THE ETHICAL PLEADER...
OR, HOW MUCH TRASH CAN I TALK?

Immaterial, impertinent, scandalous and otherwise provocative matters in pleadings

ANDREW R. “GATOR” KORN, ESQ.

4221 Avondale Avenue
Dallas, Texas 75219
akorn@kbdtx.com

FRIDAY CLINIC-BELO
DALLAS BAR ASSOCIATION
CIVIL CURRICULUM (ETHICS 1.00 HOUR)
August 21, 2015 – Dallas, Texas
TABLE OF CONTENTS

C.V. OF ANDREW R. KORN......................................................................................................................... iv

DEDICATION AND CREDITS.......................................................................................................................... vii

I. SCOPE OF ARTICLE .................................................................................................................................... 1

II. INTRODUCTION .......................................................................................................................................... 1
    A. What is a Pleading?................................................................................................................................. 1
    B. What is the Purpose of a Pleading?.......................................................................................................... 1
        1. Texas................................................................................................................................................ 3
        2. Federal............................................................................................................................................. 3

III. TWOMBLY: REVOLUTION OR SAME OLD GAME? .................................................................................. 4
    A. Federal Pleadings ................................................................................................................................. 4
    B. Fraud After Twombly ........................................................................................................................... 4

IV. WHAT IS NOT SUPPOSED TO BE IN THE PLEADINGS? ........................................................................ 5
    A. Examples of Improper Pleadings .......................................................................................................... 5
        1. Scandalous Matters ............................................................................................................................ 5
        2. Impertinent Matters .......................................................................................................................... 7
        3. Immaterial Matters ............................................................................................................................. 7
        4. Redundant Matters ............................................................................................................................ 7
        5. Provocative Matters ........................................................................................................................... 7
    B. Lack of Legitimate Purpose ................................................................................................................ 8
    C. Defenses to Charges of Improper Allegations: Contextual Purpose ................................................... 8

V. WHAT MAKES THE UNETHICAL PLEADER, UNETHICAL? ................................................................. 9
    A. Ethical Rules ........................................................................................................................................ 9
    B. Ethical Opinions .................................................................................................................................. 9

VI. PRIVILEGES: DEFAMATION AND INVASION OF PRIVACY ............................................................... 12
    A. Defamation ......................................................................................................................................... 12
    B. Absolute Light? .................................................................................................................................. 14
    C. Invasion of Privacy ............................................................................................................................. 15
    D. Other Jurisdictions ............................................................................................................................. 16

VII. PLEADINGS USED TO HARM ........................................................................................................... 19
    A. Malice and Bad Intentions May Be Inferred from your Trash Talk ................................................... 19
    B. Malice and Bad Intentions May Be Inferred from your Unredacted Talk ...................................... 20
    C. Remedies for Pleadings Used to Harm .............................................................................................. 20
        1. Texas ............................................................................................................................................... 20
        2. Federal ............................................................................................................................................ 21
        3. Sanctions can be imposed against the attorney, the client, or both ................................................. 21
        4. Motion to Strike ............................................................................................................................... 22

VIII. FUNDAMENTALS OF THE ETHICAL PLEADER ............................................................................ 22
    A. Know Your Role (and appreciate your great power and great responsibility) .................................... 22
        1. Don’t Lie ..................................................................................................................................... 22
        2. Don’t Mislead ............................................................................................................................... 24
        3. Don’t be reckless with the allegations made by your co-counsel .................................................. 25
        4. Don’t use you pleadings for improper purposes ............................................................................. 25
B. The Ethical Pleader does not File Shotgun or Prolix Pleadings ....................................................... 25
   1. Shotgun ................................................................................................................................... 25
   2. Prolix ...................................................................................................................................... 26
C. Fundamentals of Good Pleadings for the Ethical Pleader (you better check yourself before you wreck yourself) .......................................................................................... 28
   1. Jurisdiction ............................................................................................................................ 28
   2. Standing ................................................................................................................................ 29
   3. Venue .................................................................................................................................... 29
   4. Ripeness ................................................................................................................................ 32
   5. Conditions Precedent: TRCP 54 ........................................................................................... 32
D. Why Plead Less? .............................................................................................................................. 33
   1. Because the more you plead, the more you bleed ........................................................................ 33
   2. Because the rules prohibit more ................................................................................................... 34
E. Why Plead More? ............................................................................................................................ 34
   1. Sometimes you have to: ......................................................................................................... 34
      a. Fraud .................................................................................................................................... 34
      b. Injunctive Relief .................................................................................................................... 35
      c. Garnishment ......................................................................................................................... 36
      d. Special Damages ................................................................................................................... 36
   2. Sometimes you want to: ........................................................................................................ 37
      a. Defaults .............................................................................................................................. 37
      b. Planning for the Possibility of Removal ........................................................................ 40
      c. Leave to Amend (not always so free) .............................................................................. 42
      d. a/k/a’s .............................................................................................................................. 43
      e. Avoiding judgment on the pleadings ............................................................................. 43
IX. HOW MUCH TIME IS REASONABLE TO SPEND PREPARING A COMPLAINT? ............................ 45
X. THE ANSWER ............................................................................................................................................. 46
   A. Too Little ......................................................................................................................................... 46
      1. Beware the use of the General Denial in Federal Court ....................................................... 46
      2. “Commenting” is not a responsive pleading ........................................................................ 47
   B. Too Much ......................................................................................................................................... 47
      1. Over use and abuse of affirmative defenses ........................................................................ 49
      2. Pleading yourself out of court .............................................................................................. 49
      3. Unclean hands ....................................................................................................................... 49
CONCLUSION .......................................................................................................................................................... 50

GATOR’S CLOSING TIPS FOR ETHICAL PLEADING .............................................................................. 51
GATOR’S CLOSING TIPS FOR DEALING WITH AN UNETHICAL PLEADER ........................................ 52
APPENDIX................................................................................................................................................................. 55
Curriculum Vitae

ANDREW R. “GATOR” KORN, ESQ.
THE KORN DIAZ FIRM
4221 Avondale Avenue
Dallas, Texas 75219
(214) 521-8800
akorn@kbdtexas.com

Andy Korn is Board Certified in Civil Appellate Law by the Texas Board of Legal Specialization, since 2001.

Andy’s Martindale-Hubbell ratings are: 

<table>
<thead>
<tr>
<th>Peer Review AV®</th>
<th>Preeminent™</th>
<th>5.0 out of 5</th>
</tr>
</thead>
<tbody>
<tr>
<td>Client Review</td>
<td>Preeminent</td>
<td>4.8 out of 5</td>
</tr>
</tbody>
</table>

Andy was selected as a Texas Super Lawyer in 2006, and from 2009-2015.

Andy is admitted to practice before the United States District Courts for the Northern, Southern, Eastern and Western Districts of Texas and the Fifth Circuit Court of Appeals. Andy has argued several cases before the 5th Circuit, including in 2014.

Andy was admitted to practice in Texas in November, 1989. Andy has more than twenty-five (25) years of experience in commercial litigation, intellectual property litigation, securities litigation and arbitration, tort litigation, constitutional law and employment law, including accountant liability, advertiser liability, brokerage liability, security guard liability, personal injury, legal malpractice, libel, slander, DTPA, consumer law, landlord-tenant, breach of contract, copyright, trademark, rights of celebrity, business torts, injunctions, Fair Labor Standards Act, Federal Communications Act, sexual harassment, wrongful termination, employment discrimination, collections, enforcement of deed restrictions and non-compete agreements. Andy has represented Clients before the Texas Supreme Court and the following Texas Courts of Appeals:

- First District of Texas at Houston
- Second District of Texas at Fort Worth
- Fourth District of Texas at San Antonio
- Fifth District of Texas at Dallas
- Sixth District of Texas at Texarkana
- Eighth Court of Appeals at El Paso
- Tenth District of Texas at Waco
- Eleventh District of Texas at Eastland
- Twelfth District of Texas at Tyler
- Fourteenth District of Texas at Houston

In 2014, Andy’s appeals for Clients resulted in opinions issuing from the Fifth and Sixth Districts.

Andy has represented institutions such as Southwestern Bell Mobile Systems, Inc., KPMG Peat Marwick, Credit Suisse First Boston Mortgage Capital, LLC, and Royal Bank of Canada. Andy has represented such well-known individuals as Anthony Robbins and former All-Pro Dallas Cowboy Nate Newton. Andy is frequently hired by other attorneys, as local counsel, expert witness or consulting expert engagements, or for personal representation. Andy has represented brokerages, brokers, and customers in securities related disputes. Andy has served as Lead Counsel in seven arbitrations that resulted in reasoned awards, including securities arbitration through the NASD, securities, contract and employment cases before the American Arbitration Association, and an attorney fee dispute before JAMS. Andy has represented both Democrat and Republican political figures. Since 2013, through admission pro hac vice, Andy has appeared in cases “coast to coast” – representing clients in a federal court jury trial in Miami, Florida, appearing at federal court hearings in Los Angeles, California, and completing an arbitration in Los Angeles California.
Andy was an associate and participating associate in the Litigation Section of the Dallas office of Fulbright & Jaworski, L.L.P. from 1989-1994.

Andy received his B.A., cum laude, from the University of Pennsylvania in 1986 and his J.D. from Vanderbilt University School of Law in 1989. During Andy’s third year of law school, he interned with the Davidson County District Attorney’s Office, where he assisted in the prosecution of misdemeanors.

Andy was born in Brooklyn, New York on May 7, 1965.

Andy’s nickname is the “Gator.”

Publications authored in the previous ten years:

• *Void Judgments and Orders*, for the Civil Track of the 2014 TEXAS COLLEGE FOR JUDICIAL STUDIES (held May 9, 2014 – Austin, Texas).

• *Exempt Property*, for the Dallas Bar Association, CONSUMER-CREDITOR LAW SEMINAR (held September 15, 2009 – Dallas, Texas).

• *DEALING WITH SHERIFFS & CONSTABLES Getting Them to Do the Job*, for the University of Houston Law Foundation COLLECTING DEBTS & JUDGMENTS Seminar (held on August 16-17, 2007 – Houston, Texas and August 23-24, 2007 – Dallas, Texas).

• *DEALING WITH SHERIFFS & CONSTABLES Getting Them to Do the Job*, for the University of Houston Law Foundation COLLECTING DEBTS & JUDGMENTS Seminar (held on August 17-18, 2006 – Houston, Texas and August 24-25, 2006 – Dallas, Texas).


• *The Hulk in the Courtroom* (First appearing on August 7, 2006 on www.comicspriceguide.com).


Other cases in which, during the previous four years, Andy testified as an expert at trial or deposition:

• Cause No. 04-0978; Sky Helicopters, Inc. v. (1) Channel 49 Acquisition Corp. d/b/a KTEN-TV; and (2) Trophy Auto, Inc.; In the 15th Judicial District, Grayson County, Texas; and

• Cause No. 09-03893; Dallas Automatic Gate, Inc. v. (1) Devonshire Real Estate and Asset Management, L.P., individually, and d/b/a Regal Brook Apartments; and (2) Godinez-Alcala, L.P., individually and d/b/a Regal Brook Apartments; In the 134th Judicial District, Dallas County, Texas.

Other testimony:

• On March 17, 2015, at the request of the Texas Alcoholic Beverage Commission, Andy testified before the Texas Senate Business and Commerce Committee in favor of Senate Bill 367 (Relating to the unauthorized use of an alcoholic beverage permit or license; providing a criminal penalty).
Recognition for legal acumen, experience, and professionalism by judges, legislators, and county officials:

- Cause No. DC-15-00014; *RREF CB SBL II Acquisitions, LLC v. UBS Financial Services, Inc.*, in the 101st Judicial District Court of Dallas County (Tillery, J. sitting for Judge Williams); Reporter’s Record from January 2, 2015 proceedings on Applicant’s *Emergency Application for Writ of Garnishment*, at p. 34 ([The Court] “…the excellent lawyering by Mr. Korn…”);

- *J&J Sports Prods., Inc. v. Mandell Family Ventures, LLC v. Time Warner Cable, LLC*, 2013 U.S. Dist. LEXIS 89236, *20 (N.D. Tex. Mar. 31, 2013) (Stickney, Mag.) (Order [Doc. 71]), reversed on other grounds, 751F.3d346 (5th Cir. 2014) (“David Diaz and Andrew Korn, both of whom have a great deal of experience with antipiracy cases, as well as other civil litigation areas.”);


- Texas State Senate Debate on SB 1269 (now codified at Texas Civil Practice and Remedies Code chapter 34) (Senator Royce West - author of the Bill) (“Issues concerning what the Constables' responsibilities are. This is a story about a very smart attorney who’s found some nooks and crannies in some old statutes and exploited them based on a reputed set of facts. Apparently one of Dallas's finest has found a legal loophole... I’m advised that the attorney in question sues small bars who buy pay-per-view boxing matches from a California company...”) Video Recording of April 11, 2007 Hearing before the Senate Committee on Jurisprudence (available at [http://tlcsenate.granicus.com/MediaPlayer.php?view_id=16&clip_id=2829](http://tlcsenate.granicus.com/MediaPlayer.php?view_id=16&clip_id=2829)).

- Cause No. CC-03-09174-D; *KingVision Pay-Per-View v. Eduardo Ortega*, Individually and d/b/a El Burrito Restaurant, and Dallas County Constable, Precinct 5, Michael Dupree a/k/a Mike Dupree and his Surety, America States Insurance Company; In the County Court at Law No. 4 of Dallas County, Texas (Hon. Bruce Woody) (February 4, 2005, R.R. Vol. 4, at p. 118) (After closing argument on Plaintiff’s Motion to Recover Full Amount of Judgment: “Thank you. Well presented.”);

- Transcript of Record at 7, *Garden City Boxing Club v. Lara*, No. 7:03-cv-00383 (S.D. Tex. April 21, 2004) (Hinojosa, C.J.) (“In fact, you've been very polite, Mr. Korn. I wish everybody would be like you and Mr. Yzaguirre, then I wouldn't have any problems in the courtroom.”); and

- Bexar County, Texas Commissioners Court. Proceeding, January 4, 2000. San Antonio, Texas (statement of Bexar County Commissioner Precinct One Robert Tejada):

  *It was a very smart move for Statewide to bring Mr. Korn in and make that presentation today. I wasn't in the room when the last presentation was made by Statewide. But if it would have been that tenor, I would have very easily and very quickly have moved to throw out all bids and re-bid the process all over again. That would present other problems, but I would be willing to put up with it...*
CREDITS

Andy would like to thank his editor:

John W. Bowdich, Esq.
Partner, The Willis Law Group
10440 N. Central Expwy., Suite 520
Dallas, Texas 75231
jbowdich@thewillislawgroup.com

The “Wolf” – John is my former partner and my “go to” commercial litigation co-counsel, recently named to both D Magazine’s Best Lawyers for 2014 and a Texas Super Lawyer for 2014.
THE ETHICAL PLEADER… OR, HOW MUCH TRASH CAN I TALK?

Immaterial, impertinent, scandalous and otherwise provocative matters in pleadings.

I. SCOPE OF THE ARTICLE

This article covers technical, theoretical, practical and ethical matters (including rules and issues) regarding pleadings in Texas State Court and Federal Court.

II. INTRODUCTION

A. WHAT IS A PLEADING?

“Pleadings” are by Petition and Answer. Exitio Elecs. Co. v. Trejo, 142 S.W.3d 302, 305 n. 11 (Tex. 2004); Dick Frohn & Dick Frohn Ins. Agency, Inc. v. PCNB Corp., 2010 U.S. Dist. LEXIS 34229 at *3 n.1 (S.D. Miss. Apr. 7, 2010) (“Rule 7 defines pleadings as including only various forms of complaints and answers…”).

B. WHAT IS THE PURPOSE OF A PLEADING?

“The object and purpose of pleading is to give fair and adequate notice to the party being sued of the nature of the cause of action asserted against him so he may adequately prepare his defense.” Castleberry v. Goolsby Bldg. Corp., 617 S.W.2d 665, 666 (Tex. 1981) (“Under Rules 45 and 47, pleadings are sufficient if they give the opposing attorney fair notice of the claim involved.”).

“Texas follows a ‘fair notice’ standard for pleading, in which courts assess the sufficiency of pleadings by determining whether an opposing party can ascertain from the pleading the nature, basic issues, and the type of evidence that might be relevant to the controversy.” Low v. Henry, 221 S.W.3d 609, 612 (Tex. 2007).


The pleadings therefore serve the primary purpose of acquainting the court and the parties with the facts in dispute. They should in so doing point out the actual issues to be settled. Several other purposes may also be served by the pleadings. Thus a Committee of the American Bar Association classified the main purposes to be achieved by the pleadings as follows: (1) to serve as a formal basis for the judgment to be entered; (2) to separate issues of fact from questions of law; (3) to give the litigants the advantage of the plea of res adjudicata if again molested; (4) to notify the parties of the claims, defenses and cross-demands of their adversaries.


[Under the Federal Rules of Civil Procedure, the humble complaint must play multiple roles. Its filing supplies a start date for the litigation process. It provides notice of the nature of the claims being asserted. It identifies at least some of the relevant facts and sets the boundaries within which further facts may be developed during discovery. In conjunction with the answer and any later amended complaints, it defines and narrows the issues that must be resolved at trial. It provides a means for testing, and when appropriate dismissing, claims without a legal basis or for which jurisdiction does not lie. When litigation has ended, the complaint helps identify, for purposes of issue and claim...
preclusion, which issues were and might have been litigated.

**GATOR’S TIPS:**

In Texas State Court, if you want to limit discovery, move to limit pleadings.

Pleadings govern the scope of discovery. See *In re Eurecat US, Inc.*, 425 S.W.3d 577, 585-586 (Tex. App.—Houston [14th] 2014) (orig. proceeding) (McCally J., dissenting) (“[I]t is axiomatic that the scope of discovery is measured by the live pleadings regarding the pending claims… the live pleadings control the scope of discovery.”). A party can’t seek discovery on unplod theories. *cf. Certified EMS, Inc. v. Potts*, 392 S.W.3d 625, 630 (Tex. 2013) ("Discovery allows a claimant to refine her pleadings to abandon untenable theories and pursue supported ones.").


$See In re Rogers*, 200 S.W.3d 318, 324 (Tex. App.—Dallas 2006, orig. proceeding) (holding, when petition was “broadly pleaded” and had not been “challenged or narrowed through special exceptions or any other pleading vehicle,” that party “cannot attempt to limit the scope of the pleading through discovery objections”); *In re Citizens Supporting Metro Solutions, Inc.*, No. 14-07-00190-CV, 2007 Tex. App. LEXIS 8550, 2007 WL 4277850, at *3 (Tex. App.—Houston [14th Dist.] Oct. 18, 2007, orig. proceeding) (mem. op.) (holding that “[t]he scope of discovery is measured by the live pleadings regarding the pending claims” and that “[i]f, as here, the trial court does not rule on the merits of any of the claims, then the scope of discovery in the mandamus proceeding will be based on the pleadings.").

$Jordan v. Hagler*, 179 S.W.3d 217, 219 (Tex. App.—Fort Worth 2005, no pet.) (”Normally, a special exception is the proper procedural vehicle to attack a pleading defect.”); *Positive Feed, Inc. v. Guthmann*, 4 S.W.3d 879, 882 (Tex. App.—Houston [1st Dist.] 1999, no pet.) (The “proper vehicle to test the adequacy of the other party’s pleadings” is “attack[] by special exceptions.”).

**Use pleading Judo to defend attacks on your pleading.**

If your opponent claims your Pleading omits a claim, see if your opponent’s responsive pleading contemplated the remedy. If it did, your opponent is barred from claiming lack of notice. *See Perez v. Briercroft Service Corp.*, 809 S.W.2d 216, 218 (Tex. 1991):

Ultimately, the purpose of pleadings is to give the adversary parties notice of each parties claims and defenses, as well as notice of the relief sought. This purpose is served, however, when the defendant pleads a defense or limitation of liability which contemplates a particular remedy; then the plaintiff is entitled to that relief despite a failure to plead specifically for such relief. Furthermore, by pleading cancellation as a limitation, Briercroft cannot contend it is not an issue.

**Use the entire Record to expand your pleading.**

One Commentator has identified a recent case to support the argument that a party can go outside its pleading to show its opponent has sufficient notice of the relief requested. *See Sallee S. Smyth, Family Law Legislative and Case Law Update*, at p. 23-24 (Texas Bar College 17th Annual Summer School Course July 16 - 18, 2015):


$A party’s overall pleadings in the case, including various motions and affidavits, as well the trial court’s temporary orders, all combined to constitute sufficient pleadings which put the other party on notice of the relief requested and were sufficient to support the trial court’s judgment…$

---

1 Contra Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 351, 98 S. Ct. 2380, 2389, 57 L. Ed. 2d 253, 265 (1978) ("[D]iscovery is not limited to issues raised by the pleadings, for discovery itself is designed to help define and clarify the issues…Nor is discovery limited to the merits of a case, for a variety of fact-oriented issues may arise during litigation that are not related to the merits."); Gheesling v. Chater, 162 F.R.D. 649, 650 (D. Kan. 1995) ("While discovery is not limited to issues raised by the pleadings, and is very broad in scope, there are limits to the scope of discovery.").
COMMENT: … Here the 14th COA allows a party’s pleadings “as a whole” (not just the petition but later filed affidavits and other motions) coupled with court orders to serve as sufficient notice to a party of the issues at trial, when admittedly the H’s live pleading did not seek the relief ultimately granted.

C. WHAT RULES OF CIVIL PROCEDURE GOVERN PLEADINGS?

1. Texas:

   TEX. R. CIV. P. 1, 13, 22, 45-75, 78-85, 90-98, 169, 185, 190.1-190.4.


   Rules of civil procedure 45 and 47 govern pleadings and require them to give fair notice of the claim asserted. See id.; see also TEX. R. CIV. P. 45, 47. Rule 45 requires “plain and concise language” and further provides, “That an allegation be evidentiary or be of legal conclusion shall not be grounds for objection when fair notice to the opponent is given by the allegations as a whole.” TEX. R. CIV. P. 45. Rule 47 requires that an original petition include “a short statement of the cause of action sufficient to give fair notice of the claim involved.” TEX. R. CIV. P. 47. The purpose of the fair notice requirement is “to provide the opposing party with sufficient information to enable him to prepare a defense.” Paramount, 749 S.W.2d at 494. “Pleadings are sufficient if a cause of action or defense may be reasonably inferred from what is specifically stated.” Spiers v. Maples, 970 S.W.2d 166, 169 (Tex. App.—Fort Worth 1998, no pet.).

2. Federal:

   FED. R. CIV. P. 3, 7-15.

   FED. R. CIV. P. 8(a) requires a complaint to be “short and plain.” “Rule 8(e) reinforces this command: ‘Each averment of a pleading shall be simple, concise, and direct.’” FED. R. CIV. P. 8(e)(1). See Christopher M. Fairman, The Myth of Notice Pleading, 45 Ariz. L. Rev. 987, 1009, n. 47 (2003); FED. R. CIV. P. 84 (“The forms in the Appendix under these rules and illustrate the simplicity and brevity that these rules contemplate.”).

   Even a short complaint violates the rules if it is not plain. See Bennett v. Schmidt, 153 F.3d 516, 517–18 (7th Cir. 1998) (it may be appropriate to dismiss a short complaint under Rule 8 because it is not plain). Even a heightened pleading standard is no excuse for disregarding Rule 8’s requirement of “simplicity, directness, and clarity.” See McHenry v. Renne, 84 F.3d 1172, 1178 (9th Cir. 1996).


   To survive a dismissal motion, a complaint need only satisfy the minimal notice pleading requirements of Rule 8(a)(2)—a short and plain statement of the claim. Porter v. Jones, 319 F.3d 483, 494 (9th Cir. 2003). The factual “allegations must be enough to raise a right to relief above the speculative level” and a claim for relief must be "plausible on its face." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555, 570 (2007).

---

2 Not including the rules for special proceedings beginning at Rule 735.
III. TWOMBLY: REVOLUTION OR SAME OLD GAME?

A. FEDERAL PLEADINGS


As Judge Loken indicated for the Circuit in *Hamilton v. Palm*, 621 F.3d 816 (8th Cir. 2010) *Twombly* and *Iqbal* should not be exaggerated as a revolutionary change in pleading practice. Recent local rulings show the overuse by counsel of these new precedents... The rulings most sympathetic to challenges to pleadings have been dismissing complaints, but without prejudice to filing of amended pleadings within a short time. This practice is quite similar to motions for more definite statements, under Rule 12(e), Fed.R.Civ.P., a practice that has been lying fallow for decades because it does little to advance cases toward meaningful issue, necessary discovery, summary judgment, or dispositive motion practice and trial.

Except where the focus of the case is quite narrow but the allegations are rather plainly implausible in context, *Twombly* and *Iqbal* are not helpful to resolve litigation.


In *Twombly*, the Supreme Court expressly overruled *Conley* and “retired” its "no set of facts" language and stipulated that one must plead “enough facts to state a claim to relief that is plausible on its face”; thus, amending the standard of possibility to plausibility. *Iqbal* not only reinforced *Twombly*, but maintained that *Twombly*’s heightened standard applied uniformly to all civil actions, confirming the transubstantivity of “Twiqbal.” Critics contemplate whether *Twiqbal* was indeed a departure from the pleading standard or if it merely solidified the court’s daily practice...

*Twiqbal* promulgated a new, stricter “plausibility” standard, ruling that plaintiffs in an antitrust case may survive a motion to dismiss only if one pleads “enough facts to state a claim to relief that is plausible on its face.”...

In re-evaluating *Twombly*, the *Iqbal* Court re-emphasized that Rule 8 does not require detailed factual allegations, however, conclusory and formulaic allegations will not suffice. In its reevaluation, the Court found that *Twombly* rested on two fundamental principles: (1) that a court must accept all plaintiff’s allegations as true is inapplicable to legal conclusions; and (2) a complaint must state a plausible claim for relief to survive a motion to dismiss. In its interpretation of Rule 8, the Supreme Court justified its holding in affirming that *Twombly* “expounded the pleading standard for all civil actions.”...

*Twiqbal* restricted the liberal pleadings by enforcing plausibility rather than possibility.

B. FRAUD AFTER TWOMBLY. TAKING IT UP A NOTCH.

*Eclectic Props. East, LLC v. Marcus & Millichap Co.*, 751 F.3d 990, 995 n.5 (9th Cir. 2014):

Rule 9(b) requires that “circumstances constituting fraud” must be alleged with particularity but allows fraudulent intent to be
alleged generally. Federal Rule of Civil Procedure 9(b). We have held that the plausibility analysis of Twombly and Iqbal applies equally to Rule 9 as it does to Rule 8. Cafasso v. Gen. Dynamics C4 Sys., Inc., 637 F.3d 1047, 1055 (9th Cir. 2011). Accordingly, although the language of Rule 9 poses no barrier in itself to general pleading of fraudulent intent, Twombly and Iqbal’s pleading standards must still be applied to test complaints that contain claims of fraud.


[I] a party’s claim contains allegations of fraud, the pleading must meet a heightened standard and “state with particularity the circumstances constituting fraud.” FED. R. CIV. P. 9(b). This particularity requirement “does not ‘reflect a subscription to fact pleading.’” … Pleadings alleging fraud must instead contain “simple, concise, and direct allegations of the circumstances constituting fraud, which . . . must make relief plausible, not merely conceivable, when taken as true.” … (referring to the Twombly standard. Indeed, Rule9(b) supplements, and does not “supplant” the notice pleading requirements of Rule 8(a).

IV. WHAT IS NOT SUPPOSED TO BE IN THE PLEADINGS?

A. EXAMPLES OF IMPROPER PLEADINGS:

1. SCANDALOUS MATTERS

A matter is scandalous when it “unnecessarily reflects on ‘the moral character of an individual or states anything in repulsive language that detracts from the dignity of the court…’” [and] includes ‘allegations that cast a cruelly derogatory light on a party or other person.’” Quatela v. Stryker Corp., 820 F.Supp.2d 1045, 1050 (N.D. Cal. 2010) (internal citations omitted); Nault’s Auto. Sales, Inc. v. American Honda Motor Co., Inc., Acura Auto. Div., 148 F.R.D. 25, 30 (D.N.H. 1993):

“Scandalous material is that which ‘casts an adverse light on the character of an individual or party.’” Scandalous pleadings for the purpose of Rule 12(f) are those which, “‘reflect cruelly’ upon the defendant's moral character, use ‘repulsive language’ or ‘detract from the dignity of the court’ … to be scandalous such ‘degrading charges must be irrelevant, or, if relevant, must be gone into in unnecessary detail.’”


A matter is “scandalous” if it “reflects cruelly” on the objecting party’s moral character or uses language that “detracts from the ‘dignity of the court.’” Scandalous but relevant material may nonetheless be stricken as “immaterial” if it “has no essential or important relationship to the claim” or provides unnecessarily specific details in connection with matters which are material. Chi. Printing Co. v. Heidelberg USA, Inc., No. 01 C 3251, 2001 U.S. Dist. LEXIS 21358, 2001 WL 1646567, at *1 (N.D. Ill. Dec. 21, 2001) (finding allegations of past fraudulent activities potentially relevant to the plaintiff’s claims but striking as immaterial specific details of that fraud because “it is not the function of a complaint to plead evidence”…

Plaintiff also argues that Exhibit C provides “evidentiary support” to the Complaint’s “factual contentions” regarding the downloader’s identity, support Federal Rule of Civil Procedure 11(b) requires an attorney have. Rule 11 does not, however, require that such “evidentiary support” be included in the Complaint, just that it exist. If the adequacy of Plaintiff’s evidentiary support regarding the downloader’s identity were questioned, Plaintiff could include the contents of Exhibit C in its defense, but it need not be preemptively included in the Complaint.

Although it is not necessarily improper to include extraneous information in a complaint, this case presents special considerations. Because anyone connecting to a subscriber’s Internet connection would appear to use the same IP address, there is a fair chance that someone other than the subscriber performed the alleged downloads. Accordingly, the Court is more sensitive to the need to protect Defendant from unwarranted embarrassment.

See also, Murray v. Sevier, 156 F.R.D. 235, 258 (D. Kan. 1994) (Finding allegations that movant and his attorney
paid “hush money” to witnesses “entirely collateral and immaterial to the underlying claims,” court strikes scandalous matters by refusing to grant leave for an amended complaint containing them); Cairns v. Franklin Mint Co., 24 F.Supp.2d 1013, 1037 (C.D. Cal. 1998) (“Defendants’ motion to strike the allegation that they are “like vultures feeding on the dead” is granted…This language is irrelevant and impertinent as it has no bearing whatsoever on the legal issues presented.”); Lema v. Courtyard Marriott Merced, 2012 U.S. Dist. LEXIS 82822, at *13 (E.D. Cal. June 13, 2012):

Inflammatory language includes language that is inflammatory and highly prejudicial. Bureerong v. Uvawas, 922 F.Supp. 1450, 1479 (C.D. Cal. 1996). For example, even when certain defendants had recently pled guilty to slavery charges, the court found the term “slave sweatshops” to be “immaterial, scandalous, and highly prejudicial” since referring to the defendants’ subjecting workers to involuntary servitude could have been alleged using a less inflammatory term. Id

See, e.g.:

- Alvarado-Morales v. Digital Equipment Corp., 843 F.2d 613, 1st Cir. 1988):

  Appellants do not expressly object to the order of the district court striking from appellants’ amended complaint scandalous matter which impugned the character of defendants. A court has considerable discretion in striking “any redundant, immaterial, impertinent or scandalous matter.” Fed. R. Civ. P. 12(f); Boreri v. Fiat S.P.A., 763 F.2d 17, 23 (1st Cir. 1985). Counsel for appellants does, however, defend his use of such terms as “concentration camp,” “brainwash” and “torture” and such similes as “Chinese communists in Korea,” as accurate renderings of his clients’ description of their experiences. No matter the origin of these repugnant words replete with tragic historical connotations, they are superfluous descriptions and not substantive elements of the cause of action. As such, they have no place in pleadings before the court.


  Paragraph 7, Page 3, Lines 13-17: “What about the patients? These patients, who could live for years with dialysis, die within weeks without these transports. Of course, Kaiser welcomes these deaths because these are the ‘expensive patients’ who actually require care and cost Kaiser money. When these patients die, Kaiser is left with a ‘cheaper’ patient population that costs Kaiser much less money. With practices like these, it’s no wonder how Kaiser is making billions in profits year-after-year.”

  The Court GRANTS the Motion to Strike in part. References to Kaiser welcoming deaths, causing deaths or profiting from deaths — unsubstantiated by factual allegations — are immaterial and scandalous and should be stricken….


  [T]he judge noted that Gaspard asked the court to “horse whip” Beadle and Lupo in several pleadings. He also used other unnecessary, inflammatory language, including suggestions that Beadle and Lupo had conspired with the devil to ruin his good name. Finally, Gaspard admitted under oath that he had no evidence of any
The inquiry whether an allegation is scandalous is not decided by how well a person can bear the allegation, but the purpose behind it. See Idaho State Bar v. Warrick, 44 P.3d 1141, 1145 (Idaho 2002):

The Idaho Rules of Professional Conduct are based upon the Model Rules of Professional Conduct recommended by the American Bar Association. The ABA comments to Model Rule 4.4 state that the model rule focuses upon “the substantial ‘purposes’ of the action rather than its effect.” ABA Annot. Model Rules of Prof’l Conduct R. 4.4 cmt. (1996). The former ABA Rule 4.4 focused on effect and forbade an attorney from acting when the attorney knows or it is obvious that the action would harass or maliciously injure another. Id. The Board in this case properly considered the purpose rather than the effect of Warrick’s conduct.

2. IMPERTINENT MATTERS

A matter is impertinent when it consists of statements that do not pertain, and are not necessary, to the issues in question. See Whittlestone, Inc. v. Handi-Craft Co., 618 F.3d 970, 974 (9th Cir. 2010).

3. IMMATERIAL MATERIAL

A matter is immaterial when it has no essential or important relationship to the claim for relief or the defenses being plead. See Whittlestone, Inc. v. Handi-Craft Co., 618 F.3d 970, 974 (9th Cir. 2010).

4. REDUNDANT MATTERS


Claims are redundant if they are based upon the same operative facts and allege the same injury… The negligence and fiduciary claims are based on the same facts. More than that; they are basically identical. Rule 8(d)(2) does permit alternative pleading, but requires the plaintiff "use a formulation from which it can be reasonably inferred that" the plaintiff is indeed pleading in the alternative… The Plaintiff has not done that here. Accordingly, the breach of fiduciary duty claim must be dismissed.

5. PROVOCATIVE MATTERS

In Franklin v. Law Firm of Simon, Eddins & Greenstone, LLP, 2011 U.S. Dist. LEXIS 20007, (N.D. Tex. Jan. 24, 2011), Plaintiff filed suit against the Defendant law firm, her former employer, alleging that she was illegally fired from her job in violation of Title VII of the Civil Rights Act of 1964 based on her gender and in retaliation for her advising her employers at the time of her termination that she had been in contact with the Equal Employment Opportunity Commission about filing a charge of discrimination.” Id at *1. The Complaint described pornographic e-mails and other instances of crude behavior. See Defendants’ Motion for Rule 11 Sanctions [Doc. 7]. Defendant moved for Rule 11 sanctions, asking the Court to (1) strike various false and defamatory allegations from Plaintiff’s complaint; (2) dismiss her claims with prejudice; and (3) tax costs and attorney’s fees against Plaintiff. Id. at *2.

Magistrate Tolliver denied the Motion for sanctions without prejudice:

Although Defendant’s evidence is persuasive, at this juncture the undersigned is not able to objectively ascertain that Plaintiff’s counsel submitted the complaint for an improper purpose. Further, because the case...
is in its infancy and the facts are not fully developed, the undersigned is not in a position to make factual findings regarding the adequacy of counsel’s prefiling inquiry under the particular circumstances of this case. The court's imposition of Rule 11 sanctions of the magnitude that Defendant requests will require further development of the record. Nevertheless, the undersigned is not unsympathetic to Defendant’s concerns about the provocative nature of the complaint, especially given that Plaintiff acknowledges that it contains at least some erroneous information.

Id. at *8-9 (citations omitted) (emphasis added). Although Magistrate Tolliver denied the motion for sanctions, she recommended that:

Plaintiff should be DIRECTED to file an amended complaint by February 4, 2011, and should be advised to exercise caution in drafting her complaint because she and her counsel remain subject to Rule 11 sanctions should the Court find such to be warranted at a later date. Upon Plaintiff's filing of her amended complaint, the Clerk of the Court should be DIRECTED to strike Plaintiff's original complaint (Doc. 1) from the record.

Judge Fitzwater adopted Magistrate Tolliver’s recommendations. Franklin v. Law Firm of Simon, Eddins & Greenstone, L.P., 2011 U.S. Dist. LEXIS 20002 (N.D. Tex. Feb. 28, 2011). Judge Fitzwater noted that Plaintiff had filed an amended complaint, and ordered that the original complaint “stricken from the record.” Id. at *2. The Original Complaint is not available to the public on PACER.

**B. LACK OF LEGITIMATE PURPOSE**

If there is no legitimate purpose for a scandalous allegation, it is deemed to be an attempt to harass, embarrass and humiliate. See Katz v. Looney, 733 F. Supp. 1284, 1288 (W.D. Ark. 1990):

There is absolutely no legitimate basis for the scandalous, impertinent and libelous statements made by plaintiff against one of the defendants, and Magistrate Stites and, in fact, this court. Those statements are strictly personal attacks and don't even arguably address any legitimate issue before the court. Since there is no legitimate purpose for these statements, they must have been made by plaintiff in an attempt to harass, embarrass and humiliate the persons about which they are made. There is no place for this kind of conduct in any court, and this court will not allow it. The conduct of the plaintiff would be bad enough if he was an untrained and uneducated person “off the street”, but the file shows that he is trained as a lawyer, albeit a disbarred one, who, in fact, seeks a master’s degree in the law. This case “cries out” for Rule 11 Sanctions, and they will be imposed.

**C. DEFENSES TO CHARGES OF IMPROPER ALLEGATIONS: CONTEXTUAL PURPOSE**


The Court has reviewed the paragraphs identified by Defendants and find that none rise to the level of being impertinent, immaterial, or scandalous under Rule 12(f). Every paragraph relates in some way to mortgage-lending practices. The paragraphs that are not specific to Defendants’ lending practices or Los Angeles serve a contextual purpose that the Court finds entirely proper. Defendants’ arguments in the Motion to Strike would be more appropriate at a later stage in the litigation in the form of evidentiary objections.


Paragraphs 6 through 10 of plaintiff's first amended complaint allege that in 2006 defendants, with the help of two recently elected Nevada County Supervisors who engaged in dishonest and misleading conduct, unsuccessfully attempted to obtain legal title to the county road at issue. The paragraphs also allege that despite their “defeat,” defendants “continued to make their absurd and fraudulent claim of ownership of the road and threatened and harassed many people hiking on the road since March 2006.” Plaintiff refers to defendants as “outlaws” and alleges that “[d]efendants were lucky in that none of their many victims filed police reports or sued them for their illegal actions.” Although defendants argue that the allegations in paragraphs 6 through 10 are “superfluous historical allegations” and “unnecessary particulars,” and that the overall theme of paragraphs 6 through 10 is to denigrate
defendants, paragraphs 6 through 10 do provide a context for plaintiff's lawsuit and reflect on defendants' knowledge and awareness regarding the legal status of the road on which the incident occurred. Where allegations, when read with the complaint as a whole, give a full understanding thereof, they need not be stricken. LeDuc v. Kentucky Cent. Life Ins. Co., 814 F. Supp. 820, 830 (N.D. Cal. 1992). Also, although defendants contend that they are “at risk of prejudice by the possibility that Plaintiff will attempt to display the offensive pleading to a jury or otherwise publish the pleading,” as plaintiff notes, the “complaint is very unlikely to be used as a jury exhibit” and “defendants may move to exclude evidence of the statements, if appropriate, at a later stage of the litigation.” At this stage, the court is unable to conclude that paragraphs 6 through 10 are irrelevant, immaterial, impertinent, or scandalous, as defendants contend. Therefore, defendants' motion to strike those paragraphs will be denied.

V. WHAT MAKES THE UNETHICAL PLEADER, UNETHICAL?

The unethical pleader may violate some, or all, of the following rules and opinions:

A. ETHICAL RULES

TEX. DISC. R. PROF. CONDUCT RULE 4.04(a) Respect for Rights of Third Persons:

In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person…

See, e.g., Texas Ethics Opinion 585 (2008) (With examples of conduct that do and don’t violate this Rule).

TEX. DISC. R. PROF. CONDUCT RULE 3.01 Meritorious Claims and Contentions:

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless the lawyer reasonably believes that there is a basis for doing so that is not frivolous.

Comment.

1. The advocate has a duty to use legal procedure for the fullest benefit of the client’s cause, but also a duty not to abuse legal procedure.

TEX. DISC. R. PROF. CONDUCT RULE 3.04(c) Fairness in Adjudicatory Proceedings:

(1) habitually violate an established rule of procedure or of evidence;

(2) state or allude to any matter that the lawyer does not reasonably believe is relevant to such proceeding or that will not be supported by admissible evidence…

TEX. DISC. R. PROF. CONDUCT RULE 8.04(a) (12) Misconduct:

A lawyer shall not violate any other laws of this state relating to the professional conduct of lawyers and to the practice of law.

B. ETHICAL OPINIONS


ABA Informal Opinion 1172 (May 31, 1971):

Disclosure of the fact of filing of the suit and making the complaint available are references to public records and, except as suggested below, are not “reasonably likely to interfere with a fair trial of the action.” We, therefore, are of the opinion that the Society's practice you describe does not violate the Code of Professional Responsibility if the qualifications made below are observed.

Standards for permissible and prohibited conduct of a lawyer with respect to trial publicity have been established in the interest of adjudication of an impartial tribunal. EC 7-33. Release by your Society of the fact of a suit being instituted and furnishing a copy of the complaint if requested, at the Society’s office, should not affect the impartiality of the tribunal, absent comments on the litigation which you say the Society eschews.
We suggest, however, that even a legal aid society should not supply the complaint, unless requested by the reporter, and should not deliver a copy of the complaint to the reporter unless he comes to the society for it. While this difference may be slight in many cases, adherence to this practice should help put a brake on any tendency to rush into print or to draft complaints with an eye to biased publicity that might affect the impartiality of the tribunal. No attorney should use language in a pleading which, if publicized, would, by its nature, be likely to prejudice the public or the tribunal, except to the extent that it is essential to properly plead the cause of action.

ABA Informal Opinion 1172 (February 17, 1971) (Dissenting Opinion):

The majority opinion has determined that it is not improper for a legal aid society “...to inform them [news media] of the filing of the lawsuit....” in law reform cases. I think it improper for any lawyer, whether or not on the staff of a legal aid society, to ever inform the news media of the filing of any lawsuit when it is readily apparent that it is for the ostensible purpose of obtaining public notoriety of either (1) the particulars of the lawsuit; (2) the legal aid society and/or the lawyers handling the litigation; (3) the plaintiff’s dilemma; (4) the defendant’s identity and the wrong he is charged with; and/or (5) the relief sought.

I find it reprehensible that the majority opinion would permit a lawyer to seek such notoriety, whether it be for himself or the cause he champions. To do so is to permit him to make extra-judicial statements (DR 7-107(G)) as would otherwise be prohibited if made by an attorney for a private litigant.

If the purpose of notifying the new media not be self-laudation (DR 2-101(A)) of either the legal aid society or the individual lawyer or lawyers handling the case, then it would be reasonable to assume that it is for the purpose of endeavoring to influence the public in favor of the plaintiff, or to create prejudice as against the defendant. It matters not that the nature of the lawsuit is one of purported “law reform”. It is not for us to predetermine the philosophical considerations or merits of the litigation. That determination is to be made by the Court. To do otherwise is to substitute our judgment in place of a final adjudication in a court of law.

While there may be averments of a complaint bespeaking of law reforms, yet these may be wholly untenable; the averments may be inflammatory and prejudicial which might ultimately be stricken. Certainly a lawyer should not be permitted to direct the news media's attention to the filing of a complaint, which the Court might ultimately determine to be without merit. To do so is to ignore the long-established and traditional concepts of what lawyers everywhere have continuously treated as impermissible and unethical conduct.

The majority apparently believe that the provisions (DR 2-101(A) and DR 7-107(G)) of the new Code of Professional Responsibility do not prohibit the conduct described. I vigorously disagree.

ABA Informal Opinion 1230 (August 9, 1972):

You desire an elaboration of Informal Opinion 1172 and, in particular, you ask if the penultimate paragraph of Informal Opinion 1172 is merely a suggestion or whether it is mandatory. The penultimate paragraph of Informal Opinion 1172 states as follows:

We suggest, however, that even a legal aid society should not supply the complaint, unless requested by the reporter, and should not deliver a copy of the complaint to the reporter unless he comes to the society for it. While this difference may be slight in many cases, adherence to this practice should help put a brake on any tendency to rush into print or to draft complaints with an eye to biased publicity that might affect the impartiality of the tribunal. No attorney should use language in a pleading which, if publicized, would, by its nature, be likely to prejudice the public or the tribunal, except to the extent that it is essential to properly plead the cause of action.
The Committee gave long and careful consideration to the question presented before they released Informal Opinion 1172 and two of the members of the Committee wrote dissenting opinions which expressed the view that it is a violation of the Code for any attorney in a civil action to supply the media with a complaint he had filed. The Committee, in carefully considering the matter, feels that the paragraph you refer to and above quoted should be mandatory. To hold otherwise, we believe, would be a violation of DR 7-107(G) and would also “ignore the long established and traditional concepts that lawyers everywhere have continuously treated as impermissible and unethical conduct” as expressed in one dissenting opinion. The very purpose of our court system is to provide a means of impartial, unemotional adjudication of issues of fact and law. Extrajudicial statements and press releases by counsel are accordingly severely proscribed. DR 7-107. Any news release your Center may issue, as apparently contemplated by your letter of May 8, 1972, is subject to the limitations of DR 7-107.

Pleadings by their very nature contain self-serving statements and the voluntary furnishing by counsel to the public media of pleadings prepared by him constitutes an invitation to those media to publish and comment upon the contents of those pleadings and is itself an extra-judicial statement in contravention of DR 7-107(G).

While we would have thought our intention was clear, without amplification, in view of your New York Times example we expressly state here that we would not require that the reporter come to the Society in person for the complaint. It is our point that he, not you, should take the initiative in obtaining the complaint, so as to put a brake on counsel rushing into print, and that point would of course be met if he sent someone for it instead of coming for it himself.

Texas Ethics Opinion 415 (February 1984):

**QUESTION PRESENTED**

Does an attorney’s pleading of a dollar amount for unliquidated damages in an original pleading which sets forth a claim for relief constitute an ethical violation?

**DISCUSSION**

Rule 47 of the Texas Rules of Civil Procedure provides:

An original pleading which sets forth a claim for relief, whether an original petition, counterclaim, cross-claim, or third party claim, shall contain (a) a short statement of the cause of action sufficient to give fair notice of the claim involved, (b) in all claims for unliquidated damages only the statement that the damages sought exceed the minimum jurisdictional limits of the court, and (c) a demand for judgment for all the other relief to which the party deems himself entitled. Relief in the alternative or of several different types may be demanded; provided, further, that upon special exception the court shall require the pleader to amend so as to specify the maximum amount claimed. Tex. R.Civ. P. 47 (emphasis added).

Disciplinary Rule (DR) 7-106(C)(7) provides that in appearing in his professional capacity before a tribunal, a lawyer shall not intentionally or habitually violate any established rule of procedure or of evidence.

An attorney’s act of signing his name to any pleadings filed in a case constitutes an appearance. Tex. R. Civ. P. 10.

DR 1-102(A) prohibits lawyers from engaging in conduct which violates a disciplinary rule or in conduct prejudicial to the administration of justice.

Canon 1 provides “A lawyer should assist in maintaining the integrity and competence of the legal profession,” and Ethical Consideration (EC) 1-5 provides in part, “Obedience to law exemplifies respect for law. To lawyers especially, respect for the law should be more than a platitude.”

EC 7-25 is especially pertinent:
Rules of evidence and procedure are designed to lead to just decisions and are part of the framework of the law. Thus, while a lawyer may take steps in good faith and within the framework of the law to test the validity of rules, he is not justified in consciously violating such rules and he should be diligent in his efforts to guard against his unintentional violation of them. As examples, a lawyer should subscribe to or verify only those pleadings that he believes are in compliance with applicable law and rules . . . . (emphasis added).
This Committee has on previous occasions determined that the inclusion of improper or false allegations in pleadings is unethical. See Ethics Opinions 405 (1983), 337 (1968), and 213 (1958).

The wording in Rule 47(b) set forth herein above is clearly mandatory.

CONCLUSION

An attorney’s intentional or habitual violation of Rule 47(b) constitutes a violation of the Code of Professional Responsibility. (9-0.)

VI. PRIVILEGES: DEFAMATION AND INVASION OF PRIVACY

A. DEFAMATION

One explanation for the amount of trash talk in pleadings is the absolute privilege (a/k/a immunity) afforded communications made in the course of judicial proceedings. See e.g.:


  The proper administration of justice requires full and free disclosure of information as to criminal activity both by the public and by participants in judicial proceedings. James v. Brown, 637 S.W.2d 914, 916-17 (Tex. 1982) (per curiam). In support of this policy, Texas recognizes two classes of privileges applicable to defamation suits: absolute privilege and conditional or qualified privilege… In Hurlbut we relied heavily on the Restatement (Second) of Torts in differentiating between the two:

  An absolute privilege is more properly thought of as an immunity because it is based on the personal position or status of the actor. . . . Such immunity, however, attaches only to a limited and select number of situations which involve the administration of the functions of the branches of government, such as statements made during legislative and judicial proceedings . . . . Privileges of the second class, the conditional or qualified privilege, are true privileges because they arise out of the occasion upon which the false statement is published. . . . The occasions which may give rise to a conditional privilege are described in the Restatement…

  We quoted from the Restatement to explain that “[a] witness is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding or as part of a judicial proceeding in which he is testifying, if it has some relation to the proceeding.” Id. At 767 (quoting RESTATEMENT (SECOND) OF TORTS § 588 (1977)); James, 637 S.W.2d at 917 (same); see also RESTATEMENT (SECOND) OF TORTS § 587 (1977) (noting that an absolute privilege applies to communications by potential parties in criminal prosecutions). The test for whether a communication is absolutely privileged when it occurs before judicial proceedings have begun entails both subjective and objective components. See RESTATEMENT (SECOND) OF TORTS § 588 cmt. e (1977) (“As to communications preliminary to a proposed judicial proceeding, the rule . . . applies only when the communication has some relation to a proceeding that is actually contemplated in good faith and under serious consideration by the witness or a possible party to the proceeding.”) (emphasis added). The fact that a formal proceeding does not eventually occur will not cause a communication to lose its absolutely privileged status; however, it remains that the possibility of a proceeding must have been a serious consideration at the time the communication was made. See id. (“The bare possibility that the proceeding might be instituted is not to be used as a cloak to provide immunity for defamation when the possibility is not seriously considered.”); see also United States v. Baggot, 463 U.S. 476, 103 S. Ct. 3164, 77 L. Ed. 2d 785 (1983) ("The words ‘preliminary to’ necessarily refer to judicial proceedings not yet in existence, where, for example, a claim is under study.").

  In Texas, the absolute privilege is also extended to quasi-judicial proceedings and other limited instances in which the benefit of the communication to the general public outweighs the potential harm to an individual. Bird v. W.C.W., 868 S.W.2d 767, 771 (Tex. 1994); see also Reagan v. Guardian Life Ins. Co., 140 Tex. 105, 166...
S.W.2d 909, 913 (Tex. 1942) (“The rule is one of public policy. It is founded on the theory that the good it accomplishes in protecting the rights of the general public outweighs any wrong or injury which may result to a particular individual.”). While abuse of the absolute privilege is possible, it is limited because the speaker will generally still be subject to the risk of criminal prosecution for perjury or obstruction of justice. See, e.g., TEX. PENAL CODE ch. 37 (“Perjury and Other Falsification”); 18 U.S.C. § 1505 (“Obstruction of proceedings before departments, agencies, and committees”).

Not all communications to public officials are absolutely privileged, but may yet warrant protection as being conditionally privileged:

An occasion makes a publication conditionally privileged if the circumstances induce a correct or reasonable belief that

(a) there is information that affects a sufficiently important public interest, and

(b) the public interest requires the communication of the defamatory matter to a public officer or a private citizen who is authorized or privileged to take action if the defamatory matter is true.

Hurlbut, 749 S.W.2d at 768 (quoting RESTATEMENT (SECOND) OF TORTS § 598 (1977)). This privilege is lost if abused, such as when the statement is made with malice and with knowledge of its falsity. Id.

See also, Crain v. Smith, 22 S.W.3d 58, 62-63 (Tex. App.—Corpus Christi 2000, no pet.):

“Any communication made or published during the course of a judicial proceeding is absolutely privileged; that is, no action will lie to recompense any injury which they may cause.” James v. Brown, 637 S.W.2d 914, 916-17 (Tex. 1982). This privilege has been held by several courts to include communications by counsel in which the alleged wrongs suffered by the client are detailed. See e.g. Russell v. Clark, 620 S.W.2d 865 (Tex. Civ. App.—Dallas 1981, writ ref’d n.r.e.); Thomas v. Bracey, 940

S.W.2d 340 (Tex. App.—San Antonio 1997, no writ); see also Helfand v. Coane, 12 S.W.3d 152 (Tex. App.—Houston [1st Dist.] 2000, no pet. h.). The rationale is largely that of the absolute privilege that attaches to allegations in a petition filed in court, in that the demand letter is an attempt to alert the potential defendant of the grievance before suit is filed...

The statements contained in Smith’s demand letter were factual allegations and legal conclusions that formed the basis of her proposed legal action. She was stating a claim for relief to counsel for Airtron, her anticipated target if she sued for her client. The statements in the letter were absolutely privileged, and cannot constitute the basis for litigation against the lawyer, just as, if suit is filed, the allegations of the petition cannot be actionable.

• Darrah v. Hinds, 720 S.W.2d 689, 692 (Tex. App.—Fort Worth 1986, writ ref’d n.r.e. (citations omitted):

It is well settled that communications in the course of judicial proceedings are absolutely privileged and cannot serve as the basis of defamation actions, regardless of the negligence or the malice with which they are made. This absolute privilege is a rule of non-liability and applies even though the statements are not relevant, pertinent or material to the issues involved in the case in which they were uttered. In recent years, the rule has been extended to communications made in contemplation of judicial proceedings.

• 5-State Helicopters, Inc. v. Cox, 146 S.W.3d 254, 256-257 (Tex. App.—Fort Worth 2004, pet. denied) (citations omitted):

An absolutely privileged communication is one for which, due to the occasion upon which it was made, no civil remedy exists, even though the communication is false and was made or published with express malice. This doctrine has been firmly established in Texas for well over one hundred years. The absolute privilege applies to communications related to both proposed and existing judicial and quasi-judicial proceedings.
• **Bell v. Lee**, 49 S.W.3d 8, 10-11 (Tex. App.—San Antonio 2001, no pet.):

  Communications in the due course of a judicial proceeding will not serve as the basis of a civil action for libel or slander, regardless of the negligence or malice with which they are made. **James v. Brown**, 637 S.W.2d 914, 916 (Tex. 1982). This absolute privilege extends to a communication “preliminary to a proposed judicial proceeding … if it has some relation to the proceeding.” *Id.* At 917 (quoting RESTATEMENT (SECOND) OF TORTS § 588 (1981)). Whether a statement is made in contemplation of a judicial proceeding is a question of law. **Thomas v. Bracey**, 940 S.W.2d 340, 343 (Tex. App.—San Antonio 1997, no writ). “All doubt should be resolved in favor of the communication's relation to the proceeding.” *Id.*

**Accord Levario v. NCO Fin. Sys.**, 2004 U.S. Dist. LEXIS 9496, at *22 (W.D. Tex. May 21, 2004) (Garcia, J.) (“Texas law is clear that statements made in the course of a deposition or other judicial proceeding are protected by an absolute privilege. Such statements, therefore, cannot form the basis for a defamation cause of action.”).

**B. Absolute Light? The Dallas Court of Appeals “some relation” standard provides a potential remedy to those defamed our “outed” by the content of a pleading.**

**See Jenevein v. Friedman**, 114 S.W.3d 743 (Tex. App.—Dallas 2003, no pet.) (Bridges, J.).

**The Petition at issue alleged:**

On information, ancillary to this matter but relevant to issues of pattern and pervasiveness of the type of conduct being complained of, [Judge] Gibson has in other cases exchanged rulings for sexual favors, has made frequent *ad litem* appointments to Judge Robert Jenevein's wife and to Beverly Whittley, a lawyer with his former firm, and with whom Gibson is alleged to have a more intimate relationship.

**Plaintiff read the allegation one way:**

Jenevein states she reads the quoted statement as including her as one who exchanged sexual favors for *ad litem* appointments. She vigorously contends the statement, read as such, is false and defamatory.

**Defendant reads it differently:**

Friedman asserts that the statement is in no way an accusation that Jenevein exchanged sexual favors for *ad litem* appointments from Judge Gibson.

**Defendant moves for summary judgment on absolute immunity and prevails.**

Friedman asserted the affirmative defense of privilege and moved for summary judgment, which the trial court granted, based on “the absolute immunity applicable to pleadings filed by an attorney in pending litigation.” The trial court dismissed Jenevein’s libel claim with prejudice.

**Plaintiff (now appellant) argues that the allegedly defamatory statement has nothing to do with the litigation. Hence, no litigation privilege.**

Jenevein argues that Friedman has not shown he is entitled to the litigation privilege because the allegedly defamatory statement had no connection to the subject of the *Yahoo* suit. Friedman counters that Texas Supreme Court precedent negates a rule imposing a requirement that the allegedly defamatory statement be related to the litigation for the privilege to apply.

**Dallas COA assumes for purposes of the appeal that the statement was defamatory.**

[Dallas COA notes]: We do not decide whether the statement was in fact defamatory, i.e., whether it can be read to assert that Jenevein exchanged sexual favors for *ad litem* appointments. The law governing the privilege cloaks qualifying communications with the privilege even if the statement was false and made with ill will. **Reagan v. Guardian Life Ins. Co.**, 140 Tex. 105, 111, 166 S.W.2d 909, 912 (Tex. 1942) (if privilege applies, falsity or malice of utterer immaterial). Thus, in testing whether the privilege applies, we may assume for the sake of argument that the statement was defamatory.

**Dallas COA reviews precedent. It is not clear.**

Our review of precedents on the litigation privilege reveals that the Texas Supreme Court has alluded to, but has not addressed, the exact issue presented here—whether the defamatory statement must be connected to the subject matter of the proceeding for the privilege to apply.
THE ETHICAL PLEADER... OR, HOW MUCH TRASH CAN I TALK?

Dallas COA finds that it has always been clear.

Nonetheless, this Court has directly addressed this issue and has consistently required that the defamatory matter bear some relationship to the judicial proceeding to be protected by the privilege.

Dallas COA describes the standard for immunity.

An attorney at law is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding, or in the institution of, or during the course and as a part of, a judicial proceeding in which he participates as counsel, if it has some relation to the proceeding.

The standard is not “relevance” but a lesser standard: the statement must only bear “some relation to the proceeding,” and all doubt should be resolved in favor of “some relation.” Further, the standard is necessarily minimal so as to occasion no fear, by any witness, of retaliatory damage suits for defamation and thereby hamper the original purpose of the privilege to encourage testimony...

Dallas COA acknowledges that not every court agrees.

We are mindful that at least two of our sister courts have rejected our application of a “pertinence” or “some relation” test...

Dallas COA reaffirms the “some relation” standard

We reaffirm the principle that, for the litigation privilege to apply, the allegedly defamatory statement must bear “some relation” to the proceeding. We note that the germane comment in the Restatement makes clear that the "some relation" test does not require that the defamatory statement meet technical relevance, materiality, or admissibility standards.

Dallas COA applies the some relationship standard.

Friedman alleged a conspiracy to bribe Judge Gibson, with the so-called “campaign contribution” intended as an improper quid pro quo for a ruling sanctioning Friedman. The statement concerning Jenevein could bear some relation to the Yahoo proceeding. The testimony concerning Gibson’s alleged judicial improprieties in granting ad litem appointments could be introduced to establish intent. Resolving all doubts in favor of showing a relationship, we conclude that there was some relation between the alleged bribery scheme and the statement concerning the judge’s allegedly improper exchanges for judicial favors.

Dallas COA reiterates the “some relation” standard.

Having articulated a plausible evidentiary avenue by which the offending statement might become the subject of inquiry, we nonetheless reiterate that the principles governing application of the "some relation" test explicitly do not require technical relevance, materiality, or admissibility

Only two cases have cited Jenevein v. Friedman on the issue of defamation immunity. In Senior Care Res., Inc. v. OAC Senior Living, LLC, 442 S.W.3d 504, 518 (Tex. App.—Dallas 2014, no pet.) (Richter, J.) (Affirming summary judgment on absolute litigation immunity). The Dallas COA concluded that because a state agency determination was a quasi-judicial proceeding, it followed “that any communications made during such a proceeding were absolutely privileged or immune from suit. Id. That language speaks as if the court considered the litigation privilege to be actually “absolute.” However, the court indicated that it would have performed a “some relationship” analysis if there had been a dispute over whether the communications were related to the proceeding. Id.

In Gawlikowski v. Sikes, 2012 Tex. App. LEXIS 4703 (Tex. App.—Houston [1st Dist.] June 14, 2012, no pet.), the court affirmed a judgment in favor of Plaintiff, awarding him actual damages of $25,000, and, finding that Defendant “acted with malice and knowledge of the falsity of his statements,” and awarding Plaintiff $50,000 in punitive damages. The court applied the “some relationship standard,” and resolving all doubt in favor of the privilege, found that an e-mail accusing the Plaintiff of sexually assaulting his stepdaughter was not related to ongoing child custody proceedings between the Child’s Mother and Defendant. Id. at *9-10.

C. INVASION OF PRIVACY

See Gaither v. Davis, 582 S.W.2d 913, 914 (Tex. Civ. App.—Fort Worth 1979, writ dism’d w.o.j.) (While giving testimony in a criminal proceeding, Ms. Davis testified that Ms. Gaither was a Thief. Ms. Gaither sued Ms. Davis for slander and invasion of privacy. The trial court rendered summary judgment in Ms. Davis’ favor. The COA concluded that the considerations applicable to absolute privilege for communications in judicial proceedings applied with equal force to allegations of invasion of the right to privacy. “We hold that the absolute privilege extends in this case to the alleged
invasion of privacy.”); *Wolfe v. Arroyo*, 543 S.W.2d 11, 13 (Tex. Civ. App.—San Antonio 1976, no writ) (“[C]ommunications in judicial proceedings are absolutely privileged and are immune from an action for invasion of privacy.”).


As a matter of law, communications made during a court’s proceedings are absolutely privileged and are immune from an action alleging defamation or invasion of privacy. *James v. Brown*, 637 S.W.2d 914, 916 (Tex.1982); *Wolfe v. Arroyo*, 543 S.W.2d 11, 13 (Tex.Civ.App.1976). The Restatement provides that the privileges applicable in defamation actions also “apply to the publication of any matter that is an invasion of privacy.” Restatement (Second) of Torts § 652F. According to the Restatement, judges, attorneys, parties, and witnesses may publish defamatory material, and thus false light material, preliminary to or in the course of judicial proceedings if the material is related to the proceedings. *Id.* at §§ 585-88. These privileges exist in Texas. *See Reagan v. Guardian Life Ins. Co.*, 140 Tex. 105, 166 S.W.2d 909, 912 (1942).

**D. OTHER JURISDICTIONS:**

Judicial opinions from other jurisdictions may eventually be considered persuasive authority in Texas for imposing tort liability on unethical pleaders.

*Some jurisdictions require closer connection to the proceedings before a statement earns the litigation privilege.*


Although absolute immunity attaches to statements made in the course of, or incident to, a judicial or quasi-judicial proceeding, *privilege may be overcome by demonstrating that the defamatory statement is irrelevant to the subject matter of the proceeding in connection with which the communication was made.* *Durr v. Kelleher*, 54 Ore. App. 965, 636 P.2d 1015 (Or. App. 1981).

**E. PLEADER REPEATERS & TWEETERS**


The Martins argue that the statements to WLBT are not actionable because they were made in the course and scope of pending litigation. They rely exclusively on *Prewitt v. Phillips*, 25 So. 3d 397 (Miss. Ct. App. 2009) (granting motion to dismiss defamation action stemming from statements attached to a motion filed in a civil action). That decision from the Mississippi Court of Appeals notes that “[s]tatements made in connection with judicial proceedings, including pleadings, are, if in any way relevant to the subject matter of the action, absolutely privileged and immune from attack as defamation, even if such statements are made maliciously and with knowledge of their falsehood.” … *But this case is easily distinguishable from Prewitt because Defendants allegedly made the offending statements to a television station and not within a pleading filed in court.*

While the Martins argue the statements made to WLBT are not actionable because they were identical to the allegations contained in the *Blackmon v. Virginia College* complaint, they cite no authority to support the contention. And it appears that Mississippi would not extend protection once the statements are republished to the general public. One of the earliest cases adopting the litigation privilege in this state is *Lewis v. Black*, where the court noted that “[i]n all
judicial proceedings . . . the parties are permitted to speak freely; and if they should ever make use of harsh expressions, they will not be liable to an action although the same words spoken on another occasion would be actionable.”…Later, in Netterville v. Lear Siegler, Inc., the Mississippi Supreme Court addressed the litigation privilege in the context of attorney disciplinary proceedings. 397 So. 2d 1109 (Miss. 1981). Although the context was different and subject to a state statute, the court expressly stated that its ruling was based in part on the common law, and it provided the following synopsis:

Any person or legal entity filing such complaint shall be immune from any civil suit predicated thereon, so long as the statements are made within the course and framework of the disciplinary process and are reasonably relevant to the complaint…

The Court then concluded that the same statements lost their privilege if "circulated to persons who were not entitled to receive it."

As stated, the context in Netterville is different, but the case is consistent with cases from many other jurisdictions holding that a statement made in the course of a judicial proceeding may lose absolute privilege when republished. See Helena Chem. Co. v. Uribe, 2011 NMCA 60, 149 N.M. 789, 255 P.3d 367, 376 (N.M. 2001) (reversing finding of absolute privilege for statements made to news reporters despite argument that the statements related to the subject matter of the judicial proceeding); Bochetto v. Gibson, 580 Pa. 245, 860 A.2d 67, 72 (Pa. 2004) (reversing finding of judicial privilege in transmittal of complaint to a reporter) (citing Pawlowski v. Smorto, 403 Pa. Super. 71, 588 A.2d 36, 41 n.3 (Pa. 1991) ("[E]ven an absolute privilege may be lost through overpublication . . . . In the case of the judicial privilege, overpublication may be found where a statement initially privileged because made in the regular course of judicial proceedings is later republished to another audience outside of the proceedings."); Barto v. Felix, 250 Pa. Super. 262, 378 A.2d 927, 930 (Pa. 1977) (although allegations in attorney's brief were protected by judicial privilege, attorney's remarks concerning contents of brief during press conference were not likewise protected by privilege)). Taking Plaintiff's allegations as true, dismissal is inappropriate.

Ball v. D'Lites Enters., 65 So. 3d 637, 639-641 (Fla. App. 2011) (emphasis added):

The issue presented in this case is whether the statements by a party on its commercial website constituted a statement made in connection with judicial proceedings. We hold that it does not.

Recently, we confronted the scope of the Levin ruling in DelMonico v. Traynor, 50 So. 3d 4 (Fla. 4th DCA 2010), rev. granted 47 So. 3d 1287 (Fla. 2010). There, a defense attorney interviewing a witness made allegedly defamatory statements regarding the plaintiff. The interview was outside of a court proceeding. The majority held that the attorney was entitled to absolute immunity because he was acting as defense counsel in the underlying litigation when interviewing a witness in the dispute. While the majority and dissent split on the scope of the immunity, even the majority limited immunity to statements made in connection with the judicial process itself, such as interviewing witnesses, obtaining discovery, settlement negotiations, and the like.

We analogize the publication of statements on the internet to calling a press conference with the media or otherwise publishing defamatory information to the newspapers or other media. Other courts have considered the issue of whether statements to a newspaper or other media are made in connection with a judicial proceeding. In Buckley v. Fitzsimmons, 509 U.S. 259, 113 S. Ct. 2606, 125 L. Ed. 2d 209 (1993), the Supreme Court held that a prosecutor was not entitled to absolute judicial immunity for making defamatory statements at a press conference regarding a criminal prosecution, because comments to the press do not have any functional tie to a judicial proceeding. A footnote further explained the limits of absolute immunity:

[Absolute immunity] does not apply to or include any publication of defamatory
matter before the commencement, or after the termination of the judicial proceeding (unless such publication is an act incidental to the proper initiation thereof, or giving legal effect thereto); nor does it apply to or include any publication of defamatory matter to any person other than those to whom, or in any place other than that in which, such publication is required or authorized by law to be made for the proper conduct of the judicial proceedings.” Veeder, Absolute Immunity in Defamation: Judicial Proceedings, 9 Colum.L.Rev. 463, 489 (1909) (footnotes omitted).


Buckley, 509 U.S. at 277 n.8 (emphasis supplied). The prosecutor was entitled only to qualified immunity.

In Pratt v. Nelson, 2007 UT 41, 164 P.3d 366 (Utah 2007), the Utah Supreme Court similarly held that statements to newspapers regarding pending litigation were not subject to protection under the judicial proceeding privilege. The court agreed with similar statements of both the Arizona Supreme Court in Green Acres Trust v. London, 141 Ariz. 609, 688 P.2d 617 (1984) and the Eighth Circuit in Asay v. Hallmark Cards, Inc., 594 F.2d 692 (8th Cir. 1979). The court also cited Prosser & Keeton on Torts § 114, 816-20 (5th ed. 1984) for the propositions that “[a]bsolute immunity has been confined to very few situations where there is an obvious policy in favor of permitting complete freedom of expression” such as a judicial proceeding and that, although a judicial proceeding “has not been defined very exactly,” it “is clear . . . that statements given to the newspapers concerning the case are no part of a judicial proceeding, and are not absolutely privileged.”… Pratt explained “that the press generally lack a connection to judicial proceedings sufficient to warrant an extension of the judicial privilege to statements made by parties to the press.” Id. at 380. It found that such statements did not further the purpose of judicial proceedings:

Statements made and distributed to the press concerning pending or ongoing litigation do little, if anything, to promote the truth finding process in a judicial proceeding. Further, statements made to the press do not generally encourage open and honest discussion between the parties and their counsel in order to resolve disputes; indeed, such statements often do just the opposite. Id. at 381.

See also Bochetto v. Gibson, 580 Pa. 245, 860 A.2d 67 (Pa. 2004) (attorney’s transmittal of complaint to freelance reporter was an extrajudicial act that occurred outside of the regular course of the judicial proceedings and thus judicial privilege did not apply to provide attorney with absolute immunity in defamation action); Kennedy v. Zimmermann, 601 N.W.2d 61 (Iowa 1999) (counsel’s statements to reporter in course of interview were not protected by absolute privilege for statements made by attorneys in connection with judicial proceedings); contra Daystar Residential, Inc. v. Collmer, 176 S.W.3d 24 (Tex. App. 2004) (attorney who calls press conference prior to filing suit was protected by absolute immunity).4

Our court has ruled contrary to the majority rule in one limited context. In Stewart v. Sun Sentinel Co., 695 So. 2d 360 (Fla. 4th DCA 1997), we held that an attorney’s delivery of a copy of a notice of claim to a reporter, which notice was a required filing prior to instituting suit, was protected by absolute immunity. We cited to Ange v. State, 98 Fla. 538, 541, 123 So. 916, 917 (1929), for the proposition that the privilege extends to statements in judicial proceedings or those “necessarily preliminary thereto.” In Ange, however, the privileged statement was one made to the county judge in order to obtain a judicial warrant from the judge. Therefore, the statement was “necessarily preliminary”

4 Daystar is not an easy road to immunity. “In judicial immunity cases, there are multiple components to the absolute privilege: the communication must bear some relationship to a judicial proceeding; the attorney must be employed for that proceeding; and the communication must be in furtherance of that representation… Thus, determining whether a communication is absolutely privileged under Russell requires sufficient discovery.” Daystar, at 29-30.
to the issuance of the warrant. The statement itself was part of the judicial process. In contrast, publication to a newspaper is not “necessary” to a judicial proceeding.

**GATOR’S TIP:**

The defamation privilege is no shield against sanctions. See *Malevitis v. Friedman*, 753 N.E.2d 404, 409 (Ill. App. Ct. 1st Dist. 2001) (Although statements describing counsel as a “perfidious” and “dishonest” lawyer were sufficiently related enough to the judicial proceedings to be absolutely privileged, court found “the remedy for such conduct more appropriately sought in the form of sanctions”). When moving for sanctions, remind the court how a member of the bar is abusing a privilege designed to aid the administration of justice. *See ED&F Man Biofuels, Ltd. v. MV Fase*, 728 F. Supp. 2d 862, 868 (S.D. Tex. 2010) (citations omitted):

The privilege is one of public policy “founded on the theory that the good it accomplishes in protecting the rights of the general public outweighs any wrong or injury which may result to a particular individual.” The absolute privilege for judicial proceedings is also based on a public policy that “the administration of justice requires full disclosure from witnesses, unhampred by fear of retaliatory suits for defamation.”

**VII. PLEADINGS USED TO HARM**

**A. MALICE AND BAD INTENTIONS MAY BE INFERRED FROM YOUR TRASH TALK**

If the Court is convinced that there was no legitimate purpose for a scandalous allegation, it will be deemed to have been made in an attempt to harass, embarrass and humiliate. *See Katz v. Looney*, 733 F. Supp. 1284, 1288 (W.D. Ark. 1990):

There is absolutely no legitimate basis for the scandalous, impertinent and libelous statements made by plaintiff against one of the defendants, and Magistrate Stites and, in fact, this court. Those statements are strictly personal attacks and don’t even arguably address any legitimate issue before the court. Since there is no legitimate purpose for these statements, they must have been made by plaintiff in an attempt to harass, embarrass and humiliate the persons about which they are made. There is no place for this kind of conduct in any court, and this court will not allow it. The conduct of the plaintiff would be bad enough if he was an untrained and uneducated person “off the street”, but the file shows that he is trained as a lawyer, albeit a disbarred one, who, in fact, seeks a master’s degree in the law. This case “cries out” for Rule 11 Sanctions, and they will be imposed.


[T]he Court admonishes Plaintiff to carefully choose the language used in documents filed. In Plaintiff’s Response to Defendant’s Motion to Dismiss for Lack of Personal Jurisdiction [Dkt. No. 61], Plaintiff accused opposing counsel of “misrepresentation,” “false statements,” and “hiding evidence.” Unless Plaintiff presents proper evidence of bad behavior on the part of opposing counsel, these types of accusations will be construed as evidence of improper purpose. The Court will not only strike future filings that contain such accusations and language absent proper evidence of wrongdoing, but will consider sanctions with severe consequences for his case.

The Plaintiff in *Thomas* was a pro se. Attorneys, as officers of the court, don’t need to be warned to refrain from such impropriety.

**GATOR’S TIP:**

There is another reason to conclude that malice is implied when improper allegations are made in pleadings. Texas attorneys know, or should know, that Texas State Court is the most difficult forum for sealing a document once it is filed in the public record.5 Texas attorneys know, or should know, that court records are now easily accessible

---

from anywhere in the world. Therefore, any immaterial, impertinent, scandalous or provocative matter disclosed in pleadings (or other court records) is likely meant to hurt and haunt.

B. MALICE AND BAD INTENTIONS MAY BE INFERRED FROM YOUR UNREDACTED TALK

Failing to redact personal information - especially personal information that is specifically protected, may carry the inference that the Pleader disclosed the information intentionally. See, e.g. FED. R. CIV. P. 5.2. Privacy Protection For Filings Made with the Court:

(a) REDACTED FILINGS. Unless the court orders otherwise, in an electronic or paper filing with the court that contains an individual’s social-security number, taxpayer-identification number, or birth date, the name of an individual known to be a minor, or a financial-account number, a party or nonparty making the filing may include only: (1) the last four digits of the social-security number and taxpayer-identification number; (2) the year of the individual’s birth; (3) the minor’s initials; and (4) the last four digits of the financial-account number.

N.D. Tex. Miscellaneous Order No. 61, I(D) (October 21, 2008) (“If an attorney determines that a transcript contains a Social Security number, taxpayer identification number, birth date, the name of an individual known to be a minor, financial account number, or (in a criminal case) a home address, the attorney must file a ‘Redaction Request’ with the clerk’s office on the approved form.”).

See also, In re Fowler, 2008 Bankr. LEXIS 3452, at *2-3 (Bankr. D.S.C. Oct. 14, 2008) (Identifying nine potentially applicable privacy standards which regulate the improper disclosure of nonpublic personal identifiers and providing that the Court has the authority pursuant to 11 U.S.C. § 105 to enforce these standards, as well as the inherent authority to regulate the conduct of parties that appear before it.).

C. REMEDIES FOR PLEADINGS USED TO HARM

1. Texas:

Sanctions available under:

- TEX. CIV. PRAC. & REM. CODE § 9.011
- TEX. CIV. PRAC. & REM. CODE § 10.001
- TEX. R. CIV. P. 137

A trial court has certain inherent power derived “from the very fact that the court has been created and charged by the constitution with certain duties and responsibilities.” A court may call upon its inherent powers “to aid in the exercise

Commodity Futures Trading Commission v. Paron Capital Management, LLC, Case No. 11-cv-04577 (N.D. Cal. Nov. 5, 2012) (Cousins, Mag.) (ECF No. 247) (Order) (“[P]leadings can be accessed accurately and readily via PACER (an internet, publicly-accessible court service)”; Jodi Kantor, Lawsuit’s Lurid Details Draw an Online Crowd (N.Y. Times, February 22, 2015) (“Intimate, often painful allegations in lawsuits — intended for the scrutiny of judges and juries — are increasingly drawing in mass online audiences far from the courthouses where they are filed.”)).

See also, Kuhn v. Sulzer Orthopedics, Inc., 498 F.3d 365, 371 (6th Cir. 2007) (Discussing the electronic information at someone’s fingertips from the CM/ECF system, including ease and speed of access to all filings in a case); United States

See also, Kuhn v. Sulzer Orthopedics, Inc., 498 F.3d 365, 371 (6th Cir. 2007) (Discussing the electronic information at someone’s fingertips from the CM/ECF system, including ease and speed of access to all filings in a case); United States
of its jurisdiction, in the administration of justice, and in the preservation of its independence and integrity.” The trial court has inherent power to sanction to the extent necessary to deter, alleviate, and counteract bad faith abuse of the judicial process, such as any significant interference with the court's administration of its core functions, including hearing evidence, deciding issues of fact raised by the pleadings, deciding questions of law, entering final judgment, and enforcing that judgment.

2. Federal:

Sanctions available under:

- **Fed. R. Civ. P. 11;**

- 28 U.S.C. § 1927 whereby sanctions may be imposed against an attorney who “so multiplies the proceedings in any case unreasonably and vexatiously.” In order to impose sanctions under § 1927, the court must find “evidence of bad faith, improper motive, or reckless disregard of the duty owed to the court.” *González v. Fresenius Medical Care North America,* 689 F.3d 470, 479 (5th Cir. 2012).

- Court’s inherent power. See e.g.:
  - *Blanco River, L.L.C. v. Green,* 457 Fed. Appx. 431, 438 (5th Cir. Tex. 2012) (“Sanctions under the court's inherent authority require a finding of bad faith...We have said that ‘[w]hen bad faith is patent from the record and specific findings are unnecessary to understand the misconduct giving rise to the sanction, the necessary finding of ‘bad faith’ may be inferred.’”); *West v. Hsu,* 413 B.R. 643, 665 (Bankr. S.D. Tex. 2009) (“The Court may sanction bad faith conduct through its inherent powers, by statute, or through the rules of procedure.”).

  - *See In re Gleason,* 492 Fed. Appx. 86, 87-88 (11th Cir. 2012) (“When an attorney files inappropriate and unprofessional documents, a court may impose sanctions based on its “inherent power to oversee attorneys practicing before it.” *Thomas v. Tenneco Packaging Co.,* 293 F.3d 1306, 1308 (11th Cir. 2002) (upholding a district court’s decision to sanction an attorney who submitted documents containing personal attacks on opposing counsel”).

- See also *Allapattah Services, Inc. v. Exxon Corp.***, 372 F.Supp.2d 1344, 1374 (S.D. Fla. 2005) (“Sanctions authorized under the court’s inherent powers include the striking of frivolous pleadings or defenses, disciplining lawyers, punishing for contempt, assessment of attorney's fees, and outright dismissal of a lawsuit.”); *Douglas J. Pepe, Persuading Courts to Impose Sanctions on Your Adversary Litigation,* at p. 4, 6, 36:2 (Winter 2010) (“The power of federal courts to curb abusive litigation practices through the use of inherent powers is well established...Inherent power sanctions...are as broad as the imagination. The list of ‘usual suspects’ includes the entry of default judgment, preclusion of evidence and issues, dismissal, fee awards, contempt citations, disqualification of attorneys, and adverse inferences.”).

3. Sanctions can be imposed against the attorney, the client, or both

See *In re Porto,* 645 F.3d 1294, 1304 (11th Cir. 2011) (“[T]he rule that the sins of the lawyer are visited on the client does not apply in th[e] context [of sanctions], and a court must specifically conduct of the [client] herself that is bad enough to subject her to sanctions.”); *Hopson v. Deffenbaugh Indus.,* 2008 U.S. Dist. LEXIS 49521, at *2-3 (D. Kan. June 25, 2008) (finding counsel responsible for the fees ‘as a sanction for necessitating the filing of this motion’); *In re Thompson,* 2003 Bankr. LEXIS 2197, at *8-10 (Bankr. N.D. Tex. Apr. 8, 2003) (finding counsel and client jointly and severally liable for expenses, fees, and sanctions when both acted “wantonly and in bad faith”).

See also:

- *TransAmerican Natural Gas Corp. v. Powell,* 811 S.W.2d 913, 922(Tex. 1991); (Mauzy, J. concurring) (“I concur in the Court's judgment, but write separately to outline the guidelines which I feel are necessary to explain the parameters of our decision today. Whether or not a sanction is appropriate must be determined by the particular facts of the individual case. In order to determine the appropriate sanctions in each case, the trial court should engage in a three-part inquiry. First, the trial court must resolve the question of whether the offending conduct actually constitutes an abuse of the discovery process. Second, the court must determine who is actually responsible for the offensive conduct and the extent of their culpability. Third, the court must determine
what sanctions would be appropriate under the
circumstances.

- **Braden v. Downey**, 811 S.W.2d 922, 930 (Tex. 1991) (When offensive conduct is attributable to
  the lawyer, court should impose sanctions
  against lawyer, not party);

  confuses the conduct of client and attorney by
  referring to the ‘conduct of George R. Neely and
  PEGGY ANN GLASS’ in the filing of pleadings
  after the divorce judgment. The trial court’s
  confusion of the conduct of Peggy Glass with
  that of her attorney led the court to err. Nowhere
  in its findings of fact did the trial court find that
  Peggy Glass did anything other than what her
  attorney did on her behalf. Indeed, no evidence
  was adduced which tended to show that Peggy
  Glass did anything except rely on her attorney's
  advice.

4. **Motion to Strike**

Rule 12(f) is a codification of part of the district court's
inherent power to manage pending litigation. See
**Allapattah Services, Inc. v. Exxon Corp.**, 372 F. Supp. 2d
1344, 1371 (S.D. Fla. 2005). Rule 12(f)(2) grants a court
the authority to “strike from a pleading... any immaterial,
impertinent, or scandalous matter...” **Joe Hand
Promotions, Inc. v. Mid Life Paradise, Inc.**, Case No.
3:12-cv-00324-F (N.D. Tex. June 4, 2012) (Furgeson, J)
(ECF No. 20) (**Order Granting In Part and Denying In
Part Plaintiff’s Motion to Strike**).

While Rule 12(f) motions to strike are generally
disfavored, motions to strike scandalous matters are not. See
2d 633, 641-642 (S.D.N.Y. 2001); “The disfavored
character of Rule 12(f) is relaxed somewhat in the context
of scandalous allegations and matter of this type will be
stricken from the pleadings in order to purge the court’s
files and protect the subject of the allegations.” 5C
Charles A. Wright and Arthur R. Miller, Federal Practice

The Court has broad discretion in considering a motion
to strike under Federal Rule of Civil Procedure 12(f) and
the standard of review is abuse of discretion. See
**Whittlestone, Inc. v. Handi-Craft Co.**, 618 F.3d 970, 974
(9th Cir. 2010); **Tracfone Wireless, Inc. v. Access
Telecom, Inc.** 642 F.Supp.2d 1354, 1360 (S.D. Fla.
2009).

VIII. FUNDAMENTALS OF THE ETHICAL
PLEADER

A. **Know Your Role (And Appreciate Your
Great Power and Great Responsibility)**

When you file a pleading, you are not “playing a game.”
**Scurlock Oil Co. v. Smithwick**, 724 S.W.2d 1, 12 (Tex.
1986) (Spears, J. Concurring) (“[T]he judicial system
is not a game. It is society's way of fairly resolving
disputes.

(Hecht, J. Concurring) (The law will not countenance
“the image that lawyers will take any position, depending
on where the money lies, and that litigation is a mere
Houston [14th] 1999, p.d.r. ref’d) (Wittig, J., concurring)
(“The lynchpin of the law is truth. Without truth, there
can be no law and there can be no justice for any person
in our society.”); **Rouse v. II-VI Inc.**, 2013 U.S. Dist.
(“Litigation is not a platform to advance unsupported
conclusions.”)

(citations omitted):

> Attorneys owe to the courts duties of scrupulous honesty, forthrightness, and the
> highest degree of ethical conduct. Inherent in this high standard of conduct is compliance
> with both the spirit and express terms of the rules of conduct.

See generally **Davis v. Tarbut**, 298 P. 941, (N.M.
1931) (“Under our system and policy, great power and responsibility are reposed in attorneys at
law.”)

1. **Don’t Lie.**

See Tex. Ethics Op. 405 (June 1983) (“This Committee
has always made it clear and will continue to stress that
an attorney has a duty to act in a truthful and honest
fashion with respect to all of his professional dealings.”)

Lying can be fatal to your case (as it should be).

See **Dunham Place Realty Inc. v. Arndt**, 734 N.Y.S.2d
sufficient ground for the dismissal of the proceeding, the
court finds that the petition, in claiming that respondent's
commercial lease expired, was a misrepresentation that so infected the proceeding as to deprive the court of subject matter jurisdiction requiring dismissal of the petition.”).

Lying can be fatal to your career.

Contrary to popular belief, a pervasive liar will not stay a lawyer very long. See:

- In re Gabell, 858 P.2d 404, 405-406 (N.M. 1993):

  When false evidence is presented during the course of litigation, the adversarial system is compromised. The effectiveness of our system of justice depends upon a full and truthful disclosure of facts at all stages of a legal proceeding. Only in this way can justice be attained and public confidence in the legal system be preserved. When an attorney, who is an officer of the court and whose duty it is to protect the integrity of the system, intentionally lies under oath and manufactures documents designed to achieve an advantage in litigation, that attorney demonstrates a complete lack of fitness to practice law. As one court has noted, “Truth is the cornerstone of the judicial system; a license to practice law requires allegiance and fidelity to truth.”


  Attorneys who make misrepresentations to a court create “an erosion of confidence on the part of the judiciary and the public in lawyers’ honesty.” Florida Bar v. Corbin, 701 So.2d 334, 336 (Fla. 1997). This Court has found that “[t]here is no more serious impact upon the integrity of our judicial system.” Id.

- People v. Costa, 56 P.3d 130, 135 (Colo. 2002) (Proceeding disbaring Attorney Maria Costa):

  An attorney’s misrepresentation of material facts to a court with the aim of benefiting himself or others to the detriment of his adverse party cannot be tolerated under an adversary system which depends upon the honesty of its officers to render fair and just decisions. Judicial officers, members of the profession and the public at large must be able to rely upon the truthfulness of an attorney's statements to the court. Confidence in the truth-seeking process engendered in our system of justice cannot exist absent such reliance.

Judges are required to take action against lying. And sometimes, they do.

See Woods v. Covington County Bank, 537 F.2d 804, 810 (5th Cir. 1976) (“[A] District Court is obliged to take measures against unethical conduct occurring in connection with any proceeding before it.”); Wallic v. Owens-Corning Fiberglas Corp., 40 F. Supp. 2d 1185, 1191 (D. Colo. 1999) (“A court ‘is obliged to take measures against any unethical conduct occurring in connection with any proceeding before it.’”); See also CODE OF CONDUCT FOR UNITED STATES JUDGES, Canon 1 (“A judge should maintain and enforce high standards of conduct and personally observe those standards, so that the integrity and independence of the judiciary might be preserved.”); TEXAS CODE OF JUDICIAL CONDUCT, Canon 1 (“A judge should participate in establishing, maintaining and enforcing high standards of conduct, and should personally observe those standards so that the integrity and independence of the judiciary is preserved.”); United States v. Welton, 2009 U.S. Dist. LEXIS 71509, at *38 (C.D. Cal. Aug. 1, 2009) (Sanctioning attorney because “declining to impose some type of litigation sanction would endorse the notion that [the improper conduct] is permissible”); cf. Judge John McClellan Marshall, Somebody’s Lying … and I Can Prove It!, DAYL Newsletter, at 7 (August 1994) (“When someone lies to the court it is not merely frustrating to us as attorneys. It is one of the most serious threats to the system that exists…The answer goes to the heart of the system in that a liar undermines the integrity of the process. As attorneys, we have a special duty to insure that the liar doesn’t have a chance to pervert the search for the Truth. If we fail in our task, then so does the entire system to some extent.”).

See, e.g., Davis v. Rupe, 307 S.W.3d 528, 535 (Tex. App.—Dallas 2010, no pet.) (Morris, J.) (Affirming an order imposing sanctions on an attorney, because “[m]isstating facts or misrepresenting the record can never be justified under the guise of zealous advocacy. Nor should the requirement of complete candor with a court ever conflict with an attorney’s ability to represent her client effectively.”); Keever v. Finlan, 988 S.W.2d 300, 312 101 (Tex. App.—Dallas 1999, pet. dism’d)
(Roach, J.) (Affirming $18,000 Rule 13 sanction against attorney for making “false statements in an affidavit executed by him and filed with the court.”).

And even when Judges don’t take action, judicial examination of an attorney’s conduct can still turn out bad.

See In re Seelig, 850 A.2d 477, 258-259 (N.J. 2004) (LaVecchia, J. concurring and dissenting) (Disagreeing with the Majority’s determination not to find an ethical violation and not to impose any discipline, identifying attorney’s “intentional withholding of publicly available information from the tribunal, knowing that the tribunal would be misled thereby, and stating that Dissenter would impose a reprimand for the attorney’s “sharp practice” before the tribunal).

2. Don’t mislead.

(Putting your best foot forward is OK, as long as you avoid doing it in a way that creates a false impression about what the other foot looks like.)


The court expects a party to be forthcoming and operate with complete candor in making representations to the court. In this regard, Plaintiff represented to the court that it only sought to clarify certain facts and no new claims would be asserted. The court took this representation at face value and granted the motion to amend. The court does not allow amendment of pleadings after a summary judgment has been filed if the amendment adds new claims or defenses of a party; and it would not have done so in this case had full disclosure occurred. Such misrepresentation and gamesmanship will not be countenanced by the court, and striking the offending portions of Plaintiff’s First Amended Complaint is warranted under the circumstances.

Hartsell v. Source Media, 2003 U.S. Dist. LEXIS 5250, at *9 (N.D. Tex. Mar. 31, 2003) (Lynn, J.) (“Of course, an attorney may breach the fiduciary duty of candor through silence as well as through an affirmative misrepresentation.”); Champlin v. Bank of Am., N.A., 293 P.3d 541, 545 (Ariz. Ct. App. 2013) (Attorney’s duty of candor required her to disclose her knowledge so that the record was factually clear); In re Fisher, 153 N.E.2d 832, 841 (Ill. 1958) (Attorney censured when the record was “replete with instances of his vacillation and equivocation in situations demanding his utmost candor and loyalty to the courts before whom he practiced.”); cf. Hughes v. Long, 1999 U.S. Dist. LEXIS 16890, at *21 (E.D. Pa. Oct. 21, 1999) (Absolute immunity given to court-appointed evaluator because the court “surely needs and deserves the utmost candor and objectivity from professionals.”).


At the outset, it is important to understand that it was obvious... that matters had been represented to me that were not true... It is also important to understand that even though I find no proof of a nefarious purpose underlying the representations made during the hearing by Respondent's counsel or in Respondent's brief, I do find: (1) facts were misrepresented (2) Respondent’s counsel should have known better; (3) no satisfactory explanation for the misrepresentation exists; and (4) Complainant was harmed by Respondent's misrepresentation... I am not persuaded by Respondent’s excuses. In what has to be the legal equivalent to “the dog ate my homework excuse,” Respondent blamed its misrepresentation upon a combination of miscommunication with a law firm associate and the press of litigation ... Even in combination, Respondent's proffered excuses are not excuses any judge can ever accept, for if we were to do so, they would swallow accountability. Hence, I find Respondent, without sufficient or credible reason or excuse, misrepresented the facts and its intentions to Complainant and me and therefore caused additional confusion, expenditures, delay, and increased the potential for injustice...

I do agree with Complainant’s assertions that Respondent should have fixed its App Store position earlier and that because of its inaction, Complainant had to expend additional effort and expense... I am also
disturbed that Respondent's counsel did not correct his misrepresentation before Dr. Noble’s testimony…

3. **Don’t be reckless with the allegations made by your co-counsel.**

Trust, but verify. *Raylon LLC v. Complus Data Innovations; 6:09-cv-00355-RWS; Order [ECF No. 207] at p. 18 (E.D. Tex. May 4, 2015)* (“An attorney who is presented with the opportunity to file a new case or to join others in pursuing an existing case is obligated to at least ask the hard questions about the quality of the claims.”).

4. **Don’t use your pleadings for improper purposes.**

See Carol Rice Andrews, *Ethical Limits on Civil Litigation Advocacy*, 63 Case W. Law Res. L. Rev. 381, 437-438 (2012) (“From the very beginning, lawyers have known that they must act reasonably in litigation: …they must not use…harassing words or methods.”).

B. **THE ETHICAL PLEADER DOES NOT FILE SHOTGUN OR PROLIX PLEADINGS**

1. **SHOTGUN:** *See Lee v. FAEC Holdings (LA), LLC, 2014 U.S. Dist. LEXIS 131906, at *2 (M.D. La. Sept. 18, 2014):*

   Taken alone, Lee’s Petition for Damages is far from clear. Indeed, Lee’s Petition might charitably be described as a “shotgun pleading.”*2* *Kelly v. Huzella, 71 F.3d 878 at *4 (5th Cir. 1995) (unpublished but persuasive) (describing a “shotgun pleading” as “frivolous”).


   [T]he Court specifically cautions Plaintiff's counsel to heed this Court’s numerous prior admonitions against the practice of shotgun pleading in the event an amended complaint is sought to be filed.*8* Shotgun pleading—“in which the pleader heedlessly throws a little bit of everything into his complaint in the hopes that something will stick”—clouds the issues in a case, “escalates the cost of litigation for both the parties and the Court, requiring voluminous discovery and motions to pinpoint the specific issues for trial,” and falls "dangerously close to Rule 11 territory.”


   The typical shotgun complaint “contains several counts, each one incorporating by reference the allegations of its predecessors.” … This leads to a situation where most of the counts “contain irrelevant factual allegations and legal conclusions.” *Id.*

   The underlying problem is that the shotgun complaint “fails to link adequately a cause of action to its factual predicates.” … *see also Anderson v. Dist. Bd. of Trustees of Cent. Fla. Cnty. Coll., 77 F.3d 364, 366 (11th Cir. 1996)* (“[Plaintiff’s] complaint is a perfect example of ‘shotgun’ pleading in that it is virtually impossible to know which allegations of fact are intended to support which claim(s) for relief.” (internal citation omitted)); *Pelletier v. Zweifel, 921 F.2d 1465, 1517-18 (11th Cir. 1991)* (describing “quintessential shotgun pleadings” replete with “rambling recitations” and “factual allegations that could not possibly be material” that force the “district court [to] sift through the facts presented and decide for [itself] which were material to the particular cause of action asserted”); *Bates v. Laminack, 938 F. Supp. 2d 649, 2013 WL 1345193, at *17 (S.D. Tex. 2013)* (“What makes a pleading a ‘shotgun’ pleading is the inclusion of irrelevant and unrelated facts not tied to specific causes of action such that the claims made are indeterminate and the defendant’s task in defending against them is significantly impaired.”).

   In conjunction with failing to link causes of action to their factual predicates, another common problem found in shotgun pleadings is failing to organize the various claims as separate counts. Rule 8(a)(2) requires “a short and plain statement of the claim,” and Rule 10(b) instructs that, “[i]f doing so would promote clarity, each claim founded on a separate transaction or occurrence . . . must be stated in a separate count or defense.” Feder. R. Civ. P. 8(a)(2),10(b) (emphasis added).
These rules work together to require the pleader to present his claims discretely and succinctly, so that his adversary can discern what he is claiming and frame a responsive pleading, the court can determine which facts support which claims and whether the plaintiff has stated any claims upon which relief can be granted, and, at trial, the court can determine that evidence which is relevant and that which is not.

*Davis v. Coca-Cola Bottling Co. Consol.*, 516 F.3d 955, 980 n.57 (11th Cir. 2008) (quoting *Fikes v. City of Daphne*, 79 F.3d 1079, 1082-83 (11th Cir. 1996)); see also *id.* at 979-80 (stating that the framers of the Federal Rules of Civil Procedure would “roll over in their graves” upon reading a complaint containing “untold causes of action, all bunched together in one count” contrary to Rule 10(b)); *Magluta v. Samples*, 256 F.3d 1282, 1284 (11th Cir. 2001) (vacating judgment and remanding for repleading where shotgun complaint “buried” material allegations “beneath innumerable pages of rambling irrelevancies” in complete disregard of Rule 10(b)). In such a case, the Eleventh Circuit held that a trial court properly ordered plaintiff to amend her complaint to specify which of her claims were against which defendants and to segregate the relevant facts to each claim. See *Beckwith v. Bellsouth Telecomms., Inc.*, 146 Fed. Appx. 368, 372 (11th Cir. 2005).

Additionally, shotgun complaints “often fail to specify which claims are brought against which defendants.” *Skyventure Orlando, LLC v. Skyventure Mgmt., LLC*, No. 6:09-CV-396, 2009 U.S. Dist. LEXIS 77212, 2009 WL 2496553, at *6 (M.D. Fla. Aug. 12, 2009) (citing *Magluta*, 256 F.3d at 1284). In such a case, the Eleventh Circuit held that a trial court properly ordered plaintiff to amend her complaint to specify which of her claims were against which defendants and to segregate the relevant facts to each claim. See *Beckwith v. Bellsouth Telecomms., Inc.*, 146 Fed. Appx. 368, 372 (11th Cir. 2005).

The Eleventh Circuit “has addressed the topic of shotgun pleadings on numerous occasions in the past, often at great length and always with great dismay... [S]hotgun pleadings wreak havoc on the judicial system.”... There are many unacceptable consequences of shotgun pleading. First, shotgun pleadings “divert already stretched judicial resources into disputes that are not structurally prepared to use those resources efficiently.” ... Shotgun pleadings, if tolerated, require trial courts to sift through the facts presented, decide for itself which allegations are material to the particular causes of action asserted (many of which may be foreclosed by defenses), and sift out the irrelevancies – “a task that can be quite onerous.” ... see also *Byrne*, 261 F.3d at 1131 (“The time a court spends managing litigation framed by shotgun pleadings should be devoted to other cases waiting to be heard.”). In addition to wasting trial court resources, shotgun pleadings waste attorneys' and litigants' resources, inexorably broaden the scope of discovery, wrongfully extort settlements, wreak havoc on appellate court dockets, and undermine the public's respect for the courts....


[P]laintiffs are on notice that the Court is disturbed by their unnecessarily prolix and unprofessional pleadings. The pleadings contain pages of irrelevant factual assertions designed to poison the well, or prematurely argue the merits, which in any event are unrelated and unnecessary to the issue now before this Court. These rambling pleadings with vituperative name-calling are a burden on the Court and will not be accepted. Plaintiffs are directed to focus on the issues relevant to their claims. If plaintiffs fail to confine their briefings to the issues at hand, the Court will shorten the page limits applicable to further filings and consider any other sanction that may be appropriate under the circumstances.


Finally, plaintiff's repeated filing of prolix, confounding pleadings in this relatively simple case is sufficient indication he has no intention of proceeding with this case in good
faith, and that any lesser sanction than dismissal would be wholly ineffectual.


A troubling trend toward prolixity in pleading is infecting court dockets in this district and elsewhere. As this case illustrates, a growing number of attorneys, from solo practitioners to “big law” partners, are ignoring Rule 8 and its exhortation that “[a] pleading . . . must contain . . . a short and plain statement of the claim . . . .” Fed. R. Civ. P. 8(a)(2); see also Fed. R. Civ. P. 8(d)(1) (requiring that allegations be "simple, concise, and direct"). UPS launched its relatively straightforward claims with a sprawling 175-paragraph Complaint, larded with more than 1,400 pages of exhibits. That initial pleading, masquerading as a summary judgment motion, may have been intended by UPS to overwhelm the defendants. But the Hagans were not deterred. They retaliated with a 210-page, 1,020-paragraph Answer asserting twelve counterclaims and attaching voluminous exhibits.

UPS and the Franchisees sought leave to move to dismiss the Hagans’ counterclaims. At a pre-motion conference, this Court expressed concern about the length of both side’s pleadings. UPS’s counsel attributed UPS’s lengthy pleading to predecessor counsel, yet never offered to prune the Complaint. In turn, the Hagan’s counsel proposed amending their Answer and counterclaims to identify the franchisee counter-defendants. This Court urged the Hagans to downsize their pleading when naming the franchisee counter-defendants.

Several weeks later, the Hagans interposed their Amended Answer with counterclaims naming the Franchisees. Instead of shrinking their pleading, they enlarged it to a breathtaking 1,263 paragraphs, spanning 303 pages. It brims with irrelevant and redundant allegations. This Court convened another conference among counsel in an effort to end the madness and avoid a motion. But that, too, proved futile. And so, more than a year after this action was filed, the parties continue to spar over their behemoth pleadings.

The “short and plain” statement requirement of Rule 8 serves many salutary purposes. It focuses litigants and judges on the real issues in dispute. It also aids the public in understanding the judicial process. Disregarding it only spawns mischief.

Voluminous pleading is self-defeating. It chokes the docket and obscures otherwise meritorious claims and defenses. It can also unnecessarily highlight fatal weaknesses in a party’s case.” “[A] plaintiff can plead himself out of court by alleging facts which show that he has no claim, even though he was not required to allege those facts.” … Lawyers should think twice about the burden they impose on judges to wade through surfeit pleadings, let alone “labyrinthine prolixity of unrelated and vituperative charges that defy comprehension.” … see also *Salahuddin v. Cuomo*, 861 F.2d 40, 42 (2d Cir. 1988) (“The statement should be short because ‘[u]nnecessary prolixity in a pleading places an unjustified burden on the court and the party who must respond to it because they are forced to select the relevant material from a mass of verbiage.’”). They should also think about their clients who presumably come to court “to secure the just, speedy, and inexpensive determination” of their claims. Fed. R. Civ. P. 1.

There is ample authority empowering [a court to dismiss pleadings for failure to comply with Rule 8. **See Wynder v. McMahon**, 360 F.3d 73, 77 (2d Cir. 2004) (“Rule 41(b) clearly authorizes dismissal where plaintiffs have ‘fail[ed] . . . to comply with these rules [i.e. the Federal Rules of Civil Procedure],’ including, of course, Rule 8.”); *Salahuddin*, 861 F.2d at 42 (“When a complaint does not comply with the requirement that it be short and plain, the court has the power . . . to dismiss the complaint.”). And that might be an appropriate way to dispose of the Hagans’ counterclaims, if not the entire case. But the Hagans could view a Rule 8 dismissal as unfair because UPS was just as culpable in filing its outsized Complaint.

Recently, Senior Judge Glasser lamented about needlessly long pleadings and offered a solution that was undoubtedly effective in
its time but would not likely be countenanced today. Quoting Lord Buckmaster, formerly Lord Chancellor of England, Senior Judge Glasser related that in the reign of the Stuarts there was one counsel who had offended the court by preparing a needlessly long and prolix pleading on parchment. He was ordered to have his pleadings taken, a large hole to be cut in the middle, he was to have his head pushed through it, and he was to attend the first day of the term of every court with his head through the pleadings.


While Lord Buckmaster’s in terrorem remedy is tempting, this Court fashions a pragmatic solution aimed at advancing this litigation beyond the pleading stage for the benefit of the litigants. This Court will address each of the counterclaims on their merits, giving many of them more thought than they deserve. And because all but one of the Hagans’ counterclaims will be dismissed, the parties will be directed to submit amended pleadings that clearly and concisely present the issues and comport with the strictures of Rule 8.

**C. FUNDAMENTALS OF GOOD PLEADINGS FOR THE ETHICAL PLEADER (YOU BETTER CHECK YOURSELF BEFORE YOU WRECK YOURSELF)**

An attorney preparing an ethical proper complaint or petition must insure they are correctly alleging:

1. **Jurisdiction**

Pleading something as simple as your client’s domicile can still lead to trouble. In one case, Plaintiff plead himself out of Federal Court by admitting that he was a U.S. citizen “currently residing in England.” In response to a Motion to dismiss, the Plaintiff then claimed he was a New York or Florida citizen. The Magistrate wrote a lengthy opinion on Plaintiff’s unreasonable position and recommended that sanctions - in the form of payment of Defendants costs – be imposed on Plaintiff’s counsel. *See Segen v. Buchanan Gen. Hosp., Inc.*, 2007 U.S. Dist. LEXIS 8774 (W.D. Va. Feb. 7, 2007) (Sargent, Mag.) (“[Plaintiff’s] counsel made a glaring mistake in asserting jurisdiction; a mistake which was unreasonable... a reasonable attorney, under like circumstances, would have realized that, based upon existing law, proper jurisdiction did not exist. Accordingly, I recommend that sanctions be imposed against Segen’s counsel for unreasonably asserting improper jurisdiction.”). Although the District Judge adopted the facts stated in the Magistrate’s Report, he rejected the recommendation for sanctions. *See Segen v. Buchanan Gen. Hosp., Inc.*, 552 F. Supp. 2d 579, 2007 U.S. Dist. LEXIS 26379 (W.D. Va. 2007) (Rejecting Magistrate’s report recommending sanctions because, while “it certainly could be argued that [Respondent] alleged diversity of citizenship upon unreasonable grounds, not warranted by existing law...both parties displayed uncertainty as to whether diversity of citizenship existed.”). The District Judge said that because the Defendants “exhibited the need for the [Plaintiff’s] deposition to address the jurisdictional issues...based upon the unique circumstances... Plaintiff’s legal argument was not unreasonable.”. *Id.* at 586. You can’t tell from the opinion whether the Plaintiff’s attorney had the nerve to argue that his jurisdictional facts were reasonable because they momentarily confused his adversary, or the District Judge was just being kind.

**GATOR’S TIP:**

Remember: The party filing an action in Federal Court, or removing an action to Federal Court, is making a representation that the action belongs before the court.

---


10 *See El Paso v. Socorro*, 917 F.2d 7, 9 (5th Cir. difficult areas in federal law.”).

11 For a good explanation of the “diversity loophole” ignored by Plaintiff’s counsel in *Segen*, see Joseph Hage Arronson LLC’s Complex Lit Blog at http://www.jha.com/us/blog/?blogID=144.
2. Standing

Although a confusing and unpredictable doctrine, you'll be expected to comply with this threshold jurisdictional issue. *Horne v. Flores*, 557 U.S. 433, 445, 129 S. Ct. 2579, 2592, 174 L. Ed. 2d 406, 418 (2009) (“[W]e consider the threshold issue of standing— an essential and unchanging part of the case-or-controversy requirement of Article III.”); *B. C. by & Through Powers v. Plumas Unified Sch. Dist.*, 192 F.3d 1260, 1264 (9th Cir. 1999) (“[F]ederal courts are required sua sponte to examine jurisdictional issues such as standing.”).

What must you do to establish standing?

“To establish standing, a plaintiff must present an injury that is concrete, particularized, and actual or imminent; fairly traceable to the defendant's challenged action; and redressable by a favorable ruling.” *Horne v. Flores* at 557 U.S. 433, 445.

What can happens if you improperly allege standing?

In a “double whammy” of lack of standing, Plaintiff’s counsel was sanctioned under Rule 11 to pay Defendant’s attorney’s fees. See *Fonseca v. Hall*, 2005 U.S. Dist. LEXIS 5442 (S.D. Ind. Jan. 18, 2005). Plaintiff’s counsel failed to appreciate that he alleged a “classic case of injury to the corporation” and that his shareholder client was “not a proper party to the case.” Id. at *31-32. Further, counsel knew that the defendant was in bankruptcy when he filed the live complaint. Id. at 32. Only the bankruptcy Trustee had standing at that point. Id. The court found that “a reasonable inquiry into the facts and law would have led [Plaintiff’s counsel] to the conclusion that [Plaintiff] was not a proper party and lacked standing.” Id. at 33.

3. Venue

The ethical pleader carefully chooses or challenges the forum.


**25, 2012** Louisiana domiciliaries, diversity jurisdiction did not exist when suit was filed or when State Farm received a copy of the initial pleading. Thus, the case stated in the initial pleading was not removable, and Plaintiff's mistaken allegation that Sykes was a Texas resident could not render it otherwise… Indeed, had State Farm removed the case based upon the initial pleading, the Court's examination of the jurisdictional facts almost certainly would have resulted in remand and possibly even sanctions given that State Farm knew (based upon its earlier interactions with Sykes' in settling her claims) that Sykes was a Louisiana resident.

Under the circumstances of this case we should be reluctant to impose sanctions at this early stage, *simply for alleging improper venue, and failing to recede promptly from the allegation without a motion being made to the Court*. At least on the present record before me the underlying complaint presents fair ground for litigation. *Selection of a forum is not part of the claim itself.* When initially selected by plaintiff’s attorney, the venue was not known to be improper. Furthermore, *objections to venue,* and indeed objections to the exercise of *in personam* jurisdiction, may be and often are, waived. While imposition of sanctions serves an essential purpose in cases where allegations concerning the merits are unfounded or discovery is being abused, it must be remembered that for every social benefit in litigation, there is also likely to be a corresponding detriment. The detriment in the case of sanctions is that the attorney or party upon whom sanctions are imposed must justify his or her conduct in his relationships with his or her client and his or her office colleagues. Furthermore, *his or her own self-esteem may come to be at stake,* although it should not be. These factors tend to destroy the atmosphere of friendly cooperation and professional collegiality which should exist between opposing attorneys in civil litigation. A cordial, professional relationship must be preserved between attorneys if civil litigation is to be resolved promptly and fairly on the merits and with minimum expense to society and the participants. That this is true is shown from the fact that almost 85% of our cases are settled prior to appellate finality. A lawyer who has been sanctioned by the Court at the instance of an adversary is likely to be resentful toward the adversary and counterphobic in his or her actions, therefore less effective in achieving a just settlement, or in resolving those minor controversies which often arise during pre-trial proceedings. The Court, and counsel who request attorneys’ fees or sanctions, should remain conscious of these fundamental truths.

Against these considerations the Court must balance the right of the opposing party to be free from the cost and expense of having to resort to unnecessary motion practice. The inconvenience and delay suffered by defendant Proudline, Inc. in this case does not counterbalance the other considerations cited so as to require the imposition of sanctions… Furthermore, the egregiously oppressive conduct found in that case is not present here.

**Question:** So it’s O.K. to file suit in any venue, as long as I don’t allege that venue is proper of belongs in that Court when it doesn’t (because venue can be waived)?

**Answer:** It depends. Compare ABA Informal Opinion 1011 (1967) (“It is the opinion of the Committee that the practice described in your inquiry [a systematic pattern and practice of filing collection suits in counties other than that in which the defendant resides] is unethical if it is done to harass the defendant or to take advantage of the absence of the opposite party in such county…”) *with* Illinois State Bar Association Opinion No. 86-10 (1987) (affirmed, July 2010) (Topic: Duty to Adversary System) (Even if venue allegations are omitted, knowingly filing an action in the wrong county is contrary to State Bar Ethical Considerations); Opinion of the General Counsel: ETHICAL PROPRIETY OF LAWYER KNOWINGLY FILING LAWSUIT IN WRONG VENUE, 60 Ala. Law. 201 (1999) (“When an attorney knows, or reasonably should know, that a lawsuit has been filed in one county when that county is the wrong venue, the attorney has, in fact, counseled or assisted his client in conduct the lawyer knows to be fraudulent and that he has knowingly made a false statement of law or fact…”); *cf.* Kentucky Bar Association Ethics Opinion KBA E-236 (1980) (“A lawyer…has the duty to not knowingly file a suit in which a judge has no jurisdiction to decide the matter. In doing this, the lawyer misleads the Judge.”)

**GATOR’S TIPS:**

**Venue speaks to Districts, not Divisions:** So venue for a claims against an El Paso Defendant (W.D. Texas) is proper in Waco (W.D. Tex.). As long as you do not

---

14 *See Dow Agrosciences, LLC v. Bates*, 2002 U.S. Dist. LEXIS 4197, at *12 (N.D. Tex. Mar. 12, 2002) (Cummings, J): Section 1391(a)(1) speaks in terms of districts and not divisions. It appears to the Court that Defendants have confused the two terms. Venue is proper in the Lubbock Division because every named defendant resides in the Northern District of Texas; Section 1391(a)(1) requires that any one defendant reside in the district when all of the
misrepresent venue facts, Waco is a proper venue for the Case.

But Remember: It takes three to tango. Parties cannot stipulate venue. If the Judge thinks holding a defendant to proper venue is unfair, it doesn’t matter if the Defendant completely fails to meet the “heavy burden” to support a convenience transfer. You’re going. The court may even use hypothetical or speculative reasons to justify transfer. See, e.g. J&J Sports Prods. v. Riviera, 2010 U.S. Dist. LEXIS 89484, at *8 (S.D. Tex. Aug. 30, 2010) (Ellison, J.) (“Neither party has yet identified specific nonparty witnesses. However, because this case is local to Hidalgo County, potential nonparty witnesses likely reside in or around Weslaco, Texas.”).

Forum selection may be the most important pre-suit consideration a Plaintiff undertakes.

---

The purpose of Section 1404(a) “is to prevent the waste ‘of time, energy, and money’ and to protect litigants, witnesses and the public against unnecessary inconvenience and expense...”

---

When moving to transfer venue, Defendants should consider omitting trash talk about venue. See Nexans Inc. v. Belden Inc., 966 F. Supp. 2d 396, 405 (D. Del. 2013):

The court declines, however, to characterize a plaintiff’s choice of venue as “forum shopping” when, by essentially moving to transfer venue, a defendant is doing the same thing — choosing a venue that it believes to be more favorable to its claims for whatever reason.


4. Ripeness

The ethical pleader understands and considers the ripeness doctrine. See Air New Zealand, Ltd. v. Civil Aeronautics Bd., 726 F.2d 832, 835 (D.C. Cir. 1984) (“The doctrine of ripeness is an important element of our judicial tradition, and indeed -- in some applications at least -- of the ‘case or controversy’ requirement of the Constitution itself.”)

Otherwise, you can’t properly determine whether your case is “good to go” before you file it. See Worthington v. Golden Oaks Apts., 2011 U.S. Dist. LEXIS 115348, at 6-8 (N.D. Ind. Oct. 4, 2011) (Citations omitted):

The existence of a case and controversy is a prerequisite for the exercise of federal judicial power under Article III. “One important element of the ‘case’ or ‘controversy’ is satisfying the ripeness doctrine, which determines when a party may go to court.” The prudential concern underlying ripeness “is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements.” Deciding whether a claim is ripe requires the court “to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.” “A claim is not ripe for adjudication if it rests upon ‘contingent future events that may not occur as anticipated, or indeed may not occur at all.’” …Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.”… Cases are unripe when the parties point only to hypothetical, speculative, or illusory disputes as opposed to actual, concrete conflicts.”) “Ripeness is, essentially, a question of timing.”


Crucially, plaintiff also fails to clearly allege that defendants conducted a foreclosure sale or initiated foreclosure proceedings. When given the opportunity to clarify the issue after the McCurdy defendants represented that no foreclosure sale was pending, plaintiff merely declared that the issue was not “germane” to his complaint… Contrary to plaintiff’s suggestion, an allegation that defendants have initiated foreclosure proceedings is essential to his claim for wrongful foreclosure…

The Court agrees that plaintiff has abused the litigation process in this case. However, because plaintiff is appearing pro se, and the Court explicitly gave him permission to attempt to put forth a legally sufficient complaint, sanctions are inappropriate at this time.

5. Conditions Precedent (TRCP 54)

Be careful to satisfy and plead conditions precedent to your recovery have occurred, even on counterclaims. See Evadale Water Control & Improvement Dist. No. 1 v. J&D Constr., 2010 Tex. App. LEXIS 7435, at *7 n.5 (Tex. App.—Beaumont, Sept. 9, 2010, no pet.):

district court examined the appellants' claimed injuries through the lens of the standing doctrine as well as through the lens of the ripeness doctrine. Few courts draw meaningful distinctions between the two doctrines; hence, this aspect of justiciability is one of the most confused areas of the law.”

32
A condition precedent is an event that must happen or be performed before a right can accrue to enforce an obligation. *Centex Corp. v. Dalton*, 840 S.W.2d 952, 956 (Tex. 1992). Bryan Garner provides a similar definition: “A condition precedent is something that must occur before something else can occur.” BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 197 (2d ed. 1995).

To recover attorney’s fees under Chapter 38: (1) the claimant must be represented by an attorney; (2) the claimant must present the claim to the opposing party or to a duly authorized agent of the opposing party; and (3) payment for the just amount owed must not have been tendered before the expiration of the 30th day after the claim is presented. TEX. CIV. PRAC. & REM. CODE ANN. § 38.002 (West 2008). The claimant bears the burden to plead and prove presentment. *Ellis v. Waldrop*, 656 S.W.2d 902, 905 (Tex. 1983); *Jones v. Kelley*, 614 S.W.2d 95, 100 (Tex. 1981). However, a claimant is excused from proving presentment if it pleads that all conditions precedent to recovery have been met and the opposing party fails to specifically deny presentment. See TEX. R. CIV. P. 54 (party is required to prove only those conditions precedent that have specifically been denied by the opposing party); *Shin-Con Dev. Corp. v. I.P. Investments, Ltd.*, 270 S.W.3d 759, 768 (Tex. App.—Dallas 2008, pet. denied) (appellants waived argument that appellee failed to present its contract claim to them as required by Chapter 38 because they failed to specifically deny presentment had occurred); *Belew v. Rector*, 202 S.W.3d 849, 857 (Tex. App.—Eastland 2006, no pet.) (defendant’s failure to affirmatively deny that all conditions precedent had been met relieved plaintiff from producing specific evidence of presentment); *Knupp v. Miller*, 858 S.W.2d 945, 955 (Tex. App.—Beaumont 1993, writ denied) (defendant’s failure to deny that all conditions precedent had been met justified the trial court’s award of attorney’s fees).

It is RTS’s contention that BSA did not make a presentment of its claim with regard to overcharges, and that such a presentment is required by the provisions of section 38.002 of the Texas Civil Practice and Remedies Code. There is no evidence in the record of such a presentment, and BSA does not assert that it presented a claim for overcharges to RTS. Instead, BSA argues that under section 38.002 a defendant is not required to make a formal presentment before filing a counterclaim. This is simply not the law. The language of section 38.002 does not make a distinction between plaintiffs and defendants with regard to its mandatory language of presentment.

**D. WHY PLEAD LESS?**

1. Because the more you plead, the more you can bleed.


CAUTION: DRAFT PLEADINGS CAREFULLY

Since the pleadings frame and restrict the entire case, draft them with utmost care. Ideally, avoid the need to amend. Although amendments are liberally permitted, superseded pleadings may be admitted in evidence for impeachment purposes...Thus, erroneous allegations made in your original pleading can seriously hurt you at trial — particularly if that pleading was verified by the witness being impeached.

“Assertions of fact, not plead in the alternative, in the live pleadings of a party are regarded as formal judicial admissions.” *Holy Cross Church of God in Christ v. Wolf*, 44 S.W.3d 562, 568 (Tex. 2001) (quoting *Houston First Am. Sav. v. Musick*, 650 S.W.2d 764, 767 (Tex. 1983)); See also *Dallas Bank & Trust Co. v. Commonwealth Dev. Corp.*, 686 S.W.2d 226, 232 (Tex. App.—Dallas 1984, writ ref’d n.r.e) (Storey, J.) (“Whether we consider the allegations of Dallas Bank’s petition as judicial admissions of material fact or as statements of applicable law, it is clear that those
allegations established that Commonwealth was entitled to the relief it sought as a matter of law.”); *White v. Cole*, 880 S.W.2d 292, 296 (Tex. App.—Beaumont 1994, writ denied) (“Assertions of fact in live pleadings are formal judicial admissions…”); See generally *American National Petroleum Co. v. Transcontinental Gas Pipe Line Corp.*, 798 S.W. 2d 274, 278 (Tex. 1990) (Court may “hold a party to its position”).

2. Because the rules prohibit more. A party violates Tex. R. Civ. P. 47 by pleading unliquidated damage amounts. Courts have noted that it is unusual to see this type of allegation. See *Salomon v. Wells Fargo Bank, N.A.*, 2010 U.S. Dist. LEXIS 61755, at *15 (W.D. Tex. June 21, 2010) (“As specific numerical allegations of unliquidated damages are prohibited by Rule 47(b), initial state court pleadings typically do not include such allegations…”).

---

**E. WHY PLEAD MORE?**

1. **Sometimes you have to.**

   **a. Fraud**

   In Federal Court, fraudulent conduct must be plead with particularity. Fed. R. Civ. P. 9(b).


   - *Ashlar Fin. Servs. v. Sterling Fin. Co.*, 2002 U.S. Dist. LEXIS 2086, at *11 (N.D. Tex. Feb. 8, 2002) (Sanderson, Mag.) (“Fifth Circuit precedent holds that a civil conspiracy to commit a tort that sounds in fraud must be pleaded with particularity.”)


     Although the language of Rule 9(b) confines its requirements to claims of ... fraud, the requirements of the rule apply to all cases where the gravamen of the claim is fraud even though the theory supporting the claim is not technically termed fraud.” *Toner v. Allstate Ins. Co.*, 821 F. Supp. 276, 283 (D. Del. 1993) (citations omitted); *Frota v. Prudential-Bache Securities, Inc.*, 639 F. Supp. 1186, 1193 (S.D. N.Y. 1986) (“Rule 9(b) extends to all averments of fraud..., whatever may be the theory of legal duty--statutory, common law, tort contractual, or fiduciary.”). Claims alleging violations of the Texas Insurance Code and the DTPA and those asserting fraud, fraudulent inducement, fraudulent concealment, and negligent misrepresentation are subject to the requirements of Rule 9(b). *See Williams*, 112 F.3d at 177-78 (dismissing plaintiffs’ state law claims for fraud and negligent misrepresentation for failure to comply with Rule 9(b)); *Jay Freeman v. Glenn Falls Ins. Co.*, 486 F. Supp. 140, 141 n.1 (N.D. Tex. 1980) (noting district court’s dismissal of plaintiffs’ DTPA claims without prejudice for failure to comply with Rule 9(b)); *Waters v. State Farm Mut. Auto Ins.*, 158 F.R.D. 107 (S.D. Tex. 1994) (dismissing plaintiffs’

We have noted that the purpose of this particularity requirement is “to discourage a ‘sue first, ask questions later’ philosophy.” “Heightened pleading in the fraud context is required in part because of the potential stigmatic injury that comes with alleging fraud and the concomitant desire to ensure that such fraught allegations are not lightly leveled.”


*Border Area Mental Health Servs. v. Squier*, 2013 U.S. Dist. LEXIS 188209, at *21-22 (D.N.M. July 25, 2013) (Detailing evidence from Affidavits in support of a Motion for a TRO, including: “I believe that if we are not cleared of all allegations of fraud, etc., as published in the newspapers of New Mexico, we will lose most, if not all, non-Medicaid contracts in the near future,” and noting: “This evidence, while somewhat anecdotal and conjectural, does tend to suggest that the stigma from the allegations of fraud is making it more difficult for Plaintiffs to obtain funding or retain and attract clients.”); *Kahane v. Jansen*, 2008 Cal. App. Unpub. LEXIS 9719, at *1-2 (Cal. App. 1st Dist. Dec. 3, 2008) (“We are not unsympathetic to the devastation that can result from legal claims alleging malpractice, fraud and breach of fiduciary duty against an attorney, even where those allegations are never proven.”); *Dai & Assoc., P.C. v. Gao*, 930 N.Y.S.2d 174, 2011 N.Y. Misc. LEXIS 2380, at *5, (2011) (“For Shang Dai and the Dai law firm to be tarred by ruinous allegations of collaboration, fraud, and forgery among a populace that is not acquainted with the operations of American courts may well constitute irreparable harm that might justify injunctive relief in the present case.”).

**b. Injunctive relief**

Under Texas Law, a party seeking injunctive relief has a heightened pleading requirement. See *Alomang v.


The petition in a suit for injunction must "state all material and essential elements entitling the petitioner to relief and negative every reasonable inference arising upon the facts so stated, that the petitioner under other susceptible facts might not be entitled to relief." Allegations of fact should be direct, certain and particular and leave nothing to inference. The petition should contain specific fact allegations showing a right in the pleader, the wrong done by the defendant, and the resulting injury.

Not surprisingly, Courts have been more indulgent of Petitions for injunction that plead evidence. In Cain v. State, 106 S.W. 770 (Tex. Civ. App. 1907) a County attorney sought an injunction to restrain the use of a property for "gaming." The Petition set forth the gaming convictions of some of the defendants, alleging they were aiding and abetting each other in using the property for gaming. The Defendants "insisted that the petition is insufficient in that it alleges convictions for gaming long prior to the institution of suit, without showing the nature of the game." Id. at 377. The court did "not regard the allegations ...as essential to the sufficiency of the petition." Id. The court characterized the allegations as "in the nature merely of evidence tending to support the material complaint." Id. The court considered the convictions "relevant to the issue of the threatened use charged, and while it may not be good pleading for the pleader to set forth his evidence...we fail to see why we should hold the petition bad in its entirety because of such fault." Id.24

Federal courts require a heightened pleading standard for mandatory injunctions.25 See Tuttamore v. Lappin, 429 Fed. Appx. 687, 692, 2011 U.S. App. LEXIS 8151 at *12 (10th Cir. 2011) (Mandatory injunction is generally and traditionally disfavored and requires a heightened showing of the traditional injunction factors); Iron Thunderhorse Bill Pierce, 2005 U.S. Dist. Lexis 23154 at *2-3 (E.D. Tex. 2005) (Mandatory preliminary relief goes beyond maintaining the status quo and is particularly disfavored and should not be granted without the facts and the law clearly favoring the moving party); Saucedo v. Enders, 2004 U.S. Dist. LEXIS 7218 at *7 (W.D. Tex. Apr. 16, 2004) ("[A] mandatory injunction, as compared to an injunction seeking merely to maintain the status quo pending trial, 'is particularly disfavored, and should not be issued unless the facts and law clearly favor the moving party’") (Citing 5th Circuit authority).

### c. Garnishment


Texas Rule of Civil Procedure 658 requires the applicant to comply with all statutory requirements, which include the statement of “specific facts” relied upon to warrant the required findings by the court. TEX. R. CIV. P. 658.

### d. Special damages

TEX. R. CIV. P. 56 (“When items of special damage are claimed, they shall be specifically stated.”)

**GATOR’S TIP:**

Consider stating all your special damages in your Petition, including impaired sexual performance and mental anguish. See:

- **Campbell v. Cook**, 26 S.W. 486, 487 (Tex. 1894):

24 A mandatory injunction requires the non-moving party to take affirmative action. Tuttamore v. Lappin, 429 Fed. Appx. 687, 692, 2011 U.S. App. LEXIS 8151 at *12 (10th Cir. 2011); Gulf Park Water Co., Inc. v. First Ocean Springs Development Co., 530 So.2d 1325, 1334 (Miss. 1988) (Looking to the “essence” of the relief sought, an Injunction requiring defendant to change discharge points was a mandatory injunction).
THE ETHICAL PLEADER… OR, HOW MUCH TRASH CAN I TALK?

The injuries received are alleged as follows: “Breaking and crushing the bones of his hip and thigh; tearing, cutting, and lacerating his flesh; bruising, wounding, and injuring him in his back, bowels, hips, legs, and in other parts and members of his body.” Plaintiff alleged, that from the said injuries he had suffered and would continue to suffer great mental anguish and physical pain; that the injuries are permanent, destroyed the use of one leg, and that his capacity to labor and earn money is almost entirely destroyed.

At the trial the court permitted the plaintiff, over the defendant's objections, to testify, that “his capacity to have sexual intercourse with his wife was greatly impaired;” to which the defendant objected, “because there was no allegation in the petition which would authorize the admission of such evidence, and because the petition does not claim such damages.” It is well settled in this State, that a general allegation of damages will let in evidence of such damages as naturally and necessarily result from the wrongs charged; but to admit proof of damages which do not necessarily result from the injury alleged, the petition must set up the particular effects claimed to have followed the injury… The object of pleading is to notify the opposite party of what it is expected to prove on the trial. In this case there was no injury alleged to have been inflicted upon any organ or member of the body from which such “impairment” would naturally, not to say necessarily, follow. The court erred in admitting the evidence.

  
  In this case, it was not clear from the Holland's petition the legal injury on which they were predicating their claims or their damages… mental anguish is not an injury that is generally evident from the tortious conduct. Cf. *City of Tyler v. Likes*, 962 S.W.2d 489, 494-96 (1997) (explaining limitations on the recoverability of mental anguish damages is linked to problems of foreseeability of such damages). Indeed, a claim for mental anguish damages must be supported by pleadings to give a defendant adequate notice to prepare a defense. See *Dalon v. City of DeSoto*, 852 S.W.2d 530, 538 (Tex. App.—Dallas 1992, writ denied).

  
  Vaughan’s pleadings, however, did not raise the issue of mental anguish. TXI did not specially except to Vaughan's pleadings, so we are to construe the pleadings liberally… However, even construing the pleadings liberally, there is no language to support the submission of a damages question instructing the jury to consider mental anguish. Vaughan specifically stated in his pleadings, “Plaintiff … seeks damages for past lost wages, future lost wages, and lost retirement benefits.” Although Vaughan included a general prayer for “such other relief … to which plaintiff may be entitled,” this does not adequately apprise TXI as to what damages would be sought.

  See also, *Ortale v. Rowlett*, 696 S.W.2d 640 (Tex. App.—Dallas 1985, writ ref’d n.r.e.) (en banc) (Interesting fractured opinions disagreeing on which types of special damages were adequately pleaded and whether the Plaintiff was entitled to a trial amendment).

2. **Sometimes you want to.**

   a. **Defaults**

   One reason to be specific and more substantive in a Petition is to support a potential default judgment. A default judgment operates as an admission of the facts contained in the Petition (except for the amount of unliquidated damages).26

26 Texas: See *Morgan v. Compugraphic Corp.*, 675 S.W.2d 729, 731(Tex. 1984) (“[A] judgment taken by default on an unliquidated claim admits all allegations of fact set out in the petition, except the amount of damages.”); *Stoner v.
The ethical pleader... or, how much trash can I talk?

Attorneys fear, with good reason, that a reviewing court might declare a default judgment void because their petition is conclusory. See In re S.A.W., 279 S.W.3d 853, 856 (Tex. App.—Dallas 2009, no pet.) (Murphy, J.):

A trial court’s judgment shall conform to the pleadings. See Tex. R. Civ. P. 301. “A court’s jurisdiction to render judgment is invoked by pleadings, and a judgment unsupported by pleadings is void.” Ex parte Fleming, 532 S.W.2d 122, 123 (Tex. Civ. App.—Dallas 1975, no writ).

See, e.g. Morgan v. Davis, 292 S.W. 610, 611 (Tex. Civ. App. 1927) (Voiding judgment on a Note when the statement of liability in the Petition on liability was “only a conclusion of the pleader,” and stating that “It has been the uniform rule in this state that, to sustain a judgment by default, the petition must set forth a cause of action with substantial accuracy and with sufficient certainty to inform the court of the judgment to render without looking to proof not within the allegations.”); C & H Transp. Co. v. Wright, 396 S.W.2d 443, 446 (Tex. Civ. App.—Tyler 1965, writ ref’d n.r.e.) (reversing default judgment for breach of an agreement to pay wages, inter alia, because:


In determining whether a default judgment should be entered against a defendant...courts assess the substantive merits of the plaintiff’s claims and determine whether there is a sufficient basis in the pleadings for the judgment. See Nishimatsu Constr. Co., Ltd. v. Houston Nat’l Bank, 515 F.2d 1200, 1206 (5th Cir. 1975) (noting that “default is not treated as an absolute confession by the defendant of his liability and of the plaintiff’s right to recover.”). In doing so, courts are to assume, that due to its default, defendant admits all well-pleaded facts in the plaintiff’s complaint. Id. However, “defendant is not held to admit facts that are not-well pleaded or to admit conclusions of law.” Id.
The requirements of a valid contract are: (1) an offer; (2) an acceptance in strict compliance with the offer's terms; (3) a meeting of the minds; (4) each party's consent to the terms; (5) consideration; and (6) execution and delivery of the contract with the intent that it be mutual and binding. The elements of written and oral contracts are the same and must be present for a contract to be binding. See, e.g. Wester v. Hester, 1994 Tex. App. LEXIS 4083, at *6-10 (Tex. App—Dallas Dec. 21, 1994, no writ) (citations omitted):

An original pleading that presents a claim for relief must contain a short statement of the cause of action sufficient to give fair notice of the claim involved. When the pleadings do not give a defendant fair notice of a cause of action, the plaintiff cannot obtain a default judgment on that claim. However, when the pleadings do give a defendant fair notice of a cause of action, a default judgment will stand even if the plaintiff stated some elements as legal conclusions that would require revision if attacked by special exceptions.

Pleadings give fair notice under the rules of civil procedure when “an opposing attorney of reasonable competence, with the pleadings before him, can ascertain the nature and the basic issues of the controversy and the testimony probably relevant.” This test requires the pleader to allege every element of her cause of action, to allow the opposing party to prepare his defense. A pleading should allege the ultimate facts of the cause of action, but it need not be evidentiary. The pleader may say nothing in advance about the evidence she intends to offer to prove her allegations.

To conclude the pleader sufficiently alleged the elements, the court must be able to identify each element in the pleadings. To determine whether each element is identifiable, the court must liberally construe the pleadings. Furthermore, the court must consider the pleader's intention, and indulge the presumption that the pleadings have sufficiently stated all reasonable inferences from the facts alleged.

Hester's original petition contained ten pages. The first four pages set out allegations about the parties, jurisdiction, and the facts. Hester alleged, among other things: (1) she conveyed her interests in the oil and gas leases in trust to J.J. Wester; (2) Wester promised he would sell the interests and deliver the proceeds to her; (3) Wester did not deliver $30,000 of the proceeds; (4) Wester put the money in a CD and promised Hester the interest would accumulate and compound; and (6) Wester misappropriated the interest from the CD. Hester designated the next five pages of the petition “VII. CAUSES OF ACTION.” This portion of the pleadings contained sections discussing Hester's claims. Each section began with a title identifying a specific claim. The section then alleged the elements of the claim. Hester alleged: (1) J.J. Wester acted in a trust, confidential, or special relationship with Hester in the relevant transactions; (2) he breached his fiduciary duties to Hester; (3) he violated his confidential relationship with Hester; (4) he violated the Texas Trust Act; (5) he committed fraud; (6) he committed fraud in a real estate transaction; (7) he made negligent misrepresentations to Hester; (8) he breached a contract with Hester; (9) he tortiously breached a contract with Hester; (10) Laura Wester conspired with or acted in concert with J.J. Wester to commit these wrongful acts; and (11) the Westers violated section 1962 of the Racketeering Influence and Corrupt Organizations Act. Additionally, Hester set out her claims for exemplary damages, pre-judgment and post-judgment interest, court costs, and attorney's fees.

We conclude an opposing attorney of reasonable competence could have determined from Hester's original petition the nature and the basic issues of the controversy and the relevant testimony. We hold, therefore, the pleadings afforded the Westers fair notice.


Polley’s September 2008 original petition alleged the following:

IV. BACKGROUND INFORMATION

Plaintiff, JESSICA POLLEY, now aged nineteen (19) and a former employee of Metro Restaurants,

Even if Jansing’s allegations are conclusory, they can support a default judgment. A default judgment must be based on the pleadings. Plaintiffs must use plain and concise language in asserting a cause of action in their petitions. The fact that an allegation is a legal conclusion, however, is not grounds for objection when the allegations as a whole give fair notice to the opponent of the claims made. A petition is sufficient if a cause of action may reasonably be inferred from what is specifically stated in the petition, even if an element of the action is not specifically alleged.

b. Planning for the possibility of Removal (Will your Petition be subject to the federal pleading)

V. CAUSE OF ACTION

Defendants, METRO A, LLC; DENAR RESTAURANTS, LLC; SUN HOLDINGS, LLC; POP RESTAURANTS, LLC; GOLDEN RESTAURANTS, INC.; FIREBRAND PROPERTIES, LP; CORRAL GROUP, LP; KANSAS CORRAL, LLC; SUNNY CORRAL MANAGEMENT, LLC; FRYS MANAGEMENT, LLC; INDIE CORRAL, LLC[,] AN-MAR COMPANIES, LLC; and GUILLERMO PERALES, Individually, are jointly and severally liable for the negligence of Metro Restaurants, LLC. Accordingly, Plaintiff seeks such damages from the above-named Defendants.

Polley’s original petition did not include any other factual allegations or legal theories…

Appellants contend in their second issue that the trial court erred by granting default judgment because Polley’s original petition is substantively defective. Specifically, Appellants argue that Polley’s original petition does not allege facts sufficient to provide fair notice of her claims and that the only cause of action purportedly alleged—

standard for purposes of improper joinder?)


A defendant has the right to remove a case to federal court when federal subject-matter jurisdiction exists and the removal procedure has been properly followed. See 28 U.S.C. § 1441. A federal court has subject-matter jurisdiction based on diversity of citizenship “where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between . . . citizens of different States.” 28 U.S.C. § 1332(a)…. To establish that a nondiverse defendant has been improperly joined for the purpose of defeating diversity jurisdiction, the removing party must prove either that there has been actual fraud in the pleading of jurisdictional joint and several liability—is a damages apportionment theory rather than an independent cause of action recognized by Texas law…

Polley’s petition alleged that she was sexually assaulted by an employee and supervisor for Metro Restaurants while she was also employed by Metro Restaurants. Her petition further alleged that Appellants “are jointly and severally liable for the negligence of Metro Restaurants” and that she sought damages from Appellants. Although Polley’s petition clearly would have been subject to special exceptions, it set forth sufficient information to provide Appellants with fair notice that Polley sought to recover damages from Appellants because they were legally responsible for Metro Restaurants’s negligence. In other words, the petition alleges a cause of action for negligence and that Appellants were jointly and severally liable for that negligence… see also Paramount, 749 S.W.2d at 494-95 (stating that plaintiff not required to “set out in his pleadings the evidence upon which he relies to establish his asserted cause of action” and holding that pleading provided fair notice to principal by alleging purported agent was “acting for itself and for” principal despite not containing specific allegations against principal). Thus, while joint and several liability is not an independent cause of action… Polley’s petition alleged a cause of action for negligence, and we hold that although Polley’s petition would have been subject to special exceptions, it pleaded a recognized cause of action against Appellants and provided them with notice sufficient to prepare a defense.
facts or that there is no reasonable possibility that the plaintiff will be able to establish a cause of action against that party in state court.

The second approach focuses on whether plaintiff has asserted a valid state-law cause of action against the nondiverse defendant. Id. The test is whether “there is no reasonable basis for the district court to predict that the plaintiff might be able to recover against an in-state defendant.” Id. In determining whether there is a reasonable basis to predict the plaintiff might recover against a defendant under state law, a court conducts “a Rule 12(b)(6)-type analysis, looking initially at the allegations of the complaint to determine whether the complaint states a claim under state law against the in-state defendant.” Id. “If the plaintiff can survive a Rule 12(b)(6) challenge, there [generally] is no improper joinder.”

The petition as filed in the state court at the time of removal controls the inquiry. See Cavallini v. State Farm Mut. Auto Ins. Co., 44 F.3d 256, 264 (5th Cir. 1995). If the pleading reveals a reasonable basis of recovery on one cause of action, the court must remand the entire suit to state court.

The federal courts have reached inconsistent results over whether a court deciding if a plaintiff’s state-court petition provides a reasonable basis for predicting recovery against an in-state defendant under state law applies the federal pleading standard if the standard that applies under that state’s law is more lenient...

The majority of courts have held that a federal court should not look to the federal standard for pleading sufficiently under Rule 8 and 12(b)(6) to determine whether the state-court petition provides a reasonable basis for predicting that the plaintiff could recover against the in-state defendant at least when, as here, the state pleading standard is more lenient.


If your Petition is removed to Federal Court in the Eastern District of Texas, your State Court Petition will likely be viewed under the Federal Rules. See Studer v. State Farm Lloyds, 2013 U.S. Dist. LEXIS 183915 (E.D. Tex. Dec. 18, 2013) (Mazzant, J.):


The courts that have applied the federal pleading standards have treated the standards to be a matter of procedure, to be governed by federal law once the case has been transferred to federal court. The courts that have applied the state law standards have concluded that it
would be unfair to a plaintiff who has filed a suit in the state court to be bound by federal pleading standards in a determination of whether the pleading states a claim upon which relief can be granted.

The court has concluded that by reason of a recent amendment to the Texas Rules of Civil Procedure the issue of federal standards versus state standards now is somewhat moot. In September 2011 the Texas legislature amended § 22.004 of the Texas Government Code to add a requirement that the Texas Supreme Court "adopt rules to provide for the dismissal of causes of action that have no basis in law or fact on motion and without evidence." Tex. Gov't Code § 22.004(g) (West Supp. 2014). In response, the Texas Supreme Court adopted in 2013 civil Rule 91a governing dismissal of baseless causes of action...


Now that the Texas pleading standards have, essentially, been brought into line with the federal standards, the court is making its ruling on the basis of the case law applicable to the federal standards.

**c. Leave to Amend (not always so free)**

See Blankenship v. Citizens Nat’l Bank, 431 F.2d 569, 570 (5th Cir. 1970) ("It is well recognized that amendments are to be liberally granted."); United States ex rel. Doe v. Dow Chem. Co., 343 F.3d 325, 329 (5th Cir. 2003):

Leave to amend under Federal Rule of Civil Procedure 15(a) “shall be freely given when justice so requires.” FED. R. CIV. P. 15(a). Although liberally allowed, such leave to amend is not automatic, but rather “is within the sound discretion of the district court.” … This Court reviews denials of leave to amend under an abuse of discretion standard.

KSNG Architects, Inc. v. Beasley, 109 S.W.3d 894, 899 (Tex. App.—Dallas 2003, no pet.) (Fitzgerald, J.) (Texas law favors “liberal amendment of pleadings and affording litigants the opportunity to cure defects in pleadings whenever possible.”); In re City of Dallas, 445 S.W.3d 456, (Tex. App.—Dallas 2014) (Fitzgerald, J.) ("[W]e review a trial court's decision whether to grant leave to file an amended pleading for abuse of discretion."). Because this is a highly deferential standard of review, the complaining party faces an

---

28 See Amanda Peters, THE MEANING, MEASURE AND MISUSE OF STANDARDS OF REVIEW, 13 (2004) (citing commentators and case law) ("The abuse of discretion standard, which is the most deferential to trial court decisions..."); Texas Gulf Sulphur Co. v. Blue Stack Towing Co., 313 F.2d 359, 363 (5th Cir. 1963) ("The instances in which we can declare that the action is so lacking in reason as to constitute an abuse of discretion will be, as they have been, rare indeed."); In re Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Prod. Liab. Litig., 582 F.3d 524, 550 (3d Cir. 2009) (Explaining that the boundaries of the abuse of discretion standard can be “difficult to discern at times,” but stating that the standard is “particularly deferential."); James Baker, Harnessing the Standards of Review, 18 Annual Advanced Civil Appellate Practice Course 2004 (Under abuse of discretion standard, “the party challenging the trial court’s decision must establish that the facts and law permit the court to make but one decision.”); TrafficSchool.com, Inc. v. Edriver Inc., 2011 U.S. App. LEXIS 15536, at *25 n.7 (9th Cir. July 28, 2011) (Every party alleging abuse of discretion faces an uphill battle); Brown v. Argosy Gaming Co., L.P., 384 F.3d 413, 417 (7th Cir. 2004) (Appellant faces a “steep uphill climb” to overcome the liberal abuse of discretion standard); Harriman v. Hancock County, 627 F.3d 22, 30 (1st Cir. 2010) (sanctioned party shoulders a “heavy burden” to show that an abuse of discretion has
uphill battle and unlikely odds of getting that ruling reversed.


The sole basis upon which the Motion rests is Defendants’ inadvertent failure to incorporate the newly proffered affirmative defenses in their responsive pleading…

Their original Answer, however, did include "affirmative defenses." (Answer, Page 4). It is apparent that Defendants took time to consider affirmative defenses. Inadvertence seems a strange explanation for the inclusion of two affirmative defenses and the omission of seven others.

Because Defendants' proposed affirmative defenses do not meet the standard of plausibility imposed under Twombly; because they have not established that the underlying facts or circumstances relied upon may be a proper subject of relief, as contemplated by Foman; and because they have not established that the interests of justice would be served by the relief sought, Defendants’ Motion to Amend Pleadings is DENIED.

d. a/k/a’s

An ethical pleader identifies alias names in the Caption of the Petition, and in the names of the parties, because that pleader is looking ahead to the form of the Final Judgment and the attorney’s responsibility to abstract that judgment correctly and effectively. See Olivares, 126 S.W.3d 242, 247 (Tex. App.—San Antonio 2003, pet. denied) (“It is well settled in Texas that it is the Judgment Creditor’s responsibility to insure that the clerk abstracts the judgment properly.”). Many people go by, and hold property in, several forms of a name. Many writ officers won’t levy on property unless the name of the owner matches exactly to the name on the judgment.29 By then, it may be too late to fix the deficiency. And even if you try to add names to your judgment, you may not succeed. See, e.g. Office Depot, Inc. v. Zuccarini, 2007 U.S. Dist. LEXIS 21255, at 3-4 (N.D. Cal. Mar. 15, 2007) (Order Denying Motion to Add Pseudonyms to Writ of Execution).

GATOR’S TIP: Consider fully naming your defendants, in a form like this:

Juan Jorge Torres a/k/a Juan J. Torres a/k/a J.J. Torres a/k/a Juan Torres a/k/a Juan Torrez a/k/a John Torres a/k/a J. Torres a/k/a Johnny Torres a/k/a George Torres, individually and d/b/a J.J.’s Market

Judge Lynn N. Hughes once called this “tacky” (presumably because it makes a defendant look like they have been indicted), but if you have a Jr./Sr., or someone who has used both their Foreign and Americanized version of their names, you may be keeping your client from one day satisfying a judgment.

e. Avoiding judgment on the pleadings30

If there is a distinction to be made between a clear or manifest or simple abuse, perhaps courts want to communicate that any abuse above a simple abuse of discretion must be “more than just maybe or probably wrong,” it must be so wrong that it strikes the appellate court “with the force of five-week-old … dead fish.” Parts & Elec. Motors, Inc. v. Sterling Elec., 866 F.2d 228, 233 (7th Cir. 1988).

* * *

As one law professor observed, “[t]he area of discretion is a pasture in which the trial judge is free to graze. The appellate courts will not disturb the trial court’s ruling – depending on the graduation of discretion that applies to the particular instance – but will defer to them.” Maurice Rosenberg, Appellate Review of Trial Court Discretion, 79 F.R.D. 173, 180 (1975).

29 Few writ deputies appreciate the doctrine of idem sonans.


A motion for judgment on the pleadings under Federal Rule of Civil Procedure 12(c) is subject to the same standards as a Rule 12(b)(6) motion to dismiss. Doe v. MySpace, Inc., 528 F.3d 413, 418 (5th Cir. 2008). “To 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)).
Fed R. Civ. P 12(c) Motion for Judgment on the Pleadings. After the pleadings are closed--but early enough not to delay trial--a party may move for judgment on the pleadings.31

"A motion brought pursuant to FED. R. CIV. P. 12(c) is designed to dispose of cases where the material facts are not in dispute and a judgment on the merits can be rendered by looking to the substance of the pleadings and any judicially noticed facts."


Obazee contends that defendants have waived their Rule 12(b)(6) motion by filing an amended answer containing only a general denial that does not specifically plead that Obazee failed to state a claim on which relief can be granted. But even if the court assumes arguendo that defendants filed a deficient Rule 12(b)(6) motion, this does not preclude them from moving under Rule 12(c) for judgment on the pleadings on the basis that Obazee has failed to state a claim on which relief can be granted. See Rule 12(h)(2) (permitting party to raise defense of failure to state a claim by motion for judgment on the pleadings under Rule 12(c)); see also Fisher v. Dallas Cnty., 2014 U.S. Dist. LEXIS 135925, 2014 WL 4797006, at *8 (N.D. Tex. Sept. 26, 2014) (Fitzwater, C.J.) ("[T]he intent of [Rules 12(g)(2) and (h)(2)] is to make clear that a party can raise by Rule 12(c) motion the defense of failure to state a claim on which relief can be granted.").


"Plaintiff also notes that it referred to free writing prospectuses in its original complaints, and it argues that the Court should not allow defendants to raise issues now that they could have raised in response to the prior complaints. The Tenth Circuit has noted, however, that Rule 12 does not provide for waiver of the defense of failure to state a claim upon which relief may be granted, and that the same defense could be asserted in a motion for judgment on the pleadings under Rule 12(c) at any rate."); Dalenko v. Stephens, 2014 U.S. Dist. LEXIS 25166 (E.D.N.C. Feb. 26, 2014) (emphasis added) ("Plaintiff overlooks Rule 12(h)(2), however, which provides that a Rule 12(b)(6) motion may be raised in any pleading, by motion for judgment on the pleadings, or at trial.").


The Court finds that a 12(c) motion for judgment on the pleadings would be improper here. Motions under 12(c) are “designed to dispose of cases where the material facts are not in dispute and a judgment on the merits can be rendered by looking to the substance of the pleadings and any judicially noticed facts.”

31 “Whether a delay of trial will result from a Rule 12(c) motion is committed to the sound discretion of the court.” O’Diah v. University of California, 1991 U.S. Dist. LEXIS 13468, at *7 (N.D. Cal. Sept. 19, 1991).

32 Hebert Abstract Co. v. Touchstone Properties, 914 F.2d 74, 76 (5th Cir. 1990); See also McDonnell v. Estelle, 666 F.2d 246, 249 (5th Cir. 1982) ("Rule 12(c), permits judgment on the pleadings… by its terms the court may consider only
IX. HOW MUCH TIME IS REASONABLE TO SPEND PREPARING A COMPLAINT?

The answer is, of course: it depends.

1 Hour (Signal-Piracy Complaint).


Defendants allege that counsel’s time spent on preparing pleadings, motions, or responses “should be met with the greatest skepticism” because these documents are nearly identical to pleadings from counsel’s prior cases… Defendants further contend that some of the other cases’ pleadings are nearly identical to some of the pleadings in this case. Defendants contend that if counsel has handled 3,000 cases under the Communications Act over a period in excess of ten years, as alleged in the Diaz Affidavit, it is clear that “this output was achieved using boilerplate pleadings . . . likely prepared by the paralegals, secretaries and assistants…

Although some of the pleadings in this matter may be similar to the pleadings in other cases, that is to be expected considering all of the cases concern the Communications Act. The law in the various pleadings, in the various cases, would be the same so long as it hasn’t changed. Spending an hour drafting and filing a complaint, which happens to be similar to another complaint that counsel has completed, is not excessive or unreasonable.

See also Langer v. 1600 E Downtown Prop., LLC, 2015 U.S. Dist. LEXIS 75923, at *12 (C.D. Cal. June 9, 2015) (“Defendants' contention that it was unreasonable for an attorney to spend less than an hour drafting and reviewing a complaint—which is subject to Rule 11 sanctions—lacks merit, even if the complaint is based on an existing template.”)

4 Hours (IDEA Complaint).


First, the DOE argued that the 9.8 hours Sunderland spent drafting the Complaint was unreasonable. The Court agrees. The Complaint was indeed excessively long, consisting of 130 pages to appeal an administrative decision of only 39 pages. There was no need to spend almost ten hours drafting such a long document. Four hours would have been a reasonable length of time for Sunderland to spend on the Complaint.

6 Hours (FOIA Complaint).


Having reviewed the hours EPIC spent preparing and filing the Complaint as set forth in EPIC’s case billing record… the Court agrees it is appropriate to reduce the fee award attributable to the preparation and filing of the Complaint. The Complaint drafted by EPIC is a straightforward, nine-page FOIA complaint, similar to the complaints that EPIC frequently files in FOIA litigation in this Circuit. Although the Court recognizes the comprehensive nature of EPIC's Complaint, the Court nevertheless finds it unreasonable for EPIC to bill 18.4 hours—more than two full days of work—over three different attorneys for the preparation and filing of this Complaint. A review of the case billing record reveals inefficiencies and redundancies that makes EPIC's fee request for the Complaint unreasonable. For example, two senior EPIC attorneys spent nearly twice as much time editing the Complaint as was spent initially drafting the Complaint… Accordingly, the Court shall reduce the requested attorney's fee award attributable to the time spent preparing the Complaint. The Court finds it more reasonable to award EPIC fees for 6 hours preparing and filing the Complaint…

45
THE ETHICAL PLEADER… OR, HOW MUCH TRASH CAN I TALK?

7.8 Hours (Trademark Infringement Complaint).


[T]he Court does not consider Counsel’s time working on the Complaint excessive. As set forth in their declarations, McKusick worked on the Complaint for 3.8 hours, Daily for three hours, and Luers for one hour… Despite the case's outcome on summary judgment, the issues presented here are complex, and Counsel have provided sufficiently detailed time entries to substantiate time spent on this particular task. The Court thus declines to adjust any of Counsel's requested hours concerning work performed for the Complaint.


The Defendants argue that spending seventeen and a half hours drafting a three-count complaint is excessive… The Court disagrees. The importance in drafting a well-pled civil complaint for a federal court cannot be overstated. See Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). A civil complaint defines a case. It provides that defendants with notice of the allegations against them. If the complaint does not sufficiently and plausibly state a claim, the entire case will be dismissed. Absent subsequent modifications, a plaintiff will be bound by the complaint's claims and allegations. It is reasonable that Mr. Fredlund would spend a significant amount of time researching, drafting, and modifying the Complaint. Consequently, the Court will not disturb these entries.

18.1 Hours (ADA Complaint) (reduced 30% by Plaintiff’s counsel for work on non-recoverable claim).


When a defendant argued that the amount of time a plaintiff’s attorney spent researching and drafting a complaint was excessive, Judge Carter of the Central District of California pointed out in Charlebois v. Angels Baseball LP, 993 F.Supp.2d 1109 (C.D. Cal. 2012), that many complaints are dismissed “because attorneys spend too little time researching the grounds for their case;” therefore, there is “no reason why [the court] should punish the attorney that researches the law and facts before putting paper to pen.” Id. at 1124-25. The court similarly finds that the efforts spent in setting forth a detailed, and factually specific complaint are reasonable and compensable.

53.5 Hours (ERISA Complaint) (Might sound good but they asked for 107).

See Pasternak v. Radek, 2008 U.S. Dist. LEXIS 34134 (N.D. Ill. Apr. 24, 2008) (“Court found that K&A had failed to show that the time it had spent on various tasks -- primarily 107 hours Ms. Dixon recorded for researching and preparing plaintiffs' complaint -- was reasonable, and it reduced that time by one-half.”).

X. THE ANSWER

A. TOO LITTLE:

1. Beware the use of the General Denial in Federal Court

While it is possible that every allegation in a complaint can be denied, use of a general denial in Federal Court is rarely appropriate and may leave the pleader in great peril of default or other sanction. See Donohoe v. Consolidated Operating & Production Corp., 1986 U.S. Dist. LEXIS 16443, at *3 (N.D. Ill. December 15, 1986):

Rule 8(b)’s last sentence permits a general denial where appropriate. But this Court has reviewed the
Complaint, and there is no way in which anyone in the position of a defendant in this case can be [sic] good conscience deny every one of the Complaint’s allegations. Rule 8(b)’s permission for a general denial is specifically made ‘subject to the obligations set forth in Rule 11,’ and current ‘Answers’ fly directly in the fact of Rule 11 obligations.


the Government objects that this Answer contains a conclusory “general denial” of the Complaint. This objection is meritorious. General denials of all allegations in a complaint are almost never appropriate under the Federal Rules of Civil Procedure, which apply to this pleading question by operation of Supplemental Rule G(1). See Mortensen v. Mortgage Electronic Registration Systems, Inc., 2010 U.S. Dist. LEXIS 87756, 2010 WL 3339492, *2 n.7 (S.D. Ala. Aug. 23, 2010) (“General denials are almost always improper under the Federal Rules of Civil Procedure.”); Matter of Crawford, 2 B.R. 589, 592 (Bankr. N.D. Ill. 1980) (“A general denial is appropriate only where the pleader intends in good faith to controvert the preceding pleading.”); Gulf Oil Corp. v. Bill’s Farm Center, Inc., 52 F.R.D. 114, 118-19 (W.D. Mo. 1970) (declaring that “[g]eneral denials or the equivalent are no longer permitted under the Federal Rules of Civil Procedure.”). Under Rule 8(b)(2), Fed.R.Civ.P., denials set forth in an answer “must fairly respond to the substance of the allegation.” Id. Moreover, a general denial such as that offered here is appropriate only when a party “intends in good faith to deny all the allegations of a pleading — including the jurisdictional grounds.” Rule 8(b)(3). By contrast, “[a] party that does not intend to deny all the allegations must either specifically deny designated allegations or generally deny all except those specifically admitted.” Id. Claimants Norman Tubbs and Joacandra Childs have not done so; therefore, the Motion to Strike is granted as to their Answer, and such pleading is stricken.

White v. Smith, 91 F.R.D. 607, 610 (W.D.N.Y. 1981) (“Under the circumstances of this case [Defendant filing a general denial], appropriate sanctions are more than justified. As noted supra, footnote 2, a pleading filed in violation of Fed. R. Civ. P. rule 11 may be stricken as sham and false and the action may proceed as though the pleading had not been served. I am satisfied that such a penalty is fully warranted in this matter.”).

Entertainment by J&J, Inc. v. Guerrero, Civil Action No. H-02-3324 (S.D. Tex. December 4, 2003) (Hittner, J.) (“Because Defendant has not responded properly, the Court will treat all of Plaintiff’s claims as admitted by Defendant”).

But see Hiramanek v. Clark, 2015 U.S. Dist. LEXIS 19985, at *9 (N.D. Cal. Feb. 18, 2015) (“The remaining denials in the answer are proper. The paragraphs of the complaint that defendants deny include vague language, terms of degree, legal conclusions, and other phrases that make them ambiguous. Accordingly, a general denial is proper.”).

2. “Commenting” is not a responsive pleading.

See Payne v. District of Columbia, 559 F.2d 809, 825 (D.C. Cir. 1977) (noting that the defendant’s answer failed to deny that the plaintiff “was acting under color of his official authority” and merely commented that the plaintiff’s allegation was a “conclusion of the pleader requiring no answer.”); See generally, Lockwood v. Wolf Corp., 629 F.2d 603, 611 (9th Cir. 1980) (No additional evidence required to prove matters admitted by Defendant’s failure to deny allegations of a complaint).

B. TOO MUCH

1. Over use and abuse of affirmative defenses.

See Ford Motor Co. v. Benitez, 639 S.E.2d 203, 205- 208 (Va. 2007) (Affirming sanction in the amount of $2000 against attorney for the Defendants who signed Answer):

The [trial] court noted that the defense admitted a lack of factual support for six of the affirmative defenses, and also noted the evasive answer the defense had given to the plaintiff’s interrogatory asking what factual basis existed for the affirmative defenses. The court found that affirmative defenses 1, 2, 3, 6, 10 and 11 were not grounded in fact when the pleading asserting them was signed…

“The purpose of a defensive pleading is to inform the opposite party, and to permit the court to determine, what is the true nature of the defense.” … A pleading that puts the opposing party to the burden of preparing to meet claims and defenses the pleader knows to have no basis in fact
is oppressive. It constitutes an abuse of the pleading process and results in the wrong that Code § 8.01-271.1 was enacted to prevent.

That wrong is not dispelled by couching the pleading in language that merely threatens the use of the unsupported claim if it should later become available. The opposing party must still shoulder the burden of preparing to meet it.


[T]he obligation to conduct expensive and potentially unnecessary and irrelevant discovery is a prejudice. Id.; see also Ganley v. County of San Mateo, No. C06-3923 TEH, 2007 U.S. Dist. LEXIS 26467, 2007 WL 902551, at *1 (N.D. Cal. Mar. 22, 2007) (motions to strike are proper even if their only purpose is to make the issues less complicated and to streamline the ultimate resolution of the action).


Practitioners must “wake up” to the heightened scrutiny required for affirmative defenses. Long lists of affirmative defenses – “in boiler plate fashion” – are no longer appropriate in an Answer. See Peter M. Durney and Jonathan P. Michaud, Fending off the Use of a Rule 12(f) Motion to Strike Affirmative Defenses, DEFENSE COUNSEL JOURNAL, p. 441 (October 2012); See, e.g. United States Welding, Inc. v. Tecsys, Inc., 2015 U.S. Dist. LEXIS 73108, at 6-7 (D. Colo. June 4, 2015):

In this case, [Defendant] has simply listed 25 one-sentence defenses in which the majority refer to "one or more" of USW’s claims… These listed defenses do nothing to give USW notice of which claim [Defendant] intends each defense to be applied. Fed. R. Civ. P. 8(b)(1)(A) ("state in short and plain terms its defenses to each claim asserted against it") (emphasis added). Certainly, "permitting bare-bones submissions would allow parties simply to bombard their opponent with a laundry list of affirmative defenses without making any individualized inquiry into whether a particular defense actually applies to the facts of the case. ... [It seems to serve no purpose except to reserve defendants' rights to the maximum extent possible."

However, at least one Judge is not much concerned with the over use of affirmative defenses. See Wells Fargo & Co. v. United States, 750 F. Supp. 2d 1049, 1051-1052 (D. Minn. 2010):

Affirmative defenses are almost always simply listed in answers; only rarely do defendants plead much in the way of facts in support of affirmative defenses. (Of course, prior to pleading an affirmative defense, a defendant must make "an inquiry reasonable under the circumstances"-- one of the circumstances being that the defendant must file an answer in just 21 days -- and certify that the affirmative defense is pleaded in conformity with Rule 11.) In a typical case, it quickly becomes apparent that most of the affirmative defenses are not viable, and the parties simply ignore them. No judicial intervention is necessary.

GATOR’S TIP:

Call people out on improper affirmative defenses. See Ray E. Critchett, Ferreting Out Affirmative Defenses 28 (Ohio Trial-Winter 2009):

If opposing counsel raises sixteen affirmative defenses and you do not believe they are applicable to your case, ensure that each affirmative defense was pled with specificity. If they were not pled with specificity, you may move the court to strike affirmative defenses pursuant to Ohio Civ. R. 12(F). Similarly, if you do not believe that the affirmative defense is applicable to your case, you can either move to strike the defense pursuant to Ohio Civ. R 11 and/or Ohio Civ. R 12 (F)...”), available at http://www.buckeyelaw.com/team/e_ray_critchett/Affirmative_Defenses.pdf.


[T]he Court finds that [Defendants] first affirmative defense—failure to state a claim—is patently frivolous. Flav-O-Rich, Inc. v. Rawson Food Serv., Inc., 846 F.2d
1343, 1349 (11th Cir. 1988) (“A defense which points out a defect in the plaintiff’s prima facie case is not an affirmative defense.”). Failure to state a claim must be the subject of a motion to dismiss, not the basis of an affirmative defense. This defense will therefore be stricken with prejudice.

With Lane v. Page, 272 F.R.D. 581, 594 (D.N.M. 2011):

Form 30 provides an example of an “Answer Presenting Defenses Under Rule 12(b).” Fed. R. Civ. P. Form 30. The section titled “Failure to State a Claim” states, in its entirety: “4. The complaint fails to state a claim upon which relief can be granted.” Fed. R. Civ. P. Form 30. Failure to state a claim is a defense under rule 12…

2. Pleading yourself out of court.

Yes, you actually can do this. Check the Exhibits to a Plaintiff’s Petition/Complaint. And then check them again. See, e.g. Calhoun v. CitiMortgage, Inc., 2014 U.S. Dist. LEXIS 8888, at *11 n.3 (N.D. Ill. Jan. 24, 2014):

“Where exhibits attached to a complaint negate its allegations, a court is not required to credit the unsupported allegations.” Bell v. Lane, 657 F. Supp. 815, 817 (N.D. Ill. 1987); see also Matter of Wade, 469 F.2d 241, 249 (7th Cir. 1992) (“A plaintiff may plead himself out of court by attaching documents to the complaint that indicate he or she is not entitled to judgment.”). The court thus credits the exhibits and not Calhoun’s unsupported allegations where the two conflict.

3. Unclean hands.

Behaving “inequitably” in how you plead for equitable relief could cause the unintended result of barring that relief. The movant seeking equitable relief must come into Court with “clean hands.” 33 This does not mean “pretty clean.” The movant’s hands must be spotless.34 Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co., 324 U.S. 806, 815, 65 S. Ct. 993, 997-998, 89 L. Ed. 1381, 1386 (1945):

The guiding doctrine in this case is the equitable maxim that “he who comes into equity must come with clean hands.” This maxim is far more than a mere banality. It is a self-imposed ordinance that closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant. That doctrine is rooted in the court of equity; any really unconscientious conduct, connected with the controversy to which he is a party, will repel him from the forum whose very foundation is good conscience”; see also, Norvel v. Norvel, 629 So.2d 1312, 1316 (Ct. App. La. 1993) (When a party seeks equitable relief, the party seeking assistance from the court “must show that the transaction from which his claim arises is fair and just, that there is nothing unconscientious in his own conduct relative thereto, and that the relief he seeks is equitable, and not harsh or oppressive upon the opposing party… Once found to exist, the doctrine of unclean hands repels the unclean [party] at the steps of the courthouse. And he is repelled entirely.”); Accord Pepper v. Superior Court, 76 Cal. App. 3d 252, 259 (Cal. App. 1977) (“A petitioner’s own inequitable conduct may bar his right to relief in the form of a prerogative writ.”).

33 Riley v. Davidson, 196 S.W.2d 557, 559 (Tex. App.—Galveston 1946, writ ref’d n.r.e.); Owens—Illinois v. Webb, 809 S.W.2d 899, 902 (Tex. App.—Texarkana 1991, no writ) (Temporary injunctions are forms of equitable relief; thus, the general rules of equity apply, meaning a party with unclean hands is not entitled to equitable relief.).

34 Humphreys-Mexia Co. v. Arseneaux, 297 S.W. 225, 231 (Tex. 1927) (“Equity does not adjust differences between wrong-doers. The complainant is first judged and not until he has been found free taint does equity proceed to determine whether he has been wronged.”); Love v. Taylor, 8 S.W.2d 795, 799 (Tex. Civ. App.—San Antonio 1928, no writ) (“He who comes into a court of equity must come with clean hands, but they by no means exhaust its scope and effect. It is not alone fraud or illegality which will prevent a suitor from entering a
historical concept of court of equity as a vehicle for affirmatively enforcing the requirements of conscience and good faith. This presupposes a refusal on its part to be "the abettor of iniquity." Bein v. Heath, 6 How. 228, 247. Thus while "equity does not demand that its suitors shall have led blameless lives," Loughran v. Loughran, 292 U.S. 216, 229, as to other matters, it does require that they shall have acted fairly and without fraud or deceit as to the controversy in issue. Keystone Driller Co. v. General Excavator Co., 290 U.S. 240, 245; Johnson v. Yellow Cab Co., 321 U.S. 383, 387; 2 Pomeroy, Equity Jurisprudence (5th Ed.) §§ 379-399.

This maxim necessarily gives wide range to the equity court's use of discretion in refusing to aid the unclean litigant. It is "not bound by formula or restrained by any limitation that tends to trammel the free and just exercise of discretion." Keystone Driller Co. v. General Excavator Co., supra, 245, 246. Accordingly one's misconduct need not necessarily have been of such a nature as to be punishable as a crime or as to justify legal proceedings of any character. Any willful act concerning the cause of action which rightfully can be said to transgress equitable standards of conduct is sufficient cause for the invocation of the maxim by the chancellor.

Roger Young and Stephen Spitz, **SUEM – Spitz's Ultimate Equitable Maxim:* In Equity, Good Guys Should Win and Bad Guys Should Lose**, 55 S.C. L. Rev. 175, 188-199 (2003) (“Parties that are truly unreasonable and cause real harm and prejudice and who, in the common-sense use of the word, commit bad acts are frequently categorized as a ‘bad guy’ under SUEM, making many such parties almost certain losers in equity.”)

If you are the bad guy, and get called on pleading misconduct, and have the gall to argue “no blood, no foul,”35 you have some authority to save your application for equitable relief. See Park v. Escalera Ranch Owners' Ass'n, 457 S.W.3d 571, 597 (Tex. App.—Austin 2015, no pet.) (“Under the doctrine of unclean hands, a court may refuse to grant equitable relief, such as an injunction, sought by ‘‘one whose conduct in connection with the same matter or transaction has been unconscientious, unjust, or marked by a want of good faith, or one who has violated the principles of equity and righteous dealing’…the party claiming unclean hands bears the burden of showing that it was injured by the other party’s unlawful or inequitable conduct… The doctrine should not be applied unless the defendant has been seriously harmed and the wrong complained of cannot be corrected without applying the doctrine.”).

**CONCLUSION**

So be advised, the streets is full of surprises
It’s not what crew’s thelivest
One that survive is who’s the wisest

Big Pun, **You Ain’t a Killer**, on Capital Punishment (Loud Records April 28, 1998):

35 There is considerable authority rejecting this argument. See

- Derzack v. County of Allegheny, 173 F.R.D. 400, (W.D. Pa. 1996) (“Prejudice to the adversaries - At the outset, the Court rejects plaintiffs’ ‘no harm, no foul’ argument… ‘a court may impose sanctions no matter how immaterial the information withheld or how prejudicial the effect of the infraction, but… the degree of sanctions imposed may vary according to degree of prejudice or severity of the misconduct.’ (citing Tutu Wells Contamination Lit., 32 V.I. 349, 162 F.R.D. 81, 90 (D.V.I. 1995)).


  In deciding the type of sanction, if any, that should be imposed, we consider a number of factors. These factors include the duty violated, the mental state of the lawyer, the potential or actual injury caused by the misconduct, and the existence of aggravating or mitigating factors. *In re Anderson*, 163 Ariz. 362, 365, 788 P.2d 95, 98 (1990) (citing The American Bar Association's *Standards for Imposing Lawyer Sanctions* (1986))… Concerning the mental state of the lawyer and the potential or actual injury to the client, we again agree with the Committee when it said:

  We are also deeply concerned with the "no harm, no foul" attitude displayed by the Respondent. Respondent repeatedly states that his activities either helped the client or did not hurt the client.

GATOR’S CLOSING TIPS FOR ETHICAL PLEADING:

1. **Use Care.** Even a “form pleading” requires a craft and care.

2. **Don’t practice the dark arts.** Don’t use pleadings for things they are not intended for.

3. **Pack light.** If it’s not essential, have a good reason for including it.

4. **When in doubt, leave it out.** If it is still important later, add it if you can, or move for leave to add it.\(^{36}\)

5. **Avoid low blows.** If your pleading takes a cheap shot, it is likely an improper pleading.\(^{37}\)

6. **If you can’t say something to the jury, think twice about whether it is appropriate in a pleading.**\(^{38}\)

7. **Don’t pack and smoke your own pipe.** Before you file a pleading, get comments on it from experienced attorneys.

8. **Reconsider Reconsideration.**\(^{39}\) Although motions for reconsideration are disfavored,\(^{40}\) they offer a highly cost effective game…” the prosecution’s characterizations of defendant as a “con” were improper…

\(^{36}\) See Ford Motor Co. v. Benitez, 639 S.E.2d 203, 207-208 (Va. 2007) (Affirming sanctions and noting that proper course is to amend at a later date rather than “reserving” unsupported claims).


1. You’re a professional. The first, best, and only necessary reason not to attack opposing counsel in writing is that it is unprofessional. As an officer of the court and licensed professional, you should rise above petty personal disputes. A professional does not spend time worrying about how to work in a jab at opposing counsel in pleadings…


[Continuing with his argument, the prosecutor continued on the theme of defendant’s opportunity to commit the crimes, remarking that the offenses were committed “as an end result to the con he was playing on his friend, the victim ***. He did it because being a con man and conning people is the essence of his being.” Defense counsel voiced another objection, which was sustained. The trial judge further admonished the prosecution to refrain from using such terminology and directed the jurors to disregard the terms “con” and “con]

\(^{39}\) See generally, CSX Transp., Inc. v. Total Grain Mktg., LLC, 2013 U.S. Dist. LEXIS 124886, at *5-6 (S.D. Ill. Aug. 30, 2013) (“Encouraging” the plaintiff to proceed with a motion for reconsideration or renewed summary judgment motion,“ but “only if it is appropriate [after] carefully review the rules and caselaw”).

\(^{40}\) See Rhodall v. Verizon Wireless of the E., 2012 U.S. Dist. LEXIS 69447, at *2-3 (D.S.C. May 17, 2012) (citations omitted) (“Notwithstanding the broad nature of Rule 59, motions for reconsideration are disfavored. They are not a matter of routine practice. Several courts have observed that they are neither expressly cognizable under the Federal Rules of Civil Procedure nor authorized by the local rules of the district court.”); See also Beijing Sansheng Dev. Corp. v. Advertisement Tech. Corp., 2005 U.S. Dist. LEXIS 8529, at *4 (W.D. Tex. 2005) (Nowak, Mag.) (citations omitted) (“The motion to reconsider “is found nowhere in the Federal Rules of Civil Procedure.” Most courts allow motions to reconsider under the umbrella of Federal Rule of Civil Procedure 8(f) which requires all pleadings to be construed “as to do substantial justice.” However, to conserve limited judicial resources, rulings should only be reconsidered where the moving party has presented substantial reasons for reconsideration.”); But see: Bank of Waunakee v. Rochester Cheese Sales, Inc., 906 F.2d 1185, 1191 (7th Cir. 1991) (“A motion for reconsideration performs a valuable function where the Court has patently misunderstood a party, or has made a decision outside the adversarial issues
way to correct judicial error without an appeal.41 A skilled advocate might, during another proceeding, cause the court to revisit the ruling on its own.42

GATOR’S CLOSING TIPS FOR DEALING WITH AN UNETHICAL PLEADER:

Consider Patience.

An effective use of raising your opponent’s improper pleading may be in connection with complaining about other bad behavior. See Kadi v. New Tech Eng’g, LP, 2013 Tex. App. LEXIS 6536, at *6 (Tex. App.—Houston [14th Dist.] May 30, 2013, pet. denied) (When presented to the Court by the parties, or has made an error not of reasoning but of apprehension.”);

• Zander v. Craig Hosp., 267 F.R.D. 653, 655 (D. Colo. 2010) (Motions to reconsider “serve the specific purpose” of providing the court “the opportunity upon a motion for reconsideration to correct manifest errors of law or fact and to review newly discovered evidence. Appropriate circumstances for a motion to reconsider are where the court has obviously misapprehended a party's position, the facts or law, or mistakenly has decided issues outside of those the parties presented for determination…”);

• Oakley v. Remy Int’l, Inc., 2011 U.S. Dist. LEXIS 124477, at *3 (S.D. Ind. Oct. 26, 2011) (Citations omitted) (“[T]he Court does not claim perfection in its rulings, and would not hesitate to grant a well-taken motion to reconsider. And well-taken or not, the Court does not condemn counsel for filing such motions, which “serve a valuable function in situations, albeit rare, where the court has patently misunderstood a party or made an error of apprehension.”);

• In re United States for an Order Authorizing the Disclosure of Latitude & Longitude Data Relating to a Specified Wireless Tel., 2008 U.S. Dist. LEXIS 45311, at *3 n.3 (E.D.N.Y. June 9, 2008) (Noting exigent circumstances required quick writing of opinion and welcoming motions for reconsideration if any relevant authority omitted);

• Gencorp, Inc. v. AIU Ins. Co., 970 F. Supp. 1253, 1258 n.3 (N.D. Ohio 1997) (“If the Court is wrong, the parties are welcome to move for reconsideration of this determination and to direct the Court to portions of the record to support their position.”);

• United States v. Muntean, 870 F. Supp. 261, 263 n.5 (N.D. Ind. 1994) (“If the court has misunderstood… it will welcome a motion for reconsideration.”);


This court does not complain about motions for reconsideration. See Fifth Third Bank of W. Ohio v. United States, 52 Fed. Cl. 637, 638 (2002) (“The court welcomes motions for reconsideration or clarification in the endeavor to correct errors within the least amount of time and at the least effort to the parties and their counsel.[sic] These motions are an important part of the judicial process and enable a trial court to afford the parties a written decision that addresses all the facts and law that they bring to bear before either party is required to assess whether the trial court’s judgment is subject to appeal as incorrect as a matter of law, as clearly erroneous as a matter of fact, or as manifesting an abuse of discretion regarding the exclusion or admission of evidence.

41 See United States v. Martin, 226 F.3d 1042, 1049 (9th Cir. 2000) (“The authority of district courts to reconsider their own orders before they become final, absent some applicable rule or statute to the contrary, allows them to correct not only simple mistakes, but also decisions based on shifting precedent, rather than waiting for the time-consuming, costly process of appeal.”).

42 See In re Kendavis Industries Int’l, Inc., 91 B.R. 742, 746-747 (Bankr. N.D. Tex. 1988) (“A trial court is free to reconsider its previous decisions whenever it is necessary… a court need not await reversal before correcting errors.”); Petty v. City of Chicago, 2012 U.S. Dist. LEXIS 75058, at *4-5 (N.D. Ill. May 31, 2012) (“The opportunity to correct itself is a prerogative that the Court always enjoys…”).
THE ETHICAL PLEADER… OR, HOW MUCH TRASH CAN I TALK?

F. Supp. 2d 254, 267 (D. Mass. Jan. 7, 2008) (“The court also cannot entirely ignore the Defendants’ lack of compliance with other procedural requirements in this litigation and in the parallel case…”); Carlson v. Freightliner, 226 F. R. D. 343, 361 (D. Neb. 2004) (“The presence of improper conduct by the party moving to withdraw or amend an admission, and the party’s lack of reasonable explanation for untimely discovery responses, may be considered by the court in determining whether to grant a motion to withdraw or amend a deemed admission.”).

Consider doing nothing.

Otherwise, the Judge might call you out. See, e.g., Downing v. Goldman Phipps PLLC, 2015 U.S. Dist. LEXIS 87126, at *22 (E.D. Mo. July 6, 2015) (Denying motion to strike and stating: “Indeed, while an apparently inevitable personal sense of injury is not an isolated phenomenon in our system of adversary litigation, it is not to be automatically equated with a legal right to redress.”).

Implore the Judge to comply with the Judge’s responsibility to maintain order and decorum.

Consider seeking an admonishment as a remedy.

Sanctions for bad behavior after a warning are far likely to withstand challenge on appeal. Plus, an admonishment that must be published will likely deter similar bad behavior in other cases. Alternatively, consider seeking an order that prohibits your adversary from making further scandalous, impertinent or irrelevant allegations.

43 The following are some of the practice pointers Ms. Greising suggests for dealing with an unethical bully:

- Research any attorney you suspect of being a RAMBO litigator. You may uncover tactics he or she has used against others, leaving you better positioned to deal with them. In some cases, you may be able to use your findings as evidence that the tactic is being used against you or your client.

- Identify personal attacks or factual misrepresentations made in opposing counsel’s briefs or motions.

- File a motion for sanctions under Fed. R. Civ. P. 11 based on opposing counsel’s objectionable conduct and provide specific, written documentation of that conduct in the motion’s supporting exhibits.

Id. at 17.

44 See Hunter v. Earthgrains Co. Bakery, 281 F.3d 144, 150-151 (4th Cir. 2002) (Although Rule 11 does not specify the sanction to be imposed for any particular violation of its provisions, the Advisory Committee Note to the Rule’s 1993 amendments provides guidance with an illustrative list. A court may, for example, strike a document, admonish a lawyer, require the lawyer to undergo education, or refer an allegation to appropriate disciplinary authorities.”); Balerna v. Gilberti, 281 F.R.D. 63, 66 (D. Mass. 2012) (Tailoring of the penalty to fit the offense is a key consideration - guided by the admonition that the sanction imposed should be the least severe of the available alternatives necessary to serve the purposes of Rule 11.”); Iselo Holdings, LLC v. Coonan, 2010 U.S. Dist. LEXIS 94306, at 37-38 (D. Colo. Sept. 10, 2010) (Krieger, J.) (Discussing “the need to craft a sanction that will ensure” observance, and noting that the sanctions imposed “spared” respondent from “the ultimate sanction”); In re Rollings, 2008 Bankr. LEXIS 993, at *32 (Bankr. S.D. Tex. Mar. 31, 2008) (“Sanctions imposed in any particular case must be ‘tailored to fit the particular wrong.’”); Hooper-Haas v. Ziegler Holdings, LLC, 690 F.3d 34, 37 (1st Cir. 2012) (“A court faced with a disobedient litigant has wide latitude to choose from among an armamentarium of available sanctions.”); Wilczynski v. Redling, 2014 U.S. Dist. LEXIS 149023, at *12 (D.N.J. Oct. 21, 2014) (“The Court has broad discretion regarding the type and degree of sanctions it can impose.”); A1pharma Inc. v. Kremers Urban Dev. Co., 2006 U.S. Dist. LEXIS 79815, at *13 (S.D.N.Y. Oct. 31, 2006) (“It is well settled that the court has broad discretion to determine the type of sanction to impose upon a party, based on all the facts of the case.”).

45 See, e.g., In re Mayer, 1999 U.S. App. LEXIS 39844, at * (5th Cir. Aug. 16, 1999):

Mayer argues that the bankruptcy court improperly struck parts of her response to Traina’s motion to compromise. This action was in the nature of sanctions for scandalous material
If in Federal Court, consider moving to strike and seal.

See Magill v. Appalachia Intermediate Unit 08, 646 F. Supp. 339, 343 (W.D. Pa. 1986) (Granting motion to strike a paragraph of the complaint and seal the record when allegations reflected adversely on the moral character of an individual, and were unnecessary to a decision on the matters in question). Federal courts are more willing and able to use their inherent authority to prevent harm from improper pleadings. See generally, Nixon v. Warner Communications, Inc., 435 U.S. 589, 598 (1978):

Every court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes. For example, the common-law right of inspection has bowed before the power of a court to insure that its records are not “used to gratify private spite or promote public scandal” through the publication of “the painful and sometimes disgusting details of a divorce case.” In re Caswell, 18 R.I. 835, 836, 29 A. 259 (1893).

included in Mayer’s motion, so it is reviewed for an abuse of discretion...

In her pro se filing opposing Traina’s motion to compromise, Mayer included almost three pages that accused Traina and her attorney of incompetence and unprofessional conduct, and described the proposed compromise as “ridiculous” and “insulting.” These sections were stricken by the bankruptcy court, which also ordered Mayer, under the threat of sanctions, not to “make scandalous, impertinent or irrelevant allegations against” Traina or her attorney. The bankruptcy court did not abuse its discretion in taking these minimal steps to preserve decorum in a proceeding that was obviously driven in part by Mayer’s strong emotions.
APPENDIX


4. FORM ORDER [of Admonishment for Unethical Pleading]