

## Practitioner's Playbook: The Complaint

By Erin Coe

Law360, San Diego (March 18, 2015, 3:02 PM ET) -- When attorneys are drafting a complaint that will lay the foundation for the rest of their client's case, they should remember that they are only going to get one chance to make a good first impression.

Launching a suit gives the plaintiff the first-move advantage to frame the issues in the case, and it's an opportunity the plaintiff's attorney doesn't want to squander, according to Andra Greene, an Irell & Manella LLP partner who focuses on complex business litigation.

"Filing a complaint sets the stage for the case and is a very powerful position to be in," she says. "When I prepare a complaint, I make sure that it is thoroughly investigated before filing, that my legal theories are sound, and that I present the case in a way that is supported by the facts. It's important that I tell a story that I am comfortable with, because I'll be living that story."

Getting the facts in the complaint right at the outset is also crucial. Once claims are made in the pleading, it can be difficult to take back any mistakes, according to Marc Jacobs, a Michelman & Robinson LLP partner who handles complex litigation.

"A poorly pleaded complaint can create problems for the plaintiff and give the defendant a lot of ammunition to drive down the value of the case or dispose of the case," he says.

Here, experts offer six steps for making sure a plaintiff attorney's first filing in a case gets off to the right start.

### Know Your Client From All Angles

While clients may come running to their attorneys claiming they are victims of patent infringement that makes the Apple v. Samsung smartphone patent saga look trivial by comparison, it's up to the attorneys to dig into the evidence to see what kind of case they really have.

Lawyers must scour all relevant documents and applicable contracts, and interview their client and potentially other witnesses to ensure the attorneys understand the facts underlying the dispute and any limitations the client's case may have, according to litigators.

"Lawyers need to be up front with their clients that they can't file an effective complaint unless they know the good, the bad and the ugly before they file a case," says Jordan Sigale, a director at intellectual property boutique Dunlap Codding PC.

Before Sigale files suit for a client, he finds out what the defendant may have against the plaintiff.

"Anytime a plaintiff sues, the defendant can sue back," he says. "I like to ask my clients, 'If we go to court, the defendant will be looking for counterleverage. What will that be? If we raise an issue

in a suit, will it remind the defendant of a wrong you made against the defendant?"

Sigale recalls a client who wanted to sue a company for intellectual property infringement, but when Sigale did an investigation, he discovered that the company his client wanted to sue was wholly owned by another entity that had financial ties to his client.

"My client was not directly employed by the entity, but it was important for his livelihood," Sigale says. "I went back to my client and said, 'Before we sue this company, you should know it's wholly owned by the entity that gives you money.' ... We decided not to sue."

Attorneys for plaintiffs should conduct interviews and review all important documents during the investigation stage to ensure the allegations in a complaint are consistent, according to Jacobs.

"It should never be the first time you're seeing your client's documents when the defendant is asking for them in discovery," he says. "The failure to investigate and really know the facts, especially in a complex case, is a big mistake."

### Say Only What Is Needed

Attorneys have to balance telling a compelling story in their complaint with being able to prove it, according to Greene.

"It's important that you don't oversell the story," she says. "Often at the beginning of a case, you may think you know what the facts are, but you don't know everything. It's better to underpromise and overperform when it comes to what you're going for in a complaint. That way, you're not harmed by what is stated in the initial court filing."

In an ongoing false advertising case against one of Greene's clients, a plaintiff painted a dire picture of wrongdoing in the complaint but misquoted emails and omitted key parts of the communications, she says.

"We filed a detailed answer to show the plaintiff misrepresented the facts," Greene says. "The documents were available in discovery, and the plaintiff eliminated whole parts of the emails and took them totally out of context. It was easy to point that out, and it harmed the credibility of the plaintiff from the beginning."

Attorneys sometimes mistakenly focus solely on their client's case without anticipating how the defense will respond, according to Grant Esposito, a partner at Morrison & Foerster LLP with experience handling IP, product liability and securities cases.

"When drafting a complaint, you should research motions to dismiss [for] the claims you want to assert," he says. "Then use that information to bulletproof the complaint."

At the same time, complaints shouldn't try to allege too much, Jacobs says.

"Putting in too many facts and anticipating too many defenses create problems for the plaintiff," he says. "More facts put the complaint at greater risk of facing arguments of inconsistencies. And it can give the defendant ammunition to throw the complaint out."

If a professional negligence complaint lists the date a wrongful act was discovered or dates when conduct became problematic, this can subject the complaint to a statute of limitations attack or other affirmative defenses before the plaintiff has a chance to look at discovery documents and depositions, according to Jacobs.

When they are drafting complaints, attorneys should know the causes of action and the elements of those causes of action and provide no more and no less, he says.

## Keep Your Audience in Mind

When writing a complaint, attorneys should also ask themselves what they are trying to achieve for their client and who their audience is, according to Sigale.

While the judge will always make up part of the audience, perhaps the attorney wants to craft the complaint with the objective that the case will make it to a jury, he says. Or in other circumstances, the attorney may want to show the defendant a copy of the complaint before it is filed to see if the defendant would rather resolve the dispute early than see the complaint made public, according to Sigale.

"Maybe you decide to give a courtesy copy to your opponent to see if they will settle to keep you from filing the complaint," he says.

Showing complaints to defendants before they are filed is a fairly common practice in IP law, and it also happens in other cases, including antitrust matters, Sigale says. "It's a way for the plaintiff to tell the defendant there's a problem, and here's a chance to rectify it."

Federal Rule of Civil Procedure 8 requires that a claim for relief include a "short and plain statement" of the claim showing that the plaintiff is entitled to relief. U.S. District Judge Andrew J. Guilford of the Central District of California says litigators should take the "short and plain statement" to heart, rather than trying to dump everything and the kitchen sink into the complaint.

"New cases that fall under Twombly seem to require more than a 'short and plain statement,' but still, whenever possible, plaintiffs should remember that less is more," Judge Guilford says. "Complaints with 'storybook' pleadings that turn a 10-page complaint into a 100-page complaint [should be avoided]."

## Consider Who Will Pay

Before filing, attorneys who are representing plaintiffs also should examine whether the defendant has the money to pay for the claims and, if not, whether the defendant can plead a cause of action that will trigger an insurer's involvement, according to Jacobs.

"There are so many different insurance policies that may cover different claims," he says. "If an attorney is drafting a complaint seeking recovery for the plaintiff and doesn't want to deal with a defunct or deadbeat defendant, the attorney may want to give some thought to pleading allegations that could trigger coverage."

Personal injury allegations or claims based on a negligent act or an individual's breach of duty tend to be covered claims, he says.

If an attorney is worried a defendant may not respond to the suit or may file for bankruptcy, the complaint should specify the amount of recovery the plaintiff is seeking, according to Jacobs.

"If the complaint fails to allege a precise amount of dollars, the plaintiff can't get a default judgment, and it can be difficult to file for summary judgment as a plaintiff," he says. "By including a precise amount, it can help the court come up with a precise dollar figure."

## Be Wary of Lobbing Irrelevant Claims

When adding allegations to a complaint, attorneys should be careful about making personal attacks, especially ones that are unsupported by the facts of the case, according to Greene.

"Sometimes being inflammatory can be counterproductive and creates a lot of issues and bad feelings that really aren't necessary to the litigation," she says. "In my experience, judges tend to

take these attacks with a grain of salt. But in cases where individuals are involved, they remember personal attacks, and they can be a tremendous impediment to a resolution.”

Complaints that raise questionable, unrelated allegations can put the plaintiff at risk of a defamation claim, according to Judge Guilford.

“If a plaintiff is suing over a contract, and in the middle of the complaint, the plaintiff claims the defendant abuses children, and that has nothing to do with the complaint, the plaintiff can face defamation liability,” he says.

### Double-Check Your Work

Filing a complaint requires attorneys to think carefully about what claims to bring, who the appropriate defendants are and what remedies to seek. But the small details matter too, and neglecting them can easily undermine one’s case.

“It may seem insignificant to misname a defendant as an LLC, versus Inc.,” Sigale says. “But it shows you’re sloppy, and opposing counsel will look at you differently for the rest of the case.”

Other careless mistakes might include failing to mention in a trademark case that a client uses the mark in interstate commerce, which is required if the plaintiff wants to make a federal claim, or seeking a remedy of a permanent injunction without stating how the client was irreparably harmed.

Sigale says he always has the relevant statute open in front of him when deciding jurisdiction and venue provisions.

“It doesn’t matter how often I rely on the statute, I never, ever, ever file a complaint without opening up the statute and making sure I remember it correctly,” he says. “If the plaintiff screws up on jurisdiction, there is no easy way to fix that without redrafting the complaint.”

--Editing by Kat Laskowski and Edrienne Su.

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