STATE OF MAINE
SUPREME JUDICIAL COURT

AMENDMENTS TO THE
MAINE RULES OF CIVIL PROCEDURE

2008 Me. Rules 04

Effective: January 1, 2008

All of the Justices concurring therein, the following amendments to the Maine Rules of Civil Procedure, are hereby adopted to be effective January 1, 2008.

The specific rules amendments are set forth below. To aid in understanding of the amendments, an Advisory Note appears after the text of each amendment. The Advisory Note states the reason for recommending the amendment, but the Advisory Note is not part of the amendment adopted by the Court.

1. Rule 16B(f)(3) of the Maine Rules of Civil Procedure is amended to read as follows:

(f) Conference Attendees.

. . . .

(3) Attendance shall be in person or, in the discretion of the neutral, <u>for good cause shown,</u> by telephone or video conference.

Advisory Committee Note

M.R. Civ. P. 16B(f)(3) is amended to permit the neutral to approve participation by telephone or video conference but only where good cause is shown for not participating in person. Mediation works best when the parties and persons with appropriate settlement authority are present and actively engaged in the process and, therefore, remote participation should be discouraged.

2. Rule 26(b)(5) of the Maine Rules of Civil Procedure is adopted to read as follows:

. . . .

(b) Scope of Discovery. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

. . . .

(5) *Information Withheld under Claims of Privilege or Protection of Trial Preparation Materials*. When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial-preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing the information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

Advisory Committee Note

The adoption of M.R. Civ. P. 26(b)(5) is intended to provide a procedure for identifying information or material withheld under a claim of privilege or work

product. The provision is a verbatim adoption of its federal counterpart, Fed. R. Civ. P. 26(b)(5)(A).

Present practice frequently is for the withholding party simply to invoke the privilege in an objection to the discovery, leaving the requesting party no basis on which to evaluate whether the privilege is properly invoked. In response, the requesting party occasionally demands a "privilege log" so detailed that the protection of afforded by the privilege is lost. In either case, the court has no basis on which to resolve the dispute efficiently. The purpose of the rule is not to create a burdensome duty to provide a detailed list of documents or information withheld. The intent of the rule is to require a general description of what is withheld so that the requesting party can decide whether to contest the claim and the court has some basis on which to resolve the dispute. Obviously, the court in resolving the issue may require more detail or an *in camera* inspection, but the rule should obviate some disputes entirely and provide a basis for resolving most disputes if they require judicial intervention.

3. Rule 45 (b) and (e) of the Maine Rules of Civil Procedure is amended to read as follows:

. . . .

(b) Service.

(1) A subpoena may be served by any person who is not a party and is not less than 18 years of age, including the attorney of a party. Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person and, if the person's attendance is commanded, by tendering to that person the fees for one day's attendance and the mileage allowed by law. Prior notice of any commanded production of documents and things or inspection of premises or the appearance of a witness ~~before trial~~ in discovery or pretrial proceedings shall be served on each party in the manner prescribed by Rule 5(b) at least 14 days

prior to the response date set forth in the subpoena. A party shall have 7 days to object to a discovery or pretrial subpoena and to arrange for the determination of the objection by the court. Subpoenas commanding the appearance of a witness or the production of documents or things at trial or hearing shall be served on each party in the manner prescribed by Rule 5(b).

(2) A subpoena may be served at any place within the state.

. . . .

(e) Motions and Objections. Motions or objections concerning subpoenas issued in discovery or pretrial proceedings shall be made under Rule 26(g). Motions or objections concerning subpoenas issued to command appearance or production of documents or tangible things at trial or hearing shall promptly be directed first to the judge or justice presiding at such trial or hearing.

Advisory Committee Note

Subdivision (b) is amended to require that discovery subpoenas be served sufficiently in advance to enable an opposing party to object to the subpoena and to arrange to present the objection to the court under subdivision (e), which incorporates the procedure under Rule 26 (g). The amendment is intended to eliminate the sharp practice of timing the service of subpoenas during discovery so that opposing parties have no practical opportunity to object and obtain a ruling before the response to the subpoena is required. Since a party under this procedure may simply object, rather than move to quash (the remedy for nonparties), a conforming amendment is made to subdivision (e). The amendment also confirms that trial subpoenas should be served under Rule 5. Obviously, when time is short prior to trial, the best practice is for the serving party to alert the other parties by means more expedient than Rule 5 or risk having to explain to the court why a telephone call, fax or email could not have been sent to avoid a hurried hearing on

motions or objections to the subpoena. Objections should be promptly directed to the court under subdivision (3).

4. Rule 76C of the Maine Rules of Civil Procedure is amended to read as follows:

(a) Notice of Removal to the Superior Court for Jury Trial. Except as otherwise provided in these rules, a defendant or any other party to a civil action or proceeding in the District Court may remove that action to the Superior Court for jury trial in the county in which the division of the District Court is located by filing notice of removal and serving a copy of the notice upon all other parties and paying to the clerk of the District Court the jury fee. Parties joined as defendants may file jointly or separately for removal. The notice shall be filed within the time for serving the answer or reply or at the time for appearance if no written answer is required. For cases required to have an alternative dispute resolution conference pursuant to Rule 16B, payment of the jury fee shall be made as required by Rule 16B(i).

Advisory Committee Note

The amendment clarifies that the notice of removal should be filed at the time of entry of appearance if no written answer is required in the action. See *City of Biddeford v. Holland*, 2005 ME 121.

5. Subdivision (e) of RULE 80D of the Maine Rules of Civil Procedure is amended to read as follows:

(e) Time of Hearing.

(1) *Hearing Date.* All forcible entry and detainer actions shall be in order for hearing on the return day.

(2) *Mediation.* At the time set for hearing, the court may refer the parties to mediation pursuant to the process established by Rule 92(f) of these rules. Every settlement resulting from mediation shall be presented to the court in writing for approval as a court order, and the court shall approve reasonable settlements. An approved settlement shall have the force and effect of a judgment and may not be appealed. If no mediator is available, or if mediation efforts fail or mediation proves inappropriate, the court shall hear the matter without undue delay.

Advisory Note

This amendment to Rule 80D(e), along with the adoption of Rule 92(f), implements the program for available mediation in forcible entry and detainer matters authorized by the Legislature, enacting 14 M.R.S. § 6004-A in P.L. 2007, chap. 246, effective January 1, 2008. The mediation offered in these matters is intended to be similar to the mediation presently offered in Small Claims matters. Mediation should not be a cause for delay of hearings in FED matters.

6. Subdivision (a)(3)(A) of Rule 92 of the Maine Rules of Civil Procedure is amended to read as follows:

(A) *Administrative Fee*. If the referral is made through CADRES, the parties shall pay an administrative fee ~~of $20.00 to the clerk~~, which ~~fee~~ shall be

shared equally by the parties and ~~collected by~~ paid to the clerk, unless in forma pauperis status has been granted pursuant to Rule 91;

7. Subdivision (d)(3) of Rule 92 of the Maine Rules of Civil Procedure is amended to read as follows:

(3) *Mediation Fee*. ~~As established by 5 M.R.S. §§ 3341(2) and 3345(2), the~~ The fee for the initial land use and natural gas pipeline mediation session is ~~$175.00 for up to four (4) hours of mediation,~~ payable by the landowner who submits the application. Additionally, the CADRES Director shall determine the cost of providing notice, if any, which the landowner shall pay prior to the scheduling of mediation. If subsequent mediation sessions occur, the parties and mediator shall agree on an appropriate fee arrangement.

8. Subdivision (e)(2) of Rule 92 of the Maine Rules of Civil Procedure is amended to read as follows:

(2) *Mediation Fee*. ~~Pursuant to 38 M.R.S. § 347-A, the~~ A fee for environmental enforcement mediation ~~is $120.00~~ shall be paid. If an action pursuant to Rule 80K is not already pending, the additional applicable filing fee is required. Notwithstanding the general exemption for state agencies from payment of fees, the State of Maine Department of Environmental Protection (DEP) shall pay one-half of the fee and may pay the entire fee. The DEP is exempt from payment of any filing fee.

Advisory Note

Upon recommendation of CADRES, subdivisions (a)(3)(A), (d)(3), and (e)(2) of M.R. Civ. P. 92 are amended to delete references to specific fees. Fees for these ADR or mediation sessions will now be set in the Court Fees Schedule or other court order.

9. Subdivision (f) of Rule 92 of the Maine Rules of Civil Procedure is redesignated as Subdivision (g).

~~(f)~~ (g) Sanctions.

……

10. A new Subdivision (f) of Rule 92 of the Maine Rules of Civil Procedure is adopted to read as follows:

(f) Mediation in Forcible Entry and Detainer Actions.

(1) *Mediation Required.* The parties to all Forcible Entry and Detainer actions may be required to participate in mediation as ordered by the court. The court may not order mediation if no mediator is available on the hearing date or if mediation would delay the hearing.

(2) *Date and Location of Mediation.* Mediation shall take place on the hearing date, unless all parties agree to hold mediation prior to the hearing date, and CADRES is able to arrange for mediation. Mediation shall take place at a courthouse, unless otherwise authorized by the court or the CADRES Director.

(3) *Mediation Fee*. The mediation fee is included in the filing fee.

(4) *Assignment of Mediators*. The clerk of court, or a designee, shall notify CADRES of all dates on which the Forcible Entry and Detainer docket is to be scheduled, as well as any subsequent scheduling changes. CADRES shall assign one or more mediators to provide mediation services at every scheduled Forcible Entry and Detainer docket. At least twice annually, CADRES shall supply to every District Court a current list of Forcible Entry and Detainer mediation assignments, as well as a current list of mediators on the Forcible Entry and Detainer Mediation Roster.

(5) *Continuances*. All requests for continuance of mediation or a hearing date shall be presented to and ruled on by the court. A mediator may not grant a continuance for mediation or a hearing date.

Advisory Note

The adoption of Rule 92(f), and the concurrent amendment to Rule 80D(e), implements the program for available mediation in forcible entry and detainer matters authorized by the Legislature, enacting 14 M.R.S. § 6004-A in P.L. 2007, chap. 246, effective January 1, 2008. The mediation offered in these matters is intended to be similar to the mediation presently offered in Small Claims matters. Mediation should not be a cause for delay of hearings in these matters. The provisions of 14 M.R.S. § 6004-A relating to good faith participation and sanctions are similarly addressed in the Sanctions provisions in subdivision (g). The issue of fees must be separately addressed in the Court Fees Schedule.

11. These amendments are effective January 1, 2008.

Such rules as thus adopted and amended shall be recorded in the Maine Reporter.

Dated: December 12, 2007

/s/
LEIGH I. SAUFLEY
Chief Justice

/s/
ROBERT W. CLIFFORD
Associate Justice

/s/
DONALD G. ALEXANDER
Associate Justice

/s/
JON D. LEVY
Associate Justice

/s/
WARREN M. SILVER
Associate Justice

/s/
ANDREW M. MEAD
Associate Justice

/s/
ELLEN A. GORMAN
Associate Justice