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VIA ELECTRONIC MAIL

October 5, 2018

Matthew Pollack, Executive Clerk
Maine Supreme Judicial Court
205 Newbury Street, Room 139
Portland, ME 04101-4125

Re: Proposed Civil Justice Reform

Dear Matt:

Please accept these written comments on behalf of Bernstein Shur's Litigation Practice Group concerning the proposed amendments to the Rules of Civil Procedure that were published by the Law Court on September 5, 2018. We are grateful for the opportunity to share our views on these important proposed changes, which would have a wide-ranging impact on civil litigation in our state.

General Comments

We support the Court's desire to apply Differentiated Case Management ("DCM") more broadly to Maine's civil justice system. The experience of the Business and Consumer Court Docket, which has been in place now for ten years, has proven that individualized case management works.

DCM reflects the importance of two basic concepts: First, the civil courts exist for the purpose of serving litigants – primarily citizens of Maine, but others as well – by allowing them to participate in a justice system that applies the law on a fair and equal basis. Second, although the law is applied the same to everyone, every litigant and every case are by definition unique. As the Court recognized in its Civil Justice Reform Summary, "one-size-fits-all standard scheduling with limited case management does not work." This is the principle that underpins DCM and makes it worthwhile as an administrative goal.

With this as a backdrop, we respectfully have concerns that the redrafted Civil Rules presented for comment by the Law Court move too quickly and go beyond what is necessary to implement effective individualized case management. For most lawyers in practice today, these are the most

sweeping proposed changes to the Civil Rules during their careers, and they have been put forth by the Court on relatively short notice. We respectfully suggest it would be wise to take more time to consider them, including by providing additional time for comment.

In terms of scope, the proposed changes go beyond just creating a new system for individualized case management. They also would reshape the process of litigating a typical case significantly by imposing compressed procedural timeframes, shortening and curtailing the discovery process, restricting the length of written motions, curtailing summary judgment practice, and restricting the abilities of parties to obtain schedule enlargements. These changes would create a civil justice system different from the one that exists today – perhaps more efficient, but certainly also more strict and burdensome for litigants and their counsel.

While no one can predict the future, we respectfully believe this stricter philosophy may produce unintended effects that the Court should consider. Based on our experiences, a stricter litigation system likely would lead to stricter practices and a decline in civility among counsel, who will have less room to be forgiving with each other. It also may lead to a narrowing of the litigation bar based on a perception that litigation under the new rules would be the province only of very specialized practitioners. Newer lawyers may be hesitant to enter litigation as a specialty, as will those who perceive that their personal and family situations may not permit them to meet the demands of operating on an inflexible and demanding schedule. Bigger firms probably will be better able to adapt than smaller firms and solo practitioners.

Although the Court in its Summary predicts that the proposed changes would "create an efficient and straightforward process for civil cases," we anticipate they will increase the degree of difficulty of practice enough – particularly insofar as they will compress the overall timeframe within which the steps to litigate a case must be completed – that lawyers will handle fewer cases at any given time. Thus, we respectfully disagree with the Court's assessment, as expressed in the Summary, that two of the benefits of the system as proposed will be to increase civil case filings as well as the number of litigants represented by an attorney.

In summary, although we embrace the concept of DCM and believe in its benefits, what stands out in these proposed rule changes is not DCM so much as a stricter procedural regime that will make it harder for parties to litigate. We respectfully suggest that the benefits of DCM can be accomplished, and indeed enhanced, without also making aggressive changes to the way we now litigate in Maine.

Comments on Specific Proposed Rules

- Rule 7(b)(1): Requests for uncontested scheduling order changes. Proposed Rule 7(b)(1) establishes a procedure for parties to bring several types of requests to the Trial Court in lieu of more formal motion practice. The matters covered by the proposed rule include any scheduling order modifications sought by a party during the course of a case. *See* proposed Rule 16(d)(4). It is unclear how this process would work with respect to uncontested or joint efforts to enlarge scheduling order deadlines. Proposed Rule 7(b)(1)(A) requires parties to confer in a "good faith

effort to resolve by agreement any issues in dispute." Proposed Rule 7(b)(1)(B) goes on to provide that if "the dispute is not resolved by agreement" the requesting party shall request a conference with the Trial Court by letter. Under proposed Rule 7(b)(1)(C), the clerk then shall schedule a conference among the court and counsel to discuss the issues in question, to be followed by the court's issuance of an order as provided in proposed Rule 7(b)(1)(D).

Under current rules and practices, uncontested or joint motions by counsel to enlarge scheduling order deadlines are submitted to the Trial Court and either granted or denied by it in the exercise of its discretion, typically without a conference, but the court can and will confer with counsel if it sees the need to do so. Proposed Rule 7(b)(1), read in conjunction with proposed Rule 16(d)(4), appears to require that counsel, even if they agree on a proposed schedule change, would be required to seek and participate in a conference with the Trial Court in every instance. We respectfully believe this would impose an unnecessary burden on counsel and the court, and on clients in the form of increased legal fees. The Trial Court already has the tools to review enlargement requests and either grant or deny them as it sees fit, taking into account the circumstances of the case. The proposed rule acts as a restriction on the court's discretion to manage individual case schedules, which is contrary to the objectives of DCM.

- Rule 7(f): Page Limits. Proposed Rule 7(f) reduces the page limit (1) for memoranda of law in support of or in opposition to non-dispositive motions, from 10 to 7 pages, (2) for memoranda in support of or in opposition to motions to dismiss, motions for judgment on the pleadings, and motions for injunctive relief, from 20 to 14 pages, and (3) for reply memoranda (other than with respect to motions for summary judgment), from 7 to 5 pages. We respectfully submit these page limit reductions are unnecessary.

- Rule 16: Clarification of the Civil Case Information Sheet as it pertains to the identification of Track B and Track C cases. Proposed Rule 16(a) provides that the list of cases falling within Track A and the case types falling within Track B or Track C are provided on the Civil Case Information Sheet that must be completed and filed by plaintiffs with the complaint. With regard to the types of cases listed under Track B or Track C, the Civil Case Information Sheet appears to identify three categories of "presumptive" Track C cases: (1) "Business Organization Disputes"; (2) Professional Malpractice Claims; and (3) Shareholder Derivative Actions. However, the text of proposed Rule 16(a)(3) (entitled "Track C – Complex Track") identifies a longer list of presumptive Track C cases, including the following case types that are "presumptively complex": "business organization disputes, product liability claims, professional malpractice claims, complex building construction and/or design claims and shareholder derivative actions." For purposes of clarity, the list of presumptive Track C cases on the Civil Case Information Sheet should be made consistent with the list of presumptive Track C cases in proposed Rule 16(a)(3). In addition, the phrase "business organization disputes" should be clarified as to whether it encompasses any dispute involving a business organization, or rather those cases in which some aspect of the subject of business organization is at issue.

- Rule 16(d)(4): Modification of Scheduling Orders. Proposed Rule 16(d)(4) provides that a scheduling order may be modified "only upon a demonstration of good cause for not being able to

adhere to the prior schedule established by the court." Presumably, this change is intended to restrict the discretion Trial Courts now have under Rule 6(b) to grant enlargements of time "for cause shown." We respectfully believe this change is unnecessary. The Trial Court is in the best position to evaluate how a schedule enlargement may impact a case and has discretion under the existing rule to make that call. Restricting that discretion is contrary to the objectives of DCM.

- Rule 16B(a): Alternative dispute resolution; timing. Proposed Rule 16B(1) provides that the ADR conference in a Track B or Track C case must be completed within 91 days after the date of the Trial Court's entry of the scheduling order. It has been our experience that ADR conferences are most productive when parties have taken enough discovery from each other to have well-developed understandings of each other's claims and defenses. In most cases, however, we believe that less than 90 days will not be enough time to complete discovery for the purposes of having a meaningful ADR conference – this timeframe is just too short. The effect likely will be to hamper ADR efforts. The default deadline for completing ADR could be set later in the schedule without lengthening the overall time to completion of the case.

- Rule 16B(h): Alternative dispute resolution; ADR conference report. Proposed Rule 16B(h) provides that upon the successful completion of an ADR Conference, the plaintiff shall provide a report and proposed order to the Trial Court that "includes all the terms of the settlement." We respectfully urge the removal of this requirement, as it runs counter to the reality that many parties – both plaintiffs and defendants – bargain for and desire confidentiality as part of their settlement agreements. This proposed change would be a fundamental shift in settlement practice that may discourage parties from settling their disputes.

- Rule 26A: Automatic Initial Disclosures; medical records. Proposed Rules 26A(a)(2)(B) and (C) require a plaintiff in cases involving a claim of bodily injury and/or emotional distress to include with his or her Initial Disclosures medical records going back ten years before the date of the occurrence underlying the action, as well as a list of all health care professionals or practices the plaintiff has seen in that same ten year timeframe. We respectfully suggest that the ten-year upfront requirement in every case is excessive, would add unnecessary costs, and is not in keeping with the usual practices and standards in these cases. A five-year requirement would be sufficient in a typical case and would not deprive the opposing party of the opportunity to pursue older records if warranted.

- Rule 26A: Automatic Initial Disclosures; timing. Proposed Rules 26A(b)(1) and (2) provide the deadlines for parties to exchange their Initial Disclosures. For Track B cases, they provide that the plaintiff shall serve its disclosure within 7 days after the defendant has responded to the complaint, and the defendant would serve its disclosures within 7 days following the disclosures by the plaintiff. We respectfully submit this timing is unnecessarily short and will create practical difficulties for compliance. Also, it is unclear why the parties would not be required to make their disclosures simultaneously, as happens under current federal practice. Staggering the timing as proposed would provide an unnecessary informational advantage to defendants. In Track C cases, the plaintiff would provide its disclosures within 14 days after the defendant has responded to the complaint, and the defendant would serve its disclosure within 14 days thereafter. As with the

disclosures in Track B cases, the Track C disclosures would operate more fairly if they were simultaneous, and their deadlines seem unrealistically short.

- Rule 26B(b)(7)(A): Discovery deadline in Track B cases. Proposed Rule 26B(b)(7)(A) provides that the deadline to complete discovery in Track B cases shall be not more than 6 months. We respectfully suggest this is too short a discovery period to impose across-the-board in Track B cases. While some cases in Track B surely would merit a discovery period of 6 months or less, that determination properly should be made by the presiding Justice, consistent with the principles of Differentiated Case Management. We also believe that a 6 month discovery period in most civil cases will be difficult to implement and will place a practical burden on the resources of parties and the courts that will be out of proportion to its perceived benefits.

- Rule 30(b)(1): Presumptive limit on depositions in Track B cases. Proposed Rule 30(b)(1) provides for a limit of 4 depositions per party in Track B cases. We respectfully suggest it is not necessary to deviate from the current presumptive limit of 5 depositions per party in Rule 30(a), which in our experience is not abused by litigants. Depositions are a crucial discovery tool that should not be limited without a strong justification for doing so.

- Rule 30(e)(2): Time limit for depositions. Proposed Rule 30(e)(2) provides that the time limit for a deposition shall not exceed 6 hours. We respectfully contend the current limit of 8 hours should be retained. Depositions are a crucial discovery tool. Although depositions of 8 hours' durations are unusual, parties should be given the flexibility to conduct them for that amount of time in those instances in which it is necessary to do so. If a party lengthens a deposition in bad faith or so as to harass a witness, Rule 30(d)(3) provides a mechanism for the Trial Court to address that problem.

- Rule 33(b): Presumptive limits on Interrogatories. Proposed Rules 33(b)(1) and (2) provide presumptive limits of 10 interrogatories per party in Track B cases, and 20 interrogatories per party in Track C cases. We respectfully contend these limits are unnecessarily low, particularly with regard to the Track B limit of 10 interrogatories. For parties that wish to obtain an opponent's sworn responses to questions without incurring the costs of a deposition, interrogatories can be a valuable and cost-effective evidentiary tool. The proposed reduction is too drastic.

- Rule 34(b): Presumptive limits on Document Requests. Proposed Rules 34(b)(1) and (2) provide presumptive limits of 15 document requests per party in Track B cases, and 25 document requests per party in Track C cases. We respectfully submit these proposed limits are unnecessarily low and represent too deep a cut in the existing limits. Documentary evidence plays a critical role in most cases, and counsel are obliged to be thorough and careful in pursuing documents in an adversarial setting. Thorough document production is an essential aspect of a full and open discovery process, which in turn enables parties to understand their claims and defenses more fully and to proceed with confidence in refining their positions. We respectfully contend that the expected benefits from this proposed change would be outweighed by the harm it would do to the ability of parties to develop their cases properly.

- Rule 36: Limitations on Requests for Admissions. Proposed Rule 36 would make requests for admissions available as of right only with respect to the genuineness of any relevant documents. Court authorization via the request process contained in Rule 7(b)(1) would be necessary for a party to serve a request for admission on any other matter. We respectfully disagree with this proposed change as overly restrictive. Of the discovery tools available to parties, requests for admissions tend to be used the least, but they can play a unique and efficient role in narrowing the issues in a case in a way that direct requests for a stipulation cannot. We believe the proposed rule will curtail the use and utility of a valuable discovery tool without providing sufficient corresponding benefits.

- Rule 39(b): Court's discretion to order a jury trial in the absence of a demand. Proposed Rule 39(b) would eliminate the discretion of the Trial Court to order a jury trial on any or all issues in a case even if neither party has made a jury trial demand. We respectfully suggest it would be more consistent with the principles of DCM to maintain the discretion of the Trial Court that presently exists.

- Rule 56(c): Timing of summary judgment motions for Track B cases. Proposed Rule 56(c) provides that a summary judgment motion in a Track B case must be filed no later than 14 days after the discovery deadline without prior approval of the Trial Court. We respectfully submit this timeframe – even taking into account the reduced page limits and limits on statements of undisputed material facts set forth in other parts of proposed Rule 56 – is too short. Even in cases that may not meet the definition of "complex" for purposes of assignment by the court to Track C, summary judgment motions necessarily require parties to compile and synthesize a significant amount of evidence. They also require them to analyze legal concepts carefully and present them to the court in an accurate, helpful and persuasive manner. In our experience, 14 days from the close of discovery would not provide enough time to craft quality summary judgment motions in most cases.

- Rule 56(e)(1): Length of summary judgment motions for Track B cases. Proposed Rule 56(e)(1) provides that a motion for summary judgment with accompanying memorandum in a Track B case must not exceed 14 pages in length without prior approval of the Trial Court. We respectfully contend this page limit is too short. Summary judgment motions often are relatively complex and have the potential to bring a case to conclusion. In order for the moving party to demonstrate the absence of genuine factual disputes and its entitlement to judgment as a matter of law, that party typically has to make a comprehensive factual and legal presentation to the court. In our experience, 14 pages would be an insufficient general limit for this purpose in most cases, even cases that are less complex for purposes of assignment by the court to Track B status.

- Rule 56(e)(2)(A)(i): Limits on numbers of facts in statements of undisputed material facts. Proposed Rule 56(e)(2)(A)(i) provides that statements of undisputed material facts shall be limited to no more than 25 asserted facts in Track B cases and 50 asserted facts in Track C cases. We respectfully believe these limits are too low. As discussed above, summary judgment motions are relatively complex and require the moving party to make a comprehensive presentation of information to the Trial Court, which includes a careful recitation of the undisputed material facts in the case. We are aware that some litigants have filed statements of undisputed material facts that are too long and include too many asserted facts, but this proposed rule goes too far in an effort to

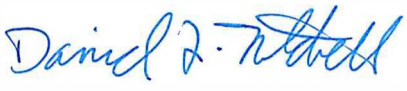
address that problem. While it may be possible in some Track B and Track C cases to use a relatively small number of asserted facts, each case is different, and the proposed limits would be insufficient in many cases. It would be more consistent with the principles of DCM to refrain from imposing a one-size-fits-all limit on the front end of a case, and to have the parties and the court confer again toward the completion of discovery for the purpose of determining (1) whether any party desires to file a motion for summary judgment, and (2) what an appropriate number of asserted facts would be in light of how the case has developed.

- Rule 56(f)(1): Opposing memorandum limited to 14 pages. Proposed Rule 56(f)(1) provides that a party's memorandum opposing a motion for summary judgment – in either a Track B or Track C case – may not exceed 14 pages. We respectfully view this page limit as too low. A party opposing a summary judgment motion may need not only to rebut the moving party's characterization of the case, but to present and argue for an entirely different one of its own. In many cases, this will be very difficult to do within the confines of a 14-page limit. Faced with the very survival of some or all of its claims, the non-moving party should not suffer this constraint.

- Rule 56(f)(3)(A): Limits on numbers of facts in Statement of Additional Undisputed Materials Facts. Proposed Rule 56(f)(3)(A) provides that statements of additional undisputed material facts shall be limited to no more than 25 asserted facts in Track B cases and 50 asserted facts in Track C cases. For reasons similar to those we discuss above regarding the proposed limits on opposition memoranda to summary judgment motions, we respectfully suggest these proposed limits on statements of additional undisputed material facts are too low. Oppositions to summary judgment motions require the opposing party to make a comprehensive rebuttal of the facts asserted by the moving party, and in many instances to present a different conception of the undisputed facts of the case through additional assertions. While it may be possible in some Track B and Track C cases to use a relatively small number of asserted additional facts, the proposed limits would be insufficient in many cases. In our view, it should be left to the Trial Court, in consultation with the parties' counsel, to set an appropriate limit on additional factual assertions at any appropriate time in the life of the case.

Again, we appreciate the opportunity to comment on these important proposed changes, and we would be pleased to provide additional information to the Court at its request.

Sincerely,



Daniel J. Mitchell

Sincerely,

Michael R. Bosse