

THE ART OF PLEADINGS - STATE COURT

2008 Program Outline

By

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1) Introduction.

This outline focuses on actions governed by the New York Civil Practice Law and Rules (“CPLR”). There are a significant number of actions and proceedings in New York that are governed in whole or in part by other laws and rules. They include, but are not limited to, those governed by the following: Court of Claims Act and Court Rules, Real Property Actions and Proceedings Law (“RPAPL”), Eminent Domain Procedure Law, Surrogate’s Court Procedure Act and Court Rules, Family Court Act and Rules, Uniform Justice Court Act and Court Rules, Uniform District Court Act and Court Rules, New York City Civil Court Act (“NYCCCA”) and Rules and Uniform City Court Act and Rules. Also excluded from this outline are the special proceedings that are included in the CPLR, such as Article 78. Generally rule, the CPLR is followed in actions and proceedings under these statutes except where they conflict.¹ While this outline makes occasional reference to certain provisions of some of these exception, there are too many of them cover comprehensively. They contain significant differences that must be followed. Practitioners must consult these laws and rules whenever involved with matters within their scope.

DISCLAIMER: The views and practices contained in this Outline are those of the author. They do not necessarily represent the views of the City Bar or its Litigation Committee. They are put forward for the consideration of experienced practitioners, who will exercise their independent and professional judgment.

2) Forum Selection. Even before considering the drafting of pleadings, one must consider the forum for the commencement of the action. The general rule is that the plaintiff has the choice of which of the available forums it prefers for the litigation of its claims. The art of pleading calls for an evaluation of very practical and strategic reasons for choosing from amongst the permissible forums. These reasons include costs, the convenience of witnesses and availability of evidence, the substantive and procedural law of the forum, judicial attitudes and attributes of the jury pools. If the forum is otherwise a permissible one, the plaintiff’s choice of forum will be respected. If there are claims and counterclaims (or an interest in a declaratory judgment disposing of the claim) there may be a “race to the courthouse steps” between the parties to bring the action first, solely for the benefit of selection of the forum. This is because the first action commences usually (but not always) is the surviving action in a motion to dismiss in the case of multiple actions pending. However, forum selection in many cases is dictated by statute or by the terms of an agreement. In such cases, commencement of an action in the wrong forum may result in delay, expensive motion practice, and even dismissal of the action.

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¹ In *Long v. State*, 7 N.Y.3d 269, 819 N.Y.S.2d 679 (July 5, 2006), where a conflict did exist between the CPLR and the Court of Claims Act, the latter governed, to the exclusion of the CPLR.

a) **Statutes.** Various statutes dealing with particular causes require that the cause be venued in particular forums. Examples are found in statutes dealing with actions against governmental entities and officials. Others deal with courts of limited jurisdiction. The general starting point for these rules are CPLR 325 and 326.

b) **Inconvenient Forum.** CPLR 327 provides:

(1) When the court finds that in the interest of substantial justice the action should be heard in another forum, the court, on motion of any party, may stay or dismiss the action in whole or in part on any conditions that may be just. The domicile or residence in this state of any party to the action shall not preclude the court from staying or dismissing the action.

(2) Notwithstanding the provisions of subdivision (a) of this rule, the court shall not stay or dismiss any action on the ground of inconvenient forum, where the action arises out of or relates to a contract ... to which section 5—1402² of the general obligations law applies, or the parties to the contract have agreed that the law of this state shall govern the rights or duties in whole or in part.

c) **Venue.** The general provisions regarding venue of an action in New York are found in CPLR Article 5. Venue is an integral part of forum selection. For example, the counties differ in the availability and requirements for Commercial Division parts. Some counties have juries reputed to be more prone to the verdict a party is seeking. There often is a perceived concern about a party having a “home court” advantage.

d) **Contracts.** Today, it is common to see forum, venue selection and choice of law provisions in commercial, franchise, consumer credit, insurance and many other contracts.³ These are generally honored by the courts, except in some cases as where they are found to be unconscionable, or there is some other inequitable element present.

² Sec. 5-1402. Choice of forum.

1. Notwithstanding any act which limits or affects the right of a person to maintain an action or proceeding, including, but not limited to, paragraph (b) of section thirteen hundred fourteen of the business corporation law and subdivision two of section two hundred-b of the banking law, any person may maintain an action or proceeding against a foreign corporation, non-resident, or foreign state where the action or proceeding arises out of or relates to any contract, agreement or undertaking for which a choice of New York law has been made in whole or in part pursuant to section 5-1401 and which (a) is a contract, agreement or undertaking, contingent or otherwise, in consideration of, or relating to any obligation arising out of a transaction covering in the aggregate, not less than one million dollars, and (b) which contains a provision or provisions whereby such foreign corporation or non-resident agrees to submit to the jurisdiction of the courts of this state.

2. Nothing contained in this section shall be construed to affect the enforcement of any provision respecting choice of forum in any other contract, agreement or undertaking.

³ See, *Boss v. American Express Financial Advisors, Inc.*, 16 N.Y.#d 242, 811 N.Y.S.2d 620 (2006)

3) CPLR 3011. Kinds of pleadings

The CPLR specifies the following types of pleadings: Complaints, answers, and when the answer contains a counterclaim, there is a reply.⁴

- a) A summons served with notice in lieu of a complaint, served pursuant to CPLR 305(b), is not a pleading, except for purposes of removal of an action to federal court. Although it required an appearance, it does not require service of an answer. It is the subsequent complaint that triggers the requirement of an answer.⁵
- b) The answer may include counterclaims and cross-claims. When it does, it is advisable that the label on the answer so state, such as “Answer and Cross-claim.”
- c) Replies to counterclaims are mandatory.
 - i) In sharp contrast to the rules of pleading in New York City Civil Court, where no reply is required unless ordered by the court (NYCCCA § 901), the allegations of the counterclaim in the Civil Court answer are deemed denied.
 - ii) Replies may, but they need not except in rare cases when ordered by the court, respond to affirmative defenses contained in the answer. When replying to counterclaims some practitioners do not resist the temptation to gratuitously answer allegations in the affirmative defenses. There is no benefit in that.
 - iii) Replies should not contain new claims, which should instead be stated in an amended or supplemental complaint, either served as of right or by leave of the Court.
- d) Under the Federal Rules of Civil Procedure (Rule 13), as well as the rules of New Jersey and many other jurisdictions adopting the federal model, there is a compulsory counterclaim rule. There, if you fail to plead a related counterclaim, you lose it. This is not the New York rule.
- e) The answer may also include a cross-claim against another defendant. The cross-claim may be related or unrelated to the main action. No reply is then necessary unless the answer demands it, as the allegations are deemed denied or avoided. See, Practice Commentary C3011:8. If there is any doubt as to the nature of the pleading, or if it is mislabeled as a counterclaim, there is no harm seen in interposing a reply to it.
 - i) The defendant that is served with the cross-claim may also plead a cross-claim in its answer against others, including the plaintiff. If it has previously answered, it should amend its answer, pursuant to CPLR 3025(a) or (b). As against the plaintiff, it may

⁴ CPLR§3011. Kind of Pleadings

There shall be a complaint and an answer. An answer may include a counterclaim against the plaintiff and a cross-claim against a defendant. A defendant’s pleading against another claimant is an interpleader complaint. There shall be a reply to a counterclaim denominated as such, an answer to an interpleader complaint or third-party complaint, and an answer to a cross-claim that contains a demand for an answer. If no demand is made, the cross-claim shall be deemed denied or avoided. There shall be no other pleadings unless the court orders otherwise.

⁵ *Olsen v. 432 East 57th Street Corp.*, 145 Misc.2d 970, 548 N.Y.S.2d 864 (1989); *Towers v. Towers*, 25 Misc.2d 821, 201 N.Y.S.2d 239 (1960).

- also be labeled a counterclaim. Whatever the label, the plaintiff should meet it with a reply.
- ii) Where the cross-claim is against one not yet joined as a party, the pleader can delay service upon that prospective party and await the plaintiff joining that party, or join that party itself, by service of a summons and copy of its answer with cross-claim. In that case, the added party must serve an answer responding to the cross-claim. See, CPLR 3019(d).
 - f) A defendant's pleading against another claimant is called an interpleader complaint, generally against a "stakeholder." An answer will then be required.
 - g) Third-party complaints are pleadings against one not already a party. It may be an "answer" as well. It is also known as an "Impleader." See, CPLR 1007-1011.
 - h) A defendant's pleading against one who is not then a party to the action is a third-party complaint. An answer will be required.
 - i) There may be no other pleadings unless the court orders otherwise. It may be wise to seek an order compelling plaintiff to reply to an affirmative defense but there must be some useful purpose to be served.⁶ A bill of particulars or disclosure device might be a more effective tool to achieve that purpose. See, CPLR 3041, *infra*.

4) CPLR 3012. Service of pleadings and demand for complaint.⁷

- a) It is no longer permissible to serve a bare summons.
- b) Summons with notice may be served without complaint. The notice should state the nature of the action, the relief sought and, with the exception of medical malpractice actions, as well as personal injury or wrongful death actions as specified in CPLR 3017(c), the sum of money for which judgment may be taken in case of default. See, CPLR 305(b).

⁶ But, see, *Olsen & Chapman Constr. Co. v. Village of Cazenovia*, 30 A.D.2d 738, 291 N.Y.S.2d 388 (3d Dep't 1968).

⁷ § 3012. Service of pleadings and demand for complaint

(a) Service of pleadings. The complaint may be served with the summons. A subsequent pleading asserting new or additional claims for relief shall be served upon a party who has not appeared in the manner provided for service of a summons. In any other case, a pleading shall be served in the manner provided for service of papers generally. Service of an answer or reply shall be made within twenty days after service of the pleading to which it responds.

(b) Service of complaint where summons served without complaint. If the complaint is not served with the summons, the defendant may serve a written demand for the complaint within the time provided in subdivision (a) of rule 320 for an appearance. Service of the complaint shall be made within twenty days after service of the demand. Service of the demand shall extend the time to appear until twenty days after service of the complaint. If no demand is made, the complaint shall be served within twenty days after service of the notice of appearance. The court upon motion may dismiss the action if service of the complaint is not made as provided in this subdivision. A demand or motion under this subdivision does not of itself constitute an appearance in the action.

(c) Additional time to serve answer where summons and complaint not personally delivered to person to be served within the state. If the complaint is served with the summons and the service is made on the defendant by delivering the summons and complaint to an official of the state authorized to receive service in his behalf or if service of the summons and complaint is made pursuant to section 303, paragraphs two, three, four or five of section 308, or sections 313, 314 or 315, service of an answer shall be made within thirty days after service is complete.

(d) Extension of time to appear or plead. Upon the application of a party, the court may extend the time to appear or plead, or compel the acceptance of a pleading untimely served, upon such terms as may be just and upon a showing of reasonable excuse for delay or default.

- c) In response to service of a summons without a complaint, the defendant may serve a demand for a copy of the complaint within 20 days after service of the summons is complete.
 - i) Service of the complaint shall be made within 20 days of the demand.
 - ii) A demand for service of a demand for the complaint does not constitute a notice of appearance, nor is a notice of appearance a demand for service of a copy of the complaint.⁸
 - iii) Generally, one serves a notice of appearance together with a demand for a complaint.
 - iv) Time for the service of and appearance is thus extended to 20 days following service of the complaint. The service of an answer constitutes an appearance,
- d) The reasons why a plaintiff would choose the procedure of serving a summons without a complaint are problematic. The might include:
 - i) Race to the courthouse.
 - ii) Insufficient time or information to draft complaint.
 - iii) Save costs in the expectation of a quick settlement.
- e) Disadvantages:
 - i) Introduces a delay in joinder of issue. Defendant has time to appear and “may” serve a demand for a complaint. (Even without a demand for a complaint, plaintiff must serve its complaint within 20 days after service of the notice of appearance.)
 - ii) Summons with notice may not, in all cases, be sufficient to toll the statute of limitations. Even a deficient complaint would be better, being more likely to toll the statute. It could always be amended thereafter. If dismissed for inadequate notice for statute of limitations purposes, it is a dismissal for jurisdictional purposes.⁹ Then the action does not get the benefit of the six-month tolling under CPLR 205(a).
 - iii) Plaintiff’s discovery opportunities are also delayed, as no answer is required until after the complaint is ultimately served.
 - iv) Issues arise coordinating the due date of the complaint within the limited applications of the six month tolling period provided in CPLR 205; and see, also, 305(b).¹⁰
 - v) Issues in obtaining a default judgment against defendant if there is a default in answering. CPLR 3215(e).
- f) The sounder practice is to serve the summons together with the complaint, as is required in federal practice. FRCP 4(d). After all, the requirements of “notice pleading” are not so much greater than the notice that must accompany the summons under CPLR 305(b).
- g) Absent a reasonable excuse for inordinate delay in appearance or answering the complaint, defendant is not entitled to compel acceptance of its late answer were willful neglect and default was found.¹¹ But, the plaintiff should not hold on to the late-served answer for an extended period of time without objection.¹²

⁸ *Comeau v. Singer Furniture, Inc.* 67 A.D.2d 622, 412 N.Y.S.2d 4 (1 Dep’t 1979) , appeal dismissed 47 N.Y.2d 706, 418 N.Y.S.2d 1025, 391 N.E.2d 1366

⁹ *Parker v. Mack*, 61 N.Y.2d 114, 472 N.Y.S.2d 882, 460 N.E.2d 1316 (1984).

¹⁰ *Micro-Spy, Inc. v. Small*, 9 A.D.3d 122, 778 N.Y.S.2d 86 (2d Dep’t 2004).

¹¹ *Gainey v. Anorzij*, 25 AD3d 650, 811 NYS2d 679 (2d Dep’t 2006; cf. *Norrish v. Pacini*, 29 AD3d 1063, 814 NYS2d 385 (3d Dep’t 2006); *Drake v. Bates*, No. 502225 (N.Y. App.Div. 03/27/2008). Also, an affidavit of

5) CPLR 3012-a. Certificate of merit in medical, dental and podiatric malpractice actions

Special rules applicable to medical malpractice actions require that plaintiff's attorney execute and serve with the complaint a certificate of merit declaring that she has reviewed the facts of the case, consulted with a licensed medical practitioner and has concluded that there is a reasonable basis for the commencement of the action; or that she does not have the time to do so before the statute of limitations expires (in which case the certificate of merit must be filed later) or that the attorney was unable to obtain a consultation after three attempts.¹³ No practitioner's consultation is required when the action is based upon *res ipsa loquitor*. No certificate is required if the complaint is *pro se*, or the defendant is provided with an expert report.¹⁴

6) CPLR 3013. Particularity of statements generally¹⁵

a) "Notice" pleading is sanctioned under the CPLR.¹⁶ It requires merely that the pleader gives notice of the transactions or occurrences that are the subject of the grievance. The leading case on the adequacy of the pleader's claim or defense under the CLPR is *Foley v. D'Agostino*¹⁷. It replaced the Civil Practice Act provision that the pleading had to contain a statement of the "material facts" upon which the party relies. Still, the pleading must give the essential facts required to give "notice."

merit is generally required for the court to entertain such an application. *Amodeo v. Gellart & Quartararo*, 26 AD3d 705, 810 NYS 2d 246 (3d Dep't 2006).

¹² *Phillip v. League for Hard of Hearing*, 254 AD2d 181, 679 NYS2d 40 (1st Dep't 1998).

¹³ This is not as rare as it might seem, since it is often difficult to get a medical professional to critique the work of another.

¹⁴ Other special rules apply to such actions, which are outside the scope of this Outline. See, CPLR § 3045; NYRules of Court § 202.56

¹⁵ § 3013. Statements in a pleading shall be sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense.

¹⁶ "Notice" pleading is often compared with "Indorsement" pleading available under the NYCCCA §902 and several uniform lower court acts. See, *Holloway v. New York City Transit Authority*, 182 Misc.2d 749, 699 N.Y.S.2d 261 (N.Y.C.Civ.Ct., N.Y. County, 1999). In such pleadings, one need only state the nature and substance of the cause of action and the amount in which the plaintiff will take judgment in the event of a default.

¹⁷ 21 A.D.2d 60, 248 N.Y.S.2d 121 (1st Dep't 1964); and see, also, *Lederman v. McLean Trucking Co.*, 41 A.D.2d 5, 342 N.Y.S.2d 570 (2d Dep't 1973).

- b) The other requirement is that the pleading must cover all of the substantive claim elements. *Practice Commentary C3013:3*.¹⁸
- c) Whether and to what extent to utilize notice pleading, is a focus of the “art of pleading.”¹⁹
- d) Complaints using prolix and inordinately lengthy clauses that substantially defeated the general purposes of this section and CPLR 107, have been stricken, without prejudice to plaintiff commencing a new action in approved form.²⁰ While this is a rare result, it should be considered, in an appropriate case, where no seemingly proper purpose is evident for a prolix pleading.
- e) Pleading of evidentiary facts is not prohibited, nor is it expressly sanctioned. When the pleading party has command of evidentiary facts of the case, the pleading of evidentiary facts can function as a discovery device, such as a demand for admissions. For example; the defendant sent the email message annexed as Exhibit 1; photographs that fairly represent conditions; or statements of steps taken prior to an occurrence.) Admissions contained in these statements, as well as the responses to these statements, limit the issues that need to be litigated. Even if such statements do not result in material admissions, they often help to tell, and lend credence to, the pleaders story.
- f) When the pleading party’s command of the fact has not fully developed, notice pleading sufficient to advise the answering party of the transaction or occurrence involved and the relief sought may be preferable. For example (except in specified causes of action discussed in CPLR 3016, below) it is sufficient to state--

“Defendant owes plaintiff \$20,000 for goods sold to and accepted by defendant between June 1 and December 1, 2006.”²¹

¹⁸ *Brickner v. Linden City Realty, Inc.*, 23 A.D.2d 560, 256 N.Y.S.2d 533 (2d Dep't 1965); *Shapolsky v. Shapolsky*, 22 A.D.2d 91, 253 N.Y.S.2d 816 (1st Dep't 1964); *Flamingo Telefilm Sales, Inc. v. United Artists Corp.*, 22 A.D.2d 778, 254 N.Y.S.2d 36 (1st Dep't 1964).

¹⁹ On September 1, 1968, following the adoption of the CPLR, Official Forms were adopted by the Judicial Conference, which is the predecessor of the Office of Court Administration. These forms were intended to illustrate what the framers of the CPLR considered adequate notice pleadings. Copies of several Official forms are annexed to this outline as Appendix “A.” In 1979, the Advisory Committee proposed a new Appendix of Official Forms and recommended that these forms be adopted by the Chief Administrator of the Courts to supersede the original forms. The proposed forms have not yet been adopted and published. The original forms still stand, and may be referred to and considered adequate models in drafting pleadings.

²⁰ See, *Domestic Finance Corp. v. Milner*, 59 Misc.2d 867, 300 N.Y.S.2d 636 (1969)

²¹ See, Official Forms of Pleadings, promulgated by the former Judicial Conference in the 1960’s, pursuant to CPLR 107. CPLR 107 states flatly that the officially adopted forms “shall be sufficient” under the CPLR and must be accepted by every court whose procedure is regulated by the CPLR. See, *Pritzker v. Falk*, 58 Misc.3d 989, 297 N.Y.S.2d 662 (1969). Sample Official Forms, found in Appendix A of this outline, will be inadequate only if they fail to comply with some express provision in a statute other than the CPLR. CPLR 107 has delegated to the Judiciary the power by CPLR 107 to amend the Official Forms at any time, without legislative approval. *Practice Commentary C3013:10* further discusses the Official Forms. A more

“Defendant owes plaintiff \$20,000 for money lent by plaintiff to defendant on June 1, 2006.”²²

“Defendant maintained a sidewalk in front of 60 Centre Street, NY, NY in a defective condition, causing plaintiff to fall and sustain personal injuries.”

- g) The stating legal theories is no longer prohibited in a complaint, and is sometimes of value in assisting the reader in understanding the issues involved.
- h) The stating evidentiary facts is considered surplusage. A motion to strike parts of a complaint will be granted if it is shown to be improper and prejudicial²³ I do it, in the hope of securing admissions as to matters such as validity, receipt of notice or other correspondence, acceptance of goods or other helpful facts.
- i) The relief sought must then be stated, although the pleader is not limited by the relief stated, if otherwise entitled by the evidence to an alternative remedy. (The federal rule may differ on this point. See Federal Outline, supra, at II(B)(3)(f).)
- j) Even in actions where particular substantive elements must be alleged but are absent, a simple amendment can add the allegation and cure the defect. *Brickner v. Linden City Realty, Inc.*, 23 A.D.2d 560, 256 N.Y.S.2d 533 (2d Dep’t 1965). Thus, even the particularity requirements of CPLR 3016, discussed below, are subordinate to the liberal standard of CPLR 3013. *Foley v. D’Agostino*, 21 A.D. 2d at 63-4, 248 N.Y.S.2d at 125-6.
- k) Alternatively, a summons may be accompanied by a mere notice in lieu of a complaint, under CPLR 305(b). This is analogous to an “indorsed complaint” as used in the lower courts. The strategic advantages of this may be to facilitate the commencement of an action before having all facts available, to forestall publicity that may muddy the waters and prevent an early settlement. In response, the defendant may appear and demand a copy of a formal complaint.
- l) Federal Rule 8 and CPLR 3013 have been considered analogous.²⁴

7) CPLR 3014. Statements

- a) “Every pleading shall consist of plain and concise statements in consecutively numbered paragraphs.” This applies to complaints, answers and replies.
- b) “Each paragraph shall contain, as far as practicable, a single allegation.”
 - i) A single paragraph consisting of one (or more) sentences containing many allegations, instead of being divided into paragraphs numbers consecutively and each

comprehensive set may be found in West’s McKinney’s Forms, CPLR, Ch. 4; Bender’s Forms – Civil Practice, CPLR 107, indexed at p. 1-17 through 21.

²² Ibid.

²³*English v. Genovese*, 49 Misc.2d 321, 267 N.Y.S.2d 283 (Sup. Onondaga, 1966); *Storch v. Gordon*, 1960, 23 Misc.2d 477, 202 N.Y.S.2d 43 (Sup., Kings, 1960).

²⁴ Siegel, *Id.*, at 347. Will the *Bell Atlantic v. Twombly*, 127 S. Ct. 1955 (2007) standard be adopted by New York State Courts? It has yet to be cited by a New York Court. It held that in order to properly plead a conspiracy one needs to plead an illegal agreement, not just parallel conduct under the Sherman Act, 15 USC § 1, FRCP 8(a)(2). See, also, *Valentine Gardens Coop., Inc. v. Kay Waterproofing Corp.*, (Sup., N.Y., 2000); 724 NYS2d 863 (1st Dep’t 2001)

- containing a single allegation should be required to be repleaded.²⁵ In an ideal pleading each element of the action should be isolated in a single paragraph with a single allegation. Consider, for example: “The motor vehicle was then owned by defendant “O” and driven by defendant “D” with defendant “O’s” permission.” This is poor pleading, in that it contains three factual elements. If the pleader broke them down, he could have gotten three separate admissions.²⁶
- ii) It is particularly poor pleading to reiterate allegations from a prior paragraph of the same pleading as a preface to facts stated in a subsequent one. If the fact in the prior paragraph is denied, the subsequent paragraph restating that fact will also be denied.
 - iii) The answerer ought not to be required to take risks in parsing compound allegations of the complaint that violates this section. If, in the paragraph, any of the disputed facts taints the entire paragraph, the paragraph should be denied. Only if the facts alleged are clearly separable, should the answerer attempt to parse, by denying the facts stated in the paragraph, except admitting the portion that is true.
 - iv) Alternatively, when faced with a prolix paragraph encompassing many statements or allegations, one may move, pursuant to CPLR 3024 (see, below), to compel the pleader to separately state and number the statements.²⁷ This is relatively rarely done, as it creates an expense for both parties and burden on the court. When applied against a really egregious pleading, it is sometimes salutary (and always dilatory).
 - v) Although not authorized by statute, in a complex pleading, it is sometimes advisable to start with an “Introduction” or prefatory paragraph that succinctly tells the reader of the pleading what the case is about, without having to read a multi-page pleading.²⁸

²⁵ See, *Gerena v. New York State Div. of Parole*, 266 A.D.2d 761, 698 N.Y.S.2d 750 (3d Dep’t 1999); *Raeder v. New York Times*, 1 A.D.2d 1017, 151 N.Y.S.2d 579 (2d Dep’t 1956); *Belkor Knitwear Co. v. Posner*, 78 N.Y.S.2d 718 (1948).

²⁶ Official Form 12, a complaint for negligence in an automobile accident, states the following:

1. On June 1, 1966, in a public highway called Broadway in New York City, defendant C.D. negligently drove a motor vehicle against plaintiff who was then crossing the highway.

2. That motor vehicle was then owned by defendant E.F. and driven by C.D with defendant E.F.’s permission.

Each of the above paragraphs contains multiple allegations, each of which could have been separately stated and numbered. However, they are plain and concise, so that the defendant can deny the paragraph but admit just what he agrees is true.

²⁷ *Consolidated Airborne Systems, Inc. v. Silverman*, 23 A.D.2d 695, 257 N.Y.S.2d 827 (2d Dep’t 1965); *Wolf v. Wolf*, 22 A.D.2d 678, 253 N.Y.S.2d 509 (1st Dep’t 1964).

²⁸ Example: “This action is on a written contract pursuant to which plaintiff, a consultant, was engaged to provide advice to defendant, an owner of real estate, as to the highest and best use of a parcel. Plaintiff

- vi) Along the same lines, I like to insert title outlines between paragraphs of complaints, e.g. “Introduction,” “Parties,” “Venue,” “The Agreement,” “Performance,” “Defendant’s Breach,” “Damages.” See, Appendix “B,” *infra*.
- c) Reference to, and incorporation of, prior allegations in the pleading may subsequently be by number. This does not apply to references outside of the four corners of the pleading.
- d) “Prior statements in a pleading shall be deemed repeated or adopted subsequently in the same pleading whenever express repetition or adoption is unnecessary for a clear presentation of the subsequent matters.” Thus, the frequently used “Repeats, Reiterates and Realleges” clause is surplusage, but some habits die hard. (Merely using the word “Realleges” is less surplusage.) Allegations within the pleading are deemed repeated, for all purposes, under this language. See, McKinney’s Practice Commentary, C3014:5.
- e) “Separate causes of action or defenses shall be separately stated and numbered and may be stated regardless of consistency. Where there are multiple causes of action, it is helpful to the number the causes (or “counts”). I always add a descriptive title to each cause. See, for example, Appendix “B.”
- f) “Causes of action or defenses may be stated alternatively or hypothetically.” A case where this is important is where you seek contract damages and unjust enrichment in the same action. Since the existence of a contract precludes an action for unjust enrichment for the same performance. Unjust enrichment is only available in the alternative, and in case the contract is invalid or does not cover the subject matter. Moreover, separate facts must be pleaded in that case.²⁹ To avoid motion to dismiss the alternative cause of action as “duplicative,”³⁰ it should be pleaded in the alternative. See, Appendix “B,” where this was implicit in ¶ 15. (It would have been clearer to have labelled the second cause as one in the “alternative.”)
- g) In cases where there are multiple theories of recovery for the same damages under the same facts, there is but one cause of action, and it should be pleaded as such. *Payne v. New York, S. & W. R. R. Co.*, 201 N.Y. 436 (1911). Where the measure of damages differs, both causes of action should be numbered and pleaded, even though the facts may be the same. Example: Employment discrimination cases under city and state law; personal injury and property damage (which may also be sued under the same cause of action, if separately stated and numbered).
- h) Inconsistent claims may be pleaded, even though they may not both be awarded in a judgment. The doctrine of election of remedies sees to that. For example: Specific performance and damages for failure to perform the contract; D. is not liable to P, but if he is found to be liable, then T. P. is liable to D.

delivered a report to defendant providing its advice, and defendant accepted that advice but refused to pay the fee stipulated in the contract.”

²⁹ *American Telephone & Utility Consultants, Inc. v. Beth Israel Medical Center*, 307 A.D. 2d 330, 763 N.Y.S. 2d 466 (1st Dep’t 2003); *Parkash v. UtiliSave Corp.*, 295 A.D.2d 834, 743 N.Y.S.2d 889 (2d Dep’t 2002).

³⁰ A motion to dismiss a cause as “duplicative,” although common, is dilatory and generally pointless, since such a cause can be easily dealt with at trial, without the wasted recourses of a formal motion. Pre-motion conferences should be required to avoid such wasteful procedures.

- i) “A copy of any writing which is attached to a pleading is a part thereof for all purposes.” If there is a conflict between the allegations and the writing itself, the writing prevails.³¹
- j) As an alternative to answering complaints with run-on allegations, a motion to separately state and number is often salutary, to remove some of the risks of parsing paragraphs of an offending complaint. The motion should be made within the time allowed to serve an answer. It also provides the defendant with more time.

8) CPLR 3015. Particularity as to specific matters³²

This is a common area to mine for bases to dismiss a complaint. There are particular allegations that must be pleaded in certain causes of action. Some are enumerated in this section. Others lurk in diverse statutes that create statutory causes of action, and one must always check them before pleading a statutory cause. The ones enumerated in this section are –

- a) **Conditions precedent.** Contractual conditions precedent need no longer be pleaded, but it is critical for the responding pleading to deny its performance or occurrence specifically and with particularity, or else failure to meet the condition is waived. Amongst the most common of these conditions is prior notice of an alleged claim or breach.
- b) **Corporate status.** A party’s status as a corporation, the type of corporation and place of incorporation, if known, must be pleaded.
- c) **Judgment, decision or determination.** This includes determinations of quasi-judicial tribunals, boards or officers.
- d) **Signatures.** Unless specifically denied in the pleadings each signature on a negotiable instrument is admitted. If in doubt, a specific denial should be made in the answer.
 - i) See, also, U.C.C. §3-307, which provides that, unless specifically denied in the pleadings, each signature on an instrument is admitted. If the signature is specifically denied, the burden of proving its genuineness is on the plaintiff.
 - ii) **N.Y.C. Civ. Ct. Act § 1102(b)** to the same effect.
- e) **Signatures on contracts, and authority of signatory to bind principal**
My practice is to affirmatively allege that the signature was genuine and that the signatory was authorized and empowered by his principal to execute and deliver the agreement. See, Appendix “B” (Complaint, ¶ 7.)
- f) **License to do particular businesses.** When a claim or a counterclaim arises out of the conduct of a business or profession that requires a license, the claimant must plead that it was possessed of a license.³³ Where the cause of action is against a consumer arising out

³¹ *805 Third Ave. Co. v. M.W. Realty Assoc’s*, 58 N.Y.2d 447, 461 N.Y.S.2d 778 (1983)

³² Unlike in federal practice, the N. Y. State Supreme Court is one of general jurisdiction. Therefore, there is no requirement that subject matter (or personal) jurisdiction must be pleaded, although these may be the basis for a motion to dismiss of an affirmative defense to be pleaded in the answer. This even applies in courts of limited jurisdiction in the state. *Fishman v. Pocono Ski Rental Inc.*, 82 A.D.2d 906, 440 N.Y.S. 2d 700 (2d Dep’t 1981).

³³ *Flax v. Hommel*, 40 AD3d 809, 835 NYS2d 735 (2d Dep’t 2007). This applies to “debt collectors” in New York City. *Centurian v. Druce*, 14 Misc.3d 564, 828 NYS2d 851 (N.Y.C.C. NY 2006).

of the plaintiff's conduct of a business which is required to be licensed by the NY C DCA, Suffolk, Westchester, Rockland, Putnam or Nassau county consumer protection departments the complaint must allege the name and number of the license.

- g) **Note:** Other statutes requiring particular allegations include, but are not limited to, the following:
- i) Suits against the City of New York and other local governments and governmental agencies require special allegation covering notice and other matters that must be scrupulously followed. For example: General Municipal Law §50-e, which applies to tort claims against local governments and public corporations.³⁴ Failure to file timely notices of claim may be excused, but don't count on it.³⁵ It is not sufficient that the complaint itself contains all the things that the notice should have stated.³⁶
 - h) **Gratuitous Allegations.** There is no requirement to plead matter such as the time the action accrued, satisfaction of the statute of limitations, satisfaction of the statute of frauds, performance of conditions precedent or other matters that should be raised in affirmative defenses. If the pleader voluntarily pleads these matters, he gratuitously injects the issue into the case, and may voluntarily assume the burden of proof that he might otherwise not have. In such cases, the answer no longer has to raise the pleaded issue affirmatively.³⁷
 - i) Artful pleading may, but does not always, dictate the pleading of these gratuitous allegations. In cases where the pleader has documentary evidence of the matter, such as a verification, a signature, authority of an agent, license in effect when the work was done (a copy of which may be attached and incorporated by reference), a written contract (which should also generally be annexed to the complaint) performance of conditions precedent, delivery, acceptance, payment, waiver, notice, and the like, that should be pleaded. This helps to present the strongest position, gain binding admissions and reduce the likelihood of dilatory motions to dismiss.
 - ii) Of course, whether the allegations are not pleaded, raised as affirmative defenses, or they are pleaded and denied, the proponent of the claim has the burden of proof on the elements.

9) CPLR 3016. Particularity in specific actions

This statute requires that the pleading serves as an early discovery tool, to reduce surprises, narrow issues and reveal the parties' positions. It also tends to discourage causes where the necessary elements are not present.

a) Libel or Slander.

³⁴ See, *Walker v. Town of Hempstead*, 84 N.Y.2d 360, 618 N.Y.S.2d 758 (1994)

³⁵ *Williams v. Nassau County Medical Center*, 6 NY3d 531, 814 NYS2d 580; *Mtr. of Kumar v. City of New York*, __AD2d __, (2d Dep't June 3, 2008); *Felice v. Eastport/South Manor Cent. School Dist.*, 50 AD3d 138, 851 NYS2d 218 (2d Dep't 2008)

³⁶ *Kellogg v. Office of the Chief Medical Examiner*, 24 AD 3d, 376, 806 NYS2d 528 (1st Dep't 2005).

³⁷ *Allis-Chalmers Mfg. Co. v. Malan Constr. Corp.*, 30 N.Y.2d 225, 331 N.Y.S.2d 636 (1972).

i) If the particular words complained of are not set forth in the complaint, the cause will be dismissed. This specificity extends to facts that give defamatory import to the words.³⁸ Also, the complaint must allege the time, place and manner if the alleged false statements and to whom such statements were made.³⁹ The absence of a date hinders the court in making a determination regarding the expiration of the one-year statute of limitations period. *Roman v. Comp USA, Inc.* 38 A.D.3d 751. Of course, where a newspaper is alleged to have libeled a plaintiff, much more must be alleged.⁴⁰ When seeking damages from the declarant's employer it is also necessary to plead that employer's particular involvement.

b) Fraud or mistake (as well as misrepresentation, willful default, breach of trust or undue influence).

- i) New York adopted Fed. R. Civ. P. 9(b). Each substantive element of these claims must be alleged. The misconduct complained of must be stated in sufficient detail to inform as to the facts of the substantive elements of the cause of action, although specificity of some detail may await later proceedings.⁴¹
- ii) A practical problem is that the victim of the wrong often lacks knowledge of the details, particularly at the pleading stage of the action.⁴² The pleading need not be of an evidentiary nature, particularly where the party against whom the claim is asserted has exclusive knowledge of the facts.⁴³
- iii) Often overlooked, this provision applies to defenses as well as causes of action. In an appropriate case, the answering defendant's affirmative defense should be tested for

³⁸ *Keeler v. Galaxy Communications*, 39 AD3d 1202, 834 NYS2d 441 (4th Dep't 2007); *Pipia v. Nassau Co.*, 34 AD3d 664, 826 NYS2d 318 (2d Dep't 2006).

³⁹ *Lesesne v. Lesesne*, 292 A.D.2d 507, 509; *See, also, Sirianni v. Rafaloff*, 284 A.D.2d 446.

⁴⁰ *Corso v. NYP Holdings, Inc.*, 2007 N.Y. Misc. LEXIS 6661: 238 N.Y.L.J. 59: 35 Med. L. Rptr. 2286 (N.Y. Sup. Ct., Kapnick, J., August 30, 2007), N.Y.L.J., 9/24/2007.

⁴¹ . *Lanzi v. Brooks*, 54 AD2d 1058, *affirmed* 43 N.Y.2d 778, 402 N.Y.S.2d 384 (1977)(alleging defendant did not intend to perform a contract when he made it). A cause of action for fraud is not pleaded where the only fraud alleged relates to a party's intent to breach its contract. *Berger v. Roosevelt Investment Group, Inc.*, 28 AD3d 345, 813 NYS2d 419 (1st Dep't 2006), lv. to app. denied, 7 NY3d 712, 827 NYS2d 604; *Carl Place U.F.S.Dist. v. Bat-Jac Const., Inc.*, 28 AD 3d 596, 813 NYS2d 748 (2d Dep't 2006). *See, also, Inter-Atlantic Fund, LP v. Alvaro*, (Index No. 601611/06, Sup. NY, 4/13/07 (Moskowitz, J)). **Note: This case can be found in Vol. 10, No. 2, of the Reports of the Commercial Division, New York County, a valuable but little-known searchable Web site, http://www.courts.state.ny.us/courts/comdiv/lawreport_Vol10No2.shtml.**

⁴² *See, P.T. Bank Central Asia v. ABN Amro Bank, N.V.*, 301 A.D. 2d 373, 754 N.Y.S.2d 245 (1st Dep't 2003).

⁴³ *DaPuzzo v. Reznick Fedder & Silverman*, 14 AD3d 302, 788 N.Y.S.2d 69 (1st Dep't 2005).

compliance with this requirement, and if not pleaded in the answer with the requisite elements, a motion may be made to dismiss the defense (which generally gives the defendant an opportunity to cure) or an objection should be made to introduction of evidence of these defenses at trial. The plaintiff's choice in this instance is an intricate part of the "Art of Pleading."

c) Separation or divorce.

The nature and circumstances of the misconduct, including the time and place of each act complained of must be specified. *C. L. v. J. L.*, (26624/2004, Sup. Kings, May 24, 2007) published N.Y.L.J., 06/19/07.

d) Judgment.

State the extent that the judgment has been satisfied, to guard against double recovery.

e) Law of a foreign country.

- i) State the substance of the foreign law. This is unnecessary regarding federal law or the law of sister states, of which the court is required to take judicial notice.
- ii) If the parties do set forth the foreign country law that they rely upon, and the pleading notifies the parties that it relies upon it and requests the court to take judicial notice of it, then the court is required to do so. CPLR 4511(b). This does not mean that the court would not welcome expert testimony on the foreign law.

f) Sale and delivery of goods or performing of labor or services (or furnishing of materials).

- i) If a complaint involves sale of a significant quantity of good, materials or services, the complaint should be verified and the items and reasonable value or agreed price of each must be separately numbered and stated.
- ii) Thereupon, the responding party, in a verified pleading, must indicate specifically those items its disputes and whether in respect to delivery and value or price. A general denial is inadequate to contest any individual listed item. *See, Duban v. Platt*, 23 A.D.2d 660, 257 N.Y.S.2d 109 (2d Dep't 1965, *aff'd* 17 N.Y.2d 526, 267 N.Y.S.2d 907 (1966).

g) Personal injury.

- i) In actions designated in Ins. Law § 5104, covering motor vehicle accidents in New York, the complaint must state that the claim is not precluded by the no-fault law. Either "serious injury" or "economic loss greater than basic economic loss" must be stated.

h) Gross negligence or intentional infliction of harm by uncompensated directors, officers or trustees of not-for-profit entities.

Complaints must be verified, and state whether it is based upon gross negligence or intentional infliction of harm.

- i) Other statutes and rules may be the source of similar pleading requirements, for example:

Part 137, Rules of the Chief Administrator, regarding arbitration of fee disputes between attorneys and clients.⁴⁴

10) CPLR 3017. Demand for relief⁴⁵

a) Generally.

- i) An *ad damnum* clause is a required component of any claim for relief, but not for an answer. A “Wherefore” clause in an answer is one of those hard to break habits.
 - (1) It is not considered in determining whether a cause of action is stated, except in these cases, where a showing of damages is required.
 - (2) A monetary demand is barred from the original complaint in all personal injury and wrongful death, including medical malpractice, actions. The amount sought may later be requested by the defendant. The amount sought on account of property damages should be stated.⁴⁶
 - (3) WARNING: The Court of Claims act §11(b) overrides this rule in the Court of Claims, so that the omission of a monetary claim in a tort case was a jurisdictional defect, incurable by amendment.⁴⁷

⁴⁴ See, *Pipia v. Nassau Co.*, 34 AD3d 664, 826 NYS2d 318 (2d Dep’t 2006), supra.

⁴⁵ § 3017. Demand for relief

- (a) Generally. Except as otherwise provided in subdivision (c) of this section, every complaint, counterclaim, cross-claim, interpleader complaint, and third-party complaint shall contain a demand for the relief to which the pleader deems himself entitled. Relief in the alternative or of several different types may be demanded. Except as provided in section 3215, the court may grant any type of relief within its jurisdiction appropriate to the proof whether or not demanded, imposing such terms as may be just.
- (b) Declaratory judgment. In an action for a declaratory judgment, the demand for relief in the complaint shall specify the rights and other legal relations on which a declaration is requested and state whether further or consequential relief is or could be claimed and the nature and extent of any such relief which is claimed.
- (c) Personal injury or wrongful death actions. In an action to recover damages for personal injuries or wrongful death, the complaint, counterclaim, cross-claim, interpleader complaint, and third-party complaint shall contain a prayer for general relief but shall not state the amount of damages to which the pleader deems himself entitled. If the action is brought in the Supreme Court, the pleading shall also state whether or not the amount of damages sought exceeds the jurisdictional limits of all lower courts which would otherwise have jurisdiction. Provided, however, that a party against whom an action to recover damages for personal injuries or wrongful death is brought, may at any time request a supplemental demand setting forth the total damages to which the pleader deems himself entitled. A supplemental demand shall be provided by the party bringing the action within fifteen days of the request. In the event the supplemental demand is not served within fifteen days, the court, on motion, may order that it be served. A supplemental demand served pursuant to this subdivision shall be treated in all respects as a demand made pursuant to subdivision (a) of this section.

⁴⁶ *State Farm v. City of White Plains*, 8 Misc.3d 916, 798 N.Y.S.2d 650 (Sup., West. 2005)

⁴⁷ *Kolnacki v. State*, 8 NY3d 277, 832 NYS3d 481 (2007). Thankfully, § 11(b) was amended in 2007 to except from the demand requirement all wrongful death, personal injury and medical, dental and podiatric malpractice causes, so that they no longer must specify the amount of damages demanded.

- ii) Punitive damages and attorney’s fees (whether available by virtue of significant public harm, statute or contract) are not to be pleaded as a separate cause of action in New York. They are an incident of ordinary damages, only recoverable as an incident to recovery on the underlying cause of action.⁴⁸ However, add to the allegations of the pleading (and do not rely solely in the *ad damnum* clause) a reference to the significant public harm, applicable statute or contract provision showing the basis for entitlement. After all, the fundamental purpose of the pleading is to provide notice. Failure to do so may constitute a waiver of the claim.⁴⁹
 - iii) Relief in alternative or several types of relief may be demanded.
 - (1) The right to a jury trial is governed by CPLR 4101, and is available where the pleading states an action for 1) a sum of money only, 2) an action for ejectment, dower, waste abatement of and damages for a nuisance, to recover chattel, or for determination of a claim to real property under article 15 of the real Property Actions and Proceedings law; and 3) any other action in which a party is entitled by the constitution or an express provision of law to a trial by jury.
 - (a) Equitable defenses shall be tried by the court.
 - (b) A party does not waive a right to a trial by jury in an action by joining it with it another claim with respect to which there is not right to a trial by jury and which is based upon a separated transaction.
 - (2) Court is not limited by *ad damnum* clause, if proof supports other relief.
 - (a) If plaintiff pleads an equitable claim, which does not get tried by a jury, but ends up proving a legal one, which does permit a jury, an award of judgment would incidentally divest defendant of a right trial by jury.⁵⁰
 - (b) Requesting “such other relief as to the Court may seem just” is surplusage, since the court has the power to award any type of relief within its jurisdiction appropriate to the proof, whether or not demanded.
 - (c) In the case of default, pursuant to CPLR 3215(b), the default judgment may not exceed the amount or differ in type than that demanded in the complaint or stated in the notice in the summons. If the plaintiff wants to expand the demand as against the defaulting defendant, an amended complaint will have to be served on that defendant, in the same manner as a summons. CPLR 3012(a), McKinney’s Practice Commentaries, C3017:9.
 - iv) That the pleading asked for the wrong relief or excessive relief will not result in a dismissal if the pleading states an action upon which relief can be awarded.
- b) **Declaratory Judgment.**

⁴⁸ *Taylor v. Eli Haddad Corp.*, 118 Misc.2d 253, 460 N.Y.S.2d 886 (1983).

⁴⁹ See, *Ganz v. HZJ, Inc.*, 605 So.2d 871 (Fla. 1992)

⁵⁰ See. Siegel, *New York Practice*, 4th Ed., p. 345, but see, also, that it might not ground a judgment if the defendant objects. *Jackson v. Strong*, 222 N.Y. 149 (1917). See, also, CPLR 4103. A defendant must be given an opportunity to demand a jury, and a new trial may be required if defendant demands a jury trial. *I.H.P Corp. v. 210 Central Park South Corp.*, 12 N.Y. 2d 329, 239 N.Y.S. 2d 547 (1963),

When the full anticipated relief is not ripe for judgment at the time of the pleading and the trial the pleader should add a cause of action for declaratory judgment. Although there is an equitable component to such relief, it does not negate a jury demand. Complaint must specify the rights and other legal relations on which a declaration is requested and nature of the further relief requested.

Add a declaratory judgment cause where performance not due at the time of the pleading or the trial can be declared to be due thereafter.

- c) **Medical Malpractice actions and actions against a municipal corporation.** Personal Injury and wrongful death actions, as well as actions against municipal corporations may not demand specific amounts, except if the action is brought in the Supreme Court, where it is necessary to allege that the damages sought exceeds the jurisdiction limits of all other courts (in NYC > \$25,000). There is a procedure for the adverse party to request the amount demanded. See, also, General Municipal Law §50-e(2), relating the notice of claim against the city.
- d) **Election of Remedies.** Related to consideration of the demand for relief and alternative relief is the doctrine of election of remedies. This involves alternative bases for the same or alternative relief arising from the same transaction or occurrence.
 - i) **Claim preclusion.** Pleadings may forfeit a perfectly viable claim in cases where they have multiple causes of action for the same relief but plead allegations in support of only one of them that may prove unsuccessful. Unless all of the alternative causes are added prior to judgment, the dismissal on the merits of the unsuccessful claim will bar the otherwise viable claim, based upon the doctrine of *res judicata*. This doctrine is also applicable if the unsuccessful claim was denied in an arbitration proceeding. The court grant preclusive effect to matters that were within the scope of the arbitration or could have been resolved in the arbitration proceeding. Avoidance of this result is accomplished by joining all alternative grounds for relief in the pleadings. For example:
 - (1) Contract and *Quantum Meruit* (if it is alleged that the contract is invalid or that the subject matter of the claim is outside the scope of the contract).⁵¹
 - (2) Breach of Contract and Fraud, Misrepresentation or Undue Influence.
 - (3) Product Liability, Breach of Warranty and Violation of a Statute.
 - (4) Conversion and Breach of Contract⁵²
 - (5) Contract and Reformation with Breach of the Reformed Contract, Rescission and Damages.
 - (6) Actions against Agent and Undisclosed Principal.
 - (7) Federal, State and local law statutes against employment discrimination.
 - ii) **Inconsistent Remedies.** While inconsistent cause of action can be interposed, inconsistent remedies cannot be awarded. For example, there cannot be a judgment

⁵¹ *American Telephone & Utility Consultants, Inc. v. Beth Israel Medical Center*, 307 A.D. 2d 330, 763 N.Y.S. 2d 466 (1st Dep't 2003); *Parkash v. UtiliSave Corp.*, 295 A.D.2d 834, 743 N.Y.S.2d 889 (2d Dep't 2002). See, also, *Quantum Meruit: Alternative Commercial-Case Claim*, Nash and Nugent, NYLJ, 08-30-2007.

⁵² Conversion may become a breach of contract if the taking is ratified, thus moving from a 3 year to a 6 year statute of limitations.

for both rescission and specific performance. The choice will have to be made prior to judgment, either by the parties or by the court.

iii) **Redundant Claims.** Under New York Law, a fraud claim will not lie if it “arises out of the same facts as plaintiff’s breach of contract claim.”⁵³ To succeed on a fraud claim arising from a breach of contract, a plaintiff must also show: (1) “a legal duty separate from the duty to perform under the contract”; (2) “a fraudulent misrepresentations collateral or extraneous to the contract”; or (3) “special damages that are caused by the misrepresentation and unrecoverable as contract damages.”⁵⁴

e) **Splitting the Cause of Action.** Commonly, in actions on a lease, installment loan, series of shipments or for royalties, a complaint omits claims that may have already accrued, permitting the pleader to bring multiple actions involving the same transaction. Multiple actions cause harassment and a burden on the courts. All parts of the same transaction that have accrued should be joined at the time of trial. Later installments, falling due prior to trial, should be added on motion to amend the pleadings. Even if sums are due upon separate causes of actions, it is a good idea to join them, to avoid the question of forfeiture by splitting the cause of action.

11) CPLR 3018. Responsive pleadings⁵⁵

(a) Denials.

(1) The two authorized responses are –

Deny (or Defendant denies each and every allegation set forth in the paragraph(s) of the complaint designated “_.”) Alternatively, one may allege “Upon information and belief, denies the each and every allegation set forth in the paragraph(s) of the complaint designated “_,” or

Deny knowledge or information (or Defendant lacks knowledge or information sufficient to form a belief as the truth of the allegations set forth in the paragraph(s) of the complaint designated “_.”) This form should be avoided, and could lead to

⁵³ *Telecom Intl. Am., Ltd v. AT&T Corp.*, 280 F.3d 175 196, (2d Cir. 2001).

⁵⁴ *Bridgestone/Firestone v. Recovery Credit Servs.*, 98 F.3d 13, 20 (2d Cir. 1996).

⁵⁵ § 3018. Responsive pleadings

(a) **Denials.** A party shall deny those statements known or believed by him to be untrue. He shall specify those statements as to the truth of which he lacks knowledge or information sufficient to form a belief and this shall have the effect of a denial. All other statements of a pleading are deemed admitted, except that where no responsive pleading is permitted they are deemed denied or avoided.

(b) **Affirmative defenses.** A party shall plead all matters which if not pleaded would be likely to take the adverse party by surprise or would raise issues of fact not appearing on the face of a prior pleading such as arbitration and award, collateral estoppel, culpable conduct claimed in diminution of damages as set forth in article fourteen-A, discharge in bankruptcy, facts showing illegality either by statute or common law, fraud, infancy or other disability of the party defending, payment, release, res judicata, statute of frauds, or statute of limitation. The application of this subdivision shall not be confined to the instances enumerated.

problems, in cases where the defendant was in a position that he must know the facts, one way or the other.⁵⁶

- (2) Commonly, one is seeing omnibus clauses, at the beginning or the end of the answer, stating that the pleader denies each and every allegation in the complaint that is not expressly admitted or otherwise stated. See: Appendix “B,” Answer, Such allegations comply with the requirement of responding to an allegation. However, it can cause credibility issues if it extends to allegations that the pleader knows to be correct.
- (3) All other statements of a pleading are deemed admitted, except that where no responsive pleading is permitted they are deemed denied or avoided.
- (4) A “General Denial,” commonly used in lower court pleadings, is not customarily interposed in detailed and fact-intensive cases in Supreme Court, as it is usually improper and frivolous, often putting into issue facts that are clearly undisputed. However, it is not prohibited, except in particular actions, such as certain of those pleaded under CPLR 3016(f) or allegations of performance or conditions precedent or genuineness of signatures under CPLR 3015 (a) and (d).
- (5) Common issues:
 - (a) “The document speaks for itself.” This might be adequate, as long as there are no facts buried in the paragraph. The safer practice would be to deny the allegation of the paragraph and then add the statement “except to the extent contained in that document.”
 - (b) CAVEAT: Before one alleges that the document speaks for itself, one must first anticipate whether one will need to offer parole evidence at the trial or on a summary judgment motion to explain the document.
 - (i) One may plead allegations as to the “intention” of the parties in executing the document. See, Appendix “B,” (Complaint). Arguably, an allegation as to what the parties intended, is not restricted to what the document says (or speaks), so that the “speaks for itself” response does not put the allegation in issue.
 - (ii) The careful answerer might deny the allegation, stating that the intention of the parties was memorialized in the document, which speaks for itself.
 - (c) “The allegation contains a conclusion of law, to which no response is required.” This might be adequate, as long as there are no facts buried in the paragraph.⁵⁷ The safer practice would be to deny the paragraph, in case it is determined that some factual content is present; then add the above statement.
 - (d) Compound allegations state a number of facts, some of which are undisputed while others are disputed. For example: “Plaintiff sold and delivered goods

⁵⁶ See, *Dahlstrom v. Gemunder*, 198 N.Y. 440 (1910), where a denial gave the responsive pleader’s posture in the litigation the appearance of sham, which today might result in summary judgment. See, *Practice Commentary* C3018:3.

⁵⁷*Silverman v. Levy*, 75 N.Y.S.2d 797 (1947), *affirmed* 273 A.D. 952, 78 N.Y.S.2d 228, motion denied 298 N.Y. 641, 82 N.E.2d 35, *affirmed* 298 N.Y. 778, 83 N.E.2d 469; *Red Robin Stores v. Rose*, 274 A.D. 462, 84 N.Y.S.2d 685 (1 Dept. 1948). See, also, *Zaveloff v. Zaveloff*, 37 N.Y.S.2d 46 (1942); *Manevetz v. City of New York*, 118 N.Y.S.2d 318 (1952).

to the defendant who accepted them, but the defendant failed to pay of them.” See, Official Form No. 8, Appendix A. The pleader has a number of ways to answer.

- (i) CPLR 3014 states that “Each paragraph shall contain, as far as practicable, a single allegation.” In this example, the pleader violates that provision, because his paragraph states three allegations.
- (ii) One could deny the allegations of the paragraph, except admit an undisputed allegation.
- (iii) Occasionally one encounters paragraphs telling a whole story and containing many more facts. The answerer may object to the form (rather than parse the loaded paragraph) and deny it, if any allegation of the paragraph is disputed. **Here, the fault lies with the plaintiff, who should have divided the statements in the paragraph into separately stated and numbered paragraphs.**
- (iv) One may admit the allegations of the paragraph, but deny the disputed allegation. **This is the worse choice, since it leaves open the possibility that the admission will be found to be broader than intended.**
- (e) A response that merely alleges a different version of the facts, and does not directly deny the allegations of the complaint runs the risk of being held to have admitted the allegation. *Smith v. Coe*, 170 N.Y. 262 (1902).
- (f) Omnibus general denials or a paragraph denying all allegations not specifically admitted or addressed in other paragraphs of the answer, are not prohibited. However, they are inadequate as to allegations concerning which the law requires a specific denial, and also may be deemed to be frivolous or in bad faith, and may not be adequate as a defense to a motion for summary judgment.
- (g) N.Y. C. C. C. Act § 1102(b) has a provision that might be useful to apply to Supreme Court action, awarding additional costs to the prevailing party for each unjustifiable denial of certain matters.

(b) Affirmative Defenses. An affirmative defense attacks the legal right to bring a cause of action, as opposed to attacking the merits of the cause and the truth of the allegations. The defense intrinsically admits the cause and supporting facts asserted, but raises some new matter which defeats the opposing party’s otherwise valid claim.

- 1) The standard for interposing affirmative defenses in an answer should be the same as in a complaint. A party must plead all matters which, if not pleaded, would be likely to take the adverse party by surprise or would raise issues of fact not appearing on the face of the prior pleading, such as accord and satisfaction, assumption of the risk, arbitration and award, collateral estoppel, culpable conduct, illegality, fraud, infancy or other disability, release, res judicata, statute of fraud or limitations, for example. This list is not exhaustive. Others include – contributory negligence (as mitigation) discharge in bankruptcy, duress, estoppel, failure of consideration, injury by a fellow servant, laches (in an equity case), payment, waiver, truth as a defense to defamation, adverse possession, qualified privilege and standing to sue.
- 2) **If in doubt as to whether the defense would surprise, the defense should be pleaded.** It may be that by doing so, the defendant assumes the burden of

proving it, but that is better than losing the matter as a defense. The initial question might be whether the matter is an element of the cause of action. If it is, then the pleader should not be surprised by the failure to raise its absence as an affirmative defense.

- 3) The ubiquitous “complaint fails to state a cause of action” is inappropriate. This is because it should not be a surprise to the plaintiff if its complaint fails to state a cause of action.⁵⁸
- 4) Affirmative defenses are subject to the same pleading rules as causes of action in a complaint. They must satisfy the pleading requirements of CPLR 3013, by giving notice of the transactions or occurrences involved. *Practice Commentary* C3013:2.
- 5) For some affirmative defenses, the single-sentence allegations, such as lack of personal service, statute of limitations or justification will suffice.⁵⁹
- 6) An affirmative defense raised in the answer, that the summons was not properly served, will be waived unless the defendant moves for judgment within 60 days after serving its answer. CPLR 3211(e).
- 7) Other affirmative defenses, such as misrepresentation, fraud, mistake, willful default, breach of trust or undue influence, should comply with the specificity requirements of CPLR 3016⁶⁰
- 8) **Contributory negligence, etc.** CPLR 1411 provides that in actions for personal injury, property damage or wrongful death, the culpable conduct attributed to the claimant or to the decedent, including contributory negligence or assumption of risk, shall not bar recovery, but the amount of damages otherwise recoverable shall be diminished in the proportion which the culpable conduct attributed to the claimant of decedent bears to the culpable conduct which caused the damages. Culpable conduct claimed in diminution of damages, in accordance with CLPR 1411, shall be an affirmative defense to be pleaded and proved by the party asserting the defense, pursuant to CPLR 1412
- 9) Performance of conditions precedent need not be pleaded in the complaint, per CPLR 3015(a). A denial or affirmative defense must be made specifically and with particularity, in which case, the party relying upon the performance is required to prove on trial only such performance as shall have been specified.

⁵⁸ *Iannarone v. Gramer*, 256 A.D.2d 443, 682 N.Y.S.2d 84 (2d Dep’t 1998); *Konow v. Sugarman*, 71 A.D.2d 1016, 420 N.Y.S.2d 411 (2d Dep’t 1979).

⁵⁹ *Youssef v. Triborough Bridge and Tunnel Authority*, 24 A.D.2d 661, 808 N.Y.S.2d 362 (2d Dep’t 2005); *Hatch v. Tran*, 170 A.D.2d 649, 567 N.Y.S.2d 72 (2d Dept.1991); *Immediate v. St. John’s Queens Hospital*, 48 N.Y.2d 671, 421 N.Y.S.2d 875 (1979); *Linton v. Unexcelled Fireworks Co.*, 124 N.Y. 533 (1891).

⁶⁰ *Sinacore v. State*, 1998, 176 Misc.2d 1, 671 N.Y.S.2d 896; *Commissioners of State Ins. Fund v. Photocircuits Corp.*, 2003, 2 Misc.3d 300, 773 N.Y.S.2d 190, reversed and vacated 20 A.D.3d 173, 798 N.Y.S.2d 367. Elements of defense of equitable estoppel had to be pleaded. *Eric Vaughn Flam, P.C. v. FTF Crawlspace Specialists Inc.*, 2002, 2002 WL 31955398; same, collateral estoppel, *Shields v. School of Law, Hofstra University*, 77 A.D.2d 867, 431 N.Y.S.2d 60 (1980). See also, *Otis Elevator Co. v. Heggie Realty Co., Inc.*, 107 Misc.2d 67, 437 N.Y.S.2d 832 (1980); fraud, as an affirmative defense, must be pleaded with the same particularity as a cause of action, *Suffolk County Federal Sav. & Loan Ass’n v. Geiger*, 57 Misc.2d 184, 291 N.Y.S.2d 982 (1968).

However, be aware that there may be special statutes related to the particular cause of action that vary this rule.

- 10) Equitable defenses, such as “laches,” are unavailable in actions at law that are within the statute of limitations and that are exclusively seeking monetary damages.⁶¹
- 11) Many affirmative defenses may be raised in motions to dismiss pursuant to CPLR 3211(a).
- 12) There is no obligation to serve a reply to an affirmative defense. They are deemed denied.⁶² However, where a reply is required in response to a counterclaim, many practitioners also add denials to the affirmative defenses. For good cause shown, the Court, on motion, may order service of a reply to an affirmative defense.⁶³
- 13) **Reservations of Rights.** Paragraphs in an answer reserving rights to make additional allegations of affirmative defenses are not sanctioned by the rules and can have no effect. See, Appendix “B” (Answer, at p.4). Amendments to the answer are required for those purposes, and these are accomplished pursuant CPLR 3025.

12) CPLR 3019. Counterclaims and Cross-Claims

- a) Counterclaims are any cause of action in favor of one or more defendants or a person whom a defendant represents against one or more plaintiffs, a person whom a plaintiff represents or a plaintiff and other persons alleged to be liable.
 - i) In N. Y. state court actions they are permissive, not compulsory.
 - ii) Even counterclaims related to the plaintiff’s claim, are permissive in New York State.⁶⁴ This is contrary to federal practice, where counterclaims that are related to the plaintiff’s claim are either interposed or waived. Fed. R. Civ. P., Rule 13(a).
 - iii) They need not relate to the action in the complaint.
 - iv) There should be a carefully considered reason if one decides not to bring a related counterclaim in the action, to avoid any issue of *res judicata* or estoppel, especially if the facts of the counterclaim will constitute part of the defense. A countervailing consideration for omitting a counterclaim may be that the defendant may choose to bring its counterclaim in a more convenient jurisdiction or venue, such as where witnesses are more readily available.
 - v) As the plaintiff has already submitted itself to the personal jurisdiction of the court, there can be no question of personal jurisdiction or proper service upon the plaintiff. If the defendant objects to personal jurisdiction or proper service upon it, it should

⁶¹ See, *Manshion Joho Center Co., Ltd. v. Manshion Joho Center, Inc.*, 24 A.D.2d 189, 896 N.Y.S.2d 480 (1st Dep’t 2005)

⁶² *Albin v. First Nationwide Mortg. Co.*, 248 AD2d 417, 670 NYS2d 42 (2d Dep’t 1998).

⁶³ *Treeforms, Inc. v. Action Audio, Inc.* 102 A.D.2d 920, 477 N.Y.S.2d 504 (3d Dep’t 1984); *Mogilevich v. Grayzel*, 228 A.D. 821, 240 N.Y.S. 540 (1930).

⁶⁴ *Batavia Kill Watershed Dist. v. Charles O. Desch, Inc.*, 57 N.Y.2d 796, 455 N.Y.S.2d 597 (1982), affirming on and adopting the appellate division opinion in 83 A.D.2d 97, 444 N.Y.S.2d 958 (3d Dep’t 1981).

- consider making a motion to dismiss, rather than answering, interposing an affirmative defense and its counterclaim. CPLR 3211. However, it has the option to answer, interposing the affirmative defense, and then move to dismiss for lack of personal jurisdiction, within 60 days of its answer.
- vi) Pleading a counterclaim related to the plaintiff's claim is not a waiver of an objection to personal jurisdiction. Pleading an unrelated counterclaim is such a waiver. *See, McKinney's Practice Commentary C3211:60.*
 - vii) If against another party that has not yet been brought into the Supreme Court or county court action a summons must be served, the answer filed, a fee paid, and proof of service filed. *See, McKinney's Practice Commentaries, C:3019:19 (1994).*
 - viii) Voluntary dismissal or withdrawal of the complaint will not be allowed to defeat defendant's recovery on its claim for attorney's fees or on its counterclaim.
 - ix) Reply to a counterclaim is necessary under CPLR 3011. Failure to reply to an answer containing a counterclaim may result in a default judgment in favor of the counterclaim.⁶⁵
 - x) A plaintiff may not include a counterclaim in its reply. Instead, the appropriated procedure would be to serve an amended complaint (which may be done without leave of court if within 20 days of service of the answer).⁶⁶
- b) Cross-claims are any causes of action in favor a one or more defendants or a person who a defendant represents against one or more defendants, a person whom a defendant represents of a defendant and other persons alleged to be liable.
- i) It may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim in the action against the cross-claimant.
 - ii) It need not be related to the plaintiff's claim. This is otherwise under FRCP 13(g).
 - iii) It is added to and served with the answer. *See, McKinney's Practice Commentaries, C:3019.19 (1994)*
 - iv) Service upon an unserved defendant can await the plaintiff gaining jurisdiction of that defendant, or answerer must commence a third-party action against such a defendant.
 - v) No answering reply is necessary from a co-defendant, unless one is demanded in the cross-claim. However, it does no harm, and is often a good idea for a co-defendant to serve an answer to a cross-claim, even if one is not demanded. This is particularly true if there is an affirmative defense, set-off or cross-claim against the cross-claimant.
- c) **Limitations of actions as applicable to defenses and counterclaims.** A defense or counterclaim is interposed when the pleading containing it is served.
- i) A defense or counterclaim is not barred if it was not barred at the time that the claims asserted in the complaint were interposed.
 - ii) Limitations of actions that would be a bar to the defense or counterclaim may be waived if the action brought arose from the same transaction or occurrence as the defense or counterclaim. For example, if within six years after service was rendered a

⁶⁵ *Carinha v. Carinha*, 178 Misc.2d 635, 679 NYS2d 901 (Sup. West. 1998).

⁶⁶ *DeMille v. DeMille*, 5 Misc. 2d 355, 784 NYS2d 296 (Sup. Nassau 2004), *affirmed as modified*, 32 AD3d 411, 820 NYS2d 111, *lv. to appeal denied* 7 NY3d 899, 826 NYS2d 607.

- professional sues for non-payment of his fees for services, a counterclaim for malpractice in connection with those services may be interposed, even though it may otherwise be barred by the three year malpractice statute of limitations.⁶⁷ The relief under the counterclaim would, however, be limited to the amount demanded in the complaint. CPLR 203(d).
- iii) Bear in mind that the critical date when the action is commenced by service is the date when the summons is “served.” It may be deemed served on the date that the summons is delivered for service to a sheriff outside of the city of New York, or filed with the clerk of the county within the city of New York where the defendant may be served, provided that service is effected not later than 60 days after the period of limitations would have expired. *See*, CPLR 203(b)(5) for this and other details.
 - iv) When the action is commenced by filing of the complaint, a claim asserted in the complaint is interposed when the action is commenced. *See*, CPLR 203(c).
- d) Where the action is brought in a lower court, the counterclaim must consider the limitation on jurisdiction. If the counterclaim is for a monetary amount in excess of the jurisdiction of the N.Y. Civil Court, district courts and city courts, the action may remain and the court may issue a judgment on the counterclaim in excess of its limitation on original claims. However, where equitable relief is demanded in the counterclaim, the action must be transferred to the Supreme Court. NYCCCA §208

13) CPLR 3020. Verification

- a) **Generally.** Verification is a statement under oath that the pleading is true to the knowledge and belief of the deponent, except as to matters alleged on information and belief, and that as to those matters he believes it to be true. *See*, Appendix A, *infra*.
 - i) Certain causes of action, such as sales of good and performance of labor using a schedule, under CPLR 3016(f), summary proceedings to recover possession of real property under RPAPL §741 and matrimonial actions under Domestic Relations Law 211 require verified complaints.
 - ii) Unless otherwise specified by law, where a pleading is verified, each subsequent pleading must also be verified, except the answer of an infant and except as to matter in the pleading concerning which the party would be privileged from testifying as a witness.
- b) **When answer must be verified.** An answer must be verified:
 - i) When the complaint charges the defendant with having confessed or suffered a judgment, executed a conveyance, assignment or other instrument, or transferred or delivered money or personal property with intent to hinder, delay or defraud his creditors, or with being a party or privy to such a transaction by another person with like intent towards the creditors of that person, or with any fraud whatever affecting a right or the recovery of another;

⁶⁷ *Clifton Springs Sanitarium Co. v. DeVoyst*, 1930, 136 Misc. 293, 240 N.Y.S. 729. *See*, also, *Jackson v. Frey*, 1931, 139 Misc. 92, 248 N.Y.S. 669. *But, see*, *Garben v. McKittrick*, 225 A.D. 772, 232 N.Y.S. 390 (2 Dept. 1928). *See*, also, *Fish v. Conley*, 221 A.D. 609, 225 N.Y.S. 27(1927).

- ii) In an action against a corporation to recover damages for the non-payment of a promissory note or other evidence of debt for the absolute payment of money upon demand or at a particular time.
- iii) Answer to a complaint charging defendant with criminal conduct, such as adultery (still a crime in New York, *see, Penal Law* §255.17), need not be verified. In such cases, the form of verification can be amended, adding – “except as to matter which would be privileged under the rules of evidence.”
- c) **Defense not involving the merits.** Whether or not the complaint is verified, the portions of an answer interposing defenses not directed to the merits, such as lack of jurisdiction, capacity and other action pending, must be verified. “If this provision is known to the bar, the evidence is not very convincing.” *Practice Commentary*, 3020:6
 - i) What should a plaintiff do upon receiving an unverified answer with a defense not involving the merits? *See, CPLR* 3022.
- d) **By whom verification is made.**

In multiparty cases, only one party need verify the pleading.

 - i) If a party is a domestic corporation, verification shall be made by an officer thereof.
 - ii) If a governmental party, by any person acquainted with the facts.
 - iii) If a party is foreign corporation, or is not in the county where the attorney has his office, or if the action is founded upon a written instrument for the payment of money only which is in the possession of an agent or the attorney, or if all of the material allegations of the pleading are within the personal knowledge of an agent or the attorney, the verification may be made by such agent or attorney.
 - iv) **Note: Where by the attorney:** The attorney is asserting that he has some level of knowledge of material facts in the pleading. That knowledge might be limited to the names of the persons he interviewed or the document he reviewed. He thereby risks -
 - (1) Being called as a witness at a deposition and at the trial, and having to reveal privileged information, including confidential communications, and information that might otherwise be protected.⁶⁸
 - (2) Being disqualified to act as attorney at the trial, since he would be advocating his own veracity, and
 - (3) Being sanctioned and charged with costs if it is shown that he did not have a good faith basis for the facts he verified.
 - v) Question: In the case where the verification is by an attorney, might this not excuse the attorney from testifying as a fact witness on such issues.⁶⁹ Is the verification by an attorney a waiver of the attorney-client privilege?

14) CPLR 3021 Form of affidavit of verification

⁶⁸ Application to question plaintiff’s counsel denied. *Becker v. City of New York*, 106 A.D.2d 595, 482 N.Y.S.2s 888 (2d Dep’t 1984) (No offer to place verified documents into evidence); *see, also, Miceli v. Reily*, 54 A.D.2d 754, 387 N.Y.S.2d 707 (2d Dep’t 1976).

⁶⁹ The attorney’s verification does not necessarily make her a deposition witness (*Miceli v. Reily*, 54 AD2d 754, 387 NYS.2d 707 (2d Dep’t 1976)) or callable as a trial witness (*Becker v. City of New York*, 106 AD2d 595m 482 NYS2d 888 (2d Dep’t 1984)).

- i) By the party: The foregoing pleading is true to the knowledge of the deponent, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.
- ii) By an agent or attorney: Add: The ground of belief as to all matters not stated upon knowledge is (review of documents; conversations with witness, etc). The reason why this affidavit (affirmation) is not made by the party is (that the party “is” not in the county where his attorney has his office, etc.).
- iii) Attorney, as well as a physician, osteopath or dentist, authorized by law to practice in the state, who is not a party to the action, may affirm the verification statement “to be true under the penalties of perjury,” rather than swear before a notary. CPLR 2106

15) CPLR 3022. Remedy for defective verification

- a) Where the verification was optional – the recipient has a choice; treat it as unverified and do not verify subsequent pleadings
- b) Where verification was mandatory-the recipient may treat the unverified or defectively verified pleading as a nullity, by first giving notice with due diligence to the attorney of the adverse party of the election to do so.
 - i) “Due diligence” in this context means that the notice must give particulars of the defect.⁷⁰
- c) Failure to follow this procedure results in a waiver of the defective verification and the rejection will itself be treated as a nullity.
- d) Bear in mind that the courts are loath to declare a default based upon a technicality, so that the likelihood of entering a default on the basis of a defective verification is slim.

16) CPLR 3023. Construction of verified pleading

The allegations or denials in a verified pleading must, in form, be stated to be made by the party pleading. Unless they are stated to be made upon the information and belief of the party, they must be regarded for all purposes, including a criminal prosecution, as having been made upon the knowledge of the person verifying the pleading. An allegation that the party lacks sufficient knowledge or information to form a belief with respect to the matter, for the same purposes, must be regarded as an allegation that the person verifying the pleading has not such knowledge or information.

Pitfalls: The party alleging that he lacks sufficient knowledge or information to form a belief may have to proffer a basis for information thereafter gained when he avers in a motion for summary judgment or testifies. Of course, by then, he may have had the benefit of discovery.

17) Rules of the Chief Administrator §130-1.1a

- a) This rule is far less stringent than those regarding verification. It does not require attesting to the truth of the facts, only that the statements are not frivolous. It states:

⁷⁰ *Treen v. Van Pelt*, 106 Misc. 35, 174 N.Y. Supp. 500 (Sup. Kings 1919) and do it promptly (*Lintile v. Egan*, 94 A.D.2d 839, 463 N.Y.S. 2d 542 (3d Dep’t 1983) within 24 hours.

- i) **Signature.** Every pleading ... served on another party or filed or submitted to the court shall be signed by an attorney, or by a party if the party is not represented by an attorney, with the name of the attorney or party clearly printed or typed directly below the signature. Absent good cause shown, the court shall strike any unsigned paper if the omission of the signature is not corrected after being called to the attention of the attorney or the party.
- ii) **Certification.** By signing a pleading, an attorney or party certifies that, to the best of that person's knowledge, information and belief, formed after an inquiry reasonable under the circumstances, the presentation of the pleading or the contentions therein are not frivolous as defined in subsection (c) of Section 130-1.1. This Rule is modeled after FRCP 11, but it is significantly less exacting upon the certifier.
 - (1) If a lawyer knows or should know that the paper contains false or misleading matter, he may face heavy sanctions. See, also CPLR 8383-a

18) CPLR 3024. Motion to correct pleadings

- a) **Vague or ambiguous pleadings.** If a pleading is so vague or ambiguous that a party cannot reasonably be required to frame a response the may move for a more definite statement.
- b) **Scandalous or prejudicial matter.** A party may move to strike any scandalous or prejudicial matter (that is) unnecessarily inserted in a pleading. **Unlike other motions to correct pleadings, this objection is not waived by service of a responsive pleading.**
- c) A motion to separately state and number allegation is not specified in this section, but has similar procedural attributes.
- d) **Time limits: pleading after disposition.** A notice of motion under this rule shall be served within twenty (20) days after service of the challenged pleading.
 - i) The mere making of this motion extends the time for answering, thereby extending the time for, and inviting, service of an amended pleading to cure defects..
 - ii) If the motion is denied, the responsive pleading shall be served within ten (10) days after service of notice of entry of the order and, if granted, an amended pleading complying with the order shall be served within that time.

19) CPLR 3025. Amended and supplemental pleadings.

- a) **Amendments without leave.** A party may amend his pleading once without leave of the court within twenty (20) days after its service, or at any time before the period for responding to it expires, or within twenty (20) days after service of a pleading responding to it.
 - i) Since without leave of the court the party may only amend its pleading once, unless there is a time element to consider, it is recommended that amendment should be deferred until the responding pleading is served.
 - ii) If a party moves to dismiss or correct a pleading, the motion automatically extends the moving party's time to answer and thereby extends the time of the party against whom the motion is made to amend as of course. Therefore, even before the motion is heard, the pleader may correct the defect to which the motion is directed. This should moot the motion. (But, see, *Practice Commentaries* ¶3211:65).
- b) **Amendments and supplemental pleadings by leave.** A party may amend its pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties (who have been served). Leave

shall be freely given upon such terms as may be just, including the granting of costs and continuances.

- i) Court has discretion to grant leave to withdraw a prior admission.⁷¹
- ii) Court may not permit a party to amend a complaint where the proposed amendment would have contradicted sworn statements of the party.⁷²
- iii) The requirement of proof of the causes and grounds to be stated in a pleading amended by leave has been relaxed. Attacks on the merits should await a motion for summary judgment.⁷³
- c) **Amendment to conform to the evidence.** The court may permit pleadings to be amended before or after judgment to conform them to the evidence, upon such terms as may be just, including the granting of costs and continuances.
- d) **Admissions in pleadings that have been amended still constitute admissions of the party.** It is critical to the credibility and future success of a party to an action that no statement is made in any pleading that is misrepresents the facts, as such statements do not disappear by the amendment of a pleading, and may be thrown back at the party or its attorney an every subsequent state of the litigation from the deposition and motion to the closing summation. If a complaint is amended, even with leave of the court, any formal judicial admission deleted by the amendment is relegated to the status of an informal judicial admission which, although not conclusive, constitutes evidence of the proposition alleged.⁷⁴
- e) **Responses to amended or supplemental pleadings.** Except where otherwise preserved by law or order of the court, there shall be an answer or reply to an amended or supplemental pleading if an answer or reply is required to the pleading being amended or supplemented. Service of such an answer or reply shall be made within twenty (20) days after service of the amended or supplemental pleadings to which it responds.
- f) For statute of limitations purposes, amended pleadings are deemed to “relate back” to the earlier pleadings, as long as the earlier ones gave notice of the transaction or occurrence out of which the new matter arose. CPLR 203 (f). *Caffaro v. Trayna*, 35 N.Y.2d 245, 360 N.Y.S.2d 847 (1947).

20) CPLR 3026. Construction

Pleadings shall be liberally construed. Defects shall be ignored if a substantial right of a party is not prejudiced. The courts will “accept the facts as alleged in the complaint as

⁷¹ *Pensee Associates, Ltd. v. Quon Shih-Shong*, 199 A.D.2d 73, 605 N.Y.S.2d 35 (1 Dept. 1993).

⁷² *Burriesci v. Paul Revere Life Ins. Co.*, 255 A.D.2d 993, 679 N.Y.S.2d 778 (4 Dept. 1998).

⁷³ *Lucido v. Mancus*, 49 AD3d 220, 851 NYS2d 238 (2d Dep’t 2008)

⁷⁴ *Stauber v. Brookhaven Nat. Laboratory*, 256 A.D.2d 570, 683 N.Y.S.2d 569 (2 Dept. 1998).

true and accord plaintiffs the benefit of every favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory.”⁷⁵

21) CPLR 3031 - 3037. Simplified procedure for court determination of the disputes

- a) Although this visionary approach to resolving disputes has been on the books since 1962 there have been relatively few cases invoking its provisions. There is only one annotation in McKinney’s section on CPRL 3031. I would like to use this pulpit to encourage more to try it.
- b) As it requires a contract to submit, it is generally not for tort actions,⁷⁶ but parties to a tort action might agree to use this procedure.
- c) Essentially it may be viewed as arbitration, but before a real judge.
- d) Contrast it to arbitration, but cheaper than most commercial arbitration forums, and with advantages.
 - i) It is a creature of contract.
 - ii) It is speedy, doing away with summons and pleadings.
 - iii) Most rules of evidence are dispensed with, but substantive legal rules still govern.
 - iv) Pretrial disclosure allowed, if permitted by court.
 - v) No jury trial, except as to issues of whether a contract to submit or a submission was made or complied with.
 - vi) Judgment may be appealed by permission, but will be final if there is any substantial evidence to support it.
- e) CPLR 3222 differs, requiring an agreed statement of facts, and envisioning no trial.

22) CPLR 3041-4. Bills of Particulars to Amplify Pleadings vs. CPLR 3130 – Interrogatories.

- a) A demand for a bill of particulars seeks amplification of the claims or defenses in an adversary’s pleading.
 - 1. Demands for bills of particulars must be confined to issues on which the responding party has the burden of proof.
 - a. They cannot properly be used to obtain facts from other parties relating to claims of defenses asserted in the proponent’s own pleadings.
 - b. The pleader "will be required to specify the statutes, laws, rules or regulations claimed to have been violated." *Sacks v. Town of Thompson*, 33 A.D.2d 627, 304 N.Y.S.2d 729 (3d Dep't 1969).
 - c. Demand can be made of the defendant relative to its defenses and counterclaims.⁷⁷

⁷⁵ *Nonnon v. City of New York*, 9 NY2d 825, 842 N.Y.S.2d 756 (2007), quoting *Leon v. Martinez*, 84 NY2d 83, 87-88 (1994); *Natural Organics, Inc. v. Wilbert Smith*, 38 A. D. 3d 628, 832 N.Y.S.2d 76 (2d Dep’t 2007) (Court must “determine only whether the facts as alleged fit within any cognizable legal theory.”)

⁷⁶ *New York Kandy Kard Corp. v. Barton’s Candy Corp.*, 32 A.D.2d 513, 298 N.Y.S.2d 562 (1st Dep’t. 1969).

⁷⁷ *McLean by Brunell v. Huntington Hosp.* 227 A.D.2d 533, 642 N.Y.S.2d 951(2 Dept. 1996); *Bycel v. Freeman*, 1978, 95 Misc.2d 270, 406 N.Y.S.2d 975.

- d. They are not intended to be used to obtain evidence,⁷⁸ but this rule is not inflexible.⁷⁹
2. Interrogatories can seek facts and evidence both on the issues upon which the proponent and the responding party have the burden of proof. And, like demands for bills of particulars, they can also seek contentions of the responding party, if properly drafted.
3. The problem is that the pleader generally must make choice between these two, somewhat overlapping, procedures. Except in a matrimonial action, a party may not serve both a demand for a bill of particulars and interrogatories upon another party.⁸⁰
4. One is hard pressed to find a case in which a demand for a bill of particulars should be chosen in place of interrogatories, since the latter can be used to “amplify” the allegations of the adversary’s pleading and obtain an itemization of its claims as well as obtain disclosure of the factual basis for the claims and defenses of all parties.
5. In negligence action, the choices are negated by the rule that a party may not serve both interrogatories on and depose the same party without leave of court. In such cases, most parties opt for a bill of particulars followed by depositions.
 - a. Consideration should be given, in multiparty cases, such as actions against a corporate and an individual party on the same side, to seeking interrogatories from the corporate parties and deposing the individual party.
 - b. This restriction is inapplicable to other actions, such as commercial actions, where one typically will require responses to interrogatories before conducting depositions of the same party.
6. Federal rules abolished the bill of particulars. The CPLR should follow suit. *See, McKinney’s Practice Commentary, C3130:4*

APPENDIX “A”

Official Forms of the Judicial Conference⁸¹

⁷⁸*State of New York v. Horsemen's Benevolent and Protective Ass'n*, 34 A.D.2d 769, 311 N.Y.S.2d 511 (1st Dep't 1970); *Yardarm Club Hotel, Inc. v. Morgan*, 22 A.D.2d 700, 253 N.Y.S.2d 920 (2d Dep't 1964).

⁷⁹ *Twiddy v. Standard Marine Transport Services, Inc.* 162 A.D.2d 264, 556 N.Y.S.2d 622 (1st Dep't 1990).

⁸⁰ *See, Spierer v. Bloomingdale's*, 17 A.D.3d 252, 793 N.Y.S.2d 403 (1st Dep't 2005); *Sassower v. New York News, Inc.*, 101 A.D.2d 1020, 476 N.Y.S.2d 698 (4th Dep't 1984).

⁸¹ This sampling of the Official Forms is to illustrate the simplicity of notice pleading intended by the committee drafting the CPLR. A more exhaustive listing and examples related to several common causes of action, can be found in McKinney’s Forms §3:74, 75 (Impleader and Declaratory Relief); 4:26

Official Form 4 – Allegation of Incorporation

Plaintiff is a corporation incorporated under the laws of the [State of New York].

Official Form 6 – Complaint for Goods Sold and Accepted

SUPREME COURT OF THE STATE OF NEW YORK
County of New York

A.B.,		
	Plaintiff,	
-against-		Complaint
C.D.,		Index No.
	Defendant.	

Defendant owes plaintiff twenty thousand dollars for goods sold to, and accepted by, defendant between June 1 1966 and December 1, 1966.

Wherefore plaintiff demands judgment against defendant for the sum of twenty thousand dollars, interest and costs and disbursements.

[Print name]

.....

Attorney for Plaintiff

Address:

Telephone Number:

Official Form 8 – Complaint for Goods Sold, Delivered and Accepted
With Schedule Annexed

(Negligence in Automobile Accident); 4:77 (Money lent); and a variety others. See, also, Siegel, New York Practice, 4th Ed. (Answer, p. 377

[Venue and Caption]

Complaint Pursuant to

CPLR 3016(f)

Defendant owes plaintiff twenty thousand dollars for the goods set forth in Exhibit A, annexed hereto, which were sold and delivered to, and accepted by, defendant between June 1, 1966, and December 1, 1966.

Wherefore plaintiff demands judgment against defendant for the sum of twenty thousand dollars, interest, and costs and disbursements.

[Print name]

.....

Attorney for Plaintiff

Address:

Telephone Number:

[Verification required; see Form 20]

Proposed Official Form 8 – Complaint for Good Sold, Delivered and Accepted,
With Itemization under CPLR 3016(f)

(Venue, Caption)

Complaint Pursuant to

CPLR 3016(f)

Plaintiff alleges:

Defendant owes plaintiff twenty thousand dollars for goods sold, delivered to, and accepted by, defendant between June 1, 1977 and December 1, 1977, as follows:

Item

Reasonable Value [or] Agreed Price

(1) [Separately number and

[State Dollar Figure]

Identify each item of the claim]

Wherefore, plaintiff demands judgment against defendant for twenty thousand dollars, interest, and costs and disbursements.

[Print name]

.....

Attorney for Plaintiff

Address:

Telephone number

[Verification required; See Official Form 22]

Official Form 10 – Complaint for Money Paid by Mistake

[Venue and Caption]

Defendant owes plaintiff twenty thousand dollars for money paid by plaintiff to defendant by mistake on June 1, 1965, under the following circumstances: *[here state the circumstances with particularity—see, CPLR 3016(b)].*

Wherefore plaintiff demands judgment against defendant for the sum of twenty thousand dollars, interest from June 1, 1965, and costs and disbursements.

[Print name]

.....

Attorney for the Plaintiff

Address:

Telephone Number

Official Form 12 – Negligence in an Automobile Accident

[Venue and Caption]

1. On June 1, 1966, in a public highway called Broadway in New York City, defendant C.D. negligently drove a motor vehicle against plaintiff who was then crossing the highway.

2. That motor vehicle was then owned by defendant E.F. and driven by C.D with defendant E.F.'s permission.

Official Form 20 – Verification by a Party

STATE OF NEW YORK
CITY OF BUFFALO
COUNTY OF ERIE⁸²

A.B., being duly sworn, states that he is the plaintiff in this action and that the foregoing complaint is true to his own knowledge, except as to matters therein stated to be alleged on information and belief and as to those matters he believes it to be true.

.....

(Jurat)

Proposed Official Form 22 – Verification by a Party

STATE OF NEW YORK
COUNTY OF NEW YORK

I, A.B., being duly sworn, state: I am the plaintiff in this action. The foregoing complaint is true to my own knowledge, except as to matters therein stated to be alleged on information and belief and as to those matters, I believe it to be true.

.....

(Print signer's name below
signature)

(Jurat)

⁸² Note that the 'SS.' in the venue has been omitted. Its meaning is somewhat obscure and in any event, its omission is immaterial. See, *Babcock v. Kuntzsch*, 85 Hun 33 (18985).

APPENDIX B

Sample Marked Complaint and Answer