MASSACHUSETTS Lawyers Weekly

Replies, cross-motions in summary judgment

By: Douglas H. Wilkins and Daniel I. Small June 18, 2020

Three or more weeks after you serve your summary judgment motion papers, you are going to get an opposition. By then, your practice has moved on to other things. You may need to get yourself back into the case by going over your original papers. However, that doesn't mean that you need to repeat everything for the judge when you draft your reply.

Still, with surprising frequency, reply briefs repeat the points already made in the original brief. Does this reflect lack of confidence in your original papers? Or lack of confidence in the judge's ability to retain what you said before, even though the court can refer back to your original papers?

Whatever the reason, unnecessary arguments in reply briefs convey the author's sense of insecurity.

Repetition is not likely to help you. Unlike you, the judge has probably read the original motion papers only a half-hour or so before reading the reply. The judge is looking for something she doesn't already know. Wasting the judge's time and attention won't aid your cause.

For another thing, Rule 9A(a)(3) limits replies "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." So, repetition simply shows the judge that you don't know the rule or aren't willing or able to follow it.

Consider not filing any reply at all. In the right case, saying nothing can convey a powerful message that the opposition didn't even lay a glove on you. It's a bit like deciding not to re-direct a witness at trial with a confident "no questions, your honor!" (Don't try this if the opposition presents a killer argument that your original papers missed, of course!).

It also avoids giving your opponent additional material to attack or to use in preparation for oral argument. It may show the judge that you respect the rules and know enough not to file an unnecessary reply.

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At the very least, starting from a "no-reply" default can focus you on which, if any, points need written response and why.

Some arguments do benefit from written presentation. If you need to quote or cite case law or evidentiary material, we don't suggest that you wait for oral argument. A written reply may well be the best way to cite or quote from evidence or legal authority that the opponent has overlooked, misquoted or quoted incompletely in a material way.

If so, don't forget that all written responses, whether reply memorandum, motion to strike or cross-motion, are part of the summary judgment motion package and should not be served or filed separately. See Superior Court Rule 9A(a)(2).

We cannot catalog every situation that will benefit from a written reply, but at least two classic circumstances call for a written response.

- You must file a cross-motion to strike any evidentiary material that would be inadmissible at trial. If you fail to do so, the court may consider that material, even if you have a good evidentiary objection. *Zaleskas v. Brigham and Women's Hospital*, 97 Mass. App. Ct. 55, 62 (2020). Waiting until the hearing is generally too late.
- With some frequency, an opposing party tries to avoid a damaging concession made at that party's deposition. "[A] party cannot create a disputed issue of fact by the expedient of contradicting by affidavit statements previously made under oath at a deposition." *O'Brien v. Analog Devices, Inc.*, 34 Mass. App. Ct. 905, 906 (1993). See also *Smaland Beach Ass'n v. Genova*, 461 Mass. 214, 229 n.24 (2012) (dubbing this the "'sham' affidavit rule"). This can be a powerful tool for the moving party, when it applies. You should, however, be wary of trying to extend it. A recent case helpfully discusses the various permutations in which inconsistent statements can occur in the summary judgment context. *Benvenuto v. 204 Hanover LLC*, 97 Mass. App. Ct. 140, 145 (2020). For instance, in some circumstances, the court may consider a subsequent conflicting affidavit from a disinterested, non-party witness who is changing deposition testimony. *Id.* Moreover, if the witness gives inconsistent testimony at a single deposition and is not forced to elect between conflicting versions, a dispute of fact may still exist. *Id.*

These two situations call for a procedural or "technical" response and, in at least the first situation, require a motion to strike. Your procedural focus may risk creating the impression that you are avoiding the merits. You might want to use a reply to assure the court that, even if the court considers the inadmissible evidence, it still should grant your motion.

It's always good when you can persuade the judge that a ruling in your favor truly reflects the merits, rather than the loss of a potentially meritorious claim because of technicalities or sloppy lawyering.

We do, however, strongly discourage at least one strategy that seems to appeal to some segments of the bar: waiting until the reply to address an issue so that your opponent will have to raise it first. Perhaps these attorneys hope that the opponent will forget to raise it, or are reluctant to "argue the other side's case."

But, if your opponent has raised the issue by pleading, motion or even informal communications, then the issue could "reasonably have been anticipated and addressed in the moving party's initial memorandum." Superior Court Rule 9A(a)(3). You actually have no right to address it in your reply memorandum at all. Even if the court does not strike your reply memorandum, you have hardly enhanced your credibility or advanced your cause.

Let's suppose you do address an argument in a reply, even though it should have been in your moving papers. Your opponent, understandably, may seek a surreply (along with a motion to strike, perhaps). Surreplies are allowed only by motion "in exceptional circumstances." Superior Court Rule 9A(a)(3).

With that restrictive test (and generally lacking a love for needless paper), judges are likely to find a solution other than allowing a surreply. The fairest solution is to disregard the material that the moving party should have included in the initial papers. The legal and practical message is clear: Don't play games.

A request for a surreply sometimes reveals another problem. In the course of briefing, the parties may learn things about their opponent's arguments or evidence in ways that shift the issues.

The best way to avoid that, of course, is adequate discovery, but that doesn't always happen. If the reply brief, in good faith, needs to address a new argument (or evidence or case law that came to light after service of the initial papers), the parties should probably restart the entire process with new motion and opposition papers.

Certainly, the court will welcome not having to read initial papers only to discover that they have become moot. The parties will probably benefit from restarting the process as well, by putting their best argument forward, without the distractions or loss of credibility that come with abandoning an initial argument.

Finally, some rare cases warrant a cross-motion for summary judgment against the moving party. In our experience, the bar understands pretty well that this is not to be done lightly. In part, that is because counsel know that only in a "rare" case can a plaintiff "establish[] his case by evidence that the jury would not be at liberty to disbelieve." *Hanover Ins. Co. v. Sutton*, 46 Mass. App. Ct. 153, 166-67 (1999). Counsel probably also have the good judgment not to file cross-motions that will undermine their credibility.

If, however, you believe in the merits of a cross-motion for summary judgment, you should not take undue comfort from Mass. R. Civ. P. 56 (c), the last sentence which provides: "Summary judgment, when appropriate, may be rendered against the moving party."

We have seen summary judgment opponents simply cite the provision or make a request at oral argument for summary judgment against the moving party. This may be innocuous, or may reveal a certain lack of understanding, but is unlikely to work.

For one thing, counsel should support a serious cross-motion for summary against the moving party with a full 9A(b)(5) statement, supporting evidence and a memorandum. Rule 9A(b)(5)(iii)(B) specifically recognizes the right to propose additional facts if there is a cross-motion for summary judgment.

For another thing, before entering summary judgment against the moving party, the court must provide "sufficient advance notice and an adequate opportunity to demonstrate why summary judgment should not be granted." *Langton v. Commissioner of Correction*, 34 Mass. App. Ct. 564, 574 (1993), citations omitted. So, the law prevents you from "slipping one by" the moving party just by citing Rule 56(c).

Sound responses or replies to an opposition for summary judgment, then, do not depend on rote reactions or automatic strategies. Think about what fits in the big picture, take the rules' lessons to heart, and consider the effect on your audience — the judge. Sound familiar?

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.

Issue: JUNE 22 2020 ISSUE

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