

NEW HAMPSHIRE SUPREME COURT  
ADVISORY COMMITTEE ON RULES

Minutes of December 18, 2020 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, Sean Gill, Esq., Sarah Greene, Esq.; Jeanne P. Herrick, Esq., Charles Keefe, Esq., Derek Lick, Esq., Susan A. Lowry, Esq., Ari Richter, Patrick W. Ryan, Esq., Hon. Donna Soucy, Janet Spalding, CPA, Charles Stewart, and Lorrie Platt, Esq., Secretary to the Committee.

1. Public Hearing

Justice Donovan opened the public hearing. He inquired whether anyone from the public wished to comment on Superior Court Rule 12(g) Motions for Summary Judgment. The Court amended Rule 12(g) on July 1, 2019, and referred it to the Committee to begin evaluating in June 2020 how the rule has worked in practice, and to recommend whether the rule should remain in effect or be further amended.

Judge Anderson first addressed the committee. He explained that he had been one of the trial judges who proposed the original rule and had been asked to address the Committee about its value. He described three types of summary judgment motions: (1) cases with no factual dispute, e.g., insurance policy cases; (2) cases in which the party that does not have the burden of proof points out that the other side cannot meet its burden, e.g., medical malpractice cases; and (3) cases in which the moving party argues that it has copious amounts of evidence to support its claim and the opposing party contends that it has more. The superior court judges crafted the rule to require that parties in the third example specify the facts that are disputed. Judge Anderson acknowledged the expressed frustration with the rule. He noted that the Committee might endorse an opt-out provision with parties arguing that no material facts were at issue. Some members of the bench have expressed concern that an “opt-out” provision would eviscerate the rule. He recommended that the rule remain in place for another year so that everyone gains more familiarity with it.

Three representatives of the Department of Justice appeared at the public hearing, Solicitor General Dan Will, and Attorneys Jessica King and Samuel Garland. They addressed concerns raised in their letter submitted on the same day. They explained that the rule as currently formulated does not meet its goal of efficiency. Among the problems they noted were: (1) parties who used the statement of facts to advance legal arguments; (2) multi-party litigation with slightly differently-worded statements of fact required significant time to review and the timing of the motions is not always coordinated; (3) the rule doesn't work with inmate litigation and many cases in which the parties are self-represented, particularly from a timing standpoint. They proposed an opt-in provision. Attorney Garland also advised that the Local Rules Subcommittee of the Federal Court had recommended that a proposal to amend the federal rules to include a process similar to Rule 12(g) be rejected after receiving input from local practitioners who opposed a blanket provision. That recommendation was adopted and a study group has been created to determine whether the summary judgment process could be improved in certain categories of cases.

Attorney Sabin Maxwell noted that he had filed a letter with the Committee outlining his concerns. He reiterated that the rule as currently crafted adds an extra layer that must be addressed one alleged fact at a time. He cited a case in which he had filed a motion for summary judgment and the opposing party cited its own statement of facts rather than the actual source documents. He endorsed a rule with an opt-in provision and advocated that the default rule should not require a separate statement of material facts. He noted that an alternative might be that the trial court, after reviewing a motion for summary judgment, could require parties to opt in.

Justice Donovan then closed the hearing.

## 2. Discussion and Vote on Public Hearing Item

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

Upon motion made and seconded, 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 develop a proposed amendment to the current rule.

Among the proposals to be considered is whether to return to the language of the 2018 rule but add an opt-in provision that would authorize the trial court to order submission of a statement of material facts.

3. Approval of Minutes of September 11, 2020 Meeting

Upon motion made and seconded, the Committee approved the September 11, 2020 minutes. Charles Stewart and Senator Donna Soucy abstained from voting because they were not present at the September meeting.

4. Items Pending Before the Committee

(a) 2020-005. Superior Court Rule 41 & a. - submission of subcommittee report authored by David Peck

At its September meeting, the Committee voted to establish a subcommittee, chaired by Judge Delker, and comprised of Attorney Albee, Judge Garner, Attorney Ryan, Attorney Lick and Attorney David Peck to review a submission by Attorney Peck that proposed several changes to superior and circuit court rules. The Committee reviewed the subcommittee report and, upon motion made and seconded, voted to send out for public comment the proposed amendments to Superior Court Rule 41, District Division Rule 1.27, Probate Division Rule 172 and Family Division Rule 1.32. The other rules were determined to be minor, technical revisions that did not require public comment. The Committee agreed to refer them to the court with a recommendation that they be adopted.

(b) 2020-006 Criminal Procedure Rule 12 (discovery of criminal records)

At its September meeting, the Committee reviewed a request received from Attorney David Rothstein. Justice Donovan asked Attorney Keefe to draft a proposed rule that would address the discovery of criminal records prior to bail hearings/arraignments and that would apply in both the superior and circuit courts.

Working with Judge Garner and Attorney Gill, Attorney Keefe developed a proposed rule and, in his report, asked the Committee to consider several issues related to its adoption. Attorney Keefe explained that the subcommittee was concerned about the time constraints imposed upon prosecutors to provide the records and upon defense counsel to adequately review the records with clients. Other issues include whether the rule will apply only to arraignments and bail hearings and that counsel may not be appointed until after the arraignment or that a defendant may elect to self-represent.

Attorney Keefe recommended that a public hearing be held and that prosecutors and defense counsel be invited to weigh in. Upon motion made and seconded, the Committee voted to send out for public comment the following proposed rule:

### Discovery of Criminal Record Prior to Arraignment

In any criminal proceeding in which the State intends to rely upon a defendant's criminal record, the State shall provide to either defense counsel or to a pro se defendant copies of any and all such records in the State's possession prior to any such hearing such that defense counsel will be given the opportunity to review said records with the defendant, or a pro se defendant to do the same individually, prior to the hearing.

If the State fails to provide said copies as described herein, the State shall be prohibited from referencing any such records except for good cause shown. If the State does not intend to cite to a defendant's criminal record during the arraignment or bail hearing, New Hampshire Rule of Criminal Procedure 12(b)(1)(C) shall govern the timing of disclosure in superior court.

The State may provide the records by fax, secure e-mail, or similar means to assure the confidentiality of said records, or in any manner consistent with state and federal law.

#### 5. New Submissions

(a) 2020-009 Rule of Criminal Procedure 12 and N.H. Rule of Evidence 404(b)

The Committee reviewed the 2020-009 submission of Attorney David Rothstein which recommended two amendments based upon recent amendments to Federal Rules. After discussion, the Committee decided not to recommend adoption of a proposed amendment based upon Federal Rule of Criminal Procedure 5(f). With respect to the second proposed amendment, the Committee agreed to send out for public comment the following proposed amendment to Rule of Criminal Procedure 12 (b)(1)(F):

(F) Notification of the State's intention to offer at trial pursuant to Rule of Evidence 404(b) evidence of other crimes, wrongs, or acts committed by the defendant, as well as copies of or access to all statements, reports or other materials that the State will rely on to prove the commission of such other crimes, wrongs or acts. (current language)

- (i) *Notice must be provided sufficiently in advance of trial so that the defendant has a fair opportunity to meet the evidence.*
- (ii) *The notice must articulate the permitted purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose.*
- (iii) *The notice must be in writing, except for good cause shown.*

## 6. 2021 Meeting Dates

The Committee voted to meet on the following dates.

Friday, March 12, 2021

Friday, June 4, 2021

Friday, September 10, 2021

Friday, December 10, 2021

Public hearings shall be scheduled on June 4, 2021 and December 10, 2021.

## 8. Adjournment

Upon motion made and seconded, the committee voted to adjourn the meeting. The next public meeting of the committee is scheduled for Friday, March 12, 2021.