Maine Trial Lawyers Association

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October 5, 2018

Matthew Pollack, Executive Clerk
Maine Supreme Judicial Court
205 Newbury St. #139
Portland, ME 04101-0368

Via email: lawcourt.clerk@courts.maine.gov

Dear Mr. Pollack:

On behalf of the Maine Trial Lawyers Association, please accept this letter as our Association's comments on the following proposed amendments to the Maine Rules of Civil Procedure.

The Maine Trial Lawyers Association is comprised of over 600 members. Our membership consists of attorneys representing both plaintiffs and defendants. We polled our membership and encouraged them to comment directly to you, and many have. The comments below generally represent the view of the MTLA and include input from both defense and plaintiff's lawyers.

During the process of reviewing these rules, several things became clear to us: the process needs more time for comment and there should be a more active role for various stakeholders. We respectfully request additional time to provide comments to the Court regarding these changes to better reflect the viewpoints of our members and practitioners.

We also request that the Court take the proposed rule changes and public comments and convene a group of stakeholders to work through the particulars and develop a final version of the proposed rules. During discussions amongst our board, there were many areas of the proposed rules that devolved into trying to divine the intent of the Court through examination of the proposed language and advisory notes. We strongly feel that if there was a direct line of communication between the Court and the stakeholders, many areas of concern would either vanish or be alleviated by a simple clarifying modification to the proposed rules. We believe that without this input, the rules, as proposed, will be ripe for unintended consequences and outcomes that will ultimately require additional amendment, not to mention additional judicial resources.

It is the hope of the Maine Trial Lawyers Association that the comment period and hearing established by the Court is the beginning of an extensive process that will create a dialogue and not the final stages of tweaking these proposals before implementation.

Proposed Rule 16

In general, the Maine Trial Lawyers Association does not object to the differentiated case management into three separate tracks. However, we have deep concerns with the limitations imposed on Track B regarding discovery. Currently, Rule 16 provides that discovery must be

completed within 8 months after the answer is filed. The proposed change to the Rule seeks to shorten discovery to be completed within just 6 months.

Every case is unique. While there are cases in which 6 months would be sufficient for discovery, those cases are the exception. This is true because even a straightforward auto crash case takes upwards of 8 months to: exchange paper discovery, conduct paper discovery follow-up, schedule and conduct fact witness depositions, schedule and conduct ADR, identify experts, and schedule and conduct expert depositions.

Even with the current 8-month rule for discovery, our members routinely request enlargements of time on all types of matters. With the proposed 6-month limitation, the Court will only be bogged down with an influx of these requests. Thus, we propose that the requirement to complete discovery remain at 8 months after the answer is filed.

During the process of reviewing proposed Rule 16 (a) (1) *Track A -Defined Process Track* and the associated proposed Civil Case Information Sheet, an issue arises regarding the intended scope of the requirement that Track A cases be "resolved in an expedited manner with **no discovery** [emphasis added] except upon order of the court for good cause shown." The Proposed Rule is not objected to by our membership regarding matters that involve 17A Settlement of Claim of a Minor, Title 14 Writ of Habeas Corpus (Prisoners), The Transfer of Structured Settlement Payment, 76D Appeal from District Court, Deposition for Use in Foreign Jurisdiction, Foreign Judgment Registration or Enforcement, and Rule 80D Forcible Entry Detainer Appeal of Law matters.

However, the proposed changes to Rule 16 provide that Track A includes such matters as: asset forfeiture, discovery (pre-action), arbitration action, 80B review of final government action, 80C review of final agency action, and 80M medical malpractice screening panel.

It is hard to imagine an asset forfeiture case without discovery regarding the assets of the party whose assets are at issue. Similarly, the very nature of a pre-action discovery matter and an arbitration action matter require discovery to determine the basic, underlying validity of the claim. It is also unlikely that litigants in 80B or 80C matters will proceed without contesting the "no discovery" aspect of Track A. Without further clarification of the proposed rule change, it appears that the Court is inviting a steady stream of motions for discovery, oppositions to such motions, replies to such motions, and hearings on such motions, burdening every Superior Court trial judge to which such matters are assigned.

The classification as Track A for Rule 80M Medical Malpractice Screening Panel matters appears to be in direct conflict with the language of Rule 80M and the statutory language of 24 MRSA §§ 2851, *et seq*. Currently, the Panel Chair "upon application of a party, may permit reasonable discovery." 24MRSA §2852 (6). Presumably, that is because it would be impossible for the Panel to make a determination whether there was "a deviation from the applicable standard of care by the health-care practitioner or health care provider charged with that care" and a finding "whether the acts or omissions complained of proximately caused the injury complained of" and a decision whether there was "any negligence on the part of the patient" that was "equal or greater than the negligence on the part of the practitioner or provider" without medical record discovery, discovery of the factual basis for the care provided by the alleged negligent party, discovery of the facts known to the patient, and discovery of the opinions of expert witnesses. If it is the Court's intent that placement in Track A with "no discovery" for Rule 80M cases radically alter the current force and effect of a finding by a Health Security Act panel, our members would find that a useful clarification.

If, on the other hand, elimination of the HSA finding's evidential impact at trial is the Court's intended effect, the transfer of the discovery process to the post-panel stage may be better understood. Diminishing or eliminating the evidential impact at trial of the HSA Panel's pre-litigation findings (as findings based on no discovery) necessarily alters the purpose of the screening panel process and would potentially also alter the likelihood of early resolution of medical malpractice claims.

Proposed Rule 16A

Proposed Rule 16A seeks to require the parties to provide the Court with a pretrial memorandum in all cases. Under the current rule, the parties often provide the requested information orally to the Court at the pretrial conference. In many cases, the requested information is included in other pleadings, such as in summary judgment or motion in limine memoranda. Requiring this information in a separate document would seem unnecessary. To be sure, there are some cases where a pretrial memorandum would be helpful. In those cases, the Court could order them to be filed. This case by case approach to pretrial memoranda would seem to be a preferred method of giving the Court what it needs while avoiding the filing of unnecessary or redundant pleadings.

Proposed Rule 16B

Under the current Rule, parties are having difficulty meeting the 120-day deadline imposed for ADR; joint written requests to the Court for extensions to 180 days are routine. The amendment shortens the deadline to 91 days and eliminates the ability of the parties to extend that time period by agreement. The Proposed Rule is unrealistic and not likely to increase the likelihood of success at mediation. Rather, the Proposed Rule is likely to increase Court involvement as requests for additional time by motion are likely to become routine. The consensus among the Association and local mediators is that more time rather than less is the desired solution.

Additionally, exempting insured corporate and government agency defendants from required attendance will not advance the likelihood of settlement. Having representatives with knowledge of the subject matter of the dispute in attendance will increase the ability of the parties and the mediator to assess the benefits and risks of settling versus proceeding to trial.

The MTLA objects to the requirement that "all the terms of the settlement" be reported to the Court and incorporated in a Court order. This broad requirement would be at odds with the normal preference of not discussing settlement terms with anyone, other than on a need to know basis. Indeed, many settlement agreements require confidentiality. Moreover, requiring all terms of settlement to be reported to the Court essentially turns the settlement terms into a public record. With electronic filing continuing to play a bigger role in our Courts, we are concerned with the accessibility of settlement terms to the general public.

Proposed Rule 26A

Upon initial review, Proposed Rule 26A seems generally favorable to plaintiffs, as most of the information, calculations, and other documents required would typically already have been obtained for the purposes of settling the case. Thus, when a case is ready to be filed, the plaintiff would likely have no problem meeting the rather quick deadline for filing the initial disclosures. However, from the point of view of our members who are defense counsel, the deadline could put them into a full-fledged scramble as they must rely on the insurer to get them a complete file and to line up the documents and information required. This rule coincides with the proposed new timetable for ADR. Rushing parties through initial disclosures and then ADR will likely prevent a more thorough investigation into each case that is required in order to promote settlement.

The Proposed Rule sets forth a one size fits all approach that is ill-advised. For example, the Proposed Rule would require plaintiffs to produce 10 years of prior medical records. In some cases that requirement may make sense, but in many others, it does not. The decision on how far back to go in a plaintiff's medical records should be made on a case by case basis by the attorneys handling the case. If they cannot agree, then they may seek court intervention. By requiring counsel to supply 10 years of prior medical information in every case, the Court will see a significant surge in motions to protect certain medical information. As drafted, it is unclear if dental, mental health providers, OBGYN records, licensed massage therapists, acupuncturists, and other healing arts records must be included and many cases do not require the disclosure of everything especially if a person is not making a certain type of claim.

Finally, the Proposed Rule seems one sided. If the plaintiff is being asked to disclose previous claims, accidents, and so forth, should not the defendants be required to disclose the same? The MTLA is concerned that the principle of reciprocity is not being required.

In sum, the proposed automatic disclosures would likely generate more unnecessary work for the parties, their counsel, and the Court. The current practice, while not perfect, is preferable.

Proposed Rules 30, 33, 34

The MTLA generally opposes any limitation to the current rules of discovery without further information. It is unclear to us exactly which cases get put into Track B and C, how those cases might be removed, and under what guidelines they are removed from one track to the other. The MTLA could support some limits to discovery depending on how the system of tracks would actually work. For example: in a simple automobile car collision with clear liability and a fixed injury, limited discovery would benefit both sides. However, a premises liability case with a more complicated injury would not benefit. Both of these types of cases might land in Track B. This is an excellent example of the need for more active interaction between the Court and various stakeholders.

Currently, Rules 30, 33, and 34 provide that parties have a limit of 5 depositions, a limit of 30 interrogatories, and no limit on requests for production. The proposed limitations in Track B cases of 4 depositions, 10 interrogatories, and 15 requests for production are arbitrary and unnecessary. Rarely are there situations where the current limitations are abused; many cases are handled well within the limits. However, there are times when particularly complex issues arise that call for the use of all available depositions or interrogatories and more extensive requests for production. These discovery tools serve an important purpose in that they allow our members to simplify the case for trial. If any abuses of the rules do arise, they would be better dealt with on an individual basis. In sum, we would suggest no changes to these rules. If the suggested limits are imposed, the result will likely be a significant increase in the number of motions to allow more depositions, interrogatories, and requests for production.

Proposed Rule 36

The Association opposes Proposed Rule 36 to eliminate requests for admission other than for genuineness of relevant documents without first obtaining Court authorization. Requests for admission are an effective tool to narrow issues at trial and to facilitate proof with respect to remaining trial issues. Requests for admission are useful to establish a multitude of matters, including, but not limited to: criminal history; wage loss; medical bills; repair costs; life expectancy; permanent impairment; weather conditions; municipal, state, and federal regulations and codes; and admissibility of records.

Requests for admission streamline the trial process and save many hours of trial preparation. Limitation on the use of these requests runs counter to the guiding principle of Rule 1 of securing "the just, speedy and inexpensive determination of every action." Requiring Court authorization to serve requests for admission only increases the burden on the Courts.

Proposed Rule 38

The changes to Proposed Rule 38 specify the timeframe that both plaintiffs and defendants must adhere to in order to request a jury trial. Currently, for all cases filed on and after January 1, 2002, the parties look to the scheduling order entered by the Court as to the deadline for filing such a jury trial request. That deadline is usually after the completion of ADR.

Now, under Proposed Rule 38, it is made clear that plaintiffs must file a demand for a jury and pay the $200 fee within 28 days after the filing of the answer. If the plaintiff has not done so and the defendant wishes to have a jury trial, then the defendant must pay within 35 days after the filing of the answer. If the case was filed in District Court and the defendant wished to remove to Superior Court for a jury trial, it is made clear under the proposed amendment that the demand and payment for jury trial must be made no later than 35 days after the due date of the answer and again,

the cost is $200. Essentially, the Proposed Rule seeks to require jury trial demands and payments earlier in the trial process.

The Maine Trial Lawyers Association does not object to the proposed amendment concerning the shortened time limits to demand a jury trial. However, we are concerned with the requirement of a jury fee this early in the trial process. Few cases actually make it to trial. Instead, the majority of cases make an earnest effort to reach settlement by the end of the ADR process. Requiring parties to provide a jury fee before ADR has taken place is misguided and puts an unnecessary cost onto many parties who will never see trial. The current rule provides a more reasonable approach to providing the jury fee when the likelihood of going to trial is much more substantial.

Proposed Rule 56

The Maine Trial Lawyers Association opposes the Proposed Rule 56 as currently drafted. We take the position that a case's assigned track is not an adequate basis upon which to impose shorter deadlines or greater limitations on the content of a motion for summary judgment.

We generally oppose allowing motions for summary judgment to be filed before the close of discovery because discovery tends to create and narrow genuine issues of material fact. To modify the proposal and current rule provisions, we suggest not allowing such a dispositive motion to be filed before the close of discovery unless the movant requests the Court make a finding of an exceptional circumstance and the Court makes such an order. Furthermore, the proposed 14-day post-discovery deadline should be increased to 28 or more days or the Court should revert to the current rule.

Too many motions are filed not on the merits, but to gain a tactical advantage at ADR while the motions are pending. Some litigants will not make serious attempts at settlement until they file motions for summary judgment and/or obtain orders on those motions. Under our proposal, early ADR will at the very least be attempted rather than delayed, which currently happens in a substantial minority of cases.

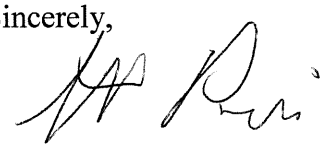
The proposed deadline of 14 days following the close of discovery in Track B cases will be insufficient, in many cases, to permit the thorough research and review of the evidentiary record required to determine whether a motion for summary judgment is appropriate and, if so, to adequately draft such motion and to assemble the necessary supporting evidence. The Proposed Rule, while limiting the time in which a moving party may file a motion for summary judgment, places no similar restriction on the opposing party, who is permitted 21 days to file an opposition regardless of track. The moving party is further disadvantaged by the deadline of 7 days in which to reply to any opposition. The deadline for replying to an opposition in the context of any other motion is 14 days. M.R. Civ. P. 7(e). There is no reason to provide a shorter time for reply in the context of a motion for summary judgment. In this context, a longer deadline would be proper as a reply is likely to be accompanied by an additional statement of material facts and supporting affidavits.

The shorter deadline for Track B cases may encourage the earlier filing of motions for summary judgment, but at a cost. Proposed Rule 56 permits parties to request continuances when such motions are filed before adequate discovery has been completed. The Court may even permit the taking of additional depositions. If motions for summary judgment are filed too early, the Court is likely to see an increase in the number of requests for extensions and/or further discovery. Such requests require judicial resources and attention and are likely to result in unnecessary delay.

Similarly, a case's track may not be a reliable indicator for the appropriate limit on the number of facts that a party may identify in its statement of material facts. Track B includes most tort claims, including products liability cases, automobile cases, general negligence cases, and premises liability cases. Disputes regarding the applicability of insurance coverage to such losses appear to be classified as Track B as well. Even in cases with less-than-catastrophic damages, complex legal and evidentiary issues frequently arise. The limit of 25 facts is too restrictive. A presumptive limit of 50 facts proposed for Track C cases may be more appropriate. Limits based on the number of claims, theories of liability, or parties are another alternative that may more accurately reflect the needs of an individual case.

Thank you for your attention to this matter. Please feel free to contact us if you have any questions regarding these comments.

Sincerely,



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