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Sent Via E-Mail

October 5, 2018

Lawcourt.clerk@courts.maine.gov

Matthew Pollack, Executive Clerk
Maine Supreme Judicial Court
205 Newbury Street, Room 139
Portland, Maine 04112-0368

RE: ***Civil Justice Reform for Maine's Courts***

Dear Matt:

The Court has asked for comments regarding its proposals for civil justice reform. First, I have been trying cases in the Maine Courts, and other courts, for more than thirty years. During that time, I have tried well more than a hundred jury cases and hundreds to thousands of other litigated matters.

Before writing this letter, I have spoken to many of my colleagues who do, on a full-time basis, civil cases in the Superior and District Courts. They included plaintiff's attorneys and defense attorneys. I actually spoke to more plaintiff's attorneys than I did defense attorneys. It is my understanding that the Maine Trial Lawyers Association will be providing the Court with comments, but I wanted to provide my own.

First, the Court's stated goal for the just, speedy and inexpensive resolution of civil cases is laudatory. My clients, as well as the clients of other attorneys, share that stated goal. However, the institution of a variety of "reforms" appears to be a solution in search of a problem.

More than a decade ago, this Court instituted a mandatory mediation process. From all that I have seen, that mandatory mediation process has been a great success. In turn, throughout the nation, many have undertaken mediation and voluntary resolution processes prior to jury trials. Concern has arisen that civil jury trials have decreased

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substantially. That, of course, is true. However, the reason for their decrease is that both plaintiffs and defendants prefer the certainty of non-jury trials to the uncertainty of juries and jury decisions. Personally, I both trust and like the jury process system. Its function is essential to the proper operation of a civil society. In Maine, access to a civil jury trial is much easier than in other states in which I have practiced (see especially Massachusetts and Connecticut) and I don't remember ever hearing a plaintiff or a defendant complain that they could not get a jury trial if they wanted one.

I understand that the National Center for State Courts has set up a test framework and that efforts in Maryland, New Jersey, Minnesota, New York, Texas and Utah have been undertaken. None of those states are Maine. Maine is a smaller, much more rural state, and we are at the disability of not having even twentieth century computer systems for our clerks and staff. The process the Court has proposed will overwhelm the judicial staff. Additionally, a proposal which, fundamentally, relies upon more supervision from already overburdened Superior Court Justices is doomed to fail. The Superior Court Justices I deal with every day are extraordinary. They take home more work than they can possibly do during the day. They are confronted with aging courthouses, lack of staff, and generally outdated and antiquated courthouses. Through all of this, they work, tirelessly, to deliver justice. This proposal will leave them with an inability to deliver justice.

My understanding from talking to others is that there was a committee that dealt with adopting these potential new rules. There has been no transparency regarding that committee despite requests. No one knows who was on the committee, what the committee decided or whether there were any dissents. All of us were simply presented with this fait accompli. In speaking with members of the Civil Rules Committee, as well as several Superior Court Justices, none believe that this system can work. I have no doubt, given the size of the state, that this information has been given to the Supreme Court. I am hoping that with the comments that I understand are being delivered to the Court, the Court will understand that this process, as proposed, cannot succeed.

I am in favor of changing many of the rules of discovery to match up with the federal rules. Proportionality has to become part of the discovery process. Too often both sides abuse the discovery process and the Superior Court Justices are restricted from pointing to rules regarding proportional discovery. That should be the first rule change. Next, asking for ADR to be earlier in the process, when no one has dug into the facts of

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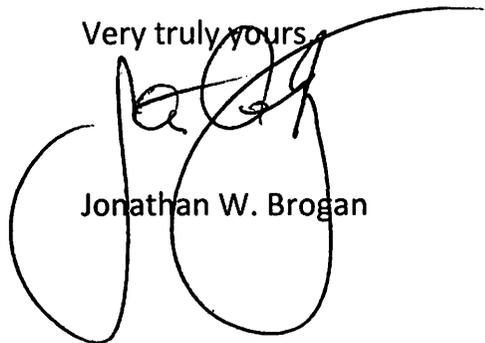
the case or the potential for resolution, makes the process worse not better. Finally, arbitrarily asking Judges to enforce strict guidelines on simple requests for extensions mean that either less justice will be delivered or both sides will present a worse case to a jury. Stating that continuances “are available only in exceptional circumstances” means that the Justices will be restricted, by Rule 40, to responding to actual day-to-day problems of litigants and their lawyers.

Speaking as a very busy trial lawyer, I hope the Court understands the difficulty associated with timelines that are essentially cast in stone. The life of any trial lawyer is difficult and stressful. There are numerous articles written and much is said about the work we trial lawyers undertake and the effect it has on our personal lives and families. That effect is only multiplied by timelines that Superior Court Justices are directed to enforce without the ability to use the discretion that they accumulated through years of practice as lawyers and judges.

At every seminar I attend in Maine, involving the judiciary on both the state and federal level, it is noted that the Maine bar is extraordinary. I agree. Part of the extraordinary nature of the Maine bar is that they understand each other’s potential problems and get along with each other so that we don’t have to involve the Court in disputes about timelines, designations, etc. Certainly some fail to have this collegiality. But it is a hallmark of the Maine bar and this proposal seems to fly in the face of all of the praise that the Courts have given Maine lawyers over the last thirty years. Please don’t create a system that is worse than the system we already use.

I hope if you have any questions or concerns, you will contact me, or if the Court has any questions or concerns that I can answer, in person, that they will contact me as well. Thank you.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Jonathan W. Brogan', with a long horizontal flourish extending to the right.

Jonathan W. Brogan

JWB/etr