

Administrative Office of the Courts

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Judicial Branch testimony in opposition to LD 267, An Act Regarding the Remote Appearance of Counsel In Pretrial Nontestimonial Criminal Matters:

Senator Carney, Representative Kuhn, members of the Joint Standing Committee on Judiciary, my name is Julie Finn and I represent the Judicial Branch. I would like to present testimony in opposition to LD 267.

The Judicial Branch opposes this bill on separation of powers grounds. Article III, Section 1 of the Maine Constitution states that “The powers of this government shall be divided into 3 distinct departments, the legislative, executive and judicial.” Section 2 makes clear that “No person or persons, belonging to one of these departments, shall exercise any of the powers properly belonging to either of the others, except in the cases herein expressly directed or permitted.” As has long been recognized, “[b]ecause of article III, section 2, the separation of governmental powers mandated by the Maine Constitution is much more rigorous than the same principle as applied to the federal government.” *State v. Hunter*, 447 A.2d 797, 799 (Me. 1982). Thus, “[t]he judicial power of this State . . . is the exclusive province of the courts.” *Anderson v. Elliott*, 555 A.2d 1042, 1047 (Me. 1989) (quotation marks omitted).

Specifically, “[t]he Supreme Court has the inherent right to establish rules for the orderly conduct of business before it.” *Fox v. Conway Fire Ins. Co.*, 53 Me. 107, 110 (1865). Indeed, this is codified at 4 M.R.S. § 9 (“The Supreme Judicial Court shall have the power and authority to prescribe, repeal, add to, amend or modify rules of pleading, practice and procedure with respect to any and all proceedings through final judgment, review and post-conviction remedy in criminal cases . . .”)

The Supreme Judicial Court (“SJC”) has issued hundreds of court rules and dozens of administrative orders setting forth the rules of procedure in many areas including filing complaints and answers, service of process, exchange of discovery, motion practice, preparing for trial, and examining witnesses. All court rules are released for public comment before finalizing and are available online and on paper. All administrative orders are published to the Judicial Branch website.

The SJC has issued an Administrative Order governing remote appearances. AO-JB-21-05 (last amended August 18, 2023). That Order governs the presumed format, remote or in-person, for different court proceedings. Even when proceedings are presumed to be in-person, any party may request to appear remotely upon good cause shown. Factors the presiding judge or

justice considers in each case include the ability of parties to participate remotely or to be present; the availability of constitutionally required counsel to other people and in the courts; and the availability of judicial officers, courtroom space, judicial marshals, technology assistance, and clerical assistance.

Requests to appear remotely are routinely granted and rarely denied. As many of you have recently seen in an actual Maine courtroom, a large screen and Zoom cart is set up in the courtroom and attorneys and litigants often attend remotely. Every case is different, however, and there are instances where the judge or justice might require the parties to attend in person. Many judges have noted that in-person discussions between the parties are far more likely to result in an agreed-upon resolution of the case and this, in turn, helps to clear the docket and reduce the backlog. In addition, when an agreement is reached with counsel appearing remotely, the case frequently must be reset for another in-person proceeding to take care of the agreement, again increasing the time and number of appearances. Whether requests to appear remotely are granted or denied is entirely within the discretion of the judge under the circumstances of a particular case.

Matters involving the operation of the courts and court procedure lie exclusively within the purview of the courts. To interfere with court procedure as suggested by LD 267 is violative of the doctrine of separation of powers, one of the cornerstones of both the Maine and the U.S. Constitution.

On behalf of the Judicial Branch, I respectfully request an ought-not-to-pass vote on this legislation. I would be happy to answer any questions. Thank you.