Maine Law Review

Volume 43
Number 2 *A Tribute to Chief Justice Vincent L. McKusick*

Article 7

June 1991

Vincent L. McKusick and the Maine Rules of Civil Procedure: A Thirty-Five Year Perspective

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VINCENT L. McKUSICK AND THE MAINE RULES OF CIVIL PROCEDURE: A THIRTY-FIVE YEAR PERSPECTIVE

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INTRODUCTION

When he retires in February 1992, Chief Justice Vincent L. McKusick will leave an enduring legacy for Maine and the nation in the rules governing civil practice in the Maine courts and the machinery for judicial rulemaking developed under his leadership.

Procedure and jurisdiction were subjects of intellectual and professional interest for McKusick long before his chief justiceship. Graduating from the Harvard Law School in 1950, he had been a student there when Professors Richard Field and Benjamin Kaplan, both members of the Harvard faculty's post-war generation, were at the threshold of their effort to make the still new Federal Rules of Civil Procedure the focal point of law school procedural instruction.[1] As law clerk to Learned Hand and Felix Frankfurter in the two succeeding years, McKusick served apprenticeships with two of the most stimulating intellects in the federal judiciary at a time when practitioners and judges in the nation's most sophisticated courts were grappling with thorny procedural questions under the new rules.[2] In 1952, following Frankfurter's oft-stated advice, he returned to Maine to practice law in Portland.[3]

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1. For a discussion of the background and development of the Federal Rules of Civil Procedure, see *infra* notes 13-20 and accompanying text. As to Field and Kaplan, see A. SUTHERLAND, THE LAW AT HARVARD 376, 378 (1967). Their casebook, MATERIALS FOR A BASIC COURSE IN CIVIL PROCEDURE, published in 1953, was a pioneering effort to consider civil procedure as a system best studied through the medium of the Federal Rules in the broader setting of federal jurisdiction. See Lubick, *Book Review*, 67 HARV. L. REV. 1489 (1954); Kaufman, *Book Review*, 8 RUTGERS L. REV. 558 (1954). It is now a commonplace that succeeding generations of law students have learned their civil procedure through the medium of the Rules. *See, e.g.*, Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 910 n. 5 (1987); J. FRIEDENTHAL, M. KANE & A. MILLER, CIVIL PROCEDURE xv (1985); F. JAMES & G. HAZARD, CIVIL PROCEDURE xxi (3d ed. 1985).

2. For discussion of procedural and jurisdictional developments under the Federal Rules in the early 1950's, see Wright, *Amendments to the Federal Rules: The Function of a Continuing Rules Committee*, 7 VAND. L. REV. 521 (1954); Clark, *"Clarifying" Amendments to the Federal Rules?*, 14 OHIO ST. L.J. 241 (1953). For decisions of "his" justice addressing procedural concerns during McKusick's clerkship, see Kerotest Mfg. Co. v. C-O-Two Fire Equipment Co., 342 U.S. 180, 186 n. 6 (1952) (Frankfurter, J.) (applicability of FED. R. CIV. P. 15(c)); Zorach v. Clauson, 343 U.S. 306, 320-23 (1952) (Frankfurter, J., dissenting) (construction of pleadings in action to determine constitutionality of school released-time statute). *See also* Sutphen Estates, Inc., v. United States, 342 U.S. 19 (1951) (Douglas, J.) (denial of intervention of right under FED. R. CIV. P. 24(c) where issues to be tried would not be res judicata as to would-be intervenor).

3. *See* Frankfurter, *The Profession of the Law*, in OF LAW AND LIFE AND OTHER

Beginning with his appointment in 1957 to the Advisory Committee established by the Maine Supreme Judicial Court to develop rules of civil procedure based on the federal model, McKusick became a leader in the development and reform of civil procedure on the national as well as the state level. In Maine, his work with the initial Advisory Committee led to his coauthorship of *Maine Civil Practice* with Professor Field, the committee's reporter. He was appointed chair of the Advisory Committee when it was reestablished by the court on a permanent basis in 1967. These activities made him a natural candidate for a variety of national organizations dealing with procedure and related subjects. In turn, his work at the national level brought to Maine ideas and insights which have put the state at the forefront of procedural reform.

McKusick's role in Maine is described in detail in subsequent sections of this Article. His national involvement began in 1964 when he was appointed to the American Bar Association's Special Committee on Federal Rules of Procedure. He served as the Committee's chairman from 1966 until 1971.[4] He was appointed a Maine Commissioner of the National Conference of Commissioners on Uniform State Laws in 1968. In that capacity he served as chairman of the Conference's Drafting Committee on the Uniform Jury Selection and Service Act and its Review Committee on the Uniform Rules of Criminal Procedure. He was secretary to the Commission from 1975 until 1977.[5] Since 1968 he has served on the Council of the American Law Institute, which, among its many concerns, reviewed and approved provisions of the *Restatements (Second) of Conflict of Laws* and *Judgments* dealing with such critical procedural issues as jurisdiction of the person and of the subject matter.[6]

McKusick was confirmed as Maine's Chief Justice on September 16, 1977.[7] As the remainder of this Article shows, he asserted the power of that office to continue Maine's leadership in the field of procedure. McKusick has also increased the level of his national activities. He has served on a special joint committee of the Judicial

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THINGS THAT MATTER: PAPERS AND ADDRESSES OF FELIX FRANKFURTER, 1956-1963, 146, 161-62 (1969).

4. *See* 89 A.B.A. REP. 43 (1964). Subjects studied by the committee under McKusick's chairmanship included Proposed FED. R. APP. P 30 providing for a single record appendix, the original 1967 proposal that led to the 1970 amendments of the discovery rules, and the proposed Federal Rules of Evidence. *See* 92 A.B.A. REP 596 (1967); 93 *id.* at 357-58, 394, 549-53 (1968); 94 *id.* at 799 (1969); 95 *id.* at 332, 991 (1970).

5. *See* HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE ANNUAL CONFERENCE MEETING 27, 51 (1968). *See also id.* at 22 (1969); *id.* at 23, 94, 110 (1970); *id.* at 64 (1975).

6. *See* 45 A.L.I. PROC. iii (1968). *See also* 1 RESTATEMENT (SECOND) OF JUDGMENTS iv, §§ 1-12 (1982); 2 *id.* §§ 78-80; 1 RESTATEMENT (SECOND) OF CONFLICT OF LAWS iv, §§ 24-144 (1971).

7. *See* 2 Me. Legis. Rec. 2-4 (Sen. Confirmation Sess., Sept. 16, 1977).

Conference of the United States and the National Conference of Chief Justices charged with considering procedural issues in the relationship between the federal and state courts.[8] From 1987 to 1989, he was a member of the Advisory Committee on the Federal Rules of Appellate Procedure.[9] Since 1987, he has been a member of the Board of the Conference of Chief Justices, which he currently serves as President.[10] In that capacity, he also serves as Chairperson of the Board of Directors of the National Center for State Courts, a primary agency of reform in the areas of court administration and procedure.[11] With all his activities he has also found time to publish.[12]

This Article will first review Vincent McKusick's involvement in the adoption of the Maine Rules of Civil Procedure and his subsequent leadership in the development of the Rules and the rulemaking process. This review will provide an opportunity to consider the process by which growth and change in Maine procedure have occurred, the ways in which Maine has responded to critical challenges facing the courts, and issues and directions for future development.

I. VINCENT MCKUSICK AND THE DEVELOPMENT OF THE MAINE RULES OF CIVIL PROCEDURE

Promulgation of the Maine Rules of Civil Procedure in 1959 was a reflection in Maine of the national tide of procedural reform stimulated by the adoption and success of the Federal Rules of Civil Procedure. The Maine Rules responded at the state level to the same problems which the Federal Rules had addressed. Vincent McKusick's background in federal practice prepared him to take a leading role in the development of the Maine Rules.

A. The Federal Model

The procedural reform which culminated in the Federal Rules of Civil Procedure began in 1906 when the American Bar Association, stimulated by a paper delivered by Roscoe Pound, appointed a committee to study the matter.[13] The Supreme Court of the United

8. *See* McKusick, *State Courts' Interest in Federal Rulemaking: A Proposal For Recognition*, 36 MAINE L. REV. 253 (1984).

9. *See* 4 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1007 (2d ed. 1987).

10. *See* 5 ME. BAR J. 314 (1990).

11. *See* NATIONAL CENTER FOR STATE COURTS, ANNUAL REPORT 3-5, 6-23 (1990).

12. *See* McKusick, *Certification: A Procedure for Cooperation Between State and Federal Courts*, 16 MAINE L. REV. 33 (1964); McKusick, *supra* note 8.

13. The account of the development of the Federal Rules in the following paragraphs is based on that in 4 C. WRIGHT & A. MILLER, *supra* note 9, §§ 1002-1007. *See also* Shapiro, *Federal Rule 16: A Look at the Theory and Practice of Rulemaking*, 137 U. PA. L. REV. 1969 (1989); Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U. PA. L REV. 1999 (1989); Subrin, *supra* note 1.

States had long been the source of federal equity rules and since 1842 had had rulemaking power for actions at law in federal courts.[14] With the latter power unexercised, however, procedure at law under the terms of the Conformity Act, adopted in 1789, had followed that of the state in which each federal district court sat.[15]

Although a number of western states had adopted New York's 1848 Field Code, most states followed common law civil procedure, with a wide variety of local variations. Both systems had major faults: The common law emphasized formalistic pleading that sought to narrow the controversy to a single issue of law to be heard upon demurrer, or a single issue of fact to be tried to a jury. The codes replaced the common law forms with a new formalism requiring that the pleadings set forth, in often prolix detail, the elements of each cause of action or defense as a matrix of facts either to be tested for legal sufficiency on demurrer or to be proven exactly at trial. The largely separate equity practice in the state courts, as under the federal Equity Rules, offered tell-it-like-it-is pleading, flexible rules for joinder of claims and parties, and extensive pretrial discovery. Because of its complexity and cumbersomeness, however, this practice could all too often emulate the exemplar proffered by Dickens in *Bleak House*.[16]

When the ABA House of Delegates voted in 1911 to support the development and adoption of uniform rules of federal procedure to be promulgated by the Supreme Court and to serve also as a model for the states, the ABA was responding both to the needs of lawyers with multi-jurisdictional practices and to the impulse for pure procedural reform. Despite continued lobbying by the ABA, action in Congress was blocked for more than twenty years by legislators from code states who purported to fear, not an invasion of carpetbagging eastern lawyers, but the imposition of the complexities of federal equity practice upon their relatively simple and familiar procedural codes.[17]

With the New Deal and a new generation of lawyers, the climate abruptly changed. Congress passed the Rules Enabling Act in 1934.[18] At the American Law Institute meeting in 1935, Chief Justice Hughes announced that federal rulemaking would begin in earnest. In June of that year, the Supreme Court established the model

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14. Act of Aug. 23, 1842, ch. 188, §6, 5 Stat, 516, 518.

15. *See* Act of Sept. 29, 1789, ch. 21, 1 Stat. 93; Act of Aug. 1, 1842, ch. 109, 5 Stat. 499.

16. For the Field Code, see 4 C. WRIGHT & A. MILLER, *supra* note 9, § 1002, at 12. *See* Subrin, *supra* note 1, at 982-83.

17. For the reactions of the westerners, see C. CLARK, PROCEDURE—THE HANDMAID OF JUSTICE: ESSAYS OF JUDGE CHARLES E. CLARK 12-13 (1965). For the ABA's lobbying effort, see 4 C. WRIGHT & A. MILLER, *supra* note 9, § 1003.

18. Act of June 19, 1934, ch. 651, 48 Stat. 1064. As to the politics, see Subrin, *supra* note 1, at 969.

that has subsequently guided rulemaking efforts not only in the federal system but in Maine and many other states. The Court appointed a distinguished Advisory Committee of practitioners and academics chaired by former Attorney General William Mitchell. Professor Charles Clark of Yale, co-author of a law review article which had spurred the effort, was appointed reporter. After public distribution and discussion of three printed drafts, the Court, with Justice Brandeis dissenting, adopted the Federal Rules of Civil Procedure, creating one form of action and merging law and equity. In accordance with the Enabling Act, the Federal Rules were transmitted to Congress in January 1938. Despite expressions of opposition by some members, Congress took no negative action and the Rules as promulgated became effective on September 16, 1938.[19]

Since 1942, the federal Advisory Committee on Civil Rules, reestablished in 1958 as a committee of the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, has proposed numerous amendments to the Federal Rules of Civil Procedure designed to attune the Rules to changing needs of practice.[20] The Supreme Court has adopted many but not all of these amendments, and Congress has on occasion exercised a concurrent power to amend the Federal Rules.

B. Adoption of the Maine Rules

The original notion that the Federal Rules would serve as a model for the states was slow in taking hold—a delay certainly exacerbated by the distracting and absorbing impact of World War II. By 1942 three states and the District of Columbia had adopted by court order comprehensive rules of civil procedure based on the federal model. By 1956, only three additional states had followed suit.[21] In that year, Justice Francis W. Sullivan, who, as keeper of the flame of traditional practice books, was current author of the eighth edition of *Maine Civil Officer*,[22] at the annual meeting of the Maine State

19. *See generally* 4 C. WRIGHT & A. MILLER, *supra* note 9, § 1004, and sources cited therein.

20. As to the Advisory Committee, see 4 C. WRIGHT & A. MILLER, *supra* note 9, §§ 1004-1007.

21. *See* Oakley and Coon, *The Federal Rules in State Courts: a Survey of State Court Systems of Civil Procedure*, 61 WASH. L. REV. 1367, 1428 (1986).

22. F. SULLIVAN, MAINE CIVIL OFFICER (8th ed. 1950 & Supp. 1963). Sullivan's work was the last in a series of Maine practice manuals tracing its origins to the justice of the peace handbooks that were the principal popular law books of 18th and 19th century England and America. The first edition of *Maine Civil Officer* was written by Edward S. Morris in 1860 and published in 1861 in Portland by Bailey & Noyes. It was revised and corrected before publication by the Hon. Ether Shepley. *See id.*, at III. The title, if not the concept, derived from J. PERLEY, THE MAINE CIVIL OFFICER OR THE POWERS OF SHERIFFS, CORONERS, CONSTABLES, AND COLLECTORS OF TAXES (Hallowell 1825), a work that "does not treat of procedure to any great degree." *Id.* As to Perley's predecessors, see, *e.g.*, M. DALTON, THE COUNTREY JUSTICE (London, 1746); S.

Bar Association urged consideration of the adoption of the Federal Rules in Maine.[23]

As Justice Sullivan's two-volume work amply documented, Maine procedure at that time was a complicated and confusing blend of traditional common law pleading rules and the results of 130 years of partial statutory codification. The common law forms of action were still in effect, and a separate equity jurisdiction was exercised by the superior court concurrently with single justices of the Supreme Judicial Court.[24] The courts were also governed by three sets of rules most recently recodified by the concerted action of the Supreme Judicial Court and the justices of the superior court in 1952: the Revised Rules of Court, many of which had first been promulgated in 1822, governing actions at law and criminal proceedings in the Supreme Judicial Court and the superior court; the Supreme Judicial Court Rules, governing bar admission and Law Court proceedings; and the Equity Rules, a modern set of rules governing equity matters in the superior court and before a single justice of the Supreme Judicial Court.[25]

Justice Sullivan's address stimulated the Bar Association to obtain enabling legislation for rulemaking. The Enabling Act authorizing the Supreme Judicial Court to make comprehensive rules that would provide one form of action and merge law and equity was enacted in 1957, and funds were appropriated to support the rulemaking process.[26] The Supreme Judicial Court quickly responded to this invitation. The Advisory Committee on Rules was appointed in August 1957 and set immediately to work, with Leonard "Squire" Pierce, McKusick's senior partner, as chairman, and his Harvard Law School mentor, Professor Field, as reporter. In the circumstances, it is hardly surprising that the young associate was appointed to this blue-ribbon panel consisting of leaders of the bar

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FREEMAN, THE MASSACHUSETTS JUSTICE (1795) (2d ed. 1802) (3d ed. 1810); RODOLPHUS DICKINSON, DICKINSON'S JUSTICE (1818).

23. Address by Justice Francis W. Sullivan, 45 ME. ST. BAR ASS'N PROC. 38 (1956).

24. *See generally* 1 F. SULLIVAN, *supra* note 22, at 176-233. For a work extensively used by Maine practitioners, see F. MARTIN, LECTURES ON COMMON LAW PLEADING (1913 & reprint 1930), a course of lectures given at the old University of Maine College of Law between 1900 and 1913. *See also* Address by Richard H. Field, *Proposed Rules of Civil Procedure for Maine*, 47 ME. ST. BAR ASS'N PROC. 30, 33-35 (Aug. 26-28, 1958); 1 R. FIELD, V. MCKUSICK & L.K. WROTH, MAINE CIVIL PRACTICE § 1.0 (2d ed. 1970) [hereinafter FIELD, MCKUSICK & WROTH]; Reporter's Notes to M.R. Civ. P. 2, *id.* at 34.

25. *See generally* 1 FIELD, MCKUSICK & WROTH, *supra*, note 24, at 13-14. For the recodification, see 147 Me. 464-504 (1952), *amended by* 148 Me. 533 (1953), 152 Me. 57 (1956), 153 Me. 221-26, 382 (1958).

26. P.L. 1957, ch. 159; 1957 resolves, ch. 148. R.S. ch. 103, § 7-A 1954, was amended by P.L. 1959, ch. 309, effective May 15, 1959. The Enabling Act is now codified at ME. REV. STAT. ANN. tit. 4 § 8.

from throughout the state.[27]

At its October 1957 organizational meeting, the Advisory Committee divided the Federal Rules into six sections, and two-member subcommittees were charged with systematically reviewing each section.[28] The subcommittees prepared draft rules based on Professor Field's analysis of the appropriate Federal Rules.[29] The subcommittees' initial reports, consisting of proposed rule drafts and the reporter's explanations of the proposals, were collected in the "Blue Book," a mimeographed compilation published for the August 1958 meeting of the full committee.[30] Changes in the subcommittee drafts proposed by the full committee were compiled in a supplement published with the August draft for committee review in November 1958—the so-called "Green Book."[31] These and a few additional minor changes were consolidated in the committee's tentative draft distributed to the bar in December 1958—the "White Book."[32]

The tentative draft was reviewed and discussed at length in a day-long general session conducted by Professor Field and committee members at the January 1959 meeting of the Maine State Bar Association. Revisions proposed as a result of that session were compiled in the "Brown Book."[33] This volume and the White Book constituted the committee's report and recommendations, which were submitted to the court on February 5, 1959. With the committee's work done, Professor Field, assisted by McKusick, worked directly with the court in the preparation of the "Court Draft."[34] After enactment of an extensive statutory cleanup measure also prepared by Professor Field, the court on June 1, 1959, issued its order promulgating the Maine Rules of Civil Procedure, with Appendix of Forms, to be-

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27. *See* Williamson, *Foreword to First Edition,* reprinted in FIELD, MCKUSICK & WROTH, *supra* note 24, at XIII-XV.

28. Field, *Introduction, in* ADVISORY COMMITTEE ON THE RULES OF COURT PROCEDURE, MAINE RULES OF CIVIL PROCEDURE i (tentative draft for committee use only, Aug. 1, 1958) [hereinafter BLUE BOOK].

29. *Id.* at ii. For McKusick's role in this process, see *infra* note 82 and accompanying text.

30. *See* BLUE BOOK, *supra* note 28. *See also* Williamson, *supra* note 27, at XV; Field, *supra* note 24, at 32-33.

31. *See* Supplement to BLUE BOOK, *supra* note 28 (Nov. 11, 1958) [hereinafter GREEN BOOK]. *See also* Williamson, *supra* note 27, at XVI.

32. *See* SUPREME JUDICIAL COURT ADVISORY COMMITTEE, MAINE RULES OF CIVIL PROCEDURE (tentative draft 1958) [hereinafter WHITE BOOK]. *See also* Williamson, *supra* note 27, at XVI.

33. *See* ADVISORY COMMITTEE OF THE RULES OF COURT PROCEDURE, ADDITIONS, CHANGES, AND CORRECTIONS IN TENTATIVE DRAFT OF MAINE RULES OF CIVIL PROCEDURE (Feb. 1, 1959) [hereinafter BROWN BOOK]. *See also* Williamson, *supra* note 27, at XVI. For the January 1959 proceedings, see Field, *Civil Procedure-Forum on the New Rules,* 48 Me. St. Bar Ass'n. Proc. 44 (1959).

34. *See* MAINE SUPREME JUDICIAL COURT, MAINE RULES OF CIVIL PROCEDURE (court draft, Apr. 20, 1959). *See also* Williamson, *supra* note 27, at XVI.

come effective December 1, 1959.[35] Municipal Court Civil Rules, developed by Professor Field and a separate committee to adapt the new provisions to that jurisdiction, were also promulgated to be effective on the same date.[36] Professor Field's reporter's notes, based on the commentaries he had prepared for the subcommittees, were published with the Rules of Civil Procedure and were declared to be an authoritative guide to interpretation.[37]

C. *Maine Civil Practice: The Treatise*

With the work of the Advisory Committee and its reporter completed, Field and McKusick undertook a complementary task designed to make the Rules more accessible and acceptable to the Maine bench and bar. Working through the spring and summer of 1959, they together wrote the first edition of the treatise, *Maine Civil Practice*. Thanks to their intensive effort, the book was published by the Boston Law Book Company, a local affiliate of West Publishing Company, simultaneously with the effective date of the Rules in December 1959.

The treatise, long familiar to all Maine practitioners, dealt with each rule in systematic form, setting forth the rule text and reporter's notes and providing commentary which served a threefold purpose: explanation of the intended function of each new rule, comparison with former Maine practice, and presentation of appropriate decisions in the federal courts and other states interpreting and applying identical rules. The authors also compared each Maine rule to its federal counterpart, pointing out significant variations, and included suggested forms to deal with matters not covered in the Appendix of Forms promulgated with the Rules. The treatise also contained the Municipal Court Civil Rules and Professor Field's memorandum to the Legislature explaining the statutory clean-up bill.[38]

Thanks both to the talents of its authors and the scope of its treatment of the Rules, *Maine Civil Practice* was a work of more than local importance. As the distinguished authority on federal jurisdiction and procedure, Professor Charles Alan Wright, said in re-

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35. *See* Williamson, *supra* note 27, at XVII; P.L. 1959, ch. 317; Order of June 1, 1959, 155 Me. 477 (1959).

36. Order of June 1, 1959, 155 Me. 477, 625-641 (1959). *See* Williamson, *supra* note 27, at XVI-XVII; Maine Municipal Court Civil Rules and reporter's notes, FIELD & MCKUSICK, MAINE CIVIL PRACTICE 673-97 (1959); *id.* at 165-69 (Supp. 1967).

37. *See* Williamson, *supra* note 27, at XVII; 1 FIELD, MCKUSICK & WROTH, *supra* note 24, at 26-27.

38. FIELD & MCKUSICK, *supra* note 36. Supplements to the first edition were published in 1962 with Frederick A. Johnson and in 1967 with the present author. A second edition was published in 1970. That edition was supplemented several times with the assistance of others. *See* FIELD, MCKUSICK & WROTH, *supra* note 24 (Supp. 1972); *id.* (Supp. 1974); *id.* (Supp. 1977); *id.* (Supp. 1981).

viewing the second edition of *Maine Civil Practice* in 1970:

> Maine lawyers hardly need to be told by a friend from Texas of the excellence of the book that Professor Field and Mr. McKusick did more than a decade ago. . . . [I]t may be of interest to Maine lawyers to know that the virtues of their local procedure book are recognized far beyond the New Hampshire border. . . . [W]hen the distinguished federal Advisory Committee on Civil Rules wanted to point to a single source in which the rationale for [the] work product [rule] is best stated, it turned to Maine's book.
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> Shortly after the first edition of this book appeared, I referred to it as "an excellent treatise," and I have kept a copy close at hand in my office so that I may benefit from its useful insights into procedural problems when I am engaged in my own writing about procedure in the federal system.[39]

D. The Maine District Court Civil Rules

In 1962, Field and McKusick also served as advisors to the Supreme Judicial Court in the adaptation of the Maine Rules of Civil Procedure for practice in the district court, created by the Legislature in 1961 to supersede the municipal courts and trial justices.[40] The Supreme Judicial Court appointed a District Court Rules Committee of practitioners chaired by Frank E. Southard, Jr., of Augusta, to address the procedure of the new court. The committee, together with the newly appointed district court judges, drafted a set of rules based on the Maine Rules of Civil Procedure. After a conference participated in by Field and McKusick, the Supreme Judicial Court promulgated the District Court Civil Rules, "[w]ith minor changes resulting from the discussion at the meeting and further study," in July 1962. The committee's notes were published with the Rules in the same fashion that the reporter's notes had been published with the Maine Rules of Civil Procedure.[41]

E. The Amendment Process

1. Consultant and Committee Chair

Vincent McKusick was actively involved from the beginning in the process of updating the Maine Rules of Civil Procedure by amendment. The first amendments of the Maine Rules were a series

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39. Wright, *Book Review*, 22 MAINE L. REV. 511, 511-12 (1970) (citing 1 BARRON & HOLTZOFF, FEDERAL PRACTICE AND PROCEDURE 59 (C. Wright ed. 1960)).

40. P.L. 1961, ch. 386, now ME. REV. STAT. ANN. tit. 4, §§ 151-171. *See generally* H. HENRY, THE MAINE DISTRICT COURT: A QUARTER CENTURY OF PROGRESS 3-20 (1987). For the municipal courts and the interim rules adopted for them, *see supra* note 36.

41. Williamson, *Foreword to Maine District Court Civil Rules*, 2 FIELD, MCKUSICK & WROTH, *supra* note 24, at 401-402; *see* 158 Me. 537 (1962). Regarding the interpretive effect of the Committee notes, see *id.* at 421-22.

of technical changes promulgated in September and November 1959 before the Rules even took effect.[42] Beginning in 1960, Field and McKusick acted informally as advisors to the court in the promulgation of amendments, developing more than a dozen promulgation orders affecting thirty-one separate rule provisions or official forms. The advisors prepared unofficial notes titled "Explanation of Amendment," which were published in supplements to *Maine Civil Practice* as the equivalent of reporter's notes.[43] Most of these amendments were also technical, but a few were of more far-reaching effect.[44]

The first substantial group of amendments based on a systematic review of the Rules was adopted effective November 1, 1966. These amendments, prepared by Professor Field, McKusick, and the present author at the request of the court acting at Professor Field's suggestion, were intended to conform the Maine Rules to a number of changes made in the Federal Rules of Civil Procedure in 1963 and 1966, primarily affecting process, pleading, and parties.[45]

In February 1967, the Supreme Judicial Court reestablished the Advisory Committee on Civil Rules, naming McKusick as chairman, a position which he held until 1975.[46] The court invited the bar to submit proposals for amendment of the Rules to the committee for review or recommendation to the court. Under McKusick's leadership, with Professor Field and the present author as consultants, the committee undertook a thorough review of the Rules. As a result of this review, the committee recommended thirty-two amendments in areas such as the pretrial conference, appeals to the Law Court, and administrative appeals. The court promulgated the amendments largely as recommended by the committee. In an introductory statement to a pamphlet publication of the amendments, Chief Justice Williamson stated: "The Committee reports that the Rules appear in general to be working well and that no major overhaul is required. With this view we agree. However, in certain limited areas these

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42. *See* Orders of September 1, 1959, and November 2, 1959, 155 Me. 661, 676. Further technical amendments were made by Order of January 19, 1960, effective February 1, 1960. *Id.* at 680. All three sets of amendments were incorporated in the full text of the rules as printed in the Maine Reports. *Id.* at 477. For examples of these amendments, see, *e.g.*, M.R. Civ. P. 4(f) and 64(b); 2 FIELD, MCKUSICK & WROTH, *supra* note 24, at 97. *See generally id.*, at 15 n.15.

43. For a summary of these early amendments, see 1 FIELD, MCKUSICK & WROTH, *supra* note 24, at 17. For the origin and effect of the "Explanation of Amendment" notes, see *id.* at 18, 26-27.

44. *See, e.g.*, the 1960 amendment of Rule 13 discussed *infra* note 108 and accompanying text, and the 1965 adoption of Rule 76B, discussed *infra* note 232 and accompanying text.

45. *See* Order of Sept. 1, 1966, Me. Rptr. 215-224 A.2d XXI (1966), effective Nov. 1, 1966. *See generally* 1 FIELD, MCKUSICK & WROTH, *supra* note 24, at 18.

46. *See* Order of Feb. 8, 1967, Me. Rptr., 225-237 A.2d XXIV-XXV.

amendments make significant changes."[47]

Following the pattern established in the federal rulemaking process, the committee submitted its recommendations to the court accompanied by Advisory Committee's notes having an interpretive value equivalent to that of the original reporter's notes.[48] The Advisory Committee on Civil Rules has been in continuous existence since 1967. All subsequent amendments, except those promulgated by the court without the recommendation of the committee, have been accompanied by Advisory Committee's notes.[49]

The court adopted Advisory Committee recommendations of substantial amendments in October 1969, July 1970, September 1971, December 1972, and June and July 1973, covering such areas as federal discovery amendments, attachment, and the pretrial conference.[50] In January 1974, the court adopted an order requiring each of its Advisory Committees to give public notice and opportunity to comment on any proposed rules amendments unless the court dispensed with such notice in the public interest.[51] Following adoption of this procedure, a number of rules were amended in April 1975, including those pertaining to reference, attachment, and discovery.[52]

On December 31, 1975, McKusick's final term as chairman of the Advisory Committee came to an end. Working with Professors Field and Wroth as coauthor of supplements to the second edition of *Maine Civil Practice* and informal consultant on the Rules, he con-

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47. *See* Order of Sept. 19, 1967, Me. Rptr. 225-237 A.2d XXVII (1967), effective Dec. 31, 1967; Williamson, Introductory Statement, in *Amendments to Maine Rules of Civil Procedure, District Court Civil Rules, Rules of Criminal Procedure, District Court Criminal Rules*, 3 (pamphl. 1967). For further discussion of the committee process, see 1 FIELD, MCKUSICK & WROTH, *supra* note 24, at 18-19; Wroth, *The 1967 Amendments to the Maine Rules of Civil Procedure*, 20 MAINE L. REV. 49-51 (1968).

48. As to the federal Advisory Committee, *see supra* note 20 and accompanying text. For the Maine Advisory Committee's Notes and their interpretive value, see Williamson, *supra* note 47; 1 FIELD, MCKUSICK & WROTH, *supra* note 24, at 19, 26.

49. Amendments promulgated without Advisory Committee recommendation have in most cases been accompanied by explanatory notes entitled "Explanation of Amendment" or "Supreme Judicial Court Note" prepared by the drafters of the amendments for the convenience of bench and bar. *See, e.g.*, Order effective July 1, 1989, Me. Rptr., 551-562 A.2d CLVIII-CLX; Order effective Feb. 1, 1984, Me. Rptr., 467-478 A.2d XXXVI-XXXIX. In a few cases, notably where the change is an obvious one such as a fee increase, no explanation has been offered. *See, e.g.*, Order effective July 1, 1986, Me. Rptr., 488-497 A.2d XL-XLII; Order effective May 1, 1986, Me. Rptr., 498-509 A.2d CV-CVII.

50. *See* Orders of Oct. 1 & 6, 1969, Me. Rptr., 248-256 A.2d XIX, XXI; Order of July 1, 1970, Me. Rptr., 257-266 A.2d XXXV; Order of Sept. 13, 1971, Me. Rptr., 276-284 A.2d XIX; Order of Dec. 28, 1972, Me. Rptr., 293-299 A.2d XIX; Order of June 12, 1973, Me. Rptr., 300-307 A.2d XXII; and Order of July 27, 1973, Me. Rptr., 300-307 A.2d XIX. *See generally* 1 FIELD, MCKUSICK & WROTH, *supra* note 24, at 17; *id.* (Supp. 1981) at 9-10.

51. Order of Jan. 21, 1974, Me. Rptr., 313-319 A.2d XLVII.

52. Order effective Apr. 15, 1975, and advisory committee's notes, Me. Rptr., 326-335 A.2d XXII-XLII.

tinued to have a significant role in the amendment process until his appointment as chief justice in September 1977. Important groups of amendments in this period accommodated the Civil Rules to the newly adopted Maine Rules of Evidence, clarified problems concerning district court appeals, and made provision for certain special proceedings such as civil violations and separate support and custody in both the superior and district courts.[53]

2. *Chief Justice*

As Chief Justice, McKusick inherited a regime of procedural rules and a mechanism for their development and adoption that he had had a major hand in constructing. In his new role as head of Maine's Judicial Department, he strengthened and expanded the court's use of the advisory committee mechanism to assert the rulemaking power in all areas of judicial authority, building on the model developed for the Civil Rules. Under his leadership, the existing Advisory Committees on the Rules of Civil Procedure, Rules of Criminal Procedure, and Rules of Evidence continued active,[54] and new Advisory Committees were established for the Rules of Probate Procedure, the Code of Professional Responsibility, and the Code of Judicial Conduct.[55] In addition, the Board of Overseers of the Bar and the Board of Bar Examiners were given the responsibility of functioning as advisory committees for the Maine Bar Rules (other than the Code of Professional Responsibility) and the Maine Bar Admission Rules.[56] In the civil realm, the rules committees produced new Rules

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53. *See* Order effective Feb. 2, 1976, and advisory committee notes, Me. Rptr., 344-351 A.2d XXII, XXIV; Order effective Nov. 15, 1976, and advisory committee notes, Me. Rptr., 360-366 A.2d XXI, XXXIV; and Order effective Apr. 15, 1975, and advisory committee notes, Me. Rptr., 326-335 A.2d XXII, XLI.

54. *See* Orders of Feb. 8, 1967, Me. Rptr., 225-237 A.2d XXIV-XXV; April 30, 1973, Me. Rptr., 293-299 A.2d XLIV-XLVI. The continuity and membership of these committees may be traced in annual appointment orders published in the front of the *Maine Reporter* and, beginning in 1974, in the front of West Publishing Company's annual *Maine Rules of Court* pamphlets.

55. The Maine Code of Professional Responsibility was developed by the Select Commission on Professional Responsibility appointed by Order of Jan. 17, 1978, Me. Rptr., 381-384 A.2d LXIX-LXX. Amendments to the Code are now the responsibility of the Advisory Committee on the Code of Professional Responsibility established by Order of Nov. 2, 1981. Me. Rptr., 434-440 A.2d XXXIII-XXXIV. The Maine Code of Judicial Conduct was adopted by the Court on the recommendation of the Section on Judicial Administration of the Maine State Bar Association. *See* Order of Feb. 26, 1974, Me. Rptr., 313-319 A.2d XXXVII; *Committee Notes on Code of Judicial Conduct*, 8 ME. BAR BULL., May 1974, at 1. Amendments are now the responsibility of the Advisory Committee on the Code of Judicial Conduct, established by Order of Sept. 6, 1989, Me. Rptr., 551-562 A.2d CLXIV-CLXV. The Maine Rules of Probate Procedure were adopted on the recommendation of the Advisory Committee on Probate Rules, appointed in February 1980 and made permanent in 1981. *See* Order of Dec. 31, 1980, Me. Rptr., 418-427 A.2d XCI-XCII.

56. *See* M. Bar R. 4(d)(17); 4 M.R.S.A. § 801; M. Bar Adm. R. 4, 5, 9, 12, Board of

of Probate Procedure, Administrative Court Rules, and Rules of Small Claims Procedure,[57] in addition to carrying forward their familiar role of maintaining the balance of the Maine rules with their federal models and the changing needs of Maine practice.[58]

Chief Justice McKusick also made use of the Maine Judicial Council as a medium for procedural reform. Special committees of the Council produced proposals for probate court reform and for an experiment in the use of alternative dispute resolution in the superior court.[59] Similarly, outside the mechanism of the Advisory Committees, the Chief Justice led the development of the Maine Court Mediation Service, providing mandatory mediation in domestic relations cases involving children and optional mediation in other domestic relations cases and all small claims cases.[60]

Not surprisingly, after McKusick became Chief Justice, amendments in January 1978 and September 1980 (the latter promulgated by the court without the aid of the Advisory Committee) made further important changes in the provisions of the Civil Rules governing appeals to the Law Court.[61] Further changes were also made in the rulemaking process. In January 1980, the court adopted an order abrogating its 1974 public comment order and establishing more elaborate "Operating Procedures for Rulemaking" to be followed by the Advisory Committees. Each committee was to report annually to the court in February with any proposed amendments and a summary of its proposals. The summary was to be distributed to the public, and the court retained the option to conduct a public hearing. Amendments would be received at other times if necessary, but the purpose of the new procedures was to eliminate confusion by consolidating all amendments in a single annual order. In a modification of the Operating Procedures adopted in December 1981, committee annual reports were to be submitted on September 20th of each year and any resulting amendments were to be promulgated by

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Bar Examiners notes to 1990 amends., Me. Rptr., 563-575 A.2d CXLV-CXLVI.

57. *See* Order of Dec. 1, 1980, Me. Rptr., 418-427 A.2d XXXI (Maine Rules of Probate Procedure); Order of June 26, 1978, Me. Rptr., 385-387 A.2d XXXI (Maine Administrative Court Rules); Order of Oct. 20, 1982, Me. Rptr., 449-458 A.2d XXX (Maine Rules of Small Claims Procedure).

58. *See infra* notes 100-104 and accompanying text. The court used a joint subcommittee of the advisory committee on civil and criminal rules to prepare guidelines implementing a two-year experiment with the use of cameras in trial courtrooms. *See* order of Feb. 1, 1991, SJC No. 228; Order of July 8, 1991, SJC No. 228.

59. COMMITTEE FOR THE STUDY OF COURT STRUCTURE IN RELATION TO PROBATE AND FAMILY LAW MATTERS, REPORT TO THE JUDICIAL COUNCIL (Jan. 18, 1985). Regarding the alternative dispute resolution study, *see infra* notes 224-27 and accompanying text.

60. *See infra* notes 220-22 and accompanying text.

61. *See* Orders effective Jan. 3, 1978, Me. Rptr., 381-384 A.2d XIX, XXI, and XXV, and Orders effective Sept. 1, 1980, Me. Rptr., 413-417 A.2d LII, LXVIII, and LXXI.

February 1st of the following year. The Operating Procedures remain in effect in this form.[62]

The first significant amendments under the new procedures were adopted in August 1981, further clarifying the attachment rules and adopting the current versions of the Federal Rules governing class actions.[63] Thereafter, substantial groups of amendments dealing with all aspects of the Civil Rules have been promulgated each year to take effect in February.[64] Numerous amendment orders have also been promulgated at other times of year under the emergency provisions of the Operating Procedures.[65]

As a member of the Law Court, Chief Justice McKusick also contributed to the development of Maine civil procedure. His opinions on procedural matters clearly articulate the basic principle that the Rules should be construed flexibly to do substantial justice. Those opinions also reflect his own knowledge and experience gained in Maine's rulemaking process and in his related professional activities.[66]

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62. *See* Order of Jan. 3, 1980, Me. Rptr., 409-412 A.2d XXI-XXIV, as amended by Order of Dec. 16, 1981, Me. Rptr., 434-440 A.2d LXXX-LXXXIV.

63. *See* Order effective Aug. 6, 1981, and advisory committee notes, Me. Rptr., 428-433 A.2d XXXV, XLVIII.

64. *See* Order effective Feb. 1, 1983, Me. Rptr., 449-458 A.2d LIII; Order effective Feb. 15, 1983, Me. Rptr., 459-466 A.2d XLII; Order effective Feb. 1, 1984, Me. Rptr., 467-478 A.2d XXXVI, LXIV; Order effective Feb. 15, 1985, Me. Rptr., 479-487 A.2d LIX; Order effective Feb. 15, 1986, Me. Rptr., 498-509 A.2d XXLII, L; Order effective Feb. 1, 1987, Me. Rptr., 510-521 A.2d XXXV; Order effective Feb. 15, 1987, Me. Rptr., 510-521 A.2d LXXXI; Order effective Feb. 15, 1988, Me. Rptr., 522-536 A.2d CCXI; Order effective Feb. 15, 1989, Me. Rptr., 551-562 A.2d XXXI; Order effective Feb. 15, 1990, Me. Rptr., 563-575 A.2d XXXI; Order effective Feb. 1, 1991, Me. Rptr., 583(4) A.2d CXXXVI; and Order effective Feb. 15, 1991, Me. Rptr., 583(4) A.2d CXX.

65. Order effective Mar. 15, 1982, Me. Rptr., 441-448 A.2d XXV; Order effective Nov. 11, 1982, Me. Rptr., 449-458 A.2d XXX; Order effective July 5, 1983, Me. Rptr., 459-466 A.2d XXXVIII; Order effective July 25, 1984, Me. Rptr., 467-478 A.2d XCV; Order effective Aug. 1, 1984, Me. Rptr., 467-478 A.2d CVII; Order effective July 25, 1984, Me. Rptr., 467-478 A.2d CVIII; Order effective Mar. 22, 1985, Me. Rptr., 483-497 A.2d XXIX; Order effective June 1, 1985, Me. Rptr. 488-497 A.2d XL; Order effective May 1, 1986, Me. Rptr., 498-509 A.2d CV; Order effective July 1, 1987, Me. Rptr., 522-536 A.2d XXXI; Order effective Mar. 1, 1988, Me. Rptr., 522-536 A.2d CCXLIII; Order effective Sept. 1, 1988, Me. Rptr., 537-550 A.2d XXXIX; Order effective July 1, 1989, Me. Rptr., 551-562 A.2d CLVIII; Order effective May 1, 1990, Me. Rptr., 563-575 A.2d LXXIV; Order effective May 8, 1990, Me. Rptr., 563-575 A.2d LXLVII; Order effective Mar. 1, 1990, Me. Rptr., 563-575 A.2d LXXX; Order effective July 1, 1990, Me. Rptr., 563-575 A.2d LXXXII; Order effective May 8, 1990, Me. Rptr., 563-575 A.2d CXLVIII; and Order effective Aug. 1, 1990, Me. Rptr., 576(3) A.2d CXXXVIII, CXLI.

66. For Law Court procedural decisions, *see, e.g.*, LaBonta v. City of Waterville, 528 A.2d 1262 (Me. 1987) (proceeding to challenge zoning ordinance amendment erroneously brought under M.R. Civ. P. 80B treated as declaratory judgment action, because dismissal would violate principle of M.R. Civ. P. 1); Harriman v. Maddocks, 518 A.2d 1027 (Me. 1986) (claims adjusters' files presumed "prepared in anticipation of

It is thus evident that, through all his varied responsibilities and activities as active practitioner and chief justice, the development and growth of the procedure by which civil disputes are heard and resolved have been among Vincent McKusick's primary concerns. The result of McKusick's efforts and focus is that Maine has a strong and comprehensive body of court-made rules of widespread application and effect that reflect the fact of his continuing national involvement. Maine has been indeed fortunate to have had the benefits of McKusick's leadership and intellect in the development of its system of civil procedure.

II. THE MAINE RULES OF CIVIL PROCEDURE: MCKUSICK'S LEGACY

The Maine Rules of Civil Procedure as a continuing, growing body are Vincent McKusick's legacy for Maine. The process by which the Rules were initially developed and the history of their amendment since 1959 demonstrates the potential and the limits of the judicial rulemaking power. At the same time, the changing provisions of the Rules illustrate the pressures and patterns that have affected American courts in this period of turbulent national growth and change.

A. The Rules as Promulgated

1. The Federal Rules

The Maine Rules as promulgated in 1959 were an artful blending of the federal model with provisions reflecting the demands of state practice. The Federal Rules of Civil Procedure as originally adopted

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litigation" and thus protected from discovery by M.R. Civ. P.26(b)(3) to avoid complexity and delay in case-by-case determination of discoverability); Tisei v. Town of Ogunquit, 491 A.2d 564 (Me. 1985) (oral testimony at summary judgment hearing motion, though taken contrary to M.R. Civ. P. 56(c), treated as affidavits for purposes of appeal by agreement of counsel); Herrick v. Theberge, 474 A.2d 870 (Me. 1985) (ex parte attachment upheld at subsequent dissolution hearing despite "sloppy" jurats; arguably inadequate showing of ex parte need did not require new motion and notice); Battryn v. Indian Oil Co., 472 A.2d 937 (Me. 1984) (sanctions against attorney for failure to respond with objections to interrogatories under M.R. Civ. P. 33 upheld with extensive reference to history and purposes of M.R. Civ. P. 37); Beegan v. Schmidt, 451 A.2d 642 (Me. 1982) (affirming "transactional test" of RESTATEMENT (SECOND) OF JUDGMENTS to determine scope of cause of action for res judicata purposes because Maine Rules of Civil Procedure permit parties to bring all aspects and theories of controversy before court); Sevigny v. Home Builders Ass'n of Maine, Inc., 429 A.2d 197 (Me. 1981) (potential collateral estoppel effect, as defined in RESTATEMENT (SECOND) OF JUDGMENTS, gave party standing to appeal judgment in its favor); Reeves v. Travelers Ins. Companies, 421 A.2d 47 (Me. 1980) (upholding dismissal of action for failure to comply with pretrial conference order to produce certain documentation, in light of purposes of discovery and pretrial rules to serve purposes of M. R. Civ. P. 1 by assuring full disclosure before trial); Bagley v. Bagley, 415 A.2d 1080 (Me. 1980) (*forum non conveniens* does not deprive court entering judgment of jurisdiction to correct error under M.R. Civ. P. 60(b)) (citing RESTATEMENT (SECOND) OF JUDGMENTS, and RESTATEMENT (SECOND) OF CONFLICT OF LAWS).

were based on two cardinal premises that have remained unchanged: Rule 1 provided that the Rules "shall be construed to secure the just, speedy, and inexpensive determination of every action." Rule 2 achieved the abolition of the common law forms of action and the merger of law and equity by providing that "[t]here shall be one form of action to be known as 'civil action.' "[67]

From that starting point, the Federal Rules established a system of procedure that sought to encourage pretrial settlement and simplify and focus trial or other disposition in those cases that could not be settled. The function of issue formulation and narrowing was shifted from detailed factual allegations and denials in the pleadings to a more complex pretrial process that allowed notice pleading, subject to counsel's undertaking that the claim could be supported, and sought through a full range of discovery devices derived from the equity practice to put all parties in equal possession of the facts and theories upon which the case depended.[68] An optional pretrial conference was provided as a forum in which the judge and the parties together could assess the results of discovery, consider settlement, and determine the issues actually to be tried and the course of the trial.[69] The common law demurrer and plea in abatement were replaced by an all-purpose motion to dismiss, and the pleadings were rendered freely amendable on both formal and substantive points.[70]

Liberal joinder provisions, also drawn from equity, meant that the pleadings served primarily as a means for bringing before the court all claims and parties related to the subject of the action, with power in the court to consolidate or separate claims, parties, and actions for trial as appropriate.[71] The common law's forbidden "speaking demurrer" was given legitimacy in the motion for summary judgment based on affidavits and other written submissions.[72] Various equitable remedies were incorporated in streamlined form, and a simplified version of the former statutory procedure for appeals to the Courts of Appeal was provided.[73] Simplified official forms of summons, pleadings, and other necessary papers were appended to the Rules and were, by a 1946 amendment, expressly declared to be "sufficient under the rules and . . . intended to indicate the simplic-

67. FED. R. CIV. P. 1, 2. *See generally* C. WRIGHT, LAW OF FEDERAL COURTS 523, 540 (4th ed. 1983); F. JAMES & G. HAZARD, *supra* note 1, at 21; C. CLARK, *supra* note 17, at 64-65.

68. *See* FED. R. CIV. P. 7-12, 26-37 (1938).

69. *See* FED. R. CIV. P. 16 (1938).

70. *See* FED. R. CIV. P. 12(b), 15 (1938).

71. *See* FED. R. CIV. P. 13-14, 17-25, 42 (1938).

72. *See* FED. R. CIV. P. 56 (1938); C. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING 541-44, 557-60 (2d ed. 1947).

73. *See* FED. R. CIV. P. 64-76 (1938).

ity and brevity of statement which the rules contemplate."[74]

2. *The Maine Rules*

The Maine Rules of Civil Procedure as adopted in 1959 incorporated eighty-one of the eighty-seven Federal Rules then in effect, omitting a few provisions unique to federal practice such as rules governing federal receiverships and condemnation proceedings.[75] Thirty-three Federal Rules were adopted without change, and the variations in many of the rest were technical or were changes necessitated by jurisdictional differences. In addition, Maine adopted eleven unique rules covering attachment, arrest, replevin, real actions, review of administrative action, certain Law Court proceedings, divorce and annulment, definitions, and admissions to the bar.[76] The Supreme Judicial Court promulgated twenty-four of the thirty-two forms in the original federal Appendix of Forms with only minor jurisdictional variations. Nine unique Maine forms covered matters, such as writs of attachment, not found in the Federal Rules.[77]

Forty-three of the ninety-two Maine Rules of Civil Procedure involved significant departures from prior Maine practice. In presenting the Rules to the bar at the January 1959 meeting, Professor Field and Chairman Pierce had focused on three principal changes: (1) law and equity were to be merged and the common law forms of action abolished in favor of the single form of civil action as provided in Rule 2; (2) the time periods and deadlines of the Rules were not to be tied to the beginning and ending dates of the statutory terms of court in each county; and (3) appellate review was to be by appeal in all cases, eliminating the technically cumbersome mode of review by bill of exceptions in actions at law.[78] As in the Federal

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74. *See* FED. R. CIV. P. 84. The 1946 amendment of Rule 84 was intended to make clear that "the forms contained in the Appendix of Forms are sufficient to withstand attack under the rules under which they are drawn, and that the practitioner using them may rely on them to that extent." *See* FED. R. CIV. P. 84 advisory committee's note to 1946 amendment.

75. *See* FED. R. CIV. P. 64 (incorporation of state attachment rules), 66 (receiverships), 71A (condemnation), 72 (Supreme Court appeals), 80 (stenographers), 83 (local rules).

76. *See* M.R. Civ. P. 4A, 4B, 4C, 76A, 80A, 80B, and 87. In addition, a number of unique Maine Rules were substituted for certain of the Federal Rules. *See* M.R. Civ. P. 64 (Replevin), 72 (report to the Law Court), 80 (divorce), 83 (definitions).

77. The omitted federal forms dealt with matters unique to federal jurisdiction. *See* FED. R. CIV. P. Appendix of Forms 2 (allegation of jurisdiction), 14-17 (federal statutory actions), 28-29 (federal condemnation), 30 (suggestion of death upon the record, adopted in Maine with 1966 amendment of M.R. Civ. P. 25, *infra* note 109). The unique forms were M.R. Civ. P. Forms 2 (writ of attachment), 2A (trustee summons), Alts. 1, 2, 2A (for use in another county), 2B (return of service), 14 (writ of replevin and bond), 21A (trustee's disclosure), 30 (writ of execution).

78. *See* FIELD, *supra* note 24, at 37-38; remarks of Leonard A. Pierce, *in* Field,

Rules, the pleading, joinder, discovery, motion practice, and pretrial rules also brought about major changes intended to encourage settlement and simplify and focus the trial, and the simplified forms in the Appendix of Forms were "sufficient under the rules."[79]

Many elements of Maine practice survived, however. Among the more significant departures from the federal model were the provision of Maine Rule 3 permitting an action to be commenced by service of process, provisions in Maine Rule 4 requiring the plaintiff to prepare and deliver the summons to the officer for service, elimination from Maine Rule 14(a) of the requirement of a motion for leave to bring in a third-party defendant, creation of an exception in Maine Rule 17(a) allowing a subrogated insurer to sue in the name of the insured, inclusion in Maine Rule 33 of a limit on the number of interrogatories permitted, the provision of Maine Rule 38 for trial by jury in the absence of waiver, the provision of Maine Rule 41 allowing voluntary dismissal by the plaintiff at any time prior to trial, the provision of Maine Rule 52 requiring findings of fact in a nonjury case only upon request of a party, and the provision of Maine Rule 62(e) making stay of execution automatic upon appeal.[80]

The Maine District Court Civil Rules as promulgated in 1962 were reflective of the initially low jurisdictional ceiling of the district court ($1,200 in 1961, increased to $10,000 in 1965). Thus the District Court Civil Rules incorporated many provisions of the Maine Rules of Civil Procedure by reference, but omitted entirely rules governing compulsory counterclaims, third-party practice, the pretrial conference, jury trial, and equitable remedies. Depositions and interrogatories could be used only by agreement or leave of court. Provisions were added to cover removal and appeal and proceedings unique to the district court such as judicial separation and forcible entry and detainer.[81]

3. The Rulemaking Process in Detail

We can better appreciate the process by which the Maine Rules were developed by studying a single section of them in detail. Together with Sanford lawyer James H. Titcomb, McKusick served on the subcommittee charged with reviewing Federal Rules 38 through 53. These rules, constituting Part VI of the Federal Rules, contain

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supra note 24, at 47; *id.* at 51-53, 89, 101-102.

79. M.R. Civ. P. 84.

80. M.R. Civ. P. 3, M.R. Civ. P. 4(b), M.R. Civ. P. 14(a), M.R. Civ. P. 17(a), M.R. Civ. P. 33(a), M.R. Civ. P. 38(a), M.R. Civ. P. 41(a), M.R. Civ. P. 52(a), M.R. Civ. P. 62(e).

81. For the increase in the jurisdictional limits of the district court, see P.L. 1965, ch. 236. For particular rules provisions, see M.D.C. Civ. R. 13, 26-37, 75-75, 80C, 80D. *See also* M.D.C. Civ. R. 1, 2, committee's notes, 2 FIELD, MCKUSICK & WROTH, *supra* note 24, at 419, 422.

the provisions pertaining to trial. The work of the McKusick-Titcomb subcommittee, as documented in the several drafts described in the preceding section, shows an approach emphasizing verbatim adoption of the text of appropriate federal rules with few major changes. Nevertheless, the Maine drafters were sensitive to the nuances of Maine practice, and in important areas, such as the right to jury trial and reference, substantial variations from the federal model were proposed. Most of the subcommittee's recommendations were adopted, with a few notable exceptions. The full committee and the court also added provisions retaining prior practice at a number of points. Since 1959, every one of the rules recommended by the subcommittee has been amended, and substantial changes have been made in nearly all of them.[82]

A summary of the work of the subcommittee follows.

Rules 38, 39—Mode of Trial. Rules 38 and 39 deal with the right to trial by jury and the manner of determining the mode of trial when that right is absent or waived. Federal Rule 38 provides that a party who claims the right to trial by jury must make a timely demand for jury trial or be treated as having waived the right. In a major change from the federal pattern, the McKusick subcommittee recommended that Maine Rule 38 recognize the existing Maine practice by providing that in a case where the right existed, jury trial would be automatic unless affirmatively waived by all parties. In the absence of such waiver, the court, on its own motion or on the demand of a party, could find that there was no jury right and order trial without jury. The subcommittee also proposed conforming modifications in Rule 39. The subcommittee's draft of Rule 38 was ultimately adopted by the court with only minor changes.[83] In adopting Rule 39, the court omitted a sentence proposed in the subcommittee draft of Rule 39(a) giving the trial court power to determine the order of trial of jury and nonjury issues and added a subdivision (b) incorporating a prior statutory provision permitting nonjury trials to be held anywhere in the state.[84]

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82. For the subcommittee process, see *supra* notes 28-33 and accompanying text.

83. M.R. Civ. P. 38 (1959). For the subcommittee's recommendations, see BLUE BOOK, *supra* note 28, at IV-1 to IV-4. Maine eventually adopted the federal practice, and other major changes were made in the jury system. *See infra* note 113 and accompanying text.

84. M.R. Civ. P. 39 (1959). For the subcommittee's recommendation, see BLUE BOOK, *supra* note 28, at IV-4; BROWN BOOK, *supra* note 33, at 16. The order of trial provision in Rule 39(a) was silently dropped prior to publication of the WHITE BOOK, *supra* note 32, presumably because of the potential constitutional issues involved in determining the order of trial where both legal and equitable claims turn on the same facts. These issues are discussed in 1 FIELD, MCKUSICK & WROTH, *supra* note 24, at § 38.2. The statute incorporated in Rule 39(b) was R.S. ch. 107, § 30 (1959), repealed by P.L. 1959, ch. 317, § 86 (effective December 1, 1959), which had made a similar provision for equity cases.

Rules 40-42—Assignment, Prosecution, and Convenience of Trial. Rules 40-42 contain provisions concerning the administration of the docket and individual cases. For Rule 40, the subcommittee recommended a provision that would carry forward the Maine practice of allowing different procedures for trial assignment in the different counties. This provision was promulgated by the court as the first sentence of what became Rule 40(a). In Rule 40(b) and (c) the court added language from the former Revised Rules of Court concerning the time at which actions were to be in order for trial and incorporated additional provisions of the Revised Rules concerning continuances.[85]

In Rule 41(a), the Committee also recommended a departure from the federal rule in recognition of Maine practice. Federal Rule 41(a)(1) allowed the plaintiff to dismiss an action unilaterally only up until the time of service of the answer or a motion for summary judgment. The subcommittee's recommendation, adopted by the court, permitted voluntary dismissal at any time prior to trial.[86] The subcommittee recommended the remainder of Federal Rule 41 with only minor changes. Subsequently, Rule 41(b)(1), permitting the trial court to dismiss an action on its own motion and without notice for lack of prosecution after two years, was added to the draft and adopted by the court.[87]

The subcommittee recommended adoption of Federal Rule 42, permitting the court to consolidate or separate issues and actions for trial. The proposal, which the court adopted, broadened the rule into a flexible transfer of venue provision by permitting such trials in any county and adding a subdivision (c) permitting an action to be transferred to any county for trial in the interests of justice or for the convenience of parties and witnesses.[88]

Rules 43-46—Trial Procedure. Rules 43-46 govern various procedural aspects of the trial. The subcommittee recommended adoption of Federal Rule 43 governing the admission of evidence, with variations primarily intended to reflect the differences between federal and state practice. The proposal narrowed Maine practice by limiting cross-examination of a party, or an officer of a party, called by

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85. M.R. Civ. P. 40 (1959). For the subcommittee recommendations, see BLUE BOOK, *supra* note 28, at IV-4 to IV-5; GREEN BOOK, *supra* note 31, at 16; BROWN BOOK, *supra* note 33, at 16.

86. M.R. Civ. P. 41(a)(1959). For the subcommittee's recommendation, see BLUE BOOK, *supra* note 28, at IV-5 to IV-7. The federal procedure was eventually adopted as part of the development of expedited pretrial procedure. *See infra* notes 116, 216 and accompanying text.

87. *See* BROWN BOOK, *supra* note 33, at 17-18. This procedure carried forward existing practice. *Id.*

88. M.R. Civ. P. 42 (1959). For the subcommittee's recommendation, see BLUE BOOK, *supra* note 28, at IV-7 to IV-9. Rule 42(c) was based on the federal transfer of venue statute, 28 U.S.C. § 1404(a). M.R. Civ. P. 42 reporter's note.

an adverse party to the subject matter of the examination in chief. The rule was promulgated substantially as proposed, with the addition of subdivisions (f)-(k) carrying forward evidentiary provisions of the Revised Rules of Court.[89] The subcommittee recommended, and the court promulgated, a modification of Federal Rule 44 that also changed Maine practice by eliminating the requirement of a "double certificate" attesting to the authority of the custodian who certifies a public record, when that record is kept within the state.[90] The subcommittee recommended, and the court adopted, Federal Rule 45, covering subpoenas, with certain changes reflecting Maine practice.[91]

Rule 46, providing that exceptions were no longer necessary, was viewed as one of the major changes brought about by the Rules, eliminating what the proponents had decried as the empty and confusing formalism that the word "exception" must be uttered at trial by the objecting lawyer to save an error for appellate review and that appellate review was limited to the matters listed in the bill of exceptions. Rule 46 retained the requirement that the grounds of objection be presented to the trial judge on the record, but, in conjunction with major changes in the rules governing appeals, opened the full record to review. The subcommittee recommended a variation of Federal Rule 46 based on what was characterized as the clearer formulation found in Federal Rule of Criminal Procedure 51. This recommendation was adopted with minor changes by the court.[92]

Rules 47-50—The Jurors and Their Verdict. Rules 47-50 govern the composition of the jury, general and special verdicts, and motions for judgment notwithstanding the verdict. The subcommittee recommended adoption of Federal Rule 47, with its provision that the trial court should conduct the voir dire, a significant change from the Maine practice in which the lawyers had questioned prospective jurors. The full committee's recommendation, which the court adopted, gave the trial court the option of conducting the voir

89. M.R. Civ. P. 43 (1959). For the subcommittee's recommendation, see BLUE BOOK, *supra* note 28, at IV-9 to IV-10; M.R. Civ. P. 43 reporter's note. For amendments to eliminate inconsistencies or duplications with the Maine Rules of Evidence, see *infra* note 115 and accompanying text.

90. M.R. Civ. P. 44 (1959). For the subcommittee's recommendation, see BLUE BOOK, *supra* note 28, at IV-11 to IV-12.

91. M.R. Civ. P. 45 (1959). For the subcommittee's recommendation, see BLUE BOOK, *supra* note 28, at IV-12-14.

92. *See* BLUE BOOK, *supra* note 28, at IV-14 to IV-15; Field, *supra* note 33, at 89; 1 FIELD, MCKUSICK & WROTH, *supra* note 24, at § 46.2. M.R. Civ. P. 46 differs from FED. R. CIV P. 46 in omitting the word "formal" at the beginning of the first sentence and in beginning the final clause of the rule with "but" rather than "and." *Cf.* FED. R. CRIM. P. 51 (1944).

dire.[93] The subcommittee recommended, and the court adopted, Federal Rule 48 permitting stipulations as to the size of the jury and number of jurors necessary for a verdict.[94] The subcommittee also recommended adoption of Federal Rule 49 governing special verdicts. This recommendation, which carried forward Maine practice, was adopted by the court.[95]

In recommending adoption of Federal Rule 50 covering directed verdicts and judgments notwithstanding the verdict, the subcommittee was proposing a significant change in Maine practice, under which, after the erroneous failure to direct a verdict, the only available relief was a new trial. Rule 50(b) allows the trial judge to reserve decision on a directed verdict motion until after verdict and then enter judgment on the verdict, enter judgment notwithstanding the verdict, or order a new trial, as appropriate. The court adopted the subcommittee's recommendation.[96]

Rules 51-52—Instructions and Findings. The subcommittee recommended adoption of Federal Rule 51 providing the procedure for instructions to the jury and objection thereto. The principal change for Maine practice was the provision that counsel were to be informed of proposed instructions prior to arguing the case to the jury. The court adopted the recommendation as Rule 51(b), adding a new Rule 51(a) to carry forward the allocation of one hour per side for closing argument from the Revised Rules of Court.[97]

Federal Rule 52 requires the trial court to make findings of fact and conclusions of law in all nonjury cases. The subcommittee recommended adoption of this rule, which would have changed Maine practice under which findings were required only upon request of a party. The full committee recommended a revised version that

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93. M.R. Civ. P. 47 (1959). For the subcommittee's recommendation, see BLUE BOOK, *supra* note 28, at IV-15 to IV-16. The rule also departed from the federal model in incorporating provisions concerning alternate jurors based on existing practice. *Id. See* M.R. Civ. P. 47 reporter's note. For extensive changes concerning challenges and alternate jurors, see *infra* note 114 and accompanying text.

94. M.R. Civ. P. 48 (1959). For the subcommittee's recommendation, see BLUE BOOK, *supra* note 28, at IV-16; M.R. Civ. P. 48 reporter's note. For amendments to implement legislation changing the size of the jury and number required for a verdict, see *infra* note 113 and accompanying text.

95. M.R. Civ. P. 49 (1959). For the subcommittee's recommendation, see BLUE BOOK, *supra* note 28, at IV-16 to IV-18.

96. M.R. Civ. P. 50 (1959). For the subcommittee's recommendation, see BLUE BOOK, *supra* note 28, at IV-18 to IV-22. The Rule as proposed and adopted contained variations clarifying the federal rule, reflecting the fact that the standards for direction of the verdict and grant of a new trial in Maine are identical, and spelling out the appropriate courses of action for the Law Court. *See* M.R. Civ. P. 50 reporter's note.

97. M.R. Civ. P. 51 and reporter's note (1959). For the subcommittee's recommendation, see BLUE BOOK, *supra* note 28, at IV-22 to IV-23. For amendments making the time for argument discretionary and permitting the court to sum up the evidence, see *infra* note 118 and accompanying text.

would require findings only upon request, citing the administrative burden that mandatory findings in every case would impose on understaffed judges. The court adopted the full committee's recommendation.[98]

Rule 53—Referees. Federal Rule 53 carried forward the rather complex provisions of the prior federal equity rule governing reference to masters in equity cases. The subcommittee originally recommended an adaptation of this rule to the traditional Maine practice of reference of cases to one or more referees. After the full committee meeting, McKusick and Chairman Pierce prepared a redraft designed to simplify the rule and preserve as much of the Maine practice as possible. This version was adopted by the court with further minor changes.[99]

B. Amendments to the Maine Rules, 1959-1991: An Overview

One of the features emphasized by proponents of judicially promulgated rules of procedure is the ease and flexibility with which such rules can be amended to adapt to changing conditions or unexpected interpretations.[100] This premise is demonstrated by the amendments which the United States Supreme Court and Congress have made to the Federal Rules. In Maine, the Supreme Judicial Court has been even more active and responsive to the needs of bench, bar, and public.

Since 1938 the Federal Rules have been amended at relatively infrequent intervals. Principal changes adopted by the Supreme Court have included amendments clarifying the procedure for multi-party and class actions, adoption of a separate body of Federal Rules of Appellate Procedure, substantial revisions to the discovery rules, amendments intended to simplify service of process, and amendments intended to police and penalize abuses of the Rules.[101] With increasing complexity of the issues and higher jurisdictional amounts, civil litigation in the federal courts has necessarily become

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98. M.R. Civ. P. 52 (1959). For the subcommittee and committee recommendation, see BLUE BOOK, *supra* note 28, at IV-23; GREEN BOOK, *supra* note 31, at 17.

99. M.R. Civ. P. 53 (1959). For the subcommittee and committee recommendation, see BLUE BOOK, *supra* note 28, at IV-24 to IV-26; GREEN BOOK, *supra* note 31, at 17-18; WHITE BOOK, *supra* note 32, at 95-97. For numerous amendments made in the operating details of the rule, see *infra* note 120 and accompanying text.

100. A. VANDERBILT, MINIMUM STANDARDS OF JUDICIAL ADMINISTRATION 91-93 (1949); J. WEINSTEIN, REFORM OF COURT RULE-MAKING PROCEDURES (1977); R. MILLAR, CIVIL PROCEDURE OF THE TRIAL COURT IN HISTORICAL PERSPECTIVE (1952); C.CLARK, *supra* note 72. *See also* C. CLARK, *supra* note 17 at 74-75.

101. For the various amendments, see 86 S. Ct. 173, 88A S. Ct. 2333, 90A S. Ct. 2357, 97 F.R.D. 165, 85 F.R.D. 521. *See* Order of Feb. 28, 1966, effective July 1, 1966, 383 U.S. 1029-1070; Order of Dec. 4, 1967, effective July 1, 1968, 389 U.S. 1063-1120; Order of March 30, 1970, effective July 1, 1970, 398 U.S. 971-1007; Order of April 28, 1983, 97 F.R.D. 165; and Order effective Aug. 1, 1980, 85 F.R.D. 521-544.

more complex, and criticism of the Federal Rules as productive of expense and delay continues to mount.[102] Such criticism raises serious issues to be considered as well by those who are responsible for the course of procedure in the state courts.

Since 1959, all but five of the original ninety-two Maine Rules of Civil Procedure have been amended at least once, many of them several times and in substantial ways. In addition, three rules have been wholly abrogated and thirty-four new rules have been added. The Maine District Court Civil Rules, also amended numerous times since their original promulgation in 1962, were in 1987 merged with the main body of Civil Rules, which were repromulgated in their entirety. In this process, the Rules were rendered gender-neutral by the elimination of masculine pronouns and other gender references. Twelve of the thirteen original official forms were amended and twenty-one new official forms were added between 1959 and 1989, when the Appendix of Forms was completely revised.[103]

These extensive amendments and additions have kept the Rules responsive to a variety of changing trends and pressures within and upon the courts over the last thirty years. Amendments through 1970 were primarily intended to adjust the Rules to the practical

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102. *See generally* 137 U. PA. L. REV. 1873 (1989) for a collection of articles assessing the Federal Rules of Civil Procedure on their 50th anniversary. For specific criticisms, see, *e.g.*, Frank, *The Rules of Civil Procedure—Agenda for Reform*, 137 U. PA. L. REV. 1883 (1989), and Louis, *Intercepting and Discouraging Doubtful Litigation: A Golden Anniversary View of Pleading, Summary Judgment and Rule 11 Sanctions Under the Federal Rules of Civil Procedure*, 67 N.C.L. REV. 1023 (1989). For concerns that reforms might limit access to the courts see Weinstein, *After Fifty Years of the Federal Rules of Civil Procedure: Are the Barriers to Justice Being Raised?*, 137 U. PA. L. REV. 1901 (1989); Carter, *The Federal Rules of Civil Procedure as a Vindicator of Civil Rights*, 137 U. PA. L. REV. 2179 (1989); Weinstein, *The Ghost of Process Past: The Fiftieth Anniversary of the Federal Rules of Civil Procedure and Erie*, 54 BROOKLYN L. REV. 1 (1988). For concerns that flexibility be sacrificed for uniformity see Shapiro, *Federal Rule 16: A Look at the Theory and Practice of Rulemaking*, 137 U. PA. L. REV. 1969 (1989). *See also* Carrington, *Making Rules to Dispose of Manifestly Unfounded Assertions: An Exorcism of the Bogy of Non-Trans-Substantive Rules of Civil Procedure*, 137 U. PA. L. REV. 2067 (1989). Rosenberg, *Federal Rules of Civil Procedure in Action: Assessing Their Impact*, 137 U. PA. L. REV. 2197 (1989); Rosenberg, *The Federal Rules after Half a Century*, 36 MAINE L. REV. 243 (1984) (Author suggests that there is little empirical evidence with which to evaluate the success or failure of the rules.).

103. The only rules so far unscathed in the amendment process are M.R. Civ. P. 2, 21, 61, 70, 85. The rules wholly abrogated are M.R. Civ. P. 4C, 87, 88. The rules added are M.R. Civ. P. 16A, 17A, 23A, 44A, 54A, 54B, 74A-74C, 75A-75D, 76B-76I, 80C-80L, 89-91. Fifteen of the added rules are the result of the merger of the Rules of Civil Procedure and District Court Civil Rules. For the 1987 merger and repromulgation, see Order of April 1, 1987, effective July 1, 1987, and advisory committee's notes, Me. Rptr., 522-536 A.2d XXXI-CCX. Conforming amendments were made to the Maine Administrative Court Rules, the Maine Rules of Probate Procedure, and the Maine Rules of Small Claims Procedure by Order of Jan. 21, 1988, effective March 1, 1988, Me. Rptr., 522-536 A. 2d CCXLIII-CCLXXVI.

realities of litigation or to adopt major Federal Rules amendments in such areas as parties and discovery that were designed to assure smoother operation of the existing system. In the second decade, changes in the Rules began to reflect the rapid social and technological change that was occurring in the society. Thus, in response to constitutional and legislative mandates, major amendments have been made in the rules governing attachments, the size and unanimity of the jury, and divorce litigation. New rules have been added to safeguard the right to trial by jury and provide procedure for such legislatively created "civil actions" as the traffic infraction, the civil violation, and the land-use violation. Increased pressures on the courts have resulted in major changes in the rules governing administrative appeals, complex developments in the pretrial and appeals rules, and the continued broadening of the procedure available in the district court to reflect its increased jurisdiction.[104]

In the 1980's, and now in the 1990's, these trends have continued. There is, however, a new emphasis on economy and efficiency, reflected in amendments increasing court control of the pretrial and appellate processes and the development of procedural avenues beyond the scope of the rules, such as judicial assignment, alternative dispute resolution, and new mechanisms to deal with domestic abuse and support. Currently, further major rules changes are being considered in such areas as attachment, discovery, and divorce litigation, as earlier reforms begin to give way under the new pressures for economy and efficiency.

These developments are summarized and documented in the following systematic survey of the principal changes in the Maine Rules of Civil Procedure since 1959.

1. Process

Substantial changes have been made in the rules governing commencement of the action and process. The purpose of the changes was to broaden and clarify the methods of serving process and to satisfy developing constitutional standards of notice and fairness. These changes are discussed at length below.[105]

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104. The jurisdictional level was increased to $30,000 by P.L. 1983, Ch. 275, amending ME. REV. STAT. ANN. tit. 4 § 152. In addition, the district court now has concurrent jurisdiction over a variety of specific claims for equitable relief and other specialized matters, including domestic relations, quiet title and foreclosure actions, and enviromental law violations, as well as exclusive jurisdiction over matters such as mental health commitment hearings and small claims. *Id.*

105. *See infra* notes 150-77 and accompanying text. In deference to changing office methods, the requirement in Rule 5(f) of a "backing" sheet on each document filed has been eliminated, and the standard size of all papers to be filed has been established at 8½ by 11 inches. *See* M.R. Civ. P. 5(f) and advisory committee's note to 1980 amend., 1 FIELD, MCKUSICK & WROTH, *supra* note 24, at 97, 98 (Supp. 1981).

2. *Pleadings and Parties*

The basic provisions of Rules 8-10, 12, and 15 concerning the content and form of pleadings, the manner of presenting defenses and objections, and the amendment of pleadings have undergone relatively little change.[106] Rule 11 has been amended to include motions as well as pleadings and its sanction has been changed from discipline of the attorney to the imposition of reasonable costs upon the party or the attorney or both.[107]

The rules concerning claims and parties have been refined and extensively elaborated. Thus, Rule 13 has been amended to establish exceptions from the compulsory counterclaim rule for motor vehicle cases and actions commenced by attachment and to make the rule applicable in the district court. Third-party practice under Rule 14 is now also available in the district court.[108] Rule 17 now provides that a subrogated insurer may sue in the name of the insured only after giving notice to the insured, and Rule 17A, providing a detailed procedure for the settlement of minor's claims by a guardian or other representative, has been added.[109] Rules 18, 19, 24, and 25 have been substantially revised to clarify the joinder of multiple claims and to take the more functional approach of the Federal Rules to joinder of parties. Federal Rules 23 and 23A, providing detailed procedural guidelines for class actions and shareholders' derivative suits, have been adopted virtually verbatim.[110]

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106. M.R. Civ. P. 8-10, 12, 15. Rule 12 was amended in 1966 to clarify the provisions for consolidation and waiver of defenses made by motion. *See* M.R. Civ. P. 12(g), (h), and explanation of 1966 amend., 1 FIELD, MCKUSICK & WROTH, *supra* note 24, at 236-38, 240. Rule 15 was amended at the same time to provide for relation back of amended pleadings bringing in a new party. *See* M.R. Civ. P. 15(c) and explanation of 1966 amend., *id.* at 297-98, 300-01.

107. *See* M.R. Civ. P. 11 and advisory committee's note to 1983 amend., Me. Rptr., 449-458 A.2d LIII-LIV, LXI-LXII.

108. *See* M.R. Civ. P. 13(a), (b), and explanation of amend. to 1960, 1962, and 1966 amends., 1 FIELD, MCKUSICK & WROTH, *supra* note 24, at 259-61, 263-65; M.R. Civ. P. 13(a), (j), and advisory committee's note to 1987 amend., Me. Rptr., 522-536 A.2d LXVIII-LXIX; M.R. Civ. P. 14 and advisory committee's note to 1987 amend., Me. Rptr., 522-536 A.2d LXX-LXXI; M.D.C. Civ. R. 14 and advisory committee's note to 1969 amend., 2 FIELD, MCKUSICK & WROTH, *supra* note 24, at 436-38.

109. *See* M.R. Civ. P. 17(c) and advisory committee's note to 1967 amend., 1 FIELD, MCKUSICK & WROTH, *supra* note 24, at 345, 346-48; M.R. Civ. P. 17A and advisory committee's note to 1970 amend., 1 FIELD, MCKUSICK & WROTH, *supra* note 24, at 166-70 (Supp. 1981); 1988 amend. and advisory committee's note, Me. Rptr., 522-536 A.2d CCXX-CCXXII, CCXXVIII-CCXXIX. On the amendment of Rule 17(c), see Wroth, *supra* note 47 at 72-78.

110. *See* M.R. Civ. P. 18, 19, 24, 25, and explanation of 1966 amends., 1 FIELD, MCKUSICK & WROTH, *supra* note 24, at 358-59, 363-65, 398-99, 404-06; M.R. Civ. P. 23, 23A, and advisory committee's notes to 1981 amends., Me. Rptr., 428-433 A.2d XL-XLIII, L-LII.

3. Pretrial Procedure

Substantial changes have been made in motion practice, discovery, the pretrial conference, and case assignment with the dual, and sometimes conflicting, goals of smoother functioning for the parties and greater opportunity for judicial management of cases. These changes are discussed at length below.[111]

4. Trial, Judgment, and Remedies

The drafting of Rules 38-53 covering trial has previously been described in detail.[112] Substantial changes have been made in a number of these rules.

Extensive amendments to Rules 38, 39, 47, and 48 were necessary to accommodate legislation changing the traditional requirement of a unanimous verdict of a twelve-member jury to a three-quarters majority of a jury of eight. In addition, Rule 38 now follows the Federal Rule in requiring a party desiring jury trial to include a jury demand in the pretrial scheduling statement, in contrast to the original Maine version of the rule under which jury trial was automatic unless waived or opposed on the grounds that there was no right to a jury.[113] Elaborate provisions concerning challenges and the impanelment of alternate jurors, borrowed from a local Maine federal district court rule, have been incorporated in Rule 47 to conform Maine civil and criminal practice.[114]

In other trial-related areas, Rule 44A covering proof of foreign law has been added, the evidentiary provisions of Rules 43 and 44A were amended for conformity with the Maine Rules of Evidence adopted in 1976, a new version of Rule 44 governing proof of official records

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111. *See infra* notes 178-228 and accompanying text.

112. *See supra* notes 83-99 and accompanying text.

113. For the amendments as to number and unanimity, see M.R. Civ. P. 38, 47, 48, and advisory committee's notes to 1973, 1975, and 1978 amends., 1 FIELD, MCKUSICK & WROTH, *supra* note 24, at 272-77, 301-304, 306-308 (Supp. 1981). Initially, the Legislature waffled between enabling the court to provide by rule for six- or eight-member juries; the present legislation allows the court to provide by rule for trial by six, seven, or eight jurors. ME. REV. STAT. ANN. tit.14, § 1204, as amended by P.L. 1977, ch. 102. *See* P.L. 1975, ch. 41, § 1; P.L. 1971, ch. 581, § 1. The provision for a less than unanimous verdict is found in ME. REV. STAT. ANN. tit. 14, § 1354. The provision for jury demand is similar to the practice under FED. R. CIV. P. 38. Despite the waiver provision in the original Maine rule, a 1967 amendment to Rule 16 had required a jury demand in the pre-trial memorandum. M.R. Civ. P. 38, 39, and advisory committee notes to 1974 amends., 1 FIELD, MCKUSICK & WROTH, *supra* note 24, at 272-73, 275, 279-80. Subsequent amendments have been driven by the changing framework of Rule 16. *See* M.R. Civ. P. 38 and advisory committee's note to 1988 amend., Me. Rptr., 522-536 A.2d CCXXII-CCXXIII, CXXIX; M.R. Civ. P. 39 and advisory committee's notes to 1986 and 1988 amends., Me. Rptr., 498-509 A.2d XLII-XLIII, XLVIII; Me. Rptr., 522-536 A.2d CCXXIII, CCXXIX.

114. *See* M.R. Civ. P. 47 and advisory committee's note to 1967 amend., 1 FIELD, MCKUSICK & WROTH, *supra* note 24, at 634-37.

has been adopted, and subpoenas under Rule 45 now may be issued by a member of the bar.[115] Rule 41(a)(1) has been amended to adopt the federal practice under which voluntary dismissal is permitted only until the time for answer or motion for summary judgment.[116] In an important clarification, the provisions of Rule 41(b)(2) governing the motion for judgment at the close of the plaintiff's evidence in a nonjury cases have been consolidated with the directed verdict provisions of Rule 50.[117]

The time-honored hour originally allowed each party for closing argument in the superior court under Rule 51 has been abandoned in favor of allowing the trial judge discretion as to the time for argument, and a provision stating the existing rule that the trial judge may sum up the evidence but may not comment on its weight was added to Rule 51 in conjunction with adoption of the Maine Rules of Evidence.[118] Rule 52 has been amended to conform to statute by making findings mandatory in every termination of parental rights case.[119]

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115. *See* M.R. Civ. P. 43, 44, 44A, and advisory committee's notes to 1966 and 1976 amends., 1 FIELD, MCKUSICK & WROTH, *supra* note 24, at 593-94, 604-06, 614; *id.* at 289-91, 295-96 (Supp. 1981). With the adoption of Maine Rule of Evidence 902(1) permitting the admission of any domestic public document under seal without extrinsic evidence, the requirement of double certification was effectively eliminated because Evidence Rule 902(1) is a means of proof incorporated under M.R. Civ. P. 44(c). *See* 1 FIELD, MCKUSICK & WROTH, *supra* note 24, at 294-295 (Supp. 1981). The change in Rule 45 reflects the fact that the powers of a notary, which include those of a justice of the peace, may now by statute be exercised by a member of the bar. *See* M.R. Civ. P. 45(a) and advisory committee's note to 1987 amend., Me. Rptr. 510-521 A.2d LXXXV, XCIII.

116. *See* M.R. Civ. P. 41(a)(1) and advisory committee's note to 1989 amend., Me. Rptr., 551-562 A.2d XXXV-XXXVI. The amendment changed the result of a Law Court decision in which a voluntary dismissal filed without prior notice at 9:00 a.m. on the day on which jury selection was to begin was upheld. *Id.* at XXXVI (citing Hall v. Norton, 549 A.2d 372 (Me. 1988)).

117. *See* M.R. Civ. P. 50(d) and advisory committee's note to 1983 amend., Me. Rptr., 449-458 A.2d LV, LXIII. Conforming changes were made in Rules 41(b)(2) and 52(a). Me. Rptr., 449-458 A.2d at LIV, LV, & LXII. A similar amendment to Federal Rule 41 and 52 is currently under consideration by the Supreme Court. *See* FEDERAL CIVIL JUDICIAL PROCEDURE AND RULES 133 (West 1991). Rule 41(b)(1) was amended in 1969 to require notice for involuntary dismissal for lack of prosecution. *See* M.R. Civ. P. 41 advisory committee's note to 1969 amend., 1 FIELD, MCKUSICK & WROTH, *supra* note 24, at 572. Rule 50 was also amended in 1966 to incorporate clarifying changes made in 1963 amendments to the Federal Rule. M.R. Civ. P. 50, explanation of 1966 amend., 1 FIELD, MCKUSICK & WROTH, *supra* note 24, at 660.

118. *See* M.R. Civ. P. 51(a) and advisory committee's note to 1988 amend., Me. Rptr., 522-536 A.2d CCXXIII, CCXXX; M.R. Civ. P. 51(c) and advisory committee's note to 1976 amend., 1 FIELD, MCKUSICK & WROTH, *supra* note 24, at 317-18 (Supp. 1981).

119. *See* M.R. Civ. P. 52(a) and advisory committee's note to 1989 amend., Me. Rptr., 551-562 A2d XXXVI. Rule 52(a) was also amended in 1975 to make clear that after findings the original judgment entered still controls unless the findings require it to be changed. *See* M.R. Civ. P. 52(a) and advisory committee's note to 1975

The provisions of Rule 53 concerning reference have been amended a number of times to broaden the court's discretion regarding compensation of the referee, to eliminate the required filing of a transcript with the report, to simplify the procedure for raising and determining objections to the report, and to provide a procedure for amendment of the report. Reference has also been made available in the district court, but further efforts to broaden the procedure to increase its use as an alternative dispute resolution device have been unavailing.[120] Few major changes have been made in Rules 54-63 covering judgment and related topics. Pursuant to special enabling legislation, the court added Rules 54A and 54B to set filing and other fees for the superior and district courts that had previously been set by statute. Entry fees are now $100 for the Law Court and superior court and $50 for the district court.[121] Amendments to the summary judgment procedure of Rule 56 are discussed below.[122] Rule 59 has been amended to clarify the power of the court to grant a new trial on its own motion, to make provision for the death or disability of the court reporter, and to condition the grant of a new trial on the grounds of excessive or inadequate damages on the prevailing party's rejection of the opportunity to remit or add a reasonable amount to the verdict.[123]

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amend., 1 FIELD, MCKUSICK & WROTH, *supra* note 24, at 324-25 (Supp. 1981).

120. *See* M.R. Civ. P. 53 and explanation of 1960, 1961, amends., 1 FIELD, MCKUSICK & WROTH, *supra* note 24, at 693-96; advisory committee's notes to 1975, 1977, and 1980 amends., *id.* at 333-36 (Supp. 1981); advisory committee's note to 1981 amend., Me. Rptr., 428-433 A.2d XLIII, LII-LII; advisory committee's note to 1991 amend., 583 A.2d No. 4 at CXXIV, CXXXI (advance sheet). For efforts to broaden the rule, see ADVISORY COMMITTEE ON CIVIL RULES, 1990 ANNUAL REPORT 4.

121. *See* M.R. Civ. P. 54A, added effective Sept. 14, 1979, Me. Rptr., 401-404 A.2d XXVI-XXVII; M.D.C. Civ. R. 54A, added effective Sept. 14, 1979, Me. Rptr., 401-404 A.2d at XXV-XXVI. The enabling legislation was P.L. 1979, ch. 425, §§ 1, 2; ch. 663, § 10, amending ME. REV. STAT. ANN. tit. 14 §§ 175, 555. District Court Civil Rule 54A became Rule 54B in the amendments merging the superior and district court rules. *See* M.R. Civ. P. 54B and advisory committee's note to 1987 amend., Me. Rptr., 522-536 A.2d CXXIX. The court has exercised its power to set fees by numerous amendments of these rules. *See* M.R. Civ. P. 54A, M.D.C. Civ. R. 54A, amends. effective Oct. 15, 1979, Me. Rptr., 405-408 A.2d XXI-XXIII; effective April 1, 1983, Me. Rptr., 449-458 A.2d CXVI-CXVII; effective June 1, 1985, Me. Rptr., 488-497 A.2d XL, XLI; effective May 1, 1986, Me. Rptr., 498-509 A.2d CV, CVI; effective March 1, May 1, and May 8, 1990, Me. Rptr., 563-575 A.2d LXXIV-LXXXI; effective Aug. 1, 1990, 576 A.2d No. 3 at CXXXVIII, CXXXIX (advance sheet). Rules 54A and 54B were also amended to provide that neither the state nor any state agency was required to pay any of the fees contained in those rules. *See* M.R. Civ. P. 54A, 54B, and explanation of 1989 amends., Me. Rptr., 551-562 A.2d CLVIII-CLX. In a recent administrative order, the court has established a new civil jury fee of $300. Order of Jan. 30, 1991, effective Feb. 1, 1991, 583 A.2d No. 4 at CXXXVI-CXXXVII (advance sheet).

122. *See infra* notes 185 and accompanying text.

123. *See* M.R. Civ. P. 59(a), (d), (f), and explanation of 1961 and 1966 amends., advisory committee's note to 1969 amend., 2 FIELD, MCKUSICK & WROTH, *supra* note 24, at 53-58.

There have also been relatively few changes to Rules 64-71 governing remedies. Amendments of Rule 64 to deal with constitutional issues concerning the procedure for replevin are considered below.[124] Rule 65 covering injunctions has been amended to increase the court's flexibility in dealing with preliminary and final hearings and to strengthen the assurances which must be made regarding efforts to give notice of an application for a temporary restraining order. The rule has been made applicable in the district court in view of the increase in that court's equity jurisdiction.[125] The offer-of-judgment procedure of Rule 68 was amended to permit an offer to be made on the issue of damages after liability has been resolved and to permit the court to allow an offer within 10 days of trial, but other efforts to expand the procedure have failed.[126] Rule 69 governing executions has been amended to make all discovery devices available in aid of the statutory disclosure procedure and to reflect constitutional concerns by allowing capias executions to issue only on court order for cause.[127]

5. *Appeals*

Rules 72-76A governing appeals to the Law Court have been substantially changed to simplify and shorten the procedure and increase Law Court supervisory control of the appellate docket. These changes are discussed at length below.[128]

Rules 76C-76I have been added to carry forward the provisions of the former District Court Civil Rules governing removal and appeals to the superior court. Those rules had been amended numerous times for purposes such as to eliminate de novo trial on appeal from a district court default judgment, to eliminate removal by plaintiff except in limited situations, to clarify the respective powers of the

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124. *See infra* note 172.

125. *See* M.R. Civ. P. 65 and explanation of 1966 amend., advisory committee's note to 1967 amend., 2 FIELD & MCKUSICK, *supra* note 24, at 103-106; advisory committee's note to 1976 amend., *id.* at 386-88 (Supp. 1981); amend. effective Jan. 3, 1978, Me. Rptr., 381-384 A.2d XIX-XX; M.D.C. Civ. R. 65 and advisory committee's note to 1983 amend., Me. Rptr., 449-458 A.2d LIX, LXVI.

126. *See* M.R. Civ. P. 68 and explanation of 1966 amend., advisory committee's note to 1967 amend., 2 FIELD & MCKUSICK, *supra* note 24, at 120-21. For the unsuccessful efforts, see ADVISORY COMMITTEE ON CIVIL RULES, 1983 ANNUAL REPORT 6; SUPPLEMENTAL REPORT 2 (Nov. 1989).

127. *See* M. R. Civ. P. 69 and explanation of 1959 amend., 2 FIELD, MCKUSICK & WROTH, *supra* note 24, at 125; advisory committee's notes to 1970 and 1971 amends., *id.* at 392-94 (Supp. 1981); advisory committee's note to 1988 amend., Me. Rptr., 522-536 A.2d CCXXIII-CCXXIV, CCXXX. For the the disclosure law as substantially revised by P.L. 1987, ch. 184, see ME. REV. STAT. ANN. tit. 14 §§ 3120-3136 (1980 & Supp. 1990); Calkins, *The New Disclosure Statutes*, 2 ME. BAR J 350 (1987). As to the constitutionality of capias execution, see 2 FIELD, MCKUSICK & WROTH, *supra* note 24, at 396-98.

128. *See infra* notes 229-45 and accompanying text.

superior and district courts in the removal and appeal process, to provide for electronic sound recording in district court proceedings, to cover direct appeals to the Law Court, and to conform in various ways to other rules amendments.[129] The rule governing removal has been completely revised to clarify its operation and applicability.[130]

6. *Courts and Clerks*

The rules governing the operations of the court and the clerks' offices have been amended in a number of respects to simplfy operations and to reflect the changing administrative structure of the Judicial Department.[131]

7. *Special Proceedings*

Rule 80, providing special procedures for actions for divorce and annulment has been amended on numerous occasions to reflect changing views of those actions and the increased complexity of domestic relations proceedings. Thus the original rule has been amended to make clear that its provisions may apply to either spouse, to accommodate legislation concerning disposition of marital property, to establish the finality of a judgment of divorce and other orders notwithstanding other pending claims, and to permit discov-

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129. *See* M.D.C. Civ. R. 73-76 and explanation of Jan. 1967 amend.; M.D.C. Civ. R. 73 advisory committee's note, Dec. 1967, 2 FIELD, MCKUSICK & WROTH, *supra* note 24, at 486-87; M.D.C. Civ. R. 73 advisory committee's notes, May 1974, Apr. 1975, Dec. 1975, Feb. 1976, and Nov. 1976, *id.* at 650-53 (Supp. 1981); M.D.C. Civ. R. 73 Supreme Judicial Court's note, Sept. 1980, *id.* at 653; M.D.C. Civ. R. 73 advisory committee's note, 1982 and 1984, Me. Rptr., 449-458 A.2d LXVI and Me. Rptr., 467-478 A.2d LXXVI; M.D.C. Civ. R. 75 advisory committee's note, Jan. 1974, 2 FIELD, MCKUSICK & WROTH, *supra* note 24, at 659 (Supp. 1981); M.D.C.Civ. R. 75 advisory committee's note, 1984, Me. Rptr., 467-478 A.2d LXXVI-LXXVII; M.D.C. Civ. R. 75A advisory committee's note, 1981, Me. Rptr., 428-433 A.2d LVII; M.D.C. Civ. P. 76 advisory committee's note, Jan. 1974 and Nov. 1976, 2 FIELD, MCKUSICK & WROTH, *supra* note 24, at 664-67 (Supp. 1981); M.R. Civ. P. 76C-76I advisory committee's notes, 1987, Me. Rptr., 522-536 A.2d CLXIII-CLXIX; M.R. Civ. P. 76H advisory committee's note, 1990, Me. Rptr., 563-575 A.2d LXIII.

130. *See* M.R. Civ. P. 76C and advisory committee's note, 1991, 583 A.2d No. 4 at CXXV-CXXVI, CXXXI-CXXXII (advance sheet).

131. *See, e.g.*, M.R. Civ. P. 6(a), 77(c), and advisory committee's notes, 1974, 1 FIELD & MCKUSICK, *supra* note 24, at 99-100, 543 (chief justice, rather than county commissioners, to determine hours and days on which clerks' offices open); explanation of 1984 amends., Me. Rptr., 467-478 A.2d XXXVI, XXXVIII (substituting "Chief Justice of Superior Court" for "Chief Justice of Supreme Judicial Court," reflecting establishment of former office by P.L. 1983, ch. 269 (enacting ME. REV. STAT. ANN. tit. 4 § 101A)); M.R. Civ. P. 78 and advisory committee's note to July 1987 amend., Me. Rptr., 522-536 A.2d CLXX-CLXXI (empowering the chief justice of the superior court and the chief judge of the district court, rather than the chief justice of the Supreme Judicial Court, to establish motion days); M.R. Civ. P. 79(b) advisory committee's note, 1983, Me. Rptr., 449-458 A.2d LVII, LXV (deleting provision concerning maintenance of extended records of judgments).

ery without court order on financial and property issues.[132] Provisions added to Rule 80 cover post-judgment motions, transfer from the superior to the district court, an exception to the pretrial conference rule, filing of property lists, and removal from the district court.[133] More recently, procedure in cases involving child support has been governed by child support guidelines and forms adopted by administrative order and statute. A general revision of Rule 80 is currently under consideration.[134]

The rules governing superior court review of state and local governmental action have been extensively amended, with the abolition of the common law writs of certiorari and mandamus, the development of elaborate procedures in Rule 80B for nonstatutory review, and the promulgation of Rule 80C to cover review under the Administrative Procedure Act.[135] Rule 80D, covering district court forcible entry and detainer actions, has been substantially amended to reflect a Law Court decision that there is a right to appeal with jury

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132. *See* M.R. Civ. P. 80 and advisory committee's note, 1967, 2 FIELD, MCKUSICK & WROTH, *supra* note 24, at 265-67, 271; advisory committee's note, 1977, *id.* at 547, 554 (Supp. 1981); advisory committee's note, 1981, Me. Rptr., 428-433 A.2d XLIV, LIII-LIV; advisory committee's note, 1984, Me. Rptr., 467-478 A.2d LXV, LXXIV.

133. *See* M.R. Civ. P. 80 and explanation of 1960 and 1962 amends., 2 FIELD, MCKUSICK & WROTH, *supra* note 24, at 267, 270-71; advisory committee's note, 1970, *id.* at 547-51 (Supp. 1981); advisory committee's note, 1981, Me. Rptr., 428-433 A.2d XLIV, LIV; advisory committee's note, 1983, Me. Rptr., 449-458 A.2d LVII, LXIV, LXII; advisory committee's note, 1984, Me. Rptr., 467-478 A.2d LXV, LXXIV; advisory committee's note, July 1987, Me. Rptr., 522-536 A.2d CLXXIV; advisory committee's note, 1988, Me. Rptr., 522-536 A.2d CXXIV, CXXX. A provision for in forma pauperis proceedings added in 1972 was deleted when Rule 91, a general rule for in forma pauperis proceedings, was adopted in 1984. *See* M.R. Civ. P. 80(l) and advisory committee's notes, 1972 and 1980, 2 FIELD, MCKUSICK & WROTH, *supra* note 24, at 548, 551-53, 555 (Supp. 1981); advisory committee's note, 1984, Me. Rptr., 467-478 A.2d LXV, LXXIV. For discussion regarding Rule 91, see *infra* note 149.

134. *See* Henry, *Child Support Guidelines Now Mandatory in Judicial Proceedings*, 4 ME. BAR J. 356 (1989); Order of Oct. 5, 1989, effective Oct. 12, 1989 (No. SJC-13); ME. REV. STAT. ANN. tit. 19, §§ 311-319 (Supp. 1990), enacted by P.L. 1989, ch. 834, Pt. A; Order of July 20, 1990, effective Aug. 19, 1990, 576 A.2d No. 3 at CXLIII-CXLVIII (advance sheet); Advisory Committee on Civil Rules, Minutes of Meeting of July 25, 1991, at 1-2.

135. *See* M.R. Civ. P. 80B, 81(c), and advisory committee's notes, 1967, 2 FIELD, MCKUSICK & WROTH, *supra* note 24, at 302-306, 322, 326-29; advisory committee's note, 1975, 2 FIELD, MCKUSICK & WROTH, *supra* note 24, at 563-64 (Supp. 1981); advisory committee's note, 1981, Me. Rptr., 428-433 A.2d XLIV-XLVI, LIV-LVI; advisory committee's note, Feb. 1, 1983, Me. Rptr., 449-458 A.2d LVIII, LXV; amend. effective Feb. 15, 1983, Me. Rptr., 449-458 A.2d CV-CVIII; advisory committee's note, Feb. 15, 1983, Me. Rptr., 459-466 A.2d XLII-XLVII; advisory committee's note, 1984, Me. Rptr., 467-478 A.2d LXVI, LXXV; advisory committee's note, 1990, Me. Rptr., 563-575 A.2d XXXII-XXXIII, LXIII; M.R. Civ. P. 80C and advisory committee's note to 1983 promulgation, Me. Rptr., 449-458 A.2d CVIII-CXI; 459-466 A.2d XLVII-XLIX; advisory committee's note, 1984, Me. Rptr., 467-478 A.2d LXVI, LXXV; advisory committee's note, 1990, Me. Rptr., 563-575 A.2d XXXIII, LXIII. *See generally* Wroth, *supra* note 47, at 86-92.

trial de novo in such actions.[136]

Since 1959, eight rules covering particular special proceedings in the superior and district courts have been added, illustrating the diversity and complexity of the uses to which civil procedure is currently put. These provisions now constitute Rules 80E-80L of the merged Maine Rules of Civil Procedure. The special rules cover proceedings for administrative inspection warrants,[137] traffic infractions,[138] separate support and custody,[139] civil violations,[140] search warrants for Schedule Z drugs,[141] warrants for surveys and tests,[142] land use violations,[143] and constitutionally required jury trial de novo of small claims appeals.[144]

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136. *See* M.R. Civ. P. 80D and advisory committee's note to 1990 amend., Me. Rptr., 563-575 A.2d XXXIII-XXXV, LXIII-LXV. The decison was North School Congregate Housing v. Merrithew, 558 A.2d 1189 (Me. 1989). A number of minor amendments had been made to the predecessor district court rule. *See* M.D.C. Civ. R. 80D and advisory committee's notes to 1967, 1969, and 1974 amends., 2 FIELD, MCKUSICK & WROTH, *supra* note 24, at 505-507; *id.* at 673-74 (Supp. 1981).

137. *See* Order effective July 1, 1987, and advisory committee notes, Me. Rptr., 522-536 A.2d XXXI, CLXXXIII-CLXXXIV.

138. *See* Order effective July 1, 1987, and advisory committee notes, Me. Rptr., 522-536 A.2d XXXI, CLXXXIV-CLXXXV; amended effective Feb. 15, 1990, and advisory committee notes, Me. Rptr., 563-575 A.2d XXXI, XXXV-XXXVI, and LXV-LXVI; amended effective Feb. 15, 1991, and advisory committee notes, Me. Rptr., 583 A.2d No. 4 at CXX, CXXVI-CXXVII, and CXXXII (advance sheet).

139. *See* Order effective Nov. 15, 1976, and advisory committee notes, Me. Rptr., 360-366 A.2d XXI, XXII-XXIV, XXXVI-XXXVIII; amended effective Feb. 1, 1984, Me. Rptr., 467-478 A.2d LXIV, LXVI; amended effective July 1, 1990, Me. Rptr., 563-575 A.2d LXXXII-LXXXIII, with advisory committee notes at LXXXIV; amended effective Feb. 15, 1991, Me. Rptr., 583(4) A.2d CLXXXV-CLXXXVII.

140. *See* Order effective Nov. 15, 1976, and advisory committee notes, Me. Rptr., 360-366 A.2d XXI, XXIV-XXV, XXX-XXXI, XXXVIII-XXXIX and XLI; amended effective Feb. 1, 1983, Me. Rptr., 449-458 A.2d LIII-LXVII; amended effective Feb. 15, 1986, and advisory committee notes, Me. Rptr., 498-509 A.2d XLII, XLVI, and L; amended effective July 1,1987, Me. Rptr., 522-536 A.2d CLXXXVII-CLXXXIX; amended effective Feb. 15, 1990, and advisory committee notes, Me. Rptr., 563-575 A.2d XXXI, XXXVI-XXXVII, and LXVI; amended effective Feb. 15, 1991, and advisory committee notes, Me. Rptr., 583(4) A.2d CXX, CXXVII, and CXXXIII.

141. *See* Order effective Nov. 15, 1976, and advisory committee notes, Me. Rptr., 360-366 A.2d XXI, XXVI, and XXXIX; amended effective July 1, 1987, Me. Rptr., 522-536 A.2d XXXI, CLXXXIX.

142. *See* Order effective July 1, 1987, Me. Rptr., 522-536 A.2d CLXXXIX-CXC.

143. *See* Order effective July 1, 1987, Me. Rptr., 522-536 A.2d CXC-CXCII; amended effective Feb. 15, 1990, and advisory committee notes, Me. Rptr., 563-575 A.2d XXXI, XXXVII-XXXVIII, and LXVI-LXVII.

144. *See* Order effective Feb. 15, 1986, and advisory committee notes, Me. Rptr., 498-509 A.2d LI, LIII-LV, and LVIII-LXI; amended effective July 1, 1987, Me. Rptr., 522-536 A.2d XXXI, CXCIII-CXCV; amended effective Feb. 15, 1990, and advisory committee notes, Me. Rptr., 563-575 A.2d XXXI, XXXVIII, and LXVII. As to the right to jury trial, see Ela v. Pelletier, 495 A.2d 1225 (Me. 1985).

8. Forms

Amendments to Rule 84 and the Appendix of Forms between 1959 and 1990 included efforts to restate the various forms of summons and writs in plainer language, amendments to accommodate the process forms to changes in the attachment rules, and changes to conform discovery forms to the 1970 amendments of the discovery rules.[145] The 21 new forms added between 1959 and 1990 covered divorce and protection from abuse, changes in the attachment and discovery rules, witness subpoenas, and miscellaneous other matters.[146] With the increasing administrative supervision of the practice and the merger of the superior and district court rules, the approach of the original Rule 84 declaring the official forms "sufficient" has been abandoned. An entirely new and reorganized Appendix of Forms containing only twenty-nine basic forms for both

145. Form 1 amended effective Sept. 1, 1960, 156 Me. Rptr. 556 and amended effective Sept. 1, 1973, Me. Rptr., 300-307 A.2d XXII, XXVI-XXVIII; Alternate Form 1 amended effective Sept. 1, 1960, 156 Me. Rptr. 556 and amended effective Sept. 1, 1973, Me. Rptr., 300-307 A.2d XXII, XXVII-XXIX; Form 1E amended effective Aug. 7, 1981, Me. Rptr., 428-433 A.2d XXXV, XLVII, and LXI; Form 2 amended effective Jan. 1, 1973, Me. Rptr., 293-299 A.2d XIX-XX and amended effective Aug. 1, 1973, Me. Rptr., 300-307 A.2d XIX-XXI; Alternate Form 2 amended effective Jan. 1, 1973, Me. Rptr., 293-299 A.2d XIX-XX and amended effective Aug. 1, 1973, Me. Rptr., 300-307 A.2d XIX-XXI; Form 2A amended effective Jan. 1, 1973, Me. Rptr., 293-299 A.2d XIX-XX and amended effective Feb. 15, 1986, Me. Rptr., 498-509 A.2d XLI, XLIV-XLV; Alternate Form 2A amended effective Jan. 1, 1973, Me. Rptr., 293-299 A.2d XIX-XX; Form 2C amended effective Dec. 31, 1967, Me. Rptr., 225-237 A.2d LXVII and abrogated Sept. 23, 1971, Me. Rptr., 276-284 A.2d XIX, XXIII; Alternate Form 2C amended effective Feb. 7, 1968, Me. Rptr., 237 A.2d XXIV and abrogated Sept. 23, 1971, Me. Rptr., 276-284 A.2d XIX, XXIII; Forms 2D-2G amended effective Aug. 1, 1973, Me. Rptr., 300-307 A.2d XIX-XXI; Form 14 amended effective Jan. 1, 1973, Me. Rptr., 293-299 A.2d XIX-XX; Form 21A amended effective Feb. 15, 1986, Me. Rptr., 498-509 A.2d XLII, XLV-XLVI; Form 22 amended effective Aug. 1, 1962, 158 Me. Rptr. 604-605 and amended effective Jan. 18, 1974, Me. Rptr., 313-319 A.2d XVII, XX-XXII; Form 24 amended effective Oct. 1, 1970, Me. Rptr., 257-266 A.2d XXXV-XXXVII; Form 30 amended effective Nov. 23, 1965, 161 Me. 696; and M.R. Civ. P. 84 amended effective July 1, 1987, Me. Rptr., 522-536 A.2d XXXI, CXCVIII.

146. Form 1D, effective Jan. 18, 1974, Me. Rptr., 313-319 A.2d XVII, XIX-XX; Form 1E, effective July 3, 1980, Me. Rptr., 413-417 A.2d XXX-XXXI; Form 2C, effective Dec. 31, 1967, Me. Rptr., 225-237 A.2d XXVII, LIX; Alternate Form 2C, effective Dec. 31, 1967, Me. Rptr., 225-237 A.2d XXVII, LIX; Forms 2D-2G, effective Jan. 1, 1973, Me. Rptr., 293-299 A.2d XIX-XX, XXXI-XXXIII; Form 13A, effective Aug. 7, 1981, Me. Rptr., 428-433 A.2d XXXV, XLVII, LXV-LXVI; Forms 14A-14D, effective Jan. 1, 1973, Me. Rptr., 293-299 A.2d XIX-XXI, XXXIII-XXXV; Form 15, effective Apr. 15, 1975, Me. Rptr., 326-335 A.2d XXII, XXIX; Form 16, effective Apr. 15, 1975, Me. Rptr., 326-335 A.2d XXII, XXIX, XXXI; Form 17, effective Feb. 15, 1985, Me. Rptr., 479-487 A.2d LIX, LXI-LXII; Form 31, effective Nov. 1, 1966, Me. Rptr., 215-224 A.2d XXI, XLIII; Form 32, effective Dec. 31, 1967, Me. Rptr., 225-237 A.2d XXVII, LXI; Form 33, effective May 9, 1970, Me. Rptr., 257-266 A.2d XXXII; Form 34, effective Aug. 7, 1981, Me. Rptr., 428-433 A.2d XXXV, XLVII, and LVIII-LX; Form 35, effective Aug. 7, 1981, Me. Rptr., 428-433 A.2d XXXV, XLVII, and LXII.

superior and district courts was adopted in 1990. Rule 84 now expressly provides that the new forms are "examples" only and that the Supreme Judicial Court and the chief judges of the two trial courts have power to promulgate "official forms" from time to time.[147]

9. *Other General Provisions*

Rules 87 and 88, covering admission to the bar and contingent fees, respectively, were abrogated in 1978 because their provisions were incorporated in the Maine Bar Rules adopted in that year.[148] Since 1959, rules have been adopted to cover the withdrawal of an attorney from representation in litigation, the admission of visiting lawyers, supervised practice by third-year law students representing public agencies or indigent clients, and proceedings in forma pauperis.[149]

C. *The Amendment Process in Detail: Three Examples*

A clearer idea of the uses of the amendment process and the changing patterns of the Maine Rules over the years can be gained by systematic and detailed examination of amendments in three key areas of procedure: process at the commencement of a civil action, pretrial practice, and appellate practice.

1. *Commencement of Action: Rules 3, 4, 4A, 4B, 4C*

Adoption of the rules in 1959 made a major change in the method of commencing an action, which under prior Maine practice had been by service of the writ upon the defendant personally, or more frequently by attachment of property, and occasionally by arrest of the defendant's person. Rule 3, combining the federal provision for

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147. *See* M.R. Civ. P. 84 and advisory committee's notes to 1987 and 1990 amends., Me. Rptr., 522-536 A.2d CXCVIII; Me. Rptr., 563-575 A.2d XXXVIII, LXVII; M.R. Civ. P. Appendix of Forms (1990) and advisory committee's note, Me. Rptr., 563-575 A.2d XXXVIII-LXII, LXVII-LXVIII. In 1991, Form 11.20, Witness Subpoena for Trial, was amended and a new Form 3.20 to implement the simultaneous amendments of Rule 4, *infra* note 157, was added. *See* M.R. Civ. P. Forms 3.20, 11.20, and advisory committee's notes to 1991 amends., 583 A.2d No. 4, at CXXXIII (advance sheet).

148. *See* M.R. Civ. P. 87, 88, 2 FIELD, MCKUSICK & WROTH, *supra* note 24, at 598, 601 (Supp. 1981). Order effective Nov. 1, 1978, Me. Rptr., 389-391 A.2d XXIV.

149. *See* M.R. Civ. P. 89 and advisory committee's note to 1967 promulgation, 2 FIELD, MCKUSICK & WROTH, *supra* note 24, at 365; M.R. Civ. P. 89 advisory committee's notes to 1971 and 1973 amends., *id.*, at 601-03 (Supp. 1981); M.R. Civ. P. 90 and advisory committee's note to 1969 promulgation, *id.*, at 368-70 (2d ed. 1970); M.R. Civ. P. 90 explanation of 1976 amend., advisory committee's note to 1980 amend., *id.*, at 605-08 (Supp. 1981); M.R. Civ. P. 90 advisory committee's note to 1988 amend., Me. Rptr., 522-536 A.2d CCXXV, CCXXXI; M.R. Civ. P. 91 and advisory committee's note to 1984 promulgation, Me. Rptr., 467-478 A.2d LXVI-LXVII, LXXV-LXXVI.

commencement by filing the complaint with an option for commencement by service of the summons and complaint, eliminated attachment and arrest as a means of commencing or giving notice of the action.[150] Rule 4 provided for notice through service of a summons and complaint personally within or without the state, or by a variety of means of substituted service.[151] Rules 4A, 4B, and 4C preserved the remedies of attachment and arrest as ancillary to the commencement of the action and the service of the summons and complaint.[152]

The numerous changes made in these rules since 1959 have had two basic purposes: (1) to expand and simplify the means of serving the summons and complaint, consistent with developing constitutional doctrines of due process; and (2) to shape the rules covering attachment and arrest to limits imposed by consumer-oriented legislation and perceived constitutional mandate. The amendments to these rules illustrate the flexibility with which rules of court can be adapted to changing constitutional and legislative requirements.

Rule 3. Rule 3 continues to provide the alternative options of filing and service for commencement of the action for the all-important purpose of tolling the statute of limitations.[153] A 1973 amendment was designed to complement simultaneous amendments of Rules 4A and 4B, requiring commencement by filing in actions involving the use of attachment and making provision for service of the writ and return on defendant.[154]

Rule 4. Rule 4 has been amended more than a dozen times since 1959.[155] Nine of these amendments were intended to expand or clarify the means of making personal service provided in Rule 4(d). The purpose of these changes has ordinarily been to identify the individual or office upon whom or which service should be made and to

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150. *See* M.R. Civ. P. 3 and reporter's notes (1959); FED. R. CIV. P. 3.

151. M.R. Civ. P. 4 and reporter's notes (1959).

152. M.R. Civ. P. 4A, 4B, 4C, and reporter's notes (1959).

153. *See* M.R. Civ. P. 3 and reporter's notes; 1 FIELD, MCKUSICK & WROTH, *supra* note 24, § 3.0. Amendments have made clear that, whichever method is used, plaintiff must complete the process within fixed deadlines. *See* Order effective Dec. 31, 1967, and advisory committee notes, Me. Rptr., 225-237 A.2d XXVII, XXIX, and 1 FIELD, MCKUSICK & WROTH, *supra* note 24, at 40; Order effective Feb. 15, 1989, and advisory committee notes, Me. Rptr., 551-562 A.2d XXXI, XXXIV-XXXV.

154. The amendments added the phrase "except as otherwise provided in these rules," at the beginning of the rule and eliminated language specifically concerning the time for filing the complaint in an action which was commenced by service. Order effective Jan. 1, 1973, and advisory committee notes, Me. Rptr., 293-299 A.2d XIX, XXIII-XXVIII; 1 FIELD, MCKUSICK & WROTH, *supra* note 24, at 57-71 (Supp. 1981).

155. An initial amendment effective December 1, 1959, changed "may" to "shall" in Rule 4(f) "to clear up any possible due process doubts" concerning the appropriateness of service by mail outside the state in certain cases. *See* M.R. Civ. P. 4(f) explanation of amendment to 1959 amend., 1 FIELD, MCKUSICK & WROTH, *supra* note 24, at 53.

specify a form of service adequate to give notice consistent with due process.[156]

More recently, Rule 4(c) was amended in 1991 to make a major change in the method by which process is served. Adopting a 1983 change in the Federal Rules, the Maine Rule was amended to provide that the summons and complaint may initially be served on defendant by mailing copies, together with a form of acknowledgment of receipt. A plaintiff attempting service under this option can serve process by any other means provided in Rule 4(d) if the defendant does not return the signed acknowledgment of receipt within twenty days after the original mailing.[157]

In 1981, Rules 4(e) and (f) were amended to reflect changing attitudes in the United States Supreme Court toward the degree of connection between the state and the subject matter of a law suit necessary to sustain the exercise of personal jurisdiction against a due process challenge. Simultaneously with the original promulgation of Rule 4(e) in 1959, Maine became one of the first states to enact a "long-arm" statute. Such statutes enabled a state's courts to assert jurisdiction over nonresidents for alleged conduct involving contact with the state sufficient to permit the exercise of jurisdiction consis-

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156. *See* M. R. Civ. P. 4(j) and advisory committee note to 1966 amend., Me. Rptr., 215-224 A.2d XXI, XXII and 1 FIELD & MCKUSICK, *supra* note 24, at 53; M. R. Civ. P. 4(d), as amended by Order effective Dec. 31, 1967, and advisory committee notes, Me. Rptr., 225-237 A.2d XXVII, XXIX and 1 FIELD, MCKUSICK & WROTH, *supra* note 24, at 53-55; Order effective Apr. 15, 1975, and advisory committee notes, Me. Rptr., 326-335 A.2d XXII, XXXIII; Order effective Feb. 2, 1976, and advisory committee notes, Me. Rptr., 344-351 A.2d XXVII, XXXI-XXXII; Order effective Jan. 3, 1978, Me. Rptr., 381-384 A.2d XIX; Order effective Sept. 1, 1980, and advisory committee notes, Me. Rptr., 413-417 A.2d LXVIII and 1 FIELD, MCKUSICK & WROTH, *supra* note 24, at 29 (Supp. 1981); Order effective Feb. 15, 1990, and advisory committee notes, Me. Rptr., 563-575 A.2d XXXI, LXII-LXIII. Rule 4 has also been amended to deal with technical changes in the law or regulations. *See* Order effective Nov. 1, 1969, and advisory committee notes, Me. Rptr., 257-266 A.2d XIX-XX; 1 FIELD, MCKUSICK & WROTH, *supra* note 24, at 55-56; Order effective Feb. 2, 1976, and advisory committee notes, Me. Rptr., 344-351 A.2d XXVII, XXXI-XXXII; Order effective Feb. 15, 1985, and advisory committee notes, Me. Rptr., 479-487 A.2d LIX, LXIII.

157. *See* Order effective Feb. 15, 1991, and advisory committee notes, Me. Rptr., 583 A.2d No. 4 at CXX and CXXIX-CXXX (advance sheet). For the Federal Rule, see, FED. R. CIV. P. 4(c)(2)(C)(ii). A simultaneous amendment to M.R. Civ. P. 4(h) provided for the return of service. The amendment also narrowed the scope of Rule 4 to service of summons and complaint, rather than service of all process, necessitating complementary amendments to Rules 4A, 4B, and 45 to make clear the means of service of writs of attachment and trustee summons and subpoenas. *See* Order effective Feb. 15, 1991, and advisory committee notes, 583 A.2d No. 4 at CXXI and CXXX (advance sheet). An earlier amendment to Rule 4(c) had eliminated the constable as an officer empowered to serve process statewide, in view of the fact that constables' powers run only within their towns or territories. *See* Order effective Feb. 15, 1987, and advisory committee notes, Me. Rptr., 510-521 A.2d LXXXI-LXXXII and XC.

tent with due process.[158] In succeeding years, the reach of the long-arm was extended by a combination of aggressive state statutes and permissive federal and state court decisions.[159] After a series of such decisions by the Law Court, the Maine Legislature expanded Maine's long-arm statute to include an extended list of specific situations and a catch-all asserting jurisdiction in any case where due process would permit.[160] The Law Court, in an opinion by Chief Justice McKusick, gave the statute a reach exceeding that which the United States Supreme Court has ultimately recognized for state long-arm jurisdiction.[161] Nevertheless, the Maine statute remains a far-reaching jurisdictional grant. The amendment of Rule 4(e) sought to reflect this increased statutory scope.[162]

The 1981 amendment of Rule 4(f) and simultaneous amendments of Rules 4A and 4B reflected a decision of the United States Supreme Court that sought to apply the "minimum contacts" jurisprudence of the long-arm cases evenhandedly. It had long been the practice of state courts, supported by the 1920 United States Supreme Court decision in *Harris v. Balk*,[163] to assert jurisdiction over nonresident defendants on the basis of property found and attached within the state, regardless of the contact of the defendant or the subject matter of the law suit with the state. Rule 4(f) and Rules 4A and 4B as originally promulgated were designed to provide the medium for the Maine courts to exercise this power of "foreign attachment."[164]

In *Shaffer v. Heitner*,[165] decided in 1980, the Supreme Court held that sauce for the goose should moisten the gander as well: unless the defendant had some contact with the state independent of prop-

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158. *See* M.R. Civ. P. 4 reporter's notes, Dec. 1, 1959, 1 FIELD, MCKUSICK & WROTH, *supra* note 24, 50, 51-52; Memorandum of Richard H. Field, 2 *id.* at 566; International Shoe Co. v. Washington, 326 U.S. 310 (1945); ILL. STAT. ANN. ch. 110, ¶ 2-209 (formerly § 17 of the Civil Practice Act); and 1 FIELD, MCKUSICK & WROTH, *supra* note 24, § 4.10.

159. *See* Hanson v. Denckla, 357 U.S. 235 (1958); Gray v. American Radiator & Standard Sanitary Corp., 22 Ill.2d 432, 176 N.E.2d 761 (1961); R.I. GEN. LAWS, § 9-5-33 (Supp. 1985); Uniform Interstate and International Procedure Act, § 1.03, 13 U.L.A. 355, 361-62; and 1 FIELD, MCKUSICK & WROTH, *supra* note 24, § 4.10.

160. *See* P.L. 1975, ch. 770, § 80, enacting ME. REV. STAT. ANN. tit. 14 § 704-A; Sohn v. Bernstein, 279 A.2d 529 (Me. 1971); 1 FIELD, MCKUSICK & WROTH, *supra* note 24, § 4.10 (Supp. 1981).

161. *See* Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102 (1987); Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985); World-Wide Volkswagen v. Woodson, 444 U.S. 286 (1980); and Tyson v. Whitaker & Son, Inc., 407 A.2d 1 (Me. 1980).

162. *See* M.R. Civ. P. 4(e) advisory committee's note to 1981 amend. *See also* Order effective Aug. 7, 1981, and advisory committee's notes, Me. Rptr., 428-433 A.2d XXXV and XLVIII.

163. 198 U.S. 215 (1905).

164. *See* M.R. Civ. P. 4(f), 4A, 4B reporter's notes, 1 FIELD, MCKUSICK & WROTH, *supra* note 24, at 52, 118-19, 131-32.

165. 433 U.S. 186 (1980).

erty ownership, or the lawsuit involved the property in question, due process prohibited the exercise of jurisdiction merely on the basis of property found within the state. The amendment of Rule 4(f) addressed this problem by limiting service by mail to cases where there were either independent contacts, or the property or status providing the basis for jurisdiction was involved in the controversy.[166]

Rules 4A, 4B, and 4C. As originally adopted, Rules 4A, 4B, and 4C incorporated the existing, complex, and antiquated statutory provisions authorizing general attachment, attachment on trustee process, and civil arrest, integrating them with the provisions of Rules 3 and 4 concerning the commencement of the action and service of the summons and complaint.[167] The first changes came in the rules governing trustee process. State and federal consumer protection legislation prohibiting attachment or garnishment of wages before judgment was reflected in 1967, 1970, and 1971 amendments of Rule 4B.[168] Thus the Maine rule was not affected by a 1969 United States Supreme Court decision that wage garnishment without some opportunity on the part of the defendant to be heard violated due process.[169]

Two years later, in *Fuentes v. Shevin,*[170] the Supreme Court extended the reach of this principle in terms which seemed to indicate that all forms of attachment were affected. Subsequently, Rules 4A and 4B were amended in two stages in January and August 1973 to permit issuance of an order of approval for either general attachment or trustee process only on a finding that there was reasonable likelihood that the plaintiff would recover damages in an amount exceeding any other available security. The order was to be issued only after notice and hearing unless plaintiff also established the likelihood that defendant would in some way impair the security if notified of the pendency of the attachment.[171]

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166. *See* M.R. Civ. P. 4(f) advisory committee's note to 1981 amend., Me. Rptr., 428-433 A.2d. XLIX; Order effective Aug. 7, 1981, Me. Rptr., 428-433 A.2d XXXV-XXXVII. For a description of simultaneous amendments to Rules 4A and 4B, see advisory committee notes, Me. Rptr., 428-433 A.2d XLIX-L. More recently, the Supreme Court has held that *Shaffer, supra* note 165, does not preclude obtaining jurisdiction by personal service upon a nonresident having no contacts with the state. Burnham v. Superior Court, 110A S. Ct. 2105 (1990).

167. *See supra* notes 150-52 and accompanying text.

168. *See* Rule 4B(a) advisory committee's note to 1967, 1970 and 1971 amends., 1 FIELD, MCKUSICK & WROTH, *supra* note 24, at 133; *id.* at 85-88 (Supp. 1981). *See also* Order effective Dec. 31, 1967, Me. Rptr., 225-237 A.2d XXVII, XXIX-XXX; Order effective July 1, 1970, Me. Rptr., 257-266 A.2d XXXIII-XXXIV; and Order effective Sept. 23, 1971, Me. Rptr., 276-284 A.2d XIX.

169. Sniadach v. Family Finance Corp., 395 U.S. 337 (1969).

170. 407 U.S. 67 (1971).

171. *See* M.R. Civ. P. 4A, 4B advisory committee's notes to Jan. and Aug. 1973 amends., 1 FIELD, MCKUSICK & WROTH, *supra* note 24, at 61-69, 88-90 (Supp. 1981). The January amendments made the hearing applicable only to attachment of per-

Although subsequent Supreme Court decisions have created some doubt about the reach of *Fuentes*, the Maine Rules have continued to require hearings, and amendments to Rules 4A and 4B in subsequent years have sought to clarify and strengthen the procedure.[172] These rules are presently under scrutiny by an ad hoc committee of the bar from two perspectives: On the one hand, it is argued that the present rules make attachment too difficult to obtain because of the time and cost involved in the hearing procedure. On the other hand, it is felt that the standard presently employed does not allow the court sufficient flexibility in balancing hardships to the defendant against the plaintiff's need.[173]

The fate of Rule 4C, carrying forward the traditional common law and statutory procedure of arrest on mesne process as a means of commencing a law suit, has been less equivocal. In *Yoder v. County of Cumberland*,[174] the Law Court held that civil arrest, even to compel a judgment debtor to disclose, was constitutionally permissible only when the recalcitrant debtor was solvent. Subsequently, the Legislature repealed the statutes which Rule 4C had incorporated.[175] In 1985, the court abrogated Rule 4C as having lost its function.[176] Presumably, the equitable writ of *ne exeat* is still available on a proper showing to arrest a defendant in the extremely rare, if not unthinkable, case in which the court has power to bring the defendant bodily before it and no adequate alternative exists to prevent

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sonal property, giving *Fuentes*, *supra* note 170, a narrow interpretation. The August amendments reflected decisions of a three-judge federal court in Gunter v. Merchants Warren National Bank, 360 F.Supp. 1085 (D.Me. 1975), holding that the *Fuentes* principle applied to real estate attachments as well. 1 FIELD, MCKUSICK & WROTH, *supra*, § 4A.1 (Supp. 1981).

172. *See* Order effective Apr. 15, 1975, and advisory committee notes, Me. Rptr., 326-335 A.2d XXII-XXV, XXXIII-XXXV; Order effective Sept. 1, 1980, and advisory committee notes, Me. Rptr., 413-417 A.2d LXVII-LXIX; Order effective Aug. 7, 1981, and advisory committee notes, Me. Rptr., 428-433 A.2d XXXVII-XL, XLIX-L; and Order effective Feb. 15, 1991, and advisory committee notes, Me. Rptr., 583(4) A.2d CXXI-CXXIII, CXXX. The constitutional issues were revisited by the United States Supreme Court this term in Connecticut v. Doehr, 59 U.S.L.W. 45-87 (June 6, 1991) (No. 90-143), which found a due process violation in an ex parte order for attachment of real estate under a Connecticut statute requiring neither a finding of exigent circumstances nor a plaintiff's bond. Similar amendments were made in Rule 64, applying *Sniadach* and *Fuentes*, *supra* notes 169 and 168, to replevin. *See* M.R. Civ. P. 64 and advisory committee's note to 1973 amend., 2 FIELD, MCKUSICK & WROTH, *supra* note 24, at 381-84 (Supp. 1981). Other amendments to Rules 4A and 4B have been discussed in conjunction with amendments to Rule 4, *supra* notes 163-66, and accompanying text.

173. *See* ADVISORY COMMITTEE ON CIVIL RULES, 1990 ANNUAL REPORT 5; Minutes of Meeting, Sept. 14, 1990, *id.* at 2; AD HOC COMMITTEE ON ATTACHMENTS, REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES (July 19, 1991).

174. 278 A.2d 379 (Me. 1971).

175. P.L. 1971, ch. 408, § 6.

176. *See* M.R. Civ. P. 4C advisory committee's note to 1985 abrogation, Me. Rptr., 479-487 A.2d LIX, LXIII.

frustration of the court's authority and jurisdiction.[177]

2. *Pretrial Practice and the Law's Delays*

A major area of continuing frustration, development, and change in both the Maine and the Federal Rules has been pretrial practice. The provisions for extensive discovery, pretrial conference, scheduling, and motions contained in Rules 7, 16, 26-37, 40, and 56 were hailed as potentially the most beneficial innovations in the Federal Rules. These provisions were also cited as one of the major benefits in Maine's 1959 adoption of the Rules.[178] In more recent years, however, the delays and expense of pretrial practice have become the focus of extensive criticism, and numerous amendments to the Federal Rules have been adopted or proposed to deal with the problems.

In Maine, the same criticisms have been heard, and some of the same solutions have been adopted. In Maine, however, the discussion and the attempted solutions have been intertwined with efforts to alter the motion, pretrial conference, and scheduling practice and to adopt more radical approaches as well. Through the whole discussion runs the continuing tension between those who see reform as simply a question of leveling the playing field between plaintiff and defendant and those concerned with the most economical and efficient use of the human, fiscal, and physical resources of the Judicial Department. The extensive amendments to this group of rules illustrate the growing perception of the need to balance these concerns and the variety of methods available to assist in striking that balance.

a. Motion Practice. Rule 7 as originally promulgated simply stated that a motion to obtain a court order on any matter should be in writing and state "with particularity" both the grounds of the motion and the order sought.[179] The rule applied alike to dispositive motions, such as those under Rules 12 and 56, and housekeeping motions, such as those to resist or compel discovery. Motion practice, however, began to present problems after the 1970 discovery amendments removed the trial court from initial review and supervision of most discovery. Compounding this were the combined effects of increased litigation and new word-processing technology. An amendment of Rule 7(b) in 1976 required the moving party to cite the rule or statute on which a motion was based, and a 1981 amendment required a supporting memorandum of authorities to be filed with all but calendar or uncontested motions, with a memorandum

177. *See* 1 FIELD, MCKUSICK & WROTH, *supra* note 24, § 4C.4 (Supp. 1981). *But see* M.R. Civ. P. 4C advisory committee's note, *supra* note 176.

178. *See* 2 J. MOORE, W. TAGGART & J. WICKER, MOORE'S FEDERAL PRACTICE 26-60 (2d ed. 1985); Field, *State-Wide Procedural Reform—How to Go About It*, 42 J. AM. JUD. SOC'Y 120, 124 (1958); Field, *supra* note 24, at 40-41.

179. M.R. Civ. P. 7(b)(1) (1959).

in opposition to be filed within ten days.[180] In 1983, teeth were added to these provisions when Rule 11 was amended to include motions within the scope of its sanctions for groundless or dilatory filings.[181]

From 1986 through 1990, the motion provisions of Rule 7 have been amended annually, with the purpose both to limit motions that must be heard to those with a genuine issue and to accommodate the rule to changing practices in the clerks' offices. Thus a 1986 amendment changed the time for filing a memorandum in opposition from ten days after service of the movant's memorandum to seven days prior to the hearing.[182] In 1987, the rule was further amended to provide that failure to file a memorandum in opposition was a waiver of objections that would result in the granting of the motion without hearing.[183] A 1988 amendment, clarified in 1989, sought to ease the burdens on both judges and clerks by requiring the movant to file a draft order stating the relief to be granted and, except in the case of dispositive or ex parte motions, a statement indicating whether or not the motion was opposed.[184]

Finally, in 1990, major amendments to Rules 6, 7, and 56 sought to end confusion about filing times for both memoranda in opposition and supporting affidavits by returning to a requirement that these items must be filed within 21 days after filing of the motion. The amendments also limited the requirement of a statement of opposition or nonopposition to calendar motions, required the parties to summary judgment motions to file summaries of their factual contentions with their memoranda, and permitted a brief reply memorandum to be filed within seven days after filing of a memorandum in opposition or two days before hearing.[185]

The history of these amendments reflects that motion practice has virtually become an end in itself. The court has sought to reduce the burden by imposing increasingly onerous requirements on those who would present a motion for hearing. Nevertheless, with word-processing at the lawyers' command, the flow of motions continues.

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180. *See* M.R. Civ. P. 7(b)(1) and advisory committee's note to 1976 amend., 1 FIELD, MCKUSICK & WROTH, *supra* note 24, at 102-03 (Supp. 1981); M.R. Civ. P. 7(b)(3) added effective Dec. 1, 1981, Me. Rptr., 434-440 A.2d XLI.

181. *See* M.R. Civ. P. 11 and advisory committee's note to 1983 amend., Me. Rptr., 449-458 A.2d LIII, LXI.

182. *See* M.R. Civ. P. 7(b)(3) and advisory committee's note to 1986 amend., Me. Rptr., 498-509 A.2d XLII, XLVIII.

183. *See* M.R. Civ. P. 7(b)(3) and advisory committee's note to 1987 amend., Me. Rptr., 510-521 A.2d LXXXII, XC.

184. *See* M.R. Civ. P. 7(b)(3), (4), and advisory committee's note to 1988 amend., Me. Rptr., 522-536 A.2d CCXI-CCXII, CCXXVI; M.R. Civ. P. 7(b)(4) and advisory committee's note to 1989 amend., Me. Rptr., 551-562 A.2d XXXI, XXXV.

185. *See* M.R. Civ. P. 6(d), 7(b)-(e), 56(c), and advisory committee's note to 1990 amends., Me. Rptr., 563-575 A.2d LXIX-LXXI, LXXII-LXXIII. *See* Alexander, *Motion Day: Old Traditions, New Rules: Guide to Survival*, 5 ME. BAR J. 166 (1990).

Consequently, any efforts to reduce the cost and delay of this aspect of practice must look to ways of reducing the occasions on which motions are brought.

b. Discovery—Rules 26-37. A major study of federal discovery in 1967 concluded that the system was working well and was not subject to abuse, but that changes to smooth the flow of the process and reduce the need for judicial intervention would be desirable. As a result, substantial amendments to the federal discovery rules were adopted in 1970 to achieve these goals.[186] In the ensuing decade, however, dissatisfaction with the operation of the discovery rules grew in both the federal and state courts. Delay, expense, and oppressive use were all cited as abuses. Accordingly, in 1980 and 1983, further federal amendments were adopted to address these problems and strengthen the hand of trial judges seeking to curb abuse.[187] In 1991, the problems remain unresolved. Proposals ranging from stricter sanctions to mandatory open-file discovery have been made, and a significant proposal to amend the federal discovery rules by replacing continuing judicial oversight with strict mechanical requirements is pending before the federal Advisory Committee.[188]

The Maine experience with discovery has tracked that of the federal courts. The 1970 federal amendments were adopted virtually without change, relying heavily on the federal Advisory Committee's Notes.[189] The principal changes wrought by the 1970 amendments of Maine Rules 26-37 were as follows:

Federal Rule 26 covering general matters such as scope of discovery and protective orders was adopted, including provisions permitting discovery of insurance policies and experts. Rule 26(b)(3), new to the federal rule, carried forward the sense of prior Maine Rule

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186. For the federal rule changes and the study on which they were based, see Report of the Judicial Conference of the United States, Proposed Amendments to the Federal Rules of Civil Procedure Relating to Discovery, 48 F.R.D 487 (Oct. 1970) (Appendix 2). The ABA Special Committee chaired by McKusick made an extensive report on the proposed amendments. See *supra* note 4.

187. For the few federal changes between 1970 and 1980 see Order of March 1, 1971, effective July 1, 1971, 401 U.S. 1019; Order of Nov. 20, 1972, effective July 1, 1975, 419 U.S. 1133-1135. The 1980 and 1983 amendments allowed judges to impose limits on unduly burdensome discovery, required counsel to frame a discovery plan, and imposed an obligation for discovery like that of Rule 11, with sanctions for violation. For advisory committee notes on the 1980 and 1983 amendments to Fed. R. Civ. P. 26, 30, 33, 34, & 37, see FEDERAL CIVIL JUDICIAL PROCEDURE AND RULES 101-103, 112, 118, 120, & 131 (West ed. 1991). For a sampling of critical commentary, see *supra* note 102.

188. *See* proposed amendments to F.R. Civ. P. 26, 29, 30-34, 36, 37, *in* COMMITTEE ON RULES OF PRACTICE, PRELIMINARY DRAFT OF THE PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE AND FEDERAL RULES OF EVIDENCE (August 1991).

189. *See* Order of July 1, 1970, Me. Rptr., 257-266 A.2d XXXV (1970), adopting amendments effective Oct. 1, 1970.

26(b) concerning discovery of trial preparation materials.[190] The scope of discovery was also broadened by eliminating the requirement of a showing of good cause for production under Rule 34; allowing interrogatories under Rule 33 against "any" party, not merely an "adverse" party; providing that Rule 33 interrogatories and requests for admission under Rule 36 could extend to matters of opinion and argument; and making physical examination under Rule 35 available for a person under the custody or control of a party.[191]

A number of changes were made in the interests of minimizing court intervention in the discovery process including elimination of the requirement in Rules 33, 34, and 36 for a court order to obtain certain discovery and placing on the party seeking discovery the burden of obtaining an order to compel in the event of an objection. The sanctions provisions of Rule 37 were strengthened and clarified in aid of these changes.[192]

Certain unique features of the existing Maine rules were retained and other departures from the 1970 federal amendments were adopted. Thus Maine Rule 29 does not contain the federal requirement that extension of the time for response under Rules 33, 34, and 36 be by court order. The Maine requirement of seven days' notice of a deposition under Rule 30(b)(1) (now ten days by virtue of a 1987 amendment) was retained in preference to the federal requirement of "reasonable" notice. Further, in Maine Rule 33, the limit to service of one set of thirty interrogatories was retained.[193]

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190. *See* M.R. Civ. P. 26 and advisory committee's note to 1970 amend., 1 FIELD, MCKUSICK & WROTH, *supra* note 24, at 205-207 (Supp. 1981). The rule also included new provisions governing sequence and timing and requiring supplementation of responses that reflected Maine practice. M. R. Civ. P. 26(d), (e); 1 FIELD, MCKUSICK & WROTH, *supra* note 24, at 197-205 (Supp. 1981).

191. *See* M.R. Civ. P. 33(a),(b), 34, 35(a), 36(a), and advisory committee's notes to 1970 amends., 1 FIELD, MCKUSICK & WROTH, *supra* note 24, at 249, 255, 259, and 262 (1981). At the same time, Rule 45(d) was amended to make clear that a deposition subpoena duces tecum could require inspection and copying of documents. M.R. Civ. P. 45(d)(1) and advisory committee's notes to 1970 amend., *id.* at 296-297. Rule 35(b) had earlier been amended to reflect creation of the physician-patient privilege in Maine by statute. See M.R. Civ. P. 35(b)(2) and advisory committee's note to 1969 amend., *id.* at 524-26 (2d ed. 1970).

192. *See* M.R. Civ. P. 33(a), 34(b), 36(a), 37, and advisory committee's notes to 1970 amends., 1 FIELD, MCKUSICK & WROTH, *supra* note 24, at 249, 255, 263, and 268-69 (Supp. 1981). Other changes included allowing modification of the procedure of the rules, by written stipulation and reduction of the requirement of a court order for early depositions. *See* M.R. Civ. P. 29, 30(a), *id.* at 223, 231. The requirement of a court order for interrogatories within 20 days of commencement of the action had been taken from the then-pending federal amendment proposals in 1967. *See* M.R. Civ. P. 33 and advisory committee's note to 1967 amend., *id.* at 503-05.

193. *See* M.R. Civ. P. 29, 30(b)(1), 33(a), and advisory committee's notes to 1970 amends., 1 FIELD, MCKUSICK & WROTH, *supra* note 24, at 223, 231, and 249 (Supp. 1981); M.R. Civ. P. 30(b)(1) and advisory committee's note to 1987 amend., Me. Rptr., 510-521 A.2d LXXXII, XCI.

In the fifteen years after the adoption of the 1970 amendments to Maine Rules 26-37, only a few relatively technical amendments were made. In fact, the most significant change may have been the elimination of the limit on the number of interrogatories, because it had resulted in increased motions "disputing the actual number of interrogatories involved."[194]

Responding to concerns about discovery abuse similar to those expressed under the Federal Rules, the Maine Advisory Committee has, since 1983, engaged in a continuing study of the problems surrounding discovery, and the federal attempts to improve the situation.[195] The Advisory Committee and the court, however, have not followed the path of the Federal Rules in increasing judicial oversight and sanctioning power in the discovery process. Only a few of the federal reforms of the 1980's and other changes designed to make discovery more efficient have been adopted.[196]

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194. *See* M.R. Civ. P. 33(a) and advisory committee's note to 1981 amend., Me. Rptr., 428-433 A.2d XLIII, LII. A conforming amendment was subsequently made to Rule 26(a). *See* Me. Rptr., 449-458 A.2d LIV, LXII; Me. Rptr., 467-468 A.2d LXIV, LXXIII. For other discovery amendments made in this period, see M.R. Civ. P. 27 and advisory committee's note to 1971 amend., 1 FIELD, MCKUSICK & WROTH, *supra* note 24, at 221; M.R. Civ. P. 28(d) and advisory committee's note to 1975 abrogation, *id.* at 222; M.R. Civ. P. 30(b)(6), (h), (c), and advisory committee's notes to 1971, 1975, and 1976 amends., *id.* at 233-37; M.R. Civ. 31(d) and advisory committee's note to 1975 amend., *id.* at 241; M.R. Civ. P. 32(a)(3) and advisory committee's note to 1984 amend., Me. Rptr., 467-478 A.2d LXIV, LXXIII; M.R. Civ. P. 32(c) and advisory committee's note to 1976 abrogation, 1 FIELD, MCKUSICK & WROTH, *supra* note 24, at 246; M.R. Civ. P. 33(a) and advisory committee's note to 1971 amend., *id.* at 250; M.R. Civ. P. 36(a) and advisory committee's note to 1971 amend., *id.* at 263.

195. *See* Alexander, *Some Thoughts on Improving Discovery and the Practice of Law*, 4 ME. BAR J. 128 (1989); Lipez, *How a Judge Can Survive Discovery*, *id.* at 150. ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE, 1983 ANNUAL REPORT 5-6; 1984 ANNUAL REPORT 4; 1985 ANNUAL REPORT 4; 1986 ANNUAL REPORT 2, 3, 4; 1987 ANNUAL REPORT 6; 1988 ANNUAL REPORT 5; 1989 ANNUAL REPORT 4; 1990 ANNUAL REPORT 5.

196. *See, e.g.*, amendments eliminating filing of discovery materials not to be used in evidence. M.R. Civ. P. 5(d), 26(f), 30(f) and advisory committee's notes to 1985 amends., Me. Rptr., 479-487 A.2d LIX-LXI, LXIII-LXIV. *See also* M.R. Civ. P. 30(e) and advisory committee's note to amend. effective Feb. 15, 1987, Me. Rptr., 510-521 A.2d LXXXIV, XCIII. For provisions for nonstenographic recording of depositions, see M.R. Civ. P. 30(b), (c), (f), and advisory committee's notes to 1987 amends., Me. Rptr., 510-521 A.2d LXXXII-LXXXV, XCI-XCIII. Federal Rule 30(b)(4) provides that the parties may stipulate, or the court may order on motion, recording by nonstenographic means. For advisory committee notes on the 1970 amendment to Fed. R. Civ. P. 30(b)(4), see FEDERAL CIVIL JUDICIAL PROCEDURE 110 (West 1991). For provisions for deposition by telephone, see M.R. Civ. P. 30(b)(7) and advisory committee's note to 1989 amendment, Me. Rptr., 551-562 A.2d XXXII, XXXV. For an amendment requiring documents to be produced either in their usual order or in requested categories, see M.R. Civ. P. 34(b) and advisory committee's note to 1991 amendment, 583 A.2d No. 4, at CXXIII-CXXIV, CXXX-CXXXI. For advisory committee notes on the 1980 amendment to Fed. R. Civ. P. 34(b), see FEDERAL CIVIL JUDICIAL PROCEDURE AND RULES 120 (West 1991). A similar provision added at the same time to F.R. Civ. P. 33(c) covering the option to produce business records in answer to an interro-

Maine's failure to follow the federal lead to this point has been based in part on the belief that discovery abuse problems in the Maine courts are not so acute and in part on the reliance, discussed below, upon other means of addressing problems of expense and delay in the pretrial process. Nevertheless, consideration of the problems of discovery continues. A subcommittee of the Advisory Committee is presently considering options ranging from adoption of the 1980 and 1983 federal amendments that would increase judicial oversight to adoption of portions of the August 1991 federal amendment proposals, such as required disclosures or standard interrogatories and strict quantitative limits on discovery methods.[197]

Changes in pretrial procedural rules are like the never-ending contest that goes on between nations in the field of armaments: For every new offensive weapon or stratagem devised, a counter soon appears. The federal discovery amendments of the 1980's have demonstrated this axiom by producing a whole subset of litigation about the imposition and enforcement of discovery sanctions.[198] The question, alike for the federal rulemakers and Maine's Advisory Committee and court, is whether the new trend toward imposition of required disclosure and strict quantitative limits will be any more effective in reducing abuse, or whether the answer lies in addressing the larger context of trial preparation and scheduling and pretrial disposition in which discovery must operate.

c. The Pretrial Conference. As originally promulgated, Rule 16 followed the federal model in providing in simple terms for a discretionary pretrial conference. The purpose of the conference was to consider simplification of the issues, amendments to the pleadings, the possibility of admissions, limitations on the number of experts, and "[s]uch other matters as may aid in the disposition of the action."[199] The resulting pretrial order was to control the course of the trial unless modified "to prevent manifest injustice." The court had discretion to establish a pretrial calendar.[200]

Federal Rule 16 remained in this form, though supplemented by local rules, until it was substantially amended in 1983 as part of the discovery amendments of that year.[201] The federal rule now provides

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gatory was not adopted in Maine. For advisory committee notes on the 1980 amendment to Fed. R. Civ. P. 33(c), see FEDERAL CIVIL JUDICIAL PROCEDURE AND RULES 118 (West 1991).

197. *See* ADVISORY COMMITTEE ON CIVIL RULES, REPORT OF THE DISCOVERY SUBCOMMITTEE (JULY 19, 1991). FOR THE 1991 FEDERAL PROPOSALS, see *supra* note 188.

198. *See* Subrin, *supra* note 1, at 982-992 (1987); Carl Tobias, *Rule 11 and Civil Rights Litigation*, 37 BUFFALO L. REV. 485-486 (1988-89); Margaret L. Weissbrod, *Sanctions Under Amended Rule 26—Scalpel or Meat-ax? The 1983 Amendments to the Federal Rules of Civil Procedure*, 46 OHIO ST. L.J. 183 (1985).

199. M.R. Civ. P. 16(5) (1959).

200. *Id.*

201. Regarding the 1983 amendments, see *supra* note 187. Regarding local rules,

for a discretionary pretrial conference with general objectives focused on case management and settlement, as well as an expanded list of specific matters for consideration at the conference: the avoidance of unnecessary proof, scheduling, the possibility of reference, settlement, or alternative dispute resolution, and the disposition of pending motions. In addition, after a scheduling conference or less formal contact with the parties, the court is to issue a scheduling order with amendment, motion, and discovery deadlines. Substantial sanctions, including those provided by Rule 37, may be imposed for noncompliance with an order, nonappearance, or lack of preparation or good faith.[202]

In Maine, the evolution of Rule 16 toward a similar posture began in 1962 with an amendment providing the sanction of dismissal or default for nonappearance at a pretrial conference.[203] In 1967, an elaborate new Rule 16 was promulgated in reaction to the fact that Maine's trial judges had made the conference virtually mandatory, with resulting stress on the pretrial calendar and loss of effectiveness for individual conferences.[204] Under the amended rule, in order to move an action to the trial calendar, one of the parties had to file a pretrial memorandum covering issues, proposed admissions, evidentiary matters, damages, and other matters and containing a jury demand if appropriate. This memorandum and a reply by the opposing party were to be filed in every case except collection actions, property damage suits, condemnation suits, nonjury matters, and cases where a pretrial conference had been waived. The court could treat the memoranda as a pretrial order and direct the case to be placed on the trial calendar or could order a conference to be held, provided that all discovery had been completed. Counsel were required to attend, with authority to settle, and sanctions could include attorneys' fees and travel.[205] By simultaneous amendment, the original local option approach of Rule 40 for the maintenance of the trial calendar was changed to a uniform procedure incorporating Rule 16.[206]

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see, *e.g.*, U.S.D.C., D. Me. R. 21 (1981) in 2 FIELD, MCKUSICK & WROTH, *supra* note 24, at 1082-84 (Supp. 1981).

202. *See* FED. R. CIV. P. 16 and advisory committee's note to 1983 amend. FEDERAL CIVIL JUDICIAL PROCEDURE AND RULES 61-64 (West 1991).

203. M.R. Civ. P. 16 and advisory committee's note to 1962 amend., 1 FIELD, MCKUSICK & WROTH, *supra* note 24, at 313.

204. *See* M.R. Civ. P. 16 and advisory committee's note to 1967 amend., 1 FIELD, MCKUSICK & WROTH, *supra* note 24, at 310-12, 314-17. The problems under the prior rule are outlined in Wroth, *supra* note 47, at 57-72 (1968).

205. M.R. Civ. P. 16, *supra* note 204. A subsequent amendment permitted a conference in any case on request of a party and provided for sanctions on the attorney as well as the party. *See* M.R. Civ. P. 16 and advisory committee's note to 1970 amend., 1 FIELD, MCKUSICK & WROTH, *supra* note 24, at 134, 138 (Supp. 1981).

206. *See* M.R. Civ. P. 40(a) and advisory committee's note to 1967 amend., 1 FIELD, MCKUSICK & WROTH, *supra* note 24, at 562, 563.

The 1967 amendment established the principle that a detailed pretrial memorandum was the mandatory predicate to a pretrial conference, as well as the sole avenue to the trial calendar, but the details of practice remained a moving target. Citing various shortcomings in the rule, the Advisory Committee proposed and the court adopted substantial amendments in 1973, eliminating the requirement for completion of discovery as well as the whole system of excepted actions. Thus a conference was to be held in every case unless the judge found that the memoranda were sufficient for the conduct of the trial.[207]

A further major revision, adopted in 1980, was "intended to remedy substantial defects in the existing scheme of pretrial procedure and to give more explicit, rigorous and detailed directions for pretrial procedure for the benefit of both the Bench and the Bar."[208] The 1980 version of the rule also retained the basic requirement of the memorandum, with a conference to be held unless the judge specifically dispensed with it. The amended rule, however, spelled out in greater detail the contents of the memorandum and the subjects to be considered at the conference. The rule also made clear the mandatory nature of its provisions by emphasizing sanctions for noncompliance. Further, it expressly required the status of motions, discovery, and settlement to be reported in the memorandum and discussed at the conference.[209] In implementation of the new rule, the court issued an administrative order basically saying "we really mean it" and setting forth detailed guidelines for clerks and court administrators and a form of pretrial order.[210] This version of the rule was to endure with minor amendments until 1988. While some of the rhetoric of the 1980 Advisory Committee's note speaks of efficient utilzation of judicial resources, it is plain that the principal focus of Rule 16 remained on the use of the pretrial memorandum and conference as instruments to assure proper trial preparation and encourage settlement within the confines of the particular litigation.[211]

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207. *See* M.R. Civ. P. 16 and advisory committee's note to 1973 amend., *id.* at 135-37, 138-41. Conforming amendments were also made to M.R. Civ. P. 40(a). *Id.* at 282-83. Rule 16 was further amended in 1974 to clarify its relationship to a concurrent amendment of Rule 38 requiring that a jury be demanded and in 1976 to accommodate the hearsay exception for learned treatises in M.R. Evid. 803(18), adopted concurrently. *Id.* at 135, 136, 141.

208. M.R. Civ. P. 16 and advisory committee's note to 1980 amend., *id.* at 142.

209. *See* M.R. Civ. P. 16 and advisory committee's note to 1980 amend., *id.* at 129-34, 141-50.

210. Order of July 14, 1980, *id.* at 142-43, 150-51.

211. *Id.* at 142-43, 150-51. Rule 16 was amended in 1983 to except divorce actions in which a conference had not been requested from the requirement of a conference. M.R.Civ. P. 16(f)(1) and advisory committee's note to 1983 amend., Me. Rptr., 449-458 A.2d LIV, LXII. In conjunction with the merger of the superior court and district court civil rules, effective July 1, 1987, Rule 16 was amended to make clear that it

d. Case Management. The Advisory Committee, however, was at work on broader concerns. In 1984, the court, on the Committee's recommendation, adopted an administrative order establishing an experimental civil case-flow management procedure to be implemented in four counties. The experiment was designed

> to address two problems . . . existing in the Maine Superior Court. First, the dramatic rise in filings of civil cases resulted in unconscionably long docket delays; and second, the greatly increased use of discovery in civil cases which is both a cause of the delays in civil litigation and a source of unnecessary expense.[212]

Derived from a system employed in the District of Columbia, the experiment involved the creation of a two-track calendar system. At the outset of each action a superior court justice was assigned to review a pretrial scheduling statement submitted by the plaintiff after consultation with the defendant. Any cases that the reviewing justice determined not to be complex would be placed on an expedited pretrial list with fixed discovery deadlines and no pretrial memoranda or conference. Cases on that list would go on the trial list 30 days after the date set for completion of discovery and would be tried as soon as they could be reached. Cases not deemed appropriate for expedited treatment would be placed on the regular trial list and proceeded with as usual under Rule 16 and the discovery rules.[213] Impressed with the effectiveness of the experiment, the court by further administrative order extended the procedure to all counties effective February 1, 1986. The only changes were the inclusion of specific provisions that the order placing a case on the regular pretrial list could establish discovery and other deadlines and that in an expedited case motions pertaining to trial could be filed after completion of discovery.[214] The case-management focus of this procedure plainly appears in the memorandum transmitting the administrative order to the clerks of court and the bar:

> The goal of the procedure is the establishment of a system under which a larger portion of the civil actions filed in the Superior Court may be resolved finally within a reasonably short period of

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applied only in the superior court, and a new Rule 16A was added, providing a discretionary pretrial conference procedure for the district court similar to M.R. Civ. P. 16 prior to the 1967 amendments, *supra* notes 204-205. *See* M.R. Civ. P. 16, 16A, and 1987 advisory committee's notes to amends., Me. Rptr., 522-536 A.2d LXXII-LXXVIII.

212. *Advisory Committee's Explanatory Memorandum Concerning Administrative Order in Regard to Civil Case Flow Expedition*, 18 ME. BAR BULL. 267 (1984).

213. *See* Order of Sept. 26, 1984, effective Nov. 1, 1984, No. SJC-316; *Advisory Committee's Explanatory Memorandum*, *supra* note 211, at 267-72. The original order was amended by Order of June 3, 1985, effective June 3, 1985, No. SJC-316, to make provision for third-party actions.

214. *See* Order of Jan. 2, 1986, effective Feb. 1, 1986, Me. Rptr., 498-509 A.2d CXIX-CXXI.

> time, hopefully within one (1) year, and the elimination of *unnecessary* delay in the processing of all civil actions.[215]

Noting that "[i]t is apparent that the fast track procedure has well served its intended purposes . . . to reduce the backlog of the civil docket and to expedite the conduct of all civil litigation," the Advisory Committee recommended the incorporation of the provisions of the 1986 administrative order in Rule 16. The recommendation as adopted by the court effective February 15, 1988, carried forward the terms of the order with the change that the conference of counsel in an expedited action was mandatory and with other minor changes necessary to blend the procedure into the Rules.[216] With most superior court justices enthusiastically directing cases to the expedited track, the new Rule 16 has effectively (some trial lawyers would say too effectively) reduced the time devoted to the pretrial process in many cases. The problem is that with no increase in the number of judges and courtrooms, these cases now sit for long periods on ever-lengthening trial calendars.

e. Single Justice Management. All reforms of Maine's pretrial procedural rules come up against an obstacle beyond their scope: Under the traditional judicial assignment system, superior court justices ride circuit through the 16 counties according to a master rotation list prepared by the Administrative Office of the Courts under the supervision of the Chief Justice of the Superior Court.[217] The effect of this system is that the circuit-riding justices take the docket as they find it on arrival in a given county and deal with whatever matters are then pending in actions filed in that county. Frequently, several judges will be involved at various points in a single lawsuit as it works its way through different procedural stages.

For a number of years, critics both of the trial process and of court efficiency have called for a change to a system of single justice management, in which assignments would be of cases rather than courts.[218] The justice first assigned by some random method to a

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215. Memorandum from Superior Court Chief Justice Clifford to clerks of court, members of the bar, January 22, 1986 (emphasis in original).

216. *See* M.R. Civ. P. 16 and advisory committee's note to 1988 amend., Me. Rptr., 522-536 A.2d CCXIII-CCXX, CXXVII-CCXXVIII. Amended Rule 16(d) now contemplates that the plaintiff will ordinarily be directed to file the initial pretrial memorandum in an action on the regular trial list. *Id.* Conforming amendments were made simultaneously to the jury demand provisions of M.R. Civ. P. 38. *Id.* at CCXXII-CCXXIII, CCXXIX. Rule 16(c)(2) was further amended effective Feb. 15, 1989, to give the court discretion to hear pretrial motions such as those for summary judgment even though filed after completion of discovery. Me. Rptr., 551-562 A.2d XXXII, XXXV. In a further conforming change in 1989, Rule 41(a)(1) was amended to provide that voluntary dismissal is permitted only until the time for answer or motion for summary judgment, rather than until trial. *See supra* notes 86, 116.

217. *See* ME. REV. STAT. ANN. tit. 4, §§ 101, 105, 110; Silsby, *History of the Maine Superior Court* 14 ME. BAR BULL. 149, 175-79 (1980) (Pt. II).

218. *See* ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE, 1989 ANNUAL RE-

particular case would thereafter be responsible for all subsequent actions concerning that case, including pretrial scheduling and the pretrial conference, decisions on discovery and other motions, and the conduct of the trial. This system would benefit both the trial of the individual action and court management. A single judge thoroughly familiar with the case could take and maintain active control over its management from the beginning, could keep counsel focused on moving the case along, and could render consistent decisions on all aspects of the case. These benefits in turn would permit cases to move more rapidly and efficiently toward settlement or trial and would provide a built-in check on discovery abuse and other delaying or cost-engendering tactics.

There are, however, numerous difficulties in implementing this system in Maine. With only sixteen superior court justices for the same number of counties, caseloads of individual judges are very high, and the practical problem of assuring appropriate geographical distribution of judge time is great. In addition, the Maine bench and bar have long recognized the positive aspects of the circuit-riding system: lawyers and litigants have access to a wider and more frequently available selection of judges than would be the case if a single justice were assigned to each county. Since 1989, the Advisory Committee has had the possibility of single justice management for the superior court under consideration. Mindful of the practical concerns and the positive aspects of circuit-riding, the Committee hopes to develop, in conjunction with the superior court justices and clerks, a system under which judges would still travel but individual assignments would be made. The first step may be an experimental application of this system in Cumberland County, where the largest number of judges presently sits and where new courtrooms are now available.[219]

f. Alternative Dispute Resolution. In the view of many, more radical solutions to the problems of cost and delay in the courts must be sought. In Maine, significant steps have been taken toward such solutions. In 1980, after three years of privately funded experimentation with the use of mediation in small claims and divorce litigation, the Maine Court Mediation Service was established within the Judicial Department by court order.[220] In 1984, the Legislature

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PORT 4; SUPPLEMENTAL REPORT 3 (Nov. 1989); 1990 ANNUAL REPORT 5; NATIONAL CENTER FOR STATE COURTS, CHANGING TIMES IN TRIAL COURTS: CASEFLOW MANAGEMENT AND DELAY REDUCTION IN URBAN TRIAL COURTS 73 (1988); ABA DIVISION FOR JUDICIAL SERVICES, DEFEATING DELAY: DEVELOPING AND IMPLEMENTING A COURT DELAY REDUCTION PROGRAM 42 (1986).

219. *See* ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE, 1990 ANNUAL REPORT 5; Minutes of Meeting, Nov. 29, 1990; Feb. 14, 1991.

220. *See* Greason, *Humanists as Mediators: An Experiment in the Courts of Maine*, 66 A.B.A.J. 576 (1980); Johns & Clark, *The Maine Court Mediation Service*, 15 ME. BAR BULL. 73 (1981). *See also Mediation Services Extended in Maine Courts*,

made mediation mandatory in all contested domestic relations cases involving minor children, and in the following year the Court Mediation Service was formally established by statute.[221] The Service, managed by employees of the Judicial Department, employs a roster of seventy-five trained mediators available on call, and has access to facilities in courthouses and elsewhere for the conduct of mediations. By statute, the chief justice is to appoint and chair in person, or through a designee, the Court Mediation Committee that sets policy for and monitors the Service.[222]

In 1986, the Legislature established a new system of mandatory prelitigation screening and mediation panels for use in medical malpractice actions. The panels are drawn from a list prepared and maintained under the direction of the Chief Justice of the Superior Court, who is also responsible for appointing the chair of each panel formed to deal with a specific claim. Unless the parties agree to bypass the process, the panel conducts a factual hearing and makes findings on the issues of negligence and causation that may be the basis for settlement or may under certain conditions be admissible in a subsequent trial.[223]

The court has been directly involved in another alternative dispute resolution development. In 1986, a special Commission on Alternative Dispute Resolution constituted by the Maine State Bar Association proposed an experiment with the use of court-annexed mediation in civil actions in the superior court. The experimental program involved the selection of "mediatable" cases by the justice reviewing the pretrial scheduling statements and the assignment of those cases (as well as those in which mediation was requested) to one of a panel of experienced trial lawyers who had agreed to serve as mediators. The mediator was given wide latitude in the methods to be used to develop the case and bring the parties together. The mediator's decision was intended to be the basis of settlement, but was to be nonbinding.[224]

With the support of the court, the Bar Commission's proposal was presented to the legislatively established Commission to Examine Problems of Tort Litigation and Liability Insurance in Maine. That Commission recommended that funds be provided to the Judicial

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14 *id.* at 37 (1981). Clark & Orbeton, *Mandatory Mediation of Divorce: Maine's Experience*, 69 JUDICATURE 310 (1986).

221. *See* P.L. 1983, ch. 813, §§ 2-5, enacting ME. REV. STAT ANN tit. 19, §§ 581, 636, 665, 752; P.L. 1985, ch. 396, § 1, enacting ME. REV. STAT. ANN. tit. 4, § 18.

222. ME. REV. STAT. ANN. tit. 4, § 18(5).

223. *See* P.L. 1986, ch. 804, § 12, enacting ME. REV. STAT. ANN. tit. 24, §§ 2851-59.

224. *See* Alternative Dispute Resolution Proposal Prepared by the Alternative Dispute Resolution Commission of the Maine State Bar Association, *in* MAINE STATE LEGISLATURE, REPORT OF THE COMMISSION TO EXAMINE PROBLEMS OF TORT LITIGATION AND LIABILITY INSURANCE IN MAINE at Appendix J, 110-115 (1987).

Council to conduct the experiment.[225] The Legislature responded with a small appropriation, and a Committee of the Council developed a revised version of the original Bar Association proposal. Adopting that version, the court by administrative order set the experiment in motion in York and Knox counties for two years beginning September 1, 1988.[226] Although evaluation of the experiment is not yet complete, early indications are that the procedure served its intended purpose of moving cases more quickly toward settlement. Whether more cases that went to mediation ultimately were settled, and whether the procedure was cost-effective, remain to be determined.[227]

The jury is still out, so to speak, on the success of the steps that have been taken to reduce litigation delays and expense in Maine. All of the steps require the continuing willingness of judges, lawyers, and litigants to use them effectively and in good faith. Moreover, it is difficult to predict the potential for success of the proposals now pending, because we lack empirical data and even the capacity to obtain such data, on the day-to-day functioning of the civil litigation process. In 1990, the Maine Legislature created the Commission to Study the Future of the Courts. Perhaps the work of that body, which is just getting under way, will provide both the data base and the fresh and comprehensive look at today's problems necessary to make substantial and systematic progress toward solving them.[228] Whatever its direction, the Court Futures Commission will start from the solid base already established in Maine.

3. *Appellate Practice in the Law Court*

In contrast to pretrial procedure, developments in appellate practice before the Law Court reflect a much more determined and successful effort to achieve efficient and economical court operation.

The appeals rule (Rules 72-76A) as originally adopted in 1959, were modeled on the framework of the Federal Rules. Although many familiar features of Maine practice were woven into the federal model, the overall effect was a major change. Previously, review by appeal had been available only in equity. In actions at law, review in the Law Court was obtained by motion or the time-honored bill of exceptions, which had to be filed during the term of court in

225. *Id.* at 82.

226. *See* P. & S.L. 1987, ch. 121 (effective Aug. 4, 1988); Order of July 29, 1988, No. SJC-319, Me. Rptr., 537-550 A.2d XXXIX (effective Sept. 1, 1988).

227. *See* McEwen, *Interim Report: Superior Court ADR Project* (1990) (typescript in present author's possession).

228. *See* P.L. 1989, ch. 891, part B. The Commission is expressly to consider alternative dispute resolution mechanisms, including increased use of reference under Rule 53 and expansion of mediation under the Court Mediation Service. *Id.*, Pt. B, § 5(3), (6).

which the judgment appealed from had been rendered.[220] Rule 73 provided a single method of appeal for all actions—filing a notice of appeal with the clerk of the superior court within thirty days from the entry of the judgment. The record was also to be filed with the trial court clerk, who was responsible for transmitting it to the clerk of the Law Court. Rule 74 adopted the federal provision making clear that co-parties could appeal jointly or separately. Rules 75 and 76 provided in detail for the preparation, contents, and transmission of the record, again drawing on the federal model, but with details retained from Maine practice. Rule 76A, unique to the Maine Rules, carried forward provisions of the prior Supreme Judicial Court Rules, including the traditional simultaneous filing of briefs and allocation of one hour to each side for oral argument.[230]

In the years immediately after 1959, several changes were made, including the addition of a provision for cross-appeals, and a number of minor changes in such matters as the number of copies and paper size of the briefs and record.[231] In addition, in 1965, the court promulgated Rule 76B, providing a procedure for certification to the Law Court of questions concerning Maine law arising in federal courts. This rule was based on a *Maine Law Review* article by McKusick proposing such a measure and on an enabling statute prepared by him.[232]

In 1967, substantial amendments recommended by the newly reconstituted Advisory Committee were adopted by the court. These changes were based in part on the pending proposed draft of Uniform Rules of Federal Appellate Procedure for the United States Courts of Appeals.[233] The amendments provided for sequential filing of briefs and incorporated revised and elaborate timetables and procedures for the preparation and filing of the record and briefs. Other

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229. M.R. Civ. P. 73 reporter's notes (1959). As to the prior practice, see Merrill, *Some Suggestions on Taking a Case to the Law Court*, 40 ME. ST BAR ASS'N REP. 175 (1951). Rule 72 had no equivalent in the Federal Rules. It preserved the prior statutory practice of reporting by agreement doubtful questions or cases made on an agreed statement of facts and added a provision for report of an interlocutory ruling on motion of the aggrieved party. M.R. Civ. P. 72 and reporter's notes (1959).

230. *See* M.R. Civ. P. 76A and reporter's notes (1959); Rules Applicable only to Proceedings in Supreme Judicial Court, 147 Me. 488-91 (1952), as amended, 148 Me. 533 (1953), 152 Me. 57 (1956), 153 Me. 221-24 (1957), 153 Me. 382 (1958).

231. *See* M.R. Civ. P. 73(a) and advisory committee's note to 1966 amend., 2 FIELD, MCKUSICK & WROTH, *supra* note 24, at 149, 153; M.R. Civ. P. 73(e) advisory committee's note to 1966 amend., *id.* at 189; M.R. Civ. P. 75 (l) advisory committee's note to 1966 amend., *id.* at 188.

232. M.R. Civ. P. 76B and explanation of amend. (1965), 2 FIELD, MCKUSICK & WROTH, *supra* note 24, at 242-44. *See id.* at 245-52; McKusick, *supra* note 12; P.L. 1965, ch. 158 and ch. 513, § 2, amending ME. REV. STAT. ANN. tit. 4, § 57.

233. 34 F.R.D. 267-324 (1964). The Federal Rules of Appellate Procedure, changed in some respects from the proposed rules, were promulgated December 4, 1967. Order of Dec. 4, 1967, effective July 1, 1968, 389 U.S. 1063-1120.

changes made specific provision for motion practice in the Law Court, imposition of the costs of producing the prevailing party's brief on the losing party, and interest on judgments.[234] A new Rule 76A was also adopted, providing for enlargement of time on stipulation and the counter-measure of dismissal for want of prosecution, and allowing the Law Court to modify or suspend all provisions of the appeals rules, except the jurisdictional times of Rule 73(a), on motion of a party or on its own motion.[235]

The basic purpose of the 1967 amendments, according to the Advisory Committee's notes, was to bring to Maine practice the benefits of closure and sharpness of issues enjoyed in the majority of states and the federal courts as a result of sequential filing of briefs. While the revised filing times increased the total potential time that could elapse in the appellate process from 155 to 190 days, this increase was said to be illusory, because under the former practice extensions of time were always necessary and, in any event, both parties were given ample opportunities to speed up the process.[236] In addition to this explanation of purpose, the Advisory Committee's Notes to these amendments are a remarkable guide to appellate practice, pointing out how the amendments have sought to embody "the better practice of counsel appearing regularly before the Law Court" and offering detailed suggestions as to that practice.[237]

Although a few additional amendments were made to the appeals rules in the ensuing years,[238] the next major changes were adopted in 1978. These amendments, designed to reduce both the expense of an appeal and the time consumed in the appellate process, were taken from the Federal Rules of Appellate Procedure as finally adopted in 1967. In the words of the Advisory Committee: "This adaptation brings to Maine a tested procedure that is working well in the United States Courts of Appeals." The changes were also intended to increase uniformity for the benefit of those practicing in both state and federal court or seeking interpretive authority for

234. The amendments also consolidated all provisions pertaining to the record in a new Rule 74. *See* M.R. Civ. P. 73-76A and advisory committee's notes to 1967 amends., 2 FIELD, MCKUSICK & WROTH, *supra* note 24, at 149-241; Wroth, *supra* note 47, at 79-86.

235. *See* M.R. Civ. P. 76A and advisory committee's note to 1967 amend., 2 FIELD, MCKUSICK & WROTH, *supra* note 24, at 236-38.

236. M.R. Civ. P. 74 advisory committee's note to 1967 amend., 2 FIELD, MCKUSICK & WROTH, *supra* note 24, at 189-93.

237. M.R. Civ. P. 75A advisory committee's note to 1967 amend., *id.* at 215. *See* M.R. Civ. P. 74 advisory committee's note to 1967 amend., *id.* at 192-93.

238. *See, e.g.*, M.R. Civ. P. 73(a) and advisory committee's note to 1969 amend., *id.* at 155; M.R. Civ. P. 74 and advisory committee's note to 1969 amend., *id.* at 193-94. Rule 75D was added by the court, effective October 1, 1969, to make provision for the composition and sessions of the Law Court, pursuant to the legislative invitation to do so contained in P.L. 1969, ch. 354. *Id.* at 229-30. For amendments adopted between 1970 and 1978, see *id.* at 429-538 *passim* (Supp. 1981).

Maine practice.[239]

The effect of the amendments, which centered on a total revision of Rule 74 and the addition of new Rules 74A, 74B, and 74C, was to provide that the "record on appeal" consisted of the entire original record of the trial including the transcript. For convenience, the parties were to prepare and submit with the briefs a "record appendix" containing the parts of the record most likely to be in question. In sharp contrast to prior practice, however, the parties and the court were not limited to matters appearing in that document, because the entire original record, transmitted to the Law Court by the superior court clerk, was before the court and open for consideration on the appeal.[240]

With a further series of amendments adopted by the court in 1980 without direct input from the Advisory Committee, it became apparent that the focus of reform of appellate practice had shifted to the court's growing need to manage its own docket. The main thrust of the 1980 amendments was to place in the Law Court and its clerk greater control over the mechanics and timing of the appellate process. Thus the appeal was now to be docketed in the Law Court immediately upon receipt of the notice of appeal, rather than upon receipt of the record as formerly. Superior court jurisdiction thereafter was limited to post-judgment motions terminating the running of the time for appeal, other necessary motions, and proceedings on certain interlocutory appeals. The trial transcript was to be transmitted directly to the clerk of the Law Court by the reporter, rather than through the superior court clerk. The parties were no longer permitted to stipulate for enlargement of time. The provisions governing dismissal for want of prosecution were simplified, and the court was authorized to impose treble costs for frivolous appeals. Specific provision was made for a motion for rehearing to be brought in a fourteen-day period established between the date of the court's opinion and the issuance of its mandate. Finally, the time for oral argument was further reduced from thirty to twenty minutes per side.[241]

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239. *See* M.R. Civ. P. 74 advisory committee's note to 1978 amend., 2 FIELD, MCKUSICK & WROTH, *supra* note 24, at 458-60 (Supp. 1981). The provisions primarily adapted were FED. R. APP. P. 12, 30. *Id.*

240. *See* M.R. Civ. P. 74, 74A, 74B, 74C advisory committee's notes to 1978 amends., *id.* at 457-61, 484-86, 493, 499-501. McKusick's ABA Special Committee on Federal Procedure had, in 1968, presented a report supportive of FED. R. APP. P. 30 and the record appendix. *See supra* note 4.

241. *See* M.R. Civ. 73(f) & (g); 74(b)(1) & (3); 74A(a), (b), & (d); 75C(b); 76(f); 76A(a) & (b) advisory committee's notes to 1980 amends., 2 FIELD, MCKUSICK & WROTH, *supra* note 24, at 431, 462, 487, 522-23, 527, and 535-36. The provision of Rule 73(f) allowing the superior court to retain jurisdiction in certain interlocutory appeals even after docketing in the Law Court was extended to include discovery orders, temporary and preliminary injunctions, and partial summary judgments by an

Subsequent amendments have further tightened and sharpened the Law Court's powers. In 1982, the procedure of Rule 76A(b) for rehearing was retitled "reconsideration" and more stringent provisions on the motion, adapted from the Rules of the United States Supreme Court, were added to the rule.[242] A 1983 amendment of Rule 75B clarified and added more detail to the procedure on motions in the Law Court, making different provision for "procedural" and "substantive" motions.[243] Amendments in 1986 and 1987 to Rule 75C provided stricter sanctions for nonappearance at oral argument and allowed the Law Court to dispense with oral argument in cases where the appeal appeared frivolous or the issues clear.[244] Rule 73(b) was also amended in 1987 to provide expressly that the notice of appeal was to be considered a "pleading" so that the sanctions of Rule 11 could be applied to an attorney signing the notice on a frivolous appeal.[245]

It is evident that the appeals rules, too, have run their course from provisions designed and adjusted to make life easier for the parties, to a set of rules tightly structured and controlled by the Law Court to assure the maximum efficiency of operation as the court deals with its ever-increasing docket. In the appellate sphere, in contrast to pretrial litigation practice, because the court administers and observes its own proceedings and because no particular constituencies have vested interests in the procedural prerogatives of appellants and appellees, the effort has been largely a successful one. Counsel and court alike understand the ground rules, and the docket of the Law Court is disposed of with relative swiftness and predictability.

CONCLUSION

Vincent McKusick brought to the practice of his profession in Maine a highly trained and finely tuned legal intellect and a sound instinct for the essential role of procedure in the legal system. He was the right person in the right place at the right time when the opportunity arose to work with Richard Field on the initial adoption of the Maine Rules of Civil Procedure and the writing of *Maine Civil Practice*. This involvement readied him not only to take on the

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amendment effective February 15, 1991. M.R. Civ. P. 73(f) and advisory committee's note to 1991 amend., 538 A.2d No. 4 at CXXV, CXXXI (advance sheet).

242. M.R. Civ. P. 76A(b) and advisory committee's note to 1982 amend., Me. Rptr., 441-448 A.2d XXV-XXVII.

243. M.R. Civ. P. 75B and advisory committee's note to 1983 amend., Me. Rptr., 449-458 A.2d LVI-LVII, LXIV-LXV.

244. M.R. Civ. P. 75C(e) & (f), and advisory committee's notes to 1986 and 1987 amends., Me. Rptr., 498-509 A.2d XLIV, XLIX; 510-521 A.2d XXXV, XXXVI. The latter provision was adapted from FED. R. APP. P. 34(a). *Id.*

245. M.R. Civ. P. 73(b) and advisory committee's note to 1987 amend., Me. Rptr., 510-521 A.2d LXXXVI, XCIV.

leadership of Maine's civil rulemaking process but to attain national exposure and prominence as well. Thus, his work on the Maine Rules was guided and informed by his experience at the highest levels of the American Law Institute, the National Conference of Commissioners on Uniform State Laws, and the American Bar Association. As Chief Justice since 1977, McKusick has contunued his national involvement and has continued to give rulemaking the highest priority, building a solid and smoothly functioning system of committees and supporting consultants that assures systematic review of the rules in operation and continuing communication between the court and the bar and public. The result is that Maine is a national leader in the quality and scope of its rules of court.

The Maine Rules of Civil Procedure as they have evolved within this system differ in many significant ways from those promulgated in 1959. There have been major changes in the provisions governing such areas as parties and the jury. The use of the civil action for a variety of administrative purposes and judicial review of administrative action have greatly expanded. There have been numerous changes in the format and basic structure of the Rules. Changes in areas such as process and pretrial and appellate procedure have been responsive to growing concerns both for fairness in the system and for a less costly and more efficient means of resolving disputes. All of these changes mirror the impact of the social and economic changes of the last three decades upon the court system as a whole. As this Article demonstrates, the process of change is a continuing one. Even now the rulemaking committees are considering proposals designed to meet new challenges. If Maine succeeds in meeting these challenges, it will be because the state is able to build on the legacy of Vincent McKusick.

I close on a personal note—perhaps to be read only by the one reader who I can be sure has come this far. I have had the privilege and good fortune to be associated with Vincent McKusick in the enterprise which I have sought to document since shortly after I came to Maine in 1964. He introduced me to the business of making rules and quickly showed me its range from late night drudgery to moments of high intellectual excitement and creative satisfaction. He taught me much about the art of articulating complex ideas of policy and practice in intelligible language, as well as refinements ranging from the difference between the Supreme Judicial Court and the Law Court to the proper use of "that" and "which." Most important, he has shown me that intense and persistent application, combined with common sense, unfailing good humor, courtesy, and patience, will unravel and resolve virtually every problem. We will miss those attributes at the head of Maine's Judicial Department, but we can be assured that we will enjoy the benefit of them in other

ways. For Vincent McKusick has left us not so much a legacy as a benefaction that he will join us in continuing to tend and nurture for many years to come.