

Pre-Litigation Planning

Before the attorney actually files the complaint, facts must be investigated, research must be completed, and analysis must be performed on several levels. The attorney will need to determine whether the case has merit and whether the defendant has any defenses. If there is a basis for the lawsuit, then the attorney has to plan his/her strategy for preparing the complaint.

This “pre-litigation planning” involves determining:

- *What to allege* in the complaint This requires consideration of potential **causes of action**, their **elements**, and an analysis as to whether the facts support each of the elements.
- *When to file* the complaint This involves **statutes of limitations** and **pre-filing notices**.^{21/}
- *Who to name* in the complaint. This requires an understanding of **standing, capacity, DOE defendants, joinder**.
- *Where to file* the complaint. This requires an understanding of **subject matter jurisdiction, personal jurisdiction, venue** and **forum non conveniens**.
- *What relief to seek* in the complaint. . . This requires an understanding of the types of remedies available for the various causes of action.

NOTE: These are not necessarily in order.^{22/}

^{21/} You may be required to notify the defendant of the claim before filing a lawsuit, or there may be some advantage to doing so.

^{22/} For example, a defendant can be identified first, and then various causes of action to be alleged against that defendant can be determined. There *is* some logic to the order, though -- you can't determine the court in which to bring the action until you know the causes of action being alleged (subject matter jurisdiction issue) and the identity of the defendant (personal jurisdiction issue); and you can't determine the applicable statute of limitations until you know the causes of action. The analysis is not linear -- you might have to go back and forth a bit. For example, you could conclude that you meet all of the elements of a particular cause of action, but then find that the cause of action is not available because the statute of limitations has expired. (Back to the drawing board . . .)

For a court to have personal jurisdiction over a potential defendant, a two prong test must be satisfied:

- There must be a *constitutionally sufficient basis* for exerting jurisdiction over the person, *and*
- The person must be given *notice* (met by service of process) in a manner that meets constitutional due process and statutory requirements.

In this section we discuss the constitutional basis for exerting jurisdiction over the defendant, and the ways in which the defendant may dispute personal jurisdiction. Notice requirements are dealt with in Chapter 7, under “Service of the Summons and Complaint.”^{34/}

Constitutionally Sufficient Basis

A state may have personal jurisdiction over a potential defendant for a variety of reasons:

- *Physical presence* in the forum state (the state in which the lawsuit is filed). If the defendant is physically in the forum state when he/she is served with the summons and complaint, the court of the forum state has personal jurisdiction over the defendant.
- *Domicile* in the forum state. States have personal jurisdiction over people living or planning to live indefinitely in the state.^{35/}
- *General appearance*. No matter where the defendant resides or does business, a state will have personal jurisdiction over a potential defendant if the *defendant makes a general appearance* in court in the case, thereby submitting to the court’s jurisdiction.^{36/}
- *Agreement*. No matter where the defendant resides or does business, a state will have personal jurisdiction over a potential defendant if the *defendant has agreed to submit* to the jurisdiction of the court by contract or other agreement.

^{34/} The defendant may attack the validity of the service of the summons on lack of constitutional basis for exerting jurisdiction and/or defective notice. (See “Motion to Quash Service of Summons” in Chapter 9)

^{35/} The authority of the court extends to the border of the state in which it is located.

^{36/} When a defendant makes an appearance in a case (for example by responding to a complaint or filing a document with the court), the appearance (a “general appearance”) constitutes a consent to the jurisdiction of the court). Only when the defendant makes a “special appearance,” discussed later, is this not the case.

Example:

“Plaintiff, Fred A. Wronged, is, and at all times material hereto was, a natural person residing in Orange County, California.”

- The plaintiff states facts regarding personal jurisdiction over the defendants, and proper venue.

Examples:

“Defendant, James A. Wrongdoer, is, and at all times material hereto was, a natural person residing in Orange County, California.”

“The defendant XYZ Corporation is, and at all times mentioned herein was, a corporation in good standing with the State of California with its principal place of business in the County of Orange.”

- The plaintiff makes the necessary DOE allegations. As noted in Chapter 5, when the plaintiff is ignorant of a possible defendant's identity or true name, the plaintiff names those defendants as DOES. This tolls the statute of limitations as to the DOE defendants, so that when they are identified, and the complaint against them is amended to specifically name them, state necessary allegations regarding personal jurisdiction, etc., the amendment will “relate back” to the date of the filing of the complaint. To take advantage of the “relate back” doctrine, the plaintiff must include all three of the following statements at this point in the complaint:
 1. The plaintiff is unaware of the true identities of the DOE defendants at the time of filing the complaint.
 2. The DOES are responsible in some manner for the damages claimed.
 3. The plaintiff will amend the complaint when the identity of the DOES is ascertained.^{48/}

^{48/} The complaint must be amended when the identity of a DOE is discovered. The DOE is then served with a summons showing they were originally named as a DOE, along with a copy of the complaint.

Excerpt from California Civil Litigation and Discovery

Now let's take a look at a breach of contract cause of action which does hit all of the elements.^{52/}

"1. On or about January 10, 2007, Plaintiff and Defendant entered into a written contract (the "Contract") where Plaintiff was to pay Defendant \$52,000 to install ten sliding glass doors and 30 windows (the "Work") in Plaintiff's apartment building. A true copy of the Contract is attached hereto as Exhibit A, and incorporated by this reference.

[This paragraph states facts establishing the existence of the contract -- the 1st element.]

2. Under the Contract, Plaintiff was to pay the Defendant a deposit of \$26,000, by May 1, 2007, and the balance of \$26,000 when Defendant finished the Work. On April 25, 2007, Plaintiff paid Defendant \$26,000.

[This paragraph states facts establishing that Plaintiff performed its duties as required -- the 2nd element.]

3. Under the Contract, Defendant was to complete the Work by May 15, 2007. Defendant did not do so by May 15, 2007, or at all. Defendant has refused to return Plaintiff's \$26,000 deposit.

[This paragraph states facts establishing that Defendant failed to perform its duties under the Contract -- the 3rd element.]

4. As a result of Defendant's refusal to comply with the terms of the Contract, Plaintiff has been damaged in the amount of \$26,000."

[This paragraph states facts establishing that Defendant's breach caused Plaintiff damage -- the 4th element.]

Hints for Drafting Causes of Action

- Before you start drafting, know the facts of the case -- who, what, when, how, and what types of damages are sought -- and know the parties and their relationships.
- Strive to draft pleadings that are clear and precise so as to avoid attacks by the opposition and eliminate the need to file amended pleadings to cure defects. In other words, DO IT RIGHT THE FIRST TIME.

^{52/} The elements of breach of contract are: (1) existence of a contract, (2) Plaintiff performed or was excused from performing its duties under the contract, (3) Defendant breached the contract by failing to perform its duties under the contract, and (4) Plaintiff suffered damages as a result of the defendant's breach. Note how each element is presented in a separate paragraph.