

**ATTORNEY GENERAL
DEPARTMENT OF JUSTICE**

33 CAPITOL STREET
CONCORD, NEW HAMPSHIRE 03301-6397

GORDON J. MACDONALD
ATTORNEY GENERAL



JANE E. YOUNG
DEPUTY ATTORNEY GENERAL

N.H. Supreme Court
Advisory Committee on Rules
1 Charles Doe Drive
Concord, NH 03301

December 18, 2020

To the Honorable Advisory Committee on Rules:

Please accept this letter in response to the request for comments issued by the Advisory Committee on Rules ("Committee") regarding the recent amendments to Super. Ct. Civ. R. 12(g) ("Rule 12(g)") governing motions for summary judgment. The Committee requested comments addressing the practical effects of Rule 12(g), whether it should remain in effect, or whether the rule should be amended further. The following reflects the views of the New Hampshire Department of Justice and contains specific input from the undersigned as well as the Transportation & Construction Bureau, including Matthew Broadhead, Jessica King, Christina Wilson and Emily Goering, and the Civil Litigation Unit, including Anthony Galdieri and Samuel Garland.

The Department of Justice ("Department") responds as follows based on the collective experience of many of its civil attorneys: Although Rule 12(g) was designed to create efficiencies to resolve factual disputes, it does not work well in practice. The rule should not remain in effect, and if Rule 12(g) is to remain in effect, its application in a given case should be determined between the parties, as part of the case structuring process, with the option for the court to impose its application if the court believes it will be useful.

In support of this request, the Department states the following:

- Rule 12(g) is not written to reflect the needs or realities of multi-defendant or complex litigation. In the Department's experience, serious logistical and substantive issues arise when responding to multiple simultaneous motions for summary judgment—in the same matter—which contain multiple Statements of Material Fact ("SOMF"). This proves to be a drain on resources, it confuses the issues with multiple statements of the same or similar facts, and attorneys for all parties are required to duplicate efforts in responding to multiple SOMFs.

- Much like findings of fact and rulings of law, SOMFs are frequently misused. They often advance legal conclusions and are laden with characterization. Sometimes SOMFs are populated with citations to material that is inadmissible at trial and therefore not useable on summary judgment. Ultimately, the misuse of SOMFs makes crafting a response difficult and renders the SOMF unhelpful.
- SOMFs are not required in cases presenting pure questions of law. Nonetheless, Rule 12(g) requires a SOMF in every case and holds out as a sanction the potential for outright denial of the motion for summary judgment if a SOMF does not accompany it. That makes little sense and is problematic.
- Rule 12(g) does not account for unrepresented parties, especially in the context of inmate litigation. The exchange of electronic word documents is difficult in *pro se* matters. This exchange is impossible where the opposing party is incarcerated. Matters where one or more parties are incarcerated should be automatically exempt from the rule. The Committee should also consider automatically exempting *pro se* matters from the rule, as additional rules only make it more difficult for *pro se* individuals to navigate the court system and *pro se* parties are more likely to misunderstand the rule and its operation and utilize it improperly.
- Rule 12(g) limits the ability of parties to meaningfully respond to opponents' SOMF. The rule states that "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. ... 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." Sup. Ct. Civ. R. 12(g)(3)(a) (emphasis added). Thus, the parties are limited to either disputing the fact in question or admitting it. However, the realities of litigation reflect a need for broader responses. For example, many facts are irrelevant, require context, or must only be partially disputed. Litigants require broader options than "deny" or "admit." The narrow rule creates a situation where parties deny facts purely on the basis of its characterization. This results in the appearance of disputed facts, when in reality the parties only dispute the phrasing of the fact.
- Pursuant to Rule 12(g)(4), the moving party's response to the non-moving party's SOMF is due 20 days after the non-moving party files an additional SOMF and Objection. However, the moving party's Reply to the Objection to Motion for Summary Judgment is due only 10 days after filing. Sup. Ct. Civ. R. 13A. This creates a peculiar multi-deadline situation for what should be a single responsive filing, especially where the Reply may be dependent upon the response to the SOMF.
- There exists disagreement as to the ability of the moving party to offer evidence to dispute additional facts offered by the objecting party. For example, Defendant Corporation A files for summary judgment and submits its SOMF. Then Plaintiff B files its objection and response to the SOMF, adding its own facts. Defendant Corporation A

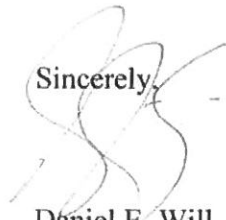
wishes to offer evidence to dispute Plaintiff B's additional facts, however, it is unclear in the rule whether Corporation A is permitted to introduce this evidence.

While the above particulars are concerning, in certain cases where counsel are experienced and enjoy a good, cooperative working relationship, the Department understands the potential benefits of Rule 12(g). In the vast majority of cases the Department encounters, however, the rule is unhelpful, burdens limited resources, and creates more problems, ambiguities, and difficulties in summary judgment than it solves. Notably, the Local Rules Subcommittee at the United States District Court for the District of New Hampshire recommended rejecting a proposal to amend the Local Rules to include a process similar to Rule 12(g) based on many of the concerns identified above. The Federal Court Advisory Committee adopted that recommendation, while at the same time creating a study group to determine how the summary judgment process might be improved in certain categories of cases. The Department requests that this Committee follow suit and reject Rule 12(g).

If the Committee is not inclined to reject the rule outright, the Department recommends that it instead make Rule 12(g) an optional practice by permitting: (1) parties to opt into Rule 12(g) during the case structuring process; or (2) a judge to impose the requirements of Rule 12(g) during the case structuring process if the judge believes the case and its resolution would benefit from such a procedure. This approach grants Rule 12(g) the flexibility to be utilized to the fullest extent by litigants with the need for the rule and judges who see value in its application, while also recognizing that Rule 12(g) is not useable, practicable, or valuable in other types of cases or circumstances.

Thank you for your consideration of the above comments, and if you have any questions, please do not hesitate to reach out.

Sincerely,

A handwritten signature in dark ink, appearing to be 'D. Will', written over the word 'Sincerely,'.

Daniel E. Will
Solicitor General
New Hampshire Department of Justice