

Surviving Dismissal

By Anika Hardmon, Career Law Clerk
for the Honorable Donald L. Graham, Senior Judge
United States District Court, Southern District of Florida

Complaint Drafting:

1. **Know the general pleading rules** - Federal Rules of Civil Procedure 8 and 10. Rule 8 (2) requires a *short and plain statement* of the claim showing that the pleader is entitled to relief. Rule 10(b) provides that pleaders must state in separate paragraphs claims or defenses arising out of different sets of circumstances. Rule 10(b) is designed to improve the readability of the pleadings.
2. **Know the most common basis for dismissal** - Rule 12(b)(6) and Rule 12(e):
 - a. To survive a Rule 12(b)(6) motion to dismiss the pleading must be sufficiently intelligible for the court to determine one or more potentially viable legal theories on which the claimant might proceed. In other words, “[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).
 - b. Rule 12(e) is limited to instances in which the challenged pleading “is so vague or ambiguous that the party cannot reasonably prepare a response.” Rule 12(e) motions are most often used when addressing so-called “shotgun pleadings,” and some courts have ordered repleading *sua sponte* when faced with such complaints.
3. **Goal of complaint** – In essence, a complaint should frame the issues to aid the parties in proceeding through the case with greater certainty and clarity about what they are litigating, the issues, and potential defenses, and the possible arguments, if any, at summary judgment. Should the case proceed to trial, everyone will then know what is being litigated. Any introduction should be a brief summary and not a novel. Focus on the necessary elements of complaint (jurisdiction, the parties, the legal elements of claim, the relevant facts, the relief sought, etc.). Make sure the complaint is answerable as pled!
4. **Know the law** - Make sure the law recognizes your claim. Think about what legal authority is controlling—statute, common law, etc. At the motion to dismiss stage a Plaintiff may plead alternative inconsistent claims under Federal Rule of Civil Procedure 8. However, every claim must be supported by law. (E.g. Florida law does not recognize a claim for negligent use of force).
5. **Pick your facts carefully** - What facts have to be known by the court to fit your case within the controlling authority? Complaints should be clear and concise. Don’t cloud your pleading with needless or irrelevant facts, conclusions or argument. Include facts that are material to your claim. Review your writing and consider which words and sentences are unnecessary. Ask yourself: 1) is it relevant; 2) is it necessary to my claim; and 3) is it a fact, a conclusion, or an argument?
6. **One Count, one claim** - To promote clarity, state each theory of liability in a separate count. Each Count should state its own claim. Avoid including multiple claims and theories of liability in a single count. Doing so makes it difficult to discern the precise nature of claim and whether or not each claim is sufficiently supported by factual allegations.

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7. **Avoid “shotgun” pleadings** - Do not reincorporate prior allegations in any count unless those allegations support the particular claim asserted. Be very careful, specific and judicious as to which paragraphs—which allegations in the complaint leading up to the counts should be reincorporated.
8. **Assess Allegations** --Avoid conclusory allegations. There must be a threshold degree of factual support for each claim. Avoid incorporating inconsistent allegations within one claim. Do not rely on argument to support your allegations. Save your argument for litigation.
9. **Keep it simple.** To write persuasively be: 1) clear, 2) concise, and 3) simple. Avoid antiquated and convoluted legalese unless specific legal terms are crucial to your argument. Simple and familiar words are more impactful. (E.g. Plaintiff suffered a blow to the (cranium v. head) and face. Use jury instructions as a guide for stating the elements of your claim in plain English.
10. **Ask for what you want.** What relief are you seeking? Make sure you are entitled to your claim for relief.

Motion to Dismiss:

11. **Silence is fatal.** Honor all court deadlines. Request extensions in a timely manner. File a timely response. Identify and respond to every argument for dismissal raised in the motion to dismiss, otherwise it will be deemed waived.
12. **Give the reader a roadmap.** At the beginning of your response/motion tell the court the gist of the motion, what relief you seek, and the reason for granting that relief. Most judges appreciate being told the bottom line at the outset. The first thing you want to communicate is “what this is all about.”
13. **Give the reader guideposts to follow in your paragraphs.** Use a short introduction and numerous headings in a lengthy pleading. An introduction at the beginning of a lengthy pleading allows the court to quickly grasp the issues and the resolution you seek. Introductions should be a brief summary and not a novel. Headings serve as persuasive sign posts on the road to your conclusion.
14. **Know the law.** Know the standard of review the court will apply in resolving the issue. Minimal consideration is given to general argument without supporting legal authority. Research your issue and try to find a case on point. Discuss recent precedent and argue as persuasively as possible why it does or does not apply to your case. Providing the court with recent legal precedent will improve your credibility, especially if your adversary has not bothered to research the issue. Be sure to notify the court of any change in law or recent decisions relevant to your issue.
15. **Cite Right.** Cite to controlling law. In your argument, substantiate each statement of law with a citation to legal precedent and to a particular page of that precedent. Check your citation, then check it again. Don’t send the court on a quest to find the proposition of law you reference in your writing. Citing the case and the page of the case (known as a “pin cite” or “jump cite”) in support of each legal statement that you make eases the court’s burden and boosts your credibility.

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16. **Avoid dissertations.** If possible write background facts like a chronological story that is readable and interesting. Only include facts that are material and relevant to your issue and argument. Don't overwhelm the court with facts that really don't matter in the ultimate resolution of the issue.
17. **Less is more.** Cite, use, and distinguish the pertinent precedent, but do not turn your argument into a digest for all of the case law in the area. You should incorporate into your argument the pertinent cases and relevant quotes. Beyond that, you may want to discuss a case if it is on point or if it needs to be distinguished further. You should not, however, turn your argument into a Law Review article. The court will fail to see the relevance of the discussion and will begin to skip over your argument. Avoid the use of long block quotes and footnotes. Instead, incorporate the relevant quotations into your sentence structure and into the flow of your argument. To say more about a particular case, you can follow the sentence containing the quoted language with a citation and a parenthetical.
18. **Keep it simple.** Think about how you can simplify the issue for the judge, while persuading the judge; how can the judge write most easily in your favor; how do you get your points across in the most straight forward way. Sentences should be simple, direct, and clear. Use short sentences and avoid long clauses. Communicate one thought per sentence and one thought per paragraph. Write like you talk. Read your writing out loud when you finish editing. Focus on readability. Ask someone unfamiliar with the case and issues, preferably a nonlawyer, to read your writing and ask the following: 1) Does your writing make sense?; 2) Is your argument clear?; 3) Can they tell you what is going on?
19. **Answer all Questions.** Think about what will likely concern your judge in deciding the case-specific issue; what questions will the judge likely have when reading your response/motion. Always assume you will not get a hearing. Try to answer the hardest question you could be asked at a hearing in your written argument. Include every authority and argument you want the Court to consider.
20. **Start strong.** Identify and lead with your most compelling point -- factual and legal. Highlight the positive but also address the negative. You cannot hide the weaknesses of your argument from the court. The best way to proceed, therefore, is to candidly address the flaw and fashion your argument on the basis of the applicable standard of review. Concession when appropriate also boosts credibility.