David C. King, Esq.
84 Harlow Street
Bangor, Maine 04401
Tel: (207) 947-4501

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Matt Pollack, Esq.
Clerk of the Law Court and
Reporter of Decisions
Maine Supreme Judicial Court
205 Newbury Street, Room 139
Portland, ME 04112-0368

Dear Mr. Pollack:

I write to express concern regarding certain of the court's Proposed Amendments to the Maine Rules of Civil Procedure.

Rule 16B.

I have an active civil practice and represent parties at mediations on a regular basis. In addition, I act as mediator in approximately 25 to 30 cases each year. I believe reducing the time for noticing and conducting mediation is unrealistic and counterproductive. In order for mediation to be meaningful, the defendants must have the opportunity to conduct written discovery as well as the deposition of at least the plaintiff, and then to report on this activity to any insurance carrier involved for its evaluation process. It is often difficult to complete these activities within the 120 days provided by the current Rule.

Plaintiffs often have difficulty in obtaining information from third-parties asserting lien, subrogation, or reimbursement claims and negotiating resolution of these claims prior to mediation under the present deadline. Unless discovery, evaluation, and negotiation of these claims can be completed prior to mediation, the mediation process is at least made problematic, and in many cases doomed to failure. Pressure under the present Rule is relieved somewhat by the automatic extension of time to 180 days to complete the ADR process. Elimination of that automatic extension provision is also likely to create impediments to early resolution of litigation.

I anticipate problems with the proposed requirement that claims adjusters have "full settlement authority." That term is not defined, and some may construe it to require authority up to the policy limits which is unrealistic in many cases. "Reasonable settlement authority" under the circumstances of the case would be a more realistic requirement.

Requiring notice to the court in a public filing including "all the terms of the settlement" seems unnecessary. I suppose this is meant to aid the court in the event of a motion to enforce settlement achieved at mediation. However, virtually every mediation is concluded with a written agreement signed by all parties setting forth the terms of the settlement. Requiring the terms to be filed in court may be an impediment to settlement by parties who wish to keep the terms of a settlement confidential. As an example, parties in a case settled recently involving a dispute between the sister and daughter of a decedent would not want the terms of the settlement to be available to the public. I also question the need for sanctions to be imposed if the neutral does not file a report with the court within 105 days.

Rule 26, 30(a) and 30(b).

Reducing the time for discovery in Track B cases to six months will also likely create scheduling difficulties. Defendants often do not know what depositions may be necessary until written discovery responses are received from a plaintiff, and possibly not until the plaintiff has been deposed. In practice in this state, it is common for depositions to be taken by agreement of the parties even after the discovery deadline so long as there is no interference with a trial date. However, it appears this practice will be eliminated by Rule 30(a) requiring leave of court for discovery after the deadline. This requirement may erode collegiality among members of the bar, and will likely increase the burden on the clerks and trial judges to some extent if frequent motions to conduct discovery after the discovery deadline by agreement of the parties are required. Scheduling of depositions is frequently delayed awaiting receipt of pre- and post-accident medical records and, on occasion, employment records. I am not confident that the mandatory initial disclosures will cure this problem.

As a practical matter, I do not believe there is any problem with the present limit of five depositions and I do not believe reducing the number from five to four in Track B cases will have any effect of reducing either cost or delay.

Rule 33. In my opinion, reducing the number of interrogatories in Track B cases from 30 to 10 will increase, not decrease, the cost and delay in most civil cases. Interrogatories are an inexpensive method of obtaining facts necessary for the prosecution or defense of civil litigation. As the court is aware, interrogatories can obtain information which may not be readily available at the deposition of a party. It may take some research and investigation to prepare proper interrogatory answers, while there is no such requirement that a deponent undertake any such investigation. In my practice, I do not believe it is burdensome for either plaintiffs or defendants to respond to written interrogatories. Without time for reflection and investigation, it is likely there will be some questions posed at depositions which the deponent reasonably could not be expected to answer in the same detail the deponent could provide in answers to interrogatories. This could prompt the adjournment of the deposition to permit the deponent to obtain the relevant and discoverable information in question. That exercise, of course, would increase both the cost and delay.

Rule 34. I do not believe it will be productive to limit document requests to fifteen in number in Track B cases. In most cases document requests from either the plaintiff or defendant in civil litigation are fairly routine and not burdensome. This proposed amendment limiting the number of requests invites the former annoying practice of attorneys quibbling over whether a document request includes 15 or more than 15 requests. If document requests are oppressive or unreasonable, the court, of course, under the present Rules has the authority to limit those requests.

Rule 36. The proposal to limit requests for admission only to the genuineness of documents is puzzling. I cannot think of an instance in my practice where genuineness or authenticity of documents has been an issue. In my experience I have only seen one set of requests for admissions that was unreasonable. This was in a case involving an automobile accident where liability was admitted and 100 requests for admission were filed. Under the circumstances, the request was unreasonable and out of proportion to the circumstances of the case. However, rather than involve the court in a discovery dispute, the requests were simply responded to mostly without objection. That example is a gross deviation from usual practice and, if requests were deemed overly burdensome, a party could seek relief from the court even under the existing Rules. In my experience, requests for admission are more often used by plaintiffs than defendants for such purposes as establishing the reasonableness, necessity, and causation of medical bills. I am unaware of any good reason to limit such requests.

I appreciate the court's consideration on these comments.

Very truly yours,

DAVID C. KING
DCK/dls