MASSACHUSETTS LAWYERS WEEKLY

Motions to dismiss: confer, confer, confer

By: Douglas H. Wilkins and Daniel I. Small September 19, 2019

Faced with a complaint that you consider meritless (and what defense counsel doesn't, with some frequency), your first instinct may be to attack. Your client? Even more so. It's human nature.

The rules, with what one might call a show of wisdom, anticipate that impulse, which is not always productive. Consistent with our last three columns on motions to dismiss, the rules recognize the need for meaningful pre-filing deliberation and consultation. Whether you agree with us or not, you will therefore have to engage in a good-faith process.

Your duty is clear. Superior Court Rule 9A(a)(1) says: "The moving party shall initiate a conference with the other parties for all dispositive and discovery motions subject to Rule 9C." The purpose of the conference is "make a good faith effort to narrow areas of disagreement to the fullest extent." Unless you file a certificate of compliance with the consultation requirement, your motion "will be denied without prejudice to renew when accompanied by the required certificate." Rule 12C(a).

In the case of Rule 12(b)(6) motions to dismiss, the rule is both specific and general. The parties' good-faith effort must attempt "to narrow areas of disagreement that may be resolved through amendment of the pleading." The parties must also explore resolution through "other means related to the subject of the motion to dismiss." Superior Court Rule 9C(a). It is not always clear what that means.

In some cases, the plaintiff might agree to drop a count of the complaint or to exhaust some remedy or take some other action prior to pressing the case in court. The defendant might agree to some form of limited relief, or the parties might even agree to settle, mediate or arbitrate the complaint in whole or part. The parties may agree that summary judgment or phased proceedings leading to prompt adjudication of discrete issues are preferable.

The rule is intentionally general because it is impossible to anticipate the particulars of every case. It does place upon the parties a burden to tailor their discussion to the specifics of their case.

Less clear is the optimal time for the Rule 9C conference. The natural tendency is to conceive and write the motion first, and have the conference second. As a result, the conference often comes after the motion to dismiss is prepared and briefed.

At that point, the moving party has already expended much effort and expense, which will have to be justified to the client. The battle lines are drawn, and the moving party likely views the conference more as an obligation than an opportunity.

Momentum makes it hard for the moving party to yield; the opposing party likely views the motion as a fait accompli and doesn't want to telegraph its response until after service of the motion. Rule 9C aspires to something more productive, for the parties and the court.

We suggest an earlier conference, to occur after analysis of the complaint's defects (and strengths), but before drafting the actual motion papers. Identifying arguments that the plaintiff can readily refute or cure through amendment not only will save time and expense for the moving party, but also has the potential to improve the motion.

That approach permits a focus upon those arguments that actually may prevail — a far superior approach to advocacy than a motion that loses credibility with the court because of too many weak arguments.

For the opposing party, you may head off an unnecessary motion and should readily embrace the rule's suggestion that you explore amendments to the complaint, instead of devoting time, effort and resources to briefing a motion that may ultimately end up in an amendment to the complaint anyway.

Both parties may benefit from a realization that summary judgment (or some other approach) is a better way to address the contested legal issues.

A recurrent procedural problem arises from the reciprocal rules that the moving party must take the complaint's factual allegations as true, while the opposing party must limit itself to the facts actually alleged.

Also, the plaintiff is entitled "favorable inferences that reasonably can be drawn from" the complaint's factual allegations. *Goodwin v. Lee Pub. Schs.*, 475 Mass. 280, 284 (2016) (citation omitted).

It is a safe bet that one or both parties will violate these rules at some point in well over half of the litigated motions to dismiss. Ideally, this issue should come up (and be resolved by amendment or otherwise) during the Rule 9C discussion, because it surely will come up before the court rules on the motion. Clearly, this is not happening.

A recent case in the 2nd U.S. Circuit Court of Appeals highlights some of the challenges in drawing the line between motions to dismiss and for summary judgment. *Palin v. New York Times*. Boiling down an interesting 21-page opinion, Sarah Palin sued for defamation, based on an editorial linking her to a shooting. The New York Times moved to dismiss.

U.S. District Court Judge Jed S. Rakoff took the extraordinary move of holding an evidentiary hearing on the "one close question" of whether Palin had sufficiently pleaded the actual malice element of her defamation claim, and then granted the motion to dismiss.

The 2nd Circuit reversed, finding that, regardless of the important issues down the road, an evidentiary hearing at this stage improperly blurred the lines between the two types of motions. By trying to give himself enough information to reach a decision, the judge strayed too far from the limits of the pleadings, without properly converting the motion to one for summary judgment. *Palin v. New York Times Co.*, No. 17-3801-CV, 2019 WL 3558545 (2d Cir. Aug. 6, 2019).

Similar to the *Palin* case in terms of evidentiary hearings on a Rule 12(b)(6) motion is *Mmoe v. Commonwealth*, 393 Mass. 617 (1985).

In our next column, we'll talk about some of the common sources of confusion and misunderstanding with motions to dismiss. Meanwhile, consider what you are trying to accomplish with the motion, and whether an early and meaningful conference might increase your chances, and increase your credibility with the court.

We realize that most of this advice seems to presume that lawyer and client want efficiency and are motivated to comply with the rules. We do know that, unfortunately, many clients want to force the other side to spend time, effort and money to oppose even a marginally meritorious motion to dismiss.

For those clients, we advise attorneys to take an active counseling role by convincing the client to consider its longer-term best interest. While marginal motions sometimes prevail, the far more likely results are damaging the lawyer's and client's credibility, encouraging the plaintiff with an early victory, and creating an adverse ruling that may haunt you later (particularly if you ask the court to resolve legal issues on a record that omits your best facts).

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