MASSACHUSETTS LAWYERS WEEKLY

Motions to dismiss: impress or address?

By: Douglas H. Wilkins and Daniel I. Small November 27, 2019

There you are, standing up in court for the first big hearing on your case, ready to slay dragons!

But what should your goal be: to impress or address? To impress the client, colleagues, onlookers or yourself? Or to address the concerns of a busy judge, trying to decide whether to take the dramatic action of cutting off litigation at its earliest stages?

As lawyers, we naturally want to argue our client's position and convince the court of our client's virtues. The temptation to do so is so strong that it often taints arguments that turn solely on the opponent's allegations — a prime example being a motion to dismiss for failure to state a claim.

When the client is in the courtroom, it seems that this temptation is almost irresistible. Who among us has not wanted to make an argument like this one:

Defense counsel: Good afternoon, your honor. I represent the Acme Construction Company and this is our motion to dismiss the complaint for failure to state a claim upon which relief can be granted. Acme is rated number one for quality and integrity by the leading consumer website; has never, ever been sued; always wins when it does get sued; and has never paid a penny in litigation except in settlement. There can be no dispute in this case that it built a beautiful building and performed every aspect of the construction contract, that the plaintiff has admitted as much, and that the complaint should be dismissed because it has no merit.

Court: Thank you, counsel. Can you point me to where in the complaint the plaintiff has alleged all those facts?

If you have actually tried an argument like that, you probably encountered that judicial response. When you have to answer "no," you have lost credibility with the court.

So, while it may sound obvious, tie your argument to the specific facts the court may actually consider. By moving to dismiss, you have already decided to accept the plaintiff's facts, for this limited purpose. Trying to undo that decision in front of the judge is doomed to fail.

When you prepare your oral argument on a motion to dismiss, constantly anticipate the court's question: *Where is that in the complaint? How can I consider it?*

In fact, you may even preempt that question by pointing out the specific paragraphs of the complaint upon which you base your argument. Quoting specific language from the complaint (briefly) can be a very impressive tactic, if the allegations warrant that approach.

If you are referring to facts that are outside the complaint but properly may be considered (such as a document specifically referred to in the complaint), you should probably make clear what the document is and why the court can consider it.

Of course, you generally shouldn't go into a long speech about the basic rules for motions to dismiss, because that is generally uninteresting, tells the court what it already knows, and diverts attention from your substantive argument.

But a skilled practitioner will be able to mention the source of certain facts quickly, as the argument goes along. In doing so, you are reassuring the judge that you know the rules and that your motion is limited to material that the

court may consider.

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No matter whether you are making or opposing the motion, you must be ready at all times to show the court specifically what document or allegation supports your argument.

The defendant needs to know where to find the reference in the record at a moment's notice, if asked. The plaintiff must be ready to show specifically which paragraphs most directly make the factual allegations that require denying the motion.

In fact, some of the most effective oppositions to a motion to dismiss simply point out the paragraph alleging the key fact and, if the defendant has not mentioned that paragraph, calling attention to that fact.

Of course, the opposing party also has the opportunity to ask the court to draw inferences from the alleged facts — a powerful argument that is never available to the party moving to dismiss.

Arguing a motion to dismiss is not the time for an eloquent jury argument, complete with rhetoric and inferences drawn in favor of the defense. A lack of discipline at oral argument will likely tip off the judge that you are trying to stretch the rules and the record. Few things will make a judge more uncomfortable, at that key moment.

If you have a meritorious motion, be disciplined. Your strict observance of the procedural limits on your argument will pay great dividends.

Keep in mind that, while issues of witness credibility do not arise in a motion to dismiss, there is one person whose credibility is always at issue: you.

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