



Litigation Skills for Young Attorneys: Responding to the Complaint

Thursday, December 10, 2020

Program - 5:30 - 6:30 p.m.

Via Zoom Webinar

1.0 hour of CLE credit





Responding to the Complaint

December 10, 2020 Training Program

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Agenda

- > 1. Early Stages
- > 2. Timing and Filing a Response
- > 3. Motions to File in Response
- > 4. Answering the Complaint
- > 5. Cross-Complaints and Counterclaims
- > 6. Questions & Answer

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First Step: Ethics

- > Determine Representation
 - May be several defendants.
- > Run a Conflicts Check
 - Even if it is a long-standing client, you may not be able to represent them based on ethical or business reasons.
- > Get an Engagement Agreement (ideally)
 - Generally should not begin work on a new case without an engagement agreement. Even for a long-standing client.



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Next Steps: Emergency Issues

- > Immediate Motions
 - Is there an *ex parte* application pending?
- > Response Deadline
 - You may get the complaint from the client a day before the answer is due. Determine whether you need to obtain an extension of time.



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Early Stages: Paying for the Defense

> Insurance

- Does the client have any insurance policy that may cover its defense. Individual clients may have a liability insurance, or even homeowner's insurance that may provide coverage.

> Budgeting

- Client may want a budget. May be cheaper to settle quick.



Preparing to Defend the Case

> Remediation

- Client may want to take remedial measures to ensure no more damages.

> Factual Investigation

> Preservation

- Litigation Hold



Resources

> State Court

- The Rutter Guide, California Practice Guide: Weil & Brown, Civil Procedure Before Trial
- California Code of Civil Procedure (CCP)
- California Rules of Court (CRC)
- County Court Local Rules
- Judge’s Courtroom Procedures



Resources

> Federal Court

- Rutter Group Practice Guide, California Practice Guide: Phillips & Stevenson, Federal Civil Procedure Before Trial, Calif. & 9th Cir. Editions
- Federal Rules of Civil Procedure (FRCP)
- Local Rules of the District Court (C.D. Cal. Local Rules)
- Judge’s Courtroom Procedures



State Court: Response Deadline

- > 30 days after the service of the summons and complaint. CCP § 412.30(a)(3).
- > **Extension of time by stipulation:** The parties may stipulate without leave of court to one 15-day extension beyond the 30-day time period. CRC 3.110(d).
- > **Extension of time by court order:** The time for filing a responsive pleading may be extended by court order. CRC 3.110(e).
- > Special rule for unlawful detainer and forcible entry or detainer actions, defendant has only 5 Court Days to respond. CCP § 1167(a).



State Court: When Is Service Complete

- > Personal Service: Complete when summons and complaint delivered to Defendant. CCP § 415.10.
- > Substitute service: delivery to someone else coupled with mailing. CCP § 415.20(a) & (b).
- > Service by mail and acknowledgment of receipt complete on the date the defendant signs the acknowledgment (rather than the date it is mailed back). CCP § 415.30(c).
- > Service by publication complete on the 28th day following the first day of publication. CCP § 415.50(c).



Federal Court: Response Deadline

- > 21 days after service of the summons and complaint. FRCP 12(a)(1).
- > Exceptions:
 - When defendant waives service per request under FRCP 4(d)(3), answer is due within 60 days of the dates of the request if sent within US, or within 90 days if was sent outside of the US.
 - Cases against the Government (we do not represent the United States)
- > Parties may stipulate to an extension, but any stipulation must be signed by the Court. C.D. Cal. Local Rule 7-1.



Federal Court: When Is Service Complete

- > Any method allowed for under state law where the District Court sits. FRCP 4(e)(1).
- > Personal service of the summons and complaint. FRCP 4(e)(2)(A).
- > Leaving summons and complaint at defendant's home with someone of suitable age. FRCP 4(e)(2)(B).
- > Delivering the summons and complaint to an authorized agent for service of process. FRCP 4(e)(2)(C).



Filing a Response

> Responses That Can Be Filed

- Motion
 - Attacking the pleadings
 - To change venue
- Answer
- Cross-Complaints, Counterclaims, Crossclaims, and Third Party Claims



State Court: Motions to File in Response to Complaint

- > Motion to Quash Service of Summons. CCP § 418.10.
- > Demurrer. CCP § 430.30.
- > Motion to Strike. CCP § 435.
- > Motion for Sanctions. CCP §§ 128.5, 128.7.
- > Special Motion to Strike (anti-SLAPP). CCP § 425.16.
- > Petition to compel arbitration. CCP § 1281.7.



Federal Court: Motions to File in Response to Complaint

- > Motion to Dismiss for Lack of Personal Jurisdiction. FRCP 12(b)(2).
- > Motion to Dismiss for Improper Venue. FRCP 12(b)(3).
- > Motion to Dismiss for Insufficient Process. FRCP 12(b)(4).
- > Motion to Dismiss for Insufficient Service of Process. FRCP 12(b)(5).
- > **Motion to Dismiss for Failure to State a Claim. Rule 12(b)(6).**
- > Motion for a More Definite Statement. FRCP 12(e).
- > Motion to Strike. FRCP 12(c).
- > Motion to Dismiss for Lack of Subject Matter Jurisdiction. FRCP 12(b)(1).
- > Motion to Dismiss for Failure to Join an Indispensable Party. FRCP 12(b)(7).
- > Motion for Sanctions. FRCP 11.
- > Special Motion to Strike (anti-SLAPP). CCP § 425.16.
- > Petition to compel arbitration. 9 USC § 4.



Motion to Quash/FRCP 12(b)(2), (3), (4), (5) Motions

- > **Purpose**
 - These motions challenge the jurisdiction over the Defendant or the service on the defendant.
- > **Strategy Considerations**
 - Bring these motions when the Defendant is not subject to jurisdiction in the state
 - Not considered a general appearance
 - But may preclude collateral attack on the judgment if unsuccessful



California Demurrers

- > A Demurrer can be both “general” and “special.”
- > “General demurrer”: pleading does not state facts sufficient to constitute a cause of action. CCP § 430.10(e).
- > **Other Grounds for Demurrer**
 - Lack of subject matter jurisdiction. CCP § 430.10(a).
 - Lack of capacity to sue. CCP § 430.10(b).
 - Another action is pending between the same parties on the same cause of action. CCP 430.10(c).
 - A defect or misjoinder of parties. C.C.P. 430.10(d); see infra, §§ 972, 973.
 - “The pleading is uncertain.” CCP § 430.10(f).



Demurrer and FRCP 12 Motions Similarities

- > General Demurrer and FRCP 12(b)(6) motions have similar goals to challenge sufficiency of the pleadings.
- > Even if you only demurrer/move to dismiss one of many causes of action, it satisfies requirement of responding to the complaint.
- > Even when successful, plaintiff usually given leave to amend.



Demurrer and FRCP 12 Motions Differences

> Papers

- A Demurrer is a Pleading. It requires a separate document.
- A 12(b)(6) motion is merely a motion that needs a notice of motion and motion and a memorandum of points and authorities.
- A Demurrer must be filed as a separate motion. It cannot be combined with a motion to strike.
- A FRCP 12(b)(6) motion can include a motion to strike (and other motions).

> Terminology

- Demurrer is “sustained” or “overruled.”
- 12(b)(6) motion is “granted” or “denied.”



Strategy Considerations for Demurrer and 12(b) Motions

- > Challenges a key legal issue in the case
- > May cut down the length, breadth, or issues in a complaint
- > May clarify key legal issues
- > Extends time for filing answer
- > Motion for a More Definite Statement rarely granted. But a demurrer for uncertainty can be included in the General Demurrer.



Motion to Strike, CCP § 435, FRCP 12(f)

> **Purpose**

- To strike out parts of a claim, any redundant, immaterial, impertinent, or scandalous matter

> **Strategy Considerations**

- Usually filed with a Demurrer or 12(b)(6) motion. Demurrer/Motion to Dismiss may not eliminate an entire cause of action, but Motion to Strike is an effective alternative.



Motion for Sanctions, CCP §§ 128.5, 128.7, FRCP 11

- > Requires that the opposing counsel certify that the claim is brought in good faith. A motion for sanctions seeks to strike the complaint or some portion of it and require the opposing party and/or its attorney to pay sanctions in the form of attorneys' fees.
- > Motion must be served 21 days before it is filed, giving opposing party a "safe-harbor" to withdraw its complaint.
- > Rarely used. Only if the opposing counsel has clearly violated a rule or Court order.
- > This does not constitute a response to the complaint, so a response must be filed, either by motion or answer.



Anti-SLAPP Motion, CCP § 425.16

- > To prevent strategic lawsuits against public policy (SLAPP suits).
- > Two-Prong Test:
 - (1) does complaint arise from protected activity (Defendant's burden);
 - (2) does Plaintiff have a probability of success based on admissible evidence (Plaintiff's burden)
- > Must be filed within 60 days of service of the complaint
- > Entitled to calendar preference (sort of)
- > Freezes Discovery
- > Entitles Defendant to mandatory attorneys' fees for bringing the motion, if successful. (Entitles Plaintiff to attorneys' fees if frivolous).
- > Useful in any case where First Amendment issues arise: free speech, right to petition.
 - Defamation Actions
 - Malicious Prosecution Actions
- > Not a response to the Complaint, so you must file motion or answer. Consider the timing.



SLAPP Motions in Federal Court

- > Considered a substantive right, not procedural right
 - May be used in diversity claims; may not be used in federal question claims
 - Does not freeze discovery
 - Treated as a 12(b)(6) motion if based only on the pleadings
 - Treated as a Motion for Summary Judgment if based on factual contentions/evidence
 - Not restricted by the timing in the SLAPP statute



Motion Practice

- > Scheduling Motions
- > Meet and Confer Requirements
- > Filing Deadlines and Timing



Removal, 28 U.S.C. § 1441

- > Available in state court action over which federal courts have jurisdiction
- > Strategy considerations
- > Removal procedure
 - Must file within 30 days of service of Summons and Complaint – no extensions. 28 USC § 1446(b).
 - Attach copies of all state court pleadings and orders served
 - Obtain joinder from all codefendants who have been served
 - Serve a copy of notice of removal on plaintiff, and file with the state court



State Court Answers

- > Judicial Council Forms
- > General denial controverts all material allegations of an unverified complaint. CCP § 431.30(d).
- > Affirmative Defenses
 - Use it or lose it.
 - Any ground for demurrer that does not appear on the face of the complaint can be raised as a defense in the answer. CCP § 430.30(b). The most common grounds are:
 - Plaintiff lacks capacity to sue
 - Nonjoinder or misjoinder of parties;
 - Another action is already pending between the same parties for the same cause.
- > Jury Demand
- > Verification. CCP § 446.



Federal Court Answers

- > General denials not used
 - Permissible ONLY when Defendant can deny “in good faith” all the allegations in the complaint “including the jurisdictional grounds.” FRCP 8(b)(3).
- > Special rules
 - Must allege a specific denial with supporting facts for denying capacity to use, existence of an organization, or condition precedent. FRCP 9.
- > Affirmative defenses
 - In addition to State Court Affirmative Defenses, note FRCP 8(c)(1)
 - FRCP 12(b) Defenses
- > Jury Demand
- > Verification not required



Cross-Complaints and Counterclaims

> **Strategy Considerations**

- Compulsory v. Permissive Claims
- Jurisdiction Issues
- The best defense is a good offense



Cross-Complaints in State Court

> Cross-Complaint, CCP § 438.10

- Claim against opposing party, co-party, or third party

> **Procedure**

- Cross-Complaint is a separate pleading. CCP § 428.40.
- Judicial Council Forms available
- Must be filed at same time as answer or with leave of the Court. CCP § 428.50.
- New parties must be served with summons. CCP § 428.60.



Federal Court: Counterclaims, and Crossclaims, and Third Parties

- > **Counterclaims, FRCP 13(a)-(e)**
 - Claims against opposing party.
 - Can join third parties, if permitted under FRCP 19 and 20.
 - Not a separate pleading. Filed with the answer. FRCP 7(a)(3).
- > **Crossclaims, FRCP 13(g)**
 - Claims against a co-party.
 - Can join third parties, if permitted under FRCP 19 and 20.
 - Not a separate pleading. Filed with the answer. FRCP 7(a)(3).
- > **Third-Party Claims, FRCP 14**
 - Indemnification/Impleader
 - Must be served within 14 days of answer, or with leave of the Court. FRCP 14(a)(1).
 - Third Party Claim is a separate pleading and must be served within 14 days of answer, or with leave of the Court. FRCP 14(a)(1).



Ancillary Documents

- > **State Court**
 - Notice of Related Cases, within 15 days. CRC 3.300.
 - Summons for Cross-Complaint (if applicable)
- > **Federal Court**
 - Notice of Related Cases. C.D. Cal. Local Rule 83-1.3.
 - Summons for Counterclaim, Crossclaim, Third Party Claim (if applicable)



Questions

