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Maine Supreme Judicial Court
205 Newbury Street, Room 139
Portland, Maine 04112-0368

RE: Proposed Changes to Civil Rules

Dear Chief Justice and Members of the Court:

I am very concerned about several of the proposed changes to the Civil Rules.

My experience for several years has been that many members of the bar just ignore discovery requests and get away with it. Sanctions don't happen unless there have first been multiple conferences, and blatant disregard of discovery orders. It usually does not go that far, but the delays still add up.

It seems to me that discovery responses in civil cases have very little priority with busy attorneys. As a result of that, or perhaps intentional tactics to slow down the litigation, responses hardly ever are made within the thirty days the rules require. When combined with the requirement that the lawyer seeking discovery must make an informal attempt to get agreement with opposing counsel (through phone calls or letters, including a face to face conference requirement), it can easily take three months just to get a discovery conference and then an order requiring answers to interrogatives or document production. Even then such an order often grants several more weeks for compliance. Just setting up the communications necessary to discuss the discovery issues can be delayed if calls and letters are not returned. Many times after an order gets entered the other lawyer finally produces a response, but often the response is incomplete or evasive, and may trigger a need for follow-up discovery.

I think one positive change in the rules you could make would be to eliminate the requirement of an informal attempt to resolve the issues. Just allowing a request for a Rule 26 discovery conference to be made by letter as soon as no

timely discovery response has been made, or as soon as a discovery response has been made that is believed to be non-responsive or evasive.

The proposed deadlines also do not take into account the idea that a discovery strategy may involve seeking information in distinct sequential steps and seems to assume that all discovery requests can be made at the same time. Often documents need to be requested first, followed by interrogatories inquiring about those documents after they are (finally) received, and then perhaps requests for admissions or depositions. If delay by opposing counsel is used at each stage, the process can take more than a year, which is not the fault of the lawyer seeking the discovery, or his client.

All of these problems may drive the parties to conduct more depositions, where evasions are less effective, but doing so drives up costs of litigation, which is not the desired result.

The rules obviously need to provide immediate and effective sanctions for failure to make requested responses. (The rules already provide a protective order remedy if the discovery requests are unreasonably burdensome for a particular case.)

Setting strict discovery deadlines as the proposed rules attempt to do effectively hamstrings the lawyer seeking discovery. It requires him/her to either give up the discovery requests or to file one or more motions to extend all the scheduling deadlines because of non-responsiveness. This puts the costs on the client seeking discovery when it is the non-responsive party who is causing the delay, and getting away with it without cost. If a lawyer does not want to seek any discovery, a short discovery time period should affect only him/her, but there should be a longer, more flexible time period for the lawyer who can demonstrate that he/she is diligently engaged in the discovery process.

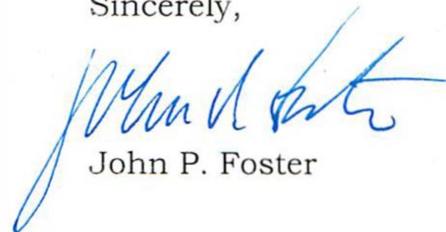
Additionally, changing Rule 36 regarding requests for admissions goes in exactly the wrong direction. That rule is the one place where a failure to respond results in automatic admissions. That is one of the few tools that the attorney requesting information can employ when an opposing attorney ignores discovery deadlines and does not even bother to file objections. Therefore I believe that there is not any good reason to limit the use of that rule only to establish that documents are genuine.

With regard to the proposed time limits and page limits regarding motions for summary judgment, I think they are too short and not warranted. The changes assume that a lawyer with a busy practice, perhaps without associates or

researchers, can nonetheless write motions as important as Rule 56 motions, and fully comply with the detailed requirements of that Rule, within a very short time. I think clients who have approved the use of a summary judgment motion in their case understand that doing it right is much more important than doing it fast. That also means that not being able to make all available arguments because of page limitations is not in the litigants' interest.

I understand the forces that drive the push for quicker and cheaper resolutions of cases, but overall the effect of the proposed changes just drives disputes into what looks more and more like Small Claims Court. I think we should avoid that impairment to the process.

Sincerely,



John P. Foster

JPF/rs

cc: Maine Trial Lawyers Association