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October 4, 2018

VIA E-MAIL

Matthew Pollack, Esq.
Clerk of the Law Court
Maine Supreme Judicial Court
205 Newbury Street
Portland, ME 04101-4125

Re: *Comments Regarding Civil Justice Reform for Maine's Courts*

Dear Mr. Pollack:

The Office of the Attorney General ("OAG") respectfully submits the following comments regarding the proposed civil justice reform to adopt Differentiated Case Management principles as described in the Court's posted summary entitled "Civil Justice Reform for Maine's Courts." We understand that the primary goal of the proposed reforms is to improve access to justice leading to the just, speedy, and inexpensive resolution of civil cases. The OAG supports this goal. The comments below reflect the OAG's perspective on the likely impact that these proposed rule amendments would have on civil practice in state court, based on the OAG's representation of the State of Maine, its agencies, officers, and employees in a wide variety of civil matters.

1. **Proposed M.R. Civ. P. 7(f).** The OAG suggests that the page limits for memoranda in support of or in opposition to motions remain at the current limits (10 pages for non-dispositive motions, 20 pages for dispositive motions, and 7 pages for reply memoranda). In our view, the current limits work well, and 20 pages are needed in most of our cases in support of a dispositive motion. Cases against the State of Maine often involve multiple defendants (entities and individuals) and multiple causes of action. Defense of State entities and officials often involves issues of immunity under the Maine Tort Claims Act, sovereign immunity, and absolute or qualified immunity in civil rights actions. Sovereign immunity provides state officials with immunity from trial, not just immunity from liability at the end of the case. Based upon our experience with these cases, the proposed reduced page limits (7 pages for non-dispositive motions, 14 pages for dispositive motions, and 5 pages for reply memos) will not be sufficient in many of our cases, and we would more often than not need to seek leave of court to enlarge the page limit, creating more work for the Court, clerks, and the OAG.

2. **Proposed M.R. Civ. P. 16.** The OAG suggests that civil rights claims (under either federal or state law), claims brought under the Maine Tort Claims Act, and employment claims (under either federal or state law) be assigned to Track C. Lawsuits against the State and state officials involving these claims are generally complex due to the factual and legal issues implicated, the large number of defendants, one or more immunity issues, and/or the need for fairly extensive discovery and case management.

In addition, we frequently see independent claims under 42 U.S.C. § 1983 joined with claims brought under M.R. Civ. P. 80C. Under the current proposal, Rule 80C cases are automatically assigned to Track A. We suggest that when an independent claim is joined with a Rule 80C claim, the assignment of the case to a track be deferred until after the Court determines the future course of proceedings in accordance with M.R. Civ. P. 80C(i).

In addition, we would recommend that the language “serious and legitimate” be deleted from the proposed language in M.R. Civ. P. 16(e)(2)(C)(vi) and 16(e)(3)(B)(vi) as unnecessary. Any motion filed with the Court is subject to the requirements of Rule 11, and this proposed language is unnecessary.

3. **Proposed M.R. Civ. P. 16A.** The proposal establishes a 5-page limit for pretrial memoranda. Currently there is no page limit in the rules. Based upon our experience and the type of cases we handle, 5 pages would not be adequate to cover all of the required information to be included in a pretrial memorandum that would be of assistance to the Court. This is especially true in multi-defendant, multiple count lawsuits, with numerous factual and legal issues (as described above). If a page limit is deemed necessary, the OAG would suggest a limit of 10 pages.
4. **Proposed M.R. Civ. P. 16B(h)(1).** In the event settlement is reached at an ADR conference, the proposal requires the plaintiff to file a proposed order that includes all of the terms of the settlement. This requirement should be deleted as most parties would object to the terms of the settlement becoming part of the public Court record.
5. **Proposed M.R. Civ. P. 30.** For Track C cases, the proposal maintains the current presumptive cap on the number of depositions at 5. As explained above, the OAG recommends that civil rights claims (under either federal or state law), tort claims under the Maine Tort Claims Act, and employment claims (under either federal or state law) be assigned to Track C. If that suggestion is adopted, the proposed presumptive limit of 5 depositions would be adequate. The proposed amendment to Rule 30 would reduce the length of each deposition from 8 hours to 6. In our experience, in many cases, the 8-hour limit is necessary. It is often difficult to arrange for a conference with a judicial officer during a deposition if it appears that a deposition will take longer than the limit. We would

suggest that, if a reduction in the length of a deposition is deemed necessary, the Court adopt the 7-hour (1 day) limit adopted in F.R. Civ. P. 30(d)(1).

6. **Proposed M.R. Civ. P. 33.** The proposal reduces the number of interrogatories from 30 to 20 for Track C and to 10 for Track B. In our view, those new limits would not be sufficient to obtain necessary discovery in many of our cases. Based upon our experience and the types of cases we handle, the OAG suggests that the current limit of 30 be maintained for Track C cases and a limit of 20 apply to Track B cases.
7. **Proposed M.R. Civ. P. 34.** The proposal imposes limits on Requests for Production, 25 for Track C, and 20 for Track B. In our view, as with the reduced number of interrogatories, those limits would not be sufficient to obtain necessary discovery in many of our cases. Based upon our experience and the type of cases we handle, the OAG suggests a limit of 30 for Track C cases and a limit of 20 for Track B cases.
8. **Proposed M.R. Civ. P. 40.** A recurring issue in many of our cases is that civil matters are placed on the trial list before the trial court has ruled on a pending motion for summary judgment. In those instances, the OAG is required to file a motion to remove the case from the trial list, which is generally granted, but creates more work for judges, clerks, and the OAG. Moreover, in the meantime, there is unnecessary confusion and time spent on trial preparation in the event that the case proceeds to trial prior to a ruling on the motion for summary judgment. In addition, in many instances, issues on summary judgment relate to sovereign immunity, absolute immunity, and/or qualified immunity, which must be resolved prior to trial and may be appealable on an interlocutory basis. Given the streamlining of summary judgment practice, and the goal of efficiency in the process, the OAG suggests that the following language be added at the end of M.R. Civ. P. 40(b)(1):

Unless otherwise ordered by the court, no case shall be transferred to the trial list until after the court has ruled on a timely filed motion for summary judgment.

This is the practice in federal court.

9. **Proposed M.R. Civ. P. 56.** The proposal limits the number of asserted facts in a statement of material facts to 50 in Track C cases and 25 in Track B cases. Based upon our experience and the types of cases that we handle, these limits are not feasible or realistic to present a case on summary judgment. As described above, many of our cases involve civil rights claims (under either federal or state law), tort claims under the Maine Tort Claims Act, and employment claims. The complaints in these cases frequently involve multiple counts and multiple parties. There are more than 50 undisputed material facts in such

cases, particularly when each fact is set forth in a separate paragraph as the rule requires. The OAG would need to request an enlargement of these limits in virtually every case.

If some limitation to the statement of facts is deemed necessary, the OAG suggests that the Court consider the current model in federal court, which requires a party intending to move for summary judgment to file with the court within seven days after the close of discovery either a joint motion with a proposed schedule and proposed page limits, estimates of statements of material facts, and deadlines or a notice of intent to move for summary judgment and the need for a pre-filing conference. *See* D. Me. Local R. 56(h).

In addition, proposed amended Rule 56 would significantly alter the page limits for memoranda in support of and in opposition to motions for summary judgment, as well as provide more pages to the moving party than the opposing party. In our experience, the current 20-page limit for both the moving party and the opposing party (with additional pages permitted by leave of court) works well in most cases. In the alternative, we suggest that the page limit for a memorandum in opposition to a motion for summary judgment (M.R. Civ. P. 56(f)(1)) be 28 pages for Track C and 14 pages for Track B (not 14 pages without regard to Track) to conform with the page limits for the memorandum in support of the motion for summary judgment.

The proposal also requires that parties “attach” supporting documents to the statement of material facts. We suggest that the proposal substitute “submit with” in place of “attach” in proposed M.R. Civ. P. 56(e)(2)(B) and 56(f)(2)(B). Attaching supporting documents to the statement of facts would be unwieldy for the parties, the clerks, and the court.

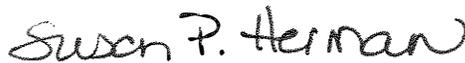
10. **Proposed M.R. Civ. P. 80C.** The OAG suggests that the following language be added to the last sentence of proposed M.R. Civ. P. 80C(i)(2):

which order shall include Case Track assignment.

See Comment 2, ¶ 2 above regarding proposed M.R. Civ. P. 16.

I hope these comments will be useful to the Court in its review of the Civil Justice Reform for Maine’s Courts. If the OAG can be of further assistance, please let me know. Thank you.

Sincerely,



Susan P. Herman
Deputy Attorney General