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

VIA EMAIL AND USPS

RE: Comments on proposed rules changes included in the proposed Civil Justice Reform for Maine's Courts, from Hardy Wolf & Downing, P.A. of Lewiston, Maine.

Dear Mr. Pollack:

If there is one theme in our observations, it is this: the proposed rules limit the time available for litigating cases while adding administrative obstacles that will slow litigation and increase costs for parties and the Courts.

Based upon our understanding of the "Track" system, we estimate approximately 75% of the cases in our firm will fall under "Track B", the other 25% in "Track C." Generally speaking we oppose any of the proposed limits on discovery in the "Track C" cases. Our specific comments are below:

1. We do not support proposed **Rule 16B** which shortens the deadline for notifying the Court and completing ADR; and which removes the mechanism by which the parties can enlarge the deadline once for 60-days upon agreement. HWD works cases aggressively but is nevertheless frequently in the position of requesting an enlargement of time for conducting ADR, usually because of delays associated with scheduling depositions. By truncating deadlines and eliminating the parties' ability to enlarge the deadlines by agreement, these proposals will increase motion practice and judicial involvement, while diminishing the parties' ability to resolve case-specific scheduling obstacles by themselves.

We support the proposal to raise the damages threshold under which a plaintiff can request an exemption from ADR, from $30,000 to $50,000 (see 16B (B)(4)).

2. **Rule 26A Automatic Disclosure:**

We generally support some basic automatic disclosures, but do not support the length of time proposed by the Court for these disclosures.

26A(a)(1)(A) requires disclosure of the name, address, and telephone number of each person likely to have discoverable information that the disclosing party may use to support its claims or defenses. Presumably, this proposal is intended to soften the impact of presumptive discovery limits established by proposed Rule 26(B) but it falls short because it does not address witnesses known to the disclosing party who have information which is damaging to the disclosing party (which is precisely the information that discovery would otherwise address as one of 30 interrogatories). Parties will still need to make discovery requests oriented towards discovering the identity of those witnesses known to the disclosing party which the disclosing party does not intend to use to support its claims or defenses – which means, at least for this example, that the automatic disclosure does not compensate for 20-fewer interrogatories, no admissions, and limited RPDs.

26(A)(a)(1)(B). We propose a five (5) year requirement versus ten (10). A requirement that plaintiffs provide 10-years of pre-DOI records conflicts with the more general rule that discovery be limited to those areas that are reasonably calculated to lead to discoverable information. Medically speaking, information contained in a medical record from 10-years pre-DOI that is not referenced in records from 5-years pre-DOI, offers very little in terms of establishing the plaintiff's pre-DOI baseline. On the other hand, it is very likely (if not inevitable) that disclosure of 10-years pre-DOI records will expose highly personal and potentially embarrassing details that have nothing to do with the issues in dispute. The benefits offered by this proposal—namely, reducing lead-time associated with discovery that might theoretically contain relevant information—are outweighed by the burdens it imposes disproportionately on plaintiffs. An analogy to the business setting—for example, a rule which required the automatic disclosure of sensitive business records for 10-years regardless

of their relevance—would seem unreasonable. The same rationale applies to the cases involving personal injury.

We feel that 5 years of pre-accident records is more than enough to establish a baseline and is sufficient to open the door for more remote medical history depending upon the contents of the 5 years of pre-DOI records.

Granted, 26(A)(a)(2)(D) provides a mechanism by which the plaintiff's lawyer can submit, on court-approved forms, a motion for protection from disclosure and an affidavit explaining the need for protection. But this approach is inconsistent with the dispute-resolution mechanism created by Rule 7(b)(1), which saves judicial resources by delaying motion practice until absolutely necessary, reserving control to the parties who are in the best position to resolve disputes. The proposed rule puts the cart before the horse by requiring broad disclosures of information which may or may not be relevant, and by requiring judicial intervention in order to avoid those disclosures before it is clear that there is a dispute.

The better approach would combine our historical practices with the new Rule 7(b)(1) dispute resolution mechanism. Plaintiff should produce a limited set of medical records which are calculated to contain relevant information about the injury in question. 5-years pre-DOI accomplishes that. If those records contain evidence of a more remote history of relevant problems, the parties can discuss more expansive disclosures (i.e., 10 or 15 years pre-DOI records depending on the injury and medical history). If the parties dispute the extent to which records justify more expansive disclosures, the parties should then—and only then—involve the Court. This approach strikes the right balance between necessary discovery and privacy while minimizing unnecessary costs on the judiciary.

The same observations apply to **26(A)(2)(C).**

3. We do not disagree with the 26B discovery limitations in concept – but we strongly object to the means by which that concept is effectuated in these proposals.

<u>Requests for admission</u> are an important tool used by both sides to streamline litigation and identify issues of contention and should not be effectively eliminated.

Certainly, there should be limits on the number of admissions requested – 500 is too many – but to eliminate them entirely except as to the genuineness of documents per proposed **Rule 36**—is to deprive litigants of a necessary tool for streamlining issues and confirming that artfully-drafted discovery responses have addressed the substance of discovery requests. For example, admissions are highly effective at narrowing ambiguous discovery responses by forcing a party to state—one way or the other—whether that party has provided all of the information requested in a given RPD or interrogatory. Admissions are a self-help mechanism for testing the veracity and completeness of discovery responses. Without that mechanism, parties will require judicial involvement far more regularly, in order to determine the sufficiency, directness, and completeness of discovery responses.

Admissions allow us to streamline discovery by eliminating issues that might otherwise be the subject of an RPD or interrogatory. If 26(B) is going to limit the number of interrogatories and RPDs available in discovery, it should not also deprive parties of their most effective tool for reducing unnecessary discovery.

By way of example: Our practice is to send requests for admissions of critical facts and disclosures set forth in responses to interrogatories and requests for production. This has resulted in obtaining information we would otherwise not know about. Lay people can be a bit less circumspect responding to interrogatories than are attorneys when addressing requests for admissions. We have found that when faced with the request for admissions, especially in cases involving corporate clients, the necessity of signing a document under oath as to the completeness of records has resulted in previously unproduced information and facts being produced.

In one notable case against a corporate defendant, a critical material fact was provided through Defendant's answers to interrogatories. A follow-up request for admission confirming completeness of this answer was submitted and in response to that Request, the defendant supplemented its interrogatory answer with information diametrically opposed to their initial response. We brought this to the attention of Justice Kennedy of Androscoggin County Superior Court. Justice Kennedy rightfully assumed an innocent mistake but chastised the defendant because it was regarding a critical material fact. We submitted a second request for admissions to make sure we now had complete information. The defendant then provided additional significant information that it had not previously produced. This was brought to the attention of Justice Kennedy who penalized the corporate defendant significantly for what became clear was either willful neglect in their response or outright deceit.

Admissions allow us to streamline discovery by eliminating issues that might otherwise be the subject of an RPD or interrogatory. We do not think litigants typically lie, but we do think requests for admissions result in a more careful ascertainment of facts and ultimately streamline many issues ahead of trial. If 26(B) is going to limit the number of interrogatories and RPDs available in discovery, it should not also deprive parties of their most effective tool for reducing unnecessary discovery.

Requests for Admissions focuses triable issues and ultimately saves many hours of trial time. The elimination of Requests for Admissions is a real mistake.

4. **Rule 26(B)** provides parties with a mechanism for expanding the presumptive discovery limits if the party seeking discovery can establish that the requested discovery is proportional to the needs of the case. But again, this approach seems to put the cart before the horse, depriving the parties of sufficient autonomy to resolve discovery issues without involving the Court and imposing a premature and unnecessary administrative burden on parties and the courts by requiring judicial involvement for issues that might otherwise be resolved under the existing 26(g) system, or the proposed 7(b)(1) system.

By requiring judicial involvement in order to enlarge the presumptive discovery limits, the proposed rules will slow the exchange of discovery which—in the context of truncated deadlines—will cause a litigation traffic-jam necessitating motions to enlarge deadlines (which motions—per the new rules—will be considered disfavored as an exception to the rule).

5. We support proposed **Rule 7(b)(1)** which sets forth a unified mechanism for addressing disputes, whether those disputes arise from subpoenas, discovery, scheduling order modifications, etc.. The rule encourages parties to resolve issues without involving the Court, which is a good thing for judicial economy, speeds litigation, and for tailoring specific resolutions to unique problems. We would like to see this theme carried forward in other aspects of these proposals—for example, at 26(A)(2)(B) and 26(B)—which require greater judicial involvement and which diminish the parties' autonomy for finding expeditious case-specific solutions to case-specific disputes.

6. We do endorse **Rule 30(e)**'s limitation on the maximum time for depositions, from 8-hours to 6-hours.

7. We do endorse **Rule 38's** amendment which limits jury trials unless they are requested promptly after the commencement of suit.

8. The proposed changes to **Rule 47(f)(2)-(4)** are confusing. Under that rule, a judge may approve post-service juror contact information disclosure as authorized by law; but then prohibits persons from directly or indirectly contacting any juror (apparently even post-service jurors) for any reason. This rule would seemingly permit us to obtain post-service juror information for purposes of seeking post-trial feedback, but prohibit us from actually using it to contact jurors. We would suggest an amendment to 39 (f)(4)(A) which would prohibit persons from using the juror information to: "directly or indirectly contact, or cause to be contacted, **any prospective juror or jurors presently serving** by any means, including by electronic or social media, **but not as to post-service jurors contemplated by the Court's order under 39(f)(1).**

9. We strongly oppose proposed **Rule 56(L)** which appears to replace the rule currently identified as 56(f). It is not infrequent for parties to exploit the procedural posture of a case when moving for summary judgment – for example, by moving for summary judgment before substantive discovery is completed or where discovery has been delayed in anticipation of mediation. Currently, the law in Maine requires that discovery be sufficiently completed under *Bay View Bank, N.A. v. The Highland Golf Mortgagees Realty Tr.*, 2002 ME 178, 814 A.2d 449 before a motion for summary judgment is appropriate. Under the proposed rule, a party could move for summary judgment very early in the discovery process and the opposing party will be required to show "extraordinary circumstances," at the discretion of the Court, in order to survive summary judgment. In making this change, the Rules will incite parties to move for summary judgment before meaningful discovery is completed, while simultaneously imposing a burden upon the party opposing summary judgment to establish "extraordinary circumstances" where none exist beyond the moving party's premature motion for summary judgment. Such a rule will disproportionately burden plaintiffs in personal injury cases insofar as summary judgment is often sought by defendants, and almost never by personal injury plaintiffs.

Thank you for your consideration.

Very Truly Yours,

/s/Christian J. Lewis

Christian J. Lewis, Esq.
On behalf of Hardy Wolf & Downing, P.A., Lewiston, ME.