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

Re: The Proposed Amendments to the Maine Rules of Civil Procedure

Dear Mr. Pollack:

In response to the Court's request for comment on the proposed amendments to the Maine Rules of Civil Procedure, I have set forth below some issues that I respectfully request that the Court consider. If it's helpful for the Court to know my background, I have practiced solely civil litigation for 30 years; I handle both plaintiff's cases and defense cases, including cases involving personal injury, claims of professional negligence, product liability, and construction claims, to name just a few areas where I work extensively. I served on the Advisory Committee on the Maine Rules of Civil Procedure for three 3-year terms; I chaired that Committee for most of those 9 years. I also have a very active mediation and arbitration practice. I regularly practice in most of Maine's 16 counties, but am most active in Cumberland, York, Androscoggin, Kennebec, Penobscot and Oxford counties.

My comments appear in numeric order, by rule:

I am concerned about **Rule 7(f)**, which proposes reducing the page limit for memoranda of law for nondispositive motions from 10 pages to 7 pages, for dispositive motions from 20 pages to 14 pages, and for replies from 7 pages to 5 pages. The current page limits are already quite short and it is often difficult to fully brief the legal arguments within those limits. I respectfully suggest that the court not adopt these new, shorter page limits.

Proposed changes to **Rule 15** gives only 7 days to respond. That is a very short time. If an attorney is in trial or on vacation the week the amended pleading is served, she cannot timely respond. If the Court's desire is to have timelines be in 7-day increments, I respectfully suggest changing the time limit for a response to 14 days.

Rule 16(d)(5) says: "The court may expressly order that the costs of sanctions be borne by counsel and not paid by counsel's client." Does that mean that the judge is going to require the lawyer to reveal confidential information about communications between her and her client?

How else will the court be able to determine whether the attorney or that attorney's client has to pay the sanctions?

Rule 16(e)(2)(C) and (3)(B) require that the parties confer about a number of issues at the very beginning of a case. How is a defendant who may know little or nothing about a case supposed to intelligently discuss things like settlement, alternative dispute resolution, narrowing the legal issues, stipulations, dispositive motions, and the like? While plaintiff's attorneys often have cases for years before suit is filed, it's not uncommon for a defendant to know nothing about a case until well after suit is filed and some discovery has occurred. Similarly, without any information from the defendant, a plaintiff may be unaware of what will be disputed. But the proposed rule requires this conference before a scheduling conference even occurs. Then, at the initial conference, the attorneys are required to discuss with the Court narrowing the issues. Many times the lawyers for both parties cannot know early on what the issues are. For example, if a defense attorney does not even know the damages claimed, how can she possibly advise the court whether the damages are contested? Cases are dynamic and follow the evidence; without any evidence, how does the Court propose that these topics be seriously discussed?

Rule 16A requires pretrial memoranda, even in Track B cases like motor vehicle accident cases. This seems unnecessary. If the Court is concerned about streamlining the process and reducing costs, I respectfully suggest that the Court make pretrial memoranda optional – at least for Track B cases.

Also, the backlog of civil cases seems to be quite large in some counties. These proposed changes require additional court conferences that were not previously held. Is it realistic for the Court to find judicial time to conduct these conferences? Given the level of work that the judges are currently handling, will this just lead to more delays in civil proceedings because it will take so much additional judge time to conduct these conferences?

The proposed changes to **Rule 16B** are concerning because they require mediation so early in the process that it is much less likely to be successful. In my work as both a civil trial lawyer and a mediator who has resolved hundreds of cases for others over the years, I have seen that if the parties come to the negotiating table too early, the case is much less likely to settle. Lawyers are reluctant to advise their clients about settlement and likelihood of success at trial until they are aware of the evidence that will likely be presented at trial. I hope that the Court will not adopt these changes as it is likely to make the costs and effort put into mediation much less likely to resolve the cases. I frequently have parties postpone mediations under the current rules because they have not had time to fairly evaluate the case. Defendants will not offer money when they feel more information to evaluate a claim. A frequent reason this occurs in personal injury cases is the delay in obtaining medical records or testimony from experts and treating physicians.

I'm also concerned about the shortened time line for reporting on the results of the mediation. Often, in the 10 days following the mediation, the parties resolve the cases – either because of further involvement by me or another mediator, further discussion directly among the parties, or the resolution of a lien issue. If the Court's interest is in keeping all time limits in 7-day increments, I respectfully suggest enlarging the time to report to 14 days, not shortening the time limit.

I endorse the change that indicates that only where a corporation's interests are not represented by an insurer must a corporate representative attend the ADR in person. I respectfully suggest a similar exception for the attendance of individual defendants. Requiring a defendant to miss a day of work to attend a mediation where he has no say in whether the case resolves or at what amount it resolves does not advance the process; often, such attendance makes the matter much less likely to settle. I've mediated many cases where the animosity between the parties either gets in the way of a resolution or convinces the insurer not to resolve the case.

New **Rule 26A(b)(1)** regarding the deadline for plaintiffs to file initial disclosures does not address what happens when there is more than one defendant. I respectfully suggest that the rule state that the time for filing is triggered by the last defendant's answer to the complaint.

Given the new requirement of initial disclosures, I am not concerned about the limits on the number of interrogatories and document requests that can be served on another party, and I support the elimination of the blanket right to serve requests for admissions on non-documentary issues. I have seen the present unlimited right to serve any number of requests for admissions abused on quite a few occasions (in one case, for example, I represented a husband and wife who were each served with 180 requests for admissions, which were not identical). I am happy to see the Court effectively end that practice.

I respectfully suggest that the Court also limit the areas of inquiry that can be included in notices under the current Rule 30(b)(6) and the proposed new **Rule 30(c)(7)**. The lack of a limit on the areas of inquiry has led to some abuse. For example, I was recently served with a corporate deposition notice listing more than 60 areas of inquiry. That required the company to proffer many different corporate deponents, and enabled the opposing party to avoid the limits on the number of depositions that can be taken. This is not uncommon in practice where a corporation is a named party.

The proposed new **Rule 40(b)** is concerning because it states that trials will be held in other counties to accommodate the court's scheduling issues, without requiring agreement of the parties. This is concerning on several levels. First, it will be more difficult for witnesses to travel to a different county to testify. If a witness in a York County case is required to travel to Bangor or Machias to testify, that is obviously problematic and greatly increases the costs and

inconvenience borne by the witness. It may also mean that the witness is outside the subpoena power of the party who calls the witness, to compel him to appear. Second, juries in different counties see cases differently and value them differently; not knowing the venue of a case has a significant impact on how each side evaluates and tries the case.

Rule 41(a)(1) states with respect to voluntary dismissal by stipulation: "A dismissal under this paragraph may be as to one or more, but fewer than all claims, but not as to fewer than all of the plaintiffs or defendants." I have never understood why the parties have to file a motion for dismissal of fewer than all defendants. This is not required by the federal court and seems to be unnecessary. If all the parties agree to the dismissal of one of several defendants, or one of several plaintiffs, there appears to be no reason that a motion would need to be filed. In practice, the motion is granted as a matter of course (but it obviously takes time to prepare and file it and for the court to act on it). I respectfully suggest that the Court remove this language from Rule 41(a)(1).

I am very happy to see the proposed new **Rule 45** which places the burden more on the litigants seeking the information than the current rule which requires the person in possession of the information to bear the costs of the production, including the need to file a motion for protection where known privileged information is sought.

Proposed **Rule 56(b)(3)(1)** pertains to summary judgment on foreclosure actions and requires that the moving party establish that the service and notice requirements of 14 M.R.S. § 6111 have been strictly performed. Because that statute does not apply to all foreclosure actions, but only those involving foreclosures on residential properties where the debtor is living in the mortgaged property as her primary residence, I respectfully suggest that the Court revise this provision to state that the Court needs to determine either that the service and notice requirements of 14 M.R.S. § 6111 have been strictly performed or are not applicable.

Rule 56(e) significantly curtails the length of summary judgment memoranda in Track B cases. I respectfully urge the court to keep the current 20-page limit. It is already difficult to address the legal issues raised, for example, by a multi-count complaint in a 20-page memorandum. Reducing that page limit by nearly one-third will make it much more difficult to both seek and oppose summary judgment. I'm also concerned about the proposed limit on the number of facts that can be included in a statement of material facts. For example, unless all employment law cases will be placed on Track C, the limit to 25 facts is likely to effectively prevent motions for summary judgment in those cases.

Thank you for your consideration of my concerns and insights into the proposed new rules.

Very truly yours,

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