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By email only to: lawcourt.clerk@couts.maine.gov

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

RE: Civil Justice Reform for Maine's Court/Proposed Rule Changes

Dear Matt:

Attached please find my comments on the proposal to adopt civil justice reform in Maine resulting in numerous changes to the Maine Rules of Civil Procedures.

I am submitting these comments as a member of the Maine Bar, having practiced law in Maine since 1987. Since June, 2004, my practice has been predominantly representing either injured parties or Defendants who were insured by liability insurance, in the Maine Superior Court. Since February of 2016, I have tried nine jury cases in five different counties to verdict. I currently have over thirty civil cases pending in numerous counties. My comments are based upon my first-hand experience with the proposed rules that are subject to amendments and my comments are supported by my first-hand experience.

Thank you for the opportunity to provide this information.

Sincerely,

Harry B. Center, II, Esq.

HBC/mab

Comments on the Proposed Changes to the Maine Rules of Civil Procedure

Initially, I wish to state my concern with the proposed amendment's summary which states that "we know the following". We do not all "know" or agree that civil process costs too much and takes too long. From the first time I stepped foot in a courtroom in Maine, as a law student intern in 1986, I was advised and taught that Maine Attorneys behave respectfully and cooperatively with each other. There are fifty different states as well a federal court system and all are unique. Perceived issues with civil litigation in other states do not translate into the need for reform in Maine.

My first-hand, extensive experience with the Maine Rules of Civil Procedure as well as having a law practice consisting primarily of initiating lawsuits in the Superior Court and bringing them to completion either through settlement or verdict leads me to observe that the current problems with civil litigation in Maine are separate and independent from the majority of the proposed changes in this proposal. To the extent that civil litigation takes too long in Maine the issue has absolutely nothing to do with the existing rules and how attorneys practice within them. A lack of judicial resources, court facilities, and the ability to have cases heard on the civil docket, because most of the sixteen (16) counties are dealing with an extremely crowded and extensive criminal docket is why civil cases in Maine take too long.

Rule 16B

When I began practicing in 1987, civil litigation in the Superior Court, had no formal alternative dispute process. Meaningful settlement discussions did not occur until a case was placed on a trial list. The implementation of Rule 16B has drastically reduced the number of cases that go to trial. My personal, first-hand experience is that the majority of litigants are pleased and satisfied with resolving their cases at mediation. Mediation is not a trial. In my opinion it is not an opportunity for persuasion of the opposing party, but rather conciliation and an explanation of all issues so that the parties may attempt to reach a middle ground for settlement. Therefore, any rules which attempt to formalize the mediation process in my view will have a chilling effect on its use. The most effective mediations are held when all parties have all the information necessary to properly assess the strengths and weaknesses of their case. It is a serious mistake to attempt to schedule mediation sooner in the litigation process. I have recently been extremely disappointed to receive notices of fines and sanctions from one particular county, if the parties have not completed or notified the court of the ADR process within days of the deadline. In the remaining fifteen (15) counties, cases linger for literally years before they are placed on a trial list at the expiration of discovery. In some counties cases wait up to three years after an unsuccessful mediation. In the absence of intentional delay tactics, the rules should provide that prior to a case being scheduled for a trial management conference they shall have either completed ADR or otherwise addressed the rules as to why the case has not gone to some type of mediation. Efforts to force earlier deadlines into the process only hinder the prospect of having a meaningful mediation.

I urge that Rulel 6B(f)(i) "individual parties" be amended to add a paragraph or phrase which allows insured parties, usually defendants, to be excused from attending mediation. In the majority of personal injury claims, the defendant is of absolutely no benefit to be present at the

mediation. Often times, the operator of a vehicle which was insured and operated with permission at the time, has long since disappeared. In reality, the defendant is an insurance company handling a claim. On a rare occasion when an insured has been present at mediation, as a well-intended lay person trying to be involved in "their case", it only hinders reaching a settlement which is completely governed by the decisions of an insurance adjuster and the injured person. In practice, we do not force insured parties to appear at these mediations. It makes sense to acknowledge that practice in a rule and allow for excusing insured parties.

The extensive changes set forth in Rule 7(b), should also be utilized to address any issues with mediation, to the extent that one party is intentionally avoiding mediation or otherwise failing in good faith to participate in the ADR process.

Jury Fee Rule 38

The jury fee should not be due until the case is placed on a trial list and a trial management conference is held. The constitutional right to a jury trial should not be treated as a technical deadline where one party missed the filing fee, a constitutional right is extinguished. Since the implementation of the jury fee a number of years ago by an executive branch that was faced with a significant shortfall in the judicial budget, the civil jury fee has at times become a technicality which on occasion denies a citizen's right that was granted by the founding fathers in the constitution. I propose a rule that the jury fee is only due when requested, at the time of trial.

Tracking Rule 16

I generally agree with a concept of tracking different types of cases. As a simple automobile collision case with insurance coverage is drastically different then a complicated medical malpractice case. However, as a matter of practice requiring the parties to attempt to confer prior to a scheduling of management tracts is completely unrealistic. In the context of contentious civil litigation such as boundary disputes, beach access, nuisance claims, large corporate commercial cases and the like, it is completely unrealistic to believe that two parties who are at such a disagreement that they have had to resort to civil litigation, will be able to confer at the outset of the case about extensive issues regarding narrowing issues in dispute, agreeing on stipulations, discovery and settlement positions. With respect to the type of cases I generally handle, insurance carriers are large corporations, big bureaucracies, and rarely are able to provide counsel that they are going to hire with significant information at the outset of a case. On numerous occasions I received panic calls from my colleagues who do a majority of insurance defense work asking for extensions of time to answer complaints, literally asking me what type of case it involved. It would be impossible for me to engage in any type of meaningful discussion with them regarding the actual case at that time.

Perhaps the rule could allow for the plaintiff to provide an indication to what type of tract a case would be, then at the time of filing answers defendants can agree to the tract and the case would proceed accordingly or at that point conference and request court intervention if the parties cannot agree as to what type of case is being presented.

Automatic Disclosures Rule 26A

Having state civil claims follow the federal court practice of initial disclosures is not a completely bad idea. I am in agreement with a rule to limit the number of years for producing prior medical records, and prior earnings if applicable. In my own experience all defense lawyers have been extremely reasonable and understanding with regard to prior medical records. There should be a provision, however, allowing plaintiffs to provide defense with medical authorizations with the accompanying list of professionals, should the plaintiff choose not to incur the cost of obtaining prior records.

To the extent that the Court is compelled to limit the number of interrogatories I don't have a strong opinion. Interrogatories are generally used to produce what is needed to process the case. Regarding limitations on depositions, in my experience those rules are largely ignored. Attorneys agree to depose as many people as necessary in order to discover the case.

An amendment to Rule 26(B)(4) as a result of the initial disclosures could provide an opportunity for a rule clarification regarding expert witnesses. In my experience lawyers agree that following strict expert witness disclosure deadlines is unrealistic. If a case is going to involve retained experts (as opposed to treating medical providers) adequate notice is given and disclosures are made so that discovery depositions may be conducted.

Continuances

The amendments to Rule 40 regarding the assignment for cases provides an opportunity to comment about the issue of continuances. While not subject to an amendment, I remain troubled by Rule 40(C), the last sentence which states that the fact that a continuance motion is unopposed does not assure the relief will be granted. The case belongs to the parties, not the court. If both attorneys and both parties agree that the case is not ready for trial what is the rationale for forcing a dispute to be decided when the parties are either unprepared, unable to present all of their evidence, or for other reasons unable to go forward with trial at that time? I would propose that the rule rather than the exception is that requests for continuances by both parties, for legitimate reasons should be granted in all circumstances absent the Court expressly finding that the reasons are due to some inappropriate action.

80B Case

I have had a municipal practice at various levels from time to time over the years and I have done a number of Rule 80B cases. I am pleased that the rule is amended to place the burden of filing a record on the governmental agency such as the municipalities, zoning board, or board of assessment review rather than requiring most times a pro se citizen to find that they have no judicial review due to their lack of understanding about preparing a record. This is a positive amendment and I strongly urge that it be adopted.

Thank you for the opportunity to comment on these proposed rules.