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Summary judgment FAQs

By: Douglas H. Wilkins and Daniel I. Small April 30, 2020

Our last two columns stressed the importance of submitting a well-drafted and well-supported Rule 9A(b)(5) statement of facts with your summary judgment motion. Recent rule changes affect other important aspects of the moving party's obligations. So do other longer-standing rules.

As always, we stress the real tactical advantages of putting the underlying goals of these rules into practice. With that advice in mind, we turn to frequently asked questions about the new (and old) provisions of Rule 9A.

Should you ask to extend the page length (9A(a)(5)(iv)(Length)?

We don't recommend it. Imposing the self-discipline to cut your initial brief to 20 pages (or fewer) almost always produces a more-focused and persuasive memorandum.

Mark Twain supposedly once said about sermons: "[F]ew souls are saved after the first 20 minutes!" The same is true for 20 pages. After that, the impact of your argument begins to recede. Longer briefs usually include unhelpful discussions of cases that are not controlling, rhetoric-filled repetition of atmospheric facts, and a writing style characterized by repetition, unnecessary words and unclear logic.

Not surprisingly, longer briefs run a great risk: that the judge will miss a key point, having been diverted in other directions. If that happens, you have no recourse. Denial of your summary judgment is almost never appealable (barring, for instance, an immunity from any trial at all). So, to quote ourselves: Get to the point and stay there.

You get some help from a new sentence in 9A(a)(5)(iv), which excludes from the page limit "an addendum that sets forth, verbatim and without argument, pertinent excerpts from key documents, statutes, regulations or the like."

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This provision relieves the pressure to repeat statutory and documentary language in the memorandum (and, for that matter, in the Rule 9A(b)(5) statement of facts). At the same time, it gives the judge an easy way to find and read the key language in context without wasting any of the precious 20 pages.

Assuming that you are happy for the judge to see the full context of your key quote, you should definitely take advantage of the option to include an addendum in cases in which the language of a document, statute, regulation or the like is important to your summary judgment motion.

Note that, while the rule squarely prohibits argument in the addendum, we don't think this prevents you from adding italics or bold type to the key language, as long as you note the "emphasis added."

Should you wait for your opponent to raise arguments, so that you can address them in your reply memo?

We answer an emphatic "no."

First, the recent amendments limit a reply memorandum "to matters raised in the opposition that were not and could not reasonably have been anticipated and addressed in the moving party's initial memorandum." Superior Court Rule 9A(a)(3) (Reply/opposition to motion to strike).

Second, it is far better strategy to anticipate, define and refute (or at least blunt) your opponents' arguments before they even have a chance to make them on their own terms. That's the same logic you would likely employ at trial, where you "explode the bomb" on direct examination of your witness so that your opponent can't achieve maximum effect on cross.

Third, failing to address a foreseeable argument hurts your credibility. Not only does it show that you don't understand or respect Rule 9A(a)(3), it suggests that you may lack confidence in your ability to address your opponent's argument.

Only if you can credibly argue that you did not expect your opponent to make the argument can you safely defer your own argument on the point. You probably can't do that with a straight face if, for instance, the argument appears in the pleadings, in an earlier memorandum, or in communications between counsel or the parties, including the mandatory pre-filing 9C conference.

Should I file a motion for partial summary judgment?

Consider doing so only if there is a clear reason and benefit, but proceed with caution. The recent amendments to Rule 9A give significant guidance.

The court has discretion to deny, without a hearing, "[m]otions for partial summary judgment that will save little or no trial time, will not simplify the trial and will not promote resolution of the case." Rule 9A(b)(6)(c).

To be sure, Mass. R. Civ. P. 56(a) allows a party to move "for a summary judgment in his favor upon all [of a claim] or any part thereof." That is a long way from saying that a partial summary judgment is wise, or that the court will receive it well.

The rule's message here is far more important than the mere denial of a hearing. The new rule confirms the courts' longstanding view that partial summary judgment motions are often ill-advised: "While permitted by rule, motions that are addressed to the disposition of some but not all of the claims or issues on behalf of or against a party in a case consume substantial amounts of the court's and the parties' time and resources but often do not substantially reduce the length of the litigation or trial." Procedural Order of the Business Litigation Session Regarding Partial Dispositive Motions (Aug. 1, 2012) (Fabricant, J., admin. justice of the BLS).

Should I file a motion to strike inadmissible evidentiary material?

Here, the law constrains us to say "yes." Under controlling authority, you may waive an evidentiary objection by failing to file a motion to strike. *Zaleskas v. Brigham and Women's Hospital*, 97 Mass. App. Ct. 55, 62 (2020); *Fowles v. Lingos*, 30 Mass. App. Ct. 435, 439-440 (1991) ("If a party does not move to strike the defective portion of an opponent's affidavit, a judge may, in his discretion, rely on the defective portions."), citing *Madsen v. Erwin*, 395 Mass. 715, 721 (1985). So, you have no choice if that situation arises.

On the other hand, motions to strike are not a vehicle to evade page limits. Nor are they an occasion to "vent," add invective, or impugn the credibility of witnesses whom the jury may believe.

Moreover, please note that any motion to strike belongs in your opposition package. Superior Court Rule 9A(a)(2) ("A party opposing a motion may serve … (3) any cross-motion (including but not limited to a motion to strike)").

How do I request leave for additional pages, time or briefing?

While these requests are disfavored, Rule 9A(b)(6) provides a very clear answer to this question:

"All requests for leave of court must: (1) be captioned as a pleading, (2) not exceed one page in length (not counting the caption and title), (3) state the grounds and specific relief sought (e.g., a specific proposed new page

limit) and (4) include a certificate of service. The request must be sent directly to the session clerk, ATTN: Session Judge. The request must be served on all other parties, but the court need not await a response to such request before ruling. Any leave granted to the moving party for additional pages applies to the opposing party's memorandum as well, unless otherwise ordered."

This process is unique. No longer do the parties send a letter to the session judge (as under prior practice). Nor do they need to comply with the motion package provisions of Rule 9A. Since this type of request is granted only in exceptional circumstances, the last thing you need is to violate this procedure.

What if the service deadline arrives before the court rules on my request for leave to file additional pages, additional time or a surreply?

The title of Rule 9A(b)(7) answers this question clearly: "No automatic extension of time pending leave of court." It provides:

"A request for leave of court under Paragraph (a)(6) does not extend the date for filing the Rule 9A Package (See Rule 9A(b)(2)) to which it relates, unless the court orders otherwise or all parties agree."

While this rule may seem harsh, it reflects reality. Your best bet for an extension is agreement of counsel. Most un-agreed requests will likely be denied. It is not worth waiting for permission that is appropriate only in "exceptional circumstances." If you think that this kind of relief is warranted, you should spend time talking to opposing counsel, in an effort to obtain consensus.

What's our core advice?

As our readers now expect, we don't just remind you to comply with these rules. Heed both their letter and spirit, and listen to what they say about what our courts think is useful. The result will be a more persuasive product. And isn't that the real goal?

Previous installments of "Merits of the Cause" can be found here. Judge Douglas H. Wilkins sits on the Superior Court. Prior to taking the bench, he was a trial attorney in private practice and at the Attorney General's Office. Daniel I. Small is a litigation partner in the Boston and Miami offices of Holland & Knight. A former federal prosecutor, he is the author of "Preparing Witnesses" (ABA, 4th Edition, 2014), and teaches CLE programs around the country. He can be contacted at dan.small@hklaw.com.

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