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October 5, 2018

## VIA HAND DELIVERY

Matthew Pollack  
Executive Clerk  
Maine Supreme Judicial Court  
205 Newbury Street Room 139  
Portland, Maine 04112-0368

### RE: Proposed Civil Rule Amendments

Dear Mr. Pollack:

We greatly appreciate the Maine Judicial Branch's efforts to improve Maine civil procedure and welcome all discussion aimed at improving judicial efficiency and access to justice. However, we have concerns about the need for the Differentiated Case Management (DCM) system, the resources necessary to effectuate this system, and the loss of flexibility and collaboration that has been a hallmark of practicing law in the Maine.

Civil litigants in Maine already have access to the Maine Business and Consumer Court and the Small Claims Court. These courts provide civil litigants with simple, speedy, and inexpensive resolution of cases, and are more than capable of handling the simple claims that the proposed track system is designed to address.

Relevant studies and public comment seem to indicate that the Maine judiciary does not have the resources required to support a DCM system. *See* NATIONAL CENTER FOR STATE COURTS, SURVEY OF JUDICIAL SALARIES (2018) (demonstrating that adjusted for cost-of-living, Maine's judges of general jurisdiction trial courts are the lowest paid in the country); Leigh I. Saufley, *Funding Justice: The Budget of the Maine Judicial Branch-We Did Get There From Here*, 62 ME. L. REV. 671, 672 (2010) ("During the last two decades, the lack of sufficient dollars appropriated to Maine Judicial Branch and the impact that this underfunding has had on people seeking access to justice have created consistent concerns for leaders in the Judicial Branch as well as for those in the Executive and Legislative Branches.").

The intensive case management characteristic of a DCM program and its focus on early disposition will require significant staff, management, and information system resources to be effective. CAROLINE COOPER ET AL., BUREAU OF JUSTICE ASSISTANCE, DIFFERENTIATED CASE MANAGEMENT IMPLEMENTATION MANUAL 14 (1993). The proposed track system would require continuous court monitoring of case progress within each track to ensure that cases adhere to track deadlines and requirements. The track system would also require judges to screen each case shortly after filing so that cases are assigned to proper tracks. It appears that the State judiciary system, as currently funded and staffed, lacks the resources to implement the court intervention required to successfully effectuate a DCM system.

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The standard proposed track criteria would not adequately categorize cases according to the time and tasks required for their fair disposition, nor would the criteria permit flexibility to accommodate the range of management and processing needs of individual cases. It is often difficult to discern a case's scope of discovery, complexity, and expected timeline at its onset, when the track would be determined. Management aspects of a case often change during the pretrial process. And differentiating by case type is not by itself an accurate way to estimate the time required to resolve all such cases fairly and expeditiously.

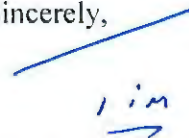
Of particular concern is Proposed M.R. Civ. P. 16(d)(4), which provides that "[o]nce established, a scheduling order may be modified only upon a demonstration of good cause for not being able to adhere to the prior schedule established by the court . . . ." The proposed Rule would not allow counsel to modify scheduling orders without a showing of good cause. This proposed rule stands in contrast to the current rules and general practice that encourage attorneys to collaborate to create an effective scheduling order with the assistance and oversight of the court. M.R. Civ. P. 16(a)(1-2). Additionally, the Business and Consumer Docket (BCD) Procedural Rules provide that a "scheduling order may thereafter be modified or revised, as the court in its discretion, deems necessary or appropriate, to meet the purpose and goals of the BCD." M.R. Civ. P. 132. The BCD Rule has enabled Maine attorneys to effectively represent their clients and customize the scheduling order for each case. Assigning cases to set tracks, without allowing for schedule modifications, but for a showing of good cause, would likely discourage attorneys from collaborating on how cases are adjudicated and may even limit the number of clients solo and small firm practitioners could effectively represent.

Also of particular concern is Proposed M.R. Civ. P. 40, which provides that continuances will only be available in "exceptional circumstances," even if the motion for a continuance order is unopposed. While we appreciate the need to be skeptical of opposed motions, the current system of encouraging and respecting collaboration among counsel seems like the more prudent approach.

Again, we greatly appreciate the Maine Judicial Branch's efforts to provide effective judicial management of civil cases in Maine's state courts. However, from our perspective some of the proposed amendments present a solution in search of a problem that does not appear to have been identified by the Maine bar or the public.

We are always open to considering ways to improve civil process in Maine. We would welcome the opportunity to further discuss the proposed amendments with the Maine Judicial Branch and our fellow bar members.

Sincerely,

A handwritten signature in blue ink, appearing to read "D. Rapaport", with a horizontal line above it and a small arrow pointing to the right below it.

The Preti Flaherty Litigation Practice Group  
Daniel Rapaport, Chair  
Timothy J. Bryant, Co-Chair