BREVITY IS ENJOINED:

PLEADING IN THE AGE OF CHATGPT

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John S. Koehler

INTRODUCTION

More than 30 years ago when I was a 1L, I purchased a small, portable device which allowed me to take notes during class. It consisted of a keyboard and an LCD screen which folded flat, was about the size of a sheet of regular letter paper and less than two inches deep. It came with plug-in modules for several programs including "WordPerfect®," a popular word processing program of the time that predated the now ubiquitous Microsoft Office®. This device was one of the first true "notebook" computers. "Laptops" such as they existed at the time, weighed upwards of 14 pounds and were out of the price-range of most law students, whereas my notebook was relatively affordable at $299. By my 3L year, laptops had come down dramatically in price and weight and were starting to be a common, if still infrequent, site in the lecture rooms and library, but at the bar exam that summer the only options for taking the written part of the exam were by pen and typewriter.

Today, laptop and notebook computers are nearly ubiquitous in law school (and undergraduate) lecture halls and while not required for the bar exam are "strongly encouraged." Indeed, the VBBE website informs potential bar applicants

that “If you fail to register in the time period allotted, you **will** be handwriting the exam.” (Emphasis in original.)

The impact on computers on the practice of law is undeniable. The typical law office of the last century would have devoted at least a wall, if not an entire room, to the reporters, codes, and treatises that were absolutely necessary to ensure both the admiration of your clients and the occasional inquiry into the law. Today, unless your firm has oil portraits of its founders on the wall, the chances are pretty fair that you have no musty volumes of law anywhere except, possibly, as props on the waiting room side table.

It is also undeniable that what in the 80s was called “Computer Assisted Legal Research” and was considered something new and novel and primarily the domain of tech nerds is now an absolute necessity for legal practice. Technological competence is now a requirement of the Virginia Rules of Professional Conduct. VRPC 1:1, cmt. 6; VRPC 1.6, cmt. 19.

Technological competence, however, should not be a substitute for exercising good legal judgment. Technology can make a lawyer more efficient, or it can make a lawyer technologically co-dependent (which is a polite way of saying “lazy”). With the advent of practical artificial intelligence, there may be an even greater temptation to substitute technology for technique. In a world where a computer can write a brief or outline an oral argument for either side of a legal question, what need does the

client have for a human lawyer – especially if that lawyer will simply turn to the same technology to prepare for trial.

While affordable AI may not yet be to the point of being able to draft a pleading (at least one that will not result in an embarrassing explanation to the court why your brief was full of made-up citations to non-existent cases), fill-in-box pleadings have been around since well before the information age and boilerplate pleading books are even older. But is ChatGPT – or some newer, smarter AI text bot – really a threat to legal practice, either as a crutch for the technologically co-dependent lawyer or as competition for us all? Well, let's set that question aside for the moment, and focus on the main topic of this CLE, who to draft a good pleading.

Drafting a good pleading for a court case involves several important steps. Here are some tips to help you:

1. Identify the legal claims or defenses: Before drafting your pleading, you need to identify the legal claims or defenses that you want to make. This requires a thorough understanding of the relevant law and how it applies to your case.
2. Follow court rules: Make sure you follow the court rules for drafting pleadings, such as formatting requirements and page limits. Failure to follow these rules can result in your pleading being rejected by the court.
3. Be clear and concise: Your pleading should be clear and concise, with a logical structure that makes it easy for the judge to follow your argument. Use short sentences and avoid legal jargon as much as possible.
4. Include relevant facts: Your pleading should include all relevant facts that support your legal claims or defenses. This may require conducting a thorough investigation of the facts of the case.

5. Support your claims with evidence: Whenever possible, support your legal claims or defenses with evidence such as witness statements, documents, or expert reports.
6. Anticipate counterarguments: Anticipate the counterarguments that the other side may make and address them in your pleading. This shows that you have carefully considered the other side's position and strengthens your own argument.
7. Proofread and edit: Finally, proofread and edit your pleading carefully to ensure that it is error-free and presents your case in the best possible light.

Remember, drafting a good pleading is crucial to the success of your case. If you are unsure about how to draft a pleading, consider seeking the advice of a qualified attorney.

Wait. What? If I am drafting a pleading, why would I need to "consider seeking the advice of a qualified attorney?" Are you saying that not all attorneys are qualified to draft pleadings?

No, I am not saying that (or at least *I* am not saying it in the paragraph that immediately followed the 7-step guide to drafting a good pleading – though I might very well think it after reviewing some of the attorney-drafted pleadings I've encountered over 30+ years). But if I am not saying that, who said it?

It was ChatGPT. The text on the preceding page beginning with "Drafting a good pleading for a court case . . ." is the unedited response I received to the ChatGPT query "How do you draft a good pleading for a court case?"

Frankly, I would be hard pressed to come up with a better outline for this course. I might have added some content about "audience awareness" and limiting

theories your claims or defenses to the strongest one, but so far as the basic rules for good pleading go, ChatGPT generated that outline faster than I typed the question. So, not being one to look a gift horse in the mouth, let's expand on ChatGPT's outline with some of the details that AI is (we hope) not yet able to supply.

1. Before Putting Pen to Paper

Drafting a pleading requires gathering information – and this means verifying what your client tells you *and* what the applicable law to their case might be. This is not merely commonsense, it's a professional responsibility. Rule 1:4, the Rule of the Virginia Supreme Court that controls the "General Provisions as to Pleadings," requires that "[c]ounsel tendering a pleading gives his assurance as an officer of the court that it is filed in good faith and not for delay." Rule 1:4(a).

ChatGPT Says

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The Rule also states that "[a] pleading that is sworn to is an affidavit for all purposes for which an affidavit is required or permitted." Rule 1:4(b). And for all practical purposes, all pleadings are "sworn to" in as much as they are subject to subsection (a).

Rule 1:4(a) is limited to "[c]ounsel tendering a pleading," which might lead you to suspect that *pro se* litigants are held to a lesser standard. This is not so, at least not from a strictly legal standpoint. Code § 8.01-271.1(B) provides that

> The signature of an attorney *or party* constitutes a certificate by him that (i) he has read the pleading, motion, or other paper, (ii) to the best of his knowledge, information and belief, formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and (iii) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

(Emphasis added.) By the way, though it is not often raised as an issue, subsection (C) of Code § 8.01-271.1 states that an *oral* motion is subject to the same standard as a written pleading.

I asked ChatGPT to Define Due Diligence

Due diligence refers to the process of conducting a thorough and comprehensive investigation or research into a business or investment opportunity before entering into a transaction or agreement. This process involves gathering all relevant information, reviewing financial statements, assessing risks and potential liabilities, and verifying the accuracy of the information provided.

The purpose of due diligence is to ensure that a party has a clear understanding of the potential risks and benefits associated with a transaction or investment and can make an informed decision based on that information. Due diligence is commonly used in business mergers and acquisitions, real estate transactions, and investment opportunities, among other situations where significant financial or legal implications are involved.

In the days when journalists were as interested (actually, more so) in integrity as in circulation (or, today, ratings), editors strictly enforced the two sources rule. No statement made it into print unless it had been verified by two independent sources. In a pinch, a sensational story

might get by with one very reliable independent source, but never with just the word of the person who would benefit from the publicity.

While attorneys do not always have the good fortune to have an independent source to verify what a client has told them, they do have a duty to conduct due diligence before setting an allegation of fact to paper. *See Byington v. Sentara Life Care Corp.*, CL16-3944, Slip Op. at 7 (Norfolk Cir. Ct. 2016). Included in that due diligence must be a hefty amount of skepticism when a client's tale seems too pat and yet not verifiable.

2. Rules Were Not Made to Be Broken

Follow court rules? Really? ChatGPT apparently knows something the average attorney in my experience does not, which is that the average attorney rarely bothers to read (and reread) the rules of court before beginning to draft a pleading or brief. That is because we attorneys are supposed to know the rules like the back of our hand. In truth, we typically know the rules like the back of our head, which means we rarely look at them, when we do it's in a mirror, so we are seeing them backwards, and we seem to forget that the topography is constantly changing. Every attorney should have this site, https://www.vacourts.gov/courts/scv/rulesofcourt.pdf bookmarked and check it

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regularly. You should also check https://www.vacourts.gov/courts/scv/amend.html regularly to see what changes to the rules have been adopted. The site also contains new LEOs. At the time this outline was prepared, there were all ready 11 entries for 2023.

Virginia state trial courts in theory have local rules – though that theory is often subject to question as few circuits or districts provide a collection of the rules promulgated. Rule 1:15 requires that local rules

> must be spread upon the order book and a copy with the date of entry must be forthwith posted in the clerk's office, filed with the Executive Secretary of the Supreme Court, and furnished to attorneys regularly practicing before that circuit court; and whenever an attorney becomes counsel of record in any proceedings in a circuit court in which he does not regularly practice, it is his responsibility to ascertain the rules of that court and abide thereby. The clerk must, upon request, promptly furnish a copy of all rules then in force and effect.

Feel free to go into your local clerk's office (or perhaps one where you are unlikely to appear and do not wish to acquire a reputation with the staff as a troublemaker) and ask for "a copy of all rules then in force and effect." I dare you. In fact, I double dog dare you.

To be fair, a small number of circuits (but so far as I am aware, no district courts) do have orderly local rule books. They are: the 1st Judicial Circuit—Chesapeake, the 2nd Judicial Circuit—Virginia Beach, the 4th Judicial Circuit—Norfolk, the 12th Judicial Circuit—Chesterfield and Colonial Heights, the 13th Judicial Circuit—Richmond, the 14th Judicial Circuit—Henrico, 18th Judicial Circuit—Alexandria, the 19th Judicial Circuit—Fairfax, and the 31st Judicial Circuit—Prince William.

What most courts have are "policies" and "preferences" which may or may not be written. Policies set by the Clerk, by the Court, and

even sometimes by the Commonwealth in criminal cases. All courts are, of course, subject to Part 1 of the Rules of the Supreme Court of Virginia, including that most important of rules with respect to drafting pleadings, Rule 1:4(j), "Brevity is enjoined as the outstanding characteristic of good pleading. In any pleading a simple statement, in numbered paragraphs, of the essential facts is sufficient."

While most trial courts will not reject a pleading that does not comport with a local "rule," the appellate courts of Virginia are unmerciful in their enforcement of the rules as they relate to format, length, and timing of the pleadings. These rules were not made to be broken.

3. What We have Here is Failure to Commun-cate

As already mentioned, the most important rule with respect to good pleadings is that "brevity is enjoined." I cannot emphasize just how important this rule is. Judges are not impressed by the heft of your brief. In fact, the opposite is often the case. A story is told about the late Judge Robert R. Merhige Jr. of the Eastern District of Virginia. At the conclusion of a hearing, counsel requested leave to file a brief before the court ruled on whatever it was that the court was going to rule on. Judge Merhige assented to the request, after which the attorney asked how long the brief should be. The judge replied,

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Be clear and concise: Your pleading should be clear and concise, with a logical structure that makes it easy for the judge to follow your argument. Use short sentences and avoid legal jargon as much as possible.

"Counsel, you can make it as long as you want, just know that I will stop reading at page 5."

One of the reasons that pleadings are longer than they need to be is that we use too much boilerplate. I once saw an answer to a complaint for breach of contract that included a paragraph reserving defenses of statute of frauds, lack of definiteness, unilateral mistake, mutual mistake, lack of capacity, fraudulent inducement, anticipatory breach, impossibility of performance and illegality. It also reserved these "defenses": contributory negligence, comparative negligence, assumption of the risk, intervening cause, supervening cause, superseding cause, statute of limitation, failure to state a cause of action, consent, waiver, laches, estoppel, force majeure, and

"HE WOULD NEVER USE ONE WORD
WHERE NONE WOULD DO"
-- PHILIP LEVINE

If you said "Nice day," he would look up
at the three clouds riding overhead,
nod at each, and go back to doing what-
ever he was doing or not doing.
If you asked for a smoke or a light,
he'd hand you whatever he found
in his pockets: a jackknife, a hankie --
usually unsoiled -- a dollar bill,
a subway token. Once he gave me
half the sandwich he was eating
at the little outdoor restaurant
on La Guardia Place. I remember
a single sparrow was perched on the back
of his chair, and when he held out
a piece of bread on his open palm,
the bird snatched it up and went back to
its place without even a thank you,
one hard eye staring at my bad eye
as though I were next. That was in May
of '97, spring had come late,
but the sun warmed both of us for hours
while silence prevailed, if you can call
the blaring of taxi horns and the trucks
fighting for parking and the kids on skates
streaming past silence. My friend Frankie
was such a comfort to me that year,
the year of the crisis. He would turn
up his great dark head just going gray
until his eyes met mine, and that was all
I needed to go on talking nonsense
as he sat patiently waiting me out,
the bird staring over his shoulder.
"Silence is silver," my Zaydee had said,
getting it wrong and right, just as he said
"Water is thicker than blood," thinking
this made him a real American.
Frankie was already American,
being half German, half Indian.
Fact is, silence is the perfect water:
unlike rain it falls from no clouds
to wash our minds, to ease our tired eyes,
to give heart to the thin blades of grass
fighting through the concrete for even air
dirtied by our endless stream of words.

failure to exhaust administrative remedies. It was an action to collect on a promissory note.

Legalese – whether it is an excess use of "wherefore" or using Latin, *mutatis mutandis*, when English will do – is also an irritant to most judges. Another problem is using a complex phrase or "ten-dollar word" instead of being plain spoken. Although not quite at the level of ChatGPT, the Microsoft Word® editor function is pretty good at spotting overused phrases such as "would be able to" ("could") and "in the event that" ("if").

Let's apply the brevity is enjoined rule to another part of Rule 1:4, shall we? Right after enjoining brevity in subsection j, subjection K of the rule says:

> A party asserting either a claim, counterclaim, cross-claim, or third-party claim or a defense may plead alternative facts and theories of recovery against alternative parties, provided that such claims, defenses, or demands for relief so joined arise out of the same transaction or occurrence. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal or equitable grounds.

One hundred six words. How about, "A party may assert alternative facts and theories for any claim or defense in law or equity arising from a common event against any party, and the insufficiency or inconsistency of one claim or defense will not invalidate in other." Forty words.

4. JUST THE FACTS MA'AM

Virginia is a notice pleading state, and Rule 1:4(d) of the Rules of the Supreme Court of Virginia provides that a pleading "shall be sufficient if it clearly informs the opposite party of the true nature of the claim." However, while "the requirements for pleading are not so strict as to demand specificity beyond that necessary to 'clearly [inform] the opposite party of the true nature of the claim or defense' pled," *O'Rourke v. Vuturo*, 49 Va. App. 139, 147 (2006), it is fundamental that "notice pleading principles require fair warning of the general form of relief sought." *Id.*

ChatGPT Says

Include relevant facts: Your pleading should include all relevant facts that support your legal claims or defenses. This may require conducting a thorough investigation of the facts of the case.

So, in a pleading or brief, how much information is TMI? Well, as with most legal questions, the answer is "it depends." Lawyers, like journalists, need to follow the basic rule of the 5 W's – "Who," "What," "When," "Where," and "Why." This formula goes back at least as far as Aristotle. A pleading or brief should answer all those questions – Who are the parties, what is the claim, when and where did the claim arise, and why is there a controversy. The rule is journalism often includes the "H" of "How,"

Who, what, and where, by what helpe, and by whose,
Why, how and when, doe many things disclose.
— Thomas Wilson, The Arte of Rhetorique, 1560

but there is no fair equivalent in pleadings, except perhaps the manner of causation. However, it is causation is often the result of asking why.

5. Support Your Local Pleading

ChatGPT's fifth element of good pleading is probably the one that most shows the AI's weakness as a street lawyer. It would probably be better worded as "Be prepared to support your claims with evidence." This is not to say that evidence does not have a place in pleadings – we usually call the evidence in pleadings "exhibits.

ChatGPT Says

Support your claims with evidence: Whenever possible, support your legal claims or defenses with evidence such as witness statements, documents, or expert reports.

Including exhibits in a pleading is a useful exercise, so long as it is not taken to extremes. Which brings us to another of the golden subsections of Rule 1:4. Subsection (i) tells us that "[t]he mention in a pleading of an accompanying exhibit, of itself and without more, makes such exhibit a part of the pleading. Filing of such exhibits is governed by Rule 3:4." There are good reasons to include exhibits – such as avoiding the inevitable motion craving oyer – and there are even better reasons – such as an exhibit, once entered in the record is there for all eternity and *does not need to be introduced at trial*.

Whoa! Wait. What? Check out *California Condominium Association v. Peterson*, ___ Va. ___, 869 S.E.2d 893 (2022). At a hearing on a plea in bar, the association had a big ol' binder of exhibits that it handed to the judge at the start.

Throughout the proceedings, both sides made reference to the documents, but after the association rested, and the defense elected to put on no evidence, the trial court sustained the plea in bar on the ground that the exhibits, which were the best evidence of the nature of the indebtedness of the defendant and when it arose, had never been moved in evidence, which they hadn't.

The association appealed to the Supreme Court (as this was back when you took civil matters straight to top), which reversed and remanded. Why? Because the relevant exhibits *had been included as exhibits to the complaint*. In other words, there was no need to have them introduced into the record because *they were already part of the record.*

Note that this rule does not require that the opposing party concede the accuracy or admissibility of the exhibits. The party relying on an exhibit from a pleading must still lay a foundation for its reliability and admissibility. Rather, the rule simply saves a party from having to reintroduce any exhibit already in a pleading.

One final word about exhibits. If you have a very large exhibit, but only a portion of it is relevant, it is perfectly permissible to abridge that document and present only the relevant portion. Likewise, recall that subsection (i) cross-references Rule 3:4, which says, "It is not required that physical copies of exhibits filed with

the complaint be furnished or served." The Supreme Court of Virginia is just a big bunch of tree huggers wanting us to cut down on filing paper.

I cannot prove that this rule was adopted because of the appeal in *Asplundh Tree Expert v. Pacific Employers*, 269 Va. 399 (2005), but that case is a fair example of why electronic exhibits are preferred. In that case, the issue involved the interpretation of a single clause in a 950-page comprehensive liability policy. Not only was the entire policy attached to the original complaint, but 19 additional complete copies were subsequently appended to other pleadings and the entire policy was introduced as an exhibit at trial *by both sides*. To compound this pointless redundancy, when the case was appeal, the entire record including all 22 copies of the policy was designated for the "appendix." *Asplundh Tree Expert* is one of only two cases in which the Supreme Court called out the parties for not adhering to Rule 5:32(g).

6. Prior Preparation Prevents Poor Performance

This recommendation from ChatGPT might at first blush appear to be more relevant to briefs than standard pleadings. But there are times when you want to forestall your opponent's likely counteroffensive by including some preemptive allegations or argument. Do

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you anticipate a statute of limitations challenge? Plead facts that show the breach or injury was not discoverable or deliberately concealed. Is your client potentially contributorily negligent? Be sure to include a theory of last clear chance.

In briefing, it is wise to anticipate arguments that might be raised by your opponent, just take care that you are not doing their research for them. If there are cases that clearly cut against your position, distinguish them. The old saw that the best way to prepare an argument is to draft the opposing argument first and then rubbish it is actually pretty good advice. Do not fall into the trap of believing your argument is unassailable.

7. Nobody's Prefect

This final section will explain why none of the students in the final form at Hogwarts this year will be given authority over the younger students. If you are having difficulty understanding that last sentence, please reread the heading.

ChatGPT Says

Proofread and edit: Finally, proofread and edit your pleading carefully to ensure that it is error-free and presents your case in the best possible light.

Editing and proofreading are not the same process and should never be confused as being simultaneous activities. Notice that ChatGPT said that you should "proofread" and then "edit." Most writers, including legal writers, get this process backasswards.

Proofreading is about correcting spelling, grammar, and structure of the writing. Editing is about improving the writing. There is also no such thing as "editing as you write." Writing is writing and editing is editing, and never the twain shall meet.

When you write, you are not editing. You cannot edit that which is not fully written. This is not to say that you cannot edit a completed sentence, or a completed paragraph, or a completed section. Ultimately, however, you should edit the final document, and do so *only after you have proofread it*. There reason for this order of things is simple – you cannot be fully mindful of what you are reading and how to improve its style and meaning if you are also correcting spelling, changing tenses, and removing commas (always remove commas, there are always too many commas, really, always).

> An animator once approached Walt Disney with his conception for a character in an upcoming feature cartoon. The animator was obviously very proud of his effort and was hoping for some encouragement from the studio head. Disney looked at the drawing for a long time without speaking and finally, unable to contain himself, the animator said, "Well, Walt, what do think?" Disney replied, "I don't know. It's hard to decide from just one."

Proofreading is an art which most lawyers never master. You should always have someone else – preferably a non-lawyer – proofread your important pleadings. Proofreading is also not a one-time process. Whenever you complete a new draft of a document, proofread it again.

Also, always keep your original draft and all interim drafts. Why? Because often you will find that the "improved draft" is not better and possibly much worse. One sure sign that the current draft is bad is if it is longer than the one before. If you are constantly finding that your revisions are longer than your originals, you probably aren't writing very good originals. It is easier to subtract and then add back in.

Keeping your drafts and comparing them will also help you learn to avoid the mistakes you are making in early drafts that you are constantly revising out of the final one. It also helps you to "choose from more than one."