Lorrie Platt

From: Saturley, William C. <WSaturley@preti.com>

Sent: Thursday, December 17, 2020 11:34 AM
To: RulesComment
Cc: Moffett, Gregory A.; External Peter G. Callaghan; Puffer, Mark H.; Fennessy, Nathan R.
Subject: Comment on Superior Court Rule 12(g)

To the Committee:

Thank you for soliciting input on the operation of Rule 12(g). To quote from your invitation, you had a concern when the Rule wa adopted that "requiring opposing counsel to submit a single statement of facts might prove unwieldy or impractical." My partners and I believe your concern was well-founded, and we wish to express our frustration with the inefficiency and potential trap-for-th unwary generated by the Rule as it currently operates.

It should not surprise the Committee that adverse parties are reluctant to agree to anything they think will hurt their position. If th opposition proposes as "undisputed" a fact which will favor that side, the natural reaction is to find a way to characterize that fact "disputed." Even when acting in good faith, each party's lawyer must carefully examine each proposed fact and scour it for ways raise a dispute – or else disappoint the client and potentially risk a malpractice claim – and has 30 days in which to do so. Multip communications between the sides are necessary in an attempt to reach consensus (usually impossible), and then to draft and refine written responses to the adverse party's proposed facts. Rather than one document in which a number of facts are identifi as undisputed – likely the goal of the Rule change in the first place -- the parties produce a lengthy document arguing that very fe (or no) material facts are undisputed.

The process requires time and effort and ends up obfuscating rather than clarifying. And the cost invested in generating this all-too-frequently worthless document multiplies the expense of moving for summary judgment. We are unconvinced it helps the co very much. If the parties are forced to actually examine and contest all the material facts, which the Rule forces them to do, the result is rarely a smoothly flowing document that will aid the court in reaching a result. It is more often a detailed and tedious stuc in word-smithing and hair-splitting.

The cost is exacerbated when there are cross-motions for summary judgment, and when the opposition party produces its own statement of material facts to which the original movant must respond. The exercise is even more fun, and costly, when multiple defendants are present. The process now repeats, geometrically, for each party's motion and each party's opposition. The rule silent as to what is required from the parties when there are multiple parties involved, and the resulting round robin most often leads nowhere but raises the cost of the process, whether a party is a movant or the opposition.

Further, in our experience *pro se* parties either intentionally disregard the above requirements and file whatever they want, or become completely confused and file their own factual statements as separate documents. No running word document gets prepared in such a case.

The risk to the parties in this expanding universe of factual statements is potentially significant, as the Rule plainly states that a party's failure to deny or respond to an opposing party's proposed fact, wherever and in whatever version of the statement that fa might be found, results in that fact/statement being deemed "admitted."

Finally, the statement does not eliminate the need to file a memo of law, which still cites to the affidavits and documents and depositions as it has traditionally done. The memo explains why the facts either do or don't merit judgement as a matter of law. When did that process become insufficient?

We have no data, but we suspect that the number of summary judgment motions has declined, and the rate at which they are granted has diminished even further. If that was the goal, then mission accomplished. But we suspect the intent of the rule change was to streamline the search for truth at the summary judgment stage, which in our opinion the revision has failed to do.

Respectfully,

Bill Saturley
Mark Puffer
Peter Callaghan
Greg Moffett
Nathan Fennessy

PretiFlaherty
Mailing Address:
P.O. Box 1318
Concord, NH 03302-1318
