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Via Hand Delivery
Mr. Matthew Pollack, Esq.
Executive Clerk
Maine Supreme Judicial Court
205 Newbury Street, Room 139
Portland, Maine 04112-0368

Via Email
lawcourt.clerk@courts.maine.gov

Re: Kelly, Remmel & Zimmerman's Comments on the Proposed Implementation of Civil Justice Reform through Differentiated Case Management

Dear Mr. Pollack:

Enclosed please find the above-referenced comments for filing with the Maine Supreme Judicial Court. The comments are being submitted on behalf of the law firm of Kelly, Remmel & Zimmerman. Our firm's address and telephone number are found below. Thank you in advance for bringing this document to the attention of the Court.

Best regards,

Lauri Boxer-Macomber
for Kelly, Remmel & Zimmerman
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INTRODUCTION

Kelly, Remmel & Zimmerman appreciates the opportunity to comment on the Maine Supreme Judicial Court's proposed implementation of "Civil Justice Reform for Maine Courts," which was noticed and released for review on September 5, 2018. We recognize that the Advisory Committee on the Maine Rules of Civil Procedure and the drafters of the proposed amended rules and supporting documents have invested significant time and resources on this effort.

Given that the proposed changes are voluminous and will have significant and lasting impacts on the practice of law in Maine and our citizens' ability to access justice for years to come, it would be helpful for the Court to enlarge the time for public comment on the proposed amendments to the Maine Rules of Civil Procedure. This would allow the Advisory Committee on Civil Rules to identify and elaborate upon the various reports and other research it relied upon in drafting the proposed rules so as to provide the bar and public a greater understanding of the rationale for the various rule amendments. While there are some references in the Summary to the proposed amendments to pilot projects and other states, there are no specific citations or web links to reports and research so as to facilitate thoughtful responses. For example, it would be useful for the bar and public to have easier access (via links, pdfs, etc.) to information about the courts that have already implemented the track systems, expansive automatic disclosures, presumptively low numbers of interrogatories and requests for production, limitations on the types of requests for admission that may be served, requirements regarding disclosure of the terms of a settlement to the court, and new summary judgment process prescribed in the new proposed rules.[1] In addition, it would be equally useful to have access to the studies on courts where similar changes have been adopted and in place for several years.

Further, in light of the way that this proposed civil justice reform will impact the State for years to come, there is additional concern that the general public may have never received notice of the proposed reform and may still be unaware of what is taking place and how it may impact them. While Maine Courts require public notices to be published in newspapers on matters of arguably lesser significance, there appears to have been limited, or maybe even no, media coverage on this significant proposed overhaul of the civil justice system.

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[1] For example, the Advisory Committee represented that "[n]ationwide 75% of civil judgments are less than $5,200" as support for the problem that civil process costs too much and takes too long. Civil Justice Reform Summary at 1. This data presumably comes from the 2016 recommendations to the Conference of Chief Justices by the Civil Justice Improvements Committee. National Center for State Courts, *Call to Action: Achieving Civil Justice For All,* available at https://www.ncsc.org/~/media/microsites/files/civil-justice/ncsc-cji-report-web.ashx (last visited Oct. 1, 2018). It may be important for the bar and public to understand that the 75% figure is derived from a 2012-2013 dataset extracted from 10 urban counties, none of which were located in Maine, and reflects only 5% of civil cases nationally. *Id.* at 8 (referencing *The Landscape of Civil Litigation in State Courts*, available at https://www.ncsc.org/~/media/Files/PDF/Research/CivilJusticeReport-2015.ashx (last visited Oct. 2, 2018). Allowing for additional time to comment on the Proposed Rules would give the Committee an opportunity to make these reports more readily available to the bar and public.

Accordingly, before turning to substantive concerns about the proposed amendments, the Court is urged to enlarge the comment period through the end of 2018, delay the public hearing on the proposed changes to February 2019, and further and more widely distribute and disseminate the proposed rules to those who will be impacted the most.

OVERVIEW OF GENERAL CONCERNS ABOUT THE PROPOSED REFORM

One of the pillars of our United States judicial system is that all citizens have access to justice. The proposed civil justice reform in Maine, while well-intended, may actually unintentionally threaten this foundational principal in a number of ways, including by slowing down fair and equal access to justice and increasing the costs and administrative burdens on litigants, their representatives, trial courts and court administration.

It is critical that the bar and the Court openly recognize and keep in the forefront that litigants are citizens whose cases are of significant importance to them. While many of the rule changes may seem innocuous at first glance, the limitations on discovery, likelihood of increased motion practice, and the invitation to impose sanctions presented by these amendments all work against the citizen's right to have their day in court.

While the concepts of differentiated case management and proportionality that provide the infrastructure for the proposed amendments are laudable and should be a part of any civil justice reform, the proposed rules, as presently written, actually end up imposing upon litigants the very same "one-size-fits-all" approach that the drafters have acknowledged is illogical, inefficient and costly. In other words, the creation of multiple tracks does not address the unique needs presented by each case, as each track still employs a "one-size-fits-all" approach to litigation that may only be altered by exception.

Further, under the proposed rules, litigants will be held to strict initial disclosure requirements (some of which are overly broad, unduly burdensome and, by default, impose on their right to privacy and threaten their families, jobs and livelihoods). In addition, parties will be offered limited and fewer opportunities to narrow the issues presented by their cases before trial, which will increase the process burdens and costs for them, their representatives and the court. More specifically, if the proposed rules were to be adopted it is anticipated that the average number of requests for discovery conferences and hearings with the court will rise exponentially, beginning with requests for conferences and hearings on how a case is characterized, what track it should be on, the appropriateness of the initial disclosure mandates, and the deadlines set forth in the scheduling order and ending with requests and motions to the court to alter the summary judgment and pre-trial processes.

In addition, throughout the discovery process of most cases, the court and its clerks will likely be subjected to requests, motions and oppositions from parties to alter the number of

depositions, interrogatories, requests for production and the types of requests for admission that may be sought, as the "one-size-fits-all" default provisions set forth in the proposed rules will likely be debated by the parties and insufficient for most plaintiffs who need decent discovery to make informed decisions about settlement, alternative dispute resolution and/or trial. Regular involvement of the court will be necessary to manage requests for amendments, exemptions and alterations and, if the judiciary does not have the time or resources to manage the requests, it is anticipated that access to justice will be further delayed and/or entirely thwarted by the reform.

There is also a very real concern that certain parties such as well-funded or insurance defense-funded litigants will have the wherewithal to use the rules as procedural tools to seek limitations on witnesses and evidence. Likewise, there is a concern that the newly imposed limitations on discovery will have minimal consequences for these parties (as they have the resources and capacity to obtain informal discovery through private investigators) but significant consequences for those without similar access to funds and resources.

Further, the proposed rule changes indirectly risk limiting access to justice by potentially discouraging attorneys from taking smaller and *pro bono* cases. At the present time, lawyers may choose to represent a client on a contingent basis, even in situations where it is expected in advance that the recovery will not allow the attorney to obtain the attorney's usual hourly rate, in order that a client with a smaller claim will have access to the courts. Should it develop as expected that the rule changes provoke more motion practice and expense, lawyers presently undertaking this type of representation may well reconsider taking on the representation in the future, leading to more *pro se* parties or parties giving up on the court system.[2]

Another concern is that the civil justice reform is partially premised on an increase of civil case filings in Maine courts being a "benefit" for litigants. *See* Civil Justice Reform Summary at 1 (Benefits). While this may have been a positive development in some jurisdictions, it is questionable whether increasing the number cases in Maine courts, which are already having difficulties ensuring due process and access to justice, would be a benefit for the citizens of our State.

Finally, it should be noted that many of the proposed rule changes do not appear to be the most effective method of addressing the issues that are significant problems in Maine. In general, the scheduling orders currently issued by the Superior Court work well and, when the need arises, counsel often work together to alter deadlines to accommodate the parties. Time to

[2] A similar rethinking occurred among practitioners who previously prepared Chapter 7 bankruptcy filings for distressed clients as a part of their general practices. This work was undertaken to fill a need, even though the flat fees usually charged by those attorneys would not fully compensate the attorney's hourly rate. When the new bankruptcy rules were enacted, implementing means testing and other requirements, most practitioners left the area entirely because the cost of preparing and following through on a filing had escalated and the attorneys could no longer justify providing the service. Today, only firms that utilize specialized software and paralegals engage in this work, and the direct attorney-client contact is kept to minimum. As a result, other options such as work-outs and restructuring are not regularly explored.

trial in Maine is also believed to be shorter than many other state court systems, and most Maine lawyers are competent and generally work well within the current rule structure. While there is certainly room for improvement in our rules and the adoption of a system that recognizes the values of proportionality, differentiated case management and early access to information, Kelly, Remmel & Zimmerman respectfully requests the Court to rethink the implications of the proposed rules and consider the more specific comments and suggestions outlined below.

INDIVIDUAL RULE COMMENTS

RULE 3. COMMENCEMENT OF ACTION

It is anticipated that the shorter time periods referenced in the proposed Rule 3 will create undue burdens on litigants, their representatives and the court, unnecessarily increase the number of cases on court dockets, and interfere with the early resolution of cases that often takes place after service or filing, but before an answer is due.

Shortening the court filing time period for a complaint that has been served on a defendant from 20 to 14 days does not take into account administrative delays associated with the return of service paperwork and other delays associated with personal and professional schedules of counsel or staff. Instead, changing the time period to 21 days, consistent with the deadlines associated with many other rules, will make it more likely that the deadline can be met.

Shortening the time period for formally serving a filed complaint on a defendant discourages pre-suit resolution of cases and will likely create unnecessary motion practice before the court. Once suit is filed (but before a complaint is formally served), adjusters and defense counsel are frequently amenable to discussing the case. Time is often needed to exchange information, bring defense counsel up to speed, allow the parties to schedule and conduct ADR with a mediator of choice, obtain settlement authority, and/or finalize settlement documents. This is especially so in more complex cases. By requiring service and an answer earlier, these opportunities for early settlement are unnecessarily decreased.

RULE 7. PLEADINGS ALLOWED: FORM OF REQUESTS AND MOTIONS

As a matter of form and style, the Court may wish to consider having a rule addressing pleadings (Rule 7) and another rule addressing requests motions and other papers (Rule 7A). In the alternative, the Court may wish to substitute a semicolon for the colon between the words allowed and form, as is done in the Federal Rules of Civil Procedure.

With respect to proposed Rule 7(b)(1)(A), so as to avoid delay, it is recommended that the Court impose a deadline within the rules for holding the party conference after one party requests one of another (e.g. no later than seven days after a request from opposing counsel, unless good cause is shown).

In Rule 7(f), the page limits are significantly unrealistic and may ultimately be adverse to a court's need for the parties to fully address the legal issues that may be presented in complex cases. Fourteen pages for dispositive motions is simply not workable and will lead to the parties being unable to fully address complex issues and legal concepts. Shortening the page length requirements for briefs is also anticipated to lead to more motions to extend page limitations, thereby increasing the number of motions that could otherwise be avoided by the Court. It is also possible that shortening the page lengths for memorandums will lead to more exhibits and attachments, thereby defeating the purpose of the amendment.

The Rule 7(h)(4) elimination of the right to respond or oppose a motion for reconsideration unless invited by the court to do so is a concern for at least one practitioner at our firm. While this proposed amendment was likely intended to avoid unnecessary and costly filings, the proposed amendment may have the unintended effect of denying parties the right to be heard and prompting additional motions (e.g. motions to be heard, motions on amended decisions, etc.).

Rule 16. DIFFERENTIATED CASE MANAGEMENT

For those in our firm who handle cases that might potentially fall under Track B, there is a concern that the time frames will deprive litigants of fair and/or due process, increase the financial and administrative burdens on the parties and the court by requiring a number of conferences, requests and motions associated with reassignment and modifications to the scheduling order. Further, as one practitioner in our firm points out, "Who is to say what type of case it is based on notice pleading?" The concerns about Track B's shorter deadlines are multiplied knowing how difficult it is currently to litigate cases with attorneys who have full litigation schedules and are unlikely to be able to accommodate these deadlines.

Similarly, those at our firm who handle cases that may fall under Track C have concerns that the Track C scheduling deadlines are arbitrary and not connected to how these cases generally proceed. Completing discovery, including written discovery, depositions and expert designations, in eight months in a complex case would be difficult to say the least. Further, the outside deadline of eighteen months (which seems more realistic) creates a ten-month window between the close of discovery and trial. The purpose of that ten-month period is unclear to us.

Some members of this firm request the Court to consider whether the procedures for Track C cases should apply to all cases. Why not require the parties and the counsel in all cases, not just Track C cases, to first meet and work together to decide an appropriate scheduling order and plan

of discovery for their case and then either have the Court adopt the agreed-upon plan or assist it with resolution of any pending issues via an initial case management conference? The goal for certain cases may be six months and in others ten or eighteen, but three sets of cookie cutter deadlines for Track A, B and C cases simply makes little sense for the courts, the attorneys, or the parties.

Please also see related and more specific commentary on Rules 26A, 26B, 30, 33, 34 and 36.

Rule 16B. ALTERNATIVE DISPUTE RESOLUTION.

The changes to the timing of ADR under Rule 16B are perceived by us to be too aggressive and ignore that the timing and likelihood of success of ADR is very case specific. We recognize and understand the value in attempting to complete ADR in cases that can be settled before significant resources are spent on discovery, but the reality is that in certain cases (especially, but not solely, complex cases), some meaningful discovery is essential before each party can understand all of the strengths and weaknesses of their case and subsequently educate the mediator on key aspects of both sides, which is necessary to provide the mediator with the ability to move the settlement discussions with substantive issues. Forced early mediation will result in many complex cases passing the mediation phase unsuccessfully only because the parties were not ready to engage.

As a practical matter, there are also procedural barriers to calendaring mediation within a short time period. Given our own caseloads and the caseloads of other busy litigation and mediation firms, it is not always easy to schedule mediation, depositions or other events that are necessary precursors for an effective mediation.

Further, although there are opportunities to request modifications, requiring the parties to make such requests as opposed to allowing them to jointly determine the best time to mediate a case seems contrary to the notions of justice, fairness and efficiency.

The new exception in Rule 16B(b)(4) removing mediation on any case involving $50,000 is also perplexing. Many smaller cases are exactly the ones that should be mediated early. Both parties to a $50,000 case will have incentive to resolve the case early, perhaps even if they do not have all of the facts, because the cost to litigate makes it wise to settle early if possible. The larger cases are less likely to settle early because of the amount of money involved and because they usually involve more complex facts that need to be unearthed.

The Rule 16B(h)(1) mandate that all of the terms of a 16B settlement must be filed with the Court essentially eliminates confidential settlements and would likely result in parties working around the rule by changing the characterization of their ADR process to be something other than a 16B proceeding so as not to have to comply with the rule. Further, even if parties were

not concerned with confidentiality, the seven day requirement for the submission of settlement terms is unrealistic, as often terms take longer to memorialize and finalize settlements.

Finally, it is unclear why the burden to report settlement to the Court is shifted to the plaintiff as it unnecessarily transfers the final litigation costs onto one party's shoulders even though both parties participated in ADR and ultimately resolved the litigation.

Rule 26A. AUTOMATIC INITIAL DISCLOSURES FOLLOWING FILING OF PLEADINGS

Encouraging the open and early exchange of information through initial disclosures is a welcome concept. However, there are some questions and concerns about the scope, nature, fairness and timing of automatic disclosures as provided in the proposed rules.

As an initial matter, it would be helpful to understand why the proposed amendments establish initial disclosures that are broader than those required by the Federal Rules of Civil Procedure, as well as the origin of the proposed disclosure requirements set forth in Rule 26A(a)(1)(C)(i)-(ii) and Rule 26A(a)(2).

In addition, some practitioners at the firm have difficulty appreciating why plaintiffs and defendants are given different dates for initial disclosures in contrast to the well-established practice set forth in the Federal Rules of Civil Procedure where both parties make disclosures on the same date. If realistic deadlines for reasonable initial disclosures are not imposed equally by the court on all parties, it is easy to imagine a situation where some parties provide comprehensive initial disclosures and are disadvantaged when others file motions for enlargements of time, motions for protective orders, and motions for confidentiality orders.

Some practitioners at our firm who practice personal injury law are also perplexed by why the default disclosure requirements for plaintiffs are much more expansive, invasive and onerous then they are for defendants. For example, it is unclear why there are initial disclosures in the proposed rules relating to plaintiff's potential damages, but no proposed initial disclosures about the potentially negligent practices and behavior by defendants that caused those damages. Similarly, personal injury practitioners question why plaintiffs are the only ones who have automatic medical and mental health disclosure requirements. In traffic crash cases, if the Court is going to require initial disclosures from a plaintiff involved in a crash, it should also require the defendant's medical, mental health and vision records for the years immediately prior to and after a crash.

Likewise, it is baffling that only plaintiffs are required to initially disclose all other lawsuits and other claims under Rule 26(a)(2)(D). It is equally important for an injured party to know early in the litigation if defendants were regularly the subject of lawsuits and complaints for similar or

other behavior. Defendants should therefore also be required to initially disclose this information.

One practitioner also recommends coupling the insurance policy disclosure requirements with disclosures of pre-suit statements given by parties and witnesses to insurance companies.

The Rule 26A(a)(2)(B) default ten-year medical disclosure required of plaintiffs claiming bodily injury or emotional distress is also concerning, as it wholly ignores the foundational principle of Rule 26, which only allows for the discovery of information reasonably calculated to lead to the discovery of admissible evidence. Requiring plaintiffs to provide records dating back ten years that might be totally irrelevant, ignores the time, expense and cost of acquiring such records. Further, although exceptions may be sought and authorizations may be provided in lieu of records under the proposed rules, plaintiffs should not have to choose between compromising their privacy or having to file motions to protect themselves from irrelevant disclosures. It is also noteworthy that state rules on medical record retention are believed to only require that adult medical records be kept by hospitals and their subsidiaries for seven years and most plaintiffs are unable to remember all of the places where they have treated over the past ten years. As such, compliance is likely to be difficult and could result in plaintiffs unfairly sanctioned in the event of noncompliance.

Similarly, the fourteen-day-post-treatment motion for protection requirement set forth Rule 26A(a)(2)(D) sets unrealistic expectations and unfair default parameters for the disclosure of plaintiffs' post-filing healthcare information. Under the proposed rule, plaintiffs' lawyers would have to constantly interact with clients about any type of treatment they are receiving, regardless of the relevancy, cost and administrative burdens, and would be required to file motions for protection with the Court even before having a reasonable opportunity to learn of such treatment and review related records.

Rule 26A(a)(1)(C)(ii) is also fraught with dangers. Giving defense counsel direct and automatic access to a plaintiff's employer during litigation is not only an undue invasion of privacy, but it has the potential to result in the loss of a job should an employer conclude it does not want the burden or the costs of supplying records, or even should an employer find fault with an employee being a party to a lawsuit.

In addition to the substantive concerns about what is required to be automatically disclosed under the default rules, our commercial and business litigators who often engage in defense work have pointed out that there is the additional problem that in complex cases with significant e-discovery, it can take months to cull through the documents and get them reviewed and ready to produce. From the perspective of these attorneys, the idea that Rule 26A(b) requires a plaintiff to provide its initial disclosures within 14 days after the answer is filed and that the defendant (who may not have had any lead up to the Complaint and is starting from a standing start) must

provide its initial disclosures within 14 days of service of the plaintiff's disclosures is a significant burden on both the parties and the attorneys.

To the extent that expert disclosures are required as part of the Rule 26A initial disclosures, as is alluded to in proposed Rule 26B(b)(4)(A)(1), this is also concerning from the perspective of both defense and plaintiff's counsel. Often defendants do not have a full understanding of the plaintiff's claim at the start of litigation, much less have an expert to counter it. As such, requiring expert disclosures at this early stage of litigation is unfair. Likewise, from a plaintiff's standpoint, it is unfair to require one party to start disclosing experts well in advance of the other and without having had the opportunity for discovery. The federal approach, where experts are disclosed later, and are staggered, is better.

Finally, there are concerns with Rule 26A(e), which allows for sanctions if a party fails to comply with initial disclosures. This could easily become a field day for those litigants with better funding, who can overwhelm the other side with motions and sanction requests. One practitioner in our firm feels that this rule could result in regular motions in state court similar to *Daubert* motions in federal court.

RULE 26B. GENERAL PROVISIONS GOVERNING DISCOVERY

While recognizing the value of proportionality, there is a concern on the part of some practitioners that the proposed amendments unintentionally created a system where some litigants will have better access to justice than others. In most cases it is expected that the litigants will have differing opinions on how the cases should be valued and litigated. As a result, it is anticipated that the court will regularly see competing motions relating to the presumptive limits relating to the extent of discovery and the time limits for the completion of discovery. As discussed in our Overview, *supra,* these motions are not only expected to cause delay, confusion and hardship for the parties, but will result in undue burdens on their legal representatives and the Court. This is particularly so where the nature of the case or the scope of the parties' claims and defenses change during the course of discovery, which often occurs.

In addition, the people most harmed by the presumptive limits are those who do not have the resources to conduct informal discovery through private investigators and other services, as well as the *pro se* parties who will have a harder time navigating the new rules and meeting their procedural and substantive burdens of proof.

RULE 30. DEPOSITIONS UPON ORAL EXAMINATION

The proposed presumptive deposition limits embodied in proposed Rule 30 are problematic on multiple fronts and should not be adopted by the Court.

Five depositions will almost never be sufficient in complex cases where there are often two or more experts and handfuls of fact witnesses likely to each have key information. If the Court is inclined to implement presumptive limits in complex cases, we suggest that the restrictions not be imposed until after the experts and parties are deposed, at the point when there are likely only a few depositions left for fact witnesses. Adoption of the proposed rules will move us back to the "sporting theory of justice" where parties can hide information and spring it at trial. That is not only uncomfortable for lawyers and a disservice to litigants but it also runs counter to the assumed goal of getting to the truth. The same thing is true of the other presumptive limits. While reducing discovery may seem appealing, these discovery tools are critical to refining complex cases and allowing the parties to fully understand their cases.

With respect to Track B and other cases, limiting the presumptive number of depositions to four also seems unrealistic for similar reasons.

Shortening the permissible length of a deposition from 8 hours to 6 hours is anticipated to make it harder to complete most Rule 30(b)(6) depositions, as well as depositions of difficult witnesses.

RULE 33. INTERROGATORIES TO PARTIES

As with limitations on depositions, limiting interrogatories in both complex and standard track cases makes it more difficult for litigants to discover information that will help narrow issues and get closer to the truth. Further, the proposed amendments will increase the information imbalance between average individuals and well-funded insurance companies and other parties who have the funds and resources to easily acquire information outside of formal discovery.

The presumptive limit of 10 interrogatories for standard track cases appears to be significantly lower than what is permitted in most federal and state courts. It would be helpful to know whether any other jurisdictions have taken this drastic step of reducing the number of permissible interrogatories by two-thirds of what was previously permissible.

RULE 34. PRODUCTION AND INSPECTION OF DOCUMENTS AND THINGS; ENTRY UPON LAND FOR INSPECTION AND OTHER PURPOSES

For the same reasons discussed above, there is concern over the low presumptive limits associated with the requests for production in both Track B and C cases, as well as with the increase in procedural burdens and motions that will follow in most cases as a result of these presumptions.

RULE 36. REQUESTS FOR ADMISSIONS

Limiting the default rule on requests for admission to anything other than the "genuineness of any relevant documents" is a grave error and should not be adopted by the Court. Many times admissions classify issues and eliminate unnecessary trial proofs. To the extent that there are currently problems with Rule 36, it is that the courts do not strictly enforce the rule and parties are able to avoid admitting matters that really should be admitted. In the event that the Court intends to adopt a limitation on the presumptive manner in which requests for admission may be used, we suggest that it expand the presumption to include admissions relating to the authentication of various forms of recordings, not just documents.

RULE 40. ASSIGNMENT OF CASES FOR TRIAL; CONTINUANCES

As a general matter, the provisions contained within proposed Rule 40(c) and (d) and other places within the proposed amended rules that make extensions and continuances "the exception and not the rule" are troubling. Courts already have discretion to grant or deny extensions and often experienced counsel work together to keep the flow of the case on an efficient path. These changes are going to put the judges in a position where they feel they cannot grant routine extensions even in situations where counsel agree. It is unclear why we need to strip the Court of its discretion. Similarly, forcing trial dates and trial preparation when cases are often not reached, coupled with significant numbers of automatic deadlines, has proven to raise expense in the federal system and is expected to increase the cost of litigation in the state system if the proposed rule is adopted by the Court.

RULE 47. JURORS

Proposed Rule 47(f)(1) appears to unduly limit counsels' ability to share juror information with clients to assist in jury selection. As a matter of due process, parties should be entitled to have juror information shared with them.

RULE 55. DEFAULT

Several practitioners expressed concern about the proposed changes to Rule 55. Because the entry of default is often set aside by the Courts, with a lower standard, it appears to be counter-productive to force a party to proceed with a motion for entry of default judgment within a strict 28-day time limit as suggested by proposed Rule 55(a) and (b). The proposed changes to Rule 55 also appear to force hearings on non-liquidated damages or a party faces the prospect of a dismissal. In addition, it also appears to also prevent one party from being defaulted and left in a

case while the case proceeds against other parties unless a motion is filed, which is illogical, particularly in the context of foreclosure proceedings.

RULE 56. SUMMARY JUDGMENT

The limitations placed by the proposed amended Rule 56 on Statements of Undisputed Material Facts and Statements of Additional Undisputed Material Facts is wholly unworkable, particularly in complex cases. While we appreciate that motions for summary judgment with significant numbers of facts may require substantial work for the court, such submissions are a function of what Rule 56 requires for proof and the case law, which permits only one fact per statement. Adoption of these presumptive limitations will result in the parties and the judiciary being denied the use of a process that could otherwise narrow or eliminate the issues for trial and the courts routinely being unable to grant summary judgment. In the alternative, the Court may find that parties begin filing isolated motions for summary judgment on each legal issue within a case, which could ultimately increase the court's workload and the cost to the parties, and defeat the purpose of the proposed rule.

RULE 68. OFFER OF JUDGMENT

Although minimal changes to this rule have been proposed by the Committee, now might be the time for the Committee to consider amending Rule 68 in a way that allows for any party (including plaintiffs) to serve an offer of judgment in writing upon any other party to the action. We suggest that the Committee study and potentially adopt a rule similar to California's Rule 998. *See* Cal. Civ. P. Code § 998 (available at http://leginfo.legislature.ca.gov/faces/codes_displaySection.xhtml?lawCode=CCP&sectionNum=998 (last visited October 5, 2018)).

Dated: October 5, 2018

Lauri Boxer-Macomber
On Behalf of Kelly, Remmel & Zimmerman