

Comments on Civil Reform Package
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1. Track for Freedom of Access cases

I would suggest that Freedom of Access cases seeking public records be placed in Track B because 1 MRS § 409 provides that after the agency files its statement of reasons for denial, “the court, after a review with taking of testimony and other evidence as determined necessary,” shall determine whether the denial was justified.

This requires a conference to hear from the parties and to decide whether submission of documents in camera followed by briefing is sufficient or whether an evidentiary hearing is necessary and if so, the scope of that hearing. *See, e.g., Dubois v. Department of Agriculture*, 2018 ME 68 ¶¶ 9-11.

2. Conferences under proposed Rules 16(c), 16(d)(4)

The proposed rules will lead to more conferences – for lawyers who are seeking to change their cases to Track C and for any modifications of the scheduling order. I fear in particular that there will be a multiplicity of requests to move cases from Track B to Track C. Even minor adjustments in scheduling orders now appear to require conferences.

I am not certain there is sufficient judge time to accommodate all the conference requests.

I also think that scheduling those conferences will result in delay. For Rule 26(g) telephonic conferences clerks often offer lawyers time slots – depending on the judge involved – such as “any day this week at 7:45 or 12:15.” Nevertheless, those conferences often do not take place for several weeks because of conflicts in lawyers’ schedules. If scheduling issues are awaiting conferences and the conferences are delayed, this will have a ripple effect of delay.

3. Conference for Continuances?

At the same time, the one place where a conference looks most appropriate – and an issue on which the lawyers and the parties would presumably most like a prompt response – would be on continuances. Proposed Rule 40 tightens up the granting of continuances but when continuances are sought, the proposed rule calls for a motion to be filed – rather than invoking the Rule 7(b)(1) conference procedure. Particularly if continuances are disfavored, the rules should provide for something more expedited than motions with 21 days for response plus 14 for reply before the issue is brought to the judge.

4. Trial Management Conferences

There appears to be an inconsistency between proposed rule 16(e)(4) (“the court may require a trial management conference” in Track B & C cases) and proposed rule 16A(a) (“Unless exempted by the court for good cause shown, a pretrial conference shall be held in each Track B and Track C case . . .”). I prefer the former wording, especially for Track B. Maybe a trial management conference should be presumptive in Track C but not Track B.

(Unless this is more complicated than I thought and there is a difference between a “trial management conference” in 16(e)(4) and a “pretrial conference” in 16A(a)).

5. Protections that would remove case from trial

I raised at the Civil Rules Advisory Committee meeting and continue to think that the last sentence of proposed Rule 40(e) is confusing. If requests for protection removing a case from the list are to be summarily denied and not treated as motions for a continuance, shouldn't the rule state that a party should file a motion for continuance instead?

6. Proposed Rules 80B(k) and 80C(k)

I would suggest that proposed Rules 80B(k) and 80C(k) be amended because those subsections continue to imply that oral argument will be held in 80B and 80C cases even though that is not always the case and the Law Court in *Lindemann v. Commission on Governmental Ethics*, 2008 ME 187 ¶¶ 23-26, interpreted Rule 80C to allow the court to dispense with oral argument in 80C cases. Since Rule 80B has identical language, *Lindemann* would appear to apply equally to 80B.

My proposed change to both rules would be to retain the first sentence in Rule 80B(k) and 80C(k) and delete the remainder of the text in those subsections.