

## Draft an Answer

Drafting and sending a timely answer is critical, as failing to do so can lead to a default judgment against your client. The good news is that drafting an answer is more straightforward than drafting a complaint. The framework for what you need to work on is provided for you. You just need respond to the causes of action alleged.

There are four basic things you can do in an answer:

- 1) Admit, deny or deny sufficient basis upon which to form a belief with regard to each of the plaintiff's allegations. As a general matter, when in doubt, you can deny (or deny knowledge), as admitting something in the pleadings may prevent you from later disputing it. However, denying something that's obviously true or denying something in bad faith can lead to sanctions by the court or even discipline by the bar.
- 2) Raise an affirmative defense. An affirmative defense says, essentially, "even if what you're saying is true, I'm not liable for reason XYZ." Examples of affirmative defenses include bankruptcy, statute of limitations and self-defense.
- 3) Raise a counterclaim. A counterclaim turns the tables on the Plaintiff and alleges that the Defendant is entitled to relief from the Plaintiff based on a cause of action. A counterclaim can be filed whether the Defendant admits or denies liability on the Plaintiff's claim(s).
- 4) Request relief. The Defendant can request judgment on his own behalf on the Plaintiff's claim and on his own counterclaims.

It's important that we raise every possible affirmative defense and counterclaim that we (in good faith) think has a chance to be legitimate. We don't have to be sure of the merits of a claim to make it at this point. We just have to believe, in good faith, that the claim is not false or frivolous. We should allege everything else, as failing to allege an affirmative defense may bar us from raising it later on. Failing to raise a counterclaim can also bar us from bringing the cause of action in a separate lawsuit under the rules of *res judicata* if the counterclaim arises from the same transaction or occurrence as the subject matter of our action.

Okay, back to Bernie and Tommy. Now that we've switched to Tommy's side, our job will be to admit what needs to be admitted, deny what needs to be denied and raise our affirmative defenses and counterclaims.

A long discussion of what defenses and counterclaims apply to our case belongs in a substantive law chapter. For our purposes, we'll use, as an affirmative defense to the alleged breach of contract, an allegation that Bernie breached the contract. We'll use self-defense as an affirmative defense to the assault and battery charges. Regarding the negligence count, we will allege that Bernie was a trespasser and so was not owed a duty of care. This is not an affirmative defense so much as it is a negation of the "duty" element.

Finally, let's allege counterclaims based on breach of contract (maybe Bernie's work was so incompetent that it constitutes a breach), intentional infliction of emotional distress and trespass to land.

I'm not saying these will work and, certainly, we'd need to know more facts before we can be confident of these claims, but for practice purposes, we will assume them.

First, let's put in an appropriate caption. That's easy. Just copy the Plaintiff's heading and change "complaint" to "answer." Even if you don't like the Plaintiff's caption, do the court and all of the parties a favor and make it similar enough so that it's obvious you're talking about the same case.

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

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BERNIE SMITH,

*Plaintiff*

ANSWER AND COUNTERCLAIM

- versus -

TOMMY JONES,

*Defendant*

Case Number: 12-34567

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### Denials and Admissions

Okay, for the substance of the answer, let's start by addressing each of the Plaintiffs' claims.

1. *Paragraphs 1-6 are admitted.*
2. *Paragraph 7 is denied.*
3. *Paragraph 8 is admitted insofar as \$4,000 was paid. It is denied that \$16,000 is outstanding.*
4. *Paragraph 9 is admitted*
5. *Paragraph 10 is denied insofar as that the knife was used as a defensive mechanism only, not to threaten the Plaintiff.*
6. *Paragraph 11 is admitted insofar as Defendant struck Plaintiff. Defendant denies sufficient information upon which to form a belief as to the damages allegation.*
7. *Defendant denies sufficient information upon which to form a belief about paragraph 12 in the complaint.*
8. *Paragraph 13 is denied insofar as defendant denies intent to shatter a window.*

Etc.

The answer will thus go through the complaint denying her admitting each paragraph or denying information upon which to form a belief. As discussed above, jurisdiction can also be admitted in part and denied in part or admitted or denied with some qualification. There's no specific rule as to how these must be phrased but they should be phrased in plain English in a way that is understandable to a common person.

As a general principle, allegations that form legal conclusions of liability on the part of the defendant should be denied. For example, in our complaint, it is pretty safe to deny, or at least deny

sufficient information upon which to form a belief, paragraphs 20, 23 and all the other paragraphs that sum up the individual count allegations with the conclusions of liability. In general, you're not going to get in trouble for denying something that is questionable. You only get in trouble for denying something that was clearly true. It is not generally expected under our system that parties be overly cooperative with their opponents. Therefore, when in doubt, straight denial or denial of sufficient information upon which to form a belief is the way to go.

The request for relief paragraph (37 in our case) need not be responded to because the defendant will also end his answer with a demand paragraph of his own.

### **Affirmative Defense**

An affirmative defense raises a reason that liability should be avoided even if the actions alleged by the plaintiff did occur. Note that an affirmative defense can be raised even on top of a denial. By doing so, in essence, you're saying "I didn't do it, but even if I did, there's a reason that I'm not liable." While this line of argumentation seems self-contradictory, there is nothing procedurally wrong with it and it is very commonly used.

In our case, let's go through the allegations and decide whether we can raise any affirmative defenses.

For the breach of contract allegation, Tommy Jones is going to argue that Bernie breached the agreement by failing to provide adequate services in satisfaction of his responsibilities under the agreement. Alleging that the other party has breached the contract, thereby excusing your own responsibility of performance, can be looked at as a straight defense or as an affirmative defense. It can be treated with a denial to paragraph 16 and/or with an affirmative defense. Since we are demonstrating an affirmative defense now, let's go in that direction.

#### *Affirmative Defense to Count 1: Plaintiff's Breach of Contract*

- 1. Plaintiff failed to substantially discharge his responsibilities under the agreement referenced in paragraph 15 of the complaint.*
- 2. As a result of such failure, defendant's duty to perform under the referenced contract was excused. Therefore, defendant has no liability for breach of contract.*

Some of the affirmative defenses on the tort counts are more straightforward. For example, because Bernie had already been asked to leave the house before Tommy brandished a knife, Tommy could reasonably argue that he was defending his own real property. Again, to be raised in an answer, the argument only has to be colorable; it doesn't necessarily have to be persuasive or winning arguments. It never hurts to put the argument in the answer as long as it's plausible. That does not necessarily mean that you have to argue it at trial. On the other hand, failing to raise an argument can prevent you from arguing that issue later on. So, when in doubt, put it in.

When raising an affirmative defense, make sure to explain why the elements of the affirmative defense are met. Let's look at our affirmative defense to the first assault charge.

#### *Affirmative Defense to Count 2: Defense of Property*

1. *At the time of the events alleged under Count 2 of the complaint, Plaintiff was trespassing on defendant's property. Defendant had asked plaintiff to leave their property and plaintiff had refused to do so.*
2. *Defendant was therefore justified in using force or the threat of force to eject plaintiff from his property.*

Notice how we avoid conceding the underlying allegations. We're not admitting that Tommy did actually brandish a knife. Instead, we're merely saying that he would have been justified in using the threat of force to eject the trespassing plaintiff. In this way, we keep our options open and can argue that Tommy did not brandish a knife or that he was justified in doing so. Which tact we will take depends on the circumstances later on at trial.

Counts three and four are based on Tommy's punch that were in response to Bernie's screaming and threatening and refusing to leave the house. Not only do we have a potential defense of defense of property, as to count two, but we can also alleged self-defense. They can be raised together in one section in the interest of economy of space, but they should be stated separately. Let's try something like this:

*Affirmative Defenses to Counts 3 and 4: Defense of Property and Self-Defense*

1. *At the time of the events alleged under Counts 3 and 4 of the complaint, Plaintiff was trespassing on defendant's property. Defendant had asked plaintiff to leave their property and plaintiff had refused to do so.*
2. *Defendant was therefore justified in using force or the threat of force to eject plaintiff from his property*
3. *At the time of the events alleged under Counts 3 and 4 of the complaint, Plaintiff had verbally menaced and threatened defendant.*
4. *Defendant was therefore justified in using force in self-defense to neutralize the threat from plaintiff.*

For Count 5, the only defense I can think of is contributory negligence, which may not be a complete defense, but should be raised nonetheless.

*Affirmative Defenses to Counts 5: Contributory Negligence*

1. *At the time of the events alleged under Count 5 of the complaint, Plaintiff was behaving aggressively and was not paying proper attention to his own movements. He negligently failed to perceive any obstacles on the defendant's porch and his alleged fall was a product of his own negligence.*

We will not raise an affirmative defense regarding Count 6. Regarding that count, it seems that the only question is whether the alleged action took place. Assuming the rock was actually thrown as alleged, there's probably no way to avoid liability. Arguing that throwing a rock at a car was self-defense would be a stretch. We don't want to make an argument that won't pass the straight face test.

## **Counterclaims**

The third thing an answer can do is to counterclaim causes of action against the plaintiff. Drafting these should be done in the same manner as when we drafted the complaint. In essence, a counterclaim

switches from defense to offense and, though contained in an answer, these become complaints against the original plaintiff.

Tommy is alleging that Bernie failed to discharge his obligations under the contract. This could be considered a breach and be grounds for a cause of action against Bernie. When we draft a counterclaim, we will use similar language to the original complaint to illustrate the parallel.

*Counterclaim #1: Breach of Contract*

- 1. On or about June 1, YR01, Plaintiff and defendant agreed that plaintiff would complete certain software writing tasks for defendant in exchange for \$20,000.*
- 2. Plaintiff failed to adequately perform his responsibilities under this agreement.*
- 3. Defendant has paid Plaintiff \$4,000 under the agreement.*
- 4. As a result of the Plaintiff's breach of the agreement, Defendant suffered pecuniary damages in delays in replacement costs made necessary by Plaintiff's failure.*

Even though we don't specify too much in the way of underlying facts (if we knew more about the underlying facts, we might), something like this should be sufficient to give the plaintiff notice as to what the counterclaim allegation is.

As for the other counterclaims, I think that at least colorable claims could be made for intentional version of emotional distress and trespass to land. The elements of both torts should be tracked in the counterclaim as though it were an initial complaint.

Since the elements of trespass to land are merely the intentional entry onto another person's real property without permission, this allegation can be phrased very simply.

*Counterclaim #2: Trespass to Land*

- 1. Plaintiff entered Defendant's house and intentionally remained there even after being directed to leave by Defendant*

Intentional infliction of emotional distress requires extreme and outrageous conduct that causes extreme emotional distress. I'm not sure for his conduct in this case could qualify, but it is close enough that we could allege it.

*Counterclaim #3: Intentional Infliction of Emotional Distress.*

- 1. Plaintiff engaged in extreme and outrageous conduct towards Defendant by failing to leave his property when directed, screaming at Defendant within earshot of his family and by calling him a "rotten, no-good back-stabber" and a "jerk" in a loud voice.*
- 2. As a result of this conduct, Defendant suffered extreme emotional distress.*

Finally, we moved to the relief sought. This will be in the form of a "wherefore" clause that is similar to the one in the initial complaint also asks that the plaintiff's complaint be dismissed. The "wherefore" clause may look something like this.

*Wherefore, Defendant demands the following relief:*

- *Dismissal of all Plaintiff's cause of action*
- *A judgment in the amount of \$10,000 to be awarded to defendant under counterclaim #1, \$5000 under counterclaim #2 and \$5000 under counterclaim #3.*
- *Court costs to be awarded to defendant*
- *Attorney's fees to be awarded to defendant*
- *Such further relief as the court deems just and proper.*

Defendant can demand a jury trial. Though, in this case, since plaintiff already demanded one, there's no need to do so, even if defendant does want a jury trial. Note also that the amount in controversy in defendant's counterclaims are under \$75,000. That's okay. The federal court still has diversity jurisdiction under the "supplemental jurisdiction" rule which allows a federal court jurisdiction over counterclaims or cross claims between the same parties that are based on the same transaction or occurrence as the initial claims, even if those counterclaims do not independently satisfy the requirements for federal subject matter jurisdiction.

The signature lines and the date and name of the firm are to be included in a similar manner to the complaint.