Verrill Dana LLP
Attorneys at Law

MARTHA C. GAYTHWAITE
PARTNER
mgaythwaite@verrilldana.com
Direct: 207-253-4650

ONE PORTLAND SQUARE
PORTLAND, MAINE 04101-4054
207-774-4000 • FAX 207-774-7499
www.verrilldana.com

October 5, 2018

Via Email

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

Re: Proposed Civil Rule Amendments

Dear Mr. Pollack:

I am Chair of the Trial Department of Verrill Dana LLP and write on behalf of the members of my department to share our collective views on the proposed Civil Rules amendments under consideration by the Maine Judicial Branch. The amendments, if adopted, will significantly impact whether cases are filed in the civil courts and how filed cases progress from initial pleadings through trial. We appreciate the opportunity to provide comments on the proposed amendments that will directly impact our clients and the way we represent them.

We largely agree that the problems the amendments are attempting to address are real, and also agree with the amendments' stated goals — to improve access to justice by making civil process proportional to individual cases. We believe that, for many cases, the amended rules will lead to resolutions that are more just, speedier and less expensive. However, some of the proposed amendments would impose unrealistic timelines and limitations, especially for more complex cases, that could actually drive up the litigation costs incurred early in a case's trajectory, making justice less available to some individuals and businesses. We identify below the proposed changes that we believe could have these unintended consequences.

In addition, many of the amendments will necessitate active case management by the judiciary, which will place additional burdens on an already stressed court system. Inability to satisfy those additional burdens could undermine the very purpose of the amendments. For example, while the proposed deadlines and presumptive limits may be appropriate in many cases, there will be other cases in which such deadlines and limitations are clearly inappropriate. In those cases, the courts will be asked – perhaps on numerous occasions – to respond to requests

of the parties to modify deadlines and limits, and to do so on short notice. The Courts' abilities to promptly respond to such requests will directly impact the thoroughness and fairness of civil proceedings.

With the goals of the amendments in mind, we offer the following, specific comments:

1. Modification of Scheduling Orders. This proposed amendment appears to restrict the discretion of the Trial Courts to grant enlargements of time. We believe that the Trial Courts are in the best position to determine the propriety of the requested enlargement and do not think that a change in the rule is necessary.

2. Automatic Disclosures. We believe that automatic disclosures, in general, will increase the speed and efficiency of litigation. The automatic disclosure requirement will force lawyers and clients to marshal relevant facts and documents before filing an action. It will also require lawyers to proactively address issues relating electronically stored information. However, we believe that the deadline for serving automatic disclosure is too brief, especially for defendants.

Under the amendments, defendants must serve their automatic disclosures no later than 14 days after the filing of its answer in Track B cases, and no later than 21 days after the filing of the answer in Track C cases. In light of the answer deadline, this means that in a complex case, a defendant has 42 days to retain counsel, investigate the matters alleged, research and prepare its response to the allegations, locate all documents that might support the defendant's defenses, including electronically stored documents, among other significant tasks. This timeline is especially aggressive for non-individuals (companies, organizations, etc.) because the information required to be included in the automatic disclosures may be in the hands of numerous individuals and may be stored in numerous locations. In addition, in many cases, a defendant is not aware of the pending litigation. Given the six year statute of limitations, this means that a plaintiff may have been investigating a potential claim for many years while a defendant will have only a few weeks to serve automatic disclosures that will shape the scope and focus of the litigation.

We have similar concerns regarding certain of the specific items that must be disclosed under the new Rule 26A. For example, in cases involving claims of bodily injury, the proposed rule requires the production of ten years' worth of medical records and a list of all health care providers seen within the previous ten years. In many cases, production of these documents and information within the proposed time limits is simply unrealistic.

3. Motion Page Limits. Proposed Rule 7(f) provides that memoranda in support of dispositive motions (other than motions for summary judgment) may not exceed 14 pages and that reply memoranda may not exceed 5 pages. We believe these page limits are unreasonable in complex cases, where a motion to dismiss, motion for judgment on the pleadings or motion for injunctive relief may need to address numerous claims and defenses, each such claim and defense requiring a discussion of the applicable law and the facts as alleged. While we understand that these page limits may be modified with leave of the court, it is often the case

(especially with motions to dismiss, which must be filed by the deadline for answering) that a request for leave remains pending at the time the motion must be filed.

4. Motions for Reconsideration. The proposed rules eliminate motions for reconsideration, except with respect to interlocutory orders. Motions for reconsideration of final order can give the trial court the ability to correct an error or a misunderstanding of fact or law. Motions for reconsideration can eliminate the need for an appeal. We believe that the right to seek reconsideration of a final order should be preserved. The court always has the ability to deny a motion for reconsideration *sua sponte*, before the party opposing reconsideration incurs the expense of responding to the motion.

5. Rule 16B(h) ADR Conference Report. The proposed rule contemplates an ADR report that would include "all terms of the settlement." A key component of many settlements is confidentiality. This proposed rule would remove an important incentive for settling cases and, because the ADR report would be part of the public record, would potentially undercut the letter and spirit of Me.R.Evid. 408.

6. Presumptive limits on Interrogatories. We believe that the limitation of 10 Interrogatories in Track B cases, and 20 Interrogatories in Track C cases may force a party to take a deposition because 10 Interrogatories in Track B cases and 20 Interrogatories in Track C cases not sufficient to obtain the information a litigant will need in most cases.

7. Time Limits for depositions. We believe that the 8 hour limitation should be retained. Although 8 hour depositions are not common, there are cases and witnesses in which the full 8 hours is necessary. Retaining the 8 hour time limit allows the litigants the flexibility to conduct a longer depositions in those instances when it is necessary and would avoid motion practice.

8. Requests for Admissions. We believe that Requests for Admission are an important discovery tool. While not used as frequently as other forms of discovery, they can be an effective and cost-saving tool for identifying or narrowing issues in the appropriate case. We believe that restricting Requests for Admissions as of right to the genuineness of documents would remove a useful discovery method.

9. Motions for Summary Judgment. The proposed rules include limitations on the number of pages and asserted facts that we believe are unrealistic for both Track B and Track C cases. In light of the number of distinct claims that a motion for summary judgment may need to address, limitations of 14 pages and 28 pages for Track B and Track C cases, respectively, may not allow parties to address the necessary legal and factual issues. The limitations on the number of facts that may be presented in support of motions are even more problematic. Summary judgment is an important tool for reducing the number and length of trials, and thus the expense and delay associated with trials. The proposed limitations on summary judgment motions could reduce the effectiveness of summary judgment motions in isolating the issues that must be tried.

10. Timing of Summary Judgment Motions. In our experience, fourteen days is not a sufficient time to synthesize the evidence and prepare a motion for summary judgment and supporting factual statement. In addition, as a practical matter, court reporters take several weeks to prepare transcripts of deposition testimony. As a result, a party would have to incur high fees for expedited transcription to meet the motion deadline with respect to any depositions taken near the end of the discovery period.. Incurring these fees would significantly increase litigation costs and be inconsistent with the goals of the Civil Justice Reform amendments.

11. Attachment and Trustee Process. Proposed Rule 4A modifies the 30 day deadline for attachment to 28 days. However, there is no similar proposed change to the 30 day deadline for serving trustee process in Rule 4B. The deadlines in these rules should be consistent to avoid confusion.

12. Changes in Calculation of Deadlines. The proposed rules contain numerous instances in which deadlines have been changed to multiples of seven. The change in the amount of time allowed is often insignificant (20 days to 21 days, 30 days to 28 days). We are unclear as to the reason for these changes and are concerned that the changes may cause unnecessary confusion. Earlier attempts to change deadlines (for example, with respect to the time to take an appeal) caused real problems for lawyers and their clients. We request that the need to change deadlines in the manner proposed be given careful consideration.

Thank you for your consideration of these comments. We appreciate the opportunity to offer our thoughts on these significant changes.

Respectfully submitted,

Martha C. Gaythwaite