COMMENTS TO THE PROPOSED AMENDMENT TO THE RULES OF CIVIL PROCEDURE

I. Rule 3

The proposed amendment to Rule 3 would reduce the time in which the served complaint, return of service, and civil case information sheet must be filed with the court from 20 days to 14 days. On average my office receives returns of service from the Sheriffs' offices 10 to 14 days after service of the complaint. I have no reason to believe the experience of my office is unique. A 14 day deadline to file the served complaint and civil case information sheet would be unreasonably short. A 21 day deadline would be far more likely to enable consistent compliance without the need for motions to enlarge the deadline.

II. Rule 7

Proposed Rule 7(b)(A) requires that a party making a "request" under the rules "confer with the opposing party in a good faith effort to resolve by agreement the issues in dispute." In a practice that handles consumer debt collection communicating with an unrepresented party is not always an option. First, pro se litigants often fail to provide proper contact information, including phone numbers. Second, under the Maine and federal Fair Debt Collection Practices Act ("FDCPA") a consumer can demand that a debt collector, which is defined to include attorneys, cease communication with the consumer entirely, or by specified means such as the telephone. 15 U.S.C. §1692c(c); 32 M.R.S. §11012(3). Rule 7 and other proposed Rules, such as Rule 16(e)(2)(C), require conferring with opposing parties but provide no guidance for what to do when such communication is not possible or barred by statute. Guidance in the Rules or the Notes, for how to handle such a common situations should be provided reduce problems in the future.

III. Rule 16

Proposed Rule 16(a)(1) assigns all collection actions to Track A, which allows for "no discovery except upon order of the court and good cause shown." The Rule and Notes give no indication as to what constitutes "good cause" for allowing discovery. I have been litigating collection actions since 2005 in the Maine District and Superior courts. In my practice if a defendant files an answer disputing the action I, as a matter of course, I serve discovery. This allows me to properly prepare for a dispositive motion or trial by determining the nature of the dispute, the facts that are contested, and the facts that are not. I have found discovery to be a vital and necessary tool to properly litigate cases, including collection actions. Rule 16 should not deprive litigants in collections actions of the right to pursue discovery barring permission from the court without providing guidance about under what circumstances that permission may be granted.

Likewise, proposed Rule 16(b)(c) indicates that a case may be reassigned to a different track "for good cause shown." Again, the Rule itself and the Notes provide no guidance as to what a showing of "good cause" would entail. Such guidance should be provided given the novel nature of these proposed amendments.

IV. Rule 16A

Proposed Rule 16(b)(4) requires that the parties, not later than 7 days before a pretrial conference, prepare and serve pretrial memorandum including "the names and addresses of all witnesses the party intends to call at trial." For collection actions, and other types of proceedings, a party may intend to call a business records witness, who may be one of a pool of

qualified employees. In such matters the identity of the particular witness who will testify at trial may not be available until after the pretrial conference. An exception for such records witnesses, or guidance in the Notes for how to handle such situations should be included in the amended Rules.

V. Rule 16B

Proposed Rule 16B(a)(1) requires that an ADR conference be scheduled within 42 days after entry of the Rule 16 scheduling order and held within 91 days after entry. In my experience, actions filed in the Superior Court in which one of the litigants is unrepresented are very difficult to successfully schedule for an ADR conference. To resolve this issue, guidance in Rule 16 itself, or the Notes, should be included for handling such situations where communication with an unrepresented party is limited or a party does not cooperate in the scheduling of the ADR conference.

VI. Rule 36

Proposed Rule 36 eliminates all requests for admissions except for those as to "the genuineness of any relevant documents" without court permission. No standard or guidance is provided in the Rule, or the Notes, as to the circumstances under which requests may be granted or denied. Additionally, the Rule does not allow admissions to be served in Track A cases and goes on to state that no requests for admissions "may be served in debt buyer collection actions described in Rule 80N."

Requests for admissions, when utilized correctly, can be a simple and efficient method of discovery. Admissions allow parties to simplify the process of proving the required elements of

a case and narrow the issues for trial. Admissions can also be a helpful evidence to support a motion for summary judgment. Admissions are an inexpensive and easy method to conclusively establish facts in an action, not just the genuineness of documents.

Rule 36 should not be modified to curtail a tool that allows parties to easily, inexpensively, and efficiently, reduce the issues required for a dispositive motion or to be proved at trial. Additionally, there is no justification for depriving parties involved in debt buyer actions from utilizing admissions as opposed to other categories.

VII. Rule 55

Proposed Rule 55(a) states that "the clerk shall enter the party's default" when a party fails to plead or defend without waiting for a request by the opposing party. Thereafter, the clerk shall send a written notice that the matter will be dismissed if no further action is taken within 28 days. In my practice I am frequently contacted by attorneys and unrepresented parties asking that I not default them due to a pending bankruptcy filing, to allow a settlement to be reached without entry of judgment, or other appropriate reasons for delay. I have found such arrangements to be a convenient means to give the other party the needed time without wasting the court's time with a motion to enlarge the answer deadline. The strict, and short, time limits of Rule 55, as proposed, will eliminate this efficient and informal practice. This could be avoided by a longer time period before dismissal or additional time before sending written notice to the party bringing the claim.

VIII. Rule 56

Proposed Rule 56(b) makes motions for summary judgment available to Track A cases and credit card, student loan, and debt buyer collection actions only upon request and prior approval of the court. No standard or guidance is provided in the proposed Rule, or in the Notes, for when such approval may be allowed or denied. Summary judgment is not a extreme remedy. Curtis v. Porter, 2001 ME 158, ¶ 7, 784 A.2d 18. It is a procedural device used to obtain judicial resolution on those matters which may be decided without fact-finding. Id. It is an appropriate practice encouraged in most litigated cases in order to effectuate policies of judicial economy. Guardianship of Jo Ann L., 2004 ME 68, ¶ 11, 847 A.2d 415. Rule 56 should continue to allow all cases to use the tool of summary judgment motions.

IX. Rule 80N

Proposed Rule 80N applies to all collection actions brought to collect credit card, student loan debt, and all debt buyer actions. As a preliminary matter, the proposed rule seems to overlook that credit cards are frequently issued to businesses and that debts owed by commercial entities are sold to debt buyers. Such cases should not simply be lumped in with consumer matters as there is a higher likelihood the party alleged to owe money is represented by counsel and that the issues are more complicated.

As proposed Rule 80N(b)(1) includes "Information Required" to be alleged in the complaint for collection actions. The language appears to be taken directly from the provisions of the Maine FDCPA concerning debt buyer collection actions. 32 M.R.S §§ 11013, 11019. The "Information Required" is, therefore, focused entirely on bought debt and debt buyers. As a result it should not be a requirement for credit card or student loan cases that are not debt buyer actions. For example, requirements for naming the original creditor and current owner are

nonsensical when there is no debt buyer. To attempt to comply with when the issuer of the credit card account or student loan is the plaintiff would be unnecessary and confusing.

Other items of the "Information Required" are also problematic. This includes subsection (C) which requires the "principal amount due at charge-off." This provision is no longer consistent with Title 32, section 11013(9)(D), which has been changed to simply "amount due at charge off." The proposed Rule should be amended to either reflect the current language of the Maine FDCPA or simply require compliance with the provisions of that statute that concern debt buyer actions.

Subsection (K) requiring a statement that the cause of action is filed within the statute of limitations is unnecessary. By filing an action the party bringing the lawsuit is, by that act, asserting that the statute of limitations has not expired.

Subsection (L) is particularly troubling. It requires, if the plaintiff is a debt buyer, that the "original creditor's account number" be provided in "a non-public affidavit attached to the copy of the complaint served on the creditor." No definition of what a "non-public affidavit" is, nor what it must include, is provided in the Rules or Notes. Additionally, it is typically the creditor who is bringing suit in such cases, therefore, no complaint is "served on the creditor." It makes far more sense to simply eliminate this provision or require that the last 4 digits of the account number be provided in the complaint, which complies with federal law.

Proposed Rule 80N should eliminate the "Required Information" section as unnecessary in light of the requirements placed on debt buyer actions placed in the Maine FDCPA or be redrafted to apply to credit card and student loan actions. As currently drafted the "Required Information" is confusing as it was intendedto deal with debt buyers.

Proposed Rule 80N(b)(2)(A) and (B) require a "copy of a form answer" and "collection action summons" to be served in addition to the complaint in any credit card, student loan, or debt buyer collection action. No copy of the form answer or collection action summons has been provided to date for review. It is not possible to evaluate this proposed rule change without the form answer and collection action summons to examine. Until the form answer and collection action summons is available for review and comment, this Rule should not be amended to include these provisions.

Subsection (c)(2) indicates that if the filings of for a collection action are satisfied "the case shall proceed as a Track B civil action." This is inconsistent with the proposed amendments to other rules, including Rules 7 and 16, which indicate collection actions would be assigned to Track A.

Subsection (f) allows the court to dismiss an action "with or without prejudice" upon a determination that "the plaintiff did not comply with the requirements of this rule or other applicable laws." No guidance is provided as to when dismissal will be appropriate with prejudice. It is unfair that a mere clerical error in a tort case will not result in dismissal with prejudice, but a similar unintentional or non-material error could result in the punishment of dismissal with prejudice in a collection action.

Kate E. Conley, Esq.
Ratchford Law Group, P.C.
PMB 815, P.O. Box 9715
Portland, ME 04104
(207) 560-5510, x401
kconley@ratchfordlawgroup.com