dismissal, you may need to answer remaining counts.

Motion Practice on Defenses

- Motion to Dismiss. Rule 12(b).
- Motion for Judgment on the Pleadings. Rule 12(c).
- Motion to Strike. Rule 12(d).
- Motion for Summary Judgment, Rule 56.

Motion Practice Docketing

- Review your District Court Local Rules and Fed. R. Civ. P. for deadlines to respond, reply on different motions.
  - Motions: Approximately 14 days to respond. AZ LRCiv 7.2. Check local rules for reply.
  - Motion to Dismiss for Lack of Jurisdiction: 30 days to respond, 21 days to amend pleading. AZ LRCiv 12.1 (b); Fed. R. Civ. P. 15(a)(1)(B). Check local rules for reply.

Motion Practice Docketing

- Motion for Sanctions: served on opposing counsel but cannot be presented to the court. OPC has 21 days to withdraw challenged paper; if not, then motion can be filed and served next day. Fed. R. Civ. P. 11 (c)(2).
- Motion to Strike: 14 days to respond, 21 days to amend. AZ LRCP 7.2 (c); Fed. R. Civ. P. 15(a)(1)(B).
- Motion for Summary Judgment: 30 days to respond. AZ LRCP 56.1.

Motion Practice Docketing

- Motion for Reconsideration or Reargument, does not toll time to appeal. But there is a deadline to file one in Arizona: 14 days. AZ LRCiv 7.2(g)(2). No Response unless court orders otherwise.
- Look for possible appeal deadlines under Federal Rules of Appellate Procedure for Motions that do toll time to appeal. Must be made within 28 days after entry of judgment. Fed. R. Civ. P. 50 and 59.

Motion to Dismiss: Rule 12(b)

- Based upon legal deficiencies for failure to state a claim upon which relief can be granted.
  - Some courts require parties to meet and confer before filing a Motion to Dismiss to attempt to resolve deficiencies. See, i.e., Ariz. L. R. Civ. P. 8.1 (Commercial Cases).
  - Not a bad practice to adopt, especially if the defect is curable.

Motion to Dismiss: Rule 12(b)

- If parties go outside the pleadings, MTD will be treated as a Motion for Summary Judgment. *Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156, 161 (D.C. Cir. 2003).
- Usually procedural in nature.
- Can you make the argument within the "four corners" of the complaint?
- Is a document mentioned, which you can argue should be considered as part of the MTD?

Motion to Dismiss: Rule 12(b)

- For purposes of a motion to dismiss, the court accepts all well-pleaded factual allegations as true and draws all reasonable inferences in the plaintiff's favor. *See Rodríguez-Reyes v. Molina-Rodríguez*, 711 F.3d 49, 52–53 (1st Cir. 2013); *Jordan v. Fox Rothschild, O'Brien & Frankel, Inc.*, 20 F.3d 1250, 1261 (3d Cir. 1994); Arvinger v. Mayor and City Council, 862 F.2d 75, 77 (4th Cir.1988).
- Copies of a written instrument that is an exhibit to a pleading may be considered without converting a MTD to an MSJ. 138 A.L.R. Fed. 393 (Originally published in 1997).
- Matters incorporated into the pleadings by reference are part of the pleadings and may be considered without converting to an MSJ. *Id.*

Motion to Dismiss: Statute of Limitations

- Ordinarily an affirmative defense but can be grounds for dismissal under Rule 12(b)(6).
- Essential facts must appear on face of pleading, which may allow the court to dismiss. *See Procter & Gamble Co. v. Nabisco Brands, Inc.*, 125 F.R.D. 405, 413 (D. Del. 1987), noting 2A J. Moore's Federal Practice ¶ 2.10.
- Very important: If the Statute of Limitations is not raised in answer or early on in case, it is waived.

Motion to Dismiss: Other Defenses That Must Be Made Before a Responsive Pleading Is Allowed: Rule 12(b).

- (1) lack of subject-matter jurisdiction;
- (2) lack of personal jurisdiction;
- (3) improper venue;
- (4) insufficient process;
- (5) insufficient service of process;
- (6) failure to state a claim upon which relief can be granted; and
- (7) failure to join a party under Rule 19.

"No defense or objection is waived by joining it with one or more other defenses or objections in a responsive pleading or in a motion."

Subject Matter Jurisdiction

- Federal question claims can be dismissed for lack of subject matter jurisdiction when the claim is not even "colorable." It must be wholly insubstantial and frivolous or is immaterial and made solely for purposes of forum shopping. *Bell v. Hood, 327 U.S. at 682-83.*
- A 12(b)(1) motion must be made prior to service of the responsive pleading, although an untimely motion will be treated as a suggestion that the court lacks jurisdiction. § 1350Motions to Dismiss—Lack of Jurisdiction Over the Subject Matter, 5B Fed. Prac. & Proc. Civ. § 1350 (3d ed.).
- Can be raised at any time by the Court.

Personal Jurisdiction

- Plaintiff must make a prima facie showing that jurisdiction exists.
- 28 U.S.C.A. § 1391 sets forth venue of all civil actions in U.S. District Courts.
- This could be waived if not raised. *See Benny v. Pipes*, 799 F.2d 489, 492 (9th Cir. 1986) (internal citations and quotations omitted), see also Jackson v. Hayakawa, 682 F.2d 1344, 1347 (9th Cir.1982).

Insufficiency of Process: Insufficiency of Service of Process

- Once a defendant challenges the sufficiency of service on them, the plaintiff bears the burden of establishing the validity of service as governed by Rule 4. *See Brockmeyer v. May*, 383 F.3d 798, 801 (9th Cir. 2004).
- Service must be done within 90 days after the complaint is filed. Rule 4(m), Fed. R. Civ. P. The Court "must dismiss the action without prejudice against that defendant or order that service be made within a specified time."

Motion for Judgment on the Pleadings. Rule 12(c)

- Motion for judgment on the pleadings is a party's request to the court to rule in his/her favor based on the pleadings on file, without accepting evidence, as when the outcome of the case rests on the court's interpretation of the law.
- Rule 12(c) provides: "[a]fter the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings."
- A district court "may also take judicial notice of matters of public record" without converting the motion into one for summary judgment. See, e.g., U.S. v. Wood, 925 F.2d 1580, 1582 (7th Cir. 1991).

Motion to Strike 12(f)

- Allows the court to strike "from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter."
- A Rule 12(f) motion can be used to strike an affirmative defense. *Kaiser Aluminum & Chem. Sales, Inc. v. Avondale Shipyards, Inc.*, 677 F.2d 1045, 1057 (5th Cir. 1982).

Discovery Motions
Rule 37, Fed. R. Civ.P.

- Failure to comply with discovery can lead to a motion for an order compelling discovery.
- Must include a good faith certification (requires meeting and conferring) to try to resolve discovery disputes. That means talking to opposing counsel.

Discovery Motions: Sanctions

- Includes:
  - Not obeying discovery order;
  - Not producing party for examination;
  - Failure to disclose or supplement;
  - Failure to admit;
  - Failure to attend party deposition, serve answers to interrogatories or respond to an inspection.

Rule 37, Fed. R. Civ. P.

Motion for Summary Judgment/Partial Summary Judgment, Rule 56

- A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought. The court shall grant summary judgment if the movant shows that *there is no genuine dispute as to any material fact* and the movant is entitled to judgment as a matter of law. *The court should state on the record the reasons for granting or denying the motion*.
- Unless a different time is set by local rule or the court orders otherwise, a party may file a motion for summary judgment at any time until 30 days after the close of all discovery.

Motion for Summary Judgment/Partial Summary Judgment, Rule 56

- Think about the MSJ from the beginning of the case.
- In fact, your MSJ should be prepared early.
  - Create your Statement of Facts and determine what facts you can establish and if there are other facts that may create a genuine issue of material fact.
  - Determine what evidence needs to be supported by Affidavits or Declarations and talk to witnesses early.
- Your Burden of Proof Outline should also be constantly updated.

Background Work for MSJ: The Timeline

- Start a master timeline at the onset of the client/attorney relationship.
- A timeline tells a story and refreshes everyone's memory of the bare facts of the case.
  - Populate the timeline by hyperlinking the relevant documents, either in a case management program, through PowerPoint or another program.
  - Make sure that those documents have been disclosed.
  - As you create the depo summaries, supplement the timeline.

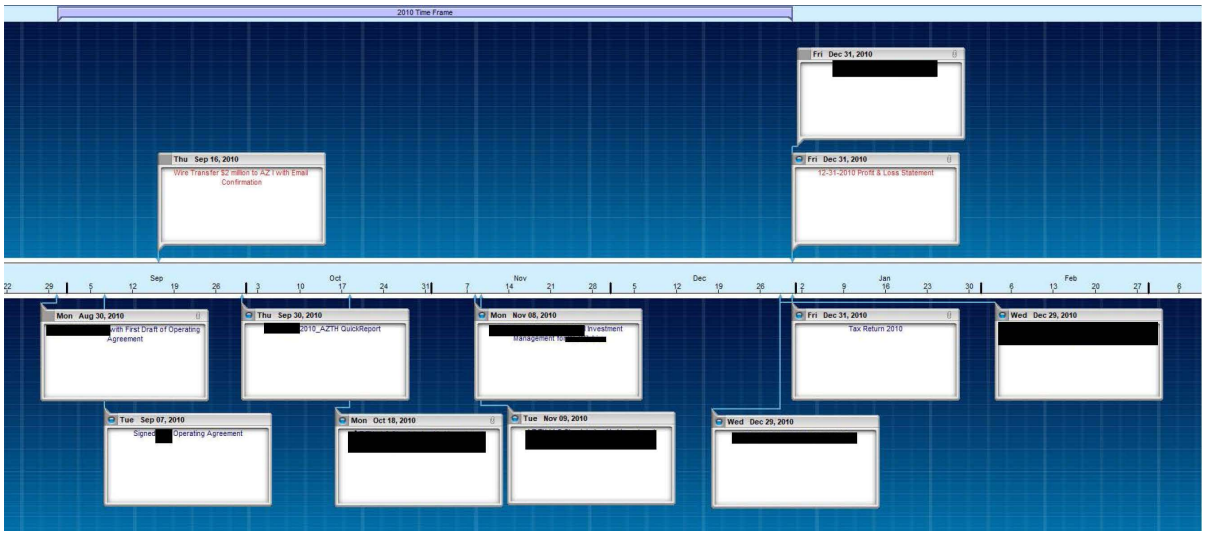
Background Work: Timeline Example

May 1, 2015
A&B signed Contract
2015-03-01 Contract_A00001
A Depo (2018-04-11), 53:1-3

June 30, 2015
First Payment Due
A00001
A Depo 54:2-3
B Depo (2018-04-15) 41:1-4

July 15, 2016
B Sends Letter of Default
2015-07-15 Default Letter_A00005
A Depo 57:3-12
B Depo 67:4-21

Background Work: Timeline Example #2

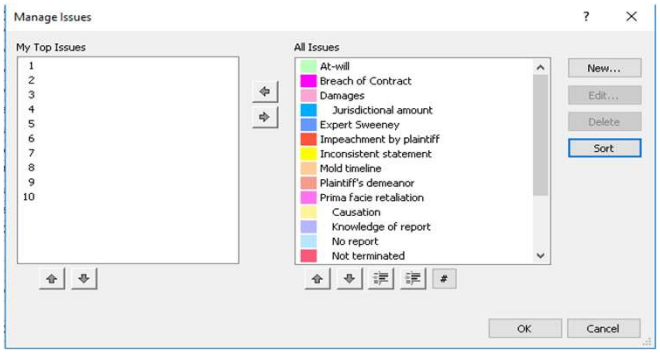


Best Practices: Proof Outline

This requires preparing a detailed PROOF OUTLINE at the onset of the case, with every issue and defense, burden of proof and all associated elements.

Issue Outline 5/18/2018 2:17 PM

	Full Name	Short Name	# Facts	# Undisputed Facts	# Facts Disp by Opp	Key
1	Wrongful Termination	WrongfulTermination	6	4	1	
2	**Age Discrimination**	AgeDiscrimination	8	5	0	
2.1	Hawkins Specific	HawkinsSpecific	6	4	0	
2.2	Pattern & Practice	Pattern&Practice	1	1	0	
3	**Retaliation**	Retaliation	6	5	0	
3.1	Transfer	Transfer	1	1	0	
3.2	Demotion	Demotion	3	2	0	
4	Deserved Termination	DeservedTermination	4	3	1	
5	**Damages**	Damages	5	1	1	
5.1	Failure to Mitigate	FailureToMitigate	4	1	1	
5.2	Lost Wages	LostWages	1	0	1	
5.3	Mental Anguish	MentalAnguish	3	1	1	



MSJ: Best Practices

- Review the complaint and answer;
- Look for genuine issues of material fact and determine how to overcome;
- Research every cause of action and defense (which should have been done based upon initial and supplemental disclosures and add to your proof outline);
- Create your statement of facts and make sure every fact would be admissible, standing alone. If not, then you have to establish foundation with a declaration/affidavit;
- Make sure that your MSJ is clear and concise.
- Be aware of page limits for motions, responses, replies.

Discovery Motions: Sanctions

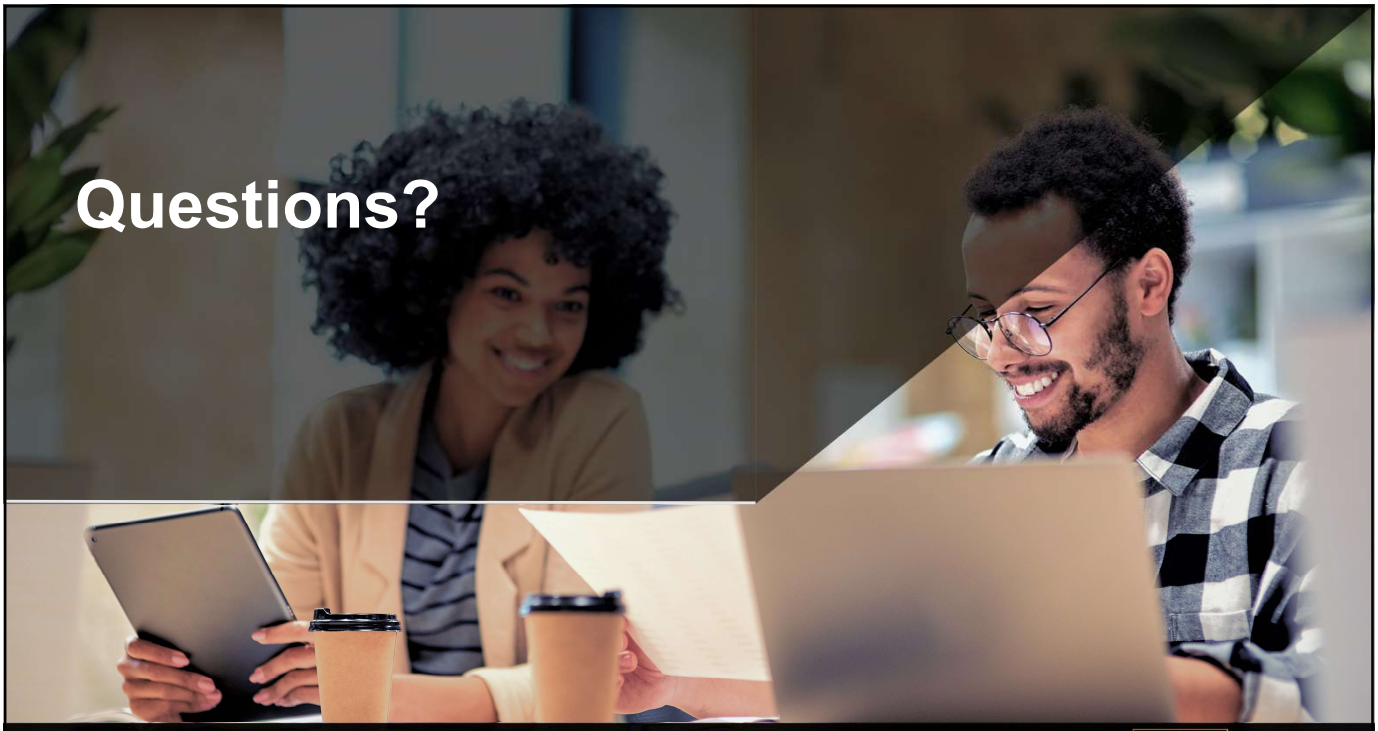
- Parties must meet and confer and prepare a good faith certification. Fed.R.Civ.P. 37(a)(1) and Local Rules.
- Set the tone early and let parties know how you want to receive documents, especially with the ESI Requirements in federal court.
- Review Rules 26(g), 30(d) and 37, Fed.R.Civ.P. to have a framework to evaluate abuses.
- Know your discovery deadlines and prepare in advance for proper responses to defend against a motion for sanctions.

Don't Forget Rule 1, FRCP

- Rule 1 codifies the courts' inherent authority to govern all proceedings, and all those who practice before the courts.
- The rules were last amended in 2022, so it is important to constantly keep apprised of changes.
- The purpose is to "secure the just, speedy, and inexpensive determination of every action and proceeding."
- In every action you take, every motion written, every interaction with opposing counsel or self-represented litigants, working on discovery, always remember the Rules' purpose.

Research Sources

- Georgetown Law Library: https://guides.ll.georgetown.edu/c.php?g=320799&p=2146450
- United States Courts Rules and Policies page: https://www.uscourts.gov/rules-policies/current-rules-practice-procedure/federal-rules-civil-procedure
- U.S. Supreme Court: https://supreme.justia.com/
- Subscribe to RSS feeds for the various courts so that you can get lists of opinions as they are released.



Conclusion

Any questions, please feel free to contact me at diw@wb-law.com, or Paralegal Victoria Stevens, victorias@wb-law.com; 602-606-2810.

Thank you for attending.



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