LITIGATION BASICS PART II:
Dispositive Motion Practice

REBA NEW LAWYERS AND LITIGATION SECTIONS
OPEN MEETING

December 3, 12:00PM-1:00PM

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I. Rule 12(b) Motions to Dismiss

A. Rule 12(b)(1): Lack of Jurisdiction over the Subject Matter

- Court Lacks Subject Matter Jurisdiction
    - Courts of Limited, Specialized Jurisdiction (Land Court, *e.g.*, pure torts, money damages; Housing Court, *e.g.*, commercial evictions, Permit Session zoning appeals)
    - Standing, Domicile in Divorce cases
- Facial / Factual Challenges
    - Facial Challenges take allegations that bear on subject matter jurisdiction as true. *See Hiles v. Episcopal Diocese of Mass*., 437 Mass. 505, 516 n. 13 (2002).
        - Applies when movant does not provide materials outside of the pleadings
    - Factual Challenges give no presumptive weight to averments in the complaint, and require courts to address the merits of the jurisdictional claim by resolving the factual disputes between the plaintiffs and defendants. *See Callahan v. First Congregational Church of Haverhill*, 441 Mass. 699, 710-711 (2004); *Hiles*, 437 Mass. at 515-516.
        - Applies when movant provides materials outside of the pleadings

        - Burden on Party Invoking Jurisdiction of the Court, *i.e.*, Non-Movant/Plaintiff, When Factual-Challenge Motion Filed. *See Callahan*, 441 Mass. at 710.

    - Unlike motions brought pursuant to Rule 12(b)(6), a court's consideration of materials outside the pleadings does not mandate conversion of rule 12(b)(1) motion into motion for summary judgment. *See Watros v. Greater Lynn Mental Health & Retardation Ass'n, Inc*., 421 Mass. 106, 108-109 (1995).

B. Rule 12(b)(2) Lack of Jurisdiction over the Person

- As with factual challenges to subject matter jurisdiction, "'the plaintiff bears the burden of adducing facts on which [personal] jurisdiction may be found.'" *Roch v. Mollica*, 481 Mass. 164, 165 (2019), quoting *SCVNGR, Inc. v. Punchh, Inc*., 478 Mass. 324, 325 n. 3 (2017), ultimately quoting *Miller v. Miller*, 448 Mass. 320, 321 (2007).

- Like with facial challenges to subject matter jurisdiction, "'[i]n considering a motion to dismiss for lack of personal jurisdiction, we accept as true the essential uncontroverted facts that were before the judge'." *Roch*, 481 Mass. at 165, quoting *SCVNGR*. 478 Mass. at 325 n. 3, ultimately quoting *Miller*, 448 Mass. at 321.

- "Massachusetts courts have personal jurisdiction over any person 'domiciled in' the Commonwealth, G. L. c. 223A, § 2, and, in certain circumstances, over nonresidents." *Roch*, 481 Mass. at 166.

- Generally, "'[f]or a nonresident to be subject to personal jurisdiction in Massachusetts, there must be a statute authorizing jurisdiction and the exercise of jurisdiction must be 'consistent with basic due process requirements mandated by the United States Constitution.'"" *Roch*, 481 Mass. at 167, quoting *Bulldog Investors Gen. Partnership v. Secretary of the Commonwealth*, 457 Mass. 210, 215 (2010), ultimately quoting *Intech, Inc. v. Triple "C" Marine Salvage, Inc*., 444 Mass. 122, 125 (2005).

    - **Statutes Conferring Personal Jurisdiction.**

        - **G. L. c. 223A, § 3, the Massachusetts Long-Arm Statute.** (Various types of "minimum contacts").

            - (a) transacting any business in this commonwealth;
            - (b) contracting to supply services or things in this commonwealth;

- (c) causing tortious injury by an act or omission in this commonwealth;
- (d) causing tortious injury in this commonwealth by an act or omission outside this commonwealth if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this commonwealth;
- (e) having an interest in, using or possessing real property in this commonwealth;
- (f) contracting to insure any person, property or risk located within this commonwealth at the time of contracting;
- (g) maintaining a domicile in this commonwealth while a party to a personal or marital relationship out of which arises a claim for divorce, alimony, property settlement, parentage of a child, child support or child custody; or the commission of any act giving rise to such a claim; or
- (h) having been subject to the exercise of personal jurisdiction of a court of the commonwealth which has resulted in an order of alimony, custody, child support or property settlement, notwithstanding the subsequent departure of one of the original parties from the commonwealth, if the action involves modification of such order or orders and the moving party resides in the commonwealth, or if the action involves enforcement of such order notwithstanding the domicile of the moving party.

- **G. L. c. 104, § 9 (personal jurisdiction over nonresident wholesalers).**

- **G. L. c. 110A, § 414(*h*) (personal jurisdiction over those who violate the Uniform Securities Act).**

- **G. L. c. 159C, § 12 (personal jurisdiction over nonresidents who violate telemarketing solicitation laws).**

- **G. L. c. 201A, § 2(*b*) (personal jurisdiction over custodians under Uniform Transfers to Minors Act).**

- **G. L. c. 203B, § 4(*c*) (personal jurisdiction over custodial trustees under Uniform Custodial Trust Act).**

        - **G. L. c. 209D, § 2-201(*a*) (personal jurisdiction over nonresidents in support order and parentage proceedings).**

    - **Transient Jurisdiction.** Even though no statute expressly confers personal jurisdiction in this scenario, "as a matter of both State common law and due process, Massachusetts courts have personal jurisdiction over nonresident individuals who are served with process while intentionally, knowingly, and voluntarily in Massachusetts." *Roch*, 481 Mass. at 168.

        - *Rationale*: "'By visiting the forum State, a transient defendant actually avails himself … of significant benefits provided by the State. His health and safety are guaranteed by the State's police, fire, and emergency medical services; he is free to travel on the State's roads and waterways; he likely enjoys the fruits of the State's economy …'; and he may sue in the State's courts (quotation omitted)." *Roch*, 481 Mass. at 171-172, quoting *Burnham v. Superior Court of Cal*., 495 U.S. 604, 637-638 (1990) (Brennan, J., concurring), ultimately quoting *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462, 476 (1985).

C. Rule 12(b)(3) Improper Venue.

- Errors of venue are not generally jurisdictional: "The matter of venue has procedural implications totally distinct from jurisdiction. Venue 'commonly has to do with geographical subdivisions, relates to practice or procedure, may be waived, and does not refer to jurisdiction at all.'" *Markelson v. Director of Div. of Employment Sec.*, 383 Mass. 516, 518 (1981), quoting *Paige v. Sinclair*, 237 Mass. 482, 484 (1921).

- "Venue being a procedural matter which in no way affects the inherent authority of a [court] to entertain . . . claims, dismissal on that single basis is not required as a matter of law." *Markelson*, 383 Mass. at 518-519.

- Whether dismissal is justified will hinge on "question[s] of lack of notice, unfairness, or other claim of prejudice". *Markelson*, 383 Mass. at 519.

- Typically, the appropriate remedy for an action being filed in the incorrect venue is a transfer to the correct venue. *See Markelson*, 383

Mass. at 519 ("transfer of venue permitted under G. L. c. 218, § 2A, does not duplicate proceedings already completed or unreasonably obstruct the continuity of action. We see no prejudice either to the court or to the parties that would ensue by permitting Markelson's motion to change venue").

D. Rule 12(b)(4) Insufficiency of Process.

- Unlike Rule 12(b)(5) for insufficiency of service of process, Rule 12(b)(4) motions go to the insufficiency of the process itself—defects in the summons and failure to provide copy of complaint, violations of Rule 4(a), (b) and or (c).

- Dismissal (particularly with prejudice) is rarely the judicially-chosen remedy for this type of claim.

E. Rule 12(b)(5) Insufficiency of Service of Process.

- The most common type of Rule 12(b)(5) claim involves the failure to serve within the 90 days prescribed by Rule 4(j); however, these claims can also concern serving process upon the wrong individual or address.

- Again, these claims rarely end in dismissal, with or without prejudice, since "[t]he mere passage of time does not require a dismissal; it must constitute prejudice to the defendants, afford the plaintiffs an unfair tactical advantage, or involve harassment of the defendants. Delay brings into question the plaintiffs' good faith and due diligence, which, in the absence of extreme delay, must be balanced against the prejudice caused to the defendant." *School Committee of Holyoke v. Duprey*, 8 Mass. App. Ct. 58, 60-61 (1979) (citations and footnote omitted).

F. Rule 12(b)(6) Failure to State a Claim upon which Relief Can Be Granted

- A claim for relief need contain only "a short and plain statement of the claim showing that the pleader is entitled to relief and a demand for judgment for the relief to which he deems himself entitled." Mass. R. Civ. P. 8(a).

- What is required at the pleading stage are factual allegations plausibly suggesting (not merely consistent with) an entitlement to relief, in order to reflect the threshold requirement that the 'plain statement' possess enough heft to show that the pleader is entitled to relief. *Iannacchino v. Ford Motor Co.*, 451 Mass. 623, 636 (2008)

- If using lexis, westlaw, etc. and shepardize, keep in mind that there are pre-*Iannacchino* cases that come up, where the legal analysis may no longer be good

- Court must accept as true the well-pleaded factual allegations in the complaint and any reasonable inferences in the plaintiff's favor that may be drawn from the allegations. Fairneny v. Savogran Co., 422 Mass. 469, 470, 664 N.E.2d 5 (1996).

- If, even taking as true the facts in the complaint and all reasonable inferences in Plaintiff's favor, the plaintiff cannot succeed as a matter of law on the claims, the complaint should be dismissed

- Can only look at the Complaint without turning the Rule 12 motion to dismiss into a Rule 56 motion for summary judgment. *Gibbs Ford, Inc. v. United Truck Leasing*, 399 Mass. 8, 13, 502 N.E.2d 508 (1987).

- *But* Court can take judicial notice of certain documents, etc. without converting to a SJ motion

- Dismissal of suit on ground of absolute immunity is dismissal for failure to state claim upon which relief can be granted. *Chicopee Lions Club v. District Attorney for Hampden Dist.*, 396 Mass. 244 (1985).

- Vehicle for raising affirmative defenses that are obvious on face, obvious from exhibits to complaint, judicial notice, etc.

- **Statute of limitations**

  - Motion to dismiss under ALM R. Civ. P. Rule 12(b)(6) is appropriate vehicle for raising defense of statute of limitations, where allegations of complaint clearly reveal that action was commenced beyond time constraints of statute. *Epstein v. Seigel*, 396 Mass. 278 (Mass. 1985).

- **Res Judicata**

  - Res judicata includes both claim preclusion and issue preclusion. *Heacock v. Heacock*, 402 Mass. 21, 23 n. 2, 520 N.E.2d 151 (1988).

  - Claim Preclusion

    - "Claim preclusion makes a valid, final judgment conclusive on the parties and their privies, and prevents relitigation of all matters that were or could have been adjudicated in the action." *O'Neill v. City Manager of Cambridge*, 428 Mass. 257, 259 (1998). The purpose of claim preclusion is based on the idea that the party to be precluded has had the incentive and opportunity to litigate the

matter fully in the first lawsuit." *Id.* at 259. Three elements are required for claim preclusion:

- the identity or privity of the parties to the present and prior actions
    - Easy where the parties to the present and prior action are the same
    - Where the parties are different, privity may be established if the parties to the present action's "interest[s] [were] adequately represented by a party to the prior litigation, and whether binding the nonparty to the judgment is consistent with due process and common-law principles of fairness." *Degiacomo v. City of Quincy*, 63 N.E.3d 365, 370 (Mass. 2016).
- identity of the cause of action - same transaction or series of connected transactions
- prior final judgment on the merits
    - Easy when decision issues after trial
    - Summary judgment constitutes a final judgment on the merits for res judicata purposes
    - "When arbitration affords opportunity for presentation of evidence and argument substantially similar in form and scope to judicial proceedings, the award should have the same effect on issues necessarily determined as a judgment has." *DaLuz v. Department of Correction*, 434 Mass. 40, 44 (2001).
    - Voluntary dismissal usually not preclusive, but see MRCP 41(a)(1) ("Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of this or any other state an action based on or including the same claim.") = no third bite at the apple.
    - Default judgment generally does not have preclusive effect on an issue in a subsequent action because the issues have not been actually litigated, but see MRCP 41(b)(3) ("Unless the dismissal is pursuant to paragraph (1) of this

subdivision (b), or unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision (b) and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, or for improper amount of damages in the Superior Court as set forth in G.L. c.212, § 3 or in the District Court as set forth in G. L. c. 218, § 19, operates as an adjudication upon the merits").

- Decision on motion to dismiss does have preclusive effect

- Issue Preclusion

  - Issue preclusion "prevents relitigation of an issue determined in an earlier action where the same issue arises in a later action, based on a different claim, between the same parties or their privies." *Heacock*, 402 Mass. at 23 n. 2.

    - there was a final judgment on the merits in the prior adjudication

    - the party against whom preclusion is asserted was a party (or in privity with a party) to the prior adjudication

    - the issue in the prior adjudication was identical to the issue in the current adjudication. *Tuper v. North Adams Ambulance Serv., Inc.*, 428 Mass. 132, 134, 697 N.E.2d 983 (1998).

  - The issue decided in the prior adjudication must have been essential to the earlier judgment. And actually litigated.

  - The prior adjudication does not have to be before a court; "[a] final order of an administrative agency in an adjudicatory proceeding . . . precludes relitigation of the same issues between the same parties, just as would a final judgment of a court of competent jurisdiction." *Tuper*, 428 Mass. at 135

G. Rule 12(b)(7) Failure to Join a Party under Rule 19

- Failure to join a necessary Party

- designed to avoid unnecessary or multiple litigation

- When is a party "necessary"?

- MRCP 19 mandates that plaintiffs join as parties individuals and entities if:

- 1) in his absence complete relief cannot be accorded among those already parties, or

- (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest

- "When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration." G.L. c. 231A, § 8

- Usual remedy is a chance to amend to fix, not outright dismissal

H. Rule 12(b)(8) Misnomer of a Party

- A motion to dismiss for misnomer of a party is appropriate when the wrong party is named as a defendant. Dismissal for misnomer of a party most commonly occurs when the name of a defendant is spelled incorrectly, a corporate entity is not identified correctly or the wrong corporate entity is identified. Under these circumstances, the court will not dismiss a complaint when the plaintiff sued and served the correct defendant, but mistakenly used the wrong name of that defendant.

I. Rule 12(b)(9) Pendency of a Prior Action in a Court of the Commonwealth

- "Rule 12(b)(9) provides for the dismissal of a second action in which the parties and the issues are the same as those in a prior action still pending in a court of this Commonwealth" and "all the operative facts relied on to support the present action had transpired prior to the commencement of the first action." M.J. Flaherty Co. v. U.S. Fid. & Guar. Co., 61 Mass. App. Ct. 337, 339 (2004); Keen v. Western New England College, 23 Mass. App. Ct. 84, 87 (1986).

- "The rule prohibits the long-barred practice of claim-splitting." Id. (citing Keen, 23 Mass. App. Ct. at 87).

- Rule 12(b)(9) codifies the longstanding common-law principle that "a party ought not to be vexed by the pendency at the same time of two actions for the same cause at the instance of the same plaintiff." See Jacoby v. Babcock Artificial Kidney Ctr., Inc., 364 Mass. 561, 563 (1974).

J. Rule 12(b)(10) Improper Amount of Damages in the Superior Court as set forth in G. L. c. 212, §3 or in the District Court as set forth in G. L. c. 218, §19

- Pursuant to Standing Order of the Supreme Court, dated July 17, 2019, effective January 1, 2020, the Superior Courts of Massachusetts now will only accept case with damages likely to be over **$50,000**.

- If the amount in controversy is less than $50,000, the case should be filed in District Court.

- The maximum procedural amount for civil actions in the District Courts and Boston Municipal Court will correspondingly increase to **$50,000**.

- **Beware: the court will sua sponte dismiss the case if the amount in controversy as plead does not meet the jurisdictional requirement**

K. Rule 12(e) Motion for More Definite Statement. "If a pleading to which a responsive pleading is permitted is **so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading**, he may move for a more definite statement before interposing his responsive pleading. The motion **shall point out the defects complained of and the details desired**. If the motion is granted and the order of the court is not obeyed within **10 days after notice of the order** or within such time as the court may fix, the court **may strike the pleading** to which the motion was directed or make such order as it deems just." (Emphases added.)

L. Rule 12(f) Motion to Strike. "Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within 20 days after the service of the pleading upon him or upon the court's own initiative at any time, the court **may after hearing order stricken** from any pleading any **insufficient defense**, or **any redundant, immaterial, impertinent, or scandalous matter**." (Emphasis added.)

M. Rule 12(g) & (h); Consolidation of Defenses in Motion, Waiver or Preservation of Certain Defenses

- Rule 12(g) & (h)(1) – **Some 12(b) Claims Waived by Not Being Brought in Direct Response to Pleading.** "A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, insufficiency of service of process, misnomer of a party, pendency of a prior action, or improper amount of damages is waived (A) if omitted from a motion in the circumstances described in subdivision (g), or (B) if it is neither made by motion under this rule nor included in a

responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course."

- Rule 12(h)(2) – **12(b)(6) & (7) May Be Brought Pursuant to Rule 12(c) Motion after Initial Response Deadline**

- Rule 12(h)(3) – **Codifies Principle that Subject Matter Jurisdiction May Be Raised at Any Time and May Be Raised *Sua Sponte* at Any Time**

II. Rule 41

A. Rule 41(a)(2)

- When parties will not stipulate to dismissal, but the plaintiff wishes to dismiss an action, this is the type of motion that is brought.

B. Rule 42(b)(2)

1. Failure to Prosecute Claim

2. Violation of Rules

- *Rule 8(a) Motions to Dismiss*. *See Mmoe v. Commonwealth*, 393 Mass. 617, 621 (1985), quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957) (on such motions, "[a] judge must consider whether the . . . complaint is so verbose and confusing that it fails to give the defendants 'fair notice of what the plaintiff's [claims are] and the grounds upon which [they rest]'").

- *Rule 9 Motions to Dismiss*. Failure to Plead with Required Particularity.

- *Failure of Plaintiff to Respond or Engage in Required Discovery.*

3. Motion for Dismissal as a Matter of Law after Plaintiff Rests (Directed Verdict in Jury Cases Brought by Defendants).

III. Rule 12(c) Motions for Judgment on the Pleadings

A. In Garden-Variety Civil Actions

- "After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings

are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."

- Rule 12(c) is designed to cover the rare case where the answer admits all the material allegations of the complaint (or the reply admits all the allegations of the counterclaim) so that no material issue of fact remains for adjudication.

- The standard for evaluating a motion for judgment on the pleadings under Mass. R. Civ. P. 12(c) is the same as the standard for a motion to dismiss under Mass. R. Civ. P. 12(b)(6).

- Defendants often take advantage of Rule 12(c) when they believe grounds for dismissal exist, but want additional time beyond the date the responsive pleading is due to serve a dispositive motion.

B. Judicial Review of Administrative Decisions

- An appeal from an administrative agency decision, also called a 30A appeal, or a request for judicial review of an administrative agency decision, is what you file in the Superior Court when you want a judge to review a final decision made by a state agency. The decisions that a judge can review under 30A must have been made by a state agency in what's called an adjudicatory proceeding.
- As described in G.L. c. 30A, § 14, the review is conducted by the judge, without a jury, and is limited to the facts that were on the record during the administrative hearing. Typically, the judge doesn't hear testimony or consider new evidence, and reviews only what happened at the administrative hearing by looking at the administrative record. If you request a transcript of the hearing, the judge can review the transcript as well.
- Proceedings for judicial review of an agency decision are filed in the Superior Court. If you decide to file an administrative agency appeal, please remember that you must follow the procedural requirements.
- For example, in addition to filing and serving a complaint to start the lawsuit, you will have to write, serve, and file a motion and written memorandum explaining why the agency decision should be modified or reversed. In addition, depending on the reason for your appeal, you may be required to request and pay for a transcript of the administrative agency hearing.

- **Superior Court Standing Order 1-96** sets forth the process for hearing complaints for judicial review of administrative agency proceedings.
    - If you file a complaint for judicial review of an administrative agency proceeding, it is imperative that you review Standing Order 1-96.
    - A claim for judicial review is resolved through a motion for judgment on the pleadings. The Standing Order sets forth the time frame within which the motion should be brought and other filing requirements.

IV. Rule 56 Motions for Summary Judgment

- Summary judgment is appropriate when "pleadings, depositions, answers to interrogatories, and responses to requests for admission…together with affidavits…show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Mass. R. Civ. P. 56(c).

- The moving party bears the burden of proving the absence of controversy over material facts and that he or she is entitled to judgment as a matter of law. *See Highlands Ins. Co. v. Aerovox Inc.,* 424 Mass. 226, 232 (1997).

- Court is to determine "whether, viewing the evidence in the light most favorable to the nonmoving party, all material facts have been established and the moving party is entitled to judgment as a matter of law." *Augat, Inc. v. Liberty Mut. Ins. Co.*, 410 Mass. 117, 120 (1991).

- "The burden on the moving party may be discharged by showing that there is an absence of evidence to support the non-moving party's case." *Kourouvacilis v. General Motors Corp.*, 410 Mass. 706, 711 (1991),

- In cases where the "nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary judgment motion may properly be made in reliance solely on the pleadings, depositions, answers to interrogatories, and admissions on file." *Id.*

- The court may also consider all facts of which the judge may take judicial notice. *Jackson v. Longcope*, 394 Mass. 577, 580 n.2 (1985). This includes public records and proceedings in related cases. *See Reliance Ins. Co. v. City of Boston*, 71 Mass. App. Ct. 550, 555 (2008) ("Properly considered public records include the records of other courts in related proceedings, of which the judge may take judicial notice in any event.").

- A corollary to the moving party's burden is that the court is to "make all logically permissible inferences" from the facts in the non-moving party's favor. *Willitts v. Roman Catholic Archbishop of Boston*, 411 Mass. 202, 203 (1991).

- "the right of a party facing summary decision to have the facts viewed in a favorable light . . . does not entitle that party to a favorable decision" and reliance upon mere "bald conclusions" is an inadequate means of defeating the motion. *Catlin v. Bd. of Registration of Architects*, 414 Mass. 1, 7 (1992)

- Can't use an affidavit to controvert sworn deposition testimony

- Not no dispute of fact, no dispute of material fact – remember the difference

- Separate statement of facts (both superior and land court)

- Responses are technically limited -

    - Land Court "Any response other than "admitted" to a statement of fact made by the moving party, and any statement of additional material fact, must include page or paragraph references to supporting pleadings, depositions, answers to interrogatories, admissions and affidavits, or else the facts described by the moving party as undisputed shall be deemed to have been admitted."

    - Superior Court "The response to the numbered paragraphs shall be limited to stating whether a given fact is disputed and, if so, cite to the specific evidence, if any, in the Joint Appendix that demonstrates the dispute."

- Timing – MRCP says served at least 10 days before hearing (56(c)), but the trial courts have set their own rules (see next section) but suffice to say pretty much always more than 10 days.

- Partial SJ an option

V. Court-Specific Rules Governing Dispositive Motion Practice

A. Superior Court Rules

- Superior Court Rule 9E

    - "in order to avoid the entry of a default for failure to respond in a timely fashion, a party responding by a motion to dismiss must serve the motion on all parties pursuant to Superior Court Rule 9A(b)(2) and, in a timely manner, must also file with the court a simple 'Notice of Motion to Dismiss' reciting the title of the motion and the date of its service on the parties."

- Superior Court Rule 9A

- Superior Court Rule 9C

- Counsel for each of the parties shall confer in advance of serving any motion under Mass. R. Civ. P. 8(a), 12 (except Rule 12(c) motions in administrative appeals), 26, 37, 41(b)(2) (first sentence) or 56 and make a good faith effort to narrow areas of disagreement to the fullest extent. Counsel for the party who intends to serve the motion shall be responsible for initiating the conference, which conference shall be by telephone or in person. All such motions shall include a certificate stating that the conference required by this Rule was held, together with the date and time of the conference and the names of all participating parties, or that the conference was not held despite reasonable efforts by the moving party to initiate the conference, setting forth the efforts made to speak by telephone or in person with opposing counsel. Motions unaccompanied by such certificate will be denied without prejudice to renew when accompanied by the required certificate.

- When conferring about any motion under Mass. R. Civ. P. 12, counsel for each of the parties shall make a good faith effort to narrow areas of disagreement that may be resolved through amendment of the pleading, curative action in respect to defective service, or other means related to the subject of the motion to dismiss. When conferring about any motion under Mass. R. Civ. P. 56 or 41(b)(2) (second sentence), counsel for each of the parties shall discuss whether the moving party should refrain from making any motion qualifying for decision without a hearing under Superior Court Rule 9A(b)(vi) and make a good faith effort to narrow areas of disagreement that may be resolved through amendment of the pleading, a stipulated dismissal of specified claims or parties, or otherwise.

B. Land Court Rules

- Rule 4

  - 12(b)(1), 12(b)(6), 12(c) or 56 - shall file with the motion or opposition a brief containing: (1) a statement of the issues presented, (2) a statement of the legal elements (with citations), (3) summary of argument, and (4) a short conclusion

  - Rules 12(b)(1) or 56 shall be accompanied by a numbered concise statement of the material facts upon which the moving party relies (with references to the appendix. For Rule 56, the material facts in the

statement must be those as to which the moving party contends there is no genuine issue to be tried.

- Each opposition to a motion under Rules 12(b)(1) or 56 shall include: (1) a response, using the same paragraph numbers, to the moving party's statement of facts, and (2) in consecutive numbered paragraphs, a concise statement of any additional material facts which the opposing party deems relevant and necessary to the motion. Any response other than "admitted" to a statement of fact made by the moving party, and any statement of additional material fact, must include page or paragraph references to supporting pleadings, depositions, answers to interrogatories, admissions and affidavits, or else the facts described by the moving party as undisputed shall be deemed to have been admitted.

- Have to include appendix: (1) all cited portions of the documents or other materials referenced in those statements, and (2) copies of all legal and other authorities cited in the briefs except MA laws, MA published cases. Don't need to reproduce something included by other side. Court need not look beyond the record.

- Court sets hearing date

- Rule 5

  - Other motions need to be marked up on 7 days' notice (regular times, during COVID-19 court sets all hearings)

  - Some Justice of the Land Court have regularly-scheduled motion sessions, others require counsel to obtain hearing dates, and others still, despite Rule 5, schedule their own hearings. Know the assigned judge's practice.