Reprinted with permission from the New York State Bar Association Journal, January 2004, Vol. 76, No. 1, published by the New York State Bar Association, One Elk Street, Albany, New York 12207.

SANFORD F. YOUNG, of the Law Offices of Sanford F. Young, P.C., has been practicing law in New York City since 1977 (www.nylitigator.com). His practice focuses on complex litigations and civil appeals in New York, New Jersey and Pennsylvania. A member of the New York County Lawyers' Association's Appellate Courts Committee, he has handled numerous litigations and more than 300 appeals. He is a graduate of Brooklyn College and received his J.D. degree from the Syracuse University School of Law.
JAN ROTHMAN, an associate, assisted in the preparation of this article. She is a graduate of Boston University and received her J.D. degree from Rutgers Law School.

Advanced Litigation Techniques

Conventional Wisdoms or Mistakes: The Complaint and the Response

This is another in a planned series of articles devoted to litigation techniques. An article in the January issue explored how to create a team-like effort with the client, together with an overview of strategy, tactics, risk assessment and innovation, and dealings with adversaries.

This article looks at how to formulate and implement strategy and tactics, beginning with planning and commencing the suit. It assumes that the facts are understood, the key documents have been gathered, the essential research is complete, and a "reality check" has been done on both the merits of the case and the client's reliability and veracity.

BY SANFORD F. YOUNG

Significant and deliberate strategy decisions must be made for beginning an action or responding to the complaint, as well as initiating discovery. These decisions and their implementation will have a pervasive effect on all subsequent proceedings and the eventual outcome of the contest.

Initial Strategy

Sue first, ask questions later.

Upon being retained to litigate a dispute, the initial question is what is the first step: send a demand letter, explore alternative dispute resolution or commence suit?

Other than small nuisance cases and minor personal injury claims, pre-suit demands are not likely to be worthwhile. They serve only to postpone the inevitable. In the past, a lawyer's letter may have been an effective strategy to gain a party's attention and give the opponent an impetus to settle without the need for litigation. Today, however, most individuals, and almost

every business, have been conditioned to the point that lawyers and litigation are accepted as a necessary evil. Hence, in most cases you can assume that by the time you are retained, your client is ready and anxious to throw down the gauntlet and serve papers.

Nevertheless, there may be specific circumstances in which a pre-suit demand is desirable. Such situations may be the rare case where the parties are susceptible to the rational influence of new faces — the attorneys — to bring them to the bargaining table. Obviously, the most rationale reason is that settlement avoids substantial cost and eliminates risk. Other reasons may be to clarify or solidify the parties' positions or where a pre-suit demand is required by contract or statute.[1] A pre-suit letter is also a way of testing, to a small degree, your client's willingness to engage his or her adversary — especially when there is some continuing relationship or dependency on the adverse party, such as an employer, partner, supplier, customer, trade organization, government agency, relative or friend.

Alternative dispute resolution (ADR) may also be considered, whether in the form of non-binding mediation or binding arbitration. ADR's are typically used when required by agreement, which is often the case in certain industries, or if required by the court, as may be true in some federal courts.[2] Otherwise, the parties will have to give their consent, which is difficult to obtain once the parties are feuding. When using a commercially available mediation or arbitration service — "rent-a-judge" — the cost can be substantial with hourly rates commensurate with that of other highly experienced attorneys.

In the case of binding arbitration, there are many considerations that can be looked upon both as pros or cons. First, most arbitrations are final and non-reviewable, subjecting the parties — much to the delight of the winner and chagrin of the loser — to a binding and final decision without any right of meaningful review.[3] Second, discovery is usually very limited. Third, arbitrations are rarely, if ever, resolved by pre-hearing dispositive motions (*e.g.*, dismissal or summary judgment). Fourth, rules of evidence are generally only loosely applied, with hearsay statements (including affidavits) and documents usually freely admitted. Fifth, the conventional wisdom is that ADR's are more likely to result in compromise awards than court actions. Sixth, while ADR proceedings are expected to be rapid and efficient, they too can get bogged down and take longer than expected.

On balance, other than specific areas of law where arbitration has become the norm (such as labor, stock brokerage and various contractual, construction and insurance matters), most attorneys are more comfortable with and prefer litigating cases in conventional courts, where the rules of evidence and case precedents are more predictable and strictly applied, and juries and appeals are available.[4]

Most lawyers find that commencing suit is the most committal act of litigation. Once filed, the lawyer is legally obligated to the case and client, unless relieved by the client and/or court.[5] For that reason alone, your retainer should be sufficient to carry you a substantial way into the case. Commencing suit is also the act that best secures your statutory lien.[6]

Whom to Sue and Where

Keep it simple.

Many attorneys have a tendency toward overly complicating the case. Those tendencies include naming too many parties and drafting long and verbose complaints as if they were trying to prove their case and convince the defendants of the error of their ways in one fell swoop. These are poor strategies that you will pay for may times over. The best complaint and the most successful suits are those that are simple and well focused.

Often, the initial impulse is to sue as many parties as can be named — *sue the world*! It is thought that the more parties you sue, the more likely someone will settle and the more parties among whom liability can be spread when judgment day comes. However, except in a small number of situations, this is a poor strategy. By suing more than one or two parties, you exponentially increase the complexity, cost and length of the case. From a plaintiff's point-of-view, numerous defendants means fighting numerous attorneys, impossible scheduling delays and often getting caught in the delay caused by their cross-fires. On the other hand, from the defendant's standpoint, it is a field day to gang-up on the plaintiff and prolong the case.

Of course, there are critical exceptions where multiple defendants may be necessary or desirable — notwithstanding the increased cost and delay. An example may be where the ultimately liable party may not be known, such as in a product liability, medical malpractice, construction or other complex tort case, where multiple actors were involved in the events leading up to the injury. Similarly, apportionment rules may necessitate suing all potentially liable parties so as to avoid the risk and legal malpractice of liability being assessed against the "empty chair."[7] However, there may be strategic reason for not suing critical actors. Those situations often arise in the case where you are suing negligent parties whom you are trying to hold liable for the acts of an intentional tort feasor (such as the one who committed an assault) who is judgment proof and has little or no insurance.[8] In those cases, even though the risk of apportionment is great, the presence of the intentional tort feasor in court may exacerbate that problem. In any event, you should be sure that the client is informed of and agrees to the decision to omit critical defendants.

Suing multiple defendants in tort cases also creates a problem if you want to settle with, or otherwise need to discontinue against, less than all parties. The General Obligations Law will automatically release the remaining parties of the proportionate share of liability of the released party, even if their settlement payment was minimal.[9]

Some attorneys also name witnesses as defendants for the singular purpose of obtaining discovery against them. This tends to be a more common practice in certain types of cases such as medical malpractice. Aside from the impropriety of this strategy, there are pros and cons. On the one hand, it is true that it is generally easier to obtain discovery from a party than from a disinterested and unmotivated non-party witness against whom sanctions for non-production

are limited to the drastic remedy of contempt.[10] On the other hand, aside from the risk of sanctions for bringing a frivolous suit by naming them as a party, you will encounter the resistance of their defending counsel, who may impose roadblocks and delays, such as motions to dismiss and insisting on priority of discovery.[11]

Some attorneys overrate the use of class actions and seize upon the first opportunity to bring one. However, the use of a class action must be well thought out, because it is a species unto itself. While class actions are obviously suited to cases where there is great numerosity of plaintiffs, for whom bringing separate actions would not be feasible or possible, there are costs and concerns that come with the field. First, you need to prove the standards for bringing the class, including your own standing and ability to represent the class.[12] In that regard, other class action attorneys may join in the fray with their own representative class plaintiffs and thus battle you for control and the lion's share of the fee. Second, you will need to move the court to certify the class within the early time limits required by the rules[13] — which application will often result in a cross-motion to dismiss before you have had meaningful discovery. Third, while the prosecuting attorney may believe that the class action may result in a substantial fee, it will be subject to judicial scrutiny, and the court will likely base the fee on factors such as time spent, rather than the formalistic percentages typically used in traditional named-plaintiff actions.[14] Fourth, from the point of view of individual claimants who have a substantial loss — such as in mass or toxic tort cases — becoming part of a class may diminish the claimants' ability to settle their individual claims, which will become lost in a sea of claims where the value of each class-member's claim is diluted and prolonged. Hence, if you are able to sign-up significantly injured plaintiffs, bringing suit as named plaintiffs — whether individually, one large action or joined or consolidated actions — may be the better way to go.

The choice of court and venue is another area where simplicity and common sense should guide. Those considerations obviously include convenience (yours and the clients), the known characteristics and biases of the local jury pool, and the length of waiting times to get to trial. Other considerations include the accessability of non-party witnesses, the quality of the local bench and how well connected or regarded you and your likely adversaries are in that venue. In cases where there may be significant legal issues or verdicts, you should also consider which venues and appellate courts and are most likely to rule in your favor, especially where there are critical conflicting precedents, new law to be made or potentially large jury awards to be reviewed.

In diversity cases, some attorneys jump at the opportunity to sue in the federal courts. This may be a poor strategy, however. Practitioners not accustomed to litigating in federal court may be surprised to find themselves in a court that is more suited and favorable to non-diversity cases, such as those involving federal questions, and that may well be less patient with run-of-the-mill cases, extended discovery,[15] and lack of adherence to the federal court's rigid requirements for discovery, scheduling, briefing and pretrial motions.[16] The risks of sanctions

are also greater,[17] especially if you are making "novel"arguments that may inhibit how aggressive you would otherwise be. The limited availability of appellate review — *i.e.* that appeals are generally only allowed from final orders and judgments,[18] may also leave the parties with little recourse when faced with unfavorable District Court judges and ruling. And, when an appeal is allowed, the practitioner will be surprised by the stringent appellate rules and short deadlines, as well as the continuing threat of sanctions.[19]

Drafting the Complaint

Less is more.

Having decided whom to sue and where, you are now down to the business of drafting the complaint. Here, you should be clear on your objective and prioritizing your goals.

First, the main goal is to state a legally cognizable claim. Second, to state the claim in a way that would either minimize inviting a motion to dismiss, or, more specifically, avoid dismissal. Third, to increase the chances of gaining admissions, without giving too many. Fourth, to clearly outline the various theories of the case as a template for future strategy. Fifth, to avoid inviting excessive requests for disclosure. There may also be a goal of convincing the adversary of the merits and resolve of your case, but that goal is not generally achieved by any one single part of the litigation. It is achieved by the entire strategy and implementation: winning at trial or by dispositive motion. It is that well-focused resolve that will enhance the chances of settlement.

As for the first priority, we all know that modern jurisdictions, such as the federal courts, ostensibly require only notice pleadings[20] with only a bare bones statement of the case. Nevertheless, various types of cases have minimal requirements such as that some types of claims (*e.g.*, fraud) be stated with particularity[21] or other pleading requirements.[22]

For cases that are beyond the garden variety claims of personal injury or simple breach of contract, you should be concerned about the potential for a motion to dismiss. Here, the quality and style of the pleading is critical in both reducing the invitation to the defendant to move, and should the motion be made, enhancing your ability to successfully defend against a dismissal motion. Obviously, that begins with researching and applying current law and requirements before you draft the complaint, knowing all available causes of action and then being sure to allege all necessary elements of each cause of action claimed.[23]

A well-drafted complaint should be easily understood and organized in some logical order, which is most often in rough chronological order of how events unfolded. The complaint should not be rambling or verbose; lengthy and prolix complaints are likely to invite motions. Organizing the complaint often includes dividing it into various sub-headings, such as for jurisdictional allegations, identifying the parties, alleging the facts applicable to all causes of action and then stating each individual cause of action (*i.e.*, legal theory). Each cause of action can also be labeled with the theory (*e.g.*, Breach of Contract, Fraud, etc.) being invoked, and if

numerous parties are named, labeled with the identification of the parties against whom it is being asserted.

In very complex cases, an introductory paragraph can be used. In framing each numbered paragraph, aim for single-sentence paragraphs, and ideally, reasonably short sentences.[24] Second-level lettered sub-paragraphs (*e.g.* a, b, c, etc.) can be used to describe elements of a complaint, or to describe the essential factual elements of the respective causes of action, such as a claim for fraud.[25] However, first-level numbered paragraphs are preferable to assure getting specific responses in the answer.

Keep in mind how the complaint will be read by your adversary, who will be looking to move to dismiss, how it will be perceived by a court considering such a motion, and how you will use the complaint to your advantage to defend against the motion. In other words, think of what you will want the complaint to contain, if and when the motion is made, rather than wait for the motion and hope for the best, or need to struggle for leave to amend and replead.

Be clear on what relief is requested for each cause of action, and keep monetary claims separate from equitable. For the latter, be sure to include required allegations, such as when there is "no legal remedy" or "irreparable harm." The complaint can allege inconsistent claims,[26] but try to do it in a way where your client — who is likely unfamiliar with the fine legal nuances — cannot be harshly cross-examined when the time comes.

Although it is difficult to obtain substantial admissions, an effort to try to pin down the defendant is worthwhile. That is done by alleging each fact in short, concise, separately numbered paragraphs. As you draft the allegations, strive to make it difficult for the defendant and the defendant's counsel to avoid giving admissions. Avoiding an admission is easy when lengthy paragraphs contain numerous factual and legal allegations, any one of may arguably be deniable. Also, the use of verified pleadings — unique to New York State — may be marginally useful.[27]

Keep in mind the scope and number of discovery requests that the complaint may elicit from the defendant, whether by way of document requests, interrogatories, and to a lesser extent, depositions. The longer the complaint and the greater the number of facts alleged, the greater the discovery you will be asked to give.

Documents can be annexed to the complaint,[28] but this approach should only be used sparingly and deliberately. If documents are annexed, it may make it easier for the defendant to move to dismiss, because there is something concrete to attack.[29] Nevertheless, there may be tactical reasons to annex and refer to critical documents, such as the contract or vital predicate notices or orders, or to obtain specific admissions, such as to authenticity.

Court rules usually give the right to amend once without leave of court, but that right ends soon after all responsive pleadings are completed.[30] Thereafter, leave of court is required. Leave is typically said to be freely given when there is merit and minimal prejudice,[31] but it is not wise to start the action with a plan to amend later on. That is a risky strategy, except in

special situations, such as where you need to commence suit hastily to make the statute of limitations. Try to make the initial pleading as complete and strong as possible, so that the case does not depend on an amendment.

Although the CPLR provides for other means to commence suit, such as a "motion for summary judgment *in lieu* of complaint" to recover "upon an instrument for the payment of money only or upon any judgment,"[32] a normal plenary action is generally preferable. Motion procedure is cumbersome — you need to prepare a formal motion (with notices, affidavits and exhibits, as well as a summons) and pick a return date based upon your guess of how long it will take to make service. Second, motions provide the defendant with additional procedural defenses that slow down the process, rather than speed it up. Last but not least, if the defendant defaults, as many often do in cases brought on instruments (*e.g.* notes) and judgments, obtaining a default judgment will be complicated and delayed by the possible need for a court order deciding the motion, when under a normal plenary action, it could simply be entered by the clerk.[33]

Responding to the Complaint

To Answer or Move, that is the Question.

Have you ever noticed that in a significant number of complex or large law suits, the first response by the defendants is to move to dismiss, rather than answer? While there are many reasons that militate in favor of moving to dismiss, there are only a few against it.

The reasons for moving to dismiss are: (1) it is the first of several possible *bites of the apple* to dismiss the case[34]; (2) until you answer, the plaintiff cannot cross-move for dispositive relief;[35] (3) the motion is a good opportunity to test the legal sufficiency and validity of some or all claims; (4) even if the motion doesn't eliminate the entire case, it may eliminate some causes of action, as well as possible remedies; (5) eventually, and the sooner the better, you should research and analyze the plaintiff's theories, and the motion puts that expense to practical use; and (6) it creates an opportunity to approach settlement at a point in which you create uncertainty for and shift the burden of work to the plaintiff.

The main disadvantage for moving to dismiss are: (1) it is expensive; but part of that expense would be inevitable as the research and analysis must be done; (2) it can result in an adverse decision that becomes *the law of the case* and may lock your party into unfavorable legal position (which may not have happened if you had waited for discovery); and (3) the denial of the motion may fortify the plaintiff's expectation of success down the road, and thus intrench its future settlement posture.

Among the most underutilized procedural tools is the motion to dismiss based upon documentary evidence.[36] Thus, while we may traditionally understand that motions to dismiss are based solely upon the allegations within the four corners of the complaint, it is possible to go beyond. Examples of documentary evidence typically used are documents that are the subject of and contemporaneous with the events that are the subject of the complaint; *e.g.*, contracts, leases,

notes, mortgages, deeds, insurance policies, and the like.[37]

Other possible grounds to move for dismissal include failure to state a cause of action, lack of jurisdiction, running of the statute of limitations, etc. You should also be sure to meet other stringent time requirements, when applicable, such as for removing cases to the federal courts[38] or contesting improper venue.[39]

Answering the complaint is one of those laborious tasks that just have to be done. It is also a task that, when done correctly, requires detailed information from the client. Make the answers as precise as possible. If necessary, qualify the denial with more specific statements.

Whether moving or answering, it is critical to follow the rules closely so that various defenses are preserved. The rules provide a non-exclusive list of "affirmative defenses"[40] as well as other grounds for dismissal,[41] and all must be asserted either by motion or answer.[42] Many attorneys automatically allege a laundry list of affirmative defenses, whether applicable or not, in their answers.[43] Special rules apply to *in personam* defenses, which must be asserted in the first response to the complaint — whether via motion or answer, or else waived.[44] If lack of proper service is asserted in the answer, a motion to dismiss on those grounds must be made within 60 days.[45]

Unlike federal practice, the CPLR does not have a compulsory/permissive counterclaim rule.[46] Thus, in state court, strategic decisions must be made about whether to assert related counterclaims or cross-claims. In either forum, such decisions must be made with regard to whether to assert unrelated claims, or leave that to a separate suit. Decisions also need to be made about joining — impleading — parties.

Discovery

Take control.

At the earliest opportunity, whether you are the plaintiff or defendant, stake your claim to discovery by serving your demands and notices. If you are the defendant in state court, you have the automatic right to preserve your priority of depositions and interrogatories by serving your notices with the answer.[47] Priority can be pivotal, because it gives you a leg up on learning the adversary's case, places the greater burden on the adverse party, who must now respond, and gives you greater control over the proceedings that follow. At times, however, there can be advantages in allowing adversaries to take the first depositions, particularly if their questioning is likely to provide insights into the facts and theories of their case.

There are various discovery devices available,[48] most of which are not substitutes for, but rather complementary to, each other. When used in concert and in proper order, they allow for the best opportunity to gain the most complete discovery, and to get it in an organized order and fashion. Those devices include:

- discovery and inspection of documents
- interrogatories or demand for a bill of particulars

- discovery and inspection of things and places
- depositions (of parties and non-parties)
- notices to admit
- expert information
- accident reports
- insurance information
- photographs, video and audio recordings
- physical and mental examinations
- names and addresses

Initial discovery demands should almost always consist of a demand for documents, questions in the form of interrogatories or a demand for a bill of particulars, and in New York state court, a notice to take deposition. In organizing the order of discovery, every effort should be made to complete the documentary production and responses to interrogatories (or bills of particulars) before depositions are taken. Other discovery may follow.

Bills of particular are unique to New York practice.[49] While there may be some technical advantages to using a bill — which I have yet to figure out — there are significant disadvantages. Demands for particulars are limited to merely seeking amplification of affirmative allegations of the pleadings, they cannot be used for obtaining evidentiary information and material.[50] By contrast, interrogatories, which must be sworn to by the party,[51] are not limited and can cover any material relevant to the case.[52] The CPLR requires that you make a choice between demanding a bill or using interrogatories.[53] Given the choice, opt for interrogatories. In personal injury cases, the CPLR *suggests* the use of a demand for a bill of particulars, because it provides that interrogatories and a deposition may not be sought from the same party.[54] The CPLR also prescribes the questions that may be asked in a demand for a bill in personal injury cases.[55]

Drafting a well-crafted set of interrogatories and demand for documents is a time-consuming and exacting process, which requires a high degree of organization and intuition. The project is a top-down process whereby your questions and requests cover a range of subjects, each going from the general to the specific. General items are those that ask about all communications between the parties or that relate to the dispute; all agreements between the parties or that relate to the dispute, and so forth. Specific questions are those that cover the facts and documents specifically related to the allegations of the complaint or answer, as well as what are specifically known or, by intuition or logic, likely to exist.

The idea is to learn whatever you can about the adversary and all the transactions, then pin the other side down on details so it has no wiggle room. If you are successful, your demands will create a great deal of discomfort for an adversary who may be more used to or desires to be evasive. Be aware, however, that your questions and demands can be thrown back at you. Therefore, your demands and eventual responses should be consistent with what you expect from your adversary. In other words, do not ask anything that you are unwilling to answer yourself.

Also, be prepared when the time comes, to compel further answers and/or defend against a motion for a protective order by being able to justify the relevance and burden for each question and demand you make.

Asking the right questions is only half the battle. The other half is maintaining the stamina and determination to compel complete responses. Make a careful review of the adverse party's initial responses, including its objections. In almost every complex case, there will be objections that need to be challenged, and the initial production and answers will not be complete, perhaps to the point of being evasive. Soon after receiving the response, draft a detailed letter outlining the deficiencies in the response, and if possible, tie it in to the timetable for your own responses (*e.g.*, condition your response, if you have priority, on the adversary's). Be prepared to follow up with further "deficiency letters" as well as to move to compel. Note that your extra-judicial efforts to seek compliance will be part of your record for the motion, as well as a possible condition to seeking court intervention.[56]

When documents are produced, request copies. Other than exceptional situations (such as where there is a truckload of non-relevant documents), it is probably economical and feasible to request copies rather than merely inspecting documents at your adversary's office. Reserve the right, where appropriate, to inspect originals if there are special issues, such as to authenticity or the order and organization of the original documents.

If you have not already began the process of organizing your own client's documents, begin doing so for your and your adversary's documents. That means several phases: The first step is a preliminarily review of what was produced to get a good feel for what there is, as well as for what may be missing. However, do not pull any documents without maintaining a complete and intact set of each side's production (*i.e.*, maintain a "shadow set"). From that, flag the relevant documents, which can be copied as needed. Second, pick the most relevant or critical documents for which copies should be made so that they can be organized into a "trial book" that will include all parties' key documents, pleadings, substantive discovery answers and other critical material, as well as for use at depositions. The trial book (to be discussed in the next article of this series) will become the "bible" of the case, because it will be the starting point for preparing for depositions, potential motions for summary judgment and trial. The third step involves a comprehensive review of the documents. How and when this step is done (which can be part of the second step), depends on many practical factors, including the complexity and size of the case, volume and type of documents, available personnel and budget, and most important, your own style of reviewing and digesting information.

Some lawyers rely on paralegal or associates to do the comprehensive review. Others prefer to do it primarily by themselves. Engaging the client's assistance is also a good idea. In large cases, it may be necessary or desirable to have the documents digested and indexed, which may include use of specialized software, and in major cases, digital imaging and cataloguing. However it is done, you will need to select and organize documents to assure easy retrieval with

several organizational goals: (1) by subject matter; (2) by witness for the purposes of preparing for each witness' depositions, as well as preparing your own clients; (3) the eventual selection of documents to be used at trial; and (4) the ability to conduct future reviews as issues arise or become clarified.

How to best organize documents is an intuitive and learned process, based on your understanding the case, overview of the documents, an intuitive feel of what and how the documentation fits into the underling transaction and dispute, and experience of how you best work with documents. While your first organization may not be perfect or final, the objective is to begin a process that will be able to keep up with the case as it progresses, then grow as more documents and facts are added. Avoid a process that would require scuttling the first organization and starting all over. But, if that is to happen, do it early while the documents are still manageable and you are not in panic mode on the eve of trial.

Summary

Significant and deliberate strategy decisions must be made for commencing the action or responding to the complaint, as well as initiating discovery. These decisions and their implementation will have a pervasive effect on all subsequent proceedings and the eventual outcome of the contest.

A future article will explore, in greater detail, tactics for discovery, when and how to move for summary judgment, and how to prepare for trial.

---

1. Of course, it is imperative that you abide by the statute of limitations, as well as any applicable notice of claim periods.

2. The federal courts have various mediation and/or arbitration programs, some of which are mandatory: See, e.g., 28 U.S.C §651, *et seq*.; Local Rules of the U.S. District Courts of N.Y. for the Southern and Eastern Districts §83.10-83.12; Local Rules for the Northern District §83.7 and 83.11; Local Rules for the Northern District §83.2; Local Rules for the Western District §16.2. However, unlike typical binding arbitration rules, the federal rules all provide the right to a trial *de novo.* 28 U.S.C §657(c); S.D./E.D. Rule 83.10(h); N.D. Rule 83.7-7; W.D. Rule 16.2(I). *Cf.* 22 NYCRR§28.1, *et seq*.

3.CPLR 7511(b) provides narrow grounds for vacating an arbitration award, such as based on corruption, fraud, partiality, etc.; *cf.* 9 U.S.C. §10(a) *and particularly* sub-sect. 3 (includes refusing to hear pertinent and material evidence. etc.).

4. Most attorneys, while familiar with the rules of court, are unfamiliar with the rules and nuances of the various arbitral forums, as well as various lesser known laws that govern certain arbitrations. *See, e.g.* the Federal Arbitration Act, 9 U.S.C. §1, *et seq.*

5. CPLR 321(b). Unlike New York practice which allows a substitution by agreement of the client, the various local federal rules require a court order. S.D./E.D. Rule 1.4 (must show "satisfactory reasons" and "posture of the case"); N.D. Rule 83.2(b)(must show "good cause" and substitution "shall not result in the extension of any deadlines..."); W.D. Rule 83.2(c)(for "good cause shown"). *See e.g.*, *Connors v. Tradition North America, Inc.*, 2001 WL 267076 (S.D.N.Y.)

6. Judiciary Law §475 creates an automatic lien on any recovery once an action is commenced (or counterclaim asserted). Prior to commencement of an action, however, a notice of lien is required. Judiciary Law §475-a.

7. Article 16 of the CPLR departs from the common law rule that held each tort feasor jointly and severally liable for the entire loss. Generally, CPLR 1601 provides that for non-economic loss (e.g., pain and suffering), where there are two or more tort feasors, any defendant found to be fifty percent or less responsible for the injury is liable only for his or her proportionate share of culpability. The rule has a myriad number of exceptions, most notably of which are motor vehicle accidents for which the common law rule still applies. CPLR 1602(6).

8. Article 16 of the CPLR can have harsh results where the main tort feasor is judgment proof, but held to be the most culpable, thus absolving deep-pocket defendants of joint and several liability.

9. General Obligations Law §15-108. It should be noted that the GOL does not have the exceptions or fifty percent threshold found in Article 16 of the CPLR. Hence, suing and then releasing someone can create more problems than had you not sued and released them in the first place.

10. *Compare* CPLR 2308(b) *with* 3126.

11. See CPLR 3106(a).

12. CPLR 901, *et seq.*; Fed.R.Civ.P. 23. *See*, *Meachum v. Outdoor World Corp.*, 171 Misc.2d 354, 654 N.Y.S.2d 240 (Sup. Ct. Queens Co., 1996).

13. CPLR 902 requires that the class certification rule be made within 60 days after the answer is due. *Cf.* Fed.R.Civ.P. 23(c)(1)("As soon as practicable...).

14.CPLR 909, *et seq.*; Fed.R.Civ.P. 23(h). *See e.g., Becker v. Empire of America Federal Savings Bank*, 177 App.Div.2d 958, 577 N.Y.S.2d 1001, 1002 (4th Dep't 1991)("Initially, the court must determine the number of hours reasonably expended from contemporaneous time sheets").

15. *See e.g.*, Fed.R.Civ.P. 26(b)(2),(d),(f); 30(a)(2),(d)(2); 33(a). *See also*, S.D. Rule 33.3; W.D.

Rule 34.

16. *See e.g.*, Fed.R.Civ.P. 16; 26(b)(2),(d),(f). *See also*, N.D. Rule 10.1,16.1,16.2; W.D. Rule 16.1. *Cf.* 22 NYCRR§202.19, 202.26.

17. *Compare* Fed.R.Civ.P. 11 *with* 22 NYCRR§37.1.

18. 28 U.S.C. §1291.

19. *See, e.g.* F.R.A.P. 38 and Local Rule 38.

20. CPLR 3013 requires pleadings to be "sufficiently particular to give the court and parties notice of the transactions, occurrences ...and the material elements of each cause of action." Fed.R.Civ.P. 8(a)(2) requires "a short and plaint statement of the claim," in addition to the grounds for the court's jurisdiction (sub. sect. 1). *See e.g., Matter of Millis v. State of New York*, 2001 WL 856465 (Ct. of Claims).

21. *See,* CPLR 3015-16; Fed.R.Civ.P. 9. *See e.g., Hartford Casualty Ins. Co. v. Vengroff Williams & Assocs, Inc*., 306 App.Div.2d 435, 761 N.Y.S.2d 308 (3d Dep't 2003)

22.*E.g.,* CPLR 1603 (inapplicability of apportionment rules); 3012-a (certificates of merit in medical malpractice cases); 3016 *and particularly* sub-sect. g (threshold injury).

23. Federal complaints must also allege the basis for jurisdiction. Fed.R.Civ.P. 8(a)(1).

24. CPLR 3014; Fed.R.Civ.P. 10(b).

25. Fraud, being one of the legal claims that must be stated with particularity, is ripe pickings for motions to dismiss. CPLR 3016(b); Fed.R.Civ.P. 9(b).

26. CPLR 3002, 3014; Fed.R.Civ.P. 8(e)(2).

27. One of the main purposes for verifying the complaint is to compel the defendant to verify his answer. The utility of the verification is substantially lost, however, where the attorney is able to sign it *in lieu* of the client due to one of the many exceptions listed under CPLR 3020, *and particularly* sub-sect. d.

28. CPLR 3014; Fed.R.Civ.P. 10(c).

29. Below, we will discuss how defendants can move to dismiss using documentary evidence under CPLR 3211(a)(1). *But see.* Fed.R.Civ.P. 12(b) and (c).

30. CPLR 3025 and Fed.R.Civ.P. 15(a) generally allow one amendment as of right up to 20 days after the last responsive pleading is served.

31. *Cf. Oil Heat Institute of L.I. Ins. Trust v. RMTS Assocs, LLC,* 2004 WL 351880 (1st Dep't);

Miller v. Goord, 1 App.Div.3d 647, 766 N.Y.S.2d 466 (3d Dep't 2003).

32. CPLR 3213.

33. See CPLR 3215(a); also pay particular attention to sub-sect. g(3) for the additional notice required in contract cases.

34. Other bites of the apple can come from motions for summary judgment and the trial, as well as any potential appeals. However, the motion to dismiss is a bite available only to the defendant.

35. *Cf.* CPLR 3212(a); Fed.R.Civ.P. 12(c) and 56(a).

36. CPLR 3211(a)(1). *B*ut see, CPLR 3211(c) and Fed.R.Civ.P. 12(b)(motions going beyond the complaint may be treated as one for summary judgment). *Cf. Shannon v. U.S. Parole Comm.*, 1998 WL 557584 (S.D.N.Y.) (on motion to dismiss for lack of jurisdiction "the Court may rely on evidence outside the pleadings, such as affidavits and documentary evidence").

37. *See e.g., N.Y. Community Bank v. Snug Harbor Square Venture,* 299 App.Div.2d 329, 749 N.Y.S.2d 170 (3d Dep't 2002) (lease; the documentary evidence "must resolve all factual issues as a matter of law, and conclusively dispose of the plaintiff's claim..." [citations omitted])*; Igarashi v. Higashi,* 289 App.Div.2d 128, 735 N.Y.S.2d 33(1st Dep't 2001(deeds); *Ozdemir v. Caithness Corp.*, 285 App.Div.2d 961, 728 N.Y.S.2d 824 (3d Dep't), *aff'd*, 97 N.Y.2d 605, 737 N.Y.S.2d 52(2001)(contract).

38. 28 U.S.C. §1446(b) requires that notice to remove must be filed within 30 days of service of the state summons and complaint. Do note, however, my discussion above as to whether it truly makes sense to opt for federal court.

39. CPLR 511(b) requires a demand to change venue based upon improper venue be served by the time the answer is served and that a motion be made withing 15 days, unless plaintiff . consents.

40. CPLR 3018(b); Fed.R.Civ.P. 8(c).

41. 3211(a); Fed.R.Civ.P. 11(b).

42. If a motion is made, the CPLR 3211(e) requires that certain enumerated defenses be included in the motion or otherwise they are waived.

43. By alleging a host of superfluous defenses, the defendant burdens the plaintiff, improperly, with the task of ferreting out those that apply to the case.

44. CPLR 3211(e); Fed.R.Civ.P. 12(h)(1)(federal rule also includes venue).

45. CPLR 3211(e).

46. *Compare* CPLR 3019 *with* Fed.R.Civ.P. 13.

47. CPLR 3106, 3132.

48. *See* CPLR 3101 *et seq. and particularly* sub-sect. a; Fed.R.Civ.P. 26-37.

49. CPLR 3041-44.

50. *See, Northway Engineering, Inc. v. Felix Industries, Inc.*, 77 N.Y.2d 332, 567 N.Y.S.2d 634 (1991); *Graves v. County of Albany*, 278 App.Div.2d 578, 717 N.Y.S.2d 420 (3d Dep't 2000).

51. CPLR 3133(b). By contrast, not all bills of particular have to be verified, and when they are, they are subject to the same exceptions that may allow the attorney to sign the verification. CPLR 3044; see also CPLR 3020(b)&(d).

52. CPLR 3131; *see also* CPLR 3101.

53. CPLR 3130(1).

54. CPLR 3130(1).

55. CPLR 3043.

56. 22 NYCRR§202.7(a); Fed.R.Civ.P. 37(a)(2)(A).