

NEW HAMPSHIRE SUPREME COURT
ADVISORY COMMITTEE ON RULES

Minutes of March 19, 2021 Public Meeting

Supreme Court Courtroom
Frank Rowe Kenison Supreme Court Building
One Charles Doe Drive
Concord, NH 03301

The meeting, which was held via Webex, was called to order at 12:30 p.m. by Justice Donovan, Committee Chair. The following Committee members were present: Abigail Albee, Esq., Hon. R. Laurence Cullen, Hon. N. William Delker, Hon. Michael Garner, Sarah Greene, Esq., Jeanne P. Herrick, Esq., Charles Keefe, Esq., Rep. Paul Berch, Sean Gill, Esq., Susan A. Lowry, Esq., Ari Richter, Patrick W. Ryan, Esq., Charles Stewart, and Lorrie Platt, Esq., Secretary to the Committee.

1. Approval of Minutes of December 19, 2020 Meeting

Upon motion made and seconded, the Committee approved the minutes of its December 19, 2020 meeting.

2. Items Pending Before the Committee

(a) 2020-008. Superior Court Rule 12(g) - Motions for Summary Judgment

At its December 18, 2020 meeting, the Committee voted to create a subcommittee comprised of Judge Delker, Judge Anderson, Attorney Lowry and Attorney Lick to consider the concerns raised during the public hearing and to develop a proposed amendment to the current rule.

Judge Delker explained that the subcommittee's proposed revisions included automatic exemptions to the requirement for submission of a consolidated statement of material facts and provided examples of other potential good cause exceptions. Justice Donovan proposed two revisions to the subcommittee's suggested amendment.

Upon motions made and seconded, the Committee approved both revisions.

Upon further motion made and seconded the Committee voted to send the proposed amendment out for public comment. A copy of the proposed amendment is attached to these minutes.

3. New Submissions

(a) 2020-010 Supreme Court Rule 12-A

The Committee reviewed the 2020-010 submission of Margaret Huang, Alternative Dispute Resolution Coordinator, in which she proposed the following amendment to Supreme Court Rule 12-A, "Mediation," which applies to cases pending before the Supreme Court.

1) Cases pending at the supreme court may be referred to the office of mediation and arbitration for mediation as set forth in this rule. All mediation will be conducted by a retired full-time judge, ~~or a~~ retired full-time marital master, *or other qualified mediator as determined by the Supreme Court in conjunction with the office of mediation and arbitration.*

After discussion, the Committee, upon motion made and seconded, voted to send the proposed amendment out for public comment.

(b) Supreme Court Rule 38, Rule 3.9

Justice Donovan advised the committee that Rule 3.9 contains outdated references to Superior Court Rules 170 and 170-B, and that a technical amendment to correct these references is needed.

4. Adjournment

Upon motion made and seconded, the committee voted to adjourn the meeting. The next public hearing and public meeting of the committee is scheduled for Friday, June 4, 2021.

PROPOSED AMENDMENT TO SUPERIOR COURT RULE 12(g)

Amend Superior Court Rule 12(g) as follows (new material is in **[bold and brackets]**; deleted material is in ~~strikethrough~~ format):

(g) *Motions for Summary Judgment.*

(1) *Motion for Summary Judgment.* Motions for summary judgment shall be filed, defended and disposed of in accordance with the provisions of RSA 491:8-a as amended. Such motions, **[objections]** and ~~responses thereto~~ **[and supporting memoranda to such motions and objections]** shall provide specific page, paragraph, and line references to any pleadings, exhibits, answers to interrogatories, depositions, admissions, and affidavits filed with the court in support of or in opposition to the Motion for Summary Judgment. Only such materials as are essential and specifically cited and referenced in the ~~Motion for Summary Judgment~~, **[motion, objection]**, ~~responses~~, and supporting memoranda shall be filed with the court. In addition, except by permission of the court received in advance of ~~filling the memoranda~~, no such motion, ~~response, or~~ **[and]** supporting memorandum of law, **[if filed]**, together shall exceed ~~20~~ **[25]** double-spaced pages **[and similarly no objection and supporting memorandum, if filed, shall exceed 25 double-spaced pages]**. The purpose of this rule is to avoid unnecessary and duplicative filing of materials with the court. Excerpts of documents and discovery materials shall be used whenever possible.

(2) **[Moving Party's]** *Statement of Material Facts.*

(A) *Content.* Every motion for summary judgment **[or its supporting memorandum]** shall be accompanied by a separate statement of the material facts as to which the moving party contends there is no genuine issue to be tried, set forth in consecutively numbered paragraphs, with page or paragraph references to supporting pleadings, depositions, answers to interrogatories, responses to requests for admission, affidavits, or other evidentiary documents. Failure to include the foregoing statement shall constitute grounds for denial of the motion.

(B) *Additional Service of Electronic Form of Statement of Material Facts to other Parties.* At the time the motion and separate statement of material **[undisputed]** facts are filed with the court, the statement of material facts shall

also be contemporaneously sent in electronic form by email to all parties against whom summary judgment is sought ~~in order~~ to facilitate the requirements of the following paragraph. The statement of material facts in electronic form shall be sent as an attachment to an email and shall be in a Microsoft Word document (or a document convertible to Word) unless the parties agree to use another word processing format. The requirement to **[separately]** email the statement of material facts to the opposing party does not alter the date or method of service **[for filing motions, memoranda or statements of material undisputed facts with the court]**. ~~The requirement for transmission by email of the statement of material facts in electronic form shall be excused if (A) the moving or any opposing party is appearing *pro se*, (B) the attorney for the moving party certifies in an affidavit that he or she does not have access to email, (C) the attorney for the moving party certifies in an affidavit that an opposing party's attorney has no email address or has not disclosed his or her email address, or (D) the parties believe that the process outlined herein will be unworkable due to particular circumstances in their case and receive advance approval from the Court for filing separate documents.~~

(3) *The Non-Moving Party.*

(A) *Response to the Motion and the Statement of Material Facts.* The non-moving party shall have 30 days after **[the]** filing **[of the motion for summary judgment]** to object to ~~a motion for summary judgment~~, unless another deadline is established by order of the court. An objection to a motion for summary judgment shall **[be accompanied by]** ~~include~~ a response to the moving party's statement identifying the facts the moving party contends are material and undisputed **[of material undisputed facts identifying which, if any, of the purported undisputed facts identified in the moving party's statement the nonmoving party contends are in dispute]**. In its response, the nonmoving party shall indicate which, if any, of the purported undisputed facts identified in the moving party's statement the nonmoving party contends are in dispute. The form of the nonmoving party's response shall be consistent with the requirements of paragraph B. For purposes of summary judgment, any fact set forth in the moving party's statement of material facts shall be deemed to have been admitted unless controverted as set forth in this paragraph.

(B) *Filing a Single Document Containing all Parties' Positions.* To permit the court to have in hand a single document containing the parties' positions as to material facts in easily comprehensible form, the opposing party shall save the moving party's statement of material facts as a new document and shall set forth a response to each directly below the appropriate numbered paragraph, including, if the response relies on opposing evidence, page or paragraph references to supporting pleadings, depositions, answers to interrogatories, responses to requests for admission, affidavits, or other evidentiary documents. Where the obligation to send the statement of material facts in electronic form

has been excused, the response to the statement of material facts may be in a separate document.

(C) *Statement of Additional Material Facts.* Along with its response to the moving party's statement of facts, the nonmoving party may assert an additional statement of material facts with respect to the claims on which the moving party seeks summary judgment, each to be supported with page or paragraph references to supporting pleadings, depositions, answers to interrogatories, responses to requests for admission, affidavits, or other evidentiary documents.

[(D) *The Moving Party's Reply to Additional Material Facts.* The moving party shall reply to the opposing party's additional statement of material facts within 20 days of filing and in the manner required by Paragraph (g)(3). For purposes of summary judgment, any fact set forth in the opposing party's additional statement of material facts shall be deemed to have been admitted unless controverted as set forth in this paragraph.]

—~~(D)~~ **[(E)]** *Filing a Single Document with Additional Material Facts.* Such an additional statement **[and reply]** shall be a continuation of the opposing party's response described in Paragraph (g)(3)(A)~~[-(B)]~~, with an appropriate heading, and shall not be a separate document. Where the party opposing summary judgment includes such an additional statement in its response, the response, including the additional statement, also shall be sent in electronic form by email to the moving party, unless excused as provided in Paragraph ~~(g)(2)~~ **[(g)(4)]**.

~~(4) *The Moving Party's Reply to Additional Material Facts.* The moving party shall reply to the opposing party's additional statement of material facts within 20 days of filing and in the manner required by Paragraph (g)(3), resulting in a final, single consolidated document for the court's consideration, unless the obligation to send the additional statement of material facts in electronic form has been excused. For purposes of summary judgment, any fact set forth in the opposing party's additional statement of material facts shall be deemed to have been admitted unless controverted as set forth in this paragraph.~~

[(4) *Exemption for Submission of a Consolidated Statement of Material Facts.* The requirement for transmission by email and filing of a consolidated statement of material facts shall automatically be excused if (i) the moving or any opposing party is appearing pro se, (ii) the moving or any opposing party is incarcerated, (iii) the attorney for the moving party certifies in an affidavit that he or she does not have access to email, or (iv) the attorney for the moving party certifies in an affidavit that an opposing party's attorney has no email address or has not disclosed his or her email address. In addition, prior to the obligation to electronically transmit and file a consolidated statement of material facts any party may file a motion to excuse the obligation to submit a consolidated

statement of facts setting forth any circumstances establishing good cause to relieve the parties' obligations to comply with Paragraph (g)(3)(B)-(E). Good cause to excuse the requirement for a consolidated statement includes, without limitation, the process outlined herein will be unworkable due to the involvement of multiple parties in the summary judgment process, unnecessary or unduly burdensome as certified by the parties that the issues to be determined on summary judgment are solely issues of law and not fact, or where the costs of compliance with this rule do not warrant its enforcement.]

(5) *Page Limits.* Neither the statement of material facts as to which there is no genuine issue to be tried nor the response thereto shall be subject to the 20 [25]-page limitation in paragraph (g)(1) of this rule.

(6) *Cross-Motions.* Cross-motions for summary judgment and oppositions thereto shall comply with the requirements of Paragraph (g)(3), with the result that there shall be a single consolidated document for both motions for summary judgment (multiple documents may only be filed with advance leave of court) containing the respective statements of material facts and responses thereto, **[the original motion for summary judgment and the cross-motion containing the respective statements of material facts and responses thereto]**, unless excused as provided in Paragraph (g)(2)[(B)].

(7) *Partial Summary Judgment.* Where a plaintiff successfully moves for summary judgment on the issue of liability or a defendant concedes liability and the case proceeds to trial by jury, the parties must provide the trial judge with a statement of agreed facts sufficient to explain the case to the jury and place it in a proper context so that the jurors might more readily understand what they will be hearing in the remaining portion of the trial. The court shall present the jury with the agreed statement of facts. Absent such an agreement on facts, the court shall provide such a statement.

(8) *Sanctions for Noncompliance.* The court need not consider any motion or opposition that fails to comply with the requirements of this rule and may deny or grant a motion for summary judgment based on the failure of the moving party or the non-moving party

