BERMAN & SIMMONS
TRIAL ATTORNEYS

Craig A. Bramley
(207) 784-3576
cbramley@bermansimmons.com

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

Dear Mr. Pollack:

On behalf of Berman & Simmons, please accept this as our firm's comments on the proposed amendments to the Maine Rules of Civil Procedure. We appreciate this opportunity to comment.

The proposal to implement civil justice reform through proposed amendments is sweeping in nature. It impacts over forty rules and would upend years of settled practice. We support some of the proposed amendments and oppose others. Our overriding concern is that more time is necessary to carefully consider the impact of each of the changes proposed. Given the short time available, we include comments on individual proposed rules below. We also respectfully request that the Supreme Judicial Court extend the comment period to allow further reflection on the effects of these proposed reforms.

Our two most pressing concerns are: (1) the implications of classifying pre-panel medical malpractice cases as Track A cases; and (2) automatic disclosures focused solely on plaintiffs in personal injury cases.

Changes to medical malpractice litigation:

By classifying pre-panel medical malpractice cases as Track A cases, the proposed rules would eliminate pre-panel discovery. This would fundamentally change how medical malpractice cases are litigated in Maine. As the 2009 Advisory Committee's Notes state, because "discovery in the panel proceedings is usable in any later filed civil action, the panel proceedings perform a valuable function in producing the discovery required in a civil action."

By moving the entire discovery process to the post-medical malpractice screening panel period, the proposed rules would greatly extend the time needed for discovery once a complaint has been filed, thereby extending the time a post-panel case remains on the docket. Moving the discovery process to the post-panel stage also undercuts the very purpose of the screening panel process – early resolution of claims following a confidential process. Once we remove the ability to fully conduct discovery from the pre-panel process, it is far less likely that any party will have the evidence necessary to accurately evaluate the case for settlement.

We understand that pre-panel medical malpractice cases were likely grouped with Track A cases because Maine Rule of Civil Procedure 80M outlines specific procedural rules for the panel system. Although the Panel Chair is responsible for setting a scheduling order for written discovery and depositions under Rule 80M(c), Rule 80M only supersedes the general provisions of the civil rules when it explicitly provides so. M.R. Civ. P. 80M(a). Thus, the general discovery rules regarding depositions, interrogatories and requests for production of documents apply to pre-panel medical malpractice cases.

This problem could be remedied while leaving pre-panel medical malpractice cases on Track A by including a provision such as: **"For the purposes of Rules 30, 33, and 34, pre-panel medical malpractice cases shall be classified Track C cases. In addition, pursuant to the Maine Health Security Act, the Panel Chair has discretion to permit additional reasonable discovery."**

Automatic disclosures:

Proposed Rule 26A exceeds Federal Rule 26's requirements for automatic disclosure. Federal Rule 26 neither singles out a particular class of cases nor imposes automatic disclosures on one party only. By contrast, the proposed changes impose significant one-sided requirements for plaintiffs in personal injury cases.

To be clear, we do not oppose the automatic disclosure requirements identical to those in Federal Rule 26. We do oppose the 'Special Requirements for Claims of Bodily Injury and/or Emotional Distress' in proposed Rule 26A(a)(2), which unfairly imposes automatic disclosure requirements on one party only. If plaintiffs are required to disclose additional categories of documents in personal injury cases as an initial disclosure without a written discovery request from the defendant, yet both parties are subject to the same limits on written discovery requests in Track B and Track C cases, this effectively provides defendants with more discovery of the plaintiff. Such disparate treatment of opposing parties in the same case provides an unfair advantage to defendants and raises significant constitutional concerns.

We propose that to the extent additional disclosures are imposed on plaintiffs in personal injury cases, defendants should also be required to produce documents routinely requested of them in such cases. Examples include:

- all documents proving or supporting affirmative defenses pled in your case;
- all video surveillance footage of the scene of an accident or injury, including footage prior to and after the injury;
- any incident report relating to the occurrence;
- in a motor vehicle case, all invoices, estimates, letters, or other documents concerning repairs or maintenance of the vehicle in the six months leading up to the crash; and
- a list of all other lawsuits or claims made against the defendant for incidents similar to the occurrence at issue in the case.

The requirement for a personal injury plaintiff to list all health care providers, hospitals, and medical practices where he or she has been seen or treated for ten years prior to the date of the occurrence, and to produce all medical records for examination or treatment during that time, is oppressive and overly burdensome. First, plaintiffs are required to produce information and

medical records for unrelated treatment or seek judicial intervention through a motion for protection from disclosure. Under current practice, counsel for the parties routinely reach agreement on the categories of treatment or records that are completely unrelated, without the need for judicial intervention. The rules should incorporate and encourage this cooperation. The rules should also incorporate a simple means for a party to withhold documents from initial disclosure based on an objection and to inform opposing counsel who can attempt to resolve the discovery dispute with the withholding party and decide whether to seek court intervention.

The timeline within which plaintiffs must file a motion for protection from disclosure of unrelated medical care during the course of litigation is unreasonable. As drafted, it requires disclosure within fourteen days after a plaintiff receives unrelated medical treatment occurring after the date of initial disclosures. Many clients receive significant unrelated medical treatment over the course of litigation, and will not always be able to notify their attorney so soon after each separate instance of treatment. The requirement for a separate motion for protection from disclosure for each instance of medical treatment occurring after the initial disclosures, would be burdensome for plaintiff's counsel and for the court, generating numerous motions over the course of litigation.

The ten year 'look back' period for medical treatment and records is potentially unfair, overly burdensome, and will be disproportional to the needs of the case in many cases. Often parties in personal injury cases agree to production of medical records for five years prior to the date of occurrence. Many judges on the Superior Court bench order production of five years of medical records when deciding a discovery dispute.

We propose that if plaintiffs are required to provide a list and produce medical records for all medical treatment as an automatic disclosure, the rule should require a list of treatment and production of medical records for all health care professionals, hospitals, other medical institutions and practices where plaintiff received examinations or treatment *reasonably related* to the claimed injuries during the *five* years prior to the occurrence, as well as between the occurrence and the date of the disclosures. Further, to the extent that any defendant presents a defense based in part or in whole on his or her health (i.e. a "sudden medical emergency" defense), such defendant should be required to produce a comparable breadth of information and medical records as an automatic disclosure.

Additionally, Proposed Rule 26A(a)(2) applies to 'a party claiming . . . damages.' Read literally, the proposal could require parties who are suing in a representative capacity, such as personal representatives of an estate, to disclose their own medical and other records, rather than the records of the person who actually suffered the relevant injury. The rule should be clarified to avoid this unintended consequence.

We also propose that if plaintiffs are required to produce a list of all other lawsuits, injury claims, disability claims, or workers compensation claims for 10 years prior as an automatic disclosure in personal injury cases, the list of lawsuits be restricted to personal injury lawsuits. Other types of lawsuits, for instance breach of contract claims, are not relevant to any issue in a personal injury lawsuit. To ensure that plaintiffs and defendants are treated equally under the rules, defendants should also be required to produce a list of all other lawsuits or claims made against the defendant for incidents similar to the occurrence at issue in the suit.

The Special Requirements for Claims of Bodily Injury and/or Emotional Distress impose heightened burdens targeted to personal injury plaintiffs, but without any legislative lawmaking process. The judiciary should be wary of using the authority of the State to impose unreasonably burdensome, intrusive, humiliating, or harassing requirements on civil litigants who have a constitutional right to seek remedies for very real and serious injuries in court. This is especially true when the production requirements include no mechanism for the plaintiff to contest production on the basis of privilege or work product doctrine protection.

Proposed Rule 3

When a plaintiff elects to commence via service (followed by filing), as per proposed Rule 3(a), the proposed rule reduces the deadline for filing the Complaint (and civil case information sheet) after completion of service from 20 to 14 days. We oppose this reduction. Plaintiffs' attorneys who commence an action via service by and large file the Complaint with the court immediately upon completion of service. It is in the multi-defendant context that plaintiffs' counsel will wait to file until all defendants have been served, as it is quite common that one or more defendants are not served until 14-20 days after the first served defendant. By shortening the filing deadline, the proposed Rule will unintentionally create additional delay and unnecessary burden on the judiciary as the frequency of plaintiff requests for additional time will increase.

When a plaintiff elects to commence via filing (followed by service), as per proposed Rule 3(b), the proposed rule reduces the deadline for filing the return of service from 90 to 70 days after the filing of the Complaint (and civil case information sheet). We oppose this reduction. Currently, plaintiffs' counsel rarely choose to wait more than 70 days to file a Complaint once it has been served on a defendant, and only do so in difficult circumstances where the extra 20 days are highly important and even help to streamline the litigation process. If a defendant is evading service or if plaintiff is having difficulty locating the defendant, the last 20 days of the current 90-day deadline are often where service is ultimately effectuated. Moreover, when plaintiffs' counsel is hired just before the applicable statute of limitations is set to expire, he or she may file a Complaint to preserve the claim and will then withhold service until he or she has more fully investigated the facts in order to assess the claim's viability. If the claim lacks merit, the plaintiff can then dismiss the action before the defendant has even been served. Therefore, the proposed 70-day filing deadline, in contrast to the current 90 days, does not accommodate the due diligence that is often necessary before plaintiffs' counsel can confidently advise his or her client regarding dismissal of the claim, and will therefore result in the litigation of claims that the current 90-day deadline serves to eliminate.

Proposed Rule 15

Current Rule 15(a) rule provides, "A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court orders otherwise." The proposed rule reduces the 10 days to 7. Amendments to pleadings often dramatically alter the facts, scope and dynamics of a case, and careful reflection should therefore be encouraged before a party responds to the Amendment. Thus, it would be more appropriate to increase the current 10 days to

14 – in order to be consistent in calculating deadlines in seven-day increments - rather than reduce it to a mere 7 days.

Proposed Rule 16

We agree generally with the assignment of cases into different case management tracks, but oppose specific aspects of the proposed Rule. As discussed above in more detail, we have concerns about the effect of the proposed Rule in medical malpractice screening panel cases.

We also have concerns that Track B appears to presumptively include all personal injury cases except products liability and medical malpractice claims. Personal injury cases range from the routine—two car intersectional collisions—to highly complex—multi-party wrongful death or catastrophic injury cases with multiple experts. The clerk assigning a case to a track will have little information about the case. Given the strict discovery limits associated with Track B cases, court involvement will increase as parties will request a conference with the judge under proposed Rule 16(c) to change the track.

We oppose the deadline of six months from the date of the answer to complete discovery in Track B cases. An unrealistically short deadline for discovery places the plaintiff at an unfair disadvantage because the plaintiff bears the burden of proof yet typically lacks access to the key information necessary to meet that burden, without discovery. It provides defendants with a procedural advantage. Foreshortened discovery decreases the likelihood of settling claims before trial. Parties are more successful in resolving cases when they have more information with which to assess their risk.

The requirement to complete discovery within six months after discovery is filed is unrealistic given the logistical factors involved in discovery, many factors being out of the control of parties and their attorneys.

For post-panel medical malpractice cases falling in Track C, eight months of additional discovery is unnecessary after the discovery allowed prior to panel hearing under the proposed modification discussed at the beginning of this comment. We propose that four months of discovery be allowed for medical malpractice cases falling in Track C that have proceeded through the panel phase.

Finally, the procedure for seeking modification of the scheduling order will itself be less efficient. Parties must use the method outlined in proposed Rule 7(b)(1), which requires the court to schedule a conference with all the attorneys. This procedure places considerable burden on the court.

Proposed Rule 16A

Proposed Rule 16A makes pretrial conferences mandatory. (The current rule states the court "*may* also schedule a conference"; the proposed rule states "a pretrial conference *shall* be held in each Track B and Track C case" unless exempted by the court for good cause shown.). Whereas the current rule provides for an oral discussion with the court at the pretrial conference, the proposed rule requires a pretrial memorandum in all Track B cases. In all Track C cases, it requires either a pretrial memorandum or a joint pretrial statement.

The pretrial memorandum and joint pretrial statement require parties to describe in writing, with case citations, their position on contested evidentiary and legal issues, even when motions are pending on those very topics. This creates duplication of effort by the parties' drafting, and the judge's reading, of these submissions. In current practice, judges typically ask parties at the pretrial conference to briefly state the contested legal and evidentiary issues that are either the topic of pending motions, or foreseen. There is no need to mandate a formal written submission in all cases.

Additionally, the rule directs judges in Track C cases to "consider" the "elimination of unsupported claims or defenses." Currently, the motion to dismiss under Rule 12(b)(6), the motion for summary judgment under Rule 56, and the motion for judgment as a matter of law under Rule 50, all provide opportunities for parties to raise (and defend against) dismissal of claims or defenses for a failure of legal or factual support. These rules provide clarity as to the standards and procedure for dismissal of claims or defenses and have been further elaborated and clarified through a body of judicially created case law. Proposed Rule 16A is ambiguous as to the standard to be applied when a judge "considers" "eliminating" claims or defenses. It is ambiguous as to the procedure to be followed, including whether the issue must be raised by motion and whether the judge can *sua sponte* 'eliminate' a claim or defense. This lack of clarity and lack of procedural safeguards raise serious constitutional issues.

Proposed Rule 16B

Under the current Rules, plaintiffs are required to promptly report the fact of a settlement to the Court. Courts then issue an order dismissing the case, without any reference to a settlement in the order. This proposed Rule goes much further, requiring plaintiffs to report "all of the terms of the settlement" to the court in a proposed order, when reporting the fact of a settlement. Presumably, the court's order entered on the docket to dismiss the case would then include the fact of a settlement and its terms.

We oppose this requirement. Frequently, confidentiality regarding a settlement and its terms is an underlying factor driving settlement. It is often a negotiated term of the settlement itself. Including the fact of settlement and its terms in the court's order makes this information a matter of public record. This is a very significant departure from current practice and is not necessary to the goal of ensuring that courts are timely informed of a settlement.

We foresee significantly fewer settlements if the parties are unable to negotiate confidentiality as a term of settlement, particularly for medical malpractice suits in the confidential pre-litigation panel hearing phase. We are concerned that personal injury plaintiffs, who can have less financial education and experience handling large sums of money, will be exploited by unscrupulous businesses and individuals if the amount of a settlement becomes a matter of public record.

Proposed Rule 16B shortens the deadline for ADR to 91 days after the entry of a scheduling order from 120 days and eliminates the ability of parties to extend that time period by agreement. We oppose this provision. Experience shows that mediation is more likely to be successful when both parties have the information they need to assess their risks. ADR conducted within the first three

months after a scheduling order is less likely to succeed for that reason. Requests to the court for additional time will become routine, increasing the burden on courts.

Proposed Rule 26B

Rule 26 provides that discovery limits on the number of interrogatories, requests for production, requests for admission, and depositions for parties in Track B and Track C cases are presumptive limits and cannot be exceeded unless a party establishes that additional discovery is proportional to the needs of the case. The proportionality standard articulated in Proposed Rule 26 mirrors that in Federal Rule 26, but with an important distinction. In federal practice, parties invoke the proportionality standard to ***limit*** the ***scope*** of another party's discovery request, for instance arguing that production of a defendant's maintenance logs should be limited to only one year prior to the incident, rather than the five years requested. Under proposed Rule 26B, plaintiffs invoke the proportionality rule to ***expand*** the ***number*** of discovery requests or depositions beyond a presumptive limit. We propose that if the proportionality standard is adopted, it must apply equally to the ***scope*** of all discovery, as in Federal Rule 26. This includes, but is not limited to, the plaintiff's production of the additional records required in the Special Requirements for Claims of Bodily Injuries and Emotional Distress.

Under the federal rules, disagreements over proportionality can be resolved by the parties without judicial intervention. Under Proposed rule 26B, judicial intervention is always required when the plaintiff seeks to establish that expanded discovery is proportional to the needs of the case. In this way, proposed Rule 26B follows a theme present throughout the proposed rules—the theme of increased judicial oversight and control of discovery issues that the parties have until now often resolved without judicial intervention. The increased burden on the judiciary will result in further delays in the litigation of cases.

Proposed Rule 30

Proposed Rule 30 eliminates depositions in Track A cases without prior authorization of a court order. If medical malpractice screening panel cases remain on Track A and there is no provision to reclassify them for the purposes of Rule 30, we oppose this rule. Complex medical malpractice cases may involve multiple defendants, multiple party witnesses, and multiple expert witnesses. Requesting prior authorization before each deposition would create a burdensome process. Going to the screening panel without deposing witnesses first would create a much less effective panel hearing process.

Proposed Rule 33

We oppose the proposal in Proposed Rule 33 that would eliminate interrogatories altogether for Track A cases and limit them to 20 for Track C cases. As stated above, we are advocating for a provision that would require pre-panel medical malpractice cases to be categorized as Track C for the purpose of Rule 33.

Limiting interrogatories to 20 in the most complex cases is a needless limitation on a valuable discovery tool. Our experience has been that Maine attorneys are able to self-regulate the use of

interrogatories. A simple medical malpractice or personal injury case may not necessarily require more than twenty interrogatories. But when complex issues arise, such as affirmative defenses, immunity issues, vicarious liability, etc., interrogatories can be an effective tool to elicit information in an efficient and cost-effective manner.

Proposed Rule 34

We oppose the proposal in Rule 34 that would eliminate requests for production of documents altogether for Track A cases and limit them to 25 for Track C cases. As stated above, we are advocating for medical malpractice screening panel cases to be categorized as Track C for the purposes of Rule 34.

Limiting requests for production of documents to 25 in all cases is a needless limitation on a valuable discovery tool. Again, our experience has been that Maine attorneys have been self-regulating how many requests for production of documents they propound. In a simple case, 25 or fewer requests is reasonable. In more complicated cases, 25 is an arbitrarily low number. Attorneys regularly take depositions in which a witness refers to a specific, previously undisclosed document. Following the deposition – but long after propounding initial requests for production of documents – a supplemental request is propounded for the new documents. Limiting parties to 25 requests would prevent attorneys from following up on documents that appear to be reasonably calculated to lead to the discovery of admissible evidence.

Proposed Rule 36

We oppose the proposal in Proposed Rule 36 that requires prior approval of specific requests from the court in order to promulgate any request for admission (except those asking whether a document is genuine). Requests for admission can elicit valuable discovery while saving court and trial time. They are generally used to eliminate issues at trial or confirm key facts prior to filing a motion. Frequently, a simple request for admission is the most efficient, least expensive method to establish key facts. By requiring prior approval by the court, this change will place an increased burden on judicial resources.

Proposed Rule 38

We oppose the proposal in Proposed Rule 38(b)(2) that a party bringing a claim and demanding a jury trial must pay the jury fee within 28 days after the filing of an answer. We do not oppose any proposal that jury demands themselves be made at an earlier stage in litigation. However, we believe that requiring jury fee payment at this same early stage would unnecessarily increase costs in the substantial number of cases that do not proceed to trial. Under current practice, parties often do not make jury demands and incur jury fees until there has been substantial opportunity for settlement negotiations, including ADR. This ensures that by the time a party makes a jury demand and pays the jury fee, the likelihood of proceeding to trial is relatively high. By requiring fee payment at an early stage in litigation, when the likelihood of proceeding to trial is relatively low, Proposed Rule 38(b)(2) would increase the number of cases in which a party incurs the cost of a jury fee only to settle before trial.

Proposed Rule 40

We oppose the proposal in Proposed Rule 40(b) that would allow judges and justices, in their discretion, to hold trials in court locations other than where a matter originated. This proposal impinges on a plaintiff's choice of venue and right to file in their home county, especially in our geographically large state where different court locations may be many hours apart. We agree that changing trial location is a tool that should be used more frequently to facilitate the prompt scheduling of trial. However, changes in trial location should only occur with the agreement of the plaintiff.

Proposed Rule 56

We oppose the proposal in Proposed Rule 56(c)(1) that summary judgment motions in Track B cases be filed within 14 days after the discovery deadline. In our experience, parties often exchange information that may be critical to summary judgment motions (or to the decision whether to move for summary judgment) up until the close of discovery. We believe that 14 days is too short a period in which to thoughtfully draft motions for summary judgment, and suggest that the deadlines in both Track B and C cases be set at 28 days after the discovery deadline.

Proposed Rules 59, 62, 68, 76D, 76F, 76G, 76H

We support the proposed amendments to these rules. Changing the deadlines as proposed is a modest means to simplify scheduling for both the courts and parties.

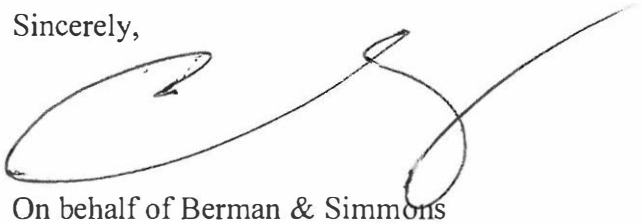
Proposed Rule 76C

We oppose the proposed amendment to subdivision (a), which would eliminate the plaintiff's right to remove an action from District Court to Superior Court for a jury trial. This proposed amendment is particularly harmful to the interests of *pro se* plaintiffs who might not, at the time of filing the cause of action, be aware of the right to a jury trial and how the choice of court affects that right.

To the extent the motivation behind the proposed amendment is to minimize opportunity for intentional delay or stalling, we would observe that plaintiffs typically desire swift action on their claims. In our experience, they want relief as promptly as possible and lack incentives to delay. Thus, the notion of a plaintiff who files in District Court with the present intent to later remove to Superior Court strikes us as unlikely to materialize in practice. However, a plaintiff might, as a case progresses in the District Court, realize that the case warrants a Superior Court venue. This option should be preserved.

We appreciate your time and attention given to this matter. Please feel free to contact me if you have any questions regarding these comments.

Sincerely,



On behalf of Berman & Simmons
Craig A. Bramley, Esq.
Managing Partner
Berman & Simmons
129 Lisbon Street
Lewiston, Maine 04243
(207) 784-3576